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Komitees van die driekamerparlement

EFJ Malherbe
BA LLB
Direkteur, Departement van Staatkundige Ontwikkeling en Beplanning

SUMMARY

Committees of the Tricameral Parliament

Consensus-forming mechanisms are indispensable in a multicameral parliament representing different interest groups. Committees composed of members of all three houses of the new South African tricameral parliament are obvious mechanisms to promote consensus on general matters. Another consideration for the establishment of such committees was the expectation that it would contribute to a departure from the conflict style of decision-making. The committee system of parliament is analysed against this background.

In this article parliamentary committees are defined and classified, and the different committees of parliament identified and discussed in terms of this classification. The extensive formal provisions of the standing orders governing committees are noted and their composition, powers and functions in terms of such rules are explained, revealing the prominent role, especially of standing committees, during the legislative process. The implications of the fact that all bills on general affairs are referred to standing committees before consideration in any house, are underlined.

Innovation and flexibility are features of the standing orders in question, preventing cumbersome and rigid legislative processes, whilst demonstrating the inherent adaptability of a Westminster-orientated system.

The potential contribution of committees to the performance of parliament is discussed on the basis of information obtained from the first and only session thusfar of the new tricameral parliament. Reference is also made to different formal and informal variables which may influence the possible future contribution of the committee system.

The committees have ushered in a new era with regard to parliamentary and especially legislative procedures in the South African parliament. Members find new involvement and challenges in committee activities and already there is a notable shift in the focus of parliamentary activity from the different chambers to the committees. The need for greater autonomy and initiative will probably increase, particularly in standing committees. Allocation of more powers and responsibilities to committees should be encouraged in view of results to date. This development can only enhance effective parliamentary decision-making.

1 INLEIDING

Konsensusvormende meganismes is onontbeerlik in 'n meerkamerparlement wat verskillende steungroepe verteenwoordig. Komitees bestaande uit lede van al drie huise van die nuwe driekamerparlement was 'n voor-die-hand-liggende meganisme om eenstemmigheid oor algemene sake te bevorder. Die verwagting

is ook gekoester dat sulke komitees sal bydra tot 'n beweging weg van die sogenaamde konflikstyl van besluitneming.[1] Teen hierdie agtergrond word hierna oor die komiteestelsel van die parlement besin.

'n Parlementêre komitee is 'n groep parlementslede wat afgesonder word om 'n bepaalde taak vir die parlement te verrig en sodoende die doeltreffende behartiging van die funksies van 'n parlement te bevorder.[2]

Aan komitees word dus opgedra om namens die parlement ondersoeke te inisieer, getuienis in te win en wetsontwerpe te ontleed, oor die voor- en nadele daarvan te besin en wysigings daarvan voor te stel. Komitees word ook gebruik om namens die parlement toesig te hou oor die optrede van die regering, byvoorbeeld ten opsigte van fondsebesteding en om die parlement se huishoudelike aangeleenthede te behartig.[3] Op dié wyse verlig komitees die parlement se werklading en stel dit die parlement in staat om sake wat voor hom dien deegliker te oorweeg.[4]

Prominente parlementêre komitees is nie 'n tradisionele kenmerk van Westminsterparlemente nie.[5] Die enigste werklike uitsondering is die Kanadese parlement.[6] Gedurende die afgelope twee dekades is weliswaar toenemend wegbeweeg van die tradisionele opvatting,[7] maar die nuwe komiteestelsel van die Suid-Afrikaanse parlement verteenwoordig 'n besonder ingrypende afwyking daarvan in enige parlement met sy wortels in Westminster.

Reëlings in verband met komitees vorm dermate deel van die prosedurereëls waaroor 'n parlement normaalweg uitsluitlike bevoegdheid het, dat die howe gemeenregtelik geen vorm van kontrole oor parlemente se prosedurereëls het nie.[8] Die Suid-Afrikaanse parlement se bevoegdheid om sy eie prosedurereëls te maak word in die Grondwet erken[9] en die howe se bevoegdheid daaroor word statutêr uitgesluit.[10] As gevolg van daardie erkenning van die parlement se gesag oor sy eie prosedures is dit nie gebruiklik dat bepalings daaroor in die Grondwet of enige ander wet verskyn nie.[11] Die opneem van 'n bepaling oor komitees in artikel 64 van die Grondwet 110 van 1983 moet vertolk word as 'n weerspieëling van die erns waarmee die nuwe komiteestelsel bejeën word en as 'n poging om groter prominensie en status aan die komitees te verleen. Dié afleiding word gerugsteun deur die feit dat artikel 64, behalwe definisies, hoofsaaklik opsionele magtigings bevat en slegs in een opsig gebiedend is, naamlik in subartikel (3),

1 *Verklarende Memorandum oor die Grondwet van die Republiek van Suid-Afrika* (1983) 74.
2 Shaw "Conclusion" in Lees & Shaw *Committees in Legislatures: A Comparative Analysis* (1979) 420; Wheare *Government by Committee* (1955) 5.
3 Shaw 371 e v.
4 Shaw 420; Shakdher "The System of Parliamentary Committees" 1973 *Constitutional and Parliamentary Information* 46.
5 Mezey *Comparative Legislatures* (1979) 113; Ameller *Parliaments* (1966) 163–165.
6 Jackson & Atkinson *The Canadian Legislative System* (1980) 130 e v; Rush "Committees in the Canadian House of Commons" Lees & Shaw 191 e v.
7 Pring "The New Select Committee System at Westminster" 1983 *The Parliamentarian* 57–63; Thomas "The Changing Face of Parliamentary Democracy" 1982 *Parliamentary Affairs* 348–355; Morris *The Growth of Parliamentary Scrutiny by Committee* (1970) 1 e v.
8 De Smith *Constitutional and Administrative Law* (1981) 316; Le Roux "Die Aard en Regskrag van Parlementêre Prosedure" 1954 *THRHR* 187.
9 a 63.
10 a 34(2)(b).
11 Le Roux 203.

