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VI ONDERWERPSINDEKS

Qui habet commoda ferre debet onera (you cannot have your cake and eat it)

The relevance of fault in breach of contract*

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OPSOMMING

***Qui habet commoda ferre debet onera* – Die relevansie van skuld by kontrakbreuk**

Sedert die agtiende eeu bestaan daar 'n skerp meningsverskil tussen Romaniste oor die betekenis en relevansie van *culpa* in die klassieke Romeinse reg. Moderne Romaniste aanvaar egter dat *culpa* (in die vorm van opset en nalatigheid) reeds sedert die klassieke reg 'n vereiste was vir aanspreeklikheid weens kontrakbreuk. Daar word ook algemeen aanvaar dat gevalle waar die skuldenaar verplig was tot *custodiam praestare* die uitsondering op die reël daargestel het. Die Romeinse juriste het kontraktuele aanspreeklikheid bepaal met die beginsel van nut (*utilitas*) as algemene maatstaf.

Skuld as vereiste by kontrakbreuk en in dié verband, die beginsel van nut, vorm deel van die Suid-Afrikaanse gemenereg. Uitsprake deur sommige moderne skrywers asook deur die appèlhof wat skuld as vereiste by kontrakbreuk ontken, is in stryd met die basiese beginsels van die Romeins-Hollandse reg en hou ook nie rekening met die internasionale belang van skuld as vereiste by kontrakbreuk nie.

Hardly any other area of Roman law has generated as much learned comment as fault in the Roman law of contract. In fact, possibly as a result of its particular relevance to problems of a political, ideological or dogmatic nature, the subject is snowed under with books and articles with theories, opinions and prejudices. For the past two or more centuries in particular, an intense debate has been raging. As early as 1895, Pernice[1] referred to the cloud of literature that concerned itself with fault (or *culpa*); and the number of scholarly works being written on the subject today indicates that we are still far from formulating final answers to the many questions that torment jurists and Romanists who concern themselves with this topic.[2]

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* Text of an inaugural lecture delivered on 1996–08–06 at the University of South Africa.

1 Pernice *Marcus Antistius Labeo. Römisches Privatrecht im ersten Jahrhundert der Kaiserzeit* Bd 2 (1895) 280 fn 1.

2 See the exhaustive bibliographies in Metro *L'obbligazione di custodire nel diritto romano* Milano (1966) 4 fn 5; MacCormack "Culpa" 1972 *SDHI* (cf fn 14 *infra*) 123 *et seq*; "Custodia and culpa" 1979 *ZSS* 149 *et seq*, Cannata "Sul problema della

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In the face of the combined industry of generations of learned scholars, one's only choice seems to be either to concur with what is believed to be the *communis opinio* or to produce a book in five volumes with five thousand footnotes.[3]

In this article I do not wish to do the former; constraints of time, and perhaps simply respect for the patience of the readers, do not permit me to do justice to the second option either. I shall therefore simply attempt to give a brief outline of the lively discussion amongst historians and Romanists of fault as a requirement for breach of contract in Roman law and in that regard the principle of utility. Secondly, I shall refer to the uncertainty that exists in modern South African law about fault as a requirement for breach of contract.

First of all, I should explain what is meant by the principle of utility. Briefly, what this principle entails is that the party who is the sole beneficiary in terms of a contract, should be held more strictly liable than would be the case with one who does not derive any benefit from it.[4]

Because of the paucity of sources, the position in archaic law (as far as breach of contract was concerned), is not clear. It would appear that primitive Rome looked at injury or damage from the point of view of the injured person only: the cause of the injury or damage was taken into account without any regard to the circumstances giving rise to such damage or injury. Whether the damage or injury had been caused intentionally, negligently or innocently, was disregarded.[5]

This rather tentative hypothesis is confirmed, as far as the law of contract is concerned, by a document dating from the middle of the second century BC. The notorious *censor*, Marcus Porcius Cato,[6] wrote a manual for those interested in cashing in on the novel form of capitalistic farming that swept through Italy.[7] I am now referring to the year 160 BC. Apart from containing technical details on farming, Cato's treatise (something akin to our *Farmers Weekly*, complete with an inventory of implements necessary for particular jobs as well as a catalogue

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responsabilità nel diritto privato romano" 1992 *IURA* 1–82 1993 *IURA* 1–83, and Cardilli *L'obligazione di "praestare" e la responsabilità contrattuale in diritto romano* (*II sec aC – II sec dC*) (1995) 48 fn 95 for an impressive list of recent studies on the topic. See also Stoop "Contractual liability in the Roman and modern South African law of contract" in Van Wyk (ed) *Nihil Obstat. Feesbundel vir WJ Hosten* (1996) 163–179, which is an expanded version of this lecture, for more bibliographical information.

3 Van den Bergh "*Custodiam praestare: custodia*-liability or liability for failing *custodia*?" 1975 *Tijdschrift voor Rechtsgeschiedenis* 59 *et seq* 59.

4 This is in essence how the rule had been applied in Roman law. Cf Kübler "Das Utilitätsprinzip als Grund der Abstufung bei der Vertragshaftung im klassischen römischen Recht" in *Festgabe der Berliner juristischen Fakultät für Otto Gierke* (1910) 237–275 237: "Am mehreren Stellen der Pandekten wird eine Regel aufgestellt, wonach die Haftung des Schuldners sich nach dem Nutzen richtet, den er von dem Geschäfte hat. Hat er gar keinen Nutzen, so haftet er nur für Dolus (und Culpa lata), hat er aber neben seinem Gegner Nutzen, so haftet er für Culpa (omnis)." Also see the discussion in Michel *Gratuité en droit romain* (1962) 325 *et seq*.

5 Kaser *Das römische Privatrecht* 1 (1971) 146 *et seq*. Also see in general Von Jhering "Das Schuldmoment im römischen Privatrecht" in *Vermischten Schriften* (1879) (Aalen 1968) 165.

6 234–149 BC. On Cato see Gundel *Der Kleine Pauly sv* Cato 4. Ample bibliographical references to commentaries on Cato's works as a source of Roman law appear in Cardilli 64 fn 3 4. The text of the *De agricultura* used is that of Mazzarino (ed) (1962).

7 On this, see the brief bibliography in Cardilli 64 fn 4.

on where to buy them), also provided the reader with standard contracts that could be concluded with farm labourers and contractors.[8] The contracts appear to have been drawn up with the interests of the proprietor/landlord in mind and, along the lines of "no work, no pay" or, "if you break it, consider it paid", fault apparently played no role in determining liability for damages suffered by any party.[9]

I said apparently, because the notion of *culpa* (fault) must at that stage already have been known to the Romans. Thirty years after Cato published his treatise, the first direct reference to *culpa* (fault) appeared in the context of (quasi) contractual liability. Following the riots in which Gaius Gracchus had been killed and his property lost, his widow Licinnia claimed the value of the dowry, since, according to her, the riots were caused through the fault of Gracchus (*Gracchi culpa*). From that time onwards (130 BC), *culpa* (in the broad meaning of blameworthiness) came to be considered as a precondition for liability in some cases of unlawful damage to property[10] and traces of a general development of fault as a prerequisite for liability in other relations in the sphere of private law may also be discerned.

This development continued and at some subsequent stage *culpa* (in the sense of both *dolus* and *negligentia*) came to be applied as a general criterion for determining liability in cases of delictual damage or damage flowing from breach of contract. According to Von Jhering (who wrote towards the end of the 19th century), this was already so in classical law (that is the period from 14 BC–AD 250) and according to him, what must count as the greatest achievement of the Roman jurists during the classical period is the fact that they came to regard fault as a prerequisite for liability in all spheres of private law.[11] During the post-classical period, fault as a requirement for criminal liability also permeated Roman criminal law.[12]

The above views expressed by Jhering represent the consensus of Romanists approximately 130 years ago. Yet, almost at the very moment that Jhering wrote this glowing testimony, voices were heard that later led to a drastic change in the meaning and role of *culpa* in classical Roman law. In fact, the next generation of legal historians regarded exactly the opposite as true. Von Jhering's views became totally obsolete[13] and were replaced by the notion that classical Roman law knew and applied a principle of objective liability – that is, liability not based on fault; post-classical law (not necessarily that of Justinian) introduced fault as the overriding criterion for liability in private law.[14]

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8 *De agricultura* c 144–150.

9 See the in depth discussion by Cardilli 71 *et seq*.

10 Pernice *Labeo* Bd 2 Abt 2 5 *et seq*; Schipani *Responsabilità "ex lege Aquilia". Criteri di imputazione e problema della "culpa"* (1969) especially 126 *et seq*; Cardilli 141 *et seq*.

11 176.

12 179.

13 Cannata *Ricerche sulla responsabilità contrattuale nel diritto romano* (I) (1966) 3.

14 See Voci "'Diligentia', 'custodia', 'culpa'. I dati fondamentali" 1990 *Studia et Documenta Historiae et Iuris* (hereafter referred to as *SDHI*) 29 *et seq*. (Voci mercilessly attacks this opinion as will be pointed out later.) In his article on the liability of the *depositarius*, Hosten (1964 *Acta Juridica* 124 129) accepts the principle of objective

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The reason for these conflicting opinions may be found in the nature of the primary Roman legal sources. During the 13th century, Jacques de Revigny had already indicated that the law contained in the *Corpus iuris civilis* differed from what the Romans knew and applied in practice. The possible presence of textual alterations (called interpolations), copying errors or omissions, as well as *lacunae* in the original sources that had been handed down, opened the door to numerous controversies and uncertainties – the debate about the content and meaning of *culpa* is not the only notorious example.

The scholastic medieval jurists tried to devise a coherent system of *culpa* in the *Corpus iuris civilis*. However, with their peculiar working method they ran amok in the field of contractual liability by distinguishing no fewer than six different degrees of fault. Their antics led successive generations of jurists (including the great Bartolus and Baldus) up countless dead ends and generated fanciful theories. It took approximately 400 years before the great humanist Donellus introduced some moderation and simplified the view of *culpa* by abolishing the distinctions made by the glossators.[15] Donellus also formulated a general theory of contractual liability based on *culpa* and the principle of utility.[16]

The development of a more convincing and practical theory of *culpa* that had been started by Donellus, was completed in 1838 when Hasse published the second edition of his *Die culpa des römischen Rechts*.[17] According to Hasse, the Roman jurists distinguished fraud (*dolus*), gross negligence (*culpa lata*) and ordinary negligence (*culpa levis*).[18] Where the debtor had to guard the creditor's property, he had to perform *diligentia omnis in custodiendo*.[19] *Custodia* according to him therefore meant the safeguarding of the creditor's property and the debtor would have been liable if he had negligently failed to properly guard such property.[20]

When Von Jhering in 1879 formulated his theory on *culpa*, he took over most of Hasse's views on the subject and, in so doing, distanced himself from the realities of a changed society brought about by the Industrial Revolution.

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liability in classical Roman Law: "[Die] begrip *culpa* in die Romeinse klassieke reg [was] nog onontwikkel en is aanspreeklikheid onder die kontrak hoofsaaklik gebaseer op dolus of *custodia* . . . [Laasgenoemde] beteken dat die skuldenaar . . . soms sonder meer aanspreeklik gehou word in sekere gevalle waar die saak verlore, vernietig of beskadig is – ook al is sulks nie aan sy skuld te wyte nie (*etiam sine culpa*)."

15 Donellus *Commentarius de jure civile* lib 16 cap 7 par 15; see Hoffmann *Die Abstufung der Fahrlässigkeit* (1968) 85.

16 Cf *Commentarius in Codicem Justiniani* in *Opera Omnia* (1830) vol 8 coll 31–32 (cited by Cardilli 4–5): "*Dicere solemus in commodato, in pignore, et in omnibus contractibus, in quibus utriusque et creditoris et debitoris, aut solius debitoris utilitas versatur, dolum et culpam praestandam esse, casum fortuitum praestandum non esse, [D 13 6 5 2] . . . Cum autem dicimus dolum, culpam, casum praestari, contrarium significatur . . . Quid ergo his verbis intellegimus? respondeo: . . . dolus pro damno dolo dato, culpa pro damno culpa dato, casus pro damno quod casu fortuito contingit.*"

17 The theories of Hasse's predecessors (Pufendorf, Löhr, Schömann and Glück) are discussed by Engelmann *Die custodiae praestatio nach römischen Recht* (1887) 9–22.

18 169.

19 135.

20 335.

The Roman lawyers had to struggle with liability in cases where a borrowed slave fell from scaffolding;[21] where leaky vats were sold;[22] clothes were torn or stained;[23] or in spectacular cases such as ships colliding;[24] or the bizarre, where a ball hit the hand of a barber who performed his service in a public place so that the poor client's throat and not just his beard was cut.[25]

On the other hand, lawyers around the middle of the 19th century had to decide on cases where workers were being injured while handling menacing blast furnaces, or powerful combustion engines, or as a result of explosions in factories. They had to grapple with liability in cases of damage and large-scale destruction caused by fires which were ignited by engines giving off sparks in densely populated areas.[26]

Now, in accordance with Roman law principles, as expounded by Hasse and his followers (most notably of course Von Jhering), liability would have depended on the presence of fault. However, in most of these cases, it would have been difficult, if not impossible, to prove negligence on the part of the person in charge of the factory or installation. This led to the passing of several laws during the 19th century that imposed strict liability on railway companies and factory owners.[27]

The industrial revolution therefore exposed the shortcomings of the insistence of the Pandectists on *culpa* as a prerequisite for liability *ex contractu* as well as *ex delicto*.[28] Accordingly, at the very moment when Von Jhering was happily formulating his views on *culpa*, others[29] were busy dismantling his theory[30] and after a battle of wits that lasted almost half a century, the interpolationists and those who built on their results,[31] succeeded in overthrowing centuries of dogma concerning *culpa* and contractual liability in Roman law.[32]

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21 Cf *D* 13 6 5 7.
22 Cf *D* 19 2 19 1.
23 Cf *D* 9 2 27 18.
24 Cf *D* 9 2 29 2.
25 Cf *D* 9 2 11 *pr*.
26 See the graphic description by Zimmermann *The law of obligations. Roman foundations of the civilian tradition* (1990) 1130 *et seq*.
27 Cf *idem* 1131 *et seq*.
28 Cf *idem* 1130 *et seq*.
29 Eg Baron, in his article "Diligentia exactissima, diligentissimus paterfamilias oder die Haftung für Custodia" 1869 *Archiv für Civilistische Praxis* 44 *et seq*. Baron corrected some of his views in a second article "Die Haftung bis höheren Gewalt" 1892 *Archiv für Civilistische Praxis* 203 *et seq*.
30 However, first traces of the idea of objective liability already appeared in 1822 in the work of Elvers *Doctrinae juris civilis romani de culpa prima lineamenta* (1822) 48 *et seq*; see Hoffmann *Fahrlässigkeit* 203.
31 One of the first exponents of this new method, Seckel (in Heumann *Handlexicon zu den Quellen des römischen Rechts* (1907) 110 *et seq* (*sv custodia*)), subscribed to the view of a technical *custodia* in classical law that implied liability for *casus minor* in respect of *res custodiri solitae*. Seckel did not contribute much to the theory put forward by Baron, but supported the theory by pointing out the presence of interpolations in the relevant texts in the *Corpus iuris civilis*. Others who gave shape to the formulation of a new theory were Schulz (see especially "Die Haftung für das Verschulden der Angestellten im klassischen römischen Recht" 1911 *Grünhut (herausg) Zeitschrift für das Privat- und öffentliche Recht* 9 *et seq*, "Die Aktivlegitimation zur actio furti im klassischen römischen Recht" 1911 *ZSS* 23 *et seq*) and Kunkel (in his article "Diligentia" 1925 *ZSS* 266 *et seq*. Kunkel built on the foundation laid by his predecessors – most notably (apart

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The theory that liability in Roman law depended on the presence of fault on the part of the defendant, was rejected. Instead, for the greater part of the first half of this century, it was held that liability in classical law depended on *dolus* and *custodia*. *Custodia* liability (in terms of the interpolationist credo) implied that the debtor had to bring about such results as would be possible through guarding or watching over property, failing which he would, in certain typified cases, have been liable irrespective of the presence or not of fault on his part.[33] It was accordingly accepted that classical Roman law accepted and applied an objective system of liability in cases of breach of contract. According to the interpolationists, fault in the sense of negligence was totally irrelevant in classical Roman law.

This theory of an objective liability in classical Roman law dates from as early as 1869 and was partly inspired by changed socio-economic circumstances. However, almost from the moment this theory was formulated (by Wolfgang Kunkel in Germany and Arangio-Ruiz in Italy), it came under fire. Gradually and very slowly, the pendulum swung back and approximately one century later a broad *communis opinio* emerged that accepted that classical Roman law, as far as contractual liability was concerned, already knew and applied *culpa* in the sense of negligence. That, incidentally, is the view to which most Romanists today subscribe.

Nothing new under the sun, you might say. We are back in the good old days of the Pandectists following the lead of Von Jhering with his insistence on *culpa*! Not quite. It must be pointed out that classical law did in fact recognise instances of objective liability in the guise of *custodia* liability. The great German Romanist Max Kaser, in his respected textbook on Roman law (which, I may add ranks in the eyes of Romanists as being almost on a par with the *glossa Accursiana*), summarises the current theory as follows with his characteristic clarity:

> "Where there was no fault on the part of the debtor, damage was ascribed to accident (*casus*). In such a case, the person whose estate or patrimony had been affected by the loss, bore the risk (*periculum*) thereof ... Normally this implied damage brought about as a result of accident and in the case of *custodia*-liability through *vis maior*."[34]

Accordingly, the debtor who was liable for *custodia*, could at times have been held liable irrespective of whether he could have prevented the damage. This would have been the case in –

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from Baron and Seckel) Kübler and Haymann "Textkritische Studien zum römischen Obligationenrecht. 1: Über Haftung für 'custodia'" 1919 *ZSS* 167). One year after Kunkel formulated his theory, Arangio-Ruiz in his work *Responsabilità contrattuale in diritto romano* (1927) confirmed Kunkel's thesis and by the time he had published the second edition of his work in 1933, his audience had been convinced and he had succeeded in establishing a large degree of unanimity amongst Romanists (including the Italian colleagues) as far as the question of fault and contractual liability was concerned. Even as recently as 1966, Cannata *Ricerche sulla responsabilità contrattuale* 11, still regarded Arangio-Ruiz's work as representative of the *communis opinio* on the subject.

32 De Robertis *La disciplina della responsabilità contrattuale* (II vols) (1981–1982) in substance still adhered to this theory. Incidentally, Hosten also subscribed to this theory as appears from 1960 *THRHR* 256 258, 1964 *Acta Juridica* 125.

33 *Ricerche sulla responsabilità contrattuale* 129.

34 *Das römische Privatrecht* 1 512.

> "certain typical accidents which were regarded as avoidable by properly watching and guarding the . . . thing (for example theft), and on the other hand [the debtor] was not liable for other typical accidents which were invariably regarded as not avoidable by the exercise of care (shipwreck; fire; pillage by the enemy and gangs of robbers; earthquake etcetera)".[35]

Yet, the controversy continues and is presently concentrated around the precise meaning and content of the words *custodiam praestare*. Today, four conflicting theories exist: In the first place, there is the *communis opinio* shared by Kaser and many others[36] that *custodia* expresses a form of liability in terms of which the debtor could have been held liable irrespective of fault on his part. Secondly, some authors seriously argue that *custodia* expresses not a standard of liability, but the content of an obligation. *Custodiam praestare* does not mean "to be liable for *custodia*", but simply implies that the debtor had to see to it that a thing or property had to be kept safe.[37] The degree of watchfulness depended on the status and skill of the debtor, the nature of the object or the conditions of the contract.[38] The third theory is that *custodia* indeed implies a form of liability, but that it involved a subjective test for liability in each case.[39]

Recently, Ricardo Cardilli[40] has investigated the whole matter *de novo* and has contributed to the already confusing debate by adding a fourth possibility. Cardilli concludes (in my opinion quite correctly) that, with the exception of cases where the debtor had to *praestare custodiam*, contractual liability during the time of Gaius depended on *culpa*, in the sense of *dolus* and negligence.[41] During the time of high classical law, *custodiam praestare* signified the content of an obligation and implied the care of the diligent *pater familias*. However, in some cases, *custodiam praestare* implied that the debtor gave a contractual warranty in terms of which he guaranteed that he would guard against certain events or damage: if the thing were damaged or lost as a result of such event, the debtor would have been liable on the ground of his warranty, irrespective of the presence of fault on his part.[42] *Custodiam praestare* therefore did not present a homogenous face.

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35 Schulz *Classical Roman law* (1951) 515. This view is accepted by, *inter alios*, Kaser *Das römische Privatrecht* 1 512; Zimmermann 193; Honsell, Mayer-Maly, Selb *Römisches Recht* (1987) 233 *et seq*; Guarino *Diritto Privato Romano* (1992) 1015 *et seq*; Talamanca *Istituzioni di Diritto Romano* (1990) 664.

36 Cf Zimmerman 193 *et seq*.

37 MacCormack 1972 *SDHI* 123 *et seq* 1979 *ZSS* 149 *et seq*, "Factum debitoris and culpa debitoris" 1972 *TvR* 59 *et seq*, "Culpa in eligendo" 1971 *RIDA* 525 *et seq*; Thomas *Textbook of Roman law* (1976) 253.

38 Van den Bergh 1975 *TvR* 59 *et seq* – see his conclusion at 71. MacCormack and Van den Bergh's views are shared by Tafaro *Regula e ius antiquum* 218 *et seq* – see his conclusion at 318; Voci (*supra* fn 2) also subscribes to the above view – see his conclusions at 142.

39 Robaye *L'obligation de garde. Essai sur la responsabilité contractuelle en droit romain* (1987) 429 *et seq*.

40 The full reference appears in fn 2 *supra*.

41 Cf his final considerations at 507 *et seq*.

42 Cardilli 483 *et seq*. The great merit of Cardilli's work lies in the fact that he also points out the laborious and sometimes slow progress in the works of the pre-classical and classical jurists from a system of "objective liability" to the legal maturation that took place towards the end of the 2nd century AD which is expressed in *D* 50 17 23. On this text, which can be regarded as the foundation for the modern views on contractual liability, see Tafaro *Regula e ius antiquum in D 50 17 23*. For a discussion of the maturation of the rule *casus a nullo praestantur* in classical law, see Cardilli 415 *et seq*.

Today, little doubt exists that, as a rule, contractual liability in the time of classical Roman law depended on the presence of fault. However, the Roman jurists recognised different degrees of fault, namely *dolus* (fraud), *culpa lata* (gross negligence), *culpa levis* (ordinary negligence) and slight negligence (*culpa*).[43] In the light of this it may be asked: How did they determine which of these had to apply in a particular case of breach of contract?

Most Romanists today accept that the Roman jurists determined the extent of the liability of the debtor in the case of contractual and quasi-contractual liability, by having recourse to the principle of utility (*utilitas*). In broad terms, the theory can be summarised as follows:

(a) Where the contract was only for the benefit of the person who delivered the property (as was the case with deposit (*depositum*)), the debtor was liable for *dolus* and *culpa lata* or that degree of neglect which bordered on fraud. [44]

(b) Where the contract was solely for the benefit of the person to whom the property had been delivered (for example free loan for use)), the debtor had to exhibit very great care, and was liable for slight neglect (*levissima culpa*).[45]

(c) Where the contract was for the benefit of both parties, each had to exhibit that diligence which persons of prudence apply to their own affairs – each would therefore have been liable for *culpa levis*[46] or the want of ordinary care.[47]

The principle of utility has been criticised as clumsy and as an unsuccessful attempt to determine contractual liability in all cases.[48] However, the principle had a sound philosophical underpinning[49] and there can be no doubt that the underlying motive satisfies the demands of logic and equity.[50] I agree with Voci[51] that the application of the principle of utility to determine contractual liability, implies a recognition of the economic moment that is present in any contract: what is more, if one should go further and also strike a balance between contractual liability and the advantage a person obtains from a contract, it will have the result that the economic moment present in the contract is also being dealt with in accordance with the demands of justice.

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43 The term *culpa levissima* was unknown to the Roman jurists. It was created by the glossators as the counterpart of the Roman *exactissima diligentia*: cf Accursius in the gloss *Diligentissimus ad D* 19 2 25 7.

44 Cf *D* 50 16 223 *pr*: "Latae culpae finis est non intellegere id quod omnes intellegunt." A debtor who acts as if he had no conscience, wantonly careless as to what becomes of the thing, will be acting with *culpa lata*.

45 Vinnius *Commentarius Institutionum* (1726) 3 15 n 10 explains *culpa levissima* as follows: "omissio eius diligentae quam vigilantissimus paterfamilias suis rebus adhibet".

46 *Culpa levis* implies a lack of *diligentia* or that amount of care that the *man in the street* usually employs in his own affairs. Vinnius n 9 explains as follows: "omissio eius diligentiae quam vulgo homines frugi suis rebus adhibere soliti sunt".

47 See the detailed discussion in Michel 325 *et seq*.

48 Cf Kaser *Das römische Privatrecht* 1 512; Zimmermann 198.

49 Cf Cicero *De fin* 2 117: "Nec cum tua causa cui commodes, beneficium . . . nec gratia deberi videtur ei qui sua causa commodaverit"; Seneca *De ben* 6 12 2: "Multum enim interest utrum aliquis beneficium nobis det sua causa an et sua"; Terent *Hec* 840: "Multa ex quo fuerint commoda, eius incommoda aequum est ferre". See Michel 327.

50 Michel 326; Van den Bergh "Qui habet commoda ferre debet onera. Contributions à l'histoire d'une maxime juridique" in *Flores legum HJ Scheltema oblati* (1971) 21 *et seq* 21.

51 1990 *SDHI* 141.

Voci even goes so far as to state that the principle of utility is more just and more suited to the demands of modern life than was the case in antiquity. Van den Bergh is also of the opinion that the rule can be justified on the grounds of equity: He who keeps another man's goods for profit does so at his own risk. I may add that the reverse side of the coin would read: *qui habet commoda ferre debet onera* (he who has the advantage must also accept the responsibility).

Fault as a requirement for breach of contract was accepted by Justinian and was later taken over by the Roman-Dutch authors. This requirement, together with the principle of utility, forms part of the South African law of contract.[52]

As recently as 1951, in the authoritative work by Wessels titled *The law of contract in South Africa*,[53] the contractual liability of the parties to a contract was explained in precisely the same terms as could be found in any standard textbook on Roman law. The principle of utility played a fundamental role in determining contractual liability, as appears from the work by Wessels and from the following statement in the 1945 edition of Maasdorp's *Institutes of South African law*:[54]

> "[I]t may be laid down as a general rule that the degree of diligence will vary according as the contract is for the benefit of one of the parties alone, or for the benefit of both."

This principle has been applied in a number of early decisions,[55] admittedly without any express mention being made of the principle of utility as such.

From the above discussion one would expect that fault as a requirement for breach of contract (including positive malperformance) would today (at least in theory) enjoy much attention. However, quite the opposite is true.

Up to the middle of the sixties, fault was still accepted as a requirement for breach of contract.[56] The following *dictum* by O'Hagan J in *Grobbelaar v Bosch*[57] clearly stated the position:

> "In any agreement where a person seeks to escape liability for a failure to implement a promise for the delivery of a specific thing, it is for him to prove that there was no fault on his part."

However, shortly thereafter, and for no apparent reason, the position changed and today fault as a requirement for breach of contract (more specifically in cases of positive malperformance), is no longer accepted as a matter of course. Even though fault does feature in some textbooks on the law of contract, most authors express their uncertainty in this regard;[58] others even fail to mention this requirement[59] or name it only briefly in passing.[60]

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52 Cf Maasdorp *The Institutes of South African law III The law of contracts* (1945) 60 *et seq*; Wessels *The law of contract in South Africa* (1951) 590 *et seq*; *Colonial Government v Green* 1870 Buch 14 21; *Sciama & Co v Table Bay Harbour Board* 1900 17 SC 121 126.

53 595.

54 60.

55 Cf *Colonial Government v Green* 1870 Buch 14 21 *et seq*; *Gifford v Table Bay Dock and Breakwater Management Commission* 1874 4 Buch 96 115 where De Villiers CJ remarked as follows: "[It] will be unnecessary to enter into the minute distinctions between the different kinds of negligence recognised by our law. It may be broadly laid down that where the contract of bailment is of mutual benefit, there ordinary diligence only is required."

56 As appears from the contribution of Hosten 1964 *Acta Juridica* 124 *et seq*.

57 1964 3 SA 687 (E) 691D–E.

58 Lubbe and Murray *Farlam and Hathaway: Contract – Cases, materials and commentary* (1988) 490 question the statement made by Van Rensburg, Lotz and Van Rhijn "Law of

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A recent decision by the Appellate Division in *Administrator, Natal v Edouard*[61] did little to clear the current uncertainty. The unique facts of this case need not concern us here. What is important is the following remark by Van Heerden JA:[62]

> "*Ex delicto* . . . damages may only be claimed if the tortfeasor acted intentionally or negligently. By contrast, fault is not a requirement for a claim for damages based upon a breach of contract."

The judge did not cite any authority in support and even though his remark constituted an *obiter dictum*[63] one cannot but express concern at the summary nature in which he dealt with the question of fault as a requirement for breach of contract. With this bold statement the judge closed his eyes to the numerous learned treatises as well as the clear authority of our common law on the topic.

There can be no doubt that fault is a requirement for breach of contract[64] and that Neethling, Potgieter and Visser[65] are correct where they define breach of contract as "an act by a person (contracting party) which in a wrongful and culpable way causes damage to another (contracting party)" – a definition that incidentally could comfortably also have fitted into any modern commentary on the Roman law of contract.

As a general rule in Italian, French and German law, fault is a requirement for breach of contract.[66] More important, the *UNIDROIT principles of international commercial contracts* (1994), also base liability for malperformance on fault.[67]

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contract" in 5 *LAWSA* (re-issue) par 221 (ie that fault is a necessary element) in the following terms: "The authors do not cite any decided cases in support of their view. Is it nevertheless, a convincing and equitable approach?" I find the criticism of Lubbe and Murray surprising. As I have stated, in view of the position in our common law, surely those who canvass the opposite view (that fault is not a requirement – or rather that our common law on this point had changed) should cite cases to support their view. The rather apologetic stance of Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract. General principles* (1993) 237: "The question whether fault is a requirement for breach of contract in all its forms – whether as an element of the particular form of breach or as a defence to a claim for breach – has not been settled", is also strange in the light of the clear authority of our common law.

59 Cf Joubert *General principles of the law of contract* (1987) 207; De Wet and Van Wyk *Kontraktereg en handelsreg* (1978) 161; Lee and Honoré *The South African law of obligations* (1978) 60.

60 See Christie *The law of contract in South Africa* (1991) 589; Kerr *The principles of the law of contract* (1989) 445.

61 1990 3 SA 581 (A) 597E–F.

62 See in this regard also Dendy "Wrongs to the pocket – X. Breach of contract as delict" 1991 *Businessman's Law* 219–224 220.

63 So also Van der Merwe *et al* 237.

64 In this sense also Hutchison, Van Heerden, Visser and Van der Merwe *Wille's Principles of South African law* (1991) fn 1105; Van Rensburg, Lotz and Van Rhijn 5 *LAWSA* par 235; Van der Merwe *et al* 253 *et seq*; Nienaber "Kontrakbreuk *in anticipando* in retrospek" 1989 *TSAR* 6; Hosten 1960 *THRHR* 258, 1964 *Acta Juridica* 125.

65 *Deliktereg* (1996) 6.

66 In respect of Germany, cf Hoffmann 176 *et seq*; Zimmermann 199. In respect of France, see Michel 358 *et seq*. For Italy, see Tafaro "Criteri di imputazione della responsabilità contrattuale e bona fides: Brevi riflessioni sulle fonti romani e sul codice civile italiano" *Studi in onore di Arnaldo Biscardi* (1987) 322 *et seq*.

67 Article 7.1.7(1) provides as follows: "Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and

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It may be stated with a measure of certainty that fault is universally regarded as one of the cornerstones of contractual liability. This fact should accord with the average person's sense of justice. Fault provides a certain borderline (even though in many cases only in theory) for liability. Abolishing this requirement, as has been suggested in *Administrator, Natal v Edouard*,[68] would mean a giant leap back to the period predating the civil strife that marked the end of the Roman Republic.

Moreover, the abolition of fault as a requirement for contractual liability would remove one of the pillars upon which the Roman and Roman-Dutch law of contract have been built. It would also have the undesirable result that our law would find itself isolated from most of the legal systems that were built on the foundations of the European *ius commune*.[69] It would also have the anomalous result that the borderline between breach of warranty and breach of an ordinary term of a contract would vanish.

The Roman law system of actions does not form part of our law and the sharp distinctions that divide contracts from each other have also become blurred. It may therefore be difficult in practice to ascertain the true nature of a specific contract and with that also the degree of care or diligence that could be expected from the debtor.[70] Applying the test of the reasonable man in all cases of breach of contract[71] may be easier in practice but may lead to dogmatically unacceptable results. In terms of our common law, the degree of care that had to be applied depended in each case on the nature of the contract. It is exactly for this reason that the application of the principle of *utilitas* may assist the judge in the exercise of his discretion. In the absence of a specific clause in the contract, or other relevant legal principle, it will be possible, by simply applying the test to the party in whose favour the contract may be, to determine the amount of care that the parties to the contract should apply.

The parties to a contract have their minds set on the fulfilment of their respective contractual obligations and not on breach of contract. It would appear that the same holds true for modern lawyers and legal academics. As a matter of fact, fault as a requirement for breach of contract, may today be regarded as *terra incognita*. The absence of a broad theoretical basis for contractual liability in the South African law of contract, is surprising in view of the prominence of the topic in the works of countless generations of jurists throughout the ages.[72] In

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that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences." The document goes on to state that this article finds application in the areas covered in common law systems by the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as *force majeure*, *Unmöglichkeit*, etc, but that it is not identical with any of these doctrines. The term "force majeure" has been chosen because it is widely known in international trade practice. However, it should also be noted that *culpa* as a cornerstone of liability, whether *ex contractu* or *ex delicto*, has come under attack and a variety of instances of liability without fault have been created by the legislature or the courts. Cf Zimmermann 195 1130 *et seq*.

68 1990 3 SA 581 (A) 597E–F.

69 See fn 66 *supra*.

70 Hosten 1964 *Acta Juridica* 127.

71 As has been suggested by Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (1991) 194; Hosten 1964 *Acta Juridica* 128.

72 On this, see in general Hoffman *Fahrlässigkeit*.

this regard, the experience of the Roman jurists and the emphasis that they placed on *culpa*, with the principle of utility as guiding factor, may provide a solid foundation for modern South African lawyers and legal academics to build on.

Ek wil afsluit deur te verwys na die titel van hierdie artikel. Die stelreël *qui habet commoda ferre debet onera* kan beskou word as 'n beknopte samevatting van die beginsel van nut as maatstaf vir die bepaling van kontraktuele aanspreeklikheid. Dit is egter wel so dat die reël onbekend was aan die Romeinse juriste[73] – dit is afkomstig vanuit die middeleeuse skolastiek en die kanonieke reg.[74] Lesers sal ook saamstem dat dit nie eintlik vertaal kan word met "jy kan nie jou brood aan beide kante botter nie". 'n Beter en letterliker vertaling sou soos volg lui: "Wie die voordeel geniet, moet ook die nadeel verduur."

Die insluiting van sowel die pseudo-Romeinse *regula iuris* as die prulvertaling daarvan, kan verduidelik word deur daarop te wys dat dit 'n *capitatio benevolentiae* is. Die twyfelagtige vertaling daarvan wil ek as voorbeeld gebruik om die gevaar verbonde aan 'n gebrekkige kennis van Latyn te illustreer.

Laasgenoemde bring my by die voor-die-hand-liggende vrae insoverre dit die onderrig van Romeinse reg betref: hoe is dit moontlik om die Romeinse reg te bestudeer sonder 'n grondige kennis van Latyn? En, les bes, wat is uiteindelik die waarde van 'n studie van die Romeinse reg?

As professor met as leeropdrag die Romeinse reg kan daar van my verwag word om my oor hierdie twee vrae in die openbaar uit te spreek. Ek hou my antwoorde kort. In die eerste plek kan daar geen twyfel bestaan nie dat dit wel moontlik is om Romeinse reg op voorgraadse vlak aan te bied vir studente wat oor geen kennis van Latyn beskik nie. Eweneens is dit ook sonder twyfel waar dat geen nagraadse studie van die Romeinse reg moontlik is sonder 'n grondige kennis van Latyn nie. In dié verband is die feit dat Latyn nie meer 'n vereiste vir die LLB-graad is nie 'n bron van kommer maar beslis nie 'n ramp nie. Daar kan sonder teenspraak gestel word dat kennis van 'n derde Europese taal (meestal Duits, soms Frans of Italiaans) 'n onontbeerlike vereiste vir die suksesvolle voltooiing van die LLM- of LLD-graad is. Die feit dat Duits, Frans of Italiaans nie as vereistes vir die LLB-graad gestel word nie, het tot dusver nie in die weg van honderde suksesvolle kandidate gestaan nie. Net so is ek van mening dat die student wat hom in die Romeinse reg wil verdiep, self sal sorg dat hy of sy oor 'n voldoende kennis van Latyn beskik.

Of 'n student wel die moeite sal doen om Latyn onder die knie te kry ten einde die Romeinse reg op 'n gevorderde vlak te kan bestudeer, sal myns insiens afhang van die antwoord op die tweede vraag: naamlik, wat die waarde van 'n studie van die Romeinse reg nou eintlik is.

Hieroor bestaan daar ook al bykans 'n "wolk van literatuur". Die meeste van u is op hoogte van die stand van die debat en sal met my saamstem dat daar eenstemmigheid bestaan oor die feit dat die Romeinse reg wel bestudeer moet word. Uiteenlopende menings bestaan egter oor die vraag of die Romeinse reg

73 Van den Bergh *Flores legum* 24. Vgl egter *D* 50 17 10: "Secundum naturam est commoda cuiusque rei eum sequi, quem sequentur incommoda."

74 Vgl de Mauri *Regulae iuris* (herdruk 1954) *sv commoda*; Van den Bergh *Flores legum* 23.

doseer moet word ter wille van Romeinse reg; of eerder doseer moet word ter wille van die praktiese nut wat dit kan hê.

In Europa is hierdie vrae sedert die 15de eeu gevra[75] en 'n antwoord daarop kan steeds nie gegee word nie. 'n Aantal jare gelede was ek bereid om 'n antwoord te waag. Ek was van mening dat Romeinse reg bestudeer moet word as 'n stelsel in eie reg, om studente bewus te maak van die verruklike skoonheid van 'n regstelsel wat deurspek was met die beginsels van billikheid en regverdigheid; 'n regstelsel wat sonder veel aanpassing in staat sou kon wees om aan die meeste eise van 'n moderne samelewing te kan voldoen. Ek het, soos Bernhard Windscheid meer as honderd jaar gelede, geglo dat indien Romeinse reg so doseer word, studente die lesingsale sal volpak, gretig om onderrig te word in die elegansie en sofistikasie wat die antieke regstelsel van Rome gekenmerk het.

Ek het van standpunt verander. Alberico Gentili (wat in die 16de eeu Regius professor in Romeinse reg aan Oxford geword het) het vertel hoe een van sy dosente, by name Rodulfius, deur studente by die lesingsaal uitgesmyt is aangesien die arme vent hulle vergas het met 'n uitvoerige lesing oor 'n historiese onderwerp wat volgens die studente niks te make gehad het met die destyds geldende reg nie.[76] Voordat ek ook so deur studente uit die lesingsaal verban kon word, het ek gelukkig tot die soberende besef gekom dat studente die regte bestudeer om redes waarvan die leer van regsestetika waarskynlik die laaste is. Voorts het die toenemende spesialisasie op regsgebied, die groter eise wat aan universiteite gestel word om 'n praktykgerigte leerplan aan te bied en moontlik ook die gevaar wat daar kon bestaan dat Romeinse reg andersins as suiwer historiese dissipline slegs buite die regsfakulteit sal bly voortbestaan, my daartoe genoop om 'n meer realistiese weg in te slaan. Ek sien nou my taak as dosent in die Romeinse reg om studente te onderrig op 'n wyse wat nuttig sal wees. Dit impliseer myns insiens dat ek hulle in die reëls van die Romeinse reg sal onderrig en tegelykertyd ook sal wys op die moderne ontwikkeling van dié reëls. Ek sal met ander woorde poog om die historiese en regsvergelykende metode te kombineer.[77]

Regsdosente word ook vandag gekonfronteer met 'n gehoor waarvan weinig, indien enige, 'n historiese bewussyn het. Dit staan vas dat die reg die resultaat is van 'n historiese ontwikkeling en dat studente deeglik hiervan bewus gemaak moet word. Die taak van 'n dosent in die regte is dus nie slegs onderrig nie maar ook om op te voed. Hiervoor is die Romeinse reg, met sy historiese komponent asook moderne relevansie, uitmuntend geskik. Deur gevolglik 'n kompromis te bereik tussen elegansie en nut ("utility and elegance") sal ek hopelik steeds die droom van Windscheid kan laat bewaarheid word.

Romeinse reg is 'n internasionale dissipline, in die sin dat daar kennis geneem moet word van navorsing wat daar oor die vak in talle lande van die wêreld gedoen word en, omgekeerd, dat daar internasionaal kennis geneem word van die navorsing wat daar hier oor die vak gedoen word. Ek sal my dus in die

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75 Zimmerman April 1995 *Journal of Legal History* 21–33 22.

76 Vgl Zwalve "De toekomst van het Romeinse recht" Junie 1993 *Ars Aequi* 455–458 456.

77 'n Metode voorgestaan deur Zimmermann April 1995 *Journal of Legal History* 27 *et seq* en deur hom tot uitvoering gebring in sy voortreflike werk, *The law of obligations. Roman foundations of the civilian tradition.*

tweede plek daarvoor beywer om navorsing te doen wat sowel nasionaal as internasionaal relevant is, om bestaande kontakte met Romaniste in ander wêrelddele te behou en nuwe bande met vakkollegas elders te smee. Dit is ook om dié rede dat die grootste gedeelte van hierdie artikel in Engels geskryf is.

PJ RABIE: *IN MEMORIAM*

Die *Tydskrif* het met leedwese verneem van die afsterwe van oudhoofregter PJ Rabie gedurende Desember 1997. Regter Rabie was 'n getroue ondersteuner en medewerker van die *Tydskrif* die afgelope vyftien jaar. Hy het naamlik op die Bestuur van die Vereniging Hugo de Groot gedien vanaf 1983, terwyl hy nog hoofregter was, en sy verbintenis voortgesit as oudhoofregter vanaf 1989 tot met sy dood. Die *Tydskrif* huldig die nagedagtenis aan Pierre Rabie en spreek ons meegevoel teenoor sy naasbestaandes en vriende uit.

Verskillende standpunte oor die algemene reël by onuitgevoerde kontrakte na toetrede deur die kurator

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SUMMARY

Different views about the general rule on unexecuted contracts after accession to office by the trustee

Despite ample authority regarding unexecuted contracts in the South African law of insolvency and the important role they play in this field, many problems and questions regarding the general rule remain unsolved and unanswered. The traditional view is that the trustee has the capacity to "terminate" the contract. A more recent view is that the trustee simply "repudiates" the duties arising from the unexecuted contract when he decides not to comply with these duties. It is therefore necessary to analyse both these views. This article, as part of a series of articles on this topic, investigates the *practical consequences* of each of these views to see whether they are, in fact, applied in the normal course of insolvency practice. The various decisions of the Supreme Court dealing with the power of the trustee are thoroughly investigated. An analysis shows an unacceptably incomplete result owing to unclear, inexact and incomplete substantiation of the various viewpoints by the courts. The second article in this series deals with the practical application of the repudiation construction under insolvent circumstances, to assess whether it gives satisfactory results. It furthermore substantiates the writer's viewpoint that a provision should be included in South African law explicitly to acknowledge the capacity of the trustee to terminate unexecuted contracts when the insolvent still has duties to perform in terms of the contract.

1 INLEIDING

Die uitwerking van insolvensie op onuitgevoerde kontrakte word dikwels verklaar met verwysing na kontrakteregtelike beginsels. So word soms sonder meer gesê dat 'n kurator, nadat hy tot die kontrak toegetree het, dit kan "repudieer". Die solvente kontraksparty kan dan skadevergoeding eis. Om te kan vasstel watter beginsels van die kontraktereg bygetrek word wanneer insolvensie tussenbeide kom, is dit nodig om ondersoek te doen na die reëls by insolvensie en onuitgevoerde kontrakte; verder is dit noodsaaklik om die verskynsel van kontrakbreuk en die beskikbare regsmiddele in daardie gevalle behoorlik te ontleed. Hierdie algemene beginsels van die kontraktereg geld nie in isolasie nie en kan nie eenvoudig deur die insolvensiereg geïgnoreer word nie. Die posisie van die partye by insolvensie moet met inagneming van daardie beginsels verklaar word tensy 'n ander regsreël in die besondere geval gevestig is. Dit is belangrik dat die ontwikkeling van die kontraktereg in die algemeen intensief ondersoek word om die korrekte terminologie en toepassings te vind. Té dikwels gebeur dit dat juis die foutiewe en onnadenkende gebruik van reeds verwerpte

terminologie en denkrigtings aanleiding gee tot die verkeerde toepassing van sekere kontrakteregsreëls in die insolvensiereg, met die wanopvattings wat daaruit voortvloei. Die uiteinde is 'n algehele afwyking van die tans geldende kontrakteregtelike beskerming van die partye in geval van insolvensie.

Normaalweg kom die partye tot 'n kontrak hul verpligtinge na en word die gevolg bereik wat hulle beoog het. Dit gebeur egter dat partye soms nie die bepalings van of verpligtinge ingevolge die kontrak nakom nie. Die onbetwiste reël in die insolvensiereg is dat die sekwestrasie van een van die kontrakspartye se boedels nie die kontrak op sigself beëindig nie.[1] Dié reël geld algemeen.[2] Die kurator tree in die plek van die insolvent. Daar is sekere uitsonderings op hierdie reël. In die eerste plek moet die kontrak van so 'n aard wees dat die kurator wel die verpligtinge van die insolvent kan oorneem. Waar 'n insolvent se prestasie uit die lewering van persoonlike dienste bestaan, kan die regte en verpligtinge van die insolvent vanselfsprekend nie op die kurator oorgaan nie.[3] Dit sal die geval wees waar die insolvent 'n ooreenkoms aangegaan het om byvoorbeeld as kunstenaar aan 'n konserttoer deel te neem of om delikate houtsneewerk by die oprigting van 'n nuwe hotelkompleks te doen. Die kontrak word nie beëindig nie.[4] Dit bly voortbestaan tussen die oorspronklike partye wat hul gewone remedies teen mekaar behou.[5]

In die tweede plek is daar sekere kontrakte wat wel deur sekwestrasie beëindig word. Dit is byvoorbeeld 'n lasgewingsooreenkoms wat deur die sekwestrasie

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1 Sien ook *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd* 1987 1 SA 827 (A) 837; *Porteous v Strydom* 1984 2 SA 489 (D) 493; *Smith v Parton* 1980 3 SA 724 (D) 728; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A) 566; *Bryant & Flannagan (Pty) Ltd v Muller* 1978 2 SA 807 (A) 812; *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester* 1982 4 SA 486 (NK) 492; De Wet en Van Wyk *Kontraktereg en handelsreg* (1978) 458; Smith *Law of insolvency* (1988) 172; De la Rey *Mars' Insolvency in South Africa* (1988) 143.

2 Sekwestrasie is niks anders nie as 'n beslaglegging op die algehele vermoë van die skuldenaar. Ewemin as wat 'n gewone beslaglegging enige invloed op 'n ooreenkoms het wat deur die skuldenaar gesluit is, sal sekwestrasie uit die aard daarvan enige invloed op so 'n ooreenkoms hê.

3 *Estate Friedman v Katzeff* 1924 WLD 298 302.

4 Die vergoeding wat die insolvent vir die uitvoering van persoonlike dienste kan verkry, val nie in sy insolvente boedel nie. Hy kan dit tot sy eie voordeel gebruik. Indien die meester van oordeel is dat die insolvent meer ontvang as wat vir sy eie onderhoud en dié van sy afhanklikes nodig is of sal wees, kan die kurator die surplus, soos deur die meester vasgestel, ten behoewe van die insolvente boedel invorder (a 23(5) van die Insolvensiewet 24 van 1936).

5 'n Interessante aspek hiervan is die implikasie van hierdie reël as die insolvent ná sekwestrasie nie die verpligtinge uit hoofde van dié kontrak nakom nie. Het die teenparty dan slegs verhaal op die tweede, afsonderlik gevormde boedel van die insolvent? Indien die antwoord positief is, is die verdere vraag wat die posisie sal wees as daar geen sodanige boedel gevorm het nie. In die Nederlandse reg (Polak *Faillissementsrecht* (1986) 55–56; Star Busmann *Molengraaff's Faillissementswet* (1951) 213) word verklaar dat as die insolvent nie hierdie persoonlike kontrakte nakom nie, die skuldeiser 'n skadevergoedingseis ter verifikasie teen die insolvente boedel kan aanmeld. Volgens Mars *Insolvency* 312 (en na my mening is dit die korrekte standpunt) moet die insolvent persoonlik aangespreek word mbt enige eis wat uit hoofde van kontrakte rakende sy beroep, professie of dienste ontstaan. As gesag word op a 23(6), (9) en (10) van die Insolvensiewet gesteun. Sien ook Sharrock *Hockly's Insolvency law* (1996) 46–47; Smith *Law of insolvency* 105. Ek stem saam.

van die lasgewer se boedel tot 'n einde kom.[6] 'n Dienskontrak word ook sonder meer deur die sekwestrasie van die werkgewer se boedel beëindig.[7] Derdens bevat die Insolvensiewet besondere reëlings in verband met huur-, koop- en huurkoopkontrakte. Met betrekking tot koopkontrakte van onroerende goed[8] waar die verkoper se boedel gesekwestreer word, is die Wet op Vervreemding van Grond[9] van toepassing.

Behoudens hierdie gevalle waar die regte en verpligtinge ingevolge die insolvent se kontrakte in 'n meerdere of mindere mate 'n verandering ondergaan, is die algemene reël dus dat die regte en verpligtinge ingevolge die insolvent se kontrakte op sy kurator oorgaan.[10] Die verpligtinge van geen van die partye word verminder nie maar ook geen nuwe verpligtinge word op die partye geplaas nie.[11]

Alhoewel dit die geval is, het die kurator die "keuse" om die verpligtinge ingevolge daardie kontrak na te kom of nie.[12] Die kurator moet hierdie keuse tot voordeel van die *concursus creditorum* uitoefen. Sou hy besluit dat die kontrak té beswarend op die insolvente boedel is en gevolglik weier om daarmee voort te gaan, kan die volgende vrae gevra word: Word daar sodoende kontrakbreuk gepleeg? Indien wel, welke vorm van kontrakbreuk word gepleeg? Is dit die kurator wat kontrakbreuk pleeg en wel as gevolg van die feit dat hy weier om met die kontrak voort te gaan, of is dit die insolvent self en wel as gevolg van die feit dat sy boedel gesekwestreer is? Of word kontrakbreuk, indien dit hoegenaamd figureer, deur die insolvente boedel gepleeg? Is kontrakbreuk hoegenaamd ter sprake? Is die kurator nie moontlik *regtens bevoeg* om die kontrak te beëindig nie? Ná kontrakbreuk is daar verskillende regsmiddels vir die onskuldige party beskikbaar. Is dit

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6 *Wilson's Trustees v Martell* (1856) 2 Searle 248 260; *Estate Friedman v Katzeff* 1924 WLD 298 302; *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 1 SA 717 (A); *Montelindo Compania Naviera South Africa v Bank of Lisbon & South Africa Ltd* 1969 2 SA 127 (W) 140–141. Voorbeelde van sulke ooreenkomste is die tussen 'n prokureur, ouditeur, advokaat of kosteberekenaar en sy kliënte of tussen dokter en pasiënt. Hieroor verklaar Sharrock *Hockly's Insolvency law* (1990) 50: "This view may be an over-generalization. The question in each case would appear to be whether the mandate relates to a matter in which the principal can act without the concurrence of his trustee. Where, for example, a person instructs an attorney to institute a third party insurance claim for personal injuries sustained and the principal's estate is subsequently sequestrated, the sequestration should not affect the attorney's mandate, except in so far as the granting of credit is concerned." Dieselfde standpunt word ook in die 1996-uitgawe van die boek gehandhaaf (68). Hierdie beginsel verdien instemming.

7 A 38. Dit sal bv die geval wees waar die insolvent 'n restaurantbesigheid bedryf. Met sekwestrasie van sy boedel word die dienskontrak tussen hom en die kelners, kokke en skoonmakers outomaties beëindig. Die werknemer(s) het 'n voorkeureis vir betaling van twee maande se salaris uit die vrye oorskot (a 100).

8 Hier spesifiek in gedagte is koopkontrakte van grond wat vir woondoeleindes gebruik word (of bestem is om aldus gebruik te word) en waarin die koopprys in drie of meer paaiemente oor 'n tydperk van meer as een jaar betaal word.

9 68 van 1981.

10 "Oorgaan" in hierdie sin is gekwalifiseer, nl oorgaan op die kurator in *amptelike* hoedanigheid. Die kurator word die statutêre, amptelike reghebbende.

11 *Estate Friedman v Katzeff* 1924 WLD 298 302; *Ward v Barett* 1963 2 SA 546 (A) 552; *Walker v Syfret* 1911 AD 141 160; *Lucas' Trustee v Ismail and Amod* 1905 TS 239 251. Sien ook *Preston & Dixon v Biden's Trustee* (1884) 1 Buch AC 322 345; *Uys v Sam Friedman Ltd* 1934 OPD 80 89, bevestig in appèl in *Uys v Sam Friedman Ltd* 1935 AD 165 166; *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied)* 1979 1 SA 940 (T) 947.

12 *Smith v Parton* 1980 3 SA 724 (D) 729.

steeds die geval indien die skuldenaar se boedel daadwerklik gesekwestreer word? As die onskuldige party 'n regsmiddel tot sy beskikking het, is die vraag hoe dit die insolvente boedel en die belange van die *concursus creditorum* raak. Hierdie vrae sal in die onderhawige artikel ondersoek word.

Nog 'n kwessie wat hier aangespreek sal word, is die volgende: Met betrekking tot onuitgevoerde kontrakte bestaan daar in die Suid-Afrikaanse insolvensiereg hoofsaaklik twee denkrigtings. Eerstens is daar die standpunt dat die kurator 'n keuse het om met die kontrak voort te gaan *of om dit te "beëindig"*.[13] Die praktiese gevolg daarvan, naamlik dat hy nie meer enige uitstaande verpligtinge uit hoofde van die kontrak hoef na te kom nie en dat die ander party 'n konkurrente eis teen die boedel het vir enige skade wat hy gely het en dat hy dit mag terugeis wat reeds uit hoofde van die ooreenkoms gepresteer is, sal in paragraaf 2 ondersoek word. Tweedens bestaan die standpunt dat die kurator slegs die verpligtinge uit hoofde van die kontrak kan "*repudieer*". Die praktiese gevolg daarvan is dat die kurator spesifieke nakoming weier. Indien dit inderdaad die geval is, beteken dit dat die ander kontraksparty nou 'n keuse het om op die repudiëring te reageer of om dit te ignoreer. Word dit as kontrakbreuk aangemerk, kan hy (die teenparty) die kontrak as beëindig beskou. Vervolgens het hy 'n konkurrente eis vir daardie skade wat hy as gevolg van die kontrakbreuk gely het. Indien die teenparty die repudiëring ignoreer, kan hy steeds nie spesifieke nakoming van die kurator eis nie. Hy moet tevrede wees met 'n konkurrente eis vir 'n geldelike substituut vir prestasie. Terselfdertyd moet hy die volle teenprestasie lewer. Hierdie gevolg sal in paragraaf 4 ontleed word.

Die verskillende standpunte van die howe sal krities ontleed word. In 'n tweede artikel sal die werking en effek van die *exceptio non adimpleti contractus* soos dit met die toepassing van die repudiëringskonstruksie aanwending kan vind, bespreek word. Dié artikel sal aandag gee aan die formulering van 'n eie standpunt oor die algemene reël.

2 DIE KEUSE OM ONUITGEVOERDE KONTRAKTE TE "BEËINDIG"[14]

Die gebruik van die woord "beëindig" het tot die afleiding gelei dat die kurator die kontrak mag "kanselleer".[15] Indien dit die geval is, is die implikasie dat sodra die kontrak regmatig gekanselleer is,[16] die kurator teruggawe van die gelewerde

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13 *Rennie v Gordon* 1988 1 SA 1 (A) 14; *Somchem (Pty) Ltd v Federated Insurance Co Ltd* 1983 4 SA 609 (K) 616; *Gordon v Standard Merchant Bank Ltd* 1983 3 SA 68 (A) 95; *Insulations Unlimited (Pty) Ltd v Adler* 1986 4 SA 756 (W) 759; *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd (in liquidation)* 1981 1 SA 171 (A) 182; *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied)* 1979 1 SA 940 (T) 948; *De Wet v Stadsraad van Verwoerdburg* 1978 2 SA 86 (T) 97; *Montelindo Compania Naviera South Africa v Bank of Lisbon & South Africa Ltd* 1969 2 SA 127 (W) 141; *Bryant & Flannagan (Pty) Ltd v Muller* 1978 2 SA 807 (A) 812; *Slims (Pty) Ltd v Morris* 1988 1 SA 715 (A) 739; Smith *Law of insolvency* 172.

14 Die keuse om 'n kontrak te "beëindig", kom slegs ter sprake waar die wederkerigheidsbeginsel op die spel is.

15 *Standard Merchant Bank Ltd v Gordon* 1980 4 SA 637 (K) 641; *Ex parte Venter: In re Rapid Mining Supplies (Pty) Ltd* 1976 3 SA 267 (O) 280; *Somchem (Pty) Ltd v Federated Insurance Co Ltd* 1983 4 SA 609 (K).

16 Van kontrakbreuk kan daar dan nie sprake wees nie. Kontrakbreuk is 'n onregmatige daad. Dit is die onregmatige versuim om die ooreenkoms na te kom. Is die kansellasie egter

vervolg op volgende bladsy

goed mag eis.[17] Sou 'n mens na artikel 35 van die wet kyk, word aan die kurator die kompetensie verleen om die kontrak te beëindig. Die presiese gevolge van so 'n beëindiging word egter nie volledig aangespreek nie.[18] Na analogie hiervan kan in die eerste plek gevra word (indien die kurator in elk geval die keuse het om die kontrak te "beëindig") waarom dit vir die wetgewer nodig was om dit in artikel 35 te herbepaal.[19] Dat dit wel gedoen is, kan op die bedoeling dui dat die kurator nie vanselfsprekend so 'n keuse het nie.[20] In die tweede plek, waar hy wel so 'n keuse deur middel van wetgewing verkry, is in *Smuts v Neethling*[21] beslis dat die kurator nie aanspraak op terugbetaling van die reeds betaalde deel van die koopprys het nie. Hy moet dus besluit of dit voordeliger sal wees om met die kontrak voort te gaan of om die kontrak te beëindig en die reeds betaalde koopprys prys te gee. Klaarblyklik is die rede hiervoor dat indien die kurator die kontrak prysgee, hy ook die reeds gelewerde prestasie prysgee.[22]

3 EFFEK VAN DIE ERKENNING VAN 'N KEUSE OM DIE KONTRAK TE "BEËINDIG"

As aanvaar word dat so 'n kompetensie bestaan, beteken dit in effek dat die kurator die kontrak *regmatig* kan beëindig. Dan kan die ander kontraksparty nie 'n eis vir skadevergoeding hê nie want daar is geen kontrakbreuk nie. Kontrakbreuk is immers 'n onregmatige handeling. Op grond daarvan kan die onskuldige party skadevergoeding eis. Om dié eis egter die ander party op grond van die regmatigheid van die beëindiging te ontsê, is uiters onbillik en onredelik. Daarom behoort 'n eis op grond van nie-voldoening aan die kontrak, samehangend met die kompetensie van die kurator om die kontrak te "beëindig", uitdruklik aan die onskuldige party toegeken te word.[23] Een van die belangrike oogmerke van hierdie ondersoek is om uit te vind of dit wel gedoen is.[24]

Regmatige beëindiging sou ook beteken dat die kurator gelewerde goed mag terugeis. Dit is nie regverdigbaar nie. Na analogie van artikel 35 van die Insolvensiewet en die toepassing daarvan in *Smuts v Neethling*[25] behoort die kurator dit nie te mag doen nie. 'n Verdere doelwit van hierdie ondersoek is om te bepaal of hierdie reg met die toepassing van die reël tot "beëindiging" uitdruklik

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regmatig, kan geen skadevergoeding op grond van kontrakbreuk geëis word nie. As daar inderdaad 'n algemene reël tot "beëindiging" bestaan, moet dit myns insiens uitdruklik so bewoord wees dat 'n alternatiewe remedie vir die solvente party beskikbaar is.

17 In hierdie geval is die kwessie van eiendomsreg dan irrelevant want selfs waar eiendomsreg reeds op die teenparty oorgegaan het, kan die kurator kies om te kanselleer en restitusie te eis (Forder "Insolvency of the hire-purchase seller: concursus creditorum, ownership and possession" 1986 *SALJ* 85). Dié gevolg is onbillik en verdien geen ondersteuning nie.

18 Dieselfde geld ingevolge a 37.

19 Dieselfde geld vir a 37.

20 Dit is ook die standpunt van Innes HR in *Liquidators FH Clarke & Co Ltd v Nesbitt* 1906 TS 726 727. Hy verklaar dat "under the common law clearly they [die likwidateurs] had no such right [nl om die kontrak te beëindig nie]".

21 (1844) 3 Menz 283. In hierdie saak het die koper van onroerende goed wat reeds 'n gedeelte van die koopprys betaal het, insolvent geraak.

22 De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 (1992) 237; *Mangold Brothers v Greyling's Trustee* 1910 EDL 471 477.

23 Hy het myns insiens nie outomaties 'n skadevergoedingseis soos in geval van kontrakbreuk nie.

24 Sien 6 hieronder oor die ontleding van die regspraak.

25 (1844) 3 Menz 283.

ontken word.[26] Die kompetensie om die kontrak met *prospektiewe* werking te beëindig, het tot gevolg dat die kontrak nie terugwerkend tot niet gemaak word nie. Dit geskied *ex nunc*, met ander woorde van die oomblik van beëindiging af. 'n Eis vir vergoeding op grond van nie-voldoening aan die kontrak kan teen die insolvente boedel ingestel word. Die kurator verloor sy eis vir teruggawe van goed wat reeds aan die insolvent gepresteer is. Die voordeel wat die solvente kontraksparty sodoende ontvang, moet teen sy vergoedingsaanspraak verreken word. Aan die ander kant kan die solvente party nie 'n eis vir teruggawe van wat reeds deur hom gepresteer is, teen die insolvente boedel instel nie. Hy het slegs 'n konkurrente eis vir die bedrag van die teenprestasie of die waarde van die prestasie (indien dit nie 'n geldbedrag is nie) wat reeds gelewer is. In teenstelling hiermee het terugtrede uit (of kansellasie van) die kontrak tot gevolg dat kontrakspartye oor en weer moet teruggee wat reeds ingevolge die kontrak gepresteer is.[27] Die teenparty moet dit wat die insolvent reeds aan hom gepresteer het, aanbied.[28] Sy eis vir teruggawe is bloot 'n konkurrente eis.[29] Hy verkry 'n vorderingsreg vir die oordrag van eiendomsreg op die prestasie wat deur hom gelewer is. Enkele terugtrede het nie tot gevolg dat eiendom wat reeds oorgegaan het, outomaties terugval nie – lewering is daarvoor nodig.[30] Die kurator is egter nie tot spesifieke nakoming verplig nie.[31] Die vraag ontstaan of die teenparty in só 'n geval gedwing kan word om nie alleen die insolvent se reeds gelewerde prestasie te tender nie, maar om dit inderdaad fisies terug te besorg en dan bloot as konkurrente skuldeiser te eis vir die waarde van sy teenprestasie wat reeds deur hom gelewer is, asook vir enige moontlike skadevergoeding. Volgens Reinecke en Cronje[32] is dit wel die posisie. Ooglopend is dit nie regverdigbaar nie. Gevolglik is daar ook die standpunt dat 'n benadeelde kontraksparty in geval van kansellasie van 'n kontrak nie die reeds ontvangde prestasie moet teruggee waar dit duidelik blyk dat sy teenparty dit nie gaan doen nie of nie volledig gaan teruggee nie.[33]

4 DIE KEUSE OM TE "REPUDIEER"

In teenstelling met die standpunt dat die kurator die kontrak kan "beëindig", bestaan daar ook die standpunt dat die kurator slegs die verpligtinge uit hoofde van die kontrak kan "repudieer".[34] Die argument is dat 'n duidelike begrip van

26 Sien 6 hieronder oor die ontleding van die regspraak.

27 Kansellasie of terugtrede is 'n remedie vir kontrakbreuk van wesenlike omvang deur die ander kontraksparty. Die verbintenis ontbind. Geen verdere prestasie word gelewer nie (Joubert *General principles of the law of contract* (1987) 236 ev 242 245; Kerr *Principles of the law of contract* (1989) 549 ev 571).

28 Dit is 'n noodsaaklike voorvereiste vir die ontvanklikheid van 'n eis vir teruggawe. Sien ook De Wet en Van Wyk (1992) 220.

29 Hy moet met die ander konkurrente skuldeisers meeding (Joubert *General principles* 242).

30 De Wet en Van Wyk (1992) 220 vn 124.

31 Sien bv Joubert *General principles* 242 waar beklemtoon word dat die solvente teenparty nie teruggawe kan eis nie.

32 1979 *THRHR* 400.

33 De Wet en Van Wyk (1992) 215. Sien ook Swart *Die rol van die concursus creditorum in die Suid-Afrikaanse Insolvensiereg* (1990) 486 ev.

34 Meskin *Insolvency law and its operation* (1996) 5–54; Mars *Insolvency* 143–144; Suid-Afrikaanse Regskommissie (Werkstuk 33 Projek 63) *Hersiening van die insolvensiereg: Uitwerking van insolvensie op bates, siviele verrigtinge en kontrakte* (1990) 66; Hockly *Insolvency law* 67.

die *concursus creditorum* sal verseker dat 'n mens nie deur die implikasies van die kurator se keuse mislei word nie.[35] Kortliks word beklemtoon dat die *concursus creditorum* die hart van die Suid-Afrikaanse insolvensiereg is. Die verskillende wette dien bloot om masjinerie vir die realisering en verdeling van die insolvente boedel te skep.[36] Die effek van die *concursus creditorum* is dat die skuldeisers van daardie boedel onmiddellik met sekwestrasie[37] in 'n soort gemeenskap tree. Die kurator is 'n statutêre ampsbekleder in 'n fidusiêre posisie met 'n definitiewe verantwoordelikheid teenoor hierdie gemeenskap.[38] Die inhoud en omvang van sy pligte asook die wyse waarop hy hierdie ampshandeling moet uitoefen, word in die wet bepaal.[39]

Die kompetensie van die gemeenskap van skuldeisers om opdragte of aanwysings aan die kurator te gee, is ook beperk. Die bedoelde effek van die totstandkoming van hierdie gemeenskap is dat al die skuldeisers, soos op datum van sekwestrasie, gelyke behandeling en beskerming moet kry sonder bevoordeling van een bo die ander.[40]

Die kurator, as verteenwoordiger van die gemeenskap, behoort egter nie deur 'n individuele skuldeiser verplig te kan word om ingevolge 'n onvoltooide kontrak te presteer nie.[41] Sou hy dit kon doen, word hy bo die ander skuldeisers bevoordeel – dan kry hy meer as sy *pro rata* deel.[42]

Dus, tensy die kurator in oorleg met die gemeenskap van skuldeisers[43] sou voel dat dit in die algemeen tot hul voordeel sal wees om met die kontrak voort te gaan, moet die skuldeiser wat voor sekwestrasie geregtig was om op nakoming van die kontrak aan te dring, sy eis in geldterme uitdruk en as 'n konkurrente skuldeiser aan die gemeenskap op gelyke voet met die ander konkurrente skuldeisers deelneem.[44] Impliseer dit dat die kurator die kontrak mag "kanselleer" of

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35 Sien Forder 1986 *SALJ* 83.

36 *Richter v Riverside Estates (Pty) Ltd* 1946 OPD 209 223.

37 Dit sluit ook 'n voorlopige sekwestrasiebevel in.

38 In *Mookrey v Smith* 1989 2 SA 707 (K) 711B-C beslis Conradie R: "Since the trustee acts on behalf of others it is obviously desirable that there should be limits to his authority, in the same way as there commonly are in the case of an agent acting on behalf of his principal. To the extent that a trustee is bound to comply with instructions from creditors as to the manner which the estate is to be wound up and the assets to be disposed of, he may be regarded as a kind of statutory agent for creditors." Vgl hierteenoor *Uys v Sam Friedman Ltd* 1934 OPD 80 85 waarin (myns insiens verkeerdelik) na die kurator as 'n beampte van die hof verwys word.

39 Sien ook *Leviton & Son v De Klerk's Trustee* 1914 CPD 685 695 waarin verklaar word dat "the trustee is only a 'creature of Statute' and the ordinary process of law must be followed out whenever the Insolvent Ordinance does not provide a new and different procedure".

40 Sien *Walker v Syfret* 1911 AD 141 160.

41 *Lucas' Trustee v Ismail and Amod* 1905 TS 239 248; *Harris v Trustee of Buisinne* (1840) 2 Menz 105 107.

42 *Preston & Dixon v Biden's Trustee* (1884) 1 Buch AC 322 346; *Leviton & Son v De Klerk's Trustee* 1914 CPD 685 694. Sien ook *Ward v Barrett* 1963 2 SA 546 (A) 553 554; *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) 471; *Slims (Pty) Ltd v Morris* 1988 1 SA 715 (A) 739; *Gordon v Standard Merchant Bank Ltd* 1983 3 SA 68 (A) 90; *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd (in liquidation)* 1981 1 SA 171 (A) 182.

43 *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) 470.

44 *Smith v Parton* 1980 3 SA 724 (D) 728. Die rede daarvoor spreek ook duidelik uit *Consolidated Agencies v Agjee* 1948 4 SA 179 (N) 189.

"beëindig"? In die *Smith*-saak[45] beslis regter Friedman dat daar slegs een regsbeginsel betrokke is. Dit is dat daar niks in die insolvensiereg is wat onuitgevoerde kontrakte in die algemeen affekteer nie. Die kontrak word nie beëindig of gewysig nie behalwe in een opsig: As gevolg van die *concursus creditorum* kan die kurator nie deur die teenparty gedwing word om ingevolge die kontrak te presteer nie.[46] Dit beteken dat die kontrak die insolvensie oorleef en, behalwe vir genoemde aspek, tree die kurator in die skoene van die insolvent. Die reël dat die kurator die keuse het om die kontrak uit te voer of nie, is bloot een aspek van die toepassing van hierdie beginsel.

In die reeds genoemde saak[47] word dan ook beslis dat 'n ander benadering tot die aard van die kurator se keuse, alhoewel dit klaarblyklik logies en aantreklik klink, aan sekere inherente gebreke onderworpe is. Indien die kurator weier om met die kontrak voort te gaan, "repudieer" hy volgens hierdie standpunt sy verpligtinge ingevolge daardie kontrak.

Vervolgens word verkondig dat die teenparty op die "repudiëring" kan reageer, uit die kontrak terugtree en 'n eis vir skadevergoeding op grond van die kontrakbreuk teen die insolvente boedel instel. Andersins kan hy die "repudiëring" ignoreer, die kontrak in stand hou en skadevergoeding, wat op die gewone wyse vasgestel en bewys moet word, eis. Albei is konkurrente eise. Meskin[48] ontken dat die beëindiging van die kontrak afhanklik is van enige aanvaarding van die "repudiëring" deur die ander kontraksparty. Volgens hom word die kontrak eenvoudig met "repudiëring" deur die kurator beëindig. Dan kan daar, afhangende van die aard en bedinge daarvan, restitusie deur een of albei partye wees en die bepalings van ander wette kan van toepassing wees. Vir hierdie gevolgtrekking steun hy op Oelofse.[49]

In die lig van hierdie standpunte is dit vervolgens noodsaaklik om te bepaal of daar inderdaad van kontrakbreuk in die vorm van repudiëring sprake kan wees indien die kurator nie met die kontrak wil voortgaan nie. Is dit wel die geval, is verdere ondersoek nodig om aan die hand daarvan die beginsels te toets wat by onuitgevoerde kontrakte in die insolvensiereg van toepassing is.

5 DIE INHOUD, WERKING EN GEVOLGE VAN REPUDIËRING

Algemeen gesproke, is repudiëring die geval waar 'n party te kenne gee dat hy nie meer die kontrak gaan uitvoer nie.[50] Baie kortliks behels dit die volgende:

5 1 Vereistes

(a) 'n Ondubbelsinnige wilsverklaring deur een van die kontrakspartye sonder regmatige gronde[51] dat die kontrak of 'n wesenlike deel daarvan nie uitgevoer

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45 *Smith v Parton* 1980 3 SA 724 (D) 728. Sien ook *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd* 1987 1 SA 827 (A) 838–839.

46 Die teendeel sal die *concursus creditorum* benadeel. Forder 1986 *SALJ* 86 se mening is dieselfde. Sien ook *Slims (Pty) Ltd v Morris* 1988 1 SA 715 (A) 741; *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A) 566 ev.

47 *Smith v Parton* 1980 3 SA 724 (D) 728H.

48 *Insolvency law and its operation in winding-up* (1996) 5–54.

49 "Thomas Construction (Pty) Ltd v Grafton Furniture Manufacturers (Pty) Ltd 1988 2 SA 546 (A)" 1988 *THRHR* 543.

50 Hy gee maw te kenne dat hy nie gaan presteer nie.

51 *Crest Enterprises (Pty) Ltd v Ryclof Beleggings (Edms) Bpk* 1972 2 SA 863 (A).

gaan word nie. Hierdie wilsverklaring kan uitdruklik of stilswyend deur woorde of gedrag geskied. Dit word nie na aanleiding van 'n subjektiewe bedoeling van die verklaarder beoordeel nie.[52] Daar word bloot gekyk of die party só opgetree het dat redelikerwys daaruit afgelei kan word dat hy nie bedoel om verder met die kontrak voort te gaan nie.[53] Dit is 'n objektiewe toets gebaseer op die redelike verwagting van die ander party aan wie prestasie belowe is.[54] Skuld is nie 'n vereiste vir repudiëring nie.

(b) Die keuse van die onskuldige party om uit die kontrak terug te tree. Nie die repudiëring alleen nie maar repudiëring gevolg deur "aanvaarding" daarvan, ontbind die verbintenis.[55] Soms word geleer dat 'n party in sekere gevalle verplig is om terug te tree.[56] De Wet en Van Wyk[57] verklaar dat dit nie korrek is nie. 'n Party kan nie eensydig 'n kontrak vernietig nie. Hy kan nie voordeel uit sy eie foute trek deur die ander te verplig om terug te tree nie. Die onskuldige party kan steeds vervulling eis. Nienaber[58] stem saam. Waar daar 'n plig op die onskuldige rus om sy skade tot 'n minimum te beperk, kan hy moontlik wel verplig wees om terug te tree. Dit is ook Kahn se mening.[59]

5 2 Gevolge

(a) Die onskuldige kan die repudiëring ignoreer en vervulling eis.[60] Hy moet vervolgens bereid wees om nog self te presteer omdat die kontrak in stand gehou word.[61]

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52 Sy optrede kan regtens op 'n repudiëring van die ooreenkoms neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom. Die skuldenaar kan daarom nie steun op sy *bona fide* geloof dat hy nie kontrakbreuk gepleeg het nie (Van der Merwe ea *Contract. General principles* (1993) 257).

53 Die afleiding dat wanprestasie in die toekoms sal plaasvind, is voldoende (Van der Merwe ea *Contract* 257).

54 *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 653. Die redelike man moet in die plek van die skuldeiser (R) geplaas word. Die vraag is dan of hy in daardie posisie sou aflei dat die skuldenaar (A) nie langer bedoel om die erwe te lewer nie? Die repudieerder se optrede moet dus 'n doelbewuste en ondubbelsinnige bedoeling toon om nie verder met die kontrak voort te gaan nie (*Culverwell v Brown* 1990 1 SA 7 (A) 14).

55 De Wet en Van Wyk (1992) 171; Joubert *General principles* 213. In *HMBMP Properties (Pty) Ltd v King* 1981 1 SA 907 (N) 910 word gesê dat repudiëring kontrakbreuk daarstel eers indien die ander party daarop reageer en die kontrak kanselleer. Nienaber "Enkele beskouinge oor kontrakbreuk *in anticipando*" 1963 *THRHR* 22 toon oortuigend aan dat repudiëring *reeds kontrakbreuk daarstel*. "Aanvaarding" daarvan bring die kontrak tot 'n einde. Dit is ook die standpunt van Joubert *General principles* 212. Sien verder *Culverwell v Brown* 1990 1 SA 7 (A). Op 28B–F verklaar die regter inderdaad dat repudiëring "a thing writ in water" is. Hierdie stelling word gemaak *vir sover dit oor kansellasie en 'n eis vir skadevergoeding* gaan. Daar word erken dat repudiëring tot 'n *keuse* vir die onskuldige party aanleiding gee. Dit is wel die hof se standpunt dat repudiëring op sigself nog nie 'n eis om skadevergoeding verleen nie. Vir die bepaling van skadevergoeding is repudiëring volgens hierdie saak dus "a thing writ in water" (sien 30E–H 31B). Sien ook Van der Merwe ea *Contract* 259 261. Op 257 is Van der Merwe ea oortuig dat repudiëring deur die skuldenaar alleen as kontrakbreuk "voltooi" sal wees as dit tot kennis van die skuldeiser kom en hy daardeur gelei word tot die geloof dat die repudiërende party nie volgens die ooreenkoms sal presteer nie. Hulle voer aan dat repudiëring net 'n nuttige funksie in die reg kan vervul as die ander party daarvan bewus word.

56 *White & Carter v McGregor* (1962) AC 413.

57 (1992) 171.

58 1963 *THRHR* 33.

59 *Contract and mercantile law through the cases* (1988) 272.

60 Hierdie eis kan nie afgedwing word voor die datum vir prestasie soos dit in die ooreenkoms vasgestel is, aangebreek het nie (Van der Merwe ea *Contract* 260).

61 Die algemeen aanvaarde standpunt was dat skadevergoeding nie geëis kan word nie (sien Van der Merwe ea *Contract* 259). Hierdie skrywers is egter ten gunste daarvan dat

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(b) Die onskuldige kan op die repudiëring reageer, terugtree[62] en skadevergoeding eis. Hy is nie verplig om te presteer nie want die kontrak is tot niet. Die skadevergoeding word bereken vanaf die oomblik waarop die onskuldige sy keuse gemaak het.[63] Dit is die geval ongeag of die tyd vir prestasie aangebreek het of nie.[64]

(c) Met repudiëring van 'n onderdeel van die kontrak is dit belangrik om te bepaal of die prestasie deelbaar of ondeelbaar is. Is dit deelbaar en die repudiëring vind ten opsigte van 'n ondergeskikte deel van die verpligting plaas, kan die onskuldige *pro tanto* terugtree – nie vir die geheel nie.[65] Is dit ondeelbaar kan die onskuldige vervulling van die kontrak eis asook skadevergoeding vir die (ondergeskikte, nie-wesenlike) deel wat nie nagekom is nie. Indien die repudiëring 'n wesenlike deel ("vital part") van die ondeelbare prestasie raak, kan die onskuldige ook terugtree en skadevergoeding eis.[66] Om te bepaal of die deel wat gerepudieer word wesenlik genoeg is om terugtrede te regverdig, word dieselfde beginsels toegepas as by positiewe wanprestasie.[67]

(d) 'n Repudiëring wat nie deur die onskuldige party "aanvaar" word nie wis nie daardie party se plig tot teenprestasie uit nie. Sy prestasieplig word vir solank as wat die ander met sy repudiëring volhou, opgeskort of verslap.[68] Dit beteken dat hy voortdurend gereed, bereid en in staat moet wees om te kan presteer sonder dat dit vir hom nodig is om intussen prestasie aan te bied. Hierdie gereedheid, bereidheid en bekwaamheid om ooreenkomstig die kontrak te presteer, moet tot die skuldige party se kennis kom.

Waar 'n reg op prestasie die onskuldige party toegeval het reeds voor hy op die repudiëring van die ander gereageer het, bly hy daarop geregtig. Sy keuse het net op die latere prestasie betrekking.[69] Dit is slegs so indien die reg reeds toegeval het, die prestasie verskuldig is en dit onafhanklik van enige nog uit te voere deel van die kontrak afdwingbaar is.[70]

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skadevergoeding (as daar skade is) op grond van repudiëring geëis kan word, ook al hou die onskuldige party die kontrak in stand. Die rede is omdat repudiëring op sigself kontrakbreuk is (260 261). Ek stem saam.

62 Dit sal wees as die verwagte wanprestasie kansellasie regverdig (Van der Merwe ea *Contract* 260 262). As *mora* bv verwag word, mag die skuldeiser op grond van die repudiëring kanselleer oa as die kontrak 'n *lex commissoria* bevat of as "time is of the essence of the contract". Kansellasie sal waarskynlik ook toegelaat word as die skuldenaar geheel en al repudieer. Dit sal die geval wees waar hy aandui dat hy geensins gaan presteer nie.

63 *Culverwell v Brown* 1990 1 SA 7 (A). Van der Merwe ea *Contract* 260–261 argumenteer dat skadevergoeding vanaf kontrakbreuk geëis moet word – dus vanaf die *repudiëring* en nie vanaf die *keuse* om op die repudiëring te reageer en terug te tree nie. Myns insiens is dit die korrekte benadering.

64 Van der Merwe ea *Contract* 256.

65 *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A) 23; *Crest Enterprises (Pty) Ltd v Ryclof Beleggings (Edms) Bpk* 1972 2 SA 863 (A) 870; De Wet en Van Wyk (1992) 171 ev; Joubert *General principles* 213.

66 De Wet en Van Wyk (1992) 171 172; Joubert *General principles* 213; Van der Merwe ea *Contract* 258 ev 261.

67 Van der Merwe ea *Contract* 262.

68 *Erasmus v Pienaar* 1984 4 SA 9 (T) 27–29.

69 *Nash v Golden Dumps (Pty) Ltd* 1985 3 SA 1 (A) 22.

70 *Ibid.*

5 3 Repudiëring en insolvensie

Insolvensie *per se* stel nie repudiëring daar nie.[71] Na my mening moet 'n skuldenaar se optrede vrywillig[72] en bevestigend[73] wees alvorens daar van repudiëring sprake kan wees. Die feit dat 'n persoon insolvent is en moontlik nie in die toekoms sal presteer nie, is in daardie stadium nog slegs 'n waarskynlikheid en die graad van erns daarvan is gewoonlik spekulatief.[74]

Die vraag of dit, spesifiek met betrekking tot onuitgevoerde kontrakte in die insolvensiereg, eenvoudig as repudiëring gesien moet word wanneer die *kurator* besluit om nie 'n verpligting uit te voer nie, sal in 'n volgende artikel bespreek word.[75] Dit is voldoende om in hierdie stadium slegs daarop te wys dat die kurator se besluit om nie uitvoering aan die een of ander verpligting uit hoofde van 'n bepaalde kontrak te gee nie, die teenparty se kompetensie om spesifieke nakoming te eis, uitsluit.[76]

6 ONTLEDING VAN DIE REGSPRAAK MET VERWYSING NA DIE ALGEMENE REËL BY ONUITGEVOERDE KONTRAKTE

Voor aanvaar word dat die kurator die onuitgevoerde kontrak kan "kanselleer", "beëindig" of "repudieer", moet 'n deeglike ondersoek na die regspraak gedoen word. Sekere vereistes word deur die reg gestel voordat sekere optrede deur een van die partye tot 'n kontrak as repudiëring beskou kan word. Die onderhawige ontleding het dus ten doel om te bepaal of die howe, wanneer in 'n bepaalde geval beslis is[77] dat "repudiëring" wel ter sprake is, ook *elkeen* van hierdie vereistes oorweeg en in die bepaalde omstandighede toegepas het.

Dit staan vas dat die kurator óf die kontrak mag uitvoer óf mag weier om 'n verpligting uit hoofde van die kontrak uit te voer indien dit die ander skuldeisers sal benadeel.[78] Spesifieke nakoming kan nie geëis word as dit die *concursus creditorum* sal benadeel deur aan een skuldeiser 'n onbehoorlike voorkeur te verleen nie.[79] Is die noodwendige implikasie dat die kurator slegs in so 'n geval

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71 *Contra Ex parte Stapleton: In re Nathan* (1879) 10 Ch D 586.

72 Dit moet verstaan word in die sin dat daar daadwerklik en deur die skuldenaar self besluit word dat hy nie meer aan 'n *spesifieke* kontrak óf verpligting gebonde wil wees nie.

73 Dit moet weer verstaan word in die sin dat sy optrede 'n ondubbelsinnige, doelbewuste bedoeling toon om nie meer aan die *spesifieke* kontrak of verpligting gebind te wees nie.

74 Sien in hierdie verband *Chadwick v Henochsberg* 1924 TPD 703 707 709.

75 In die Amerikaanse reg word dit wel as repudiëring beskou (Jeager ea *Williston's Treatise on the law of contracts* vol 18 (1978) 382; Braucher ea *Corbin's Restatement of the law* vol 2 (1981) 274 284).

76 Joubert *General principles* 241 ev.

77 Selfs indien die hof bloot *obiter* ten gunste van die repudiëringskonstruksie standpunt ingeneem het, sal die beslissing oorweeg word. Dit is ook van belang by die vasstelling van die ingesteldheid van die howe mbt hierdie aangeleentheid.

78 Benadeling vind gewoonlik plaas omdat die bates van die insolvente boedel sodoende verminder word. Die feit dat een skuldeiser sodoende 'n onregverdige voorkeur bo die ander verkry, kan moontlik ook van belang wees. Sien verder *Chadwick v Henochsberg* 1924 TPD 703 709; *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) 470.

79 *Consolidated Agencies v Agjee* 1948 4 SA 179 (N) 186–187 189. Op 188 sê die hof "in view of the fact that I have held that they [kurators] were not bound by the agreement". Dit impliseer maw daardie onuitgevoerde kontrakte met 'n uitstaande verpligting aan die kant van die insolvente boedel. Die kurator is nie verplig om daardie verpligting uit te voer nie as dit een skuldeiser bo die ander sal bevoordeel. As daar geen uitstaande verpligting aan die

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'n eis om spesifieke nakoming mag weier? Kan die solvente kontraksparty dus spesifieke nakoming eis as hy kan bewys dat dit tot voordeel van die boedel sal wees indien die kontrak ten volle nagekom word? Laasgenoemde blyk nie die geval te wees nie. In *Ex parte Liquidators of Parity Insurance Co Ltd*,[80] *Ex parte Venter: In re Rapid Mining Supplies (Pty) Ltd*[81] en *Rennie v Gordon*[82] word die reël so gestel dat die kurator nie tot spesifieke nakoming verplig is nie *tensy die skuldeisers besluit het dat dit tot hul voordeel is*. In *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd (in liquidation)*[83] beslis die hof dat "neither the purchaser nor the cessionary . . . has any say in the matter".[84]

Dit is myns insiens net die geval waar daar nog uitstaande verpligtinge is wat deur die kurator uitgevoer moet word. Sou die kurator besluit om sy instandhoudingsreg uit te oefen en sodoende die teenparty dwing om te presteer en al sy verpligtinge na te kom, is die voorwaarde dat die boedel *die volle teenprestasie* ingevolge die onuitgevoerde kontrak moet lewer.[85] Sodanige optrede is administratief van aard en enige betaling wat die kurator moet maak, vorm dan deel van die administrasiekostes.[86]

Vervolgens sal na 'n aantal hofuitsprake verwys word om te bepaal of die optrede van die kurator in sy besluit om nie met die kontrak voort te gaan nie, volgens die howe in ooreenstemming met 'n kompetensie tot beëindiging of kontrakbreuk in die vorm van repudiëring geskied.[87]

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kant van die insolvent boedel is nie is dit my mening dat die kurator verplig sal wees om die kontrak in stand te hou. Die ander party het reeds voor sekwestrasie 'n voordeel verkry – hy word nie ná sekwestrasie bevoordeel nie. Daardie party moet nog net sy verpligting nakom. Die kontrak word beoordeel soos dit op die datum van sekwestrasie bestaan. Sien *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) en die bespreking daarvan in 6 5 hieronder. Dit stem ook ooreen met die regsposisie in Duitsland en Nederland.

80 1966 1 SA 463 (W) 471.

81 1976 3 SA 267 (O) 281.

82 1988 1 SA 1 (A) 14.

83 1981 1 SA 171 (A) 182E.

84 Só gestel, is dit moontlik dat die kurator wel sonder meer die kontrak mag "beëindig". Dit is ook wat in daardie saak beslis is.

85 *Estate Friedman v Katzeff* 1924 WLD 298 302; *Uys v Sam Friedman Ltd* 1935 AD 165 166; *Tangney v Zive's Trustee* 1961 1 SA 449 (W) 453; *Lake v Reinsurance Corporation Ltd* 1967 3 SA 124 (W) 126; *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 1 SA 717 (A) 724; *Cohen v Verwoerdburg Town Council* 1983 1 SA 334 (A) 352; Smith *Law of insolvency* 172; Mars *Insolvency* 144; De Wet en Van Wyk (1978) 459; *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied)* 1979 1 SA 940 (T) 947GH; *Uys v Sam Friedman Ltd* 1935 AD 165 166. Sien ook *Bryant & Flannagan (Pty) Ltd v Muller* 1978 2 SA 807 (A) 815.

86 *Montelindo Compania Naviera South Africa v Bank of Lisbon & South Africa Ltd* 1969 2 SA 127 (W) 142; *Ex parte Venter: In re Rapid Mining Supplies (Pty) Ltd* 1976 3 SA 267 (O) 281; *Bryant & Flannagan (Pty) Ltd v Muller* 1978 2 SA 807 (A) 812–813; *De Wet v Stadsraad van Verwoerdburg* 1978 2 SA 86 (T) 97; *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd (in liquidation)* 1981 1 SA 171 (A) 182; *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester* 1982 4 SA 486 (NK) 496; *De Wet v Stadsraad van Verwoerdburg* 1978 2 SA 86 (T) 98A–B. Vgl ook *Hayne v Narun Bros* 1926 OPD 207 210.

87 Vir my betoog is dit nie werklik nodig om aan te dui watter stellings *obiter dicta* was nie. Met hierdie ontleding word gepoog om aan te dui wat die houding van die howe mbt die spesifieke onderwerp is. Die *ingesteldheid* van die howe is net so belangrik en kan ook 'n

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6 1 Skadevergoedingseis

Daar is sake waarin verklaar word dat die solvente party 'n skadevergoedingseis op grond van nie-voldoening het, *sonder om uitdruklik te beslis dat die kurator die keuse het om die kontrak te "beëindig" of dat daar kontrakbreuk op grond van "repudiëring" was.*

Reeds in 1840 word die posisie met betrekking tot onuitgevoerde kontrakte in *Harris v Trustee of Buisinne*[88] bespreek. Daarin beslis die hof dat die solvente kontraksparty slegs 'n vorderingsreg teen B se boedel het vir (a) skadevergoeding op grond van nie-voldoening aan sy onderneming om oordrag van die huis in H se naam te bewerkstellig en (b) restitusie van daardie deel van die koopprys reeds betaal. Albei is konkurrente eise. Die kurator kan nie tot prestasie gedwing word nie. Nêrens word melding gemaak van 'n keuse vir die kurator om onuitgevoerde kontrakte te "beëindig" of te "kanselleer" nie.

In *Lucas' Trustee v Ismail and Amod*[89] word bevestig dat 'n eis om spesifieke nakoming nie toegelaat word nie. Die solvente partye

> "cannot vindicate this money [die opbrengs van die onroerende eiendom] which is in the hands of the Master . . . Nor can they claim that this money should now be paid over by the trustees to them",[90]

soos wat hulle van die insolvent self sou kon eis. Die insolvent sou verplig wees om die geld aan hulle oor te betaal, was dit nie vir die sekwestrasie van sy boedel nie. Alhoewel niks gesê word oor 'n kompetensie van die kurator om die ooreenkoms (om die eiendom te hou "entirely for their benefit") te "beëindig" nie, blyk dit verder dat die opbrengs van die eiendom ook nie as vervangende prestasie geëis kan word nie.[91] Die eisers het dus slegs 'n konkurrente eis vir skadevergoeding.[92]

In *Estate Friedman v Katzeff*[93] beslis die hof dat as die kurators alles doen wat die insolvent uit hoofde van die kontrak moes doen, hulle skadevergoeding van die ander kontraksparty (kontrakteur) mag eis soos wat die insolvent sou kon doen as hy die kontrak nagekom het; *doen hulle dit nie, verloor die boedel die voordeel van die kontrak en het die ander party sy remedie teen die insolvent.*[94] Dit is steeds in ooreenstemming met die algemene reël dat die kurator 'n keuse het om met die kontrak voort te gaan en dat hy hierdie keuse binne 'n redelike tyd moet uitoefen. Doen hy dit nie, het die ander party die gewone remedies teen die insolvente boedel. Daar word na die *Scheinfeld-* en *Wilson*-saak[95] verwys,

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bepalende rol by die uiteindelike beslissing speel. Van belang is die wyse waarop hierdie houding gemotiveer en beredeneer word. Verder van belang is die vraag of die toepaslike regsbeginsels in elke geval in ag geneem, behoorlik oorweeg en korrek aangewend word.

88 (1840) 2 Menz 105 108.

89 1905 TS 239 248. In dié saak het die insolvent grond wat in sy naam geregistreer was, in trust vir twee Indiërs gehou "for their sole use and benefit". Volgens 'n sekere wetsbepaling kon die Indiërs nie die grond in hul eie name registreer nie. Die grond word onteien. Die staat betaal 'n sekere bedrag aan die insolvent uit. Ná sekwestrasie eis die Indiërs daardie bedrag van die insolvente boedel.

90 248.

91 *Lucas' Trustee v Ismail and Amod* 1905 TS 239 248.

92 251.

93 1924 WLD 298 302.

94 Welke remedie dit is, word nie verduidelik nie. Ek meen dat dit die gewone remedie van skadevergoeding is.

95 Vir 'n bespreking van hierdie sake sien 6 10 en 6 15 hieronder.

maar weer eens word geen melding gemaak van 'n "keuse om te beëindig" met behoud van 'n konkurrente eis teen die boedel deur die ander party nie.

6 2 "Kontrakbreuk"

Daar is 'n saak waarin die optrede van die kurator slegs as "kontrakbreuk" getipeer word *sonder 'n bespreking van die solvent se eis*. In *Tangney v Zive's Trustee*[96] beslis die hof dat die kurator mag kies om die kontrak in stand te hou. Tydige kennisgewing daarvan is nodig. Daarna verwys die hof na 'n aanduiding van die kurator se bedoeling "to affirm *or abandon*". *In casu* het die kurator geen aanduiding gegee dat hy die kontrak in stand wil hou nie terwyl daar voldoende tyd was om tot so 'n besluit te kom. Daarom, sê die hof, kan die solvente partye steun op die klousule in die kontrak rakende die *kontrakbreuk* deur die ander party. Soos in die *Scheinfeld*-gewysde[97] word "abandonment" dus as "kontrakbreuk" gesien. Sou "abandon" dan in hierdie konteks nie "repudiëring" kan beteken nie? Ek dink so. Die kurator gee 'n aanduiding van sy bedoeling om nie die kontrak na te kom nie.[98] Repudiëring op sigself is kontrakbreuk. 'n Regmatige beëindiging is tog nie kontrakbreuk nie. As die solvente kontraksparty dan op die kontrakbreuk-klousule steun, beteken dit dat hy op die "repudiëring" reageer en die kontrak kom tot 'n einde. Die hof gee geen aanduiding van die tipe eis wat die solvente party sou kon instel indien daar geen kontrakbreuk-klousule was nie.

6 3 "Kontrakbreuk" met 'n eis om skadevergoeding

Daar is ook 'n saak wat "kontrakbreuk" deur die kurator met 'n eis om skadevergoeding vir die solvente party erken het *sonder om uitdruklik te beslis dat eersgenoemde die kontrak mag "beëindig" of "repudieer"*. In *The Government v Thorne*[99] het die likwidateurs ingevolge 'n besluit van die skuldeisers, magtiging gekry om 'n sekere Jan Smuts-kontrak te laat vaar ("abandon"). Die appellant het dié optrede aanvaar en ander kontrakteurs opdrag gegee om die werk te voltooi. Vervolgens wou hy op grond van hierdie kontrakbreuk en soos in die betrokke kontrakte ooreengekom, sy koste in skuldvergelyking bring met bedrae aan die maatskappy verskuldig vir reeds voltooide en uitgevoerde kontrakte. Die hof sê niks oor die *aanvaarding* van die optrede nie maar erken wel die eis van die appellant. Daar word beslis dat die prysgewing ("abandonment") van die kurator "kontrakbreuk" daarstel.[100] 'n *Regmatige* keuse om te beëindig, kan tog nie kontrakbreuk in die gewone of normale betekenis van die woord wees nie. Kontrakbreuk is die *onregmatige* versuim om verpligtinge na te kom soos ooreengekom is.

6 4 Kurator mag die kontrak in stand hou of nie

In sommige sake word bloot beslis dat die kurator die kontrak in stand mag hou of nie *sonder enige verdere verduideliking*. 'n Geval waar 'n algemene reël by

96 1961 1 SA 449 (W) 453.

97 *Scheinfeld's Trustee v Murray & Co* 1920 CPD 87. Sien die bespreking van hierdie saak in 6 10 hieronder.

98 Dié aanduiding bestaan daarin dat hy nie 'n tydige kennisgewing gegee het dat hy met die kontrak wil voortgaan nie. Geen tender om die agterstallige paaiemente te betaal, is gemaak nie.

99 1974 2 SA 1 (A).

100 *The Government v Thorne* 1974 2 SA 1 (A) 9.

name genoem word, is *Hayne v Narun Bros.*[101] Volgens dié gewysde is die algemene reël in *Ex parte Chalmers: In re Edwards*[102] erken, naamlik dat waar die insolvent *of sy kurator* geen aanduiding ten gunste van voltooiing van die kontrak gee nie

> "he practically gives notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts".

In effek is dit tog "repudiëring" al word dit nie uitdruklik so gestel nie. Weer eens vind 'n mens geen vermelding van 'n keuse om die kontrak te "beëindig" nie. Daar word ook na *Ex parte Stapleton: In re Nathan*[103] verwys waarin beslis is dat die insolvent se repudiëring nie die keuse van die kurator om die kontrak na te kom deur die koopprys te betaal, beïnvloed nie – op voorwaarde dat hy binne 'n redelike tyd optree. Ook hier is geen verwysing na die keuse om die kontrak te "beëindig" nie.

In *Uys v Sam Friedman Ltd*[104] sê die hof dat as die kurator nie betyds kennis gee dat hy die kontrak in stand wil hou nie, die ander dit as beëindig kan beskou. Net daarna wys die hof daarop dat, met betrekking tot onvoordelige kontrakte in die Engelse reg, die Bankruptcy Act[105] aan die kurator 'n spesifieke kompetensie tot opsegging ("right of disclaimer") verleen. Oor so 'n spesifieke kompetensie in Suid-Afrika word niks vermeld nie. Die hof is van mening dat die kurator in alle gevalle van onuitgevoerde kontrakte (uitgesonderd die gevalle waarvoor spesiaal in die wet voorsiening gemaak is) geregtig is, gewoonlik na raadpleging met of op las van die skuldeisers, om te kies om die verpligtinge ingevolge die kontrak *na te kom of nie.*[106] Laasgenoemde kan na my mening ook "repudiëring" beteken. Regter Botha verklaar dat dit *bes moontlik is* dat die kurator die opsie-kontrak (wat 'n kompetensie tot verlenging van die huurkontrak verleen) kan "beëindig", maar beslis dat dit waarskynlik beter is om die eiendom met die huurkontrak te verkoop. Sodoende het die huurder geen eis vir skadevergoeding op grond van nie-nakoming van die kontrak nie. In appèl word die uitspraak bevestig maar daar is geen vermelding van 'n "keuse om te beëindig" nie. Daar word wel verwys na die keuse om die kontrak in stand te hou.[107]

Nog 'n saak wat oor die posisie by onuitgevoerde kontrakte handel, is *Ex parte Liquidators of Parity Insurance Co Ltd.*[108] Daarin word die beslissing in *Uys v Sam Friedman* aangehaal, naamlik dat die kurator die keuse het om te besluit of hy die verpligting van die insolvent gaan *nakom of nie.* Ook die beslissing in die *Consolidated Agencies v Agjee*-saak[109] word aangehaal, naamlik dat die ander party nie spesifieke nakoming kan eis as dit tot nadeel van die *concursus creditorum* sal wees deur aan een skuldeiser 'n voorkeur te verleen nie. Verder sê die hof[110] dat in geval van 'n koopkontrak waar die skuldenaar (insolvent) verplig is om die prys te betaal vir goedere gekoop en reeds deur die

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101 1926 OPD 207 210 211.
102 (1873) LR 8 Ch A 289.
103 (1879) 10 Ch D 586.
104 1934 OPD 80 85.
105 Die nommer van die wet word nie in die verslag aangedui nie.
106 86.
107 *Uys v Sam Friedman Ltd* 1935 AD 165 166.
108 1966 1 SA 463 (W) 470 471.
109 Vir 'n bespreking van hierdie saak sien 6 1 hierbo.
110 *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) 470–471.

verkoper gelewer,[111] *die kurator nie die kontrak kan kanselleer*, aandring om die *merx* terug te gee (al is dit onbeskadig en het die waarde daarvan nie afgeneem nie) en weier om die verkoper as 'n skuldeiser toe te laat nie.[112]

In *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)*[113] word die reël só gestel: Die kurator het die keuse om te besluit of dit in belang van die skuldeisers sal wees "to abide by the contract *or not*". Myns insiens is hierdie stelling nie duidelik en uitdruklik genoeg om te geld as gesag vir die keuse om die kontrak te "beëindig" nie.

6 5 Geen sekere afleiding kan gemaak word nie

Daar is hofuitsprake waaruit geen sekere afleiding gemaak kan word nie, alhoewel soms daarna as gesag vir die een of ander kant verwys word. Uit *Chadwick v Henochsberg*[114] is die volgende aanhaling van belang:

> "It is admitted that a repudiation can be inferred from any acts or words of the plaintiff which manifest his inability to perform his contract."

Dit is moontlik om vervolgens te redeneer dat die kurator *nie in staat is* tot spesifieke nakoming nie indien dit tot nadeel van die skuldeisers is in die sin dat een skuldeiser daardeur 'n onbehoorlike voorkeur bo die ander sal verkry. Die vorming van 'n *concursus creditorum* is die oorsaak van die weiering om te presteer. Sy versuim om in hierdie omstandighede te presteer, is dan 'n repudiëring van die kontrak. Volgens die hof is die algemene reël dat die kurator mag kies om die kontrak in stand te hou. Daar is geen verwysing na 'n keuse om die kontrak te "beëindig" nie. Op 706 van die verslag haal die hof *Ex parte Stapleton: In re Nathan*[115] aan, waarin beslis is dat insolvensie self 'n "repudiëring" is,[116] *maar dat iets meer nodig is om te bewys dat die kurator gerepudieer het.* Laasgenoemde stelling word nie weerspreek nie. Die skuldeisers mag die kontrak aanvaar. *In casu* is die koper se boedel op 2 Januarie voorlopig gesekwestreer. Die koopkontrak was een vir kontant en die kurator kon nie lewering ingevolge die kontrak eis nie tensy hy die prys sou aanbied. Die akkoord deur die insolvent, kurator en die skuldeisers opgestel, was 'n aanduiding aan die verweerder (verkoper) dat die insolvent nie kon en ook nie bedoel het om te presteer nie. Die regter beslis dat dit inderdaad 'n "*repudiëring*" van die kontrak was.[117] As die verkoper op die "repudiëring" reageer deur beëindiging te verkies, kom die kontrak tot 'n einde.[118]

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111 Hierdie voorbeeld wys duidelik op die geval waar daar geen uitstaande verpligting meer aan die kant van die verkoper (solvent) is nie.

112 *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 1 SA 463 (W) 472A. Die hof beslis dat dieselfde by die likwidasie van 'n maatskappy geld (470).

113 1968 1 SA 717 (A) 724.

114 1924 TPD 703 705.

115 (1879) 10 Ch D 586.

116 Die hof beslis uiteindelik (707) dat dit nie die geval is nie. Ook Tindall R (708) beslis dat insolvensie *per se* nie die kontrak beëindig nie.

117 709 710. Die hof beslis tereg dat aanvaarding van die akkoord die *skuld* uit hoofde van die kontrak ten volle delg. Dit kan egter nie gesien word as *voldoening* van die insolvent se *verpligting* uit hoofde van die kontrak op so 'n wyse dat dit die kontrak in stand hou nie.

118 Die regter steun op *Ex parte Chalmers: In re Edwards* (1873) LR 8 Ch A 289 en interpreteer hierdie saak só: Die koper erken dat hy insolvent is. Op grond daarvan weier die verkoper om enigsins verder te presteer. Na sekwestrasie eis die kurator skadevergoeding op grond van nie-lewering. Op 710 verklaar die hof tereg dat die kurator in sodanige omstandighede steeds die agterstallige paaiemente moet betaal. Hy eis ingevolge die kontrak. Hy moet dus sy deel van die kontrak nakom; hy word nie daarvan verskoon nie.

In hierdie saak word dit nie duidelik gestel of die kurator aanvanklik gekies het om die kontrak in stand te hou en eers daarná gerepudieer het en of hy van meet af gekies het om dit te "repudieer" nie.[119] Daarom is dit moeilik om werklik met sekerheid te konkludeer dat die hof van mening is dat die kurator in eerste instansie die keuse het om die kontrak in stand te hou of te "repudieer".[120]

As algemene reël word ook in *Lake v Reinsurance Corporation Ltd*[121] aanvaar dat as die kurator die kontrak wil afdwing, hy self die volle teenprestasie van alle uitstaande verpligtinge moet aanbied, insluitend onvoldane en agterstallige verpligtinge. Daar is geen verwysing na 'n algemene reël om die kontrak te "beëindig", sou dit verkies word nie.

In *De Wet v Stadsraad van Verwoerdburg*[122] meld die regter dat as die kurator met die kontrak wil voortgaan, hy ten volle moet presteer. Hy meld dat hy na die *Montelindo*-saak[123] verwys is. Met goedkeuring haal hy die deel daarin oor "beëindiging" van die kontrak aan, maar maak self geen beslissing daaroor nie.[124] Die regter verwys na *Bryant & Flannagan (Pty) Ltd v Muller*[125] as die jongste gesag oor die onderwerp[126] maar beslis nie daaroor nie. Hy verklaar vervolgens dat die analogie tussen genoemde sake en die saak onder bespreking[127] onvolkome is, maar dat die volgende beginsel daaruit gehaal kan word: Aanspreeklikheid vir prestasie deur die kurator kan nie 'n gewone konkurrente eis teen die insolvente boedel laat ontstaan nie, maar skep koste van beheer, administrasie en likwidasie van die boedel wat as sodanig betaal moet word. Geen ander beginsel word genoem nie.

6 6 Die kurator mag regmatig "terugtree"

'n Saak wat neig in die rigting van die standpunt dat die kurator regmatig en uit hoofde van sy amp uit die kontrak mag "terugtree", *sonder enige verwysing na die tipe eis van die solvente kontraksparty*, is onder andere *Simmons v Bantoesake Administrasieraad (Vaaldriehoekgebied)*.[128] Daarin word vermeld dat die likwidateur uit die onuitgevoerde kontrak "teruggetree" het, en vervolg die hof (*obiter*) "soos hy uit hoofde van sy amp en die maatskappy se likwidasie geregtig is om te doen". Of dit sou beteken dat die likwidateur 'n keuse uitgeoefen het om die kontrak te "beëindig", word nie pertinent in soveel woorde verklaar nie. Dit moet dus afgelei word uit die gebruik van die woorde "uit die kontrak teruggetree". Geen gesag word vir hierdie standpunt aangebied nie. Geen verwysing na die tipe eis vir die solvente party word gemaak nie.

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119 My mening is dat dit vir doeleindes van die beslissing nie nodig was om die vraag uit te maak nie.

120 Myns insiens is die bedoeling eerder dat *as* die kurator die kontrak reeds aanvaar het en hy daarna *versuim* om die agterstallige paaiemente vir die reeds gelewerde goed ten volle te betaal, dit op 'n "repudiëring" van die kontrak neerkom (709).

121 1967 3 SA 124 (W) 126.

122 1978 2 SA 86 (T) 99.

123 Vir 'n bespreking van hierdie saak, sien 6 8 hieronder.

124 97. Dus weer eens *obiter*.

125 1977 1 SA 800 (N).

126 805B.

127 Die likwidateurs het besluit om voort te gaan met 'n kontrak tav 'n erf wat voor die likwidasie deur die maatskappy verkoop is. Die hof bevind vervolgens dat die likwidateurs ook die begiftigingsgelde moet betaal – dit is deel van die administrasiekoste.

128 1979 1 SA 940 (T) 948.

Nog 'n interessante uitspraak is dié in *Ex parte Venter: In re Rapid Mining Supplies (Pty) Ltd.*[129] Daarin verklaar die hof, sonder om so te beslis, dat "the liquidators had the election of abiding by it or refusing to implement it, that is, in effect, to cancel it forthwith". Verder aan word verduidelik:

> "Such an immediate cancellation would to my mind not have been an act of administration and would not have given rise to a preferent claim for damages by Fordom. The liquidators would, by so cancelling the agreement, in effect have decided that it would play no part in their administration of the post-liquidation affairs of the company and would have excluded it therefrom."[130]

Impliseer dit 'n konkurrente eis vir skadevergoeding? Die hof verduidelik nie.

6 7 Die kurator het die keuse om die kontrak te "beëindig"

Sake as gesag vir die standpunt dat die kurator die keuse het om die kontrak te "beëindig", *sonder enige bevredigende verklaring vir die remedie van die solvente kontraksparty*, kom ook voor. 'n Direkte verwysing na 'n "keuse om te beëindig" word in *Montelindo Compania Naviera South Africa v Bank of Lisbon & South Africa Ltd*[131] gevind. Met verwysing na gesag beweer die eksipiënt in hierdie saak dat die besluit van die kurator om nie die verpligtinge uit hoofde van die kontrak na te kom nie, "*repudiëring*" is. Die hof verklaar:

> "I do not propose to discuss the cases. I confine myself to saying that in my view the weight of authority is adverse to the excipient's contention".[132]

Obiter word bygevoeg,[133] sonder 'n bespreking van enige gesag, dat die kurator ingevolge die gemenereg 'n keuse het om die kontrak te "beëindig" of in stand te hou. 'n Keuse tot beëindiging beteken nie sonder meer dat die onskuldige party nou ook 'n eis om skadevergoeding teen die boedel het nie. So 'n eis moet uitdruklik voorbehou word. Hoewel daar in beginsel geen beswaar teen die erkenning van so 'n eis in te bring is nie, volg dit nie vanselfsprekend na regmatige optrede nie.[134] In hierdie saak is daar geen aanduiding van die behoud van 'n skadevergoedingseis nie.

Ten spyte van die beslissing *Norex Industrial Properties (Pty) Ltd v Monarch South African Insurance Co Ltd*[135] het die appèlhof in *Rennie v Gordon*[136] en *Slims (Pty) Ltd v Morris*[137] die teenoorgestelde standpunt met betrekking tot die algemene reël ingeneem. Met verwysing na die *Glen Anil-* en *Gordon*-saak[138] word in eersgenoemde saak beslis dat die kurator "has exclusive power to decide whether to implement or to terminate it". Daarvolgens het die solvente party

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129 1976 3 SA 267 (O) 280–281. In hierdie saak is 'n faktoreringsooreenkoms ter sprake.
130 280H–281A.
131 1969 2 SA 127 (W) 141–142.
132 141G.
133 Op die feite bevind die hof dat die kurator die huurkontrak regsgeldig ingevolge a 37 van die wet ontbind het.
134 My kritiek is bloot dat geen hofsaak hierdie beginsels sodanig motiveer nie. Dat dit as 'n beginsel van die insolvensiereg beskou word dat die solvente party 'n konkurrente eis vir *skadevergoeding* het, al is die kurator geregtig om die kontrak te "beëindig", blyk nie duidelik uit die beslissings nie.
135 1987 1 SA 827 (A). Sien die bespreking in 6 14 hieronder.
136 1988 1 SA 1 (A) 14.
137 1988 1 SA 715 (A) 739. In hierdie saak is slegs *obiter* in die minderheidsuitspraak daarna verwys.
138 Vir 'n bespreking van hierdie sake sien 6 9 hieronder.

ingevolge die gemenereg 'n konkurrente eis vir skadevergoeding (en terugbetaling van die paaiemente in geval van 'n koopkontrak van grond).

6 8 Die kurator het die keuse om die kontrak te "beëindig" en dit stel "kontrakbreuk" daar

Aan die orde is sake waarin verklaar word dat die kurator die kompetensie het om die kontrak te "beëindig" *sonder om te verduidelik waarom dit spesifiek as kontrakbreuk gekategoriseer word.* In *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation (in liquidation)*[139] word inderdaad beslis dat die kurator die kontrak kan "beëindig". Sodoende ontstaan 'n konkurrente eis vir skadevergoeding *op grond van kontrakbreuk* teen die insolvente boedel. As gesag word na die *Bryant-*,[140] *De Wet-*[141] en *Gordon v Standard Merchant Bank Ltd*[142]-saak verwys. Na my mening kan die *De Wet*-saak nie as gesag aangehaal word nie omdat die hof in der waarheid nie pertinent daaroor beslis het nie. In paragraaf 11 hieronder word daarop gewys dat die *Bryant*-saak dubbelsinnig is en nié die tipe eis van die ander party bespreek nie.

Dieselfde standpunt word in *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester*[143] gehuldig terwyl niks van hierdie "keuse om te beëindig" in *Cohen v Verwoerdburg Town Council*[144] gesê word nie. Die algemene reël van instandhouding van 'n onuitgevoerde kontrak en volledige prestasie aan die kant van die kurator indien hy met die kontrak wil voortgaan, word wel bevestig. In laasgenoemde saak bevind die hof dat 'n bevel vir spesifieke nakoming nie gemaak behoort te word nie. In sy behandeling van die feite verwys die hof na sekere diensooreenkomste wat ook tussen die partye tot stand gekom het. Met betrekking tot daardie kontrakte het die solvente party die likwidateurs om bevestiging vir die uitvoering daarvan gevra. Laasgenoemde het kennis gegee dat hulle nie daartoe in staat is nie. Eersgenoemde het op hierdie "repudiëring" gereageer en die werk self laat doen. Die hof beslis dat die stadsraad met 'n konkurrente eis vir skadevergoeding gelaat moet word.[145] Die hof verwys nie (alhoewel dit nie vir hom nodig was nie) na die posisie as die "repudiëring" geïgnoreer sou word nie.

In *Gordon v Standard Merchant Bank Ltd*[146] word die standpunt van die hof in die *Glen Anil*-saak gesteun.

6 9 Die kurator mag die kontrak prysgee ("abandon")

Wat ook voorkom, is gesag dat die kurator die kontrak mag "abandon" (prysgee). Dit word as "kontrakbreuk" gesien maar in werklikheid word "repudiëring" bedoel. Ingevolge artikel 79 van Ordonnansie 64 van 1829 en artikel 103 van Ordonnansie 6 van 1843 het die kurator die keuse gehad om, in geval van 'n

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139 1981 1 SA 171 (A) 182–183.
140 Sien 6 11 hieronder.
141 Sien 6 6 hierbo.
142 1980 3 SA 495 (K) 498.
143 1982 4 SA 486 (NK) 492.
144 1983 1 SA 334 (A) 352. Die kontrakte wat hier ter sprake is, is diensooreenkomste vir die bou van stormwaterpype en strate tov die proklamasie en vestiging van sekere dorpsgebiede.
145 347.
146 1983 3 SA 68 (A) 92.

koopkontrak van onroerende goed waar die koper insolvent geraak het, die kontrak te "abandon", met behoud van 'n eis om skadevergoeding ten gunste van die solvente kontraksparty. Volgens *Mangold Brothers v Greyling's Trustee*[147] het "abandonment" geen ander effek nie as om die kurator te onthef van alle verpligtinge om enige uitstaande beding of voorwaarde van die ooreenkoms na te kom, terwyl die verkoper geregtig sal wees om weer besit van die verkoopte (roerende) saak te verkry omdat eiendomsreg nog nie op die insolvent oorgegaan het nie. Verder kan hy enige skade wat hy as gevolg van nie-voldoening aan die kontrak gely het, van die insolvente boedel eis. In die beslissing word op *Smuts v Neethling*[148] gesteun. Op grond van hierdie saak beslis die hof sonder verwysing na enige relevante gesag dat die beginsel wat aldaar gestel is ook vir koopkontrakte van roerende goed geld.[149]

'n Interessante geval wat spesifiek na "abandonment" verwys, is *Scheinfeld's Trustee v Murray & Co*.[150] Dit handel oor 'n onuitgevoerde, deelbare kontrak. Na oorweging van die feite beslis die hof dat die kurator (namens die skuldeisers) die kontrak in geheel in stand moes hou, óf dit moes "abandon" en die verkoper daarvan in kennis moes stel.[151]

Daar word na die Engelse saak *Morgan v Bain*[152] verwys. Die hof steun ook op Williams[153] waarin gesê word dat as die kurator nie die kontrak handhaaf nie die ander party dit as kontrakbreuk kan beskou.

"Abandonment" word in dié saak dus as "kontrakbreuk" gesien en nie as 'n kompetensie om die kontrak te "beëindig" met behoud van 'n eis om skadevergoeding, soos in *Mangold*[154] nie. Met verwysing na die feite voor hom gaan die hof verder:

> "[A]nd then the months of April, May and the material part of June passed without any instructions as to delivery being given, nor any intimation that the trustee

147 1910 EDL 471 476–477.

148 (1844) 3 Menz 283. Hierdie saak handel spesifiek oor koopkontrakte van onroerende goed waar eiendomsreg nog nie op die insolvent oorgegaan het nie. Van belang is ook die hof se standpunt in *Mangold*, gegrond op bg *Smuts*-beslissing, dat as die kurator die kontrak "beëindig" hy nie die reeds betaalde paaiemente kan terugeis nie. Die verkopers kan dus besit van die masjinerie (*wat hul eiendom gebly het*) verkry: "The creditors . . . were not entitled to have the sale annulled and rescinded *ab initio*, nor to revert to the *status quo ante* the agreement, or before any of the stipulations or conditions had been performed or fulfilled." Sodoende word die kontrak met toekomstige werking beëindig.

149 Dit is maw waar die koper se boedel gesekwestreer word.

150 1920 CPD 87 95.

151 Volgens Bosman ea *Tweetalige woordeboek* (1982) 959 beteken "abandon" laat vaar; opgee; afstaan; afstand doen van; prysgee; terugtree uit 'n kontrak. "Abandonment" beteken afstand; prysgewing. Volgens Hiemstra en Gonin *Drietalige regswoordeboek* (1986) 1 beteken "abandon" laat vaar; prysgee; abandonneer; afstand doen van; afstaan. "Abandonment" het dieselfde betekenis soos bo (word ook vertaal met "abandonment"). Uit *Mangold Brothers v Greyling's Trustee* 1910 EDL 471 476 477 blyk dit dat die howe dit as "beëindiging" interpreteer. In *Wilson's Trustees v Martell* (1856) 2 Searle 248 268 verklaar die hof: "To abandon is to give up all advantages, as well as disadvantages." In a 35 gebruik die wetgewer in die Engelse weergawe van die wet ook die woord "abandon". Die Afrikaanse weergawe (wat die getekende teks is) gebruik die woord "verwerp". In hierdie ondersoek sal die neutrale woord "prysgewing" gebruik word telkens wanneer "abandon" in die hofsake gebruik word in 'n poging om 'n algemene reël te formuleer.

152 (1874) LR 10 CP 15.

153 *Bankruptcy* 9de uitg 220; hierdie gesag is aangehaal soos dit in die verslag voorkom.

154 En moontlik ook soos in *Preston & Dixon v Biden's Trustee* (1884) 1 Buch AC 322 352.

> elected to abide by the contract, I think that the defendant would be quite justified in regarding the contract as abandoned."

Is dit nie in effek 'n "repudiëring" van die kontrak nie? As die hof dit as 'n kompetensie om te "beëindig" beskou het, sou hy dit nie as "kontrakbreuk" getipeer het nie. Aan die ander kant is repudiëring 'n vorm van kontrakbreuk. Repudiëring kan ook plaasvind deur die *optrede* van die ander kontraksparty[155] en nie slegs deur middel van woorde nie.

6 10 "Repudiëring" en "abandonment" óf "beëindiging" word in een asem genoem

Verder bestaan daar sake waarin "repudiëring" en "abandonment" óf "beëindiging" in een asem genoem word *sonder 'n voldoende bespreking van die solvent se eis en die keuse wat hy kan maak*. In die genoemde *Bryant & Flannagan*-gewysde[156] lyk dit of die hof tegelyk op twee stoele sit. In die saak argumenteer die respondent dat die kurator die volgende keuse het: om die kontrak aan te neem of te "*repudieer*".[157] Die hof verklaar egter dat daar 'n keuse is om die kontrak te "beëindig" maar sonder verwysing na gesag.[158] Gesag vir die standpunt dat die ooreenkoms nie outomaties met likwidasie van die maatskappy eindig nie word wel gegee. Die hof gaan egter verder en verklaar dat "they [die likwidateurs] could choose to abide by the contract *or to resile from it*".[159] Wat sou die hof met "resile" bedoel? Die antwoord lê klaarblyklik in die volgende baie interessante opmerking van die hof:

> "It is from the terms of the letter of 18 July that the answer must be sought as to which of these alternative courses appellants intended to pursue . . . This standard of proof would of course also relate to an intention to *repudiate* or to re-negotiate the contract . . . Accordingly, if one looks at the first paragraph of the letter of 18 July standing alone, then quite clearly it does not express an intention to *repudiate* the contract nor does it contain an offer to enter into a new agreement with respondent. It is compatible with only one conclusion and that is that the appellants were electing to abide by the contract."[160]

Volgens appèlregter Botha[161] is die enigste redelike konklusie dat die gebruik van die woord "terminate" in hierdie saak nie letterlik opgeneem moet word nie en dat dit bloot beteken dat die kurator kan weier om die kontrak spesifiek na te kom. Reinecke en Cronjé[162] voer aan dat die beslissing as neutraal beskou moet word. Ek stem saam.

In *Somchem (Pty) Ltd v Federated Insurance Co*[163] gee die hof ten aanvang 'n uiteensetting van die feite en verwys deurentyd na 'n "repudiëring" van die

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155 Dit is bv om nie, wanneer daar so 'n plig op hom rus, opdrag oor lewering of enige aanduiding te gee dat hy gekies het om die kontrak in stand te hou nie.

156 *Bryant & Flannagan (Pty) Ltd v Muller* 1978 2 SA 807 (A).

157 809–810.

158 812. Daar word ook nie vermeld wat die gevolge daarvan vir die solvente party sal wees nie.

159 813H (klem ingevoeg).

160 814A–E.

161 In *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A) 566.

162 1979 *THRHR* 397.

163 1983 4 SA 609 (K) 612–614.

kontrak en "aanvaarding" daarvan deur die ander party. Daarna volg 'n bespreking van die algemene reëls. Daar word na bogenoemde *Bryant*-saak verwys en verklaar dat die kurator die kontrak mag "terminate" en "cancel".[164] Direk daarna onderskryf die hof die uitspraak in *Smith v Parton*[165] onomwonde. Dié uitspraak sien die optrede van die kurator as 'n "repudiëring" van die kontrak. Die ander party

> "must content himself with a monetary claim either for performance or for non-performance of the insolvent's obligations, as the case may be".[166]

Hoe belangrik dit is om uit te maak presies wat die posisie werklik is, kan gesien word in *Insulations Unlimited (Pty) Ltd v Adler*[167] waarin die hof "abandonment" en "repudiëring" klaarblyklik gelykstel:

> "It was further common cause that the provisional liquidator has an election to abide by the contracts of sale and make such an election within reasonable time.[168] If he fails to make the election within a reasonable time he will be taken to have abandoned the contracts and the applicant can treat them as at an end."

En:

> "If, on the other hand, a liquidator elects to repudiate the contracts he will be obliged to return the goods to the applicant. The applicant would then have a concurrent claim for any damages it may sustain."

As gesag verwys die hof na Smith.[169] Laasgenoemde handhaaf egter die standpunt dat die kurator die keuse het om die kontrak te "beëindig".[170] Die hof maak verder ook nie melding van die keuse van die onskuldige party om op die "repudiëring" te reageer of dit te ignoreer nie. Met betrekking tot die betrokke feite, verduidelik die hof dat die direkteure van die maatskappy nie die goedere (wat die onderwerp van die onuitgevoerde kontrak is) mag gebruik nie want "it means that the provisional liquidator is deprived of his right of election to *repudiate* the contract".[171]

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164 615.

165 1980 3 SA 724 (D). Hierdie saak is reeds in 4 hierbo bespreek.

166 729C.

167 1986 4 SA 756 (W) 758G–759A. Goedere is verkoop en gelewer aan 'n maatskappy wat later gelikwideer is. Eiendomsreg op die goed is voorbehou totdat betaling sou geskied. Betaling het nog nie plaasgevind nie. 'n Voorlopige likwidateur is ook nog nie aangestel nie. Die direkteure van die maatskappy het egter met die besigheid van die maatskappy voortgegaan. Applikant vra vervolgens 'n interdik aan om te verhoed dat die betrokke goedere deur die direkteure gebruik word totdat die aangeleentheid (nl die onuitgevoerde kontrak) deur die voorlopige likwidateur hanteer kan word sodra een aangestel word.

168 Hierdie saak kan dus as gesag dien vir die standpunt dat die woord "kurator" (wat onuitgevoerde kontrakte betref) ook "voorlopige kurator" insluit.

169 Die ouer uitgawe, nl Smith *The law of insolvency* (1982) par 6 172–173.

170 Dieselfde standpunt word ook in die derde uitgawe gehandhaaf (Smith *The law of insolvency* (1988) 172).

171 761 (klem ingevoeg). Aangesien eiendomsreg op die betrokke goedere voorbehou is totdat betaling sou geskied, kan die vraag terloops gevra word waarom a 84 van die Insolvensiewet nie in hierdie saak van toepassing was nie. A 84 geld ook al is die bepalings van a 2 van die Wet op Kredietooreenkomste 75 van 1990 self nie van toepassing nie (sien Meskin *Insolvency and its operation* 5–73 vn 6). A 84 is ook van toepassing waar 'n maatskappy die koper is (a 339 Maatskappywet 61 van 1973; Meskin *Insolvency and its operation* 5–73). Waarom a 84 nie in die genoemde saak ter sprake gekom het nie, is nie duidelik nie. Waarskynlik is dit omdat 'n voorlopige likwidateur nog nie aangestel was om

vervolg op volgende bladsy

6 11 "Regmatige optrede", "repudiëring" en "terugtrede" sonder vermelding van die keuse by repudiëring

Ter sprake is 'n saak waarin gesê word dat die kurator se optrede regmatig is en dat kontrakbreuk nie ter sprake is nie. Dit word om die beurt "repudiëring" en "terugtrede" genoem. Daar word beslis dat die solvente party eenvoudig 'n konkurrente eis teen die insolvente boedel het *sonder vermelding van die keuse wat normaalweg by repudiëring beskikbaar is*.

Met verwysing na onuitgevoerde kontrakte in die algemeen word in *Preston & Dixon v Biden's Trustee*[172] beslis dat die kurator die regte en verpligtinge van die insolvent verkry; en dat hy nie meer regte het as wat die insolvent voor sekwestrasie van sy boedel teen die ander kontraksparty gehad het nie. Laasgenoemde mag egter nie spesifieke nakoming deur die kurator eis nie en daardie party het slegs 'n konkurrente eis teen die insolvente boedel. Dit is insiggewend om op die standpunt van die hof te let dat 'n kurator net op die algemene reëls[173] mag steun waar eiendomsreg in die insolvente boedel setel:

> "It is clear, however, that the Judges who decided that case [*Harris v Trustee of Buisinne*] did not intend the principle of the decision, so inequitable in itself, to any other case than that in which the *dominium*, or as they also term it, the *ius in re*, was clearly in the insolvent."[174]

Alhoewel daar dan beslis is dat die solvente party in die algemeen geen eis om spesifieke nakoming het nie, is daar in die saak geen verwysing na 'n algemene reël in die sin van 'n kompetensie om die kontrak te "beëindig" indien die kurator dit sou verkies nie. Met betrekking tot die betrokke feite lyk dit eerder of die hof op twee stoele sit want daar word gesê dat "Puzey's trustee has no right to the claims, or, having such a right, has lawfully *repudiated or abandoned* it".[175]

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die kwessie van die onuitgevoerde kontrak te hanteer nie. 'n Interdik is aangevra om die reg van die verkoper te beskerm totdat so 'n aanstelling gemaak is.

172 (1884) 1 Buch AC 322 345 346. In hierdie saak het die eienaars van sekere kleims in 'n diamantmyn hulle kleims aan Biden verkoop. Biden was 'n makelaar vir ene Puzey. Laasgenoemde het in Londen gewoon en vir sekere prinsipale in Londen opgetree. Die name van hierdie prinsipale is deur die verkopers gevra. Dit is egter nooit aan hulle openbaar nie. Biden het voorgegee dat die geld om die koopprys te betaal, reeds van Londen na Suid-Afrika op pad was. Eisers (Preston en Dixon) wou die kleims derhalwe aan "Biden qq" oordra. Die Registrateur van Kleims het geweier dat dit so gedoen word. Die kleims is toe in Biden se naam alleen, sonder kwalifikasie of voorbehoud, oorgedra. Geen betaling is ontvang nie. Die verkoop in Londen het deur die mat geval. Biden het boedel oorgegee. Kort daarna is ook die boedel van Puzey gesekwestreer. Die gevolg daarvan was dat die aksie teen Puzey vir die bedrag van die koopprys ook misluk het. Vervolgens het die kurator van Biden se insolvente boedel die kleims as bates of eiendom van daardie boedel geëis. Die eisers het egter geëis dat 'n terugoordrag van die kleims aan hulle bewerkstellig moet word. Die uitspraak van die appèlafdeling was dat die eisers op 'n terugoordrag geregtig was omdat daar geen *justa causa* vir die oordrag na Biden was óf 'n bedoeling om so oor te dra nie.

173 Dit is die reël dat as die insolvent voor die sekwestrasie van sy boedel goed verkoop en die koopprys ontvang het terwyl hy van sy kant nog nie die goed gelewer het nie, die koper slegs 'n konkurrente skuldeiser is *sonder enige reg op die goed self*.

174 346.

175 352 (klem ingevoeg). Die bedoeling van Preston en Dixon was duidelik dat Biden *namens* Puzey koop. Puzey is dus volgens hulle die ander (insolvente) kontraksparty. Die uitlating gaan oor die optrede en keuse van die kurator van sy insolvente boedel.

Repudiëring beteken normaalweg kontrakbreuk. Met die gebruik van die woord "lawfully" word egter te kenne gegee dat kontrakbreuk nie ter sprake is nie. Die hof verklaar ook dat die ander party slegs 'n konkurrente eis teen die boedel verkry. Na die gewone keuse van die onskuldige party by repudiëring word nie verwys nie.

6 12 "Repudiëring" met die gevolglike keuse vir die onskuldige party

Meer onlangs kom daar hofuitsprake voor waarin verklaar word dat die kurator die kontrak "repudieer" met die gevolglike keuse vir die onskuldige party, *sonder indringende bespreking van die gevolge wat die keuse in geval van sekwestrasie inhou.*

In *Liquidators FH Clarke & Co v Nesbitt*[176] word beslis dat daar geen gemeenregtelike reël bestaan wat die likwidateurs geregtig maak om 'n onuitgevoerde huurkontrak te "beëindig" nie. So 'n kompetensie kan alleen deur wetgewing verkry word. Vervolgens vra die hoofregter:

> "What then is the position? The lease still runs. If the liquidators do not occupy the premises, *but repudiate the lease*, then the lessor will have his action for damages or otherwise. But if they occupy they must pay rent."[177]

Hieruit is dit nie moeilik nie om af te lei dat die kurator 'n keuse het om die kontrak in stand te hou of te "repudieer". Van 'n keuse om die huurkontrak te "beëindig", is geen sprake nie. Welke remedie het die ander party? Hiervolgens het die solvente party 'n aksie vir skadevergoeding of andersins.[178]

In *Smith v Parton*[179] sien die regter die optrede van die kurator as 'n "repudiëring" van die kontrak. Die ander party

> "must content himself with a monetary claim either for performance or for non-performance of the insolvent's obligations, as the case may be".[180]

As aanvaar word dat die kurator die kontrak "repudieer", doen die feit dat die hof nie melding maak van 'n keuse van die onskuldige party na die "repudiëring" nie, afbreuk aan die korrektheid van die beslissing. Of impliseer dit dat, as gevolg van die reël dat spesifieke nakoming nie geëis mag word nie, die ander party slegs op die "repudiëring" kan reageer en 'n eis om skadevergoeding kan instel? Word daar inderdaad 'n eis om spesifieke nakoming van die kontrak toegestaan indien die ander party toegelaat word om die "repudiëring" te verwerp en nogtans 'n ekwivalente geldbedrag as skadevergoeding te eis? Dit kan nie wees nie. Hoewel met 'n eis om vervulling óf spesifieke nakoming óf die waarde daarvan geëis kan word,[181] is die eiser se eis vir die waarde van die

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176 1906 TS 726 727.

177 728 (klem ingevoeg).

178 Dit is nie duidelik presies wat met "or otherwise" bedoel word nie. Was dit nie vir die beslissing in *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) nie, sou moontlik geredeneer kon word dat as die "repudiëring" geïgnoreer word, die onskuldige party 'n eis vir die objektiewe waarde van die prestasie het (oftewel kan hy "vervangende", "alternatiewe" of "surrogaat" prestasie eis). Dit is dan ook die standpunt van De Wet en Van Wyk (1992) 212. In die geval onder bespreking gaan dit in elk geval om 'n geldeis, nl 'n eis vir die huurgeld.

179 1980 3 SA 724 (D). Hierdie saak is reeds in 4 hierbo bespreek.

180 729C.

181 Gewone skadevergoeding kan in albei gevalle geëis word. Die voorwaarde is dat daar wel skade moet wees. In *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration*

vervolg op volgende bladsy

prestasie plus moontlike skade in geval van onuitgevoerde kontrakte in die insolvensiereg slegs konkurrente eise. Dit is nie die ekwivalent van spesifieke nakoming nie en hou nie benadeling vir die *concursus creditorum* in nie.

6 13 "Repudiëring" sonder vermelding van enige keuse

Daar is ook sake waarin die standpunt gehandhaaf is dat die kurator die kontrak "repudieer" en dat die ander party skadevergoeding vir "kontrakbreuk" kan eis, *sonder vermelding van die keuse van die onskuldige party by "repudiëring".* Appèlregter Botha haal in *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd*[182] die reeds bespreekte *Nesbitt*-gewysde aan, waar gesê word dat die likwidateur die maatskappy se verpligtinge uit hoofde van 'n onuitgevoerde kontrak kan "*repudieer*". Die regter vervolg dat die korrektheid van hierdie uitspraak nog nooit bevraagteken is nie. Dit is wel die geval. Nêrens in die gelese sake is die *Nesbitt*-gewysde by name ontleed en gekritiseer nie. As gesag vir sy standpunt haal die hof die volgende passasie uit genoemde saak aan:

> "That raises the question whether they had the right to treat the lease as terminated. Under the common law clearly they had no such right."[183]

Hierdie aanhaling verwys duidelik na die kurator se kompetensie of gebrek daaraan om die kontrak te ontbind. Derhalwe beklemtoon appèlregter Botha dat die kurator nie die kontrak eensydig kan beëindig nie.[184] Dit is jammer dat appèlregter Botha nie 'n volledige uiteensetting van die gevolge van "repudiëring" gee nie, want by ignorering van die repudiëring in die gewone sin van die woord eis die ander party eintlik spesifieke nakoming. In geval van sekwestrasie kan spesifieke nakoming egter nie geëis word nie; dus het hy slegs 'n eis vir die waarde van die prestasie en moontlike skade[185] terwyl die kontrak in stand gehou maar nie afgedwing kan word nie. Die solvente party kan nie volle teenprestasie of skadevergoeding kry nie. Waar reeds gedeeltelik deur die insolvent gepresteer is, kan hy prestasie behou en 'n eis vir die aansuiweringskoste instel,[186] mits aanvaar word dat hy die *exceptio non adimpleti contractus* verloor deur so 'n eis te bewys. Die solvente party sal dan verplig wees om sy eie volle prestasie te lewer.

Die appèlregter merk voorts op dat

Co (Pty) Ltd 1981 4 SA 1 (A) spreek party regters twyfel uit oor die bestaanbaarheid van "skadevergoeding as surrogaat van prestasie". De Wet en Van Wyk (1992) 212 bestempel dit as 'n "onverklaarbare houding". Volgens hierdie beslissing kan slegs spesifieke nakoming óf *skadevergoeding* geëis word. Terminologie soos "vervangende prestasie" word nie deur die hof gebruik nie. Klaarblyklik is die hof se redenasie dat as die ander kontraksparty nie spesifieke nakoming kan kry nie, hy 'n eis om skadevergoeding (wat op die gewone wyse bereken moet word) moet hê. Die appèlafdeling verklaar onomwonde dat daar nie in die Suid-Afrikaanse reg 'n eis vir die "objektiewe waarde" van die prestasie as alternatief tot 'n eis vir spesifieke nakoming bestaan nie. Oelofse 1988 *THRHR* 546 aanvaar ook dat slegs skadevergoeding in die plek van spesifieke nakoming geëis kan word.

182 1987 1 SA 827 (A) 838.

183 *Liquidators FH Clarke & Co v Nesbitt* 1906 TS 726 727.

184 *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd* 1987 1 SA 827 (A) 838H–J 839A–I.

185 Dit is konkurrente eise. Ter wille van 'n verkorte skryfwyse, sal voortaan net na 'n skadevergoedingseis verwys word.

186 Dit is steeds 'n konkurrente eis.

"under common law his termination of the lease would have constituted a repudiation thereof, giving rise to a concurrent claim for damages for breach of contract" (840B).

6 14 "Repudiëring" sonder 'n volledige uiteensetting van die eis van die ander party

Sake kom ook voor waarin beslis is dat "repudiëring" ter sprake is *sonder 'n volledige uiteensetting van die eis van die ander party en die keuse daarby betrokke.* In *Wilson's Trustees v Martell*[187] word hoofsaaklik oor artikel 103 van Ordonnansie 6 van 1843 geargumenteer. Daarin word bepaal dat die kontrak deur die kurator aangeneem of "abandon" mag word. Dit is spesifiek met betrekking tot 'n koopkontrak vir die verkryging van onroerende goed waar die koper insolvent is. Die saak handel ook oor 'n leningsooreenkoms. Soos ook tans die geval is, was geen spesifieke artikel op so 'n tipe kontrak van toepassing nie met die gevolg dat die gemenereg toepassing sou vind. Uit verklarings van regter Bell[188] blyk duidelik dat die besluit van die kurators om nie die kontrak uit te voer nie, deur die hof as "repudiëring" gesien word.[189]

Ook in *Ex parte Serfontein: In re Insolvente Boedel Schoeman*[190] word beslis dat kontrakte in stand gehou word "tensy die eleksie uitgeoefen word om te *repudieer*".[191] Die regter interpreteer dit dus as "repudiëring". Na oorweging van die omstandighede verklaar hy vervolgens dat die kanse minimaal is dat die skuldeisers ooit van die kurators sou verwag om die kontrakte te "repudieer". Die gevolge daarvan indien repudiëring (in die ware sin van die woord) wel teenwoordig was, word nie bespreek nie. Tog verwys die regter na *Ex parte Venter* en die gesag aldaar.[192] Geen verduideliking word egter gegee waarom dit in daardie saak as 'n kompetensie om te "kanselleer" gesien is nie.

In die onlangse gewysde *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd*[193] keer die appèlafdeling terug na die repudiëringskonstruksie. Daarin steun die hof sterk op die reeds bespreekte *Smith v Parton*-saak. Die teenparty het na die "repudiëring" 'n keuse. Die stelling dat die kurator 'n keuse het om die kontrak in stand te hou of nie, beteken bloot dat die ander party nie spesifieke nakoming kan eis nie *as die kurator besluit om die kontrak prys te gee* ("abandon").[194] Al die gevolge van die kurator se "repudiëring" word nie uitgespel nie.

7 GEVOLGTREKKING

Uit die ontleding van die regspraak is dit duidelik dat daar uiteenlopende standpunte in die howe oor hierdie spesifieke onderwerp bestaan – nie almal baie duidelik, presies en volledig gemotiveer of beredeneer nie. Die ontleding lewer

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187 (1856) 2 Searle 248.
188 268 en mbt 'n reg om te beëindig 269.
189 Sien verder 258 van die verslag waar Watermeyer R ook van "repudiëring" deur die kurator melding maak.
190 1978 1 SA 246 (O) 247. Hierdie saak handel oor die verkoop van plaaseiendomme deur die insolvent voor die sekwestrasie van sy boedel.
191 Klem ingevoeg.
192 281 282.
193 1988 2 SA 546 (A) 566.
194 'n Mens kan dus aanvaar dat met "repudiëring" en "abandon" dieselfde bedoel word.

duidelik nie bevredigende resultate op nie. Myns insiens beklemtoon dit 'n warboel van standpunte wat deur die loop van jare gevorm is, elkeen gepaardgaande met 'n onnadenkende gebruik van geykte kontrakteregterme ook in die insolvensiereg, sonder enige aanpassing of verfyning daarvan spesifiek met verwysing na die feit van sekwestrasie. Soms weer is dit bloot 'n onvolledige uiteensetting sonder 'n indringende beredenering van die toepaslike regsbeginsels en die gevolge daarvan in die betrokke omstandighede. Dit weerspieël 'n onaanvaarbare, onvolledige resultaat veral wat die regsfiguur repudiëring en sy toepassing by onuitgevoerde kontrakte in die insolvensiereg betref. Wat dit nóg onaanvaarbaarder maak, is die feit dat die repudiëringskonstruksie tans die aanvaarde standpunt in die regspraak is. Met betrekking tot die standpunt dat die kurator 'n kompetensie of "keuse tot beëindiging" het,[195] is dit opvallend dat 'n eis vir nie-voldoening nie uitdruklik aan die solvente kontraksparty toegeken is gelyktydig met die beslissing dat die kurator die kontrak *regmatig* kan "beëindig" nie. Daarmee saam is ook nie uitdruklik beslis dat die kurator met regmatige "beëindiging" nié ook die reg het om gelewerde goed terug te eis nie. Dit is uiters onbevredigend.

In 'n volgende artikel sal 'n standpunt gemotiveer word wat na my mening die aanvaarbaarste oplossing vir die betrokke situasie sal bied.

(*Word vervolg*)

BUTTERWORTHS-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworths-prys vir die beste eersteling-bydrae van 1997 toegeken is aan:

Mnr C-J Pretorius
Universiteit van Suid-Afrika

195 Dit kom slegs ter sprake waar die wederkerigheidsbeginsel op die spel is.

Geld die stelreël *plures eandem rem in solidum possidere non possunt* nog in die Suid-Afrikaanse reg?*

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SUMMARY

Does the maxim *plures eandem rem in solidum possidere non possunt* still apply in South African law?

South African property law traditionally accepts that the same thing cannot be controlled in its entirety by more than one person at the same time. Exceptions to the *plures eandem rem in solidum possidere non possunt* rule do, however, regularly appear in case law. Different possibilities present themselves on the issue of shared control over the same thing in its entirety: (a) Two or more people between whom a legal relationship exists (for example, partners) jointly control a thing; (b) two or more people control a thing in its entirety individually, for example, independent contractors as parties to a building contract. No legal relationship exists between these parties and each one controls the thing individually for his or her own benefit. In both these cases the parties exercise direct control over the thing; and (c) two or more people have joint control of a thing in its entirety, but control is exercised in different ways, as in the case of an owner of a farm and a person who has a servitude over the farm. In the latter instance it is perhaps possible to distinguish, first, between direct and indirect control, and, secondly, between mediate and immediate control. The occurrence of shared control in South African law is examined with reference to case law and legal opinion. It is concluded that shared control (in all the above-mentioned possibilities) has received both tacit and express recognition and acceptance and that there is a very real need for such a legal notion. Formal recognition and acceptance thereof will harmonise legal theory and legal practice.

1 INLEIDING

Die Suid-Afrikaanse sakereg gaan tradisioneel van die standpunt uit dat meerdere persone nie dieselfde saak gelyktydig in die geheel kan beheer nie.[1] Hierdie opvatting spruit reeds uit die Romeinse reg voort: Volgens Paulus (*D* 41 2 3 5) sou dit *contra naturam* wees indien twee (of meer) persone geag sou word dieselfde saak fisies in die geheel te beheer. Dit is die gevolg van Labeo se opvatting dat dieselfde *possessio* ewemin in twee persone tegelyk gevestig kan

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* Hierdie artikel is 'n gering gewysigde weergawe van 'n hoofstuk uit die outeur se LLD-proefskrif: *Die omskrywing en funksies van die fisiese beheerelement in die Suid-Afrikaanse sakereg* (Unisa 1995).

1 Vgl bv Maasdorp *Institutes of South African law: The law of property* (1976) 13 wat hierdie standpunt sonder meer aanvaar. Sien verder Van der Merwe *Sakereg* (1989) 102.

wees as wat twee persone tegelykertyd op dieselfde plek kan staan of sit.[2] *Possessio* in hierdie sin van die woord word dus besonder letterlik opgeneem as sou dit 'n suiwer fisiese betekenis hê.[3] Maasdorp[4] sê dan ook uitdruklik dat

> "[i]t follows from the very nature of possession that, in so far as it consists in physical detention, two or more persons cannot have possession of one and the same thing *singuli in solidum* at one and the same time".

Elders[5] aanvaar hy egter sonder enige bespreking met verwysing na *Rosenbuch v Rosenbuch*[6] dat indien twee persone medebeheerders van dieselfde saak was, en een van hulle vir homself eksklusiewe beheer toe-eien, die mandament van spolie ter beskikking van die ander party is. Hiermee erken hy dus dat medebeheer van sake wel moontlik is: Indien 'n persoon op die mandament van spolie geregtig is,[7] beteken dit dat hy die betrokke saak wel fisies beheer het, en die feit dat beide partye hulle op hierdie remedie kan beroep, dui daarop dat albei dieselfde saak in die geheel op dieselfde tydstip beheer het. Delport en Olivier[8] verwys na De Groot wat sonder meer aanvaar dat medebeheer van 'n saak wel moontlik is, en vervolgens na Voet wat ook die aangeleentheid bespreek. Volgens laasgenoemde is dit nie moontlik dat twee of meer persone tegelykertyd 'n saak fisies kan beheer nie, maar dit kan wel gebeur dat een persoon die saak fisies beheer, en dat 'n ander die bedoeling het om dit te beheer, of dat almal sodanige bedoeling het. Voet is dus van mening dat daadwerklike fisiese beheer slegs deur een persoon op 'n bepaalde tydstip uitgeoefen kan word. In die moderne reg is daar egter 'n beweging weg van hierdie letterlike vertolking van *possessio* en daar word al hoe meer klem gelê op die omstandighede en verkeersopvattings ten aansien van die beheer van die spesifieke saak. Gevolglik word daadwerklike beheer nie altyd vereis nie.

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2 Dit blyk egter uit dieselfde teks dat Sabinus van mening is dat sowel die persoon wat by wyse van *precarium* iets gee as die ontvanger van die saak die betrokke saak beheer; en volgens Trebatius kan dieselfde saak tegelykertyd deur 'n *iustus* en 'n *iniustus possessor* beheer word. Hieruit volg dat die Sabiniani reeds die relatiwiteit van *possessio* ingesien het. Die verbod op medebeheer in die Suid-Afrikaanse reg is (was) ook gegrond op die beskouing dat beheer eksklusief moet wees. Die erkenning van medebeheer strook volgens Kleyn *Die mandament van spolie in die Suid-Afrikaanse reg* (LLD-proefskrif Universiteit van Pretoria 1986) 360–361 met die appèlafdeling se benadering dat dit nie eksklusief hoef te wees om te voldoen aan die vereistes wat gestel word vir beskerming dmv die mandament van spolie nie.

3 Sien Paulus *D* 41 2 1 *pr* waar Labeo daarop wys dat die woord *possessio* van die woord *sedes* afgelei is as sou dit op die fisiese beheersing van 'n saak dui. Vgl Van der Merwe 97 vn 49 in dié verband. Vgl Delport en Olivier *Sakereg vonnisbundel* (1985) 74 waar hulle die stelreël teen medebesit daaraan toeskryf dat besit uitsluitlike beheer veronderstel het en dat twee of meer persone nie elkeen uitsluitlike beheer oor 'n saak kon hê nie. Hulle wys egter daarop dat twee of meer persone wel gesamentlike besitters van dieselfde saak kon wees. Uitsluitlike beheer het dan by al die besitters gesamentlik berus en elkeen het bepaalde onverdeelde aandele in die saak besit. Volgens Van der Merwe 102 is besit so uitsluitend dat meerdere partye nie tegelykertyd oor dieselfde saak in sy geheel kan beskik nie. Let egter daarop dat eksklusiewe beheer nie altyd as vereiste gestel word nie. Sien bv Sonnekus en Neels *Sakereg vonnisbundel* (1994) 129–130.

4 13.

5 23.

6 1975 1 SA 181 (W).

7 Vgl Van der Merwe 129 ev; Kleyn en Boraine *Silberberg and Schoeman's The law of property* (1992) 134 ev; Van der Walt en Pienaar *Inleiding tot die sakereg* (1996) 276 ev vir die vereistes van hierdie remedie.

8 74.

In die lig van hierdie inleidende opmerkings moet daar egter beklemtoon word dat die stelreël klaarblyklik op die fisiese aspek van beheer betrekking het en dat die vraag wat telkens beantwoord moet word, is of meerdere persone inderdaad tegelykertyd fisiese beheer oor die betrokke saak in die geheel uitoefen en, indien wel, wat die aard van die beheer is.[9] Van der Merwe[10] wys daarop dat meerdere persone oënskynlik dieselfde saak in ideële onverdeelde aandele in die geheel kan beheer. Die gemeenskaplike beheerders moet die beheer van die ander erken, en teenoor derdes geniet elkeen volle beskerming. Hy is van mening dat fisiese beheer óf deur een persoon namens die ander óf deur almal gesamentlik uitgeoefen kan word. Sodanige beheer is gevolglik nie eksklusief of uitsluitend van aard nie. Aangesien die fisiese aspek van deurslaggewende belang is, is die partye se bedoeling of *animus* nie relevant nie. Daar word met ander woorde ondersoek ingestel na die fisiese beheer wat deur hulle uitgeoefen word al dan nie. Die vraag is gevolglik nie of hulle die saak beheer nie, maar of daar daadwerklike beheer deur hulle uitgeoefen word al dan nie: met ander woorde of hulle in sodanige fisiese verhouding ten opsigte van die saak staan dat dit erken kan word vir doeleindes van byvoorbeeld beskerming. Indien twee of meer persone se aanspraak op die mandament van spolie met betrekking tot dieselfde saak erken sou word, sou dit beteken dat hulle die saak tegelykertyd fisies beheer aangesien daadwerklike fisiese beheer een van die vereistes vir die verlening van die mandament van spolie is.

Uitsonderings op die *plures eandem*-reël het al etlike male in die Suid-Afrikaanse regspraak voorgekom. Die Suid-Afrikaanse howe het hulle egter tot dusver nie oor die reël as sodanig en of dit inderdaad nog geld, uitgelaat nie. Dit gee aanleiding tot die vraag of die reël teen medebeheer nie moontlik in die lig van moderne ontwikkelings hergeformuleer of aangepas moet word ten einde voorsiening te maak vir sulke gevalle nie, aangesien dit uit die regspraak blyk dat die praktyk opsigtelik 'n behoefte aan sodanige uitbreiding het.[11]

Met verwysing na die regspraak wil dit voorkom of verskeie moontlikhede onderskei kan word wanneer die aangeleentheid van medebeheer in die geheel oor dieselfde saak ondersoek word.[12] Die eerste moontlikheid wat ondersoek moet word, is die geval waarin daar meerdere partye is wat die saak in die geheel gemeenskaplik beheer. Heerskappy oor die saak in die geheel word dus uitgeoefen deur twee (of meer) partye tussen wie daar 'n regsverhouding bestaan, soos vennote. 'n Tweede moontlikheid wat hom voordoen, is medebeheer van 'n saak in die geheel tussen twee (of meer) partye wat die betrokke saak elkeen individueel beheer, soos onafhanklike kontrakteurs as partye tot 'n boukontrak. Daar is dus geen regsverhouding tussen die partye nie en elkeen beheer die saak afsonderlik en in sy eie belang. In beide hierdie gevalle beheer die partye die saak direk en is daar geen sprake van verteenwoordiging nie. Ten slotte kan daar op 'n derde moontlikheid gewys word, naamlik waar verskillende persone 'n saak in die geheel gesamentlik, maar op verskillende wyses, beheer,[13] soos in die

9 Daar word in die SA reg aanvaar dat beheer verskillende funksies kan hê: vgl bv Kleyn 357.
10 102.
11 Sien Kleyn 358; Sonnekus en Neels 129–130.
12 Vgl Kleyn 359–360.
13 Volgens Delport en Olivier 74 bied gevalle van hierdie aard 'n probleem aangesien dit nie duidelik is of 'n mens in sodanige gevalle met afsonderlike besit of medebesit te doen het nie en of net een van die persone inderdaad besit het nie. Sien verder Maasdorp 13; Van der

vervolg op volgende bladsy

geval van 'n eienaar van 'n grondstuk en 'n persoon wat 'n serwituut ten aansien van die grond het. Hier sou dit miskien moontlik wees om enersyds tussen direkte en indirekte beheer (gevalle waar albei beheerders beoog om 'n voordeel uit die beheer te verkry) en andersyds tussen middellike en onmiddellike beheer (waar net een van die beheerders die bedoeling het om 'n voordeel te verkry) te onderskei.

Daar sal vervolgens met verwysing na die Suid-Afrikaanse regspraak en regskrywers ondersoek ingestel word na hierdie drie moontlikhede ten einde te probeer bepaal wat die voorkoms en aard van medebeheer in die Suid-Afrikaanse reg is en wat die implikasie daarvan kan wees.

2 GEMEENSKAPLIKE EN GELYKTYDIGE BEHEER OOR DIE GEHEEL VAN 'N SAAK DEUR MEERDERE PARTYE

In *Rosenbuch v Rosenbuch*,[14] waar dit in 'n aansoek om die mandament van spolie tussen eggenote geblyk het dat die vrou sekere bates teen die wil van die applikant uit die egtelike woning geneem het, is beslis dat sake wat gemeenskaplik aan die egpaar se huishouding was, deur hulle gemeenskaplik beheer is totdat dit deur een van die partye verwyder en eksklusief toegeëien is. Daar word voorts beslis dat 'n gemeenskaplike beheerder wat van sy deel van die beheer ontneem word op die mandament van spolie geregtig is as daar aan al die ander vereistes van hierdie remedie voldoen is. Indien een van die twee gemeenskaplike beheerders dus onregmatig eksklusiewe beheer van 'n saak oorneem teen die wil van sy medebeheerder, is die mandament van spolie beskikbaar.[15] Volgens die hof is daar geen gesag daarteen dat 'n gemeenskaplike beheerder die mandament van spolie kan instel nie, maar wel gesag wat dit oënskynlik steun.[16] Die goedere ten opsigte waarvan die applikant die mandament van spolie aangevra het, was almal huishoudelike artikels wat in die huishouding vir normale doeleindes deur die gemeenskaplike beheerders aangewend is. Die fisiese beheer wat hulle ten aansien daarvan uitgeoefen het, was dus objektief vasstelbaar met verwysing na die verkeersmaatstawwe in verband met sodanige goedere. Dit blyk uit die getuienis, en word ook deur die hof aanvaar, dat beide partye die goedere fisies beheer het, met ander woorde dat hulle handelinge ten aansien daarvan uitgevoer het waaruit die afleiding gemaak kan word dat dit deur hulle beheer is.

Merwe 102 vn 80 wat na Voet 41 2 5 verwys volgens wie meer as een persoon dieselfde saak ogv verskillende soorte besit kan besit – waar die een bv regmatig en die ander onregmatig besit. 'n Ander voorbeeld wat gemeld word, is dié van die pandgewer wat *possessio civilis* van 'n saak het terwyl die pandhouer slegs *possessio ad interdicta* het.

14 1975 1 SA 181 (W) 183. Let daarop dat die man beweer het dat hy eksklusiewe *possessio* oor die betrokke sake gehad het, maar dat die vrou daarop aanspraak gemaak het dat sy en haar man gemeenskaplike *possessio* daarvan gehad het.. Coleman R beslis dat "it will be doing no injustice to anyone if I assume that each of the articles with which I am concerned was jointly possessed by the spouses up to the time when it was removed by the wife".

15 Die hof beslis dat "[w]hen one of two joint possessors of a thing illicitly takes exclusive possession of that thing against the will of his co-possessor the *ratio* underlying the remedy of a spoliation order would seem to me to be as fully applicable as in the case where a person has been wrongfully deprived of exclusive possession" (183).

16 Die hof verwys (183) na *Nienaber v Stuckey* 1946 AD 1049 1056 waarin beslis is dat die mandament van spolie ter beskikking is van een van twee persone wat die saak gemeenskaplik beheer het indien die ander onregmatig eksklusiewe beheer vir homself toegeëien het.

In *Oglodzinsky v Oglodzinsky*,[17] waar die applikant aansoek gedoen het om die mandament van spolie op grond daarvan dat sy vrou die slotte van hulle woonstel se deure teen sy sin verander het, beslis die hof met verwysing na die vorige saak[18] dat daar geen rede bestaan waarom getroude persone wat gemeenskaplike beheerders van 'n saak is, uitgesluit moet word van die toepassing van die mandament van spolie nie en staan gevolglik die versoek toe.[19] Hieruit volg dat dit onregmatig is indien 'n gemeenskaplike beheerder eksklusiewe beheer neem. Die partye in die *Oglodzinsky*-saak het albei fisiese beheer oor die woonstel uitgeoefen deurdat beide sleutels gehad het wat toegang daartoe verleen het.[20] Deur die eensydige verandering van die slotte het die eggenote haar eggenoot toegang tot die woonstel ontneem en dus vir haarself eksklusiewe beheer toegeëien. Die fisiese beheer wat hulle oor die woonstel uitgeoefen het, strook met die verkeersmaatstawwe: Daar word algemeen aanvaar dat sleutels wat toegang tot 'n gebou verleen ook beheer daaroor verleen.[21] Daar kon derhalwe objektief waargeneem word dat beide partye fisiese beheer oor die woonstel gehad het voordat die slotte verander is. In hierdie geval het die gemeenskaplike beheerders die saak elkeen in die geheel beheer en die feit dat een van hulle vir haarself eksklusiewe beheer toegeëien het, het beteken dat die ander se beheer beëindig is en dat hy daarop kon aanspraak maak om in sy beheer herstel te word.

Die hof verwys ook na *Badenhorst v Badenhorst*[22] waarin beslis is dat 'n eggenote geen reg het om haar eggenoot uit die egtelike woning te sit bloot omdat sy eiendomsreg daarvan het nie. Die feit dat hulle getroud is, het tot gevolg dat hy uit hoofde van die huwelik sekere bevoegdhede ten aansien van die eiendom verkry wat hom in 'n totaal ander verhouding ten opsigte daarvan plaas as 'n vreemdeling. Dit is dus duidelik dat die eiesoortige verhouding tussen eggenote ook in hierdie geval wys op die behoefte aan die erkenning van medebeheer.

In *Mankowitz v Loewenthal*[23] het die partye ooreengekom om te trou sodra die respondent 'n egskeiding gekry het wat in Suid-Afrika erken sou word. Hulle het saam 'n huis betrek. Nadat daar onmin tussen hulle ontstaan het, het die vrou die huis verlaat en twee waardevolle skilderye met haar saamgeneem. Die man het daarop suksesvol om 'n spoliasiebevel aansoek gedoen. Alhoewel die vrou beweer het dat die skilderye deur die man aan haar geskenk is, is hulle nooit aan haar gelewer nie en is beheer oor albei (die een teen die sitkamermuur en die ander in 'n linnekas waarvan albei die partye sleutels gehad het) deur beide partye uitgeoefen. Aangesien die man se beheer oor die skilderye voortgeduur het en steeds bestaan het toe sy dit uit die huis verwyder het, slaag haar appèl teen die spoliasiebevel nie.[24] In hierdie saak is met ander woorde ook aanvaar

17 1976 4 SA 273 (D).

18 "The Court held that a joint possessor should be entitled to the remedy of a spoliation order if the other factors requisite for such relief are present and that where one of the two joint possessors of a thing illicitly takes exclusive possession of that thing against the will of his co-possessor the *ratio* underlying the remedy of a spoliation order is as fully applicable as in the case where a person has been wrongfully deprived of exclusive possession . . ." (275).

19 Vgl *Nienaber v Stuckey* 1946 AD 1049 1055–1056 waar die hof beslis dat eksklusiewe beheer nie noodsaaklik is vir die verlening van die mandament van spolie nie.

20 1976 4 SA 273 (D) 274.

21 Vgl Van der Merwe 99.

22 1964 2 SA 676 (T) 679.

23 1982 3 SA 758 (A).

24 767.

dat beheer oor die betrokke sake in die gemeenskaplike woning deur beide partye uitgeoefen is.

Sonnekus[25] bespreek die reël teen medebeheer onder meer met verwysing na die *Rosenbuch*- en *Oglodzinsky*-beslissing. Hy is van mening dat dit moontlik bevredigend toegepas is in 'n eenvoudige samelewing, maar wys daarop dat dit in 'n komplekse moderne gemeenskap probleme oplewer en noem dan hierdie sake as voorbeelde van beslissings waar die hof medebeheer nie alleen moontlik nie, maar ook beskermingswaardig geag het. In sy bespreking van die sake sê hy dat alhoewel regter Colman in die *Rosenbuch*-saak na *Nienaber v Stuckey*[26] verwys, die begrip medebeheer nie in daardie uitspraak voorkom nie. Dit volg uit die feite van die saak dat die vraag daar ter sake eerder was of die huurder as nie-eksklusiewe beheerder aan die fisiese element van beheer voldoen het. Hy gee egter toe dat dit moontlik as 'n terloopse verwysing na medebeheer vertolk sou kon word. Indien daar wel erkenning aan sowel eksklusiewe as nie-eksklusiewe beheer verleen word, word implisiete (indirekte) erkenning aan medebeheer verleen.[27]

Sonnekus wys daarop dat sowel die Romeinse as die Romeins-Hollandse reg aanvaar het dat dit moontlik is om deur middel van 'n verteenwoordiger aan die fisiese element van beheer te voldoen.[28] In so 'n geval het die verteenwoordiger hoogstens die bedoeling gehad om die saak te hou, met ander woorde om namens sy prinsipaal die fisiese verhouding ten aansien van die saak te beklee. Daar was dan slegs een beheerder van die saak, te wete die prinsipaal. Die verteenwoordiger is nie beskerm nie, en indien versteuring sou plaasvind, was dit die prinsipaal wat sy toevlug tot die remedie kon neem. In so 'n geval van middellike beheer was die onmiddellike beheerder dus nie op die mandament van spolie geregtig nie.

Die Romeinse en Romeins-Hollandse regsreël dat medebeheer in die geheel nie erken word nie, het veral op die fisiese element van *possessio* betrekking gehad. Hieruit wil dit voorkom dat as gevolg van die daadwerklike fisiese verhouding wat dit behels, slegs een persoon op 'n gegewe moment aan die *corpus*-element kon voldoen.

In die *Rosenbuch*-, *Oglodzinsky*- en *Mankowitz*-saak het die hof egter beslis dat albei partye die betrokke sake gesamentlik beheer het. Dit wil dus voorkom of daar in die moderne Suid-Afrikaanse reg aanvaar word dat dit noodsaaklik is om medebeheer ten minste in sommige gevalle te erken as 'n feit waaraan die reg ook die gevolg van beskerming heg. In 'n moderne regstelsel waar 'n vrou se status in beginsel aan dié van haar man kan gelykstaan en waar beide partye 'n beskermingswaardige belang in die beheer van bepaalde bates in die gemeenskaplike huishouding kan hê, selfs al is net een eggenoot die eienaar daarvan,

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25 "Eggenote, medebesit en die mandament van spolie?" 1978 *SALJ* 217. Sien ook Sonnekus en Neels 162.

26 1946 AD 1049.

27 Sonnekus en Neels 164 verwys ook in hierdie verband na *Meyer v Glendinning* 1939 CPD 84. In hulle bespreking van die saak sê hulle dat dit so gelees kan word as sou daar 'n moontlikheid wees dat meerdere persone tegelykertyd in beheer van dieselfde saak kan wees, alhoewel hulle dan nie noodwendig dieselfde bevoegdhede tav die saak uitoefen nie. Dit dui daarop dat die fisiese element van besit vir sowel kwalitatiewe as kwantitatiewe verdeling vatbaar is. In so 'n geval sal die eienaar dan nog 'n mate van beheerbevoegdheid oor die saak behou ten spyte daarvan dat beheer hoofsaaklik deur 'n ander uitgeoefen word.

28 1978 *SALJ* 220.

moet die reg vir die beskerming van beheer voorsiening maak – desnoods teen die eienaar-eggenoot.[29] In die *Rosenbuch-* en *Oglodzinsky*-saak het die reg, volgens Sonnekus, die belange van die eggenote in die feitlike medebeheerverhouding binne die huwelik beskerm deur dit as 'n regsfeit te erken.[30] Hy wys ten slotte daarop dat dit ook uit die vennootskapsreg blyk dat daar in die praktyk 'n duidelike behoefte is aan die erkenning en beskerming van medebeheer as 'n regsfeit.[31]

3 INDIVIDUELE EN GELYKTYDIGE BEHEER OOR DIE GEHEEL VAN 'N SAAK DEUR MEERDERE PARTYE

In *Beetge v Drenka Investments*,[32] 'n saak waarin verskeie onafhanklike kontrakteurs verskillende dele van dieselfde gebou voltooi het, en die applikant (een van die kontrakteurs) geëis het dat sy beheer herstel word ten aansien van die erf met die gebou daarop waarop hy beweer het hy 'n retensiereg het, beslis regter Ludorf dat daar nie in *Israelson's Trustee v Harris & Black*[33] beslis is dat meerdere kontrakteurs nooit tegelykertyd 'n gebou kan beheer met die doel om 'n retensiereg uit te oefen nie. Daar is geen sprake van gesamentlike okkupasie deur die verskillende kontrakteurs wat op die perseel gebou of ander dienste gelewer het nie. Elke kontrakteur het onafhanklik gewerk; elkeen het 'n spesifieke, omlynde opdrag verrig en daar kan dus eerder gesê word dat elkeen 'n individuele retensiereg op die gebou as geheel uitoefen as gevolg van die taak wat hy ten aansien daarvan verrig het (byvoorbeeld loodgieterswerk, elektriese werk, teëlwerk, ensovoorts) en waarvoor hy nie vergoed is nie. Hulle oefen met ander woorde elkeen individueel (onafhanklik van mekaar) beheer oor die hele gebou uit. Die hof wys voorts daarop dat dit telkens van die omstandighede sal afhang

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29 Vgl ook Sonnekus en Neels 130.

30 1978 *SALJ* 222–223.

31 1978 *SALJ* 223–224. Sien verder Sonnekus en Neels 130. Sien ook Kleyn 359 volgens wie die medebeheerders in gevalle van hierdie aard almal aan die *corpus*-vereiste tov die saak voldoen het. Al die betrokke partye pleeg beheerdade tov die saak. Vgl Delport en Olivier 101 waar daar terloops na *De Abreu v Silva* 1964 2 SA 416 (T) verwys word. In hierdie saak is *obiter* opgemerk dat 'n vennoot op die mandament van spolie teen 'n medevennoot geregtig is indien dit uit die vennootskapsooreenkoms sou blyk dat hy op uitsluitlike beheer van die saak ('n vennootskapsbate) geregtig was. Delport en Olivier 74 is egter van mening dat vennote hulle ook in ander gevalle op die mandament sou kon beroep: Aangesien eksklusiewe beheer van die saak nie 'n vereiste vir die mandament van spolie is nie (vgl *Nienaber v Stuckey* 1946 AD 1049 1056), behoort 'n vennoot hom op die mandament van spolie te kan beroep in 'n geval waar vennote (maw meerdere persone) 'n saak saam beheer en een party eksklusiewe beheer oor die saak vir homself sou toe-eien. Vgl verder *Brighton v Clift* 1970 4 SA 247 (R) 249 waar die mandament van spolie aan die applikant verleen is nadat sy vennoot sekere bates van die vennootskap waarvan hulle medebeheerders was, eksklusief vir homself toegeëien het.

32 1964 4 SA 62 (W) 67: "In my view the learned Judge . . . did not lay down the proposition that several independent contractors could never possess a building for the purpose of asserting a *ius retentionis*."

33 1905 SC 135. Daar word ook in *Hillkloof Builders (Pty) Ltd v Jacomelli* 1972 4 SA 228 (D) 230 na die *Israelson*-saak verwys, maar geen beslissing word gegee oor die vraag of meerdere beheerders genoegsame beheer vir doeleindes van 'n retensiereg kan uitoefen nie. Vgl in dié verband ook Maasdorp 236 wat van mening is dat waar verskillende kontrakteurs onafhanklik van mekaar met die eienaar kontrakte sluit om bepaalde dienste te lewer in die oprigting van die gebou, daar nie gemeenskaplike okkupasie is van die hele gebou deur al die kontrakteurs of individuele okkupasie van die hele gebou deur elkeen afsonderlik nie.

of die diensnemer of kontrakteur werklik beheer verkry het oor die saak met betrekking waartoe die diens gelewer is. Indien die kontrakteur beheer ontvang het vir doeleindes van die uitvoering van sy opdrag, kan hy beheer behou vir doeleindes van die retensiereg.[34] In geval van meerdere kontrakteurs kan óf almal óf een of meer beheer behou ten einde die retensiereg af te dwing. Elkeen tree individueel op en indien een betaal sou word en gevolglik van sy retensiereg sou afstand doen, duur die ander se retensieregte voort tot tyd en wyl hulle óf betaal word óf vrywillig hulle onderskeie retensieregte laat vaar. Hulle beheer is vir doeleindes van die retensieregte gevolglik nie eksklusief nie.

Die fisiese beheer wat deur die retensiereghouer uitgeoefen word, sal telkens objektief vasgestel word met verwysing na die verkeersmaatstawwe rakende die betrokke saak. In die *Beetge*-saak, waar 'n gebou ter sprake was, het die kontrakteur wat op die retensiereg aanspraak gemaak het, 'n sleutel gehad wat hy gebruik het om ander persone uit die gebou te hou ten tyde van sy afwesigheid. Hy het voorts sy boumateriaal en gereedskap op die perseel gebring en 'n wag aangestel om dit te bewaak. Ten slotte was hy, met uitsondering van 'n vakansie, voortdurend fisies op die perseel teenwoordig en het hy deurentyd die bedoeling gehad om beheer te behou.

4 GEMEENSKAPLIKE EN GELYKTYDIGE BEHEER OOR DIE GEHEEL VAN 'N SAAK DEUR MEERDERE PARTYE WAT DIE SAAK OP VERSKILLENDE WYSES BEHEER

4 1 Direkte en indirekte beheer

In *Nino Bonino v De Lange*[35] is 'n deel van 'n restaurant deur die huurder onderverhuur. Laasgenoemde het dus direkte fisiese beheer oor daardie deel van die gebou verloor terwyl die onderhuurder beheer daaroor verkry het. Nadat die onderhuurder na bewering bepaalde kontraksbedinge geskend het, het die huurder die kontrak eensydig opgesê, toegang tot die perseel versper en op die sleutels beslag gelê. Die onderhuurder het daarop op die mandament van spolie aanspraak gemaak ten einde in sy beheer herstel te word. Dit is opvallend dat die huurder in die Romeinse reg nie op beskerming geregtig was nie – hy moes deur middel van die verhuurder ageer. In die Suid-Afrikaanse reg is die huurder wel op sodanige beskerming geregtig; dit beteken dus dat sowel die huurder as die verhuurder op beskerming kan aanspraak maak. Vir doeleindes van die mandament van spolie word die verhuurder dus geag nog steeds beheer oor die saak uit te oefen. Een van die vereistes vir die mandament van spolie is immers dat die applikant vreedsame en ongestoorde fisiese beheer oor die saak moet uitgeoefen het voordat hy onregmatig van sy beheer ontneem is of in sy uitoefening daarvan gesteur is. Daar sou moontlik in hierdie geval gesê kon word dat die huurder indirekte beheer oor die onderverdeelde deel uitoefen terwyl die onderhuurder direkte beheer daaroor het. Terwyl laasgenoemde die onderverdeelde gedeelte

34 Dit sal geen verskil maak indien die kontrakteur beheer verkry oor 'n groter deel van die gebou as dit waarvoor hyself verantwoordelik was nie. Ludorf R noem as voorbeeld 'n motorwertuigkundige wat beheer van 'n motor verkry ten einde herstelwerk daaraan te verrig en dan 'n retensiereg ten opsigte van die hele motor kan vestig om betaling af te dwing alhoewel die koste van die herstelwerk gering in vergelyking met die waarde van die motor is (69).

35 1906 TS 120.

gehuur het en die sleutels beheer het wat toegang daartoe verleen het, het hy direkte fisiese beheer oor die kamer gehad. Die onderhuurder se direkte fisiese beheer ten aansien van die huursaak is objektief waarneembaar: Hy gebruik dit vir 'n spesifieke doel en voorts het hy daadwerklike fisiese beheer oor die sleutels wat toegang tot die kamer verleen. Die huurder (onderverhuurder), wie se fisiese beheer vir doeleindes van beskerming geag word voort te duur terwyl hy die saak onderverhuur, oefen indirek beheer oor die kamer uit. Laasgenoemde se beheer is nie, soos dié van die onderhuurder, fisies waarneembaar nie. Aangesien die onderhuurder ook nie as verteenwoordiger van die huurder optree nie en dus nie die kamer namens hom beheer nie, is daar hier ook nie van middellike beheer sprake nie. Hy oefen gevolglik nie deur middel van die onderhuurder fisiese beheer uit nie. Albei die partye tree in hulle eie belang op. Die fisiese beheer wat veronderstel word deur die huurder uitgeoefen te word vir doeleindes van beskerming by wyse van die mandament van spolie, is met ander woorde glad nie fisies waarneembaar nie alhoewel dit geag word te bestaan. Indirekte beheer is derhalwe nie objektief waarneembaar nie maar sal telkens uit die omringende omstandighede van elke geval afgelei moet word. Sowel die huurder as die onderhuurder oefen hulle fisiese beheer – hetsy indirek of direk – tot hulle eie voordeel uit en word self daardeur bevoordeel.

In *Nienaber v Stuckey*[36] is daar met verwysing na *Nino Bonino v De Lange* beslis dat eksklusiewe beheer nie noodsaaklik is vir die verlening van die mandament van spolie nie. In laasgenoemde saak word spoliasie met verwysing na Leyser omskryf as "any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right",[37] en dit sluit oënskynlik ook serwitute in.

Die vraag of daar vir doeleindes van die mandament van spolie beheer of kwasibeheer oor onliggaamlike sake uitgeoefen kan word, het reeds in verskeie sake ter sprake gekom:[38]

In *Naidoo v Moodley*[39] het die appellant die eerste vloer van 'n dubbelverdiepingwoning aan respondent verhuur. Die woning was toegerus vir die gebruik van elektrisiteit. Nadat respondent geweier het om gehoor te gee aan appellant se kennisgewing dat hy die huurtermyn beëindig, het die appellant sy elektrisiteitstoevoer afgesny. Die respondent het daarop suksesvol aansoek gedoen om 'n spoliasiebevel wat in appèl bekragtig is.

In *Froman v Herbmore Timber and Hardware (Pty) Ltd*[40] het die appellant 'n meenthuis by die respondent gekoop. Die partye het ooreengekom dat appellant die huis sou betrek en okkupasiehuur sou betaal totdat oordrag van die eenheid geregistreer is. Reëlings vir die betaling van elektrisiteit en water is ook getref. Respondent het daarop die kontrak gekanselleer en appellant versoek om die meenthuis te ontruim. Nadat hy geweier het om aan hierdie versoek gehoor te gee, het appellant die elektrisiteits- en watertoevoer afgesny. Die hof verleen 'n spoliasiebevel.

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36 1946 AD 1049 1055–1056.
37 1906 TS 120 122.
38 Vgl ook Kleyn 390 392–395.
39 1982 4 SA 82 (T).
40 1984 3 SA 609 (W).

In *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*[41] het die respondent dekades lank water gebruik uit die Otavifontein wat op 'n plaas naby die dorp Otavi geleë was. Die water is in 'n opgaartenk gepomp vanwaar dit na die dorp gelei en onder die inwoners versprei is. Nadat die appellant die watertoevloei afgesny het, het die respondent suksesvol aansoek gedoen om 'n spoliasiebevel. Die appèl teen die bevel word van die hand gewys.

In *Zulu v Minister of Works, Kwazulu*[42] het die applikant aansoek gedoen om die tersydestelling van 'n besluit van die respondente om die watertoevoer na sy huis te beëindig. Hy het vroeër 'n waterpyp op eie onkoste aan die pypstelsel van die koninklike huishouding gekonnekteer en hy het jare lank op hierdie wyse gratis water gekry. Nadat die watertoevoer beëindig is, het hy om 'n spoliasiebevel aansoek gedoen. Die aansoek is van die hand gewys op grond daarvan dat die applikant nie kon bewys dat hy fisiese beheer gehad het nie.

In die *Naidoo*-, *Froman*- en *Bon Quelle*-saak is telkens beslis dat die persoon wat om die spoliasiebevel aansoek gedoen het, wel fisiese beheer uitgeoefen het waarop daar óf inbreuk gemaak is óf waarvan hy ontneem is deur die optrede van die spoliator.[43]

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41 1989 1 SA 508 (A).

42 1990 1 SA 181 (D).

43 Vgl *Naidoo v Moodley* 1982 4 SA 82 (T) 84: "In my opinion the use of the electricity was an incident of occupation which respondent had of the first floor of the dwelling. He occupied the top floor of the residence in question, not only by being physically present therein, but by using its appurtenances, including electrical installations and power," en "[A]ppellant, by cutting off the electricity, substantially interfered with respondent's occupation of the premises in question." In *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) haal Hefer AR soos volg aan uit *Jansen v Madden* 1968 1 SA 81 (GW) 84: "[A] person claiming such an order must therefore show that he is the holder of such a right and not merely that he claims such a right. An incorporeal such as a servitude cannot of course be possessed in the ordinary sense of the word and the possession is represented by the actual exercise of the right with the result that the refusal to allow a person to exercise the right will amount to a dispossession of such a right" (512). Hy laat hom dan soos volg uit: "'n Onliggaamlike saak soos 'n serwituut is natuurlik nie vatbaar vir fisiese 'besit' in dieselfde sin as wat daardie uitdrukking gebruik word met betrekking tot liggaamlike sake nie, maar wel vir *quasie possessio* wat bestaan uit die daadwerklike gebruik van die serwituut ... In die samehang van die mandament van spolie neem, soos later sal blyk, die daadwerklike gebruik van die beweerde serwituut die plek van besit van 'n liggaamlike saak" (514). In *Zulu v Minister of Works, Kwazulu* 1992 1 SA 181 (D), waar die aansoek afgewys is, laat Thirion R hom soos volg uit met verwysing na (oa) bg sake: "In all these cases the *spoliatus* had exercised physical control, one way or another, over corporeal property, although the control was not exclusive. The spoliator deprived him wholly or partially of this control and was ordered to restore his control to the extent to which he had deprived him of it" (186). Mbt daardie sake waarin die toevoer van elektrisiteit en/of watertoevoer beëindig is, sê hy die volgende: "Those installations formed part of the premises of which the *spoliatus* had control. The occupation of the premises extended to the use of the installations for the supply of water and electricity to the premises" (187). Hy kom tot die volgende gevolgtrekking: "Accepting then that what is protected by the remedy is the actual performance of acts which if lawfully performed would constitute the exercise of a right ..." (188). Vgl ook ivm die *Naidoo*-saak Van der Walt "*Naidoo v Moodley* 1982 4 SA 82 (T)" 1983 *THRHR* 238, "Nog eens *Naidoo v Moodley* – 'n repliek" 1984 *THRHR* 430; De Waal "Mandament van spolie: *Naidoo v Moodley* 1982 4 SA 82 (T)" 1984 *THRHR* 115. Sien ivm die *Froman*-saak Sonnekus "Mandament van spolie – kragtige remedie by kragonderbreking?" 1985 *TSAR* 337. Vir die *Bon Quelle*-saak vgl Van der Walt "Die mandament van spolie en *quasi*-besit" 1989 *THRHR* 448 449–450 451 452; *contra* Sonnekus "Besit van serwituutbevoegdhede,

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Regter Thirion verwys in die *Zulu*-saak[44] met goedkeuring na Van der Walt[45] se gevolgtrekking dat die gevalle waar die mandament van spolie na bewering ter beskerming van kwasi-besit toegepas is, op enkele uitsonderings na sake was waarin dit eintlik toegepas is om fisiese beheer of kontrole oor liggaamlike sake te herstel waar die uitoefening van feitelike beheer of kontrole onderbroke was en nie eksklusief nie. Eweneens stem hy saam met Van der Walt se standpunt dat die houer van 'n serwituut van reg van weg oor 'n eiendom inderdaad fisiese beheer van die pad het:[46] Sy beheer is nie so omvattend en deurlopend soos dié van die eienaar of die huurder van die grond nie, maar strek net sover as sy gebruik daarvan. In die *Naidoo*-saak[47] beslis regter Eloff dat die respondent se beheer van die woning nie net behels het dat hy fisies daar teenwoordig was nie, maar ook dat hy van die elektrisiteit wat voorsien is, gebruik kon maak. Hy het dus direkte beheer oor die verdieping gehad wat hy gehuur het terwyl die verhuurder deurentyd indirekte beheer daarvan gehad het. In die *Froman*-saak was daar ook twee persone wat beheer oor die meenthuis uitgeoefen het, naamlik die verkoper en die koper wat volgens ooreenkoms vóór registrasie van oordrag huurgeld moes betaal terwyl hy die huis bewoon het. Die respondent in die *Bon Quelle*-saak het ook beheer oor die saak uitgeoefen vir sover hy die bevoegdhede uitgeoefen het wat hom ingevolge die serwituut toegekom het. Hierdie beheer was onderbroke en nie eksklusief nie maar voldoende vir die verlening van die mandament. Regter Thirion beslis dan ook uitdruklik in die *Zulu*-saak[48] dat "in all these cases [waaronder die hier gemelde sake] the *spoliatus* had exercised physical control, one way or another, over corporeal property, although the control was not exclusive".

Dit bevestig met ander woorde eerstens dat beheer vir doeleindes van die mandament van spolie nie eksklusief hoef te wees nie en tweedens dat daar te alle tye meer as een persoon was wat feitelike beheer ten aansien van die betrokke saak uitgeoefen het. Dit gaan volgens Van der Walt[49] dus hier oor die onderbroke en beperkte beheer wat gewoonlik by die gebruik van die dienende saak deur die serwituuthouer aangetref word. 'n Persoon wat serwituutbevoegdhede of serwituutagtige handelinge op 'n stuk grond uitoefen, kan dus ook op die mandament van spolie aanspraak maak indien sy beheer onregmatig ontsê word. In hierdie geval is daar weer van twee soorte beheer sprake, naamlik dié van die eienaar wat nog steeds bepaalde regte ten aansien van die grond behou, en dié van die serwituuthouer om die bevoegdhede uit te oefen wat hom ingevolge die serwituut toekom. Die hof[50] verwys in hierdie verband na De Blécourt volgens

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mandament van spolie en logika" 1989 *TSAR* 436 volgens wie die uitoefening van die diensbaarheid van watertrekking egter nie neerkom op 'n gedeeltelike beheer van die dienende erf nie. Sien ivm die *Zulu*-saak Sonnekus "Spolie van waterverskaffing en die passiwiteitsbeginsel" 1992 *TSAR* 330–331. Sien ook Kleyn 394 395, "Die betekenis van die begrip 'spolie'" 1986 *De Jure* 282 284. Vgl verder Kleyn 376–378 wat bevestig dat gedeeltelike ontneming van beheer genoegsaam is om spolie daar te stel.

44 190.

45 1989 *THRHR* 450.

46 *Ibid.* Sien ook Sonnekus 1989 *TSAR* 436 volgens wie die uitoefening van 'n reg van weg neerkom op 'n gedeeltelike beheer van die dienende erf.

47 84.

48 186.

49 1989 *THRHR* 450.

50 *Nienaber v Stuckey* 1946 AD 1049 1056 met verwysing na *Kort begrip van het oud-vaderlands burgerlijk recht* (5de uitg) 189.

wie daar verskillende regte ten aansien van dieselfde grondstuk kan wees wat gesetel is in verskillende persone wat almal op die mandament van spolie geregtig is. Die feit dat hulle nie eksklusiewe beheer oor die grond het nie, doen gevolglik nie daaraan afbreuk dat hulle beheer beskerm word nie. Hulle word geag beheer oor die saak uit te oefen maar vir verskillende doeleindes en op verskillende wyses. Die eienaar se beheer sou as indirek omskryf kon word, terwyl die serwituuthouer se beheer direk uitgeoefen word. Eersgenoemde se beheer word deur laasgenoemde s'n ingeperk maar nie heeltemal opgeskort nie en in bepaalde gevalle sou hy dan tog daarop kon aanspraak maak dat hy nog beheer oor die grondstuk uitoefen.

Die direkte beheer wat deur die serwituuthouer uitgeoefen word, is objektief waarneembaar en die bestaan daarvan word aan heersende verkeersmaatstawwe gemeet.[51] Alhoewel die eienaar onder meer vir doeleindes van beskerming nog steeds sekere bevoegdhede ten opsigte van die grond behou, is die indirekte beheer wat hy ten aansien daarvan uitoefen, nie fisies waarneembaar terwyl die serwituuthouer sy bevoegdhede onder die serwituut uitoefen nie aangesien sy bevoegdhede daaruit bestaan dat hy die grond mag gebruik wanneer die serwituuthouer dit nie gebruik nie. Hulle kan in hierdie geval nie tegelyk die grond bewerk nie.[52]

In *Bank van die Oranje-Vrystaat v Rossouw*[53] het die applikant 'n vragmotor aan die respondent verhuur maar dit, nadat die paaiemente agterstallig geraak het, teruggeneem van 'n paneelklopper wat 'n retensiereg ten aansien daarvan gevestig het weens herstelwerk wat hy namens die respondent ten opsigte daarvan verrig het. Die hof beslis dat daar geen spoliasie teenoor die huurder (respondent) plaasgevind het nie aangesien hy van sy beheer afstand gedoen het toe hy die vragmotor aan die paneelklopper oorhandig het. Van der Walt[54] is egter van mening dat die applikant, in die lig van die eiesoortige oorwegings wat voortspruit uit die doel en aard van die mandament van spolie, voldoende fisiese beheer oor die saak gehad het aangesien hy "fisies of feitelik" in staat was om weer beheer oor die vragmotor uit te oefen "bloot" deur die herstelkoste aan die paneelklopper te betaal. Hy beroep hom op Van der Merwe[55] volgens wie die objektiewe maatstaf ten einde te bepaal of die persoon wat beweer dat hy in beheer was, inderdaad voldoende fisiese beheer behou het om die mandament van spolie in te stel, die vraag is of hy in staat was om fisiese beheer oor die saak met uitsluiting van ander persone te herwin nadat hy tydelik daarvan afstand gedoen het. Van der Walt voer dus aan dat die respondent die tydelike verlies van beheer kan beëindig deur die paneelklopper te vergoed vir sy dienste. Met hierdie argument kan egter nie saamgestem word nie.

Alhoewel toegegee word dat die respondent se fisiese beheer moontlik nie beëindig is toe hy die saak met die oog op die herstelwerk aan die paneelklopper

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51 Vgl *Nienaber v Stuckey* 1046 AD 1049 1056–1056.

52 Dit is egter wel in geval van sekere serwitute moontlik dat sowel die eienaar as die serwituuthouer hulle bevoegdhede fisies tegelykertyd kan uitoefen, soos waar die serwituuthouer 'n reg van weg oor sy buurman se plaas het en die betrokke pad deur beide benut word.

53 1984 2 SA 644 (K).

54 "*Bank van die Oranje-Vrystaat v Rossouw* 1983-09-19 KPA saak A 60/83 ongerapporteer" 1984 *THRHR* 228–229.

55 *Sakereg* (1979) 70.

oorhandig het nie (gesien die maatstaf dat fisiese beheer *finaal* beëindig moet word en nie bloot tydelik nie[56]), het die paneelklopper 'n sterker fisiese beheer oor die vragmotor verkry toe hy sy retensiereg gevestig het en dit is aanduidend daarvan dat die oorspronklike verhouding beëindig is.

In *Allan & David (Pty) Ltd v Ingram*[57] het die eiser die prys van vyf paneelwaens van verweerder (likwidateur van B maatskappy) geëis. Alhoewel die eiser vir B toegelaat het om veranderings aan die paneelwaens aan te bring ten einde dit in mobiele klinieke vir die Kersfeesfonds te verander, het hy geweier dat B die paneelwaens op krediet koop en gesê dat die voertuie nie geregistreer mag word alvorens hulle betaal is nie. Hy het gevolglik die duplikaatsleutels, petroldoppies, waarborg en diensboek teruggehou as bewys daarvan dat hy eiendomsreg ten aansien van die voertuie behou. Nadat B maatskappy gelikwideer is, is die voertuie verkoop en die opbrengs daarvan in 'n rekening inbetaal. Die hof beslis dat dit 'n kontantkoop was en dat eiendomsreg gevolglik nie kon oorgaan alvorens betaling geskied het nie. Daar word verder beslis dat die eiser nie ingevolge die Insolvensiewet[58] die eiendom terug hoef te geëis het nie aangesien hy nooit van eiendomsreg of selfs van "possession in the true legal sense"[59] afstand gedoen het nie – B het slegs vir 'n bepaalde doel *detentio* (fisiese beheer) van die paneelwaens gehad.

Regter Foxcroft[60] beslis met verwysing na *Commissioner of Customs & Excise v Randles Brothers & Hudson Ltd*[61] dat eiendomsreg van roerende goed nie oorgaan wanneer die kontrak gesluit word nie, maar wel wanneer lewering plaasvind met die bedoeling aan die kant van die vervreemder om eiendomsreg oor te dra gepaard met die ontvanger se bedoeling om eiendomsreg te ontvang. Dit is duidelik dat dit nie in hierdie saak die geval was nie. Volgens die hof het B 'n "very limited form of possession"[62] gekry. Eiser het die voertuie nog steeds as sy eiendom beskou. Die hof beslis dat die eiser deurentyd eiendomsreg behou het. B het net vir 'n beperkte en omskrewe doel fisiese beheer van die paneelwaens gehad en dit kon nooit in eiendomsreg oorgaan nie – selfs nie eens as hy die geld sou betaal het nie – aangesien hy nie die nodige bedoeling daarvoor gehad het nie. Hy het die veranderings aan die voertuie aangebring in opdrag van die Kersfeesfonds wat ná die omskakelings en betaling van die koopprys as eienaar van die paneelwaens geregistreer sou word. Die hof sluit af deur te sê dat die eiser "never ceased to hold the vehicles"[63] en te alle tye eiendomsreg daarvan behou het. Uit die feite van hierdie saak blyk dit duidelik dat B direkte beheer oor die voertuie gehad het maar dat die eiser dit ook deurentyd gehou het in die sin dat hy *indirekte* beheer daaroor gehad het (deurdat hy die duplikaatsleutels, waarborg, diensboek, ensovoorts teruggehou het). Daar was dus die hele tyd direkte beheer deur B en indirekte beheer deur die eiser. Omdat B nie in opdrag van die eiser of as sy verteenwoordiger of agent opgetree het nie, kan daar nie in hierdie geval van middellike beheer gepraat word nie. Hierdie is dus 'n geval

56 Sien Van der Walt en Pienaar 307.
57 1989 3 SA 333 (K).
58 24 van 1936 a 36.
59 341.
60 339.
61 1941 AD 369 398.
62 339.
63 342.

waar twee persone heeltemal afsonderlik van mekaar (aangesien daar geen regsverhouding tussen hulle bestaan nie) tegelykertyd beheer oor die betrokke sake in die geheel uitgeoefen het – elkeen vir sy eie doeleindes en op verskillende wyses. Daar sou geargumenteer kon word dat die mandament van spolie in bepaalde omstandighede ter beskikking van albei sou kon wees. Byvoorbeeld, indien die voertuie onregmatig deur 'n derde uit B se fisiese beheer verwyder sou word, sou hy (of, alternatief, die eiser as eersgenoemde sou nalaat om dit te doen) oor die mandament van spolie as remedie beskik. Die eiser het immers deurentyd beheer van die voertuie behou[64] terwyl B ook beheer daaroor uitgeoefen het. Albei partye voldoen aan die beheervereiste wat vir die mandament gestel word. Dit is gevolglik noodsaaklik dat die indirekte beheerverhouding ook erken moet word. Medebeheer in die geheel van dieselfde saak verdien met ander woorde erkenning ten einde regverdige en billike resultate in die praktyk teweeg te bring.

4 2 Middellike en onmiddellike beheer

Daar bestaan geen sekerheid of sowel die middellike as die onmiddellike beheerder van 'n spesifieke saak albei in hulle beheer daarvan beskerm word nie. Middellike beheer kom in *Mbuku v Mdinwa*[65] ter sprake. In hierdie saak het 'n verteenwoordiger omgesien na 'n aantal beeste wat die eienaar geërf het. Die hof bevestig[66] dat fisiese beheer óf persoonlik óf deur middel van 'n verteenwoordiger uitgeoefen kan word.[67] Hoofregter Hefer aanvaar[68] dat 'n verteenwoordiger wat geen belang het by die saak wat hy namens sy prinsipaal hou of wat geen voordeel daaruit verkry nie, nie op die mandament van spolie geregtig is nie. Hy wys daarop dat dit 'n remedie is wat die "*possessor*" toekom, en dat, sover sy kennis strek, dit nog nooit aan 'n blote "*detentor*" verleen is nie. Hierdie houer (*detentor*) het geen bedoeling om die saak vir sy eie voordeel te hou nie. Wanneer 'n agent dus 'n saak namens sy prinsipaal hou, is dit nie die agent wat *possessio* het nie, maar die prinsipaal. Die agent is in hierdie geval net 'n blote houer. Hy kan tegnies as die onmiddellike beheerder en die prinsipaal as die middellike beheerder van die saak beskou word. Volgens die hof sou die agent hom ook op die mandament van spolie kon beroep indien hy 'n belang in die saak sou hê.[69] Volgens Van der Merwe[70] is daar wel 'n moontlikheid dat sowel die middellike as die onmiddellike beheerder[71] van die saak wat die bedoeling

64 Vgl die gevolgtrekking waartoe die hof geraak het, nl dat die eiser "never ceased to hold the vehicles".

65 1982 1 SA 219 (Tk).

66 Met verwysing na De Groot *Inleyding* 2 2 4 (Maasdorp se vertaling) (221).

67 Vgl ook die ander gesag aangehaal (221).

68 222.

69 *Ibid.* Delport en Olivier 74–75 stel egter die vraag of 'n verteenwoordiger nie *ex contractu* altyd 'n bedoeling het om een of ander voordeel uit die saak te trek nie. Vgl in dié verband ook Van der Merwe 114.

70 114.

71 Indien die begrippe middellike en onmiddellike beheer beperk sou word tot gevalle waar 'n verteenwoordiger 'n saak namens 'n opdraggewer sou beheer, terwyl daar van direkte en indirekte beheer gepraat sou word in daardie gevalle waar beide die beheerders die bedoeling het om voordeel te verkry, sou dit veel daartoe bydra om verwarring uit die weg te ruim. Let daarop dat die verteenwoordiger of dienaar volgens Van der Merwe 113–114 indirekte beheer uitoefen, terwyl die prinsipaal geag word direkte beheer uit te oefen. Hierdie gebruik van terminologie is egter verwarrend in die lig daarvan dat dit die verteenwoordiger is, en nie

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het om voordeel uit die saak te trek, toegang tot die mandament van spolie het. Dit wil voorkom of die enigste vereiste wat hier gestel word, is dat albei die bedoeling moet hê om uit die beheer van die saak voordeel te trek.

In *Muller v Muller*[72] daarenteen beslis die hof dat 'n agent, net soos die prinsipaal, wel op die mandament van spolie kan aanspraak maak. Sonnekus[73] is egter van mening dat indien die agent slegs die bedoeling het om namens die prinsipaal te hou, hy nie in sy persoonlike hoedanigheid aan die fisiese element voldoen nie.[74] Net die prinsipaal is dan op die mandament geregtig. Delport en Olivier[75] wys daarop dat die werklike probleem in hierdie geval (van verteenwoordigers en prinsipale) die vraag is wie nou eintlik die saak beheer, die verteenwoordiger of die prinsipaal. Indien daar aanvaar word dat meerdere persone dieselfde saak tegelykertyd in die geheel kan beheer, maar op verskillende wyses, sou dit uiteraard die aangeleentheid oplos.

In *Scholtz v Faifer*[76] beslis die hof dat 'n retensiereghouer 'n verteenwoordiger mag aanstel om sy *possessio* te handhaaf en dat hy gevolglik nie die nodige beheer persoonlik hoef uit te oefen nie. In hierdie geval kan daar dan van middellike beheer gepraat word: Die retensiereghouer is die middellike beheerder en die verteenwoordiger die onmiddellike beheerder (met ander woorde die persoon wat daadwerklike fisiese beheer uitoefen). Laasgenoemde verkry geen voordeel uit die fisiese beheer nie, en die middellike beheerder, wat geen feitelike beheer ten aansien van die saak het nie, is die een wat op die voordeel asook die beskerming geregtig is.

Daar is reeds in *Welgemoed v Coetzer*[77] beslis dat dit vir doeleindes van verkrygende verjaring heeltemal moontlik is dat 'n agent deur middel van natuurlike beheer die regmatige beheer van die prinsipaal kan vestig op voorwaarde dat die prinsipaal daarvan kennis dra. Voet[78] word aangehaal ter ondersteuning van hierdie beginsel. Ook in hierdie geval word die agent as 'n onmiddellike beheerder beskou wat nie persoonlik by die beheer van die saak baat nie maar slegs namens die ware (middellike) beheerder fisiese beheer uitoefen.

Die hof beslis in *De Jager v Harris and the Master*[79] met verwysing na *Scholtz v Faifer*[80] dat die fisiese beheer wat deur 'n huurder (verteenwoordiger)

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die prinsipaal nie, wat in 'n direkte fisiese verhouding tav die saak staan en wat direkte beheer oor die saak uitoefen. Dit is verkieslik om te sê dat Ig die saak indirek dmv die verteenwoordiger beheer.

72 1915 TPD 28.

73 1978 *SALJ* 217.

74 Hy hou dus glad nie namens homself nie maar slegs ten behoewe van die prinsipaal. Vgl in dié verband *Jefferson, Executor of Stewart v De Morgan* 1882 2 EDC 205 220–221 waar daar by monde van Shippard R beslis word dat besit op grond van 'n persoon se bedoeling behoue kan bly dmv 'n ander persoon se fisiese beheer. Die betrokke verteenwoordiger in die saak het nie die huurgeld besit nie – hy het geen juridiese besit (*ius possessionis*) gehad nie – maar net blote *detentio* of *naturalis possessio*. Hier word dus geen erkenning verleen aan die opdraggewer se volgehoue beheer nie maar slegs toegegee dat hy dmv sy blote bedoeling beheer kan behou.

75 74.

76 1910 TPD 243 246.

77 1946 TPD 701 714–715. Hierdie standpunt word in *Strydom v De Lange* 1970 2 SA 6 (T) 11–12 bevestig deur Steyn R wat aanvaar dat 'n persoon dmv sy agent beheer kan uitoefen.

78 41 2 8.

79 1957 1 SA 171 (SWA) 179.

80 1910 TPD 243 247.

uitgeoefen word, voldoende is om 'n retensiereg te vestig en te behou. Daar word ook beslis dat die huurder beheer van die eiendom oorgeneem het en dat hy deurentyd as die eienaar se verteenwoordiger opgetree en dit namens hom beheer het.[81] Dit is met ander woorde nie noodsaaklik dat die vereiste fisiese beheer vir 'n retensiereg persoonlik uitgeoefen hoef te word nie. Die huurder, wat in opdrag van die eienaar die saak vir 'n spesifieke doel beheer het, was dus die onmiddellike beheerder daarvan terwyl die eienaar die middellike beheerder was. Fisiese beheer word deur die verteenwoordiger (die huurder) uitgeoefen maar die prinsipaal behou deurentyd die bedoeling om die saak te beheer. Die hof beslis vervolgens ook dat die verhuurder nie van sy beheer afstand gedoen het toe hy die saak aan die verteenwoordiger se onmiddellike beheer oorgedra het nie,[82] maar dat hy in beginsel nog steeds geag word sowel in staat te wees om beheer oor die eiendom uit te oefen kragtens die voorwaardes van die huurkontrak as om te verhinder dat beheer van die eiendom aan 'n derde oorgedra word.[83] Hy behou beheer, en indien die huurder of verteenwoordiger van sy beheer ontneem word, sou óf laasgenoemde self óf die eienaar deur middel van die mandament van spolie kon eis dat beheer herstel word. Dit is 'n vereiste vir die mandament van spolie dat beheer uitgeoefen moet gewees het deur die persoon wat op die remedie aanspraak maak, en indien hy die bevoegdheid sou hê om dit te gebruik, beteken dit dat hy een of ander vorm van beheer oor die saak moet behou het. Delport en Olivier[84] maak die afleiding dat sowel die huurder as die verhuurder in so 'n geval die saak beheer. Hulle stel voor dat daar in gevalle van huurder en verhuurder asook verteenwoordiger en prinsipaal moontlik gesê kan word dat hulle nie onder mekaar die betrokke saak in die geheel beheer nie, maar dat "so iets vir alle praktiese doeleindes wel teenoor buitestaanders moontlik is". Hieruit blyk weer eens dat die praktyk inderdaad 'n behoefte voel aan die erkenning van meerdere beheerders van dieselfde saak in die geheel.

Die fisiese beheer wat deur die onmiddellike beheerder uitgeoefen word, is duidelik waarneembaar en word soos gebruiklik gemeet aan die verkeersmaatstawwe wanneer fisiese beheer bepaal moet word, terwyl dié van die middellike beheerder nie objektief sigbaar is nie.

Sonnekus en Neels[85] verwys ook na *S v Masilo*[86] waarin medebesit as 'n moontlikheid deur die hof erken is sonder dat daar aan die implikasies van so 'n beslissing uitdrukking gegee is. Die hof se alternatief, naamlik dat daar moontlik

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81 "It is also expressly stated in the above-mentioned judgment that in order to preserve his possession, a lienholder may place a representative in charge. There is therefore no question of his having to exercise the necessary control or possession personally" (179); en "I have no difficulty in accepting that Visser, the tenant, was at all relevant times acting as applicant's agent to preserve his *ius retentionis*" (180).

82 Hy het immers nie finaal nie maar slegs tydelik van die beheer afstand gedoen, en behou deurentyd die bedoeling om dit weer op te neem.

83 Vgl ook Delport en Olivier 75; Van der Merwe 114.

84 75.

85 130 160.

86 1963 4 SA 918 (T) 920: "Die waarskynlikheid op hierdie feite en afleidings is dat hulle twee gesamentlike beheer oor en dus besit van die dagga gehad het of dat 'n verhouding van prinsipaal en agent tussen hulle twee bestaan het."

'n verhouding van prinsipaal en agent tussen hulle bestaan het, lewer egter volgens Sonnekus en Neels[87] probleme op. Hulle wys daarop dat indien die hof die tradisionele verhouding van prinsipaal en verteenwoordiger in gedagte gehad het toe hy hierdie uitspraak gemaak het, dit sou beteken dat die verteenwoordiger slegs die bedoeling gehad het om die dagga namens die prinsipaal te hou, en dat die prinsipaal gevolglik die enigste besitter van die dagga was: Die agent was met ander woorde bloot 'n houer daarvan. Laasgenoemde oefen dus onmiddellike fisiese beheer oor die betrokke saak uit terwyl eersgenoemde slegs die bedoeling het om deur middel van sy agent beheer daaroor uit te oefen. In die lig van die bespreking hierbo, is dit egter duidelik dat albei as beheerders van dieselfde saak op dieselfde tydstip beskou word: Die prinsipaal as middellike beheerder en die agent as onmiddellike beheerder.[88]

In *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein*[89] is uitdruklike erkenning verleen aan die bestaan van die moontlikheid van middellike beheer. 'n Persoon kan gevolglik, in 'n geval waar die feitelike beheer namens hom deur 'n derde uitgeoefen word, as beheerder van 'n saak beskou word ten spyte daarvan dat hyself geen daadwerklike beheer oor die saak uitoefen nie. Daar is hier met ander woorde tegelykertyd van twee soorte beheer sprake, naamlik middellike en onmiddellike beheer. Die middellike beheerder oefen geen feitelike beheer uit nie maar die onmiddellike beheerder wel. Alhoewel eersgenoemde nie daadwerklike beheer uitoefen nie, word daar nietemin vir bepaalde doeleindes gereken dat hy wel beheer oor die betrokke saak het. Die agent of verteenwoordiger wat bloot as houer optree, oefen onmiddellike beheer oor die saak uit, terwyl die middellike beheerder wat nie enige daadwerklike beheer oor die saak uitoefen nie, wel geag word beheer oor die saak te hê vir byvoorbeeld die doel van beskerming. Indien die saak onregmatig deur 'n derde toegeëien sou word, sou die middellike beheerder hom op die mandament van spolie kon beroep en dit impliseer dat hy beheer oor die saak gehad het voordat dit deur die derde van hom ontneem is. Daar is gevolglik twee persone wat die saak in die geheel fisies op dieselfde tydstip beheer.

Dit volg uit hierdie bespreking dat die middellike en die onmiddellike beheerder vir bepaalde doeleindes geag word die saak tegelykertyd fisies te behee in weerwil daarvan dat dit nie daadwerklik deur die middellike beheerder (die prinsipaal) beheer word nie. Sy beheer kan dus nie (soos in geval van die onmiddellike beheerder) aan die verkeersmaatstawwe gemeet word nie tensy dit dienooreenkomstig uitgebrei word. Fisiese beheer word egter om

87 160.

88 Beide soorte hoef nie noodwendig sakeregtelik relevant te wees nie maar een of albei kan in sekere omstandighede strafregtelik relevant wees.

89 1980 3 SA 917 (A) 922: "Die erkenning van die bestaan van die moontlikheid van middellike besit – nl dat een persoon besitter (*possessor*) kan wees alhoewel hy self geen regstreekse daadwerklike beheer oor die saak voer nie, maar iemand anders (*detentor*) dit namens hom doen – skep egter die moontlikheid van besitsoordrag deur blote ooreenkoms." Vgl ook 923 waar Jansen R praat van die "toepassing van die leerstuk van middellike beheer". Sien verder *R v Binns* 1961 2 SA 104 (T) 107 waar Jansen R *corpus* omskryf as die fisiese beheer deur 'n persoon oor 'n saak. Dit bestaan óf uit direkte fisiese beheer deur die betrokke persoon oor 'n saak óf uit middellike beheer deur 'n ander wat namens eg beheer uitoefen.

doelmatigheidsredes aan hom toegeskryf ten spyte daarvan dat dit nie objektief waarneembaar is nie.

5 SLOTSOM

Uit voorgaande bespreking van Suid-Afrikaanse hofbeslissings waarin daar uitdruklike of stilswyende erkenning aan medebeheer in verskeie vorme verleen is, volg dat daar wel in die praktyk 'n wesenlike behoefte aan so 'n regsfiguur bestaan.[90] Medebeheer is hiervolgens reeds erken in gevalle van: (a) medebeheer deur meerdere partye wat die saak in die geheel tegelykertyd gemeenskaplik beheer; (b) medebeheer deur partye wat die saak in die geheel tegelykertyd individueel beheer; en (c) medebeheer deur meerdere partye wat dieselfde saak in die geheel tegelykertyd op verskillende wyses beheer.

Formele erkenning van medebeheer as regsfiguur sal tot gevolg hê dat die regsteorie in lyn met die praktyk en moderne lewensomstandighede gebring word en dat billike en regverdige beslissings sonder probleme of geforseerde teorieë gemaak kan word. Deur telkens die wyse van medebeheer te omskryf ooreenkomstig die verskillende kategorieë soos hierbo uiteengesit, sal dit duidelik blyk wat in elke besondere geval bedoel word en wat die inhoud van die fisiese beheer is.

In eersgenoemde geval, naamlik waar daar meerdere persone is wat die saak tegelykertyd in die geheel gemeenskaplik beheer, sal die betrokke partye almal dieselfde tipe beheer ten aansien van die saak uitoefen. Hulle sal derhalwe almal direkte beheer oor die saak uitoefen wat objektief waargeneem kan word en wat in ooreenstemming sal wees met die heersende verkeersopvattings oor die beheer van die spesifieke soort saak. Die beheer wat in hierdie gevalle deur die partye ten opsigte van 'n spesifieke saak uitgeoefen word, sal uiteraard nie eksklusief wees nie. Dit strook met aanvaarde verkeersopvattings aangesien daar algemeen toegegee word dat byvoorbeeld eggenote of vennote tegelykertyd beheer oor dieselfde saak kan uitoefen. In geval van gebonde regsverhoudings (byvoorbeeld huwelike binne gemeenskap van goed en vennootskappe) sal die gesamentlike uitoefening van die partye se beheer ten aansien van bepaalde sake deur die onderliggende regsverhouding bepaal word. Die heersende verkeersmaatstawwe ten aansien van die betrokke saak en die aard van die verhouding sal telkens toegepas word ten einde te bepaal of voldoende (of enige) beheer in 'n spesifieke geval uitgeoefen word al dan nie.[91] Wanneer daar 'n vrye regsverhouding tussen die partye is, is hulle in beginsel daarop geregtig om enige tipe beheerdaad ten opsigte van die betrokke saak uit te oefen en elke geval sal gevolglik in die lig hiervan beoordeel moet word.[92]

In die tweede geval, te wete waar meerdere persone elkeen individueel tegelykertyd beheer oor 'n saak in die geheel uitoefen, sal die fisiese beheer wat deur die partye uitgeoefen word oënskynlik met dié in die vorige geval ooreenstem. Enige objektiewe waarneming van die fisiese beheer wat oor die saak uitgeoefen

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90 Vgl Kleyn 359 volgens wie die erkenning van medebeheer deur die howe beteken dat die medebeheerders in daardie gevalle almal ook aan die fisiese vereiste tov die saak voldoen het. Al die beheerders pleeg beheerdade tav die saak of sake en almal beheer dit gevolglik met sowel die *animus* as die *corpus*.

91 Vgl Van der Walt en Pienaar 74–75.

92 Sien *idem* 74.

word, sal dus met die vorige geval ooreenstem. Die enigste verskil sal daarin geleë wees dat die partye die saak individueel beheer en nie gesamentlik nie; hulle sal met ander woorde daarvan bewus wees dat daar geen regsverhouding tussen hulle bestaan nie. Beheer in hierdie gevalle sal uit die aard van die saak ook nie eksklusief wees nie want die een retensiereghouer sal byvoorbeeld nie regmatig 'n ander een kan uitsluit nie. Elke beheerder se feitelike beheer sal egter individueel beoordeel word ten einde te bepaal of dit in 'n bepaalde geval afdoende is.

Laasgenoemde geval, waar meerdere persone dieselfde saak in die geheel tegelykertyd op verskillende wyses beheer, bied egter meer probleme aangesien die fisiese beheer wat die indirekte en middellike beheerders toegereken word gewoonlik nie objektief waarneembaar is nie. Omdat beheer gewoonlik van publisiteit afhanklik is, sal dit veral in gevalle van indirekte en middellike beheer moeilik wees om vas te stel of daar inderdaad beheer uitgeoefen word. Daar moet egter telkens na die omstandighede van die bepaalde geval gekyk word ten einde te bepaal of beheer inderdaad deur twee persone uitgeoefen word en wat die aard en omvang daarvan is. Die doel waarvoor die beheer uitgeoefen word, sal bepaal wat die vereiste beheer moet wees. Indien gevind word dat dit wel deur meerdere persone uitgeoefen word, kan die beheer van die indirekte of middellike beheerder goedskiks selfstandig naas die verskillende tipe beheer van die direkte of onmiddellike beheerder bestaan. Daar word in sodanige gevalle dus erkenning gegee aan fisiese beheer wat as gevolg van praktiese vereistes op verskillende wyses uitgeoefen word.

HUGO DE GROOT-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Hugo de Groot-prys vir die beste bydrae van 1997 oor die 1996-Grondwet toegeken is aan:

Mnr JJ Malan
Justisie Kollege

Strafbedinge in die Suid-Afrikaanse reg – Deel 1[1]

J Jamneck
BLC LLD
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SUMMARY

Penalty clauses in South African law – Part 1

The scope of the Conventional Penalties Act 15 of 1962 is determined by sections 1 and 4 of the Act. Section 1 states that the Act applies to both penalty and genuine pre-estimate of damages clauses. The distinction made between these clauses by the South African common law under the influence of English law has been removed by the Act although some problems regarding the intention with which a clause was included in a contract still exist. Section 1 also makes it clear that breach of contract is a very important prerequisite for the application of the Act.

1 INLEIDING

Die Wet op Strafbedinge 5 van 1962 wat op 16 Maart 1962 in werking getree het, het orde geskep in die chaotiese toestand wat op daardie tydstip in die Suid-Afrikaanse reg ten aansien van strafbedinge bestaan het. In die reeks artikels wat volg, sal dié wet ontleed en vergelykings met die Engelse, Nederlandse en Franse reg waar toepaslik getrek word, ten einde bepaalde probleme, raakpunte en moontlike oplossings uit te wys.

2 DIE WET OP STRAFBEDINGE 15 VAN 1962 – DOEL EN TOEPASSINGSGEBIED

2 1 Doel van die wet

Die doel van die Wet op Strafbedinge is om voorsiening te maak vir die afdwingbaarheid van strafbedinge, gelikwideerde skadevergoedingsbedinge (ook genoem billike vooruitberaming van skadevergoedingsbedinge) en verbeuringsbedinge. Gesien in die lig van die onderskeid wat deur die vroeë Suid-Afrikaanse positiewe reg, onder die invloed van die Engelse reg, tussen genoemde soorte bedinge gemaak is,[2] is dit te verstane dat die aanhef van die wet dit reeds duidelik stel dat die oogmerk daarvan is om vir die afdwingbaarheid van *al*

1 Die artikel is 'n verwerking van 'n gedeelte uit die outeur se LLD-proefskrif getiteld *Strafbedinge in die Suid-Afrikanse reg* (UP 1995).

2 Sien bv *Cape Town Council v Linder* (1889) 6 SC 410; *Commissioner of Public Works v Hills* 1906 AC 368; *Jonker v Van Os* 1911 TPD 655; *Pearl Assurance v Union Government* 1934 AD 560; De Wet en Van Wyk *Suid-Afrikaanse kontraktereg en handelsreg* I (1992) 236; Joubert *General principles of the law of contract* (1987) 267.

hierdie bedinge voorsiening te maak. Buiten om voorsiening te maak vir die afdwingbaarheid van strafbedinge, het die wet ook die vermindering van buitensporige strafbedrae ten doel.[3]

2 2 Toepassingsgebied: artikels 1 en 4

Die toepassingsgebied van die wet word bepaal deur artikels 1 en 4. Artikel 1 word vervolgens ontleed terwyl artikel 4 in die volgende bespreking in hierdie reeks ontleed sal word. Duidelikheidshalwe word artikel 4 ook hier aangehaal.

Artikel 1(1) bepaal:

> "'n Beding, hieronder 'n strafbeding genoem, waarby bepaal word dat iemand weens 'n doen of 'n late in stryd met 'n kontraktuele verpligting, aanspreeklik is om ten bate van 'n ander persoon, hieronder 'n skuldeiser genoem, 'n geldsom te betaal of enigiets te lewer of te presteer, hetsy by wyse van straf of as gelikwideerde skadevergoeding, kan, behoudens die bepalings van hierdie Wet, in 'n bevoegde hof afgedwing word."

Artikel 1(2):

> "'n Bedrag vir die betaling of enigiets vir die lewering of prestering waarvan iemand aldus aanspreeklik mag word, word in hierdie Wet 'n stafbedrag genoem."

Artikel 4 bepaal:

> "'n Beding waarby bepaal word dat waar 'n party by 'n ooreenkoms hom onder daarin gemelde omstandighede daaraan onttrek, 'n ander party daarby die reg verbeur om restitusie te eis ten opsigte van enigiets wat hy ingevolge die ooreenkoms gepresteer het, of ondanks die onttrekking aanspreeklik bly om enigiets daaronder te presteer, geld in die mate en onderworpe aan die voorwaardes in artikels een tot en met drie voorgeskryf, asof dit 'n strafbeding is."

2 2 1 Ontleding van artikel 1

Artikel 1(1) kan vir doeleindes van hierdie bespreking in drie dele verdeel word:

(a) *'n Beding, hieronder 'n strafbeding genoem, waarby bepaal word dat iemand weens 'n doen of 'n late in stryd met die kontraktuele verpligting aanspreeklik is* Uit dié gedeelte van artikel 1(1) kan eerstens afgelei word dat daar alleen van 'n strafbeding sprake kan wees indien daar 'n kontraktuele verhouding tussen partye bestaan. Die bewoording van die artikel is wyd genoeg om enige dokument waarkragtens daar 'n afdwingbare vorderingsreg op 'n skuldenaar rus, in te sluit en gevolglik is dokumente soos promesses, borg- en verbandaktes ook daarby ingeslote.[4]

Artikel 1(1) slaan slegs op bedinge wat daarop gerig is om die onskuldige party by *kontrakbreuk* deur die teenparty,'n reg op 'n bedrag geld of 'n bepaalde prestasie te gee.[5] Is die bedonge verpligting nie aan kontrakbreuk gekoppel nie, vorm dit nie 'n strafbeding wat aan die bepalings van die wet onderworpe is nie.[6]

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3 *Van Staden v Central SA Lands & Mines* 1969 4 SA 349 (W); Joubert 268; Van der Merwe, Van Huyssteen, Reinecke, Lubbe en Lotz (hierna Van der Merwe ea) *Contract: General principles* (1993) 316. Sien die bespreking van a 3 hieronder.

4 Belcher "The Conventional Penalties Act, 1962" 1964 *SALJ* 80.

5 *Vreulink v Sun Packaging (Pty) Ltd* 1995 2 SA 326 (K).

6 *Steel v Umbilo Development (Pty) Ltd* 1964 1 SA 406 (D); *Langeberg Koöperasie Bpk v Gelderblom* 1967 1 SA 288 (K); *Da Mata v Otto* 1972 3 SA 855 (A); *De Klerk v Old Mutual Insurance Co Ltd* 1990 3 SA 34 (OK); Belcher 1964 *SALJ* 84; Kerr "Penalties under the Conventional Penalties Act" 1977 *SALJ* 379; De Wet en Van Wyk I 242; Van der Merwe ea 316; Joubert 269.

Uit *Langeberg Koöperasie Bpk v Gelderblom*[7] blyk die beginsel duidelik. Die statute van 'n maatskappy het bepaal dat 'n lid geregtig is om te bedank. In geval van bedanking is die lid se aandele aan die maatskappy verbeurd verklaar, maar die statute van die maatskappy het bepaal dat 'n lid wie se aandele verbeurd verklaar is, verplig is om die onopbetaalde bedrag van die nominale waarde van die aandele ten volle op te betaal. Die respondent het sy lidmaatskap op 'n regmatige manier beëindig, maar geweier om die onopbetaalde bedrag op sy aandele te betaal. Die hof beslis dat hier nie sprake van kontrakbreuk is nie en dat die tersaaklike beding gevolglik nie 'n strafbeding is nie. 'n Beding is dus slegs 'n strafbeding indien dit bedoel is om in geval van kontrakbreuk in werking te tree.[8]

'n Probleem ontstaan egter waar 'n beding nie slegs aan kontrakbreuk gekoppel is nie maar aan meerdere gebeure waarvan sommige kontrakbreuk kan uitmaak. Daar bestaan veral onsekerheid waar die beding aan die beëindiging van die kontrak in die algemeen gekoppel is.[9] *Bestway Agencies (Pty) Ltd v Western Credit Bank Ltd*[10] bied 'n goeie voorbeeld van eersgenoemde geval. Die kontrak het bepaal dat die verkoper sekere bedrae van die koper kan verhaal indien die koper hom aan enige van 'n aantal optredes, onder andere die wanbetaling van paaiemente, bestuur van die voertuig sonder 'n lisensie of die pleeg van 'n daad van insolvensie sou skuldig maak. Die skuldenaar het inderdaad kontrakbreuk gepleeg en die hof beslis dat die betrokke klousule wel 'n strafbeding is en dat die Wet op Strafbedinge gevolglik van toepassing is.[11]

Waar 'n beding aan die beëindiging van 'n kontrak *in die algemeen*[12] gekoppel is, bestaan daar egter uiteenlopende menings oor die vraag of die wet van toepassing is al dan nie. In 'n aantal beslissings is hierdie tipe bedinge wel as strafbedinge beskou. In *Labuschagne v Northmead Investments Ltd*[13] het 'n

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7 1967 1 SA 288 (K).

8 Die vereiste dat die strafbeding aan kontrakbreuk gekoppel moet wees, word in die Engelse reg (sien die bespreking hieronder) asook in die Franse en Nederlandse reg gestel. Hoewel kontrakbreuk ook as vereiste in die Franse reg gestel word (sien die definisie van 'n strafbeding in a 1226 *CC*), beskik die howe oor 'n baie wye diskresie tov die verminderings- of vermeerderingsbevoegdheid. Dié bevoegdheid (verleen deur a 1152 *al* 2 *CC*) val binne die *pouvoir souverain* van die regter. Sien Cass civ 9 février 1983, 1983 *JCP* IV 130; Cass com 2 octobre 1984, 1985 *JCP* II 20433; Cass civ 3 janvier 1985, 1985 *JCP* IV 101; Cass civ 14 janvier 1987, 1987 *JCP* IV 92; Paris 23 mai 1989, 1989 *JCP* IV 322; Cass civ 14 novembre 1991, 1992 *JCP* IV 170. Vir die Nederlandse reg, sien Boek 6 a 92 *NBW* lid 3; HR 26 maart 1925, *NJ* 1925 644; Pitlo *Het Nederlands Burgerlijk Wetboek Deel 3: Algemeen deel van het verbintenissenrecht* (1979) 123; Schoordijk *Het algemeen gedeelte van het verbintenissenrecht naar het Nieuw Burgerlijk Wetboek* (1979) 227; De Vries *Recht op nakoming en schadevergoeding, excepties en ontbinding volgens NBW en BW* (1984) 70.

9 De Wet en Van Wyk I 242; Van der Merwe ea 317; Lubbe en Murray *Farlam & Hathaway – Contract: Cases, materials, commentary* (1988) 642; Joubert 268.

10 1968 3 SA 400 (T) 401.

11 Die resultaat van hierdie beslissing is dat die eisers ingevolge a 2(1) nie toegelaat is om skadevergoeding ipv die strafbedrag te eis nie.

12 Bv waar die kontrak vir die betaling of verbeuring van bedrae voorsiening maak indien die kontrak "om enige rede" of "for any reason whatsoever" beëindig word. Sien *Labuschagne v Northmead Investments Ltd* 1966 4 SA 120 (W); *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 3 SA 226 (W); *Burger v Western Credit Bank Ltd* 1970 4 SA 74 (T); *De Pinto v Rensea Investments (Pty) Ltd* 1977 2 SA 1000 (A).

13 1966 4 SA 120 (W) 122.

beding in 'n dienskontrak bepaal dat die werknemer op ses maande kennisgewing en kontantbetaling gelykstaande aan een jaar se salaris geregtig sou wees indien sy dienste om *enige rede* buite sy beheer beëindig sou word. Die maatskappy het vir 'n aantal maande nie die werknemer se salaris betaal nie. Die beding het as gevolg van dié kontrakbreuk in werking getree. Die hof beslis dat die beding 'n strafbeding ingevolge die wet is en dat die werknemer dus nie skadevergoeding in plaas van die strafbedrag mag eis nie. Ook in *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou*[14] het die hof 'n beding wat voorsiening gemaak het vir kansellasie van die kontrak by *sowel* kontrakbreuk *as* in ander omstandighede as kontrakbreuk, as 'n strafbeding beskou. Feitlik dieselfde beding as dié in laasgenoemde saak het in *Burger v Western Credit Bank Ltd*[15] voorgekom en is weer eens, in navolging van die *Ephron*-saak, as 'n strafbeding beskou.

Hierdie beslissings is egter nie sonder kritiek aanvaar nie. Volgens De Wet en Van Wyk[16] is die beter houding dat 'n beding wat aan verskeie gebeurlikhede (waarvan sommige kontrakbreuk uitmaak en ander nie) gekoppel is, nie 'n strafbeding kragtens die wet is nie.

Dié benadering geld selfs al word die bedonge bedrag in die besondere geval juis weens kontrakbreuk verhaalbaar. Die appèlhof het ook inderdaad in *De Pinto v Rensea Investments (Pty) Ltd*[17] geweier om 'n beding wat voorsiening gemaak het vir die betaling van 'n som geld in geval van ontydige beëindiging van die kontrak as 'n strafbeding te beskou, ten spyte daarvan dat kontrakbreuk toevallig plaasgevind het. Die hof se rede hiervoor was dat die beding nie *in terrorem* bedoel was nie.[18] De Wet en Van Wyk[19] en Van der Merwe, Van Huyssteen, Reinecke, Lubbe en Lotz[20] toon aan dat hierdie redenasie onjuis is aangesien artikel 1 van die wet ook voorsiening maak vir bedinge wat as *bona fide* vooruitberamings van skade bedoel is. Die werklike rede vir die hof se weiering is dat die beding nie spesifiek *net* vir kontrakbreuk ingevoeg is nie. Volgens laasgenoemde skrywers is 'n beding wat voorsiening maak vir die betaling van 'n bedrag of lewering van 'n prestasie vir enige gebeurlikheid *in die algemeen* dus nie 'n strafbeding nie.

Die teenoorgestelde benadering word deur Kerr[21] voorgestaan. Volgens hom is die weg oop vir ons howe om die benadering van die Engelse reg, soos blyk uit *Cooden Engineering Co Ltd v Stanford*,[22] te volg. In dié saak het 'n klousule in 'n kontrak bepaal dat sekere bedrae betaalbaar sou wees by beëindiging van die kontrak deur (a) die huurkoopkoper; of (b) die eienaar, óf as gevolg van kontrakbreuk deur die koper óf as gevolg van die dood van die koper.

Die koper het inderdaad kontrakbreuk gepleeg en die eienaar het die betrokke bedrag geëis. Die hof beslis dat die bedrag 'n strafbedrag is nieteenstaande die feit dat die omstandighede voorsien in die klousule verder as blote kontrakbreuk

14 1968 3 SA 226 (W).
15 1970 4 SA 74 (T).
16 I 242.
17 1977 2 SA 1000 (A).
18 1007.
19 I 242 vn 228.
20 317. Sien ook Kerr 597.
21 1977 *SALJ* 384.
22 [1953] 1 QB 86.

gestrek het. Volgens Kerr[23] behoort die wet dus wel van toepassing te wees waar 'n beding, hoewel aan algemene gebeurlikhede gekoppel, *in terrorem* of as billike vooruitskatting van skadevergoeding bedoel is en inderdaad as gevolg van kontrakbreuk in werking tree.

Word daar egter 'n breër vergelyking met die Engelse reg getrek, blyk dit dat daar geensins 'n konsekwente benadering gevolg word nie. Hoewel die Engelse reg onderskei tussen 'n afdwingbare "liquidated damages clause" en 'n onafdwingbare "penalty clause",[24] word kontrakbreuk by beide vereis.[25] Die hof het ook in *Alder v Moore*[26] pertinent beslis dat die onderskeid tussen 'n strafbeding en 'n gelikwideerde skadevergoedingsbeding net by kontrakbreuk ter sprake kom.[27] In dié geval bevind die hof dat die sogenaamde ooreenkoms nie 'n kontraktuele verpligting op die verweerder geplaas het nie en dat daar gevolglik nie kontrakbreuk plaasgevind het nie.

Die feit dat die Engelse howe konsentreer op die uitleg[28] van elke betrokke beding, veroorsaak dat daar in sommige sake geen aandag geskenk word aan die vraag of 'n beding wat aan algemene gebeurlikhede gekoppel is, 'n strafbeding is nie.[29] Vir die Engelse howe is slegs die bedoeling waarmee 'n beding in 'n kontrak ingevoeg is, van belang.[30] Die beding in *Robophone Facilities Ltd v Blank*[31] het byvoorbeeld bepaal:

> "*[I]f this agreement shall be terminated for any other reason whatsoever*, then the hirer shall not be entitled to any credit or allowance in respect of any payments made by him under the terms of this agreement but shall thereupon pay to the company all rentals accrued due and also by way of liquidated or agreed damages a sum equal to 50 per centum of the total of the rentals which would thereafter have become payable."

Die hof skenk nie aandag aan die vraag of 'n beding wat nie uitsluitlik aan kontrakbreuk gekoppel is nie, 'n strafbeding of 'n gelikwideerde skadevergoedingsbeding kan wees nie, maar beslis dat die algemeenheid van die beding *in casu* beperk is tot gevalle waar die kontrak inderdaad as gevolg van kontrakbreuk beëindig word. Die hof gaan egter nie verder op die aangeleentheid in nie

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23 1977 *SALJ* 384.

24 *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* 1915 AC 79; *Lombard North Central plc v Butterworth* [1987] 1 All ER 267; *Jobson v Johnson* [1989] 1 All ER 621; Treitel *The law of contract* (1991) (hierna Treitel *Contract*) 883; Richards *Law of contract* (1992) 273; Smith *The law of contract* (1993) 219; Furmston *Cheshire, Fifoot and Furmston's Law of contract* (1991) 620; Koffman en Macdonald *The law of contract* (1992) 375.

25 Sien veral *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* 1915 AC 79. Sien ook die definisies van "penalty clauses" (Lewison *The interpretation of contracts* (1989) 348) en "liquidated damages" (*Law v Local Board of Redditch* [1892] 1 QB 127 132).

26 [1961] 1 All ER 1.

27 Sien ook *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* 1915 AC 79; *Cooden Engineering Co Ltd v Stanford* [1952] 2 All ER 915; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205; *Jobson v Johnson* [1989] 1 All ER 621.

28 Sien *Bridge v Campbell Discount Co Ltd* [1962] 1 All ER 385; *Lombank v Excell* [1964] 1 QB 415; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205; *Lombard North Central plc v Butterworth* [1987] 1 All ER 267.

29 Sien *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86; *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428.

30 Sien *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* 1915 AC 79.

31 [1966] 1 WLR 1428.

maar beslis by wyse van meerderheidsuitspraak dat die onderhawige beding wel 'n gelikwideerde skadevergoedingsbeding is.

In sommige ander sake het hierdie probleem tesame met die Engelse benadering dat strafbedinge onafdwingbaar is, sogenaamde "nice distinctions"[32] veroorsaak. In *Bridge v Campbell Discount Co Ltd*[33] het die beding bepaal dat sekere betalings gemaak moet word indien die kontrak "for any reason" beëindig word. Die skuldenaar het die motor wat hy kragtens 'n afbetalingstransaksie gekoop het aan die verkopers teruggelewer waarop hulle hierdie betalings van hom geëis het. Die hof van eerste instansie beslis dat die beding 'n strafbeding daarstel en wys die eis van die hand. Die Court of Appeal werp egter hierdie beslissing omver. Die hof beslis dat die appellant nie kontrakbreuk gepleeg het nie, maar sy reg om die kontrak te beëindig, uitgeoefen het. Aangesien geen vraag na 'n strafbeding dus ontstaan nie,[34] was die appellant verplig om die bepaalde bedrag te betaal. Die House of Lords beslis vervolgens dat die appellant inderdaad kontrakbreuk gepleeg het, dat daar tussen 'n strafbeding en 'n gelikwideerde skadevergoedingsbeding gekies moet word en dat die beding wel 'n strafbeding is. Die House of Lords het dus daarin geslaag om die moeilike vraag of daar sprake van 'n strafbeding kan wees as daar geen kontrakbreuk was nie, te vermy deur te bevind dat die appellant wel kontrakbreuk gepleeg het. Die probleem is ook in *Export Credits Guarantee Department v Universal Oil Products Co*[35] aangespreek. In dié geval beslis die hof dat die reëls aangaande strafbedinge slegs van toepassing kan wees waar 'n bedrag wat aan meerdere gebeure gekoppel is, inderdaad as gevolg van kontrakbreuk betaalbaar word.

Die howe beoordeel dus die beding as afsonderlik van toepassing op elke gebeurlikheid waaraan dit gekoppel is, ten einde te bepaal of die beding 'n strafbeding is al dan nie.[36] Die benadering in die Engelse reg is dat die reëls met betrekking tot strafbedinge geld waar die betrokke inwerkingtreding van die beding aan meerdere gebeure gekoppel is en die ooreenkoms inderdaad as gevolg van kontrakbreuk beëindig word.[37] Dié reëls is egter nie van toepassing indien die kontrak om ander redes beëindig word nie.[38] Hierdie posisie word deur die Engelse skrywers as hoogs onbevredigend beskou[39] aangesien die huurkoopkoper wat goedere wil teruggee beter daaraan toe sal wees as hy eenvoudig kontrakbreuk pleeg in plaas daarvan om van sy reg om die kontrak te beëindig, gebruik te maak.

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32 Furmston 623.

33 [1962] 1 All ER 385.

34 Die hof se houding is dat die vraag of die beding 'n strafbeding is al dan nie, slegs sou ontstaan as daar van kontrakbreuk sprake was.

35 [1983] 2 All ER 205. In dié geval was daar geen kontraktuele verpligting op die party wat aangespreek is nie en gevolglik ook nie sprake van kontrakbreuk nie.

36 Lewison 353.

37 *Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86; *Export Credits Guarantee Department v Universal Oil Products Co* [1983] 2 All ER 205; Goff "Rewriting contracts and the court of appeal" 1961 *MLR* 637 ev; Goodhart "Notes" 1961 *LQR* 300 ev; Lewison 353.

38 *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445. Sien ook Fridman "Hire-purchase: Estoppel – penalties" 1961 *MLR* 508–509; Fridman "The decline of a claim for damages: A moral tale" 1963 *MLR* 198 ev.

39 Fridman 1961 *MLR* 508–509; Waddams "Unconscionability in contracts" 1976 *MLR* 375; Furmston 623; Koffman en Macdonald 379; Atiyah "Freedom of contract and the New Right" in *Essays on contract* (1990) (hierna Atiyah *Essays*) 370.

Die probleem wat die Engelse skrywers met die benadering van die Engelse howe het, doen hom ook in 'n effe gewysigde vorm in Suid-Afrika voor. Terwyl die Engelse skuldenaar bevoordeel word deur eenvoudig kontrakbreuk te pleeg in plaas van om sy opsie uit te oefen (omdat strafbedinge onafdwingbaar is), word die Suid-Afrikaanse skuldenaar benadeel as gevolg van die interpretasie wat deur skrywers soos De Wet en Van Wyk[40] aan die *De Pinto*-saak[41] geheg word. Volgens dié interpretasie is 'n beding wat aan *algemene* gebeurlikhede gekoppel is, nie 'n strafbeding nie, selfs al tree dit juis as gevolg van kontrakbreuk in werking. Die gevolg hiervan is dat die beding nie ingevolge artikel 3 van die wet aan vermindering onderworpe is nie en die skuldenaar kan dus benadeel word in die geval waar hy kontrakbreuk pleeg.

Die howe het egter nog nie uitdruklik oor hierdie vraag beslis nie. In die *De Pinto*-saak, wat deur De Wet en Van Wyk[42] as gesag vir hulle standpunt beskou word, het die hof op die bedoeling waarmee die beding in die kontrak ingevoeg is, gekonsentreer. Die hof beslis dat die betrokke beding nie *in terrorem* bedoel is nie en dus nie 'n strafbeding is nie. Volgens De Wet en Van Wyk verloor die hof die ander moontlike bedoeling, naamlik dat die beding as 'n billike vooruitskatting van skadevergoeding bedoel is, uit die oog. Word daar egter gekyk na die beding, is dit duidelik dat so 'n vooruitskatting van skade ook nie die oogmerk was nie. Die oogmerk was om aan die huurders afslag op die normale huur te bied op voorwaarde dat die kontrak nie om enige rede gekanselleer word nie. Die hof sê dat die feit dat die beding moontlik as gevolg van kontrakbreuk in werking kan tree, nie genoegsaam is om dit 'n strafbeding te maak nie omdat die vereiste bedoeling afwesig is. Die hof gaan nie in op die vraag of die beding wel 'n strafbeding sou wees indien die vereiste bedoeling wel aanwesig was en die beding inderdaad as gevolg van kontrakbreuk in werking getree het nie.

Ook in *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd*[43] word hierdie vraag nie beantwoord nie. Die kontrak het bepaal dat bepaalde handelinge moet plaasvind as die ooreenkoms "for any reason whatsoever" beëindig word. Die hof skenk nie aandag aan hierdie frase nie maar beslis dat die beding nie 'n strafbeding is nie, omrede dit nie *in terrorem* of as billike vooruitskatting van skade bedoel is nie. Die vraag wat 'n mens nou kan stel, is of die hof die beding wel as 'n strafbeding sou beskou het as dit wel *in terrorem* bedoel is, ten spyte van die feit dat dit bepaal "for any reason whatsoever" en nie slegs tot kontrakbreuk beperk is nie. Uit die hof se oorweging van die vraag of die beding 'n strafbeding is al dan nie, sonder verdere oorweging van die vraag of dit spesifiek aan kontrakbreuk gekoppel is, wil dit tog lyk of so 'n afleiding geregverdig is.

Dit wil dus voorkom of die benadering wat deur die Engelse reg voorgestaan word, naamlik dat telkens gekyk word of die beding as strafbeding bedoel is en inderdaad as gevolg van kontrakbreuk in werking getree het, 'n billiker resultaat het as die benadering wat deur Suid-Afrikaanse skrywers voorgestaan word.

Dit is interessant om op te merk dat die Regskommissie van Engeland daarop wys dat die vereiste van kontrakbreuk wat deur artikel 1 Wet 15 van 1962 gestel word, te eng is om alle omstandighede te dek waarin 'n strafbeding in werking

40 I 242; sien ook Van der Merwe ea 317; Joubert 269.
41 1977 2 SA 1000 (A).
42 I 242 vn 228.
43 1982 3 SA 398 (A).

kan tree.[44] Die regskommissie het die voorstel gemaak dat 'n beding as 'n strafbeding beskou moet word wanneer die doel daarvan is om te verseker dat die handeling wat die werklike doel van die ooreenkoms is, nagekom word. Daar word dus beoog dat selfs 'n beding wat as gevolg van vrywillige beëindiging van die ooreenkoms, of wat as gevolg van *vis maior* (soos weersomstandighede) in werking tree, as strafbeding beskou moet word.[45] Hierdie voorstelle is ongelukkig tot op hede nog nie in wetgewing vervat nie.

Ook in Suid-Afrika het 'n denkrigting ontstaan wat beheer oor onbillike kontraksbedinge voorstaan.[46] Hoewel wetgewing oor hierdie aangeleentheid nog nie die lig gesien het nie, wil dit voorkom of die tipes bedinge hier onder bespreking wel daaronder sal val.'n Voorstel in die Konsepwetsontwerp op die Beheer van Kontraksbedinge, 1994 bepaal:

> " 'n Hof kan enige kontrak of beding in 'n kontrak
> (a) wat ontstaan het in omstandighede wat, of
> (b) wat 'n vorm, inhoud of strekking het wat, of
> (c) waarvan die uitvoering of afdwinging,
> in die lig van al die omstandighede meebring dat dit in stryd met die handhawing van goeie trou is –
> (d) geheel of gedeeltelik nietig verklaar, of
> (e) dit voor die afdwinging daarvan so wysig,
> om te voorkom dat enige kontraksparty daardeur benadeel word, of enige ander bevel maak wat nodig is om dit te voorkom."[47]

Een van die riglyne by die toepassing van hierdie algemene maatstaf lui soos volg:

> "(xvii) of die gebruiker andersins tot nadeel van 'n teenparty in 'n posisie geplaas word wat wesenlik beter sal wees as die posisie waarin die gebruiker ingevolge die reëlende reg sou gewees het as dit nie vir die betrokke beding was nie."[48]

Dit wil dus voorkom of sommige van die bedinge wat nie onder die Wet op Strafbedinge tuisgebring kan word nie omdat dit nie spesifiek aan kontrakbreuk gekoppel is nie, wel onder hierdie riglyn tuisgebring sal kan word.

(b) *[o]m ten bate van 'n ander persoon, hieronder 'n skuldeiser genoem, 'n geldsom te betaal of enigiets te lewer of te presteer* Artikel 1(1) Wet 15 van 1962 maak dit baie duidelik dat die wet van toepassing is op alle bedinge wat 'n kontraksparty verplig om "'n geldsom te betaal of enigiets te lewer of te presteer". 'n Geldsom hoef nie bepaald te wees nie maar moet wel bepaalbaar wees.[49]

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44 *The Law Commission working paper no 61: Penalty clauses and forfeiture of monies paid* (1975) par 25.

45 *Idem* par 26.

46 Sien Werkstuk 54: Projek 47 van die Suid-Afrikaanse Regskommissie: *Onbillike kontraksbedinge en die rektifikasie van kontrakte* (1994) 84; Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 367, "Enkele uitgangspunte vir 'n Suid-Afrikaanse ondersoek na beheer oor onbillike kontraksbedinge" 1989 *THRHR* 81, "Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge" 1986 *SALJ* 658–661, "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor kontrakteervryheid in die Suid-Afrikaanse reg" 1993 *THRHR* 65; Jamneck "Die Konsepwetsontwerp op die Beheer van Kontraksbedinge, 1994" 1997 *TSAR* 637.

47 Kl 1 van die Konsepwetsontwerp. Sien Van der Walt 1993 *THRHR* 80.

48 Van der Walt 1993 *THRHR* 81.

49 *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 3 SA 226 (W) 230; *Bester v Smit* 1976 4 SA 751 (K); Bamford "The Conventional Penalties Act 1962" 1972 *SALJ* 230 vn 24.

Die wet is egter nie slegs van toepassing waar 'n party tot betaling van 'n geldsom verplig word nie maar ook waar 'n ander prestasie van hom vereis word.[50] Dié benadering word bevestig deur artikel 1(2) en is ook deur die howe erken. Die hof het byvoorbeeld in *Langeberg Koöperasie Bpk v Gelderblom*[51] die beginsel erken dat verbeuring van aandele in 'n maatskappy wel 'n strafbeding kan daarstel, maar aangesien die verbeuring in dié besondere geval nie aan kontrakbreuk gekoppel is nie, word beslis dat die betrokke beding nie 'n strafbeding is nie en gevolglik is die wet nie toegepas nie.

Die elemente van 'n strafbeding kan dus uiteengesit word as (1) betaling van 'n bedrag geld;[52] (2) lewering van 'n saak of prestasie;[53] of (3) uitvoering van 'n verpligting.[54]

Dié benadering van Wet 15 van 1962 stem ooreen met dié van die Nederlandse reg. Boek 6 artikel 91 *NBW* bepaal dat 'n strafbeding 'n beding is waarvolgens die teenparty verplig word om 'n geldsom te betaal of "een andere prestatie te voldoen".[55] In die Franse reg bestaan daar onsekerheid oor hierdie aspek aangesien artikel 1226 van die *Code Civil 'n* strafbeding wyd genoeg omskryf om die betaling van 'n bedrag geld, 'n onderneming om iets te doen of nie te doen nie, of 'n onderneming om 'n bepaalde prestasie te lewer, in te sluit.[56] Artikel 1152 wat handel oor die vermindering of vermeerdering van

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50 *Langeberg Koöperasie Bpk v Gelderblom* 1967 1 SA 288 (K): verbeuring van aandele (*in casu* was daar egter nie sprake van kontrakbreuk nie); *Da Mata v Otto* 1972 3 SA 858 (A): verbeuring van verbeterings; *Cave t/a The Entertainers and The Record Box v Santam Insurance Co Ltd* 1984 3 SA 735 (W): verbeuring van voordele van versekeringspolis. Sien ook Belcher 1964 *SALJ* 84; Kerr "Raising exceptio doli when formal contract has been varied informally" 1971 *SALJ* 408: "Forfeiture clauses and the Conventional Penalties Act 15 of 1962" 1972 *SALJ* 15 ev; Bamford 1972 *SALJ* 231; Kerr *The principles of the law of contract* (1989) 599; Joubert 268–269; De Wet en Van Wyk I 244. Die Wet op Vervreemding van Grond 68 van 1981 (a 15(1)(b)) laat nie verbeuring van verbeterings op residensiële grond toe wat kragtens 'n afbetalingsverkooptransaksie gekoop is nie. Sien die bespreking hieronder en Vorster "Die beperking van die regte van die verkoper in die geval van kontrakbreuk deur die koper by die verkoop van grond op afbetaling" 1985 *THRHR* 88; Kerr 599 vn 541.

51 1967 1 SA 288 (K)

52 *Van Staden v Central SA Lands & Mines* 1969 4 SA 349 (W); *Du Plessis v Oribi Estates (Pty) Ltd* 1972 3 SA 75 (N); *Smit v Bester* 1977 4 SA 937 (A); *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 3 SA 460 (T); *Matthews v Pretorius* 1984 3 SA 547 (W); Belcher 1964 *SALJ* 84; Bamford 1972 *SALJ* 230; Hackwill *Mackeurtan's Sale of goods* (1984) 238; Joubert 268; De Wet en Van Wyk I 244.

53 *Langeberg Koöperasie Bpk v Gelderblom* 1967 1 SA 288 (K). In *Da Mata v Otto* 1972 3 SA 858 (A) is beslis dat verbeuring van die reg tot vergoeding vir verbeterings op grond aangebring, nie 'n strafbeding uitmaak nie. Die beslissing word egter as strydig met die bedoeling van die wetgewer beskou. Sien Kerr 1972 *SALJ* 15 ev; Van Rensburg, Lotz en Van Rhijn "Contract" 5 *LAWSA* par 245; Joubert 268. Sien egter De Wet en Van Wyk I 248 vn 253. Sien voorts oor die lewering van 'n prestasie of uitvoering van 'n verpligting, Belcher 1964 *SALJ* 84; Bamford 1972 *SALJ* 230; Hackwill 238; Joubert 268; Van der Merwe ea 316.

54 Belcher 1964 *SALJ* 84; Bamford 1972 *SALJ* 230; Hackwill 239.

55 Hartkamp *Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht: Verbintenissenrecht* I (1992) 329.

56 Paris 18 mai 1981, 1983 *JCP* IV 181; Cass civ 5 décembre 1984, 1986 *JCP* II 20555; Cass civ 3 janvier 1985, 1985 *JCP* IV 101; Cass civ 6 novembre 1986, 1987 *JCP* IV 17; Cass civ 20 juillet 1989, 1989 *JCP* IV 358.

strafbedinge, verwys egter slegs na die geval waar 'n kontraksparty onderneem het om 'n bedrag geld te betaal. In 'n enkele beslissing[57] het die hof ook beslis dat 'n beding wat nie op die betaling van 'n bedrag geld gerig is nie, nie 'n strafbeding in die sin bedoel deur artikel 1152 is nie.[58] Die benadering van sowel die Suid-Afrikaanse as die Nederlandse reg is dus baie duideliker en skakel ook probleme uit soos deur die Engelse howe in *Jobson v Johnson*[59] ondervind is. In dié saak het die hof te staan gekom voor die probleem dat die betrokke beding die skuldenaar verplig het tot die heroordrag van aandele in 'n sokkerspan teen 'n heelwat laer bedrag as wat hy reeds daarop afbetaal het. Die hof moes deur middel van uitleg van die kontrak besluit of die beding 'n onafdwingbare strafbeding of 'n afdwingbare vooruitberaming van skade uitmaak. Die hof bevind dat die heroordrag van die aandele 'n strafbeding uitmaak aangesien die verkoper £40 000 vir die heroordrag daarvan moes betaal, ongeag die bedrag wat die koper reeds betaal het. Oor die vraag of dit enige verskil aan die regsposisie maak dat die strafbeding in hierdie geval nie die betaling van 'n geldsom behels nie, beslis die hof dat dit in beginsel geen verskil behoort te maak of die skuldenaar tot die betaling van 'n bedrag geld, die oordrag van aandele teen 'n verminderde prys of die oordrag van aandele vir geen teenprestasie verplig word nie.[60]

In die Suid-Afrikaanse reg is probleme soos dié wat die Engelse en Franse reg ondervind deur middel van die uitdruklike bepaling van artikel 1(1) van die Wet op Strafbedinge uitgeskakel.

(c) *[h]etsy by wyse van straf of as gelikwideerde skadevergoeding, kan behoudens die bepalings van hierdie Wet, in 'n bevoegde hof afgedwing word*
Artikel 1(1) doen weg met die onderskeid wat gemeenregtelik tussen strafbedinge en gelikwideerde skadevergoedingsbedinge gemaak is deur albei afdwingbaar te verklaar.[61] Die wetgewer het gepoog om weg te doen met die ondersoek na die bedoeling van die partye soos dit in die positiewe reg voor 1962 aangewend is.[62] Aanvanklik is gemeen dat daar in hierdie doel geslaag is en dat die hof nie meer nodig het om die aard van 'n betrokke beding te bepaal nie.[63] Die onjuistheid van hierdie benadering het egter gou duidelik geword. Christie[64] toon aan dat die sleutelwoord "straf" nie deur die wet gedefinieer word nie. Dit moet dus steeds in die gemeenregtelike betekenis van 'n beding *in terrorem* gesien word. Die bedoeling van die partye moet gevolglik steeds uit die kontrak vasgestel word. Kerr[65] toon ook tereg aan dat wanneer aangevoer word dat 'n bepaalde beding nie 'n strafbeding is nie, aangetoon sal moet word dat dit

57 Cass soc 19 juillet 1988, 1988 *JCP* IV 347.
58 Sien egter Mestre "Obligations et contrats spéciaux: 1. Obligations en général" 1985 *Revue Trimestrielle de Droit Civil (RT)* 373–374.
59 [1989] 1 All ER 621.
60 *Idem* 628.
61 Van der Merwe ea 316; Kerr 597; De Wet en Van Wyk I 241.
62 *Cape Town Council v Linder* (1889) 6 SC 410; *Peach & Co v Jewish Congregation of Johannesburg* (1894) 1 OR 345; *Davey, Paxman & Co v Langlaagte Star GM Co* (1898) 5 OR 216; *Commissioner of Public Works v Hills* 1906 AC 368; *Jonker v Van Os* 1911 TPD 655; *Pearl Assurance Co Ltd v Union Government* 1934 AD 560.
63 Belcher 1964 *SALJ* 83. Die mistasting van hierdie benadering is ook in *Sasol Dorpsgebiede Bpk v Herewarde Beleggings Bpk* 1971 1 SA 128 (O) aangedui.
64 658.
65 597; sien ook Kerr 1977 *SALJ* 379.

nóg *in terrorem* nóg as billike vooruitskatting van skade bedoel is. In die lig van ons gemenereg bly die bedoeling van die partye dus van belang vir sover daar aangevoer word dat 'n betrokke beding nie binne die raamwerk van die wet val nie.[66] Dit is betreurenswaardig dat die wetgewer nie daarin kon slaag om 'n eenvoudiger benaderingswyse soos dié van die Franse reg te bewerkstellig nie. Artikel 1152 *alinéa* 1 van die *Code Civil* bepaal: "When the agreement provides that the party who fails to perform shall pay a certain sum on account of damages, no larger or smaller sum can be awarded to the other party."[67] Artikel 1152 *alinéa* 2 bepaal vervolgens dat 'n hof so 'n ooreengekome bedrag kan verminder of vermeerder ondanks die bepalings van *alinéa* 1. In die praktyk word dus nie onderskei tussen 'n strafbeding en 'n skadevergoedingsbeding nie maar *enige* beding waarvolgens 'n party verplig word om 'n bedrag aan die teenparty oor te betaal, word kragtens artikel 1152 *alinéa* 2 aan vermindering (of vermeerdering) onderworpe gestel.[68]

Ook in die Nederlandse reg word geen onderskeid gemaak ten opsigte van die bedoeling waarmee 'n strafbeding in 'n kontrak ingesluit is nie. Boek 6 artikel 91 *NBW* bepaal dat 'n strafbeding 'n beding is waarvolgens 'n skuldenaar verplig is om, in geval van kontrakbreuk, 'n geldsom te betaal of 'n prestasie te lewer "ongeacht of zulks strekt tot vergoeding van schade of enkel tot aansporing om tot nakoming over te gaan". In *Hof Amsterdam 24 juni 1976*[69] word ook uitdruklik beslis dat die bedoeling waarmee 'n beding in 'n kontrak ingesluit is, geensins van belang is wanneer die strafbedrag opgeëis word nie.[70]

Ten spyte daarvan dat die nodigheid van 'n ondersoek na die partye se bedoeling nie uit die Suid-Afrikaanse reg geweer is nie, het die wet tog 'n baie welkome wysiging aan die vroeë reg aangebring. Dit is naamlik die bepaling in artikel 1(1) dat beide strafbedinge en gelikwideerde skadevergoedingsbedinge afdwingbaar en onderworpe aan die bepalings van die wet is. Die regsgevolge van sodanige bedinge is dus dieselfde ongeag die bedoeling waarmee die partye dit in die kontrak ingesluit het. So gesien, stem die benadering van die Suid-Afrikaanse reg ten aansien van die gevolg van so 'n beding met dié van die Franse en Nederlandse reg ooreen. Dié benaderingswyse skakel baie van die probleme uit wat in die Engelse reg ondervind word. Die Suid-Afrikaanse howe hoef nie meer (soos die hedendaagse Engelse howe en die vroeë Suid-Afrikaanse howe) vas te stel in watter kategorie 'n beding val ten einde te bepaal of 'n beding afdwingbaar of onafdwingbaar is nie.[71] Daar hoef ook nie, soos wat die Engelse howe dikwels doen, tot 'n wye uitleg oorgeleun te word ten einde billike

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66 Sien *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A) vir die korrekte toepassing van die onderhawige beginsels.

67 Nicholas *The French law of contract* (1992) 232.

68 Die howe is meer gemoeid met die gesindheid waarmee kontrakbreuk gepleeg is as met die bedoeling waarmee die betrokke beding in die kontrak ingesluit is. Sien Cass com 19 janvier 1993, 1993 *JCP* 711; Cass civ 24 février 1993, 1993 *JCP* IV 1073 en Paisant se aantekening *re* lg saak: 1993 *JCP* II 22166.

69 *NJ* 1977 302.

70 Sien ook Schoentjes-Merchiers "Strafbeding – boetebeding" 1969 *TP* 52; Brahn *Zwaartepunten van het nieuwe vermogensrecht* (1989) 288.

71 Sien *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* 1915 AC 79; *Cooden Engineering Co Ltd v Stanford* [1952] 2 All ER 915. Sien ook *Bridge v Campbell Discount Co Ltd* [1962] 1 All ER 385 396; *Lombard North Central plc v Butterworth* [1987] 1 All ER 267 vir kritiek teen die benadering van die Engelse howe tot die oplossing van die probleem.

bedinge afdwingbaar te maak nie.[72] Die benadering van die Suid-Afrikaanse en Europese stelsels blyk gevolglik 'n baie minder problematiese benadering as dié van die Engelse reg te wees.

(*Word vervolg*)

HUGO DE GROOT-PRYS

Die Hugo de Groot-prys van R1 000 word elke jaar deur die Vereniging Hugo de Groot uitgeloof aan die outeur wat die beste bydrae oor die Grondwet van die Republiek van Suid-Afrika 108 van 1996 vir publikasie in die THRHR *aanbied. Die redaksiekomitee behartig die beoordeling na afloop van die kalenderjaar. Die redaksiekomitee behou hom die reg voor om die prys nie toe te ken nie indien die bydraes wat ontvang is, na sy mening toekenning nie regverdig nie.*

72 *Alder v Moore* [1961] 1 All ER 1; *Bridge v Campbell Discount Co Ltd* [1962] 1 All ER 385; *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556; *Jobson v Johnson* [1989] 1 All ER 621.

Regsvrae rondom die geneeskundige behandeling van ernstig gestremde pasgeborenes*

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SUMMARY

Legal questions surrounding the medical treatment of severely handicapped neonates

The subject of this article is the question whether it is lawful to withhold drastic medical treatment from severely handicapped neonates. Although a considerable number of congenital abnormalities are known to medical science today, only five of the more severe and well-known of these abnormalities are discussed.

Ethicists from different backgrounds view the issue of selective non-treatment of severely handicapped neonates from different perspectives. Some of these ethical viewpoints are discussed.

The law has tended to lag behind modern technology. Legal principles that might have been formulated centuries ago are frequently invoked to resolve current issues. An investigation is conducted into the way the English, American and South African legal systems deal with the issue of selective non-treatment of severely handicapped neonates. In conclusion the author states his own point of view.

1 INLEIDING

Vooruitgang op die gebied van die geneeskunde en geneeskundige tegnologie het die vermoë van geneeshere aansienlik uitgebrei om babas wat met ernstige aangebore (kongenitale) gebreke gebore is, te behandel. Hedendaags is babas wat met afgryslike gebreke gebore word se vooruitsigte om die eerste dae of weke ná geboorte te oorleef, aansienlik beter as babas wat dertig of veertig jaar gelede met dieselfde gebreke gebore is.

Sodra intensiewe en hoogs verfynde geneeskundige ingrepe nodig is om ernstig gestremde babas aan die lewe te hou, kan sodanige ingrepe daartoe lei dat 'n wese aan die lewe gehou word wat 'n uiters geringe kans op persoonlike ontwikkeling en individuele interaksie het. Vir die betrokkenes is dit dikwels ook 'n groot probleem dat sodanige babas wat gered word waarskynlik vir die res van hul lewe aan 'n baie ernstige graad van fisiese en/of verstandelike gestremdheid sal ly.

Die vooruitgang van die geneeskunde het nou aanleiding gegee tot 'n sogenaamde tegnologiese imperatief, naamlik dat enige optrede minder as "absolute"

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* LLM skripsie, Unisa (1996). Publikasie in hierdie vorm geskied met goedgunstige toestemming van die Universiteit.

behandeling – dit wil sê 'n ingreep of ingrepe wat alles behels wat geneeskundig moontlik is – verdag voorkom. Sommige mense is van mening dat daar 'n absolute plig op geneeshere en mediese personeel rus om 'n lewe ten alle koste te probeer red.[1] Ander verklaar egter onomwonde: "We think that some infants with severe disabilities should be killed."[2]

Gevalle kom voor waar 'n vrou geboorte skenk aan 'n ernstig gestremde baba, die ouer(s) oor die baba se afwyking(s) ingelig word en hulle aandring óf op die geneeskundige behandeling van die baba, ten alle koste, terwyl die geneesheer en/of verpleegkundige personeel van mening is dat behandeling geen vooruitsig op welslae inhou nie;[3] óf daarteenoor op die nie-behandeling van die baba terwyl die geneeshere en/of mediese personeel 'n teenoorgestelde standpunt inneem.

Gevalle kom egter ook voor waar ouers en geneeshere *ad idem* is dat ingrypende geneeskundige behandeling van 'n ernstige gestremde baba weerhou moet word.

Verskeie vrae duik onvermydelik op wanneer daar besin moet word oor die lot van 'n ernstig gestremde pasgeborene. Die belangrikste hiervan is die vraag of dit geoorloof is om ingrypende geneeskundige behandeling te weerhou van 'n baba wat met ernstige kongenitale gebreke of abnormaliteit gebore is en, indien wel, in watter omstandighede.[4]

Tans heers daar groot onsekerheid in Suid-Afrika, soos in die res van die beskaafde wêreld, oor die vraag of dit regtens geoorloof is om ingrypende of "aggressiewe" geneeskundige behandeling van ernstig gestremde pasgeborenes te weerhou of te onttrek. Geneeshere wat in hierdie situasie na die een of ander kant besluite moet neem, vrees die moontlike regsgevolge van hul beslissings en handelinge.

2 AANGEBORE (KONGENITALE) ABNORMALITEITE OF GEBREKE

Ongeveer ses persent van pasgebore babas benodig intensiewe geneeskundige behandeling vir een of ander aangebore gebrek of gebreke.[5] Sommige van hierdie gebreke of toestande het ouers eeue gelede heel waarskynlik daartoe gedwing om dade van kindermoord te pleeg.[6] Vyf van die meer bekende ernstig aangebore gebreke word hier bespreek.

2 1 *Spina bifida*

Nicholas Tulp, 'n Nederlandse geneesheer, beskryf in sy boek *Observationes medicae* in 1652 die toestand waar 'n baba gebore is met 'n gedeeltelik gesplete en blootgestelde rugmurg. Tulp het hierdie toestand *spina bifida* genoem – 'n ruggraat wat in twee verdeel is.[7] *Spina bifida* het verskeie verskyningsvorme

1 McMillan, Engelhardt en Spicker (reds) *Euthansasia and the newborn* (1986) ix.
2 Kuhse en Singer *Should the baby live: The problem of handicapped infants* (1985) v.
3 Volgens dr PW Kruger, 'n gesinsarts, kom hierdie situasie gewoonlik voor in gevalle waar 'n kinderlose egpaar jare gesukkel het om 'n kind te verwek (persoonlike mededeling).
4 By die navorsing van sommige gedeeltes van die onderwerp van hierdie artikel was die skrywer in 'n mate aangewese op sekondêre bronne aangesien die primêre bronne hier te lande onbekombaar is.
5 Weir *Selective non-treatment of handicapped newborns: Moral dilemmas in neonatal medicine* (1984) 39.
6 Weir 7.
7 Kuhse en Singer 48.

waarvan sommige minder ernstig is en geen of geringe geneeskundige behandeling vereis. Daar is egter 'n ander, baie ernstige vorm van *spina bifida* wat medies bekend staan as *spina bifida* met miélomeningoseel. Dit beteken dat daar 'n opening in die borskas, lumbale of lumbosakrale gedeelte van die rug is wat sowel senuwee as membraanweefsel ontbloot en waaruit serebro-spinale vloeistof dreineer.

Vervolgens word daar in hierdie bespreking, wanneer melding gemaak word van *spina bifida*, slegs hierdie ernstiger verskyningsvorm van die toestand bedoel.

2 1 1 Tekens en gevolge van spina bifida[8]

Spina bifida word herken aan 'n opgeswelde gedeelte op die middel van 'n baba se rug waaruit spinale- of rugmurgvloeistof dreineer. As gevolg hiervan is die baba uiters vatbaar vir infeksies. 'n Groter en nog ernstiger komplikasie is egter die gevaar dat die senuwee wat teen die ruggraat afloop, beskadig kan word.

Kinders wat met hierdie defek oorleef, kan gedeeltelik of volkome verlam wees in die bene. Sodanige kinders het geen blaas- of ontlastingsbeheer nie en het gewoonlik ook 'n misvormde ruggraat. Boonop ontwikkel babas wat aan *spina bifida* ly ook 'n toestand wat bekend staan as hidrokefalie (die sogenaamde waterhoof). Hidrokefalie word veroorsaak deur die akkumulering van vloeistof in die serebrale ventrikels. Gevolglik swel die hoof en breinskade word veroorsaak vanweë die druk wat op die breinweefsel uitgeoefen word. Baie babas wat met *spina bifida* gebore word, ly aan een of ander graad van verstandelike vertraging.[9]

Babas wat met *spina bifida* gebore word, het tallose rekonstruktiewe operasies nodig en gaan met geweldig ernstige fisiese gebreke en gestremdhede deur die lewe.

2 1 2 Voorkoms van spina bifida[10]

Die voorkoms van *spina bifida* wissel van plek tot plek. *Spina bifida* kom meer algemeen voor onder sekere etniese groepe as ander. Oor die algemeen word een uit 'n duisend babas met *spina bifida* gebore. In Japan is die verhouding een tot vierduisend terwyl dit in Wallis en Ierland een tot tweehonderd-en-vyftig skyn te wees.

Wetenskaplikes is tans nog in die duister oor die presiese oorsake van *spina bifida*. Verskeie hipoteses wat wissel van die gebruik van pynstillers tot die eet van aartappels is al voorgehou as oorsaak daarvan. Geeneen van die verskeie voorgehoue hipoteses word egter deur genoegsame bewyse gesteun nie. Tot op hede blyk dit egter dat *spina bifida* heel waarskynlik aan 'n vitamien- en ystertekort toegeskryf kan word.

2 2 Down se sindroom of "Trisomy 21"

Down se sindroom is die eerste keer in 1866 deur Langdon Down beskryf.[11] Ongeveer vierduisend babas word jaarliks in Noord-Amerika met dié sindroom

8 Kuhse en Singer 48; Weir 43.
9 Dit is egter nie 'n algemene reël nie. Sommige sodanige kinders beskik wel oor normale intelligensie (sien in die verband Kuhse en Singer 49).
10 *Idem* 49 ev.
11 Weir 44.

gebore.[12] Vroue onder die ouderdom van dertig staan 'n kans van een uit eenduisend-vyfhonderd om geboorte te skenk aan 'n baba met Down se sindroom, terwyl vroue ouer as veertig 'n kans van een uit honderd-en-dertig het om aan so 'n kind geboorte te skenk.[13] Die sindroom word veroorsaak deur 'n foutiewe verspreiding van chromosome in die eiersel, sperma, of tydens die vroeë selverdeling van die bevrugte eiersel.[14] Kinders met Down se sindroom beskik oor 'n ekstra chromosoom 21.[15]

2 2 1 Kenmerke van Down se sindroom[16]

Die kenmerke van Down se sindroom is matige tot ernstige verstandelike vertraagdheid, hipotoniese of verswakte spiere asook sekere uiterlik waarneembare kenmerke soos skuins oë, misvormde ore en hande (kort vingers), 'n plat gesig, 'n kort nek met oormatige vel en 'n verdikte tong. Die kind het 'n mongoolagtige voorkoms; vandaar dat die woord "mongolisme" ook vir die toestand gebruik word. Babas met die sindroom het gewoonlik kardiovaskulêre probleme en benodig dikwels hartchirurgie.

2 2 2 Behandeling vir Down se sindroom[17]

Down se sindroom is ongeneesbaar. Een derde tot die helfte van babas wat met die sindroom gebore word, worstel ook met ander aangebore gebreke soos esofageale of duodenale atresie, 'n kongenitale hartabnormaliteit, en een persent van die babas staan 'n kans om leukemie (bloedkanker) gedurende hulle kinderjare te ontwikkel. Waar 'n baba met die sindroom gebore word en chirurgie die enigste uitweg is om die baba se lewe te verleng, gebeur dit dikwels dat ouers verkies dat die voorgestelde ingreep nie uitgevoer word nie vanweë die vooruitsig van lewenslange verstandelike vertraagdheid,[18] en die risiko dat die chirurgie self (opehartchirurgie word in sekere gevalle benodig) nie sal slaag nie.

2 3 Babas wat tydens moeilike geboorte hoofbeserings opdoen

2 3 1 Tangverlossings

Verlostange is verloskundige instrumente wat in sekere gevalle gebruik word om die moeder te help om geboorte aan haar kind te skenk. 'n Verlostang word gebruik om die baba se kop te draai of te trek in die rigting na waar die baarmoeder die vaginale kanaal ontmoet. Babas wat gebore word met behulp van 'n verlostang loop egter die risiko om tydens die geboorteproses beseer te word. Die besering(s) kan wissel van langtermyn morbiditeit in die vorm van serebrale gestremdheid tot lae intelligensie. Sommige babas kan ook sterf

12 McMillan, Engelhardt en Spicker 102.
13 Weir 44.
14 *Ibid.*
15 Die liggaamselle van 'n normale mens bevat ses-en-veertig chromosome. In die geval van Down se sindroom bevat dié individu se liggaamselle sewe-en-veertig chromosome. Hierdie ekstra chromosoom staan bekend as chromosoom 21. Sien *Dorland's medical dictionary* sv "trisomy".
16 Widerstrom, Mowder en Sandall *At risk and handicapped newborns and infants: Development, assessment and intervention* (1991) 89; Weir 45.
17 Weir 45.
18 Die IK van babas wat met Down se sindroom gebore word wissel gewoonlik tussen 25 en 60. Sien Weir 45 in die verband.

vanweë die beserings tydens tangverlossings opgedoen.[19] As gevolg van die risiko wat verlostanggeboortes vir babas inhou, word eerder keisersneë as tangverlossings uitgevoer indien dit blyk dat 'n moeilike geboorte voorhande is.[20] In Suid-Afrika is hoofbeserings verantwoordelik vir twintig tot veertig persent van die sterftes onder pasgeborenes.[21]

2 4 Esofageale atresie

Negentig persent van kongenitale misvorming van die esofagus (slukderm) bestaan uit esofageale atresie met 'n gepaardgaande tragea-esofageale fistula. Hierdie toestand kom voor waar 'n pasgeborene se boonste gedeelte van sy esofagus verbind is met 'n holte of sakkie in plaas van die maag. Hiermee saam word die distale gedeelte van die tragea (lugpyp) deur 'n fistula (abnormale buis) verbind met die laer gedeelte van die esofagus. Hierdie toestand veroorsaak 'n abnormale verbinding tussen die tragea en die maag.[22]

2 4 1 Kliniese tekens van esofageale atresie

Kliniese tekens van esofageale atresie is konstante kwyling of spu, hoes en verstikking, en dit onmoontlik is om 'n nasogastriese buis in te plaas. 'n Definitiewe diagnose van esofageale atresie kan egter met behulp van x-strale gemaak word.

2 4 2 Die behandeling van esofageale atresie

Antibiotika word toegedien om longontsteking te beveg wat kan ontstaan weens die inaseming van voedsel. Die esofageale sakkie of holte word uitgesuig en binne-aarse voeding word toegedien.[23] In vyf-en-tagtig persent van gevalle kan esofageale atresie chirurgies herstel word.[24] Dit is egter 'n hoogs delikate operasie in die geval van 'n pasgeborene wat groot vaardigheid verg en baie duur kan wees.[25] Die operasie behels onder meer oorplanting van ingewande uit die baba. 'n Gedeelte van die dikderm word gebruik om die esofagus met die maag te verbind. Daar is 'n groot risiko aan die operasie verbonde en in die beste hande is daar hoogstens 'n tagtig persent kans vir sukses. Die sukses van die operasie hang grootliks af van die graad van die atresie, die algemene gesondheid van die baba, wie die operasie uitvoer en waar die operasie uitgevoer word.[26]

2 5 Prematuur of vroeggebore babas en "klein-vir-datum" babas

Vroeë geboortes is die grootste oorsaak van sterftes onder babas in Australië, Europa en Noord-Amerika.[27] Statistieke toon dat in dié lande een uit twintig babas te vroeg gebore word en dat ses-en-sestig persent van sterftes onder babas toegeskryf kan word aan die feit dat hulle vroeggebore is.

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19 Volk en Morgan *Medical malpractice: Handling obstetric and neonatal cases* (1986) 214.
20 *Ibid.*
21 Schwär, Loubser en Olivier *Die ABC van geregtelike geneeskunde: 'n Praktiese handleiding* (1985) 278.
22 Weir 43.
23 MacMahon (red) *An aid to paediatric surgery* (1991) 87.
24 Weir 45.
25 Persoonlike mededeling aan die skrywer.
26 *Ibid.*
27 Yu en Wood (reds) *Prematurity* (1987) 1.

2 5 1 Premature of vroeggebore babas

Volens die aanbeveling van die Wêreld Gesondheidsorganisasie word alle babas wat voor 37 weke gebore word as prematuur beskou.[28]

2 5 2 Lae-gewig-by-geboorte- of "klein-vir-datum"-babas

"Klein-vir-datum" – of die sogenaamde "small for gestational age" – (SGA) babas is babas wat by geboorte minder as 2 500 gram (5½ pond) weeg. Beide premature of voltermyn babas kan klein vir hul datum wees. 'n Abnormale lae gewig by geboorte is gewoonlik 'n aanduiding dat daar tydens die moeder se swangerskap ernstige ontwikkelingskomplikasies ingetree het wat die fetus verhinder het om te ontwikkel tot 'n normale grootte en gewig vir sy of haar ouderdom.

2 5 3 Oorsake van premature geboortes en lae gewig by geboorte

2 5 3 1 Premature geboortes

Premature geboortes is gewoonlik die gevolg van veelvuldige swangerskappe van die moeder, swak servikale spiere of infeksies gedurende die derde kwartjaar[29] van swangerskap. Sowel vroue wat tweelinge verwag as vroue wat aan die een of ander chroniese siekte soos diabetes ly, loop 'n groot risiko om prematuur geboorte te skenk. Navorsers in die VSA sê dat hulle vasgestel het dat die hormoonvlakke van vroue wat geboorte geskenk het aan premature babas abnormaal is. Indien hierdie hormoonversteurings reggestel kan word, kan premature geboortes voorkom word.[30]

2 5 3 2 "Lae-gewig-by-geboorte-babas"[31]

Hierdie toestand kan veroorsaak word deur die misbruik van dwelmmiddels en/of alkohol, kafeïen, nikotien en die gebrek aan voorgeboortelike sorg.

2 5 4 Komplikasies wat kan intree by premature babas[32]

Die volgende komplikasies kan voorkom: Asfiksie of versmoring tydens geboorte omdat die longe van premature babas onderontwikkeld is, aangesien die longe een van die laaste organe is om in 'n baba te ontwikkel; verlies aan liggaamshitte; asemnood; metaboliese bloedversuring; infeksies (longontsteking, breinvliesontsteking, urienweg-infeksie); tydperke van asemstilstand (apnee); geestesafwykings; versteurings soos aanvalle en stuipe; serebrale verlamming; en blindheid. Indien premature babas nie onmiddellik intensiewe geneeskundige behandeling ontvang nie, kan hulle vanweë dié komplikasies sterf.

2 5 5 Komplikasies wat kan intree by babas met 'n abnormale lae gewig by geboorte[33]

Klein-vir-draagtyd- of "SGA"-babas se kanse om tydens geboorte weens versmoring te sterf, is tien maal groter as babas met 'n normale gewig by geboorte.

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28 Widerstrom, Mowder en Sandall 62.
29 Die derde kwartjaar van swangerskap is vanaf 26 weke tot die geboorte van die fetus.
30 Luidens 'n berig in *Die Burger* 1995-05-02 7.
31 Widerstrom, Mowder en Sandall 99 ev.
32 Weir 39; luidens die berig in *Die Burger* 1995-05-02 7.
33 Weir 40; 1995 (85 7) *SA Medical Journal* nr 599.

Uit die resultate van 'n opvolgstudie by die Tygerberg Hospitaal oor die algehele gesondheidstoestand van klein-vir-draagtyd-babas een jaar na hulle geboorte, blyk dit dat sommige van die babas, veral die wat minder as 'n 1 000 gram by geboorte geweeg het, aan permanente fisiese abnormaliteite ly soos abnormale motoriese ontwikkeling, sensoneurale doofheid en degenerasiesiekte van die retina. Ander komplikasies wat kan intree, is verlies aan liggaamshitte en infeksies.

Klein-vir-draagtyd-babas is ook geneig tot stadiger fisiese groei (hulle is dus meer tenger en kleiner) as babas met 'n normale gewig by geboorte. Dié babas het gewoonlik ook die een of ander aangebore afwyking en is ook geneig tot stadiger neurologiese ontwikkeling in hulle vroeë jare. Vyftig persent van dié babas het gewoonlik ook 'n laer as normale IK.[34]

3 ETIESE STANDPUNTE OOR DIE SELEKTIEWE NIE-BEHANDELING VAN ERNSTIG GESTREMDE PASGEBORENES

Met die vooruitgang van die geneeskunde is dit vandag moontlik om die lewe van ernstig gestremde pasgeborenes te verleng maar teen hoë geldelike koste. Ernstige etiese vrae ontstaan nou, waarvan die volgende seker die belangrikste is: wanneer, indien ooit, sou dit geoorloof wees om lewensonderhoudende geneeskundige behandeling van ernstig gestremde pasgeborenes te weerhou?

3 1 Etiese standpunte

3 1 1 Behandel alle nie-sterwende pasgeborenes voor die voet

Paul Ramsey, 'n afgetrede Christelike etikus van die Universiteit van Princeton, is die bekendste voorstander van hierdie standpunt.[35] Ramsey verklaar dat een van die belangrikste take van geneeshere behoort te wees om te bepaal watter pasgeborenes sterwend is en watter nie. Volgens hom word sommige babas, byvoorbeeld anenkefale (harsinglose) babas,[36] sterwend gebore. In hierdie tragiese gevalle sou selfs intensiewe geneeskundige behandeling geen nut dien nie en slegs die sterwensproses verleng. Ramsey meen dat gestremde babas in die meeste gevalle egter nie sterwend gebore word nie en dat dit met kragdadige geneeskundige behandeling moontlik is om hulle lewens te verleng. Hy sê: "We have no moral right to choose that some live and others die."[37] Die kern van Ramsey se standpunt is dat ouers en/of geneeshere nie mediese behandeling mag weerhou van nie-sterwende normale of gestremde babas nie.

3 1 2 Die "heiligheid-van-lewe-beginsel"[38] ("sanctity-of-life principle")

Volgens die "sanctity-of-life"-beginsel word menslike lewe, ongeag die waarde daarvan, bo alles gestel. Die oorsprong van dié beginsel kan in die Joods-Christelike tradisie gevind word. Judaïsme en die Christendom huldig die standpunt dat die waarde van menslike lewe van God afkomstig is.[39] Geen mens

34 Persoonlike mededeling aan die skrywer deur professor X. Sien 4 3 1 5 *infra*.
35 Volgens Weir 147.
36 Dit is 'n toestand waar die ontwikkeling van die brein onvolkome is. In die oorgrote meerderheid van anenkefale babas is daar geen brein en breinstam nie.
37 Aangehaal deur Weir 147.
38 Eie vertaling. Daar word soms ook gepraat van die "onskendbaarheid" van lewe.
39 Shelp *Born to die?* (1986) 132.

is by magte om oor die waarde van die lewe te besluit nie. Lewe is 'n gawe van God en mense is verplig om die gawe van lewe te verryk, te beskerm en te verleng.[40] Behalwe in streng omskrewe uitsonderingsgevalle is die algemene beskouing dat slegs God die mag het om te besluit wanneer lewe beëindig word.[41]

Immanuel Jakobovits, president van die Instituut van Judaïsme en Geneeskunde in Jerusalem, meen dat die heiligheid-van-lewe-beginsel geen ruimte laat vir selektiewe nie-behandeling van ernstig gestremde pasgeborenes nie. Volgens Jakobovits is elke pasgeborene, ongeag of hy of sy gestremd is of nie, geregtig op geneeskundige behandeling omdat "the title of life is absolute from the moment of birth".[42]

Meer gematigde ondersteuners van die heiligheid-van-lewe-beginsel maak 'n onderskeid tussen gewone en buitengewone pogings tot die bewaring van lewe. Gewone pogings tot die beskerming van lewe is maklik bekombare behandeling wat sonder te veel ernstige moeite toegepas kan word en wat 'n redelike kans tot proporsionele voordeel bied. Wanneer enige een van hierdie voorwaardes afwesig is, is die poging buitengewoon.[43] Wanneer pogings aangewend word om 'n gestremde baba se lewe te red en die behandeling 'n ernstige en swaar las op die baba en ouers sou plaas, word die behandeling as buitengewoon gesien.[44] Buitengewone pogings om 'n gestremde baba se lewe in stand te probeer hou, word nie deur hierdie gematigde ondersteuners aanbeveel nie.

3 1 3 Wanneer behandeling meer skadelik as voordelig vir 'n gestremde baba is

Onderdrukkende en ingrypende geneeskundige behandeling kan skadelik en tot nadeel van die baba wees indien dit meer pyn veroorsaak as wat hy of sy sou verduur het indien geen behandeling toegepas word nie.[45] Indien 'n baba onderwerp word aan verskeie diagnostiese prosedures, korrektiewe operasies en medikasie met negatiewe newe-effekte, en die baba ten spyte van hierdie behandeling sterf, kan daar gesê word dat die baba baie pyn en lyding gespaar sou kon word indien slegs verligtende en ondersteunende behandeling toegedien is. Margery W Shaw[46] beweer dat behandeling skadelik is indien die kwaliteit van lewe ná behandeling slegter is as wat dit sou wees sonder behandeling. Shaw meen ook dat behandeling meer sleg as goed doen indien 'n baba gered word wat as gevolg van aangebore defekte sou sterf, maar so gestrem is dat daar geen kans op vooruitsig van lewensgenietinge is nie.[47] Laastens betoog Shaw dat geneeskundige ingrepe skadelik is indien dit slegs die sterwensproses verleng.[48]

3 1 4 Wanneer behandeling meer skadelik as voordelig vir die ouers van die gestremde baba is

Hier word die newe-effekte van 'n ernstig gestremde baba se lewe (of dood) op ander beoordeel. Glover[49] is van mening dat daar gevalle is, soos babas met

40 *Idem* 132.
41 *Idem* 133.
42 Aangehaal deur Weir 150.
43 Shelp 135.
44 *Ibid.*
45 McMillan, Engelhardt en Spicker 120.
46 *Ibid.*
47 *Ibid.*
48 *Ibid.*
49 Soos aangehaal deur Weir 170.

spina bifida, waar die dood die voordeligste alternatief sal wees vir al die betrokkenes. Glover[50] verklaar:

> "Where the handicap is sufficiently serious, the killing[51] of a baby may benefit the family to an extent that is sufficient to outweigh the unpleasantness of the killing."

Ouers kan ook emosioneel verpletter voel indien 'n gestremde baba slegs in staat is om eenvoudige dinge te geniet, soos om vasgehou of gevoed te word, maar andersins vir die res van sy of haar lewe afhanklik sal wees en nie in staat sal wees om sy of haar ouers te herken of liefde en toegeneentheid te bewys of te erken nie.[52] Sodanige ouers en hul ander kinders het geen hoop op verligting van 'n lewenslange las van versorging van die gestremde gesinslid nie.

Die ouers van ernstig gestremde kinders sal ook geldelik swaar getref word deur geneeskundige, hospitaal- en verpleegonkoste selfs lank nadat normale kinders van dieselfde ouderdom reeds onafhanklik van hul ouers leef.

3 1 5 Die "kwaliteit-van-lewe-beginsel" of "quality-of-life-principle"

Die "kwaliteit-van-lewe-beginsel"[53] – soos die heiligheid-van-lewe-beginsel – bevestig dat menslike lewe kosbaar is. Voorstanders van die kwaliteit-van-lewe-beginsel ondersoek die kenmerke, gehalte en hoedanighede van menslike lewe om te bepaal of die lewe die moeite werd is vir die menslike wese wat dié lewe leef. Hierdie voorstanders poog om redes te vind vir die geoorloofde neem van 'n lewe wat verder gaan as bloot oorlog- en noodweersituasies.[54]

Richard McCormick, 'n sedeleer-teoloog aan die Kennedy Instituut van Etiek, benader die kwessie van selektiewe nie-behandeling vanuit 'n teologiese oogpunt wat baie ooreenstem met die nuttigheidsleer.[55] McCormick voer aan dat die waarde van 'n mens se lewe nie bepaal kan word deur inkomste, opvoeding, geslag, beroep of enige eienskap wat 'n individu se waarde ("value") in die gemeenskap kan bepaal nie. Hy meen dat die waarde van die individu se lewe relatief is tot die verwesenliking van geestelike goed ("spiritual goods") soos liefde vir God of jou medemens. Lewe vergestalt slegs deur metaboliese prosesse is nie beskermingswaardig nie.[56] Hy betoog verder dat lewe slegs beskermingswaardig is indien daar 'n potensiaal vir menslike verhoudings is.[57] Hierdie verhoudingspotensiaal ("relational potential") van ernstig gestremde babas moet volgens hom gebruik word as 'n maatstaf by die besluit van nie-behandeling.

McCormick is van mening dat hierdie verhoudingspotensiaalmaatstaf gebruik kan word om twee groepe pasgeborenes te identifiseer waar die weerhouding van behandeling geoorloof sal wees: (a) pasgeborenes wat byvoorbeeld aan anenkefalie ly,[58] waar die verhoudingspotensiaal volkome afwesig is; en (b) pasgeborenes wat so erg gestrem is dat die verhoudingspotensiaal geheel-en-al oorskadu sal word deur die blote strewe na oorlewing.

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50 *Ibid.*
51 Vir Glover is die verskil tussen doodmaak en laat sterf moreel irrelevant, aldus Weir 170.
52 McMillan, Engelhardt en Spicker 121.
53 Eie vertaling.
54 Shelp 136.
55 Soos aangehaal deur Weir 166.
56 Weir 166.
57 *Ibid.*
58 Sien 3 1 1 *supra*.

Laastens betoog McCormick dat hierdie riglyn vir besluitneming toegepas moet word deur ouers in oorleg met geneeshere.[59]

Vir Jonathan Glover, 'n filosoof aan die Universiteit van Oxford,[60] is die besluit om die lewe van 'n erg gestremde baba te beëindig, afhanklik van die twee vrae:[61] (a) of daar gesê kan word dat die baba se lewe nie werd is om geleef te word nie; en (b) of die baba se lewe (of dood) voordelige of skadelike neweeffekte op ander mense sal hê.

Glover gee toe dat dit 'n hoogs ingewikkelde saak is om te besluit wanneer 'n lewe die moeite werd is of nie. Sy oplossing vir hierdie dilemma is dat waar 'n waarde-oordeel uitgespreek moet word oor die lewe van 'n ernstig gestremde baba, mense hulself in die plek van die baba moet stel. Op hierdie hipotetiese wyse kan die vraag gevra word of, indien 'n persoon met hierdie gebrek of abnormaliteit gebore sou wees, hy of sy sou verkies het om deur die lewe in hierdie toestand te gaan, of eerder sou verkies het dat sy of haar lewe beëindig word.[62]

3 1 6 Die nie-behandeling van ernstig gestremde pasgeborenes omdat die behandeling nie geag word in die beste belang van die baba te wees nie

Sedekundiges wat voorstanders is van hierdie beskouing spits hulle toe op die vraag wat in die beste belang van die kind is. Volgens hulle wentel die vraag nie om die verwagte lewensgehalte van die baba nie maar eerder om die verwagte las van voortgesette bestaan.[63]

Vir Phillipa Foot, 'n filosoof verbonde aan die Universiteite van Oxford en Kalifornië (UCLA),[64] is die kritieke vraag waar daar besluit moet word oor die behandeling of nie-behandeling van ernstig gestremde babas, die volgende: as geneeshere en ouers besluit dat die gestremde baba nie behandel moet word nie, is dit 'n besluit wat geneem word tot beswil van die baba? Sy beweer dat in die meeste gevalle van selektiewe nie-behandeling van ernstig gestremde babas daar nie in die beste belang van die kind opgetree word nie, maar in die beste belang van ander partye[65] (soos die ouers van die baba). Sy meen dat die meeste besluite ten gunste van nie-behandeling verkeerd is omdat geen mens (dit wil sê sowel babas as volwassenes) doelbewus doodgemaak mag word nie bloot "to avoid trouble to others".[66]

Foot meen egter ook dat waar die mediese prognose uiters swak is, soos vir sommige babas met *spina bifida*, dit in die beste belang van die kind is en moreel geregverdig sou wees om teen behandeling te besluit. Haar siening berus op die oortuiging dat voortgesette lewe vir sommige ernstig gestremde babas (of volwassenes) eerder pyn en lyding as vreugde sal meebring.

Van belang is dat Foot die mening huldig dat geen reg geskend word waar eutanasie op versoek van 'n persoon toegepas word nie. Foot erken egter dat 'n

59 Weir 167.
60 Soos aangehaal deur Weir 169.
61 Weir 170.
62 *Ibid.*
63 *Idem* 171.
64 Aangehaal deur Weir 176.
65 *Ibid.*
66 *Ibid.*

ernstige morele vraagstuk opduik waar daar besluit word om geneeskundige behandeling van 'n ernstig gestremde baba te weerhou, veral waar weerhouding as in die beste belang van die baba geag word. Die rede vir die probleem is dat die baba self nie die besluit kan neem nie, al is sy lewe een groot proses van lyding. Sy doen aan die hand dat indien vrywillige eutanasie in die toekoms toelaatbaar sou word, daar voorsiening gemaak moet word vir 'n meganisme waarkragtens 'n voog of kurator aangestel word om namens die baba op te tree. Tot tyd en wyl dit gebeur, moet aanvaar word dat selektiewe nie-behandeling van gestremde babas tot die dood kan lei weens ontwatering (dehidrasie) of verhongering.[67]

David H Smith, 'n professor in godsdiensstudies aan die Universiteit van Indiana, se standpunt oor selektiewe nie-behandeling stem wesenlik ooreen met die van Foot. Smith meen egter dat as 'n besluit geneem moet word wat in die baba se beste belang is, die proses van besluitneming 'n prerogatief is wat slegs die ouers toekom.[68] Smith betoog dat selektiewe nie-behandeling slegs gesien kan word as in die baba se beste belang te wees indien dit die beste keuse ("best option") vir die baba is.

