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NOTES

THE PUISNE JUDGE, THE CHAOS THEORY AND THE COMMON LAW

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INTRODUCTION

Puisne judges (judges of first instance) justifiably feel that they are at the bottom of the food chain — to be devoured when least expected by what they perceive to be the sharks in appeal courts. Their lot is exacerbated by the fact that courts of appeal are prepared to decide cases on issues that were never canvassed at first instance; that appeal tribunals do not defer to their factual findings; and that they have a duty to develop the common law even if not called upon to do so by the parties. In spite of lip service to a contrary position, the Constitutional Court assumes that all that puisne judges have to do is to think laterally while forgetting that they work without the privilege of clergy or clerks.

The sharks may also get a second or third bite at the proverbial cherry because a matter may be referred back to the puisne judge with the instruction to develop the common law because the higher court is dissatisfied with the factual findings, does not know how to change them and evades the issue through a referral. The veiled message from above is that the judge must find a way to change the result and say that it was done through a development of the common law.

John Maynard Keynes allegedly said either that ‘When my information changes, I alter my conclusions. What do you do, sir?’ or ‘When the facts change, I change my mind. What do you do, sir?’ This appears to be a simplified version of the butterfly effect much used to explain the chaos theory. Small changes in information may make big changes in the end result. Hyperbolically, the flap of the wings of a butterfly in Brazil could in due course lead to a tornado in Texas. From a legal perspective the butterfly has since been observed in places such as Argentina (<http://plato.stanford.edu/entries/chaos/>), Bombay (Robert E Scott ‘Chaos theory and the justice paradox’ (1993) 35 *William & Mary LR* 329) and New York (Edward S Adams, Gordon B Brumwell & James A Glazier ‘At the end of *Palsgraf*, there

is chaos: An assessment of proximate cause in light of chaos theory' (1998) 59 *University of Pittsburgh LR* 507). An internet search will show many other locations visited by the butterfly for non-legal purposes.

One assumes that Keynes referred to relevant facts but, as will be indicated, irrelevant facts can give rise to different outcomes in cases that are said to be constitutional. The chaos theory applies and inevitably leads to legal chaos.

These issues will be illustrated with special reference to the minority approach in two Constitutional Court judgments, namely *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) and *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC). The minority would, in each instance, have referred the case back to the high court to develop the common law. It did not consider the fact that the puisne judge would thereby have been placed in an invidious position. The purpose of this note is to analyse these judgments hypothetically from the perspective of that judge.

EVERFRESH

Everfresh dealt with the enforceability of an option to extend the term of a lease for a rental to be agreed. It is unnecessary to quote the provision since it suffices to state its essence: the lessee had the right to renew the lease for a period of four years and eleven months; the right was subject to the lessee giving written notice to the lessor of its intention to renew; and in the event of the parties failing to reach agreement in regard to the rentals for the renewal period the right of renewal would have been 'null and void'. The lessee exercised the option and proposed what it regarded as a 'reasonable' rental for the extended period. The lessor, who intended to redevelop the property, responded by stating that the clause did not constitute a legally enforceable right of renewal capable of being exercised and refused to negotiate on the rental rate.

The lessee's case in opposing an application for eviction before the high court was that the terms of the agreement precluded the lessor from frustrating the lessee's 'qualified right' to renew by refusing to negotiate in good faith, and that the lessee's right to renewal would fall away only if negotiations in good faith did not result in an agreement.

The high court held against the lessee on three grounds: that (a) an option to renew a lease on terms to be agreed is unenforceable; (b) the clause did not oblige the lessor to negotiate; and (c) in any event an obligation to negotiate in good faith is too vague to be enforced absent a 'readily ascertainable objective standard' of good faith (see *Shoprite Checkers (Pty) Ltd v Everfresh Market Virginia (Pty) Ltd t/a Wild Break 166 (Pty) Ltd* [2010] ZAKZPHC 34 para 22).

The lessee's ultimate submission in the Constitutional Court (according to Yacoob J) was that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith (para 18). In other words the lessee, accepting that the puisne judge was correct on point (a), did not ask, and the court did not consider, whether the law should be developed to enable a court to tell parties what their agreement should be.

Moseneke DCJ, for the majority, understood the submissions differently. The lessee required the adaptation of the common law in four possible manners: recognising the validity of a lease at a reasonable rental; recognising an implied (*ex lege*) term that rental (absent agreement) would be reasonable; requiring contracting parties who have a discretion to negotiate to do so reasonably (*arbitrio boni viri*); or imposing a duty on the parties to negotiate in good faith (para 64). The majority refused to refer the case back to the puisne judge for technical reasons and it is accordingly appropriate to begin with the minority judgment which desired another outcome.