wat bepaal dat die gesamentlike reëls en orders voorsiening moet maak vir minstens een staande komitee oor algemene wetsontwerpe.[12]

Besonderhede oor die driekamerparlement se komiteestelsel word dus primêr in die Gesamentlike Reëls en Orders (GRO) gevind, hoewel daarin nie afgewyk word van die nuwe benadering tot die komiteestelsel waarop artikel 64 dui nie. Verder bevat die Reglement van Orde van elke huis (RO) ook bepalings rakende komitees.

2 TIPES KOMITEES IN DIE DRIEKAMERPARLEMENT

2 1 Klassifikasie van Komitees

Die benamings van komitees verskil aansienlik van parlement tot parlement, wat terminologiese verwarring tot gevolg het en die klassifikasie van komitees bemoeilik.[13] Eintlik is daar net twee kategorieë komitees, naamlik permanente en *ad hoc*-komitees. 'n Permanente komitee word vir 'n spesifieke periode aangestel, normaalweg die duur van die parlement, om 'n deurlopende taak te verrig, terwyl 'n *ad hoc*-komitee vir 'n bepaalde eenmalige taak aangestel word, na afhandeling waarvan dit ontbind. Afhangende van sy opdrag kan 'n *ad hoc*-komitee wel vir die duur van 'n sessie aangestel word.

Permanente en *ad hoc*-komitees kan intern of gesamentlik wees. In eersgenoemde geval dien slegs lede van die betrokke huis van 'n parlement daarin en in laasgenoemde geval is elke huis van 'n meerkamerparlement daarin verteenwoordig. Verskillende tipes permanente en *ad hoc*-komitees met as vernaamste onderskeidende eienskap hulle opdragte, word in die meeste parlemente aangetref.[14]

2 2 Komitees van die Driekamerparlement

Verskillende tipes van beide kategorieë komitees word ook in die driekamerparlement aangetref.

2 2 1 *Permanente Komitees*

Daar is net een tipe permanente komitee in die driekamerparlement, naamlik die *staande komitee.*

Daar is 'n staande komitee ten opsigte van elke ministeriële portefeulje vir algemene sake.[15] Daarbenewens is daar staande komitees ten opsigte van rekeninge, privaatlede se wetsontwerpe, staatkundige aangeleenthede en interne parlementêre aangeleenthede.[16] Daar is tans 'n totaal van 25 staande komitees.

'n Staande komitee word vir die duur van die parlement aangestel[17] en kan sy werksaamhede ook gedurende 'n reses van die parlement verrig.[18] 'n Onlangse wysiging van artikel 64 magtig komitees om hul werksaamhede in ander sentra

12 Booysen & Van Wyk *Die '83-Grondwet* (1984) 102.
13 Shakdher 3 e v.
14 Lees "Committees in the United States Congress" Lees & Shaw 15.
15 GRO 9(1).
16 byvoorbeeld die biblioteek, verversings en huishoudelike reëlings. Sien GRO 9(2), (3) en (4).
17 a 64 en GRO 8(1)(d).
18 a 64 en GRO 21.

as die setel van die parlement te verrig.[19] Elke staande komitee bestaan uit drie staande gekose komitees, een van elke huis.[20] 'n Staande gekose komitee is 'n komitee van 'n huis wat vir die duur van die huis ingestel word en wat saam met ander staande gekose komitees deel van 'n staande komitee kan vorm.[21] Indien 'n staande gekose komitee wat deel moet vorm van 'n staande komitee nie aangestel word of nie funksioneer nie, bestaan die staande komitee uit die komitees wat wel aangestel is en funksioneer.[22]

Tensy die huise anders besluit, mag geen staande gekose komitee wat deel uitmaak van 'n staande komitee uit minder as vyf of meer as 15 lede bestaan nie.[23] Daar is tussen die huise ooreengekom dat staande gekose komitees normaalweg sal bestaan uit elf lede in die geval van die Volksraad, sewe in die geval van die Raad van Verteenwoordigers en vyf in die geval van die Raad van Afgevaardigdes. Staande komitees bestaan dus normaalweg uit 23 lede.

Soos voorheen word die verteenwoordiging van partye in die staande gekose komitee van elke huis op proporsionele grondslag bepaal. Indien 'n party oor so min setels beskik dat hy nie vir lidmaatskap van alle komitees kwalifiseer nie, verklaar die party se leier in welke komitees sy party wil dien.[24] Die speaker stel die voorsitter van 'n staande komitee aan, wat nie 'n lid van die komitee hoef te wees nie.[25]

Dit blyk uit die besluitnemingsprosedure wat vir 'n staande komitee voorgeskryf word waarom 'n staande komitee uit drie staande gekose komitees bestaan. 'n Besluit word naamlik geneem wanneer die meerderheid van die aanwesige lede van elke staande gekose komitee wat deel vorm van die staande komitee dit steun, dus by wyse van samevallende meerderheid.[26] Daarbenewens moet elke staande gekose komitee wat deel vorm van 'n staande komitee 'n verslag (wat 'n wetsontwerp kan insluit) aanneem en dit aan die betrokke huis voorlê.[27] Wanneer 'n staande gekose komitee nie sodanige verslag of wetsontwerp aanvaar en aan sy betrokke huis voorlê nie, plaas die speaker 'n ander staande gekose komitee se verslag op die ordelys van die betrokke huis vir oorweging.[28] Op dié wyse word deurgaans verseker dat elke huis gekonfronteer word met die resultate van 'n staande komitee se beraadslagings, hetsy eenstemmigheid bereik is al dan nie.