4 ERNSTIG GESTREMDE PASGEBORENES EN DIE REG

Besluite betreffende die behandeling of nie-behandeling van gestremde pasgeborenes behels nie net die oorweging van etiese beskouings nie. Wanneer ouers en/of geneeshere moet besluit oor die geneeskundige behandeling of nie-behandeling van 'n ernstig gestremde baba, behoort die besluitnemende partye deeglik te besef dat hul besluite sekere regsgevolge kan inhou. Die gevoel dat ouers en geneeshere behoort te besluit oor die behandeling of nie-behandeling van ernstig gestremde pasgeborenes berus op die aanname dat daar 'n onderskeibare klas persone is, soos gestremde pasgeborenes, van wie geneeskundige behandeling regmatig weerhou kan word. Dit behoef geen betoog nie dat dit ongeoorloof sou wees om geneeskundige behandeling van normale babas te weerhou, in ieder geval wanneer sodanig behandeling redelikerwys beskikbaar is.

Indien die reg egter nie-behandelingsbesluite sou veroorloof, is die logiese gevolgtrekking dat sekere lewens minder beskermingswaardig as ander is. Die uitgangspunt van die Suid-Afrikaans reg, soos dié van die Amerikaanse reg, is egter dat die lewe van sowel normale persone as van gestremde babas beskerm moet word.[69]

Dit is nogtans 'n feit dat selektiewe nie-behandeling van ernstig gestremde pasgeborenes plaasvind en dat ouers, geneeshere, verpleegpersoneel en hospitale hulle ten spyte van edele motiewe, volgens tradisionele regsreëls skuldig maak aan moord, strafbare manslag, sameswering ("conspiracy" soos begryp in die Amerikaanse reg) of verwaarlosing.[70] Baie min gevalle van selektiewe nie-behandeling van ernstig gestremde pasgeborenes beland uiteindelik in die geregshowe en indien dit wel gebeur, word ouers en/of geneeshere selde vir hul dade

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67 *Idem* 176.

68 Aangehaal deur Weir 175.

69 In *S v De Bellocq* 1975 3 SA 538 (T) verklaar De Wet R onder meer: "The law does not allow any person to be killed whether that person is an imbecile or very ill." Sien ook in dié verband Milunsky en Annas (reds) *Genetics and the law* (1975) 452 ev.

70 Milunsky en Annas 452.

veroordeel. Die vraag is dus: hoe word hierdie skynbaar radikale afwyking van beginsels soos eerbied vir die lewe en die gelyke beskerming van almal geregverdig?

4 1 Die posisie van ernstig gestremde pasgeborenes in die Engelse reg

Verskeie geneeshere in Groot-Brittanje is van mening dat 'n geneesheer nie verplig behoort te word om die lewe van 'n ernstig gestremde pasgeborene te verleng nie – veral nie as dit ook die wens van die ouers is nie.[71]

In die Engelse saak *In re B (A Minor) (Wardship: Medical Treatment)*[72] het die volgende situasie hom voorgedoen. 'n Getroude vrou het geboorte geskenk aan 'n kind wat aan Down se sindroom asook aan 'n ingewande-obstruksie gely het. Geneeshere het gemeen dat die baba binne dae sou sterf indien die obstruksie nie chirurgies verwyder word nie. Indien die obstruksie verwyder sou word, sou die lewensverwagting van die kind ongeveer twintig tot dertig jaar wees. Die ouers se wens was dat hulle baba nie die operasie ondergaan nie en toegelaat moes word om te sterf. Die plaaslike owerheid het ingegryp, die kind onder voogdyskap van die hof laat plaas en aansoek by die hof ingedien vir 'n bevel dat die operasie uitgevoer moet word. Die hof het egter beslis dat die ouers se wens geëerbiedig moet word en geweier om die operasie te beveel. Die plaaslike owerheid het appèl aangeteken teen die beslissing en die Court of Appeal het die appèl gehandhaaf. Die appèlhof beslis by monde van Templeman LJ dat "I have no doubt that it is the duty of this court to decide that the child must live".[73] Die *ratio* van die appèlhof se uitspraak is soos volg:

(a) By beoordeling van die vraag of die baba die operasie moet ondergaan of nie, is die vraag voor die hof of dit in die baba se belang sal wees as sy die operasie ondergaan[74] en nie of die ouers se wens geëerbiedig moet word nie.

(b) Sou die baba die operasie ondergaan, sou sy die normale lewensverwagting van 'n mongool hê en aangesien daar nie aangetoon is dat die lewe van 'n mongool sodanig is dat die baba eerder toegelaat moet word om te sterf nie, kan die hof nie goedkeur dat hierdie tipe lewe uitgewis word nie.[75]

Die hof het egter ook te kenne gegee dat by beoordeling van die kwessie of die baba die operasie moet ondergaan of nie, die hof nie doof is vir die wense van die ouers en die menings van die geneeshere nie, maar dat die finale besluit by die hof lê.[76] Templeman LJ maak dan ook die volgende opmerking:

> "There may be cases, I know not, of severe proved damage where the future is so certain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion."[77]

In die geval waar 'n redelik normale kind se lewe in onmiddellike gevaar is, sal die begeerte van die ouers dat geneeskundige behandeling van die kind weerhou word, nie die geneesheer onthef van die verpligting om die kind se lewe te red nie.[78] Onsekerheid oor die verpligting van geneeshere bestaan egter in die geval

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71 Skegg *Law, ethics and medicine: Studies in medical law* (1988) 158.
72 [1981] WLR 1421 (CA).
73 1424D.
74 1424D–E.
75 1424E.
76 1424A–C.
77 1424B–C.
78 Skegg 157.

waar dit die ouers van 'n ernstig gestremde baba se begeerte is dat "aggressiewe" geneeskundige behandeling van hulle baba weerhou word. Soos vroeër genoem, is verskeie geneeshere gekant teen die verlenging van die lewe van 'n ernstig gestremde pasgeborene.[79] Skegg[80] meen dat 'n geneesheer se primêre verpligting teenoor die kind en nie teenoor die ouers is nie. Volgens Skegg is dit ongewens dat die ouers se wense, sonder inagneming van ander faktore, as voldoende rede geag word om hul ernstig gestremde baba te laat sterf.[81] Hy is egter van mening dat indien 'n geneesheer 'n ernstig gestremde baba laat sterf, grootliks omdat dit die ouers se begeerte is, vooraanstaande lede van die geneeskundige beroep in die guns van die geneesheer sal getuig indien die geneesheer strafregtelik vervolg sou word vir sy late.[82] Skegg meen dat 'n regter hoogs ongeneë sal wees om enigiets te sê wat 'n jurie sal aanmoedig om te glo dat die geneesheer nie soos 'n redelike geneesheer in die omstandighede opgetree het nie. Skegg betwyfel in elk geval of 'n jurie in hierdie omstandighede 'n geneesheer sal straf vir sy late.

Ongeveer tien jaar na die uitspraak in *B* se saak[83] het die aangeleentheid van nie-behandeling van 'n ernstig gestremde kind weer ter sprake gekom in die Engelse appèlhofsaak *Re J (a minor) (wardship: medical treatment)*.[84] Die feite van die saak was kortliks die volgende. J was 'n sestien-maande-oue baba. Ten gevolge van 'n val op sy hoof was hy erg gestrem, beide fisiek en verstandelik. Hy was ernstig mikrokefalies omdat die groei van sy brein vertraag is vanweë die val. Hy het ook aan 'n ernstige graad van serebrale verlamming en skorsblindheid gely. Boonop het hy aan 'n ernstige graad van epilepsie gely en soms tot sewe epileptiese aanvalle op een dag gekry. J moes met behulp van 'n nasogastriese buis gevoed word. Geneeshere was van oordeel dat J se lewensverwagting, alhoewel onseker, uiters kort sou wees. J was deur die plaaslike owerheid in die sorg van pleegouers geplaas.

In Desember 1991 het dr I, onder wie se sorg J sedert sy hoofbesering was, in 'n verslag geskryf dat dit medies onvanpas[85] sou wees om aggressiewe geneeskundige behandeling op J toe te pas indien 'n lewensbedreigende toestand J in die gesig sou staar. Dr I het egter gemeen dat gewone resussitasie soos fisioterapie, die uitsuig van sy lugweë en die toediening van antibiotika wel op J toegepas moet word. In 'n opvolgverslag wat deur die plaaslike owerheid van dr I aangevra is met betrekking tot J se toestand, merk sy onder meer op dat

> "since J has made very little development progress since the accident he has no potential to return to a healthy life and thus intensive care would not only be cruel but would artificially prolong his vegetative state".[86]

Op 30 Maart 1992 het die plaaslike owerheid 'n bevel by die hof aangevra wat onder meer die plaaslike gesondheidsowerheid sou verplig om alle mediese behandeling wat J sou benodig om aan die lewe te bly, aan hom te verskaf. Die bevel is aan die plaaslike owerheid toegestaan. Die gesondheidsowerheid, J se aangestelde kurator *ad litem*, asook die plaaslike owerheid wat intussen van

79 Sien 4 1 *supra*.
80 Skegg 159.
81 *Ibid*.
82 *Ibid*.
83 Sien vn 72 *supra*.
84 [1992] 4 All ER 614 (CA).
85 Eie vertaling van die Engelse sinsnede "it would not be medically appropriate".
86 618i–619a.

mening verander het, het teen die bevel geappelleer. (J se moeder het die appèl teengestaan.) Die appèlhof het die appèl gehandhaaf en die bevel wat in die hof *a quo* toegestaan was, tersyde gestel. Die gesondheidsowerheid is derhalwe toegelaat om J te behandel volgens hul beste mediese oordeel.

Die *ratio* vir die appèlhof se beslissing (per Lord Donaldson) was soos volg: Die gepaste benadering vir die hof is om te probeer vasstel watter optrede werklik in die beste belang van die baba sal wees. Faktore soos "balance of convenience" of bloot om die *status quo* te handhaaf, behoort glad nie deur die hof oorweeg te word nie. Die vraag wat eintlik beoordeel moet word, is of 'n hof, met inagneming van sy inherente mag om die belange van kinders te beskerm, 'n geneesheer wat *bona fide* glo dat geneeskundige behandeling nie in die kind se beste belang is nie, mag dwing om wel die kind te behandel.[87] Hierdie vraag beantwoord die hof ontkennend. Die regter merk ook op dat die basiese plig van 'n geneesheer teenoor sy pasiënt is om die pasiënt te behandel ooreenkomstig sy beste kliniese oordeel.[88] Die hof kom tot die gevolgtrekking dat geneeshere toegelaat moet word om hul pasiënte te behandel ooreenkomstig hul kliniese oordeel en dat dit vir niemand anders geoorloof is om in te meng met hierdie oordeel nie.[89]

Die probleem wat nou kan ontstaan waar behandelings- of nie-behandelingsbesluite aan geneeshere alleen oorgelaat word, is dat 'n geneesheer sy eie kulturele en godsdienstige voorkeure op ander, wat nie sy sienings in dié verband deel nie, kan afdwing. Dr Peter M Dunn[90] is van mening dat die uiteindelike besluit oor behandeling of nie geneem moet word deur die geneesheer en die ouers van die gestremde baba gesamentlik. In hierdie omstandighede moet die geneesheer op 'n baie taktvolle wyse aan die ouers verduidelik wat die probleem presies behels, wat die vooruitsigte vir die baba is en watter moontlike behandelingswyses vir die baba beskikbaar is.[91]

4 1 1 Die geval waar 'n geneesheer sekere geneeskundige behandeling voorstel, maar dit die begeerte van die ouers is dat die behandeling weerhou moet word

Waar ouers geneeskundige behandeling vir hul ernstig gestremde baba weier ten spyte van die mening van die betrokke geneesheer dat die baba behandel moet word, sê Dunn dat die geneesheer hom die volgende vyf vrae moet afvra:[92]

- Verstaan die ouers die kliniese toestand en die prognose van hul baba ten volle?
- Behoort die ouers nie 'n tweede mening in te win voordat hulle 'n finale besluit neem nie?
- Benodig die ouers nie dalk meer tyd nie?
- Is die besluit van die ouers een wat met deernis en liefde geneem is en in die beste belang van hul baba?

87 622h–i.
88 622i.
89 626g.
90 "Appropriate care of the newborn: ethical dilemmas" 1993 19 *Journal of Medical Ethics* 82.
91 *Idem* 83.
92 *Ibid.*

- Laastens, is die ouers se besluit redelik, en indien daar twyfel bestaan, moet die ouers nie eerder aangeraai word om nog 'n mening in te win nie of behoort die geneesheer te poog om die baba onder voogdyskap van die hof te laat plaas?

Dunn is van mening dat die paternalistiese bevoegdhede wat aan geneeshere verleen is met die uitspraak in *Re J (a minor) (wardship: medical treatment)*[93] deel is van goeie geneesheerskap.[94]

(*Word vervolg*)

Dit is die taak van 'n geregshof om die Grondwet se bepalings af te dwing. Trouens optrede in stryd met die handves van fundamentele regte is grondwetlik contra bonos mores. *Dit kan dus nie van 'n hof verwag word om deel te wees van of sy stempel te plaas op 'n ongrondwetlike praktyk of gebruik nie. 'n Eis wat dit behels moet eenvoudig afgewys word* (per Van Dijkhorst R in *Walker v Stadsraad van Pretoria* 1997 4 SA 189 (T) 212).

93 Sien vn 84 *supra*.
94 Eie vertaling van die Engelse uitdrukking "good doctoring".

Evaluation of security by means of claims: Problems and possible solutions

Section C: Codification of the law of cession

(*continued*)*

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2 PROBLEM AREAS

2 3 Validity requirements

2 3 1 Introduction

In tracing the historical development of the validity requirements for cession, one becomes acutely aware of the peculiarities of the South African legal system referred to above.[106] From both a historical and a practical point of view, this aspect of the law of cession is probably the most interesting. It illustrates the unsatisfactory way in which the courts have dealt with Roman-Dutch law in the past, and even today; the inherent weaknesses of Roman-Dutch law[107] as the common law of modern South Africa; the confusing influence of English law;[108] the role of the personal backgrounds and preferences of judges;[109] the manner in which the system of *stare decisis* is manipulated[110] and the courts' reluctance to evaluate academic writing thoroughly.[111]

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* See 1997 *THRHR* 633–649.

106 See the discussion under 1 above.

107 Eg the effect of the retention of the Roman law distinction between the *actio directa* and the *actio utilis*; the notion that cession is a quasi-delivery of quasi-possession of incorporeals and the conflicting views of different authors from diverse schools of thought and distinctive periods.

108 Eg the interpretation of the doctrine of all effort in the courts – see Scott *Cession* ch 4 1 2, 1995 *TSAR* 760.

109 Eg the role which De Villiers CJ played in the controversial issue of delivery of the document and the doctrine of all effort, as well as that of Howie JA in *Botha v Fick* 1995 3 SA 750 (A) – see Scott *Cession* ch 4 1 2, 1995 TSAR 760.

110 Compare eg the judgments of *Jeffery v Pollak and Freemantle* 1938 AD 1, *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A) and *Roman Catholic Church*

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Three validity requirements have played a role in South African case law in the past: the intention to transfer and acquire the claim, referred to as the transfer agreement; delivery of the document evidencing the claim and the doctrine of all effort.

2 3 2 Transfer agreement

J McNeil v Insolvent Estate of R Robertson[112] contained the following exposition of the most important requirement for cession: "Rights of action are, we are told, ceded by any expression of intention for the purpose of the ceder and the cessionary."[113]

In *The Liquidators of the Co-operative Butcheries v Zeederberg*[114] Maasdorp J deduced an intention to transfer from an irrevocable *mandatum in rem suam*[115] and the same judge held in *Loxton and Hugo v Eaton, Robins & Co*[116] that the requirement of an intention to transfer and to receive[117] was essential to a valid

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(Klerksdorp Diocese) v Southern Life Association Ltd 1992 2 SA 807 (A), as well as the attempt by Howie JA in *Botha v Fick* 1995 2 SA 750 (A) to reconcile the conflicting judgments. See further Scott *Cession* ch 4 1 2, 1993 *THRHR* 686, 1995 *TSAR* 760.

111 Eg the fact that Howie JA completely ignored not only the present writer's criticism (see Scott *Cession* ch 4 1 2 (39–44)) of delivery of the document as a validity requirement in *Fick v Botha* 1995 2 SA 750 (A), but also that of Oelofse "Lewering van die dokument waaruit die reg blyk as geldigheidsvereiste vir sessie" 1990 *THRHR* 61 *et seq*.

112 (1882) 3 NLR 190 193.

113 As authority for this statement Connor CJ cited Sande *De cessione* 2 1 2, 9, 10, 11 and Ulrich Huber *Praelectionum juris civilis ad D* 17 1 15. Sande *De cessione* 2 1 was also cited with approval in *Ex parte Narunsky* 1922 OPD 32 36. The importance of an intention to transfer was also stressed in *Fick v Bierman* (1883) 2 SC 26; *Van der Merwe v Franck* (1885) 2 SAR 26 27; *Wright v Colonial Government* (1891) 8 SC 260 269; *Van den Heever v Cloete* (1904) 21 SC 113 116; *African Farms Ltd v Sadler* (1907) 10 HCG 126; *Kessler v Krogmann* 1908 TS 290; *National Bank v Marks & Aaronson* 1923 TPD 69 74; *Hayward, Young & Co v Glendinning* 1933 EDL 288 295; *Hartley v Filmer's Estate* 1938 EDL 101 111.

114 (1899) SAR 171 173.

115 This is, however, incorrect, since the requirement of appointing the cessionary as a mandatory became unnecessary with the abrogation of the distinction between the *actio utilis* and the *actio directa*. In accordance with the pure Romanist approach, the cessionary could institute the *actio directa* if he had a mandate to do so from the cedent – see Sande *De cessione* 2 1. A person acting with the *actio directa*, however, acted as representative of the cedent, not as cessionary. Although some Roman-Dutch writers accepted the idea of cession being a transfer of the claim itself and the abolition of the distinction between the *actio directa* and the *actio utilis*, as I have indicated above under 1 1 and 2 2, they did not always appreciate that, as a result of this, a *mandatum in rem suam* became unnecessary. Consequently one still finds references to such a mandate in the literature dealing with cession and this has led to confusion in earlier cases and even in modern South African law. Inclusion of a *mandatum in rem suam* is a relic of the Roman-Dutch usage of including such a mandate in the deed of transfer. Wiarda *Cessie* 46 refers to examples of such clauses given by Lybrechts and Huber.

116 (1908) 18 CTR 353 354. In the absence of an intention to transfer on the part of the transferor, it was decided in *Wilcocks v Visser and New York Life Insurance Co* 1910 OPD 99 that cession had not taken place. In *Pick v Estate Neylan* 1910 CPD 100 Laurence J stressed the fact that the intention of the parties should be implemented. Relying on this, Searle J in *Biggs v Molefe* 1910 CPD 242 252 explained the position as follows: "There must be not only an intention, but a mutual agreement, entered into, giving effect to the intention, in order to create a valid cession."

117 In *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 258 the requirement of two concurring minds was set out in accordance with the requirements of a real agreement

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cession. In all the cases, then, the fact that cession is effected by means of an agreement was stressed.

The idea of two concurring minds raises the question whether an express agreement is required for a valid cession. In *Luttig v Jacobs*[118] it was held that a cession may be implied in a transaction and this view was confirmed by the Appellate Division in *Botha v Fick*.[119] In this case the court deduced the transfer agreement from the contract of sale and held that the parties' intention was that payment of the purchase price should take place immediately on conclusion of the contract with the concomitant implication that quasi-delivery (cession) would also take place.

I have some difficulty with the way in which the court came to this conclusion, since it seems to suggest that cession took place on conclusion of the contract of sale.[120] This cannot be the position: to effect cession there has to be a definite transfer agreement, completely distinguishable from the obligationary agreement. The transfer agreement can be embodied in either a deed of transfer or the obligationary agreement itself, such as, for example, in the contract of sale,[121] but a definite intention to transfer and receive (transfer agreement) should be expressed.

Howie JA's view is in conflict with Roman-Dutch law, most other legal systems and also with *Johnson v Incorporated General Insurances Ltd.*[122] Here Joubert JA correctly explained the nature and relevance of the transfer agreement. In requiring such an agreement, South African law has retained the Roman-Dutch requirement of a *pactum cessionis*[123] as one of the basic requirements for cession.

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aimed at the transfer of ownership. In this case cession was regarded as the transfer of ownership of the claim. The court in *Engel v Moritz* 1925 WLD 205 207, held incorrectly that the cedent's intention to transfer is sufficient to effect the cession. The latter case was followed in *R M van de Ghinste & Co (Pty) Ltd v Van de Ghinste* 1980 1 SA 250 (C) 255G. Since cession is effected by means of an agreement, it is imperative that the parties to the cession should have the intention to transfer and receive respectively, as the court explicitly indicated in *Estate Loock v Graaff-Reinet Board of Executors* 1935 CPD 117 126; *Hiddingh v CIR* 1941 AD 111 119; *Luttig v Jacobs* 1951 4 SA 563 (O) 568; *Barnhoorn v Duvenage* 1964 2 SA 486 (A) 494A; *Trust Bank of Africa Ltd v Frysch* 1977 3 SA 562 (A) 575A.

118 1951 4 SA 563 (O).

119 1995 2 SA 750 (A) 762E–H.

120 In French law, the claim itself is transferred on conclusion of the obligationary agreement and possession is delivered by means of the transfer of the document evidencing the claim ("par la remise du titre"). A contractual system of the transfer of ownership is followed, whereas in Roman-Dutch law a causal system was followed. In Roman-Dutch law an additional act to the obligationary agreement was required to transfer the claim. In the case of movable corporeals it was the physical handing over of the thing and in the case of incorporeals (claims) it was cession – see further Wiarda *Cessie* 45 *et seq*; Schrage "Notes on the transfer of property: modus et titulus" 1992 *Fundamina* 99 *et seq*.

121 Voet eg makes a definite distinction between the *pactum cessionis* and the *pactum de cedendo* – see Zwalve *Hoofdstukken* 280–283; Huwiler *Begriff* 116. This view is followed in most European systems.

122 1983 1 SA 318 (A) 331G–H.

123 It should be borne in mind that Voet, unlike Sande, had a modern approach to cession and completely equated cession of incorporeal things with delivery of corporeal things. He did not require notice of the cession to the debtor as a validity requirement in terms

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A further question which arises is whether an agreement is the sole requirement for cession. In *Britz v De Wet*[124] Potgieter J relied entirely on De Wet and Yeats[125] for his unequivocal statement that, in terms of the common law (Roman-Dutch law?), a mere agreement is the only requirement for cession. The cases cited by De Wet and Yeats (and later by De Wet and Van Wyk[126]), however, support this view only to the extent that they require a transfer agreement as *one* of the validity requirements. Careful analysis of the relevant passages reveals that neither the cases[127] nor the Roman-Dutch authors[128] regarded a transfer agreement as the only requirement for a valid cession.

In rejecting a deed of transfer, Howie JA in *Botha v Fick*[129] neither evaluated the inherent merit of such a requirement,[130] nor did he indicate why the Roman-Dutch authority supporting this requirement should not be followed. The judge referred only to Huber,[131] Van Bijnkershoek[132] and Sande.[133] He disposed of Van Bijnkershoek's and Sande's references to the deed of cession, by merely stating that they referred to it only casually. He stated that Huber required a deed of cession, because it was a statutory requirement in Friesland. This is correct, but it only strengthens the argument, because Roman-Dutch law refers to Roman law as it was adopted in Holland. Although Huber was strictly speaking a Frisian jurist, he was so well-known that students flocked from Holland, England, Scotland and Germany to study under him. This particular work of his was basically a description of Frisian law, but, as the title indicates, also of Roman law as applied in Holland. Voet, for example, also refers to the changes that have been effected to Roman law, *nostris moribus*, and his authority as a source of South African law is not questioned for that reason.

Huber, in this text, like Sande, merely states that a Frisian ordinance required that the cause should be specifically stated in the deed. He does not say that the

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of *C* 8 41 3, but a form-free agreement of cession, a *pactum cessionis* that could be distinguished from the obligationary *pactum de cedendo* – see Zwalve *Hoofdstukken* 280-283 298-299 300 *et seq.*

124 1965 2 SA 131 (O) 133E. This approach was also adopted by Howie JA in *Botha v Fick* 1995 2 SA 750 (A).

125 The reference was to the third edition of De Wet and Yeats *Die Suid-Afrikaanse kontraktereg en handelsreg* (1964) 178.

126 De Wet and Van Wyk *Kontraktereg* 252 fn 4.

127 For a discussion and evaluation of the cases referred to by these authors in support of their view, see Scott *Cession* ch 4 1 2, 1995 *TSAR* 760.

128 De Wet and Van Wyk refer to Sande *De cessione* 2 1 and 2 9, who requires a transfer agreement, but not to Sande *De cessione* 2 5 where he, like other Roman-Dutch writers, regards a deed of transfer as essential: see eg Damhouder *Practycke in civile saecken* 49 9; Peckius *Opera* 3 6; Christinaeus *Decisiones* 2 90 12, 3 18 4; Goris *Adversariorum* 3 1 8; Huber *HR* 3 3 36, 3 13 2, *Utrechtsche consultatien* 1 134 6, *Hollandsche consultatien* 4 5; Van Bijnkershoek *Obs tum* 1523; Lybrechts *Redenerend vertoogh* II 2 28 4. Wiarda *Cessie* 47 also accepts that Roman-Dutch law required a deed of cession. In discussing the historical background of the requirement of a deed of cession in § 668 of the old Dutch *Burgerlijk Wetboek,* he further indicates that the Roman-Dutch authors were followed on this aspect and not the *Code Civil* (see *idem* 67). It is interesting to note that it is mostly the more practical jurists that require a deed of transfer.

129 1995 2 SA 750 (A) 762E–H.

130 See Scott *Cession* 42; Wiarda *Cessie* 152 *et seq.*

131 *HR* 3 3 36.

132 *Obs tum* 1523.

133 *De cessione* 2 5.

Frisian code required a deed! Howie JA did not refer to Huber[134] where he again refers to the above-mentioned Frisian ordinance which required mention of the cause in the deed. Sande and Huber probably accepted the deed as so self-evident that they did not discuss it, but considered it necessary to refer to the peculiarity of the Frisian ordinance requiring explicit reference to the cause. According to Howie JA Sande[135] and Van Bijnkershoek[136] did not require a deed at all.

Sande[137] clearly requires a deed of transfer and Van Bijnkershoek reports a case in which the validity of a cession was attacked on various grounds, *inter alia*, on the ground that the cause was not mentioned in the deed of cession. This accentuates the importance attached to this requirement in Roman-Dutch law as a whole, since Van Bijnkershoek can hardly be discarded as a Frisian author or even a Romanist! The judge by implication, and wrongly, in my view, rejected the general interpretation of these Roman-Dutch authorities.

2 3 3 Delivery of document evidencing claim[138] *and doctrine of all effort*[139]

The validity requirements of cession were once again[140] placed under scrutiny in *Botha v Fick*.[141] Although I welcome the thorough revision of these requirements and the rejection of delivery of the document as a validity requirement for cession, I obviously[142] do not agree with the way in which the judge dealt with the authority and some of the ideas expressed by him, in particular his outright rejection of a deed of transfer as a requirement.[143]

After a review of most of the important cases on the role of delivery of the document, Howie JA came to the following conclusions:[144]

(a) Mere consensus is sufficient to effect cession.

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134 *HR* 3 13 2.

135 *De cessione* 2 5.

136 *Obs tum* 1523.

137 *De cessione* 2 5, 6 17.

138 A very clear distinction should be made here between a document evidencing (embodying) the claim and one constituting it. A claim which is evidenced by a document exists independently from this document and in such a case the document has evidential value only. A claim that is constituted by a document cannot exist independently of the document, ie the claim can only be exercised by the holder of the document. An example of a document evidencing a right is a written contract of sale or credit transaction, and an example of a document constituting a right is a bill of exchange. This distinction was also adopted in *Botha v Fick* 1995 2 SA 750 (A) 764H–I, but the judge regarded a share certificate as a document evidencing the claim. In earlier cases the courts described the document in different ways, without making the above distinction: eg in *Smuts v Stack*, *Vendue Master*, *Van Reenen and Karnspeck* (1828) 1 Menz 297 298 and *Guman v Latib* 1965 4 SA 715 (A) 722 as the deed *constituting* the right; in *Luttig v Jacobs* 1951 4 SA 563 (O) 568 and *Kessler v Krogmann* 1908 TS 290 296 as the document *embodying* the right; in *Rabinowitz v De Beers Consolidated Mines Ltd* 1958 3 SA 619 (A) 636 as the document *representing* the right; in *Goode, Durrant & Murray (SA) Ltd v Glen and Wright* 1961 4 SA 617 (C) 620 as the document *evidencing* the right.

139 For a full discussion of this position, see Scott *Cession* ch 4 1 2 and 1995 *TSAR* 760.

140 See the long line of decisions discussed and referred to in Scott *Cession* ch 4 1 2, 1995 *TSAR* 760.

141 1995 2 SA 750 (A).

142 See my view in Scott *Cession* ch 4 1 3.

143 See my discussion of this case in 1995 *TSAR* 760.

144 778F–779B.

(b) Cession is effected by means of a transfer agreement ("oordragsooreenkoms") that may coincide with or be preceded by a just cause. The cause may be an obligationary agreement.

(c) A claim constituted by a document and which cannot exist independently from the document, such as a negotiable instrument, should be distinguished from a claim evidenced by a document, but which can exist independently from the document, such as a share in a company in terms of which a share certificate has been issued.

(d) Delivery of the document is not required, and the doctrine of all effort does not find application in respect of a cession of a claim evidenced in a document.

(e) The legal duty that rests on the registered holder and seller of shares to deliver the share certificate and a blank transfer form to the buyer is not a validity requirement of cession, but an obligation flowing from the contract of sale.

(f) The rule referred to in *Labuschagne v Denny*[145] is not a rule of substantive law and does not constitute a validity requirement for cession.

(g) The rule referred to in the *Labuschagne* case merely refers to evidential matters in terms of which delivery of the document is an important – possibly a decisive – factor where the question arises whether cession has been proved or not.

The judge then concluded by saying that whenever the cases to which he had referred contradicted these seven statements of law, they were wrong and should not be followed. This is a clear indication that the judge intended to settle the issue once and for all.

Although *Botha v Fick* is a very interesting case since it highlights some interesting features of South African law in general,[146] and of the law of cession in particular, it is also open to criticism[147] on various grounds. I shall now briefly deal with some of these.

(1) Application of the principle of stare decisis. I find the application of this doctrine in the South African cases on cession intriguing and regard Howie JA's *modus operandi* as a good example of the peculiar way in which some of the courts sometimes apply it.

To give but one example: in my view the Appellate Division in *Jeffery v Pollak and Freemantle*[148] unequivocally applied the doctrine of all effort.[149] It also required delivery of the document evidencing the right for the validity of the cession and rejected the view that such delivery merely serves as proof of the existence of the cession. Howie JA, however, said that his decision was not contrary to the decision in *Jeffery v Pollak and Freemantle.* He stated that the decisions of Curlewis CJ and Stratford JA on the role of delivery of the document could not be regarded as the views of the majority of the court and, furthermore, that these two judges did not agree.[150]

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145 1963 3 SA 538 (A) 543 *in fine* – 544B.
146 See discussion above under 1 and 1 2.
147 1995 *TSAR* 760.
148 1938 AD 1.
149 For a full discussion of the meaning and effect of this doctrine, see Scott *Cession* ch 4 12.
150 779D–E.

As to the views of Curlewis CJ and Stratford JA on the role of delivery of the document, I would like to point out that they absolutely agreed on this aspect, and as to the claim that their view was not the view of the majority, I would like to point out that all the judges concurred on the outcome of the case and that they were the only two to comment on this requirement, in no uncertain terms.[151]

The Appellate Division here expressly relied on and confirmed the decision in *Smith v Farrelly's Trustee.*[152] It is important to note that, although De Villiers CJ in *Jacobsohn's Trustee v Standard Bank*,[153] restricted the requirement of delivery of the document to those cases where the document is the *sole proof* of existence of the right, Smith J, who followed the *Jacobsohn's* case in *Smith v Farrelly's Trustee*,[154] did not adopt this restriction. Howie JA[155] played down the significance of this judgment on the basis that the court in the *Farelly* case did not really express a view on the role of delivery of the document since delivery (in the form of *constitutum possessorium)* did take place. He further argued that this passage was simply a statement ("net 'n stelling") and did not contribute anything to what was held in the *Jacobsohn's* case. I fail to see the point of this argument in the face of the clear statement[156] referred to above.

Several later cases[157] also required delivery of the document for the validity of cession. The *Jeffery* case was also followed in *Luttig v Jacobs*[158] (with reference to the dissenting judgment in *Block v Universal Produce Co (Pty) Ltd*),[159] *Rabinowitz v De Beers Consolidated Mines Ltd*,[160] *Factory Investments (Pty) Ltd v Ismails*,[161] *Uxbury Investment (Pty) Ltd v Sunbury Investments (Pty) Ltd*,[162] *Lief v Dettmann*[163] and *Lief v Western Credit (Africa) Ltd*,[164] where delivery of the document was required as part of the doctrine of all effort.

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151 Curlewis CJ 14: "We were referred *inter alia* to *Smith v Farelly's Trustee* (1904, T.S. 949) which laid down how a right of action is transferred by cession, and that if the right of action is evidenced by a document delivery of the document is required to complete the cession. *I was a part to that judgment and have nothing to add to it.*" (My italics.) And Stratford JA 20: "Also, if there is a document which evidences the title to the right it must be delivered to the cessionary (*Smith v Farelly's Trustees,* 1904, T.S. 949) – but not because this is the equivalent to delivery of possession of a chattel, but because the delivery of the document is a requisite formality of cession in such cases. *There can be no delivery of a jus in personam.* Such a right passes on cession effected with such formalities as the case may require."

152 1904 TS 949 956.

153 (1899) 16 SC 201.

154 1904 TS 949 956: "Where, as in the present case, the evidence of the right is contained in the written instrument which records it, then the right cannot be completely ceded unless the instrument is delivered to the cessionary . . ."

155 770C.

156 956.

157 *Kessler v Krogmann* 1908 TS 290 296: *Kleinenberg v Du Preez* 1910 TPD 559 561; *Ex parte Narunsky* 1922 OPD 32 36; *Pooley v Bredenkamp* 1925 GWL 60 66; *Graaff-Reinet Board of Executors Ltd v Estate Erlank* 1933 CPD 41 48; *Hartley v Filmer's Estate* 1938 EDL 101 109.

158 1951 4 SA 563 (O) 568E.

159 1934 NPD 324.

160 1958 3 SA 619 (A) 636G: "Rights are transferred by cession, with the apparently established rider that when the right is represented by a document this must generally be delivered to the transferee."

161 1960 2 SA 10 (T).

162 1963 1 SA 747 (C) 752B.

163 1964 2 SA 252 (A) 275D–E.

164 1966 3 SA 344 (W) 351A–B.

Howie JA stressed the use of the word "apparently" in the *Rabinowitz* case and declared that this judgment did not regard that in *Jeffery* as authority for the proposition that delivery of the document evidencing the right is a requirement for validity of the cession.[165] In the face of the clear words to the contrary, I cannot agree with this conjecture of the judge.

(2) Influence of judges' educational background on their judgments. I have referred briefly to the role of judges in the law-making process in South Africa above.[166] Of special interest in this regard is the influence which their educational backgrounds sometimes have on their judgments. It is therefore interesting to contrast the judgments of De Villiers CJ and Howie JA. Between the years 1876 and 1896 De Villiers CJ, strongly under the influence of English law, but professing to uphold the Roman-Dutch principles of cession, applied English legal principles pertaining to assignments of choses in action and accordingly introduced both the requirement of delivery of the document and the doctrine of all effort into South African law.[167] More than 100 years later, in 1995, Howie JA, strongly under the influence of German law (via De Wet), without regard for the Roman-Dutch principles of cession, applied the English-law doctrine of *stare decisis* in a peculiar way, and rejected both requirements introduced by De Villiers CJ. The idea that cession is effected by mere *consensus* expounded by Howie JA in this case, was propagated by De Wet and is based on § 398 of the German *BGB*.

(3) JC de Wet's influence on the law of cession. De Wet's influence specifically on the South African law of cession can be detected in various cases that deal with delivery of the document as a validity requirement for cession, but in particular in the judgment of Howie JA. He often referred to De Wet and Van Wyk, he was a student of De Wet[168] and he also strongly relied on Nienaber (another student of De Wet).[169]

(4) Value attached to Roman-Dutch law in modern South African law. This judgment illustrates that the courts no longer value Roman-Dutch law highly as a source of South African law. The judge, for example, referred to the fact that delivery of the document was not a requirement of Roman-Dutch law, but did not go into the actual requirements of that system. In rejecting the deed of transfer, he merely referred to a few passages in Sande, one of Voet, and then to De Wet and Van Wyk and Nienaber. In effect, he rejected the generally accepted view that the Roman-Dutch authors required a deed of cession with reference to the above-mentioned modern writers and to only three Roman-Dutch authors who do not support his argument, in any case.

When criticising the judge on this aspect, I do not plead for a slavish devotion to Roman-Dutch law. On the contrary, I am merely saying that if one rejects certain Roman-Dutch principles, one should evaluate those principles in the light of modern circumstances and then furnish reasons why they should no longer apply. In the case of cession it is not difficult to do so, since the modern idea of cession differs completely from the views of some Roman-Dutch authors. In

165 773D–G.
166 See discussion above under 1 2.
167 See Scott *Cession* ch 4 12 (29–31).
168 See *Personalia* 1994 *De Jure* iii.
169 *Ibid.*

actual fact, the whole gist of my argument is that Roman-Dutch law can no longer be regarded as the basis for the South African law of cession and that the legislature should therefore intervene. The courts, however, cannot reject a validity requirement, such as a deed of cession, without at least going into the inherent merit of such a requirement.

2 3 4 Conclusion

I find it fascinating that South African law insists on stringent formalities in the case of a transfer of land, but no formalities[170] whatsoever in the case of a transfer of claims. This type of approach is in keeping with an old-fashioned approach to the value of assets in an estate. In terms of this approach, immovable property is regarded as very valuable and movables as less valuable. In the modern commercial world, however, claims (incorporeal movables) are probably the most important assets in a (juristic) person's estate. The anomaly that results from this approach is that for the disposal of a relatively valueless immovable thing (for example, a small residential plot) valued at, say, for example, R50 000-00, the law (in terms of the Alienation of Land Act 68 of 1981 and the Deeds Registries Act 37 of 1947) prescribes very formal requirements for the contract of sale and the transfer itself, but for the sale and transfer of a claim valued at, say, for example, five million rand, there are no formal requirements.

The legislature could consider various possibilities in introducing a formal requirement for cession: for example, the introduction of a notarial deed. This is a very formalistic approach and will make cession more expensive, but its cost should be weighed against the advantages of such a requirement. Apart from the fact that most practically-orientated Roman-Dutch authors required it, it is a formality which should not cause practical difficulties; it would afford a measure of certainty which would only benefit the law of cession; and it would largely eliminate the possibility of fraud and is the best evidence of the cession, an aspect which invariably causes problems in a conflict of interests in cession cases. One could go so far as to compare a cession effected by mere agreement with delivery by means of *constitutum possessorium*, in that the method of transfer greatly increases the possibility of fraud. A deed of transfer will facilitate proof both of the date of transfer and of the identity of the true cessionary in the case of competing cessionaries. Another important argument in favour of such a deed relates to the protection afforded the debtor, as well as the independence it affords the cessionary from an uncooperative cedent. It is not necessary for the transfer to be embodied in a notarial deed; it can merely be required that the agreement be in writing and signed by both parties. This still leaves the door open for a measure of uncertainty and fraud. The Dutch law makes provision for an informal deed, but requires registration of this deed to have conclusive evidential value.

170 The new Dutch code requires both a deed of transfer and notice of the cession for the validity of the transfer itself – see § 94. This is also the position in Swiss law – see § 165 – and in English law in terms of section 136 of the Law of Property Act of 1925. German law indirectly requires a deed, since the debtor is not obliged to perform unless he has been notified of the cession by the cedent or the cessionary has presented him with a deed of transfer signed by the cedent – see § 410(1) of the *BGB*. In terms of § 1689 of the French civil code, ownership of the claim is transferred on conclusion of the contract of sale and possession is transferred to the cedent by means of delivery of the documents evidencing the claims.

The position in German law is very interesting and can serve as a possibility which can be followed. Although the transfer is effected by mere agreement between the cedent and the cessionary,[171] § 410(1) of the *Bürgerliches Gesetzbuch* provides that the debtor is not obliged to pay the cessionary unless the cedent notifies the debtor of the cession *or a deed of transfer drawn up by the cedent* can be produced by the cessionary. Therefore, although a deed of transfer is not required for the validity of cession, it is necessary to make the cession effective where a cedent refuses to notify the debtor of the cession.

One should also take note of the more formalistic approach to the validity requirements in the new Dutch code. In the old Dutch *Burgerlijk Wetboek* a notarial or underhand deed of transfer was required for a valid cession and this requirement has been retained in the new code.[172] Notice of the cession to the debtor was introduced in the new code as an additional validity requirement[173] for the transfer itself. The Dutch draw a distinction between an informal deed ("onderhandse akte") and a notarial deed. Registration of the informal deed affords it the same evidential value as a notarial deed, but in such a case the date of registration is regarded as the date of cession and not the date on the informal deed. The date of the cession is of paramount importance in solving a conflict of interests.

French law requires transfer of the document evidencing the right as formality for the transfer of possession of the claim from the cedent's to the cessionary's estate.[174] For the transfer to be effective against third parties, including the debtor, the cedent or cessionary must inform the debtor of the cession by making the appropriate communication through a *huissier* ("signification"), or when the debtor has "acknowledged" the cession by judicial or notarial document ("acceptation"). Business people found the formalistic requirements of French law too stringent, so that the French legislature intervened in 1981 and introduced the so-called *Loi Dailly* of 2 January 1981. In terms of this Act, a business person can cede as security his/her claims to a bank by listing the claims in a "bordereau" or annexure following the statutory formalities. The delivery of this "bordereau" effects the transfer of the claims listed in it. In Italian law, the requirement for effectiveness of the cession as regards the debtor is not as formal, but also requires notice or acceptance by the debtor.[175]

I favour an approach in terms of which a deed – even a notarial deed – of transfer is required, at least for cessions of claims for the payment of money above a prescribed value. Consideration should also be given to the French idea that cessions to banks or other financial institutions can be treated differently. Banks and financial institutions should be consulted on the best way to effect cessions of a multitude of claims. This should also be done in determining the amount above which a notarial deed is required.

In determining the formal requirements for cession, attention should be paid to the internal effect of cession, that is between the cedent and the cessionary, and the external effect of cession. Here again, a distinction should be made between

171 See § 398 of the *BGB*.
172 See § 94.1 of the *BW*.
173 *Ibid*.
174 See § 1689 *CC*.
175 See § 1264 of the Italian *CC*.

the effect of cession on the debtor and on other third parties such as the creditors of the cedent and the cessionary.

Any historical and comparative student of the law of cession will note that this branch of the law is dominated by two conflicting interests: on the one hand, the interest of commerce in increasing the circulation of credit (claims sounding in money). On the other hand, the interests of the debtor are at stake, since his/her legal position is effected by the unilateral interference of the creditor in his/her legal sphere. It appears that in solving this conflict of interests the German legal family and the common law (English law) have accorded preferences to commercial interests, whereas the Romanistic (French, Italian and Dutch) systems still incline to the protection of the debtor.

2 4 *Causa*[176]

2 4 1 Introduction

Cession, like delivery, is an act of transfer which is effected by means of a transfer agreement. This transfer agreement cannot exist independently of a previous juristic act. Since cession effects a transfer of assets from one estate to another, the law requires a reason (*causa*) for this shifting to have a permanent effect. In *Johnson v Incorporated General Insurances Ltd*[177] Joubert JA reaffirmed this requirement, which derives from Roman-Dutch law and is also required in other legal systems. He gave the following examples of *causae* for cession: sale, donation, settlement and payment.[178]

An interesting question which arises in this regard, is whether South African law recognises fiduciary agreements as *causae* for cession. I have indicated above[179] that such recognition is imperative for the implementation of fiduciary security cessions. Recognition of fiduciary agreements is also vital for cession for collecting purposes.

In the modern credit world, creditors, small and large, make use of the services of institutions to collect their debts (enforce their claims). These institutions offer specialised services in the field of debt collecting towards which creditors are not geared. Factoring[180] institutions and debt collecting agencies are organised in such a way that they can perform this task excellently. The basic cover agreement between the client and the institution or agency determines the relationship between them.[181] In order to give effect to this agreement, which in the case of factoring has debt collecting as one[182] of its aims, and in the case of debt

176 See Scott *Cession* ch 6 2.

177 1983 1 SA 318 (A) 331G–H.

178 In *First National Bank of SA Ltd v Lynn* 1996 2 SA 339 (A) 346A Joubert JA stated that a security agreement can also be the reason for a cession. Interestingly enough, he did not go into the reason for the cession in *Janse van Rensburg v Muller* 1996 2 SA 557 (A).

179 In section B under 1 1 2 and 1 1 3.

180 For a full discussion of this commercial institution and all its complexities, see Joubert *Die regsbetrekkinge by kredietfaktorering* (LLD thesis RAU 1986), and for a brief synopsis of the relevance of cession for this institution, see Scott *Cession* ch 15.

181 For a discussion of the nature of this relationship in the case of factoring, see Joubert *Kredietfaktorering* 323–420.

182 Factoring has financing as its basic function, but it may also include credit security, accounting, credit control and debt collecting; see Joubert *Kredietfaktorering* 5 *et seq*.

collecting, as its exclusive aim, the parties may make use of a cession for collecting purposes.

Although collecting agencies play an indispensable role in the modern commercial world, the legality and nature of their activities have received very little attention in South African courts.[183] All over the world the appearance of these agencies is a relatively[184] new phenomenon with many facets. Formal recognition of the activities of debt-collecting agencies poses many interesting legal and policy questions pertaining to the nature of their activities,[185] including possible infringement on the domain of attorneys, the nature of their relationship with their clients (including the effect of this relationship on their creditors and the debtors of the client) and control over the activities of such agencies.

All kinds of creditors, small and large, make use of the services of debt-collecting agencies who specialise in collecting outstanding debts. These agencies are organised administratively in such a way that it is financially and in terms of time far more expeditious for them to collect debts than for creditors who are basically not geared towards debt collecting. Before one can discuss the relationship between the parties, the basic idea or object of debt collecting should be established. As I have already indicated, most creditors are not geared towards debt collecting, since they actually expect their debtors to pay their debts on the agreed dates. However, experience has shown that debtors often do not pay on time or out of their own free will and that they have to be reminded and coaxed into paying their debts. This is a very time-consuming as well as psychological[186] and administrative process which does not fall within the scope of the ordinary day-to-day dealings of most creditors in the commercial world. It can also become very expensive if creditors employ the services of attorneys to perform this task. Although debt collecting is a very specialised operation, it is not of such a difficult or legal nature that it requires the services of highly trained specialists such as attorneys. Debt-collecting agencies specialise in performing this task very efficiently but at a lower cost.

To put the institution of debt collecting on a sound footing in South African law, it is imperative to determine the nature of the legal relationship between the

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183 The only cases dealing directly with such cessions, of which I know, are *McLachlan v Wienand* 1913 TPD 191; *Marsh v Van Vliet's Collection Agency* 1945 TPD 24; *Goodgold Jewellery (Pty) Ltd v Brevadu CC* 1992 4 SA 474 (W); *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 1 SA 867 (A).

184 Windolph in *Aktuelle Beiträge über das Inkassozession im In- und Ausland Schimmelpfeng-Schriftenreihe* Bd 8 (1977) 47 points out that collecting agencies appeared as a result of the division of labour which developed from the middle of the nineteenth century, especially in Germany, although a similar institution had already been developing in France since 1800.

185 Windolph in *Aktuelle Beiträge* 47 54–55 restricts the activities of collecting agencies to the extrajudicial collecting of undisputed outstanding debts. Therefore, if the debtor, after various requests to pay, refuses to pay the agency, the creditor (client) can decide whether it should go to court and engage the services of an attorney. The collecting agency may engage the services of an attorney and the attorney then acts as mandatory of the client, not of the collecting agency – see Windolph *Aktuelle Beiträge* 59.

186 For psychological reasons, most creditors prefer not to deal with their debtors personally at this stage and most debtors find it embarrassing to continue their relationships with their creditors after they have had to deal with them personally in order to ensure payment of their debts.

creditor ("client") and the debt-collecting agency, as well as the effect of this relationship on third parties. A debt-collecting agency can act as representative of the client or as cessionary of the client. For various reasons which I cannot discuss here, debt-collecting agencies prefer to act as cessionaries. In order to act as such, it is necessary for the law to recognise the fiduciary agreement between the client and the agency as a *causa* for cession and to prescribe its effect on third parties.

2 4 2 System of transfer

It is beyond doubt that a *causa* is required for the transfer of assets. The controversial issue in this regard is whether the *causa* has to be a valid one for the passing of the asset to take place. Three transfer systems merit consideration here, namely, the contractual, the causal and the abstract systems of transfer of property. In the contractual system of transfer, the object passes on conclusion of the contract (of sale, for example) from one estate to another. If the abstract system of transfer is applied, the right passes regardless of the validity of the *causa*, but if the passing of the claim is dependent on a valid *causa*, the causal system applies. The causal system protects the interests of the parties to the agreement, whereas the abstract system protects the interests of *bona fide* third parties.

In South African law the abstract system for the transfer of ownership of corporeal movables is adhered to and the question arises whether it follows automatically that this system should be adopted for the transfer of claims. In *Johnson v Incorporated General Insurances Ltd*[187] Joubert JA explicitly referred to a "*justa*" *causa*. It is not clear whether, in employing the term "*justa*" *causa*, the judge intended to introduce the causal system for the passing of claims, or whether it was used in the sense in which it was understood in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd*,[188] that is, in the sense of a real and deliberate agreement showing an intention to transfer and to receive.

The effect of the invalidity of the *causa* on the cession has not yet been canvassed thoroughly in South African case law. In requiring a *causa*, reference is often made to Sande: the *causa* to which Sande refers is the same *causa* that is required for the transfer of ownership. His view results from the fact that he regarded cession as a transfer of ownership of an incorporeal. It does not follow automatically that the system followed for the transfer of ownership of corporeals should necessarily also be followed for the transfer of claims. The effect of each system on cession as a peculiar legal phenomenon should be examined before a conclusion can be drawn.

The first factor that should be taken into consideration is the interests of the parties to the cession. It had been indicated above that the causal system is more favourable to the parties to the agreement, but that the abstract system protects *bona fide* third parties who could be prejudiced and have no means of protecting their interests. It is therefore clear that if it were left to the parties to the cession to determine the applicable system of transfer, they would invariably opt for the causal system. However, there are other interests which also merit protection.

187 1983 1 SA 318 (A).
188 1941 AD 369.

In practical terms there is very little difference in the effect of the two systems in the following situations:

(a) If the *causa* falls away and the right is still in the cessionary's estate, it does not really matter which system of transfer is adopted. Under the causal system the cedent remains holder of the right, while under the abstract system the cedent can claim transfer of the right in terms of unjust enrichment.

(b) If the *causa* falls away and the right has been extinguished, for example, by payment to the cessionary, the system of transfer which is adopted also does not really affect the position. After payment the cessionary becomes owner of the money and the cedent only has a claim against the cessionary based on unjust enrichment.

However, the effect of these two systems in the event of the cessionary's insolvency or attachment by his/her creditors is of greater importance. If the *causa* falls away, the right, in terms of the causal system, does not form part of the cessionary's insolvent estate and cannot be attached by his/her creditors. Under the abstract system, on the other hand, the right forms part of the insolvent estate and the cedent has only a concurrent claim against the insolvent estate. Creditors can also attach the claim. The abstract system therefore protects the interests of third parties and this is one of the factors which may tip the scale in favour of this system. Since South African law does not acknowledge the principle that a *bona fide* third person may acquire a right from someone who is not the holder of that right (not even in the case of real rights), the only way in which such a *bona fide* person can be protected in such circumstances, is through the application of the abstract system of the transfer of rights.

Although it is not clear which system of transfer should be adopted in South African law for the transfer of claims, the arguments in favour of an abstract system seem to be stronger: first of all, this system is accepted for the transfer of corporeal things in general and since the courts – following the views of the Roman-Dutch writers – regard cession as a transfer of incorporeal things, they should have no objection to the application of the abstract system of transfer to cession. In any event, the Appellate Division has accepted, albeit in an *obiter dictum*, the abstract system in a case[189] actually dealing with cession. Secondly, the abstract system works more equitably as regards third persons and, in the case of cession, the debtor is pre-eminently such a third person whose position should be protected.

In German law, cession, like delivery, is regarded as an abstract legal act and therefore no valid cause is required.[190] Therefore, if the cause falls away or is invalid, the claim, if it is still in the hands of the cessionary must be ceded back to the cedent. In the new Dutch code it is clearly stated in paragraph 84 1 that there should be a valid reason for the transfer. French and English law follow the contractual system of transfer and the transfer is therefore dependent on the validity of the underlying *causa*.

The practical importance of the principle of abstraction should, however, not be overly emphasised in the law of cession. In Switzerland, this principle, with its artificial separation between the obligationary agreement to cede and the

189 See *Rabinowitz v De Beers Consolidated Mines Ltd* 1958 3 SA 619 (A).
190 See Scott *Cession* ch 6 2.

cession itself, has been criticised severely and even the German courts which have endorsed the principle of abstraction, have suggested that there should be a renewed investigation into the applicability of this principle in the law of cession.

2 5 Role of notice to debtor[191]

2 5 1 Introduction

I have indicated above that there are no formal requirements for cession. Notice of the cession to the debtor is therefore not a validity requirement. In South African law, as in German law, the claim passes to the cessionary on conclusion of the transfer agreement. If one accepts that cession takes place by mere agreement between the cedent and the cessionary, and that cession effects a substitution of creditors, then, in theory, a debtor should not be discharged by payment to the cedent, since it is a basic principle of the law of obligations that a debtor can only discharge his/her obligation by payment to his/her creditor. However, bearing in mind the fact that the law allows a cedent to interfere unilaterally in the legal sphere of the debtor, the latter's interests should at least be protected. It is in this regard then that notice of the cession becomes important.

Notice of the cession is also invoked in case law where there are two or more competing "cessionaries". I shall briefly evaluate the validity of this approach below.

2 5 2 Payment

Theoretical and practical problems can arise where a debtor, without knowledge of a cession, pays the cedent. The question here is whether the debtor can rely on discharge of his/her obligation by payment or not. In terms of the above-mentioned rule, the debtor cannot discharge his/her obligation by payment to the cedent and he/she should in fact then pay the cessionary as the true creditor again.

This is clearly inequitable and it is therefore generally accepted that the debtor who pays the cedent without knowledge of the cession is discharged.[192] Theoretically, it is very difficult to give a satisfactory explanation for discharge by payment under these circumstances.

2 5 2 1 Theory

Three basic theoretical approaches to cession as a legal phenomenon can be distinguished:

(a) Cession can be regarded as a phenomenon *relating to the law of property*. In terms of this approach, the transfer of the right (the shifting of assets) also effects the substitution of creditors; notice to the debtor is generally required for the validity of the transfer itself. This is the position in French and Dutch law.

This is a very formalistic approach which can be questioned on the ground that it places obstacles in the way of recognising cession of future claims, as well

191 *Idem* ch 7.

192 See eg the general statement to this effect in *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A) 578F–G.

as confidential revolving fiduciary security cessions. In the Netherlands it has already caused problems and has been severely criticised.

The question arises, therefore, whether notice should necessarily be required for the valid transfer of the claim, in other words, for the shifting of assets relating to the law of property. Is such a formalistic approach to the validity requirements for cession justified? I used to think so, for the following reasons: because the interests of the debtor are sacrificed to those of the creditor in that the debtor, without his/her consent and even against his/her wish, will be obliged to a person other than the one with whom, for example, he/she has contracted. In requiring notice for the validity of the cession, the transfer of the right and the substitution of creditors are effected simultaneously and the juridical position of the debtor will be the same as it was before cession. This approach affords more certainty to all parties concerned and protects the interests of the debtor in the sense that no additional burden is placed on him/her to ascertain who his/her creditor is. The debtor's *de facto* position, of course, will not always be the same. On rethinking the issue, and with due regard to the objections raised above to such an approach, I have come to the conclusion that the two aspects of cession, the one relating to the law of property and the other to the law of obligations, should be acknowledged and separated – see the discussion under (c) below.

(b) Cession may be regarded as *relating to the law of obligations*. In terms of this approach, the one basically adopted in German and South African law, the transfer effects the substitution of creditors. In German law, this is, to a large extent, the position only in principle, since the substitution is in actual fact completed on notice to the debtor. In German law, a debtor who pays the cedent without knowledge of the cession is discharged. Although notice is not a validity requirement, it plays a decisive role. Paragraph 410(1) allows a debtor to refuse payment to a cessionary unless he/she is furnished with a deed of transfer drawn up by the cedent. Notice of the cession by the cessionary has no effect unless it is accompanied by a deed of transfer drawn up by the cedent. Paragraph 410(2) provides that the provisions of paragraph 410(1) do not find application in the event of the cedent giving notice.

Although the German jurists accept the transferability of claims and the principle that the cession, effected by means of a mere agreement, effects the substitution of creditors, the supportive provisions indicate that the idea of an obligation being a personal bond between the creditor and the debtor, which cannot be altered by the unilateral act of one of the parties thereto, still exerts a measure of influence. The substitution of creditors is not really completed by mere agreement between the cedent and the cessionary. The additional measures which protect the interests of the debtor, effectively complete the substitution.

(c) Cession may be regarded as a phenomenon with a *dual nature*. In other words, the influence of the dual nature of claims is recognised. Consequently, a distinction is made between the property-law aspect of cession, in terms of which the shifting of assets is effected by means of the transfer of the claim, and the aspect relating to the law of obligations, in terms of which the substitution of creditors is completed on notice to the debtor.

Bearing in mind the ultimate aim of cession, that is, a substitution of creditors, this aspect of cession should be determined with reference to the law of obligations. The substitution can be completed only when the debtor is obliged to pay the cessionary, that is, when he/she receives notice of the cession from the

cedent or when the cessionary submits a deed of transfer. Notice to the debtor obliges him/her to pay his/her new creditor and makes the cessionary the creditor of the obligation which previously existed between the cedent and the debtor. The notice should be reduced to writing and dated. It should be the duty of the cedent to notify the debtor, but as it is in the interest of the cessionary that notice be given, the cessionary should ensure that the cedent fulfils this duty or should himself submit the deed of transfer to the debtor. Notice, in other words, is the way in which the substitution of creditors is perfected.

The more I think about this issue, the more the third approach appeals to me as a practical solution. It recognises the dual nature of claims as legal objects and allows for a less formalistic method of transfer. South African positive law does not recognise these different approaches and their theoretical foundations. As a result of this, certain basic principles of the law of cession, the law of property and the law of obligations are sometimes neglected. Consequently, there is little uniformity in the approach to the problem and this leads to conflicting judgments.

2 5 2 2 Case law

In some cases the judges have recognised the dual nature of cession and have held that a cession is complete *inter partes* without notice; in other words, the shifting of assets takes effect before notice has been given to the debtor. As far as the debtor is concerned, however, the cession is completed only after he/she has received notice of the cession, that is, only once the substitution of creditors has been completed. If the dual nature of cession is accepted, it is possible, with references to Voet and the general principles of the law of obligations, to give a theoretically sound explanation of the fact that the ignorant debtor is discharged by payment to the cedent. Although the courts generally refer to Voet[193] in this regard, they overlook the historical background to this text and the explanation advanced by Voet for the discharge of the debtor. Voet states that the debtor is discharged because there is no legal rule prohibiting his discharge and he pays to the person to whom he was under an obligation to pay. Thus, according to Voet, the substitution of creditors is incomplete until the debtor has received notice of the cession.

In *Goode, Durrant & Murray (SA) Ltd v Glen and Wright*[194] Diemont J, in my opinion correctly, explained the position as follows:

> "Once the debtors were informed of the cession they would be obliged to pay the cessionary and not the cedent ... [If] on the other hand, the debtor was not informed of the cession and made payment to the cedent the debt would be lawfully discharged and, since it was discharged, would no longer form part of the cessionary's security ..."

The judge summarised the position clearly: the debtor is obliged to pay the cessionary only after he has received notice of the cession. Before such notice the debtor is not obliged to pay the cessionary and may still pay the cedent, thereby lawfully discharging his/her debt. Here the judge clearly distinguished between the fact that the debtor is not obliged to pay the cessionary before he/she has received notice of the cession, and the fact that he/she is discharged if

193 *Commentarius* 18 4 15.
194 1961 4 SA 617 (C) 621G.

he/she pays to the cedent without knowledge of the cession. Although the view is dogmatically sound and in accordance with Voet, it is not generally accepted, as will appear from the following discussion.

In the case law basically *two approaches* are followed to explain discharge by payment to the cedent, namely the one relying on *estoppel*[195] and the *bona fide* approach based on equitable considerations.[196]

In the *Katz* case the judge, unfortunately, but possibly as a result of counsel not having stressed the nature of an obligation sufficiently, misunderstood his argument and its implication. Counsel argued that a cedent does not cease to be creditor in all respects after cession, since the debtor can discharge himself by payment to the cedent in the absence of notice. The judge approached the problem basically from the perspective of the cessionary and held that the substitution of creditors is effected on the transfer of the claim to the cessionary. He did not concern himself directly with the question from what moment the debtor is obliged to pay the cessionary. He merely held that the debtor is not discharged by payment to the cedent because, after the cession, the cessionary, as creditor, is the only person who can sue the debtor for payment. Despite this finding, the judge then held that the cessionary cannot claim from the debtor who has made a *bona fide* payment to the cedent.

To my mind the court in this case paid insufficient attention to the historical background of cession and to the possible interpretations of cession as a legal phenomenon. The judge's answer to counsel's argument indicated that he did not recognise the dual nature of a claim and the influence of the nature of an obligation upon cession. The statement of some Roman-Dutch authors that cession transfers the right in its entirety and that the cedent retains nothing after the cession, has no connection with the two aspects of cession, namely the transfer of the right as an object from one estate to the other, and the substitution of creditors which cannot be effected by the unilateral act of one of the parties to the obligation. Their view pertains to the fact that the right was considered to be nontransferable, with the result that the cessionary acquired only the *actio utilis* while the cedent retained the *actio directa*. Therefore, when these authors stated that the distinction between the *actio directa* and the *actio utilis* has been abrogated and that the cedent retains nothing, it merely means that they accepted the transferability of the right, but it does not necessarily imply that the transfer itself also effects the substitution of creditors. The Roman-Dutch authors were practically orientated and did not theorise to the same extent as the German jurists. They were, however, not unaware of the underlying theoretical basis of their statements. This is clearly manifested in the reason advanced by Voet for the debtor's release: there is no legal rule to prevent this, since he paid the person to whom he was obligated. Voet realised that the mere transfer of the right cannot create the obligation between the cessionary and the debtor and that as far as the debtor is concerned, the cedent is still his creditor.

Although Roper J relied on Voet, he ignored two aspects of Voet's approach. First of all, he stated that the debtor's defence is not based on discharge of the debt by payment, whereas Voet expressly states that this is the position. Secondly, the judge ignored the reason advanced by Voet for the discharge of the

195 *Katz v Katzenellenbogen* 1955 3 SA 188 (T).
196 *Brook v Jones* 1964 1 SA 765 (N).

debtor, namely that he paid the person to whom he was under an obligation to pay. The judge further erred in regarding estoppel as the proper defence on which the debtor should rely. First of all, this view is in direct conflict with Roman-Dutch law as expounded by Voet, and secondly, it is not possible to construe all the requirements for the defence of estoppel in this case.

Whereas Roper J did not investigate the requirements for a successful reliance on estoppel, Nienaber, who also regards the estoppel approach as the correct one, did so.[197] One of the aspects of this approach to which I object, is the construction of unlawfulness. According to Nienaber the cessionary has a duty to speak and if he/she breaches this duty, he/she acts unlawfully. The question here is from where this duty originates. Nienaber accepts, as a point of departure, that notice to the debtor is not a requirement for the validity of the cession, including, I presume, the substitution of creditors, but then continues to state that there is a duty on the cessionary to notify the debtor of the cession. Failure to do so can result in the debtor relying on estoppel against the cessionary's claim for payment. Thus, on the one hand, the law does not require the cessionary to give notice of the cession, but, on the other hand, the law penalises the cessionary for not having done so.

In the *Brook* case, the judge held that a *bona fide* debtor who pays the cedent even if he has some form of knowledge, is discharged. This judgment is open to criticism on many grounds. The judge failed to appreciate the implication of Voet 18 4 15 and to recognise the dual nature of cession. He misunderstood the role of notice, as it is not only important where the debtor pays the cedent, but in particular to determine the moment from which the debtor is obliged to pay the cessionary. The court does not seem to be too sure about the basis for allowing the debtor to discharge his/her obligation by payment to the cedent and then falls back on equitable considerations. By referring to the innocent debtor, it would appear that the court merely tried to strengthen its reliance on equitable considerations, whereas we are not dealing with innocent or guilty parties here, but with the general principles of the law of obligations. Furthermore, in this case the court also seemed to imply that the cessionary should give notice to the debtor, whereas this should come from the cedent, unless the cessionary can submit a deed of cession signed by the cedent. It would be unwise for a debtor to rely on notice from a person other than the cedent as it may appear that no cession was in actual fact effected. As to the defence available to the debtor the court, fortunately, did not follow the approach adopted in the *Katz* case, but held that the debt is extinguished by payment, and not that the cessionary is estopped from claiming from the debtor.

2 5 2 3 Conclusion

Van Heerden AJA stated in *Illings (Acceptance) v Ensor*,[198] without reference to any authority, that it is trite law that, if a debtor makes payment to the cedent without knowledge of the cession, the debt is discharged. This statement is questionable on two grounds. First of all, the criterion is not so much knowledge on the part of the debtor, as whether the payment was made *bona fide (Brook* case); and, secondly, it is not trite law that this is the position, since there are

197 "The inactive cessionary" 1964 *Acta Juridica* 99.
198 1982 1 SA 570 (A) 578F.

conflicting decisions in the Natal Provincial Division, where the *bona fide* approach was adopted, and in the Transvaal Provincial Division, where the estoppel approach was followed. Although the *Illings* case is an Appellate Division judgement, I am of the view that it cannot be relied on as authority for the proposition that court has now settled the law in this regard to the extent that a debtor who pays *bona fide*, but with knowledge, is not discharged by payment.

2 5 3 Multiple cessions

Another interesting aspect of the South African courts' approach to the validity requirements of cession and the role of notice revolves around the issue of multiple cessions of the same claim to more than one "cessionary". Since the Appellate Division has stated unequivocally in *Botha v Fick*[199] that a mere agreement is the only validity requirement for cession, priority in the case of multiple cessions should be determined with reference to the *prior in tempore* rule. Although the *Botha* case overruled the view that in a case of competing cessionaries, the cessionary to whom the document was delivered should enjoy priority, it did not refer to or overrule the view that the cessionary who notified the debtor of the cession should enjoy preference.

In *Hanau & Wicke v Standard Bank*[200] Kotzé CJ and Jorissen J held that the cessionary who notifies the debtor enjoys preference in the case of a double cession. This is incorrect if mere agreement is the sole validity requirement for cession. At most, notice to the debtor then only serves to complete the substitution of creditors. Once the right has been ceded, the cedent retains nothing to cede to a subsequent "cessionary". In *Lucas v Stevens*[201] the court referred to Sande[202] and held that a cession, together with notice, enjoys preference over a later attachment by the cedent's creditors. Sande, however, states that a later attachment has preference over an earlier cession of which the debtor had no notice. He substantiates this by referring to the fact that the cedent retains his *actio directa*. Sande's view is in accordance with Roman law, but is incorrect in terms of the modern approach to cession, where the cedent retains nothing after the cession and there is consequently nothing to attach. In *Block v Universal Produce Co (Pty) Ltd*[203] the correct approach was followed regarding such an attachment.

German law distinguishes between determining priority in the case of competing cessionaries and the protection of the ignorant debtor who pays one of the competing cessionaries who notifies him of the cession. The Germans argue that the cedent retains nothing after the cession and the first cessionary becomes holder of the right; in other words, they uphold the idea that cession effects a complete transfer of the right and that the first cessionary becomes the creditor. Despite this, they allow the ignorant debtor who pays in good faith to a second cessionary who has notified him, to discharge his debt by payment to that cessionary, although the latter is not the creditor.[204] This problem does not arise in

199 1995 2 SA 750 (A).
200 (1891) 4 SAR 130.
201 1925 EDL 228 237.
202 *De cessione* 12 10.
203 1934 NPD 324 330.
204 Fikentscher *Schuldrecht* (1985) § 57 III B 4.

French and Dutch law, since notice or acceptance is a validity requirement for the transfer itself.

Here again, the idiosyncrasies of the South African law of cession are evident. If one strictly applies the doctrine of *stare decisis*, the view of Sande as applied in the *Lucas* case should be applied in determining priority, but in terms of the general tenor of *Botha v Fick* a prior cession should enjoy preference.

2 6 Security cessions

The problems surrounding this type of cession have been discussed above, in sections A and B, extensively.

2 7 Agreements prohibiting cession

2 7 1 Introduction

Although the depersonalisation of an obligation results in the claims flowing from it being freely transferable, the parties to an obligationary agreement can reinstate the personal nature of their obligation by including an agreement prohibiting or restricting cession (*pactum de non cedendo*) in the agreement. This agreement can be of such a nature that it does not result in absolute non-transferability of the claim, but it may restrict free transferability, for example, where the debtor must give his/her consent or be notified (as is the position in most insurance policies). The nature and effect of such agreements raise very interesting legal issues.

2 7 2 Theory

In determining the legal nature and effect of an agreement prohibiting or restricting cession, two possibilities must be distinguished clearly:

(a) In the one instance the agreement restricting or prohibiting cession is included in the agreement creating the right. In terms of the principle of freedom of contract, parties are free, in principle, to conclude such an agreement and the right thus created is not transferable. A cession effected contrary to this agreement has no effect, since the right was created as a non-transferable right. The cessionary therefore acquires no right from a proposed cession. The principle of freedom of contract, pertaining to the law of obligations, dictates the legal position here.

(b) In the second instance, one is dealing with an existing transferable claim, but its transferability is restricted or prohibited afterwards by means of an agreement. Such a claim is an existing asset and, therefore, an object *in commercio*. In terms of property law principles, an object *in commercio* may not be excluded from commercial dealings, unless the person who wishes to do so has an interest in the prohibition or restriction. A cession contrary to such an agreement is nevertheless valid, but the cedent is liable to the other contracting party (debtor) for damages based on breach of contract. This type of prohibition is absolutely indispensable for the effective operation of fiduciary security cessions.[205]

2 7 3 Case law

South African case law does not always distinguish between the two situations referred to above. The leading case on the validity and effect of agreements

205 See the discussion in section B above.

prohibiting cession is *Paiges v Van Ryn Gold Mines Estates Ltd.*[206] As regards the validity of such agreements, De Villiers JA held as follows: "In other words, if the stipulation can be shown to serve a useful purpose to the debtor, it is valid and binding upon the parties to the contract." From this statement it appears that this agreement operates *inter partes* only and not against third parties. In other words, it appears that the cedent may still transfer his/her right to the cessionary. This, however, was not the judge's intention, since he explained that the right does not pass, with reference to the principle that the cessionary steps into the shoes of the cedent. He held that the right becomes non-transferable from the moment of its creation and, since the cedent cannot transfer more rights than he/she himself has, the cessionary obtains nothing.

Certain aspects of the court's approach to agreements prohibiting cession in *Paiges v Van Ryn Gold Mines Estates Ltd* can be questioned.[207] The most unsatisfactory aspect of the judgment is that the court referred to the views of Sande and Voet to determine the validity of such agreements, but to nineteenth-century German jurists (Windscheid and Dernburg) to determine the effect of these. This *modus operandi* is even more unacceptable if one bears in mind that Sande and Voet were dealing with the validity of agreements restricting alienation of existing things and the German authors to whom the judge referred were discussing the effect of agreements prohibiting cession of claims incorporated in the obligationary agreements creating those very same claims. I have referred to the difference in approach to cession between the Roman-Dutch law and German law above.

The legal position of *pacta de non cedendo* after the *Paiges* case was as follows: these agreements were valid only if the debtor had an interest in them. As authority for this the court incorrectly relied on Sande and Voet. An alienation contrary to the agreement was void, on the strength of the German Pandectists. The restraint against alienation could be revoked unilaterally and applied only to voluntary transfers. No authority was given for this proposition. Therefore, although the court referred to Sande and Voet, it interpreted these authorities incorrectly and, furthermore, as far as the effect of this type of agreement is concerned, it ignored their views and applied German law pertaining to the effect of an agreement creating the claim as a non-transferable claim.

In *Johnson v Incorporated General Insurances Ltd*[208] Joubert JA completely misunderstood the effect of such agreements and held that, where a cession took place contrary to such a prohibition, the cessionary must transfer the right back to the cedent. This re-cession had to be effected in terms of a resolutive agreement, which can be implied. This view is incorrect, because in a case such as the one under discussion, where the right was created as a non-transferable right, it does not pass to the cessionary at all and consequently there is no need to make use of the so-called resolutive agreement in order to transfer the claim back to the cedent.

2 7 4 Conclusion

The legal position regarding agreements prohibiting cession in South African law is clearly unsatisfactory and various writers have tried to offer acceptable

206 1920 AD 600.
207 See Scott *Cession* ch 10 3 2.
208 1983 1 SA 318 (A) 332 *in fin et seq.*

interpretations[209] to such agreements. To my mind the present position is as follows: an agreement restricting the transferability of existing rights is invalid unless the restriction is in the interest of the person in whose favour it has been made. If the restricting agreement is part and parcel of the agreement creating the right, such an agreement is also valid, even if the cedent has no interest in the restraint. In both cases, however, the effect of the *pactum de non cedendo* is that a cession contrary to the restraint is of no force and effect and therefore does not result in a claim for damages for breach of contract only.

The correct approach (for which support can be found in the *Trust Bank* case) should be as follows: a clear distinction should be made between an agreement prohibiting cession in relation to a right which is created as a non-transferable right ((a) above) and one pertaining to existing rights ((b) above). In relation to a right which is created as a non-transferable right, the agreement is valid, since the principle of freedom of contract is paramount here. The requirement that the debtor should have an interest in the agreement is, therefore, unnecessary. A cession contrary to such an agreement is of no force and effect even in the event of involuntary cessions, because the nature of the right is such that it is not transferable.[210]

The views of Sande and Voet can be followed in regard to both the validity and the effect of agreements prohibiting the transfer of existing rights (existing assets). Such agreements are contrary to the basic principle of the law of property that *res in commercio* should not be withdrawn from commercial dealings without good reason. This type of prohibition binds only the parties to the agreement and a breach of it results in a claim for damages. The claim, however, passes to the cessionary.

The approach suggested above is, however, not without pitfalls: it has been suggested, for example, that recognition of cession-prohibiting agreements of the type mentioned in (a) above has a detrimental effect on commercial institutions such as factoring. It has also been suggested that they amount to an agreement in restraint of trade in that they restrict a creditor in freely disposing of his/her claims. Here, again, one notices the conflict between the interests of commerce in demanding a free circulation of credit and those of the debtor.

3 CONCLUSION

I trust that this brief exposition of some of the problem areas of the law of cession will motivate the South African Law Commission to initiate a thorough investigation into the possibility of codifying the law of cession.

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209 See eg Joubert *Kredietfaktorering* 463; Scott 1987 *De Jure* 15 37 *et seq.*

210 See *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A) 189F: "These principles do not, however, apply where the right is created with a restriction against alienation, and the restriction is contained in the very agreement recording the right." See also *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 3 SA 1 (A) 11D.

AANTEKENINGE

WATER FOR THE ENVIRONMENT

1 The need for water law reform

South African water law no longer provides adequately for the management of water resources. The following are some of the reasons for this condition:

- The predominantly private law orientation of our water law has diverted attention away from the state's role to serve as custodian of the public interest in our water resources.
- Our water law has its roots in the needs of a predominantly agrarian society but our society has since undergone a transformation towards urbanisation and industrialisation, with several developing water user sectors having been identified.
- South African water law is derived from legal systems which were applicable in countries with vastly different climatological conditions.
- A poor understanding of South African hydrology prevailed when our water law was developed and this is reflected in the different legal rules which apply, depending upon the legal classification or status of the water source in question.
- Environmental considerations were not taken into account during the formative stages of our water law and did not even feature in the Water Act or its amendments, while such considerations are today regarded as being of fundamental importance.

These factors accordingly reveal the need for a comprehensive overhaul of our water law. The reform process was set in motion in 1995 and has reached the stage of a *White paper on a national water policy for South Africa*, published in April 1997. Legislation is now being prepared to give effect to this policy; the first draft of a new Water Bill is expected in September 1997.

2 Unity of the hydrological cycle

All water forms part of the hydrological cycle, which is indivisible and interrelated. Ideally, all water should be managed uniformly. This is impossible on a global scale and even at national level; distinctions are usually made between the management of marine systems and of freshwater systems. Even fresh water systems within a given country are usually not managed uniformly: government agencies responsible for water affairs, although administering the use of *water*,

usually have little control over *land* use, notwithstanding the fact that different land uses also impact on the hydrological cycle (see par 5).

A major shortcoming of our existing water law is that it fails to respect the unity of the hydrological cycle, even taking account of only fresh water. A distinction is made between different categories of water, such as between public water and private water and between surface water and groundwater. These categories are subject to different water rights and give rise to administratively divided controls.

The White Paper now recognises the unity of the hydrological cycle and the interdependence of its elements (principle 5). This uniform status of water will serve to eliminate the uncertainty which prevails in respect of water resources such as groundwater, wetlands and the sources of public streams. It should, furthermore, facilitate an improved allocation system.

3 Water for the environment

When water resource management is considered from the perspective of the environment – of which water is, of course, an integral part – different issues may be identified. First, there is the immediate question of health aspects relating to drinking water, while a related issue concerns water quality generally. A further question is the assessment of the environmental impact of water projects and, indeed, the impact on aquatic ecosystems of developmental projects generally. However, conservation of the water resource base itself did not traditionally feature in water resource management. The optimal use of water resources was usually regarded as the maximum possible extraction for beneficial use, coupled with minimum loss of fresh water to the sea.

The first official recognition of the water needs of the environment was through the *Report of the commission of enquiry into water matters* in 1970. It was recommended that provision be made for the reasonable needs of designated nature conservation areas, such as the Kruger National Park and Lake St Lucia. More recently, in 1986, "water for the (natural) environment" generally has been identified as a major competing water demand and acknowledged as such by the Department of Water Affairs and Forestry (DWAF) (*Management of the water resources of the Republic of South Africa* Department of Water Affairs (1986) par 2.9. As far as qualitative demands are concerned, cf *Water quality management policies and strategies in the RSA* Department of Water Affairs and Forestry (1991) par 5). In fact, a draft policy, entitled *Water for managing the natural environment*, was published by the DWAF in January 1992. Water requirements for environmental purposes were again highlighted by the President's Council in its 1991 report on a national environmental management system (*Report for the three committees of the President's Council on a national environmental management system* PC 1/1991 par 2 3 4 14–2 3 4 21).

The concept of "water for the environment" in effect refers to the minimum water quantity and quality which aquatic ecosystems require for their organisms to survive and for them to be able to perform their normal functions. Processes involved include photosynthesis, the decomposition of dead material and the recycling of substances, particularly nutrients, oxygen and carbon. Human water needs are dependent on the above functions and processes of aquatic ecosystems. Although natural water systems can absorb some degree of human impact, there are critical levels beyond which the capacity of such systems to perform their functions satisfactorily in order to meet human demands can be reduced or even

lost. In short, human water use must be environmentally sustainable. Such sustainability is threatened if too much water is withdrawn from the system, too much waste is put in or the shape and structure are permanently altered.

Although our current water law deals with water pollution control and, to a very limited extent, with water conservation, it makes minimal provision (if any) for the protection of the aquatic ecosystems involved. This conclusion was reached by Hiddema ("The Water Act, 1956: Water rights for the environment" 1989 *Southern African J of Aquatic Sciences* 219), Uys ("Natuurbewaring se wateraanspraak in regshistoriese perspektief" 1992 *Stell LR* 375, "Statutory protection for the water requirements of natural ecosystems" 1992 (35) *Koedoe* 101) and by the President's Council (Report *supra* par 2 3 4 21 5 4 20). Moreover, the environment is unable to protect its own interests and it is doubtful whether, prior to the Constitution of the Republic of South Africa Act 108 of 1996, individuals or interest groups had *locus standi* to litigate for the water needs of the environment. And, in any case, those who attempted to articulate the water needs of the environment did not have sufficient information or influence to stimulate official action. Another major factor is that the protection of aquatic ecosystems is also dependent upon land use controls, something which is largely beyond the powers of the DWAF (see par 5).

The recognition of the environmental needs of aquatic ecosystems initially meant that the environment qualified as one of several established water user sectors, and that it was in competition with these other sectors for a scarce resource. The implication was that an allocation of a certain amount of water should be made for environmental purposes. The water demand of conservation areas was estimated in 1970 at only one per cent of the then estimated total water requirements of the country. However, only 15 years later, the annual water requirements necessary for environmental management – which by then was interpreted to encompass not only conservation areas but generally consumptive and non-consumptive use by estuaries, lakes, wetlands and riverine habitats – was estimated at about 17 per cent of total water usage (*Water for managing the natural environment supra* 1 3. Cf also the President's Council Report *supra* par 2 3 4 15, according to which the estimate was 14,5 per cent).

A radical change has now been foreshadowed by the White Paper. Apart from water to provide for basic human needs, the only other water that is provided as a right, is the so-called Environmental Reserve, which is set aside to protect the ecosystems that underpin our water resources (principle 9 and par 5 2 2). The Environmental Reserve constitutes the resource base; it is not an allocation, but the base upon which other allocations depend. The Reserve enjoys priority by right, while the use of water for all other purposes will be subject to governmental authorisation (principle 10). The Environmental Reserve encompasses both the quantity and quality of water as well as its reliability (principle 9). Moreover, it is acknowledged that water quantity and quality are interdependent and must be managed in an integrated manner (principle 15).

The above approach may be expected to prevent human use of water resources from compromising the long term sustainability of aquatic ecosystems. Indeed, the overriding objective of water resource management, according to the White Paper, is to achieve optimum, long term, environmentally sustainable social and economic benefit for society from the use of our water resources (principle 7). The maintenance of sustainable use implies that the Environmental Reserve may not be compromised by any *proposed* development, even if the demands are

very high (White Paper par 4 2 2) and that active intervention is indicated if *existing* developments imply that the needs of the Reserve cannot be met (White Paper par 5 2 2; cf also principle 16).

Determining the Environmental Reserve will pose a challenge to researchers and water resource managers. To answer questions of whether, when, how much and what quality water is required to sustain the water resource base, will require a comprehensive knowledge of the physical, chemical and biological structure of each individual aquatic ecosystem, its position in the landscape and the numerous factors which influence the quantity and quality of water as it moves across the landscape (Walmsley "Stream environments and catchment processes – A South African perspective" in *Water allocation for the environment* Proceedings of an international seminar and workshop, Armidale, Australia 1991-11-27 to 29 45).

4 Riparian principle and irrigation

The water allocation system, according to our current law, favours owners of properties which border rivers and displays a bias in favour of irrigation as a user sector. The White Paper expressly abolishes the riparian system of allocation (principle 4) and subjects all water uses beyond those connected with the Reserve, to a uniform allocation system, in which no user sector enjoys any special preference. These proposed amendments to our water law will bring about a further radical change.

5 Land use control

A crucially important factor as far as the management of water resources is concerned, particularly with regard to the aquatic ecosystems involved, is that many, if not most, land use practices to a greater or lesser extent affect water quantity or water quality. The most important such practices concern agriculture, forestry, industry, mining, urbanisation, road building and recreation. It is important to note that the DWAF, which is responsible for water resource management, has little or no control over the above land use practices (see par 6).

The Water Law Review Panel, in its report to the Minister of Water Affairs and Forestry (*Fundamental principles and objectives for a new water law in South Africa*, January 1996) as part of the current water law reform process, pointed out that owing to the inter-relationship between land and water, water resource management without any influence on land use policy and development, would be very restrictive in its effectiveness. It therefore recommended the adoption of a fundamental principle that any land use development which will seriously affect the hydrology of a catchment, should require the approval of the Minister, in conjunction with other line-function ministers (principle 8 6). This principle failed to find its way into the White Paper, probably because it would have amounted to an unwarranted extension of the Minister's powers. The White Paper nevertheless acknowledges that land use has a major impact on water resources and that such resources accordingly cannot be managed in isolation (par 2 2 2 and principle 18).

The need for an integrated approach to water and land management is obvious. It seems that such an approach will be accomplished through the implementation of integrated catchment management (ICM). ICM may be defined as the simultaneous and harmonised assessment and management of water and associated land and other resources within a defined catchment area with a view to the

optimal and sustainable utilisation of the available water resources by the different sectors involved in developing the area (see, generally, Rabie "Integrated water and land management in South Africa" 1996 *SA Public Law* 321). Application of the concept of the Environmental Reserve should assist in securing the environmental sustainability of the water resources involved in ICM, but then it should be subscribed to by all authorities involved in land use controls within the catchment in question.

6 Co-operative administration of water-related affairs

The management of water resources has been centralised for almost nine decades and can be justified on several grounds: from an environmental perspective, attention is drawn to the uneven geographical and seasonal spread of rainfall and runoff across the country and the need for territorial redistribution of available supplies, involving interbasin transfer schemes; the vulnerability of downstream provinces to excessive abstraction from, and pollution of, rivers by actions in upstream provinces and the fact that some drainage basins do not respect provincial boundaries.

The White Paper assumes that the management of water is, constitutionally, a national function (principle 12 and par 2 1 9 5 1 2) Water management, indeed, is not listed as a functional area of concurrent national and provincial competence, nor is it an exclusive provincial competence, according to the Constitution (schedules 4 and 5).

However, it has been shown above (par 5) that almost every land use practice affects our water resources in some way. Control over such activities is mostly the responsibility of other government departments at national level or of provincial or even local administrations. Relevant functional areas such as the environment, agriculture, including soil conservation, nature conservation, the administration of indigenous forests, pollution control, tourism and urban and rural development constitute areas of concurrent national and provincial competence (schedule 4). A distinction between water and the environment, especially if the latter concept is defined as comprehensively as in the Environment Conservation Act 73 of 1989 (s 1), is, in any case, wholly artificial and this already indicates that the management of water resources will have to be approached in a spirit of co-operative governance. This is, in fact, the intention of the DWAF, as reflected in the White Paper (par 2 1 9), but devising appropriate strategies to give practical effect to co-operative government constitutes a formidable challenge. It will probably have to be accomplished through the application of ICM.

7 Conclusion

The proposed law reforms sketched above appear satisfactory from an environmental perspective. In fact, many of the environmentally related reforms have already been suggested before (Rabie "The conservation of rivers in South African law" 1989 *SA Public Law* 1 186 200–202).

The challenge now is to implement the intended reforms by drafting the required provisions and finally applying them in practice. Much will depend upon the effective formulation and implementation of the key concept of the Environmental Reserve and also on its acknowledgement and support by bodies responsible for land use controls.

Since many reforms of an almost revolutionary nature are to be superimposed upon a vastly different existing situation, especially as far as the use of water for

agricultural purposes is concerned, the satisfactory settling of issues like transitional arrangements, the constitutionality of restrictions on water rights and possible compensation for the loss of existing rights, will demand considerable wisdom (cf Lazarus and Currie "Water law reform: Assessing the constitutionality of restrictions on the right to use water" 1996 (1(2) *Human Rights and Constitutional LJ of Southern Africa* 11).

Finally, the newly introduced constitutional principle of co-operative governance will be put to the test in so far as an integrated approach to water and land management is demanded. Such an approach is essential for the effective protection of the aquatic ecosystems concerned.

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MEETING COMMUNITY NEEDS: PRACTICAL LEGAL TRAINING AND DISTANCE EDUCATION*

Introductory

In the fledgling South African democracy, the community need for access to justice is real. In order to meet this need, not only should there be structural change with regard to access to the courts and adjudication but this should be accompanied by the development of human resources within a sound system of legal education.

The question of legal education and concomitant problems have enjoyed wide attention in various South African legal writings over the past decades. One of these problems has been the difficulty that students, particularly those from hitherto disadvantaged groups, have experienced in gaining access to professional training. A related problem has been a lack of integration between the academic and practical components in legal education. Measures have been taken to address these problems by the universities, by the Association of Law Societies and by the General Bar Council but there are problems that remain. In this note the problem of access to legal education that includes professional training is examined against the historical background in South Africa and with regard to a recent initiative which involves practical training by means of distance education.

Historical background

(See in general Church "Reflections on legal education" 1988 *THRHR* 153.)

* Revised version of a supplementary paper presented at the 1997 Commonwealth Legal Education Conference on *The status of legal education and its future* Kuala Lumpur 1997-09-9 to 11.

The legal system in South Africa, though essentially a civilian system has roots in diverse families of law and for that reason is correctly classified as hybrid. Two of the larger layers in what may be described as a many-layered cake are Roman-Dutch and English law, the latter having exerted an influence, for example, on the law of procedure and the judicial process as well as in areas of mercantile law. While there has been an English influence on legal education (many of our famous judges at the turn of the century and later were educated in England), contrary to popular belief the division of the practising profession into attorneys and advocates is a Roman-Dutch and not an English legacy although the position in England is similar.

In the early days at the Cape, in accordance with a western European tradition, advocates presumably were doctors of law as in the Netherlands, while no formal professional training was required of attorneys. After the Batavian interlude in 1804, advocates were expressly required to be law graduates of Holland while attorneys had to undergo an examination conducted by the Cape courts' commissioners. Subsequently, under British rule, the Royal Charter of Justice required advocates to be members of an English Bar or doctors of law of Oxford, Cambridge or London. Despite the English influence (a university education as a preparation for entry into the profession was not part of the English tradition), the tradition of a university education for advocates in South Africa was maintained and entrenched by statute in the twentieth century. Until recently, however, it was the *only* qualification for entry into the profession and even today only those advocates who wish to become members of one of the various bar associations need undergo a four-month pupillage.

Those wishing to become attorneys had to serve a period of articles of clerkship that was introduced in 1829. At first this was the sole qualification needed for one to practise as an attorney; later prerequisites were a practical examination and a certificate in law and jurisprudence laid down in 1877 and 1883 respectively. Today a university degree is a prerequisite for entry into the profession, but a system of articles still obtains for those aspirant attorneys or candidate attorneys, as they now are called, who wish to join the ranks of the practising profession. However, an amendment to the Attorneys Admission Act 53 of 1979 by Act 115 of 1993 provides that candidate attorneys need now serve only one year's articles if they have attended a training course approved by the Association of Law Societies (ALS) for at least four months or they have, for at least a year, performed some community service, in terms of a contract of service approved by the Association. Here service in a law clinic would qualify as would service in the small claims court, for example. In order to be admitted, would-be attorneys still have to undergo the practical or as it is commonly known, Board examination. Nevertheless service in an accredited law school clinic as an alternative or at least as a less restrictive route for entry into the profession has been hailed as a significant development in legal education in South Africa (among others by Iya "The proposed program for service of articles in the campus law clinic: Reflections on implemental issues" 1993 *Jnl Prof Leg Ed* 231). Moreover, in terms of the Act (s 2A read with s 2(1) of the Attorneys Act 53 of 1979), a would-be attorney may be completely exempted from the traditional two-year term of articles served in a law firm. If she has completed the training course offered by the ALS Practical Law School and has performed the required period of community service in a law clinic, she need only pass the Board exam to qualify for admission as an attorney.

As was the case in other countries, albeit some years later, the introduction of clinical service programmes was seen as a move away from the traditional "rule-oriented" approach to legal education (see in general Church "Towards integration in legal education: An introduction to practice" 1987 *Papers 4.2 Professional education and practical training at a distance* Unisa 205). It was seen as a means whereby students would not only be "sensitised" to the problems and needs of others, but would also be made aware of the importance of social, economic and political considerations in the "lawyering" process. Moreover, the importance attached to skills development would be highlighted. More specifically, these would include interviewing, fact-gathering (an analytical, intellectual skill which ideally students should acquire early on in their academic studies), drafting, negotiation and trial advocacy. With regard to skills training in a clinical setting, the catchword would be "learning by doing" which might be effected either by actual experience (eg writing letters for clients) or by simulation (eg appearing at a moot) which would be aimed at developing the skills of drafting and advocacy respectively.

Clinical programmes which reflect a measure of integration of academic and practical/professional components of legal education (see eg Grimes "Reflections on clinical legal education" 1995 *Law Teacher* 169; Lundy "The assessment of clinical legal education: an illustration" 1995 *Law Teacher* 311) feature in the law school curricula of most South African universities. At Unisa, for example, a paper designated Introduction to Legal Practice is offered as an LLB elective. The paper comprising a practical and theoretical component, is offered in conjunction with clinical experience.

Initially there was resistance to the idea of introducing a course of this nature. In the first place it was felt that a course involving practical skills was academically unacceptable and secondly it was argued that even if such a course could be justified in principle, practical problems in presenting it at a university engaged in distance education would be insurmountable. The perceived difficulties were more apparent than real. Thus, for example, it was argued that the mentor in a skills programme should be in contact with her students and that this was not possible at Unisa. However, it is trite that personal contact is not necessarily physical contact and contact can be maintained in various ways, for example telephonically or by means of audio and video cassettes and by using mentors or tutors at strategic centres. In any event, the course has been very popular and has been running successfully for some ten years.

In offering the paper at Unisa over the years, there has been valuable co-operation with practitioners in the various regional offices of the university and successful seminars are conducted on this basis. Attendance at these seminars, which are skills rather than rule oriented, is compulsory. Knowledge of the relevant legal rules is assumed and the skills involved include negotiation, drafting, drawing pleadings in a civil case and core aspects of a criminal trial and trial advocacy. Students are informed prior to the seminar of the topic/s to be covered and are required to prepare for it. As well as attending seminars, students are involved in practical work in the small claims court on a roster basis and of course also assist with client's cases in the legal aid clinics. The legal aid officers/lecturers in the Legal Aid Clinic based in Pretoria co-ordinate the practical training. Visits are undertaken to the various centres during the year in order to monitor progress and this is done in conjunction with the supervisor/mentor who, as already indicated, is a practitioner, at each centre.

Evaluation is on an on-going basis and a satisfactory report by the student is a pre-requisite for admission to the examination in October/November. The latter forms part of the theoretical component of the course. Clinical programmes are not without problems; a major problem is that of costs involved. Nevertheless I believe that experience in a law clinic could provide a valuable component in the education of well-rounded lawyers. Moreover, as already indicated, clinical service would give hitherto excluded students an alternative route to admission to practice in terms of the Attorneys Act.

Thus although the possible model suggested by Chaskalson some years ago that law clinics attached to universities might become the counterpart of teaching hospitals (Chaskalson "Responsibility for practical training" 1995 *De Rebus* 117) has not fully materialised, the recognition by the legislator of clinical education as a means of training for the profession is to be welcomed.

To return to the position regarding education for the profession: In the past there have also been differences in the academic education of advocates and of attorneys. While the academic qualification for advocates was the post-graduate LLB (a Bachelor of Laws degree which, in the civilian tradition, was always a second degree), the academic qualification for attorneys was the undergraduate Baccalaureus Procurationis or BProc, which was specially tailored to the needs of the attorneys' profession. This distinction is now to fall away. Legislative amendment provides for a single law degree known as an LLB as a pre-requisite for admission to practice, whether as an attorney or as an advocate. Restructuring of the curriculum for the new LLB has already begun at most South African universities. The new dispensation follows upon a process of consultation initiated at the first Legal Forum held in 1994 at which various stakeholders, including law teachers, members of the practising profession and students, were present. In the following years the matter was discussed at subsequent Legal Forums and at the annual Dean's Conference held under the auspices of the Society of University Teachers of Law. Consequently a new four-year LLB will be offered as a first degree at most South African universities from 1998.

At Unisa for example, the curriculum consists of a number of compulsory courses and electives. The compulsory course are: Introduction to the theory of law; Regsafrikaans/Legal English; The origin and foundations of South African law (new course); Private law I; Criminal law; Private law II; Mercantile law I; Civil procedure; Criminal procedure; Interpretation of statutes; Constitutional law (from 1998 the last two courses will be replaced by four modules: Interpretation of statutes, Constitutional law, Administrative law and Fundamental rights); Private law III; Indigenous law; Mercantile law II; Evidence; General principles of public international law; and Legal theory. Students may choose the remaining eight modules freely in any combination from a number of papers currently offered as part of the old LLB curriculum, for example Comparative law, Conflict of laws and Labour law.

Despite the fact that there have been the welcome changes to which I have already referred, legal education in South Africa may still be regarded as encompassing three main and largely separate, components: an academic component comprising theoretical instruction; a practical/professional component which involves training in practical skills and instruction directed towards a sense of professionalism, and the component of continuing legal education for post-admission training.

Although, as mentioned above, there have been moves at university level towards the integration of academic and practical/professional training, most law graduates (at least until recently) have had to be content with what may be termed the in-service training provided by the organised profession. Up to four years ago, for attorneys this was solely via service of articles, a system which has come under fire both here and abroad. Complaints have been voiced about the difficulty of obtaining articles and the legislative amendment allowing for alternative routes to the profession, as already indicated, has been widely welcomed. The expansion of the Association of Law Societies' School for Legal Practice has also improved the position.

Practical legal training of candidate attorneys

The School for Legal Practice which had its beginnings in 1991 in a pilot project of the Practical Legal Training Section of the Association of Law Societies, has become a permanent feature of legal training in South Africa. By the end of 1997 more than 1 000 BProc and LLB graduates will have received their training at the School's centres in Pretoria, Durban, Cape Town, Johannesburg, Bloemfontein and East London. In 1991, only 51 graduates received training when the practical training programme was offered only in Pretoria.

The school is attended by would-be attorneys across the country and after completion of the five months full-time skills programme, graduates are entitled to reduction in articles and may sit for the attorneys' admission exam even though they have not served articles during their participation in the programme. Graduates receive vocational training in more than 16 areas of practice including human rights practice, magistrate's and high court practice, motor vehicle accident claims, drafting of contracts, ethics and commercial litigation.

The school functions under a permanent directorate with directors in each of the School Centres and training is provided by some 200 experienced practitioners and teachers. Various South African universities also participate in the programme and generally provide campus facilities and faculty expertise.

Students who enrol (ideally the student group should not exceed 60) are divided into ten "firms" of five to six members each. Each firm chooses its own name and "managing partner" and is provided with an "office", books and word processor. Furthermore each School centre houses a computer centre and basic library. Evaluation and assessment of students is done by means of group and individual assignments, presentation during advocacy training and examination in 16 topics. A certificate of attendance is awarded to each student completing the programme (the President of the Association awards Certificates of Outstanding Performance to students who excel) and participating universities award a Certificate in Legal Practice to students who successfully complete the programme.

The School for Legal Practice is subsidised by the profession through the Attorneys' Fidelity Fund; its contribution for 1997 amounted to some eight million rands. Financial assistance is provided to enable underprivileged students to attend the school and scholarships are made available by two of the provincial law societies. Several law firms award prizes, as do the large publishing houses of Butterworths and Juta, who also provide sponsorships for the libraries attached to each centre.

An important point to mention here is that instructional design of the programme has been informed by scientific research, particularly research into skills

training which has generally been conducted by former academics. Nevertheless, despite the progress that has been made, there are still the problems with regard to skills training and preparing students to be competent lawyers. Some of these will be discussed below.

Practical training for advocates

For advocates who wish to be members of one of the various associations of advocates or Bars, a necessary pre-requisite is a five-month period of pupillage (the previous four-month period has recently been extended). This is undertaken under the supervision of a master and is followed by an examination conducted under the auspices of the General Bar Council; examiners are senior practising advocates and the moderators are judges. Presently a further period of one month's practical training is envisaged. During this time prospective advocates would be trained in workshops and seminars in, for example, trial advocacy, litigation generally, motion proceedings and the preparation and presentation of appeals.

Searching for competence – the role of the law school

Over the years the traditional law school curriculum, and its traditional teaching methods, has come under fire. So, too, the need for self examination by the legal profession has been highlighted by public criticism and government pressure. The need for self-examination has been universally recognised and efforts to find ways and means to ensure that only competent lawyers enter the profession have not been confined to South Africa. Over the last few years the focus on legal competence in countries of the Commonwealth – Canada, Australia and the United Kingdom – and in the United States, has increased exponentially and numerous significant studies on the competence of lawyers have been conducted in these countries. A valuable summary of these studies was published in 1995 by Maureen Fitzgerald, the then policy and research lawyer attached to the Education Department of the Law Society of British Columbia (Fitzgerald "Competence revisited: A summary of research on lawyer competence" 1995 *Jnl Prof Leg Ed* 227). In her conclusion the author notes that while the difficulty of researching and describing the competent lawyer was generally recognised, almost all the research indicated that it was the exercise of practical skills rather than mere knowledge of substantive or black letter law that was the most important criterion for determining a lawyer's competence. None the less, in the studies conducted there were differences in the way "competency" was described. Thus, for example, the concept of competence as a "trinity" of knowledge, skills and attitude expounded upon by Cruickshank in 1989, has been abandoned for a more functional model that tends to emphasise tasks and abilities which focus on problem solving, legal analysis and management skills. In this context we should possibly consider the current "outcomes-based" approach which is presently in vogue in the field of education in South Africa generally but which I believe may also be relevant in legal education.

Outcomes-based education

Concepts underpinning outcomes-based education are not new; the current interest has its roots in earlier writings on educational objectives like those of Bloom, Mager and Franc (Bloom et al *Taxonomy of education objectives* (1974); Mager *Preparing instructional objectives* (1975); Franc *Toward improving patterns of instructions* (1978)). However, while objectives or aims describe the

intent of some or other educational process, it is the end product of such process which is referred to as an educational outcome. Thus, as Killen has pointed out ("Outcomes-based education: Rethinking teaching" in a paper presented by Dr Killen, the Deputy-Dean of the Faculty of Education, University of Newcastle, Australia at Unisa on 1996-10-15),

> "statements of intent or statements of desired educational outcomes focus attention on the *purpose* of instruction, rather than on the *content* or *learning experiences* that are the vehicles for instruction" (my emphasis).

Where these intentions are realised, the end product may be referred to as an educational outcome.

Clearly, outcomes-based education is more focused on the specific and it follows logically that the extent to which our intentions have been realised can be determined more easily. Once the outcomes have been predetermined and specified unambiguously, they can serve as criteria or benchmarks for assessment purposes. Thus if a student's achievement matches these criteria it may be said that she has achieved a certain level of competency.

As Killen points out, the current interest in outcomes-based education is largely the result of community pressure for accountability in education, with a concomitant notion that if education is achieving predetermined and measurable outcomes, then all is well. For this reason outcomes-education is often more attractive to politicians and administrators than to teachers faced with the practicality of implementing it. All might in fact, not be well, and educators should never abrogate their right to question the *appropriateness* of the particular outcome or the *practicalities* involved in attempting to achieve it.

In a recent incisive article, some English writers (Maughan *et al* "Sharpening the mind or narrowing it? The limitations of outcome and performance measures in legal education" 1995 *The Law Teacher* 255) focus on the shortcomings of outcomes models. Among the failings which the authors identify are the following:

- The tendency to standardisation divests education of variety and challenge
- There are dangers and difficulties inherent in trying to infer competent intellectual and affective process from observable behaviour
- Outcomes models tend to perpetuate the artificial distinction between knowledge and skill
- Attempts to write assessment criteria fail to capture the complexity and contextual imperatives of professional interactions

Clearly, in the light of these problems outcomes models should be approached with a measure of caution.

None the less, I believe they have much to recommend them particularly in the light of skills training. Since the focus should be on the expected outcome, it is very important for teacher and student to know what the expected outcome is to be. In determining this, the mentor needs to be realistic. Obviously an outcome determined as being "to act like a lawyer" would be framed too widely and therefore be inappropriate. Furthermore, students must be aware of what they are learning and why and they must be given responsibility for their own learning. As an essential element of outcomes-based education, assessment procedures should give a clear indication of what students are learning. They should be equitable and flexible and specifically designed to match the outcomes students are striving to achieve.

Training at a distance

At the start of my note I referred to the possibility of accommodating practical/professional training by means of distance education. As explained above, this is already being done at my university in a clinical setting and, despite initial resistance, a successful programme has been running for the last ten years. A further possibility which is being considered is that, in conjunction with the School for Legal Practice of the ALS, Unisa will run programmes which will incorporate the content of the present programmes of the School for Legal Practice. To this end a steering committee appointed by the faculty is presently engaged in talks with representatives of the ALS. The idea is that in a co-operative or joint venture, the resources of both the university and the School would be exploited to provide practical training for graduates who, for one reason or another, were unable to obtain articles or attend the programmes presently offered by the ALS. In this way, for example, people in rural areas could be accommodated. It is logical to assume that a student who is based in a rural area and who undergoes practical training there, will eventually practise as a lawyer in that area thus serving a community where access to justice has hitherto been restricted. The suggestion might seem startling to many people. However, vocational training by distance education institutions is not new (see too Chivore "The Zimbabwe integrated teacher education course" in Peiraton (ed) *Distance education for teacher training* (1993)) and has involved the training of teachers and nurses, for example, for many years. No doubt the suggested joint venture will require innovative teaching and assessment together with the exploitation of new technological resources (see eg Kovach "Virtual reality testing: The use of video for evaluation in legal education" 1996 *Jnl of Leg Ed* 233). The course materials would be based on the course materials presently presented by the ALS School of Legal Practice, but presented in the mode of distance education. As with the paper on Introduction to Legal Practice as discussed above, mentors will include members of the practising profession. The challenges are exciting. In a country where the population is approaching forty million there are only some twelve thousand legal practitioners. The greater access to academic and professional training for would-be legal practitioners is a matter of urgency if the obvious needs of the South African community are to be adequately met. I believe that distance education can serve that end.

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DIVERTING CHILDREN FROM THE CRIMINAL COURTS: SOME PROPOSALS

1 Background

Of the many issues addressed by the South African Law Commission in its recent paper, *Juvenile justice* (Issue paper 9, Project 106 1997), the diversion of

child offenders from the criminal justice system ranks among the most important. The principle of diversion has been elevated to a legal norm by South Africa's recent ratification and adoption (on 16-06-1995 and 30-07-1995 respectively) of the United Nations Convention on the Rights of the Child (adopted by the UN General Assembly on 20-11-1989, Resolution 44/25). (See generally Sloth-Nielson "Ratification of the United National Convention on the Rights of the Child: Some implications for South African law" 1995 *SAJHR* 401 ff; Skelton "Developing a juvenile justice system for South Africa: International instruments and restorative justice" in *Children's rights* (1996) 180 ff.) Article 40(3)(b) of the Convention, which embodies the principle of diversion, reads as follows:

> "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular ... [w]henever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."

The diversion principle thus proceeds from the premise that it is, generally speaking, in the best interest of child offenders not to become contaminated by the criminal justice system where alternative routes to deal with them are available.

Two formal mechanisms for diverting child offenders exist in South African law (par 7.3 (which surprisingly, however, states that "[t]here is no formal legislative framework for diversion") 7.11 and 8.6 of the issue paper refer to a third, what may be termed "informal" mechanism, to wit a decision by the prosecutor to divert): Section 254 of the Criminal Procedure Act 51 of 1977, which explicitly subscribes to the principle, and section 11 of the Child Care Act 74 of 1983, which does so by implication. Section 254 states:

> "(1) If it appears to the court at the trial upon any charge of any accused under the age of eighteen years that he is a child as referred to in section 14(4) of the Child Care Act, 1983 (Act 74 of 1983), and that it is desirable to deal with him in terms of sections 13, 14 and 15 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in terms of section 5 of that Act and that he be dealt with under the said sections 13, 14 and 15.
>
> (2) If the order under subsection (1) is made after conviction, the verdict shall be of no force in relation to the person in respect of whom the order is made and shall be deemed not to have been returned."

Section 11 states:

> "If it appears to *any court* in the course of *any proceedings* before that court that any child has no parent or guardian or that it is in the interest of the safety and welfare of any child that he be taken to a place of safety, that court may order that the child be taken to a place of safety and be brought as soon as may be thereafter before a children's court" (italics supplied).

Although section 11 makes no mention of a criminal court and criminal proceedings, these are evidently implicit in the italicised words. Hence, the diversion of child offenders to a Children's Court can also be achieved through section 11.

In practice, however, diversion has by and large been unsuccessful, owing to an apparent under-utilisation (see par 3.20 7.15(a) and 8.9 of the issue paper) of the procedures offered by these sections, the restricted range of diversion options offered by them and the fact that they *start* at the wrong *end* in so far as criminal prosecution of child offenders should only be used as a *last resort.*

The Law Commission's efforts (see the proposals and options in ch 7 of the issue paper) to extend the options offered by sections 254 and 11, and to provide a framework for diverting child offenders from the criminal justice system, are clearly a step in the right direction. At the same time, they are in some respects insufficiently radical to achieve their declared objective. The main reason for this is that the implementation of the Law Commission's proposals and options are bound to *continue*, to a certain extent, rather than to *reverse*, the current system of handling and channelling child offenders. Consonant with the tenets of the diversion principle, the proposal tendered here attempts to resort, as a *point of departure*, to measures other than the implementation of the criminal justice system to deal with child offenders, without compromising the rights of the victim or the protection of society. Obviously, the present solution will not escape the necessary evil of fresh problems that attend all development, but hopefully its benefits will exceed its disadvantages.

2 Proposals

Diversion is a many-faceted phenomenon which comes in a variety of forms and which may be employed at different stages in the process of handling child offenders (see eg ch 7 of the issue paper). The present proposals focus on one aspect of diversion only, namely on providing a *formal structure* which will facilitate diversion. To achieve this aim, it is submitted that subsequent to the apprehension of a child who is suspected of having committed an offence or is caught in the act of committing a crime, the following options should be available:

2 1 Caution and reprimand

The option of caution, reprimand and subsequent release of the child by the police officer who apprehended the child (cf par 5.11 of the issue paper) should be reserved for cases of minor offences which involve little moral turpitude. It has the advantage of not unduly burdening the court with cases which are of a trivial nature. It is readily admitted that placing the decision to divert entirely in the hands of the police officer on the scene may lead to inconsistencies and arbitrariness in the diversion process. However, this can, to a large extent, be avoided by the legislature formalising the issue by conferring clear and limited discretionary powers upon police officers to facilitate this option.

2 2 Children's Court

The option of bringing the child before a Children's Court (cf generally Skelton "Children, young persons and the criminal procedure" in *The law of children and young persons in South Africa* (1997) 169 ff) should, as a matter of course, be resorted to in all cases barring those contemplated in paragraphs 2 1 *supra* and 2 3 *infra*. The Children's Court should accordingly be vested with the power to exercise a variety of options after having assessed or screened the child and his or her circumstances. These options would depend upon the following circumstances:

(a) *The child offender is "in need of care" in terms of section 14(4) of the Child Care Act* The court should, wherever possible, deal with such child on that basis rather than as a criminal offender.

(b) *The child offender is not "in need of care" and is alleged to have committed an offence for which a caution and reprimand is inappropriate* If the court

considers it to be in the best interest of such child, and the child (assisted by its parent or guardian and/or legal representative) elects not to be criminally prosecuted, it should refer such child to programmes (such as skills training programmes, community based service programmes or family group conferencing) aimed at restorative justice. The purpose and function of such programmes should be to educate the child to accept responsibility for his or her own actions, to prevent such child from re-offending and to reintegrate him or her into society (cf par 2.5 2.8 7.1 7.2 7.6 and 7.12 of the issue paper). Examples of offences in respect of which such programmes could be appropriate, are less serious offences against property (eg fraud and theft, but usually not robbery or housebreaking with the intent) and traffic offences. (Whether or not such programmes would be appropriate in cases of sexual offences as suggested in par 7.6 of the issue paper (cf South African Law Commission *Sexual offences against children* Issue paper 10, Project 108 1997 par 5.9 5.11 and 5.12), particularly where these are accompanied by violence, is at least doubtful.) It goes without saying that the assessment or screening of child offenders should be undertaken by the court at the earliest possible convenience. In the interim (ie subsequent to the perpetration of the alleged offence and prior to referral by the Children's Court to a programme) the child should be placed in the custody of a suitable person (eg parent or guardian) or institution (eg place of safety or shelter but, for obvious reasons, not a prison).

(c) *The court considers, on all the evidence before it, the case to be one which should rather be dealt with by a criminal court* Channelling a child offender into the criminal justice system should be a last option reserved for appropriate cases. Appropriate cases would, for example, include instances in which the child has committed a serious offence (such as murder or rape) or has been subjected to the option mentioned in paragraph (b) *supra* without success. Guidelines for determining appropriate cases should be provided for by the legislator.

As regards the implementation of the suggested assessment or screening process by the Children's Court, it is submitted (quoting from par 7.13(d) of the issue paper) that a "specially trained official, using a process and/or instrument developed by a multi-disciplinary team and subject to monitoring by such team", should undertake that task.

Legislative provision should be made for guidelines to assist such officials to decide which option is desirable in the circumstances. Moreover, judicial officials should undergo special training to sensitise them to the multi-faceted nature of the issues involved in dealing with child offenders (cf generally Zaal "Children's courts: An underrated resource in a new constitutional era" in *Law of children and young persons* 102 ff).

2 3 Criminal prosecution

A criminal prosecution, initiated by the prosecutor, as an option of *first instance* (as distinct from criminal prosecution, initiated by the Children's Court, in terms of par 2 2 (c) *supra*) should be used in exceptional circumstances only. Exceptional circumstances refer to cases which are of manifest gravity, for instance recidivism of serious offences by children who have previously been unsuccessfully channelled (of which proper record will have to be kept) through any of the processes mentioned in paragraph 2 2 *supra*. (Should proposals to raise the age of criminal capacity to twelve or fourteen years (see ch 3 of the issue paper)

become a reality, children under that age will, of course, not be liable to criminal prosecution.)

The present option does not necessarily mean that sections 254 and 11 will become redundant. In the unlikely event of the court considering, during the course of the proceedings, the criminal prosecution to be inappropriate, sections 254 and 11 should remain options.

As regards pre-trial detention, it is submitted that the problems traditionally associated with it (see eg ch 6 of the issue paper) will to a large extent be restricted to the cases (wherever appropriate, of course) covered by the present option and, conceivably, paragraph 2 2 (c) *supra*, and would therefore exclude from its ambit child offenders within the framework of paragraphs 2 2 (a) and 2 2 (b) *supra*.

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SOME COMMENTS ON THE DISCUSSION PAPER BY THE SOUTH AFRICAN LAW COMMISSION: "ASPECTS OF THE LAW RELATING TO AIDS: HIV/AIDS AND DISCRIMINATION IN SCHOOLS"

1 General remarks

It is obvious that there should be a constitutionally acceptable and realistic national policy regarding the handling of HIV/AIDS in schools. Beckmann and Prinsloo "Some legal aspects of AIDS in schools and other education institutions" 1993 (13:2) *Journal of Education* 55 point out the absence of clarity on issues which have to be addressed by the education authorities as well as uncertainty about the rights, duties and protection of learners either carrying or in contact with a carrier of the AIDS virus. They indicate that it is imperative that a general coherent policy that is fair to all concerned be developed and implemented by education authorities as soon as possible.

Such policy should be implementable and manageable at school level and may have an important impact on many aspects of the law applicable to the handling of AIDS in the community. Unfortunately the draft national policy ("the policy") contained in the South African Law Commission's discussion paper 73 (Project 85) appears to lack acceptability and realism in important respects. In our view the policy is flawed on account of *inter alia* the following:

(a) The policy fails to achieve a correct and equitable balance between the fundamental rights of those free from HIV/AIDS and those so afflicted in that it generally overemphasises the rights of the latter group.

(b) The policy does not fully comply with section 3 of the National Education Policy Act 27 of 1996.

(c) The policy appears to be inconsistent with section 5 of the South African Schools Act 84 of 1996.

(d) Unfortunate drafting as well as incorrect or misleading statements also mar the policy.

In the subsequent paragraphs some examples will be cited to support the points of criticism referred to above (however, not necessarily in the order in which they are listed above). If the draft policy is not amended to be more realistic and in accordance with the relevant legal principles, it is conceivable that schools may consider ignoring the provisions of the policy in so far as they are in conflict with a reasonable interpretation of education law and common sense. In view of its current formulation it will also not be surprising if parts of the policy are in any event never implemented.

2 Perceptions on sexual promiscuity or other forms of unacceptable conduct

The policy, no doubt inadvertently, reinforces the prevalent public perception that HIV/AIDS is in general strongly linked to sexual promiscuity, other forms of sexually deviant behaviour, or drug abuse. For example, on page ix (a kind of preamble to the policy itself) the point is made that "[i]ndications that young people are sexually active, mean that increasing numbers of learners attending secondary schools might be infected". Yet the policy itself seems to condone or support teenage sexual activity and promiscuity by declaring in clause 6(3) that learners will be "encouraged" to make us of "reproductive health care". What is the purpose of the so-called "HIV/AIDS education programme" announced in clause 6(1) if some learners are at the same time "encouraged" to use condoms, for instance? The programme will thus apparently simultaneously attempt to curb AIDS *and* create conditions favourable to its spreading. It will not be surprising if many parents, educators and learners reject what could result in a "condom strategy" on religious and moral grounds as an inappropriate response to a serious problem that may be better addressed by lifestyle choice education.

3 Knowledge of someone's HIV/AIDS status

On page ix of the policy it is stated that it "is impossible to know who is infected and who not". This statement is obviously inaccurate and misleading and may further detract from the credibility of the policy as a whole. Surely it is possible to accurately establish the condition of many of those infected – even if such identification is clearly beyond the capabilities of those entrusted with school management in general. If the policy could be construed as an attempt to shroud a learner's HIV/AIDS status in such mystery that others are deterred from showing any interest in it, it would be medically and legally unsound as it could preclude action that would be in the best interests of the learner concerned.

4 Exposure of others to risk

It is remarked in the policy (on page ix, the third paragraph from the top) that the infection of children with HIV/AIDS does not expose others to "significant risk". This observation is apparently intended to allay any unjustified or exaggerated fears in the school situation. The very next paragraph plays down the risk of transmission even further by referring to a "negligible" risk. It seems that

those drafting the policy could not make up their minds about the real nature of the risk. The statement about the "negligible" risk is, in any event, at odds with the earlier prediction in the policy that "increasing numbers" of learners at secondary schools might be infected on account of their early sexual activity.

It must also be considered that although the risk of being infected with HIV/AIDS in the school situation may be small, it is a general principle of our law that reasonable steps to prevent harm are required where someone's conduct creates the possibility of grave and extensive damage (see generally Neethling, Potgieter and Visser *Law of delict* (1994) 134 for references to cases in the field of negligence). Thus in view of the serious consequences of AIDS, the apparently small risk of infection does not mean that the risk should be ignored.

In this regard attention could be drawn to a recent report in the *Citizen* (1997-11-08 11) entitled "Head butt gives victim HIV":

> "An Italian man was infected with the AIDS virus after being head-butted during a road rage attack, scientists said in the British medical journal the Lancet yesterday . . . The force of the blow left imprints on both men's foreheads and caused them to bleed extensively, it said."

As bullying, fights and brawls, gangsterism, sexual abuse, attacks with knives and firearms and even killings are not unfamiliar on the school grounds of South Africa (61 Ragolane "Death besieges institutions of learning in the Northern Province" 1997 (8:1) *TUATA Newsletter* 12), this incidence appears to indicate that the risk of infection is not so insignificant that it can safely be ignored for all practical purposes. With the general level of AIDS infection apparently on the increase in South Africa, the risks in the school situation may also become greater – a probability that should be provided for in the policy.

5 Bill of Rights

The "preamble" to the policy (on page x) refers to certain constitutional rights, namely the right to a basic and further education, the right not to be unfairly discriminated against, the right to freedom of access to information (a problematic reference in view of the policy's obvious aim to keep someone's HIV/AIDS status as much of a secret as possible – see clause 4), the right to freedom of conscience, and the right to privacy. Conspicuously absent from this list are references to the right to life (s 11 of the Bill of Rights), the right to bodily and psychological integrity (s 12(2)), the right to freedom of association (s 17) and the right to an environment that is not harmful to one's health and well-being (s 24). It must also be noted that clause 3(2) of the policy specifically refers to the "best interests" of a learner with HIV but makes no mention of the best interests of other learners with whom he or she may be in contact.

It would appear that the point of departure of the policy clearly places an unreasonable emphasis on the position of those with HIV/AIDS. While the invidious and tragic position of those with HIV/AIDS must be fully understood, cognisance must also be taken of the well-being and reasonable fears of "others". A sound policy must be informed not only by sympathy for some but also by the rights of everyone involved. This lack of cognisance of the position of "others" causes the policy apparently to fall foul of section 4(a) of the National Education Policy Act 27 of 1996 which requires that policy shall be directed toward "the fundamental rights of *every person*". (The drafters appear to assume that the Minister of Education may make policy on the matter of HIV/AIDS but s 3 of the Education Policy is by no means absolutely clear in this regard.)

6 Admission policy

Clause 2(1) of the policy proclaims that no learner will be denied admission or continued attendance at school on account of his or her HIV status. This prohibition appears incompatible with the provisions of section 5(5) of the South African Schools Act 84 of 1996. This section provides that, subject to the Schools Act and any applicable provincial law, the governing body determines the admission policy of a school. Section 5(3) states three grounds on which learners may not be refused admission – which are unrelated to the issue of HIV/AIDS infection. The health and conduct of a learner, which may expose others to unreasonable risks, are obviously relevant factors which may be taken into account on a reasonable and equitable basis in formulating an admission policy. While section 3(4)(i) of the National Education Policy Act allows the Minister to determine national policy in respect of "the admission of students to educational institutions", it could hardly have been the intention of the legislature to allow the Minister to force his ideas on admission of those infected with HIV/AIDS on democratically elected governing bodies. Such an interpretation would make a mockery of section 5(5) of the Schools Act. Although the automatic denial of admission to any learner with HIV/AIDS will probably be illegal (constituting unfair discrimination), the extreme position adopted in the policy, which apparently refuses to accept that there may be fair and legitimate reasons to deny an individual learner admission to a school, is incorrect and unrealistic.

Section 5(2) of the Schools Act stipulates that the governing body of a public school may not administer any test related to the admission of a learner to the school or direct or authorise the principal to administer such a test. In our view this provision does not relate to a medical test. However, even if a test to determine the HIV/AIDS status of a learner may not be part of a legitimate admission policy, there is nothing in the Act preventing the governing body from requiring the parents of a learner, for the protection of the learner in question and of other learners at the school, to disclose the HIV/AIDS status of a learner on admission (obviously on a confidential basis) and to undertake to inform the governing body immediately when a change in the status occurs. We further submit that a governing body may, as a condition to admission, require parents to undertake to compensate losses caused to others at the school by any illness suffered by their child (including AIDS).

The governing body of a school may, in our opinion, include in its admission policy a provision requiring the principal (or the governing body) to disclose to parents who intend to enrol their children at the school, whether anyone at the school does have HIV/AIDS. Such a provision would be in line with the right to access to information (s 32 of the Bill of Rights read with s 23 of Schedule 6 of the Constitution). Only by having information on whether the school is AIDS free or not, will parents be able to make an informed choice as to the placing of their children at that school (and accordingly be able to act in the best interests of their children). Access to this information (and any further communication on the position regarding AIDS at the school) will not infringe anyone's right to privacy as the identity of anyone suffering from AIDS need not be disclosed.

It is not clear whether or to what extent relevant health regulations are reflected in the policy.

7 Secrecy regarding AIDS status and sufferers with neurological damage

Clause 4(2), which generally attempts to keep someone's HIV status a secret, nevertheless authorises disclosure to the principal of a school or "care giver".

However, who qualifies as a so-called "care giver" is not revealed. The final policy will have to contain more guidelines regarding access information as regarding the incidence and risks of AIDS at schools (see generally on delictual liability for wrongful disclosure of facts relating to AIDS, *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A)).

Clause 5(4) prescribes in vague terms that learners with HIV related behavioural problems or who are subject to neurological damage "could, if necessary, be accommodated within alternative structures in the same institution". However, the policy is silent on how ordinary schools are supposed to deal practically with this daunting task in view of, *inter alia*, the lack of funding, space and human resources in most schools. The policy could have contained more on realistic alternatives for infected learners/patients who are reasonably unable to attend schools or who should not be allowed to attend school.

8 HIV/AIDS education programme

In clause 6(1) it is announced that a continuing HIV/AIDS education programme will be implemented at all schools. We have already indicated that some parents may have serious moral and religious reservations about the content of certain programmes and we are therefore concerned about the impression that parents may be excluded from the design and implementation of such programmes (including their methodology and contents). It seems that parents and guardians will only be "informed" and "should be invited to participate". It is not clear whether parents have a *right* to be invited and the policy is also silent as to the form and nature of their so-called "participation." The suspicion exists that their participation could be limited to that which is acceptable to the education authorities and that parents could generally only be invited ostensibly to comply with the requirements of participation and transparency. The position of the other role-players in the community is not defined clearly enough. The absence of references in clause 6 to governing bodies of schools, associations of governing bodies and other bodies representing the interests of parents, is noteworthy (and unacceptable).

Clause 6(4) contains some far-reaching ideas. Learners must be taught how to behave towards and live with a person with HIV. Why they should be specially taught how to "live" with them and what this is supposed to mean and imply, is not clear. The policy then adds the following *non sequitur*: "Social norms against drugs, sexual abuse and violence will be promoted." The inclusion of this sentence will strengthen popular (but not necessarily always correct) notions that HIV/AIDS is somehow generally linked to immoral and anti-social behaviour – which will not make it easier for those suffering from AIDS.

9 Encouragement of learners to use reproductive health care

Reference has already been made to the principle in clause 6(3) that learners must *inter alia* be encouraged to make use of "reproductive health care". If this refers mainly to access to condoms, it would be repugnant to many parents who believe on religious, moral or other grounds that condoms are not the ultimate answer to AIDS and that its use by school children is already indicative of a lifestyle which may have extremely negative consequences. Besides being invidious to many parents on religious and moral grounds, programmes to make condoms available to learners will no doubt invite cynical comparisons with prisons where this is also said to be the practice.

10 Practical guidelines on treatment of open wounds, etcetera

Despite the "negligible" risk of infection of which the policy seeks to reassure its readers, it nevertheless provides (in clause 7) in considerable detail a long list containing some vague, unrealistic, contradictory and in some instances ill-conceived instructions to be followed in the treatment of open wounds, etcetera at schools. Some of these instructions are clearly impractical – for example, how will it be possible to really ensure that no learner with an open wound or infected skin lesion participates in contact sport? (assuming that the concept "open wound" is clearly understood by all involved). And who will have the legal duty in practice to purchase, secure, take care of and maintain the two prescribed first aid kits on which so much apparently depends? And whose duty will it be to clean up surfaces contaminated by blood? Who is to supply these kits and train educators in their use? What will the position be if an educator is neither prepared nor trained to take the risks involved in cleaning open wounds or remove blood from surfaces at the school?

The implications in terms of labour law have obviously not been properly considered by those who framed the draft policy. It is a question whether educators' unions will allow their members to be exposed to the risks posed by implementing parts of the Minister's policy. An attempt to force educators to act in accordance with aspects of the policy may constitute a unilateral change in the job description of such educators – which will obviously be unacceptable. Nor have all the insurance implications of the policy apparently also been considered.

11 Power of governing bodies to adopt a policy on AIDS

Clause 8 of the policy has some puzzling aspects. Governing bodies are given the opportunity to adopt a school level policy only to give *effect* to the national policy and are expressly prohibited from deviating from the national policy. On the other hand, lip service is paid to the autonomy of governing bodies by allowing them to make a policy, which reflects the "needs, ethos and values of the school and the community". How these two principles are to be reconciled is not clear. It is also undemocratic to decide in a national policy that the chairperson of the proposed "Health Advisory Committee" must necessarily be the principal. This could create the impression that this is an attempt by the education authorities to put themselves in a position to force their own views on school communities.

12 Conclusion

The points made above suggest that those involved with the formulation of a national policy for dealing with HIV/AIDS in schools will have to do some serious rethinking as far as certain aspects of the draft policy are concerned. Otherwise the document proposed by them may simply result in an inappropriate, impracticable and unrealistic policy that will not be able to make the transition from the drawing board to the school grounds. It is strongly recommended that the Commission specifically consult with parents' and teachers' organisations in finalising the proposals before the draft policy becomes formal policy.

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FEMINISM AND CRIMINAL LAW*

1 Introduction

Criminal law as a subdivision of public law deals with the relationship between the state as authoritative power and the subjects of the state. In South Africa, prior to the coming into operation of the 1993 (interim) Constitution, no enforceable measures existed to safeguard the subject against the legislative power of the state. Although the principle of legality is revered as the ideal by academics, it has not always been treated with the same respect by politicians.

The Constitution, which is aimed primarily at regulating the relationship between subject and state, has introduced a number of new values to be taken into consideration when creating a new crime or scrutinising an existing crime. In terms of the Constitution all people are equal before the law. Equality, specifically gender and race equality, is, therefore, a fundamental value of the South African constitutional order (Albertyn, Fedler and Goldblatt "Gender" in 10(2) *LAWSA* (1997) par 220). This discussion will focus on rape as an example of a crime where gender equality is at issue.

2 Equality

A distinction is made between formal equality, which refers to the form and procedures of the law, and substantive equality, which refers to the substance of the law. Formal equality also prescribes equal treatment of all people regardless of their circumstances whilst substantive equality takes these circumstances into account and requires effective social equality (Erasmus and Van Riet *Human rights practice* (1996) 108).

3 Gender

Feminist jurisprudence claims that gender as a social category shapes all institutions, including the law. Although the law may appear to be neutral, objective and value-free, it is, in fact, gendered in that its assumptions, rules and practices often reinforce the inequality of women (Albertyn, Fedler and Goldblatt 10(2) *LAWSA* par 218). Policies developed by men do not serve the interests of women, but those of men. This point is particularly well illustrated by cases of sexual assault (see Francis (ed) *Date rape: feminism, philosophy and the law* (1996) 72). Feminists claim that criminal law has developed around the male criminal with the result, for example, that negligent conduct is evaluated in terms of male notions of what constitutes reasonable conduct.

Gender is a social term and refers to the social features attributed to men and women in society. According to feminist theory, all known societies are patriarchal. Patriarchy denotes a power structure in which certain roles are ascribed to

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men and others to women with the men's role being the more powerful one. In many societies women are seen as attending to domestic duties, nurturing and caring for their families, whilst men are seen as breadwinners and decision-makers. These roles are not equal. Albertyn, Fedler and Goldblatt 10(2) *LAWSA* par 219 offer the following reasons for this state of affairs:

(a) the unequal value placed on the roles;

(b) the unequal rewards for doing this work;

(c) the obstacles that domestic duties pose to a woman's ability to compete on an equal footing in the workplace;

(d) the oppression to which women are subject in the private sphere of the home.

4 Rape

Rape consists in a male having unlawful and intentional sexual intercourse with a female without her consent (Snyman *Criminal law* (1995) 424). The crime is confined to penile penetration of the vagina. This means that other forms of serious sexual assault, which can be even worse in character, are excluded. Furthermore, rape does not include sodomy. Rape is not motivated by lust but by an "exploitable imbalance of power in which the infliction of pain or humiliation is the goal of the rapist" (Albertyn, Fedler and Goldblatt 10(2) *LAWSA* par 237). The high incidence of the crime therefore has a bearing on women's equality.

4 1 History of rape

Rape is viewed as a serious crime against bodily integrity. Burchell and Milton (*Principles of criminal law* (1997) 435) point out, correctly, that the very intimate and personal nature of the act makes it a particularly reprehensible form of assault. It has also been described as the "ultimate invasion of a woman's privacy and autonomy" (Clarkson as quoted by Burchell and Milton 435).

In older law, the object of rape was not to protect bodily integrity but rather to protect the economic interest of the patriarch in the women under his protection. The crime consisted in taking the woman from his control without his consent or having intercourse with her without his agreement. Forced sexual intercourse was, therefore, punished only if it involved abduction (Burchell and Milton 436–437).

Enforced sexual intercourse was punished in Roman law as a form of unchaste sexual relations. In Germanic law, the focus was on the abduction of marriageable females and not on forced sexual intercourse. The Roman-Dutch writers confined rape to forcible sexual intercourse with a woman without her consent. In English law, rape was originally understood as the crime of deflowering a virgin female, consequently affecting her value as a bride. Forcible sexual intercourse with a woman without her consent was therefore punished only if the woman was a virgin (*idem* 437–438).

Originally the crime of rape was understood to mean sexual intercourse against the female's will. When the scope of the crime was widened to include consent obtained by fraud and without the use of force, the requirement of "by force and against her will" was replaced by "without her consent".

4 2 Rape and the criminal justice system

The following example of cross-examination illustrates the extent of the bias against women in rape trials:

"Mr Smith, you were held up at gun-point at the corner of First and Main?

Yes.

Did you struggle with the robber?

No.

Why not?

He was armed.

Then you made a conscious decision to comply with his demands rather than resist?

Yes.

Did you scream? Cry out?

No, I was afraid.

I see. Have you ever been held up before?

No.

Have you ever *given* money away?

Yes, of course.

And you did so willingly?

What are you getting at?

Well, let's put it like this, Mr Smith. You've given money away in the past. In fact you've quite a reputation for philanthropy. How can we be sure that you weren't contriving to have your money taken away from you by force?

After a few more questions to Mr Smith about what he was wearing and where he was walking, at what time, the final question asks: In other words, Mr Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr Smith, we might even think you were *asking* for this to happen, mightn't we?" (Reeves *A woman scorned* (1996) 117–178).

4 2 1 Rape laws from a feminist perspective

Feminists argue that rape laws are largely based on traditional attitudes about social roles and sexual mores (Temkin (ed) *Rape and the criminal justice system* (1995) 197).

Legal and social attitudes have produced a number of formal and informal restraints which prevent the successful prosecution of rape offenders. These restraints include the fear that false rape charges may result in the convictions of innocent men.

It is suggested that a false complaint is feared more in cases of rape than other cases because of the basic assumption that many women are either amoral or hostile towards men (Reeves 175). Concomitant to the assumption that women lay false charges is the belief that it is difficult to defend a rape charge (Temkin (ed) 210).

Another myth that proves to be an obstacle to successful prosecution in rape cases is the notion that women like to be raped. Because women like to be raped, men are not responsible for their acts – they are mere victims of passions and urges which are impossible to control once aroused (*idem* 211).

Attacks on the consent requirement are also based on the fundamental assumption that no reliance can be placed on the woman's account of the rape, as her opinion is often distorted. This assumption is once again underpinned by the fear that a false charge may result in the conviction of an innocent man.

Conflicting interests lie at the heart of rape laws: the desire to protect chaste innocent women from sexual assault versus the fear that innocent men may be convicted (*idem* 216).

4 2 2 Rape and legal reform

Temkin (in Tomaselli and Porter *Rape: An historical and cultural enquiry* (1996) 16) categorises a number of problems which rape presents for the criminal justice system, of which the traumatisation of the victims, first by the rapist and secondly in the handling of the case by the police and the courts, the law of rape and the evidential rules that surround it are important for this discussion.

A perusal of existing rape laws shows that, although the South African legislature has in recent years tried to accommodate women, not nearly enough has been done to better the position of women in rape cases. The broadening of the scope of rape to include marital rape, by which equal protection is granted to all women, is welcomed. However, the requirement of lack of consent and the rules of evidence applicable in rape cases illustrate the discriminatory nature of rape laws.

South African law has followed English law and placed the emphasis on the absence of valid consent to intercourse on the part of the female (Snyman 424). One of the crucial problems in rape cases is that of the consent (or rather the non-consent) of the victim. The fact that the honest belief of the accused, however unreasonable, that the woman consented to intercourse, grants him a defence creates a particular form of inequality (Albertyn, Fedler and Goldblatt 10(2) *LAWSA* par 237; Temkin in *Rape* 24). However, this requirement is in accordance with the general principle applicable in criminal law that *mens rea* should extend to every element of the crime.

A particular discriminatory evidentiary principle which comes into operation as soon as consent is placed in issue, is the fact that the victim can be cross-examined with regard to her sexual history. This rule has recently been amended and the victim can, at present, only be subjected to that type of cross-examination if the court is of the opinion that it is relevant. However, this concession should be seen in the light of the rule that no reference may be made to the accused's sexual past. This discriminatory state of affairs is largely attributed to the unfounded fear that false rape charges may result in the convictions of innocent men.

The cautionary rule which applies in rape cases, is yet another example of the discriminatory nature of rape laws. In *S v D* 1992 1 SA 513 (Nm), a Namibian High Court decision, this rule was declared unconstitutional. In the light of the Constitution's commitment to equality, it is highly unlikely that this rule will stand constitutional scrutiny in South Africa (Albertyn, Fedler and Goldblatt 10(2) *LAWSA* par 237).

The most comprehensive reform in respect of rape laws advocated by feminists is the replacement of the crime of rape by a ladder of offences (Temkin in *Rape* 25). In Canada, the crime of rape has been abolished and replaced by three crimes of sexual assault. No distinction is made between penetration and other sexual assaults but the levels of violence involved are distinguished (*idem* 35). The first category deals with simple assault. This is followed by an offence where the accused, in committing a sexual assault, carries, uses or threatens to use a real or imitation weapon or threatens to cause bodily harm to a person other than the defendant. The last offence carries a life imprisonment sentence and pertains to those instances where the accused in committing a sexual assault wounds, maims, disfigures or endangers the life of the complainant (*ibid*).

Consent is still at issue but a number of situations in which consent will not be deemed to exist are listed.

It is submitted that the rape laws should be amended to promote formal equality. One of the problems experienced in rape cases is the victim's fear of testifying in court. Rather than to submit to court procedures which are experienced as hostile, the victim would let the perpetrator escape the consequences of his crime. It is submitted that the abolition of the cautionary rule as well as a total prohibition on the examination of the victim's sexual experiences would contribute to formal equality. Alternatively, should the rule remain in terms of which the court can rule whether evidence of the victim's sexual past and experience is relevant to the issue at hand, evidence should be led concerning the sexual past of the perpetrator as well. The underlying problem in rape cases is that discriminatory evidential rules have resulted in the victim being put on trial and not the perpetrator.

In respect of substantive equality, it is submitted that the definition of rape should be amended to include sodomy as well. The ladder system was introduced *inter alia* because juries were hesitant in the light of the penalty for rape to convict for rape. Consequently prosecutors did not institute prosecutions for rape. As we do not have a jury system and the biggest restraint in rape cases is not the definition of rape but rather the formal procedures followed in prosecutions, a ladder system is at present not the answer. A ladder system will also not address the problem that the accused has to have *mens rea* in respect of all the elements of the crime, including that of consent.

5 Conclusion

The perceived inequality of women is embedded in the beliefs of society. Legal reform alone cannot alter perceptions. Social attitudes and values have to change. Although crimes should stand constitutional scrutiny in respect of gender equality, the mere application of the criminal sanction cannot and will not guarantee equality.

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'N REG AS TEENKANT VAN 'N REG: OPMERKINGE OOR DIE OPKOMS VAN INTERAKSIEREGTE[1]

1 Inleiding

In *Nancy M v Brian M* 642 NYS 2d 66 (AD 2 Dept 1996) 67 het die vraag na die omgangsreg van 'n vader met sy kind na egskeiding ter sprake gekom. In appèl

1 Dank word uitgespreek teenoor die Universiteit van Pretoria wat my finansieel in staat gestel het om 'n deel van hierdie navorsing in 1996 te kon onderneem aan die College of Law van die University of Arizona (Tucson) in die VSA. Die menings hierin uitgespreek, verteenwoordig nie noodwendig dié van die Universiteit van Pretoria nie.

verklaar die appèlafdeling van die hooggeregshof van die Amerikaanse staat New York dat 'n ouerlike omgangsreg "is a joint right of the non-custodial parent and of the child". In 'n kommentaar op die beslissing van ons appèlhof in *B v S* 1995 3 SA 571 (A) is die opmerking gemaak dat die ouerlike omgangsreg van 'n ongehude vader met sy buite-egtelike kind wesenlik 'n interaksiereg en gelyktydig 'n reg van beide die vader en die kind is (Labuschagne "Vaderlike omgangsreg, die buite-egtelike kind en die werklikheidsonderbou van geregtigheid" 1996 *THRHR* 182). Die vraag wat in dié verband onmiddellik na vore tree, is of 'n reg as teenkant van 'n ander reg moontlik is, met ander woorde: Kan die regswetenskaplike aksioma dat 'n reg altyd 'n plig as teenkant moet hê in die lig van moderne ontwikkelinge stand hou? In hierdie aantekening word dié vraag kortliks aan die orde gestel.

2 Die effek van die menseregtelike gelykheidsbeginsel op die juridiese status van menslike verhoudinge

In 'n dikwels aangehaalde artikel wys Joubert daarop dat die

> "praktiese regsontwikkeling veral sedert die Franse Revolusie die regte van die mens so sterk op die voorgrond gebring [het] dat die wysbegeerte en die regswetenskap moes poog om wat die werklikheid van die reg beklemtoon het, ook wetenskaplik te formuleer" ("'n Realistiese benadering van die subjektiewe reg" 1958 *THRHR* 98–99)

Die opkoms en dinamiese ontplooiing van die erkenning van fundamentele regte in die onlangse verlede het onvermydelik ook 'n effek op genoemde regswetenskap. Die effek van die werking van die menseregtelike gelykheidsbeginsel, veral in die sin van respektering van menslike individualiteit en erkenning van spesifieke menslike behoeftes, was dat die aard en funksionering van die tradisionele subjektiewe regsbegrip noodwendig onder verdenking moes kom. Hierdie stelling word veral vanuit twee tipes menslike (natuur-) verhoudings, naamlik dié van psigoseksuele interaksie in 'n intieme assosiasie (veral 'n huweliksverhouding) en die kind-ouer-verhouding, verduidelik en geëvalueer.

2 1 Psigoseksuele interaksie in 'n intieme assosiasie

In die vroegste menslike gemeenskap het die vrou se baarvermoë aan haar man behoort. Hy kon, binne die grense van sekere bonatuurlike taboes en rites, sy vrou se baarvermoë na willekeur benut (sien hieroor Labuschagne "Regsakkulturasie, lobolo-funksies en die oorsprong van die huwelik" 1991 *THRHR* 544–545, "Verkragting in die inheemse reg: Opmerkings oor die oorsprong van vroulike ondergeskiktheid in misdaadomskrywing" 1994 *Obiter* 92–94). Verkragting van 'n man op sy vrou was dus, in strafregtelike sin, nie denkbaar nie. Uit *D* 48 6 3 4 kan die afleiding gemaak word dat 'n man in die Romeinse reg *per vim stuprum* ten aansien van sy vrou kon pleeg (sien ook Schulz *Classical Roman law* (1955) 115; Labuschagne "Misdade tussen gades" 1980 *THRHR* 40). Wat ook al die posisie in die Romeinse reg was, in die Romeins-Europese fase van die ontwikkeling van ons gemenereg het 'n man "vol Recht in den Persoon van sijnen Wijve" gehad (Damhouder *Practycke in crimineele saken* (1650) hfst 95 16). Daarom kon slegs 'n *uxor aliena* 'n verkragtingslagoffer wees (Püttmann *Elementa iuris criminalis* (1802) par 590). Aan die vrou se psigoseksuele behoeftes is derhalwe 'n ondergeskikte posisie toegeken. Van outonome en behoeftematige beskikking oor haar psigoseksuele funksionering was daar nie sprake nie (sien Fryer "Law versus prejudice: Views on rape through the centuries" 1994 *SAS* 60). Die egaliseringsproses wat soos 'n goue draad deur die

geskiedenis van die menslike samelewing loop, het geleidelik egter gelyke behandeling van die geslagte tot gevolg gehad (sien hieroor Labuschagne "Regsnavorsing: 'n meerdimensionele en regsevolusionêre perspektief" 1994 *TRW* 93–95, "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif vir Etnologie* 40; Kaganas en Murray "Law and women's rights in South Africa: An overview" 1994 *Acta Juridica* 8–28).

Dat die misdaad verkragting binne huweliksverband gepleeg kan word, word in 'n groeiende mate wêreldwyd aanvaar (sien hieroor Jansen "Verkragting binne huweliksverband: Die laaste spykers in die doodskis" 1994 *SAS* 78). Binne 'n intieme assosiasie het een party gevolglik nie meer 'n reg op die psigoseksuele integriteit van die ander party nie (sien oor die begrip "intieme assosiasie" Karst "The freedom of intimate association" 1980 *Yale LJ* 624; Labuschagne "Nietige en vernietigbare huwelike: Opmerkinge oor die deregulering van die huwelik" 1989 *TSAR* 382–383). Daar bestaan wedersydse en pligongebonde regte, interaksieregte dus.

2 2 Ouer-kind-omgangsregte

In rudimentêre gemeenskappe het die *pater* 'n *ius vitae necisque* oor sy kinders gehad (sien bv Rein *Das Kriminalrecht der Römer* (1844) 439–442; Van den Heever 'n *Sistematiek vir die inheemse deliktereg van die swartman* (LLD-proefskrif UP 1984) 243); De Mause *The history of childhood* (1974) 1). Kinders self het aanvanklik geen regte gehad nie (Aries *Centuries of childhood* (1962) 411; Arnold "Kindheit im europäischen Mittelalter" in Martin en Nitschke (reds) *Zur Sozialgeschichte der Kindheit* (1986) 443). Met verloop van tyd het die reg in 'n toenemende mate aan die behoeftes en belange van kinders erkenning verleen. Die erkenning van kinderregte het hiervolgens onvermydelik geword (Cohen *Equal rights for children* (1980) 1; Veerman *The right of the child and changing image of childhood* (1992) 181).

Aanvanklik het die ongehude vader selfs nie eers 'n onderhoudsplig teenoor sy buite-egtelike kind gehad nie (Steward "Constitutional rights of unwed fathers: Is equal protection equal for unwed fathers?" 1990 *Southwestern Univ LR* 1087; Labuschagne "Regspluralisme, regsakkulturasie en onderhoud van kinders in die inheemse reg" 1986 *De Jure* 294–295). Die eerste en primêre regsband van die ongehude vader met sy buite-egtelike kind was suiwer ekonomies van aard, naamlik 'n onderhoudsplig (Hurst "The sins of the fathers: From filius nullius to the sixth circuit's liberal interpretation of social security child survivorship provisions" 1983 *Toledo LR* 1022–1029; Bradley "Equality for children of unmarried parents in Swedish law" 1990 *Journal of Social Welfare Law* 346). Die belange en behoeftes van beide die ongehude vader en sy buite-egtelike kind het mettertyd 'n regsdinamika in werking gestel wat nog nie afgeloop is nie. In die gesaghebbende beslissing van *B v S* 1995 3 SA 571 (A) 582 merk appèlregter Howie op dat "if one is to speak of an inherent entitlement at all, it is that of the child, not the parent". In bykans al die moderne regstelsels van die wêreld is daar prosesse in werking gestel wat die gelykstelling van die regte, verpligtinge en voorregte van binne- en buite-egtelike kinders en gehude en ongehude ouers, onderskeidelik, binne redelike grense ten doel het (Doek "De 'definitive' regeling van het omgangsrecht: een weerbarstige kwestie" 1992 *FJR* 26; Hoge Raad 22 Des 1995, NJ 1996, 419; Lakies "Umgang zwischen Vater und nichtehelichem Kind" 1990 *ZRP* 232; Salgo "Zur Stellung des Vaters bei der Adoption seines nichtehelichen Kindes durch die Mutter und deren

Ehemann" 1995 *NJW* 2129; Atwater "A modern-day Solomon's dilemma: What of the unwed father's rights?" 1989 *Univ of Detroit LR* 268; Labuschagne "Aanvaarding van verantwoordelikhede as ontstaansbron van 'n omgangsreg vir 'n ongetroude vader met sy buite-egtelike kind" 1995 *TSAR* 162, "Vaderlike omgangsreg en die toepassing van die vermoede *pater est quem nuptiae demonstrant* op 'n konkubinaat" 1994 *Obiter* 266). In Nederland is die woord "bezoekrecht" vervang deur die woord "omgangsrecht" omdat eersgenoemde te eensydig is en dit waarom dit werklik gaan nie na behore beskryf nie. In die Amerikaanse staat New York, soos ook blyk uit die saak waarmee die onderhawige bespreking ingelei is, word na die ouerlike omgangsreg verwys as 'n "joint right" wat beide die ouer en die kind toekom (sien *Weis v Weis* Ct App 436 NYS 2d 862 (1981) 865; *Gerald D v Lucille S* 591 NYS 2d 409 (AD 2 Dept 1984) 410; sien ook *Remson v Remson* 672 So 2d 409 (La App 1 Cir 1996); *Lopez v Lopez* 97 NM 332, 639 P 2d 1186, 28 ALR 4th 1 (SC New Mexico 1981) 6).

2 3 Samevatting

Uit bogaande uiteensetting blyk dat die ontplooiing van die gelykheidsbeginsel in die sosio-juridiese organisasie van die mens tot gevolg gehad het dat beide partye betrokke by 'n intieme assosiasie tans gelyke en gelyktydige seksuele regte het en dat 'n omgangsreg tans aan beide ouer en kind gelyktydig toekom.

3 'n Plig altyd 'n teenkant van 'n reg?

Regswetenskaplikes stel deur die bank die vereiste dat 'n subjektiewe reg 'n plig as teenkant moet hê. So verduidelik Joubert:

> "Voorbeelde hoe valse begrippe tot verkeerde konklusies in die praktyk lei en dus onreg in die hand werk, sou ook uit ons eie regsliteratuur vermenigvuldig kan word. Om hier slegs na een oorbekende geval te verwys: die konsepsie van 'n onregmatige daad as die nie-nakoming van 'n 'duty of care'. Teen die opvatting van 'n onregmatige daad as die nie-nakoming van 'n verpligting kan wetenskaplik weinig beswaar ingebring word, want elke reg van 'n subjek het as keersy die verpligting van ander subjekte" ("Die realiteit van die subjektiewe reg en die betekenis van 'n realistiese begrip daarvan vir die privaatreg" 1958 *THRHR* 13).

Van Zyl en Van der Vyver verwys na die "verpligting wat daar op derdes rus om nie op 'n reghebbende se regsobjek inbreuk te maak nie" as die teenkant van die subjektiewe reg (*Inleiding tot die regswetenskap* (1982) 437; sien ook Neethling, Potgieter en Visser *Deliktereg* (1996) 48).

In geval van interaksieregte, dit wil sê indien twee of meer persone gelyke en gelyktydige regte ten opsigte van dieselfde aktiwiteit het, is daar nie sprake van pligte in die tradisionele sin van die woord nie. Die een party se reg word begrens deur die ander party se reg. So, byvoorbeeld, het 'n man wat in 'n intieme assosiasie met 'n vrou betrokke is slegs 'n reg op haar psigoseksuele integriteit in soverre sy haar reg op sy psigoseksuele integriteit wil uitoefen. Persone wat in 'n intieme assosiasie betrokke is, moet myns insiens een of ander ("preferente") reg op mekaar se liggame hê, al word aan owerspel as sodanig, en tereg ook, in baie westerse lande nie meer deliktuele en strafsanksies geheg nie (Labuschagne "Deïnjuriëring van owerspel" 1986 *THRHR* 336). Emosionele en sosiale stabiliteit verg dat langtermyn intieme assosiasies deur die reg bevorder word. Die idee van 'n reg as teenkant van 'n reg, soos by interaksieregte blyk, geld natuurlik slegs vir die interaksiepartye. In dié verband het dit uiteraard 'n relatiewe werking (Labuschagne "Relatiewe kante van die subjektiewe reg" 1988 *THRHR* 377).

4 Konklusie

Uit bogaande uiteensetting blyk duidelik dat die tradisionele opvatting dat 'n reg altyd 'n plig as teenkant het, nie binne die konteks van moderne ontwikkelinge kan stand hou nie. Dit is in besonder so by interaksieregte.

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Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.

The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the steeets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives (per Van Heerden and Olivier JJA in *S v Chapman* 1997 3 SA 341 (SCA) 344–345).

VONNISSE

THE CONSTITUTIONALITY OF THE RULE OF PRIMOGENITURE IN CUSTOMARY LAW OF INTESTATE SUCCESION

Mthembu v Letsela 1997 2 SA 935 (T)

Introduction

One of the most interesting cases to come before our courts since the era of constitutional supremacy in South Africa is *Mthembu v Letsela*. This decision indicates in no uncertain terms that in the interpretation of any law, that is, the common law as well as customary law, the courts have to take into account the values that underlie our Constitution (*S v Makwanyane* 1995 6 BCLR 665 (CC)). The values that must be promoted in this endeavour are those that underlie an open and democratic society based on human dignity, equality and freedom (s 39(1) Act 108 of 1996; see also s 35(1) Act 200 of 1993). Furthermore, it indicates that the application and the development of the common law and customary law have to be undertaken with due regard to the spirit, purport and object of the bill of rights (s 35(3) Act 200 of 1993; s 39(2) Act 108 of 1996).

The facts of this case illustrate the problems faced by the court in arriving at the decision reached (937J–939B). The rider added to this decision is of primary importance for an appreciation of the reasons behind it (946D–E). This qualification is essentially relevant in understanding the role of section 8 (the equality provision) of the interim Constitution in the application and interpretation of any rule of customary law (presently s 9 Act 108 of 1996).

Applicant alleged that she was married to the deceased by customary rites on 14 June 1992 at Tsakane, Brakpan. This was denied by the deceased's father (first respondent). The deceased was employed as a clerk at Ergo Mine in Boksburg, and since 1990 she (the applicant) lived with him in his house at 822 Ditopi Street, Vosloorus, Boksburg. A daughter was born of the marriage. The deceased had no other children besides the daughter, but had three sisters and a father (first respondent). The deceased was the holder of a 99-year leasehold title which entitled him to the full right, title and interest in the leasehold stand situated at the address mentioned above. Prior to his death, the deceased, the applicant and her daughter, as well as his parents and the deceased's sister and her daughter, lived in the said house. The deceased died intestate and his father (first respondent) claimed that the house had to devolve upon him by virtue of the operation of the customary law rule of primogeniture (s 23 Act 38 of 1927

read with reg 2 of GN R200 of 1987). Indeed, the present position in South African law is that on intestacy, the father of the deceased in these circumstances becomes an heir (*ibid*).

Regulation 2 GN R200 of 1987

The type of marriage entered into by the deceased in South Africa is used as a connecting factor to indicate the system applicable to the devolution and administration of his estate in the case of intestacy. This is provided for by regulation 2 of GN R200 of 1987 issued under the provisions of the Black Administration Act of 1927 (s 23 Act 38 of 1927). In terms of this regulation, the intestate estates of deceased black persons may devolve in terms of either the common law or the customary law depending on the type of marriage contracted by them. Where the deceased is exempt from the operation of customary law, such exemption is used as a factor indicating that the common law is to apply to the devolution of his intestate estate (reg 2(b) GN R200 of 1987). Residence is also employed as a connecting factor in the case of Mozambicans who die intestate in South Africa (reg 2(a) GN R200 of 1987; see also Maithufi "Marriage and succession in South Africa, Bophuthatswana and Transkei: A legal pot-pouri" 1994 *TSAR* 262).

The common law is, furthermore, made applicable to the devolution and administration of the following deceased black persons, provided that they are not survived by partners to a customary marriage entered into subsequent to the dissolution of a civil marriage contracted before death:

(a) a partner to a marriage in community of property or under antenuptial contract (reg 2(c)(i)), and

(b) a widow, widower or divorcee of a marriage in community of property or under antenuptial contract (reg 2(c)(ii)).

Customary law, on the other hand, is applicable to the intestate estates of the following deceased persons, provided that they are survived by partners or spouses to a marriage previously contracted by them (before death), or any issue of such marriage:

(a) the deceased who had contracted a marriage that did not produce the consequences of marriage in community of property in terms of the repealed section 22(6) Act 38 of 1927 (reg 2(d)(i)),

(b) the deceased who had contracted a customary marriage (reg 2(d)(ii)), and

(c) the deceased who had contracted a putative marriage (reg 2(d)(iii)).

In the case of these intestate estates, the regulation further provides that on application to the Minister of Justice and by his direction, the common law may be made applicable to their devolution. The direction may be given if the circumstances are such as in the opinion of the Minister to render the application of customary law to the devolution of the whole or some part of his property inequitable or inappropriate (proviso to reg 2(d)).

These estates therefore normally devolve in terms of customary law unless the Minister otherwise directs. The rest of the intestate estate not mentioned above, including the estate of unmarried black persons, devolve in terms of customary law (reg 2(e)).

It should be borne in mind that in the *Mthembu* case, the deceased and the applicant were married by customary rites. Consequently the legal system applicable to the devolution of this intestate estate was customary law. As the

deceased was not survived by a son, the deceased's father was, in terms of the principles of primogeniture, the intestate heir of the deceased (*Mthembu* 939C–D).

Question to be decided

The main question to be addressed in this case was whether

> "the whole system of devolution of an estate on intestacy under or in indigenous law . . . is discriminatory and therefore unconstitutional in terms of the provisions of chap 3 of the interim Constitution contained in the Constitution of the Republic of South Africa Act 200 of 1993" (939D).

Applicant thus sought an order to declare that the administration and distribution of the estate be governed by common law in which event her daughter would be the deceased's only intestate heir (see the Intestate Succession Act 81 of 1987).

In the alternative, applicant sought an order directing that the customary law rule applicable here, namely primogeniture, offends against public policy and is consequently unenforceable, with the result that her daughter would still be the only intestate heir (*Mthembu* 939I–940A). As a further alternative, she sought an order to the effect that if the court found that the customary law rule is valid and enforceable and governs the administration and distribution of the estate, the heir would be obliged under customary law to permit her and the daughter to continue to reside in the deceased's house (ie the concomitant duty of support).

As the respondents' main defence against the granting of the relief sought in this case was that the deceased was never married to the applicant according to customary rites, it was correctly indicated that the applicant

> "approaches this court for relief on the premise that she was married to the deceased under customary law and that the indigenous rules of succession applied to the estate of the deceased and to its devolution. The house at Ditopi Street, Vosloorus, which was held by the deceased under the leasehold title for 99 years, would devolve on the nearest male relative according to this system which means that the first respondent would become entitled to it subject to a duty to maintain her and her child" (*Mthembu* 939C–D).

This question could, however, not be determined without hearing oral evidence. The matter was therefore referred for the hearing of oral evidence to determine whether a customary marriage or a putative marriage under customary law had existed between the applicant and the deceased (947D–E). Where this could be established, then the common law would possibly be applicable to the devolution of the estate, provided that application was made to the Minister for his direction as to the applicable legal system (reg 2(d) of GN R200 of 1987; *Mthembu* 946B–C).

The court then had to consider the constitutionality of the rule of primogeniture. Applicant's contention was that because women and children are excluded from inheriting under this rule, it discriminates unfairly against them and is as such constitutionally invalid. The court indicated that the constitutionality of the rule should be considered against the background of section 31 of the interim Constitution (Act 200 of 1993) which provided that every person shall have the right to use the language and to participate in the cultural life of his or her choice (presently s 31 Act 108 of 1996). The limitation clause (s 33 Act 200 of 1993) had also to be considered in determining whether the apparent discrimination provided by the rule of primogeniture in excluding women and children (younger children) from succeeding intestate was a reasonable and justifiable

limitation of the rights entrenched by the Constitution (limitation clause presently contained in s 36 Act 108 of 1996).

The court came to the conclusion that this succession rule is not in conflict with the equality provision of the interim Constitution (s 8 Act 200 of 1993), nor is it contrary to public policy as envisaged by the Law of Evidence Amendment Act 45 of 1988. It indicated further that

> "even if this rule is *prima facie* discriminatory on the grounds of sex or gender and the presumption contained in s 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support. The rights conferred by this rule are not inconsistent with the fundamental rights contained in chap 3 and the injunction found in s 33(3) can accordingly be implemented, namely, to construe the chapter in such a way as not to negate those rights" (946B–C).

Appropriateness of the application of the rule of primogeniture

From this decision it is clear that the application of the rule of primogeniture may not be appropriate in certain circumstances. In this regard the court commented that

> "it is common cause that in rural areas where this rule most frequently finds its application the devolution of the deceased's property onto the male heir involves a concomitant duty of support and protection of the woman or women to whom he was married by customary law and of the children procreated under that system and belonging to a particular house" (945E–F).

Consequently, under these circumstances this customary law rule cannot be said to discriminate unfairly against women (*ibid*).

The application of this rule may be inappropriate where the concomitant duty of support falls away. Where this rule is applied in an urban community, there is also a possibility that it may be found to be inappropriate and probably unconstitutional (*Mthembu* 947C). Where the application of the rule would lead to inappropriate or inequitable results, application may also be made to the Minister to direct that the intestate estate must devolve in terms of the common law (reg 2(d) GN R200 of 1987). The Intestate Succession Act of 1987 would then become applicable to such devolution. This was pointed out in *Mthembu* as follows:

> "This would in my view be an appropriate case to be placed before the Minister where she can show that her position and that of her child as urban dwellers is adversely affected by this rule of succession under customary law eg because the heir fails to maintain her, or because the leasehold property does not fall within the scope of s 23(2) and she is threatened with ejectment from her erstwhile common marital home by the application of this rule" (946I–J; see also Bekker and De Kock "Adaptation of the customary law of succession to changing needs" 1992 *CILSA* 366).

Conclusion

In conclusion, it should be mentioned that the customary law of succession is applicable to the estate of a person who has not executed a will, namely on intestacy. Where the deceased has executed a valid will disposing of his property, the property devolves in accordance with his wishes as contained in the will. Not all kinds of property may, however, be disposed of by means of a will as house property and land in a location held under quitrent conditions may not be so disposed of (s 23 Act 38 of 1927).

Although the court in *Mthembu* held that the rule of customary law applicable to the devolution of the intestate estate, which generally excludes women and

children from inheriting, does not discriminate unfairly between persons on the grounds of sex or gender, and is thus not in conflict with section 8 of the interim Constitution (and probably with s 9 Act 108 of 1996), the fact that the application of the rule may be inappropriate in an urban setting must always be borne in mind. When the concomitant duty of support falls away, as indicated by the court, the application of the rule may also be regarded as inappropriate (see *Mthembu* 946B–C).

The South African choice of law rules in matters of succession are necessitated by the fact that South Africans have the option of marrying in terms of either the common law or customary law.

The type of marriage is therefore used as a connecting factor to indicate the legal system to be applicable to the devolution of property on intestacy. Where there is a likelihood that the application of customary law to the devolution of the estate would be inappropriate or inequitable, the descendants of the deceased or his or her spouse have the choice of approaching the Minister to direct that the common law is to apply to such devolution. Another possibility is the execution of a valid will disposing of property, in which event customary law will not become applicable except in instances envisaged by section 23 Act 38 of 1927.

Be that as it may, I think that the thorny issue that has to be addressed by the South African legal system, is whether polygamy should be legalised or not (see *inter alia Ryland v Edros* 1997 2 SA 690 (C)). Although the South African legal system frowns upon polygamy, it is quite evident that the intention behind the enactment of the choice of law rules relating to succession is based on the conflict that may arise in cases where persons (deceased) had contracted polygamous marital relationships during their lifetime. No opinion will be expressed in this regard, but it should be remembered that our Constitution contains a provision that makes it possible for the enactment of legislation that may ultimately recognise these types of marital relationship (s 15 Act 108 of 1996). The court was not faced with this problem in this case but in a recent related case it was held that consequences flowing from a potentially polygamous marriage which in fact was monogamous, can be enforced (*Ryland v Edros supra*). The validity of a polygamous marriage in the light of our present constitutional dispensation was consequently not addressed.

The decision in *Mthembu* has to be welcomed, although in my opinion, it reads like a riddle. It should not be read as express authority for the view that the rule of customary law of succession, namely primogeniture, does not unfairly discriminate between persons on the ground of sex or gender in terms of our Constitution (see *Mthembu* 945A–B). It would also appear that in arriving at this decision, the court assumed that a customary marriage existed, since the determination of the constitutionality of this rule, it is submitted, depended upon proof of the existence of a customary marriage between applicant and the deceased (939C–D read with 946E–F). It was stated that the

> "right of intestate succession by the male heir of the deceased only is undoubtedly discriminatory against women and younger children where this does not involve a concomitant duty of support and protection" (946D).

Whether this rule may find application to the devolution of intestate estates in urban areas was also not addressed (945E–G 947C–D). Thus the court had to indicate that this was an appropriate case to be placed before

> "the Minister where she (applicant) can show that her position and that of her child as urban dwellers is adversely affected by this rule of succession under customary

> law for example because the heir fails to maintain her, or because the leasehold property does not fall within the scope of s 23(2) and she is threatened with ejectment from her erstwhile marital home by the application of the rule" (946I–J; cf *Malaza v Mndaweni* 1975 BAC (C) 45).

The court was furthermore in my opinion hesitant to arrive at this decision. This is illustrated by the following:

> "It follows that even if this rule is *prima facie* discriminatory on the grounds of sex or gender and the presumption contained in s 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support. The rights conferred by this rule are not inconsistent with the fundamental rights contained in Chap 3 and the injunction found in s 33(3) can accordingly be implemented, namely, to construe the chapter in such a way as not to negate these rights" (946B–C).

It follows from the reading of this decision that the determination of the validity of principles of customary law in the light of our present constitutional dispensation will not be a trivial but rather a daunting task indeed (see Kerr "The Bill of Rights in the new Constitution and customary law" 1997 *SALJ* 346 esp 350–355). In this determination, the dynamic nature of customary law should always be kept in mind. There is no doubt that as customary law is not static the principles relating to primogeniture have changed. A clear distinction has to be made between succession to status and to the inheritance of the property of the deceased. Succession to status is not necessarily nor inevitably accompanied by the inheritance of property. Bearing this distinction in mind, it is submitted that despite the allegations of the first respondent in *Mthembu*, the issue at hand dealt with succession to the status of the deceased. Although presently the eldest son still "steps into the shoes of the deceased" (Bekker and De Kock 368), this does not imply that he inherits the whole estate of the deceased (Coetzee *Bafokeng family law and law of succession* (1988) 240–241). Normally, approximately three weeks after the burial of the deceased, a family meeting is arranged to determine the devolution of the estate. In most instances the decision that is arrived at will benefit all the children (sons and daughters, irrespective of age) and the widow of the deceased. The homestead is usually allocated to the youngest son of the deceased, as it is his responsibility to care for his mother. Where there is an unmarried daughter in the family or a daughter who has returned to her parental home after being divorced the homestead is allocated to her. Other children of the deceased are also allotted a portion of the estate. Succession to the status of the deceased, however, remains the right of the eldest son of the deceased's family. Thus although the term ""mojaboswa"/"indlalifa" (loosely translated: the eater of the inheritance), refers to the eldest son, it does not inevitably imply the inheritance of the whole estate (see Maithufi *Recognition and co-existence of civil and customary marriages in South Africa, Bophuthatswana and Transkei: An analytical and comparative evaluation* (LLD thesis UP 1993)). Sometimes the decision about the devolution (division) of the estate is suspended or postponed until the death of the last dying spouse. The last dying spouse will in this case acquire something akin to an implied *fideicommissum* in favour of his or her children (see De Waal, Schoeman and Wiechers *Law of succession* (1996) 105–115). The control of this property before the deceased's death vests in such surviving spouse and the deceased's children, more particularly his eldest son. The eldest son of the deceased or the deceased's nearest male relative still acquires the family headship (status) of the deceased.

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SKULDLOSE AANSPREEKLIKHEID IN DIE AFWESIGHEID VAN 'N WILLEKEURIGE HANDELING?

Telkom (SA) Ltd v Duncan 1995 3 SA 941 (W)

Die eiser, Telkom, eis 'n bedrag van R47 831,69 van die verweerder vir skade wat na bewering veroorsaak is deurdat laasgenoemde se motor met 'n Telkom-installasie gebots het. Die partye was dit eens dat daar geen nalatigheid aan die kant van die verweerder was nie. 'n Derde party se voertuig het naamlik die verweerder s'n getref en dit sodoende geforseer om met die installasie te bots. Die partye was dit verder eens dat die verweerder vanaf die oomblik wat sy voertuig deur dié van die derde party getref is, geen beheer oor sy eie voertuig gehad het totdat dit teen die installasie tot stilstand gekom het nie.

Eiser steun op artikel 108 van die Poswet 44 van 1958 wat soos volg lui:

> "Iemand wat, hetsy regstreeks of deur middel van 'n dier, voertuig of ander voorwerp wat sy eiendom of onder sy bewaring of beheer is, 'n telekommunikasielyn of oproepkantoorspreeksel van die telekommunikasiemaatskappy vernietig of beskadig, is aanspreeklik om aan die telekommunikasiemaatskappy die onkoste te betaal wat aangegaan word om die vernietiging of beskadiging te vergoed, en indien die vernietiging of beskadiging deur iemand se nalatigheid veroorsaak is, is so iemand bowendien aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens R500: Met dien verstande dat, in 'n geval waar dit na die oordeel van die telekommunikasiemaatskappy geregverdig is, die telekommunikasiemaatskappy die geheel of 'n gedeelte van die bedoelde onkoste kan dra . . ."

Die verweerder voer aan dat skuldlose aanspreeklikheid nie as gevolg van die gemelde artikel toepassing moet vind nie aangesien dit tot 'n onredelike resultaat sou lei (943B 944C). Regter Zulman verwerp hierdie argument op grond daarvan dat die bewoording van die artikel duidelik en ondubbelsinnig is. Indien die woorde in hulle gewone betekenis verstaan word, kan daar nie 'n ander afleiding gemaak word as dat die wetgewer bedoel het om skuldlose aanspreeklikheid daar te stel nie (943E–944A). Verder maak die wetgewer self 'n duidelike onderskeid tussen nalatige en nie-nalatige optrede deur te bepaal dat nalatige optrede bowendien 'n misdryf uitmaak (944A–B). Skuldlose aanspreeklikheid is nie in ons reg onbekend nie en in hierdie geval, meen regter Zulman, wou die wetgewer 'n groot "kwasi-openbare onderneming soos die poskantoor" te hulp gekom het om skade aan sy toerusting te verhaal in omstandighede waar dit moeilik is om nalatigheid te bewys (944B–J).

Verder is namens die verweerder aangevoer dat hy nie aanspreeklik kan wees nie aangesien hy ten tyde van die skadeberokkening nie in beheer van sy voertuig was nie (943B–C 945D ev). Ook hierdie argument word deur regter Zulman verwerp. Eerstens verwys hy na *Esterhuizen v Minister van Pos- en Telekommunikasiewese* 1978 2 SA 227 (T) waarin beslis is dat 'n eiser wat op artikel 108 steun, se skuldoorsaak nie noodwendig op die verweerder se bewaring of beheer van 'n voertuig hoef te berus nie, maar dat die verweerder se eiendomsreg op die voertuig genoegsaam is om aanspreeklikheid te vestig. Dit is nie nodig dat ten tyde van die vernietiging of beskadiging so 'n eienaar-verweerder *fisiese beheer*

oor die voertuig moet gehad het nie (946C–F; vgl ook 943E–F waar Zulman R aandui dat aanspreeklikheid ingevolge a 108 vir skade deur 'n voertuig aangerig, op een van drie *alternatiewe* gronde kan berus, nl (i) eiendomsreg van daardie voertuig; of (ii) bewaring (*custody*) van daardie voertuig; of (iii) beheer (*control*) oor die voertuig).

Verder sê regter Zulman dat selfs al sou aanvaar word dat die verweerder se eienaarskap alleen nie genoegsaam is vir aanspreeklikheid nie, beteken dit steeds nie noodwendig dat *beheer* oor die voertuig aan die kant van die eienaar-verweerder vereis moet word nie. Die ander alternatief genoem in artikel 108, te wete *bewaring*, sou dan gepaard met eienaarskap voldoende vir aanspreeklikheid wees. Hy bevind dat in die onderhawige saak die voertuig ten tyde van die skadeberokkening inderdaad in die eienaar-verweerder se bewaring (*custody*) was. Derhalwe word die verweerder aanspreeklik gehou ten spyte daarvan dat hy ten tyde van die skadeberokkening nie fisiese beheer oor sy voertuig gehad het nie (947E–J). Regter Zulman vind onder andere steun (946G–947E) vir hierdie beslissing in 'n ou volbankbeslissing van die Transvaalse Provinsiale Afdeling, *Du Toit v Minister of Posts and Telegraphs* 1936 TPD 248.

Die hof se bevinding dat artikel 108 'n vorm van skuldlose aanspreeklikheid skep, verdien volle instemming. Die hantering daarvan in hierdie saak is egter vatbaar vir kritiek. Op die keper beskou, maak artikel 108 voorsiening vir twee hoofkategorieë persone wat vir vernietiging of beskadiging van Telkom-installasies skuldloos aanspreeklik kan wees. Die eerste kategorie is persone wat sodanige vernietiging of beskadiging *regstreeks* (*directly*) veroorsaak het. Die tweede kategorie is persone wat sodanige vernietiging of beskadiging deur middel van 'n dier, voertuig of ander voorwerp (*by means of an animal, vehicle or other thing*) veroorsaak het. Hierdie tweede hoofkategorie word in drie subkategorieë verdeel: (i) *eienaars* van sodanige dier, voertuig of ander voorwerp; (ii) persone wat sodanige dier, voertuig of ander voorwerp in hul *bewaring* (*custody*) het; en (iii) persone wat *beheer* (*control*) oor sodanige dier, voertuig of ander voorwerp uitoefen. Hierdie drie subkategorieë is klaarblyklik alternatiewe. 'n Persoon wat (onregstreeks) deur middel van 'n dier, voertuig of ander voorwerp 'n telekommunikasie-installasie vernietig of beskadig, kan dus óf op grond van sy eienaarskap op, óf op grond van sy bewaring van, óf op grond van sy beheer oor sodanige dier, voertuig of ander voorwerp vir skuldlose aanspreeklikheid in aanmerking kom.

Dit is egter baie belangrik om daarop te let dat hierdie alternatiewe hoedanighede nie die enigste vereiste vir skuldlose aanspreeklikheid ingevolge artikel 108 is nie. Die artikel skep aanspreeklikheid sonder *skuld*; nie aanspreeklikheid sonder 'n *skadestigtende handeling* nie. Daar word immers vereis dat iemand – ongeag in watter een van bogenoemde kategorieë hy val – "'n telekommunikasielyn of oproep-kantoorspreeksel . . . *vernietig of beskadig*" (ons beklemtoning). Die woorde "vernietig of beskadig" dui ondubbelsinnig aan dat die verweerder 'n statutêr omskrewe handeling moet begaan het – hetsy regstreeks, hetsy deur middel van 'n dier, voertuig of ander voorwerp. Volgens algemene regsbeginsels is 'n handeling waarvan die reg kennis neem 'n willekeurige menslike gedraging (vgl Neethling, Potgieter en Visser *Deliktereg* (1996) 25). Willekeurigheid veronderstel dat die gedraging vatbaar vir wilsheerskappy deur die betrokke persoon is (*idem* 26). Soos gesien, was dit in *Telkom (SA) Ltd v Duncan* gemeensaak dat die verweerder op die oomblik van skadeberokkening nie meer beheer oor sy voertuig gehad het nie. Sy voertuig is naamlik deur 'n botsing wat nie aan sy nalatigheid te wyte was nie, in 'n ander

rigting gedwing as dié waarin hy dit probeer stuur het. Dit is 'n geval van absolute oormag (*vis absoluta*) wat die willekeurigheid van die handeling uitskakel en die verweer van outomatisme kan fundeer (Neethling, Potgieter en Visser 27). Van 'n willekeurige gedraging aan die kant van die verweerder op die oomblik van skadeberokkening was dus geen sprake nie. Die verweerder moes dus vry uitgegaan het. Die bestuurder van die ander voertuig wat die verweerder se voertuig teen die telekommunikasie-installasie vasgestamp het, het waarskynlik wel willekeurig gehandel, en indien wel, moes dié persoon skuldlose aanspreeklikheid opgedoen het. Die blote feit dat hierdie party moontlik onopspoorbaar of onvermoënd was (dit blyk nie uit die hofverslag nie), regverdig nie die skuldlose aanspreeklikheid van 'n verweerder wat glad nie willekeurig gehandel het nie. Dieselfde kritiek geld ook die beslissing in *Du Toit v Minister of Posts and Telegraphs* 1936 TPD 248 – die appellant in daardie saak moes ook aanspreeklikheid vrygespring het.

Die vereiste dat 'n verweerder se gedraging willekeurig moet gewees het om regtens as 'n handeling in aanmerking te kom, beteken nie dat die verweerder op die oomblik van skadeberokkening noodwendig *beheer* soos vereis in subkategorie (iii) oor die voertuig moet gehad het nie, maar wel dat hy *in staat moet gewees het om beheer daaroor uit te oefen*. Waar 'n eienaar van 'n dier byvoorbeeld versuim om beheer oor die dier uit te oefen – in omstandighede waar hy wel in staat was om die dier te beheer – handel so 'n eienaar willekeurig. As die dier dan skade aan 'n telekommunikasie-installasie aanrig, het die eienaar vir doeleindes van artikel 108 deur sy (willekeurige) late om die dier te beheer, die telekommunikasie-installasie "vernietig of beskadig". Die verskil tussen hierdie voorbeeld en die verweerder in die *Telkom*-saak, is dat ons denkbeeldige dier-eienaar in staat was om beheer oor sy dier uit te oefen, terwyl die verweerder in die *Telkom*-saak nie in staat was om beheer oor sy voertuig uit te oefen nie.

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TOEKENNING VAN "EXEMPLARY DAMAGES" IN 'N GEVAL VAN LASTER

Afrika v Metzler 1997 4 SA 531 (NmHC)

1 Belang van die uitspraak

Hierdie uitspraak van die Hoë Hof van Namibië is veral van belang weens die feit dat regter Leek beslis dat 'n vrygewige benadering tot die toekenning van genoegdoening by laster gevolg moet word in die lig van die grondwetlike verskansing van fundamentele regte en vryhede. Hieraan koppel hy 'n afskrikkingsdoel met die toekenning van genoegdoening in gevalle van flagrante en ernstige laster. Die kwessie van 'n direkte verband tussen die erkenning en

beskerming van fundamentele regte en 'n hoë (of hoër as die normale) genoegdoeningsbedrag, maak die saak dus noemenswaardig.

2 Basiese feite

Die eiser is 'n bekende politikus en mediese praktisyn van Namibië. Sy eerlikheid en integriteit is nog nooit in twyfel getrek nie. Nietemin word daar gedurende 1994 in die blad *Akasia Nuus* verskillende lasterlike bewerings aangaande hom gepubliseer. Die bewerings kom onder meer daarop neer dat dr Afrika oneerlik, rassisties en misdadig sou wees en optree (534).

Die hof lewer soos volg kommentaar op die aard van die laster:

> "It is difficult to conceive of anything more damaging to the reputation and esteem of an eminent medical practitioner and, incidentally, an illustrious politician and Member of Parliament than imputing to him the commission of criminal offences" (535F).

Die eiser eis N$30 000 van die redakteur en die eienaar/verspreider van die betrokke blad. Na die aanvanklike publikasie van die laster het die verweerders geen apologie aangeteken nie en boonop verdere laster oor die eiser gepubliseer. Alhoewel die verweerders verskyning in die saak aangeteken het, is die saak op 'n onbestrede wyse hanteer aangesien die verweerders nie by die verhoor opgedaag of verteenwoordig is nie (533E 537J), welke feit deur die hof as 'n verswarende omstandigheid beskou is (537J). Regter Leek bevind dat die laster die eiser in verskillende opsigte benadeel het (hy het bv pasiënte verloor en familie-probleme ondervind). Ondanks die feit dat die eiser waarskynlik 'n verlies aan inkomste ondervind het deurdat minder pasiënte van sy professionele dienste gebruik gemaak het, handel die saak net oor *genoegdoening* weens *nievermoënskade*.

3 Beslissing

Weens die erns van die geval ken die hof die bedrag toe wat die eiser aanvanklik geëis het (nl N$30 000) en weier om aan die *eiser* se versoek te voldoen om die bedrag na N$20 000 af te skaal (539F); sien 5 hieronder oor hierdie kwessie). Die hof bied die volgende as *ratio* aan om die betrokke vergoedingsbedrag in die korrekte grondwetlike konteks te plaas:

> "With the new democratic dispensation heralded by the Namibian Constitution entrenching fundamental human rights and fundamental freedoms and the premium to be attached to one's good name and reputation in instances of flagrant violation thereof, the time has come to have a liberal approach in the determination of the *quantum* and award much higher damages, especially in instances where aggravating circumstances are present as in the present case. Only then will persons, especially newspaper editors/reporters, publishers/printers and/or owners, be more on their *qui vive* and be mindful of the strict/absolute liability applicable to members of the press and hopefully act in accordance with the special duty of care that rests upon their shoulders and subject to law pursuant to the reasonable restrictions on the exercise of the fundamental freedoms imposed by art 21(2) of the Namibian Constitution, if they know that substantive exemplary/punitive damages could be visited upon them if they defame another *animus iniuriandi*.This might prevent these aforementioned persons from being motivated by and/or frolicking upon journalistic sensationalism" (539F–I).

Ter regverdiging van die toekenning van "exemplary damages" haal die regter aan uit die bekende saak uit die destydse Rhodesië, *Khan v Khan* 1971 2 SA 499 (RA) 500, waarin verklaar word dat in sowel die Engelse as Suid-Afrikaanse reg

'n hof die bevoegdheid het om in bepaalde gevalle 'n toekenning van hierdie tipe "vergoeding" te maak. Die hof verwys vervolgens ook na verskillende sake wat oor die rol van verswarende omstandighede by laster handel (538–539).

4 Evaluering van sekere aspekte van die uitspraak

Die hof meld nie gesag om sy uitdruklike inagneming van die grondwetlike dimensie van die skending van die reg op goeie naam by kwantumbepaling te staaf nie. Die Namibiese handves van regte bevat nie 'n spesifieke bepaling wat met die reg op die goeie naam handel nie, maar hierdie reg word waarskynlik (soos in Suid-Afrika – sien bv Neethling *Persoonlikheidsreg* (1998) 95 vn 394 157 vir verwysings) op die algemene reg op menslike waardigheid baseer (sien a 8(1) van die Namibiese grondwet: "The dignity of all persons shall be inviolable").

Oor die feit dat die kwantum van vergoeding in die algemeen die relatiewe belangrikheid van die geskonde reg ter sprake moet weerspieël, sou die hof ook kon verwys na die beslissing van waarnemende regter Van der Spuy in *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 (V) 847:

> "When researching the case law on the *quantum* of damages, I took note with some surprise of the comparatively low and sometimes almost insignificant awards made in Southern African Courts for infringements of personal safety, dignity, honour, self-esteem and reputation. It is my respectful opinion that courts are charged with the task, nay the duty, of upholding the liberty, safety and dignity of the individual . . ." (sien Visser en Potgieter *Skadevergoedingsreg* (1993) 416 vn 114 vir verdere verwysings na gesag).

Die pas aangehaalde *dictum* moet nietemin gelees word in die lig van die appèlafdeling se beslissing in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 590:

> "Our Courts have not been generous in their awards of *solatia*. An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches" (sien ook *Pakendorf v De Flamingh* 1982 3 SA 146 (A)).

Die vraag is natuurlik of hierdie standpunt van die appèlafdeling steeds korrek is in die lig van Suid-Afrika se handves van fundamentele regte vervat in hoofstuk 2 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996.

In die *Afrika*-saak is dit duidelik dat die *erns* en *gevolge* van die laster bloot op algemene privaatregtelike beginsels 'n hoë toekenning behoort te regverdig (sien in die algemeen Neethling 205–207; Visser en Potgieter 417 ev). Die vraag is of die feit dat die reg op die goeie naam nou as fundamentele reg erken word (volgens die *uitleg* van die handves van regte aangesien so 'n reg nie uitdruklik genoem word nie – sien bv *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 606; *Mandela v Felati* 1995 1 SA 251 (W) 257), 'n spesifieke faktor is wat in ag geneem moet word benewens die ander relevante omstandighede.

In die bekende onlangse beslissing van die konstitusionele hof in *Fose v Minister for Safety and Security* (1997 7 BCLR 851 (CC): sien ook 1996 2 BCLR 232 (W) vir die beslissing van die hof *a quo*) is daar heelwat wat van belang is oor sogenaamde grondwetlike delikte en "exemplary damages" (dié saak het nie spesifiek oor laster gehandel nie maar wel oor aanranding). In die meerderheidsuitspraak van regter Ackermann word erkenning verleen aan die feit dat in gevalle van laster "punitive damages" in sekere gevalle toegeken kan word (vgl bv *Salzmann v Holmes* 1914 AD 471 480 483; *SAAN Ltd v Yutar* 1996 2 SA 442 (A) 458)).

Regter Ackermann voeg egter by dat

> "it is not always easy to draw the line between an award of aggravated, but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the *injuria* have justified a substantial award and the award of punitive damages in the strict and narrow sense of the word".

Die hof stel ook die standpunt dat

> "even the most ardent supporters of a 'public law' or constitutional remedy draw attention to anomalous and unsatisfactory features of a constitutional damages remedy aimed at punishment or deterrence or to such part of a constitutional damages remedy which has this object",

en vermeld dan 'n lys van besware teen vergoeding met 'n strafoogmerk. Die konstitusionele hof kom uiteindelik tot die gevolgtrekking dat daar in 'n grondwetlike staat nie ruimte in 'n geval soos die onder oorweging is vir addisionele "punitive constitutional damages" benewens "normale" skadevergoeding nie:

> "I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution."

Die *ratio* in die *Afrika*-saak (soos blyk uit die aanhaling in 3 hierbo) is skynbaar nie dat daar 'n afsonderlike grondwetlike eisoorsaak weens die laster is nie, maar dat die blote feit van die grondwetlike erkenning en beskerming van fundamentele regte een van die wesenlike faktore is wat by die kwantum van vergoeding in ag geneem moet word (vgl egter ook die hof se siening dat die berekening van genoegdoening analoog aan vonnisoplegging in 'n strafsaak is – 535J). So beskou, is daar nie noodwendig 'n teenstrydigheid met die beslissing in *Fose* nie. Die oorwegings in die *Fose*-saak in verband met die verhoogde las op die staat indien grondwetlike skadevergoeding weens die onregmatige optrede van staatsamptenare toegeken word, is uiteraard nie aanwesig in gevalle van privaatregtelike litigasie tussen nie-staatlike entiteite nie. Die beklemtoning van die afskrikkingsgedagte in *Afrika* is in elk geval volkome in ooreenstemming met sowel die Suid-Afrikaanse praktyk (sien bv die gesag na verwys in Visser en Potgieter 429 vn 262; Erasmus, Gauntlett en Visser 7 *LAWSA* (heruitgawe) par 94), as die gangbare teorie in verband met die aard en funksie van genoegdoening (sien Visser "Genoegdoening in die deliktereg" 1988 *THRHR* 469). Die *Afrika*-benadering kan ook verklaar word ingevolge beginsels uit die prehandves-era ingevolge waarvan toekennings vir laster "substantial" moet wees (*Scholtz v Kriel* 1946 GWL 86; *Buthelezi v Poorter* 1975 4 SA 608 (W) 617) ten einde te verseker dat die eiser se reg op die goeie naam voldoende erken en beskerm word.

Die hof in *Afrika* se stellings in verband met die aanspreeklikheid van die massamedia verdien ook oorweging. Dit is 'n kwessie wat tans in 'n belangrike ontwikkelingsfase in Suid-Afrika verkeer (vgl in die algemeen Neethling 173–174 176 188–190 199 204–205). Die vraag wat deur feitlik alle regstelsels wat vryheid van uitdrukking en persoonlikheidsregte erken, beantwoord moet word (vgl in die algemeen Beater *Zivilrechtlicher Schutz vor der Presse als konkretisiertes Verfassungsrecht* (1996) vir 'n vergelykende studie van die Engelse, Duitse en Amerikaanse reg), is hoe die twee tipes regte op 'n aanvaarbare en redelike wyse met mekaar versoen behoort te word. In die onderhawige geval was hierdie aspek nie so belangrik nie aangesien daar min twyfel kon wees dat die verweerders opsetlik en kwaadwillig opgetree het (538). Nogtans is die hof

se kriptiese uiteensetting van die posisie (in 3 hierbo aangehaal) nie so duidelik as wat dit behoort te wees nie aangesien daar in dieselfde asem na uiteenlopende sake soos die media se skuldlose aanspreeklikheid, hulle "special duty of care" en *animus iniuriandi* verwys word. Iets waarop ook aandag gevestig moet word, is dat die algemene beperkingsklousule van die Namibiese Grondwet (a 21(2)) spesifiek meld dat die regte en vryhede van die Grondwet onderworpe is aan die redelike beperkings wat nodig is in 'n demokratiese samelewing in belang van onder meer *defamation*. Alhoewel nie besonder elegant geformuleer nie, is die klaarblyklike bedoeling hiermee dat die bestaande lasterreg as begrensing vir vryheid van uitdrukking (a 21(1)(a)) dien vir sover dit "redelik" en "noodsaaklik" in 'n demokratiese samelewing is.

Daar blyk uiteraard nie veel uit regter Leek se uitspraak wat as regverdiging kan dien vir 'n tipe media-privilegie waaroor daar al regterlike *dicta* in Suid-Afrika was en wat groter speelruimte vir die media, veral in politieke aangeleenthede, sou impliseer nie (sien bv *Holomisa v Argus Newspapers Ltd supra*; *Zillie v Johnson* 1984 2 SA 186 (W); Neethling 188–189).

Waar die kwessie van deelname aan die politiek gewoonlik beteken dat daar groter ruimte aan vryheid van uitdrukking verleen word (vgl bv Neethling 171 190; *Pienaar v Argus Printing and Publishing Co Ltd* 1956 4 SA 310 (W) 318; *Mandela v Felati supra*; sien egter ook *Mangope v Asmal* 1997 4 SA 277 (T) 289: "I do not accept that the Constitution legalises character assassination of individuals merely because they are politicians"), het regter Leek *in casu* oënskynlik die politieke status van die eiser as 'n *verswarende omstandigheid* beskou omdat dit hom so buitengewoon kwesbaar vir laster maak! (536D).

5 Gevolgtrekkings

Daar kan min twyfel wees dat die beslissing *in casu* en die vernaamste argumente wat regter Leek ter ondersteuning daarvan aanvoer, aanvaarbaar is. 'n Mens kan natuurlik die korrektheid van die regter se beslissing bevraagteken vir sover hy weier om die genoegdoeningsbedrag van N$30 000 *op versoek van die eiser self na N$20 000 af te skaal* (sien in die algemeen oor die hof se bevoegdhede by die toekenning van 'n bepaalde bedrag Visser en Potgieter 444) en nogtans die hoër bedrag toeken. By die toekenning van genoegdoening behoort die eiser se versoek die maksimum bedrag te wees.

Die hof se verwysing na "exemplary damages" dui nie noodwendig daarop dat daar 'n selfstandige tipe skadevergoeding soos hierdie in die Namibiese reg bestaan nie. Die verwysing hierna is klaarblyklik meer bedoel om die kwessie van straf as *een* van die moontlike funksies van die *actio iniuriarum* te verwoord en te beklemtoon in 'n geval waar daar kwaadwillige of opsetlike optrede aan die kant van die pers is.

Daar is in die uitspraak *in casu* eenvoudig nie 'n voldoende behandeling van die herkoms van al die besware teen en al die anomalieë in verband met "exemplary damages" dat gesê kan word dat "exemplary damages" in die algemeen as 'n remedie aanvaar is nie (vgl ook Van der Walt *Delict: Principles and cases* (1979) 6 waarna met goedkeuring verwys is in *Fose supra*). Voorts kan afgelei word dat die hof nie straf by die genoegdoeningsbedrag sal oorweeg waar die pers bloot nalatig of onskuldig opgetree het nie.

In die geheel gesien, bewys hierdie beslissing dat in 'n era waar die vryheid van uitdrukking en die vryheid van die media as noodsaaklike en waardevolle

demokratiese regte erken word, die normale beskerming van die reg op die goeie naam nie onredelik verswak behoort te word nie (soos in die VSA gebeur het – sien hieroor Neethling 73 204 vn 362).

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DIE VOEGING VAN DIE NALATIGE BESTUURDER AS VERWEERDER NAAS DIE MMF

Dodd v Multilateral Motor Vehicle Accidents Fund 1997 2 SA 763 (A)

1 Inleiding

Die posisie rakende die betaling van skadevergoeding na die plaasvind van 'n motorvoertuigongeluk word deur wetgewing gereël. Tans is dit die Padongelukfondswet 56 van 1996 (hierna die POF-wet), wat die welbekende Multilaterale Motorvoertuigongelukkefondswet 93 van 1989 (hierna die MMF-wet) op 1 Mei 1997 vervang het. Vir doeleindes van hierdie bespreking sal na die MMF-wet verwys word aangesien die betrokke motorvoertuigongeluk (skadestigtende gebeurtenis) gedurende Junie 1991 plaasgevind het, op welke datum die MMF-wet nog in werking was. Die relevante bepalings van die MMF-wet wat hier ter sprake kom, is weer net so opgeneem in die POF-wet, en die onderhawige beslissing sou dus ook vir die interpretasie van die nuwe wet van belang wees.

2 Aanspreeklikheid van die MMF

Die Fonds of sy benoemde agent (let daarop dat die Fonds tans nie meer van benoemde agente gebruik maak nie) kan net aanspreeklikheid opdoen indien daar ingevolge die gemenereg aanspreeklikheid om vergoeding te betaal aan die kant van die betrokke bestuurder sou wees (a 48(a)). Indien die bestuurder van die motorvoertuig dus nie aanspreeklik sou gewees het om vergoeding te betaal nie (óf hoegenaamd nie óf – weens medewerkende nalatigheid byvoorbeeld – nie ten volle nie) sal die Fonds of sy benoemde agent ook nie aanspreeklik wees om vergoeding te betaal nie (óf hoegenaamd nie óf nie ten volle nie). Dit beteken dus ook dat alle verwere wat tot die beskikking van die bestuurder is deur die Fonds of sy benoemde agent geopper kan word.

Ingevolge artikel 52 word die nalatige bestuurder onthef van aanspreeklikheid om die derde party te vergoed in die mate waarin die Fonds aanspreeklik is. Die derde party het dus nie 'n keuse om vergoeding wat van die Fonds verhaalbaar is, eerder van die deliktspleger te verhaal nie. Indien die Fonds egter nie in staat is om vergoeding te betaal nie, of waar sy aanspreeklikheid uitgesluit (a 48) of beperk (a 46) word, kan die derde party steeds vergoeding of enige tekort wat nie van die Fonds verhaalbaar is nie, gemeenregtelik van die deliktspleger verhaal (kyk *Rose's Car Hire (Pty) Ltd v Grant* 1948 2 SA 466 (A)). Niks verhoed dus die derde party om die deliktspleger as mededader tot die geding teen die

Fonds te voeg nie en sodoende sy gemeenregtelike eise, wat nie deur die wet beïnvloed word nie, terselfdertyd in te stel. Dit is dan ook inderdaad wat in die beslissing onder bespreking gebeur het.

3 Feite van die beslissing

Die appellant (Dodd) was die nalatige bestuurder van 'n motorvoertuig waarin 'n passasier (ene Siegers) gedood is. 'n Tweede motorvoertuig, waarvan ene Matheba die bestuurder was, was ook betrokke in die motorvoertuigongeluk. Die hof *a quo* bevind dat Dodd een derde en Matheba twee derdes afgewyk het van die standaard van die redelike man. Die afhanklikes van Siegers stel 'n eis in teen die Fonds se benoemde agent en voeg Dodd as tweede verweerder tot die geding, om sodoende beide partye gesamentlik en afsonderlik aanspreeklik te hou vir die skade wat gely is (765I–766D). (Die eisers sou ook Matheba as derde verweerder kon gevoeg het.) Gedurende die verloop van die verhoor is die benoemde agent (President Versekeringsmaatskappy) onder likwidasie geplaas en sy plek is deur die Fonds ingeneem as derde verweerder. Dit is gemene saak dat die eerste R25 000 van elke afhanklike se eis, vanweë die werking van artikel 46, nie van die appellant (Dodd) geëis kan word nie. Die hof *a quo* beslis dat die appellant en die Fonds gesamentlik en afsonderlik aanspreeklik is vir die skade gely deur die eisers. Die appellant appelleer teen hierdie beslissing. Die eisers het besluit om nie aan die appèl deel te neem nie maar om hulle by die beslissing van die hoogste hof van appél te berus.

4 Appellant se bewerings

Die appellant ontken aanspreeklikheid ten opsigte van enige skade gely deur die eisers en beweer dat die Fonds ten volle aanspreeklik is. Die appellant steun op artikel 52 wat bepaal dat 'n derde party vergoeding van die Fonds moet eis vir enige verlies of skade gely as gevolg van enige liggaamlike besering of dood van enige persoon veroorsaak vanweë die bestuur van 'n motorvoertuig, en dat die derde party nie daarop geregtig is om vergoeding van die nalatige bestuurder te verhaal nie tensy die Fonds nie in staat is om te betaal nie (766D–767B). Verder beweer die appellant dat ingevolge artikel 6(b) van die Wet op Interpretasie 33 van 1957, enige verwysing na 'n woord in die enkelvoud ook na die meervoud verwys, met die gevolg dat artikel 52 steeds van toepassing is al is daar meer as een motorvoertuig betrokke in die botsing (767B–C). Met hierdie argument kan daar nie veel fout gevind word nie. Die appellant gaan verder en beweer dat omrede 'n verdere motorvoertuig betrokke was in die ongeluk en die Fonds ook ten volle aanspreeklik gehou kan word vir skade deur hierdie tweede motorvoertuig veroorsaak, die beperking van artikel 46 van toepassing op passasiers in die skuldige motorvoertuig verval. Die passasiers (of hulle afhanklikes) baseer dan hulle volle eis op die nalatigheid van die bestuurder van die ander motorvoertuig in wie se plek die Fonds aangespreek word (767D–F). Hierdie bewerings is in ooreenstemming met die algemene praktyk, naamlik dat slegs een persent nalatigheid aan die kant van 'n verweerder bewys hoef te word om skade gely deur die eiser te verplaas na die verweerder. Dit beteken dus dat die beperking ter sprake in artikel 46 slegs van toepassing is indien die eiser sy volle eis baseer op die nalatigheid van die bestuurder van die motorvoertuig waarin hy/sy 'n passasier was, en geen ander bestuurder skuld ten aansien van die ongeluk het nie. Volgens Klopper ("Third-party matters" Mei 1997 *De Rebus* 330) is dit noodsaaklik om artikel 46 op hierdie wyse toe te pas om sodoende te verseker

dat die eiser die volle eis teen die Fonds kan instel en nie met 'n moontlike behoeftige verweerder belas word nie.

5 Hoogste hof van appèl se beslissing

Volgens hierdie hof strook die appellant se bewerings nie met die duidelike bedoeling van die wetgewer nie. Die bedoeling was om die eis van 'n passasier, of 'n afhanklike van 'n passasier, teen die Fonds tot R25 000 te beperk en dit aan daardie persoon(e) oor te laat om die restant van die eis(e) van die delikspleger te verhaal (767H–I). Die hof baseer sy uitspraak op die beslissing in *Rose's Car Hire supra* ten spyte daarvan dat die appellant gepoog het om daardie beslissing van hierdie saak te onderskei op grond daarvan dat die posisie van 'n tweede bestuurder nie deur die *ratio* van daardie saak gedek is nie (769B–C). Die hof beslis dat die feit dat 'n tweede motorvoertuig betrokke is nie die posisie verander nie. Die gemeenregtelike eis wat die eisers teen die appellant instel, word, wat die posisie tussen die Fonds en die appellant betref, steeds deur sowel die bepalings van artikel 52 as artikels 40 en 46 gereël. Die gemeenregtelike eise teen die appellant word dus nie deur die werking van artikel 52 uitgesluit nie maar slegs met die bedrag van R25 000 verminder.

6 Evaluering van die beslissing

Hierdie beslissing van die hoogste hof van appèl kan maklik verkeerd geïnterpreteer word indien die afleiding gemaak word dat die hof nou 'n nuwe rigting ingeslaan het in die toepassing van artikel 46 (kyk Klopper Mei 1997 *De Rebus* 330). Hierdie verkeerde interpretasie kan gemaak word as die besondere feite en omstandighede van hierdie saak vergeet word. Twee belangrike punte moet hier gemaak word:

(a) Hierdie uitspraak raak slegs die posisie van die verweerders *inter se* (767G–H) en het geen uitwerking op die posisie van enige eisers nie. Dit is vir eisers irrelevant watter een van meerdere verweerders en of alle verweerders die skade vergoed, solank die skade vergoed word. Indien die hof, soos inderdaad die geval *in casu* was, die verweerders gesamentlik en afsonderlik aanspreeklik hou, hoef die eisers dus nie te vrees dat een van die verweerders moontlik 'n "man of straw" is nie. Die voeging van die nalatige bestuurder(s) in 'n saak wat teen die Fonds ingestel word, kan dus nie die posisie van die eiser(s) benadeel nie, maar het wel 'n dramatiese invloed op die posisie van die eiser(s) benadeel nie, maar het wel 'n dramatiese invloed op die posisie van die delikspleger(s) (nalatige bestuurder(s)). Die hof kan nie die feit dat daar 'n tweede verweerder voor die hof is, ignoreer nie. Indien die tweede verweerder nie as 'n party gevoeg was nie, sou die hof die Fonds ten volle aanspreeklik gehou het in ooreenstemming met die tradisionele wyse waarop soortgelyke sake in die verlede hanteer is. Hierdie beslissing behoort dus slegs nagevolg te word indien die nalatige bestuurder(s) gevoeg word deur die eiser(s) as verweerder(s) tot die geding.

(b) Ingevolge artikel 64 kan die Fonds in bepaalde omstandighede die bedrag vergoeding wat aan die derde party betaal is, van die delikspleger verhaal. Nie een van die spesifieke omstandighede, genoem in artikel 64, vind toepassing in hierdie saak nie. Die Fonds sou dus nie op grond van artikel 64 oor 'n verhaalsreg teen die appellant (tweede verweerder) kon beskik nie. Die vraag is gevolglik of hierdie uitspraak die Fonds se verhaalsreg ingevolge artikel 64 uitbrei, en indien wel, of sodanige uitbreiding in ooreenstemming met die bedoeling van die wetgewer is. Volgens Klopper (Mei 1997 *De Rebus* 330) kom hierdie uitspraak wel op 'n uitbreiding van die Fonds se verhaalsreg neer en is

die verhaalsreg nou inderdaad wyer as wat die wetgewer beoog het. Van hierdie opinie sou verskil kon word. Indien die Fonds die nalatige bestuurder(s) self tot die geding sou kon voeg, sou dit inderdaad op 'n onaanvaarbare uitbreiding van sy verhaalsreg neerkom. Indien die nalatige bestuurder(s) egter deur die eiser(s) gevoeg word, maak die hof 'n verdeling van skadevergoeding op grond van die bepalings van die MMF-wet (a 52 en 46) – en nie op grond van die Wet op Verdeling van Skadevergoeding 34 van 1956 nie – en wel teenoor die partye voor die hof wat vanweë die voeging deur die eiser(s) die deliktspleger(s) insluit. Dit staan die Fonds natuurlik vry om die volle vergoeding self (maw afsonderlik) te betaal en dus nie op sy regresreg teen die deliktspleger(s) ingevolge die hofbevel te steun nie. Hierdie sou die meer aanvaarbare wyse gewees het om die situasie te hanteer.

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STRAFBEVRYDENDE TERUGTREDE UIT 'N POGING TOT BRANDSTIGTING*

Bundesgerichtshof, Beschl v 25/2/1997, NStZ-RR 1997, 193

1 Inleiding

Die relevante feite van dié saak is soos volg: A het uit woede en ergernis vir sy vriendin, wat hulle verhouding wou beëindig, besluit om die huis af te brand waarin sy gewoon het. Met dié doel voor oë het hy in drie kamers houtskoolontbranders op maklik brandbare stof aan die brand gesteek. Die hof *a quo* het bevind dat die-aan-die-brand-gesteekte stof nie tot 'n brand met helder vlamme gekom het nie, maar slegs tot hewige rookontwikkeling gelei het. Daarna het A, blykbaar omdat hy berou gehad het, na die brandaanmelder wat ongeveer 100 meter verwyder was, geloop en die sirene geaktiveer waarop die brandweer reageer het. Die vraag of daar in dié omstandighede sprake van 'n strafbevrydende (en vrywillige) terugtrede uit poging tot brandstigting kan wees, word hier onder die loep geneem. Uiteraard word die problematiek met verwysing ook na die Suid-Afrikaanse reg geëvalueer.

2 Die Duitse reg

Die hof *a quo* (*Landgericht*) het A aan (onder andere) oortreding van artikel 306(1) van die Duitse Strafwetboek (*Strafgesetzbuch – StGB*) skuldig bevind.

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Hiervolgens word, met 'n minimum van 1 jaar gevangenisstraf, diegene strafbaar gestel wat 'n gebou waarin godsdienstige byeenkomste plaasvind of 'n gebou, 'n skip of 'n hut wat vir menslike bewoning aangewend word of ruimte waarin mense van tyd tot tyd vertoef en gedurende sodanige tyd, aan die brand steek (sien ook Labuschagne "Nalatige brandstigting: Dekriminalisasie deur onbruik of regterlike oningeligtheid?" 1995 *Obiter* 220 en artikel 307 *StGB* tav omstandighede wat tot strafverswaring aanleiding kan gee). Vir voltooiing van dié misdaad word ingevolge artikel 306(2) *StGB* vereis dat voortbranding van die aangesteekte vuur uit eie krag moontlik is. Die *Bundesgerichtshof* (*BGH*) beslis egter dat dit nie in die onderhawige saak bewys is nie. Die gevolg is dat artikel 24(1) *StGB* in dié saak ter sprake kom. Hiervolgens word iemand wat vrywillig uit 'n misdaadpoging terugtree van bestraffing vrygestel (sien ook Jescheck en Weigend *Strafrecht. Allgemeiner Teil* (1996) 538; Roxin *Strafrecht. Allgemeiner Teil*, Bd 1 (1997) 900). Die *BGH* wys daarop dat A deur die brandweer te ontbied het 'n nuwe kousaliteitsketting aan die gang gesit het wat minstens medeverantwoordelik vir die nie-voltooiing van die misdaad was. Sodanige optrede kan 'n strafbevrydende terugtrede ooreenkomstig artikel 24 *StGB* daarstel. Die *BGH* stel dit baie duidelik dat dit nie 'n vereiste is dat die dader die vuur self moet blus of selfs daaraan deel moet neem nie (193). Die *BGH* wys verder uitdruklik daarop dat 'n dader wat op strafbevryding aanspraak maak, alles in sy vermoë moet doen om die intrede van die gevolg te voorkom en hy moet die beste beskikbare weg daartoe gevolg het. So sou dit nie voldoende wees indien dit in die omstandighede aan toeval oorgelaat sou word of die alarmering van die brandweer tot gevolg sou hê dat hulle betyds die brandobjek sou bereik en die korrekte maatreëls sou tref nie (194; sien ook Heckler "Beendeter Versuch bei fehlender Vorstellung des Täters über die Folgen seines Tuns?" 1996 *NJW* 2491).

Die Duitse reg ten aansien van strafbevrydende terugtrede uit 'n misdaadpoging kan as baie dadervriendelik en verfynd beskou word. Die *BGH* het in ander sake beslis dat strafbevrydende terugtrede selfs in daardie gevalle moontlik is waar die dader eers van verdere optrede afsien indien hy reeds sy doel bereik het (sien BGH, Beschl v 28/2/1989, NStZ 1989, 317; BGH, Beschl v 19/5/1993, NJW 1993, 2061; Pahlke "Rücktritt nach Zielerreichung" 1995 *Goltdammers' Archiv für Strafrecht* 72).

3 Die Suid-Afrikaanse reg

Müller wys daarop dat die idee van bestraffing van 'n poging tot die pleeg van 'n misdaad nie in die Germaanse reg bekend was nie. In die Romeinse reg word kasuïstiese vorme van pogingsmisdade egter wel aangetref (*Die geschichtliche Entwicklung des Rücktritts vom Versuch bis zum Inkrafttreten des neuen StGB-AT 1975* (1995) 19–23; sien ook Mommsen *Römisches Strafrecht* (1899) 97). In *D* 48 10 19 *pr* word vermeld dat diegene wat valse munte vervaardig het maar dit later weens berou stopgesit het, van bestraffing vrygestel word. Hierdie bepaling stel die enigste vorm van strafbevrydende terugtrede uit 'n "misdaadpoging" in die Romeinse reg daar (Müller 26–28). By sekere ander misdade het vrywillige terugtrede uit 'n poging strafversagting tot gevolg gehad (*D* 48 19 16 8; Mommsen 97–98).

Die leerstuk van strafbevrydende terugtrede uit 'n misdaadpoging het, anders as in byvoorbeeld Duitsland, Nederland en die VSA, nie in Suid-Afrika posgevat nie (sien Grew "Should voluntary abandonment be a defense to attempted crimes? 1988 *American Criminal LR* 441; Hoeber "The abandonment defense to

criminal attempt and other problems of temporal individuation" 1986 *California LR* 377; a 45(1) van die Nederlandse Strafwetboek). Die algemene benadering in die Suid-Afrikaanse reg is dat 'n vrywillige terugtrede uit 'n (voltooide) misdaadpoging slegs tot strafversagting aanleiding kan gee (sien hieroor *R v Hlatswayo* 1933 TPD 441; *S v Agmat* 1965 2 SA 874 (K) 895; *S v Du Plessis* 1981 3 SA 382 (A) 400). Ons howe het egter beslis dat 'n vrywillige terugtrede uit 'n gemeenskaplike doel ("common purpose") om 'n misdaad te pleeg, tot 'n vryspraak kan lei (sien bv *S v Nzo* 1990 3 SA 1 (A) 11). In die lig hiervan merk Burchell op dat

> "these decisions could provide some support for those who contend that voluntary withdrawal from an attempt to commit a crime may, in limited circumstances, be a defence" (*South African criminal law and procedure* vol 1 (1997) 350; sien verder Snyman "Vrywillige terugtrede as verweer by poging" 1980 *SASK* 169).

4 Konklusie

Die problematiek rondom die bestraffing van vrywillige terugtrede uit 'n misdaadpoging hou intiem verband met die verskerpte bestraffing van die voltooiing van 'n sekere handeling of die intree van 'n sekere gevolg. Hierdie toedrag van sake is by 'n vorige geleentheid gekritiseer. Die inligting daarin verskaf en die argumente daar geopper, word nie hier herhaal nie (sien Labuschagne "Die uitskakeling van toeval by strafregtelike aanspreeklikheid" 1985 *De Jure* 155; "Misdaadelementologie en indoktrinasie: 'n Teelaarde vir stagnasie?" 1993 *SAS* 76). Sancinetti verwys daarna as 'n dogter van die "Erfolgsmythos" (*Subjektiewe Unrechtsbegründung und Rücktritt vom Versuch* (1995) 24). Die dekonkretiseringsproses wat soos 'n goue draad deur die ontwikkeling van die sosio-juridiese waardestrukture van die mens loop, het tot gevolg dat strafregtelike aanspreeklikheid in 'n toenemende mate in meer abstrakte terme omskryf word (sien Müller 121; Labuschagne "Evolusielyne in die regsantropologie" 1996 *SA Tydskrif van Etnologie* 40). Die Duitse reg ten aansien van strafbevrydende terugtrede uit 'n misdaadpoging het reeds ver op hierdie weg gevorder. Ons regstelsel sal in finale instansie ook nie hierdie ontwikkeling vryspring nie (sien verder Labuschagne "Vrywillige terugtrede uit 'n misdaadpoging en menslike gedragsbeheermeganismes: Opmerkinge oor die persoonlikheidsregtelike begrensing van die strafreg" 1995 *Stell LR* 186 waar hierdie problematiek in meer besonderhede aangespreek word).

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NOODTOESTAND EN NOODWEER: REGVERDIGINGSGRONDE BY ONREGMATIGE VRYHEIDSONTNEMING AS *INIURIA*

Robbertse v Minister van Veiligheid en Sekuriteit 1997 4 SA 168 (T)

Dit is gevestigde reg dat die *libertas* of liggaamlike vryheid as 'n hoogs beskermingswaardige regsgoed in die Suid-Afrikaanse reg erken word (sien bv

Areff v Minister van Polisie 1977 2 SA 900 (A) 914; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A)). Hierdie erkenning word onderstreep deur die verskansing van die reg op vryheid van die persoon as fundamentele reg in artikel 12 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996. Daar word aanvaar dat enige vorm van belemmering of ontneming van die liggaamlike vryheid wat nie onbenullig van aard is nie, in beginsel as 'n *iniuria* met betrekking tot die fisiese integriteit geld (sien Neethling *Persoonlikheidsreg* (1998) 137-139). Onder invloed van die Engelse reg het daar egter in die regspraak twee spesifieke wyses van belemmering van die fisiese vryheid as besondere verskyningsvorme van *iniuria* ontwikkel, te wete *onregmatige vryheidsberowing* (hetsy as "false imprisonment" of "wrongful arrest") en *kwaadwillige vryheidsberowing* ("malicious imprisonment" of "malicious arrest") (sien *idem* 139 ev 150 ev oor hierdie onderskeid). In die onderhawige saak is net onregmatige vryheidsberowing (in die vorm van onregmatige aanhouding) van belang, en dan veral die kwessie van onregmatigheid. Die basiese posisie met betrekking tot die onregmatigheid van vryheidsontneming word soos volg deur die appèlhof in *Minister of Justice v Hofmeyr supra* 13 verwoord:

> "The plain and fundamental rule is that every individual's person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction."

In die afwesigheid van 'n regverdigingsgrond is iedere krenking van die liggaamlike vryheid dus onregmatig (sien nietemin Neethling *Persoonlikheidsreg* 141) en bygevolg 'n *iniuria*. Tradisionele regverdigingsgronde wat hier in aanmerking kan kom, is byvoorbeeld noodweer, noodtoestand, tugbevoegdheid en *volenti non fit iniuria* (*idem* 142).

In casu was noodtoestand as verweer volgens die hof ter sprake. Die eiser het genoegdoening geëis van die verweerder weens beweerde onregmatige aanhouding deur lede van die Suid-Afrikaanse Polisiediens. Die gewraakte *iniuria* het gespruit uit voorkomingsoptrede wat die polisie op die eiser se plaas geloods het nadat daar inligting ontvang is dat lede van die Afrikaner Weerstandsbeweging (AWB) wat op die eiser se skietbaan uitgekamp het, verantwoordelik was vir 'n aantal ontploffings op die Witwatersrand. Die polisie is ook ingelig dat die eiser die AWB goedgesind was, dat hy toestemming verleen het dat die groep op sy plaas kon bly, dat die groep gewapen was en oor heelwat plofstof beskik het, dat "die oorlog sou begin" en dat verdere bomaanvalle vanaf die eiser se plaas uitgevoer sou word. Die polisie het `n taakmag bymekaar geroep met die opdrag om die hele plaas en die geboue daarop te beveilig totdat 'n ondersoekspan hulle werk kon verrig. Die begrip "beveilig" het ingesluit die aanhouding van persone op die plaas en in die geboue en die deursoeking daarvan vir wapens. Volgens die eiser het vier polisielede sesuur die oggend sy huis binnegestorm, hom vir omstreeks 20 minute geboei en daarna in 'n rondawel bewaak en van sy vryheid ontneem tot omstreeks 11:30 voormiddag (feite-opsomming ontleen van kopstuk: 168-169). Die polisie het hierdie bewerings bevestig maar aangevoer dat hulle optrede geregverdig was omdat die eiser sy pistool gegryp, dit gespan en op hulle gerig het. Gevolglik is die eiser geboei en aangehou totdat die gebied inderdaad beveilig was.

Regter Roux vervolg:

> "Die feit is egter dat die eiser aangehou was en sy vryheid hom ontneem was. *Prima facie* is dit 'n ernstige inbraak op sy regte en die bewyslas berus op die verweerder

> om te bewys dat dit nie onregmatiglik geskied het nie. Die verweer, deur die verweerder geopper, is dat die lede van die Suid-Afrikaanse Polisie óf in 'n noodtoestand opgetree het óf dat hulle in noodweer opgetree het óf dat hulle 'n redelike verdenking gehad het dat eiser 'n misdryf soos in Bylae 1 tot die Strafproseswet 51 van 1977 omskryf, gepleeg het" (172H-I).

Die regter is van oordeel dat die beginsels van noodtoestand uitgebrei moet word om die onderhawige geval te dek (173B):

> "In hierdie geval het die Suid-Afrikaanse Polisie 'n absolute plig gehad om misdadigers op te spoor en te arresteer. So ook is daar 'n onmiskenbare plig om verdere gruweldade te voorkom. Volgens my siening kon die Suid-Afrikaanse Polisie stappe neem wat gelykmatig is met pligte wat hulle in die openbare belang moes uitvoer. Indien daar op tone getrap word in die uitvoering van hulle pligte, is dit nie onregmatig nie. Dit is natuurlik altyd onderhewig daaraan dat kwaadwillige of roekelose of verregaande gedrag nog altyd as wederregtelik beskou moet word" (173C-E).

Die hof beslis voorts dat in die omstandighede wat daar geheers het, kon die polisie stappe geneem het wat gelykmatig was aan die gevare waaraan hulle redelik moontlik kon verwag het om blootgestel te word. Regter Roux kom tot die slotsom – interessant genoeg met verwysing na *Ntanjana v Vorster and Minister of Justice* 1955 4 SA 398 (K) 406 wat oor *noodweer* handel – dat dit redelik was om die eiser aan te hou ten einde te verseker dat hy nie op die polisie sou begin skiet nie. Die polisie kon nie verkwalik word daarvoor dat hulle redelikerwys verwag het dat die eiser minstens 'n bondgenoot van die AWB was nie (173E-F). Gevolglik het die polisie nie onregmatig *vis-à-vis* die eiser opgetree nie en is dit volgens regter Roux bygevolg onnodig om die ander verwere te oorweeg. Die eis word van die hand gewys.

Alhoewel nou met die resultaat van die uitspraak saamgestem word, is sommige aspekte daarvan tog bevraagtekenbaar.

(a) Die hof aanvaar sonder meer, met verwysing na McKerron *The law of delict* (7e uitg) 74, dat 'n mens hier met noodtoestand te make het sonder om hoegenaamd te oorweeg of die onderhawige feite nie eerder noodweer vergestalt nie. Myns insiens kan minstens 'n goeie saak uitgemaak word dat dit wel die geval is. Ter verduideliking is dit nodig om vooraf kortliks by die onderskeid tussen noodtoestand en noodweer stil te staan (sien hieroor Neethling, Potgieter en Visser *Deliktereg* (1996) 73 ev 82 ev 83; vgl Neethling *Persoonlikheidsreg* 117–120). 'n Noodweershandeling bestaan daarin dat die dader hom weer teen 'n reeds begonne of dreigende onregmatige handeling (aanval) ten einde sy geregverdigde belange (of dié van andere) te beveilig. Onregmatigheid hou in dat die aanval 'n geregverdigde belang van die persoon wat in noodweer optree, of dié van 'n ander, moet bedreig of inderdaad krenk. Ten einde binne regsperke te geskied, moet die noodweershandeling teen die aanvaller self gerig wees, noodsaaklik wees om die dader se geregverdigde belang te beveilig (dws die krenking van die aanvaller se belang(e) – hier sy fisiese vryheid – moet in die omstandighede redelikerwys die noodwendige middel (of enigste uitweg) ter beskerming van die bedreigde of aangetaste geregverdigde belang wees), en op 'n redelike wyse geskied (dws nie skadeliker wees as wat nodig is om die aanval af te weer nie)(sien ook *Ntsomi v Minister of Law and Order* 1990 1 SA 512 (K) 526-527). Baie belangrik is nietemin dat die beginsel van eweredigheid van belange (aangetaste teenoor bedreigde belang) nie by noodweer geld nie (*Ex Parte Die Minister van Justisie: in re Staat v Van Wyk* 1967 11 SA 488 (A) 496–497; Neethling, Potgieter en Visser *Deliktereg* 79–82).

Noodtoestand weer is aanwesig waar die dader deur oormag in so 'n posisie geplaas word dat hy sy geregverdigde belange (of dié van andere) slegs kan beveilig deur 'n aantasting van die regsgoed van 'n ander. Ten einde binne regsperke te geskied, moet (soos by noodweer) die vryheidsberowing redelikerwys die noodwendige middel of enigste uitweg ter beveiliging van die geregverdigde belang wees; en moet die belang wat aangetas word, te wete die fisiese vryheid, (anders as by noodweer) nie groter wees as die belang wat gered staan te word nie (hiermee hang saam dat die dader nie meer nadeel moet veroorsaak as wat nodig is nie). Uiteraard geld die beginsel van ewredigheid van belange dus wel by noodtoestand (sien Neethling, Potgieter en Visser *Deliktereg* 86-88; vgl *S v Goliath* 1972 3 SA 1 (A)).

Kort gestel, die onderskeid tussen noodweer en noodtoestand is daarin geleë dat die dader hom by noodweer rig teen 'n onregmatige aanval; by noodtoestand daarenteen rig hy hom teen die belange van 'n onskuldige buitestander (sien ook Van der Walt *Delict: Principles and cases* (1979) 43). Dit verklaar terselfdertyd waarom die reg vryer teuels by optrede in noodweer as by noodtoestand gee deur nie ewredigheid van belange te vereis nie. Boberg (*The law of Delict I Aquilian liability* (1994) 789) verklaar:

> "This remarkable difference between necessity and defence rests on the policy consideration that, whereas the victim of necessity is innocent, the victim of defence is himself an unlawful aggressor, in some degree unworthy of the law's protection. The victim's own turpitude is therefore the key to this differential treatment – an important criterion when deciding whether a particular situation is one of necessity or defence."

In die lig van bostaande kan daar waarskynlik min twyfel bestaan dat die polisieoptrede in *Robbertse* eerder 'n noodweers- as 'n noodtoestandshandeling was. Die polisie het hulle in eerste instansie gerig teen 'n groep AWB-lede wat hulle na bewering aan (dreigend) onregmatige optrede skuldig gemaak het (hulle was swaar bewapen (oa met militêre wapens, plofstof en handgranate), die "oorlog sou begin" en verdere bomaanvalle sou geloods word). Alhoewel niks uit die feite blyk dat die eiser direk by hierdie dreigend onregmatige optrede betrokke was nie, was hy baie beslis nie 'n onskuldige buitestander nie. Inteendeel. Die omringende omstandighede (sy AWB-goedgesindheid, die verskaffing van blyplek aan hulle op sy plaas se skietbaan, sy eie waarneming van die aktiwiteite op die skietbaan), en veral die feit dat die eiser sy pistool gegryp, dit gespan en op die polisielede gerig het toe hulle sy huis binnegedring het, regverdig die afleiding dat sy optrede self dreigend onregmatig was en dat sy vryheidsontneming daarom in noodweer geregverdig was.

Hierdie gevolgtrekking is nie net van akademiese belang nie omdat, soos reeds aangedui, optrede in noodweer, veral wat die omvang daarvan betref, makliker te regverdig is as optrede in noodtoestand. Daarom is dit miskien raadsamer vir 'n verweerder om hom in omstandighede soos die onderhawige eers op noodweer en daarna, as alternatief, op noodtoestand te beroep.

(b) Volgens die hof (173D-E, aangehaal *supra*) moet "kwaadwillige of roekelose of verregaande gedrag nog altyd as wederregtelik beskou ... word". Hierdie ongekwalifiseerde stelling is vatbaar vir kritiek:

(i) *Kwaadwillige gedrag* kan óf gedrag wat met opset óf gedrag wat met 'n onbehoorlike (kwade) motief (*malice*) gepaard gaan, beteken. Anders as kwade motief het opset egter geen rol by onregmatigheid te speel nie. Opset is 'n regstegniese begrip wat wilsgerigtheid op die teweegbring van 'n bepaalde

gevolg en onregmatigheidsbewussyn as wesenselemente omvat (sien bv die *Hofmeyr*-saak *supra* 154; Neethling *Persoonlikheidsreg* 71). Daarom kom opset logieserwys eers ter sprake as onregmatigheid reeds vasstaan – daar kan tog nie van onregmatigheidsbewussyn sprake wees as onregmatigheid nog bepaal moet word nie (sien hieroor Neethling en Potgieter "Die rol van opset by onregmatige mededinging" 1991 *SALJ* 33 ev; Neethling, Potgieter en Visser *Deliktereg* 42 vn 36). Daarenteen speel kwaadwillige motief beslis 'n rol by die vraag na onregmatigheid, ook by onregmatige vryheidsberowing (sien Neethling, Potgieter en Visser *Deliktereg* 42 109 ev 111 vn 449 328; Neethling *Persoonlikheidsreg* 72 vn 203 146). Anders egter as wat regter Roux te kenne gee, word kwaadwillige gedrag in bedoelde sin nie sonder meer as onregmatig beskou nie, maar is kwade motief net 'n faktor wat 'n rol by die beoordeling van die onregmatigheid al dan nie van die dader se gedrag kan speel (vgl Neethling, Potgieter en Visser *Deliktereg* 112-113; sien in die besonder oor die rol van kwade motief by onregmatige arrestasie, *Tsose v Minister of Justice* 1951 3 SA 100 (A) 17; *Duncan v Minister of Law and Order* 1986 2 SA 805 (A) 817; Neethling *Persoonlikheidsreg* 146).

(ii) *Roekelose gedrag* kan óf opsetlike gedrag in die vorm van *dolus eventualis* óf grof nalatige gedrag beteken. Bedoel die regter eersgenoemde, geld dieselfde kritiek as wat onder (i) met betrekking tot opset geopper is. Bedoel hy grof nalatige gedrag, is dit ook onaanvaarbaar aangesien die appèlhof in *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 364 onlangs onomwonde verklaar het dat die nalatigheidsvraag net beantwoord kan word as onregmatigheid reeds vasstaan – volgens appèlregter Olivier is dit "trouens juridies onmoontlik" om oor nalatigheid te spekuleer as onregmatigheid nie bepaal is nie. Daarom kan nalatigheid geen rol by die bepaling van onregmatigheid speel nie en kan roekeloos nalatige gedrag bygevolg nie op onregmatige optrede dui nie (sien ook Neethling, Potgieter en Visser *Deliktereg* 148-150 oor die onderskeid tussen onregmatigheid en nalatigheid).

(iii) *Verregaande gedrag* het nie 'n regstegniese betekenis nie; daarom is dit nie duidelik wat hiermee bedoel word nie. Indien regter Roux egter gedrag in die oog het wat die grense van noodtoestand as regverdigingsgrond oorskry omdat dit skadeliker is as wat in die omstandighede nodig is en daarom onredelik en bygevolg onregmatig is, kan met hom saamgestem word.

Ter afsluiting word aan die hand gedoen dat regters ter wille van regsekerheid en gesonde regsontwikkeling baie noukeuriger met regsterme en woordgebruik moet omgaan; die onversigtige gebruik van regstaal sal hom uiteindelik in die regsteorie en -praktyk wreek.

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BOEKE

PRESCRIPTION IN SOUTH AFRICAN LAW

deur J SANER

Butterworths Durban 1996; vii en 217 bl

Prys R182,40 (losblad)

Die skrywer van hierdie losbladwerk oor verjaring het hom ten doel gestel om verkrygende en bevrydende verjaring asook vervaltermyne op 'n toeganklike, eenvoudige en duidelike wyse vir regspraktisyns uiteen te sit (v). Saner vermy gevolglik sover moontlik enige teoretiese bespreking en konsentreer daarop om die regspraak weer te gee. Hoewel hy dit duidelik stel dat hy nie beoog het om 'n volledige, intellektuele en akademiese bespreking van verjaring te gee nie (v), is die bespreking volledig genoeg dat die leser 'n duidelike begrip daarvan kan vorm. Die teks is verder voorsien van voetnote en 'n bibliografie van al die vernaamste werke oor verjaring.

Na 'n inleidende hoofstuk (hfst 1), bespreek Saner agtereenvolgens verkrygende verjaring (hfst 2), bevrydende verjaring (hfst 3) en ten slotte verskeie statutêre verjaringstermyne en vervaltermyne (hfst 4 en 5). Die grootste bydrae van hierdie boek lê daarin dat al hierdie aspekte van verjaring in een werk bespreek word. Die toeganklikheid en bruikbaarheid van die boek word verder verhoog deur 'n tabel van die verskillende verjarings- en vervaltermyne, uittreksels uit die verskillende wette, asook 'n vonnis- en 'n trefwoordregister. Die feit dat die boek 'n losbladuitgawe is, beteken dat dit maklik op datum gehou kan word. Die uitgewers beoog om die boek minstens een keer per jaar by te werk en indien daar meerdere substansiële veranderings gedurende 'n betrokke jaar plaasvind, selfs meer dikwels. Hierdie moontlikheid van bywerking is veral nuttig in die lig daarvan dat veranderings op die gebied van verjaring wel voorsienbaar is. Verjaring word immers grotendeels statutêr gereël. Verder is sommige van die bestaande kort statutêre verjarings- en vervaltermyne waarskynlik strydig met die gelykheidsbeginsel en onkonstitusioneel, omdat dit die owerheid bo privaat persone bevoordeel (5–3 tot 5–4).

'n Volledige bespreking van enkele onderwerpe sal die praktiese bruikbaarheid van die boek verhoog. Hoewel die meeste praktisyns bekend is met die siviele metode van berekening van tydperke, sal 'n bespreking van die fynere aspekte daarvan tog nuttig wees (1–6). Die tydstip waarop die verskillende soorte skulde opeisbaar word en bevrydende verjaring begin loop (3–33), verdien ook 'n kort bespreking. Saner beperk sy bespreking van die verskillende statutêre verjarings- en vervaltermyne (hfst 4 en 5) tot die belangrikste. Weer eens sal 'n bespreking van *al* die verskillende verjarings- en vervaltermyne die bruikbaarheid van die boek vir die praktisyn verhoog.

Soms is 'n blote uiteensetting van die positiewe reg onvoldoende en sal 'n teoretiese bespreking nie net nuttig nie maar ook noodsaaklik wees. Waar die regspraak oor 'n aangeleentheid omstrede is omdat verskeie skrywers glo dat dit verkeerd is, sal 'n uiteensetting van die kritiek (al is dit net in die voetnote) ook uit 'n praktiese oogpunt vir 'n praktisyn nuttig wees (om bv 'n saak voor te berei). 'n Voorbeeld hiervan is die bespreking van afstanddoening van die loop van bevrydende verjaring reeds voordat verjaring 'n aanvang neem (soos tydens kontraksluiting) (3–50). 'n Kort uiteensetting van

die onderskeid tussen verjarings- en vervaltermyne aan die begin van hoofstuk 5 sal beslis bydra tot 'n beter begrip van die latere bespreking van die verskillende statutêre verjarings- en vervaltermyne.

Saner slaag grotendeels in die doel wat hy gestel het en die boek sal beslis aan die behoeftes van regspraktisyns voldoen. Die boek is selfs 'n goeie beginpunt vir enigeen wat dieper navorsing oor enige aspek van verjaring wil doen.

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CIVIL PROCEDURE IN MAGISTRATES' COURTS
deur LTC HARMS
Butterworths Durban 1997; viii en 1,158 bl
Prys R433,20 (losblad)

Gebruikers van hierdie werk sal waarskynlik vind dat die inhoud daarvan vir hulle bekend voorkom. Daar hoef nie ver gesoek te word vir die rede hiervoor nie. In die voorwoord wys die outeur self daarop dat die werk gebaseer is op die hoofstuk wat handel oor siviele prosesreg in die welbekende *Law of South Africa* asook op 'n verwante werk van die outeur, *Civil procedure in the supreme court* (wat hoofsaaklik ook maar op voormelde gedeelte in *LAWSA* geskoei is). Hierbenewens is die styl van *Law of South Africa* steeds behou. Om hierdie rede kan die werk maklik aangesien word as 'n ou werk in 'n nuwe gedaante. Die outeur is waarskynlik self sensitief vir so 'n aantyging, en wys daarop dat "wesenlike" gedeeltes herskryf is, ander weggelaat is en dat nuwe gedeeltes ingevoeg is. Hierdie onderskeie gedeeltes word egter nie deur hom uitgelig nie.

Die werk bestaan uit hoofsaaklik twee gedeeltes: ten eerste 'n kommentaargedeelte wat ingedeel is ooreenkomstig onderwerpe (in teenstelling met ander werke wat 'n kommentaar op óf die reëls óf die Wet op Landdroshowe van 1944 behels), en tweedens, 'n groot aantal aanhangsels. Hierdie aanhangsels is verdeel in afdelings wat die volgende bevat: die volledige Afrikaanse en Engelse tekste van die Wet op Landdroshowe van 1944 en die reëls, 'n nuttige prosessuele tydtafel, registers van gewysdes wat gerangskik is ooreenkomstig die onderskeie reëls en artikels van die wet, aangehaalde gewysdes en statute en ten slotte, 'n woordindeks. Die grootste gedeelte van die inhoud word opgeneem deur die onderskeie aanhangsels en die kommentaargedeelte beslaan slegs ongeveer een derde daarvan.

Volgens die outeur is regspraktisyns die teikengroep van die werk en word die werk ook beskryf as 'n praktisynsgids. Myns insiens behoort studente in die siviele prosesreg die werk nuttig te vind as agtergrondstudie. Praktisyns wat reeds oor kommentare op die wet en die reëls of *Law of South Africa* beskik, sal waarskynlik twee maal dink voordat hulle hierdie werk aanskaf maar dit is denkbaar dat dit wel 'n aantreklike opsie vir talle sal wees.

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SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE
VOLUME II COMMON LAW CRIMES
by JRL MILTON
Third edition; Juta Kenwyn 1996; 849 pp
Price R368,00

JRL Milton writes in the preface of his work that he has made two major changes to the new edition, namely to restructure and re-arrange the chapters. The addition of new headings within each chapter and the "user friendly" lay-out of the work as a whole make the third edition very accessible to practitioners and students alike.

Some of the major changes are to be found in the introduction of each chapter. In previous editions the definition of the crime was provided after a reflection on its history. The definition has now been moved to the beginning of each chapter – a move which focuses the discussion. The history section now also includes a discussion of the *development* of the crime in English law.

The deliberation on the "social context of the crime" and its place in South African criminal law is a welcome addition. The effect of the Constitution and the bill of rights on common law crimes, where relevant, is pointed out and discussed. The author's views on the viability of the criminalisation of certain sexual crimes and the crime of blasphemy provide persuasive arguments for their decriminalisation.

As a result of the restructuring of chapters, the classification of some crimes has changed: *crimen iniuria* and defamation are now classified as crimes against personality. Housebreaking with the intent to commit a crime is no longer a "kindred crime", but an "intrusion upon property".

The author has departed from the custom followed in the previous edition to include many of the related statutory offences. Statutory offences that do not directly supplement the common law crimes are excluded. Although the fact that the common law crime of abortion has been repealed is mentioned, the reader is advised to consult the volume on statutory crimes as regards offences created by the Abortion and Sterilisation Act, 1996.

The author has not merely updated the second edition. He has rejuvenated *Common law crimes*, thereby putting the volume in its rightful place as an authoritative textbook for the criminal law of the new order.

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THE LAW OF SALE AND LEASE
deur AJ KERR
Butterworths Durban 1996; xvi en 499 bl
Prys R189,24 (sagteband)

Professor Kerr het tot dusver 'n baie vrugbare akademiese loopbaan gehad. Daarvan getuig die aantal werke uit sy pen. Hy word as 'n kenner op 'n aantal regsgebiede, soos die algemene beginsels van die kontrakte-, koop-, huur- en verteenwoordigingsreg beskou.

Die uitstaande kenmerk van Kerr se bydrae tot die regswetenskap is sy uitvoerige uiteensetting van die positiewe reg.

Die ontwikkelings op die gebied van die koop- en huurreg wat sedert die eerste uitgawe van *The law of sale and lease* (1984) plaasgevind het, het 'n nuwe uitgawe genoodsaak. Diegene wat vertroud is met die eerste uitgawe sal sonder moeite hulle weg in die nuwe uitgawe vind aangesien die formaat en indeling wesenlik dieselfde gebly het. Nogtans is daar bykans nie 'n hoofstuk wat onaangeraak gebly het in die bywerk van nuwe regspraak, regsliteratuur en wetgewing nie. Daar is te veel veranderings om te bespreek en daarom wil ek slegs een van die belangrikstes noem. Dit is die uitgebreide bespreking van die vraag of die verhuurder se waarborg teen verborge gebreke 'n afsonderlike verpligting is en of dit opgeneem is in die verhuurder se verpligting om die huursaak in 'n behoorlike toestand te lewer en gedurende die huurtermyn in sodanige toestand te hou (285–312).

Enkele veranderings hou glad nie verband met nuwe regsontwikkelings nie maar is nogtans verbeterings van die eerste uitgawe. Voorbeelde hiervan is die bespreking van *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A) oor afleidings wat gemaak kan word ten aansien van die verkoper se kennis van die bestaan van 'n verborge gebrek (192–130) en die bespreking van die geval waar 'n derde se regmatige optrede tot vermindering van huurgeld kan lei (319–320).

'n Punt van kritiek is dat 'n bespreking van die huur van roerende goed asook die Wet op Huurbeheer 80 van 1976 ontbreek, terwyl 'n bespreking daarvan die bruikbaarheid van hierdie werk beslis sou verhoog.

Die nuwe uitgawe van hierdie bruikbare werk sal sonder twyfel allerweë verwelkom word.

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STRAFREG VONNISBUNDEL/CRIMINAL LAW CASE BOOK

by CR SNYMAN

Second edition; Juta Kenwyn 1995; 288 pp

Price R120,00

This casebook provides the novice in the study of criminal law with a user-friendly introduction to case law. It comprises a compilation of some 54 cases, of which 48 deal with general principles of criminal liability and six with specific crimes.

The author has written short comments on most of the cases reproduced in the book in which he points out the significance of the judgment, comments on certain aspects that need clarification and gives an elementary analysis of the judgment intended to facilitate comprehension of the case. The notes are not comprehensive as this book is intended as supplementary material to a textbook.

In selecting the cases to be included in the book, the author has given precedence to more recent cases, Appellate Division judgments and judgments in which certain important previous decisions were discussed.

In the first edition, excerpts from judgments delivered in Afrikaans were reproduced in Afrikaans. In the second edition such excerpts are followed by English translations.

Professor Snyman has included an introduction to the reading of cases in which he introduces the beginner to certain aspects of a judgment and certain terms and expressions

that he/she may encounter in reading a judgment. This instructive chapter deals with the significance of cases (the *stare decisis* principle), style of reference, the parties to a case, appeals, headnotes, abbreviations like "*cur adv vult*", "J", "AJ", "JP", "ACJ" etcetera, and the distinction between a *ratio decidendi* and an *obiter dictum*.

Strafreg vonnisbundel/Criminal law case book succeeds admirably in its aim to provide the beginner with a selection of cases on criminal law that is not intimidatingly voluminous. Its contribution towards introducing students to the reading of cases and facilitating comprehension of judgments is laudable.

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JONES & BUCKLE: THE CIVIL PRACTICE OF THE MAGISTRATES' COURTS IN SOUTH AFRICA VOLUME II: THE RULES

deur HJ ERASMUS en D VAN LOGGERENBERG

Negende uitgawe; Juta Kenwyn 1997

Prys R425,00 (losblad)

Aangesien hierdie boek waarskynlik een van die oudste en bekendste in regsbiblioteke is (die eerste publikasie het reeds voor 1920 verskyn), het dit geen bekendstelling nodig nie. Hierdie uitgawe het egter 'n gedaantewisseling ondergaan en verdien kortliks kommentaar.

Die algemene tendens van losbladpublikasies word voortgesit en gevolglik verskyn volume II dan ook in losbladformaat. Soos aangedui, bevat hierdie volume die volledige teks van die landdroshofreëls asook 'n kommentaar daarop. Die skrywers voorsien dat die opdatering van die inhoud jaarliks sal geskied. Hoewel hierdie werk nou verskyn, is dit nog nie volledig van kommentaar voorsien nie: kommentaar op reël 6, reël 14, 'n ekskursus oor koste in die algemeen en die kostetarief in Aanhangsel 2 is byvoorbeeld nog nie deur die skrywers gedoen nie en sal ter gelegener tyd beskikbaar gestel word. Wat die inhoud van die boek betref, is dit baie toeganklik vir die gebruiker, juis vanweë die formaat daarvan. Hoewel die verskillende afdelings duidelik gevlag is, word die inhoud van die aanhangsels en byvoegsels eers duidelik nadat die inhoudsopgawe geraadpleeg is. Dit is effens lastig maar doen nie afbreuk aan die gehalte van die publikasie nie.

Hoewel die losbladformaat van publikasies op terreine van die reg wat onderworpe is aan dinamiese ontwikkeling voor-die-hand-liggende voordele inhou, moet daarop gewys word dat die koste verbonde aan sodanige publikasies dit buite die bereik van die deursnee student en selfs die jong praktisyn plaas. Desnieteenstaande sal die werk ongetwyfeld byval vind by akademici en regspraktisyns weens die gehalte van die kommentaar en word die werk dan ook sonder voorbehoud aanbeveel.

Met die uitsondering van die tariefskale weerspieël die werk die reg soos op 20 Maart 1997.

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A critical analysis of the innovations introduced by the Sectional Titles Amendment Act of 1997

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OPSOMMING

'n Kritiese ontleding van die wysigings wat die Wysigingswet op Deeltitels van 1997 teweeggebring het

Hierdie artikel bied 'n kritiese weergawe van die vernaamste wysigings wat deur die Wysigingswet op Deeltitels 44 van 1997 teweeggebring is. Benewens die skrapping of invoeging van bepaalde omskrywings om veranderings in die Akteswet, die Grondwet 108 van 1996, die Oorgangswet op Plaaslike Regering 209 van 1993 en die Wet op Ontwikkelingsfasilitering 67 van 1995 te akkommodeer, poog die Wysigingswet om deeltitelontwikkeling meer vaartbelyn te maak. Om hierdie doel te verwesenlik en ten einde rompslomp uit te skakel en die koste van deeltitelontwikkeling te verminder, word die rol van die plaaslike owerheid gedegradeer tot 'n passiewe een van kondonasie van gebreke in die skema indien die ontwikkelaar dit versoek. Wat koperbeskerming betref, skrap die Wysigingswet die verouderde artikel 9 sodat die ontwikkelaar nou kan voortgaan om eenhede in 'n onvoltooide gebou te verkoop, sonder om te wag tot 'n deeltitelregister vir die gebou geopen is. Die wetgewer ag die beskerming ingevolge artikel 26 van die Wet op die Vervreemding van Grond 68 van 1981 voldoende om voornemende kopers in hierdie opsig te beskerm. Om die omskepping van huurwoonstelle in deeltitelwoonstelle meer stroombelyn te maak, word die ontwikkelaar toegelaat om die inligtingsvergadering van huurders met die skriftelike toestemming van al die betrokkenes uit te skakel. Artikel 17 wat handel oor die verkoop of verhuur van gedeeltes van die gemeenskaplike eiendom, word opgeknap om vir alle moontlike transaksies voorsiening te maak. Die Wysigingswet gun die ontwikkelaar 'n tweede kans om uitsluitlike gebruiksgebiede te skep of die reg om die skema in fases te ontwikkel voor te behou, indien hy reageer voordat die regspersoon tot stand gekom het. Indien bykomende grond by die skema gevoeg word, vereis die Wysingswet nie meer dat hierdie grond slegs vir die skep van bykomende geriewe aangewend hoef te word nie. Ten slotte laat die Wysigingswet die moontlikheid herleef om uitsluitlike gebruiksgebiede ingevolge die modelreëls van die skema te skep. Globaal gesien maak die Wysigingswet deeltitelontwikkeling meer ingewikkeld in plaas daarvan om dit te vereenvoudig en verkry die ontwikkelaar 'n bevoorregte posisie *vis-à-vis* deeleienaars en voornemende kopers van deeltiteleenhede.

1 INTRODUCTION

According to the Memorandum on the Objects of the Sectional Titles Amendment Bill[1] it has become necessary to bring the Sectional Titles Act[2] in line with

1 B 9D–97, 30.
2 Act 95 of 1986.

changes in other legislation, most notably the Deeds Registries Act,[3] the new Constitution,[4] the Local Government Transition Act[5] and the Development Facilitation Act.[6] Besides amending, deleting or inserting certain definitions to accomplish this aim, the Amendment Act of 1997[7] generally streamlines and tidies up certain provisions of the Sectional Titles Act. The main innovation is, however, to reduce the role of a local authority in the process of the establishment of a sectional title scheme and later adaptations of the sectional plan. To eliminate red tape and soaring holding costs, sectional schemes, plans of subdivision and consolidation and plans for the extension of a section, amongst other things, will from now on require approval by the Registrar only and not approval by the local authority. Another major innovation is to reinstate the practice of creating exclusive use areas by means of rules. The legislator also realised that section 26 of the Alienation of Land Act[8] affords sufficient consumer protection to prospective purchasers of sectional title units to delete the somewhat archaic section 9 of the Sectional Titles Act, which provided that the developer could deal in sectional title units only once a sectional titles register had been opened. Further important changes are that the developer no longer has to hold a tenants' meeting on conversion of a rental building to sectional titles if all the tenants have stated in writing that they do not wish to purchase their flats; that the Registrar will no longer be involved in the enforcement or application of the rules of the scheme, since rules are no longer lodged with but only filed by the Registrar; that the developer is granted a second opportunity after the sectional title register has been opened to reserve a right to develop the scheme in phases or exclusive use areas; and that rights held by the developer in terms of section 18 of the Sectional Titles Act of 1971[9] will lapse within 24 months after the Amendment Act of 1997 comes into operation if the developer does not take steps to secure his or her rights in terms of the Act.

2 DEFINITIONS AND OTHER MINOR AMENDMENTS

Several definitions have been amended in order to bring the Sectional Titles Act in line with other legislation.

The definition of "Administrator" has been deleted; the office of Administrator is no longer recognised in terms of the Constitution of the Republic of South Africa,[10] and both approval of the scheme by the local authority and an appeal to the Administrator on refusal have been abolished. The Amendment Act, however, replaces the word "Administrator", wherever it still appears, with the word "Premier". An exception is made in section 46 where the word "Administrator" is retained for the official appointed by the court to try to salvage a financially troubled sectional title scheme.[11]

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3 Act 47 of 1937.
4 Act 108 of 1966.
5 Act 209 of 1993.
6 Act 67 of 1996.
7 Act 44 of 1997. This Act was published on 1997-10-03 and came into operation on that date.
8 Act 61 of 1981.
9 Act 66 of 1971.
10 Act 108 of 1996.
11 Sectional Title Amendment Act of 1997 s 29.

The lengthy definition of "local authority" is replaced by a much shorter definition, namely a municipality contemplated in section 151 of the Constitution of the Republic of South Africa[12] exercising jurisdiction in the area where the land is situated.[13] Section 151(1) reads as follows:

> "The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic."

Where such municipalities have not yet been established, their functions will in the interim be exercised by the relevant transitional authorities. This simple definition obviates the need to distinguish between local authorities established in terms of section 84(1)(f) of the old Provincial Government Act[14] and those established under section 1 of the Black Local Authorities Act[15] and section 30 of the Black Administration Act.[16] Although a local authority need no longer approve a sectional title scheme, it can still be called on to condone certain infringements.[17] More importantly, the land on which a development scheme is to be developed, must be situated within the area of jurisdiction of a local authority.[18] A developer who wants to establish a resort sectional title scheme in a remote part of South Africa must therefore first ascertain whether a municipality has indeed been established for that particular area. It is doubtful whether the power given to the Minister of Regional and Land Affairs to declare an institution exercising the functions of a local authority, a local authority for the purpose of the Sectional Titles Act,[19] is still valid in the light of the new definition of "local authority". In my view this section should also be deleted.

The main reasons for amending the definition of "owner" for the umpteenth time in the Amendment Act, were to cater for the abolition of the marital power for marriages in community of property on 1 December 1993,[20] and to streamline the somewhat tortuous definition of "owner". Instead of opting for a straightforward enumeration of the persons who can be regarded as "owners" of sections, the legislator has again resorted to an intractable distinction between "owners" in relation to immovable property, and owners in relation to immovable property, real rights in immovable property and notarial bonds.[21]

In terms of the first part of the definition,[22] "owner" in relation to immovable property includes the following persons:

(i) the person registered as owner of immovable property;

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12 Act 108 of 1996.
13 S 1 *sv* "local authority".
14 Act 32 of 1961.
15 Act 102 of 1982.
16 Act 38 of 1927.
17 S 4(5). See further below.
18 See s 1 *sv* "developer" and "development scheme".
19 S 1(4).
20 This was done in terms of the General Law Fourth Amendment Act 132 of 1993 promulgated on 1993-12-01. S 29 replaced s 11 of the Matrimonial Property Act 88 of 1984. In terms of the substituted s 11(2), any marital power which a husband may have had over the person and/or property of his wife prior to 1993-12-01 has been abolished. Accordingly, the provisions of Chapter III of the Matrimonial Property Act 88 of 1984 are applicable to every marriage in community of property, regardless of the date on which the marriage was entered into.
21 S 1 *sv* "owner" par (a) and (b).
22 S 1 *sv* "owner" par (a).

(ii) the person registered as holder of immovable property;

(iii) the trustee in an insolvent estate;

(iv) a liquidator or trustee elected or appointed in terms of the Agricultural Credit Act;[23]

(v) the liquidator of a company or close corporation which is an owner;

(vi) the executor of an owner who has died; and

(vii) the legal representative of an owner who is a minor, of unsound mind or otherwise under a disability.

A proviso attached to persons (iii) to (vii) is that they must be acting within the scope of their authority.

Whereas the person who is "registered as owner", be it a natural person, a juristic person or the State, can easily be identified, it is not all clear which persons who are registered as holders should be considered to be owners. The legislators presumably wanted to maintain the *status quo* by including holders of a 99-year leasehold. This is reinforced by the fact that section 36(2) of the Sectional Titles Act,[24] dealing with the legal position on expiry of the 99 years leasehold has been retained.[25] However, a person who has a registered lease,[26] usufruct or sectional mortgage bond over a unit may also be regarded as a person who is registered as the holder of immovable property. The fact that it is nowhere expressly stated that these holders are regarded as "owners" to the exclusion of the registered owners of a unit, however, militates against accepting these registered holders as owners. The Afrikaans version, which refers to a person who is registered "as besitter", makes even less sense. "Besit" usually refers to a factual relationship between a person and a thing which does not give rise to a limited real right with regard to the property.[27]

The second part of the definition of "owner"[28] endeavours to clarify the position of spouses married in community of property after the abolition of the marital power of the husband as from 1 December 1993. The abolition, which also covered marriages concluded before 1984, made the provisions of Chapter III of the Matrimonial Property Act[29] applicable to all marriages in community of property. The effect of this is that all spouses married in community of property now have equal power to deal with property forming part of the common property. Accordingly, the Amendment Act defines "owner" (in relation to immovable property, real rights in immovable property and notarial bonds) as either one or both of the spouses (a) when the immovable property, rights in immovable property and notarial bonds are registered in the names of both spouses in a marriage in community of property; or (b) when the property or rights are registered in the name of only one spouse and the property or rights form part of the joint estate of both spouses. The impression thus created that

23 Act 28 of 1966.
24 Act 95 of 1986.
25 Note that the reference in s 36(2) to par (b) of the definition of "owner" in s 1 is outdated.
26 Note that a new definition of "lease" in s 1, defining a "lease" in terms of a traditional long term lease, is expressly inserted for the purpose of s 17(1).
27 See Van der Merwe *Sakereg* (1989) 91–92.
28 S 1 *sv* "owner" par (b).
29 Act 88 of 1984.

one of the spouses married in community of property may act on his or her own with regard to transactions in respect of property forming part of the common property, is, however, false, since the Matrimonial Property Act[30] still requires the written consent of the other spouse. Finally, it is still unclear whether this definition of "owner" in the case of marriages in community of property refers only to proprietary transactions concluded by owners or also to administrative functions which must be performed by owners, namely voting at the general meeting. Do either, or both of them have the right to vote as "owner" at the general meeting?

In terms of the Sectional Titles Act, the body corporate has the power to recover contributions owed by sectional owners with an action in any court including a magistrate's court.[31] All other actions have to be instituted in the High Court. An amendment to the definition of "court" now entitles a sectional owner to institute an action in the magistrate's court if he wants to change the use of his section and is unable to obtain the consent of all the other sectional owners. He may now approach the cheaper magistrate's court for an order that such refusal of consent is unfairly prejudicial, unjust or inequitable to him.[32]

The definition of "developer", to include the agent of such person or his successor in title, or any other person acting on their behalf has been extended in the Amendment Act. It now also includes a person who makes an affidavit on behalf of the developer that the sale of the unit concerns a unit in a converted rental building, and that the right of pre-emption of the lessee has been honoured.[33]

A new definition of "lease" has been inserted which corresponds to the traditional definition for a long lease in terms of the Deeds Registries Act.[34] This definition has, however, been expressly inserted for the sole purpose of section 17(1), which regulates dealings with the common property.[35] The definition of "sectional mortgage bond" has been replaced to make provision for the registration of a sectional mortgage bond over any registered real right in the common property.[36] For the first time, "operative town planning scheme" has been inserted and defined in the Act as a town planning scheme map and accompanying town planning scheme clauses prepared in terms of any law.[37] In order to facilitate sectional title development in former Black areas, a new definition of "statutory plan" has been inserted in the Act. In terms of this definition a "statutory plan" refers to a land development objective prepared in terms of the Development Facilitation Act,[38] an integrated development plan prepared in terms of the Local Government Transition Act,[39] or any other integrated plan, layout plan or package of plans in force in the area and which has or have been approved by a competent authority in terms of any law.[40] In terms of section 30 of

30 Act 88 of 1984 s 15(2)(a).
31 S 37(2).
32 S 1 *sv* "court" read with s 44(1)(g).
33 S 1 *sv* "developer" read with s 15B(3)(c).
34 Act 47 of 1937.
35 S 1 *sv* "lease".
36 S 1 *sv* "sectional mortgage bond". An example is a sectional mortgage bond hypothecating a lease created in terms of s 17(1).
37 S 1 *sv* "operative town planning scheme".
38 Act 67 of 1995 Chapter IV.
39 Act 209 of 1993.
40 S 1 *sv* "statutory plan".

the Sectional Titles Amendment Act of 1997, the expression "operative town planning scheme" must, wherever it appears, be replaced by the expression "operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law". Section 8 makes it clear that complaints of improper conduct on the part of land surveyors and architects must be referred by the Director-General Land Affairs and the Director-General Public Works, respectively, to the relevant council.[41] Section 34 has been amended so as to specify that if a developer alienates the whole or a share of his interest in the land and building comprised in the scheme, a unit is transferred by a deed of transfer, and a right to develop the scheme in phases[42] and rights of exclusive use by a bilateral notarial deed of cession.[43] Section 38(i) has been amended to empower the body corporate to let a portion of the common property to the owner or occupier of a section by means of a lease other than a registered long-term lease.[44]

Finally, the composition of the sectional titles regulation board has been changed slightly,[45] and the Minister of Regional and Land Affairs may no longer regulate the fees and charges of local authorities in connection with the performance of their functions.[46]

3 THE PROCESS OF ESTABLISHMENT OF A SECTIONAL TITLE SCHEME[47]

3 1 Introduction

The Amendment Act reduces the role played by the local authority in the process of establishing a sectional title scheme. Instead of being given an active role in the approval of sectional title schemes, the local authority's role has been marginalised to the passive function of condoning irregularities in a sectional title scheme, should the developer choose to approach it for such condonation. The investigative and policing role of the local authority has been shifted to architects and land surveyors (as well as the Surveyor-General), who must ascertain that certain certificates and affidavits accompany the submission of the draft sectional plan for his approval, without having to vouch for the accuracy and correctness of these documents.

3 2 Reduction of the role of the local authority

The Sectional Titles Amendment Act of 1997 eliminates the function of the local authority in the process of establishing a sectional title scheme almost entirely, save for a limited power of condonation in certain specified circumstances. The reason for this is to save costs and to avoid red tape. Because of the lack of

41 S 8(g).
42 In terms of s 25.
43 S 34(3).
44 S 38(i) read with s 17(1).
45 S 54(2)(iv) and (vi). The officer nominated by the United Municipal Executive of South Africa has been replaced by an officer in the employ of the Council of South African Banks. The Department of Land Affairs has been substituted for the Department of Public Works and Land Affairs.
46 S 55(j). What about fees for condonation?
47 In writing this section the author was aided by valuable suggestions made by his LLM students Tertius Maree, Rykie Steenkamp and Lindy van Rooyen.

guidance provided by the Act in respect of the nature and scope of their functions, local authorities traditionally exercised their powers in a very subjective way. Some local authorities regarded their approval as a mere formality while others abused their power to rectify past mistakes. The result was that approval took anything between two weeks and six months. The delays caused by excessive scrutiny, and repeated requests for further particulars resulted in an escalation of the developer's holding costs. The main goal of the amendment is therefore to streamline the process of establishment, to eliminate excessive bureaucracy and to cut down on soaring costs occasioned by unnecessary delays.[48]

In terms of the 1986 Act, the local authority had to grant an application for approval of the scheme if the following requirements had been met:

(i) the method and purpose of the proposed division into sections and common property were not in conflict with any operative town planning scheme at the date of the application for the approval of the scheme;

(ii) in regard to any matter other than the proposed use, the building did not conflict with any operative town planning scheme at the date of approval of the building plans;

(iii) in regard to matters other than buildings, any applicable condition of any operative town planning scheme had been complied with; and

(iv) the sectionalised buildings were erected in accordance with the applicable building regulations or building by-laws in operation at the date of erection.[49]

The local authority was allowed to disregard discrepancies and infringements in all instances except where the method and purpose of the division into sections and common property conflicted with any operative town planning scheme.[50] Furthermore, it was allowed to accept an architect's affidavit as necessary proof that the sectionalised building had been erected in accordance with applicable building regulations at the date of erection.[51] Finally, if the local authority failed to approve the scheme within 60 days, or refused to approve the scheme, the developer could appeal to the Administrator for the reversal of such a decision.[52]

Since certain local authorities took an inordinate period of time to ascertain whether the above-mentioned provisions had been met, the Amendment Act relieves the local authority of the task of approving the scheme and effectively imposes on the architect or land surveyor the burden of determining whether aspects of the scheme comply with relevant town planning schemes and building by-laws. A developer must, in terms of the Amendment Act, instead of applying for approval by the local authority, cause a draft sectional plan to be submitted to the Surveyor-General in terms of section 7(2), accompanied *inter alia* by a certificate issued by an architect or land-surveyor certifying compliance with applicable town planning schemes and building regulations.[53]

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48 See general SAPOA *Memorandum Sectional Title and Group Housing Committee* (1991) 4–5; SAPOA *Proposed amendments to the Sectional Titles Act 95 of 1986* (1993) par 3.3; Van der Merwe and Butler *Sectional titles, share blocks and time-sharing* Vol 1 *Sectional titles* (1995) 15–6.16.

49 Repealed s 4(5).

50 Repealed proviso to s 4(5).

51 *Ibid.*

52 Repealed s 4(10) read with repealed s 4(8).

53 S 4(1) read with s 7(2).

When instructing the architect and land-surveyor to draw up a draft sectional plan, the developer should therefore also instruct the architect or land-surveyor to carry out the necessary investigations in order to furnish the Surveyor-General with the required certificate. An architect or land surveyor acting on behalf of the developer is therefore required to inspect the property.[54]

If the investigations reveal any inconsistencies or irregularities, the developer, on being informed about them, may, in his discretion, bring an application to the local authority concerned for a condonation of the following instances of non-compliance:

(i) if in regard to any matter other than the proposed use, the building does not comply with an operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law at the date of the approval of the building plans;[55]

(ii) if, in regard to matters other than buildings, there is non-compliance with any applicable conditions of any operative town planning scheme, statutory plan or conditions; and

(iii) if the building has not been erected in accordance with any applicable building regulations or building by-laws in operation of the date of erection.

The local authority can thereupon condone such non-compliance by issuing a certificate of condonation to the applicant.[56] No certificate may, however, be issued for condonation of non-compliance with a national building regulation regarding the strength and stability of any building unless a deviation has been permitted or an exemption has been granted in terms of the National Building Regulations and Building Standards Act.[57]

The position before and after the Amendment Act differs in the following respects:

(i) There is no longer a positive obligation on the local authority to approve the scheme if certain criteria are met; instead, the local authority plays a role only if the developer in his discretion decides to approach it to condone certain discrepancies in the scheme.

(ii) The first formal step in the establishment of a sectional title scheme is therefore no longer the approval of the scheme by the local authority, but the submission of the draft sectional plan to the Surveyor-General for approval.

(iii) The matters that can be condoned correspond in general terms to the matters which the local authority formerly had to consider when approving the scheme. The only such instance where condonation is not possible is where the method and purpose of the proposed division into sections and common property are contrary to the provisions of an operative town planning scheme. If there is

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54 S 4(5).

55 Note that s 4(5)(a) contemplates condonation if, in respect of matters other than the proposed use, the building "at the date of approval of the building plan" did not comply with any operative town planning scheme, whereas the compliance s 7(2)(a)(ii) requires simply compliance with "any operative town planning scheme". As it reads now, s 4(5)(a) means that the local authority has no discretion to waive non-compliance with a town planning scheme as at the time of application to the Surveyor-General unless it also did not so comply at the date of approval of building plans.

56 S 4(5) *in fine*.

57 Act 103 of 1977. See proviso to s 4(5).

complete compliance with the requirements of the new section 4(5), the local authority need not be approached for condonation.

(iv) The local authority is not given a discretion to condone minor discrepancies and infringements when approached for condonation.

(v) The developer is given a wide discretion whether to apply for condonation. The result is that he can ignore discrepancies without seeking condonation.

(vi) The local authority, when approached for condonation, is not entitled to ask for further particulars.

(vii) There is no appeal to the Administrator from a refusal of the local authority to condone.

(viii) The local authority is, with certain exceptions, expressly forbidden to condone non-compliance with a national building regulation regarding the strength and stability of any building.

From the above, it is clear that a local authority's involvement in the establishment of a sectional title scheme is restricted to the following:

(i) approval of the building plans;

(ii) consideration of an application for condonation with regard to the aspects of the scheme indicated above; and

(iii) the issue of a certificate of approval where applicable.

If it is approached for condonation of discrepancies or infringements, the local authority does not have the power to request further particulars to assist in the exercise of its discretion to condone non-compliance. It may be argued that in order to apply its mind to the condonation, the local authority should be entitled to request further particulars as it deems fit. However, since this would reopen the door to unnecessary delays contrary to the spirit of the Amendment Act of 1997, the form of an application for condonation should be carefully regulated to obviate the need for a request for further particulars.

Formerly, the local authority had to make its decision known to the developer within 60 days of receipt of the application, or compliance with a request for further particulars.[58] The period within which the local authority should hand down its decision on the application for condonation should therefore at least be stipulated in the regulations. Failure to do so would reopen the door to delays and would deprive the applicant of his right to demand a speedy decision. Furthermore, the local authority now has a discretion to grant or refuse condonation. The developer no longer has a cheap statutory remedy of appeal to the Administrator.[59] Faced with the local authority's refusal to condone non-compliance, the developer will be compelled to effect physical changes to the scheme to ensure compliance with applicable regulations and thus obtain the certificate of the architect or land surveyor to be submitted to the Surveyor-General. A refusal to condone a discrepancy may in appropriate circumstances be taken on review to the High Court. In view of the fact that the local authority is not required to furnish reasons for its refusal,[60] such a right of review would have limited application. It would succeed only if it could be proved that the

58 See repealed s 10(8).
59 See repealed s 4(10) and 4(11).
60 Cf the repealed reg 3(a).

local authority clearly acted with ulterior motives or such gross unreasonableness that it could not have applied its mind to the application.[61]

In the case of a building under erection, the local authority was, in terms of the Sectional Titles Act, obliged to grant approval of the scheme in the following circumstances. First, it had to be satisfied that the building had reached a sufficient stage of completion to allow an architect or land surveyor preparing the draft sectional plan to take actual measurements of the building. Secondly, before the building had been completed, compliance with the other applicable requirements of section 4(5) relating to any operative town planning scheme and building regulations of building by-laws[62] was still required. If the local authority was satisfied about the above, it had to approve the scheme. If, however, there was non-compliance with any town planning scheme or building regulations, the local authority could either condone minor discrepancies or refuse to approve the scheme. In the latter case an appeal to the Administrator was allowed.

In terms of the Amendment Act of 1997, the policing role of the local authority in this regard has also been shifted to the land surveyor or architect who approaches the Surveyor-General for approval. In the case of an application in respect of a building under completion under section 4(5A), one of the documents to be submitted to the Surveyor-General is a certificate from the architect or the land surveyor concerned to the effect that the building and the land comply with all the applicable requirements mentioned in that subsection.[63]

3 3 Application to the Surveyor-General

The Amendment Act of 1997 eliminates the need for approval of the scheme by the local authority and provides instead that the developer must "cause" a draft sectional plan (plus a prescribed number of copies)[64] to be submitted to the Surveyor-General.[65] Since a number of important documents must now accompany the submission of the draft sectional plan, the prescribed form should be appropriately amended.[66] The application should no longer be signed by the land surveyor or architect[67] but by the developer or his representative. This is clear from the wording of the new section 7(2)(c) which requires that written authority is needed if the application is signed by a person other than the developer.

In addition to the draft sectional plan and the application form signed by the developer or his authorised agent, a whole range of documents must accompany the submission to the Surveyor-General:

(i) a certificate issued by an architect or a land surveyor stating that:

(a) the proposed division into sections and common property is not contrary to

(aa) any operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law; or

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61 See in general *The Administrator Transvaal and the Firs Investment (Pty) Ltd v Johannesburg City Council* 1971 1 SA 56 (A) 86.
62 Repealed s 4(5A).
63 S 4(5A) read with s 7(2)(d).
64 Reg 6(1).
65 S 4(1).
66 See reg 6(1) and Annexure 1 Form AB.
67 See Form AB.

(bb) any other current planning or development initiatives by any authority with jurisdiction over the area;

that may affect the development –

(b) in respect of matters other than the proposed use, the building is not contrary to any operative town planning scheme;

(c) in respect of matters other than buildings, any applicable condition of any operative town planning scheme has been complied with; and

(d) the building to which the scheme relates was erected in accordance with approved building plans.[68]

(ii) If condonation was granted, the certificate of the local authority which condoned certain specified instances of non-compliance.[69]

(iii) If the application is not signed by the developer personally, a written authority by the developer in which the signatory is authorised to sign the application on behalf of the developer.[70] This will always be required if the developer is a company or other juristic person.

(iv) If at the time of the application, the building is still in the process of erection, a certificate of the architect or land surveyor to the effect that the building is sufficiently completed for actual measurements to be taken and that the building and the land comply with any operative scheme, by-laws or regulations referred to in section 4(5) and that the proposed use of the property complies with any operative town planning scheme.[71]

(v) If the application concerns the conversion of a rental building to a sectional title scheme –

(a) an affidavit by the developer stating that the requirements for the tenants' meeting[72] have been complied with;

(b) a copy of the notice of the tenants' meeting[73] and the certificate which contains the particulars of the proposed scheme;[74] and

(c) if all the tenants have indicated in writing that they do not wish to purchase their unit, a certificate of a conveyancer to that effect.[75]

(vi) If the scheme does not involve the conversion of a rental building to a sectional title scheme,[76] an affidavit by the developer that the provisions relating to the tenants' meeting are not applicable.[77]

Although the Surveyor-General is not responsible for investigating the correctness or accuracy of any documents submitted to him,[78] he is not entitled to

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68 S 7(2)(a)(i), (ii), (iii) and (iv). The extent to which these statements correspond to the provisions on condonation is discussed above.
69 S 7(2)(b) read with s 4(5).
70 S 7(2)(c).
71 S 7(2)(d) read with s 4(5A) and 4(5). While s 4(5A) requires compliance in respect of the building only, s 7(2)(d) requires a certificate in respect of both the buildings and the land.
72 In terms of s 4(3).
73 S 4(3)(a)(i).
74 S 4(3)(a)(ii).
75 S 4(3). See for all these document s 7(2)(e).
76 See s 4(3).
77 S 7(2)(f).
78 S 7(2A).

approve a draft sectional plan unless the applicable documents have been submitted to him.[79]

The following comments can be made on the procedure outlined above. First, the architect or land surveyor surely need not comment on discrepancies and infringements condoned by the local authority. As the section reads, no account is taken of the fact that the certificates required in (i) and (ii) might overlap. Secondly, in the light of financial risks involved in an unreviewable refusal to grant condonation, unscrupulous developers may be tempted simply to ignore any discrepancy. This would put the architect or land surveyor who is responsible for the certification of compliance with the scheme in an impossible situation. Since the Surveyor-General is not responsible for the accuracy of the documentation submitted to him for approval,[80] the responsibility for the accuracy of the documentation and compliance with the Act fall squarely on the shoulders of the architect or land surveyor who submits the application. Should it later become apparent that, despite certification to the contrary, the scheme does not in fact comply with an operative town planning scheme, building by-law or building regulation, the architect or land-surveyor could in appropriate circumstances be held liable for damages suffered by an interested party. The architect or land surveyor would therefore be well advised to insist on the developer's written indemnification prior to issuing the relevant certificate of compliance.[81]

3 4 Conclusion on process of establishment

In conclusion, it may be stated that the Amendment Act succeeds in its aim of streamlining the process of the establishment of a sectional title scheme. Once the building plan and the completed building have been approved, the scheme need not at a later date be subjected to approval by the local authority as a formal step towards establishing a sectional title scheme. This puts the developer in the driver's seat with regard to the establishment of the scheme. In consultation with his architect or land surveyor, he will consider whether to apply to the local authority for condonation of certain irregularities in the scheme. If there are no apparent discrepancies, or if he considers an application for condonation unnecessary, he will cause the draft sectional plan to be submitted to the Surveyor-General for his approval. In the case of the conversion of a rental building into a sectional title scheme, he will arrange for the meeting to be held in a formally

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79 S 7(4). Note that the role of the local authority is not only eliminated in the case of the original establishment of a sectional title scheme, but also in cases of subdivision and consolidation, the extension of a section by a sectional owner or the development of a further phase in a phase sectional title scheme. In all these cases the owner intending the subdivision, consolidation or extension (or the developer intending the next phase), must cause the land surveyor or architect concerned to submit a draft sectional plan of subdivision, consolidation or extension to the Surveyor-General for approval. In all three cases the documents which must be submitted to the Surveyor-General in terms of s 7(2) must be submitted, suitably adjusted. See s 21(1), (2)(a) and s 24(3), 4(a) and the deleted s 25(7).

80 S 7(2A).

81 SAPOA Memorandum (1991) has suggested that the certificate of the architect or land surveyor should be underwritten by a banker's guarantee or an insurance bond so that prospective purchasers who suffer loss because of non-compliance would have recourse to recover their loss.

correct fashion so that the necessary documents can be submitted to the Surveyor-General. An additional burden is, however, placed on the architect or land surveyor to certify that the proposed scheme is not in conflict in any respect with building by-laws and regulations or an operative town planning scheme. In the past architects were responsible for the approval of building plans and the preliminary approval of the draft sectional plan. Perhaps the reality of the practical situation has simply been given statutory validity. The important distinction is that the architect may now be held professionally liable for his certification in terms of the Act. However, suitable indemnification may protect him from this eventuality.[82] Ultimately, the role of local authorities as custodian of the public interest in the process of the establishment of a sectional title scheme, has been marginalised because of their incompetence or reluctance to play a meaningful role. Although local authorities do retain their powers to regulate zoning and compliance with building regulations, they will from now on exert an indirect rather than a direct influence on the process of establishment of a sectional title scheme.

In my submission, the role of local authorities as custodian of the public interest should rather have been increased than diminished. In terms of the New South Wales Act the local authority must ensure that, having regard to the circumstances of the case and the public interest, the proposed sectional title scheme does not interfere with the existing or likely future amenities of the neighbourhood.[83] A provision of this nature permits the refusal of an application if the scheme would create fire, noise or pollution hazards; if essential services, access roads and general traffic would be unduly strained; or if recreational facilities such as parks and playgrounds would become overcrowded.[84] In an application for the conversion of a rental building into a sectional title scheme, local authorities should have been allowed to refuse approval of the scheme if the life expectancy of the building proposed for division was too short because it was likely to be condemned soon because of its age. Again, as part of an urban renewal project, a local authority should have been empowered to grant an application on condition that defects in the roof, the plumbing or the electrical wiring of the rental building chosen for conversion first be repaired. Finally, if conversion to sectional title would result in a severe shortage of rental accommodation in the area of jurisdiction of the local authority concerned, it should perhaps have been allowed to refuse an application for conversion. Furthermore, some useful conditions have in the past been inserted in the sectional plan by local authorities or the Administrator, most notably the provision that sufficient parking should be provided for on the premises in order to avoid on-street parking.[85]

4 CONSUMER PROTECTION

The Amendment Act of 1997 repeals section 9 of the Sectional Titles Act which prohibited the developer from entering into any transactions with regard to proposed units before a sectional title register had been opened with regard to

82 See above.

83 See New South Wales Strata Titles Act 68 of 1973, s 37(1)(b)(iii).

84 It is not always possible to consider these factors in an application for the approval of building plans.

85 See further Van der Merwe and Butler Vol I *Section titles* 6–17. Provisions to prevent on-street parking must perhaps now be prescribed in a suitable regulation.

the building. The artificial distinction between buildings erected before 25 February 1981[86] (units in which could not be sold) and buildings erected after that date (units in which could legitimately be sold), was probably the main reason for the elimination of this section. Another was to discourage developers from circumventing section 9 by first creating a share-block scheme and providing for the conversion of the scheme to a sectional title scheme afterwards. This involves the tortuous process of first registering a share block company, transferring share blocks and finally converting them to sectional title ownership in accordance with the intricate procedures regulated by Schedule 1 of the Share Block Control Act.[87] This process was unintelligible to prospective purchasers and fraught with all the uncertainties inherent in the share block concept.[88]

Despite the repeal of section 9, prospective purchasers of proposed units are still protected by section 26 of the Alienation of Land Act.[89] This section is not dependent upon the date of erection of a sectionalised building, but states generally that no person shall by virtue of a deed of alienation relating to an erf or sectional title unit, receive any consideration until such erf or unit is registrable.[90] Thus units in a rental building erected before 1981 which is in the process of being converted to sectional title may now be offered for sale or sold even before a sectional title register has been opened for that building. Section 26 does not prohibit the sale of such units, but only the receipt of consideration in terms of a sale subject to two exceptions: first, if the money is paid into a trust account, and secondly if an unconditional guarantee has been furnished by certain financial institutions.[91] If the developer becomes insolvent before the unit is registrable, the amount held in trust or payable under the guarantee immediately becomes payable to the purchaser.[92]

In its zeal to expedite the process of establishment of a sectional title scheme, the Amendment Act also endeavours to eliminate the tenants' meeting which is aimed at giving tenants in a rental building being converted to sectional title as much information as possible about the proposed scheme.[93] In a new proviso, the developer is absolved from holding such a meeting if all the lessees in the rental building have stated in writing that they were aware of their rights as set out in their statement and that they do not wish to purchase the proposed units which they occupy. This must be accompanied by a written certificate issued by a conveyancer that such statements have been received in respect of all the units in question.[94] This injudicious inroad into the sophisticated protection afforded to

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86 The date of commencement of the Sectional Titles Amendment Act 12 of 1981 is 1981-02-25. S 2 of this Act inserted this prohibition as s 8A in the old Sectional Titles Act 66 of 1971, which prohibition was taken over as s 9 in the Sectional Titles Act 95 of 1986.

87 Act 59 of 1980. See Van der Merwe and Butler *Sectional titles, share blocks and time sharing* (1985) 435 *et seq*.

88 See in general Van der Merwe and Butler Vol I *Sectional titles* 7-9–7-10.

89 Act 68 of 1981.

90 S 26(1). In terms of s 26(3)(a) the money must be paid into the trust account of an attorney or an estate agent to be held in trust for the benefit of the seller. In terms of s 26(3)(b) an irrevocable unconditional guarantee can be supplied by banks, building societies and insurers registered as such under the relevant legislation.

91 S 26(3).

92 S 26(4).

93 See s 4(3).

94 First proviso to s 4(3)(b).

tenants can be questioned on the following grounds. First of all, it may be asked whether the developer's obligation in terms of section 4(3) to furnish all tenants with adequate information about the proposed scheme and their right of pre-emption, has been fulfilled as far as the tenants who opt not to buy their units are concerned. It is submitted that the notice prescribed in section 4(3)(a)(i) inviting the lessees to attend the information meeting must expressly state that the lessee has a choice either to attend the meeting or to furnish the conveyancer with the relevant written statement, and allow the lessee a certain period of time to make his choice. In order adequately to inform the lessees about the novel character of the choice they have to make and the consequences of such a choice, it is suggested that the prescribed notice in terms of section 4(3)(a)(i) should contain the following particulars:

(i) the date and particulars of the meeting;

(ii) the certificate of the developer pertaining to the particulars of the proposed scheme;

(iii) a *pro forma* option to notify a conveyancer in writing that they do not wish to purchase the units they occupy instead of attending the information meeting;

(iv) the name and particulars of the conveyancer to whom such notice must be given;

(v) the time period within which such notice must be given; and

(vi) the consequence of such notice or failure to do so.[95]

Secondly, the inadequate information supplied to tenants is not rectified by the written statement by the tenants that they are aware of their rights as set out in their statement. No procedure is provided for checking the accuracy of the rights so set out. It is further questionable whether the written statement by a tenant that he is not interested in purchasing his unit should also be construed as a waiver of the tenant's statutory right of pre-emption as well as of the period of grace he is given to seek alternative accommodation in terms of section 10.[96] Apart from being half-baked in that it does not take account of the tenant's right to sophisticated protection, this proviso is also impractical because it requires that the written consent of *all* the tenants must be obtained before the tenants' meeting can be eliminated.

With regard to a tenant's right of pre-emption, the Amendment Act of 1997 deletes the intractable phrase in the Sectional Titles Act which stated that a developer shall *notwithstanding that a sectional title register has been opened in respect of a building and land*, not sell a unit occupied by a tenant to any person other than such lessee.[97] This unfortunate phrase was formerly interpreted to mean that the right of pre-emption applied even if the local authority had approved the scheme without the tenants' meeting having been held.[98] This uncomfortable explanation will henceforth not be necessary. Any contract concluded in conflict with the right of pre-emption is still void and the parties enjoy the same

95 The author is indebted to one of his LLM students, Miss Lindy van Rooyen, for these suggestions.

96 S 10(1), (2) and (3).

97 S 10(1).

98 See Cowen "Consumer protection for sectional title and share block – the way ahead" *Supplement* to 1983 *Planning and building developments* 8; Van der Merwe *Sectional titles* 7–22.

rights of restitution as before. This is accomplished by resurrecting the deleted section 9(3) and section 10(5)(b).

5 REGISTRATION OF THE SECTIONAL PLAN AND OPENING OF A SECTIONAL TITLE REGISTER

Amendments in this regard concern the documents which must accompany a developer's application for the registration of the sectional plan and the opening of a sectional title register. Since the local authority or the Administrator is no longer empowered to impose conditions when approving a sectional title scheme, and since an architect or land surveyor has to certify certain facts with regard to a building which is under completion, the documents evidencing these conditions or facts need no longer accompany the application.[99] The only other amendment is a proviso to section 11(3)(d) that section 40(5) of the Deeds Registries Act applies with the necessary changes, to any bond which is registered against one or more pieces of land shown on the sectional plan. Section 40(5) of the Deeds Registries Act[100] provides that a certificate of consolidated or amended title may not be issued unless a mortgage bond burdening any plot of land is first cancelled. If the sectional title scheme thus comprises two plots of land which have been consolidated or only a part of one plot of land, bonds which are registered against such plots must first be cancelled. The developer may, however, apply for registration of the bond against the consolidated or amended title with the consent of the bondholder.[101]

6 TRANSFER OF A UNIT OR REAL RIGHTS

Section 15A has been streamlined by the Amendment Act of 1997 by the deletion of section 15A(2) and the transcription of the contents thereof into subsection 15A(1). The result is that not only a conveyancer, but any other person who is authorised to provide proof of certain facts, may provide deeds and documents needed for transfer of ownership and other rights. Section 15B has also been amended to clarify which certificates must be furnished to the Registrar before he may proceed to register a transfer of a unit or an undivided share therein.[102] Finally, section 15B(6) has been deleted, absolving a conveyancer who has prepared a deed of transfer, of the duty to retain his file with documents relating to the transaction in question for a period of at least six years after the date of registration of such deed of transfer. With this deletion the only difference between transfer of a sectional title unit and of a plot of land is that the deed of transfer of a plot of land has to be accompanied by a diagram of the plot of land. This is not necessary for the transfer of a unit, since a mere reference to the registered sectional plan will suffice.[103]

7 DEALINGS WITH THE COMMON PROPERTY

Section 17, dealing in transactions in the common property, has been amended in several respects to fill certain gaps and to streamline the provisions. To cater for

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99 See the substitution of s 11(3)(b) and the deletion of s 11(3)(fA).
100 Deeds Registries Act 47 of 1937.
101 Deeds Registries Act 47 of 1937 s 40(5) read with the Sectional Titles Act 95 of 1986 s 11(3)(d).
102 S 15B(3)(a) and (b).
103 See s 15B(2).

the case where a right to extend the scheme in phases has been reserved,[104] section 17 now requires a unanimous resolution, as well as the consent of the holders of a right of extension,[105] to direct the body corporate to alienate or let a part of the common property. The Amendment Act also regulates the legal position where the whole of the right of extension under section 25 of the new Sectional Titles Act[106] or under section 18 of the old Sectional Titles Act[107] is affected by the alienation of the common property. In such a case, such a right may be cancelled by the Registrar with the consent of the holder, on submission of the title to the right of extension. The significance of this amendment is that the option of withdrawal of land in a phased scheme when financial expectations are not met, is legally recognised or at least facilitated.[108]

In terms of the amended section 17(3), the written consent of sectional bondholders is no longer required where a portion of the land on which no section or part of a section is erected, is alienated or let.[109] Not only the Surveyor-General, but also the local authority, must be notified of any reversion of land to the land register.[110] Where a lease is registered over a portion only of the land comprised in the common property, a new proviso stipulates that a diagram of that portion, approved in terms of the Land Survey Act,[111] must now be annexed to the deed of lease.[112]

Section 17(4), which deals with the alienation or lease of a portion of the land on which a section or part of a section is erected, has been tidied up. If such land is let, the amendment requires the Registrar not to register the lease unless it is made subject to any right which the owner of the section or part of the section may have.[113] The new subsection 17(4A) endeavours to deal with the amendment of the registered sectional plan to reflect only the remaining sections or parts of sections. It seems that the participation quota schedule must be amended and referred to the Surveyor-General for approval.[114] The Surveyor-General must notify the Registrar if any change or amendment affects the description or size of a section, so that the Registrar can simultaneously with the transfer of the land endorse the sectional title deed of the affected section with the new size as reflected in the amended participation quota schedule.[115] On being notified of such an endorsement, the Surveyor-General must make the necessary amendments on the original sectional plan, the deeds registry copy of the sectional plan

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104 In terms of s 25.

105 The reading of the amended s 17(1), namely the "owners and holders of a right of extension in terms of section 25 may by unanimous resolution direct the body corporate" is unfortunate. The holders of such a right are not members as such of the body corporate and therefore never take part in a unanimous resolution.

106 Act 95 of 1986. The transitional provision s 60(1)(b) of the new Sectional Titles Act 95 of 1985 preserves a right of extension acquired under s 18 of the old Sectional Titles Act before the promulgation of the new Sectional Titles Act 95 of 1986.

107 Act 66 of 1971.

108 See new proviso to s 17(1).

109 See amended s 17(3)(a) and (c).

110 See amended s 17(3)(b).

111 Act 9 of 1927.

112 Proviso to s 17(3)(c). A similar diagram annexed to the title deed is already required in terms of s 17(1)(a) if a portion of the land is *alienated*.

113 S 17(4)(b).

114 S 17(4A)(a).

115 S 17(4A)(b).

and the participation quota schedule.[116] The difficulty with this amendment is that section 17(4A) contains no indication of how the participation quotas of the remaining sections or parts of sections must be adjusted. In the case of residential sections this can presumably be done by utilizing the proportional floor area method. Since the developer need not reveal the formula by which he allocates participation quotas to non-residential sections, readjustment of the participation quotas of the remaining sections in a non-residential scheme may give rise to insurmountable problems except if the legislator wanted to give the Surveyor-General an absolute discretion in this regard. Finally, where a portion of land on which an exclusive use area or part of it is registered, is alienated, a new section 17(4B) provides that the Registrar may not register the transfer unless the registration of the exclusive use area or part of it has been cancelled with the written consent of the holder.[117] Such a cancellation must be notified to the Surveyor-General so that he can make the necessary amendments on the original sectional plan and the deeds registry copy of the sectional plan.[118] No mention is made of the case where a portion of the land on which an exclusive use area is registered, is not alienated but merely let in terms of section 17(1).

Section 17(5), dealing with the case where the whole of the land comprised in the common property (that is, the land and all the units, etcetera) is alienated, has been set in order. The (sectional) title deeds of the owners of units, the holders of registered real rights in the units, and the holders of exclusive use areas must be surrendered to the Registrar for cancellation. In addition, the title deeds of any other registered real right in the land, excluding mineral rights, must be surrendered to the Registrar for endorsement before the sectional title register is closed. Notification of the closure must be given to the Surveyor-General and the local authority.[119]

8 SUBDIVISION AND CONSOLIDATION

The provisions on subdivision and consolidation have been streamlined by the repeal of section 20 and the incorporation of the provisions on subdivision into section 21. Instead of having to obtain the approval of the local authority, the sectional owner who wants to subdivide or consolidate must now cause the land surveyor or architect to submit the draft sectional plan of subdivision or consolidation to the Surveyor-General for approval.[120] The documents referred to in section 7(2), suitably adjusted, must accompany the submission to the Surveyor-General.[121] Because the local authority or Administrator is no longer empowered to impose registrable conditions, the two copies of the sectional plan of subdivision or consolidation need no longer be accompanied by a schedule containing conditions imposed by these public authorities when the sectional owner applies for the registration of the plan of subdivision or consolidation.[122]

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116 S 17(4A)(c).
117 S 17(4B)(a).
118 S 17(4B)(b). Note that the provisions of s 17(4A) and (4B) also apply to the cancellation of a section when land which has been expropriated is transferred in terms of s 19(4).
119 S 17(5).
120 S 21(1).
121 S 21(2)(a). Of practical importance would be the certificate of the architect or land surveyor that the proposed subdivision does not conflict with applicable building plans or regulations.
122 S 22(2)(a) and 23(2)(a) respectively.

9 EXTENSION OF A SECTION

Section 24, dealing with the extension of sections, has been similarly streamlined to replace approval of the draft sectional plan of extension by the local authority with consideration by the Surveyor-General. As in the case of submission of a plan of subdivision or consolidation, the submission of the plan of extension must be accompanied by the documents mentioned in section 79(2), suitably adjusted.[123] With regard to the documents which must accompany the application to the Registrar for the registration of the sectional plan of extension, the consent of each sectional mortgagee in the scheme need not accompany the sectional mortgage bond on the section if a conveyancer has certified that there is not a deviation of more than five per cent in the participation quota of a section or sections as a result of the extension. If the deviation is more than five per cent, the conveyancer must certify that the mortgagee of each section in the scheme has consented to the registration of a sectional plan of extension.[124] Here again, the amended participation quota must presumably be calculated in accordance with the proportional floor area method in the case of residential sections. There is no indication of how the quotas in the scheme must be adjusted if a commercial section is extended.

10 PHASED DEVELOPMENT

The Act now provides that a right to develop a sectional title scheme in phases reserved by the developer, or which vests in the body corporate and for which a certificate of real right has been issued, may be transferred by the registration of a notarial deed of cession, not only in respect of the whole, but also in respect of a portion or a share in such a right. If the cession affects only a portion of the land comprising the scheme, such a portion must be identified to the satisfaction of the Surveyor-General.[125]

By the substitution of section 25(b) it is made clear that if the right of developing the scheme in phases vests in the body corporate, such phases may extend to land added to the common property in terms of section 26. Formerly, such an addition to the common property had to be used solely for the provision of additional amenities and facilities.

Section 25(6A) and (6B) has been inserted to give the developer a second bite at the cherry. If no reservation has been made by the developer and if the body corporate has not yet been established, the developer (accompanied by the sectional mortgage bond, the written consent of any bondholder and such of the documents contemplated in section 25(2) that are applicable) may apply for, and the Registrar may issue, a certificate of real right of extension.[126] Thereafter this Act applies with the necessary changes to such real right as if it had originally formed part of the application for the opening of the sectional title register and such certificate of real right is issued subject to any sectional mortgage bond against the land.[127]

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123 S 24(3) and 24(4)(a).
124 S 24(6)(d).
125 S 25(4)(b).
126 S 25(6A) read with s 12(1)(e).
127 S 25(6B).

Section 25(7) has been deleted, which obviates the need for approval by the local authority for an extension of the scheme in terms of section 25. For the same reason, a submission to the Registrar of the plan of extension need no longer contain a schedule certified by a conveyancer containing registrable conditions imposed by the local authority or the Administrator when approving the extension of the scheme.