Yacoob J, in deciding whether the case involved a constitutional issue, said that public policy issues (which he equated with constitutional issues) were involved, namely whether a duty to negotiate in good faith was imposed by the contract and, if imposed, is or should be enforceable (para 26). He added that the issue before the court was, 'purely and simply . . . about the interpretation of a contract in terms of the applicable law' (para 28). He then posed the question 'whether the detailed provisions of the clause carry the necessary implication that the renewal was not to be regarded as null and void in every respect' (para 36). Although it is not easy to fathom what the qualification 'in every respect' means, he focused on the interpretation of the particular clause.

This harked back to one of the questions put to the parties by the court before the hearing, which was 'if there is an obligation to negotiate in an effort to arrive at an agreement are the parties required, at common law, to negotiate reasonably and/or in good faith?' (see para 14). This, I would suggest, begs the question because the issue in the case was whether there was in fact an enforceable obligation to negotiate. A vague undertaking does not create an obligation.

In any event, as Yacoob J said while relying on *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA), the answer is in the affirmative. He said that 'the determination whether a promise is too illusory or too vague and uncertain must be made against the backdrop of an understanding that good faith should be encouraged in contracts and a party should be held to its bargain' (para 37). He also accepted the correctness of the current law that a promise to negotiate in good faith is only enforceable if it is not too illusory or too vague and uncertain. (See further Carole Lewis 'The uneven journey to certainty in contract' (2013) 76 *THRHR* 80.)

The court in its questions appeared to realise that if the promise was too illusory or vague, the need to develop the common law could not arise (see paras 14(c) and (d)). Yacoob J nevertheless ignored what the court had regarded to be self-evident and boldly proposed or suggested a (new) common-law contract principle that provides meaningful parameters to render an agreement to negotiate in good faith enforceable (para 36). He was, however, not daring enough to tell the puisne judge what he meant by 'meaningful parameters'. Instead, he sought to place in the lap of the puisne judge the question whether the common law to be developed will require the enforcement of the bargain in this case (para 37). In other words, the

puisne judge had to develop parameters to make this clause enforceable and then decide whether the clause falls within those parameters.

A reading of the judgment of Yacoob J as a whole shows that his approach, shorn of verbiage, was this: the parties by implication agreed to negotiate on a rental rate for the extended period; this required bona fide negotiation; the lessor ought not to be released from his undertaking unless the undertaking was too vague to enforce; and the court below must develop the law in order to find for the tenant.

The quest for the constitutional issue reminds one of a dog chasing its own shadow. The court referred only to s 39(2) of the Constitution, which obliges courts to develop the common law in accordance with the Constitution. One would have expected that the constitutional value would have been more closely identified. Fortunately, ubuntu was there to save the day and both the majority and the minority invoked ubuntu. (For meaningful and meaningless references to the concept regard may be had to footnote 18 of the judgment.) Unsurprisingly ubuntu, as understood by the court, in the present context was nothing more nor less than the holy cow with the Latin name *pacta sunt servanda* (see especially paras 70 and 71). Instead of slaughtering it the court imbibed its milk and the snide reference by Yacoob J to ‘colonial’ laws, as if there are some pre- or non-colonial laws that can change the meaning of words, was accordingly uncalled for.

It is time to revert to the problem of the puisne judge — what was he or she required to do? There is a suggestion in the judgments of both Yacoob J and Moseneke J that what could have been done was to order the lessor to make a bona fide counter-offer. But, as the puisne judge had said, how do I decide whether any offer is bona fide or not? And, the judge could have added, if I find that it was not bona fide, what do I do? Make a contract for the parties? Impose a fine on the lessor for contempt? Order the lessor to pay damages, and if so, how do I quantify damages? All this while the lessee occupies without a lease?

Considering that the majority would have referred the matter back had it not been for the manner in which the lessee conducted the case, its judgment is perplexing where it said the following in para 69:

‘When two contracting parties conclude a bargain that a certain state of affairs will come into existence between them, provided only that the terms of a necessary condition “shall be agreed”, a court called upon to interpret that provision may find itself required to develop the common law. It may find that “shall” imports a duty to negotiate and that parties would at least try to reach agreement on those terms.’

How does one develop the common law to give a new meaning to the word ‘shall be agreed’? It means either x or y or it is meaningless, and a common-law rule cannot change that. The common law does not have rules similar to definitions one finds in statutes where, for instance, a peacock can be defined to include a fowl or a pheasant (see *S v Kohler* 1979 (1) SA 861 (T)). Ubuntu is not that good a muti that it can transform something that is uncertain into something that is certain and using ubuntu as a general cure for

all ills debases its meaning and value. Aesop warned us aeons ago that one should not call ‘wolf!’ unless there is a wolf close by.