2 2 2 Ad Hoc-*komitees*

Daar is verskillende tipes *ad hoc*-komitees in die driekamerparlement.

2 2 2 1 *Gesamentlike komitees* Gesamentlike komitees word op 'n *ad hoc*-grondslag aangestel, byvoorbeeld om 'n spesifieke saak te ondersoek. 'n Gesamentlike komitee bestaan uit drie gekose komitees, een van elke huis en word

19 Wysigingswet op die Bevoegdhede en Voorregte van die Parlement en die Grondwet 99 van 1985.
20 GRO 8(1)(d).
21 GRO 8(1)(b). 'n Staande gekose komitee kan ook afsonderlik funksioneer.
22 GRO 8(1)(e).
23 GRO 10.
24 RO 163(5).
25 GRO 11.
26 GRO 12(1). Eng "concurrent majority."
27 GRO 13(1).
28 GRO 13(2).

vir die duur van 'n sessie of korter aangestel.[29] 'n Gekose komitee is 'n komitee van 'n huis wat hoogstens vir die duur van 'n sessie aangestel is en wat saam met ander gekose komitees deel kan vorm van 'n gesamentlike komitee.[30] Die speaker kan 'n gesamentlike komitee wat by die prorogasie van die parlement nie sy werksaamhede afgehandel het nie, magtig om dit voort te sit totdat dit afgehandel is.[31]

Die reëls betreffende die samestelling, bevoegdhede en funksionering van staande komitees is op gesamentlike komitees van toepassing vir sover dit nie met die werksaamhede van gesamentlike komitees onbestaanbaar is nie.[32]

Slegs enkele gesamentlike komitees is tot dusver aangestel, waarvan die gesamentlike komitee oor die Wet op die Verbod van Gemengde Huwelike en artikel 16 van die Ontugwet die prominentste was.

2 2 2 2 *Gekose komitees vir eie sake* Naas gekose komitees wat deel vorm van gesamentlike komitees, kan elke huis gekose komitees aanstel vir die hantering van eie sake.[33] Die samestelling, bevoegdhede en funksionering van sulke gekose komitees is dieselfde as dié van gekose komitees van die vorige parlement.[34]

2 2 2 3 *Komitees van die hele raad* Elke huis kan besluit om in komitee van die hele raad te gaan.[35] Dit vind normaalweg plaas wanneer wetsontwerpe in besonderhede oorweeg word en word die komiteestadium genoem. Al die lede van 'n huis vorm deel van 'n komitee van die hele raad. Die reëls van toepassing op verrigtings van die betrokke huis geld vir 'n komitee van die hele raad,[36] maar die speaker of voorsitter van die huis verlaat die stoel[37] en die voorsitter of adjunk-voorsitter van komitees van die betrokke huis sit voor. Aangesien alle algemene wetsontwerpe deur staande komitees in besonderhede behandel word, word komitees van die hele raad nog net in uitsonderingsgevalle vir die oorweging van algemene wetsontwerpe aangestel. Vir wetsontwerpe oor eie sake is 'n komiteestadium egter verpligtend.

2 2 2 4 *Begrotingskomitees* Elke huis kan 'n begrotingspos vir afhandeling na 'n begrotingskomitee van die betrokke huis verwys.[38] 'n Begrotingspos deur 'n begrotingskomitee goedgekeur, word geag goedgekeur te wees deur 'n komitee van die hele raad.[39] 'n Begrotingskomitee bestaan uit hoogstens 30 lede deur die komitee oor die Reglement van Orde van die betrokke huis aangewys[40] en die

29 GRO 8(1)(c).
30 GRO 8(1)(a). Ook 'n gekose komitee kan afsonderlik funksioneer. Wanneer die drie Komitees oor die Reglement van Orde ingevolge GRO 7(2) saam vergader, vorm hulle vir alle praktiese doeleindes ook 'n gesamentlike komitee.
31 GRO 8(2).
32 GRO 20.
33 GRO 8(1)(a) en RO 160 e v.
34 RO 160–175.
35 RO 99.
36 RO 100.
37 RO 99.
38 GRO 47(1)(b)(ii) en (c)(ii) en RO 75.
39 GRO 47(2) en RO 89(1).
40 RO 77.

prosedurereëls van toepassing op 'n komitee van die hele raad geld vir 'n begrotingskomitee.[41] Omdat meerdere poste gelyktydig behandel kan word, bring begrotingskomitees aansienlike tydsbesparing mee.

3 KOMITEES SE ROL: DIE WETGEWENDE PROSES

3 1 Publieke Wetsontwerpe oor Eie Sake

Die hantering van publieke wetsontwerpe oor eie sake word deur die Grondwet en deur die Reglement van Orde (RO) van elke huis gereël.