11 ADDITION OF LAND TO THE COMMON PROPERTY

Section 26, dealing with the extension of the scheme by addition of land to the common property, has been amended in the sense that the land added to the common property need no longer be used only for the provision of amenities and facilities.[128] As in other cases, the requirement of approval by the local authority has been deleted.[129] Curiously, section 4(2) has not been amended. Does this mean that the piece of land added to the common property in terms of section 26 must first be consolidated or notarially tied to the existing land before a building to be sectionalised can be erected on it?

12 EXCLUSIVE USE AREAS

As in the case of the reservation of a right to develop in phases, the developer is also given a second opportunity to reserve exclusive use areas. If no reservation was made when the sectional plan was registered and the body corporate has not yet been established, the Amendment Act allows the developer to apply (with the written consent of any sectional mortgage bondholder) to the Registrar to be issued with a certificate(s) of a real right(s) in respect of (a) right(s) of exclusive use.[130] Thereafter the Act applies (with the necessary changes) to such real right(s) as if they had originally formed part of the application for the opening of the sectional title register. Such certificate of real right is issued subject to any sectional mortgage bond against the land.

By inserting a new section 27(A), the Amendment Act opens the door for a cheaper and less cumbersome method of establishing exclusive use areas by reverting to the establishment of exclusive use areas in the rules of the scheme, a method practised in terms of the old Sectional Titles Act.[131] The developer may now, on application for the opening of a sectional title register, instruct a conveyancer to certify that a special rule providing for exclusive use areas has been added to the model rules applicable to the scheme.[132] Likewise, the body corporate is empowered to amend the management (or conduct) rules of the scheme by a unanimous (or special) resolution of the body corporate to provide for exclusive use areas. The Registrar of Deeds must be notified of such an amendment, and once this notification is filed, the rule becomes enforceable.[133] The

128 See s 26(1) where the phrase "for the purpose of providing amenities and facilities to its members" has been deleted.

129 S 26(2) has been deleted.

130 S 27(1A) read with s 12(1)(f).

131 Act 66 of 1971. See Van der Merwe and Butler *Sectional titles* (1985) 179 231.

132 Pursuant to s 11(3)(e) a certificate by a conveyancer must state whether the model rules of Annexure 8 and 9 are applicable and must contain any special rules inserted or substituted by the developer.

133 S 35(5) read with s 11(3)(e).

requirements for such a rule are that it must include a layout plan to scale on which the locality of the distinctively numbered exclusive use and enjoyment parts (areas), as well as the purpose for which such areas may be used, are clearly indicated; as well as a schedule indicating to which member every part is allocated.[134] The Amendment Act states expressly that exclusive use areas created in this way, do not create the rights contemplated in section 27(6).[135] This means that these exclusive use rights, unlike *genuine* rights of exclusive use complying with the requirements of section 27(2), are not deemed to be a right to urban immovable property which is capable of being mortgaged.

In future, one will therefore have to distinguish between *genuine* exclusive use areas created pursuant to section 27(2) and *non-genuine* areas of exclusive use (sole utilisation areas) established by means of special rules. In practice, the trustees will have to keep a register of these sole use areas and record changes in ownership. The owners to whom these rights are allocated will not acquire any real rights with regard to these areas, they will not be issued with certificates of real rights, and unlike genuine rights of exclusive use these rights will be incapable of being mortgaged as security for a loan. Ultimately, the owners will, like share-block holders pursuant to a use agreement in a share block scheme, acquire contractual rights enforceable only between the owners *inter se* and the body corporate. Since these areas are nevertheless designated as exclusive use areas, they will be subject to the other provisions of the Act dealing with exclusive use areas.[136]

Unfortunately the Amendment Act merely states that the developer or body corporate may make *rules* to establish these rights of exclusive use without specifying by which type of rules this can be done. This opens the door for these areas to be established by a special resolution in the form of conduct rules. In view of the importance of exclusive use areas and their capacity to create conflict between sectional owners, it is submitted that the legislator should have stated clearly that exclusive use areas may be established only by way of management rules and thus by means of a unanimous resolution.[137]

13 RULES

Previously, the Registrar of deeds would examine special rules and could reject them if they imposed obligations or conditions which detracted from a sectional owner's rights or if they were in conflict with the provisions of the Act or the regulations applicable to rules. The amended section 35(5) now makes it clear that the Registrar will no longer be involved in the enforcement or application of the rules. An owner who feels aggrieved by a special management or conduct rule, will therefore have to apply to court to have the rule set aside. Section 35(5) further absolves the Registrar from the obligation to note any substitution, addition, amendment or repeal of rules against the conveyancer's certificate pertaining

134 S 27A(b) and (c).

135 S 27A(a).

136 See eg s 37(1)(b) and s 44(1)(a), (c) and (e). If these areas were designated something else, eg "sole utilisation areas", limitations on the use and enjoyment of these rights, etc would have to be spelt out in the rule establishing such area. See in general Van der Merwe "The establishment of exclusive use areas in terms of the Sectional Titles Act by means of management rules" 1997 *THRHR* 325–329.

137 See s 35(2)(a).

to the rules which must accompany the developer's application for registration of the sectional plan and the opening of a sectional title register.[138] Such a substitution, addition, amendment or repeal of rules now comes into operation on the date on which the Registrar files the notification of such substitution, addition, amendment or repeal.[139]

14 SAVINGS AND TRANSITIONAL PROVISIONS

The Act provides that the registration of a sectional plan and the opening of a sectional title register (which had before the coming into operation of the Sectional Titles Act of 1986 to be approved by the local authority in terms of the Sectional Titles Act of 1971), must be completed as if the 1971 Act had not been repealed. This is subject to the proviso that such registration be effected within 24 months after the commencement of the Sectional Titles Amendment Act of 1997 or such extended period as may be prescribed by regulation.[140]

Similarly, a certificate of real right to develop the scheme in phases (in terms of section 25 of the Sectional Titles Act of 1986) may be obtained by the holder of a right of extension in terms of section 18 of the Sectional Titles Act of 1971, upon compliance with section 25. Such a certificate will be issued only if the right of extension still vests in the developer and if a conveyancer certifies that the consent of all owners and mortgagees to the extension has been obtained. The right to obtain such a certificate likewise lapses if it has not been obtained within 24 months after the commencement of the Sectional Titles Amendment Act of 1997 or such extended period as may be prescribed by regulation.[141] Finally, an owner who has acquired a right of exclusive use under rules made under the 1971 Act, may now request the body corporate to transfer such a right to him by the registration of a notarial deed without having to obtain the consent of a mortgagee of that owner's section.[142]

15 CONCLUSION

The amendment of the Sectional Titles Act was necessary to bring the Sectional Titles Act into line with changes in other legislation and to streamline certain procedures and provisions of the Act. Certain other amendments to the Act, notably the reinstatement of the practice of establishing areas of use and enjoyment in terms of the rules, may also be applauded. The main concern is that most of the amendments concern technical deeds registration matters which make the South African legislation more complicated than is necessary. A good example of this is the procedure by which the local authority, when approached, is allowed to condone certain infringements of operative town planning schemes and building plans. If the South African Act cannot be kept simple, straightforward and clear it will never again serve as a model for new overseas legislation as has occurred in the case of the proposed Scottish Law of the Tenement. Having recently experienced the way in which the local council of Amsterdam has

138 S 35(5)(b).
139 S 35(5)(c).
140 S 60(1)(a).
141 S 60(1)(b).
142 S 60(3).

employed the institution of sectional title (*appartementeneigendom*) to clear the slums of old Amsterdam in a courageous urban renewal project, I am also distressed by the fact that the function of South African local authorities of approving and setting standards for the improvement of sectional title schemes and alterations to them is no longer proactive. Was it really necessary to move the pendulum so far in favour of the developer at the expense of the sectional owner and the public in general?

If I were to accede to [the] request and declare the customary law rule of succession invalid because it offends against public policy, I would, I believe, be applying western norms to a rule of customary law which is still adhered to and applied by many African people. If one bears in mind, further, that in the present case such a declaration would also have an effect on the customary family law rules, I do not think that public policy, or the interim Constitution, requires me to do that. I think that I would be adopting a paternalistic attitude towards many black people in the country if I hold in the present case that the customary law rule of succession falls foul of s 1(1) of the Law of Evidence Amendment Act (per Mynhardt J in *Mthembu v Letsela* 1998 2 SA 675 (T) 688).

Die repudiëringskonstruksie toegepas by onuitgevoerde kontrakte in die insolvensiereg teenoor 'n nuwe benadering in hierdie konteks

(vervolg) *

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SUMMARY

The repudiation construction applied to unexecuted contracts in insolvency law *vis-à-vis* a new approach in this context

Despite ample authority regarding unexecuted contracts in the South African law of insolvency and the important role they play in the law of insolvency, many problems and questions regarding the general rule remain unsolved and unanswered. The traditional view is that the trustee has the capacity to "terminate" the contract. A more recent view is that the trustee simply "repudiates" the duties arising from the unexecuted contract when he decides not to comply with these duties. It is therefore necessary to analyse both these views. In a previous article the *practical consequences* of each were investigated. The various decisions of the Supreme Court regarding the power of the trustee were thoroughly investigated. This article (as part two of a series of articles on the topic) deals with the practical application of the repudiation construction in the event of insolvency, to assess whether it provides satisfactory results. To let justice prevail, one will inevitably have to deviate from the general principles of the law of contract if the repudiation construction is applied in this context. This article substantiates the writer's viewpoint that a provision should be introduced into South African law explicitly to acknowledge the capacity of the trustee to terminate unexecuted contracts when the insolvent estate still has duties to perform in terms of the contract. Moreover, the concurrent claim of the other (solvent) contracting party for non-compliance with the stipulations of the contract, must be acknowledged explicitly. Related to this, it is also submitted that the trustee should forfeit his right to claim return of the goods. This should at any rate be the case where ownership has already passed to the other party. The benefit which the solvent party receives in this situation should be balanced against his claim based on non-performance by the other party. If the solvent party has already performed and the trustee uses his capacity to terminate the contract, the question is whether ownership has already passed to the insolvent. If it has not, the owner has a claim for the return of what was performed as well as a concurrent claim based on non-performance of the contractual obligations.

1 INLEIDING

Soos kortliks in die vorige artikel* daarop gewys, het die appèlafdeling duidelik besluit dat die optrede van die kurator 'n "repudiëring" daarstel. Dié kwessie

* Sien 1998 *THRHR* 15–41.

word ook deur Oelofse[1] bespreek, spesifiek met verwysing na *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd.*[2]

Die feite van hierdie saak was kortliks die volgende: Appellant was 'n maatskappy in likwidasie (werkaannemer).[3] Die gesamentlike voorlopige likwidateurs[4] het in die hof *a quo* regstappe teen die respondent (werkgewer) ingestel uit hoofde van twee sake waarin betaling van sekere bedrae geëis is. Dit is gedoen op grond van tussentydse sertifikate wat reeds voor die voorlopige likwidasieaansoek aan die aannemer uitgereik is. Dié uitreiking het geskied ingevolge twee aparte boukontrakte tussen die partye. Die sake is gelyk aangehoor. Die werkgewer het die aansoeke teengestaan. Albei aansoeke is met koste verwerp. Daarteen het die aannemer geappelleer.

Volgens die ooreenkoms tussen die partye moes die werkgewer binne veertien dae ná uitreiking van die sertifikate die betrokke bedrae betaal (klousule 25.1). Klousule 22.1.3 het egter bepaal dat die werkgewer die kontrak kon kanselleer as kennisgewing aan die aannemer gegee is om die werk met redelike ywer te hervat én laasgenoemde versuim het om dit binne veertien dae te doen. Klousule 22.2 het ook bepaal dat die werkgewer die kontrak kon kanselleer as die aannemer gelikwideer sou word. Volgens klousule 22.3.4 van die ooreenkoms hoef die werkgewer nie te betaal vir werk gedoen nie indien die kontrak ingevolge laasgenoemde twee klousules gekanselleer sou word. Dit sou die geval wees totdat alle werk voltooi is. Voordat die veertien dae ingevolge klousule 25.1 verstryk het, het die werkgewer 'n kennisgewing aan die aannemer gegee om die werk te voltooi.[5] Dit is nie binne veertien dae gedoen nie. Daarop het die werkgewer die kontrak gekanselleer en ook geweier om ingevolge die eerste sertifikate te betaal. Ná die kansellasie het die gesamentlike voorlopige likwidateurs gekies om nie met die kontrak voort te gaan nie. Hulle het ook geëis dat die aannemer, ongeag die bepalings van die kontrak, op betaling geregtig was uit hoofde van die sertifikate wat voor likwidasie uitgereik is. Die argument was dat 'n reg op betaling reeds op datum van likwidasie toegeval het. Die volgende argument was dat klousule 22.3.4 teen die *concursus creditorum* werk, met die gevolg dat die werkgewer voorkeur bo dié groep verleen sou word indien hy toegelaat sou word om sy keuse tot kansellasie uit te oefen.

Die geskilpunt in hierdie saak was dus die reg van die aannemer (appellant) om betaling af te dwing van bedrae, gereflekteer as deur die werkgewer (respondent) aan die aannemer verskuldig te wees uit hoofde van tussentydse sertifikate wat voor likwidasie aan hulle uitgereik is. Dit moet egter gesien word in die lig van die werkgewer se verweer dat die kontrakte behoorlik gekanselleer is (hoewel ná die aannemer se likwidasie). Die uitspraak van die hof was dat die werkgewer se kansellasie die likwidateur se "keuse om te repudieer" voorafgegaan het. Die werkgewer was nie 'n skuldeiser van die insolvente boedel nie. Hy

1 1988 *THRHR* 543.
2 1988 2 SA 546 (A).
3 *Conductor operis*, hierna die "aannemer".
4 Die feit dat likwidateurs en nie 'n kurator nie betrokke is, is mbt die spesifieke onderwerp nie van belang nie. Sien Meskin *Insolvency law and its operation* 9 5–52; Cilliers ea *Ondernemingsreg* (1993) 412.
5 Dit is inderdaad ook gegee op dieselfde dag toe aansoek om 'n voorlopige likwidasiebevel gedoen is. Die bevel is egter nie daardie dag toegestaan nie.

was wel 'n skuldenaar. Hy het nie probeer om die kontrak af te dwing nie. Hy het slegs probeer om hom teen 'n eis vir betaling deur die aannemer te verweer.[6] Die likwidateurs moes die kontrak neem soos hulle dit gekry het. Hulle kon nie 'n deel van die kontrak van die res daarvan isoleer en dít afdwing nie. Die *concursus creditorum* het nie die werkgewer verhoed om 'n verweer op te werp wat op die kontrak waarvolgens prestasie geëis word, gegrond is nie. Die hof het verder bevind dat die likwidasie nie die geldigheid van die werkgewer se kansellasie geraak het nie; as die likwidateurs gerepudieer het, kon hulle tog nie op betaling van die sertifikate aanspraak maak nie. Die werkgewer kon hom ook op die kansellasie van die ooreenkoms beroep.

Die probleem wat hier aangespreek word, is die gevolg van sekwestrasie van die boedel van een van die partye tot 'n kontrak ingevolge waarvan geeneen van die partye reeds volledig gepresteer het nie. Oelofse wys daarop dat as dit wel oor 'n blote repudiëring gaan waarop eers deur die ander party gereageer moet word voordat die kontrak ontbind word, die kurator inderdaad nog wel van plan sou kon verander voordat die keuse uitgeoefen is.[7]

Die skrywer verwys dan na *Norex Industrial Properties (Pty) Ltd v Monarch South Africa Insurance Co Ltd*[8] waar appèlregter Botha tot die gevolgtrekking kom dat die kurator nie die kontrak kon "beëindig" nie. Die regter wys daarop dat die besluit om nié met die huurkontrak voort te gaan nie, by ontstentenis van artikel 37 "repudiëring" sou daarstel. Die verhuurder sou dan die keuse hê om 'n eis vir skadevergoeding op grond van nie-voldoening aan die kontraktuele verpligtinge in te stel. Vervolgens is Oelofse van mening dat dit nie so duidelik is of bogenoemde gevolgtrekking en laasgenoemde aanname versoenbaar is nie. Sy kritiek is dat indien die kurator se "repudiëring" nie die kontrak beëindig nie, dit nie *op sigself* 'n konkurrente eis vir *skadevergoeding* teen die boedel in die lewe kan roep nie. As die "repudiëring" geïgnoreer word, sou die teenparty volgens appèlregter Botha se siening 'n konkurrente eis vir die *huurgeld* hê en nie vir skadevergoeding nie.[9] Die skrywer is verder van mening dat ook die

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6 Die argument van die aannemer (appellant) nl dat die werkgewer (respondent) se uitoefening van sy keuse om die kontrak te kanselleer, die *concursus creditorum* sou benadeel en dat hy sodoende 'n substansiële voordeel bo die ander skuldeisers sou verkry, was daarom ook nie suksesvol nie.

7 1988 *THRHR* 543–547. Hy verwys na *Culverwell v Brown* 1988 2 SA 468 (K) 477. Dit is korrek. Daar is egter net soveel gesag vir die reël dat indien die kurator eenmaal sy keuse uitgeoefen het, hy aan daardie keuse gebonde is. Sien bv *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester* 1982 4 SA 486 (NK) 495; *Gordon v Standard Merchant Bank Ltd* 1983 3 SA 68 (A) 95; *Uys v Sam Friedman Ltd* 1934 OPD 80 86, welke uitspraak in appèl 1935 AD 165 bevestig is. Dit is in stryd met bg beginsel soos dit by die kontrakbreukvorm repudiëring aangewend word (Joubert *General principles* 213; *HMBMP Properties (Pty) Ltd v King* 1981 1 SA 906 (N) 910, bevestig deur die appèlhof in *Culverwell v Brown* 1990 1 SA 7 (A)).

8 1987 1 SA 827 (A) 838. In hierdie saak was a 37 van die Insolvensiewet van toepassing. 'n Aantal opmerkings van die hof is egter gebaseer op die posisie wat sóú bestaan sónder a 37.

9 In die saak self is die kontrak op grond van a 37 beëindig. Dat Botha AR nie 'n volledige en bevredigende uiteensetting gee van die gewone of normale gevolge van repudiëring en die effek wat sekwestrasie daarop het nie, is waar. Die vraag is of aanvaar kan word dat die regter slegs die geval in gedagte gehad het waar die ander party op die "repudiëring" reageer. So 'n aanname is myns insiens nie geregverdig nie. In die saak is pertinent gekyk of beëindiging van die kontrak ingevolge a 37 "a statutory act of intervention which

vervolg op volgende bladsy

aanhalings uit *Liquidators FH Clarke & Co Ltd v Nesbitt*[10] nie baie duidelik met die regter se gevolgtrekking versoenbaar is nie. In laasgenoemde saak word uitdruklik verklaar dat

> "if the liquidators do not occupy the premises, but *repudiate* the lease, then the lessor will have his action for damages or *otherwise*".[11]

Heeltemal tereg vestig Oelofse die aandag op die feit dat appèlregter Botha na die *Muller*-saak verwys, maar dat hy nie aantoon hoe dit met sy standpunt versoen moet word nie aangesien in laasgenoemde saak uitdruklik gesê word dat die kontrak in so 'n geval "beëindig" word ("is terminated").[12]

In *Thomas* is beslis dat die kurator se "repudiëring" nie die kontrak beëindig nie. Volgens Oelofse beteken dit dat indien die solvente party die "repudiëring" ignoreer, hy nie op spesifieke nakoming deur die kurator teen lewering van sy eie teenprestasie aanspraak kan maak nie. Hy sal wel 'n *konkurrente* eis teen die boedel kan bewys vir (a) die insolvent se teenprestasie as dit 'n geldbedrag is; of (b) skadevergoeding in plaas van teenprestasie waar laasgenoemde nie 'n geldbedrag is nie.[13]

Die skrywer meen dat hierdie argument op 'n dooiepunt uitloop. Die moontlike instandhouding van die kontrak word erken terwyl die solvente party nie volle teenprestasie of volle skadevergoeding van die kurator kan verkry nie. Die eis teen die boedel is gebaseer op die solvente party se voortgesette plig om ook

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conferred on the plaintiff a right differing in its juristic nature from the rights it had previously enjoyed" was. Die regter moes dus noodgedwonge na die regsposisie in geheel kyk. Dit is ook moontlik dat die bedoeling juis is (maar dan behoort dit uitdruklik so gestel te word) dat die ander party in hierdie gevalle nie 'n keuse het om die "repudiëring" te ignoreer en skadevergoeding te eis nie; die motivering daarvoor is juis dat as die kurator nie met die kontrak wil voortgaan nie, die teenparty nie spesifieke nakoming kan eis nie. Ek twyfel of dit 'n geldige verklaring kan wees. 'n Eis vir skadevergoeding (terwyl die kontrak in stand gehou word omdat die onskuldige party die ander se "repudiëring" ignoreer) is nie 'n eis vir spesifieke nakoming nie – dit is bloot 'n konkurrente eis. 'n Ander moontlike verklaring is dat die regter die konkurrente eis vir die huurgeld as 'n eis vir skadevergoeding sien omdat die skadevergoedingseis op die huurgeld gebaseer is. Dit is 'n eis vir skadevergoeding gelyk aan die waarde van die prestasie. Die waarde van die prestasie wat nie ontvang is nie, is die skade van die onskuldige party. Omdat die prestasie van die insolvent nie altyd uit 'n geldbetaling bestaan nie, sal dit myns insiens onbevredigend wees om hierdie deel van die uitspraak in die *Norex*-saak as gesag vir 'n algemene reël by onuitgevoerde kontrakte aan te voer.

10 1906 TS 726.

11 728 (klem ingevoeg).

12 Botha AR verklaar later in the *Thomas*-saak dat die gebruik van die woord "terminate" in die *Muller*-saak nie letterlik opgeneem moet word nie; dat dit bloot beteken dat die kurator mag weier om die kontrak spesifiek na te kom. Dit is egter te betwyfel of hierdie interpretasie die werklike bedoeling van daardie hof korrek weerspieël.

13 Oelofse 1988 *THRHR* 546. Dit is in ooreenstemming met die appèlafdeling se beslissing in *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A), nl dat skadevergoeding as surrogaat van prestasie nie 'n selfstandige remedie is wat tot die benadeelde se beskikking is nie. Ná die saak is daar nie eenstemmigheid of hierdie spesifieke eis nog deel van ons reg uitmaak nie. De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 222 beklemtoon dat skadevergoeding as surrogaat van prestasie wel in hierdie omstandighede geëis mag word. Vir dié doeleindes is die markwaarde van die nie-gelewerde saak van belang (231). 'n Bedrag gelyk aan die waarde van die prestasie word dus geëis. Dit is bo en behalwe die gewone eis vir skadevergoeding omdat spesifieke nakoming nie plaasgevind het nie.

sy eie prestasie te lewer. Die kurator sal dus die bewese eis teen die boedel *ten volle* moet betaal ten einde die solvente party se prestasie te kan opeis. Die kurator is uit die aard van die saak nie bereid om dit te doen nie. Op grond van die *exceptio non adimpleti contractus* kan die solvente party tog nie gedwing word om ten volle te presteer teen betaling van 'n blote dividend op sy eie vordering nie.[14]

Gevolglik meen Oelofse dat die oplossing vir die probleem sou wees om te erken dat die kurator deur sy verwerping die kontrak met toekomstige werking beëindig, behoudens 'n konkurrente eis vir skadevergoeding teen die insolvente boedel. As dit nie aanvaar word nie moet die solvente party, in die geval waar die insolvent reeds gedeeltelik gepresteer het, baie versigtig wees by die besluit hoe hy op die kurator se "repudiëring" gaan reageer. Indien hy die "repudiëring" as sodanig aanmerk, sal hy die gedeeltelike prestasie moet teruggee terwyl hy self slegs 'n konkurrente eis vir skadevergoeding teen die boedel het. Ignoreer hy die "repudiëring", is hy terug by die dooiepunt hierbo bespreek.[15]

2 DIE *EXCEPTIO NON ADIMPLETI CONTRACTUS*

Die argument is dus dat wanneer aanvaar word dat die kurator bloot die kontrak repudieer (in die ware sin van die woord), 'n onwenslike resultaat volg. Die repudiëring kan byvoorbeeld deur die onskuldige party geïgnoreer word met die gevolg dat die kontrak in stand bly. Tog kan dit nie afgedwing word nie. Die solvent kan nie volle prestasie of skadevergoeding verkry nie. Dit is veral 'n probleem wanneer die *exceptio* as verweer teen 'n eis om vervulling vir die solvente kontraksparty beskikbaar is. Die *exceptio* is nie 'n remedie ná kontrakbreuk nie. Dit is 'n verweer gerig op vervulling van die ooreenkoms tussen die partye.[16] Waar een kontraksparty die ander vir prestasie aanspreek terwyl hyself nog nie (volledig) gepresteer het nie en ook nie prestasie aanbied nie, kan die aangesprokene hom met die *exceptio* verweer sonder om enigsins weens versuim veroordeel te word. Dit is die geval totdat die eiser bewys dat hy wel gepresteer het of bereid was om ooreenkomstig die kontrak te presteer.

In geval van 'n gebrekkige prestasie is die reël dat indien die eiser wel gepresteer het maar sy prestasie só gebrekkig is dat die verweerder dit mag verwerp, en dit ook doen, kan die *exceptio non adimpleti contractus* suksesvol opgewerp

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14 Die skrywer wys daarop dat die solvente party wel van die *exceptio* afstand kan doen en die dividend in ruil vir sy eie volle teenprestasie kan aanvaar. Hy kan egter nie daartoe gedwing word nie. Hy vra dan of die blote bewys van 'n eis teen die boedel in die toekoms as 'n afstanddoening van die *exceptio* beskou sal word. Dit is nie seker nie. Myns insiens is die antwoord negatief. Dit sal beteken dat die teenparty se posisie soos wat dit op die oomblik van sekwestrasie bestaan, in 'n groot mate verswak word. Hy word van die voordeel van die weerhoudingswaarde van sy eie prestasie ontneem. Sien ook Swart *Rol van die concursus creditorum* 471 ev.

15 Op die veronderstelling dat die kurator nie die kontrak beëindig deur dit te "verwerp" nie, sê Oelofse 1988 *THRHR* 547 dat voorskrifte soos a 35 en 37 volslae anomalieë is.

16 Die vereistes daarvoor is kortliks dat die kontrak tussen die partye wederkerig moet wees (*BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A)), die prestasie van die eiser voor of gelyktydig met die prestasie van die verweerder verskuldig moet wees en dat die eiser self nog nie gepresteer het nie en ook nie prestasie aanbied nie (De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 197 ev; Joubert *General principles* 229).

word.[17] Dit sal inderdaad ook die regsposisie wees indien die eiser se boedel intussen gesekwestreer is. Veral aktueel by sekwestrasie-aangeleenthede is onuitgevoerde aanbestedingskontrakte. Die weerhoudingsreël kan wel verslap word[18] en indien dit gedoen word, sal die aanbesteder beveel word om die kontraksprys *minus* wat dit sal kos om die gebrek te herstel, te betaal.[19] Indien die aannemer nie ten volle gepresteer het nie, rus die bewyslas op hom om eerstens te bewys dat die aanbesteder die prestasie benut; dat daar omstandighede bestaan wat dit billik maak dat die hof sy diskresie in die guns van die eiser moet uitoefen; en laastens wat die verminderde kontraksprys moet wees.

Waar een van die kontrakspartye se boedel gesekwestreer word, kan die volgende situasie voorkom: Die insolvent het slegs gedeeltelik of gebrekkig gepresteer. Die ander party doen eenvoudig niks. Hy werp telkens net die *exceptio* op wanneer die kurator teenprestasie eis. Die kurator wil slegs teenprestasie vir die gedeeltelike prestasie hê omdat hy, met verwysing na die omstandighede van die insolvente boedel, nie bereid is om die kontrak in geheel in stand te hou nie. Soos enige ander persoon wat gebrekkig gepresteer het, sou die kurator 'n eis vir 'n verminderde kontraksprys teen die solvente party kan instel. Die kurator moet vervolgens bewys wát die verminderde kontraksprys moet wees. *Daarbenewens* moet hy bewys dat die teenparty die prestasie benut. In omstandighede kan dit 'n moeilike bewyslas wees, gedagtig daaraan dat die teenparty *eenvoudig kan ontken* dat hy benut. Die kurator sal hom gevolglik tot die hof moet wend.[20] Dít kan 'n duur en uitgerekte proses tot gevolg hê. Benadeling van die *concursus creditorum* is dan onvermydelik. Die vraag is vervolgens of 'n kurator in hierdie spesifieke omstandighede makliker as enige ander skuldeiser behoort te kan eis. Kan aan die hand gedoen word dat sekwestrasie van die boedel van die persoon wat gedeeltelik gepresteer het ook as 'n omstandigheid erken word wat dit billik maak dat die weerhoudingsreg van die teenparty verslap word, sodat die kurator geregtig sal wees om die verminderde kontrakprys van die ander party te eis sonder die las om benutting te bewys?[21] Of behoort dieselfde reëls vir alle eisers te geld? Die antwoord is 'n besliste ja, maar *slegs indien* die algemene beginsels en die toepassing daarvan in die insolvensiereg wel kan verhoed dat die teenparty bloot met gebruik van die *exceptio* afhandeling van die kontrak onbepaald kan uitrek. Sodoende sal die insolvente boedel ten koste van die *concursus creditorum* moontlik geen vergoeding vir die reeds gelewerde (gedeeltelike of gebrekkige) prestasie ontvang nie.

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17 De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 200.

18 Vir 'n volledige bespreking van hierdie beginsels sien *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

19 Innes R se standpunt in *Hauman v Nortje* 1914 AD 293 305 is dat die *bona fides* van die aannemer nie die grondslag van die verslapping is nie. So ook nie die grootte van die gebrek nie. Verslapping kan gevolglik intree, ongeag of die gebrek groot of klein is. Albei is slegs omstandighede by die billikheidsoordeel wat met die diskresie gepaard gaan.

20 In die praktyk is dit gewoonlik so dat benutting in geskil geplaas word en die partye gevolglik daaroor hof toe gaan.

21 'n Bedrag word dan van die volle kontraksprys afgetrek om vir die gebrek te vergoed. Dit sal beteken dat die gebrekkige prestasie van die insolvent "aangevul" word deur die betaling van 'n geldsom as plaasvervanger vir daadwerklike vervulling. Die kurator sal dus finansieel wesenlik in dieselfde posisie wees as waarin hy sou gewees het as hy die insolvent se onvolkome prestasie daadwerklik aangevul het.

By deelbare kontrakte moet die dele onafhanklik van mekaar beoordeel word. Die verweer dat die kontrak nie nagekom is nie kan alleen opgewerp word ten opsigte van daardie deel van die kontrak wat nie vervul is nie. Kontrakbreuk ten opsigte van een deel kan gevolglik nie teen 'n eis vir prestasie uit hoofde van 'n ander deel van die (deelbare) kontrak opgewerp word nie.[22]

Indien die vermoënsposisie van die een party na sluiting van die ooreenkoms versleg, is die algemene reël dat die party wat eerste moet presteer die risiko loop.[23] In beginsel is die *exceptio* nie tot die solvent se beskikking nie en wel omdat hy vooruit moet presteer. Hy móét dus presteer. In *Hayne v Narun Bros*[24] is beslis dat die vooruitpresteerder sekerheidstelling kan vra indien die gevaar bestaan dat die teenparty nie sal kan presteer nie. By gebrek daaraan kan hy uit die ooreenkoms terugtree. Die sekerheidstelling moet binne 'n redelike tyd geskied. Dit is 'n bevredigende reëling vir daardie gevalle. Kan die vooruitpresteerder egter dieselfde van die insolvente kontraksparty se kurator eis? Joubert[25] meen van ja. Is dit egter korrek? Deur sekerheid te stel, word die teenparty immers bo die ander skuldeisers bevoordeel. Sodoende word hy 'n versekerde skuldeiser.[26] Dít sal in stryd wees met die algemene beginsel van die insolvensiereg dat elke skuldeiser se eis beoordeel moet word soos dit op die oomblik van die sekwestrasiebevel bestaan.[27]

Indien sekuriteit nie binne 'n redelike tyd gestel word nie, is die implikasie dat die ander (solvente) kontraksparty verder 'n keuse om terug te tree verkry waarop hy nie voorheen geregtig was nie. Weer word hy bevoordeel. Die verskil is dan die volgende: Sou B in die voorbeeld hierbo reeds gepresteer het sonder om sekuriteit te vra terwyl die kurator kies om nie met die kontrak voort te gaan nie, het hy na die verwerping 'n konkurrente eis vir die waarde van die gelewerde prestasie[28] en vir skadevergoeding. Het hy wel sekuriteit gevra en dit is nie binne 'n redelike tyd gegee nie, kan hy volgens bogenoemde standpunt terugtree. Die prestasie wat hy moes lewer, is dan steeds in sy besit terwyl hy ook 'n konkurrente eis vir skadevergoeding op grond van kontrakbreuk het. Hy is dus inderdaad in 'n beter posisie as wat hy andersins sou gewees het.[29] Aangesien spesifieke nakoming nie afgedwing kan word nie, spreek dit myns insiens verder vanself dat *sekuriteit daarvoor ook nie afgedwing kan word nie.*

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22 De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 208 ev; Joubert *General principles* 232.

23 De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 198.

24 1926 OPD 207 210–214. Sien ook *Ullman Bros Ltd v Kroonstad Produce Co* 1923 AD 449.

25 *General principles* 232.

26 Indien die kurator met die kontrak wil voortgaan, moet hy bereid wees om dít waartoe die insolvent verbind was, te presteer. As hy in elk geval gaan presteer, sal die boedel nie die gestelde sekerheid verloor nie. Is hy egter nie van plan om die kontrak in stand te hou nie, sal bevoordeling plaasvind.

27 *Ward v Barrett* 1962 4 SA 732 (N) 736.

28 Die enigste uitsondering is as lewering daarvan geskied het sonder oordrag van eiendomsreg. In só 'n geval moet die kurator myns insiens teruggawe van die gelewerde prestasie aanbied. Hierdie standpunt is op een lyn met uitsprake soos *Mangold Brothers v Greyling's Trustee* 1910 EDL 471 476–477; *Insulations Unlimited (Pty) Ltd v Adler* 1986 4 SA 756 (W) 759; *Preston & Dixon v Biden's Trustee* (1884) 1 Buch AC 322 346.

29 Alhoewel dit 'n billike resultaat bewerkstellig, is dit nie in ooreenstemming met die algemene beginsel van die insolvensiereg nie.

Die logiese optrede in hierdie situasie is vir die vooruitpresteerder om die kurator by voorbaat te vra om sy keuse vir instandhouding van die kontrak al dan nie te maak. Die kurator is dan aan daardie keuse gebonde. Daarna moet hy volle teenprestasie lewer.[30] Die uiteindelike resultate van hierdie twee benaderings is dieselfde: Die insolvente boedel kan nie die prestasie bekom sonder om daarvoor te betaal nie. Die voordeel van laasgenoemde standpunt is egter dat daar nie in stryd met die algemene beginsels opgetree word of uitsonderings daarop geformuleer hoef te word nie.

3 DIE UITWERKING VAN DIE *EXCEPTIO* SPESIFIEK IN GEVAL VAN 'N SEKWESTRASIE

Vervolgens word die effek van die *exceptio* waar die boedel van een van die partye gesekwestreer is, ondersoek.[31] Die doel is om die toepassing van die repudiëringskonstruksie in sy volle konsekwensie op die gebied van die insolvensiereg te illustreer.

3 1 Die solvente party moet eerste presteer maar lewer slegs gedeeltelike prestasie[32]

(a) Indien die kurator die kontrak in stand wil hou, kan hy die volle prestasie opeis. Omdat die solvente party in hierdie stadium nog net gedeeltelik[33] gepresteer het, is die *exceptio* tot die kurator se beskikking. Daarmee kan hy volledige vervulling van die teenparty afdwing. Hy is dan verplig om ook volle teenprestasie te lewer.

(b) Wanneer die kurator "repudieer", kan die ander party daarop reageer en uit die kontrak "terugtree".[34] As die gedeeltelike prestasie met oordrag van eiendomsreg gelewer is, kan die onskuldige party dit nie terugeis nie. Hy het slegs 'n konkurrente eis vir skadevergoeding op grond van die kontrakbreuk en 'n konkurrente eis vir die waarde van die gelewerde prestasie. Indien eiendomsreg nie oorgegaan het nie, het die onskuldige party myns insiens 'n eis vir teruggawe van die gedeeltelike prestasie asook 'n konkurrente eis vir skadevergoeding op grond van die kontrakbreuk.[35] 'n Verdere moontlikheid wat hom ook hier kan voordoen, is waar die insolvent ook al gedeeltelik gepresteer het op grond van die gedeeltelike prestasie van die solvente party. Swart[36] is van mening dat ook in hierdie geval 'n probleem ontstaan:

> "Die gevolg hiervan is dat daar, net soos in die geval van instandhouding van die kontrak, 'n skaakmatsituasie ontstaan. Die kurator is naamlik verplig om te weier om die eis vir restitusie ten volle na te kom en die teenparty hoef van sy kant nie

30 Geeneen van die partye het al ingevolge die kontrak gepresteer nie.
31 Die *exceptio* kom slegs by wederkerige kontrakte ter sprake.
32 Dit gaan hier nie oor 'n deelbare kontrak nie.
33 Dit kan ook die geval wees waar hy onbehoorlik of gebrekkig gepresteer het.
34 In hierdie geval is die *exceptio* nie meer ter sake nie. Na terugtrede is daar nie meer 'n kontrak nie.
35 Die eis vir teruggawe kan in sekere omstandighede veroorsaak dat hy beter daaraan toe is as wat hy met instandhouding van die kontrak sou gewees het. Dit sal wees wanneer hy vir minder gekontrakteer het as wat hy self moet presteer, of waar die prestasie wat hy aan die insolvent gelewer het in waarde vermeerder het (Swart *Rol van die concursus creditorum* 464).
36 *Idem* 479 489.

die reeds ontvangde prestasie terug te besorg voordat hy die versekering het dat die kurator ten volle gaan presteer nie."[37]

(c) In die geval waar die solvente party die "repudiëring" ignoreer, word die volgende ter oorweging gegee: Deur die "repudiëring" te ignoreer, verklaar die solvente party homself bereid om volledig te presteer. Anders gestel, voortbestaan van die plig tot volledige prestasie is die noodwendige gevolg van 'n ignorering. Die dilemma in so 'n geval is dat die solvent eerste en volledig sal moet presteer. In ruil daarvoor het hy slegs 'n konkurrente eis vir prestasie (as dit 'n geldbedrag is) óf skadevergoeding (as die prestasie nie 'n geldbedrag is nie). Dit is so omdat die kurator juis nie bereid is om, as gevolg van die vorming van 'n *concursus creditorum*, die kontraktuele verpligtinge van die insolvent na te kom nie.[38] Hy sal derhalwe ook weier om die volle skadevergoedingseis uit te betaal.[39] Die teenparty het in hierdie omstandighede nie die *exceptio* tot sy beskikking nie.[40] Dit is ook my standpunt dat die solvente party nie op sekuriteit kan aandring voor hy verder presteer nie. Net soos 'n eis vir spesifieke nakoming kan sekuriteit daarvoor nie afgedwing word nie. Die kurator het dan juis "gerepudieer". In die gegewe feitestel sal dit vervolgens dwaas wees om die "repudiëring" te ignoreer. Die aangewese weg vir die solvente party is om uit die ooreenkoms "terug te tree". Sodoende hoef hy nie volledig te presteer nie.

Net soos Reinecke en Van der Merwe is dit ook Swart[41] se standpunt dat die wederkerigheidsbeginsel in hierdie gevalle van toepassing is. Van 'n party wat die kurator se "repudiëring" negeer, kan nie verwag word om ten volle te presteer en dan slegs konkurrent te eis nie. Swart doen aan die hand dat die teenparty in hierdie omstandighede 'n weerhoudingsreg analoog aan die *exceptio* sal hê.[42] Dit beteken dat die kontrak in stand gehou word terwyl die solvente party nie verder hoef te presteer voordat die kurator presteer nie. Die kurator wil egter nie presteer nie en juis daarom het hy die kontrak verwerp. Dit is na my mening 'n tipiese patsituasie. Al beskik die solvent dus oor die *exceptio* in die onderhawige omstandighede, is ek nie oortuig dat dit 'n bevredigende oplossing bied nie.

As die insolvent egter intussen op grond van die solvent se gedeeltelike prestasie ook gedeeltelik gepresteer het en die solvent, omdat hy daardie gedeeltelik gelewerde prestasie wil behou, nie wil terugtree nie, behoort die posisie soos volg te wees: Die solvente party behoort, ten spyte van die feit dat hy nie terugtree nie, 'n konkurrente eis vir skadevergoeding te kan instel op die basis dat hy weens die kurator se verwerping nie verder van sy kant af gaan presteer nie. Dán

37 Sien ook De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 215. Myns insiens is die gebruik van die term "skaakmatsituasie" nie korrek nie. 'n Skaakmatsituasie impliseer 'n wensituasie – nie 'n dooiepunt of dat alles gevries word nie. "Patsituasie" is 'n aanvaarbaarder term.

38 Hy kan ook nie tot spesifieke nakoming gedwing word nie. Die solvent het daarom slegs 'n konkurrente eis.

39 Die solvente party kry dus slegs 'n konkurrente dividend ipv volle teenprestasie.

40 Reinecke en Cronjé 1979 *THRHR* 399 is van oordeel dat die *exceptio* wel beskikbaar behoort te wees al moet die solvent vooruit presteer. Die rede hiervoor vind hulle in a 50 van die wet. Myns insiens geld a 50 nie in hierdie gevalle nie. In elk geval het die solvent nog net gedeeltelik presteer. Die insolvent se teenprestasie kan myns insiens selfs ingevolge a 50 nie opvorderbaar word voordat die solvent volledig presteer nie.

41 *Rol van die concursus creditorum* 473 ev; sien veral 474 vn 82.

42 Joubert *General principles* 62 pas die *exceptio* toe.

kom 'n mens uit by dieselfde resultaat as prospektiewe beëindiging van die kontrak deur die kurator behoudens 'n konkurrente vergoedingseis aan die solvente party.

Word dít nie aanvaar nie, is die beste uitweg vir die solvente teenparty om die kontrak te kanselleer. As hy egter die hoop koester dat daar 'n ommekeer gaan kom en dat die skuldeisers die kurator opdrag sal gee om tog maar die solvent se prestasie te bekom teen lewering van die volle teenprestasie, kan hy wel besluit om die kontrak te handhaaf. Daar moet in gedagte gehou word dat waar 'n sekwestrasieproses aan die gang is, die solvent rekening daarmee sal moet hou dat eise binne sekere tydsgrense aanhangig gemaak moet word. So nie gaan die boedel sonder hom afgesluit word. Afgesien hiervan sou verjaring ook intussen aanstap. Gevolglik sal hy mooi moet dink of hy nie maar genoeë moet neem met 'n konkurrente dividend nie. Nietemin is dit denkbaar dat die kurator opnuut sal "repudieer" met die gevolg dat die solvent sy posisie sou kon heroorweeg. Intussen kan die kurator rustig met die likwidasieproses voortgaan.

(d) Waar die kurator geen aanduiding van enige keuse met betrekking tot die kontrak gee nie, moet die solvente party hom eers versoek om sy keuse te maak alvorens hy volledig presteer. Afhangende van die besluit van die kurator sal die posisie wees soos hierbo uiteengesit.

3 2 Die insolvent moet eerste presteer maar lewer slegs gedeeltelike prestasie

(a) Indien die kurator besluit om die kontrak in stand te hou, moet hy eerste en wel ten volle presteer. Die onskuldige party het die *exceptio* tot sy beskikking waarmee hy volledige vervulling van die kontrak kan afdwing. Dit is die geval tensy daar omstandighede bestaan vir 'n geslaagde beroep op verslapping van die weerhoudingsreg.[43]

(b) Sou die kurator "repudieer", kan die onskuldige party sy keuse uitoefen om uit die kontrak "terug te tree". Die onskuldige party is dan verplig om die gedeeltelike prestasie terug te lewer.[44] Hy is nie verplig om te presteer nie en het 'n konkurrente eis vir skadevergoeding op grond van kontrakbreuk. Aanvaarding van die repudiëringskonstruksie sluit dus ook in hierdie geval die voordeel uit dat die solvente party kan kies om die gedeeltelike prestasie van die insolvent te behou, en 'n konkurrente vergoedingseis op grond van nie-voldoening teen die insolvente boedel in te stel.[45]

Sou die solvente party op grond van die gedeeltelike prestasie deur die insolvent ook reeds gedeeltelik gepresteer het, kan hy teruggawe van prestasie' en moontlike skadevergoeding eis. Terselfdertyd moet hy die insolvent se gedeeltelike prestasie aanbied. Weer is die vraag of 'n party wat 'n kontrak in reaksie op

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43 Sien *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

44 Sien Oelofse 1988 *THRHR* 547; Reinecke en Cronjé 1979 *THRHR* 400; De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 237 ev. Vgl egter *Mangold Brothers v Greyling's Trustee* 1910 EDL 471 477. Alhoewel hierdie saak klaarblyklik verkeerd beslis is, stel dit die billiker standpunt dat die kurator die reeds gelewerde prestasie prysgee indien hy die kontrak prysgee. 'n Argument tgv van hierdie standpunt is dat die *kurator* die kontrak "gerepudieer" het. *Hy* moet die gevolge dra.

45 Prospektiewe beëindiging van die kontrak soos deur my voorgestel word, het wel hierdie gevolg.

sy teenparty se kontrakbreuk gekanselleer het, verplig is om die reeds ontvangde prestasie daadwerklik terug te lewer as hy weet dat die teenparty nie van sy kant af ten volle gaan presteer nie. Swart[46] beantwoord die vraag negatief. Hy is van mening dat die solvent na analogie van die *exceptio* by instandhouding teruggawe kan weerhou. Welke effek sal die toepassing van die *exceptio* in hierdie geval hê? Die kurator sal moontlik weier om die prestasie van die solvent terug te gee. Hy kan argumenteer dat die teenparty slegs 'n konkurrente eis het omdat eiendomsreg reeds op die insolvente boedel oorgegaan het.[47] Nou is daar weer 'n patsituasie.[48]

(c) As die solvente party die "repudiëring" ignoreer (omdat hy graag die gedeeltelike prestasie wil behou), is die effek dat die kontrak in stand gehou word. Die solvent is in 'n veilige posisie omdat hy nog nie gepresteer het nie. Hy kan sy prestasie terughou totdat die kurator stiptelik en volledig gepresteer het. Boonop sit hy reeds met 'n gedeeltelike prestasie deur die insolvent wat hy kan terughou. 'n Moontlike eis vir 'n verminderde kontraksprys deur die kurator moet in gedagte gehou word. Die probleem hier is weer eens dat die kurator die bewyslas dra om benutting, ensovoorts te bewys. Dit kan 'n tydrowende en duur proses word. Soos reeds verduidelik, kan die solvente party alleen maar ontken dat hy die prestasie benut,[49] in welke geval die kurator hom tot die hof sal moet wend. Of hy bereid sal wees om sulke onkostes aan te gaan, is onseker. Dit is 'n vraag of ignorering van die "repudiëring" deur die solvente party in toepaslike omstandighede nie benutting van die gedeeltelike prestasie kan impliseer nie. Ek dink wel so. Word so 'n moontlikheid erken, kan die teenparty se weerhoudingsreg verslap word. Dan het die kurator 'n eis vir die verminderde kontraksprys. Sodoende kan die solvent steeds die reeds gelewerde prestasie behou terwyl die bewyslas van die kurator heelwat verlig word.

Kan 'n verminderde kontraksprys om die een of ander rede nie geëis word nie, is die volgende situasie voor hande: Omdat die kontrak voortbestaan, kan die kurator nie die onvolkome prestasie terugeis nie. Die kurator kan net die onvolkome prestasie aanvul en so volle teenprestasie kry. Die kurator is egter van oordeel dat dit nie die beste vir die boedel is nie en wil nie presteer nie. As gevolg van die sekwestrasie en vorming van 'n *concursus creditorum* is dit egter nie moontlik nie. Die teenparty sal dan met 'n konkurrente dividend in plaas van die volle teenprestasie tevrede moet wees.[50] Hy behou wel die gedeeltelike prestasie. Die dilemma is egter dat slegs 'n gedeelte van sy eis uitbetaal sal word. Steeds hoef hy nie van sy kant te presteer nie want die feit is dat die insolvente

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46 *Rol van die concursus creditorum* 489.

47 As die solvente party eiendomsreg voorbehou het, is die kurator verplig om spesifieke nakoming toe te staan (Swart *Rol van die concursus creditorum* 481; Reinecke en Cronjé 1979 *THRHR* 400).

48 Oelofse 1988 *THRHR* 543 noem dit 'n "dooiepunt" en volgens Swart is dit 'n "skaakmatsituasie". Daar word ook na 'n "konfliksituasie" verwys (sien die uiteensetting in (c) hieronder). As die solvent nie die prestasie wat hy ontvang het, hoef prys te gee nie, moet ek erken dat dit presies die resultaat is wat ek bepleit. As die solvent se gedeeltelike prestasie egter meer werd is as dié van die insolvent, is daar 'n probleem. Daarom behoort die solvente party myns insiens 'n keuse te hê om die prospektiewe beëindiging in retrospektiewe beëindiging te omskep.

49 Hy beweer bv dat hy nie die gedeeltelike prestasie benut nie maar hoop dat die kurator die gedeeltelike prestasie sal aanvul of aansuiwer.

50 Sien Reinecke en Cronjé 1979 *THRHR* 395 400.

boedel nie volledig gepresteer het nie.[51] Die groot probleem in hierdie situasie is die feit dat die ooreenkoms tussen die partye steeds bestaan. Dit is nie gekanselleer nie. Dit is ook nie afgehandel nie. Die kontrak hang dus in die lug. Die vraag is of die solvente party kan weier om te presteer tensy hy volle prestasie of volle skadevergoeding kry. Dit bring 'n mens weer by die dooiepunt uit.[52] Dít is wat opgelos moet word. Myns insiens behoort die solvente party, ten spyte van die feit dat hy nie terugtree nie (omdat hy byvoorbeeld die reeds gelewerde prestasie wil behou), 'n konkurrente eis vir skadevergoeding te kan instel op die basis dat hy (weens die kurator se verwerping) nie verder van sy kant af gaan presteer nie.[53]

Is hierdie aanbeveling onaanvaarbaar,[54] en wil 'n mens nogtans verhoed dat die boedel skade ly, sal noodgedwonge erken moet word dat die effek van dié probleemsituasie is dat die solvente party nie werklik die "repudiëring" kan ignoreer nie. Al moontlikheid wat daar dan as gevolg van sekwestrasie kan wees, is om uit die ooreenkoms "terug te tree" (reeds gelewerde prestasie word dan verbeur) en skadevergoeding te eis.

Erkenning van 'n keusereg by "repudiëring" in geval van sekwestrasie, noop 'n mens om met Oelofse saam te stem, naamlik dat 'n dooiepunt ontstaan. Die probleem kan alleen op 'n redelike wyse opgelos word indien 'n mens sou bevind dat die solvente party kan terugtree terwyl hy die gedeeltelike prestasie behou. Daar is egter nie voldoende gesag te dien effekte nie.

(d) Waar die kurator geen aanduiding gee dat hy die kontrak in stand wil hou of wil "repudieer" nie en steeds teenprestasie van die ander eis, is die enigste redelike afleiding dat hy daardeur te kenne gee dat hy die kontrak wil uitvoer. Die ander party kan vervolgens die *exceptio* as verweer opwerp totdat die kurator ten volle presteer. Die posisie is soos in (a) hierbo. Ook in geval van 'n aanbestedingskontrak kan hierdie weerhoudingsreg nie absoluut geld nie omdat dit onbillik en onredelik kan wees.[55] Daarom mag die hof die weerhoudingsreg op billikheidsgronde verslap. Ek is van mening dat die sekwestrasie van een van die

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51 Reinecke en Cronjé (*ibid*) wys daarop dat die solvente party van die *exceptio* kan afstand doen, maar dat hy nie daartoe verplig is nie. Dit los dus nie die probleem op nie. Oelofse 1988 *THRHR* 546 verklaar dat slegs as die solvente party 'n eis vir skadevergoeding bewys wat bereken is op die basis dat hy ten volle van sy kant af gaan presteer, gesê kan word dat hy hom bereid verklaar om teen volle te presteer in ruil vir 'n konkurrente eis teen die boedel. Slegs in so 'n geval doen hy *afstand* van sy *exceptio*. Op 547 wys hy daarop dat die blote bewys van 'n eis teen die boedel *moontlik* in die toekoms as afstanddoening van die *exceptio* beskou sal word.

52 Swart *Rol van die concursus creditorum* 475 kom tot die konklusie dat hierdie stand van sake 'n "skaakmatsituasie" tot gevolg het. Hy verduidelik dit soos volg: Die teenparty is nie verplig om te presteer tot tyd en wyl hy verseker is dat die kurator al die uitstaande verpligtinge sal nakom nie. Die kurator is daarenteen verplig om te weier om hierdie verpligtinge na te kom omrede die nakoming tot gevolg sal hê dat die teenparty se relatiewe posisie soos bevries op die oomblik van sekwestrasie, ten koste van ander skuldeisers verbeter word. Joubert "Sekwestrasiebevele en onvoltooide kontrakte" 1984 *EM Hamman-Gedenkbundel* 59 63 noem dit 'n "konfliksituasie".

53 Dán kom 'n mens weer eens uit by dieselfde resultaat as *prospektiewe* beëindiging van die kontrak deur die kurator, behoudens 'n konkurrente skadevergoedingseis aan die solvente party.

54 Dit is duidelik nie op een lyn met die algemene beginsels tov repudiëring nie.

55 Sien bv *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

kontrakspartye se boedel een geval behoort te wees waar die hof sy diskresie ten gunste van verslapping moet uitoefen. Die las rus dan op die kurator om aan te toon dat die huidige 'n geval is waar die weerhoudingsreg verslap moet word, met die gevolg dat hy 'n eis vir die kontraksprys minus aansuiwerings- of besparingskoste het. Die posisie sal nog beter wees as dit nie vir die kurator nodig sal wees om eers die hof te nader nie.

Waar die kurator geen aanduiding van sy keuse gee nie maar 'n eis teen die solvente kontraksparty instel (slegs) vir daardie deel van die prestasie wat die insolvent reeds gelewer het, is die afleiding dat hy die verpligtinge uit hoofde van die kontrak "repudieer". Die posisie is soos in (b) en (c) hierbo.

(e) Waar die kurator geen aanduiding van sy keuse met betrekking tot die kontrak gee nie, geen eis instel nie en bloot niks doen nie, kan die ander party hom versoek om sy houding ten opsigte van die kontrak bekend te maak of bloot die volle prestasie van hom eis. Nou sal die kurator sy keuse bekend moet maak en is die posisie soos reeds uiteengesit. As hy nie binne 'n redelike tyd kennis gee dat hy die kontrak in stand wil hou nie, kan die teenparty aanneem dat die kurator "repudieer". Op grond daarvan kan hy sy keuse uitoefen.[56]

4 GEVOLGTREKKING

Wat uit die voorgaande seker en duidelik is, is dat die kurator die keuse het om die onuitgevoerde kontrakte van die insolvent in stand te hou. So ook die feit dat die kurator nie tot spesifieke nakoming van 'n uitstaande verpligting gedwing kan word nie. Die appèlafdeling het in *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* [57] beslis dat die optrede van die kurator om nie met die kontrak voort te gaan nie, "repudiëring" daarstel. As die volle implikasies van repudiëring[58] dan van toepassing is, het die ander party natuurlik die keuse om op die repudiëring te reageer of dit te ignoreer. 'n Besondere probleem ontstaan in die geval waar die onskuldige uit die kontrak terugtree terwyl beide partye slegs gedeeltelik gepresteer het. Die solvente party se eis vir teruggawe is bloot konkurrent. Gevolglik is daar 'n mening dat hy teruggawe van dit wat aan hom gepresteer is, na analogie van die *exceptio* by instandhouding, kan weerhou. Dit lei tot 'n tipiese patsituasie. Waar die solvente party die "repudiëring" ignoreer, kan die *exceptio non adimpleti contractus* ter sprake kom in die geval waar gedeeltelik of gebrekkig gepresteer is. Dit kan aanleiding gee tot die probleemsituasie soos hierbo bespreek is.[59] Ook pogings deur die

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56 *Glen Anil Finance (Pty) Ltd v Joint Liquidators Glen Anil Development Corporation Ltd (in liquidation)* 1981 1 SA 171 (A) 182; *Bryant & Flannagan (Pty) Ltd v Muller* 1978 2 SA 807 (A) 812; *Tangney v Zive's Trustee* 1961 1 SA 449 (W) 453; *Montelindo Compania Naviera South Africa v Bank of Lisbon & South Africa Ltd* 1969 2 SA 127 (W) 141.

57 1988 2 SA 546 (A).

58 Reeds voor die appèlafdeling se beslissing het Reinecke en Cronjé 1979 *THRHR* 398 tot die gevolgtrekking gekom dat daar geen konklusiewe gesag is vir die standpunt dat 'n kurator 'n onuitgevoerde kontrak kan ontbind nie. Hulle doen aan die hand dat die algemene beginsels van die kontraktereg toepaslik is. Die kurator kan dus volgens húlle standpunt slegs die kontrak "repudieer".

59 Die vraag is steeds of die solvente party kan weier om te presteer tensy hy *volle* betaling of *volle* skadevergoeding kry. Die antwoord volgens die oorwig gesag is ja. Dít bring 'n mens weer by die patsituasie of dooiepunt uit. Ook Swart *Rol van die concursus creditorum* 496 verklaar dat nóg in die geval waar slegs een party uitstaande verpligtinge het, nóg in die geval waar albei uitstaande verpligtinge het, die ideale resultaat deur die repudiëringskonstruksie gewaarborg word.

kurator om die weerhoudingsreg te verslap, kan uiteindelik tot nadeel van die *concursus creditorum* inwerk as gevolg van die koste wat aangegaan sal moet word om benutting te bewys.

Die posisie soos dit tans daar uitsien, dwing na my mening die ander kontraksparty om die "repudiëring" as "kontrakbreuk" aan te merk en 'n konkurrente eis vir skadevergoeding teen die insolvente boedel in te stel. Die prestasie wat hy reeds ontvang het, word dan verbeur. Prestasie wat gedeeltelik en sonder oordrag van eiendomsreg deur die solvente party gelewer is, kan teruggeëis word. Dit is ook die standpunt van Meskin.[60] Met hierdie standpunt word dan noodgedwonge van die algemene beginsels van die kontraktereg afgewyk. Slegs as die solvente party, ten spyte van die feit dat hy nie terugtree nie (omdat hy byvoorbeeld die gedeeltelike prestasie wat reeds gelewer is, wil behou), toegelaat word om 'n konkurrente eis vir skadevergoeding in te stel en wel op die basis dat hy (weens die kurator se verwerping) nie verder van sy kant af gaan presteer nie, sal die probleem opgelos word. Uiteindelik het dit dan dieselfde effek as prospektiewe beëindiging van die kontrak deur die kurator indien so 'n kompetensie erken sou word. Sodoende is dit onnodig om van die algemene beginsels van die kontraktereg af te wyk. Swart[61] doen aan die hand dat die repudiëringbenadering tot onuitgevoerde kontrakte, soos wat dit tans geïnterpreteer word, vanuit 'n beginseloogpunt onaanvaarbaar is.

5 STANDPUNTINNAME

Die hantering van die reëls met betrekking tot repudiëring ook wanneer 'n onuitgevoerde kontrak ter sprake is, is onbevredigend. In 'n vorige artikel is ook gewys op die standpunt dat die kurator geregtig is om die kontrak (regmatig) te "beëindig". Terselfdertyd word 'n skadevergoedingseis telkens aan die solvente kontraksparty toegeken *asof kontrakbreuk plaasgevind het.* Daar is dan ook beklemtoon dat hierdie twee beginsels nie met mekaar versoen kan word nie.[62]

Soos duidelik blyk uit 'n bestudering van die Duitse, Nederlandse en Engelse insolvensieregstelsels, word die weiering van die kurator om aan 'n onuitgevoerde kontrak van die insolvente boedel te voldoen beslis nie bloot as 'n repudiëring beskou sodat die gevolge van daardie regsfiguur geld nie. In elk van die genoemde stelsels word die keuse van die kurator om die kontrak te beëindig uitdruklik deur toepaslike wetgewing erken. Ek is van mening dat die keuse van die kurator om onuitgevoerde kontrakte te verwerp of prys te gee ook in die Suid-Afrikaanse insolvensiereg uitdruklik erken moet word.[63] Myns insiens moet

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60 *Involvency law and its operation* 5–54: "[B]ecause a right effectively to refuse to accept the repudiation is predicated on a right to specific performance of the contract and, as a consequence of the institution of the *concursus*, this latter right does not exist."

61 *Rol van die concursus creditorum* 508. Op 501 verklaar hy dat daar geen aanvaarbare basis vir die repudiëringskonstruksie is nie.

62 Myns insiens tree die kurator met statutêre gesag op wanneer hy 'n kontrak beëindig. Daarom kan hy geensins kontrakbreuk pleeg nie – al gaan die kontrak tot niet anders as deur voldoening of ooreenkoms.

63 Dit is weliswaar so dat nie al die gesag wat bespreek is, voorgee dat die kurator geregtig is om die kontrak te kanselleer nie. In die meeste gevalle is hierdie vraagstuk nie in dispuut nie. Die houding word ingeneem dat die kurator so 'n kompetensie het sonder dat die vraagstuk werklik beredeneer word. Swart *Rol van die concursus creditorum* 494 waarsku dat die kar nie voor die perde gespan word nie deur van die standpunt uit te gaan dat die

vervolg op volgende bladsy

dit egter net geld *indien daar nog 'n uitstaande verpligting aan die kant van die insolvente boedel is.*[64] Dit vloei voort uit die gevestigde en onbestrede reël in die insolvensiereg dat die ander kontraksparty nie in die gegewe omstandighede spesifieke nakoming van 'n uitstaande verpligting kan eis nie. Op grond van billikheidsoorwegings moet die konkurrente eis van die ander party vir nie-voldoening aan die kontrak uitdruklik erken word. Die grondslag van hierdie eis is die solvente party se *vervullingsbelang*. Hy moet met ander woorde in die posisie gestel word waarin hy sou wees indien die kontrak nagekom sou word. Die waarde van die prestasie wat hy nou nie meer hoef te lewer nie, moet derhalwe ook in berekening gebring word. Nie alleen die skade wat deur die beëindiging veroorsaak is, moet ingesluit word nie; dit moet ook gevolgskade omvat, byvoorbeeld wins wat hy verloor het. In die geval waar die vordering van die solvente teenparty nie 'n geldbedrag is nie, is die geskatte waarde daarvan *minus dit wat reeds gelewer is* die essensiële kriterium. Dit bepaal die omvang van die eis wat die teenparty teen die insolvente boedel moet bewys hoewel hy slegs 'n konkurrente skuldeiser is.[65] In *Consolidated Agencies v Agjee*[66] word dan ook gesê dat die teenparty gewoon 'n skuldeiser van die boedel word. Hierdie standpunt is ook in pas met die houding ingeneem in *Mangold Brothers v Greyling's Trustee*[67] en *Preston & Dixon v Biden's Trustee.*[68] Gemotiveer deur die beginsels van billikheid en goeie trou teenoor die solvente teenparty, is dit ook my standpunt dat die kurator daarby uitdruklik sy eis vir teruggawe van goed behoort te verloor.[69] Hy is in die bevoorregte posisie en behoort goed te kan oordeel wat tot voordeel van die insolvente boedel sal wees. Dit is myns insiens net billik dat,

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hantering van onuitgevoerde kontrakte met bestaande kontrakregtelike beginsels versoen móét word, ongeag die resultaat wat hierdeur verkry word. Ek stem saam. As dit blyk dat die reëls van die algemene reg nie alle skuldeisers se posisies *soos wat dit op die oomblik van sekwestrasie bestaan*, handhaaf nie, moet reëls geformuleer word wat uitsluitlik gedurende die sekwestrasieproses geld.

64 Op grond van openbare belang en goeie trou is dit tog ook noodsaaklik om 'n gesonde balans tussen die beginsel van afdwingbaarheid van kontrakte en die beginsel van gelyke behandeling van die *concursus creditorum* te soek. Na my mening verteenwoordig hierdie standpunt daardie gesonde balans.

65 Dit is prospektiewe beëindiging van die kontrak deur die kurator, behoudens 'n konkurrente eis vir nie-voldoening vir die teenparty.

66 1948 4 SA 179 (N) 186–187.

67 1910 EDL 471.

68 (1884) 1 Buch AC 322.

69 Die posisie in die Nederlandse reg is dieselfde (sien Van Zeben *Faillissementswet* (1990) 1.2.37–5; Dorhout Mees *Nederlands handels- en faillissementsrecht* vol III (1974) 483 ev). Daarom is dit so belangrik dat die kurator eers goed oorweeg wat in die beste belang van die boedel en die skuldeisers is. Die voordeel wat die solvente kontraksparty in hierdie situasie ontvang, behoort egter met sy eis op grond van nie-voldoening in berekening gebring te word. Dit is nie op verryking gebaseer nie. Die beleidsvraag is of die boedel enige verhaal op hom moet hê indien dit blyk dat hy na beëindiging van die kontrak, en met behoud van die insolvent se gedeeltelike prestasie, in elk geval beter daaraan toe is as wat hy by volle uitvoering van die kontrak sou wees. Indien so 'n verhaalsreg as wenslik beskou word, sal dit statutêr geskep moet word. Aan die gewone vereistes vir verrykingsaanspreeklikheid word nie voldoen nie (in die besonder nie aan die *sine causa*-vereiste nie). In die Duitse reg is daar wel gesag vir die standpunt dat die insolvente boedel 'n verrykingseis teen die solvente teenparty verkry (sien Kilger *Konkursordnung* (1987) 106; Hess en Kropshofer *Kommentar zur Konkursordnung* (1989) 332–333). Klaarblyklik verskil dit van die beginsels van die Engelse insolvensiereg (sien bv Griffiths *Insolvency of individuals and partnerships* (1988) 126; Berry en Bailey *Bankruptcy: law and practice* (1987) 246).

wanneer die kurator die kontrak prysgee, die teenparty toegelaat moet word om die kurator se prospektiewe beëindiging in 'n retrospektiewe beëindiging te omskep *indien hy so verkies*. In elk geval behoort dit die geval te wees waar eiendomsreg nog nie op die insolvente boedel oorgegaan het nie. Die kurator kan dus met betrekking tot onuitgevoerde kontrakte, in die geval waarby daar nog 'n uitstaande verpligting[70] van die insolvente boedel is, kies om die kontrak in stand te hou of te beëindig. Hierdie keuse moet hy binne 'n redelike tyd uitoefen. Doen hy dit nie, kan die ander party aanvaar dat die kontrak beëindig is.[71]

Myns insiens is die vraag telkens net of daar 'n uitstaande verpligting aan die kant van die insolvente boedel is. Indien wel, behoort die kurator die keuse te hê om die kontrak te beëindig indien hy so verkies. Dié standpunt is reeds in 1901 in die Engelse saak *Pearce v Bastable's Trustee in Bankruptcy*[72] erken.

Die strydvraag betreffende die tradisionele huurkoopkontrak of afbetalingsverkooptransaksie waar die boedel van die verkoper gesekwestreer word, sal ook met aanvaarding van hierdie standpunt geredelik opgelos kan word. Dan is die enigste en moeilike vraag waaroor uitsluitsel verkry moet word, of daar in so 'n geval nog 'n uitstaande verpligting aan die kant van die insolvente boedel is waar die saak reeds finaal aan die koper gelewer is. Sonder om volledig daarop in te gaan, kan gemeld word dat daar spesifiek wat hierdie aspek betref, teenstrydige standpunte en argumente bestaan. Die een standpunt is dat die insolvent sy kontraktuele verpligtinge nagekom het. Die kurator het geen ander keuse nie as om die insolvent se eis teen sy teenparty in te vorder.[73] Die ander standpunt is dat daar wel nog 'n uitstaande verpligting is, naamlik die oordrag van eiendomsreg.[74] Word uiteindelik beslis dat eersgenoemde die korrekte standpunt is, kan die kurator vanselfsprekend nie die kontrak verwerp nie. Word aanvaar dat laasgenoemde standpunt die reg korrek weerspieël, sal die kurator wel die keuse hê om die kontrak prys te gee. Al die gevolge hieronder genoem, sal dan ook in hierdie geval van toepassing wees.

Die voordeel van aanvaarding van dié standpunt is dat dit die likwidasieproses inderdaad sal bespoedig. Na my mening maak dit die proses meer vaartbelyn as wat die geval is met die repudiëringskonstruksie, waar noodsaaklike aanpassings (om spesifiek vir sekwestrasie voorsiening te maak) gemaak moet word. Ek meen ook dat dit wegdoen met die talle onsekerhede wat deel van die repudiëringskonstruksie vorm.

6 TERUGGAWE VAN PRESTASIE

Om onnodige uitgawes vir die boedel te vermy en onbehoorlike voorkeure te verhoed, is die reël dat die kurator nie verplig is om te presteer nie.[75] Beteken

70 Selfs Reinecke en Cronjé 1979 *THRHR* 399 erken: "Dit spreek vanself dat as die insolvent reeds volledig gepresteer het, (daar is maw geen uitstaande verpligtinge meer aan die kant van die insolvente boedel nie) die kurator geen eleksie het om uit te voer nie maar net eenvoudig die regte van die insolvent sal moet afdwing." Ook in vn 37 verklaar hulle dat "[d]ie eenvoudige waarheid skyn te wees dat die eleksiebevoegdheid van die kurator nie ter sprake kom as die medekontraktant nie (meer) oor die *exceptio* beskik nie" – dus as die insolvent reeds volledig gepresteer het.

71 *Tangney v Zive's Trustee* 1961 1 SA 449 (W) 453; Reinecke en Cronjé 1979 *THRHR* 399.

72 (1901) 2 Ch 122 125.

73 Sien Reinecke en Cronjé 1979 *THRHR* 401; Forder 1986 *SALJ* 83 ev.

74 Sien Flemming *Krediettransaksies* (1982) 424 ev; Smith *Law of insolvency* (1988) 170 ev.

75 Sien bv *Cohen v Verwoerdburg Town Council* 1983 1 SA 334 (A) 347.

hierdie reël dat die *teenparty*, wanneer die kurator besluit om nie met die kontrak voort te gaan nie, teruggawe van 'n reeds gelewerde prestasie kan eis of beteken dit dat alle persoonlike regte teen die insolvent[76] sonder uitsondering onafdwingbaar teenoor die kurator is? In die eerste plek moet duidelik gestel word dat 'n konkurrente eis vir teruggawe van dit wat reeds op die insolvente boedel oorgegaan het, slegs ter sprake kom indien die solvente party verkies om die kurator se prospektiewe beëindiging van die kontrak in 'n retrospektiewe beëindiging te omskep.[77] Is dit sy keuse, is die antwoord op die gestelde vraag negatief. Ek meen dat onderskei moet word tussen die geval waar eiendomsreg met lewering van die prestasie op die insolvent oorgegaan het en die geval waar dit nie oorgegaan het nie. In laasgenoemde geval is die posisie soos volg: Die skuldeiser word van 'n reg ontneem.[78] Die *concursus creditorum* kan egter nie daardeur aan die kurator 'n groter reg verleen as wat die insolvent self kon geniet het nie. Sou die kurator dan die kontrak beëindig, is die eienaar op teruggawe van die reeds gelewerde goed geregtig. Teruggawe is tog nie 'n eis vir prestasie of spesifieke nakoming nie. As aanvaar word dat die eienaar nie op teruggawe geregtig is nie, beteken dit dat die kurator ten koste van daardie party 'n wins vir die boedel maak. Geen sodanige anomalie word deur die wet of die gemenereg geïmpliseer nie;[79] indien goedere dus gelewer is maar eiendomsreg daarop nie met lewering op die insolvent oorgegaan het nie, het die eienaar 'n reg op teruggawe van die prestasie met behoud van sy konkurrente eis op grond van nievoldoening aan die ooreenkoms.[80] Hierdie standpunt word ook bevestig deur die uitspraak "as regards an insolvent's *jura ad rem*, as distinguished from his *jura in re*, the trustee is in no better position than the insolvent himself".

Wat is die posisie indien eiendomsreg reeds op die insolvent oorgegaan het?[81] In hierdie geval het die teenparty slegs 'n konkurrente eis vir die waarde van die prestasie reeds gelewer, tesame met 'n konkurrente eis op grond van die nievoldoening aan die kontrak. Vergelyk byvoorbeeld die opmerking in *Preston & Dixon v Biden's Trustee*,[82] dat "the only remedy be a personal one, the real right having gone".[83]

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76 Die verpligting tot teruggawe is 'n persoonlike verpligting (*Slims (Pty) Ltd v Morris* 1988 1 SA 715 (A) 741).

77 Sien die voorstel in par 5 hierbo.

78 Dit is die reg op spesifieke nakoming.

79 McLennan en Forder 1989 *SALJ* 9 14. Volgens hierdie skrywers maak dit geen verskil of die teenparty se reg 'n persoonlike of saaklike reg is nie. Hulle meen dat dit in beginsel ook geen verskil behoort te maak of die betrokke kontrak op roerende of onroerende goed betrekking het nie.

80 *Preston & Dixon v Biden's Trustee* (1884) 1 Buch AC 322 339 346 351. Sien ook *Harris v Trustee of Buisinne* (1840) 2 Menz 105 108 waar beslis is dat indien eiendomsreg in die insolvente boedel setel, die ander party nie teruggawe kan eis nie. Kyk verder *Mangold Brothers v Greyling's Trustee* 1910 EDL 471 477; *Ward v Barrett* 1963 2 SA 546 (A) 554. Die posisie in die Duitse reg (sien Hess en Kropshofer *Kommentar zur Konkursordnung* (1989) 322; Gottwald *Insolvenzrechtshandbuch* (1990) 374; Kilger *Konkursordnung* (1987) 106 ev) en die Nederlandse reg is dieselfde (sien Corpeleijn *Faillissementsgids* (1987) 38; Polak *Faillissementsrecht* (1986) 56).

81 Aan die orde is die geval waar die kurator besluit het om die kontrak te beëindig.

82 (1884) 1 Buch AC 322 338.

83 *Ibid*. Soos in die Engelse reg kan die teenparty gevolglik nie teruggawe van die goed eis nie (Bailey *Halsbury's laws of England* vol 3(2) (1989) 221).

7 TOEPASSING

Die toepassing van hierdie standpunt behels die volgende:

7 1 Geen party het nog gepresteer nie

Het geeneen van die partye al gepresteer nie, volg dit uit die *exceptio non adimpleti contractus* dat die kurator die volle prestasie moet aanbied[84] voordat hy die ander party se prestasie kan opvorder. Indien die solvente party egter vooruit moet presteer, is die vraag of hy nou die risiko moet loop dat die kurator moontlik daarna tog besluit om nie te presteer nie en sodoende die skuldeiser laat met 'n konkurrente eis teen die boedel. Sekerlik nie. Met verwysing na *Ullman Bros v Kroonstad Produce Co*[85] word ook in *Hayne v Narun Bros*[86] beslis dat sodra die solvente party van die ander kontraksparty se situasie bewus word, hy onmiddellik geregtig is op sekerheid "as to the integrity and safety of the purchase price under the contract".[87] Dit lyk of die regter in *Chadwick v Henochsberg* dieselfde standpunt huldig.[88] Soos reeds in paragraaf 2 hierbo bespreek is, is ek egter van mening dat dit onaanvaarbaar is dat sekerheid deur die insolvente boedel gegee moet word en die eis van een skuldeiser sodoende verseker word. Myns insiens behoort die solvente party geregtig te wees om die kurator *by voorbaat* te vra om sy keuse uit te oefen.[89] Indien die kurator eenmaal besluit het om met die kontrak voort te gaan en prestasie van die skuldeiser vorder, is hy aan sy keuse gebonde en moet hy daarna die *volle* teenprestasie lewer.[90] Hy kan nie weer van rigting verander nie.[91] Besluit die kurator om die onuitgevoerde kontrak te beëindig, het die solvente kontraksparty bloot 'n konkurrente eis vir nie-voldoening aan die kontrak. Geen eis vir teruggawe van prestasie is ontvanklik nie want geeneen van die partye het nog gepresteer nie.

7 2 Volledige prestasie deur die insolvent

Het die insolvent al ten volle gepresteer, sodat daar geen uitstaande verpligting aan die kant van die insolvente boedel is nie, kan die kurator slegs die teenprestasie van die ander party vorder.[92] Hy is dan gewoon 'n skuldenaar van die boedel. Ook uit *Ex parte Liquidators of Parity Insurance Co*[93] blyk dit duidelik

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84 Indien hy verplig is om eerste te presteer.

85 1923 AD 449 458.

86 1926 OPD 207 212.

87 In die Engelse reg is voorsiening gemaak vir die "unpaid seller's lien" (sien Bailey *Halsbury's laws of England* vol 3(2) (1989) 221; Guest ea *Chitty on contracts: General principles* vol 1 (1989) 2(1).

88 *Chadwick v Henochsberg* 1924 TPD 703 709.

89 Sien ook Reinecke en Cronjé 1979 *THRHR* 399 400. My standpunt is die keuse tussen instandhouding en beëindiging van die kontrak. Die teenparty behoort in elke geval geregtig te wees om die kurator te verplig om sy keuse uit te oefen. Lg moet dan binne 'n redelike tyd, met verwysing na die tipe kontrak, die inhoud daarvan en die omstandighede wat dit raak, verklaar of hy die ooreenkoms in stand wil hou.

90 Dit vorm deel van die administrasiekostes van die insolvente boedel.

91 *Noord-Westelike Koöperatiewe Landboumaatskappy Bpk v Die Meester* 1982 4 SA 486 (NK) 495; *Gordon v Standard Merchant Bank Ltd* 1983 3 SA 68 (A) 95; *Uys v Sam Friedman Ltd* 1934 OPD 80 86. In *Lake v Reinsurance Corporation Ltd* 1967 3 SA 124 (W) 126H beslis die hof dat "[t]he party who seeks to enforce specific performance must first fulfil or be ready and able to fulfil his own obligations".

92 A 77.

93 1966 1 SA 463 (W) 470–471.

dat indien die insolvente boedel geen uitstaande verpligtinge meer het nie, die kurator nie die kontrak mag beëindig nie.[94] Die solvente teenparty is geregtig om die prestasie van die insolvent te behou.

7 3 Gedeeltelike of gebrekkige prestasie deur die insolvent

Het die insolvent egter slegs gedeeltelik of gebrekkig gepresteer, kan die volgende gebeur: Die kurator het die keuse om die kontrak in stand te hou. As hy volgens die ooreenkoms eerste moet presteer, moet hy volledig presteer omdat die solvente party andersins die *exceptio non adimpleti contractus* as verweer kan opwerp. In gepaste omstandighede en op grond van billikheidsbeginsels kan hierdie weerhoudingsreël verslap word.[95] Dit impliseer dat die kurator slegs die kontraksprys minus die bedrag om die gedeeltelike of gebrekkige prestasie aan te suiwer, kan eis.

Indien die kurator die kontrak verwerp,[96] is dit my standpunt dat hy die reeds gelewerde, gebrekkige of gedeeltelike prestasie verbeur.[97] Die solvente party hoef nie sy teenprestasie te lewer nie, behou die gedeeltelike prestasie en het daarbenewens 'n konkurrente eis vir nie-voldoening teen die insolvente boedel. Vir die voordeel wat hy ontvang het, behoort[98] 'n verrekening teen sy vergoedingseis gedoen te word.[99] Is hierdie standpunt met betrekking tot die behoud van die gedeeltelike prestasie nie aanvaarbaar nie, behoort dit in elk geval die posisie te wees waar eiendomsreg *reeds* op die ander party oorgegaan het.[100]

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94 Kyk verder ook Forder 1986 *SALJ* 90. Die posisie is dus dieselfde as in die Duitse reg (Kilger *Konkursordnung* 96; Gottwald *Insolvenzrechtshandbuch* 430; Baur *Insolvenzrecht* 430) en Nederlandse reg (Corpeleijn *Faillissementsgids* 37; Polak *Faillissementsrecht* 54).

95 Sien *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A).

96 Wat hy myns insiens geregtig behoort te wees om te kan doen omdat daar nog die uitstaande verpligting aan die kant van die insolvente boedel is (om ten volle of behoorlik te presteer).

97 Sien ook die posisie in die Duitse reg (Marotzke *Gegenseitige Verträge* 155 ev 338 ev). Ek is van mening dat dit ook die posisie in die Engelse reg is.

98 Hierdie aangeleentheid gaan wesenlik oor voordeeltoerekening. Daar is skrywers wat meen dat voordeeltoerekening bloot 'n kwessie van berekening is. Sien bv De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 222 ev. As 'n mens egter na die positiewe reg kyk, is dit duidelik dat hierdie 'n *behorensvraag* is wat aan die hand van openbare beleid uitkristalliseer. Sien veral Van der Walt "Die voordeeltoerekeningsreël – knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" 1980 *THRHR* 1–26; Reinecke "Nabetragtinge oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 221–238. In *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 1 SA 248 (W) word die toepassing van die voordeeltoerekeningreël op die gebied van die kontraktereg bespreek. Volgens hierdie beslissing gaan voordeeltoerekening oor *billikheid* en *redelikheid* en nie oor 'n blote *berekening* nie. Die vraag is derhalwe wat die openbare beleid in die geval van sekwestrasie vereis. In die lig van die sentrale plek van die *concursus creditorum* en die taak van die kurator, word vervolgens aan die hand gedoen dat die openbare beleid vereis dat voordele soos hierbo genoem, wel in ag geneem behoort te word.

99 *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A) sal klaarblyklik in hierdie verband tot 'n ander resultaat lei.

100 Lg standpunt is op een lyn met die beginsels van die Nederlandse reg (Polak *Faillissementsrecht* 56; Van Zeben *Faillissementswet* 1.2.37–7; Van Nievelt *Invloed van het faillissement* 74).

7 4 Volledige of gedeeltelike prestasie deur die solvente teenparty

Het die teenparty al gepresteer (gedeeltelik of ten volle) maar die insolvent nog nie, kom die ander skuldeisers se belange op die spel. Die teenparty kan nie spesifieke nakoming eis nie. Hy kan wel versoek dat die kurator sy keuse moet uitoefen. Die kurator kan vervolgens besluit om die kontrak in stand te hou. Hy kan nie prestasie ingevolge enige uitstaande verpligting ingevolge die kontrak van die ander party eis nie tensy hy bereid is om ten volle te presteer en ook volledige prestasie aanbied.[101]

Besluit die kurator om die kontrak prys te gee, het die ander party 'n konkurrente eis vir nie-voldoening teen die boedel. Daarbenewens het hy 'n eis vir teruggawe van die prestasie of gedeeltelike prestasie indien eiendomsreg nie met lewering daarvan op die insolvent oorgegaan het nie. Het eiendomsreg wel oorgegaan, is dit my standpunt dat die solvente party slegs 'n konkurrente eis vir die bedrag van die teenprestasie of die waarde van die prestasie wat reeds gelewer is (indien dit nie 'n geldbedrag is nie) teen die insolvente boedel het.[102]

8 SLOTBESKOUINGS EN VOORSTELLE

Ten spyte van die talle hofbeslissings oor onuitgevoerde kontrakte en die belangrike rol daarvan in die insolvensiereg, is daar nog baie probleemvrae wat met betrekking tot die algemene reël opduik en meestal onbeantwoord gelaat word. Daar is aangedui dat die tradisionele standpunt met betrekking tot die algemene reël by onuitgevoerde kontrakte is dat die kurator die keuse het om die kontrak te "beëindig". Die appèlafdeling se benadering is dat die kurator eenvoudig die verpligtinge uit hoofde van die onuitgevoerde kontrak "repudieer" wanneer hy besluit om nie meer daarmee voort te gaan nie. Die standpunt is dat die gewone en algemene beginsels van repudiëring in so 'n geval van toepassing is. Bestudering van die regspraak het duidelik laat blyk dat 'n klinkklare antwoord na elke gevolg van die toepassing van een of ander van hierdie benaderings en elke moontlike uitwerking wat dit op die hele posisie by onuitgevoerde kontrakte tot gevolg kan hê, nie te wagte kan wees nie. Die ontleding het duidelik nie bevredigende resultate opgelewer nie. Myns insiens bring dit 'n warboel van standpunte wat deur die loop van jare gevorm is na vore, elkeen gepaardgaande met 'n onnadenkende gebruik van geykte kontrakteregterme ook in die insolvensiereg, sonder die aanpassing of verfyning daarvan wat noodwendig is as gevolg van die insolvente omstandighede.

Aangesien die repudiëringsbenadering tot onuitgevoerde kontrakte in die Suid-Afrikaanse insolvensiereg na my mening nie die gewensde resultaat sal

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101 *Goodricke & Son v Auto Protection Insurance Co Ltd (in liquidation)* 1968 1 SA 717 (A) 723 724F: "but the obligation to perform in full flows from the trustee's right to compel the solvent party to perform his obligations . . ." Dit is slegs die geval by ondeelbare kontrakte. Voordat die kurator nakoming deur die ander party kan eis, moet hy van sy kant eers al die agterstallige verpligtinge van die insolvent nakom.

102 Dit is ook die posisie in die Duitse insolvensiereg (Kilger *Konkursordnung* 106 107; Gottwald *Insolvenzrechtshandbuch* 357; Hess *Kommentar zur KO* 374). Dit blyk nie die geval in die Engelse reg te wees nie. Volgens die beginsels van die Nederlandse insolvensiereg kan die teenparty, soos hierbo reeds na verwys is, nie dit wat hy reeds gepresteer het, terugeis nie. Ingevolge die bepalings van a 37 van die *Nieuwe Faillissementswet* ontstaan daar egter in hierdie geval 'n "ongedaanmakingsverplichting". Die teenparty en die boedel is verplig om reeds gelewerde prestasies ongedaan te maak.

oplewer nie, en aangesien 'n "keuse tot beëindiging" en die volle konsekwensies daarvan nog nie hier te lande indringend ontleed of ontwikkel is nie, is ook gekyk na die algemene reël by onuitgevoerde kontrakte soos dit in die verskillende sekwestrasiestelsels van Duitsland, Nederland en Engeland geformuleer is. In die insolvensiewetgewing van elkeen van daardie lande word 'n uitdruklike keuse tot beëindiging van onuitgevoerde kontrakte aan die kurator toegeken. Die gevolge van die uitoefening van so 'n keuse word duidelik in die wetgewing uitgespel. Die weiering van die kurator om aan 'n onuitgevoerde kontrak van die insolvente boedel te voldoen, word beslis nie bloot as "repudiëring" beskou nie, met as resultaat dat daardie regsfiguur, soos wat dit in daardie lande van toepassing is, aanwending vind.

Daar word derhalwe ter oorweging gegee dat 'n statutêre reël geformuleer moet word wat die keuse van die kurator om onuitgevoerde kontrakte te verwerp of prys te gee ook in die Suid-Afrikaanse insolvensiereg uitdruklik erken. Myns insiens moet dit egter net kan gebeur indien daar nog 'n uitstaande verpligting aan die kant van die insolvente boedel is, uitgesonderd die geval waar die enigste uitstaande verpligting ingevolge die kontrak die betaling van 'n geldbedrag deur die insolvente party is. Daarby moet die konkurrente eis van die ander (solvente) kontraksparty vir nie-voldoening aan die ooreenkoms uitdruklik erken word. In samehang hiermee is dit ook my standpunt dat die kurator uitdruklik sy eis vir teruggawe van goed behoort te verloor. Ten minste behoort dit die geval te wees waar eiendomsreg reeds op die teenparty oorgegaan het. In die lig van die taak van die kurator en die sentrale plek van die *concursus creditorum* word aan die hand gedoen dat die voordeel wat die solvente party in hierdie situasie ontvang, met sy eis op grond van nie-voldoening aan die ooreenkoms in berekening gebring behoort te word. Die teenparty behoort ook toegelaat te word om die kurator se prospektiewe beëindiging in 'n retrospektiewe beëindiging te omskep indien hy so verkies. Het die teenparty reeds gepresteer en die kurator maak gebruik van sy reg om die kontrak te verwerp, is die vraag of die genoemde party daardie prestasie kan terugeis. Myns insiens is dit noodwendig 'n vraag na die bepaling van eiendomsreg – 'n vraag of eiendomsreg reeds op die insolvent oorgegaan het. Is dit wel die geval het die ander slegs 'n konkurrente eis vir daardie prestasie tesame met 'n konkurrente eis op grond van nie-voldoening aan die ooreenkoms. Het eiendomsreg nog nie oorgegaan nie, het die eienaar 'n reg op teruggawe van die prestasie plus die konkurrente eis op grond van nie-voldoening aan die ooreenkoms.

Is 'n deelbare verbintenis ter sprake, moet elke deel van die kontrak onafhanklik van die ander beoordeel word. Elke deel van daardie deelbare verbintenis moet dan aan die besondere besluit van die kurator en die gevolge daarvan soos in hierdie hoofstuk uiteengesit is, getoets en beoordeel word.

'n Artikel met die volgende inhoud word gevolglik voorgestel:

(a) Indien 'n wederkerige ooreenkoms ten tyde van die sekwestrasiebevel óf in geheel nie óf slegs gedeeltelik deur die insolvente party vervul is, het die kurator of voorlopige kurator van sy insolvente boedel die keuse om die ooreenkoms in stand te hou of te verwerp.

(b) Die teenparty kan die kurator skriftelik opdrag gee om sy keuse uit te oefen. Die kurator moet binne 'n redelike tyd verklaar of hy die ooreenkoms in stand wil hou of verwerp. Bly hy in gebreke, verloor hy na verloop van hierdie tydperk die reg om op nakoming van die ooreenkoms aan te dring.

(c) Verwerp die kurator die ooreenkoms, kan die teenparty as konkurrente skuldeiser vergoeding weens nie-voldoening eis. Daarby verloor die kurator sy eis vir

teruggawe van goed wat reeds deur die insolvent gepresteer is. Die voordeel wat die teenparty sodoende ontvang, moet teen sy vergoedingsaanspraak verreken word. Indien dit nadat die verrekening gemaak is, blyk dat die teenparty beter daaraan toe is as wat hy by volle uitvoering van die kontrak sou wees, kan die insolvente boedel 'n eis tot daardie omvang teen die teenparty instel.

(d) Het die teenparty reeds (geheel of gedeeltelik) gepresteer en die kurator verwerp die ooreenkoms, is die teenparty op teruggawe van prestasie geregtig indien eiendomsreg nie reeds op die insolvent oorgegaan het nie. Het eiendomsreg reeds oorgegaan, het die teenparty slegs 'n konkurrente eis vir die bedrag van die teenprestasie of die waarde van die prestasie (indien dit nie 'n geldbedrag is nie) wat reeds gelewer is.

(e) Die bepalings van subartikels (a)–(d) doen nie afbreuk aan 'n terugtredingsreg wat die teenparty verwerf het op grond van kontrakbreuk deur die insolvent gepleeg voor die sekwestrasie van sy boedel nie. Indien die tydperk vir nakoming van die prestasie in die kennisgewing van ontbinding wat deur die teenparty gegee is, nie reeds voor die sekwestrasie van die insolvent se boedel ten volle verloop het nie, word dit na verlening van die sekwestrasiebevel vir 'n tydperk van een-en-twintig dae opgeskort.

Met verwysing na die dilemma in geval van boukontrakte, kan oorweging ook geskenk word aan die byvoeging van 'n subartikel met die volgende inhoud:

(f) Met betrekking tot boukontrakte moet gelde wat aan die hoofkontrakteur betaal is vir werk deur die subkontrakteur gedoen asook retensiegeld wat deur die eienaar gehou word tot na voltooiing van die kontrak, by insolvensie van die hoofkontrakteur onmiddellik of direk, afhangende van die geval, aan die subkontrakteur betaal word.

Ten slotte word daarop gewys dat hierdie voorstelle ter hervorming nie die nodigheid van die reëls van die Insolvensiewet met betrekking tot besondere onuitgevoerde kontrakte uitskakel die. Dié reëls is spesifiek geformuleer met die oog op die eie omstandighede en beginsels wat respektiewelik op koop- en ander kontrakte van toepassing is. As gevolg daarvan verskil dit ook inderdaad van geval tot geval. Met verloop van tyd is hierdie bepalings op 'n sekere manier deur die howe geïnterpreteer en toegepas om op die billikste en redelikste wyse moontlik vir die afwikkeling van die betrokke onuitgevoerde kontrak voorsiening te maak. Sodanige besondere reëls moet vir die spesifieke gevalle behou word.

Observations on the observance of administrative law in student disciplinary proceedings at universities in Southern Africa

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OPSOMMING

Opmerkings oor die handhawing van administratiefreg in dissiplinêre verrigtinge teen studente aan Suider-Afrikaanse universiteite

'n Ondersoek word gedoen na die dissiplinêre verhouding tussen 'n universiteit en sy geregistreerde studente. Hierdie verhouding is sowel kontraktueel as administratiefregtelik van aard. Die universiteit is streng gebonde aan die administratiefreg met betrekking tot die gesag wat dit oor studente uitoefen, spesifiek ten aansien van dissiplinêre optrede teen hulle. In die ondersoek word gefokus op die huidige dissiplinêre reëling by elf universiteite in Suid-Afrika, Lesotho en Zimbabwe. Daar word veral gelet in welke mate die toepaslike beginsels van die administratiefreg by elk toepassing vind. Ten slotte word veranderinge aan die huidige praktyke voorgestel.

1 INTRODUCTION

The case for the transformation of educational institutions, particularly the universities, in South Africa has been well pleaded. Many universities have set up transformation structures of one form or another to give direction and pace to the efforts to create a non-racial education system of higher education. The administration of student discipline on university campuses must be examined in the context of that transformation. It should also be viewed in the light of the recent fundamental constitutional developments which seek to close the door to authoritarianism and to usher in an era of self-sustaining legitimacy. While those developments are taking place, indiscipline and misconduct at university campuses are prevalent.[1] It is incumbent upon universities to inculcate in their students an appreciation of the values that underpin the society which the new South African social order strives for.

1 Violations of disciplinary rules ranging from vandalism to aggravated assault have occurred at many universities in South Africa. Media attention has, at one point or another, been drawn to unsavoury events at the universities of Pretoria, Witwatersrand, Vista, South Africa, Free State, Fort Hare, Rhodes, Durban Westville, Cape Town, and the Western Cape.

2 A THEORETICAL PERSPECTIVE

The relationship between a university student and the university appears at first sight to be entirely contractual. It may appear that the student's position is analogous to that of a party to a contract which makes certain demands upon him and offers him reciprocal benefits. On enrolling the student, the university undertakes to provide tuition, facilities and a learning environment that is conducive to the pursuit of knowledge. The student in turn undertakes to pay the prescribed fees which will make it possible for the university to provide these services. He also undertakes to commit himself to the process of learning.[2] The relationship does, however, have a disciplinary dimension to it. In so far as the university commits itself to creating and maintaining an environment that is conducive to learning, it assumes a position of authority in relation to the student. In turn the student undertakes to accept that authoritative status.

A relationship of authority is by definition hierarchical.[3] It is a relationship in which the student is in a subordinate position and the university is in a superior, superordinate, position. The relationship is *also* administrative. An administrative relationship is characterised by the unequal distribution of power between the subordinate and the superordinate. The attribute by which the latter is easily identifiable is the vesting of power in it; power which it is in a position to enforce.[4] The power is usually derived from statute, and normally the same statute will define the subsidiary position of the subordinate. A common formula is to provide that every registered student shall be subject to the disciplinary authority of the university council.

As far as the administrative side of the relationship is concerned, the student/university relationship is regulated by administrative law. Apart from creating and recognising certain rights, administrative law also serves to prevent the wrongful encroachment upon or violation of those rights.[5] This essay attempts to examine the extent to which the principles of administrative law are observed in university student disciplinary processes at selected universities in southern Africa.

3 THE NATURE OF DISCIPLINARY PROCEEDINGS

The disciplinary power of a university is quite often derived from the Act by which the university was established, or the statute from which it derives its authority. It is common for the "primary" statute to empower the university council or some other body to make disciplinary rules. Thus the University of Venda Act provides in section 20:

> "A student of the University shall be subject to the disciplinary provisions prescribed by the Statute or by the rules made by the Council."

In terms of that enabling provision, regulations are then made, dealing with, *inter alia*, control of students and disciplinary action. Disciplinary regulations create the framework within which disciplinary action is taken. They set out the procedure to be adopted in respect of inquiries into alleged indiscipline. These regulations provide a useful reference point in this discussion. This essay seeks

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2 Indeed, in *Sibanyoni v University of Fort Hare* 1985 1 SA 12 (Ck) Pickard ACJ based his judgment on this theory. He went on to hold, erroneously, that the rules of natural justice had no application to matters of contract.

3 See Steytler "'Policing unrest': The resorting of authority" 1989 *Acta Juridica* 234.

4 Hosten *et al Introduction to South African law and legal theory* (1995) 1046.

5 See also *idem* 1047.

answers to a number of questions, relating to the nature of the proceedings, whether the rules of natural justice are observed, whether there is a right to representation, what standard of proof is applied, and whether a comprehensive record of the proceedings is kept.

There are three broad categories into which administrative proceedings of a judicial or quasi-judicial nature can be divided.[6] They may be accusatorial and resemble a criminal trial in which due process principles are prominent. In its purest form this model presupposes a contest between parties on opposite sides of a dispute. The accuser is responsible for proving the case to the satisfaction of an independent umpire who adopts an indifferent attitude to the objective truth underlying the contest. Proof is generally beyond reasonable doubt; and in striving to achieve such proof, the accuser can expect no co-operation or assistance from the accused.

The inquisitorial model, in contradistinction, demands an interventionist role for the decision-maker. The decision-maker has the responsibility of inquiring into the truth of the allegations made against the accused. For that purpose, he or she has power to question both the accused and the accuser, and to call witnesses if their evidence appears to be helpful in getting to the bottom of the case. Proof may be on a balance of the probabilities.

Finally, there is a hybrid model which borrows from both the accusatorial and the inquisitorial. The extent of borrowing determines the side to which the resulting hybrid leans. Thus the South African criminal trial is a predominantly accusatorial one, but it has significant inquisitorial aspects.[7] That of France, on the other hand, is predominantly inquisitorial, but has some adversarial elements.

These models are descriptive labels which are not used in the legislation which creates the procedural systems in question. Similarly, none of the university disciplinary regulations characterises the proceedings which they spawn one way or the other. One therefore has to examine the text of the regulations in order to make any such determination, if such a characterisation is seen as important.

There is a relationship between the character of a disciplinary system and its capacity to observe the principles of administrative law, in particular the rules of natural justice. If the person who chairs a disciplinary committee actively participates in the presentation of the evidence against a student, it will be difficult for him or her to remain objective in the evaluation of that evidence. It will be even more difficult to deflect the perception of bias. The *nemo iudex in sua causa* rule may well be flouted. This is less likely to occur where there is a separation between the organs which investigate and present the allegation and the decision-makers.

A feature common to most of the universities examined is that the disciplinary tribunal which deals with student discipline is not a mere investigatory body exercising powers of recommendation. It is an adjudicative organ vested with the power to make findings as to guilt. This is so notwithstanding the nominal

6 See generally Snyman "The accusatorial and inquisitorial approaches to criminal procedure: Some points of comparison between South African and Continental systems" 1975 *CILSA* 100; Herrmann "Various models of criminal proceedings" 1978 *SACC* 3–19.

7 Eg, the guilty plea procedure in terms of s 112(1)(b) and the plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977.

description of the disciplinary process as an "inquiry",[8] or an "investigation".[9] In most cases, the disciplinary tribunal has sentencing powers as well. It is, to that extent, a court of final instance. As such, the tribunal is therefore bound to observe and uphold the rules of natural justice.[10] It is more difficult to determine whether the proceedings in each case are adversarial, inquisitorial or a bit of both. Two fairly broad approaches are manifest. An inquisitorial approach is discernible in the Venda regulations. The chairperson of the disciplinary committee is responsible for calling witnesses to substantiate the allegations, and may require the production of any documentary evidence relevant to the hearing. Such witnesses are questioned by the committee and by the student who is facing a charge. It appears that the parties to the disciplinary hearing are the student on the one hand and the disciplinary committee chairperson on the other. The university is not represented by a proctor or prosecutor. Thus if the authenticity of evidence (for example, a document) tendered at the hearing is contested by the accused student, the chairperson's dual role is exposed. As the person responsible for presenting the case against the accused, it is up to the chairperson to establish that the evidence is authentic. At the same time, he/she must participate in deciding the issue. In certain cases, this may create the impression of partiality.

In contrast, there are universities at which the functions of case presentation and adjudication have been separated. Provision is made for the appointment of a standing, or *ad hoc* university representative to present the case. At the University of Cape Town, a prosecutor who is appointed by the Vice-Chancellor, prepares and presents the case to the disciplinary committee. It is the function of the prosecutor to submit any evidence, documentary or oral, to support the allegation. If the authenticity of documentation is placed in issue, the prosecutor must prove it. The same system is followed at the University of the Western Cape, as well as the University of Zimbabwe. At the latter, the prosecution is carried out by the Legal Proctor, who is a specially appointed academic from the Law Faculty. Similarly, the university appoints a prosecutor at the University of Natal (Durban) from the ranks of legal academics. At the University of the Witwatersrand, the prosecutor need not be a member of staff.[11] At Rhodes University the case against a student is investigated and presented by the Investigating Officer, who is "a member of the academic staff who has served as a judicial officer or practised as an officer of a superior court of law".

The University of the North West has a different system. The disciplinary committee there does not have adjudicative powers, but performs a purely investigatory role. The committee is composed of 12 persons who represent the various components of the university. An allegation of misconduct is investigated by the security department and a report is submitted to the committee. The Chairperson of the committee performs a similar function to his Venda counterpart. At the

8 See the University of the Western Cape's rules for the Student Discipline Court.

9 University of Zimbabwe Rules of Procedure in Disciplinary Proceedings before the Student Disciplinary Committee, Ordinance 30 Rule 8.

10 See *Vice Chancellor, University of Zimbabwe v Mutasa* 1993 1 ZLR 162 (S).

11 In terms of the Rules for Student Discipline at Wits, the Vice-Chancellor may appoint a member of the staff of the university, an attorney or counsel or both to present the case against the student. For some reason which is not readily apparent, this official is referred to throughout as "the person presenting the case against the student".

end of the hearing, the committee must make a recommendation to the Deputy Vice-Chancellor responsible for Student Affairs.

Notwithstanding the distinction in resolutive power between the North West's committee and its counterparts elsewhere, the former is also enjoined to observe the rules of natural justice.[12]

4 THE RIGHT TO BE HEARD AND TO BE REPRESENTED

The right which is expressed in the maxim *audi alteram partem* is a basic right of natural justice. It is the right to be given an opportunity to be heard by or to make representations to an administrative tribunal. Friedman J (as he was then) reiterated the point thus:

> "The celebrated principles of natural justice provide that persons who are likely to be affected by administrative action should be entitled and afforded a fair and impartial hearing before a decision to act is taken."[13]

In judicial proceedings, a corollary of that right is the right to legal representation. The issue of whether a person who is facing an allegation in an administrative hearing is entitled to be represented by a lawyer or by some other person is problematic.

The extension of the principles of natural justice to proceedings in university disciplinary tribunals is justified mainly by reference to the punitive or damning character of the decisions that may be taken on account of such proceedings.[14] The right to be heard is obviously one of the rights which apply. Does it necessarily follow that the right to legal representation must be observed? In *Yates v University of Bophuthatswana*[15] the court inferred, from certain provisions relating to the rights of the subject of the inquiry (an employee), that it did. In that case the contract of appointment gave the applicant the right

> "(a) to be informed in writing of the nature of the inquiry in such a way as to enable him to prepare his defence, and, furthermore, . . . at least 20 working days notice thereof;
>
> (b) to call witnesses and lead relevant evidence, and to cross-examine the witnesses against him".

The court indicated that it would have upheld the right to legal representation even in the absence of such a contractual provision. Among the principles which he regarded as relevant to "hearings before statutory, quasi-judicial and disciplinary bodies", Judge Friedman included the following:

> "[T]hat a person appearing before a statutory or quasi-judicial or disciplinary tribunal be accorded every opportunity of putting his/her case clearly and concisely. Inherent in this principle is that the said person is entitled to engage someone trained in the law to put his/her case to the tribunal concerned, in that the person trained in the law is better able to put the case than the person involved. This is the basis of legal representation."[16]

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12 At common law, the requirement of procedural fairness permeates all administrative actions (see *Administrator Transvaal v Traub* 1989 4 SA 731 (A)). The interim Constitution elevated this to a fundamental right through s 24(b).

13 In *Yates v University of Bophuthatswana* 1994 3 SA 815 (B) 835C–D.

14 *Lunt v University of Cape Town* 1989 2 SA 438 (C) 446J.

15 *Supra* fn 6.

16 846G–H.

He also described it as the "most persuasive"[17] right available to a person accused of wrongdoing before a tribunal.

The judge did not allude to the position at common law. Had he done so, he would have noted that under both South African and English law, legal representation is not a *sine qua non* for a fair oral hearing.[18] As Baxter[19] points out, while

> "[there] are advantages to be gained by legal representation in certain proceedings, ... there is also much to be said for keeping lawyers out of the administrative process where the adjudicative process is not essential: lawyers and over-judicialization tend to go hand in hand".

It is only where the case is unusually complex that legal representation might be implied as a requirement to a fair hearing. In other words, the right to be heard does not necessarily imply the right to be heard through a lawyer. Indeed, some statutes expressly exclude legal representation.[20]

The courts will, however, be reluctant to read an exclusion of legal representation into a statute which is silent on the point.[21] The general approach of the courts in such cases is that where an individual's career is at stake before a tribunal, he should be entitled to be legally represented if he so wishes.[22]

4 1 Interfering with the right

The Venda regulations specifically exclude legal representation.[23] This is in spite of the fact that the cases which fall within the jurisdiction of the disciplinary committee are those which are too serious to be disposed of by the disciplinary committee of the SRC[24] or by the House Representative Committee.[25] It is a trite principle that the common law can be superseded by statute. The Venda regulations can therefore legitimately negate legal representation if it flows from the common law. The question is whether the position is still entirely regulated by the common law.

Section 33 of the Constitution of South Africa 108 of 1996 provides for administrative justice. In subsection (1), it enshrines a right to procedurally fair administrative action. This subsection encompasses the requirement to observe the *audi alteram partem* rule. If that rule is widely conceived to imply the right to legal representation, as Judge Friedman contended, the right must be regarded as having been constitutionalised.

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17 846I.

18 *Dabner v South African Railways & Harbours* 1920 AD 583.

19 *Administrative law* (1984) 555–556.

20 Eg, no legal representation is allowed in the Small Claims Court, in terms of the Small Claims Court Act 61 of 1984.

21 See McNally JA's judgment in *Vice-Chancellor, University of Zimbabwe v Mutasa supra* 174.

22 See *Metsola v Chairman, PSC* 1989 3 ZLR 147 (S); *Chairman, PSC v Marumahoko* 1992 1 ZLR 304.

23 Reg (d)(v) reads: "No legal representation shall be allowed at the hearing of a student on a charge of misconduct, but a minor may be assisted at his/her hearing by a parent or guardian."

24 Created in terms of reg (f).

25 Created in terms of the Residence Regulations, reg 2(a) and given responsibility for "discipline in the residences" subject to the control of the Dean of Students.

Wiechers[26] and Corder[27] share the view that the right to a hearing includes the right to be assisted by legal counsel. Wiechers regards it as conditional upon the circumstances of the administrative enquiry. Corder, on the other hand, suggests that it should be an open right exercisable at the option of the individual subject of the administrative action. In my view, in disciplinary proceedings, the right to a hearing incorporates the right of legal representation, even where the hearing does not have the potential to yield results which are disastrous to a person's rights or interests. This is the only way in which effect can be given to the intention of building the rules of natural justice into the Constitution. It should be left to the subject of the disciplinary process to decide whether the services of a lawyer are necessary.[28]

If the right to legal representation is implicit in section 33(1) of the Constitution,[29] a law which negates that right is *prima facie* unconstitutional. As such, it can only survive if it is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[30]

As noted above, the Venda regulations create a disciplinary committee which operates without a prosecutor. It is arguable that the prohibition of legal representation is a reciprocal "concession" to maintain the "lay" balance between the university and the person charged with an offence. The argument is illusory, in so far as it overlooks the patent imbalance inherent in the hierarchical nature of the relationship between the student and the university. It may be noted that the University of the North West, which also runs a disciplinary structure without a prosecutor, allows legal representation.

What is needed is to make a value judgment of the kind envisaged by the limitation clause in the Constitution and to draw a line between minor cases and serious ones. The criterion becomes the penalty which may be imposed. One can distinguish between a warning on the one end of the spectrum and an expulsion on the other. It is submitted that while it might be reasonable to prevent the overjudicialisation of the less serious cases by ruling out legal representation, it would be difficult to sustain the argument in respect of a hearing which may lead to the suspension or expulsion of a student. It is possible for the Venda regulations to retain the exclusion of counsel, but only in a restricted type of case, determinable by reference to the effects on the rights of the student. Where a minor penalty is imposable, the present dispensation can be retained, but in the other cases a prosecutor must be appointed and legal representation allowed.[31] In any event, in the more serious cases, even if a student is not represented, it

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26 *Administratiefreg* (1984) 211.

27 "The content of the *audi alteram partem* rule in South African administrative law" 1980 *THRHR* 177.

28 As Corder *ibid* argues, the cost of legal representation coupled with the rarity of occasions when such representation is really necessary, will militate against its excessive use.

29 S 33(1) of the 1996 Constitution, which reproduced s 24(b) of the interim Constitution 200 of 1993, reads: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair." Subsection 3 imposes a duty on the state to pass legislation to give effect to those rights.

30 Ie, it must comply with the requirements of s 36 of the Constitution.

31 These remarks would also be applicable to the University of the Transkei, which does not use a prosecutor or allow legal representation. Rule 4 1 3 3 of the Student Rules states that legal representation "shall not, as a general rule, be allowed".

would be preferable if a prosecutor were to present the case. This would facilitate the observance of the other rule of natural justice, namely that the adjudicating authority should be free of bias.

In this regard the dispensation at the University of Cape Town provides a helpful model. Minor cases are heard by a Proctor's court, with no assessors. No legal representation is allowed then, but the sentence may not be expulsion, rustication from the university or residence, or a fine of more than R500.[32]

4 2 Adequate notice

The right to be heard encompasses a right to be given adequate notice of an impending inquiry/trial. There is no prescribed minimum notice or preparation time, but the student must be given a reasonable opportunity to prepare for the hearing. One observes that different universities set different notice periods, ranging from Rhodes' "at least 24 hours" to Wits' "not less than ten days' written notice". The shorter notice appears to be rather permissive of injustice in serious cases, especially where it is compounded by the denial of legal representation.[33]

4 3 "Cards on the table"

Recent constitutional developments in South Africa have added to the content of the right to be heard. The party to be heard must have an opportunity adequately to prepare to be heard. He or she must have access to information which is relevant to his or her rights. In disciplinary matters, the information may be in the form of statements made by witnesses or documentary evidence. Section 23 of the interim Constitution created a 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 his or her rights". This provision has been relied on to justify the disclosure of statements made to the police by witnesses before a criminal trial. It has been held that this right to disclosure is essential to the right of an accused person to challenge the evidence with which he will be confronted in the trial.[34] In civil cases, section 23 served to incorporate a constitutional right to discovery.[35] It is arguable that section 23 extended to disciplinary proceedings in a university forum. It was held in *Baloro v University of Bophuthatswana*[36] that a university is an organ of state, and as such, it is bound by the Bill of Rights. If it has information which falls within the scope of section 23, it is obliged to disclose the information.

Moreover, the successor to section 23 is wider in application. Section 32(1) of the 1996 Constitution gives everyone the right of access not just to official information, but also to information which is in the custody of a person other than the state. Since that person may be a natural or juristic person,[37] it is submitted that the university would, as a juristic person, be included.

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32 See University of Cape Town DJP 5 1 to 5 9.

33 As is the case at Venda.

34 *S v Nassar* 1995 1 SACR 212 (Nm); *S v Shabalala* 1995 2 SACR 761 (CC).

35 *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E); *Khala v Minister of Safety and Security* 1994 4 SA 218 (W).

36 1995 4 SA 197 (B).

37 S 8(2) of the 1996 Constitution extends the application of the Bill of Rights to all natural and juristic persons, where applicable.

None of the rules reviewed provides for pre-hearing disclosure.[38] It was, however, observed that the University of the Western Cape makes such disclosure as a matter of course in contested hearings.

5 THE ABSENCE OF BIAS

Natural justice requires administrative authorities to be of unquestionable impartiality. This requirement, in its application to judicial and quasi-judicial organs, cannot be better expressed than it was by Solomon J, in *Liebenberg v Brakpan Liquor Licensing Board*[39] thus:

> "Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial . . . The impartiality after which the courts strain may often in practice be unrealised without detection, but the ideal cannot be abandoned without irreparable injury to the standards hitherto applied in the administration of justice."[40]

This statement cannot be dismissed as the mere manifestation of judicial chauvinism. It expresses an important procedural value, which has certain implications for administrators and those affected by their determinations. Its significance is enhanced by the commonplace phenomenon of a concentration of responsibility or power in one person. (A case of one man, several hats!) In the context of a university it assumes significance because disciplinary structures are run by functionaries who are part of and have other responsibilities within the university system.

Two possibilities are highlighted in Solomon J's *dictum*; first, the existence of actual bias and second, the existence of circumstances which create the appearance of bias. Actual bias is rather difficult to prove, more so where it is harboured unconsciously. The law does not insist on the proof of actual bias. In either case, the test for bias is the "reasonable suspicion" test, which is preoccupied with the perception of the fictitious reasonable lay observer. The question is whether the reasonable lay observer would gain the impression that there is a real likelihood that the decision-maker will be biased.[41] The decision-maker does not have to be actually biased for that impression to be created. Among the circumstances which have been found to create the appearance of bias are the existence of a pecuniary interest and the existence of a personal relationship with one of the parties affected by the decision. Such a relationship need not be familial;[42] it may be social, business or professional[43] or even institutional.[44]

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38 Save for an obscure provision in the Wits rules, entitling the student to a copy of any written statement received in evidence and to inspect any other documentary or real evidence so received (see Rule 7(11)). This rule appears to be intended to apply at the hearing rather than before, as the entitlement is conditional upon the reception/admission of the evidence.

39 1944 WLD 52.

40 54–55, cited in Baxter 557.

41 *Metropolitan Properties (FCG) Ltd v Lannon* [1969] 1 QB 577 599; *S v Radebe* 1973 1 SA 796 (A) 811; *S v Herbst* 1980 3 SA 1026 (E) 1030; *Ciki v Commissioner of Correctional Services* 1992 2 SA 269 (E) 271–272.

42 As was the case in *Liebenberg v Brakpan Liquor Licensing Board supra.*

43 In *S v Nhantsi* 1994 1 SACR 26 (Tk) the accused asked the trial magistrate to recuse himself on this ground. The facts showed that during an adjournment, while the main

continued on next page

Prejudice, which is often actuated or manifested by the prejudgment of the issues to be decided by the decision maker, clearly grounds disqualification for bias. In the words of Baxter,

> "[the] most obvious form of prejudice is that which arises when someone is both prosecutor and judge in the same case".[45]

The prejudice should relate to the matter at hand in a way which could prevent a fair decision. In the context of a university disciplinary committee, a lecturer who initiated the complaint against a student would not qualify for membership of the committee trying that student. That would not necessarily disqualify his colleague from the same department, or faculty, however.

The practice of conferring on the chairperson of an adjudicative disciplinary committee the responsibility of submitting evidence and calling witnesses appears to raise the suspicion of bias. As has been observed above, a dispute relating to the validity of the evidence might pit the presenter of the evidence against the student. This practice must surely yield the risk of prejudgment of the case by the chairperson. That risk looms larger if he or she is allowed or required to preview the evidence before the hearing. In the process, he or she might be prematurely persuaded by the first version that is presented to him/her. This could lead the chairperson to try and confirm a preliminary view through partisan cross-examination of the student. The result is to inculcate a bias in the chairperson.

It is therefore submitted that requiring the chairperson to present the evidence as well as judge the case is contrary to the dictates of natural justice. It goes without saying that it is also procedurally unfair. In South Africa, it conflicted with section 24(b) of the interim Constitution.[46]

6 THE REQUIREMENT TO RATIONALISE DECISIONS

Whatever the position was at common law, the South African Constitution now makes it obligatory to give reasons for judicial and quasi-judicial administrative action.[47] Section 24(c) of the interim Constitution required reasons to be given in writing to a person whose rights or interests are affected, unless the reasons have already been publicised. Section 33(2) of the 1996 Constitution is in similar vein. This implies that administrative action must be rational and fair. The rationality of such action can, however, be tested only if the information on the basis of which the action was taken is also preserved. Two consequences flow from this: the first is that it is not sufficient simply to hand down an unsubstantiated

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prosecution witness was still under cross-examination, the magistrate had travelled in the same motor car as the complainant. On another occasion, the magistrate had had a discussion with the complainant (who was a regional magistrate) and another magistrate in a closed office. The application for recusal having been refused, it was held, on review, that these facts could give rise to a reasonable suspicion that the magistrate may have been biased and he ought to have recused himself. It was accordingly ordered that the trial should start afresh before a different magistrate.

44 As was the case in *Ciki v Commissioner of Correctional Services supra*; *Jansen v Commissioner of Correctional Services* 1992 2 SA 269 (E).

45 564.

46 S 32(1) of the 1996 Constitution.

47 In this regard, Baxter 568–569 submits that the courts have not read the duty to justify a decision to the affected party(ies) into the rules of natural justice.

decision, whether orally or in writing. Secondly, methods by which to compile an accurate and accessible record of the evidence presented have to be used. It is not sufficient simply to take paraphrased minutes of the proceedings, because that creates room for inaccuracies and "editing".

There are variations in approach at the respective universities. Some universities have enacted the obligation to keep a record by providing that the disciplinary courts must be courts of record. The University of the Western Cape has adopted this approach. A variation of this is the formulation used in the University of Cape Town's rules, to the effect that "a record of proceedings in each case shall be kept in such manner as directed by the University Proctor". This seems to be more subjective than the first, in that it makes it unnecessary to keep a verbatim record.[48] The University of Zimbabwe's rules specifically permit such non-verbatim recording of the proceedings.[49] The University of Natal (Durban) keeps a verbatim record through its Student Affairs department.

Other rules are silent on the extent to which the proceedings must be recorded. The Venda regulations are an example of this. They merely require the Registrar to appoint a member of the administrative staff to act as secretary to the disciplinary hearing, presumably to take minutes. The Transkei rules envisage the preparation of a report of the disciplinary committee for submission by the Registrar to Council in the event of an appeal. There are no guidelines as to the matters that must be covered by this report, or whether the evidence must be part of the report. Neither is there an indication of when this report must be prepared or whether it must be prepared as a matter of course. In view of the inquisitorial nature of the hearing, there is a danger that an irregularity committed during the hearing will be masked by a unilateral report which is compiled days or weeks after the hearing on the basis of selective notes. The potential for injustice therefore looms large.[50]

7 STANDARD OF PROOF

Disciplinary proceedings often call for a choice to be made between conflicting versions of a given incident or event. Decision-makers have to make the choice rationally. The casting of lots or thumb-sucking is not permissible.[51] This means that there has to be some indication of the extent to which the decision maker has to be persuaded before he or she can decide in favour of one version. In procedural law this extent of persuasion is referred to as the standard of proof. Generally speaking, in criminal cases proof has to be beyond reasonable doubt, while in other cases a predominance of the probability in one direction will suffice.

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48 In practice, the University of Cape Town records the proceedings on tape. A transcript may be prepared in the event of an appeal or review.

49 See Rule 8 8.

50 The only reference to a record of the proceedings at Rhodes occurs in Rule 18 9, which requires the Proctor to record the charge(s), the facts found proved, the verdict, punishment and the reasons for it within 48 hours of its imposition. Such a record cannot be complete.

51 Notwithstanding provisions to the effect that the decisions of the disciplinary committee must be determined by a majority vote of the members present and that every member must cast his vote.

Disciplinary proceedings are not criminal proceedings, regardless of the nature of the allegation. Principle would therefore dictate that the applicable standard should be the non-criminal one. There is, however, a difference of approach between South African and Zimbabwean administrative law on this important question. In South Africa the standard applied is "the balance of probability" standard.[52] In Zimbabwe the Supreme Court prefers a variable standard, depending on the nature of the allegation before the tribunal. The law was set out in the context of alleged embezzlement by a law firm in these terms:

> "Where an allegation involves professional misconduct simpliciter it only has to be proved on a balance of probabilities, but where an allegation involves an element of deceit or moral turpitude of a high order, which might make the accused liable to criminal prosecution, that allegation should be proved beyond reasonable doubt . . . The application of the two standards is reflective of the seriousness with which one is viewed over the other."[53]

The dichotomy of standards advocated in that proposition has been criticised elsewhere and the scope of this essay does not allow for a review of the pitfalls inherent in it.[54] Suffice it to say that loyalty to principle favours the adoption of a uniform standard, the non-criminal standard, in student disciplinary cases.

The University of Cape Town rules insist on proof on a balance of probability. The University of the Western Cape is less specific. Its rules allow the disciplinary court to

> "convict the student if it is satisfied that, in the light of the evidence advanced or the voluntary and substantiated admission of guilt by the student, (s)he is guilty".[55]

In practice, the court is satisfied with proof on a balance of probability. The University of Zimbabwe, on the other hand, requires proof beyond reasonable doubt.[56] The university goes further than is required by the law as set out in *Mugabe v Law Society of Zimbabwe*,[57] quoted above, in so far as it makes no distinction between criminal and non-criminal misconduct. One can only speculate that this apparent "bending over backwards" is attributable to an abundance of caution.

Most universities seem to uphold the principle that reasons must be given for the decisions of the disciplinary court within a reasonable time of the end of the hearing.

8 INTERNAL CONTROL OF THE DISCIPLINARY COURT

The most common method by which the disciplinary court is subjected to internal control is by allowing an aggrieved student to appeal to a sub-committee of Council. The University of Cape Town has a standing court of appeal which is

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52 See *Olivier v Kaapse Balieraad* 1972 3 SA 485 (A); *Law Society of the Cape v Koch* 1985 4 SA 379 (C); Lewis *Legal ethics* (1982) 310; Hoffmann and Zeffertt *The South African law of evidence* (1988) 528.

53 Per Korsah JA in *Mugabe v Law Society of Zimbabwe* 1994 2 ZLR 356 (S); see also *Pitluk v Law Society of Rhodesia* 1975 2 SA 21 (RAD) 29; *Chirambasukwa v Law Society of Zimbabwe* SC 135/95.

54 See Goredema "Variable standards of proof in disciplinary proceedings" 1996 (8) *Legal Forum* 20.

55 Rule 3 8 3 10.

56 Rule 8 6.

57 *Supra* fn 43.

chaired by a legal academic. The University of Natal (Durban) has a similar structure. The University of the Western Cape's appellate committee does not include a lawyer. The University of Venda's regulations also do not dictate a particular composition for the appellate committee of Council. At Wits, an Appeals and Review Committee made up entirely of legal professionals is appointed by Council to determine appeals.

In contract, at the University of the North West, appeals are directed to the Deputy Vice-Chancellor (Student Affairs). The University of Zimbabwe rules, like those in force at the University of Transkei, make no mention of an appellate structure. It appears that the disciplinary court's decision is finally determinative, internally at least. There is no appellate structure at Rhodes University either, but at that university, the Principal has powers of reviews over decisions of the Proctor or the Disciplinary Board.

In all cases the superior courts have review jurisdiction over all proceedings and decisions of disciplinary courts, committees and tribunals. Through the exercise of that jurisdiction the courts strive to give meaning to and protect the procedural and other rights extended by administrative law.

9 CONCLUSION

It would be an oversimplification to describe any university in Southern Africa as a microcosm of the broader society in which it exists. Universities, especially residential ones, tend to constitute distinct societies in themselves. As such, they provide opportunities for socialisation and the acquisition of life experience. It is to be hoped that in the process there is a development of an appreciation of the values which are essential to the co-existence of social beings.

The structures within a university which are charged with the responsibility of maintaining discipline have an important role to play in developing this appreciation. They can only perform that role if they are committed to upholding a system which places a premium on those values. Administrative law offers such a system. Its value has long been recognised in the field of industrial relations in both the private and the public sectors of the economy. It is about time that universities embrace that law in a more systematic way. In fact, this is not a matter on which they have a choice. The courts have repeatedly demonstrated a readiness to interfere where administrative irregularities occur. It would not be inappropriate to conclude by urging that the old adage that prevention is better than cure be observed in letter and spirit.

Strafbedinge in die Suid-Afrikaanse reg – Deel 2

(vervolg) [1]

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SUMMARY

Penalty clauses in South African law – Part 2

The scope of the Conventional Penalties Act 15 of 1962 is defined in sections 1 and 4 of the Act. Section 4 provides for the application of the Act to forfeiture clauses, thereby removing all distinctions made between forfeiture and penalty clauses in the early South African common law. The removal of these distinctions has also brought the South African law in line with the law of France and the Netherlands.

1 INLEIDING

In die vorige bespreking is begin met 'n ontleding van die toepassingsgebied van die Wet op Strafbedinge 15 van 1962. Die toepassingsgebied word bepaal deur artikels 1 en 4, waarvan artikel 1 reeds ontleed is. Hier volg nou 'n bespreking van artikel 4.

2 ONTLEDING VAN ARTIKEL 4

Die Wet op Strafbedinge is nie alleen op straf- en vooruitberaming van skadevergoedingsbedinge van toepassing nie maar ook op verbeuringsbedinge. Artikel 4 bepaal:

> " 'n Beding waarby bepaal word dat waar 'n party by 'n ooreenkoms hom onder daarin gemelde omstandighede daaraan onttrek, 'n ander party daarby die reg verbeur om restitusie te eis ten opsigte van enigiets wat hy ingevolge die ooreenkoms gepresteer het, of ondanks die onttrekking aanspreeklik bly om enigiets daaronder te presteer, geld in die mate en onderworpe aan die voorwaardes in artikels een tot en met drie voorgeskryf, asof dit 'n strafbeding is."

Alle onderskeid wat in die gemenereg tussen strafbedinge en verbeuringsbedinge gemaak is, is deur die wet verwyder. Verbeuringsbedinge is nou ook aan vermindering kragtens artikel 3 onderworpe.

Geriefshalwe kan artikel 4 ook, soos artikel 1, vir doeleindes van hierdie bespreking in onderafdelings verdeel word.

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1 Sien 1998 *THRHR* 61–72. Hierdie artikel is 'n verwerking van 'n gedeelte uit die outeur se LLD-proefskrif getiteld *Strafbedinge in die Suid-Afrikaanse reg* (UP 1995).

2 1 " 'n Beding waarby bepaal word dat waar 'n party by 'n ooreenkoms hom onder daarin gemelde omstandighede daaraan onttrek, 'n ander party daarby die reg verbeur om restitusie te eis ten opsigte van enigiets wat hy ingevolge die ooreenkoms gepresteer het"

'n Beding waarvolgens 'n party die reg verbeur om dit terug te eis wat hy ingevolge die ooreenkoms gepresteer het, word as strafbeding beskou en deur die wet beheer.[2] 'n Verbeuringsbeding bepaal normaalweg dat die party wat hom aan kontrakbreuk skuldig gemaak het, dit wat hy reeds presteer het, moet verbeur.[3]

Alhoewel artikel 4 nie spesifiek van kontrakbreuk melding maak nie, blyk dit duidelik uit die terugverwysing na ander artikels dat kontrakbreuk wel 'n vereiste is.[4] In *Custom Credit Corporation (Pty) Ltd v Shembe*[5] gee die hof *obiter* te kenne dat die bewoording van artikel 4, naamlik "dat waar 'n party by 'n ooreenkoms hom *onder daarin gemelde omstandighede* daaraan onttrek," moontlik 'n wyer betekenis as die kontrakbreukvereiste kan hê. Volgens De Wet en Van Wyk[6] kan hierdie voorstel nie aanvaar word nie aangesien artikel 4 in sy besondere verband gesien moet word. 'n Verbeuringsbeding kan, volgens hulle, net as 'n strafbeding beskou word as dit, soos 'n strafbeding, met kontrakbreuk verband hou. Volgens dié skrywers word die korrekte benadering in *Da Mata v Otto*[7] gevolg. In die saak het 'n klousule in 'n afbetalingsverkoop van grond onder andere bepaal dat die verkoper in bepaalde omstandighede geregtig sou wees om die grond terug te neem "together with all improvements thereon without payment of any compensation whatsoever".

Die hof moes beslis of dié beding 'n strafbeding binne die betekenis van die wet uitmaak.[8] Die hof ontleed beide artikel 4 en artikel 1 en kom tot die

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2 Alle bepalings van die wet is dus op verbeuringsbedinge van toepassing. Die onderskeid wat in die gemenereg tussen onafdwingbare strafbedinge en afdwingbare maar onverminderbare verbeuringsbedinge gemaak is, word uitgewis. Sien *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A); *Tobacco Manufacturers' Committee v Jacob Green & Sons* 1953 3 SA 480 (A); *Baines Motors v Piek* 1955 1 SA 435 (A); Van Heerden "Die strafbeding – Vier nuwe beslissings" 1957 *THRHR* 261; Hepple "Conventional Penalties Bill" 1961 *SALJ* 444; De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) I 239; Joubert *General principles of the law of contract* (1987) 267; Diemont en Aronstam *Law of credit agreements and hire purchase in SA* (1982) 202; Joubert, Otto en Grové "Algemene kontraktereg" in Van Jaarsveld en Oosthuizen (reds) *Suid-Afrikaanse handelsreg* I (1988) 135.

3 Vir voorbeelde sien *Langeberg Koöperasie Bpk v Gelderblom* 1967 1 SA 288 (K); *Van Staden v Central SA Lands & Mines* 1969 4 SA 349 (W); *Bester v Smit* 1976 4 SA 751 (K); *Edengeorge (Pty) Ltd v Chamomu Property Investments (Pty) Ltd* 1981 3 SA 460 (T); Kerr "Forfeiture clauses and the Conventional Penalties Act 15 of 1962" 1972 *SALJ* 15; Bamford "The Conventional Penalites Act" 1972 *SALJ* 230; Joubert 268; De Wet en Van Wyk I 236.

4 De Wet en Van Wyk I 247 vn 252. Sien die bespreking van a 1.

5 1972 3 SA 462 (A) 473; sien ook De Wet en Van Wyk I 247 vn 252; Van der Merwe ea 318 vn 274.

6 I 247 vn 252.

7 1972 3 SA 858 (A).

8 Indien die Wet op Strafbedinge 15 van 1962 wel op die beding van toepassing was, sou dit beteken dat die beding kragtens a 3 vir vermindering vatbaar sou wees. Toegepas op die feite, sou die verkoper dan vergoeding vir die verbeterings aan die koper moes betaal (sien *Da Mata v Otto* 1972 3 SA 858 (A) 870).

gevolgtrekking dat aan die volgende vereistes voldoen moet word ten einde 'n strafbeding daar te stel:

> "(a) [T]hat as required by sec. 4 the appellant was obliged to make improvements on the property and
>
> (b) that as enjoined by sec. 1(1) the appellant was obliged on the breach of the contract to deliver or perform improvements for the benefit of the seller."[9]

Die hof beslis dat die beding nie hieraan voldoen nie. Die feite en beslissing in dié saak het die aandag gevestig op die feit dat die wet nie vir bedinge van hierdie aard voorsiening maak nie. Waar die kontrak dus bepaal dat 'n party 'n prestasie waartoe hy nie in die eerste plek verplig is nie, moet verbeur, is die wet nie van toepassing nie. So 'n verbeuring val nie binne "enigiets wat hy ingevolge die ooreenkoms gepresteer het" soos deur artikel 4 van die wet vereis nie.

Verskeie skrywers is dit egter eens dat daar nie 'n vaste reël neergelê moet word dat so 'n beding nooit 'n strafbeding kan wees nie. Kerr[10] doen byvoorbeeld aan die hand dat die kontrak in elke geval as geheel oorweeg moet word om vas te stel of die beding as straf of bloot ter vergemakliking van herinbesitneming bedoel is. Van Rensburg, Lotz en Van Rijn[11] betoog ook dat daar in so 'n geval twee moontlikhede bestaan, naamlik dat

(a) so 'n verbeuringsbeding nie onder die wet ressorteer nie en die gemenereg steeds van toepassing is (in dié geval sal dus telkens vasgestel moet word of die verbeuringsbeding 'n strafbeding of 'n billike vooruitberaming van skadevergoedingsbeding daarstel); of

(b) so 'n beding onder die wet gebring kan word óf deur 'n wye interpretasie van die woorde "ingevolge die ooreenkoms gepresteer het", óf deur die verbeuring van vergoeding te beskou as 'n prestasie waarop die skuldeiser ingevolge artikel 1(1) geregtig is.

Hierdie skrywers is voorstanders van die tweede moontlikheid en sê dat dit nie uit die *Da Mata*-beslissing duidelik is dat 'n algemene reël (dat so 'n beding nooit onder die wet val nie) afgelei moet word nie.[12]

De Wet en Van Wyk[13] is van mening dat die hof tereg in *Da Mata v Otto* beslis het dat artikel 4 slegs slaan op verbeuring van dit wat ingevolge ooreenkoms gepresteer is, soos reeds betaalde paaiemente, en nie op verbeterings wat iemand aangebring het sonder om *ex contractu* daartoe verplig te wees nie. Dit is ongelukkig nie duidelik of hierdie skrywers meen dat hierdie benadering as algemene reël neergelê moet word nie. Hulle beklemtoon bloot die feit dat kontrakbreuk by beide artikel 1 en artikel 4 as vereiste gestel word. Volgens Joubert[14] is die gevolgtrekking wat in die *Da Mata*-beslissing bereik is, strydig met die beleidsoorwegings waarmee die wet daargestel is en daarom verkeerd. Dit wil voorkom

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9 1972 3 SA 858 (A) 871. Die hof volg die beslissings in *Ngomezulu v Alexandra Townships Ltd* 1927 TPD 401 en *Auby & Pastellides (Pty) Ltd v Glen Anil Investments (Pty) Ltd* 1960 4 SA 865 (A) waarin beslis is dat die beding nie as straf bedoel is nie, maar ingevoeg is om terugneming van die eiendom te vergemaklik. Sien ook Kerr 1972 *SALJ* 15.

10 1972 *SALJ* 15.

11 "Contract" in 5 *LAWSA* (red Joubert 1978) par 245.

12 5 *LAWSA* par 245 vn 29.

13 248 vn 253.

14 268; sien ook Van Rensburg, Lotz en Van Rhijn 5 *LAWSA* par 245 vn 5.

of die benadering deur Kerr en Van Rensburg, Lotz en Van Rhijn voorgestaan die billikste is en ook aan die bedoeling van die wetgewer uiting sal gee.

Word die posisie van die Suid-Afrikaanse reg ten opsigte van verbeuringsbedinge met ander stelsels vergelyk, blyk dit dat die Nederlandse en Franse reg geen onderskeid tussen straf- en verbeuringsbedinge maak nie.[15] Beide soorte bedinge word dieselfde behandel en daar word trouens nie eens van 'n afsonderlike definisie vir verbeuringsbedinge melding gemaak nie. Die Engelse reg daarenteen onderskei verbeuringsbedinge wel van strafbedinge en behandel dit ook verskillend. Terwyl strafbedinge as onafdwingbaar beskou word, word bedinge vir die verbeuring van deposito's of van reeds betaalde paaiemente as afdwingbaar beskou.[16] Verbeuringsbedinge word ook sonder vermindering afgedwing.

2 2 "[o]f ondanks die onttrekking aanspreeklik bly om enigiets daaronder te presteer"

Die Wet op Strafbedinge het ook betrekking op bedinge waarkragtens die skuldeiser by kansellasie geregtig is om sowel teruggawe van die koopsaak as betaling van alle agterstallige bedrae te eis.[17] So 'n beding is 'n strafbeding kragtens die wet en moet van 'n vervroegingsbeding onderskei word.[18] Ingevolge 'n vervroegingsbeding eis die skuldeiser nie kansellasie van die kontrak nie maar bloot die betaling van paaiemente op 'n vroeër datum as oorspronklik beding. Die koopsaak word dus nie teruggeneem nie.[19]

Verwarring kan egter tussen egte strafbedinge en vervroegingsbedinge ontstaan. 'n Voorbeeld[20] van 'n beding wat dikwels in afbetalingsverkoopkontrakte aangetref word, is die volgende: Die partye kom ooreen dat die kredietgewer in geval van kontrakbreuk die kontrak mag kanselleer, die koopsaak mag terugneem, alle reeds betaalde paaiemente mag behou en alle toekomstige paaiemente mag opeis. Laasgenoemde gedeelte van so 'n beding, naamlik 'n beding waarkragtens die skuldeiser ook geregtig is om alle toekomstige betalings onmiddellik by kontrakbreuk op te eis, skep besondere probleme. Verskillende benaderings tot sulke bedinge word deur die howe en skrywers voorgestaan.[21]

In *Claude Neon Lights (SA) Ltd v Schlemmer*[22] het die appellant 'n naambord vir 60 maande teen R9,00 per maand aan die respondent verhuur. Die kontrak het bepaal dat die huurder in sekere omstandighede kontrakbreuk sal pleeg en dat die verhuurder in so 'n geval geregtig sal wees

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15 Boek 6 a 91 *NBW*; a 1152 *CC*.

16 *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 2 All ER 321; Lang "Forfeiture of interest in land" 1984 *LQR* 431.

17 Diemont en Aronstam 206; De Wet en Van Wyk I 248; Joubert 268.

18 Ook bekend as 'n opeisbaarheids- of versnellingsklousule; Engels: "acceleration clause". Sien Joubert 269; Grové en Jacobs *Basic principles of consumer credit law* (1993) 41; De Wet en Van Wyk I 248.

19 Joubert 269; Grové en Jacobs 41. Sien ook die feite en bespreking van *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 1 SA 143 (N) hieronder.

20 Sien Grové en Jacobs 41; Joubert 269.

21 Sien *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 1 SA 143 (N); *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 3 SA 618 (D); Joubert (N) "Aspekte van die betalingsverpligting van 'n huurder ingevolge 'n finansiële huurkontrak" 1991 *De Jure* 152; Van der Merwe ea 318; Grové en Jacobs 41 vn 150; Joubert, Otto en Grové 178; De Wet en Van Wyk I 243 vn 230.

22 1974 1 SA 143 (N).

(a) om die naambord terug te neem en alle agterstallige huurgeld te vorder, asook om alle skade wat hy mag ly, te vorder; of

(b) om onmiddellik die volle balans van die huurgeld vir die oorblywende gedeelte van die huurtermyn op te eis, in welke geval die huurder geregtig sou wees om die naambord vir die res van die termyn te gebruik.

Nadat die huurder kontrakbreuk gepleeg het, het die verhuurder klousule (b) hierbo in werking gestel. Die hof beslis dat hierdie beding ingevolge artikel 4 van die wet 'n strafbeding is[23] aangesien die verhuurder onmiddellik 'n bedrag sal ontvang waarop hy slegs oor 'n tydperk van vyf jaar geregtig is. Die hof merk op dat

> "it would *prima facie* be markedly unfair to the debtor to allow the plaintiff to receive in one sum an amount which, had the contract run its full length, it would have received only over a period of years, without the allowance of a discount".[24]

Die *Claude Neon Lights*-beslissing kan egter gekritiseer word. Die verhuurder het nie die naambord teruggeneem nie. Hy het hom nie aan die ooreenkoms "onttrek" soos artikel 4 dit stel nie maar bloot spesifieke nakoming van die ooreenkoms geëis. Die beding was nie aan 'n *lex commissoria* gekoppel nie en val dus streng gesproke nie binne die bestek van artikel 4 nie. Dit is interessant dat die hof self hierop wys[25] maar, sonder om verder daarop in te gaan, beslis dat die betrokke beding 'n strafbeding is en onder artikel 4 óf artikel 1 tuisgebring kan word. Joubert (N)[26] wys ook (met verwysing na finansiële huurkontrakte) daarop dat 'n egte vervroegingsbeding so bewoord kan word dat die verpligting om uitstaande huur in een bedrag te betaal, reeds voor terugtrede opeisbaar word. Hy doen aan die hand dat

> "sodanige bedinge ingevolge artikel een as strafbedinge beskou kan word. 'n Beding ingevolge waarvan die verhuurder, wat die huurkontrak in stand hou, geregtig is daarop dat die huurder die huursaak aan die verhuurder teruglewer tot hy alle agterstallige en uitstaande huur betaal het, val ook binne artikel 1 se omskrywing van 'n strafbeding aangesien die huurder deur die beding verplig word om suiwer as gevolg van sy kontrakbreuk iets te lewer".

Volgens hierdie standpunt sou die egte vervroegingsbeding wat in die *Claude Neon Lights*-beslissing ter sprake was, dus wel onder die wet tuisgebring kan word en sou die beslissing dus korrek wees.

Die volgende punt van kritiek teen laasgenoemde beslissing is dat die verhuurder niks geëis het waarop hy nie geregtig was nie[27] – hy sou dieselfde

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23 Daar dien op gewys te word dat die regsverteenwoordiger van die appellant (verhuurder) in sy stukke toegegee het dat die beding 'n strafbeding is en dat die hof gevolglik nie hierdie aspek deeglik ondersoek het nie, maar oorgegaan het tot 'n bespreking van die verminderingsbevoegdheid ingevolge a 3. Sien *Claude Neon Lights (SA) Ltd v Schlemmer* 1974 1 SA 143 (N) 147.

24 1974 1 SA 143 (N) 148.

25 *Idem* 147.

26 1991 *De Jure* 156.

27 Om as strafbeding te kwalifiseer, moet die beding een van die partye geregtig maak op 'n bedrag geld of ander voordele wat hom by kontrakbreuk sal toekom en waarop hy andersins nie geregtig sou wees nie. Sien bv *Van Staden v Central SA Lands & Mines* 1969 4 SA 349 (W); *Du Plessis v Oribi Estates (Pty) Ltd* 1972 3 SA 75 (N); *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A); *Matthews v Pretorius* 1984 3 SA 547 (W); *Cave t/a The Entertainers & The Record Box v Santam Insurance Co Ltd* 1984 3 SA 735 (W); *Bank of Lisbon International Ltd v Venter* 1990 4 SA 463 (A); Joubert 265; Joubert, Otto en Grové 177.

bedrag in elk geval bekom het al was dit oor 'n langer termyn. Deur die bedrag te verminder, het die hof dus aan die skuldenaar 'n voordeel gegee wat hy nie sou gehad het as hy nie kontrakbreuk gepleeg het nie. In *Parekh v Shah Jehan Cinemas (Pty) Ltd*[28] wys die hof ook op hierdie punt:

> "In my opinion the common law read with the Act shows that in order to constitute a penalty there must be something added to a debtor's obligation to pay his debt. Furthermore, a stipulation which ensures that a debtor pays no more than he owes cannot in my view be regarded as being *in terrorem*, ie forcing the debtor to comply with the terms of his contract by means of 'onbillike dwang'."

Hoewel die hof hom gebonde ag aan die beslissing in die *Claude Neon Lights*-saak, meen hy dat die onderhawige saak daarvan onderskei kan word en dat die betrokke beding nie 'n strafbeding is nie. Regter Leon som sy beslissing soos volg op:[29]

> "In that case [*Claude Neon Lights (SA) Ltd v Schlemmer*] what was accelerated was the rental which was to fall due between the date of the lessee's breach and the contractual date of termination of the lease. What was there accelerated were several debts which had never previously been owing by the lessee to the lessor and which were reciprocal to the performance by the lessor of its obligations in terms of the lease. Any acceleration of payments not yet due gives an advantage to the lessor over and above what would be his normal remedy for the breach, namely cancellation and ejectment, or, in the case of a lease of movables, repossession. A right given to a lessor to require the lessee to pay, in accelerated form, the rent up to the terminal date of the lease being something additional to, and over and above, the normal remedy of a lessor might well be regarded as being *in terrorem* the lessee. But in the present case the respondents had only one obligation to the applicant, ie to pay the instalments, and the applicant had only one obligation to the respondents: not to claim payment of the full amount of the pre-existing debt provided that the instalments were paid. If the obligation was breached nothing accrued to the applicant which was not already owing to him."

Sommige skrywers[30] ontken ook dat 'n beding met die uitwerking aangedui in die *Claude Neon Lights*-beslissing enige strafelement bevat. Joubert (DJ)[31] stel die standpunt dat "[t]he simple rule is that the mere alteration in the date upon which an instalment becomes payable does not constitute a penalty". Dié benadering word ook deur Van Rensburg, Lotz en Van Rhijn[32] en De Wet en Van Wyk[33] gevolg en stem ooreen met die benadering in die Englese reg. Interessant genoeg, beskou die Engelse reg 'n suiwer vervroegingsbeding, anders as 'n strafbeding, wel as afdwingbaar. Treitel[34] wys daarop dat die howe so 'n beding bloot as 'n versnelling en nie as 'n verswaring van die skuldenaar se verpligtinge beskou nie.[35] Dit is ook interessant dat die Engelse howe 'n vervroegingsbeding van 'n strafbeding onderskei op grond daarvan dat 'n vervroegingsbeding in werking kan tree ongeag of daar kontrakbreuk plaasgevind het al dan nie.[36]

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28 1982 3 SA 618 (D) 626–627.
29 *Idem* 628.
30 Joubert 269; Van Rensburg, Lotz en Van Rhijn 5 *LAWSA* par 244; Joubert, Otto en Grové 177.
31 269.
32 5 *LAWSA* par 244.
33 I 243 vn 230.
34 *Remedies for breach of contract* (1991) 211; asook *The law of contract* (1991) 885.
35 *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776; *Oresundsvarvet Aktiebolag v Marco Diamantis Lemos ("The Angelic Star")* [1988] 1 Lloyd's Rep 122.
36 *Oresundsvarvet Aktiebolag v Marco Diamantis Lemos ("The Angelic Star")* [1988] 1 Lloyd's Rep 122.

Nieteenstaande hulle algemene standpunt soos hierbo aangetoon, meen De Wet en Van Wyk[37] dat dit wel moontlik is om 'n straf aan 'n vervroegingsbeding te koppel. Dit sal byvoorbeeld die geval wees waar die hoofsom en rente gekonsolideer word tot 'n oënskynlik enkele skuld wat in paaiemente oor 'n termyn gedelg word en die ooreenkoms 'n vervroegingsbeding ten aansien van die paaiemente bevat. In só 'n geval het 'n mens volgens dié skrywers

> "materieel, so nie formeel nie, met 'n situasie te doen waar die skuldeiser geregtig is op betaling van die hoofsom plus rente op die hoofsom ook vir die tydperk na betaling. So 'n situasie val binne die gees, so nie die letter nie, van art. 4 van die Wet. So 'n beding beoog immers die betaling van die teenprestasie (rente) in weerwil van die intrekking van die prestasie (die lening) deur die ander party".

Ook Joubert (DJ)[38] stel hom op die standpunt dat

> "where the sum payable includes interest, as is usually the case in instalment sales, then the fact that interest is payable in respect of a period during which the debtor did not have the benefit of the credit for which he is paying interest therefore constitutes a penalty in respect of the delay".

Hierdie benadering word ook deur die howe voorgestaan.[39]

Die gevolgtrekking wat gemaak kan word, is dat 'n vervroegingsbeding nie *per se* 'n strafbeding is nie.[40] Die beding moet telkens deeglik ondersoek word om vas te stel of dit inderdaad binne die toepassingsgebied van die wet val.

3 GEVOLGTREKKING: TOEPASSINGSGEBIED VAN DIE WET

In die lig van die voorafgaande ontledings van artikels 1 en 4, moet daar gewys word op sekere kontraktueel-ooreengekome eise wat nie strafbedinge is nie[41] en gevolglik nie onder die Wet op Strafbedinge tuisgebring kan word nie:

(a) Soos hierbo aangedui, is vervroegingsbedinge nie *per se* strafbedinge nie.

(b) Roukoopbedinge moet ook van strafbedinge onderskei word.[42] Hoewel roukoopbedinge voorsiening maak vir die betaling van 'n som geld of die lewering van 'n prestasie, word hierdie verpligting nie aan kontrakbreuk gekoppel nie. Die skuldenaar moet hierdie verpligting nakom vir die voorreg om, sonder om homself aan kontrakbreuk skuldig te maak, uit die kontrak te kan terugtree.[43] 'n

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37 I 243 vn 230.

38 269. Sien ook Lubbe en Murray *Farlam & Hathaway: Contract – Cases, materials, commentary* (1988) 642; Joubert, Otto en Grové 178.

39 *Du Plessis v Oribi Estates (Pty) Ltd* 1972 3 SA 75 (N); *Premier Finance Corporation (Pty) Ltd v Rotainers (Pty) Ltd* 1975 1 SA 79 (W); *Western Bank Ltd v Lester & McLean* 1976 4 SA 200 (O). Sien egter *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 3 SA 618 (D) – dit is nie duidelik waarom die hof nie in hierdie saak ook die benadering onder bespreking gevolg het nie.

40 Joubert 269; Joubert, Otto en Grové 178; Van der Merwe ea *Contract: General principles* (1993) 318; Grové en Jacobs 41; De Wet en Van Wyk I 243; Lubbe en Murray 642.

41 Sien in die algemeen Visser en Potgieter *Skadevergoedingsreg* (1993) 316; Joubert, Otto en Grové 178 ev.

42 *Baines Motors v Piek* 1955 1 SA 534 (A); Joubert, Otto en Grové 179; Visser en Potgieter 317; Van der Merwe ea 319; Joubert 265.

43 *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A); *Baines Motors v Piek* 1955 1 SA 534 (A); De Wet en Van Wyk I 240; Joubert 264; Visser en Potgieter 317; Van Rensburg en Treisman *The practitioner's guide to the Alienation of Land Act* (1984) 196; Aronstam *The alienation of land* (1985) 122.

Roukoopbeding is dus nie 'n strafbeding nie[44] en gevolglik is die Wet op Strafbedinge nie daarop van toepassing nie. Hierdie situasie het al gou daartoe gelei dat die opstellers van afbetalingsverkooptransaksies bedinge as roukoopbedinge ingeklee het ten einde die nadelige uitwerking van die Wet op Strafbedinge vir die verkoper te vermy.[45] Dié probleem is, sover dit afbetalingsverkooptransaksies van grond betref, ondervang deur artikel 12(5) van die Wet op Vervreemding van Grond 68 van 1981. Dié artikel bepaal dat roukoopbedinge in kontrakte wat deur hoofstuk 2 van dié wet beheers word, aan die Wet op Strafbedinge onderworpe is.

(c) *Arrha* moet ook van strafbedinge onderskei word.[46] *Arrha* is iets wat as bewys van die partye se erns met die onderhandelinge of sluiting van die ooreenkoms oorhandig word. Die hoofeienskap daarvan is dat dit gewoonlik iets van min waarde is.[47] *Arrha* wat vóór kontraksluiting gegee word, word verbeur deur die party wat hom aan die onderhandelings onttrek, terwyl *arrha* wat ná kontraksluiting gegee word, verbeur word indien 'n party nie sy verpligtinge nakom nie.[48] Laasgenoemde verbeuring beïnvloed egter nie 'n skadevergoedingseis nie.[49] *Arrha* verskil dus van strafbedinge daarin dat dit nie noodwendig aan kontrakbreuk gekoppel is nie en ook nie 'n eis om skadevergoeding beïnvloed nie.[50]

(d) Bedinge wat 'n skuldeiser se gemeenregtelike aansprake op kansellasie en restitusie bevat, moet ook van strafbedinge onderskei word.[51] Die skuldeiser sou, in die afwesigheid van die kontraktuele bepaling, in elk geval *ex lege* op terugtrede en restitusie geregtig wees[52] mits natuurlik aan bepaalde vereistes voldoen word.[53] Die *lex commissoria* wat die gemeenregtelike remedie van terugtrede in bepaalde omstandighede aan 'n kontraksparty verskaf,[54] is nie gerig op die

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44 Oor die verwarring wat vroeër tussen strafbedinge en roukoopbedinge bestaan het, sien *Ex parte Swift* 1923 OPD 182; *Adam v Curlews Citrus Farms* 1930 TPD 68; *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A); *Baines Motors v Piek* 1955 1 SA 534 (A). Oor die verwarrende gebruik van die term "rouwkoop" deur kontrakspartye, sien *Van Staden v Central SA Lands & Mines* 1969 4 SA 349 (W); *De Lange v Deeb* 1970 1 SA 561 (O).

45 Joubert, Otto en Grové 179; Van Rensburg en Treisman 196; Visser en Potgieter 317 vn 308.

46 Visser en Potgieter 317; Joubert, Otto en Grové 179.

47 Sien Joubert 264; De Wet en Van Wyk I 239; Joubert, Otto en Grové 180. Daar het vroeër aansienlike verwarring bestaan tussen strafbedinge, roukoop en *arrha*. Sien bv *Dreyer's Trustee v Hanekom* 1919 CPD 196; *Ex parte Swift* 1923 OPD 182; *Adam v Curlews Citrus Farms* 1930 TPD 68; *De Lange v Deeb* 1970 1 SA 561 (O); *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A).

48 Visser en Potgieter 317 vn 309.

49 *Baines Motors v Piek* 1955 1 SA 534 (A) 542; Visser en Potgieter 317 vn 309.

50 Waar 'n strafbeding bestaan, kan die skuldeiser nie beide die strafbedrag én skadevergoeding eis nie – sien a 2 Wet 15 van 1962.

51 *Sasol Dorpsgebiede v Herewarde Beleggings* 1971 1 SA 128 (O); *Da Mata v Otto* 1972 3 SA 858 (A); *Tamarillo v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A); Visser en Potgieter 316; Joubert, Otto en Grové 178.

52 Joubert, Otto en Grové 178; Visser en Potgieter 316 vn 305.

53 Joubert, Otto en Grové 160 ev.

54 Sien oor die *lex commissoria Kroukamp v Buitendag* 1981 1 SA 606 (W); *Alessandrello v Hewitt* 1981 4 SA 97 (W); *Westcar Properties v Young* 1983 2 SA 188 (N); *Ver Elst v Sabena Belgian World Airlines* 1983 3 SA 637 (A); *Moodley v Reddy* 1985 1 SA 76 (D); *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 4 SA 809 (A); Harker 1980 *Acta Juridica* 61 ev; Kerr "Flugel v Swart" 1980 *THRHR* 330–332; Eiselen "Teruggawe en beslaglegging by kredietooreenkomste" 1991 *De Jure* 101; Joubert, Otto en Grové 159–168. Joubert 239 ev; De Wet en Van Wyk I 214 ev.

versekering van nakoming van die ooreenkoms of die vooruitberaming van skadevergoeding nie maar slegs op die kansellasie van die ooreenkoms. Dit verskil dus van 'n strafbeding.

(e) Soos vroeër aangetoon, is 'n beding waarvolgens 'n kontraksparty 'n saak moet restitueer en afstand moet doen van vergoeding van verbeterings aangebring, ook nie 'n strafbeding nie.[55]

(f) Volledigheidshalwe moet ook net kortliks uitgewys word dat die Wet op Strafbedinge nie van toepassing is vir sover die Wet op Kredietooreenkomste 75 van 1980 op 'n koopkontrak van toepassing is nie.[56]

(*Word vervolg*)

55 Sien die bespreking van verbeuringsbedinge en *Da Mata v Otto* 1972 3 SA 858 (A) hierbo. Sien ook *Cohen v Cohen* 1980 1 SA 561 (Z); Joubert, Otto en Grové 178; *contra* Joubert 268.

56 A 5 Wet 15 van 1962 bepaal dat dié wet nie van toepassing is waar die Huurkoopwet 36 van 1942 van toepassing is nie. Die Huurkoopwet is nou deur die Wet op Kredietooreenkomste 75 van 1980 vervang.

Price discrimination

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OPSOMMING

Prysdiskriminasie

Anders as in the Verenigde State van Amerika en die Europese Unie, word prysdiskriminasie in die algemeen tans nie statutêr in Suid-Afrika verbied nie. Die Wet op die Bevordering en Handhawing van Mededinging 96 van 1979 maak egter voorsiening vir ondersoeke deur die Raad op Mededinging na beperkende praktyke en die Raad het prysdiskriminasie reeds op twee geleenthede ondersoek. Wetgewing in the Verenigde Koninkryk maak ook voorsiening vir ondersoeke na prysdiskriminerende bedrywighede op 'n basis soortgelyk aan dié deur die Raad op Mededinging in Suid-Afrika.

Prysdiskriminasie geskied wanneer 'n koper vanweë die pryselement van transaksies in 'n ongeregverdigde nadelige posisie in die mededingingstryd geplaas word vergeleke met 'n ander, welke posisie nie die oorsaak van prestasiemededinging is nie. Prysdiskriminasie moet egter nie uitsluitlik aan kosteverskille gemeet word nie maar 'n gesofistikeerde benadering behoort gevolg te word wat kennis neem van die kompleksiteit van die moderne ekonomiese bestel.

Die totaliteit van die regte en verpligtinge van die kontrakspartye moet gevolglik in ag geneem word om te bepaal of prysdiskriminasie in 'n bepaalde geval aanwesig is. Daar word aan die hand gedoen dat 'n onderskeid gemaak word tussen onregmatige prysdiskriminasie en regmatige prysdifferensiasie met verwysing na die *boni mores* en die mededingingsprinsiep. Prysdifferensiasie is nie ongewens nie en kan selfs noodsaaklik wees om mededinging te bevorder.

Die slagoffer van prysdiskriminasie wat met die *actio legis Aquiliae* wil ageer, moet natuurlik voldoen aan al die vereistes van die *actio*. Daar is geen presedente tot beskikking van so 'n litigant nie (wat uiteraard die risiko verbonde aan litigasie verhoog) maar daar kan met vrug gekyk word na die analoë geval van boikot.

'n Studie van die posisie in ander lande toon dat prysdiskriminasie daar meer aandag geniet as in Suid-Afrika. Die huidige gebrek aan aktiwiteit betreffende prysdiskriminasie in Suid-Afrika kan verander as gevolg van ekonomiese ontwikkeling en nouer handelsbande met die VSA en die Europese Unie. Ontwikkeling behoort dan aan die hand van die algemene beginsels van ons deliktereg te geskied.

INTRODUCTION

In a competitive business environment, some participants will succeed while others will fail. A successful business enterprise consciously wants to take the market share away from its competitors. Ultimately, every business wants a 100% market share![1] It stands to reason that some of the strategies employed in

1 See Neethling *et al Deliktereg* (1996) 306 ff; Whish *Competition law* (1989) 3; Merkin (ed) *Encyclopaedia of competition law* 1–001ff, as well as *Lorimar Productions Incorporated v Sterling Clothing Manufacturers (Pty) Ltd* 1981 3 SA 1129 (T) 1141 and *Royal Beech-nut (Pty) Ltd t/a Manhattan Confectioners v United Tobacco Co Ltd t/a Willards Foods* 1992 4 SA 118 (A) 123.

the cut and thrust of competition may be lawful while others may be unlawful.[2] How is lawfulness in this context to be determined?

Initially, the courts referred to "fairness and honesty in competition".[3] However, the general norm for the determination of lawfulness in delict remains the "legal convictions of the community", the *boni mores*.[4] In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd*,[5] Van Dijkhorst J rejected honesty and fairness as criteria, and said that the objective norm of public policy must be applied. The interests of competing parties must be weighed, bearing in mind also the interests of society, the "public weal". The judge stated: "What is needed is a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play." This norm cannot exist *in vacuo*. The "morals of the market place, the business ethics of that section of the community where the norm is to be applied",[6] must be taken into account. This approach has found acceptance with the courts.[7]

The *boni mores* test can be reconciled with the earlier criteria of fairness and honesty. In *Schultz v Butt*[8] Nicholas AJA said:

> "In judging fairness and honesty, regard is to be had to *boni mores* and the general sense of justice of the community ... Van der Merwe and Olivier[9] ... rightly emphasise that '*die regsgevoel van die gemeenskap opgevat moet word as die regsgevoel van die gemeenskap se regsbeleidmakers, soos Wetgewer en Regter*'."[10]

Very pertinent also are the words of Van Schalkwyk J in *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd*:[11]

> "[T]here is no doubt that there exist in South African law a 'natural standard of fairness and reasonableness' beyond which competition must not go ... Commercial warfare is not proscribed by our law ... there are certain forms of conduct which, when tested against the *boni mores* of the market place, remain untenable."

After an explanation of the criteria of fairness and honesty and *boni mores*, Van Heerden and Neethling say the following:[12]

> "The question now arises as to the criterion or principle which should be employed in the balancing or weighing up of the conflicting interests of competitors. In answering this question, the real nature and function of competition, and consequently also the current economic order ... must firstly be determined. Nowadays the economic order of most Western countries is to a greater or lesser extent regulated by the principle of free competition ... [C]ompetition must necessarily bring about the ruin of some competitors but ... [this] is not prejudicial to the

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2 See *A Becker and Co (Pty) Ltd v Becker* 1981 3 SA 406 (A) 417; Neethling *et al* 308.
3 Van Heerden and Neethling *Unlawful competition* (1995) 120; see *Gous v De Kock*; *Combrinck v De Kock* (1887) 5 SC 305; *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C); *Stellenbosch Wine Trust Ltd v Oude Meester Group Ltd* 1972 3 SA 152 (C).
4 Van Heerden and Neethling 122.
5 1981 2 SA 173 (T) 188–189.
6 188H.
7 Van Heerden and Neethling 124; see *The Concept Factory v Heyl* 1994 2 SA 105 (T), and other cases.
8 1986 3 SA 667 (A) 697B–C.
9 Van der Merwe and Olivier *Die onregmatige daad in the Suid-Afrikaanse reg* (1985) 58.
10 See also Van Heerden "Die mededingingsprinsiep en die *boni mores* as onregmatigheidsnorme by onregmatige mededinging" 1990 *THRHR* 153; Corbett "Aspects of the role of policy in the evaluation of our common law" 1987 *SALJ* 62.
11 1988 2 SA 350 (W) 358.
12 Van Heerden and Neethling 130.

> national economy [when] the victor in the competitive struggle is the person who delivers the most valuable commercial performance. *The real competition principle is therefore that the competitor who delivers the best or fairest (most reasonable) performance, must achieve victory, while the one rendering the weaker (or worst) performance, must suffer defeat.*"

This principle gives substance to the *boni mores* in the sphere of competition and was adopted by the Orange Free State Provincial Division of the Supreme Court in *Van der Westhuizen v Scholtz*.[13] In *Payen Components CC v Bovic Gaskets CC*[14] Van Zyl J said that "the competition principle should be regarded as a policy consideration *per se* rather than as a yardstick for establishing wrongfulness in the sphere of competition". The judge continued as follows:

> "However esoteric it may sound, it is, in my view, the general considerations of justice, equity, reasonableness, good faith and public policy[15] which underlie the value judgment required of a Court when it is called upon to establish whether or not a competitor has indulged in unfair or unlawful competition."[16]

The general principles of unlawful competition were again stated in *The Concept Factory v Heyl*.[17]

(It should be noted that not all legal systems recognise unlawful competition as a delict. For instance, in *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)*[18] the Australian High Court rejected the notion of a general action for unfair competition.)

There are numerous ways in which a competitor may infringe his rival's right to goodwill or interfere with his use of it.[19] One can distinguish between direct and indirect infringement.[20]

OBJECTIVES AND DEFINITIONS

In the United States of America, price discrimination has been defined as follows:

> "Price discrimination is one of the means by which a powerful business enterprise can exploit its superiority over competitors and thus substitute coercion and misuse of economic power for efficiency in the performance of economic functions. In short, 'price discrimination distorts the competitive contest, shifting it from a test of efficiency to one of brute financial power'."[21]

In the United Kingdom, Whish[22] defines price discrimination thus:

> "[T]he sale or purchase of different units of a good or service at prices not directly corresponding to differences in the cost of supplying them."

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13 1992 4 SA 866 (O) 873–874.
14 1994 2 SA 464 (W) 474G.
15 *Re* public policy, see *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd supra* 1152–3; *Aetiology Today CC t/a Somerset Schools v Van Aswegen* 1992 1 SA 807 (W) 818B; *Schultz v Butt supra* 697E.
16 See also Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 172; Corbett 1987 *SALJ* 54.
17 *Supra* 115C–H.
18 (1983–4) 156 CLR 414 (HC of A).
19 Van Heerden and Neethling 129.
20 Neethling *et al* 145.
21 Altman *Callmann: The law of unfair competition, trademarks and monopolies* (vol 1A) 51 § 7.24, also quoting Dixon *Price discrimination and the Sherman Act* 27 ABA Antitrust Section, 13, 20 (1965).
22 515.

It is submitted that costs should not be the only criterion, or even the most important criterion, in defining price discrimination. There are various other factors[23] consonant with lawful competition in a free market economy (or in an open and democratic society based on freedom and equality[24]) which justify different prices to different buyers. Determining real costs is also notoriously difficult.[25]

Competition requires the businessman constantly to seek and develop new markets, geographical and otherwise, and competition itself often makes price differences not directly related to cost differences essential, for instance when intense competition in a specific geographical area brings downward pressure to bear on prices in that area. Similarly, fidelity or loyalty discounts and promotional discounts are not necessarily related to costs but are nevertheless accepted business practices. These practices establish and maintain goodwill.

That is not to say that such practices are never used as discriminatory mechanisms. The challenge facing the law is to separate the chaff from the wheat and to deal with price discrimination in a manner consonant with the basic premises of law and economics. In a world of increasing technological and economic sophistication, the precision of a scalpel is required to excise discriminatory practices without interfering unnecessarily in free market activity. Not all forms of price "discrimination" are therefore necessarily undesirable, and it is necessary to distinguish between undesirable and acceptable or even desirable "discrimination".

In this article, the term "price discrimination" is used to denote price variation in conflict with the *boni mores* and the competition principle, while the term "price differentiation" is used to identify conduct which is not anti-competitive and which is not in conflict with the *boni mores*. The first should be unlawful and the second lawful. It is proposed that the law should distinguish between lawful price differentiation and unlawful price discrimination with reference to and on the basis of the principles of the *actio legis Aquiliae*, the *boni mores* and the competition principle.

The following definition of price discrimination is proposed: *Price discrimination occurs when in a comparison of the obligations imposed by two contracts of sale of goods or services involving the same seller, one purchaser is placed, intentionally or through negligence, at a competitive disadvantage* vis-à-vis *another in respect of the price element of the transactions and which is the result not of merit competition but rather of unlawful conduct.*

Price discrimination need of course not occur solely in respect of the prices of goods sounding in money or the provision of "free" goods or bonuses, but could also occur through other benefits such as cash rebates, gifts, donations, intangible benefits such as free holidays, and other incentives.[26] The maxim *de minimis non curat lex* must be applied to avoid absurd interventions.

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23 An attempt is made to list some of these factors *infra*; see also Merkin 1–412.

24 To paraphrase s 33(1) of the Republic of South Africa Constitution Act 200 of 1993; s 36(1) of the Republic of South Africa Constitution Act 108 of 1996.

25 Whish 516.

26 Altman (vol 1A) 70 § 7.28. This was also recognised in South Africa in the prohibition of price discrimination by pharmaceutical manufacturers, discussed *infra*, where "price" is defined to include, *inter alia*, "discounts, the granting of bonuses, samples and gifts which relate directly or indirectly to the sale of medicine".

Discrimination need not necessarily be price related. Refusing to deal with certain buyers or excluding certain buyers from access to preferential contracts could also be discriminatory. Such forms of discrimination fall outside the scope of this article.

FORMS OF PRICE DISCRIMINATION

Price discrimination can be practised in any number of ways. It may also involve horizontal collusion and may then be hit by the prohibition on horizontal collusion on conditions of supply.[27] "Primary line injury"[28] occurs when discrimination affects a competitor, whereas "secondary line injury"[29] refers to anti-competitive effects at the level of the purchaser. When competition is in turn distorted at the level of the customers of the purchaser, this could be referred to as "tertiary line injury".[30] In the United States of America, fourth line injury has also been recognised.[31]

The most obvious example of a horizontal discrimination, is predatory pricing[32] aimed at driving an existing competitor out of the market or preventing a new competitor from entering the market. Historically, in the United States of America, price discrimination "was initially regarded as a tactic principally available to dominant business units wishing to destroy competition in the struggle for monopolistic market power".[33] In *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd*,[34] the "sheer malice" of the respondent distinguished "this case from the normal one where, propelled by the capitalistic profit motive, the supermarket undercuts the corner store, causing its inevitable demise. Lamentable as such demise may be, this action is not wrongful".[35] Van Dijkhorst J continued as follows:

> "In my view a clear line should be drawn between acts of interference with the interests of another with the object of the advancement of a person's own interest and such acts whose sole or dominant purpose is the infliction of harm for its own sake. Whereas in law the advancement of one's own economic interest is, generally speaking, a legitimate motive for action, there can be no doubt that the community would condemn as *contra bonos mores* the malicious destruction or jeopardising of a sound business through the marketing of identical furniture at cut-throat prices for reasons of personal vindictiveness. I have no doubt that not only by the community in general but also in the field of the ethics and morality of the furniture manufacturers [the industry in which the dispute took place] such conduct is not acceptable . . ."[36]

An improper motive "can tip the scales in favour of a finding of unlawfulness".[37]

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27 GN 801 1986-05-02 in *GG* 10211. See van Heerden and Neethling 45.
28 Whish 521; see also Altman (vol 1A) 66 § 7.27; 83 § 7.32.
29 Whish 523.
30 *Idem* 521.
31 *Perkins v Standard Oil Co* 395 US 642, 89 S Ct 1871, 23 L Ed 2d 599 (1969), quoted by McManis *The law of unfair trade practices* (1983) 393.
32 Whish 522 532 539 546; see also Merkin 1–414 ff.
33 Altman (vol 1A) 47 § 49.24. For this reason, the Clayton Act of 1914 focused on monopolistic pricing abuses by dominant sellers.
34 1991 2 SA 455 (W) 474–476.
35 475A.
36 475I–6H; see Van Heerden and Neethling 139.
37 *Aetiology Today CC t/a Somerset Schools v Van Aswegen supra* 820B; see also Van Heerden and Neethling 136. In *Hawker v Life Offices Association of SA* 1987 3 SA 777

continued on next page

Predatory pricing could encompass primary, secondary and tertiary line injury, for example where predatory price cutting, at wholesale level and on a geographical basis, drives a regional competitor (another wholesaler) from the market, prevents retailers in other areas from buying at lower prices for the period of the scheme, and prejudices other participants in the distribution chain by diminishing choice. This example illustrates the fact that discrimination may simultaneously operate vertically and horizontally, that price discrimination aimed at one party may also prejudice third parties, and that the party practising discrimination may have the requisite *dolus*, whether it be *dolus directus*, *indirectus*, or *eventualis*, or *culpa* for Aquilian liability to these third parties as well.

Vertical price discrimination may be dictated either by dominant sellers or by dominant buyers. In this way it may place a small business at a competitive disadvantage *vis-à-vis* large enterprises. The extent to which small business enterprises need to be protected and the desirability of such small enterprises being active in the economy of course requires a socio-political value judgment falling outside the scope of the article, but naturally the courts will be guided by the *boni mores*.[38]

THE UNITED KINGDOM

Price discrimination may be addressed under the Restrictive Trade Practices Act,[39] the Fair Trading Act[40] and the Competition Act.[41] The Fair Trading Act enables the Monopolies and Mergers Commission to investigate "monopoly situations".[42] The Competition Act provides for investigations into "anti-competitive practices". An anti-competitive practice occurs[43] when "a course of conduct" is pursued which "has or is intended to have or is likely to have the effect of restricting, distorting or preventing competition". The Monopolies and Mergers Commission have condemned loyalty rebates and other similar discounting practices, predatory price cutting and delivered pricing[44] under the provisions of the Fair Trading Act[45] and the Competition Act.[46]

Some commentators speculate that a "more hostile approach" to price discrimination might be adopted in future.[47] The application of the law in the

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(C) 781, Howie J said that malice "can be a factor to be taken into account in determining reasonableness or not in a borderline case . . ." If there are other reasons to show that the act complained of was unreasonable, it is not necessary to show malice, and, conversely, malice is irrelevant if there were reasonable grounds for the act (see also Van Heerden and Neethling 316 ff; Neethling "Onregmatige mededinging: Prestasieaanklamping en die rol van motief" 1992 *THRHR* 134).

38 Whish 520.

39 1976. This Act pertains to agreements.

40 1973.

41 1980.

42 Whish 66.

43 S 2(1).

44 "Delivered pricing" means a price inclusive of delivery, and deprives the customer of the opportunity to take delivery at the premises of the seller at a lower price. The customer is obliged to pay for delivery by the seller. In this way, buyers close to the supplier are forced to subsidise more distant clients.

45 Whish 531.

46 *Idem* 538.

47 *Idem* 540.

United Kingdom will no doubt be influenced by developments in the European Union. At the same time, however, the law itself is unlikely to be reformed for the time being.[48]

THE UNITED STATES OF AMERICA[49]

As long ago as 1890, it was an offence to "monopolize or attempt to monopolize . . . any part of the trade or commerce among the several States".[50]

Whereas the Clayton Act of 1914, which outlawed price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce", was focused on monopolistic conditions, the Robinson-Patman Act of 1936 (which amended the earlier Clayton Act) reflected the "anti chain store syndrome" prevalent in the United States during the depression in the 1930s. It was aimed at curbing the abuse of dominant market power by chain stores which could demand discounts not available to smaller businesses.

The Act is enforced by the Federal Trade Commission and the Department of Justice, but a private plaintiff who has sustained damage may bring a private suit.[51] The successful litigant must show that a person engaged in and in the course of commerce discriminated in price between purchases of commodities of like grade and quality for use or resale within the United States of America, where at least one of the purchases was in commerce and the substantial effect is to lessen competition, create a monopoly, or injure, destroy or prevent competition with the parties to the contract or any of their customers.[52]

It is unlawful[53] in terms of the Act[54] to discriminate in price directly or indirectly between purchasers of goods of like grade and quality, when such discrimination may substantially lessen competition, tend to create a monopoly or "injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them". Nothing prevents a seller from "selecting his own customers in bona fide transactions and not in restraint of trade".

Price differences may be justified with reference to the following criteria, in addition to the defences available under the common law:[55]

- "[d]ifferences in the cost, other than brokerage, of manufacture, sale or delivery resulting from the different methods or quantities;"[56]
- discrimination in good faith "to meet an equally low price of a competitor",[57]

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48 *Idem* 542.
49 Twenty-eight states and Puerto Rico have adopted their own statutes to deal with price discrimination (Altman (vol 1A) 181 § 7.53).
50 S 2(a) of the Sherman Act, 1890.
51 Altman (vol 1A) 90 § 7.32. The plaintiff can recover treble damages and obtain injunctive relief (see also McManis 389).
52 *Idem* 390.
53 Once the plaintiff has met the burden of establishing the elements and the *quantum* of damages, the burden of proving that the differential price was not unlawful is on the defendant (see Altman (vol 1A) 90–1 § 7.32).
54 S 2(a).
55 Altman (vol 1A) 49 § 7.24.
56 A "degree of approximation" is allowed (see McManis 398; Altman (vol 1A) 101 § 7.34).
57 Again, a margin for error is allowed (see McManis 400).

- differentials attributable to changing conditions affecting the market, such as the sale of perishables and seasonal variations.

Price discrimination may not be practised under the guise of a reduction in commission for brokerage[58] or through promotional allowances to compensate a customer for marketing expenses.[59] The Act therefore defines three kinds of price discrimination, namely price discrimination *per se*, brokerage fees, and promotional allowances and services.[60] The Act also prohibits the solicitation or receipt of a discriminatory price,[61] and contains criminal provisions.[62]

The rigidity imposed by the Robinson-Patman Act has been criticised. The Act "represents a raid by selfish interests attempting to uphold obsolescent and inefficient methods of distribution".[63] The Supreme Court has commented that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act".[64] Furthermore, the Act is a

> "price-fixing statute clothed in 'anti-monopoly and pro-competition symbols'; almost with the same force as a pricing cartel, it can lead to uniformity and rigidity of prices because of its debilitating effect upon the bargaining dynamics of the big buyers".[65]

Despite its many shortcomings, the Act has nevertheless been responsible for a greater measure of circumspection amongst those tempted to practise price discrimination.[66] Be that as it may, it is clear[67] that sixty years after its promulgation in the United States, the Act is in need of fundamental revision[68] to meet the demands of the new millennium.

THE EUROPEAN COMMUNITY

Horizontal as well as vertical agreements to discriminate infringe article 85 of the Treaty of Rome, and discrimination in the absence of an agreement is hit by article 86. Article 85[69] prohibits all agreements which "may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market". Article 86[70] in turn prohibits abuse of a dominant position within the common market or a substantial part of it, in so far as it may affect trade between member states. Like article

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58 S 2(c).
59 S 2(d) and (e); see Altman (vol 1A) 146 § 7.42 to 149 § 7.44.
60 McManis 389.
61 S 2(f).
62 S 3. The criminal provisions do not represent an amendment of the Clayton Act.
63 Altman (vol 1A) 48 § 7.42, quoting Mclaughlin "The Courts and the Robinson-Patman Act in Symposium on Price Discrimination and Price Cutting" 1937 (4) *Law and Contemp Prob* 271 413; see also Whish 527.
64 *Automatic Canteen Co v Federal Trade Commission* 346 US 61, 65, 97 L Ed 1454, 73 S Ct 1017 (1953); see Altman (vol 1A) 51 § 7.24.
65 Altman (vol 1A) 51 § 7.24, also quoting Levi "The Robinson-Patman Act – Is it in the public interest?" 1952 (1) *ABA Antitrust Sections* 60 61.
66 Altman (vol 1A) 52 § 7.24.
67 See Altman (vol 1A) 119 Fall 1995 Cum Sup § 7.24.
68 In Altman (vol 1A) 52 § 7.24 the author concludes that "[t]he draft of an effective law against price discrimination should require no Herculean effort and the experience of the past should enable the draftsmen to avoid many pitfalls".
69 Whish 212.
70 *Idem* 275.

85,[71] it specifically prohibits abuse consisting of applying "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".[72] Article 86 is enforced by the European Commission and it is directly enforceable by individuals in that it creates rights and duties recognised also by national courts.

In the case law, three[73] types of discrimination can be identified, namely primary line injury (loyalty rebates and similar discounting practices,[74] predatory price cutting,[75] and delivered pricing[76]); secondary line injury;[77] and geographical discrimination.[78]

THE SOUTH AFRICAN COMPETITION BOARD'S APPROACH TO PRICE DISCRIMINATION[79]

In Report No 4,[80] the Competition Board commented as follows on price discrimination:

> "The ultimate aim of those practising discrimination in the free-enterprise economy can only be to ensure a desirable profit situation in the long run. The intermediate aims may vary. One way of achieving the ultimate object is to limit or eliminate competition. But discrimination may equally well be practised to meet competition and thus safeguard a given profit situation."

The Board came to the conclusion that there are "many kinds of discriminatory practices and that their effects are varied. Some are harmful on balance, others are beneficial and yet others might be either beneficial or harmful depending on circumstances".[81] The Board also concluded that localised price discrimination could, depending on various factors, either suppress or promote competition. Price discrimination (such as "price chiselling" through secret concessions in an oligopolistic market) could even be necessary to competition. The Board then came to the conclusion that the threat posed to manufacturers and small traders by chain stores had been grossly exaggerated. It follows that the Board found it impossible to recommend that price discrimination in general be prohibited. The Board was of the view that the abuse of buying power by large firms would be best dealt with on an *ad hoc* basis.

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71 Article 85(1)(c).
72 Article 86(c); see also Merkin 1–411.
73 Whish 544.
74 See *Hoffman-La Roche v Commission* [1979] 3 CMLR 211; *Re Nederlandsche Banden-Industrie Michelin* [1982] 1 CMLR 643. In the latter case the Commission rejected discounts not linked to a genuine cost reduction.
75 *ECS / AKZO* [1986] 3 CMLR 273.
76 *Napier Brown-British Sugar* OJ [1988] L 284/41.
77 *GVL v Commission* [1983] 3 CMLR 645.
78 *United Brands Co v Commission* [1978] 1 CMLR 429.
79 See s 1 of the Maintenance and Promotion of Competition Act 96 of 1979 for the definition of a "restrictive practice". If the Competition Board, after an investigation, forms the opinion that a restrictive practice exists or may come into existence, is not satisfied that it is in the public interest and no arrangement had been made with the parties, the Minister may upon consideration of the Report declare any particular type of agreement, arrangement, understanding, business practice or method of trading unlawful (see Van Heerden and Neethling 30 ff for a discussion of the Act).
80 "Investigation into discrimination in respect of prices or conditions of the sale" (1981).
81 Competition Board Annual Report (1981) 10; see also Altman (vol 1A) 49 § 7.2.4.

A decade later, in Report No 34, the Competition Board enumerated certain complaints which prompted the Board to recommend to the Minister for Public Enterprises that price discrimination by pharmaceutical manufacturers be prohibited. In this investigation, the Board was seized not with the abuse of buying power by large and powerful purchasers, but with the ability of dispensing medical doctors to obtain alleged preferential prices from manufacturers because of their ability to dictate which medicines in which quantities would be prescribed as a result of their right to prescribe pharmaceuticals, thus increasing turnover for the pharmaceutical manufacturer whose products were being prescribed.[82] Traditional pharmaceutical wholesalers and retail pharmacists were not able to dictate demand to any great extent and were therefore unable to demand access to preferential prices.

The complaints lodged with the Board were to the effect that certain benefits were not available to all purchasers, and that so-called "full line" wholesalers (that is, pharmaceutical wholesalers who carried a comprehensive range of products and not only the popular, high volume brands) and retail pharmacists were prejudiced.

The central complaint was not that price discrimination precluded competition between manufacturers but primarily that it marginalised retail pharmacy and traditional wholesalers by favouring dispensing doctors with prices not available to pharmacy even at higher volumes.

The Board was of the opinion that bonusing, hidden discounts, sampling, gifts, sponsorship, and price disparity amounted to price discrimination when the same benefits were not available to all purchasers. Price discrimination was aimed at wholesalers and retail pharmacists. Price discrimination benefited manufacturers, the non-traditional dispensing doctors, and patients of dispensing doctors who were unable to afford high prices.

The following parties were prejudiced by price discrimination: manufacturers not practising price discrimination; pharmaceutical wholesalers excluded from the distribution chain; certain retail pharmacists; and the public.

In response to the viewpoint that the sale of a medicine to a pharmacist was not a transaction equivalent to the sale of a medicine to a dispensing doctor,[83] the Board was of the opinion that different marketing methods did not serve as a yardstick to define the concept of an equivalent transaction, and that the single most important element as to whether the two transactions would be regarded as equivalent, was whether the transactions would reduce competition between buyers of the product.

The Board could not countenance a situation whereby suppliers are allowed arbitrarily to divide purchasers into classes, and then to discriminate between those classes. Permitting such "discrimination by category" would defeat the object of anti-discrimination legislation where the complaints relate to alleged discrimination between groups. It must be stressed, however, that the question of discriminatory pricing can arise only where the individuals or groups are in fact

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82 In other words, the ability of the doctor to act as the "demand director" in respect of pharmaceuticals.

83 A dispensing doctor dispenses medicine prescribed by himself or by a colleague. See s 52 of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974.

in competition.[84] Dispensing doctors and pharmacists can be said to be in competition in respect of the sale of medicines to the public and for that reason discriminatory price differentials based on nothing other than the fact that the one purchaser is a medical doctor and the other a pharmacist, should not be permitted.

It is acceptable in the United States[85] to sell at different prices to wholesalers, retailers, end users, *etcetera*, but a sale to a retailer at prices lower than that available to the wholesaler who then supplies the other retailers, may be discriminatory. This accords well with the principles proposed in this article, which are intended to bring the test for price discrimination in line with the general principles of Aquilian liability.

On 24 June 1993,[86] the Minister for Public Enterprises in response to Report No 34 declared it unlawful for a manufacturer of medicine which can eventually be sold on prescription, to sell such medicine, or otherwise dispose of it, in a manner which, directly or indirectly, discriminates between buyers, or classes of buyers, of medicine, by applying dissimilar prices and conditions to equivalent transactions[87] thereby placing one or more buyers or classes of buyers at a competitive disadvantage *vis-à-vis* its or their competitors.

The prohibition does not apply where the Co-ordinating Committee for Medical Procurement in the Department of Health is the purchaser, or where the purchase has taken place under an authority granted to the buyer by the State Tender Board. This removes the sale of pharmaceuticals to the State from the ambit of the prohibition. It is also not applicable in the following circumstances:

> "[W]here differences in prices and conditions are objectively justifiable to provide for the difference in cost or probable cost in the manufacture and/or distribution of the medicine which may be ascribed to –
>
> (i) the different quantities that are sold; or
>
> (ii) different conditions of supply, including the terms of payment, that may apply."

The prohibition is applicable only to manufacturers as defined, and not to other sellers or to purchasers.

A number of pharmaceutical manufacturers appealed against this prohibition.[88] Because of the appeal, the prohibition is not subjected to critical analysis.

THE FUTURE OF PRICE DISCRIMINATION IN SOUTH AFRICA

The question arises whether price discrimination amounts to unlawful competition in the absence of a prohibition pursuant to an investigation in terms of the

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84 See also, in respect of the USA, Altman (vol 1A) 64 § 7.27.

85 Altman (vol 1A) 64 § 7.27. The author adds that a "proper functional discount can only be allowed if, in fact, the buyer's function merits the price differential". A functional discount is a price differential related to the function of the buyer in the various levels of distribution (Altman (vol 1A) 106 § 7.34).

86 Notice No R 1136 published in *GG* No 14898 of 1993-06-24.

87 The term "equivalent transactions" is defined in the Notice as "transactions that require materially the same performance". This definition is deserving of critical analysis.

88 *SmithKline Beecham Pharmaceuticals (Pty) Ltd v Minister of Public Enterprises* 1994 4 SA 382 (T). By agreement between the parties, the sole issue which the court was seized with at that stage was the nature of the appeal under s 15 of the Maintenance and Promotion of Competition Act 96 of 1979. The court found that s 15 provided for an appeal in the wide sense.

Maintenance and Promotion of Competition Act[89] or other legislation. Aquilian liability in consequence of price discrimination has not yet enjoyed the attention of the courts in any reported judgment but the *actio legis Aquiliae* provides a flexible remedy to a disadvantaged competitor and is available even in the absence of a direct precedent.[90] The risk of litigation in the absence of precedent must of course not be underestimated.

Action could in such a case be instituted not between direct competitors, but by an aggrieved client, who believes he is being discriminated against and placed in an invidious position *vis-à-vis* his competitors, against a supplier. The aggrieved client will probably be met by the defence that the supplier is not in competition with him, and that the question of unlawful competition cannot arise. In the analogous situation of a primary boycott[91], it was held in *Times Media Ltd v South African Broadcasting Corporation*[92] "that there is no competition between the applicant and the respondent, let alone competition which is unlawful". It is the prerogative of a businessman to decide "with whom and on what basis" he will do business.[93]

This case must, however, be distinguished from the situation where a supplier boycotts certain clients, or subjects them to price discrimination, with the aim of driving them out of the market or gaining a competitive advantage, not because of its own superior performance,[94] but through misuse of a dominant position. It is submitted that, given an appropriate set of facts, the aggrieved client may be able to meet the requirements of the Aquilian action. The *actio legis Aquiliae* is a general remedy and is not restricted to actions between competitors. It is trite that unlike, for instance, the English law of torts, the South African law of delict is based on general principles rather than individually recognised torts.

The plaintiff may admittedly experience great difficulty in distinguishing his case from the decision in the *Times Media* case.[95] Even less clear, perhaps, is the potential fate of an aggrieved client who joins issue, not with the supplier, but with a fellow client with whom he is in competition. The plaintiff will allege that his competitor, because of a position of dominance, is able to enforce a system of price discrimination intended to place him at an unjustifiable competitive disadvantage. There is no reason in law to presuppose that the actions of a supplier (seller) are more likely to be unlawful *vis-à-vis* rivals than those of a purchaser, especially where the purchaser is in the dominant position, even

89 Act 96 of 1979.

90 Neethling *et al* 306; Van Heerden and Neethling 64; *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd supra* 218. See Neethling *et al* 9 ff and Van Heerden and Neethling 56 for a discussion of the *actio legis Aquiliae*. In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377, Booysen J described the *actio* succinctly as follows: "In essence the Aquilian action lies for patrimonial loss caused wrongfully (or unlawfully) and culpably."

91 A primary boycott is instituted not between competitors, but against clients (see Van Heerden and Neethling 307).

92 1990 4 SA 604 (W).

93 607E. The judgment was delivered by Van Schalkwyk J. See also Altman (vol 2) 61 § 10.10–11. In the USA, the "common law has generally taken a hands-off approach to pricing practices" (McManis 374).

94 Ie, the merits of his own performance.

95 *Supra.*

though actions against suppliers rather than purchasers are somehow more readily imaginable.

Again it is instructive to refer to the situation created by a secondary boycott.[96] A secondary boycott is an "organised effort to withdraw and induce others to withdraw from . . . business relations with another".[97] Discriminatory pricing at the instigation of a buyer may, depending of course on all the facts, be analogous to a secondary boycott in that an entrepreneur successfully instigates third parties to sell to a rival only at higher (discriminatory) prices. It is aimed, as is the boycott, at the exclusion or marginalisation of a competitor through measures other than the merits of the instigator's own performance. Public policy and motive will again play a decisive role, and discrimination instigated by the purchaser with the aim to harm or eliminate other purchasers and to gain a competitive advantage, not through the merits of his own performance, but rather through the instigation of what could be termed a "quasi-boycott", could conceivably make the offending purchaser liable in delict. It must be stressed, however, that the successful plaintiff will have to establish all the requisites of Aquilian liability. The unlawfulness of the act "may fall into a category of clearly recognized illegality or may consist of unfairness and dishonesty".[98]

The author is of the view that a sophisticated prohibition of price discrimination or an interpretation of price discrimination for the purposes of an Aquilian action, should exhibit the following characteristics:

(a) It would distinguish[99] lawful price differentiation from unlawful price discrimination in accordance with the principles accepted in the courts for determining lawfulness in delict, namely the *boni mores*[100] as reconciled with the earlier criterion of fairness.[101]

(b) It would be compatible with the competition principle.

(c) It would allow price differentiation on acceptable and defensible business grounds, dictated by the realities of the marketplace.[102] There can be no *numerus clausus* of such grounds but the following come to mind: number and location of delivery points; costs; volumes purchased at a given time; quantities purchased over time; payment terms; creditworthiness; marketing obligations by the seller or purchaser; meeting competition; developing markets; the provision of marketing information; and other contractual obligations by the parties towards each other and towards third parties.

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96 Van Heerden and Neethling 308; see also *Hawker v Life Offices Association of SA supra* 780H; *Murdoch v Bullough* 1923 TPD 495. (On a different but related topic, see also Van Heerden and Neethling 257 *re* interference in the contractual relationship of a competitor.)

97 Altman (vol 2) 2 § 10.01.

98 *Bress Designs (Pty) Ltd v GY Lounge Suit Manufacturers supra* 473G–H.

99 In the USA, "Robinson-Patman is not directed against the type of injury which is the normal incident of free and open competition; it is directed against the type of injury that results from competitive price discrimination; this is a basic distinction, albeit somewhat abstract" (Altman (vol 1A) 83 § 7.32.).

100 *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd supra.*

101 *Schultz v Butt supra.*

102 In Europe it was held, eg, that discrimination in favour of regular customers at a time of shortage was justifiable (Merkin 1–411; *BP v Commission* [1978] 3 CMLR 174).

Price differences must then be justified by and be relative to the inherent differences in the various contracts of sale. Whether this "proportionality criterion" has been satisfied in a specific case is, of course, a question of law and of fact.

It is recognised in the United States that

> "[l]egitimate differences with respect to the conditions of the sale may properly warrant differences in price; thus, the differences in the terms of payments or the credit risks involved and other variations in the method of trading will justify price differentials".[103]

The temptation to hide unlawful discriminatory practices behind a smokescreen of lawful differentiation will be greater when huge profits are at stake. The maxim *plus valet quod agitur quam quod simulate concipitur* should be vigorously applied.

Unfortunately, a sophisticated approach which promotes flexibility and adaptability on the basis of norms accepted in law, brings with it a measure of uncertainty. Conversely, a system which promotes absolute certainty will also be absolutely inflexible.

An inflexible approach to price differentiation could in itself be discriminatory towards the purchaser who purchases the same volumes as his competitor, is obliged by law to pay the same price, but has a better credit record, pays promptly, markets the product more efficiently, and provides the seller with useful marketing information. The more efficient competitor is then denied the benefits of efficiency which should give him the advantage in accordance with the competition principle.

The courts or any tribunal should in the application of a sophisticated, flexible prohibition of price discrimination have no more difficulty in determining whether one transaction amounts to unlawful price discrimination *vis-à-vis* another transaction, than in determining the lawfulness of other forms of behaviour in competition. In the event of an Aquilian action, the court would have to do this in any event.[104] Clearly, a price differential of 70% will hardly be justified by a volume differential of 0,01% or a credit period of 129 days versus 130 days. On the other hand, a price differential of 5% may very well be justified by cash payment versus payment in thirty days. More complex comparisons will no doubt be encountered in practice.

CONCLUSION

Price discrimination has not enjoyed the same attention in South Africa as in the European Union and the United States of America. The prospect of growth in international trade, the development of stronger economic ties with other countries, and technological developments may prompt further development in this area of the law. It is submitted that such development should be evolutionary rather than revolutionary, and be based on the basic tenets of competition in this country.

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103 Altman (vol 1A) 66 § 7.27, referring to *Krug v International Tel & Tel Corp* 142 F Supp 230 (DCDNJ) (1956).

104 See discussion *supra*.

Regsvrae rondom die geneeskundige behandeling van ernstig gestremde pasgeborenes

(vervolg)[*]

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4 ERNSTIG GESTREMDE PASGEBORENES EN DIE REG

4 2 Die posisie van ernstig gestremde pasgeborenes in die Amerikaanse reg

In die VSA is babas nog altyd as persone beskou en is die aktiewe doodmaak van babas deur wetgewing van die deelstate verbied.[95] Vroeër was sogenaamde nie-behandelingsbesluite in die VSA betreklik onbekend omdat sulke besluite geneem is binne die vertrouensverhouding wat tussen die ouers van die gestremde kind en die betrokke geneeshere bestaan het.[96] Vanaf ongeveer die middel van die tagtigerjare het die selektiewe nie-behandeling van ernstig gestremde pasgeborenes meer bekend begin word en gevolglik het selektiewe nie-behandeling van gestremde pasgeborenes al hoe meer aandag van die federale regering, wetgewers van die deelstate en die howe begin kry.[97]

4 2 1 Staatlike wetgewing

Wetgewing van die deelstate beïnvloed besluite rakende nie-behandeling van gestremde pasgeborenes op twee wyses. Eerstens het alle state wetgewing wat op moord en kinderverwaarlosing betrekking het. Na gelang dus van die feite van die geval, kan die ouers en/of geneeshere wat geneeskundige behandeling van 'n gestremde baba weerhou, ingevolge hierdie wette aangekla word. Wanneer ouers opsetlik of nalatig besluit om lewensverlengende mediese behandeling van 'n gestremde baba te weerhou en die baba sterf, en daar bewys kan word dat die ouers se optrede regstreeks verband hou met hul baba se dood, kan die ouers aangekla word van oortredings wat wissel vanaf die ernstige graad van moord ("first-degree murder") tot strafbare manslag en verwaarlosing.[98]

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* Sien 1998 *THRHR* 73–87.

95 Zajac "Legal issues in neonatal intensive care" (Winter 1989) 34 (4) *Hospital and Health Services Administration* 579.

96 *Ibid.* Sien ook in die verband Milunsky en Annas 142.

97 Weir (red) *Ethical issues in death and dying* (1986) 115.

98 *Ibid.*

Geneeshere wat behandeling weerhou van gestremde babas wat moontlik voordeel sou put uit die behandeling, stel hulle ook bloot aan strafregtelike vervolging. Ouers en geneeshere wat geneeskundige behandeling van gestremde babas weerhou, word egter selde ingevolge hierdie wette aangekla.[99]

Tweedens het verskeie state in die VSA in die vroeë tagtigerjare wetgewing deurgevoer wat op die beskerming van gestremde pasgeborenes gemik was. Louisiana was die eerste om sodanige wetgewing te verorden. Die staatlike wetgewing was egter dikwels vaag, uiters ingewikkeld om uit te lê en het somtyds geen spesifieke riglyne gestel oor hoe gestremde pasgeborenes deur geneeshere hanteer moet word nie.[100]

4 2 2 Federale regulasies

As gevolg van die publisiteit wat die *Bloomington*-saak[101] in die VSA uitgelok het, tesame met die algemene siening dat die hof die aangeleentheid hopeloos onbeholpe hanteer het, het die federale regering in die selektiewe nie-behandeling van gestremde pasgeborenes ingegryp. Eerstens het die Department of Health and Human Services in 1982 federale regulasies uitgevaardig wat ten doel gehad het om die lewens van gestremde pasgeborenes te beskerm. Die mees kontroversiële van hierdie regulasies was die sogenaamde "Baby Doe"-reëls wat in Maart 1983 in opdrag van president Reagan uitgevaardig is. Hierdie reëls wat verskeie kere hersien is, het kortliks soos volg bepaal:

> "It is unlawful under sec 504 of the Rehabilitation Act of 1973 for a recipient of Federal financial assistance to withhold from a handicapped infant nutritional sustenance or medical or surgical treatment required to correct a life-threatening correction if (1) the withholding is based on the fact that the infant is handicapped, or (2) the handicap does not render the treatment or nutritional sustenance medically contraindicated."[102]

'n Instelling wat hierdie kennisgewing sou verontagsaam, sou sy federale befondsing verbeur. Die kennisgewing moes opsigtelik vertoon word in kraamsale, kindersale en kinderkamers. Ingesluit by die kennisgewing was 'n 24 uur "hotline-number" wat enige persoon wat 'n vermoede had van enige diskriminerende behandeling teen gestremde babas, kon skakel. "DHHS"-amptenare is beklee met die bevoegdheid om onmiddellik stappe te doen om babas te beskerm.

Hierdie regulasies het sterk kritiek uitgelok en die algemene gevoel was dat dit 'n lompe poging deur die regering was om in te meng in aangeleenthede wat 'n sensitiewe uitoefening van oordeel en omsigtigheid geverg het. Alhoewel die bedoeling met die regulasies was om gestremde babas te beskerm, was hierdie kragdadige maatreëls teenproduktief en het die regulasies finaal gesneuwel toe dit in die saak van "Baby Jane Doe"[103] as ongrondwetlik verklaar is.

Weens die mislukking van die regulasies, het die federale regering besluit om weer te probeer maar hierdie keer by wyse van wetgewing.[104] Wysigings tot die

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99 *Ibid.*
100 *Idem* 114.
101 *Doe v Bloomington Hospital* Indiana CP Appl [Feb 2 1983].
102 McMillan, Engelhardt en Spicker (reds) 293.
103 *United States v University Hospital of the State University at Stony Brook* US District Court ED New York 575 F Supp 607 (1983).
104 Weir 116.

bestaande Child Abuse Prevention and Treatment Act is deur die Amerikaanse Kongres aangebring. Dit het bepaal dat geen geneeskundige behandeling van 'n gestremde pasgeborene weerhou mag word nie tensy (a) 'n pasgeborene sterwend of in 'n onomkeerbare komateuse toestand is; of (b) geneeskundige behandeling in 'n bepaalde geval nutteloos; of (c) onmenslik sou wees.

Hierdie wetswysigings het dit ook vir state verpligtend gemaak om binne een jaar prosedures te ontwikkel om gevalle van gerapporteerde weerhouding van geneeskundige behandeling van gestremde pasgeborenes te hanteer. State wat nie binne een jaar na promulgering van die wetswysigings sodanige prosedures ingestel gehad het nie, sou hulle federale subsidie vir kindermishandelingsprogramme verloor.

Alhoewel hierdie wetswysigings minder streng was as die "Baby Doe"-reëls, was hulle ook vatbaar vir kritiek. Een punt van kritiek was dat indien gesê word dat menslike lewe in 'n onomkeerbare komateuse toestand nie verleng hoef te word nie, dit 'n oordeel is wat op die kwaliteit-van-lewe-beginsel gegrond is.[105] Verdere kritiek was dat die verwysing na onmenslike behandeling neerkom op 'n etiese oordeel waarvolgens die lyding van die baba opgeweeg word teenoor die twyfelagtige vooruitsigte van lewensverlengende behandeling.[106]

4 2 3 Die benadering van die Amerikaanse howe tot selektiewe nie-behandeling van ernstig gestremde pasgeborenes

Seker die bekendste saak in die VSA in hierdie verband is die *Bloomington*-saak[107] van baba "Doe". Baba "Doe" is met sowel Down se sindroom as esofageale atresie gebore. Die ouers van die baba wou nie toestemming gee dat die esofageale atresie chirurgies herstel word nie. Die hospitaal (Bloomington) het hom egter tot die hof gewend vir advies met betrekking tot enige moontlike aanspreeklikheid wat kon ontstaan ingevolge die bestaande wetgewing oor kindermishandeling. In sy uitspraak merk regter Baker op dat die hof moet besluit of die natuurlike ouers van die baba, nadat hulle ten volle ingelig is oor al die gevolge van hulle voorgenome optrede, die reg het om te besluit oor 'n geneeskundig voorgestelde wyse van behandeling vir hulle kind.[108] Die regter beslis dat die ouers se besluit om behandeling van hulle baba te weerhou, redelik was.[109] Voordat daar egter namens die baba appèl aangeteken kon word teen die beslissing, het die baba vanweë uithongering gesterf. Hierdie uitspraak het aanleiding gegee tot die veelbesproke federale regulasies.

In *United States v University Hospital of the State University of New York at Stony Brook*[110], oftewel die *Baby Jane Doe*-saak, was die feite kortliks soos volg. In Oktober 1983 is baba "Jane Doe" gebore. Sy het onder andere aan spina bifida, hidrokefalie en mikrokefalie gely en het 'n misvormde breinstam gehad. Die ouers van die baba het geweier om toestemming aan die universiteitshospitaal te gee vir die chirurgiese herstel van die spinale defek en om vog uit die skedel van die baba te dreineer. In stede daarvan het die ouers versoek dat hulle

105 Kushe en Singer 46.
106 *Ibid.*
107 Sien vn 101 *supra.*
108 Soos aangehaal deur Kushe en Singer 13.
109 *Ibid.*
110 Sien vn 103 *supra.*

baba slegs konserwatief behandel moet word. Genoegsame voedsel en antibiotika is toegedien. Die blootgestelde rugmurg is ook met medikasie behandel om infeksie te probeer stuit en om vel aan te moedig om oor die gaping te groei. Met betrekking tot die geoorloofheid van die ouers se wens (dat geen chirurgiese behandeling toegepas moet word nie), beslis die appèlafdeling van die hooggeregshof van New York dat "[i]n refusing permission for the operation [the parents] made a reasonable choice among possible medical treatments, acting with the best interest of the child in mind".[111]

Soos hierbo gemeld, was hierdie uitspraak die laaste spyker in die doodskis van die federale regulasies.

Die posisie in die Amerikaanse reg oor die onttrekking of weerhouding van geneeskundige behandeling van ernstig gestremde pasgeborenes of pasiënte kan soos volg weergegee word.

Geen Amerikaanse hof het al beslis dat daar 'n absolute plig op geneeshere rus om pasiënte aan die lewe te probeer hou, op watter wyse ook al, ongeag die mediese werklikhede van die pasiënt se toestand of die nutteloosheid van die behandeling nie.[112] Nelson en Cranford[113] betoog ook dat daar regtens relevante faktore kan wees wat die opsetlike weerhouding van geneeskundige behandeling regverdig, ten spyte van die feit dat weerhouding van geneeskundige behandeling 'n pasiënt se lewe sal verkort. In 1984 beslis die hooggeregshof van Georgia in *In re LHR*[114] dat 'n kind, soos 'n volwassene, 'n grondwetlike reg het om geneeskundige behandeling te weier. Hierdie reg kan namens die kind deur sy ouers of wettige voog uitgeoefen word.

In *In re Guardianship of Barry*[115] het die appèlhof van Florida eenparig bevestig dat dit vir die ouers van 'n tien-maande-oue baba, wat in 'n vegetatiewe toestand was, geoorloof was om te versoek dat die ventilator waaraan die baba gekoppel was, afgeskakel moet word. In sy uitspraak sê dié hof:

> "When the courts are called in, the court must be guided primarily by the judgement of the parents who are responsible for their child's wellbeing, provided of course, that their judgement is supported by competent medical evidence."[116]

Slegs een geval kon opgespoor word waar 'n geneesheer aangekla is van moord weens sy versuim om voort te gaan met lewensonderhoudende behandeling.[117] Die appèlhof van Kalifornië beslis dat alhoewel die optrede van die geneesheer opsetlik was en hy geweet het dat die pasiënt sou sterf, sy optrede nie op 'n ongeoorloofde versaking van sy regsplig neergekom het nie omdat die pasiënt in 'n blywende komateuse toestand was en die pasiënt se familie ook versoek het dat alle geneeskundige behandeling gestaak moet word.

Staking van kunsmatige voeding om die sterwensproses te versnel, word egter met afkeer bejeën deur die Amerikaanse howe.[118]

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111 Weir 172.

112 Nelson en Cranford "Legal advice, moral paralysis and the death of Samuel Linares" (Winter 1989) 17 (4) *Law, Medicine & Health Care* 316 317.

113 *Ibid.*

114 312 SE 2d 712 (Ga 1984).

115 455 So 2d 365 (Ct App Fla 1984).

116 371.

117 *Barber v Superior Court* 147 Cal App 3d 1006 (1983).

118 Nelson en Cranford 319. As gesag vir hul stelling verwys Nelson en Cranford na die uitspraak in *Cruzan v Harmon* 760 SW 2d 408 (Mo 1988). Nadat daar egter nuwe

vervolg op volgende bladsy

Met betrekking tot die vraag of die sogenaamde "do-not-resuscitate orders" geoorloof is, meld Nelson en Cranford[119] dat daar weinig wetgewing of hofuitsprake is wat die aangeleentheid direk aanspreek. Dié skrywers is van mening dat waar hierdie bevele te goeder trou gegee word met die goedkeuring van die ouers, daar geen rede is waarom dit nie geoorloof kan wees nie. Nelson en Cranford[120] meen ook dat die onderskeid tussen weerhouding van behandeling en onttrekking van behandeling heeltemal ongegrond is.

Die moontlikheid dat 'n geneesheer wat behandeling van 'n terminaal siek pasiënt weerhou omdat die geneesheer *bona fide* glo dat dit in die beste belang van die pasiënt is, weens moord vervolg sal word, is dus feitlik nul.

4 3 Die selektiewe nie-behandeling van ernstig gestremde pasgeborenes in die Suid-Afrikaanse reg

Selektiewe nie-behandeling van ernstig gestremde pasgeborenes het tot dusver weinig aandag in die Suid-Afrikaanse reg geniet. Geen Suid-Afrikaanse gewysdes wat in besonder hierdie aangeleentheid behandel, kon opgespoor word nie. Die onderwerp is egter by geleentheid aangeroer in besprekings wat op eutanasie[121] oor die algemeen betrekking het.

4 3 1 Standpunte van akademici

4 3 1 1 T Jenkins

Jenkins, 'n toonaangewende genetikus, maak die stelling dat passiewe neonatale eutanasie[122] wydverspreid voorkom in sowel Suid-Afrika as in ander lande.[123] Hierdie vorm van eutanasie, wat oordeelkundige bestuur[124] genoem word, is volgens hom al in gevalle van spina bifida aangewend. Vir Jenkins is die onderskeid tussen die onttrekking van geneeskundige behandeling en weerhouding van sodanige behandeling van 'n gestremde baba kunsmatig en ongegrond. Jenkins is van mening dat waar daar oor die behandeling al dan nie van 'n ernstig gestremde baba besluit moet word, die oorweging van die gehalte van lewe wat vir die baba voorlê indien hy of sy behandel sou word van kardinale belang is. Volgens hom moet die besluitnemers hulself die volgende vraag aanvra: "What kind of life are we saving?"[125] Onvermydelik kom die besluitnemers dus te staan voor die kwaliteit-van-lewe-vraag wat met eerlikheid en deernis maar ook met nugtere denke beantwoord moet word. Waar daar besluit word om 'n baba nie geneeskundig te behandel nie sal die menslikste optrede wees om die baba so gou moontlik uit sy lyding te verlos.

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getuienis aan die lig gekom het, is daar by 'n tweede verhoor beslis dat die kunsmatige voeding van Nancy Cruzan wel gestaak mag word. Hierdie tweede uitspraak geld egter slegs vir die staat Missouri. (Sien in hierdie verband Boisaubin "Legal decisions affecting the limitation of nutritional support" (1993) 9 (2/3) *Hospice Journal: Physical Psychosocial and Pastoral Care of the Dying* 131 141 ev.)

119 319.

120 321.

121 Sien in hierdie verband Oosthuizen, Shapiro en Strauss (reds) *Euthanasia* (1978) 173 ev; Strauss *Doctor, patient and the law* (1991) 200.

122 Passiewe eutanasie in die sin dat ernstig gestremde babas toegelaat word om te sterf deur geneeskundige behandeling van hulle te weerhou.

123 Oosthuizen, Shapiro en Strauss 174.

124 Eie vertaling van die Engelse uitdrukking "judicious management".

125 Oosthuizen, Shapiro en Strauss 176.

Jenkins se eie siening aangaande die selektiewe nie-behandeling van ernstig gestremde pasgeborenes is soos volg: "Perhaps the time has come for us to consider seriously legalizing selective infanticide."[126]

4 3 1 2 Ellison Kahn

Die juris Kahn[127] is van mening dat indien dit die ouers se wens is dat hul ernstig gestremde baba nie geneeskundig behandel moet word nie, die hof nie die ouers behoort teë te gaan nie. Volgens hom aanvaar pediaters oor die algemeen dat daar geen plig op hulle rus om die lewe van elke pasgeborene te probeer red ongeag die fisieke pyn en struikelblokke asook die geestelike lyding wat die baba sal verduur nie.[128] Hy spreek die hoop uit dat die howe 'n realistiese houding sal inneem wanneer daar beslis word oor so 'n geval. Laastens gee Kahn sy mening met betrekking tot die plig om ernstig gestremde pasgeborenes te behandel:

> "I can only say that it would be wrong of the criminal law to compel unwilling parents and doctors to do anything positive to prolong the life of a malformed or severely handicapped baby and expose them to a charge of murder if they do not act. Where the line is to be drawn is impossible to say, however."[129]

4 3 1 3 Michael Katzen

Katzen,[130] 'n geneesheer, is van mening dat 'n beleid van selektiewe nie-behandeling van ernstig gestremde pasgeborenes gevolg moet word. Hierdie "beleid"[131] behoort egter in oorleg met die ouers van die gestremde baba toegepas te word. Katzen is egter ook van mening dat die ouers van 'n gestremde baba nie altyd die volle implikasies van hul baba se toestand in die kort tyd voordat 'n besluit geneem moet word, sal begryp nie. Dit kan dus tot gevolg hê dat die besluit van weerhouding of onttrekking van geneeskundige behandeling van 'n ernstig gestremde pasgeborene aan die geneeshere alleen oorgelaat word.[132]

4 3 1 4 SA Strauss

Die juris Strauss gee toe dat die selektiewe nie-behandeling van ernstig gestremde pasgeborenes 'n ingewikkelde en problematiese aangeleentheid is. Sy eie siening is soos volg:

> "[I]f it amounts to euthanasia to withhold medical treatment of grossly defective newborns – who have no hope of being cured or living for any length of time – and the withholding doesn't inflict starvation or any other form of cruelty and allows the baby to die a natural and hopefully early death, I for one, am in favour of that kind of euthanasia."[133]

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126 *Idem* 179.

127 Kahn (red) "Murder as a fine art" in *The sanctity of human life* Wits Univ, Spesiale Lesings (1984) 27.

128 *Ibid*.

129 *Idem* 28.

130 "Should the severely handicapped newborn be saved? Spina bifida as an example of the dilemma" Kahn (red) in *The sanctity of human life* 21.

131 Eie vertaling van die Engelse woord "policy".

132 Katzen 21.

133 Strauss *Doctor, patient and the law* 200. Sien ook in hierdie verband *idem* 200 vn 48 waar melding gemaak word van 'n tragiese geval wat in 1982 voorgekom het. Volgens 'n persoonlike mededeling aan die skrywer deur prof Strauss, was hy self by die geval

vervolg op volgende bladsy

4 3 1 5 Professor X

Volgens professor X,[134] 'n chirurg, is selektiewe nie-behandeling van ernstig gestremde pasgeborenes vandag nie net 'n aktuele onderwerp vir debatsvoering nie maar 'n daaglikse werklikheid in staatshospitale. Verskeie redes is hiervoor verantwoordelik, naamlik:

- 'n Uiters kritieke gebrek aan mediese fasiliteite soos hospitaalbeddens en ander noodsaaklike mediese toerusting
- 'n Tekort aan geneeshere en ander verpleegpersoneel
- 'n Feitlik algehele gebrek aan voorgeboortesorg wat veral voorkom onder lede van die minder gegoede gemeenskap. Baie swanger vroue sien eers die binnekant van 'n hospitaal wanneer die tyd vir hulle aanbreek om te kraam
- Weens die gebrek aan mediese geriewe is dit onmoontlik om geneeskundige behandeling ten alle koste aan elke baba wat met ernstige abnormaliteite gebore word, te verleen. Indien dit wel die geval sou wees, sou normale babas wat beter vooruitsigte het op 'n normale lewe afgeskeep word

Volgens professor X word egter net in werklik hopelose gevalle op selektiewe nie-behandeling besluit. Babas met Down se sindroom word byvoorbeeld nie as 'n hopelose geval gesien nie en selfs waar so 'n baba boonop aan 'n dermobstruksie ly, word die baba vir die toestand geopereer.

Die toepassing van selektiewe nie-behandeling in die staatshospitaal waar professor X werksaam is, geskied volgens hom op die volgende grondslag: Alle gestremde pasgeborenes ontvang aanvanklike lewensinstandhoudende behandeling soos wat die toestand vereis. Premature babas word byvoorbeeld dadelik aan 'n ventilator gekoppel. Geen ernstig gestremde baba word net toegelaat om daar en dan te sterf nie. Ernstig gestremde pasgeborenes word deeglik ondersoek en verskeie opinies word ingewin betreffende die lewensvatbaarheid van die baba. Slegs indien daar volslae konsensus is dat geneeskundige behandeling nutteloos sou wees, word behandeling onttrek sodat "die natuur sy gang kan gaan".[135] Groot sorg word egter gedra dat die sterwensproses so pynloos en menslik moontlik is. Waar dit moontlik is, word die toestand van die baba wel met die ouers bespreek maar dit is nie die algemene reël nie.

By 'n vraag of geneeshere wat dié passiewe eutanasie toepas, besef dat hulle hul dalk aan strafregtelike vervolging – byvoorbeeld vir moord – blootstel, was professor X se antwoord "ja". Hy spreek hom egter sterk uit teen die "wanbalans" wat hier bestaan, naamlik dat geneeshere in sekere omstandighede gemagtig is of selfs onder druk kom om 'n vrugafdrywing op 'n welgeskape, normale fetus uit te voer terwyl hulle gevaar loop om strafregtelik vervolg te

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betrokke. Die baba is met ernstige abnormaliteite (Down se sindroom en sonder 'n slukderm) gebore. Na oorleg met geneeshere het die ouers teen die geneeskundige behandeling van hul baba besluit. Ten spyte van dreigemente van sekere partye teen die ouers, het die ouers na die inwin van regsmenings by hul besluit gehou. Geen regsgeding is egter teen die ouers ingestel nie.

134 Prof X is 'n wêreldbekende chirurg en uiters bekwame geneesheer op die gebied van kindergeneeskunde. Hy is hoof van 'n departement by een van die grootste staatshospitale in Suid-Afrika. Prof X verkies om anoniem te bly vanweë die sensitiewe aard van sy mededelings aan die skrywer.

135 Persoonlike mededeling aan die skrywer.

word indien hulle geneeskundige behandeling sou onttrek aan 'n wese wat hopeloos gestrem en inderdaad heeltemal onlewensvatbaar is.[136]

Passiewe eutanasie vind dus daagliks in staatshospitaal Z plaas en faktore wat hiertoe aanleiding gee, is hoofsaaklik die nie-beskikbaarheid van fasiliteite, die gebrek aan gehalte van lewe wat voorlê indien die pasgeborene behandel sou word asook swak vooruitsigte op welslae met geneeskundige behandeling.

4 3 2 Benadering van Suid-Afrikaanse howe

'n Saak wat in 'n mate eerder met eutanasie as met selektiewe nie-behandeling verband hou, is die welbekende *S v De Bellocq*.[137] Die feite was kortliks soos volg. Die moeder van 'n baba het 'n paar weke na die baba se geboorte uitgevind dat die baba aan 'n toestand ly wat bekend staan as toksoplasmose.[138] Die moeder was uit Frankryk afkomstig en het daar vier jaar medies gestudeer. Sy het gevolglik besef wat dié toestand inhou. Een aand, terwyl sy haar baba gebad het, het sy die baba op die ingewing van die oomblik verdrink. Mevrou De Bellocq is aangekla en skuldig bevind aan moord.[139]

Veral die volgende woorde van regter De Wet is van belang vir selektiewe nie-behandeling van ernstig gestremde pasgeborenes:

> "The law does not allow any person to be killed whether that person is an imbecile or very ill. The killing of such a person is an unlawful act and it amounts to murder in law."[140]

Ongeveer sewentien jaar na die *De Bellocq*-saak moes 'n hof uitspraak lewer oor die geoorloofdheid of ongeoorloofdheid van onttrekking van mediese behandeling van 'n pasiënt wat reeds 'n aantal jare in 'n vegetatiewe toestand was. In *Clarke v Hurst*[141] het die pasiënt se eggenote aansoek gedoen om aangestel te word as *curatrix personae* om sodoende die bevoegdheid te verkry om te beveel dat die kunsmatige voeding van haar eggenoot gestaak word. Die hof het by oorweging van dié aangeleentheid die klem geplaas op die vraag of die optrede in die beste belang van die pasiënt sal wees of nie.[142]

By oorweging van optrede wat in die beste belang van die pasiënt is, verleen die hof voorkeur aan die instandhouding van lewe, maar dié voorkeur gaan nie so ver om te verkies dat lewe ten alle koste, ongeag die gehalte daarvan, onderhou moet word nie.[143]

Ten opsigte van die geoorloofdheid van die eggenote se voorgenome optrede – om die gee van kunsmatige voeding te staak – is die toets om die geoorloofdheid al dan nie van die optrede te bepaal, dié van die *boni mores* of regsoortuigings van die gemeenskap. By die vertolking van die *boni mores* is die gehalte van die lewe wat voorlê vir die pasiënt van kardinale belang.

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136 Persoonlike mededeling aan die skrywer.
137 1975 3 SA 538 (T).
138 Toksoplasmose is 'n toestand waar 'n pasiënt aan ernstige brein- en oogskade ly.
139 Agv verskeie versagtende omstandighede is me De Bellocq 'n baie ligte vonnis opgelê, nl ontslag met die voorwaarde dat sy binne 6 maande moet verskyn vir vonnisoplegging indien so versoek. Dit het egter nooit gebeur nie.
140 539C–D.
141 1992 4 SA 630 (D).
142 660C–D.
143 600D–E.

Is daar 'n verskil tussen kunsmatige voeding van 'n komateuse pasiënt en ander vorme van geneeskundige behandeling om so 'n pasiënt aan die lewe te hou? Uit die uitspraak van regter Thirion blyk dit dat kunsmatige voeding wat so 'n pasiënt aan die lewe hou niks anders as 'n vorm van geneeskundige behandeling is nie. In normale omstandighede het voeding van 'n hulpelose individu spesiale simboliese waarde wat mededeelsaamheid ("sharing") en deernis ("compassion") weerspieël.[144] Kunsmatige voeding kan in sekere omstandighede egter slegs tot gevolg hê dat die sterwensproses verleng word.[145] Net soos wat 'n ventilator 'n komateuse pasiënt aan die lewe hou wat self nie kan asemhaal nie, hou kunsmatige voeding 'n pasiënt aan die lewe wat self nie voedsel kan inneem nie.[146]

In die Engelse saak *Airedale NHS Trust v Bland*[147] het die vraag of kunsmatige voeding as geneeskundige behandeling gesien kan word, ook ter sprake gekom. In die Family Division getuig professor Bennet, 'n neurochirurg, dat hy van mening is dat kunsmatige voeding 'n vorm van geneeskundige behandeling is "just as is a ventilator or a kidney machine".[148] Sir Stephen Brown beslis ook oor hierdie aspek soos volg: "In my judgement the provision of artificial feeding by means of a nasogastric tube is 'medical treatment'."[149]

In appèl teen die beslissing van die Family Division beslis die Court of Appeal, Civil Division by monde van Sir Thomas Bingham dat kunsmatige voeding wel geneeskundige behandeling kan wees.[150] Sir Thomas is egter van mening dat die antwoord op die vraag of geneeskundige behandling in die onderhawige geval gestaak mag word of nie, nie afhanklik is van "fine definitional distinctions"[151] nie. Wat belangrik is, is die doel van mediese behandeling.[152] Die House of Lords beslis by monde van Lord Keith dat dit verkeerd is om kunsmatige voeding van ander vorme van geneeskundige behandeling te onderskei. Volgens Lord Keith asook Lord Goff[153] is kunsmatige voeding deel van geneeskundige behandeling.[154]

Kunsmatige voeding van pasiënte wat in 'n onomkeerbare komateuse toestand is, word dus as geneeskundige behandeling beskou in Suid Afrika, die VSA[155] en Groot-Brittanje.

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144 656E–F.
145 *Ibid.*
146 656F–G.
147 [1993] 1 All ER 821 (HL). Die saak het gehandel oor Anthony Bland, 'n jong seun, wat tydens 'n oproerigheid by 'n sokkerwedstryd 'n ernstige borskasbesering opgedoen het. Weens dié besering is die toevoer van suurstof na sy brein ingekort. Die uiteindelike gevolg was dat Anthony in 'n onomkeerbare komateuse toestand verval het. Die gesondheidsowerheid wat vir die behandeling van Anthony verantwoordelik was, het aansoek gedoen om 'n hofbevel wat dit sou veroorloof om alle geneeskundige behandeling van Anthony se staak. Die aansoek is in die House of Lords toegestaan.
148 827e–f.
149 832f–g.
150 836g.
151 836h–i.
152 *Ibid.*
153 861d–e.
154 871b.
155 *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (HL) 836g.

Die kern van die hof se uitspraak in *Clarke* is dat waar daar besluit moet word oor die geoorloofdheid van onttrekking van mediese behandeling, die hof 'n oordeel vel of onttrekking van geneeskundige behandeling, met inagneming van die gehalte van die lewe wat vir die pasiënt voorlê, in die beste belang van die pasiënt sal wees of nie.

Wat ook van belang is, veral vir potensiële gevalle van selektiewe nie-behandeling van gestremde pasgeborenes, is dat regter Thirion van mening is dat die onderskeid tussen weerhouding van geneeskundige behandeling en die onttrekking van geneeskundige behandeling nie tersaaklik is nie.[156]

4 3 3 Eie standpunt

Ek stem saam met Strauss dat die beginsel van selektiewe nie-behandeling van ernstig gestremde pasgeborenes 'n mens vierkantig op die onsekere gebied van eutanasie plaas.[157] Dit behoef geen betoog dat aktiewe eutanasie deur die Suid-Afrikaanse strafreg verbied word nie.[158] Myns insiens is selektiewe nie-behandeling van ernstig gestremde pasgeborenes niks anders nie as selektiewe passiewe eutanasie wat op ernstig gestremde pasgeborenes toegepas word. Alhoewel daar nog geen gerapporteerde Suid-Afrikaanse sake is waarin selektiewe nie-behandeling van ernstig gestremde pasgeborenes ter sprake gekom het nie, is ek van mening dat ouers en geneeshere wat passiewe eutanasie in hierdie omstandighede beoog, hulle blootstel aan die risiko van strafregtelike vervolging indien die baba sou sterf. Die moontlikheid dat 'n ywerige maar onsensitiewe openbare amptenaar kan besluit om die ouers of geneeshere in hierdie omstandighede te vervolg, kan nie oor die hoof gesien word nie.[159]

Hoe behoort 'n hof selektiewe nie-behandeling van 'n ernstig gestremde pasgeborene te benader? Na my mening is veral drie aspekte van belang, naamlik opset, kousaliteit en wederregtelikheid.

4 3 3 1 Opset

Indien die betrokke ouers en/of geneeshere weens moord vervolg sou word, is dit moeilik in te sien hoe dié partye sal kan aantoon dat opset ontbreek het.[160] Ek is trouens van mening dat opset altyd aanwesig sal wees by die ouers en/of geneeshere waar 'n ernstig gestremde pasgeborene gesterf het weens die besluit dat lewensonderhoudende geneeskundige behandeling van hom of haar weerhou moet word.

4 3 3 2 Kousaliteit

Is daar 'n kousale verband tussen die afsterwe van 'n ernstig gestremde pasgeborene en die besluit van sy of haar ouers en/of geneeshere dat geneeskundige

156 658B.

157 Strauss *Doctor, patient and the law* 200. Met eutanasie in dié verband word bedoel passiewe eutanasie, dws die doelbewuste besluit om 'n pasiënt nie geneeskundig te behandel nie, of om lewensonderhoudende geneeskundige behandeling van 'n sterwende pasiënt te onttrek (*idem* 342 ev).

158 *Idem* 339.

159 Die geskiedenis toon dat beskuldigdes in eutanasie-gevalle gewoonlik aangekla word van moord (sien in hierdie verband *idem* 339 ev).

160 Die ouers en/of geneeshere besef immers deeglik dat die baba kan sterf vanweë hul optrede (late). In werklikheid is dit selfs die wil van die ouers en/of geneeshere dat die baba moet sterf.

behandeling weerhou of onttrek moet word? In *R v Makali*[161] het die volgende situasie hom voorgedoen. Die appellant het die oorledene 'n nie-ernstige[162] snywond bokant sy linkerpols toegedien. Die oorledene het egter gekla van 'n pyn in sy borskas voordat hy gesterf het. In die hof *a quo* is die appellant skuldig bevind aan moord van die oorledene. Uit 'n nadoodse ondersoek het dit geblyk dat die oorledene 'n sieklike persoon was en 'n swak hart gehad het. In appèl word daar namens die appellant onder andere betoog dat daar nie bewys is dat die wond wat die appellant die oorledene toegedien het, sy dood verhaas of veroorsaak het nie. [163] Volgens regter Broome was die vraag voor die hof of die hartversaking waaraan die oorledene gesterf het, die gevolg was van die wond bokant sy pols.[164] Regter Broome stel die vraag soos volg: "Would the deceased have died when he did but for the appellant's unlawful act?" [165] Die hof beslis dat die toediening van die wond deur die appellant aan die oorledene wel die dood van die oorledene verhaas of veroorsaak het. [166]

In *S v Williams*[167] het die appellant die oorledene geskiet en haar in die nek verwond. Die oorledene is kunsmatig aan die lewe gehou met behulp van 'n ventilator. Die geneeshere het egter later besluit om die ventilator te ontkoppel en die oorledene het gesterf. Die appèlhof beslis dat die ontkoppeling van die ventilator bloot die beëindiging was van 'n vrugtelose poging deur die geneeshere om die gevolge van die appellant se aanval op die oorledene af te weer.[168] Die ontkoppeling van die ventilator is nie deur die hof gesien as die oorsaak van die dood van die oorledene nie. Wat bemoedigend is, veral met die oog op moontlike gevalle van onttrekking van geneeskundige behandeling van ernstig gestremde pasgeborenes, is die gedeelte van hoofregter Rabie se uitspraak waarin hy beslis dat dokter Buchmann wat die ventilator afgeskakel het, nie die oorledene se dood veroorsaak het nie maar haar hoogstens toegelaat het om te sterf.[169]

In *Clarke v Hurst*[170] beslis regter Thirion dat die ontrekking van geneeskundige behandeling die tydstip van die dood verhaas het en "therefore in a sense caused it".[171] Feitelike kousaliteit alleen is egter onvoldoende om aanspreeklikheid daar te stel.[172] Met betrekking tot die vraag of daar ook juridiese kousaliteit aanwesig is, is regter Thirion van mening dat faktore soos redelikheid ("reasonableness"), billikheid ("fairness") en geregtigheid ("justice") ook in ag geneem behoort te word.[173]

Met inagneming van die uitsprake in *S v Williams*[174] en *Clarke v Hurst*[175] is ek van mening dat die howe ten opsigte van kousaliteit nie onsensitief sal wees by

161 1950 1 SA 340 (N).
162 343.
163 342.
164 343.
165 344.
166 345.
167 1986 4 SA 1188 (A).
168 1195C–D.
169 *Ibid.*
170 1992 4 SA 630 (D).
171 659I–J.
172 *Ibid.*
173 600B–C.
174 Vn 167 *supra.*
175 Vn 170 *supra.*

gevalle waar geneeskundige behandeling onttrek of weerhou sou word van ernstig gestremde pasgeborenes nie en dat sodanige onttrekking of weerhouding nie gesien behoort te word as die werklike oorsaak van die baba se dood nie. Howe behoort in te sien dat sommige ernstig gestremde pasgeborenes eintlik reeds sterwend is en dat lewensonderhoudende geneeskundige behandeling eerder pyn en lyding as lewensvreugde sal meebring.

4 3 3 3 Wederregtelikheid[176]

Is daar wederregtelikheid aanwesig in gevalle waar geneeskundige behandeling weerhou of onttrek word van ernstig gestremde pasgeborenes? Om vas te stel of 'n handeling of late wederregtelik is, moet gekyk word of dit in stryd is met die goeie sedes of die regsoortuiging van die gemeenskap.[177] Indien 'n handeling of late in bepaalde omstandighede nie ingevolge die regsopvattinge van die gemeenskap (*boni mores*) as ongeoorloof beskou word nie, sal die handeling of late nie wederregtelik wees nie.[178] Die *boni mores* is die juridiese maatstaf waarmee die heersende opvattings van die gemeenskap aangaande wat (regtens) as reg of verkeerd beskou word, uitgedruk word.[179] Die *boni mores* is 'n maatstaf wat die hof in staat stel om die reg voortdurend aan te pas by die veranderende waardes en behoeftes van die gemeenskap.[180]

Soos vroeër gemeld, kon geen Suid-Afrikaanse hofsaak oor selektiewe nie-behandeling van ernstig gestremde pasgeborenes opgespoor word nie. Indien so 'n geval wel in die hof sou beland, hoe behoort die hof die *boni mores* te bepaal? Neethling, Potgieter en Visser[181] is van mening dat dit

> "die taak van 'n regter is om die gemeenskapsoortuiging in 'n besondere geval te vertolk en te bepaal met inagneming van regsreëls en hofbeslissings waarin die gemeenskapsgevoel reeds uitdrukking gevind het, aangevul deur die getuienis en die inligting wat hy self ingesamel het, en om dié vertolking op die betrokke probleem toe te pas met inagneming van die omstandighede van die geval".[182]

Myns insiens kan gebeure in die werklike praktyk ook nie geïgnoreer word nie. Volgens professor X is selektiewe nie-behandeling van ernstig gestremde pasgeborenes 'n alledaagse gebeurtenis in Suid-Afrika.[183] Die indruk word geskep dat hierdie praktyk nie as oneties beskou word nie, en na my mening moet beroepsetiek (hier spesifiek die geneeskundige etiek) 'n belangrike faktor wees by die bepaling van die *boni mores* in gevalle van selektiewe nie-behandeling van ernstig gestremde pasgeborenes. Ook in ander beskaafde regstelsels word selektiewe nie-behandeling van ernstig gestremde pasgeborenes nie sonder meer as afkeurenswaardig beskou nie.

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176 Die toets vir strafregtelike wederregtelikheid en privaatregtelike onregmatigheid is in beginsel dieselfde, naamlik die *boni mores* of die regsoortuigings van die gemeenskap (sien in die verband Neethling, Potgieter en Visser *Deliktereg* (1996) 36 vn 84; Snyman *Strafreg* (1992) 103).

177 Snyman 103.

178 *Ibid.*

179 Neethling, Potgieter en Visser 39.

180 *Ibid.*

181 41.

182 Sien 4 3 1 5 *supra*.

183 Sien in die verband die uitspraak van Lord Browne-Wilkinson in *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (HL) 884d–e.

Met inagneming van die geweldig hoë koste van die geneeskundige behandeling van 'n uiters gebreklike pasgeborene, die pyn en lyding wat sodanige behandeling vir die kind kan inhou en die byna ondraaglike smart wat die toestand vir die ouers (en familie) van die baba teweegbring, sal dit na my oordeel nie *contra bonos mores* wees om geneeskundige behandeling van ernstig gestremde pasgeborenes te weerhou of te onttrek nie.

Ek doen aan die hand dat indien die toestand en prognose van 'n ernstig gestremde pasgeborene deeglik met die ouers bespreek is deur die betrokke geneeshere, en die ouers dan sou besluit dat hul kindjie toegelaat moet word om te sterf op die mees pynlose en menslike wyse moontlik, die hof die wens van die ouers moet eerbiedig. Volkome regsekerheid sou by wyse van wetgewing bewerkstellig kon word.

5 SAMEVATTING EN GEVOLGTREKKINGS

Tans heers daar groot onsekerheid in sowel Suid-Afrika as die res van die wêreld oor die vraag of dit regtens geoorloof is om ingrypende of "aggressiewe" geneeskundige behandeling – met inbegrip van kunsmatige voeding wat by wyse van geneeskundige metodes geskied – van ernstig gestremde pasgeborenes te weerhou of te onttrek.

Ongeveer ses persent van pasgebore babas benodig intensiewe geneeskundige behandeling vir een of ander aangebore gebrek of gebreke. Alhoewel 'n groot verskeidenheid kongenitale of aangebore gebreke waarmee babas gebore kan word aan die geneeskundige wetenskap bekend is, is spina bifida, Down se sindroom, hoofbeserings opgedoen deur babas tydens hul geboorte, esofageale atresie en premature asook "klein-vir-datum"-babas van die meer bekende maar ook ernstiger abnormaliteite wat voorkom.

Ongeveer een uit 'n duisend babas word met spina bifida gebore. Die presiese oorsaak van spina bifida is tans nog onbekend. Babas wat met spina bifida gebore word, benodig tallose rekonstruktiewe operasies vir die defek en gaan met verskeie fisiese hindernisse deur die lewe.

Ongeveer vierduisend babas word jaarliks in die VSA met Down se sindroom gebore en vroue ouer as veertig het 'n kans van een uit honderd-en-dertig om geboorte te skenk aan 'n baba met dié sindroom. Die sindroom, wat grootliks gekenmerk word deur verstandelike vertraagdheid, is ongeneesbaar.

Twintig tot veertig persent van alle sterftes onder pasgeborenes in Suid-Afrika kan toegeskryf word aan hoofbeserings opgedoen tydens geboorte. Omdat daar so 'n groot risiko bestaan vir hoofbeserings tydens tangverlossings word daar eerder keisersneë uitgevoer indien dit blyk dat 'n moeilike geboorte voorhande is.

Esofageale atresie is 'n toestand waar 'n baba se slukderm verbind is met 'n fistula in plaas van sy maag. In vyf-en-tagtig persent van dié gevalle kan die abnormaliteit chirurgies reggestel word. Indien die abnormaliteit nie herstel word nie, sal die baba weens uithongering sterf indien geen kunsmatige voeding toegedien word nie.

Ongeveer ses-en-sestig persent van sterftes onder babas in Australië, Europa en die VSA kan aan voortydige geboorte (prematuriteit) toegeskryf word. Volgens die Wêreld-gesondheidsorganisasie word alle babas wat voor sewe-en-dertig weke gebore word, as prematuur beskou. "Klein-vir-datum"- of "SGA"-babas is babas wat by geboorte minder as 2 500 gram weeg. Sowel premature as

klein-vir-datum-babas is uiters broos en benodig gewoonlik intensiewe geneeskundige behandeling na geboorte.

Verskeie etiese standpunte bestaan oor selektiewe nie-behandeling van ernstig gestremde pasgeborenes. Sekere sedekundiges soos Paul Ramsey betoog dat die belangrikste taak van 'n geneesheer behoort te wees om te bepaal watter pasgeborenes sterwend is en watter nie. Volgens Ramsey moet alle nie-sterwende babas geneeskundig behandel word.

Volgens die "heiligheid-van-lewe"-beginsel word menslike lewe, ongeag die waarde daarvan, bo alles gestel. Hiervolgens word lewe as 'n gawe van God beskou en het slegs God die mag om te besluit wanneer lewe beëindig word. Meer gematigde ondersteuners van dié beskouing is egter van mening dat daar geen plig op geneeshere en ouers rus om buitengewone pogings aan te wend om 'n ernstig gestremde baba se lewe te probeer red nie.

Margery W Shaw is van mening dat geneeskundige behandeling meer nadelig as voordelig is indien die baba na behandeling geen hoop of kans het om die lewe "te geniet" nie. Die mening bestaan ook dat geneeskundige behandeling van 'n gestremde baba uiters nadelige maatskaplike en geldelike gevolge vir die ouers van die baba kan inhou.

Ondersteuners van die "kwaliteit-van-lewe" beginsel, soos Richard McCormick en Johnathan Glover, probeer om hoedanighede te bepaal wat sal aandui of 'n spesifieke tipe lewe die moeite werd is om te leef. Tog erken sedekundiges wat die kwaliteit-van-lewe-beginsel ondersteun dat dit baie ingewikkeld en problematies is om te bepaal wanneer lewe die moeite werd is of nie.

Sommige sedekundiges soos Phillipa Foot en David H Smith is van mening dat dit geoorloof is om lewensonderhoudende geneeskundige behandeling van ernstig gestremde pasgeborenes te weerhou indien dié behandeling nie in die beste belang van die baba geag word nie. Behandeling word nie in die beste belang van die gestremde baba geag nie indien die prognose swak is en voortgesette lewe eerder pyn en lyding as vreugde vir die baba inhou of indien dit die beste opsie vir die baba skyn te wees.

Selektiewe nie-behandeling van ernstig gestremde pasgeborenes vind daagliks plaas ten spyte van die feit dat persone wat hierdie besluit neem, hulle blootstel aan moontlike vervolging weens moord, strafbare manslag, sameswering ("conspiracy" soos begryp in die Amerikaans reg) of verwaarlosing. Tog beland baie min gevalle van selektiewe nie-behandeling uiteindelik in die geregshowe; indien dit wel gebeur, word ouers en/of geneeshere selde vir hul dade veroordeel.

Groot eenstemmigheid heers onder geneeshere in Groot-Brittanje dat hulle nie verplig behoort te word om die lewe van 'n ernstig gestremde pasgeborene te probeer verleng nie. Die juris PDG Skegg is van mening dat dit uiters moeilik sal wees om te bewys dat 'n geneesheer wat 'n ernstig gestremde baba laat sterf het weens beweerde onttrekking of weerhouding van lewensonderhoudende behandeling, nie soos 'n redelike geneesheer opgetree het nie. Die posisie in Groot-Brittanje ten opsigte van die selektiewe nie-behandeling van ernstig gestremde pasgeborenes is tans dat waar 'n geneesheer of geneeshere *bona fide* glo dat behandeling nie in die beste belang van 'n pasiënt is nie, hy of hulle nie gedwing kan word om die pasiënt te behandel nie. Geneeshere alleen het dus die bevoegdheid om te besluit watter pasiënt behandel sal word en watter nie. Die gevoel bestaan egter dat gewaak moet word dat geneeshere nie hulle posisie misbruik deur hul eie persoonlike kulturele en godsdienstige voorkeure op ander af te dwing nie.

Verskeie mislukte pogings soos staatlike wette, federale regulasies en die wysiging van bestaande wette is in die VSA onderneem om selektiewe nie-behandeling van ernstig gestremde pasgeborenes te probeer bekamp. Geen Amerikaanse hof het egter tot op hede beslis dat daar 'n absolute plig op geneeshere rus om pasiënte aan die lewe te probeer hou ongeag die mediese werklikheid van die pasiënt se swak prognose of die nutteloosheid van die behandeling nie. Die posisie ten opsigte van siek kinders wat geen kans op betekenisvolle herstel het nie, is dat die onttrekking (of weerhouding) van lewensonderhoudende geneeskundige behandeling geoorloof sal wees indien dit die ouers se begeerte is en hul besluit deur geloofwaardige mediese getuienis gesteun word. Volgens vooraanstaande Amerikaanse juriste sal "do-not-resuscitate-orders" wat *bona fide* deur geneeshere met die goedkeuring van die ouers in gevalle van ernstig gestremde babas gegee word, waarskynlik geoorloof wees.

Soos aangetoon, het selektiewe nie-behandeling van ernstig gestremde pasgeborenes dusver weinig aandag in Suid-Afrika geniet en is geen gewysdes al aangeteken wat spesifiek oor dié aangeleentheid handel nie. Sekere vooraanstaande akademici op die gebied van die reg en geneeskunde is van mening dat ernstig gestremde pasgeborenes toegelaat moet word om 'n natuurlike dood te sterf mits die sterwensproses nie pynlik of onmenslik is of deur uithongering teweeggebring word nie. Die Suid-Afrikaanse hooggeregshof het – teenstrydig met die menings van sommige Suid-Afrikaanse akademici – al beslis dat eutanasie wat deur uithongering teweeggebring word in sekere omstandighede geoorloof is.

Kunsmatige voeding word deur die howe in Groot-Brittanje, die VSA en Suid-Afrika as 'n vorm van geneeskundige behandeling gesien.

Indien die toestand en prognose van 'n uiters gebreklike pasgeborene deur die betrokke geneeshere met die ouers van die kind bespreek is en die ouers daarna sou besluit dat hul kindjie toegelaat moet word om op die mees pynlose en menslike wyse moontlik te sterf, sal sodanige besluit myns insiens nie *contra bonos mores* wees nie en behoort 'n hof die wense van die ouers te respekteer.

Alhoewel daar tans groot onsekerheid heers oor die geoorloofdheid van onttrekking of weerhouding van mediese behandeling van ernstig gestremde pasgeborenes, wil dit voorkom dat indien 'n hof oortuig kan word dat die gehalte van die lewe wat vir 'n gestremde baba voorlê, na behandeling so swak sal wees dat voortgesette lewe nie in die baba se beste belang geag kan word nie, die hof waarskynlik nie sal gelas dat "lewe" tot elke prys in stand gehou moet word nie.

AANTEKENINGE

HUURKONTRAKTE, "RENTALS", FINANSIERINGSKOSTE EN DIE WOEKERWET

1 Inleiding

Mense hou daarvan om goed name te gee. Ons praat eerder van 'n tarentaal en 'n volstruis as sommer maar net van 'n voël, en van Koos en Piet eerder as van ou dinges. Die Romeine, wat maar taamlik formalisties kon wees as hulle wou, was nie juis anders nie. Een van die baie dinge in die lewe waarvoor hulle name gegee het, was kontrakte wat mense met mekaar gesluit het en wat sekere geykte eienskappe vertoon het. Sedertdien word die gebruik voortgesit om name te gee aan afsprake wat mense aangaan met die bedoeling om 'n regsband te skep. Die Romeine het egter al besef dat daar plek is vir onbenoemde kontrakte in 'n regstelsel (vgl Thomas *Textbook of Roman law* (1976) 311 ev). In die hedendaagse Suid-Afrikaanse reg volg kontraktuele gebondenheid indien 'n ooreenkoms aan al die geldigheidsvereistes vir 'n kontrak voldoen. 'n Kontrak hoef nie 'n naam te dra om geldig te wees nie. Dit weet enigiemand (lees asseblief: *behoort* enigiemand te weet) wat drie jaar se regstudie op universiteit voltooi het.

Die regsgeleerde wêreld is, soos De Wet en Van Wyk dit stel, fundamenteel konserwatief, en daarom word nie geredelik aanvaar dat iemand 'n nuwe kontraksvorm ontdek het nie. Dit word eerder beskou as "'n effens afwykende verskyningsvorm van 'n bekende kontrakstipe" (*Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 6). Die kommersiële wêreld is egter minder behoudend en sakelui glo graag dat 'n sekere tipe besigheidstransaksie wat hulle aangaan, regtens uniek is. Hulle doen dit om verskillende redes, byvoorbeeld omdat sekere kontrakte belastingvoordele op 'n bepaalde stadium mag inhou, of omdat hulle angstig is dat die spesifieke soort kontrak buite die woordomskrywing van een of ander lastige wet val, of omdat iemand vir hulle gesê het dat die betrokke kontrak van 'n bepaalde soort is wat wonderlike gevolge inhou.

2 Finansiële en bedryfshuurkontrakte

'n "Nuwe" kontraksoort wat in die laaste paar dekades uiters gewild geraak het, is die huur van duursame roerende goedere soos motors en kantoortoerusting vir 'n redelike lang tydperk waar 'n mens vanmelewe eerder sou verwag het dat die voornemende gebruiker van die goedere dit sou koop. Skuldenaars het om 'n verskeidenheid redes voorkeur aan huurkontrakte bo koopkontrakte begin gee, waaronder kontantvloeivoordele en belastingvoordele (sien vir 'n volledige bespreking Joubert *Die finansiële huurkontrak* (1991) 23 ev). Skuldeisers het

ook om verskeie redes verkies om eerder huurkontrakte as afbetalingskope te sluit, byvoorbeeld omdat dit vir hulle meer winsgewend is (Joubert 36 ev). 'n Oorweging wat moontlik ook 'n invloed kon gehad het, was die feit dat sekere wetgewing nie op sulke kontrakte van toepassing was nie, of dat daar minstens twyfel daaroor bestaan het. As gevolg van wetswysigings het sommige van hierdie oorwegings met die jare vervaag of selfs verval maar party is steeds geldig.

Die huurkomponent van die kredietmark het ontwikkel in 'n enorme en immer groeiende bedryf wat syfers in hierdie verband dan ook aantoon. Bankkrediet aan die privaatsektor op die terrein van sogenaamde bruikhuur het vanaf R923 miljoen in 1976 toegeneem tot 'n astronomiese R22 673 miljoen in 1996. Dit is sowat die helfte van die syfer vir afbetalingskoopkontrakte, maar twee en 'n half keer meer as krediet by wyse van kredietkaarte (Van der Walt "Bankkrediet aan die private sektor" Junie 1997 *Kwartaalblad SA Reserwebank* 87).

Hierdie nuwerwetse huurkontrakte vertoon 'n groot verskeidenheid *incidentalia* wat veral ten doel het om die partye se finansiële verhouding en die risiko verbonde aan die besit en gebruik van die goedere te reël. Verskillende name word in die besigheidswêreld in Afrikaans en in Engels aan die onderskeie huurverhoudings tussen die partye gegee, soos "finansiële huurkontrak", "bedryfshuur", "operational lease", "operating lease", "business lease" en "rental". Ondanks verskille wat 'n mens kan verwag, vertoon die onderskeie tipe kontrakte wat dieselfde naam dra grootliks dieselfde eienskappe. Dit is egter ook waar dat selfs kontrakte met dieselfde benaming, byvoorbeeld *finansiële huurkontrak*, wisselvorme vertoon met aanmerklike verskille veral wat betref die finansiële impak daarvan op die partye.

In Suid-Afrika is daar nie baie deur regsgeleerdes oor hierdie nuwe verskyningsvorme van 'n stokou kontraksvorm geskryf nie. Nereus Joubert is 'n welkome uitsondering en hy het waardevolle bydraes gelewer om die ekonomiese en regsimplikasies van nuwerwetse huurkontrakte vir Suid-Afrikaanse juriste te ontsluit. Benewens 'n aantal artikels hieroor het hy in 1991 ook 'n omvangryke monografie getiteld *Die finansiële huurkontrak* die lig laat sien waarna reeds verwys is. Daar sal in hierdie aantekening meerdere kere na sy bydraes verwys word.

Dit is onmoontlik, en ook onnodig, om in 'n bydrae van hierdie aard in te gaan op die verskillende verskyningsvorme van wat Joubert "verkeerstipiese kontrakte" noem (voorwoord tot *Die finansiële huurkontrak*). Ter wille van die oningewyde leser word net op enkele onderskeidings gewys wat Joubert beskryf, te wete dié tussen finansiële huurkontrakte en bedryfshuur, en tussen finansiële huurkontrakte en "rentals". Joubert verduidelik die tipiese eienskappe van hierdie kontrakte by geleentheid soos volg:

> "By finansiële huur vind volle amortisasie van die verhuurder se koste met rente en wins plaas terwyl dit nooit by bedryfshuur die geval is nie. Dit bring mee dat die huurder die risiko van waardevermindering by finansiële huur dra terwyl die risiko deur die verhuurder in geval van bedryfshuur gedra word. As gevolg van die feit dat die huurder nie tot volle amortisasie by bedryfshuur verplig is nie, moet die bedryfsverhuurder die huursaak agtereenvolgens verhuur of eenmalig verhuur en dan vervreem om sy koste met rente en wins te dek . . . [D]ie onopsegbare termyn van 'n bedryfshuurkontrak [sal] aansienlik korter wees as wat die termyn van 'n eerste geslag finansiële huurkontrak is" ("Die regsaard van die finansiële huurkontrak" 1989 *TSAR* 573).

En elders:

> "Full amortization financial leasing owes its name to its involving a leasing contract in terms of which the purchase price paid by the lessor in acquiring the leased asset plus interest and profit will be fully amortized by the rent payments made by the lessee during the term of the leasing contract ... In terms of a residual-value financial leasing contract (often referred to as a 'rental' in the South African leasing industry), the lessor's capital expenditure in acquiring the leased asset plus interest and profit is not fully amortized during the term of the lease ... A residual-value financial leasing contract, however, is structured in such a way that the lessor will nevertheless in the end recoup his capital expenditure in acquiring the leased asset plus interest and profit. In terms of all residual-value financial leasing contracts, at the time the contract is concluded a residual value is placed on the leased asset. Such a residual value usually represents the amount of the lessor's capital expenditure in acquiring the asset plus interest and profit that will not be amortized by the lessee's rent payments during the term of the leasing contract. On the expiry of the leasing term the lessee, in terms of all residual-value financial leasing contracts, is obliged to pay the lessor the difference between the residual value of the leased asset and its market value or the proceeds of the sale. In terms of some financial leasing contracts, the lessee is afforded an option to purchase the leased asset on the expiration of the contract for an amount equivalent to the residual value placed on the asset on the conclusion of the contract. Full amortization of the lessor's capital expenditure in acquiring the leased asset plus interest and profit is therefore accomplished ..." ("Which financial leasing contracts are subject to the Usury Act 73 of 1968 and the Credit Agreements Act 75 of 1980?" 1991 *SALJ* 334–335).

Daar bestaan verskeie variasies op hierdie beskrywings van Joubert. Betreklik onlangs het ek 'n standaardhuurkontrak van 'n bepaalde instelling onder oë gehad wat hulle 'n "rental" noem en wat heel anders daar uitsien as die geykte "rental" wat Joubert beskryf. Die betrokke kontrak, wat duidelik bedoel was om buite die Woekerwet te val (sien 3 hieronder), het net vir huurpaaiemente voorsiening gemaak en vir geen boekwaarde of reswaarde ("residual value") nie. Dieselfde verhuurder gebruik 'n "lease agreement" wat duidelik ten doel het om aan die Woekerwet se vereistes te voldoen. In hierdie kontrak word die boekwaarde van die saak (sien 3 hieronder tov *boekwaarde*) op nul gestel en is die huurder geregtig om na afloop van die huurkontrak 'n bedrag te ontvang van die verhuurder wat die verskil tussen die markwaarde in daardie stadium en die nulboekwaarde verteenwoordig. Die huurder ontvang dus nadat hy argumentsonthalwe 48 of 54 huurpaaiemente betaal het, die bedrag waarteen die saak by afloop van die kontrak gewaardeer is van die verhuurder terug en lewer die saak aan die verhuurder. Dikwels sal die huurder eerder die saak teen hierdie waardasiebedrag van die verhuurder koop, en die Woekerwet gee hom ook 'n reg daartoe (a 6(K); sien 3 hieronder).

Dit wys maar net: soos 'n kat op verskillende maniere na sy saligheid begelei kan word, kan huurkontrakte met dieselfde naam verskillende resultate oplewer.

3 Die Woekerwet en huurkontrakte

Die Woekerwet was vir baie jare nie in soveel woorde van toepassing verklaar op huurkontrakte nie. Die definisie van *krediettransaksie* het ook die gebruik en genot van goedere ingesluit, maar die omskrywing het 'n hele paar kwalifikasies en uitsluitings bevat. Tydens die omvangryke wysigings aan die wet in 1980 deur die Wysigingswet op Beperking en Bekendmaking van Finansieringskoste 90 van 1980 is vir die eerste keer uitdruklik voorsiening gemaak vir huurkontrakte. (Die Woekerwet het vroeër bekend gestaan as die Wet op Beperking en

Bekendmaking van Finansieringskoste.) 'n *Huurtransaksie* is in die 1980-wysigingswet redelik breedvoerig omskryf. Die definisie is daarna ingrypend vereenvoudig en dit is voldoende om laasgenoemde omskrywing weer te gee. Die Woekerwet omskryf 'n huurtransaksie as

> 'n transaksie, in watter vorm dit ookal is, en ongeag of dit deel uitmaak van 'n ander transaksie of nie, waarby 'n verhuurder roerende goed aan 'n huurder verhuur en die bedrag wat deur die huurder aan die verhuurder . . . verskuldig is of sal word, na die datum waarop bedoelde transaksie aangegaan is, betaalbaar is of sal word".

Die wetgewer kon dit beswaarlik eenvoudiger gestel het maar nie almal wou dit glo nie, soos hieronder sal blyk.

Indien die Woekerwet op 'n huurtransaksie (die wetgewer verkies nou maar eenmaal "transaksie" bo "kontrak") van toepassing is, is daar 'n hele aantal (lastige) verpligtinge wat op 'n verhuurder rus. So moet 'n verhuurder wat huurtransaksies as deel van sy besigheid aangaan sekere finansiële besonderhede in die geskrewe kontrak bekend maak (a 3(2)(A)). Dit sluit in die kontantprys of markwaarde van die goed, die boekwaarde van die goed en die teenswoordige waarde van die boekwaarde. Die boekwaarde is "die geldwaarde van daardie goed by verstryking van die huurtermyn, soos deur die verhuurder by die aangaan van daardie transaksie bepaal" (a 1). Die teenswoordige waarde van die boekwaarde word omskryf as

> "'n bedrag wat, indien dit op die datum waarop daardie transaksie 'n aanvang neem vir die termyn van daardie transaksie belê word teen die finansieringskostekoers per jaar wat vermeld word in die skuldakte . . . op die datum van verstryking van daardie transaksie gelyk is aan die boekwaarde op laasbedoelde datum van die goedere wat ingevolge daardie transaksie verhuur word" (a 1).

Die verhuurder stel dus die boekwaarde van die goed by kontraksluiting vas. Dit is 'n skatting van die goed se waarde by die afloop van die kontrak. Die boekwaarde wat hy vasstel, is bepalend vir die teenswoordige waarde van die boekwaarde. Laasgenoemde word bepaal met behulp van tabelle wat in die *Staatskoerant* afgekondig is. 'n Enkele voorbeeld sal dit illustreer. Gestel die kontantprys van die goedere is R10 000 en die boekwaarde is gestel op R4 000. Die huurtermyn is 48 maande en die finansieringskostekoers is 24% per jaar. Volgens die tabelle in die *Staatskoerant* is die teenswoordige waarde van die boekwaarde van R1 teen 'n koers van 24% oor 48 maande R0,3865. Dit beteken dat R0,3865 wat vir 48 maande teen 24% belê word R1 sal oplewer. Die teenswoordige waarde van die boekwaarde van R4 000 is R4 000 x R0,3865 en dit is R1 546. (Hierdie voorbeeld is ontleen aan Otto *Credit law service* vol *Commentary* (1991) 7–10).

Die relevansie van die teenswoordige waarde van die boekwaarde is dat dié bedrag kragtens die Woekerwet van die kontantprys (R10 000 in die voorbeeld) *afgetrek* moet word ten einde die *hoofskuld* te bepaal (sien die definisie van *hoofskuld* in a 1). Die *finansieringskoste* wat die verhuurder mag verhaal, word weer bereken as 'n persentasie van die hoofskuld (a 5(1)(c)) binne welke bedrag die teenswoordige waarde van die boekwaarde reeds verreken is toe dit van die kontantprys afgetrek is. Indien die huurkontrak sy normale loop neem, moet die verhuurder die *geldwaarde* van die goed aan die einde van die termyn by wyse van waardasie vasstel. Die huurder is dan geregtig om die goed teen hierdie bedrag te koop of weer te huur. Indien die geldwaarde aan die einde die *boekwaarde* (wat by kontraksluiting bepaal is) egter oorskry, is die huurder geregtig op die verskil in kontant (a 6(K)). Dit verhoed dat die verhuurder ten aanvang 'n

onrealisties lae boekwaarde bepaal, wat op sy beurt 'n groot hoofskuld tot gevolg het, wat weer 'n hoë finansieringskostekoers oplewer (sien vir 'n volledige bespreking Otto par 50 en 75).

Dit is nie alles so ingewikkeld as wat dit met die eerste oogopslag lyk nie, maar die Woekerwet het tog tot gevolg dat sekere beperkings en verpligtings in hierdie verband op verhuurders geplaas word wat nie al te gewild by hulle is nie. Dit spreek dus vanself dat 'n verhuurder eerder sy kontrak buite as binne die Woekerwet se toepassingsgebied sal wil sien.

Verskeie kategorieë huurkontrakte is vrygestel van die Woekerwet. Die vrystellings word kernagtig hierna weergegee, behalwe vir een geval wat latere bespreking verg en woordeliks aangehaal word. Die volgende huurtransaksies is van die wet vrygestel:

(i) huurtransaksies wat nie langer as drie maande duur nie, nie deur die verhuurder hernieu word nie en uit hoofde waarvan die huurder die bedrag verskuldig voor verstryking van die transaksie moet betaal;

(ii) huurtransaksies waar die kontantprys of markwaarde van die goed, minus die deposito, minus die teenswoordige waarde van die boekwaarde, R100 000 oorskry en die huurder 'n klousule onderteken waarin hy afstand doen van die beskerming van die wet;

(iii) huurtransaksies waar die huurder deur hoogstens 90 dae kennis te gee die kontrak mag beëindig sonder dat hy bybetalings hoef te maak vir die beëindiging daarvan;

(iv) krediet- en huurtransaksies ten opsigte van roerende goed wat deel uitmaak van die bates van 'n besigheid wat as lopende saak aan die huurder of koper verkoop word;

(v) "huurtransaksies ingevolge waarvan

(a) die huurbetalings geheel of gedeeltelik van die inkomste van die huurder afgetrek kan word kragtens deel 1 van hoofstuk II van die Inkomstebelastingwet . . .;

(b) die eiendomsreg van die verhuurde goedere nie op die huurder oorgaan op enige tydstip gedurende of na verstryking van die huurtermyn of na die beëindiging van die transaksie nie; en

(c) die huurder nie op enige tydstip gedurende of na verstryking van die huurtermyn of na beëindiging van die transaksie aanspreeklik is vir, of 'n bedrag moet waarborg ten opsigte van, die waarde van die verhuurde goedere nie."

(A 15(h) van die Woekerwet het gesorg vir vrystelling (i) en die res is afgekondig in GK 2262 van 1988-11-04 soos gewysig deur GK 1697 van 1989-09-01.)

Die definisie van 'n huurtransaksie in die Woekerwet is so wyd bewoord dat dit enige kontrak behoort in te sluit wat aan die gemeenregtelike vereistes vir 'n huurkontrak voldoen al gee die partye uiting aan hulle menslike geneigdheid om hom 'n nuwe naam te gee (sien ook Joubert *Die finansiële huurkontrak* 234; Grové en Jacobs *Basic principles of consumer credit law* (1993) 16). Indien 'n verhuurder gevolglik wil hê dat sy besondere huurkontrak buite die Woekerwet moet val, sal hy moet sorg dat dit so opgestel word dat dit binne een van die vrystellings hierbo tuisgebring kan word.

4 Enkele opvattings in die handelswêreld oor die Woekerwet

Ofskoon die vrystellings wat in paragraaf 3 hierbo genoem is verhuurders op die oog af baie ruimte laat om hulle kontrakte so te konstrueer dat die kontrakte die toepassingsgebied van die Woekerwet vryspring, stel dit nie alle verhuurders tevrede nie. Die Woekerwet dek steeds sekere gevalle waarop die wet hoegenaamd nie van toepassing behoort te wees nie. Joubert wys daarop dat die Woekerwet steeds van toepassing is op huurtransaksies wat geen finansieringsoogmerke het nie. Egte onopsegbare bedryfshure, of bedryfshure waar die huurder nie sy paaiemente vir doeleindes van inkomstebelasting mag aftrek nie, is maar enkele sulke voorbeelde. Nie alle verhuurders is byvoorbeeld geneë om aan die man op straat of instellings wat nie belastingpligtig is nie, 'n kontraktueel eensydige opseggingsreg te verleen ten opsigte van 'n ooreengekome jaarkontrak vir 'n fotostaatmasjien of 'n betonmenger ten einde buite die wet te val nie (sien vrystelling (iii) in 3 hierbo). Sulke verhuurders het geen finansieringsoogmerke nie, hef nie finansieringskoste nie en is geensins gediend daarmee om voortydig 'n saak terug te ontvang waarvoor hy in daardie stadium dalk nie dadelik 'n afsetmark beskikbaar het nie. Ek het al bedryfsverhuurders teëgekom wat presies hierdie argument gebruik. Ongelukkig kan 'n mens hulle geen ander raad bied nie as dat jy óf die Woekerwet eerbiedig óf jou kontrak so bewoord dat dit binne een van die vrystellingsbepalings, en gevolglik buite die Woekerwet, val. Die saak wat in paragraaf 5 hieronder bespreek word, is bevestiging hiervoor.

Vir geruime tyd was daar binne sekere kringe in die handelswêreld die gedagte, betreklik onwrikbaar, vaardig dat "rentals" buite die Woekerwet val. Sakelui het my meermale tydens konsultasies verbaas aangekyk as ek dit sou durf betwis, en party kollegas uit die regspraktyk het stil-stil die indruk gelaat dat hulle ernstige bedenkinge oor jou intellek het. Meer nog, dat jy gewoon onnosel is. Dit is natuurlik nie waar van alle sakelui nie, en sekerlik ook nie van al hulle regsverteenwoordigers nie, maar die gedagte "rentals val buite die Woekerwet" is so dikwels verkondig dat 'n mens begin wonder het waar jy dan die kluts kwytgeraak het.

Die tipiese "rental" waarvan hier gepraat word, maak slegs voorsiening vir huurpaaiemente wat met die eerste oogopslag lyk of dit vasstaande en niewisselend is. Daar word geen kontantprys, boekwaarde, teenswoordige waarde van die boekwaarde, hoofskuld, finansieringskoste of finansieringskostekoers in die kontrak vermeld nie. Die oënskynlik vaste huurpaaiemente is egter nie noodwendig (of selfs hoegenaamd) nie-wisselend nie. Die kontrak maak naamlik soms uitdruklik voorsiening vir 'n jaarlikse eskalasiekoers in die paaiemente. Die kontrak is ook gewoonlik gekoppel aan 'n bepaalde rentekoers, byvoorbeeld die prima uitleenkoers van 'n betrokke bank. Indien laasgenoemde sou verander, kan die paaiemente ook deur die verhuurder aangepas word. Teoreties kan die paaiemente dus selfs verlaag tydens die duur van die kontrak.

Die argument is gewoonlik gebruik dat die Woekerwet nie op sulke "rentals" van toepassing is nie omdat daar nie finansieringskoste volgens die kontrak betaalbaar is nie. Ek het by meerdere geleenthede geadviseer dat so 'n siening om verskillende redes nie korrek is nie. (Joubert huldig dieselfde mening: 1991 *SALJ* 342.) Ten eerste stel nóg die Woekerwet se bepalings nóg die definisie van 'n huurtransaksie sodanige vereiste as voorwaarde vir die toepaslikheid van die wet. Ten tweede is die blote feit dat die huurpaaiemente aan 'n bepaalde rentekoers gekoppel is, 'n aanduiding dat die omvang van die paaiemente beïnvloed

word deur finansieringskostekoerse en dat die paaiemente verskuilde finansieringskoste bevat. 'n Eenvoudige vergelyking tussen die werklike kontantprys of markwaarde van die huursaak en die totale bedrag betaalbaar by wyse van paaiemente sal dikwels as genoegsame bewys hiervan dien, veral waar 'n reswaarde nie vasgestel word nie.

5 Die howe se siening

Die afgelope paar jaar was daar 'n toename in gerapporteerde sake waarin die Woekerwet ter sprake gekom het. Presedente ontbreek egter nog oor baie kwelvrae omdat die meeste litigasie wat met die Woekerwet verband hou, eweas dié wat op die Wet op Kredietooreenkomste betrekking het, in die laer howe afgehandel word. Meeste eise word eenvoudig nie teengestaan nie omdat skuldenaars óf geen verweer het nie, óf nie bewus van 'n verweer is nie, óf nie oor die finansiële vermoë beskik om 'n eis teen te staan nie, óf weet dat hy die geld skuld en basta, hulle moet maar kom vat wat hulle kan kry.

Oor die toepaslikheid van die Woekerwet op huurtransaksies is daar egter in 1997 'n rigtinggewende beslissing gelewer wat by die skryf hiervan nog nie gerapporteer is nie. Die saak het ook uitsluitsel gegee oor sekere van die kwessies wat hierbo aangeraak is. Die beslissing is *Ex parte Siemens Telecommunications (Pty) Ltd* (saakno 005884/97 (W); sien *Juta's digest of SA law* 1997 (11) 8) van regter Wunsh. Die beslissing gaan sommige verhuurders onrustig laat slaap maar ek meen dat die regter geen ander keuse gehad het as om die beslissing te lewer wat hy gelewer het nie. Hy het die Woekerwet korrek toegepas. Indien die beslissing enigsins probleme oplewer in die huurmark, moet die wetgewer daaraan aandag gee.

Die applikant in hierdie *ex parte* aansoek het die hof versoek om 'n bevel te gee wat sou verklaar dat die Woekerwet nie van toepassing is op 'n huurtransaksie waarkragtens geen finansieringskoste betaalbaar is nie. Die applikant (hierna ook die verhuurder genoem) het probleme ervaar in die landdroshowe om vonnis te verkry op sy huurkontrakte, selfs in sake wat nie teengestaan is nie. Landdroste het die houding ingeneem dat die verhuurder se kontrakte binne die Woekerwet val maar nie voldoen aan die vereistes wat die Woekerwet stel nie. Meer in besonder wou die landdroste nie vonnis verleen nie omdat die kontrakte nie die hoofskuld, finansieringskoste en ander bedrae uiteensit nie. Die kontrakte het net die huurpaaiemente vermeld (vgl weer die gelykluidende "rental" wat in 4 hierbo beskryf is). Die verhuurder se houding was dat hy nie die hoofskuld en finansieringskoste in die kontrak kan uiteensit nie omdat daar geen hoofskuld en finansieringskoste is nie.

Die verhuurder het telefoon- en skakelbordstelsels aan huurders verhuur, gewoonlik vir 60 maande. Die huurder het 'n maandelikse huur betaal asook 'n bedrag vir die onderhoud van die toerusting. Die verhuurder het aangevoer dat die huurpaaiemente geensins finansieringskoste insluit nie en dat geen geld voorgeskiet word nie. Die oogmerk met die huurkontrakte is nie dat die huurder ooit eienaar sal word nie. Die standaardkontrakte wat die verhuurder gebruik het, het voorsiening gemaak vir 'n jaarlikse eskalasie in die paaiemente. Verder het die kontrak die verhuurder gemagtig om die huurgeld aan te pas indien daar 'n wysiging in die prima oortrokke koers intree (vgl weer die soortgelyke "rental" wat in 4 hierbo beskryf is).

Regter Wunsh het die applikant in *Ex parte Siemens Telecommunications (Pty) Ltd* se argument dat sy huurtransaksies nie binne die Woekerwet val nie, as

onhoudbaar afgemaak. Die kontrakte val binne die woordomskrywing van *huurtransaksie* en daarom is die Woekerwet van toepassing. Die hof verwys na die aanvangswoorde van artikel 6K van die Woekerwet wat daarop dui dat dié artikel net betrekking het op huurtransaksies waarkragtens finansieringskoste betaalbaar is. Die betrokke frase in artikel 6K lui: "Indien 'n huurtransaksie ten opsigte waarvan finansieringskoste gehef word, verstryk . . ." Regter Wunsch meen dat hierdie woorde 'n aanduiding is dat die wet andersins ook op sekere huurtransaksies van toepassing is waar finansieringskoste *nie* betaal word nie.

Die hof het vervolgens aandag gegee aan die verhuurder se argument dat die Woekerwet nie ter sake is nie omdat daar geen hoofskuld is nie, en omdat geen finansieringskoste daarop gehef word nie. Die begrip *hoofskuld* in die Woekerwet is nie 'n man se maat nie, hy is lank. Net omtrent Metusalag se lewe was langer as dit. Wat die hoofskuld by huurtransaksies betref, kan dit vir huidige doeleindes in 'n neutedop saamgevat word. Die hoofskuld bestaan uit:

- die *kontantprys of markwaarde* van die goed; minus
- die deposito; minus
- die teenswoordige waarde van die boekwaarde; plus
- sekere uitgawes wat die verhuurder aangegaan het soos seëlregte, verseke-ringspremies wat hy namens die huurder betaal het, ensovoorts.

Die finansieringskoste word, soos vroeër in paragraaf 3 hierbo verduidelik is, op hierdie einste hoofskuld bereken.

In casu beslis die hof dat die verhuurder verkeerd is om te beweer dat daar geen hoofskuld in sy kontrakte voorkom nie. Die verhuurder verkoop nou wel nie normaalweg die huursake ter sprake nie (en gevolglik bestaan daar nie 'n kontantprys vir die huurgoed nie), maar dit wil nie sê dat dit nie 'n markwaarde het nie. Inteendeel, die kontrakte ter sprake verplig die huurders om die roerende goed teen markwaarde te verseker. Dit is dus heeltemal moontlik om 'n hoofskuld vas te stel en gevolglik die finansieringskoste te bereken. In reële terme sal die finansieringskoste in die geval voor hande volgens regter Wunsh op die volgende neerkom:

> "The finance charges in the present case are, therefore, the difference between the total consideration payable by the lessee under a lease and the amount by which the market-value of the movable property leased exceeds the present value of the book value of the goods" (21).

Dit is wel 'n baie indirekte manier om die saak te stel maar ek meen regter Wunsh het daarmee 'n korrekte opsomming van die werking van die Woekerwet gegee. Die regter laat hom verder soos volg oor die verhuurder se kontrak uit (22):

> "I am not required to characterise the applicant's lease as a financial lease or a business lease. There is no black and white division and the Act applies to both classes . . . Without compliance by the applicant with its obligation to disclose the principal debt and finance charges, one cannot determine the amount of the finance charges."

Aangesien die beslissing nie die verhuurder se probleem sal oplos om vonnis in die laer howe te kry nie, het die regter kortliks op 'n moontlike uitweg gewys, naamlik dat die verhuurder kan steun op die vrystellings onder die Woekerwet. Die hof verwys spesifiek na die vrystelling wat vroeër woordeliks by nommer (v) in paragraaf 3 hierbo aangehaal is. Volgens die hof voldoen die applikant se kontrak aan vereistes (b) en (c) van die vrystelling. Indien die applikant in sy

eise teen huurders kan bewys dat die goed aan persone verhuur word wat dit gebruik om inkomste in hulle besighede of professies te genereer, sal daar ook aan vereiste (a) van die vrystelling voldoen word. Dit sal natuurlik tot gevolg hê dat die kontrak buite die Woekerwet val en dat daar gevolglik nie aan die wet se vereistes voldoen hoef te word nie.

Die uitweg wat regter Wunsh voorgestel het, is ongelukkig nie so eenvoudig as wat dit met die eerste oogopslag mag blyk nie. Daarvan sal baie verhuurders kan getuig. Omdat presedente ontbreek, sit verhuurders nog met 'n gewigtige probleem, en dit is dat landdroste bepaalde punte opper en soms in hulle navrae aan prokureurs antwoorde verlang op sekere vrae voordat hulle vonnis verleen. Hierdie navrae het dikwels betrekking op sekere standaardbedinge in kontrakte wat sommige landdroste meen in die weg staan van 'n beroep op een van die vrystellings. Dit is veral vereiste (c) van vrystelling (v) (3 hierbo) wat verhuurders baie probleme besorg. Vrystelling (v) is vervat in regulasie 2(4) van Goewermentskennisgewing 2262. Om die leser se taak te vergemaklik, word bloot daarna verwys as vrystelling (v) soos wat dit in paragraaf 3 hierbo genommer is, en word dit weer aangehaal:

> (v) "huurtransaksies ingevolge waarvan
>
> (a) die huurbetalings geheel of gedeeltelik van die inkomste van die huurder afgetrek kan word kragtens deel 1 van hoofstuk II van die Inkomstebelastingwet . . .;
>
> (b) die eiendomsreg van die verhuurde goedere nie op die huurder oorgaan op enige tydstip gedurende of na verstryking van die huurtermyn of na die beëindiging van die transaksie nie; en
>
> (c) die huurder nie op enige tydstip gedurende of na verstryking van die huurtermyn of na beëindiging van die transaksie aanspreeklik is vir, of 'n bedrag moet waarborg ten opsigte van, die waarde van die verhuurde goedere nie."

Hierdie vrystelling het meerdere mense al grys hare besorg. 'n Kritiese ontleding daarvan kan maklik tot verskillende interpretasies lei wat uiteenlopende resultate oplewer wat elk weer sy eie meriete het. Die vrystelling het 'n hele klompie onopgeloste vrae geskep. So is dit byvoorbeeld glad nie vir my duidelik wat bedoel word met die *oorgang van eiendomsreg* in paragraaf (b) nie aangesien dit tog hier in ieder geval gaan om die vrystelling van *huurtransaksies* waar eiendomsreg nie veronderstel is om vanself oor te gaan nie. (Sien vir 'n bespreking van hierdie aspek van die aangehaalde vrystelling, Otto 2–18.)

Dit is nie die voorneme om by hierdie geleentheid volledig op al die moontlikhede in te gaan wat die vrystelling bied nie. Daar sal net op 'n enkele probleem gewys word, en dit is sekere landdroste se siening van paragraaf (c) van die vrystelling. Die vrystelling het volgens Grové en Jacobs ten doel om sekere bedryfshure ("operational leases") van die Woekerwet vry te stel (18 vn 68). Joubert wys daarop dat die vrystelling so bewoord is dat dit gewis *nie* reswaarde finansiële huurkontrakte vrystel nie. Sodra daar op 'n reswaarde afgespreek is, waarborg die huurder die waarde van die saak of staan hy in vir die waarde daarvan (sien weer Joubert 1989 *TSAR* 572 en 1991 *SALJ* 335 se verduideliking van reswaarde finansiële huurkontrakte). Dit beteken dat die kontrak nie aan die vrystellingsvereiste van paragraaf (c) voldoen nie en dus onderworpe is aan die Woekerwet se bepalings (Joubert *Die finansiële huurkontrak* 237).

Die opsteller van die vrystellings het waarskynlik juis reswaarde finansiële huurkontrakte of verskyningsvorme daarvan in gedagte gehad toe paragraaf (c)

van vrystelling (v) bewoord is. Ek het egter al vrae onder oë gehad wat sekere landdroste aan litigerende verhuurders se prokureurs gestel het wat daarop dui dat hulle meen paragraaf (c) moet baie wyd uitgelê word. Sommige landdroste opper naamlik die argument dat bepaalde standaardbedinge wat in haas alle kontrakte voorkom, aanstoot teen paragraaf (c). Twee bekende gevalle is risiko- en versekeringsklousules. Die huurder dra daarkragtens die risiko vir totnietgaan van die saak, of skade daaraan, en is verantwoordelik om die saak ten volle te verseker en die premies te betaal. Die argument van die landdroste is dan dat die huurder in der waarheid aanspreeklik is vir die waarde van die goedere soos beoog in paragraaf (c) van die vrystelling.

Die tyd sal leer of 'n hoë hof bereid sal wees om paragraaf (c) so wyd uit te lê soos wat sommige regsprekers in die laer howe blykbaar wel doen. Die landdroste se gemelde uitleg is beslis nie absurd of vergesog nie. 'n Letterlike uitleg kan sekerlik die besondere resultaat oplewer, en dit is nie ondenkbaar dat 'n hoë hof die betrokke uitleg en toepassing van die vrystelling in die toekoms sal onderskryf nie. Ek het egter my bedenkinge of dit werklik die (subjektiewe) bedoeling van die wetgewer was om sy net so wyd te span. Indien paragraaf (c) so wyd toegepas word om geykte bedinge in huurkontrakte anders as egte reswaardeafsprake te tref, sal dit baie moeilik vir verhuurders wees om hulle kontrakte so te bewoord dat dit buite die Woekerwet val. Hulle sou sekere bedinge, soos die verpligting om die saak te verseker teen sy markwaarde, moet weglaat wat enorme finansiële risiko's en laste vir verhuurders sou meebring.

Een of ander tyd gaan 'n hoë hof gevra word om die vrystelling in (v) hierbo behoorlik uit te lê, op 'n bepaalde kontrak toe te pas en gesaghebbende antwoorde te verstrek op die talle belangrike kwelvrae wat bestaan. Dit staan vas.

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STATUTORY MULTILINGUALISM AND TEXTUAL CONFLICT UNDER THE 1996 CONSTITUTION

1 The position until 1994

By virtue of constitutional provisions since 1910, bilingualism has become characteristic of legislation in South Africa. It has affected the interpretation of statutes in particular.

A multilingual statutory text provides an opportunity for the comparison of its various versions. This could – as was shown on several occasions in the past (see Devenish *Interpretation of statutes* (1992) 144–146) – enhance an understanding of it. Three successive constitutions between 1910 and 1994 each contained a provision relating to statutory bilingualism (the 1909 South Africa Act 9 Edw 7 ch 9 s 67; the Republic of South Africa Constitution Act 32 of 1961 s 65 and the Republic of South Africa Constitution Act 110 of 1983 s 35). The focal

point of these almost identically worded sections was not, however, the meaning-enhancing potential of statutory bilingualism. It was rather the predicament of possible conflict or inconsistency between the Afrikaans and English versions of a text. Section 35 of the 1983 Constitution, for example, provided as follows:

> "As soon as may be after any law has been assented to by the State President, the Secretary to Parliament shall cause two fair copies of such law, one being in the English and the other in the Afrikaans language (one of which copies shall have been signed by the State President), to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court of South Africa, and such copies shall be conclusive evidence as to the provisions of every such law, and in case of conflict between the two copies so enrolled that signed by the State President shall prevail."

The corresponding provision in the 1961 Constitution Act (s 65) created the very problem that it professed to solve. The signed Afrikaans version referred to a "verskil" (ie a "difference" or "discrepancy") between the two texts. The English version used the narrower term "conflict" (ie "clash" or "incompatibility") (Du Plessis *The interpretation of statutes* (1986) 119). Devenish (144), however, rightly understands the case law to say that, as a point of departure, the compatibility of the two versions always had to be assumed. The constitutional mechanisms to resolve deadlocks could therefore only be invoked as a very last resort.

For this reason the "verskil" in the signed Afrikaans version of the 1961 Constitution was understood to mean "conflict" ("teenstrydigheid") as in the unsigned English version (Du Plessis 119). The so-called "highest common factor approach" was in effect invoked to arrive at this result. This approach is appropriate if one of the versions of a statute can be construed in more than one way while the other version is capable of one construction only. The latter version (bearing the narrower, shared meaning) is then to prevail (*Jaffer v Parow Management Board* 1928 CPD 159 162). "Conflict" is the highest common factor when "verskil" and "conflict" are compared.

This note focusses on constitutional provision for the handling of possible *conflicts* or inconsistencies between the various versions of legislative texts under the Constitution of the Republic of South Africa, Act 108 of 1996. The meaning-enhancing potential of statutory multilingualism will therefore not be considered in depth. It will, however, be necessary to bring it up at times for compelling reasons that will appear in the course of the discussion.

The case law as it stands will probably, for the time being, guide the comparison of the various versions of a statute as an aid to interpretation. This is to be welcomed, since the case law approach constrains a mere literalist or "face value" comparison of the different versions of an enactment. It therefore forms a sound basis for the creative and constructive development of answers to questions posed by the 1996 Constitution.

In theory the recognition of eleven official languages in section 6(1) of the Constitution gives rise to a situation where eleven versions of a legislative text, each in a different language, can become available for comparison. Whether this is likely to happen in practice, will briefly be considered.

Traditionally the different versions of an enactment are referred to as "texts", for example, "the English text" or "the Afrikaans text". The integrity of a legislative text is, however, better preserved if it is referred to as one text of which, in South Africa, a number of versions in different languages (can) exist.

2 The 1993 Constitution

The Constitution of the Republic of South Africa, Act 200 of 1993 ("the transitional Constitution") was passed as an Act of Parliament under procedures laid down by the 1983 Constitution (including s 35). Section 3(1) of the transitional Constitution, for the first time in history, recognised nine African languages, in addition to English and Afrikaans, as official languages of the Republic of South Africa. Section 15 of the Constitution of the Republic of South Africa Amendment Act 2 of 1994, however, provided that, notwithstanding the fact that the Afrikaans version of the Constitution was signed by the then State President, its English version had, for the purposes of its interpretation, to prevail (Afrikaans: "voorrang geniet") as if it were the signed version. This provision made sense because the transitional Constitution was negotiated and drafted exclusively in English. The text was officially translated into Afrikaans but this translation was done in quite a hurry and was, generally speaking, not as adequate as the Afrikaans translation of the later 1996 ("final") Constitution. (See also De Waal "A comparative analysis of the provisions of German origin in the Bill of Rights" 1995 *SAJHR* 4 fn 4.)

Botha (*Statutory interpretation: An introduction for students* (1996) 84) – with reference to the law as it stood prior to 27 April 1994 – asserts:

> "The 1993 Constitution has, in principle, introduced the same method of reconciling conflicting legislative provisions. Because the principles have remained the same, the case law which has developed those principles is equally valid today."

The provision of the transitional Constitution Botha has in mind is section 65. It provided that an Act of Parliament had to be enrolled of record in the office of the Registrar of the Appellate Division of the Supreme Court (presently the Supreme Court of Appeal) in such official languages as may be required (s 65(1)). In the case of conflict between various copies of an Act so enrolled, the copy signed by the President had to prevail (s 65(2)). This was indeed not at variance with the position under section 35 of the 1983 Constitution, except that it had become possible that statutes could be enrolled in more official languages than English and Afrikaans.

Section 141 of the transitional Constitution makes similar provision for provincial legislation.

3 Section 240 of the 1996 Constitution

Section 240 states that "[i]n the event of an inconsistency between different texts of the Constitution, the English text prevails". This provision, unlike its predecessor in the transitional Constitution (namely s 15 of the 1994 Amendment Act), makes explicit references to *an inconsistency* between the versions. The phrase "shall, for the purposes of its interpretation prevail as if it were the signed text" in section 15, however, imported the notion of an inconsistency. It implicitly referred to the inconsistency provision in section 35 of the 1983 Constitution according to which, in the event of an inconsistency between the different versions of the transitional Constitution, the signed Afrikaans version actually had to prevail. Section 15 provided that, by way of exception, the English version had to prevail instead. It did not, in other words, differ in substance from section 240, its successor in the final Constitution.

In instances of conflict between various versions of the Constitution, the pre-1994 case law approach to inconsistencies is commendable. The compatibility of

the different versions of the Constitution has to be assumed and the section 240 mechanism to resolve deadlocks may only be invoked as a last resort.

Kentridge AJ (in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) 682C–H (par 44)) seemed to have endorsed this approach, albeit with reference to the transitional Constitution. In spite of the provisions of section 15 of the 1994 Constitution Amendment Act, he concludes that the English phrase "all law in force" in section 7(2) of the transitional Constitution, can be understood extensively with reference to the Afrikaans version "alle reg wat van krag is". "All law in force" can be read as a reference restricted to statute law. The more inclusive Afrikaans word, "reg", however, clearly indicates that "law" embraces common law as well as statute law. This is clear from the Afrikaans wording of other sections of the transitional Constitution too, for example sections 8(1) and 33(1), where "reg" is used as the Afrikaans equivalent for "law".

In Kentridge AJ's interpretation of section 7(2), the Afrikaans version in effect "prevails". This is possible, he explains, because there is *no conflict* between the two versions. Reliance on what he calls "another well-established rule of interpretation" is therefore warranted:

> "[I]f one text is ambiguous, and if the ambiguity can be resolved by the reference to unambiguous words in the other text, the latter unambiguous meaning should be adopted. There is no reason why this common-sense rule should not be applied to the interpretation of the Constitution. Both texts must be taken to represent the intention of Parliament" (682E–F).

(See also De Waal 1995 *SAJHR* 4 fn 4 who, on an assumption similar to that of Kentridge AJ, asserts that reference could be made to the Afrikaans version of the transitional Constitution to make sense of the term "constitutional state". The Afrikaans version of this notion, namely "regstaat", corresponds more closely to the original German term, *Rechtsstaat.*)

Kentridge AJ finally justifies his conclusion on the basis that Afrikaans has remained an official language with undiminished status in terms of section 3 of the transitional Constitution.

4 Section 82 of the 1996 Constitution

Section 81 of the 1996 Constitution provides that a bill becomes an Act of Parliament as soon as it has been assented to and signed by the President. It must then be published promptly and it takes effect either when published or on a date determined in terms of the Act itself. Section 82 then continues:

> "The signed copy of an Act of Parliament is conclusive evidence of the provisions of that Act and, after publication, must be entrusted to the Constitutional Court for safekeeping."

Section 124 makes similar provision for the safekeeping and determination of the content of provincial legislation.

Schedule 6 item 27 makes it clear that sections 82 and 124 do not affect the safekeeping of Acts passed before the Constitution took effect. Those are the Acts presently in safekeeping with the Registrar of the Supreme Court of Appeal.

Section 82 makes no reference to the possible inconsistency of the various versions of an Act. It simply states that *one version* of an Act (out of a possible eleven), namely the one signed by the President, shall be conclusive evidence of the provisions of the Act. The explicit exclusion of an inconsistency mechanism

is an implicit recognition of the intrinsic concurrence of the different versions of legislative texts. It therefore opens the door to the fullest possible development of the principles of the case law as it stands.

Botha (89) quite correctly criticises the conflict provision (s 65) in the transitional Constitution. First, he asserts that it could have been problematic if the signed version had been required to prevail in terms of section 65 but was in conflict with the Constitution, while the unsigned version was not. Secondly, he complains that section 65 of the transitional Constitution required quite a literal reading of the various versions of an Act (in order to detect inconsistencies). Section 35(5) of that Constitution, on the other hand, in a much more contextual and "purposive" vein, called on a court interpreting a statute, to have "due regard to the spirit, purport and objects" of the Bill of Rights.

He therefore thinks that the section 65 provision for an inconsistency mechanism was superfluous and proposes the following section instead (90):

> "In the case of conflict between versions of an Act of parliament or a provincial legislature, the versions should be read together taking into account the scope, spirit and purport of the chapter on fundamental rights."

I agree with Botha's assertion that specific inconsistency mechanisms are superfluous. His proposed provision is, however, superfluous as well. First of all, the existing common and, in particular, case law already provides for the reading together of the various versions of an enactment in a constructive way. There is no inconsistency (or conflict) provision, lurking somewhere on the horizon and posing a temptation to those who are too mindful of possible inconsistencies, to read the various versions of an Act just literally. This paves the way for a creative development of the existing case law drawing on statutory multilingualism. Inconsistencies will not readily be found. Secondly, Botha's proposed provision seems to apply only where the different versions are *in conflict*. The reading together of various versions of an enactment in the light of the Bill of Rights is, however, a sound interpretative procedure irrespective of whether these versions are in conflict. Under the transitional Constitution it was at any rate called for in terms of the provisions of section 35(3). This has remained the position under the final Constitution in terms of section 39(2).

The absence of an explicit conflict resolution mechanism in section 82 does, of course, have repercussions:

4 1 The preferred constitutional text

The different versions of the Constitution, the highest law of the land, have to be read together subject to a familiarly narrow conflict resolution mechanism prescribed by section 240. This could invite a comparison of the different versions of the Constitution in a literalist vein. On the other hand, the reading together of different versions of ordinary (non-supreme) legislation is not subject to a conflict resolution mechanism of any sort, since section 82 is silent on the issue. The comparative reading of the different versions of an ordinary Act is therefore not as vulnerable to literalist temptations as a similar reading of different versions of the Constitution – a menacing oddity indeed! A literalist reading of any legislation can hardly be justified. However, if literalism, in spite of good intentions, somehow still creeps in, it will be much more hazardous in the domain of constitutional interpretation than in the area of conventional statutory interpretation.

The literalist risk posed by section 240 is best faced with stoic pragmatism. Section 82's implied recognition of the intrinsic concurrence of the different versions of ordinary legislative texts, serves as a springboard to develop the existing case law creatively. The wording of sections 82 and 240 differs, but the existing case law premising an intrinsic concurrence of different versions of multilingual acts, could develop with reference to both. Section 240 itself *need not* be read *literally* and its conflict resolution mechanism can be relied on only as a *last resort* without doing violence to its objectives.