The more intriguing question invokes the chaos theory. Yacoob J emphasised two facts, namely that the lessor, who refused to negotiate, was a successor in title to the original lessor and that the lease had previously been renewed by the original lessor (para 28). Neither fact has any relevance to the meaning or enforcement of the clause in the contract. Why then did he attach weight to them? Would the result have been the same if these facts were not there?

More troubling is the second mentioned fact (or is it a factoid?). According to the judgment the lease was concluded on 15 July 2003 for the period 1 April 2004 to 31 March 2009. The lessee sought to exercise the option for renewal as from 1 April 2009, something that had to be done six months before the expiry date. A previous renewal could simply not have taken place.

Consider another flap of the butterfly’s wings. What would have happened if the lessee had exercised its option to renew (something the landlord was very happy about because he did not have another tenant in sight) but offered an unreasonably low rental? Would Yacoob J have held that the tenant was obliged to up its offer in bona fide negotiations? And if it did not, what would he have ordered as a judge of first instance?

One should not ask rhetorical questions because they have no answers.

LEE

The facts in *Lee* (2013 (2) SA 144 (CC)) were more complicated. The case turned, as Nkabinde J for the majority said, on a narrow factual point on the application of the test for causation (para 1). It did not concern legal causation (proximity). Factual causation, she said, is not in itself a policy matter ‘but rather’ a question of fact — a statement that, apart from the adverb ‘rather’, appears to be eminently sensible — but she added that factual causation ‘constitutes issues connected with decisions on constitutional matters’ (para 39). It is fortunate that the jurisdiction of the Constitutional Court has been changed and that it is no longer necessary for it to justify its decision to regard a matter as constitutional in such terms (s 3 of the Constitution Seventeenth Amendment Act, 2012, amending s 167 of the Constitution).

The plaintiff contracted tuberculosis while incarcerated. The question was whether the prison authorities, during his incarceration, had failed to take adequate steps to protect him against the risk of tuberculosis infection. The trial court (*Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC)) and the Supreme Court of Appeal (*Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA)) held that the prison authorities had failed in their duties, that their failure was wrongful and that they were negligent. The trial court held that their failure factually caused the infection, while the SCA held otherwise: the plaintiff failed to establish a causal link between the negligence and his infection. The source of his infection, and thus the cause, was unknown. The majority of the Constitutional Court upheld the appeal from the SCA by holding, on what it called a common sense approach, that there was a factual

causal link between the negligence and the infection and that there was accordingly no need to develop the common law and, especially, that there was no pressing need 'to contaminate the factual part of the causation enquiry' with 'normative considerations based on social and policy considerations' (para 53 and also para 51).

It is not possible for an outsider to assess whether a court's factual findings are right or wrong. There are nevertheless a few aspects of the majority judgment that require comment. The majority was prepared to overrule the SCA on facts without reading the evidence. It relied on an agreed statement of fact and the facts as set out in the two judgments below. This must be a first, not only for the Constitutional Court, but for any court. A further distressing aspect is that the majority did not deal with the facts set out in the minority judgment of Cameron J (paras 84 to 86) and which formed the basis of the SCA judgment.

Its legal approach requires a few preliminary remarks. Factual causation always requires as a starting point the *sine qua non* test (the 'but-for' test). The question is, however, how one *applies* the test in given circumstances, and this is what Corbett JA addressed in the quotation relied on by Nkabinde J (para 48) from *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914F–915G. One cannot 'relax' it, as Nkabinde J suggested (para 74). There is either a causal link or there is not. The normative limitation on liability created by factual causation is legal causation (remoteness) and not, as Nkabinde J would have it, the test for wrongfulness (para 74). The causation enquiry can only arise when there is wrongfulness and fault, although it may in a given instance be practical to begin and end with the factual enquiry.

It is a pity that the Constitutional Court caused such confusion, especially where the majority found the necessary nexus between the neglect and the harm without bending or relaxing the 'but-for' test (see also the analysis by Brand JA in *Die Minister van Polisie v Van der Vyver* [2013] ZASCA 39 para 32). That is what the *puisne* judge did and the majority thought that he did it correctly (para 55). Nkabinde J said in so many words that she was 'applying the but-for test' (para 58).

Cameron J agreed with the SCA that that the plaintiff had failed to establish factual causation and that the claim should have been dismissed on that basis. But, he felt that the plaintiff should have been entitled to 'compensation' (is it the same as damages?) and that our law should be developed 'to compensate a claimant negligently exposed to risk of harm, who suffers harm' (para 79). He did not believe that the Constitutional Court should do it without the views of the courts below. Accordingly, the *puisne* judge had to be tasked with the exercise to decide the manner in which the common law ought to be developed and, depending on the conclusion, to permit the parties to lead further evidence.