'n Publieke wetsontwerp oor eie sake van 'n bevolkingsgroep kan slegs by die betrokke huis ingedien word indien die staatspresident, handelende in oorleg met die kabinet,[42] gesertifiseer het dat die wetsontwerp oor eie sake van daardie groep handel.[43] Sertifisering geskied aan die hand van die definisie van eie sake in artikel 14(1) en die maatstaf in artikel 16(1) dat die owerheidsinstellings van een bevolkingsgroep nie deur die beslissing in staat gestel moet word om die belange van 'n ander bevolkingsgroep te raak nie. Voordat die staatspresident die wetsontwerp sertifiseer, moet hy die speaker van die parlement en die voorsitters van al drie huise daaroor raadpleeg op die wyse wat hy goed ag,[44] en kan hy die presidentsraad om advies nader.[45]

Tydens die voorbereiding van die wetsontwerp deur die uitvoerende gesag behoort gepoog te word om soveel sekerheid moontlik te bereik oor die vraag na die eie of algemene aard daarvan voordat die staatspresident genader word in verband met die uitreiking van sy sertifikaat. Dit kan potensiële meningsverskil rondom die handeling verminder. 'n Administratiewe reëling is dus getref dat 'n konsepwetsontwerp oor eie sake reeds voor goedkeuring daarvan deur die betrokke ministersraad, na die staatsregsadviseurs verwys word vir 'n regsmening oor die vraag of die wetsontwerp oor eie of algemene sake handel. Indien die betrokke administrasie verskil met die mening verstrek deur die staatsregsadviseurs, kan die aangeleentheid na die staatspresident verwys word vir 'n beslissing ingevolge artikel 16(1).

Na beginselgoedkeuring van 'n wetsontwerp oor eie sake deur die betrokke ministersraad, word dit weer na die staatsregsadviseurs verwys vir nasiening, waarna dit gedruk en aan die staatspresident voorgelê word met die oog op die uitreiking van 'n sertifikaat ingevolge artikel 31(1).

'n Wetsontwerp wat by indiening nie deur die staatspresident gesertifiseer is nie, word geag ingevolge 'n besluit van die staatspresident oor algemene sake te handel.[46] Die bepaling dat geen geregshof bevoeg is om ondersoek in te stel na of uitspraak te doen oor die geldigheid van 'n besluit van die staatspresident ingevolge artikel 16 dat 'n saak 'n eie of algemene saak is nie,[47] word op dié wyse op alle wetsontwerpe van toepassing gemaak.

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41 RO 91.
42 Vgl a 16(1)(b) en a 19(2).
43 a 31(1).
44 a 17(2)(a).
45 a 17(1).
46 a 18(3).
47 a 18(2).

Indiening geskied deur die wetsontwerp aan die speaker voor te lê en nadat die speaker dit ter tafel gelê het, word die wetsontwerp geag vir die eerste keer gelees te wees.[48] Daar word dus weggedoen met indiening by wyse van voorstel.

Die verdere verloop van die proses is grootliks dieselfde as voorheen.[49] Die tweede lesing word deur die komiteestadium en die derde lesing gevolg, terwyl die wetsontwerp te eniger tyd voor of na tweede lesing na 'n gekose komitee van die huis verwys kan word.[50]

Amendemente wat gedurende die behandeling van die wetsontwerpe aangeneem word, moet ook oor die eie sake van die betrokke groep handel.

Die staatspresident kan ten opsigte van 'n voorgestelde of aanvaarde amendement sertifiseer dat dit nie oor 'n eie saak van die betrokke groep handel nie en die wetsontwerp kan dan slegs aan die staatspresident vir sy toestemming voorgelê word indien die voorgestelde amendement teruggetrek of verwerp is, of die aanvaarde amendement vervang is met 'n amendement ten opsigte waarvan die staatspresident gesertifiseer het dat dit oor die eie sake van die betrokke groep handel.[51] 'n Sertifikaat uitgereik na sodanige amendering vereis nie weer vooraf raadpleging met die speaker van die parlement en die voorsitters van die huise nie.[52] 'n Sertifikaat van die staatspresident in dié verband moet in die betrokke huis ter tafel gelê en deur die huis oorweeg word.[53]

Ook in die geval van amendemente is administratief gereël dat die mening van die staatsregsadviseurs ingewin word voordat die staatspresident 'n sertifikaat uitreik.

Nadat 'n wetsontwerp oor eie sake aangeneem is, moet die voorsitter van die huis sertifiseer dat dit volgens voorskrif aangeneem is voordat dit aan die staatspresident vir sy toestemming voorgelê word.[54] Die staatspresident moet sy toestemming verleen, tensy hy oortuig is dat die wetsontwerp nie volgens voorskrif van die Grondwet aangeneem is nie.[55] Indien amendemente aangeneem is ten opsigte waarvan die staatspresident nie geleentheid gehad het om oor die eie of algemene aard daarvan te beslis nie en hy bevind in hierdie stadium dat die wetsontwerp of dele daarvan nie oor die eie sake van die betrokke groep handel nie, kan hy 'n sertifikaat te dien effekte uitreik en die wetsontwerp aan die betrokke huis terugstuur.[56]

'n Wetsontwerp waarin die staatspresident toestemming verleen het, is 'n wet van die parlement[57] en word in die register van die kantoor van die griffier van die appèlhof opgeneem.[58]

Die vorige prosedures vir geldwetsontwerpe is grootliks ten opsigte van geldwetsontwerpe oor eie sake behou.[59]

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48 RO 51.
49 Vgl Kilpin *Parliamentary Procedure in South Africa* (1955) 4 e v.
50 RO 52–64.
51 a 31(2).
52 a 17(2)(b).
53 RO 98.
54 a 31(3) en RO 96.
55 a 33(1). Sien Booysen & Van Wyk 107.
56 a 33(2).
57 a 34(1).
58 a 35.
59 RO 68 en 75. 'n Huis neem sy eie begroting in behandeling nadat die begroting vir algemene sake afgehandel is.