There is historical justification for the explicit conflict resolution mechanism in section 240. The 1996 Constitution, like the transitional Constitution, was negotiated and drafted in English. This means that the English version was constantly subject to the constitution-makers' watchful scrutiny. Other versions of the Constitution are later translations of the English "original" by officials. Preference for the English version so as to resolve conflict is therefore warranted, provided it is so relied on with due regard to the pitfalls of literalism and is therefore used only as a very last resort.

4 2 Insurmountable inconsistencies

The absence of an explicit conflict resolution mechanism in section 82 raises the further question of what to do if different versions of a statute appear to be insurmountably inconsistent. No particular version of a statute can be preferred on historical grounds since, traditionally, the President simply signs different versions by turns. The signing of a particular version has therefore always been (and still is) a matter of chance.

Section 82 prefers the signed version to the extent that it declares it to be *conclusive evidence* of the provisions of an Act. "Conclusive" means "incontrovertible", "unequivocal", "indisputable" or "incontestable". Had the signed version been said to be *prima facie* evidence, its written content would have stood unless contradicted or controverted. However, it now seems as though, even in the absence of inconsistencies, the signed version simply has to be preferred no matter how questionable it may seem. Such a formalistic, literal reading of section 82 undermines recognition of the essential concurrence of the various versions of a statute which, in turn, contradicts and unmakes the case law. A non-formalistic, contextual reading of section 82 is both feasible and preferable.

The signed version of a statute is not conclusive evidence of its *meaning* but of its *provisions* or *written* content which must still be *construed* in order to arrive at a meaning. Kentridge AJ's *modus operandi* in *Du Plessis v De Klerk supra* can help illustrate this.

Suppose the phrase "all law in force" occurred in the signed English version of an ordinary statute and not in the Constitution itself. The unsigned Afrikaans version speaks of "alle reg wat van krag is". Section 82 needs not preclude what Kentridge AJ did in *Du Plessis v De Klerk*. The signed English version is conclusive evidence of the fact that the phrase "all law in force" occurs in the text. It is, however, no final indication of what the ambiguous word "law" means. This word still has to be interpreted. The unsigned Afrikaans version indicates how the word "law" *is to be understood*, namely as inclusive of both common and statute law.

Suppose the English version spoke of "all enactments in force". The grammatical meaning of this phrase is seemingly unambiguous and a strict literalist

might argue that the two versions are inconsistent because the Afrikaans version speaks of "alle *reg* wat van krag is". The term "enactments" in the English version must therefore be preferred by virtue of section 82. This would, however, be too formalistic a way of jumping to the conclusion that, because the English version is conclusive evidence that the provision contains the phrase "all enactments in force", "enactment" can only be read literally in comparison with "reg" also so read. A less strictly literalist argument, arriving at the same result, could be that "enactments" is to be preferred because it emerges as highest common factor when the English and Afrikaans versions are compared. Hermeneutically this is a more acceptable way of achieving such a result. The word "enactments" then prevails, not because it occurs in the English version as conclusive evidence of the provision containing it, but because of a recognised interpretative procedure.

The second argument does not, however, proceed much beyond the literalism of the first. The textual context in which the phrases (and the varying words) occur still has to be considered. *Systematic interpretation*, seeking to derive meaning from the coherence of the provision to be construed and other provisions and components of the legislative text, should also be invoked.

Such a contextual reading could, in the hypothetical example, reveal that, as in the transitional Constitution, the word "reg" occurs in several places in the Afrikaans version and that its English equivalent in each instance is "law". The one particular instance where "enactments" occurs, is therefore an aberration. In the absence of a credible (contextual or other) explanation for such a deviation, it could be concluded that "enactments" was mistakenly used and that it actually means "law" in its inclusive sense *in spite of the fact that the English version is conclusive evidence of the use of the word "enactments" in the provision in question.*

As long as that meaning-component in the signed version, inconsistent with its ostensible counterparts in other versions, remains interpretable, it cannot be assumed to prevail merely on face value. Say, for instance, the signed English version of a statute says that certain proceedings must be instituted within twenty (20) days while an unsigned version says twenty-one (21) days. At a glance "20 days" hardly seems to be interpretable. The inconsistency of the two versions can therefore not be resolved through interpretation and section 82 has to be invoked in such a way that the English version trumps the other version: "20 days" is then preferred to "21 days" as an evidential inevitability. However, even this "obvious" conclusion cannot follow without due regard to the broader context, constituted by the statute as a whole and/or the legal system at large.

Other provisions of the statute under consideration (or of other statutes) may, for instance, consistently allow a period of 21 days for instituting the very proceedings. This will warrant the conclusion that the 21 days allowed under the unsigned version of the provision in question, has to prevail over the 20 days allowed under the signed version – even though the signed version is conclusive evidence of the fact that the phrase "20 days" occurs in the statutory text. Construed in context, "20 days" could mean "21 days" and the operation of section 82 does not exclude this possibility. This reading will be enhanced if a restriction of the time limit burdens a party entitled to institute the proceedings *vis-à-vis* the state. The interpretative presumption that a statute is not aimed at achieving unjust, unreasonable or inequitable results and/or section 34 of the Constitution, which guarantees a person's right of access to a court or to another independent and impartial forum, then also take effect.

To sum up: *Conclusive evidence as to the provisions or written content of a statute, is something other than (absolute) proof of the meaning of such provisions or written content.* An endeavour to proceed beyond an unnuanced, literalist reading of the enactment underlies this seemingly "artificial" application of section 82, which narrows down insurmountable inconsistencies between the different versions of an enactment and is justified not only in the interest of a contextual (and hence "purposive") reading of statutory texts, but also as a creative extension of applicable case law.

The constitution-makers would have facilitated a contextual reading of multilingual statutory texts had they, in section 82, declared the signed version of an Act to be *prima facie* instead of *conclusive* evidence of its provisions. The written content of the signed version would then have remained more readily controvertible in the light of contextual evidence emerging from unsigned versions of the Act, the text as a whole or indicators within the legal system at large. Insurmountable inconsistencies between the signed and unsigned versions of an Act, could then occur only in the absence of such evidence and giving preference to the signed version would indeed more clearly have been a very last resort.

This result is, however, as was argued above, also achievable under section 82 as it stands, albeit in a somewhat more circuitous way.

5 Postscript: how many versions of an Act are possible and probable?

Section 6(1) recognises eleven official languages: Afrikaans and English (the two languages traditionally recognised) and nine indigenous African languages. The national government as well as provincial governments may use any particular official languages for "the purposes of government" (which includes *the publication of legislation*) but *must* use at least two (s 6(3)(a)). It is therefore possible, in principle, to have as many as eleven versions of a statute (which would increase the inconsistency potential dramatically). This is improbable, however, because it does not seem to be incumbent upon government to use more than two languages. An inquiry into present practices at the state law advisers' office revealed that statutes are still published and signed by the President in the same way as before 27 April 1994. They are, in other words, published in English and Afrikaans (only) and the different versions are signed in turn.

At face value this practice seems to comply with the provisions of section 6(3). However, if section 6 is read more closely it becomes clear that the existing practice is unconstitutional. Section 6(3)(a) mentions a number of factors that government must take into account when it decides which languages to use. Certain of these factors, namely usage, practicality and expense seem to favour the use of Afrikaans and English only "the way it used to be". Regional circumstances and the preferences of the population are, however, also to be taken into account and this could result in an insistence of the use of languages other than or in addition to English and Afrikaans. More importantly, section 6(2) enjoins government to take practical and positive measures to elevate the status and advance the use of the indigenous languages which, historically, enjoyed a diminished use and status. This, read with the section 9(3) prohibition of discrimination on the ground of, amongst other things, language, open the existing practice to constitutional challenge. It cannot remain in the long term.

Should the publication of more than two versions of enactments become the rule *and the inconsistency potential increases*, it will become even more important not to read the different versions of a statutory text together in a literalist vein. The notion of intrinsic compatibility of the various versions of the text will have to be honoured to the fullest possible extent. Such an eventuality lends further support to the arguments previously advanced in favour of a contextual reading of section 82.

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INLEIDENDE AANTEKENINGE OOR DIE NOORD-ATLANTIESE VRYE HANDELSVERDRAG

1 Inleiding

Die bestudering en evaluering van die Noord-Amerikaanse Vrye Handelsverdrag (North American Free Trade Agreement; hierna NAFTA genoem) word geensins vergemaklik deur die uiteenlopende standpunte wat in die Amerikaanse literatuur verskyn nie (sien veral Alford "Introduction: The North African Free Trade Agreement and the need for candor" 1993 *Harv Int LJ* 293; Rosa "Old wine, new skins: NAFTA and the evolution of international trade dispute resolution" 1993 *Mich J of Int L* 255). Dit blyk duidelik dat NAFTA óf heelhartig ondersteun óf met volle oortuiging verwerp en gekritiseer word.

Daar gaan derhalwe nie gepoog word om in hierdie aantekening 'n vergelyking tussen NAFTA en die bestaande ooreenkomste tussen state in suidelike Afrika, soos die Suider-Afrikaanse Ontwikkelingsgemeenskap en die Suidelike Afrikaanse Doeane Unie, te trek nie. Ook sal nie gepoog word om voorstelle rakende soortgelyke ooreenkomste vir Suider-Afrika te maak nie.

Slegs enkele aspekte rakende NAFTA word as 'n verkennende en inleidende aantekening bespreek, naamlik die geskiedenis en doel van NAFTA en enkele aspekte rakende geskilbeslegting in NAFTA. Geen aanspraak op volledigheid word gemaak nie.

2 Bondige historiese oorsig

Die verligte handels- en ekonomiese beleid van die Salinas-regering in Mexiko het gelei tot samesprekings tussen Mexiko en die VSA oor die opheffing van beperkings op die vrye handel tussen die twee state. Ten einde sy handelsbelange te beskerm, het Kanada daarop aangedring om by die samesprekings ingesluit te word (Purnell "1993 International trade update: The GATT and NAFTA" 1994 *Nebraska LR* 220).

Hierdie samesprekings het die idee van 'n Noord-Atlantiese Vrye Handelsverdrag laat ontstaan en op 7 Oktober 1992 is in San Antonio, Texas, die eerste stappe gedoen om NAFTA in plek te kry (Siqueiros "NAFTA institutional

arrangements and dispute settlement procedures" 1993 *Calif West Int LJ* 383). Twee maande later is NAFTA op 17 Desember 1992 deur die presidente van die VSA en Mexiko en die eerste minister van Kanada onderteken (Spracker en Mertz "Labor issues under the NAFTA: Options in the wake of the agreement" 1993 *The Int Lawyer* 737; Bello en Holmer "The NAFTA: Its overarching implication" 1993 *The Int Lawyer* 589; Wechter "NAFTA: A complement to GATT or a setback to global free trade?" 1993 *South Cal LR* 2611).

Met NAFTA word gepoog om alle onderhandelinge oor en beperkings op handel tussen die drie lande geleidelik oor die volgende tien na vyftien jaar uit te faseer (Goldberg "South of the border" 1994 *ABA Journal* 74).

Die aanvanklike ondertekening van NAFTA deur president Bush moes egter nog deur die Kongres goedgekeur word en die proses is deur president Clinton verder gevoer. Clinton het die wetgewing vir die implementering van NAFTA ter tafel gelê (Wechter 2611) en op 8 Desember 1993 het hy NAFTA onderteken. NAFTA het op 1 Januarie 1994 in werking getree (Crawford "Some thoughts on the North American Free Trade Agreement, political stability and environmental equity" 1995 *Brooklyn J of Int L* 586). Ook in Kanada is wetgewing goedgekeur wat NAFTA in werking gestel het (Burshtein "The impact of NAFTA on trade secrets and regulatory disclosures in Canada" 1994 *Patent World* 37).

Die ondertekening van hierdie verdrag het een van die wêreld se grootste en rykste ekonomiese markte geskep (Broadman "International trade and investment in services: A comparative analysis of the NAFTA" 1993 *The Int Lawyer* 623; Lewis "Negotiation of NAFTA text completed" 1992 *Int Law News* 5-7; Thomure "The uneasy case for the North American Free Trade Agreement" 1995 *Syracuse J for Int L and Com* 181; Rosa 255) wat vergelyk kan word met die Europese Unie (Wechter 2611). NAFTA verenig 'n gebied van 8,2 miljoen vierkante myl, 364 miljoen verbruikers en ongeveer $7 triljoen ekonomiese aktiwiteite (Bierman, Fraser en Kolari "The North American Free Trade Agreement: A market analysis" 1994 *Vanderbilt J of Transnational L* 720).

NAFTA is egter nie sonder teenkanting en negatiewe reaksies ontvang nie. Studies het aangetoon dat Mexiko die grootste voordeel uit die verdrag sal trek, terwyl sekere van die industriële sektore van die Amerikaanse ekonomie daardeur benadeel sal word (Rozwood en Alker "Side agreements, sidesteps, and sideshows: Protecting labour from free trade in North America" 1993 *Harv Int LJ* 334; sien ook Hafbauer en Schott "Options for a hemispheric trade order" 1991 *Univ of Miami Inter-American LR* 282-283; Bierman, Fraser en Kolari 721). Dit het onder meer daartoe aanleiding gegee dat veral in die VSA vrese ontstaan het dat Amerikaanse werksgeleenthede verlore sal gaan en dat dit na suid van die grens sal verskuif as gevolg van die goedkoop arbeid en gunstige arbeidspraktyke in Mexiko (Gonzalez "The North American Free Trade Agreement" 1996 *The Int Lawyer* 345; Alford 269; Charny "Competition among jurisdictions in formulating corporate law rules: An American perspective on the "Race to the Bottom" in the European Communities" 1991 *Harv Int LJ* 423-424; Trachtman "International regulatory competition, externalization, and jurisdiction" 1993 *Harv Int LJ* 47-56; Bierman, Fraser en Kolari 721). Ook het die politieke onstabiliteit in Mexiko die teenstanders van NAFTA verder aangemoedig om daarop te wys dat NAFTA geensins die omstandighede in Mexiko verander het nie (Gonzalez 345). Dit het veral gespruit uit die opstand van die Chiapas, 'n groep Indiaanse arbeiders wat as een van hulle redes vir hul opstand

of revolusie onder andere die aanvaarding van NAFTA genoem het. Volgens hulle is NAFTA 'n doodsvonnis vir Indiane en sal dit die gaping tussen die klein groepie rykes en die massa armes vergroot en die oorblywende eiesoortige Indiaanse samelewing vernietig (Crawford 586). Die teenstanders van NAFTA se argumente is verder versterk deur die ekonomiese resessie wat Mexiko beleef het en die devaluasie van die Mexikaanse geldeenheid. Daarteenoor redeneer die voorstanders van NAFTA dat die ekonomiese en politieke toestand in Mexiko baie erger sou gewees het as NAFTA nie reeds in plek was nie (Gonzalez 345). NAFTA lewer nie net 'n belangrike bydrae tot die ontwikkeling van die Mexikaanse ekonomie nie, maar dra ook daartoe by dat nuwe beleggingsmoontlikhede vir die VSA en Kanada geskep word. Sewentig persent van invoere na Mexiko is afkomstig van die VSA en Mexiko is tans die snelgroeiendste van die VSA markte. Die gemiddelde handelsomset tussen die VSA en Mexiko was $100 biljoen gedurende die eerste jaar van NAFTA met 'n gemiddeld van $2 biljoen per week. Gedurende dieselfde tydperk het handel tussen die VSA en Kanada met 17% toegeneem tot $348 biljoen (Narajo "Alternative dispute resolution of international private commercial disputes under NAFTA" 1996 *Texas Bar J* 116-117; Tenebaum "International arbitration of trade disputes in Mexico. The arrival of the NAFTA and the new reforms to the Commercial Code" 1995 *J of Int Arbit* 53).

3 Doel van NAFTA

NAFTA dra by tot 'n dramatiese uitbreiding van die grense van internasionale handel en die beleid ten opsigte van die beskerming van immateriële goedere, handel in dienste, beleggings en die beslegting van internasionale geskille en prosedures vir die oplossing van ander geskille (Bello en Holmer 590), en laastens aspekte rakende oorsprong- en doeaneprosedures (*ibid*; sien veral Harrison en Weigel "Customs provisions and rules of origin under the NAFTA" 1993 *The Int Lawyer* 647-669).

Die kern van NAFTA is om voorsiening te maak dat institusionele, regulatoriese en enige ander struikelblokke in die weg van vrye handel en beleggings in die streek verwyder of ten minste beperk word (Broadman 623).

Volgens Bello en Homer 592-601 is daar sewe oorkoepelende kenmerke van NAFTA wat die internasionale handelsreg en -beleid direk beïnvloed: Eerstens is NAFTA 'n duidelike voorbeeld van gelyke en wedersydse voordelige samewerking tussen ontwikkelde en ontwikkelende lande. Tweedens kan NAFTA vrye handel op sowel streeks- as in wêreldwye konteks bevorder. Derdens bevorder NAFTA 'n internasionaalregtelike regime vir die beskerming van immateriële goedereregte (*idem*). Vierdens dra NAFTA by tot 'n meer geïntegreerde benadering tot handel, arbeid en omgewingsaangeleenthede deur die lidlande. In die vyfde plek skep NAFTA die nodige prosedures waardeur internasionele handelsonderhandelinge bespoedig en vergemaklik kan word. Sesdens simboliseer NAFTA die internasionalisering van die VSA se binnelandse beleid. En laastens dien NAFTA as die band in die nuwe verhouding tussen die VSA en Mexiko en as rigtingwyser van die koers wat die VSA se buitelandse beleid na die een-en-twintigste eeu gaan volg.

4 Vordering tot 1996

Daar het reeds meer as vier jaar verloop sedert die ondertekening van NAFTA en die sukses daarvan kan slegs gemeet word aan dit wat in hierdie tydperk bereik

is. Gedurende die eerste jaar na die ondertekening van NAFTA is die klem geplaas op die oprigting en vestiging van die instellings, reëls en prosedures wat nodig is vir die funksionering van die verdrag as 'n regsinstelling. Dit het dus tot gevolg gehad dat NAFTA eers gedurende 1995 in volle werking getree het en effektief die handel tussen die drie ondertekenaars kon beïnvloed (Gonzalez 346).

Daar het egter 'n aantal positiewe gebeure plaasgevind wat duidelik toon dat NAFTA inderdaad begin om sy doel te vervul. Die eerste binasionale paneel ingevolge hoofstuk 19 van NAFTA is saamgestel. Die VSA het 'n eerste klag teen Mexiko ingebring ingevolge die geskilbeslegtingsprosedure van hoofstuk 20 van NAFTA en die eerste aansoek is by die Kommissie vir die Omgewing ingedien. Laasgenoemde kommissie is ingestel ingevolge 'n bykomende ooreenkoms oor die omgewing tot NAFTA (*idem* 345).

Die Nasionale Administratiewe Kantoor wat ingevolge 'n bykomende ooreenkoms oor arbeid tot NAFTA ingestel is, het 'n verslag oor geskille wat verband hou met arbeidsaangeleenthede uitgereik. Die vordering van NAFTA word egter ook duidelik geïllustreer deur die groot aantal aansoeke en klagtes wat ingedien is ingevolge die bepalings van NAFTA en wat suksesvol besleg is deur die geskilbeslegtingsprosedures van NAFTA (*idem* 346).

5 Geskilbeslegting in NAFTA

NAFTA se geskilbeslegtingsprosedure is 'n voortsetting van die prosedure in NAFTA se voorganger, die Kanada-VSA Vrye Handelsverdrag, asook die prosedures in die Algemene Ooreenkoms oor Tariewe en Handel (General Agreement on Tariffs and Trade en hierna genoem GATT) en die Konvensie oor die Beslegting van Beleggingsgeskille tussen State en Burgers van Ander State (*Convention on the Settlement of Investment Disputes between States and Nationals of Other States*; hierna ICSID genoem). Die VSA, Mexiko en Kanada het ook hul onderskeie regte en verpligtinge ingevolge GATT en ICSID bevestig (Thomure 197).

'n Party wat 'n klagte ingevolge NAFTA se algemene geskilbeslegtingsmeganisme indien terwyl die geskil ook deur GATT gedek word, moet kies ingevolge watter ooreenkoms die geskil besleg moet word (Rosa 263; Abbott "Integration without institutions: The NAFTA mutation of the EC Model and the future of the GATT regime" 1992 *The Am J of Comp L* 935).

Die geskilbeslegtingsmeganismes en -prosedures in NAFTA het ten doel om gesentraliseerde beheer oor geskilbeslegting binne NAFTA uit te oefen in 'n poging om die gebruik en effektiwiteit daarvan te bevorder en te verseker (Straight "GATT and NAFTA: Marrying effective dispute settlement and the sovereignty of the fifty states" 1995 *Duke LJ* 221).

NAFTA maak van mediasie, nie-bindende arbitrasie en bindende of afdwingbare arbitrasie in sy meganismes vir die beslegting van geskille gebruik. Deur hierdie geskilbeslegtingsmeganismes poog NAFTA om voorsiening te maak vir die beslegting van interregeringsgeskille, maar ook vir die beslegting van geskille tussen 'n burger van een van die lidlande en die regering van 'n ander lidland (Johnson "Alternative dispute resolution in the international context: The North American Free Trade Agreement" 1993 *South Meth Univ LR* 2178).

Daar moet onderskei word tussen die prosedures en geskille waarvoor in onderskeidelik hoofstukke 19, 20 en 11 voorsiening gemaak word. Hoofstukke 19

en 11 handel oor bepaalde aspekte en is meer omlyn as die onderwerp van hoofstuk 20 (Endsley "Dispute settlement under the CFTA and NAFTA: From eleventh-hour innovation to accepted institution" 1995 (18) *Hastings Int and Comp LR* 661). Hoofstuk 19 beperk 'n lidland se vermoë om beskermende wetgewing toe te pas en voorsien geskilbeslegtingsmeganismes vir die state maar ook vir byvoorbeeld maatskappye (Oelstrom "A treaty for the future: The dispute settlement mechanisms of the NAFTA" 1994 *Law & Policy in Int Business* 791). Hoofstuk 19 het ten doel om geskille oor *antidumping* en subsidiewetgewing van lidlande te besleg (Endsley 661). Hoofstuk 20 bied interstaatlike meganismes vir beslegting van algemene geskille oor die toepassing en interpretasie van NAFTA en bied 'n verskeidenheid opsies ten einde 'n oplossing te vind (Oelstrom 785; Endsley 661; Bialos en Siegel "Dispute resolution under the NAFTA: The newer and improved model" 1993 *The Int Lawyer* 612). NAFTA maak egter ook in hoofstuk 11(B) voorsiening vir die beslegting van geskille tussen 'n lidland en 'n belegger van 'n ander lidland (Oelstrom 799; Endsley 661).

5 1 Hoofstuk 19

Hoofstuk 19 van NAFTA maak voorsiening vir die beslegting van geskille rakende *antidumping* en *countervailing* verpligtinge (Endsley 663). Hoofstuk 19 maak ook voorsiening dat 'n party in bepaalde omstandighede voordele wat 'n ander lidland uit NAFTA kan toekom, mag terughou (Oelstrom 804).

Binasionale panele van regters en handelsdeskundiges word saamgestel om die regering van 'n lidland se administratiewe besluite te hersien indien daar 'n ondersoek plaasgevind het na onbillike handelspraktyke teen vreemdelinge. Die substantiewe reg van die lidlande word egter onveranderd gelaat (Endsley 664).

5 2 Hoofstuk 20

Hoofstuk 20 van NAFTA stel die algemene geskilbeslegtingsmeganismes daar (Rosa 260) en is ontwerp om alle algemene geskille wat kan voorkom, op te los (Bialos en Siegel 612). Derhalwe sal die afdwinging van immateriële goedereregte, finansiële dienste, standaarde, gesondheid en aangeleenthede rakende die omgewing ook deur hoofstuk 20 beheers word (Endsley 662; Bialos en Siegel 613). Hoofstuk 20 kan selfs aangeleenthede aanspreek wat nie 'n oortreding of verbreking van NAFTA daarstel nie (Endsley 662).

Hoofstuk 20 maak voorsiening vir mediasie en waar mediasie onsuksesvol is, kan nie-bindende arbitrasie volg (Johnson 2179). Waar daar 'n geskil bestaan oor enige aangeleentheid wat die werking van NAFTA kan beïnvloed, mag enige party 'n gesprek met die ander party aanvra. Die partye moet poog om deur hierdie konsultasie die geskil te besleg. Indien hulle onsuksesvol is en nie binne dertig dae nadat die konsultasie aangevra is die geskil kan besleg nie, kan enige van die partye 'n vergadering met die "Free Trade Commission" versoek (Rosa 264).

Daar word dus as gevolg van die mediasiemaatreëls 'n "Free Trade Commission" (hierna genoem die "kommissie") ingevolge hoofstuk 20 opgerig (Johnson 2179) wat ten doel het om geskille oor die interpretasie en/of toepassing van handelsooreenkomste te besleg (Rosa 261). Die kommissie besleg ook geskille wat ontstaan omdat 'n party oortuig is dat 'n ander party 'n maatreël ingestel het of voorstel wat strydig met die bepalings van NAFTA is (*idem* 262). Hierdie kommissie is die hart van die mediasieproses van NAFTA en word saamgestel uit persone op kabinetsvlak in elke lidland (Johnson 2179; Rosa 260).

Indien die konsultasie- en daarna die mediasieproses van die kommissie onsuksesvol is, kan partye hul wend tot nie-afdwingbare of nie-bindende arbitrasie (Johnson 2181; Siqueiros 385). Die arbitrasieprosedure in NAFTA is geskoei op die prosedures in die ander vrye handelsverdrae van die VSA, naamlik die verdrae met Kanada en Israel. Die arbitrasiepaneel moet 'n aanvanklike verslag uitreik waarop die partye kommentaar kan lewer alvorens 'n finale verslag gelewer word. Daar word egter nie voorsiening gemaak dat die partye aan die finale arbitrasieverslag gehoor moet gee nie. Na die uitreiking van die finale verslag word die partye egter dertig dae gegun om tot 'n vergelyk te kom en die geskil op te los (*ibid*).

Die samewerkende, reëlgebaseerde regime van hoofstuk 20 beklemtoon dus die voorkoming van geskille of die gesamentlike oplossing daarvan deur konsultasie, mediasie en arbitrasie (Endsley 663).

5 3 Hoofstuk 11

Hoofstuk 11 het drie doelwitte. Eerstens het dit ten doel om 'n sekere en veilige beleggingsomgewing te skep deur die daarstelling van duidelike reëls ten aansien van die billike en regverdige behandeling van buitelandse beleggings en beleggers. Tweedens word gepoog om hindernisse en beperkinge op beleggings te verminder of te verwyder. Die derde doelwit is om doeltreffende geskilbeslegtingsmeganismes te skep vir die beslegting van geskille tussen beleggers en gasheerlande (Price "An overview of the NAFTA investment chapter: Substantive rules and investor-state dispute settlement" 1993 *The Int Lawyer* 727). Hoofstuk 11 is 'n unieke sisteem van arbitrasie vir die oplossing van geskille rakende beleggingsaangeleenthede tussen 'n vreemdeling-belegger en die gasheerland (Endsley 663).

Die geskilbeslegtingsmeganisme van hoofstuk 11 maak voorsiening vir konsultasie en bindende arbitrasie om beleggingsgeskille te besleg. Daar word nie tradisioneel in handelsverdrae vir hierdie tipe geskille voorsiening gemaak nie en juis daarom is die bepalings van hoofstuk 11 uniek (Endsley 663).

Hoofstuk 11(B) reël die beslegting van beleggingsgeskille. Die partye moet egter eers poog om die geskil deur middel van konsultasie of onderhandelinge te besleg. Indien dit misluk, mag 'n party die aangeleentheid vir arbitrasie voorlê (Johnson 2180) waar die ander party van die bepalings van NAFTA verbreek het en die belegger as gevolg daarvan skade gely het. Kennis van die arbitrasie moet aan die ander party gegee word. Die arbitrasie vind plaas ingevolge die reëls van ICSID of die United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL). Die partye mag slegs 'n eis vir arbitrasie instel indien hulle daartoe instem en van hul reg om die geskil voor 'n plaaslike hof te bring, afstand doen (Oelstrom 799; Price 732).

Die arbitrasieverrigtinge vind plaas voor 'n tribunaal van drie lede. Die partye wys elk een lid van die tribunaal aan en besluit saam op die derde lid. Die tribunaal het die bevoegdheid om oor die aangeleentheid te beslis ingevolge NAFTA en ander toepaslike reëls van die internasionale reg (Oelstrom 799-800).

6 Slot

Oelstrom 811 wys daarop dat NAFTA die potensiaal het om verreikende gevolge vir ekonomiese samewerking in Noord-Amerika in te hou. Die effektiwiteit van die geskilbeslegtingsmeganismes sal egter in 'n groot mate die sukses van die verdrag bepaal. Dit wil voorkom of NAFTA 'n geïntegreerde stelsel daarstel wat

'n balans tussen die binnelandse en private belange en die buitelandse belange handhaaf.

NAFTA is 'n stap vorentoe op die pad van voortdurende evolusie van die reg insake die beslegting van geskille rakende die internasionele handel. Die geskil-beslegtingsmeganismes van NAFTA is gerig op konsultasie, mediasie en arbitrasie en kan as nuttige rigtingwyser dien vir diegene wat in Suider-Afrikaanse konteks met internasionale handel, handelsreg en handelsverdrae gemoeid is.

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CONSUMER PROTECTION CONCRETICISED IN GAUTENG

On March 14 this year the Business Practices Committee published a notice in the *Government Gazette* stating that it would investigate Newport Business Club in terms of the Harmful Business Practices Act 71 of 1988. In *Newport Business Club v The Minister of Trade and Industry* the High Court held on 17 September 1997 (*GG* No 18292) that the business qualified as a harmful business practice and was no longer entitled to operate as such.

1 Introduction

One of the lasting contributions made by English law to the South African common law has been the adoption of the classical theory of contract and the principle of autonomy in the South African law of contract. Because the foundation of the classical theory of contract, namely freedom of contract, forms an integral part of the civilian tradition, this theory has never been in danger of being purged and the underlying adherence to the principle of equality appears to guarantee it a safe future. The classical theory indeed propagates the view that the law is impartial and will, in accordance with the principles of corrective justice, enforce the sanctions of the law of contract regardless of the parties, who are both equal before the law.

It has, however, been pointed out on occasion that the classical theory is not concerned with social and economic equality, nor with existing inequalities; that no account is taken of the discrepancies in resources such as ownership, wealth and knowledge; and that these imbalances sustain inequality between parties to a contract. In ignoring these disparities, the classical theory ignores reality and tacitly condones domination and the exploitation of the weaker party. The oft-quoted statement that nobody is forced to contract, is another distortion of reality. It is common knowledge that economic necessity compels people to contract; that many underprivileged members of society do not enjoy true freedom of contract; and, finally, it is generally accepted that private individuals rarely possess the resources to litigate.

Although the underlying political philosophy of complete economic freedom is to all appearances enjoying a strong revival, most governments have been forced to accept the reality of material inequality, and the second half of the twentieth century has witnessed the development of legislative protection for certain categories of persons in order to nullify the inequality between contracting parties. Moreover, South African courts have consistently denied that they have a general equitable jurisdiction to refuse the enforcement of unfair contract terms which are clear and not against public policy (*Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A)). The courts insist that public policy requires that contracts validly concluded should be strictly enforced (*Portwig v Deputation Street Investments (Pty) Ltd* 1985 1 SA 83 (D)). In line with this approach they have repeatedly refused to make or remake contracts for the parties (*Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A)). Furthermore, the elimination of the *exceptio doli* and the growing pains of the *bona fides* concept have hardly contributed to the creation of a consumer-friendly environment.

Continually solicited, invited, bulldozed, misled, and often ignorant and gullible, the consumer is often unaware of his/her rights, and even if this is not the case, most consumers lack the means to enforce their rights.

It is against this background that the Gauteng Provincial Legislature has made use of the power granted by the Constitution Act 108 of 1996 in section 104(1)(b)(i) read together with Schedule 4 part A, and passed the Consumer Affairs (Unfair Business Practices) Act 7 of 1996, which Act came into operation on 27 September 1996. However, the implementation of the Act is dependent on the promulgation of the Regulations envisaged in section 29, pertaining to the operation of the Act, and more particularly to the practice and proceedings of the court. At the time of writing the Regulations were expected to be accepted in the course of 1998.

The Consumer Affairs Act makes provision for a two-pronged procedure, namely the investigation of an unfair business practice, which may culminate in a court hearing before the Consumer Court.

2 Sphere of application

2 1 Introduction

Acknowledging in the preamble that the common law provides inadequate protection against the exploitation of consumers, the Consumer Affairs Act aims at providing for the investigation, prohibition and control of harmful business practices in order to remedy this situation. In consequence, the legislation establishes the Office for the Investigation of Unfair Business Practices (s 3) as well as one or more Consumer Affairs Courts (s 13) for the province of Gauteng.

2 1 1 Consumers

Since "consumer" is an economic term, the legislator deems it to refer to natural persons who are acquiring commodities for personal use or making investments (s 2(1)(a) and (b)). However, any other person can be declared a consumer by the member of the Executive Council of the province responsible for economic affairs and finance (s 2(1)(c)) in terms of the power conferred on him/her in section 2(2). This enables the Act to be extended to those juristic persons which do not have as its object the acquisition of gain.

2 1 2 Business, commodity, business practice and unfair business practice

Business is defined as the offer, supply or making available of a commodity or the soliciting or receiving of an investment (s 1(ii)). Commodity is any property, whether corporeal or incorporeal, movable or immovable including any make or brand or service (s 1(v)(a) and (b)).

Business practice includes

> "any agreement, accord or undertaking with regard to business which is either legally enforceable or not [s 1(iii)(a)]; any scheme, practice or method of trading in connection with business, including any method of marketing or distribution [s 1(iii)(b)]; any advertising, type of advertising or any other manner of soliciting business [s 1(iii)(c)]; any act or omission in connection with business on the part of any person, whether acting independently or in concert with any other person [s 1(iii)(d)]; [and] any situation in connection with the business activities of any person or group of persons" [s 1(iii)(e)].

The vital question, however, hinges on the definition of "unfair business practice". Since the enthusiastic adherence by the Appellate Division in *Tjollo Ateljees (Edms) Bpk v Small* 1949 1 SA 856 (A) to the *laissez-faire* tenets of economic liberalism, the *carte blanche* for the "fast buck" provided by *D* 19 2 22 3 has created an enormous grey area of sharp business practices – hence the demarcation of unfair business practice as the basis for the Act under discussion. In section 1(xix) the provincial legislature defines unfair business practice as "any business practice which, directly or indirectly, has or is likely to have the effect of unfairly affecting any consumer". The fact that this definition is circular is hardly surprising in view of the contentious nature of the subject-matter.

The Act is not applicable to a service rendered in terms of a contract of employment (s 1(v)(b)), nor to a restrictive practice, acquisition or monopoly as defined in section 1 of the Maintenance and Promotion of Competition Act 96 of 1979 (s 1(iii)(e)).

3 Investigation of unfair business practices

3 1 Introduction

The Act establishes the office for the investigation of unfair business practices. This office falls under the auspices of the Department of Finance and Economic Affairs of the province (s 3(1)) and the functions of the office are to be performed by the Consumer Protector (s 3(2)).

3 2 Personnel and staff of investigative office

3 2 1 Consumer Protector (CP)

The CP (or acting CP) is appointed by the provincial MEC for Economic Affairs and Finance (s 4(1)(a) and (b)).

3 2 2 Assistance to CP

The MEC may furthermore appoint persons to assist the CP (s 4(c)). Besides, the CP himself/herself can appoint assistants or an assisting body for a particular investigation (s 4(2)).

3 2 3 Investigating officers

In view of his mission, the CP is considered to have been appointed an investigating officer (s 9(2)), but must appoint other investigating officers from those persons in the service of the office, or any other suitable persons (s 9(1)).

All investigating officers must have a certificate of appointment (s 9(4)) which must be carried on their person when performing any function in terms of this Act (s 9(5)).

3 3 Functions to be performed by the CP

Section 5 provides that the functions of the office are the receipt and investigation of complaints of alleged harmful business practices; the disposal of such complaints in terms of the Act; and the submission of an annual report to the responsible MEC.

3 3 1 Lodging of complaints with investigating office

Anyone may lodge a complaint with the office regarding an alleged unfair practice (s 6(1)). The office will record oral complaints in writing (s 6(2)). The obvious aim of this section is the creation of an *actio popularis*. However, a number of questions come to the fore in respect of this section. Although it is clear that the filing of a complaint is not limited to the victims of the unfair business practice, the question should be asked whether competitors in the marketplace may also make use of this procedure. Furthermore, is the right to file complaints limited to natural persons, or can juristic persons also avail themselves of this *modus operandi*? The question of group action is also relevant in this context.

3 3 2 Conducting of investigations

In terms of section 5(1) the CP must investigate lodged complaints, but may also investigate on his/her own initiative, where no complaint has been lodged but where there is reason to suspect that an unfair business practice exists or may come into existence (s 7(1)(a)). The CP may also investigate any business practice which is suspected of being linked to unfair business practices (s 7(1)(b)).

In order to advertise investigations, the office publishes them in the *Provincial Gazette* so that the public may make written representations regarding the investigation to the office (s 7(3)).

Furthermore, the office may concern itself with any investigation, finding or measure taken by the Business Practices Committee established by section 2 of the Harmful Business Practices Act 71 of 1988, or by the Minister of Trade and Industry in terms of that Act, or by any other competent authority, including an authority in another province (s 7(4)).

In order to execute his functions the CP is vested with extensive powers.

3 3 3 Summoning and questioning of persons

The CP and his staff may summon anyone who is believed to possess relevant information, and to question that person under oath (s 8(1)(a) and (b)).

3 3 4 Production of books and documents

The CP and his staff may summon anybody to produce books, documents or other objects which may be relevant and to examine such material, and retain it for further information or for safe custody (s 8(1)(a) and (b)).

3 3 5 Search and seizure

Investigating officers may enter any premises on or in which they suspect relevant books, documents or other objects are kept. They may search those premises and make the necessary inquiries in order to obtain information (s 10(1)(a)). The officers may examine objects found to be related to the investigation, and request the owner or the person in charge of the premises or in possession of the object concerned, to give information about that object (s 10(1)(b)). They may make copies of books or documents found on or in the premises or take extracts from them (s 10(1)(c)) and seize anything on or in the premises which has or might have a bearing on the investigation in question (s 10(1)(d)). However, unless the investigating officer has written permission from the owner or person in charge of the premises, he may enter the premises and exercise the above powers only in terms of a search warrant issued by the Consumer Affairs Court (s 10(2)). This court may issue a search warrant only if there are reasonable grounds to suspect, on the basis of information given under oath or solemn affirmation, that an unfair business practice or evidence of this exists or is contained on the premises. Nevertheless, for reasons of impartiality, it is suggested that a seach warrant issued by a magistrate's court is preferable.

3 4 Consequences of an investigation into an unfair business practice

3 4 1 Negotiation to discontinue unfair business practice

The office may at any time after institution of an investigation, but before a final order by the court (s 11(2)(a)), negotiate and conclude an arrangement. The content of such negotiated settlement may be the discontinuance or avoidance of an unfair business practice (s 11(1)(a)) and/or the reimbursement of affected consumers (s 11(1)(b)). Moreover, the discontinuance or avoidance of aspects of an unfair business practice (s 11(1)(c)), or any other matter relating to the unfair business practice (s 11(1)(d)) may be arranged in this manner, that is, by negotiated settlement.

This negotiated arrangement must be in writing and signed by both parties (s 11(2)(b)) and is subject to confirmation by the court (s 11(2)(c)). The CP must apply for such confirmation.

The court has a discretion to confirm the arrangement (s 21(2)(a)) or to modify it in agreement with the person concerned (s 21(2)(b)). Finally, the court may also set aside the arrangement if it is of the opinion that the arrangement will not ensure the discontinuance or avoidance of the unfair business practice in question (s 21(2)(c)).

The guideline provided to the court in this instance is that due consideration must be given to the interests of affected consumers. The interest of the business involved is safeguarded by the requirement that modification must be agreed upon by the person concerned, and the requirement that the persons involved in the arrangement must have been given an opportunity to be heard, before the arrangement can be set aside.

3 4 2 Institution of proceedings in the Consumer Affairs Court

However, if no such negotiated settlement has been reached, the CP may institute court proceedings against the alleged unfair business practitioner (s 12(1)(a)), or generally (s 12(1)(b)). In the latter case the proceedings are instituted

> "with a view to the prohibition of any business practice or type of business practice, in general or in relation to a particular commodity or investment or any kind of commodity or investment or a particular business or any type of business or a particular area, and which is commonly applied for the purposes of or in connection with the creation or maintenance of unfair business practices" (s 12(1)(b)).

It is, however, unclear against whom the proceedings will be instituted.

If the office decides not to institute proceedings, the complainant must be informed (s 12(2)).

4 Consumer Affairs Court

4 1 Establishment of Consumer Affairs Court

The MEC for Economic Affairs and Finance has established and has the power to establish further Consumer Affairs Courts for the province of Gauteng, by notice in the *Provincial Gazette* (s 13(1)).

4 2 Members of the Consumer Affairs Court

A Consumer Affairs Court has five members. The chairperson must be a retired judge of the High Court (s 14(2)(a)(i)) or an attorney, advocate, retired magistrate or lecturer in law at a university, with not less than 10 years' cumulative experience in one or more such capacities (s 14(2)(a)(ii)). The four additional members must have special knowledge or experience of consumer advocacy, economics, industry or commerce (s 14(2)(b)). The appointment procedure is set out in section 14, while section 15 disqualifies certain people from appointment to the court (s 15(1) and (2)).

The quorum of the court is three members and the majority decision is the decision of the court (s 16(1) and (2)). A clerk of the court and supporting staff to perform the administrative work are appointed by the MEC in question (s 17(3)(a) and (b)).

4 3 Functions and duties of the court

The jurisdiction of a Consumer Court is to hear and decide on cases of unfair business practices.

Proceedings are initiated by summons, which may be served outside the province of Gauteng (s 18(1)). The CP (represented or assisted by an advocate, attorney or any other approved person (s 18(4)) prosecutes the person allegedly involved in the unfair business practice, while any person who may be adversely affected by the proceedings is entitled to participate. Participating parties may appear in person or via legal or other representatives (s 18(5) and (6)).

The orders of the court have force throughout the province (s 17(2)) and the court may award costs (s 17(1)(b)). The problem of concurrent jurisdiction with civil courts has been addressed by section 34(1), which leaves civil remedies intact; section 34(2) provides that in simultaneous court proceedings any other civil court may halt its proceedings on the application of any party until the Consumer Court has come to a decision.

4 3 1 Court orders

The crucial task of the court will obviously be to delineate an unfair business practice from sharp but fair business practices. The proof of the pudding will

obviously be in the eating and it may be that the court is able to identify an unfair business practice at a glance. In this event, the available options are threefold.

4 3 1 1 Temporary orders

If the court thinks that adherence to normal proceedings could cause irreparable prejudice to a consumer or group or class of consumers, the court may issue a temporary order. The temporary order may prohibit any act connected with unfair business, attach any money or property and authorise investigators to take any action outside their already considerable powers (s 20(1)).

The court may require publication in the *Provincial Gazette* (s 20(3)).

It is noteworthy that the risk of irreparable prejudice to a business does not produce the same urgency and temporary orders are not provided for in this eventuality.

4 3 1 2 Confirmation of negotiated settlement

The CP may apply for a court order for confirmation of a negotiated settlement concluded in terms of section 11 and the court may issue an order confirming, modifying or setting aside such arrangement (s 21).

4 3 1 3 Orders by the court prohibiting unfair business practices

The area in which the court will make its greatest impact will obviously be in the issuing of court orders ensuring the discontinuance or prevention of the harmful business practice in question (s 22(1) *in toto*).

This means that the court will develop case law defining the parameters of unfair business practice and the ever-shifting grey area between the acceptable and the indefensible.

Once an unfair business practice has been identified, the court can order virtually anything it deems fair. This can vary. It could be to require the dissolution of any association or corporate body (s 22(1)(a)); or to direct a person to terminate agreements, understandings and omissions, to refrain from using (a certain type of) advertising, to cease a scheme, practice, method of trading, act, creation of situation, interest in business or derivation of income from it. It could be an order to refrain permanently from agreements, advertising, schemes, or from deriving income from a type of business (s 22(1)(b)).

The court may also order the repayment of the money received (together with interest) to the affected consumers (s 22(2)(a)). If the court is of the opinion, however, that such an order has the effect of enforcing an unfair business practice, the court may order that the consumer be restored to the position in which he or she would have been had no such unfair business practice taken place (s 22(3)).

An order of the court in terms of subsection 22(1) will be made known by notice in the *Provincial Gazette* (s 22(5)(a)) and may be made known in any other manner, including a notice in a newspaper or magazine or on the radio or television (s 22(5)(b)).

The potential content of the court order exemplifies the difficulty in formulating the scope of the unfair business practice. However, the question that should be raised is whether the wide powers granted to the court do not reveal a hamfisted approach to a more serious social and economic problem, and whether the cure has the potential to be more serious than the disease.

Finally, the court may appoint a curator (s 22(2)) to perform certain functions, which are set out in section 23.

4 3 1 4 Appointment of curator by the court

A curator appointed in terms of section 22 has far-reaching powers. He may realise the assets of the person involved in the unfair business practice in question, as is necessary for the reimbursement of the consumers concerned, and he may distribute them among the said consumers (s 23(1)(a)); he may take control of and manage the whole or any part of the business of such a person. In this instance the management of the business or affairs of the person involved in the unfair business practice will vest in the curator. The management will, however, be subject to the supervision of the court, and any other person vested with the management of the affairs of that person is to be divested of it (s 23(1)(b)). The curator may, as from the date of his or her appointment as curator or any subsequent date, suspend or restrict the right of creditors of the person involved in the unfair business practice to claim or receive any money owing to them by that person until due performance of the order of the court (s 23(1)(c)); he may make payments, transfer property or take steps for the transfer of property of the person involved in the unfair business practice as he sees fit (s 23(1)(d)); he may open and maintain banking or similar interest-bearing accounts (s 23(1)(e)); he may enter into agreements on behalf of the person involved in the unfair business practice (s 23(1)(f)); he may from time to time convene a meeting of creditors of the person involved in the unfair business practice for the purpose of establishing the nature and extent of the indebtedness of that person to the creditors and for consultation with them (s 23(1)(g)); he may negotiate with any creditor of the person involved in the unfair business practice with a view to the final settlement of the affairs of the creditor against that person (s 23(1)(h)); he may, in the course of his management of the affairs of the person involved in the unfair business practice, make and carry out any decision which, in terms of the provisions of the Companies Act 61 of 1973, would have been required to be made by way of a special resolution contemplated in section 199 of that Act (s 23(1)(i)); he may, by public auction, tender or negotiation, dispose of any asset of the person involved in the unfair business practice, including any advance or loan (s 23(1)(j)(i)) or any asset for the disposal of which approval is necessary in terms of section 228 of the Companies Act (s 23(1)(j)(ii)); and he may perform any other incidental or ancillary duties or functions as may be necessary to give effect to any order of the court (s 23(1)(k)).

5 Consequences of Consumer Court decision

5 1 Declaration of unlawfulness or voidness

The powers of the court are far-reaching. If, as a result of proceedings instituted in the court in terms of this Act, the court is satisfied that it is in the public interest that any particular business practice or type of business practice which was the subject of the proceedings in question should be declared to be unlawful, it may declare the business practice or type of business practice concerned unlawful, either generally or in respect of a particular area, depending upon whether the investigation was of a general nature or was undertaken in relation to a particular area (s 24(1)(a)). The court may, furthermore, declare any agreement, accord or undertaking, or terms thereof to be void (s 24(1)(b)).

The implications of such orders raise all the questions pertaining to the consequences of illegality. The first issue which arises, is whether the innocent party,

the victim of the unlawful business practice will be successful in redressing the imbalance created by the unfair business practice, since he has no contract on which to base any claim and will have to rely on unjustified enrichment and the concomitant rule of *in pari delicto potior est conditio possidentis*. If the innocent party has concluded a contract in execution of the unfair business practice which is now declared unlawful, whether he will be able to claim back his performance will be dependent on public interest.

5 2 Prohibition on entering into or being party to an unlawful business

The court may prohibit any person from entering into an agreement or from being or continuing to be a party to an agreement, arrangement or understanding, or from using advertising, or from applying a scheme, practice or method of trading, or from committing an act or from bringing about a situation which was the subject of the proceedings, either wholly or to the extent specified by the court (s 24(1)(c)). Conditions or requirements may also be laid down in order to regulate any business practice or type of business practice which was the subject of a court order (s 24(1)(c)).

6 Offences

6 1 Introduction

In order to provide the investigations by the CP with the necessary teeth and to ensure compliance with the procedures of the Consumer Court, the Act introduces a number of criminal offences.

6 2 Offences with regard to investigative procedures

They are the following:

(a) Failure to comply with summons of the CP (s 8(4)(a));

(b) failure to take the oath or make an affirmation administered by the CP (s 8(4)(b));

(c) failure to answer lawful questions by the CP (s 8(4)(c));

(d) failure to produce books, documents or objects for the CP (s 8(4)(d));

(e) making false statements to the CP (s 8(4)(e));

(f) obstruction of investigative officer (s 10(6)(a));

(g) refusal to answer or to answer fully and satisfactorily to the best of his or her knowledge and belief (s 10(6)(b)(i)); and

(h) knowingly providing false or misleading information or explanation (s 10(6)(b)(i) and (ii)).

The rather extensive powers of the investigating officers are exemplified in sections 8(5) and 10(7), which provide that a person summoned to appear or from whom information or explanation has been requested, does not have the right to remain silent. It is questionable whether the provincial legislature has not overstepped the mark here and whether these provisions are justifiable in the light of section 35(1)(a) of the Constitution. One could perhaps argue that, since arrested criminals have the right to remain silent, a person summoned in terms of the consumer legislation has an even stronger right to do so. It is also questionable whether the derogation of section 14 meets the requirements of section 36(1) of the Constitution. Furthermore, the fact that anyone summoned may incriminate him- or herself makes for the creation of legislation in contravention of the Constitution.

6 3 Offences with regard to the Consumer Court proceedings

They are the following:

(a) Failure to comply with summons of the court (s 19(2)(a));

(b) failure to take the oath or make an affirmation administered by the court (s 19(2)(b));

(c) failure to answer lawful questions in the court (s 19(2)(c));

(d) failure to produce books, documents or objects before the court (s 19(2)(d));

(e) making false statements before the court (s 19(2)(e)).

The powers of the court are also such that the Gauteng legislature adopted section 19(3), which provides that a person summoned to appear before the court does not have the right to remain silent. Once again the question arises whether such provision is constitutionally justified in the light of section 35(1)(a) of the Constitution. Furthermore, the obligation to produce books, documents or objects could be interpreted as contravening the constitutional right to property (cf Van der Walt *Constitutional property clauses, a comparative analysis* (draft manuscript of forthcoming textbook)).

6 4 Contravention of or failure to comply with order of the Consumer Court

In order to ensure compliance with the order of the court, the Act makes it an offence to contravene or fail to comply with an order of the court which has been published by notice in the *Provincial Gazette* (s 30). Although, in terms of section 18(1), summons to appear before the court can be served outside Gauteng, the orders of the court have effect in the said province only (s 17(2)). However, the contemplated seriousness of this offence is made clear by the penalty.

7 Penalties

7 1 Contravention of court order

Any person convicted of non-compliance with a court order is liable to a maximum fine of R200 000 or to a maximum imprisonment of five years or to both fine and imprisonment (s 31(a)). Although the Act makes provision for a rather draconian penalty for non-compliance with a court order, the fact that the effect of the court order is bound to the province, and does not prevent resumption of the unfair business practice elsewhere, removes some of the sting. On the other hand, it is doubtful whether the penalty of imprisonment will be valid. Analogous to the penalty in these circumstances is the penalty of civil imprisonment which could previously be meted out in terms of section 65A-65M of the Magistrates Courts Act 32 of 1944 in the event of a debtor's failure to satisfy a judgment debt. The Constitutional Court found in *Coetzee v The Government of South Africa* 1995 10 SA BCLR 1382 (CC) that a penalty of imprisonment in this regard was unconstitutional.

7 2 Offences regarding investigative or court proceedings

These offences are punishable with a non-specified fine or a maximum imprisonment of 12 months or with both (s 31(b)).

8 Appeal

There is an appeal from the Consumer Court to the special court established in terms of section 13 of the Harmful Business Practices Act 71 of 1968 (s 25).

However, the High Court has an inherent right to intervene in cases where the Consumer Court has displayed an excess of power, bad faith or dishonesty, use of powers for an ulterior purpose, breach of the *audi alteram partem* rule and gross unreasonableness (Harms *Civil procedure in the Supreme Court* (1995) 479 par R5).

9 Conclusion

Time will tell whether the legislation under discussion has created a more effective watchdog over business than the previous Consumer Council. The fact that provinces have concurrent legislative authority with Parliament in respect of a nationwide problem such as consumer protection raises the question of the viability of the provincial legislation as opposed to implementation of national legislation. It also raises the question whether the Act under discussion does not pre-empt Project 47 of the South African Law Commission, which proposes legislation (the Unfair Contractual Terms Act) to establish the principle of equitable jurisdiction. This legislation should establish a more flexible instrument. Whereas the provincial legislation is blunt in that it makes provision only for orders of nullity and criminal acts, the proposed Unfair Contractual Terms Act will make provision for redrafting as well as voidability. However, the two Acts operating in conjunction have the potential for enormous legal development in the sphere of contract law which could extend to the eventual recognition of economic duress as a basis for voiding a contract.

Moreover, it is notable that comparison with other systems leads one to believe that all varieties of the contract of sale (credit, door-to-door, by mail order), advertising, the consumer's right to quality in products and services, the right to information and recourse towards providers of goods and services are the fields most likely to be affected. The powers of both the CP and Consumer Court are awesome, and indiscriminate exercise of these powers could severely damage business confidence. Overseas experience shows that awareness of rights forms the best prevention. It also shows that continuous publicity and the organisation of both business sectors and of consumers together with the creation of administrative services, where complaints can be filed and solutions mediated, have produced more success than confrontational, adversarial encounters.

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OOR GELYKHEID EN MINDERHEIDSBESKERMING NA AANLEIDING VAN *RYLAND v EDROS* EN *FRASER v CHILDREN'S COURT, PRETORIA NORTH*

Inleiding

Die bedoeling met hierdie aantekening is om aan die hand van die onlangse beslissings in *Ryland v Edros* 1997 2 SA 690; 1997 1 BCLR 77; 1996 4 All SA 557 (C) en *Fraser v Children's Court, Pretoria North* 1997 2 SA 261; 1997 2

BCLR 153 (CC) te fokus op die inhoud en implikasies van die grondwetlike reg op gelykheid. Aandag word veral gewy aan die konsep van *substantiewe* gelykheid wat 'n intergrale deel van die reg op gelykheid is. Voorts word die prinsipiële verband tussen minderheidsregte en substantiewe gelykheid gelê.

In *Ryland* het die eiser sy huwelik met die verweerderes, wat hulle ingevolge Islamitiese gebruik gesluit het, beëindig. Die huwelik tussen hulle het ook 'n kontraktuele verhouding ingesluit wat trouens 'n integrale deel van so 'n Islamitiese huweliksverhouding uitmaak. Die kontrak (en die onderliggende huwelik) was die grondslag vir die verweerderes se teeneis teen die eiser. Die teeneis het van die hof vereis om drie kwessies te beslis:

- of die verweerderes daarop geregtig is om agterstallige onderhoud te verhaal as 'n eis wat nie vir verjaring vatbaar is nie;
- of die verweerderes geregtig is om 'n troosgeskenk van die eiser te ontvang in omstandighede waar die huwelik op die aandrang van die eiser beëindig is; en
- of the verweerderes geregtig is op die oordrag of, alternatief, betaling van 'n billike gedeelte van die vermeerdering van die eiser se boedel waartoe sy gedurende die bestaan van die huwelik bygedra het (84B–D). (Die eis in konvensie is geskik.)

Die huwelik tussen die partye was potensieel, dog nie daadwerklik nie, poligaam. Die hof beklemtoon dat sy uitspraak slegs op potensieel poligame huwelike betrekking het en nie noodwendig geld vir Islamitiese huwelike wat daadwerklik poligaam is nie (92C–D).

Die probleem waarmee die hof te kampe gehad het, was die lang reeks Suid-Afrikaanse beslissings waarin geweier is om enige juridiese erkenning aan Islamitiese huwelike en die gevolge daarvan te verleen (sien oa *Kaba v Ntela* 1910 TS 964 969; *Seedat's Executors v The Master (Natal)* 1917 AD 302 308–309; *Docrat v Bhayat* 1932 TPD 125–127; *Ismail v Ismail* 1983 1 SA 1006 (A)).

In die besonder was die hof gekonfronteer met die appèlhofuitspraak in *Ismail v Ismail* (waarvan die feite baie soortgelyk was as dié in die onderhawige saak). Die hof het geweier om erkenning te gee aan die gevolge van 'n Islamitiese huwelik op grond daarvan dat dit strydig met die openbare beleid is. Volgens die appèlhof is so 'n huwelik

> "*contra bonos mores* in the wider sense of the phrase, ie contrary to accepted customs and usages which are regarded as morally binding upon all members of society or as Innes CJ said in *Seedat's* case at 309 – as being fundamentally opposed to our principles and institutions".

Sou die hof in die *Ryland*-saak die *Ismail*-uitspraak volg, sou dit beteken dat die kontrak wat die verweerderes poog om af te dwing as onregmatig, nietig en dus onafdwingbaar beskou sal word. Indien die hof sigself aan hierdie uitspraak gebonde sou ag, is daar nie eens die moontlikheid om die verweerderes se eise te oorweeg nie. Derhalwe was dit van groot belang om eers vas te stel of *Ismail* nog as bindende gesag beskou kon word.

Boni mores (soos vergestalt in openbare beleid) verander met verloop van tyd. Dit is derhalwe in beginsel moontlik om van *Ismail* af te wyk op grond daarvan dat die *boni mores* betekenisvol verander het. Die hof kon egter nie bevind dat die *boni mores* dermate verander het dat dit genoegsame gronde gebied het om te weier om die *Ismail*-uitspraak te volg nie (85C–G 88D). Bygevolg was dit noodsaaklik om te steun op artikel 35(3) van die tussentydse Grondwet (nou artikel 39(2)) wat onder andere voorskryf dat die hof by die ontwikkeling van

die gemenereg die gees, strekking en die oogmerke van die handves van regte in ag moet neem (of, in die woorde van artikel 39(2), dat die hof dit moet bevorder). Die hof beslis dat die suurdeeg-effek (98F–88D) van die handves van regte meebring dat hierdie grondwetlike voorskrif dit inderdaad noodsaak om te bevind dat die *Ismail*-uitspraak nie langer gesag dra nie.

Die kernargument ter bereiking van hierdie gevolgtrekking was dat die handves van regte onder meer berus op die beginsels van gelykheid en verdraagsaamheid. Dit word bevestig deur verskeie grondwetlik beskermde regte (90I–91I) en noodsaak behoorlike inagneming van diversiteit binne 'n plurale gemeenskap:

> "I agree with the submission that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our constitution" (91I–J).

Die hof aanvaar die argument namens die verweerder dat die opdring van die oortuigings en waardes van een groep aan 'n ander, vyandig staan teenoor die waardes van die *nuwe* Suid-Afrika en dat die hof slegs 'n kontrak as strydig met openbare beleid (en derhalwe nietig weens onregmatigheid) sal brandmerk indien dit bots met die waardes wat deur die gemeenskap in den brede en deur alle regdenkende persone in die gemeenskap gedeel word in plaas van slegs deur een komponent daarvan (90F–G). Die gebrek in die *Ismail*-uitspraak wat dit in botsing met die waardes van fundamentele regte bring, is dat die menings van slegs een deel van die staatsbevolking in aanmerking geneem (90G–H) en op die res van die gemeenskap afgedwing is.

Na kritiek op die *Ismail*-uitspraak weens die gebrek aan erkenning van die waardes van verdraagsaamheid, gelykheid en verskeidenheid in 'n plurale gemeenskap, wat uit pas is met die hoë premie wat die handves van regte op hierdie waardes plaas, kom die hof tot die slotsom dat die *Ismail*-uitspraak die hof nie langer daarvan kan weerhou om die soort eise wat in die onderhawige saak ter sprake is, af te dwing nie (94A–B). Dit beteken nie noodwendig dat die hof alle eise voortspruitend uit 'n Moslem-huwelik sal afdwing nie, maar wel dat die konsep van onregmatigheid binne die konteks van die kontraktereg op so 'n wyse beoordeel moet word dat dit nie net die waardes van een segment van die gemeenskap in ag sal neem nie, maar ook, en in die besonder die waardes van die godsdienstig-kulturele groep waarbinne die kontrak gesluit is.

Die hof gaan daarna voort om die eise van die verweerderes teen die eiser te beoordeel in die lig van die suurdeeg-effek van die handves van regte, en bevind soos volg:

- 'n Ooreenkoms ingevolge waarvan by voorbaat van verjaring afstand gedoen is, is ongeldig aangesien dit strydig met openbare beleid is. Derhalwe word beslis dat die verweerderes nie daarop geregtig is om onderhoud te eis wat sy in die gewone loop van sake weens verjaring nie sou kon doen nie. Die verweerderes is egter geregtig op agterstallige onderhoud met betrekking tot die tydperk wat nie verjaar het nie (94C–97E 101I).
- Die verweerderes is geregtig op 'n troosgeskenk van die eiser indien die huwelik op die eiser se aandrang beëindig was (97F–G 101I–J).
- Daar was botsende getuienis met betrekking tot die verweerderes se beweerde reg op 'n billike aandeel van haar bydrae tot die groei van die eiser se boedel en die beskikbare getuienis het nie voldoende ondersteuning vir die verweerderes se eis gebied nie. Hierdie eis was derhalwe onsuksesvol (97G ev 101J).

Die *Ryland*-uitspraak is besonder gunstig ontvang soos blyk uit die aantekeninge van Mahomed 1997 *De Rebus* 189 ev, Maithufi "Possible recognition of polygamous marriages" 1997 *THRHR* 695 en Church "The dichotomy of marriage revisited; a note on *Ryland v Edros*" 1997 *THRHR* 292.

Ofskoon dit moontlik nie met die eerste lees so voorkom nie, toon die benadering van die konstitusionele hof in *Fraser v Children's Court, Pretoria North* opvallende filosofiese ooreenkomste met die benadering in *Ryland v Edros*. Trouens, soos hieronder aangedui sal word, is die *rationes decidendi* van die twee uitsprake wesenlik op dieselfde lees geskoei.

In *Fraser* het die konstitusionele hof die gedeelte van artikel 18(4)(d) van die Wet op Kindersorg 84 van 1983 wat wegdoen met die vereiste dat vaders van buite-egtelike kinders tot die aanneming van hulle kinders moet toestem, ongrondwetlik bevind. Die gewraakte bepaling stipuleer dat slegs die toestemming van die moeder van 'n buite-egtelike kind vir die aanneming van die kind vereis word. Die posisie verskil van die aanneming van kinders wat in die eg gebore is. Die aanneming van laasgenoemde is as algemene reël slegs moontlik indien albei ouers daartoe toestem. Die tersaaklike gedeelte van die bepaling lui:

> "'n Kinderhof waarby aansoek gedoen is om 'n aannemingsbevel ingevolge subartikel (2) mag die bevel nie toestaan nie tensy die hof oortuig is –
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> (d) dat die toestemming tot die aanneming verleen is deur albei die ouers van die kind, of, as die kind 'n buite-egtelike kind is, deur die moeder van die kind, hetsy die moeder 'n minderjarige of ongetroud is al dan nie, en hetsy sy bygestaan word deur haar ouer, voog of eggenoot, na gelang van die geval, al dan nie."

Volgens die hof lei hierdie bepaling tot 'n aantal anomalieë. Daar kan geargumenteer word dat dit op grond van geslag teen die vaders van buite-egtelike kinders diskrimineer aangesien die toestemming van die moeders van buite-egtelike kinders wel vir aannemingsdoeleindes vereis word (par 25; 164B–C). Die *obiter*-mening van die hof was dat hierdie vorm van diskriminasie onredelik en sonder regverdiging in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid is (par 25; 164C–D). Tweedens is daar ook gronde vir die argument dat die bepaling onbillik diskrimineer tussen getroude en ongetroude vaders (par 26; 161E–F). Voormelde is egter niks meer as *obiter*-stellings nie.

Die *ratio decidendi* van die hof se beslissing was dat die bepaling onbillik diskrimineer teen die vaders wat partye is tot sekere soort huwelike, in vergelyking met vaders wat by ander huweliksvorme betrokke is. Huwelike wat kragtens die reëls van die Islamitiese geloof voltrek word, word byvoorbeeld weens die potensieel poligame aard daarvan nie in die Suid-Afrikaanse reg erken nie. Dit is die posisie selfs al is die betrokke huwelik nie daadwerklik nie maar slegs potensieel poligaam:

> "In my view, the impugned section does in fact offend section 8 of the Constitution. It impermissibly discriminates between the rights of a father in certain unions and those in other unions. Unions which have been solemnised in terms of the tenets of the Islamic faith, for example, are not recognised in our law because such a system permits polygamy in marriage. It matters not that the actual union is in fact monogamous. As long as the religion permits polygamy, the union is 'potentially polygamous' and for that reason, said to be against public policy. The result must therefore be that the father of a child born pursuant to such a religious union would not have the same rights as the mother in adoption proceedings pursuant so s 18 of the Act. The child would not have the status of 'legitimacy' and the consent of the father to the adoption would therefore not be necessary, notwithstanding the fact that such a union, for example under Islamic law, might

have required a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable" (par 21; 162E–G).

Die *ratio decidendi* van die hof se beslissing is derhalwe dat die onderhawige bepaling onbillike diskriminasie op kultureel-godsdienstige gronde daargestel het.

Kommentaar op die uitsprake

1 Die ongelykheid en dominasie van algemene boni mores

Die uitspraak in *Ryland v Edros* dui daarop dat die konsep van 'n algemene Suid-Afrikaanse *boni mores* as gemeenregtelike maatstaf vir die bepaling van onregmatigheid in die konteks van die privaatreg, nie – of minstens nie deurlopend nie – met die waardes onderliggend aan die handves van regte vereenselwigbaar is nie. Algemeen geldende *boni mores* as determinant vir regmatigheid en geoorloofdheid (wat in verskeie sfere van die privaatreg en ook buite die trefwydte van die privaatreg aanwending het) vertoon sigself as die uitdrukking van 'n breë nasionale konsensus. In werklikheid kan dit egter juis die teenoorgestelde werking hê, naamlik om in die gewaad van neutrale taalgebruik die waardes en oortuigings te verteenwoordig van die hegemoniese komponent van die gemeenskap. Weens die *neutrale* aanskyn van die bepaling slaag dit daarin om die magstrategiese werking en effek daarvan te verdoesel. Dit gee dus voor om 'n algemeen geldende (universeel omvattende) konsensus te weerspieël maar funksioneer daarenteen as hegemoniese ideologie en strategie. Die magshegemoniese ideologie kom egter nie geredelik aan die lig nie weens die skadu waarin die neutrale begrip *boni mores* die hegemonie hul. Die implikasie van *Ryland v Edros* was juis dat die Suid-Afrikaanse *boni mores* met betrekking tot die geldigheid van huwelike en die gevolge daaruit voortspruitend, nie 'n breë Suid-Afrikaanse konsensus weerspieël het nie maar slegs die waardes van 'n bepaalde segment van die bevolking. Die seksionele voor- en afkeure het sigself egter as 'n universele opvatting voorgedoen. Aangesien dit as *algemene* opvatting geopereer het, het dit die moontlikheid van alternatiewe opvattings en oortuigings per definisie onmoontlik gemaak. Die *Ryland*-uitspraak poog om hierdie hegemonie te breek deur uitdruklik die afdwing van die waardes van een segment van die samelewing op 'n ander segment (soos wat dit onder meer tot uiting gekom het in die weiering om aan die hand van die *boni mores* die Moslem-huwelik te erken), te verwerp. Die uitspraak lei derhalwe 'n grondwetlike voorkeur ten gunste van pluralisme af en konstrueer tegelykertyd vanuit die Grondwet 'n afkeer van oënskynlik neutrale universalisties gedrewe liberalisme. Die liberale idee dat 'n enkele stel reëls op presies dieselfde wyse vir almal geld, bly gevolglik in die slag. Universeel geldende reëls wat op alle persone van toepassing is, word hier geïdentifiseer nie as die waarborg vir gelyke regserkenning en beskerming nie maar juis as 'n voertuig na ongelykheid en 'n miskenning van legitieme vorme van menslike uitdrukking. Dit funksioneer dus as meganisme waardeur die waardes van een segment van die bevolking op 'n ander segment afgedwing word. Die kern van die saak is dat die universalisme oftewel die gelykvormige afdwing van regsreëls op almal, die instrument van onverdraagsaamheid word. Daarenteen is pluralisme, wat in hierdie konteks manifesteer in die erkenning van meerdere stelle regsreëls wat geld vir verskillende groepe in die samelewing die teenvoeter vir onverdraagsaamheid en die waarborg dat die regstelsel geregtigheid vir *almal* in die hand werk.

Waar die fokus van die *Ryland*-uitspraak die *gemenereg* was, is die fokus van die *Fraser*-uitspraak 'n *statutêre* maatreël. Die *Fraser*-uitspraak gaan egter uit van dieselfde filosofiese vertrekpunt. Subartikel 18(4)(d) vergestalt ook die waardes van 'n enkele segment van die samelewing met betrekking tot die huwelik en die verhouding tussen ouers en kinders. In die geval van die aanneming van 'n kind wat uit 'n wettige burgerlike huwelik gebore is, word vereis dat albei die ouers tot die aanneming van die kind moet toestem. In gevalle waar 'n kind uit 'n andersoortige verhouding die lewenslig aanskou het, word slegs die toestemming van die moeder vereis. Die bepaling bevat derhalwe 'n uitdruklike oordeel oor en veroordeling van persone wat weens 'n andersoortige verhouding 'n kind verwek het. Dit sluit, soos die konstitusionele hof aangedui het, 'n negatiewe oordeel oor die Islamitiese huwelik in. Partye betrokke by 'n burgerlike huwelik kwalifiseer vir die normale reëling ingevolge waarvan albei die ouers volledig as ouers gereken word, terwyl die ouers van kinders wat uit 'n Islamitiese huwelik gebore is daarenteen nie kwalifiseer vir dieselfde (normale) regsreëling nie. Die vader van 'n kind gebore uit laasgenoemde soort huwelik het dus veel minder regte as die vader van 'n kind gebore uit 'n "normale" burgerlike huwelik. Die onderhawige statutêre reëling is derhalwe die produk van presies dieselfde *boni mores* wat in *Ryland* as onversoenbaar met die Grondwet bevind is.

Die konstitusionele hof kon in *Fraser* met gemak sy uitspraak oor die ongrondwetlikheid van artikel 18(4)(d) gebaseer het op die feit dat die bepaling op grond van geslag of huwelikstatus diskrimineer. Dit is derhalwe van besondere betekenis dat die hof by monde van regter Mahomed (tans die hoofregter), gegewe die beskikbaarheid van hierdie opsies, uitdruklik sy uitspraak gebaseer het op die godsdienstige-kulturele diskriminasie wat die bepaling daarstel. Die hof neem dus in soveel woorde die kultuur-godsdienstig gedrewe leefwyse en gebruike van 'n bepaalde kultuurgroep onder sy beskerming en weier om die algemene reëls en vereistes daarop van toepassing te maak. Net soos in *Ryland* het hierdie vermeende neutrale en universalistiese reël 'n diskriminerende gevolg. Die hof gaan staan juis in die pad van hierdie universalisties gedrewe liberalisme en beskerm die eiesoortige belange en waardes van die groep. Weer eens – net soos in *Ryland* – word die inherente ongelykheid en diskriminasie wat die gewaande neutrale reël in sigself ronddra, geïdentifiseer en aan die man gebring. Die reël soos vervat in artikel 18(4)(d) versuim om na die belange van 'n bepaalde groep om te sien. Dit gee uiting aan die waardes van diegene wat hoort tot die Westers-Christelike kultuurgroep maar ignoreer die waardes en opvattings van die Islamitiese kultuurgroep. Juis weens die feit dat dit groepsonsensitief is, en teen die Islamitiese kultuur-godsdienstige komponent diskrimineer, word dit ongrondwetlik bevind.

2 Minderheidsbeskerming as manifestasie van regsgelykheid

Sowel die *Ryland*- as die *Fraser*-uitspraak neem stelling in teen simplistiese meerderheidsdemokrasie (*majoritarianism*). Die *boni mores* wat die erkenning van die Islamitiese huwelik onmoontlik gemaak het en die opvattings onderliggend aan artikel 18(4)(d), verteenwoordig die Christelike waardes van die groot meerderheid van die Suid-Afrikaanse bevolking. Hierdie meerderheidsopvattings is egter nie voldoende om die waardes van die klein minderheidsgroep, wat volgens Islamitiese waardes leef, te misken nie. Die pluralisme wat derhalwe in beide hierdie uitsprake tot uiting kom, verleen erkenning aan sowel die eiesoortige identiteit en bestaanswyse as eiesoortige wyse van eksterne uitdrukking van

hierdie groepsidentiteit. Deur die beskerming hiervan word die integriteit van die minderheidsgroep onder die beskerming van die Grondwet geneem en word die minderheidsgroep geïnsuleer teen meerderheidsdominasie en die opdring van die waardes van die meerderheid aan die minderheid. Die reg in die vorm van die Grondwet verleen dus beskerming aan die minderheid in omstandighede waar dit weens die getalle-oorwig van die meerderheid nie self daartoe in staat is nie. In *Ryland* en *Fraser* word die Grondwet derhalwe geïnterpreteer as instrument tot die beskerming van minderheidsregte. Die stellinginname teen meerderheidsdominasie bou voort op die uitdruklike verwerping deur die konstitusionele hof van die openbare mening (dws die algemene of meerderheidsmening) as bepalende faktor by konstitusionele interpretasie (*S v Makwanyane* 1995 6 BCLR 665 par 87–88). Chaskalson P gaan uit sy pad om te beklemtoon dat die openbare mening wat ten grondslag lê van 'n stelsel van parlementêre soewereiniteit, die teenpool is van die beginsel van grondwetlike soewereiniteit wat juis die hoeksteen van die post-27 April 1994-regsorde vorm:

> "The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.
>
> Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution" (par 87–88; 703E–H).

Daar is 'n regstreekse (en logiese) verband tussen hierdie verwerping van meerderheidsdominasie (en sy konstitusionele spanmaat, wetgewersoewereiniteit) en die konstitusionele eis tot minderheidsbeskerming. Soos die konstitusionele hof (*ibid*) dit stel:

> "The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected" (par 88; 703H–I).

Die grondwetlike beskerming van minderheidsbelange in *Fraser* en *Ryland* word nie bereik op sterkte van enige uitdruklike konstitusionele bepaling tot die effek nie maar op grond van interpretasie van die gelykheidsklousule en die diskriminasieverbod. Kortliks: die grondwetlike eis vir gelykheid van individue en die verbod op diskriminasie teen individue hou in die lig van hierdie uitsprake tegelykertyd ook 'n eis vir gelykheid van groepe in, en plaas ook 'n verbod op diskriminasie teen groepe (in die onderhawige geval kultuur-godsdienstige groepe). Die verbod op groepsdiskriminasie en die eis vir gelykheid van groepe is 'n noodsaaklike voorvereiste vir die realisering van individuele gelykheid en die teenwerk van diskriminasie teen individue. Die Grondwet verorden gevolglik gelykheid van individue asook die gelykheid van groepe en verbied beide individuele en groepsdiskriminasie. Indien enige van die komponente weggelaat word, bly die ander outomaties in die slag. Groepsgelykheid en 'n verbod teen groepsdiskriminasie is dus 'n voorwaarde vir die realisering van individuele

gelykheid en die voorkoming van individuele diskriminasie. Die Suid-Afrikaanse reg omvat tans beide.

3 Die dominasie van die fiktiewe "nasie-gemeenskap"

Die onderhawige uitsprake dank hulle belangrikheid aan die wyse waarop die grondwetlike reg op gelykheid hanteer word. Die ooglopendste implikasie van die reg op gelykheid is die eis dat almal *eenders* behandel moet word, oftewel dat dieselfde reëls vir almal moet geld. Dit is formele gelykheid. Formele gelykheid skiet egter dikwels te kort in die strewe om daadwerklike gelyke regsbeskerming te bewerkstellig aangesien een en dieselfde reël weens groepe se variërende sosio-ekonomiese, kulturele en politieke situasie drasties verskillend ervaar kan word. Die uiteenlopende sosio-ekonomiese kontekste waarin verskillende kategorieë persone en groepe hulle bevind, die uiteenlopende kulturele en godsdienstige identiteite van kulturele-, taal- en godsdienstige groepe asook die variërende waardes wat kultuurgroepe op besondere kultuurgoedere plaas, het die gevolg dat eenvormige reëls in plaas van gelykheid dikwels juis *on*gelykheid teweegbring. Dit onderstreep die noodsaak om die grondwetlike voorskrif tot gelykheid uit te lê as 'n eis om substantiewe gelykheid en nie bloot 'n eis om eenvormige regsreëls nie.

Om dus te leer dat die reg op gelykheid slegs vereis dat persone wat in 'n soortgelyke posisie is, op eenvormige wyse behandel moet word, is ontoereikend om behoorlik gevolg te gee aan die reg op gelykheid (sien Chaskalson *et al Constitutional law of South Africa* (1997) 14–3 ev). Wat ook vereis word, is dat verskille in ag geneem moet word ten einde konkrete inhoud aan gelyke regsbehandeling te gee. Die reg op gelykheid vereis derhalwe nie net dat daar formele gelykheid sal wees nie maar ook *substantiewe* gelykheid. Formele gelykheid fokus op die gelyke *formulering* van 'n regsreël, oftewel, op die vraag of die taalgebruik waarin die regsreëls vervat is vir *eenderse* (*uniforme*) regsbehandeling voorsiening maak. Die fokus van substantiewe gelykheid is daarenteen nie die oënskynlike gelykheid wat gelyke formulering *prima facie* meebring nie, maar die vraag of die regsreël uiteindelik 'n daadwerklike bedeling in gelyke beregtiging meebring. Die fokuspunt van substantiewe gelykheid is die reële *gevolge* van regsreëls. Die soeke na substantiewe gelykheid bring mee dat die (dikwels gewaande) gelykheid van algemeen geldende formulerings nie genoegsame bewys lewer dat daar in werklikheid gelykheid bestaan nie. Substantiewe gelykheid vereis bykomende bewys alvorens aanvaar word dat gelykheid bewerkstellig is. Daar moet naamlik ook aangedui word dat die reëls daadwerklik substantiewe gelykheid as *resultaat* gelewer het.

Ryland en *Fraser* dekonstrueer die oënskynlike gelykheid van onderskeidelik 'n gemeenregtelike en 'n statutêre reël, deurdat hierdie uitsprake deur die skyn van gelykheid van die regsreëls dring en die ongelykheid wat daaragter skuil, identifiseer en as ongrondwetlik brandmerk. Die grondliggende probleem van formele gelykheid is dat dit slegs voorsiening maak vir soortgelyke gevalle (dws individue wat in soortgelyke posisies verkeer). 'n Regsbedeling wat slegs vir soortgelyke gevalle voorsiening maak, is gegrond op die versweë aanname dat daar inderdaad slegs soortgelyke gevalle (individue en groepe) is en dat daar derhalwe in die lig van die afwesigheid van ongelyksoortige gevalle inderdaad geen noodsaak vir die hantering van individuele, besondere en eiesoortige gevalle is nie. Die implikasie daarvan is dat die besondere gevalle, naamlik die gevalle wat eiesoortige behandeling verg, geensins deur die regstelsel in ag

geneem word nie. 'n Regstelsel wat so ingerig is, maak slegs voorsiening vir die dominante (hegemoniese) komponent van die staatsbevolking en akkommodeer nie die besondere waardes en belange van die nie-hegemoniese komponente nie. Die enkele stel reëls wat ingerig is ooreenkomstig die waardes, behoeftes en belange van die dominante komponent word uiteraard gunstig beleef deur die dominante komponent maar in wisselende mate ongunstig deur die niedominante gemeenskappe. Die enkele stel reëls is in formeel gelyke terme verwoord en maak volgens die formele aanskyn van die reëls geen onderskeid nie. Soos aangedui, word die *uitwerking* van die reels egter drasties uiteenlopend ervaar. Die formele bewoording van die reëls en beginsels blyk geen onderskeide en ongelykhede daar te stel nie maar die resultaat daarvan is om inderdaad onderskeide en ongelykhede mee te bring. Scenario's wat hieronder gebruik word, bring aan die lig dat 'n enkele stel reëls Moslems (weens kultureelgodsdienstige ongelykheid), vroue (weens geslagsongelykheid), Afrikaners (weens taal-kulturele ongelykheid) en tradisionele Afrikane (weens kulturele ongelykheid) tot minderbevoorregte stiefkinders van die regsorde kan reduseer.

In "Integrity and ideology: Towards a critical theory of the judicial function" 1995 *SALJ* 129 wys Davis op die noodsaak dat 'n demokratiese regsorde noodwendig pluralisties moet wees. Dit vereis dat die (uiteenlopende) stemme van alle mense en groeperings die regsorde gesamentlik moet konstitueer. Dworkin word juis gekritiseer vir sy ondemokratiese opvatting van reg as 'n koherente stelsel wat (onder meer) deur die regbank geformuleer word op grond van die waardes van *die gemeenskap*:

> "Legal coherence is impossible in a society where political activity is free. In other words, the activity of a variety of interest groups who are active in society renders impossible the construction of a coherent moral system of politics and principles, as each group places its moral and social perspective on the political agenda" (129).

En voorts:

> "In its struggle towards democracy South Africa needs a critical jurisprudence, one which allows us to examine the dominant values of the legal system, its quest for coherence, and the nature and justification of it. In this manner law might assist in the transformation to a pluralist democracy rather than being a tool of social engineering towards a non-racial autocracy" (130).

Die kernprobleem van die *formele* gelykheidskonsep is dat dit die bestaan van 'n gemeenskap ('n nasie), 'n monistiese, nie-pluralistiese entiteit veronderstel en derhalwe vyandig staan teenoor die partikuliere. Vandaar juis die waarskuwing van Davis teen die nie-rassige outokrasie, naamlik 'n outokrasie wat weens die afwys van die partikuliere en van verskille gekonstitueer is op die grondslag van die belange en die waardes van die hegemoniese komponent van die staatsbevolking.

Duncanson (*Law, democracy and the individual; Legal studies* vol 8 (1988)) lewer juis skerp kritiek op Dworkin wat op 'n onkritiese wyse die grondslag van regsbeginsels in *die gemeenskap* vind en dan boonop sonder meer die gemeenskap met die *nasie* gelykstel. So 'n *nasie*-gemeenskap bestaan eenvoudig nie en funksioneer in laaste instansie net as 'n instrument vir die juridiese magsverskansing van die hegemoniese komponent se dominasie oor die res. Nasiestaat "gemeenskappe" word toenemend as kunsmatig beskou (Duncanson 310) en die regsinstellings van sulke gewaande gemeenskappe staan vreemd teenoor groot (nie-dominante) gedeeltes van die staatsbevolking. Duncanson reken soos volg met die Dworkiniaanse *nasie-gemeenskap* af:

> "The fact is of course, that he does not, and if he had, Law's Empire would have resembled more closely the Empire of Austria-Hungary prior to 1918. Those whom a government claims as citizens are not participants of differing levels of sophistication or competence in the same enterprise. The Dworkinian interpreter insists that the institutions 'we' face are 'ours'. But if some of 'us' are heard at all, they will be heard to say that legal institutions are alien. Some of 'us' are, after all, Roman Catholics in Ulster, Scots in Thatcher's UK, Aboriginal Australians, women, workers, unemployed people" (310).

Die staatsgemeenskap bestaan inderdaad uit 'n variasie van gemeenskappe met 'n veelheid van waardes, behoeftes, belange en oortuigings. 'n Demokratiese orde met die vermoë om gelykheid te bewerkstellig, vereis dat almal by die openbare debat betrek word. Wanneer almal 'n "spreekbeurt" kry, kom dit weldra aan die lig dat daar wyd uiteenlopende waardes, kultuurgoedere, belange, ensovoorts bestaan. Die regsorde waartoe die demokratiese proses moet lei, moet hierdie variërende waardes, kultuurgoedere en belange akkommodeer. Indien nie, staan die regsorde vreemd en vyandig teenoor diegene en die groeperings wie se waardes en belange nie in die regsorde geakkommodeer is nie. Vanuit die oogpunt van sodanige ongeakkommodeerde groeperings is die regsorde ondemokraties. Die regsorde geniet nie die instemming van sodanige ongeakkommodeerde groepe nie en aangesien instemming die kernvoorwaarde vir legitimiteit is, is die stelsel vanuit die perspektief en gegewe die ervaring van sulke persone en groeperings nie-legitiem.

4 Die ongelyke hantering van partikuliere waardeprioriteite

Die redenasie-strategie wat gebruik word om substantiewe gelykheid te bewerkstellig, neem as vertrekpunt dat die samelewing pluraal saamgestel is. Die groepe wat die samelewing (nasie) konstitueer, het uiteenlopende eienskappe, waardes en behoeftes en die geestesgoedere (kultureel en godsdienstig) van uiteenlopende groepe dra variërende gewig by verskillende groepe. Nie alle dinge is vir alle individue en groeperinge ewe belangrik nie. Waarde- en belangeprioriteite varieer. Sommige persone en groeperinge beskik oor sekere kultuurgoedere wat ander nie het nie. Andersins registreer sekere kultuurgoedere die hoogste waarde by sekere groeperinge terwyl dit kwalik van enige waarde vir ander is.

Wanneer die regsorde op so 'n wyse gekonstrueer word dat dit die kultuurgoedere en waardevoorkeur en die ervarings van slegs een groep reflekteer, skep dit, soos aangedui, 'n regsverskanste politieke hegemonie wat deur inherente ongelykheid tussen groeperings gekenmerk word. So 'n orde is ondemokraties met betrekking tot die perspektiewe wat nie in ag geneem is nie en is gevolglik ook nie-legitiem.

'n Regsreël wat formeel gelyk vir almal geld, kan dus heeltemal uiteenlopend beleef word deur uiteenlopende groepe. Trouens, een en dieselfde reël kan weens die inherente en kontekstuele verskille van groepe deur een groep beleef word as regverdig en billik, maar deur 'n ander as kwetsend, diskriminerend en identiteitsontkennend.

(a) In *Ryland* en *Fraser* kom dit na vore dat een en dieselfde reël met betrekking tot huwelike en die buite-egtelikheid van kinders gunstig deur Christene beleef word maar krenkend en diskriminerend deur Moslems. Die rede hiervoor is dat die reël vanuit 'n Westerse waardeperspektief sy beslag gekry het en die eiesoortige kultuurgoedere van Moslems misken. Die ongelykheid en diskriminasie wat hierdeur teweeg gebring word, spruit voort uit die ignorering van die

eksklusiewe geesteswaardes van daardie groep – geesteswaardes wat slegs tot daardie groep behoort – maar wat noodwendig in ag geneem moet word ten einde 'n substantiewe gelyke regsbedeling te bewerkstellig.

(b) Een van die hooftemas van die feministiese jurisprudensie is dat die regsorde patriargaal georganiseer is, dit wil sê dat regsbeginsels en -reëls 'n manlike ervaringswêreld weerspieël, daarop gerig is om 'n sosiale orde soos deur mans beleef, te organiseer en om belange soos deur mans beleef, te dien (sien in die algemeen Van Blerk *Jurisprudence: An introduction* (1996) 72–192). Gevolglik is die regswêreld 'n wêreld wat eiesoortige vroulike belewenisse, behoeftes, belange en selfs psigiese tendense verontagsaam. Dit word die regsorde ten laste gelê dat dit inherent 'n manlike hegemonie konstitueer en derhalwe diskriminerend teen vroue is omdat dit die vroulike stem by voorbaat buite orde gereël het. Weer eens is daar 'n enkele stel reëls en beginsels wat op almal van toepassing is en wat die (wan-) indruk van gelykheid laat. Die orde is egter manlik geïnspireerd, is nie vanuit 'n vroulike perspektief medegekonstitueer nie en is gevolglik inherent ongelyk met betrekking tot vroue. Die *gemeenskap* waaruit die regsorde ontwikkel het, is gevolglik per definisie 'n manlike gemeenskap maar die formele gelyke aard van die regsreëls skep die wanindruk van 'n omvattende gemeenskap wat vroue ook in ag neem. Die imperatief van daadwerklike gelykheid en van demokrasie en legitimiteit vereis weer eens dat die verskille in ag geneem moet word, anders word ongelykheid permanent verskans weens die feit dat dit deur die valse skyn van *formele* gelykheid bedek word (sien in verband met die noodsaak van die inagneming van geslagsverskille – hetsy biologies of sosiaal – ten einde gelykheid te bewerkstellig, onder meer Littleton "Reconstructing sexual equality" vervat in Bartlett en Kennedy (reds) *Feminist legal theory* (1991) 35–52; Scales "Towards a feminist jurisprudence" 1989 *Indiana LJ* 430–434).

(c) Een en dieselfde erf- en familieregtelike bedeling kan heeltemal gunstig deur Westerlinge beleef word maar kwetsend, diskriminerend en identiteitsontkennend deur Afrikane. Die defek van hierdie reëls is dat dit deur Westersgedrewe kultuur beslag gekry het en die eiesoortige kultuurgoedere van Afrikane misken. Die ongelykheid en diskriminasie van hierdie reëls is die resultaat van die miskenning van die besondere behoeftes van tradisionele Afrikane. Dit is weer eens 'n vorm van substantiewe ongelykheid wat volg op die miskenning van 'n eiesoortige kultuurgoed wat tot niemand anders behalwe hierdie groep behoort nie maar wat noodwendig in ag geneem en beskerm moet word, anders word inherente ongelykheid in die regsorde gedoog. Juis hierdie misstand wat deur 'n Westers-onderleë formele gelykheid teweeg gebring is, het in die jongste tyd gelei tot die ontwikkeling van eiesoortige regte vir inheemse bevolkings wat die reg van persone wat tot sulke bevolkings behoort, insluit om as fundamentele reg 'n keuse uit te oefen om beheers te word deur 'n stelsel van inheemse reg in plaas van nasionale (Westerse) reg wat andersins van toepassing sal wees maar wat vreemd is aan die kulturele identiteit van inheemse bevolkings (sien in die verband Bennet *Human rights and African customary law* (1995) 11 ev asook die pleidooi van Sachs "Towards a Bill of Rights in a democratic South Africa" 1990 *SAJHR* 19 ev vir spesiale verdraagsaamheid vir die behoud van tradisionele Afrikareg en -gewoonte).

'n Insiggewende demonstrasie vir die noodsaak van die inagneming van die eiesoortige inheemse regsopvattings ten einde gevolg aan die reg op gelykheid te gee, kom voor in die onlangse uitspraak van *Bangindawo v Head of the Nyanda*

Regional Authority; *Hlantlalala v Head of the Western Tembuland Regional Authority* 1998 3 BCLR 314 (Tk). Hier is die grondwetlikheid van die sogenaamde *regional authority courts* wat kragtens die Regional Authority Courts Act 13 of 1982 (Transkei) ingestel is, betwis. Die argument was dat hierdie howe nie aan die vereistes van onafhanklikheid en onpartydigheid voldoen nie aangesien daar in voorsittende beamptes benewens hulle regsprekende funksies, ook wetgewende en uitvoerende bevoegdhede setel. Met 'n beroep op Sieghart *The international law of human rights* asook die Kanadese beslissing *R v Valente* (1986) 19 CRR 354 (SC), is aangevoer dat hierdie howe per definisie nie werklik as howe kan kwalifiseer nie.

By monde van regter Madlanga is die hof van mening dat hierdie siening rakende die vereistes waaraan 'n tribunaal moet voldoen ten einde as 'n hof te kwalifiseer, van toepassing is op tribunale met 'n Westerse oorsprong:

> "However, the position is different when it comes to the African customary law setting. There is a danger of a wholesale transplant of a concept suited to one legal system into another legal system. For example, African customary law knows of no distinction between the executive, the judicial and the legislative arms of government" (326D-E).

Westers gedrewe opvattings oor hierdie aangeleentheid behoort nie universeel te geld nie en moet dus ook nie die Afrika-opvattings opsy skuif nie. Soos die hof sê:

> "Surely, the views and outlook of believers in and adherents of African customary law to the question of independence and impartiality of the judiciary would not be the same as those of non-believers and non-adherents. This being so, there seems, in my view, to be no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting. Any such imposition is very much akin to the abhorrent subjection of matters African to 'public policy'. As our recent legal history discloses, such was the public policy of those then in power and it did not necessarily accord with the public policy of the Africans and, for that matter, the public policy of the rest of the South African people who were not in power. The believers in and the adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial functions. The imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof" (327C-F).

(d) 'n Enkele reëling mag gemaak word met betrekking tot die taalsituasie en daar kan geargumenteer word dat dit alle persone in gelyke mate raak. Daar mag gereël word dat die voertaal in skole en universiteite slegs enkelmedium Engels is of dat die staat se dokumentasietaal ook slegs enkelmedium Engels is of dat die openbare uitsaaier hoofsaaklik in Engels uitsaai terwyl alle ander Suid-Afrikaanse tale elk met 'n fraksie van die uitsaaityd tevrede moet wees. So 'n reëling, kan beweer word, raak met die uitsondering van Engelssprekendes, almal dieselfde: Afrikaans-, Zoeloe-, Xhosa-, Sotho-, Vendasprekendes, ensovoorts. Afrikaners vir wie Afrikaans 'n fundamentele identiteitstigtende kultuurwaarde is en wie se historiese bewussyn in 'n hoë mate om Afrikaans wentel, plaas vanselfsprekend 'n hoë premie op Afrikaans. Voorts is Afrikaans anders as die ander inheemse tale daartoe in staat om alle taalfunksies met gemak te kan vervul. Almal besig 'n taal, maar Afrikaners kan Afrikaans veel belangriker ag as wat ander hulle tale beskou. Taal kan derhalwe by Afrikaners 'n baie belangriker posisie inneem as vir enige ander groepering in Suid-Afrika. Afrikaans en Afrikaners word derhalwe veel meer negatief geraak deur so 'n reëling as enige ander Suid-Afrikaanse taal en taalgroep. So 'n taalreëling kan dus byna onopgemerk

by nie-Afrikaners verbygaan, dog kwetsend diskriminerend en juridies ongelyk met betrekking tot Afrikaans funksioneer en dienooreenkomstig deur Afrikaners beleef word. 'n Argument dat niemand anders behalwe Afrikaners oor verengelsing beswaard is nie, misken die besonderse waardes, kultuurgoedere en belange van Afrikaners en misken Afrikaners se vryheid om na eie oortuiging kulturele en waardeprioriteite te bepaal. So 'n taalopset is nie geskoei op die lees van die kulturele en sosiale waardeprioriteit van die *Suid-Afrikaanse gemeenskap* nie, maar wel op die waardeprioriteite van die nie-Afrikaanse hegemoniese gemeenskap(pe) van die Suid-Afrikaanse nasie. 'n Sodanig gekonstrueerde regsorde dra 'n inherente ongelykheid in sigself om want dit gee uitdrukking aan die kulturele en sosiale waardeprioriteit van nie-Afrikaners terwyl die eiesoortige waardeprioriteite van Afrikaners verontagsaam word. Die effek van hierdie regsbedeling is ook om weens die ignorering van Afrikaanse kultuurperspektiewe Afrikaans en dus Afrikaners weens ongelykheid te benadeel op dieselfde wyse as wat Moslems, vroue en tradisionele Afrikane weens ongelykheid benadeel word. Weer eens is die weg uit hierdie juridiese ongelykheid dat daar met die eiesoortige kultuurbehoeftes van Afrikaners erns gemaak moet word. Dit vereis dat Afrikaans 'n rol toegeken word in ooreenstemming met die kulturele waardepremie wat Afrikaners op die taal plaas, asook in ooreenstemming met die bewese vermoë van Afrikaans (soos Engels en anders as die ander inheemse tale) as akademiese, regs-, tegniese en literêre taal en een wat in die algemeen tot die vul van hoër taalfunksies in staat is. Versuim om dit te doen, is weer eens gelyk aan die oogluikende toelating van 'n substantief ongelyke en diskriminerende regsbedeling.

Slotsom

Ryland en *Fraser* lê 'n stewige en aantreklike prinsipiële grondslag vir 'n jurisprudensie van substantiewe gelykheid wat daartoe in staat is om onder meer daadwerklike gelykheid vir diegene waarna in die scenario's hierbo verwys is, te verseker. 'n Belangrike element hiervan is dat die hegemoniese en dus ongelyke werking van (gewaande) nasionale gemeenskapswaardes aan die lig gebring en die dominerende effek wat dit het op nie-dominante groeperings aan die kaak gestel moet word. Die valsheid van 'n koherente *nasie*-gemeenskap en die fiktiewe koherente reg waartoe dit aanleiding gee, moet telkens aan die man gebring word as 'n blote verdoeseling van dominasie. Anders, soos Davis paslik waarsku, staar 'n raslose outokrasie ons in die gesig.

Die konsep van substantiewe gelykheid soos deur die onderhawige uitsprake ontwikkel, maak ook die reg op gelykheid betekenisvol vir minderhede (hetsy getalle- of funksionele minderhede), oftewel vir almal wat nie posisies van dominasie geniet nie. Trouens, wat dit blootlê, is dat die beskerming van minderheidsregte indien nie volledig nie, dan wel grotendeels, 'n funksie is van die reg op (substantiewe) gelykheid. Indien nie, is minderhede altyd slegter daaraan toe as die (dominante) meerderhede, oftewel verkeer minderhede altyd in 'n nadelig ongelyke posisie teenoor die dominate groeperings. Minderheidsbeskerming is 'n manifestasie van die reg op substantiewe gelykheid. Daarmee kom die reg op gelykheid tot volle wasdom.

KOOS MALAN
Justisie-Kollege

KENNISPYN: 'N BEWUSSYNSANTROPOLOGIESE PERSPEKTIEF OP DIE EVOLUSIEPROSES VAN DIE PERSOONLIKHEIDSREG*

1 Inleiding

Die problematiek wat in die onderhawige aantekening aan die orde gestel word, kan aan die hand van die feitestelle van drie relatief onlangse sake uit die Suid-Afrikaanse, Nederlandse en Amerikaanse reg onderskeidelik verduidelik word.

(a) In *Clinton-Parker v Administrator, Transvaal* 1996 2 SA 37 (T) is twee babas nalatig in 'n hospitaal omgeruil met die gevolg dat moeders nie hulle biologiese kinders ontvang het nie. Ongeveer 21 maande later, tydens 'n onderhoudsgeding wat deur die beweerde vader betwis is, het uit bloedtoetse geblyk dat nóg die "moeder" nóg die beweerde vader van een van die kinders sy biologiese ouer is. As gevolg hiervan het die omruiling van die babas aan die lig gekom. Die *kennis* dat hulle nie hulle eie biologiese kinders grootgemaak het nie, het groot emosionele pyn en ongerief vir die moeders teweeggebring (vgl ook *Espinosa v Berverly Hospital* 114 Ca 2d 232, 249 P 2d 843 (1952); *Johnson v Jamaica Hospital* 62 NY 2d 523, 467 NE 2d 502 (1984)). Hulle stel vervolgens (suksesvol) 'n deliktuele eis vir genoegdoening teen die administrateur, as verteenwoordiger van die provinsiale hospitaal, in. Die mediese wetenskap het gevolglik inligting (*kennis*) aan die lig gebring wat persoonlikheidsnadeel tot gevolg gehad het.

(b) In *Buckley v Metro-North Commuter RR* 79 F 3d 1337 (2nd Cir 1996), wat in finale instansie voor 'n federale appèlhof in die VSA gedien het, was die feite dat B, 'n spoorwegwerknemer wat as 'n pyppasser in stoomtonnels gewerk het, 'n eis vir genoegdoening ooreenkomstig die Federal Employers' Liability Act (FELA) ingestel het waarin beweer is dat op 'n nalatige wyse emosionele pyn en ongerief ("emotional stress") weens sy grootskaalse blootstelling aan asbes by hom veroorsaak is. Hy het 'n intense vrees dat hy 'n asbesveroorsaakte siekte, spesifiek kanker, sou opdoen. Die United States District Court for the Southern District of New York het uitspraak ten gunste van die werkgewer gegee. B beroep hom op genoemde federale appèlhof. In sy uitspraak wys regter Oakes daarop dat B se massiewe blootstelling aan asbes kan neerkom op 'n fisieke impak, soos vereis vir die vestiging van 'n eis ingevolge die FELA vir die nalatige toediening van emosionele pyn en ongerief, selfs al sou daar nog geen kliniese tekens van die ontwikkeling van 'n asbesverwante siekte wees nie. Hy wys verder daarop dat die effek van asbes op die mens se longe van 'n subtiele en komplekse aard is en dat dit oorgelaat moet word aan die jurie om, met behulp van deskundige getuienis, te bepaal of B teenswoordige benadeling ondergaan het (1344). Die saak word vervolgens terugverwys vir sodanige beslissing deur die jurie. B se emosionele pyn en ongerief kan in dié saak duidelik

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terugherlei word tot die medies-wetenskaplike *kennis* dat betekenisvolle blootstelling aan asbes tot siektetoestande, spesifiek ook kanker, aanleiding kan gee (sien ook in dié verband Labuschagne "Werkgewersaanspreeklikheid vir asbesveroorsaakte siektes" 1994 *SAML* 336).

(c) In 'n saak wat op 18 Junie 1993 (NJ 1994, 347) voor die Hoge Raad in Nederland gedien het, het 'n verkragtingslagoffer gevrees dat sy met die HIV besmet is en VIGS kon opdoen. Die eerste toets het positief geblyk maar sy het as gevolg van die inkubasietydperk nog geen sekerheid gehad nie. Sy het van die dader geëis dat hy 'n VIGS-toets moet ondergaan. Die Hoge Raad staan haar versoek toe (sien ook Labuschagne "Die reg op emosionele trankiliteit: Opmerkings oor die dinamiese aard van die persoonlikheidsreg" 1995 THRHR 499). Na aanleiding van dié saak, asook die Nederlandse gewysdereg in die algemeen, opper Stolker en Levine die vraag of 'n VIGS-fobie of -angs 'n deliktuele eis ten grondslag kan lê en kom in beginsel tot 'n positiewe konklusie ("AIDS-phobia. Schadevergoeding voor angst" 1996 *NJB* 881); vgl ook De Boer "De uitdijende reikwijdte van de aansprakelijkheid uit onrechtmatige daad" 1996 *NJB* 881). Hierdie toedrag van sake is gebaseer op die medies-wetenskaplike *kennis* dat die HIV deur geslagskontak oorgedra kan word (sien verder Labuschagne "Voltooiingsaanspreeklikheid, verkragting en VIGS: 'n Rigtingwyser van die natuur?" 1993 *THRHR* 129, "Oningeligte geslagsomgang met 'n VIGS-lyer en die vraagstuk van toestemming by verkragting" 1993 *De Jure* 417).

Dit blyk uit bogenoemde voorbeelde duidelik dat emosionele pyn en ongerief, persoonlikheidsnadeel dus, gegenereer is deur relatief onlangse (wetenskaplike) kennis wat voorheen nie beskikbaar was nie. Wat duidelik blyk, is dat die persoonlikheidsreg se trefkrag met die tydsgang verbreed het. In die onderhawige bydrae word, in 'n neutedop saamgevat, die effek wat die verbreding van die bewussynswêreld (of kenniswêreld) van die mens op die evolusie van die persoonlikheidsreg het, onder die loep geneem.

2 Bewussynsantropologie

In hulle werk *Verklarende vakwoordeboek vir antropologie en argeologie* (1995) 153 verklaar Coertze en Coertze oor kognitiewe antropologie soos volg:

> "'n Tematiese spesialiteitsveld van die algemene antropologie waarin die kennissisteem (begripsisteme en denkmodelle) van kultuurgroepe bestudeer word; dit raak die geldende opvattings (idees) oor waarneming en interpretasie van die omgewing, die kategorisering van verskynsels asook die verklaring van kousale verband daartussen."

Waaroor dit hier wesenlik gaan, is die omvang van die mens, in kollektiewe sin, se kennis- en bewussynswêreld. Vandaar dat ek, ten minste in onderhawige verband, die begrip bewussynsantropologie bo die begrip kognitiewe antropologie verkies. Thompson (*Psychology and culture* (1975) 1) wys daarop dat die mens gebore word met weinig instinkte maar met 'n ongelooflike vermoë om te leer. Hoofsaaklik as gevolg van die mens se vermoë om deur middel van taal te kommunikeer, kan alle lede met normale fisieke en geestelike vermoëns binne agt tot tien jaar in 'n betrokke gemeenskap genoegsame kulturele kennis en vaardigheid opdoen om sinvol met hulle omgewing om te gaan (sien ook Malan "Ontwikkelingsperspektief vanuit kognitiewe antropologie" 1989 *Suid-Afrikaanse Tydskrif vir Etnologie* 40; Sturtevant "Studies in ethnoscience" 1964 *American Anthropologist* 111; Berry, Poortinga, Segall en Dasen *Cross-cultural psychology: Research and applications* (1992) 214–218). Wat vir onderhawige doeleindes van besondere belang is, is Thompson se opmerking (3) dat

> "all normally functioning human beings have the cognitive capability to assimilate and utilize impressively intricate information; all operate within the structural and processual limits established by hundreds of thousands of years of evolution in the human brain".

Die feit dat die menslike brein in 'n evolusieproses verkeer, hou meteens ook in dat die menslike bewussyn in 'n proses van evolusie verkeer aangesien die brein die bewussynsbasis vorm (vgl ook Crook *The evolution of human consciousness* (1980) 30–31; Frank "Is self-consciousness a case of présence a soi?" in Wood (red) *Derrida: A critical reader* (1992) 232). In die lig hiervan is Lampe se opmerking onderskryfbaar dat die menslike persoonlikheid wat intiem met sy bewussyn verbind is, 'n histories-evolusionêre fenomeen is ("Persönlichkeit, Personlichkeitssphäre, Persönlichkeitsrecht" 1987 (12) *Jahrbuch für Rechtssoziologie und Rechstheorie* 76).

Ek het by vorige geleenthede aangetoon dat sekere duidelik sigbare antropologiese evolusielyne in die sosio-juridiese waardestrukture van die mens sigbaar is. Twee van hierdie evolusielyne, naamlik dié beliggaam in die individualiserings- en dekonkretiseringsprosesse, is by die ontwikkelingsproses van die persoonlikheidsreg opvallend (Labuschagne "Regsnavorsing: 'n Meerdimensionele en regsevolusionêre perspektief" 1994 *TRW* 91, "Evolusielyne in die regsantropologie" 1996 *Suid-Afrikaanse Tydskrif vir Etnologie* 40). In die vroegste gemeenskappe was die individu in eerste instansie 'n groepsmeganisme en sy "persoonlikheidsreg" was gevolglik aan die groepsbelange ondergeskik (sien Rouland *Legal anthropology* (1994) 155; Lampe "Rechtsanthropologie heute" 1991 *Archiv für Rechts- und Sozialphilosophie* 226). Die mens se aanspraak op beskerming van sy besondere individualiteit en evoluerende persoonlikheid het met die loop van tyd momentum verkry. Die eerste spore hiervan, naamlik individuele ontkoppeling van die groep, is reeds by hoër werweldiere sigbaar (Hendrichs "Integration und Selbstbestimmung der Individuen in den sozialverbänden höherer Wirbeltiere" 1987 (12) *Jahrbuch für Rechtssoziologie und Rechtstheorie* 18). Die dekonkretiseringsproses het tot gevolg dat die prosesse onderliggend aan, en die onderbou van die konkreet-sigbare en andersins sintuiglik-waarneembare, voortdurend verken en ontleed word. Hierin speel wetenskaplike navorsing uit die aard van die saak 'n rigtinggewende rol. So wys Goulden en Naitove daarop dat genetiese navorsing 'n totaal nuwe dimensie aan menslike kennis gegee het (*Medical science and the law* (1984) 113–123; sien ook Moenssens, Starrs, Henderson en Inbau *Scientific evidence in civil and criminal cases* (1995) 870). Die wetenskap in die algemeen het tot gevolg dat die kennis- en gevolglike bewussynswêred van die mens voortdurend vergroot. Soos reeds uit bogaande bespreking behoort te blyk, het dit die neiging om die omvang van die persoonlikheidsreg te verbreed. In sekere omstandighede kan wetenskaplike kennis inderdaad ook 'n begrensende effek op die persoonlikheidsreg hê. Ter illustrasie: in rudimentêre gemeenskappe is 'n beskuldiging van betrokkenheid by toordery-aktiwiteite 'n ernstige aangeleentheid wat persoonlikheidskending en regsaanspreeklikheid tot gevolg kan hê. In moderne gemeenskappe sou dit as 'n grap afgemaak word (sien hieroor Sagan "Religion and magic: A developmental view" 1979 *Sociological Inquiry* 107 ev; Labuschagne "Geloof in toorkuns: 'n Morele dilemma vir die strafreg?" 1990 *SAS* 246; Aldrich *The primitive mind and modern civilization* (1931) 73–87).

3 Regshistoriese perspektief

Joubert wys daarop dat die Twaalf Tafels sterk nadruk lê op die beskerming van die fisiese persoon (*Grondslae van die persoonlikheidsreg* (1953) 78). Met

beroep op Jhering ("Rechtsschutz gegen injuriöse Rechtsverletzungen" in 1995 (23) *Jhering's Jahrbucher* 157) wys hy verder daarop dat die begrip *injuria* "by die verhoogde beskawingspeil" aangepas is en dat die meer "geestelike" skendinge op die voorgrond getree het (79). Uit die Suid-Afrikaanse gewysdereg voor 1973 blyk dat 'n psigiese besering of benadeling slegs tot deliktuele aanspreeklikheid aanleiding kon gee indien dit 'n liggaamlike onderbou gehad het (sien bv *Hauman v Malmesbury Divisional Council* 1916 CPD 216 220; *Creydt Ridgeway v Hoppert* 1930 TPD 661 668; Milner "Liability for emotional shock" 1957 *SALJ* 265; Tager "Nervous shock in South African law" 1972 *SALJ* 435; Van der Walt "Skoktoedienings: Wie sal die aftreksom maak?" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 249). Die appèlhofbeslissing *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) het in 1973 'n nuwe era ingelei. 'n Deliktuele eis vir psigiese benadeling word in dié saak vir die eerste keer nie direk van liggaamskending of -benadeling afhanklik gemaak nie. Appèlregter Botha verduidelik in dié verband soos volg:

> "Iemand wat aan 'n angsneurose ly, wat geen rustige nagrus kan geniet nie en wie se verhouding met andere versteur is, geniet geen normale fisiese gesondheid nie. Die senu- en breinstelsel is, in iedere geval, net so 'n deel van die fisiese liggaam as wat 'n arm of been is, en 'n besering aan die senu- of breinstelsel is net so 'n besering van die fisiese organisme as wat 'n beseerde arm of been is" (779).

Die regsposisie in Suid-Afrika is tans dat nie-onbeduidende senuskok of psigiese (emosionele) benadeling tot deliktuele aanspreeklikheid aanleiding kan gee (sien verder hieroor *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K) 342; *Boswell v Minister of Police* 1978 3 SA 268 (OK) 273–275; *N v T* 1994 1 SA 862 (K) 864–865; Neethling en Potgieter "Senuskok of psigiatriese besering – verhaalbaar indien voorsienbaar" 1973 *THRHR* 176; Tager "Nervous shock and mental illness" 1973 *SALJ* 123; McQuoid-Mason "Emotional shock: Shades of Descartes?" 1975 *SALJ* 19; Midgley "The role of foreseeability in psychiatric injury cases" 1992 *THRHR* 411; Labuschagne "Deliktuele aanspreeklikheid weens verkragting" 1994 *Obiter* 242 247–248). Terloops, dit is tans ook die posisie in die Engelse reg (sien *Alcock v Chief Constable of the South Yorkshire Police* 1991 4 All ER 907 (HL); *Page v Smith* 1995 2 All ER 736 (HL)). Hier het ons 'n pragtige voorbeeld van die werksaamheid van die dekonkretiseringsproses in die persoonlikheidsreg. Aanvanklik is die konkrete liggaamskending vooropgestel, later is die gees en psige agter die liggaam erken maar nog daaraan ondergeskik gestel en in finale instansie het 'n konsepsuele ontkoppeling van die psige en gees van die (konkrete) liggaam plaasgevind.

4 Konklusie

Uit bogaande bespreking blyk dat in die evolusieproses van die sosio-juridiese waardestrukture van die mens die individu al hoe meer op die voorgrond getree en die groep al hoe meer na die agtergrond verskuif het. 'n Individualiseringsproses is in dié strukture duidelik sigbaar. Die (sintuiglik-konkrete) menslike liggaam het aanvanklik in hoofsaak die beskermingsobjek van die persoonlikheidsreg daargestel. As gevolg van die werking van die dekonkretiseringsproses in die sosio-juridiese waardestrukture van die mens het die menslike psige en gees, as aspek van sy individualiteit en persoonlikheid, op die voorgrond getree. Die ontplooiing van die kollektief-menslike bewussyn – waarin kennis verkry deur wetenskaplike navorsing 'n belangrike rol speel – onderlê die dekonkretiseringsproses. Uit twee van die voorbeelde waarmee die onderhawige bespreking aan die orde gestel is, blyk dat medies-wetenskaplike kennis aangaande

die veroorsaking van dodelike siektetoestande by die betrokkenes emosionele pyn (en ongerief) ontketen het, naamlik die kennis dat die HIV deur geslagskontak oorgedra kan word en dat grootskaalse blootstelling aan asbes longkanker kan veróorsaak. By die ander voorbeeld, naamlik die omruil van die babas in die hospitaal, is daar nie sprake van 'n (direkte) doods- en lydingsvrees by die betrokkenes nie. Hier gaan dit meer spesifiek oor die emosionele pyn (en ongerief) wat by die moeders ontketen is deur die wete dat 'n genetiese produk of deel van hulle, emosioneel van hulle vervreem is. Dit hang in 'n verwyderde sin tog met die kern van die mens sé doodsvrees saam aangesien die mens deur sy nakomelinge geneties die dood transendeer en iets van hom/haar in hulle (die nakomelinge) bly voortleef (sien hieroor Labuschagne "Regspluralisme, regsakkulturasie en onderhoud van kinders in die inheemse reg" 1986 *De Jure* 298). Wat ook al die diepere rede of verklaring vir dié toedrag van sake mag wees, word in al drie hierdie voorbeelde die emosionele pyn (en ongerief) deur abstrakte wetenskaplike kennis gegenereer. Daarom sou daarna ook as *kennispyn* verwys kon word.

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Daar is nog een aangeleentheid wat ongelukkig genoem moet word. Dit is die skokkende swak toestand van die rekord wat voor hierdie Hof geplaas is. Daar is bykans nie een paragraaf wat nie wemel van tikfoute en taalfoute (wat klaarblyklik nie deur die Hof, die getuies of die advokate begaan is nie). Dit is duidelik dat die rekord getik is deur iemand wat nie eens by benadering die tale wat in die Hof gebruik is – hoofsaaklik Engels en 'n klein bietjie Afrikaans – verstaan het nie. Dit is egter geen verskoning vir die swak toestand van die rekord nie. Dit is die plig van die appellant se prokureurs, beide ter plaatse en in Bloemfontein, om die rekord deur te lees en hierdie soort foute te herstel, desnoods in samewerking met die eiser se prokureurs. Daardie plig is in die onderhawige geval gruwelik versuim. Ek is van voorneme om 'n bestrawwende kostebevel in dié verband te maak.

Dit is ook verontrustend dat die advokate die rekord gelate aanvaar het en die appèl kom argumenteer het sonder om die onaanvaarbare oorkonde na die verweerder se prokureurs terug te verwys en aan te dring op 'n behoorlike reggestelde oorkonde. Advokate is immers, net soos prokureurs, verantwoordelik vir die handhawing van daardie hoë standaarde wat die uiteindelike legitimiteitswaarborg van ons regstelsel is. Die dag mag aanbreek dat die verweerder se advokaat saam met sy opdraggewende prokureurs vir gemelde pligsversuim van sy gelde sal moet inboet, te meer wanneer, soos in die onderhawige geval, daar meer as voldoende tyd was, nadat die advokate opdrag ontvang het om appèlbetoogshoofde voor te berei, om die rekord reg te stel (per Olivier AR in *Venter v Bophuthatswana Transport Holdings (Edms) Bpk* 1997 3 SA 374 (A) 390-391).

VONNISSE

LIMITS OF PRIVATE DEFENCE IN THE LAW OF DELICT

Minister of Law and Order v Milne 1998 1 SA 289 (W)

1 Facts

One evening, two members of the South African Police Service were on duty in their yellow "squad car". Apart from its distinctive markings, it was equipped with a radio, siren, loudhailer and blue flashing light – there could be no doubt whatsoever that it was a police vehicle. At one stage they parked their car alongside a dual carriageway to observe the traffic. This road is a main arterial route: it consists of two unlit carriageways separated by a broad strip on which grass and trees had been planted. Each carriageway has two lanes, which taper into three at intersections.

At about 22:00 the policemen were greatly surprised to observe a vehicle travelling at high speed on the wrong carriageway, against the flow of the traffic. They immediately gave chase, in the process activating the car's siren and blue flashing light. When they caught up with the speeding vehicle, the policeman in the passenger seat addressed the driver of that car by means of the loudhailer, calling upon him to stop immediately. The offender showed no signs of any reaction, and in this fashion the policemen tailed the other vehicle at the astonishing speed of about 160 km/h along the inner (fast) lane of the incorrect carriageway. Through immediate radio contact with the flying squad control station, the policemen learnt that the car they were chasing had been reported stolen. Although they passed through two intersections controlled by traffic lights without stopping and were passed by several vehicles approaching from the opposite direction, they covered a considerable distance without any mishap. At a certain point the police vehicle narrowly missed coming to grief, after evasive action had to be taken by the driver to avoid smashing into two vehicles that were approaching on both traffic lanes. However, after having recovered from the effects of this action, the policemen renewed their efforts and were soon directly behind the speeding car. Desperate to bring this lethally dangerous situation to a sudden end, the constable in the passenger seat took out his service pistol and fired a warning shot into the ground. As this had no effect, he endeavoured to hit the tyres of the car in front. Six shots to this effect were unsuccessfully fired. Then the driver drew his pistol, rested it on the car's wing mirror and commenced shooting at the driver of the other vehicle. At first he aimed low, but gradually shot higher until the rear window of the vehicle was shattered and it careered off the road to come to a stop. They found the driver dead with two

bullet wounds, one in the pelvis and one in the neck; a subsequent analysis of the deceased's blood showed that he was heavily under the influence of liquor when the incident occurred.

The plaintiff (respondent) was the wife of the deceased. She claimed compensation from the defendant (appellant) for the loss suffered by her and her two minor children in consequence of her husband's death. In the court *a quo* Goldblatt J, in dealing with the issue of liability as such (the *quantum* question was held over, pending the outcome of the main issue), decided in her favour by holding that no justification for killing the deceased existed. The defendant's appeal against this judgment was rejected by the Full Court.

2 Evaluation of Full Court's judgment

2 1 Introduction

The unanimous judgment of the Full Court was handed down by Nugent J. At the outset (292F) he pointed out that section 49 of the Criminal Procedure Act 51 of 1977, which authorises the use of force which is reasonably necessary to prevent a person from avoiding arrest, did not apply in the present case, because there was no immediate danger that the deceased would evade the policemen in the long run. The court rather had to express itself on the issue whether the policeman who fired the fatal shots acted within the confines of private defence as a ground of justification. Far from busying himself with the general requirements for such defence to be successful, Nugent J formulated the particular question crisply as follows:

> "He [the deceased] was shot because of the danger which his conduct created for other users of the road ... He [the policeman] said that his purpose in doing so [shooting at the deceased] was to prevent the vehicle from entering the blind curve which it was approaching. He believed that if one or more vehicles were to be approaching in the opposite direction when the [deceased's car] entered the curve, there was likely to be a collision with fatal consequences. *The question then is whether the presence of that risk justified killing the deceased*" (292F–H; italics supplied).

2 2 Court's application of sources

Although the question whether private defence can be invoked in a particular set of circumstances and, if so, whether the bounds of the defence have not been exceeded by the party pleading it, has on numerous occasions been examined by South African textbook writers and academics in legal journals, one finds no references to contemporary South African legal writing in this judgment. After merely referring to the well-known criminal cases of *R v Molife* 1940 AD 202 204 and *R v Patel* 1959 3 SA 121 (A) 123A (292J) and quoting four lines from *R v Attwood* 1946 AD 331 340 (293A) in support of the contention that homicide in self-defence (or in defence of another) can be justified under appropriate circumstances, Nugent J chose to avail himself of quotations from two contemporary textbooks on the English law of torts, viz *Salmond and Heuston on Torts* (1987) 142 and the slightly outdated *Pollock on Torts* (1951) 123. One page further, the American *Restatement* vol 1 par 66, and two famous American textbooks, *Prosser on Torts* (1971) par 19 and *Fleming on Torts* (1992) 84 fn 67 are quoted, together with the only reference to a modern South African work, *Law of delict* (1994) 71 by Neethling, Potgieter and Visser in an endeavour to justify making a distinction between those cases where the defence is directed

against a deliberate attack on the one hand, and a negligent attack on the other (which purported distinction will be commented upon *post*). In total five foreign (academic) works were quoted, against one South African (academic) source.

To my mind the most encompassing South African reference work, which should have been referred to, is without any doubt *The law of delict: Volume 1 (Aquilian liability)* (1984) by the late Professor PQR Boberg. The topics of defence, self-defence and necessity are most lucidly described and distinguished from one another, with copious references to academic writing (see 787 *et seq* in part 789 794–795 where a plethora of South African academic writing is referred to). Even the most superficial glance over the sources quoted warrants the conclusion that the questions under consideration could have been answered without a reference to English and American sources. Without wishing to revive the battle between "purists", "pragmatists" and "pollutionists" (see Mulligan 1952 *SALJ* 25; Edwards *The history of South African law – An outline* (1996) 95 *et seq*) it is none the less to be lamented that foreign sources dominate in the face of such an overwhelming flood of local learning. (In Boberg's work, completed 14 years ago, in excess of 30 contemporary sources on private defence alone, are quoted within the confines of one page! (794–795).) Leaving aside modern South African textbooks on criminal law, one finds that the shelves of most of our legal practitioners reveal copies of local textbooks on the law of delict (if we confine ourselves to the authors, we may refer to Van der Walt and Midgley, Van der Merwe and Olivier, McKerron and Burchell in addition to the two already referred to). The law of delict is certainly one of the branches of private law most frequently written about.

The status of English law as "foreign law" was settled by our Appellate Division as long ago as 1964 (*Schlesinger v Commissioner for Inland Revenue* 1964 3 SA 389 (A) 396G: "Inasmuch as English law is foreign law, our Courts cannot take judicial notice of it." See also the famous (notorious to some) judgment of *Trust Bank van Afrika Beperk v Eksteen* 1964 3 SA 402 (A) 411). For purposes of the present discussion I shall conclude by referring to a *dictum* from a contemporary introductory student textbook, which summarises our approach to English law (*a fortiori* to secondary English sources) in a balanced, but firm way (*Introduction to South African law and legal theory* by Hosten, Edwards, Bosman and Church (1995) 435):

> "[I]t is believed that although South African law is indeed a hybrid legal system, this is no ground for asserting that English law, notwithstanding its considerable influence on the structure of South African legal practice, should be regarded as an ancillary common law."

2 3 Court's decision on excessive use of lethal force

2 3 1 Application of English authority

As already pointed out, Nugent J relied heavily on English authority as basis for his judgment. *Salmond and Heuston* (*loc cit*) was quoted extensively in support of the following statement:

> "For the defence to succeed then, the force which was used must not only be necessary, but it must also not be excessive. It ought not to be thought that, once there is some risk of death or injury, resort may necessarily be had to lethal force merely because that is the only means available to repel the risk" (293C–D).

The second sentence from the quote expresses the judge's view that a balancing of possibilities/probabilities has to take place, in order to decide whether the

force used in private defence was excessive. Thus he in fact suggested that if the possibility of death flowing from the unlawful attack is not so great, the defender is not entitled to employ lethal force to repel the attack (although this may well result in the person unlawfully attacked being killed in the final instance – in such event the ensuing death will probably have to be accepted as unavoidable in law!) This line of reasoning is clearly borne out in the following sentences:

> "Certainly there was some risk that another vehicle would be approaching when the Ford [the wrongful attacker's car] entered the curve, and that a fatal accident could occur. *I have accepted too that the only means by which the vehicle could have been prevented from entering the curve was by killing the driver* (293G; italics supplied).

It is suggested that the words from *Salmond and Heuston* (in particular the statement that "[f]orce is not reasonable if it is . . . (ii) disproportionate to the evil to be prevented") are definitely not authority for Nugent J's statement thus far. This is clearly borne out when those authors immediately employ examples to explain the rules they have formulated (142–143):

> "Still, 'If you are attacked with a deadly weapon you can defend yourself with a deadly weapon or with any other weapon which may protect your life. The law does not concern itself with niceties in such matters' (quoted from *Turner v M-G-M Pictures Ltd* [1950] 1 All ER 449 471) . . . He on whom an assault is threatened or committed is not bound to adopt an attitude of passive defence: 'I am not bound to wait until the other has given a blow, for perhaps it would come too late afterwards' (quoted from the *Chaplain of Gray's Inn's Case* 1400 YB 2 Hen IV of 8 pl 40)."

The previous (18th) edition of this work contains a further quotation which has been excised from the present, no doubt for mere reasons of conciseness, but which is worthy of mention in this context:

> "'A man cannot justify a maim for every assault; as if A strike B, B cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in probability the life may be in danger'" (quoted from *Cook v Beal* (1697) 1 Ld Raym 176 177).

The first example from the 19th and the one from the 18th edition merely demonstrate that in assessing the ambit to which private defence will be tolerated in law, regard should be had to the nature of the interest threatened by the wrongful attack on the one, and the nature of the attacker's interest infringed by the person acting in defence, on the other hand. Thus in the above-mentioned first example, the threatened interest is the attacked person's life; this justifies countermeasures by means of a deadly weapon, which implies that the taking of the attacker's life will not *per se* be regarded as an excessive measure. (These are principles well-known to South African law and no recourse to textbooks on tort law need to have been made: see, eg, *Ex parte die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A) 498A; Boberg 789; Neethling, Potgieter and Visser 74; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 75.) Likewise, it is demonstrated in the example from the 18th edition that where a mild assault will at most give rise to a slight infringement of the threatened person's bodily integrity, the law will not tolerate a drastic countermeasure such as slashing off the attacker's hand. Ironically, the second quotation employed by *Salmond and Heuston* in the 19th edition (from the *Chaplain's* case) rather serves as justification for holding the view that the policemen did in fact *not* exceed the bounds of private defence – in contrast Nugent J expected them "to wait until the other has given a blow (to an unfortunate third-party road user) . . ."

It is suggested that the quotation from *Pollock on Torts* (293E) likewise serves no purpose other than to reiterate the recognised principle of our law of delict that the interest infringed by the defender's act should not clearly be inferior out of all proportion in relation to the interest of the attacker which was sacrificed in the process of defence. This is most lucidly borne out in the three brief sentences (123) following directly upon that quoted by Nugent J:

> "We say apparent, for a man cannot be held to form a precise judgment under such conditions. The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary. Thus it is not justifiable to use a deadly weapon to repel a push or a blow with the hand."

2 3 2 Underestimating of threatened interest and erroneous application of *boni mores* test

The court's ineffective application of sources aside, one is bound to ask what the true conflicting interests in the present case were. One can come to no other conclusion than the life of the deceased had to be weighed up, in the first instance, against the life *or lives* of other users of the road who were threatened by the deceased's unlawful attack. Seen in this light, there is no question of any disparity. One should further bear in mind that our law even warrants the taking of life *if it presents the only means by which property can be protected* (*Van Wyk's* case *supra*). Thus even the fact that the deceased's actions threatened the purely proprietary interests of other motorists should have been taken into consideration in assessing the policeman's counter-measure – the likelihood of enormous damage to vehicles travelling in the right direction, after having been struck by the deceased's vehicle, can hardly be ignored. The court paid no attention to this further consideration. To my mind, there is thus no justification whatsoever for the following sweeping statement by Nugent J (293C):

> "It ought not to be thought that, once there is some risk of death or injury, resort may necessarily be had to lethal force merely because that is the only means available to repel the risk."

To this sentence he immediately added the following (293D):

> "To the extent that this may be what is suggested by the *dictum* in *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) at 530D, in my view, it does not accord with the decisions to which I have referred."

The dictum from the *Ntsomi* case referred to, reads as follows:

> "Thus, if an offender attacks a policeman who has a dangerous weapon such as a shotgun in his hands, he has only himself to blame if the gun is used in self-defence."

Nugent J did not explain why the contention that a resort to lethal force may not necessarily be had merely because that is the only means available to repel the risk is not in accordance with the judgments in *R v Molife supra*, *R v Attwood supra* and *R v Patel supra*. Nor did he offer any further substantiation why an interpretation of the *dictum* from *Ntsomi's* case adverse to his own point of view would be erroneous. (For a critical discussion of certain aspects of the *Ntsomi* case, see Scott 1991 *THRHR* 299.)

In my opinion the court erred in its finding that the policemen exceeded the bounds of private defence, in two main respects: first, the judge underestimated the interests which had been wrongfully threatened by the attack and consequently downplayed the possible results of the attacker's actions with regard to

the infringement of life, limb and property of other road users; and, secondly, it incorrectly applied the *boni mores* test for wrongfulness to the facts.

With respect to the former point of criticism, the court's emphasis on the question revolving around the *possibility or probability* of a fatal accident occurring as a result of the deceased's wrongful conduct detracts from the importance of the interest protected by the policemen's actions – the lives (or even property) of innocent road users. When Nugent J agreed with the trial court judge that the danger against which one may lawfully protect (and even kill) in order to save human life must be *real and imminent* (294C), he expressed the opinion that such an approach "is in keeping with contemporary notions of the value to be attached to human life" (*ibid*). However, it is clear that the human life foremost in his mind, was that of the attacker which was lost as a result of the policeman's actions. In my opinion the court did not accord the potential loss of life by innocent third parties, threatened by the attacker's actions, its rightful weight. It is most significant that the type of danger that presented itself in the instant case is regarded as so serious on the European continent, that a special name has been coined for a motorist driving against the traffic on a freeway. The Germans refer to a *Geisterfahrer* and the Dutch to a *spookrijder*. (See, eg, Duden *Das groβe Wörterbuch der deutschen Sprache* (1977) *sv* "Geisterfahrer": "Sogenannte G., die auf der falschen Autobahnseite chauffieren und stets tödliche Gefahr bedeuten"; Van Dale *Groot woordenboek der Nederlandse taal* (1992) *sv* "spookrijder": "automobilist die op een eenrichtingsweg in de verbode rijrichting rijdt, m.n. op autosnelwegen".) The use of the term *ghost driver* speaks for itself: long experience has taught that driving on the wrong lane of a freeway usually results in someone's death. A European legal practitioner would undoubtedly not hesitate to furnish the conduct of a ghost driver as one of the best examples of conduct presenting a "real and imminent danger" (in accordance with the maxim of *res ipsa loquitur*).

As regards the court's application of the *boni mores* test for wrongfulness (and thus for the ground of justification of private defence), the court did emphasise the objective character thereof, but then proceeded to advocate a more subjective approach, in keeping with a practice which had been developed specifically in the sphere of private defence:

> "What must be asked is whether the reasonable man in the position of the actor would have considered that there was a real risk that death or serious injury was imminent" (294C–D).

The nature of the objective test for establishing wrongfulness (or, conversely, the presence of a ground of justification) and the distinction of this test from that of the reasonable man for establishing the presence or absence of negligence have been scrutinised on many occasions by South African academic writers (see, eg, Boberg 795 *et seq*; Neethling, Potgieter and Visser 70; Van der Merwe and Olivier 72; Burchell *Principles of delict* (1993) 74; Van der Walt and Midgley *Delict – Principles and cases* (1997) 99). That the words of Nugent J on the method of employing the objective test do not in fact describe a purely objective test, is clearly evident; but this does not imply that the judge erred in his formulation of the test as it is usually applied in this context. I am of the opinion that the following exposition (Skeen "Criminal law" in Joubert (ed) 6 *LAWSA* (First reissue 1996) 46) is a fairly accurate description of the established court practice in this respect:

> "The approach to the question of unlawfulness in private defence is . . . not purely objective, in that the courts determine, not the real nature of the attack and

> concomitant danger ex post facto, but the attack and danger as they would have been perceived by a reasonable man. Because the criterion of the reasonable man is also applied to determine *mens rea* in the form of negligence, it appears that the approach of the courts to the question of unlawfulness in defence fails to distinguish between unlawfulness and negligence as separate elements . . ."

This current practice therefore fails to distinguish adequately between the diagnostic *boni mores* test for wrongfulness and the prognostic *reasonable man* test for negligence (at least, insofar as the first tier of the latter test, viz that of reasonable foreseeability, is concerned – cf Neethling, Potgieter and Visser 122 130 *et seq* 143 *et seq*). Although the reasonableness test for negligence is usually less strict than the diagnostic *boni mores* criterion, one does not experience any "mellowing" in the present case. In fact, the court expected an extremely cool and collected evaluation of the balancing of different possibilities in the heat of the moment from the policemen concerned. This is very far from the robust approach advocated by Holmes JA in the leading case of *S v Ntuli* 1975 1 SA 429 (A) 437E:

> "In applying these formulations to the flesh and blood facts the Court adopts a robust approach, not seeking to measure with nice intellectual callipers the precise bounds of legitimate self-defence or the foreseeability or foresight of resultant death."

It would appear that the method employed by the court rather resembles a test which seems more suited to evaluate the presence and ambit of the defence of necessity, where the law is much more strict in its approach towards the defendant. Boberg (789) lucidly explains the fundamental difference between the tests for private defence and necessity:

> "Yet there is this crucial difference between the defences: Whereas necessity will 'hardly ever' justify the taking of a human life . . . it has been held that [private] defence may do so even to protect property . . . *A fortiori* will [private] defence of one's own or another's life justify killing the aggressor, if this be reasonably necessary in the circumstances . . . This remarkable difference between necessity and [private] defence rests on the policy consideration that, whereas the victim of necessity is innocent, the victim of [private] defence is himself an unlawful aggressor, in some degree unworthy of the law's protection. The victim's own turpitude is therefore the key to this differential treatment – an important criterion when deciding whether a particular situation is one of necessity or [private] defence . . ."

It is quite evident that this distinction is not borne out in the judgment of Nugent J.

2 4 Court's evaluation of nature and possible effect of deceased's conduct

In terms of our law, the person pleading private defence does not have to prove that the aggressor acted intentionally or negligently: fault on the aggressor's part is not a requirement (Neethling, Potgieter and Visser 71). And yet, in the most remarkable fashion the court does place the degree of fault of the deceased aggressor under scrutiny, in order to draw a conclusion on the question of whether the deceased's conduct constituted a real and imminent risk to other motorists. Nugent J expressed himself as follows (294D–E):

> "The problem most often arises where harm to life or limb is deliberately threatened, and in such cases it might readily be assumed that the threat will be carried to its conclusion if it is not interrupted. While harm caused by negligence is also unlawful (*sic*) and may be defended against . . . the very nature of the conduct which is in issue in cases of negligence is such that it ought not to be as readily assumed that the apparent threat will in due course manifest itself in harm."

No further explanation for this startling proposition is offered. A simple example will show that the degree of fault of a transgressor need not have any bearing at all on the evaluation of the possible results of such person's conduct: Person A wishes to kill X, his arch-enemy. He takes aim at X with an obsolete .22 rifle, over a distance of 800 metres, on a windy day. It does not need an expert to tell that the chances of A's intentional conduct killing X is virtually nil. However, if the absent-minded B inadvertently speeds into the wrong lane of the Pretoria-Johannesburg highway at an off-ramp at 8:30, the chance of a fatal accident occurring is substantial.

Although the judge did in fact at an earlier stage correctly conclude that the state of mind of the deceased is not material (292C–D), his emphasis on the distinction between an aggressor's intentional and negligent act confounded his application of that principle to the present facts.

2 5 Court's failure to appreciate policeman's duty towards public

It was argued on behalf of the Minister of Law and Order that, under the circumstances, the policeman who had shot the deceased would have been guilty of a dereliction of duty and would even have exposed himself to civil liability for the consequences of a possible collision, had he not stopped the speeding motorist (see 293H). This contention was summarily dismissed by the court as follows (239H–I):

> "I doubt that this is so. He [the policeman] had done nothing to create the danger, and our law seldom recognises liability for mere omissions. Although in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597 Rumpff CJ said that there are circumstances in which a mere omission will be actionable, in my view, the circumstances in which that will apply do not necessarily coincide with the circumstances which are required to exist in order for an otherwise unlawful act to be justified. However, even if I am wrong in that respect, to ask whether [the policeman] had a duty to act as he did would beg the question which we are called upon to decide."

The following points of criticism can be levelled against Nugent J's exposition of the delictual principles pertaining to liability for omissions:

First, it would appear that the judge regards the prior conduct basis for actionable omissions as still being the rule. It is, however, generally accepted today that other factors may be equally strong indicators of a duty to act positively: Neethling, Potgieter and Visser (51–64) convincingly point out that the present position in our law of delict is that no fewer than six additional such considerations exist (the history of the demise of the prior conduct principle is well-known: see, in addition, Boberg 210 *et seq*).

Secondly, the term "mere omission" is not correctly applied here: there can never be liability for a mere omission, because such omission is one where no legal duty to act positively existed. It would appear that Nugent J regards all omissions, even those giving rise to liability, as "mere omissions" if they are not preceded by a previous positive act (*commissio*). This approach of the court is not in accordance with modern notions regarding liability for omissions in South Africa (the *Ewels* case, to which reference is made, makes that clear).

Thirdly, the judge's opinion that the reasonableness test for wrongfulness in the case of omissions may vary from the same test in the event of ascertaining whether a ground of justification exists, emphasises the deviation from the

normal *boni mores* test when we are concerned with the defence of private defence (see my discussion and reference to Skeen under 2 3 2 *ante*).

Fourthly, the judge's remark that a scrutiny of the policeman's possible duty to act would beg the question, seriously undermines an accepted line of argumentation which is traditional and commonplace in any court of law – the *argumentum a contrario* (conclusion arrived at by way of contrast). The judgment of Van Winsen AJ in *Ntanjana v Vorster & Minister of Justice* 1950 4 398 (C) 407C–D, a case in which it was held that a policeman lawfully shot someone who was resisting arrest, directly contradicts Nugent J's approach in this respect:

> "Before considering whether the action actually taken fell within the legitimate bounds of self-defence, I might say that this is not a case where the necessity of taking any action at all could be avoided by the police beating a retreat. *Not only was it their duty to arrest the deceased and not retreat, but in any event, if it could be argued that such would have been their proper course, retreat would clearly have been fraught with danger and in such circumstances the law would not have required of them that they retreat . . .*" (italics supplied).

Furthermore, one is well reminded of the fact that the Minister was held liable for the omission of a police officer in the *Ewels* case *supra*, because of that policeman's failure to act in accordance with a duty thrust upon him by law. Modern commentators (eg Neethling, Potgieter and Visser 63) maintain that that judgment is open to an interpretation that the policeman's duty may be deduced from three sources, namely the statutory duty to prevent crime (see s 5 of the Police Act 7 of 1958), from the special relationship that exists between a policeman and the ordinary citizen, and from the public office which the policeman holds. It is not far-fetched to say that a policeman thus bears a triple burden to act in the protection of citizens!

The *Ntsomi* case *supra* to which Nugent J referred with grave reservations (293C–D) is also a case in point. There the court found that a policeman who had shot an assailant with a shotgun had acted in self-defence – the crux of the matter lay in the fact that the policeman's life and limb had been under wrongful attack. A further "police" case worth mentioning is *Nkumbi v Minister of Law and Order* 1991 3 SA 29 (E) where the court found that three heavily-armed policemen had behaved wrongfully in failing to protect the plaintiff and her husband against a hostile crowd.

2 6 Fault as requirement for delictual liability

In the court *a quo* it was held "that the killing of the deceased was not justified and that the appellant was *accordingly* liable to the respondent" (292E). In dismissing the appeal, and failing to add anything to this preliminary remark, Nugent J by implication accepted that the Minister was liable, in spite of the fact that no mention had been made of fault as a requirement of liability. This now apparently means that by succeeding in warding off a defendant's plea of private defence, a plaintiff can dispense with proof of intent or negligence on the defendant's part!

As regards intent (*dolus malus*) on the policeman's part, one can readily assume that he was at all times under the impression that his actions were justified (the facts of the case bear testimony to this: first the chase with flashing lights, subsequently the shooting at tyres and, only as a last resort, the fatal shot). Thus it is fairly certain that a finding of *dolus* would not have been made, because the

element of consciousness of wrongfulness would be absent (see, eg, *S v De Blom* 1977 3 SA 513 (A); cf Neethling, Potgieter and Visser 119–120).

With respect to negligence on the policeman's part, I am of the opinion that the similarity between the tests for wrongfulness and negligence in the type of situation under discussion exists in relation only to the first tier of the *diligens paterfamilias* test, that is, the question of reasonable foreseeability. The second tier of that test, namely whether the *diligens paterfamilias* would have taken reasonable steps to avoid the loss suffered by the plaintiff, which steps the defendant failed to take, cannot be so easily assimilated with the *boni mores* test for wrongfulness. (For the standard formulation of the reasonable man test, see the leading judgment in *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F). For instance, here it would be of the utmost importance to bear in mind that we are concerned with a policeman, and thus the standard mode of conduct of a reasonable policeman would be applied in dealing with possible measures to avoid or counter the loss in question. It is well established that an expert's conduct will be evaluated in accordance with the yardstick of the reasonable expert in the field, in accordance with the maxim *imperitia culpae adnumeratur* (see eg Midgley *Lawyers' professional liability* (1992) 121 125–126). To my mind, the reasonable policeman would in all probability endeavour to stop the wrongful attack, and he would do so by employing the skills he had been taught. The judge did refer to this in an offhand way in setting out the facts, when he mentioned that "[t]raining and experience had told [the policeman] that he should not draw alongside or ahead of a vehicle in a situation like this, to avoid the danger of being fired upon or forced off the road" (291C). Furthermore, one can add to this that the reasonable policeman will act in conformity with the measures contained in the Police Act, specifically those defining the functions of the police. Section 5(d) mentions "the prevention of crime" as one of the four main functions. This should be a consideration in assessing the policeman's actions in order to ascertain whether his actions fell short of the second tier of the reasonable man test for negligence, just as it should first have come under consideration in ascertaining whether a duty to act existed. As was stated by the court itself, the only effective way in which the policeman could have stopped the deceased from further constituting a danger to other road-users, was by shooting him (293G). Had the policeman chosen not to avail himself of this opportunity, he would have been guilty of a dereliction of duty, in that he would have contravened section 5(d) and allowed a situation "fraught with danger" to other motorists to continue (cf the *dictum* from *Ntanjana*'s case quoted under 2 5 *ante*). It is open to doubt whether a court of law, specifically charged with the task of expressing itself on the element of negligence, would find that the policeman in the present case acted negligently.

3 Conclusion

The discussion above centres around the court's application of certain well-known delictual principles. Unfortunately, the conclusion has to be reached that the court failed to apply those principles correctly: it has been shown that doubts can be cast over most of the findings pertaining to the delictual elements of conduct (omissions, in particular) and the bounds of private defence as a ground of justification (a specific application of the test for wrongfulness). The lack of any decision with regard to fault on the policeman's part has also been criticised.

However, a policy aspect which should not be overlooked, and which contains grave dangers for future policing activities, revolves around the standard of

conduct the court expects from a policeman acting in a situation of imminent peril. One cannot escape the conclusion that the court moved in the direction of the pure armchair test, in direct contrast with a long line of authorities actually warning about such a method of evaluation. In the present crime-ridden South Africa, it can only bode further ill if our policemen are to be held liable for actions such as that which came under scrutiny in the present case. The outcome would be that the "prudent policeman" would then prefer to opt for a dereliction of duty, rather than risking civil or criminal liability for performing his duty to the best of his ability.

It is hoped that this judgment will not set a new trend in evaluating the boundaries of private defence in our law of delict and criminal law.

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GOOD FAITH AND PROCEDURAL UNFAIRNESS IN CONTRACT

Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman
1997 4 SA 302 (A)

"It is unlikely that *Bank of Lisbon* will remain the last word on the matter of good faith and contract law" (Zimmermann "Good faith and equity" in Zimmermann and Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 256). These words have proved to be prophetic in the light of the recent decision handed down by the Supreme Court of Appeal in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman*.

The facts of this case were, briefly, as follows: On 2 May 1989, one Mrs Malherbe signed a deed of suretyship in favour of First National Bank for the debts of a company known as Dalsig Mynbou Bpk. She also ceded her rights under certain share certificates to the Bank as security for the company's debts. Mrs Malherbe's son Willem held a financial interest in the company, as well as being a director. It transpired that Mrs Malherbe had agreed to stand surety for the company's debts at the behest of her son. In June 1991 Dalsig Mynbou Bpk was liquidated. The Bank informed Mrs Malherbe that it intended to enforce the surety contract, and that as a result, it was likely that it would have to sell the shares she had ceded to them as security for the debt (312B). Matters were complicated, however, when in September 1991, in an application brought by the respondent (Mrs Malherbe's daughter), a court held that Mrs Malherbe was no longer fit to conduct her affairs, and the respondent was appointed her *curatrix bonis* (312I). The respondent immediately sought an order to compel First National Bank to return the share certificates. The Bank in turn submitted a counterclaim for the shares, based on the deed of suretyship and the accompanying cession agreement. In the court *a quo*, Conradie J held that on the date when

Mrs Malherbe signed the deed of surety and the cession agreement, she was mentally ill ("geestesongesteld" (307)) and therefore could not be bound by the terms of the agreement since she had lacked contractual capacity (314F). In the premises, the judge declared the surety agreement and cession a nullity, ordered the share certificates to be returned to Mrs Saayman, and dismissed the Bank's counterclaim (307A).

The Bank appealed against the decision of the Cape High Court. The appeal was ultimately unsuccessful. Streicher AJA (who delivered the majority judgment, Hefer, Vivier and Zulman JJA concurring) confined himself crisply to the issue of whether Mrs Malherbe had the requisite contractual capacity at the time she had entered into the contract, in line with the approach taken by the court *a quo*. The judge endorsed the views of Innes CJ in *Pheasant v Warne* 1922 AD 481 488 that it is a *sine qua non* of any valid contract that the parties have contractual capacity, and that (314I–J)

> "a court of law called upon to decide a question of contractual liability depending on mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction which he purported to enter".

Streicher AJA conducted a detailed analysis of the facts and circumstances that had led to Mrs Malherbe signing the deed of surety and cession, as well as dissecting the expert psychiatric evidence that had been led on both sides concerning Mrs Malherbe's state of mind at the time the contract was signed. He concluded that the respondent had indeed proved on a balance of probability that her mother had been mentally ill at the time the contract had been signed, that she did not appreciate the implications of the documents which she had signed, and that she therefore lacked the contractual capacity necessary for the agreements to be valid (315B–C 318E). This was held to be so for a number of reasons: At the time Mrs Malherbe signed the contracts, she was eighty-five years old, partially blind and hard of hearing, had suffered since 1975 from various neurological afflictions, and had hardly left her home since being assaulted on a shopping excursion in July 1988. After this incident, she no longer even conducted the most simple transactions, leaving all her day-to-day business to her daughter. Her behaviour in signing the deed of surety and cession was described as being contrary to the nature of a person who had always lived frugally, and was indeed dependent upon the income derived from her share portfolio for financial support. The fact that Mrs Malherbe could have derived no personal benefit whatsoever from the contract was held to be particularly significant. The evidence gleaned from the entry in Mrs Malherbe's personal diary on 2 May 1989 indicated quite clearly to the majority of the court that she had no inkling of the possible consequences of signing the contracts. In the end, Streicher AJA described Mrs Malherbe as more of a "bewysstuk" than a "getuie" (308G). The majority therefore agreed with the judge in the court *a quo* that Mrs Malherbe had no contractual capacity on 2 May 1989, and as a result, the appeal was dismissed with costs (318F).

Olivier JA (who delivered a separate, concurring minority judgment) also found for the respondent, but for completely different reasons. It is the opinions of Olivier JA to which I intend to confine myself in the remainder of this note. He held that he was not convinced that the respondent had satisfied the burden of proving that Mrs Malherbe had indeed lacked contractual capacity (318H). Nevertheless, he held that the appeal still had to fail when he measured the way

in which the contract had been concluded against the principles of *bona fides* (318I). Olivier JA described the role of *bona fides* as "eenvoudig om gemeenskapsopvattings ten aansien van behoorlikheid, redelikheid en billikheid in die kontraktereg te verwesenlik" (319B).

First, Olivier JA conducted a comprehensive and detailed analysis of how the Appellate Division has historically taken the lead both in recognising and indeed applying the doctrine of good faith in the law of contract (see *Neugebauer & Co Ltd v Hermann* 1923 AD 564; *Macduff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A)). His lordship felt constrained to disagree with the *dictum* of Kotzé JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 to the effect that "[e]quitable principles are only of force insofar as they have become authoritatively incorporated as rules of positive law" (295). He held, in the spirit of Innes CJ's celebrated comments in *Blower v Van Noorden* 1909 TS 890 905 that this view postulates a static, closed system of law based on rules alone; that this was not in keeping with the spirit of our law, and would unduly compromise the process of evolution that is the hallmark of any growing legal system (319J–320B). The judge preferred to champion the many cases where the dictates of public policy have played an active role in re-shaping the law of contract (321I) and concluded that the principles of *bona fides*, which are based on the legal convictions of the community, play a "wye en onmiskenbare rol in die kontraktereg" (321J–322A).

Secondly, the judge held that there is a close connection between the doctrine of *bona fides*, and those of public policy, public interest, and *iusta causa* (322C). In law, the relationship between such concepts, and the differences (if any) between them are not always clear (Zimmermann in *Southern cross* 259 fn 326). Olivier JA submitted that the *bona fides* principle forms an element of the umbrella concept that is public policy. Courts should apply the notion of good faith to all contracts because public policy demands that this should be so (322E).

Thirdly, Olivier JA felt constrained to discuss the thorny issue of the *exceptio doli generalis*, since the debate concerning the continued existence or otherwise of this defence is inextricably linked to the concept of *bona fides*. The judge confirmed the view of the majority in the case of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) that the need for a remedy like the *exceptio doli generalis* had fallen away, since all contracts in our law are *negotiae bonae fidei*, and must automatically comply with the dictates of good faith (322G). Olivier JA recognised that the problem most commentators have with *Bank of Lisbon v De Ornelas* is that it can be interpreted to mean that there exists no equitable jurisdiction based upon good faith at all in our law (see the judgment at 605I–606D, and Van der Merwe, Lubbe and Van Huyssteen "The *exceptio doli generalis: Requiescat in pace – vivat aequitas*" 1989 *SALJ* 240; Zimmermann in *Southern cross* 255). However, Olivier JA opined that it was never the intention of the majority in *Bank of Lisbon v De Ornelas* to say this at all. On the contrary, he showed that the Appellate Division had continued, after that case, actively to employ the dictates of good faith in deciding contractual disputes, although often under the guise of public policy and the public interest (*Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A); *LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 (A)). Therefore, Olivier JA felt justified in applying the principles of public policy (which by definition include the precepts of good faith) to a dispute over a suretyship

agreement and cession – fields of law in which the principles of public policy have been championed in recent years (see eg *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A)). His lordship summed up his thesis succinctly as follows (326G):

> "Ek hou dit as my oortuiging na dat die beginsels van die goeie trou, gegrond op openbare beleid, steeds in ons kontraktereg 'n belangrike rol speel en moet speel, soos in enige regstelsel wat gevoelig is vir die opvattinge van die gemeenskap, wat die uiteindelike skepper en gebruiker is, met betrekking tot die morele en sedelike waardes van regverdigheid, billikheid en behoorlikheid."

For the purposes of comparison, as well as reinforcement, it was shown that in the civil codes of France, Germany and the Netherlands, the good faith principle has become one of the cornerstones of the law of contract. In these civilian systems, a rule has emerged that where a contractant is unlikely to understand the import of what is being signed, or there is a possibility of a third party (or even a family member) pressurising the contractant into signing the agreement, it is the duty of the creditor to ensure that the debtor is made fully aware of the nature of the agreement and its possible consequences, and agrees to become a party to the contract on the basis of such information. A failure to act in this way is contrary to good faith, and renders the contract unenforceable (Olivier JA referred to *Hajziani v Van Woerden* HR 1983-01-14; NJ 1983: 457; *Hajjout v Ijmah Metaalwarenfabriek* HR 1983-04-15: NJ 1983: 458 in this regard).

The same rule has evolved in English law. In *Kingsnorth Trust Ltd v Bell* 1986 1 All ER 423 (CA) Dillon LJ held that where creditors demand that a mortgage bond be passed in their favour as security for a debt, and the bond has implications for a third party (in that case, a wife married in community of property to the debtor), the creditors must grant the third party an opportunity to seek independent legal advice before signing the contract, for their protection. This equitable rule was restated by Scott LJ in *Barclays Bank plc v O'Brien* 1992 4 All ER 983 (CA) as follows (1008e–g):

> "In cases falling within this protected class, equity would hold the security given by the surety to be unenforceable by the creditor if: (i) the relationship between the debtor and the surety and the consequent likelihood of influence and reliance was known to the creditor; and (ii) the surety's consent to the transaction was procured by undue influence or material misrepresentation on the part of the debtor or the surety lacked an adequate understanding of the nature and effect of the transaction; and (iii) the creditor, whether by leaving it to the debtor to deal with the surety or otherwise, had failed to take reasonable steps to try and ensure that the surety entered into the transaction with an adequate understanding of the nature and effect of the transaction and that the surety's consent was a true and informed one."

Olivier JA held that equitable notions of good faith required that the selfsame rule should apply in South African law – public policy requires that where a surety is quite obviously elderly and suffering from physical and psychological deterioration, and is therefore unlikely to understand the nature of the agreement, or where the surety is either a spouse or elderly parent of the debtor, the creditor himself must take pains to ensure that the contract is explained to the surety, and that the surety fully understands the implications of the deed of suretyship, and any possible cessions that might attach to it (331E–F). The creditor should do this either by carefully explaining the position to the surety, or by encouraging the surety to seek independent legal advice (331G).

Turning to the facts of the case, the judge held that no such steps had been taken by the Bank. Mrs Malherbe was eighty-five, almost deaf and blind, and doted upon her son Willem. Willem had exploited the situation by influencing

his mother into signing documents that could clearly be prejudical to her financial situation, although she had no idea that this was so. The appellants themselves made no effort to ensure that Mrs Malherbe understood what she was signing when she visited the Bank in Stellenbosch on 2 May 1989 – she was simply handed the papers, and she appended her signature without even reading the contents. Olivier JA therefore held that the Bank had not discharged its obligations as described above, and therefore the appeal had to fail (331H).

It is difficult to assess the likely impact of such a concurring minority judgment on our law, since the reasoning behind it does not form part of the court's *ratio decidendi*. However, the opinion of Olivier JA is likely to rekindle the debate about the role that the doctrine of *bona fides* has to play in the law of contract (see Van der Merwe, Lubbe and Van Huyssteen 1989 *SALJ* 235; Lewis "Towards an equitable theory of contract: The contribution of Mr Justice EL Jansen to the South African law of contract" 1991 *SALJ* 249; Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse verbintenisreg" 1990 *Stell LR* 7; Zimmermann "The law of obligations – character and influence of the civilian tradition" 1992 *Stell LR* 5). Olivier JA's reliance upon a principle of equity developed in the Netherlands and England is particularly interesting. He relied quite heavily upon the decision of the Court of Appeal in *Barclays Bank plc v O'Brien supra* to fix a duty upon banks to take reasonable steps to ensure that sureties understand the nature and effect of the contract, or even to enjoin them to seek independent legal advice if the bank surmises that the surety may not understand the implications of the contract, or is likely to be influenced into contracting by the relative. His lordship seems to have overlooked the fact that the case went on appeal to the House of Lords (*Barclays Bank plc v O'Brien* 1993 4 All 417 (HL)) where Lord Browne-Wilkinson expressly rejected Scott LJ's special equity theory (428h – Lord Templeman, Lord Lowry, Lord Slynn of Hadley and Lord Woolf concurring). Lord Browne-Wilkinson preferred to use the doctrine of notice as the basis for fixing a duty upon banks to ensure that a surety enters into the transaction freely and with full knowledge of the material facts. In other words, if a creditor has either actual or constructive notice of the possibility that a wrongful act may have occurred which may affect the surety's prior rights, and contracts on that basis, the contract may be set aside. Lord Browne-Wilkinson held that a creditor should be put on inquiry by a combination of two factors: (i) the absence of financial advantage to the surety; and (ii) the presence of substantial risk that the surety has been induced into by signing the agreement as a result of some wrongful act (eg misrepresentation or undue influence) (429f–g).

The English courts have therefore preferred to reject the uncertain implications of deciding cases involving banks, mortgages and deeds of suretyship on the basis of a broad principle of special equity. The approach has generally been welcomed by commentators (Dixon "The special tenderness of equity: Undue influence and the family home" 1994 *Cam LJ* 21; Lehane "Undue influence, misrepresentation and third parties" 1994 *LQR* 167; Fehlberg "The husband, the bank, the wife and her signature" 1994 *Mod LR* 467; Goo "Enforceability of securities and guarantees after *O'Brien*" 1995 *Oxford Journal of Legal Studies* 119). In contradistinction, the first significant feature of Olivier JA's opinion is his re-assertion of the meaningful role the principles of *bona fides* have to play *in contrahendo* in South African law. Olivier JA invoked the doctrine of good faith not to strike down a term of the contract for being unfair, but because he held that the Bank's failure to act sensitively during the process of concluding

the contract rendered it unenforceable. The role of good faith *in contrahendo* had previously been championed by Jansen J in *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W). He said the following (802A):

> "It is now accepted that all contracts are *bonae fidei* . . . This involves good faith (*bona fides*) as a criterion in interpreting a contract (*Wessels*, *op cit* para 1976) and in evaluating the conduct of the parties both in respect of its performance (*Wessels* para 1997) and its antecedent negotiation."

These sentiments were echoed by Stegmann J in *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W): "The proposition that by our law all contracts are *bonae fidei*, is not confined to matters that arise after *consensus* is reached; it applies to the very process of reaching *consensus*" (198A). However, there has recently been some doubt about the precise role that good faith plays *in contrahendo* in South African law. The doubts arose out of the decision in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A), where Joubert JA held that the duty of disclosure in the realm of insurance contracts was imposed *ex lege* by the very nature of the contract of insurance, and did not originate from the general dictates of *bona fides* (433A). Olivier JA's use of the doctrine of good faith in *Saayman's* case (albeit in a minority judgment) takes a step towards addressing the uncertainties raised by the decision in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*, and reviving the position set out by Jansen J in *Meskin v Anglo-American Corporation supra*.

Despite the judicial statements referred to above, little attention has been paid to the importance of good faith in the process of negotiating and concluding contracts. In recent years, the concepts of *bona fides* and public policy have been commandeered almost exclusively to test the validity of the contract itself, or a substantive term of the contract (*Magna Alloys and Research (Pty) Ltd v Ellis* 1984 4 SA 874 (A); *Sasfin (Pty) Ltd v Beukes supra*; *Botha (now Griessel) v Finanscredit (Pty) Ltd supra*). Traditionally, a contract may be rescinded because of procedural unfairness, or improper conduct *in contrahendo*, in three instances – where the agreement is tainted by misrepresentation, duress or undue influence. Before this decision, it seems that the Appellate Division had only gone beyond these recognised grounds in one instance (Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: General principles* (1993) 73). In *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A), the Appellate Division held that where a contractant had bribed the agent of a principal to contract with him, the principal was allowed to rescind the contract, but on the basis that the other party had acted wrongfully, and had obtained the principal's consensus in an improper fashion (848C–D). The second significant feature of Olivier JA's decision in *Saayman's* case was therefore that it was the first time to my knowledge that the doctrine of *bona fides* was invoked to entitle a respondent to rescind a contract in circumstances where actions based upon misrepresentation, duress and undue influence could not be used. Cases referring to good faith *in contrahendo* have generally been concerned with misrepresentation and non-disclosure (see eg *Meskin v Anglo-American Corporation supra*; *Trust Bank Bpk v President Versekeringsmaatskappy Bpk* 1988 1 SA 546 (W)). Olivier JA's opinion not only reinforces the view gleaned from *Plaaslike Boeredienste v Chemfos Bpk supra* that the courts do not intend to restrict the grouns for rescission *in contrahendo* to the three traditional ones listed above, but also suggests that the doctrine of *bona fides* is the basis upon which future extensions might be made. (In parenthesis, one could argue that Mrs Malherbe's

son Willem was undoubtedly guilty of unduly influencing his mother into signing the contracts, but in South African law undue influence cannot operate to rescind a contract involving a third party: Hahlo and Kahn *The Union of South Africa: The development of its laws and constitution* (1960) 471; Scholtens "Undue influence" 1960 *Acta Juridica* 288. In this case the respondent was taking action against the Bank, not Willem. To have a remedy, the respondent needed to show somehow that the Bank had acted improperly – the Bank's failure to satisfy the dictates of good faith provided the basis for that conclusion.)

The fact that Olivier JA used the doctrine of *bona fides* as the cornerstone of his judgment is particularly significant in that it resembles the proposals contained in the South African Law Commission Report 47: *Unreasonable stipulations in contracts and the rectification of contracts*. As the Report currently stands, the proposal is to give the courts the jurisdiction to rescind a contract if the way in which it was concluded was "unreasonable, unconscionable or oppressive" (SALC Discussion Paper 65: *Unreasonable stipulations in contracts and the rectification of contracts* (1996); Working committee's proposed unfair contractual terms bill s 1(1) – the term "unconscionable" being used in preference to the term good faith or *bona fides* (Discussion Paper 65 21–22)). Leaving aside the difficulties of reconciling Olivier JA's proposals with the judgments in cases like *Bank of Lisbon v De Ornelas supra* and *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality supra*, the problem with invoking concepts like *bona fides* or unconscionability is one of definition. It is difficult to attach a precise meaning to these amorphous doctrines. Olivier JA's view that the doctrine of *bona fides* is designed to champion the community's desire for fairness, reasonableness and justice, and is a substratum of public policy, with respect, does not take one very far. Like the decisions in *Bank of Lisbon v De Ornelas supra* and *Sasfin (Pty) Ltd v Beukes supra*, there was no detailed examination of the policy requirements that would have to be balanced in deciding whether a particular contract is *mala fide* (see Van der Merwe, Lubbe and Van Huyssteen 1989 *SALJ* 240; Lubbe 1990 *Stell LR* 15). To go as far as the Law Commission working committee proposes, and to give the courts a *carte blanche* discretion to strike down contracts on the basis of "unconscionability" (without any guidelines as to where this would be appropriate) would in all likelihood provoke much legal and commercial uncertainty: contractual litigation would mushroom, the expectations of contracting parties could be frustrated, and the courts would in all probability differ regarding the application of such wide principles.

It is therefore submitted that equitable notions like good faith and unconscionability should be treated with the utmost caution. In *Saayman*'s case Olivier JA responsibly used the doctrine of *bona fides* as the foundation for articulating a specific rule that should be applied by banks in the process of negotiating contracts of suretyship and cession. His minority opinion is an indication that the courts may in the future feel justified in using the doctrines of public policy, good faith and unconscionability to rescind contracts tainted by procedural unfairness, and indeed for reasons other than the traditional misrepresentation, duress and undue influence. However, it is submitted that the dictates of good faith are unlikely to provide sufficient justification, nor sufficient guidelines for a paradigm shift in the way the courts will deal with the rescission of contracts entered into improperly (see in this regard Van der Merwe *et al Contract: General principles* 96). Even if they have to be "recast in the language of bona fides" (Cockrell "Substance and form in the law of contract" 1992 *SALJ* 56), it is submitted that concepts like misrepresentation, duress and undue influence will

continue to play a pivotal role in the adjudication of cases of procedural unfairness in contract. In this way some of the dangers and uncertainties alluded to above may be averted. If the doctrine of *bona fides* is going to reassert itself as a core value underlying our law of contract in the future, a cautious approach should be followed, and the law should be interpreted and applied "in a form which is principled, reflects the current requirements of society and provides as much certainty as possible" (per Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien supra* 428d).

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GEDINGSVATBAARHEID VAN SENUSKOK WEENS DIE VERNEEM VAN 'N KIND SE DOOD

Barnard v Santam Bank Bpk 1997 4 SA 1032 (T)

In hierdie saak het die eiseres ernstige emosionele skok opgedoen en gevolglike psigiese trauma ondergaan toe sy van die dood van haar jong seun in 'n motorvoertuigongeluk verneem het. Sy eis vergoeding van die verweerder, die benoemde agent ingevolge die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989, op grond daarvan dat die ongeluk deur die nalatigheid van die bestuurder van die versekerde voertuig veroorsaak is. Die aard en omvang van die persoonlikheidsnadeel wat die eiseres gely het, kan kortliks soos volg saamgevat word (sien 1038A–G): histeriese skoktoestand by verneming van die kind se dood; huil dae aaneen en kan nie slaap nie; ontvang inspuitings en slaapmiddels en gebruik kalmeermiddels; treur voortdurend; kry gereeld verskriklike nagmerries; kon vir lank nie die familieplot besoek nie; ontwikkel 'n obsessie; ondervind gereeld hoofpyne wat met naarheid, braking en ander fisiese gevolge gepaard gaan; en ly aan depressie. Die hof moes hom oor twee regsvrae uitspreek, naamlik of die skok en psigiese trauma weens die eiseres se verneming van haar seun se oorlye en die gevolge daarvan regtens verhaalbare skade verteenwoordig; en of die eiseres se getreur as gevolg van die verlies van haar seun regtens gedingsvatbare skade daarstel.

Na 'n deurvorste oorsig (1040–1066) van die belangrikste beslissings op die gebied van emosionele skok in die Suid-Afrikaanse en Engelse reg (wat ons reg betref, sien bv *Waring and Gillow Ltd v Sherborne* 1904 TS 340; *Hauman v Malmesbury Divisional Council* 1916 CPD 216; *Mulder v South British Insurance Co Ltd* 1957 2 SA 444 (W); *Bester v Commercial Union Versekeringsmpy van SA Bpk* 1973 1 SA 769 (A); *Boswell v Minister of Police* 1978 3 SA 268 (OK); *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K); *N v T* 1994 1 SA 862 (K); *Clinton-Parker v Administrator, Transvaal* 1996 2 SA 37 (W); ek mis nietemin 'n verwysing na *Gibson v Berkowitz* 1996 4 SA 1024 (W); sien in die algemeen ook Neethling, Potgieter en Visser *Deliktereg* (1996) 283 ev; Neethling *Persoonlikheidsreg* (1998) 112 ev; en wat die Engelse reg aangaan,

sien bv *McLoughlin v O'Brian* [1982] 2 All ER 298 (HL); *Hevican v Ruane* [1991] 3 All ER 65 (QB); *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 (HL)(sien Midgley "The role of foreseeability in psychiatric injury cases" 1992 *THRHR* 441 vir 'n bespreking); *Page v Smith* [1995] 2 All ER 736 (HL)), vat regter Swart sy gevolgtrekkings soos volg saam:

(1) Ten aanvang wys hy tereg daarop dat "senuskok gepaardgaande met fisiese beserings in die geykte sin van die woord of wat op fisiese manifestasies uitloop" (1066J–1067B), normaalweg nie probleme verskaf nie (vgl nietemin *Gibson v Berkowitz supra* en die bespreking van Neethling en Potgieter "Emosionele skok, juridiese kousaliteit en bydraende nalatigheid" 1997 *THRHR* 548).

(2) Fisiese impak is egter nie 'n onontbeerlike vereiste vir aanspreeklikheid weens senuskok nie (sien ook Neethling, Potgieter en Visser *Deliktereg* 284–285). Regter Swart vervolg (1067C–D):

> "Die tersaaklikheid van die afwesigheid van 'n fisiese botsing kom eerder ter sprake by die ander gevalle wat uit die regspraak blyk, te wete waar die eiser nie self in 'n botsing betrokke was nie maar, na gelang van die omstandighede, in die onmiddellike omgewing was, in persoonlike gevaar verkeer het al dan nie, die ongeluk en die nagevolge daarvan self gesien het of eers later van die nagevolge van die ongeluk gesien het of daarvan gehoor het."

In al hierdie gevalle is die maatstaf vir aanspreeklikheid weens emosionele skok redelike voorsienbaarheid. Alhoewel senuskok ook redelik voorsienbaar kan wees waar die slagoffer na die gebeurtenis van die ontstellende nuus verneem, is die feit dat die slagoffer die skokkende gebeure waargeneem of self in persoonlike gevaar van fisiese besering verkeer het, belangrike faktore wat op redelike voorsienbaarheid kan dui. Hierbenewens kan 'n verweerder nie aanspreeklikheid ontkom deur te bewys dat die eiser besonder vatbaar vir die nadelige gevolge van die skok was en dat die gevolge daarom nie redelikerwys voorsienbaar was nie (sien ook Neethling, Potgieter en Visser *Deliktereg* 285–286).

(3) Die hof (1068C–D) kom tot die slotsom dat

> "vir doeleindes van deliksaksies die onderskeid tussen fisiese en ander beserings grootliks verval het en moet die senustelsel en die psige tereg as deel van die menslike liggaam gesien word ... Uit daardie oogpunt gesien, is daar geen beginselrede waarom vir senuskok as sodanig of vir meer ernstige en permanente nagevolge daarvan nie geëis kan word nie ..."

(4) Vervolgens pas die regter die benadering van appèlregter Botha in die *Bester*-saak *supra* op die feite *in casu* toe. Ten aanvang wys hy daarop dat voorsienbaarheid by sowel nalatigheid as juridiese kousaliteit 'n rol kan speel (1068F–J). Met verwysing na juridiese kousaliteit verklaar hy (1069A–C):

> "Dit skyn, met eerbied gesê, dat Botha AR voorsienbaarheid in laasgenoemde sin in gedagte gehad het omdat hy praat van 'n nalatige handeling waarvan die moontlike gevolge voorsien sou gewees het deur die redelike persoon. Ek vind die aangeleentheid moeilik maar ek dink dat ek dit vir doeleindes hiervan nie verder hoef te neem nie. Ek dink dat die begrip 'voorsienbaarheid' vir doeleindes van hierdie saak dieselfde inhoud het. Ek dink nie dit maak 'n verskil nie of enersyds gevra word of die motorbestuurder nalatig was ten aansien van die uiteindelike gevolge omdat die redelike man in sy plek daardie gevolge sou voorsien het en of die saak benader word uit die oogpunt van die nalatige en onagsame bestuur van 'n motorvoertuig waar die bestuurder juridies aanspreeklik gehou moet word vir sekere gevolge omdat hulle voorsienbaar was."

Sy gevolgtrekking oor die kwessie van voorsienbaarheid sien dan soos volg daaruit:

(a) Eerstens is dit volgens hom duidelik dat beleidsoorwegings 'n rol speel by die vraag of 'n dader aanspreeklik gestel moet word. Dit geld wat kousaliteit en nalatigheid betref. Hy laat hierop volg (1069D–F):

> "Indien daar met voorsienbaarheid gewerk word as 'n element van nalatigheid meen ek nie dat die kwessie van beleidsoorwegings direk en as sodanig toegepas behoort te word nie omdat die vraag eerder 'n feitelike een is, nie wat die betrokke dader voorsien het of sou voorsien het nie, maar wat die fiktiewe redelike man in sy posisie met al sy goeie en slegte hoedanighede sou voorsien het. Ek glo egter dat oorwegings wat beperkings op grond van beleidsoorwegings onderlê ook 'n rol kan en behoort te speel by die vraag of die voorsienbaarheid wat ondersoek word redelik is . . . Ek dink dus nie dat voorsienbaarheid as element van nalatigheid, wat hierdie aspek betref, heeltemal uitgesonder moet word nie."

(b) Tweedens aanvaar hy dat, alhoewel dit uit 'n beginseloogpunt onnodig is om beperkende vereistes soos dié van persoonlike gevaar te stel, emosionele skok in so 'n geval normaalweg met 'n groter graad van waarskynlikheid voorsienbaar sal wees as in 'n geval waar die benadeelde die ontstellende gebeurtenis waargeneem of net daarvan verneem het (1069H–J).

(c) Alhoewel, soos gesê, beleidsoorwegings ter sprake behoort te kom, is die rol daarvan tans by nalatigheid beperk. Regter Swart verduidelik (1070A–D):

> "Dit is vir my duidelik, veral by oorsaaklikheid, dat dit hier by ons en elders nie altyd bloot oor die objektiewe feitevraag gegaan het oor wat die redelike bestuurder sou voorsien het nie en dat daar by geleentheid beleidsoorwegings ingevoer is ten einde te bepaal wat redelik is . . . Ek stem saam dat daar op die gebied van hierdie soort eis, uit die oogpunt van openbare belang, ruimte bestaan vir beperkings aan die hand van beleidsoorwegings . . . Ek dink egter nie wat nalatigheid betref, dat 'n benadering soos in *Bester* . . . veel ruimte laat vir die invoering deur 'n Hof van beperkings as sodanig weens beleidsoorwegings nie. Dit is gevolglik 'n aspek waaraan die wetgewer aandag sal moet gee."

(d) Vervolgens poog die regter om te bepaal of die eiseres behoort te slaag (1070E–J):

> "Die ongelukkige nagevolge wat die eiseres uit hierdie tragiese gebeure nagehou het, is in die alledaagse menslike ondervinding buitengewoon weens haar onbetrokkenheid by die botsing of die fisiese nagevolge daarvan. Dit sou miskien nie buitengewoon wees dat intense skok met ernstige nagevolge kan volg vir 'n persoon op wie 'n voertuig of 'n trein afpyl nie. Die posisie van die eiseres is aansienlik meer afgetrokke. Ongelukkig is selfs in die moderne lewe die dood geen ongewone verskynsel nie en dit geld ook wat betref nuus van die dood van geliefdes in motorongelukke. 'n Moeder wie se kind op 'n skooltoer gaan, bid en hoop natuurlik dat niks gebeur nie maar mag onrustig wees tot die kind veilig tuis is. Die rede daarvoor is juis haar besef dat ten spyte van alle moontlike voorsorg iets met die kind kan gebeur soos wat in hierdie geval gebeur het. Hoewel mens hoop dat dit jou nie tref nie, kan dit nie as ongehoord of ongekend beskrywe word nie. Die meeste mense wat deur so 'n tragedie getref word, kom dit te bowe minstens tot die mate dat hulle daaglikse lewe voortgaan. Kan van die redelike motoris verwag word om te voorsien dat benewens die fisiese skade wat natuurlikerwys op die toneel uit sy nalatige bestuur voortspruit, iemand in die posisie van die eiseres ook beseer kan word, al is dit net psigies? Indien wel, moet daar nie terselfdertyd verwag word dat dit kan gebeur met die kind se grootouers of met die ouers van iemand in die posisie van die eiseres as gevolg van die terugslag wat hulle dogter ondervind het nie? Indien so iets voorsienbaar sou wees, sou die redelike man stappe gedoen het om dit te vermy en indien wel, watter stappe?"

Hy antwoord hierop soos volg (1071G–1072C):

> "Langs hierdie weg beoordeel, meen ek nie dat die eiseres se skade voorsienbaar was, en indien dit was, dat die redelike man enige stappe daarteen sou of kon

gedoen het nie. Dit is natuurlik so dat indien die versekerde bestuurder nie nalatig bestuur het nie, die eiseres se skade ook voorkom kon gewees het. Motorverkeer vorm egter 'n wesenlike deel van die daaglikse lewe van 'n moderne gemeenskap. Die motoris se taak word ook nie makliker gemaak deur die steeds groter wordende voertuig- en voetgangerverkeer nie. Ek meen dat daar byvoorbeeld aan die motoris vandag eise gestel word wat 30 jaar gelede nie gestel was nie. Sodoende word groot eise aan die motoris gestel en die sanksies, beide strafregtelik en privaatregtelik, is groot. Indien dit bowendien van die motoris verwag word om so te bestuur dat hy ook verantwoordelikheid moet aanvaar vir die indirekte skade van persone wat hy nie op die toneel beseer of fisies in gevaar gestel het of wat enigsins by sy manier van bestuur betrokke was nie, sou die las op die motoris nie alleenlik ondraaglik word nie, maar sou die enigste manier om hierdie indirekte skade te voorkom daarin lê om glad nie te bestuur nie. Dit is maklik om te sê dat die motoris in iedere geval nie nalatig moet bestuur nie. Dit is waar binne die direkte sfeer van sy aktiwiteite as motoris. Nalatigheid, hoe verwytbaar dit ookal mag wees, is egter 'n lewensfeit en selfs die versigtigste en mees agsame motoris kan nie waarborg dat dit hom nie sal oorkom nie. Indien van hom verwag word om ook die versekeraar te wees van iedereen, hoe verwyderd ookal, wat as gevolg van sy optrede skade ly, sou daar myns insiens geen moontlikheid gewees het vir die deelname van die gewone motoris aan die verkeer nie. Ek maak hierdie stellings natuurlik met betrekking tot die feite van hierdie saak en nie ter ondermyning van die beginsel hierbo uiteengesit nie."

(e) Ten slotte is dit vir die hof ook van belang dat 'n soortgelyke eis nog nie voor die howe gedien het nie. Regter Swart stel dit so (1072D–I):

"Ek is ook gedagtig daaraan dat hier by ons, sover ek weet, iemand in die posisie van die eiseres nog nooit geslaag het nie en dat daar trouens nog nooit op hierdie feite aksie ingestel is nie. Dit mag dus wees dat, ongeag ander oorwegings, die daadwerklike kennis van die redelike motorbestuurder nog nie uitgebrei is om hierdie soort geval te omvat nie. Die kennis wat van die redelike motorbestuurder verwag word is natuurlik 'n faktor by voorsienbaarheid . . . Die tersaaklikheid is natuurlik dat indien ek reg is wat die geskiedenis van hierdie soort eis betref, motorbestuurders nog deurgaans bestuur het op die basis dat hulle nie ook verantwoordelik is teenoor persone soos die eiseres nie."

Gevolglik word die twee regsvrae ontkennend beantwoord.

'n Aantal aspekte van regter Swart se uitspraak verg kommentaar.

1 In eerste instansie is dit bevraagtekenbaar of, anders as in die geval van onregmatigheid en juridiese kousaliteit (Neethling, Potgieter en Visser *Deliktereg* 36–39 178–181), beleidsoorwegings werklik 'n rol te speel het by die bepaling van nalatigheid, en dan veral by die voorsienbaarheidsbeen daarvan. Tradisioneel, ook as 'n mens die Engelsregtelike "duty of care"-benadering volg, lê die onderskeid tussen onregmatigheid en nalatigheid juis daarin dat nalatigheid die voorsienbaarheids- (en voorkombaarheids)toets betrek terwyl onregmatigheid 'n waarde-oordeel verg waar beleidoorwegings pertinent ter sprake kan kom (sien Neethling "Onregmatigheid, nalatigheid; regsplig, 'duty of care'; en die rol van redelike voorsienbaarheid – praat die appèlhof uit twee monde?" 1996 *THRHR* 682 ev, "Nogmaals 'duty of care' – onregmatigheid en nalatigheid by aanspreeklikheid weens 'n late" 1997 *THRHR* 730 ev; sien in die algemeen oor die onderskeid tussen onregmatigheid en nalatigheid ook Neethling, Potgieter en Visser *Deliktereg* 148–150; sien verder 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:

> "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).

Die feit dat die nalatigheidsoordeel nie beleidsoorwegings betrek nie, blyk ook baie duidelik uit die gesaghebbendste formulering daarvan in ons reg 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) and 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."

Die nalatigheid van die dader word dus 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 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, nalatigheid word beoordeel op grond van *waarskynlikhede* ('n prognose) van benadeling (sien Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 19 vn 65), oftewel wat die voorsienbaarheidstoets betref, wat die kans is dat benadeling sal intree. Hieruit volg dat hoe groter die waarskynlikheid of kans is dat skade kan intree, hoe makliker kan bevind word dat die skade redelikerwys voorsienbaar is (vgl Van der Walt *Delict: Principles and cases* (1979) 77; Neethling, Potgieter en Visser *Deliktereg* 137). Nou behoef dit geen betoog nie dat by die bepaling van hierdie waarskynlikheid/kans, beleidoorwegings (soos dat aanspreeklikheid te wyd sou uitkring: vgl Neethling, Potgieter en Visser *Deliktereg* 38–39 291–292) tog nie 'n rol kan speel nie. Inteendeel, die toepassing van beleidsoorwegings sou die voorsienbaarheidstoets verkrag aangesien geen beleidsoorweging skade meer of minder waarskynlik/voorsienbaar kan maak nie. Daarom is regter Swart (1069D–G 1070A–D, aangehaal *supra*) verkeerd om die nalatigheidstoets te wil gebruik om aanspreeklikheid weens emosionele skok op grond van beleidsoorwegings te beperk en kan sy beroep dat die wetgewer hieraan aandag moet gee, nie ondersteun word nie.

2 Tweedens is regter Swart se hantering van die onderskeid tussen en toepaslikheid van nalatigheid en juridiese kousaliteit, vatbaar vir kritiek. Alhoewel

hy wel kennis neem van juridiese kousaliteit as delikselement, gee hy ten onregte te min aandag aan die toepassing van hierdie element op die onderhawige feitestel ten spyte daarvan dat hy ten regte verklaar dat wat voorsienbaarheid aangaan, hierdie begrip dieselfde inhoud by nalatigheid en juridiese kousaliteit het. Die oorwegings hiervoor is die volgende: In die *Bester*-saak het die appèlhof, volgens regter Swart (1069A, aangehaal *supra*) se eie erkenning, by implikasie verkies om die kwessie van aanspreeklikheid vir verwyderde emosionele skok-skadeposte oor die boeg van juridiese kousaliteit te gooi. Daarom behoort die regter hierdie benadering in meer besonderhede te bespreek het – 'n duidelike standpunt van die appèlhof kan nie sommer goedsmoeds eenkant gelaat word nie – veral ook in die lig van die resente soepele benadering van die hoogste hof van appèl tot juridiese kousaliteit waar die vraag of 'n (verwyderde) skadepos die dader toegereken kan word, beantwoord word met inagneming van *beleidsoorwegings op grond van redelikheid, billikheid en regverdigheid* (sien bv *S v Mokgethi* 1990 1 SA 32 (A) 40–41; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700 ev; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764 ev; *Smit v Abrahams* 1994 4 SA 1 (A) 14 ev; *Napier v Collett* 1995 3 SA 140 (A) 143 ev). By die toepassing van die elastiese benadering kan die bestaande juridiese kousaliteitsmaatstawwe, soos redelike voorsienbaarheid, wel nog 'n subsidiêre rol speel. (Spesifiek wat emosionele skok betref, het die howe tot dusver hoofsaaklik die voorsienbaarheidsmaatstaf aangewend. In *Clinton-Parker supra* 52 ev 57 lig die hof ook redelike voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf uit maar beklemtoon dat dit net 'n faktor by die toepassing van die soepele benadering tot juridiese kousaliteit is: sien Neethling en Potgieter 1997 *THRHR* 551–552.) Dit beteken dat beleidsoorwegings naas redelike voorsienbaarheid in ag geneem mag (moet) word ten einde 'n juridies kousale verband te bepaal – 'n benadering wat *in casu* met goeie gevolg aangewend sou kon word om vas te stel of die moeder se skok weens die verneem van haar kind se dood die nalatige bestuurder toegereken moet word. Hierdie benadering word inderdaad in die *Clinton-Parker*-saak gevolg met betrekking tot 'n eis weens emosionele skok (sien ook *Barnard* 1064J–106G vir 'n bespreking van hierdie saak). Regter Swart (1069B, aangehaal *supra*) se opmerking dat hy die aangeleentheid van juridiese kousaliteit moeilik vind maar dit nie nodig ag om dit vir doeleindes van die saak verder te voer nie, is gevolglik onaanvaarbaar.

Die regter se oogklapbenadering om net die nalatigheidstoets te betrek en die vraag na juridiese kousaliteit te negeer, het boonop tot gevolg dat eersgenoemde toets ingespan word vir doeleindes wat niks meer met nalatigheid te make het nie. In hierdie verband kan nie genoeg beklemtoon word dat dit totaal onlogies is om, nadat bevind is dat 'n dader nalatig opgetree het (omdat hy in die lig van redelik voorsienbare gevolge anders moes opgetree het), met verwysing na *verdere* gevolge *weer* te vra of die dader anders moes opgetree het. Daar is immers reeds besluit dat hy anders moes opgetree het. Dit is dus sinloos om weer te vra of die dader hom van sy daad moes weerhou het juis met die oog op die waarskynlikheid dat die verwyderde gevolg op sigself sou intree. By verdere gevolge is dit met ander woorde onnodig om weer die tweede been van die nalatigheidstoets (of die dader anders moes opgetree het) toe te pas (sien Neethling, Potgieter en Visser *Deliktereg* 192–193). Hart en Honoré (*Causation in the law* (1959) 239–240) stel dit só:

> "[T]here is a logical absurdity in asking whether the risk of further harm, arising from a harmful situation which a reasonable man would not have created, would itself have deterred a reasonable man from acting."

Hieruit volg dat die nalatigheidstoets nie geskik is om aanspreeklikheid vir verwyderde gevolge te bepaal nie. Inteendeel, omdat 'n mens hier die gebied van juridiese kousaliteit betree en die funksie en doel van nalatigheid (vraag na *verwytbaarheid* van die dader) radikaal verskil van dié van juridiese kousaliteit (vraag na *toerekenbaarheid* van skade), behoort die toepassingsgebiede van hierdie twee delikselemente ter wille van begripshelderheid en gesonde regsontwikkeling duidelik uitmekaar gehou te word. In die lig van die voorgaande is regter Swart (1070I–J 1071G, aangehaal *supra*) se vraag ten aansien van die onderhawige feite of, indien die moeder se skok wel redelikerwys voorsienbaar was, "die redelike man stappe sou gedoen het om dit te vermy en indien wel, watter stappe?", en sy antwoord dat hy nie meen "dat die redelike man enige stappe daarteen sou of kon gedoen het nie", in die lig van die bevinding dat die bestuurder die ongeluk en daarom die dood van die kind *nalatig* veroorsaak het, onlogies en ontoepaslik en maak daarom geen sin nie.

3 Ten slotte moet die regter se bevinding onder die loep geneem word dat al was die emosionele skok van die eiseres *in casu* redelikerwys voorsienbaar (wat dit na sy mening nie was nie), die eis nogtans om klaarblyklike beleidsoorwegings van die hand gewys moet word – onder andere omdat die gevaar bestaan dat die aanspreeklikheid van die motoris te wyd sou uitkring (vgl 1070H–J 1071G–1072C), en omdat geen soortgelyke eis nog ooit in 'n Suid-Afrikaanse hof geslaag het of selfs ingestel is nie (1072D–I). Sy vrees vir oewerlose aanspreeklikheid word soos volg deur regter Navsa in *Clinton-Parker supra* 63 *obiter* verwoord (1066D–E):

> "Accident cases present particular policy problems. The floodgates will open if claims for nervous shock are not contained within manageable limits. An infinite number of people could claim for nervous shock upon viewing an accident and its consequences. So too with relatives or friends to whom an accident and its consequences are communicated. The number of deaths and severe physical injuries that occur in modern life due to motor vehicle and other accidents is great. The Courts may well, in adopting too liberal an approach to these situations and allowing bystanders and relatives to the umpteenth degree to claim damages, cripple economic activity."

Myns insiens is die vrees vir onbeperkte aanspeeklikheid ietwat oordrewe en kan bowendien besweer word deur 'n korrekte toepassing van die beginsels van die onregmatige daad wat op die gebied van emosionele skok toepassing vind. Die appèlhof het in *Bester supra* 779 beklemtoon dat "niksbeduidende emosionele skok van kortstondige duur wat op die welsyn van die persoon geen wesentlike uitwerking het nie", nie ageerbaar is nie. Hier gaan dit om gevalle van *de minimis non curat lex*. Nou kan aanvaar word dat in verreweg die meeste gevalle waar persone geskok word weens die verneem van 'n kind (of ander nabyfamilielid, verloofde of goeie vriend) se dood, dit nie 'n wesentlike uitwerking op die welsyn van die geskokte sal hê nie. In *Clinton-Parker supra* 63 stel regter Navsa dit so (sien ook *Barnard* 1066F–G):

> "As to communications about death or injuries flowing from accidents, I suspect that Dr Shevell is correct. It is easier for humans to deal with acts that have finite consequences that the human condition has to adapt to. One is faced with the news of someone's death. Human experience has taught us that with few exceptions we live with the finality of death. After all, we all lose a relative or a loved one to death. We generally get on with our lives. News of severe injuries may mean that a family member may be traumatised by viewing the invalid and by working towards the recovery of the person for a very long time, perhaps lifelong. However, here too experience has taught us that people generally accept severe physical injuries as finite and get on with their lives. They are generally dealing with settled situations."

Die gevalle waar emosionele skok na kommunikasie van dood of besering werklik redelik ernstig van aard is (sien Neethling, Potgieter en Visser *Deliktereg* 285; Neethling *Persoonlikheidsreg* 115), sal dus hoogs uitsonderlik wees en bowendien deeglik deur mediese getuienis gestaaf moet word (vgl Neethling en Potgieter 1973 *THRHR* 180–181). Hierdie resultaat dui daarop dat die betrokke eiser(es) 'n gebrek in sy/haar psigiese samestelling het wat normaalweg nie by die deursneemens voorkom nie. Op die keper beskou, het 'n mens dan met 'n sogenaamde "psigiese eierskedelgeval" te make. Hierdie tipe geval doen hom juis voor waar die eiser, as gevolg van die een of ander liggaamlike of psigiese swakheid, ernstiger benadeling opdoen weens die dader se optrede as wat die geval sou gewees het as die eiser nie aan so 'n swakheid gely het nie. Meeste juriste is dit eens dat die dader in so 'n geval in beginsel aanspreeklik moet wees ook vir die benadeling wat aan die aanwesigheid van die betrokke swakheid toegeskryf kan word – hierdie beginsel word in die spreuk "you must take your victim as you find him" weerspieël en staan ook as die *talem qualem*-reël bekend (Neethling, Potgieter en Visser *Deliktereg* 198–199; sien ook Neethling en Potgieter 1997 *THRHR* 550–551). Op die gebied van emosionele skok is dit belangrik om daarop te let dat indien eenmaal bevind is dat die gewraakte emosionele skok redelikerwys voorsienbaar was (of andersins die dader toegereken moet word), die dader volgens die howe aanspreeklik is vir enige nadelige fisies-psigiese gevolg wat daaruit resulteer ongeag of sodanige gevolg óók redelikerwys voorsienbaar was. Dienooreenkomstig kan 'n verweerder nie aanspreeklikheid ontkom deur te bewys dat die benadeelde *besonder vatbaar* vir die nadelige gevolge van die skok was en dat die gevolge hom daarom nie toegereken moet word nie (sien *Boswell v Minister of Police* 1978 3 SA 268 (OK) 272; *Gibson v Berkowitz supra* 1049–1050; *Clinton-Parker supra* 64–65). In die *Masiba*-saak *supra* 342 word dit soos volg gestel:

> "Regard being had to the physical condition of the deceased and his long history of hypertension the present case affords an almost classic instance of the so-called 'thin skull case', the rule being that a negligent defendant is bound to take his victim as he finds him, see *Wilson v Birt (Pty) Ltd* 1963 (2) SA 508 (D) at 516. It being a *sine qua non* of liability where non-physical injury is inflicted that this harm should have been foreseeable, the application of the 'thin skull rule' to cases involving injury of this nature is that once a psychiatric injury of gravity sufficient to render it actionable is foreseeable, then the injured party can recover for more extensive psychiatric damage which is attributable to his pre-existing weakness, see *Bester* [*v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A)] *supra* at 779."

In die lig van bostaande kan die volgende gestel word: Dit behoef geen betoog nie dat skade wat uit emosionele skok voortvloei redelik voorsienbaar kan wees ook in gevalle waar die slagoffer na die ontstellende gebeurtenis daarvan hoor (sien *Bester supra* 781). Myns insiens is dit byvoorbeeld die geval waar 'n ouer (of 'n persoon wie se "relationship to the primary victim was sufficiently close that it was reasonably foreseeable that he might sustain nervous shock if he apprehended that the primary victim had been or might be injured": *Alcock v Chief Constable supra*, aangehaal in *Barnard* 1063I–1064A) emosionele skok opdoen wanneer hy of sy kennis van die dood van 'n kind in 'n ongeluk kry. Hierdie skok is meesal egter nie van so 'n vry ernstige aard dat die reg daarvan kennis neem nie (*de minimis non curat lex*). In uitsonderingsgevalle waar ernstige psigiese krenking wel voorkom, behoort aanspreeklikheid ingevolge die *talem qualem*-reël te volg. So beskou, behoort die vrees vir oewerlose aanspreeklikheid voldoende besweer te word.

Hierdie "uitbreiding" van aanspreeklikheid op grond van emosionele skok word by implikasie ook deur die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996 ondersteun. Die Grondwet verleen naamlik in artikel 12 verskansing aan die reg op die sekuriteit van die persoon, waarby die reg op die liggaamlike en psigiese integriteit inbegrepe is. Sodoende word die beskerming van hierdie persoonlikheidsreg versterk en bekom dit 'n hoër status in die sin dat dit op alle reg van toepassing is – dus ook die bestaande regsbeginsels aangaande emosionele skok (vgl Neethling *Persoonlikheidsreg* 21 94–95). So gesien, kan die grondwetlike beskerming van die fisies-psigiese integriteit (*idem* 103 135; Visser "Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van die fisies-psigiese integriteit op deliktuele remedies" 1997 *THRHR* 495 ev) 'n verruimende invloed op die toepassingsgebied van deliksremedies (*in casu* die aksie weens pyn en lyding en die Aquiliese aksie) uitoefen. Regter Swart se houding dat die eis afgewys moet word omdat niemand in die posisie van die eiseres nog ooit in Suid-Afrika so 'n aksie ingestel het nie, getuig van 'n konserwatisme wat beslis deur die Grondwet weerspreek word.

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A RARE DECISION ON THE MEASURE OF INDEMNITY IN PROPERTY INSURANCE

Protea Assurance Co Ltd v Desmond Ronald Kinnear case no 5007/95 (W); Juta's Supreme Court Digest 13 of 1995, serial no 0362/95

Introduction: the applicable principles

There is a dearth of South African authority on the general principles of indemnity as they find application in the context of property insurance. For that reason alone an unreported decision dating from 1995 is deserving of a concise discussion. A potted restatement of the applicable principles may serve as an introduction.

In the calculation of the measure of indemnity in property insurance much appears to depend upon usage and practice and the topic does not give rise to much litigation, quite possibly because the amounts involved are usually relatively insignificant. Our courts have in the past and will no doubt in the future continue to have regard to decisions handed down by the courts in England because local insurers would appear to follow practices comparable to those followed in that country. However, the general principles of the law relating to damages should also, if not in the first place, find application in this connection, with due regard to the fact that one is concerned here with the measure of indemnity and not with (delictual or contractual) damages.

Despite the fact that the insurance contract is not a contract of perfect indemnity (see generally Van Niekerk "Maintaining the principle of indemnity: Theory and practice" 1996 *TSAR* 572), an insured is in principle entitled to full indemnity against the loss or damage he has suffered (on the measure of indemnity, see generally Reinecke and Van der Merwe *General principles of insurance* (1989) par 198–212). This, however, is subject to any limitation imposed by his policy. The most important of these limitations, and one which almost invariably features in every insurance, is the sum insured mentioned in the policy. The sum insured is the maximum amount an insured may recover from his insurer and also one of the principal factors with reference to which the premium is calculated. An insured is in principle entitled to the amount of his loss or the sum insured, whichever is the smaller. Thus where a house worth R500 000 is insured for R400 000 and is totally lost, the insured will be entitled to no more than R400 000; and where the house is only partly damaged to the extent of R100 000, the insured will not be entitled to more than that amount. Although an insured may not recover more than a full indemnity for his loss, he will often recover less.

Apart from the sum insured and such other contractual limitations which may be imposed upon the amount the insured may recover from the insurer, the other cardinal element in determining the amount which the insured can recover is the amount of his loss. In the case of property insurance, the insured's measure of indemnity is calculated with reference to the value of the particular object of risk. More specifically the "real and actual value" of the object, usually represented by the reasonable market value, is relevant for insurance purposes. A comparison is made between the value of the object immediately before and after the loss, the diminution in the value of the object and thus the insured's loss being the difference between these two values. In principle the insured will have to establish this difference and will therefore have to prove both the pre-accident and post-accident values (see eg *Erasmus v Davis* 1969 2 SA 1 (A); *Joubert v Santam Versekeringsmaatskappy Bpk* 1978 3 SA 328 (T) on the need for such proof).

In *Nafte v Atlas Assurance Co Ltd* 1924 WLD 239 rules or rather guidelines were laid down to ascertain this "real and actual value". First, the relevant value is the value of the object of risk at the time and at the place of the loss. Inconclusive, therefore, is the cost price of the object, its value when acquired by the insured, or its value at the time when the insurance was concluded. It follows from this that the insured will be entitled to be compensated for any appreciation in the value of the object after its insurance and prior to its loss or damage. By the same token, he will not be able to recover from the insurer any depreciation in the value (such as usually occurs to articles in daily use) which may have occurred prior to any loss or damage. Secondly, the value is the objective or "market" value of the object. No allowance is made for any sentimental value the insured may attach to the object or for any consequential loss such as a loss of prospective profits.

To this may be added the fact that the value of the object is the value it has for the insured. In *Zeeman v Royal Exchange Assurance* 1919 CPD 63 65–66 the court appeared to have considered the market value of property to be its selling price ("the price which can be obtained for the [property]") as seen from the insured's point of view. But that may not necessarily be the proper way to determine market value. If, for example, the insured had no intention (as the

insured in this case appears to have had though) of selling the property, its buying price (again seen from the insured's perspective) may be more appropriate. Thus, it is submitted that in order to place the insured owner of a stolen motor vehicle in the financial position he occupied before its loss, he must in the usual case be paid not the trade-in value (selling price) of that vehicle but an amount which will enable him to buy a similar vehicle on the market, that is, the buying price of the vehicle in question. However, the fact that trade-in values of motor vehicles are readily ascertainable may account for the use of that value in practice as the basis for indemnification (on this point, see eg *Labuschagne v Fedgen Insurance Ltd* 1994 2 SA 228 (W) 230F–G 234I–J).

An alternative method of establishing the insured's measure of indemnity and, more specifically, the extent of depreciation in the value of the object of risk, is that based upon the reasonable cost of repairing or reinstating the object. It is a method frequently employed in practice in the case of partial losses or in the case of personal property (as opposed to merchandise) for instance. Where the cost of reinstatement is employed, a reasonable deduction must be made to allow for the difference in the value of a repaired or reinstated object as compared to its (previous) value prior to the loss. In non-marine insurance this deduction is not fixed as is the case in marine insurance where, at least in the case of wooden ships, the customary deduction from the cost of repairs is fixed at "one third new for old". (On this deduction, see also eg *Page v Malcomess & Co* 1922 EDL 284 293–294 where the estimate of the amount of damage was based on the cost of repairs and of new spare parts. The court remarked that "[i]f these operations were carried out, it is obvious that a newer and better car would be substituted for the one in question, which the [owner] had been using for 12 or 13 months". Accordingly, the court accepted as proof of the extent of the damage, the cost of repairing the vehicle without such new parts together with the depreciation in its value remaining after such repairs.)

A further alternative method which finds application where the market value is difficult to establish, is based on the replacement value of the object of risk (as an alternative to its market value), that is, on the cost of a new article similar to that insured and now lost or damaged. Unless the insurance is expressly concluded on the basis of new or replacement value, a deduction of new for old must also be made in this instance.

The particular method which will find application will depend on the circumstances of every case. The aim should always be to restore the insured to the financial position he was in at the time of the loss. Thus, in *Parham v Royal Exchange Assurance* 1943 SR 49 (HC) an insured motor vehicle was damaged in an accident. Included in the insured's loss was the destruction of a part of the car (the headlamp) which was unprocurable at the time. In consequence the car could not be used at all. The court held that the insurer was obliged to place the insured in the same position as he was in before the accident. Because the damaged part of the vehicle was unprocurable, it was impossible to say what its cost was and the insurer's offer of a payment of its cost was therefore wholly illusory as a basis of indemnity. In consequence the alternative basis of market value had to be adopted to determine the measure of indemnity.

It is also possible for the parties to agree that the measure of indemnity calculated according to a particular method is to be the maximum amount the insured can recover. Thus, in *Palmer v President Insurance Co Ltd* 1967 1 SA 673 (O) the policy insuring the motor vehicle provided for the indemnification of the

insured against the loss of or damage to the vehicle. The policy provided further that

> "the maximum indemnity stated in the schedule shall be the maximum amount payable by the company in respect of such loss or damage but not exceeding the reasonable market value of such motor car and its accessories and spare parts at the time of such loss or damage".

The court thought that this was an agreement on the measure of indemnity to be employed in this case and that the insured's claim should have been based on that measure, namely the reasonable market value of the car and more specifically that value as it was at the time of the loss. However, it would seem that the aim of the provision was merely to limit any indemnification to the reasonable market value of the insured car at the time of its loss; it was an agreement that the extent of the insurer's liability, however that might be calculated, had to be limited to a liability calculated on the basis of market value. Therefore, the fact that the cost of repairing the car would have been greater than its market value would not have availed the insured.

The *Kinnear* decision

In the unreported decision in *Protea Assurance Co Ltd v Desmond Ronald Kinnear* the facts relevant to the present discussion were as follows. The insurer undertook to indemnify the insured against loss of his motor vehicle, described in the schedule to the policy as a 1980 Jaguar XJS. The limit of the indemnity according to the schedule was R73 000 and the policy also limited the insurer's liability for any loss of or damage to the vehicle to its reasonable market value.

The insured had bought the insured vehicle in question from a dealer in second-hand vehicles. The latter in turn had a short time before, in May 1992, bought the vehicle for R18 000. At the time the insured acquired the vehicle, it was not in a functioning condition: the windscreen was damaged, the headlights were broken and all the upholstery was rotten. The insured had dents and rust to the insured vehicle repaired and had it completely resprayed at a cost of R7 700. He also had it fitted with aluminium rims and new tyres. The tyres cost R2 820. The aluminium rims he obtained from his brother but the latter had been advised by the importers of the rims that their replacement value was about R8 000. No evidence was tendered as to the price at which the insured's brother had obtained the rims.

The insured vehicle was stolen in October 1992. The insured claimed on his policy and alleged that its value was R50 000. The insurer denied liability in that amount, arguing, amongst other things, that because it was in fact a 1978 model and was fitted with a Chevrolet V8 engine and not a Jaguar V12 engine, the vehicle was not worth R73 000.

In the court *a quo* it was held that the insured had proved that the value of the insured vehicle was R36 520 and judgment was granted against the insurer in that amount. The judge *a quo* could make no finding as to the mechanical condition of the vehicle and thought that he had to endeavour to determine what its value was on the basis that the only value it had was its value as a shell. He held that the value of the motor vehicle as a shell was the amount it had cost the second-hand dealer from whom the insured had bought the vehicle, together with the amounts the latter had expended on it (that is, the total of R18 000, R7 000, R2 820 and R8 000, namely R36 520).

One of the insurer's grounds of appeal before a full bench of the Witwatersrand Local Division was that the court *a quo* should have granted an absolution on the basis that the insured had failed to discharge the burden of establishing the value of the insured vehicle.

Before turning to the judgment on appeal, it may be worth mentioning that while dealing with another ground of appeal, the court had occasion to comment (at 11 of the judgment) on the basis on which the premiums in the case of a motor vehicle policy are calculated. It noted that the age of the car insured would be a factor in the assessment of the premium. However, that would only be the case, it was thought, where the policy did not limit the amount of the indemnity undertaken by the insurer: "Where the policy does stipulate a limit it may well be that that limit and not the age of the vehicle determines the premium." In this instance the policy limited the insurer's liability not only to a specified amount (the sum insured) but also to the reasonable market value of the vehicle.

The judgment on appeal was short and to the point. The court, per Streicher J, in allowing the appeal on the ground under consideration here, argued a follows:

> "In my view the evidence that [the second-hand] motor dealer . . . bought the shell . . . at a price of R18 000 *prima facie* does establish a value of at least R18 000. The fitting of new tyres at a price of R2 820 in my view increased that value to R20 820. I am however of the view that there is no evidence that the respraying of the car at a cost of R7 700 increased the value of the car by R7 700. I am also of the view that there is no evidence that the value of the rims was R8 000. The evidence that the [insured's] brother was so advised is hearsay evidence and, in any event, the price given was probably the price of new rims. Moreover, there is no evidence as to the value of the rims that were replaced. . .
>
> [It was] testified [on behalf of the insured] that the vehicle without the engine would have been worth R47 000 and that the shell alone would have been worth R20 000 to R25 000, the rear axle R5 000 and the front suspension a similar amount, perhaps a little less, but not much less. There is no evidence as to the condition of the rear axle or the front suspension and I agree with the finding of the judge *a quo* in respect of [this] evidence [namely, that it is generally unhelpful and does not establish as a fact the value of the vehicle as a shell].
>
> In my view therefore the trial judge should have granted judgement in the sum of R20 820 and not R36 520" (13–14).

The court quite correctly distinguished the cost price and the market value of an object. Clearly the price paid for the vehicle by the insured (or, in this case, by the person from whom the insured had bought the vehicle) is not necessarily indicative of the market value of that vehicle at the time of its loss. Much will depend on the circumstances. It is submitted that given the general depreciating nature of the market value of second-hand (as opposed to vintage) motor vehicles, the cost price of a motor vehicle at an earlier time cannot even be taken as establishing *prima facie* that the vehicle was at least worth that much at the time of its subsequent loss. In *Monumental Art C v Kenston Pharmacy (Pty) Ltd* 1976 2 SA 111 (C), to which the court in the *Kinnear* case did make reference, these principles were set out in the following terms (119D–F):

> "A cost price may, and often does, have some connection with value, but it is not always an accurate measure of the value of a thing. Cost by itself, with nothing more said, cannot in principle be equated with value. It is incorrect to look only to evidence of cost in determining value . . . The cost of a thing at an indeterminate time and without evidence of the circumstances in which the cost was incurred so as to show a relationship between that cost and market value, is not *prima facie*

> evidence of the market value of the thing, either at the time of its acquisition or at the time of its subsequent damage or destruction. Conceivably, of course, evidence of the cost of goods may in an appropriate case be evidence of proving value, as, for example, where the cost is the price of goods in an open competitive and recognised market immediately before the loss of the goods . . . But evidence of cost without further evidence to show that such cost is indicative of market value is not evidence of market value."

In the *Kinnear* case, though, it would appear that the cost price was in fact indicative of market value. The person who had sold the vehicle to the dealer from whom the insured had bought it, had unsuccessfully been trying to get rid of the vehicle since 1987. He at one stage refused an offer of R30 000 for it. Eventually he sold it to the dealer in May 1992 for R18 000. It was stolen only some five months after the dealer had acquired it and thus an even shorter period after the insured had paid the dealer R20 000 for it. These circumstances may well have established that there was a sufficiently close relationship between the cost price and the market value at the time of the loss. It was more than likely that had the insured gone into the market to replace his stolen vehicle with another of the same kind and in the same condition, he would have had to pay in the vicinity of R20 000 for it. Ordinarily, though, as had already been established in the *Nafte* case *supra*, cost price is not the same as nor even *prima facie* evidence of market value at the time and the place of the loss.

The court was also correct in its approach, it may be thought, that not all expenses incurred in connection with property may be taken as increasing the value of that property by the amount of the expenses in question. Certain improvements to property are just not worth the price paid for them, whether by reason of the nature of the improvements themselves or by reason of the nature and condition of the property to which they are made.

A final point clearly illustrated by the decision in the *Kinnear* case: The insured must place sufficient evidence before the court, if not conclusively to prove the extent of his loss, then at least to permit the court to make an assessment of the amount of that loss. If no or insufficient evidence is adduced by the insured, the court will not speculate and arbitrarily award him an amount of indemnity. In such a case the insured will recover nothing from the insurer for that loss.

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DIVERSITY OF OPINION IN A DIVERSE SOCIETY

S v Lawrence; S v Negal; S v Solberg 1997 10 BCLR 1348 (CC)

By the end of its third term in December 1997, the Constitutional Court had delivered judgment in sixty cases. The bulk of these cases concerned the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993), as

the final Constitution (Constitution of the Republic of South Africa, Act 108 of 1996) only came into operation on 4 February 1997. Moreover, the final Constitution provided that all proceedings which were pending before it took effect were to be dealt with as if it had not come into effect.

It is for this reason that Miss Solberg chose to rely on the freedom of religion provision contained in the interim Constitution to challenge her criminal conviction for selling wine on a Sunday. Her appeal, one of the last matters disposed of in terms of the interim Constitution, came before the Constitutional Court in the case under discussion. In its decision the court dealt with the constitutional validity of various provisions of the Liquor Act 27 of 1989. In respect of the first two appeals, the court unanimously decided that the impugned provisions of the Liquor Act did not violate the appellants' right freely to engage in economic activity contained in section 26 of the interim Constitution. However, in respect of the appeal in *S v Solberg* the court was divided.

The plurality of opinions in *S v Solberg* provides a good illustration of the difference in adjudicative style and approach taken when giving meaning to fundamental rights and freedoms. Finally, *S v Solberg* provides a useful peg upon which to hang considerations of the problems governing legal adjudication in a diverse society, such as that in South Africa.

Not on a Sunday, please

In *Solberg* the appellant was convicted in terms of the Liquor Act, which proscribed any failure to comply with a condition attached to the grant of a licence to sell liquor. The Act also prohibited the sale of liquor in terms of a "grocer's wine licence" on a "closed day", the definition of which covered Sundays, Good Friday and Christmas day. As an employee of a "Seven Eleven" chain store that had sold liquor on a "closed day", Miss Solberg had been convicted in a magistrate's court.

Together with Lawrence and Negal, Solberg appealed against the decision of the magistrate and the appeal found its way to the Constitutional Court. The court summed up the thrust of the *Solberg* appeal as follows:

> "The appellant contended that the purpose of prohibiting wine selling by grocers on 'closed day(s)' was 'to induce submission to a sectarian Christian conception of the proper observance of the Christian Sabbath and Christian holidays or, perhaps, to compel the observance of the Christian Sabbath and Christian holidays'. This . . . 'coerced individuals to affirm or acquiesce in a specific practice solely for a sectarian Christian purpose', and was inconsistent with the freedom of religion of those persons who do not hold such beliefs and do not wish to adhere to them" (1375E–F, par 85).

The court was therefore required to consider whether the prohibition contained in the Act was inconsistent with the freedom of religion contained in the interim Constitution. Section 14(1) dealt with religious freedom and declared:

> "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."

Prudence and the President

The majority opinion was delivered by Chaskalson P. His first task was to distinguish *R v Big M Drug Mart Ltd* (1985) 13 *Canadian Rights Reporter* 64, a decision of the Canadian Supreme Court, as this was a primary authority relied

upon by the appellants. Chaskalson P endorsed the following definition of the main attributes of freedom of religion given by Dickson CJC in *R v Big M Drug Mart* (97):

> "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 of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination" (1378A, par 92).

He observed that freedom of religion also implies an absence of coercion. Moreover, it may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This was particularly relevant to the Canadian Lord's Day Act under attack in *R v Big M Drug Mart* because, according to Chaskalson P, "it compelled believers and non-believers to observe the Christian Sabbath" (1378C, par 92).

However, in his view, the Liquor Act, unlike provisions of the Canadian Lord's Day Act, did not prohibit grocery stores from doing business on Sundays. This appears therefore to have rendered *R v Big M Drug Mart* entirely inapplicable to the facts at hand, notwithstanding the acceptance by Chaskalson P of a portion of the definition of the freedom of religion rendered by Dickson CJC.

Chaskalson P also considered references made by other judges to decisions of the United States Supreme Court dealing with the "establishment" clause in the First Amendment. (The relevant portion of the First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .") He observed that "the primary purpose of the 'establishment clause' in the United States constitution is to prevent the advancement or inhibition of religion by the State" (1379H, par 100). For Chaskalson P, neither the text of section 14 nor the historical background to the interim Constitution allowed for the inclusion of an "establishment clause". The only provision relied upon by the appellant in *S v Solberg* was section 14. Therefore the United States jurisprudence developed around the "establishment clause" was inappropriate in the context of South African constitutionalism (see 1380A–1381B, par 101–104).

Chaskalson P decided that the selection of Sunday was neither purely religious nor was it possible to discern any religious purpose served by the Liquor Act. In South Africa Sundays had acquired a secular as well as a religious character. It was the most common day of the week on which people chose not to work and was recorded thus in labour agreements, in business practice, in contracts of service and provincial legislation. It did not constrain the practice of other religions and did not compel anyone to open or close their businesses on Sunday (see 1378F–1379B, par 95–97). With three other justices concurring, Chaskalson P held that the impugned provisions of the Liquor Act were not contrary to section 14 of the interim Constitution and the appeal in *S v Solberg* was accordingly dismissed.

The judgment of Chaskalson P displays a prudence on the part of the President of the court reminiscent of his adjudicative style in *S v Makwanyane* 1995 6 BCLR 665 (CC). In his judgment invalidating the death penalty, he chose to confine himself to the meaning of "cruel, inhuman or degrading treatment or punishment" contained in section 11(2) of the interim Constitution. He used the rights to equality, life and dignity in the interim Constitution to give broad meaning to the right at issue without creating expectations about the specific content of rights not strictly related to the matter at hand (see Klug "Striking

down death" 1996 *SAJHR* 66). Similarly, in *S v Solberg* Chaskalson P chose to give no more meaning to section 14 than he thought necessary. He refused to consider the impact of the right to equality, contained in section 8, on the appellant's freedom of religion, because the appellant chose to rely on section 14 alone.

He moreover displayed reticence in his refusal to accept the import of foreign doctrines, notwithstanding the Constitutional Court's easiness with the decisions of overseas courts. (In *S v Makwanyane*, eg, the Constitutional Court made reference to the decisions of no fewer than ten foreign courts in declaring the death penalty to be unconstitutional. Section 35(1) of the interim Constitution sanctioned the use of "comparable foreign case law" in the interpretation of the interim Constitution. However it did not require it as was the case with applicable "public international law". See further Henderson "Strange bedfellows: The use of foreign case law in constitutional litigation" 1996 *De Rebus* 681.) He eschewed placing undue reliance on American jurisprudence in the area of freedom of religion, and was therefore able "to avoid the extremes of that country's jurisprudence" (Carpenter "Beyond belief – Religious freedom under the South African and American constitutions" 1995 *THRHR* 695).

Chaskalson P also chose a pragmatic course by not unnecessarily disturbing secular and thus constitutionally consistent practices that were enabled and facilitated in terms of any "establishment clause" by the nature of Sunday as a day of rest. Applying the criteria regarding the violation of religious rights in South Africa suggested by Carpenter (*ibid* 695), it is submitted that it would have been difficult to hold that the impugned provisions of the Liquor Act inhibited alternative religious views or forced Christianity on unwilling subjects. The Act may have prevented the appellant from selling wine on a Sunday, but it did not force her to attend church as an alternative to being behind the counter of the "Seven-eleven". Nor did the Act prevent the applicant from practising her own religion, unless she could have shown that her religion could be practised only on every day other than a "closed day" in terms of section 2 of the Act. Moreover, on the basis that a law would be "unconstitutional if enforcement interferes with a religious body in matters of *religious* significance" (Carpenter *ibid*) it is, with respect, difficult to see how the sale of wine could be viewed as being of religious significance. (This seems to be hinted at by Sachs J in his concurring judgment, which is discussed below.) Finally, it is difficult to envisage a less restrictive means of curbing the sale of alcohol short of allowing its sale on every day of the year. The law thus imposed "the least restrictive means of protecting others or ensuring equitable treatment in regard to burdens and benefits" (Carpenter *ibid*).

Minority opinions, majority conclusions

In her judgment O'Regan J agreed that the interim Constitution contained no "establishment clause". She focused on section 14(2), which stated:

> "Without derogating from the generality of subsection (1), religious observances may be conducted at state-aided institutions under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary."

In her view, this subsection showed "that the strict approach of the United States Supreme Court ... in relation to the separation between State and religious bodies had been avoided" (1383H, par 118).

However, O'Regan J observed that section 14(2)'s particular requirements of an absence of coercion and presence of fairness and equity reflected an important component of the contents of the freedom of religion generally. She proceeded to remark:

> "The requirement of equity in the conception of freedom of religion as expressed in the interim Constitution is a rejection of our history, in which Christianity was given favoured status by government in many areas of life regardless of the wide range of religions observed in our society ... The explicit endorsement of one religion over others would not be permitted in our new constitutional order" (1385H–1386A, par 123).

In a separate judgment, Sachs J went into greater detail in his examination of the history of state bias toward Christianity. For him the interim Constitution was

> "very much about the acknowledgement by the state of different belief systems and their accommodation within a non-hierarchical framework of equality and non discrimination" (1395C, par 148).

Just as O'Regan J took the view that the definition of a "closed day" in the Liquor Act was not to be read in the abstract, Sachs J observed that there were symbolic problems with the definition:

> "My view then is that the identification of Sundays, Good Friday and Christmas Day as closed days for the purposes of selling liquor, does involve an endorsement by the State of the Christian religion in a manner that is problematic in terms of section 14. The functional effect of the law may be marginal, and its symbolic effect muted, yet the communication it makes cannot be disregarded" (1420F, par 160).

Sachs J therefore concluded that the inescapable message sent out by the choice of "closed days" in the Liquor Act violated the right continued in section 14 of the interim Constitution. O'Regan J reached the same conclusion after declaring that the interim Constitution required "more of the legislature than that it refrain from coercion. It requires in addition that the legislature refrain from favouring one religion over others" (1387D, par 128).

O'Regan J, with whom Goldstone J and Madala J concurred, would, however, differ in the final result from Sachs J, with whom Mogoro J agreed, the latter deciding that the legislative provisions under attack were nevertheless constitutional.

The difference in conclusion lay in the divergence of opinion regarding the reasonableness, justifiability and necessity of the violation of the right contained in section 14 of the interim Constitution.

Section 33(1)(a) of the interim Constitution required any limitation of a right in chapter 3 be "reasonable" and "justifiable in an open and democratic society" and that it "not negate the essential content of the right in question". In the case of some of the rights, including the right to freedom of religion, section 33(1)(b) also required that the limitation be "necessary".

For O'Regan J the absence of evidence regarding the purpose of section 90 of the Liquor Act was an obstacle to assessing whether that purpose was in proportion to the infringement of the right in section 14. She was nevertheless willing to accept that a purpose of the impugned provision was to restrict the consumption of alcohol. She held, however, that this purpose did not weigh heavily enough for the purposes of proportionality in the realm of section 14. She concluded:

> "It is true that the scope of the infringement of section 14 is not severe or egregious, but in my view, the purpose and the effect of the legislation is not sufficient to meet the test of justification required by section 33" (1389A, par 132).

However, for Sachs J the degree of infringement played a vital part in his decision that the purpose of the impugned legislation justified the infringement of section 14: "[T]he intensity or severity of the breach must accordingly be a highly relevant factor in any proportionality exercise; the more grievous the invasion of the right, the more compelling must be its justification" (1406F, par 168). He took the view that in the present case no economic disadvantage flowed from the Liquor Act's violation of section 14. He turned to the symbolic effect of the state's choice of "closed days" in the Act and reached the following conclusion:

> "The overall consequence is a law that, while indeed offending against section 14, does so in an indirect and marginal way, imposing relatively little obligatory observance, in respect of a matter of slight sectarian import, in relation to days that have become highly secularised. The message of inclusion coupled with exclusion is accordingly a notably subdued one" (1408G, par 174).

Sachs J turned to those factors which in his view operated to justify the singling out of Sunday, Good Friday and Christmas Day. He seemed unperturbed by the absence of evidence showing that the factors which justified the singling out of the specific "closed days" as days upon which the reduction in the consumption of alcohol, justified an infringement of the right to freedom of religion. For him there were "facts of common knowledge to which we cannot blind ourselves" (1408, par 175), which showed that the state's interest in encouraging temperance on those particular days was a powerful and legitimate one. After outlining these he was therefore able to come to a conclusion different to that of O'Regan J:

> "On the one hand, the scope and intensity of the invasion of section 14 is relatively slight. On the other hand, the dangers of excessive drinking, particularly on weekends, at the beginning of the Easter weekend and at Christmas time are grave" (1409E, par 177).

In contrast with the economy of Chaskalson P, O'Regan J and Sachs J displayed a generosity of approach to the interpretation of the freedom of religion in section 14 and indeed a broader approach to the issues at stake. The fact that the appellant in *S v Solberg* did not rely on the right to equality in section 8 did not prevent O'Regan J from reading this right into section 14. This had the effect of rendering much of the "establishment clause" jurisprudence of the United States Supreme Court relevant. She quoted from *Engel v Vitale* 370 US 421 (1962) (1384G, par 120) and *Larson v Valente* 456 US 228 (1982) (1385C–D, par 122) and cited other United States authorities in importing the principle of equity into the freedom of religion contained in section 14 of the interim Constitution. This, notwithstanding her view that the interim Constitution had avoided the strict approach adopted in the United States regarding the separation between state and religious bodies.

Sachs J seemed to have taken an even broader view in extracting an "establishment clause" from the freedom of religion in section 14. Without highlighting any difference between the two legal systems, he quoted freely from *Lynch, Mayor of Pawtucker v Donnelly* 465 US 668 (1984) (1390E–F, par 138) in order to emphasise the negative radiating symbolic effect of the state's endorsement of Christianity. He qualified his reliance on United States jurisprudence with the following remarks:

> "If I draw on statements by certain United States Supreme Court justices, I do so not because I treat their decisions as precedents to be applied in our courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/state relations" (1392D, par 141).

For Sachs J, the interim Constitution seemed not necessarily to have avoided an approach similar to that in United States and hence the comments of members of that country's Supreme Court were applicable. Perhaps Sachs J was able to give a very expansive meaning to the right in section 14 of the interim Constitution, a meaning adverse to the case for the respondent, safe in the knowledge that the respondent's case would be rescued by the limitation clause. Nevertheless, together with that of O'Regan J, the judgment of Sachs J represents a broad statement of opinion covering the right to freedom of religion in South Africa.

Free opinions in the realm of freedom of opinion

It is interesting to note the correlation between difference in judgment style and difference in professional background of the three justices. Before his appointment to the Constitutional Court, Chaskalson P was a practising advocate, while O'Regan J and Sachs J were both legal academics. This cannot necessarily be said to account for the difference in conclusion. However, the willingness of the former academics to give as full a meaning as possible to section 14 by drawing on comparative sources stands in contrast to the former practitioner's interpretation, which tightly confines itself to the issues at hand.

The judgment of Sachs J, in particular, may be viewed as an instance of substantive reasoning in response to criticism of the Constitutional Court in its first term by Cockrell ("Rainbow jurisprudence" 1998 *SAJHR* 1). Cockrell outlines substantive reasoning, which furthers the substantive vision of law, which for him has replaced the formal vision of law that typified the previous legal order in South Africa:

> "[T]he substantive vision of law which trails in the wake of Chapter 3 of the (interim) Constitution requires judges to go behind the formal reasons and to engage in a particular variant of moral and political reasoning. The simple reliance on the rule of law will rarely be sufficient to dispose of a case which involves constitutional review, and the enterprise of going behind formal reasons will of necessity involve judges in making difficult decisions about matters of political morality ... the most striking feature of the record of the Constitutional Court in the first year has been the absence of such ... a *rigorous* jurisprudence of substantive reasoning" (10–11).

He identifies nine approaches to substantive reasoning taken by the court but leaves open the content of constitutional values that flow or ought to flow from substantive reasoning.

In *S v Solberg* Sachs J did not shy from engaging with the values underlying section 14 of the interim Constitution. He engaged in a type of moral and political reasoning, which ensured that the value of freedom of religion in South Africa was given a meaning that justified the rule against any law favouring one religion over another. This accords with the approach advocated by Davis ("Overview of the 1993 Interim Constitution and 1996 Constitution" in Davis, Cheadle and Haysom (eds) *Fundamental rights in the Constitution* (1997) 1). Davis suggests that the open texture of a constitution necessitates the substantive justification for a constitutional provision, which is "critical to unlocking the meaning of (that) provision" (*ibid* 23).

The following questions must, however, be asked: In a society where there is social dissensus on large-scale issues, *how much* meaning should be given to the provisions of its Constitution? Indeed, how much meaning *can* be given to those provisions where the provisions are the result of a political compromise accommodating divergent ideological positions? The judgment of Chaskalson P responds to these questions by restricting the content of the meaning given to the freedom of religion. The outcome of the decision of the President of the court for the parties in the case was the same as that of Sachs J. However, he found it unnecessary to pin a meaning to section 14 which would unnecessarily impact on issues beyond those contemplated by the parties to the dispute in *S v Solberg*.

"Rainbow jurisprudence", or an absence of rigorous substantive reasoning, may be criticised for not fully exposing the content of the values underlying a constitutional rule or the considerations underlying a judicial determination. However, perhaps it is safer for judges in a heterogeneous society to, *where possible*, engage in what Sunstein describes as the "constructive uses of silence" (*Legal reasoning and political conflict* (1996) 38). This facilitates agreement on the particular details of a legal outcome without the court having to engage in broad and abstract reasoning in moral and political areas where agreement may be absent. A court that serves a multifarious society or, indeed, a court that is itself a multimember institution is well suited to engaging itself in the use of what Sunstein labels

> "incompletely theorised agreements . . . By definition, such agreements have the large advantage of allowing convergence on particular outcomes by people unable to reach accord on general principles. This advantage is associated not only with the simple need to decide cases, but also on social stability, which could not exist if fundamental disagreements broke out in every case of public or private dispute" (39).

At first glance an approach which restrains judges from engaging fully in substantive reasoning runs contrary to the rule of law, which would require that judges give a constitutional provision a meaning that renders that provision fully determinable and accessible. The goals of consistency and finality would also be served by this end as the meaning of a constitutional provision is clearly demarcated and its position on an issue fully exposed. In *S v Solberg* O'Regan J and Sachs J seem to have applied this theory and, although differing in result, engaged as much as possible in substantive reasoning.

An alternative and more modest spin, which emphasises universality or impartiality, may be given to the rule of law. On this view the rule of law, as opposed to the rule of men, places certain deep ideas of the right or good off-limits, because those ideas ought not to be invoked by those playing the type of social role played by judges. Sunstein puts it thus:

> "Among the forbidden or presumptively forbidden ideas are, often, high-level views that are taken as too hubristic or sectarian precisely because they are so high-level. The presumption against high-level theories is an aspect of the ideal rule of law to the extent that it is an effort to limit the exercise of discretion at the point of application" (45).

In defending the opinions of O'Regan J and Sachs J against the criticism that they entered a forbidden or presumptively forbidden realm of substantive reasoning, it is possible to contend that the ideas engaged by O'Regan J and Sachs J in *S v Solberg* would not fall into the category of "high level". Of course this is a question of degree itself determinable by a prior political or moral choice as to what is encompassed by a "high-level" idea. Moreover, it is possible to argue

that by its very nature the interim Constitution, as well as the final Constitution, requires judges to tackle the politically and morally controversial and take a stand determined by the exercise of personal – albeit in the guise of judicial – discretion, thus identifying themselves with a particular "high-level" view to the exclusion of other "high-level" views. However, again it is a question of the degree to which a judge is required to identify with a particular "high-level" view without marginalising or alienating the adherents to another "high-level" view.

In contrast with the approach taken by O'Regan J and Sachs J, that adopted by Chaskalson P highlights a method of addressing the issues at hand while being cautious not to engage too fully in moral and political reasoning. In assessing the extent of the individual's freedom of belief, conscience and opinion, Chaskalson P seems to have been more willing to limit his own opinion than O'Regan J and Sachs J were to limit theirs. Notwithstanding the divergence in result between O'Regan J and Chaskalson P, in contra-distinction to the other opinions in *S v Solberg*, that of Chaskalson P leans more towards the neutral in *style*. Style must be emphasised for, although judges, particularly those charged with constitutional adjudication, engage in a form, at least, of law making, which implies that a partial political or moral stance be taken, the *manner* of law making is vital. The need for transparency and openness in every organ of government, including the judicial branch, is naturally of great importance to the new constitutional order. However, one must ask whether national unity (presuming that national unity is a worthy purpose) is better served by the judges, *where possible*, saying less than it is by saying more.

S v Solberg provides an illustration of the different manner of judicial opinion writing. The economic, perhaps terse, approach adopted by Chaskalson P on the one hand stands in contrast to the generous, perhaps rhetorical, path taken by O'Regan J and Sachs J. It is perhaps ironic that it was in the realm of freedom of opinion that the freedom of judicial opinion yielded divergent styles as well as different results.

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GOOD FAITH IN INSURANCE CONTRACTS

Santam Bpk v Potgieter 1997 3 SA 415 (O)

The facts in this case could easily provide the script for a detective story. The court described some aspects of the insured's testimony as so far-fetched that they bordered on fiction (422G). Unfortunately the actual facts are not based on fiction but support the belief of some insurers that some (many?) policyholders are not completely honest when making a claim.

The insured alleged that his house had been broken into and that his motor vehicle, twenty laser disks, two Technics loudspeakers and some other items had been stolen. He claimed an amount of over R60 000 from the insurer. After the insurer had paid this amount, an assessor found the motor vehicle at a panel beater where it had been left by the insured.

According to the insured, an unknown person had contacted him after the theft had occurred and asked him whether he was interested in purchasing a vehicle and to remodel it. He agreed and they met each other and proceeded to the house where the vehicle was kept. This house was situated in a township and the vehicle was parked under a shack. They agreed on a purchase price and the insured requested that the vehicle be taken to the cemetery outside the township. The insured claimed that the vehicle did not have a steering wheel and that he had only recognised it as his when it arrived at the cemetery.

Apparently the insured then took the vehicle to the panel beater. The panel beater was instructed by the insured to respray the vehicle with another colour so that "you could not recognise that it was a respray" (420A). The insured also removed the back window of the vehicle which contained a unique identifiable sticker, the wheels with special rims and also the engine.

A case of fraud was made against the insured after the assessor had found the vehicle at the panel beater. The investigating officer visited the insured's home and two Technics loudspeakers were found behind the bar counter in the insured's home. The insured first alleged that these speakers were on loan from his brother-in-law but later acknowledged that the speakers which he had placed on the list of stolen goods had in fact never been stolen (421D–E). He then claimed that he initially owned four speakers, two Technics and two Mordaunt Short speakers, and that the latter had been stolen. He wanted the insurer to replace the Mordaunt Short speakers with Technics and this explained the presence of the two Technics speakers behind the bar. The assessor responsible for making the inventory after the burglary testified that the insured had never mentioned that he owned four loudspeakers and that he had not seen any other speakers in the house.

The investigating officer also found twenty laser disks in a box. The insured explained that these disks were on the list of stolen items but had been discovered behind a small cupboard when the house was cleaned after the burglary.

The insurer averred that it could claim back the amount that was paid to the insured since it was not due, alternatively that it was entitled to cancel the insurance contract and to repayment of the sum insured (419F–H). In a further alternative the insurer claimed that the insured had committed fraud, as provided for in the contract, and in a further alternative that it had been obstructed or hindered in exercising its rights under the insurance contract and that the insured had forfeited his benefits in terms of the policy. The insured was therefore obliged to repay the sum insured to the insurer.

The court held that even if it was assumed in favour of the insured that the insurer could not prove the required fraud, the contract provided that the insured forfeited all benefits under the contract if the insurer was obstructed or hindered in exercising its rights under the insurance contract (423E–F). In this regard the contract provided that the insured had to do everything to find lost or stolen goods and that the insurer had a right to take possession of such goods (423G–H. Presumably this right could only be exercised after the insurer had compensated the insured).

The court further pointed out that an insurance contract is a contract of *uberrima fides* and that it is expected of the insured to lay his cards on the table when dealing with the insurer (423H). The court, without comment, mentioned that the insured's counsel referred to the following well-known *dictum* in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433D:

> "Moreover, there is no magic in the expression *uberrima fides*. There are no degrees of good faith. It is entirely inconceivable that there could be a little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room for *uberrima fides* as a third category of faith in our law. Oelofse (*op cit* at 2):
>
> 'Streng gesproke kan daar nie grade van goeie of kwaaie trou wees nie. Iemand tree òf te goeie trou òf te kwaaie trou op.' "

The court found that there was overwhelming evidence that the insured's conduct obstructed or hindered the insurer in exercising its rights. This held true not only for the motor vehicle but also for the laser disks and the two loudspeakers. With regard to the disks and the loudspeakers the court held that the insured's conduct was fraudulent. In the final instance the insured forfeited his benefits under the policy and the insurer was entitled to repayment of the sum insured. The court also made an order for costs to be paid on an attorney and client scale in view of the insured's dishonest and reprehensible conduct (424D).

This case may be used as an example of how a court gives effect to that which the parties agreed upon. After all, the contract contained a term which provided that the insured forfeited all benefits under the contract if the insurer was obstructed or hindered in exercising its rights under the contract. However, such an interpretation would be superficial and does not take cognisance of a more fundamental issue underlying the law of contract. The key to fully understanding the court's decision lies in the reference to *uberrima fides*. Although the court stated that an insurance contract is one of *uberrima fides*, it immediately thereafter referred to *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality supra*. This case makes it very clear that in our law all contracts, including insurance contracts, are *bonae fidei* and specifically rejects the concept of *uberrima fides*. The paragraph from which the citation in *Santam Bpk v Potgieter* was taken states that "[b]y our law all contracts are *bonae fidei* . . ." (433B). Nevertheless, the rather imprecise formulation of the court does not detract from the fundamental truth that the requirement of good faith underlies the operation of all contracts. This has also been decided in a number of other cases (see, eg, *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802A; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652F; *Fourie v Potgietersrusse Stadsraad* 1987 2 SA 921 (A) 927G–H; *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W) 194A; *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 609J 610A 616C–D; *Ex Parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W) 227A; *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA) 321H. See also Lubbe and Murray *Farlam and Hathaway: Contract – Cases, materials and commentary* (1988) 390; Zimmerman "Good faith and equity" in Zimmermann and Visser *Southern cross – Civil and common law in South Africa* (1996) 217 *et seq*).

On a previous occasion I examined the role of good faith in insurance contracts and concluded that the requirement of good faith allows a court to imply terms into a contract to "ensure that the conduct of the parties to the contract complied with the community's concept of reasonableness, justice, and equity"

(Havenga "Good faith in insurance contracts – Some lessons from Australia" 1996 *SA Merc LJ* 77). More recently the role of good faith in the law of contract was extensively discussed by Olivier JA in a concurring minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (SCA). In this case the court had to decide whether one of the contracting parties had the capacity to act when the contract was concluded. It is clear from his Lordship's exposition that one of the purposes of the requirement of good faith is to provide a criterion to evaluate the conduct of the parties when they perform in terms of the contract (320G). Such conduct must adhere to the community's concept of reasonableness, justice and equity (326G).

Keeping in mind the dictate of good faith and applying it to the facts in *Santam Bpk v Potgieter*, it is clear that no other finding than that made by the court was possible. The conduct of the insured when he claimed compensation for the allegedly stolen goods can under no circumstances be said to have been reasonable and certainly did not comply with the dictates of justice. In short: the insured did not act in good faith. A matter that still has to receive attention is what the consequences are where a party does not act in good faith. In other jurisdictions it may give rise to a delictual or a contractual action (Havenga 1996 *SA Merc LJ* 78–79). In principle there seems to be no reason why a party who has suffered damage as the result of another party's failure to act in good faith, should not have a claim for damages (*idem* 87). In this case the insurer did not claim damages, but the court did order costs to be paid on an attorney and client scale in view of the insured's conduct. Once again, the unstated reason for this order was the failure by the insured to act in good faith.

The role of good faith in the law of contract and more particularly in insurance contracts is beginning to develop and content is being given to the requirement of good faith. This move is to be welcomed since it provides a guideline to ensure that the conduct of both the insurer and the insured adheres to the community's concept of reasonableness, justice and equity.

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The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead (Holmes *Learning and science. Speeches* (1913) 67).

BOEKE

MEDIATION – PRINCIPLES PROCESS PRACTICE

by LAURENCE BOULLE and ALAN RYCROFT

Butterworths Durban 1997; ix and 278 pp

Price R166,40 (soft cover)

The front cover depicts the water's edge in a steamy palm-treed swamp which could be somewhere in South Africa or Australasia. A turtle in the lake seems to be in earnest conversation with an Australian emu and a South African rhinoceros. Although no details are given of the artist or the scene, the cover is symbolic of the fact that the book is the product of a (now) Australian author's collaboration with a South African author. Together they have produced a harmonious and deeply insightful book on the principles and technique of mediation in its universally applicable principles and in the relatively newly emerged practice of mediation in a South African context. The symbolism probably also extends to the diverse and widespread applicability of mediation to many different situations – albeit not unlimited – including those where there are power imbalances.

In part one, the authors introduce the reader to an amazing smorgasbord of definitions, goals, purposes and theories of mediation. Mediation, says the preface, is to some extent a practice in search of a theory. The authors do not necessarily arrive at a complete and satisfying theory, partly because it does not seem to be their ultimate aim and partly because, as they say, they are exploring mediation in the shadow of the law.

The authors, too modestly I feel, deny any pretension for the book as a manual or guide to mediation. This may be so, as the book is an academically sound text on the theory and practice of mediation. But it also comes the closest to a manual for the aspirant mediator in our country. About a third of the book is devoted to the standard mediation process in its three sequential phases.

This is not a book which will be merely read. It is a deeply serious book which requires study. The reason is that although the authors believe that mediation is a science and not an art, it seems to me that the efficacy of a good mediator depends, as in other disciplines, a great deal on how well the mediator has internalised the knowledge, skills and tricks of the trade.

The concluding part deals with mediation in practice. It surveys the role assigned to mediation by the South African legislature in the resolution of disputes. Predictably, it concentrates on labour mediation, which is by far the most developed branch of this science. It concludes with some valuable discussions about mediation, how it is regulated by law and its relationship to the law and judicial instruments and institutions.

The book is intended for those learning about mediation in academic institutions, those being exposed to it in training workshops and those who practise it. It will probably have a wider readership among traditional dispute resolvers such as arbitrators and judges and persons who will appreciate the value of communication in the resolution of disputes.

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Labour Court

VAN WINSEN, CILLIERS & LOOTS HERBSTEIN AND VAN WINSEN THE CIVIL PRACTICE OF THE SUPREME COURT OF SOUTH AFRICA

deur M DENDY (red)

Vierde uitgawe; Juta Kaapstad 1997; 1268 bl

Prys R625,00 BTW ingesluit (hardeband)

Daar is met groot verwagting uitgesien na hierdie uitgawe van 'n werk wat tradisioneel sekerlik een van die gesaghebbendste op die terrein van die siviele prosesreg is. Sedert die publikasie van die derde uitgawe agttien jaar gelede, het daar grootskaalse veranderings ingetree in die prosedure van die hooggeregshof. Hoewel 'n mens groot waardering het vir die monumentale werk wat die outeurs verrig het en begrip het vir die omstandighede wat publikasie van die werk op 'n vroeër tydstip verhoed het, is dit nogtans jammer dat die uitgewer dit nie goed gevind het om publikasie terug te hou tot ná die inwerkingtreding van die Grondwet nie. Hierdie andersins puik publikasie is gevolglik in enkele opsigte reeds verouderd, nie alleen wat die titel betref nie, maar ook wat prosessuele aangeleenthede rakende die konstitusionele hof betref, 'n feit wat die outeurs self in die voorwoord aanroer.

Die inhoud van die werk het, soos verwag, 'n redelike groot verandering ondergaan. Twee nuwe hoofstukke wat interdikte en Anton Piller-bevele onderskeidelik behandel, maak hul verskyning en inhoudelik het 'n herrangskikking van stof op 'n groot skaal plaasgevind. So is daar in die vorige uitgawe stof saamgevoeg wat logieserwys nie noodwendig in dieselfde hoofstuk gehoort het nie. In hierdie uitgawe is sodanige gebreke reggestel deur die stof te skei en afsonderlik te bespreek. (Ter illustrasie vind 'n mens dat die dagvaarding in hoofstuk 15 en voeging in hoofstuk 6 behandel word terwyl hierdie onderwerpe vroeër saam in hoofstuk 7 behandel is.) Hierbenewens is die volgorde van die hoofstukke nou meer logies as in die vorige uitgawe. Dit is egter lastig dat voorlopige vonnis in hoofstuk 41 ná appèl en hersiening (hfst 39 en 40 onderskeidelik) behandel word: logieserwys behoort dit veel vroeër te geskied. Wat opval, is dat die outeurs by die herrangskikking van die stof ook ruimskoots gebruik gemaak het van addisionele opskrifte. Diegene wat bekend is met die vorige uitgawe, behoort saam te stem dat die inhoud hierdeur baie meer toeganklik (en selfs meer hanteerbaar) geword het.

Wat taal en styl betref, sal volstaan word met enkele opmerkings. Hoewel daar plekplek 'n oormatige gebruik van kommas voorkom (sien bv hfst 9 II C (2) en 14 II D (2)) wat veroorsaak dat die teks nie vloeiend lees nie, is die skryfstyl van die outeurs oor die algemeen gemaklik. Ook is gevind dat begrippe en beginsels op 'n maklik verstaanbare wyse behandel word. Laasgenoemde blyk veral uit die bespreking van jurisdiksie (hfst 2), 'n onderwerp wat dikwels aanleiding gee tot onsekerheid by sowel praktisyns as studente. In die vorige uitgawe is die posisie ten aansien van die *peregrinus* van die hele Republiek ietwat oorsigtelik behandel, terwyl dit nou meer indringend gedoen word aan die hand van resente regspraak.

'n Definitiewe pluspunt is die insluiting van 'n uiters nuttige (en in die lig van die omvangryke inhoud, noodsaaklike) opsommende inhoudsopgawe. Hierdie inhoudsopgawe in die kleine lei die gebruiker vinnig na 'n bepaalde onderwerp en bied ook 'n oorsig van die inhoud van die werk as geheel. Anders as die vorige uitgawe word die volledige inhoud in die inhoudsopgawe weergegee en dié strek oor 23 bladsye. Hierbenewens bevat die werk ook aanhangsels met hoofsaaklik uittreksels uit wetgewing, 'n sakeregister, 'n register van wetgewing en hofreëls asook 'n woordregister. Wat laasgenoemde betref, moet die outeurs gelukgewens word. 'n Mens kry dikwels die indruk dat die invoeging van woorderegisters bloot 'n formaliteit is wat kan verklaar waarom sulke registers dikwels van weinig nut is. Dit is nie hier die geval nie. Die woordregister

beslaan sowat 73 bladsye en is duidelik nie bloot van die vorige uitgawe oorgeneem en uitgebrei nie. Hierbenewens is die keuse van trefwoorde sinvol en effektief aangesien dit die inhoud van die werk help ontsluit.

Hierdie werk bevat 'n geweldige hoeveelheid inligting en sal na verwagting, soos dit die geval was met die vorige uitgawes, 'n onontbeerlike naslaanbron vir praktisyns, akademici en studente word. As sodanig word dit sonder voorbehoud vir sodanige gebruikers aanbeveel.

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MALAN ON BILLS OF EXCHANGE, CHEQUES AND PROMISSORY NOTES

deur FR MALAN en JT PRETORIUS

Derde uitgawe; Butterworths Durban 1997; 573 bl

Prys R203,00 (sagteblad)

Die derde uitgawe van *Malan on bills of exchange, cheques and promissory notes* het pas verskyn en is een van die belangrikste bronne vir sowel die regstudent as praktisyn oor hierdie aspek van die Suid-Afrikaanse handelsreg.

Die boek bestaan uit twintig hoofstukke, die volledige teks van die Wisselwet (Bills of Exchange Act) 34 van 1964, 'n register met verwysings na genoemde wet asook 'n nuttige, volledige bibliografie, 'n sakeregister en 'n indeks. Die register is 'n handige hulpmiddel om 'n aangeleentheid vervat in die wet maklik op te spoor. Die uiteensetting, organisasie en volgorde van die onderwerpe is goed beplan, funksioneel en logies.

Hoofstuk 1 ("Principles of the cambial obligation") en hoofstuk 2 ("Legislative history of bills, cheques and notes) bied die fundamentele grondslag wat nodig is vir die bestudering van die vakgebied oor verhandelbare dokumente. Die definisies is bondig en ondubbelsinnig. Die hele ontwikkeling van die wetgewing word sistematies en sinvol aangebied en op dié wyse word 'n bepaalde perspektief van die huidige Suid-Afrikaanse wetgewing geskep. Dit is veral prysenswaardig dat die internasionale modelle nie agterweë gelaat is nie en die verwysings na byvoorbeeld UNCITRAL is veral sinvol in die lig van die toenemende internasionale handel waarin Suid-Afrikaanse regspraktisyns 'n al hoe belangriker rol te speel het.

Hoofstuk 3 ("The bill of exchange") tot hoofstuk 14 handel oor die wissel. In hoofstuk 3 word verskeie aspekte rakende die wissel volledig dog bondig bespreek, onder meer die oorsprong van die wissel, die wisselpartye, vorm van die wissel, opdrag, handtekening of ondertekening, onvoorwaardelikheid, gerig deur een persoon aan 'n ander, plek van trekking en betaling, seëlreg, uitsluitingsbedinge, afstanddoening en waarde. Hoofstuk 4 handel oor lewering en hoofstuk 5 oor die *causa* van die wisselkontrak.

In hoofstuk 6 word die handtekening en in hoofstuk 7 verhandeling bespreek. Hoofstuk 8 en 9 behandel onderskeidelik die houer en die reëlmatige houer, hoofstuk 10 die nieteenstelbaarheid van verwere en hoofstuk 11 die aanspreeklikheid van die wisselpartye. Hoofstuk 12 gee 'n goeie verduideliking van die verpligtinge van die houer. 'n Sinvolle bespreking oor die belangrike onderwerp internasionale privaatreg is in hoofstuk 13 vervat en hier word onder meer kortliks verwys na die bepalings van die *Geneva Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes* en die *Geneva Convention for the Settlement of Certain*

Conflicts of Laws in connection with Cheques. Hoofstuk 14 sluit die behandeling van die wissel af met 'n bespreking van die voldoening van die wisselskuld.

Hoofstuk 15 tot hoofstuk 19 handel oor die tjek as betaalmiddel. Die volgende onderwerpe word bespreek: betaling per tjek (hfst 15); die verhouding tussen bank en kliënt (hfst 16); die kruising van tjeks (hfst 17); die nie-oordraagbare tjek (hfst 18); en die aanspreeklikheid van die invorderingsbank (hfst 19).

Hoofstuk 20 bied 'n volledige bespreking van die promesse en begin met sekere historiese aspekte gevolg deur 'n definisie en die funksie van 'n promesse. Ook word die toepassing van die wet op 'n promesse verduidelik. Ander onderwerpe wat aandag geniet, is betaalbaarheid op aanvraag, meerdere makers, aanbieding vir betaling en aanspreeklikheid van die maker.

Die drukwerk en tegniese afwerking van die boek is van goeie gehalte. Die skryfstyl is vloeiend en die taalgebruik keurig. Die skrywers slaag daarin om die stof logies uiteen te sit. Volledige voetnotas verhoog die standaard van hierdie werk verder. Die proefleeswerk is besonder goed en verdien 'n pluimpie. Die enigste fout wat ek raakgesien het, is die aanhalingsteken wat ontbreek voor "Naturally" op 37.

Diegene van ons wat nog die voorreg het om die oorspronklike werk *Wisselreg en tjekreg* in ons besit te hê, gebruik die Engelstalige *Malan on bills* met 'n tikkie weemoed. Die indeling en die styl is dieselfde. 'n Nuwe *Wisselreg en tjekreg* sal opreg waardeer word deur Afrikaanse regstudente en praktisyns, maar by gebrek daaraan, beveel ek *Malan on bills* ten sterkste aan.

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BASIC APPROACHES TO PROBLEM SOLVING IN CUSTOMARY LAW: A STUDY OF CONCILIATION AND CONSENSUS AMONG THE CAPE NGUNI

by RB MQEKE

Grocott & Sherry Grahamstown 1997

Price R69,00

There has recently been a revival of interest in African customary law. In terms of the new Constitution it is recognised as a system of law – it would seem, no different from common law. On the other hand, it is recognised subject to the precepts of the Bill of Rights. Thus, although the courts must apply customary law in appropriate cases, rules of customary law may fall foul of the Bill of Rights.

In my view, customary law will pass constitutional muster, but only if its inherent characteristics, its underlying values, are appreciated. One of these underlying principles is that of problem solving by conciliation and consensus. Prof Mqeke has now written this excellent study on this topic. Although it is confined to the Cape Nguni, the principles apply equally to other African communities.

The book puts the whole matter in legal, historical and cultural perspective, after which the author proceeds to discuss the application in various fields of law, namely constitutional and administrative law, the law of persons and the family, the law of property and succession and the law of obligations. Finally, the author speculates on the future development of customary law.

The publication should serve the needs of students and practitioners. A pity, though, that the author has not made an index of key words and phrases. That is what practitioners like – a type of self-starter. The table of contents is, however, quite extensive and does pave the way.

JC BEKKER
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HANDBOEK VIR MAATSKAPPYWETGEWING 1998 WAARBY INGESLUIT DIE WET OP BESLOTE KORPORASIES

deur EML STRYDOM (red)

11de uitgawe; Butterworths Durban 1997; 504 bl

Prys R114,00 (sagteband)

Volgens die redakteur is die doel met hierdie publikasie om die volledige en tot op datum gewysigde wette, regulasies en reëls redelik goedkoop tot die beskikking van studente, lede van die regs- en rekeningkundige beroepe, sakemanne, ensovoorts te stel. Die feit dat die publikasie 'n elfde uitgawe beleef, dien as bewys dat daar in 'n groot mate in hierdie doel geslaag is.

Die teks en bylaes van die betrokke wette, soos gewysig, regulasies, vorms en praktyksnotas is volledig in die boek vervat. Alle wetswysigings tot 1 Oktober 1997 is ingesluit.

Die boek hanteer maklik en die afsonderlike woordregister vir elke wet vergemaklik die gebruik van die boek. Aan die einde van die Maatskappywet-afdeling, is twee indekse deurdat 'n afsonderlike indeks vir die Maatskappywet en een vir die bylaes, regulasies en vorms voorsien is. Daar is 'n enkele indeks aan die einde van die Beslote Korporasie-afdeling.

Die drukwerk en die tegniese afwerking van die boek is van goeie gehalte. Die plasing van die bladsynommer in die middel bo van die bladsy en nie onder aan die buitekante van die bladsy nie, is effe ongerieflik wanneer die inhoudsopgawe gebruik word. Die bladsy-opskrifte is egter baie handig en indien vinnig na 'n bepaalde artikel gesoek word, is dit 'n nuttige hulpmiddel.

Die proefleesgehalte van die werk is goed en geen foute is opgemerk nie.

'n Engelse weergawe van die boek, *Company legislation handbook including the Close Corporations Act* is ook beskikbaar.

ELIZABETH SNYMAN
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CASES AND MATERIALS ON CRIMINAL LAW
by JONATHAN BURCHELL AND JOHN MILTON
Second edition; Juta Kenwyn 1997; 752 pp
Price R195,00 (soft cover)

Professors Burchell and Milton's purpose with *Cases and materials on criminal law* was twofold: (a) to provide students studying their textbook *Principles of criminal law* (1997) with a collection of cases and materials indicated in the textbook as essential or useful reading; and (b) to provide a selection of cases and materials that can be used in teaching criminal law by the Socratic or casebook method.

Since the casebook was designed as a companion volume to the second edition of *Principles of criminal law*, no commentary is provided upon the cases and materials. For any commentary on the cases, the reader should consult the textbook. For this purpose, the compilers have effected an excellent, easy-to-use method of cross reference.

As is the case with the first edition, an English translation of judgments delivered in Afrikaans is provided (the original Afrikaans version is not included in the text).

In the second edition, the compilers have included a number of extracts not contained in the first edition, notably chapter 2 of the Constitution of the Republic of South Africa 106 of 1996, leading Constitutional Court judgments, the Prevention of Family Violence Act of 1993, the Termination of Pregnancy Act of 1996, the South African Law Commission's Working Paper on "Euthanasia and the artificial preservation of life" and its report on the "Application of the Trapping System". The second edition reflects the law as at the end of 1996.

Cases and materials on criminal law is a useful collection of case law, legislation and working papers and reports of the South African Law Commission (totalling 322 items) in one volume, and makes a valuable companion to *Principles of criminal law*.

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Gelykberegtiging

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SUMMARY

The right to equality before the law

The constitutional dispensation which came into operation in South Africa on 27 April 1994 represented a conscious reaction to the evils of South Africa's past. Institutionalised discrimination was a characteristic of our political history; it is therefore not surprising that equality before the law is a core principle of the new constitutional system – so much so, that it may even be argued that equality is the *Grundnorm* of the new South African Constitution.

Constitutional equality has two facets: equal protection and benefit of the law and the prohibition of discrimination. Among the issues addressed in this article are: the scope of the prohibition of private discrimination, the application of the limitation provision and the equality clause, the scope of the right to equal protection and benefit of the law, affirmative action and discrimination (particularly in the sphere of education and that of gender and sexual orientation).

Die grondwetlike verandering in Suid-Afrika wat op 27 April 1994 in werking gestel is, was daarop bedag om radikale veranderinge op sosiale, ekonomiese, politieke en regsgebied te inisieer. Die nuwe grondwetlike bedeling moet in daardie sin vertolk word as die doelbewuste reaksie teen die euwels van die voorafgaande tydvak in die land se geskiedenis.[1] Die Grondwet van die Republiek van Suid-Afrika 1996[2] erken daarmee die "ongeregtighede van ons verlede",[3] en tipeer die nuwe Suid-Afrika dienooreenkomstig as "'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid".[4] Die grondwetlike handves van regte[5] voorsien die afdwingbare stukrag vir so 'n gemeenskap: enige instelling wat met diskriminasie en onderdrukking van die apartheid era geassosieer kan word, is – grondwetlik beskou – onversoenbaar met die waardes wat deel vorm van die soort samelewing wat die nuwe Grondwet poog om tot stand te bring.[6]

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1 Vgl Van der Vyver "Constitutional options for post-apartheid South Africa" 1991 *Emory LJ* 745 785–787 789; *Du Plessis v De Klerk* 1996 3 SA 850 (CC), 1996 5 BCLR 658 (CC) par 90 (per Ackermann R).

2 Wet 108 van 1996.

3 Aanhef.

4 A 36(1), 39(1)(a); en vgl ook a 7(1).

5 Hfst 2.

6 Vgl *Brink v Kitshoff* 1996 4 SA 197 (CC), 1996 6 BCLR 752 (CC) par 33 (per O'Regan R); en vgl verder *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 218

vervolg op volgende bladsy

Geïnstitusionaliseerde diskriminasie was kenmerkend van die politieke geskiedenis van Suid-Afrika en was waarskynlik die beslissende oorsaak van die land se radikale transformasie. Met die reaksionêre strekking van die Grondwet voor oë, moet die idee van gelykberegtiging daarom erkenning geniet as 'n kernbeginsel van die nuwe bedeling.[7]

In dié verband gaan dit allereers om rassediskriminasie.[8] In die tydvak van apartheid het die staat, met ras as die primêre maatstaf, voorgeskryf met wie 'n mens kon trou, waar jy kon woon en werk, watter skool en universiteit jy kon besoek, en watter soort werk gereserveer is vir persone van die groep waartoe jy behoort. Die staat het aan sportliggame voorgeskryf wie as lede van 'n klub toegelaat kon word, en teen wie daar gekompeteer kon word. Die siekes moes in ambulanse met 'n rasseklassifikasie gekarwei word, kon slegs bloed van 'n op ras gedefinieerde skenker ontvang, en moes in ras-eksklusiewe hospitale versorg word. Die staat het selfs bepaal wie toegelaat sou kon word om kerkdienste in sekere gebiede by te woon, en waar persone van 'n bepaalde ras begrawe mog word.[9]

Diskriminasie het ook wel op ander grondslae as net ras berus,[10] byvoorbeeld op geslag[11] en seksuele georiënteerdheid.[12] Die egalitêre opset van die nuwe bedeling is in omvattende terme verwoord in die Grondwet:[13]

> "(1) Elkeen is gelyk voor die reg en het die reg op gelyke beskerming en voordeel van die reg.
>
> (2) Gelykheid sluit die volle en gelyke genieting van alle regte en vryhede in. Ten einde die bereiking van gelykheid te bevorder, kan wetgewende en ander maatreëls getref word wat ontwerp is vir die beskerming of ontwikkeling van persone, of kategorieë persone, wat deur onbillike diskriminasie benadeel is.
>
> (3) Die staat mag nie regstreeks of onregstreeks onbillik teen iemand diskrimineer op een of meer gronde nie, met inbegrip van ras, geslagtelikheid, geslag, swangerskap, huwelikstaat, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, oortuiging, kultuur, taal en geboorte.
>
> (4) Geen persoon mag regstreeks of onregstreeks onbillik teen iemand op een of meer gronde ingevolge subartikel (3) diskrimineer nie. Nasionale wetgewing moet verorden word om onbillike diskriminasie te voorkom of the belet.
>
> (5) Diskriminasie op een of meer van die gronde in subartikel (3) vermeld, is onbillik, tensy daar vasgestel word dat die diskriminasie billik is."

(per Langa R), 262 (per Mahomed R), 322 (per O'Regan R); *Shabalala v Attorney-General of the Transvaal* 1996 1 SA 725 (CC), 1995 12 BCLR 1593 (CC) par 26 (per Mahomed R); *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC) par 29.

7 *Brink v Kitshoff supra* n 6 par 33. Let ook daarop dat die voorskrifte rondom gelykberegtiging in die eerste substantiewe bepaling van die handves van regte (a 9) vervat is.

8 Par 40.

9 Vgl Van der Vyver (*supra* n 1) 745–753 vir 'n beknopte oorsig van rasgebonde regsbepalings uit daardie tydperk; en vgl ook *Ferreira v Levin; Vryenhoek v Powell supra* vn 6 par 51 (per Ackermann R).

10 *Brink v Kitshoff supra* vn 6 par 41.

11 Par 44; en vgl bv a 1(b) van Wet 108 van 1996.

12 Vgl *S v H* 1995 1 SA 120 (K) 129, waar Ackermann R verwys na "broad consensus on eliminating discrimination against homosexuality and the likelihood that this will be entrenched in a new constitutional dispensation" – wat dan ook wel gebeur het.

13 A 9.

Die beginsel van gelykberegtiging het dienooreenkomstig twee fasette: gelyke beskerming deur en voordele van die reg, en die diskriminasieverbod. Die vertakking van die Suid-Afrikaanse reg wat betrekking het op gelyke regsbeskerming deur en voordele van die reg, en die grondwetlike verbod op diskriminasie, is die personereg. In hierdie verband moet "personereg" in die breedste sin vertolk word as daardie deel van die positiewe reg – met inbegrip van die privaatreg en die publiekreg, en insluitende die gemenereg, gewoontereg en statutereg – wat die regstatus van 'n persoon (insluitende die ontstaan en tot niet gaan van regsubjektiwiteit) reël, en met besondere klem op differensiasies met betrekking tot die kompetensies en subjektiewe regte van regsubjekte.[14]

A DIE GRONDWETLIKE *GRUNDNORM*

Waarskynlik alle handveste van menseregte is gebaseer op 'n bepaalde basiese norm, die fondament van die hele stelsel van menseregtebeskerming, wat in die geval van 'n botsing van grondwetlike waardes enige ander bepaling wat daarmee in botsing kom, sal troef:[15] In Duitsland, die beskerming van menswaardigheid; in die Verenigde State, die Eerste Amendement vryhede van spraak, godsdiens en die pers (die sg "preferred freedoms"); in Kanada, die gelykheidsbeginsel.

Aangesien die basiese norm van 'n bepaalde land nie willekeurig geselekteer kan word nie maar op historiese omstandighede berus – dikwels euwels van die verlede wat die totstandkoming van 'n nuwe grondwetlike bedeling genoodsaak het – behoort dit duidelik te wees dat gelyke regsbeskerming en die verbod op diskriminasie die *Grundnorm* van die "nuwe Suid-Afrika" is.[16]

Die historiese werklikheid, en nie soseer die bewoording van die interim-Grondwet[17] self nie, verleen steun aan hierdie standpunt: die feit dat hoofsaaklik diskriminerende instellings en praktyke van apartheid in Suid-Afrika die grondwetlike veranderinge in die land genoodsaak het. Die sinsnede wat deur skrywers van die interim-Grondwet gebruik is om die soort samelewing te tipeer wat met die nuwe grondwetlike bedeling geïnisieer is, verwys daarna as "'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid",[18] as sou die libertêre en egalitêre waardes gelykwaardig wees, of – nog erger – as sou die grondwetlike vryhede hoër op die rangorde van grondwetlike waardes gereken moes word as die voorskrifte wat op gelykberegtiging betrekking het.[19] Met verwysing na die regtebedeling van die interim-Grondwet, het die president van die konstitusionele hof op 'n keer gesê:[20]

> "The right to life and dignity are the most important of all human rights, and the source of all personal rights in ... [the Chapter on Fundamental Rights]. By

14 Vgl Van der Vyver en Joubert *Persone- en familiereg* (1991) 55–56.

15 Vgl Van der Vyver "Constitutional free speech and the law of defamation" 1995 *SALJ* 572 593–594.

16 *Idem* 594.

17 Grondwet van die Republiek van Suid Afrika 200 van 1993.

18 A 26(2) 33(1)(a)(ii) 35(1).

19 Du Plessis "A background to drafting the chapter on fundamental rights" in De Villiers (red) *Birth of a Constitution* (1994) 89 91–92 beskryf die grondwetlike magstryd vanuit hierdie gesigspunt as een tussen voorstanders van die libertêre ("libertarian") en bevrydingsbeginsels ("liberationists").

20 *S v Makwanyane supra* vn 6 par 144 (per Chaskalson P).

> comitting ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."

Die pertinente wysiging, deur bemiddeling van die 1996-Grondwet, van die sinsnede wat bestem is om die aard van die nuwe Suid-Afrika aan te dui, het nou hierdie faset van die grondwetlike bedeling in die reine gebring: Suid-Afrika – word nou gesê – is "'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid".[21] In die lig van hierdie wysiging, kan aangeneem word dat in die geval van 'n botsing tussen grondwetlike bepalings, menswaardigheid belangriker geag moet word as gelykheids- en vryheidsoorwegings,[22] terwyl die waardes wat in gelykberegtiging opgesluit lê, die grondwetlike vryheidsbepalings sal troef.

In hierdie opsig verskil die Suid-Afrikaanse menseregtebedeling fundamenteel van onder meer die Amerikaanse stelsel. Die beskerming van menswaardigheid deur byvoorbeeld die lasterreg geniet voorrang in Suid-Afrika bo die beskerming van die vryheid van (nie-politieke)[23] spraak. Vonnisse wat, met verwysing na Amerikaanse regspraak, onkrities gewag maak van die sogenaamde opperste belang van vryheid van spraak, moet daarom met 'n knippie sout geneem word. In *Mandela v Falati*[24] het regter Van Schalkwyk byvoorbeeld met verwysing na Amerikaanse gewysdes gewag gemaak van "the primacy of the freedom of speech" en vryheid van uitdrukking aangewys as "the freedom upon which all others depend". In *Bogoshi v National Media Ltd*[25] het regter Eloff die aangewese standpunt gehandhaaf waarvolgens menswaardigheid (in lastersake) belangriker geag moet word as vryheid van spraak.

Aan dieselfde mate gemeet, is vryheid van spraak ondergeskik aan gelyke regsbeskerming en nie-diskriminasie. Regsverbiedinge van die produksie en verspreiding van pornografie (wat die gelyke regsbeskerming van vrouens ondermyn) sou daarom in Suid-Afrika grondwetlik houdbaar wees ten spyte van die grondwetlike beskerming van vryheid van spraak[26] – en anders as wat byvoorbeeld in die Verenigde State die geval is.

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21 Vgl a 7(1) 36(1) 39(1)(a) van Wet 108 van 1996.

22 Let egter daarop dat die artikel wat op gelyke regsbeskerming en non-diskriminasie betrekking het (a 9), steeds die eerste substantiewe bepaling van die handves van regte is, en die een wat menswaardigheid waarborg (a 10), voorafgaan.

23 Vgl die uitspraak van Cameron R in *Holomisa v Argus Newspapapers Ltd* 1996 2 SA 588 (W) 608–13, 1996 6 BCLR 836 (W) 854–859, waar klem gelê word op die belangrikheid in 'n demokratiese bestel van die vryheid om politieke uitlatings te maak.

24 1995 1 SA 251 (T) 259, 1994 4 BCLR 1 (T) 8; en vgl ook Marcus "Freedom of expression under the Constitution" 1994 *SAJHR* 140 143, waar hy onkrities na *New York Times Co v Sullivan* 376 US 254 (1964) verwys as – na sy mening – voldoende gesag vir die gevolgtrekking dat die interim-Grondwet "horisontale" toepassing vind in vryheid van spraak-aangeleenthede (sonder om buitendien daarop te let dat *Sullivan* met statutêre laster te make gehad het, wat in elk geval "state action" ooreenkomstig die Amerikaanse betekenis van daardie konsep impliseer).

25 1996 3 SA 78 (W) 83–84; en vgl ook *Hull v Welz* 1996 4 SA 1070 (K) 1072 (per Conradie R), wat in dié verband onder meer onderskeid maak tussen politieke en niepolitieke spraak.

26 In *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC), 1996 5 BCLR 609 (CC) is die besit van onwelvoeglike en onbetaamlike fotografiese materiaal (in die privaatheid van die beskuldigde se woning) in 'n meerderheidsbeslissing ongrondwetlik bevind, en wel op grond van die beskerming van die reg op privaatheid soos verorden in a 13 van Wet 200 van 1993. Vgl ook die Kanadese saak,

vervolg op volgende bladsy

B TOEPASSINGSGEBIED VAN DIE HANDVES VAN REGTE

'n Mens kan nie sinvol oor enige aspek van die handves van regte besin sonder om rekenskap te gee van die toepassingsgebied van menseregtebeskerming in Suid-Afrika nie. As skrywers van die handves maar net kon sê wat hulle wou sê, kon die probleem bloot met verwysing na die Grondwet opgeklaar word. Maar, nou ja . . .

Dit staan vas dat die Grondwet oor die hele spektrum van die Suid-Afrikaanse reg toepassing vind – soos wat inderdaad ook met die interim-Grondwet die geval was, hoewel met 'n ietwat ander fokus. Dit behoort ook vir almal duidelik te wees dat die toepassingsgebied van die 1993-Grondwet absoluut niks te make gehad het met die onderskeid tussen privaat- en publiekreg nie, en die twisgeskryf oor die sogenaamde "horisontale werking" van die hoofstuk oor menseregte was daarom ook 'n gejaag na wind.[27] Dit geld steeds wat die 1996-Grondwet betref.

Blykbaar was dit die bedoeling:

- om te onderskei tussen toepassing van die handves van regte in die geval van regsreëlings en handelinge (respektiewelik);[28]
- om enige regsvoorskrif[29] – statutereg, gemenereg en gewoontereg – wat onversoenbaar is met die Grondwet, ongeldig te maak;[30]
- om 'n onderskeid te maak tussen die optrede van staatsorgane, insluitende statutêre liggame wat 'n openbare bevoegdheid uitoefen of 'n openbare funksie verrig,[31] aan die een kant, en van natuurlike en regspersone (uitgesonder die staat en staatsorgane), aan die ander kant, in die opsig dat alle optredes (besluite wat geneem en handelinge wat verrig word) van die staat en staatsorgane aan grondwetlike toesing onderhewig is,[32] terwyl die optrede van persone wat nie straatsorgane is nie, slegs in bepaalde omstandighede, afhangende van "die aard van die reg en die aard van enige plig deur die reg opgelê", aan die handves van regte onderhewig is.[33]
- In gevalle waar die handves van regte wel van toepassing is op optredes van persone wat nie staatsorgane is nie en daardie optredes deur die gemenereg gereguleer word, moet 'n hof die toepaslike gemenereg toepas, en indien nodig ontwikkel, ten einde gevolg te gee aan 'n grondwetlik beskermde reg, of

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R v Keegstra 1990 3 SCR 697, waar die verbod op sekere vorme van spraak gehandhaaf is in 'n stelsel wat vryheid van spraak ondergeskik ag aan ander, meer dringende, sosiale eise.

27 Vgl van der Vyver *supra* vn 15 577–90; Woolman en Davis "The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions" 1996 *SAJHR* 361 365–368.

28 Vgl a 2 en 172(1)(a) van wet 108 van 1996.

29 Dit is belangrik om daarop te let dat vertaling van "law" in die Afrikaanse teks van die Grondwet met "regsvoorskrif" daarop dui dat "positiewe reg", insluitende statutereg, gemenereg en gewoontereg, bedoel word; en waar "law" met "wet" vertaal word, beteken dit spesifiek "statutereg". Vgl *Du Plessis v De Klerk supra* vn 1 par 44; Van der Vyver "The meaning of 'law' in the Constitution of the Republic of South Africa" 1994 *SALJ* 569.

30 A 2 36(2) 172(1)(a) van Wet 108 van 1996.

31 A 239.

32 A 8(1).

33 A 8(2).

om die voorgeskrewe inperking van die reg in ooreenstemming te bring met die beperkingsbepalings van die Grondwet.[34]

- Elke hof, tribunaal en forum word verder opdrag gegee om die gemenereg en gewoontereg te ontwikkel op 'n wyse wat "die gees, strekking en oogmerke van die Handves van Regte bevorder".[35]

Die bogenoemde regsreëlings behels verskeie anomalieë. Daar word aan die een kant bepaal dat enige regsvoorskrif (insluitende reëls van die gemenereg) wat die Grondwet weerspreek, ongeldig is, maar aan die ander kant word howe opdrag gegee om voorskrifte van die gemenereg wat die optrede reguleer van persone wat nie staatsorgane is nie, in gevalle waar daardie optrede wel aan die handves van regte onderhewig is, te "ontwikkel" ten einde die betrokke voorskrifte van die gemenereg in ooreenstemming te bring met die handves van regte. Ooreenkomstig artikel 8(3) van die Grondwet word aan (slegs) howe 'n ontwikkelingsfunksie ten opsigte van (slegs) 'n bepaalde vertakking van die gemenereg toegesê, terwyl artikel 39(2) aan elke hof, tribunaal en forum opdrag gee om die (hele gebied van die) gemenereg, asook die gewoontereg, te ontwikkel op 'n wyse wat "die gees, strekking en oogmerke van die Handves van Regte bevorder".

Die teenstrydige bepalings wat op die eersgenoemde anomalie neerkom, kan waarskynlik aan die hand van die volgende riglyne versoen word:[36]

(a) Statutereg, gewoontereg en reëls van die gemenereg wat die optrede van staatsorgane reguleer en wat teenstrydig is met die Grondwet (insluitende die handves van regte), is ongeldig.

(b) Voorskrifte van die gemenereg wat:

(i) die gedrag van persone wat nie staatsorgane is nie, reguleer;

(ii) in gevalle waar daardie gedrag wel onderhewig is aan die handves van regte; en

(iii) daardie voorskrifte van die gemenereg in stryd is met die handves van regte – óf deurdat dit nie beskerming verleen aan 'n grondwetlik gewaarborgde reg, óf deurdat dit nie voorsiening maak vir die inperking van so 'n reg wat met die grondwetlike inperkingsvoorskrifte ooreenstem nie,

is wel ongeldig, maar moet nietemin deur 'n hof "ontwikkel" word ten einde die bedoelde reël van die gemenereg in ooreenstemming te bring met die substantiewe of inperkingsbepalings van die handves van regte.

Die anomalie wat betrekking het op die ontwikkelingsfunksie van 'n hof ingevolge artikel 8(3), en van 'n hof, tribunaal en forum ingevolge artikel 39(2), is nie so geredelik versoenbaar nie. 'n Mens moet – om mee te begin – aanneem dat die woord "ontwikkeling" soos in artikel 39(2) gebruik, nie dieselfde betekenis het as "ontwikkel" in artikel 8(3) nie.

Die bewoording van artikel 8 wil sê dat 'n hof, onder die vaandel van "ontwikkeling" van ('n bepaalde vertakking van) die gemenereg, grondwetlike regte

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34 A 8(3).

35 A 39(2).

36 Hierdie interpretasie berus op die veronderstelling dat skrywers van die Grondwet daarop bedag was om die uitspraak van Kentridge WnR in *Du Plessis v De Klerk* (*supra* vn 1) (waarvoor daar hoegenaamd geen steun in die interim-Grondwet waarop die uitspraak gebaseer was, te vinde is nie) by die 1996-Grondwet in te skryf.

by die gemenereg kan inlees wat andersins nie deur die gemenereg beskerm sou word nie, en die gemenereg kan herskryf deur beperkings van regte, wat nou ook deur die Grondwet beskerm word, daarin op te neem sodat die gemeenregtelike beperkings van die bedoelde regte sal inpas by die grondwetlike voorwaardes van, en vereistes vir, sodanige beperkings.

Aangesien die gemeenregtelike bepalings wat die Grondwet weerspreek in elk geval ongeldig is,[37] is die gevolgtrekking onvermydelik dat howe hierdeur in der waarheid met 'n regsvormende kompetensie beklee word, wat die magte wat dusver deur die hoë hof (soos wat dit nou ook genoem word) ten aansien van die gemenereg uitgeoefen is, verreweg oortref. Die feit dat uitoefening van die artikel 8(3) - magte daarop neerkom dat die hof nou met funksies van die wetgewer beklee word, en daarom die beginsel van die skeiding van staatsmagte in die gedrang bring, maak eintlik nie meer saak nie. Hoewel die skeiding van staatsmagte ingevolge Grondwetlike Beginsel VI 'n besondere komponent van die nuwe grondwetlike bedeling sou wees,[38] is aan die verkragting van daardie staatkundige beginsel[39] onaanvegbare sanksie verleen[40] toe die konstitusionele hof die gewysigde Grondwet gesertifiseer het met die oog op die grondwetlike beginsels wat in die interim-Grondwet opgeneem is.[41]

Die vraag bly egter staan: Hoe verskil die ontwikkelingsfunksie van 'n hof met betrekking tot ('n gedeelte van) die gemenereg soos in artikel 8(3) omskryf van die ontwikkelingsfunksie van 'n hof, tribunaal en forum met betrekking tot (die geheel van) die gemenereg en gewoontereg soos deur artikel 39(2) verorden?

Terwyl die magte wat deur artikel 8(3) aan howe verleen word met betrekking tot ('n gedeelte van) die gemenereg inderdaad 'n regskeppende kompetensie is, word aan die hand gedoen dat die magte waarmee 'n hof, tribunaal en forum ingevolge artikel 39(2) met betrekking tot (die geheel van) die gemenereg en die gewoontereg beklee is, neerkom op dieselfde kompetensie wat die howe dusver uitgeoefen het wanneer regsvoorskrifte *in favorem libertatis* uitgelê is – met net dié verskil dat die gees, strekking en oogmerke van die Grondwet nou as substantiewe norm van die regsidee geld. Hierdie laasgenoemde kompetensie kan miskien geriefshalwe as "ontwikkeling deur interpretasie" getipeer word.

Die onderskeid tussen regskepping ooreenkomstig artikel 8(3) en ontwikkeling deur interpretasie ingevolge artikel 39(2) is moeilik definieerbaar. Ontwikkeling deur interpretasie behoort in beginsel nie te verskil van die magte wat in die verlede deur die hoë hof sedert sy instelling in 1827 ten aansien van die gemenereg en gewoontereg uitgeoefen is nie. Wanneer 'n hof, tribunaal of forum sy artikel 39(2) - magte uitoefen, moet dit gevolg gee aan die bestaande formulering van die gemenereg of gewoontereg. Die regspreker moet interpretasies vermy wat op 'n radikale wysiging van die gemenereg of gewoontereg sou neerkom. Sulke wysigings kan wel ingevolge artikel 8(3) aangebring word, maar dan

37 A 2 en 172(1)(a) van Wet 108 van 1996.

38 Aanhangsel 4 par VI van Wet 200 van 1993.

39 Die feit dat lede van die kabinet (die uitvoerende gesag) ook lede van die parlement (die wetgewende gesag) is, maak in elk geval 'n bespotting van die belydenis van die skeiding van staatsmagte in die Suid-Afrikaanse staatkundige bestel.

40 A 71(3) van Wet 200 van 1993.

41 *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 1 BCLR 1 (CC).

slegs deur 'n hof, en met betrekking tot slegs daardie gedeelte van die gemenereg wat aan die artikel 8(3) magte onderworpe gestel is (en glad nie met betrekking tot gewoontereg nie). Ontwikkeling van die reg deur interpretasie kan wel aanpassings behels, maar dit sluit nie die kompetensie in om 'n reël van die gemenereg of gewoontereg ongedaan te maak, of om dit deur 'n botsende bepaling te vervang of aan te vul nie. 'n Hof, tribunaal of forum, moet, wanneer dit ingevolge artikel 39(2) optree, regsaanpassings vermy in die gevalle waar die hoë hof in die verlede sou sê: "Aanpassing van die gemenereg (of gewoontereg) moet in die omstandighede van hierdie saak aan die wetgewer oorgelaat word." Ontwikkeling van die gemenereg en gewoontereg moet wel ingevolge artikel 39(2) gerig bly op verwerkliking van die gees, strekking en oogmerke van die Grondwet, maar dan steeds binne die raamwerk van "interpretasie".

Die Grondwet van 1996 het aldus verskeie wysigings aangebring vir sover dit die tradisionele ontwikkelingsfunksie van die howe met betrekking tot die gemenereg en gewoontereg betref:

- Terwyl die ontwikkelingsfunksie in die verlede in hoofsaak by die hoë hof berus het, word dit nou aan alle howe, insluitende die konstitutsionele hof,[42] die hoogste hof van appèl, die hoë howe en die landdroshowe, toegesê.
- Terwyl in die verlede "die beginsels van natuurlike geregtigheid" as maatstaf gedien het van die regterlike ontwikkelingsfunksie, moet die howe nou na die grondwetlike beginsels omsien as rigsnoer van die norm van regtebeskerming, en van die inperking van regte, wat by die gemenereg en gewoontereg inbegryp moet word.[43]
- Die howe wat ingevolge artikel 8(3) met 'n ontwikkelingsfunksie beklee is, het veel groter magte om voorskrifte van die gemenereg te wysig, aan te vul en af te skaf as wat die hooggeregshof in die verlede vir homself toegeëien het.

C INPERKING VAN GRONDWETLIK BESKERMDE REGTE

Die inperkingsbepalings van die 1996-Grondwet verskil in verskeie belangrike opsigte van die ooreenstemmende voorskrifte van die interim-Grondwet van 1993. Daar is byvoorbeeld weggedoen met die onderskeid tussen gevalle waar die inkorting van grondwetlik beskermde regte redelik, en in gevalle waar dit redelik en noodsaaklik, moet wees, asook met die vereiste dat alle beperkings van grondwetlik beskermde regte van so 'n aard en omvang moet wees dat dit nie die kern van die betrokke reg aantas nie. 'n Wysiging ten aansien van regstellende aksie in die gelykberegtigingsbepaling (a 9) kan ook wel beteken dat die betekenis van "redelikheid" in die toepaslike beperkingsklousule (a 36(1)(b)) van gedaante verwissel het.

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42 Die *obiter* uitlating van Kentridge WnR in *Du Plessis v De Klerk* (*supra* vn 1) par 64 dat ontwikkeling van die gemenereg van die jurisdiksie van die konstitusionele hof uitgesluit is, is sonder grond, en word trouens deur sy eie beoordeling (in par 63) van die funksie van daardie hof "[to] ensure that the provisions of section 35(3) in relation, *inter alia*, to the development of the common law are properly interpreted and applied ..." weerspreek.

43 Vgl *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (K) 404–406; 1995 9 BCLR 1191 (K) 1212–1214.

Ingevolge artikel 36(2) van die 1996-Grondwet moet die inperking van grondwetlik beskermde regte voldoen aan die vereistes in artikel 36(1) vermeld, óf dit moet deur enige ander bepaling van die Grondwet gesanksioneer word. Die beperkingsverseistes moet, om aan die vereistes van artikel 36(1) te voldoen:

- veroorloof word deur 'n algemeen geldende regsvoorskrif;
- redelik wees;
- regverdigbaar wees in 'n oop en demokratiese samelewing, gebaseer op menswaardigheid, gelykheid en vryheid, met inagneming van alle relevante faktore, insluitende die aard van die reg, die belangrikheid van die doel van die beperking, die aard en omvang van die beperking, die verband tussen die beperking en die doel daarvan, en minder ingrypende wyses om die doel te bereik.

Vervolgens net 'n kort woord oor elkeen van hierdie vereistes – veral met die oog op die inwerking daarvan op die huidige regsreëling aangaande gelykberegtiging.

'n Regsvoorskrif met algemene gelding

Aangesien dit hier om 'n "regsvoorskrif" gaan,[44] sou die inperkingsbepaling in statutereg, die gemenereg of gewoontereg vervat kon word.[45] Uit regspraak van die Europese Hof van Menseregte ten aansien van die ooreenstemmende bepaling in die Europese Konvensie vir die Beskerming van Menseregte en Fundamentele Vryhede[46] is daar twee lesse te leer:

- Die vereiste dat die beperking in 'n regsvoorskrif vervat moet wees, sluit aan by die beginsel van die "rule of law",[47] wat op sy beurt onder meer die vereiste van regsekerheid in hom omdra: 'n regsvoorskrif wat die inperking van 'n grondwetlik beskermde reg behels, sou daarom grondwetlik onhoudbaar wees as dit vaag en verwarrend is.[48]

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44 Vgl *supra* vn 29.

45 Vgl *Shabalala v Attorney-General of Transvaal supra* vn 6 par 23; *S v Majuva* 1994 4 SA 268 (Ck) 316, 1994 2 BCLR 56 (Ck) 84; *Khala v Minister of Safety and Security* 1994 4 SA 218 (W) 222 227, 1994 2 BCLR 89 (W) 97; en vgl ook die *Sunday Times Case* 1979 PECHR Series A vol 30 par 47, waar beslis is dat "law" in die onderhawige sin van die woord, gemenereg insluit.

46 213 *UNTS* 222 (tree op 1953-09-03 in werking).

47 Vgl Janis en Kay *European human rights law* (1990) 297.

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

- "Regsvoorskrif" sluit ook die nie-staatlike reg[49] in: dit wil sê die interne gedragsreëls van sosiale entiteite anders as die staat, soos 'n kerkgenootskap, sportliggaam, handelsmaatskappy en dies meer.[50]

Die vereiste dat die regsvoorskrif algemeen geldend moet wees, is problematies. In *Smith v Attorney-General, Bophuthatswana*[51] het hoofregter Hiemstra die ooreenstemmende bepaling in die Grondwet van Bophuthatswana vertolk as sou dit beteken dat die inperking van 'n grondwetlik beskermde reg nie net vir "individue of 'n groep individue" mag geld nie. So eenvoudig is dit egter nie. Die vereiste dat die regsvoorskrif algemene gelding moet hê, vereis bloot dat gelyksoortige gevalle oor dieselfde kam geskeer moet word. Manfred Lepa verwys, met die oog op die ooreenstemmende bepaling in die Duitse Basiese Wet,[52] na 'n geval waar die inperking van die handelsvryheid van apteke by spoorwegstasies grondwetlik bevind is, hoewel daar slegs een so 'n apteek in Duitsland was:[53] die betrokke wet het in beginsel vir alle stasie-apteke gegeld, en sou ook dié tref wat in die toekoms opgerig kon word. Sou so 'n wet egter net vir die een gegeld het wat deur Mathys Medisyne bedryf word, of vir die een op die spoorwegstasie van Makwassie, dan sou die vereiste van algemene gelding nie nagekom gewees het nie.

Die beginsel onderliggend aan die vereiste van gelyke regsbeskerming – waarop later teruggekom sal word – sou ook aangewend kon word om die betekenis van "algemene gelding" van 'n regsvoorskrif wat die inkorting van 'n grondwetlik beskermde reg sanksioneer, te bepaal. Die regsvoorskrif wat 'n groep (soos apteke op spoorwegstasies) uitsonder, moet op 'n grondslag berus wat relevant is ten opsigte van daardie groep: daar moet 'n relevante verband bestaan tussen die kriterium wat aangewend word om die groep van ander groepe te onderskei en die doel wat met die betrokke inperking van 'n grondwetlik beskermde reg nagestreef word. Dit sou byvoorbeeld sinvol wees om die verkoop van alkoholiese drank by motorhawens en restourante langs die land se hoofweë te verbied – solank daarmee beoog word om die gebruik van sterk drank deur motoriste aan bande te lê, en die verbod vir al sodanige motorhawens en restourante geld.

Die redelikheidsvereiste

Die vereiste van redelikheid beteken kortweg, aldus regter Kriegler se uitspraak in *Coetzee v Government of the Republic of South Africa*, [54] dat "[a]t the very least a law or action limiting the right . . . must have a reasonable goal and the means for achieving that goal must also be reasonable". Met die oog op aanwysings uit die Kanadese reg,[55] vat regter Joffe, namens die hof in *Government of the Republic of South Africa v "Sunday Times" Newspaper*,[56] besonderhede van die redelikheidsvereiste soos volg saam:

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49 Vgl Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 104–105 340 342.
50 Vgl bv die *Barthold Case* 1985 PECHR Series A vol 90 par 46, waar beslis is dat die interne reëls van 'n veeartsenyraad deel uitmaak van "law" in die onderhawige sin van die woord.
51 1984 1 SA 196 (BSC) 202.
52 A 19(1), wat vereis dat 'n inperking "allgemein und nicht für den Einzelfall" moet geld.
53 Lepa *Der Inhalt der Grundrechte* (1985) 294–295.
54 1995 4 SA 631 (CC), 1995 10 BCLR 1382 (CC) par 11.
55 Vgl Hogg *Constitutional law of Canada* (1992) 35–37.
56 1995 2 SA 221 (T) 225, 1995 2 BCLR 182 (T) 185–186.

- Die inperking moet 'n voldoende belangrike oogmerk nastreef.
- Daar moet 'n rasionele verband wees tussen die beperking en daardie oogmerk.
- Die beperking moet die mins drastiese middel wees om daardie oogmerk te verwesenlik.
- Die proporsionele uitwerking van die beperking ten aansien van die persoon op wie dit betrekking het, moet in aanmerking geneem word.

"Proporsionaliteit" het die sleutelwoord geword in regterlike aanwysings van die redelikheidsmaatstaf wat op die inperking van grondwetlik beskermde regte van toepassing is. In *S v Williams*[57] definieer regter Langa hierdie begrip as "a process of weighing up the individual's right which the State wishes to limit against the objective which the State seeks to achieve by such limitation".[58] In *Brink v Kitshoff*[59] verskuif regter O'Regan die klem enigsins in haar omskrywing van proporsionaliteit. Sy verwys meer bepaald na 'n "proportional exercise, in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused".[60]

In *S v Makwanyane*[61] verklaar president Chaskalson dat redelikheid die afweging van kompeterende waardes, en uiteindelik 'n waardebepaling gegrond op proporsionaliteit, behels. Hy verduidelik verder dat proporsionaliteit nie vasgestel kan word op die grondslag van absolute standaarde nie maar oorweeg moet word deur in elke besondere geval verskillende belange teen mekaar op te weeg, insluitende die aard van die reg wat beperk word, die belangrikheid van die beperking – in die bewoording van die 1996-Grondwet – vir 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid, die doel waarvoor die reg beperk word, die belangrikheid van daardie doel vir so 'n samelewing, die omvang van die beperking, die effektiwiteit daarvan,[62] die vraag of die beoogde doel bereik kan word deur middele wat minder afbreuk sal doen aan die reg waarom dit gaan, en dit alles terwyl daarteen gewaak word om politieke keuses van die wetgewer te bevraagteken.[63]

Die skrywers van die 1996-Grondwet het die kern van hierdie oorwegings in die statutêre lys van omstandighede saamgevat wat in ag geneem moet word wanneer vasgestel word of 'n beperking redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid, soos wat dit tans in artikel 36(1) gespesifiseer word.

'n Bruikbare aanwysing om vas te stel of 'n klassifikasie van persone vir die doeleindes van die inperking van 'n grondwetlik beskermde reg redelikerwys aanneembaar is, sou wees om die geldigheidsvereistes van artikel 36(1) in die lig van die nie-diskriminasie klousule[64] te takseer: alle klassifikasies gegrond op,

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57 1995 3 SA 632 (CC), 1995 7 BCLR 861 (CC) par 58.
58 Vgl ook *S v Majavu supra* vn 45 85.
59 *Supra* vn 6.
60 Par 46.
61 Par 104.
62 Die sinsnede in die onderhawige uitspraak wat lui "and particularly whether the limitation has to be necessary", is hier doelbewus weggelaat, omdat die noodsaaklikheidsvereiste van a 33(1) van die interim-Grondwet ingevolge a 36(1) van die 1996-Grondwet nie meer deel vorm van die beperkingsbepaling nie.
63 Vgl ook par 339 (per O'Regan R).
64 A 9(3) en (4) van Wet 108 van 1996.

onder meer, ras, geslag, geslagtelikheid, swangerskap, huwelikstaat, etniese of sosiale oorsprong, kleur, seksuele georiënteerdheid, ouderdom, ongeskiktheid, godsdiens, gewete, geloof, kultuur, taal en geboorte moet met agterdog bejeën word. Tensy 'n redelike grondslag aanwysbaar is vir die klassifikasie wat op enigeen van hierdie oorwegings gegrond is – dit wil sê, 'n pertinente verband tussen die grondslag van die klassifikasie en die regsdoel wat dit moet dien – sal die klassifikasie grondwetlik onaanvaarbaar wees.