The *puisne* judge, as said, found factual causation. The judge is now told that he was wrong on the facts. He is also told how the law should be developed, namely that someone who is negligently exposed to a risk of harm and suffers harm is entitled to compensation. He is not given the choice

of one of the other options, such as a shift of onus, developed in other jurisdictions. (The complexities of the issue are discussed by Erik S Knudsen 'Ambiguous cause-in-fact and structured causation: A multi-jurisdictional approach' (2003) 38 *Texas International LJ* 249, and he points out that there is more than one possible approach.) After developing the law the puisne judge may listen to further evidence if so inclined.

The puisne judge will wonder why the minority did not develop the law itself. It has already decided that on these facts that the plaintiff should be entitled to compensation. What is there to refine? What SCA jurisprudence could conceivably be relevant, especially since the SCA has always held that delictual liability depends on causation? (See para 115.)

The relevance of the chaos theory to causation was the subject of the article by Adams, Brumwell & Glazier 'At the end of *Palsgraf*, there is chaos: an assessment of proximate cause in light of chaos theory' referred to above. Accepting the new rule as stated in unambiguous terms by the minority, the obvious question is whether the rule is supposed to be a general rule or is limited to what the Americans refer to as ambiguous cause-in-fact cases; that is, cases where there are two or more possible causes and the plaintiff is unable to pinpoint the real cause. In other words, if it can be established that A caused the harm but that B created a risk, will B be liable? The next question is whether it only applies where the plaintiff is a member of a 'vulnerable group' (para 113) or someone whose basic rights 'have been trespassed upon' (para 110). If not, why did the butterfly flap its wings?

The puisne judge was not called upon to decide or consider these issues and the Constitutional Court arguably also not. The questions are not rhetorical because some puisne judge will have to answer them, and being confronted by a general rule carrying the imprimatur of the highest court in the land one can but pity the judge who has to create a rule out of chaos.

CONCLUSION

Courts of ultimate appeal function in one of two ways. Courts of cassation decide either on appeal by a party or at the request of a lower court what the law is and leave it to the lower court to apply the law to the facts. Others, typically those that operate under an English common-law based system, tend to decide both fact and law and in exceptional circumstances they may refer the case back for the court below to apply the law as found by them.

Our Constitutional Court has to date not yet considered firmly how it should operate. Originally under s 102 of the interim Constitution of the Republic of South Africa, 1993, its jurisdiction was supposed to be limited to constitutional issues and high courts could engage the court as a court of cassation. This is no longer possible. Instead, the court has opted for the converse procedure (at least sometimes) where it requires of lower courts to inform it what the law should be and it can then decide whether it agrees or disagrees. Another novelty.

Probably the first non-judgment of this kind was *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), where the court required of the trial

court to develop the common law in order to make law enforcement officers liable for the failure to protect a vulnerable section of the population. There was no reason for the referral back and the referral did not change the law. The problem with the original SCA judgment (2001 (1) SA 489 (SCA)) was fairly simple: the court failed to take relevant factors into account in applying the reasonableness test for wrongfulness. When the case reached the SCA again, the factors identified by the Constitutional Court had to and were placed in the scale and the inevitable result in favour of the plaintiff followed.

The qualification 'at least sometimes' in the preceding paragraph is because of the failure to refer the issue of liability of the state for wrongdoings of police officers back to the puisne judge in *K v Minister of Safety & Security* 2005 (6) SA 419 (CC). It is not unfair to ponder whether this was because the court realised that no puisne judge would have been able to create a new rule of vicarious liability in the light of the forceful, compelling and binding judgment in *Phoebus Apollo Aviation CC v Minister of Safety & Security* 2003 (2) SA 34 (CC).

In adopting this yo-yo process the court has no regard to rule 16A(1) of the Uniform Rules of Court, which requires of any litigant who wishes to raise a constitutional issue in an application or action to give notice thereof to the registrar at the time of filing of the relevant affidavit or pleading, and that the notice must contain a clear and succinct description of the constitutional issue concerned.

This note concentrated on cases with common-law dimensions, but the problem of non-judgments appears to be as significant in the public law field as illustrated by cases such as *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC), *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) and *Mukkadam v Pioneer Foods (Pty) Ltd* 2013 (5) SA 89 (CC).

Public interest is a flexible concept and is subject to change. Although it has always been accepted that it is in the public interest that litigation should be brought to an early final conclusion, this approach does not appear to have survived the introduction of our present court structures. The time has arrived for the Constitutional Court, as court of ultimate appeal, to take the bit between the teeth and to stop debating and prevaricating. It should give firm and clear guidance to lower courts, as it has done so often. The buck must stop soon and there.