3 2 Publieke Wetsontwerpe oor Algemene Sake

Die grootste aanpassings van die vorige wetgewende proses is ten opsigte van die hantering van algemene wetsontwerpe aangebring.[60]

Publieke wetsontwerpe oor algemene sake, uitgesonderd geldwetsontwerpe, word ingedien deur dit aan die speaker voor te lê tesame met 'n memorandum wat die oogmerke daarvan uiteensit.[61] Wanneer die parlement *in sitting* is, lê die speaker die wetsontwerp en memorandum in elke huis ter tafel waarna dit geag word in elke huis vir die eerste maal gelees te wees en, tensy elke huis besluit om dit na 'n gesamentlike of 'n ander staande komitee te verwys, dit geag word deur elke huis na die staande komitee oor die ministeriële portefeulje waaronder die wetsontwerp ressorteer, verwys te wees.[62]

Wanneer die parlement *nie in sitting* is nie, verwys die speaker die wetsontwerp en memorandum na die toepaslike staande komitee, in welke geval dit geag word deur die huise verwys te wees.[63]

Direkte verwysing van 'n wetsontwerp na 'n staande komitee impliseer dat die komitee nie gebonde is aan besluite van die huise nie en die beginsel van die wetsontwerp ook onder die loep kan neem.[64]

Nadat die staande komitee 'n wetsontwerp behandel het en aan die huise verslag gedoen het soos hierbo uiteengesit, kan die lid (minister) belas met die wetsontwerp 'n versoek rig dat hy die tweede lesing voorstel by 'n gesamentlike sitting van die huise. Anders stel die betrokke minister die tweede lesing in elke huis voor, maar hou sy tweedelesingtoespraak net in een huis, terwyl dit in die ander huise ter tafel gelê word.[65] Die tweedelesingdebat vind in beide gevalle in elke huis afsonderlik plaas.[66]

Soos voorheen kan amendemente gedurende die tweedelesingdebat voorgestel word waarin teenstand teen die wetsontwerp uitgespreek word of waarin versoek word dat die wetsontwerp na 'n gesamentlike of staande komitee verwys of terugverwys word.[67] Indien twee huise 'n amendement aanvaar dat die wetsontwerp na 'n komitee verwys word en die derde huis keur die tweede lesing goed, word geag dat laasgenoemde ook die amendement goedgekeur het.[68] Indien twee huise die tweede lesing goedkeur en die derde aanvaar 'n amendement in verband met verwysing na 'n komitee, word geag dat laasgenoemde huis die wetsontwerp verwerp het.[69]

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60 Die Grondwet en die Gesamentlike Reëls en Orders (GRO) wat die Volksraad ingevolge a 102(6)(b) goedgekeur het, soos gewysig, handel daaroor.
61 GRO 22(1)(a). Die memorandum word saam met die wetsontwerp gedruk en dui kortliks die gebreke in die huidige posisie aan, die wyse waarop beoog word om dit aan te pas en die implikasies daarvan.
62 GRO 22(2)(a).
63 GRO 22(3)(a). Per definisie kan 'n staande komitee sy werksaamhede gedurende die reses verrig – a 64(1)(c) en GRO 21.
64 Wiechers *Staatsreg* (1981) 285.
65 GRO 24A(1).
66 GRO 25.
67 GRO 27(1). Dié reël maak onder andere voorsiening vir die bekende voorstel "dat die wetsontwerp vandag oor ses maande gelees word."
68 GRO 27(2).
69 GRO 27(3).

Nadat elke huis die tweede lesing goedgekeur het, word die wetsontwerp aan die staatspresident vir sy toestemming voorgelê.[70] Aangesien die staande komitee reeds oor die besonderhede van die wetsontwerp besin het, is 'n komiteestadium en 'n daaropvolgende derde lesing nie meer verpligtend nie. Die wetgewende proses is daardeur aansienlik vereenvoudig. 'n Lid kan egter binne drie dae nadat elke huis die tweede lesing goedgekeur het in sy huis voorstel dat die wetsontwerp na die betrokke gesamentlike of staande komitee terugverwys of na 'n komitee van die hele raad verwys word met die doel om amendemente te oorweeg.[71] Slegs die klousules ten opsigte waarvan amendemente voorgestel is, word in 'n komitee van die hele raad oorweeg,[72] wat aansienlike tydsbesparing kan meebring. Indien twee huise die voorstel steun, word die wetsontwerp aldus verwys.[73] Word geen amendemente deur die komitee aangebring nie, word die wetsontwerp aan die staatspresident vir sy toestemming voorgelê.[74] Indien die wetsontwerp wel geamendeer word, word die gewysigde wetsontwerp aan elke huis vir 'n derde lesing voorgelê en indien elke huis die derde lesing goedkeur, word die wetsontwerp aan die staatspresident vir sy toestemming voorgelê.[75]

Die prosedures met betrekking tot geldwetsontwerpe verskil hiervan. Geldwetsontwerpe word ook ingedien by wyse van voorlegging aan die speaker, wat dit in elke huis ter tafel lê, waarna dit geag word vir die eerste maal gelees te wees.[76]