In die Verenigde State is die beginsel wat in dié verband geld, soos volg in die uitspraak van regter Brennan (namens die hof) in *Plyer v Doe*[65] saamgevat:

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

Wat die nie-diskriminasiebepalings van die Suid-Afrikaanse Grondwet betref, het die wetgewer – waarskynlik onbewustelik – aan wetsuitleggers die verpligting opgelê om te onderskei tussen redelikheid en billikheid. Artikel 9(3) en (4) verbied slegs "onbillike" diskriminasie. Sou dit in enige geval bevind word dat 'n diskriminerende voorskrif of optrede wel "onbillik" is, sou dit nogtans grondwetlik aanneemlik wees indien dit sou blyk dat die diskriminasie (onder meer) "redelik" is. Wat, dan, is die verskil tussen billikheid en redelikheid? Die antwoord op hierdie vraag vereis die analise van, en 'n keuse tussen, uiters gekompliseerde sosiologiese teorieë.

Die 1993-Grondwet het hier aan die uitlegger 'n gerieflike ontsnaproete voorsien. Regstellende aksie – wat tans deur artikel 9(2) veroorloof word – is in daardie Grondwet in verband gebring met die nie-diskriminasie klousule, en 'n mens kon toe 'n wysgerige ondersoek na "billikheid" en "redelikheid" vermy deur gewoon aan te neem dat diskriminasie ter wille van regstellende aksie "billik" is, terwyl diskriminasie vir enige ander doel "onbillik" geag moet word. In gevalle waar regstellende aksie nie ter sprake kom nie, sou dan verder ondersoek ingestel kon word na die redelikheid of onredelikheid van die (onbillike) diskriminasie.

Soos later vollediger sal blyk, het skrywers van die 1996-Grondwet – om goeie redes – regstellende aksie en diskriminasie van mekaar geskei. Regstellende aksie word nou uitsluitlik as 'n komponent van gelyke regsbeskerming ingeklee. Terwyl diskriminasie nie meer uit regstellende oorwegings geregverdig kan word nie, kan die "billikheid" van gevalle van diskriminasie daarom ook nie meer aan die hand van regstellende aksie gemotiveer word nie. Daar moet dus opnuut rekenskap gegee word van die grondwetlike verskil tussen billikheid en redelikheid.

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65 457 US 202 (1981) 216.

Die omvattende literatuur, en uiteenlopende standpunte, in die geskiedenis van die wysbegeerte oor die presiese betekenis van billikheid ("equity" of "fairness") en redelikheid bemoeilik die regsgeleerde se taak aansienlik. Wanneer dit op gelykberegtiging aankom, sou 'n mens redelikheid in verband kon sien met die verhouding tussen 'n klassifikasie vir regsdoeleindes en die grondslag van daardie klassifikasie, terwyl billikheid dan betrekking sou hê op die onderlinge belange van persone of groepe persone wat deur die klassifikasie in verskillende kampe tereg gekom het.

Redelikheid vereis in daardie sin dat die grondslag van die klassifikasie 'n werklik relevante basis moet bied om die oogmerke van die klassifikasie te verwesenlik. Neem die volgende voorbeeld:

Voor die inwerkingstelling in 1954 van die Wet op Testamente,[66] het die kompetensie om 'n testament te maak aan alle persone oor die puberteitsouderdom behoort,[67] en ingevolge die gemenereg kon persone onder die puberteitsouderdom ook nie in die huwelik tree nie.[68] Die puberteitsouderdom is in die Romeinse reg vasgestel op 12 jaar in die geval van dogters en 14 jaar in die geval van seuns.[69] Daar word dus dienooreenkomstig onderskei tussen 'n 13-jarige dogter en 'n 13-jarige seun. Puberteit is 'n fisiologiese begrip wat met geslagtelike rypheid te make het, wat op sy beurt 'n relevante oorweging is as dit op die kompetensie om te trou aankom. Maar geslagtelike rypheid het hoegenaamd niks te make met die vermoë van persone om oor die bemaking *mortis causa* van hulle eiendom te beskik nie. 'n Mens moet daarom aanneem dat die differensiasie tussen dogters en seuns in die huweliksreg redelik is, terwyl dieselfde klassifikasie vir doeleindes van die erfreg onredelik was.

Terwyl die redelikheidsvraag aldus op 'n regsklassifikasie vanuit die oogpunt van die grondslag en doel daarvan bedag is, word vanuit 'n billikheidsoogpunt ag geslaan op die toebedeling van kompetensies, regte en verpligtinge aan verskillende groepe persone tussen wie daar vir regsdoeleindes onderskei word. In hierdie geval is die vraag of daar met 'n gelyke hand na die belange van sodanige groepe persone omgesien word ooreenkomstig die geregtigheidseis dat gelykes gelyk, en ongelykes ongelyk, behandel moet word.[70] Indien byvoorbeeld vasgestel is dat dit redelik sou wees om tussen jeugdiges en volwassenes te onderskei vir doeleindes van handelingsbevoegdheid in die kontraktereg, sal daar uit billikheidsoorwegings ingegaan moet word op die vraag of die bestaande differensiasie tussen die kontrakteregtelike kompetensies van minderjariges en meerderjariges (respektiewelik) reg laat geskied aan die onderskeie grade van ontwikkeling van daardie twee groepe persone.

Toepassing van hierdie betreklik algemeen aanvaarde onderskeid tussen redelikheid en billikheid loop hom egter in die Suid-Afrikaanse staatsreg teen verdere probleme vas. In die hierbo omskrewe sin gaan die redelikheidsvraag 'n ondersoek na die billikheid van die toebedeling van kompetensies, regte en verpligtinge van gedifferensieerde groepe vooraf: 'n redelike klassifikasie is trouens

66 Wet 3 van 1953.
67 Grotius *Inl* 2 15 3; Voet 28 1 31; Van der Linden 1 4 1.
68 Van Leeuwen *Censura forensis* 1 14 2; Brouwer *De jure connubiorum libri dua* 2 3 27; Arntzenius *Inst juris Belgici* 2 3 28.
69 *C* 5 60 3 (529 nC).
70 *Infra* vn 77.

'n voorwaarde vir die billike toepassing van uitdelende geregtigheid. Die Suid-Afrikaanse Grondwet ruil egter hierdie volgorde om: dit is slegs nadat vasgestel is dat 'n geval van diskriminasie onbillik is dat die redelikheid van daardie diskriminasie ingevolge artikel 36(1) ter sprake kom!

Die alternatiewe uitweg sou wees om die verwysing na "onbillike" diskriminasie in artikel 9 van die Grondwet as oorbodige retoriek af te maak. Dit is waarskynlik die weg wat die konstitusionele hof gaan verkies.

Regverdiging van 'n regtebeperking met die oog op attribute van die nuwe Suid-Afrika

Die elemente vervat in die omskrywing van die soort staatsbestel wat met die nuwe grondwetlike bedeling in Suid-Afrika beoog word – 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid – moet in die verband van artikel 36(1) waarskynlik in één begrip saamgevat word. Daar is veral een aspek van daardie omskrywing wat hier aandag verdien: dit wat geriefshalwe as die negatiewe tipering van die "nuwe Suid-Afrika" aangemerk kan word.

Die Suid-Afrikaanse grondwetlike stelsel is by geleentheid as die "never again"-bedeling beskryf.[71] Die soort gemeenskap wat die Grondwet in die oog het, is een waarin die soort instellings, regsvoorskrifte en gedraginge wat met apartheid vereenselwig word, nooit weer sal plaasvind nie. In *Ferreira v Levin; Vryenhoek v Powell*[72] het regter Ackermann in daardie gees die betekenis van persoonlike vryheid in die Suid-Afrikaanse demokratiese samelewing omskryf: die Grondwet verbied (by implikasie) al die inkortings van persoonlike vryheid wat in apartheid-Suid-Afrika aan die orde van die dag was en wat vanaf geboorte tot die dood onder 'n verskeidenheid wetgewende bepalings die lewe van Suid-Afrikaners versuur het. Dit behels, onder meer, regsvoorskrifte wat die vryheid van 'n ouer beperk het om sy kind te identifiseer, medies te laat versorg en van onderwys te voorsien; wat beperkings geplaas het op die vryheid om 'n woon- of werkplek te kies, of om eiendom te besit; wat die soort werk wat 'n mens toegelaat was om te verrig, die persoon met wie jy mag trou, die wyse waarop jy aan die politieke lewe kon deelneem, of selfs waar jy begrawe mag word, gereguleer het: samevattend, "a denial of freedom to choose or develop one's own identity, a denial of the freedom to be fully human".

Die handves van regte is op die oog af aanvegbaar omdat dit nie tipies Suid-Afrikaans van aard, of "gelokaliseer" is nie. As 'n mens die bepalings daarvan op die keper beskou, sou jy kon sê dat dit net sowel die menseregtehandves van enige ander land kon wees.[73] Hierdie tekortkoming sou ondervang kon word

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71 Dit was die sentrale tema van die bydrae van Langa R van die konstitusionele hof by 'n simposium wat op 1997-04-03 by Emory Universiteit in Atlanta, Georgia in die VSA gehou is.

72 *Supra* vn 6 par 51.

73 Suid-Afrika is sedert 1986 met die ontwerp van 'n menseregtehandves doenig. Twee ontwerpe wat besondere vermelding verdien, is die een wat deur die SA Regskommissie opgestel is en die een wat vanuit die geledere van die ANC die lig gesien het. 'n Opmerklike verskil in benadering van hierdie twee ontwerpe lê daarin opgesluit dat die Regskommissie slegs betreklik algemene bepalings uit bestaande grondwetlike menseregte-aktes voorgestel het, terwyl die ANC 'n reaktiewe dokument saamgestel het, wat, naas die standaardbepalings van menseregte-aktes, pertinent die euwels van apartheid-Suid-Afrika

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indien die konstitusionele hof erns sou maak van die gemelde negatiewe betekenis van die "oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid", waarvan die Grondwet gewag maak. Met die negatiewe tipering van daardie omskrywing van die "nuwe Suid-Afrika", word aan die algemene bepalings van die handves van regte 'n reaktiewe betekenis verbind wat enersyds die historiese redes vir 'n nuwe grondwetlike bedeling gestand doen, en andersyds aan die handves relevansie verleen as die fondament en rigsnoer van werklike verandering.

D GELYKE BESKERMING EN VOORDELE VAN DIE REG

Gelykheid in die oë van die reg en gelyke genieting van voordele wat die reg bied, het in besonder te make met gevalle waar persone vir doeleindes van die reg in groepe geklassifiseer, en daar regtens tussen daardie groepe gedifferensieer word. Gelyke regsbeskerming sluit naamlik nie differensiasies tussen geklassifiseerde kategorieë van persone uit nie. Dit beteken ook nie absolute gelykskakeling van groepe persone wat alle gedifferensieerde regsreëlings sou negeer nie.

Die beginsel wat in dié verband geld, word saamgevat in die Aristoteliese begrip van uitdelende geregtigheid.[74] In *Ethica Nichomacheia* vat Aristotelés (384–322 v C) die beginsel van geregtigheid wat die politieke toebedeling van eerbewyse, goedere en dies meer behoort te reguleer, soos volg saam:

> "Daar sal dieselfde gelykheid tussen die persone en die aandele (wat toebedeel word) bestaan: die verhouding tussen die aandele sal dieselfde wees as dié tussen die persone. As die persone nie gelyk is nie, sal hulle (regverdige) aandele nie gelyk wees nie; maar dit is die bron van onenigheid en wedersydse verwyte, indien aan gelykes ongelyke aandele toegeken word, of aan ongelykes gelyke aandele."[75]

Dit beteken dat die aandeel van elke persoon bepaal word op die basis van verdienste,[76] sodat – om weer eens 'n voorbeeld van Aristotelés self te gebruik – die beste van twee fluite aan die beste fluitspeler toegeken word.[77] Gustav Radbruch

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aangespreek het. Albei hierdie ontwerpe het met die onderhandelings in Kempton Park in die snippermandjie beland. Die ANC het sy ontwerp nie eers aan die tegniese komitee belas met die ontwerp van 'n menseregtehandves voorgelê nie. Die tegniese komitee het met sy ontwerp van die hoofstuk oor menseregte in die interim-Grondwet hier geraap en daar geskraap, en uiteindelik met 'n uiters middelmatige (en hoogs problematiese) menseregtehandves voor die dag gekom. Die belofte is egter deur segsmanne van die ANC voorgehou dat daar met die finale Grondwet weer na die oorspronklike voorstelle van die Regskommissie en die ANC self omgesien sal word. Soos te wagte was, het dit nooit gebeur nie. Daar is met die ontwerp van die handves van regte in die Grondwet van 1996 hoofsaaklik lapwerk gedoen (veral met die oog daarop om ongewenste en anomaliese bepalings van die interim-Grondwet te vervang). Die finale produk was daarom nooit eksplisiet reaksionêr nie.

74 Vgl Salomon *Der Begriff der Gerechtichkeit bei Aristotelés* (1937); Trude *Der Begriff der Gerechtichkeit in der aristotelischen Rechts- und Staatsphilosophie* (1955); Dooyeweerd "Een nieuwe studie over het aristotelisch begrip der gerechtigheid" 1958 *Rechtsgeleerd magazijn themis* 3; Van der Vyver "Die regsleer van Aristotelés: 'n probleemstelling" 1962 *Koers* 224; Van der Vyver *Seven lectures on human rights* (1976) 1–4; Van Zyl en Van der Vyver *supra* vn 49 151–161.

75 Aristotelés *Ethica Nichomacheia* 5 3 6 (oorgesit uit die Engelse vertaling van Ostwald).

76 *Idem* 5 3 7.

77 Aristotelés *Politica* 3 12 5 (Engelse vertaling van Barker *The politics of Aristotle* (1952) 130).

het die Aristoteliese begrip van uitdelende geregtigheid soos volg kernagtig saamgevat: "Dit beteken die gelyke behandeling van gelykes, en die ongelyke behandeling van ongelykes ooreenkomstig 'n gelyke maatstaf."[78] Ten einde die aangewese maatstaf te vind, volg Aristotelés 'n teleologiese benadering: die doel van die differensiasie tussen groepe persone bepaal die etiese behore van die grondslag wat vir die toepaslike klassifikasie aangewend moet word. Daardie basis moet werklik relevant wees met die oog op die doel wat deur die klassifikasie gedien staan te word.

Die Suid-Afrikaanse Grondwet vereis in dieselfde sin dat die klassifikasie van persone vir regsdoeleindes redelik moet wees; dit wil sê, die vereistes van gelyke regsbeskerming word bevredig solank klassifikasies van persone vir regsdoeleindes op 'n redelike basis berus en daardie basis werklik relevant is vir die doel wat dit moet dien. Die professor wat aan al die studente in sy klas 'n punt van 66% toeken – die goeie studente én diegene wat minder goed is – behandel daardie studente nie gelyk nie; en dit geld ook vir die professor wat wel in sy puntetoekenning onderskei, maar wat hom in die toekenning van 'n punt laat lei deur die sportprestasies, die aansien van die ouers, of die ras van die studente. Gelykheid vereis dat gedifferensieerde akademiese krediete gebaseer moet word op prestasies in formele toetse en eksamens, klasdeelname, en alle ander oorwegings wat werklik ter sake is vir die beoordeling van die akademiese meriete van die student.

In die Suid-Afrikaanse reg word persone in groepe geklassifiseer van, onder andere, *infantes*, minderjariges en meerderjariges met die oog op handelingsbevoegheid[79] en verskyningsbevoegdheid.[80] Die ouderdomsgrens wat die status van *infans* aandui, is in die Suid-Afrikaanse reg ook relevant met betrekking tot toerekeningsvatbaarheid.[81]

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78 Radbruch *Vorschule der Rechtsphilosophie* (1959) 26: "Sie bedeutet Gleichbehandlung Gleicher, Ungleichbehandlung Ungleicher nach gleichem Maszstab."

79 As algemene reël, kan 'n *infans* ('n persoon oner die ouderdom van sewe jaar) glad nie self 'n ooreenkoms sluit nie. Die ouer of voog van die *infans* kan egter vir en namens die *infans* (bv) 'n kontrak aangaan. Minderjariges (persone ouer as sewe jaar wat nog nie meerderjarige status bereik het deur 21 jaar oud te word, 'n huwelik te sluit, of deur die hof meerderjarig verklaar te word nie) kan self ooreenkomste aangaan maar vereis, weer eens as algemene reël met heelwat uitsonderings, die toestemming van die ouer of voog, of die ouer of voog kan vir en namens die minderjarige ooreenkomste aangaan. Wanneer 'n persoon meerderjarige status bereik, verkry daardie persoon in die gewone gang van sake volkome handelingsbevoegdheid. Ooreenkomste deur 'n *infans* self aangegaan in stryd met die bogenoemde voorskrif is nietig. Ooreenkomste aangegaan deur minderjariges in stryd met die regsbeperkings wat aan hulle handelingsbevoegdheid kleef, is – steeds met heelwat uitsonderings – vernietigbaar deur die minderjarige (die ander party tot die ooreenkoms kan hom/haar nie op die vernietigbaarheid van die ooreenkoms beroep nie). Vgl in die algemeen Van der Vyver en Joubert *supra* vn 14 141–168.

80 'n *Infans* kan nie self in sy/haar eie naam dagvaar of gedagvaar word nie, maar die ouer of voog kan namens die *infans* as eiser of verweerder, of as applikant of respondent, in 'n privaatregtelike geding optree. Minderjariges beskik wel oor volkome verskyningsbevoegdheid in sekere gedinge, bv om by die hoë hof aansoek te doen vir toestemming om te trou, maar moet in ander gedinge deur die ouer of voog bygestaan word. Meerderjariges het in die gewone gang van sake volkome verskyningsbevoegdheid. Vgl Van der Vyver en Joubert *supra* vn 14 174–183; Van der Vyver "Verskyningsbevoegdheid van minderjariges" 1979 *THRHR* 129.

81 'n *Infans* is regtens *doli et culpae incapax*. *C* 6 30 18*pr*; *Inst* 3 19 10; *D* 42 2 23; en vgl ook Matthaeus *De criminibus prol* 2 2, wat melding maak van *infantes* en *infantiae proximi* wat geag word ontoerekeningsvatbaar te wees.

Die vraag wat in verband met gelyke regsbeskerming en gelyke voordele van die reg ter sprake kom, kan kortweg soos volg saamgevat word: Wat is so besonders aan die ouderdom van 21 jaar dat juis dit as die grens tussen meerderjarige en minderjarige status moet geld, en in besonder vir doeleindes van die kompetensie om ooreenkomste aan te gaan of om as gedingsparty in privaatregtelike aangeleenthede te kan optree? Waarom word die ouderdom van juis sewe jaar uitgesonder as die moment wanneer radikale beletsels van die kind se kompetensie om ooreenkomste aan te gaan, en om skuld vir onregmatige optrede te kan hê, opgehef word?

Die intellektuele, emosionele en biotiese rypheid – die primêre *ratio* van differensiasies gegrond op ouderdom – ontwikkel kennelik teen 'n verskillende tempo by verskillende persone. Bedink byvoorbeeld die geval van Hugo de Groot (1583–1654):[82] Toe hy op elfjarige ouderdom aan die Universiteit van Leiden as student ingeskryf het (met as deel van sy *studium generale* vakke soos geskiedenis, Griekse en Latynse letterkunde, wysbegeerte, wiskunde en sterrekunde, asook teologie en die regte), het hy, ooreenkomstig huidige Suid-Afrikaanse regsvoorskrifte, nie oor die kompetensie beskik om in die huwelik te tree nie, en was daar 'n regsvermoede van ontoerekeningsvatbaarheid op hom van toepassing. In die daaropvolgende jaar, toe hy gedigte (in Latyn) geskryf en gepubliseer en verskeie ander uit Grieks vertaal het, was hy in die oë van die reg onbevoeg om 'n testament te maak of om sonder bystand ooreenkomste aan te gaan. Toe hy op die ouderdom van 15 jaar by 'n Nederlandse afvaardiging aangesluit het om koning Hendrik IV van Frankryk te oorreed om die wapens teen Spanje op te neem, was hierdie begaafde jong man – na wie die Franse koning as *le miracle de la Hollande* verwys het – regtens onbevoeg om 'n groot verskeidenheid openbare ampte te beklee en om te kon stem. Heelwat van hierdie – en nog vele ander – beletsels het aan sy regstatus bly kleef toe hy op sestienjarige ouderdom die graad van doktor in die regte van die Universiteit van Orléans ontvang het. Daar is natuurlik nie baie Hugo de Groots in Suid-Afrika nie, maar die feit bly staan dat sommige kinders vinniger en verder ontwikkel as ander – en tog, as dit op die regstatus van persone aankom wat op ouderdom aangewese is, word almal eenvoudig oor dieselfde kam geskeer (ongelykes word gelyk behandel).

Dit wil nie sê dat die reg die klassifikasie van jeugdiges en volwassenes nie aan vaste ouderdomsgrense moet verbind nie. Praktiese oorwegings en die eise van regsekerheid – wat deur vooraanstaande regsgeleerdes soos Gustav Radbruch (1878–1949)[83] en Lon Fuller (1902–1978)[84] as een van verskeie wesenlike (konstitutiewe) waardestrukture van die reg uitgesonder is – moet daarby in berekening gebring word.[85]

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82 Vgl Scott "Die lewe en betekenis van Hugo de Groot" 1983 *THRHR* 123; Kahn "Hugo Grotius 10 April 1583–29 August 1645: a sketch of his life and his writings on Roman-Dutch law" 1983 *SALJ* 192.

83 Vgl die hoofstuk oor "Das Idee des Rechts" in *Vorschule der Rechtsphilosophie supra* vn 77 24–33.

84 *The morality of the law* (1969) 46–91, waar hy regsekerheid insluit by beginsels wat deel uitmaak van "the internal morality of the law"; en vgl ook oor die algemeen Van der Vyver "Regsekerheid" 1981 *THRHR* 269.

85 Labuschagne se standpunt dat (by toerekeningsvatbaarheid) daar van vaste ouderdomsgrense afgesien moet word, hou nie voldoende met hierdie basiese legaliteitsvereiste

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In *Klink v Regional Court Magistrate*[86] is die grondwetlikheid van artikel 170A van die Strafproseswet[87] in stand gehou. Hierdie artikel verleen aan strafhowe die bevoegdheid om te gelas dat getuienis van 'n getuie onder die ouderdom van 18 jaar gelewer, en kruisondervraging en herondervraging van die getuie waargeneem moet word, deur bemiddeling van 'n tussenganger in gevalle waar lewering van die getuienis die jeugdige getuie aan oormatige spanning en lyding sal onderwerp. Die artikel, wat veral met die oog op verkragtingsake op die wetboek geplaas is, is nie op grond van gelyke regsbeskerming betwis nie, maar met die oog op die prosessuele bepalings van die interim-Grondwet wat betrekking het op die reg van 'n beskuldigde om die getuienis teen hom aan te veg (wat kennelik die reg op kruisondervraging insluit).[88] Differensiasie in hierdie geval tussen jeugdiges en volwassenes, en aanwysing van die ouderdom van 18 jaar as die toepaslike grens tussen die gemelde twee groepe persone, is na die skrywer se mening redelik en daarom grondwetlik geoorloof.

Die wetgewer sal egter ernstig aandag moet gee aan die meerderjarigheidsouderdom, met die oog daarop om dit deur 18 jaar te vervang. Die verbetering van onderriggeleenthede en van toegang tot sekondêre onderwys, toenemende blootstelling deur die media en andersins van jong mense aan inligting en invloede wat tot hulle vroeë volwassenheid bydra, en die aankweek van allerlei verantwoordelikhede by die jeug deur die spanninge en rekkinge van hedendaagse lewensomstandighede, het daartoe bygedra dat die Wet op die Meerderjarigheidsouderdom[89] ouderwets geword het. Agtien jaar is die ouderdom waarop skoliere meestal matrikuleer en tot die arbeidsmark toetree; die strafprosesreg aanvaar 18 jaar vir 'n groot verskeidenheid doeleindes as 'n skeidslyn tussen jeugdigheid en volwassenheid;[90] persone wat 18 jaar oud is, word met die

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rekening nie. Vgl Labuschagne "Strafregtelike aanspreeklikheid van kinders: geestelike of chronologiese ouderdom?" 1993 *SALJ* 148 152; "Strafregtelike aanspreeklikheid van kinders en die vermoede teen ontoerekeningsvatbaarheid" 1997 *TSAR* 168 173; en vgl ook "Strafregtelike aanspreeklikheid van kinders" 1978 *TSAR* 250 265–266; "Strafregtelike aanspreeklikheid van kinders weens nalatigheid" 1983 *THRHR* 222 228.

86 1996 3 BCLR 402 (SOK); en vgl Schwikkard en Jaywath "*K v Regional Court Magistrate* 1996 (1) SACR 343 (OK): The constitutionality of s 170 of the Criminal Procedure Act" 1996 *SAJCJ* 215.

87 Wet 51 van 1977.

88 A 25(3)(d) van Wet 200 van 1993, en vgl a 35(3)(i) van Wet 108 van 1996.

89 Wet 57 van 1972, a 1.

90 Daardie voorskrifte kan geklassifiseer word in (a) dié wat gerig is op beskerming van jeugdige verhoorafwagtende persone, bv om jeugdige verhoorafwagtendes sover moontlik uit die gevangenis te hou (vgl a 72(1)(b) van die Strafproseswet 51 van 1977; a 29(1) van die Wet op Korrektiewe Dienste 8 van 1959); (b) dié wat na die belange van die jeugdige beskuldigde omsien, bv deur die bystand, en teenwoordigheid in die hof, van die jeugdige beskuldigde se ouer of voog te verseker (a 73(3) en 74 van die Strafproseswet 51 van 1977), deur die jeugdige beskuldigde teen publisiteit te beskerm (a 153(3) en (4); a 5(1) van die Algemene Regswysigingswet 68 van 1957), en deur vir alternatiewe optrede ingevolge die Kinderwet 74 van 1983 voorsiening te maak (a 254 van die Strafproseswet 51 van 1977); (c) dié wat op die jeugdige getuie betrekking het, bv mbt aflê van die eed (a 164(1) van die Strafproseswet 51 van 1977), met die oog op beskerming van die identiteit van die jeugdige getuie (*idem* a 164(1); a 5(1) van die Algemene Regswysigingswet 68 van 1957), en ten einde die jeugdige getuie te beskerm in gevalle waar die lewering van getuienis in bv 'n verkragtingsaak daardie getuie aan geestelike spanning en lyding sal blootstel (a 170A van die Strafproseswet 55 van 1977) en; (d) dié wat die jeugdige veroordeelde in die oog het en bv vir alternatiewe optrede

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verantwoordelikheid beklee om te kan stem[91] en om in die wetgewende vertakking van die landsregering te dien;[92] en 18 jaar word in 'n toenemende mate deur wetgewing erken as 'n ouderdomsgrens vir die toebedeling van belangrike ander regskompetensies.[93]

Dit is boonop redelik om aan te neem dat die Grondwet self van die veronderstelling uitgaan dat "volwassene" 'n persoon oor die ouderdom van 18 jaar beteken. Artikel 19(3) waarborg die stemreg van "elke volwasse burger", en artikel 15(1) van die Kieswet[94] bepaal dat persone van 18 jaar en ouer kan stem in 'n verkiesing.[95]

Suid-Afrika het in Junie 1995 die Internasionale Konvensie oor die Regte van Kinders[96] geratifiseer. Die land het daarmee 'n volkeregtelike verpligting onderskryf om die Suid-Afrikaanse reg in ooreenstemming te bring met die bepalings van die Konvensie.[97] Artikel 1 van die Konvensie bepaal soos volg:

> "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

Kindskap word hier teeenoor meerderjarige status gestel. Dit is daarom redelik om aan te neem dat die Konvensie 18 jaar as die meerderjarigheidsouderdom aanwys (tensy die regstelsel van 'n konvensiegenoot meerderjarige status op 'n vroeër ouderdom aan die kind verleen). Artikel 1 van die Konvensie sluit dus ook die volkeregtelike plig aan die kant van Suid-Afrika as 'n konvensiegenoot in om die Wet op die Meerderjarigheidsouderdom dienooreenkomstig te wysig. Aangesien 'n hof, tribunaal of forum ingevolge artikel 39(1)(b) van die Grondwet die volkereg moet oorweeg wanneer dit die Handves van Regte interpreteer, sal artikel 1 van die Konvensie beslis in aanmerking moet kom ten einde die grondwetlike definisie van 'n kind te laat geld as steun vir die slotsom dat 18 jaar as die meerderjarigheidsouderdom aanvaar *moet* word.

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ipv 'n strafoplegging voorsiening maak (a 290(1) van die Strafproseswet 51 van 1977; en vgl ook a 254(2)). Die Strafproseswet bevat selfs bepalings wat die reg van 'n jeugdige persoon om strafverrigtinge by te woon, aan bande lê (a 153(6)) – steeds met 18 jaar as die aangewese sperouderdom van jeugdigheid.

91 A 19(3) van Wet 108 van 1996 waarborg die reg van "elke volwasse burger" om te kan stem, en a 15(1) van die Kieswet 202 van 1993 verleen stemreg aan agtienjariges.

92 A 46(1)(c) en 47(1) van Wet 108 van 1996 mbt die parlement, en a 105(1)(c) en 106(1) mbt provinsiale wetgewers.

93 'n Persoon van 18 jaar of ouer kan, ingevolge a 2 van die Wet op die Meerderjarigheidsouderdom 57 van 1972, by die hoë hof aansoek doen om meerderjarig verklaar te word. Op agtienjarige leeftyd kan 'n persoon, ingevolge a 16(a) van die Padverkeerordonnansie 21 van 1966 van die Kaap, Vrystaat, Natal en Transvaal (soos wat die gebiede afgebaken was toe die ordonnansies op die wetboek geplaas is), 'n bestuurderslisensie bekom. Kragtens a 45(1)(a) van die Drankwet 27 van 1989 mag die houer van 'n dranklisensie nie alkoholiese drank verkoop aan 'n persoon onder die ouderdom van 18 jaar nie.

94 Wet 202 van 1993.

95 Vgl ook a 28(3) van Wet 108 van 1996, waar 'n kind gedefinieer word as 'n persoon onder die ouderdom van 18 jaar; en vgl verder a 1 van die Wet op Kindersorg 74 van 1983.

96 GA Res 44/25 (annex); 44 UN GAOR Supp (No 49) 167; UN Doc A/44/49 (1989).

97 *Idem* a 4. Let daarop dat die bepalings wat progressief geïmplementeer moet word en wat (slegs) op ekonomiese, sosiale en kulturele regte betrekking het (*ibid*), slegs van toepassing is op "maatreëls" en nie op wetgewende en administratiewe optrede nie.

E REGSTELLENDE AKSIE

Artikel 9(2) van die Grondwet veroorloof wetgewing en ander maatreëls "vir die beskerming of ontwikkeling van persone, of kategorieë van persone, wat deur onbillike diskriminasie benadeel is". Sodanige wetgewing of ander maatreëls moet daarop ingestel wees "om die volle en gelyke genieting van alle regte en vryhede" te bevorder.[98]

Daar bestaan uiters belangrike verskille tussen die regstellende bepalings van die 1993-Grondwet en die ooreenstemmende voorskrifte wat in die 1996-Grondwet opgeneem is. Die kern van daardie verskille sentreer om die nadruklike verband wat in die 1996-Grondwet tussen regstellende aksie en gelyke regsbeskerming ingestel is. Ingevolge die 1993-Grondwet[99] het regstellende aksie as kwalifikasie van die diskriminasieverbod gegeld[100] – of dan ten minste van gelyke regsbeskerming én nie-diskriminasie.[101] Terwyl regstellende aksie soos in die 1993-Grondwet verorden, geïnterpreteer kon word as 'n kwessie van omgekeerde diskriminasie, is dit beslis nie meer die geval nie. Kragtens die 1996-Grondwet kan daar hoegenaamd nie op regstellende aksie gesteun word om enige vorm van diskriminasie te regverdig nie. Daardie Grondwet veroorloof maatreëls wat in die lig van die benadeling van sekere persone of groepe persone ingevolge diskriminerende praktyke van die verlede, aan alle Suid-Afrikaners die volle en gelyke genieting van alle regte en vryhede sal verseker. 'n Enkele voorbeeld word hier ter illustrasie opgediep.

As gevolg van diskriminasie van die verlede in die onderwysstrukture van Suid-Afrika, kan universiteitstoelating nie bloot op *de facto* akademiese prestasies gebaseer word nie. Toelatingsvereistes moet ontwerp word wat op potensiaal eerder as op prestasies van die verlede ag slaan; en daardie vereistes moet op alle applikante vir universiteitstoelating toegepas word. Gelyke genieting van die reg op onderwys word nie gedien deur verskillende akademiese standaarde vir bevoorregte en benadeelde studente toe te pas nie, maar vereis wel aanvullende akademiese steunprogramme wat daarop ingestel is om aan die benadeelde studente (toegelaat tot die universiteit op grond van hulle potensiaal) 'n geleentheid te bied om die stremmende gevolge van diskriminasie van die verlede te bowe te kom sodat hulle ook op 'n gelyke grondslag kan meeding om die prestasies, eerbewyse en toekennings wat met universiteitsopleiding gepaard gaan. Sonder sulke akademiese steunprogramme bevorder onderwysinstellings wat nou gekleurde studente toelaat, die voortgesette benadeling van daardie studente eerder as om met "oop" geleenthede die bestaande ongelykhede hok te slaan.

Hierdie beginsel geld nie net vir primêre, sekondêre en tersiêre onderwysinstellings nie. Dit geld ook in die arbeidsmark, op sportgebied, en vir alle ander fasette van die kompeterende lewensterreine waar diskriminasie 'n tol geëis het.

Die vele struikelblokke waaronder regstellende inisiatiewe (ingevolge die 1993-Grondwet) gebuk gaan, word treffend aan die lig gebring deur die feite in

98 In die lig van a 39(3), wat erkenning verleen aan regte en vryhede wat nie in die Grondwet verskans is nie, moet aangeneem word dat regstellende aksie nie beperk is tot versekering van die gelyke genieting van slegs grondwetlik beskermde regte nie.

99 A 8(3) van Wet 200 van 1993.

100 A 8(3) is onmiddellik voorafgegaan deur die nie-diskriminasie bepaling (a 8(2)).

101 Die aanvangsfrase van a 8(3): "Hierdie artikel belet nie uit . . .", kan as gesag vir hierdie uitleg aangedien word.

Motala v University of Natal.[102] Alhoewel die toelatingsbeleid wat daar ter sprake was, voorgegee het dat dit op die "true potential of each student" ingestel was, het getuienis laat blyk dat die evaluering van "potensiaal" uitsluitlik gebaseer was op skoolprestasies (die standerd IX-eksamenuitslae). Weens rassediskriminasie in die onderwys van die vorige bedeling, kan potensiaal vanselfsprekend nie op hierdie wyse gepeil word nie. Op die ou einde het die universiteit daarom gewoon 'n kwotastelsel toegepas. Die geskil het eintlik daarom gedraai dat die universiteit in sy regstellende program tussen Indiër en swart applikante om toelating tot die universiteit onderskei het, en wel met die wete dat die benadeling van swartes in die apartheid-gerigte onderwys dié van Indiërskoliere oortref het. Die hof het bevind dat die universiteit se toelatingsbeleid voldoen het aan die regstellende-aksie-bepalings van die interim-Grondwet en dat die (Indiese) applikant vir tussentydse verligting nie aan die bewysregtelike eise van so 'n bevel voldoen het nie.

Die toelatingsbeleid wat in *Motala* ter sprake was, voldoen beslis nie aan die regstellende vereistes van die 1996-Grondwet nie. 'n Toelatingsbeleid wat voorgee op "true potential" bedag te wees maar wat potensiaal op kennelik onbetroubare gegewens baseer, is eenvoudig nie goed genoeg nie. Buitendien dra elke kwotastelsel die kiem van omgekeerde diskriminasie in hom om. Indien potensiaal as die aangewese kriterium moet geld, dan moet betroubare toetse ontwerp en toegepas word om potensiaal te peil; en as dit nie gedoen kan word nie, is regstellende aksie in die onderwys gedoem tot mislukking.

Die Grondwet self het nie regstellende programme in die lewe geroep nie; dit veroorloof bloot sodanige programme. Die slagoffers van diskriminasie van die verlede kan daarom nie op regstellende wetgewing of op die instelling van regstellende programme aandring nie; maar sou die wetgewer sodanige wetgewing aanneem, of sou enige ander regskeppende instelling of administratiewe orgaan sodanige maatreëls verorden of van stapel laat loop, dan sal die wetgewing, maatreël of uitvoerende handeling grondwetlik geoorloof wees – solank dit net met die voorwaardes en oogmerke van artikel 9(2) ooreenstem.

Daar moet op gelet word dat regstellende aksie in die land van sy herkoms – die Verenigde Sate van Amerika – 'n stormagtige verloop gehad het. Dit sal in die onderhawige verband insiggewend wees om net kortliks van daardie geskiedenis rekenskap te gee – al is dit net om die slotsom te motiveer dat dit in Suid-Afrika anders behoort te verloop.

In *Regents of the University of California v Bakke*[103] het die hof, met die oog op gelyke regsbeskerming soos in die Veertiende Amendement verorden,[104]

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102 1995 3 BCLR 374 (D). Die hof het in daardie saak fouteer deur lukraak aan te neem dat die interne toelatingsbeleid van 'n universiteit aan die Grondwet onderworpe was. Ingevolge a 7(1) van Wet 200 van 1993, was die hoofstuk oor menseregte op staatsorgane van toepassing (wat ingevolge a 233(1)(xii) statutêre liggame ingesluit het), mits die staatsorgaan deel gevorm het van die wetgewende of uitvoerende vertakking van die staatstruktuur, én daardie staatsorgaan op enigeen van die vlakke van regering (die nasionale, provinsiale of plaaslike vlak) gefunksioneer het. Aangesien universiteite nie aan hierdie aanvullende vereistes voldoen het nie, was hulle (al is hulle staatsorgane) nie aan die hoofstuk oor menseregte in die interim-Grondwet onderworpe nie. Die handves van regte van die 1996 Grondwet geld egter wel vir universiteite (vgl a 8(1) van Wet 108 van 1996, saamgelees met a 239(1)(b)(ii)).

103 438 US 265 (1978).

104 Die aansoek was ook wel op Titel VI van die Civil Rights Act van 1964 (Pub L No 88–352, 78 Stat 252 § 601) gebaseer, wat soos volg bepaal: "No person in the United States

vervolg op volgende bladsy

uitspraak gelewer oor die regstellende toelatingsbeleid van 'n (staats-gesubsidieerde) universiteit en daardie beleid ongrondwetlik verklaar. Die hof het nie regstellende aksie wat daarop ingestel is om 'n benadeelde student tot die universiteit *toe te laat*, veroordeel nie, maar het dit teen die *uitsluiting* van 'n (wit) student (Bakke) ten einde onder aansprake van regstellende aksie plek te maak vir die benadeelde kandidaat. *Bakke* het geen duidelikheid gebring ten aansien van die standaard wat toegepas moet word wanneer oor die grondwetlikheid van 'n rasseklassifikasie wat beoog om 'n benadeelde minderheidsgroep te bevoordeel, geoordeel moet word nie. Regsreëlings of (grondwetlik relevante) optredes wat afwyk van die gelykheidsnorm maar wat nietemin op grondwetlikheid aanspraak maak, moet naamlik in die VSA 'n sogenaamde "compelling governmental interest" bevorder en word met verskillende mate gemeet, wat wissel van "strict scrutiny" tot "relaxed standards of scrutiny", afhangende van die mate van "agterdog" waarmee differensiasies in verskillende omstandighede in die VSA bejeën word.

In *Fullilove v Klutznick*[105] het die hof 'n wet grondwetlik bevind wat 'n tien persent deelname van benadeelde bevolkingsgroepe in openbare-werke-ondernemings vereis. Die vraag aangaande die mate van versigtigheid wat deur die hof aan die dag gelê moet word wanneer die grondwetlikheid van regstellende aksieprogramme oorweeg word, het weer eens onbeantwoord gebly. In *Wygant v Jackson Board of Education*[106] is 'n bepaling in 'n ooreenkoms vir kollektiewe bedinging, wat voorkeurbehandeling ten aansien van nuwe aanstellings van onderwysers aan minderheidsgroepe toesê ten einde, onder meer, "the effects of societal discrimination" die hoof te bied, ongrondwetlik bevind. Die pluraliteit verklaar onder andere dat "social discrimination" nie as grondslag van regstellende aksie kan dien nie omdat dit "too amorphous a basis for imposing a racially classified remedy" sou wees, en dat programme wat op ras gefundeer is "some showing of prior discrimination to the government unit involved" vereis.[107] In *United States v Paradise*[108] is 'n kwotastelsel, waarvolgens ten minste die helfte van toekomstige bevorderings tot die rang van korporaal in die polisiediens van Alabama gereserveer moes word vir swartes, gehandhaaf. Regter Brennan verklaar in daardie saak (namens die pluraliteit) dat die stelsel "strict scrutiny" kan oorleef.[109]

Dit wat in die *Paradise*-gewysde sommer net gesê is, is in *Richmond v JA Croson Co*[110] spesifiek oorweeg – en onderskryf: meerderheidsteun is in daardie saak gemonster vir die proposisie dat alle klassifikasies wat op ras gegrond is, aan die eise van "strict scrutiny" wat op "suspect classifications" van toepassing is, moet voldoen. Dit het in daardie saak gegaan om regstellende aksie by die

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shall, on grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." Daar het egter twyfel bestaan of 'n private persoon hierdie statutêre reg kon afdwing. Hierdie vraag is oopgelaat, en daarom is toepassing van die Veertiende Amendement in die saak – die grondwetlike kwessie – van die allergrootste belang.

105 448 US 448 (1980).
106 476 US 267 (1986).
107 *Ibid* 276.
108 480 US 149 (1987).
109 185–186.
110 488 US 469 (1989).

toekenning van konstruksiekontrakte. Aangesien die plaaslike owerheid in gebreke gebly het om voldoende bewys te lewer van "a strong basis" wat die slotsom sou kon onderskraag dat die regstellende-aksie-program noodsaaklik was, is daardie program ongrondwetlik bevind. Terwyl die uitspraak in *Croson* op die gelykheidsbepaling van die Veertiende Amendement berus het, kom die hof in *Adarand Constructors Inc v Pena*[111] tot die gevolgtrekking dat dieselfde eise gestel word wanneer dit om rasseklassifikasies vir regstellende doeleindes op die vlak van die federale regering (ingevolge die gelykheidskriterium van die Vyfde Amendement) gaan. Regter O'Connor verklaar in daardie saak:[112] "[F]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."

Die jongste uitspraak oor rasseklassifikasies vir doeleindes van regstellende aksie, *Hopwood v State of Texas*,[113] het waarskynlik die doodsklok van regstellende aksie in die Verenigde State ingelui. Dit het daar gegaan oor die toelatingspraktyk van die Regskool van die Universiteit van Texas. Rasse-onderskeid het by die toelating van studente 'n tweërlei funksie vervul: eerstens om 'n heterogene studentegemeenskap te verseker, en tweedens om diskriminerende praktyke van die verlede reg te stel.

Die hof aanvaar as uitgangspunt dat differensiasies wat op ras gegrond is, "highly suspect" geag moet word en daarom aan die eise van streng kontrole moet voldoen. Tipering deur die regering van 'n klas as "benign" of "remedial" is betekenisloos, word bevind.[114] Rasseklassifikasie wat nie 'n regstellende doel dien nie maar wat op 'n diversiteit in die studentekorps bedag is, is sonder meer ongrondwetlik.[115] Voordat 'n rasseklassifikasie met 'n regstellende opset grondwetlik bevind kan word, moet twee aangeleenthede bewys word: Die rasseklassifikasie moet 'n dringende regeringsbelang dien; en streng kontrole ("strict scrutiny") moet toegepas word om te verseker dat die rasseklassifikasie wel (inderdaad) regstellende gevolge sal hê.[116] 'n Dringende regeringsbelang vereis die nakoming van twee verdere voorwaardes: Die regskool self moet geïdentifiseer word as die sondebok wat in die verlede teen die benadeelde groep studente gediskrimineer het,[117] en daar moet nog steeds nagevolge van die diskriminasie van die verlede wees wat tot die soort behoort wat die rasseklassifikasie waarom dit gaan, sou regverdig.[118] Aangesien hierdie twee aangeleenthede nie uit die getuienis blyk nie, bevind die hof dat 'n "compelling governmental interest" nie bewys is nie en dat die regstellende aksieprogram daarom ongrondwetlik is.[119]

Daar bestaan een belangrike ooreenkoms tussen die Amerikaanse en Suid-Afrikaanse persepsies van regstellende aksie: in albei lande word dit as 'n komponent van, of in verband met, die norm van gelyke regsbeskerming gekonstrueer. Die feit dat die Suid-Afrikaanse Grondwet nadruklik vir regstellende

111 115 S Ct 2097 (1995).
112 2117.
113 78 F 3d 932 (5th Cir 1996).
114 940.
115 945.
116 951.
117 949–952.
118 952–955.
119 955.

aksie voorsiening maak, dui egter aan dat die eise van "strict scrutiny" nie in Suid-Afrika toegepas behoort te word nie. Die Suid-Afrikaanse Grondwet erken eksplisiet "die ongeregtighede van ons verlede" en stel hom ten doel om "[d]ie verdeeldheid van die verlede te heel en 'n samelewing gegrond op demokratiese waardes, maatskaplike geregtigheid en basiese menseregte te skep".[120] Die nuwe Suid-Afrika word, luidens sy Grondwet, gebaseer op "[n]ie-rassigheid en nieseksisme"[121] en maak in die handves van regte voorsiening vir regstellende aksie in die konteks van gelyke regsbeskerming,[122] eiendom,[123] en die onderwys.[124] Dit alles dui daarop dat daar in Suid-Afrika geheel en al van die ondersoek na 'n dringende regeringsbelang afgesien kan word (die Grondwet self is reeds bewys daarvan), of in elk geval dat die bewys van so 'n belang – soos dit op Amerikaans gesê word – hoogstens "relaxed standards" van bewyslewering vereis.

F DIE DISKRIMINASIEVERBOD

Artikel 9(3) van die Grondwet verbied onbillike diskriminasie, regstreeks of onregstreeks, deur die staat gegrond op (onder meer)[125] ras, geslagtelikheid, geslag, swangerskap, huwelikstaat, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, oortuiging, kultuur, taal en geboorte. Artikel 9(4) verbied onbillike diskriminasie deur enige ander persoon as die staat, maar in hierdie geval moet die diskriminasieverbod deur nasionale wetgewing verorden word wat daarop ingestel moet wees om die diskriminasie te voorkom of te belet. Artikel 9(5) skep 'n weerlegbare vermoede dat diskriminasie gegrond op enige van die nadruklik vermelde gronde, onbillik is.

Die Internasionale Konvensie vir die Eliminasie van Alle Vorme van Rassediskriminasie[126] definieer diskriminasie as:

> "any distinction, exclusion, restriction or preference . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an unequal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[127]

Aangesien 'n hof, tribunaal of forum wat die bepalings van die handves van regte interpreteer, die volkereg moet oorweeg,[128] tel hierdie definisie ten minste in 'n mate. Daar moet egter op gelet word dat die diskriminasieverbod van die Suid-Afrikaanse Grondwet nie beperk is tot die miskenning van, of inbreuk op die beskerming, genieting of uitoefening van slegs menseregte en fundamentele vryhede nie, maar alle gevalle van onbillike diskriminasie aanspreek; en die

120 Aanhef van Wet 108 van 1996.
121 A 1(b).
122 A 9(2).
123 A 25(6)–(9).
124 A 29(2)(c).
125 Die faktore wat in a 9(3) vermeld word, is nie 'n *numerus clausus* nie.
126 1966 UNTS 195, 5 ILM 352 (1966).
127 A 1; en vgl ook a 1 van die Konvensie vir die Eliminasie van Alle Vorme van Diskriminasie teen Vrouens 1979 (GA Res 180 (XXXIV) (1979); (1980) 19 ILM 33); a 2(2) van die Deklarasie oor die Eliminasie van Alle Vorme van Onverdraagsaamheid en van Diskriminasie gebaseer op Godsdiens of Geloof 1981 (GA Res 55 (XXXVI) (1981); (1982) 21 ILM 205); a 1(1)(a) en (b) van die ILO Konvensie (No 111) aangaande Diskriminasie met betrekking tot Indiensneming en Beroep 1958; a 1(1) van UNESCO Konvensie teen Diskriminasie in die Onderwys 1960.
128 A 39(1)(b) van Wet 108 van 1996.

Suid-Afrikaanse grondwetlike reëling geld ook nie net vir differensiasies, uitsluitings, beperkings of bevoordelings binne die kader van die openbare lewe nie, maar tref ook dié wat op die private sfeer van 'n persoon se daaglikse lewe betrekking het – behalwe as dit sou blyk dat die differensiasie, uitsluiting, beperking of bevoordeling billik is. Maar selfs dan, as die persoon wat die grondwetlikheid beweer van diskriminasie gegrond op enigeen van die faktore wat in artikel 9(3) gespesifiseer is, nie daarin kan slaag om die vermoede van artikel 9(5) te weerlê nie, sou sy/hy in elk geval 'n bevinding van grondwetlikheid kon aanvra op die veronderstelling af dat die onbillike diskriminasie in 'n algemeen geldende regsvoorskrif vervat is, redelik is, en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid.

Die Grondwet verplig dus sy interpreteerders om tussen billikheid en redelikheid te onderskei – 'n opdrag wat gebuk gaan onder allerlei probleme, teenstrydighede en uiteenlopende opvattings in die geskiedenis van die regsetiek. Soos reeds vermeld, sal Suid-Afrikaanse howe in alle waarskynlikheid hierdie uitlegverleentheid omseil deur die billikheidsmaatstaf min of meer te ignoreer en deurgaans op die riglyne van redelikheid te konsentreer.

Die implikasies van die diskriminasieverbod sal vervolgens geïllustreer word met verwysing na sommige van die differensiasies in die Suid-Afrikaanse reg gegrond op ras, geslag en seksuele georiënteerdheid.

Ras

As daar een faset van die Suid-Afrikaanse samelewing is waarby regstellende aksie dringend geword het, dan is dit seker die onderwys. Segregasie van en diskriminasie in die onderwys[129] het aanleiding gegee tot waarskynlik die mees afbrekende gevolg van apartheid.

Die Grondwet waarborg die reg van elkeen:

(a) op basiese onderwys, met inbegrip van basiese onderwys vir volwassenes;[130]

(b) om onderwys te ontvang in die amptelike taal of tale van eie keuse;[131] en

(c) om onafhanklike onderwysinstellings tot stand te bring en in stand te hou.[132]

Die Wet op Nasionale Onderwysbeleid[133] is in 1996 op die wetboek geplaas om die land se onderwysbeleid in ooreenstemming te kan bring met die grondwetlike

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129 In bv 1984/1985, het die totale begroting vir onderwys R4,200,000,000 beloop, waarvan R2,600,000,000 vir blanke onderwys (20% van die bevolking), en die oorblywende R1 600, 000,000 vir die gesamentlike onderwysbehoeftes van swart, gekleurde en Indiër skoliere, bewillig is. Die *per capita* besteding aan onderwys het in 1982/1983 die volgende syfers bedra: R1385,00 in die geval van blanke onderwys, R593,37 in die geval van gekleurdes, R871,87 in die geval van Indiërs, en R192,34 in die geval van swartes. In dieselfde boekjaar was die onderwyser/skolier ratio 1:18,2 in die geval van blanke onderwys, 1:26,7 in kleurlingskole; 1:23,6 in Indiërskole, en 1:42,7 in skole vir swartes. Teen die einde van die tagtigerjare was die *per capita* staatsbesteding in die onderwys R3082,00 in die geval van blankes, en in die geval van swartes slegs R764,73. Vgl mbt die laasgenoemde statistieke "Human Rights Index, 1 March 1990–30 June 1990" 1990 *SAJHR* 325 333.

130 A 29(1) van Wet 108 van 1996.

131 A 29(2).

132 A 29(3).

133 Wet 27 van 1996.

aanwysings. Die grondwetlikheid van hierdie wet is in die konstitusionele hof aangeveg omdat die nasionale wetgewer daarmee op die gebied van die provinsies sou oortree het, maar die aansoek is deur die hof verwerp.[134] Die Suid-Afrikaanse Skolewet[135] is daarop aangeneem om meer bepaald praktiese uitvoering te gee aan die grondwetlike beginsels wat op die onderwys van toepassing is. Die grondwetlikheid van sekere bepalings van die wet – dié wat implikasies inhou vir die toekoms van Afrikaanse skole en Christelike onderwys – is eweneens sonder sukses in die hof aangeveg.[136] In 'n ondersteunende uitspraak verklaar regter Sachs:[137]

> "[I]mmense inequalities continue to exist in relation to access to education in our country. At present, the imperatives of equalising access to education are strong, and even although these should not go to the extent of overriding constitutionally protected rights in relation to language and culture, they do represent an important element in the equation. The theme of reducing the discrepancies in the life chances of all South Africans runs right through the Constitution, from the forceful opening words of the preamble to the reminder of the past contained in the powerful postscript."

Rassespanning in onderwysaangeleenthede sentreer veral om die kwessie van die voertale in die onderwys. Artikel 29(2) van die Grondwet bepaal in dié verband:

> "Elkeen het die reg om in openbare onderwysinstellings onderwys te ontvang in die amptelike taal of tale van eie keuse waar daardie onderwys redelikerwys doenlik is. Ten einde doeltreffende toegang tot en verwesenliking van hierdie reg te verseker, moet die staat alle redelike alternatiewe in die onderwys, met inbegrip van enkelmediuminstellings, oorweeg, met inagneming van –
>
> (a) billikheid;
>
> (b) doenlikheid; en
>
> (c) die behoefte om die gevolge van wette en praktyke van die verlede wat op grond van ras gediskrimineer het, reg te stel."

Moedertaalonderwys – 'n uitvindsel van die Sowjet Konstitusie van 1924 – is 'n hoogs emosionele aangeleentheid in Suid-Afrika. Die Grondwet verplig nie skoliere om onderwys in hulle moedertaal te ontvang nie, maar veroorloof onderwys in die ampstale van Suid-Afrika of in die taal of tale van eie keuse.

As onderwys in die ampstale maar net vryelik en voldoende beskikbaar was oor die hele land, dan sou implementering van die grondwetlike taalreg in die onderwys nie 'n probleem gewees het nie. Maar dit is nie die geval nie. Daarom kan net op onderwys in 'n bepaalde taal – byvoorbeeld Afrikaans – aangedring word waar onderwys deur die medium van Afrikaans "redelikerwys doenlik" is. Openbare onderwysowerhede (die staat) word met 'n omvangryke diskresie beklee om hulle opsies by die toebedeling van (taalkundige) skaars hulpbronne te oorweeg: daardie owerhede moet alle alternatiewe in berekening bring, met inbegrip van enkelmediuminstellings, met die oog op billikheid, uitvoerbaarheid

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134 *In re: The National Education Policy Bill No 83 of 1995* 1996 3 SA 289 (CC), 1996 4 BCLR 518 (CC).

135 84 van 1996. Die wet is aanvanklik beplan as 'n wetsontwerp van Gauteng maar is uiteindelik as 'n wet van die nasionale wetgewer aangeneem.

136 *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 536 (CC). Vgl Venter "Afrikaanse en Christelike onderwys in die nuwe grondwetlike bedeling" 1996 *Tydskrif vir Geesteswetenskappe* 232 vir 'n kritiese analise van hierdie uitspraak.

137 Par 52.

en die eise van regstellende aksie. Waarskynlik kan die slotsom van die onderwysowerhede – byvoorbeeld om 'n Afrikaansmediumskool in 'n Engelsmediumskool te omskep – slegs tersyde gestel word as dit sou blyk dat hulle die gemelde oorwegings nie *bona fide* oorweeg het nie.

Dit is werklik jammer. Daar bestaan sterk weerstand by seksies in die geledere van die Suid-Afrikaanse bevolking teen Afrikaans (deur baie mense beskou as "die taal van die onderdrukker"). Afrikaansmediumskole word dikwels oorstroom met swart skoliere wat, vir welke rede ook al, onderrig deur die medium van Engels verkies. Daar word dan by die owerhede aangeklop om gevestigde Afrikaansmediumskole in Engelsmediumskole te omskep – wat by die deursneë Afrikaanssprekende gemeenskap sterk weerstand ontlok. Adversatiewe magte word gevolglik ontketen. Die Afrikaanse segspersone argumenteer: hierdie skool is en was nog altyd 'n Afrikaanse instelling; swart skoliere is welkom om by die skool in te skryf en hulle onderrig deur medium van die skool se gebruiklike voertaal te ontvang; diegene wat onderrig deur die medium van Engels verkies, moet maar by die Engelstalige skool om die draai gaan inskryf. Die anti-Afrikaanse drukgroep beweer daarenteen: ons het die reg om by die skool van ons eie keuse in te skryf; ons verkies onderrig deur die medium van Engels; aangesien ons 'n aansienlike deel van die skolierekorps uitmaak, moet aan ons eise voldoen word; as onderwys in albei tale nie voorsien kan word nie, dan moet Afrikaans die aftog blaas.

In die heersende politieke klimaat, neig simpatieë in die rigting van laasgenoemde sentimente; en daar is nie veel wat die Afrikaanse gemeenskap daaraan kan doen nie – behalwe om hulle toevlug tot private onderwysinstellings te neem.

Die Grondwet maak uitdruklik voorsiening vir die reg van "elkeen" om onafhanklike onderwysinstellings tot stand te bring en in stand te hou.[138] Sulke instellings moet egter aan bepaalde grondwetlike voorwaardes voldoen: rasseoorwegings mag nie die rede vir die oprigting van die instelling wees, of as vereiste vir die toelating van skoliere tot die inrigting geld nie;[139] en die instelling moet by die staat geregistreer word en moet akademiese standaarde handhaaf wat nie minderwaardig is in vergelyking met dié van openbare onderwysinstellings nie.[140]

Toepassing van die nie-diskriminasievereiste kan gekompliseerd wees. Putatiewe egalitarisme kan onder die dekmantel van allerlei toelatingsvereistes wat oënskynlik ras-neutraal is, ontwikkel word. Die beginsel van "doelgerigte diskriminasie" wat in die Amerikaanse regspraak beslag gekry het om met wetgewing af te reken wat op die oog af geen rassevooroordeel openbaar nie maar wat in die toepassing daarvan op *de facto* diskriminasie neerkom,[141] kan met vrug hier in Suid-Afrika nagevolg word: indien bewys kan word dat die toelatingsvoorwaardes ingestel is met die opset om 'n rassevooroordeel te verbloem, word aangeneem dat die onderwysinstelling opgerig is met die doel om op rassegronde te diskrimineer.

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138 A 29(3).
139 A 29(3)(a).
140 A 29(3)(b) en (c).
141 *Washington v Davis* 426 US 229 (1976); *Mobile v Bolden* 446 US 55 (1980): en vgl Van der Vyver "Comparative law in constitutional litigation" 1994 *SALJ* 19 30–31.

Die Grondwet verplig nie die staat om onafhanklike onderwysinstellings met 'n spesifieke kulturele, etniese, linguïstiese of godsdienstige beslag te voorsien nie. Ingevolge artikel 29(3) word aan elkeen die reg veroorloof om sodanige onderwysinstellings op die been te bring en te onderhou.[142] Sulke instellings word opgerig en onderhou op koste van die oprigter.[143] Niks verhinder die staat egter om 'n onafhanklike onderwysinstelling te subsidieer nie.[144]

Geslag

Die eerste saak waarin die konstitusionele hof uitspraak moes lewer oor die diskriminasieverbod is *Brink v Kitshoff*.[145] Die saak het betrekking op sekere bepalings van die Versekeringswet:[146] sou die manlike eggenoot in 'n huwelik buite gemeenskap van goed 'n lewensversekeringspolis op sy eie lewe aan sy eggenote sedeer en sy boedel word binne twee jaar na die sessie gesekwestreer, dan val die polis, of enige opbrengs van die polis, in sy insolvente boedel (behoudens bepaalde uitsonderings), en die vrou het dan geen aanspraak op die polis of op enige opbrengs van die polis nie. Selfs as die boedel van die man nie gesekwestreer is nie – wat in *Brink* juis die geval was – kan krediteure van die man se bestorwe boedel, indien dit inderdaad insolvent is, die opbrengs van die gesedeerde polis eis wat die bedrag van R30 000 oorskry. Die vrou kry in so 'n geval hoogstens 'n gedeelte van die polis se opbrengs.

Hierdie bepalings is by die wet ingesluit om skuldeisers van die man te beskerm, en spruit uit die tradisionele opvatting dat die man (noodwendig) die broodwinner van die gesin is. Die konstitusionele hof het bevind dat daardie bepalings neerkom op diskriminasie teen die vrou, dat daardie diskriminasie nie op grond van die beperkingsbepalings van die handves van regte geregverdig kan word nie, en dat hulle daarom ongrondwetlik is. Regter O'Regan verklaar in haar uitspraak (namens die hof):[147]

> "Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution."

Wat differensiasies gegrond op geslag aanbetref, sou ook oorweging geskenk kon word aan sekere bepalings van die Wet op Seksuele Misdrywe.[148] Ingevolge artikel 14(1)(a) van die wet kan statutêre verkragting (met 'n meisie onder die ouderdom van 16 jaar) slegs deur die manlike persoon (van oor die ouderdom van 21 jaar en insluitende eerste oortreders) gepleeg word. Dit laat die grondwetlike vraag ontstaan hoekom geslagtelike gemeenskap tussen 'n vrou van oor

142 Vgl *In re: The School Education Bill of 1995 (Gauteng) supra* vn 136 par 7.
143 A 29(3) van Wet 108 van 1996.
144 A 29(4).
145 *Supra* vn 6; en vgl Jansen van Rensburg en Stander "Artikel 44 van die Versekeringswet ongrondwetlik verklaar – bestaan daar 'n leemte in ons reg?" 1997 *THRHR* 119; Havenga "The comfortable estate of widowhood: Insurance law and the Constitution" 1997 *THRHR* 164.
146 Wet 27 van 1943, a 44(1) en (2).
147 *Brink v Kitshoff supra* vn 6 par 44.
148 Wet 23 van 1957.

die ouderdom van 21 jaar met 'n manlike jeugdige onder die ouderdom van 16 jaar nie ook strafbaar is nie.

Die wet bevat ook die volgende diskrepansie: 'n manlike[149] of vroulike[150] persoon wat 'n immorele of onbehoorlike daad met 'n meisie onder die ouderdom van 16 jaar of met 'n seun onder die ouderdom van 19 jaar verrig of poog om dit te doen, pleeg 'n oortreding. Hier word geen op geslag gegronde onderskeid gemaak tussen die manlike en vroulike beskuldigde nie, maar wel tussen die manlike en vroulike slagoffer. Hierdie differensiasie spruit waarskynlik uit die mite dat seksuele rypheid (na puberteit) stadiger in die manlike persoon as in die vrou ontwikkel. Hierdie voorskrif is daarom ook verdag, en trouens ongrondwetlik.

Vergelykenderwys kan daarop gewys word dat die US Supreme Court, in die saak van *Michael M v Superior Court*,[151] met 'n geringe meerderheid die grondwetlikheid gehandhaaf het van 'n statuut van Kalifornië wat 'n man, maar nie die vrou nie, strafbaar stel indien vleeslike gemeenskap plaasgevind het terwyl die vrou onder die ouderdom van 18 jaar was. Die pluraliteit baseer hulle uitspraak op die veronderstelling dat die wet aangeneem is om buite-egtelike swangerskappe te bekamp; en aangesien die vrou, en nie die man nie, "all of the significant harmful and inescapable identifiable consequences of teenage pregnancy" op die lyf loop, meen die pluraliteit dat dit vir die wetgewer geoorloof was om slegs daardie deelgenoot aan die daad te straf wat net 'n paar van die gevolge van die daad moet verduur. Hierdie argument is klaarblyklik nie op enige (diskriminerende) bepalings van die Suid-Afrikaanse Wet op Seksuele Misdrywe van toepassing nie.

Die verbod op diskriminasie deur persone en instellings wat nie staatsorgane is nie,[152] kan met die volgende geskilpunt voor oë onder die loep geneem word: In die jongste tyd is daar 'n lewendige debat in Suid-Afrika ontketen oor die weiering van die Rooms-Katolieke Kerk om vrouens as priesters te ordineer. Die vraag wat hier oorweeg moet word, is of dit 'n geskilpunt is wat aan grondwetlike toetsing onderworpe gestel kan word.

Die 1993-Grondwet is bewustelik ontwerp om te voorkom dat handelinge verrig of besluite geneem deur "private" persone, asook die interne gedragsreëls van sosiale entiteite buiten die staat en staatsorgane, aan grondwetlike kontrole onderwerp word.[153] Daar is wel voorsiening gemaak vir burgerregtewetgewing om onbillike diskriminasie te verbied deur persone of instellings wie se handelinge, besluite of regsreëlings nie aan grondwetlike toetsing onderworpe was nie.[154] Sodanige wetgewing sou doenlik wees indien rassediskriminasie in die private sfeer van so 'n aard is, of sulke afmetings aanneem, dat dit van staatskant nie geduld behoort te word nie. Skrywers van die 1993-Grondwet wou daarmee die gevare van 'n totalitêre staatsbestel – staatsinmenging in die private lewe van mense en/of in die interne huishouding van nie-staatlike sosiale entiteite – vermy,

149 Vgl a 14(1)(b).
150 Vgl a 14(3).
151 450 US 464 (1981).
152 A 9(4) van Wet 108 van 1996.
153 Vgl Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 378; Van der Vyver *supra* vn 15.
154 A 33(4) van Wet 200 van 1993.

maar darem ook voorkom dat rassediskriminasie by veral openbare geriewe wat in private besit is, bly hoogty vier.

Artikel 9(4) van die 1996-Grondwet verteenwoordig een van verskeie bepalings wat afwyk van die beleidstandpunt wat in die 1993-Grondwet weerspieël word. Dit bepaal uitdruklik dat die diskriminasieverbod op persone wat nie staatsorgane is nie, van toepassing is; en "persone" sluit ingevolge artikel 8(2) sowel natuurlike as regspersone in. Dit belas dus die Rooms-Katolieke Kerk met 'n (deur die staat opgelegde) grondwetlike plig om nie teen vrouens – of teen "gays" en lesbiërs – te diskrimineer nie.[155]

Die bewoording van artikel 9(4) gee te kenne dat vrouens wat priesters wil word, hulle nie op die grondwetlike diskriminasieverbod as sodanig kan beroep om daardie begeerte op die kerk af te dwing nie. Anders as wat met diskriminasie deur staatsorgane die geval is,[156] word in die onderhawige subartikel aan die nasionale wetgewer opdrag gegee om met wetgewing aan die grondwetlike verbod uitvoering te gee.

Die rede waarom dit aan die wetgewer oorgelaat is om gestalte te gee aan die verbod op diskriminasie deur persone wat nie staatsorgane is nie, sou moontlik kon wees om dit aan die volksverteenwoordigers oor te laat om te besluit welke gevalle van "private" diskriminasie "onbillik" beskou en derhalwe verbied moet word. As dit die geval is, is die bewoording van die subartikel sleg gekies. Dit veroorloof naamlik nie net sodanige wetgewer nie, maar verplig die wetgewer om die diskriminasieverbod deur wetgewing af te dwing.

Dit laat op sy beurt die vraag ontstaan hoe daardie grondwetlike gebod afgedwing kan word. Indien enige hof, insluitende die konstitusionele hof, aan die wetgewer opdrag sou gee om 'n bepaalde statuut aan te neem, sou dit op 'n skreiende verkragting van die skeiding van staatsmagte, én van die demokrasiebeginsel, neerkom – wat in albei gevalle as ononderhandelbare norme van die nuwe grondwetlike bedeling vooropgestel is.[157] Indien sodanige wetgewing nie aangeneem word nie, sal die konstitusionele hof in alle waarskynlikheid bloot 'n bevinding boekstaaf dat die wetgewer versuim om aan 'n grondwetlike plig uitvoering te gee – en dit dan aan die wetgewer self, en uiteindelik aan die kiesers, oorlaat om te besluit hoe om op daardie bevinding te reageer.

Indien wetgewing beplan word wat onbillike diskriminasie in die interne huishouding van godsdienstige instellings gaan verbied, sou die kerk vertoë kon voorlê wat beweer dat die diskwalifikasie van vrouens om as priesters geordineer te word, in die lig van die geskiedenis en dogma van die kerk, nie onbillik, of ten minste nie onredelik, is nie. Of die kerk by die konstitusionele hof kan aanklop om sulke wetgewing in die kiem te smoor, is egter twyfelagtig.[158] Nadat die wet aangeneem is, kan die kerk natuurlik wel die grondwetlikheid daarvan in die hoë hof betwis.[159] Die kerk sou ook moontlik die grondwetlike reg op selfbeskikking van kulturele, godsdienstige en taalgemeenskappe "om hul kultuur te geniet, hul

155 Vgl ook Smith "Freedom of religion under the final Constitution" 1997 *SALJ* 217 224–225.

156 A 9(3) van Wet 108 van 1996.

157 Vgl Grondwetlike Beginsel I en VIII (demokrasie) en VI (skeiding van staatsmagte) in Byl 4 van Wet 110 van 1993.

158 Vgl a 167(4)(b), gelees met a 79(4) van Wet 108 van 1996.

159 A 38.

godsdiens te beoefen en hul taal te gebruik"[160] kon aanhaal as grond vir die handhawing van sy interne soewereiniteit, maar die Grondwet bepaal nadruklik dat hierdie reg nie uitgeoefen mag word op 'n wyse wat met enige bepaling van die handves van regte onversoenbaar is nie.[161]

Die meriete van hierdie aansprake is nie nou ter sake nie. Die blote feit dat die kerk verplig mag word om sy interne regsreëlings voor 'n sekulêre tribunaal te moet verdedig, kom neer op totalitarisme van die ergste graad. Daarby moet in gedagte gehou word dat die uitoefening van politieke mag in die Suid-Afrikaanse staatsbestel wat deur die Grondwet verdoem word, baie sulke totalitêre praktyke ingesluit het.[162] Indien die "oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid" op 'n "never again"-gemeenskap dui, behoort staatsinmenging in die private lewe van persone, en in die huishoudelike aangeleenthede van nie-staatlike sosiale entiteite, net soseer vermy te word as enige manifestasie van diskriminasie.

Seksuele georiënteerdheid

In 1993 is die saak van *Van Rooyen v Van Rooyen*[163] in die Witwatersrandse Plaaslike Afdeling van die Hoë Hof beslis rondom die volgende feitestel: Die applikant en respondent was getroud en uit hulle huwelik is twee kinders gebore. Hulle is daarna geskei, en toesig van die kinders is aan die vader toegestaan. Die moeder het later in 'n lesbiese verhouding betrokke geraak, en het uiteindelik 'n woning, en haar slaapkamer, met haar lesbiese gesel gedeel. Die vader van die kinders het begin om die besoektye van die moeder in te kort, en die moeder het daarom, in die aansoek waarom dit hier gaan, by die hoë hof aangeklop om haar reg van toegang tot die kinders – op daardie stadium 'n elfjarige seun en 'n negejarige dogter – op te klaar. Die hof gee in sy uitspraak toe dat die moeder die lewenswyse van haar eie keuse kan bedryf en dat die hof moet poog om haar lewenstyl te repekteer en te beskerm.[164] Nogtans, word bevind, geld die belange van die kinders as die hoogste norm, en daarom voel die hof verplig om beperkings te plaas op die moeder se gedrag gedurende die tye wat die kinders in haar sorg is, sodat die kinders nie blootgestel sal word aan "wrong signals",[165] soos videos, foto's, artikels en persoonlike klere (insluitende mansklere) wat op homoseksualiteit mag dui of die goedkeuring van lesbianisme by die kinders sou kon tuisbring nie.[166] Indien die kinders oor 'n naweek by die moeder sou oorbly, mag sy nie haar slaapkamer met die lesbiese genoot deel nie, en wanneer die kinders gedurende 'n skoolvakansie in die moeder se sorg is, mag die lesbiese genoot nie in dieselfde woning wees of onder dieselfde dak slaap as die moeder en haar kinders nie.[167] Met verwysing na 'n verslag wat aan die hof voorgelê is en wat beweer dat homoseksualiteit nie meer as 'n geestessiekte of as sonde beskou word nie, verklaar regter Flemming dat hy die gedeelte oor 'n geestessiekte

160 A 31(1)(a).
161 A 31(2).
162 Vgl *supra* die teks rondom vn 9.
163 1994 2 SA 325 (W).
164 329.
165 *Ibid.*
166 332.
167 331.

aanvaar, maar "[a]s to whether it is a sin, I defer to her [die deponent se] view but perhaps I would prefer to leave that to the Heavenly Father to decide".[168]

Dit was voordat die nuwe bedeling in werking gestel is. Die beslissing in *Van Rooyen* strook hoegenaamd nie met die grondwetlike moraliteit wat tans deur die diskriminasieverbod weerspieël word nie.[169] Die beste belange van die kind is steeds die hoofoorweging in enige aangeleentheid wat op die welsyn van jeugdiges betrekking het. Maar differensiasies gegrond op seksuele georiënteerdheid kan nie meer aangewend word om die belange van 'n kind te bepaal nie – net so min as wat 'n hof met die ouer-kind-verhouding kan inmeng op grond van die geloofsoortuigings van die ouer, al sou die voorsittende regter die ouer se geloof as 'n voorspel tot die verdoemenis beskou. Indien getuienis vandag aan 'n hof voorgelê sou word wat te kenne gee dat blootstelling van 'n kind aan 'n "gay" of lesbiese verhouding mag meebring dat die kind self homoseksuele neigings ontwikkel, sou die aangewese grondwetlike reaksie daarop wees: Wat daarvan! Ooreenkomstig die huidige grondwetlike ethos word homoseksualitiet as "normaal en natuurlik, bevredigend en reg" beskou.[170]

Dit neem nie die reg weg van persone of kerkgenootskappe wat 'n stigma aan homoseksualitiet verbind, om hulle standpunt te verkondig en ander mense daarvan te probeer oortuig nie. Daartoe geniet hulle vryheid van spraak. Maar wat die reg en regsinstellings betref, mag daar nie onbillik teen enigeen gediskrimineer word op grond van daardie persoon se seksuele georiënteerdheid nie.

G SLOTOPMERKINGS

Die beslissing in *Van Rooyen v Van Rooyen*[171] weerspieël klaarblyklik die oorheersende standpunt in Suid-Afrika, naamlik dat dit nie in die beste belang van kinders is om hulle aan 'n lesbiese of "gay" verhouding bloot te stel nie. Die uitspraak weerspreek nietemin die gelykberegtigingsbepalings van die Grondwet. Om daardie rede kan die *ratio decidendi* van die uitspraak in die nuwe bedeling nie meer as bindende gesag ingevolge die *stare decisis*-reël geld nie.

Daar is trouens heelwat ander grondwetlike bepalings wat nie die regsetiese voorkeure van 'n "swygende meerderheid" in die land gestand doen nie. Dit word bereken dat naastenby 80% van die Suid-Afrikaanse bevolking ten gunste van die doodsvonnis is; nogtans beskerm die Grondwet die reg op lewe[172] en word strawwe wat menswaardigheid aantas, verbied.[173] Bykans net soveel Suid-Afrikaners is na skatting teen aborsies gekant, maar nogtens het skrywers van die 1996-Grondwet dit goed gedink om die grondwetlike reg op liggaamlike en psigiese integriteit uit te brei ten einde die reg "om besluite oor voortplanting te neem"[174] en "op sekerheid van en beheer oor die eie liggaam"[175] daarby in te sluit.

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168 327.

169 Vgl in die breë Labuschagne "Menseregtelike beskerming van seksuele oriëntasie en die huweliksregtelike status van die transseksueel" 1996 *SALJ* 229.

170 Hierdie tipering is ontleen aan die woordkeuses van publikasiebeheer uit die dae van streng sensuur. Vgl *Publications Control Board v William Heineman Ltd* 1965 4 SA 137 (A) 154.

171 *Supra* vn 163.

172 A 11 van Wet 108 van 1996.

173 Vgl *S v Makwanyane supra* vn 6 tav die doodstraf; *S v Williams supra* vn 57 tav lyfstraf.

174 A 12(2)(a) van Wet 108 van 1996.

175 A 12(2)(b).

Dit wys net dat die Suid-Afrikaanse Grondwet nie ontwerp is om opvattings van die meerderheid te bevredig nie. Die Grondwet is inteendeel daarop ingestel om menseregte te beskerm, afgesien van die eise en wense wat populêr is onder ons mense. 'n Grondwetlike handves van regte sien in besonder om na die belange van minderhede. Die Suid-Afrikaanse Grondwet verleen dienooreenkomstig beskerming aan die selfbeskikkingsreg van kulturele, godsdienstige en taalgemeenskappe.[176]

Die diskriminasieverbod is ook besonderlik sensitief vir die behoeftes van minderheidsgroepe in die gemeenskap. Hulle is die mense wat, meer as enigiemand anders, spesiale beskerming nodig het. Dit geld te meer vir minderheidsgroepe wie se lewenstyl en oortuigings deur 'n meerderheid van die bevolking veroordeel of bespot word.

Gelyke regsbeskerming, nie-diskriminasie en respek vir die kulturele, godsdienstige en linguïstiese besonderheid van dele van die samelewing is die enigste basis waarop groepe in 'n gepolariseerde gemeenskap sáám kan ontwikkel tot 'n reënboogvolk.

We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men – Immanual Kant

176 A 31.

Roman law, fundamental rights, and land reform in Southern Africa*

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OPSOMMING

Romeinse reg, fundamentele regte en grondhervorming in Suider-Afrika

In hierdie artikel argumenteer die outeur dat die tema "Romeinse reg by 'n kruispad" nie aan die hand van die "normale" substantiewe temas bespreek behoort te word nie, maar eerder met verwysing na die "kruispad"-status van die Romeinse reg en die redes waarom die Romeinse reg vandag wêreldwyd in 'n krisis verkeer. Volgens hierdie benadering word die Romeinse reg bespreek aan die hand van 'n oënskynlik onverwante probleem, naamlik die vandag so belangrike konflik tussen die grondwetlike beskerming van fundamentele regte en die bevordering van grondhervorming. In die artikel word 'n kort oorsig van grondhervormingsinisiatiewe en -programme in Suider-Afrika verskaf, en daarna word die verhouding tussen grondhervorming en die beskerming van fundamentele regte (en spesifiek eiendomsregte) geanaliseer. Die gevolgtrekking is dat die tradisionele, privaatregtelike beskouing van eiendomsregte die hoofoorsaak is van die konflik wat na bewering in die weg van grondhervorming staan, en in die slotgedeelte van die artikel word dan geargumenteer dat hierdie privaatregtelike siening in die onderrig van Romeinse reg as universiteitsvak ondermyn kan en behoort te word. 'n Alternatiewe lesing van die Romeinse reg word gevolglik voorgestel, waarin minder aandag aan die kontinuïteit van die Romeinse tradisie gegee word, en meer aandag aan die breuke en diskontinuïteite wat ook deel van die geskiedenis van die Romeinse reg uitmaak. So 'n benadering kan dit moontlik maak om die oënskynlik ononderbroke tradisie van absoluutheid, eksklusiwiteit en individualisme waarop die privaatregtelike siening van eiendomsreg berus te relativeer en te ondermyn, sodat daar ruimte oopgemaak word vir die ontwikkeling van 'n ander beskouing van eiendomsreg wat beter in die huidige sosiale, ekonomiese en grondwetlike konteks inpas.

1 INTRODUCTION: "HOW CAN THIS BE A PROBLEM?"

Upon reading the title of this paper, most lawyers brought up in the Western European civilist tradition will ask: "How can this be a problem?" Roman law, fundamental rights, and land reform – how can you even mention these things in the same breath, let alone construe some relationship between them? Everybody

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* Background article for a paper read at a symposium entitled "Roman law at the crossroads", presented at the University of Namibia, Windhoek, 1997-06-30 to 1997-07-01. I am indebted to Karen Prinsloo for research assistance, to Clement Ng'ong'ola for fruitful and informative discussions and for documentation on land reform and constitutional property in Southern Africa, and to Johan van der Walt, Henk Botha, Karin van Marle and Wessel le Roux for their comments. The remaining errors are all my own.

knows that the notion of fundamental rights is a creature of the modern, constitutional state; and land reform is a state programme based on government policy – surely Roman law does not have the remotest interest for anybody interested in fundamental rights or in land reform? And, conversely, why would a scholar of Roman law have any interest in the concept of fundamental rights or in land reform policies? The more cynical observer may perhaps wonder whether this combination of topics is yet another example of the politicization of the law, or perhaps just a clumsy effort to demonstrate, against all odds, that Roman law is indeed still relevant, even in Southern Africa. After all, Roman law is at the crossroads, especially in Southern African countries attempting to design and develop new law degrees that will suit the needs and requirements of postcolonial Africa at the end of the millennium.[1]

It is not my intention to argue that the study of Roman law may receive new impetus from its possible relevance for currently high-profile topics like fundamental rights and land reform. On the contrary, the relationship I have in mind tends, at least superficially, to support the proposition that Roman law is irrelevant in Southern Africa and should be abolished from the law curriculum altogether. It is this basically negative (but by no means novel) connotation that alerted me to the idea of raising this topic at a symposium on "Roman law at the crossroads" – after all, the notion that Roman law should be abolished from the law curriculum does highlight its crossroads status rather dramatically.

To my way of thinking, it seems inappropriate, at a symposium on "Roman law at the crossroads", to focus on and talk about the usual substantive topics in Roman law and their supposed relevance for current law in Southern Africa. I do not subscribe to the view that (at least some parts of) South African law are still deeply imbued with the principles of Roman law,[2] or that the core principles of Roman law are "universal" or "natural" and that the study of Roman law is therefore an appropriate discipline for scholars or lawyers in a society in transformation.[3] Instead, I think we should focus on and talk about the crossroads aspect of the main theme of the symposium, in other words, the ways in which and the reasons why Roman law is at the crossroads. This means that we should, in my view, not be looking for the unbroken golden thread, for evidence of the continued functionality and relevance of Roman law in Southern Africa today, but that we should rather have a closer look at the dysfunctional aspects and the discontinuities of Roman law, and at the way in which it performs or can perform along some of the fault lines and breakdown points in contemporary society, in legal theory and practice, and particularly in the study and teaching of

1 At the time of writing South African universities are all in the process of designing a new four-year LLB degree, which is supposed to be the basic law degree for all branches of the legal profession. The position of Roman law in this degree is precarious.

2 See Domanski "Teaching Roman law on the eve of the millennium: a new beginning?" 1996 *THRHR* 539, 1997 *THRHR* 38. Domanksi (541) also regards this argument as "facile and specious".

3 Domanski (fn 2). Domanski (545–546) subscribes to this argument. Cheadle and Davis "The application of the 1996 Constitution in the private sphere" 1997 *SAJHR* 44 50 argue that, if anything, the conservative values of traditional private law stand in the way of a proper interpretation of the application provisions in the 1993 and 1996 South African Constitutions.

law, in Southern Africa today.[4] This requires a somewhat untraditional approach, where Roman law features not in the basis or at the centre, but on the edge of the legal order.[5] For this kind of marginal approach to Roman law there can hardly be a better point of departure than a topic outside of and seemingly completely unrelated to Roman law: land reform in Southern Africa. Given the state of land distribution patterns and the general land hunger in Southern Africa it would not be unfair to say that land reform is one of the most urgent and important priorities in the process of transformation in Southern Africa. It would therefore be interesting to judge the value of Roman law for the law as it appears along this fault line in society.

2 LAND REFORM IN SOUTHERN AFRICA

Clearly this is neither the time nor the place for a complete analysis of land reform in Southern Africa, but in order to obtain the kind of external perspective on Roman law that I am aiming for it is necessary to compile a brief sketch of the kind of reform policies and programmes that have been implemented in the recent past. My focus is on the broader picture: the general aims and purposes of land reform, general trends in land reform, and general characteristics of land reform. In the analysis I shall be particularly interested in the implications of land reforms for traditional perceptions of Roman-Dutch and customary-law land rights.

The clearest policy documents on land reform available to me are of South African origin, but they illustrate and identify land reform needs that apply more generally to the whole region. The following land reform priorities can be identified in the former De Klerk government's *White Paper on Land Reform* of 1991,[6] the present Mandela government's *Reconstruction and Development Programme*[7] and the subsequent *White Paper on Reconstruction and Development* of 1994:[8]

- To abolish and eradicate the remnants of apartheid land law and all forms of racially discriminatory laws and practices with regard to land.[9]

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4 Smits "Privaatrecht en postmodernisme: over recht en tijdsgeest, toegelicht aan de hand van enige civielrechtelijke fenomenen" 1997 *Recht en Kritiek* 155 explains some of the scepticism and criticism of current law with reference to postmodernism, which he sees as a kind of *fin de siècle* melancholy.

5 For this formulation of the idea of jurisprudence operating on the edge of the legal order I am indebted to Gerrit van Maanen, who raised it in a different context in "Balanceren op de grens van de rechtsorde" 1982 *Recht en Kritiek* 467.

6 WP B-91 March 1991.The following laws were promulgated in terms of the 1991 *White Paper*: the Abolition of Racially Based Land Measures Act 108 of 1991; the Upgrading of Land Tenure Rights Act 112 of 1991; and the Less Formal Township Establishment Act 113 of 1991.

7 Published for the ANC by Umanyano Publications, Johannesburg (1994).

8 WPJ/1994, see *GG* 16085 1994-11-23. The *Green Paper on South African Land Reform* (published under the title *Our land*, Department of Land Affairs, Pretoria 1996-02-01, after lengthy consultations and a National Land Policy Conference 1995-08-31 and 1995-09-01) sets out the new government's latest policy principles and objectives relating to land reform. The *Green Paper* still functions within the broad policy framework of the *RDP*, albeit in a more specific and detailed manner.

9 The 1991 *White Paper* already acknowledged the injustice of the existing system and the need to abolish so-called "racially-based land measures". Both the *RDP* (1) and the 1994

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- To institute and administer some form of restitution for those whose land rights have been affected by apartheid policies.[10]
- To promote greater equality in existing land distribution patterns by implementing redistribution programmes, and to ensure access to land for all on an equal basis.[11]
- To improve the security of tenure of those who already have access to land, and to improve the suitability of existing land rights in their respective contexts.[12]
- To ensure and promote the economic, productive and sustainable use, of especially, valuable agricultural land.[13]

On the basis of these priorities, a number of land reform programmes and initiatives have been instituted in South Africa since 1991.[14] Obviously the most basic and important of all reforms is the initial abolition of discriminatory laws, and in the case of South Africa this was completed by the time the new, democratically elected government took over in 1994.[15] Land reform initiatives in the rest of Southern Africa are generally less comprehensive than in South Africa,[16] but

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White Paper (7) emphasise the need for an integrated, coherent socio-economic policy framework within which apartheid can be eradicated and a new, democratic, non-racial and non-sexist future can be built.

10 The 1991 *White Paper* did not provide for restitution, but the *RDP* and the 1994 *White Paper* regard it as one of the three main pillars of the land reform process.

11 The 1991 *White Paper* proposed limited measures for the promotion of greater access to land, especially in residential areas. The *RDP* and the 1994 *White Paper* regard redistribution and greater access to land as one of the three main pillars of land reform, and propose a number of redistribution policies and programmes relating to agricultural and residential land.

12 The 1991 *White Paper* places heavy emphasis on tenure reform, and in fact proceeds with an already exsting pre-1991 programme of so-called "upgrading" of existing land rights. The focus of these upgradings was on the transformation of residential and occupation permits to leasehold, and leasehold to ownership. Both the *RDP* and the 1994 *White Paper* regard tenure reform and greater security of tenure as one of the three main pillars of land reform.

13 In the 1991 *White Paper*, land was described as "the most precious resource for the existence and survival of man (*sic*)", and the aims of the "new land policy" contained in the 1991 *White Paper* were explained with reference to "the best opportunities to bring about, in a responsible and orderly fashion, a land dispensation which is both economically sound and compatible with the basic values and ideals expressed in the Manifesto for the New South Africa". For an ironical twist, compare the discussion of the importance of land in the 1991 *White Paper* (1–2) with the sentiments expressed by the then still banned Zola Skweyiya in "Towards a solution to the land question in post-apartheid South Africa: problems and models" 1990 *SAJHR* 195 (land was always the major national asset of South Africa and represented the "very element of human survival", but through colonialisation, land robbery and accumulation of wealth it became an instrument of and a primary cause of social injustice during the apartheid era).

14 See Van der Walt "Land reform in South Africa since 1990 – an overview" 1995 *SAPL* 1–30; Du Plessis, Olivier and Pienaar "The ever-changing land law – 1994/1995 reforms" (1995) 10 *SAPL* 145–167.

15 The Abolition of Racially Based Land Measures Act 108 of 1991 abolished the majority of discriminatory land laws such as the Black Land Act 27 of 1913, the Development Trust and Land Act 18 of 1936, the Group Areas Act 36 of 1966, the Black Communities Development Act 4 of 1984 and the Free Settlement Areas Act 102 of 1988.

16 I am indebted to Clement Ng'ong'ola for providing me with material and information on land reform in Botswana, and for discussing the problems with me. For the following

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basically all land reforms in the region can be classified with reference to the three main pillars of land reform in the *RDP*:

- *Land restitution* is a fairly limited process whereby specific parcels of land are restored to the people or communities from which they have been dispossessed in the course of discriminatory practices. In some cases the restitution may involve the provision of alternative land or even payment of compensation, but generally speaking restitution is restricted to restoring specific parcels of land to specific victims of discriminatory dispossessions. South Africa seems to be the only country in Southern Africa where a more or less comprehensive restitution programme has been implemented.[17]

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analysis I relied heavily on the papers made available to me by Clement Ng'ong'ola, and also on Ng'ong'ola "Land tenure reform in Botswana: post-colonial developments and future prospects" 1996 *SAPL* 1–29. See further Ng'ong'ola "The post-colonial era in relation to land expropriation laws in Botswana, Malawi, Zambia and Zimbabwe" 1992 *ICLQ* 117; Ng'ong'ola "Compulsory acquisition of private land in Botswana: the Bonnington Farm case" 1989 *CILSA* 298 299; Mathuba "Land policy in Botswana" paper prepared for the workshop on Land Policy in Eastern and Southern Africa, Maputo, Feb 1992 at 4; Mathuba "Land institutions and land distribution in Botswana" paper presented to the conference on Land Redistribution Options, Johannesburg, October 1993 1–3.

17 Ch VI of the Abolition of Racially Based Land Measures Act 108 of 1991 introduced the concept of land restitution. It provided for the establishment of the Advisory Committee on Land Allocation (changed to the Commission on Land Allocation by s 4 of the Abolition of Racially Based Land Measures Amendment Act 110 of 1993, which also increased and broadened the functions and powers of the Commission), to which certain fairly limited powers and functions were given relating to the restitution (or "allocation") of land rights. Provision was made in ss 121–123 of the interim Constitution of the Republic of South Afica 200 of 1993 for the promulgation of a special restitution law (the Restitution of Land Rights Act 22 of 1994), which would initiate and control a land restitution programme. S 121 of the 1993 Constitution provided for restitution claims, s 122 for the establishment of a Commission on Restitution of Land Rights, and s 123 for the nature of restitution orders. S 121 made it clear that the process of restitution was restricted to individuals and groups of people who had been dispossessed of land in terms of racially discriminatory laws (and not a general process for access to land), and that it was intended to function as claims against the state and not against other individuals, but s 123 extended the scope of the restitution process somewhat by allowing for restitution in the form of alternative land or compensation. See s 35(2) of Act 22 of 1994, and cf s 33 for factors to be considered by the court when making an order. S 1 of Act 22 of 1994 defines "rights in land" widely to include any righs, whether registered or not, including customary land rights and "beneficial occupation" of land for not less than ten years. Despite the wide definition of "right in land" in s 1(xi), s 121(4)(a) of the 1993 Constitution excluded from the scope of the Act rights in land that were dispossessed under the Expropriation Act 63 of 1975 if just and equitable compensation was paid for such expropriation. This precluded the possibility of restitutions simply for the sake of restoring historical or tribal and ancestral interests in the land. The Restitution of Land Rights Act 22 of 1994 provides for the establishment of a Commission on Restitution of Land Rights (s 4) and for a Land Claims Court (s 22). Certain provisions of the Act have been amended by the Land Restitution and Reform Laws Act 63 of 1997. The Commission's rules were published in 1995 (GN R703 in *GG* 16407 1995-05-12), and the Court's rules in 1997 (GN R300 in *GG* 17804 1997-02-21). In *In re MacLeantown Residents Association: Re Certain Erven and Commonage in MacLeantown* 1996 4 SA 1272 (LCC) the court set out the procedure for an application to have a settlement agreement declared an order of court in terms of the Act. S 25(7) of the final Constitution of the Republic of South Africa 1996 replaced s 121 of the 1993 Constitution as the authorising provision for Act 22 of 1994.

- *Land redistribution* is a much wider process by which the current (uneven or inequitable) land distribution pattern is changed and greater access to land ensured for people and communities who have historically been marginalised by apartheid policies and practices.[18] This process can include physical expropriations and redistributions,[19] the introduction of planned incentives to make land available for redistribution, programmes to facilitate the development

18 An important aim of transformation in the *RDP* (2-3) and the 1994 *White Paper* (7-8) was to address the huge disparities in income distribution, access to urban and agricultural infrastructure, and access to land and housing which resulted from decades of apartheid policies and practices. This aim was addressed in the fifth of the six basic principles of the *RDP*: to link reconstruction and development, redistribution and growth. See *RDP* 6; *White Paper* 8. Compare *RDP* 14–57, esp 19–22; *White Paper* 43–44. S 25(5) of the 1996 South African Constitution places a direct obligation on the state to take reasonable legislative and other measures, within its available resources, to foster conditions that will enable citizens to gain access to land on an equitable basis.

19 Various reform laws, like the South African Restitution of Land Rights Act 22 of 1994, allow for expropriations, but expropriations for land reform are also generally authorised by s 25 of the South African Constitution of 1996. S 25(2) requires that expropriations take place in terms of law of general application, for a public purpose or in the public interest (including land reform: see s 25(4)(a)), and against just and equitable compensation. S 25(3) prescribes how the compensation should be calculated. Part IV of the Namibian Agricultural (Commercial) Land Reform Act 6 of 1995 provides the procedures and requirements for expropriation of land for purposes of the Act. S 23 prescribes the procedure to be followed to negotiate an offer of compensation, and s 25 (which is subject to the "just compensation" requirement in s 16(2) of the Constitution of the Republic of Namibia Act 1 of 1990) provides for the determination of the amount of compensation. S 25(5) contains considerations to be taken into account when calculating the amount of compensation, and some of these resemble the provisions in s 25(3) of the Constitution of the Republic of South Africa 1996. Part V of the Act deals with the alienation of agricultural land, and lays down the procedures and requirements for such alienation. The Minister of Lands, Resettlement and Rehabilitation may, after consultation with the commission and with the concurrence of the minister of Agriculture, Water and Rural Development, allot state land or acquired agricultural land to any person or group by way of alienation, lease or any other scheme, for agricultural purposes. When the land is allotted in terms of a lease, the lessees always acquire an option to purchase the land. In Botswana, the Acquisition of Property Act of 1955 provides for expropriation of property. The power to expropriate vests in the President, who may exercise it for the purposes of defence, public safety, public order, public morality, public health, town and country planning and land settlements, or in order to secure the development or utilisation of the property for a purpose beneficial to the community. From this provision it is clear that expropriation for land reform (land settlement) is permissible. S 8(1) of the Constitution of the Republic of Botswana of 1966 requires "adequate compensation" for expropriation, and the Act provides that certain factors should be taken into account or disregarded when calculating compensation for expropriation. Part II of the Zimbabwean Land Acquisition Act 3 of 1992 provides that the President may compulsorily acquire any land, when the land is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of property for a purpose beneficial to the public; or any rural land, where the acquisition is reasonably necessary for the utilisation of land for settlement for agricultural or other purposes, or for purposes of land reorganisation, forestry or environmental conservation, or for the relocation of dispossessed persons. Part III of the Act provides for the procedure for such a compulsory acquisition. Part V provides for compensation, which has to comply with the (non-justiciable) "just compensation" requirement in s 16 of the Zimbabwean Constitution of 1980.

of land,[20] regulation of the distribution of land[21] and other programmes with regard to both urban[22] and agricultural land.[23] Generally speaking the purpose

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20 The South African Development Facilitation Act 67 of 1995 is aimed at facilitating, simplifying and speeding up the process of development in the context of provision of housing. The Act deals with both urban and rural development, and provides for procedures that will make development speedier and cheaper. Ch VII of the Act also provides for the upgrading of certain unregistered and informal tenure arrangements to full ownership, and for a completely new land right, called "initial ownership" (s 62). The regulations and rules in terms of the Act were published in 1996 (GN R1412 in *GG* 17395 1996-08-30). This new right, which can be established before the land is ready for the registration of normal real rights (to enable the initial owner to obtain financing at a very early stage and so shift the initial cost of development away from the developer), is a radical departure in the law of property: it can be registered in the deeds office, and it provides the initial owner with the right to occupy and use the land as if the right were common-law ownership, to encumber the initial ownership by means of mortgage or personal servitude, to sell the initial ownership and to upgrade the initial ownership to full ownership; but not the right to sell the land itself or encumber it in any other way. As soon as the land is developed so far that normal registration becomes possible, the initial ownership is converted to full ownership and vested in the holder of initial ownership.

21 S 14 of the Namibian Agricultural (Commercial) Land Reform Act 6 of 1995 empowers the Minister of Lands, Resettlement and Rehabilitation to acquire agricultural land offered for sale to the minister; agricultural land that is underutilised as defined in s 14(3); agricultural land or portions of such land that are excessive land in terms of s 14(3); and agricultural land acquired by a foreign national in contravention of s 58 or 59. The purpose of these acquisitions is stated quite explicitly as "to make such land available for agricultural purposes to Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibian citizens who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices". Part III of the Act provides for a preferent right of the state to purchase agricultural land whenever it comes on the market, unless that right is waived by the state. In Botswana, urban land is mostly state land, and state land is administered in terms of the State Land Act of 1986, which controls the allocation of state land in terms of a prescribed procedure. Citizens of Botswana are given priority in the allotment of state land. Part IV of the Zimbabwean Land Acquisition Act 3 of 1992 allows the Minister of Lands, Agriculture and Rural Settlement to designate any area or piece of rural land as land that will be acquired in terms of the Act. The designation must specify the purpose of the intended acquisition, the acquiring authority and the period (no longer than ten years) within which it is intended to acquire the land. Once land has been designated in terms of the Act, all sales, leases and other dispositions of the land are subject to ministerial approval, but the designation does not affect the owner's right to use the land.This process of designation of land has been the subject of constitutional litigation in Zimbabwe, and the Zimbabwean Supreme Court has decided that the designation of land in terms of the Act does not amount to an expropriation and does not create a duty to pay compensation (*Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZSC)).

22 There are some instances of freehold tenure on urban land in Botswana, but the greater part of urban land is state land, and the most important tenure forms that were introduced in the 1960s and 1970s are Fixed Period State Grants and Certificates of Right. The Fixed Period State Grants vest title in the holder for a fixed period, while the Certificates of Right provide a secure, inheritable, perpetual use right that can be converted into a Fixed Period State Grant. Freehold land is controlled by the Land Control Act, which provides that a proposed sale of freehold agricultural land must be advertised, and that a citizen must receive priority when the land is purchased. The explicit purpose of this Act is to provide citizens with a statutory right of pre-emption with regard to agricultural land, in order to promote the redistribution of agricultural land.

23 In 1995, the South African Department of Land Affairs introduced a number of so-called Pilot Projects, as part of which the department bought land in areas where disadvantaged

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is to increase access to land for disadvantaged individuals and communities and to improve the overall distribution of land.[24]

- *Tenure reform* is a complex process by which the security of tenure or the legal suitability of existing land rights or interests is improved.[25] This may take the form of simple upgrading of existing rights and interests in land, but experience has shown that simple upgrading often creates as many problems as it solves.[26] Tenure reform may also mean that entirely new land rights are created by special legislation to provide for specific needs, such as the need to hold land communally while retaining some form of democratic management and security of tenure.[27] Other forms of tenure reform involve complex

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communities had insufficient agricultural land, and then made the extra land, together with certain subsidies and infrastructure, available to these communities to improve their self-sufficiency.

24 Part VI of the Zimbabwean Land Acquisition Act 3 of 1992 establishes a Derelict Land Board, and Part VII provides for the appointment of land officers, who may investigate the state of occupation of land and initiate a procedure that may end with the acquisition, without compensation, of derelict land. Considerations for determining whether land is derelict are specified in the Act, and include factors such as whether the land is or has been occupied and cultivated, whether the owner can be found and whether rates, levies and taxes are being paid.

25 S 25(6) and 25(9) of the 1996 South African Constitution places a direct obligation on the legislature to make laws to provide security of tenure or comparable redress to those persons and communities whose security of tenure was affected by past discriminatory laws and practices.

26 The South African Upgrading of Land Tenure Rights Act 112 of 1991 provides for the upgrading of certain statutory land tenure rights to full ownership (for an example of the results of this process of upgrading see *Mnisi v Chauke; Chauke v Provincial Secretary, Transvaal,* 1994 4 SA 715 (T): the widow of a holder of a statutory occupation right obtained a certificate to occupy in her own name, upgraded it to leasehold and then to ownership, and then sold the house to someone else, leaving her children faced by an eviction order from the new owner). The Less Formal Township Establishment Act 113 of 1991 provides for simplified and shortened procedures for the establishment of less formal settlements and townships (for an example of the problems caused by this law, see *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1994 3 SA 336 (A): residents of an established township opposed the establishment of a less formal township in their vicinity, claiming it would lower property values and result in increased pollution and crime).

27 The South African Communal Property Associations Act 28 of 1996 is aimed at providing a secure legislative structure within which members of a group or community can acquire and hold movable and immovable property collectively. This Act is especially important for groups or communities that want to hold land collectively for social and economic reasons, or for groups and communities that benefit from land reform measures as a group and not individually (s 2). The Act provides a framework for the formation and registration of a communal property association, which must register a written constitution which conforms with certain principles set out in the Act to protect the members against abuse and ensure fair process, equality and accountability (ss 5–9). In Botswana, customary land rights are use rights and the land is not owned or for sale as a commodity, but the rights themselves are perpetual, inheritable and secure. The major reform measure relating to tribal land was the introduction in 1968 of rural land boards. The Tribal Land Act of 1968 vested tribal land in and transferred all the powers of the chiefs to the land boards. The Act upheld the customary land rights, but added some common-law land rights such as leases, especially for some commercial farms and for residential purposes. The Tribal Grazing Land Policy was introduced in 1975 to control grazing rights and improve pasture management. It is clear from all the reforms that the objectives were to simultaneously improve management, control and productivity, and secure or safeguard the land rights and interests of land users.

legislative structures that secure, upgrade and reinforce existing land rights.[28] Finally, some of the arguably most urgent and important reforms take the form of statutory measures that provide security of tenure (including temporary security),[29] for specific land holdings or categories of land holdings that are insecure in terms of current law.[30]

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28 The South African Land Reform (Labour Tenants) Act 3 of 1996 (rules pertaining to arbitration in labour tenancy disputes in terms of the Act were promulgated in 1997 (GN R299 in *GG* 17804 1997-02-21)) is aimed at stabilising and securing the position of a specific category of agricultural land rights, held by so-called labour tenants. For a full analysis of the Act see Pienaar "Huurarbeiders – Baas of Klaas?" 1997 *TSAR* 131–144. The Act is restricted to labour tenants and does not apply to farm labourers or farmworkers; see the definitions in s 1(xi) and 1(ix). The major difference (apart from the three requirements for a labour tenant in s 1(xi), which also apply to many farmworkers) is that a farmworker is paid predominantly in cash or some other form of remuneration and the labour tenant predominantly in the form of the right to occupy and use land; and that a farmworker has to perform his or her services personally, while a labour tenant just has to provide labour. See further in this regard *De Jager v Sisana* 1930 AD 71 (early decision on position of labour tenants); *Mahlangu v De Jager* 1996 3 SA 235 (LCC); *Zulu v Van Rensburg* 1996 4 SA 1236 (LCC); but see *Klopper v Mkhize* 1998 1 SA 406 (N); *Tselentis Mining (Pty) Ltd v Mdlalose* 1998 1 SA 411 (N), where the restrictive interpretation in *Zulu* was questioned (distinction between labour tenants and farmworkers). In *Zulu v Van Rensburg supra* 1259F–G the Land Claims Court decided that impoundment of the labour tenants' livestock amounted to an eviction in itself, even though the tenants themselves had not been evicted physically, because the definition of "labour tenant" in s 1(xi) of the Act made it clear that the right to use the land for grazing or cropping was part of the labour tenant's right to occupation of the land. The Act seeks to protect the interests of both the landowner and the labour tenant. A labour tenant may be evicted only in terms of a court order issued under the Act, and such order may be given only if it is just and equitable, and if the labour tenant refuses or fails to provide labour as agreed or committed a material breach of the agreement (s 7). A labour tenant who has reached the age of 65 years or, as a result of physical disability, is unable to provide labour and who fails to provide a substitute labourer may not be evicted in terms of s 7(2)(a): s 9(1). On the death of a labour tenant all his or her associates may be given 12 months' notice to leave the farm: s 9(2). Following an eviction the court may grant a compensation order against the owner to the extent that it is just and equitable. Compensation must be calculated with reference to factors such as the replacement value of structures and improvements effected by the labour tenant, the reason for the eviction and so forth (s 10). Ch III of the Act provides for the acquisition by a labour tenant of ownership of the land occupied by the labour tenant, or of other land elsewhere on the farm or in the vicinity as proposed by the owner, or of other rights in land such as servitudes (s 16). The acquisition of such rights is subject to procedures prescribed in the Act, and may take place by agreement or in arbitration or by way of court order, and the owner is entitled to just and equitable compensation (procedures are set out in ss 17–22; on compensation see ss 23–24). Subsidies are provided by the Department of Land Affairs (s 26).

29 The South African Interim Protection of Informal Land Rights Act 31 of 1996 provides temporary protection to rights and interests in land that are formally insecure and insufficiently protected by existing law. The Act was always supposed to function as a temporary measure, and s 5(2) provides that it will lapse on 1997-12-31, unless the Minister (with the approval of Parliament) extends its duration by notice in the *GG* for a period of no more than 12 months. The duration of the Act was extended until 1998-12-31. A new, permanent Act is being drafted. The "informal land rights" protected by the Act include customary land rights, beneficial occupation of land, right of access, use or occupation of land in terms of custom, administrative practice or usage in a certain area, but excludes the contractual occupation or use rights of labour tenants, sharecroppers and employees and precarious or temporary, revocable use permissions (s 1(i), 1(iii)). The protection afforded by the Act excludes an expropriation in terms of the Expropriation Act 63 of 1975,

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The land reforms that have been implemented share several interesting general characteristics:

- A number of new rights (or "rights"), completely unknown to Roman-Dutch and to customary law, have been introduced[31] to improve access to and strengthen the security of "black" land rights.
- Many reforms are aimed at providing statutory security or backup for traditionally insecure or weak rights,[32] and others are characterised by strong policy-oriented efforts to change the current distribution of land rights.[33] Both these categories amount to efforts to change the relative position of "black" land rights *vis-à-vis* "white", Roman-Dutch or common-law land rights.
- Some land reform measures demonstrate a tendency to privilege traditional, Roman-Dutch or common-law property structures (where full ownership is regarded as the strongest and most secure right);[34] others demonstrate a tendency to opt for a greater fragmentation of land rights (where a wider range of differentiated rights is promoted and, where necessary, is bolstered by statutory security of tenure).[35]
- The constitutional arrangements around land reform, especially in the 1996 Constitution, demonstrate a clear intention to break down the paradigmatic primacy and inviolability of existing (mostly "white") land rights and to create a new, constitutional, balance between the protection of existing rights and

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and also a deprivation of land rights in accordance with the custom of a community, provided the community's deprivation is based on a majority decision and provides for appropriate compensation. In any other instance nobody may be deprived of informal land rights without his or her consent (s 2).

30 The latest piece of South African land reform legislation, the Extension of Security of Tenure Act 62 of 1997, aims to provide security of tenure to agricultural workers and employees not protected by the Land Reform (Labour Tenants) Act 3 of 1996, and to provide a just and equitable framework for evictions from agricultural land. The Act provides security against evictions similar to the comparable provisions of the Land Reform (Labour Tenants) Act 3 of 1996. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 abolishes the infamous Prevention of Illegal Squatting Act 52 of 1951 and provides new measures to ensure security of tenure while, at the same time, preventing unlawful occupation of land.

31 South African examples are "initial ownership" in terms of the Development Facilitation Act 67 of 1995, and the "right" of labour tenants and other farm labourers who may not be evicted because of age or disability in terms of the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997. In Botswana the introduction of leases and other common-law rights with regard to tribal land offer similar examples.

32 The South African Land Reform (Labour Tenants) Act 3 of 1996 and the Interim Protection of Informal Land Rights Act 31 of 1996 are the best examples.

33 Examples are the South African Land Reform (Labour Tenants) Act 3 of 1996, the Development Facilitation Act 67 of 1995 and the agricultural Pilot Projects of 1995; the Namibian Agricultural (Commercial) Land Reform Act 6 of 1995; and the Zimbabwean Land Acquisition Act 3 of 1992.

34 The best examples are the South African Land Reform (Labour Tenants) Act 3 of 1996 and the Restitution of Land Rights Act 22 of 1994 and the Botswana Tribal Land Act of 1970.

35 The best South African example is the Communal Property Associations Act 28 of 1996, but also (to a lesser degree) the introduction of "initial ownership" in the Development Facilitation Act 67 of 1995. In a sense the Botswana Tribal Land Act of 1970 contributes to the fragmentation of land rights by "mixing" common-law and tribal land rights.

the promotion of land reform.[36] This aspect is discussed further in the section on fundamental rights below.

3 LAND REFORM AND FUNDAMENTAL RIGHTS

Reading through the brief analysis above of land reform in Southern Africa, and judging from the literature, an important question that arises is: "But is this enough?" Surely the measures introduced thus far cannot suffice to guarantee a meaningful, comprehensive reform of land tenure patterns and institutions, especially not in those instances where existing distributional patterns have been skewed by decades of racial domination and discrimination? It is perhaps possible that the South African restitution process may address at least part of the actual restitution problem, but the redistribution of property and the transformation of existing land tenure systems must surely require much more fundamental and comprehensive reforms than are presented in the overview above? Of course, it is also possible to argue that the existing distribution and status of land and other property rights is just fine, or that a modicum of reform initiative will do the necessary to restore whatever was wrong with the situation, but by and large many people will be left with some uneasiness about the adequacy of land reforms. To put it bluntly: do the changes in land distribution and in tenure patterns that are being brought about or made possible by these reforms really justify the decades of suffering and the trauma of more or less peaceful revolutions that Southern Africa has witnessed during the last few decades, and will these changes really satisfy the masses for whose benefit they have been implemented?

If one accepts that more fundamental and comprehensive changes are required, the next question is: "Why are the existing reforms insufficient?" What inhibited or inhibits real or substantive land reform in Southern Africa? One answer is: "The constitutional protection of property, which entrenches existing property holdings and vested property interests and insulates them from the process of land reform, thereby restricting the reform process so severely that it becomes inefficient or inadequate." Several politicians and academics have resisted the idea of introducing a property clause in the South African Constitution for exactly the same reason, claiming that such a property clause would simply entrench existing privilege and prevent the state from introducing meaningful reforms.[37] This section of the paper investigates that claim, and asks whether it is true that the constitutional protection of property really inhibits effective land reform. It is impossible to discuss all the arguments for and against a constitutional property clause here, but to answer this question it is necessary at least to have a brief look at the role and function of a constitutional property clause.

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36 S 25(8) of the 1996 South African Constitution is perhaps the clearest example, but the same intention can be read into s 25(2) read together with s 25(4)(a), and in s 25(3). This impression is strengthened by s 36 of the 1996 Constitution. Cf in particular s 16 of the Constitution of Zimbabwe of 1980.

37 See Chaskalson "The problem with property: thoughts on the constitutional protection of property in the United States and the Commonwealth" 1993 *SAJHR* 388–411; compare Murphy "Property rights and judicial restraint: a reply to Chaskalson" 1994 *SAJHR* 385–398. See further Nedelsky "Should property be constitutionalized? A relational and comparative approach" in Van Maanen and Van der Walt (eds) *Property on the threshold of the 21st century* (1996) 417 422ff.

Constitutional property clauses vary quite dramatically in format and in content, but by and large they all tend to contain the following standard features:

- Some constitutional property clauses contain a positive or affirmative guarantee of property. The interpretation problems caused by this phenomenon cannot be discussed here, but in general this kind of provision is either ignored or read as a so-called institutional guarantee, which secures the institution of property as opposed to individual property rights.[38]
- Most constitutional property clauses contain a general provision to the effect that property rights may be regulated or limited in the public interest. This provision deals with regulation or control of the use of property in general (so-called "due process" clause).[39] Regulatory controls will affect land reform if they control the acquisition, holding or disposal of property.[40] In such a

38 S 28(1) of the interim South African Constitution of 1993 contained such an affirmative provision, but s 25 of the 1996 Constitution does not. S 16(1) of the Constitution of the Republic of Namibia Act 1 of 1990 provides a positive or affirmative guarantee to the effect that all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of movable and immovable property individually or in association with others, and to bequeath the property to their heirs and legatees. The right of non-citizens to acquire property may be prohibited or regulated by law. Both the Zimbabwean and the Botswana property clauses are so-called combined or double guarantees, the first (general) part of which can be regarded as positive guarantees if they are recognised as separate guarantees. These "double" or combined property clauses are characteristic of postcolonial Lancaster House constitutions. The first part of the clause is contained in a general, introductory provision that summarises the human rights in the bill of rights and states the general principle that they may be limited to prevent prejudice to the rights and freedoms of others. The second part of the clause appears in a special section that deals with property only. It is not entirely clear whether the two parts of such a double property clause should be seen as separate guarantees or as parts of a single guarantee. The most important cases are *Societe United Docks v Government of Mauritius* [1985] LRC (Const) 801 (PC) (Mauritius); *Shah v Attorney-General (No. 2)* [1970] EA 523 (UHC) (Uganda); *Macadeen Ameerally and Aubrey Bentham v Attorney General, Director of Prosecutions and Magistrate, Prem Persaud* [1978] 25 WIR 272 (CAG) (Guyana); and most recently *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZSC) (Zimbabwe). The issue is whether the first, general part of the property clause provides a separate guarantee, or forms part of the special section that deals with property only. Usually the second, special part of these double guarantees does not contain a positive or affirmative provision, and if the first, general part is seen as a separate guarantee, it extends the function of the property clause.

39 S 25(1) of the South African Constitution of 1996 provides that nobody may be deprived of property otherwise than in accordance with law of general application, which law may not provide for arbitrary deprivations. S 22 of the Namibian Constitution of 1990 provides that any law may limit the rights in the Constitution, as long as the law in question is of general aplication, does not negate the essential content of the right, is not aimed at a particular individual and specifies the ascertainable extent of the limitation and identifies the article in the Constitution that provides authority for such a law. Presumably this provision also allows for regulatory limitations of property that do not amount to expropriations. S 3 of the Botswana Constitution of 1966 and s 8 of the Zimbabwean Constitution of 1980 lay down the general principle that any right in the bill of rights may be limited; presumably this includes non-acquisitive limitations of property rights.

40 Several examples of laws like this have been mentioned in the previous section of the article above: Namibian law controls excessive and underutilised agricultural landholdings; Zimbabwean law controls unutilised agricultural landholdings; Botswana, Zimbabwean and Namibian law controls acquisition and disposal of scarce urban and agricultural land in order to ensure that citizens and possible beneficiaries of land reform programmes (through the state) receive priority in the allotment of land. See fns 19 21 22 24 above.

case the question is often whether the control "goes too far" and becomes an expropriation or inverse condemnation, which would mean that it requires compensation like a "regular" expropriation.

- All constitutional property clauses contain a classic negative guarantee, which consists of a provision to the effect that property may be expropriated for a public purpose or in the public interest and against compensation.[41] Expropriation is often used as a first step in a process of land redistribution. The biggest problem in this regard, as far as land reform is concerned, is that expropriations for the purpose of redistribution to other private persons was traditionally not regarded as legitimate in terms of the public purposes requirement. However, this view has changed, and it is now widely accepted that expropriations aimed at land reform are legitimate if they form part of a properly planned and coordinated programme of land reform for the public benefit.[42]

Judged from the analysis of land reforms above and the brief analysis of constitutional property clauses in this section, a number of conflicts or potential conflicts between land reform and fundamental righs can be identified:

- In the area of regulation, the main question is whether certain land-reform oriented regulations concerning the acquisition, holding and disposal of land

41 Various examples of land reform laws that authorise expropriation are mentioned above. See fn 19 above and fn 42 below.

42 S 25(2) of the South African Constitution of 1996 provides that property may not be expropriated other than in terms of law of general application, for a public purpose or in the public interest and against just and equitable compensation (to be determined in accordance with s 25(3), which lists some considerations to be taken into account). S 25(4)(a) provides explicitly that land reform is included in the concept of "public interest". S 16(2) of the Namibian Constitution of 1980 provides that the state or any competent body or organ authorised by law may expropriate property in the public interest and subject to the payment of just compensation, in accordance with the requirements and procedures provided for by law. In the light of the promulgation of land reform law, it seems that it is accepted that this provision authorises expropriation for purposes of land reform. S 8(1) of the Botswana Constitution of 1966 provides that property may not be compulsorily dispossessed or acquired unless the following two requirements are satisfied: the dispossession or acquisition must be necessary or expedient in the interests of defence, public safety, public order, public health, town and country planning and land settlement, or to secure the development or utilisation of that or other property in the interests of the community, or for the development or utilisation of the mineral resources of Botswana; and provision is made by the law that authorizes the dispossession or acquisition for prompt payment of adequate compensation, and securing the right of any affected person to attack the legality of the action and the amount of compensation in court. In the Zimbabwean Constitution of 1980, s 16(a) makes a distinction between land and interests in land and any property (including land and any interest in land). In the latter case the requirement of public interest is basically the same as in the Constitution of Botswana, but with regard to land the requirement is that the acquisition must be reasonaby necessary for the utilisation of that or any other land for settlement or agricultural or other purposes, for purposes of land reorganisation, forestry, environmental conservation, or for the relocation of dispossessed persons. With regard to land, the right to approach the courts to attack the validity of an expropriation or the amount of compensation has been ousted, and now the law which authorises an expropriation may specify the principles on which and the manner in which compensation has to be determined and paid, and no such law can be called into question by any court on the ground that the compensation is not fair.

are legitimate and justifiable in terms of the constitutional property clause, and whether they perhaps "go too far" and become expropriations.[43]

- The first problem in the area of expropriation is whether it is legitimate and justifiable (in terms of the property clause) to expropriate land for the purpose of redistribution, which means that the land is later disposed of for the benefit of another person or community. In terms of the classical concept of expropriation for public use in the narrow sense, this is unacceptable, but in more recent case law it has been accepted if the acquisition and disposal took place within the framework of a planned land reform process.[44]
- The second problem concerning expropriation is compensation, and more specifically the calculation of compensation when the expropriation is carried out for purposes of land reform. Here the question is whether the purpose of the expropriation or the circumstances (which often involve an unjust acquisition of the property by the current owner in the first case) can justify expropriation either without or at a substantially lower rate of compensation than market value.[45]

By way of summary it may be stated that the main problem, as far as the relationship between land reform and the constitutional protection of property is concerned, is whether the constitutional property guarantee is seen and interpreted in such a way that it impedes land reform. The fear that treating property

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43 The best example is from Namibia, where excessive agricultural land can be identified and acquired by the state for purposes of redistribution: see fn 21 above. It is possible to argue that s 16(1) of the Namibian Constitution of 1990 guarantees the right to acquire, own and dispose of land without qualification, and that the Agricultural (Commercial) Land Reform Act 6 of 1995 subjects that right to qualifications. As long as the acquisition takes place against compensation and in the public interest (in this case land reform) this procedure can perhaps be justified as a legitimate regulation, arguing that redistribution of excessive agricultural land holdings is in the public interest, and that expropriations of excessive agricultural land for that purpose serves the public interest. Other examples from Namibia and Zimbabwe regarding the acquisition of underutilised land and the acquisition of land by non-citizens involve the same issues: see fns 21 24 above.

44 See *James v United Kingdom* [1986] 8 EHRR 123 (with reference to the European Convention on Human Rights 1950); *BVerfGE* 66, 248 [1984] (with reference to the German property clause); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) (USA); but see *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 (Australia) *contra*.

45 The South African Constitution of 1996 contains several provisions that ensure that land reform is promoted despite or together with the protection of property: s 25(5)–(9), and especially s 25(8), which provides explicitly that nothing in the property clause shall impede land reform, as long as any deviations from the provisions in s 25 still conform to the general limitation clause in s 36(1). It is not entirely clear that it will be possible to deviate from the provisions of s 25(1)–25(3) without automatically falling foul of s 36(1), and the only real possibility for such deviation seems to be an expropriation without or with very low compensation – something that would have been possible even in the absence of s 25(8) anyway, since s 25(3) provides for the possibility that compensation may be substantially lower than market value because of surrounding circumstances. Recent amendments to the Constitution of Zimbabwe of 1980, the most important of which restricts the jurisdiction of the courts to adjudicate the fairness of compensation for expropriations of land, were presumably undertaken to facilitate the expropriation of land for purposes of land reform, and therefore one may assume that the point of departure was that it was impossible to effect meaningful reforms in accordance with the original property guarantee, and particularly for so long as it was possible to approach the courts to contest the fairness of the compensation for expropriation.

as a fundamental right will impede land reform seems to be based upon a very specific perception of what property is, and in the next section below I will argue that this perception derives not from constitutional law, but from the private-law tradition.

4 FUNDAMENTAL RIGHTS AND THE PRIVATE-LAW TRADITION

The main fear of those who oppose treating property as a fundamental right is that the constitutional property guarantee will insulate existing land rights and land holdings from all state interference in general, so that it becomes impossible or extremely difficult to change existing land right patterns in a meaningful way. The question that interests me for the purposes of this paper is whether (and how far) this fear is reasonable. It is based on the assumption that the constitutional property clause will be interpreted and applied as it entrenches existing rights in such a way that the state, when faced with the necessity to introduce legislation to meet some public need, is faced with a narrow choice: either leave existing rights unaffected, or expropriate them against compensation. This perception, which is closely related to the traditional, private-law perception of ownership and property rights, takes it for granted that existing property rights are fundamentally inviolable, and that the function of the constitutional property clause is to ensure that they stay inviolable. However, from recent literature in constitutional law it is apparent that this perception is inaccurate, and that the property concept in the constitutional context is fundamentally different from the traditional property concept in private law.[46] The differences relate to at least three areas:

- In private law, the *objects* of property rights are traditionally restricted to corporeals, and instances where property rights with regard to incorporeals are recognised are seen as exceptions. In the constitutional context, the property concept is much wider, and in fact property rights with regard to incorporeals may even be more important than traditional property rights with regard to corporeals.
- In private law, *property as a right* is traditionally associated primarily with *ownership*, and all other rights are seen as derivative limited real rights or personal rights. In the constitutional context, a wider spectrum of property rights

46 It is impossible to cover the literature here. Compare the following examples: although both § 903 of the German *BGB* and art 14 of the German *GG* refer to *Eigentum* (literally "ownership"), § 90 *BGB* restricts the objects of property rights to corporeals, whereas a wide range of intangibles are accepted as objects of property rights in terms of art 14 (see esp *BVerfGE* 58, 300 [1981] (*Naßauskiesung*) 335, where the principle is explained). Similarly, § 903 *BGB* defines *Eigentum* (in the sense of the right of ownership) as a basically unrestricted right that is capable of being restricted by law or by the rights of others, but then (by implication) by way of temporary exceptions. This is in line with the traditional definition of *dominium* deriving from Bartolus *ad D* 41 2 17 1 fn 4: "dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur" and the traditional interpretations of this definition, cf Van der Walt "Der Eigentumsbegriff" in Feenstra and Zimmermann (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 485ff. In constitutional law, on the other hand, the point of departure is that property is inherently restricted: see arts 14.1 and 14.2 *GG*, and cf Kleyn "The constitutional protection of property: a comparison between the German and the South African approach" 1996 *SAPL* 402 424ff. The analysis of the various Southern African property clauses above indicate that they also restrict property inherently.

is acknowledged, and in fact the non-ownership rights enjoy more attention than traditional ownership.[47]

- In private law, property rights (and particularly ownership) are traditionally seen as fundamentally unlimited or unrestricted rights, and restrictions are treated as temporary exceptions to the rule. In the constitutional context, property is seen as a fundamentally restricted right, with the result that all the entitlements that may accompany a particular property right at a given moment may not necessarily be protected by the property clause. Similarly, it is accepted very widely that just or equitable compensation for expropriation relates to what is just and equitable under the circumstances, and not primarily to market value. Market value may be one of the factors that determine the calculation of compensation, but there are many other factors that should also be taken into account.

It can be argued that at least some of the fears noted above derive from the traditional private-law perception of what property is or entails, rather than from constitutional law. In fact, it appears that the fears in question and the perception of property upon which they are based, is also in conflict with constitutional law and the principles of protecting fundamental rights. The conflict which causes these fears does not derive from the protection of property as a fundamental right, but from a conflicting, typically private-law perception of what the constitutional property guarantee should be. Land reform is inhibited not by the constitutional protection of property as a fundamental right, but by the traditional, private-law perception of what the protection of property should entail. It becomes necessary, therefore, to consider the relationship between the protection of fundamental rights and the private-law tradition.

There is a further aspect of land reform that does not seem to be inhibited by the constitutional property clause at all, but rather by the traditional property concept. The possible success or failure of land reform depends exclusively on the question whether the legislature can succeed in introducing the required reforms of traditional, private-law or customary-law property institutions and practices:

- Tenure reform necessarily relies on the development of new, improved or changed tenure forms to accommodate the simultaneous existence of a variety of land rights to the same land. This affects mainly some forms of redistribution and tenure reform, and it involves aspects such as the security of tenure, the accessibility of financing and so forth. The main problem is to develop suitable tenure forms that provide security of tenure, equitable access to financing and infrastructure and the kind of use rights that are required in each individual case. Nothing in the constitutional property clauses analysed above appears to impede this process, and the only possible resistance against reforms of this nature will come from traditional views about the nature of established private-law or customary-law property institutions and practices.

It appears, then, that the problem with land reform and its perceived conflict with the protection of property as a fundamental right is caused by a specific,

47 A good example here is German case law: cf *BVerfGE* 52, 1 [1979] (*Kleingarten*); *BVerfGE* 87, 114 [1992] (*Kleingarten*); *BVerfGE* 89, 1 [1993] (*Besitzrecht des Mieters*); all of which protect "minor" and "derivative" use rights against the owner of land, because it was in the public interest to do so.

typically private-law perception of what property is and how it should be protected by the property guarantee. This traditional, private-law perception of property cannot be analysed or discussed in any detail here,[48] but at least the following general observations can be made to show that this perception of property is, in one sense, completely unhistorical and in conflict with the sources and development of Roman law, and, in another sense, completely historical and based on a long legal tradition:

- The notion that property is basically unrestricted though capable of being restricted (by what then amounts to a temporary and exceptional burden), is based on a long tradition that dates back to the first interpretations of Bartolus's famous formal definition of *dominium*, on the other hand this notion is profoundly unhistorical and actually in conflict with what Bartolus intended.[49] This means that the private-law perception, in terms of which existing rights either have to be left untouched or expropriated against compensation, has to be judged with some skepticism. If anything, this traditional and typically private-law perception conflicts with both the constitutional idea of fundamental rights and the public interest in the promotion of land reform, because it inhibits or at least restricts the scope and efficacy of regulatory control over the acquisition, holding and disposal of property.
- The fact that property may perhaps be restricted inherently (rather than temporarily and by way of exception) also affects the compensation question in the case of expropriation. If certain uses or entitlements simply are not protected constitutionally, and if the state actually has a third option when confronted with the inevitable need to regulate the use of property in the public interest, it also means that even existing uses or entitlements may be subjected to new or more stringent restrictions, controls, prohibitions and even levies, without compensation, if that is justified by the context and all the circumstances. It also means that certain uses and entitlements may be excluded from the calculation of compensation when property is expropriated, or that certain value items can be discounted when the compensation is determined. This principle is established and accepted in constitutional case law all over the world, based on the premise that the function of the property clause is not to

48 In fact, Bartolus never intended to say that *dominium* was inviolable, nor that restrictions on it should be temporary and exceptional. It seems more likely that he thought that at least some restrictions were inherent and inevitable. For a discussion see Van der Walt "Marginal notes on powerful(l) legends: critical perspectives on property theory" 1995 *THRHR* 396; "Towards a theory of rights in property: exploratory observations on the paradigm of post-apartheid property law" 1995 *SAPL* 298; "Tradition on trial: a critical analysis of the civil-law tradition in South African property law" 1995 *SAJHR* 169. It is interesting to note that the same kind of criticism has been levelled at common-law perceptions of property; see Alexander "The concept of property in private and constitutional law: the ideology of the scientific turn in legal analysis" 1982 *Col LR* 1545. Similar observations underlie the analysis of Underkuffler-Freund "Takings and the nature of property" 1996 *Can J Law & Jur* 161. Schlag "Law and phrenology" 1997 *Harv LR* 877 offers a fascinating analysis of how law, like the nineteenth-century pseudo-science of phrenology, developed a "science" by organising "doctrines" and "principles" around a "fundamental ontology of reifications and animisms".

49 Cf Van der Walt 1995 *THRHR* 396; 1995 *SAPL* 298; 1995 *SAJHR* 169; "Eigentumsbegriff" 485ff; "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" 1986 *THRHR* 305.

indemnify the individual owner for each loss of value, but to establish a just and equitable balance between the interests of property holders and the public interest.[50] Fears that the constitutional protection of property may render state interference with and control of the property system impossible or too expensive are, therefore, based on an outdated and misplaced private-law perception of what the property clause is, and are in conflict with established and generally accepted constitutional experience and principles.

- Nor did Bartolus intend to place *dominium*, in the sense of ownership, at the apex of a pyramid of property rights. Closer analysis of his discussion proves that he actually discusses, typically for his time, three different categories of *dominium*.[51] In fact, the special position of ownership in the system of property rights was the work of Grotius more than anyone else.[52] Both the idea of ownership as a basically unrestricted right and the traditional hierarchy of property rights inhibit the creation and development of new forms of property for the purposes of land reform, and both have a long history although they are not of classical or Justinian origin.

It appears that the traditional, private-law perception of property rights is the main culprit that inhibits or impedes the promotion of land reform within a system of constitutionally protected fundamental rights (including property). The perceived conflict between the protection of property as a fundamental right and the promotion of land reform is, in fact, based on a perception of property that is contrary to the principles and the requirements of both constitutional law and land reform. The problem is not one of either fundamental rights or land reform, but of the traditional, private-law view of property. According to this traditional view, property is a basically unrestricted and inviolable right; and property consists of a hierarchy of rights of which individual ownership is the apex in the sense of the strongest, most complete and most valuable mother-right from which all other property rights are derived.

For present purposes the most important fact is that this traditional, private-law perception of property is said to rest on strong and deep historical roots. In fact, the textbooks tell us that the resemblance between Roman law and current law is stronger in property law than anywhere else.[53] Even worse, there is a

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50 The literature and case law are vast and cannot be covered here. See, eg, Kleyn 1996 *SAPL* 402 and the German cases discussed there. The best German examples are *BVerfGE* 24, 367 [1968] (*Deichordnung*); *BVerfGE* 42, 263 [1976] (*Contergan*). A further example from the ECHR is *Sporrong and Lönnroth v Sweden* [1982] EHRR 35.

51 Bartolus *ad D* 21 2 39 1 fn 3: "Tria sunt dominia, directum et utile et quasi dominium". Cf further Feenstra "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *RM Themis* 248 255; Meynial "Notes sur la formation de la théorie du domaine devise (domaine direct et domaine utile) du XIIe au XIVe siécle dans les Romanistes – étude dogmatique et juridique" in *Mélanges Fitting II* (1969) 409 442; Coing "Zur Eigentumslehre des Bartolus" 1953 *ZSS(R)* 348 355.

52 Cf Van der Walt 1995 *THRHR* 396; 1995 *SAPL* 298; 1995 *SAJHR* 169; "Eigentumsbegriff" 485ff; Feenstra 1976 *RM Themis* 248; Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen" in Behrends *et al* (eds) *Festschrift Franz Wieacker* (1978) 209. Grotius's contribution received some assistance from Windscheid: see Van der Walt "Ownership and personal freedom: subjectivism in Bernhard Windscheid's theory of ownership" 1993 *THRHR* 569.

53 See Van der Merwe *Sakereg* (1989) 169–172; cf Jolowicz *Historical introduction to the study of Roman law* (1967) 272; Thomas *Textbook of Roman law* (1976) 133–134; Kaser *Römisches Privatrecht* (trans Dannenbring) (1968) 92. *Contra* Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) 161.

widespread perception that the general principles and the values of Roman law are so inherently just, so universal and so timeless that we should use them to transform whatever is wrong with our current legal system, even in Southern Africa today. The question is, if this is true, will the continued inclusion and teaching of Roman law in the law curriculum not reinforce the traditional, private-law perception of property, and thereby impede and inhibit both the development of a properly *constitutional* fundamental rights practice and the promotion of land reform? Should Roman law take the blame for the continued influence of the traditional, private-law perception of property? And does that mean that Roman law should rather be removed from the law curriculum than be allowed to entrench and reinforce traditional views and perceptions that stand in the way of meaningful reforms?

5 CONCLUDING REMARKS: AN ALTERNATIVE READING OF ROMAN LAW?

The really important question is whether the teaching of Roman law should take the blame for the perceptions and problems discussed earlier, and whether the solution is to remove Roman law from the law curriculum. It is clear from the sources that the traditional, private-law perception of ownership is not a true reflection of classical or Justinian Roman law and that most of its elements and characteristics were added by later developments and interpretations, ranging fom medieval commentaries through Grotius and the Roman-Dutch authors to German pandectism and nineteenth-century liberalism. In this sense, the negative elements of the traditional, private-law perception of property cannot be blamed on Roman law as such. On the other hand it is equally true that most elements of this perception, even if they do not actually reflect Roman law, have a long history and strong historical roots, so that they cannot be dismissed out of hand either. As long as the teaching of Roman law (and of private law, for that matter) retains and reinforces the perception that the traditional, private-law perception of property is based on strong, universal and inherently just values deriving from Roman law, it will subscribe to the whole history and all the implications of this traditional perception of property, and it will then have to take the blame for the ways in which the traditional perception impedes and inhibits the development of constitutionalism and the promotion of land reform. It will also have to run the risk of having the baby thrown out with the bath water, because in that scenario it is hard to justify the retention of Roman law in the law curriculum.[54]

Is there an alternative way in which Roman law can be taught in Southern African universities, without subscribing to or reinforcing this traditional perception of property? Surely not by purifying it from its historical baggage and returning to untainted, pure classical or Justinian law. Even if it is accepted that

54 For some recent arguments regarding the perceived universality of Roman law see Luig "The everlasting universality of Roman law through the eyes of Rudolph von Jhering (1818–1892)" 1996 *Fundamina* 11; Van Reenen "The relevance of Roman (-Dutch) law for legal integration in South Africa (with some lessons to be learnt from the African and European experience)" 1996 *Fundamina* 65; Church "The future of the Roman-Dutch legal heritage" 1996 *Fundamina* 308, the latter with some further references. Perhaps Church 310 comes closest to the attitude I have in mind here, but the most explicit statement of the argument is by Domanski "Teaching Roman law on the eve of the millennium: a new beginning?" 1996 *THRHR* 539, 1997 *THRHR* 38 545–546.

most of the unwanted elements of the traditional, private law perception of property are of later vintage and therefore well avoided, this solution will raise the question of the relevance of "pure" classical or Justinian Roman law for students of law in Southern Africa today. Moreover, in this situation the argument that Roman law should be retained simply for its universal values starts wearing a little thin at the edges – for one thing, why didn't those universal values survive (or even save the law from) the development of the traditional, un-Roman perception of property? If Roman law is to remain in the curriculum, it has to be approached from a completely different perspective.

To my mind, that perspective concerns the creation of a historical sensitivity, with reference to the crises and the traumas of Roman law, rather than concentrating on the golden thread of continuity in the life of Roman law. If Roman law is valuable to Southern African lawyers today, it has to be valuable in a time of crisis, change, and transformation rather than in normality, stability and continuity. By this I do not mean that we must demonstrate how Roman law survived its crises, but that we must study the way in which it changed and was transformed in them and by them. Roman law is of interest to a Southern African lawyer today because of the examples and illustrations of the ways in which it was transformed to help society transform itself and survive a crisis; the ways in which it shows us that crises, changes, traumas and transformations are normal, and that both the law and society can and will adapt to them, often by leaving the well-trodden paths and venturing into new and unknown territory. The history of Roman law is rich in stories of change, adaptation, transformation and invention, and perhaps that is what we should be teaching our students. Two (hi)stories illustrate the kind of material that, to my mind, should form the backbone of a course in Roman law.

It is trite that the classical period of Roman law was followed, roughly from the last half of the fourth until the first half of the sixth century, by a period of decline, during which classical notions and concepts were left behind and replaced by less precise and less systematic legal norms and practices, especially in the Western part of the empire. The law of this period is often referred to as "vulgar Roman law",[55] to indicate that it was characterised by a general decline, caused by the departure from the highly developed concepts and principles of classical law. In the same sense, the subsequent codification of Justinian is widely regarded as a salvage operation, which at least preserved some of the valuable classical legal treasures that had not yet been destroyed or forgotten. Taking into account the political and social circumstances in the Western part of the empire, where the Germanic "barbarians" had overrun the Roman social and political institutions by 476, it is clear that Roman law was in a state of crisis during his period. It is, therefore, not surprising to find that much of what is commonly described as "vulgar law" of this period consists of local customs and legislation. Then, as now, the emergence of a sudden increase in legislative activity posed a serious threat to the existence of Roman law. In the field of property law, "vulgar law" had two main characteristics: first, the well-developed classical concept of *dominium* (and especially its clear distinction from *possessio* and the "limited real rights") was practically destroyed and replaced by

55 A term first used by Brunner *Zur Rechtsgeschichte des römischen und germanischen Urkunde* (1880).

a vague and inclusive concept that resembled the pre-classical usages more than anything else; and, secondly, a vast array of new rights and interests were developed, all of them clustered around this wide, vague, damaged notion of *dominium*.[56] The departure from classical law is fairly obvious, but even more interesting are the similarities with the current situation in a Southern African country in the middle of a huge political and social transformation: new laws are being promulgated almost every day, new property rights are created or recognised, and some vague, broad notion of "property" seems to be the paradigmatic example for all development. However, it becomes really fascinating when one reads that the pejorative and negative description of "vulgar law" is a biased and not necessarily always accurate picture of the historical circumstances, and that a different historical perspective and interpretation might perhaps be possible.[57] Is it possible that this alternative reading might depict "vulgar law" as a more positive process, by which the legal aspects of a huge social and political crisis were effectively managed, with a nett positive result? Shouldn't we be investigating this question, and shouldn't we be telling our students this (hi)story?

A second story dates from the medieval period. It is trite that the medieval romanist scholars acknowledged two or even three forms of *dominium*: *dominium directum*, *dominium utile* and *quasi dominium*.[58] Many scholars see this system (if they are willing to call it that) as a remnant of the "vulgar law" of an earlier period, and the departure from the triad of *dominia* during the eighteenth and nineteenth centuries is generally seen as a positive step.[59] However, the possibilities presented by a divided or fragmented[60] system of property rights, where ownership is not the main or the most valuable right, and where ownership does not set the paradigm within which all other property rights have to fit,[61] have yet to be explored properly, especially in a legal system characterised by inequality and faced by transformation and land reform. The medieval history of the so-called shift in landownership (*eigendomsverschuiving*)[62] is interesting

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56 See in general Levy *West Roman vulgar law: the law of property* (1951) 6 32 34 100–121; Kaser *Eigentum und Besitz im älteren römischen Recht* (1943); Kaser *Zum Begriff des spätrömischen Vulgarrechts* (1961) 551; "Vulgarrecht" in Pauly (ed) *Realencyklopädie der klassischen Altertumwissenschaft* (1894–1972) Part 2 18 s II.

57 See Kop *Beschouwingen over het zgn "vulgaire" romeinse recht* (1980), esp 3–8.

58 There is a vast literature on this topic. See generally Van der Walt 1995 *THRHR* 396 405 and references there; Van der Walt and Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Visser (ed) *Essays on the history of law* (1989) 213 235ff.

59 Grotius got rid of the medieval division when he effectively reduced ownership to what we still know as full ownership: see *Inleidinge* II 33 1 (ed) Dovring, Fischer, Meijers 1953 151; see Van der Walt 1995 *THRHR* 396 404. Thibaut was responsible for its demise in German law; see Thibaut "Über dominium directum und utile" in *Versuche über einzelne Theile der Theorie des Rechts* (1817 reprint 1970) vol II part III 67–99.

60 See Van der Walt "The fragmentation of land rights" 1992 *SAJHR* 431.

61 See Van der Walt "Towards a theory of rights in property: exploratory observations on the paradigm of post-apartheid property law" 1995 *SAPL* 298.

62 The term comes from Van Iterson "Beschouwingen over rolverwisseling of eigendomsverschuiving" in *Verslagen en mededelingen van de vereniging tot uitgave der bronnen van het oud-vaderlands recht* part XIII no 3 (1971) 407–466. The theory is criticised by Immink PWA " 'Eigendom' en 'heerlijkheid' – exponenten van tweeërlei maatschappelijk structuur" 1959 *TR* 36. See further Wiegand "Zur theoretischen Begründung der Bodenmobilisierung in der Rechtswissenschaft: der abstrakte Eigentumsbegriff" in Coing and Wilhelm (eds) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert III:*

continued on next page

in this regard. The theory, which was developed by the Dutch legal historian De Blécourt, holds that the relative legal positions of the medieval landlord and vassal underwent a complete switch as a result of socio-economic and political developments, so that the vassal became owner and the landlord nothing more than a political overlord. The bond between the landlord and the land became increasingly tenuous, while the bond of the vassal who worked the land became stronger. Eventually the annual payment that the vassal had to make for the use of the land assumed the nature of a tax, while the vassal's right to the land became permanent and comprehensive. This theory expounds some interesting aspects of the complex medieval relationships with regard to land, and especially of the way in which the law reacted to dramatic and fundamental changes in the social and political fabric.[63] Once again there are some interesting legal developments at work in this history, and they can no doubt be explained as responses to a social and political crisis or transformation, which eventually resulted in the end of the medieval and the beginning of the modern period. Shouldn't we be telling our students this (hi)story?

The point I have been trying to make is this: the legal needs, requirements and priorities of Southern African societies are illustrated most clearly in the field of land reform. A survey of legislation and initiatives in this field indicates that land reforms are inadequate, and that more fundamental and comprehensive reforms are needed before land reform can have a meaningful influence on the distribution of land and resources and on the transformation of postcolonial and post-apartheid societies in Southern Africa. There is a general perception that the main impediment that stands in the way of the required reforms is the constitutional protection of property as a fundamental right, but once again analysis indicates that this is not entirely true, and that the real problem is a traditional, private-law perception of ownership which is in conflict with both the promotion of land reform and the establishment of a truly constitutional fundamental rights practice. This traditional perception of ownership is not of classical or Justinian Roman-law origin, but has strong roots in legal history and cannot be discounted. The conclusion is that, if we want Roman law to be a sensible part of our law curriculum, we have to present it in such a manner that it undermines rather than reinforces this traditional, private-law perception of ownership as a basically unrestricted right. Perhaps such a subversive, undermining approach is the only reasonable and justifiable way in which we can still teach Roman law in Southern Africa; namely in an effort truly to come to terms with our past by resisting and breaking down the iniquities that form such an inherent part of our history, rather than by vainly attempting to justify our past in general terms and thereby entrenching those iniquities.[64] In the words of the Dutch historian Van den Bergh,[65] we should study the history of law to debunk it.

Die rechtliche und wirtschaftliche Entwicklung des Grundeigentums und Grundkredits (1976) 118.

63 It is important to remember that basically the same relationship also resulted in the French Revolution, which places it in a very interesting context.

64 See Visser "The legal historian as subversive or: killing the Capitoline geese" in Visser (ed) *Essays on the history of law* (1989) 1–31; Honig "Declarations of independence: Arendt and Derrida on the problem of founding a republic" 1991 *Am Pol Science Rev* 97–113. Honig teases out some similar sentiments from the views of Arendt and Derrida on the American declaration of indepedence. See particularly 108–109.

65 Van den Bergh *Geleerd recht* 3rd ed (1994) IV, quoting Oliver Wendell Holmes jr.

In the final analysis we must decide what we want to teach the students in a course on Roman law. Do we want to teach them higher, more universal and more equitable values than are contained in our current systems of law, tainted as they are by the heritage of colonialism and racism? Do we teach them Roman law because we think that Roman law teaches us these higher, more universal and more equitable values? I cannot see the justification for such a traditional approach, given the realities of Southern African society today. Instead, I suggest that we follow a narrative approach to the teaching of Roman law, and that we concentrate on some of the breakdown points and discontinuities in the history of Roman law, where those much-vaunted universal values of Roman law would have been tested to the full, if they ever existed. And if we do not find the higher values we are looking for there, on the edges and along the abysses of Roman law, at least we would have heard some interesting and entertaining stories in the process.

Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was . . . The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it . . . [In such cases] when the judges are professing to declare what the Legislature meant, they are in truth, themselves legislating to fill up casus omissi (Gray *The nature and sources of the law* (1921) 172-173).

Aspekte van getuienisaflegging deur kindergetuies deur bemiddeling van tussengangers

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SUMMARY

Aspects relating to the testimony of child witnesses through intermediaries

In this contribution the author discusses those principles underlying a criminal trial which have in the past been criticised for the insensitivity they displayed towards children as witnesses. These include cross-examination, testifying in open court and the rendering of *viva voce* evidence. The conclusion is reached that these principles are, for the same reasons, also the subject of criticism in the United States of America, England and Australia, but are part and parcel of the accusatorial system of criminal procedure. The approach and solutions developed in these countries are discussed briefly. The relief proposed by the South African Law Commission – sections 161(2) and 170A of the Criminal Procedure Act 51 of 1977 – is set out and explained and certain recommendations are made regarding the practical implementation of especially section 170A. In the final analysis the question is discussed whether the provisions of section 170A encroach on certain fundamental rights of an accused person as embodied in the Bill of Rights of the Constitution of the Republic of South Africa, Act 108 of 1996. It appears that the provisions of section 170A impact negatively on the right of an accused person to challenge evidence by means of cross-examination, but it is concluded that this infringement is justifiable in terms of the limitation clause (section 36 of the Constitution; section 33 of the interim Constitution). Finally, reference is made to the envisaged amendment to section 158 of the Criminal Procedure Act which will provide for a witness or an accused person to give evidence by means of closed circuit television or similar electronic media.

1 INLEIDEND

Die aanbieding van die getuienis van kinders en veral seksueel gemolesteerde kinders op konvensionele wyse in 'n milieu waar direkte konfrontasie tussen getuie en kruisondervraer plaasvind, het in die verlede dikwels daartoe aanleiding gegee dat belangrike getuienis nie na behore op rekord geplaas kon word nie. As hoofrede daarvoor kan aangevoer word die traumatiese ervaring om in teenwoordigheid van die beskuldigde die gebeure te verbaliseer en dan in kruisondervraging in detail daaroor uitgevra te word.[1] Ter ondervanging van hierdie dilemma het die wetgewer deur middel van die bepalings van artikel 170A van die Strafproseswet 51 van 1977 (die Strafproseswet) die moontlikheid

1 Zieff "The child victim as witness in sexual abuse cases – a comparative analysis of the law of evidence and procedure" 1991 *SAS* 21; Engelbrecht "Kindermolestering en verkragting: die howe se rol" 1995 *Consultus* 20–26.

geskep om sekere tipes getuienis deur bemiddeling van 'n tussenganger aan te bied. Die betekenis van *viva voce*-getuienis is ook deur middel van artikel 161(2) van die Strafproseswet uitgebrei om enige vorm van nie-verbale uitdrukking deur 'n getuie van onder die ouderdom van 18 jaar, in te sluit.

In hierdie bydrae word die algemene beginsels van toepassing op kruisondervraging, getuienisaflegging in die ope hof en *viva voce*-getuienis soos dit toepassing vind in die strafhowe, behandel.

Die probleme wat hierdie algemene beginsels in die aanbieding van kindergetuienis oplewer, word bespreek en daar word kortliks verwys na die wyse waarop die aanbieding van kindergetuienis in Engeland, Australië en sommige state van die VSA hanteer word. Die oorsprong van artikel 170A en 161(2) van die Strafproseswet, die praktiese funksionering daarvan en die invloed – indien enige – op die grondwetlike reg van 'n beskuldigde persoon om getuienis te betwis in kruisondervraging, word ondersoek. Ten slotte word verwys na die moontlike uitbreiding van hierdie maatreël om ander klasse van getuies in te sluit.

2 ALGEMENE BEGINSELS ONDERLIGGEND AAN DIE STRAFVERHOOR

Alleen daardie algemene beginsels van toepassing op die strafprosesreg wat in die verlede gekritiseer is as sou dit inbreuk maak op die behoorlike aanbieding van die getuienis van 'n kind, word hier bespreek. Dit sluit in kruisondervraging, getuienisaflegging in ope hof en *viva voce*-getuienis. Alhoewel aspekte soos die versigtigheidsreëls wat toepassing vind op die getuienis van 'n kind ook 'n invloed het op die suksesvolle aanbieding van strafsake waarin daardie getuies getuig, het dit betrekking op die bewysreg en val dit dus buite die bestek van hierdie bespreking.[2]

2 1 Kruisondervraging

Kruisondervraging is al beskryf as "'n onvergelyklike toets van die waarde van mondelinge getuienis".[3] Artikel 166(1) van die Strafproseswet bepaal:

> "'n Beskuldigde kan 'n getuie wat ten behoewe van die vervolging by strafregtelike verrigtinge opgeroep word of 'n mede-beskuldigde wat by strafregtelike verrigtinge getuig of 'n getuie wat ten behoewe van so 'n mede-beskuldigde . . . opgeroep word, kruisvra, . . ."

Hierdie reg op kruisondervraging word verder bevestig in artikel 35(3)(i) van die Grondwet van die Republiek van Suid-Afrika, 108 van 1996 (die Grondwet)[4] wat bepaal:

> "35(3) Elke beskuldigde het die reg op 'n billike verhoor, waarby inbegrepe is die reg –
>
> . . .
>
> (i) om getuienis aan te voer en te betwis; . . ."

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2 In sake van seksuele misdrywe is die getuienis van 'n kind soms onderworpe aan soveel as drie versigtigheidsreëls, te wete dié van toepassing op 'n jong kind as enkelgetuie in 'n geslagsmisdryf. Sien in dié verband Schmidt *Bewysreg* (1989) 125; Watney "Versigtigheidsreëls en die beoordeling van die getuienis van 'n kind" 1995 *THRHR* 715 en Combrinck "Monsters under the bed: challenging existing views on the credibility of child witnesses in sexual offence cases" 1995 *SAS* 326.

3 Kriegler *Hiemstra Suid-Afrikaanse strafproses* (1993) 419.

4 Voorheen omskryf in a 25(3)(d) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (die tussentydse Grondwet).

Die doel van kruisondervraging is om aan die teenparty die geleentheid te bied om die getuienis van 'n getuie te toets deur middel van die stel van vrae. Die konfrontasie geskied direk tussen die kruisondervraer en die getuie en stel die hof in staat om die reaksie van die getuie gade te slaan en evalueer. Groot vryheid word aan die kruisondervraer verleen aangaande die tegniek en volgorde waarin relevante onderwerpe tydens kruisondervraging aangespreek word. As hoofoogmerk van kruisondervraging word gestel die ontlokking van getuienis wat vir die kruisondervraer gunstig is.[5]

Die passiewe rol van die voorsittende beampte in die Suid-Afrikaanse akkusatoriese strafprosesstelsel kom veral na vore tydens kruisondervraging. Van die voorsittende beampte word verwag om 'n passiewe rol te vervul tydens die verhoor. Die gevolg hiervan is dat die voorsittende beampte se bevoegdheid om met kruisondervraging in te meng, beperk is. Indien daar onnodig 'n beperking op kruisondervraging geplaas word, kan dit later daartoe aanleiding gee dat 'n skuldigbevinding en vonnis vanweë dié onreëlmatigheid tersyde gestel word. In hierdie verband word die riglyn neergelê in *S v Cele*[6] oor die algemeen nagevolg om te bepaal in welke mate kruisondervraging rakende die geloofwaardigheid van 'n getuie toegelaat kan word alvorens 'n hof ingryp:

> "Latitude in testing by cross-examination the credibility of a witness where credibility is clearly the issue, should be allowed until the court is satisfied, either that the right to cross-examine is being abused or misused, or that the particular line of cross-examination could never be productive of anything which could assist the court in its eventual decision on credibility."

Hierdie riglyn bevestig die wye diskresie wat aan die kruisondervraer verleen word met as teenpool die versigtige benadering wat deur 'n voorsittende beampte gevolg moet word alvorens hy kruisondervraging beperk.

Hoflikheid en billikheid word as vereistes van kruisondervraging gestel.[7] Ook hier sal 'n hof egter eerder fouteer deur nie in te gryp nie as om wel die kruisondervraging in 'n grensgeval tussen billik en onbillik aan bande te lê en dus die gevaar te loop dat sodanige ingrype later as 'n onreëlmatigheid aangemerk word.

2 2 Verrigtinge geskied in ope hof

Die algemene beginsel is dat strafregtelike verrigtinge in die ope hof plaasvind.[8] Die beginsel is onderworpe aan enige uitdruklik andersbepalende wet. Die redes vir hierdie beginsel is voor die hand liggend en is onverbeterlik verwoord deur Lord Hewart in *R v Sussex Justices; Ex parte McCarthy*:[9] "Justice must not only be done but must manifestly be seen to be done."

Benewens uitsonderings in ander wetgewing[10] maak artikels 153 en 154 van die Strafproseswet ook voorsiening vir omstandighede waarin strafregtelike verrigtinge nie in die ope hof plaasvind nie.

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5 Kriegler 420; Du Toit *et al Commentary on the Criminal Procedure Act* (1987) 22–20.
6 1965 1 SA 82 (A) 91H.
7 Sien *S v Azov* 1974 1 SA 808 (T); *S v Tswai* 1988 1 SA 851 (K); *S v Booi* 1964 1 SA 224 (OK) en *S v Gidi* 1984 4 SA 537 (K).
8 A 152 van die Strafproseswet. Sien ook a 35(3)(c) van die Grondwet.
9 1924 1 KB 256 259.
10 Sien die Wet op Ampsgeheime 16 van 1956, die Wet op Atoomkrag 90 van 1967, die Verdedigingswet 44 van 1957 en die Wet op Publikasies 42 van 1974.

Die gedeeltes van artikels 153 en 154 wat vir doeleindes van hierdie bespreking relevant is, bepaal soos volg –

> "153(5) Waar 'n getuie by strafregtelike verrigtinge voor 'n hof onder die ouderdom van 18 jaar is, kan die hof gelas dat niemand, behalwe so 'n getuie en sy ouer of voog of 'n persoon *in loco parentis*, by bedoelde verrigtinge teenwoordig mag wees nie, tensy so iemand se teenwoordigheid in verband met bedoelde verrigtinge noodsaaklik is of deur die hof gemagtig is . . ." en
>
> "154(3) Niemand mag op enige wyse hoegenaamd enige inligting publiseer wat die identiteit openbaar van 'n . . . getuie by strafregtelike verrigtinge wat onder die ouderdom van 18 jaar is nie: . . ."

Die bepalings van artikel 153(5) verleen aan die hof 'n diskresie om toeskouers van die verrigtinge uit te sluit. Inaggenome die beginsel dat verrigtinge in die ope hof plaasvind, sal die party wat versoek dat die verrigtinge *in camera* geskied, dus redes moet aanvoer waarom die hof sy diskresie sodanig moet uitoefen om van die algemene beginsel af te wyk.

Artikel 154(3) verleen beskerming aan 'n beskuldigde of getuie jonger as 18 jaar teen openbaarmaking van identiteit in die pers. Die verbod sluit in die publikasie van besonderhede waaruit 'n afleiding rakende identiteit gemaak kan word.[11]

2 3 *Viva voce*-getuienis

'n Verdere beginsel wat strafregtelike verrigtinge onderlê, is dat 'n getuie sy getuienis *viva voce* (mondeling) aflê, tensy uitdruklik anders bepaal word.[12] Dit is die algemene reël. 'n Wysiging is egter aangebring wat voorsiening maak vir getuienisaflegging van getuies jonger as 18 jaar.[13] Dié laasvermelde bepaling word egter later volledig behandel.

3 PROBLEEMSTELLING

Verskeie skrywers het reeds vir 'n geruime tyd aangetoon dat die aflegging van getuienis deur jong kinders in die ope hof, waar hulle gekonfronteer word deur direkte kruisondervraging ten aanskoue van die beskuldigde persoon, as erg traumaties deur hierdie getuies ervaar word.[14] Die strafregstelsels van verskeie oorsese lande het eweneens met dieselfde probleem te kampe gehad.[15]

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11 *S v Citizen Newspapers (Pty) Limited*; *S v Perskorporasie van Suid-Afrika Beperk* 1980 3 SA 889 (T).

12 A 161(1) van die Strafproseswet. Sien Du Toit 22–17 vir die uitsonderings daar vermeld.

13 "Artikel 161(2) In hierdie artikel word die uitdrukking *viva voce*, in die geval van 'n doofstom getuie, geag gebaretaal èn, in die geval van 'n getuie onder die ouderdom van 18 jaar, geag demonstrasies, gebare of enige ander vorm van nie-verbale uitdrukking in te sluit." Sub-a (2) is ingevoer deur a 1 van Wet 135 van 1991 wat op 1993-07-30 in werking getree het.

14 Zieff (vn 1) 21; Schwikkard "The child witness: assessment of a practical proposal" 1991 *SAS* 44; Allan "Psigiese gevolge van 'n verkragting" 1993 *SAS* 186 en Engelbrecht (vn 1) 20.

15 Sien Libai "The protection of the child victim of a sexual offence in the criminal justice system" 1969 *Wayne LR* 980; Waller "Victims on trial – prosecutions for rape" 1977 *SACC* 147 (aanduidend van hoe volwasse getuies getuienislewering in soortgelyke omstandighede ervaar); Avery "The child abuse witness: potential for secondary victimization" 1983 *Criminal Justice J* 47; Spencer "Child witnesses, video-technology and the law of evidence" 1987 *Crim LR* 76; McEwan "Child evidence: more proposals for reform" 1988 *Crim LR* 813; Spencer "How not to reform the law" 1988 *New LJ* 497.

Kruisondervraging geskied met die oogmerk om getuienis van die getuie te ontlok wat tot voordeel van die kruisondervraer is. Dit geskied deur aanvullende opmerkings van die getuie te ontlok deur middel van onder meer leidende vrae en suggestie of om deur middel van 'n aanvallende styl, toegewings van die getuie te kry.[16] Soos reeds vermeld, geskied kruisondervraging volgens die styl en metode wat deur die kruisondervraer verkies word. Inperking daarvan word met omsigtigheid deur voorsittende beamptes benader.

Die verdere vereiste dat getuienislewering mondeling in teenwoordigheid van die beskuldigde geskied, het eweneens 'n negatiewe invloed op die kindergetuie. Alhoewel die bepalings van artikel 153(5) in die verband verligtend inwerk, bied dit steeds nie beskerming aan die getuie van wie verwag word om ten aanskoue van die beskuldigde persoon getuienis van 'n sensitiewe aard te lewer in die milieu van 'n kil en onvriendelike hofsaal nie.

Inaggenome die aard van en metodes wat toepassing vind in kruisondervraging en die direkte visuele konfrontasie met die beskuldigde, is dit nie verbasend dat die getuienis deur jong kinders aangebied dikwels in die verlede as onbevredigend en onoortuigend afgemaak is nie. Die algemene beginsels onderliggend aan die akkusatoriese strafprosesstelsel is klaarblyklik nie ontwikkel met die oogmerk om voorsiening te maak vir die kindergetuie nie. As gevolg daarvan moes alternatiewe metodes gevind word om hierdie tipe getuienis op 'n aanvaarbare wyse te hanteer sonder om afbreuk te doen aan 'n billike en regverdige verhoor vir die beskuldigde persoon. Die situasie is reeds op verskillende wyses in ander regstelsels hanteer voordat ernstige aandag daaraan in Suid-Afrika geskenk is. Daar word nou na 'n aantal maatreëls in ander regstelsels gekyk om die uiteindelike oplossing wat hier in gebruik gestel is, in perspektief te stel.

4 REGSVERGELYKING

Die posisie in die Verenigde State van Amerika, Engeland en Australië word kortliks geskets om te bepaal welke maatreëls getref is om die getuienisaanbieding van kinders aldaar te reguleer. Hierdie lande is gekies omdat die strafprosesstelsels daar van toepassing, soos in Suid-Afrika, akkusatories van aard is.

4 1 Verenigde State van Amerika

'n Eenvormige beleid word nie in Amerika gevolg nie. Die metodes wat in die onderskeie state gevolg word, kan in drie kategorieë verdeel word: die gebruik van eenrigtingskerms in howe wat verseker dat die beskuldigde persoon die getuie kan sien, maar die beskuldigde nie sigbaar is vir die getuie nie;[17] geslotebaantelevisie waardeur die getuie se optredes vanaf 'n aangrensende vertrek na die hofsaal herlei word;[18] en die ontvangs in getuienis van 'n video-opname gemaak van 'n vroeëre onderhoud gevoer met die getuie.[19]

16 Kriegler 420.
17 Zieff (vn 1) 38; die staat Iowa gebruik hierdie tegniek.
18 Zieff (vn 1) 39; Agt-en-twintig state van die VSA het wetgewing aanvaar om vir die prosedure voorsiening te maak.
19 Zieff (vn 1) 39.

Al drie die vermelde metodes verseker dat geen direkte kontak in die ope hof tussen die beskuldigde en getuie plaasvind nie. Ten opsigte van die eersvermelde twee metodes geskied getuienislewering steeds *viva voce*, maar dit is nie die geval waar van 'n video-opname gebruik gemaak word nie.

Die grondwetlikheid van die gebruik van 'n eenrigtingskerm is in *Coy v Iowa*[20] aangeval. Daar is aangevoer dat die gebruik van hierdie metode van getuienisaanbieding inbreuk maak op die grondwetlike reg, soos vervat in die sesde amendement tot die Grondwet van die Verenigde State van Amerika, van 'n beskuldigde persoon om getuies te konfronteer. Die Supreme Court van Iowa beslis egter dat hierdie metode nie 'n inbreukmaking op die beskuldigde se reg op konfrontasie van die getuie meebring nie. Hierdie beslissing word egter omvergewerp in 'n appèl na die US Supreme Court. 'n Volledige bespreking volg egter later in die afdeling wat handel oor die moontlike inbreukmaking op die konstitusionele regte van die beskuldigde.

Deur middel van geslotebaantelevisie word die geleentheid geskep om die kindergetuie heeltemal uit die hof te verwyder en vanaf 'n afsonderlike vertrek sy getuienis na die hofsaal te herlei. Hierdeur word nie alleen die probleem rondom konfrontasie aangespreek nie, maar kan die afsonderlike vertrek waarin die kindergetuie hom bevind, meer gebruikersvriendelik ingerig word om voorsiening te maak vir die vlak van emosionele ontwikkeling van die getuie en om getuienisaanbieding te vergemaklik.

Zieff[21] meld dat die toelaatbaarheid van getuienis deur middel van video-opnames vinnig veld gewen het in Amerika. Die prosedure wat in hierdie gevalle gevolg word, behels dat 'n opgeleide terapeut 'n onderhoud, wat op videoband vasgelê word, met die kind voer. Die opname word dan as getuienis in die latere verhoor aangebied. Hierdie tipe getuienis word as hoorsê geklassifiseer, maar is deur wetgewing in verskeie state as 'n uitsondering op die hoorsêreël getipeer. Die beginsel van konfrontasie word op verskillende wyses geakkommodeer by hierdie tipe getuienis. Soms word daarvoor voorsiening gemaak dat die opname as die getuie se getuienis-in-hoof beskou word en dat die getuie beskikbaar moet wees vir kruisondervraging oor enige aspek van sy getuienis. Die tweede benadering beskou die opname as plaasvervangend van die kindergetuie se deelname in die verhoor. Kruisondervraging is in hierdie geval net toelaatbaar indien dit noodsaaklik of wenslik vir die regspleging geag word.[22]

4 2 Engeland en Australië

Daar word van geslotebaantelevisie (*video-link*) gebruik gemaak in getuienisaanbieding in sowel Engeland as Australië.[23] Die tegniek is soortgelyk aan dié in die Verenigde State van Amerika. Gebruik is ook van eenrigtingskerms in Engeland gemaak,[24] maar dit sal waarskynlik in onbruik verval met die beskikbaarstelling van die tegnologies meer gevorderde geslotebaantelevisie.

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20 487 US 1012 (1988).
21 (Vn 1) 39–40.
22 Zieff (vn 1) 40. Die vraag oor die grondwetlikheid van hierdie reëling bly aktueel. In *Long v State of Texas* 742 SW 2d 302 (1987) is bevind dat dié maatreël ongrondwetlik is in die mate waarin dit inbreuk maak op die reg op konfrontasie.
23 Zieff (vn 1) 39.
24 Zieff (vn 1) 38.

Voorstelle is in Engeland gemaak oor die aanvaarding van getuienis op videoband, maar geen formele erkenning is nog daaraan verleen deur óf die wetgewer óf die howe nie. Daar is aan die hand gedoen dat 'n onderhoud deur 'n spesiaal opgeleide persoon met die kindergetuie gevoer word en dat die beskuldigde en sy regsverteenwoordiger dit deur eenrigtingglas gadeslaan. Geleentheid sal dan aan die verdediging gebied word om vrae aan die onderhoudvoerder deur te gee wat hy dan aan die getuie stel. Die hele onderhoud word op videoband opgeneem wat dan die kind se getuienis vir verhoordoeleindes sal uitmaak. Kruisondervraging van die getuie sal net deur die voorsittende beampte toegelaat word indien spesiale redes daarvoor bestaan.[25]

5 DIE SUID-AFRIKAANSE OPLOSSING

Vanweë vertoë gerig aan die Minister van Justisie aangaande getuienislewering van kinders in gedinge waarin bewerings van onsedelike dade ter sprake is, het die minister die Suid-Afrikaanse Regskommissie op 10 November 1988 versoek om 'n ondersoek te onderneem na moontlike beskermingsmaatreëls en -prosedures in sake van hierdie aard.

Die bepalings van artikels 161(2) en 170A van die Strafproseswet het daarop hul oorsprong gehad in die bevindings en aanbevelings van die Suid-Afrikaanse Regskommissie.[26] In sy bevinding dat die akkusatoriese strafprosesstelsel wat in die reël swaar klem op kruisondervraging plaas, onsensitief en onbillik is jeens die kindergetuie, het die Regskommissie nie net op plaaslike voorleggings gesteun nie, maar ook verwys na die ervaring in ander regstelsels. Na aanleiding van die aanbevelings van die Regskommissie het die wetgewer die bepalings van artikel 161(2) en 170A deur middel van artikel 3 van die Strafproseswysigingswet 135 van 1991, op die wetboek geplaas.[27] Artikel 170A is verreweg die ingrypendste en word eerste behandel.

5 1 Artikel 170A van die Strafproseswet 51 van 1977

Artikel 170A bepaal:

> "Getuienis deur bemiddeling van tussengangers.
>
> 170A(1) Wanneer strafregtelike verrigtinge voor 'n hof hangende is en dit aan daardie hof blyk dat dit 'n getuie onder die ouderdom van 18 jaar aan onredelike geestesspanning of -lyding sal blootstel indien hy by daardie verrigtinge getuig, kan die hof, behoudens subartikel (4), 'n bevoegde persoon as tussenganger aanstel ten einde so 'n getuie in staat te stel om sy getuienis deur bemiddeling van daardie tussenganger af te lê.
>
> (2)(a) Geen ondervraging, kruisondervraging of herondervraging van 'n getuie ten opsigte van wie 'n hof 'n tussenganger kragtens subartikel (1) aangestel het, behalwe ondervraging deur die hof, mag op 'n ander wyse as deur bemiddeling van daardie tussenganger plaasvind nie.
>
> (b) Bedoelde tussenganger kan, tensy die hof anders gelas, die algemene strekking van 'n vraag aan die betrokke getuie oordra.

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25 Williams "Videotaping children's evidence" 1987 *New LJ* 108; Spencer "Child witness, video technology and the law of evidence" 1987 *Crim LR* 76.

26 *Werkstuk 28 van die Suid-Afrikaanse Regskommissie: Die Beskerming van Kindergetuies: Projek 71* (April 1989) en *Suid-Afrikaanse Regskommissie: Verslag oor die Beskerming van Kindergetuies: Projek 71* (Februarie 1991)(hierna genoem Verslag).

27 Die artikels het egter eers op 1993-07-30 in werking getree na afkondiging daarvan in proklamasie R64 van *Staatskoerant* 15024 van dieselfde datum.

(3) Indien 'n hof 'n tussenganger kragtens subartikel (1) aanstel, kan die hof gelas dat die betrokke getuie sy getuienis aflê op 'n plek–

(a) wat informeel ingerig is om daardie getuie op sy gemak te stel;

(b) wat so geleë is dat iemand wie se teenwoordigheid daardie getuie mag ontstel, buite die sig en gehoor van daardie getuie is; en

(c) wat die hof en iemand wie se teenwoordigheid by die betrokke verrigtinge noodsaaklik is in staat stel om, hetsy direk of deur middel van enige elektroniese of ander toestelle, daardie tussenganger sowel as daardie getuie gedurende sy getuienis te sien en te hoor.

(4)(a) Die Minister kan die persone of die kategorie of klas persone wat bevoeg is om as tussengangers aangestel te word by kennisgewing in die Staatskoerant bepaal.[28]

(b) Aan 'n tussenganger wat nie in die heeltydse diens van die Staat is nie, word die reis-, verblyf- en ander toelaes ten opsigte van die dienste deur hom gelewer, betaal wat die Minister, met die instemming van die Minister van Finansies, bepaal."[29]

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28 Ingevolge GK R1374 gepubliseer in *SK* 15024 van 1993-07-30, soos gewysig deur GK R5875 gepubliseer in *SK* 17822 van 1997-02-28, het die Minister van Justisie die volgende kategorieë of klasse persone as bevoeg bepaal om as tussengangers aangestel te word: "(a) Geneeshere wat ingevolge die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe, 1974 (Wet 56 van 1974), as sodanig geregistreer is en teenoor wie se naam die spesialiteit pediatrie ook geregistreer is. (b) Geneeshere wat ingevolge die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe, 1974, as sodanig geregistreer is en teenoor wie se naam die spesialiteit psigiatrie ook geregistreer is. (c) Gesinsraadgewers wat kragtens artikel 3 van die Wet op Bemiddeling in Sekere Egskeidingsaangeleenthede, 1987 (Wet 24 van 1987), as sodanig aangestel is en wat kragtens artikel 17 van die Wet op Maatskaplike Werk, 1978 (Wet 110 van 1978), as maatskaplike werkers geregistreer is of was, of as onderwysers in kwalifikasiekategorie C tot G, soos bepaal deur die Departement van Nasionale Opvoeding, ingedeel is of was, of kragtens die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe, 1974, as kliniese, opvoedkundige of voorligtingsielkundiges geregistreer is of was. (d) Kinderversorgers wat 'n tweejaarkursus in kinder- en jeugversorging, goedgekeur deur die Nasionale Vereniging van Kinderversorgers, suksesvol voltooi het en vier jaar ondervinding in kinderversorging het. (e) Maatskaplike werkers wat ingevolge artikel 17 van die Wet op Maatskaplike Werk, 1978, as sodanig geregistreer is en twee jaar ondervinding in maatskaplike werk het. (f) Opvoeders kragtens die Wet op Indiensneming van Opvoeders, 1994 (Proklamasie Nommer 138 van 1994), wat vier jaar ondervinding in die onderwys het en wat nie in enige stadium, om watter rede ookal, uit diens in die onderwys geskors of ontslaan is nie. (g) Sielkundiges wat ingevolge die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe, 1974, as kliniese, opvoedkundige of voorligtingsielkundiges geregistreer is."

29 Volgens die Departement van Justisie is die volgende toelaes deur die Minister van Justisie met die instemming van die Minister van Finansies, bepaal: "(1) Iemand wat in strafregtelike verrigtinge as tussenganger kragtens artikel 170A(1) van die Strafproseswet, 1977, aangestel is en wat nie in die heeltydse diens van die Staat is nie, is vir dienste deur hom gelewer as tussenganger geregtig op die volgende toelaes: (a) Vir bywoning van die strafsaak: R50,00 vir elke 24 uur of gedeelte daarvan wat hy afwesig is van sy woonplek of die plek waar hy vertoef. (b) Indien genoodsaak om huisvesting vir 'n nag te huur: Redelike werklike uitgawes aangegaan ten opsigte van huisvesting en maaltye: Met dien verstande dat kwitansies of ander bewysstukke ter stawing van sodanige uitgawes aan die regterlike beampte of griffier van die Hooggeregshof verstrek word. (c) Indien van openbare vervoer gebruik gemaak word ten einde die strafsaak by te woon, word 'n toelae gelyk aan die werklike koste van sodanige vervoer vir die heen-en-terugreis langs die kortste geskikte roete betaal: Met dien verstande dat indien meer as een geskikte openbare vervoermiddel beskikbaar is die reisgeld ten opsigte van die goedkoopste vervoermiddel betaal word. (d) Indien van private vervoer gebruik gemaak word ten einde die strafsaak

vervolg op volgende bladsy

Die kommissie het ter oorweging van die vraag of voorsiening in die strafprosesreg vir 'n tussenganger of "vertaalde" kruisverhoor gemaak behoort te word, onder meer verwys na die belange van die kind (slagoffer), beskuldigde, ouer van die slagoffer, die voorsittende beampte, die staatsaanklaer en die gemeenskap. In sy finale slotsom dat die aanwending van 'n tussenganger die belange van al die betrokke partye sal dien, word soos volg opgemerk:

> "Dit moet aanvaar word dat in die adversatiewe stelsel aggressie teenoor getuies, intimidasie, uitlokking tot weersprekings, slim woordspel en die stel van slaggate plaasvind. Daar is ook geen twyfel oor die feit dat daar 'n behoefte bestaan aan die beskerming van kindergetuies deur aan hulle in die hof bystand van professionele persone te gee nie. Die vraag is egter of die bestaande beskermingsmiddels, naamlik besware en kontrole deur die voorsittende beampte, voldoende is om die kindergetuie teen onbillike kruisondervraging te beskerm. Die kommissie se standpunt is dat die voorsittende beampte se bevoegdheid om kruisondervraging wat skerp en aggressief is, wat uit leidende vrae of suggesties bestaan, of wat langdurig is, aan bande te lê, beperk is."[30]

5 2 Artikel 161(2) van die Strafproseswet 51 van 1977

Besware is aan die kommissie voorgehou rakende die gebruik van "vertaalde" kruisverhoor deur middel van 'n tussenganger. Die besware was gegrond op die vereiste van *viva voce* getuienis soos vervat in artikel 161 van die Strafproseswet en die plig van die hof om ingevolge artikel 193 van die Strafproseswet te beslis oor die bevoegdheid en verpligbaarheid van 'n getuie om getuienis af te lê.[31] Ten opsigte van laasgenoemde beswaar meld die kommissie dat die aanbeveling rakende tussengangers nie gemik is op 'n aantasting van 'n hof se verpligtinge ingevolge artikel 193 nie. Die hof moet steeds 'n bevinding maak oor die getuie se bevoegdheid om getuienis af te lê, maar sal in gevalle waar van 'n tussenganger gebruik gemaak word, dit doen met inagneming van die feit dat die getuie op die betrokke wyse getuienis aflê.[32]

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by te woon: 50 sent per kilometer vir die heen-en-terugreis langs die kortste geskikte roete. (e) Indien inkomste verbeur word as gevolg van die bywoning van die strafsaak: Die inkomste aldus verbeur behoudens 'n maksimum van R400-00 per dag. Met dien verstande dat bevredigende bewys ter stawing van sodanige verbeurde inkomste aan die regterlike beampte of griffier van die Hooggeregshof verstrek word. (2) Indien 'n regterlike beampte of griffier van die Hooggeregshof van Suid-Afrika oortuig is dat dit geregverdig is, kan hy goedkeur dat 'n tussenganger op staatskoste van lugvervoer gebruik kan maak om die strafsaak by te woon. (3) Iemand wat as tussenganger meer as een strafsaak op dieselfde dag in dieselfde hof bywoon, word vir doeleindes van die berekening van die toelaes betaalbaar, geag slegs een strafsaak by te gewoon het. (4) Waar daar uit enige ander bron voorsiening gemaak word vir die uitgawes wat 'n tussenganger in verband met die bywoning van 'n strafsaak aangaan, word geen toelaes ingevolge hierdie bepaling betaal nie. (5) Die direkteur-generaal, 'n adjunk-direkteur-generaal, 'n hoofdirekteur, 'n direkteur, 'n adjunk-direkteur of die hoof van die rekening-afdeling van die Departement van Justisie kan magtiging verleen dat daar van die voorgeskrewe tarief afgewyk word, indien hy oortuig is dat die toepassing daarvan vir 'n tussenganger ontbering tot gevolg kan hê. (6) Die beslissing van 'n regterlike beampte of 'n griffier van die Hooggeregshof met betrekking tot die toelaes betaalbaar aan 'n tussenganger is finaal."

30 Verslag 61.

31 Verslag 57.

32 Die kommissie wys tereg daarop dat 'n soortgelyke situasie ontstaan in gevalle waar van 'n tolk gebruik gemaak word om getuienis oor te tolk. Hierdie situasie doen hom daagliks in die strafhowe voor en lewer geen wesenlike probleme op in die toepassing van a 193

vervolg op volgende bladsy

In die beswaar dat aanwending van 'n tussenganger inbreuk kan maak op die vereiste dat getuienis *viva voce* gelewer moet word, is die volgende voorgehou: die vraag is gevra of gebare, kopknikke en demonstrasies van 'n getuie wat daarna deur die tussenganger aan die hof oorgedra word, as *viva voce* getuienis beskou kan word.[33] Die kommissie het, sonder om veel op die beswaar uit te brei, aanbeveel dat artikel 161 van die Strafproseswet gewysig word om voorsiening te maak dat demonstrasies, gebare en ander nie-verbale uitdrukkings van kindergetuies, geag word *viva voce* getuienis te wees.[34]

6 PRAKTIESE FUNKSIONERING

6 1 Aanwendingsgebied

Sover vasgestel kan word, word van die bepalings van artikel 170A gebruik gemaak waar dit beskuldigde persone ten laste gelê word dat die volgende misdrywe ten opsigte van kinders jonger as 18 jaar gepleeg is: verkragting, onsedelike aanranding, sodomie en oortreding van die bepalings van artikel 14 van die Ontugwet 23 van 1957 en artikel 50 van die Kinderwet 74 van 1983. Alhoewel die opdrag aan die Regskommissie was om "getuienislewering van kinders in gedinge waarin bewerings van onsedelike dade ter sprake is", te ondersoek,[35] bestaan daar geen aanduiding in artikel 170A dat die wetgewer voorsiening wou maak vir getuienislewering net in daardie gevalle nie. Daar word aan die hand gedoen dat 'n getuie jonger as 18 jaar wat aan onredelike geestesspanning of -lyding blootgestel sou word indien hy in die ope hof getuig, in *enige* tipe strafsaak op hierdie wyse getuienis behoort te kan aflê.

6 2 Diskresie van die hof

Om van 'n tussenganger gebruik te kan maak, moet dit vir 'n hof blyk dat die betrokke getuie aan "onredelike geestesspanning of -lyding" blootgestel sal word indien hy op die normale wyse gedurende die hofverrigtinge sou getuig.[36] Die hof behoort ook gedurende die verrigtinge *mero motu*, op grond van sy eie waarnemings, te gelas dat 'n getuie sy getuienis aflê deur bemiddeling van 'n tussenganger.[37] Die prosedure wat normaalweg egter gevolg word, behels dat die staatsaanklaer voor die aanvang van die verrigtinge of voor aanvang van die kind se getuienis, 'n aansoek tot die hof rig dat van 'n tussenganger gebruik gemaak word om die betrokke getuie se getuienis aan te bied. Geen melding word in artikel 170A van 'n bewyslas gemaak nie en daar word aan die hand gedoen dat indien die aansoek nie geopponeer word nie, dit voldoende sou wees indien die staatsaanklaer wat die getuienis van die getuie gaan aanbied, 'n aansoek vanaf die balie rig. Aangesien die vervolging by uitstek in 'n posisie sal wees om die hof toe te lig ten opsigte van onder meer die aard van die getuienis,

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nie. Sien in die algemeen vir die faktore wat die hof oorweeg om die bevoegdheid van 'n getuie te bepaal, die beslissing in *Woji v Santam Insurance Company Limited* 1981 1 SA 1020 (A) 1028A–E.

33 Verslag 56 ev.

34 A 161(2) van die Strafproseswet.

35 Verslag 1.

36 A 170A(1); sien ook *S v Mathebula* 1996 2 SASV 231 (T).

37 Du Toit (vn 5) 22–32.

die ontwikkelings- en intelligensievlak en die emosionele stabiliteit van die getuie, sal die staatsaanklaer in hierdie verband 'n wesenlike rol speel om die nodige inligting aan die hof voor te hou om te verseker dat die voorsittende beampte 'n ingeligde besluit neem oor die toepaslikheid al dan nie van artikel 170A. Waar 'n aansoek om die toepassing van artikel 170A deur die verdediging geopponeer word, behoort 'n sielkundige of maatskaplike werker wat in noue verband met die getuie gewerk het, ter ondersteuning van die aansoek te getuig. Die hof behoort die beskikbare inligting en die onderskeie argumente op normale wyse op te weeg en tot 'n beslissing te raak. Sterk oorweging behoort egter deur howe daaraan gegee te word dat die bepalings van artikel 170A 'n weldeurdagte en eerlike poging is om 'n ernstige gebrek in die prosesreg te remedieer en daardeur die belange van die regspleging in die breë te dien.

6 3 Ondervraging na aanstelling van 'n tussenganger

Sodra die hof bevind dat 'n getuie sy getuienis deur middel van 'n tussenganger moet aflê, mag geen ondervraging in hoof, kruisondervraging of her-ondervraging van die getuie geskied sonder bemiddeling van 'n tussenganger nie.[38] Die enigste uitsondering is dat die hof self by magte is om vrae aan die betrokke getuie te stel sonder gebruikmaking van die tussenganger.

6 4 Kwalifiserende vereistes vir optrede as tussenganger

Daar word nie vereis dat 'n persoon wat as tussenganger gaan optree, die een of ander eed moet aflê nie.[39] Die enigste vereiste is dat 'n persoon deel moet vorm van die kategorie of klas persone soos bepaal deur die Minister van Justisie.[40]

Dit is uit die aard van die saak belangrik welke persone as tussengangers aangewend word. In die lig van die belangrike rol wat hierdie persoon as skakel tussen die getuie en die hofverrigtinge vervul, moet hy vir al die partye met 'n belang in die verhoor aanvaarbaar en bo verdenking wees. Wanneer gekyk word na die kategorieë of klasse van persone wat as bevoeg verklaar is deur die Minister van Justisie,[41] blyk dit met welke erns die rol van tussenganger bejeën word.[42] Alhoewel daar geen riglyne bestaan nie, word aanvaar dat daar geen betrekkinge tussen die getuie en tussenganger behoort te bestaan wat die onpartydige vertolking van vrae aan die getuie kan belemmer nie. Die situasie moet ook ten alle koste vermy word waar die getuie beskerming ontvang teen direkte konfrontasie met die beskuldigde, maar geïntimideer of beïnvloed word deur die teenwoordigheid van 'n familielid of -vriend wat as tussenganger optree. Daar word ook voorgestel dat vooraf kontak tussen die getuie en tussenganger beperk

38 A 170A(2)(a).

39 Van 'n persoon wat optree as tolk in 'n hof word verwag om 'n eed af te lê – 61(1) en 68 van die hooggeregshofreëls. Sien ook Kriegler (vn 3) 417 ev.

40 Sien vn 28.

41 Sien vn 28.

42 Dieselfde erns word egter ongelukkig nie gereflekteer in die vergoeding van tussengangers nie. Sommige kategorieë kwalifiseer slegs vir R50-00 per dag – sien vn 29. Hierdie onvoldoende vergoeding gee daartoe aanleiding dat 'n voortdurende tekort aan tussengangers ondervind word wat meebring dat die spoedige en effektiewe afhandeling van hierdie tipe sake ernstig in die wiele gery word.

word tot dit wat noodsaaklik is vir die tussenganger om 'n vertrouensband met die getuie te vestig en dat enige bespreking van die gebeure waaroor die getuie later moet getuig, vermy behoort te word.

6 5 Pligte en funksies van die tussenganger

Weinig aandag word in artikel 170A geskenk aan 'n omskrywing van die werksaamhede van die tussenganger. Dié persoon se pligte en funksies is in 'n hoë mate in duisternis gehul en word dit klaarblyklik aan die howe self oorgelaat om in die praktyk gestalte daaraan te gee. Die gebruik wat tot op hede uitgekristalliseer het, is dat die kindergetuie en tussenganger in 'n afsonderlike vertrek plaasneem vanwaar alle gebeure en gesprekke per geslotebaantelevisie en luidspreker na die hof herlei word. Enige vrae vir die getuie word aan die tussenganger gerig en die tussenganger ontvang die vrae deur middel van oorfone. Hierdie vrae kan dus nie deur die getuie gehoor word nie. Die vrae word daarop met inagneming van die ouderdom, ontwikkelingspeil en verwysings-raamwerk van die getuie, in verstaanbare vorm aan die getuie oorgedra deur die tussenganger. Die getuie se reaksie daarop is onmiddellik hoor- en waarneembaar deur die partye in die hof. Die tussenganger speel dus uiteraard 'n sleutelrol in die verrigtinge, aangesien van hierdie persoon verwag word, tensy die hof anders gelas, om die algemene strekking van 'n vraag aan die getuie oor te dra.[43] Dit is dus veral ten opsigte van kruisondervraging dat van die tussenganger verwag sal word om aggressie, intimidasie, slim woordspel en die stel van slaggate teen te werk deur middel van "vertaalde" kruisondervraging. Daar word aan die hand gedoen dat die tussenganger ook die negatiewe effek van langdurige en uitputtende kruisondervraging moet teëwerk deur, waar dit voorkom, aan die hof aan te dui dat die getuie moeg is en konsentrasie verloor en dat 'n kort verdaging om die getuie te laat rus aangewese is.

Indien daartoe gelas deur die hof, moet die tussenganger 'n gestelde vraag direk aan die getuie stel. Hierdie is eweneens 'n beslissing wat die hof *mero motu* of op aansoek deur 'n party kan neem. Die betrokke omstandighede van die saak en die spesifieke vraag op daardie tydstip behoort die deurslag te gee. Die oogmerke van artikel 170A en die beweegredes vir die daarstelling van hierdie prosedure behoort egter deurentyd in gedagte gehou te word deur die voorsittende beampte in die oorweging van 'n aansoek van hierdie aard. Van groot belang is dat die oorspronklike vraag, die omskepping daarvan deur die tussenganger en die antwoord van die getuie daarop, deel behoort te vorm van die saakrekord.[44] Nie alleen behoort die geheel van die verrigtinge beskikbaar te wees vir die voorsittende beampte vir doeleindes van evaluering van die getuienis nie, maar dit sal ook verseker dat geen onduidelikhede ontstaan in geval van latere hersiening of appèlverrigtinge nie.

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43 A 170A(2)(b).

44 Kriegler (vn3) 433. Daar word aan die hand gedoen dat indien daar ook van 'n tolk gebruik gemaak word, die oorspronklike vraag, die omskepte weergawe en die antwoord daarop, oorgetolk word. Indien die partye nie die taal van die kindergetuie magtig is nie, word voorgestel dat 'n tolk die vrae gerig aan en antwoorde ontvang vanaf die getuie oortolk en dat die tussenganger nie ook as tolk aangewend word in gevalle waar sy/hy al die gebesigde tale magtig is nie.

6 6 Lokaal vir doeleindes van getuienisaflegging

Verdere bepalings wat hand aan hand gaan met die gebruik van 'n tussenganger, word in artikel 170A(3) aangetref. Hierin word voorsiening gemaak dat 'n voorsittende beampte, na aanstelling van 'n tussenganger, kan gelas dat die betrokke getuie sy getuienis aflê op 'n plek wat informeel ingerig is en so geleë is dat 'n persoon wat die getuie mag ontstel, nie aan die getuie sigbaar of hoorbaar is nie. Die getuie en tussenganger moet egter wel vir die hof en iemand wie se teenwoordigheid by die verrigtinge noodsaaklik is, hoorbaar en sigbaar wees. Die oogmerk is om die getuie te verwyder vanuit die streng formele en dikwels strak en onvriendelike milieu waarin die hofverrigtinge plaasvind na 'n vertrek of plek wat op meer informele wyse voorsiening maak vir die behoeftes van jong kinders. Alhoewel die bewoording van die bepaling die gebruik van eenrigtingglas moontlik maak, is by meerdere landdroskantore in die Republiek voorsiening gemaak vir spesiaal ingerigte vertrekke wat toegerus is met speelgoed en kindermeubels asook vrolik beskilderde mure wat in geen opsig herinner aan 'n hof nie. Kontak soos vereis deur artikel 170A(3)(c) word bewerkstellig deur geslotebaantelevisie en 'n luidsprekersisteem. Alhoewel die hof 'n diskresie het om te gelas dat die getuie sy getuienis aflê op 'n plek soos bedoel in artikel 170A(3)(a)–(c), word dit in die praktyk in die reël toegepas nadat die hof bevind het dat van 'n tussenganger gebruik gemaak moet word. In die lig van die ooglopende voordele wat so 'n reëling inhou, is die gereelde toepassing daarvan dan ook geen verrassing nie.[45]

7 DIE EFFEK VAN ARTIKEL 170A VAN DIE STRAFPROSESWET OP DIE KONSTITUSIONELE REGTE VAN 'N BESKULDIGDE

Vrae ontstaan onmiddellik oor die effek, indien enige, wat artikel 170A op die konstitusionele reg tot 'n billike verhoor van 'n beskuldigde persoon kan hê. Veral die reg op 'n openbare verhoor[46] en die reg om getuienis te betwis,[47] soos vervat in die handves van regte, val onmiddellik op as sou die bepalings van artikel 170A daarmee in konflik wees.

In die onlangse beslissing *Klink v Regional Court Magistrate*[48] is geargumenteer dat die bepalings van artikel 170A onredelike en onnodige beperkings plaas op die reg op 'n billike verhoor van 'n beskuldigde. *Klink* is die enigste Suid-Afrikaanse beslissing oor hierdie aspek, in ieder geval ná inwerkingtrede van die tussentydse Grondwet, en die saak verg nadere beskouing.[49]

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45 Die getuie hoef onder meer nie die persoon wat beskuldig word van die pleging van wandade teenoor hom, van aangesig tot aangesig te aanskou nie. Sien Whittle "New room to protect child witnesses" 1993 *De Rebus* 736.

46 A 35(3)(c) van die Grondwet.

47 A 35(3)(i) van die Grondwet.

48 [1996] 1 All SA 191. Ook gerapporteer as *K v The Regional Court Magistrate* 1996 1 SASV 434 (OK).

49 Sien Schwikkard (vn 14) 44–47 vir die bespreking van 'n saak wat in die streekhof te Pietermaritzburg gedien het en waartydens 'n onsuksesvolle aansoek gebring is om 'n kindergetuie vanaf 'n aangrensende vertrek deur middel van geslotebaantelevisie te laat getuig. Die bepalings van a 170A en die tussentydse Grondwet was in daardie stadium nog nie in werking nie.

7 1 *Klink v Regional Court Magistrate*

Die applikant (18 jaar oud) in die onderhawige saak het in die streekhof te Port Elizabeth tereggestaan op 'n aanklag van verkragting van 'n sestienjarige dogter (klaagster). By aanvang van die verrigtinge en voor pleit, het die staatsaanklaer 'n aansoek ingevolge artikel 170A van die Strafproseswet gerig vir die aanstel van 'n tussenganger vir doeleindes van die aflegging van die klaagster se getuienis. Die aansoek is deur die applikant teengestaan en ter ondersteuning van die aansoek het die staat die getuienis van 'n kliniese sielkundige aangebied. Die sielkundige lewer getuienis dat die klaagster nie in staat sal wees om die stremming van 'n verskyning in die ope hof te hanteer nie en dat dit aanleiding kan gee tot 'n algehele ineenstorting van die getuie. Die opinie word uitgespreek dat getuienislewering in die ope hof geestesspanning by die klaagster tot gevolg sal hê. In die lig van hierdie getuienis word die aansoek toegestaan en gelas die streeklanddros dat 'n tussenganger ingevolge artikel 170A(1) aangestel word.

Aansoek word hierop deur die applikant na die Suid-Oos-Kaapse Plaaslike Afdeling van die Hooggeregshof gerig vir die ongeldigverklaring van artikel 170A op grond daarvan dat die applikant se reg op 'n billike verhoor daardeur geskend word.[50] Die vraag wat aan die hof voorgehou word vir beslissing en waarop applikant 'n bevestigende antwoord verlang, word soos volg ingeklee:

> "Whether section 170A of the Criminal Procedure Act, in attempting to achieve its laudable purpose – the protection of child witnesses in certain types of criminal trials – overshoots the mark and has resulted in an unreasonable and unnecessary limitation of the fundamental rights of an accused person to a fair trial."[51]

Die argument dat die applikant ontneem word van sy reg op 'n billike verhoor deur die bepalings van artikel 170A, berus op twee bene:

(i) die applikant word ontneem van die reg op kruisondervraging van 'n getuie; en

(ii) daar word inbreuk gemaak op die applikant se reg op 'n openbare verhoor.

7 1 1 Die reg op kruisondervraging

Ter beoordeling van die aansoek volg regter Melunsky (met regters Van Rensburg en Jennett instemmend) die tweeledige benadering soos uiteengesit deur die konstitusionele hof.[52] Hiervolgens rus die aanvanklike onus op die applikant om aan te toon dat artikel 170A inbreuk maak op sy reg op 'n billike verhoor. Indien bevind word dat 'n sodanige inbreukmaking bestaan, rus die onus op die respondent wat ten gunste van behoud van die inbreukmakende bepaling is, om aan te toon dat regverdiging ingevolge artikel 33 van die tussentydse Grondwet[53] bestaan vir 'n beperking op die fundamentele reg van die applikant.[54]

Regter Melunsky wys daarop dat die regte gespesifiseer onder die oorkoepelende reg op 'n billike verhoor in artikel 25(3) van die tussentydse Grondwet, nie 'n volledige lys regte is nie en dat van die strafhowe verwag word om verhore in

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50 Ingevolge a 103(3) van die tussentydse Grondwet.
51 197A.
52 *S v Zuma* 1995 2 SA 642 (CC); *S v Makwanyane* 1995 3 SA 391 (CC) en *Park-Ross v Director: Office for Serious Economic Offences* 1995 2 SA 148 (K).
53 Nou a 36(1) van die Grondwet.
54 197f–g.

ooreenstemming met die beginsels van basiese billikheid en geregtigheid te laat geskied.[55] Die hof bevind dat alhoewel kruisondervraging nie spesifiek in artikel 25(3) vermeld word nie, dit inbegrepe is by die reg om getuienis te betwis soos vermeld in artikel 25(3)(d).[56]

Die hof beslis dat die bepalings van artikel 170A nie kruisondervraging uitsluit nie, maar dat enige kruisondervraging daarvolgens deur 'n tussenganger moet geskied. Namens die applikant word op hierdie punt aangevoer dat kruisondervraging deur middel van 'n tussenganger die effektiwiteit daarvan kan belemmer. Daar word in hierdie verband veral verwys na die bepalings van artikel 170A(2)(b) ingevolge waarvan die tussenganger die algemene strekking van 'n vraag aan die getuie mag oordra tensy die hof anders gelas. Regter Melunsky verwys verder na die argument geopper deur die respondent dat die akkusatoriese strafprosesstelsel nie die ideale wyse is waarop die getuienis van kinders geakkommodeer kan word nie en dat kruisondervraging dikwels 'n ernstige negatiewe uitwerking op kindergetuies het.[57] Na oorweging van hierdie argument bevind die hof dat die normale prosedures van die akkusatoriese strafprosesstelsel onvoldoende voorsiening maak vir die aanbieding van die getuienis van kinders en word beslis dat:

> "Section 170A is designed to address the imbalance and to provide protection for the young witness. The question is whether, in so doing, it violates the right of an accused person to a fair trial."[58]

Regter Melunsky kom tot die gevolgtrekking dat die kanalisering van kruisondervraging deur 'n tussenganger nie neerkom op 'n beperking van die reg op kruisondervraging nie. Ter motivering van sy gevolgtrekking wys die hof daarop dat kruisondervraging steeds toegelaat word en dat die tussenganger as 'n tipe tolk optree – welke gebruik algemeen voorkom in die howe van die land.[59] Alhoewel die hof bereid is om toe te gee dat die effek van kruisondervraging in 'n mate afgestomp kan word deur die aanwending van 'n tussenganger, is hy nie bereid om die invloed daarvan as so ernstig te beskou dat die applikant daardeur die reg op 'n billike verhoor ontsê word nie. Regter Melunsky wys daarop dat die vraag na skending van die regte van die applikant beantwoord moet word ook met oorweging van dit wat in belang van die kindergetuie is.[60]

Ten opsigte van die argument dat 'n tussenganger die frasering van en dus moontlik ook die beplanning en einddoel van kruisondervraging in die wiele kan ry,[61] beslis die hof dat dit van belang is dat die getuie 'n vraag moet verstaan om hom in staat te stel om dit te beantwoord. Die rol van die tussenganger in dié verband is nie om die vraag te verander na wat dit nie is nie, maar om dit oor te dra op 'n vlak wat vir die getuie verstaanbaar is. Die volgende opmerking van regter Melunsky daaroor is van belang:

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55 198d.
56 198e.
57 199d–i.
58 200d.
59 200f–g.
60 Die hof regverdig die belange-afweging wat hy reeds in hierdie stadium bybring by oorweging van die vraag of daar 'n inbreukmaking op 'n fundamentele reg was, met verwysing na *S v Makwanyane* (vn 51) 433B.
61 201e–f.

> "[I]t is quite apparent that it is in the interests of justice for questions to be posed to children in a way that is appropriate to their development. This furthers the truth-seeking function of the trial court without depriving the accused of his right to cross-examine".[62]

Die hof beklemtoon dan ook die plig van 'n voorsittende beampte om te verseker dat hy in beheer van die verrigtinge is en om dus toe te sien dat die tussenganger sy taak na behore en sonder vooroordeel vervul. Die hof beskik ook oor die bevoegdheid om in gepaste gevalle te gelas dat 'n vraag in direkte vorm aan die getuie oorgedra word.[63]

In sy uitspraak verwys regter Melunsky met goedkeuring na die volgende aanhaling uit 'n Kanadese saak, *Regina v Toten*:[64]

> "The public adversarial process is, however, a means to an end – the ascertainment of truth – and has virtue only to the extent that it serves that end. Where the established process hinders the search for the truth, it should be modified unless due process or resource-based considerations preclude such modification."

Die hof kom uiteindelik tot die gevolgtrekking dat die bepalings van artikel 170A nie inbreuk maak op die reg op kruisondervraging van die applikant nie.[65] In die lig van hierdie bevinding is dit dus onnodig vir die hof om te oorweeg of die onkonstitusioneelverklaring van artikel 170A strydig met artikel 30(3) van die tussentydse Grondwet sou wees en om die vraag te beantwoord of artikel 170A se bestaan geregverdig word deur artikel 33 van die tussentydse Grondwet.[66]

7 1 2 Die reg op 'n openbare verhoor

Die tweede been van die applikant se argument dat hy van 'n billike verhoor ontneem word, berus daarop dat die verhoor nie in ope hof geskied nie aangesien die getuie in 'n afsonderlike vertrek getuienis lewer wat deur geslotebaantelevisie na die hofsaal herlei word. Die essensie van die argument behels dat daar geen openbare verhoor is indien die beskuldigde en getuie nie in dieselfde hofsaal is nie.[67]

In sy uitspraak verwys regter Melunsky na onder andere twee Amerikaanse beslissings, *Coy v Iowa*[68] en *Maryland v Craig*.[69] In die *Iowa*-saak het die vraag ontstaan of die teenwoordigheid van 'n skerm tussen die beskuldigde en getuies wat aangebring is sodat die getuies die beskuldigde nie moes sien nie, die beskuldigde se reg op 'n billike verhoor geskend het. In 'n meerderheidsbeslissing ten gunste van die beskuldigde, bevind die US Supreme Court dat die Sesde Amendement tot die VSA-Grondwet aan 'n beskuldigde die reg waarborg van 'n aangesig-tot-aangesig-konfrontasie met getuies tydens 'n verhoor.

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62 201g–h.
63 201i.
64 (1993) 16 CRR (2d) 49 (*Ontario Court of Appeal*) 58.
65 202e.
66 Ingevolge a 30(3) van die tussentydse Grondwet word in alle aangeleenthede rakende 'n kind sy of haar beste belang voorop gestel terwyl a 33 vir die beperking van 'n fundamentele reg vervat in hfst 3 onder sekere omstandighede voorsiening maak.
67 202g–h.
68 101 L Ed 2d 857.
69 111 L Ed 2d 666.

In die *Maryland*-saak het die klaagster, aanklaer en regsverteenwoordiger van die beskuldigde in 'n afsonderlike vertrek plaasgeneem waar die klaagster getuig het en kruisondervra is. 'n Video-monitor het die gebeure na die regter, jurie en beskuldigde in die hofsaal herlei. Die meerderheid van die US Supreme Court beslis in hierdie geval dat die Sesde Amendament nie so 'n prosedure verbied nie. Regter Melunsky verwys veral na die volgende opmerking van regter O'Connor in die *Maryland*-saak waaraan hy heelwat waarde heg:

> "We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy."[70]

Die hof wys daarop dat die reg op 'n openbare verhoor daargestel is om te verseker dat geheime verhore nie plaasvind nie, maar dat dit geen waarborg bied dat die beskuldigde en getuie fisies in dieselfde hofsaal teenwoordig moet wees nie.[71] Regter Melunsky beslis dat die beskuldigde se reg op 'n openbare verhoor nie geskend word indien 'n getuie getuienis aflê in 'n afsonderlike vertrek nie en kom bygevolg tot die gevolgtrekking dat artikel 170A ook ten opsigte van hierdie tweede been van die applikant se argument, nie onkonstitusioneel is nie.[72]

7 2 Kommentaar op *Klink v Regional Court Magistrate*

Daar kan nie saamgestem word met die bevinding van regter Melunsky dat artikel 170A nie sodanig inbreuk maak op die reg op kruisondervraging dat die bepalings daarvan nie as onkonstitusioneel aan te merk is as synde strydig met die reg op 'n billike verhoor nie.

In die akkusatoriese strafprosesstelsel word die wesenlike belang van konfrontering van 'n getuie deur middel van kruisondervraging algemeen erken.[73] Daar word aan die hand gedoen dat direkte konfrontasie tussen getuie en kruisondervraer gewoonlik noodsaaklik is vir effektiewe kruisondervraging. Die posisie ingevolge artikel 170A(2)(a) waardeur kruisondervraging deur middel van 'n tussenganger geskied, kan in meerdere gevalle kruisondervraging aan bande lê en tot gevolg hê dat effektiewe kruisondervraging nie kan geskied nie.[74] Selfs indien 'n hof ingevolge artikel 170A(2)(b) sou gelas dat 'n tussenganger 'n vraag direk moet oordra aan die getuie, sal dit 'n onderbreking van die kruisondervraging tot gevolg hê aangesien die hof so 'n bevel van vraag tot vraag sal moet maak. Daarby kan die staatsaanklaer beswaar aanteken teen so 'n versoek van die verdediging en dit kan verder daartoe bydra dat die kruisondervraging met rukke en stote geskied.

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70 203b.
71 203d–e.
72 204e.
73 Kriegler (vn 3) 419–426; Du Toit (vn 5) 22–20.
74 Sien ook Van der Merwe "Cross-examination of the (sexually abused) child witness in a constitutionalized adversarial trial system: is the South African intermediary the solution?" 1995 *Obiter* 194 208–209; Schwikkard en Jagwanth "*K v The Regional Magistrate* 1996 1 SACR 434 (E): the constitutionality of section 170A of the Criminal Procedure Act" 1996 *SAS* 215.

Die verwysing deur regter Melunsky na die gebruik van tolke in die howe en die verband wat hy daarmee deurtrek na tussengangers,[75] oortuig nie. Van 'n tolk word verwag om 'n vraag te tolk soos dit gevra is en nie om net die algemene strekking daarvan oor te dra soos 'n tussenganger ingevolge artikel 170A(2)(b) mag doen nie. 'n Verdere verskil in hierdie verband is dat kruisondervraging met behulp van 'n tolk steeds geskied van aangesig tot aangesig tussen die getuie en kruisondervraer terwyl ingevolge artikel 170A(3)(b) en (c) 'n getuie hom op 'n plek bevind waar iemand wie se teenwoordigheid hom kan ontstel, buite sig en gehoor is. Daar word aan die hand gedoen dat ook hierdie bepalings onkonstitusioneel is omdat behoorlike en effektiewe kruisondervraging 'n aangesig-tot-aangesig-konfrontasie tussen getuie en kruisondervraer veronderstel.[76]

Vir sover regter Melunsky in die *Klink*-saak die argument van die applikant verwerp het dat daar geen openbare verhoor kan wees indien die beskuldigde en getuie nie in dieselfde hofsaal teenwoordig is nie, word daarmee saamgestem. Daar word aan die hand gedoen dat die aan- of afwesigheid van 'n getuie in 'n hofsaal saam met die beskuldigde nie 'n effek het op die openbare aard al dan nie van die verhoor nie. Openbare verhoor verwys in hierdie verband na die openheid en deursigtigheid van die proses asook na die toeganklikheid van getuienis vir die breë publiek.

7 3 Gevolgtrekking

Uit die bovermelde volg dit na my mening dat die bepalings van artikel 170A sodanig inbreuk maak op die fundamentele reg op 'n billike verhoor, en meer spesifiek die reg op kruisondervraging, dat dit as *prima facie* onkonstitusioneel aan te merk is. Die vraag ontstaan egter nou of die reg op kruisondervraging deur artikel 33(1) van die tussentydse Grondwet beperk word.[77] Die bepalings van artikel 170A kan as *algemeen geldende reg* beskou word wat *redelik* en *regverdigbaar* is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid.[78] Artikel 170A is reeds in detail bespreek en daar word aan die hand gedoen dat dit as algemeen geldende reg beskou kan word in die mate waarin die bepaling toepassing vind ten opsigte van alle getuies onder die ouderdom van 18 jaar wat aan onredelike geestesspanning of -lyding blootgestel sal word indien die getuie by die verrigtinge getuig. Die redelikheid asook die regverdigbaarheid daarvan in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid blyk duidelik uit die beweegredes waarom en wyse waarop dié wetgewing geïnisieer is. Soos duidelik uit die aanbevelings van die Regskommissie blyk, was die oogmerk met hierdie prosedure om die kindergetuie, in belang van die regspleging in die breë, te akkommodeer in die bestaande strafprosesregstelsel. Die prosedure het met die minimum inbreukmaking op die bestaande regte van 'n beskuldigde en met behoud van die adversatiewe stelsel, gepaard gegaan. Daarom word aan die hand gedoen dat die bepalings van artikel 170A sowel redelik as regverdigbaar is. Daar kan ook nie gesê word dat artikel 170A die

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75 *Klink*-saak 200g; sien ook Schwikkard en Jagwanth (vn 74) 219.

76 Van der Merwe (vn 74) 209.

77 Aangesien die *Klink*-uitspraak gelewer is tydens die bestaan van die tussentydse Grondwet, word die bespreking gedoen aan die hand van die bepalings van hierdie Grondwet. Daar word aan die hand gedoen dat die posisie ingevolge a 36 van die huidige Grondwet van die Republiek van Suid-Afrika, 108 van 1996, dieselfde sal wees.

78 A 33(1)(a)(i) en (ii) van die tussentydse Grondwet.

wesenlike inhoud van die reg op kruisondervraging ontken nie aangesien voorsiening steeds gemaak word vir uitoefening van die reg al is dit ook met die beperkings wat die tussenganger daarop plaas. Die kruisondervraer mag steeds enige toelaatbare vraag stel in die volgorde wat hy verkies. In sommige gevalle kan die direkte vraag ook deur die tussenganger oorgedra word. In die verband voldoen artikel 170A dus ook aan die bepalings van artikel 33(1)(b) van die tussentydse Grondwet. Ten opsigte van die vereiste dat die beperking van die reg op kruisondervraging *noodsaaklik* moet wees,[79] word aan die hand gedoen dat die wye reaksie hier te lande asook internasionaal rondom die dilemma van kindergetuies in die tipies akkusatoriese strafprosesstelsel, aanduidend was van die onvermoë van die bestaande stelsel om die probleme wat ontstaan het, effektief die hoof te bied. Verandering ter wille van die behoud van die geloofwaardigheid van die stelsel is genoodsaak.[80]

Die vraag of die reg op kruisondervraging onder die gegewe omstandighede beperk word deur die bepalings van artikel 33(1) van die tussentydse Grondwet, word bygevolg bevestigend beantwoord.

8 SLOT

Alhoewel artikel 170A aanvanklik, soos normaalweg die geval is met ingrypende wysigings aan die bestaande stelsel, met agterdog bejeën en die aanwending daarvan met 'n mate van skuheid vermy is, word daar nou vry algemeen van hierdie maatreël gebruik gemaak in die aanbieding van kindergetuienis.

Dit is egter nie net getuies onder die ouderdom van 18 jaar wat konfrontasie in ope hof traumaties ervaar en bygevolg in 'n posisie geplaas word om óf te verkies om nie getuienis af te lê nie óf om wel te getuig en vanweë die teenwoordigheid van die beskuldigde persoon geïntimideerd te voel en as getuie 'n swak indruk te maak nie. Veral die posisie van volwasse verkragtingslagoffers[81] en slagoffers van geweldsmisdade[82] val in hierdie verband op.

In 'n poging om ook voorsiening te maak vir onder meer hierdie gevalle het die wetgewer 'n wysiging van die Strafproseswet in die vooruitsig gestel.[83] Hiervolgens sal dit vir 'n hof moontlik wees om te beveel dat enige getuie of beskuldigde, indien die getuie of beskuldigde daartoe instem, getuienis deur middel van geslotekringtelevisie of 'n soortgelyke elektroniese medium aflê. Faktore wat deur 'n hof in ag geneem kan word by oorweging van so 'n aansoek, is onder meer die belang van geregtigheid en die belang van die publiek asook die waarskynlikheid dat die benadeling of skade wat 'n persoon sou tref indien hy of sy in die ope hof getuig, vermy sal kan word.

Hierdie wysiging aan die bestaande beginsel[84] dat alle strafregtelike verrigtinge in die teenwoordigheid van 'n beskuldigde plaasvind, word verwelkom. Die bepaling sal verseker dat beskerming verleen word aan daardie getuies wat vanweë onder meer die erns van of tipe misdryf ter sprake, emosioneel nie in

79 Soos vereis in a 33(1)(b)(aa) van die tussentydse Grondwet.
80 Vir 'n volledige bespreking van die bepalings van a 33 van die tussentydse Grondwet, sien Van der Merwe (vn 73) 210 ev.
81 Sien Allan (vn 14) 186; Waller (vn 15) 152.
82 Schwikkard (vn 14) 49; Engelbrecht (vn 1) 21.
83 Die Strafproseswysigingswet 86 van 1996 gepubliseer in *SK* 17596 van 1996-11-20.
84 A 158(1) van die Strafproseswet.

staat is om die beskuldigde in die ope hof te konfronteer nie. Aangesien geen tussenganger betrokke is nie, sal daar minimale inbreuk op die reg op kruisondervraging gemaak word.

Soos hierbo aangetoon, verleen die beperkende bepalings van sowel artikel 33 van die tussentydse Grondwet as artikel 36 van die finale Grondwet bestaansreg aan artikel 170A om sodoende nie alleen 'n billike verhoor in gemeenskapsbelang tot gevolg te hê nie, maar ook te verseker dat die hof se soeke na die waarheid vergemaklik word. Daar word aan die hand gedoen dat die belange van die regspleging in die breë gedien sal word deur die voorgestelde verdere uitbreiding van beskermingsmaatreëls van toepassing op getuies. Sonder om volledig daarop in te gaan, word voorsien dat enige moontlike inbreuke deur die voorgestelde wysigings op die konstitusionele regte van 'n beskuldigde persoon, deur die bepalings van artikel 36(1) van die finale Grondwet ondervang sal kan word.

Levelling the playing field: A feminist redefinition of the crime of rape*

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OPSOMMING

Die gelykmaking van die speelterrein: 'n feministiese heromskrywing van die misdaad van verkragting

Die toenemende omvang van geweld teen vroue in die huidige Suid-Afrikaanse samelewing is simptomaties van die sistemiese onderdrukking van Suid-Afrikaanse vroue. Ten spyte van die staat se geneentheid tot geslagtelike gelykheid wat in die Finale Grondwet en in die ratifikasie van die Vrouekonvensie voorkom, lei die patriargale sienswyse van die Suid-Afrikaanse reg met betrekking tot verkragting daartoe dat geslagsongelykheid bly voortbestaan. In hierdie artikel word daar met verwysing na die Vrouekonvensie en Kanadese reg met betrekking tot die reg op geslagsgelykheid en die misdaad van seksuele aanranding betoog dat in die lig van die reg op geslagsgelykheid in artikel 9(3) van die Finale Grondwet, dit moontlik is om die beginsels van die misdaad van verkragting te herformuleer om sodoende substantiewe geslagsgelykheid te bewerkstellig. In hierdie verband word bewys dat die bereiking van substantiewe geslagsgelykheid vereis dat die misdaad van verkragting deur die misdaad van seksuele aanranding vervang moet word en dat laasgenoemde misdaad heromskryf moet word as onregmatige en opsetlike seksuele wangedrag van 'n man teenoor 'n vrou. Die inhoud van die beginsels van die misdaad en die bewyslas wat met betrekking daartoe ontstaan, word in die lig van die reg op substantiewe geslagsgelykheid herformuleer en volledig uiteengesit.

1 INTRODUCTION

Violence against women is endemic in South African society. It was estimated in 1990 that approximately 1 000 South African women can expect to be raped every day.[1] It has recently been reported that the incidence of rape has increased by about 81% from 1990 to 1995.[2] This high incidence of rape is indicative of the systemic powerlessness of South African women. Despite the state commitment to gender equality that is evident in the provisions of the Final

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* This article is an enlarged version of a paper entitled "The empowerment of the rape survivor: the reform of rape laws in the light of the Final Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women" presented at the international conference on "Violence, abuse and women's citizenship" (1996) Brighton, England.

1 Vogelman "Violent crime: rape" in McKendrick and Hoffman (eds) *People and violence in South Africa.*

2 Nel "The South African Police Service victim support programme initiative: the way forward" (1996). Unpublished paper presented at *International Crime Conference: Crime and Justice in the 90s* 8.

Constitution[3] and in the ratification of the Women's Convention,[4] South African rape law is characterised by androcentric conceptions of the ontology and effect of rape that obscure and perpetuate gender inequality. This article is premised upon a feminist analysis of the provisions of the Women's Convention and of South African and comparable foreign jurisprudence in the context of the substantive law of rape. It will be shown that the principle of substantive gender equality that informs the Women's Convention and Canadian jurisprudence is conducive to the gender-sensitive redefinition of the South African crime of rape.

2 TOWARDS A FEMINIST JURISPRUDENCE OF VIOLENCE AGAINST WOMEN

Violence against women constitutes the primary manifestation of the systemic subordination of women in contemporary society. This subordination is founded upon the distortion of the essential biological *difference* between women and men (sex) and its transformation into socio-culturally constructed gender roles and stereotypes.[5] This transformation of sex into gender is achieved in two ways. First, the systemic exercise of male power over women (by means of, *inter alia*, the perpetration of acts of violence such as rape and domestic violence) defines and constitutes the relations between the sexes as power relations of domination and subordination. Secondly, the imbalance in these power relations is obscured by patriarchal ideology. This obfuscation is achieved by the ideological representation of certain ideas, beliefs and practices concerning these relations as "natural" or "inevitable".[6] The power imbalances that underpin heterosexual intercourse, for example, are obscured by the naturalisation of beliefs about innate male sexual desire and female passivity. These beliefs, in turn, generate "rape myths" such as the view that rape is a consequence of uncontrollable male desire or that women's silence constitutes consent. The obfuscation of these power imbalances by adherence to such myths and gender stereotypes disadvantages women and perpetuates gender inequality.

This disadvantage is exacerbated for certain women by the intersection of gendered power imbalances with other power imbalances premised, *inter alia*, upon race, sexual orientation, culture, religion and age. Crenshaw explains the intersection between race and gender discrimination by reference to women's experiences of this discrimination:

> "Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double discrimination – the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women – not the sum of race and sex discrimination, but as Black women."[7]

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3 Constitution of the Republic of South Africa 1996, hereinafter referred to as the "Final Constitution".

4 Convention on the Elimination of All Forms of Discrimination Against Women GA Res 34/180 1979; 19 ILM 33 1980, hereinafter referred to as the "Women's Convention".

5 Van Marle "'One is not born, but rather becomes, a woman' geslagtelikheid en geslag in die tussentydse Grondwet" 1995 *SA Public Law* 461–462.

6 Fegan "'Ideology' after 'discourse': a reconceptualization for feminist analyses of law" 1996 (23) *J of Law and Society* 173 180–181.

7 Crenshaw "Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics" in Kelly and Weisberg (eds) *Feminist legal theory foundations* (1993) 383 385.

Violence against black women by white men constitutes double discrimination. The pornographic representation of black women as promiscuous or "a good lay", for example, is justified not only by androcentric, but also by racist conceptions of women's sexuality. Violence against black women by black men, on the other hand, discriminates against black women as black women. The marital rape of black women, for example, is justified both by androcentricism and in terms of African culture.[8]

Patriarchal and other dominant ideologies are maintained and reproduced at an *inter*-institutional level by dominant hegemony.[9] This process of hegemonic control is facilitated by the operation of dominant discourses *within* different institutions of civil society and the state, such as the law. Duncan has argued that dominant legal discourse does not recognise the concept of sexual difference. The legal subject is gendered male. Woman, per contrast, has no legal subjectivity but is rendered "other" and infused with characteristics that are reflective of male legal subjectivity.[10] In the context of the criminal law, the legal subject, albeit presented as a "man of reason", is provided "[w]ith space for his construction as a violent, desiring being".[11] The gendered nature of the legal subject, and the space for the expression of male sexual desire, is most clearly evident in the substantive law of rape. Penetration is paramount, consent is *de facto* presumed unless disproved, and male belief in the existence of consent, however unreasonable, is a valid defence. Dominant legal discourse thus clothes socially constructed gender stereotypes with the legitimacy of the law and thereby obscures and perpetuates gender inequality.

The effect of feminist strategy on the Canadian law of sexual assault[12] indicates that the hegemony of this discourse may be resisted by the development of a competing discourse of substantive gender equality. This discourse is premised upon the recognition and accommodation of sexual (as well as racial, cultural, religious and other) *difference* and the eradication of gender (and intersectional) discrimination. In the context of rape law, the attainment of substantive equality necessitates the recognition of women's *different* (and *intersectional*) *experiences* of, and *responses* to, gender-based violence, and the *accommodation* of these differences. It also necessitates the recognition of the *different* (and *intersectional*) *effects* of both gender-based violence itself and of secondary victimisation by the criminal justice system on different women, and the eradication of these effects. The attainment of these objectives requires, *inter alia*, a gender-sensitive reformulation of the substantive elements of the crime of rape and the eradication of gender (and other) bias from the culture of court personnel in order to facilitate the gender-sensitive interpretation and application of these reformulated provisions.[13] The dearth of local jurisprudence in this regard

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8 Intersectional disadvantage on account of gender, race and culture is prevalent in South Africa. It is unfortunately not possible to deal with the multi-faceted nuances of this disadvantage in an article of this magnitude.

9 Pantazis "The problematic nature of gay identity" 1996 *SAJHR* 291 302.

10 Duncan "The mirror tells its tale: constructions of gender in criminal law" in Bottomley (ed) *Feminist perspectives on the foundational subjects of law* (1996) 173 177.

11 *Ibid.*

12 See "The crime of rape: a comparative analysis" *infra.*

13 The attainment of substantive gender equality also necessitates the reform of the laws of procedure and evidence that are applied in rape trials and the restructuring of the response of the criminal justice system to the incidence of rape. A detailed consideration of these reforms is, however, beyond the scope of the present article.

necessitates recourse to the provisions of the Women's Convention and the jurisprudence of comparable jurisdictions.

3 THE WOMEN'S CONVENTION

The Women's Convention, albeit signed and ratified by the South African state, has not yet been incorporated into municipal law.[14] The Department of Justice has, however, stated that it aims to enact legislation to implement the provisions of the Women's Convention.[15] In order to obviate the ideological distortion of these provisions, and to preclude their implementation in a manner that is conducive to the attainment of mere formal equality, it is necessary to explicate the principle of substantive equality that they embody.

3 1 Violence against women

Gender-based violence has been defined by the Committee on the Elimination of Discrimination Against Women (CEDAW) as

> "[v]iolence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty".[16]

Albeit not expressly dealt with in the Women's Convention, violence against women has been characterised by CEDAW[17] as gender discrimination within the meaning of article 1.

3 2 Substantive gender equality

Article 1 of the Women's Convention provides that

> "the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

The use of a male comparator to determine gender equality may, upon a restrictive interpretation of article 1, result in failure to recognise and accommodate gender difference. Human rights may therefore be accorded to women on the basis of their similarity to, rather than their difference from, men. It appears, however, from an analysis of certain other provisions of the Women's Convention, that the principle of gender equality is clearly substantive in nature.

First, article 2(f) enjoins States Parties "[t]o modify or abolish existing *laws*, regulations, customs and *practices* . . ." that discriminate against women (own emphasis). Article 5(a) requires States Parties

> "[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women".

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14 In terms of s 231(4) of the Final Constitution, "[a]ny international agreement becomes law in the Republic when it is enacted into law by national legislation . . .".

15 Department of Justice "*Justice Vision 2000 -- draft strategic plan for the transformation and rationalisation of the administration of justice*" 3rd draft (1996) 21.

16 General Recommendation No 19 of 1992.

17 *Ibid*.

Since legal discourse is infused with socially constructed gender roles and stereotypes, the provisions of article 5(a) apply to discriminatory prejudices and practices that are imbedded both in legal and in social discourses. The cumulative effect of these provisions is thus to impose a duty on States Parties, *inter alia*, to remove these prejudices and practices from the substantive law of rape, to reformulate it in a manner that *accommodates gender difference*, and to excise gender bias from the culture of court personnel in order to facilitate its gender-sensitive interpretation and application.

Secondly, the provisions of article 3,[18] read with those of article 2(e),[19] impose a duty on States Parties, not merely to refrain from gender discrimination, but also to take positive steps to prevent the perpetration of discriminatory acts by private persons. CEDAW has confirmed that article 2(e) engenders state responsibility for gender-based violence by private persons.[20] The infusion of legal discourse with discriminatory gender stereotypes that invalidate women's sexual difference constitutes a form of secondary victimisation of the rape complainant that exacerbates the underreporting of rape. Failure by States Parties to eradicate these stereotypes thus constitutes, in *effect*, a failure to exercise due diligence to prevent and punish gender-based violence, and should, it is submitted, result in state responsibility in terms of the Women's Convention.[21]

The Women's Convention thus clearly embodies a principle of substantive gender equality. Cook has argued that the Women's Convention has moved from

> "[a] sex neutrality norm that requires equal treatment of men and women, usually measured by how men are treated, to recognize that the distinctive characteristics of women and their vulnerabilities to discrimination merit a specific legal response".[22]

4 CONSTITUTIONAL JURISPRUDENCE: EQUALITY, DIFFERENCE AND THE RIGHT TO FREEDOM FROM VIOLENCE

The South African state has signified a preliminary commitment to the provisions of the Women's Convention by embodying the principle of gender equality in section 9 of the Final Constitution. It has also entrenched the right to freedom from violence in section 12(1)(c). An assessment of the constitutionality of

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18 Art 3 provides: "States Parties shall take in all fields, in particular the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

19 Art 2(e) provides that States Parties undertake "[t]o take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise".

20 *Op cit* fn 16.

21 The state's duty to prevent and punish acts of gender-based violence is broad in ambit. It encompasses, *inter alia*, a duty to implement effective policing and arrest procedures, programmes for the rehabilitation of sexual assault offenders, and the reformulation of parole conditions and procedures. Failure to comply with this duty will engender state liability in terms of international law. A detailed consideration of the ambit of this duty, and the sanctions in terms of the Women's Convention for its breach, is beyond the scope of this article. (See, *inter alia*, Cook "State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women" in Cook (ed) *Human rights of women national and international perspectives* (1994)).

22 Cook *op cit* fn 21 235.

South African rape law, and the measures that are required for its reform, necessitates a consideration of the nature and content of these provisions.

4 1 The right to equality

4 1 1 South African law: the test of disadvantage

Section 9(3) of the Final Constitution provides that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender [or] sex . . .". In terms of section 9(5), "[d]iscrimination on one or more of the [enumerated] grounds . . . is unfair unless it is established that the discrimination is fair". The application of the right to freedom from discrimination is thus premised upon a dual enquiry. First, it must be established by the party who alleges that an instance of differential treatment violates the provisions of section 9(3) that such treatment constitutes discrimination on one of the enumerated grounds. If it does, it is presumed to be unfair in terms of section 9(5). At the second stage of the enquiry, the party seeking to uphold the discriminatory treatment bears the *onus* of rebutting the presumption of unfairness. If the presumption is rebutted, the discrimination is not unfair. If it is upheld, the differential treatment constitutes unfair discrimination. If an instance of differential treatment is held to constitute unfair discrimination, it may none the less still be upheld if, in terms of section 36(1),[23] it constitutes a justifiable limitation of the right in question.

A test to determine what constitutes unfair discrimination on account of sex in terms of the Interim Constitution[24] was formulated in *Brink v Kitshoff*.[25] The decision concerned the constitutionality of section 44 of the Insurance Act[26] in terms of which married women are deprived of the benefits of life insurance policies taken out in their favour or ceded to them by their husbands. The court held that, since the difference in treatment in section 44 between married women and married men disadvantages the former and not the latter, it constitutes unfair discrimination on the ground of sex.[27] The court took the view that discrimination on account of sex has resulted in "[d]eep patterns of disadvantage . . . [in our society that] are particularly acute in the case of black women, as race and gender discrimination overlap". Since a commitment to gender equality is

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23 S 36(1) provides that "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose".

24 Constitution of the Republic of South Africa Act 200 of 1993, hereinafter referred to as the "Interim Constitution". S 8(2) of the Interim Constitution is the approximate equivalent of s 9(3) of the Final Constitution. S 8(2) and s 9(3) differ, in the present context, only in so far as marital status and pregnancy are included as grounds of discrimination in terms of s 9(3) but not in terms of s 8(2).

25 1996 6 BCLR 752 (CC).

26 27 of 1943.

27 *Supra* fn 25 769D–F.

evident in the provisions of the Interim Constitution, such discrimination must be eradicated.[28]

Although the references to "patterns of disadvantage" and to the overlap between race and gender discrimination contain the seeds of a principle of substantive equality, the use of a male comparator to determine the existence of disadvantage problematises the delineation of discrimination in cases, such as violence against women, where there is no comparable male disadvantage. It is conducive to an analysis of equality that denies the reality of women's differential experiences of, and responses to, acts of male violence.

4 1 2 Canadian law: the social context test

In terms of section 15(1) of the Canadian Charter,[29]

> "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination[30] and, in particular, without discrimination based on . . . sex . . .".[31]

Prior to the decision in *Andrews v Law Society of British Columbia*,[32] the American "similarly situated" test was adhered to in Canadian law. In terms of this test, the imposition of a burden upon, or the denial of a benefit to, an individual or group amounts to discrimination if the individual or group is similarly situated to an individual or group that is freed from the burden or given the benefit. If the two individuals or groups are differently situated, the differential treatment in question is not discriminatory.[33] It was held, on the basis of this test, that restrictions placed on unemployment benefits for pregnant women do not amount to sex discrimination, since pregnant women are differently situated from non-pregnant women and from men.[34] The "similarly situated" test is clearly premised upon an androcentric legal norm. In so far as women are the same as men, they qualify for equal treatment. In so far as they differ, however, they do not. The test thus obscures the discriminatory effect of a failure to accommodate women's difference. Mahoney has argued that, since the "similarly situated" test ignores "[s]ocial, economic and physical disadvantages or prejudices . . . [it] often has the effect of perpetuating inequality rather than curing it".[35]

The "similarly situated" test was rejected in favour of a "social context"[36] test in *Andrews v Law Society of British Columbia*.[37] The court took the view that the

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28 *Supra* fn 25 769G–I.

29 Canadian Charter of Rights and Freedoms, Constitution Act of 1982 Part I, hereinafter referred to as the "Canadian Charter".

30 Albertyn and Kentridge "Introducing the right to equality in the Interim Constitution" 1994 *SAJHR* 149 160: "Most constitutional and legislative instruments which outlaw discrimination [like the Canadian Charter] have left the pejorative connotation of the word discrimination to speak unaided to those who interpret them."

31 See also s 28, in terms of which "[t]he rights and freedoms referred to in [the Charter] are guaranteed equally to male and female persons"

32 1989 56 DLR (4th) 1 (SCC).

33 Davis "Equality and equal protection" in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and constitutionalism – the new South African legal order* (1994) 196 197.

34 *Bliss v Attorney General of Canada* 1979 1 SCR 183 (SCC) 190–191.

35 Mahoney "The constitutional law of equality in Canada" 1992 (24) *NYUJ Int'l L and Pol* 759 770.

36 Although the court did not expressly refer to the test as the "social context" test, it will be referred to as such in order to distinguish it both from the American "similarly situated" test and from the South African test of "disadvantage".

37 *Supra* fn 32.

determination of what constitutes discrimination must not only be made "[i]n the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of . . . society".[38] Mahoney has argued that this test

> "[r]equires judges to look at women [not in relation to a male norm but] . . . in their place in the real world and to confront the reality that the systemic abuse and deprivation of power women experience is because of their place in the sexual hierarchy".[39]

The social context test therefore encompasses a principle of substantive gender equality. The right to gender equality in section 15(1) of the Charter, substantively conceived, was taken into account by L'Heureux-Dube J in *R v Park*[40] in order to "[e]nsure that [the] criminal law [of sexual assault] is responsive to women's realities, rather than a vehicle for the perpetuation of historic repression and disadvantage".

The Canadian approach is clearly premised upon the accommodation of sexual difference and the eradication of the effects of systemic gender disadvantage *per se*, without reference to a male comparator.[41] However, unlike its South African counterpart, it fails to take account of women's experiences of intersectional discrimination. It is suggested that, because both tests embody a criterion of disadvantage, they are amenable to amalgamation and modification in a manner that reflects the realities of systemic gender discrimination. The test should be whether, in the context of the place of the group in the entire social, political and legal fabric of society, the differential treatment in question constitutes unfair discrimination on one or more constitutionally entrenched grounds, and/or on the basis of the intersection of one or more of these enumerated grounds. The test thus construed is, it is submitted, conducive to the accommodation of all difference and the eradication of the effect of all discrimination in the South African law of rape.

4 2 The right to freedom from violence

4 2 1 South African law

Section 12(1)(c) of the Final Constitution provides that "[e]veryone has the right to freedom and security of the person, which includes the right . . . to be free from all forms of violence from either public or private sources".[42] Although a

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38 *Supra* fn 32 32.

39 Mahoney "Canadian approaches to equality rights and gender equity in the courts" in Cook (ed) *Human rights of women national and international perspectives* (1994) 445.

40 1995 2 SCR 836 (SCC) par 51. The other members of the court refrained from commenting on the views of L'Heureux-Dube J in this regard. (See the discussion of "Intention", *infra*, for a detailed consideration of these views.)

41 See the discussion of "The constitutionality of the crime of rape: a comparative analysis", *infra*, for a detailed analysis of the gender-sensitivity of the Canadian approach to sexual assault.

42 Since s 12(1)(c) embodies a right to *freedom* rather than *protection* from violence, it is uncertain whether it creates a mere negative state duty to refrain from its infringement, or whether it also imposes a positive duty on the state to take steps, such as the prevention and punishment of gender-based violence, to ensure its effective exercise. A positive duty, if it is held to exist, will clearly encompass a broad spectrum of state responsibility. (See fn 21 *supra*.) A detailed consideration of the nature and content of this responsibility

continued on next page

private act of male violence against a woman clearly contravenes section 12(1)(c), there is no authority concerning the consequences of such a contravention. The majority in *Du Plessis v De Klerk*[43] took the view that, whereas an individual may found an action upon a contravention of the Bill of Rights in the Interim Constitution in a private dispute that is regulated by statute or in which her opponent relies on an executive action that is regulated by statute or by the common law, she may not do so in a private dispute that is regulated by the common law in which there is no aspect of state involvement. Since rape constitutes a crime that is regulated by the common law, it may be argued that a complainant does not, in a private dispute, have a direct cause of action against the perpetrator for a contravention of the Bill of Rights in the Interim Constitution. In terms of section 8(2) of the Final Constitution, however, the Bill of Rights "binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right". The provisions of section 8(2), read with section 8(1),[44] justify the conclusion that the Bill of Rights is directly horizontally applicable to the relations between private individuals that are regulated by the common law and in which there is no element of state involvement. A complainant may therefore found an action for constitutional redress against a perpetrator upon a violation of section 12(1)(c). However, there is as yet no authority concerning the nature and content of such constitutional redress.

4 2 2 American law

Since the due process clause in section 1 of the fourteenth amendment to the American Constitution[45] is limited by the doctrine of state action to relations between the state and private individuals,[46] specific civil rights legislation has been enacted to create individual liability for the perpetration of gender-based violence. In terms of section 40302(b) of the Violence Against Women Act,[47] "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender". Section 40302(c) provides that any person who violates this right by committing such a crime, is liable to the victim for "[c]ompensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate". No prior criminal complaint, prosecution or conviction is necessary to establish a cause of action in terms of section 40302(c).[48]

In the light of the direct horizontality of the Bill of Rights in the Final Constitution, it is not necessary to enact legislation to generate similar liability for a contravention of section 12(1)(c). It is accordingly suggested that, by analogy

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is beyond the purview of the present article. (See *Jane Doe v Board of Commissioners of Police for Municipality of Toronto* 1990 72 DLR (4th) 580 (Ont HC) for the Canadian approach in this regard.)

43 1996 5 BCLR 658 (CC) 682–685.

44 S 8(1) provides: "[T]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

45 The Constitution of the United States of America, Fourteenth Amendment, 1868. S 1 provides that no state shall "[d]eprive any person of life, liberty, or property without due process of law . . .".

46 *Civil Rights Cases* 1883 109 US 11.

47 18 USC 1994.

48 S 40302(e)(2) 18 USC 1994.

with section 40302(c), South African law should recognise a constitutional claim for damages by a woman against a perpetrator of gender-based violence for a violation of her right to freedom from violence. This claim should exist independently of a delictual claim against the perpetrator, and regardless of whether criminal proceedings have been instituted or not.

5 THE CONSTITUTIONALITY OF THE CRIME OF RAPE: A COMPARATIVE ANALYSIS

South African law is characterised by a plethora of sexual offences that are differentiated according to gender,[49] age[50] and mental defectiveness.[51] Rape, the most pervasive sexual offence, is defined as the unlawful and intentional sexual intercourse by a man with a woman without her consent.[52] It comprises five elements, namely (1) sexual intercourse; (2) with a woman; that is (3) unlawful; (4) without the woman's consent; and (5) intentional. The constitutionality of these elements will be assessed with reference to the social context test, as redefined, and with the assistance of the jurisprudence of comparable jurisdictions.

5 1 Sexual intercourse

5 1 1 South African law

The *actus* of the crime of rape comprises any penetration, however slight, of the woman's vagina by the man's penis, regardless of whether or not it results in ejaculation.[53] Other sexual contact with a woman's body, such as anal or oral penetration by any object, vaginal penetration by a part of the man's body other than the penis or by an object, and non-penetrative conduct such as fondling of the genitals, merely constitutes indecent assault,[54] a less serious offence that entails a more lenient sentence. Conduct that violates a woman's sexual integrity without involving contact with her body, such as sexual overtures, constitutes, at most, *crimen iniuria*,[55] an offence that is rarely policed or prosecuted.

5 1 2 Canadian law

The crime of rape has been replaced with the three-tiered crimes of sexual assault,[56] sexual assault with a weapon, threats to a third party or causing bodily

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49 Snyman *Criminal law* (1995) 424 419 340. The crime of rape consists in the unlawful and intentional sexual intercourse by a man with a woman without her consent. The crime of indecent assault, on the other hand, consists in the unlawful and intentional commission of an assault by any person on another person, regardless of their gender, with the object of committing an indecency. The crime of sodomy consists in unlawful and intentional intercourse between two adult males *per anum*.

50 See s 14 of the Sexual Offences Act 23 of 1957.

51 See s 15 of the Sexual Offences Act 23 of 1957.

52 Snyman *op cit* fn 49.

53 See, *inter alia, S v F* 1990 1 SACR 238 (A) 244h.

54 See, however, the decision in *S v M (2)* 1990 1 SACR 456 (N) 457f, where the court stated that it is not clear in South African law whether anal intercourse with a woman without her consent constitutes the crime of rape, but declined to decide the matter since the accused had been charged, not with rape, but with indecent assault.

55 Burchell and Milton *Principles of criminal law* (1991) 454.

56 S 271(1) Criminal Code (1985). S 271(1) provides that a person who commits a sexual assault is guilty of an indictable offence that carries a maximum penalty of ten years' imprisonment or of an offence punishable on summary conviction that carries a maximum penalty of 18 months' imprisonment.

harm,[57] and aggravated sexual assault[58] in Canadian law. Sexual assault is not defined in the Criminal Code. It was held in *R v Chase*[59] that sexual assault is an assault that falls within the definition of assault in the Criminal Code[60] and that is "[c]ommitted in circumstances of a sexual nature, such that the sexual integrity of the victim is violated". The test in each case is whether, "[v]iewed in the light of all the circumstances, . . . the sexual or carnal context of the assault [is] visible to a reasonable observe[r]".[61] In order to determine whether this test is satisfied,

> "[t]he part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, . . . [and] the intent or purpose of the person committing the act . . ."

must be considered.[62] On the basis of this test the repsondent's act of grabbing the complainant's breasts constituted sexual assault.[63] The flexibility of the Canadian approach, albeit a commendable improvement upon the narrow requirement of penetration in South African law, is conducive to the infusion of discriminatory myths and stereotypes by a male-centred judiciary.

5 1 3 American law

The American federal offences of sexual abuse[64] and abusive sexual contact[65] encompass conduct that is comprehensively defined. A sexual act, for the purposes of the crime of sexual abuse, includes

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57 S 272 Criminal Code (1985). S 272(1) provides that "[e]very person commits an offence who, in committing a sexual assault,
(a) carries, uses or threatens to use a weapon or an imitation of a weapon;
(b) threatens to cause bodily harm to a person other than the complainant;
(c) causes bodily harm to the complainant; or
(d) is a party to the offence with any other person".
In terms of s 272(2), a person who commits an offence under subs (1) is guilty of an indictable offence that carries a maximum penalty of 14 years' imprisonment and a minimum penalty of four years' imprisonment if a firearm is used, or a maximum penalty of 14 years' imprisonment in any other case.

58 S 273 Criminal Code (1985). S 273(1) provides that "[e]very one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant". S 273(2) provides that a person who commits an aggravated sexual assault is guilty of an indictable offence that carries a maximum penalty of life imprisonment and a minimum penalty of four years' imprisonment if a firearm is used, or a maximum penalty of life imprisonment in any other case.

59 1988 45 DLR (4th) 98 (SCC) 103.

60 In terms of s 265(1), "[a] person commits an assault when
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs".

61 *Supra* fn 59 104.

62 *Ibid.*

63 *Supra* fn 59 105.

64 S 2242 18 USC (1986). S 2242 provides that "[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly –
(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any

continued on next page

> "[c]ontact [involving penetration, however slight] between the penis and the vulva or the penis and the anus . . .; contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; [or] the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person . . .".[66]

The crime of abusive sexual contact, on the other hand, consists of the

> "[i]ntentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person".[67]

The American approach, it is submitted, is both too broad and too narrow to ensure substantive gender equality. It is too broad because it is gender-neutral.[68] It is too narrow for several reasons. First, the retention of the requirement of penetration is undesirable. The offence of sexual abuse should, as is the case in Canadian law, encompass all acts of a sexual nature. Secondly, the restriction of the offence of abusive sexual contact to the parts of the body specified in section 2246(3) is premised upon a male-centred conception of sexuality. Since unwanted hugging or kissing also constitutes a violation of a woman's sexual integrity, the offence should encompass unwanted sexual contact with all parts of a woman's body. Third, since non-physical sexual harassment also constitutes an infringement of a woman's sexual integrity, it should be included in the ambit of the offences. The specificity of the American approach, however, suitably modified to address these flaws, is preferable to the flexibility of the Canadian approach since it minimises the opportunity for the infusion of discriminatory preconceptions by the judiciary.

5 2 The victim: gender-specificity

The South African crime of rape can only be committed by a man upon a woman.[69] By contrast, the offence of sexual assault[70] in Canadian law and the offences of sexual abuse and abusive sexual contact[71] in American law are

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person will be subjected to death, serious bodily injury, or kidnapping [the offence of aggravated sexual abuse]); or

(2) engages in a sexual act with another person if that other person is –

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both".

65 S 2244 18 USC (1986). In terms of s 2244(a), "[w]hoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in or causes sexual contact with or by another person, if to do so would violate – . . .

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both . . .".

66 S 2246(2) 18 USC (1986).

67 S 2246(3) 18 USC (1986).

68 See the discussion of "The victim: gender-specificity" *infra*.

69 The marital rape exemption, in terms of which a man was regarded as incapable of raping his wife, has been abolished by the Prevention of Family Violence Act 133 of 1993. In terms of s 5 of the Act, "[a] husband may be convicted of the rape of his wife".

70 *R v Chase supra* fn 59 104.

71 S 2242 2244 18 USC (1986).

gender-neutral. The gender-specificity of the crime of rape originated in the patriarchal conception that rape is a violation of a man's right of ownership of his wife or daughter.[72] Certain feminists have accordingly argued that gender equality necessitates the gender-neutrality of the crime.[73] It is submitted, however, that the equality that will be attained if the offence is gender-neutral will merely be formal in nature. The gender-neutrality of the offence, by deflecting attention from the fact that most survivors of gender-based violence are women, obscures the legal measures that are necessary to accommodate women's differential experiences and to eradicate the effect of systemic gender disadvantage. The gender-specificity of the crime should thus be retained.

5 3 Unlawfulness: absence of consent[74]

5 3 1 South African law

Although both force and absence of consent were required in Roman-Dutch law in order to render an act of sexual intercourse unlawful,[75] it is sufficient in modern South African law that the act occurred without the woman's consent. In order to be valid, consent to sexual intercourse

> "[m]ust be freely and consciously given by a woman who has the mental ability to understand what she is consenting to, and it must be based on a true knowledge of the material facts relating to the intercourse".[76]

Consent is not present if the woman is asleep, intoxicated, mentally incapable of understanding the nature of the act, or below the age, namely 12 years, at which the law deems her capable of consent.[77] Consent is vitiated if it is given on the basis of, or as the result of the fraudulent inducement by the perpetrator of, a material mistake. Only mistakes as to the nature of the act or the identity of the perpetrator are regarded in law as material.[78]

Duress that results in the woman's will being overborne also vitiates consent. It was held in *R v Swiggelaar*[79] that

> "[s]ubmission by itself is no grant of consent, and if a man so intimidates a woman as to induce her to abandon resistance and submit to intercourse to which she is unwilling, he commits the crime of rape. All the circumstances must be taken into account to determine whether passivity is proof of implied consent or whether it is merely the abandonment of outward resistance which the woman, while persisting in her objection to intercourse, is afraid to display or realises is useless."

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72 Fryer "Law versus prejudice: views on rape through the centuries" 1994 *SACJ* 60 64–65.

73 See, *inter alia*, Reddi "A feminist perspective of the substantive law of rape" in Jagwanth, Schwikkard and Grant (eds) *Women and the law* (1994) 159 163; Mphahlele "From legal rape to a crime. Does that solve the problem?" 1993 1 *J for Juridical Science* 165 173.

74 The elements of absence of consent and unlawfulness, albeit independent elements of the crime of rape, are interrelated since it is the absence of consent that renders the act of sexual intercourse unlawful. The two elements will accordingly be discussed together.

75 Mphahlele *op cit* fn 73 172.

76 Snyman *op cit* fn 49 426.

77 *Idem* 426–427.

78 Burchell and Milton *op cit* fn 55 445–446. A mistake concerning the nature of the act occurs when the complainant thinks eg, that the act of intercourse is a surgical operation. A mistake concerning the identity of the perpetrator occurs where, eg, the complainant thinks that an identifiable third party is her husband.

79 1950 1 PH H61 (A).

The application or threatened application of physical force constitutes the clearest illustration of the vitiation of consent on account of duress. Non-physical coercion, such as a threat by an employer to dismiss an employee if she does not engage in intercourse, does not negate consent.[80] It has been held, however, that lack of resistance due to fear induced by a relationship of captor and captive between a policeman and a woman who is under his control does not amount to consent.[81]

5 3 2 Canadian law

In terms of section 273.1(1) of the Criminal Code, consent is defined as "[t]he voluntary agreement of the complainant to engage in the sexual activity in question". It has been held that the complainant is not required to "[o]ffer some minimal word or gesture of objection and [that] lack of resistance must [not] be equated with consent".[82] In *R v Park*[83] L'Heureux-Dube J, albeit *obiter*, referred with approval to the view that consent should be regarded, not as a subjective mental state, but rather as the communication, by verbal or non-verbal behaviour, of permission to engage in sexual activity.

The circumstances in which, in terms of the Criminal Code, consent is vitiated or negated are fairly broad in ambit.[84] Consent is absent, *inter alia*, if, for any reason, the complainant is incapable of consenting, or submits because of fraud, regardless of whether or not the fraud induces a material mistake. Submission or lack of resistance due to the application of force or threats or fear of the application of force to the complainant or a third party negates consent. Furthermore, if "[t]he accused induces the complainant to engage in the activity by abusing a position of trust, *power* or authority", consent is vitiated (own emphasis).

The Canadian approach, albeit more gender-sensitive than its South African counterpart, does not fully recognise the fact that the gendered power imbalances that underpin heterosexual intercourse are conducive to submission rather than consent. In order to accommodate this reality, the definition of consent should, as suggested by L'Heureux-Dube J in *R v Park*,[85] be premised upon externalised communication rather than internal deliberation. Furthermore, the exercise of male power, whatever its external manifestation, should, on the basis of the reference to "power" in the Criminal Code, be held to negate consent.

5 4 Intention

5 4 1 South African law

The crime of rape can only be committed intentionally.[86] Since the accused's intention must relate to all the elements of the crime, he must have known, or foreseen and discounted the possibility, that the complainant did not consent to the intercourse. A subjectively mistaken belief that the woman consented, however unreasonable, constitutes a valid defence since it excludes the element of

80 Burchell and Milton *op cit* fn 55 444.
81 *S v S* 1971 2 SA 591 (A) 596H.
82 *R v M (ML)* 1994 2 SCR 3 (SCC).
83 *Supra* fn 40 par 42.
84 See s 265(3) and 273.1(2) and (3) Criminal Code (as amended in 1992).
85 *Supra* fn 40 par 42.
86 Snyman *op cit* fn 49 427.

intent. It is not essential that the existence of this mistaken belief be attributable to the (active or passive) conduct of the woman.[87]

5 4 2 Canadian law

The crime of sexual assault can also only be committed intentionally in Canadian law. An honest but mistaken belief in the existence of consent constitutes a defence, provided that certain requirements are met. First, in terms of section 273.2(a) of the Criminal Code, the defence is not available if the accused's mistaken belief that the complainant consented arose from "[s]elf-induced intoxication, or ... recklessness or wilful blindness". The exclusionary provisions of section 273.2(a) were given an extended interpretation by L'Heureux-Dube J in *R v Park*[88] in order to accommodate the complainant's right to gender equality in section 15(1) of the Canadian Charter. One of the disadvantageous realities that women face, the judge opined, is the existence of a gender-based communication gap between the sexes as to how women experience consent to sexual activity. Whereas women may experience silence as lack of consent, it may be perceived by men, frequently on the basis of myths and gender stereotypes, to constitute consent.[89] In order to ensure that the consequences of this gap accrue more equally to men and women, "[m]en ... must assume the responsibility for that part of the communication gap that is driven by androcentric myths and stereotypes ...".[90] The ascription of this responsibility to men necessitates the reformulation of the *mens rea* of sexual assault. The judge accordingly took the view that, in addition to awareness of, or recklessness or wilful blindness to, the fact that *non-consent* was communicated, the *mens rea* for sexual assault must encompass awareness of, or recklessness or wilful blindness to, the *absence* of communicated consent.[91] The approach of L'Heureux-Dube J will, if endorsed by the Canadian Supreme Court, restrict the parameters of the defence of mistaken belief in consent and thus validate the reality of women's experiences of consent.

Second, in terms of section 273.2(b) of the Criminal Code, the defence of mistaken belief in consent is not available if "[t]he accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting". The requirement of reasonableness, provided it is infused with a gender-sensitive awareness of the power relations that underpin sexual assault, is conducive to the accommodation of women's experiences of the existence of consent or its absence.

5 5 Critique: disadvantage and the exclusion of sexual difference

It has been argued that the attainment of substantive gender equality in the context of the legal response to sexual violence requires the accommodation of women's sexual difference and the eradication of the effects of the systemic gender disadvantage that both gives rise to, and perpetuates, this sexual violence. It has been shown that the Canadian social context test, duly modified to encompass a recognition of the intersectional discrimination experienced by certain

87 Burchell and Milton *op cit* fn 55 447.
88 *Supra* fn 40 para 39.
89 Par 40.
90 Par 46.
91 Par 39.

women, is premised, in its determination of what constitutes discrimination, upon a principle of substantive gender equality. It has accordingly been suggested that this test should be applied to the determination of what constitutes unfair discrimination in terms of section 9(3) of the Final Constitution. Those rules or principles of South African rape law that, upon the application of this test, are found to entrench or exacerbate gender (or intersectional) disadvantage, either intentionally or in effect, constitute unfair discrimination and must be struck down and reformulated.

5 5 1 Elements of the offence

The distinction between rape and less serious offences, such as indecent assault and *crimen iniuria*, on the basis of the element of penetration by the penis, trivialises women's experiences of sexual violation that do not constitute rape. Viewed in its social context, this distinction exacerbates systemic gender disadvantage by creating the impression, reflected in sentence, that other sexual violations, albeit not tolerated, are nevertheless treated more benignly by the law. The element of penetration accordingly constitutes unfair discrimination and should be discarded.

The distinction between men and women, on the one hand, and heterosexual and homosexual persons, on the other hand, that is embodied in the gender-specificity of the crime of rape may be open to constitutional challenge. It may be argued that the former distinction disadvantages men by rendering their sexual violation by women the lesser crime of indecent assault. By analogy, it may be argued that the latter distinction disadvantages homosexual persons. In terms of section 9(3), therefore, these distinctions constitute unfair discrimination. However, the presumption of unfairness in section 9(5) may, it is submitted, be rebutted on the basis that, since the majority of survivors of sexual assault are women, a gender-specific crime of sexual assault is necessary in order to redress women's systemic gender disadvantage. Alternatively, if the presumption of unfairness is not rebutted, the right to equality of men and homosexual persons may justifiably be limited in terms of section 36(1), on the basis of women's rights to equality and freedom from violence.[92]

The rules relating to the element of absence of consent are premised upon an androcentric view of women's responses to unwanted sexual activity. The kinds of mistake that vitiate consent exclude women's perceptions of materiality. A fraudulently induced mistaken belief that the perpetrator would marry the woman, for example, or that he is free from AIDS or sexually transmitted disease, does not vitiate consent despite the fact that, had the woman been aware of the true state of affairs, she would not have consented to the intercourse. The kinds of duress that vitiate consent are open to similar criticism. With the exception of the rule that fear induced by police authority vitiates consent, the courts adhere to a conception of duress that is premised upon submission to countervailing physical

92 Same-sex assaults and assaults by a woman on a man that are of a sexual nature may be distinguished from sexual assault by being termed the offences of "same-sex sexual assault" and "female-initiated sexual assault" respectively. In order to ensure that the right to equality is limited as little as possible, these offences should, with the exception of the gender of the perpetrator and the survivor, embody the same definitional elements as the offence of sexual assault. Furthermore, all three offences should carry the same penalties.

force or coercion.[93] This conception creates a dichotomy between the application of force or coercion (which is prohibited) and the exertion of male power (which is condoned). The refusal to regard passivity or submission as non-consent *as a matter of law* rather than a matter to be determined on the facts, undermines the reality of women's differential responses to sexual violation. Viewed in its social context, the exclusion of the reality of women's experiences of consent or non-consent exacerbates gender disadvantage by expanding the space for legitimate rape. The legal conception of consent therefore constitutes unfair discrimination and should be reformulated.

This gender disadvantage is further exacerbated by the subjectivity of the defence of mistaken belief in consent. Duncan has argued that the fact that the belief does not have to be reasonable broadens the space for legitimate rape. "A non-consenting woman can be subjected to sex with no legal redress if the defendant *honestly believed* she was consenting."[94] The subjectivity of the defence, and the concomitant ease with which it can be raised, rather than the defence itself, thus constitutes unfair discrimination and must be discarded.

5 5 2 Burden of proof

It is a fundamental principle of criminal procedure that, on account of the presumption of innocence, the prosecution must bear the *onus* of proving all the elements of an offence beyond a reasonable doubt. Since lack of consent constitutes an element of the offence of rape, and since knowledge on the part of the accused that the complainant did not consent is part of the element of intention, both must be proved by the prosecution beyond a reasonable doubt. Although the *onus* to prove any element cannot, on account of the presumption of innocence, be transferred to the accused, the disadvantage that accrues to the complainant as a consequence of this *onus* can be alleviated by the imposition of an evidentiary burden on the accused in the context of consent and mistaken belief in consent.

5 5 2 1 Consent and mistaken belief in consent

Absence of consent is not generally an element of offences other than rape. However, consent may be raised as a defence to certain offences, such as assault.[95] In such cases, the accused bears an evidentiary burden to lay a factual foundation for the defence. The prosecution only bears the *onus* of proving absence of consent beyond a reasonable doubt if the accused discharges this evidentiary burden.[96] This distinction between rape and other crimes is premised upon the androcentric assumption that women consent more readily to sexual intercourse than other victims consent to the perpetration of other crimes. The difficulty of proving and convicting on a charge of rape that results from the rule

93 Estrich "Rape" in Smith (ed) *Feminist jursiprudence* (1993) 158 167.

94 *Op cit* fn 10 181.

95 Burchell and Milton *op cit* fn 55 423 426. "Assault consists in unlawfully and intentionally (1) applying force to the person of another, or (2) inspiring a belief in that other that force is immediately to be applied to him." Consent is not necessarily a defence to every kind of assault. The availability of the defence is determined by reference to public policy.

96 For a discussion of the distinction between the concepts "burden of proof" and "evidentiary burden" in the context of criminal law, see Hoffmann and Zeffertt *The South African law of evidence* (1988) 498.

that absence of consent is an element of the crime of rape, is conducive to the increased perpetration of the crime. This distinction between rape and other crimes thus disadvantages women and constitutes unfair gender discrimination. It is suggested that, in order to obviate such discrimination, the element of absence of consent should be removed from the definition of the offence of rape. An allegation in the complainant's evidence that she did not consent should therefore render the accused's conduct *prima facie* unlawful. In order to raise the issue of consent, the accused should, as is the case in other crimes, bear an evidentiary burden to establish a factual foundation for the defence of consent. If he discharges this evidentiary burden, the prosecution should bear the *onus* of proving absence of consent beyond a reasonable doubt. In the same way, if the accused wishes to raise the defence of mistaken belief in consent, he should bear an evidentiary burden, as is the case in other criminal law defences, to lay a factual foundation for his mistaken belief.[97]

The incidence of this burden, and the evidence that suffices for its discharge, has been the subject of considerable attention in Canadian law in the context of mistaken belief in consent. Section 265(4) of the Criminal Code provides that

> "[w]here an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief".

It has been held that the reference in section 265(4) to "sufficient evidence" imposes an evidentiary burden on the accused to lay a factual foundation for a mistaken belief in consent, albeit only in the event that such evidence does not appear from the prosecution case.[98] In order to discharge this evidentiary burden, there must be evidence that gives the defence of mistaken belief in consent an "air of reality". This "air of reality" threshold requires that "[t]he totality of the evidence for the accused must be reasonably and realistically capable of supporting th[e] defence". The evidence must thus "[a]mount to something more than a bare assertion" and must be supported by the circumstances of the case.[99]

5 5 2 2 Constitutionality of evidentiary burden

In terms of section 35(3)(h) of the Final Constitution the accused has the right "[t]o be presumed innocent, to remain silent, and not to testify during the proceedings". In *Scagell v Attorney-General of the Western Cape*[100] the court took the view that the evidentiary burden placed on the accused in terms of section 6(3) of the Gambling Act[101] violates the accused's right to a fair trial in section

97 *Ibid.*

98 See, *inter alia*, *R v Robertson* 1988 39 DLR (4th) 321 (SCC) 332; *R v Osolin* 1993 4 SCR 595 (SCC) 688j–689a.

99 *R v Park supra* fn 40 par 20. See also, *inter alia*, *R v Osolin* 1993 4 SCR 595 (SCC) 649a–650a; *R v Livermore* 1995 4 SCR 123 (SCC) par XVIII XX.

100 1996 11 BCLR 1446 (CC) par 16; 1997 2 SA 368 (CC).

101 51 of 1965. S 6(3) of the Act provides that "[w]hen any playing-cards, dice, balls, counters, tablcs, equipment, gambling devices or other instruments or requisites used or capable of being uscd for playing any gambling game are found at any place or on the person of anyone found at any place, it shall be *prima facie* evidence in any prosecution for a contravention of subsection (1) that the person in control or in charge of such place

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25(3) of the Interim Constitution. However, the court found it unnecessary to decide whether this evidentiary burden also violates the accused's right to be presumed innocent or to remain silent. The court premised its conclusion on the fact that the effect of the evidentiary burden in section 6(3) "[i]s that innocent persons, against whom there is no evidence suggestive of criminal conduct at all, may be charged, brought before a court and required to lead evidence to assert their innocence".

An evidentiary burden to lay a foundation for the defences of consent or mistaken belief in consent is, it is submitted, distinguishable from the evidentiary burden in section 6(3) of the Gambling Act. The burden in both instances arises only after testimony by the complainant that she did not consent to intercourse and is therefore clearly suggestive of the commission of a criminal offence. In the Canadian decision in *R v Osolin*[102] the court took the view that, since the provisions of section 265(4) do not require the accused to prove any of the essential elements of the offence of sexual assault, they do not violate the accused's right to be presumed innocent in section 11(d) of the Canadian Charter. By analogy, it is submitted that the imposition of an evidentiary burden on the accused to lay a factual foundation both for the defence of consent, and for the defence of mistaken belief in consent, does not infringe the provisions of section 35(3)(h). However, even if it does, it should be justified in terms of section 36(1) on the basis of the complainant's right to gender equality.

6 REDEFINITION: FROM RAPE TO SEXUAL ASSAULT

It is suggested that, in order to accommodate sexual difference and to eradicate gender disadvantage, the offence of rape must be replaced by that of sexual assault.[103] The offence should be defined as unlawful and intentional sexual conduct by a man with a woman. The *actus* of the offence should embody sexual conduct that involves (1) contact between a woman's vulva, anus, mouth or other orifice and a man's penis, other bodily part or an object administered by a man; or (2) contact between a woman's body and a man's body or an object administered by a man, and non-physical conduct directed by a man at a woman, that is engaged in with an intent to abuse, humiliate, harass, degrade, or otherwise violate the sexual integrity of a woman, or an intent to arouse or gratify the sexual desire of any person. The act should, upon an allegation in the woman's evidence that she did not consent, be *prima facie* unlawful. The defence of consent may be raised by the accused by laying a factual foundation, that is supported by evidence in the circumstances of the case, that the complainant consented. Consent should be defined "[a]s the unequivocal communication of voluntary agreement to the sexual activity . . .".[104] Absence of communicated

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permitted the playing of such game at such place and that any person found at such place was playing such game at such place and was visiting such place with the object of playing such game".

102 1993 4 SCR 595 (SCC) 690i–691a.

103 The term "sexual assault" is preferable to that of "sexual abuse", since the latter bears a connotation of abnormality that obscures the fact that a violation of a woman's sexual integrity is attributable to the exercise of male power rather than to the existence of individual pathology.

104 Boyle "Recent development in the Canadian law of sexual assault" in Jagwanth, Schwikkard and Grant (eds) *Women and the law* (1994) 178 183.

consent should thus constitute non-consent. Mistake induced by fraud and submission induced by the exercise of male power, whatever its external manifestation, should negate consent, even if it is unequivocally communicated. The *mens rea* for the offence should exist if the accused knew, or foresaw and discounted the possibility, *either* that the complainant communicated lack of consent, *or* that she failed to communicate consent. In order to constitute a valid defence, a mistaken belief in consent must be reasonable. The test for reasonableness must be premised upon a two-fold inquiry that may be formulated as follows: (1) what steps would a reasonable person with due knowledge of the gender inequality that underpins sexual activity have taken to ascertain whether the complainant communicated consent? and (2) did the accused take such steps? The accused may raise this defence if he discharges the evidentiary burden of laying a factual foundation, supported by the evidence, for his mistaken belief in consent.

The elements of the crime of sexual assault, as redefined, are conducive to the accommodation of sexual difference and the elimination of gender discrimination provided that they are interpreted and applied in a gender-sensitive manner. In order to obviate gender (and race) bias on the part of the judiciary, training programs should be implemented to educate presiding officers in regard to the structural causes and effects of violence against women.[105]

7 CONCLUSION

The recent expressions of state commitment to gender equality and freedom from violence have engendered a political space in which the attainment of substantive gender equality is possible. The *onus*, however, is on feminist and other human rights organisations, in conjunction with the legislature and the judiciary, to ensure that this space is effectively utilised. The current dynamism of South African society is amenable to the transformation of the legal and social conception of rape from a situation that "[i]s dismissed with a knowing wink as a natural consequence of the sexual game in which man pursues and woman is pursued",[106] to a systemic act of male violence that is constitutionally and socially unacceptable.

105 Magistrates' training programs that include the education of magistrates concerning gender-based violence have already been implemented in certain districts in the Western Cape, Mpumalanga and Gauteng.

106 Clark and Lewis *Rape: The price of coercive sexuality* (1977) 24.

Strafbedinge in die Suid-Afrikaanse reg – Deel 3

(*vervolg*)[1]

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SUMMARY

The Penalty Clauses Act 15 of 1962 prohibits the cumulation of remedies and provides for the reduction of penalties stipulated by the parties to a contract. These provisions may be compared to similar provisions in both the law of the Netherlands and French law. These provisions and their application by our courts compare favourably to these European systems and can improve in one aspect only, namely the fact that the European systems not only provide for a reduction of penalties, but also for an increase to a penalty amount.

1 INLEIDING

In vorige besprekings is die toepassingsgebied van die Wet op Strafbedinge 15 van 1962 van naderby beskou. Vervolgens word die ander bepalings van die wet, naamlik dié rakende kumulasie van regsmiddels en vermindering van strafbedrae ontleed. Bondige vergelykings met die beginsels rakende hierdie aspekte in die Engelse, Nederlandse en Franse stelsels word getref ten einde enkele moontlike verbeterings in die Suid-Afrikaanse benadering aan te beveel.

2 KUMULASIE VAN REGSMIDDELS: ARTIKEL 2

2 1 Algemeen

Artikel 2 van die Wet op Strafbedinge 15 van 1962 plaas 'n verbod op die kumulasie van regsmiddels. Artikel 2(1) bepaal:

> "'n Skuldeiser is nie geregtig om ten opsigte van 'n doen of late wat die onderwerp van 'n strafbeding is, beide die strafbedrag en skadevergoeding, of behalwe waar die betrokke kontrak uitdruklik aldus bepaal, skadevergoeding in plaas van die strafbedrag te verhaal nie."

Artikel 2(2) bepaal voorts:

> "Iemand wat gebrekkige of nie-tydige prestasie aanvaar of moet aanvaar, is nie geregtig om 'n strafbedrag weens die gebrek of versuim te verhaal nie, tensy die straf uitdruklik vir daardie gebrek of versuim beding is."

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1 Sien 1998 THRHR 61–72 en 229–237. Hierdie artikel is 'n verwerking van 'n gedeelte uit die outeur se LLD-proefskrif getiteld *Strafbedinge in die Suid-Afrikaanse reg* (UP 1995).

2 2 Ontleding van artikel 2

2 2 1 Strafbedrag/Skadevergoeding/Beide?

Artikel 2(1) bepaal dat 'n skuldeiser nie geregtig is om beide 'n strafbedrag én skadevergoeding, óf skadevergoeding in die plek van 'n strafbedrag te eis nie. Die partye mag egter uitdruklik in die kontrak bepaal dat skadevergoeding in die plek van die strafbedrag verhaal mag word. In *De Lange v Deeb*[2] het 'n beding in die kontrak bepaal dat die verkoper, in geval van kontrakbreuk deur die koper, geregtig sou wees om reeds betaalde gelde te behou, "sonder enige verbeuring van sy reg om geregtelike eise in te stel vir enige skade". Daar is geargumenteer dat hierdie beding, wat 'n verbeuringsbeding binne die toepassingsgebied van die wet uitmaak, die effek het dat beide die strafbedrag en skadevergoeding geëis kan word, omdat die woorde "in plaas van die strafbedrag" nie bygevoeg is nie. Die hof beslis egter dat hierdie woorde nie uitdruklik in die kontrak ingesluit hoef te word nie. Die respondent was dus ten volle geregtig om skadevergoeding in plaas van die bedonge strafbedrag te eis aangesien die keuse vir hom voorbehou is.

Die bepalings van artikel 2 stem grootliks ooreen met die bepalings van Boek 6 artikel 92 *NBW* van Nederland. Dié artikel bepaal dat 'n skuldeiser nie spesifieke nakoming sowel as 'n strafbedrag mag eis nie. Voorts tree 'n strafbedrag ook in die plek van skadevergoeding. Die skuldeiser het wel 'n keuse tussen afdwinging van spesifieke nakoming en 'n strafbedrag, net soos wat hy 'n keuse het tussen spesifieke nakoming en skadevergoeding. Hy het egter nié 'n keuse tussen skadevergoeding en 'n strafbedrag nie.[3] Omdat hierdie beginsel onbillik kan werk waar die skuldeiser se skade veel groter as die ooreengekome strafbedrag is, maak artikel 94 *NBW* daarvoor voorsiening dat die hof 'n strafbedrag kan vermeerder.[4] (Hierdie benadering kan gekontrasteer word met dié van die Suid-Afrikaanse reg waarvolgens 'n strafbedrag slegs verminder kan word.[5]) Die partye kan ook, net soos in die Suid-Afrikaanse reg, ooreenkom dat skadevergoeding in plek van die strafbedrag geëis mag word.[6]

Ook in die Franse reg het die onskuldige party nie 'n keuse tussen skadevergoeding en die strafbedrag nie, maar die strafbedrag kan wel verminder óf vermeerder word. Artikel 1152 van die *Code civil* bepaal as algemene beginsel dat geen kleiner of groter bedrag as die ooreengekome bedrag aan 'n kontraksparty toegestaan kan word nie. Artikel 1152 *alinéa* 2 maak dan voorsiening vir vermindering of vermeerdering van die strafbedrag indien dié bedrag "manifestement excessive ou dérisoire" is.[7]

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2 1970 1 SA 561 (O). Sien ook *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 3 SA 462 (A); *Tierfontein Boerdery (Edms) Bpk v Weber* 1974 3 SA 445 (K); *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A).

3 HR 21 december 1956, *NJ* 1957 126; Hof Amsterdam 24 juni 1976, *NJ* 1977 302; Raad van Arbitrage Bouwbedrijven 30 januari 1976, *NJ* 1977 103; Rb Arnhem 17 april 1980, *NJ* 1980 628; Asser-Hartkamp 1 334.

4 Sien Boek 6 a 94 *NBW*, asook Raad van Arbitrage Bouwbedrijven 20 november 1975, *NJ* 1977 113; Hartkamp *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht: Verbintenissenrecht* (1992) I 335.

5 Sien die bespreking van a 3 van Wet 15 van 1962 hieronder.

6 Sien De Vries *Recht op nakoming en schadevergoeding, excepties en ontbinding volgens NBW en BW* (1984) 77.

7 Sien Cass com 2 octobre 1984, 1985 *JCP* II 20433 (en die aantekening daarby deur Paisant) Cass civ 3 janvier 1985, 1985 *JCP* IV 101; Cass soc 16 octobre 1985, 1986 *JCP*

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Artikel 1228 en 1229 *Cc* bepaal voorts dat die skuldeiser as algemene reël nie beide skadevergoeding én die strafbedrag mag eis nie en ook dat hy nie 'n keuse tussen die twee remedies het nie. Hy het wel 'n keuse tussen spesifieke nakoming en die strafbedrag. Artikel 1229 bepaal verder dat 'n skuldeiser nie beide nakoming en die strafbedrag mag eis nie, tensy die strafbedrag uitdruklik op "simple delay"[8] gemik is. Waar 'n party dus verplig is om nie-tydige prestasie te aanvaar, is hy ook geregtig om die strafbedrag te vorder indien die strafbeding uitdruklik vir die versuim voorsiening gemaak het.[9]

Ons sien dus uit die Europese stelsels dat nie alleen vermindering van 'n strafbedrag nie, maar ook vermeerdering toegelaat word omdat die beginsel dat 'n kontraksparty nie 'n keuse tussen skadevergoeding en 'n strafbeding het nie, onbillik kan werk.

2 2 2 Strafbedrag weens gebrek of versuim

Artikel 2(2) bepaal dat 'n party wat verplig is om laat of gebrekkige prestasie te aanvaar, of wat dit aanvaar, nie 'n strafbeding wat in algemene terme weens kontrakbreuk beding is, kan afdwing nie.[10] Hy moet sy skade op die gewone wyse bewys.[11] Om hierdie rede bepaal boukontrakte dikwels 'n bepaalde bedrag vir *elke dag* wat verloop na verstryking van die datum waarop die kontrakteur die voltooide werk moes gelewer het. So 'n strafbedrag is verhaalbaar omdat dit uitdruklik vir die betrokke versuim beding is.[12]

Waar die onskuldige party die gebrekkige prestasie mag verwerp, of uit die kontrak mag terugtree en dit ook doen, kan hy wel 'n strafbedrag wat in algemene terme beding is, verhaal.[13]

Hierdie benadering word ook in die Nederlandse en Franse reg aangetref. Artikel 1229 *Cc* bepaal dat 'n strafbedrag slegs geëis mag word waar 'n party nie-tydige prestasie aanvaar het, indien die strafbedrag uitdruklik vir "simple delay"[14] beding is. Die bepaling van artikel 2(2) van Wet 15 van 1962 is dus effe breër as die Franse bepaling, aangesien nie alleen vir nie-tydige prestasie nie, maar ook vir gebrekkige prestasie voorsiening gemaak word.

Ook in die Nederlandse reg kan die skuldeiser nie nakoming sowel as die strafbedrag eis nie,[15] tensy die strafbeding slegs op nie-tydige prestasie gerig is.

IV 3; Cass civ 14 janvier 1987, 1987 *JCP* IV 92; Cass civ 26 mai 1988, 1988 *JCP* IV 266; Paris 23 mai 1989, 1989 *JCP* IV 322; Cass civ 14 novembre 1991, 1992 *JCP* IV 170; 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* 665.

8 Treitel *Remedies for breach of contract* (1991) 217.

9 Treitel 217; Lawson, Anton en Brown *Amos and Walton's Introduction to French law* (1967) 189. Sien die bespreking van hierdie uitsondering onder die bespreking van a 2(2) van Wet 15 van 1962.

10 De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) I 245; Van Rensburg, Lotz en Van Rhijn "Contract" in *LAWSA* (red Joubert 1978) 5 par 245; Visser en Potgieter *Skadevergoedingsreg* (1993) 319.

11 Van Rensburg, Lotz en Van Rhijn *LAWSA* 5 par 245; Visser en Potgieter 319.

12 Visser en Potgieter 319 vn 325; Joubert, Otto en Grové "Algemene kontraktereg" in Van Jaarsveld en Oosthuizen (reds) *Suid-Afrikaanse handelsreg* (1988) I 181 vn 352.

13 De Wet en Van Wyk I 245 vn 240.

14 Treitel 217.

15 Die rede hiervoor is dat die skuldeiser nie nakoming sowel as vervangende skadevergoeding kan eis nie (Hartkamp I 335).

Indien die strafbedrag dus die plek inneem van *aanvullende* skadevergoeding en nie in die plek van die oorspronklike prestasie geëis word nie, kan dit wel saam met die nakoming geëis word.[16]

2 3 Gevolgtrekking: Regsmiddels

Die bepalings van artikel 2 is baie duidelik en lewer min probleme. 'n Strafbedrag en skadevergoeding is nie kumulatief opeisbaar nie. Die skuldeiser het ook nie 'n keuse tussen die strafbedrag en skadevergoeding (volgens normale beginsels bereken) nie,[17] tensy die kontrak uitdruklik daarvoor voorsiening maak.[18] Die skuldeiser sal slegs geregtig wees om prestasie sowel as die strafbedrag te vorder waar hy gebrekkige of laat prestasie aanvaar het of moet aanvaar en die strafbedrag uitdruklik vir daardie versuim of gebrek beding is.[19]

3 VERMINDERING: ARTIKEL 3

3 1 Algemeen

Artikel 3 van die Wet op Strafbedinge 15 van 1962 verleen aan die hof die bevoegdheid om buitensporige strafbedrae te verminder. Artikel 3 bepaal:

> "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."

3 2 Ontleding van artikel 3

3 2 1 "*Indien dit . . . vir die hof blyk . . .*"

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 dan kan die verweerder vir vermindering van die strafbedrag vra.[20] Die vraag na na die ligging van die bewyslas is egter problematies en is aanvanklik verskillend beantwoord.[21] Na aanleiding van die verwarring wat geheers het, het Van Rhyn en Van Rensburg 'n volledige bespreking van hierdie uitsprake sowel as die

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16 Rb Assen 4 maart 1975, *NJ* 1976 420; Raad van Arbitrage Bouwbedrijven 30 januari 1976, *NJ* 1977 103; HR 24 januari 1992, *NJ* 1992 230; Brahn *Zwaartepunten van het nieuwe vermogensrecht* 288; Hartkamp I 335.

17 De Wet en Van Wyk I 244; Visser en Potgieter 319.

18 *De Lange v Deeb supra* vn 2; *Custom Credit Corporation (Pty) Ltd v Shembe supra* vn 2; *Tierfontein Boerdery (Edms) Bpk v Weber supra* vn 2; *Botha (now Griessel) v Finanscredit (Pty) Ltd supra* vn 2; Visser en Potgieter 319; Joubert, Otto en Grové 181.

19 De Wet en Van Wyk I 245; Joubert, Otto en Grové 181; Visser en Potgieter 319.

20 Vgl *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 321; De Wet en Van Wyk I 246; Christie *The law of contract in South-Africa* (1991) 659.

21 Sien *Cous v Henn* 1969 1 SA 569 (GW) 573; *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N); *Bloemfontein Munisipaliteit v Ulrich supra* vn 20 790.

begrippe "bewyslas" en "weerleggingslas" gelewer[22] en tot die gevolgtrekking[23] gekom 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".

Hierdie standpunt is met goedkeuring deur die appèlhof in *Smit v Bester*[24] aangehaal en die hof beslis[25] gevolglik dat die bewyslas om die buitensporigheid van die strafbedrag te bewys op die skuldenaar rus.[26]

Die woorde "*indien dit ... vir die hof blyk*" laat ook die vraag ontstaan of die hof *mero motu* die *prima facie* buitensporigheid van 'n strafbedrag in ag mag neem.[27] Ten aansien van aansoeke om summiere[28] of voorlopige vonnis[29] of vonnis by verstek[30] is beslis dat die hof nie hoef te wag vir een van die partye om vermindering aan te vra nie. Ten aansien van bestrede sake het die appélhof egter in *Bank of Lisbon International Ltd v Venter*[31] beslis dat 'n hof nie ongevraagd vermindering kan toepas nie. 'n Ondersoek van die gesag waarop gesteun word,[32] toon egter dat nie een van dié beslissings werklik hierdie standpunt steun nie.[33]

In die lig van die bedoeling van die wetgewer om skuldenaars teen uitbuiting deur middel van strafbedinge te beskerm, is dit dus te betreur dat die appèlhof so pertinent in die *Venter*-beslissing aandui dat die hof nie in bestrede sake *mero motu* 'n stafbedrag kan verminder nie.[34]

Die vraag aangaande *mero motu* vermindering skep ook probleme in die Nederlandse reg[35] en in die Franse reg. Na vele debattering, bepaal Boek 6

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22 1977 *THRHR* 261 ev.
23 1977 *THRHR* 263.
24 *Supra* vn 20. Sien ook *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 906.
25 1977 4 SA 937 (A) 942.
26 Sien ook Jamneck "Die bevoegdheid van die hof om bedrae in strafbedinge te verminder" 1996 *THRHR* 122; Van der Merwe ea *Contract: General principles* (1993) 319; Visser en Potgieter 320; De Wet en Van Wyk I 246; Christie 659.
27 *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 supra* vn 20; Van Rhyn en Van Rensburg 1977 *THRHR* 266; Visser en Potgieter 320; De Wet en Van Wyk I 243.
28 *Premier Finance Corporation (Pty) Ltd v Steenkamp* 1974 3 SA 141 (D).
29 Vgl *Du Plessis v Oribi Estates supra* vn 27 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.
30 *Smit v Bester supra* vn 20 942.
31 *Supra* vn 20 475.
32 *Smit v Bester supra* vn 20 942 D-G; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra* vn 24; *Chrysafis v Katsapas supra* vn 24.
33 Sien Jamneck 1996 *THRHR* 122.
34 Sien ook die kritiek van Kerr "The role of the court in civil cases. The Conventional Penalties Act" 1991 *SALJ* 245 ev.
35 Reehuis en Slob *Parlementaire geschiedenis van het Nieuw Burgerlijk Wetboek. Boek 6: Algemeen gedeelte van het verbintenissenrecht* (1990) 1261; Zeben en Du Pon

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artikel 94 *NBW* nou uitdruklik dat vermindering of vermeerdering slegs "op verlangen van de schuldenaar" kan geskied. Ook in die Franse reg is daar, in *Com 2 octobre 1984,*[36] beslis dat die hof 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.[37]

3 2 2 "... dat daardie bedrag buite verhouding is tot die nadeel deur die skuldeiser gely weens die doen of die late ten opsigte waarvan die straf beding is"

Die eerste vraag wat hieruit ontstaan, is dié na die betekenis van die frase "buite verhouding" aangesien dit nie in die wet gedefinieer word nie. Die volgende *dictum* in *Western Credit Bank Ltd v Kajee*[38] word algemeen as die korrekte interpretasie aanvaar:[39]

> "The words 'out of proportion' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the Legislature would have said so. What is contemplated, [is] that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor, not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded."

Die verhouding tussen die strafbedrag en die nadeel word nie met "mathematical precision"[40] bereken nie en die hof sal alleen die strafbedrag verminder indien daar 'n opvallende wanverhouding tussen die strafbedrag wat die skuldeiser wil verhaal en die nadeel wat hy moontlik weens die kontrakbreuk kan ly, bestaan.[41]

'n Soortgelyke benadering word in die Franse reg aangetref. Artikel 1152 *alinéa* 2 *Cc* bepaal uitdruklik dat 'n strafbedrag slegs verminder (of vermeerder) mag word indien dit "manifestement excessive ou dérisoire" is. Die *Code civil* verduidelik egter nie wat hiermee bedoel word nie, maar laat dit aan die howe oor om hul eie riglyne neer te lê.[42] Die howe het gevolglik beslis dat 'n

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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; Pitlo 159.

36 1985 *JCP* 20433.

37 Sien Paisant 1985 *RT* 675. Volgens dié skrywer sou die wetgewer uitdruklik *mero motu*-vermindering verbied het, indien dit nie mag plaasvind nie.

38 1967 4 SA 386 (N) 391.

39 Sien *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N); *Western Bank Ltd v Meyer; Western Bank Ltd v De Waal; Western Bank Ltd v Swart* 1973 4 SA 697 (T); Lubbe en Murray 643; De Wet en Van Wyk 247; Kerr *The principles of the law of contract* (1989) 562.

40 Van Rensburg, Lotz en Van Rhyn *LAWSA* 5 par 245.

41 *Western Bank v Meyer, etc supra* vn 39; *Western Bank Ltd v Lester & McLean supra* vn 27; Lubbe en Murray 644; De Wet en Van Wyk I 247. Kerr (602) wys daarop dat die bedrag van die werklike of potensiële nadeel bekend of beraam moet wees alvorens die verhouding daarvan tot die strafbedrag bepaal kan word. Dié feit hang saam met die hele vraag na die bewyslas, soos hierbo bespreek.

42 Vir kritiek teen hierdie feit, sien Boccara "La reforme de la clause pénale: Conditions et limites de l'intervention judiciaire" 1975 *JCP* I 2742; Sanz "La consécration du pouvoir judiciaire par la loi du 9 juillet, 1975, et ses incidences sur la théorie générale de la clause

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strafbedrag wat slegs "un peu éleveé" is, nie verminder kan word nie.[43] Die Franse skrywers wys ook daarop dat die doel van die wetgewer nie was dat die hof 'n blote wanbalans moet regstel nie. Waar 'n "pénalité démesurée, violant de façon flagrante l'équité"[44] egter ter sprake is, word die hof gemagtig om in te gryp en die strafbedrag te verminder.

In die Nederlandse reg hierteenoor, word nie met buitensporigheid van 'n strafbedrag as maatstaf gewerk nie, maar eerder met 'n billikheidsbeginsel wat 'n verwysing na buitensporigheid insluit. Boek 6 artikel 94 *NBW* bepaal dat die hof 'n strafbedrag kan verminder "indien de billijkheid dit klaarblijkelijk eist". Die grondslag van hierdie verminderingsbevoegdheid is daarin geleë dat die bedonge boete in verhouding met die wanprestasie so buitensporig kan wees dat dit teen die goeie trou sal wees om die strafbeding onverminderd af te dwing.[45] By die toepassing van die billikheidsmaatstaf neem die hof nie alleen die verhouding tussen die strafbedrag en nadeel in ag nie, maar alle omstandighede van die geval word in aanmerking geneem.[46] Die hof neem dus nie alleen die skuldenaar se omstandighede tydens kontrakbreuk in ag nie, maar ook alle ander omstandighede, soos byvoorbeeld die mate waarin die skuldeiser self tot die wanprestasie bygedra het[47] of die feit dat iemand anders onderneem het om met die betaling van die strafbedrag te help.[48] In die Nederlandse reg word dus 'n wyer maatstaf as in die Franse en Suid-Afrikaanse reg toegepas.

Die tweede begrip uit die onderhawige gedeelte van artikel 3 van die Wet op Strafbedinge wat bespreking verg, is die begrip "nadeel". Wat dié begrip betref, bepaal artikel 3:

> "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."

In *Van Staden v Central SA Lands and Mines*[49] wys regter Snyman ten aansien van die Engelse teks van die wet daarop dat die wetgewer die woord "prejudice" (nadeel) gebruik om dit te onderskei van "damage" (skade); so ook die uitdrukking "proprietary interest" (vermoënsbelange) om dit te onderskei van "patrimonial loss" oftewel "pecuniary loss". Die begrip "nadeel" is duidelik wyer as blote vermoënskade en kan ook 'n ideële nadeel wat voortvloei uit die aantasting van 'n onstoflike belang insluit.[50] Aangesien slegs vermoënskade met 'n eis vir

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pénale" 1977 *RT* 274; Thilmany "Fonctions et révisibilité des clause pénales en droit comparé" 1980 *RIDC* 30 ev; Paisant 1985 *RT* 665; De Lamberterie "The effect of changes in longterm contracts: French report" in Harris en Tallon (reds) *Contract law today – Anglo-French comparisons* (1989) 233; Carbonnier *Droit civil: 4 Obligations* (1976) 283.

43 Cass Ch mixte 28 janvier 1978, *D* 1978 IR 229; 8 novembre 1978, *Gaz Pal* 1979 1 Somm 118.

44 Sanz 1977 *RT* 273.

45 HR 4 november 1988, *NJ* 1989 244; HR 26 oktober 1990, *NJ* 1991 22; HR 24 januari 1992, *NJ* 1992 230; Hartkamp I 338.

46 Rb Arnhem 17 april 1980, *NJ* 1980 628; HR 21 oktober 1983, *NJ* 1984 166; HR 4 november 1988, *NJ* 1989 244.

47 HR 4 november 1988, *NJ* 1989 244.

48 HR 21 oktober 1983, *NJ* 1984 166.

49 1969 4 SA 349 (W).

50 *Van Staden v Central SA Lands & Mines supra* vn 49; *Bloemfontein Munisipaliteit v Ulrich supra* vn 20; Bamford "The Conventional Penalties Act 1962" 1972 *SALJ* 232; De Wet en Van Wyk I 247.

skadevergoeding geëis kan word, bied die wyer benadering van die Wet op Strafbedinge beter beskerming aan die onskuldige party by kontrakbreuk. Die hof kan ingevolge die wet enige "regmatige belang" in ag neem. In *Van Staden v Central SA Lands and Mines*[51] verklaar die hof:

> "It seems to me that everything that can reasonably be considered to harm or hurt a creditor in his property, his person, his reputation, his work, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must . . . be taken into account . . ."

Ook in *Bloemfontein Munisipaliteit v Ulrich*[52] is hierdie benadering gevolg en het die hof gesê dat die wydste moontlike uitleg aan die begrip nadeel gegee moet word. Ooreenkomstig hierdie wye benadering, is ook al gesê dat skade aan (of verlies van) sentimentele waarde en selfs die feit dat vakansieplanne in die wiele gery is, by die "nadeel" wat bepaal moet word, ingereken kan word.[53]

In die Franse reg maak artikel 1152 *alinéa* 2 *Cc* nie vir die vergelyking van die strafbedrag met nadeel óf skade voorsiening nie. Die artikel bepaal bloot dat 'n strafbedrag wat buitengewoon groot of klein is, verminder of vermeerder mag word. As gevolg hiervan het daar onsekerheid ontstaan oor die vraag of daar met 'n objektiewe of subjektiewe maatstaf by bepaling van die buitensporigheid van 'n strafbedrag gewerk moet word.[54] Volgens die subjektiewe maatstaf speel die skuldenaar se goeie trou of oneerlikheid by nakoming van sy verpligtinge 'n belangrike rol by die bepaling van die verminderbaarheid van die strafbedrag.[55] Volgens die objektiewe maatstaf moet die strafbedrag met die "prejudice effectivement subi"[56] of "préjudice réel"[57] vergelyk word ten einde te bepaal of die strafbedrag "manifestement excessive" is. Hierdie benadering word dikwels deur die howe gevolg.[58] Die howe bevind dienooreenkomstig dat 'n strafbeding "manifestement excessive" is wanneer "[l']excès résultera de la trop grande disporportion entre la peine et le préjudice".[59] Artikel 1152 maak dit ongelukkig nie duidelik of die strafbedrag met die *werklike* skade of met die *verhaalbare* (voorsienbare) skade vergelyk moet word nie. Daar is egter aanvaar dat die verhouding tussen die strafbedrag en die werklike skade (*préjudice réel*) vergelyk moet word.[60] Die objektiewe en subjektiewe maatstawwe het egter algaande

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51 *Supra* vn 49.

52 *Supra* vn 20.

53 *Van Staden v Central SA Lands & Mines supra* vn 49; *Bloemfontein Munisipaliteit v Ulrich supra* vn 20; Bamford 1972 *SALJ* 232; De Wet en Van Wyk I 247.

54 Cass civ 8 novembre 1976, 1978 *JCP* IV 69; Cass civ 1 juillet 1980, 1980 *JCP* IV 351; Cass civ 14 novembre 1991, 1992 *JCP* IV 170; Cass civ 24 février 1993, 1993 *JCP* IV 1073; Boccara 1975 *JCP* I 2742; Sanz 1977 *RT* 278; Thilmany 1980 *RIDC* 30; Mestre "Obligations et contrats spéciaux: 1. Obligations en général" 1993 *RT* 124 ev.

55 Sanz 1977 *RT* 278; Mestre 1993 *RT* 124.

56 Paisant 1985 *RT* 665.

57 Cornu "Contrats spéciaux" 1979 *RT* 149.

58 Amiens 23 février 1976, 1976 *JCP* IV 318; Cass civ 26 avril 1978; 1978 *JCP* IV 193; Cass com 23 janvier 1979, 1979 *JCP* IV 106; Cass civ 1 juillet 1980, 1980 *JCP* IV 351; Cass civ 9 février 1983, 1983 *JCP* IV 130; Cass com 2 octobre 1984, 1985 *JCP* II 20433 (en die aantekening daarby deur Paisant); Cass civ 26 mai 1988, 1988 *JCP* IV 266; Paris 23 mai 1989, 1989 *JCP* IV 322; Cass civ 14 novembre 1991, 1992 *JCP* IV 170.

59 Paisant 1985 *RT* 665.

60 Cass civ 19 mars 1980, 1980 *JCP* IV 213; Paisant 1985 *RT* 667; Treitel *Remedies* 224-225. Die feit dat die howe die datum van die verhoor as die relevante datum vir die berekening van die "manifestement excessive"-karakter van die strafbeding, bo die datum

vervolg op volgende bladsy

vermeng geraak,[61] met die gevolg dat die hof oor 'n wye diskresie beskik om *equité* te gebruik wanneer 'n strafbedrag verminder of vermeerder moet word.[62] Elke geval word dus afsonderlik, in die lig van die besondere omstandighede, beoordeel[63] ten einde te bepaal of die strafbedrag "manifestement excessive" is.

Die billikheidsbeginsel speel dus in beide die Franse en Nederlandse reg 'n belangrike rol. Daar word nie soveel klem op nadeel gelê soos in die Suid-Afrikaanse reg nie. Die billikheidsbeginsel word ook wel in die Suid-Afrikaanse reg gebruik, maar is onlosmaaklik aan die begrip nadeel verbonde. Die twee beginsels saam dui vir die howe 'n duideliker rigting om in te beweeg as wat in genoemde Europese stelsels gevind word.

3 2 3 "... kan die hof die strafbedrag verminder in die mate wat hy onder die omstandighede billik ag"

Reeds in 1967 het die hof in *Western Credit Bank Ltd v Kajee*[64] beslis dat die woord "kan" in artikel 3 nie alleen 'n diskresie om 'n strafbeding te verminder aan die hof verleen nie. Die hof het ook 'n verpligting om 'n strafbedrag te verminder indien bewys is dat die strafbedrag buitensporig in verhouding met die nadeel deur die skuldeiser gely, is.[65] Die hof sê[66] dat "[t]he word 'may' in the section does not merely confer a discretion, but a power coupled with a duty". Die hof kan egter die strafbedrag verminder in die mate wat hy *onder die omstandighede* billik ag. Die hof kan dus alle omstandighede van die geval in ag neem ten einde te bepaal of vermindering billik sal wees.[67] Bamford[68] noem die volgende omstandighede wat in ag geneem kan word:

(a) vorige optrede van die partye;

(b) die verhouding tussen die partye;

(c) die onderskeie onderhandelingsposisies waarin partye hulself bevind het;

(d) die aard van die skuldeiser se besigheid;

(e) enige verskoning of poging deur die skuldenaar om die skuldeiser te vergoed;

(f) die rede vir die skuldeiser se kontrakbreuk; en

(g) die effek van vermindering op die skuldeiser.

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van kontraksluiting verkies, word as aanduidend daarvan dat dat daar met werklike skade in teenstelling met voorsienbare skade gewerk word, beskou (sien Cass civ 19 mars 1980, 1980 *JCP* IV 213; Paisant 1985 *RT* 667).

61 Paisant 1985 *RT* 664 ev; Cornu 1979 *RT* 150.

62 Boccara 1975 *JCP* I 2742; Cornu 1979 *RT* 151; Paisant 1985 *RT* 666.

63 Cass soc 16 octobre 1985, 1986 *JCP* IV 3; Cass com 12 novembre 1986, 1987 *JCP* IV 26; Paris 23 mai 1989, 1989 *JCP* IV 322; Cass civ 14 novembre 1991, 1992 *JCP* IV 170; Paisant 1985 *RT* 666-667; Treitel *Remedies* 227.

64 *Supra* vn 38.

65 Sien ook *South African Mutual Life Assurance Society v Uys* 1970 4 SA 489 (O); *Matthews v Pretorius* 1984 3 SA 547 (W); Van der Merwe ea 319; De Wet en Van Wyk I 247; Visser en Potgieter 322.

66 1967 4 SA 386 (N) 391.

67 Vgl bv *Burger v Western Credit Bank Ltd* 1970 4 SA 74 (T); *Bank van die OVS Bpk v Theron* 1981 1 SA 700 (NK); Bamford 1972 *SALJ* 234; Visser en Potgieter 322.

68 1972 *SALJ* 234. Dié skrywer wys ook daarop (234) dat dié omstandighede duidelik onderskei moet word van die faktore wat by die bepaling van nadeel oorweeg moet word.

Die Suid-Afrikaanse reg stem op hierdie punt met die Nederlandse en Franse reg ooreen. In beide hierdie stelsels word alle omstandighede ook in ag geneem ten einde te bepaal of vermindering billik sal wees. Die enigste verskil tussen die Suid-Afrikaanse reg en hierdie stelsels is dat daar in hierdie stelsels nie alleen vermindering nie, maar ook vermeerdering van 'n strafbedrag toegelaat word.

3 3 Gevolgtrekking: Vermindering

Die Suid-Afrikaanse reg verskil wat die vermindering van strafbedinge aanbetref nie baie van die Franse en Nederlandse reg nie. Die meeste aspekte rakende vermindering word in die Nederlandse en Franse reg dieselfde as in die Suid-Afrikaanse reg hanteer, hoewel die Suid-Afrikaanse reg moontlik meer duidelikheid het oor dit wat met 'n strafbedrag vergelyk moet word ten einde die buitensporigheid daarvan te bepaal.

Die enigste werklike verskil tussen dié drie stelsels (en 'n gebied waarop die Suid-Afrikaanse reg moontlik kan verbeter), is dat daar in die Franse en Nederlandse reg nie alleen vermindering van 'n strafbedrag nie, maar ook vermeerdering toegelaat word. Hierdie benadering lyk billik aangesien 'n skuldeiser nie 'n keuse tussen 'n strafbedrag en skadevergoeding het nie en gevolglik onder sy aanvanklike bedinging van 'n strafbedrag kan ly, indien sy skade groter as daardie bedrag is.

4 GEVOLGTREKKING: DIE WET OP STRAFBEDINGE 15 VAN 1962

Na aanleiding van die bespreking in die reeks voorafgaande artikels kan die volgende gevolgtrekking gemaak word: Die Wet op Strafbedinge het orde gebring in die aansienlik verwarde regsposisie wat as gevolg van die Engelsregtelike invloed ontstaan het. Die wet het 'n terugkeer na die algemene beginsels van die Romeins-Hollandse reg bewerkstellig en die taak van die howe vereenvoudig. Die howe het sedert die inwerkingtreding van die wet dit telkens so uitgelê en toegepas dat min teenstrydighede ontstaan het. Daar word wel sekere probleme met die uitleg van die definisie van 'n strafbeding sowel as met die vereiste dat kontrakbreuk moet plaasvind, ondervind, maar dit wil voorkom asof die howe en skrywers algemene, navolgingswaardige riglyne in die verband neergelê het. Die Suid-Afrikaanse reg stem in 'n groot mate ooreen met die Nederlandse en Franse reg se billike hantering van strafbedinge, hoewel aan die hand gedoen kan word dat die vermeerderingsbevoegdheid wat in hierdie stelsels aan die howe verleen word, ook aan ons howe toegeken kan word.

AANTEKENINGE

EXTENSION OF SECURITY OF TENURE ACT – A BONE OF CONTENTION

1 Introduction

The contentious Extension of Security of Tenure Act 62 of 1997 was adopted by Parliament during November 1997. The Extension of Tenure Security Act is aimed at the protection of people occupying land outside urban areas with the explicit or implied permission of the land owner. The bill was met with fierce criticism especially from the agricultural unions (cf De Villiers "Verblyfreg sal afsetting bemoeilik" *Beeld* (1997-01-30) 2; Anon "Plaaswerkers" *Citizen* (1997-01-31) 10; Anon "Hanekom stands firm on land tenure legislation" *Citizen* (1997-02-04) 6). Some felt that it would prejudice farm workers as farmers would not lease land to them for grazing or would not employ full-time workers. Many farmers may even decide to mechanise their farming methods (cf Anon "Wetsontwerp benadeel plaaswerkers, sê die NP" *Beeld* (1997-05-26) 2; Anon "Call to halt land tenure legislation" *Citizen* (1997-02-13) 14). Shortly after the publication of, and even during discussions on, the proposed bill, many farm workers were evicted from farms in order to circumvent the Act. The Act, however, defines farm workers as those who were living on the farm on 4 February 1997 when the bill was published for the first time.

In this note the purpose of the Act, its application, the implications of fundamental rights, the rights of the occupier and the owner, the termination of rights of residence, the restoration of rights of residence and use of land, dispute resolution and recourse to the courts, planning and development, offences, regulations and guidelines will be discussed briefly to identify positive and negative aspects of the Act.

2 Purpose of the Act

In the preamble to the Extension of Security of Tenure Act it is stated that whereas many South Africans do not have security of tenure of their homes and land and are therefore vulnerable to unfair eviction that leads to hardship, conflict and instability, and where the practice is part of past discriminatory laws and practices, the law should achieve long-term security of tenure for occupiers of land through the joint effort of occupiers, land owners and government bodies. The law must give due recognition to the rights, duties and legitimate interests of owners and occupiers of land. The Act further regulates the eviction of vulnerable occupiers of land in a "fair" manner while recognising the right of

land owners to apply for an eviction order in "appropriate" circumstances presented in sections 9 to 12.

The Act tries to strike a balance between:

(1) the need for security of tenure which is a basic prerequisite for development; and

(2) the protection of rights and interests of owners and companies, where rights to property are protected by the property clause (s 25) in the 1996 Constitution.

These land users, vulnerable to eviction and in need of long term security of tenure, are afforded special status in terms of the Act.

3 Application

The Act applies to all land outside townships or outside a proclaimed or approved township. It includes land in the townships designated for agricultural purposes, including land that was occupied by persons before the township was proclaimed or approved (s 2). An occupier is defined as a person residing on land which belongs to another person and who on 4 February 1997 or thereafter had been granted consent by the owner (including the holder of mineral rights (s 1(xiii)) or a person in charge (s 1(xiv)) to reside on that land. The occupier may not be someone who on that date enjoyed some other right in law to reside on such land – labour tenants and persons using the land for industrial, mining, commercial and commercial farming purposes are excluded for purposes of this definition (s 1(x)). The position of labour tenants is dealt with in the Land Reform (Labour Tenants) Act 3 of 1996.

Section 3 deals with consent to reside on land. Consent includes both tacit and express consent (s 1(1)), and consent to reside on land may be terminated only in accordance with section 8 (cf 6). If consent was withdrawn prior to 4 February 1997 but the person continued to reside on the land, he or she will still be regarded as an occupier in terms of this Act (s 3(2)). If, however, the withdrawal of the consent was just and equitable, it will be deemed to be a valid withdrawal of consent in terms of section 8.

Consent is regarded as effective regardless of whether official authority was required by law for such residence (s 3(3)). A person who continuously and openly resided on land for a period of one year is presumed in civil proceedings to have had the required consent unless the contrary is proven (s 3(4)). Section 3(3) and 3(4) is, however, not applicable to state land.

Unless occupiers have committed a prescribed breach, the right of residence for occupiers who (1) have resided on land for 10 years and are older than 60 years or (2) who resided there for 10 years and were employees (of the owner or person in charge) and had become disabled because of ill-health, injury or disability, may not be terminated (s 8(4)). Refusal by such an occupier to work is not regarded as a breach on the basis of which a right of residence may be terminated as contemplated in section 10(1) (cf 6). The rights of the occupier and the consent given by previous owners or persons in charge) are (subject to the provisions of the Act) binding on successors in title of an owner or person in charge of the land (s 24). (Hereafter reference to owners of land will include persons in charge of land.)

4 Fundamental rights

The Act specifically mentions that an occupier or owner has the right to human dignity, freedom and security of the person, privacy, freedom of religion, belief and opinion and of expression as well as freedom of association and movement (s 5). This right may be subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The rights of the owner are indeed limited as interpreted by the limitation clauses of the Constitution.

5 Rights of the occupier and the owner

The occupier has the right to reside and use the land on which he or she has resided on or after 4 February 1997 and to have access to all services that form part of an express or tacit agreement between the occupier and the owner (s 6(1)). The occupier has a right to security of tenure and to receive *bona fide* visitors at reasonable times for reasonable periods (s 2(a)–(b)). The owner may, however, impose reasonable conditions on visitors to ensure that life and property are protected and to prevent unnecessary disruption of work on the land (s 6(2)(b)(i)). The occupier is liable for any act, omission or conduct of his or her visitors which causes damage and which could have been prevented by taking reasonable steps (s 6(2)(b)(ii)). The occupier may receive postal and other communication and has a right to family life in accordance with the culture of the family (this does not include people living in single accommodation in hostels built before 1997-02-04) (s 6(2)(c)–(d)). An occupier may not be denied or deprived of access to water, educational or health services (s 6(2)(e)–(f)). These rights of the occupier should be read with section 5 and should be weighed up against the rights of the owner (s 6(2)).

It is a duty of the occupier not to harm any other person who occupies the land or to cause material damage to the owner's property, whether intentionally or unlawfully. He or she may not engage in threatening or intimidating conduct towards other lawful occupiers on this land or land in the vicinity, or assist any unauthorised persons to erect new dwellings on the land in question (s 6(3)).

Family graves on the land of another person may be visited and maintained subject to reasonable conditions imposed by the owner to safeguard property and life and to prevent undue disruption of work (s 6(4)).

An occupier cannot waive any of his or her rights in terms of this Act unless the waiver is incorporated in an order of court. A court is not restricted by an agreement that limits any right of an occupier granted in terms of this Act. If an occupier freely and willingly vacates the land while being aware of his or her rights, he or she may not institute proceedings for restoration of rights in terms of section 14 (cf s 25).

The Prevention of Illegal Squatting Act 52 of 1951 does not apply to an occupier in respect of land to which he or she is entitled to in terms of the Act under discussion (s 29).

The owner, on the other hand, may have a trespassing animal which is usually or actually in the care of the occupier, impounded and removed to a pound in accordance with the applicable laws. This may be done only if 72 hours' notice has been given to remove such an animal and the occupier has failed to respond. The land owner may also take reasonable steps to prevent that animal from causing any damage (cf s 7(1)).

The owner may not prejudice "an occupier if one of the reasons for the prejudice is the past, present or anticipated exercise of a legal right" (s 7(2)). A presumption in favour of the occupier is included in section 7(3). If it is proved in any proceedings that the effect of the conduct complained of is to the prejudice of the occupier, it may be presumed (unless proven to the contrary) to be for one of the reasons mentioned in section 7(2).

The Act does not affect the rights of an owner in terms of the Trespass Act 6 of 1959 (s 27). The Trespass Act has accordingly been amended by the 1997 Extension of Security of Tenure Act to ensure that a person who is entitled to be on land in terms of the latter Act is deemed to have lawful reason to enter and be upon such land (s 1(1A) Act 6 of 1959; cf also the amendment to s 2(2); the Act has been made applicable throughout the Republic – s 3A).

It is submitted that the manner in which the owner must allow land users to exercise various land use rights, does not differ from the normal practice of farmers and owners of smallholdings in the past. Of course there was until recently no threat that temporary land users would be granted special status and no right to have temporary concessions converted to permanent tenure rights.

6 Termination of right of residence and eviction

The Act provides for the termination of rights of residence and for the eviction of persons who were occupiers on 4 February 1997 and of persons who became occupiers after 4 February 1997. "Eviction" is defined as "means to deprive a person against his or her will of residence on land or the use of land or access to water which is linked to a right of residence in terms of this Act" (s 1(vi)).

An occupier's right of residence may be terminated on a lawful ground if the termination or withdrawal is just and equitable according to the factors stated in the Act (s 8). These factors include the fairness of agreements or laws or their provisions, the conduct of the parties leading to the termination of agreements, the interests of the parties (including comparative hardship suffered by the owner, occupier and other occupiers of the land in respect of which tenure is not terminated), the existence of a reasonable expectation of the renewal of the agreement after it lapses and the fairness of the procedure followed by the owner (including the question whether the occupier had effective opportunity to make representations before the decision was made to terminate the right of residence) (s 8(1)(a)–(e)).

If the occupier is an employee whose right of residence is based on an employment agreement, his or her right of residence may be terminated when the occupier resigns or is lawfully dismissed in terms of the Labour Relations Act 66 of 1995. Disputes in this regard are also dealt with in terms of labour relations legislation.

The right of residence of a deceased occupier's spouse or dependants may be terminated only if 12 calendar months' written notice to vacate the land is given, unless an act amounting to a "breach" has been committed in terms of section 10(1) (s 8(5)). A breach, as contemplated in section 10(1), is committed when the occupier (on 1997-02-04) acts as set out in section 6(3) (cf 5; s 10(1)(a)) or the occupier breaches a material and fair term of the contract when it is possible to comply with that term (the owner must also have complied with the terms of the agreement). A month's written notice must have been given to the occupier to remedy the breach (s 10(1)(b)). A fundamental breach of the relationship

between the occupier and the owner, which is not reasonably capable of being remedied, constitutes a breach in terms of section 10(1)(c). Should an employee, whose right to residence is based on a contract of employment, resign (not be dismissed in terms of the Labour Relations Act), such resignation can also be regarded as a breach (s 10(1)(d)).

If none of the above mentioned factors applies, the court may nevertheless grant an eviction order if it is satisfied that the occupier has suitable alternative accommodation (s 10(2)). "Suitable alternative accommodation" is defined as

> "alternative accommodation that is safe and overall not less favourable than the occupiers' previous situation, having regard to the residential accommodation and land for agricultural use available to them prior to eviction, and suitable having regard to
>
> (a) the reasonable needs and requirements of all of the occupiers in the household in question for residential accommodation, land for agricultural use, and services;
>
> (b) their joint earning abilities; and
>
> (c) the need to reside in the proximity to opportunities for employment or other economic activities if they intend to be economically active".

If no suitable accommodation can be found within nine months after termination of employment in terms of section 8, and the dwelling used by the occupier was provided by the owner, and further, if the occupation of that dwelling prejudices the efficient carrying on of the operation of the owner because the new employee needs that accommodation, the court may grant an eviction order if it appears to be just and equitable for such occupier and his dependants to be evicted (s 10(3)(1)). The court must take into account the efforts made by the owner and the occupier to find suitable alternative accommodation, the interests of the parties, as well as the comparative hardship to the owner, occupier and other remaining occupiers should the order of eviction not be granted (s 10(3)(c)(i)–(ii)).

An occupier may be evicted only in terms of a court order issued under the Act (s 9(1)). Eviction without a court order is an offence (s 23(1) cf 10). The court may grant the order only when specific conditions are met, such as that the right of residence has been terminated in terms of section 8, that the land was not vacated within the period mentioned in the notice given by the owner and that the conditions for the eviction order in terms of sections 10 and 11 have been complied with. The owner must give two calendar months' notice of intention to obtain an order for eviction to the occupier, the relevant municipality and the head of the provincial department of land affairs, for information purposes. If the notice was received two ordinary months before the commencement of the hearing of the application, this requirement will nevertheless be deemed to have been complied with. The notice must contain the prescribed particulars as well as the grounds for eviction (s 9(1)(d)).

An order for the eviction of a person who became an occupier after 4 February 1997 may be granted on the ground that a fixed period agreed upon by the occupier and the owner has lapsed or that the eviction is just and equitable (s 11(1)–(2)). The court must take into account the period of residence, the fairness of the terms of the agreement, whether suitable alternative accommodation is available to the occupier, the reason for the proposed eviction and the balance of interests of the owner, the occupier and the remaining occupiers of the land (s 11(3)).

The court granting the eviction order should determine a just and equitable date on which the occupier should vacate the land or determine the date on

which an eviction order may be carried out if there has been no compliance with that order (s 12(1)). In determining a just and equitable date, the court must take into account the fairness of the terms of the agreement, the balance of interests as well as the period of residence (s 12 (2)).

The court may, on request of the sheriff, authorise any person to assist him or her in carrying out the order for eviction, demolition or removal; the presence of the sheriff is, however, required at the execution of the order (s 12(3)). Eviction orders in terms of sections 10 and 11 may be made conditional to reasonable terms, such as extended rights to residence, having regard to the income of all the occupiers in that household. A court may vary a term or condition on good cause being shown (s 12(4)–(5)). The court may not grant an eviction order if of the opinion that the intended purpose of the eviction is to prevent an occupier from acquiring rights in terms of section 8(4) (ie the right of residence of an occupier who has resided on that land for 10 years and has reached the age of 60 years – cf 3).

The effect of an eviction order is that the owner has to pay just and equitable compensation for any structure erected or improvement made or standing crops planted by the occupier. Certain factors will have to be taken into account when determining compensation. These include: whether the improvements were made or the crops planted with the consent of the owner, whether the improvements are useful or necessary or whether a written agreement was entered into before the improvements were effected in which it was agreed that the occupier would not be entitled to compensation (s 13(a)). Any outstanding wages have to be paid. The court may order the owner to give the occupier a fair opportunity to break down any structures, dismantle any improvements, to tend crops until they are ready for harvesting, and to harvest and remove them. In effect, section 13 gives expression to existing common law rights of possessors. (Cf Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) 150–156; Sonnekus and Neels *Sakereg vonnisbundel* (1994) 236–238; Van der Merwe *The law of things* (1987) par 90–97).

The court must consider the following factors when determining compensation: the costs to the occupiers of replacing the structures and improvements in which they were residing prior to the eviction, the value of the removed materials, the contribution of the owner to the acquisition of the materials or, should the crop not be removed, the value of the crop less the contribution of the owner to its planting and maintenance. An order for eviction cannot be executed before compensation is paid (again the common law *ius retentionis* is confirmed in the Act – cf Van der Merwe par 94; Sonnekus and Neels 769–771; Kleyn and Boraine 153–154).

An urgent application for the removal of an occupier of land may be made pending the outcome of proceedings of a final order. The court must be satisfied that there is a real and imminent danger of substantial injury or damage to any person or property should the occupier not be removed immediately, that there is no other effective remedy available, that the likely hardship of the owner or other affected persons exceeds the likely hardship of the occupier and that adequate arrangements have been made for the reinstatement of any person evicted if the final order is not granted.

7 Restoration of residence and use of land

The court may order restoration of occupation and may, *inter alia*, grant damages to a person unlawfully evicted in an attempt to avoid the process of this Act

(s 14(a) and (e)). Any person who had the right to reside on the land as if the Act had been applicable on 4 February 1997 and who was evicted between 4 February and 28 November 1997 (s 14(2)) may apply for such an order. The court may order the repair, reconstruction or replacement of any damaged, demolished or destroyed building, structure, installation or thing that was peacefully occupied or used by this person prior to eviction (s 14(3)(b)–(c)). The Act also authorises the court to order the restoration of services and the payment of costs.

The proceedings referred to above must be instituted within one year of the commencement of the Act. The court must, in addition to any other just and equitable factor, take into account whether the order would have been granted had the proceedings been instituted after commencement of the Act and whether the occupier was properly represented (s 14(4)).

8 Dispute resolution and courts

The Act provides for redress by the courts (s 16–20), mediation (s 21) and arbitration (s 22). A party may institute proceedings either in the magistrate's court or the land claims court (s 17(1)) subject to the provisions of sections 19 and 20. If all the parties consent, the proceedings may also be instituted in the High Court. The Rules Board for Courts of Law (established in terms of the Rules Board for Courts of Law Act 107 of 1985) may make rules of procedure to be applied in the magistrate's court and the High Court. Until such rules are formulated, the High Court rules of civil procedure will apply in these courts (s 17(3)(4)). The courts may determine the manner of execution of an order and may set time limits in this regard (s 18).

A magistrate's court has jurisdiction in respect of proceedings for eviction and reinstatement as well as criminal proceedings in terms of the Act (a number of offences are listed in s 23, cf 10). An appeal lies to the land claims court. All eviction orders made by a magistrate's court on or before 31 December 1999 will be subject to automatic review by the land claims court. The parties may make written or oral submissions in this regard (s 19(3)), but section 19(3) does not apply to an appeal noted by the occupier.

The land claims court has jurisdiction in respect of the whole of South Africa. It has all ancillary powers necessary for or reasonably incidental to its functions in terms of this Act. The land claims court further has the power to decide any constitutional matter in relation to the Act, to grant interlocutory orders, declaratory orders and interdicts as well as to review any act, omission or decision of relevant functionaries, and may also review arbitration awards made in terms of the Arbitration Act 42 of 1965. If proceedings are instituted in the High Court dealing with a matter arising from this Act and no oral evidence is led, the proceedings should be referred to the land claims court.

Any of the parties may request the Director-General of Land Affairs to appoint one or more persons with expertise in dispute resolution to facilitate meetings between the interested parties in order to mediate and settle the dispute (s 21(1)). The director-general may appoint such a person on any condition he or she may deem fit; this does, however, not preclude the parties from appointing a person subject to conditions determined by the director-general. A person not in the employ of the government service must be remunerated by the state. The discussions, disclosures and submissions made by the parties are privileged except when the parties agree otherwise.

The parties may refer the dispute to arbitration in terms of the Arbitration Act 42 of 1965. A person appointed as arbitrator in terms of the Land Reform (Labour Tenants) Act 3 of 1996 may also be used. Such a person must be remunerated by the state. If the person is not one of those listed in terms of Act 3 of 1996, his or her remuneration has to be approved by the director-general.

9 Funds for planning and development

The minister must make available subsidies to facilitate the planning of on-site and off-site developments, to enable occupiers, former occupiers and persons previously evicted from the land, to acquire land or rights in land and to develop occupied or unoccupied land (s 4(1)). "Rights in land" are not defined. "Off-site development" is defined as

> "a development which provides the occupants thereof with an independent tenure right on land owned by someone other than the owner of the land on which they resided immediately prior to such development" (s 1(xii)).

The minister must take various criteria into account when determining priorities for approving subsidies. The development must accommodate the interests of both the occupiers and the owners and must be cost-effective (s 4(2)(a)–(b)). Where an off-site development is proposed, while an on-site development is preferred by the occupiers, satisfactory reasons must be given why an on-site development is not an appropriate solution (s 12(c)). Owners and occupiers must have made a reasonable attempt to devise a cost-effective development accommodating the interests of all parties (s 12(2)(d)). An application for an off-site development will not be prejudiced when an owner, other than the one on whose land the off-site development is to take place, does not support the idea (s 12(2)(c)). Other criteria to be taken into account are the fact that the occupiers are the spouses or dependants of section 8(4) occupiers (those who have occupied land for longer than 10 years and are older than 60 years) (s 12(2)(d)) and the fact that there is an urgent need for the proposed development because of an eviction or the possibility of an eviction (s 12(2)(e)–(f)). The minister will grant the subsidy only if the majority of the adults concerned find the development acceptable (s 12(3)).

Subsidies may be granted through a municipality or the provincial government (s 12(4)). No transfer duties are payable on any transaction for the acquisition of land which is financed by subsidies in terms of section 12 (s 12(5)). A potential beneficiary in terms of this Act may also apply for a housing subsidy in terms of the Housing Act 4 of 1996 (s 10A–D). The Subdivision of Agricultural Land Act 70 of 1970 does not apply (s 12(7)), but the Expropriation Act 63 of 1975 applies to developments in terms of this Act (s 26).

10 Offences

Offences created in terms of the Act (s 23(1)–(2)) are eviction without a court order and wilful obstruction or interference with a state official or mediator. A person will be liable on conviction to a fine or to imprisonment not exceeding two years or both (s 12(3)).

In the case of evictions without a court order, the affected person may institute a private prosecution in terms of the Criminal Procedure Act 51 of 1977 (s 12(4)). This may be done through a practising advocate or attorney (s 12(5)(a)). Written notice must be given to the public prosecutor, who must certify within 14 days

that he or she does not intend to prosecute (s 12(5)(b)–(c)). The private prosecutor will then not be required to obtain a certificate from the attorney-general stating refusal to prosecute and will not have to provide security (s 12(5)(i)–(ii)). The accused will be entitled to an order for costs if the charge is dismissed, the accused is acquitted, the judgment reversed on appeal, or the court finds that the prosecution was unfounded and vexatious (s 12(5)(iii)–(iv)). The attorney-general will be barred from prosecuting except by leave of the court (s 12(5)(iv)).

11 Regulations and guidelines

The minister may make regulations dealing, *inter alia*, with the conditions for the granting of subsidies and the form and manner of serving of notices (s 28(1)). Different regulations based on the conditions of a specific area may be issued (s 28(2)). Guidelines may be issued in respect of procedures as well as to provide assistance to parties who may become involved in disputes (s 28(3)).

12 Positive and negative aspects

The Act differs substantially from the earlier bills that were so contentious. The end result of the Act is a more balanced mechanism to protect the interests of both farm workers and land owners. The fact that the Act places the emphasis on fundamental rights as well as just and equitable action, ensures that it is not the draconian legislation feared by some agricultural unions and farmers' organisations.

Evictions may now take place only by way of a court order – this will ensure that farm workers are not evicted from farms purely to ensure that they will never be able to obtain land rights. The period after which workers may acquire tenure rights was amended from 20 years in the bill to 10 years in the Act. The Act further provides the land owner with more mechanisms for protection than the bill had provided for.

To ensure that costs are kept to the minimum and the processes expedited, the magistrate's court and the land claims court are also given jurisdiction to deal with these matters. The land claims court may even hear matters involving constitutional issues – this also ensures a speedier process for land users or land owners.

The underlying rationale of this Act, seems to be that if the law is used to secure permanent tenure for unreasonable land users, those land users will be better off in the long term. This is a fallacy. The history of the past, almost 80 years, taught that neither land nor people can be developed by legislative measures. The use of law for purposes of social engineering has failed dismally in South Africa and elsewhere. A law such as the one discussed above may have short term results in terms of policy or political goals, but in the long run it may impact negatively on agriculture production and the value of commercial agricultural land. Even more serious would be the breakdown in the relationships between commercial farms and other rural dwellers who have for many years been beneficially employed in the agricultural sector. It may be that as a result of this Act, in the long term, fewer jobs will be created in rural areas and fewer development opportunities will become available. The converse of vulnerability to possible eviction, is not permanence of tenure, but rather nation building, opportunity for production and economic capacity, the creation of jobs and the building of new partnerships for the future.

This Act may create permanence of tenure for some, but does not guarantee that these land users will not remain poor, and it does not address the real reasons why land users are usually evicted.

It does, however, represent a gallant effort to prevent unfair and unjust evictions. Land users who would not normally be in a position to have access to the available legal remedies in the face of inhuman and heartless evictions by ruthless land owners, will enjoy more protection as well as prospects of becoming the owners of a house or piece of land. Even should only a relatively few vulnerable people and families be granted relief under this Act, it can be stated with certainty that at least some good has come of this rather elaborate legislative measure.

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DIE DINAMIESE AARD VAN DIE INHOUD VAN DIE MISDAAD AANRANDING EN GEREGTIGHEIDSKONFORME ANALOGIE IN DIE STRAFREG*

1 Inleiding

Beide die Engelse Court of Appeal *(R v Burstow* [1997] 1 Cr App R 144) en die Duitse *Bundesgerichtshof* (BGH, Beschl v 5/11/1996, *NStZ* 1997, 123) het onlangs te doen gehad met die vraag of die toevoeging van 'n psigiatriese besering (of emosionele pyn) binne die trefkrag van die misdaad aanranding ("assault") of liggaamskending ("Körperverletzung") kan val. Die kern van die problematiek in dié verband kan herlei word tot die vraag: Mag die trefkrag van 'n misdaad by wyse van analogiese interpretasie uitgebrei word? Of vanuit 'n ander hoek beskou: Is uitsonderings op die analogieverbod in die strafreg hoegenaamd moontlik? Hierdie problematiek word in die onderhawige aantekening onder die loep geneem.

2 Die Suid-Afrikaanse reg in 'n regsvergelykende perspektief

Hunt en Milton omskryf aanranding in die Suid-Afrikaanse reg soos volg:

> "Assault consists in unlawfully and intentionally: (1) applying force to the person of another, or (2) inspiring a belief in that other that force is immediately to be applied to him."

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(*South African criminal law and procedure* vol 2 (1996) 406.) Snyman se omskrywing is soortgelyk (*Strafreg* (1992) 452).

Wat hieruit duidelik blyk, is dat die misdaad aanranding op twee bene staan. Eerstens omvat dit geweld teen die liggaam van 'n ander. Tweedens word ook 'n dreigement tot onmiddellike geweldsaanwending en die daaruitvoortspruitende geloof of vrees van die slagoffer, as aanranding gestraf. Die kern van die misdaad aanranding wentel in ons reg gevolglik om die begrip "liggaamsgeweld". Dit is insiggewend dat Ulpianus geweld (*vis*) in die Romeinse reg as optrede in stryd met 'n ander se wil (*necessitas imposita contraria voluntati*) omskryf (*D* 4 2 1. Sien ook Mommsen *Römisches Strafrecht* (1899) 652). In gemeenregtelike terminologie sou mens kon sê dat die hedendaagse aanrandingsmisdaad in Suid-Afrika beide *vis absoluta* en *vis compulsiva* omvat (vgl bv Boehmer *Meditationes in CCC* (1744) 126 4; Püttmann *Elementa iuris criminalis* (1802) par 482). Uit 'n blik op die ontwikkeling van aanranding as misdaad in die Suid-Afrikaanse reg blyk meteens dat die inhoud daarvan nie as staties beskryf sou kon word nie. Soos by 'n vorige geleentheid aangetoon is, blyk duidelik dat die geweldsbegrip 'n proses van interpretatiewe verbreding ondergaan het (Labuschagne "Aanranding en misdaadkondensering: Opmerkings oor die strafregtelike beskerming van biopsigiese outonomie" 1995 *De Jure* 367 371).

Hierdie opmerking kan aan die hand van twee sake verduidelik word: In *S v Marx* 1962 1 SA 848 (N) het M alkoholiese drank aan twee kinders van onderskeidelik sewe en vyf jaar toegedien. As gevolg hiervan het hulle in 'n toestand van semi-bewusteloosheid verval. Die hof bevind M aan aanranding skuldig en wys daarop dat geweld, in die konteks van aanranding, nie slegs direkte nie maar ook indirekte geweld insluit (850–854). In 'n kommentaar op dié saak merk Strydom op dat die hof die omvang van die begrip "indirekte geweld" so wyd stel dat dit ook handelinge insluit wat in ons gemenereg *iniuria* sou kon uitmaak ("Aanranding-vereiste van geweld – opsetlike toediening van alkohol aan kinders" 1962 *THRHR* 214 216). In ons gemenereg word na *iniuria* verwys as *contumelia contra bonos mores alicui illata* (sien Matthaeus *De criminibus* (1644) 47 4 11 gelees met I 4 4 pr). Joubert beweer, en tereg ook, dat die konsep *boni mores* verwys na die gemeenskap se opvattings aangaande wat behoorlik is (*Grondslae van die persoonlikheidsreg* (1953) 109). En dit het by uitnemendheid 'n dinamiese karakter. In *S v A* 1993 1 SASV 600 (A) 610 het die Suid-Afrikaanse appèlhof beslis dat dit aanranding daarstel om 'n ander te dwing om sy eie urine te drink. Hier het mens te doen met 'n geval wat sterk herinner aan die bogenoemde definisie van geweld deur Ulpianus in die Romeinse reg. Dit gaan hier wesenlik om die buig van 'n ander se wil. In Nederland en Duitsland word sodanige optrede afsonderlik as dwang of *Nötigung* gestraf (sien a 240 van die Duitse Strafwetboek (*Strafgesetzbuch; StGB*) en a 240 van die Nederlandse Strafwetboek). Dié misdade beskerm wesenlik individuele wilsvryheid (sien Köhler "Nötigung als Freiheitsdelikt" in Kerner, Göppinger en Streng (reds) *Festschrift für Heinz Leferenz* (1983) 511 524). Hierdie misdade is oorkoepelend van aard en blyk 'n dinamiese kern te hê (sien bv Kohler "Vorlesungstörung *als Gewaltsnötigung*" 1983 *NJW* 10; Otto "Sitzendemonstration und strafbare Nötigung in strafrechtlicher Sicht" 1987 *NStZ* 212; Schroeder "Widerstand gegen Willensmittler als Nötigung?" 1985 *NJW* 2392 2393; Remmelink *Het Wetboek van Strafrecht* Bk 2 (1992) 913). Hunt en Milton, na 'n analise van die vooraf-gaande gewysdereg en kommentare daarop, konkludeer dat 'n slagoffer van "assault by threats" dikwels emosionele vrees beleef, maar dit word egter nie as 'n vereiste gestel nie (427. Sien ook *S v Mokgalaka* 1993 SASV 704 (A) 708 en

tav die deliktereg *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 779).

Artikel 223 *StGB* bepaal in Duitsland dat enigeen wat 'n ander persoon liggaamlik mishandel of sy/haar gesondheid benadeel met 'n vryheidstraf van tot vyf jaar of met 'n boete bestraf word (sien ook a 300 van die Nederlandse Strafwetboek). Liggaamlike mishandeling ("körperliche Mißhandlung") is liggaamskending deur onvanpaste behandeling, wat die slagoffer in sy/haar liggaamlike welsyn in meer as 'n geringe graad benadeel en wat nie noodwendig die toevoeging van pyn hoef mee te bring nie. Dit is in besonder die geval by substansiële inwerkinge op die liggaam, soos by substansbenadelinge (bv verwonding) of substansverliese (bv 'n ledemaatverlies). Ook misvorming van die liggaam, soos afsny van hare, of die besmering daarvan met 'n moeilik verwyderbare stof, soos teer, of die veroorsaking van funksieversteuring van die liggaam, soos deur gehoorbeskadigende geraas, kan liggaamskending daarstel (Schönke-Schröder-Eser *Strafgesetzbuch-Kommentar* (1997) 1602). In 'n saak wat in 1993 voor die *Bundesgerichtshof* gedien het, was die relevante feite soos volg: Eiser het 'n operasie ondergaan wat steriliteit tot gevolg sou hê. Omdat hy later kinders wou hê, het hy van sy sperma laat vries. Verweerder het hierdie sperma sonder eiser se toestemming vernietig. Eiser eis vervolgens, kragtens artikels 833(1) en 847(1) *BGB*, genoegdoening weens liggaamskending ("Körperverletzung") van verweerder (BGH, Urt v 9/11/1993, NJW 1994, 127). Die eis word toegestaan, hoofsaaklik op grond daarvan dat die regsgoed wat in artikels 823(1) en 847(1) *BGB* beskerm word, nie die materie is nie, maar die bestaan en bestemming van die menslike persoonlikheid wat in 'n liggaamlike identiteit materialiseer. Veronderstel A se arm word in 'n motorongeluk afgeruk. Ten aanskoue van A beskadig B die arm wat later weer suksesvol aangeheg word. Sou B aan oortreding van artikel 223 *StGB*, dit wil sê die misdaad liggaamskending ("Körperverletzung"), skuldig bevind kon word? Schönke-Schröder-Eser is van mening dat dit, soos ook die vernietiging van ekstrakorporale sperma, nie liggaamskending daarstel nie (1602-1603. Sien ook Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 89). Hierdie tipe gevalle, wat die gevolg van medies-tegnologiese ontwikkelinge is, dwing ons wesenlik tot 'n herbesinning oor die begrip liggaam (sien ook Visser "Enkele gedagtes oor die moontlike invloed van fundamentele regte ten aansien van die fisies-psigiese integriteit op deliktuele remedies" 1997 *THRHR* 495 498). Soos by 'n vorige geleentheid beredeneer, behoort aan die begrip liggaam 'n minder konkrete betekenis toegeken te word sodat genoemde gevalle op liggaamskending sou neerkom. Die argumente daarin geopper, word nie hier herhaal nie (Labuschagne "Deliktuele aanspreeklikheid weens liggaamskending as gevolg van spermavernietiging: 'n Verreikende uitspraak van die Duitse Bundesgerichtshof" 1995 *THRHR* 148). Dit blyk uit uitsprake van die Duitse howe dat die opwekking van walging of vrees nie as sodanig liggaamskending kan daarstel nie, aangesien psigiese of geestelike ("seelische") benadeling as sodanig nie voldoende is nie. Daar moet addisioneel 'n prikkeling van die sentrale senustelsel plaasvind (sien bv RG, Urt v 9/6/1902, GA Bd 49, 274; RG, Urt v 30/5/1910, GA Bd 58, 184; OLG Koblenz, Urt v 7/10/1971, VRS 42 29 31; BGH Urt v 26/11/1985, MDR 86, 272; OLG Düsseldorf, Urt v 3/5/1983, MedR 1984, 28 29; OLG Köln, Urt v 28/3/1984, StV 85, 17; OLG Hamm, Urt v 16/9/1958, MDR 1958, 939; OLG München, Urt v 7/9/1962, VersR 63, 666; Schönke-Schröder-Eser 1603). Die *Bundesgerichtshof* het beslis dat 'n ernstige maagpyn as gevolg van vrees deur dreigemente veroorsaak, liggaamskending kan daarstel (Urt v 5/10/1974, MDR

1975, 22). Die begrip gesondheidsbenadeling, wat ook liggaamskending ooreenkomstig artikel 223 *StGB* kan daarstel, is nie liggaamsgebonde nie. Die teweegbring of verergering van 'n psigopatologiese versteuring (psigiatriese besering) stel gesondheidsbenadeling daar (BGH, Beschl v 5/11/1996, NStZ 1997, 123; Schönke-Schröder-Eser 1603). Namate meer kennis aangaande die menslike psige en psigopatologiese siektetoestande ingewin word, sal die trefkrag van artikel 223*StGB* derhalwe kan uitbrei.

Artikel 20 van die Engelse Offences Against the Person Act 1861 lui soos volg:

> "Whosoever shall unlawfully and maliciously . . . inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence] and being convicted thereof shall be liable to [imprisonment] . . . for not more than five years."

Hierdie bepaling is aanvanklik so uitgelê dat dit slegs betrekking het op 'n besering of benadeling van 'n liggaamlike aard (sien *R v Wilson* [1983] 79 Cr App R 319; Smith en Hogan *Criminal law* (1992) 425-426). 'n Australiese hof het dit by die uitleg van 'n soortgelyke artikel soos volg gestel:

> "In our opinion, grievous bodily harm may be inflicted . . . either where the accused has directly and violently 'inflicted' it by assaulting the victim, or where the accused has 'inflicted' it by doing something intentionally, which, though it is not itself a direct application of force to the body of the victim, does directly result in force being applied violently to the body of the victim, so that he suffers grievous bodily harm . . ."

(*R v Salisbury* (1976) VR 452 461. Vgl ook a 265(1) van die Kanadese Strafkode en *R v Jobidan* (1991) 6 CCC (3d) 454 (SCC) 469-470). In 1861 was inligting en kennis oor psigiatriese siektetoestande en besering nog minimaal. Die sintuiglik-waarneembare, die konkrete dus, het nog op die voorgrond gestaan (sien verder hieroor Labuschagne "Geesteskrankheid as verweer in rudimentêre regstelsels: 'n Strafregtelik-evolusionêre perspektief" 1993 *THRHR* 292). Dat psigiatriese en ander wetenskaplike kennis hierdie toedrag van sake mettertyd sou ondergrawe, is voor die hand liggend. In 1994 in die saak *R v Chan-Fook (Mike)* [1994] 99 Cr App R 147 is vir die eerste keer beslis dat 'n liggaamlike besering ook 'n psigiatriese besering kan omvat. In *R v Burstow* [1997] 1 Cr App R144 149 sluit hoofregter Lord Bingham by dié benadering aan waar hy opmerk dat "the distinction between physical and mental injury is by no means clear-cut, and psychiatric injury may often be manifested by physical symptoms" (sien ook tav die Engelse privaatreg *Page v Smith* [1995] 2 All ER 736 (HL)).

3 Die analogieverbod in die strafreg

In ons strafreg, soos in die meerderheid ander strafregstelsels, bestaan 'n verbod op analogiese uitbreiding van misdade (sien bv *R v Oberholzer* 1941 OPD 48 60; *S v Smith* 1973 3 SA 945 (O) 947; Roxin *Strafrecht AT 1* (1997) 104; Langemeijer "Analogische toepassing van strafbepalingen" 1938 *TvS* 35; Gomard "Auslegung und Analogie bei der Anwendung dänischer Wirtschaftsstrafgesetze" 1971 *ZStW* 332; Foregger "Die Problematik der ausdehenden Interpretation einigen praktisch bedeutsamen Fällen des Strafgesetzes" 1960 *ÖJZ* 290). Uitbreiding van strafregtelike verwere of van voorskrifte ter strafversagting, dit wil sê analoë interpretasie *in bonam partem*, is egter wel toelaatbaar (*S v Mnanzana* 1966 3 SA 38 (T); Roxin 114). Soos by 'n vorige geleentheid aangetoon, vereis geregtigheid dat analogiese interpretasie in twee gevalle ook andersins toelaatbaar

behoort te wees (Labuschagne "Die sekerheidsbasis van die strafreg" 1988 *SAS* 52 68-70).

3 1 Begripsgerigte analogie

Die wetgewer gebruik dikwels, en soms onvermydelik, generieke of vae begrippe met 'n waardematige of andersydse begripskern (sien hieroor Roxin 105; Labuschagne "Regsdinamika: Opmerkinge oor die aard van die wetgewingsproses" 1983 *THRHR* 422 435; Dickerson *The interpretation and application of statutes* (1975) 49-50; Franssen "(Un)- bestimmtes zum unbestimmten Rechtsbegriff" in Fürst, Herzog en Umbach (reds) *Festschrift für Wolfgang Zeidler* (1987) 429; Dopslaff *Wortbedeutung und Normzweck als die maßgeblichen Kreiterien für die Auslegung von Strafrechtsnormen* (1985) 71; Wank *Die Auslegung von Gesetzen* (1997) 58-59). Nuwe kennis en gepaardgaande waardeaanpassinge (asook natuurlik die mensfaktor) het 'n effek op die evolusie van die inhoud van generieke begrippe. Die uitbreiding van die inhoud van die misdaad "aanranding", deur kennis- en waardematige herinterpretasie van begrippe soos "geweld", "liggaam" en "besering", bied 'n goeie voorbeeld van die aanwending van begripsgerigte analogie in die strafreg (vgl ook Kuchenbauer "Asbest und Strafrecht" 1997 *NJW* 2009 2011).

3 2 Doelgerigte analogie

Die feitestel van 'n saak wat onlangs voor 'n Duitse hof gedien het, dien as 'n voorbeeld in dié verband (LG Koblenz, Urt v 30/10/1996, NStZ-RR 1997, 104). Die beskuldigde, wat verskeie vorige veroordelings vir ekshibisionisme (openbare onsedelikheid) gehad het, het, uit vrees vir 'n hernude bestraffing, 'n kunspenis gebruik om sy slagoffer te terroriseer. Hoewel hy onder 'n ander artikel van die Duitse Strafwetboek skuldig bevind is, sou elementêre geregtigheid myns insiens ook gedien gewees het indien die begrip "penis" of "geslagsdeel" as insluitend 'n kunspenis of -geslagsdeel geïnterpreteer sou word. Elementêre geregtigheid vereis dat die strafreg nie tot nadeel van regsonderdane misbruik mag word nie (sien ook *SW v United Kingdom; CR v United Kingdom* (1996) 21 *EHRR* 363). Hierdie sienswyse staan ook in die teken van teleologiese of doelgerigte interpretasie van wette, asook van die reg in die algemeen, wat tans wêreldwyd die heersende benadering is (sien hieroor Labuschagne "Die opkoms van die teleologiese benadering tot wetsuitleg in Suid-Afrika" 1990 *SALJ* 569; Botha *Waarde-aktiverende grondwetuitleg: vergestalting van die materiële regstaat* LLD-proefskrif Unisa (1996) 72 ev). Vandaar dat na dié gevalle as doelgerigte analogie verwys word. Artikel 35(1)(l) van die *Grondwet van die Republiek van Suid-Afrika* 108 of 1996, bepaal tans dat iedereen 'n reg het "not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted" (sien ook Burchell *South African criminal law and procedure, vol 1* (1997) 29). Die grenslyn tussen die verbod op retroaktiewe misdaadskepping en die verbod op analogiese misdaadskepping is uiters vloeiend (sien ook Labuschagne "Retroaktiewe wetgewing" 1986 *SAPR/PL* 135). Regterlike interpretasie van die reg (insluitend voorafgaande regtersreg) is wesenlik altyd terugwerkend: die regter interpreteer (eintlik: vorm) die reg op 'n tydstip na die pleeg van die misdaad en gee dan terugwerkend effek daaraan. Die mensfaktor maak meganiese regsinterpretasie in ieder geval onmoontlik en daarmee saam ook absolute regsekerheid (vgl hieroor Larenz "Der Richter als Gesetzgeber?" in Roxin (red) *Grundfragen der gesamten Strafrechtswissenschaft* (1974) 31; Müller "Richterrecht – rechtstheoretisch

formuliert" in *Festschrift der Juristischen Fakultät zur 600 – Jahr-Feier der Ruprecht-Karls-Universität Heidelberg* (1986) 65 85; Kellermann *Probleme des gesetzlichen Richters* (1971) 181–202; Bitzilekis "Das richterliche Urteil als rationales Denkverfahren" in Bemmann en Manoledakis (reds) *Der Richter in Strafsachen* (1992) 55 56–60). In die lig van artikel 39(1)(a) van die Grondwet van die Republiek van Suid-Afrika 108 of 1996, moet 'n hof by interpretasie van die bepalings in hoofstuk 2 (akte van menseregte) "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Hiervolgens sou artikel 35(1)(l) in elk geval in die lig van elementêre geregtigheid geïnterpreteer moes word (sien ook Baratta "Juristische Analogie und Natur der Sache" in Hollenbach, Maihofer en Würtenberger (reds) *Mensch und Recht* (1972) 137 161).

4 Konklusie

Analogiese interpretasie van die strafreg is nie slegs geregtigheidskonform *in bonam partem* nie, maar ook in twee gevalle *in malam partem*, naamlik in 'n begripsgerigte en doelgerigte sin, soos hierbo verduidelik. Geen regsfiguur mag toegelaat word om elementêre ongeregtigheid in die strafreg te sanksioneer of te bevorder nie. Kennis- en waardematige ontwikkelinge in 'n gemeenskap kan geregtigheidskonforme misdaadverbreding noodsaak. Hierdie benadering kan, soos elders verduidelik, slegs geregtigheidsmatig funksioneer in 'n strafregsisteem wat regsdwaling as verweer erken, maar sonder om misbruik van die strafreg te duld (sien Labuschagne 1988 *SAS* 70 75–76. Vgl ook Kenntner "Der deutsche Sonderweg zum Rückwirkungsverbot" 1997 *NJW* 2298).

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THE ADMISSION OF LEARNERS TO PUBLIC SCHOOLS: WHO MAKES THE DECISIONS?

1 The issue of admission to public schools has led to litigation that has focused the international community's attention on the South African school system. In *Matukane v Laerskool Potgietersrus* 1996 3 SA 223 (T) the court held that that the admission policy of the school discriminated unfairly against Black children. It could not have been difficult on the facts for the court to have come to this conclusion in view of the overtly racial policies pursued by the school (231I). In the meantime, however, South Africa has acquired a new Constitution and has adopted the South African Schools Act (Act 84 of 1996). It is therefore appropriate to consider some general aspects of admission policy and admission to public schools, particularly in the light of the South African Schools Act (see generally Potgieter "The South African Schools Act, 1996: Comments on the functions of school governing bodies, with special reference to admission and language policies" in De Groof and Malherbe (ed) *Human rights in South African education* (1997) 110).

2 Section 5(1) of the Schools Act provides that a public school (which is a juristic person acting through its governing body – see ss 15 and 16) "must admit learners and serve their education requirements without unfairly discriminating in any way" (see generally Veny "Minorities and the right to education: equality of rights in education" in De Groof and Bray (ed) *Education under the new Constitution in South Africa* (1996) 177 *et seq*). This is partly to be seen as fulfilling the obligation placed on the state by section 29(1) of the Constitution, which recognises a fundamental right to "basic education" as well as a qualified right to "further education". The school is obviously also bound by the general prohibition on unfair discrimination contained in section 9 of the Constitution (see generally De Groof "Some comments and questions on rights dealing with education in the RSA" in De Groof and Bray 77). Section 5(1) leaves open the possibility of "differentiation", as well as "discrimination" falling short of "unfair discrimination", or even that "unfair discrimination" may be permitted in terms of section 36(1) which provides for reasonable limitation of fundamental rights (see generally *Harksen v Lane NO* 1997 11 BCLR 1489 (CC)).

3 Section 5(2) of the Schools Act prohibits the use of a test as a requirement for admission. This obviously does not prevent a school from conducting tests on learners after they have been admitted to ascertain how their educational needs may be met in that particular school, and even whether the school is capable of meeting their needs.

4 Section 5(3) provides that a refusal of admission may not be based on three specific grounds relating to the parent of a learner (see generally for a discussion Visser "Some principles regarding the rights, duties and functions of parents in terms of the provisions of the South African Schools Act 84 1996 applicable to public schools" 1997 *TSAR* 626 629–630):

4.1 The first ground relates to the situation where a parent is unable to pay or has not paid the school fees prescribed by the governing body (see Visser 629 for a detailed discussion).

4.2 The second ground relates to the situation where a parent does not subscribe to the mission statement of the school (see Visser 629–630 for a discussion). This constitutes a very narrow ground for not refusing admission, since it may be argued that a *learner* may still be required to subscribe to the mission statement of the school and that a learner's non-acceptance of the mission statement may be used to refuse admission. What would be the use of allowing the governing body to develop the mission statement of the school (see section 20(1)(c) of the Schools Act) if it has no legal effect whatsoever in regard to at least the learners at a particular school?

4.3 The third ground deals with the situation where the parent refuses to enter into a contract with the school in which possible claims for damages arising out of the education of the learner are waived (see Visser 630 for an analysis of this ground).

5 Section 5(5) of the Schools Act gives the governing body of a public school the right and the duty to determine the admission policy of that school. This clearly implies that this function of the governing body may be used to limit a learner's right of access and admission to the school. There is therefore no unlimited or absolute right of access to a school – otherwise there would obviously not have been any need for a provision such as section 5(5). Furthermore, the provision suggests that the legislature does not envisage that all public schools will have identical admission policies. If this were the intention, the

legislature would merely have given the national minister or another official the authority to promulgate a single admission policy applicable to all public schools. Alternatively, the Schools Act could have required all admission policies to satisfy certain norms and standards (such as those foreseen in regard to language policy – s 6(1)). Instead, the legislature has given each governing body, which mainly represents those intimately involved with the particular school (see s 23 on the membership of the governing body), the important function of deciding on the principles upon which learners can be admitted to that school. Differentiation is therefore legally possible – and factually desirable – to reflect the diversity in education.

6 It appears from section 5(4) of the Schools Act that the governing body of a public school does not have the power to establish age requirements for the admission of learners to the different grades at a school. This power is given to the minister of Education (acting after consultation with the Council of Education Ministers – see s 9 of the National Education Policy Act 27 of 1996). The minister may, by notice in the *Government Gazette*, determine the age requirements and the governing body may obviously incorporate these in its admission policy. However, the fact that the Act expressly empowers the minister to make such a determination, seems to imply that the governing body has no power in this regard (see also s 3(4)(i) of the National Education Policy Act, in terms of which the minister may make national policy on "the admission of students to education institutions, which shall include the determination of the age of admission to schools").

7 It is noteworthy that when adopting an admission policy, the governing body need not consult with anyone, comply with any formalities, or obtain any further consent or ratification.

8 Although the governing body appears to have a wide discretion in determining admission policy, it is not an unlimited one. Section 5(5) of the Schools Act subjects the governing body to any provisions on admission in the Schools Act and any applicable provincial legislation. The corollary of this provision is that the authority of the governing body is limited only by legal provisions contained in the two abovementioned laws. For example, neither the principal of the school nor the head of the education department may override legitimate policy made in terms of section 5(5). The question is therefore not whether an admission policy is acceptable to the education department or any of its officials or is in accord with its ideas on admission, but only whether it has been determined by a properly constituted governing body acting in terms of the law.

9 In some provinces (eg KwaZulu-Natal) the education authorities distribute documents entitled "School Admission Policy for Public Schools". If these documents are sanctioned by provincial legislation or deal with age requirements on which the national minister has made a determination, they will be binding on public schools. However, education departments are not given the power to determine admission policy in terms of the Schools Act and any such policy documents may only have the status of guidelines to governing bodies for framing their own policies. Schools are therefore not bound by such "admission policies" and learners cannot acquire any rights through them (see generally *In re: The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (CC) pars 26 and 27 on the position in regard to former model C schools; also Government Notice No R703 of 1990-03-30 and Government Notice No R2932 of 1991-12-06).

10 When determining its admission policy, the governing body should be guided first and foremost by its duty not to discriminate unfairly in any way and

by sound educational considerations. It may therefore not include whatever requirement it pleases in its admission policy even though such a requirement does not discriminate unfairly. The admission policy must be based on the law and on factors that are relevant in providing education. It may also be possible for a governing body to incorporate parts of its code of conduct for learners (made in terms of s 8 of the Schools Act) in its admission policy (see also *Matukane v Laerskool Potgietersrus supra* 234G). In so far as the admission policy of the school purports to limit any fundamental right of a learner (such as the right not to be unfairly discriminated against), such limitation must be tested against the criteria contained in section 36(1) of the Constitution (see in general *Bill of Rights Compendium* (Butterworths 1997) par 1A43 *et seq*).

11 What is the position if a school's admission policy does not satisfy the relevant legal requirements? This may happen where, for example, the policy –

(a) discriminates unfairly against a prospective learner;

(b) provides for a test prohibited in terms of section 5(2);

(c) refuses admission because the parent does not subscribe to the mission statement of the school, is unable to pay school fees or does not enter into a contract waiving a claim for damages;

(d) contravenes any specific provision of the Schools Act (eg that only the Minister rules on age requirements for admission);

(e) conflicts with a provincial law;

(f) was not made by a properly constituted governing body;

(g) is too vague to be interpreted and applied;

(h) contains clearly unreasonable or irrelevant provisions.

In such instances the policy as a whole or the relevant part of it will be invalid and will therefore not constitute an enforceable admission policy. However, even the existence of such a problem does not give any other authority the power to prescribe what the admission policy of the school should be. It is clear from the Schools Act that only the governing body may determine the general admission policy.

10 A further important question is: *Who* may actually decide whether a learner is to be admitted to a public school or not? It is clear that the governing body determines the policy, but *who* applies it to a prospective pupil of the school? The Schools Act does not seem to give a clear answer to this question. On the one hand, the governing body makes admission policy (s 5(5). On the other hand, an application for the admission of a learner must be made to the education department itself in a manner determined by the head of department (s 5(7)). It is not surprising to find that this provision is not followed in general practice. What actually happens, is that application is made only at the school concerned and usually has to be approved by the principal, who is also a member of the governing body. It is not clear whether this is based on any express decision by the head of department to delegate the department's function to the principal, or because there are no official guidelines in this regard. It is not expressly stated in the Schools Act that it is the head of department who must admit learners to a school. Before the head of education is able to admit a learner, he must, of course, be furnished with and consider the relevant admission policy – otherwise the policy would be irrelevant. Perhaps section 5(7) is intended to deal only with

exceptional cases where a learner is refused admission at a school and then re-applies to the education department itself.

11 Section 5(8) of the Schools Act, which obliges the head of the education department to furnish written reasons to a parent for a refusal of admission, may possibly support the interpretation that admission is something decided upon by the department. On the other hand, section 5(1) places a duty on a *school* to admit learners and it is reasonable to assume that it also confers a discretion on the governing body in this regard.

12 In practice, the governing body of a school does not have a secretariat and is not suited to deal with administrative issues such as admission to the school. It may probably transfer its functions regarding admission itself (but not admission policy) to the principal of the school (as appears to happen in practice). It is, however, not clear what the position is should there be serious disputes between the principal, governing body or the education department regarding the admission of a learner.

13 In terms of section 5(9) of the Schools Act, any learner or parent of a learner who has been refused admission to a public school, has the right to appeal against the decision to the MEC responsible for education. Thus this internal remedy should be used before a possible court application is brought. The Schools Act itself does not contain detailed provisions on how and within which period this right of appeal is to be exercised and whether the department or the governing body involved may furnish a reply to the grounds of appeal. In is interesting to note that section 5(9) does not contain any express provision as to against whose decision the appeal lies. Section 5(8) obliges the head of department to inform the parent of a learner who has been refused admission to give written reasons for a refusal. This may suggest that the head of department has made a decision on admission as he can hardly be expected to furnish reasons why the governing body refused admission. It is further not clear to what extent the MEC, when considering an appeal, is bound by the admission policy of the school and whether the MEC may take different considerations into account.

14 The above discussion clearly shows that there are too many questions on admission and admission policy left unanswered by the Schools Act. More detailed legislation on a national or provincial level seems to be required to clear up some of the ambiguities.

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DISKRIMINASIE TEEN LEERLINGE MET HIV-INFEKSIE OF VIGS

1 Inleiding

Die doel van hierdie aantekening is om die regsreëls wat betrekking het op diskriminasie teen leerlinge met HIV-infeksie of VIGS in skole te bespreek. Hierdie aantekening sal poog om kortliks:

- te verduidelik wat HIV-infeksie en VIGS is en hoe dit aan ander persone oorgedra kan word
- die regsposisie met betrekking tot VIGS binne skole te verduidelik
- te verduidelik of VIGS-verwante inligting vertroulik is en of dit aan 'n skool bekend gemaak moet word
- die voorgestelde nasionale beleid vir skole te bespreek.

2 Definisie

VIGS is die akroniem vir "verworwe immuniteits gebrek sindroom" en HIV die Engelse akroniem (wat internasionaal gebruik word om die virus aan te dui) vir "human immunodeficiency virus" (hierna kollektief na verwys as VIGS). VIGS word veroorsaak deurdat HIV die liggaam van buite inval. HIV val die liggaam se immuniteitsisteem aan en vernietig dit sodat dit nie die normale weerstand teen siektes kan bied nie. VIGS is 'n sindroom – dit is nie 'n spesifieke siekte nie, maar 'n versameling van verskeie toestande wat plaasvind weens skade wat HIV aan die immuniteitsisteem veroorsaak. Persone met VIGS sterf gewoonlik van een of meer siektes of infeksies wat die liggaam aanval wanneer die immuniteit laag is, en nie van VIGS self nie. VIGS kan gedefinieer word as 'n sindroom van opportunistiese siektes, infeksies en sekere kankers wat uiteindelik 'n persoon se dood veroorsaak. 'n Persoon met HIV-infeksie kan vir jare gesond wees en normaal funksioneer sonder enige fisiese tekens van die infeksie. In hierdie stadium het die persoon nog nie VIGS nie. Eers wanneer die persoon siek word weens die een of ander opportunistiese siekte, kan gesê word dat hy/sy VIGS het. Dit is die endfase van infeksie met HIV (SA Regskommissie "Aspects of the law relating to AIDS: HIV/AIDS and Discrimination in Schools" *Werkstuk 73 Projek 85* 16–17).

HIV word seksueel oorgedra, deur die blootstelling aan of ontvangs van bloed, bloedprodukte ensovoorts, deur 'n HIV-geïnfekteerde moeder aan haar baba voor of gedurende die geboorte, of deur borsvoeding (SA Regskommissie 18). Dit kan nie deur daaglikse sosiale kontak soos handskud, hoes, asemhaal, kos, water of eetgerei oorgedra word nie. In teenstelling met ander oordraagbare siektes word HIV dus nie maklik oorgedra nie.

3 Mag kinders met HIV-infeksie verbied word om 'n skool by te woon?

Die onlangse aansoek van Nkosi Johnson, 'n agtjarige seun met VIGS, om tot 'n Johannesburgse openbare skool as leerling toegelaat te word, het groot reaksie by die publiek uitgelok wat duidelik gewys het dat riglyne by die Departement van Onderwys in dié verband noodsaaklik is. Mag 'n skool beveel dat kinders vir HIV/VIGS getoets word voor toelating tot die skool en na willekeur besluit of 'n kind wat positief toets, wel die skool mag bywoon of nie?

HIV/VIGS sal noodwendig 'n uitwerking op skole hê. Buiten dat die leerling moontlik self HIV het wat later in VIGS kan ontwikkel met die gewone mediese implikasies, kan familielede van 'n leerling self ook HIV/VIGS hê en sodoende 'n groter las op die leerling plaas om die huishouding in stand te hou en vir skoolfooie te betaal.

Opnames het getoon dat HIV nie deur daaglikse sosiale kontak oorgedra kan word nie en dat die risiko van oordrag van HIV in skole onder normale omstandighede effektief uitgesluit is. Daar is ook geen bekende gevalle van oordrag van

HIV in 'n skoolopset nie (SA Regskommissie viii). HIV kan dus nie 'n rede wees om 'n kind toegang tot 'n skool te weier nie.

Ingevolge artikel 32 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (die 1993-Grondwet) en artikel 29 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 (die 1996-Grondwet) het elke persoon, wat leerlinge met HIV/VIGS insluit, die reg op basiese onderwys en gelyke toelating tot onderwysinstansies. Verpligte toetsing van skoolkinders as 'n voorvereiste vir toelating tot 'n skool is dus ontoelaatbaar. Ingevolge artikel 28(2) van die 1996-Grondwet is die beste belang van die kind van hoofbelang in enige saak wat 'n kind raak. 'n "Kind" beteken 'n persoon onder die ouderdom van 18 jaar (a 28(3)).

Die bestaande regulasies (1987) met betrekking tot oordraagbare siektes en die aanmelding van aanmeldbare mediese toestande bepaal dat 'n skoolhoof 'n leerling wat 'n HIV-draer is (of vermoed word een te wees, of in kontak was met 'n persoon wat 'n HIV-draer is) bywoning tot die skool moet weier (reg 7(1)(b)). In 1993 is voorgestelde konsepregulasies gepubliseer vir kommentaar om die vermelde posisie te wysig, wat in mid-1997 nog nie gefinaliseer was nie. In die voorgestelde konsepregulasies is VIGS nie meer gelys as 'n oordraagbare siekte nie, wat sou meebring dat die skoolhoof nie meer 'n leerling wat 'n HIV-draer is (of vermoed word een te wees, of in kontak was met 'n persoon wat 'n HIV-draer is) slegs op hierdie grond bywoning tot die skool mag weier nie.

Die Suid-Afrikaanse Skolewet 84 van 1996 bepaal dat elke ouer elke leerder vir wie hy/sy verantwoordelik is, 'n skool moet laat bywoon (a 3). 'n "Leerder" verwys na enige persoon wat onderwys ontvang of verplig is om dit te ontvang, en sluit dus 'n persoon met HIV/VIGS in. 'n Openbare skool moet leerders toelaat tot die skool en moet hulle opvoedkundige behoeftes dien sonder om op enige wyse onregverdig te diskrimineer (a 5(1)). Daar mag ook nie toetse wat verband hou met die toelating van die leerder tot 'n openbare skool toegepas word nie (a 5(2)). 'n Skool mag dus nie beveel dat kinders vir HIV/VIGS getoets word vir toelating tot die skool nie.

Leerlinge met VIGS mag verder ook op artikel 8(1) tot (3) van die 1993-Grondwet en artikel 9(1) tot (5) van die 1996-Grondwet steun vir beskerming teen diskriminasie.

Ingevolge artikel 8(1) van die 1993-Grondwet het elke persoon (insluitend elke persoon met HIV-infeksie of VIGS) die reg op gelykheid voor die reg en op gelyke beskerming deur die reg. Artikel 8(2) het bepaal dat daar teen niemand (insluitend 'n persoon met HIV-infeksie of VIGS) onbillik gediskrimineer mag 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, *inter alia*, geslagtelikheid, seksuele georiënteerdheid of gestremdheid.

Die toepaslike artikel in die 1996-Grondwet is artikel 9. Artikel 9(1) bepaal dat elkeen gelyk voor die reg is en die reg op gelyke beskerming en bevoordeling van die reg het. Ingevolge artikel 9(2) sluit gelykheid die volle en gelyke genieting van alle regte en vryhede in. Enige persoon met HIV-infeksie of VIGS geniet dus dieselfde beskerming as enige ander persoon, het die reg op gelyke beskerming en bevoordeling van die reg, en het die volle en gelyke genieting van alle regte en vryhede. Artikel 9(3) bepaal dat die staat (dit geld die publiekregtelike of vertikale sfeer) nie onbillik, direk of indirek, teen enigeen (insluitend 'n persoon met HIV-infeksie of VIGS) mag diskrimineer nie op een of meer

gronde, waaronder geslagtelikheid, seksuele oriëntasie of gestremdheid. Ingevolge artikel 9(4) mag geen persoon onbillik, direk of indirek teen enigeen (insluitend 'n persoon met HIV-infeksie of VIGS) diskrimineer op een of meer gronde genoem in artikel 9(3) nie. Diskriminasie is onbillik tensy daar vasgestel word dat dit billik is (a 9(5)).

Van Wyk ("HIV-infeksie en die grondwetlike reg op gelykheid" in Joubert (red) *Huldigingsbundel vir SA Strauss* (1995) 332-336) bespreek die moontlikheid dat persone met VIGS vir direkte beskerming ingevolge artikel 8(2) van die 1993-Grondwet (en a 9(3) en (4) van die 1996-Grondwet) mag kwalifiseer. Sy argumenteer dat daar teen niemand onbillik gediskrimineer mag word nie, hetsy direk of indirek, *inter alia* op grond van gestremdheid, en dat VIGS as 'n gestremdheid beskou kan word. Dit is egter nog onseker hoe die howe gestremdheid sal interpreteer en of VIGS wel as 'n gestremdheid beskou sal word. Die gronde waarop nie onbillik gediskrimineer mag word nie en wat genoem word, maak egter nie 'n *numerus clausus* uit nie (Van Wyk 332). Mens sou in gepaste omstandighede moontlik kon argumenteer dat HIV/VIGS 'n afsonderlike grond moet uitmaak, byvoorbeeld in die geval van 'n leerling met HIV-infeksie in die beginfase, waar hy/sy nog nie gestremd is nie maar bloot soms siek is weens 'n lae weerstand teen infeksies.

Die Wet op Onderwysaangeleenthede 70 van 1988 maak voorsiening vir die onderrig van 'n "gestremde" kind. Ingevolge artikel 1 beteken 'n "gestremde kind" 'n kind wat na mening van die onderwyshoof in staat is om bevoordeel te word uit 'n gespesialiseerde onderwysprogram vir gestremde kinders, maar wat in so 'n mate afwyk van die meerderheid van kinders van sy ouderdom in liggaam, verstand of gedrag dat hy:

- nie voldoende bevoordeel word deur die onderrig wat in die gewone loop van onderwys verskaf word nie;
- gespesialiseerde onderwys benodig om sy aanpassing in die gemeenskap te fasiliteer; of
- nie 'n gewone klas in 'n gewone skool behoort by te woon nie, aangesien sulke bywoning skadelik vir homself of haarself of ander leerlinge in so 'n klas mag wees.

Hierdie definisie is egter van so 'n aard dat 'n kind met asimptomatiese HIV-infeksie nie ingesluit sal wees nie, byvoorbeeld soos *supra* genoem in die geval van 'n leerling met HIV-infeksie in die beginfase, sodat hy/sy nog nie gestremd is nie, maar bloot soms siek is weens 'n lae weerstand teen infeksies.

Verpligte toetsing van skoolkinders as 'n vereiste vir toelating, of enige onbillike diskriminerende behandeling (byvoorbeeld die weiering van voortgesette skoolbywoning slegs op die HIV-positiewe status van 'n leerling) is dus in die lig van die voorgaande bespreking ongeregverdig.

4 Vertroulikheid van VIGS-verwante inligting

Mag 'n leerling wat ingelig is dat hy/sy HIV-geïnfekteer is die inligting geheim hou, of moet hy/sy die inligting aan die skoolhoof openbaar? Is verdere openbaring daarvan aan derde partye deur iemand anders as die geïnfekteerde leerling, byvoorbeeld die skoolhoof aan derde partye, of die geneesheer aan die skoolhoof, geregverdig? Hierdie is sommige van die mees problematiese aspekte betreffende VIGS, en handel oor vrae om die geïnfekteerde leerling se reg op privaatheid in stand te hou.

Elke persoon het 'n reg op privaatheid. Hierdie reg beskerm die persoonlike inligting van die individu. Elke individu mag besluit oor die inhoud en mate van sy of haar belang in sy of haar privaatheid. Hierdie beginsel is deel van ons gemenereg en word ook in artikel 13 van die 1993-Grondwet erken as 'n mensereg, wat bepaal dat elke persoon die reg het op sy of haar persoonlike privaatheid wat *inter alia* die reg insluit om nie aan die skending van private kommunikasie onderwerp te word nie. Die ooreenstemmende artikel van die 1996-Grondwet is artikel 14(d) wat bepaal dat elkeen die reg op privaatheid het, wat die reg insluit dat die privaatheid van hulle kommunikasie nie geskend mag word nie.

In die geval van HIV en VIGS moet 'n geneesheer inligting met betrekking tot die pasiënt se gesondheid as vertroulik beskou ter beskerming van die individu se reg op privaatheid. Die dokter se algemene gemeenregtelike plig met betrekking tot vertroulikheid bestaan in beginsel teenoor elke derde party. Hy of sy mag dus nie die gade, kinders of, indien die pasiënt 'n leerling is, die skool van die pasiënt inlig dat die pasiënt HIV-positief getoets het nie. Die bekendmaking van sulke inligting kan tot 'n deliktuele eis lei. In *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) het 'n algemene praktisyn twee kollegas (wat in die verlede net per geleentheid by die versorging van geïnfekteerde pasiënte betrokke was) oor die HIV-positiewe status van 'n pasiënt ingelig. Die hof het beslis dat die dodelike en ongeneeslike aard van VIGS nie *per se* die geïnfekteerde persoon se reg op privaatheid benadeel nie (veral waar hierdie reg gebaseer is op die verhouding tussen so 'n persoon en sy of haar dokter) maar dat 'n pasiënt steeds van sy of haar dokter kan verwag om in ooreenstemming met die etiese standaarde van die mediese professie op te tree.

Die gemeenregtelike verpligting van vertroulikheid is egter nie absoluut nie, aangesien daar ander belange is wat belangriker kan wees en wat die verbreking van 'n vertrouensplig mag regverdig en noodsaak. Openbaarmaking kan geregverdig wees indien die pasiënt sy of haar ingeligte toestemming daartoe gee; indien 'n geneesheer deur 'n hof beveel word om die inligting te openbaar; waar wetgewing vereis dat die inligting openbaar word; of indien openbaring in die openbare belang sou wees.

Die reg op privaatheid wat in die 1993- en 1996-Grondwet verleen is, is ook nie absoluut nie, en mag beperk word in die mate wat dit redelik en regverdigbaar in 'n oop en demokratiese samelewing is, gebaseer op menswaardigheid, gelykheid en vryheid (a 36 van die 1996-Grondwet).

Die vraag ontstaan of die bekendmaking dat 'n leerling HIV-positief is nie moontlik in openbare belang is nie, of redelik en regverdigbaar in 'n oop en demokratiese samelewing, gebaseer op menswaardigheid, gelykheid en vryheid is nie, sodat 'n geneesheer hierdie feit aan die skoolhoof moet openbaar nie. In die lig daarvan dat opnames getoon het dat HIV nie deur daaglikse sosiale kontak oorgedra kan word nie, dat die risiko van oordrag van HIV in skole onder normale omstandighede effektief uitgesluit is en dat daar ook geen bekende gevalle van oordrag van HIV in 'n skoolopset is nie, kan geargumenteer word dat die leerling se reg op privaatheid swaarder weeg as die openbare belang, of dat dit nie redelik en regverdigbaar in 'n oop en demokratiese samelewing, gebaseer op menswaardigheid, gelykheid en vryheid is en dus nie openbaarmaking aan die kant van die geneesheer regverdig nie.

Volgens McLean "HIV infection and a limit to confidentiality" 1996 *SAJHR* 452 word die beginsel van vertroulikheid van 'n geneesheer teenoor sy pasiënt

beperk deur die feit dat die pasiënt se mediese toestand 'n risiko vir ander persone kan inhou, en dat 'n geneesheer in sulke gevalle 'n duidelike plig het om die identifiseerbare derde party wat in gevaar is, dienooreenkomstig in te lig. Daar kan dus geargumenteer word dat 'n geneesheer verplig is om 'n skoolhoof en die leerlinge van 'n spesifieke skool in kennis te stel dat sy pasiënt, wat ook 'n leerling van die skool is, HIV/VIGS het. Of die identifiseerbare derde party (in dié geval die skoolhoof en die leerlinge) egter in gevaar is, is te betwyfel aangesien HIV/VIGS nie 'n direkte gevaar van oordrag inhou nie (sien 2 *supra*).

5 Voorgestelde nasionale beleid oor HIV/VIGS vir skole

Die Suid-Afrikaanse Regskommissie het saam met die Departement van Onderwys 'n voorgestelde nasionale beleid oor HIV/VIGS vir skole saamgestel ("Aspects of the law relating to AIDS: HIV/AIDS and Discrimination in Schools" *Werkstuk 73 Projek 85*). Die rede is dat daar meer en meer kinders met HIV gebore gaan word wat, met beter mediese versorging, die skoolgaanouderdom gaan bereik en laerskole gaan bywoon. Aanduidings dat jongmense seksueel aktief is, dui daarop dat toenemende getalle leerlinge besmet kan word. Kinders met HIV/VIGS moet 'n vol lewe lei en nie die geleentheid om onderwys te ontvang ontneem word nie. As daar vasgestel word dat 'n geïnfekteerde leerling as gevolg van sekondêre infeksies 'n medies erkende risiko vir andere is, kan gepaste maatreëls wel geneem word. Standaard infeksiekontroleprosedures en goeie higiëniese praktyke moet te alle tye gevolg word ten einde die risiko van die oordrag van HIV te beperk.

Ingevolge die voorgestelde nasionale beleid oor HIV/VIGS vir skole sal geen leerling skoolbywoning geweier word weens sy/haar HIV-status nie (a 2(1)). Die toetsing van leerlinge as 'n voorvereiste vir toelating tot 'n skool word uitdruklik verbied (a 2(2)). Daar mag nie onregverdig teenoor enige leerling gediskrimineer word nie (a 3).

'n Kind het dieselfde regte met betrekking tot privaatheid as enige volwassene (a 4(1)). Die openbaarmaking van die feit dat 'n leerling HIV/VIGS het, is regtens nie afdwingbaar nie, maar dit sal tog in die beste belang van die leerling wees om wel die skoolhoof daarvan in kennis te stel (a 4(2)). Indien hierdie inligting aan die skoolhoof of enige ander persoon bekend gemaak is, mag die skoolhoof of enige ander persoon nie die inligting aan enige ander persoon bekend maak nie, tensy hy/sy die ingeligte geskrewe toestemming van die leerling (bo 14 jaar oud) of sy/haar voog of ouer het.

Die voorgestelde beleid stel verder ook voor dat studiemateriaal aan HIV-geïnfekteerde persone beskikbaar gestel moet word vir tuisgebruik (a 5), dat 'n opvoedingsprogram oor HIV/VIGS by alle skole geïmplementeer moet word (a 6), en dat alle skole universele voorsorgmaatreëls sal implementeer ten einde die risiko van die oordrag van alle bloedverwante patogene, insluitend HIV, in die onderwysopset te minimiseer. Dit beteken dat alle bloed, oop wonde, velskeure, skaafplekke en geïnfekteerde velletsels as potensieel geïnfekteerd behandel moet word (a 7).

6 Gevolgtrekking

Die voorgestelde nasionale beleid oor HIV/VIGS vir skole word verwelkom aangesien dit onduidelikhede sal opklaar met betrekking tot skole se hantering van sulke gevalle en regsekerheid sal bevorder.

Mens kan verstaan dat persone met kinders op skool bekommerd kan wees indien hulle te hore sou kom van 'n HIV/VIGS-geïnfekteerde leerling wat saam met hulle kind op dieselfde skoolbanke sit of tydens die skoolpouse saam met hulle kinders aan speletjies meedoen. Die wete dat daar 'n nasionale beleid is waaraan alle skole moet voldoen om standaard higiëniese kontroleprosedures en goeie higiëniese praktyke daar te stel, stel mens gerus. Die Regskommissie en die Departement van Onderwys word gelukgewens met weldeurdagte voorstelle.

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DATA PROTECTION PROVISIONS IN THE OPEN DEMOCRACY BILL, 1997

1 Introduction

The draft Open Democracy Bill (hereafter "the bill") was published on 18 October 1997 for information and comment (*GG* 18381). This is a scaled down version of the earlier version published on the Internet. One of the principal objectives of the bill is to give effect to the provisions of the Constitution of the Republic of South Africa, 1996 which provides that everyone has a right of access to information held by the state (s 32(1)(a)) or held by another person where such information is required for the exercise or protection of any rights (s 32(1)(b)). The Constitution requires enactment of national legislation to give effect to this right within four years of the commencement of the Constitution (ie before 2001-02-04).

Another objective of the bill is to promote transparency and accountability by all organs of the state by providing the public with timeous, accessible and accurate information, and empowering members of the public effectively to scrutinise and participate in governmental decision-making that affects them (Memorandum on the objects of the Open Democracy Bill, 1997). To attain these objectives, the bill includes provisions giving the public access to information held by the state (subject to exemptions) and the disclosure of such information; access by individuals to information about themselves held by the state or private persons, the correction of such information and the protection of individuals against the abuse of their personal information; protection of whistle-blowers (ie persons who make known evidence that discloses contraventions of the law, serious maladministration or corruption in governmental bodies); and enforcement mechanisms in the form of internal appeals and applications lodged with a High Court.

In previous versions of the bill, an Open Meetings component, opening important meetings of governmental bodies to public attendance, was also included, and provision was made for the establishment of information courts, superior courts which would have dealt only with the enforcement of the Open Democracy

Act. The information courts would have functioned under their own rules which would have been devised to ensure that they were accessible, cheap, simple, informal and expeditious.

In essence, the current bill includes a freedom of information component, a privacy or data protection component, and a whistleblower component. This note will examine the data protection provisions of the bill only.

2 Data protection – the background

Data protection entails the legal protection of a person with regard to the processing of data concerning such person by another person or institution (Neethling, Potgieter and Visser *Neethling's Law of personality* (1996) 291). "Processing" refers to any operation which is performed upon personal data, such as collection, recording, organisation, storage, adaptation, alteration, retrieval, use, disclosure, dissemination, erasure or destruction. "Personal information" should be understood to mean any information relating to an identified or identifiable individual.

Since the early seventies, many countries have adopted data protection legislation in order to protect their citizens' right to privacy when personal information about them is processed. Today, almost all European Union member countries have data protection legislation, as have Australia, Canada, Japan and New-Zealand. The United States of America also has different pieces of legislation protecting "information privacy" (the term preferred in the USA) in, for instance, federal records, bank records and credit records. These countries soon realised, however, that because of rapid technological advances in the field of communications technology, and the concurrent expansion of international data transmissions, information gathered on their citizens was increasingly being processed or used outside their countries. If such countries do not have similar privacy legislation, the protection of their citizens' information privacy would be nullified. Consequently, most of the data privacy legislation in these countries provides that the flow of personal information to countries without adequate protection could be stopped. Sweden, the first country to adopt national data protection legislation (in 1973) has for example on occasion denied the transfer of personal information to the USA and Italy, because these countries were deemed to have insufficient data protection rules; and in a more famous case, the French subsidiary of the Fiat company was not allowed by the French data protection authority to store and process its customer information in Italy because of a lack of data protection legislation in that country (Bing and Torvund *Twenty five years anniversary anthology – Norwegian Research Center for Computers and Law* Tano 1995 72–73).

In 1980, an international agreement was concluded on the processing of data and the protection of privacy under the auspices of the OECD. The OECD *Guidelines on the protection of privacy and transborder data flows of personal data* set standards for countries to adhere to in the cross-border transfer of personal data. Even more detailed than these guidelines, was the Council of Europe's *Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data*, 1981. A very important development in the international arena was the adoption in 1995 by the European Union of a directive on data protection (*Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data* (Directive 95/46/EC of the European Parliament and of the Council), hereafter:

the European Union Directive). This Directive, which is binding on all European Union member states, prescribes that member states must provide in their national legislation that the transfer to a third country of personal information which is to be processed, may take place only if the third country in question provides "adequate" protection for the privacy of the individuals involved. Member states must comply with the European Union Directive by 1998.

Considering the international trend and expectations, it is therefore to be welcomed that the Open Democracy Bill also contains an information privacy or data protection component. If it is regarded as providing "adequate" data protection by international standards, it will ensure South Africa's future participation in the information market.

3 Data protection provisions in the bill

3 1 Scope of the bill

The bill distinguishes between personal information kept by governmental bodies and personal information kept by private bodies. In both the private and the public sector, the individual is granted a right of access to his/her personal information kept in "records" as well as a right to request correction of such information. In both sectors the use and disclosure of personal information is also regulated. However, as far as the collection of personal information is concerned, only governmental bodies are regulated. The same goes for the retention, accuracy and disposal of information. From the definition of "records" as "recorded information regardless of form and medium" (cl 1(1)) it is evident that both manual and computer records are included in the scope of the bill. It would appear that only natural persons (ie not juristic persons) are protected by the bill's provisions, since "personal information" is defined as information about an identifiable *individual* (my emphasis).

3 2 Index of records (government bodies)

Before an individual can request access to personal information, he/she has to have knowledge of the fact that personal information about him/her is being kept by a specific body. The bill provides that government bodies must publish a manual containing *inter alia*, a description of the subjects on which information is kept, as well as the categories of records held on each subject. The manual should also contain a description of every "personal information bank" (defined as "a collection or compilation of personal information that is organised or capable of being retrieved by using an individual's name or identifying number or other particulars assigned to the individual" – cl 1(1)) held by the body. Such description must, apart from identifying the information bank and the categories of individuals to whom the bank relates, also state the purpose for which the information was obtained and indicate the uses, compatible with this purpose, for which the information will be used or disclosed (cl 6(1)(d)).

If the information is subsequently used or disclosed for any purpose that is not included in the manual, the head of the government body must keep a register of this and attach it to the personal information. Subsequent manuals must include the new uses (cl 60).

3 3 Right of access to personal information (governmental and private bodies)

A request for access to personal information may be made by the individual to whom the information relates, or his/her authorised representative, or where the

person is under the age of sixteen, incapable of managing his/her affairs, or deceased, by the person with parental authority, the court appointed person or the executor of the estate, as the case may be (cls 14(5) and 51(4)). However, no party to criminal or civil proceedings may, for the purposes of those proceedings, request access to a record containing personal information kept by either a governmental or a private body (cls 11 and 50).

The form of the request to access is prescribed (cls 14(1)–(4) and 51(2)). In the case of a request for access to personal information held by a governmental body, it should be made in writing to the information officer (in terms of the bill, each governmental body must designate a person as information officer (cl 4(1)). If the requester is illiterate the request may be made orally, in which case the information officer must reduce the request to writing (cl 14(1), (2), and (4)(a), (b)). In the case of a private body, the request should be made to the head of the body, in writing or orally. A fee may be payable for reproduction of the information (cls 25(3) and 51(6)).

The decision whether access will be granted or refused must be given within 30 days (cls 20(1) and 51(5)). (Provision is also made for urgent requests in the case of governmental bodies – see cl 21.) Various grounds for refusal of access are given. Both governmental and private bodies *must* refuse a request for access to a record containing personal information of the requester, if the disclosure would constitute an invasion of privacy of another person, including a person who died less than 20 years previously (cls 30(1) and 51(7)(a)). Refusal is also mandatory where the record contains trade secrets of a third party, or other financial, commercial, scientific or technical information supplied in confidence by a third party, or any other information supplied by the third party, the disclosure of which will put that third party at a disadvantage in commercial competition (cls 32(1) and 51(7)(a)). Exceptions to these mandatory prohibitions on disclosure, are permitted if the records have already been made public for instance, or if the relevant parties consent to disclosure (see further cls 30(2) and 32(2)).

Apart from these mandatory grounds for refusal, there are also several discretionary grounds for refusal, such as the fact that disclosure will cause serious harm to the health of the requester (cls 31(1) and 51(7)(a)), would jeopardise the body's capacity to collect information supplied in confidence by a third party where it is in the public interest to collect such information (cls 33(1) and 51(7)(a)), would endanger the safety of individuals or the security of particular buildings (cls 34 and 51(7)(a)), would undermine law enforcement (cls 35(1) and 51(7)(a)) and legal professional privilege (cls 36 and 51(7)(a)), would substantially harm the national defence and security of the Republic of South Africa (cls 37 and 51(7)(a)), or the Republic's capacity to conduct international relations in the best interest of the Republic, or would be in contravention of an international obligation imposed on South Africa (cls 38 and 51(7)(a)), or would substantially jeopardise the financial or economic welfare of the Republic, or the confidential commercial information of the state (eg trade secrets held by the state) (cls 39 and 51(7)(a)), or would jeopardise the deliberative process in the government or private body or other operations of the body (cls 40 and 51(7)(a)). The request for access may also be refused if the request is manifestly frivoulous (cls 41 and 51(7)(a)), if the information cannot be found (cls 42 and 51(7)(a)), or is already open to the public or will be open to the public within a short period (cls 43, 44 and 51(7)(a)).

Access should always be given to part of a record, if that part can be severed from any part that contains information which may not be disclosed (cl 24(1)). Also, if public interest in the disclosure of the record outweighs the need for non-disclosure, the record must be disclosed even though a ground for discretionary or mandatory refusal is present (cl 45). Where a ground for mandatory refusal is present (ie the record contains personal information of a third party, or confidential commercial information of a third party), and access is contemplated in terms of clause 45, the third party must receive notice of the request for access and be given an opportunity to explain orally or in writing why access should be refused (cls 46 and 47). If access is given despite the third party's representation, the third party may lodge an internal appeal against the decision with the head of the governmental body (cl 48(3)).

3 4 Right to request correction of personal information (governmental and private bodies)

When a person has been given access to his/her personal information, the person may also ask for the correction of inaccurate information in the record (cls 51 and 52). Correction in the bill means amending, supplementing or deleting inaccurate information (cls 52(1) and 53(1)). If the head of the private body or the information officer of a governmental body decides that the information is incorrect, he/she must correct the information, and if the same information is contained in other records of the body, also correct those records (cls 52(5) and 53(6)). In the case of a governmental body, the information officer must also inform all other governmental bodies or persons to whom the inaccurate information has been supplied of such correction and inform the individual that such notice was given (cl 53(6)(c) and (d)). Where an inaccurate part of the information is to be deleted, a copy must first be made of that part and a note must be made on the original document that a part was deleted. The copy must be kept as long as the record is kept (cls 52(6) and 53(7)). If the head of the private body or the information officer of the governmental body decides that the information is not inaccurate, and as long as the request was not irrelevant, frivolous or vexatious, a notice must be attached to the record indicating that the individual disputes the accuracy of the information. A copy of the notice must be given to the requester (cls 52(7) and 53(8)). In the case of a governmental body, the requester has another opportunity to give reasons why he/she thinks that the information is inaccurate, and may also lodge an internal appeal against the decision not to correct the information (cl 53(9)(b)(iii) and (c)). If a record has been corrected or a note has been attached to it, all subsequent use and disclosures of the record must be in the corrected form (cls 52(8), (9) and 53(10), (11)).

3 5 Use and disclosure of personal information (governmental and private bodies)

In general, personal information may not be used or disclosed without the consent of the individual concerned, except for specific purposes mentioned in the bill (cls 54, 55, 56 and 57).

Private and governmental bodies may use personal information for the purpose for which it was originally compiled, or for a compatible purpose (cls 54(a) and 55(a)). They may also use it for the purpose of avoiding prejudice to the maintenance of law and order or to avert an imminent and serious threat to the

health or safety of an individual or the public (cls 54 and 55). Private bodies may disclose personal information on the same grounds as those mentioned for the use of information, and further also in accordance with legislation that authorises the disclosure, or to comply with a subpoena or court order (cl 56). Public bodies have wider grounds for disclosure of personal information. Apart from the grounds on which private bodies may disclose information, governmental bodies may also disclose information to the state or certain international organisations for the purposes of law enforcement, to an official of a governmental body for an internal audit, to an archival repository, or to any person for research or statistical purposes, or to a governmental body in order to collect a debt owed to the state or to pay a debt owed by the state (cl 57(1)). Further purposes may also be prescribed by regulation.

The sections relating to the use and disclosure of records will not immediately apply to records held before the commencement of the the Open Democracy Act, but a period will be specified by regulation in which the government or private body will be given an opportunity to obtain the consent of the individual (cl 59).

The following information is excluded from the provisions regarding the use and disclosure of personal information: information already publicly available, or created or acquired solely for use in a library or museum, or placed in an archive by a person other than the government, or information about an individual who is or was an official of government (if the information relates to the position of functions of the official)(see cl 49(2)).

3 6 Collection of personal information (governmental bodies)

A governmental body may not collect information unless such collection is required by legislation or required for the performance of the functions of the body (cl 61(1)). When personal information which may be used in taking any decision which affects an individual's rights is collected, it must be collected from the individual concerned, unless the latter has authorised the body to collect it from someone else, or if the body may obtain the information from another governmental body in terms of the provisions allowing disclosure of the information to it (cl 61(2)). When collecting information direct from the individual, the individual must be informed of the purpose for which the information is being collected, for whom it is being collected, by whom it will be held, whether it is being collected in terms of legislation permitting the collection, and if so, whether it is obligatory to the supply the information or not. The individual must also be informed about his/her right of access and of correction of personal information (cl 61(3)). If the collection of information direct from the individual would defeat the purpose or prejudice the use for which the information is collected, the requirement does not apply (cl 61(4)).

3 7 Retention, accuracy and disposal of personal information (governmental bodies)

The head of a governmental body must take responsibility for the security and confidentiality of personal information kept by the body. The head is also responsible for ensuring that personal information used when making a decision that affects an individual's rights, must be accurate, up-to-date and as complete as possible. Once the information has been used, it must be kept for a prescribed period to ensure that the individual to whom it relates has a reasonable

opportunity to obtain access to the information, and it may only be disposed by the head of the department in a prescribed manner (cl 62).

3 8 Remedies

In the case of governmental bodies, an individual may first of all lodge an internal appeal against a decision by the head of the department or the information officer (cl 68), and may further bring an application to the High Court (which will be considered as an urgent application) against the decision of an information officer or head of a governmental body (cl 73). No remedy seems to be provided for in the bill specifically for the case where private bodies are involved in the processing of data, apart from stating that the remedies in the bill do not exclude any remedy that a person may have in terms of the law (cl 72).

3 9 Functions of Human Rights Commission

The bill does not establish a data protection authority as such, but uses the Human Rights Commission to perform some of the functions of such an authority. The Human Rights Commission must annually review the Open Democracy Act, make recommendations for its improvement, monitor its administration, develop programmes to educate the public about the Act, publish a guide on how to use the Act, assist any individual in the exercise of his/her rights in terms of it if requested to do so, and annually submit a report to the National Assembly (cl 82(1)). Such report must *inter alia* contain details about requests for access, internal appeals, and applications to the High Court in regard to each governmental department (cl 83). No real power is granted to the Human Rights Commission, because its functions consist in "advising", "developing", "assisting", and so on.

4 Evaluation: does the bill provide "adequate" protection?

In a comparative study of the data protection policies of four countries (Sweden, the United States of America, The Federal Republic of Germany and the United Kingdom) Bennett (*Regulating Privacy* 1992 101 *et seq*) identified six principles, called "fair information principles" that have come to be accepted internationally as the essential ingredients of an adequate data protection policy. They are:

4 1 The principle of openness

This principle entails that the existence of record-keeping systems, registers or data banks should be publicly known. No organisation should conceal the existence of a personal record-keeping system, the kinds of information in it, and the way in which it may be used (Bennett 101).

The bill complies with this principle as far as the public sector is concerned, with the requirement in cl 6(1)(d) that an index of records must be kept (see *Index of records (governmental bodies)* above) .

There is no similar provision applicable to private bodies, and it is therefore possible that the existence of a personal record-keeping system in the private sector could still be a secret. Consequently, the bill falls short on the openness principle as regards the private sector.

4 2 The principle of individual access and correction

This principle entails that the individual should have the right to obtain a copy of the information on him/her, and if such information is incorrect, to have it

corrected. According to Bennett (104) "the expectation is that individuals themselves can do much to mitigate any problems arising from the wrong people using wrong data for the wrong purposes".

The bill gives the individual a right of access to his/her personal information (cls 14(5) and 51(1)), as well as a right of correction (cls 52 and 53). This is applicable to both private and public bodies (see *Right of access to personal information (governmental and private bodies*) and *Right to request correction of personal information (governmental and private bodies)* above). The right of access is subject to many exemptions, but this is not unusual when one compares it to legislation in other jurisdictions. It remains to be seen whether in practice these exemptions will result in the right of access being unduly curtailed.

However, provisions that are unusual if the bill is compared with other legislation in this area, are the clauses providing that no party to criminal or civil proceedings may, for the purposes of those proceedings, request access to a record containing personal information kept by either a governmental or a private body (cls 11 and 50). A concern with these provisions is that they may result in an individual being denied a remedy for the invasion of a personality right. For example, an insurance company's records incorrectly indicate that an individual has AIDS. On the strength of that information the individual is refused insurance coverage. Should the person concerned wished to sue for infringement of a personality right (in this case infringement of his/her identity because an incorrect representation of the individual was made – see Neethling, Potgieter and Visser *Neethling's Law of personality* 39–40) access could arguably be denied to such records on the basis of cl 50.

Another shortcoming as regards the principle of access and correction, is that whereas public bodies must inform all other governmental bodies or persons to whom inaccurate information has been supplied of a subsequent correction in such information, private bodies are not under a similar obligation. The bill should be improved to ensure that it does not fall short on this point.

4 3 The principle of collection limitation

This principle envisages that there should be limits to the collection of data. Data should be collected by lawful and fair means, and, where appropriate, with the knowledge and consent of the data subject (Bennett 106). "Fishing expeditions" should not be allowed, and personal information should be collected for a clearly specified purpose only (Bennett 108).

The bill provides adequate protection to the individual when the personal information at issue is collected by the public sector (see *Collection of personal information (governmental bodies)* above and cl 61). This provision could be improved, however, by making it clear that the purpose for which the information is collected should be a *legitimate* purpose.

Adequate protection is once again not provided in the private sector, since the bill does not contain a provision regulating the collection of information by private bodies.

4 4 The principles of use limitation and disclosure limitation

These two principles are closely related and require that, once personal data are collected, there are limits to the internal uses to which a collecting body may put them, or to the external disclosure that may be made. The notion of "relevance"

underlies both these principles, since the data may be used or disclosed only for purposes that are relevant to the purpose specified at the time of collection (Bennett 108). Information gathered to determine income tax liability, for example, may not be used to evaluate eligibility for social assistance. If data are disclosed for other purposes, the consent of the individual must first be obtained (Bennett 109).

The bill contains provisions reflecting these principles, since it clearly provides that personal information may not be used or disclosed without the consent of the individual concerned, except for specific purposes mentioned in the bill (see *Use and disclosure of personal information (governmental and private bodies)* above and cls 54, 55, 56 and 57). It remains to be seen in practice whether the exceptions to these provisions will make inroads on the provisions, or whether collecting bodies will strive to adhere to the essence of the principles reflected in these provisions.

4 5 The security principle

This principle envisages that physical, organisational and technical measures should be taken to protect personal data against unauthorised access, modification, disclosure or destruction (Bennett 110–111). Once again, this principle is reflected in the bill, but only in regard to public bodies (see *Retention, accuracy and disposal of personal information (governmental bodies)* above and cl 62). Ideally, private bodies should also be under a specific obligation to nominate a person to be responsible for the security of personal information.

4 6 General

The following aspects may also be pointed out as areas where the bill needs to be improved: First of all, that no real power is granted to the oversight body, namely the Human Rights Commission. The European Union Directive on data protection requires its member states to establish an independent supervisory authority with, *inter alia*, powers of investigation and intervention, and the power to engage in litigation.

Further, the treatment of sensitive data: the European Union Directive requires special treatment of sensitive data, that is, "data which are capable by their nature of infringing fundamental freedoms or privacy" (Recital 33 of European Union Directive). Such data includes data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or data concerning health or sex life.

Another provision of the Directive which, it is suggested, would improve the bill should a similar provision be included, is that no individual may be subjected to a decision which significantly effects him/her (eg evaluation of performance at work, or creditworthiness) where such decision is based solely on the automated processing of data. This provision therefore requires human intervention whenever important decision are made about an individual.

5 Conclusion

The effectiveness of the data protection provisions in the Open Democracy Bill in protecting individuals' personality rights will depend largely on how they are applied and interpreted in practice. Most of the fair information principles are reflected to some extent in the bill, especially as far as government bodies are concerned. However, as indicated, certain of these need to be extended to private

bodies, and in other areas the bill should also be improved. The bill should nevertheless be welcomed as it, in theory, reflects the government's commitment to protect the rights and liberties of individuals. It is hoped that this commitment will also be reflected in the practical application of a subsequent Act.

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PEACE OFFICER POWERS FOR SOME PRIVATE SECURITY OFFICERS

1 The private security industry (especially that part of it which provides security guards) is regulated by the Security Officers' Board in terms of the Security Officers Act 92 of 1987. Regulation generally entails the screening of persons before they are allowed to render a "security service" (see s 1(1) of the Act) and the enforcement of a code of conduct applicable to the activities of those practising as security officers (see generally Geldenhuys *Inleiding tot die sekuriteitsreg* (1992) 177-196).

2 In view of the unacceptably high crime rate and the various limitations on the state police service, the role of private security officers has become increasingly relevant and visible. In recent months the South African Police Service has been approached by a number of individual security firms with requests for the formation of partnerships with them on an *ad hoc* basis (see eg the unpublished paper by De V Minnaar "Partnership policing between the South African Police Service and the South African Private Security Industry" (1997) 1 *et seq*). This development obviously has important repercussions regarding the legal position and powers of private security officers. Currently private security officers only enjoy the powers given to ordinary citizens in terms of the Criminal Procedure Act 51 of 1977. The Security Officers' Board has on various occasions argued for a change in the legal status of private security officers and in particular for the granting of certain peace officer powers to specific grades of security officers in terms of section 334 of the Criminal Procedure Act (see generally Kriegler *Hiemstra Suid-Afrikaanse strafproses* (1993) 879–880). This has *inter alia* led to a debate in the mass media on the desirability of such a development (see eg the article "Calls for private policing" in the *Weekly Mail and Guardian* (1997-09-12–18)).

3 The main object of this note is to place the issue of more powers to private security officers in a constitutional context (in terms of the application of the Bill of Rights in ch 2 of the Constitution, 1996) and to deal with some popular arguments against the granting of further powers. Attention is focused mainly on the *principle* involved. This contribution is not intended to be an exhaustive discussion of all the relevant legal issues and the actual practical implementation of the principle. It is therefore deemed unnecessary to refer to or quote from all the relevant parts of the Criminal Procedure Act and other legislation or authorities.

4 A popular argument raised against the idea of the granting of peace officer powers to those in the private sector, is that it may impact negatively upon certain fundamental rights recognised in the Bill of Rights. For example, the argument has been advanced that security officers are in fact claiming wide powers of search and seizure and that this may infringe the right to privacy (s 14 of the Constitution). Issues such as accountability, the role of private economic motives, involvement in crime and corruption have also been raised (see for a list of other concerns De V Minnaar 5–9). It has also been stated that

> "[n]o convincing argument outside of business reasons/self interest has . . . been made nor has there been any cognisance taken on the part of the security industry to the very real constitutional and human rights concerns regarding individual rights to privacy" (see De V Minnaar 21).

5 The following basic premisses of the Bill of Rights need to be emphasised (see generally Rautenbach and Malherbe *Constitutional law* (1996) 285 *et seq*):

(a) The Bill of Rights is the cornerstone of the legitimate and reasonable exercise of power by all those involved in the public or the private security sector (see generally s 7 of the Constitution).

(b) The constitutional validity of the conferment of further legal powers on private security officers which impact upon fundamental rights relating to, for example, human dignity, life, freedom and security of the person (which includes the right to be free from all forms of violence from either public or private sources), privacy, freedom of movement, property and the interests of arrested or detained persons, must obviously be tested against all the criteria mentioned in section 36 of the Constitution. This section contains the requirements to be met before a right in the Bill of Rights may be limited by law and includes a general reference to the fact that a limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Other factors to be considered include the importance and purpose of the limitation, the nature and extent of the limitation and the relation between the limitation and its purpose (for a general discussion see Rautenbach and Malherbe 311 *et seq; Bill of Rights Compendium* (Butterworths) par 1A43–1A55).

6 It would seem that, in general terms, the granting of greater powers to some private security officers in terms of existing legislation will be compatible with the principles and values of the Constitution. Specific reasons which may be advanced in favour of this proposition are:

(a) the undisputed and factual need for adequate private security services in South Africa to supplement the service already rendered by the state police;

(b) the unacceptable high level of criminality which threatens the fabric and future of the South African society;

(c) the limited resources available to the state police in preventing and combating crime;

(d) the safeguards and conditions which will be attached to the granting of further powers.

7 The basic idea behind the granting of more powers to particular classes of security officers should obviously not be to allow them to usurp the core functions of the state police service provided for in section 205 of the Constitution. This section (as well as s 206) suggests that policing falls under government

control (see eg the reference to the role of "national legislation"). Section 205(3) lists the objects of the envisaged police service as

> "to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law".

It may possibly be argued that, since these objects can in any event never be fully achieved by a state police service, this situation obliges the state (in the form of the South African Police Service) to involve private security officers in terms of a reasonable, accountable and workable partnership (see also the National Crime Prevention Strategy programme referred to by De V Minnaar 1).

8 An important reason for considering greater legal powers for private security officers is that they will be better equipped to assist the state police to perform their *constitutional functions* where necessary in certain areas. Section 7(2) of the Constitution places a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Crime obviously poses a very serious threat to these rights. Section 8 of the Constitution provides for the "horizontal" application of the Bill of Rights in relationships between private individuals and it is therefore also applicable in the relationship between a criminal and his actual or potential victim (see generally on this issue Visser "Enkele gedagtes oor die horisontale werking van die nuwe Grondwet" 1997 *THRHR* 296; "*Drittwirkung* – ideas on some differences between Germany and South Africa" 1997 *Obiter* 99). It is common cause that the state has the duty to protect and promote the rights of its subjects against possible criminal infringement by others. Where the state's financial, human and other resources are insufficient to provide a comprehensive police service on its own, it may be seen as its constitutional duty to assist the private security sector in any other reasonable manner possible to extend the protection of fundamental rights of the members of society. One way of doing this is to grant powers to some private security officers in terms of section 334 of the Criminal Procedure Act.

9 The argument which is sometimes raised that there is no convincing reason (outside business or self interest) for the extension of certain powers to private security officers (see par 4 above), is fallacious. It does not take account of the fact that such an extension is a necessary part of the constitutionally required overall protection of fundamental rights in the state and is accordingly not contrary to the Constitution.

10 It is clear that, generally speaking, the interests of clients of security businesses have been served reasonably well by security officers who normally have only the same statutory powers as members of the public. However, the basis for the request for the granting of greater legal powers to the private security industry is first of all that it will enable this sector to make a necessary and meaningful contribution to the safeguarding of certain public or quasi-public security interests (eg by assisting the police in the performance of certain specific or general functions) and secondly that it will legitimately serve the interests and needs of their clients in an even more effective and professional manner. Clients of the private security industry are increasingly experiencing more sophisticated security needs and industry in general must be placed in a position to satisfy these needs through, for example, advanced training, technological development and the granting of greater legal powers to them.

11 A further argument which is sometimes raised is that fundamental rights may be infringed when private security officers "abuse" their powers. This argument

does not survive the scrutiny of correct legal thinking. Private security officers (or state police officers) can act unlawfully or maliciously regardless of whether they possess particular legal powers. When any power is "abused" (see generally Neethling, Visser and Potgieter *Law of delict* 97–99 104–110) and the person in question acts unlawfully, the well-known principles of criminal law and the law of delict (or, in some instances, the law of insurance) are available to remedy the situation. The granting of *legitimate* powers can logically never be seen as facilitating any *unlawful* conduct. The very idea behind granting greater powers is to enable certain persons to act *lawfully* in achieving legitimate aims. If the argument is that the granting of certain powers may be an incentive to act outside those powers, the obvious answer is that all private security officers and state police officials are subject to such temptation.

12 It may be argued that it is unacceptable that all registered security officers, regardless of the standard of their training, their professionalism, their experience and the nature of their duties, should possess only the powers of ordinary members of the public in terms of, for example, section 42 of the Criminal Procedure Act. Members of the public generally do *not* have any relevant law-enforcement training, they do not have to render a security service as defined in section 1(1) of the Security Officers Act, they are not screened for previous convictions and are not registered and controlled by a code of conduct as are private security officers (see s 19 of the Security Officers Act). Purely on the facts mentioned in this paragraph, it is unrealistic (and possibly even unfairly discriminatory – see s 9 of the Constitution) to limit the authority of private security officers to the legal powers generally available to ordinary members of the public. In this regard it has been correctly argued by those representing the private security industry that the misconception which apparently still exists in the minds of some that the private security industry is largely involved in limited and static guarding operations – and therefore needs no further legal powers – must be rectified.

13 In practice, a situation may develop where, for example, the most highly trained security officers and those employed in so-called armed response functions and who are involved in or employed by security businesses which approve, will be given at least the power to make an arrest without a warrant (s 40 of the Criminal Procedure Act), the power to demand a name and address (s 41), and the powers of search and seizure after arrest (s 23(a)). Further details may be worked out after the basic question of policy in this regard has been settled (see the general training and grading regulations *GG* No 14178 1993-07-31, No 14877 1993-06-25 and No 16840 1995-12-01)

14 The accountability of private security officers with enhanced powers should not pose any special problem. Most sectors of the security industry and many aspects of the conduct of individual security officers are already regulated by law. The degree of regulation (especially in regard to training standards and the enforcement of the code of conduct) may possibly be stepped up in future. It is also unlikely that security businesses which have to pay damages (or high insurance premiums) in consequence of the wrongful conduct of their employees (see generally on vicarious liability and risk creation, Neethling, Potgieter and Visser 355–358) will retain the services of security officers who present a threat to their reputation or their financial interests. Perhaps liability insurance may be statutorily required for companies employing peace officers if such a mechanism is really deemed necessary. However, it should be remembered that, legally

speaking, there is no direct link between the granting of greater legal powers to security officers and the commission of a delict for which an employer may be held vicariously liable – even an officer with only the limited powers of an ordinary member of the public can cause enormous loss for which an employer may be held liable.

15 If the idea of peace officer powers is implemented, it may be that only the more experienced security businesses (eg those which have been in existence for at least five years, and have an acceptable record in terms of the code of conduct enforced by the Security Officers' Board) will be permitted to have some of their suitably qualified security officers declared peace officers.

16 A further safeguard is that the Security Officers' Board and the state police service may deal with and advise on complaints from the public connected with the exercise of these powers. A further possibility is that the office of a "public protector" or ombudsman for the private security industry may be created as part of the new Security Officers' Board (envisaged in terms of s 2 of the Security Officers Amendment Act, 1997).

17 As indicated earlier, an important reason for giving greater powers to certain private security officers is that the concept of a partnership between the South African Police Service and the private security industry seems to be both necessary and likely to occur on a national scale. A partnership between partners having vastly unequal powers does not seem to be practical and viable (*contra* De V Minnaar 28).

18 A legal issue of a purely technical nature which may present a possible obstacle to the extension of powers to security officers is found in the wording of section 334(1)(a) of the Criminal Procedure Act. In terms of this provision the Minister of Justice may by notice in the *Government Gazette* declare that any person "who by virtue of his *office*" falls within any category defined in the notice, shall, within an area specified in the notice be a peace officer for the purpose of exercising, with reference to any provision of the Criminal Procedure Act or any offence or class of offences likewise specified, the powers defined in the notice. Section 334(2) and (3) deals with a certificate of appointment, while section 334(4) is concerned with the liability of the employer of the relevant peace officer (and the fact that the state is not liable). It has been suggested by the chief state law adviser that the word "office" used in section 334(1)(a) precludes private security officers from being appointed as peace officers.

19 The term "office" is defined in the *Oxford dictionary* as a "position with duties attached to it, place of authority or trust or service, especially of a public kind". In the *Oxford advanced learner's dictionary of current English* it is stated that the term "office" means "the work which is the subject's duty to do, especially in a public position of trust and authority" (see further on the meaning of "office" Claassen *Dictionary of legal words and phrases* (1976) 64–65; *Collins Cobuild essential dictionary* 545; Walker *The Oxford companion to law* (1980) 900). It has been said that "office" includes "assigned duty" or "function" and the further synonyms given are "appointment", "situation", "place" or "position" (see eg *Black's law dictionary* (1990) 1082). Although not every form of employment constitutes an "office", the processes regarding the (public) vetting, registration and control in terms of the Security Officers Act suggest that a registered and graded security officer indeed occupies an "office". Such an interpretation would be consistent with the general import of section 334(1)(a). It is therefore possible in terms of the general principles of construction to interpret

the phrase "who by virtue of his office" in section 334(1)(a) as including a person registered as a security officer in terms of the Security Officers' Act and made available by his employer for the rendering of security services as defined in section 1 of the Act. Section 334(4) gives an indication that the state and a provincial administration need not be the employer of someone given peace officer powers. It would be unreasonable to restrict the interpretation of "office" to a position occupied by a state servant or a person employed by a municipality (as described in ch 7 of the Constitution).

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In this country [the USA] it is chiefly to the judiciary that is entrusted the task of preventing a discrepancy between the law as declared and as actually administered. This allocation of function has the advantage of placing the responsibility in practiced hands, subjecting its discharge to public scrutiny, and dramatizing the integrity of the law. There are, however, serious disadvantages in any system that looks solely to the courts as a bulwark against the lawless administration of the law. It makes the correction of abuses dependent upon the willingness and financial ability of the affected party to take his case to litigation. It has proved relatively ineffective in controlling lawless conduct by the police, this evil being in fact compounded by the tendency of lower courts to identify their mission with that of maintaining the morale of the police force. For an effective control of police lawlessness much can be said for some overseeing agency, like the Scandinavian ombudsman, capable of acting promptly and flexibly on informal complaints (Fuller *The morality of law* (1969) 82-83).

VONNISSE

THE NEGLIGENT COLLECTION OF CHEQUES: IS ANYTHING CLAIMABLE FROM THE COLLECTING BANKER?

Holscher v Absa Bank 1994 2 SA 667 (T)
Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank 1998 2 SA 667 (W)

All experts in the law of delict and the law of negotiable instruments are surely familiar with the rule – established in Zimbabwe in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 2 SA 703 (R), *Philsam Investments (Pvt) Ltd v Beverley Building Society* 1977 2 SA 546 (R), *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pvt) Ltd* 1985 4 SA 553 (ZS), *UDC Ltd v Bank of Credit & Commerce Zimbabwe Ltd* 1990 3 SA 529 (ZH) and *Bank of Credit & Commerce Zimbabwe Ltd v UDC Ltd* 1991 4 SA 82 (ZS), and subsequently in South Africa in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A), *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993 3 SA 779 (A), *Fedgen Insurance Ltd v Bankorp Ltd* 1994 2 SA 399 (W) and *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 1 SA 377 (D) – that, in principle, a collecting banker is liable in delict to the true owner of a lost or stolen cheque which was negligently collected by the banker for a person not entitled to its proceeds (hereinafter referred to as a thief). But has all the effort expended by lawyers and judges over many years in establishing this rule been of little or no point because, in the overwhelming majority of cases, no claim will lie against the collecting banker? This will be so if the value of the true owner's claim against the thief forms part of the estate of the true owner, and must accordingly be taken into account in assessing the difference between the value of that estate before the misappropriation of the cheque and its value afterwards. According to Van Dijkhorst J in *Holscher v Absa Bank* 1994 2 SA 667 (T), this is indeed the legal position. According to Boruschowitz J in *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998 2 SA 667 (W), however, it is not the law at all. Which of the two judges is correct?

In *Holscher*, the plaintiff was the true owner of a cheque which, at his instruction, was drawn against moneys standing to his credit in the Fedhasa Pension Fund and posted to his broker, Duerka Makelaarsdienste (Edms) Bpk ("Duerka"), for investment in a retirement annuity with the Old Mutual. The cheque was made payable to "SA Mutual Retirement Annuity Fund". The managing director of Duerka, one Hamman, however, stole the cheque and paid it into Duerka's account at the Trust Bank, a division of the first defendant.

Despite the fact that the cheque was marked "not transferable" ("nie oordraagbaar"), the Trust Bank collected the proceeds of the cheque for Duerka, which subsequently went into liquidation. No attempt was made by the plaintiff to recover the proceeds of the cheque, or any part of the proceeds, from either Duerka in liquidation or Hamman himself.

Van Dijkhorst J held that Duerka was not entitled to payment of the proceeds of the cheque and that the Trust Bank had behaved both wrongfully and negligently in collecting the cheque on behalf of Duerka (672D–F). It was clearly the plaintiff who was the true owner of the cheque, for the amount of the cheque represented his pension money and the plaintiff would have been entitled, had the cheque come into his possession, to tear up the cheque and to demand a replacement had he decided to invest his pension money with an institution other than the Old Mutual. The Fedhasa Pension Fund had divested itself of ownership of the cheque, Old Mutual had never become the true owner of the cheque as it had never taken delivery, and neither Duerka nor Hamman was the true owner as both held the cheque on behalf of the plaintiff (672H–673C). The decision is manifestly correct on this point, for the true owner of a cheque has been described as "[t]he person for the time being entitled to the property in and possession of a cheque, as against all other claimants" (*Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* 1968 2 All ER 1073 (ChD) 1106D–E, followed in *The Godfather v Commissioner for Inland Revenue* 1993 2 SA 426 (N) 429I–430B; see also Gering *Handbook on the law of negotiable instruments* (1997) 292). *Holscher* is therefore authority for the proposition that the true owner of a cheque may be a person whose name does not appear on the cheque at all. (See also *APA Network Consultants (Pty) Ltd v ABSA Bank Ltd* 1996 1 SA 1159 (W) 1167A–B.) The recognition of a right of action at the instance of such a person, said Van Dijkhorst J, would not open the floodgates to unlimited liability: there remained only one act of negligence on the part of the collecting bank towards a single aggrieved party, whether or not that party's name was apparent from the face of the cheque (673C–F).

The court then turned to consider the quantum of the plaintiff's damages. On behalf of the first defendant it had been argued that the plaintiff had failed to quantify his damages, since he had not shown how much he could have recovered from either Duerka in liquidation or from Hamman, in a claim based on the theft of the cheque. Although the plaintiff was entitled to sue the first defendant alone, as one of several wrongdoers, said Van Dijkhorst J, that claim stood on a different footing from the action against the thief himself: from the thief the plaintiff was entitled to claim what was stolen, be it goods or money, and no question arose of the extent of the plaintiff's loss; on the other hand, the claim against the first defendant was for compensation ("skadevergoeding") only (673G–H). Two points must be borne in mind in this regard. First, since goods are not claimable under the Aquilian action (or other remedies in delict), Van Dijkhorst J appears to have had in mind the *rei vindicatio* when he remarked that the plaintiff can recover from the thief what was stolen. Secondly, it is not correct that in all claims against thieves by their victims, the extent of the plaintiff's loss is irrelevant. For the Aquilian action is also available against the thief, in which event the amount of the damage suffered by the plaintiff is clearly in issue. (In a case in which money or a cheque has been stolen, the value of the loss will obviously be the amount of cash stolen or the amount withdrawn by the thief against the proceeds of the cheque, as the case may be (cf *Holscher* 675G–H).)

When damages are quantified under the Aquilian action, continued Van Dijkhorst J, the value of the plaintiff's estate immediately after the delict must be subtracted from the value of his estate immediately before. Since the value of rights of action accruing to the plaintiff against third persons fall into his estate, their value must be ascertained and taken into account. Accordingly, the plaintiff's rights of action against Duerka and Hamman had to be valued and deducted from the amount of the stolen cheque in order to quantify the plaintiff's loss. But it was for the defendant to adduce evidence that the chance of recovering compensation from Duerka or Hamman was not purely academic or speculative: it was not for the plaintiff to show that his rights of action against Duerka and Hamman were worthless (673H–675H). Since no evidence had been led by the defendant to suggest that the plaintiff might have recovered any damages from Hamman, the possibility of the plaintiff's doing so had to be ignored. But because the evidence disclosed that a liquidation dividend of R2 400 would probably have been received from Duerka had the plaintiff lodged a claim against it, that amount had to be subtracted from the plaintiff's claim for damages in the amount of the stolen cheque (675H–676F).

The decision to reduce the plaintiff's claim by the amount of the dividend that the plaintiff could have recovered from Duerka was, however, surely incorrect. For, while the measure of a plaintiff's damages under the Aquilian action is the difference between the value of his estate immediately prior to the delict and the value of his estate immediately after it (*Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 665; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150A–B; *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917A–B), Duerka, Hamman and the first defendant were joint wrongdoers in relation to the loss suffered by the plaintiff; as such, each was jointly and severally liable to the plaintiff in the amount of the stolen cheque (s 2(8) (a)(i) of the Apportionment of Damages Act 34 of 1956), and the plaintiff as *dominus litis* was entitled to recover the full amount from whichever joint wrongdoer he chose. Van Dijkhorst J accordingly erred in reasoning that the value of a right of action against Duerka (or Hamman) had to be included in the plaintiff's estate for the purpose of determining the size of the claim against the first defendant. For in reality, if joint wrongdoers are potentially liable, rights of action against all of them in respect of the loss complained of must be disregarded in determining the value of the plaintiff's estate after the delict, since it is those very rights of action which will be in issue in the claim for damages. If the judgment in *Holscher* were correct, then every joint wrongdoer would be able to point to his fellow tortfeasor(s) and to contend that the value of a right of action against the other joint wrongdoer, or against each of the other joint wrongdoers, must be included in the value of the plaintiff's estate after the delict, and hence excluded from the plaintiff's claim against him. And if that were so, then the plaintiff would not receive any compensation at all from the defendant unless the total sum recoverable in damages from all the joint wrongdoers other than the defendant was less than the amount of the plaintiff's loss. Such a result would be entirely contrary to the scheme of section 2 of the Apportionment of Damages Act. Indeed, it would be absurd, for in the case of a stolen cheque, no action would ever lie against the negligent collecting banker where a right of action existed against the thief (or the deceased estate of the thief) for the amount withdrawn by him against the proceeds of the cheque. And such a right of action will lie in all instances other than those in which the thief has been declared insolvent or (in the case of a furacious company or close corporation) liquidated.

Thus no damages would be claimable against the negligent collecting banker in the overwhelming majority of cases of stolen cheques; only in the event of sequestration (or liquidation) of the thief would an action be available against the collecting banker, and then only for the difference between the amount stolen and the sum recoverable from the estate of the insolvent thief. The only counter given by Van Dijkhorst J to this criticism is that in most cases the plaintiff's right of action against the thief is of an academic or speculative nature and accordingly should not be taken into account in determining the value of the plaintiff's estate after the theft, unless the defendant can show that the plaintiff's right of action against the thief is of some value in practice (674C–D). There is, however, no warrant for the court to assume that all claims against stealers of cheques are *prima facie* worthless unless the defendant can establish otherwise. And besides, it is trite law that the plaintiff (not the defendant) must quantify the damage by proving the difference between the value of the plaintiff's estate immediately before the delict and the value immediately afterwards (Boberg *The law of delict I Aquilian liability* (1984) ("Boberg *Delict*") 475; Visser and Potgieter *Law of damages* (1993) 435–436; *Skadevergoedingsreg* (1993) 448; Neethling, Potgieter and Visser *Law of delict* (1994) ("Neethling *et al Delict*") 229; *Deliktereg* (1996) ("Neethling *et al Deliktereg*") 235). The reasoning of Van Dijkhorst J flies in the face of this well-established rule relating to *onus* of proof. And it seems self-contradictory to suggest that in all cases involving stolen cheques the plaintiff must deduct from his claim against the collecting banker the value of his right of action against the thief, but that the right of action against the thief should always be presumed, *prima facie*, to be worthless.

In *Lloyd-Gray Lithographers*, two cheques made out in favour of the plaintiff, crossed and marked restrictively, were misappropriated by one Stergiopoulos, who deposited the cheques into his account with the defendant bank. Payment was collected for Stergiopoulos in circumstances rendering the defendant liable in delict to the plaintiff. The court was asked to assume that the plaintiff had a claim in delict against Stergiopoulos, and that both Stergiopoulos and the defendant had the financial means to satisfy the claims that lay against them. The *quantum* of the plaintiff's loss was *prima facie* the aggregate of the face value of the two misappropriated cheques. On the basis of these facts, which were common cause between the parties, Boruchowitz J was asked to decide whether the plaintiff's claim against the defendant as collecting banker fell to be reduced by the amount of the claim against Stergiopoulos. Clearly, in the circumstances, if this question had to be answered in the affirmative, then the plaintiff's claim against the defendant would be eliminated entirely, rather than merely reduced. For purposes of argument, it was accepted that Stergiopoulos had been guilty of intentional wrongdoing; no claim would lie against Stergiopoulos in delict, said the judge, were it shown that he was *bona fide* in receiving and appropriating the proceeds of the cheques (670F–H, with reference to *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A) 153A–E). Reference to the *John Bell* case shows, however, that the delictual remedy there under discussion was not the Aquilian action but the *condictio furtiva*, an action for damages by the owner of stolen property (or by another with an interest in the property) against the thief, based on strict liability. Even if Stergiopoulos had been *bona fide*, a claim under the Aquilian action might have lain against him, on the basis of negligence on his part in appropriating and depositing the cheques. This possibility appears to have been overlooked by Boruchowitz J when he remarked that "[n]o claim would lie

against Stergiopoulos in delict were it shown that he was *bona fide* in receiving and appropriating the proceeds of the cheques" (670G–H). But this is a quibble of an incidental nature, and does not detract from the reasoning upon which the decision to uphold the plaintiff's claim against the defendant was based.

Turning to section 2 of the Apportionment of Damages Act, the court emphasised that the section will apply only where two or more people are alleged to be liable in delict for the same damage, not where two tortfeasors, acting independently of each other, cause separate harmful consequences or damage – as, for instance, where A breaks C's arm and while C is on the way to a doctor to obtain medical treatment, B runs C down and breaks his leg (see *Mkwanazi v Van der Merwe* 1970 1 SA 609 (A) 622B–D). At common law, two people who are liable for the same damage to a third person may be either joint wrongdoers or concurrent wrongdoers. The former are people who jointly commit a delict by acting in pursuit of a concerted purpose or a common design (*Gray v Poutsma* 1914 TPD 203 205–206 cited in *Lloyd Lithographers* 671E–F); the latter are those whose independent wrongful acts have caused the same harm – perhaps the most common example being that of injury to C in a motor collision caused by the negligent driving of two vehicles by A and B, respectively (*Hughes v Transvaal Associated Hide & Skin Merchants (Pty) Ltd* 1955 2 SA 176 (T) 179H–180C and *Shell Tankers Merchants (Pty) Ltd* 1955 2 SA 176 (T) 179H–180C and *Shell Tankers Ltd v SAR & H* 1967 2 SA 666 (E) 673G–H, cited in *Lloyd-Gray Lithographers* 671F–G). The defendant and Stergiopoulos had clearly not acted in concert pursuant to a common design, for they had committed independent wrongful acts (671H–I). But (in the terminology of the common law) they were concurrent wrongdoers, since their independent acts had combined to produce the same damage, namely, the loss by the plaintiff of its claims against the drawers of the two stolen cheques. Stergiopoulos and the defendant were accordingly joint wrongdoers within the meaning of that expression in section 2(1) of the Apportionment of Damages Act ("persons [alleged to be] jointly or severally liable in delict to a third person . . . for the same damage") (671J–672C). The defendant contended, however, that the Act did not apply to instances in which one wrongdoer was guilty of intentional wrongdoing and the other of negligence. In support of this argument, the defendant relied upon *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A), 1993 1 SACR 256 and *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W). But *Ntsane* was concerned with section 1(1)(a) of the Apportionment of Damages Act, and merely established that where the defendant has been guilty of *dolus*, the defence of contributory negligence cannot be raised against the plaintiff (1993 1 SA 570A–F, 1993 1 SACR 263c–g). And the *Greater Johannesburg* case was concerned with the questions whether section 1(1)(a) could be invoked against a "vicariously liable plaintiff", and whether that provision was applicable where there was *dolus* on the part of both the plaintiff and the defendant. The two cases relied upon by the defendant in *Lloyd-Gray Lithographers* were therefore not concerned with the proper interpretation of section 2 of the Act, and could not serve as a guide to the problem whether people can be regarded as joint wrongdoers for purposes of section 2 where one of them is guilty of intentional wrongdoing and the other of negligence only. Boruchowitz J was therefore (with respect) quite right in stating that neither *Ntsane* nor *Greater Johannesburg* was *in pari materia* with *Lloyd-Gray Lithographers*, and in regarding the first two cases as irrelevant (672C–E). In *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608

(W) Mahomed J held that a person who has committed a delict intentionally may be treated as a joint wrongdoer in terms of section 2 of the Apportionment of Damages Act: nowhere in the Act is there a qualification limiting to instances of negligence the possibility of a claim by one joint wrongdoer for a contribution from another (619E–H 620D–E 621D–E). Although there was "considerable authority" that at common law such a claim could not be preferred when *dolus* was present, the Act "was intended to constitute a major departure from certain basic common law rules" (619I–620C). And it could not be said that to construe "fault" in section 2(6), (7) and (8) of the Act as including intention would lead to insuperable difficulty in apportioning liability as between joint wrongdoers guilty of *dolus* (620E–621B). Approving these dicta, Boruchowitz J in *Lloyd-Gray Lithographers* held that, although Mahomed J was dealing with the situation in which both wrongdoers had acted intentionally, there was no reason in principle why there could not be an apportionment of liability where one joint wrongdoer had acted intentionally and the other negligently. Intention and negligence were not mutually exclusive concepts, and it was logically possible for both to be present simultaneously (672E–673E; see also *S v September* 1972 3 SA 389 (C) 391pr–E; *S v Smith* 1981 4 SA 140 (C) 142H–143C; *S v Zoko* 1983 1 SA 871 (N) 896F–H; *S v Ngubane* 1985 3 SA 677 (A) 687E–H; Boberg *Delict* 273–274; Neethling *et al Delict* 123–124; Neethling *et al Deliktereg* 127–128; Van der Walt and Midgley *Delict: Principles and cases I Principles* 2 ed (1997) ("Van der Walt and Midgley") par 155 at 217). Apportioning liability between intentional and negligent wrongdoers, continued Boruchowitz J, was not an impossible task; it was a question of assessing the relative degrees of blameworthiness. In doing so, the court was not required to act with precision or exactitude but to assess the matter in accordance with what it considered to be just and equitable. There was accordingly no merit in the defendant's argument that section 2 of the Apportionment of Damages Act was inapplicable where one joint wrongdoer was guilty of negligence and the other of intentional conduct (673E–F).

In terms of section 2(6)(a) of the Act, the court continued, the plaintiff was entitled to institute action against any joint wrongdoer for the full amount of the damage suffered (673F–J). In the result, the plaintiff was entitled to judgment in the amount of its loss – the aggregate of the face values of the two misappropriated cheques. The value of the plaintiff's claim against Stergiopoulos was of no relevance in the calculation of the damages recoverable from the defendant bank; nor was the ability of Stergiopoulos to pay a claim against him a salient consideration. To take those matters into account would be contrary to the scheme of section 2. Only in the event of payment by Stergiopoulos would the plaintiff's damages be diminished, and then only to the extent of that payment (674E–G; cf my remark in 1994 *Annual Survey of South African Law* 265 to the effect that the contrary conclusion arrived at by Van Dijkhorst J in *Holscher* was "both absurd and entirely contrary to the scheme of section 2 of the Apportionment of Damages Act"). It is, therefore, hardly surprising that Boruchowitz J proceeded to reject as manifestly incorrect the decision of Van Dijkhorst J to deduct from the claim of the plaintiff in *Holscher* the amount of the liquidation dividend that he would have received from Duerka had he lodged a claim against it:

> "I am respectfully of the view that the decision in *Holscher's* case to reduce the plaintiff's claim by the amount of the dividend that the plaintiff could have recovered from [Duerka] is clearly wrong. [Duerka] and ABSA Bank were joint

> wrongdoers in relation to the loss suffered by the plaintiff, and the plaintiff was entitled having regard to the provisions of s 2 of the Act to recover from ABSA Bank the full amount of its loss being the face value of the cheque. The fact that the plaintiff had a claim against [Duerka] does not mean that it had suffered less damage than the face amount of the cheque" (675A–C).

The plaintiff in *Lloyd-Gray Lithographers*, concluded Boruchowitz J, was accordingly entitled to recover from the defendant the total face value of the two stolen cheques.

It will be obvious from the remarks I have made above that, in my view, the decision of Boruchowitz J should be followed in preference to that of Van Dijkhorst J in *Holscher*. For *Lloyd-Gray Lithographers* establishes not only that, in actions against negligent collecting bankers, a potential claim against those who misappropriated the cheques should be ignored, but also that in actions against joint wrongdoers in terms of section 2 of the Apportionment of Damages Act, it matters not that one was negligent and the other guilty of *dolus*. Whatever the position under section 1(1)(a) of the Act in cases in which there is contributory fault on the part of the plaintiff, there is clearly no warrant for limiting apportionment under section 2 to instances of comparable forms of fault (see Van der Walt and Midgley par 155 at 217).

And so, it seems, the courts in the cases listed at the start of this note did not labour in vain: damages are claimable from the negligent collecting banker after all.

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DELIKTUELE MEDEDADERSKAP: TOEPASLIKHEID OP PERSONE WAT OPSETLIK OF NALATIG DIESELFDE SKADE VEROORSAAK

Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank
1998 2 SA 667 (W)

In hierdie saak is die interessante vraag te berde gebring of daar van mededaderskap ingevolge artikel 2 van die Wet op Verdeling van Skadevergoeding 34 van 1956 (hierna die wet) sprake kan wees in 'n geval waar een persoon opsetlik en 'n ander nalatig dieselfde skade aan 'n derde veroorsaak.

Die eiser het na bewering skade gely toe 'n invorderingsbankier (verweerder) tjeks wat van die eiser as ware eienaar deur S gesteel is, ten behoewe van S ingevorder het. Die eiser stel deliktuele eise teen sowel die verweerder as S in. Die kernvraag was of die bankier wat nalatig en die dief wat opsetlik opgetree het, mededaders ingevolge vermelde wet kan wees (670H). Die verweerder antwoord ontkennend; voorts word aangevoer dat artikel 2 van die wet in elk geval nie van toepassing is nie omdat die verweerder en S afsonderlike daders was.

Regter Boruchowitz (671D–I; sien ook Neethling, Potgieter en Visser *Deliktereg* (1996) 263) wys daarop dat die gemenereg 'n onderskeid gemaak het tussen gesamentlike mededaders ("joint wrongdoers") en onafhanklike of afsonderlike mededaders ("concurrent wrongdoers"): waar persone bewustelik meegewerk het om 'n onregmatige daad te pleeg, was hulle gesamentlike mededaders; waar meer as een persoon deur hulle onafhanklike onregmatige optrede kousaal tot dieselfde skadelike gevolg bygedra het, was hulle afsonderlike mededaders. In ooreenstemming met hierdie onderskeid is die aanspreeklikheid van die twee tipes mededaders dan ook gemeenregtelik verskillend gereël. Tans word die posisie deur artikel 2(1) van die wet beheers. Ingevolge die wet verval die gemeenregtelike verskil tussen gesamentlike mededaders en afsonderlike mededaders; mededaders word nou omskryf as persone wat gesamentlik of afsonderlik op grond van *delik* aanspreeklik is vir *dieselfde skade*.

'n Persoon kan dus slegs as 'n mededader aangespreek word indien hy eerstens inderdaad deliktueel teenoor die eiser aanspreeklik ("liable") is. (*In casu* bestaan geen twyfel nie dat die verweerder en S sodanig aanspreeklik is: Daar bestaan nl 'n regsplig op 'n invorderingsbank om finansiële verlies vir die eienaar van 'n verlore of gesteelde tjek te vermy deur nie die tjek aan 'n onregmatige besitter uit te betaal nie. Doen die bank dit wel en tree hy in the proses nalatig op, is hy *ex lege Aquilia* aanspreeklik (*Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); sien Neethling, Potgieter en Visser 291 vn 126 vir verdere gesag). Voorts word aanvaar (670F–G) dat S hom deur sy diefstal van die gewraakte tjeks aan opsetlike (*mala fide*) deliktuele skadeveroorsaking skuldig gemaak het.) Tweedens moet die een dader dieselfde skade as die ander (mede)dader veroorsaak het. Hieruit volg dat die wet nie van toepassing is waar meerdere persone *afsonderlike skadelike gevolge* vir die eiser berokken het nie; elkeen is volgens gewone deliksbeginsels dan net aanspreeklik vir die skade wat hy veroorsaak het (sien 671H; *Mkwanazi v Van der Merwe* 1970 1 SA 609 (A) 622; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 293–294).

Nou bestaan daar volgens die hof geen twyfel nie dat die bank en die dief afsonderlike onregmatige dade gepleeg het; nietemin staan dit eweneens vas dat hulle vir dieselfde skade van die eiser aanspreeklik is. Gevolglik kwalifiseer hulle as mededaders ingevolge die wet. Die regter verwoord dit so (671J–672C):

> "There is clearly an interrelationship between the wrongful acts of [S] and the defendant and the resultant loss. [S's] wrongful conduct, on its own, would not have caused the plaintiff any loss had the defendant not collected the proceeds of the cheque for his account. So too, had [S] not wrongfully appropriated the proceeds of the cheques, the plaintiff would not have suffered any loss as a result of the defendant's errant collection of the cheques. It is thus clear that their independent wrongful acts combined to produce the same damage, namely, the loss by the plaintiff of its claims against the drawers of the cheques . . . The defendant and [S] are thus concurrent wrongdoers at common law, and therefore joint wrongdoers within the meaning of s 2(1) of the Act."

Vervolgens geniet die verweer dat die huidige geval, waar die een mededader opsetlik en die ander nalatig dieselfde skade veroorsaak het, nie onder die wet tuisgebring kan word nie, aandag (672C–673F). Ten aanvang verwys regter Boruchowitz na *Randbond Investments v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 616 ev, waar regter Mahomed beslis het dat die wet ook op opsetlike, anders as nalatige, mededaders van toepassing is. Die kern van regter Mahomed se beslissing (619–620) is dat aangesien die wet radikaal met die

gemenereg gebreek het en nie sy toepassing tot nalatige daders beperk nie, die woorde "liable in delict" (a 2(1)) sowel nalatige as opsetlike delikspleging insluit. Die probleem om aanspreeklikheid te verdeel tussen twee mededaders wat beide opsetlik gehandel het, kan volgens regter Mahomed oorkom word deur die "degrees of culpability" (620) van die daders in ag te neem – 'n dader met *dolus directus* is byvoorbeeld meer verwytbaar as een met *dolus eventualis* (sien 672G–I; vgl ook *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569):

> "Apportioning liability between joint tortfeasors is very often a difficult exercise, but I am not persuaded that the difficulty becomes insuperable merely because the delictual act concerned was intentional. There can be degrees of culpability even between different joint wrongdoers perpetrating an intentional act which attracts delictual liability. There is, for example, a clear difference between the kind of intention which is inferred from a *dolus eventualis* on the one hand and *dolus directus* on the other. Even between different wrongdoers whose intention is to be inferred from a *dolus eventualis* there are different gradations of culpability. This is one of the reasons why the Legislature probably provided that what the Court had eventually to do was to apportion the damages against the joint wrongdoers in such proportions as the Court 'may deem just and equitable'."

Hierop laat regter Boruchowitz volg (672I–673A 673E):

> "Although the above *dictum* is applicable to situations where both wrongdoers acted intentionally, there is, in my view, no reason in principle as to why there cannot be an apportionment of liability where one joint wrongdoer has acted intentionally and the other negligently. Intention and negligence are not mutually exclusive concepts. It is logically possible for both to be present simultaneously ... Apportioning liability between intentional and negligent wrongdoers is not an impossible task. It is a question of assessing the relative degrees of blameworthiness. In so doing, the Court is not required to act with precision or exactitude but to assess the matter in accordance with what it considers to be just and equitable."

Hierdie standpunt word ten volle ondersteun (sien Neethling en Potgieter "Bydraende opset en die Wet op Verdeling van Skadevergoeding 34 van 1956" 1992 *THRHR* 658–662 661 waar die *Randbond*-saak bespreek en dieselfde mening as Boruchowitz R gehuldig word) alhoewel toegegee word dat 'n rasionele verdeling van skadevergoeding ooreenkomstig elke mededader se skuld met betrekking tot die skade met die eerste oogopslag onmoontlik lyk waar die een opsetlik (subjektiewe toets) en die ander nalatig (objektiewe toets) dieselfde skade veroorsaak het. As uitgangspunt word aanvaar (soos *in casu* 673A–D en *S v Ngubane* 1985 3 SA 677 (A)) dat indien 'n dader opsetlik gehandel het, daar terselfdertyd ook by hom nalatigheid aanwesig is. Hierdie standpunt is logies en regverdig omdat 'n mens in hierdie verband kan betoog dat die opsetlike benadeling van 'n ander beslis strydig is met die sorgsaamheid wat die redelike man aan die dag sou gelê het en dat nalatigheid daarom gelyktydig aanwesig is (sien ook Neethling, Potgieter en Visser 127–128; Boberg *The law of delict Vol 1 Aquilian liability* (1984) 273–274). Voorts word aanvaar dat 'n opsetlike handeling in die reël *minstens* op 'n 100% afwyking van die norm van die redelike man sou neerkom. (Hier word die skadevergoedingsverdelingskriterium by a 1(1)(a) van die Wet op Verdeling van Skadevergoeding, soos aanvaar in *Jones v Santam Bpk* 1965 2 SA 542 (A) (sien Neethling, Potgieter en Visser 154–156 vir 'n bespreking), analoog toegepas. Dit is nl dat 'n (mede)dader se aandeel in die skade(vergoeding) bepaal word met verwysing na sy *graad van nalatigheid (of verwytbare gedrag)*, en dit geskied deur sy afwyking van die norm van die redelike man as 'n persentasie aan te dui.)

Pas 'n mens nou hierdie uitgangspunte op mededaderskap toe (soos deur a 2 gereël), kan verdeling ook tussen opsetlike (of opsetlike en nalatige) mededaders op 'n rasionele grondslag geskied (sien ook Neethling en Potgieter 1992 *THRHR* 661; Neethling, Potgieter en Visser 264 vn 14 281 vn 57). Die uitgangspunt dat 'n opsetlike mededader minstens 100% van die norm van die redelike man afwyk, sou veelal meebring dat in die geval van twee opsetlike mededaders die skade gelykop tussen hulle verdeel sal word. In die geval waar die een mededader opsetlik en die ander nalatig gehandel het, sal die verdeling afhang van die graad waarin die nalatige dader van die norm van die redelike man afgewyk het: indien hierdie afwyking byvoorbeeld 60% was, geskied die verdeling op 'n 100:60 basis. Dit beteken egter nie dat die verdeling in die geval van opsetlike optrede noodwendig altyd op 'n 100:?-verdelingsverhouding sal geskied nie. 'n Faktor wat volgens regter Mahomed in *Randbond supra* 620 by die bepaling van die verdelingsverhouding 'n belangrike rol speel en wat volle steun verdien, is die *graad van verwytbaarheid (of verwytbare gesindheid)* ("degree of culpability") van die opsetlike dader. Daarom, soos dié regter tereg uitwys (620; hierbo aangehaal), kan 'n dader wat met *dolus eventualis* handel waarskynlik minder verwytbaar wees as 'n dader wat byvoorbeeld met *dolus directus* opgetree het, of kan selfs mededaders met dieselfde vorm van opset in die lig van die betrokke omstandighede meer of minder verwytbaar wees. Hierdie faktor sal gevolglik die resultaat hê dat 'n opsetlike handeling nie altyd net as 'n 100% afwyking van die norm van die redelike man aangedui kan word nie, met die gevolg dat in 'n gegewe geval twee opsetlike mededaders byvoorbeeld in 'n 100:120 (*dolus eventualis: dolus directus*)-verdelingsverhouding te staan kan kom, of 'n opsetlike (*dolus directus*) en nalatige dader byvoorbeeld in die verhouding 120:60. Die slotsom is dus dat die mededader se *graad van verwytbaarheid* (verwytbare gedrag by nalatigheid en verwytbare gesindheid by opset: vgl Neethling, Potgieter en Visser 117–118), soos uitgedruk in sy *persentasie-afwyking van die norm van die redelike man*, 'n belangrike rol behoort te speel om die hof in staat te stel om die skadevergoeding tussen mededaders te verdeel "op 'n regverdige en billike" wyse met inagneming van hulle "skuld met betrekking tot die skade" (vgl a 2(6) 2(7) 2(8)(a) van die wet).

Die bevinding dat persone as mededaders aangemerk word, het tot gevolg dat hulle *in solidum*, gesamentlik en afsonderlik, vir die eiser se volle skade aanspreeklik is. Die eiser kan dus die volle skadevergoeding van enige mededader verhaal terwyl laasgenoemde op sy beurt in beginsel regres van die ander mededader(s) kan vorder. So 'n verweerder se regres- of verhaalsreg is, soos gesê, gerig op die vordering van 'n bedrag wat, met inagneming van die mededaders se onderskeie grade van skuld met betrekking tot die skade, as billik en regverdig geag word (sien a 2(6)(a) van die wet; *Lloyd-Gray* 673F–674A; Neethling, Potgieter en Visser 263–264). As die hof seker is dat al die mededaders voor die hof is, kan hy die skadevergoeding tussen hulle verdeel op die basis van hulle relatiewe skuldgrade en vonnis teen elke mededader vir 'n gedeelte van die skadevergoedingsbedrag gee (a 2(8) van die wet; *Lloyd-Gray* 674A–E).

Omdat S nie as 'n party gevoeg is en die skadevergoeding dus nie tussen S en die bankier verdeel kan word nie, bevind regter Boruchowitz dat die verweerder-bankier vir die volle skade van die eiser aanspreeklik is. In hierdie verband is die hof van mening, wat instemming verdien, dat die beslissing in *Holscher v ABSA Bank* 1994 2 SA 667 (T) verkeerd is (674–675). Hier het die bank (verweerder) nalatig 'n gesteelde tjek van die eienaar-eiser (A) ten gunste van sy kliënt (B) ingevorder. Daarna word B in likwidasie geplaas maar A versuim om 'n eis teen

B se boedel in te dien. A eis die volle bedrag van die tjek van die bank. Die hof bevind egter dat A net geregtig is op die waarde van die tjek minus die likwidasiedividend wat hy waarskynlik sou ontvang het as hy 'n eis teen B ingestel het. Regter Boruchowitz stem nie saam nie (675A–C). Volgens hom was die bank en B mededaders; daarom was elk van hulle solidêr aanspreeklik vir die volle bedrag van die tjek. Die feit dat A 'n eis teen B gehad het, doen nie afbreuk aan hierdie beginsel van mededaderskap ingevolge die wet nie.

Dit is ter wille van regsontwikkeling jammer dat S nie voor die hof was nie. Die hof sou dan 'n verdeling van die skadevergoeding tussen die nalatige bankier en die dief ooreenkomstig hulle onderskeie grade van verwytbaarheid moes onderneem. Daarom word met afwagting uitgesien na die toekomstige praktiese hanteerbaarmaking deur die regspraak van die graad-van-verwytbaarheid-kriterium in konkrete gevalle.

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DIE INTESTATE ERFOPVOLGINGSREG VAN 'N SWART VROU IN 'N GEBRUIKLIKE HUWELIK

Mthembu v Letsela 1997 2 SA 936 (T)

1 Inleiding

Die bespreking is gemik op die intestate erfopvolgingsregte van 'n swart vrou. Wanneer die vrou haarself in 'n gebruiklike huwelik bevind en die man te sterwe kom, het sy volgens die tradisionele erfopvolgingsprosedure geen regte ten opsigte van erfopvolging gehad nie. Die tradisionele reël is dat die eersgebore manlike afstammeling in die manlike linie die enigste erfopvolger is. Vroue het dus geen erfopvolgingsregte gehad nie. Die vraag wat ondersoek word, is of hierdie tradisionele voorskrifte (wat ook statutêr gereël word) met die voorskrifte van die Grondwet versoenbaar is (die Grondwet in hierdie saak synde die (tussentydse) Grondwet van die Republiek van Suid-Afrika 200 van 1993).

2 Feite

Die applikant, 'n volwasse Zoeloe-vrou, beweer dat sy op 14 Junie 1992 te Tsakane in Brakpan met Letsela (die oorledene), 'n Suid-Sotho, getroud is. Die oorledene was op die Ergo Myn te Boksburg werksaam. Die applikant het sedert 1990 met die oorledene te Boksburg in Vosloorus saamgewoon (937I).

2 1 Dood van oorledene

Die oorledene is op 18 Augustus 1993 deur 'n onbekende persoon vermoor. Die oorledene het intestaat gesterf en die weduwee (applikant) is deur die tweede respondent aangewys om die boedel te beredder.

2 2 Erfgename

Die weduwee en oorledene het een dogter (Tembi) wat op 1 April 1988 gebore is. Sy het met hulle in Vosloorus saamgewoon. Die oorledene het geen ander kinders of broers gehad nie. Hy het drie susters en sy vader (1ste respondent) en moeder leef nog. Volgens die inheemse reg is die vader dan die naaste manlike verwant van die oorledene (Olivier *Indigenous law* par 148).

2 3 Erfpaggrond

Ten tyde van die oorledene se dood was hy die houer van erfpaggrond in Vosloorus. Hy had die "full right title and interest in the leasehold" en die voorwaarde was dat die erfpag vir 99 jaar aan hom toegeken is vir doeleindes van behuising. Die weduwee en haar dogter het op hierdie erf gewoon tot die dood van die oorledene. Die oorledene se ouers asook 'n suster en 'n kind van haar het in die huis van die oorledene gewoon.

Weduwees se statutêre regte ten opsigte van okkupasie van erfpaggrond na die dood van haar man, word soos volg in artikel 37 van Proklamasie R188 van 1969 voorgeskryf:

> "(1) Wanneer die geregistreerde besitter te sterwe kom, en hy deur enige weduwee of deelgenoot oorlewe word wat te alle tye die enigste persoon was met wie hy in die huwelik getree het of met wie hy 'n gebruiklike verbinding aangegaan het, of indien sy nie sodanige enigste persoon is nie, dan die deelgenoot van die eersterangse huis, is sodanige weduwee of deelgenoot daarop geregtig om, totdat sy weer trou of 'n ander gebruiklike verbinding aangaan en tydens haar inwoning by haar oorlede eggenote of deelgenoot se kraal of sodanige ander kraal as wat deur haar oorlede eggenoot of deelgenoot se familiebetrekkinge goedgekeur word, sodanige grond te gebruik en te okkupeer onderhewig aan die verpligtinge wat uit die titelvoorwaardes of enige behoorlik geregistreerde verband spruit, en tydens sodanige gebruik en okkupasie bly sodanige grond op naam van die oorledene geregistreer.
>
> (2) Enige weduwee of oorlewende deelgenoot wat ingevolge die bepalings van hierdie artikel op die gebruik en okkupasie van grond geregtig is, word geag haar regte ten opsigte van sodanige grond te verbeur het as sy nie binne drie maande na die datum van betekening aan haar persoonlik van 'n formele kennisgewing wat deur die Kommissaris onderteken is en waarin van haar vereis word dat sy haar aanvaarding van sodanige regte te kenne gee, aan sodoende vereistes voldoen het nie."

Volgens Olivier (*Indigenous law* par 157 ev) is soortgelyke voorskrifte in artikel 9 van Proklamasie 142 van 1910 op erfpaggronde in Transkei van toepassing.

2 4 Opvolging

Die oorledene het nie 'n geldige testament nagelaat nie. Die oorledene se vader (1ste respondent) voer aan dat die huis hom toekom omdat daar geen oorlewende broers van die oorledene is nie en dat hy die enigste naaste senior manlike verwant is (938D).

Die vader eis dat artikel 23 van die Swart Administrasie Wet 38 van 1927 en die regulasies ingevolge daarvan uitgevaardig, wat die inheemse reg en gebruik op intestate opvolging van toepassing maak, op die onderhawige feitestel toegepas moet word (938E).

Volgens die tradisionele erfopvolgingsbeginsels kan slegs 'n manlike persoon opvolg. Die beginsel van eersgeboortereg geld. Dit impliseer dat die oudste seun van die hoofvrou opvolg en indien hy reeds oorlede is, volg sy oudste seun op. So word daar deur die afstammelinge na die oudste eersgeborene gesoek en

indien geen opvolger gevind word nie, skuif die bates op na die oorledene se voorgangers. Dit sluit sy vader en die vader se broers in. Indien hulle reeds oorlede is, gaan die bates na die grootvader en sy broers. Die beginsel van eersgeboortereg word deurgaans toegepas (Olivier *Indigenous law* par 143; Die KwaZulu-Wet op die Wetboek van Zoeloereg, Wet 16 van 1985 van die KwaZulu Wetgewende Vergadering, gepubliseer in KwaZulu GK 105 van 1986; Die Natalse Wetboek van Zoeloereg, Proklamasie R151 van 1987, gepubliseer in RSA *SK* 10966 van 1987-10-09).

Bennett in sy werk *A sourcebook of African customary law for Southern Africa* (1991) 400 stel dit soos volg: "Primogeniture, a major characteristic of the kinship systems of the Southern Bantu, is one of the most hallowed principles of customary law."

Hy sê egter dat daar wel stamme is by wie die beginsel van eersgeboortereg nie toegepas word nie. Die rede is onder andere dat die laasgebore seun normaalweg die huis laaste verlaat. Die ouer broers is dan reeds gevestig en die jongste is dan verantwoordelik vir die versorging van die huis. Dit sou derhalwe billik wees om aan hom ook erfopvolgingsregte te verleen. Hierdie is 'n logiese benadering hoewel dit van die tradisionele reël afwyk. Dit bly egter strydig met die beginsels van die Swart Administrasie Wet en die Zoeloe Wetboeke. Vir doeleindes van die onderhawige bespreking word nie na die verdere opvolgingsprosedure verwys nie.

2 5 Opvolger

In die onderhawige saak was daar geen manlike afstammeling van die oorledene nie. Hy het ook geen broers gehad nie. Die enigste persoon wat aan die gewoonteregtelike en statutêre vereistes vir opvolging voldoen het, is die vader van die oorledene. Hy is ook die eerste respondent. Sy eis is dus relevant (938F).

2 6 Versoek van die applikant

Die applikant beweer dat na die "huwelik" met die oorledene die verhouding tussen haar en sy familie versuur het. Hulle eis dat sy (applikant) en haar dogter die eiendom verlaat en dat die roerende eiendom aan die oorledene se vader oorgegee word. Die vader (1ste respondent) weier egter om tot die onderhoud van die weduwee (applikant) en haar dogter by te dra. Hy beskou hom nie as ingevolge die inheemse reg verplig om tot die onderhoud van die applikant by te dra nie.

2 7 Verweer van eerste respondent

Die rede vir die houding van die oorledene se vader is dat hy ontken dat sy oorlede seun volgens gewoontereg met die applikant getroud was. Die oorledene het volgens die eerste respondent nooit die bedoeling gehad om so met die applikant te trou nie. Hy erken ook nie die applikant en haar dogter (Tembi) as deel van sy familie nie.

2 8 Applikant

Die applikant het aangevoer dat sy volgens die gewoontereg met die oorledene getroud was. Sy verwys na die reëlings van die huwelik, die datum, die getuies teenwoordig asook die wyse van die bevestiging van die huwelik. Volgens haar is die *lobolo* ook gedeeltelik betaal. "Dokumentêre" bewyse wat deur die partye onderteken is, is ook voorgelê (938I–939A).

Op die vraag of gedeeltelike betaling van die *lobolo* die voltrekking van die huwelik bevestig, is nie ingegaan nie. Olivier (*Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 113) sê die volgende:

> "Waar die lobolo bv. 'paaiementsgewys' betaal kan word, sal die vader van die eggenote, solank hy maar betreklik gereeld van die 'paaiemente' ontvang, geen druk op sy skoonseun en dié se familie uitoefen nie. Solank as hulle, of die skoonseun, maar net sy verpligting erken en die vaste bedoeling het om wel aan die verpligting te voldoen, sal die skoonvader gewoonlik daarmee genoeë neem, al moet hy ook vir 'n onbepaalde tyd wag."

Olivier stel dit duidelik dat hierdie voorskrifte net op sommige volkere van toepassing is. Dit is dus nie algemeen geldend nie. As die skoonvader oortuig is dat die skoonseun die *lobolo* kan betaal, is daar nie 'n probleem nie. By gebrek aan bogenoemde, kan die skoonseun van gebrek aan goeie trou beskuldig word.

Geeneen van bogenoemde stellings is bewys nie.

Die applikant voer aan dat die inheemsregtelike reëls van erfopvolging op die verdeling van die boedel toegepas moet word. Die huis in Vosloorus wat in huurpag gehou is, moet ingevolge die inheemse reg op die naaste manlike verwant oorgaan. Dit beteken dat die vader van die oorledene (1ste respondent) daarop geregtig is en dat hy gevolglik die applikant en haar dogter moet onderhou. Die applikant eis nie onderhoud van die eerste respondent nie. Sy eis ook nie dat 'n interdik verleen word wat hom verhoed om haar uit die huis te sit nie (939C).

Namens die applikant is 'n aanval geloods waarin aangevoer is dat die gewoonteregtelike en inheemsregtelike reëls van intestate erfopvolging diskriminerend en dus ongrondwetlik is. (Die hof verwys na die tussentydse Grondwet, 200 van 1993.) Die versoek is dat die hof die gewoonteregtelike stelsel ongeldig verklaar en dat dit dus onkonstitusioneel is. Die verligting wat die applikant versoek, is kortliks die volgende (939E ev):

1 'n Bevel van die hof wat die volgende verklaar:

1.1 dat die reël van die gewoontereg wat swart vrouens van intestate erfopvolging uitsluit, ongrondwetlik en dus ongeldig is;

1.2 dat artikel 23 van die Swart Administrasie Wet en artikel 2 van Gk R200 van 1987 ongeldig is vir sover dit die toepassing van die inheemse reg vereis;

1.3 dat die administrasie en die verdeling van die boedel van die oorledene volgens die gemeenregtelike reëls van opvolging moet geskied; en

1.4 dat Tembi Mthembu (dogter van die oorledene) die oorledene se enigste intestate erfgenaam is.

2 Alternatief tot 1:

'n Bevel wat die volgende verklaar:

2.1 dat die gewoonteregtelike reëls strydig is met die openbare belang en natuurlike geregtigheid en gevolglik onafdwingbaar is;

2.2 dat die interpretasie van artikel 23 van die Swart Administrasie Wet en artikel 2 van Gk R200 in die lig van artikel 1(1) van die Wysigingswet op die Bewysreg 45 van 1988 en die Grondwet nie die toepassing van die reëls van die gewoontereg vereis nie;

2.3 dat die administrasie en verdeling van die oorledene se boedel nie deur die gewoontereg gereël word nie;

2.4 dat Tembi Mthembu die oorledene se enigste intestate erfgenaam is.

3 Alternatief tot 1 en 2:

As bevind word dat die reëls van die gewoontereg geldig en afdwingbaar is en dus die administrasie en verdeling van die oorledene se boedel reël, 'n bevel wat verklaar dat die oorledene se opvolger ingevolge die gewoontereg verplig is om die applikant en haar dogter toe te laat om in die huis in Vosloorus aan te bly.

4 As een of beide die respondente die aansoek teenstaan, 'n bevel dat die respondent(e) die applikant se kostes betaal.

5 Alternatiewe verligting.

2 9 Huweliksluiting

Die vader het hierdie versoek teëgestaan op grond van die feit dat die oorledene nie met die applikant getroud was nie. Die huwelik is volgens hom ook nie volgens die gebruike bevestig nie. Die vader het aangevoer dat die oorledene geen bedoeling gehad het om met die applikant te trou nie. Sy was slegs een van sy vriendinne. Hy het gevolglik geen verpligting om haar en haar dogter te onderhou nie. Hy beweer die volgende (940D):

> "He maintains that he is the rightful heir entitled to the estate of his son and that he has no responsibility towards or duty to maintain applicant or her daughter. He says that the applicant is not destitute, having inherited her mother's home, and that she is an 'opportunist'. He adds the following:
>
> 'In terms of our custom, under no circumstances can we live with a person who was never formally married and delivered according to our custom. Such a stay is taboo.' "

Die vraag is gevolglik of die partye ingevolge die gewoontereg getroud was. Volgens die applikant se getuienis was die huwelik voltrek. Die blote saamleef van die partye stel reeds ingevolge die voorskrifte van die Swart Administrasie Wet (soos genoem) 'n huwelik daar.

2 10 Saamwoon – getroud wees?

Die vraag is gevolglik of die partye ingevolge die gewoontereg getroud was en of daar enige vorm van huweliksluiting of samewoning bestaan het.

Artikel 2 van GK R 200 van 1987 bepaal in subartikel (d):

> "(d) Wanneer 'n oorlede Swarte deur 'n party oorleef word –
>
> (i) met wie hy 'n huwelik aangegaan het wat ooreenkomstig subartikel (6) van artikel 22 van die Wet nie die regsgevolge van 'n huwelik in gemeenskap van goedere gehad het nie; of
>
> (ii) met wie hy 'n gebruiklike verbinding aangegaan het; of
>
> (iii) wat ten tyde van sy afsterwe as sy sogenaamde vrou met hom saamgeleef het; . . ." (die restant van die reëlings is nie hier ter sake nie).

Uit die gegewe blyk dit dat die applikant met die oorledene volgens die gewoontereg getroud was en dat sy volgens die datums wat aangedui is, met die oorledene tydens sy afsterwe saamgewoon het. Die voorskrifte van die regulasie stel dit duidelik dat indien 'n vrou met 'n man saamwoon, die gevolge van erfopvolging deur die gewoontereg bepaal word, tensy die minister anders bepaal. Die gewoontereg is dus op die erfopvolging van toepassing omdat die gevolge van die huwelik deur die vorm van huweliksluiting bepaal word. Uit die feite blyk dit dus dat daar 'n gewoonteregtelike huwelik was omdat die partye in elk geval ingevolge artikel 2(d)(iii) van GK R200 van 1987 saamgewoon het.

Volgens die applikant is die bates vir haar dogter en nie vir haarself nie, geëis. Indien die applikant slaag om die gewoonteregtelike reëls van erfopvolging asook die statutêre voorskrifte wat die toepassing van die reël magtig, ongeldig verklaar te kry, is die vraag na die geldigheid van haar huwelik met die oorledene irrelevant.

As die hof bevind dat die vader van die oorledene op die bates geregtig is, word die feitegeskil relevant.

2 11 Betoog van applikant

In hierdie geval voer die applikant die volgende aan (940I–J):

(a) dat die "dokumentêre" getuienis oor die bestaan van die gewoonteregtelike huwelik wat die applikant voorgelê het, oortuigend is, alternatief,

(b) dat die aangeleentheid vir mondelinge getuienis voorgelê moet word.

Namens die applikant is aangevoer dat die reël van die gewoontereg wat vrouens van opvolging tot die bates van die oorledene uitsluit, strydig met die voorskrifte van die tussentydse Grondwet is. Dit is gevolglik nietig. Die regsverteenwoordiger van die applikant se argument is soos volg (941A–942B):

> "(i) In its traditional setting the rule entails that the heir steps into the shoes of the deceased as head of the family and acquires the duty of maintaining all family members who are excluded from succession by the principles of male primogeniture.
>
> (ii) In modern urban society the rule is devoid even of these redeeming features and the male heir simply acquires the assets of the deceased's estate without assuming any of the responsibilities.
>
> (iii) This rule is grossly discriminatory against African women, and children who are not the eldest child.
>
> (iv) It is obviously unconstitutional as it contravenes ss 8(1) and 8(2) and s 14 of chap 3, as it discriminates between persons on the grounds of sex or gender. In terms of s 8(4) the offending provision is therefore presumed to be unfair until the contrary is proved and no such proof has been tendered by the first respondent.
>
> (v) Respondent relies on reg 2(e) of the regulations framed under s 23(10) of the Black Administration Act 38 of 1927 for his claim to the house and movables, but these provisions should also be declared invalid for the same reasons as stated above.
>
> (vi) Although the whole question whether chap 3 of the Constitution applies horizontally as well as vertically (that is to private relationships under the common law or customary law in contradistinction to relationships between organs of state and subjects) is a controversial one and has not been finally decided by the Constitutional Court, applicant submits that it does apply horizontally and accordingly the offending rule of succession is invalid in terms of ss 4(1) and 33(1) of the interim Constitution.
>
> (vii) In any event, so the argument runs, s 1(1) of the Law of Evidence Amendment Act 45 of 1988 provides as follows:
>
> > '(1) 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 other similar custom is repugnant to such principles.'
>
> This rule of customary law is clearly repugnant to the principles of public policy and natural justice as expressed in the Constitution.
>
> (viii) The regulation promulgated under Government Notice R200 of 6 February 1987 is *ultra vires* because it is delegated or subordinate legislation and exceeds

> the provisions of the enabling Act. It has in any event been repealed by implication by the passing of the Intestate Succession Act 81 of 1987, which regulates intestate succession and provides, *inter alia*, that where a person dies intestate and is survived by a descendant but not by a spouse such descendant shall inherit the intestate estate. A further provision contained in this Act stipulates that illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation. In the definition clause 'intestate estate' includes any part of an estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act 38 of 1927 does not apply."

Die eerste respondent se verteenwoordiger kon nie op die bewerings reageer nie en het versoek dat tyd verleen word om geskrewe hoofde van argument voor te lê. Die hoofde is, volgens die hof, in 'n ongewone vorm voorgelê (942B).

Volgens die verteenwoordiger van die eerste respondent is die vraag of 'n gebruiklike huwelik tussen die partye bestaan het. Die vraag is essensieel om te bepaal hoe die bates vererf en wie die wettige voog van Tembi is. Die hoofde van betoog van die verteenwoordiger het die opinies van twee akademici waarop die submissies baseer is, bevat (prof TW Bennett van die Universiteit van Kaapstad en prof AJ Kerr, voorheen van die Rhodes Universiteit). Die opinies hou onder andere in dat 'n moeder geen *locus standi in judicio* het om haar minderjarige kind te verteenwoordig nie. Die opinies dui verder daarop dat die erfopvolgingsreëls ingevolge die gewoontereg nie onregverdig diskriminerend volgens die Grondwet is nie. Die regsverteenwoordiger van die eerste respondent het versoek dat die aangeleentheid vir mondelinge getuienis op die volgende preliminêre aangeleenthede voorgelê word (942E–F):

(1) Die vraag of 'n inheemsregtelike huwelik bestaan het al dan nie;

(2) of die applikant *locus standi* in die aansoek het;

(3) of die applikant die voog van die minderjarige Tembi is;

(4) of die applikant verplig was om haar remedies ingevolge artikel 2(d) van GK R200 van 1987 uit te put.

Namens die eerste respondent is ook aangevoer dat die vraag of die Grondwet horisontale werking het, eers deur die konstitusionele hof beantwoord moet word voordat die onderhawige hof oor die geldigheid van die gewoonteregtelike reëls van erfopvolging kan beslis (942H).

Namens die applikant is besware teen die opinies van die professore aangeteken omdat hulle slegs deskundiges op die gebied van die inheemse reg is en nie op die gebied van die konstitusionele reg nie. Trengove sê namens die applikant dat dit "presumptuous and impermissible" (vermetel en ontoelaatbaar) is om deskundige getuienis in mosieverrigtinge op so 'n manier aan te bied (942H).

Die applikant se verteenwoordiger voer aan dat dit verkeerd en te laat is om verdere getuienis aan te bied. Die versoek aan die hof is om die deskundige opinies te skrap (942H).

3 Uitspraak

Die hof begin die uitspraak deur na die laaste beswaar (die kritiek teen die professore) van die applikante se regsverteenwoordiger te verwys. Regter Le Roux laat hom soos volg uit (943A ev): "Although it is novel and even unusual to attach opinions by experts to heads of argument, I cannot agree that" die aanbieding van die argumente ontoelaatbaar of strydig met die hofreëls of die reëls van die bewysreg is nie. Die hof toon aan dat hy nie onbehoorlik deur die menings van die akademici beïnvloed is nie (943C).

Die laaste alternatief wat deur die eerste respondent se regsverteenwoordiger voorgehou is, (met verwysing na 'n uitspraak van die konstitusionele hof), is dat die grondwetlikheid van die gewoonteregtelike reëls van intestate erfopvolging nie oorweeg kan word, as die handves van regte net op vertikale verhoudings van toepassing is nie (943C).

4 *In limine*

Namens die eerste respondent is aangevoer dat die Grondwet ondubbelsinnig is (met verwysing na intestate erfopvolging) en hy steun vir sy submissie op die volgende voorskrifte, te wete (943D ev):

(1) Artikel 4(1) bepaal dat die Grondwet die hoogste reg van die Republiek is en dat enige reg of wet wat daarmee strydig is, tensy anders bepaal, daarmee strydig sal wees tot die mate van die strydigheid;

(2) artikel 7(2) bepaal dat hoofstuk 3 van toepassing is op alle geldende reg tydens die duur van die Grondwet; en

(3) artikel 33(2) bepaal, soos behalwe in die Grondwet voorgeskryf, geen reg, of dit 'n reël van die gemenereg, gewoontereg of wetgewing is, die regte wat in hoofstuk 3 verskans is, beperk nie.

Die hof verwys na regspraak waarin aangetoon is dat hoofstuk 3 van die tussentydse Grondwet bedoel is om net vertikale werking te hê (943F).

Heelwat is te sê vir die siening dat die gewoontereg deur die opstellers van die Grondwet gesien is as 'n afsonderlike regs- en kulturele sisteem. Hierdie gewoontereg kan vryelik deur die partye ingevolge artikel 31 van die Grondwet as regsisteem gekies word. Artikel 33(3) bevat egter 'n vreemde voorskrif wat soos volg lui (944E):

> "33(3) Die verskansing van die regte ingevolge hierdie Hoofstuk word nie so uitgelê dat dit die bestaan ontken van enige ander regte of vryhede deur die gemenereg, gewoontereg of wetgewing erken of verleen nie, in die mate waarin hulle nie met hierdie hoofstuk onbestaanbaar is nie."

Die aanvullende maatreëls van subartikel (4) bepaal dat (944H):

> "(4) Hierdie Hoofstuk belet nie maatreëls wat daarvoor ontwerp is om onbillike diskriminasie deur ander liggame en persone as dié wat ingevolge artikel 7(1) gebonde is, te verbied nie."

Dit blyk dat dit 'n verdere keuse stel aan persone wat hulleself aan hierdie ander "rights and freedoms" ontbloot (944C). Artikel 181(1) sit die voortsetting van die toepassing van die gewoontereg deur tradisionele owerhede voort. Die reëls moet aan hoofstuk 3 van die hoofstuk oor fundamentele regte getoets word en mag nie strydig met die openbare belang en natuurlike geregtigheid wees nie (a 1(1) van die Wysigingswet op die Bewysreg 45 van 1988).

Die hof is van oordeel dat dit in die onderhawige geval onnodig is om 'n mening oor die horisontale werking van die Grondwet uit te spreek. Die aangeleentheid dien voor die konstitusionele hof. Regter Le Roux sê verder (944E):

> "On the other hand, I do not intend to accede to the request to postpone this matter indefinitely in order to await that decision as the applicant's rights need to be addressed expeditiously and her case should be advanced by the order which I intend to make herein. I will, therefore, assume for purposes of this case that the Constitution governs the succession rule of customary law – without expressing an opinion on the horizontal or vertical application thereof . . ."

Die hof verwys na die argument van die regsverteenwoordiger van die applikant. Hy voer aan dat die reëls van intestate opvolging in stryd is met artikel 8(2) van die Grondwet wat soos volg bepaal (944G):

> "8(2) 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."

Artikel 8(4) is ook toepaslik en bepaal soos volg:

> "*Prima facie*-bewys van diskriminasie op enige van die gronde in subartikel (2) vermeld, word geag voldoende bewys van onbillike diskriminasie soos beoog in daardie subartikel te wees, totdat die teendeel blyk."

Die submissie van die regsverteenwoordiger is dat omdat vroue en kinders (behalwe die oudste kind – wat 'n manlike afstammeling moet wees) van erfopvolging ingevolge die reël van die manlike erfopvolgingsreg uitgesluit is, die reël onregverdig diskriminerend teenoor vrouens en ander kinders is. Dié reël is dus ingevolge artikel 4 van die tussentydse Grondwet ongeldig (944I).

Regter Le Roux laat homself soos volg uit oor dié opmerking (945A–D):

> "If stated in this fashion, the right of intestate succession by the male heir of the deceased only is undoubtedly discriminatory against women and younger children. But against this should be balanced the provisions of s 31 of the Constitution, which provides that every person shall have the right to use the language and to participate in the cultural life of his or her choice."

Daar is ook die beperkende voorskrifte in artikel 33(1) van die tussentydse Grondwet wat soos volg bepaal (945B):

> "(1) Die regte in hierdie hoofstuk verskans, kan beperk word deur algemeen geldende reg, met dien verstande dat so 'n beperking –
>
> (a) slegs geoorloof is in die mate waarin dit –
>
> (i) redelik is; en
>
> (ii) regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid; en
>
> (b) nie die wesenlike inhoud van die betrokke reg ontken nie, . . ."

Die vraag wat die hof moet beoordeel, is of dié reël van erfopvolging onregverdig tussen persone op grond van geslag of geslagsvoorkeur onderskei.

Dit is gemeensaak dat in landelike gemeenskappe waar die reël oor die algemeen toegepas word, die oorgang van die oorledene se bates op die senior manlike afstammeling ook 'n verpligting om die vrou of vroue van die oorledene met wie hy volgens die gewoontereg getroud was, asook die kinders uit die huwelike gebore, te onderhou en te versorg.

Die hof verwys na Bennett se mening dat die weduwee in die oorledene se kraal mag aanbly en die bates vir onderhoud mag gebruik. Die opvolger mag nie die vrou en haar kinders verwerp nie (945F). Die hof verwys soos volg na Bennett (945F–G):

> "[A] widow in particular may remain at the deceased's homestead and continue to use the estate property and . . . the heir may not eject her at whim. He quotes numerous decisions of the Native Appeal Court in support of this proposition, and he submits that accordingly the customary law rule cannot be said to discriminate unfairly against women."

Volgens die hof is daar veel vir hierdie reël van erfopvolging te sê. As aanvaar word dat die plig om te onderhou, 'n noodsaaklikheid van die beginsel van

eersgeboortereg is, vind die hof dit moeilik om hierdie vorm van diskriminasie tussen man en vrou met die beginsel van onbillike diskriminasie soos in artikel 8 van die tussentydse Grondwet uiteengesit, te vergelyk (945H).

> "The word 'discrimination' originally had a neutral meaning of 'distinguishing between' or 'drawing a distinction, to differentiate, to make a difference between'... It is only in recent times that the word has acquired the secondary negative meaning of bigotry, prejudice, bias, intolerance or unfairness ... In view of the manifest acknowledgement of customary law as a system existing parallel to the common law by the Constitution ... and the freedom granted to persons to choose this system as governing their relationships (as implied in s 31), I cannot accept the submission that the succession rule is necessarily in conflict with s 8. Neither is it contrary to public policy or natural justice ... There are other instances where a rule differentiates between men and women, but which no right-minded person considers to be unfairly discriminatory, for example the provision of separate toilet facilities. It follows that even if this rule is *prima facie* discriminatory on the grounds of sex or gender and the presumption contained in s 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support. The rights conferred by this rule are not inconsistent with the fundamental rights contained in chap 3 and the injunction found in s 33(3) can accordingly be implemented, namely to construe the chapter in such a way as not to negate those rights" (945H).
>
> "Should the counter-balance of the right to support fall away, however, the whole matter assumes a different aspect. Under customary law a child born out of wedlock belongs to the mother's family where it occupies a very lowly position, and has no claim on the natural father, whereas by the Intestate Succession Act 81 of 1987 the prohibition against inheriting from a biological father *ab intestato* has now been removed in respect of European law ..." (946C).

Dit is dus belangrik om vas te stel wat die huweliksverband tussen die oorledene en die applikant was. Regulasie 2(d) van GK R200 van 1987 wat ingevolge artikel 23(10) van die Swart Administrasie Wet uitgevaardig is, bepaal onder andere soos volg:

> "(d) Wanneer 'n oorlede Swarte deur 'n party oorleef word –
>
> (i) .....
>
> (ii) met wie hy 'n gebruiklike verbinding aangegaan het; of
>
> (iii) wat ten tyde van sy afsterwe as sy sogenaamde vrou met hom saamgeleef het;
>
> of deur 'n nakomeling van hom en so 'n party, en die omstandighede van so 'n aard is dat dit na die mening van die Minister die toepassing van Swart reg en gebruik op die vererwing van al of 'n gedeelte van sy goed onregverdig of ongeskik maak, kan die Minister gelas dat vermelde goed of genoemde gedeelte daarvan, na gelang van die geval, moet oorgaan asof sogenoemde Swarte en genoemde party wettig buite gemeenskap van goedere getroud was, of dit nou in werklikheid die geval was of nie, en asof genoemde Swarte 'n Blanke was."

Volgens die dokumentasie voor die hof blyk dit dat die applikant nie van die remedie wat dit vir haar moontlik maak om aan te toon dat die gewoontereg nie op haar en haar kind van toepassing is nie en dus ontoepaslik is, gebruik gemaak het nie. Regter Le Roux sê (946H):

> "This would in my view an appropriate case to be placed before the Minister where she can show that her position and that of her child as urban dwellers is adversely affected by this rule of succession under customary law, for example because the heir fails to maintain her, or because the leasehold property does not fall within the scope of s 23(2) and she is threatened with ejectment from her erstwhile common marital house by the application of the rule.

> In order, however, to bring herself within the ambit of this rule it is essential to establish the jurisdictional requirement, viz that she was married by customary law or at least was living with him as his putative spouse (which is also denied by first respondent)."

Die aangeleentheid is hierbo behandel waarvolgens datums duidelik aangetoon het dat die partye inderdaad saamgewoon en aan die vereistes van die Goewermentskennisgewing voldoen het. Daar is ook geen aanduiding dat die partye nie 'n gewoonteregtelike huwelik gesluit het nie. Die applikant het getuienis hieroor voorgelê wat myns insiens nie betwis is nie. Die getuienis van die applikant kom meer geloofwaardig voor as die van die eerste respondent.

Die hof het die volgende bevel gemaak (947D):

> "1 The application is postponed *sine die*.
>
> 2 The matter is referred for the hearing of oral evidence on the following preliminary questions:
>
> (a) whether the applicant had entered into a valid customary union with the deceased during the latter's lifetime; or
>
> (b) whether a putative marriage under customary law existed between the applicant and the deceased . . ."

6 Samevatting

Die getuienis wat voorgelê is, dui daarop dat die partye (die oorledene en die applikant (weduwee)) ten minste saamgewoon het. Die vraag of 'n gebruiklike huwelik voltrek is, is dan irrelevant. Artikel 2(d)(iii) van Regulasie 200 van 1987 impliseer juis dat die blote samewoning van partye 'n gebruiklike verbinding (samewoning) daarstel. Die gewone erfopvolgingsreëls geld dan. Volgens die getuienis het die partye wel saamgewoon. Die gewone opvolgingsregte is dus dit wat ingevolge die gewoontereg voorgeskryf word. Die weduwee en haar dogter is geregtig op sowel onderhoud van die oorledene se vader (die eerste respondent) as op die bewoningsregte van die erfpaggrond.

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ISLAMIC MARRIAGES, THE DUTY OF SUPPORT AND THE APPLICATION OF THE BILL OF RIGHTS

Amod v Multilateral Motor Vehicle Accident Fund
1997 12 BCLR 1716 (D)

1 Introduction

In *Amod v Multilateral Motor Vehicle Accident Fund* 1997 12 BCLR 1716 (D) the High Court was once again faced with a challenge to the constitutional validity of the decision of the Appellate Division in the case of *Ismail v Ismail* 1983 1 SA 1006 (A), in which it had been held that a marriage entered into according to Muslim rites was not a lawful marriage and that consequently the

marriage itself, as well as any contracts or customs flowing from it, were invalid. The Appellate Division had based its decision on the fact that Islamic marriages are polygamous or potentially polygamous and were therefore considered to be contrary to public policy. Marriages considered to be contrary to public policy are invalid in South African law (Hahlo *The South African law of husband and wife* (1986) 28). This would include any contracts or customs that flow from such a marriage (*Ismail* 1025C–1026F).

In the post-apartheid era the constitutional validity of the common law rule enunciated in the *Ismail* case has been challenged on two previous occasions, namely in *Kalla v The Master* 1994 4 BCLR 79 (T); 1995 1 SA 261 (T) and in *Ryland v Edros* 1997 1 BCLR 77 (T); 1997 2 SA 690 (C). In *Kalla* the applicants argued that in the light of the protection afforded to religious freedom in section 14(1) of the interim Constitution (the Constitution of the Republic of South Africa, Act 200 of 1993), the *mores* of our society had changed to such an extent that the decision in *Ismail*'s case was therefore no longer valid. The court rejected this argument on the basis that the provisions of the interim Constitution did not apply retrospectively, and that any reliance on section 14(1) was accordingly misplaced. The marriage in question had been terminated by death on 1 April 1992, whereas the interim Constitution had only come into effect on 27 April 1994. The court also observed, in passing, that polygamous or potentially polygamous marriages may in addition contravene the principle of gender equality embodied in the Constitution and could therefore be "as unacceptable to the *mores* of the new South Africa as they were to the old" (*Kalla* 270G).

In *Ryland v Edros supra*, on the other hand, the court found that certain contracts or customs flowing from a marital relationship which is potentially polygamous may now be enforced. The court held that in the light of the values of equality, the tolerance of diversity, and the recognition of the plural nature of South African society contained in the interim Constitution, there had been a significant change in public policy after 1994. Consequently, an agreement or custom which existed between a husband and a wife married in accordance with Muslim rites, and in terms of which the husband undertook to support his wife, was now enforceable. In arriving at this decision, the court held that, given the changes in public policy brought about by the enactment of the interim Constitution, it was no longer bound by the decision in *Ismail*'s case.

In *Amod*'s case the question that arose for consideration was whether the contractual duty of support which a husband owes his wife in terms of their Islamic marriage, satisfied the requirements of a dependant's action for loss of support against a third party.

2 The facts

The facts were as follows: the plaintiff lodged a claim against the Multilateral Motor Vehicle Accident Fund (the "MMV") for compensation for loss of support arising out of the death of her husband (the "deceased") in a motor car accident. Although the deceased's death was caused by the negligence of the other driver involved in the accident, the MMV repudiated liability on the ground that the deceased had not been under a legal duty to provide support for the plaintiff while their marriage was in existence. The relevant facts in this respect were that the plaintiff had married the deceased according to Islamic law. This marriage was, however, not registered as a civil marriage in terms of the provisions of the Marriage Act 25 of 1961. It was common cause between the

parties that the Islamic marriage which existed between the plaintiff and the deceased was a contract, and that in terms of this contract the deceased was obliged to provide support for his wife while their marriage was in existence.

The only issue facing the court was whether the MMV was legally liable to compensate the plaintiff for loss of support.

3 The judgment

Meskin J began his judgment by pointing out that the MMV would be liable only if the driver of the vehicle who had negligently killed the deceased was legally liable for the loss of support suffered by the plaintiff. In terms of the common law, it is legally possible for a widow to sue in her own right for loss of support suffered as a result of the negligent killing of her husband. The widow may sue in terms of a "dependant's action" which is based on an extension of the principles of Aquilian liability (Neethling, Potgieter and Visser *Law of delict* (1993) 270). According to the courts, the most important element of the dependant's action is that while the deceased was still alive, he must have been under a common law duty to provide maintenance and support to the dependant (*Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 837–838). Traditionally, a common law duty of support arises only in respect of either a lawful marriage or a blood relationship (Neethling, Potgieter and Visser *op cit* 272). Consequently, the traditional approach in South African law has been that no common law duty of support arises from an Islamic marriage, given the Appellate Division's decision that such marriages are unlawful (*Ismail v Ismail supra*).

In response to this traditional legal position, counsel for the plaintiff put forward two arguments:

(i) First, that public policy considerations had changed since 1982 when *Ismail*'s case was decided, and that consequently Islamic marriages should, as a matter of public policy, no longer be considered unlawful.

(ii) Secondly, and in the alternative, that the court should in terms of section 39(2) read with section 8(2) and (3) of the so-called final Constitution (the Constitution of the Republic of South Africa, Act 108 of 1996), develop the common law to recognise a duty of support arising out of an Islamic marriage.

As far as the first argument was concerned, Meskin J pointed out that the onus was on the plaintiff to prove that there had been a change in public policy and that the decision in *Ismail*'s case was consequently no longer applicable. Counsel for the plaintiff conceded, however, that this could not be established on the evidence before the court. The judge therefore dismissed the first argument. Before turning to consider the second argument, the question arose whether the interim or the final Constitution applied. After an examination of the relevant provisions of both the interim and the final Constitutions, the judge came to the conclusion that the matter should be dealt with in terms of the final Constitution.

Having found that the provisions of the final Constitution were applicable Meskin J turned to consider the provisions set out in sections 8 and 39(2) of the Constitution. He began his analysis by observing that section 39(2) must be read with section 8(2) and (3). Reading these sections together, Meskin J explained, makes it clear that the development of the common law to which the Constitution refers in section 39(2) is restricted to the development of the common law so as "to give effect to a right in the Bill [of Rights] . . . to the extent that legislation does not give effect to that right" (s 8(3)(a)) when applying a provision of

the Bill of Rights to a natural or juristic person. In other words, the judge argued, the courts do not have a general power to develop the common law to "promote the spirit, purport and objects of the Bill of Rights" (s 39(2)), but only to develop the common law to promote the spirit, purport and objects of the Bill of Rights when the court is applying a provision of the Bill of Rights to a natural or juristic person in those circumstances where legislation does not give effect to the right in question.

The court then went on to find that such circumstances did exist in the case at hand. Meskin J found that a refusal to recognise that a duty of support arises out of an Islamic marriage, and that this duty of support meets the requirements for a dependant's action, would be a violation of the rights to equality (s 9(1)), dignity (s 10) and the right not to be unfairly discriminated against on the grounds of marital status (s 9(3) or (4)). The court held:

> "Essentially, such refusal results in unequal treatment by the law, predicated only on the unlawfulness of the plaintiff's marriage, as between the plaintiff and a woman who was lawfully married to her deceased husband with reference to the obtaining of compensation for loss of support arising from the deceased's death" (1723C).

The question which then had to be answered, Meskin J explained, was whether in terms of section 39(2) read with section 8(3)(a), the court's power to develop the common law included the power, not only to amplify the existing common law, but to alter the existing common law by eliminating from it a principle already forming a part of it. He held that it did not. He explained:

> "As I read section 8(3)(a), the intention is that if there is silence in the common law with regard to the giving effect to a right in the Bill, and legislation does not give effect to such right, the court must amplify the common law to eliminate such silence. This is not an intention that the court must, in order to give effect to a particular right, eliminate or alter an existing principle of the common law which affects the operation of such right, irrespective of the manner in which this occurs. The intention is that such alteration or elimination is to remain the function of the legislature" (1723H–I).

Applying these principles to the facts before him, Meskin J noted that it was an established principle of the common law that a dependant's action for loss of support depended upon the existence of a legal duty of support. Furthermore, that in the case of a widow, a legal duty of support arose only out of a lawful marriage. He then held that in the light of his interpretation of section 39(2), read with section 8(3)(a), he could not alter these established principles by finding that a duty of support arising out of an unlawful marriage now satisfied the requirements for a dependant's action. This, he concluded, was the task of the legislature. Consequently, the court found that the MMV was not legally liable to compensate the plaintiff for the loss of support she had suffered as a result of her husband's death.

4 Comment

Amod's case raises the difficult and much debated question of the manner in which the Bill of Rights applies in litigation between private parties involving the principles and rules of the common law. This question, which is sometimes referred to as the "horizontality" issue, is governed by sections 8 and 39(2) of the Constitution. It is submitted that Meskin J's analysis of section 8 and its relationship with section 39(2) is overly cautious. It is further submitted that an alternative construction of these sections may be adopted which would require

the courts to play a greater role in reshaping the common law so as to give effect to the values underlying the new constitutional order.

A useful starting point in this respect is to recognise that the Bill of Rights will apply in every common law dispute between private parties. This is made clear in section 8(1) of the Constitution, which expressly provides that the Bill of rights applies to all law, which must include legislation, the common law and customary law (Rautenbach "Fundamental rights" in Joubert *LAWSA First Reissue* vol 10 part 1 (1998) par 624). What is more contentious, however, is the manner in which the Bill of Rights should be applied to a common law dispute between private parties. In regard to this question it is submitted that sections 8(2) and 39(2) of the Constitution indicate that the Bill of Rights may apply either directly or indirectly to a common law dispute involving private parties. A distinction between direct and indirect application of the Bill of Rights was approved by the majority of the Constitutional Court in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC); 1996 3 SA 850 (CC) par 72, where it was held that the Bill of Rights in the interim Constitution applied only indirectly when a private person in private litigation alleged that a common law rule was inconsistent with the Bill of Rights. A significant difference between the interim and the final Constitutions is that in terms of the final Constitution, the Bill of Rights may now apply either directly, in terms of section 8(2), or indirectly, in terms of section 39(2), to a common law dispute between private persons.

Before turning to consider when the Bill of Rights will apply directly or indirectly, it is important to understand what is meant by the "direct" and "indirect" application of the Bill of Rights in the private realm. As Cockrell explains, direct application means that the Bill of Rights can be used to ground a substantive right held by one private person against another private person in the absence of any statute. The Bill of Rights can, in other words, be used by a private litigant against a non-governmental agency to bring a case to court. The private litigant will use the Bill of Rights to found the right which he or she claims has been infringed. Indirect application, on the other hand, means that the Bill of Rights can be used only to influence a court's interpretation and development of the common law in the same circumstances. In other words, when it is applied indirectly, the Bill of Rights can be used only to interpret and develop the common law once the case is before the court quite independently of the Bill of Rights (Cockrell "Private law and the bill of rights: a threshold issue of 'horizontality' " in *Bill of Rights compendium* (1996) 3A–7).

We may now turn to consider the circumstances in which the Bill of Rights will apply directly or indirectly. In this respect section 8(2) provides that the Bill of Rights does "bind" private persons, but only to the extent that a provision of the Bill of Rights is applicable in the light of the nature of the right and the nature of the duty imposed by the right. As Cockrell explains, this means that the courts will have to decide in an *ad hoc* manner whether or not a particular right binds a private person (3A–12). The only guidance provided by section 8(2) is that regard should be had to the nature of the right, and to the nature of any corresponding duty imposed by the right.

In some instances, however, the constitutional right which is under consideration might itself provide further guidance. This will be the case when the constitutional right under consideration contains an internal application provision which makes it clear that the right does or does not apply against a private person. For example, it is clear that the right to equality has been drafted in such

a manner that it envisages the possibility that a burden may be imposed directly on private persons (s 9(4)). In the absence of an internal application provision, a court will be required to make a value judgment whether it is appropriate for the constitutional right under consideration to impose burdens on the private person (Cockrell 3A–13). In *Amod*'s case the applicant relied, *inter alia*, on the right not to be discriminated against on the grounds of marital status. Section 9(4) of the Constitution expressly provides that this right applies directly against private persons.

Having established that the constitutional right in question applies directly, it is submitted that the court would then have to determine whether the constitutional right has been infringed by the common law rule. In this analysis it is submitted that the court may adopt a two-stage approach. At the first stage, the court must determine the meaning and content of the right protected by the Constitution. It must then assess whether the common law rule under consideration curtails or infringes the constitutional right. If so, the second stage calls for an inquiry whether, in the light of the overall constitutional scheme, the violation can be justified as a permissible limitation of the constitutional right (*Holomisa v Argus Newspapers* 1996 6 BCLR 836 (W) 853; 1996 2 SA 588 (W) 607).

In *Amod*'s case the court (correctly, it is submitted) came to the conclusion that a refusal to recognise a duty of support arising out of an Islamic marriage as sufficient to ground the liability which the plaintiff sought to enforce, did violate the right to equality, including the right not to be unfairly discriminated against on the grounds of marital status. Although the court did not explicitly engage in limitations analysis, it seems fairly clear that the common law rule in issue would not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (*Fraser v Children's Court, Pretoria North* 1997 2 BCLR 153 (CC); 1997 2 SA 218 (CC) par 21–24).

Having established that a constitutional right has been unjustifiably infringed by a rule of the common law, the question of an appropriate remedy then arises. Remedies for the infringement of the Bill of Rights by the common law are contained in section 8(3) of the Constitution. Section 8(3) provides that a court must first seek a remedy in legislation. If no remedy exists in legislation, then the court must seek a remedy in the existing common law, failing which the common law must be developed to give effect to the right (s 8(3)(a)). In applying or developing a common law rule, the court may also limit the constitutional right, provided that the limitation is in accordance with section 36(1) of the Constitution.

If, as is the position in *Amod*'s case, there is no legislation or common law rule giving effect to the constitutional right, then the courts will have to develop a common law rule (s 8(3)(a)). Given the facts of *Amod*'s case, this would require the court either to set aside the common law rule that Islamic marriages are unlawful, or to extend the common law rules relating to the duty of support.

As far as the first option is concerned, it is submitted that where a common law rule is so manifestly out of step with a constitutional provision that it cannot be "developed", it must be set aside. It is further submitted that the language of section 8 indicates that the courts have been given law-making powers which far exceed those previously exercised by the High Court in respect of the common law. Accordingly, the courts may set aside a rule of the common law where it cannot be justified (Van der Vyver "Constitutional protection of children and young persons" in Robinson ed *The law of children and young persons* (1997)

270–271). Once an Islamic marriage is recognised as lawful, the plaintiff's claim could then be dealt with in terms of the normal rules governing a dependant's action.

The power of the courts to set aside a rule of the common law in terms of section 8(3) also highlights an important distinction between the court's powers in terms of that provision and in terms of section 39(2). As Van der Vyver explains, the power conferred by section 8(3) is a law-creating power; whereas the power conferred by section 39(2) is to apply the court's normal powers of interpretation *in favorem libertatis*, with the spirit, purport and objects of the Constitution as the substantive directive of the legal idea (Van der Vyver 274–275).

The second, and narrower, option would be for the court to amplify or extend the common law rules relating to the duty of support. As is pointed out above, the traditional approach has been that a common law duty of support arises only out of a lawful marriage or blood relationship. The court could remedy the constitutional defect this rule gives rise to by simply expanding the common law duty of support to include marriages entered into according to Muslim rites. In *Chawanda v Zimnat Insurance* 1991 2 SA 825 (ZS) the Zimbabwean Supreme Court did exactly this in respect of customary marriage, and in the absence of any constitutional imperative (a partner in a customary marriage in South Africa is already entitled to claim damages for loss of support in terms of s 31(1) of the Black Laws Amendment Act 76 of 1963). The plaintiff's claim could then be dealt with in terms of the normal rules governing a dependant's action.

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DIE MISHANDELDE VROU-SINDROOM, DIE REDELIKE PERSOON-STANDAARD EN DIE GRENSE VAN NOODWEER

R v Malott (1998) 121 CCC (3d) 456 (SCC)

1 Inleiding

Die relevante feite in dié saak was soos volg: M is daarvan aangekla, en in die verhoorhof daaraan skuldig bevind, dat sy haar man vermoor het. M en die oorledene het vir ongeveer 19 jaar in 'n konkubinaat saamgeleef – as sogenaamde "common law spouses" (vgl hieroor Labuschagne "Die vermoede *pater est quem nuptiae demonstrant*, sosio-morele transformasie en die reg op 'n nakomskennis" 1996 *Obiter* 30). Die oorledene het M oor 'n lang termyn fisiek, seksueel, psigologies en emosioneel misbruik. M was voorheen vir 7 jaar met 'n man getroud wat haar en haar vyf kinders gewelddadig mishandel en misbruik het. M het by die polisie gekla oor die oorledene se optrede. Laasgenoemde was egter 'n polisie-informant ten aansien van onwettige dwelmhandel, met die gevolg dat hy oor M se klagtes ingelig is. Dit het aanleiding gegee tot 'n eskalasie van geweld deur die oorledene op haar. 'n Paar maande voor die skietery het oorledene M verlaat en saam met hulle seun by sy vriendin ingetrek. M en hulle dogter het

voortgegaan om by oorledene se moeder se huis te woon. Na die skeiding het oorledene nog kontak met M behou, aangesien hy op 'n gereelde grondslag sy moeder besoek het, in welke geval hy dikwels sy vriendin saamgebring het.

Op 21 Maart 1991 het M, vergesel van die oorledene, na 'n mediese sentrum gegaan om 'n mediese voorskrif te kry wat hy in sy onwettige dwelmhandel gebruik het. M het 'n .22-kaliber pistool van oorledene se vuurwapenkabinet geneem, dit gelaai en in haar handsak saamgeneem. Nadat hulle na die mediese sentrum gery het, het M oorledene doodgeskiet. Sy het vervolgens 'n taxi na sy vriendin, Carrie Sherwood, geneem en haar geskiet en met 'n mes gesteek. Sherwood het die aanval egter oorleef en vir die staat getuig.

M is aan moord in die tweede graad en poging tot moord skuldig bevind. Die jurie het as gevolg van die ernstige aard van die mishandeling wat M oor 'n lang tydperk ondergaan het, aanbeveel dat die ligste straf moontlik opgelê moet word. Hierdie saak land uiteindelik in die Kanadese Supreme Court. In dié hof is onder andere geargumenteer dat M, in die lig van voorafgaande mishandeling, in noodweer opgetree het. Dit moet ten aanvang duidelik gestel word dat die skuldigbevinding aan poging tot moord op Sherwood nie ernstig betwis is nie. In die onderhawige bydrae word die vraag na die grense van noodweer en die effek daarvan op 'n mishandelde vrou wat haar man (in huweliks- of konkubinaatsverband) ernstig aanrand of dood onder die loep geneem (vgl verder in dié verband Connelly "Women who kill violent men" 1996 *Juridical Rev* 215; Burt "The battered woman syndrome and the plea of self-defence: can the victim and accused be strangers?" 1993 *Univ of British Columbia LR* 93; McColgan "In defence of battered women who kill" 1993 *Oxford J of Legal Studies* 508).

2 Noodweer en die mishandelde vrou

Artikel 34(2) van die Kanadese Strafkode is hier ter sake 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 purpose; and
>
> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

In sy uitspraak wys regter Major daarop dat daar hiervolgens drie vereistes vir noodweer gestel word, naamlik: (i) die bestaan van 'n onregmatige aanranding; (ii) 'n redelike vrees vir die risiko van dood of ernstige liggaamlike letsel; en (iii) 'n redelike geloof dat die dood of die toedien van ernstige liggaamlike letsel die enigste wyse van selfbeskerming is (464. Sien ook *R v Pétel* (1994) 87 CCC (3d) 97 (SCC) 103). Regter Major merk ten aansien van die eerste vereiste op dat die vraag nie is of die noodweerdader onregmatig aangeval is nie, maar of hy/sy eerlik en redelik geglo het, al sou dit foutief wees, dat hy/sy aangeval word. In *R v Lavallee* (1990) 55 CCC (3d) 97 (SCC) het die hoogste Kanadese hof beslis dat deskundige getuienis toelaatbaar is ten aansien van die psigologiese effek wat mishandeling van 'n vrou in huweliksverband op haar gehad het. Die hof (jurie) kan deur sodanige getuienis ingelig word oor hoe die volgende begryp en/of verklaar kan word: (i) die paradoksale vraag oor waarom 'n mishandelde vrou voortgaan om in 'n misbruikverhouding te bly; (ii) die aard en omvang van die geweld wat in so 'n verhouding bestaan; (iii) die beskuldigde (vrou) se vermoë om gevaarlike optrede van haar misbruiker (voortydig) te antisipeer; en

(iv) die vraag of die beskuldigde op redelike gronde geglo het dat sy haarself op geen ander wyse van ernstige liggaamlike letsel of die dood kon bevry nie (464–465). Regter Major beslis vervolgens dat M se beroep op noodweer nie kan slaag nie. Uit die voorafgaande berekende optrede van M blyk reeds duidelik dat sy nie in 'n noodsituasie verkeer het nie.

In 'n afsonderlike uitspraak beweer regter L'Heureux-Dubé – waarmee regter McLachlin saamgestem het – dat die toelating van deskundige getuienis in dié verband gesien moet word as die "legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly" (469). Sy wys verder daarop dat deur toelating van genoemde deskundige getuienis aanvaar word dat 'n vrou se persepsie van wat redelik is deur haar geslag en haar persoonlike ervaring beïnvloed word. Sy vervolg dan:

> "This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of the particular events. But it is wrong to think of this development of the law as merely an example where an objective test – the requirement that an accused claiming self-defence must *reasonably* apprehend death or grievous bodily harm – has been modified to admit evidence of the subjective perceptions of a battered woman ... The perspectives of women, which have historically been ignored, must now equally inform the 'objective' standard of the reasonable person in relation to self-defence" (470–471).

Later wys sy daarop dat die redelike vrou-standaard, as onderdeel van die redelike persoon-standaard, in sodanige gevalle in oorweging geneem moet word (471–472). Met beroep op die menings van verskeie feministe merk sy op dat die ondersoek na die morele aanspreeklikheid van 'n vrou wat haar op noodweer beroep, moet fokus op die redelikheid van haar optrede binne konteks van haar persoonlike ondervinding, asook haar belewenisse as vrou, en nie op haar status as 'n mishandelde vrou en haar aanspraak dat sy aan die mishandelde vrou-sindroom ly nie:

> "By emphasizing a woman's 'learned helplessness', her dependence, her victimization, and her low self-esteem, in order to establish that she suffers from 'battered woman syndrome', the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women. Therefore, it should be scrupulously avoided because it only serves to undermine the important advancements achieved by the decision in *Lavallee*" (472).

Daar is verskeie ander faktore wat, binne die sosiale en andersydse konteks waarin sy haar bevind, 'n rol kan speel by die vraag waarom sy nie die persoon wat haar mishandel, verlaat het nie en "which do not focus on those characteristics most consistent with stereotypes" (472). Hierdie faktore sluit in haar gebrek aan arbeidsvaardighede, kinders wat versorg moet word, druk om die familie intakt te hou, beskerming van haar kinders teen mishandeling, vrees dat sy toesig oor haar kinders kan verloor, gebrek aan sosiale en finansiële ondersteuning vir mishandelde vroue in die betrokke jurisdiksie en die vrees dat die mishandeling deur haar verlating bloot sal voortduur. Hierdie oorwegings kan lig werp op die vraag na die redelikheid van die betrokke vrou se vrese en persepsies, spesifiek ook waarom daar nie redelikerwys alternatiewe vir haar optrede bestaan het nie (472–473). Sien in die algemeen Le Roux *Geweldsmisdade binne huweliksverband* (LLD-proefskrif UP 1994) 58–172. Regter L'Heureux-Dubé konkludeer in dié verband soos volg:

> "Where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered woman's experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women" (473).

Sy wys vervolgens daarop dat mans ook slagoffers van mishandeling binne huweliksverband kan wees. In so 'n geval sou navorsing en deskundige getuienis oor hierdie tipe slagoffers se belewenisse en die psigodinamika onderliggend aan hulle optrede aan die howe, by bepaling van die redelikheidstandaard, leiding kon gee (473). Binne die feitestel van die betrokke saak wys sy egter ook M se appèl van die hand.

Die aandrang op 'n redelike vrou-standaard en die (gedeeltelike?) praktiese realisering daarvan deur toelating van deskundige getuienis oor die mishandelde vrou-sindroom, dui duidelik op 'n subjektiveringsproses in die noodweerreg (vgl ook Labuschagne "Geregtigheidsdinamiek van die vroutipiese" 1996 *SAPR/PL* 225 234–236 en "Die menseregtelike dimensie van seksuele teistering in arbeidsverband" 1997 *SA Merc LJ* 76–82). Dit bevestig op 'n treffende wyse 'n standpunt wat ek by vorige geleenthede ingeneem het (sien bv "Putatiewe noodweer: opmerkinge oor 'n dadersubjektiewe benadering tot misdaadomskrywing" 1995 *THRHR* 116; "Strafregtelike effek van die noodweerdader se emosionele belewenis van die aanval op die oorskryding van die noodweersgrense" 1995 *TSAR* 754; "Noodweer, die redelike man en misdaadelementologiese dinamiek" 1996 *THRHR* 661).

3 Konklusie

Dit blyk uit bogaande uiteensetting dat die Kanadese Supreme Court se erkenning van die effek van die mishandelde vrou-sindroom by vasstelling van die noodweervoorwaardes en -grense, via die redelikheidsvereiste, 'n proses van dekonkretisering en subjektivering van noodweer gestimuleer het (sien verder hieroor Labuschagne "Van instink tot norm. Noodweer en noodtoestand in strafregtelike-evolusionêre perspektief" 1993 *TRW* 133). In ons reg kan die feit dat 'n vrou wat aan 'n voortdurende proses van mishandeling onderworpe was en "geestelik geknak" het tot 'n onskuldigbevinding op grond van nie-patalogiese ontoerekeningsvatbaarheid aanleiding gee (sien bv *S v Campher* 1987 1 SA 940 (A) 955; *S v Potgieter* 1994 1 SACR 61 (A) 73–74; Burchell *South African criminal law and procedure* vol 1 (1997) 204–211). Vgl ook Labuschagne "Medemensdwang as strafregtelike verweer" 1997 *Stell LR* 205 217–218). Waar ontoerekeningsvatbaarheid in 'n spesifieke geval nie bewys kan word nie, bly die vraag nog steeds of die betrokke vrou nie moontlik in noodweer opgetree het nie. In dié verband sou ons howe by die Kanadese howe kon kers opsteek.

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BOEKE

MAATSKAPPYWET 61 VAN 1973 EN WET OP BESLOTE KORPORASIES 69 VAN 1984
(met Regulasies, Sakeregister en Indekse)

saamgestel en geredigeer deur

JT PRETORIUS

4e uitgawe; Juta & Kie Bpk; Kenwyn 1997; 436 bl

Prys R99,50 (sagteband)

en

HANDBOEK VIR MAATSKAPPYWETGEWING 1998 WAARBY INGESLUIT DIE WET OP BESLOTE KORPORASIES

EML STRYDOM (redakteur)

11e uitgawe; Butterworths; Durban 1997; 504 bl

Prys R114,00 (sagteband)

Dit is interessant wanneer twee boeke gerig op dieselfde teikenmark oor dieselfde onderwerp op 'n mens se lessenaar beland. Die vraag wat jy dan moet beantwoord is watter een aangekoop moet word. Die vraag word in 'n groot mate deur persoonlike voorkeur beantwoord en ander aspekte as die blote inhoud sal sekerlik deurslaggewend wees. Die rede hiervoor is voor-die-hand-liggend aangesien daar teksgewys min te kies is tussen die twee publikasies.

Beide publikasies bevat die volledige teks en bylaes van die betrokke wette, soos gewysig. *Maatskappywet 61 van 1973 en Wet op Beslote Korporasies 69 van 1984 (met regulasies, sakeregister en indekse)* (hierna "Pretorius" genoem) saamgestel en geredigeer deur JT Pretorius en *Handboek vir maatskappywetgewing 1998 waarby ingesluit die Wet op Beslote Korporasies* (hierna "Strydom" genoem) onder redaksie van EML Strydom is beide gerieflike, toeganklike en relatief goedkoop bronne van die betrokke wetgewing. Pretorius is bygewerk tot Augustus 1997 en Strydom tot Oktober 1997.

Wat inhoud betref, is daar min te kies tussen die twee boeke, maar die handige sakeregister laat die skaal effe in Pretorius se guns swaai. In die Beslote Korporasie-afdeling word slegs Praktyksnotas 3 en 4 in Strydom vervat, terwyl Pretorius al vier reeds gepubliseerde Praktyksnotas vervat.

Die meer volledige inhoudsopgawe van Strydom is geriefliker vir vinnige gebruik van die boek. Beide boeke vervat die betrokke artikels in die bladsy-opskrifte en daar is dus geen verskil tussen die twee wanneer na 'n spesifieke artikel of reël gesoek word nie.

Die grootste verskil tussen die twee boeke is die uitleg. Pretorius is in twee kolomme gedruk, terwyl Strydom die gewone volbladuitleg volg. Die verskil van uitleg het tot gevolg dat Pretorius uit 436 bladsye en Strydom uit 504 bladsye bestaan.

Die gehalte van die drukwerk en tegniese versorging van beide boeke is goed, maar Strydom is op beter papier gedruk en het ook 'n gelamineerde buiteblad wat 'n netjieser indruk skep. Die sagte buiteblad van Pretorius vertoon slordig na dit 'n paar maal hanteer is.

Hierdie verskille tussen die twee boeke word egter nie in die prys weerspieël nie. Met inagneming daarvan dat daar 68 bladsye meer in Strydom is en die dikker gelamineerde buiteblad asook die beter papier van Strydom, is daar slegs 'n R14,50 prysverskil tussen die twee publikasies.

Wat betref die proefleesgehalte, is daar min te kies tussen die twee publikasies en moet professor Pretorius en doktor Strydom geluk gewens word met die hoë standaard wat gehandhaaf is in beide die boeke.

In teenstelling met die meeste ander soortgelyke werke, is beide hierdie publikasies nie losbladuitgawes nie en is daarom by uitstek geskik vir diegene wat slegs geïnteresseerd is in die teks van die betrokke wette soos op datum van publikasie. Beide die boeke word sterk aanbeveel vir beide die student en die praktisyn. Watter een gekies word, berus egter by persoonlike keuse.

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ENVIRONMENTAL LAW
A SOUTH AFRICAN GUIDE
by MICHAEL KIDD
Juta & Co Ltd, Kenwyn, Cape Town 1997; xxviii and 193 pp
Price R125 (soft cover)

The author's introductory remark reads:

> "As we near the end of the twentieth century, environmental issues are prominent in people's minds and they dominate political agendas" (1).

On the situation in South Africa regarding environmental law as a discipline, he observes:

> "Ten years ago, environmental law was on the curriculum of perhaps only one or two South African universities. Today, not only do most universities have an LLB course in environmental law but it is now seen as increasingly important in practice, as evidenced in part by the recent establishment of a national Environmental Law Association" (v).

These introductory remarks underline the importance of environmental issues globally, but especially in South Africa. Environmental law has come of age; the new constitutional dispensation now protects an environmental right and places South Africa in the front line of international environmental cooperation and management. The need for and importance of a publication like this which focuses primarily on environmental law in the South African and international context, should not be underestimated and will prove to be an invaluable guide to students, practitioners, academics and policy makers.

The book is divided into ten chapters. The first five deal with general and basic environmental-law issues, while the second half covers specific *capita selecta*. A comprehensive bibliography, which also contains a table of statutes and cases, would be handy for research purposes, particularly in view of the paucity of environmental-law sources. The alphabetical index at the back is brief but to the point, and adds to the overall thorough yet succinct style of the publication.

Chapter 1 covers basic principles and general concepts which include the meaning of the term "environment" and the history, scope and *rationale* of environmental law. Chapters 2 and 3 deal with the administration and implementation of environmental law

and the prominence of the environment in the new constitutional dispensation. Of particular interest here is the discussion of the environmental right and other rights relevant to the environment as well as the division of environmental issues among the different spheres of government. In chapter 4 the author discusses the Environment Conservation Act which, although in need of revision to align it within the constitutional framework, is still regarded as the main piece of environmental legislation as regards policy and conservation of the environment in general. In this context, a discussion of the main divisions and principles of the Act is justified. International environmental law is dealt with in chapter 5 and covers aspects such as the sources of international law, the historical context, status, general principles and enforcement of international environmental law. This chapter will become increasingly important in years to come, particularly with regard to the compulsory consideration of international law by the courts in the interpretation and application of the environmental right and other related rights in chapter 2 of the Constitution.

The *capita selecta* in the second half of the book include: water law and the environment, conservation of resources, land use and planning law and the integration of environmental management. Key issues in the relevant legislation are analysed and criticised, policy issues discussed, and particular reference made to application in the South African and wider international environmental sphere. Throughout the last few chapters the reader is made aware of the fragmented nature of existing environmental legislation and the enormous task ahead of government and policy-makers to bring this network of legislation in line with the constitutional framework, its fundamental rights and underlying values and purpose. The author encapsulates most of these problems and shortcomings in the last chapter, where he discusses the need for integrated environmental management in South Africa. He highlights the problems and risks of administrative fragmentation, which has culminated in the distribution of responsibility for administering environmental law amongst a large number of government organs; he emphasises that administrative and legislative fragmentation has resulted in the absence of a holistic vision of the environment. It is hoped that the project on integrated pollution control and waste management will lead to a more holistic approach to pollution control in South Africa and that it will also promote a more holistic vision in environmental legislation generally. The cautionary concluding remark by the author illustrates the strong, yet precarious, state of environmental law during the transitional phase and in the years to come:

> "[E]nvironmental law in South Africa is currently at a stage where it could either grow in strength or play second fiddle to objectives which are seen as more important in the short term, like unsustainable economic development and land use. Recent developments in policy and legislation, however, coupled with the steadily growing environmental awareness of South Africa's people, suggest that environmental law will develop into a system which will be well equipped to meet the continuing demands of sustainable development" (171).

The book is written as a guide and therefore introduces the reader to basic concepts and principles of environmental law. It provides a sound foundation for environmental law in South Africa and is therefore strongly recommended as a prescribed book for the LLB course. The technical layout and attractive physical appearance make it easy to read – the few printing and spelling errors do not detract from its overall pleasing content and style.

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PERSOONLIKHEIDSREG

deur J NEETHLING

4e uitgawe; Butterworths Durban 1998; xi en 390 bl

Prys R259,75 (sagteband)

Hierdie is die vierde uitgawe van *Persoonlikheidsreg* en is hoofsaaklik gerig op nuwe literatuur en gesag (vonnisse tot en met Oktober 1997 is bygewerk). Dit bevat verder ook die veranderings wat in *Neethling's Law of personality* (1996) deur Neethling, Potgieter en Visser (sien bespreking hieronder) aangebring is.

In 'n baie belangrike opsig verskil *Persoonlikheidsreg* egter van *Neethling's Law of personality*. Die wysigings wat die handves van fundamentele regte, vervat in hoofstuk 2 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996, teweeggebring het op die terrein van persoonlikheidsregte, is in *Persoonlikheidsreg* bygewerk (92–97). Die invloed wat die horisontale werking van die 1996-Grondwet op die privaatregtelike verhouding tussen persone onderling kan en gaan hê, word byvoorbeeld kortliks bespreek. Verder word na regspraak verwys wat sedert die verskyning van *Neethling's Law of personality* gelewer is (bv tov die invloed wat die reg op vryheid van spraak op die grondwetlike beskerming van die goeie naam het). Daar word ook verwys na die moontlikheid dat ons reg 'n sogenaamde konstitusionele delik kan erken, en die invloed wat fundamentele regte op die toepassing van die *boni mores*-maatstaf as onregmatigheidskriterium kan hê, word bespreek (67–70). Waarskynlik sal die grondwetlike verbod op onbillike diskriminasie – uitdruklik ook op horisontale vlak van toepassing gemaak – 'n beduidende rol in hierdie verband speel.

Dieselfde algemene opmerkings wat hieronder gemaak is ten opsigte van *Neethling's Law of personality* geld hier. Die boek word aanbeveel vir sowel die student as die regspraktisyn. Dit slaag myns insiens op uitmuntende wyse om die positiewe reg ten opsigte van die persoonlikheidsreg so volledig moontlik weer te gee.

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NEETHLING'S LAW OF PERSONALITY

by J NEETHLING, JM POTGIETER and PJ VISSER

Butterworths Durban 1996; xi and 348

Price R165,30 (soft cover)

This book is a translated, updated, revised and explained version of Neethling's *Persoonlikheidsreg* (3rd ed 1991). It sets out the doctrine and basis of the law of personality, and describes the protection afforded by South African law to the various rights of personality – such as the right to life, the right to good name and the right to privacy. The focus is on the private law protection, as rights of personality are recognised as an independent group of private law "subjective" rights. Nevertheless, reference is also made to criminal law and constitutional law protection of rights of personality in South Africa.

The development of a system of rights of personality is critically researched, starting with the protection Roman law afforded personality rights in the form of the *actio iniuriarum*. Following this, the casuistry of Roman Dutch law (which highlighted the need for a truly scientific system) is discussed, after which South African judgments and literature up to October 1995 are examined. The new constitutional dispensation and its meaning for personality rights – many of which are now also recognised as human rights – are dealt with cursorily (see especially 19 and 82–84). As this book was written before the final Constitution came into existence, this part is already dated. Many court decisions have in the meantime brought clarity on issues which were still unresolved at the end of 1995.

The research is thorough and one seldom seeks in vain for information on an aspect of personality rights. It is without doubt a most useful and accessible book for students and practitioners. In the light of the fact that law students are no longer obliged to take a course in Latin, the authors should perhaps consider translations of Latin phrases in future editions. This will undoubtedly further enhance the accessibility of the book.

The translation is good. However, the word "protection" in the following sentence should surely be "infringement": "The enticing away of a *comes* and the following of someone in a street clearly constitute examples of the protection of a person's *good name*" (45).

The technical production is excellent. The book contains a bibliography, a table of cases, a table of statutes and a useful index.

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CHILDREN AND THE LEGAL SYSTEM

by G BRADFIELD, A COCKRELL, D HUTCHINSON, R JOOSTE, R KEIGHTLEY, S LEEMAN, T MALUWA, D VAN ZYL SMIT and D VISSER (eds)

Acta Juridica 1996

Juta & Co Ltd, Kenwyn, Cape Town 1996

Children are increasingly being seen as an important interest group. Children's issues are no longer confined to private or public law, and the child is seen as having rights of his/her own in all spheres of law. A very important factor in this regard is that the Bill of Rights in the Constitution of the Republic of South Africa 1996 provides specifically for children's rights (s 28). In the light of the broad title, this volume examines a range of topics such as children's rights, the best interests of the child criterion and child abuse.

Sloth-Nielsen "Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa" reviews the constitutionalisation of children's rights over the last year, advancing reasons for the high profile that the implementation of children's rights has enjoyed, and making suggestions for the future implementation of children's rights in South Africa.

In "Against children's rights" King discusses the recent social phenomenon of the formulation of children's rights, demanding certain rights to which all children are entitled, generating an expectation that the legal system will be able to deliver on this utopian deal.

Matthias and Zaal ("Can we build up a better children's court? Some recommendations for improving the processing of child removal cases") deal primarily with the processes in the children's court where decisions have to be made about the removal of children from their present environments to institutions or other substitute-familial care. They point out that the correct handling of these cases requires great skill and that most children's courts work under some severe constraints in the adjudication of such cases. Not only must suitable training and status be provided for staff of the children's court, but the court must be given extended powers to work in an ongoing manner to monitor removed children through regular reappearances after the initial placement decision.

Burman and McLennan ("Providing for children? The Family Advocate and the legal profession") discuss the operation and function of the Family Advocate in Cape Town, pointing out problems experienced in practice and challenges for the future.

In her paper "Children's right to support – a public responsibility?" Clark compares the family to the state in the provision of maintenance for children. She considers different methods of assessment of maintenance, namely the discretionary powers of the court to make a maintenance award based on the relative means and earning capacities of the parties, the "percentage" method and the "formula" method. She discusses problems arising from the enforcement of the maintenance obligation, and concludes that the implementation of a scheme of child support along the lines of that recommended by the Finer Committee with the incorporation of a central Child Support Agency, supplemented by social security, should be adopted if sufficient funds are available.

Palmer ("The best interest criterion: An overview of its application in custody decisions relating to divorce in the period 1985–1995") is of the view that there are no statutory guidelines to assist the courts in determining what the best interest of a child is. It is left to the individual court to decide which factors are important, leading to subjective assessments of the best interests criterion. The legislature should provide a statutory checklist of factors to determine the best interests of the child.

Mosikatsana ("Gay/lesbian adoptions and the best interest standard: a critical analytical perspective") raises the concern that there is a presumption that a parent is unfit because of his/her sexual orientation and examines the consequences of bias against gay and lesbian prospective adoptive parents for the welfare of the child. He discusses the South African law on adoption, the ideological underpinnings of the best interest standard with gay and lesbian adoptions, adoptive matching of gay and lesbian children, and the protection of the child's rights under human rights legislation in the context of gay and lesbian adoptions. He concludes that a desirable policy would be to place self-identified gay or lesbian adolescents and HIV infected children with homosexual parents.

In his contribution, "Health care decision-making and the competent minor: the limits of self-determination" Ngwena explores the extent to which South African law accommodates and should accommodate the ideal of a self-determining minor in decisions about treatment. Section 39(4) of the Child Care Act provides that minors over 14 years are competent to consent to treatment, but may consent to surgery only if they are 18 years of age. He proposes that the 18-year age limit referred to should be revised downwards to a level of parity with that of medical treatment (14 years).

Schwikkard ("The abused child: a few rules of evidence considered") points out that the Constitution of the Republic of South Africa entrenched not only an accused's right to a fair trial, but also children's rights and that there is a potential conflict between these two rights. He investigates the testimonial competence of children, the cautionary rules, the adversarial trial, videotaped statements and concludes that in the context of child abuse and the child witness, reform is necessary to do away with the "competence" test, cautionary rules, the right to confront and the right to cross-examine. Alternative methods of receiving and testing children's evidence must be found.

In "The statutory obligation to report child abuse and neglect" Van Dokkum constructively discusses the current mandatory reporting legislation of child abuse and neglect in South Africa and the structures necessary for following up reports. He refers to the

problem of definition, detection and prosecution, and proposes a statutory amendment effectively to compel the reporting of child abuse and neglect, but makes it clear that the report is aimed at the detection of children in need of care rather than the apprehension and conviction of the perpetrators.

Skelton ("Developing a juvenile justice system for South Africa: international instruments and restorative justice") examines the relevant international instruments of juvenile justice systems, emphasising those aspects which are useful for developing a new system in South Africa. Restorative justice (reconciliation rather than punishment) is discussed, and the conclusion is drawn that the development of a restorative justice system in South Africa could set us on the road to an effective and fair new system of juvenile justice.

Benatar ("The child, the rod and the law") refers to the South African Constitutional Court's recent ruling that judicial corporal punishment (not in schools or at home) is unconstitutional. Although he does not agree with corporal punishment, he considers whether it is *necessarily* cruel, unjust or unacceptably degrading.

This 1996 edition of the *Acta Juridica* should be widely welcomed: as stated earlier, children are increasingly regarded as an important interest group and are seen as having rights of their own in all spheres of law.

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LABOUR DISPUTE RESOLUTION

by JOHN BRAND, CASPER LÖTTER, CARL MISCHKE and FELICITY STEADMAN

Juta & Co Ltd, Kenwyn 1997; xxiii and 302 pp

Price R129,00 (soft cover)

During the operation of the Labour Relations Act 28 of 1956 (the old Act), industrial relations were often marred by unlawful industrial action which frequently went hand-in-hand with serious misconduct such as assault, intimidation or damage to property. Often, unlawful industrial action was resorted to because workers saw the dispute resolution procedures and bodies provided for by the old Act as time-consuming and ineffective. The Labour Relations Act 66 of 1995 (the Act) makes provision for simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration and through independent alternative dispute resolution services accredited for that purpose.

The purposes of *Labour dispute resolution* are threefold. First of all, it aims to guide employees, employers, trade unions and employers' organisations who are parties to labour disputes through the various dispute resolution processes regulated in the Act. Secondly, it explains the nature of the different processes and thirdly, it instructs how to prepare for and participate in these processes.

The authors have achieved all three these purposes. The different types of dispute regulated by the Act are set out in tables in chapter 3. These tables enable the reader to determine at a glance the nature of a dispute and the procedure to be followed for its resolution. In chapter 17, the various disputes and procedures for their resolution are revisited. The emphasis, however, is on the substantive issues involved in the different types of dispute. Chapters 3 and 17 are inextricably linked and should be read in conjunction for a

more comprehensive understanding of the nature of a particular dispute and the procedure which must be followed for its resolution.

The nature of the different dispute resolution processes is discussed in chapter 4. A distinction is made between primary dispute resolution processes and other processes. Five categories of primary dispute resolution process are identified, namely private and statutory conciliation, private and statutory arbitration and labour court adjudication. These categories and their differences and similarities are set out in a table, which is extremely useful as it enables the reader to distinguish between the various processes and to compare them.

The different dispute resolution bodies regulated by the Act are discussed in chapter 5. These include the Commission for Conciliation, Mediation and Arbitration (the CCMA), bargaining and statutory councils, the Labour Court and the Labour Appeal Court as well as private dispute resolution agencies such as the Independent Mediation Service of South Africa (IMSSA). The composition of these bodies, as well as their functions, is set out in point form. This will undoubtedly facilitate readers' understanding of these bodies and their operation. However, the chapter's usefulness would have been enhanced if the persons who may appear before these bodies had also been listed and a brief explanation of concepts such as legal practitioner, office bearer or official of a trade union or employers' organisation, and juristic person, given.

Preparation for and participation in the different processes regulated by the Act are dealt with in parts 3 and 4 of the book. Part 3 (chapters 6 and 7) deals with the consensus-seeking processes of conciliation and facilitation, whereas part 4 (chapters 9 to 16) deals with arbitration. The topics are discussed in an extremely user-friendly manner. Extensive use is made of lists, tables, checklists and diagrams. Where necessary, excerpts from relevant portions of the Act are reproduced in the text.

The authors have succeeded in instructing the reader how to prepare and participate in conciliation, facilitation and arbitration. Nevertheless, a number of comments are warranted. On page 178, it is stated that the employer bears the onus in disputes regarding dismissal. This statement is not, strictly speaking, correct. In terms of section 192 of the Act, the onus is on the employee to establish the existence of a dismissal and, if this has been done, the employer must prove that the dismissal is fair. Furthermore, sections of part 4 dealing with voluntary arbitration (see chapter 12) and participation in the arbitration process (see chapters 13 and 14) have been taken verbatim from Casper Lötter and Kenny Mosíme's book entitled *Arbitration at work: practice and procedure in individual dismissal disputes* (1993). A fresh approach to these topics and their presentation would have benefited those readers who are already in possession of Lötter and Mosíme's book. Further, as the Act allows a party to a dispute to appear in person before the Labour Court and the Labour Appeal Court or to be represented by a legal representative or a co-employee, an office-bearer or official of a trade union or employers' organisation (see ss 161 and 178), a chapter on preparation for and participation in hearings before these courts would have been invaluable.

Despite these shortcomings, the authors have undoubtedly achieved their aims. They have written a book which is extremely readable and user-friendly. It will assist parties involved in labour disputes to select the correct dispute resolution procedure and to prepare properly for and participate effectively in those processes. Nor will the book's usefulness be limited to people who have little or no knowledge of dispute resolution. Conciliators and arbitrators as well as legal practitioners will find sections of the book useful.

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Old wine in new bottles or The story of translations of the "old authorities" produced by South Africans

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OPSOMMING

Die verhaal van die vertaling van die "ou bronne" deur Suid-Afrikaners

Teenswoordig is Suid-Afrikaners die bewese leiers op die gebied van die beskikbaarstelling van die Romeins-Hollandse regsdenke aan 'n wêreld waar slegs weiniges nog die Nederlands of Latyn van die 17e en 18e eeue kan lees. In hierdie bydrae word die historiese omstandighede bespreek wat ná 1815 bepalend was ten opsigte van watter tekste vertaal moes word asook hoe hierdie vertalings moes geskied. Sedert die eerste Britse besetting (1795) is die Romeins-Hollandse reg amptelik behou, maar vir die nuwe aankomelinge was Nederlands 'n geslote boek en Latyn was natuurlik ook nie die *lingua franca* van die Engelse reg nie. Dientengevolge was daar 'n besondere behoefte om so gou moontlik die belangrikste Nederlandse tekste soos Van Leeuwen se *Rooms-Hollandsch recht* en De Groot se *Inleiding* te vertaal. Later sou die Latynse tekste wat as die relevantste ten opsigte van die praktyk beskou is, asook die hofbeslissings wat die meeste aangehaal word, in Engels vertaal word.

Oor die algemeen is die vertalingswerk vanaf die middel van die vorige eeu tot 1945 deur toegewyde praktisyns gedoen, maar sedert die tweede helfte van hierdie eeu was daar 'n merkbare verandering. Ten eerste is die werk al hoe meer deur akademici onderneem en tweedens is ook werke wat nie primêr vir die praktyk van belang was nie (soos ongepubliseerde manuskripte), vertaal. Terselfdertyd het dit praktyk geword om sodanige vertalings van wetenskaplik-verantwoorde biografiese en bibliografiese kommentaar te voorsien.

Hierdie klemverskuiwing dui daarop dat die moderne Suid-Afrikaanse vertalings op 'n wyer internasionale gehoor gemik is.

INTRODUCTION

During the last decades there has been a marked upsurge in the translation of Roman and Roman-Dutch legal sources from the original Latin or Dutch into English. This has been prompted by the stark realisation that ever fewer of the modern generation of lawyers, academics and students are capable of reading and understanding these texts in the original languages and unless they are translated into a language with which the present and future generations are comfortable, much of the legal wisdom of the past will be lost.

In Europe and America the main focus of attention has been on the Roman law source material. Pharr's translation of *The Theodosian code*,[1] Watson's

1 *Codex Theodosianus the Theodosian codes and novels and the Sirmondian constitutions*, tr Pharr (1952).

Pennsylvania *Digest*,[2] the Birks and McLeod translation of Gaius' *Institutes*[3] and Gordon and Robinson's version of Justinian's *Institutes*[4] immediately spring to mind. Then there are pioneering translations of the *Leges Barbarorum*[5] by Katherine Drew – not Roman law source material, but source material for much of Europe, including the Netherlands.[6] On the other hand, in South Africa the emphasis has been on the legal treatises of the Netherlands in the 17th and 18th century and here South Africa occupies a unique position. For the last century and a half, translations of Roman-Dutch authorities have been necessary as a support system for our legal life and consequently where translations were not otherwise available (and few were), it was necessary for us to produce them for ourselves. Today we are the established leaders in making the treasures of Roman-Dutch legal thinking available to a wider world.

In the present article I shall first sketch in brief the historical background that dictated which texts were to be translated and the manner of their translating. Then I shall present a reasonably up-to-date and comprehensive survey of the English (and Afrikaans) translations of 17th and 18th century works which have been produced here. Unfortunately, many of these are currently out of print, even those published in recent years, but most are to be found in South African law libraries. All those mentioned in this paper are present in the Van Zyl Collection of antiquarian legal material at the University of Cape Town, except where noted to the contrary. Finally, I shall finish with a few concluding remarks.

I THE WHYS AND WHEREFORES

South Africa's role in the translating of the "old authorities" is largely a product of two major events in our history. First of all, after the Napoleonic Wars the former Dutch colonies of the Cape of Good Hope, Ceylon and Guiana, were acquired by Britain by the Treaty of Vienna (1815). With them she acquired the legal system inherited from their Dutch past. Secondly, after the Anglo-Boer War, the Orange Free State and the Transvaal, where the Roman-Dutch system brought from the Cape was still largely in position, were added to the British Colonies of the Cape and Natal by the Treaty of Vereeniging (1902). In 1910 the former colonies united to become the Union of South Africa.

From the start of the British occupation, Roman-Dutch law was officially left in place, since by the Articles of Capitulation of 1806 existing rights and privileges were maintained. Later, by the Charter of Justice of 1827 and that of 1832, the courts were directed to exercise jurisdiction "according to the laws now in force within our . . . colony". However, although there is no doubt that the policy – both overt and covert – was to anglicise as much as possible and as soon as was feasible, it was necessary and practical for English speakers involved with

2 *The digest of Justinian* ed Mommsen and Krueger tr into English ed Watson (1985).

3 *Justinian's institutes* trs Burks, McLeod (1987).

4 *Gaius' institutes* trs Gordon, Robinson (1988).

5 *The laws of the Salian Franks* tr Drew (1991), *The Burgundian code* tr Drew (1949) (1976 reprint). *The Lombard laws* tr Drew (1973).

6 Although this article concerns itself only with translations into English and no attempt has been made to cover the wide range of translations into Dutch – useful as they undoubtedly are to South Africans, an exception must be made of the sterling work on primary sources currently emanating from the Netherlands, under the leadership of Professor JE Spruit of Utrecht.

the law to come to grips with Roman-Dutch sources and treatises. Unfortunately, Dutch was a closed book to the new officials and Latin was not the *lingua franca* of English law. Initially, there was a pressing need to translate the basic works written in Dutch, such as Van Leeuwen's *Rooms-Hollands recht*[7] and Grotius' *Inleiding*,[8] but with the passage of time the Latin works most relevant to the courts and most frequently cited in judgments were tackled.

In general, from the middle of the last century to the end of the Second World War, most of the translations which appeared were the work of dedicated practitioners labouring for the express benefit of their fellows. After the war, the concern to come to terms with the old authorities was intensified. AA Roberts[9] was one who had long been crusading on behalf of "making the sources of that legal system of which in the past we have been so justly proud accessible to all and sundry". In the Introduction to his *A guide to Voet* Roberts diagnoses the reasons why advocates, magistrates and attorneys fail to use the Roman-Dutch authorities. The texts are difficult to come by, few can read Voet, Matthaeus or the *Hollandsche consultatien* with any degree of ease, and "up-to-date authoritative and excellently indexed English law books are easily obtained and on every branch of Law".[10] To promote his cause, Roberts not only wrote extensively in local legal journals but in 1942 produced the fruits of twelve years of laborious collecting of bibliographical information relating to the Roman-Dutch holdings of the major law libraries in the country and to the dusty tomes in private collections. For our purpose it is important to note that in *A South African legal bibliography*[11] Roberts also lists existing translations and calls for more. The enterprise was given official support in 1951 when the Minister of Justice announced that an annual sum of £2000 would be made available for compiling a register and index of the authoritative Roman-Dutch law sources and for translating the most important works from Latin into Afrikaans or English. In 1973 the task of making Roman-Dutch law accessible to the public was taken over by the South African Law Commission.[12]

During the last 40 years, there have been several major changes and developments in the story of these translations. First of all, this work has increasingly been undertaken by academics rather than by practising members of the profession, probably because pressure of work and a lack of the necessary skills make it an impossible task for the practising jurist. This has produced a shift in emphasis, as members of our law schools are not only translating the standard works required by the profession but are branching out into the *terra incognita* of hitherto unpublished handwritten manuscripts.[13] This development in South Africa was prompted by an increasing interest in archival material in the Netherlands where, before and after the war, archives, especially university and provincial archives, were being winnowed for manuscript treasures. At that stage the Dutch were primarily interested in getting the manuscripts into print, the

7 Van Leeuwen *Het Rooms-Hollands-recht* (1664).

8 Grotius *Inleiding tot de Hollandsche rechtsgeleertheyd* (1631).

9 AA Roberts (1890–1964) was a barrister of the Middle Temple, advocate of the Supreme Court of SA and law advisor to the Union Government.

10 See Roberts *A guide to Voet* (1933) Introduction *passim*.

11 Roberts *A South African legal bibliography* (1942).

12 See The South African Law Commission *Beskikbaarstelling van die gemeenregtelike kenbronne* projek 8 werkstuk I (1983).

13 A typical example is Van der Keessel's *Lectures on the criminal law*, on which see more below.

South Africans in making a translation available, but in recent years Dutch academics have come to see the need for translation into a modern language, not necessarily Dutch. In not a few instances, the end product has been the result of collaboration between Dutch and South African academics.[14]

Further, the swing away from translating purely for and by the profession, has led to a greater degree of academic research into the legal-historical significance of the writer and his work. Recent translations are accompanied by serious studies of biographical and bibliographical import, rather than listings of South African cases citing the authority. In short, these translations, although produced in South Africa, are intended for a wider and international audience.[15]

Lastly, modern technical advances in reproducing manuscripts and printed works have made available a range of hitherto inaccessible texts. It is now possible for a South African academic working on a valuable manuscript held in a Dutch archive to have at his disposal photocopies of the master-text as well as other relevant material. Previously those who toiled to translate were usually limited by the edition of the work which they themselves possessed. A by-product of this technical advance is that of late – in synoptic editions – it has been practical policy to reproduce the specific document translated and not to wrestle with the problems of type-setting 17th century Latin.

II SIMON VAN LEEUWEN – *HET ROOMS-HOLLANDS-RECHT* AND *CENSURA FORENSIS*

Of the texts available to the servants of the Dutch East Indian Company, among the most useful was Simon van Leeuwen's *Het Rooms-Hollands-recht* (1664), in which the author briefly expounds the Roman law and reconciles it – where relevant – with the law of his own day as practised in both the province of Holland and its neighbours. Moreover, Van Leeuwen was highly regarded in the Afrikaner Republics, and Annexure I to the *Grondwet of the South African Republic* (19 September 1859) states:

> "(1) The law book of Van der Linden remains . . . the law book in this state;
>
> (2) If in the aforesaid book a question is not sufficiently clear or is not treated fully the law book of Simon van Leeuwen and the *Inleiding* of Hugo de Groot will be binding."[16]

The "law book of Simon van Leeuwen" is *Het Rooms-Hollands-recht* and provided no linguistic problems for the Dutch-speaking settlers and their Volksraad. There was, however, a problem for those in South Africa whose only tongue was English. After 1820, an English translation of the 1744 edition – *Commentaries on the Roman-Dutch law* – was available. The moving spirit

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14 Early examples were collaboration between the South Africans Paul van Warmelo (University of Pretoria) and Ben Beinart (University of Cape Town) and the Dutch EM Meijers, HFWD Fischer, P Gerbenzon, R Feenstra, J Th de Smidt, HW van Soest.

15 Unimaginative and unenterprising marketing is one of the reasons why much of the quality work produced in South Africa has hitherto failed to reach the international scene. The Law Commission is not entitled to advertise or sell and the above is particularly true of the Government Printer.

16 *Het Wetboek van Van der Linden blijft . . . het Wetboek in dezen Staat. 2. Wanneer in genoemd boek over eenige zaak niet genoegzaam duidelijk of in het geheel niet wordt gehandeld, zal het Wetboek van Simon van Leeuwen en de Inleiding van Hugo de Groot verbindend zijn.*

behind this translation was Sir Alexander Johnston, the then Chief Justice of Ceylon, which, like the Cape of Good Hope, was a former Dutch possession. Johnston had enrolled the aid

> "of such translators as he could procure on the island ... so that the work may form a useful manual to professional Gentlemen on Ceylon, the Cape of Good Hope and the other Dutch Colonies now under the English Government".[17]

The same desire to aid the profession is apparent in Sir John Gilbert Kotzé's[18] preface to his translation of 1881–1886. Kotzé likewise dubbed the child of his pen *Commentaries on the Roman-Dutch law*. He, however, worked from the 12th revised edition with notes by CW Decker (Amsterdam, 1780) and included a translation of the notes. Kotzé was familiar with and used the Ceylon translation but alleged that it "in many places entirely missed the meaning of the original text".[19] Kotzé also speculated that the translators procured on the island were not lawyers and a glance at the somewhat basic misconceptions certainly confirms this view.[20] Moreover, the English is somewhat stilted, even for its day. However, Kotzé's own first edition is not entirely flawless, especially with regard to typesetting errors involving names, such as Nood for Noodt (151 ng) and Paulius Voet for Paulus Voet (87 nb). The second edition which appeared in 1921–1923 is a considerable improvement – but, errors apart, its value in South Africa cannot be overestimated.

Van Leeuwen's major work in Latin, *Censura forensis*, was first published in 1662, but the 1741 edition revised and annotated by G de Haas is generally considered to be the best. It is this edition which was translated piecemeal at the end of the last century. Part I, book 1 was translated by WP Schreiner[21] in 1883; part I, books 2 and 3 by AJ Foord in 1884 and 1885; part I, book 4 was translated by SH Barker[22] and WA MacFadyen[23] in 1896. It was almost a century later, in 1991, that part I, book 5 was translated by the present writer and published as Number 15 of the South African Law Commission's Research series. Citations are rendered in the modern form and full bibliographical information is provided, but only of writers mentioned in this section. Part II, which treats of procedure, remains to be translated.

It was originally part of the Law Commission's plan to check all the early translations, controlling and modernising the citations, and publishing a thoroughly

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17 See (anon) *Commentaries on the Roman-Dutch law* (1820). Preface.

18 Sir John Gilbert Kotzé (1849–1940) was born in Cape Town and was a barrister of the Inner Temple, advocate of the Supreme Court of the Cape of Good Hope and Chief Justice of the Transvaal from 1881–1898. His appointment to the Transvaal High Court was terminated by President Kruger as a result of a serious difference of opinion about the court's right to test Acts of the Volksraad. Thereafter he served variously in the Cape and Rhodesia. He was appointed to the Appellate Division in 1922 and retired in 1927.

19 See Kotzé *Simon van Leeuwen's commentaries on the Roman-Dutch law* (1881) translator's preface ix.

20 See eg *Commentaries on the Roman-Dutch law* book II, ch 3, §10.

21 WP Schreiner (1857–1919) was born near the Basutoland border of the Cape colony. After a brilliant career at Cambridge, he became leader of the Cape Bar, Prime Minister of the Cape Colony (1898–1900), and High Commissioner for South Africa in London (1914–1919).

22 SH Barker was a barrister of the Inner Temple, advocate of the Supreme Court of the Cape Colony, and advocate of the High Court of the SA Republic.

23 WA MacFadyen was an LLB graduate of the University of the Cape, an advocate of the Supreme Court of the Cape Colony and advocate of the High Court of the SA Republic.

revised version, as these volumes are almost impossible to locate. In the 1983 statement from the Law Commission on rendering the common law sources available, Censura forensis occupied the number one position. The best that could be achieved, however, was to complete the translation of part I and copies of that work are still available either from the Law Commission or from the Government Printer, Pretoria.

III GROTIUS – *INLEIDING* AND SOME OPINIONS

Grotius's *Inleiding tot de Hollandsche rechtsgeleertheyd* (1631) holds a unique position in law schools and in legal practice. From its first appearance, one of its strengths was the fact that it was written in the vulgar tongue and although various proposals were apparently made to render it into Latin, nothing came of this at the time.[24] In the Netherlands, the *Inleiding* was the object of annotations, lectures[25] and commentaries. In the Dutch colonies it was well thumbed, but with the advent of the British administration both at the Cape and elsewhere, the new authorities were handicapped by their lack of Dutch until, in 1845, an English translation by an advocate practising in British Guiana, one Charles Herbert, appeared under the title *Introduction to Dutch jurisprudence*. The *Inleiding* was, however, considered so important for South African legal life that it was again translated in 1878, this time by AFS Maasdorp.[26] Maasdorp was Solicitor-General in the Eastern Cape at the time and his similarly named *Introduction to Dutch jurisprudence* included translations of a selection of Schorer's notes and the annotations by Simon van Groenewegen. Another English translation often found in South Africa is that by RW Lee,[27] this translation being more accurately named *The jurisprudence of Holland* (1926). For his translation Lee used the text of the second edition and added brief notes. A companion volume appeared with commentary and extracts from Van der Keessel's *Dictata* in 1936. In 1953 volume I and in 1977 both volumes were reprinted.

Another South African to labour on Grotius was DP de Bruyn. As Grotius's major works were already available in English, De Bruyn turned his attention to Grotius's opinions, scattered here and there throughout the six volumes of *Hollandsche consultatien*, printed in black-letter type and expressed in the Dutch of the 17th century. As reference to them is at best "vexatious and annoying or at least distasteful",[28] De Bruyn assembled, arranged, annotated and translated into English and so resurrected 89 of the 92 opinions buried in the *Consultatien*. His translation, *The opinions of Grotius as contained in the Hollandsche consultatien en advijsen*, was printed in London in 1894.

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24 In 1962, HFWD Fischer published a Latin translation under the title *Institutiones juris Hollandicae*, written by J van der Linden shortly before his death in 1835 but never published. This work is not in the Van Zyl Collection.

25 For South African translations of lectures on the *Inleiding*, see below *passim*.

26 Sir Andries Ferdinand Stockenstroom Maasdorp (1847–1931), was born in Malmesbury (Cape), was a barrister of the Inner Temple, Solicitor-General at Grahamstown, member of the Transvaal Bar, 1897–1898, and Chief Justice of the Orange Free State, 1902–1919.

27 RW Lee (1868–1958) was born in Wales, educated at Oxford and served in the Ceylon Civil Service. From 1894 he devoted most of his time to lecturing in Jurisprudence, Roman law and Roman-Dutch law, chiefly in England. From 1921 he was Rhodes Professor of Roman-Dutch law at Oxford. He also wrote *An introduction to Roman-Dutch law in South Africa* (1915) and *Elements of Roman law with a translation of the Institutes of Justinian*.

28 See De Bruyn *The opinions of Grotius* (1894) vii (Introduction). De Bruyn was an advocate of the Supreme Court of the Cape of Good Hope and of the High Court of the SA Republic.

IV VAN DER LINDEN – *KOOPMANS HANDBOEK* AND JOHAN VAN DEN SANDE

Sir Henry Juta, in the preface[29] to his translation of Johannes van der Linden's *Regtsgeleerd, practicaal en koopmans handboek* (1806) remarks on the earlier translation by one Jabez Henry, which appeared as *Institutes of the law of Holland* in 1828. He explains that it was necessary to retranslate Van der Linden as the earlier translation "was not entirely free from inaccuracies" and furthermore there were copyright problems. Juta did, however, retain the earlier title *The institutes of Holland* for his version which first appeared in 1884.

Roberts[30] refers to a translation of the second book, on the criminal law, by PB Borcherds which was printed at Cape Town, 1822. Roberts does not appear to have found a copy of this, nor is it to be found in the Van Zyl Collection.

Johan van den Sande's *Decisiones aureae* (1635) (half-titled *Decisiones Frisicae*) has not to my knowledge been translated into English *in toto*, but titles 4, 5 and 6 of Book 4 of the 1647 edition have been translated by FN de Vos.[31] However, two other of his minor works are well known in South Africa, namely his *Commentarius de actionum cessione* translated and annotated as *Commentary on cession of actions* (Grahamstown 1906) by PC Anders and *Commentarius de prohibita rerum alienatione* which WS Webber translated under the title *Treatise upon restraints* (Cape Town 1892).

V JOHANNES VOET – *COMMENTARIUS AD PANDECTAS* AND HUBER – *HEEDENDAAGSE RECHTGELEERTHEYT*

The translation of Johannes Voet's[32] monumental *Commentarius ad Pandectas* (1698–1704) from Latin into English is one of two feathers in the cap of Percival Gane.[33] Voet's *Commentaries* have always been widely read and the number of editions printed both in the Netherlands and abroad attest to its popularity. In South Africa and the ex-Dutch colonies, the ability to use the original Voet profitably declined and various attempts were made to provide an English version. An attorney's clerk in Pietermaritzburg, by name Robert Lyon,[34] all but completed a translation. The translation was inadequate and the manuscript never reached the press. However, it was deposited in the library of the Supreme Court, Pietermaritzburg, where it was seen and inspected by AA Roberts, to be mentioned in his *A guide to Voet*. In the *Guide* and in the *Legal bibliography*

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29 See Juta *Institutes of Holland or manual of law, practice and mercantile law* (1904) preface. Henry Hubert Juta (1857–1930) was born in Cape Town, educated at the SA College and London University. He was Attorney-General of the Cape (1894), Speaker of the Cape House of Assembly (1896–1898), Judge President of the CPD in 1914 and was appointed to the Appeal Court (1920–1923).

30 See Roberts *Legal bibliography* 191 note.

31 The Van Zyl Collection does not contain a copy. Roberts describes this book as rare (*Legal bibliography* 273).

32 On Voet and his works, see Feenstra and Waal *Seventeenth-century Leiden law professors* (1975); Roberts *A guide to Voet* (1933); Ahsmann and Feenstra *Bibliographie van hoogleraren in de rechten aan de Leidse universiteit tot 1811* (1984).

33 Percival Gane (1874–1963) was born in England, educated at Oxford and at the Cape. He took silk in 1919 and was a judge of the Supreme Court of South Africa.

34 Robert Lyon (d 1894) came from Edinburgh, was employed as an attorney's clerk in Pietermaritzburg and is presumed by Roberts to have been the librarian to the Legislative Council of Natal.

(1942) Roberts discussed at length various part translations made earlier. He says that of the 4833 sections in the *Pandects*, 3670 were translated into English, Dutch or both; but the Dutch translations were not easy for many South Africans to follow, while some of the English translations were poor. Moreover, even in 1933 the majority were out of print and some were very scarce. Consequently, I shall merely refer the interested reader to the *Guide*,[35] especially as their potential usefulness largely lapsed when, in 1955, Gane produced his *Selective Voet*, so called because he omitted small sections – about 10% in all – on the grounds that they were obsolete or had no practical application in South Africa. The space saved was profitably used to give short notes of all reported cases in South Africa where Voet's work has been judicially considered, with a very brief intimation of how far the view expressed by him was accepted.[36]

To Gane's credit also must be entered *The jurisprudence of my time*,[37] a translation of the fifth edition of Ulrich Huber's *Heedendaegse rechtgeleertheyt*, which was published in 1768 in Amsterdam, with additions by Zacharias Huber. It has been argued that because Huber is writing of the law of his *patria* (Friesland), his work is not relevant to courts applying a Roman-Dutch system. This is, of course, adopting a blinkered approach to the ambit of Roman-Dutch law, a topic I shall not expatiate on here. However, it is worthy of note that the full title is *Heedendaegse rechtsgeleertheyt, so elders, als in Frieslandt gebruikelijk*, translated by Gane as *The jurisprudence of my time as prevailing in Friesland and elsewhere*. Certainly Huber and his son, Zacharias, cite cases from Holland and the other provinces and draw on a wide range of literature. Further, the work was an immediate success in the Netherlands generally, running to five editions in the first 80 years of its existence and the translation by Gane has certainly added lustre to the name of Huber.

VI GROENEWEGEN – *DE LEGIBUS ABROGATIS* AND THE TWINKLES IN THE EYES OF THE LAW COMMISSION

It is perhaps convenient at this point to discuss as a group the texts translated under the aegis of the South African Law Commission. This task was only one of several before the committee established to make the sources of the common law available but the mechanics of organisation do not concern us here. Nor, unfortunately, do the details of the ambitious programme initially envisaged. It is the published results with which we are concerned.

First, let us consider the four-volume parallel text of Groenewegen's *De legibus abrogatis* (1649). An early attempt to translate this significant work was

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35 However, I shall make one exception and refer the interested reader further to the latest of the Van Riebeeck Society Publications (2 26 1996) – *The war memoirs of commandant Ludwig Krause 1899–1900* edited by Jérold Taitz. In the preface (xvii) Taitz tells how his interest in LE Krause and consequently in his war memoirs was prompted, many years ago, by the need for a translation of a title in Voet's *Commentaries*, where the Gane translation appeared unsatisfactory. In the University of Natal Law Library Taitz found the required translation by one LE Krause, an attorney of the Supreme Court, Pietermaritzburg. Krause was responsible for translating books 44 and 45, 39 and 23, 41, 42 and 43 of Voet. Further on this see Roberts *SA Bibliography* 325.

36 See *The selective Voet being the commentary on the Pandects* [Paris edition of 1829] by Johannes Voet and the *Supplement* to that work by Johannes van der Linden (1955). Introduction xi.

37 Gane tr *The Jurisprudence of my time by Ulrich Huber* (1939).

made in 1908 by Victor Sampson.[38] His work, however, only encompassed the *Institutes* and furthermore was based on the first edition of *De legibus abrogatis*, published in Leiden in 1649. Groenewegen died in 1652, but before his death he had greatly extended and improved his manuscript. The third edition of 1669 (Wesel and Amsterdam) which incorporates this new material, was based on a revised manuscript found in the possession of his heirs by Andreas van Hoogenhuysen, a printer in Wesel. It was the South African Law Revision Committee which originally suggested to Professor Ben-Zion Beinart of the University of Cape Town that he undertake the translation *de novo* and using the third (Amsterdam) edition of 1669. Professor Beinart was responsible for the first two volumes on the *Institutes* and the *Digest* and after his death in 1979, I took over and brought the work to completion. (Fortunately, as I had worked with Beinart on the earlier volumes and on Van der Keessel's *Praelectiones ad ius criminale*, this was not an impossibly onerous task, although there were times when my supporters on the Law Commission and I were at screaming pitch with the problems which developed from the printer's inabilities to handle the then novel methods of setting by computer, to say nothing of the difficulties attendant on setting the Latin from a well-foxed and dilapidated edition using unfamiliar letter fonts in an unintelligible language. This experience convinced me that there could only be more efficient means of reproducing the Latin and this I found to my delight was possible by photocopying the original 17th century text. With minor adjustments such as transferring alternate page numbers from the right hand top corner to the left, Rustica Press (Cape) (and later other printers) could reproduce a very fair copy of the original, thus providing the reader with the Latin in the form from which the translation was taken.) However, to return to Groenewegen. *De legibus abrogatis* has always been a basic reference book for our courts; the translation sold rapidly and the full set of four volumes is no longer available. It was with surprise but pleasure that I recently received proposals for a reprint from the original publishers. It is hoped that this proposal will come to fruition.

The works translated at the instigation of the Law Commission fall into two categories: first those that were published by Lex Patria, Johannesburg, and later the Research Services printed by the Government Printer, Pretoria. Owing to constraints of space it is most practical at this point merely to list the works translated and to indicate whether copies are still available at the time of going to press.

(1) Brouwer *De iure connubiorum* 1714 edition (in part) translated into Afrikaans as *Oor die huweliksreg* by Van Warmelo and Bosman (out of print). The manuscript translation of the complete work by Van Wamelo is in the library of the University of Pretoria.

(2) Pothier *Traité du contrat de mandat* translated into English as *Pothier's treatise on the contract of mandate* (1979) by BG Rogers and BX de Wet (available from Lex Patria).

(3) Molinaeus *Tractatus de eo quod interest* translated into Afrikaans as *Verhandeling oor skadevergoeding* and Donellus *Commentarius ad C* 7 47 translated as *Kommentaar op C 7 47* (1973) by HJ Erasmus (out of print).

38 Victor Sampson (1855–1940) was born in Cape Town, admitted as an advocate, 1881; took silk (1895) and in 1898 was elected to the Cape Parliament. From 1904–1908 he was Attorney-General at the Cape.

(4) Voorda (Jacobus) *Tractatus de statutis* translated from manuscript into English as *A treatise on statutes* (1985) by ML Hewett and P van Warmelo[39] (available from Lex Patria).

(5) Scheltinga *Dictata oor Hugo de Groot se "Inleiding tot de Hollandsche Rechtsgeleerdheid"*, edited by W de Vos and GG Visagie[40] (available from Lex Patria).

Of the Research series, the following are relevant for our purposes and obtainable either from the Law Commission or the Government Printer:

No 5 *Observations on decided cases concerning antenuptial contracts written by D Cornelius Neostadius*, translated into English by FJ Bosman and P van Warmelo. (Archivalia prepared by T Th de Smidt and HW van Soest (1986) (available).)

No 6 *Some cases heard in the Hooge Raad reported by Willem Pauw* translated into English by R Feenstra, P van Warmelo and DT Zeffertt (1985) (available).

No 8 *Observationes ad Hugonis Grotii mandictionem [sic] ex collegio clarissimi viri, doctissimi Johannis Voet ex ore excerptae partim, partim et maxime [sic] parte a Clarissimo Viro dictatae*. Vol 1 text. *Aantekeninge van Johannes Voet oor die Inleiding van Hugo de Groot* translation into Afrikaans by P van Warmelo and CJ Visser (1987) (available).[41]

No 9 *Vinnius se vertaling van tractatus de pactis* translated into Afrikaans by LJ du Plessis (1985) (available).[42]

No 10 *Treatise on the quasi-contract called promutuum and on the condictio indebiti* by Robert-Joseph Pothier translated into English by WJ Hosten *et al* (1979) (available).

No 11 *Translation of Cornelis van Bijnkershoek's quaestiones juris privati* (2 vols only) translated into English by R Whitaker (1987) (available).

No 15 *Censura forensis, part I, book V* (1991) by Simon van Leeuwen translated into English with bibliographical and biographical notes by ML Hewett (available).

Although it is not a translation, we should also note here the *Index to the opinions of the Roman-Dutch lawyers and the decisions of the courts of the Netherlands which have been digested in the Algemeen Beredeneerd Register of Nassau La Leek* (7 vols 1985–1987), started by AA Roberts and brought to completion by SIE van Tonder – a truly mammoth task.

In 1963, the Government Printer also printed a partial translation of Hendrik Jan Arntzenius's *Institutiones iuris Belgici de conditione hominum*. Part 1, titles 2 and 13, and parts 2 and 3 were translated into English by FP van den Heever, under the title *Introduction to the civil law of the Netherlands*.

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39 For a review see Feenstra 1988 *Tijdschrift voor Rechtsgeschiedenis* 224–229.

40 *Idem* 112 ff.

41 See Feenstra "Dictata van Johannes Voet en Gerlaeh Seheltingen op de inleidinge van Hugo de Groot" 1988 *Tijdschrift voor Rechtsgeschiedenis* 93 ff.

42 See Feenstra "Het Traetatus de Paetis van Vinnius en de Strijdsehriften tegen Maestertius uit 1640" in 1988 *Tijdschrift voor Rechtsgeschiedenis* 199 ff.

VII VAN DER KEESSEL – *THESES SELECTAE* AND PREVIOUSLY UNPUBLISHED WORKS

Van der Keessel[43] of Leiden, one of the last of the Roman-Dutch authorities, did not publish much of great significance during his lifetime and almost certainly his name would lack its current lustre if it were not for the sterling work done by Paul van Warmelo, and later by Ben Beinart, who were largely responsible for publishing the handwritten manuscripts of Van der Keessel's lectures to students and also for translating them into either English or Afrikaans.

Apart from a number of orations, Van der Keessel's only major publication was *Theses selectae juris Hollandici et Zelandici ad supplendam Hugonis Grotii Introductionem ad jurisprudentiam Hollandicam*, of which the first edition appeared in 1800. This was intended as a companion to studies of Grotius's *Inleiding*, on which Van der Keessel lectured during his years at Leiden. An English translation by Charles Ambrose Lorenz[44] (of Ceylon), *Select theses on the laws of Holland and Zeeland being a commentary of (sic) Hugo Grotius' Introduction to Dutch jurisprudence* appeared in 1854 and Lorenz, in his introduction to the first edition, states that in its turn his translation was intended as a companion to Charles Herbert's translation of the *Inleiding*, (*Introduction to Dutch jurisprudence*), and hopefully would "be found acceptable to the Profession in those British Colonies where the Roman-Dutch Law still obtains". The 1854 edition was published in London; a second edition with a biographical note on Van der Keessel by Professor J de Wal of Leiden was published in 1884 and 1901 in Cape Town.

Interest in Van der Keessel's actual lectures on Grotius's *Inleiding* was prompted by EM Meijers of Leiden, who found a student copy of those lectures. One thing led to another and eventually the task of transcribing and translating the text into Afrikaans was completed, chiefly by the hand of Paul van Warmelo and HC Gonin of the University of Pretoria. The parallel text was published as *Praelectiones iuris hodierni ad Hugonis Grotii Introductionem ad iurisprudentiam Hollandicam*, Cape Town (1961) (2 volumes).

There was more to come. Paul van Warmelo in Pretoria and Ben Beinart in Cape Town developed a working team. The first result of their teamwork was a Latin edition of Van der Keessel's *Praelectiones ad Institutiones Justiniani* (1965–1967). The next task was to tackle the array of manuscripts relating to Van der Keessel's lectures on the criminal law during the period 1772–1809 and to translate those into English. In 1969 the first of six volumes appeared, under the title *Praelectiones ad jus criminale. Lectures on books 47 and 48 of the Digest, setting out the criminal law as applied in Holland . . . and on the new criminal code of 1809*.[45] The other five followed in due course, although Beinart died in 1979, shortly before the completion of volume VI (1981). This is a most significant work, as Van der Keessel was one of the last of the Dutch to write on the criminal law before the era of codification effectively began in 1807.

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43 Dionysius Godefridus van der Keessel (1738–1816) was born in Deventer; he studied in Deventer and Leiden, became *doctor iuris* (Leiden) in 1761; advocate at The Hague, 1761–1762; professor at the University of Groningen, 1762–1770; professor at the University of Leiden, 1770–1815. On his published work see Ahsmann and Feenstra *Bibliographie van hoogleraren in de rechten aan de Leidse universiteit tot 1811* (1984) 132–138.

44 Charles Ambrose Lorenz was a barrister at law of Lincoln's Inn and advocate of the Supreme Court of the island of Ceylon.

45 Van der Keessel *Praelections ad ius criminale* VI vols (1969–1981).

A final small contribution to our knowledge of academic life at Leiden was the publication in 1972 of a series of addresses given by Van der Keessel to his students at the beginning and end of each series of lectures. These were published synoptically in Latin and English in 1972 *Acta Juridica* 1–37.

VIII ANTONIUS MATTHAEUS

The last contribution to the shelves of English translations is Antonius Matthaeus's *De criminibus*, an elegantly produced parallel text in four volumes entitled *On crimes, a commentary on books XLVII and XLVIII of the Digest* (1987–1995), edited and translated by ML Hewett and BC Stoop. This edition includes bibliographical data on the textual citations, full indices and comprehensive notes on Matthaeus's life and works. Not only is this work of unique significance to the criminal lawyer because of its prolegomena, classifying and analysing the factors necessary to constitute a crime, discussing those who can commit a crime and those against whom a crime can be committed, but it also has much to offer in the field of private law, for example in the spheres of theft and damage to property. It concludes with a comprehensive section on procedure.

Further, although *De criminibus* has often been regarded purely as a statement of the Roman law position, it is also an early and significant commentary on 17th century practice.[46] In South Africa, Matthaeus was certainly known and cited under the Dutch-East India Company. The later use of *De criminibus* in the courts from 1800 to the present is undoubted, but statistics are not available and it would be unacademic to make sweeping statements which cannot be substantiated.[47]

IX *QUO VADIMUS* OR WHERE TO NEXT?

In the 1980s the Unit for Legal Historical Research at the University of South Africa, Pretoria, also took on its shoulders the translation of the old authorities. Matthaeus's *De criminibus* was originally undertaken as one of its projects and there are others in the pipeline. Paulus Voet's *De statutis* is being translated by D Kriel assisted by BC Stoop and should appear shortly. A panel has started work on Benvenuto Straccha's *De assecurationibus*.

I personally have completed a translation of Christian Thomasius's *Larva legis Aquiliae* (1703) which is awaiting publication, and am undertaking Jacobus Voorda's *Ad ius hodiernum*, the manuscript of which has already been transcribed by Paul van Warmelo and partly published by the University of Pretoria.[48] This manuscript contains Voorda's lectures given in Utrecht and based on his own book, *Differentiae juris Romani et Belgici* (1744), which contains a brief statement of the Roman law of the *Digest* followed by the law of the various

46 See eg Hewett "The prelate, the praetor and the professor, or the crimen laesae majestatis and the law – Utrecht 1639–1640" (to be published shortly in *Tydschrift voor Rechtsgeschiedenis*).

47 At the time of this article going to print all four volumes are obtainable from Juta's Publishers, Cape Town, or any Juta's bookstore. This observation is prompted because vol II was published by Unisa Press and vol III by UCT Press, a situation forced on me by financial considerations and one which has given various critics and commentators grounds for doubt. However, the final product is a beautiful published set, each of which meets the highest standard, and Juta's, the senior partner in this joint enterprise, is marketing all four.

48 See Feenstra 1994 *Tydschrift voor Rechtsgeschiedenis* 214.

provinces. His lectures expand and comment on the local law, and give extensive citations – not only to Dutch writers.

There are many tempting texts available for anyone who feels the urge to translate, but texts and potential translators are not enough. Time – in other words, leisure – to tackle this work is essential as hundreds of pages of Latin cannot be converted into modern English overnight. Secondly, no-one in his right mind is going to embark on a long-term project of this nature without some assurance that the work will be published – preferably in a form appropriate to its worth. This means that financial backing is a prerequisite and regrettably under prevailing conditions it seems that this must be sought from abroad rather than locally.

X OVERVIEW AND CONCLUSION

From the perspective of 1998 it is apparent that the work done by Beinart and Van Warmelo and their collaborators set the standard and parameters for future translations, especially those involving hitherto unpublished manuscripts. First of all, the transcribing and editing of the Latin text by a comparison of manuscripts, or printed editions, must be performed as meticulously as possible. Consequently, presenting a synoptic version with the Latin on the left hand page and the English on the opposite side is basic to the academic evaluation of such texts. Secondly, the rendering of citations from the original clumsy verbal form into the modern numerical form is time-consuming, but an essential part of the process of understanding the text and of making the citations more readily accessible to modern readers. Thirdly, the choice of English as the target language is no longer merely a matter of enabling English-speaking South Africans to access the texts but, with English replacing Latin as the *lingua franca* of scholarly communication, is critical to broadening the market beyond the bounds of this country. Finally, the inclusion of full bibliographical information is providing a database for those researching other aspects of the legal writings of the past.

Clearly, South African scholars are now producing work which is contributing substantially to international endeavours in the field of legal translating, and specially making the treasures of the Golden Age of Dutch jurisprudence known to a wider audience.

But what are the benefits which could and should devolve on South Africans from this herculean labour of translating the old authorities? If Roman-Dutch law in any form continues to be one of the bastions of our developing mixed jurisdiction, and if, as Albie Sachs so trenchantly wrote of our law derived from Europe,

> "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"[49]

then surely there will still be need for access to the "old authorities". Granted, it is no longer possible for both parties to a dispute to go direct to the Latin, but at least both can still read the translations which endeavour to reflect the exact tenor of the old writers' thoughts in a modern language. It is hoped that this article will serve to draw attention to the existence of a wide range of potentially useful "old authorities".

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49 Sachs *The future of Roman-Dutch law in a non-racial democratic South Africa: some preliminary observations* (1989).

Illegal income and remunerative loss – I: Claims by income-earners in Southern African law*

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OPSOMMING

Onwettige inkomste en beloningsverlies – I: Eise deur inkomsteverdieners in die Suider-Afrikaanse reg

Die beslissing in *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) het drie kategorieë van onwettige belonende aktiwiteite geskep: (i) aktiwiteite (soos roof, diefstal en huurmoord) wat teen die goeie sedes is of wat misdadig is; (ii) aktiwiteite wat kleurloos is (in die sin dat die nie as misdadig of teen die goeie sedes beskryf kan word nie), maar wat nietemin statutêr verbied word en nie regsgeldig is nie omdat dit maatskaplike belange soos openbare veiligheid of die handhawing van publieke gesondheid aantas; en (iii) aktiwiteite wat kleurloos in bogemelde sin is, maar wat neitemin statutêr verbied word as hulle sonder lisensie geskied. In laasgenoemde geval beoog die wetgewer slegs die insameling van lisensiegelde tot voordeel van die fiskus. Indien 'n belonende aktiwiteit binne die eerste of tweede kategorie val, word skadevergoeding vir verlies van inkomste in sake waar die verdiener beseer is nie toegeken nie omdat dit teen die openbare beleid sou wees om die eis toe te staan. Indien die tersaaklike aktiwiteit egter in die derde kategorie val, word skadevergoeding vir verlies van inkomste wel toegeken, aangesien die kontrakte tussen die verdiener en sy kliënte regtens afdwingbaar is. Die verhaalbaarheid van deliktuele skadevergoeding in gevalle van onwettige kontrakte hang derhalwe af van die toepaslikheid al dan nie van die *turpis causa*-reël van die kontraktereg.

Dhlamini en beslissings wat daarop gevolg het, is egter vatbaar vir kritiek, en wel op vier gronde: (i) bogemelde driedelige klassifikasie van onwettige belonende aktiwiteite het verwarring in die reg geskep omdat regters nie altyd besef het dat afsonderlike kategorieë van onwettigheid bestaan waarvan een verskillende gevolge as 'n ander mag hê nie; (ii) die indelingsisteem geskep deur *Dhlamini* kan in die praktyk moeilik wees om toe te pas aangesien dit dikwels onduidelik is of kontrakte binne die tweede of die derde kategorie val; (iii) die afdwingbaarheid van die onderliggende transaksies is nie altyd geskik as 'n toets vir die verhaalbaarheid van skadevergoeding weens beloningsverlies in die deliktereg nie; en (iv) die ontkenning van skadevergoeding in die eerste en tweede kategorieë geskep deur *Dhlamini* rym nie met die oorheersende beginsel dat in deliktuele eise om beloningsverlies, skadevergoeding toegeken moet word vir verlies van verdienvermoë nie.

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1 INTRODUCTION

Is compensation recoverable in respect of remunerative loss when the income that an injured or deceased breadwinner would have made but for his injuries or death would have been earned illegally? This apparently simple question has sowed confusion and inconsistency in the law, principally in consequence of the belief on the part of certain judges that to award damages in cases of illegal earnings is indirectly to bestow the imprimatur of the law upon prohibited conduct. The problem of how to deal with illegal earnings in the law of delict arises in two contexts: that of a claim for remunerative loss by the income-earner himself, and that of a claim for loss of support by dependants whose deceased breadwinner was maintaining them out of the proceeds of illegal income-producing activities.[1] The two situations are governed, to some extent, by different policy considerations and are accordingly dealt with separately in the discussion that follows. In this article the Southern African legal position in regard to claims by breadwinners will be discussed. Claims by dependants in our law will be dealt with in the second article in this series.

2 THE SOUTHERN AFRICAN LEGAL POSITION

2 1 Claims by income-earners

2 1 1 The case law

The leading South African case on the recoverability of illegally earned income by the breadwinner is *Dhlamini v Protea Assurance Co Ltd*.[2] The first appellant, one Mrs Dhlamini, who was the second plaintiff in the court a quo, had been earning a living by hawking fruit. This activity was to her knowledge illegal, for she required a licence, had applied for one on numerous occasions and, notwithstanding the assistance of an attorney at one stage of her endeavours to procure a licence, had been refused one repeatedly.[3] Following her injury in a

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1 It has been held in South Africa that a dependant may not claim damages for loss of support unless the breadwinner has been killed: *De Vaal v Messing* 1938 TPD 34; *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 3 SA 295 (A) 305G–H; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 839E–F. The correctness of this view is, however, open to doubt, and there is authority pointing towards the conclusion that dependants may recover compensation for loss of support even though their breadwinner is still alive. See McKerron *The law of delict* (1971) 157; Davel *Skadevergoeding aan afhanklikes by die dood van 'n broodwinner* (1987) 84 vn 456; Van Zyl "Maintenance" in Clark (gen ed) *Family law service* (1988) para C25; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 336–339 340–341 367–368; *Wille's Principles of South African law* (1991) by Hutchison, Van Heerden, Visser and Van der Merwe 677; Burchell *Principles of delict* (1993) 234–235; Visser and Potgieter *Law of damages* (1993) ("Visser and Potgieter *Damages*") 138 218; Neethling, Potgieter and Visser *Law of delict* (1994) 263 276–277; Neethling, Potgieter and Visser *Deliktereg* (1996) 269 282–283.

2 1974 4 SA 906 (A).

3 At the time, the first appellant required a licence in terms of s 1(1) and (2) of the Licences Act 44 of 1962, read with item 12 (or possibly item 19) of the Second Schedule to the Act. (Item 12 provided for hawkers' licences, item 19 for pedlars' licences. The principal distinction between a hawker and a pedlar was that a hawker travelled about with his

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motor collision, she sued the responsible third-party insurer[4] for compensation for loss of earnings,[5] but was refused compensation in the Witwatersrand Local Division on the basis that a loss of income illegally earned cannot support an award of damages. Philips AJ[6] said:

> "It seems to me that once it has been shown that the second plaintiff knowingly continued to conduct her trade illegally, then she is not entitled to obtain the assistance of the Court by way of damages to compensate her for her inability to continue to conduct that trade. I am therefore obliged, in my view, on principle to hold that the second plaintiff ... cannot be awarded damages for loss of earnings which would have been illegal. I will therefore make no award in respect of the claim for loss of earnings."[7]

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goods "on any vehicle (other than a vehicle propelled by himself) or with a pack animal or carrier" (item 12(5)(*a*)), whereas a pedlar travelled with his goods "either on foot or with a vehicle propelled by himself" (item 19(4)). The trial court decided the matter on the basis that the first appellant required a hawker's licence as provided for in item 12 (916pr–B) and counsel for the first appellant, in argument before the Appellate Division, assumed that that was indeed the case (907E–F). Rumpff CJ did not find it necessary to determine which type of licence the first appellant required, merely citing the definitions of "hawker" and "pedlar" set out in items 12(5) and 19(4) respectively (911F–in fine). It thus appears to have been immaterial for purposes of the damages claim under which category the first appellant fell. (The references to " 'n marskramer" (a hawker) and "marskramers" at 916 in fine – 917E indicate, however, an assumption on the part of the Appellate Division that the first appellant fell under item 12.) Section 9 of the Licences Act provided that "[a]ny person who carries on any trade or occupation without being in possession of a licence as required by this Act shall be guilty of an offence" and liable on conviction to a fine, imprisonment or both.

The grant of business licences is presently regulated by the Businesses Act 81 of 1991. Although many small entrepreneurs no longer need licences in order to carry on business lawfully, hawkers of meals or perishable foodstuffs are required by s 2(3)(b), read with item 3(1) of Schedule 1 to the new Act, to hold licences to ply their trade. The former distinction between hawkers and pedlars was swept away by item 3(1)(a) of Schedule 1 to the Businesses Act, which defines the hawking of meals or perishable foodstuffs as, *inter alia*, the conveyance to those wares "from place to place, whether by vehicle or otherwise". The business activities of vendors of meals or perishable foodstuffs who were previously classified as pedlars in terms of item 19 of the Second Schedule to the Licences Act clearly fall within that definition. For that reason, the allusion in s 6(5)(*a*)(ii) of the Businesses Act, and in s 6A (inserted by s 4 of the Businesses Amendment Act 186 of 1993), to the business of pedlar (in the expression "street vendor, pedlar or hawker") appears to be mere surplusage.

4 The claim was instituted in terms of the Motor Vehicle Insurance Act 29 of 1942.

5 The action was formulated as one for loss of earnings rather than loss of earning capacity. Thus, Philips AJ in the court *a quo* referred to "earnings" or "loss of earnings" rather than "earning capacity" or "loss of earning capacity" respectively (see 1974 4 SA 910H–911pr), adding that the damages claimed were to compensate the second plaintiff for income that she was prevented from earning illegally (911B–C). In argument before the Appellate Division, counsel for the first appellant approached the matter on the same basis (908B–C). Counsel for the respondent accordingly countered by arguing that compensation cannot be claimed "for loss of income which would have been illegally earned" (908C–D). (See also the references to "loss of earnings", "loss of income" and "loss sustained ... in being precluded from carrying on ... criminal activities" in counsel's heads of argument at 909pr–C and H.) On the similar classification of the problem by the Appellate Division in *Dhlamini*, see below.

6 The judge's surname is incorrectly spelt "Phillips" at 907A–B of the report of the judgment on appeal.

7 This passage is reproduced at 910H – *in fine* of the report of the judgment on appeal. There was, added Philips AJ, no evidence to suggest that the second plaintiff could or would have earned any income in any other, legitimate way (911A–B).

The second plaintiff appealed to the Appellate Division against this finding, but lost on appeal as well. The judgment of the court was delivered by Rumpff CJ,[8] who saw the case as raising two problems. The first was whether the transactions entered into by Mrs Dhlamini with the people who bought fruit from her were legally enforceable.[9] (If, for example, she had sold fruit on credit, would she have been able successfully to claim payment for it in the event of default on the part of a buyer?) The second question, said the Chief Justice, was to what extent the enforceability of the underlying income-earning transactions was relevant to the plaintiff's claim.[10] The matter was one of public policy,[11] and loss of income derived from an immoral or criminal activity would not be compensated, because it would be against public policy to compensate it.[12] The same rule, continued Rumpff CJ, would apply to income derived from a "colourless statutorily prohibited activity" ("kleurlose statutêr verbode aktiwiteit"[13]), the word "colourless" being used to refer to activities that were neither immoral nor criminal *per se*, when the income derived from the activity is unenforceable by reason of the invalidity of the underlying transactions: to compensate for loss of income of that kind would also be contrary to public policy.[14] What the position would be when income was derived from a colourless activity prohibited by statute and the underlying transactions were nevertheless enforceable at law, said the Chief Justice, did not have to be decided,[15] nor did the court have to determine whether the enforceability of the underlying transactions should be used as the test for the recoverability of compensation in every case.[16] For in this instance, the prohibition against hawking fruit without a licence had been enacted in the public interest, and that justified a finding that the contracts made by Mrs Dhlamini for the sale of fruit were unenforceable.[17] That being so, the claim for damages was based upon illegal income and had to be treated in the same way as a claim by a thief for loss of the money that he would have been able to steal had he not been injured.[18] Mrs Dhlamini's appeal was consequently dismissed with costs.[19]

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8 Botha, Wessels, Jansen and Rabie JJA concurred.

9 913G–H.

10 913G–*in fine*.

11 914F–G..

12 915B–C.

13 915C.

14 915B–D.

15 915C–E.

16 915D–E.

17 915E–G, 916 *in fine*–917E. The fact that the first appellant had hawked fruit without a licence over a lengthy period (some twenty years), said Rumpff CJ, raised the possibility of connivance in her conduct on the part of the relevant municipal officials, which might affect the question of public policy (917E–F). Although the court found it unnecessary to decide the point (because reliance had not been placed on it in argument), there could clearly have been no substance in the contention that the first appellant's transactions were enforceable at law merely because the authorities turned a blind eye to her trading activities: on that account to have disregarded the important public-policy considerations ("belangrike oorwegings van publieke beleid") adumbrated at 916 *in fine*–917E would have been to subvert the manifest purpose of the licensing enactment and to have accorded to bureaucratic collusion a legal effect overriding that of original legislation.

18 915F–G 917E–F. This remark appears at first blush to contradict the distinction drawn earlier in the judgment between income-earning activities that are inherently immoral and those that are unenforceable only because of statutory proscription. That the Chief Justice

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The decision in *Dhlamini* was followed and applied in *McLean v President Insurance Co Ltd.*[20] Prior to his injury in a motor collision, the plaintiff in *McLean* had been earning a living as a commercial pilot, conveying passengers and freight for reward. He held a private pilot's licence, but had never sat the qualifying examination to obtain the requisite commercial pilot's licence. Even though the plaintiff could not be regarded as incapable of obtaining such a licence[21] and was aware that he was not permitted to fly for reward without one,[22] De Wet J was "not at all persuaded that [he] would eventually have

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did not, however, intend to blur or obliterate this distinction is clear from his observation at 915E–F that the first appellant's conduct was not "teen die goeie sedes" and did not suffer from *permanens turpitudo*, for the sale of fruit *per se* was perfectly lawful ("volkome wettig"). Rumpff CJ seems therefore to have meant only that, just as compensation is not awarded to a thief for loss of the proceeds of his furacious activities, damages were not recoverable by the first appellant for the loss of her own ill-gotten receipts.

19 Doubt was cast on the correctness of the decision in *Dhlamini* by the judgment in *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A), where the court upheld a claim in contract for payment for goods sold by a general dealer who was not in possession of the requisite business-registration certificate or trading licence. Delivering the unanimous judgment of the Appellate Division, Boshoff JA attempted to distinguish *Dhlamini* on the ground that the court in that case had not been called upon to consider the validity of contracts concluded with innocent customers in the course of illegal trading, and consequently that different considerations applied in the two cases (194B–D 195A–G). Had *Dhlamini* been concerned with a claim by an illegal trader against a customer, said the court in *Ross*, "it would have been necessary to construe the legislation in order to determine whether the Legislature intended to render such contracts void and unenforceable" (195A–B). The endeavours of Boshoff JA to distinguish *Dhlamini* are, however, unconvincing. For in *Dhlamini* the success of the claim was expressly made dependent upon the enforceability of the underlying income-producing transactions, and the court did indeed construe the legislation there in issue to determine whether it rendered those transactions void and unenforceable. In addition, similar considerations of public health and the need to protect those who trade with purveyors of foodstuffs were in issue in both cases (see *Dhlamini* 917A–E and *Ross* 189D–I 190I–J 191D–E 192F–H). *Ross* undermines the authority of *Dhlamini*, for if (as was held in *Dhlamini*) the recoverability of damages in delict for loss of earnings depends upon the validity of the illegal trader's contracts with his customers, and if (as was laid down in *Ross*) an illegal trader can successfully claim payment from "innocent customers" for whose protection the infringed licensing legislation was enacted, it must follow that a claim for loss of the remuneration that the trader would, but for his injuries, have earned from his contracts with such customers, ought to succeed.

20 (1979) III Corbett & Buchanan 68 (E).

21 77.

22 He could not do so because s 2(1) of the Air Services Act 51 of 1949 prohibited any person from using an aircraft for the provision of an air service (defined in s 1 as "any service performed by means of an aircraft for reward . . .") except in accordance with the terms of a licence granted to that person. (Aircraft could not be flown for reward in terms of a private pilot's licence.) Section 2(4) declared the contravention of s 2(1) to be an offence punishable by a fine (but not imprisonment; *contra* s 26(2)(b) of the Air Services Licensing Act 115 of 1990, which now prescribes the maximum penalties for operating a domestic air service without a licence). The Air Services Act was renamed the International Air Services Act by par 1 of Part II of the Schedule to the Air Services Licensing Act, and rendered applicable only to international air services by s 1A of the International Air Services Act, as inserted by par 2 of Part 1 of the Schedule to the Air Services Licensing Act and substituted by s 2 of the International Air Services Amendment Act 99 of 1992. The International Air Services Amendment Act, Parts 1 and II of the Schedule to the Air Services Licensing Act and the International Air Services Amendment Act were subsequently repealed by s 47(4) of, read

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qualified as a commercial pilot".[23] The plaintiff would, however, probably have continued to earn income illegally as a commercial pilot had he not been injured.[24] After the collision the only work that the plaintiff did was to sell a little insurance on a freelance basis, at a lower remuneration than that which he was earning as an unlicensed commercial pilot. Accepting that the plaintiff continued, after his injury, to possess the capacity to earn,[25] De Wet J refused to award the plaintiff any compensation for remunerative loss. As in the case of *Dhlamini*, it was apparent from the governing legislation that the breadwinner's underlying income-earning transactions had to be regarded as unenforceable for reasons of social policy, in particular public safety:

> "To paraphrase what was said in *Dhlamini's* case *supra*, the issuing of a commercial pilot's licence must be regarded as an act of the National Transport Commission in which consideration[s] of public interest and public safety play an important role. The Legislature envisaged that no pilot should be allowed to convey passengers or goods for reward without the necessary licence. To do so is not only punishable, but because of important considerations of public policy the result of such flying also ought not to be legally valid.
>
> The plaintiff cannot, therefore, be awarded damages for loss of earnings flowing from his illegal acts."[26]

Turning to consider whether damages should nevertheless be awarded on the ground that the plaintiff's earning capacity had been adversely affected by his injuries and their *sequelae*, the court pointed out that counsel had been unable to say how much should be awarded, or to suggest a method by which the court might quantify the damages. The plaintiff had failed to establish that he had suffered any loss of income since the collision, and no award fell to be made under the head of loss of earning capacity.[27]

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with the Schedule to, the International Air Services Act 60 of 1993. Similar provision to that in s 2(1) of the International Air Services Act 1949 is made in s 12 of the Air Services Licensing Act in relation to domestic air services. Section 26(1)(b) of the latter Act declares non-compliance with, *inter alia*, s 12 to constitute an offence, the punishment for which may be a fine, imprisonment or both (s 26(2)(b)).

23 77. Later on the same page of the reported judgment, the court added that it was "highly improbable" that the plaintiff would indeed have taken the trouble to sit for his commercial pilot examination, despite his claim that, prior to his injury in September 1975, he had intended to write the examination the following month.

24 At 78 De Wet J remarked: "I have no doubt that [the] plaintiff would have continued flying as a commercial pilot had he not been involved in this accident."

25 At 77 *in fine* the judge remarked: "I do not accept that [the plaintiff] is either physically or mentally unable to hold down employment."

26 79.

27 79. A curious feature of the case was the plaintiff's admission that, "if he could find employment", he "could possibly earn as much" in some other vocation as he would have done by working as a qualified commercial pilot (76 *in fine*). Since the plaintiff had neither looked for equally lucrative employment nor registered as a work-seeker with the Department of Labour (76–77), his admission was clearly fatal to his claim in respect of the period after he had recovered sufficiently to resume work, for two reasons. First, he had unreasonably failed to mitigate his loss by finding alternative employment (see Visser and Potgieter *Damages* 232 and the authorities cited at 231 fn 134 and 232 fn 136). Indeed, at 77 *in fine* De Wet J remarked that "[i]f [the plaintiff] had made an effort to obtain employment he might very well have found a suitable field of employment". Secondly, on the plaintiff's own admission, his capacity to earn was undiminished and he could therefore not recover compensation for loss of earning capacity. De Wet J did not, however,

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The most recent reported decision on a claim by a breadwinner who, prior to his injury, earned a living illegally is *Nkwenteni v Allianz Insurance Co Ltd*.[28] The plaintiff in that case had been earning a living by operating taxis without a valid road-transportation permit issued in his name, and hence illegally, at the time when he was injured in a motor collision.[29] After he had recovered sufficiently to drive again he continued to operate taxis unlawfully for another four years, although, owing to his injuries, he was during that time no longer able to drive for seven days a week or to maintain his vehicles himself, as he alleged he had done previously. His counsel conceded[30] that the earnings which the plaintiff would, but for his injuries, have made during the four-year period after he resumed work had to be disregarded because, had the plaintiff not been injured, he would have continued throughout that period to earn his livelihood illegally. Echoing the view of the court in *Santam Insurance Ltd v Ferguson*,[31] Claassen AJ agreed: "if [the plaintiff] was not operating legally . . . there is no measure or norm whereby to quantify his damages".[32] Since the safety of passengers and of other road-users was clearly of prime importance in relation to the grant and transfer of road-transportation permits, the legislation prohibiting the operation of taxis unless the operator held a permit issued in his own name was "not merely a fiscal arrangement".[33] The plaintiff's unauthorised operation of a taxi service until four

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pursue this line of argument, apart from remarking that the question of the plaintiff's ability to procure a commercial pilot's licence "really becomes academic in view of [the] plaintiff's admission that he could possibly earn as much as a commercial pilot if he could find employment" (77). The basis of the court's refusal to award compensation for remunerative loss was not the plaintiff's ill-conceived admission, but (as the word "therefore" in the last sentence of the passage cited in the text immediately above shows) the fact that the income earned by the plaintiff prior to his injury was illegal, coupled with his failure to quantify his alleged loss of earning capacity. In short, *McLean* reaffirms the *Dhlamini* approach and the principle that the plaintiff bears the onus of proving his damage on a balance of probabilities (Visser and Potgieter *Damages* 435–436).

28 1992 2 SA 713 (Ck). The decision is reported *sub nom Knwenteni v Allianz Insurance Co Ltd* in 1991 2 PH J23 (Ck). The spelling of the plaintiff's name appearing in the *South African Law Reports* is accepted here as being the correct one.

29 The plaintiff was in possession of two road transportation permits, issued in the names of one Jekwa and one Duwe, respectively. He had on one occasion paid Jekwa an amount of R50 in return for Jekwa's permission to operate a taxi on Jekwa's permit and had thereafter paid the annual renewal amount in respect of Jekwa's permit to the relevant authorities. This practice was, however, proscribed by the Road Transportation Control Act 15 of 1982 (Ck), which required application to be made to the local road transportation board for the transfer of a permit from one person to another. The permit holder's written consent to the transfer had to be obtained by the applicant, whose ability to provide a satisfactory road transportation service would be inquired into by the board (s 12 and 15 of the Act). No application for a transfer had ever been made by the plaintiff, and no written consent to a transfer had ever been obtained from Jekwa or Duwe.

30 716A–D.

31 1985 4 SA 843 (A) 851E–F.

32 716J–717A. The same approach was adopted by counsel: at the close of the hearing it was common cause that "for [the] plaintiff to be entitled to compensation *of any amount whatsoever*, he had to have proved that at the time of the collision, he was operating legally under a valid Road Transportation permit" (716A–C). This clearly implies that if the plaintiff was in fact earning his income illegally (as, the court went on to hold, was indeed the position), no compensation could be awarded for remunerative loss on any basis. See also 716C–D: "if the only measure of income earned by a plaintiff is derived from illegal activity, then there is nothing to go on to establish his loss of future earning capacity".