In die geval van 'n begrotingswetsontwerp stel die minister daarmee belas die tweede lesing daarna voor by 'n gesamentlike sitting.[77] Weens die aard en belangrikheid van 'n begrotingsrede ingevolge waarvan bepaalde maatreëls onmiddellik in werking kan tree, byvoorbeeld verhoogde tariewe, word die wetsontwerp nie voor die begrotingsrede na 'n staande komitee verwys nie. Die minister van finansies het egter te kenne gegee dat hy die staande komitee vroeër by die proses betrokke sal wil sien.[78] Dit kan die staande komitee se invloed op die vasstelling van die begroting laat toeneem – vergelyk komitees van die Amerikaanse kongres se invloed op die begroting.[79] Direk na die minister se rede verwys die speaker die begrotingswetsontwerp, die minister se toespraak en gepaardgaande stukke wel na die toepaslike staande komitee; in die geval van die hoofbegroting, die staande komitee oor finansies, wat vir 'n maksimum tydperk van sewe agtereenvolgende sittingsdae oor die begrotingswetsontwerp kan beraadslaag.[80] Die aanname van 'n verslag deur 'n staande gekose komitee wat deel vorm van die betrokke staande komitee is nie verpligtend nie, maar 'n verslag wat wel aangeneem word, moet by verstryking van die sewe-dae-tydperk aan die betrokke huis voorgelê word.[81] Die voorsiening vir 'n opsionele

70 GRO 30.
71 GRO 31(1).
72 GRO 31(2).
73 GRO 31(4).
74 GRO 33.
75 GRO 34.
76 GRO 39.
77 GRO 40.
78 1985 Hansard 3072.
79 Vgl Sundquist "The Crisis of Competence in our National Government" 1980 *Political Science Quarterly* (PSQ) 216.
80 GRO 41(1) en (2). Die vervoer- en pos- en telekommunikasiebegrotings word vir onderskeidelik drie en twee dae deur die betrokke staande komitees oorweeg.
81 GRO 41(3) en (4).

in plaas van 'n verpligte verslag spruit uit die feit dat die staande komitee nie in hierdie stadium wysigings kan voorstel nie.[82]

Die tweedelesingdebat vind daarna in elke huis afsonderlik plaas.[83] Na goedkeuring van die tweede lesing deur elke huis, moet die wetsontwerp in sy geheel of ten opsigte van 'n bepaalde begrotingspos of -poste verwys word na 'n komitee van die hele raad van elke huis, of die toepaslike begrotingskomitee(s) van elke huis,[84] of na die toepaslike gesamentlike of staande komitee.[85]

Die prosedure in 'n komitee van die hele raad en in 'n begrotingskomitee stem ooreen met die vorige.[86] Indien die wetsontwerp verwys word na 'n gesamentlike of staande komitee moet elke gekose of staande gekose komitee wat deel vorm van eersgenoemde komitee 'n verslag aanneem wat verder op dieselfde wyse as gewone algemene wetsontwerpe behandel word.[87]

Die derde lesing van die begrotingswetsontwerp volg daarop in elke huis[88] en indien elke huis die wetsontwerp goedkeur, word dit aan die staatspresident vir sy toestemming voorgelê.

Wanneer die huise hul finale besluite oor 'n algemene wetsontwerp, insluitende 'n geldwetsontwerp, neem, en die besluite verskil, bestaan daar 'n geskil tussen die huise. Een of twee huise kan byvoorbeeld 'n wetsontwerp met of sonder wysigings aanneem terwyl een of twee huise dit afkeur, of die huise kan deur wysigings verskillende weergawes van 'n wetsontwerp aanneem.[89]

Daar is reeds op gewys dat 'n huis geag word 'n wetsontwerp te verwerp het indien die ander huise die tweede lesing van 'n wetsontwerp goedkeur, maar daardie huis besluit om die wetsontwerp na 'n gesamentlike of staande komitee te verwys.[90] Indien 'n wetsontwerp reeds deur een huis aangeneem en in 'n ander huis ingedien is, kan die staatspresident laasgenoemde huis versoek om die wetsontwerp binne 'n bepaalde tydperk wat nie korter as 14 dae mag wees nie, af te handel. Indien die huis in gebreke bly om die wetsontwerp binne die tydperk deur die staatspresident bepaal, af te handel, word geag dat die huis die wetsontwerp verwerp het, tensy die staatspresident binne sewe dae na die vervaldatum anders bepaal.[91] Hierdie reëling is daarop gemik om vertragingstaktiek aan bande te lê.

Indien 'n geskil tussen die huise oor 'n algemene wetsontwerp ontstaan, moet die speaker die staatspresident daarvan in kennis stel.[92] Die staatspresident kan die wetsontwerp vir advies na die presidentsraad verwys.[93] Hy kan die geskil ook gedurende dieselfde sessie na die presidentsraad verwys vir 'n beslissing,

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82 GRO 41(3). Hierdie bepaling is nodig omdat wysigings deur die komitee voor die tweede lesing aangebring en daarna deur die huise goedgekeur, op afkeuring van die begroting kan neerkom, wat die regering ingevolge a 39(2)(b)(ii) tot 'n val kan bring.
83 GRO 42.
84 Vgl RO 75–91.
85 GRO 47(1)(b).
86 GRO 48–50.
87 GRO 47(3).
88 GRO 53.
89 a 32(1).
90 GRO 27(3).
91 a 32(2).
92 GRO 54.
93 a 78(1).

maar kan die verwysing terugtrek te eniger tyd voordat die raad sy beslissing gee.[94]

Wanneer 'n wetsontwerp na die presidentsraad verwys word vir 'n beslissing, word die wetsontwerp, indien die raad in sitting is, in die raad ter tafel gelê,[95] tesame met 'n aanbeveling van die reëlingskomitee van die raad dat die wetsontwerp na 'n komitee vir ondersoek en verslag verwys word of dat die raad voortgaan om 'n beslissing te gee.[96] Indien die raad nie in sitting is nie, kan die voorsitter die wetsontwerp self na 'n komitee verwys.[97]

Indien die raad besluit (wat sonder debat geskied)[98] om 'n wetsontwerp nie na 'n komitee te verwys nie, kan die raad die staatspresident adviseer oor moontlike wysigings of ander optrede[99] of voortgaan om 'n beslissing te gee.[100] Indien die raad die wetsontwerp na 'n komitee verwys, kan die komitee by die raad aanbeveel om die staatspresident oor wysigings of ander optrede te adviseer, of om 'n beslissing te gee.[101]

Die raad oorweeg die komitee se aanbevelings en kan besluit om die staatspresident omtrent wysigings of ander optrede te adviseer of om 'n beslissing te gee.[102]

Indien die staatspresident die presidentsraad se advies aanvaar, trek hy die verwysing terug. Aanvaar hy nie die advies nie, moet die raad voortgaan om 'n beslissing te gee.[103] Advies van die presidentsraad moet in elke huis ter tafel gelê word.[104]

'n Beslissing van die presidentsraad behels 'n keuse tussen die besluite wat die huise geneem het. Indien een of twee huise die wetsontwerp aangeneem en een of twee huise dit verwerp het, moet die presidentsraad dus beslis dat die wetsontwerp aan die staatspresident vir sy toestemming voorgelê moet word of dat dit nie voorgelê moet word nie.[105] Indien twee huise verskillende weergawes van die wetsontwerp aangeneem het en die derde dit verwerp het, moet die presidentsraad beslis welke weergawe aan die staatspresident voorgelê moet word of dat geeneen voorgelê moet word nie.[106] Indien verskillende weergawes van die wetsontwerp deur elke huis aangeneem is, moet die presidentsraad beslis welke weergawe aan die staatspresident voorgelê moet word.[107] Die presidentsraad kan dus nie self wysigings aan 'n wetsontwerp voor hom aanbring of in 'n ander opsig 'n nuwe element inbring nie, byvoorbeeld om in die geval waar die huise verskillende weergawes van 'n wetsontwerp aangeneem het te beslis dat

94 a 32(1).
95 Dit geskied ingevolge die reëls van die presidentsraad, hierna RP.
96 RP 42(1)(a) en 89(1).
97 RP 42(1)(b) en 89(2).
98 RP 42(2).
99 a 78(4)(b) en RP 43.
100 RP 44.
101 RP 46(1)(a) en (b). Vgl a 78(4)(a).
102 a 78(4)(a) en RP 46(3), (4) en (5).
103 RP 46(6).
104 a 78(8).
105 a 78(5)(a).
106 a 78(5)(b).
107 a 78(5)(c).

die wetsontwerp nie aan die staatspresident voorgelê moet word nie. Die presidentsraad se beslissing moet in elke huis ter tafel gelê word.[108]

'n Wetsontwerp wat ingevolge 'n beslissing van die presidentsraad (wat gedurende dieselfde sessie van die parlement as dié waarin die staatspresident die geskil na die raad verwys het gegee moet word) aan die staatspresident vir sy toestemming voorgelê moet word, word geag deur die parlement aangeneem te wees, word dienooreenkomstig deur die speaker gesertifiseer en word aan die staatspresident vir sy toestemming voorgelê.[109]

Die staatspresident moet sy toestemming verleen aan 'n wetsontwerp wat deur die drie huise aangeneem is of wat ingevolge 'n beslissing deur die presidentsraad geag word deur die parlement aangeneem te wees, tensy hy oortuig is dat die wetsontwerp nie volgens voorskrif van die Grondwet aangeneem is nie.[110] Die staatspresident het dus geen substantiewe veto-bevoegdheid nie.

Met inagneming van die opmerkings vroeër dat geen geregshof ook ten opsigte van algemene wetsontwerpe bevoeg is om die staatspresident se besluit dat 'n saak 'n eie of 'n algemene saak is, te bevraagteken nie, is die hooggeregshof soos voorheen[111] bevoeg om ondersoek in te stel na en uitspraak te gee oor die vraag of die bepalings van die Grondwet, dit wil sê die prosedures daarin voorgeskryf, nagekom is in verband met enige eie of algemene wet, maar nie andersins oor die geldigheid, dit wil sê die inhoud, van so 'n wet nie.[112]

4 DIE BYDRAE VAN KOMITEES

Dit is te vroeg om afdoende gevolgtrekkings te maak oor die bydrae van die nuwe komiteestelsel tot die doeltreffende funksionering van die parlement. Met hierdie voorbehoud word gepoog om aan die hand van die resultate tot dusver 'n aanduiding te verskaf van die bydrae wat die komitees kan lewer en van faktore wat daarop 'n invloed kan uitoefen.