33 718I–719B.

years after his injury was, as counsel had conceded, accordingly illegal,[34] and the mere fact of illegality debarred the plaintiff's claim in respect of that period.[35] In relation to the subsequent period, the plaintiff recovered no damages either although he had by then applied for, and been issued with, a permit in his own name, because he failed to establish that he was still suffering any loss of income occasioned by his injuries.[36]

2 1 2 Criticism

The judgment in *Dhlamini* divided illegal income-producing activities into three categories:[37]

(1) Activities which are in themselves immoral ("teen die goeie sedes"),[38] for example prostitution or pimping, or "criminal" ("misdadig"),[39] by which Rumpff CJ seems to have meant "evil",[40] for example the conduct of the robber, the thief or the hired assassin. When a claim is instituted for loss of the income that would have been earned from such an activity, it will fail, for the law will not indirectly give its approval to conduct of this type by placing the perpetrator in the financial position he would have occupied had he successfully pursued his income-earning activities.[41]

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34 719C–D G–H.

35 719H 722B–C.

36 721H. Notwithstanding the plaintiff's evidence to the contrary in court, the records of his takings indicated that he had not in fact operated a taxi for seven days a week prior to his injury, and that after he had recovered sufficiently from his injury to drive again, he drove no less frequently than before (720E–721C). The plaintiff's averment that his injuries prevented him from performing maintenance work on his vehicles was at odds with the maintenance records kept by him and was therefore likewise disbelieved (721C–H). In any event, the plaintiff had since his injury increased his fleet of taxis from two to five, and employed others to drive the vehicles while he attended to administrative work connected with his business. On that basis alone he failed to prove that after going back to work he suffered remunerative loss on account of his injuries (721H–J). The court's finding on the issue of illegality nevertheless constituted the basis of its decision not to award damages in respect of the period after the plaintiff's recovery (722B–C).

37 See Dendy "Damages for loss of illegally earned income – I: The breadwinner denied" 1992 *Businessman's Law* 115 ("Dendy *Breadwinner*") 117. Counsel for the first appellant had suggested a bipartite classification of illegal activities: those that were intrinsically criminal or immoral ("gekenmerk ... deur klaarblyklike of inherente skandelikheid","misdadig of *contra bonos mores*") and those that were not. A court, it was submitted, may on the ground of public policy come to the assistance of an income-earner in cases of the latter type (1974 4 SA 907B–C 908pr–B 912E–F). Counsel for the respondent, on the other hand, urged that no distinction should be made between *any* categories of conduct punishable by law: "each act of trading, when the trader is unlicensed, in itself constitutes a criminal offence" and the first appellant's earnings therefore "emanated from the proceeds of crime" (909A–B).

38 915B–C. See also 915E–F, where Rumpff CJ spoke of "'n aktiwiteit wat teen die goeie sedes is of aan *permanens turpitudo* ly".

39 915B–C.

40 Cf Voet 1 3 16 (iv), who writes of acts which suffer from "some obvious and ingrained disgrace" (cited in *Dhlamini* 914C–D). Conduct of such a type is inherently wicked and cannot be rendered lawful by compliance with some or other legal formality, such as the procurement of a licence.

41 At 915B–C the Chief Justice remarked that it would be "teen die publieke beleid" to award compensation in such a case. This line of reasoning clearly reflects the view of Bloembergen *Schadevergoeding bij onrechtmatige daad* (1965) 21, cited at 914E–F: "Het

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(2) Activities which are neither immoral nor "criminal" in the above sense, but which are nevertheless prohibited by legislation and unenforceable at law for reasons of social policy, such as the protection of the safety of the public or the maintenance of public health.[42] In cases of this nature, the illegal income-earner will likewise find himself unable to recover compensation for the income he would have been able to earn had he not been injured.[43] The hawking of fruit in *Dhlamini*'s case was held to fall into this category,[44] the health of the public being used by the court as the principal policy reason for denying the legal validity of Mrs Dhlamini's contracts for the sale of fruit.[45]

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zou ongerijmd en onaanvaarbaar zijn om voor zulke schade een aanspraak op schadevergoeding toe te kennen, want op die wijze zou men rechtens toch een zekere bescherming verlenen aan deze door de wet verboden activiteiten."

42 915B–D.

43 915C–D: "Vergoeding van gederfde inkomste van so 'n aard sou ook teen die publieke beleid wees".

44 This is clear from the *dicta* at 915E-G and 917D–E. Although the selling of fruit *per se* was perfectly lawful ("volkome wettig"), said Rumpff CJ, a court may nevertheless declare a contract for the sale of fruit to be invalid if the vendor lacked the requisite licence, the grant of which depended upon the satisfaction of requirements imposed in the interests of public health or for other reasons of public policy. The legislature had envisaged that no hawker would be permitted to trade without a licence. It was punishable to engage in such trade, and the consequences ought, for important reasons of public policy, in addition to be unenforceable ("nie regsgeldig . . . nie").

The court did not address itself expressly to the (somewhat inexplicitly couched) argument of the counsel (907E–G) that, in the light of s 10 of the Licences Act, the first appellant's failure to acquire a licence did not invalidate any of her income-producing transactions. Section 10(1) imposed a "penalty" (in the nature of a surcharge) for failure, *inter alia*, to take out a licence within one month of one's becoming liable to do so. Counsel's submission appears to have been based upon the maxim of statutory interpretation "*expressio unius est exclusio alterius*": from the express mention of the surcharge it ought to be inferred that no other sanction (save that of criminal liability, for which s 10(2) provided) would attend acts performed in contravention of the licensing requirement. The argument failed, however, because "[o]ther indications of legislative intent may make it very clear that what is not [expressly] mentioned was intended to be included" (Mureinik "expressio unius: exclusio alterus?" 1987 *SALJ* 264 265): since it appeared to the court in *Dhlamini* that, for public policy reasons, invalidity was one of the consequences visited upon conduct in breach of the Licences Act (917D–E), the existence of the surcharge provided for in s 10(1) was construed not to preclude invalidity (cf *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718 723 and 727–728. See also Hahlo and Kahn *The South African legal system and its background* (1968) ("Hahlo and Kahn") 190–191; Steyn *Die uitleg van wette* 5 ed (1981) by Van Tonder *et al* ("Steyn") 50–51; Du Plessis *The interpretation of statutes* (1986) ("Du Plessis") par 58.2; Cockram *The interpretation of statutes* 3 ed (1987) ("Cockram") 152; Devenish *Interpretation of statutes* (1992) ("Devenish") 85–86; Kellaway *Principles of legal interpretation of statutes, contracts and wills* (1995) ("Kellaway") 153–157; Botha *Statutory interpretation: an introduction for students* 2 ed (1996) ("Botha") 138–139; and the authorities cited in these references).

45 916E–G 916 *in fine*–917D, where heavy reliance was placed on s 7(2)(a) of the Licences (Control) Ordinance 3 of 1932 (T). A further relevant consideration was the need for a local authority, acting in terms of s 7(1)(*bis*) of the Ordinance, to be able to restrict the number of hawkers or pedlars selling goods of a particular class within the municipal area (916D–E 917pr).

Under the Businesses Act 71 of 1991, public health remains a factor of primary importance in the decision whether to grant licences to hawkers of meals or perishable foodstuffs (see s 2(4)(aA) (inserted by s 2(a) of the Businesses Amendment Act 186 of

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(3) Activities which are neither immoral nor "criminal" in the sense already described, but which traders are nevertheless prohibited from engaging in without a licence, the purpose of the licensing requirement being merely to raise revenue for the fisc in the form of licence fees.[46] In instances of this kind, the underlying transactions will be valid and enforceable in law, and damages for loss of the income derived from them will, it seems, be recoverable against a person responsible for the injury to the income-earner.[47] When the activity falls

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1993), s 2(6) (substituted by s 2(b) of Act 186 of 1993) and s 2(9)(d) (amended by s 2(c) of Act 186 of 1993)). Control over the size of the hawker population remains, however, a factor of subsidiary importance, for in terms of s 6A(2)(c) of the Businesses Act (inserted by s 4 of Act 186 of 1993) a local authority that contemplates restricting or prohibiting hawking in an area is enjoined to have regard to "the effect of the presence of a large number of street vendors, pedlars or hawkers" in that area.

46 The possibility that licensing legislation may be enacted, not in order to invalidate the underlying income-producing transactions, but simply to fill the coffers of the relevant authority was expressly recognised at 915C–E, where Rumpff CJ alluded to "die posisie . . . in verband met inkomste uit 'n kleurlose statutêr verbode aktiwiteit, wanneer die inkomste wel afdwingbaar is". From this it is apparent that income from a colourless activity may be enforceable even though the activity itself is prohibited by statute. The same may be inferred from the Chief Justice's remark at 913G–H that one of the problems arising for consideration in illegal-income cases is whether transactions concluded in the course of an unlawful activity are valid. The statement at 917D–E that the first appellant's hawking was "nie alleen strafbaar nie, maar . . . behoort die gevolge van so 'n handeldryf *ook* nie regsgeldig te wees nie" (my emphasis) likewise implies that proscription on pain of criminal penalty does not *per se* result in unenforceability. See also the submission of counsel for the first appellant that the Licences Act was, in the words of Rumpff CJ, "alleen 'n belastingsmaatreël" (912E); the allusion (913C–D) to *Delport v Viljoen* 1953 2 SA 511 (T) 516C–G (where Blackwell J referred to cases in which "the penalty is purely of a fiscal nature in a fiscal statute" and the proscribed act is therefore not rendered void); and the citation (914pr–A) of Voet, who mentions (in 1 3 16(ii)) a number of instances in which, under the Roman law, nullity did not attend things done contrary to law, and who concludes (in 1 3 16(iv) that "there is no lack of laws which forbid, and yet do not invalidate things done to the contrary". The view of Voet was upheld in *Standard Bank v Estate Van Rhyn* 1925 AD 266 274, where Solomon JA (Innes CJ and Wessels JA concurring) said that it was "not a hard and fast rule universally applicable" that acts penalised by the legislature are impliedly prohibited and consequently nullified. Likewise, in *Nkwenteni* Claasssen AJ held it not to be an "inflexible and inexorable" rule that a thing done contrary to a legal prohibition is void and of no effect (1992 2 SA 718F–I).

47 Rumpff CJ did not, however, go so far in *Dhlamini* as to hold that compensation for remunerative loss will be awarded in such cases: at 915C–E the Chief Justice said that he did not have to determine what the legal position would be when income derived from a colourless statutorily prohibited activity was enforceable. This was because (as explained above) the first appellant's conduct fell within the second category of illegal conduct, thus rendering her income-producing transactions invalid and damages for loss of the unlawful income they would have generated irrecoverable. The court's avoidance of the issue was however, a clear case of unnecessary judicial caution. For if damages for loss of income are not claimable in the third type of situation either, then there is no point in distinguishing (as Rumpff CJ was at pains to do) for purposes of remunerative-loss claims between legislation which invalidates the transactions it prohibits and legislation which does not. The clear recognition in *Dhlamini* of the existence of the third category of case, distinct from the second, therefore implies a different treatment of remunerative-loss claims falling within category 2 from that accorded to claims in category 3 – a conclusion which the Chief Justice's remark at 915C–E unfortunately tends to obscure. Moreover, it would be preposterous to deny the breadwinner a right to sue the tortfeasor for loss of the earnings he would have made had he not been injured while nevertheless recognising his right to sue his clients for

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into this third category, therefore, the only respect in which the earner falls foul of the law is that he renders himself liable to punishment – usually in the form of a fine, though possibly also in the form of imprisonment – for engaging in the targeted business activity without having procured the necessary licence.[48]

On the test applied in *Dhlamini*, it is therefore only when the breadwinner's activity is neither tainted by turpitude nor nullified by statute – in other words, in the third category of case – that damages for loss of illegally earned income will be claimable. The apparent effect of *Dhlamini* is therefore to make the *turpis causa* rule[49] of the law of contract the litmus test of recoverability of compensation by injured income-earners for remunerative loss in those illegal-earnings cases in which there is voluntary commercial dealing between the income-earner and third parties.[50] I say "apparent" because, in framing the second of the questions which he perceived Dhlamini as raising, Rumpff CJ expressly left open the possibility that some criterion other than the *turpis causa* principle may be applied in such instances:

> "Die tweede [probleem] is tot welke mate die toets omtrent 'n geldige of ongeldige handeling, wat uit 'n verbode aktiwiteit ontstaan, [sc the *turpis causa* test] relevant is by die beoordeling van die regmatigheid of nie van die inkomste van 'n eiser waarop hy staat maak in 'n aksie om skadevergoeding.

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payment of the income he earned while still working, for then the pre-injury income would be recoverable (from those with whom the plaintiff did business) whereas the post-injury earnings would not. Consistency demands that if the pre-injury and the post-injury earnings derive (or would have derived) from the same prohibited activity, then the court must either allow recovery of both or deny recovery of both. It follows that a remunerative-loss claim must be held to lie against the injurer, or one responsible for his wrongdoing, when income-earning transactions are enforceable despite their being prohibited by statute.

48 Cf *Nkwenteni*, where Claassen AJ said: "Even if the Act can be construed purely as a 'revenue statute', that by itself would not necessarily constitute proof one way or the other [sc as to the validity of an income-producing transaction entered into in breach of the statute]" (1992 2 SA 718H–I). This dictum is infelicitously worded and ill-conceived, for if legislation is "purely" a fiscal measure, it will not impugn the legal validity of a transaction entered into in breach of it; conversely, if a statute has the effect of nullifying a transaction, it cannot be said to be "purely . . . a 'revenue statute' ".

49 "*Ex turpi (vel iniusta) causa non oritur actio*." Hiemstra and Gonin *Drietalige regswoordeboek/Trilingual legal dictionary* (1992) 186 render this principle as "uit 'n skandelike oorsaak ontstaan daar geen regsvordering nie"/"from a base consideration no action arises". Generally on illegality of contract and the *turpis causa* rule, see *Wille and Millin's Mercantile law of South Africa* (1984) by Coaker and Zeffertt ("Wille and Millin") 32ff; Joubert *General principles of the law of contract* (1987) ("Joubert") 129 ff; *Farlam and Hathaway Contract cases, materials and commentary* (1988) by Lubbe and Murray ("Farlam and Hathaway") 237ff; Kerr *The principles of the law of contract* (1989) ("Kerr") 150ff; Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: general principles* (1993) ("Van der Merwe *et al*") 139ff; Christie *The law of contract in South Africa* (1996) ("Christie") 432ff; Sharrock *Business transactions law* (1996) ("Sharrock") 68ff; and Gibson assisted by Comrie *South African mercantile and company law* (1997) by Visser, Pretorius, Sharrock and Mischke ("Gibson") 62ff.

50 Only when there is no such fiscal intercourse between the earner and another person is the *turpis causa* rule unavailable as a yardstick of liability. Such instances entail the perpetrator's separating others from their money (or goods) involuntarily, by deceit or without their knowledge, and therefore clearly fall within Rumpff CJ's first category (income from immoral or criminal conduct), in which damages for loss of earnings will be refused. Perhaps the most obvious examples of such conduct are the common-law crimes of theft, robbery, extortion, forgery and uttering, fraud and theft by false pretences, and the statutory offences of counterfeiting coin and forging banknotes in breach of s 2(a) and (b) respectively of the Prevention of Counterfeiting of Currency Act 16 of 1965.

> . . . Ek sou . . . nie graag 'n opinie wou uitspreek oor die vraag of by vergoeding van skade, bereken volgens inkomste, die regsgeldigheid of nie van die gevolge van 'n statutêr verbode en strafbare handeling, in elke geval die toets moet wees of sulke skade toegeken sal word of nie."[51]

These remarks raise two problems. First, when should the court abandon the test of enforceability of the underlying income-earning transactions in favour of some other criterion? Secondly, what test should then be used in place of the *turpis causa* principle? Unfortunately, no indication of the answer to either question was given in *Dhlamini*.[52] The uncertainty thus introduced is not only unsatisfactory but also unnecessary. For the entire spectrum of unlawful income-earning activities involving contracts is covered by the three categories of illegality recognised by Rumpff CJ. That being so, one would have thought that the *turpis causa* principle, which underlies the refusal of damages for remunerative loss in the first two categories and the (seeming) recognition of a right of action for loss of income in the third, would have been embraced as the only gauge of liability for loss of earnings when the breadwinner has been making his income out of commercial transactions with others. Instead, the Appellate Division has left open the possibility that such cases will be decided on some other (undisclosed) basis, which litigants and their legal advisers may well be at a loss to anticipate.

The approach followed in *Dhlamini* is unsatisfactory in four respects: (i) the tripartite division of unlawful income-producing activities adopted by the court has created confusion in the law, because our judges have not always appreciated that there may exist discrete categories of illegal conduct, one type of which can have different *sequelae* from another; (ii) the system of classification in *Dhlamini* may be difficult to apply in practice; (iii) the enforceability of the underlying income-producing transactions is not always appropriate as a test for the recoverability of damages in delict for remunerative loss; and (iv) the denial of compensation in the first two of the *Dhlamini* categories is incompatible with the governing principle that in cases of remunerative loss, damages must be awarded for loss of earning capacity. These objections will be discussed *seriatim*.

(i) A tendency is sometimes discernible on the part of the courts to lump all forms of prohibited gainful conduct into a single amorphous category and to decline to award damages, on the ground of illegality, in every such case.[53] Besides being simplistic, this approach loses sight altogether of the existence of the third category of unlawful remunerative activity recognised in *Dhlamini*, and may therefore lead to the denial of compensation even when the lawgiver intended no such result.

Traces of this mode of thinking are to be found in *McLean*. After pointing out that the plaintiff's conduct in conveying passengers and goods by air for reward

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51 913G–*in fine* 915D–E.

52 Dendy *Breadwinner* 118. Two other possible tests are alluded to in the judgment: first, whether "greater inconveniences and greater impropriety would follow on the actual rescission of the things done, than attend the actual thing done contrary to the laws" (Voet 1 3 16 (iv), cited by Rumpff CJ 914A–B), and secondly, whether "substantially incontestable" harm will be done to the public interest if the plaintiff is awarded damages (*Kuhn v Karp* 1948 4 SA 825 (T) 840, relied upon in argument by counsel for the respondent at 909D–E, where the case is miscited as "*Karp v Kuhn*"). Both tests have the benefit of flexibility but also the drawback of vagueness that invariably goes hand in hand with it.

53 This, indeed, was the view urged by counsel for the respondent in *Dhlamini*: see fn 37 above.

without a commercial pilot's licence was in contravention of legislation, De Wet J concluded that the plaintiff's income "was, therefore, income obtained from a criminal activity" and immediately afterwards cited the English version of the headnote in *Dhlamini*, which commences:

> "Damage calculated according to the amount of income obtained from an activity which was immoral or criminal will not be compensated because it would be contrary to public policy to compensate it."[54]

Similarly, in *Nkwenteni* Claassen AJ pointed out that "[c]ontraventions of the [licensing legislation in issue] are furthermore visited with penalties, making them offences".[55] It is but a short step from this point to the conclusion that conduct that is declared by legislation to be an offence can never form the basis of an award of damages for remunerative loss. The loose expression "criminal activity", said in relation to morally colourless conduct proscribed by legislation, blurs the distinction between behaviour in the first category in *Dhlamini* (inherently evil conduct, which was also labelled "criminal" ("misdadig")[56]) and conduct falling into either the second or the third of the categories in that case. Even the Appellate Division has fallen into the trap of reasoning along similar lines: in *Santam Insurance Ltd v Ferguson*,[57] because the carrying on of an unlicensed panel-beating business in breach of a licensing ordinance was punishable as an offence, it was held not to fall under the description "colourless statutorily prohibited activity" ("kleurlose statutêr verbode aktiwiteit"). Joubert JA said:

> "Die verbod om die besigheid van duikklopwerk binne die regsgebied van 'n plaaslike owerheid sonder lisensie te dryf, is ook nie 'n kleurlose statutêr verbode aktiwiteit nie aangesien oortreding van die verbod strafbaar as 'n misdryf is . . ."[58]

Since the designation "kleurlose statutêr verbode aktiwiteit" applies, in Rumpff CJ's classification, to all conduct falling into the second or the third of the *Dhlamini* categories,[59] it follows inevitably that if the view expressed in *Ferguson* were correct, then conduct prohibited by legislation on pain of criminal sanction could not fall into either the second or the third of Rumpff CJ's categories and would perforce have to be relegated to the first. The second category would then be a permanently empty portmanteau and, because licensing legislation invariably criminalises unlicensed conduct prohibited by it, the third category would in practice be a chimera. *Ferguson* is irreconcilable with *Dhlamini* in this respect, for the court in *Dhlamini* envisaged that conduct might form the basis of a claim for remunerative loss even thought it may be a statutory offence, whereas *Ferguson* treats the criminalisation of an activity as precluding any reliance upon it in a claim for damages.[60] In *Metro Western Cape (Pty) Ltd v*

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54 (1979) III Corbett and Buchanan 78. The excerpt reproduced here from the headnote appears in 1974 4 SA 906G–H.

55 1992 2 SA 718I–J. Further on this *dictum*, see fn 66 below.

56 Sec 1974 4 SA 915B–C.

57 1985 4 SA 843 (A).

58 850B–C. Rabie CJ and Jansen, Cillié and Grosskopf JJA concurred.

59 See above.

60 In *McLean, Ferguson* and *Nkwenteni* the courts went on to hold that the income-producing conduct in question had been prohibited by the legislature for reasons of public policy other than the generation of revenue from licence fees (see, respectively, (1979) III Corbett and Buchanan 79, 1985 4 SA 850C–D and 1992 2 SA 718I–719B). Those cases might therefore be regarded as instances in which the business activities in question fell

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Ross[61] the Appellate Division subsequently held that although the conduct of a general dealer's business without the requisite licence and registration certificate was prohibited on pain of a fine or imprisonment, contracts for the sale of goods concluded in breach of the prohibition were none the less enforceable in an action in contract against a customer for payment for those goods. Whether a contract entered into in violation of a statute is void, said Boshoff JA, depends on the intention of the legislature which must be ascertained from the statute as a whole; no single consideration, however important it may seem, is necessarily conclusive.[62] The decision in *Ross* is therefore clearly inconsistent with the view in *Ferguson* that criminalisation of trading activity *per se* precludes recovery of compensation for remunerative loss, and that view must accordingly be rejected as unsound. But *Ferguson* illustrates how readily the distinctions made in *Dhlamini* and the ramifications of them may be misunderstood or overlooked by even our most senior judges.[63]

(ii) The *Dhlamini* system of classification may be difficult to apply because of uncertainty as to which activities prohibited by statute fall into the second of the *Dhlamini* categories (when the claim for loss of illegally earned income will fail) and which into the third (when a claim for loss of income will, it seems, succeed).[64] It is notorious that legislative draftsmen in South Africa do not spell out explicitly whether the purpose of licensing laws is to invalidate unlicensed transactions or merely to raise revenue for the fisc, leaving the unlicensed transactions valid in all respects,[65] and the matter may accordingly be one of conjecture which even a careful study of the relevant statute will not always resolve.[66]

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within the second of the *Dhlamini* categories. Such a view presupposes, however, that the separate classes of illegality recognised in *Dhlamini* continue to exist – a conclusion at odds with the *dicta* from *McLean*, *Ferguson* and *Nkwenteni* discussed in the text immediately above.

61 1986 3 SA 181 (A).

62 188F–189C. Rabie CJ and Jansen, Trengove and Viljoen JJA concurred. See also Wille and Millin 35; Joubert 131; Farlam and Hathaway 237; Kerr 155–156; Van der Merwe *et al* 146; Christie 378–382, 432–433; Sharrock 70–71; Gibson 11.

63 It is noteworthy that Rabie CJ and Jansen JA, who sat as the two most senior members of the bench in *Ferguson* and again in *Ross*, concurred in both judgments. One must, it seems, infer that those judges failed to appreciate the inconsistency between the decision in *Ross* and the *Ferguson dictum*, despite that *dictum* being quoted in *Ross* at 195C–D.

64 See above.

65 For example, the Businesses Act 71 of 1991, currently South Africa's most important piece of business-licensing legislation, does not stipulate in its key provisions (s 2(3) and 5(1), read with Schedule 1 to the Act), or for that matter elsewhere in the Act, whether business transactions entered into in breach of the Act are to be treated as invalid for purposes of the *turpis causa* rule of the law of contract or for purposes of claims in delict for remunerative loss.

66 Thus in *Nkwenteni* Claassen AJ, with reference to *dicta* in *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 188F–H, remarked that nullity would not flow inexorably from statutory proscription: each legislative prohibition would have to be dealt with "in the light of its own language, scope and object, and the consequences in relation to justice and convenience of adopting one view rather than another": the object of the legislature would have to be ascertained from the whole of the Act (1992 2 SA 718F–I). (The court did not appear to appreciate the inconsistency between those remarks and the view expressed a paragraph later (718I–J) that the imposition of a penalty for a contravention of licensing legislation is a reason for holding the offending transactions to be null and void. For statutory proscriptions in licensing laws are invariably coupled with the imposition of

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The difficulties are exacerbated by the rule of statutory interpretation that prohibits recourse to parliamentary debates, explanatory memoranda and the like in order to ascertain the intention or the meaning of the enactment in question.[67] In the result, judges are often left in the air in cases like this, and people who neglect to comply with licensing laws (or their legal advisers) must speculate about the legal consequences of their conduct, or litigate to discover them.

(iii) In *Metro Western Cape (Pty) Ltd v Ross*[68] the Appellate Division drew attention to the unsatisfactory consequences that could arise from the invalidation of all contracts entered into illegally. Nullity, said Boshoff JA, could wreak great unfairness upon a trader who by sheer inadvertence or negligence fails to renew his trading licence and, during a period of unlicensed trading, sells goods on credit. If the sale is regarded as unenforceable, the consequence could be an unmerited windfall for the purchaser, and a hardship for the trader utterly incommensurate with the gravity of the statutory contravention committed by him, for which only a trivial punishment might be appropriate. Contract law lacks flexibility as an instrument of deterrence of unlawful trading.[69] The same considerations apply *mutatis mutandis* to claims for damages for remunerative loss against people legally responsible for injury to the breadwinner: an outright refusal to award damages on the ground of invalidity of the contracts that the income-earner would, but for his injuries, have concluded, might likewise lead to wholly disproportionate financial hardship to the breadwinner (and, frequently, to his dependants as well), and to an unexpected windfall for the defendant, who might otherwise have had to pay substantial compensation for remunerative loss. On the other hand, to avoid these often unwarrantable consequences by holding the breadwinner's contracts to be enforceable may well be, in the words of Fagan JA in *Pottie v Kotze*,[70] to give legal sanction to the very situation that the legislature wished to prevent. In short, an equitable approach to the problem of damages for remunerative loss in illegal-income cases will sometimes lie along a *via media* between the only two options recognised by the court in *Dhlamini*: enforceability of the breadwinner's unlawful contracts for all purposes, or outright invalidity.

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penalties, and if the existence of a penalty *ipso facto* invalidates the plaintiff's income earning activities, then nullity will indeed flow inexorably.) See further above.

67 See Hahlo and Kahn 184–186; Steyn 134–136; Du Plessis par 46 134; Cockram 52ff; Devenish 122–129; Kellaway 281–284; Botha 100–103; and the authorities cited in these references. In the English case of *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 (HL), [1993] 1 All ER 42, however, the House of Lords by a majority of six to one (Lord Mackay of Clashfern LC dissenting) relaxed the rule in its country of origin to the extent of permitting recourse by the courts to parliamentary materials when (*a*) legislation is ambiguous or obscure, or the literal meaning leads to an absurdity; (*b*) the material relied upon consists of statements by a minister or other promoter of a bill together, if necessary, with such other parliamentary material as is necessary for the understanding of those statements and their effect; and (*c*) the statements relied on are clear ([1992] 3 WLR 1039H–*in fine*, [1993] 1 All ER 49G–H, per Lord Bridge of Harwich; [1992] 3 WLR 1040C–D, [1993] 1 All ER 50A–B, per Lord Griffiths; [1992] 3 WLR 1042H–1043C, [1993] 1 All ER 52E–G, per Lord Oliver of Aylmerton; and [1992] 3 WLR 1056A–D 1057B–C 1058F–G 1058H–*in fine* 1060C–D 1061A–B and 1061E–G, [1993] 1 All ER 64D–F 65D–E 66G–H 67pr–B 68C–D 68 *in fine*–69pr and 69D–F, per Lord Browne-Wilkinson).

68 1986 3 SA 181 (A).

69 191H–192F. See also *Pottie v Kotze* 1954 3 SA 719 (A) 727E–G.

70 1954 3 SA 719 (A) 726 *in fine*–727pr. Greenberg, Schreiner, Van den Heever and Hoexter JJA concurred.

(iv) The reasoning in *Dhlamini* lost sight of the governing principle previously laid down by the Appellate Division that when compensation is claimed for remunerative loss, damages must be awarded on the basis of loss of earning capacity, rather than for loss of earnings *per se*. Remarkably, that principle was adopted less than two years prior to the decision in *Dhlamini*, by, *inter alios*, none other than Rumpff CJ himself, as a judge of appeal, in the following dictum from the majority judgment in *Santam Versekeringsmaatskappy Bpk v Byleveldt*:[71]

> "Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. *Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik geneet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie.*"[72]

The sentence emphasised here clearly distinguishes between loss of earnings and loss of earning capacity as possible bases for the award of damages for remunerative loss, and rejects the former in favour of the latter. Yet, when one examines the judgment in *Dhlamini* one finds neither an acknowledgement by Rumpff CJ that loss of earning capacity ("verlies van verdienvermoë") is the true basis of awards in remunerative-loss claims,[73] nor any reference to *Byleveldt*'s case;[74] instead, the court repeatedly categorised the first appellant's claim as being for loss of "inkomste" ("earnings"). This was because the first appellant's lawyers were (apparently) themselves oblivious of the distinction between loss of earnings and loss of earning capacity, and fought the case on the basis that the first appellant ought to be compensated for the actual *income* (or *earnings*) that she had lost, rather than for her loss of the *capacity* to earn a living.[75] That, indeed, was why the claim failed. As counsel for the respondent pointed out:

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71 1973 2 SA 146 (A).

72 150B–D, my emphasis. Potgieter and Jansen JJA concurred. See also *Union & National Insurance Co Ltd v Coetzee* 1970 1 SA 295 (A); *Commercial Union Assurance Co of SA Ltd v Stanley* 1973 1 SA 699 (A) 705pr–B; *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917B–C D–E; *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 111C–F; *SA Eagle Insurance Co Ltd v Cilliers* (1987) III Corbett and Buchanan 716 (A) 728, 1988 1 PH J7.

73 This is particularly surprising in view of the allusions by counsel for the respondent to the first appellant's "ability to earn her alleged income" and to the decision in *Byleveldt* (910pr–B), and in the light of the reference in the quotation from *Meadows v Ferguson* [1961] (wrongly cited in *Dhlamini* at 914 in fine as "1916") VR 594 597 line 25 to "deprivation of earning capacity".

74 The only reference to *Byleveldt* in the report of *Dhlamini* occurs in the respondent's heads of argument at 910A–B, where it was submitted that *Byleveldt*, "relied upon by the first appellant[,] does not assist her". This submission is cryptic, for nowhere in the first appellant's heads of argument is mention made of *Byleveldt*'s case.

75 There are numerous *indicia* that the claim was based on loss of earnings *per se*, as opposed to loss of earning capacity. First, three references appear in the first appellant's heads of argument to the damages claimed as being for "loss of earnings" (908A–D). Secondly, Rumpff CJ categorised the action as being, not for "verlies van verdienvermoë", but for "verlies van *inkomste* reeds gely en van toekomstige *inkomste*" (910E, my emphasis) and went on to hold that the claim was founded on "nie-regmatige inkomste" (914C–D, 915F–G and 917E–F). Thirdly, at 911A–B Philips AJ in the court *a quo* is quoted as having remarked that "[t]here [was] no evidence whatever to suggest that [the first appellant] could or would have earned any income in any other[,] legitimate way",

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> "It is not that the first appellant was without remedy. She came to Court knowing that she was seeking to recover a loss in respect of an illegal trade. It was open to her to call evidence establishing what a person of her age, health and capabilities *could reasonable be expected to earn* in the legitimate labour market."[76]

Had the first appellant done so, her claim ought, in my view, to have succeeded.[77]

The same conceptual and terminological imprecision is evident in *McLean*, where the expressions "earnings" and "earning capacity" were used interchangeably,[78] the court at one stage seeming to treat loss of earnings and loss of earning capacity as alternative potential bases of claim.[79] Likewise, in *Nkwenteni* the

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that being so, the claim had necessarily to be formulated as one for compensation for loss of the first appellant's (illegal) earnings. Fourthly, at 913F–G Rumpff CJ said that "[i]n 'n geval soos die onderhawige ... die bedrag van skadevergoeding vasgestel moet word enkel en alleen na aanleiding van 'n eiser se inkomste wat hy gekry het vóór sy ongeskiktheid, en die beraamde inkomste daarna". That can be so only when the claim is for loss of the income that the plaintiff would actually have earned had he not been injured. (In the same vein are the references to "inkomste van 'n eiser waarop hy staat maak in 'n aksie om skadevergoeding" (913H–*in fine*) and "skade, bereken volgens inkomste" (915D–E; cf 915B–C).) Finally, at 916A–B the court remarked that the question of law before it was whether the first appellant could recover compensation based on the earnings that she would have made had she continued to trade without a licence: "Die regsvraag is of sy skadevergoeding kan eis *op grond van gederfde inkomste* terwyl sy nie 'n lisensie gehad het nie" (my emphasis; cf 915C–D). See also *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 194C–D, where Boshoff JA remarked that the court in *Dhlamini* had had to consider "whether a person injured in a motor collision as a result of negligence was entitled to claim as delictual damages loss of earnings and future loss of earnings based on income derived and to be derived from her illegal trading as a hawker".

76 909H–*in fine*.

77 This aspect of the matter will be explored in detail later in this series of articles.

78 Thus in a discussion under the heading "Plaintiff's loss of earnings" ((1979) III Corbett and Buchanan 75) De Wet J referred (78) to evidence before him "as to [the] plaintiff's earning capacity" and, after quoting at length from the judgment in *Dhlamini*, concluded that the illegality of the plaintiff's income-earning activities precluded the making of an award of "damages for loss of earnings" (79). In the next paragraph of the judgment the court declined an invitation by counsel to award compensation for loss of earning capacity, giving as its reason the fact that "[plaintiff] has failed to establish that he has suffered any loss of income since the accident" (*ibid*). This *dictum* overlooks the fact that, in order to prove a loss of earning capacity, a plaintiff need not establish that he has lost income which he would, but for his injury, in fact have earned: only on a loss-of-earnings approach is such evidence required. Earlier in the judgment, however, De Wet J alluded to the plaintiff's "inability to earn his living" (71), terminology that clearly categorises the plaintiff's loss as one of earning capacity rather than a loss of earnings *per se*.

79 After dismissing the plaintiff's claim for "loss of earnings" on the ground that his income had flowed from his illegal acts, the court remarked: "It has been suggested by counsel that, even if I were to hold that [the] plaintiff is not entitled to claim damages [sc for loss of earnings] for the above reason, I should nevertheless find that his earning capacity has been adversely affected ... and, therefore, award him damages on this basis" (79). Nowhere in his brief discussion of this submission (see the previous footnote) did De Wet J make the point that, in terms of *dicta* in *Stanley* and *Byleveldt* (fn 72 above), loss of earning capacity had, by the time *McLean* was decided, become the only permissible basis of a claim for remunerative loss, not a ground of last resort when a claim for loss of earnings *per se* had failed. Although the judgment in *Dippenaar* (fn 72 above) reaffirming the loss-of-earning capacity approach, was handed down some two and a half months before *McLean*, *Dippenaar* was reported a month after *McLean* was decided and appears for that reason not to have come to the attention of De Wet J.

remunerative loss suffered by the plaintiff was referred to both by counsel and by the court as a "loss of earnings"[80] or a "loss of income".[81] The expression "loss of future earning capacity" was, however, used elsewhere in the judgment,[82] the court being apparently of the view that these various expressions mean the same thing.[83]

If, however, loss of earning capacity is adopted as the basis of awards of damages for remunerative loss, then it matters not in principle that, prior to his injury, the breadwinner was earning income unlawfully. For, despite the fact that it was being utilised in an illegal manner, the capacity to earn has nevertheless been lost, and compensation must accordingly be paid for its destructionor impairment.[84] This approach is being followed increasingly in cases involving claims for loss of support instituted by dependants whose deceased breadwinners were earning income illegally, where damages have been computed on the basis of what the breadwinner could have earned by putting his income-producing capacity to lawful use.[85] The view expressed by Claassen AJ in *Nkwenteni* that in cases of illegal earnings compensation may not be recovered for remunerative loss since the damages must needs be quantified on the basis of the breadwinner's illegal earnings[86] was therefore unfounded – as was the concession of counsel for the plaintiff on which the court's view was based.[87]

One must therefore conclude that the approach in *Dhlamini*, *McLean* and *Nkwenteni* is both productive of confusion and, worse still, contrary to principle. But, despite the fact that our courts have begun, in claims by dependants, to move away from the thinking enshrined in that line of cases, there has not, at the time of writing, been a single reported decision of a South African court in which a breadwinner has been awarded compensation for remunerative loss in circumstances in which he would, but for his injuries, have been earning income illegally.

(*To be continued*)

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80 1992 2 SA 714I–J 715C–D 715G–H 719I 722A–B.

81 715F–G 722A–B.

82 716D. See also 720D–E.

83 Thus at 715F–G Claassen AJ categorised one of the issues for decision by him as being "the *quantum* of [the] plaintiff's damages in respect of past and future loss of income (earning capacity)".

84 Dendy 1986 *Annual Survey* 204; Dendy "Damages for loss of support out of illegally earned income: visiting the sins of the fathers" 1987 *SALJ* 243 ("Dendy *Loss of support*") 249; Dendy 1991 *Annual Survey* 401; Dendy 1992 *Annual Survey* 459 460; Dendy "Damages for loss of illegally earned income – III: a new direction" 1992 *Businessman's Law* 167.

85 See eg *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A); *Lebona v President Versekeringsmaatskappy Bpk* 1991 3 SA 395 (W); *Dhlamini v Multilaterale Motorvoertuigongelukkefonds* 1992 1 SA 802 (T). These and other cases in which dependants' actions succeeded notwithstanding the fact that the deceased breadwinners had been earning income illegally will be discussed later in this series of articles.

86 1992 2 SA 716C–D 716J–717B. See fn 32 above.

87 For criticism of the same view in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 851E–F, see Dendy *Loss of support* 251; Dendy 1992 *Annual Survey* 460–461.

Similar company names: A comparative analysis and suggested approach – Part 1[1]

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OPSOMMING

Soortgelyke maatskappyname: 'n Vergelykende analise en voorgestelde benadering – Deel 1

Alhoewel daar beperkings is op maatskappyname, word identiese en soortgelyke name nie direk beperk in die Maatskappywet 1973 nie. Anders as in Engeland sedert 1948 en in Nieu-Seeland ingevolge die Maatskappywet 1993, word die verbod op en beskerming teen identiese of soortgelyke maatskappyname onder die Maatskappywet 1973 nie eksklusief aan administratiewe prosedures toevertrou nie – die howe het die finale sê.

Die kriterium vir die *verbod* op soortgelyke name in artikels 41 en 44 is "onwenslike". As die registrateur die verbod nie behoorlik toepas nie, tree die *beskerming* wat verleen word deur artikel 45 in werking. Dan vorm die begrip "bereken is om . . . skade te berokken", tesame met "onwenslik", die kriteria vir die beskerming. Die registrateur kan óf ingevolge artikel 45(1) die maatskappy *mero motu* beveel om sy naam te verander indien dit volgens hom onwenslik is, óf enigeen kan hom ingevolge artikel 45(2) versoek om die maatskappy te beveel om sy naam te verander indien dit onwenslik is of bereken is om skade te berokken. Artikel 45(2A) laat enigeen wat beskerming verlang toe om die hof direk te nader, op dieselfde gronde as in artikel 45(2), om 'n bevel dat die maatskappy sy naam verander.

Daar word aanbeveel dat die bestaande bepalings gewysig word deur die woorde "bereken is om . . . skade te berokken" in artikel 45(2) en (2A) weg te laat. In die lig van die groot trefwydte van "onwenslik" en aangesien dit die enigste kriterium is om te besluit of 'n naam geregistreer behoort te word of nie, is die woorde "bereken is om . . . skade te berokken" niksseggend. Dit verdoesel slegs die doel van die statutêre beskerming teen soortgelyke maatskappyname (primêr, die beskerming van die publiek teen misleiding en, sekondêr, die beskerming van die reg van eksklusiwiteit van gebruik) en bestendig die verwarring met aanklamping.

1 INTRODUCTION

Anthropomorphism, which has been prevalent in religion and politics since the Middle Ages, has also found its way into the law.[2] The anthropomorphic idea and the physical analogy between a body corporate and man have had various effects upon the law, one of which is that a corporate body or legal *persona* must have a name. A name is necessary to the very existence of a company; it is one

1 This article is based on an extract from the author's LLM dissertation "The prohibition of and protection against the use of identical and similar company names in company law: a comparative study" UOFS (1996) (hereinafter referred to as "Cilliers *Dissertation*").

2 Carr *The general principles of the law of corporations* (1905) 150–155.

of the company's attributes, and is a means of identification.[3] It is by means of a company's name that the company preserves its legal identity through changes of membership, business constitution and different spheres of activity.

South Africa is still experiencing the effects of the regulation of company names first introduced in the general companies legislation in England more than a century ago. However, rapid industrial and commercial progress resulted in an increase in the number of incorporations over the last century, raising problems in regard to the regulation of company names which were not envisaged at the time. Moreover, advertising has emphasised company name association by prospective customers as perhaps the most important marketing factor. A successful business enterprise soon acquires a commercial goodwill in respect of its products or services that members of the public and consumers associate with the company name, so that a company name has become a more and more valuable asset in itself.[4] The question arises how far the law protects an established company from newcomers seeking to incorporate under the same or a similar name.

Despite the close similarity in principle and the fact that it is sometimes difficult to ascertain where to draw the line, this article is confined to a discussion of the protection of company names in company law and does not deal with the protection granted by the law of trade marks, trade names or passing off. The reason for this distinction is the fact that in South Africa, as in the other Commonwealth jurisdictions, there is a statutory company law provision which prohibits the adoption by a company of a name identical or similar to that of an existing company. These statutory provisions take company names out of the general sphere of the law of trade marks, trade names, or passing off, and afford them special statutory protection within the realm of company law.

Initially, the South African company legislation dealing with the similarity of company names was based on English law. In 1948, the British Parliament changed not only the wording of the statutory provisions, but the whole regime dealing with similar company names. Although the South African Parliament did not follow suit, it adopted the conceptual change of the Companies Act 1948 (Eng) by also introducing the concept of undesirability in 1973. Since then the role of the courts in England has been diminished, and the South African courts started mirroring the New Zealand position in determining this issue. In 1993, the New Zealand legislation was amended fundamentally when the concept of undesirability was abandoned and, as in England, the whole procedure regarding company names became an administrative one. In South Africa reliance is placed on the courts to determine the question of the similarity of company names in the final instance.[5]

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3 Sir William Blackstone *Commentaries on the laws of England* (1765) (Book the First) 462–463; Stewart Kyd *A treatise on the law of corporations* (Vol 1) (1793) 226–227. See also Chowles "Company names" 1960 *THRHR* 126.

4 For a definition of "goodwill", see *McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd* 1997 1 SA 1 (A) 16, where reference was made to *The Commissioner of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 (HL) 223–224.

5 The concepts of undesirability and "calculated to deceive" are used in determining the issue of similar company names.

2 ENGLAND[6]

2 1 Historical overview

The first legislation[7] dealing with company names in England was introduced with the enactment of section 6 of the Joint Stock Companies Act of 1856.[8] The wording of the three immediate successors to this section, namely section 20 of the Companies Act of 1862,[9] section 8 of the Companies (Consolidation) Act of 1908[10] and sections 17(1) and 19 of the Companies Act of 1929,[11] was more or less similar as far as the regulation of company names was concerned. All these Acts provided that no company could be registered with a name which was identical to that of an existing company[12] or which so nearly resembled the name of an existing company as to be calculated to deceive.[13] Mere similarity was not sufficient.[14] The courts gave a limited application to section 20 of the Companies Act 1862 (Eng). In *Merchant Banking Company of London v Merchants' Joint Stock Bank*[15] it was held that this section did not apply as between two companies, both of which had already been registered under its provisions,[16] while in *Hendriks v Montagu*[17] the court held that a company not incorporated under the Companies Act 1862 (Eng) had no right to enforce section 20 of this Act.[18]

Despite the fact that the House of Lords expressly stated in *Manchester Brewery Company Ltd v North Cheshire and Manchester Brewery Company Ltd*[19] that the issue to be decided for passing-off and an action under section 20 of the Companies Act 1862 (Eng) were the same, and that it was held in *British Vacuum Cleaner Company Ltd v New Vacuum Cleaner Company Ltd*[20] that the principles applicable were "extremely analogous",[21] Buckley J subsequently recognised in

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6 See Cilliers *Dissertation* 6–86.

7 Before 1856, no company could obtain an exclusive right to any specific name. An existing company could not obtain an injunction against any company registered subsequently with a similar name merely because of the fact of similarity. If fraud in equity could be proved, the only remedy available was an injunction based on passing off. See eg *Croft v Day* (1843) 7 Beav 84. An injunction is an equitable remedy which is similar to an interdict in South African law. See in this regard Cilliers *Dissertation* 6–9.

8 Public General Statutes, 1856, 19 & 20 Vict, c 47 (the "Companies Act 1856 (Eng)"). For a useful summary of company law in England prior to 1856, see Gower *Gower's principles of modern company law* (1992) 19–47; Goitein *Company law* (1960) 27–37.

9 25 & 26 Vict, 1862, c 89 (the "Companies Act 1862 (Eng)").

10 8 Edw 7 1908, c 69 (the "Companies Act 1908 (Eng)").

11 19 & 20 Geo 5 1929, c 23 (the "Companies Act 1929 (Eng)").

12 See, in general, Lindley *A treatise on the law of companies* (1889) 112.

13 It was irrelevant whether the business carried on by the two companies was the same. For a discussion of the minor differences that existed in the various Acts, see Cilliers *Dissertation* 12–13.

14 Furthermore, there was no specific statutory provision for a remedy for the non-compliance of the provisions of these Acts: Rolston and Gerald "A new law of corporate trade names" 1961 *Osgoode Hall LJ* 191 205. See Cilliers *Dissertation* 9–15.

15 [1878] 9 Ch D 560.

16 *Supra* 565. *Cf* Lindley *op cit* 113. See Cilliers *Dissertation* 15–18.

17 [1881] 17 Ch D 638. See Cilliers *Dissertation* 18–24.

18 *Idem* 639–640. See also *Tussaud v Tussaud* [1890] 44 Ch D 678 692–693.

19 [1899] AC 83. See Cilliers *Dissertation* 28–29.

20 [1907] 2 Ch 312. See Cilliers *Dissertation* 41–45.

21 320–321.

Daimler Motor Car Company Ld v British Motor Traction Company Ld[22] that there was a difference between these two actions. The former was available to prevent the registration of a new company, and operated prospectively to prevent a wrong from occurring, while the latter worked retrospectively to undo the operation of a company which was already in existence.[23] The crucial difference appeared to be that in the case of section 20 the court merely had to be satisfied that there was a likelihood of deception, whereas in a case of passing off the court had to find actual deception.[24]

With the ambit of the statutory provisions settled, two important issues that arose were first, whether a monopoly can be obtained by adopting an ordinary word in a company name and secondly, what rights an individual has in incorporating a company under his own name. In *Aerators Limited v Tollitt*[25] the court stated that if the name was a coined or a fancy word, or even a name of a place,[26] it would be more readily indicative of a particular company and *vice versa*.[27] The court further held that section 20 was not intended to give companies any greater rights than individuals possessed in respect of names which were not identical but only similar.[28] In this regard it was held in *Fine Cotton Spinners and Doublers' Association Ltd & John Cash and Sons Ltd v Harwood Cash and Co Ltd*[29] that a new company did not have the rights to a name that a natural person would have to his own given name. The case was even stronger where an individual who formed and incorporated a company had not been conducting the business in his own name.[30]

When the interpretation of section 8 of the Companies Act 1908 (Eng) came before the court in *Ouvah Ceylon Estates Limited v Uva Ceylon Rubber Estates Limited*,[31] Farwell LJ adopted a new approach, namely that the court had to determine first of all whether the doctrine of *res ipsa loquitur*[32] applied. In other words, if one merely looked at the words or names, did it follow that there was a

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22 (1901) 18 RPC 465. It appears that the abbreviation "Ld", and not the modern "Ltd", was in common use at that time.

23 This was the case in *La Société Anonyme Des Anciens Etablissements Panhard et Levassor v Panhard-Levassor Motor Company Ld* [1901] 2 Ch 513. See Cilliers *Dissertation* 30–32.

24 *Daimler Motor Car Co v British Motor Traction Co supra* 472.

25 [1902] 2 Ch 319. The court also held that, in considering whether a name was calculated to deceive as contemplated in s 20 of the Companies Act 1862 (Eng), passing-off principles were applicable. See Cilliers *Dissertation* 33–40.

26 This appears to be a justification for not accepting that the case was similar to the case of *Manchester Brewery Co v North Cheshire & Manchester Brewery Co* (HL) *supra*, where the defendant took over the whole of the name of the plaintiff and merely added words to it.

27 *Aerators v Tollitt supra* 324–325. This distinction was also recognised in *British Vacuum Cleaner Co v New Vacuum Cleaner Co supra* 321.

28 *Idem* 322.

29 [1907] 2 Ch 184 190.

30 This approach was followed in *Kingston, Miller and Co Ltd v Thomas Kingston and Co Ltd* [1912] 1 Ch 575 581–582. See Cilliers *Dissertation* 50–51.

31 The Chancery Division decision was reported in (1910) 103 LT 16 (the trial case) and the decision of the Court of Appeal in (1910) 103 LT 416 (the appeal case). See Cilliers *Dissertation* 46–50.

32 This is a doctrine of the law of evidence, the use of which leads to a rebuttable factual presumption.

likelihood of deception or confusion?[33] If it *prima facie* appeared that confusion or deception would result if both companies were allowed to retain their names, then the burden of proof shifted to the defendant.[34] In another case based on section 8 of this Act, *The King v The Registrar of Companies*,[35] Lord Alverstone CJ and Pickford J held that the court could not interfere by way of *mandamus* in the refusal by the Registrar to register a company name under section 8.[36] Avory J agreed with this decision, but qualified it.[37]

In a number of cases the court did not refer either to section 8 of the Companies Act 1908 (Eng)[38] or to section 17(1) of the Companies Act 1929[39] (Eng), but dealt with the issue simply as a matter of passing off,[40] apparently assuming that the law was settled.[41] The reason for the lack of case law on section 17 of the Companies Act 1929 (Eng) appears to have been the practice followed by the Board of Trade and the Registrar. The latter advised promoters to be careful to avoid company names that might be confusing or misleading, but if no attention was paid to such advice, the registration proceeded and an aggrieved company had to bring a passing-off action.[42] In view of the costs involved in passing-off actions, the time-consuming nature of such actions, the fact that passing-off actions were notoriously difficult to prove and generally the abuses which occurred of companies taking names which were likely to deceive, the Cohen Report recommended that the Registrar should, subject to appeal to the Board of Trade, have a discretion to reject any name which he considered to be calculated to mislead.[43]

Major changes were introduced by sections 17 and 18(2) of the Companies Act 1948 (Eng),[44] following the general thrust of the recommendations by the

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33 *Ouvah Ceylon Estates v Uva Ceylon Rubber Estates* (the appeal case) *supra* 417.

34 *In casu*, the doctrine was held to be applicable, especially because the difference between the two company names really lay in the insertion of the word "Rubber" in the defendant's name. "Uva" was merely a variant of "Ouvah".

35 [1912] 3 KB 23.

36 In forming an opinion, the Registrar was exercising his discretion.

37 Avory J held that the court would interfere with the Registrar's decision that a name was likely to deceive only if one of the following had been made out namely: (i) that the Registrar had not in fact exercised any discretion: (ii) that he had exercised his discretion upon a wrong principle of law; or (iii) that he had been influenced by extraneous considerations which he ought not to have taken into account.

38 The court proceeded to deal with these cases on the basis of passing off: *Ewing v Buttercup Margarine Company Ltd* [1917] 2 Ch 1 (CA); *The Society of Motor Manufacturers and Traders Ltd v Motor Manufacturers' and Traders' Mutual Insurance Company Ltd* [1925] 1 Ch 675.

39 See *FW Woolworth and Co Ld v Woolworths (Australia) Ld* (1930) 47 RPC 337; *Office Cleaning Services Ld v Westminster Window and General Cleaners Ld* (1946) 63 RPC 39.

40 There were also cases where s 8 of the Companies Act 1908 (Eng) was referred to in argument, but the court held it to be inapplicable and dealt with the issue as a passing-off matter: see *Waring & Gillow Ld v Gillow & Gillow Ld* (1916) 33 RPC 173 180; *Albion Motor Car Company Ld v Albion Carriage and Motor Body Works Ld* (1917) 34 RPC 257; *Harrods Ltd v R Harrod Ltd* (1923) 41 RPC 74.

41 See *British Legion v British Legion Club (Street) Ld* (1931) 48 RPC 555; *Radio Rentals Ld v Rentals Ld* (1934) 51 RPC 407; *Midland Counties Dairy Ld v Midland Dairies Ld* (1948) 65 RPC 429.

42 See the Report of the Committee on Company Law Amendment, Cmnd 6659, June 1945, par 13–16 (the "Cohen Report").

43 The Cohen Report *supra* par 16.

44 11 & 12 Geo 6, 1948 c 38 ("the Companies Act 1948 (Eng)"). See Cilliers *Dissertation* 58–67.

Cohen Report.[45] The Board of Trade was permitted to refuse the registration of a name which in its opinion was undesirable,[46] while it could compel any company to change its name if that was too like a name by which an existing company had already been registered. This meant that the Board of Trade had a wide discretion[47] (in practice implemented by the Registrar) which could not be challenged in the courts.[48] The onus was on the Registrar to check each application and to advise on the likelihood that a proposed name would be acceptable.[49] Complaints could be made to the Ombudsman.[50] Thus an administrative process, in which the Board of Trade and the Registrar were the main players, dealt with the question of the similarity of company names and the role of the courts was diminished.[51] The prohibition against similar company names was not placed on the statute books for the benefit which an existing company could possibly reap – what was of primary importance was that the public had to be protected from being misled.

During the late 1970s it became apparent that, although the general arrangements for preventing the use of undesirable company names in terms of the Companies Act 1948 (Eng) were working reasonably well, the Registrar was finding it increasingly difficult, owing to the ever-growing number of company registrations, to check prior to registration whether proposed names were not too like existing ones. A new system which had to embody the same objectives was thought to be desirable to alleviate the burden on the Registrar's Office.[52]

2 2 Current position[53]

As a result, a number of changes were introduced by the Companies Act of 1981,[54] which came into effect in 1982.[55] The Companies Act 1981 (Eng) re-examined

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45 *Supra*.

46 See Parker and Buckley *Buckley on the Companies Act* (Vol 1) (1981) 58–61; Pennington *Company law* (1979) 15.

47 See Goitein *op cit* 49; *Halsbury's Laws of England* (Vol 7) (1974) 78; Gower, Cronin, Easson, Lord Wedderburn of Charlton *Gower's principles of modern company law* (1979) 302; Pennington *op cit* 15.

48 In other words, a registered company was provided with a *de facto* monopoly of that particular name.

49 Morse "Company names and the Companies Act 1981" 1982 *Journal of Business Law* 10 11.

50 The report of the Ombudsman in *Re The Registration of a Company Name* [1982] ECC 236 highlighted the difficulties experienced by the Registrar in applying the Companies Act 1948 (Eng) and gave some insight into the operations of the Registrar's Office.

51 To provide some guidance as to which company names would be regarded as undesirable, the Companies Registration Office of the Department of Trade and Industry published a practice direction with the title "Notes for guidance on incorporation of new companies', Practice Note c 186 (Rev 72) 1972-09-07. See Parker and Buckley *op cit* (Vol 2) Appendix 1.

52 See Chapman and Ballard *Tolley's company law* (1983) 586, where reference is made to the Department of Trade's Consultative Document "Companies registration and business names: Proposals for reducing the functions of the Department of Trade".

53 See Cilliers *Dissertation* 67–78.

54 C 62 (the "Companies Act 1981 (Eng)"). S 119(5) read with Sch 4 of the Companies Act 1981 (Eng) repealed s 17 and 18 of the Companies Act 1948 (Eng) as well as the Business Names Act 1916 (Eng).

55 S 119(3) of the Companies Act 1981 (Eng) read with the Companies Act 1981 (Commencement No 3) Order 1982, par 2 and Sch (S1 1982, No 103).

the criteria which the Secretary of State could consider when rejecting a company name and provided a new framework for changing company names. These changes have been introduced in accordance with the new policy of the Department of Trade, namely to reduce the burden on the civil service by minimising the discretionary powers of the Secretary of State. The sections on company names in the Companies Act 1981 (Eng) were consolidated, virtually in precisely the same terms, in the Companies Act of 1985,[56] which still regulates the registration and change of company names today.

At present, a company cannot be registered with a name which is the same as a name of another company or body listed in the Registrar's index.[57] Since the introduction of the Companies Act 1981 (Eng), the duty to avoid a name already on such index is no longer on the Department of Trade (or Registrar), but on the party seeking to register or alter the name of a company. The consent of the Secretary of State is no longer required for a voluntary change of name of a company. However, the Secretary of State may direct a company to change its name where the name is the same as or, in his opinion, "too like" a name that appears or should have appeared in the Registrar's index of names.

The provisions in the Companies Act 1985 (Eng) regarding the registration and change of company names, as well as the prohibition against similar company names, are much more elaborate and detailed than the provisions of the Companies Act 1948 (Eng).[58] The method and criteria used under the two Acts to prevent the co-existence of similar company names differ, but the objectives are the same, namely that the name of a registered company should be distinctive so that it can be readily identified and not be confused with any other registered company, and that no company should have a name which is likely to mislead the public about its real status or activities.[59] Like the Companies Act 1948 (Eng), the Companies Act 1985 (Eng) keeps the whole question of similarity of company names out of the hands of the court and entrusts it to the Secretary of State, who has an unfettered discretion to direct names which are the same or "too like", and the Registrar, who keeps an index of names of companies and other entities. With the enactment of the Companies Act 1985 (Eng), the legislature reiterated its preference for an administrative procedure to prevent the use of similar company names. As a result, the English courts have not had the opportunity to consider the question of similarity of company names since the adoption of the Companies Act 1948 (Eng).

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56 C 6 (the "Companies Act 1985 (Eng)").

57 There is no control over or prohibition of names similar to or "too like" those already on the index kept by the Registrar at the time of registration: s 26(1) of the Companies Act 1985 (Eng). However, an order for a change of name may still result if such name is considered "too like" the registered name: s 28 of the Companies Act 1985 (Eng).

58 The Companies Act 1985 (Eng) retained the new system of regulating the choice of company names introduced by the Companies Act 1981 (Eng).

59 See Gullick *Ranking and Spicer's Company law* (1987) 35; Morse, Marshall, Morris and Crabb *Charles & Morse: Company law* (1995) 54; Pennington *Company law* (1995) 8.

3 NEW ZEALAND[60]

3 1 Historical overview

The first companies legislation enacted in New Zealand dealing with company names was the Joint Stock Companies Act of 1860,[61] which was modelled on the Companies Act 1856 (Eng).[62] As in England at that time, no company could be registered with a name identical to that of an existing company or so nearly resembling the name of an existing company as to be calculated to deceive.[63] The New Zealand Companies Act of 1882[64] consolidated the Companies Act 1860 (NZ) and its amendments. The New Zealand Companies Act of 1908[65] came into force before the relevant sections of the subsequent Companies Act of 1903[66] could be considered by the New Zealand courts.[67]

Although section 27 of the Companies Act 1908 (NZ) had not been referred to in *JJ Craig Ltd v EA Craig & HR Craig*,[68] this was the only reported case where the plaintiff successfully used the principles underlying its provisions. Salmond J treated the case as a passing-off action and held that an incorporated company was entitled to receive the same protection for an established nickname or abbreviated title as for its official name.[69] What was relevant was the likelihood of confusion or deception of the public who had no authentic information about the internal matters of the various entities involved.[70] Since the defendants, as individuals, could not do business under a particular name, it followed *a fortiori* that they could not incorporate a company under such a name, especially because a company did not have the same right to use its shareholders' names,[71] and a company "[had to] select a name which [was] not calculated to deceive", and "it [was] no excuse for choosing a deceptive name that one of [the company's] shareholders to whom that name [belonged] might lawfully [have used] it as his own business".[72]

The Stanley Works v Stanley Ironworks Ltd[73] was also not decided in terms of section 27 of the Companies Act 1908 (NZ), but the principles underlying this

60 See Cilliers *Dissertation* 87–221.
61 Act 13 of 1860, 24 Vict, 410 (the "Companies Act 1860 (NZ)").
62 Prior to 1860 there was no statute dealing with corporate names in New Zealand. As in England before the Companies Act 1856 (Eng), any person who wished to register a company in New Zealand could do so under any name, provided there was no fraud.
63 S 7 of the Companies Act 1860 (NZ).
64 Companies Act 35 of 1882, 46 Vict, 349 (the "Companies Act 1882 (NZ)").
65 1903 3 Edw VII 133 ("Companies Act 1903 (NZ)"). The Companies Act 1903 (NZ) in turn consolidated the Companies Act 1882 (NZ) and its amendments.
66 Public General Statutes 1908 (Vol I 1908–08–04) (the "Companies Act 1908 (NZ)"). The Companies Act 1908 (NZ) consolidated the Companies Act 1903 (NZ) and its amendments, and incorporated the English legislation enacted during the period 1862–1907. See Farrands *Company law in New Zealand* (1970).
67 See Cilliers *Dissertation* 87–94.
68 [1922] NZLR 199. See Cilliers *Dissertation* 94–99.
69 *JJ Craig v EA Craig & HR Craig supra* 204.
70 *Idem* 206.
71 *Idem* 211.
72 *Ibid*. This was clearly a reference to the provisions of s 27 of the Companies Act 1908 (NZ).
73 [1935] NZLR 865. See Cilliers *Dissertation* 107–110.

section were applied.[74] As a strong probability of deception existed,[75] the court held that the subsequently registered company should be restrained from using its incorporated name unless it could show strong reasons to the contrary.[76] Because the later company did not succeed to the goodwill of an existing business, it could not rely on *Dunlop Pneumatic Tyre Company Ld v Dunlop Motor Company Ld*[77] or *Tussaud v Tussaud*.[78] Since its name was not the name of the individual who had incorporated his business but the name of a street,[79] it enjoyed less protection than an individual.[80] It could not rely on the principle enunciated in *Aerators Ltd v Tollitt*[81] because the word in dispute was not an ordinary word used to describe a product and should not be monopolised by one company.[82]

Specific reliance was placed on section 27 of the Companies Act 1908 (NZ) in only two reported decisions, namely *National Timber Company Ltd v National Hardware, Timber & Machinery Company Ltd*,[83] and *In re Cuff & Thomson Ltd*.[84] In neither case was relief granted.[85] Reed J in *National Timber v National Hardware, Timber & Machinery*[86] followed *Merchant Banking Company of London v Merchants' Joint Stock Bank*[87] and held that section 27 gave a direction to the Registrar not to register two companies under the same name, whether or not the businesses carried on were the same, and that this section did not apply between two companies where both of them had already been registered under its provisions. The only remedy available was passing off.[88] In *In re Cuff & Thomson Ltd*[89] Herdman J, with reference to *Aerators v Tollitt*,[90] held that

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74 The decision in *The Stanley Works v Stanley Ironworks supra* was the most comprehensive in New Zealand on the similarity of company names, and proof that, until 1955, the law in New Zealand was the same as in England before 1948.

75 *The Stanley Works v Stanley Ironworks supra* 877. The judge relied on the English cases of *Hendriks v Montagu supra*; *Manchester Brewery Co v North Cheshire & Manchester Brewery Co (HL) supra*; *Ouvah Ceylon Estates v Uva Ceylon Rubber Estates* (appeal case) *supra*; *Ewing v Buttercup Margarine Co Ltd supra*; *Fine Cotton Spinners v Harwood Cash supra*; *Albion Motor v Albion Carriage supra*.

76 *The Stanley Works v Stanley Ironworks supra* 878.

77 (1906) 23 RPC 761.

78 *Supra*.

79 *The Stanley Works v Stanley Ironworks supra* 878.

80 *Fine Cotton Spinners v Harwood Cash supra*.

81 *Supra*.

82 *The Stanley Works v Stanley Ironworks supra* 879. The plaintiff did not have to prove actual deception because the action was in the nature of *quia timet*. See Cilliers *Dissertation* 9.

83 [1923] NZLR 1258. See Cilliers *Dissertation* 100–103.

84 [1933] NZLR s 50. See Cilliers *Dissertation* 103–104.

85 The law in New Zealand on this point, as interpreted in these decisions, was the same as the English law.

86 *Supra*. See also *McBean's Orchids (Australia) Pty Ltd v McBean's Orchids Ltd* [1982] 1 NZIPR 406.

87 *Supra*.

88 *Supra* 1268–1270. This was similar to the position under s 20 of the Companies Act 1892 (Eng). Reed J relied upon the English decisions of *Aerators v Tollitt supra*; *Ouvah Ceylon Estates Ltd v Uvah Ceylon Rubber Estates Ltd supra*; and on the decision of the Court of Appeal in England in *Manchester Brewery Company Ltd v North Cheshire & Manchester Brewery Company Ltd (CA) supra*. See also *JJ Craig Ltd v EA Craig & HR Craig supra*.

89 *Supra*.

90 *Supra*.

there was no justification for a conclusion that members of the public dealing with the applicant might be deceived into believing that they were getting the services of the objecting company where the companies were situated in different cities. The judge also held that ordinary English words should not be allowed to be monopolised.[91]

3 2 Concept of undesirability[92]

A new Companies Act,[93] promulgated in 1955, effected a number of changes.[94] The most important change was the introduction of the concept "undesirable" by section 31(4). This section provided that, except with the court's consent, a company could not be registered by a name which was undesirable in the opinion of the Registrar. Section 32 of the Companies Act 1955 (NZ) provided for the voluntary change of a company's name, subject to the Registrar's approval, as well as for the compulsory change of name, if a company had been registered inadvertently in contravention of section 31.[95]

In *South Pacific Airlines of New Zealand v Registrar of Companies*[96] the court held that sections 31 and 32 had to be read in conjunction so that the interpretation of the one could be aided by the wording of the other.[97] "Calculated to deceive" in section 31(1)(a) meant "likely to deceive", but the likelihood of deception should be limited to "deception resulting solely from similarity of names".[98] The similarity of names was "a question of fact or opinion",[99] and the legal principles to be applied to an application for registration of a name were the same as those applied to an injunction to restrain a duly registered company from carrying on business under its registered name or any other name resembling the plaintiff's name.[100] Section 34(1) conferred a very wide discretion on the Registrar. Although every name should be considered in the light of its own merits or demerits, any name that might mislead the public or a recognised section of the public in a particular locality, or would be likely to cause confusion, was undesirable, and the plaintiff's intentions, motives or purposes were

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91 *In re Cuff & Thomson Ltd supra* s 51–s 52. Herdman J also relied on the decision in *British Vacuum Cleaner Co v New Vacuum Cleaner Co supra*, which he found to be almost indistinguishable.

92 See Cilliers *Dissertation* 110–188.

93 Act 63 of 1955 (the "Companies Act 1955 (NZ)").

94 In terms of s 31(1), no company could be registered with a name identical to that of an existing company or which so nearly resembled it as to be calculated to deceive. This was the same as the position in England under the Companies Act 1929 (Eng). However, the words "carrying on business in New Zealand" were included in s 31(1) of the Companies Act 1955 (NZ).

95 Section 32 of the Companies Act 1955 (NZ) did not, however, make provision for an appeal to the court by a company which had been required by the Registrar in terms of s 2(a) to change its name because it was in contravention of s 31 of the Act. Likewise, no provision was made for an appeal by a company against the Registrar's refusal to require a company, registered subsequently with a similar name, to change its name.

96 [1964] NZLR 1. See Cilliers *Dissertation* 115–118.

97 *South Pacific Airlines of NZ v Registrar of Companies supra* 2–3. His Lordship furthermore followed the decision in *The King v The Registrar of Companies supra*.

98 *South Pacific Airlines of NZ v Registrar of Companies supra* 3.

99 *Ibid.*

100 *Idem* 3–4. McGregor J quoted, with approval, from the judgment in *National Timber v National Hardware, Timber & Machinery supra* 1270–1271.

irrelevant.[101] *Finbanco International Ltd v Registrar of Companies*[102] followed *South Pacific Airlines of NZ v Registrar of Companies*[103] both in respect of the question of when and how far the court should supervise the exercise by the Registrar of his discretion and in respect of the question of undesirability.[104] The court also held that the purpose of section 31(4) was to enable the Registrar to guard against the possibility of the public being misled in whatever way by the registration of a particular company name.[105]

One of the most important cases dealing with the statutory protection under the undesirability criterion in New Zealand is *Vicomm Systems Ltd v Registrar of Companies*.[106] Although the approach in *Toyota Motors (NZ) Ltd v Registrar of Companies*[107] and *George v Registrar of Companies*,[108] that an appeal pursuant to section 9B should be on the basis of considering the application *de novo*, was followed,[109] Tompkins J in *Vicomm Systems v Registrar of Companies*[110] disagreed with the judgments in the aforementioned cases insofar as he held that the crucial date was the date of registration of the offending name[111] and that the court could not take into account facts that occurred later.[112] In considering whether a company name was undesirable in terms of section 31(4), Tompkins J agreed that the factors listed in *South Pacific Airlines of NZ v Registrar of Companies*[113] had to be taken into account, but pointed out that these were not exhaustive.[114] On appeal, Cooke P[115] in *Vicom New Zealand Ltd v Vicomm*

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101 *South Pacific Airlines of NZ v Registrar of Companies supra* 5.

102 Unreported judgment of Quilliam J in the High Court of New Zealand, Wellington Registry, (case no 384/77) dated 1980-10-14. See Cilliers *Dissertation* 126–129.

103 *Supra*.

104 Here the court was faced with an application under the Judicature Amendment Act of 1972 for an order reviewing the decision of the Registrar requiring the plaintiff to change its name.

105 On occasion the court dealt with the question of the similarity of company names as a passing-off matter. In *Pest Control Service Ltd v McClelland* [1968] NZLR 482, the court decided not to deal with the question of *mandamus* against the Registrar to direct the defendant to change its name, and allowed an opportunity to interpret s 31(1)(a), (4) and 32 of the Companies Act 1955 (NZ) to pass by. In *New Zealand Insurance Company Ltd v New Zealand Insurance Brokers Ltd* [1976] 2 NZLR 40 there was no reference to the provisions of the Companies Act 1955 (NZ). However, the judgment contained a convenient overview of the principles and considerations applied and taken into account by the courts when they had to decide, for purposes of passing off, whether a company name was so similar as to be calculated to confuse or deceive members of the public. This was basically the same question that had to be decided under s 31(1)(a) of the Companies Act 1955 (NZ).

106 [1985] 2 NZCLC 99 291 99 296. In view of the scope of the appeal pursuant to s 9B of the Companies Act 1955 (NZ), Tompkins J found that the old s 31 and 32 of the Companies Act 1955 (NZ), and not the new sections of the Companies Amendment Act (No 2) 1983, were applicable to the appeal *in casu*. See Cilliers *Dissertation* 134–142.

107 [1979] 1 BCR 212. See Cilliers *Dissertation* 122–125.

108 [1981] 2 NZLR 237 241. See Cilliers *Dissertation* 129–133.

109 *Vicomm Systems v Registrar of Companies supra* 99, 295.

110 *Supra*.

111 *Ibid*.

112 *Ibid*.

113 *Supra* 5, followed in *George v Registrar of Companies supra*.

114 *Vicomm Systems v Registrar of Companies supra* 99, 296. It was also accepted that, if a name was calculated to deceive as contemplated in s 31(1) of the Companies Act 1955

(To be continued)

Systems Ltd[116] confirmed the view that an appeal in terms of section 9B was a hearing *de novo*[117] and assumed, without deciding, that facts occurring after the Registrar's decision should not be taken into account, except to the extent that they were reasonably foreseeable at the date of the Registrar's decision.[118] Cooke P accepted a serious risk of confusion of the public or at least a section of the public as a head of undesirability when the registration of a company name was in issue.[119]

The Companies Act 1955 (NZ) was amended in 1983.[120] The new section 31 merely provided that no company should be registered by a name which, in the opinion of the Registrar, was undesirable. Thus the question of undesirability was the only criterion, in the absence of consent, in dealing with the statutory provisions against the similarity of company names under the Companies Act 1955 (NZ), as amended.[121] The new section 32 no longer referred to a trade mark, but merely empowered the Registrar to direct a company to change its name if such company, through inadvertence or otherwise, was first registered or its new name registered which could not be registered without contravening sections 31(1), (2) or (7) of this amended Act.[122] The court in *First National Brokers Ltd v Registrar of Companies*[123] confirmed that an appeal under section 9B was a hearing *de novo*[124] and held that, since the amended sections 31 and 32 differed more in form than in substance from the old sections which they replaced, most of the principles laid down in the cases dealing with the equivalent sections under the Companies Act 1955 (NZ) before the 1983 amendments were effected, remained relevant.[125]

(NZ) before its 1983 amendment, it would nevertheless be open to the Registrar to determine that such name was undesirable in terms of s 31(4). Furthermore, a company name would be undesirable if such a name contained or resembled a registered trade mark and there was a likelihood of deception or confusion as contemplated in s 31(1) of the Companies Act 1955 (NZ) before its amendment in 1983.

115 McMullin and Bisson JJ concurred.

116 [1987] 2 NZLR 600 (CA).

117 *Vicom NZ v Vicomm Systems supra* 604.

118 *Ibid.*

119 *Idem* 605. As to the other heads of undesirability, Cooke P specifically approved of the remarks by McGregor J in *South Pacific Airlines of NZ v Registrar of Companies supra* 5.

120 See the Companies Amendment Act (No 2) of 1983.

121 Factors such as the resemblance to the name of another company, calculated to deceive, and the public interest no longer had to be considered separately.

122 There was also an extension of the time period within which the company had to comply with the Registrar's direction to change its name from 30 days to six weeks. Any party aggrieved by the decision of the Registrar by refusing to act in terms of s 32 and directing a company to change its name, could lodge an appeal in terms of s 9B of the Companies Act 1955 (NZ), as amended.

123 [1986] 3 NZCLC 99,863. See Cilliers *Dissertation* 147–151.

124 *First National Brokers v Registrar of Companies supra* 99, 866. In considering such an appeal, the court could consider all relevant material before it. The court was not restricted to material available to the Registrar or concerned with whether he had exercised his discretion properly on the material then before him.

125 *First National Brokers v Registrar of Companies supra* 99,866–99,867. Sinclair J considered the question of undesirability with reference to *South Pacific Airlines of NZ v Registrar of Companies supra* and *National Timber Co v National Hardware, Timber & Machinery Co supra*.

In regard to undesirability, Tompkins J in *Trade Consultants Ltd v Registrar of Companies*[126] adopted the approach in *South Pacific Airlines of NZ v Registrar of Companies*[127] but stated that if public deception and confusion was not manifest, the court had to determine the likelihood of confusion by considering the areas of operation and the kind of business in which the two companies were involved respectively, the nature of the names and, often, also evidence of confusion which had occurred.[128] Ongley J in *Abacus Finance Ltd v Registrar of Companies*[129] also adopted the approach in *South Pacific Airlines of NZ v Registrar of Companies*[130] and stated that where inconvenience rather than financial detriment was objected to, the degree of such inconvenience would be an important factor to be taken into account.[131] Cases such as *Pacific Life Ltd v First Pacific Life Insurances Ltd*,[132] *Charisma Waterbeds Company Ltd v Registrar of Companies*[133] and *Asia Pacific Trading Corporation Ltd v Registrar of Companies*[134] served as corroboration that the degree of inconvenience could play a vital role when the question of undesirability had to be determined.

In *Edwin Fox Condominiums Ltd v Registrar of Companies*[135] Ellis J held that, in analysing the likelihood of confusion, the court had to evaluate the commercial environment in which the entities competed.[136] Although the objector *in casu* was a society incorporated for a charitable purpose, it competed for funds and there was a real possibility that the project of the subsequently registered company would create unfavourable reactions, resulting in a decline in donations to the society.[137] Ellis J subsequently had another opportunity, this time in a

126 [1986] 1 NZIPR 706. Tompkins J followed his own judgment in *Vicomm Systems v Registrar of Companies* in determining the scope of a s 9B appeal. See Cilliers *Dissertation* 151–155.

127 *Supra* 709.

128 *Ibid*. Cf *George v Registrar of Companies supra*.

129 [1985] 2 NZLR 607 610. Ongley J (609) confirmed previous decisions regarding s 9B of the Companies Act 1955 (NZ). See Cilliers *Dissertation* 144–146.

130 *Supra*. It should be noted that this case was decided before the 1983 amendments.

131 *Abacus Finance v Registrar of Companies supra* 610–611.

132 [1988] 4 NZCLC 64,670. Wylie J (64,673–64,674) followed *Vicom NZ v Vicomm Systems* and decided the matter *de novo*, unfettered by the opinion reached by the Registrar, but not taking facts into account which occurred after the Registrar's decision, except insofar as they were reasonably foreseeable. His Lordship stated that the desirability of a name had to be decided on the facts in question. Because the evidence of actual and likely confusion and inconvenience *in casu* was so slender, it should not influence the result of the s 9B-appeal. See Cilliers *Dissertation* 159–163.

133 [1987] 3 NZCLC 99,922 99,926. Unfortunately no light was cast on what would constitute sufficient inconvenience. Williamson J (99,925) followed the same approach to s 9B as Tompkins J (see *Vicomm systems v Registrar of Companies supra* and *Trade Consultants v Registrar of Companies supra*) but accepted that, because of the wide nature of the power conferred by s 9B(2), the court should consider all the evidence before it. The date of the Registrar's decision was relevant insofar as it explained or affected the content of his decision. See Cilliers *Dissertation* 155–159.

134 [1989] 4 NZCLC 65,173. A slight degree of confusion and inconvenience is not sufficient to reject a s 9B-appeal. *In casu* the parties accepted that events subsequent to the date of the Registrar's decision could properly be taken into account. See Cilliers *Dissertation* 164–166.

135 [1989] 4 NZCLC 64,798. The appeal in terms of s 9B was once again treated as a fresh consideration of the matter (799). See Cilliers *Dissertation* 167–170.

136 *Idem* 64,800.

137 *Idem* 64,800–801. The principal object was in the public interest and for the public good.

more conventional commercial setting, to grapple with the undesirability of company names in *New Zealand Trophy Hunting Ltd v Registrar of Companies.*[138] He adopted a new approach by identifying two considerations, albeit flip sides of the same coin, in determining the question of undesirability under the amended section 31(1)(a).139 The first was whether it was undesirable to give either company a monopoly in a name that was merely descriptive of itself and, secondly, whether the potential for confusion in the particular market place was of such a nature that it was undesirable to allow both names to exist alongside each other.[140]

The interpretation of the amended sections 31(1)(a) and 32 of the Companies Act 1955 (NZ) reached a high-water mark in the seminal judgments in *Sika (NZ) Ltd v Sika Technology Ltd.*[141] In dealing with the merits[142] of the appeal,[143] Tompkins J restated the principles applicable in cases of this kind.[144] When considering whether the name was undesirable because of confusion, it should not be considered in isolation, but regard should be had to all the circumstances,

> "including the extent to which the areas of operation and the nature of the businesses [were], or [were] likely in the future to become, similar, the nature of the names, the evidence of confusion, the consequences of any confusion established, and the degree of inconvenience consequential upon requiring an existing business to change its name".[145]

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138 [1990] 5 NZCLC 66,346. See Cilliers *Dissertation* 170–173.

139 The parties were *ad idem* that on appeal the court had to treat the matter afresh and that the test for undesirability was whether there was potential for confusion between the two company names in their shared market place: *NZ Trophy Hunting v Registrar of Companies supra* 66,348.

140 Although Ellis J found that *in casu* it was undesirable to grant a monopoly in a descriptive name and that sufficient potential confusion had been established, the "very banality of the names" forced him to conclude that such potential for confusion could be dealt with adequately in the market place: *NZ Trophy Hunting v Registrar of Companies* 66,351.

141 The judgment on whether to cite the Registrar as a respondent on appeal in terms of s 9B of the Companies Act 1955 (NZ) was reported at [1991] MCLR 344. The judgment on undesirability and whether Sika Technology Ltd should change its name was reported at [1992] MCLR 264. See Cilliers *Dissertation* 174–182.

142 In deciding the procedural issue, Tompkins J approved of the general practice for the Registrar to be cited as a respondent in appeals to the court relating to company names under section 9B. Although the Registrar would be required to act in accordance with natural justice, his function was administrative rather than judicial or quasi-judicial: *Sika (NZ) v Sika Technology* (1991) *supra* 348–349. See also *NZ Trophy Hunting v Registrar of Companies supra*; *Asia Pacific v Registrar of Companies supra.*

143 Simultaneous with the hearing of the appeal in *Sika (NZ) v Sika Technology* (1992) *supra*, Anderson J in *Dollar Rent A Car Ltd v Dollar Save Car Hire (NZ) Ltd* [1922] MCLR 396 397 accepted that when determining an appeal in terms of s 9B, the court should proceed by way of a hearing *de novo*, and that the more restrictive vision of traditional review proceedings as expounded in *South Pacific Airlines of NZ v Registrar of Companies* and *The King v The Registrar of Companies* should not be followed. The court found (399) that it was undesirable to have a name registered "for the purpose of preventing trade by others rather than facilitating trade by itself or oneself". Cf *George v Registrar of Companies.*

144 *Sika (NZ) v Sika Technology* (1992) *supra* 266–267. The judge referred only to *South Pacific Airlines of NZ v Registrar of Companies supra* and to his own judgment in *Vicomm Systems v Registrar of Companies supra.* Unfortunately no reference was made to the approach in *NZ Trophy Hunting v Registrar of Companies supra.*

145 *Sika (NZ) v Sika Technology* (1992) *supra* 267. The factors or circumstances mentioned were not stated to be a *numerus clausus.*

It was a question of fact and degree, the court weighing up all the aforementioned factors, whether a likelihood of sufficient confusion had been established so as to justify a change of the company's name.[146] Tompkins J concluded that the name was not undesirable on the basis that the degree of confusion that existed was not substantial.[147]

3 3 Current position[148]

In 1993, the law relating to names of companies in New Zealand was changed significantly. In terms of the New Zealand Companies Act of 1993, a name has to be reserved before the Registrar may register a company under such name or register such a change of name.[149] However, the Registrar may not reserve a name if its use would contravene an enactment, or if it is identical or almost identical to the name of another company or other body corporate or the name which is reserved for another company,[150] or if it is offensive.[151] The Registrar's decision regarding the reservation of a name is appealable[152] and may be revised even after registration if it appears on reasonable grounds that the name should not have been reserved in the first place.[153]

Under the Companies Act 1993 (NZ) the Registrar also has the power to direct a company to change its name where, subsequent to name reservation being granted,[154] the Registrar believes on reasonable grounds that the name should not have been reserved.[155] The Registrar should not reserve a name if it is in breach of section 22(2) of this Act. However, he may not direct a change of a similar company name, because of his limited discretion under the Companies Act 1993 (NZ) compared with that under the Companies Act 1955 (NZ), as amended. The Registrar will probably issue directions under section 24(1) of the Companies Act 1993 (NZ) only where, through an oversight, two identical or almost identical

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146 *Sika (NZ) v Sika Technology* (1992) *supra* 267. In *The Mount Cook Group Ltd v Mt Cook Marketing Ltd* [1993] MCLR 322 324 326 Fraser J also considered the matter *de novo*, attached weight to the Registrar's opinion, and followed the principles stated by Tompkins J in *Sika (NZ) v Sika Technology* (1992) *supra* 264.

147 There was no risk of loss of custom because of the distinctly different areas of operations of the two companies: *Sika (NZ) v Sika Technology* (1992) *supra* 269. A further appeal to the Court of Appeal in *Sika (NZ) v Sika Technology Ltd & The Registrar of Companies* [1994] MCLR 47 was also dismissed.

148 See Cilliers *Dissertation* 193–210.

149 S 20 of Act 105 of 1993 (the "Companies Act 1993 (NZ)"). See also s 31 of the Companies Act 1955 (NZ), as amended by the Companies Amendment Act 1993 (NZ).

150 In *Flight Centre NZ Ltd v Registrar of Companies* [1994] MCLR 443 the phrase "almost identical" was held to mean names in which the key words appeared and the order in which such key words appeared so as to make them almost indistinguishable.

151 S 22(2) of the Companies Act 1993 (NZ); see also s 32(2) of the Companies Act 1955 (NZ), as amended by the Companies Amendment Act 1993 (NZ). In practice the Registrar refers to *South Pacific Airlines of NZ v Registrar of Companies supra* 5 to establish whether a name is offensive. These provisions are also applicable to overseas companies that wish to carry on business in New Zealand: s 333(4) of the Companies Act 1993 (NZ).

152 S 370 of the Companies Act 1993 (NZ).

153 See Part III, par 7 2 of the Registration Manual of the Commercial Affairs Division of the Department of Justice ("Registration Manual").

154 For the criteria for the reservation of a name in terms of s 22(2) of the Companies Act 1993 (NZ), see Part III, par 9–11 of the Registration Manual.

155 S 24(1) of the Companies Act 1993 (NZ).

names have been registered.[156] In such a case, the more recently registered company would be the one directed to change its name.[157] Companies with closely similar names are permitted to register under the Companies Act 1993 (NZ). This Act makes no provision for a register to protect company names, does not prohibit similar company names, and creates no proprietary rights to a name once granted.[158] The protection of the right to a company name, to trade under that name or to prevent another company from using a similar company name, must be sought under the law relating to trade marks, copyright, passing off and deceptive or misleading conduct in terms of the Fair Trading Act 1986.

4 INDIA[159]

4 1 Historical overview

Prior to 1866, the position in India regarding company names was similar to that which prevailed in England before the enactment of the Companies Act 1856 (Eng). The Companies Act of 1866[160] was the first Companies Act dealing with company names in India and was almost identical to the Companies Act 1856 (Eng), on which it was based. The Companies Act 1866 (India) in turn formed the basis of the Companies Act of 1882[161] and the Companies Act of 1913.[162]

Although no reported cases could be found dealing with similarity of company names under the Companies Act 1913 (India) or its predecessors as such, when the matter did come before the court, reliance was placed on English decisions dealing with the interpretation of the relevant English statutory provisions as well as with the law of passing off and trade marks.[163]

4 2 Current position[164]

The Companies Act of 1956[165] reflects the current position in India.[166] Section 20(1) of this Act is almost identical to section 17 of the Companies Act 1948 (Eng).[167] Section 20(2) of the Companies Act 1956 (India), however, goes

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156 McDonald "Company Names" in *Morison's company and securities law* (vol 2) (1994) C/305.

157 *Ibid*. A person who is aggrieved by the Registrar's direction to change a company name, or his refusal to direct a change of name, also has a right of appeal to the court: s 370 of the Companies Act 1993 (NZ).

158 Reg 8(1) of the Companies Act 1993 (NZ) Regulations 1994. See also Reg 6(1) of the Companies Act 1955 (NZ) Regulations 1994 and Jones *Company law in New Zealand: a guide to the Companies Act* 1993 (1993) 11.

159 See Cilliers *Dissertation* 222–251.

160 Act 10 of 1866 (the "Companies Act 1866 (India)").

161 Act 6 of 1882.

162 Act 7 of 1913 (the "Companies Act 1913 (India)").

163 See *National Bank of India v National Bank of Indore* AIR 1923 Bombay 119 120 and the English cases referred to there. See Ahuja "Corporate name infringement in India" 1995 *Trademark World* 46 49 where he refers to the healthy trend of Indian courts restraining infringing companies from including another's trademark in their company names or adopting a similar company name.

164 See Cilliers *Dissertation* 226–247.

165 Act 1 of 1956 (the "Companies Act 1956 (India)").

166 The Companies Act 1956 (India) has been amended subsequently, but such amendments do not relate to the provisions regarding company names.

167 The only difference is that, while the Indian statute provides that no company shall be registered by a name which, in the opinion of the central government, is undesirable, the English statute provided for the exercise of a discretion by the Board of Trade.

further than the Companies Act 1948 (Eng) by providing that, without detracting from the generality of the power conferred on the central government, a name may be deemed to be undesirable by the central government if it is identical with, or too nearly resembles, the name by which a company already in existence has been previously registered.[168] In terms of section 21 of the Companies Act 1956 (India) a company may voluntarily change its name if it passes the necessary special resolution and obtains the approval of the central government,[169] which will be withheld if the proposed name is, *inter alia*, undesirable. Section 22(1) provides that if, through inadvertence or otherwise, a company is registered by a name which, in the opinion of the central government, is identical with, or too nearly resembles, the name by which another company has already been registered, the first-mentioned company may, by ordinary resolution and with the required approval of the central government, change its name and is obliged to do so on direction by the central government.[170]

Because there is no statutory definition of "undesirable", the central government in India had to give an indication of its policy in considering whether a particular company name was undesirable or not. Accordingly, guidelines were published in 1960[171] and 1962,[172] both sets of which are still in force.[173] These guidelines list certain circumstances in which a company name would be regarded as undesirable.[174] An important prohibition contained in the guidelines (which is relevant where more than one language is spoken in a particular country such as India) is that an exact translation of a company name is regarded as undesirable.[175] It should also be borne in mind that, in a multi-language country, the pronunciation of English words by local non-English speaking people could increase the chances of confusion and therefore have an impact on the question whether a particular name is undesirable or not. In *Simatul Chemical Industries Pvt Ltd v Cibatul Ltd*[176] Thakkar J was of the view that, where people spoke different languages, they could not be expected to notice minor differences in names where the names were similar in overall structure and

168 The central government's wide discretion in deciding on the undesirability of a name has not been impaired at all by s 20(2) of the Companies Act 1956 (India). This is similar to the unfettered discretion conferred on the Board of Trade in England.

169 See, in general, Iyengar *The Companies Act, 1956* (Vol 1) (1986, with 1990 supplement) 149–154 for the procedure to be followed by a company to change its name.

170 Because of their nature and wide terms, s 20 and 22 of the Companies Act 1956 (India) took the whole question of similarity of company names out of the hands of the courts and clothed the central government with the power and discretion to prevent similar company names. Although the court cannot be approached directly in terms of s 20 and 22 of the Companies Act 1956 (India), passing-off and injunction proceedings will still avail the aggrieved company. See Singh *EE Jhirad's law relating to private companies* (1991) 24–25.

171 Circular Letter No 10(1) – RS/60 dated 1960–04–01.

172 Central Government Circular No W (19) – R5/61 dated 1962-05-05.

173 The 1960 and 1962 guidelines in effect render s 20(2) of the Companies Act 1956 (India) unnecessary. Although the guidelines are useful to a certain extent, it is unfortunate that they contain certain inherent contradictions which detract from their usefulness. See Cilliers *Dissertation* 229–234 for a discussion of the guidelines and examples.

174 It is clear that the guidelines are not exhaustive and do not have the force of statute.

175 This should also be considered in South Africa where there are eleven official languages and where a company is not registered in more than one name.

176 AIR 1978 Gujarat 216. See Cilliers *Dissertation* 238–242.

phonetically.[177] The decision in *Simatul v Cibatul* is important because it not only firmly established the law that an injunction was available to an existing company to protect itself against the use of a similar name by another company,[178] but emphasised the duality of the objective of preventing the later company from using a similar name, namely, to protect the existing company's right to use its name to the exclusion of other companies, and to protect the public or customers of the existing company against deception and confusion.[179] Because of the need to protect the public or customers, the court will issue an injunction even if the second company innocently selected a fancy name which is deceptively similar to the name of an existing company.[180] The test applied to consider deceptive similarity closely resembles the test of the likelihood of deception or confusion in trade mark cases.[181]

In the other relevant decision in India on this topic, *KG Khosla Compressors Ltd v Khosla Extraktions Ltd*,[182] Wadhwa J held, *inter alia*, that a person did not have a right to have a company registered in a name which happened to be his own name. The right to incorporate a company in a particular name was a statutory right which was limited by section 20 of the Companies Act 1956 (India).[183] Furthermore, Wadhwa J found that the central government had no power to grant any injunction to restrain a company from using a name similar to that of another company even though the offending company was disobeying a direction under section 22 of the Companies Act 1956 (India) to change its name. The penalty provided for in terms of section 22(2) of the said Act was the only remedy.[184] But the aggrieved company could still institute proceedings in the court for passing off or an injunction to restrain the use of the offending name.[185]

(To be continued)

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177 *Simatul v Cibatul supra* 220.

178 In *Simatul v Cibatul supra* 219 Thakkar J stated that the test to be applied in deciding the question of the similarity of company names was that of an average person with average memory and imperfect recollection.

179 *Simatul v Cibatul supra* 225.

180 *Ibid.* There are statutory limits to the right that a person has to have a company registered in a name which happens to be his own name.

181 See *Corn Products Refining Co v Shangrila Food Products Ltd* AIR 1960 SC 142.

182 AIR 1986 Delhi 181. See also Bakshi "Company names and legal restrictions" 1986 *Chartered Secretary* 835. See Cilliers *Dissertation* 243–247.

183 *KG Khosla compressors v Khosla Extraktions supra* 194.

184 If a company fails to comply with any direction given under s 22(1) of the Companies Act 1956 (India), the company and every director who is in default, are liable to a maximum fine of 100 rupees for every day during which the default continues.

185 *Ibid.*

Herroeping en wysiging van testamente

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SUMMARY

Revocation and amendment of wills

The Law of Succession Act 7 of 1953 does not make provision for formalities when revoking a will. The common law, which provided for revocation without any formalities in certain recognised instances, therefore applies. These instances are express and tacit revocation in a later will or by means of ademption and revocation by destruction. Since the amendment of the Act by Act 43 of 1992, the court may declare a will revoked or partially revoked if the testator's intention is clear. The Amendment Act has also changed certain powers of the Master in this regard.

Act 7 of 1953 provides for formalities to be complied with when a testator wishes to alter his will. These are the same as for the execution of a will and the court is empowered to condone a defect in the compliance with these formalities. The court may also declare a will to be partially revoked, with the effect that alterations may, in certain circumstances, be seen as partial revocation.

1 INLEIDING

Aangesien 'n testament 'n eensydige regshandeling is,[1] kan 'n testateur te eniger tyd voor sy dood sy testament wysig of herroep. Die formele vereistes vir 'n geldige wysiging verskil egter van die vereistes vir 'n geldige herroeping en dit is ook moontlik dat 'n testament gedeeltelik herroep kan word.[2] Dit is selfs moontlik dat 'n wysiging as gedeeltelike herroeping beskou kan word.[3]

2 HERROEPING VAN TESTAMENTE

2 1 Inleiding

'n Testateur kan net deur herroeping[4] sy regsgeldige testament van die regskrag daarvan ontneem. Herroeping kan slegs op een van die gemeenregtelik erkende wyses geskied.[5] Dié wyses behels (1) uitdruklike herroeping in 'n latere testament;

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1 Die feit dat die medewerking van getuies nodig is vir die geldige verlyding van 'n testament, beteken nie dat 'n testament 'n meersydige regshandeling is nie. Die getuies attesteer slegs die testateur se handtekening: *Sterban v Dixon* 1968 1 SA 322 (K).

2 De Waal, Schoeman en Wiechers *Erfreg studentehandboek* (1992) 62. Sien ook die bespreking hieronder.

3 Sien die bespreking hieronder.

4 Schoeman "Herroeping van 'n testament deur vernietiging of informele handeling" 1990 *De Jure* 216; Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 187; De Waal, Schoeman en Wiechers 62.

5 Sonnekus "Vereistes vir testamentsherroeping" 1982 *TSAR* 110; Schoeman 1990 *De Jure* 216; Schoeman "Testamente en regterlike diskresies" 1992 *De Jure* 427; De Waal, Schoeman en Wiechers 62.

(2) fisiese optredes waaruit 'n herroepingsbedoeling mag blyk; en (3) stilswyende herroeping.[6]

Artikel 2A van die Wet op Testamente 7 van 1953 (ingevoeg deur die Wet tot Wysiging van die Erfreg 43 van 1992) maak voorts voorsiening daarvoor dat die hof in bepaalde omstandighede 'n testament as herroepe kan verklaar.[7]

2 2 Uitdruklike herroeping

'n Testateur kan 'n geldige testament by wyse van verlyding van 'n latere testament, kodisil, huweliksvoorwaardekontrak of ander behoorlik verlyde dokument herroep.[8] Die latere dokument of testament wat die *clausula revocatoria* bevat, moet natuurlik geldig wees[9] en 'n herroepingsbedoeling moet duidelik daaruit blyk ten einde effektiewe herroeping daar te stel.[10]

Hoewel uitdruklike, mondelinge herroeping wat voor getuies plaasgevind het[11] in die gemenereg erken is, word dit nie in ons reg erken nie.[12] Buiten uitdruklike, skriftelike herroeping, word fisiese handelinge waaruit 'n herroepingsbedoeling blyk, ook as uitdruklike herroeping erken.[13] Voorbeelde hiervan is die opskeur, verbranding of enige ander wyse van vernietiging van die testament.

2 3 Fisiese optredes

Enige fisiese aantasting van die testament waaruit die herroepingsbedoeling van die testateur blyk, is gemeenregtelik as 'n geldige herroepingshandeling erken[14] en word gevolglik ook in ons reg aanvaar.[15] In hierdie verband is die begrip

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6 Sonnekus 1982 *TSAR* 235–236. Vir 'n volledige bespreking, sien Schoeman *Wysiging en herroeping van testamente* (LLD-proefskrif 1990 UP).

7 Schoeman 1992 *De Jure* 428; Schoeman en Van der Linde "Artikel 2(3) en 2A van die Wet op Testamente – kondonasiebevoegdheid van die hof – verlyding en herroeping van testamente" 1995 *THRHR* 518; De Waal, Schoeman en Wiechers 68. Sien ook die bespreking hieronder.

8 *Gentle v Ebden's Executors* 1913 AD 199; *Kleyn v Estate Kleyn* 1915 AD 527 537; *Ex parte Estate Cooper* 1943 NPD 217; De Waal, Schoeman en Wiechers 64; Van der Merwe en Rowland 188.

9 'n Testament sal dus aan al die verlydingsvereistes van a 2 van die Wet op Testamente 7 van 1953 moet voldoen. Sien *Ex parte Mathers* 1932 CPD 149; *Mellish v The Master* 1940 TPD 271; *Ex parte Beckmann* 1952 2 SA 106 (N); Van der Merwe en Rowland 188. 'n Dokument wat kragtens a 2(3) van die wet as geldige testament van 'n erflater aanvaar is, sal natuurlik ook die herroeping van 'n vorige testament tot gevolg hê ten spyte daarvan dat dit nie aan die geldigheidsvereistes van a 2 voldoen nie. Sien Schoeman en Van der Linde 1995 *THRHR* 520. Vir 'n bespreking van die hof se kondonasiebevoegdheid kragtens a 2(3), sien Schoeman 1992 *De Jure* 423; Jamneck "Die invloed van artikel 2(3) van die Wet op Testamente 7 van 1953 op die erkende beginsels van rektifikasie en interpretasie van testamente" 1994 *THRHR* 596; Schoeman en Van der Linde 1995 *THRHR* 520; Du Toit "Artikel 2(3) van die Wet op Testamente 7 van 1953 en substansiële nakoming van formaliteite: Vier uitsprake in perspektief" 1996 *THRHR* 272.

10 *Gentle v Ebden's Executors supra*; *Kleyn v Estate Kleyn supra*; De Waal, Schoeman en Wiechers 64.

11 Van der Merwe en Rowland 189.

12 *Louw v Engelbrecht* 1979 4 SA 841 (O) 848; Cronjé en Roos *Erfreg vonnisbundel* (1993) 62.

13 *Marais v The Master* 1984 4 SA 288 (D) 291; Sonnekus 1982 *TSAR* 236; Schoeman 1990 *De Jure* 216 ev; Van der Merwe en Rowland 189; De Waal, Schoeman en Wiechers 65.

14 Sonnekus 1882 *TSAR* 236; Schoeman 1990 *De Jure* 216 ev.

15 *Van Niekerk v Van Niekerk* (1898) 15 SC 229; *Oosthuizen v Sharp* 1935 WLD 22; *Senekal v Meyer* 1975 3 SA 372 (T); *Marais v The Master supra*.

"vernietiging" dikwels gebruik, maar die begrip is wyd geïnterpreteer sodat ook gevalle waar die testament in sy geheel gekanselleer is of waar die testateur of getuies se handtekeninge uitgeskeur of doodgekrap is, as "vernietiging" en dus as geldige herroeping beskou is.[16]

Na die inwerkingtreding van Wet 7 van 1953 (voor die wysiging in 1992) het verwarring ontstaan rondom gevalle waar die testateur strepe deur die hele testament getrek het. Die rede vir die verwarring was die feit dat artikel 2(1)(b) bepaal het dat enige "wysiging" in 'n testament, waarby 'n "skrapping" ingesluit is, aan die formaliteite vir verlyding van 'n testament moet voldoen. Die wet het egter nie "skrapping" omskryf nie, met die gevolg dat daar betoog is dat 'n deurhaling van die hele testament as "skrapping" beskou moet word.[17]

In *Senekal v Meyer* het die hof dit egter duidelik gestel dat artikel 2(1)(b) slegs verwys na skrappings *in* 'n testament en nie na skrapping *van* die hele testament nie. Die Wet tot Wysiging van die Erfreg 43 van 1992 het hierdie posisie ook nou duideliker gemaak deur "skrapping" so te omskryf dat dit nie 'n skrapping insluit wat herroeping van die hele testament beoog nie.[18]

2 4 Stilswyende herroeping

Stilswyende herroeping vind plaas indien 'n testateur in 'n latere, geldige testament bepalings maak wat strydig met die bepalings in sy aanvanklike testament is.[19] Teenstrydige testamente word sover moontlik saamgelees,[20] maar die latere testament[21] word geag die vroeëre een te herroep vir sover dit botsende bepalings bevat.[22]

Die testateur kan 'n legaat ook stilswyend by wyse van *adempsie* herroep.[23] Dit beteken dat, indien die testateur die voorwerp van 'n legaat vrywillig vervreem, die bepalings in sy testament wat oor die legaat handel as herroepe geag word.[24] Die bedoeling van die testateur om die betrokke bepaling te herroep, moet steeds duidelik blyk.[25]

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16 Met "gekanselleer" word bedoel dat die erflater strepe deur die hele testament getrek het, of "gekanselleer" (of iets soortgelyks) oor die hele testament geskryf het. Die uitskeur of uitkrap van handtekeninge het tot gevolg dat die dokument nie meer 'n geldige testament is nie omdat die formaliteite nie nagekom is nie. Die testament word gevolglik as herroep beskou. Sien *Senekal v Meyer supra*; Sonnekus 1982 *TSAR* 236 ev; Schoeman 1990 *De Jure* 219–220.

17 Sien *Senekal v Meyer supra.*

18 Sien die bespreking van "wysiging" hieronder.

19 Sonnekus 1982 *TSAR* 235; De Waal, Schoeman en Wiechers 69; Van der Merwe en Rowland 192.

20 *Re Estate Whiting* 1910 TPD 527; *Ex parte Estate Adams* 1946 CPD 267; *Price v The Master* 1982 3 SA 301 (N); Van der Merwe en Rowland 192.

21 Datering van 'n testament is nie 'n geldigheidsvereiste nie en dit kan dus gebeur dat 'n testateur meerdere ongedateerde testamente nalaat. Om te bepaal welke een die laaste testament is, word *aliunde* getuienis toegelaat: *Ex parte Tarr* 1941 CPD 104; *Moskowitz v The Master* 1976 1 SA 22 (K).

22 *Vimpany v Attridge* 1927 CPD 113; *Louw v Engelbrecht supra*; Sonnekus 1982 *TSAR* 235; Schoeman 1988 *De Jure* 144; De Waal, Schoeman en Wiechers 69.

23 *Estate Le Roux v Le Roux supra*; *Sorge v Estate Preuss* 1933 CPD 61; De Waal, Schoeman en Wiechers 70.

24 *Estate Le Roux v Le Roux* 1918 CPD 417; *Oelrich v Beck* 1920 OPD 209; *Sorge v Estate Preuss supra*; *Barrow v The Master* 1960 3 SA 253 (OK); De Waal, Schoeman en Wiechers 70.

25 *Ibid.*

2 5 Artikel 2A van Wet 7 van 1953

Soos ons tot dusver gesien het, word geen formaliteite vereis wanneer 'n testament op een van die gemeenregtelik erkende wyses hierbo genoem, herroep word nie. Die vraag het egter ontstaan of sogenaamde "informele herroepingswyses" ook sonder nakoming van enige formaliteite erken kan word.[26] Hierdie wyses sluit die gevalle in waar die testateur in 'n dokument wat nie behoorlik verly is nie aandui dat hy sy testament herroep of waar hy byvoorbeeld voor op die testament of in die kantlyn "herroep" skryf.[27]

Skrywers en die regspraak was verdeeld oor hierdie aangeleentheid.[28] Sonnekus[29] se standpunt dat informele herroepingswyses erken behoort te word, is byvoorbeeld met goedkeuring aangehaal in *Marais v The Master*,[30] terwyl 'n teenoorgestelde standpunt uit *Louw v Engelbrecht* blyk.[31]

Die probleme wat met die sogenaamde informele herroepingswyses ondervind is, word hopelik nou ondervang deur die Wysigingswet tot die Erfreg 43 van 1992 se invoeging van artikel 2A tot Wet 7 van 1953. Dié artikel bepaal:

> "Indien 'n hof oortuig is dat 'n erflater –
>
> (a) 'n geskrewe aanduiding op sy testament aangebring het of voor sy dood sodanige aanduiding laat aanbring het;
>
> (b) 'n ander handeling met betrekking tot sy testament verrig het of voor sy dood sodanige handeling laat verrig het wat uit die voorkoms van die testament waarneembaar is; of
>
> (c) 'n ander dokument opgestel of voor sy dood sodanige dokument laat opstel het,
>
> waardeur hy bedoel het om sy testament of 'n gedeelte van sy testament te herroep, verklaar die hof die testament of die betrokke gedeelte na gelang van die geval, herroepe te wees."

Die basiese vraag is dus of die testateur bedoel het om sy testament te herroep en nie of hy dit by wyse van 'n erkende herroepingshandeling gedoen het nie.[32] Sy bedoeling moet uit die voorkoms van die testament of uit 'n ander dokument blyk. Skriftelike herroeping of een of ander fisiese optrede wat uit die voorkoms van die testament blyk, is dus steeds 'n vereiste en mondelinge herroeping is nie moontlik nie.[33] Die wet dek dus nou die gevalle waaroor daar vroeër twyfel bestaan het, dit wil sê die sogenaamde "informele wyses" wat hierbo genoem is, soos waar die testateur op die eerste bladsy of in die kantlyn "gekanselleer" skryf. Die wet dek ook 'n aantal gevalle wat vroeër as "vernietiging" beskou is, naamlik waar die testateur byvoorbeeld sy handtekening of die getuies se handtekeninge uitskeur of uitbrand of waar hy oor die hele testament "gekanselleer" skryf, strepe daardeur trek of dit opskeur. Omdat die testament in hierdie gevalle nog bestaan en die handeling daaruit waarneembaar is, is die wet van toepassing. In hierdie gevalle moet daar gevolglik aansoek gedoen word om 'n hofbevel wat

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26 Sien Sonnekus 1982 *TSAR* 230 ev; Schoeman 1990 *De Jure* 222.

27 Dié gevalle sluit dus nie die gevalle in waar die testateur dwarsoor die hele testament "gekanselleer" skryf of strepe daardeur trek, soos hierbo bespreek nie.

28 Vir 'n volledige opsomming van die standpunte, sien Schoeman 1990 *De Jure* 222 ev.

29 1982 *TSAR* 230 ev.

30 1984 4 SA 288 (D) 293. Dit wil egter voorkom asof hierdie opmerkings bloot *obiter* gemaak is – sien Schoeman 1990 *De Jure* 225.

31 1979 4 SA 841 (O) 848.

32 Cronjé en Roos 62.

33 *Ibid.*

die testament of 'n gedeelte daarvan as herroepe verklaar. Daar word dus gepoog om alle twyfel en alle meningsverskille[34] oor die aangeleentheid uit die weg te ruim.

Die wet raak nie die erkende gemeenregtelike gevalle waar herroeping uitdruklik (in 'n ander geldig verlyde dokument of testament) of stilswyend plaasgevind het nie.[35] In hierdie gevalle kan die Meester dus steeds die besluit neem oor aanvaarding al dan nie van die testament.

Met die eerste oogopslag raak artikel 2A ook nie die gevalle waar die testateur die hele testament fisies vernietig[36] het nie – met ander woorde waar die testament nie meer bestaan sodat die fisiese optrede daaruit waarneembaar is nie.

In hierdie verband is dit egter belangrik om die bepalings van artikel 8(4A) van die Boedelwet 66 van 1965 in gedagte te hou. Dié bepaling is deur die Wet tot Wysiging van die Erfreg ingevoer omdat die Meester nie getuienis aangaande die testateur se *animus* kan aanhoor nie – dit is die taak van die hof.[37] Dié artikel bepaal dat die Meester, by die neem van 'n besluit aangaande die aanvaarding van 'n testament, nie die gemeenregtelike vermoedens in ag mag neem nie.[38] Die gemeenregtelike vermoedens waarna hier verwys word, is die volgende:

(1) Indien daar bewys word dat die testateur sy testament vernietig het, is daar 'n weerlegbare vermoede dat hy die *animus revocandi* gehad het.[39]

(2) Indien 'n testateur sy testament of 'n kopie daarvan in sy besit gehad het, maar dit na sy dood nie gevind kan word nie, word weerlegbaar vermoed dat hy die *animo revocandi* vernietig het.[40]

Veral die tweede vermoede is hier van belang. Die effek van artikel 8(4A) saamgelees met artikel 2A soos hierbo uiteengesit, beteken dat die Meester nie besluite kan neem oor 'n geval waar 'n testament of 'n kopie wat in die testateur se besit was, nie gevind kan word nie omdat hy nie die vermoede aangaande die *animus* mag oorweeg nie. Aangesien die vernietigingshandeling hand aan hand gaan met die bedoeling om die testament te herroep,[41] kan die Meester nie aanvaar dat die testament vernietig is sonder om die bedoeling in ag te neem nie. Aangesien die Meester nou nie meer toegelaat word om te vermoed dat die testateur die testament *animo revocandi* vernietig het nie, moet die hof ook oor hierdie gevalle beslis. Waar die Meester dus vroeër kon vermoed dat 'n testament *animo revocandi* herroep is en dié vermoede dan deur 'n belanghebbende party weerlê moes word, word 'n swaarder las nou op die belanghebbende geplaas.[42] Waar die belanghebbende wil aantoon dat 'n testateur sy testament of

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34 Sien *Louw v Engelbrecht supra*; *Marais v The Master supra*; Sonnekus 1982 *TSAR* 242; Schoeman 1990 *De Jure* 224.

35 Die wysigingswet verklaar uitdruklik in a 12 wat a 8(4) van die Boedelwet 55 van 1965 wysig, dat die Meester wel herroeping deur 'n latere testament in ag mag neem.

36 "Vernietig" word hier in die eng sin gebruik – maw sodanig vernietig deur dit op te skeur of te verbrand dat dit nie meer bestaan nie.

37 Cronjé en Roos 68.

38 A 12 van Wet 43 van 1992 wysig a 8(4) van die Boedelwet 66 van 1965 deur a 8(4A) in te voeg.

39 Voet 28 4 4.

40 *Fram v Fram's Executrix* 1947 1 SA 787 (W); *Davis v Steel and Eriksen* 1948 3 SA 177 (W). Die vermoede kom ter sprake omdat die Meester gemagtig word om 'n duplikaat van 'n testament te aanvaar (a 8(4B) van Wet 66 van 1965).

41 Sien bv *Van Niekerk v Van Niekerk supra*; *In re Odendaal* (1899) 16 SC 271.

42 Sien Schmidt *Bewysreg* (1982) 43 ev.

'n kopie daarvan *animo revocandi* vernietig het, sal hy 'n aansoek by die hof moet bring en moet bewys dat die testateur die *animus* gehad het om sy testament te herroep.

Neem 'n praktiese voorbeeld. Gestel 'n kopie van 'n testateur se testament wat in sy besit was, kan nie gevind word nie. Voor die wysigingswet sou die Meester weerlegbaar vermoed het dat die testateur die testament *animo revocandi* herroep het. 'n Belanghebbende kon dan in 'n hofaansoek getuienis tot die teendeel aanvoer ten einde die vermoede te weerlê en die testament te laat geld. Tans sal 'n belanghebbende by die hof 'n bevel moet verkry indien hy verlang dat die testament herroepe verklaar moet word. Hierdie aansoek sal op die gemeenregtelike grond van vernietiging gebaseer moet word, aangesien artikel 2A nie voorsiening maak vir 'n geval waar die testateur die testament of 'n kopie in sy besit gehad het en dit nie meer gevind kan word nie. (Dié artikel maak slegs voorsiening vir gevalle waar die herroeping uit die testament of 'n ander dokument blyk.) Die belanghebbende sal dus moet bewys dat die testament nie gevind kan word nie, waarop die hof sal vermoed dat die testateur dit *animo revocandi* vernietig het. Daar vind dus 'n verskuiwing van partye plaas. Vroeër moes die party wat die testament wou laat geld, 'n hofaansoek bring terwyl die party wat die testament herroepe verklaar wil hê, nou die aansoek moet bring.[43]

Om op te som: Die Meester kan uitdruklike of stilswyende herroeping in 'n latere testament aanvaar. Enige ander wyse van herroeping, hetsy dit onder die gemeenregtelike begrip "vernietiging" tuisgebring kan word, of as een van die sogenaamde "informele wyses" beskou word, moet deur die hof hanteer word.

3 WYSIGING VAN TESTAMENTE

3 1 Inleiding

Anders as by die herroeping van testamente, word formaliteite wel by die wysiging van 'n testament vereis. "Wysiging" word omskryf as "'n skrapping, byvoeging, verandering of tussenskrif".[44]

3 2 Formaliteite by die wysiging van testamente

Die formaliteite waaraan voldoen moet word wanneer 'n testament *na* die verlyding daarvan[45] gewysig word, is presies dieselfde as die formaliteite vir die aanvanklike verlyding van 'n testament. Artikel 2(1)(b) van die Wet op Testamente 7 van 1953 bepaal:

> "Behoudens die bepalings van artikel 3*bis* –
>
> (b) is geen wysiging wat in 'n testament wat op of na genoemde datum verly is, en na verlyding daarvan aangebring word, geldig nie tensy –

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43 Daar rus dus nou 'n bewyslas op die belanghebbende wat die testament herroepe wil sien. Dié las is swaarder as die weerleggingslas wat hy vroeër gehad het. Aangesien hier met 'n feitelike vermoede gewerk is, het dit vroeër bloot 'n weerleggingslas op die belanghebbende geplaas en nie 'n egte bewyslas nie – sien Schmidt 43 ev asook 165. Mi is dit 'n ope vraag of die blote feit dat die Meester nie getuienis kan aanhoor nie, genoegsame rede is om eerstens die belanghebbende se bewyslas te verswaar en tweedens om 'n praktyksreëling wat baie lank goed gewerk het, te wysig.

44 A 1 van Wet 7 van 1953.

45 Geen formaliteite word vereis vir wysigings wat tydens die verlydingsproses aangebring word nie, maar aangesien weerlegbaar vermoed word dat enige wysiging *na* verlyding aangebring is (a 2(1)(b)(2)), word slegs die posisie by wysiging na verlyding bespreek.

(i) die wysiging deur die handtekening van die erflater of deur die handtekening van iemand anders in sy teenwoordigheid en in opdrag van hom aangebring, bevestig word; en

(ii) bedoelde handtekening in teenwoordigheid van twee of meer bevoegde getuies wat gelyktydig teenwoordig is, deur die erflater of deur bedoelde ander persoon aangebring word of deur die erflater en, indien dit deur bedoelde ander persoon aangebring word, ook deur daardie ander persoon erken word; en

(iii) die wysiging ook bevestig word deur die handtekeninge van bedoelde getuies in teenwoordigheid van die erflater en van mekaar aangebring en indien die wysiging deur die handtekening van bedoelde ander persoon bevestig word, ook in teenwoordigheid van bedoelde ander persoon; en

(iv) indien die wysiging deur die merk van die erflater of die handtekening van iemand anders in sy teenwoordigheid en in opdrag van hom aangebring, bevestig word, 'n kommissaris van ede op die testament sertifiseer dat hy homself oortuig het van die identiteit van die erflater en dat die wysiging op versoek van die erflater aangebring is: Met dien verstande dat –

(aa) die wysiging in die teenwoordigheid van die kommissaris van ede ingevolge subparagrawe (i) en (iii) bevestig word en die betrokke sertifikaat so gou doenlik nadat die wysiging aldus bevestig is, aangebring word; en

(bb) indien die erflater sterf nadat die wysiging ingevolge subparagrawe (i) en (iii) bevestig is maar voordat die kommissaris van ede die betrokke sertifikaat aangebring het, die kommissaris van ede so gou doenlik hierna sy sertifikaat aanbring of voltooi."

Enige "wysiging" van 'n testament moet dus deur die testateur en getuies "bevestig" word. Die betekenis van "bevestig" blyk nie duidelik uit die wet nie, maar daar kan aanvaar word dat die testateur deur sy handtekening aandui dat die wysiging volgens sy wense aangebring is en die getuies op hulle beurt die testateur se handtekening bevestig.[46] Die testateur moet in teenwoordigheid van die getuies sy handtekening aanbring of erken dat dit sy handtekening is.[47] Beide getuies moet gelyktydig teenwoordig wees en hulle handtekeninge in mekaar se teenwoordigheid sowel as in die teenwoordigheid van die erflater aanbring. Die wet dui nie aan waar hierdie handtekeninge aangebring moet word nie. Van der Merwe en Rowland[48] betoog dat 'n wysiging geldig sal wees, "mits daar uit die vereiste handtekeninge, waar ook al aangebring op die testament, voldoende blyk dat die wysiging bekragtig is". Dit is egter te betwyfel of die aanbring van die vereiste handtekeninge op 'n ander bladsy as die bladsy waarop die wysiging aangebring is as voldoende beskou kan word. So 'n werkswyse sou die bedoeling van die wetgewer, naamlik om te verseker dat die wysiging die erflater se wil is en nie valslik deur iemand anders aangebring is nie, verydel. Die standpunt dat daar *ex facie* die dokument 'n *nexus* tuussen die handtekeninge en die wysiging moet wees, is te verkies.[49] Die handtekeninge moet dus op so 'n wyse

46 De Waal, Schoeman en Wiechers 57; Cronjé, Sonnekus, Van der Spuy en Vorster (hierna Cronjé ea) *Werkboek vir erfreg* (1990) 57; Erasmus en De Waal *The South African law of succession* (1989) par 70 vn 4.

47 Die testateur kan dus sy handtekening aanbring terwyl die getuies nie teenwoordig is nie en slegs later, wanneer beide getuies teenwoordig is, erken dat dit sy handtekening is. Sien *Bosch v Nel* 1992 3 SA 600 (T).

48 182.

49 Cronjé ea 37.

aangebring word dat afgelei kan word dat die bedoeling daarmee is om die betrokke wysiging te bevestig.

Die wet omskryf "wysiging" onder andere as "'n skrapping". Voor die wysiging van die wet deur die Wet tot Wysiging van die Erfreg 43 van 1992 het daar twyfel bestaan oor die betekenis van die woord "skrapping" aangesien dit nie deur die wet gedefinieer is nie.[50] Beinart[51] het ten aansien van die Engelse teks van die wet gesê dat "deletion" nie wyd genoeg strek om ook "destruction by erasure, cutting out or pasting over" in te sluit nie. Hy was voorts ook van mening dat artikel 2(1)(b) slegs van toepassing is op skrapping wat deur middel van 'n skryfinstrument aangebring is. Dié standpunt sou beteken dat daar nie aan die formaliteite voldoen hoef te word waar 'n gedeelte van 'n testament byvoorbeeld uitgeskeur of uitgebrand word nie. Volgens Beinart sou dit op gedeeltelike herroeping neerkom waarvoor geen formaliteite vereis is nie.[52] Beinart se standpunt is deur die meerderheid skrywers aanvaar,[53] hoewel dit onseker was of die howe dit ook sou toepas.[54] Schoeman[55] dui tereg aan dat die hele polemiek rondom die betekenis van skrapping eintlik onnodig was aangesien die betekenis van "verandering" (wat deel uitmaak van die definisie van "wysiging") alle gevalle wat nie deur die woord "skrapping" gedek word nie, insluit. Desnieteenstaande het die wetgewer dit goedgedink om "skrapping" in Wet 42 van 1993 te definieer. "Skrapping" word beskou as "'n skrapping, deurhaling of uitwissing op welke wyse ook al bewerkstellig, uitgesonderd 'n skrapping, deurhaling of uitwissing wat die herroeping van die hele testament beoog".

Enige poging om 'n wysiging in 'n testament aan te bring, hetsy by wyse van 'n skryfinstrument,[56] of by wyse van toeplakking, uitskeuring, uitbranding of op enige ander wyse, moet dus aan alle formaliteite voldoen, tensy die oogmerk is om die hele testament te herroep.[57] Daar moet egter in gedagte gehou word dat artikel 2(3) aan die hof die bevoegdheid verleen om 'n wysiging wat nie aan al die formaliteite voldoen nie, te kondoneer indien die hof oortuig is dat die testateur bedoel het dat dit 'n wysiging van sy testament moet wees.[58] Probleme soortgelyk aan dié ondervind in *Moskowitz v The Master*[59] word dus nou ondervang deurdat aan die hof 'n kondonasiebevoegdheid verleen word. In dié geval

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50 Sien bv *Senekal v Meyer supra*; Schoeman 1988 *De Jure* 143 ev; Cronjé en Roos 58; Van der Merwe en Rowland 192 en die bespreking hierbo.

51 "Testamentary form and capacity and the Wills Act, 1953" 1953 *SALJ* 292.

52 Soos ons hierbo gesien het, stel die wet (voor die wysiging én daarna) geen vormvereistes vir die herroeping van testamente nie, met die gevolg dat die gemenereg, waarvolgens daar nie enige formaliteite was nie, toepassing vind.

53 Sien bv Cronjé ea 41–42; Erasmus en De Waal par 92; Van der Merwe en Rowland 183.

54 De Waal, Schoeman en Wiechers 58; Van der Merwe en Rowland 183.

55 1988 *De Jure* 144. Sien ook De Waal, Schoeman en Wiechers 58.

56 Die onduidelikheid rondom die vraag of slegs skrapping wat met 'n skryfinstrument aangebring is (Beinart 1953 *SALJ* 292) geraak word, is dus ook nou uit die weg geruim.

57 Sien die bespreking hierbo.

58 Vir 'n bespreking van a 2(3) en al die onsekerhede wat daarmee saamhang, sien *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); *Letsekga v The Master* 1995 4 SA 731 (W); Jamneck 1994 *THRHR* 596; Schoeman en Van der Linde 1995 *THRHR* 520; Du Toit 1996 *THRHR* 472.

59 1976 1 SA 22 (K). In dié saak het die hof bevind dat a 2(1)(b) nie van toepassing is nie omdat die wysiging nie ná verlyding aangebring is nie. Die feite word hier as voorbeeld gebruik vir 'n geval waar die wysiging wel ná verlyding aangebring is.

het die testateur die datum op sy testament in die teenwoordigheid van die twee getuies verander, maar nie daarby geteken nie. Slegs een van die getuies het daarby geparafeer. Daar is dus nie aan die formaliteite van artikel 2(1)(b) voldoen nie, maar die hof sal so 'n geval wel kan kondoneer indien die bedoeling van die testateur om die testament te wysig, duidelik blyk.

Voorts het die hof ingevolge artikel 2A van die wet[60] die bevoegdheid om 'n testament, of 'n gedeelte daarvan, as herroepe te verklaar as die erflater se herroepingsbedoeling uit die testament of uit 'n aparte dokument blyk. Dit is dus moontlik dat die hof 'n testament gedeeltelik herroepe kan verklaar waar 'n gedeelte van die testament doodgetrek of uitgeskeur is. 'n "Skrapping" kan dus ook herroeping uitmaak, in welke geval daar nie aan enige formaliteite voldoen hoef te word nie.[61]

4 GEVOLGTREKKING

Deur middel van die Wet tot Wysiging van die Erfreg 43 van 1992 het die wetgewer gepoog om sekere onduidelikhede wat rondom die herroeping en wysiging van testamente bestaan het, op te klaar. Daar is in 'n groot mate in hierdie doelwit geslaag, maar dit is jammer dat die wetgewer in so 'n groot mate met die Meester se bevoegdhede rakende herroeping ingemeng het. Afdoende rede vir hierdie inmenging kan nie ingesien word nie en dit sou waarskynlik sowel die howe as belanghebbendes by testamente se taak vergemaklik het as die Meester se bevoegdheid om gemeenregtelike vermoedens in ag te neem, hom nie uitdruklik ontneem is nie.

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60 Sien die bespreking hierbo.
61 Cronjé en Roos 59.

Lawyers are students of language by profession . . . [T]he language they use is the principal means by which they achieve their successes . . . They exercise their power in court by manipulating the thoughts and opinions of others . . . (Philbrick *Language and the law*, aangehaal in 1971 *Case & Comment* 76):

Vicarious liability for agents and the distinction between employees, agents and independent contractors*

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OPSOMMING

Middelike aanspreeklikheid vir verteenwoordigers en die onderskeid tussen werknemers, verteenwoordigers en onafhanklike kontrakteurs

Die middelike aanspreeklikheid van die prinsipaal vir delikte gepleeg deur 'n verteenwoordiger binne die perke van sy volmag word in hierdie bydrae onder die loep geneem. Volgens algemene taalgebruik kan 'n verteenwoordiger enigiemand wees wat in opdrag van 'n ander optree. Daar word egter algemeen aanvaar dat 'n werkgewer nie middellik aanspreeklik kan wees vir die delikte van 'n onafhanklike subkontrakteur nie. Dit is dus noodsaaklik om in die konteks van middellike aanspreeklikheid 'n besondere inhoud aan die begrippe "verteenwoordiger" en "prinsipaal" te gee, ten einde te voorkom dat die onderskeid tussen 'n werknemer (vir wie se delikte die werkgewer middellik aanspreeklik kan wees) en 'n onafhanklike subkontrakteur (vir wie se delikte 'n werkgewer nie middellik aanspreeklik kan wees nie), verdoesel word. Waar 'n "verteenwoordiger" spesifiek gemagtig is om 'n onregmatige daad te pleeg, is die prinsipaal se aanspreeklikheid gewone persoonlike aanspreeklikheid, en nie middellike aanspreeklikheid nie. 'n Prinsipaal kan middellik aanspreeklik wees vir die delik van 'n agent *stricto sensu* wat binne die bestek van sy volmag gepleeg is, byvoorbeeld 'n wanvoorstelling gemaak deur 'n verteenwoordiger wat aangestel is om kontraktuele verhoudings tussen die prinsipaal en derdes te bewerkstellig. Daar moet 'n noue verband bestaan tussen die onregmatige gedrag en die regshandeling waartoe die verteenwoordiger gemagtig is. In een besondere geval kan 'n prinsipaal middellike aanspreeklikheid opdoen vir die onregmatige handeling van 'n verteenwoordiger wat nie gemagtig is om 'n regshandeling te verrig nie (en wat dus nie 'n verteenwoordiger *stricto sensu* is nie): dit is waar 'n verteenwoordiger – soos 'n eiendomsagent – aangestel is om kontraktuele verhoudings tussen die prinsipaal en derdes te bewerkstellig, maar nie gemagtig is om self die kontrakte te sluit nie. In so 'n geval kan die prinsipaal middellik aanspreeklik wees vir 'n wanvoorstelling van die verteenwoodiger.

Soos in die geval van die werknemer, berus die sosiale regverdiging van die middellike aanspreeklikheid vir die delikte van die verteenwoordiger – in teenstelling met die onafhanklike subkontrakteur – op verskeie beleidsoorwegings. Middellike aanspreeklikheid vir die dade van 'n werknemer en dié van 'n verteenwoordiger onderskeidelik berus in beide gevalle in 'n mate op risikoskepping, maar word nie deur dieselfde reëls beheers nie.

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Vicarious liability denotes a situation where one person is strictly liable for the commission of a wrongful act by another. Apart from a delictual act or omission, it generally requires some relationship between the actual wrongdoer and the party whom it is sought to hold liable, and some connection between the delictual act or omission and that relationship. The archetype of vicarious liability – and the most important from a practical point of view – is that of the employer for the delict of his or her employee in the course of employment. However, vicarious liability also applies to other relationships.[1] One category of vicarious liability which has received little academic attention arises from the relationship between "principal" and "agent". In the legal literature the general principle is stated that a principal is liable for the delicts of an agent committed within the scope of authority.[2]

Even though the formulation of the principle may sound fairly clear, its precise meaning is difficult to determine. This concerns first the terms principal and agent. As De Wet points out,[3] "[t]he expression 'agency' is used in such a wide variety of meanings that it cannot be regarded as a term of art denoting a specific branch of the law". From a linguistic point of view, an agent may be anybody who acts at the order of another, no matter whether he or she is a servant or an independent contractor, and the person giving the order a principal. However, it is generally accepted nowadays that an employer is not liable for the negligence or the wrongdoing of an independent contractor.[4] The terms "principal" and

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1 South African law recognises altogether four categories of vicarious liability that are determined according to the relationship between the parties (see Wicke *Vicarious liability*). The relevant relationships are: (1) employer and employee; (2) principal and agent; (3) car owner and driver; (4) partners with each other. On the motor car owner's liability see *Boucher v Du Toit* 1978 3 SA 964 (O) 972 where Van Heerden J characterised the car owner's liability as "'n analogiese uitbreiding van die aanspreeklikheid van 'n werkgewer vir die onregmatige dade van sy werknemer wat op grond van beleidsoorwegings gebillik kan word". In respect of vicarious liability of partners note *Lindsay v Stofberg* 1988 2 SA 462 (C) 467: "[I]t seems to be generally accepted that one partner is vicariously liable for the wrongful act of another when such act falls within the scope of partnership business."

2 Neethling, Potgieter and Visser *Deliktereg* (1996) 368; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 520; Scott *Middellike aanspreeklikheid en die risiko-aanspreeklikheidsbeginsel* (1983) 254 *et seq*; Hahlo and Kahn *The Union of South Africa* (1960) 527; 30 *LAWSA Vicarious liability and strict liability* par 52; McKerron *The law of delict* (1971) 87; Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 73. But cf also Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract general principles* (1993) 182, who seem to go further (see below). Norman-Scoble *Law of master and servant in South Africa* (1956) as well as Burchell *Principles of delict* (1993) do not deal with the vicarious liability of the principal for his agent.

3 1 *LAWSA Agency and representation* par 100.

4 An employer can be liable for the delict of an independent contractor only if he or she was personally at fault and therefore committed a delict, see *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A); *Minister of Community Development v Koch* 1991 3 SA 751 (A); *De Jager v Taaf Hamman Holdings (Edms) Bpk* 1993 1 SA 281 (O); see also *Eksteen v Van Schalkwyk* 1991 2 SA 39 (T); further Neethling, Potgieter and Visser *Deliktereg* 364 fn 110; Burchell *Delict* 227 *et seq*; Knobel "Deliktuele aanspreeklikheid vir skade aangerig deur 'n onafhanklike subkontrakteur – *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A)" 1991 *THRHR* 661; Neethling and Potgieter "Deliktuele aanspreeklikheid by die lasgewer-lashebber-verhouding – *Minister of Community Development v Koch* 1991 (3) SA 751 (A)" 1992 *THRHR* 311; Wicke *Vicarious liability* 130 *et seq*.

"agent" must therefore have some specific meaning in the context of vicarious liability: on the one hand, there is no vicarious liability of an employer for the conduct of an independent contractor; on the other hand, an agent can be anybody who acts at the order of another, thus including the independent contractor. Unless the terms principal and agent have a specific meaning, the clear distinction between employees and independent contractors that has developed in the law of vicarious liability would be blurred. The subject of this article is to investigate the requirements of vicarious liability for agents. It is also attempted to relate this kind of liability to the liability for the employee and the independent contractor. Since a principal may be strictly responsible for the conduct of an agent but not for the conduct of an independent contractor, the reasons for this distinction must be determined. A further important question is whether a single principle underlies vicarious liability for conduct of an employee and an agent.

1 LIABILITY FOR AN AUTHORISED OR RATIFIED ACT

One sense in which the term "agent" has been used in connection with this subject, is that of a person who was specifically authorised to commit a wrongful act or whose conduct was subsequently ratified by the principal.[5] However, in this sense the principal's liability for the agent's act is personal rather than vicarious liability. The principal is liable because he or she has authorised the very wrongful act in question and, therefore, for his or her own wrongful conduct. The principal is responsible as a secondary party to the delict, and the normal requirements of delictual liability must be proven in respect of his or her own conduct.[6] In contrast to that, vicarious liability is strict liability and requires neither fault nor wrongful conduct on the part of the person sought to be held responsible.

2 AGENT WHO IS AN EMPLOYEE

It is obvious that the principal will be liable for the conduct of an agent if the latter is also his or her employee and the wrongful act has been perpetrated in the course of the employment.[7] This would be a normal instance of vicarious liability in accordance with the principles applying to the relationship between employer and employee. Therefore, something different must be meant by vicarious liability for an agent's conduct.

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5 Hahlo and Kahn *Union* 527: "Where an agent commits a tortious act on behalf of his principal with the latter's express or implied authority or which is subsequently ratified by him, both parties are generally liable: the agent because he is the actual wrongdoer, and the principal because the agent's act is regarded as his own in accordance with the principle '*qui facit per alium facit per se*'"; see further 30 *LAWSA Vicarious liability and strict liability* par 52; McKerron *Delict* 87. Note also the decisions *McKenzie v Van der Merwe* 1917 AD 41 45 51; *Naude & Du Plessis v Mercier* 1917 AD 32; *Mouton v Beket* 1918 AD 181 190; *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (I)* 1955 2 SA 1 (W) 16; *Bhika v Minister of Justice* 1965 4 SA 399 (W) 400; *Birch v Johannesburg City Council* 1949 1 SA 231 (T) 238 *et seq*. The ratification of an act can be regarded as equivalent to a prior authority; *cf Whittaker v Roos and Bateman* 1912 AD 92 112 *et seq*.

6 See Atiyah *Vicarious liability in the law of torts* (1967) 289 *et seq*.

7 See 30 *LAWSA Vicarious liability and strict liability* par 52; McKerron *Delict* 88 *et seq*; Hahlo and Kahn *Union* 527.

3 AGENT *STRICTO SENSU*

An early statement of extended vicarious liability beyond the relationship of employer and employee was made by Wessels JA in *Ravene Plantations Ltd v Estate Abrey*[8] (the facts of the case are not important here):

> "It is a well-known principle of our law that a master is liable for the act of his servant so long as the servant does the act in the course of his employment, even though the act is an unlawful one . . . This doctrine has been extended so as to embrace the case where an agent or servant acting within the scope of his authority makes a fraudulent misrepresentation by which the principal or master is benefited."[9]

"Authority" is a legal term from the law of representation denoting the capacity of one person to conclude juristic acts on behalf of another so as to affect that other's relationship. The term may sometimes also have a wider meaning than that of empowering another person to enter into a legal transaction, namely to give permission to someone else or to sanction another person's action.[10] From the context of the quotation it is, however, fairly clear that "scope of authority" refers to agency in the technical sense of representation. Outside the employer-employee relationship, a principal may therefore be vicariously liable for the agent where the wrongdoer is an agent *stricto sensu*, a person who is authorised to enter into legal relationships with third parties on behalf of the principal.[11] The principal is liable for the delict committed by his agent in this capacity and within the scope of his (actual or implied) authority.

As the significance of agency *stricto sensu* is the conclusion of a juristic act on behalf of another, the wrongful act must have some connection to the legal transaction in question. *Ravene Plantations Ltd v Estate Abrey* concerned the liability of the principal for a fraudulent representation by the agent in concluding a contract. This is the most obvious instance of liability for an agent empowered to perform some juristic act.[12] It appears, however, that the vicarious liability of the principal is not confined to this instance. As mentioned above, the prerequisites for the principal's responsibility are generally formulated more broadly in the legal literature. Accordingly, there must be a principal-agent relationship *stricto sensu*, the agent must commit a wrongful act and the agent must be acting within the scope of his authority when the wrong is committed.[13] Even though the principle has never been expressed in such general terms by the courts, the case law indicates that the liability of the principal is not confined to

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8 1928 AD 143 153.

9 Note also the comment on the statement by Scott *Middellike aanspreeklikheid* 254: "Dadelik moet egter daarop gewys word dat dit nie nodig is om te bewys dat die bedrog van die verteenwoordiger die prinsipaal bevoordeel het nie en dat die invoeging daarvan in die aangehaalde stelling klaarblyklik oorbodig is."

10 See Wicke *Vicarious liability* 35 *et seq*.

11 30 *LAWSA Vicarious liability and strict liability* par 52; McKerron *Delict* 87 *et seq*; Hahlo and Kahn *Union* 527.

12 See also *Black v Le Voy* 1924 EDL 176 181: "Even if defendant [the principal] was unaware of the representations Belinsky [the agent] intended to make to the plaintiff to induce him to consent to the reduction which is unlikely, it is clear that the defendant employed Belinsky to bargain with the plaintiff concerning the reduction and the defendant is therefore bound by the fraud of his agent and cannot take advantage of the letter he thus obtained."

13 See the references in fn 2.

fraudulent misrepresentations by his agent. The principal may be liable if his agent brought about a contract with the third party by means of a threat of harm.[14] Another case of liability for an agent's delict may occur when money or property is received by the agent (having authority to do so) as part and parcel of a transaction which an agent concludes on the principal's behalf.[15] Likewise, liability may arise if the agent makes a fraudulent misrepresentation, as a result of which the plaintiff suffers damage other than the conclusion of a contract to his or her detriment.[16] Since negligent misrepresentations may lead to a delictual claim, it is conceivable that the principal may be liable for damages as a consequence of false statements of an agent who merely acted negligently, but this is uncertain as the element of dishonesty which is inherent in fraudulent actions of the agent may be an important justification for this class of liability.[17] The liability of the principal may also be extended to wrongful conduct of the agent performing a unilateral juristic act.[18]

However, it is clear that the act of the agent must fall *within the scope of his authority*, since the agent must have acted in his capacity as agent in order to make the principal liable. "It is therefore essential to see what the exact authorisation is of the principal to his agent in every case in which it is sought to make the principal liable."[19] A principal would be responsible for misrepresentations by his representative, provided that the latter had authority to make representations in relation to the transaction concerned.[20] The concept of scope of authority implies that there must be some close connection between the agent's conduct and the juristic act in question. Thus it is unlikely that liability of the principal could arise from physical acts of agents. If, for example, A gives his friend B authority to sell his land in another town and B negligently causes a traffic accident en route, it is difficult to conceive that a court would hold A liable for

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14 See Van der Merwe and Olivier *Onregmatige daad* 520, referring to *Broodryk v Smuts NO* 1942 TPD 47. It is, however, doubtful whether that decision concerned delictual liability at all: "[T]he principal who has authorised his agent to negotiate or enter into contracts on his behalf will not be entitled to hold the other party to a contract which was obtained by the duress of the agent" (53).

15 Silke *The law of agency in South Africa* (1981) 547.

16 See on the wrong of fraudulent misrepresentation McKerron *Delict* 210 *et seq*. Scott *Middellike aanspreeklikheid* 261 *et seq* extends the principal's liability for his agent's conduct to the delict of "injurious falsehood". The wrong of injurious falsehood consists in false statements made to other persons concerning the plaintiff whereby he suffers loss through the action of those others (see McKerron *Delict* 214). It is doubtful whether in this instance there could be a sufficiently close connection between the legal authority and the commission of the delict, if only a third person is affected by the statement.

17 See also Joubert *Verteenwoordigingsreg* 74. Furthermore, it would be rather improbable for the principal to incur liability for misrepresentations of the agent in the absence of fault on the part of the latter, as no delict could be proved. But note the decision *Victor v Gillespie Motors* 1938 GWL 47 to which more detailed reference will be made later. See also Scott *Middellike aanspreeklikheid* 262 *et seq*.

18 See *Barclays National Bank Ltd v Traub*; *Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) concerning a claim for damages for the embarrassment caused by the principal's attorney, who had applied for and was granted a default judgment against the third party.

19 *Ravene Plantations Ltd v Estate Abrey* 1928 AD 143 154.

20 Cf Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract* 182: a representative who has authority to conclude a contract will usually have tacit authority to make representations in relation to the contract.

the damage to third parties on the ground of a principal-agent relationship.[21] The connection between the wrong and the business the agent is transacting for his principal is too remote to fall within the scope of authority.[22]

A decision very much on the borderline is *Barclays National Bank Ltd v Traub*; *Barclays National Bank Ltd v Kalk*.[23] In that case a bank had granted power of attorney to sue another person, K, to a candidate attorney, who issued summons. The latter thereafter received notice that the summons had been served on somebody at the wrong address, but ignored the notice and proceeded with an application for default judgment. K sued the bank and claimed damages in delict for the embarrassment caused by the default judgment. The court found that the candidate attorney had received the information within the terms of his authority and the bank as principal was held liable for the delict committed by the agent.

It is extremely difficult to reconcile this decision with that in *Eksteen v Van Schalkwyk*.[24] Here the defendant had bought a block of flats from the plaintiff, but subsequently wished to cancel the contract owing to the plaintiff's alleged fraudulent misrepresentations. He instructed an attorney to send a notice of cancellation to the plaintiff. The attorney addressed a letter informing the plaintiff that the contract of sale was being cancelled owing to his alleged fraud and deliberate misrepresentations. Copies of the letter were sent to three different bodies, an estate agent, the Estate Agents' Board and the local municipality. The plaintiff sued the defendant for defamation. It was found that the defendant had not instructed his attorney to send copies of the letter to anyone, and the court therefore dismissed the plaintiff's claim. Van Zyl J based his decision in the *Eksteen* case on the principle of non-liability for an independent contractor, without even mentioning the specific rules governing vicarious liability for an agent.

In both the *Eksteen* and the *Kalk* case the agent had authority to perform a juristic act, and both cases concerned injury to the personality rights of a third person by an agent. The decisions may be distinguished from each other on the ground that in the *Kalk* case it was the very act for which the agent had been authorised, namely the institution of a legal action that led to the embarrassment, while in *Eksteen v Van Schalkwyk* the sending of the letter containing the defamatory statements was an act quite different from the cancellation of the contract (for which the agent had been authorised). But one may also argue that defamation can never fall within the scope of authority conferred in the sense in which the expression has been used by the courts. Unless the principal specifically ordered the defamation (in which case he would be personally liable), it is difficult to accept that the agent had authority to make offensive remarks in relation to the transaction concerned.[25]

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21 If A was also the owner of the car he may be liable in accordance with the principles of the motor car owner's liability for the negligence of the driver (cf Neethling, Potgieter and Visser *Deliktereg* 369; *Roman v Pietersen* 1990 3 SA 350 (C); *Du Plessis v Faul* 1985 2 SA 85 (NC); *Boucher v Du Toit* 1978 3 SA 965 (O)).

22 Cf *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 442.

23 1981 4 SA 291 (W); see also Midgley "Mandate, agency and vicarious liability: conflicting principles" 1991 *SALJ* 419 423.

24 1991 2 SA 39 (T). Cf also the case note by Midgley 1991 *SALJ* 419.

25 For a different opinion see Silke *Agency* 544; Scott *Middellike aanspreeklikheid* 262; note also the view expressed by Atiyah *Vicarious liability* 113: "There is, after all, little essential difference for this purpose between a statement which is tortious because it is made

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4 LIABILITY FOR AN AGENT WITHOUT AUTHORITY?

The principal may incur vicarious liability where the agent acted without authority, but the lack of authority was subsequently cured by ratification. Likewise, the principal may be liable if he is estopped from denying that the agent had authority to conclude the juristic act on his behalf.[26] In both instances the agent is by law regarded as the juristic representative of the principal. However, the most difficult question is whether vicarious liability for an agent may arise if the agent was neither vested with authority, nor considered to have acted with authority (in the technical sense) by law. In other words, can there be vicarious liability of the principal for the conduct of his agent in the absence of authority?

The prevailing opinion in the legal literature is that no such liability is imposed,[27] but there is also strong support for the view that such liability is possible.[28] If anybody who acts on the orders of another, no matter whether he or she is servant or independent contractor, may be called an agent, there is a danger that the concept of agency may obscure the clear distinction between servants and independent contractors. Since South African law does not recognise vicarious liability for the conduct of an independent contractor, vicarious liability for the acts of agents, if it is to be recognised beyond agency *stricto sensu*, must have clear limits.

The decision of *Colonial Mutual Life Insurance Society Ltd v MacDonald*[29] is instructive. While De Villiers CJ completely rejected liability for agents, Roos JA thought that a principal was liable for delicts committed by an agent "*in obtaining the result which the principal authorised him to obtain*".[30] Similarly,

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fraudulently or negligently, and a statement which is tortious because it is defamatory. In both cases the gravamen of the complaint against the principal is that he has put his agent in a position where his statements gain credence from the very fact that he is an agent of that principal." The defamation, however, does not manifest itself in a binding legal consequence, as a misrepresentation does; see below.

26 See also Scott *Middellike aanspreeklikheid* 271.

27 See Neethling, Potgieter and Visser *Deliktereg* 368; Hahlo and Kahn *Union* 527; 30 *LAWSA Vicarious liability and strict liability* par 52; McKerron *Delict* 87; Joubert *Verteenwoordigingsreg* 73. Van der Merwe and Olivier contend that the vicarious liability of a principal where the agent is empowered to perform juristic acts should not be confused with the position which obtains when the mandatary has no authority (*Onregmatige daad* 520).

28 See Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract* 182; Silke Agency 544; Midgley 1991 *SALJ* 419 esp 422: "It is therefore incorrect to differentiate between empowered and unempowered mandataries"; Scott *Middellike aanspreeklikheid* 266 *et seq*.

29 1931 AD 412. In that case the duties of an agent of a life insurance society, in terms of his contract, were to obtain proposals for the society, to collect the required premiums, and to arrange for proponents to be medically examined. He was paid on a commission basis which was to include his expenses and was entitled to undertake other work provided it was not insurance business. The insurance society had no right of supervision or control over the methods employed by the agent, who was free to obtain proposals or not as he pleased. One day the agent had driven a medical practitioner out for the purpose of examining an insurance proponent; on the return journey, the medical practitioner was injured in an accident caused by the negligent driving of the agent. The court held that the agent was not a servant of the insurance society, but an independent contractor for whose negligence the society was not liable. The *Colonial Mutual* case is one of the most influential, but also one of the most controversial cases on vicarious liability. For a detailed discussion see Wicke *Vicarious liability* 42 *et seq*.

30 427; my italics.

Wessels JA considered liability for the delict of an agent perpetrated "*in the very business the agent was transacting for the principal*".[31] From the context of the statements it follows that both judges envisaged liability for fraud or misrepresentation by an agent. Even though the matter is not perfectly clear, it is quite possible that they had in mind an agent appointed to effect contractual relations between his principal and third parties.[32] If the agent makes a misrepresentation in this process, this would clearly be a delict "attached to the very business" he was transacting or "in obtaining the result" he was employed to obtain. Usually an agent appointed to effect contractual relations will have authority to conclude the contract. But in certain situations no such authority may exist, as in the case of an estate agent. A principal may nevertheless be responsible for misrepresentations made by such an estate agent, provided that the latter had "authority" (in a non-technical sense) to make representations in relation to the transaction concerned, regardless of whether he was authorised to conclude a contract.[33]

However, it is necessary to find a reasonable explanation for the extension of the principal's liability beyond agency *stricto sensu* which takes into account that vicarious liability is not imputed for the conduct of an independent contractor. In both instances (misrepresentation by estate agent and agency *stricto sensu*) the delict of the agent is closely connected with a juristic act and manifests itself in a certain legal result. The rationale of the vicarious liability for the conduct of agents may therefore be the protection of third parties against the delictual conduct of agents who are employing the mechanisms of the legal order as a vehicle for their dishonest objectives. Such liability, understood in this manner, would be incurred in respect of a specific kind of risk justifying vicarious liability for the conduct of an agent in the absence of personal fault of the principal. In effect the vicarious liability for the conduct of agents would be a way of protecting the legal order against abuse of its mechanisms for dishonest purposes.

There is authority for such an extension of vicarious liability in respect of an agent. In *Davidson v Bonafede*[34] the plaintiff had purchased a house from the defendant, but had cancelled the sale on the ground that he had been induced to enter into the sale by misrepresentations made to him by an estate agent acting on behalf of defendant. The misrepresentations were material and had been made fraudulently or recklessly, without regard to whether they were true or false. The claim for the return of the purchase price and payment of certain further costs was allowed on delictual grounds *inter alia*:

> "The next question is whether defendant is answerable for Kellerman's [the estate agent's] misrepresentations. Despite their assertions to the contrary, it is plain that Kellerman had a mandate from defendant to find a buyer for the property. He obviously had authority to introduce buyers to the property and to use his powers of persuasion to induce them to make offers to buy it. A commission was to be paid and a sale eventuated. In these circumstances, it is trite law that defendant is liable for misrepresentations made by Kellerman in the course of executing his mandate."[35]

31 442; my italics.
32 See also Silke *Agency* 544.
33 In this regard cf Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract* 182.
34 1981 2 SA 501 (C).
35 504.

The agent had "authority" to introduce buyers to the property and to induce them to make offers to buy it, but no authority actually to conclude the contract himself. He was therefore not an agent *stricto sensu*. Nevertheless the court held the principal vicariously liable for the conduct of the agent. In the absence of authority (in the technical sense) a principal may be responsible for the misrepresentations of an agent who is appointed to effect contractual relations between his principal and third parties, provided that the agent was entitled to make representations in relation to the transaction concerned. Apart from this specific situation, there seems to be no further reported instance of vicarious liability for the conduct of an agent who is not authorised to perform the juristic act himself. As in the case of an agent *stricto sensu*, there is a close connection between the wrongdoing of the agent and the performance of a juristic act. This feature allows a neat distinction between the liability for the conducts of agents and independent contractors. Vicarious liability for the physical acts of agents who are not employees can therefore generally be ruled out.[36]

5 SOCIAL JUSTIFICATION OF VICARIOUS LIABILITY FOR AGENTS

The line drawn by the courts between relationships which may give rise to vicarious liability and those that do not is a fine one. Vicarious liability is in effect an extraordinary limitation of the rights of the liable person. The state under the rule of law demands that such limitation rest on rational grounds. Lawyers must be able to explain why a certain legal consequence is imposed in the one situation, but not in the other. In concrete terms, there must be a clear and rational motivation why the principal is vicariously responsible for the delict of the agent, but not for the delict of the independent contractor.

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36 But see Scott *Middellike aanspreeklikheid* 266 *et seq*. The author considers the liability for an agent without authority as an instance of what he calls liability for a "werknemer in die ruimer betekenis van die woord" (268; on the concept of the "werknemer in die ruimer betekenis van die woord" see Wicke *Vicarious liability* 71 *et seq*). The crucial question for the author is whether "daar genoeg regspolitiese faktore aanwesig mag wees op grond waarvan in alle regverdigheid verklaar kan word dat 'n opdraggewer verantwoordelik gehou behoort te word vir die diensaktiwiteit wat 'n ander vir en namens hom verrig" (see eg 105). According to his opinion it is not necessary "om 'n onderskeid te maak tussen 'n verteenwoordiger met volmag om 'n prinsipaal kontraktueel te verbind en 'n agent wat sonder sodanige volmag vir en namens 'n prinsipaal 'n opdrag uitvoer". He is not entirely consistent in this respect in his analysis of the case law. On the one hand he states: "Dit lyk ook asof ons regspraak in hierdie verband geen onderskeid tref nie" (270). On the other hand he asserts in his summary the following: "Was volmag om te verteenwoordig en om voorstellings te maak nie gegee nie, sal die prinsipaal slegs aanspreeklik gehou kan word indien hy die optrede van sy verteenwoordiger geratifiseer het of indien hy belet of estop is om die ware toedrag van sake te bewys" (271). With respect, when relying on factors of legal policy in the abstract, the author fails to explain the distinction between employees, agents and independent contractors which is made by the courts in regard to vicarious liability. Note further Midgley 1991 *SALJ* 419, who denies the relevance of the distinction between "empowered and unempowered mandataries" altogether. Outside the employment relationship, vicarious liability should be contemplated in instances in which one person acts on behalf of another. The crucial criterion to establish whether the legal convictions of the community favour the imposition of vicarious liability would then be the control test. For that reason a client should not be held liable for a lawyer's fault. See more on the control test in this context below.

It seems to be generally accepted nowadays that the rationale for imposing vicarious liability on the employer for the delict of his or her employee must be sought in a number of considerations.[37] A substantial aspect is, for example, the combination of risk and interest: someone who employs another person for his or her own purposes, is able to extend his or her own range of action. The potential of harm to third persons is objectively increased in consequence. It is therefore just that he or she should bear the burden of damage arising from the danger to innocent third parties. Another substantial feature is the idea of loss distribution. The person held responsible, in contrast to the immediate wrongdoer, will often have the means to distribute the loss over a large community of people, for example by way of insurance. Since the injured plaintiff has no insight into the business of the defendant employer, a further reason for imposing liability may be sought in difficulty of proof.

Similarly, the motivation for imposing liability for the conduct of agents may lie in a combination of social factors. However, not all policy considerations applicable to employment relationships apply with the same force in cases of agency. For example, a professional agent such as an attorney may be as able to distribute the loss over the community as would some other independent contractor, unlike an ordinary employee.

5 1 Imputation of knowledge

Since the agent represents his principal in connection with legal transactions, the imputation of knowledge may be a justification for the vicarious liability of the principal. This approach was rejected by Wessels JA in *Ravene Plantations Ltd v Estate Abrey:* "The liability of the principal is not based upon any constructive fault."[38] In other cases, however, the courts have based their decision on imputation of knowledge.[39] If imputation of knowledge is to be the true rationale of the liability for an agent, such liability must have clearly determined limits: the principal can then be liable only for the fraudulent conduct of his agent. It is interesting to note that up to now the courts have never held a principal liable for the negligent conduct of the agent. Imputation of knowledge could therefore serve as a possible explanation for liability in respect of an agent in contrast to an independent contractor.

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37 See eg Neethling, Potgieter and Visser *Deliktereg* (1996) 363; Van der Walt *"Botes v Van der Venter"* 1967 *THRHR* 70; for English law cf Atiyah *Vicarious liability* 12 *et seq.*

38 1928 AD 143 153.

39 See *Barclays National Bank Ltd v Traub*; *Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) 298. Referring to the sections on imputation of knowledge by Kerr *The law of agency* and De Villiers and MacIntosh *The law of agency in South Africa* the court justified the liability of the principal in the following terms: "I hold that on the facts in this particular case, Mr Mereine received the information ... within the authority of Mr Mereine and in terms of the power of attorney to sue." Note also *Victor v Gillespie Motors* 1938 GWL 47, where the principal was held liable for a representation which was made in the principal's name by an innocent agent upon information supplied by another agent who knew of the falsity of the information. The court relied on an English decision where it was stated: "It has been settled that the principle of responsibility is that the principal and agent are one, and if between them a misrepresentation is made it does not matter which of them made the representation or which of them possessed the guilty knowledge" (57 *et seq*). The problematic aspect of the decision is that the agent making the representation did not act wrongfully. It is worth noting that the English courts subsequently changed their view on the problem, see Atiyah *Vicarious liability* 272 *et seq.*

5 2 Undertaking for the absence of fraud on the part of the agent

Wessels JA in *Ravene Plantations Ltd v Estate Abrey* chose a different approach. Referring to English law the judge stated:

> "It is important to put the case on its true ground. I think that every person who authorises another to act for him in the making of any contract undertakes for the absence of fraud in that person in the execution of the authority given as much as he undertakes for its absence in himself when he makes the contract."[40]

The "undertaking" by the principal should not be understood to mean that the principal's liability is based on contract, more particularly a warranty,[41] because such an approach would raise questions *inter alia* about the formation of the warranty and possible notice of acceptance by the other contractant; and it does not seem as if Wessels JA indeed had such a construction in mind. "Undertaking" suggests rather that the principal indicates to the third party that he chose his agent as an honest and reliable person whom he can trust. If the third person's legitimate trust is afterwards betrayed, it is just that the person who inspired the confidence carries the burden of possible damages.[42] It is the principal who at least had a choice in the matter, not the third party. Since most instances of vicarious liability for the conduct of agents involve some kind of communication between agent and third party (in contrast to the liability for the conduct of employees), such an implied mutual understanding could to some degree serve as justification for this category of liability.

5 3 Control

A further reason might be sought in possible control of the principal over the agent's conduct. The criterion of control has played a central role in the discussion of vicarious liability as a whole. It has been regarded as a justification as well as a comprehensive test for all relevant relationships of vicarious liability.[43] However, control is in general neither a sufficient nor a necessary condition for vicarious liability. It is not sufficient since, for example, parents are not vicariously liable for the wrongs committed by their children or schoolteachers for the delicts of their pupils, without proof of fault on their part.[44] Recent developments have shown that control is not a necessary requirement for the relationship of employer and employee: in distinguishing an employee from an independent contractor the courts nowadays take a typological approach.[45] Accordingly, the combination of a number of factors indicates the existence of the employer-employee relationship; the "dominant impression" is relevant. Control is regarded as one important *indicium* for the relationship of employer and employee, but there are other *indicia*[46] which may be crucial in the decision of a case.[47]

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40 1928 AD 143 153.

41 But cf Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz 181 *et seq* fn 90.

42 See also Steyn CJ in *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 4 SA 363 (A) 372.

43 See Barlow *The South African law of vicarious liability in delict and a comparison of the principles of other legal systems* (1939) 95 *et seq*; Joubert *Verteenwoordigingsreg* 181; see also Mureinik "The contract of service: an easy test for hard cases" 1980 *SALJ* 246 247 fn 6; *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 41 43; *Rodrigues v Alves* 1978 4 SA 834 (A) 842.

44 See eg Barlow *Vicarious liability* 180 *et seq*; *Mkize v Martens* 1914 AD 382.

45 See in general Wicke *Vicarious liability* 39 *et seq*.

46 For example, the nature of the work, the freedom of action, the manner of payment, the magnitude of the contract amount, the power of dismissal, the obligation of the employee

continued on next page

Likewise, control is not a necessary condition for the relationship of principal and agent. McKerron in particular argues that since

> "an agent is bound to act in the matter of the agency subject to the directions and control of the principal . . . it would seem that in the ultimate analysis the liability of the principal, like the liability of the master is based on a right of control".[48]

The author therefore attempts to identify a common principle for the vicarious liability of master and principal. Besides the limited function of the control criterion in the context of the employer-employee relationship, it is submitted that the granting of authority does not affect a principal's right of control in any way: An agent's duty to keep within the limits of authority arises, according to modern understanding, not out of the act of authorisation but from the contract that may accompany the authorisation governing the parties' relationship.[49] Control therefore cannot serve either as a test or as social justification for vicarious liability in general and the principal's liability for the agent's delicts in particular.

5 4 The notion of risk

A principal who employs agents in order to achieve purposes of his own creates an increased potential of harm to innocent third persons. The idea of risk appears to play an important role in justification of vicarious liability of the principal for the acts of his agent.[50] This is confirmed by a statement of Steyn CJ in the Appellate Division case *Randbank Bpk v Santam Versekeringsmaatskappy Bpk*[51] to the following effect:

> "Dit is redelik dat die prinsipaal wat sy verteenwoordiger kies en hom voorhou as 'n betroubare persoon, en nie die ander party wat geen seggenskap by die keuse het nie, *die risiko van sy moontlike oneerlike voorstellings of verswygings sal dra*."[52]

However important the notion of risk may be in justifying the principal's liability, it does not provide sufficient explanation for the fact that a principal is

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to perform his duties personally, ownership of the working facilities, the place of work, the length of time of the employment, the intention of the parties etc; see eg *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 443; *R v Feun* 1954 1 SA 58 (T) 60 *et seq*; *Auto Protection Insurance Co Ltd v MacDonald (Pty) Ltd* 1962 1 SA 793 (A) 797 *et seq*; *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A) 456 *et seq*; *Gibbins v Williams, Muller Wright & Mostert Ingelyf* 1987 2 SA 82 (T); Murcinik "Contract of service" 1980 *SALJ* 246 260.

47 See eg *Smit v Workmen's Compensation Commissioner* 1979 1 51 (A); *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 4 SA 446 (A); *Minster van Polisie v Gamble* 1979 4 SA 759 (A); *Mtetwa v Minister of Health* 1989 3 SA 600 (D). This is, however, not uncontroversial. Note, eg, *Rodrigues v Alves*; Silke *Agency* 26.

48 McKerron *Delict* 87 fn 77; see also McKerron "Servant or independent contractor?" 1935 *SALJ* 414; see further Barlow *Vicarious liability* 110 *et seq*.

49 See also Midgley 1991 *SALJ* 419 422.

50 See also Scott *Middellike aanspreeklikheid* 268 *et seq*; Neethling, Potgieter and Visser *Deliktereg* 368.

51 1965 4 SA 363 (A) 372.

52 My italics. It is worth mentioning that the decision did not concern the usual constellation of vicarious liability, where the injured third party claims damages from the principal for the acts of his agent. It was the principal who claimed damages from his insurer who had agreed to compensate the principal "vir enige verlies wat hy sou ly deur enige oneerlike daad van 'n werknemer 'in die voortsetting' van die appellant se besigheid" (367). The circumstances were complicated by the fact that the wrongful conduct arose from an application the agent had made to the insurance company for handing over a renewal of insurance policies with the intention to defraud his principal.

strictly liable for the act of an agent but not for the conduct of an independent contractor. A person employing an independent contractor for his own purposes also creates some risk of harm to innocent third parties, yet is not liable unless he is himself to blame. The increase of danger to others is not sufficient ground in itself for imposing risk liability in the one instance but not in the other. The answer to this problem is that it is a specific kind of risk for which the principal is held responsible in the case of an agent. As indicated above, the delict of the agent must be closely connected with a juristic act and must manifest itself in a certain legal result. The main rationale for imposing vicarious liability for the conduct of agents is to protect third parties against the risk that the mechanisms of the legal order are used for unlawful purposes. It is this specific risk which is increased by employing an agent rather than an independent contractor. A legal system may decide to sanction different risks in different ways, as long as the differentiation rests on rational grounds. The approach in this regard reflects the particular legal convictions of the community. The specific quality of risk that arises from abuse of the mechanisms of the legal order has the potential of damaging innocent parties in a severe manner and bringing discredit on the legal order. The distinction between liability for agents and independent contractors can be justified for this reason.

5 5 The element of dishonesty

Furthermore, as shown above, in all decisions on vicarious liability for the conduct of agents, the latter acted in a fraudulent manner. One feature underlying the cases is therefore an element of dishonesty in the agent's conduct. The element of dishonesty is generally a factor which justifies extended liability in the law of delict and could likewise provide an important reason for imposing vicarious liability on the principal. Together with the risk created by the principal, the rationale of vicarious liability for the conduct of agents seems to be the protection of the legal order against abuse for dishonest purposes and the protection of third parties against dangers arising from such abuse.

6 ARE AGENTS EITHER SERVANTS OR INDEPENDENT CONTRACTORS?

In an essay published in 1935, McKerron stated that "agents are of two kinds, distinguishable as (1) servants and (2) independent contractors".[53] The employer is responsible for wrongs committed by agents of the first kind in the course of their employment, but not for wrongs committed by agents of the second kind. The criterion for distinguishing between the two categories must be sought in the nature and degree of control exercisable by the employer over the agent.

> "[S]ince an agent [*stricto sensu*] in carrying out the mandate is bound to keep within the limits of the authority conferred upon him, he is to that extent subject to the principal's control and therefore a servant and not an independent contractor."[54]

Accordingly, there is one and only one test to determine the relationship which is relevant for vicarious liability, and that is the control test. In effect, there is only one category of persons for which a superior may be vicariously liable, namely servants.

The difficulty with this theory is that it involves treating as employees many classes of persons who would not otherwise be treated as such, for example a friend who is asked to enter into a legal transaction on behalf of the principal, as

53 See McKerron "Servant or independent contractor?" 1935 *SALJ* 414 *et seq.*
54 421.

well as others who are undoubtedly independent contractors, and liability for whose acts is treated by the courts as resting on their specific character as agents and not on the relationship between master and servant. Furthermore, as pointed out earlier, the granting of authority does not affect a principal's right of control in any way: According to modern understanding, an agent's duty to keep within the limits of authority arises, not out of the act of authorisation, but from the contract which may accompany the authorisation governing the parties' relationship. The control criterion plays a limited role in the employer-employee relationship, and it can by no means serve as a test in vicarious liability for the acts of an agent. The dichotomy used by McKerron is therefore misleading, since it implies that there is only one category of vicarious liability, namely for employees, which is not correct.

Another commentator, Silke, identifies three distinct classes of persons for whose conduct the employer may be vicariously responsible, namely: servants, agents and independent contractors.[55] In respect of the servant, the employer is liable for all the delicts committed within the scope of employment. With regard to the agent, the principal is liable only for such delicts as were specifically authorised or were committed in actually obtaining the authorised result. For the wrong of an independent contractor, the employer is liable only where he had a duty *vis-à-vis* the person injured and entrusted the performance of that duty to another who committed a delict resulting in a breach of the principal's duty, and consequent injury, to such third person. The three classes would overlap. There was much to be said in favour of this trichotomy at the time when it was formulated. However, recent legal developments have made it quite clear that the employer of an independent contractor incurs personal liability only. While it used to be unclear whether there were exceptions to the general rule of non-liability of the employer of an independent contractor, it is nowadays regarded as established that the employer is liable only if he committed a delict himself.[56] An employer is vicariously liable for the delict of an employee, but not for the conduct of an independent contractor. In certain specific cases which have been discussed above, a principal may also be liable for the wrong of an (independent) agent. The vicarious liability for an employee on the one hand and for an agent on the other may overlap, if the agent is an employee. A principal may also incur vicarious liability for an agent *stricto sensu* who is at the same time an independent contractor. But there is no vicarious liability for the conduct of an independent

55 *Agency* 539 *et seq*:
"(1) A *servant*, who acts on behalf of another and is controlled even as to the manner in which he does his appointed work which is other than that of contracting legal relations with third persons on his principal's behalf.
(2) An *agent* (*stricto sensu*), who is a person acting as the representative of a principal in contracting legal relations with third persons on behalf of his principal but is not subject to the latter's control in the execution of his mandate.
(3) An *independent contractor*, who is his own master, free of his employer's control and representing no one else when performing the obligations he has incurred under the contract which he has entered into with his employer, such obligations not being those of contracting legal relations with third parties on behalf of his employer."

56 See *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A); *Minister of Community Development v Koch* 1991 3 SA 751 (A); *De Jager v Taaf Hamman Holdings (Edms)* 1993 1 SA 281 (O); see also *Eksteen v Van Schalkwyk supra.*

contractor as such. Thus Silke's classification of three categories of vicarious liability is no longer accurate, because there is only vicarious liability for the acts of employees and agents and not for those of independent contractors.

7 CONCLUSIONS

From the linguistic point of view an agent may be anybody acting on the instructions or authority of another, no matter whether he is an employee or independent contractor. However, in the context of vicarious liability, the term must be given a specific meaning, otherwise the distinction between employees and independent contractors will be blurred. One sense in which the term "agent" has been used in this context, is that of a person who has been specifically authorised to commit a wrongful act. In this sense the principal's liability for the agent's act is not true vicarious liability, but personal liability. A principal may be vicariously liable for the wrongful act of an agent *stricto sensu* which is committed within the scope of the agent's authority. The clearest example would be the responsibility for the misrepresentations of an agent who is appointed to effect contractual relations between his principal and third parties. There are also other instances. But in any case, there must be a close connection between the wrongful conduct and the juristic act performed by the agent; the wrong must express itself in a legal result. Consequently there would be no vicarious liability of the principal for the physical acts of an agent. A marginal case is liability for defamatory statements related to a legal transaction.

In one specific instance a principal may be strictly liable for the conduct of an agent who is not vested with authority to perform a juristic act and is therefore not an agent *stricto sensu*. If an agent is appointed to bring about contractual relations between his principal and third parties, for example, an estate agent, the principal may be responsible for the misrepresentations, even though the agent had no authority to conclude the contract himself. Here again the principal is liable because the misrepresentations manifest themselves in a legal result.

As in the case of the employee, the social justification for vicarious liability for the conduct of an agent as opposed to that of an independent contractor appears to rest on a combination of reasons, even though not all policy considerations applicable to employment relationships apply with equal force in cases of agency. An important reason for the vicarious liability of the principal is the notion of risk, being risk in a very specific form: the objective of vicarious liability for the conduct of agents is to protect innocent third parties against wrongful conduct of agents who are abusing the mechanisms of the legal order (eg the conclusion of a binding contract) normally in a dishonest manner (eg by fraudulent misrepresentation). By employing an agent, the principal increases the risk of legal mechanisms being used for dishonest purposes. Therefore, risk is an important justification for vicarious liability in respect of both the employee and the agent. However, it is a distinct and specific kind of risk in each of these instances. Consequently, it would not be accurate to say that all the different instances of vicarious liability rest on exactly the same principle.

There is no single test for determining the employer-employee and the principal-agent relationship. In particular, the control test which to some extent characterises the relationship between employer and employee, is not an appropriate criterion for determining the principal-agent relationship. Vicarious liability for the acts of an employee and for those of an agent are therefore two different categories of vicarious liability, both of which are to some extent justified by the idea of risk, but are not governed by the same rules.

AANTEKENINGE

GRONDSLAE VAN DIE MODERNE *RECHTSSTAAT*/FOUNDATIONS OF THE MODERN *RECHTSSTAAT*[*]

Inleiding

In die *WA Joubert-huldigingsbundel* (1988) 12 skryf professor SA Strauss:

> "Joubert was 'n generalis in die beste sin van daardie woord. Sy benadering tot die reg was nie gefragmenteerd nie. Hy het steeds aangedring op grondliggende denke. Sonder om ooit tot oorvereenvoudiging te neig, het hy sy studente gedwing om bewus te bly van die sentrale begrippe van die regsgeleerdheid. Per slot van sake gaan dit om 'n strewe na geregtigheid en nie na die doelmatigheid van 'n toevalligwerkende struktuur van menslike beheermaatreëls nie."

Hierdie bewuste soeke van Willem Joubert na grondliggende denke – waarby ek as kollega en vriend ook uitmuntend baat gevind het – het my geïnspireer om my gedenklesing te wy aan die grondslae van die moderne regstaat. Grondslae veronderstel daardie feite, verskynsels en beskouings wat 'n regsfiguur nie slegs onderlê nie, maar inderdaad bepaal. As die moderne staat vandag primêr as *regs*instelling betrag word, volg dit logies dat die eietydse juris nie meer die staat, sy aard en werkinge, aan die politieke wetenskaplike of staatkundige kan oorlaat nie. Kortom, die hedendaagse juris moet besin oor die staat omdat binne hierdie regsabstraksie vandag alle regshandelinge voltrek, owerheidsoptredes volvoer en alle private sowel as publieke verhoudings gereël word. Natuurlik bestaan die moderne staat – en veral die moderne regstaat – as abstrakte regsmodel of instelling nie sonder sy politieke, ekonomiese en maatskaplike substraat nie. Trouens, die moderne staat is nog steeds 'n grootheid van georganiseerde mag wat hom oor 'n bepaalde grondgebied ten opsigte van sy burgers en ander persone binne daardie grondgebied uitstrek. Anders as in die verlede, waar die magselement met sy politiek-soms-onvoorspelbare en willekeurige die deurslaggewende en bepalende element was, wil die moderne regstaat egter juis die staatsmag en die uitvoering daarvan in die voeë en voorskrifte van 'n basiese regsorde veranker. So beskou, is die regstaat die verwesenliking van die ideaal om voorop 'n regering van wette en nie van mense te hê nie.

Met grondslae word bedoel daardie boustene waarop 'n regsfiguur of instelling berus om sy werksaamheid en stabiliteit te verseker. As daar van die grondslae van die moderne regstaat as regsfiguur gepraat word, word al die faktore betrek wat

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* WA Joubert-gedenklesing gelewer te Unisa, Pretoria, op 1998-09-08.

so 'n staat funksioneel, standvastig en bowe-al demokraties maak. In hierdie verband mag die historiese agtergrond en verband met die regstaat nie uit die oog verloor word nie. 'n Regstaat val nie uit die bloue hemel nie. Dit is juis wat in baie Afrika-lande gebeur het: pragtige grondwette is by onafhanklikwording as koloniale afskeidsgroet aan hulle toegesê sonder dat die regerings en die mense van hierdie lande die ervaring en historiese bewustheid van regstaatlikheid gehad het. Regstaatlikheid veronderstel sekerlik kennis en waardering van die reg en die instellings en wyses waardeur die reg verwesenlik word.

In die bestek van hierdie bydrae, sal dit onmoontlik wees om al die grondslae van die moderne regstaat te ontleed. Trouens, dit is ook nie nodig nie omdat daar veral in die afgelope paar jaar 'n mag- en rykdom van geleerde geskrifte oor die onderwerp verskyn het. (Dit sou onmoontlik wees om al die bydraes van die afgelope jare oor die moontlikhede vir, ontwikkeling van en inhoud van die Suid-Afrikaanse regstaat hier te vermeld. Daar word volstaan met 'n verwysing na die monumentale werk van Van Wyk, Dugard, De Villiers en Davis (reds) *Rights and constitutionalism, the new South African legal order* (1994).) Wat ek beoog, is om na hierdie grondslae te verwys en my hoofsaaklik te bepaal by die vraag watter faktore die regstaat werksaam maak. Of anders gestel: hoe word die integrerende, vryheid-skeppende en bowe-al geregtigheidsfunksies van die reg binne die moderne regstaat verwesenlik? Dit sou totaal onuithoudbaar en leuenagtig wees as 'n staat hom formeel as regstaat bestempel sonder om die guns en geregtigheid van regsreëling en regsorde aan almal sonder aansien des persoons te laat toekom. In die tweede deel van hierdie bydrae sal ek in die lig van my teoretiese beskouings, my siening oor die stand van sake in ons land gee.

The modern *Rechtsstaat*

There are many definitions of the modern *Rechtsstaat*. All these definitions, quite correctly, emphasise the constitutional nature of such a *Rechtsstaat*. This is the reason why some authors, instead of talking about the *Rechtsstaat*, prefer the term "constitutional state".

Fundamental to the notion of the *Rechtsstaat*, is the requirement of a constitution that has the strength and resilience of a fundamental law. Stated very simply, the constitution must be stronger than and indeed be above the hurly-burly of everyday affairs of state. Of course, the reasons why a constitution acquires such a fundamental nature which transcends political passions and whims, are also to be found in the foundations of the modern constitutional state. A constitution that is not respected and perceived to be legitimate and a citizenry that has no respect for their constitution as their fundamental law would simply mean the end of the constitutional state.

In constitutional theory, a distinction is often made between the so-called "material" and the "formal" *Rechtsstaat*. Formally, a state would be a *Rechtsstaat* if it has a constitution in the nature of a fundamental law which guarantees the independence of the judiciary, protects fundamental human rights, maintains a division between the legislative, executive and judicial institutions of state and provides for procedures to give effect to all these formal characteristics. A material *Rechtsstaat*, while possessing all the features of the formal *Rechtsstaat*, harbours values of freedom, equality and justice which are at the same time the guiding principles for the state's self-realisation and the promotion of the common weal of its people.

By and large, the distinction between the formal and material *Rechtsstaat* is a valid one. It is self-evident that a state that has all the formal trimmings and

trappings of a constitutional state, but is not imbued with all those abiding values which make law and its application meaningful, and therefore generally respected, will soon deteriorate into a monolith in which the law itself becomes an instrument of oppression, or worse, will pave the way for the brutal overthrow of those institutions which sustain the constitution.

To summarise, it can be said that the modern *Rechtsstaat*, both in the material and formal sense of the word, bears the following characteristics:

- a constitution which is the fundamental law and from which all other laws derive their authority as well as an independent constitutional jurisdiction to protect that constitution;
- the exercise of government authority in terms of legislation adopted in accordance with the constitution;
- guaranteed freedom, justice and legal certainty;
- equality before the law, distribution of authority and judicial control over the exercise of authority;
- commitment to the law, judicial protection and a prohibition of excessive powers;
- constitutional protection of fundamental rights and prohibition of retrospectivity;
- the supremacy and unambiguity of the law; and
- the predictability and measurability of executive conduct.

(Cf Venter "Aspects of the South African Constitution of 1996: An African democratic and social federal *Rechtsstaat*?" 1997 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 51 76.)

These characteristics are, however, purely descriptive. They may be said to depict the *Rechtsstaat*-in-rest. The question remains, and this is what I shall try to answer: what are the pervasive forces and motivations which set the *Rechtsstaat* in motion? In other words, what are the fundamental pre-conditions for the *Rechtsstaat* to operate and function as such?

An obvious answer to the question would be that a strong feeling and respect for the law makes the *Rechtsstaat* operative. Of course, in a sense this is true law. The modern *Rechtsstaat* is the embodiment of a total legal order and the law, with its immanent and transcendent qualities, can fulfil its integrating, peace-creating and justice-seeking functions only if the state and its institutions, as well as its politicians and citizenry, consider the law to be good, just and legitimate. If the very fabric of the *Rechtsstaat* which is its legal system, is in disrepute, that state will fall apart. However, an answer which seeks the operative success of the *Rechtsstaat* in the overall acceptance and respect of such a state's legal system, does not fully answer the question of what sets the *Rechtsstaat* in motion. At most, it tells us what are the requirements to assure that the *Rechtsstaat* moves or operates *successfully*.

Another possible answer to the question what are the moving forces in a *Rechtsstaat*, would perhaps be: Those democratic values which sustain the state and its institutions. Or, perhaps, those political forces as well as socio-economic needs which require the state and its government to keep moving.

On closer examination, however, it will be realised that, while political forces and socio-economic needs provide the *motivation* for the state, its government

and institutions to act, they do not of themselves trigger off the immensely wide-ranging series of state activities. It can truthfully be said that political considerations and socio-economic needs provide the fuel for state and government action. They do not, however, provide the spark which sets the *Rechtsstaat* in motion. The reason for this is obvious: in the perfect state, all political forces will be balanced and all socio-economic needs addressed and fulfilled. It should not be forgotten that all governments, more or less, promise a perfect state. All of us know, however, that the perfect state is an unattainable ideal. It is as a result of unbalanced political forces, unfulfilled socio-economic needs, unkept promises on the part of the governors, frustration and outrage on the part of the citizens, conflict, strife, corruption, dirty tricks and law-breaking that any state – including the *Rechtsstaat* with its high ideals of peace-through-law – is set in motion. It is exactly as a result of conflict, transgression, penury and want that a state is set in motion. It is precisely under such conditions that the *Rechtsstaat* is not simply activated, but has to prove its qualities and, above all, show its dedication to the legal order upon which it rests. It is in the face of adversity that the constitutional state is put to the test. Put differently, any state and its government must become operative in the face of conflict, whether small or big, whether real or imminent. A *Rechtsstaat*, moreover, must prove itself worthy of the name of *Rechtsstaat* under such conditions.

Some idealists or naïve do-gooders would have us believe that the *Rechsstaat* which is inspired by lofty ideals and sustained by high values, is a paradise. They ignore the fact that the very notion of a *Rechtsstaat* is a response to a world which is inherently riddled with conflicts of interests and many other complex forms of strife and disruption. A *Rechtsstaat* cannot erase conflict and strife. But by solving these conflicts in a lawful manner, it is hoped that it may bring justice to an unjust world.

The assertion that it is conflict which sets the *Rechtsstaat* in motion, should not come as too severe a shock. If it is accepted that the *Rechtsstaat* finds its *raison d'être* in a normative, fundamental legal order, it follows that such a state must in its fulfilment, or rather in the carrying out of all its functions and activities, adhere to strict and prescribed legal processes. In short, the *Rechtsstaat* requires the entire state and its government, as well as its politics, to become judicialised. Obviously, this judicialisation of the state and its activities cannot be exactly similar to the judicial process *pro tanto*, since many of these activities are motivated by considerations of a political nature which would fall beyond ordinary judicial scrutiny. This does not mean, however, that any one of these politically motivated activities should escape some or other form of legal control. (This is the reason why the erstwhile infamous "act of state", the uncontrollable *raison d'êtat* and the uncontrollable "executive discretion" have no place in the *Rechtsstaat* and conversely, why the idea of a "High Court of Parliament" acquires a new significance.) If it is accepted that the *Rechtsstaat* by its very nature, requires the "judicialisation" of all its activities, it is not far-fetched to look to the ordinary judicial process for similarities. Ordinary judicial processes are set in motion by concrete disputes and conflict, whether of a public or private nature.

This is the reason why, generally, a court of law will not entertain purely academic disputes. (In this respect, it must be mentioned that the Constitutional Court also performs functions which go beyond the jurisdictions of ordinary courts and by doing so, enters into broader political processes, thereby judicialising the legislative process in particular.) Similarly, it can safely be said that all *Rechtsstaat* activities, processes and procedures are set in motion by dispute and

conflict. Obviously such a dispute and conflict, in the sense of an activator for the *Rechtsstaat*, may take many divergent forms and does not present itself in the same rather narrowly prescribed manner in which ordinary courts would open their doors to conflict and dispute resolution. But this does not detract from my basic assumption that in the fulfilment of its manifold tasks, and the undertaking of its vast array of activities, the *Rechtsstaat* is activated by disagreement, conflict (whether real, perceived or expected) and the plethora of other disputes which may arise in the fields of politics, economics, welfare, health, international relations, and so on. Indeed, it is my assumption that conflict and dispute, whether real or potentially real, constitute the foundations of the *Rechtsstaat*-in-motion.

Rechtsstaat en demokrasie

Wanneer erken word dat teenspraak, belangebotsings, konflik en stryd die grondslag van die *Rechtsstaat*-in-beweging uitmaak, kan die daadwerklike antinomie tussen *Rechtsstaat* en demokrasie beter verstaan word. Demokrasie veronderstel dat staatsmag by die volk setel en het as grondslae algemene gelykheid en meerderheidsregering. Die spanningsveld tussen regstaat en demokrasie bestaan daarin dat die demokrasie uiteraard geroepe is om die konflikdinamiek van die regstaat te bestry, hetsy om die konflik te ontlont, hetsy om die konflik – as dit staatsbedreigend is – te onderdruk. Konflikte word deur 'n demokratiese regering op verskillende maniere ontlont, deur hulp, onderhandeling, vreedsame beslegting, opheffing en versorging. Dit kan gerieflik gesê word dat die standhoudende, aanhoudende taak van 'n demokratiese regering is om struweling, konflik en moontlike belangebotsings op te los. Die toets van 'n demokratiese regering binne 'n regstaat is of hy hierdie botsings en konflikte steeds volgens die regsorde en regsvoorskrifte gaan oplos.

Dit is die basiese antinomie tussen regstaat en demokrasie: die regstaat kom in beweging en gedy as gevolg van konflik, belangebotsings en vergrype, terwyl die demokrasie juis die opdrag het om konflik te bestry en uit te wis. In 'n lewenskragtige demokrasie word die konflikdinamiek van die regstaat volledig erken en word daar gepoog om konflik volgens die reëls en voorskrifte van regstaatlikheid op te los en te besweer. In die swak demokrasie word konflik óf negeer óf onderdruk op ongrondwetlike en dus onwettige maniere. Wat noodwendig gebeur, is dat die regering 'n beroep doen op die sogenaamde "hoër gesag wat by die meerderheid van die volk berus", om regstaatlikheid te verkrag. Wat volg, is oorbekend: 'n saamtrekking van staatsmag in die sentrale owerheid, onderdrukking van teenspraak en opposie en uiteindelik 'n diktatorskap.

Hoe gebeur dit dat 'n demokratiese staat as gevolg van sy onvermoë om konflik te hanteer, uiteindelik sy regstaatlikheid ondermyn en in tirannie verval? Die voor-oorlogse Duitse Weimarrepubliek verskaf 'n duidelike antwoord. Daar moet onthou word dat die grondwet van die Weimarrepubliek 'n toonbeeld van regstaatlikheid was. Die feit dat die moderne staat wesenlik pluralisties is en dat die regering gedurig daarop bedag moet wees om konflik te reël, is negeer en het tot valse gerustheid gelei. Soos Vitzthum verduidelik (vry vertaling):

> "Die besef dat stryd, belangebotsings, party-verskille, die natuurlikste ding op aarde is, dat die 'enigste waarheid van die staat daarin bestaan om verskeie waarhede te laat geld', dat die algemene welvaart nie as iets voorbestemds uit die hemel val nie, maar in die subsisteme van die maatskappy en staat, in dialoog en teenspraak van die verskillende akteurs opgebou moes word – kortliks: die leerstelligheid van 'n moderne massa-demokrasie – is in die antipluralistiese Duitsland van die dertigerjare skaars verkondig, of gewoon verswyg." ("Eher Rechtsstaat als Demokratie" *Verfassungsstaatlichkeit – Festschrift für Klaus Stern zum 65. Geburtstag*) (1997) 111.)

In die Weimarrepubliek het inderdaad gebeur wat Alexis de Tocqueville *De la démocratie en Amerique* (1864) in sy beroemde ontleding van die Amerikaanse demokrasie meer as een-en-'n-half eeu gelede voorspel het. De Tocqueville, alhoewel hy 'n groot voorstaander van die demokrasie was, was nie blind vir die gebreke en veral die gevolge van so 'n staatsvorm nie. Meerderheidsregering, dit wil sê regering deur die verkose verteenwoordigers van die massa, lei volgens hom tot 'n verlies van breë en algemene denke, tot materialisme en korrupsie, 'n woelige maar terselfdertyd konforme, monotone maatskappy en baie ambisieuse mense sonder dat daar werklik groot ambisies is. Deur die bewuste, naarstigtelike soeke na gelykheid van omstandighede (*egalité des conditions*), word 'n valse gerustheid geskep, word die demokratiese gewetes van die meerderheid gesus en word die weg vir onderdrukking gebaan. Dit is waarskynlik wat in Nazi-Duitsland gebeur het. Dit is ook waarskynlik waarom die grootste deel van die bevolking nie bewus was, of gewoon nie bewus wou wees nie, van die alleronmenslike vergrype wat deur hul regering gepleeg is.

Die vraag kan gestel word waarom die Amerikaanse demokrasie, ten spyte van De Tocqueville se bedenking, nie in dieselfde valse gerustheid verval het nie. Jean-Francois Revel verskaf die antwoord:

> "While it is obvious that the passion for equality generates uniformity, let's not forget that democracy also rests on a passion for liberty, which fosters diversity, fragmentation, unorthodoxy" (*How democracies perish* (1983) 14; sien ook Ostrom *The political theory of a compound republic* (1987) 170).

Enkele dekades gelede was dit hoogmode om 'n Afrika-vorm van demokrasie aan die wêreld voor te hou wat kwansuis die geskikste manier sou wees om konflik en belangebotsings, veral tussen etniese groepe, te reël. Dit sou die eenpartystaat wees waarbinne alle groepe en partye binne één party die geleentheid sou kry om nasionale eenheid te bewerkstellig en op 'n basis van konsensus die land te regeer. Vandag weet ons dat die geroemde Afrika-eenpartystaat 'n jammerlike mislukking was en tot oorheersing en growwe tirannie gelei het. Afrika-leiers het goedskiks en alte gemaklik die koloniale heerser blameer vir onenigheid en stryd in hul lande. Volgens hulle was die hele koloniale beleid op die beginsel van verdeel-en-heers baseer en sodoende is interne antagonismes en stryd gekweek. 'n Eenpartystaat sou, volgens hulle, die koloniale verdeeldheid genees en eenheid bring, terwyl 'n veelpartydemokrasie – ten spyte van die moontlikhede van koalisievorming – juis daardie verdeeldheid sou vererger. Daar is algemeen geargumenteer dat die veelgeroemde Afrikaanse *ubuntu* – 'n kollektiewe drang na medemenslikheid en inskiklikheid – ook geëien is om politieke teenstrydighede te beteuel. Die praktyk het hierdie idealistiese maar naïewe siening, wat ook al te graag deur sommige Westerse politikoloë en staatkundiges opgeraap is, as 'n klaaglike mislukking en leuen openbaar.

Die Afrika-eenpartystaat het baie gou al die tipiese wanstaltigheid en verval van alle eenpartystate vertoon, naamlik 'n sentralisering van mag, etniese uitwissing, onderdrukking van teenspraak en uiteindelik die vestiging van 'n brutale diktatorskap wat in baie gevalle sy logiese uiteinde gevind het in die vestiging van 'n militêre bewind wat sy mag met brute wapengeweld handhaaf. In wese was die Afrika-eenpartystaat dus enersyds die jammerlike gevolg van ondemokratiese staatsdenke en andersyds die gevolg van 'n algehele onvermoë om die regstaatlike potensiaal van normatiewe konflikregulering te handhaaf.

It must be clearly stated that the *Rechtsstaat* or constitutional state is not synonymous with democracy. Whereas the constitutional state presupposes a state

and institutions as well as politics which are openly regulated by legal norms, democracy assumes the exercise of state power by the elected representatives of the majority of the people. The legal regulation of conflicts and clashes of interests, and all the other conciliatory forces of the *Rechtsstaat*, rest on principles of justice and are not dictated by the will of the majority. And this is exactly where the antinomy between *Rechtsstaat* and democracy lies. While the *Rechtsstaat*, in a constitutional manner, respects the authority of the democratic majority to govern and make laws under certain prescribed conditions, it does not by the same token ascribe authority to the will of the majority of the people to transcend and go beyond the authority of the law.

To summarise: the fact that a clash of interests, divergent claims and conflicts form the basis of the modern *Rechtsstaat*-in-motion, need not upset sensitive minds. No healthy society within any state is free of conflict. In fact, such conflict is absolutely necessary to make a society vibrant and proactive. What is of concern is not the conflict itself, but the manner in which it is resolved, prevented and contained.

The South African *Rechtsstaat*

Although this is not formally stated, it can be safely said that our Constitution (the Constitution of the Republic of South Africa, Act 108 of 1996) ascribes all the characteristics of the formal and material *Rechtsstaat* to our South African state. (See Venter *loc cit* where he compares the 1996 Constitution with the Interim Constitution of 1993 and concludes, quite correctly, that the latter was more explicit in its formal description of South Africa as a constitutional state.) The Constitution is our supreme law, there is an independent Constitutional Court to safeguard the Constitution and powers of government are constrained in accordance with the time-honoured doctrine of the *trias politica*. What is more, our Constitution came about and was adopted in such a manner that its overall legitimacy is acknowledged and respected. Our legal institutions function effectively and law, as a regulatory force of society, is generally recognised. Indeed, it can safely be said that constitutionally, South Africa has emerged from its sad past into a fully-fledged *Rechtsstaat*. Stated differently, we may say that if we look at the Constitution, South Africa presents itself as a *Rechtsstaat* or constitutional state in the true sense of the word. That is, a *Rechtsstaat*-at-rest. The crucial question, however, is whether the South African *Rechtsstaat*-in-motion will have the strength and resilience to maintain its essential features. The answer to this question depends on the political forces in our country, and more particularly, as I have indicated, on the capacity and will of politicians and political leaders to deal with conflict within the ambit and scope of *Rechtsstaatlichkeit*. It should never be forgotten that previously, under the apartheid regime, South Africa was also in a sense a constitutional state, since we did have a written constitution and regulation by law. The constitution of that time, however, was founded upon the principle of parliamentary sovereignty – which, it is true, is also an abiding general principle recognised by constitutional law. Through the application of parliamentary sovereignty, a parliamentary majority which represented a minority of the people, largely abused its constitutional powers to suppress, compound or divert our country's most severe political conflict, namely the conflict between white and black. In other words, what happened was that politicians abused the constitutional principle of parliamentary sovereignty to divert, evade and suppress our country's gravest conflict. The

crucial question now is whether our new Rechtsstaat permits similar abuses. Ultimately, the answer to this question depends on the nature of our new democracy.

Rechtsstaat and democracy in the "new" South Africa

The "new" South Africa is battling with the problems of the past, the present and the future. Liberation has brought democracy to our country, but has not lessened our problems. What the new democracy has achieved – and this fact is too readily forgotten by many pessimists – is that for the first time ever, South Africa's politicians can face and try to solve these problems in a legitimate, democratic and universally accepted manner.

But will these problems always be addressed and solved within the context of the South African *Rechtsstaat*? Tersely stated, will the South African *Rechtsstaat* be able to deal with all the strife, turmoil and conflict arising from all our problems?

Looking at our Constitution, we can answer positively and say that the Constitution, which is the basis of our *Rechtsstaat*, is not oblivious to the fact that our society is riddled with conflict. That is why special organs of government had to be created and special procedures instituted to deal with real or potential conflict. In this respect, the pre-eminent role of the Constitutional Court cannot be overemphasised. Nor should the encompassing and essential conflict-resolving roles of the legislatures, executives and judiciary, ever be forgotten. Other organs and institutions such as the Public Protector, the Public Service Commission, the Human Rights Commission, the Commission for the Promotion of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality, are also there to deal with conflict which could arise from divergent interests. The Constitution abounds with examples of mediation procedures and, what is of the utmost importance, it entrenches as a basic human right the individual's right to administrative justice. It is often within the sphere of conflict between individuals and the state that injustice occurs.

Afgesien van die grondwetlike konflikreëlings, het ons regering reeds veel vermag om die woelinge en gedurige gistinge van die Suid-Afrikaanse samelewing te beteuel en te probeer besweer. Nuwe wetgewing, onder meer nuwe arbeidswetgewing, wetgewing oor grondbesit en herstel van grondaansprake en wetgewing oor gelyke geleenthede (nieteenstaande soms politieke kontrovers) is almal voorbeelde van wyses waarop die regering regstaatlik met ons konflikpotensiaal omgaan. In hierdie verband moet die Waarheids- en Versoeningskommissie en sy Amnestie-komitee uitdruklik vermeld word. Nieteenstaande moontlike geldige kritiek, meen ek dat die kommissie 'n grootmoedige, dapper en absoluut noodsaaklike manier was om 'n bron van aanhoudende konflik deur ondersoek en openbaarmaking te besweer. Die bitterheid van die verlede en veral die oorsake van al die bitterheid moes eenvoudig aangespreek word. Ek kry die indruk dat baie van die kritiek teen die kommissie uit oorde kom wat in die verlede al te gemaklik met arrogansie ampshalwe toegesmeer, verswyg en boweal gelieg het. Vir my is die grootste les van die Waarheids- en Versoeningskommissie dat ons nooit weer mag sê: "Ek het nie geweet nie omdat ek maar ons leiers vertrou het."

Alhoewel daar tereg gesê kan word dat ons nuwe demokrasie dus grondwetlik en andersins daadwerklik poog om konflik regstaatlik te beheers, is daar ook versigtige kommer. Daar is al die bedenking geopper dat ons regstaatlikheid in gedrang kan kom weens die "potential of communalism overshadowing

individualism; '*Sozialstaatlichkeit*' gaining the upper hand over '*Rechtsstaatlichkeit*' " (Venter 82). Daar moet onmiddellik opgemerk word dat sosiaalstaatlikheid, in die sin van maatskaplike en ekonomiese opheffing, in geen opsig teen regstaatlikheid hoef in te druis nie. As so 'n opheffing egter grondwetlike waarborge en prosedures verkrag en die belange van minderhede op 'n ongrondwetlike wyse aantas, bestaan daar inderdaad 'n gevaar dat regstaatlikheid bedreig kan word.

South Africa is a *Rechtsstaat* with a young democracy. It is often said that our young democracy should be protected. This is not correct. What should be protected, is our young *Rechtsstaat* against the mistakes which beset young democracies, often as a result of lack of experience, lust for power, status and material gains, and a general irresponsibility in the name of freedom. Our Constitution, for instance, violates the basic democratic principle of a free mandate for political representatives in legislative assemblies, which means that such representatives must toe the party line in order to retain their seats. The democratic state becomes a party political state in which the possibility of open dispute and above all, individual opinion, is squashed. Thus the first step towards a possible dictatorship is taken. The justification for this flagrant violation of one of democracy's most precious principles is that our young democracy needs unity and party political solidarity. This, however, is the crux of the problem: a young democracy should never be nurtured by the poison of undemocratic food.

I agree that political leaders of a young democratic order should be encouraged and should not be criticised for reasons of petty political and other personal acrimonies. However, political attitudes, circumstances and tendencies which pose a threat to the *Rechtsstaat* and more particularly, un-*Rechtsstaat*-like ways to solve and diffuse conflict, should be clearly and unambiguously exposed, especially when a democracy is young and in need of guidance.

Unfortunately, there are already clear danger signals for the South African *Rechtsstaat* and our young democracy:

- There are still many signs of a nostalgia for a kind of "African" democracy which simply means one-party rule. National unity and a healing of the divisions of the past are still too easily translated in terms of party-political unity. National unity and a healing of past divisions must be found in a common patriotism and embedded in the Constitution, not in the destruction of a multiparty democracy. This is the reason why I am convinced that although a government of national unity was necessary for a certain period of our transition, it would not have served democracy in the long run. This is why I regard a fusion of political parties on the strength of providing positions of high government to leaders, with extreme suspicion. Bribery takes many forms; political bribery can lead to the destruction of a multi-party democracy. Also, unresolved intra-party-political disputes and conflict can lead to the undermining of the *Rechtsstaat*. This is what is presently happening in Namibia: because the ruling political party is not capable of resolving the dispute about the succession to its leadership, it is bent on changing the Constitution to provide for a continuation of the present leadership and state presidency. And so the way is paved to a life-presidency, Africa-style.
- "Equality of conditions", whether in the form of levelling the playing fields, affirmative action and equal opportunities, is absolutely necessary for a stable democracy, since a democracy relies on the stability which flows from equality, not only of status but also of human conditions. On reflection, however, I

doubt whether the Constitution's condition which is coupled to its equality provision, namely that special measures may be taken to protect and advance persons who were "disadvantaged by unfair discrimination", was an entirely happy one. What is found in practice, is that measures to advance and protect previously disadvantaged persons, are increasingly being perceived as creating benefits and rewards for the permanently disadvantaged. Persons bandy claims of disadvantage about in order to be promoted or gain positions for personal gain. All of this creates racial and other tensions which can overtax the *Rechtsstaat's* capacity to regulate conflict. A positive expression such as "persons who were previously denied the development of their full potential" should have been used rather than "disadvantaged", which sounds so dismal and can so easily be used in a pejorative sense.

- There are simply too many signs of conflict, whether in the form of party-political rivalry, criminality or lawlessness, which detract from the wholesomeness of lawful resolution which the *Rechtsstaat* is supposed to bring. In short, much conflict in our country is not resolved, or is left to be unresolved, without any recourse to *Rechtsstaatlichkeit*. This inevitably leads to a discrediting of the law and its institutions and finally, to the demise of the *Rechtsstaat* itself.
- Our Constitution, which is the basis of the South African constitutional state, has ample and well-entrenched provisions relating to its amendment. With a few exceptions, the Constitution can be amended by a two-thirds majority. An ambitious political party which proclaims that it wants to gain supreme political power based on the will of the people, may unashamedly strive to obtain a two-thirds majority to change the Constitution at will. By doing so, it would defy the very foundations of the *Rechtsstaat*. Unfortunately, this is a tendency which often manifests itself in so-called young democracies with a weak democratic culture, such as ours. It would have been infinitely more advisable, in order to fortify our *Rechtsstaat*, for our Constitution to have had clear and well-entrenched procedures for its partial and total revision instead of such bland amendment provisions. Examples of the kind of procedure I have in mind were found in the interim Constitution; these could have provided for mediation, opposition by minorities, consultation, popular advice in the form of plebiscites and referendums and advice by the Constitutional Court, and would have eliminated the possibility of a political party with a two-thirds majority rashly amending the Constitution to suit its own whims.
- A *Rechtsstaat*, by its very nature, must have a completely independent and also a most competent judiciary. Fortunately, we are still in the happy position that we can be proud of such a judiciary, but there are some disturbing noises. Politicians must realise that the bench should never be a party-political tool. A judiciary, although democratically invested, does not derive its legitimacy from a popular or majority vote, but from the eminence of the Constitution and the law which it applies. This is a lesson for all democracies and should be repeated over and over again.
- Finally, the *Rechtsstaat*, in order to resolve conflict, relies on open dialogue. Much of this dialogue takes place in the public media. A government which seeks to destroy the basis of the *Rechtsstaat*, will often start by suppressing public debate in order to conceal real or potential conflict. Although South Africa's media freedom is still intact, I view with extreme concern some of the utterances of politicians over the last year to the effect that our press is in

the hands of a minority which is bent on discrediting the government. One cannot become too vigilant as far as freedom of the press and expression is concerned.

Samevatting en afsluiting

Daar is al tereg gesê dat in die diepste sin is alle regstate eintlik "ontwikkelingslande" (Häberle "Der Verfassungsstaat in entwicklungsgeshichtlicher Perspektiv" in *Festschrift für Klaus Stern* 143 159: "In einem tieferen Sinne sind alle Verfassungstaaten 'Entwicklungsländer' "). 'n Demokrasie is nooit voleindig en afgeslote nie, maar bly in gedurige ontwikkeling, 'n ontwikkeling om gelykheid, vryheid en welvaart vir almal te skep. Die regstaat vorm die konteks waarbinne die demokrasie immer voorwaartsstuwend is. Die regstaat gedy deur regmatige reëling en oplossing van konflik en word in hierdie taak- en funksievervulling gedra deur dieper waardes van eerbaarheid, moraliteit en verantwoordelikheid. As die aktiewe politiek, wat die bewegende kragte in die regstaat uitmaak, hierdie waardes ontbeer, sal die regstaat ook vernietig word. Hoeseer ons ook al ons tereg op die Suid-Afrikaanse regstaat en ons nuwe demokrasie mag beroem, is daar terselfdertyd baie rede tot kommer. Suid-Afrika moet die toon aangee om die sogenoemde Afrika-renaissance aan te moedig en te inspireer. So 'n Afrika-renaissance is egter tot 'n misgeboorte verdoem as Afrika-lande nie die gelykheidsgrondslag van die moderne regstaat met die ewe wesenlike vryheidsgrondslag kan paar nie. Vryheid bring 'n eie ongelykheid. Sommige mense werk harder, studeer harder en verkry beter posisies. Vryheid bring verskil van menings en opposisie. Die staat wat hierdie ongelykhede wat deur individuele vryheid verwerf word, in die naam van gelykheid wil onderdruk, beroof die regstaat van sy lewenskragtige stimulus. Slaafsheid, onvryheid en onderdrukking sal 'n Afrika-hergeboorte vir altyd onmoontlik maak. Dit is die les en uitdaging vir ons almal. 'n Besinning oor die grondslae van die moderne regstaat soos toegepas op die Suid-Afrikaanse situasie is dus nie net 'n blote akademiese tydverdryf nie. Dit bring 'n dringende boodskap vir ons en 'n bevestiging – in die aangehaalde woorde van professor Strauss – van Willem Joubert se strewe, naamlik dat ons ook in ons Suid-Afrikaanse staatsbeskouing nie na die Suid-Afrikaanse staat bloot mag kyk "as 'n toevallig-werkende struktuur van menslike beheermaatreëls" nie.

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TYDDEELGEREGTIGDES EN TELEVISIE-ONTVANGS

1 Die tyddeelbedryf het in Suid-Afrika gedurende die afgelope anderhalf dekade met rasse skrede vooruitgegaan. Die populariteit van dié vorm van vakansievoorsiening het intussen uit die aanvanklike doelmark van 'n gewaarborgde vakansieweek iedere jaar iewers by die see vir 'n tyddeelgeregtigde in "sy"

woonstel of eenheid, ontwikkel tot die koppeling met internasionale tyddeelskemas (bv via Resort Condominiums International) en die gepaardgaande uitruilmoontlikhede wat dit meebring. Die regsgrondslag wat vir die doel beskikbaar is, het egter grootliks dieselfde gebly en die meeste tyddeelskemas word óf as deeltitelskema óf as aandeleblokskema bedryf hoewel die wet ook voorsiening maak vir die klubmodel of enige ander skema wat die minister tot sodanige skema verklaar (Wet op die Beheer van Eiendomstydsdeling 75 van 1983 woordomskrywingsartikel *sv* "eiendomstydsdelingskema" sub (a); sien ook Van der Merwe vol I *Sectional titles, share blocks and time sharing* (1995) 1–13 en 10–21. Sien oor die ontwikkeling van die regsaspekte van die tyddeelbedryf in ander verwante stelsels oa Martinek "Das Teilzeiteigentum an Immobilien in der Europäischen Union" 1994 Zeitschrift für Europäisches Privatrecht [ZEuP] 470–492; Pleysier "Time-Sharing" 1989 *De Notarisklerk* 173–175 en 1990 *De Notarisklerk* 2–4).

Ongeag welke regsgrondslag vir die bepaalde skema benut word, is dit gebruiklik dat die skema as oorhoofse liggaam voorsiening maak vir die meubilering van die onderskeie eenhede en vir die instandhouding daarvan aanspreeklikheid aanvaar. In daardie geval bepaal die wet dat die verkoper die koper in die kontrak moet voorsien van 'n volledige inventaris van alle roerende sake wat vir gebruik saam met die tyddeelbelange beskikbaar sal wees (a 4(1)(m)). Die onderskeie aandeelhouers of deeltiteleienaars is dus selde elk persoonlik verantwoordelik vir die voorsiening van nóg 'n volledige meubilering van die bepaalde ruimte vir sy persoonlike week se benutting. Die koste verbonde aan die meubilering en die instandhouding daarvan word dan ook langs een van meerdere wyses *pro rata* van die reghebbendes verhaal wat in die breë onder die begrip "heffing" saamgevat kan word. (Sien Van der Merwe en Butler in die eerste uitgawe van die werk van Van der Merwe *Sectional titles, share blocks and time sharing* (1985) 474 vn 37.)

Die meerderheid tyddeeleenhede is benewens al die ander nuttige en noodsaaklike toerusting toegerus met 'n funksionerende beeldradiostel. Die tyddeelgas hoef nie uit vrees dat hy gedurende sy vakansieweek sy geliefkoosde program sou ontbeer sy reeds oorvol voertuig (met of sonder sy tipiese sleepwaentjie) met sy eie televisiestel ook nog te oorlaai nie.

Dit is egter nie met die eerste lesing duidelik of die televisiestel wat aldaar beskikbaar is sogenaamd afsonderlik gelisensieer moet word nie. In die lig van die bekende honger na verhoogde inkomste sou dit nie verbaas indien die enigste statutêr gemagtigde lisensiëringsowerheid wel graag van die aanname sou wou uitgaan dat hy geregtig is om vir elke tyddeelwoonstel of -hut toegerus met 'n televisiestel reg deur die land 'n bykomstige lisensie-inkomste te vorder nie. Nie alleen is dit makliker om die lisensiebedrag van die bekende betalingskragtige tyddeelbestuurskemas te verhaal as om dit van die roofkykers in die tradisionele roofkykgemeenskap te probeer verhaal nie, maar dit kan selfs kwasie-ongemerk gedoen word indien die lisensiegeld eenvoudig onder al 52 die potensiële tyddelers per jaar *pro rata* verdeel word as ongespesifiseerde onderdeel van die verskuldigde "heffing".

Die regsposisie met betrekking tot die lisensiëring van persone as gelisensieerde seinontvangers word tans beheers deur die Uitsaaiwet 73 van 1976 soos gewysig veral deur Wet 103 van 1996 wat reeds op 1 Julie 1997 in werking getree het. Vóór daardie wysigings was die lisensiëring en ook die gepaardgaande regulasies egter beheers deur die Radiowet 3 van 1952 wat deur Wet 103 van 1996 herroep is.

Vervolgens word kortliks verwys na die regsposisie soos dit van toepassing was vóór 1 Julie 1997 omdat dit die onderliggende gees waarbinne die wetgewer se bedoeling met van die bepalings, wat steeds via die gemelde regulasies van toepassing is, die duidelikste na vore bring.

Daarna word, met verwysing na die regsposisie soos dit gewysig is ná 1 Julie 1997, die huidige regsposisie bespreek.

2 Die Radiowet van 1952 soos gewysig (in a 2 van Wet 2 van 1978 en a 23 van Wet 61 van 1982) het voor sy herroeping op 1 Julie 1997 in artikel 5 bepaal:

> "5 Verbod op oorsending of ontvangs deur middel van radio en beoefening van sekere ander radiobedrywighede sonder lisensie of sertifikaat –
>
> (1) *Niemand mag* 'n . . . sein deur middel van radio oorsend of . . . *ontvang nie* . . . *tensy hy* in besit is van die toepaslike lisensie.
>
> (2) (a) *Niemand mag 'n televisiestel gebruik* vir die *ontvangs* van enigiets wat in 'n uitsaaidiens uitgesaai word nie, *tensy hy* –
>
> (i) *in besit is van 'n televisielisensie*; of
>
> . . . of
>
> (iii) Geregtig is om dit te doen uit hoofde van toestemming verleen kragtens 'n televisielisensie ingevolge artikel 17(2) van daardie Wet uitgereik; . . ."

Die Engelse teks van die ondertekende wet het in die verband bepaal:

> "5 (1) *No person shall . . . receive* by radio any sound, image, sign or signal . . . *unless* he is in possession of the appropriate licence, . . .
>
> (2) (a) *No person shall use* any television set for the reception of anything broadcast in a broadcasting service *unless* he –
>
> (i) is in possession of a television licence; or
>
> . . . or
>
> (iii) is entitled to do so by virtue of any permission granted under a television licence issued in terms of section 17(2) of that Act; . . ." (my kursivering).

2 1 Die toepassing en ook uitleg van die tersake lisensiëringsbepalings in daardie wet behoort slegs vanuit hierdie artikel beoordeel te word. Ook die regulasies wat ter uitvoering van daardie wet uitgevaardig is, bly gebonde binne die duidelike premisse wat in bogemelde artikel gestel word.

2 2 Die klem val in die wet op die *natuurlike persoon* wat 'n sein ontvang (a 5(1)) of wat 'n televisiestel *gebruik vir ontvangs* van iets wat in 'n uitsaaidiens uitgesaai word (a 5(2)). Die klem val dus, kort gestel, op die lisensiëring van die mens as seinbenutter en nie op die lisensiëring van óf die stel óf die reghebbende van die stel nie.

Die wet het nie in die eerste plek betrekking op die eienaar van 'n stel nie en ook die benutting elders in die wetgewing van die begrip "besit" dui onomwonde op die gemeenregtelike persoonlike beheeraspekte wat uiteraard slegs deur natuurlike persone uitgeoefen kan word. (Besit is immers die feitelik persoonlike relasie tussen 'n bepaalde regsubjek en 'n saak.) Dit staan in teenstelling tot die reg op eiendomsreg wat uiteraard ook deur 'n regspersoon as volwaardige regsubjek gehou kan word. Dit speel streng gesproke vir die doeleindes van lisensiëring geen rol of die bepaalde televisiestel in 'n bepaalde vakansiewoonstel of eenheid in werklikheid aan die verskillende deeltiteleienaars gesamentlik in medeeiendom behoort en of dit aan die maatskappy, wat reghebbende van die aandeleblok-beheerde woonstelperseel is, behoort nie. Dit is nie die privaatregtelike eiendomsreg wat as sleutel tot lisensiëring dien nie dog die benutting van die stel vir ontvangs van seine "wat in 'n uitsaaidiens uitgesaai word" (a 5(2)(a)).

Die wet beheer primêr die natuurlike persoon as benutter van 'n stel vir ontvangs van seine en nie in die eerste plek die sakeregtelike vraag wie eienaar van die stel is nie. Nóg die wetgewing nóg die regulasies daaronder uitgevaardig verwys in die tweede plek ooit na die lisensiëring van 'n bepaalde ontvangsstel as sakeregtelike saak. In dié opsig verskil die wet wesenlik van byvoorbeeld ander lisensiewetgewing soos dié wat betrekking het op die lisensiëring van 'n bepaalde vuurwapen of 'n bepaalde voertuig en kan uitsprake oor daardie wetgewing nie klakkeloos as analogie by die onderhawige probleem benut word nie.

2 3 Pas as sekondêre uitsondering (let op die benutting van "of" voor a 5(2)(a)(iii) hierbo) word in artikel 17(2) en 17(3)(b) van die Uitsaaiwet voorsiening gemaak vir gevalle waar die bepaalde natuurlike persoon nie verplig is om self 'n lisensie uit te neem alvorens hy die uitgesaaide sein wil benut deur 'n ontvanger nie. Sy benutting word dan ingevolge daardie subartikels gemagtig deur een van daardie uitsonderings. Die feit dat die wetgewer in die subartikels voorsiening maak vir die lisensiëring van 'n besigheid om stelle byvoorbeeld te verhuur, is egter nie gelyk te stel met 'n primêre verpligting op elke regspersoon (of natuurlike persoon) in sy hoedanigheid as "eienaar van die inrigting of besigheid" om self in alle gevalle 'n lisensie vir iedere stel op die tersake perseel te moet uitneem nie. Laasgenoemde verpligting kom slegs ter sprake indien die primêr aangesproke verpligte kyker as benutter van die sein inderdaad anders as deur artikel 5(2)(a)(i) voorgeskryf, nie oor 'n daarvoor geldige lisensie beskik nie.

Die benutting van die woord "kan" in die hoofsin van die tersake subartikel dui daarop dat die wetgewer dit ook so bedoel het. Artikel 17(2) van die Uitsaaiwet is van toepassing op *inrigtings of besighede* – en bepaal:

> "17(2): Die korporasie *kan* 'n televisielisensie uitreik wat aan die houer daarvan in sy hoedanigheid van eienaar of bestuurder *van 'n besigheid of inrigting* in die lisensie vermeld die reg verleen om –
>
> (a) gedurende 'n bepaalde lisensiejaar; en
>
> (b) in verband met daardie besigheid of inrigting; en
>
> (c) op 'n plek, aldus vermeld, waar daardie besigheid of die sake van daardie inrigting gedryf word of wat reeds in die registers van die korporasie aangeteken is; of
>
> (d) in enige voertuig, vaartuig of lugvaartuig wat gebruik word in verband met die dryf van daardie besigheid of inrigting op daardie plek,
>
> enige televisiestel of, indien en vir sover die korporasie te eniger tyd in die algemeen of met betrekking tot 'n kategorie waartoe daardie besigheid of inrigting behoort, by regulasie so bepaal het, 'n aantal televisiestelle in die lisensie vermeld, of enige televisiestel van 'n kategorie aldus vermeld, of 'n aantal televisiestelle aldus vermeld, *te gebruik, of beskikbaar te stel en iemand anders toe te laat om dit te gebruik*, om enigiets te ontvang wat in 'n uitsaaidiens uitgesaai word" (my kursivering).

2 4 Ook subartikel 5(2)(iv) van die Radiowet, wat voorsiening maak vir die beeldstelverhuurbedryf, skep 'n uitsondering op die normale reël dat die kyker as benutter van die ontvange sein primêr die lisensieverpligte party is. Dit bepaal dat 'n nie-gelisensieerde persoon regmatig as kyker 'n stel mag benut mits hy die stel bekom het van 'n beeldstelverhuurder wat self oor die tersake lisensie beskik:

> "'n Persoon is aan wie daardie *televisiestel verhuur of andersins beskikbaar gestel is* kragtens 'n televisielisensie ingevolge artikel 17(3)(b) of (c) van daardie Wet [di die Uitsaaaiwet] uitgereik."

Artikel 17(3)(b) van die Uitsaaiwet maak voorsiening vir:

> "'n lisensie wat aan die houer daarvan *in sy hoedanigheid van radiohandelaar* die reg verleen om gedurende 'n bepaalde lisensiejaar en onderworpe aan die voorwaardes en vereistes wat by regulasie voorgeskryf is – . . ."

Daardie artikels is duidelik nie op die onderhawige probleem van die tyddeelwoonstelbedryf van toepassing nie. Die bedoeling van nóg die verskillende deeltiteleienaars as tyddeelgeregtigdes nóg van die skema se bestuur is om die tersake ontvangsstelle "te verhuur" of "beskikbaar te stel" in hul hoedanigheid as 'n "radiohandelaar". (Dit is trouens ook die geval met a 17(3)(c) van die Uitsaaiwet wat eweneens op handelaars van toepassing is: "(c) 'n lisensie wat aan die houer daarvan, *in sy hoedanigheid van radiohandelaar*, . . .")

2 5 Subartikel 5(2)(b) van die Radiowet bepaal:

> "(b) Geen eienaar of bestuurder van 'n *besigheid of inrigting* mag in verband met daardie besigheid of inrigting–
>
> (i) 'n televisiestel gebruik, of *iemand anders toelaat om dit te gebruik*, vir die ontvangs van enigiets wat in 'n uitsaaidiens uitgesaai word nie, tensy *hy* in besit is van 'n televisielisensie ingevolge artikel 17(2) van die Uitsaaiwet, 1976, uitgereik; of
>
> (ii) 'n televisiestel anders as ooreenkomstig die bepalings van so 'n lisensie wat hy in sy besit het, soos voormeld gebruik nie, *of iemand anders toelaat* om dit te doen nie." (Par (b) vervang by a 23 van Wet 61 van 1982.)

Hoewel hierdie subartikel op die eienaars of bestuurders van besighede van toepassing is waar persone toegang het tot die benutting van 'n ontvangsstel van die besigheid, staan ook die artikel binne die oorkoepelende bedoeling van die wetgewer waarna hierbo verwys is, te wete dat die wetgewer bedoel om primêr die kyker as ontvanger van die tersake seine te lisensieer en sou dit pas relevant raak indien 'n bepaalde kyker op geen ander wyse 'n gelisensieerde kyker kan wees nie.

2 6 Niks in die wetgewing spreek daarvoor dat die wetgewer bedoel het om in bepaalde gevalle dieselfde kyker as seinbenutter meermale tot 'n gelisensieerde kyker te klassifiseer ten einde sodoende die lisensiëringsowerheid te magtig om meerdere lisensie-inkomstes vir en van die kyker te verhaal nie. In die laaste plek is enige vorm van lisensiëring deur 'n owerheidsliggaam, hetsy direk of indirek, 'n vorm van belasting en geld in geval van twyfel die bekende spreuk: *Boni pastoris est tondere pecus non deglubere* – dit is kenmerkend van 'n goeie herder om die skape te skeer en hulle nie af te slag nie! Daarmee saam gaan die ander bekende reël van wetsuitleg: *in dubio contra fiscum – D* 49 14 10: waar 'n belastingvoorskrif onduidelik is, word dit ten ongunste van die skatkis vertolk.

3 Die formulering in artikel 17(2) van die Uitsaaiwet sou moontlik by die eerste lees daarvan die indruk kon wek dat dit juis voorsiening kon maak om 'n tyddeelbestuursorganisasie of die "beheerliggaam" van 'n bepaalde deeltitelkompleks waar die tyddeelskema bedryf word, as 'n "besigheid" soos in daardie subartikel omskryf, te klassifiseer. As sodanige "besigheid" sou dit dan verplig wees om daardie tipe besigheidslisensie uit te neem. Myns insiens staan die onderskeie tyddeelreghebbendes en ook die tyddeelskemabestuurders egter nie in die ware sin van daardie artikel in 'n *besigheidsverhouding* tot die onderskeie tyddeelreghebbendes wat in 'n bepaalde eenheid vakansie hou en tussendeur die televisiestel benut nie. Die besigheid van die tyddeelbestuurder of van die hele skema is nie om stelle te verhuur of beskikbaar te stel nie.

4 Die wet verplig die gebruiker van die stel om 'n geldige lisensie vir die benutting van die bepaalde stel te hê en dit moet die vertrekpunt bly. Die volgende vrae behoort dus beantwoord te word ten einde die lisensiepligtige te bepaal: (1)

Wie "gebruik" regtens vir die doeleindes van die wet 'n bepaalde stel om daarmee seine te ontvang, en (2) indien hy nie in die eng sin van die woord vir die benutting van die bepaalde stel op die bepaalde adres gelisensieer is nie, kan hy nie moontlik *vrygestel* wees ingevolge die bepaalde regulasievoorwaardes van die uitneem van 'n lisensie vir die benutting van 'n bepaalde stel op 'n bepaalde plek nie? Vir die onderhawige probleem, of die tyddeelskema verplig is om 'n geldige lisensie vir iedere stel op die perseel uit te neem, mag artikel 17(3)(a) van die Uitsaaiwet wel ter sake wees:

> "17(3): Die korporasie kan die volgende verdere televisielisensies uitreik, naamlik –
>
> (a) 'n lisensie wat aan die houer daarvan die reg verleen om –
>
> (i) gedurende 'n bepaalde lisensiejaar; en
>
> (ii) *op 'n plek* wat in die lisensie vermeld word of wat reeds in die registers van die korporasie aangeteken is; of
>
> (iii) op 'n ander plek waarvan kennis onder die omstandighede en op die wyse en tyd by regulasie voorgeskryf aan die korporasie gegee is,
>
> *enige televisiestel*, of, indien die korporasie te eniger tyd by regulasie so bepaal het, die aantal televisiestelle wat in die lisensie vermeld word, *te gebruik* om enigiets te ontvang wat in 'n uitsaaidiens uitgesaai word" (my kursivering. Par (a) is vervang by a 11(e) van Wet 61 van 1982).

4 1 Gedurende die afgelope jare is by herhaling nuwe regulasies ingevolge die wetgewing uitgevaardig om die uitreiking van beeldkyklisensies te reguleer (enkele voorbeelde: R 1763 in *SK* 5301 van 1-10-1976; R 1727 in *SK* 9257 van 13-08-1982; R 1720 in *SK* 10859 van 7-08-1987; R 1812 in *SK* 12675 van 27-07-1990; R 1747 in *SK* 13428 van 14-08-1991; R 1575 in *SK* 15077 van 16-08-1993).

Regulasie 3 van die Regulasies Betreffende Televisielisensies beheers in grootliks ongewysigde vorm van meet af *vrystellings*. Regulasie 3(1) bepaal in die weergawe as R 1408 in *SK* 15914 van 10 Augustus 1994:

> "Indien die hoof van 'n huisgesin reeds in besit is van 'n televisielisensie, uitgereik teen 'n tarief voorgeskryf in paragraaf 2 van die Aanhangsel by hierdie Regulasie vir die gebruik van 'n televisiestel *by 'n bepaalde adres* om enigiets te ontvang wat in 'n uitsaaidiens uitgesaai word, *is sodanige hoof en die lede* van die huisgesin wat by hom inwoon, *vrygestel* van die verpligting om 'n verdere lisensie of lisensies uit te neem *vir die gebruik* van 'n televisiestel of -stelle *by 'n ander adres* as die een in die lisensie vermeld *indien* daardie *ander adres as die tydelike of addisionele adres van die hoof van die huisgesin beskou word* en mits daar –
>
> (a) in die geval van 'n addisionele adres wat ten tyde van die aansoek om die uitreiking van die betrokke lisensie reeds bekend was, gelyktydig met dié aansoek; of
>
> (b) in die geval van die verkryging van so 'n tydelike of addisionele adres gedurende die loop van 'n lisensiejaar, binne veertien (14) dae na sodanige verkryging;
>
> aan die Korporasie kennis gegee is van sodanige gebruik by daardie ander adres" (my kursivering).

Hierdie regulasie maak daarvoor voorsiening dat die behoorlik gelisensieerde gesinshoof en lede van sy gesin, soos in daardie woordomskrywingsbepalings omskryf, mits hy reeds oor 'n geldige lisensie beskik, tydelik by 'n ander adres as die aangegewe "permanente kykeradres" ook mag beeldradio kyk. Hy is dan vrygestel van die verpligting om 'n bykomstige lisensie uit te neem indien hy tydelik 'n ander stel by 'n ander adres gaan benut en mits die ander adres as 'n tydelike adres beskou kan word.

4 2 Enige (tydelike) vakansieadres behoort as tydelike of addisionele adres te kwalifiseer – ongeag of die lisensiehouer tydelik sy woonwa, sy vakansiewoonstel

of 'n gehuurde hut in die wildtuin of 'n gehuurde chalet in die berge as adres het waar die tersake stel benut word. Die vrystellingsregulasie vereis ook geensins dat die benutte stel by die tydelike adres dieselfde stel moet wees wat normaalweg by die permanente adres benut word nie. Die wetgewing maak immers, soos reeds hierbo aangestip, nêrens voorsiening vir die lisensiëring van bepaalde stelle per reeksnommer en fabrikaat nie. Dit is tog die mens as seinbenutter wat gelisensieer word as gelisensieerde kyker. Om daardie rede sou dit geen snars verskil maak aan die aanspraak op vrystelling van die verpligting om 'n bykomstige lisensie uit te neem of die gelisensieerde kyker sy eie "draagbare" stelletjie in sy woonwa gebruik en of hy gebruik maak van die televisiestel wat in die gemeubileerde woonstel of chalet beskikbaar is nie. Op die moment wat hy die stel vir seinontvangs benut, is hy ingevolge die vrystellingsregulasie 'n gelisensieerde kyker. (In R 1763 van 1976 is inderdaad in die Bylae onder § 5(3) uitdruklik melding gemaak van die vrystelling vir die benutting van "'n draagbare televisiestel ... op 'n ander plek as by die adres wat in die betrokke televisielisensie vermeld word". In latere weergawes van die tersake regulasie is dit eenvoudig, klaarblyklik as oorbodig, weggelaat.)

4 3 Streng gesproke vereis die regulasie dat die korporasie kennis gegee moet word (laastens 14 dae na benutting van die tydelike adres) van die tydelike adres. Dat dit nie noodwendig prakties is nie blyk uit die voorbeeld van die rondreisende woonwabenutter of die besoeker aan verskillende ruskampe in die wildtuin. Dieselfde sou ook geld ten aansien van die onderskeie tyddeelweke wat die tyddeelgeregtigde deur die loop van die jaar by verskillende tyddeeleenhede benut – hetsy sy eie of omdat hy, soos gebruiklik is in die bedryf, sy tyddeel-"punte" uitruil ten einde nuwe adresse te kan benut.

4 4 Dit is hoogs onwaarskynlik dat die korporasie in staat sou wees om die bykomstige administratiewe las verbonde aan die registrasie van die derduisende potensiële kennisgewings van sodanige tydelike adresveranderings te registreer of te bestuur. Daar moet boonop beklemtoon word dat die oefening geen inkomste vir die korporasie genereer nie – dit verskaf bloot werk. Sonder om insae in die binnewerking van die korporasie as lisensiëringsowerheid te hê, kan aanvaar word dat die kennisgewingsvereiste oogluikend nooit deur die korporasie toegepas word nie. Die gevolg is dat iedere gelisensieerde kyker wat tydelik 'n sein benut by 'n ander adres as sy permanente adres selfs sonder om die korporasie kennis te gee van die tydelike adres steeds as gelisensieerde kyker hanteer sal word.

5 In die lig van die voorgaande bly die primêre vertrekpunt van die wetgewer ingevolge die ou Radiowet die lisensiepligtige seinbenutter ongeag of hy die eienaar van die ontvangsstel is al dan nie. Dit speel dus geen rol of die bepaalde stel in 'n privaatwoning of 'n tyddeelwoonstel staan en of die stel aan 'n maatskappy as regspersoon of aan 'n indiwidu alleen of bloot as mede-eienaar van 'n tyddeelgemeenskap behoort nie.

6 Die weerleggingslas is ingevolge artikel 5(4) van die ou Radiowet soos volg verskuif:

> "5(4) Indien dit by 'n vervolging weens 'n oortreding van 'n bepaling van subartikel (2) bewys word dat die beskuldigde te eniger tyd 'n televisiestel in sy besit gehad het, of dat hy die okkupeerder was van 'n perseel waarin of waarop 'n televisiestel te eniger tyd gevind is, *word vermoed*, tensy die teendeel bewys word, dat hy daardie televisiestel gebruik het terwyl dit in sy besit of in of op daardie perseel was, om uitsendings in 'n uitsaaidiens te ontvang." (Subartikel (4) is bygevoeg by a 32(1) van Wet 73 van 1976 en vervang by a 23 van Wet 61 van 1982.)

Daar kan min twyfel bestaan dat daardie bepaling nie die toets aan die nuwe grondwet sou oorleef nie. Dit is by wyse van analogie in effek beslis deur die grondwetlike hof in meerdere uitsprake wat oor die verskuiwing van die weerleggingslas gehandel het. In *S v Zuma* 1995 2 SA 642 (KH) is 'n artikel in die Strafproseswet om dié rede ongrondwetlik verklaar. In *S v Bhulwana*; *S v Gwadiso* 1996 1 SA 388 (KH) is 'n bepaling in Wet 140 van 1992 om dieselfde rede ongrondwetlik bevind waar 'n verskuiwing van die weerleggingslas op die persoon in wie se besit méér as 115 gram dagga gevind is, geplaas is. In *S v Mbatha*; *S v Prinsloo* 1996 2 SA 464 (KH) is 'n soortgelyke verskuiwing van die weerleggingslas in Wet 75 van 1969 met betrekking tot die besit van vuurwapens en ammunisie ongrondwetlik verklaar. Die herroeping van die gewraakte artikel 5(4)-vermoede het dus nie werklik die posisie van die lisensiëringsowerheid verswaar nie aangesien daar na die inwerkingtreding van die grondwetlike kultuur nie langer suksesvol daarop gesteun sou kon word nie.

7 Vervolgens word nog aandag bestee aan die wysigings meegebring deur die herroeping van die ou Radiowet van 1952 en die nuwe bepalings in die nuwe Wet op Telekommunikasie 103 van 1996 en die gepaardgaande wysigings ingevolge artikel 125 aangebring aan Wet 73 van 1976. In dié verband is dit egter beduidend dat die wetgewer uitdruklik die bovermelde regulasies in plek gelaat het en steeds as van toepassing beskou.

7 1 Met die eerste oogopslag mag dit voorkom of die woordomskrywing van "radio-apparaat" in Wet 103 van 1996 wyd genoeg is om die tersake artikels ook op die gebruik van *ontvangstoestelle* bekend as televisiestelle van toepassing te maak. Die kwalifikasie onder "behalwe" in die hoofsin en die omskrywing onder subklousule (b) maak dit egter duidelik dat dit nie die geval is nie:

> " 'radio-apparaat' 'n telekommunikasiefasiliteit wat in staat is om enige sein deur middel van radio te send of te ontvang, *behalwe* –
>
> (a) 'n klankradiostel of ander toerusting wat in staat is om uitsending deur radio in die vorm van klank te ontvang maar nie ook in die vorm van beelde of enige ander sigbare sein nie, indien sodanige stel of toerusting slegs vir die ontvangs van uitsending gebruik word;
>
> (b) buiten in artikels 54 en 55, 'n *televisiestel* soos beoog in die Uitsaaiwet, 1976 (Wet 73 van 1976)."

(Gemelde verwysings na a 54 raak slegs die vereiste dat telekommunikasietoerusting van 'n goedgekeurde tipe moet wees; terwyl a 55 slegs verwys na die tegniese standaarde vir telekommunikasiefasiliteite en -toerusting wat duidelik nie van toepassing is op die gebruik of benutting van 'n ontvangsstel nie.)

7 2 Hoewel artikel 30 in die oënskynlik breë verband verwys na "Frekwensie- en stasielisensies, sertifikate en magtigings" het dit in die eerste plek die benutting van sendtoerusting op oog en nie die gebruik van ontvangsstelle nie.

> "30 (1) Geen persoon mag enige sein per radio send of radio-apparaat *gebruik* om enige sein per radio *te ontvang* of enigiets doen of toelaat dat dit gedoen word waarvoor 'n lisensie, sertifikaat of magtiging ingevolge hierdie artikel vereis word nie buiten kragtens en ooreenkomstig – . . ."

In die lig van die uitsluiting van televisiestelle in die woordomskrywing van radio-apparatuur waarna hierbo verwys is, is die voorskrifte nie van toepassing op die onderhawige probleem nie.

7 3 Artikel 31 bevat bepalings wat in die algemeen die beheer oor *besit van radio-apparaat reguleer*.

> "31 (1) Behoudens artikel 30(9) mag geen persoon enige radio-apparaat *in sy of haar besit hê nie* tensy hy of sy in besit is van 'n permit . . ."

By ontstentenis van die duidelike uitsluiting van 'n televisiestel in die woordomskrywing sou moontlik nog ruimte vir twyfel oor die reikwydte van die voorskrif kon bestaan maar danksy daardie duidelike uitsluiting kom dit nie eens ter sprake by die lisensiëring van seinbenutters in 'n tyddeelkompleks nie.

7 4 In die lig van die voorgaande is dit duidelik dat die nuwe bepalings vervat in Wet 103 van 1996 behoudens die invoeging tot Wet 73 van 1976 wat in artikel 125 gereël word, geen nuwe opheldering van die probleem bied nie. Aan daardie wet kan die owerheid nie die bevoegdheid ontleen om van tyddeelskemas vir elke geïnstalleerde beeldradiostel 'n bykomstige lisensiefooi te hef nie.

8 Artikel 125 van Wet 103 van 1996 bepaal dat nuwe artikels 21A en 21B toegevoeg word tot artikel 21 van Wet 73 van 1976, welke artikel primêr voorsiening maak vir die aanstelling van inspekteurs wat moet verseker dat lisensies inderdaad beskikbaar is. Hierdie is oënskynlik die ingrypendste wysiging aan die regsposisie soos dit tot voor inwerkingtreding van Wet 103 van 1996 in 1997 geheers het.

8 1 Artikel 21A bepaal (met toegevoegde kursivering):

> "21A Onregmatigde *gebruik van televisiestel vir ontvangs* deur radio verbied
>
> (1) (a) Geen persoon *gebruik 'n televisiestel vir die ontvangs* van enigiets wat in 'n uitsaaidiens uitgesaai word nie *tensy* hy of sy –
>
> (i) *in besit van 'n televisielisensie is* nie; of
>
> (ii) daarop *geregtig is* om dit te doen *uit hoofde van 'n vrystelling* ingevolge regulasies wat kragtens artikel 23(1)(c) uitgevaardig is nie; of
>
> (iii) daarop geregtig is om dit te doen uit hoofde van enige toestemming wat kragtens 'n televisielisensie verleen is wat ingevolge artikel 17(2) uitgereik is; of
>
> (iv) 'n persoon is aan wie daardie televisiestel verhuur is of andersins beskikbaar gestel is ooreenkomstig 'n televisielisensie wat ingevolge artikel 17(3)(b) of (c) uitgereik is.
>
> (b) Geen eienaar of bestuurder van enige sake-onderneming of instansie mag in verband met daardie sake-onderneming of instansie enige televisiestel gebruik vir die ontvangs van enigiets wat in 'n uitsaaidiens uitgesaai word, of enige ander persoon toelaat om dit te doen nie *tensy* –
>
> (i) hy of sy in besit is van 'n televisielisensie wat ingevolge artikel 17(2) uitgereik is; en
>
> (ii) daardie televisiestel gebruik word ooreenkomstig daardie lisensie; en
>
> (iii) *daardie persoon* in staat is om daardie lisensie op versoek te toon.
>
> (c) Behoudens die bepalings van regulasies wat kragtens artikel 23(1)(d) uitgevaardig is, mag geen persoon 'n televisiestel *gebruik vir die ontvangs* van enigiets wat in 'n uitsaaidiens uitgesaai word of enige ander persoon toelaat om daardie televisiestel te gebruik behalwe ooreenkomstig die bepalings van 'n lisensie of die voorwaardes en vereistes onderworpe waaraan daardie televisiestel aan hom verhuur is of soos in paragraaf (b) beoog, beskikbaar gestel is.
>
> (2) . . .
>
> (3) . . ."

8 1 1 Dit is van deurslaggewende belang dat die wetgewer hierdie artikel tot Wet 73 van 1976 toegevoeg het op die moment wat die ou Radiowet van 1952 deur artikel 103 van Wet 103 van 1996 geskrap is.

8 1 2 In die lig van die vertrekpunt van die wetgewer by die 1952-wet wat hierbo uitgelig is, is dit dus nie sonder betekenis nie dat die wetgewer weer eens die klem laat val op die *gebruik* van 'n stel om seine te ontvang. Soos hierbo aangedui is,

kan slegs natuurlike persone 'n stel só gebruik want ontvangs is in die sin van die wet 'n benuttingshandeling wat slegs deur menslike verstandelike vermoëns sinvol raak. Om daardie rede is die artikel nie primêr gerig op die regulering van regspersone wat toevallig sakeregtelik 'n belang as eienaar in 'n ontvangsstel mag hê nie.

8 1 3 Artikel 21A(1)(b)(iii) bevestig die betoog hierbo dat ook die hipotetiese bestuurder van 'n wildplaas (hetsy dit 'n "sake-onderneming" vir doeleindes van die wet is al dan nie – die begrip word nie in die woordomskrywingsartikel nader gedefinieer nie) wat 'n stel in 'n hut vir gebruik deur gaste beskikbaar stel, primêr van enige lisensiëringsverpligting gevrywaar is *mits* die gas as gebruiker van die stel inderdaad in besit van 'n geldige lisensie is. Die *onus* is steeds op die gebruiker wat die stel benut ten einde 'n sein te ontvang om self te verseker dat hy 'n gelisensieerde kyker of seinontvanger is. Dit mag wees dat hy so gemagtig is danksy die bogemelde vrystellingsregulasie 3 se bewoording wat voorsiening maak daarvoor dat die lisensie-houer by 'n ander adres as sy tuisadres reeds gelisensieerd is en dus as 'n gemagtigde seinontvanger kwalifiseer by die huidige tydelike adres.

8 2 Die laaste relevante toevoeging tot Wet 73 van 1976 vind neerslag in die nuwe artikel 21B:

> "21B Besit van televisiestel sonder lisensie of permit verbode
>
> (1) *Geen persoon mag* enige televisiestel in sy *besit hê* nie *tensy* –
>
> (a) hy sodanige televisiestel in sy besit het op 'n plek waar en in omstandighede waarin hy uit hoofde van enige vrystelling ingevolge regulasies wat kragtens artikel 23(1)(c) uitgevaardig is, daarop *geregtig is om dit vir die ontvangs* van uitsendings in 'n uitsaaidiens *te gebruik*; . . ."

8 2 1 Uit die gekursiveerde gedeeltes is dit duidelik dat, soos so dikwels by wetgewing die geval is, die spreekwoordelike vlag nie die lading dek nie. Die opskrif tot die subartikel wek indien dit los van die inhoudelike bepalings van die artikel gelees word, verkeerdelik die indruk dat die blote besit van 'n stel sonder meer verbode kan wees. Die algemene stelreël *rubrica non est lex* vind steeds in die Suid-Afrikaanse reg toepassing. By 'n duidelike geval waar die opskrif te wyd is en nie deur die inhoudelike bepaling van die artikel saamgelees met die gees van die wet gedek word nie, moet die breedsprakige opskrif met versigtigheid hanteer word.

8 2 2 In die tersake artikel 21B gaan dit nie sonder meer oor die blinde veroordeling van die besit (in die sakeregtelike sin van die onder jou beheer hê met die bedoeling om 'n voordeel uit sodanige beheer vir jouself te bekom) van 'n ontvangsstel nie. Die klem val in die lig van die voorgaande artikel en weer eens met inagneming van die historiese aanloop tot die wet soos vervat in die 1952-wet steeds op die besit *vir die geregtigde gebruik* om seine te ontvang (a 21B(1)(a)).

Die vraag sal dus steeds wees of die natuurlike persoon wat in beheer van 'n stel is, in die sin van in die beste korporele betrekking tot die stel staan, inderdaad bedoel om uit die benutting van die bepaalde saak (stel) inderdaad die voordeel van ontvangs van seine te trek.

8 2 3 Aangesien die wetgewer nagelaat het om besit vir die doeleindes van die wet te omskryf, moet die gebruiklike privaatregtelike betekenis daaraan geheg word wat méér vereis as bloot voldoening aan die korporele element van besit.

8 2 4 Anders as onder die hierbo vermelde gewraakte artikel 5(4) van die herroepe ou Radiowet, skep die tans geldende wetgewing geen omkeer van die

weerleggingslas in die verband nie en moet die owerheid (inspekteur) bewys dat aan elk van die elemente van besit voldoen word indien hy wil beweer dat 'n bepaalde indiwidu wederregtelik in besit van 'n stel was om seine te ontvang.

8 2 5 Vir doeleindes van die inkleding van die verwysing na "besit" in artikels 21A en 21B van Wet 73 van 1976 soos gewysig, moet dus met groot versigtigheid omgegaan word. Die wetgewer het nagelaat om in die woordomskrywingsartikel 'n besondere inhoud aan die begrip te heg en gevolglik behoort die normale inkleding wat die reg aan die besitsbegrip heg te geld met inagneming van die nuwe grondwetlike kultuur. Dit sou nie sonder meer juis wees om te aanvaar dat "besit" hier bloot op die feitelik beste korporele betrekking tussen die indiwidu en die saak dui nie. Daar behoort kennis geneem te word van minstens die gerapporteerde uitsprake wat uitdruklik aandui dat ook by strafregtelike bepalings waar van besit uitgegaan word, die *animus*-element van besit nie negeer kan word nie. (Vgl Van der Merwe 1972 *THRHR* 297 en Whiting 1971 *SALJ* 296 asook 422.)

In *S v R* 1971 3 SA 798 (T) was eweneens 'n strafregtelike vervolging weens "besit" van 'n saak ter sprake waar die wetgewer nagelaat het om die begrip "besit" te omskryf. Regter Joubert merk op:

> "The question to be decided is whether the state has proved beyond a reasonable doubt that the appellant had the two booklets 'in his possession' in terms of s 2(1). That calls for a determination of the meaning of the word 'possession' in s 2(1) since Act 37 of 1967 does not define it" (799H–800A).

Na 'n versigtige dog deeglike oorweging van die gemeenregtelike skrywers in die verband kom die regter tot die gevolgtrekking:

> "In the absence therefore of any indication that the Legislature intended to prohibit the mere physical detention of the offensive matter, I come to the conclusion that the Legislature intended 'possession' to be construed as requiring a mental element in addition to a mere physical detention. It now remains to determine what the scope and content of the mental element was intended to be" (803H).

Indien dit in 'n gegewe geval duidelik is dat die toesighouer of bestuurder van 'n tyddeelskema inderdaad daarvan uitgaan dat die onderskeie tyddelers self elk as houer van 'n geldige televisielisensie 'n gemagtigde benutter van sodanige toestel is vir die doel om tot sy eie voordeel die uitgesaaide seine te ontvang, gaan die blote feit dat die stel fisies van tyd tot tyd in sy as die bestuurder of toesighouer se beste korporele beheer is omdat die betrokke tyddeeleenheid waar die stel toegesluit staan dan toevallig nie beset is nie, hom geensins om daardie rede strafregtelik in ongemagtigde besit van 'n ongelisensieerde stel plaas nie. Dit gaan pas die geval wees indien aangetoon kan word dat die bepaalde bestuurder as natuurlike persoon vir sy persoonlike voordeel van benutting van die stel as seinontvanger in beheer van die stel was. Laasgenoemde gaan nie 'n maklike bewyslas wees om te kwyt nie – veral nie in die afwesigheid van die vroeëre omgekeerde weerleggingslas nie. Soos reeds aangedui is, sou daardie uitsonderlike reëling stellig nie die grondwetlike toets oorleef het nie. In die lig van die grondwetlike kultuur wat tans heers, is daar weinig ruimte vir twyfel dat 'n hof verplig sal wees om noulettend te vra of in die vervolging van 'n beweerde wederregtelike beheerder van 'n stel aan die animus én die corpus-elemente van besit voldoen word.

In die minderheidsuitspraak in *S v Brick* 1973 2 SA 571 (A) het appèlregter Jansen hom by die suiwer redenering in die verband deur regter Joubert in *S v R* aangesluit en verklaar:

> "The word 'possession' is used. In ordinary legal parlance this does not mean detention or custody or mere intentional physical control – words the Legislature could easily have used had it so intended. In our law 'possession' ordinarily connotes intentional physical control with, at least, the qualification that it is effected for one's own purpose or benefit (*animo sibi habendi*) as stated, eg, by Voet 41.2.1, over 200 years ago. [528G–H] . . . In the premises I am of the view that 'possession' in s 2(1) of Act 37 of 1967 should not be read in a wide sense and should be taken to bear its ordinary technical meaning of holding for one's own use or benefit, as held in *S v R*" (583G).

In *S v Adams* 1986 4 SA 882 (A) 890G–891F het die appèlhof weer bevestig dat die besitsbegrip benewens 'n *corpus*-element ook 'n *animus*-element het waarvan kennis geneem moet word indien die wetgewer dit (soos *in casu*) nie uitdruklik uitgesluit het nie.

9 In die lig van die voorgaande kan moontlik tot die gevolgtrekking geraak word dat die tipiese tyddeelskema as regspersoon nooit juridies "in besit" kan wees vir die doel om self 'n voordeel, dit wil sê die ontvangs van 'n sein, uit 'n stel op die perseel van die skema te bekom nie.

10 Die natuurlike persoon wat as werknemer van die regspersoon toesig hou en die tyddeeleenhede se besetting bestuur, kan myns insiens ook nie as "in besit" van 'n ongelisensieerde stel beskou word nie. *Ten eerste* gaan hy nie in die beste korporele betrekking tot die saak wees indien die bepaalde tyddeeleenheid waar die stel as deel van die meubels aanwesig is in enige stadium beset is deur die betrokke tyddeelgeregtigde of sy verteenwoordiger nie. (Sien oor die inkleding van die korporele betrekking by besit *Ex parte van der Horst: in re Estate Herold* 1978 1 SA 299 (T): Geen derde mag in 'n beter korporele betrekking tot die saak wees as die beweerde beheerder as besitter nie en die beheerder moet ter keuse die intensiteit van sy beheersverhouding kan intensiveer:

> "[T]he person in question should manifest the power at his will to deal with the property as he likes and to exclude others" (301G–H).)

Ten tweede is die bewyslas op die owerheid om te bewys dat die bestuurder bedoel het om vir homself 'n voordeel in die sin van die ontvangs van die sein te bekom uit die tersake stel/le in die onderskeie tyddeeleenhede. Die waarskynlikhede is uiters skraal indien hy inderdaad self ten aansien van sy wooneenheid 'n gelisensieerde kyker is. Waarom sou die bestuurder dan ook bedoel om vir homself 'n voordeel van seinontvangs te bekom uit een van die stelle in die tyddeeleenhede indien hy ten aansien van sy eie stel 'n gelisensieerde kyker is?

11 Enige strafregtelike vervolging weens die benutting van 'n beeldradiostel in 'n tyddeeleenheid wat binne 'n tyddeelskema bestuur word en waarvoor nie 'n bykomstige lisensie uitgeneem is nie, sal slegs ter sprake kom indien die vervolgende owerheid kan aantoon dat 'n bepaalde kyker inderdaad nie onder enige van die gemelde regulasies waarna hierbo verwys is, geregtig is om as gelisensieerde seinontvanger ook op 'n ander stel as sy persoonlike eiendom by sy tuisadres 'n sein te ontvang nie. In die lig van die voorgaande gevolgtrekking behoort die bestuur van tyddeelskemas te oorweeg om nie so klakkeloos voor die dreigemente van die lisensiërende owerheid en sy trawante te swig en bloot omdat dit minder moeite is tog maar ter wille van die vrede die uitsaaiowerheid se koffers met nóg lisensiegeld te vul nie.

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JURIDIESE ASPEKTE VAN TUISONDERWYS

1 Sekere grondwetlike oorwegings

Die Grondwet van die Republiek van Suid-Afrika 108 van 1996 gee ingevolge artikel 29(1) 'n reg op basiese onderwys aan "elkeen" in Suid-Afrika. Voorts erken hierdie bepaling 'n *gekwalifiseerde* reg op "verdere onderwys" (sien in die algemeen oor a 29, Malherbe "Reflections on the education clause in the SA Bill of Rights" 1997 *TSAR* 85 95–98). Die kwalifikasie tot die reg op verdere onderwys hou verband met die beperkte hulpbronne wat die staat het om in meer as "basiese" onderwysbehoeftes te voorsien. Wat die begrippe "basiese onderwys" en "verdere onderwys" presies beteken, is nog nie volkome duidelik nie.

Voorts skep artikel 29(2) 'n reg op onderwys in 'n taal of tale van keuse en in artikel 29(3) is daar die reg om op eie koste onafhanklike instellings (wat skole insluit) op te rig mits aan sekere vereistes voldoen word. Die vereistes hou verband met die standaard van onderrig, registrasie by die staat en nie-diskriminasie op grond van ras (sien in die algemeen oor privaatonderwys Squelch *Private education in South Africa: The legal status and management of private schools* (D Ed-proefskrif Unisa 1997) *passim*).

Die uitgangspunt is dat elkeen se reg op basiese of verdere onderwys teen die staat geld en dat die staat dus dienooreenkomstig 'n plig het om 'n openbare onderwysstelsel te vestig, te bedryf en uit te brei sodat die reg op onderwys nie bloot 'n "papierreg" is nie maar voldoende praktiese betekenis het.

Die staat se plig gaan egter verder as die openbare onderwysstelsel en in die algemeen kan mens sê dat die staat nie onredelike struikelblokke in die weg mag lê van ander geldige inisiatiewe om aan kinders se reg op onderwys te voldoen nie. Die staat behoort dit byvoorbeeld nie onredelik moeilik te maak om onafhanklike skole (privaatskole) te stig en te bedryf nie en dieselfde geld vir enige ander geldige onderwysalternatiewe wat daar bestaan – soos tuisonderwys. Die staat se onbetwisbare verantwoordelikheid ten aansien van onderwys (sien hieroor in 'n Amerikaanse konteks, *Wisconsin v Yoder* 406 US 205 214–215) gee nie daaraan die reg om 'n "onderwysdiktatuur" te vestig en ander alternatiewe as die openbare skoolstelsel te probeer onderdruk of te versmoor nie. Nogtans is dit regverdigbaar dat die staat ook in gevalle waar hy nie onderwys self finansier of andersins in stand hou nie, minimum vereistes ten opsigte van gehaltebeheer kan stel en afdwing ten einde kinders en hulle ouers te beskerm (sien in die algemeen vir regterlike opmerkings oor gehalte-onderwys in SA, selfs deur die gebruik van buitelandse onderwysers, *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (KH) par [30]–[31]).

Die Grondwet behandel onderwys op twee vlakke, *eerstens* die algemene reg op basiese en verdere onderwys, en *tweedens* onderwys by openbare of onafhanklike instellings.

Die eerste vlak sluit die algemene reg op onderwys in wat uitgelê moet word in die lig van die geweldige internasionale en buitelandse gesag wat daaroor opgebou is (vgl in die algemeen De Groof "Some comments and questions on

rights dealing with education in the RSA" in De Groof en Bray *Education under the new Constitution in South Africa* (1996) 55–103). Dit is beslis nie net die staat wat ingevolge hierdie reg kan of moet presteer om onderwys te voorsien nie. Onderwys is 'n wye begrip en kan nie beperk word tot onderrig in die meer formele instellings waaroor daar bepalings in artikel 29 van die Grondwet is nie. Die feit dat ons Grondwet dus nie soos die Ierse Grondwet (in a 42(1) – sien hieronder) 'n bepaling bevat wat ouers uitdruklik die reg gee om hulle kinders tuis te onderrig nie, maak nie hierdie alternatief grondwetlik ongeldig nie (vgl in die algemeen Malherbe 96 oor die gebrek aan 'n verwysing na "home education" in a 29). In Suid-Afrika kan tuisonderwys grondwetlik wel gekoppel word aan 'n kind se fundamentele reg op ouersorg (a 28(1)(b)) – mits die begrip "ouersorg" ruim genoeg uitgelê word.

Die tweede vlak dui op institusionele onderwys weens die verwysing na openbare en onafhanklike instellings waar onderwys kan plaasvind (a 29(2) en (3)). Soos reeds gestel, verteenwoordig institusionele onderwys egter nie die hele spektrum van onderwysvoorsiening as teenkant van die fundamentele reg op onderwys nie.

Die Grondwet bevat in elk geval nie alle moontlike regte wat mense toekom nie (vgl a 39(3)). Die Grondwet erken en verskans net sekere regte wat dan op besondere grondwetlike beskerming aanspraak kan maak (bv ingevolge a 36 wat oor begrensing van regte handel). Ouers kan dus onderwysaktwiteite bedryf wat nie spesifiek deur die Grondwet erken word nie maar dan is dit onderhewig aan die staat se bevoegheid om dit deur wetgewing te verbied of te beperk sonder dat artikel 36 van die Grondwet 'n rol speel. Die punt is egter dat die algemene reg op onderwys heelwat ruimte vir ouers bied om handelinge te onderneem en inisiatief aan die dag te lê ten einde aan hulle kinders se reg op onderwys gevolg te gee. Dit is argumenteerbaar dat alle sodanige redelike aktiwiteite steeds binne die bepalings van die Grondwet val as synde voldoening aan kinders se fundamentele reg op onderwys.

2 Artikel 51 van die Suid-Afrikaanse Skolewet

Artikel 51 van die Suid-Afrikaanse Skolewet 84 van 1996 handel uitdruklik met tuisonderwys. Die bepaling kom voor in hoofstuk 5 van die wet wat die regsraamwerk vir "onafhanklike skole" bevat. Die implikasie mag wees dat die wetgewer tuisonderwys as 'n verskyningsvorm van private of "onafhanklike" onderwys beskou en dat dit dus moontlik wel onder artikel 29(3) van die Grondwet ressorteer. Soos hierbo betoog, is die fundamentele reg op onderwys egter so wyd dat dit waarskynlik ook vir tuisonderwys voorsiening maak.

2 1 Die inhoud van artikel 51(1) en (2)

"(1) 'n Ouer kan by die Departementshoof aansoek doen om die registrasie van 'n leerder om by die leerder se huis onderwys te ontvang.

(2) Die Departementshoof moet 'n leerder soos beoog in subartikel (1) registreer indien hy of sy oortuig is dat –

(a) die registrasie in belang van die leerder is;

(b) die onderwys wat die leerder waarskynlik tuis sal ontvang –

(i) aan die minimum vereistes van die kurrikulum van openbare skole sal voldoen; en

(ii) van 'n standaard sal wees wat nie minderwaardig is aan die standaard van onderwys wat in openbare skole aangebied word nie; en

(iii) die ouer aan enige ander redelike voorwaardes wat deur die Departementshoof gestel word, sal voldoen."

Artikel 51(3)–(5) handel met die terugtrekking van registrasie en 'n ouer se appèl na die provinsiale LUR vir onderwys in so 'n geval.

2 2 Bespreking van aspekte van artikel 51(1) en (2)

(a) Die bepalings van artikel 51 skep waarskynlik minimum norme en standaarde sowel as 'n raamwerk (soos voorsien in a 146(2)(b)(i) en (ii) van die Grondwet) en sal dus voorkeur geniet bo enige provinsiale onderwyswetgewing. Daar moet ook gelet word op artikel 2(3) van die Skolewet (soos gewysig deur a 2 van Wet 100 van 1997) wat soos volg bepaal:

> "Geen bepaling van hierdie Wet belet 'n provinsiale wetgewer om wetgewing vir skoolonderwys in 'n provinsie ooreenkomstig die Grondwet en hierdie wet te verorden nie."

Hierdie subartikel se bewoording versterk die argument dat provinsies gebonde is aan die Skolewet (en natuurlik aan a 51 in die besonder) nog verder. Die woord "skoolonderwys" doen nie hieraan afbreuk nie.

(b) Artikel 51(1) en (2) gee duidelik regte aan ouers en hulle kinders ten aansien van tuisonderwys. Dit gaan natuurlik nie so ver as artikel 42(1) en (2) van die Ierse Grondwet (1937) waarna hierbo verwys is nie, en wat soos volg lui:

> "(1) The State acknowledges that the primary and natural educator of the child is the Family and guarantees the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.
>
> (2) Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State."

Artikel 51 het 'n meer beperkte doel as die Ierse bepalings en handel in werklikheid met tuisonderwys as alternatief tot verpligte skoolbywoning (a 3 van die Skolewet). Terloops moet daarop gewys word dat die Skolewet se uitgangspunt van "verpligte skoolbywoning" gekritiseer kan word aangesien die korrekte vertrekpunt eerder "verpligte onderwys" behoort te wees.

(c) Sekere besluitnemingsbevoegdhede oor tuisonderwys word ingevolge artikel 51 na provinsiale onderwysdepartemente afgewentel wat met die praktiese uitvoering daarvan gemoeid is. Die belangrikste bevoegdheid van die onderwyshoof is waarskynlik om redelike voorwaardes te formuleer waaraan 'n ouer moet voldoen (ingevolge a 51(2(c)). Soos hierbo vermeld, mag die provinsies waarskynlik nie van artikel 51 afwyk nie. Die betrokke bepalings kan dus waar nodig aangevul word maar daar mag nie buite die raamwerk wat dit skep (en veral die regte aan ouers en hulle kinders wat dit toeken) beweeg word nie. In die Wes-Kaap word regulasies oorweeg om tuisonderwys te hanteer (sien *Buitengewone Provinsiale Koerant* 5254 gedateer 1998-04-24; a 39 van die Wes-Kaapse Provinsiale Wet op Onderwys 12 van 1997). Sodanige regulasies kan deurgaans aan die bepalings van artikel 51 getoets word vir redelikheid en geldigheid.

(d) 'n Leerder wat geregistreer word om onderwys tuis te ontvang, hoef uiteraard nie aansoek te doen om vrystelling van skoolbywoning ingevolge artikel 4 van die Skolewet nie. Artikel 4 gaan heelwat verder as artikel 51 en magtig ook die vrystelling van skoolplig van leerders wat nie tuisonderwys sal ontvang nie.

(e) Die bestaan van artikel 51 dui op 'n wettige en geldige onderwys-alternatief vir die algemene skoolstelsel wat die Skolewet skep en erken. Dit sou klaarblyklik teenstrydig met die bedoeling van die wetgewer wees om artikel 51 so streng uit te lê en toe te pas dat dit feitlik onmoontlik is om met 'n aansoek om

registrasie te slaag of dat slegs mediese redes of 'n groot afstand van 'n skool tuisonderwys regverdig. Dit is waar dat die meeste provinsiale onderwysowerhede nie besonder entoesiasties oor tuisonderwys is nie. Hierdie gesindheid is dikwels aan onkunde te wyte. Uiteraard behoort tuisonderwys beheer te word maar net vir sover dit nodig is om te verseker dat daar redelikerwys aan kinders se reg op onderwys voldoen word. Te streng beheer mag tuisonderwys ondergronds dwing waar daar geen beheer oor moontlik onaanvaarbare praktyke sal wees nie.

(f) Artikel 51 handel nie streng gesproke met *toestemming* vir onderwys tuis nie maar oor die *plig* op die departementshoof om 'n leerder te registreer indien daar aan sekere objektiewe vereistes voldoen word. (In die VSA word in die meerderheid van state nie toestemming van die owerhede vereis nie maar bloot dat hulle in kennis gestel word – vgl in die algemeen Gordon, Russo en Miles *The law of home schooling* (1994) 29–36; *State v Schmidt* 505 NE 2d 627 (Ohio) 1987); *Jeffery v O'Donnell* 702 F Supp 513 (MD Pa 1988); *Blackwelder v Safnauer* 689 F Supp 106 (NDNY 1988)). 'n Provinsiale onderwyshoof *moet* registrasie toelaat indien aan al die betrokke vereistes voldoen word. Hy het geen diskresie in hierdie verband nie – sy bevoeghede gaan slegs sover as om te bepaal of daar aan die vereistes van artikel 51 en aan redelike en geldige voorwaardes wat hy mag stel, voldoen word. Die departementshoof se plig tot registrasie ontstaan wanneer hy "oortuig" is dat aan die bepaalde vereistes voldoen is. Die bewyslas in hierdie verband rus waarskynlik op die ouer. Nogtans handel dit uiteraard nie hier oor 'n subjektiewe graad van oortuiging nie – indien die ouer objektief op 'n oorwig van waarskynlikheid aantoon dat aan die vereistes voldoen word, moet die departementshoof die registrasie laat plaasvind.

(g) Die betrokke artikel skryf nie voor *wie* die onderwys tuis van 'n leerder moet behartig nie. Dit bepaal net dat die plek van onderwys die leerder se "huis" moet wees (welke begrip seker ook nog behoorlik geïnterpreteer sal moet word aangesien 'n leerder vermoedelik op meer as een plek "tuis" kan wees). Alhoewel die ouer van 'n leerder die een is wat aansoek moet doen, is daar niks wat aandui dat slegs die ouer by die onderwys betrokke moet wees, of wat die ouer verbied om aldus betrokke te wees nie (sien oor 'n konflik tussen ouers oor die onderwys van hulle kinders, Visser "Some principles regarding the rights, duties and functions of parents in terms of the South African Schools Act 84 of 1996 applicable to public schools" 1997 *TSAR* 626 628; Gordon, Russo en Miles 49 oor die posisie van ouers sonder bewaring van die betrokke kinders).

Volgens gebruik in sekere kringe waar tuisonderwys aangetref word, kan dit benewens die ouer van 'n kind ook 'n grootouer, of 'n broer of suster of 'n ander geskikte persoon wees wat as tutor optree. Dit sou waarskynlik onredelik wees om te vereis dat slegs 'n ouer wat ook as onderwyser gekwalifiseer is die tuisonderwys van sy of haar kind mag behartig. In die VSA (en in baie ander toonaangewende lande) is die tendens om wel sekere minimum akademiese vereistes aan die "tuisopvoeder" te stel maar daar word nie formele registrasie as onderwyser vereis nie (vgl Gordon, Russo en Miles 36–45; *Matter of Franz* 390 NYS 2d 940 (NY App Div 1977) – 'n opvoeder moet slegs "competent" wees).

(h) Artikel 51(2)(a) meld dat die registrasie "in belang" van die leerder moet wees. Daar word geen vereiste gestel dat die onderwys tuis in die "*beste* belang" van die leerder moet wees of dat dit in die algemeen "beter" vir die leerder moet wees om onderwys tuis te ontvang as in 'n skool nie. Sulke vereistes sou uiteraard tuisonderwys onmoontlik maak behalwe miskien waar daar mediese redes bestaan waarom 'n kind nie die skool hoef by te woon nie. By die uitleg en toepassing

van die vereistes van artikel 51((2)(b) (minimum kurrikulum-vereistes in openbare skole en onderwys wat nie minderwaardig is tov openbare skole nie) moet die Amerikaanse standpunt in gedagte gehou word dat "[i]f the provision requires literal equivalence to public school, then home education is not a real alternative" (sien Stocklin-Enright "The constitutionality of home education: The role of the parent, the state and the child" 1982 (18) *Willamete LR* 563 619; *Farrington v Tokushige* 273 US 284 (1927); sien ook in die algemeen hieroor Nguyen *Home education: The road less travelled* (voorlesing tydens 'n seminaar in 1993) 17–18); verder Gordon, Russo en Miles 17–24).

(i) Die bepaling dat die departementshoof ander redelike voorwaardes kan stel (a 51(3)) is nie 'n vrypas om vereistes in te voer wat die registrasie vir onderwys tuis effektief onmoontlik maak nie. Die toets vir redelikheid in hierdie geval behoort te draai om daardie elemente wat noodsaaklik mag wees om te verseker dat daar wel in 'n genoegsame mate aan 'n leerder se fundamentele reg op onderwys voldoen sal word. Uit die bewoording van artikel 51(3) blyk dit dat dit hier om "ander" voorwaardes gaan as daardie wat met die kurrikulum en die standaard van onderwys verband hou. Die departementshoof se voorwaardes moet ook duidelik genoeg wees sodat die ouer redelikerwys kan weet waaraan hy of sy moet voldoen. Hierdie voorwaardes mag moontlik onder meer verband hou met voorgeskrewe kontak tussen die tuisopvoeder (en die leerling) en 'n openbare op private skool, die toelating van inspeksies, die hou van registers, of selfs die toetsing van leerders (sien oor lg Gordon, Russo en Miles 45–46). Daar moet op gelet word dat die departementshoof oortuig moet wees dat die ouer aan die betrokke voorwaardes "sal voldoen". In praktyk kan dit beteken dat daar 'n redelike waarskynlikheid in hierdie verband moet wees. Absolute sekerheid hieroor sal uiteraard die uitoefening van die reg op tuisonderwys onredelik bemoeilik en is boonop totaal onrealisties.

(j) By die toepassing van die bepalings van artikel 51 moet die onderwysowerhede handel ingevolge die beginsels van administratiewe geregtigheid (a 33 van die Grondwet; in praktyk sal dit oa behels dat besluite onbevooroordeeld geneem word nadat die ouer 'n redelike kans gegee is om sy saak te stel, daar nie onbehoorlike motiewe by die amptenare mag wees nie, die owerhede redelike aandag moet bestee aan elke geval en geldige redes verskaf moet word vir enige weiering).

3 Evaluasie

Artikel 51 voorsien 'n raamwerk en los uiteraard nie alle probleme op nie. Dit gee moontlik te veel mag aan die provinsiale onderwyshoof en moes dalk eerder sekere bevoegdhede (bv by die stel van voorwaardes vir registrasie) by die nasionale Minister van Onderwys gelaat het wat dit deur regulasie kon voorskryf. Die provinsiale onderwyshoof behoort meer gemoeid te wees met die stel van tegniese vereistes (soos die vorm en algemene vereistes vir 'n aansoek) en die goedkeuring of afkeuring van aansoeke as met die formulering van beleid.

Alhoewel artikel 51 uitvoerbaar is, is die vraag steeds hoe provinsiale onderwysowerhede dit gaan uitlê en toepas. In sekere provinsies is daar aanduidings van 'n houding oor tuisonderwys wat skynbaar nie rekening hou met die jongste ontwikkelinge op regsgebied (en ander terreine) in vergelykbare jurisdiksies nie. Dit kan natuurlik tot litigasie aanleiding gee maar hopelik word sulke probleme eerder deur die wetgewende en administratiewe prosesse aangespreek.

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DIE BEDOELING VAN DIE KONTRAKSPARTYE AS MAATSTAF BY DIE *PACTUM SUCCESSORIUM*

1 Inleiding

Die *pactum successorium* is 'n regsfiguur wat in die Suid-Afrikaanse reg aangewend word om erfopvolging by wyse van ooreenkoms te reël. In *Borman en De Vos v Potgietersrusse Tabakkorporasie* 1976 3 SA 488 (A) 501A–D (hierna *Borman* genoem) is die begrip *pactum successorium* in so 'n mate uitgebrei dat dit alle ooreenkomste insluit wat 'n erflater se testeervryheid beperk, ongeag of die ooreenkoms verband hou met die inhoud van 'n testament of nie. So 'n ooreenkoms word sedert die vroegste reg, behalwe indien dit in 'n huweliksvoorwaardeskontrak vervat is, as ongeldig beskou (sien in die algemeen Joubert "*Pactum successorium*" 1962 *THRHR* 93–111; Cronjé en Roos *Erfreg vonnisbundel* (1997) 483–501; *Borman* 501D en *McAlpine v* (*McAlpine*) 1997 1 SA 736 (A) 750C – hierna *McAlpine* genoem). In die jongste appèlhofbeslissing (*McAlpine*) het die appèlhof die geleentheid gehad om die uitwerking van *Borman* teë te werk. Die hof het egter die beginsels met betrekking tot die *pactum successorium* soos in *Borman* bevestig en hervorming van die beginsels rondom die *pactum successorium* aan die wetgewer oorgelaat.

Die *pactum successorium* is 'n problematiese regsfiguur. Op teoretiese vlak word dit deur beginsels en reëls van sowel die erfreg as die kontraktereg beheer. Voortvloeiend hieruit het daar nog altyd op praktiese vlak probleme in verband met die identifisering van die *pactum successorium* bestaan (sien in die algemeen Williams "*Pacta successoria*" 1969 *Responsa Meridiana* 45; Hutchison "Isolating the *pactum successorium*" 1983 *SALJ* 221; Hutchison "More light on the *pactum successorium*" 1989 *SALJ* 1; Rautenbach "Die praktiese implikasies van die verbod op die *pactum successorium* met betrekking tot vennootskapsooreenkomste" 1995 *De Jure* 98).

Die doel van hierdie aantekening is om kortliks die maatstawwe of toetse wat aangewend word om die *pactum successorium* van ander soortgelyke ooreenkomste te onderskei en te bespreek. Daar word veral gekonsentreer op die bedoeling van die kontrakspartye soos toegepas in die minderheidsuitspraak van *McAlpine*.

2 Maatstawwe vir die identifisering van die *pactum successorium*

2 1 Afwesigheid van 'n teenprestasie

In *Schauer v Schauer* 1967 3 SA 615 (W) 616H–617A het die hof beslis dat 'n ooreenkoms 'n ongeldige *pactum successorium* is, tensy bewys gelewer kan word dat 'n *quid pro quo* aan die *promissor* gegee is. Hewige kritiek is al uitgespreek teen dié standpunt en daar word algemeen aanvaar dat die gee van 'n teenprestasie nie die kriterium is om te bepaal of 'n ooreenkoms 'n *pactum successorium* is of nie (Hutchison 1983 *SALJ* 225–226 en *Jubelius v Griesel* 1988 2 SA 610 (K) 622H).

2 2 Herroepingsbevoegdheid

Een van die fundamentele beginsels in die testate erfreg is dat die erflater in staat gestel moet word om te enige tyd tydens sy lewe 'n testament te herroep. Behalwe

in die geval van enkele uitsonderings kan hy nie van sy herroepingsbevoegdheid afstand doen nie (Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 187; Corbett ea *The law of succession in South Africa* (1980) 31). Die herroeplikheidsmaatstaf het al heelwat verwarring in die regspraak veroorsaak.

In *Costain and Partners v Godden* 1960 4 SA (SR) 456 45C–D is beslis dat 'n opsie 'n gewone "straight forward commercial contract" is wat by die sluiting daarvan onherroeplik word. Indien dit onherroeplik is, ontsnap dit die stigma van 'n *pactum successorium* en word dit afdwingbaar. Hierdie uitgangspunt is sterk gekritiseer en dit is duidelik dat die herroeplikheidsmaatstaf in bovermelde beslissing verkeerd toegepas is. Geen ooreenkoms wat herroeplik is, kan die testeervryheid van die *promissor* inkort of beperk nie (Williams 1969 *Responsa Meridiana* 52; Hutchison 1983 *SALJ* 226).

'n Bevredigender toepassing van die herroeplikheidsmaatstaf word gevind in *Varkevisser v Estate Varkevisser* 1959 SA 196 (SR) en *Ex Parte Calderwood: In Re Estate Wixley* 1981 3 SA 727 (Z). In albei beslissings is beslis dat die fundamentele beginsel van die *pactum successorium* juis geleë is in die feit dat die *promissor* hom onherroeplik tot die ooreenkoms verbind het. Hy behou nie vir hom die reg voor om sy aanbod te herroep nie. Sou hy dit doen, sal die ooreenkoms nie in stryd wees met die algemene reël dat erfopvolging slegs *ex testamento* of *ab intestato* mag plaasvind nie.

Alhoewel in *Varkevisser* na die herroeplikheidsmaatstaf verwys is, het die hof uiteindelik die vestigingsmaatstaf (sien par 2 3 hierna) toegepas om te bepaal of die ooreenkoms 'n *pactum successorium* was of nie. Dit blyk uit die beslissings en standpunte van die skrywers dat die herroeplikheid van 'n ooreenkoms nie altyd bevredigend as enigste kriterium gebruik kan word om die *pactum successorium* van ander ooreenkomste te onderskei nie (sien in die algemeen *Jubelius v Griesel* 622I; Hutchison 1983 *SALJ* 226).

2 3 Vestigingsmaatstaf

Die howe het al in verskeie gevalle beslis dat daar reeds met die aangaan van die ooreenkoms regte in die bevoordeelde gevestig het en dat die ooreenkoms nie 'n *pactum successorium* is nie (*Keeve v Keeve* 1952 1 SA 619 (O) 623F–G; *Varkevisser v Estate Varkevisser* 198-199; *Costain and Partners v Godden* 460A–C; *Jubelius v Griesel* 623–626; *McAlpine* 750C). Indien regte in die bevoordeelde *inter vivos* vestig, al word die uitvoering daarvan *mortis causa* uitgestel: is die ooreenkoms nie 'n *pactum successorium* nie. Anders gestel: die *pactum successorium* is 'n ooreenkoms *inter vivos*, maar die vestiging van regte vind eers *mortis causa* plaas. Volgens Hutchison 1989 *SALJ* 8 is die toets nie of 'n party gedurende sy lewe afstand gedoen het van sy eiendomsreg nie, maar of die reg om die bate te eis reeds *inter vivos* in 'n ander party gevestig het. Indien wel, is die ooreenkoms nie 'n ongeldige *pactum successorium* nie, maar 'n gewone kommersiële ooreenkoms.

Die toepassing van hierdie maatstaf bied nie altyd bevredigende resultate nie. Dit is byvoorbeeld nie altyd duidelik wat die aard van die regte is wat vestig nie. Eerstens is daar juriste wat 'n onderskeid maak tussen voorwaardelike ("contingent") of gevestigde ("vested") regte (Cowen "Vested and contingent rights" 1949 *SALJ* 404; Corbett ea 133; Honore *The South African law of trusts* (1985) 430–431; De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 150 ev; Hutchison 1983 *THRHR* 228 en Swanepoel *Oor stigting, trust, fideicommissum, modus en beding ten behoewe van 'n derde*

(1961) 81). Volgens hierdie skrywers is 'n gevestigde reg "simply, one the title of which is complete and unconditional . . ." en 'n voorwaardelike reg 'n reg waar "one or more (of the investitive facts) has already happened, but one or more has not yet happened, and may never happen . . ." (Cowen 406).

Tweedens is daar die skrywers wat die sogenaamde voorwaardelike reg gelykstel aan 'n *spes* of verwagting (Joubert "Die *fideicommis*, die trust en die stigting" 1952 *THRHR* 188 ivm 'n *spes fideicommissi* en vgl ook die standpunt van Wille in Hutchison ea *Wille's Principles of South African law* (1991) 382 vn 315). Derdens is daar die skrywers wat meen 'n voorwaardelike reg het geen bestaansgrond nie: "'n Reg kan eenvoudig nie voorwaardelik wees nie. 'n Reg bestaan of dit bestaan nie . . . Vir voorwaardelike bestaan – iets tussen die synde en die nie-synde – is in 'n drie-dimensionele denkproses net nie ruimte nie" (Van der Merwe "*Spes fideicommissi* of *ius in personam*?" 1965 *THRHR* 138–139).

Hierdie verwarring kom ook in die regspraak voor. In *Jubelius v Griesel* 624–625 pas die hof die vestigingsmaatstaf toe en kom tot die gevolgtrekking dat die koopkontrak in die onderhawige geval aan 'n ontbindende voorwaarde onderworpe was. Die hof stel egter die vestiging van regte in geval van 'n ontbindende en opskortende voorwaarde gelyk en bevind dat die eiser geen gevestigde reg verkry het nie. Hierdie gevolgtrekking is natuurlik foutief. In geval van 'n ontbindende voorwaarde vestig daar reeds afdwingbare regte by die aangaan van die ooreenkoms, maar alle verkreë regte verdwyn by die vervulling van die voorwaarde (sien Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* 273–279 ivm die uitwerking van voorwaardes). Alhoewel daar met die uitslag van die saak saamgestem kan word, is daar tereg heelwat kritiek teen die beslissing uitgespreek (sien Radesich en Roos "The effect of a resolutive condition on the formation of a *pactum successorium*" 1988 *TSAR* 572; Cronjé en Roos 496).

Daarbenewens word die situasie verder bemoeilik deurdat die reg beskerming verleen aan 'n voorwaardelike reg of 'n *spes* (De Wet en Van Wyk 151; Cowen 408 vn 17; Gibson *Wille's Principles of South African law* (1985) 287). Byvoorbeeld, 'n reg onderhewig aan 'n opskortende voorwaarde vestig in 'n regstegniese sin reeds by die aangaan van die ooreenkoms (aangesien dit reeds 'n sekere mate van beskerming geniet) en gevolglik is dit nie heeltemal korrek om te sê dat só 'n reg eers vestig by vervulling van die voorwaarde nie.

'n Verdere kritiekpunt teen die aanwending van die vestigingsmaatstaf word in die minderheidsuitspraak van *McAlpine* aangetref. Volgens appèlregter Nienaber is die toepassing van die vestigingsmaatstaf selektief in dié sin dat dit die bedoeling van die partye geheel en al ignoreer (755F).

Ten spyte van die kritiek wat teen die vestigingsmaatstaf uitgespreek kan word, het die meerderheid van die appèlhof in *McAlpine* bevestig dat die vestigingsmaatstaf die korrekte maatstaf is om aan te wys of 'n ooreenkoms 'n *pactum successorium* is of nie. Hulle was verder van mening dat dit die taak van die wetgewer is om die reël te verslap waar die *pactum successorium* deel vorm van 'n kommersiële ooreenkoms tussen partye (753H).

2 4 Inperking van testeervryheid

Dit is 'n basiese beginsel van die erfreg dat enige erflater volkome testeervryheid oor sy bates het tot op datum van sy dood en behalwe vir enkele uitsonderings is enige ooreenkoms wat so 'n erflater se testeervryheid aan bande lê, nietig (vir uitsonderings op die reël sien oa Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* 612 ev; Isakow *The law of succession through the cases* (1985) 21).

In *Borman* 505D–E aanvaar die hof by wyse van implikasie die vestigingsmaatstaf, maar lê meer klem op die beperking van testeervryheid van die kontrakterende partye. Die appèlafdeling het eenparig tot die gevolgtrekking gekom dat die leningsheffing wat ten gunste van 'n lid van die Tabakkorporasie oploop 'n bate in die lid se boedel vorm en dat hy geregtig is om testamentêr daaroor te beskik. As die uiteindelike beskikking oor hierdie fondse deur die statute van die Tabakkorporasie beheers word (wat inderdaad die geval was), kom dit neer op 'n ooreenkoms tussen die lid en die Tabakkorporasie wat inderdaad inbreuk maak op die lid se testeervryheid om na goeddunke testamentêr daaroor te beskik (508A). Gevolglik het die hof beslis dat die besondere bepaling wel neerkom op 'n ongeldige *pactum successorium*.

Die eerste vraag wat ontstaan, is of appèlregter Rabie korrek was in sy vertolking dat die lid 'n vorderingsreg wat deel van sy boedel gevorm het teen die maatskappy gehad het. Hierbo (par 2 3) is alreeds aangedui dat die toets nie is of 'n kontraksparty gedurende sy lewe afstand gedoen het van sy eiendomsreg in 'n bate nie, maar of die reg om die bate te eis *inter vivos* in 'n ander party gevestig het. In hierdie saak behoort die vraag te gewees het of die lid se weduwee *inter vivos* 'n reg ten opsigte van die geld in die ledebelangefonds gevestig het al dan nie. Indien wel, is die ooreenkoms nie 'n ongeldige *pactum successorium* nie, ongeag of daar geld in die lid se boedel was of nie.

Verder word aan die hand gedoen dat die hof 'n kunsmatige onderskeid maak tussen die *stipulatio alteri* (wat in versekeringspolisse en pensioenskemas aangetref word) en die ooreenkoms *in casu*. Volgens appèlregter Rabie is die onderskeid tussen 'n *stipulatio alteri* en 'n *pactum successorium* daarin geleë dat die persoon wat die subskripsies of premies in gevai van versekeringspolisse en pensioenskemas betaal, tydens sy lewe afstand doen van alle aansprake op die geld wat hy betaal het. Dit word uit sy boedel onttrek en word die eiendom van die vereniging of maatskappy. In *Borman* is die bedrag geld wat die oorledene betaal het egter die totaal van die bydraes wat die lid gedurende sy lewe aan die Tabakkorporasie gemaak het. Die lid het deurgaans 'n vorderingsreg op die bydraes behou. Daar word aan die hand gedoen dat hierdie onderskeid kunsmatig is. Net soos wat die versekeraar die premies kon aanwend om aan die ekonomiese verkeer deel te neem, kon die Tabakkorporasie die geld in die ledebelangefonds aanwend vir die bevoordeling van die korporasie se doelstellings (498C–D). Die vraag ontstaan wat die posisie sou wees indien die Tabakkorporasie insolvent sou raak. Sou die lid dan nog steeds in die lig van bogenoemde 'n vorderingsreg teen die Tabakkorporasie gehad het? Volgens die minderheidsuitspraak in *McAlpine* (756H) is die ware rede waarom versekeringspolisse en pensioenskemas nie as ongeldige *pacta successoria* kwalifiseer nie, die feit dat dit nooit die bedoeling van die kontrakspartye was dat erfopvolging moet plaasvind nie (sien par 2 5 hierna).

Laastens blyk dit dat 'n te hoë premie op die beginsel van testeervryheid geplaas word. In beginsel beperk alle vervreemdings *inter vivos* of *mortis causa* die testeervryheid van die erflater. Die rede waarom die *pactum successorium* verbied word, is dat die *pactum successorium mortis causa* onherroeplike regte in die begunstigde vestig. Die gevolg is dat die testeervryheid van die erflater ingeperk word. Beperking op testeervryheid is dus 'n gevolg van die *pactum successorium*. Om vas te stel of 'n persoon se testeervryheid beperk word al dan nie, word sekere toetse aangewend, naamlik die herroeplikheids- en vestigingsmaatstaf. Streng gesproke is die inperking van die erflater se kontrakteervryheid dus nie 'n maatstaf wat bepaal of 'n ooreenkoms 'n ongeldige *pactum successorium* is of nie, maar eerder die gevolg indien 'n ooreenkoms as 'n ongeldige *pactum successorium* aangemerk kan word.

Die beskerming van die erflater se testeervryheid, deur die *pactum successorium* as verbode te beskou, maak inbreuk op kontrakspartye se kontakteervryheid. Die vraag ontstaan gevolglik of dit houdbaar is om testeervryheid as belangriker as kontrakteervryheid te beskou. Behoort hierdie twee vryhede nie op gelyke grondslag te staan sodat 'n persoon vryelik kan besluit watter een van die vryhede hy wil gebruik nie? Indien 'n persoon dan eenmaal sy keuse uitgeoefen het, behoort hy daaraan gebonde gehou te word en nie soos in *Borman* sy verpligtinge ingevolge die ooreenkoms te ontduik omdat die ooreenkoms inbreuk maak op sy testeervryheid nie.

2 5 Bedoeling van die partye

'n Vyfde en bevredigender kriterium om te bepaal of 'n ooreenkoms as 'n *pactum successorium* aangemerk behoort te word, is die bedoeling van die kontrakspartye. Hierdie maatstaf het vir die eerste keer ter sprake gekom in die minderheidsuitspraak van *McAlpine* en verdien daarom spesiale vermelding (754–758).

Die feite van die saak was kortliks soos volg: Ian en sy broer Gilroy McAlpine (laasgenoemde is die appellant) het 'n skriftelike kontrak gesluit ingevolge waarvan Ian 50% van die uitgereikte aandelekapitaal in 'n maatskappy aan die appellant verkoop het. Die ander 50% van die aandelekapitaal in die maatskappy is deur Ian self gehou. Die maatskappy se enigste bate was 'n stuk grond. Die twee broers het 'n verdere ooreenkoms aangegaan waarin hulle onder meer ooreengekom het dat "[i]n the event of either party's death, the other party will get 100% of the shares in the company . . . in other words, the deceased party's shareholding will go to the one remaining alive" (267H). 'n Paar jaar later is Ian eerste oorlede en het die appellant 'n eis ingestel teen die weduwee van Ian, in haar hoedanigheid as eksekutrise van sy boedel, vir oordrag van die 50% van Ian se aandele. Sy het die eis teengestaan op grond daarvan dat die ooreenkoms op 'n ongeldige *pactum successorium* neergekom het. Die hof *a quo* het die verweer gehandhaaf en 'n appèl teen hierdie beslissing het misluk.

Volgens die minderheidsuitspraak van appèlregter Nienaber is die bedoeling van die kontrakspartye en nie die aard van die reg nie (nl 'n gevestigde of voorwaardelike reg) die dominante kenmerk van 'n ooreenkoms. Die bedoeling van die kontrakspartye is 'n feitevraag en ten einde die bedoeling van die kontrakspartye vas te stel, is daar verskillende oorwegings wat in aanmerking geneem kan word, onder andere die herroeplikheid van die ooreenkoms en die vestiging van regte ingevolge die ooreenkoms. Só gesien, word die vestigings- en herroeplikheidsmaatstawwe bloot gereduseer tot hulpmiddels ten einde die bedoeling van die kontrakspartye vas te stel. Hierdie benadering verklaar waarom gewone kommersiële ooreenkomste, soos pensioenskemas, vennootskapsooreenkomste, lewensversekeringspolisse (wat nie noodwendig verband hou met die inhoud van 'n testament nie, maar nogtans 'n party tot die *mortis causa*-bemaking van sy eiendom kan verbind) nie as *pacta successoria* beskou kan word nie (756F). Sodanige ooreenkomste is gesluit sonder *animus testandi* en kan daarom nie as ongeldige *pacta successoria* aangemerk word nie. 'n Verdere belangrike beginsel by die vasstelling van die bedoeling van kontrakspartye is dat, indien dit nie duidelik is wat die bedoeling van die partye is nie, die ooreenkoms eerder in stand gehou moet word as wat dit afgewys word (756A).

Toegepas op die feite van die saak is dit duidelik dat die partye nie die bedoeling gehad het om te testeer nie. Die ooreenkoms het nie met die testeervryheid

van die twee broers ingemeng nie en was ook nie 'n poging om die testamentsformaliteite te omseil nie. Gevolglik was dit 'n

> "ordinary although comprehensive commercial agreement between two brothers who, through the medium of a company of which they were the sole shareholders, sought to provide contractually for various foreseeable eventualities relating to their co-ownership; more particularly, to ensure that each party would be protected should the other mortgage or sell his shares or predecease him" (757G).

Hierdie benaderingswyse van appèlregter Nienaber ondervang die gevaar ten opsigte van die praktiese implikasies van die verbod op kommersiële ooreenkomste (vgl hieroor Rautenbach 1995 *De Jure* 98).

3 Ten slotte

Daar bestaan 'n duidelike behoefte in die regsverkeer om die belange van partye in 'n kommersiële regsverhouding soos 'n vennootskap of tussen mede-eienaars, te reël. Dit is dikwels in belang van die partye om die *status quo* te handhaaf indien een van die partye sou sterf. Die gevaar bestaan egter dat hierdie ooreenkomste as verbode *pacta successoria* aangemerk kan word en dat die bedoeling van die partye só verydel kan word.

Die redes vir die verbod teen die *pactum successorium* in die moderne Suid-Afrikaanse reg is tweeledig. In die eerste plek beperk dit die testeervryheid van die erflater en word daarom met groot agterdog bejeën. Deur die *pactum successorium* in die Suid-Afrikaanse reg te verbied, word daar ook op 'n ander vryheid, naamlik kontrakteervryheid, inbreuk gemaak. Albei vryhede is gebaseer op private besit en private outonomie en is daarom belangrike beginsels in 'n kapitalistiese bestel. Die vraag ontstaan gevolglik of dit houdbaar is om een vryheid, naamlik testeervryheid, te beskerm ten koste van 'n ander vryheid, naamlik kontrakteervryheid. Behoort 'n persoon nie 'n vrye keuse te hê om te besluit watter een van die twee vryhede vir hom die swaarste weeg nie? Deur 'n erflater deur middel van die beletsel teen die *pactum successorium* te verhinder om sy kontrakteervryheid te beoefen, lyk na 'n anachronisme en onnodige spanning word geskep tussen die twee vryhede waaroor die erflater self 'n keuse behoort te kan uitoefen.

Die tweede beswaar teen die *pactum successorium* is dat dit op 'n ontduiking neerkom van die formaliteite wat normaalweg vir die verlyding van testamente vereis word. In die lig van artikel 2(3) van die Wet op Testamente 7 van 1953 is hierdie beswaar taamlik afgewater. Hierdie bepaling verleen aan 'n hof kondonasiebevoegdheid om ten spyte van nie-nakoming van die formaliteitsvereistes by 'n testament die Meester te gelas om steeds die betrokke dokument as testament te aanvaar. In *Horn v Horn* 1995 1 SA 48 (W) het die hof 'n selfmoordbrief wat nie aan die testamentsformaliteite voldoen het nie, as die selfmoordenaar se laaste testament erken. Dit is moeilik om te aanvaar dat testamentsformaliteite in die lig van sulke omstandighede nog as 'n belangrike rede vir die verbod op die *pactum successorium* beskou kan word.

Die funksie van die howe is om die gemenereg te ontwikkel en aan te pas sodat dit by die behoeftes van die moderne samelewing kan aanpas. Die appèlhof het egter al by twee geleenthede (*Bornman* en *McAlpine*) aangedui dat hulle nie bereid is om dit te doen nie en daar word gevolglik aan die hand gedoen dat die wetgewer moet ingryp om die posisie met betrekking tot die *pactum successorium* statutêr te reël.

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MOTOR VEHICLE ACCIDENT COMPENSATION: LEGISLATIVE CHANGES AND PROPOSALS FOR THE FUTURE

Motor vehicle accident compensation has gone through many changes in the past decades. Since 1942 motor vehicle accident compensation has been regulated by legislation. During 1997 new legislation regulating this type of compensation was once again introduced. The Second Draft White Paper on the Road Accident Fund was also published during 1997 and in January 1998 the (final) White Paper on the Road Accident Fund became available. These three documents will be the focus of this discussion.

1 Road Accident Fund Act 56 of 1996

The Road Accident Fund Act 56 of 1996 (hereinafter the RAF Act) was published on 1 November 1996 (*GG* 17532). In terms of section 29 the RAF Act shall come into operation on a date fixed by the President by proclamation in the *Gazette*, except section 10 (on the Board of the Fund and the executive committee), which shall be deemed to have come into operation on 21 April 1996. This section, therefore, gave retroactive effect or validity to the Board of the Fund and the executive committee. The rest of the Act came into operation by proclamation on 1 May 1997 (*GG* 17939 *RG* 5913 of 1997-04-25). In the same *Gazette* the Minister of Transport proclamated regulations in terms of section 26 of the RAF Act, which regulations also came into operation on 1 May 1997.

The following laws are repealed by section 27 of the RAF Act: Compulsory Motor Vehicle Insurance Act 32 of 1980 (Bophuthatswana), Motor Vehicle Accidents Act 28 of 1986 (Ciskei), Motor Vehicle Accidents Act 84 of 1986, Decree No 9 (Motor Vehicle Accidents) of 1988 (Transkei), Multilateral Motor Vehicle Accidents Fund Act 5 of 1989 (Bophuthatswana), Multilateral Motor Vehicle Accidents Fund Act 7 of 1989 (Venda), Decree No 9 (Multilateral Motor Vehicle Accidents Fund) of 1989 (Transkei), Multilateral Motor Vehicle Accidents Fund Act 17 of 1989 (Ciskei) and the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989. In a claim for compensation in respect of which the occurrence took place prior to the commencement of this Act in terms of a law repealed by section 27, any such claim shall be dealt with as if this Act had not been passed (s 28(1)). Section 28(2) of the RAF Act provides that any law repealed by section 27 shall not affect: (a) the previous operation of such law or anything duly done or permitted under such law; or (b) any right, privilege, obligation or liability acquired, accrued or incurred under such law; or (c) any penalty, forfeiture or punishment incurred in respect of any offence committed in terms of such law; or (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed.

The primary reason for the promulgation of the RAF Act 56 of 1996 is to make provision for the regulating of motor vehicle accident compensation after

the incorporation of the TBVC states into the Republic of South Africa through one Act. One could ask whether this combined Act should not have been promulgated sooner, especially in the light of the fact that the incorporation of the TBVC states already took place in 1993. The Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 came into operation in terms of an Agreement between the TBVC states and the RSA. In terms of this Agreement the operation of the Motor Vehicle Accidents Act 84 of 1986 was only suspended for the period of existence of the Agreement between the TBVC states and the RSA (s 3 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989). When the TBVC states were incorporated into the Republic, all the contracting parties of the Agreement, except the Republic, did not exist any more, which should have resulted in the termination of the Agreement. That would have had the effect that the MVA Act of 1986 came into operation again after incorporation. This did not happen, which, from a technical point of view, could mean that all the settlements by the Fund after incorporation up to 1 May 1997, are invalid.

Nevertheless, the new Act came into effect on 1 May 1997 and the important question to be answered now would be whether or not the new Act changed motor vehicle accident compensation dramatically. Fortunately, the answer is no. The provisions of the MMF Act 93 of 1989 stayed almost unchanged in the new RAF Act. Most of the changes only affected the numbering of the sections of the Act.

1 1 Definitions and administration

The definitions in section 1 and article 1 of the MMF Act remained unchanged in section 1 of the RAF Act. Sections 2–8 and articles 4–39 of the MMF Act are now contained in sections 2–16 of the RAF Act. The Road Accident Fund (hereinafter the RAF) is established as a juristic person (s 2(1)) and according to section 2(2)(a) the Multilateral Motor Vehicle Accident Fund shall cease to exist and the RAF shall take over all its assets, liabilities, rights and obligations. The object of the RAF (s 3) is still to pay out compensation for loss or damage wrongfully caused by the driving of motor vehicles. The powers and functions of the RAF (s 4) as well as the financial matters (s 5–6) also did not change. Provision is made for the appointment of agents for the RAF (s 8), but this system has not been re-introduced and the RAF is handling all claims at the moment. The composition of the Board of the Fund and the executive committee (s 10), the powers and functions of the Board and procedures to be followed (s 11), and the functions of the Chief Executive Officer and staff (s 12) changed slightly from the provisions in articles 17–20 of the MMF Act 93 of 1989. The incorporation of the TBVC states forced most of these changes. The Board of the Fund consists of the following members: the Director-General: Transport and at least 11, but not more than 12, members appointed by the Minister of Transport.

1 2 Liability of the RAF and its right of recourse

Article 40 of the MMF Act is now contained in section 17(1) of the RAF Act. The requirements for liability remained unchanged, but the distinction between identified and unidentified vehicles is now reflected in the Act. The wording of the following sections are identical to their predecessors: section 17(2) on costs (a 41), section 17(3)(a) on interest (a 42(a)), section 17(3)(b) on offers (a 42(b)), section 17(4) on undertakings (a 43(a) and (b)), section 17(5) on direct claims by a supplier (a 44), section 17(6) on interim payments (a 45), section 18 on limitations (a 46, 47, 47A and 47B), section 19 on exclusions (a 48) and section 20 on

presumptions regarding driving of a motor vehicle (a 49–51). It is difficult to understand why this opportunity was not used to change some of the sections that have been criticised for a long time. For instance, the R25 000 limitation referred to in section 18. This amount has been the same since 1986 and surely due to inflation this amount should have been increased several times. (In the White Papers later under discussion, it is proposed that the limitations referred to in s 18 be abolished.) The exclusions in section 19 have also been under severe criticism (see *Tsotetsi v Mutual and Federal Insurance* 1997 1 SA 585 (CC)) and could also have been omitted in the new RAF Act. Section 25 on the right of recourse of the Fund is identical to the provisions previously contained in article 64.

1 3 Common-law liability

Article 52 of the MMF Act which regulated the exclusion of the liability of the driver or owner of the motor vehicle in cases where compensation lies against the Fund, is retained in section 21 of the RAF Act. (See *Dodd v MMF* 1997 2 SA 763 (A) on the common-law liability of the driver.)

1 4 Submission of information

Articles 53–54 of the MMF Act are now contained in section 22 of the RAF Act. These provisions remained unchanged, except for an addition contained in section 22(1)(b). This section places the onus of proving that it was not reasonably possible to furnish the Fund with the necessary information within 14 days after the occurrence, on the person who must furnish the information.

1 5 Prescription and procedures

Section 23 of the RAF Act regulates prescription and this section is identical to the provisions previously contained in articles 55, 56, 57, 61 and 61A of the MMF Act. The provisions regarding claim procedures (a 62–63 of the MMF Act) also remained unchanged and are now contained in section 24 of the RAF Act.

1 6 Regulations

Section 26 of the RAF Act provides for ministerial powers to make regulations. Regulation 1 to the RAF Act is identical to regulation 1 to the MMF Act, it incorporates the definitions in section 1 of the RAF Act. Regulation 2 to the MMF Act used to make provision for claims against appointed agents. No such provisions are to be found in the regulations to the RAF Act, even though section 8 of the RAF Act still makes provision for the possible introduction of agents in the future. Regulation 2 to the RAF Act (reg 3 to the MMF Act) makes provision for the liability of the Fund in terms of section 17(1)(b) of the RAF Act, the so-called hit-and-run cases. Regulation 2(1)–(2) to the RAF Act is similar to regulation 3(1)(a)–(b) to the MMF Act . The exclusions and qualifications to the liability of the Fund to be found in regulation 3(1)(c)–(e) to the MMF Act, are omitted in the regulations to the RAF Act. Regulation 2(3)–(5) to the RAF Act regulates prescription of claims and is identical to regulation 3(2)(a)–(c) to the MMF Act, except that the waiting period of 90 days after deliverance of the claim as regulated in regulation 3(2)(b) to the MMF Act, has now been changed to 120 days as provided for in section 24(6)(a) of the RAF Act. The exclusion of certain medical costs as provided for in regulation 3(2)(d) to the MMF Act has been omitted in the regulations to the RAF Act. Regulation 2(6) to the RAF Act on the interrogation of the injured person is identical to regulation 3(3) to the MMF Act. The formal cession of the right of action to the

Fund as was provided for in regulation 3(4) to the MMF Act, has now been incorporated in the provisions of section 25 of the RAF Act. The wording of regulation 2(7) to the RAF Act on the application of the provisions of the Act is similar to the wording of the previous regulation 3(2)(e) to the MMF Act. Regulation 4 to the RAF Act determines that these regulations will take effect on 1 May 1997.

2 Second Draft White Paper on the Road Accident Fund

The Second Draft White Paper on the Road Accident Fund (made available to the public on 1997-04-16) aimed to identify and analyse the causes of the deterioration in the financial condition of the system of victim compensation and to suggest effective and lasting solutions to the problems facing the system, including measures to facilitate and simplify the system and to maximise the proportion of the available resources which reaches the victims by way of compensation. Most of the proposals made in this Second Draft White Paper have been omitted or replaced in the (final) White Paper, and therefore a discussion of those proposals will be fruitless. The explanation given of the RAF's financial position is, however, very valuable in understanding the proposals made in both the draft and final White Paper. For that reason a short summary of the financial position of the RAF will be given, as it was sketched in the (draft) White Paper.

According to the (draft) White Paper the MMF started in 1989 with a deficit of R966 million which the MMF inherited from its five predecessors. At the end of April 1996 (seven years later) the deficit was R6 347 million. A major cause of the RAF's financial problems is the high accident rate in the RSA, which is amongst the highest in the world. A comprehensive Road Traffic Management Strategy has been developed with the clear target of reducing road accident fatalities by 10% by the year 2000. A Road Traffic Safety Board has been established to act as guardians of the Strategy, but all of this will require special funding. It is envisaged that the RAF Act be amended so that 2,5% of the RAF's levy income during its financial year 1997/8 (ie some R38 million) be made available for this purpose.

Apart from investment income generated by assets held by the RAF, the RAF's main source of income is the levy on fuel sold. Even though this system of fuel levy seems to be better than collecting individual premiums from motorists, this system can also be criticised. The main criticism at this stage would be that the income derived from collecting the fuel levy is not sufficient to cover the expenses of the RAF. If this system should remain, which seems likely, the levy charged per litre will have to be increased dramatically.

On the expenditure side it is interesting to note that, according to the (draft) White Paper, during the financial year of 1995/6 payments made for internal administration costs amounted to only 2,1% of the total expenditure of the Fund. Statistics further indicate the skew distribution of claims paid out to victims during that period. Nearly 92% of the number of claims were smaller than R50 000, but they accounted for only 39% of the total amount paid; or in other words, 8% of claims occasioned more than 60% of the total amount paid. The amount of claims paid comprised both the compensation paid to victims and the settlement costs. These settlement costs were made up of the fees paid to attorneys, advocates, doctors, actuaries, etcetera, but did not include the internal administrative expenses of the RAF or its former agents. The settlement costs amounted to R223 million in the financial year ending in 1996, and it represented more than 20% of the amount paid in claims. Looking at the different

heads of damages paid to victims during the calendar year of 1996, general damages (pain and suffering, loss of amenities of life, disfigurement, and other non-financial loss or inconvenience) amounted to 34,8% of the compensation paid, medical costs 23,9%, loss of income 23,8%, loss of support 17,1% and funeral costs 0,4%.

It is clear from the above that the RAF need to increase its income and decrease its expenditure. It seems inevitable that the fuel levy will be increased dramatically and more regularly in future to keep up with inflation and increases in medical costs. Comprehensive proposals were made in the (draft) White Paper based on the statistics given above to redress the gross imbalance between the income and expenditure of the Fund.

3 (Final) White Paper on the Road Accident Fund

The proposals contained in the (final) White Paper are designed to achieve an interim sustainable system of providing reasonable benefits within the financial constraints of the present economic situation. The (final) White Paper proposes a transition from a delict-based compensatory system to a system of affordable state benefits. It is suggested that these proposals will apply from 1 May 1998 until Government can consider recommendations by the Road Accident Fund Commission. The Minister of Transport, after consultation with the Ministers of Finance, Health and Justice, will appoint members to this independent Road Accident Fund Commission.

It is, however, common knowledge that proposals in a White Paper cannot change existing legislation. Before the proposals in this White Paper can be implemented, the current legislation must first be altered by another Act of Parliament. This has not happened yet, and it is unlikely to happen before the end of the year. The implementation date of 1 May 1998 has therefore been premature.

3 1 Assumptions and projections

The (final) White Paper suggests that in order to wipe out the RAF's deficit, a high annual increase in the fuel levy rates will not be sufficient. In order to fully fund the RAF's total liabilities by May 2008, an immediate saving of 40% would also be required. As alternative to these two extremes, Government proposes to draw a distinction between an "Old Fund" and a "New Fund". The Old Fund will be constituted by the assets and liabilities of the RAF as at 30 April 1998, whilst the levy income and liabilities arising from 1 May 1998 will accrue to the New Fund. The intention is to keep the New Fund solvent over the next decade, and given certain assumptions, this will require an estimated reduction of 18% in current expenditure. The reduction is proposed to be achieved in the following manner: reducing settlement costs (see par 3 2), restructuring benefits for loss of income (see par 3 3 2), fully apportioning loss of support benefits (see par 3 3 3) and replacing general damages with the Catastrophic Permanent Impairment Benefit (see par 3 3 2). This will result in an estimated saving of 31% in expenditure. However, this saving will be reduced to a nett result of approximately 18% by an increase in payments due to the removal of the current limitation of R25 000 on certain passenger claims (see par 3 5) and contributions to road safety measures (see par 3 7).

The nature of the proposed New Fund will consist of two elements, namely an element of social welfare in the form of state benefits and an element of risk cover.

The social welfare element will provide stated benefits instead of compensation to victims and the risk cover will protect negligent drivers against claims by victims.

The main objective of the Fund is to provide adequate medical care and benefits to road accident victims, within an affordable and sustainable financial framework. The allocation of available resources will be driven by the best interests of the majority of victims to achieve a more even distribution than at present, but subject to the principle that the more seriously impaired victims should receive increasingly larger shares of the available funds.

3 2 Reducing settlement costs

One of the proposed ways in which the Fund's expenditure can be decreased is by reducing the legal, medical and actuarial costs.

3 2 1 Reducing legal costs

It is proposed in the (final) White Paper to simplify and streamline the legal procedures with a view to saving time and expenses. The most significant changes are the following:

(a) The merits of the claim are to be settled first before a claim on quantum may be lodged.

(b) A merits claim form must be lodged within 12 months of the accident, failing which there is no claim.

(c) There will be no formal pleadings or discovery.

(d) Magistrates' courts will be granted jurisdiction to hear disputes on merits regardless of the amount of the claim or the location of the court.

(e) The normal three year prescription period contemplated in the Prescription Act 68 of 1969 (and those longer periods applicable to persons under legal disability) will apply but commence to run only upon final resolution of the merits.

(f) Pre-trial conferences will be obligatory and will crisply define the issues in dispute.

(g) Costs will be awarded on the so-called disparity basis.

(h) A special tariff for RAF litigation will be prepared.

3 2 2 Reducing medical costs

In terms of the current legislation future medical expenses can be settled either by way of a cash lump sum, or by way of an "undertaking" by the Fund (s 17(4) of the RAF Act 56 of 1996) to discharge its liability in the future when the expense is incurred, or a combination of the two. It is foreseen in the (final) White Paper that the Fund will in future make more use of undertakings. This will mean that the Fund will have to acquire the administrative capability to receive, validate, assess, data process and pay claims from the providers of health care services to road accident victims without undue delay or administrative problems. It is further proposed that the Fund should negotiate preferential rates with suppliers of medical goods and services, and that claims in terms of undertakings will prescribe four months after the end of the month in which the service was rendered.

It is furthermore proposed that medical evidence regarding the victim's injuries should be standardised to reduce subjectivity and disputes. The "Guides to the Evaluation of Permanent Impairment" (4th ed) of the American Medical

Association is suggested as an internationally comparable system to assess the nature and degree of impairment of a victim. The alteration in the victim's ability to meet the demands of his or her own and alternative occupations for which that person may be qualified will be determined with reference to the International Standard Classification of Occupations (ISCO-88). "Pain" and "disfigurement" are specifically provided for in the Guides and will be included in the assessment of the percentage permanent impairment.

3 2 3 Reducing actuarial costs

Actuaries are employed to discount expected future streams of medical expenses and loss of earnings or support to a single present value or capitalised amount for purposes of lump sum settlements. In the process they have to make assumptions regarding the expected real rate of interest, as well as life contingencies likely to materialise in respect of a particular individual, over periods usually stretching far into the future. It is proposed that for purposes of arriving at lump sum settlements, the real rate of interest and mortality tables be regulated, and that all other general contingencies be disregarded in future.

3 3 Benefits

It is significant that the (final) White Paper uses the word "benefit" and not "compensation". Some benefits are determined with reference to actual loss or damage suffered, but the Fund is liable to pay "benefits", and therefore not to necessarily compensate for the actual or full loss or damage.

3 3 1 Medical benefit

Medical expenses (including past and future ongoing medical treatment, assisting devices, personal assistants, home alterations and transport assistance) will be reimbursed by the Fund, subject to apportionment of fault and to a threshold of R500. A large number of small claims would, therefore, be excluded. These benefits will be subject to standardised items and in accordance with the tariffs recommended by the medical schemes. Payments towards future or ongoing medical treatment (after settlement of the claim), will be made to the service providers directly. These medical benefits will only cover medical treatment in South Africa, or the rand-value equivalent of similar treatment available in South Africa.

3 3 2 Income benefit

The (final) White Paper distinguishes between total temporary disability and partial permanent disability for the victim. During the period of the victim's *temporary total disability* a benefit equal to 75% of the victim's "deemed earnings" will be payable, but this payment will be subject to fault and only paid from the second month of such disability and only to victims under the age of 65 years. In the case of children, students, apprentices and trainees in a trade, occupation or profession, the "deemed earnings" will be R1 500 per month from the age 21 to 65. For all other South African residents under the age of 65 years the "deemed earnings" will be a minimum of R1 000 per month and a maximum of the higher of actual monthly earnings at the time of the accident and the average actual monthly earnings over the preceding three years. Claims based on deemed earnings above the tax threshold must be supported by tax documentation. The deemed earnings of foreign residents and tourists will be limited to the lesser of actual income at the date of the collision or R10 000 per month. In all cases the income of the victim will be determined on the date of the accident with annual increases in accordance with the inflation rate, but all other possible future income increases will be disregarded.

The *partial permanent disability* benefit will be paid as soon as a "permanent impairment" has set in and this benefit will also be paid subject to apportionment of fault and based on 75% of the deemed earnings of the victim. "Permanent impairment" is defined in the (final) White Paper as an impairment that has become static or stabilised during a period of time sufficient to allow optimal tissue repair, and that is unlikely to change in spite of future medical or surgical therapy. The nature and degree of permanent impairment will be determined according to guidelines published by the American Medical Association (see par 3 2 2 above) and payments will be subject to a threshold of 10%. The Fund may pay this benefit in a lump sum or at regular intervals on an ongoing basis in future, or as a combination of these options, but also only until the victim reaches the age of 65 years.

The (final) White Paper also distinguishes a *Catastrophic Permanent Impairment* benefit. The following medical conditions constitute Catastrophic Permanent Impairment: paraplegia or quadriplegia; amputation or other impairment causing the total and permanent loss of use of both arms or the loss of use of both an arm and a leg; total loss of vision in both eyes; brain impairment; any impairment that results in a marked or extreme impairment due to a mental or behavioural disorder; or any impairment or combination of impairments that results in 55% or more impairment of the whole person and which is comparable to the above-mentioned conditions. A specific formula, where the age of the victim (even above 65) is applied, is used, and the payment of this benefit is also subject to apportionment of fault.

This proposal will replace all claims for general damages. General damages currently constitutes nearly 28% of total claims paid by the RAF, and it is proposed that the available resources should rather be applied in compensating real economic loss.

If the proposal to exclude all common law claims is accepted (see par 3 4), then by also excluding a claim for general damages against the RAF the total loss suffered by one victim for which no remuneration will be received, might be very high. It is not reflected in the (draft or final) White Papers what the average payment for general damages are, but it can only be assumed that it must be very high if it amounts to 28% of the total claims paid by the RAF. Maybe it would have been better to rather place capping on general damages than excluding the right to claim it from the Fund. As stated, this form of remuneration is for a non-financial loss and therefore the amount of money can never replace the loss suffered. The psychological effect of receiving this money should, however, not be underestimated. By not excluding it, but placing a realistic, not very high, cap on it, it might just serve both needs. (Klopper 1997 *De Rebus* 488 also suggests to retain the claim for general damages and to cap it at both the entry and maximum level.)

3 3 3 Loss of support benefit

This benefit provides income to the deceased victim's dependants, which will include the surviving spouse (partners of a legal marriage and/or customary union), children (natural or legally adopted) and dependent parents (natural or legally adoptive). The basis for calculating the loss of support will also be 75% of the deceased victim's deemed earnings, using the customary allocation of 2 parts for the deceased, 2 parts for the surviving spouse, and 1 part for each child and for each dependent parent. (The (final) White Paper also stipulates that the

actual earnings of the surviving spouse will be taken into account to determine this income-related benefit. It is, however, unclear how the surviving spouse's income will be taken into account.) This benefit will be reduced by the degree of fault on the part of the deceased breadwinner. The surviving spouse and dependent parents will receive the benefit until they reach 65 years and the dependent children until they reach 21 years, or until the deceased would have become 65 years old, whichever event occurs earlier.

3 3 4 Funeral benefit

The (final) White Paper proposes a standard funeral benefit of R3 000 to be paid in all instances, subject to apportionment of fault on the part of the deceased. (It can be suggested that this amount, if accommodated in legislation, be re-evaluated on an annual basis.)

3 3 5 Apportionment of fault against children

Generally all the benefits are subject to fault, but it is proposed that in no instance should fault on the part of a child under the age of 14 years be apportioned.

3 4 Common-law rights

The damage suffered by the victim may exceed the benefits payable by the RAF under the proposals in the (final) White Paper. Accordingly the issue arises once again whether the common-law right to recover any excess damage not covered by the RAF, should be abolished. This existence of a common-law right to claim the excess brings with it the *right to sue* (as victim) and the *risk of being sued* (as wrongdoer) and Government proposes to carefully balance this right against this risk.

The drafters of the (final) White Paper suggest that if the common-law right to claim the excess remains, the consequence will be to shift a large component of the burden onto individual wrongdoers and members of the transportation industry. A modest or middle-income wrongdoer may be left destitute by a large claim from a high-income person. The wrongdoers in motor-vehicle accidents are seldom wrongdoers in any turpitudinous way and a moment's inattention in years of driving may attract a ruinous liability. All members are taxed through a fuel levy to provide the statutory benefits and they may expect to be reciprocally protected from the potentially devastating consequence of a personal common-law liability. To take out personal insurance to cover one against such a common-law claim can be very expensive and the burden of expensive insurance will merely be passed on to the consumer.

According to the (final) White Paper the abolition of the common-law right may not be as radical as it may appear at first glance, for various reasons. Inter alia Government feels that it would be inequitable if one road user without means who falls victim to an accident, could recover his excess from the wrongdoer with means, whereas maybe the next road user falls victim to the wrongdoing of a person without means and the common-law right yields no recovery for him. (Whether this inequity is a good reason to abolish the common-law right, is very doubtful.) Government further feels that it is unlikely that many wrongdoers will be able to pay meaningful claims without expensive indemnity insurance which few can afford. Furthermore, for those victims who have acquired appropriate private insurance and top-up cover on medical-aid care, pension and disability benefits, there would be no need to revert to the common law. However, it would be unrealistic to assume that many pedestrians would take out

such cover. One could, however, agree with the argument that the removal of the cap on certain passenger claims (see par 3 5) further alleviates the need to maintain the common-law right.

According to the (final) White Paper leaving this common-law right intact has many disadvantages, and would create uncertainty, anxiety and loss of confidence amongst private motorists and have grave implications for the transportation industry, including the taxi industry. On the other hand to deny innocent victims the right to claim the damage they have suffered in excess of the benefits they have received from the RAF would seem to be protecting the negligent driver at the expense of the innocent victim. Nevertheless, having carefully weighed all the important factors Government has concluded that the balance of benefit from the point of view of the population as a whole, is to abolish the right to claim such excess damage from the negligent wrongdoer.

This is a very dramatic proposal and could have extensive consequences and should therefore not be accepted without serious consideration. A factor that should be taken into consideration is the fact that the main objective of third-party compensation is to benefit the victims of a motor vehicle accident, not to protect the negligent driver or owner of a vehicle. To abolish any common-law claim will effectively mean that the negligent driver is completely absolved from any form of actual or potential liability, except for criminal liability. Klopper 1997 *De Rebus* 488 suggests that the common-law claim stay intact and in order to prevent the claimant from being prejudiced by the defendant being a man of straw, an unsatisfied judgment fund could be created. This fund could be funded from fines imposed on drunken, negligent or reckless drivers as well as fines imposed on traffic-law offenders guilty of serious moving violations.

One should also not forget the influence of the Constitution and the bill of rights. In terms of section 34 (of the Constitution of the RSA 108 of 1996) everyone has the right to have access to courts and if the legislature intends to limit such a right, it must take section 36 (limitation clause) into consideration. In terms of section 36 the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including, *inter alia*, the nature and extent of the limitation and less restrictive means to achieve the purpose. Especially the last factor could be difficult for the Government to prove. (See also Bobroff 1997 *De Rebus* 382 on the unconstitutionality of the abrogation of the victim's common-law rights.)

The (final) White Paper refers to the Compensation for Occupational Injuries and Diseases Act 130 of 1993 as an example of an existing Act in which provision is made for a similar situation as this proposal to exclude all common-law claims. There is, however, many differences between these two situations. *Firstly*, in the case of Act 130 of 1993 a certain relationship exists between the workman and the employer in terms of which the workman renders some form of service to the employer's advantage. For this reason the responsibility rests on the employer to pay an assessment (in terms of s 83) or "premium" to the Compensation Fund on behalf of the workman. This situation differs vastly from compensation paid in cases of motor-vehicle accidents where there is no relationship between the RAF and the victim and, even more importantly, the victim himself contributes (except in exceptional cases) to the Fund. *Secondly*, in the case of Act 130 of 1993 section 36 makes provision for common-law liability in a situation where a "third party", other than the employer, is liable for damage

caused. This appears to be similar to the current provisions of the RAF Act, and not similar to the proposals in the White Paper. In Act 130 of 1993 the employer pays a "premium" to the Compensation Fund to indemnify him in cases of damage caused in the work place. If the damage is caused by someone other than the employer or his delegates, the victim will have a common-law claim for the remainder of his damages not paid by the Fund. In terms of the RAF Act every road user pays a "premium" in the form of a fuel levy to indemnify himself in the case of a motor-vehicle accident resulting in the damage suffered by him. If a "third party", other than the victim, caused the damage partially or wholly, then the victim has a common-law claim for the remainder of his damages not paid by the Fund. Based on these distinctions between the two Acts, one cannot just accept that what applies in the case of the one, would also be good to apply in the case of the other.

3 5 Passenger claims

It is proposed in the (final) White Paper that all victims of road accidents qualify for the same benefits - be they drivers, passengers, pedestrians or cyclists. This proposal can be recommended and is also more in line with the principle of no unfair discrimination to be found in the Constitution. According to Klopper (1998 *De Rebus* 51) the solution would seem to be rather to increase the amount of the limitation to R125 000, subject to even further increases to make provision for inflation.

3 6 Exclusions

It is proposed in the (final) White Paper that in certain instances it is considered inappropriate to pay benefits from public Funds and in those instances total exclusions should apply, namely (i) claims arising from organised motor sport; (ii) claims by thieves of stolen vehicles; (iii) claims by perpetrators of intentional harm or self-harm; (iv) claims submitted by persons who are illegally present in the country; and (v) fraudulent and misrepresented claims. This proposal can be recommended.

3 7 Road safety

It is proposed that the RAF invest or pay 2,5% of its fuel levy income towards road safety measures, expecting a yield in the shape of fewer and smaller claims. A comprehensive Road Traffic Management Strategy has been developed with a clear target of reducing road accident fatalities by 10% by the year 2000.

3 8 Payment of compensation to minors

It is proposed that payments of compensation to minors be placed in trust with a bank and only to become payable to the minor on attaining majority. A model which achieves this has been set up in Botswana and its aim is to avoid that benefits paid to minors are dissipated before they reach majority.

4 Conclusion

Government recognises in the (final) White Paper, with regret, that in seeking to allocate limited resources equitably for the benefit of the majority of the population, some individual inequities are inevitable. However, Government proposes to closely monitor and review the results of the new system, when once in place, with a view to continuously enhancing the system and to take appropriate action in the light of experience.

One of the criticisms against the proposals in the (final) White Paper, is the retainment of a delictual basis for claims against the Fund in the sense that fault is still a requirement and also the fact that fault on the part of the plaintiff is taken into account. (See also Klopper 1998 *De Rebus* 51.) If it is Government's objective to reduce settlement costs, the retainment of a fault-based system will not promote this objective. The over-all impression given by the proposals in the (final) White Paper is that the new system favours the negligent driver against the victim and the fact that it is further proposed that all common-law claims be abrogated, accentuates this impression even more. It is hoped that Government will take all the various criticisms raised into consideration when drafting new legislation on motor-vehicle accident compensation.

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ADDRESSING THE INSANE LANGUAGE OF LAW

1 Problems

Studying law in English in Africa poses many problems. First we need to acknowledge that our students encounter a difficulty that is experienced by students of law throughout the world when learning the "language of law". As Van der Walt and Nienaber ("The language needs of undergraduate law students: a report on empirical investigations" 1996 *De Jure* 72) point out:

> "Furthermore, the language problems students experience in undergraduate law courses cannot solely be ascribed to the fact that the students are second-language speakers of English. The unique nature of legal language and the demands made on tertiary-level students affect both first- and second-language speakers of English . . ."

What is meant by this is that much time that is devoted to legal studies is taken up without understanding the specific meaning that words are given by the legal structure. A simple example is the confusion of "waive" and "wave". Most home-language speakers of English would know at least two meanings of the word "wave" (See *New Webster's dictionary and thesaurus* (1991) 431: "Wave (wàv) n. Waving movement or gesture of hand; Advancing ridge or swell on surface of liquid") but would have to acquire further instruction to understand accurately the legal implications of "waive". (Indeed, the *New Webster's dictionary and thesaurus* (1991) does not have a reference for "waive"!) In addition, their knowledge of the meaning of "wave" would lend no assistance to understanding "waive". It is in this sense that I conclude that all students of law need to study the "language of law".

Lawyers, having acquired this "language of law", engage in a discourse which is kept exclusive to their in-group. The discourse of law is one of the reasons

why lawyers are so highly regarded by the general population. The lawyers' use of and access to this particular legal discourse makes the services of lawyers sought-after, as only lawyers, and no other group, have access to the legal discourse. In a very real sense, the language of law is the ultimate "language of power".

In parallel, the notion has developed in South Africa that English is the language of power. This is a consequence of the history of languages and power groups in South Africa. Many people view English as necessary to express intelligence, the key which accesses power and knowledge in our society. As a consequence, the language of law and lawyers becomes embedded within this parallel language of power, English (and, because of our history, Afrikaans). So the power of law has been limited to those who have gained interpretive power over the language of law and the language of power it is embedded within.

For most students, and indeed for most South Africans, the law is at a second remove for those who use a second language other than English or Afrikaans. Law is also situated within a minority culture which provides the context for the language of power. The law and legal interpretation need to overcome the barrier of difficulty and complexity which confronts most lay people, but it also has to face two additional difficulties in South Africa, that of being situated within both a language and a culture that is foreign to the majority of the people. Just as most English (or Afrikaans) first-language speakers would not understand the complex set of negotiations, rights, obligations and familial ties that arise from *lobola* negotiations because of their innate complexity, so too would they not be able to understand the indigenous law principle that: "Izinkomo yizo ezinika ilungelo labantwana ukuti babe ngabalowo muzi." or "Abautwana baba lupho ilobolo lingayiswanga rhona!" (Bekker *Family law: An introduction* (1990) 129: "*Cattle beget children*" *or* "*The children are where the lobolo is not*" translated from the English by Bekker) because of their inability to understand the language in which the principle is written and because of the cultural context in which the principle is placed.

Frantz Fanon states:

> "To speak means to be in a position to use a certain syntax, to grasp the morphology of this or that language, *but it means above all to assume a culture*, to support the weight of a civilization" (Fanon *The wretched of the earth* (1976) 17–18).

Law students who begin a study of law must discard a part of their own existence in order fully to submerge themselves in the law. This is not only the reality of the study of law but often its objective, the intention being that the student must assume the "culture" of law, understanding its own peculiar quirks and dynamics so that as a lawyer one can best represent one's client within this system. As Gabel points out:

> "This sense of the normal movement of the total 'factual' context, without which it would be impossible to apply the law to any discrete situation, has been interiorized by the judge during the course of his conditioning" (Gabel "Reification in legal reasoning" in Boyle (ed) *Critical legal studies* (1992) 267).

Whether the interiorising of the law is a "good" thing or a "bad" for society in general, is an issue still under debate. What is clear is that without some interiorising good lawyering within the established legal system cannot take place.

In a society emerging from the imbalances created by the apartheid era, it is clear that the unequal distribution of power is supported by and entrenched in language. The fact that South Africa has a low English literacy rate and that the majority of the population is less than proficient in reading, writing and critical

thinking in English, means that there is even greater reliance on lawyers. This, in turn, has perpetuated the perception that lawyers wield an enormous amount of power and are the "select few" who hold the keys of both the language of law and the law itself that will lead to the unlocking of legal power. But before the law can unlock this legal power, the perception is held that it is English and only English that can unlock learning, especially legal learning. The fact that these perceptions are associated with particular race groups in South Africa is merely a sign that we have not yet rid ourselves of the effects of colonialism. (Clearly it is not possible ever to rid ourselves of the effects of colonialism, nor do many wish to. Regardless of personal views, the reality is that they exist and we should be selective about them.)

It is my contention that English does not grant access and power to persons who do not speak it as a home language but rather that it inhibits access to both knowledge and power. The reality of this statement was expressed by Foucault in relation to language, and can be equally be said of law, both as a language and as a text:

> "Having become a dense and consistent historical reality, language forms the locus of tradition, of the unspoken habits of thought, of what lies hidden in a people's mind; it accumulates an ineluctable memory which does not even know itself as memory ... men believe that their speech is their *servant* and do not realise that they are submitting to its demands" (Foucault *The order of things: an archaeology of the human sciences* (1973) 197).

The effect of submitting to the demands of English in order to learn law, results effectively in the exclusion from law itself. This exclusion is serious, since accessibility to and understanding of the law excludes certain sectors of society not only from a legal text but from the justice that should govern interpersonal relationships on a daily basis through access to and knowledge of rights and responsibilities.

First-language speakers of English face this difficulty with regard to law. They struggle with the particular discourse under which law operates, they must become familiar with its vocabulary, unique metaphors and turns of phrase. Their studies insist that they become familiar with the language of law, since inability to do so results in failure. It results in not "knowing" the law. First-language speakers of English must grapple with the terms and language offered in textbooks and court judgments, submitting to the demands of law under the penalty of failure. The task for second-language speakers of English is even more demanding. They, too, must deal with these difficulties of law, but only if they pass the difficulties of English first. They must pass two gates to gain entry into the holy land of law, while first-language speakers of English pass only one.

Second-language speakers have an added potential capacity for greater misunderstanding and/or non-understanding of the law. Not as sure of their legal rights and responsibilities as they would be with the law in the language of the home, they tread, if at all, with uncertainty and at their own peril about the events of their daily lives. More importantly, those who wish to learn the law, struggle to come to terms with it, its unique language and most importantly the language in which it is presented – English.

The result can be a general failure to grasp the principles of law and more importantly the principles upon which the law is based. If to know and understand the law is to internalise it, and if to internalise it is to follow and obey it, then it is small wonder that the law is taken so lightly in the new South Africa. We cannot agree that the law is justified (whether *any* law is justified has been and is still debated in legal circles, a debate initiated by the school of Critical

Legal Studies) if we cannot see where it comes from, why it is as it is and what it means. We can take it into our hearts only if we hear it on our tongue and it rolls from our lips in our own words, if it is spoken by our parents and friends in our own home. (One can assume that this is a desirable thing only if one adopts the approach that internalisation of the law is desirable and necessary. Gabel 262–278 is of the opinion that it is not.)

2 Evidence

I shall now discuss some biographical information that indicates how English hinders the acquisition of the law and legal language. The following examples were taken verbatim from the test and examination scripts of my students at Vista University in 1996 and 1997 and provide the title of my paper. All the students used English as a second or third language. My focus is not on why students make these errors (the grammatical or linguistic origins) but rather what the result of making these errors is and what effect of using English has on both the studies of the student and on society as a whole in terms of alienation and internalisation of the law.

> "A person who is *insane* can conclude a valid contract, because all human beings are *insane*. A person who is *sane* cannot conclude a contract. Anyone who can conclude a contract with such a person the contract will be invalid. Because such a person is disturbed mentally."

This answer shows clearly that the student has confused the terms. The student understands the concept that persons without mental health cannot enter into contracts but the words "sane" and "insane" have been attributed incorrectly by the student. After the test I asked the class if they knew what the words meant. Most said they did but the response was more positive when I used the terms "mad" or "crazy" and "not mad" and "not crazy". The misunderstanding could be compounded by the fact that a student may think to be "insane" is to be "in-a-sane" state.

> "When *sanity* is *presumed* the *insane* party cannot enter into contractual capacity without the assistant of a guardian, because the *insane* person has a limited mental capacity."

Here the student used the terms "sane" and "insane" interchangeably. The problem was compounded by a lack of understanding of the word "presumed" the student may think that when you presume sanity then the person is insane. Again the misunderstanding could be made worse by the fact that a student may think that to be "insane" is to be "in-a-sane" state. Here again the student clearly understands that lack of mental capacity limits contractual capacity, but language has proved a stumbling block.

> "The effects of *presumption* of *sanity* is when you past your *insanity* to another person and you are declared to be *insanity.*"

Not only did this student fail to understand the finer workings of mental health (ie its non-contagious nature) but also what a presumption of insanity was. Had the student known what the word "insane" means, the answer would perhaps have become clearer.

> "The contract[s] that are *detrimental* to public interest are *enforceable.*"

Again one has the impression that, had the student understood the meaning of "detrimental" and "enforceable", the answer would not have contained such a blatant contradiction. Perhaps the student was under the impression that "detrimental" had a positive connotation and so the sentence would read: "The contract[s] that are *good* to public interest are *enforceable*". Another alternative is

that the student understood "enforceable" to mean "unenforceable (not enforced)" (more accurately "not able to be enforced") so the sentence would read: "The contract[s] that are *detrimental* to public interest are *unenforceable (not enforced)*". Whatever the possibilities it is certainly not that "[t]he contract[s] that are *good* to public interest are *unenforceable*" or that "[t]he contract[s] that are *bad* to public interest are *enforceable*". At university level one would not expect a student to make such an elementary error of contradiction and so I was left only to conclude that it was a simple misunderstanding of language that led to such a contradictory answer.

This point is well illustrated by similar mistakes by other students:

> "The contract which is considered to be in the public interest must considered to be *unenforceable*."
>
> "Restrain of trade is *valid* and *unenforceable* unless it proves reasonable by our common law."

This answer shows a common confusion of terms like "valid, invalid, void, voidable, enforceable and unenforceable". These often cause confusion not only because the meaning of the words is difficult and the words themselves are similar, but also because the prefixes and suffixes give no uniform indication of the relation between the words with a common root, and words with both prefixes and suffixes like "unenforceable" are particularly confusing. The confusion over terms and their meaning hides the fact that there is a sound knowledge of the work as this student demonstrated later on in the same answer: "If it is against public interest is unlawfully and unenforceable by our common law."

> "In the case of the restraint of trade – approaches of restrain[t] of trade is *enforceable unless* it is proven to be *reasonable* (English common law approach) if the contract is *detrimental* to the public interest is considered *enforceable*."

In this example the student has made a number of contradictions. Note that the first statement has a contradiction: the student states that "the ... restrain[t] of trade is *enforceable unless* it ... [is] *reasonable*". In other words the student contends that the restraint of trade will be enforced only if it is unreasonable or, more accurately, that all unreasonable restraints of trade will be enforced unless it is proved that it was a reasonable contract, at which point the contract will no longer be enforced. Surely this cannot be what the student intended. An error in understanding could reasonably have occurred at three points in this statement: the terms "enforceable", "unless" and "reasonable". If the student understood "enforceable" to mean "unenforceable", then the statement would read "the ... restrain[t] of trade *is unenforceable unless* it ... [is] *reasonable*". This statement would not only be non-contradictory but would also correctly state the position in English law with regard to restraints of trade (a position which differs from South African law with regard to restraint of trade). The reason for the rather cryptic reference to the "*(English common law approach)*" is that the students were expected to know what the position is in English law. The second possibility is that the student could have understood "unless" to mean something different – for example "especially" or "if": with this understanding the sentence would read "the ... restrain[t] of trade is *enforceable especially* if it ... [is] *reasonable*" *or* "*the ... restrain[t] of trade is enforceable if* it ... [is] *reasonable*". This statement, too, would have inner consistency and would indicate the correct English law position. The third possibility is that the student understood "reasonable" to mean "unreasonable", in which case the sentence would read: "The ... restrain[t] of trade is *enforceable unless* it ... [is] *unreasonable*". This statement would also have no apparent inconsistency and would approximate the South African law position.

Having examined the first inconsistency in the answer it is necessary to examine the second. The second part of the student's answer is formulated as follows "The . . . restrain[t] of trade is *enforceable unless* it . . . [is] *reasonable*" Here the possibilities for error are the same as discussed in the answer by a previous student. Again one has the impression that, had the student understood "detrimental" and "enforceable", the answer would not have contained such a blatant contradiction. Perhaps the student was under the impression that "detrimental" had a positive connotation and so the sentence would read: "The contract[s] that are *good* to public interest are *enforceable*" (a position which approximates the South African law). Another alternative is that the student understood "enforceable" to mean "unenforceable (not enforced)" (more accurately "not able to be enforced"), so the sentence would read: "The contract[s] that are detrimental to public interest are *unenforceable (not enforced)*" (a position which even more accurately describes South African law). The difference is one of approach. For example "The contract[s] that are *good* to public interest are *enforceable*". This implies that the contracts must be shown to be good before they can be enforced. "The contract[s] that are *detrimental* to public interest are *unenforceable (not enforced).*" This implies that the contracts must be shown to be bad before it will not be enforced. The court takes as its starting point that all restraints of trade are "good". Thus it is incumbent on the party who wishes the contract not to be enforced to show why it is "detrimental to public interest". Whatever the possibilities, it is certainly not that "the contract[s] that are *good* to public interest are *unenforceable*" or that "the contract[s] that are *bad* to public interest are *enforceable*". One would not expect a student to make such an elementary error of contradiction at university level. I was therefore left to conclude that it was a misunderstanding of language that led to such a contradictory answer.

The third inconsistency in the answer comes from the comparison of the two statements "the . . . restrain[t] of trade is *enforceable unless* it . . . [is] *reasonable*" with "if the contract is *detrimental* to the public interest is considered *enforceable*".

In essence, the statements appear to say the same thing: statement one is that "*reasonable contracts will not be enforced*"; statement two that "*if the contract is bad for the public then it will be enforced*". One might then conclude that this is precisely what the student intended to say, since the proposition is repeated twice from two different perspectives. This conclusion could be supported by the argument that the student does not have a clear grasp of the law and believes it to be as he has stated, and that the error in understanding the law has no origin in a misunderstanding of language but is merely a failure to come to grips with the nature of restraints in trade. My reply to such an argument would be to say that the answer speaks for itself. As a university lecturer I would not expect any student seriously to propose that contracts that are harmful to the public in general should be enforced and then also to state that if a contract is reasonable then it should not be enforced. I certainly would not expect such a proposition to be made without any supporting or substantiating argument. The reason for no additional argument is plain – the student did not intend to make a contentious statement but rather merely to present the position of the law in a statement form. A lack of understanding of the law would result in an answer which may conflict with the position of the law but, one would expect, would still be consistent with basic logic. For example, a student may wish to state that "all restraint of trade contracts are not enforced because they are all against public interest"; a statement like this would have the strength of inner logic whilst at the same indicating a lack of understanding of the law in failing to state the correct legal

position. Furthermore, the fact that the mistake is made by other students points to a common problem. This common problem can be either a common language difficulty or a common misunderstanding of the work. The second possibility is hard to accept when one considers the statistical possibility that the misunderstanding takes exactly the same form and that this form of misunderstanding defies all forms of logic expected from university students.

> "The restrain[t] of trade is *valid* and *enforceable*, unless *proved* to be *reasonable*."

This sentence contains a contradiction that is so dramatic that one cannot believe it to have been made intentionally. Paraphrased it states: "*Reasonable contracts must not be enforced.*" By implication "*only unreasonable contracts must be enforced*". Areas of possible misunderstanding could occur around the terms "valid", "enforceable", "unless", "proved", and "reasonable".

The student may have understood the second phase to mean "unless proved to be *unreasonable*" or perhaps the student understands the term "unless" to mean the opposite ("if") so that the statement reads: "The restraint of trade is valid and enforceable, *if it* is proved to be reasonable."

The other explanation which in my view is not very probable, is that the student may have taken the words "valid", "enforceable" and "proved" to mean the opposite, in other words: "The restraint of trade is *invalid* and *unenforceable,* unless proved to be reasonable." Or "The restraint of trade is invalid and unenforceable, unless it is proved *not* to be reasonable." The statistical possibility of the former is unlikely when compared to the other options.

> "Legally speaking a minor is not entitled to enter into a contract *with* the assistance of a parent/guardian."

This sort of answer always poses a problem for the examination marker. It is clear that the student could not have meant what he or she said, namely that "children can not enter contracts *with* the help of their parent". Here I can pinpoint two possibilities. Either the students meant the opposite, in other words, the term "with" must be replaced by "without" to read "legally speaking a minor is not entitled to enter into a contract *without* the assistance of a parent/guardian." This statement would more accurately reflect the position of the law. The other alternative is that the students may have intended to write what they have written, but have understood it to mean that "*children may not enter into a contract with their parents*". This second option would also indicate a lack of understanding of language in that it ignores the word "assistance" in the answer. In other words, the student ignores the joint participation of the parent to enter a contract with another. The difficult question is should the examiner mark the answer correct or incorrect?

> "The agreement of a contract must *not be lawful* eg to kill one another."

Once again one would not realistically expect a university student to make such a controversial statement, namely "contracts must be unlawful (against the law) for example contracts must be to kill one another". The exact opposite meaning would be logically and legally accurate. There are two possibilities for errors here. The sentence could be understood to mean that "the agreement of a contract must *be lawful* eg to kill one another" but then the example would conflict with the sentence because as you are aware it is rarely lawful "to kill one another". The other possibility is that the term "lawful" should read "unlawful" so that the sentence reads that "the agreement of a contract must not be *unlawful* eg to kill one another." This would lead to an inner consistency between the statement

and the example. In this last example I regard it as more probable that the student has language difficulties rather than difficulty with the legal issues. I suspect again that we have problems with prefixes and suffixes.

3 Solutions

One may say that the solution to the illustrations given above are simple: students must come to terms with the language and learn English (Van der Walt and Nienaber "The language needs of undergraduate law students: A report on empirical investigations" 1996 *De Jure* 71–88). Their livelihood as lawyers depends on their language skill and as such they must be required by their training to acquire those skills. If they cannot, then they are not ready to enter their profession. This argument has some basis but ignores the reality of our specific situation in South Africa. The *status quo* is that learning is predominantly in English. That is why the profession is dominated by it. Perhaps it is not only good English skills that are necessary for the profession – what about other language abilities? But how can these other language skills be rewarded and recognised if our training systems do not take them into account? All of this also overlooks the reality that an understanding of legal principles is often more important than language skills, if we are to maximise language skills to the detriment of conceptional ones, we have put the proverbial cart before the horse.

It is also not enough to say that there are non home-language speakers who manage. That is only to acknowledge the skill of the exceptional and to ignore the rights and expectations of the majority. Ultimately this leads to double standards, making entry into the profession easer for those who speak English as a home language.

A focus on English skills also ignores the reality that law is currently very European-based and also ignores the movement and the need for movement towards making law relevant to the majority of the population, which in effect means bringing African law and, by implication, African legal concepts into our current law. This is not possible unless the majority of persons are included, but more importantly that their languages are acknowledged, recognised and incorporated.

The reasons for this are expressed by Mwaura in the following terms:

> "Language influences the way in which we perceive reality, evaluate it and conduct ourselves with respect to it. Speakers of different languages and cultures see the universe differently, evaluate it differently, and behave towards its reality differently. Language controls thought and action and speakers of different languages do not have the same world view or perceive the same reality unless they have a similar culture or background" (Mwaura *Communication policies in Kenya*: UNESCO (1980) (27).

Alamin Mazuri ("Language and the quest for liberation in Africa: The legacy of Frantz Fanon" 1993 *Third World Quarterly* 351) observes that Benjamin Lee Whorf contents that each language is encoded with a particular mode of thought so that speakers of different languages map the world in different ways. This contentious Sapir-Whorf hypothesis is better tempered by the psychological effect of linguistic colonialism than the "deterministic" view of language and thought encodement, but it does provide some food for thought.

The only way diverse modes of thought and different perspectives can be included in South Africa, and especially in South African law, is by recognising the languages in which these modes are based. Why should we do this? some may ask. The answer is simple, to build the legitimacy of law through internalisation, but also to recognise and redress the negative effect of linguistic colonialism as Mazuri (*ibid*) argues:

> "It is true, of course, that wherever European languages and cultures have been imposed on people of colour there have been certain psychological ramifications. This psycholinguistic impact, however, has had less to do with the supposed deterministic power of language on human cognition than on the psychological alienation that results from 'racial' and class domination."

Terminology is also cited as an obstacle to Africanisation. One colleague of mine commented: "We cannot teach law in our (African) languages because there is no legal terminology in our languages." Jokingly I replied that there is no terminology in English either. Her response helped only to sustain my argument. "What I mean," she continued, "is that we have no words for *prima facie*". African languages have the prerogative, and indeed if they are living languages, the necessity, to adopt words from other languages. That is, as some have pointed out, the very strength of a language like English. It is true that African languages have adopted words from other languages in everyday speech. There is no reason why this cannot be done for law. Some reading this article may then argue that if the purpose of using African languages in legal training is to help students by avoiding terminology, how will it be of help if you propose that the African languages adopt all the difficult legal terminology? The answer to this question is twofold. First of all, I do not propose that the African languages adopt all legal terminology, nor do I propose that they adopt them as they appear in Western usage. The adoption is organic and the languages will adopt what they require in a manner which lends itself to the language. This means that the terminology will be more comfortable and familiar and linked to the African language. Secondly, you will recall that I started out this note by arguing that there are two barriers which law students studying in a language which is not their home language must face: the one is universal in that all students must strive to come to terms with the terminology of law. This obstacle will still be present even if terms are adopted by a home language, but if the other obstacle of learning the language and culture in which the law is set is removed, problems of language like the ones I have illustrated above will not obscure one's knowledge of concepts. In other words, students will do better because they can focus more on studying the law and less on the English terminology, since they can understand concepts like "sane", "insane", "enforceable" and "presumption", where they occur in their own language.

What does this mean in practical terms? Should all students be permitted to be taught and answer exams in their home language? In her response to Rosaline Pedalino Porter's book *Forked tongue*, Susan Dicker refers to a longitudinal study of structured English immersion strategy, early-exit and late-exit transitional bilingual education programs for language-minority children by Ramirez *et al* (Ramirrez, Yuen, Ramey, Pasto, Billings "Longitudinal study of structured English immersion strategy, early-exit and late-exit transitional bilingual education programs for language-minority" 1991 in Dicker "Examining the myths of language and cultural diversity: a response to Rosalie Pedalino Porter's *Forked tongue*: the politics of bilingual education" 1992 *Bilingual Review* 210). She contends that the results of the survey

> "suggest that instruction in native language does not impede academic growth, and that sustained native language instruction may actually help minority language students catch up to their English-speaking classmates" (218).

Dicker agrees with this contention and concludes that

> "there is substantial reason to believe that some form of native language instruction would help a great number of students achieve academic success" (219).

We can therefore conclude that the teaching of law in indigenous languages is both practical and necessary. It is necessary if we wish to increase the number of law graduates who do not have English as their first language. Failure to include indigenous languages as a medium of legal education may lead to an entrenchment of the law as a western prerogative. In order to Africanise the law, the concepts must at least be expressed in indigenous languages so that they can penetrate the home and then be reformulated and leave the home to begin to shape our law and legal system. It is only through this process that we can internalise the law for the majority of South Africans.

Summary or Kakaretšo

I wish to thank Professor Serudu for translating this summary:

Taodišwana yekhwi e na le dikarolo tše tharo. Karolo ya mathomo e akaretša mathata ao a tswalwago ke go ithuta molao, kudu polelo ya semolao. Gape e bile e sekaseka mathata ao baithuti bao ba ithutago molao ka leleme la bobedi goba la boraro ba a fahlogelago. Go feta moo go na le poledišano ye itšego ka ga pewolekatana ye e fahlogelwago ke bobedi, molao le baithuti ka lebaka la karogantšho ye ya polelo. Karolo ya bobedi e beakanyetša tshedimošo ya taodišophelo yeo e laetšago ka moo tirišo ya Seisimane, go le fa mohlala, e šitišago sebakeng sa gore e hlatloše go ithuta molao ga baboledi ba leleme la bobedi la Seisimane. Karolo ye e tšea dikarabo tša baithuti go tšwa ka ditlhahlobong gomme ya di fetleka ka nepo ya go laetša gore baithuti ba feitše mo dikarabong tše ka baka la bothata bja polelo e sego ka lebaka la go hloka tsebo ya molao. Karolo ya mafelelo ya taodišwana ye e sekaseka ditharollo tše di kgonagalago tša bothata bjo. E thoma ka go tsinkela dikgopolo tše dingwe tše di lego kgahlanong le go ruta molao ka maleme a setšo mme ya ruma ka gore, gore go tle go hlatlošwe phetogo le kwešišo ya molao, go ruta ka maleme a setšo go swanetše go hlohleletšwa ka ge go nyakega le gona go dirišega.

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A REPLY TO "SOME COMMENTS ON THE DISCUSSION PAPER BY THE SOUTH AFRICAN LAW COMMISSION: 'ASPECTS OF THE LAW RELATING TO AIDS: HIV/AIDS AND DISCRIMINATION IN SCHOOLS'" 1998 *THRHR* 127

The South African Law Commission's discussion Paper 73 *Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools*, containing preliminary recommendations for a national policy dealing with HIV/AIDS, was widely distributed for comment in August 1997. (The document was distributed to more than 1 237 identified parties. These include representatives of the organised educators' profession, school principals, women's organisations and the medical and health professions. The release of the discussion paper was advertised in the

Government Gazette and by way of media statement. A further 44 copies of the paper were subsequently distributed. The closing date for comment was 1997-09-30, extended to 1997-10-15. Comments received after the extended date were also taken into account.) Written comments were received from 66 respondents, an overwhelming majority of whom strongly supported the principle of enacting such a policy. Widespread agreement with the contents of the policy was expressed. However, a number of concerns were raised with regard to the broad principles on which such policy should be based and to some of the terms of the policy. Detailed suggestions for further refining the policy were made, several of which were subsequently incorporated in the revised policy.

In evaluating the comments the aim was to strike a fair balance between the rights of learners with HIV and those without HIV. Furthermore, a joint consultative process was followed throughout with the Department of Education. Senior officers of the department gave input and guidance in the development of the draft and also final policy. The *Third interim report on aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools* (hereafter the *Schools interim report*) was finalised by the South African Law Commission's project committee investigating aspects of the law relating to AIDS in early 1998. (Although this report is a final one, it is called "interim" to indicate the piecemeal nature of the reports, each dealing with a specific aspect of the law and HIV. The first interim report dealt with the use of disposable syringes, needles and other hazardous material; universal work place infection control measures (universal precautions); a national compulsory standard for condoms; descheduling of HIV/AIDS in the Regulations Relating to Communicable Diseases and the Notification of Notifiable Medical Conditions (GN R2348 in *GG* 11014 of 1987-10-30), and a national policy on HIV testing and informed consent. The second interim report dealt with pre-employment HIV testing. Subsequent interim reports will deal with other matters identified for reform.) In the third interim report the preliminary conclusion in the preceding Discussion Paper 73 was confirmed, namely that a national policy for HIV/AIDS in schools was urgently needed. The *Schools interim report* was accepted by the Law Commission in April 1998 and formally handed to the Minister of Justice. It was tabled in Parliament on 13 August 1998. The report contains final recommendations with regard to the promulgation of a national policy on HIV/AIDS in public schools. (The policy may be obtained from The Director-General, Department of Education, Private Bag X895, Pretoria, 0001.) Clause 15 of the proposed policy provides for its regular review and adaptation if necessitated by changed circumstances (for instance a scientifically established change in the risk of transmission of HIV).

PJ Visser and JL Beckmann of the University of Pretoria recently commented on Discussion Paper 73 ("Some comments on the Discussion Paper by the South African Law Commission: 'Aspects of the law relating to AIDS: HIV/AIDS and discrimination in schools' "1998 *THRHR* 127–132). While they accept the need for a general coherent policy which will be fair to all concerned and which will bring clarity on the rights, duties and protection of learners either carrying or in contact with a carrier of the AIDS virus, they argue in essence that the draft policy contained in Discussion Paper 73 "appears to lack acceptability and realism in important respects" and that it is seriously flawed (127).

The project committee in its work welcomed a wide range of critical comments and proposals. It is doubtful, however, whether the criticism of the authors is well-directed. In particular, their views seem to depend on an inappropriately

constricted understanding of the latest statutory framework for education, and on a misappreciation of central aspects of the committee's approach.

As the draft policy has in the meantime been superseded by the *Schools interim report* containing the final proposed policy, the discussion that follows will be restricted to important points raised by Visser and Beckmann in connection with Discussion Paper 73 which would also seem to apply to the *Schools interim report.*

(a) Visser and Beckmann argue that the draft policy fails to achieve a correct balance between the fundamental rights of those free from HIV/AIDS and those so afflicted and that it overemphasises the rights of the latter group.

The project committee strove to develop a policy that would not pit the rights of learners with HIV against those who are not infected. Instead, it endeavoured to follow an integrated approach which would deal with the problem of HIV/AIDS in schools in a holistic manner. The fundamental rights *of every person* (*learner*) and the best interests of *all* learners, and not only those infected with HIV, were carefully considered in the *Schools interim report.* It was further accepted that HIV infection will occur increasingly among the South African school-going population and that it will not be feasible to segregate this population between those that are infected and those that are not infected. (Apart from heterosexual intercourse, transmission from mother to baby (before, during and after birth by way of breastfeeding) accounts for the most infections in South Africa. As a result of better medical care, more and more children born with HIV will reach school-going age, while on the other hand, young people are becoming sexually active at an increasingly younger age. A national survey done in 1997 among pregnant women attending public antenatal clinics indicated that 13% of pregnant teenagers (girls younger than 20 years) were HIV positive.)

The following fundamental rights in the school environment were considered: the right to equality and dignity; the right to a basic education; the right to privacy; the right to freedom of association; the right to life, bodily integrity and an environment that is not harmful to health or well-being; the right of access to information; and the right to freedom of conscience, religion, thought, belief and opinion. The duty of the state to respect, protect, promote and fulfil these rights – regardless of constraints on resources – was stressed, as well as the legal duty of private individuals to respect the fundamental and common-law rights of others.

Furthermore, the project committee was convinced that the code of conduct – to be drawn up by every public school – would be an ideal vehicle for stressing the duties of all learners (including those with HIV) and for dealing with behaviour which may create a risk of HIV transmission. Such code could anticipate and thus minimise the risk of behaviour leading to HIV transmission. Unacceptable behaviour in the context of HIV/AIDS could include sexual abuse, aggressive behaviour, intentional or negligent exposure of others to blood or other body fluids (which may be contaminated by blood), and behaviour related to intravenous drug abuse. The South African Schools Act 84 of 1996 provides that the Member of the Executive Council of a province who is responsible for education in that province must determine by notice in the *Provincial Gazette* the behaviour which may constitute misconduct and serious misconduct and the disciplinary proceedings to be followed in such cases (suspension, expulsion, or placement in an alternative school environment, eg in a special school for learners with behavioural disorders) (s 9(3)). The committee argued that behaviour which may create risk of HIV transmission could well constitute serious misconduct and in some instances even criminal conduct, which could be dealt with in the appropriate manner.

(b) Visser and Beckmann question whether the draft policy's assumption that the Minister of Education is statutorily empowered to make policy on HIV/AIDS is correct.

Section 3 of the National Education Policy Act 27 of 1996 provides that, *without derogating from the generality of this section*, the Minister of Education may determine national policy for *inter alia* the organisation, management, and governance of education institutions (which include institutions providing primary and secondary education), the admission of students (persons enrolled in education institutions), compulsory school attendance, curriculum frameworks, core syllabuses, education programmes, and education support services (including health and welfare development and counselling) (my emphasis).

This section is without doubt wide enough to provide for a policy on the matter of HIV/AIDS in schools dealing with aspects such as the admission of learners and their continued school attendance, education and information on HIV/AIDS as part of the curriculum, the management of schools in the context of HIV/AIDS by the implementation of universal precautions effectively to eliminate the risk of transmission of all blood-borne pathogens, including HIV, in the school environment, and the adoption of a code of conduct which contains provisions regarding the unacceptability of behaviour which may create risk of HIV transmission.

(c) Visser and Beckmann charge that the draft policy is inconsistent with the powers of the governing body of a private school to determine admission policy.

Section 5 of the South African Schools Act provides: A public school must admit learners and serve their educational requirements *without unfairly discriminating* in any way (s 5(1); my emphasis); the governing body of a public school may not administer *any* test related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test (s 5(2); my emphasis); and the governing body determines the admission policy of a public school *subject to* this Act (s 5(5); my emphasis).

The project committee was convinced that it would be unfair to discriminate against learners on account of their HIV infection as such. Their infection *as such* does not expose others to significant health risks within the school environment which cannot be eliminated by ordinary measures or reasonable adaptations. Therefore, even though a governing body of a school determines the admission policy in accordance with section 5, such policy may not under the statute competently exclude learners on account of HIV infection as such, or require a negative HIV test result as a prerequisite for admission. Clause 4 of the policy proposed in the *Schools interim report* therefore provides that no learner may be denied admission to or continued attendance at school on account of his or her HIV status or perceived HIV status. It further states that there is no medical or scientific justification for routinely testing learners for evidence of HIV infection and provides that the testing of learners for HIV as a prerequisite for admission to or continued attendance at school is prohibited.

It is generally accepted that children with HIV should lead as full a life as possible and should not be denied the opportunity to receive an education to the maximum of their ability. The committee consequently affirmed a premise adopted in Discussion Paper 73 that learners with HIV should be accommodated in schools to the extent that their infection does not expose others to significant risks which cannot be eliminated by ordinary measures or reasonable adaptations

(*Schools interim report* 39). A medically recognised significant health risk would, for instance, be present where a learner has a serious secondary infection which cannot be treated and could be transmitted to other persons in the course of day-to-day contact, or where the learner suffers from unmanageable bleeding, or behaves in an aggressive manner (sexually or otherwise). In instances like these, discrimination (refusal of admission or continued attendance) would probably be fair and rational. Clause 3.3 of the proposed policy provides that "(a)ny special measures in respect of a learner with HIV should be fair and justifiable in the light of medical facts, school conditions and the best interests of the learner with HIV or those of other learners". From this it should be clear that the committee did not adopt "the extreme position . . . which apparently refuses to accept that there may be fair and legitimate reasons to deny an individual learner admission to a school" as claimed by Visser and Beckmann (130).

Visser and Beckmann also state that the governing body should be allowed to require "from the parents of a learner, for the protection of . . . other learners at the school, to disclose the HIV/AIDS status of a learner on admission (obviously on a confidential basis)" and that the principal (or the governing body) could be required to disclose to parents who intend to enrol their children at the school, whether anyone at the school does have HIV/AIDS. They state that "(o)nly by having information on whether the school is AIDS free or not, will parents be able to make an informed choice as to the placing of their children at that school" (130).

Because of the nature of HIV antibody testing and the window period, it is currently impossible to know with certainty at any specific time who in any given group has HIV and who does not. Visser and Beckmann concede this when they state that "it is possible to establish the condition of *many* of those infected" (128, my emphasis). Even if mandatory testing for HIV were to form part of a school's admission requirements and if it were repeated at regular intervals, or if cases of infection were made known – all measures which would make great inroads into fundamental rights and freedoms – it would still be simply impossible to guarantee that a school is "AIDS free". Such measures or "guarantees" would instead create a false sense of security and may result in the greater likelihood of HIV transmission. Testing for HIV or trying to exclude those who test positive or who are known to be HIV positive are not considered meaningful ways in which to deal with HIV in the school environment. It is far safer and far less invasive of fundamental rights, to assume that a school is *not* "AIDS free" and in situations of potential exposure to regard all persons as being potentially infected with HIV and to treat their body fluids as such. By the consistent application of universal precautionary measures in all such instances (including contact sport and contact play), learners (and educators) will be better protected from infection within a society in which HIV infection is reaching epidemic proportions. Universal precautions are basic and ordinary measures which need not be expensive and which will effectively eliminate the risk of HIV transmission in the school environment. Furthermore, all learners should be taught that certain types of behaviour are unacceptable and that they may not expose others to their blood or body fluids.

State and public schools have the obligation to ensure a safe environment. By the adoption of relatively low-cost targeted programmes, they will be able to ensure that the necessary universal precautions are available and are adhered to. Clause 14 of the proposed policy provides that the Member of the Executive Council responsible for education is responsible for the implementation of the proposed policy.

(d) Visser and Beckmann aver that the draft policy contains incorrect or misleading statements. They state that – contrary to their reading of the document – it is possible to know the HIV status of many learners, that the risk of HIV transmission in schools is not so negligible that it can be ignored, and that by encouraging learners to make use of reproductive health care, the policy encourages them to use condoms, an idea which is repugnant to many parents.

(The risk that learners with HIV will expose others too, is generally accepted by scientific and medical experts as "negligible". The risk in the school setting is negligible when compared to the low risk in the health care environment. The incidence of infection among health care workers who receive injuries from needle sticks and other sharp objects contaminated with blood *known to be HIV infected*, is calculated to be approximately three in 1 000 (Tereskerz et al 1996 *New England Journal of Medicine* 1150–1153, quoted in *AIDSScan* March 1997 9). Where the *status of the blood has not been established*, but surgical procedures are prone to expose a person to blood, the risk of infection is considered to be at most one in 42 000 (*Doe v University of Maryland Medical System Corporation* 50 F 3d 1261 (1995)). "Negligible" and "insignificant" (the alternative use of which in Discussion Paper 73 is criticised by Visser and Beckmann (128-129) may be regarded as synonyms (the Afrikaans translation of both being "onbeduidend", "gering").) HIV is not transmitted through normal day-to-day contact and no case of HIV infection in the school setting has been reported to date. It is safe to share, for example, toilet facilities and a swimming pool with somebody who has HIV. The negligible risk of transmission in the normal school setting (where potential exposure to blood and body fluids is avoided by way of universal precautionary measures) will not necessarily be heightened by more learners being infected with HIV. The claim by Visser and Beckmann that "(t)he statement about the 'negligible' risk is . . . at odds with the earlier prediction that 'increasing numbers' of learners at secondary schools might be infected" (on account of their early sexual activity) is therefore not sound. Of far greater importance is their reference to "fights and brawls . . . sexual abuse, attacks with knives . . . which are becoming familiar on the school grounds of South Africa" (129). Such unruly behaviour does carry the risk of HIV transmission and will undoubtedly heighten the risk of transmission in the school setting. This is precisely what should not be tolerated and for this reason schools' codes of conduct should deal in no uncertain terms with unacceptable behaviour in the context of HIV/AIDS. Instead of ignoring the risk, the project committee dealt in a meaningful way with situations in which the risk of transmission is aggravated.

Visser and Beckmann further claim that the draft policy condones or supports teenage sexual activity and promiscuity because learners are to be "encouraged to make use of 'reproductive health care' " (128), which they then seem to equate with an encouragement to use condoms. From this they conclude that the draft policy attempts to curb AIDS while at the same time creating conditions favourable to the spreading of HIV.

The project committee was well aware that sex education in general can be controversial – even more so when issues such as safer sex practices, the use of condoms and the mechanisms to make condoms available to learners in schools are considered. The broad guidelines of the proposed national policy do not expressly provide for condom distribution in schools since this issue is regarded in some communities as offensive (*Schools interim report* 86). The authors therefore seem to have attached too much meaning to the careful formulation in the draft policy. However, section 27(1)(a) of the Constitution does provide for

the right to have access to "reproductive health care". It is further well known that a wide variety of circumstances prevails in South African schools which may result in the need in certain communities to have condoms made available in the school setting. The proposed national policy thus sets out broad guidelines in accordance with constitutional principles and it is couched in wide terms to enable governing bodies of schools to adopt an HIV/AIDS policy at school level. The school level policy may then give operational effect to the national policy in an individual school community and may even then include provisions regarding condoms. In this way parents and the needs of individual schools and their communities are accommodated – although to a limited extent – in that the school level policy may not deviate from the basic principles of the national policy.

The project committee saw the primary responsibility of schools with regard to HIV as that of information and education, while matters such as the accessibility of condoms, and access to health care and counselling, more suitably fall within the ambit of the Department of Health. The committee was further of the view that a representative of this department could be co-opted on the Health Advisory Committee – a committee of the governing body which will elect its own chairperson and which will advise the governing body on all HIV/AIDS-related matters – as envisaged in clause 13 of the proposed policy (*Schools interim report* 172).

The committee also accepted that all learners have a right to be educated about HIV/AIDS, sexuality and healthy lifestyles in order to protect themselves against HIV infection. The public interest in containing the epidemic necessitates the provision of such education. Furthermore the state, through the courts, is the upper guardian of all children, and parental rights regarding the education and upbringing of children are not unlimited. The project committee concluded that in the light of the singular urgency of the matter, HIV/AIDS education had to be made part of the compulsory curriculum (in which parents have little or no say) and that it could fit in comfortably with the Department of Education's curriculum on life skills or life orientation for schools. HIV/AIDS education is regarded as a sound investment in the country's future for which the state itself is duty bound to make adequate provision (*Schools interim report* 79).

Two other concerns raised by Visser and Beckmann are that the practical guidelines for the effective elimination of the risk of transmission of HIV in the school environment and on the sports field, are "vague, unrealistic, contradictory and . . . ill-conceived" (132). They ask, for example, whether the concept of an "open wound" will be clearly understood by all involved. Clauses 7 and 8 of the proposed policy now deals extensively with a safe school environment and the implementation of universal precautions to prevent HIV transmission during play and sport. Visser and Beckmann further justifiably ask who will be responsible for the practical implementation of the policy at school level, and for maintaining an adequate standard of safety. This aspect is now dealt with in clause 14 of the proposed policy which provides that the principal, or the head of a hostel, will be responsible for the practical implementation of the policy at school or residential level, and for maintaining adequate standards of safety according to the policy.

It is a pity that Visser and Beckmann did not comment on the discussion paper to the Law Commission so that the project committee could have had the benefit of their input.

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MISDAADKONKURRENSIE VAN GRAFSKENDING EN PLURIEKRENKING

1 Inleiding

In 'n saak wat op 16 September 1996 (NJ 1997, 88) voor die Hoge Raad in Nederland gedien het, het die volgende feitestel voorgekom: EF en MAJC het gedurende die nag van 9 en 10 Augustus 1993 te Nijmegen op en voor 'n plek wat vir die publiek toeganklik is, te wete die oorlogsbegraafplaas Jonkerbos, openlik en gesamentlik geweld gepleeg teen goedere, naamlik 'n groot aantal grafstene (en grafte), monumente en gedenktekens. Genoemde geweld het bestaan in die bekladding en bespuiting (met "tectyl") van genoemde objekte met rassistiese en diskriminerende spreuke. Die vraagstuk van medepligtigheid deur verskaffing of beskikbaarstelling van genoemde spuitstof het spesifiek ook ter sprake gekom. Dit word vir onderhawige doeleindes egter daargelaat. Die klagstaat het skending van artikel 141(1) van die Nederlandse Strafwetboek (Sr) beweer. Dié artikel lui soos volg:

> "Zij die openlijk met verenigde krachten geweld plegen tegen personen of goederen, worden gestraft met gevangenisstraf van ten hoogste vier jaren en zes maanden of geldboete . . ."

(Sien ook a 125 van die Duitse Strafwetboek en Schönke, Schröder en Lenckner *Strafgesetzbuch. Kommentar* (1997) 1078 asook Van Dorst, Fokkens en Machielse *Het wetboek van strafrecht* Bk 2 (1997) 257.)

Hoewel hierdie optrede duidelik ook binne die trefkrag val van artikel 149*Sr*, wat grafskending strafbaar stel, is die beskuldigdes klaarblyklik van artikel 141*Sr* aangekla omdat skending daarvan hoër strawwe dra. Die beskuldigdes sou egter ook van oortreding van artikel 137c*Sr* aangekla kon word. Dié artikel stel strafbaar met gevangenisstraf van hoogstens een jaar of 'n geldboete diegene wat in die openbaar, mondeling of skriftelik of by wyse van afbeelding, hom of haar opsetlik beledigend uitlaat oor 'n groep mense weens hulle ras, godsdiens, lewensoortuiging of seksuele oriëntasie (sien ook a 137c–d*Sr*).

In die onderhawige bydrae word die sameloop van die misdade grafskending en pluriekrenking, die misdaadkonkurrensie daarvan dus, onder die loep geneem (vgl Labuschagne "Die misdaadkonkurrensie van afpersing en verkragting" 1993 *SAS* 326). Ek het by 'n ander geleentheid daarop gewys dat die begrip haatspraak ("hate speech") onbevredigend is. Die mens vorm in 'n plurale gemeenskap deel van verskeie groepe en eienskapsbindinge of -koppelinge. Daar bestaan nie 'n bestaande begrip wat dié "pluralisme-eenhede" in die menslike gemeenskap na behore kan beskryf nie. Die woord "plurie" is by 'n vorige geleentheid aan die hand gedoen om 'n samestellingseenheid van 'n pluralisme of plurale gemeenskap aan te dui. Daar kan 'n verskeidenheid plurieë in 'n gemeenskap bestaan, soos rasse, etniese eenhede, tale, kulture, geslagte, seksuele oriëntasies ensovoorts. Pluriekrenking beteken dan dat 'n eienskap of groepsverbandskap van 'n samestelling van individue gekrenk word, soos om neerhalend na andere se ras, soos in bogenoemde Nederlandse saak, te verwys (Labuschagne "Menseregtelike en strafregtelike bekamping van groepsidentiteitmatige krenking en geweld" 1996 *De Jure* 23 35–36).

2 Grafskending

In ons gemenereg is nie duidelik tussen graf- en lykskending onderskei nie. Die misdaad *sepulcri violatio* het verwys na beide graf- en lykskending (*D* 47 12 3; *D* 47 12 8; Rein *Das Kriminalrecht der Römer* (1844) 897; Cloete "Grafskending in die Romeinse reg" 1984 *Obiter* 111; Püttmann *Elementa iuris criminalis* (1802) par 184; Van der Keessel *Praelectiones ad ius criminale* (1972) 47 12 1). Dit wil voorkom of dit in die hedendaagse Suid-Afrikaanse reg in twee afsonderlike misdade, naamlik grafskending en lykskending, ontwikkel het (Hunt en Milton *South African criminal law and procedure*, vol 2 (1996) 286). Grafskending, waarom dit in onderhawige verband gaan, bestaan in die opsetlike en wederregtelike skending van 'n menslike graf (Hunt en Milton 286). Handelinge wat op die oneerbiediging van 'n graf neerkom, stel grafskending daar (*Cape Town and Districts Waterworks Co (Ltd) v Executors of Elders* (1890) 8 SC; De Vos "Grafskending" 1952 *SALJ* 296. Vir meer inligting sien Labuschagne "Menseregte na die dood? Opmerkinge oor lyk- en grafskending" 1991 *De Jure* 141 142–144). Wat vir onderhawige doeleindes van wesenlike belang is, is dat die aanbring van rassistiese slagspreuke en graffiti op grafstene en -monumente in ons reg op grafskending sou neerkom.

Artikel 149*Sr* stel grafskending strafbaar en lui soos volg:

> "Hij die opzettelijk een graf schendt of enig op een begraafplaats opgericht gedenkteken opzettelijk en wederrechtelijk vernielt of beschadigt, wordt gestraft met gevangenissstraf van ten hoogste een jaar of geldboete . . ."

Soos reeds hierbo aangetoon, sou die aanbring van rassistiese slagspreuke of graffiti op grafstene en -monumente op skending van artikel 149*Sr* kon neerkom (sien verder Van Dorst, Fokkens en Machielse 179). Artikel 168 van die Duitse strafwetboek stel uitdruklik strafbaar diegene wat teenoor 'n plek van teraardebestelling affronterende onbetaamlikhede pleeg (Schönke, Schröder en Lenckner 1252). Artikel 262(1) van die Switserse Strafwetboek en artikel 190 van die Oostenrykse Strafwetboek het 'n soortgelyke strekking.

3 Pluriekrenking

Soos reeds hierbo genoem, stel artikel 137c*Sr* rassistiese uitlatings, mondeling of skriftelik, strafbaar. Dié uitlatings moet *ad homines* en nie bloot *ad hominem* wees nie, met ander woorde dit moet op meerdere persone betrekking hê. Hoewel die begrip "ras" nie uitdruklik omskryf word nie, het die howe beslis dat dit in die lig van die internasionale reg rakende die bekamping van rassisme uitgelê moet word. Hiervolgens geniet ook persone van gemengde rasse-afkoms beskerming (Hoge Raad, 15 Junie 1976, NJ 1976, 551; Hoge Raad, 29 Maart 1983, NJ 1983, 531). Die Hoge Raad lê die begrip "ras" breed uit sodat dit ook velkleur, afkoms en etniese en nasionale herkoms insluit (14 Maart 1989, NJ 1990, 29. Sien ook Hoge Raad 21 Feb 1995, NJ 1995, 452 en Labuschagne 1996 *De Jure* 29–31).

Artikel 130(1)(1) van die Duitse Strafwetboek stel strafbaar diegene wat by andere op 'n wyse wat die openbare vrede kan versteur, haat teen 'n bevolkingsdeel opwek of andere tot geweld of willekeurige optrede teen 'n bevolkingsdeel aanstig. Artikel 130(1)(2) stel ook strafbaar die skending van menslike waardigheid deur bespotting, kwaadwillige veragting of belastering van 'n bevolkingsdeel. Gevangenisstraf van tot vyf jaar kan opgelê word (sien ook a 130(2)–(3); OLG München, Beschl v 25/3/1985, NJW 1985, 2430; Streng "Das Unrecht der Volksverhetzung" in Küper (red) *Festschrift für Karl Lackner*

(1987) 501). Volgens die Duitse howe beskerm artikel 130 'n groep persone wat nie 'n onbeduidende getal is nie en wat as bevolkingsgroep aanduibaar is (BGH, Urt v 30/1/1979, GA 1979, 391; OLG Celle, Urt v 16/7/1970, NJW 1970, 2257; OLG Hamm, Urt v 24/9/1980, NJW 1981, 591; OLG Karlsruhe, Beschl v 19/12/1986, NJW 1986, 1276).

Artikel 16(1) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 waarborg die reg van vryheid van uitdrukking. Volgens artikel 16(2)(c) sluit hierdie reg nie die reg op die verkondiging van haat gebaseer op ras, etnisiteit, geslag of godsdiens, wat 'n uitlokking tot veroorsaking van benadeling daarstel, in nie. Die bevordering van rasse- en etniese haat is vanaf 'n redelik vroeë stadium in die Suid-Afrikaanse geskiedenis met straf verbied (sien hieroor Labuschagne "Ras en rassisme: Strafregtelike manifestasies" 1982 *THRHR* 41 51 ev; Morkel "Die bevordering van menseverhoudinge en artikel 29(1) van Wet 38 van 1927" 1975 *De Jure* 176). Artikel 8(5) van die Wet op die Afskaffing van Beperkings op Vrye Politieke Bedrywighede 206 van 1993 het bepaal dat enigeen wat teenwoordig is by of deelneem aan 'n byeenkoms of demonstrasie en wat deur 'n banier, plakkaat, toespraak of tekening of op 'n ander wyse haat aanwakker teen andere op grond van rasse-, kultuur-, geslag-, taal- of godsdiensverskille, wederregtelik optree. Hierdie artikel het slegs 'n byeenkoms of demonstrasie getref. Artikel 29(1) van die Wet of Films en Publikasies 65 van 1996 lui tans soos volg:

> "Iemand wat wetens 'n publikasie versprei wat, binne verband beoordeel – (a) neerkom op propaganda vir oorlog; (b) aanhits tot dreigende geweld; (c) of haat wat op ras, etnisiteit, geslag of geloof gebaseer is verkondig, en wat aanhitsing om leed te veroorsaak, uitmaak, is aan 'n misdryf skuldig."

Blykens artikel 1 omvat die begrip "publikasie" ook 'n tekening, prent, illustrasie, afbeelding en kerfwerk. Dit blyk duidelik hieruit, en in besonder ook uit die doel van artikel 29, dat die aanbring van pluriekrenkende slagspreuke en graffiti op skending van artikel 29(1) sou kon neerkom. Volgens artikel 30(1) is oortreding van artikel 29 strafbaar met gevangenisstraf van tot vyf jaar of 'n boete of beide. Sonder om hier in detail in te gaan, moet vermeld word dat, by wyse van 'n voorbeeld, seksuele oriëntasie wat in artikel 9(3) van die Grondwet teen diskriminasie verskans word, nie in artikel 29(1) teen pluriekrenking (haataanblasing) beskerm word nie. Die moontlikheid is gevolglik nie uitgesluit dat artikel 29(1) as onkonstitusioneel verklaar sou kon word nie. Trouens, artikel 29(1) sou self as pluriekrenking beskryf kon word (sien verder hieroor Labuschagne "Eengeslaghuwelike: 'n menseregtelike en regsevolusionêre perspektief" 1996 *SAJHR* 534 en "Sexual orientation, sexual autonomy and discrimination in definition of crime" 1996 *SAJHR* 321).

4 Konklusie

Dit blyk uit bogaande bespreking dat die aanbring van rassehaatdraende slagspreuke en graffiti op grafte in Duitsland en Nederland beide binne die trefkrag van grafskending en pluriekrenking val. Dit is tans ook die posisie in Suid-Afrika. 'n Beskuldigde sou egter nie vir dieselfde handeling van beide misdade aangekla en gestraf kon word nie (sien hieroor Labuschagne "Klagtesplitsing en die organiese aard van die misdaadinhoud" 1980 *De Jure* 356). Daar bestaan gevolglik 'n misdaadkonkurrensie tussen grafskending en pluriekrenking.

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VONNISSE

KONTRAKTUELE GEBONDENHEID, DIE VEREISTES VAN DIE GOEIE TROU, REDELIKHEID EN BILLIKHEID

Eerste Nasionale Bank van Suidelike Afrika Beperk v Saayman
1997 4 SA 302 (A)

1 Algemeen

Die feite in die betrokke beslissing kan kortliks soos volg opgesom word: Mev Malherbe, 'n 85-jarige weduwee "wat skaars behoorlik [kon] sien of hoor" (330) is by verskeie geleenthede deur haar "lieflingseun" (331) versoek om borgaktes en sessie-dokumente ten gunste van 'n aantal bankinstellings te teken om die seun in die posisie te plaas om sy eie besigheidsbelange te bevorder. Die respondente tree as kurator *bonis* ten gunste van mev Malherbe op.

Die meerderheid, by monde van waarnemende appèlregter Streicher, bevind, na die aanhoor van deskundige getuies, dat mev Malherbe geestesongesteld was op die tydstip toe sy die relevante dokumente ten gunste van die appellant-bank geteken het. Weens die afwesigheid van handelingsbevoegdheid kan sy dus nie kontraktueel gebonde wees nie.

Appèlregter Olivier lewer 'n minderheidsuitspraak. Volgens hom is daar nie bewys dat mev Malherbe tydens ondertekening van die betrokke dokumente handelingsonbevoeg was nie. Hy kom egter ook tot die gevolgtrekking dat mev Malherbe kontraktueel nie gebonde is nie omdat die "*bona fides* [dit] verg" (331G). Hy formuleer sy siening soos volg:

> "Waar die borg, soos in hierdie geval, opsigtelik liggaamlik swak is en uit 'n gesprek met die skuldeiser laat blyk dat hy of sy verward is of moontlik nie die implikasies van die borgkontrak goed verstaan nie, of waar die borg tot die kennis van die skuldeiser 'n eggenote is wat vir die eggenoot borg staan of 'n bejaarde ouer is wat vir 'n kind borgstaan, verg die openbare belang myns insiens dat die skuldeiser seker maak dat die borg die volle en werklike betekenis en implikasies van die borgkontrak en enige gevolglike sessies goed begryp. Soos in *Kingsnorth Trust Ltd v Bell and Others* [[1986] 1 All ER 423 (CA)] en *Barclays Bank plc v O'Brien and Another* [[1992] 4 All ER 983 (CA)] aangetoon, kan dit gedoen word deur aan te dring dat die borg onafhanklike regsadvies kry of deurdat die skuldeiser self die volle en werklike implikasies van die borgkontrak en ander dokumente aan die borg verduidelik."

Die spesifieke gedeelte van die uitspraak wat oor die *bona fides* handel, word vervolgens van naderby beskou.

Die *bona fides* is tradisioneel 'n laaste-loopgraaf-verweer, 'n verweer wat, by wyse van spreke, ingespan word deur middel van 'n gewysigde pleit as dinge regtig desperaat word (318H). (Sien *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* 1992 4 CLD 314 (W) 315: "It has become a favourite defence of last resort.") Van der Werf (*Redelijkheid en billijkheid in het contractenrecht* (1982) 12) stel dit soos volg:

> "Helaas wordt dit beroep in de praktijk vaak als tweederangs ervaren. Alsdan beschouwt men het beroep op de goede trouw als een teken van zwakte. Kennelijk, zo wordt betoogd, voel de partij die de goede trouw inroept zich niet sterk staan. De goede trouw is de strohalm 'for better for worse', oftewel baat het niet dan schaadt het niet."

Hy haal Nieuwenhuis aan (*Drie beginselen van contractenrecht* (proefskrif 1979 Leiden) 7) wat die volgende skryf:

> "'Billijk' en 'te goeder trouw' zijn de meest algemene predicaten van waardering die een jurist in huis heeft. Het meest algemeen en daardoor het minst zeggend."

In *Donelly v Barclays National Bank Ltd* 1990 1 SA 375 (W) waarsku regter Kriegler dat die uitspraak in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) nie gesien moet word as "a free pardon for recalcitrant and otherwise defenceless debtors" nie ('n siening waarmee appèlregter Olivier saamstem (326)) of, soos Van der Werf dit stel (13): "De goede trouw dient niet om chicaneurs in de kaart te spelen en om in werklijkheid niet-bestaande rechtsaanspraken tot gelding te kunnen brengen."

Skeptici se houding is dat ope norme soos die goeie trou regsonsekerheid skep weens die gebrek aan maatstawwe om vir die aan- of afwesigheid van goeie trou te toets. Die voordeel wat ope norme egter inhou is dat dit 'n regspreker toelaat om geregtigheid te laat geskied. Soos Van der Werf (13) dit stel:

> "Een belangrijk voordeel is voorts, dat hantering van het richtsnoer van de goede trouw de mogenlijkheid opent tot zekerheid van *recht*. Zij behoedt voor letterknechterij. De beoefening van het overeenkomstenrecht mag niet uitsluitend een juridische techniek zijn. Dit recht dient vooral beoefen te worden met de intentie gestalte te willen geven aan de gerechtigheid."

Aan die ander kant moet die antwoord op die vraag na die aan- of afwesigheid van *bona fides* nie die resultaat wees van 'n willekeurige diskresie gebaseer op intuïsie en persoonlike voorkeure nie. *Ubi ius, ibi remedium.*

2 Wat is die goeie trou?

Die goeie trou-vereiste het sy ontstaan in die onderskeid wat in die Romeinse reg gemaak is tussen *negotia stricti iuris* en *negotia bonae fidei*, 'n onderskeid wat baie nou gekoppel was met die Romeinse prosesreg en verwere wat teen eise geopper kon word. Vandag word aanvaar dat alle kontrakte *bonae fidei* is. Wat was die effek indien 'n Romeinsregtelike kontrak *bonae fidei* was? Meijers *Verzamelde privaatrechtelijke opstellen (derde deel verbintenissenrecht)* (1955) verduidelik dit soos volg:

> "Wat dan wel een iudicium of een contractus bonae fidei wil zeggen? De Romeinen zeggen het uitdrukkelijk, het zijn die rechtsbetrekkingen, waarbij de taak van den rechter niet enkel bestaat in het toepassen van het door partijen overeengekomene, maar waarbij hij, op grond van de eischen der goede trouw, van partijen bepaalde gedragingen kan verlangen of het tusschen partijen overeengekomene in bijzondere gevalle buiten toepassing kan laten [Gaius *Inst* 3 22 3; *D* 3 5 6; *D* 44 7 2 3; *D* 44 7 5 *pr.*]. Met betrekking tot het tusschen partijen overeengekomene had dus de goede trouw een deels aanvullende, deels opheffende werking.

> Op grond van de bona fides hebben aldus de Romeinsche juristen contractanten tot vrijwaring en rentebetaling verplicht, ook al maakte de overeenkomst daarvan geen melding [Vrijwaring: *D* 21 1 31 20; *D* 19 1 1 1; *D* 19 1 13 *pr*; Rente: *D* 22 1 32 2]. De beperkende werking van de goede trouw vindt men o.a. terug in de aan de bewaarnemer toegekende bevoegdheid om teruggave van de in bewaring genomen zaak te weigeren, wanneer hij ontdekt dat de zaak gestelen is [*D* 16 3 31]; in het aan een schuldenaar toegekende recht van niet behoeven betalen, wanneer hij een tegenvordering van gelijke grootte heeft [*I* 4 6 30]; in den eisch dat de verkooper in ieder geval den koopprijs moet teruggeven wanneer de kooper door iemand, die een beter recht heeft, uit zijn bezit gestooten wordt, ook al zou de verkooper uitdrukkelijk iederen vrijwarensplicht uitgesloten hebben [*D* 19 1 11 18]."

Uit bogenoemde voorbeelde blyk duidelik die sogenaamde aanvullende en beperkende (opheffende) werking van die goeie trou, attribute wat steeds in moderne kodes teruggevind word. Hieronder word slegs na enkele voorbeelde verwys: Wat aanvullende werking betref: Ingevolge die *NBW* (a 6 5 3 1 lid 1) moet, benewens die uitdruklike bedinge in die kontrak, ook ingesluit word al die gevolge wat na die aard van die ooreenkoms, uit wet, uit gewoonte of die eise van redelikheid en billikheid voortvloei. (In die *NBW* is die begrip "goede trouw" vervang met die begrippe "redelijkheid en billijkheid".) (Sien ook a 242 *BGB*; a 1134 lid 3 van die *Code Civil.*) Wat beperkende werking betref: *NBW* a 6 5 3 1 lid 2 lui byvoorbeeld soos volg:

> "Een tussen partijen als gevolg van de overeenkomst geldende regel is niet van toepassing, voor zover dit in de gegeven omstandighede naar maatstaven van redelijkheid en billijkheid onaanvaardbaar zou zijn."

Sien ook *NBW* a 6 1 1 2 lid 2.

Gegewe die feit dat die Suid-Afrikaanse kontraktereg nie gekodifiseer is nie, ontstaan die vraag oor wat die begrip "goeie trou" in die Suid-Afrikaanse reg inhou. Soos Lubbe tereg opmerk, is die goeie trou 'n ope norm "wat nog nie in ons Privaatreg uitputtend omlyn is nie" ("*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 7 20). Na 'n bespreking kom hy tot die gevolgtrekking dat die *bona fides* vereis dat beide kontrakspartye redelikerwys respek vir mekaar se belange moet toon nieteenstaande die feit dat elke kontraksparty probeer om sy eie belang te bevorder.

Van Dunné *Verbintenissenrecht deel 2* (1997) 31 stel dit soos volg:

> "De eisen van redelijkheid en billijkheid, alias van goede trouw, houden volgens de vaste jurisprudentie in, om het in één zin samen te vatten: het rekening houding met de gerechtvaardige belangen van de andere partij. Dus niet alle belangen – 'al te goed is buurmans gek' – maar haar *gerechtvaardigde* belangen."

Lubbe gaan verder en maak die volgende opmerking (1990 *Stell LR* 7 20):

> "Die presiese strekking van die agsaamheidaspek van die *bona fides* hang af van die relatiewe gewig wat aan outonomie teenoor altruïsme toegeken word, en mag van stelsel tot stelsel, en van tyd tot tyd en van kontrakstipe tot kontrakstipe varieer. Die implikasies is egter dat die onredelike bevordering van eie belang ten koste van die ander party tot die kontraktuele verhouding strydig mag wees met die *bona fides*. Vanweë die noodsaaklikheid om botsende individuele belange te versoen, kan nie betwyfel word dat handhawing van hierdie norm in die openbare belang is nie."

Bogenoemde sluit aan by die siening van regter Olivier wat aandui dat die *bona fides* gebaseer is op die redelikheidsopvattinge van die gemeenskap (321J). Volgens die regter is die *bona fide*-begrip in die kontraktereg 'n onderdeel van die algemeen-geldende openbare belang-beginsel.

Regter Olivier maak dit weer eens duidelik dat alle kontrakte in die Suid-Afrikaanse reg *bonae fidei* is wat beteken dat die Suid-Afrikaanse kontraktereg deur die goeie trou beginsel beheers word (321). Hy verwys na 'n hele aantal baie bekende sake (*Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Magna Alloys and Research (SA) v (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 893C; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433B–C; *LTA Construction Bpk v Administrateur, Transvaal* 1992 1 SA 473 (A) 480D–E; *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7I, 8C–D; *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) 782J.) Op die voetspoor van Zimmermann ("Good Faith and Equity" in Zimmermann en Visser (reds) *Southern Cross – civil law and common law in South Africa* (1996) 217–260) maak regter Olivier die stelling (322B–C) dat die *bona fides* onderliggend is aan bekende regsinstellings soos estoppel, rektifikasie, onskuldige wanvoorstelling, die kennisleer, onbehoorlike beïnvloeding, dat dit 'n belangrike rol speel by die uitleg van kontrakte, die inlees van stilswyende en geïmpliseerde bedinge, die openbaringsplig by kontraksluiting, fiktiewe vervulling van 'n voorwaarde en die erkenning van repudiëring as 'n vorm van kontrakbreuk. Bogenoemde gevalle kan dus tereg beskou word as gevalle van gekonkretiseerde goeie trou. Die feit dat die *bona fides* die substraat van al bogenoemde regsfigure is, het egter nie verhinder dat elk van hierdie regsfigure 'n eie ontwikkelingspad en verfyning ondergaan het nie.

Regter Olivier verwys egter na die uitspraak van appèlregter Kotzé in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 295 wat die volgende sê:

> "Our common law, based to a great extent on civil law, contains many an equitable principle; but equity, as distinct from and opposed to the law, does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of positive law."

Regter Olivier antwoord soos volg (319):

> "Die probleem met hierdie stelling is dat dit skyn uit te gaan van 'n statiese, afgeslote sisteem: as billikheid nie reeds as 'n regsreël gepositiveer is nie, *cadit quaestio*. Beteken dit dat die *bona fide* beginsel êrens in die verlede uitgewerk is en nie in die toekoms tot nuwe regsreëls of verwere aanleiding kan gee nie? Hierdie *dictum* staan vernuwing en aanpassing in die weg en reflekteer dat dit slegs die taak van die howe is om die reg te vind en nie te skep nie, 'n siening wat nie by die gees van ons reg of die behoeftes van ons gemeenskap pas nie."

Ons moet egter nie die effek van die Engelse *common law* op die ontwikkeling van die Suid-Afrikaanse reg onderskat nie. Neem byvoorbeeld 'n uitspraak van Bingham LJ in *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] 1 QB 433 439:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

(Sien *Pao On v Lau Yiu Long* [1980] AC 614; *National Westminster Bank plc v Morgan* [1985] AC 686 708; *CNT Cash & Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714 717.)

Die Suid-Afrikaanse Regskommissie (*Discussion Paper 65 Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (1996) 19 haal Goode aan wat die volgende skryf:

> "[T]he strictness of the English contract law [ie common law], its insistence that undertakings in commercial agreements must be fully and timeously performed, may be repellent to lawyers trained in the civil tradition with its emphasis on good faith and fair dealing. Yet it is the very rigour of our common law of contract and its preference for certainty over equity that have made the English contract law ... one of the most commonly selected systems in choice of law clauses in international contracts."

Neem byvoorbeeld die belangrike beslissing van *Wells v South African Alumenite Company* 1927 AD 69 waar regter Innes (73) goedkeurend verwys na die uitspraak van Jessel MR in *Printing & Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 465:

> "No doubt the condition is hard and onerous; but if people sign conditions they must, in the absence of fraud, be held to them. Public policy so demands.'[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntary shall be held sacred and shall be enforced by courts of justice'."

In reaksie op die strengheid van die Engelse *common law*, het daar in die *law of equity* die sogenaamde "unconscionability-doctrine" ontstaan. Daar is egter nie in die Engelse reg 'n algemene leerstuk met betrekking tot "unconscionable bargains" nie. Soos *Chitty on Contracts vol 1* (1994) 428 dit stel:

> "But it remains uncertain in modern law whether there are any residuary equitable principles entitling the courts to interfere with freedom of contract on the ground that the contract (or a part of it) is, in all the circumstances of the case, a harsh unconscionable bargain."

Inmenging vind wel plaas in geval van sogenaamde "salvage-cases", "unconscionable bargains with poor and ignorant persons" en waar "unconscionable conduct" plaasvind wat lei tot "contractual imbalance".

Ander regstelsels in die gemenebes is baie meer geneë om 'n algemene "doctrine of unconscionability" te ontwikkel. Sien *Black v Wilcox* (1976) 30 DLR (3d) 192 (Kanada) en *Blomley v Ryan* (1956) 99 CLR 362; *Commonwealth Bank of Australia v Amadio* (1983) 75 ALJR 358 (Australië). Die betrokke goeie trou-beginsel gaan mettertyd óók die Engelse reg beïnvloed vanweë die druk wat daar op lidlande van die Europese Unie is om hulle kontraktereg te harmonieer in die daarstelling van 'n moderne Europese *lex mercatoria*. (Sien Kommissie vir Europese Kontraktereg (voorsitter Lando) *The principles of European contract law* (*Part 1: Performance, non-performance and remedies*) (reds Lando en Beale) (1995) xviii 53.)

3 Die goeie trou en die kontrak

3 1 Algemeen

Volgens Lubbe kan die *bona fides* ter sprake kom by (1) die totstandkoming van die kontrak en (2) as die resultaat van die partye se ooreenkoms beoordeel moet word. Lubbe verwys daarna as prosedurele en substantiewe onbehoorlikheid (1990 *Stell LR* 22 23). Daar word aan die hand gedoen dat die *bona fides* waarskynlik óók ter sprake kan kom by kontrakbreuk, die remedies in geval van kontrakbreuk en by die beëindiging van kontraktuele verhoudinge. (So is die

verpligting wat in sommige gevalle 'n skuldeiser opgelê word om sy samewerking te gee dat die skuldenaar kan presteer 'n voortvloeisel uit die *bona fides*. Sien Lando en Beale 61. Meijers, in die aanhaling hierbo, is van mening dat die regsfiguur van skuldvergelyking deur die *bona fides* onderlê word. In dié vonnisbespreking word verder net aandag gegee aan "prosedurele" en "substantiewe" onbehoorlikheid.)

Wat is die effek van die "goeie trou" op sogenaamde "prosedurele" en "substantiewe" onbehoorlikheid?

3 2 Prosedurele onbehoorlikheid

In sy uitspraak dui appèlregter Olivier aan dat die *bona fides* gebaseer is op die "redelikheidsopvatting in die gemeenskap"; die idee dus dat persone in hulle onderlinge regsverhoudinge hulle redelik en te goeder trou moet gedra – *honeste vivere, alterum non laedere, suum cuique tribuere.*

Dié siening vind dus aansluiting by die *boni mores*-toets in die deliktereg ingevolge waarvan vir onregmatigheid getoets word (sien *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387). Laasgenoemde toets word ook na verwys as die "algemene redelikheidsmaatstaf" of kortweg die "redelikheidsmaatstaf" (*Marais v Richard* 1981 1 SA 1157 (A) 1168). Dit is oorbekend dat die *boni mores*-toets neerkom op 'n *ex post facto* afweeg van die belange wat die een party met sy handeling bevorder het, teen die belange wat hy inderdaad aangetas het. Die hof moet die belange van die persoon wat gehandel het en die persoon wat daardeur geraak word in die lig van al die tersaaklike faktore en omstandighede teen mekaar opweeg ten einde te beslis of daar op 'n redelike of onredelike wyse op die belange van die benadeelde inbreuk gemaak is. Soos Neethling, Visser en Potgieter *Deliktereg* (1996) 38 tereg aandui, is daar diverse faktore wat die redelikheid van 'n dader se optrede kan bepaal, naamlik

> "die aard en omvang van die benadeling en van die voorsiene en voorsienbare toekomstige skade; die moontlike nut van die benadelende optrede vir die dader of die gemeenskap; die koste en moeite verbonde aan die stappe waardeur die benadeling voorkom kon gewees het; die waarskynlikheidsgraad van die sukses van die voorgenome stappe; die aard van die verhouding tussen die partye; die motief van die dader; ekonomiese oorwegings; die regsposisie in ander lande; etiese en morele kwessies; die waardes onderliggend aan die handves van menseregte en ander tersaaklike (beleids-) oorwegings van openbare belang".

In die normale geval handel 'n persoon nie onregmatig waar hy versuim om te verhoed dat 'n ander skade ly nie (*Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596–597). Aanspreeklikheid kan slegs volg indien die late onregmatig was, dit wil sê waar daar 'n *regsplig* op die dader gerus het om positief te handel en hy of sy nagelaat het om die regsplig na te kom. Dit is verder so dat 'n besondere verhouding (wat insluit 'n kontraktuele verhouding) tussen partye aanduidend van so 'n regsplig kan wees (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N)). In die saak onder bespreking bevind regter Olivier dat daar 'n regsplig op die skuldeiser was om toe te sien dat die borg behoorlik ingelig word oor die aard en effek van die dokumente wat die borg geteken het of, as alternatief, dat daar 'n regsplig op die skuldeiser is om aan te dring dat die borg onafhanklike regsadvies kry. Deur dit nie te doen nie, tree die skuldeiser in stryd met die *bona fides* op, tree hy onregmatig op.

Watter effek het dit op prosedurele onbehoorlikheid? 'n Kontraktant kan 'n kontrak tersyde laat stel as wilsooreenstemming onbehoorlik bekom is (by wyse van 'n wanvoorstelling, dmv dwang, onbehoorlike beïnvloeding ens). Laasgenoemdes is maar almal *species* van die *genus* wilsooreenstemming wat by wyse van 'n onregmatige handeling bekom is (sien Van der Merwe en Van Huyssteen "Improperly obtained consensus" 1987 *THRHR* 78). Aan die ander kant is dit ook so dat 'n kontraktant kontraktuele aanspreeklikheid kan vermy indien hy of sy kan aandui dat daar weens die aanwesigheid van 'n *iustus error* aan sy/haar kant geen wilsooreenstemming is nie. Dit sal die geval wees as genoemde kontraktant onder 'n dwaling verkeer wat slaan op die aard of die inhoud van die kontrak welke dwaling verskoonbaar is (die dwaling is dus wesenlik en redelik). 'n Kontraktant se dwaling sal verskoonbaar wees as dit te wyte is aan die onregmatige handeling van die ander kontraktant. (Sien *Spindrifter v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A); *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A); *Steyn v LSA Motors* 1994 1 SA 49 (A).)

Op sterkte van bogenoemde kan ons sê dat in sommige gevalle die onregmatige handeling tot gevolg het dat daar wilsooreenstemming is wat daar andersins nie sou gewees het nie (wanvoorstelling, dwang ens) en in ander gevalle weer dat daar oënskynlike maar nie werklike wilsooreenstemming is nie (dwaling). Indien aanvaar word dat mev Malherbe handelingsbevoeg was toe sy die dokumente geteken het, dat sy egter verward was en nie presies geweet het wat die aard en die inhoud van die dokumente was wat sy geteken het nie en dat daar 'n regsplig op die bank was om haar in te lig (wat hulle nie gedoen het nie) sou mev Malherbe haar op *iustus error* kon beroep. Die bank se late om haar op die hoogte te bring of om aan te dring dat sy onafhanklike regsadvies bekom, sou dus onregmatig wees.

Wat prosedurele onbehoorlikheid betref, kan ons dus opsom deur te sê dat die *bona fides* vereis dat 'n party in die proses van kontraksluiting nie onregmatig moet handel nie. Dit kan tot gevolg hê dat die kontrak nietig of vernietigbaar is.

3 3 Substantiewe onbehoorlikheid

Indien dit eenmaal vas staan dat daar wel wilsooreenstemming is en dat wilsooreenstemming behoorlik bekom is, moet daar getoets word vir substantiewe behoorlikheid, of anders geformuleer, of die ooreenkoms tussen die partye juridies geoorloof is.

Sedert *Magna Alloys & Research (SA) Pty Ltd v Ellis* 1984 4 SA 874 (A) is dit duidelik dat die openbare belang die toetssteen is om te bepaal of kontrakte juridies geoorloof is al dan nie. Is dit eenmaal duidelik dat 'n kontrak geoorloof is, vereis die openbare belang dat só 'n ooreenkoms afgedwing word (sien *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 767A). Waarom ooreenkomste in stryd met die openbare belang nie afgedwing word nie, is voor-die-hand-liggend. Die gemeenskap skep die meganismes wat deur partye gebruik kan word om ooreenkomste af te dwing (howe, regters en landdroste, eksekusieprosedures ens). Noodwendigerwys wil die gemeenskap toesien dat die prosesse en instelling deur die gemeenskap daargestel nie misbruik word om ooreenkomste af te dwing wat nie in die openbare belang sou wees nie. Die gemeenskap wil nie indirek 'n party wees by ooreenkomste wat dus tot onreg sou kon lei nie.

In die proses om te bepaal of 'n ooreenkoms in die openbare belang is al dan nie, is 'n party se subjektiewe siening nie relevant nie. Inteendeel, die gemeenskap

staan in 'n vertikale verhouding teenoor die partye en hulle ooreenkoms. 'n Waarde-oordeel word *ex post facto* gemaak ten opsigte van die vraag of die ooreenkoms in die openbare belang is al dan nie. Dit geskied ongeag die feit dat die partye wilsooreenstemming bereik het en ongeag die partye se eie wense en sienings. Neem byvoorbeeld die geval waar twee persone ooreenkom om gesteelde goedere te koop en te verkoop. Ongeag die feit dat beide partye verkies dat die ooreenkoms geldig moet wees, is dit nietig. 'n Ander voorbeeld: X koop vir Y om. Beide partye wil bitter graag hê dat die ooreenkoms geldig moet wees omdat beide daaruit voordeel trek. Die kontrak is egter nietig. *Ex turpi causa non oritur actio.*

In die soeke na die openbare belang word daar tradisioneel rekening gehou met die inhoud van die *boni mores*, regsbeleid en statutêre verordeninge (wat insluit die bepalings van hoofstuk 2 van die Grondwet).

Die vraag ontstaan of die openbare belang enige impak op die partye se onderlinge (horisontale) verhouding het. Tradisioneel is die antwoord dat wat die partye betref, die enigste relevante vraag is of die partye handelingsbevoeg is en "vrylik en in alle erns" wilsooreenstemming bereik het. Indien dit die geval is, "vereis die openbare belang" dat die kontrak afgedwing word (sien *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* hierbo 767A).

Wat is egter die posisie as die openbare belang verder sou vereis dat kontraksparty redelikerwys respek vir mekaar se belange moet toon nieteenstaande die feit dat elke kontraksparty in wese poog om sy eie belang te bevorder? Anders gefraseer: Wat is die posisie as die resultaat van die partye se ooreenkoms die goeie trou tussen hulle moet reflekteer?

Ons howe het al male sonder tal aangedui dat ons kontraktereg nie 'n algemene substantiewe verweer gebaseer op onbillikheid erken nie (sien *Wells v SA Alumenite Co* 1927 AD 69; *Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd* 1982 1 SA 398 (A); *Magna Alloys Research (SA) Pty Ltd v Ellis* 1984 4 SA 874 (A); *Bank of Lisbon & South Africa Ltd v De Ornelas* 1988 3 SA 580 (A)). Wat is dus die posisie as daar 'n wesenlike wanbalans tussen die partye se onderskeie prestasies is? Tans wil dit lyk asof die posisie in die Suid-Afrikaanse reg is dat 'n wesenlike wanbalans nie 'n genoegsame rede is om te weier om die kontrak af te dwing nie. Die wesenlike wanbalans kan egter die resultaat wees van dwang, onbehoorlike beïnvloeding, 'n moontlike misbruik van die ander party se onkunde en so meer en dit bring mens terug by die vraag of wilsooreenstemming behoorlik bekom is (prosedurele onbehoorlikheid dus, die Engelsregtelike posisie van "unconscionable conduct" wat lei tot "contractual imbalance"). 'n Wesenlike wanbalans mag ook tot gevolg hê dat 'n ander determinant van die openbare belang ter sprake kom (bv ooreenkomste in stryd met die regsbeleid – sien *Baart v Malan* 1990 2 SA 862 (OK) ('n kontraksparty moet nie ontneem word van die reg om voordeel te trek uit sy of haar eie arbeid nie)). Die laaste woord oor wesenlike wanbalans is waarskynlik nog nie gespreek nie. (Sien die voorstelle van die Suid-Afrikaanse Regskommissie hieronder.)

Waar dit oor 'n wesenlike wanbalans handel met betrekking tot die partye se onderskeie prestasies, sal dit gewoonlik op die vlak van die *essentialia* van die ooreenkoms lê. Die *essentialia* van 'n kontrak is dié terme van die benoemde kontrak wat die partye se prestasies definieer. Teenoor die *essentialia* staan die *naturalia* en die *incidentalia*. Die *naturalia* en die *incidentalia* is, breedweg gesproke, daardie gedeelte van die ooreenkoms wat vir gebeurlikhede voorsiening

maak. Wat is die posisie as die resultaat van die partye se ooreenkoms op die vlak van die *incidentalia* die goeie trou tussen hulle moet reflekteer?

'n Uitermate eensydige beklemtoning en onnodige beskerming van 'n party se eie belange ten koste van die ander party kan moontlik aanduidend daarvan wees dat die ooreenkoms of deel daarvan in stryd met die goeie trou is. Indien daar egter goeie kommersiële redes is waarom 'n spesifieke klousule op 'n spesifieke wyse ingekleë word, sal 'n regspreker moeilik bevind dat genoemde klousule in stryd met die *bona fides* is (sien *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (K) 829:

> "Because of this, clauses which at the first blush may seem to be somewhat oppressive are, in the context of the realities of present day commercial life, natural consequences of loans to companies, particularly those with a small or limited capital structure. One must have regard to those realities . . ."

'n Ander moontlike aanduiding dat 'n ooreenkoms of klousule in stryd met die *bona fides* is, is gevalle waar partye die essensiële kenmerke van 'n spesifieke benoemde kontrak deur middel van *incidentalia* ongedaan maak (sien *Sasfin (Pty) Ltd v Beukes* hierbo; Lubbe 1990 *Stell LR* 23–24) of waar 'n party poog om 'n kontrak af te dwing in 'n feitelike situasie wat nie deur die partye tydens kontraksluiting voorsien is nie (*contra Bank of Lisbon & South Africa Ltd v De Ornelas* hierbo).

Die vraag of 'n gegewe ooreenkoms of klousules van 'n ooreenkoms in stryd met die openbare belang is, is in wese 'n feitelike vraag (Aquilius "Immorality and illegality in contract" 1941 *SALJ* 337 346) en is dit noodsaaklik dat die partye se ooreenkoms in die konteks waarin dit aangegaan is, beoordeel word (sien *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd* (1992) 4 CLD 314 (W) 316-317; *Standard Bank of SA Ltd v Wilkinson* 1993 3 SA 822 (K)). Waarskynlik sal ons howe op die voetspoor van sommige Europese kodes bevind dat daar 'n vermoede is dat aan die vereistes van die *bona fides* voldoen is en dat 'n party wat beweer dat dit nie die geval is nie die bewyslas in dié verband dra. (Sien Lando en Beale 55.) Daar is gemeenregtelike steun vir hierdie siening (sien *Cod* 4 10 4: *Bona fides praesumitur*).

4 Slotopmerkings

Die minderheidsbeslissing in die saak onder bespreking is 'n verdere jaarring in die groei van die *bona fides*-konsep na 'n algemene norm wat van kontrakspartye verwag om oor en weer mekaar se belange redelikerwys te ag. Die agsaamheidsverpligting slaan op handelinge voor, tydens en na kontraksluiting asook die inhoud van die partye se ooreenkoms. Die redelikheidsopvatting in die gemeenskap dien as rigsnoer om redelikheid te meet. Waar partye voor, tydens en na kontraksluiting redelik optree en die inhoud van ooreenkomste objektief gesproke redelik is, sal dit noodwendig tot 'n groter mate van kontraksbillikheid lei.

Volledigheidshalwe moet vermeld word dat die Suid-Afrikaanse Regskommissie reeds geruime tyd besig is met 'n ondersoek na onbillike kontraksbedinge en rektifikasie van kontrakte. In 'n besprekingsdokument (*Discussion Paper 65 Project 47 Unreasonable stipulations in contracts and the rectification of contracts* (1996)) word die "Unfair Contractual Terms Bill" voorgestel. ('n Volledige evaluering van die meriete van genoemde konsep val buite die bestek van hierdie bespreking.) Klousule 1(1) van die konsep lui soos volg:

> "Court may rescind or amend unfair contractual terms
> 1 (1) If a court, having regard to all relevant circumstances, including the relative bargaining positions which parties to a contract hold in relation to one another and the type of contract concerned, is of the opinion that the way in which the contract between the parties came into being or the form or content of the contract or any term thereof or the execution or enforcement thereof is unreasonable, unconscionable or oppressive, the court may rescind or amend the contract or any term thereof or make such order as may in the opinion of the court be necessary to prevent the effect of the contract being unreasonably prejudicial or oppressive to any of the parties, notwithstanding the principle that effect shall be given to the contractual terms agreed upon by the parties."

Bogenoemde voorstelle is wydlopend en ingrypend. In dié verband word saamgestem met Christie (*The law of contract in South Africa* (1996) 17) waar hy die volgende oor genoemde konsepwet skryf:

> "Another unintended consequence of the proposed Bill would be to upset the delicate balance the courts are in the process of achieving by employing the concept of public policy."

Indien die howe tyd gegun word, sal hulle wat kontraktuele billikheid betref 'n gelykmatige oplossing vind wat die belange van die partye, teenoor mekaar en teenoor die gemeenskap, in balans sal bring. Wat die wetgewer betref, is die proses waarskynlik te langsaam en gaan ons waarskynlik binnekort wetgewing sien op die patroon van bogenoemde konsep. Wat wel duidelik is, is dat die begrip "redelikheid" in die toekoms 'n baie groter rol in ons kontraktereg gaan speel. Regsgeleerdes moes in die deliktereg leer om die "algemene redelikheidsmaatstaf" in die konteks van onregmatigheid te gebruik. Hulle sal ook moet leer om die "algemene redelikheidsmaatstaf" in die kontraktereg te gebruik. Daar sal seker steeds diegene wees wat van mening is dat "sekerheid" 'n groter rol te speel het as "redelikheid". Dalk is die antwoord hier dat die *praetor* meer as 2 000 jaar gelede reeds ingesien het dat dit tyd was om weg te beweeg van die *negotia stricti iuris* na die *negotia bonae fidei*. En is 'n standaardvormkontrak nie maar 'n moderne hibried van die Romeinsregtelike *stipulatio* nie, met dié groot verskil dat een van die partye die *verbis solemnibus* kies?

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OOR DIE HOFNOTULERINGSTAAL IN DIE LIG VAN DIE GRONDWET EN NA AANLEIDING VAN ONLANGSE REGSPRAAK

Mthetwa v De Bruin NO 1998 3 BCLR 330 (N)
S v Matomela 1998 3 BCLR 330 (Ck)

Twee onlangse uitsprake, *Mthetwa v De Bruin NO* 1998 3 BCLR 330 (N) en *S v Matomela* 1998 3 BCLR 330 (Ck) het die soeklig skerp laat val op die uitoefening van taalregte in die hofkonteks en op die kwessie van die taal/tale van rekord (notuleringstale) van die howe.

In eersgenoemde saak het die landdros die applikant (beskuldigde), 'n Zoeloesprekende, se aansoek kragtens artikel 35(3)(k) van die Grondwet 108 van 1996, dat die hofverrigtinge in Zoeloe geskied, afgewys. Op hersiening is aangevoer dat die afwysing van die aansoek ongrondwetlik was.

Weens van die praktiese omstandighede in die betrokke provinsie (Kwazulu-Natal) wat dit nie moontlik maak dat aan die applikant se versoek voldoen kan word nie, handhaaf die hof die landdros se bevinding:

> "Under these circumstances, as they obtain in this province at present, it is clearly not practicable for an accused person to demand to have the proceedings conducted in any language other than English or Afrikaans. Section 35(3)(k) does not give an accused person the right to have a trial conducted in the language of his choice. Its provisions are perfectly plain, namely, that he has the right to be tried in a language which he understands or, if that is not practicable to have the proceedings interpreted in that language" (338D).

In die onderhawige geval was dit nie prakties haalbaar dat die verrigtinge in Zoeloe kon plaasvind en dienooreenkomstig genotuleer word nie en daarom kon die beskuldigde uiteraard ook nie daarop aandring nie. Die alternatiewe reg wat in hierdie omstandighede uitoefenbaar was, was dat die verrigtinge in Zoeloe getolk moet word (338E).

Die *Matomela*-saak was eweneens 'n hersiening. In die landdroshof waar die saak sy oorsprong gehad het, was daar op die betrokke dag nie 'n tolk beskikbaar nie. Aangesien alle belanghebbende partye asook die voorsittende landdros Xhosasprekend was, het die verrigtinge egter in Xhosa voortgegaan en is die notule van die hofverrigtinge ook in Xhosa gehou. Op hersiening is die verrigtinge bekragtig. Die hersieningsregters het klaarblyklik geen beginselprobleme gehad met die feit dat die verrigtinge in Xhosa was en spesifiek met die feit dat Xhosa as taal van rekord gebruik is nie. Desondanks voorsien die hof probleme met die moontlike toenemende gebruik van inheemse tale vir notule-doeleindes en vind dit gevolglik nodig om onder meer die volgende *obiter*-stelling te maak:

> "All official languages must enjoy parity of esteem and be treated equitably but for practical reasons and for better administration of justice one official language of record will resolve the problem. Such an official language should be one which can be understood by all court officials irrespective of mother tongue" (342H).

Die hof se aanbeveling dat slegs een taal vir doeleindes van hofnotulering gebruik behoort te word – en wat die aanleiding tot hierdie bydrae is – is 'n ongelukkige *obiter*-opmerking waaruit blyk dat die grondwetlike bepalings met betrekking tot taal klaarblyklik grotendeels die hof se aandag vrygespring het.

Grondwetlike bepalings rakende taal in die hof

1 Die eerste bepaling waarna verwys moet word, is artikel 35(3)(k) wat juis in eersgenoemde uitspraak ter sprake was. Hierdie bepaling is van besondere belang weens die talle kere wat dit in die praktyk in die strafhof aanwending vind. Dit lui:

> "Every accused person has the right to a fair trial, which includes the right – (k) to be tried in a language that the accused person understands or, if that is not practical, to have the proceedings interpreted in that language."

Die reg wat 'n beskuldigde kragtens hierdie bepaling toekom, is die reg om verhoor te word in 'n taal wat hy verstaan. Die reg bevat egter 'n interne beperking deurdat die subartikel bepaal dat in daardie gevalle waar dit nie prakties haalbaar is dat 'n beskuldigde verhoor word in 'n taal wat hy verstaan nie, die verrigtinge aan hom getolk moet word.

Uit die bepaling blyk dit dat die primêre reg van die beskuldigde is dat die taal wat deur die hof gebruik word – dit wil sê die taal van rekord – en die taal wat die beskuldigde verstaan, dieselfde taal sal wees. Net by wyse van uitsondering, naamlik wanneer dit nie prakties doenlik is dat die taal van rekord en die taal wat die beskuldigde verstaan dieselfde is nie, moet van tolkdienste gebruik gemaak word om die kommunikasiegaping tussen die beskuldigde en die hof te oorbrug.

Indien dit enigsins moontlik is dat die taal van rekord en die taal wat die beskuldigde verstaan dieselfde kan wees, moet die verrigtinge dienooreenkomstig plaasvind. Hierdie reg van die beskuldigde plaas 'n ooreenkomstige plig op die staat om te reël dat die taal van rekord en die taal wat die beskuldigde verstaan, dieselfde is. Trouens, die staat kan net van hierdie verpligting ontkom indien aangetoon kan word dat dit nie prakties haalbaar is nie. Indien dit wel haalbaar is, moet die staat sy sake so inrig dat daar op hierdie wyse aan beskuldigdes se regte gestalte gegee word.

In *Matomela supra* vind ons die situasie waar dit prakties moontlik was dat die beskuldigde in Xhosa (synde sy moedertaal wat hy uiteraard deeglik verstaan) verhoor kon word. Alle belanghebbende partye by die saak asook die landdros was Xhosasprekend. Die omstandighede van hierdie saak was dus die ideale situasie wat in artikel 35(3)(k) voorsien word, naamlik dat die beskuldigde verhoor word in 'n taal wat hy verstaan. Daar hoef derhalwe nie teruggeval te word na die tweede beste situasie waarvoor artikel 35(3)(k) as alternatief voorsiening maak, naamlik om op tolkdienste te steun nie.

Desondanks en weens 'n skynbare versuim om artikel 35(3)(k) na behore onder oë te neem, sien die hof in hierdie toedrag van sake nie die ideale verwesenliking van 'n element van 'n beskuldigde se reg op 'n billike verhoor nie, maar 'n dreigende probleem wat roep om 'n oplossing. En die oplossing wat die hof aan die hand doen, is dan sonder meer dat net een taal vir hofrekorddoeleindes gebruik moet word. Hierdie taal, aldus die hof, moet deur alle hofbeamptes verstaan word (342G–H). Daar is geen rede om te dink dat die hof 'n ander taal as Engels vir hierdie doel in gedagte het nie. Wat die hof hier doen, is om hom reëlreg in opposisie te plaas met wat artikel 35(3)(k) bepaal. Die bepaling wil hê dat die taal van rekord en die taal wat die beskuldigde verstaan, sover moontlik dieselfde moet wees. Slegs by wyse van uitsondering, naamlik wanneer dit nie prakties haalbaar is nie, moet die verrigtinge getolk word. Presies die teenoorgestelde volg egter kragtens hof se voorstel. Daarvolgens sal die verrigtinge in die reël altyd aan die beskuldigde getolk moet word. Die tolk van verrigtinge sal net onnodig wees in daardie uitsonderingsgevalle waar die (enkele) notuleringstaal en die taal wat die beskuldigde verstaan, toevallig dieselfde is.

Die hof se mening ignoreer dus klaarblyklik die duidelike voorskrifte van artikel 35(3)(k). Volgens die hof se siening het die taal-element van die beskuldigde se billike verhoorregte nie die betekenis wat artikel 35(3)(k) duidelik voorskryf nie. In plaas daarvan hou dit in dat die beskuldigde die reg het dat die verrigtinge altyd aan hom getolk moet word tensy die enkele taal wat vir rekorddoeleindes aangewend word en sy taal toevallig dieselfde is. Hierdie "uitleg" wyk so ver af van die heldere inhoud van artikel 35(3)(k) dat dit nouliks as uitleg maar eerder as 'n regterlike herskryf van die bepaling getipeer kan word.

Die besware teen die hof se siening dat net een taal vir hofnotuledoeleindes aangewend moet word, gaan egter verder. Die hof meld dat persone wat Afrikatale praat, na alle waarskynlikheid in die toekoms al hoe meer hulle toetrede as hofbeamptes sal maak as onder andere regters en landdroste. Die neiging verskaf

blykbaar verdere impetus aan die saak vir 'n enkele amptelike hoftaal. Die argument is egter nie logies nie. Indien dit so is – en dit is klaarblyklik so – dat al hoe meer Zoeloe-, Sotho-, Xhosa- en ander Afrikataal-sprekendes hulle weg na die regbank gaan vind, gaan dit toenemend gebeur dat die beskuldigde en die voorsittende beampte dieselfde moedertaal deel. Dit is veral voorsienbaar in gebiede waar hoë konsentrasies sprekers van dieselfde taal voorkom. Gevolglik gaan dit ongetwyfeld in toenemende mate gebeur dat die huidige kommunikasiebreuk tussen voorsittende beamptes en beskuldigdes weens die feit dat hulle verskillende tale besig (welke breuk met die dikwels gebrekkige middel van tolkdienste gelap moet word), geheel word danksy die feit dat hulle dieselfde taal deel en juis daardie taal as die taal van rekord kan dien. Hoe meer dit gebeur, hoe meer verval die noodsaak om van artikel 35(3)(k) se tweede beste oplossing (tolkdienste) gebruik te maak, en om in plaas daarvan die ideale oplossing wat in hierdie bepaling gekoester word, dat die verhoor plaasvind in die taal wat die beskuldigde verstaan, te verwesenlik. Wat dus in die landdroshof met die *Matomela*-saak gebeur het, was nie net reëlmatig soos wat tereg op hersiening beslis is nie. Dit bied rede tot vreugde omdat die verrigtinge juis geskied het in ooreenstemming met wat die Grondwet idealiseer. Allermins bied dit rede tot die hersieningshof se ongrondwetlike kommer.

In Suid-Afrika was die praktyk eers dat hofverrigtinge slegs in Engels plaasgevind het. Met verloop van tyd het Afrikaans egter ook as regspraaktaal ontwikkel met die gevolg dat dit onder andere prakties moontlik geword het dat die taal van rekord en die taal van die beskuldigde in veel meer gevalle dieselfde kon wees. Indien die hersieningshof se oplossing aanvaar word dat slegs een taal vir rekorddoeleindes gebruik word – en daardie taal blyk Engels te wees – het dit die implikasie dat die hof aan die hand doen dat selfs in daardie gevalle waar dit prakties moontlik is en dit reeds vir dekades geldende praktyk is dat Afrikaans as taal van rekord gebruik word die verrigtinge, nogtans teen wil en dank getolk moet word. Die implikasie van hierdie versugting is dus dat die talle situasies waarin tot voordeel van Afrikaanssprekende beskuldigdes (en trouens alle Afrikaanssprekende belanghebbendes by strafsake) die hofverrigtinge in Afrikaans plaasvind, sal moet verdwyn. Die ongrondwetlikheid van hierdie "oplossing" is dat die ideale situasie van artikel 35(3)(k) waarvolgens dit staande praktyk is dat die beskuldigde verhoor kan word in die taal wat hy verstaan – die beste verstaan – opgeoffer moet word. Artikel 35(3)(k) bepaal dat slegs in daardie gevalle waar dit nie prakties moontlik is om bogenoemde te bewerkstellig nie, die verrigtinge vir die beskuldigde getolk moet word. Nee, sê die hof, selfs in daardie gevalle waar dit moontlik is dat die verrigtinge soos blyk uit gevestigde praktyk in Afrikaans kan plaasvind, moet dit in Engels wees. Daar word daagliks talle Afrikaanssprekende beskuldigdes deur Afrikaanssprekende (moedertaal of andersins) voorsittende beamptes in Afrikaans verhoor. Die feit dat dit alledaagse praktyk is, getuig oorweldigend van die praktiese doenlikheid daarvan. Vanuit 'n grondwetlike oogpunt is die belang van hierdie feit dat dit juis inpas by die ideale scenario – die primêre reg – soos verwoord deur artikel 35(3)(k). Dit is juis 'n gunstige praktyk wat die onaantreklike alternatief van tolkdienste vermy. Dit adem by uitnemendheid die gees van artikel 35(3)(k). Te oordeel aan die oplossing van die hof in *Matomela* is dit egter nie so nie, want volgens hierdie eentalige oplossing sou die huidig gevestigde praktyk waar Afrikaans as hofnotuletaal gebruik word, moet verdwyn. Hierdie implikasies van die hof se aanbevole oplossing blyk dus eweneens in vyandskap met artikel 35(3)(k) te staan.

'n Laaste aspek met betrekking tot artikel 35(3)(k) is dat dit streng gesproke nie taalregte aan 'n beskuldigde toeken nie. Dit is 'n onderafdeling van die breëre reg op 'n billike verhoor. Dit word as 'n element van 'n billike verhoor beskou dat waar dit enigsins prakties moontlik is, die taal waarin die hofverrigtinge plaasvind en die taal wat die beskuldigde verstaan dieselfde moet wees. So, aldus artikel 35(3)(k), word optimaal beslag gegee aan die reg op 'n billike verhoor. Alleen wanneer dit nie prakties moontlik is nie, is daar 'n verskoning om nie op hierdie optimale wyse nie, maar op die swakker manier naamlik deur middel van tolkdienste daaraan gevolg te gee.

Die implikasie van die oplossing in *Matomela* dat daar net een taal van rekord moet wees, is dus dat die hof onnodig en in omstandighede waar dit prakties moontlik is om op die optimale wyse aan die reg op 'n billike verhoor beslag te gee, die beskuldigde se reg op 'n billike verhoor sonder gronde wil inkort.

Die konserwatiewe rigting wat die hof hier ingeslaan het, is duidelik die gevolg van 'n onoorwoë *obiter* wat eerder ongeartikuleer moes gebly het.

2 Artikel 39(3) van die Grondwet bepaal:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

Hierdie bepaling is die opvolger van artikel 33(3) van die tussentydse Grondwet 200 van 1993 en stem ooreen met soortgelyke bepalings van internasionale menseregte-dokumente. Artikel 5(2) van beide die Internasionale Konvensie vir Burgerlike en Politieke Regte en die Internasionale Konvensie vir Ekonomiese, Sosiale en Kulturele Regte bepaal:

> "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent."

Die kern van al voorgemelde bepalings is dat dit lig werp op een van die grondliggende eienskappe van 'n handves van fundamentele regte, naamlik dat dit minimumstandaarde daarstel. Die keersy daarvan is dat sodanige handveste erken dat daar van die bepalings daarin misbruik gemaak kan word deur reeds bestaande en meer uitgebreide beskerming in te kort en dat sodanige inkorting verhoed moet word. Om dié rede bepaal die twee gemelde internasionale konvensies uitdruklik dat die betrokke konvensies nie 'n verskralende effek op bestaande regte mag hê nie en dus geensins aan bestaande regte mag afbreuk doen nie. Buerganthal sê met betrekking tot artikel 5(2) van die Internasionale Konvensie vir Burgerlike en Politieke Regte in Henkin *The international bill of rights* 89:

> "The purpose of this provision is to ensure that the Covenant is not used as a basis for denying or limiting other more favourable or more extensive human rights which individuals might otherwise enjoy or be entitled to, whether under international law or national law or practice."

En voorts op 90:

> "The fact that the Covenant affords lesser protection is not to be interpreted as reducing exising rights, and the Covenant is not to serve states as a pretext for adopting laws to reduce existing rights."

Die uitleg van artikel 39(3) van die Suid-Afrikaanse handves moet teen hierdie agtergrond geskied. Die Suid-Afrikaanse handves verskaf ook minimum- in

plaas van maksimum-regsbeskerming en mag net soos sy internasionale eweknie ook nie gebruik word vir die inkorting van bestaande regte nie.

In die Suid-Afrikaanse reg is die taal van rekord reeds vir dekades óf Engels óf Afrikaans. Artikel 6(1) van die Wet op Landdroshowe 32 van 1944 bevat 'n uitdruklike bepaling met betrekking tot hofverrigtinge in die landdroshowe, terwyl dit ook gevestigde praktyk in die hooggeregshowe is.

Wanneer hierdie toedrag van sake vergelyk word met artikel 35(3)(k) van die Grondwet waarna hierbo verwys is, blyk dit dat Afrikaans- en Engelssprekendes alreeds kragtens die regsposisies soos wat dit voor die inwerkingtreding van die Grondwet gegeld het, die voordele kon geniet om verhoor te word in 'n taal wat hulle verstaan en dat in die normale verloop van sake nie op die tweede beste opsie van tolkdienste teruggeval hoef te word nie. Dit geld trouens sowel strafas siviele sake. Die implikasie van die reeds bestaande praktyk is dat die regsposisie soos wat dit voor die Grondwet bestaan het, dus alreeds konkrete inhoud gegee het aan wat artikel 35(3)(k) beoog, oftewel alreeds praktiese beslag gegee het aan dit wat die Grondwet in die vooruitsig stel. In twee opsigte ken die bestaande reg buite-om die Grondwet en spesifiek buite-om artikel 35(3)(k) reeds meer regte toe as die bepaling self. Anders gestel, die bestaande regsposisie het alreeds in fyner besonderhede uiting gegee aan wat artikel 35(3)(k) beoog. Artikel 39(3) verbied dat aan hierdie bestaande regte afbreuk gedoen word. Wat die hof in *Matomela* doen, is om hierdie uitlegvoorskrif wat juis aan die adres van die howe gerig is, te ignoreer. Die hof se voorstel dat slegs een taal (na alle waarskynlikheid Engels) vir notule-doeleindes aangewend moet word, het die implikasie dat die bestaande posisie van die Afrikaanssprekende beskuldigde wie se verhoor tans in Afrikaans moet plaasvind, noodwendig moet verswak en moet plek maak vir 'n verhoor deur middel van vertaling. Die hof se stelling sou meriete gehad het in daardie gevalle waar die Afrikaanssprekende beskuldigde argumentshalwe êrens in die Oos-Kaap of in Kwazulu-Natal moet verskyn voor 'n landdros wat nie Afrikaans magtig is nie en waar dit nie prakties haalbaar is om die verrigtinge in Afrikaans te notuleer nie. In daardie geval sou die alternatief van tolkdienste aanwending vind. Maar waar die beskuldigde verskyn in Wes- of Noord-Kaap, die Vrystaat of in Pretoria of trouens waar ook al die voorsittende beampte Afrikaans magtig is en die verrigtinge in Afrikaans kan geskied, *moet* dit in Afrikaans geskied. Dit is wat artikel 35(3)(k) bepaal. Artikel 39(3) voeg dan verder hieraan toe dat waar daar reeds 'n bestaande reg is, daaraan nie afbreuk gedoen moet word nie. In *Matomela* doen die hof juis hieraan afbreuk en lê dientengevolge oorhoops met beide artikel 35(3)(k) en artikel 39(3) van die Grondwet.

3 Artikel 34 van die Grondwet verskans die reg van toegang tot die hof en bepaal:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Behoorlike uitleg van hierdie bepaling vereis onder meer dat dit vergelyk moet word met sy voorganger, artikel 22 van die tussentydse Grondwet 200 van 1993 wat bepaal het:

> "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial body."

Vir doeleindes van die onderhawige aantekening is die belangrikste verskil tussen die twee bepalings dat artikel 22 nie die reg op 'n billike verhoor (veral 'n billike siviele verhoor) verskans het nie. In *Bernstein v Bester* 1996 4 BCLR 449 (KH) 102–106 beslis die hof dat artikel 22 nie voorsiening maak vir 'n reg op billikheid in 'n siviele verhoor nie. Die bepaling is wel daarop gemik om te verseker dat beregbare geskille deur die regsprekende gesag hanteer moet word in plaas daarvan dat die uitvoerende of selfs die wetgewende gesag vir sigself regsprekende bevoegdhede aanmatig. Die implikasie hiervan is klaarblyklik dat artikel 22 nie beoog het om regte soortgelyk aan die groep billike verhoorregte van 'n beskuldigde aan 'n party by 'n siviele geding toe te ken nie.

Met die huidige artikel is dit klaarblyklik anders gesteld. Die bepaling verskans nie slegs soos sy voorganger die reg van toegang tot die hof nie, maar voorts ook die reg op 'n billike verhoor in sodanige tribunaal. Die huidige artikel 34 vertoon derhalwe meer ooreenkomste met die reg op 'n billike verhoor van 'n beskuldigde kragtens artikel 35(3) as artikel 22 van die tussentydse Grondwet met artikel 25(3) (die huidige a 35(3) vervang a 25(3) van die tussentydse Grondwet).

Die uitleg van grondwetlike bepalings moet geskied in samehang met ander grondwetlike bepalings wat verdere lig kan werp op die korrekte interpretasie van eersgemelde bepaling. (Sien in dié verband *S v Makwanyane* 1995 6 BCLR 665 (KH) par 10; en par 164–166.) Twee ander grondwetlike bepalings is van besondere belang vir doeleindes van die uitleg van artikel 34.

Eerstens: in die lig van die ooglopende feit dat artikel 34 nou (anders as sy voorganger), die reg op 'n billike verhoor verskans, behoort artikel 35(3) wat onder andere juis handel met 'n reeks bestanddele van die reg op 'n billike verhoor, nou regstreeks betrekking te hê op die vertolking van artikel 34. Tersake in hierdie verband, is dat artikel 35(3)(k) (soos hierbo aangedui) juis die reg verskans om verhoor te word in die taal wat die beskuldigde verstaan, of indien dit nie prakties moontlik is nie, dat die verrigtinge dan getolk moet word.

Waar die taal-element verskans word as een van die noodsaaklike elemente ter versekering van 'n billike verhoor, volg dit logies dat billike verhoor ("fair hearing") soos beoog in artikel 34 dieselfde taalbestanddeel behoort te bevat. In die praktyk hou dit in dat die party in 'n siviele geding oor soortgelyke taalregte as 'n beskuldigde in 'n strafsaak moet beskik.

Tweedens is dit voor-die-hand-liggend dat artikel 34 uitgelê moet word in samehang met die reg op gelykheid kragtens artikel 9. Dit het die effek dat elke persoon nie net die reg op toegang tot die hof en 'n billike verhoor het nie, maar inderdaad 'n *gelyke* reg op 'n billike verhoor. (Dit was juis die strekking van die konstitusionele hof se beredenering in *Makwanyane supra*.)

Die noodsaak om juis die reg van toegang tot die hof in samehang met die reg op gelykheid te oorweeg, word beklemtoon deur die feit dat die konstitusionele hof met betrekking tot die reg op gelykheid juis verklaar het dat dié reg op die allerminste gelyke behandeling deur die howe moet waarborg (*S v Ntuli* par 18 150 G–H; *Prinsloo v Van der Linde* par 22 771A).

Nou is dit so dat 'n persoon die reg het om sy saak in persoon te bestry en uiteraard nie verplig kan word tot gebruikmaking van regshulp nie. Die huidige situasie met betrekking tot notuleringstale maak dit bykans onmoontlik vir moedertaalsprekers van inheemse Afrika-tale om 'n saak in persoon te voer. Indien 'n eiser 'n moedertaalspreker van 'n inheemse Afrika-taal is, is hy tans

ten einde sy saak na behore te voer, verplig om van regshulp gebruik te maak. As alternatief sal tolkdienste verkry moet word vir die vertaling van dokumentasie en betoë. Vanselfsprekend het albei opsies ingrypende koste-implikasies wat veral behoeftige persone swaar tref. Indien 'n persoon nie kan beskostig om enige van hierdie opsies uit te oefen nie, is die reg van toegang tot die hof vir so 'n persoon bloot 'n leë papierbelofte. Die effek is dus dat die huidige taalbedeling ingevolge waarvan slegs Afrikaans en Engels as notuleringstale in siviele sake gebruik word, die reg van toegang tot die hof van veral die behoeftige (voornemende) litigant heeltemal kragteloos maak. In *Matomela* gee die hof geen blyke daarvan dat hierdie misstand oorweeg is nie. Trouens, deur die voorstel dat slegs een taal vir notuleringsdoeleindes aangewend moet word, word hierdie ongesonde miskenning van die reg van toegang tot die hof goedsmoeds oorgesien.

'n Verdere gevolg van die hof se voorstel dat net een taal in plaas van die twee volgens huidige praktyk as notuleringstaal gebruik moet word, is dat die misstand van inkorting van die reg van toegang tot die hof nie net gekondoneer word nie, maar tewens vererger word. Word Afrikaans as notuleringstaal omver gegooi, word nog 'n verdere groep mense gevoeg by diegene wie se reg van toegang tot die hof reeds skipbreuk gely het.

Soos hierbo aangedui, is die reg van toegang tot die hof ook 'n reg wat elke persoon in 'n gelyke mate moet toekom. 'n Welgestelde persoon is uiteraard geredelik daartoe in staat om regsverteenwoordiging te bekom met die gevolg dat so 'n persoon moontlik nie werklik nadelig geraak sal word indien hy nie die taal van rekord na behore verstaan nie. Geld verseker derhalwe sodanige persoon se vermoë tot toegang tot die hof. 'n Behoeftige persoon is egter sleg daaraan toe. So 'n persoon het weens die vreemde taal wat gebruik word en weens die feit dat hy nie tolkdienste of regsverteenwoordiging kan bekostig nie, geen sinvolle toegang tot die hof nie, om van 'n billike verhoor nie eers te praat nie. Die kommunikasiebreuk tussen 'n litigant en die taal van rekord raak die behoeftige persoon derhalwe veel ernstiger as die vermoënde litigant. Hoe minder tale van rekord gebruik word en hoe meer persone derhalwe gedinge moet voer in tale wat hulle nie verstaan nie, des te groter is die strukturele ongelykheid wat in die reg van toegang tot die hof ingebou is.

Dikwels doen situasies hulle voor waar 'n behoeftige en 'n vermoënde party mekaar in die hof aandurf. Nie een van die twee mag in staat wees om die taal van rekord na behore te verstaan nie. Laasgenoemde is egter in staat om die probleem te oorbrug deur die gebruikmaking van regshulp en tolkdienste as gevolg waarvan die taalprobleem grootliks oorbrug word. Eersgenoemde het geen oplossing nie. Die verhouding in so geding is een van uiterste ongelykheid wat kwalik vereenselwigbaar is met die gedagte van gelyke toegang tot die hof of met die konsep van 'n billike verhoor.

Dit is nouliks denkbaar dat hierdie probleem van ongelyke toegang of 'n verskraling van 'n billike verhoor ooit volledig opgelos sal kan word. Die veeltalige opset in Suid-Afrika, en die feit dat mense van verskillende moedertale mekaar dikwels in die hof opponeer, verhoed 'n maklike oplossing.

Aan die ander kant is dit egter ook waar dat hoë konsentrasies van bepaalde groepe moedertaalsprekers in bepaalde streke aangetref word. In sulke streke kan die taal van die betrokke streek geredelik as taal van rekord aangewend word. Dit is verstaanbaar vir die partye, getuies, hofbeamptes en die voorsittende beampte. Die gevolg is dat behoorlike uiting aan gelyke toegang tot 'n billike verhoor gegee word. Streke waarin hierdie scenario hoogs waarskynlik is, is

sekere dele van die Oos-Kaap en groot dele van KwaZulu-Natal waar Xhosa en Zoeloe onderskeidelik as notuleringstale gebruik kan word. Bowendien is dit voorsienbaar dat al hoe meer voorsittende beamptes – landdroste en regters – juis uit hierdie taalgemeenskappe sal kom. Die *Matomela*-saak toon dit alreeds.

Die slotsom is dat, ofskoon die probleem nie vir volledige oplossing vatbaar is nie, dit aansienlik verlig kan word. Die voorwaarde dáárvoor is dat 'n akkommoderende en inklusiewe houding met betrekking tot die tale van die land ingeneem moet word. Al hoe meer van die tale moet gebruik word. Die teendeel, naamlik om die konserwatiewe houding in te neem soos in *Matomela* en die status van notuleringstaal eksklusief vir een taal te reserveer, dra net tot verdere regskending by. Dit vererger die probleem eerder as om dit te help verlig.

4 Artikel 6 van die Grondwet reël die posisie met betrekking tot amptelike tale en bepaal onder meer in subartikel (4) dat al die amptelike tale "must enjoy parity of esteem and must be treated equally":

> "Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages."

Die belang en die impak van hierdie bepaling blyk duidelik wanneer dit in konteks geplaas word en spesifiek wanneer dit met artikel 9(2) van die Grondwet, die regstellende-optrede-bepaling, vergelyk word. Laasgenoemde lui:

> "Equality includes the full enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken."

Beide bepalings identifiseer 'n bestaande misstand wat 'n historiese oorsprong het; artikel 6(4) die histories ondergeskikte status en gebruik van die inheemse tale, en artikel 9(2) die agterstand van persone of kategorieë persone weens onbillike diskriminasie. Beide bepalings verwerp 'n *laissez-faire* houding met betrekking tot die geïdentifiseerde misstande en stel daadwerklike staatsoptrede in die vooruitsig ten einde die misstande uit die weg te ruim: artikel 6(2), praktiese en positiewe maatreëls, en artikel 9(2), wetgewende en ander maatreëls. Die maatreëls waarna in artikel 6(2) verwys word, is van 'n praktiese en positiewe aard wat net soos artikel 9(2) ook wetgewende maatreëls kan insluit. Daarenteen moet die wetgewende en ander maatreëls wat in artikel 9(2) ter sprake is, klaarblyklik van 'n daadwerklike en positiewe ("affirmative") aard wees, met die gevolg dat die aard en vorm van die maatreëls wat in die twee bepalings beoog word, ook grootliks ooreenstemmend is. Vir sover daar wel verskille in die vorm van die maatreël mag wees, doen dit nie afbreuk aan die wesenlike eensgeaardheid van die twee bepalings nie. Albei bepalings stel doelwitte wat deur hierdie maatreëls verwesenlik moet word: artikel 6(2) die verhoogde status en die toenemende gebruik van die inheemse tale en artikel 9(2) die verwesenliking van gelykheid.

'n Vergelyking van die twee bepalings dui daarop dat albei bepalings regstellende-optrede- ("affirmative action"-) bepalings is.

Die belangrikste verskil tussen die bepalings is dat die bewoording van die twee bepalings 'n onderskeid maak tussen die graad van verpligting wat op die owerheid geplaas word met betrekking tot die aanspreek van die misstande wat in die bepalings geïdentifiseer word. Volgens artikel 9(2) *mag* regstellende stappe gedoen word terwyl artikel 6(2) bepaal dat praktiese en positiewe maatreëls geneem *moet* word. Artikel 6(2) is derhalwe in gebiedende terme geformuleer terwyl bloot aanwysende oftewel vergunnende terme in artikel 9(2) gebruik

word. Albei subartikels bevat regstellende-optrede-bepalings maar artikel 6(2) is, geoordeel aan die gebiedende bewoording, 'n sterker regstellende-optrede-bepaling as sy bekende eweknie. Dit is weliswaar so dat die breër konteks van 'n oënskynlike gebiedende bepaling daarop mag dui dat die bepaling inderdaad slegs vergunnend is, of dat 'n bepaling wat aldus die woordgebruik aanwysend is, uit die breër konteks daarvan uiteindelik 'n gebiedende effek mag hê (Devenish *Interpretation of statutes* 229–230). In die lig van die sentrale belang van die reg op gelykheid kan moontlik redeneer word dat die gebruik van die woord *mag* in artikel 9(2) tog uiteindelik gebiedende implikasies het.

Aan die ander kant verskyn hierdie twee regstellende-optrede-bepalings kort na mekaar in dieselfde wet. Daarbenewens, soos hierbo aangedui, is die struktuur van die bepalings ook ooreenstemmend. Gevolglik is dit sekerlik nie toevallig dat die een bepaling die gebiedende *moet* bevat terwyl in die ander met 'n vergunnende *mag* volstaan is nie. Daar kan dus oortuigend geargumenteer word dat artikel 6(2) inderdaad 'n sterker opdrag as artikel 9(2) bevat. Selfs indien dit nie die geval is nie, en al moet 'n meer gebiedende karakter aan artikel 9(2) toegedig word as wat die woord "may" sou aandui, staan dit (ten minste) vas dat die opdragte van die twee bepalings minstens ewe swaar weeg.

Die effek hiervan is dat die staat die verpligting het om albei die bepalings ewe ernstig op te neem en aan albei praktiese gevolg te gee. Versuim om die bepaling uit te voer, is ongrondwetlik. Voorts kan die staat nouliks in ruime mate gevolg gee aan die een bepaling terwyl die ander bepaling geïgnoreer word. Die staat dra die verpligting om albei bepalings *bona fide* uit te lê en aan albei uitvoering te gee. In die mate waarin daar wel uitvoering aan een van bepalings gegee word, plaas dit druk op die staat om minstens in gelyke mate uitvoering aan die ander een te gee. Tans word heelwat wetgewende en uitvoerende energie bestee aan die uitvoering van artikel 9(2). In die lig hiervan sou dit skreiend teenstrydig en ooglopend ongrondwetlik van die staat wees om energiek te werk ter verwesenliking van die oogmerke van die een regstellende-optrede-maatreël terwyl die bepaling wat soortgelyke optrede met betrekking tot taal beveel, geïgnoreer word.

Dit is weliswaar korrek dat die twee bepalings nie soseer aan die adres van die howe gerig is nie. Dis nie die plig van die howe om die positiewe maatreëls wat in hierdie bepalings beoog word, ten uitvoer te bring nie. Die howe kan egter nie die bepalings ignoreer nie. Wanneer 'n situasie sigself dus voordoen soos in die *Matomela*-saak is dit die plig van die hof om eerstens ag te slaan op artikel 6(4) wat bepaal dat al die amptelike tale onder meer "parity of esteem" moet geniet en tweedens dat dit 'n grondwetlike voorskrif is dat die status en die gebruik van die inheemse tale bevorder moet word. Allermins mag die hof die teenoorgestelde doen as wat die Grondwet bepaal. In *Matomela* maak die hof melding van artikel 6(4). Die saak bied 'n gulde geleentheid vir die verhoging van die status en die gebruik van 'n inheemse taal, naamlik die gebruik van die taal as taal van rekord. Dit situasie wat sigself in die saak voordoen, pas dus juis in by wat artikel 6(2) beoog. Wat in die saak gebeur, is dat die status en gebruik van Xhosa verhoog word. Indien daar 'n terloopse stelling te maak is oor die gebruik van Xhosa as taal van rekord, moet dit goedkeurend wees, naamlik dat dit uitvoering gee aan die bepalings van die Grondwet, dat die tale gelyke status moet geniet en dat die status en die gebruik van die inheemse tale bevorder moet word. Desondanks reageer die hof op 'n teenoorgestelde wyse, teenstrydig met die Grondwet.

KOOS MALAN
Justisie-kollege

ONREGMATIGE BESLAGLEGGING OP GOED: DIE *ACTIO INIURIARUM* EN STRIKTE AANSPREEKLIKHEID

Minister of Finance v EBN Trading (Pty) Ltd 1998 2 SA 319 (N)

Dit gebeur nie aldag dat 'n geval van onregmatige beslaglegging op goed voor die howe dien nie. Daarom is dit miskien wenslik om vooraf 'n kort oorsig van die belangrikste algemene beginsels in hierdie verband te gee. Reeds in die Romeinse reg is die beslaglegging op 'n persoon se goed *dolo malo* as 'n *iniuria* beskou (sien *D* 47 10 15 31; *D* 47 10 20; sien ook Voet 47 10 7; Neethling *Persoonlikheidsreg* (1998) 225). Onder invloed van die Engelse reg het die regspraak egter in hierdie verband twee besondere verskyningsvorme van *iniuria* (elk met sy eie aanspreeklikheidsvereistes) ontwikkel, te wete onregmatige ("illegal") en kwaadwillige ("malicious") beslaglegging op goed (McKerron *The law of delict* (1971) 260). Die onderskeid tussen hierdie twee verskyningsvorme bestaan basies daarin dat terwyl onregmatige beslaglegging sonder enige geldige judisiële gesag of regverdiging geskied, kwaadwillige beslaglegging onder die dekmantel van 'n geldige judisiële proses verrig word (sien bv *Cole's Estate v Olivier* 1938 CPD 464 468; Neethling, Potgieter en Visser *Deliktereg* (1996) 342). Vir huidige doeleindes is net onregmatige beslaglegging van belang. Sodanige onregmatige optrede stel die verweerder sonder meer aanspreeklik. Skuld, hetsy in die vorm van opset ("malice"), hetsy in die vorm van nalatigheid is onnodig om aanspreeklikheid te vestig (bv *Trust Bank van Afrika Bpk v Geregsbode, Middelburg* 1966 3 SA 391 (T) 393; *Weeks v Amalgamated Agencies Ltd* 1920 AD 218 226). Dienooreenkomstig kan die verweerder ook nie dwaling of afwesigheid van onregmatigheidsbewussyn as 'n verweer opwerp nie (*Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818–819) – sy aanspreeklikheid is skuldloos. Feitlik elke geval van onregmatige beslaglegging op goed konstitueer primêr 'n aantasting van die eiser se *fama* (veelal in die sin van benadeling van sy finansiële of "kredietreputasie") (vgl *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 2 SA 373 (O) 383–385). Hierdie gevalle is dus streng gesproke verskyningsvorme van laster. Waar die eiser se goeie naam nie in gedrang kom nie, is die gekrenkte persoonlikheidsgoed die eer (vgl *Smith and Lardner-Burke v Wonesayi* 1972 3 SA 289 (RA) 294) of die privaatheid (a 14(c) van die Grondwet 108 van 1996). Die eiser kan dus genoegdoening met die *actio iniuriarum* verhaal, asook skadevergoeding met die Aquiliese aksie vir sover hy as gevolg van die beslaglegging vermoënskade opgeloop het (Neethling *Persoonlikheidsreg* 229).

In die onderhawige geval het dit klaarblyklik net oor skadevergoeding gegaan. Die feite was kortliks die volgende. Die staat (Minister van Finansies, Kommissaris van Doeane en Aksyns en Ontvanger van Doeane en Aksyns) het op goedere van die eiser beslag gelê omdat hy na bewering nog doeane-aksyns en BTW op die goedere verskuldig was. Die eiser ontken sodanige aanspreeklikheid, voer aan dat die beslaglegging daarom onregmatig was en eis skadevergoeding ten bedrae van amper R15 miljoen van die verweerders. In eksepsie word betoog dat die besonderhede van eis nie 'n skuldoorsaak openbaar nie (323C–D):

> "Plaintiff has founded its claim in delict. One of the essentials of a delict is fault on the part of the defendants. No allegation has been made that fault can be ascribed to the conduct of any of the defendants, thus rendering the pleading excipiable for lacking an essential allegation to sustain the cause of action relied upon."

Ten aanvang wys regter Magid (323G–H) daarop dat alhoewel die eis klaarblyklik op die *actio iniuriarum* gegrond is, "the damages claimed by the plaintiff are . . . intended to compensate [him] for actual patrimonial loss and not as a mere *solatium* for the *injuria* suffered by it". Daarom is dit nodig om eers te bepaal of skadevergoeding óók met hierdie aksie verhaal kan word. Die regter verklaar (324B–C):

> "In Roman-Dutch law, unlike English law, there are no hard and fast categories of delicts, nor is it necessary to label a cause of action. In our law all delicts give rise to claims based on either the *actio injuriarum* or on the *lex Aquilia*. Provided facts are alleged in a pleading which justify the relief sought in accordance with the principles of our law, the pleading will disclose a cause of action without the delict being named. Similarly, if the evidence led in an action justifies a judgment consistent with our legal principles no label need be attached to the claim on which it is based."

Na 'n ondersoek van gemeenregtelike bronne en regspraak (325–326) is sy slotsom dat skadevergoeding nie met die *actio iniuriarum* verhaal kan word nie; daarvoor moet die Aquiliese aksie ingespan word, ook in 'n geval soos *in casu*, "which is to say that in an action based on an *injuria* in which the plaintiff claims special damages the requisites for a claim under the *actio legis Aquiliae* must be alleged and proved" (326F–G).

Hierdie bevinding verdien volle instemming (sien Neethling *Persoonlikheidsreg* 81–85). Dit is nie alleen in ooreenstemming met die gemeenregtelike grondslae van ons deliktereg nie (sien Joubert *Grondslae van die persoonlikheidsreg* (1953) 99–100; sien ook Voet 47 10 18) maar klop ook met die beslissing van die appèlhof in *Matthews v Young* 1922 AD 492 (sien ook *EBN* 324G–325A) waar duidelik tussen die toepassingsgebied van die *actio iniuriarum* en dié van die *actio legis Aquiliae* onderskei word. Nietemin is daar op hierdie punt nie altyd eenstemmigheid nie (sien bv *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1; vgl Van Heerden en Neethling *Unlawful competition* (1995) 284–287). Selfs in 'n resente beslissing van die appèlhof, *Caxton Ltd v Reeva Foreman (Pty) Ltd* 1990 3 SA 547 (A) 560–561, het hoofregter Corbett nog steeds onsekerheid of die Aquiliese aksie dan wel die *actio iniuriarum* die toepaslike aksie is om skadevergoeding te verhaal vir vermoënskade wat op die belastering van 'n regspersoon gevolg het (sien ook *EBN* 326B–D). Soos elders reeds gesê, word vertrou dat die hoogste hof van appèl die volgende geleentheid sal benut om eens en vir altyd klaarheid hieroor te verkry (Van Heerden en Neethling *Unlawful competition* 55 288 vn 47; Neethling, Potgieter en Visser *Deliktereg* 321 vn 19).

Om saam te vat: Met die *actio iniuriarum* word genoegdoening (*solatium*) op grond van persoonlikheidskrenking verhaal. Dit is in 'n mate steeds 'n *actio vindictam spirans* en as sodanig nie 'n aksie gerig op die verhaal van skadevergoeding nie. In die geval van vermoënskade moet die *actio legis Aquiliae* ingestel word. Dit geld ook ten opsigte van vermoënskade wat deur 'n *iniuria* meegebring word. (Soos in die *EBN*-saak. Magid R (324B) se onversigtige stelling dat "[i]n our law all delicts give rise to claims based on either the *actio injuriarum* or on the *lex Aquilia*", is nietemin vatbaar vir kritiek aangesien ons deliktereg beslis ook 'n aantal ander aksies ken, waaronder die aksie weens pyn

en lyding en dié gebaseer op skuldlose aanspreeklikheid, soos die *actio de pauperie* (sien Neethling, Potgieter en Visser *Deliktereg* 253–254).) Die feit dat nalatigheid 'n voldoende skuldverwyt vir die Aquiliese aksie is, beteken dat vermoënskade voortvloeiende uit die skending van 'n persoonlikheidsreg geëis kan word selfs in die geval van blote nalatigheid (Joubert 144). Vir genoegdoening geld die opset-vereiste van die *actio iniuriarum*, op enkele uitsonderings na, steeds. Daar moet nietemin goed voor oë gehou word dat alhoewel hierdie twee aksies in teorie geskei is, in die praktyk skadevergoeding en genoegdoening in een aksie verhaal word en dat die twee aksies omtrent nie meer by name genoem word nie (*ibid*). Dit beteken egter nie, soos regter Magid ook uitwys (324B–C, hierbo aangehaal), dat die verskil tussen die vereistes van die twee aksies ook verdwyn het nie. Daarom moet die eiser steeds in sy pleitstukke die feite uiteensit wat nodig is om, waar toepaslik, die *actio iniuriarum* en/of die *actio legis Aquiliae* te fundeer (sien ook Neethling *Persoonlikheidsreg* 84–85; Neethling, Potgieter en Visser *Deliktereg* 256 vn 40).

Om nou terug te keer tot die eksepsie dat die besonderhede van eis weens die afwesigheid van 'n bewering van skuld, nie 'n skuldoorsaak openbaar nie: As uitgangspunt stel regter Magid (326G–H) die noodsaaklike vereistes vir die Aquiliese aksie, te wete "(a) a wrongful act or omission; (b) fault (either *dolus* or *culpa*); (c) causation; (d) patrimonial loss". Volgens hom (326H–I 328C) bevat die dagvaarding en besonderhede van eis voldoende bewerings van al hierdie elemente – ook van opset: "It is certainly clear that it is, at least inferentially, alleged that the defendants have acted intentionally . . ." Hierdie afleiding is volgens die verweerders egter nie voldoende nie aangesien dit nie ook inhou dat die verweerders met onregmatigheidsbewussyn – wat 'n noodsaaklike element van *dolus* is (*Maisel v Van Naeren* 1960 4 SA 836 (K) 840) – opgetree het nie (328D). Hierteenoor voer die eiser aan dat onregmatigheidsbewussyn by sekere *iniuriae*, waaronder onregmatige beslaglegging op goed, nie meer 'n vereiste vir aanspreeklikheid is nie (bv *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818). In *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154 word dit soos volg gestel:

> "It is clear that without *dolus* the action for an *injuria* would lie neither in Roman law nor in Roman-Dutch law . . . It is equally clear, however, that in a limited class of *injuriae* the current precedent has in modern times flowed strongly in a different direction. In this limited class of delicts *dolus* remains an ingredient of the cause of action, but in a somewhat attenuated form, in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods."

Hiermee stem regter Magid saam (329B–C) en kom tot die slotsom dat die eiser se besonderhede van eis 'n afdoende bewering van *dolus* aan die kant van die verweerders bevat:

> "I am . . . not persuaded that the remarks of Hoexter JA in *Hofmeyr (supra)* go too far although they may indeed be obiter. It seems to me to accord better with the human rights culture of the new South Africa, which is stressed in both the interim and the final Constitutions of the Republic, that in cases involving wrongful imprisonment or the wrongful detention of goods that it should no longer be 'necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act'. Certainly, I can see no compelling grounds of public policy to differentiate between the wrongful detention of a person or his property . . .

> Upholding [this] principle ... does not create strict liability for the Commissioner. For example, in this action the plaintiff will still have to establish that it is not, in fact, liable to the Commissioner for the payment of any customs, duty or VAT. Moreover, although the claim for damages in this case is large, the plaintiff will still have to establish the element of causation and that its damages are not too remote. All this will protect the Commissioner against unjustified and excessive claims."

Die volgende opmerkings kan in hierdie verband gemaak word.

(a) Die beslissing bevestig dat aanspreeklikheid op grond van onregmatige beslaglegging, altans wat opset betref, skuldloos of strik is – aangesien onregmatigheidsbewussyn nie as aanspreeklikheidsvereiste gestel word nie, en opset in regstegniese sin daarom nie vereis word nie (sien bv *SAUK v O'Malley* 1977 3 SA 394 (A) 403; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154), is daar op die keper beskou nie werklik van *dolus* sprake nie (net soos in die geval van onregmatige vryheidsberowing en (voorheen) aanspreeklikheid van die pers weens laster: sien Neethling *Persoonlikheidsreg* 146–148 203–204; sien ook *National Media Ltd v Bogoshi* 1998-09-29 saaknr 597/96 (SCA) waarin weggedoen is met die strikte aanspreeklikheid van die pers ten gunste van aanspreeklikheid gebaseer op nalatigheid).

Hierdie negering van die opsetvereiste moet in eerste instansie aan Engelsregtelike invloed toegeskryf word. Met die gemeenregtelike grondslae van die *actio iniuriarum* strook dit beslis nie. Nietemin kom daar in hierdie geval (asook in die geval van onregmatige vryheidsberowing) 'n besondere oorweging te pas wat goedbegryplik 'n afwyking van die gemeenregtelike posisie regverdig. Dit is naamlik meestal amptenare van die staat wat by onregmatige beslaglegging betrokke is. Die betrokkenes staan, so gesien, in 'n verhouding van volslae ongelykheid teenoor mekaar: aan die een kant die magtige, gesiglose staatsorganisasie met sy onweerstaanbare dwangmiddels (in *EBN* 329F word bv verwys na die "extraordinary powers" van die kommissaris) en feitlik onbeperkte finansiële vermoë en aan die ander kant die feitlik weerlose enkeling – die ongelukkige slagoffer van ongetwyfeld onregmatige optrede van staatsverteenwoordigers. Billikheid en regverdigheid eis dus dat die staat, of die persoon wat sonder 'n geldige judisiële proses die staatsmasjinerie gebruik, aanspreeklik gehou word selfs al ontbreek dit hom – weens 'n *bona fide* dwaling – aan onregmatigheidsbewussyn en bygevolg *animus iniuriandi* (sien Neethling, Potgieter en Visser *Deliktereg* 361; vgl Neethling en Van Rensburg 1973 *THRHR* 303–304).

Soos regter Magid tereg uitwys, is hierdie beskouing ook in ooreenstemming met die handves van fundamentele regte in die Grondwet, waarvan die primêre oogmerk is om onderdane teen arbitrêre optrede van die staat te beskerm (Neethling *Persoonlikheidsreg* 20–21 68; *Gardener v Whitaker* 1995 2 SA 672 (OK) 682–685). Hierbenewens word die reg dat daar nie op 'n persoon se besittings beslag gelê word nie, as inbegrepe by die fundamentele reg op privaatheid verskans (a 14(c) van die Grondwet). Dit beteken dat hierdie uitstraling van die reg op privaatheid versterk word (vgl Neethling *Persoonlikheidsreg* 21 94–95) en daarom nog meer regverdiging vir die skuldlose aanspreeklikheid van die staat bied.

Terloops kan opgemerk word dat die appèlhof die beginsel van strikte of skuldlose aanspreeklikheid wat by onregmatige vryheidsberowing (en onregmatige beslaglegging op goed) geld, uitgebrei het tot die aantasting van die reg op die fisies-psigiese integriteit (sien *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A); *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD

92; Neethling *Persoonlikheidsreg* 107 114) en dié op privaatheid (*C v Minister of Correctional Services* 1996 4 SA 292 (T) 304–306; Neethling *Persoonlikheidsreg* 303 vn 230) van *gevangenes*. Hierdie beskouing is egter bevraagtekenbaar aangesien bedoelde persoonlikheidsregte van gevangenes nou beter beskerming as dié van regsgehoorsame burgers geniet (sien nietemin Knobel "HIV-toetse, toestemming en onregmatigheidsbewussyn" 1997 *THRHR* 536).

(b) Volgens regter Magid het 'n mens nie by aanspreeklikheid gebaseer op kleurlose opset (*dolus* sonder onregmatigheidsbewussyn) met strikte aanspreeklikheid te make nie. Dit is egter nie duidelik wat hy met strikte aanspreeklikheid bedoel nie. Myns insiens is die term "strict liability" (strikte, absolute of risikoaanspreeklikheid) die sinoniem vir skuldlose aanspreeklikheid (Neethling, Potgieter en Visser *Deliktereg* 351), en dit is, soos aangedui (*supra* (a)), presies waarmee 'n mens in die *EBN*-saak te make het. Skuldlose aanspreeklikheid beteken bloot dat skuld nie as vereiste vir skadevergoedings- en genoegdoeningsaansprake gestel word nie; dit doen beslis nie afbreuk aan die feit dat daar aan al die ander vereistes van 'n onregmatige daad voldoen moet gewees het nie, naamlik die handeling (sien Knobel en Steynberg "Skuldlose aanspreeklikheid in die afwesigheid van 'n handeling?" 1998 *THRHR* 149–150); onregmatigheid (daarom het bv by laster al die regverdigingsgronde steeds tot die eienaar, drukker, uitgewer en redakteur se beskikking gestaan: Neethling *Persoonlikheidsreg* 203 vn 358); feitelike en juridiese kousaliteit (sien mbt onregmatige vryheidsberowing, bv *Thandani v Minister of Law and Order* 1991 1 SA 702 (OK) 705–706; *Ebrahim v Minister of Law and Order* 1993 2 SA 559 (T) 564–566; Neethling *Persoonlikheidsreg* 140 vn 26); en skade. Hiermee gaan regter Magid akkoord aangesien hy uitdruklik of by implikasie "detention and seizure", "wrongful and unlawful", "causation" ("not too remote") en "patrimonial loss" as vereistes stel (sien 326H–I 329G). So gesien, is daar geen prinsipiële verskil tussen die vereistes vir "strict liability" en die regter se benadering nie.

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REGSREËLS TEN AANSIEN VAN DIE OPSTEL VAN PLEITSTUKKE BY EGSKEIDINGSAKE

Stassen v Stassen 1998 2 SA 105 (W)

1 Feite

Hierdie is 'n onbestrede egskeidingsgeding. In die skikkingsakte wat opgehandig is, vra die moeder (die verweerderes) aan dat die "toesig en beheer" van die minderjarige kinders aan haar toegeken word. Regter Wunsh, wat die uitspraak lewer, maak in hierdie onbestrede geding van die geleentheid gebruik om 'n

direktief aan die regsverteenwoordigers te verskaf ten aansien van die opstel van pleitstukke by egskeidingsake. Hy doen dit ten opsigte van vier aangeleenthede, te wete:

(a) die term "toesig en beheer" (Engels – "custody and control");

(b) die beskrywing van die partye as "volwassenes" (Engels – "adults");

(c) die gebruik van die woorde "welke" en "which" in plaas van "en die" en "and the"; en

(d) die aanpassing van die onderhoudsbedrag jaarliks volgens "die veranderings in die waarde van ons geld" (Engels – "in accordance with the (inflation) value of currency").

Vervolgens word aangeleenthede (a) en (b) afsonderlik bespreek.

2 "Toesig en beheer"

Soos reeds na verwys het die verweerderes tydens die egskeidingsgeding aangevra dat die "toesig en beheer" (Engels – "custody and control") van die minderjarige kinders aan haar toegeken word. Regter Wunsh wys op die woordgebruik van hierdie bede in teenstelling met die woordgebruik "bewaring" (Engels "custody") in sowel artikel 5(1) van die Wet op Huweliksaangeleenthede 37 van 1953 as in artikel 6(3) van die Wet op Egskeiding 70 van 1979.

"Bewaring" in sy gevestigde betekenis is 'n faset van ouerlike gesag. Ouerlike gesag kom ter sprake ten aansien van: (1) die persoon van die kind; (2) die boedel van die kind; (3) die regsoptredes van die kind; en (4) die benoeming van voogde vir die kind. (Sien Van der Vyver en Joubert *Persone- en familiereg* (1991) 607 ev.) "Bewaring" verteenwoordig die ouerlike gesag oor die persoon van die kind. Waarnemende regter King in *Kastan v Kastan* 1985 3 SA 235 (K) skets bewaring in die volgende woorde (236E):

> "Custody of children involves day to day decisions and also decisions of longer and more permanent duration involving their education, training, religious upbringing, freedom of association and generally the determination of how best to ensure their good health, welfare and happiness."

(Sien ook *Fraser v Fraser* 1945 WLD 112 116; *Niemeyer v De Villiers* 1951 4 SA 100 (T) 103H; *Wolfson v Wolfson* 1962 1 SA 34 (SR) 37C; *Du Preez v Du Preez* 1969 3 SA 529 (D) 531D; *Kustner v Hughes* 1970 3 SA 622 (W) 624H–625.)

In teenstelling met bogenoemde gevestigde betekenis van die woord "bewaring", merk regter Wunsh dan oor die betekenis van "beheer" op (107C–D):

> "'Beheer' of 'control' het in die onderhawige samehang geen presiese betekenis nie. Aspekte van beheer word deur die ouerlike gesag gedek en nie alle bestanddele daarvan kom die ouer aan wie bewaring toegeken word toe nie. Die presiese betekenis en omvang van die beheer waarvan gepraat word is onduidelik. 'n Ouer wat die bewaring van 'n kind het, het die reg 'to control its daily life'. (Hahlo *The South African Law of Husband and Wife* 5de uitg (1985) op 394.) Maar daar is ander aspekte van beheer wat deur die voogde of "guardians" uitgeoefen word."

Hy illustreer (107E) bogenoemde stelling met verwysing na die volgende woorde van Hahlo 394 (vn 38), toe vaders nog voor die inwerkingtreding van die Wet op Voogdy 192 van 1993 alleen die voogdy oor die minderjarige kinders gehad het:

> "'The routine *splitting of control* over the child by awarding the custody to the mother while leaving the father with the guardianship appears to be particular to South African law'" (Wunsh R se kursivering).

Die betekenis van "voogdy" ("guardianship") in die verband waarna Hahlo verwys, word pragtig in Van der Vyver en Joubert (239–240 595–596 616–618) toegelig. Die vader en nie die moeder nie beheer en administreer die eiendom van die minderjarige kind(ers); die vader moet aan die kind(ers) bystand of toestemming verleen om kontrakte te sluit en om ander regshandelinge aan te gaan en dit is sy toestemming wat vereis word om 'n kind te emansipeer; die vader moet die kind(ers) bystaan in hofgedinge of aan die kind(ers) toestemming gee om te dagvaar of gedagvaar te word. Een belangrike uitsondering het in hierdie verband bestaan en dit was die huweliksluiting van die minderjarige. Vir laasgenoemde regshandeling het die minderjarige beide sy vader en moeder se toestemming nodig.

Voogdy, anders as bewaring, het na egskeiding nie betrekking op die persoon van die kind nie, maar het betrekking op die boedel en regsoptredes van die kind. Bewaring en voogdy na egskeiding het dus betrekking op verskillende aspekte van die ouerlike gesag gehad.

As ons terugkeer na die aanhaling van Hahlo hierbo, dan praat hy van die "splitting of control". Hy bedoel met "control" beide bewaring en voogdy. (Sien in hierdie verband ook Spiro *The law of parent and child* (1985) 295–296 soos aangehaal deur Wunsh R 107–108.) "Control" volgens Spiro (hierbo) is ook nie 'n sinoniem vir "bewaring" nie.

Met die inwerkingtreding van die Wet op Voogdy 192 van 1993 verkry moeders van binne-egtelike minderjarige kinders egter voogdy gelykstaande aan die voogdy van vaders ingevolge die gemenereg (sien a 1(1)). Slegs in vyf gespesifiseerde gevalle word die toestemming van beide ouers verlang (a 1(2)). Anders as in die tyd toe Hahlo en Spiro geskryf het, verkry die moeder wat "bewaring" ontvang, nou ook "voogdy" oor die kind(ers). (Hierdie situasie het natuurlik nog altyd gegeld indien die "bewaring" aan die vader toegeken is.) Die moeder aan wie "bewaring" dus vandag toegeken word, verkry in die woordgebruik van Hahlo en Spiro eerder die "beheer" oor die kind. 'n Bevel wat dus vandag net voorsiening maak vir "bewaring" in die betekenis wat Hahlo hieraan toeken, ontneem dan die "voogdy" van die betrokke ouer. Die ouer wat nie die "bewaring" verkry nie, behou steeds sy/haar "voogdy", tensy die "uitsluitlike voogdy" aan die "beheerder" gegee is. Indien, na aanleiding van hierdie uiteensetting, "uitsluitlike beheer" by egskeiding aan een ouer toegeken word, is die gevolg daarvan dat die ander ouer sy "voogdy" asook sy "bewaring" by oorlye van die "beheerder" ontneem word. Dienooreenkomstig is daar ook nog plek vir die toekenning van "uitsluitlike bewaring". Na aanleiding van hierdie verduideliking is die woord "beheer" myns insiens juis die regsteoreties korrekte woord om te gebruik wanneer ouerlike gesag oor sowel die persoon ("bewaring") as die boedel en regsoptredes van die kind ("voogdy") gevra word. Gevolglik kan ek nie met regter Wunsh saamstem nie wanneer hy sê (108D):

> "Na my mening behoort die Hof, sonder voldoende motivering deur die eiser/es en sonder 'n presiese omskrywing, nie die beheer of 'control' van die kinders toe te ken nie, maar bewaring of 'custody'."

Die uiteensetting hierbo noodsaak myns insiens die wysiging van artikel 6(3) van die Wet op Egskeiding 70 van 1979 om uitdruklik voorsiening te maak vir 'n bevel van beheer asook vir 'n bevel van uitsluitlike beheer van die minderjarige kind(ers). 'n Gelykluidende wysiging van artikel 5(1) en (3) van die Wet op Huweliksaangeleenthede 37 van 1953 moet ook geskied. (A 2(1) van die Wet op Natuurlike Vaders van Buite-egtelike Kinders 86 van 1997 gee aan die

natuurlike vader van 'n buite-egtelike kind die bevoegdheid om aansoek te doen om onder andere die "bewaring van" of "voogdy oor" die kind. Daar is geen regsteoretiese beswaar teen die gebruik van "bewaring" in hierdie konteks nie, omdat die natuurlike vader nie die voogdy verkry wanneer "bewaring" toegeken word nie. "Bewaring" in hierdie verband dui uitsluitlik op ouerlike gesag oor die persoon van die kind.)

3 "Volwassenes"

"Die bewering word dikwels in pleitstukke gemaak", sê regter Wunsh (108E) "dat elkeen van die partye 'n volwassene is." Die doel met hierdie bewering, aldus regter Wunsh, is "om die *locus standi* van die partye, wat van hulle meerderjarigheid of mondigheid afhang, te bewys" (108G). Regter Wunsh vervolg dan met dié woorde (108G–H):

> "In egskeidingsgedinge is die partye *ex hypothesi meerderjarig* en het hulle verskyningsbevoegdheid. Wat ek so pas gesê het geld ook vir pleitstukke en beëdigde verklarings in die meeste ander sake wat voorkom. Daar word gesê dat die verwysing na volwassenes en "adults" 'n lank gevestigde gebruik is, maar na my mening behoort dit nie in pleitstukke en beëdigde verklarings, wat formele dokumente is, gebesig te word nie" (my beklemtoning).

Regter Wunsh is van mening dat getroude partye meerderjarig is. (Vgl vir dieselfde mening Van der Vyver en Joubert 138 525; Visser en Potgieter *Inleiding tot die familiereg* (1998) 73. Davel en Jordaan *Personereg studentehandboek* (1994) 48–49 bespreek, myns insiens korrek, die onderskeid tussen "mondigheid" en "meerderjarigheid", maar vermeld op 84 "huweliksluiting" as wyse waarop *minderjarigheid* beëindig word. Laasgenoemde is egter nie korrek nie.) Hierdie is 'n voorbeeld van, om die woorde van regter Van den Heever in *Meyer v The Master* (1935 SWA 3 5) te gebruik, "[d]at die woord 'meerderjarig' dikwels taamlik los gebruik word ..." Huweliksluiting verleen nie aan 'n minderjarige meerderjarigheid nie. (Sien hieroor *Meyer v The Master* 1935 SWA 3; *Roux v Santam Versekeringsmaatskappy Bpk* 1977 3 SA 261 (T) 265G–H; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 2 SA 856 (A) 864.) Dit verleen wel aan die minderjarige mondigheid (sien gesag direk hierbo). Mondigheid en meerderjarigheid is nie sinonieme nie, hoewel die regsgevolge van die twee dieselfde is. Regter Van den Heever verduidelik die twee begrippe so (*Meyer v The Master* 1935 SWA 3 5–8):

> "Die woord 'meerderjarig' is self verklarend; dit dui aan 'n leeftydsgrens . . .[6].
>
> Die woord 'mondig' is natuurlik afgelei van 'munt' of 'mundium'; . . . [7].
>
> Ten laaste, Grotius konstateer in sy *Inleyd Boek* I deel 6 n 4: 'De onbestorven kinderen [die kinders wie se ouers nog leef] werden mondig door huwelick ofte handlichtinge . . .' In die breë sin beduie die woord 'mondig' in Afrikaans die genus en 'meerderjarig' die species. Mans word mondig deur meerderjarigheid, huwelik, handligting, *venia aetatis* ens."

Ek wil nie 'n bespreking voer oor die wyses hierbo genoem waarop mans mondigheid verkry nie. Wat wel interessant is, is die feit dat net mans genoem word en nie vroue ook nie. Daar moet egter in gedagte gehou word dat toe regter Van den Heever die uitspraak gelewer het, die maritale mag nog bestaan het. Gevolglik het nie alle vroue met huweliksluiting mondig geword nie. Indien die maritale mag in die huwelik gegeld het en nie uitdruklik uitgesluit was nie, het die vrou onder die maritale mag van die man gebuk gegaan en nie mondigheid verkry nie, al was sy ook reeds meerderjarig. Die maritale mag is egter op 1 Desember 1993 afgeskaf vir alle huwelike in Suid-Afrika gesluit (a 29 van die

Vierde Algemene Regswysigingswet 132 van 1993 wat sedert 1 April 1997 ingevolge die Rasionaliseringswet op Justisiewette 18 van 1996 in die hele Suid-Afrika geld). Die gevolg is nou dat beide mans en vroue deur huweliksluiting mondig word.

In die lig van hierdie bespreking moet daar ongelukkig ook van hierdie siening en woordkeuse van regter Wunsh verskil word en moes die woord "mondig" in plaas van "meerderjarig" in die aanhaling hierbo gebruik gewees het.

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PLEIDOOI VIR EENVOUDIGER EN JUISTER REGSTAAL

Stassen v Stassen 1998 2 SA 105 (W)

1 'n Tipiese regsdokument (in die geykte formaat)

Wat hier volg, is 'n tipiese regsdokument, opgestel volgens die gangbare styl. Onmerkwaardig, alledaags, meen u dalk, geagte leser? U weet immers dat die styl daarvan berus op jarelange oorlewering, en op modelle wat uitgekristalliseer het in staatmaker-handboeke soos dié van Harms *Amler's Precedents of pleadings* (1993) 125, Isaacs *Beck's Theory and principles of pleadings in civil actions* (1982) 212 en Lessing en Kuper *Voorbeelde van hofpleitstukke* (1971) 56–65. Die dokument lyk soos volg:

"Dagvaarding vir egskeiding ingevolge Wet 70 van 1979

1 Die eiseres is Maria Stevenson, 'n volwasse vrou.

2 Die verweerder is John Peter Stevenson, 'n volwasse man.

3 Die eiseres was gewoonlik binne die Republiek van Suid-Afrika (binne die regsgebied van hierdie Agbare Hof) woonagtig vir 'n tydperk van meer as een jaar wat die datum waarop hierdie geding ingestel word onmiddellik voorafgaan.

4 Die eiseres is met haar genoemde eggenoot getroud te Johannesburg op die tweede dag van Februarie 1991, welke huwelik nog steeds van krag is.

5 (a) Daar is twee kinders uit gemelde huwelik gebore, beide is steeds minderjarig en is huidiglik onder die sorg van die eiseres.

(b) Dit sal in die beste belang van die kinders wees indien beheer en toesig aan die eiseres toegestaan sou word.

6 Die huweliksverhouding tussen die partye het onherstelbaar verbrokkel, en daar is op grond van die volgende redes geen redelike vooruitsig op die herstel van 'n normale verhouding tussen hulle nie:

(a) die verweerder het die eiseres herhaaldelik aangerand; en

(b) die partye het vir 'n tydperk van langer as een jaar nie as eggenoot en eggenote saamgewoon nie.

Derhalwe vorder die eiseres:

(a) 'n Egskeidigsbevel.

(b) Beheer en toesig van die minderjarige kinders gebore uit die huwelik.

(c) R700 per kind per maand, synde onderhoud vir die kinders.

(d) Onderhoud vir die eiseres ten bedrae van R900 per maand.

(e) Die bedrae in (c) en (d) moet jaarliks aangepas word volgens veranderings in die waarde van die Suid-Afrikaanse geldeenheid.

(f) 'n Verdeling van die gesamentlike boedel."

2 Die regterlike kritiek

Regter Wunsh het in *Stassen v Stassen* 1998 2 SA 105 (W) 'n soortgelyke dokument onder oë gehad, hoewel die egskeiding in daardie geval onbestrede was. 'n Skikkingsakte is aan die hof oorhandig. Die regter kritiseer vier aspekte van die dokument voor hom, wat ook in die "tipiese" voorbeeld hierbo voorkom:

- Dis onnodig, meen hy, om na die partye in so 'n dagvaarding as "volwassenes" te verwys. Die enigste rede om na die eiser en verweerder as "volwassenes" te verwys, is om aan te toon dat hulle meerderjarig, en dus verskyningsbevoeg, is. Uit die aard van die saak sal beide partye tot 'n egskeiding altyd meerderjarig wees. Dit maak 'n verwysing na hulle "volwassenheid" oorbodig. Die enigste motivering vir die insluiting van so 'n frase is dat dit "'n lang gevestigde gebruik" is om dit te doen (108H). Hierdie motivering oortuig regter Wunsh nie. Volgens hom het die term geen regsrelevante betekenis nie. Dit hoort daarom nie in 'n formele regsdokument nie.

- Die "welke"-konstruksie (wat ook in par 4 van die dagvaarding hierbo voorkom) is "'n irriterende ongepastheid" (108J). Dit moet vervang word deur "en die", sodat par 4 soos volg lui: "Die eiser is met . . . getroud . . . en die huwelik is steeds van krag."

- Paragraaf 5 en die "bede" maak melding van die "beheer en toesig" van die minderjarige kinders. Die regter meen dat die frase "beheer en toesig" met die term "bewaring" vervang moet word. "Beheer", soos die Engelse ekwivalent daarvan, "control", het volgens hom nie 'n vaste en duidelike betekenis in die konteks van egskeidings nie (107C–D). "Bewaring", soos die Engelse spieëlbeeld, "custody", is immers ook die term wat gebruik word in artikel 6 van die Wet op Egskeiding 70 van 1979. Artikel 6 bepaal dat 'n hof wat 'n egskeidingsbevel toestaan enige bevel kan maak ten aansien van die "onderhoud van 'n afhanklike kind" of die "bewaring van of voogdy oor of toegang tot 'n minderjarige kind" uit 'n huwelik.

- Die bedrag wat as onderhoud betaal moet word, kan logies nie vir altyd dieselfde bly nie. Die vraag is op watter grondslag jaarlikse aanpassings moet geskied. Gewoonlik word ooreengekom dat die bedrag jaarliks aangepas sal word "volgens veranderings in die waarde van ons geld" (109B). Waar buitelandse geld betrokke is, word die veranderings bepaal volgens "wisselkoerse met betrekking tot buitelandse geld" (109B). Hieroor merk die regter soos volg op: "Wat bedoel word is dat die bedrag jaarliks aangepas sal word in verhouding tot wysigings in die verbruikersprysindeks, alle items, soos maandeliks deur Die Hoof: Sentrale Statistiekdiens in die *Staatskoerant* gepubliseer" (109B–C).

3 Verdere kritiek

Benewens die opmerkings van regter Wunsh, kan mens die volgende kritiek op die "modeldagvaarding" uitspreek:

- "Vrou" en "man" in paragraaf 1 en 2 is onnodig. Dis sekerlik oorbodig om na die eiser as "'n vrou" of die verweerder as "'n man" te verwys. Die eiename laat geen ruimte vir onsekerheid nie. Geslag-spesifieke vorms moet in elk geval sover moontlik vermy word. (Dit sal waarskynlik soms nodig wees om die geslag van die partye te identifiseer. Dan kan "eiseres" gebruik word om onduidelikheid te voorkom.)
- Die gebruik om na 'n bepaalde dag as die "soveelste dag van 'n maand" te verwys, is onnodig omslagtig. Deesdae sê mens sommer net "2 Februarie 1992".
- Die gebruik van terme soos "genoemde" (par 4) en "gemelde" (par 5) kan weggelaat word sonder dat enige betekenis verlore gaan. Die "eggenoot" en "huwelik" wat ter sprake is, is binne die konteks so duidelik soos daglig.
- Hinderlike en hoogdrawende woorde (soos "Agbare" in par 3) kan vermy word. Net so kan "op grond van" (par 6) met "omdat" vervang word. "Huidiglik" in (par 5) kan weggelaat, of met "tans" of "nou" vervang word. In plaas van "woonagtig" (par 3) kan gewoonweg net van "woon" gepraat word. Die verwysing na "binne die Republiek" en "binne die regsgebied van hierdie . . . Hof" (par 3) kom ook op onnodige herhaling neer.
- Gewone woorde kry soms 'n spesifieke "regsbetekenis" wat van die gewone betekenis verskil. Dit kan gewone mense maklik verwar. Voorbeelde hiervan is "vorder" en "bewaring". "Vorder" word gewoonlik gebruik om vooruitgang aan te dui. "Bewaring" het, volgens die *HAT*, drie gewone betekenisse: "beskerming", "bewaking ná arrestasie" en "behoud van die geskiedkundige". "Eis" kan in die plek van "vorder" gebruik word, en iets soos "sorg en versorging", in plaas van "bewaring".
- Oortolligheid is 'n verdere probleem. Die frase "ten bedrae van" in die "bede" kan weggelaat word: 'n Bedrag bly 'n bedrag, ongeag of dit as sodanig "aangekondig" word. Net so kan "'n tydperk van" voor "een jaar" in die derde paragraaf weggelaat word.
- "Synde" is argaïes. Die sin waarin dit voorkom, kan mens soos volg herformuleer: "Onderhoud vir die kinders van R 700 per kind per maand".
- Die passiewe vorm kan met die aktiewe vorm vervang word, sodat dit duidelik blyk wie wat doen. So kan "die datum waarop hierdie geding ingestel word" (par 3) vervang word met "die datum waarop die eiser hierdie eis ingestel het".
- Sinne is onnodig lank en kompleks (kyk bv weer na par 3 en par 6).

4 Die dokument ('n tweede weergawe)

Teen die agtergrond van dié kritiek, volg hier nou 'n tweede weergawe van die dagvaarding:

"Dagvaarding vir egskeiding ingevolge Wet 70 van 1979

1 Die eiser is Maria Stevenson.

2 Die verweerder is John Peter Stevenson.

3 Die eiser het gewoonlik binne die regsgebied van hierdie hof gewoon vir meer as een jaar onmiddellik voor die datum waarop sy hierdie eis ingestel het.

4 Die partye is in Johannesburg getroud op 2 Februarie 1991, en is nog steeds getroud.

5 (a) Twee kinders is uit die huwelik gebore. Beide is minderjarig en onder die eiser se sorg.

(b) Dit sal in die beste belang van die kinders wees om hulle sorg en versorging aan die eiser toe te staan.

6 Die huweliksverhouding tussen die partye het onherstelbaar verbrokkel. Daar is geen redelike vooruitsig dat die verhouding tussen hulle sal herstel nie. Die huwelik het verbrokkel omdat

(a) die verweerder die eiser herhaaldelik aangerand het; en

(b) die partye vir 'n tydperk van langer as een jaar nie as eggenote saamgewoon het nie.

Daarom eis die eiser:

(a) 'n egskeidingsbevel,

(b) sorg en versorging van die minderjarige kinders,

(c) onderhoud van R700* per kind per maand,

(d) onderhoud van R900* per maand vir haarself, en

(e) 'n verdeling van die gesamentlike boedel.

**Hierdie bedrae moet jaarliks aangepas word in verhouding tot wysigings in die Verbruikersindeks, alle items, soos Die Hoof: Sentrale Statistiekediens dit maandeliks in die* Staatskoerant *publiseer.*"

Die dagvaarding kan op baie ander maniere verbeter word. Die volgende aspekte rakende die uitleg van die dokument ("document design") kan in hierdie en soortgelyke dokumente bydra tot groter gebruikersvriendelikheid:

- Die lettergrootte kan vergroot word, sodat die leser makliker kan lees.
- Die gebruik van meer ruimte tussen reëls of gedeeltes sal lesers help om hulle weg makliker deur die dokument te vind.
- Sekere begrippe of woorde (soos "eiser" of "verweerder") kan in 'n ander lettertipe (kursief of vetdruk) gedruk word, sodat die leser deur die dokument gelei word.
- Die dokument hoef nie aan die regterkant gejusteer te word nie.
- Sub-opskrifte kan gebruik word om inligting in onderafdelings saam te groepeer.

5 Kritiek op die uitspraak

Hierdie uitspraak is 'n welkome stap in die rigting van eenvoudige regstaal. In die Engelssprekende regswêreld het die "plain language"- of "plain English"-beweging reeds oor twee dekades sy merk begin laat. (Sien onder andere Wydick *Plain English for lawyers* (1994) en *Clarity*, die publikasie van die organisasie met dieselfde naam.) Plaaslik het vereenvoudigde regstaal reeds 'n impak gehad op onder andere die skryf van die Grondwet 108 van 1996, die Wet op die Menseregtekommissie 54 van 1994 en die Wet op Arbeidsverhoudinge 66 van 1995. (Sien "CLARITY in South Africa" 34 *Clarity* 20, Knight "Clearly

better drafting: testing two versions of the South African Human Rights Commission Act, 1995" 38 *Clarity* 6 en James "Drafters of South Africa's new constitution adapt to plain language" 38 *Clarity* 13.)

Nie net wetgewing nie, maar ook ander regsdokumente moet hierby aanpas. Dit sluit regspraak in: Laat hom wat die pen optel, die risiko loop. Dit maak regter Wunsh se uitspraak ook die teiken van kritiek vanuit hierdie hoek:

- Sy gebruik van uitgediende en vreemde woorde en frases pla. Hy skryf byvoorbeeld: "Verwysings" behoort nie in formele dokumente "gebesig" te word nie (108I). "Gebesig" kan deur "gebruik" vervang word. Hy skryf verder: "Advokate lei getuienis met 'n vraag "ten dien effekte" (108I–J). "Ten dien effekte" (dit moet in elk geval "*te* dien effekte" wees) kan met "soos die volgende" vervang word. Hy merk ook op dat die partye tot 'n egskeidingsgeding "*ex hypothesi*" meerderjarig is. Wat die regter eerder kon sê, is dat dit "noodwendig so is" of dat die "veronderstelling is" dat die partye meerderjarig is. Latynse frases is onnodig en kom gebruikers-onvriendelik voor wanneer daardie frases maklik in gewone Afrikaans weergegee kan word.
- Die regter skryf lang sinne, waarin sinsnedes verstrik raak. Dit lei tot onduidelikheid. Die volgende is 'n voorbeeld: "Artikel 5 van die Wet op Huweliksaangeleenthede 37 van 1953, wat die Hof die statutêre mag gee om bevele in dié opsig te gee, en artikel 6 van die Wet op Egskeiding 70 van 1979, wat sekere verpligtinge op 'n Hof lê wanneer 'n egskeidingsbevel toegestaan word en verdere magte in dié opsig verleen, praat van 'bewaring' en 'custody', wat erkende en gevestigde begrippe is" (107B–C). Die sin het sowat sestig woorde. Drie "wat"-sinne word in een sin ingebed.
- Die regter plaas werkwoorde dikwels aan die einde van 'n sin. Sodoende word dit geskei van die naamwoord waarop dit betrekking het. Voorbeeld: "Dit lyk of hierdie gebruik van welke of 'which' onder wat Garner *A Dictionary of Modern Usage* 2de uitg (1995) as die gebruik van 'which without a proper antecedent' veroordeel ressorteer . . ." (108J–109A). Die betekenis van die sin sou duideliker wees as die werkwoord "ressorteer" direk na die eerste "which" geplaas was.

6 'n Slotgedagte

Die uitspraak onderstreep dat taal die werktuig van die regsgeleerde is, en met sorg hanteer moet word. 'n Klemverskuiwing is nodig in die praktyk en akademie: Nie net wat ons sê nie, maar hoe ons dit sê, is van belang. In 'n deelnemende demokrasie moet burgers se toegang tot die reg sover moontlik gewaarborg word. Die formele waarborg van "toegang tot howe" (a 34 van die 1996 Grondwet) sal 'n leë letter bly as burgers nie in die eerste plek kennis dra van die reg nie.

Miskien is 'n goeie begin om net meer noukeurig na te dink voor ons praat en skryf: Is dit die bondigste en eenvoudigste manier waarop inligting gekommunikeer kan word? Dit sal van die wetsopsteller, die praktisyn, die amptenaar, die regspreker en akademikus verg om deurentyd te hersien en te herskryf.

Bondigheid en sierloosheid beteken nie dat taal van alle gevoelswaarde ontneem word nie. Luister na die eerste drie sinne uit 'n uitspraak van die Konstitusionele hof, oor 'n relatief droë onderwerp:

> "Much of South Africa is tinder dry. Veld, forest and mountain fires sweep across the land, causing immense damage to property and destroying valuable forest, flora and fauna. The Forest Act 122 of 1984 has as one of its principal objects the prevention and control of such fires" (regters Ackermann, O'Regan en Sachs in *Prinsloo v Van der Linde* 1997 6 BCLR 759 (KH)).

Natuurlik is die "verbeterde" weergawe van die dagvaarding ook weer vatbaar vir verbetering, verstelling of regstelling. (Net só met die woorde wat ek in hierdie bespreking gebruik: Daar sal noodwendig kritiek wees op die kritiek van die regterlike kritiek.) Die gedagte is nie om hier 'n finale bloudruk voor lê, of om wysneusig en beterweterig fout te probeer vind nie. Dit is eerder net 'n poging om die soeklig wat regter Wunsh in *Stassen v Stassen* op regstaal en -formulering geplaas het, 'n bietjie verder te verskerp.

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DIRECTOR'S PERSONAL LIABILITY FOR RECKLESS TRADING

Philotex (Pty) Ltd v Snyman
Braitex (Pty) Ltd v Snyman
1998 2 SA 138 (SCA)

Section 424 of the Companies Act 61 of 1973 empowers the court, when it appears in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, and on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, to declare any party who was knowingly a party to the carrying on of the business in such a manner, personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company (s 424(1). On this provision generally, see *Dorklerk Investments (Pty) Ltd v Bhyat* 1980 1 SA 443 (W); *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 4 SA 156 (W); *Gordon NO and Rennie NO v Standard Merchant Bank Ltd* 1984 2 SA 515 (T); *Cronje, NO v Stone* 1985 3 SA 597 (T); *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T); *Howard v Herrigel* 1991 2 SA 660 (A); *Ex parte de Villiers NO: in re MSL Publications (Pty) Ltd (in liq)* 1990 4 SA 59 (W); *Ozinsky NO v Lloyd* 1992 3 SA 396 (C); *Ex parte De Villiers NNO: in re Carbon Developments (Pty) Ltd (in liq)* 1992 2 SA 95 (W); *Ex parte De Villiers NNO: in re Carbon Developments (Pty) Ltd (in liq)* 1993 1 SA 493 (A)).

Commentators have in the past questioned the effectiveness of section 424 (see eg Fourie "*Dorklerk Investments (Pty) Ltd v Bhyat*" 1980 *THRHR* 330; MacKenzie "Directors' liability – in which direction is South Africa heading?" 1997 *TSAR* 370), especially since recent decisions in the Appellate Division, now the Supreme Court of Appeal (*Howard v Herrigel* 1991 2 SA 660 (A); *Ozinsky NO v Lloyd* 1995 2 SA 915 (A)), refused the applicants' claims to hold directors personally liable. However, the decision by the Supreme Court of Appeal in *Philotex (Pty) Ltd v JR Snyman* 1998 2 SA 138 (SCA) indicates that our courts are indeed prepared to use section 424 as an effective measure to control directors' actions.

The facts, briefly, were that Wolnit, a company in the Rentmeester group, was, despite making substantial losses, kept alive as a going concern by financing provided by its holding companies (Rentbel and Rentmeester). The financial transactions aimed at keeping Wolnit going were not fully disclosed in the financial statements. The purpose of not doing so appeared to be an attempt to avoid tarnishing the reputation of the group by the liquidation of one of its subsidiaries, rather than a true belief that it was a viable concern (182B–D). The management of Wolnit amounted to a saga of unsuccessful recapitalisation attempts, poor cash flow, stocks being overvalued and the board ignoring alarming reports issued by the company's auditors (Basson "Directors beware: you may be in the hot seat" Dec 1997 *Financial Mail* 40). Wolnit was eventually voluntarily liquidated in 1989. The appellants, former creditors of Wolnit, instituted action against the respondents, who had at all material times been directors of the company, for relief under section 424. The court had to decide whether the directors should be declared personally liable for the debt of Wolnit on the basis that they had conducted the business recklessly in terms of this section. The unreported decision of the court *a quo*, where Van Dijkhorst J decided that the directors should not be held liable on the basis that recklessness had not been proved, was overturned. Judgment in the Supreme Court of Appeal was delivered by Howie JA, with Eksteen JA, Marais JA, Schutz JA and Van Coller AJA concurring.

The court confirmed that the test for recklessness is objective in so far as the defendant's actions are measured against the standard of conduct of the notional reasonable person, and subjective, in so far as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge (143G). It confirmed that risk-consciousness is not an essential component of recklessness (143H). In the application of the recklessness test to the evidence before it, held the learned judge, the court should have regard *inter alia* to the scope of the operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties, and the prospects, if any, of recovery (144B) (on recklessness in the context of s 424 generally, see Havenga "Creditors, directors and personal liability under section 424 of the Companies Act" 1992 *SA Merc LJ* 65 and authorities cited there; also De Koker "Roekelose of bedrieglike dryf van besigheid – 'n verdere hoofstuk" 1995 *JJS* 101 110). A director's honest belief as to the prospects of payments when due, while critical in a case of alleged fraudulent trading, is therefore not in itself the determinant of whether he was reckless. It will be irrelevant if a reasonable person of business in the same circumstances would not have held that belief (147D).

Howie JA confirmed the interpretation of "knowingly" in *Howard v Herrigel supra*. It means having knowledge of the facts from which the conclusion is properly to be drawn that the business of the company was or is being carried on recklessly. It does not, however, entail knowledge of the legal consequences of those facts (143B; *Howard supra* 673I–674A).

Participation in business necessarily involves taking entrepreneurial risks. Section 424 therefore penalises the subjection of third parties to risk only where, apart from fraudulent trading, it is grossly unreasonable (146G–H). The distinction between negligence and recklessness is sometimes obscure. Although courts have traditionally been reluctant to become involved in companies' business

decisions (Havenga "Corporate opportunities: a South African update (Part 2)" 1996 *SA Merc LJ* 233 241 and authorities referred to), each case must therefore turn on its own facts and involve a value judgment on those facts (147C).

The court further confirmed the position as set out in section 286 of the Companies Act, that the preparation and presentation of a company's annual financial statements remains the responsibility of the directors (145G). This obligation cannot be delegated to the auditors, whose function is to report to the members, not on behalf of the company, but independently, concerning the reliability of the company's accounts and, consequently, to report to members on their investment (145G; *Powertech Industries Ltd v Mayberry* 1996 2 SA 742 (W) 746B–H).

After consideration of the facts, Howie JA agreed with the conclusion by the lower court that the directors had known the true state of affairs of Wolnit and had intended the financial statements to convey a false picture. This the court regarded in a very serious light, holding that no reasonable person in the respondents' position would have done the same (174B). The court found that Wolnit had at all relevant times been factually insolvent and that the respondents had known this (175C), but had none the less projected a false picture regardless of the consequences (174D). In respect of commercial insolvency, the trial court accepted the managing director's evidence that the directors still regarded Wolnit as a viable concern. Van Dijkhorst J considered himself bound to accept this evidence in view of the continued support of the holding company over a long period of time (176H). The Supreme Court of Appeal disagreed. Howie JA took into account that the material support had ended some years before. On the facts it considered that commercial insolvency had dated from as early as October 1988 (177–178). In the light of all the circumstances, the court found that the conduct of the directors amounted to recklessness. The evidence established clearly that all the respondents were knowingly parties to this reckless trading (186E–F). The appeal was consequently upheld.

As the relief to be granted, counsel for the appellants asked for an order declaring the respondents liable for all the debts of Wolnit incurred after 1 July 1988, and, in the alternative, for an order in favour of the appellants in the sum of the respective debts owing to each at the date of liquidation. The amounts constituting those debts were agreed between the parties. Howie JA considered the alternative form of relief appropriate, since it was conducive to greater certainty as regards the parties' respective rights and obligations flowing from the court order (186H–J).

The decision in *Philotex* has far-reaching implications, especially for directors in a group structure. As the trial court observed, the Wolnit directorate was really just an extension of the controlling group (179G). The Supreme Court of Appeal opined that had there been an arm's length relationship between Wolnit and its financial supporter, the respondents might have understood their responsibilities better (179H). None the less, the respondents were not only directors of the holding company, but also of Wolnit. They and their fellow Wolnit directors should have applied reasonable standards in their conduct of the company's affairs and in observing their duty to members. Also, in the court's view, they were required to have reasonable regard for the interests of trade creditors once it was manifest, as it must have been to them, that only sufficient holding company support could keep Wolnit from commercial insolvency and liquidation (179I). In the circumstances the directors should have obtained a commitment

from the group as to what financial support was available and for how long. Instead of doing that, the respondents and their colleagues on the Wolnit board left those questions both unresolved and unasked, with the result that culpably inadequate attention was given to ascertaining what support Wolnit could rely on.

The court gave a clear indication that if the directors of Rentbel and Rentmeester had in fact held a negative view of Wolnit's prospects, it would have amounted to irresponsible and unreasonable behaviour towards their own companies to inject further operating capital into Wolnit (178H). This also opens the door to action by the holding companies against the directors concerned.

The decision in *Philotex* demonstrates that our Supreme Court of Appeal is clearly prepared to take a firm stance against directors' abuse of their power and position in the company. The Constitutional Court has indicated a similar point of view. In *Bernstein v Bester* 1996 2 SA 751 (CC), for example, Ackermann J said:

> "The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute will have concomitant responsibilities."

In *S v Coetzee* 1997 3 SA 527 (CC) too, the pivotal role of directors was stressed (per Kentridge AJ 572I–573C; per Madala J 584G–585G; per Mokgoro J 587B–D). Yet appropriate enforcement of directors' obligations should not be so invasive that it completely stifles the corporate business activity needed for economic growth and welfare (The Institute of Directors in Southern Africa *The King Report on Corporate Governance* 1994 pars 1 2 1 13 and 1 16). The decisions in *Howard*, *Ozinsky* and *Philotex* show how difficult it is to balance the scales in this regard.

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SAME-SEX UNIONS, THE BILL OF RIGHTS AND MEDICAL AID SCHEMES

Langemaat v Minister of Safety and Security
1998 3 SA 312 (T)

1 A clear case

Langemaat was a member of the South African Police Services (SAPS) and held the rank of captain. Since 1986 she had lived together with Beverly Ann Myburgh in a lesbian relationship. The couple could not enter into marriage but owned a house, operated joint finances, were financially co-dependent, made joint decisions and named each other as beneficiaries in their respective policies. These were the undisputed facts and the court concluded that their relationship was abiding and serious (314A). Langemaat then applied to register Myburgh as

her dependant in terms of the medical aid scheme (Polmed) to which she belonged. Polmed was created in terms of the regulations to the Police Act 7 of 1958. That Act was repealed by the South African Police Services Act 68 of 1995 but section 72(4)(a) of the Act retained the regulations and they remain operative.

Regulation 30(2)(b) defines a dependant as follows:

> "(i) The legal spouse or widow or widower or a dependant child of a member referred to in para (*a*)(i) and (ii), excluding those of a National Serviceman doing his national service in the Force; and unless otherwise directed by the Commissioner.
>
> (ii) The legal spouse or widow or widower of a dependant child or a member referred to in paras (*a*)(iii), (iv) and (v): Provided that in the case of a customary law marriage only the first spouse and dependants born from the union shall qualify as dependants: Provided further that if such a widow or widower remarries, he or she shall forfeit all benefits and privileges accruing to them under the regulations."

Polmed is further governed by rules made in terms of the regulations. The court was provided with the Afrikaans text of the rules of which section 4.2 reads:

> "4.2 'Afhanklike van 'n lid' beteken 'n afhanklike soos omskryf in die regulasies en dit beteken ook –
>
> 4.2.1 die wettige eggenote van 'n lid; en
>
> 4.2.2 'n afhanklike ongetroude kind bedoel in reël 4.11 wat –
>
> 4.2.2.1 nog nie 18-jarige leeftyd bereik het nie;
>
> 4.2.2.2 reeds 18-jarige leeftyd bereik het en wat besig is met primêre, sekondêre of tersiêre opleiding;
>
> 4.2.2.3 reeds 18-jarige leeftyd bereik het en liggaamlik of geestelik permanent ongeskik is vir die ope arbeidsmark; en
>
> 4.2.2.4 sluit nie die afhanklike van 'n diensplig tige in reël 5.1.3 bedoel in nie."

The chairman of Polmed refused Langemaat's formal request to register Myburgh as a dependant. Langemaat applied to the court for an order to declare regulation 30(2)(b) and rule 4.2 in conflict with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996 and thus to be invalid. She also applied to the court to review and set aside the decision not to register Myburgh as her dependant for purposes of the medical aid scheme and to direct the chairman of Polmed to register Myburgh as her dependant.

Langemaat relied on section 9(3) of the Constitution in support of her argument against the validity of regulation 30(2)(b) and rule 4.2. This section provides:

> "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth".

In terms of section 172(1)(a) of the Constitution, a court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency.

On the face of it, Langemaat's case was fairly simple. The outcome seemed so obvious that one is left wondering why the parties ended up in court. Roux J also did not waste much time and in a four-page judgment ruled in favour of Langemaat. However, the simplicity of the case and the brevity of the judgment is no indication of the intense and sometimes emotional discussion that it created in the national media. Before the judgment is compared to a recent Australian case, the reasons advanced by Roux J for his decision are analysed.

2 Evaluating the judgment

The reasons for the decision revolved around the meaning that should legally be ascribed to the concept of a dependant. According to him "[a] dependant is one who relies upon another for maintenance" (315G). The next question is: When is a person legally obliged to maintain another? This entails two further enquiries (315G–H):

> "1. Does the dependant require financial aid?
> 2. Does the relationship between the two parties create a duty to maintain?"

The formulation of these requirements is not without problems. The use of the word "dependant" in the first question seems to imply that the second question has already been answered in the affirmative. A better formulation is that of Boberg *The law of persons and the family* (1977) 249:

> "The law imposes a duty upon one person to support another when three requirements are satisfied:
>
> (a) the person claiming support must be unable to support himself;
>
> (b) the person from whom support is claimed must be able to support the claimant; and
>
> (c) the relationship between the parties must be such as to create a legal duty of support between them."

Boberg further comments that the first two requirements are concerned with questions of fact whereas the third is a matter of law.

In casu the court was primarily concerned with the third requirement. It first held that Polmed discriminated by excluding persons who were *de facto* dependants of its members. Roux J was of the opinion that he did not have to "quote the high-flown language used in the many judgments quoted to [him] by counsel to reach this conclusion" (316B–C). But the judgment did not end here.

The next issue went to the heart of the matter and the court had to decide whether the relationship between couples in a same-sex union created a duty of support between them. Although the court held that such a union created a duty of support, it seems that this is a *prima facie* right only (316D). The court seems to have implied that the relationship between couples to a same-sex union will be recognised only if it has existed for some time. This is clear from the following *dicta* :

> "I would ignore my experience and knowledge of several same-sex couples who had *lived together for years*. The stability and permanence is no different from the many married couples I know " (316F–G) (my emphasis).
>
> "Parties to a same-sex union, which has *existed for years* in a common home, must surely owe a duty of support, in all senses to each other" (316H–I) (my emphasis).

The implication that the union must have existed for some time is also clear from the following remarks:

> "The respondents . . . fear a flood of applications from unmarried persons, be they hetero- or homosexual, to register their mates as dependants. There is no merit in this. The third respondent will consider every application and make an appropriate decision on the merits. Marriages of *short duration* seldom warrant orders of support. He will also consider the *financial means* of the two persons" (317E–F) (my emphasis).

It seems that the conclusion to be drawn from the above quotations is that couples to a same-sex union will have to prove, not only that there is a duty of support based on the time that their relationship has existed, but also that the one party needs financial assistance and that the other party is able to provide it. In

other words, the legal and the factual requirements to find a duty of support must be present. However, such an approach is valid only if applied in an even-handed manner. A simple example will illustrate the point: couples in same-sex unions will have to prove that their relationship is, in the words of the court, stable and permanent. This is done by proving that it has existed for some time. They must also prove that one party requires financial assistance and the other party is able to provide it. The same criteria should apply to married couples: they must prove that their relationship is stable and permanent. If one uses the same criteria as for couples to same-sex unions, this means that they will have to prove that the marriage has existed for some time. It seems that the mere fact that the parties are married will not be sufficient to prove the stability and permanence of the relationship. The high divorce rate in South Africa attests to this. Married couples will also have to prove that the one party requires financial assistance and that the other party is able to provide it. In effect the court held that a person must be a factual and legal dependant (ie there must be a duty to support) before he or she will qualify as a dependant who can be registered in terms of the medical aid scheme.

Finally, the respondents argued that the rights of Langemaat and Myburgh had to be limited in terms of section 36 of the Constitution. Basically section 36 provides that the rights in the Bill of Rights may be limited if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This argument was dismissed in a single sentence: "[S]ection 36 offers the respondent no basis for opposition" (317F).

3 A comparison

A distinct feature of the decision in *Langemaat* is that no other comparable cases are cited. *Langemaat* is certainly not the first South African case where the court had to decide whether a person was deemed to be a dependant for purposes of registering him or her as a member of a medical aid scheme (see eg *Simpson v Selfmed Medical Scheme* 1992 1 SA 855 (C) 864D–865B; confirmed on appeal 1993 1 SA 860 (C) 867G–H and 1995 3 SA 816 (A) 820F–821A).

However, perhaps the decision of the Australian Equal Opportunity Tribunal in *Hope v NIB Health Funds Ltd* (1995) 8 ANZ Insurance Cases 61–269 76,015 provides the best comparison to the decision in *Langemaat*. The complainants, Andrew Hope and William Brown, claimed damages and certain orders with respect to conduct alleged to be unlawful under the Australian Anti-Discrimination Act 1977. They lived together in what was described as a stable homosexual relationship: they cohabited in a common household, they had a joint bank account for the payment of their daily living and other expenses, they had joint ownership of the one motor vehicle used by them and the mortgage over their home was in their joint names. Living with them was the son of one of the complainants. Both complainants had been contributors to and members of NIB Health Funds Ltd, the insurer, for years. The complainants applied to the insurer for health benefits insurance on the concessionary family basis, to cover themselves and the young child residing with them. The insurer refused the application and stated that the rules of the fund provided for concessionary rates for a spouse or a dependant. Since neither of the couple could be defined as a spouse or a dependant of the other, they were not entitled to concessionary rates. The complainants claimed that they had been discriminated against by the insurer on the basis of their sex and homosexuality.

In terms of the rules of the fund, "Dependant" included the spouse of the contributor, a child under 16 years of age, a student (with certain exceptions) and such other person or person as the Controlling Body determined from time to time. It was common cause that spouse did not mean a married or domestic couple comprising persons of the opposite sex. The next question was whether the complainants were dependants in the ordinary sense of the word. The insurers argued that the couple were not dependants of each other since they were not financially dependent one upon the other. The tribunal held that "dependant" as it appeared in the rules of the fund, was

> "an ordinary word having normal connotations of reliance and need, trust, confidence, favour and aid in sickness and in health including social and financial support and its normal meaning is not limited to financial dependence" (76,021).

Each complainant was therefore a dependant of the other. The tribunal further held that even if financial dependency was a requirement in terms of the rules, the complainants were financial dependants to a substantial degree, one on the other. The tribunal also held that it was unreasonable

> "to require proof of financial dependency between couples who are members of a domestic relationship of the same sex and not to require it of couples who are not of the same sex" (76,023).

Furthermore, the insurer's argument that it was necessary to discriminate against the complainants (in South African parlance an argument that their rights had to be limited) was rejected by the court (76,024).

The tribunal therefore had no hesitation in holding that there had been discrimination on the ground of homosexuality against the complainants by the insurer in refusing them access to the concessional rate. This conclusion was reached against the background, that in similar circumstances had one of the parties been a person of the opposite sex, living in a *bona fide* relationship with the other, the concessional rate would not have been denied.

4 Conclusion

The factual and legal similarities between the decisions in the *Langemaat* and *Hope* cases are obvious. On a single issue they seem to differ: in *Langemaat* the court required that a person must in actual fact be financially dependant upon another to qualify as a defendant. In *Hope* the tribunal did not require actual financial dependency. However, it is clear from both *Langemaat* and *Hope*, that should factual financial dependency be a requirement, it applies to all persons who apply to be registered as dependants of the member whether he or she is the spouse of the member or not. The decision in *Langemaat* is yet another example of the influence that the Bill of Rights will have on shaping the law in South Africa (see, eg, Havenga "Equality in insurance law – the impact of the Bill of Rights" 1997 *SA Merc LJ* 275). From the above discussion it is also clear that South African lawyers, now more than ever, need to take note of developments in other jurisdictions. I doubt whether the respondents in *Langemaat* would have bothered to take the matter to court if they knew about the decision in the *Hope* case. Perhaps they would have argued it differently. In any event, the brevity of the judgment is an indication of the specious arguments raised by them.

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DIE INVLOED VAN DIE LIGGING VAN 'N GRONDSTUK OP DIE REËLS TEN OPSIGTE VAN DIE NATUURLIKE AFVLOEI VAN WATER

Harris v Williams 1998 2 SA 263 (W)

Hierdie beslissing handel oor die bureregtelike verpligtinge van grondeienaars, veral ten opsigte van die natuurlike afvloei van water. Die applikant, eienaar van 'n grondstuk in 'n residensiële area van Johannesburg, het beweer reënwater vloei onregmatig af op haar grondstuk vanaf die respondent se hoërliggende grondstuk. Mure van sekere buitegeboue is daardeur beskadig. 'n Serwituut ten gunste van die respondent se grondstuk het wel voorsiening gemaak dat storm- en reënwater op die applikant se grondstuk mag afvloei – die area wat deur die afvloei geraak is, was egter groter as die twee voet breë strook waarvoor in die serwituut voorsiening gemaak is. Die respondent het ook versuim om, soos ingevolge die serwituut bepaal is, behoorlike afvoerriolering aan te bring op dié deel van die applikant se grondstuk. Verder het 'n klimplant, gewortel in die respondent se grondstuk, in só 'n mate oorskry op die applikant se erf dat sy nie in staat was om dit terug te snoei nie.

Regter Coetzee staan 'n aansoek toe om 'n interdik wat die respondent gebied om die deel van die klimplant wat op die applikant se erf oorhang, te verwyder. Hoewel minder aandag aan dié kwessie bestee is, skyn hierdie die eerste Suid-Afrikaanse beslissing te wees wat direkte gesag verskaf vir die toestaan van 'n gebiedende interdik in die geval van oorskryding van plante. Sodanige remedie is wel in verbiedende vorm *obiter* erken in *Malherbe v Ceres Municipality* 1951 4 SA 510 (A) 518H. 'n Interdik wat 'n grondbesitter verbied om takke op 'n aangrensende grondstuk te laat oorhang, is ook deur die Rhodesiese appèlhof toegestaan in *Francis v Roberts* 1973 1 SA 507 (RA).

Die hoofgeskilpunt in die saak, naamlik die bureregtelike verpligtinge van eienaars van aangrensende grondstukke ten opsigte van die natuurlike vloei van water, het egter reeds in verskeie Suid-Afrikaanse beslissings ter sprake gekom. Uit die beslissing onder bespreking blyk dat die toepassing van die neergelegde kriteria steeds nie 'n eenvoudige saak is nie. Daar is veral onsekerheid oor die wyse waarop 'n onderskeid tussen landelike en stedelike grondstukke gemaak moet word. Dié onderskeid is van belang vir sover die gemenereg en regspraak'n "natuurlike serwituut" erken waarvolgens die eienaar van 'n landelike grondstuk die reg tot die natuurlike afvloei van water van 'n hoër- na 'n laerliggende landelike grondstuk het. (Sien oa *De Villiers v Galloway* 1943 AD 439 en *Redelinghuis v Bazzoni* 1976 1 SA 110 (T), ook vir die remedies *infra* bespreek. Vir kritiek teen die benaming "natuurlike serwituut" sien Van der Merwe *Sakereg* 205, en 204–11 vir 'n bespreking van die reg tov die natuurlike vloei van water in die algemeen.)

Volgens bureregtelike reëls moet water toegelaat word om op natuurlike wyse af te vloei. Die reg van laerliggende landelike grondeienaars om te verhoed dat hoërliggende grondeienaars die natuurlike vloei van water verander, word beskerm

deur die *actio aquae pluviae arcendae* en die *interdictum quod vi aut clam*. In die geval van landelike grondstukke word die natuurlike afvloei van water dus nie slegs toegelaat nie, maar beskerm. Hierteenoor rus daar 'n verpligting op stedelike grondeienaars om water wat afvloei van hul grondstukke na die straat te lei: ter bespreking van die *actio aquae pluviae arcendae* verklaar Voet (39 3 4 in Gane se vertaling):

> "Action does not cover urban tenement.
>
> The action falls away furthermore if water is hurtful not to a rural but to an urban tenement, inasmuch as in that case suit would rather have to be brought by the action for denying liability to receive drippings or a stream of rain water."

Voet stel dus die gemeenregtelike posisie soos volg: in die geval van stedelike grondstukke bestaan geen reg om water natuurlik (of andersins) te laat afvloei ten gunste van die hoërliggende grondeienaar nie. 'n Eienaar van 'n laerliggende stedelike grondstuk het die reg tot 'n interdik wat sy buurman verbied om water te laat afvloei; dié reg word beskerm, nie met die *actio aquae pluviae arcendae* nie, maar met 'n aksie waarin aanspreeklikheid om afvloeiende water te ontvang, ontken word. Só 'n aksie het moontlik sy oorsprong in die Romeinsregtelike *actio negatoria de stillicidio vel flumine* (sien Van der Merwe 208). Net so is Grotius (*Inleiding tot die Rooms-Hollandse Reg* 2 34 16) in 'n hoofstuk wat handel oor stedelike serwitute van mening dat "na 't gemeen recht moet yder syn water op't syne leiden: ofte door 't syne ter straten uit".

Die eienaar van 'n stedelike grondstuk moet dus sorg dat hy afloopwater op een of ander wyse weglei sodat dit nie op 'n aanliggende grondstuk beland nie.

Die applikant *in casu* doen aansoek om 'n interdik wat die respondent verbied om reënwater te laat afvloei op haar grondstuk, behalwe soos voor voorsiening gemaak in die serwituut. Regter Coetzee stel ondersoek in na die gemeenregtelike posisie ten opsigte van die natuurlike afvloei van water en bevind op grond van bogenoemde gesag asook die Suid-Afrikaanse beslissings *Bishop v Humphries* 1919 WLD 13 en veral *Redelinghuis v Bazzoni supra*, dat daar 'n verskil is tussen die regsbeginsels toepaslik op stedelike teenoor landelike grondstukke. Die vraag onistaan egter nou watter kriteria gebruik moet word om te besluit of 'n grondstuk landelik of stedelik is, 'n vraag wat uiteraard beantwoord moet word aan die hand van die rede vir sodanige onderskeid.

Die rede vir die onderskeid tussen landelike en stedelike grondstukke is dat daar geen sprake kan wees van die natuurlike vloei van water waar die topografie van grondstukke op 'n kunsmatige wyse verander is nie (Van der Merwe *Sakereg* 209 en veral *Bishop v Humphries*). Die eienaar van 'n laerliggende landelike perseel kan 'n *actio aquae pluviae arcendae* of die *interdictum quod vi aut clam* instel om 'n hoërliggende grondeienaar te verhoed om 'n gebou op te rig of ander werke te verrrig wat die natuurlike vloei van water na sy grondstuk tot sy nadeel verander of weerhou (indien hy die water wel sou wou ontvang). Maar dié reg bestaan nie ten opsigte van stedelike grondstukke nie: dit is inherent aan die verbetering van stedelike grondstukke dat sodanige bouwerk wel gedoen word. 'n Ooreenstemmende plig rus dan op die hoërliggende grondeienaar om nie water te laat afvloei op die aanliggende grondstuk nie. 'n Stedelike grondstuk word dus as sodanig beskou in die konteks van die natuurlike vloei van water, omdat die topografie van die omgewing reeds só verander is deur bou- en ander werke dat water nie meer natuurlik vloei nie – dit sou dus geen sin maak as daar 'n reg daartoe sou bestaan nie.

Aan die hand van dié oorwegings is die faktore waarvolgens geoordeel moet word of 'n grondstuk landelik of stedelik is, soos volg beskryf in *Redelinghuis v Bazzoni* (117B–C):

> "[D]ie ligging van 'n eiendom binne 'n munisipale gebied, [verskaf] nie alleen en op sigself die antwoord ... of die betrokke eiendom as stedelike of landelike besit beskou moet word nie, maar ... die grootte van die grondbesit, die mate van bebouing in die opvanggebied en afloopgebied sowel as die gevolglike herkenbaarheid van die oorspronklike topografiese eienskappe van die betrokke grondstukke, [is] maatstawwe ... om te bepaal of die grondstuk as 'n stedelike of landelike grondbesit beoordeel moet word."

Met verwysing na dié faktore bevind regter Coetzee dat die applikant en respondent se grondstukke, geleë in 'n residensiële woonbuurt van Johannesburg en onderskeidelik 9826 en 13036 vierkante voet (1292 en 1714 vierkante meter) groot, stedelike grondstukke is. Die natuurlike kontoere is naamlik versteur deur die oprigting van woonhuise, die maak van tuine en, in die geval van die hoërliggende grondstuk, 'n opgeboude swembad. Volgens 'n deskundige getuie sou water wel natuurlikerwys afvloei op die applikant se grondstuk, maar die tempo van afvloei is definitief verhoog deur die bouwerke op die respondent se grondstuk. Die regter staan aldus, benewens die interdik wat die respondent gelas om die oorskrydende plante te verwyder, 'n interdik toe wat die respondent verbied om water te laat afvloei op die applikant se erf (benewens soos voor voorsiening gemaak in die serwituut), tesame met 'n bevel dat die respondent afvoerriolering ingevolge die serwituut moet bou.

Die belangwekkende faset van die saak is sekere opmerkings (270J–271C) van regter Coetzee aangaande die beslissing in *Redelinghuis v Bazzoni* waar die grondstukke daar in geskil as landelik beskou is:

> "In that case, on those facts before that Judge, and by an inspection *in loco*, the learned Judge found that it was still rural tenements and that the law applicable thereto applied. It is noteworthy to mention that the stands in issue were situated on the southern slope of Meintjieskop, Pretoria 200 to 300 metres east of the Union Buildings. The whole area is completely built up, and it boggles the mind to find that the southern slope of Meintjieskop in Pretoria, Arcadia, is rural area.
>
> I find on the undisputed facts before me that the present applicant has shown that the instant properties are urban tenements. It would make a mockery of the City of Johannesburg if, on these facts, it is held that Craighall Park is a rural area."

Hoewel regter Coetzee duidelik huiwerig is om eksplisiete kritiek uit te spreek teen 'n bevinding gegrond op die feite van die saak, laat sy opmerkings tog 'n vraag ontstaan na die substansiëelregtelike vereistes vir die onderskeid tussen landelike en stedelike grondstukke. In teenstelling met die *Redelinghuis*-beslissing beskou hy kennelik die ligging van 'n grondstuk as van deurslaggewende belang by dié onderskeid.

In *Bishop v Humphries*, waarna in beide die *Redelinghuis*- en *Harris*-beslissing as gesag verwys is, is beslis dat kleinerige erwe van omtrent 5000 vierkante voet, en waarvan ongeveer 50% van die oppervlak deur geboue bedek is, geleë in Turffontein, Johannesburg, stedelike grondstukke is. Só beslis regter Gregorowski (16–17):

> "By putting up buildings the natural disposition of the rainwater flow has been altered and the owner of the buildings must see that the water that he has collected on his roof does not damage his neighbour's property ... The fact is that when land is sold in small building plots, a state of things is created and contemplated which puts an end to a large extent to the natural servitude which previously

> existed as regards the water which falls on the plots. Each owner puts up a building which covers a substantial part of the plot. He places an impervious surface over the naturally porous surface of the soil. He accumulates the water thereon. He alters the natural surface of the rest of the area of his plot by paving it or by locating temporary structures thereon or digging it up, and thereby annihilates the natural arrangement of the soil. The rainwater can no longer flow as it used to flow."

In *Barklie v Bridle* 1956 2 SA 103 (SR) word grondstukke van 40 000 vierkante voet ten spyte van hul relatiewe grootte as stedelik aanvaar en konkludeer regter Beadle (106B–C):

> "[T]he effect of the development which has taken place on the applicant's stand has been to disturb completely the natural and normal flow of water from this stand. The effect has been to concentrate the flow at point "X" and to increase its volume. It has been greatly increased because of the run-off from the roof of the house and the removal of all the vegetation in the area contiguous to the house. The general direction of the normal flow has further been affected by the terraces which have been erected on the property. It is very difficult indeed to say today what the normal flow would have been like when the property was in its natural state."

Die moontlike vindbodem vir die nuanseverskil tussen die *Redelinghuis-* en *Harris*-beslissing is *Green v Borstel* 1940 2 PH M89 (W). In daardie saak het die applikant, die eienaar van 'n hoërliggende grondstuk, aansoek gedoen om 'n bevel dat 'n lae betonmuur, wat die respondent *in casu* op hul gesamentlike grens opgerig het om die afloop van water na sy grondstuk te verhoed, verwyder moet word. Daar word egter beslis (soos regter Coetzee dit opsom in *Harris v Williams* 270G):

> "[I]f the applicant had proved that the water whose flow was obstructed by the wall was water which would have flowed onto the respondent's land, even if no buildings had been erected and the original contours of the grounds not interfered with, grounds for relief would have been disclosed."

Die kwalifikasie van die algemene reël dat die *actio aquae pluviae arcendae* nie toepassing vind by stedelike grondstukke nie, is skynbaar in *Redelinghuis v Bazzoni* so toegepas dat waar die natuurlike kontoere steeds herkenbaar is, op die oog af stedelike grondstukke (22800 en 12000 vierkante voet groot onderskeidelik) waar die grondstukke 25–30% bebou en plavei is, nie stedelike grondstukke is vir die doel van die burereg nie. Regter FS Steyn bevind (118C–E):

> "Ten spyte van ingryprende terrassering van al die grond is dit na my mening beslis moontlik om nog die oorspronklike kontoere van die omgewing te identifiseer en is die kontoere bewys deur indiening van die omgewingskontoerkaart . . . Met inagneming van die vry lae persentasie van bebouing, die betreklike grootte van die grondstukke en die herkenbaarheid van die oorspronklike kontoere is dit my bevinding dat die omstrede standplase . . . nie stedelike grondbesitte is in terme van die begrip soos aangewend deur ons gemeenregtelike skrywers nie. Ek is in hierdie beskouing versterk omdat die Romeinse skrywers sowel as Voet en Grotius geskryf het uitgaande van 'n stadskonsepsie van uiters digte bebouing wat dikwels dateer het uit onheugelike tyd, waarin oop grond 'n seldsame verskynsel was, beperk tot die binneplaas en klein agtertuin."

Die eiser word aldus geoordeel geregtig te wees op die *actio aquae pluviae arcendae* ('n aksie dat die natuurlike afvloei van water herstel moet word) ten opsigte van sekere bouwerk op die grondstuk van die verweerder, wat die afvloei en deursypeling van water op sy grond verhoog het. Die toestaan van só 'n aksie kan tot gevolg hê dat die eienaar van 'n hoërliggende erf gebied word om 'n bestaande bouwerk te verwyder of verbied word om 'n spesifieke bouwerk op te rig (Van der Merwe *Sakereg* 207).

Daar kan egter gevra word of die toestaan van só 'n aksie in 'n gebied wat op die oog af stedelik is (en op 'n grondstuk wat reeds, soos regter Steyn erken, "ingrypend geterrasseer" is), nie 'n grondeienaar kan verhinder om sy grond te eksploiteer deur bouwerk, soos normaal is in 'n stedelike area, nie. (Vgl die analoë reg van 'n landelike grondeienaar om wel 'n bouwerk op te rig wat die natuurlike vloei van water verander mits dit 'n spesifieke verbetering van die landbou beoog. Sien hiervoor Van der Merwe 208.) Die implikasie van die beslissing in *Redelinghuis* is immers dat 'n grondeienaar wie se grondstuk wel in 'n residensiële area geleë is, maar wat slegs 25–30% bebou is, verhoed kan word om dit verder te bebou omdat dit steeds 'n landelike grondstuk geag word (as dit die "natuurlike vloei" van die water sou verander) – en dít sal veroorsaak dat die grondstuk nooit voldoende bebou kan word om stedelik te word nie!

As gevolg van hierdie beswaar is die benadering van regter Coetzee, waarvolgens die ligging van die grondstuk die grootste gewig dra, moontlik verkieslik: waar 'n grondstuk geleë is in 'n residensiële area binne munisipale gebied, en bebou, bewerk en geterrasseer is in 'n mate wat normaal is in 'n stedelike gebied (sien ook die aanhaling uit *Bishop v Humphries supra*) moet dit vir die doel van die reg ten opsigte van die natuurlike vloei van water as stedelike gebied beskou word. Hoewel die grootte van die grondstukke moontlik nie as "star, formele maatstawwe" (sien *Redelinghuis v Bazzoni* 117H) vir die onderskeid tussen stedelike en landelike grondstukke beskou moet word nie, dien daar tog op gewys te word dat die grondstukke in die *Barklie*-saak, wat as stedelik beskou is, aansienlik groter as dié in die *Redelinghuis*-saak was; die grondstukke in die *Harris*-saak was nie aanmerklik kleiner nie. Die implikasie van die *Harris*-beslissing is dus dat eienaars van grondstukke geleë in 'n residensiële gebied en bebou in 'n mate wat normaal is in 'n residensiële gebied, moet sorg dat die afvloei van water van hul grondstukke nie op buurgrond beland nie. Dié benadering bevorder regsekerheid en is in ooreenstemming met die publisiteitsbeginsel van die sakereg: die aard van 'n grondstuk wat op die oog af stedelik is, sal moeiliker in geskil geplaas kan word. Dit is ook in ooreenstemming met die gemenereg en die meeste regspraak tot op datum.

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IS 'N DIEF VAN TJEKS EN DIE NALATIGE INVORDERINGSBANK MEDEDADERS INGEVOLGE DIE WET OP VERDELING VAN SKADEVERGOEDING 34 VAN 1956?

Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank 1998 2 SA 667 (W)

1 Inleiding

In hierdie saak beslis regter Burochowitz onder meer dat twee persone wat dieselfde skade aan 'n derde veroorsaak, die een op opsetlike wyse ('n dief van tjeks) en die ander nalatig ('n invorderingsbank), vir doeleindes van artikel 2 van die Wet op Verdeling van Skadevergoeding 34 van 1956 (hierna "die wet") mededaders is.

Die hof se beslissing het die steun ontvang van twee bydraers in die vorige uitgawe van die *Tydskrif*: Dendy "The negligent collection of cheques: Is anything claimable from the collecting banker?" 1998 *THRHR* 512 en Neethling "Deliktuele mededaderskap: Toepaslikheid op persone wat opsetlik en nalatig dieselfde skade veroorsaak" 1998 *THRHR* 518. Myns insiens kan daar egter 'n saak uitgemaak word dat 'n opsetlike en 'n nalatige dader wat dieselfde skade aan 'n derde veroorsaak het, nie vir doeleindes van die wet as mededaders kwalifiseer nie.

2 Feite en beslissing

Ene S het tjeks van die eiser, die ware eienaar van die tjeks, gesteel. Die verweerder, 'n invorderingsbank, het die tjeks op nalatige wyse ten behoewe van S ingevorder, as gevolg waarvan die eiser skade gely het. Die eiser stel 'n skadevergoedingseis teen die verweerder in op grond van die beginsels neergelê in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A).

Die regsvrae wat die hof moes beantwoord (sien 670C-F), het daarvan afgehang of die verweerder en S mededaders ingevolge die wet was, en meer in besonder of 'n invorderingsbank wat nalatig optree, en 'n dief van die tjeks, mededaders kan wees (670H-I).

Volgens die eiser is S en die verweerder wel mededaders ingevolge die wet en as sodanig gesamentlik en afsonderlik aanspreeklik vir die eiser se skade (die totaal van die sigwaarde van die tjeks). Die eiser, as *dominus litis*, is dus geregtig om die volle bedrag van die verweerder te eis. Derhalwe, so word voorts betoog, is die waarde van die eiser se eis teen die dief S irrelevant en behoort dit nie in berekening gebring te word om die eiser se eis teen die verweerder te verminder nie (670I-671A).

Op sy beurt argumenteer die verweerder onder meer dat die wet nie toepassing vind waar een deliktspleger nalatig en die ander opsetlik optree nie (671B-C), en dat die korrekte benadering tot die berekening van die eiser se skadevergoeding in *Holscher v Absa Bank* 1994 2 SA 667 (T) uiteengesit is. (In *Holscher*, waarin soortgelyke feite voorgekom het, beslis Van Dijkhorst R dat by die berekening van die eiser se skadevergoedingseis teen die nalatige invorderingsbank, die waarde van die eiser se eis teen die dief van die eis teen die bank afgetrek moet word aangesien die vorderingsreg teen die dief die omvang van die eiser se boedel medebepaal. Gevolglik verleen die hof 'n bevel vir die sigwaarde van die tjek minus die likwidasiedividend wat waarskynlik van die dief bekom sou kon word indien die eiser 'n eis teen die dief sou ingestel het.)

Regter Burochowitz gee die eiser gelyk. Hy beslis dat S en die verweerder wel mededaders ingevolge artikel 2(1) van die wet is (672C-D), en dat die wet toepassing vind waar dieselfde skade deur 'n opsetlike en 'n nalatige dader veroorsaak is.

Die hof in *Lloyd-Gray* steun op die uitspraak van regter Mahomed in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W). In *Randbond* 619F-G beslis regter Mahomed dat artikel 2 van die wet ook toegepas kan word by die verdeling van skadevergoeding tussen twee opsetlike mededaders en dus nie beperk is tot verdeling tussen nalatige deliksplegers nie. Regter Mahomed is van mening dat daar geen aanduiding in die wet is dat die begrip "skuld", wat die grondslag vir die verdeling van skadevergoeding ingevolge die wet uitmaak, tot nalatigheid beperk is nie (619F-G). Ook is die

regter van mening dat die verdeling van skadevergoeding tussen twee opsetlike deliksplegers nie 'n onoorkomelike probleem is nie (620H-621A). Daarom word die twee opsetlike mededaders in *Randbond* elk vir 50% van die skade aanspreeklik gehou.

In *Lloyd-Gray* gaan regter Burochowitz verder as *Randbond*. Volgens hom is daar geen beginselrede waarom verdeling nie ook kan plaasvind in 'n geval soos die onderhawige waar een delikspleger nalatig en die ander opsetlik gehandel het nie: opset en nalatigheid sluit mekaar volgens hom nie uit nie en kan gelyktydig aanwesig wees, terwyl verdeling tussen opsetlike en nalatige deliksplegers ook nie onmoontlik is nie (672I-673F). Gevolglik bevind die hof dat S en die verweerder mededaders ingevolge artikel 2 van die wet is (673F-G) en dat die eiser geregtig is om sy volle skadevergoeding van die verweerder te verhaal. Anders as wat in *Holscher* beslis is, meen die hof ook dat die moontlike eis teen die dief (S) nie relevant is by die berekening van die eis teen die verweerder nie (674G-675D).

3 "Skuld" beteken dieselfde in artikel 1 en 2 van die wet

Die hoeksteen van die uitsprake in sowel *Randbond* as *Lloyd-Gray* is dat die begrip "skuld" in artikel 2 van die wet nie tot nalatigheid beperk is nie maar ook opset insluit. Die appèlhofgesag dat "skuld" in die wet tot nalatigheid beperk is (sien oa *Mabaso v Felix* 1981 3 SA 865 (A) 877A; *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835D-G), word deur sowel regter Mahomed as regter Burochowitz omseil met die argument dat die gesag net geld vir artikel 1 (wat met bydraende nalatigheid handel) en nie vir artikel 2, wat op mededaderskap betrekking het nie. Die implikasie van die twee regters se benadering is dat die begrip "skuld" in artikel 1 en artikel 2 van die wet nie noodwendig dieselfde beteken nie.

Daar word egter aan die hand gedoen dat die begrip "skuld" in die wet dieselfde betekenis in sowel artikel 1 as artikel 2 het. Die grondslag van beide artikels van die wet is die verdeling van skadevergoeding op grond van "skuld": "The whole basis of the Apportionment of Damages Act is the apportionment of *fault*" (Burchell *Principles of delict* (1993) 111). "Skuld" word op dieselfde wyse in beide artikels gebruik en daar is geen aanduiding dat die woord verskillende betekenisse in artikel 1 (verdeling tussen eiser en verweerder) en artikel 2 (verdeling tussen mededaders) het nie.

Dit is immers 'n bekende vermoede van wetsuitleg "dat dieselfde woorde en uitdrukkinge in dieselfde wet 'n gelyke betekenis dra" tensy die teendeel blyk (Steyn *Uitleg van wette* (1981) 126 en die bronne daar aangehaal). So verklaar regter Goldstein in *Greater Johannesburg Transitional Metropolitan Council v Absa Bank Ltd* 1997 2 SA 591 (W) 609F-G dan ook: "[T]he Legislature would probably have intended the word ['fault'] to mean the same in both ss 1 and 2" (vgl Scott "Vicarious liability – meaning of word 'fault' in s 1(1)(*a*) of the Apportionment of Damages Act" 1997 *De Jure* 388 393). Ook Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 168 is van mening dat "skuld" dieselfde in beide artikels beteken. (Sowel Goldstein R as Van der Merwe en Olivier gebruik egter dié argument om te betoog dat "skuld" in artikel 1 opset insluit omdat dit na hul mening ongetwyfeld die geval in artikel 2 is. Ek argumenteer die teendeel: omdat "skuld" in artikel 1 tot nalatigheid beperk is, geld dieselfde vir artikel 2. Hierop word later teruggekom.)

Hoe dit ook al sy, die punt is dat die betekenis van "skuld" in enige van die twee artikels van die wet waarin dit gebruik word, van belang is vir die betekenis

daarvan in die ander artikel. Die betekenis van "skuld" in artikel 2 kan nie geïsoleer word van die betekenis van presies dieselfde woord in artikel 1 nie, en andersom.

Gevolglik het regter Burochowitz in *Lloyd-Gray* na my mening fouteer deur te beslis dat die betekenis van "skuld" in artikel 1(1)*(a)*, asook die beslissings in *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) en *Greater Johannesburg* wat beide oor die betekenis van "skuld" in artikel 1(1)*(a)* gehandel het, nie relevant is vir die bepaling van die betekenis van "skuld" in artikel 2 nie. By die bepaling van die betekenis van "skuld" in artikel 2 moes die hof myns insiens wel die betekenis daarvan in artikel 1 oorweeg het.

4 Die betekenis van "skuld" in artikel 1 van die wet

Sonder om hier in besonderhede in te gaan, kan onomwonde gestel word dat die oorwig van gesag daarop dui dat die woord "skuld" in artikel 1, wat oor bydraende nalatigheid handel, net nalatigheid beteken en nie ook opset insluit nie (sien oa *King v Pearl Insurance Co Ltd* 1970 1 SA 462 (W); *Smit* 835B-G; *Mabaso* 877A; Botha *Die verdeling van die skadedragingslas by onregmatige daad* (LLD-proefskrif PU vir CHO 1993) 310; Van der Walt en Midgley *Delict: Principles and cases* (1997) 211; die SA Regskommissie *The Apportionment of Damages Act, 1956* Discussion Paper 67, Project 96 (1996) ("SA Regskommissie") par 2.18; vgl Scott "Some reflections on section 1(1)*(a)* of the Apportionment of Damages Act 1956 and contributory intent" *Huldigingsbundel Paul van Warmelo* (1984) 166 177); Neethling, Potgieter en Visser *Deliktereg* (1996) 153; *contra Greater Johannesburg* 606-609).

Van der Walt en Midgley 211 som die posisie soos volg op:

> "Although the question has been raised whether 'fault in section 1 of the Apportionment of Damages Act includes intent, this seems extremely doubtful. The legislature clearly intended section 1 of the Act to connote either negligence or contributory negligence. In *King v Pearl Insurance Co Ltd* the court held that 'fault' on the part of the plaintiff means and refers exclusively to conduct which would have grounded a defence of contributory negligence at common law. The explicit reference to contributory *negligence* in both the long title of the Act and the heading to section 1, the use of a similar concept of 'fault' with reference to both the plaintiff and the defendant, and the historical background to the enactment of section 1 [vgl *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 2 SA 521 (K) 528-529], indicate that 'fault' bears the restricted meaning of either contributory negligence on the part of the plaintiff, or negligence on the part of the defendant."

Die wet het duidelik bedoel om in artikel 1 net die verweer van medewerkende nalatigheid te reël, met ander woorde die verdeling van skadevergoeding waar sowel die eiser as die verweerder nalatig was. 'n Opsetlike verweerder wat 'n medewerkend nalatige eiser skade berokken het, kan hom nie ingevolge die wet op die eiser se medewerkende nalatigheid beroep om 'n verdeling van skadevergoeding te bewerkstellig nie. In die gemenereg reeds was die posisie dat so 'n verweer nie by die opsetlike optrede van 'n verweerder geld nie en daar word algemeen aanvaar dat die beginsels van die wet hierdie reël nie wysig nie (Neethling, Potgieter en Visser 153; *Ntsane* 570; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418).

Voorts kan uit die bewoording van die wet nie afgelei word dat artikel 1 van toepassing is op die verweer van sogenaamde bydraende opset aan die kant van die eiser nie: Die wet het nie bedoel om verdeling van skadevergoeding moontlik te maak waar die eiser opsetlik en die verweerder nalatig of waar beide partye opsetlik opgetree het nie. In beide hierdie tipe gevalle het die eiser volgens die

gemenereg sy eis verbeur, en die appèlhof het al by geleentheid twyfel uitgespreek of daar ingevolge die bepalings van die wet enige sprake van 'n verweer van bydraende opset kan wees (*Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422; *Mabaso* 876-877; vgl *Wapnick* 418; Neethling, Potgieter en Visser 153).

In *Greater Johannesburg* 606-609 het regter Goldstein 'n opsetlike eiser se eis teen 'n opsetlike verweerder ingevolge artikel 1(1)(*a*) met 50% verminder. Die hof het naamlik bevind dat "skuld" in artikel 1(1)(*a*) sowel nalatigheid as opset insluit. Hoe bevredigend die uitslag van die beslissing ook al vir die regsgevoel mag wees, kan in die lig van die oorwig gesag tot die teendeel nie met die hof saamgestem word dat opset ook by artikel 1(1)(*a*) ingesluit is nie. Soos later aangevoer word (par 8), sal die wetgewer die saak moet beredder.

5 Die betekenis van "skuld" in artikel 2

Soos reeds verduidelik (par 3 hierbo), het die wetgewer klaarblyklik bedoel dat "skuld" in beide artikel 1 en 2 dieselfde beteken. Indien nou aanvaar word dat "skuld" in artikel 1 nie opset insluit nie maar tot nalatigheid beperk is, is die onvermydelike afleiding dat "skuld" in artikel 2 ook (net) nalatigheid beteken (en nie opset insluit nie).

Ook wat artikel 2 betref, het die wetgewer nie bedoel om die gemenereg te wysig waarvolgens verdeling van skadevergoeding tussen opsetlike en nalatige mededaders onmoontlik was nie:

> "There is undoubtedly considerable authority which supports the view that one joint wrongdoer cannot claim a contribution from another joint wrongdoer where the wrongful delictual act had been perpetrated intentionally. (McKerron *Law of Delict in South Africa* 1st ed at 73; I van Zyl Steyn 'Contribution Between Joint Tortfeasors' 1926 (43) *SALJ* 251 at 254, 256 and 267; *Digest* 27.3.1 para 13; Voet 9.2.12; *Digest* 27.8.7; M de Villiers *The Roman-Dutch Law of Injuries* at 45; *Walker v Matterson* 1936 NPD 495 at 501; *Toerien v Duncan* 1932 OPD 180 at 203)" (*Randbond* 619).

Omdat die bedoeling was dat die gemenereg in hierdie opsig onveranderd moes bly, was daar geen rede om opset by die betekenis van skuld in artikel 2 in te sluit nie. Vir doeleindes van verdeling van skadevergoeding, hetsy ingevolge artikel 1 of artikel 2, is opset irrelevant. Dit sou absurd wees om die betekenis van "skuld" in artikel 1 tot nalatigheid te beperk (omdat bydraende opset duidelik nie by artikel 1 ingesluit is nie), maar om 'n ander vorm van skuld tussen mededaders kragtens artikel 2 toe te laat sonder om enige aanduiding te gee dat die betekenis van skuld, wat *prima facie* in beide artikels dieselfde is, vir verdeling kragtens artikel 2 verander het. Waar 'n wet beoog om die gemenereg te wysig, moet sodanige bedoeling uitdruklik uiteengesit word: "[A] statute is not to be understood to vary the common law unless it plainly does so" (*Greater Johannesburg* 606B-C; *Gordon NO v Standard Merchant Bank Ltd* 1983 3 SA 68 (A) 94; Kellaway *Principles of legal interpretation* 101 135). Steyn *Uitleg* 97-100 *237* druk die betrokke vermoede so uit: "Tensy die teendeel blyk, word vermoed dat die wetgewer die bestaande reg nie meer wil wysig as nodig nie."

Twee ander faktore bevestig dat die wetgewer bedoel het om die bepalings van artikel 2 tot nalatige mededaders te beperk: Eerstens word in artikel 2(14) die "last opportunity"-reël ook tussen mededaders afgeskaf (net soos in die geval van bydraende nalatigheid in artikel 1(1)*(a)*). Indien die wetgewer bedoel het om ook met bydraende opset as 'n verweer tussen mededaders weg te doen, sou dit

uitdruklik gedoen gewees het, soos in die geval van die "last opportunity"-reël. Tweedens word in artikel 3 van die wet die bepalings van artikel 2 uitdruklik van toepassing gemaak op aanspreeklikheid ingevolge die Motorvoertuigassuransiewet 29 van 1942 vir skade voortspruitende uit die bestuur van 'n motorvoertuig. Dit is welbekend dat aanspreeklikheid ingevolge hierdie wet (en sy opvolgers) feitlik uitsluitlik op nalatigheid, en nie opset nie, gebaseer word.

In *Randbond* 619 regverdig regter Mahomed sy vertolking van die wet dat "skuld" in artikel 2 wel opset insluit (in die saak was daar twee opsetlike mededaders betrokke tussen wie die hof skadevergoeding verdeel het), onder meer op grond daarvan dat dit die oogmerk van die wet was om sekere basiese gemeneregbeginsels ingrypend te wysig. Dit is sekerlik waar, maar juis daarom het die wetgewer die veranderinge wat hy wel beoog het, uitdruklik in die wet uiteengesit: die afskaffing van die verweer van bydraende nalatigheid en die laaste geleentheidsreël. Daar word aan die hand gedoen dat die wetgewer die afskaffing van die verweer van bydraende opset net so duidelik sou vermeld het indien dit die oogmerk was om ook daarvan ontslae te raak. Die feit dat die wetgewer dit nie gedoen het nie, bewys dat dit nooit die bedoeling was om in die wet van daardie besondere gemeenregtelike reël afstand te doen nie. Gevolglik geld die gemenereg in hierdie verband steeds, in teenstelling met die beslissings in *Randbond* en *Lloyd-Gray*.

In 'n poging om verdere steun te vind vir sy standpunt dat "skuld" in artikel 2 benewens nalatigheid ook opset insluit, beroep regter Mahomed hom in *Randbond* 620E-F op die gebruik van die begrip "uit delik" in artikel 2(1), en wys daarop dat die wet nêrens die bydrae wat 'n delikspleger van 'n ander kan eis, tot nalatige optrede beperk en opset uitsluit nie. Daar word egter aan die hand gedoen dat die wetgewer met die verwysing na "delik" in artikel 2(1) in die eerste plek wou duidelik maak dat die wet net op verdeling van skadevergoeding uit delik van toepassing is *en nie ook op kontraktuele eise nie (OK Bazaars; Barclays Bank v Straw* 1965 2 SA 93 (O) 98-99). Die algemene verwysing na eise "uit delik" bied dus nie gesag dat "skuld" in die latere artikel 2(6) noodwendig opset insluit nie en doen nie afbreuk aan die argument dat vir doeleindes van verdeling tussen mededaders, die wet net nalatigheid in gedagte het nie.

Die nalatige verweerder (Nedcor Bank) en die dief (S) in *Lloyd-Gray* was dus nie mededaders vir doeleindes van artikel 2 van die wet nie eenvoudig omdat die wet nie die gemeenregtelike beginsel wat die verdeling van skadevergoeding tussen sodanige mededaders onmoontlik maak, gewysig het nie. Artikel 2 beoog nie om 'n omvattende definisie van mededaders te verskaf en sodoende alle mededaders te betrek nie; dit het bloot ten doel om mededaders *tussen wie verdeling van skadevergoeding volgens die bedoeling van die wet moontlik is – dit wil sê bydraend nalatige mededaders* – by die bepalings van die wet te betrek (*Commercial Union Assurance Co v Pearl Assurance Co* 1962 3 SA 856 (OK) 863A-B; *Becker v Kellerman* 1971 2 SA 172 (T) 175H-176I 177F-H; *Saitowitz v Provincial Insurance Co Ltd* 1962 3 SA 443 (W)).

6 As "skuld" wel opset insluit, moet beide mededaders opsetlik handel

Indien toegegee sou word dat "skuld" in die wet wel opset insluit (soos wat Van Heerden AR in *Ntsane* 569H argumentshalwe met verwysing na artikel 1 doen), volg dit steeds nie dat verdeling van skadevergoeding tussen 'n opsetlike en nalatige mededader kan plaasvind nie. Wat die posisie tussen eiser en verweerder kragtens artikel 1 betref, maak die appèlhof dit duidelik dat die wetgewer nooit

bedoel het om die gemeneregbeginsel te wysig waarvolgens 'n opsetlike verweerder hom nie op die nalatigheid van die eiser kan beroep nie. Verdeling van skadevergoeding kan dus net plaasvind waar beide partye dieselfde skuldvorm, hetsy nalatigheid, hetsy opset, gehad het (vgl *Ntsane* 570D-E; *Greater Johannesburg* 606-609 (sowel eiser as verweerder opsetlik)).

Die argument geld, *mutatis mutandis*, vir mededaders in artikel 2. Indien aanvaar word dat "skuld" in artikel 2 opset insluit (soos in *Randbond* beslis is), sal verdeling tussen mededaders net moontlik wees indien beide mededaders dieselfde skuldvorm, hetsy nalatigheid, hetsy opset, gehad het. Volgens die gemenereg was verdeling tussen opsetlike en nalatige mededaders onmoontlik (*Randbond* 619), en, soos hierbo aangetoon, het die wetgewer nie beoog dat die wet hierdie beginsel in die ban doen nie.

Randbond, waar beide mededaders opsetlik gehandel het, bied dus nie gesag vir die beslissing in *Lloyd-Gray* dat 'n opsetlike en nalatige deliksspleger mededaders ingevolge die wet is nie. Die wet maak eenvoudig nie voorsiening vir verdeling tussen sodanige mededaders nie.

Die blote feit dat dit nie 'n onoorkomelike probleem sou wees om skadevergoeding tussen 'n opsetlike eiser en verweerder (*Greater Johannesburg* 606-609), twee opsetlike mededaders (*Randbond* 620H-621A), of selfs tussen 'n opsetlike en 'n nalatige mededader te verdeel nie (*Lloyd-Gray* 673E-F; vgl Neethling 1998 *THRHR* 520; Neethling, Potgieter en Visser 154-156; Neethling en Potgieter "Bydraende opset en die Wet op Verdeling van Skadevergoeding 34 van 1956" 1992 *THRHR* 661; Scott 1997 *De Jure* 388), baat die eiser nie. Die punt is dat, hoe uitvoerbaar sodanige verdeling ook al mag wees, die wet nie die gemeenregtelike verbod op sodanige verdeling opgehef het nie. Soos die gemenereg, maak ook nie die wet die verdeling van skadevergoeding tussen opsetlike en nalatige mededaders moontlik nie.

In 'n poging om opset as verdelingsnorm by die wet te betrek, is al op grond van die aanname dat opset en nalatigheid gelyk teenwoordig kan wees, geargumenteer dat opset terselfdertyd ook nalatigheid daarstel en dat 'n opsetlike handeling in die reël op 'n 100%-afwyking van die norm van die redelike man neerkom – dat 'n opsetlike mededader met ander woorde 100% nalatig is (sien Neethling, Potgieter en Visser 127-128 153 vn 170 264 vn 14; Neethling en Potgieter 1992 *THRHR* 661-662 en die gesag daar vermeld). Deur opset onder die dekmantel van nalatigheid in die wet in te bring, word dit nou moontlik om skadevergoeding tussen 'n opsetlike (oftewel "100% nalatige") mededader en 'n "gewoon" nalatige mededader te verdeel deur te bereken hoe ver elkeen van hulle van die norm van die redelike man afgewyk het. Hoe aantreklik hierdie benadering ook al met die eerste oogopslag mag lyk, sou daarteen tog aangevoer kon word dat so 'n herdefiniëring van opset as 'n vorm van nalatigheid, die wesenlike verskille tussen opset en nalatigheid verdoesel en die ware bedoeling van die wetgewer, asook die gemeenregtelike verbod op verdeling tussen opsetlike en nalatige deliksplegers, systap. Alhoewel hierdie benadering moontlik 'n skuiwergat sou kon bied om verdeling van skadevergoeding tussen opsetlike en nalatige deliksplegers ingevolge die wet te bewerkstellig, behoort dit eerder vermy te word by gebrek aan duidelikheid oor die konsekwensies daarvan vir die onderskeid tussen opset en nalatigheid in die algemeen, en om nie die bedoeling van die wetgewer te verydel nie. Dit behoort aan die wetgewer oorgelaat te word om, indien nodig, die regsposisie te verander (sien par 8 hieronder).

7 *Holscher v Absa Bank*

In *Lloyd-Gray* 674G-675D bevind regter Burochowitz voorts dat *Holscher* verkeerd beslis is. (Soos in par 2 hierbo gemeld, beslis Van Dijkhorst R in *Holsher* dat by die berekening van die eiser se skadevergoedingseis teen die nalatige invorderingsbank, die waarde van die eiser se eis teen die (opsetlike) dief van die eis teen die bank afgetrek moet word aangesien die vorderingsreg teen die dief die omvang van die eiser se boedel medebepaal. (Vir besprekings van *Holscher*, sien oa Dendy 1998 *THRHR* 512 ev, 1994 *Annual Survey* 264 461; Oelofse 1994 *Journal of International Banking Law* 217; Van der Linde "The liability of a collecting bank for negligence" 1995 *Juta's Business Law* 10).)

Daar word nie hier op die skadevergoedingsregtelike aspekte van regter Van Dijkhorst se uitspraak ingegaan nie (vgl in die algemeen oa Visser en Potgieter *Skadevergoedingsreg* (1993) *passim*). Regter Burochowitz se verwerping van *Holscher* is gebaseer op die, met eerbied foutiewe, gevolgtrekking dat die nalatige bank en die dief mededaders ingevolge artikel 2 van die wet is, en dat die eiser om daardie rede sy volle skade, die sigwaarde van die tjeks, van die bank kon vorder. 'n Mens sou egter kon sê dat regter Van Dijkhorst se uitspraak in effek minstens gedeeltelik uitvoering gee aan die gemeenregtelike posisie dat die nalatige bank en die dief nie mededaders vir doeleindes van verdeling kan wees nie; dat die opsetlike optrede van 'n deliktspleger 'n verweer is teen die eis wat teen die nalatige deliktspleger ingestel word; en dat die eiser hom in die eerste plek tot die opsetlike dader (die dief) moet wend voor sy eis teen die nalatige dader kan slaag.

Soos Dendy 1998 *THRHR* 515 tereg aantoon, sal die effek van die *Holscher*-benadering in sake soos *Lloyd-Gray* wees dat "no damages would be claimable against the negligent collecting banker in the overwhelming majority of cases of stolen cheques". Dendy is klaarblyklik van mening dat hierdie resultaat onaanvaarbaar is. Aan die ander kant sou net so goed – ooreenkomstig die siening van die gemenereg rakende opsetlike en nalatige (mede)daders – geargumenteer kon word dat dit onbillik is om 'n nalatige bank ten volle aanspreeklik te hou terwyl die opsetlike dief in die meeste gevalle skotvry daarvan afkom.

8 Wysiging van die regsposisie deur middel van wetgewing

Indien dit onaanvaarbaar geag word dat die eienaar van 'n gesteelde tjek misluk in sy eis teen die nalatige bank in sake soos *Lloyd-Gray* (hetsy die bank se nie-aanspreeklikheid gewyt word aan die afwesigheid van mededaderskap ingevolge die wet, of aan die benadering in *Holscher* dat die eiser eers sy vordering teen die dief moet aftrek by bepaling van sy eis teen die bank), bied nóg die gemenereg, nóg die wet, soos dit nou daar uitsien, 'n bevredigende oplossing. Die regsposisie sal deur middel van wetgewing verbeter moet word.

Daar moet in gedagte gehou word dat sake soos *Lloyd-Gray* eers betreklik onlangs op die voorgrond begin tree het. Die uitbreiding van die *actio legis Aquiliae* na eise teen nalatige invorderingsbanke is so onlangs as 1992 eers deur die appèlafdeling bevestig (*Indac Electronics*). Voor hierdie ontwikkeling was die moontlikhede vir verdeling tussen nalatige en opsetlike deliksplegers waarskynlik relatief skaars. Dit is daarom nie verbasend dat die 1956-wet nie voorsiening maak vir uitbreidings van Aquiliese aanspreeklikheid wat na vore kom bykans veertig jaar na die wet se inwerkingtreding nie.

Dit is die taak van die howe om die wet konsekwent volgens die bedoeling van die wetgewer toe te pas totdat die wetgewer self die wet verander. Terwyl

howe die ruimte kan benut wat bestaande wetgewing bied om nodige aanpassings in die regsposisie te maak, is dit onbillik om van die howe te verwag om beslissings te vel wat teen die klaarblyklike bedoeling van die wetgewer indruis. Word bevind dat wetgewing nie meer veranderde eise en omstandighede akkommodeer nie, moet die wetgewer self ingryp om die nodige veranderinge aan te bring. Dit het in die verlede by meer as een geleentheid juis met die wet onder bespreking gebeur. Die vroeëre konsekwente en korrekte toepassing van die wet deur die howe het bepaalde leemtes uitgewys wat deur die wetgewer self aangevul is (vgl die gevalle van die benadeling van 'n gade deur die optrede van die ander gade en 'n derde, en die benadeling van 'n persoon agv die dood of besering van 'n ander in omstandighede waar die oorledene of beseerde en 'n derde tot die dood of besering meegewerk het – die Wysigingswet op die Verdeling van Skadevergoeding 58 van 1971 en die Wet op Huweliksgoedere 88 van 1984 het die leemtes aangevul wat uitgewys is in bv *Tomlin v London and Lancashire Insurance Co Ltd* 1962 2 SA 30 (D); *Kleinhans v African Guarantee and Indemnity Co Ltd* 1959 2 SA 619 (OK)); sien in die algemeen Neethling, Potgieter en Visser 264-269).

Daar word aan die hand gedoen dat die wetgewer die wet spoedig onder die loep neem om leemtes te identifiseer en aan te vul. Die Suid-Afrikaanse Regskommissie het weliswaar in 1996 'n besprekingsdokument en 'n nuwe konsepwet op verdeling van skadevergoeding gepubliseer ("The Apportionment of Damages Amendment Bill, 1996" – sien die verwysing in par 4 hierbo), maar dit is te betwyfel of die konsepwet aan al die eise van die moderne praktyk voldoen. Daar word vertrou dat, in die lig van die nuwe behoeftes uitgewys in onlangse sake rakende die verdeling van skadevergoeding, die Regskommissie prioriteit aan die hersiening van die wet sal verleen. (Verskeie lande met verdeling van skadevergoeding-wetgewing soortgelyk aan die van Suid-Afrika is besig met ingrypende hersiening van hul wetgewing. Sien oa die Nieu-Seelandse Regskommissie se *Report 47: Apportionment of civil liability* (1998); die Alberta Law Reform Institute *Report 75: "Last clear chance" rule* (1997); Common Law Team of the British Law Commission *Feasibility investigation of joint and several liability* (1996); Ontario Law Reform Commission *Report on contribution among wrongdoers and contributory negligence* (1988); New South Wales Law Reform Commission *Contribution between persons liable for the same damage*, Discussion Paper 38 (1997); The Law Reform Commission of Hong Kong *Report on the law relating to contribution between wrongdoers (Topic 5)* (1984).)

Tot tyd en wyl die wetgewer die wet wysig, behoort die howe, soos voor die promulgering van die Wysigingswet op die Verdeling van Skadevergoeding 58 van 1971 en die Wet op Huweliksgoedere 88 van 1984, in belang van gesonde regspleging uitvoering te gee aan die duidelike bedoeling van die wetgewer in die Wet op Verdeling van Skadevergoeding 34 van 1956. Daarom behoort die eiser se eis in *Lloyd-Gray* ooreenkomstig 'n logiese en korrekte toepassing van die wet van die hand gewys te gewees het aangesien die nalatige bank en die (opsetlike) dief van die tjeks vir doeleindes van die wet klaarblyklik nie mededaders is nie.

Hiermee word nie te kenne gegee dat 'n konsekwente toepassing van die wet die ideale oplossing bied nie. Daar kan geargumenteer word dat die resultaat wat in sake soos *Greater Johannesburg* (eiser en verweerder beide opsetlik – 50%-vermindering van eis) en *Randbond* (twee opsetlike mededaders – 50/50-verdeling) bereik is, die regsgevoel beter bevredig. Nogtans word die vermelde uitsprake

nie deur die korrekte toepassing van die wet geregverdig nie. In die geval van *Lloyd-Gray* word nie net nog verder buite die grense van die wet beweeg nie, maar om 'n (bloot) nalatige bank as mededader solidêr aanspreeklik te hou met 'n dief wie se optrede veel verwytbaarder is, bevredig eweneens nie die regsgevoel nie. Aan die ander kant sou 'n mens tog ook nie wou sien dat die bank, wat self nalatig was, aanspreeklikheid heeltemal vryspring (die resultaat van 'n korrekte toepassing van die wet) nie.

Die wet sal gevolglik gewysig moet word om 'n bevredigender grondslag vir verdeling van skadevergoeding daar te stel. "Skuld", selfs al sluit dit sowel opset as nalatigheid in, is waarskynlik nie meer op sigself 'n bevredigende kriterium vir die verdeling van skadevergoeding nie. In sekere buitelandse regstelsels word wegbeweeg van skuld en 'n veel wyer diskresie as in die verlede aan die howe verleen om billike verdelings te maak. Die Nieu-Seelandse regskommissie beveel byvoorbeeld in kousule 8 van hul Draft Civil Liability and Contribution Act (1998) 'n verdeling aan in die verhouding wat die hof "just and equitable" vind, met inagneming van 'n verskeidenheid faktore soos die

> "nature, quality and causative effect of . . . the wronged person's failure (if any) to act with due regard for that person's own interest; and . . . the acts and omissions of the wrongdoer or of each concurrent wrongdoer; and . . . the rights and obligations of the wronged person and the wrongdoer or each concurrent wrongdoer in relation to one another".

In die kommentaar op bogenoemde voorstel sê die kommissie onder meer:

> "Because of the almost infinite variety of circumstances in which loss will fall to be attributed, the court is left with a complete discretion. The court must, however, have regard to the nature, quality and causative effect of the acts or omissions of the wronged person and the wrongdoer(s) . . . The court must also have regard to the rights and obligations of each of these persons to the other(s) . . ." (*Report 47* 21).

Ook New South Wales Law Reform Commission *Discussion paper* par 4.82 maak met goedkeuring melding van die wye diskresie wat howe ingevolge artikel 5(2) van die Law Reform (Miscellaneous Provisions) Act 1946 (NSW) het. Daarvolgens word 'n bydrae van 'n delikspleger gevorder op grond van wat die hof "just and equitable" ag, "having regard to the extent of that person's responsibility for the damage". Hierop lewer die Commission onder meer soos volg kommentaar:

> "Section 5(2) . . . allows a court a wide discretion to achieve a just and equitable apportionment, having regard to the extent of each person's responsibility. 'Responsibility' here is taken to mean more than fault, and invites consideration of individual culpability as well as of the relevant 'causal factors'" (par 4.81) en: "This provision allows a court a wide discretion in apportioning liability including the power to order one defendant to pay 100% of the plaintiff's liability. The extent of this discretion is important in allowing the court to apportion responsibility between the wrongdoers in a just and equitable way. This may be particularly important where one of the defendants has committed and intentional tort" (par 4.83).

Elders word verklaar:

> "Further arguments in favour of retaining rights of contribution for intentional tortfeasors consider the position of the other concurrent tortfeasors whose wrongdoing may or may not be categorised as intentional. It can be argued that a negligent concurrent tortfeasor should not be allowed to escape liability for some share of the harm to a plaintiff simply because an intentional tortfeasor was also responsible. There is also the possibility that an intentional tortfeasor could escape liability simply because of the presence of another intentional tortfeasor against whom the plaintiff seeks recovery" (par 4.13).

Die wye diskresie vir howe waarvoor die pasvermelde buitelandse (konsep-) wetgewing voorsiening maak, het in die lig van die resente gedinge oor verdeling van skadevergoeding ook in die Suid-Afrikaanse reg nodig geword. Maar ook hier behoort dit die wetgewer te wees wat sodanige diskresie aan die howe verleen. Dit is onwenslik dat die howe buite die grense van die wet moet soek na gronde vir billike verdelings terwyl hulle (verkeerdelik) te kenne gee dat die wet eintlik hul bevindinge regverdig. So het appèlregter Van Heerden in *General Accident Versekeringsmaatskappy SA Bpk v Uijs* 1993 4 SA 228 (A) moontlik reeds 'n groter diskresie gebruik as wat die bewoording van artikel 1(1)(*a*) (waarvolgens die eiser se skuld oënskynlik die enigste faktor is wat 'n rol mag speel by die bepaling van die vermindering van sy skadevergoeding) streng gesproke toelaat. Hy verklaar naamlik dat "regverdigheid en billikheid inagneming [verg] van die feit dat [die eiser] geensins tot die plaasvind van die botsing bygedra het nie, en dat sy skuld andersoortig as dié van [die motorbestuurder] was" (2341-235E; vgl Neethling en Potgieter "Die korrekte kriterium vir die berekening van bydraende nalatigheid" 1994 *THRHR* 131; Neethling, Potgieter en Visser 156-157; Scott 1995 *TSAR* 132). En in *Randbond*, *Greater Johannesburg* en *Lloyd-Gray* is ongetwyfeld buite die bedoeling van die wet beweeg in 'n soeke na billike verdelingsgronde.

Tot tyd en wyl die wetgewer die wet verander, behoort die howe die wet ooreenkomstig die bedoeling van die wetgewer toe te pas. Totdat dit gebeur, is die benadering van regter Van Dijkhorst in *Holscher*, ondanks al die kritiek op die uitspraak waarna vroeër verwys is, ironies genoeg waarskynlik die aangewese weg om te volg.

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HUGO DE GROOT-PRYS

Die Hugo de Groot-prys van R1 000 word elke jaar deur die Vereniging Hugo de Groot uitgeloof aan die outeur wat die beste bydrae oor die Grondwet van die Republiek van Suid-Afrika 108 van 1996 vir publikasie in die THRHR aanbied. Die redaksiekomitee behartig die beoordeling na afloop van die kalenderjaar. Die redaksiekomitee behou hom die reg voor om die prys nie toe te ken nie indien die bydraes wat ontvang is, na sy mening toekenning nie regverdig nie.

BOEKE

DIE STAAT – TEORIE EN PRAKTYK
deur MARINUS WIECHERS en FRANCOIS BREDENKAMP (reds)
Van Schaik Pretoria 1996; viii en 251 bl
Prys R154,95 (sagteband)

Baie boeke oor fundamentele regte en die handves van regte sien deesdae in Suid-Afrika die lig. Publikasies oor basiese staatkundige figure en verskynsels is heelwat skaarser en werke oor hierdie onderwerpe in Afrikaans miskien nog skaarser.

Die staat behels 'n ontleding deur 'n aantal bekende akademiese skrywers van verskillende aspekte van die staatsreg en politieke wetenskap. Volgens die redakteurs gaan die boek oor van die vernaamste en fundamenteelste aspekte van die politieke teorie. Die eerste bydrae, geskryf deur Wiechers en Bredenkamp, is getitel "Oorsig: Polities-teoretiese uitdagings by staatsvorming in Suid-Afrika". Die skrywers stel die volgende vrae wat dan in die werk aangespreek word: Kan ons hier in Afrika 'n moderne staat tot stand bring? Watter staatsvorm is die geskikste vir Suid-Afrika? Uit watter elemente bestaan die staat vandag? Hoe kan ons die staat beskerm teen bedreigings van sowel buite as binne? Laastens is daar 'n bespreking oor "Rang in die statery".

Die tweede bydrae gaan oor die opkoms van die moderne staat en is volgens die skrywer (Van Vuuren) 'n histories-filosofiese verkenning. Die bespreking vind plaas in die konteks van die modernisering en demokratisering van die Suid-Afrikaanse staat.

"Staatstipes", deur Johan Kruger, raak interessante en belangrike kwessies in staatsregtelike verband aan, byvoorbeeld die konsentrasie/verspreiding van staatsgesag en die tipering regstaat/kultuurstaat/welvaartstaat. Die kwessie van die verdeling van owerheidsmag is uiters aktueel in Suid-Afrika. Die tradisionele skeiding van magte tussen wetgewende, uitvoerende en regsprekende gesag het reeds die aandag van die konstitusionele hof geniet en daar is lank nog nie uitsluitsel bereik oor die presiese skeidslyne tussen die bevoegdhede van die verskillende regeringsfere (nasionaal, provinsiaal en plaaslik) nie. Die probleem is geensins opgelos deur die transformasie van regeringsvlakke na regeringsfere of die insluiting van 'n hoofstuk getitel "Samewerkende regering" in die Suid-Afrikaanse Grondwet nie. Insgelyks is die bespreking van die eienskappe van 'n regstaat, 'n kultuurstaat en 'n welvaartstaat soos hulle in die Suid-Afrikaanse Grondwet voorkom, van belang.

"Elemente van die staat" word deur drie outeurs ondersoek: territoriale gebied (TW Bennett); burgers en burgerskap (Bredenkamp); en regering en staatsgesag (wyle Peet van Niekerk). Denke oor burgerskap het met die koms van die nuwe bedeling en die erkenning van die reg op burgerskap soos handomkeer verander en die verhouding tussen staat/owerheid en burger vanselfsprekend ook. Die laaste bydrae in hierdie hoofstuk is ook interessant. Hoewel die skrywer 'n staatsreggeleerde was, ontleed hy hier verskillende populêre standpunte oor die staat en die politiek met verwysing na die werk van bekende filosofiese denkers soos Aristoteles, Hobbes, Thomas van Aquino, Machiavelli, Bodin, Locke, Rousseau, Marx, Engels, Kelsen en Rawls. Selfs die mening van Hitler dat die staat nie opsigself 'n doel is nie, maar slegs 'n middel tot 'n doel – die ontstaan van 'n hoër menslike kultuur – word aangehaal!

Mens sou miskien geneig wees om te dink dat die beskerming van die staat (Wiechers) nie in die nuwe Suid-Afrika so prominent as in die verlede figureer nie. Dit is wel waar dat die era van die totale aanslag hopelik nou tot die verlede behoort; dit is nietemin van belang dat die wyse waarop moontlike noodtoestande gehanteer word, nie aan die toeval oorgelaat word nie.

In die laaste bydrae behandel Hennie Strydom die staat en internasionale betrekkinge. Verskillende aspekte word aangeraak, onder andere die opkoms van die internasionale organisasiewese, internasionale regspleging, internasionale aspekte van die menseregtedebat, die bewaring van die omgewing en ontwikkelingshulp. In die verlede het Suid-Afrikaners hulle dikwels nie te veel gesteur aan die internasionale dimensie nie. Met die terugkeer van Suid-Afrika na volle lidmaatskap van die gemeenskap en in die lig van die belangrike posisie wat die volkereg in die Grondwet inneem, is hierdie onkunde 'n ding van die verlede.

Die boek word aantreklik aangebied en is goed afgewerk. Dit is nie 'n studentehandboek of selfs 'n werk wat praktisyns eintlik sal gebruik nie en sal dus na alle waarskynlikheid nie 'n groot verkoper of "money-spinner" wees nie. Dit herinner die leser egter daaraan dat die letter van die wet (al is dit die Grondwet) nie die hele verhaal vertel nie, en sal met belangstelling gelees word deur enigeen wat in die teoretiese staatsreg of die politieke wetenskap in die algemeen belangstel. Mens hoef nie 'n kenner in hierdie velde te wees om genot uit die werk te put nie – dit is uiters "toeganklik" geskryf; 'n "lekker" boek om op jou rak te hê.

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INLEIDING TOT DIE FAMILIEREG

deur PJ VISSER en JM POTGIETER

Tweede uitgawe; Juta Kaapstad 1998; 230bl

Prys R135 (sagteband)

1 Inleiding

Die tweede uitgawe van dié werk van Visser en Potgieter staan, soos die eerste, in die teken van die besondere onderrigbehoeftes van eerstejaarstudente. In die

voorwoord maak die outeurs dit by herhaling duidelik dat dié werk gerig is op "eerstejaars wat leke op regsgebied is" terwyl daar steeds teen oorvereenvoudiging gewaak word. Soos met die gebruik van die vorige uitgawe van die werk, blyk dit 'n werkswyse te wees wat goeie resultate lewer.

Vir doeleindes van die resensie word hoofsaaklik op die Afrikaanse uitgawe van die werk gekonsentreer, ofskoon die Afrikaanse en Engelse weergawes inhoudelik identies is.

2 Die inhoud van die werk

In 'n vorige resensie van die werk van Visser en Potgieter in 1994 is die opmerking gemaak dat ontwikkeling wat noodwendig deur die Grondwet van die Republiek van Suid-Afrika 200 van 1993 teweeg gebring sou word, dit moeilik sou maak om 'n regshandboek op die mark te bring. Die Grondwet van die Republiek van Suid-Afrika 108 van 1996 het intussen die lig gesien en die regsontwikkeling wat reeds in 1993 begin het, voortgesit. Dit is veral die invloed van die handves van regte wat in die Grondwet vervat is, wat in die behandeling van die privaatreg voortdurend voor oë gehou moet word. Teen dié agtergrond is die tweede uitgawe van Visser en Potgieter nie alleen tydig nie, maar ook 'n waardevolle verwysingswerk om die student op die hoogte te stel met verandering wat deur die handves van regte in die familiereg teweeg gebring word.

Die outeurs stel juis in hoofstuk 1 relevante grondwetlike aspekte aan die orde. Onder paragraaf 8 in dié hoofstuk word gekyk na die basiese aard en toepassing van fundamentele regte, spesifieke fundamentele regte wat in die handves vervat word, die feit dat daar geen fundamentele reg bestaan om te trou of familie te vestig of om beskerming van die familie te eis nie, en die reg op gelykheid. Die problematiek rondom aborsie word ook onder die loep geneem. Die verduideliking van die indirekte en direkte werking van die bepalings van die handves in paragraaf 8.1 is 'n duidelike en korrekte weergawe van die regsposisie en is beslis vir eerstejaarstudente toeganklik. Ander aspekte wat benewens die geykte inhoud van die familiereg in hoofstuk 1 aan die orde is, handel oor die konkubinaatsverhouding, homoseksuele en lesbiese verhoudings en regspluralisme.

Dit is algemene kennis dat die handves veral ten aansien van bogemelde aspekte verandering gebring het en steeds sal bring. Die bespreking daarvan deur die outeurs is voldoende om die eerstejaarstudent in te lig oor enersyds die werking van die handves en andersyds die invloed daarvan op familieregtelike aangeleenthede. Die leemte in die handves om die familie as instelling te beskerm word indringend bespreek en dit is duidelik 'n aspek waaroor die wetgewer ernstig moet herbesin.

Die verdere hoofstukke van die werk handel oor wat as die geykte inhoud van die familiereg getipeer kan word. Die vakgebied word hier verhelderend en voldoende vir eerstejaarstudente bespreek. Trouens, die besondere moeite wat die outeurs gedoen het om na relevante bronne te verwys, brei die werk se gebruiksmoontlikhede ook na praktisyns uit. Die sistematiek waarvolgens die werk aangepak is, bied eweneens die moontlikheid aan praktisyns om die werk as 'n bron van eerste verwysing te raadpleeg.

Die outeurs meld reeds in die voorwoord dat daar gepoog word om die gebruikersvriendelikheid van die werk te verhoog deur die gebruikmaking van tabelle en grafiese voorstellings. Een sodanige grafiese voorstelling word gevind

voor hoofstuk 1 waar die struktuur van die familiereg uiteengesit word. Dit bied met 'n oogopslag 'n oorhoofse beeld van die familiereg en dit kan juis tot die voordeel van die eerstejaarstudent strek om die chronologiese vordering deur die dissipline deurlopend te volg. Op bladsy 63 van die Afrikaanse weergawe en 62 en 63 van die Engelse weergawe, verskyn byvoorbeeld 'n tabel om die uitwerking van sekere gebreke op die geldigheid van die huwelik aan te toon. Die grafiese voorstelling van die verskillende huweliksgoederebedelings op bladsy 86 en 87 in albei uitgawes is eweneens verhelderend.

Enkele aspekte waaraan die outeurs kan oorweeg om heroorweging te skenk, is die gebruik van die woord 'huweliksvorme' ('forms of marriage') op bladsy 86 in die Afrikaanse en Engelse uitgawes wanneer hulle ooglopend huweliksgoederebedelings bedoel. Die gebruik van die woord 'huweliksvorm' is in hierdie verband onnodig verwarrend.

Die waarde van hierdie werk sou beslis ook aansienlik verhoog gewees het indien die outeurs omvattender bespreking aan die familiehof sou gewy het. Daar word met enkele oorsigtelike opmerkings oor die egskeidingsproses volstaan. Dit is jammer, want die debat rondom die vestiging van 'n familiehof is reeds ver gevorder. Skrywer hiervan is in groot beskeidenheid van oordeel dat die outeurs 'n geleentheid deur hulle vingers laat glip om 'n jong opkomende geslag regsgeleerdes rigtinggewend hieroor voor te lig.

In die voorwoord meld die outeurs dat daarmee rekening gehou word dat 'n eerstejaarkursus nie die geskikte plek is om sekere aangeleenthede rakende die familereg te bestudeer wat in elk geval in latere kursusse soos die deliktereg, kontraktereg en gevorderde familiereg aan die orde kom nie. Daar moet daarteen gewaak word dat so 'n benadering nie tot onnodige verarming in die bestudering van die betrokke vakgebied lei nie. Terwyl hoofstuk 1 op voldoende wyse die invloed van die handves van fundamentele regte, synde primêr 'n publiekregtelike bron, bespreek, behoort aspekte van die verbintenisreg in hoofstuk 2, wat handel oor verlowings, te figureer. Dit is geykte reg dat 'n verlowing 'n kontrak *sui generis* is. Die besondere vereistes om 'n geldige verlowingskontrak te sluit, word afdoende bespreek. Daar word egter aan die hand gedoen dat die waarde van die hoofstuk beslis verhoog sou word indien die problematiek van die toepassing van die *par delictum*-reël in *Friedman v Harris* 1928 CPD 43 en die latere afwatering daarvan in *Jajbhay v Cassim* 1939 AD 537 ook by die bevoegdheid van die partye om met mekaar in die huwelik te tree, verder toegelig sou word. Die bespreking daarvan in voetnoot 29 en 65 is onvoldoende. Die waarde van so 'n bespreking sou vir eerstejaarstudente veral daarin geleë wees dat dit aspekte van die verrykingsreg vir hulle ontsluit en juis ook aansluit by kennis wat hulle reeds in dié verband opgedoen het in die behandeling van ouderdom as statusbepalende faktor. Dit is veral die geval van nietige kontrakte deur *infantes* gesluit, waar die *condictio indebiti* en die *rei vindicatio* ingestel kan word, wat hier voordoen.

3 Slot

Die boek van Visser en Potgieter is 'n besonder gebruikersvriendelike werk wat op die eerstejaarstudentemark afgestem is. Dit ontsluit die familiereg vir die nuwe intreder tot die familiereg op stimulerende en sistematiese wyse en as sodanig staan die meriete en gehalte daarvan bo enige verdenking. Daar kan beslis geen twyfel bestaan nie dat hierdie werk juis vanweë die besondere verhelderende styl van aanbieding daarvan, die vakgebied deeglik aan die nuwe student bekendstel.

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CONSUMER LAW IN SOUTH AFRICA
by D McQUOID-MASON (General Editor)
Juta Kenwyn 1997; 386 pp
Price R185,00 (soft cover)

The book starts from the premise that consumer rights as identified by Consumers International are to be dealt with intensively rather than by emphasising only consumer credit or attempting to cover the legislation which touches the consumer as a citizen. The consumer rights are dealt with comprehensively: the authors cover not only the traditional aspects of consumerism such as purchase and sale and consumer credit, but have included an analysis of product liability, banking and the consumer, health and safety legislation, advertising, access to labelling, debt collecting and finally give the relevant information regarding both statutory and private consumer protection mechanisms.

The authors clearly delineate the consumer rights recognised by Consumers International which are integrated into all the relevant aspects of the book. Consumers International recognise various rights not usually viewed from the consumer's perspective. The right to satisfaction of basic needs includes access to basic goods and services; adequate food, clothing, shelter, health care education and sanitation; the right to safety; the right to be informed; the right to choose; the right to be heard; the right to redress; the right to consumer education and the right to a healthy environment. The work is divided into thirteen chapters with further subdivisions logically covering the various aspects of the topic.

Chapter 3 dealing with product liability is used as a spring-board for the submission that the liability test as propagated in *Kroonstad Westelike Boere Kooperatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A) which restricts liability for consequential damages arising from hidden defects to sellers who profess skill and expert knowledge in relation to particular goods, be jettisoned in favour of the imposition of strict liability on all manufacturers, regardless of whether they are contractually linked to consumers (108).

Chapter 6, dealing with consumers and banks, covers all the traditional aspects of banking relationships as well as the law relating to electronic banking and credit cards.

Consumer health and safety legislation provides but one of the innovative subjects this book covers (ch 7). Although McQuoid-Mason states that there is very little consolidated health and safety law in South Africa, he has extensively analysed all the legislation pertaining to the topics of food; medicines and drugs; health and medical services; tobacco; liquor; pollution; nuisance; hazardous and dangerous products; housing; transport and energy which are all consumer rights adopted by Consumers International.

Health and safety is followed by the vitally important coverage of consumer access to accurate advertising information. Moreover, chapter 8 is of importance because the effect of the Constitution on advertising and freedom of speech is considered by way of a comparative study. The conclusion is reached that freedom

of speech is a fundamental right, but that the right to commercial speech is of less importance than the right to political speech. Furthermore, that restrictions to commercial speech will be accepted by society provided consumers have access to accurate information. The advertising industry can avoid extensive government control by effective self-policing (280).

Chapter 9 provides a thorough examination of labelling legislation and the extent of the protection afforded the consumer. Labelling legislation is an example of the recognition that consumers need to be protected from their free choices which, more often than not, are based upon inadequate information and lack of expertise. The fact that the relationship between the consumer and manufacturer is one based on economic dependence rather than voluntary choice justifies the imposition of compulsory duties of care. The proposals for reform (291 *et seq*) in this area by the author are therefore consistent with the new conception of contract law.

In the section on consumer and debt collecting contained in chapter 10, it is pointed out that an effective debt recovery system must balance both the needs of the creditor to recover outstanding debts as expeditiously and inexpensively as possible and the interests of the consumer not to be subjected to cumbersome and degrading court procedures by extra-judicial debt collecting bodies. The fact that the Constitutional Court found in *Coetzee v Government of the Rep of South Africa* 1995 4 SA 631 (CC) that the civil imprisonment of debtors is unconstitutional and that the legislative provisions implementing this are invalid, emphasises the need for reform. The view is held that the recommendations made by the South African Law Commission should be implemented as soon as possible (306).

Chapters 11 and 12 deal with access to the courts and statutory consumer bodies respectively. Comprehensive coverage is given to both topics which enables the reader to make a choice about the route to follow in respect of consumer complaints.

Professor McQuoid-Mason and his team of co-authors are to be congratulated with an outstanding contribution to South African legal literature. It is a textbook which will be used by practitioners and academics as well as students.

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ENGLISH FOR LAW STUDENTS
by C VAN DER WALT and AG NIENABER
Juta Cape Town 1997; xx and 315 pp
Price R119,00

Law teachers have long awaited a publication such as *English for law students* and this title does the wait justice. Van der Walt and Nienaber have sensitively and thoroughly covered an area of legal education that was sorely in need of

attention. The book is based on four years of empirical research into the topic, which has resulted in a good understanding of the practical language needs of law students. The stated aim of the book is not to teach law but rather to develop the skills that will help law students to read, study and write successfully in relation to law. The book sets out to do this in a structured and practical manner. It is divided into fourteen units, each focusing on a particular area including *dealing with textbooks, structuring academic writing, reading an Act* and *formal correspondence*. The usefulness of these units relies not only on their focus on the practical, but also on the fact that each unit is further broken down into sections that are concerned with reading, grammar and communication skills respectively. These divisions give the student a holistic approach to the language skills needed for law. Another useful feature of the book is the revision which takes place in two units that take the form of both tests and "feedback". Suggested answers are provided to some of the more difficult questions in the book, which makes much of the book suitable for self-study. The academic substance of the book is garnished with attractive artwork and cartoons. Of special interest are the units dealing with the reading of court cases and statutes and dealing with textbooks. In the unit dealing with court cases, an example of a case is given and exercises devised to develop the students' skills in reading cases. There is also advice on note-taking and summarising of case law. The book moves from elementary aspects to some more advanced topics such as *Advanced research in law subjects*, a chapter which will undoubtedly be of use to students later on in their studies.

A text such as this will provide valuable help to all law students whether their mother tongue is English or another language and it provides assistance to staff in law schools who need to help students in developing the skills they need for the effective study of law. The book should be an essential part of the first year LLB course, particularly now that the new LLB is an undergraduate degree. The scope and level of *English for law students* is such that students from different linguistic backgrounds will be able to benefit from its use. It will be welcomed by both lecturers and students.

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