Daar is verskillende wyses waarop komitees die doeltreffende funksionering van 'n parlement kan bevorder:

a Vroeër is daarop gewys dat komitees dien om 'n parlement se werklading te verlig, meer aandag aan besonderhede moontlik te maak en deegliker oorweging van sake wat voor die parlement dien, te bewerkstellig.[113] Veral as gevolg van die eise wat tegnologiese vooruitgang stel, is die ontwikkeling van 'n gedifferensieerde en gespesialiseerde komiteestelsel 'n noodsaaklikheid.[114] Die nuwe komiteestelsel is dus 'n gepaste en tydige ontwikkeling wat, indien ten volle benut, die parlement se taak veel kan vergemaklik. Daar is reeds aanduidings dat komitees onnodige debatvoering in die huise inkort deur tegniese aspekte vooraf uit te klaar, terwyl amendering van wetsontwerpe veel deegliker deur

108 a 78(8).
109 a 32(4) en (5) en a 33.
110 a 33(1).
111 Van der Vyver *Die Grondwet van die Republiek van Suid-Afrika* (1984) 43.
112 a 34(2)(a) en (3). Sien hieroor Booysen & Van Wyk 140–141.
113 Shaw 420; Shakdher 46; Wheare 150.
114 Francis & Riddlesperger "U S State Legislative Committees: Structure, Procedural Efficiency and Party Control" 1982 *Legislative Studies Quarterly* (LSQ) 454; Jackson "Committees in the Philippine Congress" Lees & Shaw 190; Morrow *Congressional Committees* (1969) 229.

komitees oorweeg word as wat normaalweg in komiteestadiums in die raad die geval was.

Wat die komitees se invloed op die inhoud van wetgewing betref, kan daarop gewys word dat van die meer as honderd algemene wetsontwerpe wat gedurende die eerste sessie voor komitees gedien het, byna die helfte deur die komitees gewysig is, waarvan minstens twaalf substansieel. In twee gevalle het die betrokke komitee 'n nuwe wetsontwerp in die plek van die oorspronklike voorgestel en in drie gevalle het 'n wetsontwerp sy oorsprong in 'n komitee gehad. Slegs enkele wetsontwerpe deur 'n komitee gewysig is daarna deur die huise in komiteestadiums behandel en weer gewysig. Verreweg die meeste wetgewing van die afgelope sessie was tegnies en nie-kontensieus van aard, wat die waarskynlikheid van beginselverskille en wesenlike wysigings verminder. Selfs indien Rosenthal se aanname aanvaar word dat "a committee system performs less well if it makes changes in proportionately few of the bills it proposes for passage on the floor,"[115] kan nietemin gesê word dat die komitees reeds na een sessie 'n merkbare invloed op die inhoud van wetgewing uitoefen.

b Komitees bied meer geleentheid aan lede om aan die besluitnemingsproses deel te neem.[116] Met 'n staande komitee vir elke ministeriële portefeulje vir algemene sake en as gevolg van die verwysing van elke algemene wetsontwerp na so 'n staande komitee, is lede van die driekamerparlement veel aktiewer by die wetgewende proses betrokke. Daarbenewens bied *ad hoc*-komitees en komitees van elke huis vir eie sake verdere geleentheid vir deelname.

c Komitees bied aan lede meer geleentheid vir spesialisasie[117] en vir die ontwikkeling van hul vaardighede en bekwaamhede.[118] Dit is eerstens noodsaaklik in die lig van die eise wat deur tegnologiese vooruitgang aan 'n parlement gestel word en tweedens bied dit geleentheid vir publisiteit en prestige-bou, wat komitees dus 'n belangrike instrument maak vir die rekrutering van leiers.[119] Deur middel van die komiteestelsel word lede van die driekamerparlement baie vinnig geskool in die komplekse en soms tegniese besluitnemingsproses. Terselfdertyd brei deelname aan komiteewerk hulle kennis van die sake waaroor besluit word, vinnig uit.

d Komitees verskaf forums vir kommunikasie tussen lede onderling en tussen lede en die uitvoerende gesag, amptenare en die publiek, wat die politieke sosialisering van alle betrokkenes bevorder.[120] Daar kan geen twyfel wees nie dat die komitees reeds bewys gelewer het van hulle bydrae tot beter kommunikasie,

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115 Rosenthal *Legislative Performance in the States* (1974) 28.

116 Eulau & McCluggage "Standing Committees in Legislatures: Three Decades of Research" 1984 *LSQ* 237; Shaw 426; Jackson 187; Bekker "Parlementêre Komitees in Brittanje, Botswana, Bophuthatswana en Transkei" 1978 *De Jure* 372; Kornberg & Mishler *Influence in Parliament: Canada* (1976) 305.

117 Hedlund "Organizational Attributes of Legislatures: Structure, Rules, Norms, Resources" 1984 *LSQ* 81; Unekis & Rieselbach *Congressional Committee Politics: Continuity and Change* (1984) 3; Dodd "Congress and the Quest for Power" Dodd & Opperheimer *Congress Reconsidered* (1977) 277; Asher "Committees and the Norms of Specialization" 1974 *Annals of the American Academy of Political and Social Science* (Annals) 67; Polsby "The Institutionalization of the US House of Representatives" 1968 *American Political Science Review* 166.

118 Shaw 428; Blondel *Comparative Legislatures* (1973) 48–49.

119 Smith & Deering *Committees in Congress* (1984) 89 e v; Shaw 429.

120 Kashyap "Committees in the Indian Lok Sabha" Lees & Shaw 311; Blondel 48–49.

veral tussen lede en amptenare. Die komiteestelsel kan egter in 'n veel groter mate as 'n kommunikasie-instrument aangewend word.

e Komitees verskaf meer en beter geleentheid vir steunwerwing deur belangegroepe[121] en dus vir deelname deur buitestaanders aan die besluitnemingsproses.[122] Dit lei dikwels tot groter ontvanklikheid by die wetgewer vir die eise en behoeftes van die kiesers.[123] Hoewel belangegroepe reeds by verskeie geleenthede getuienis voor komitees afgelê het, kan komitees van die driekamerparlement veel meer vir hierdie doel benut word.

f Komitees verskaf meer en geskikter forums vir bedinging.[124] Een van die vernaamste oorwegings vir die nuwe omvattende komiteestelsel was inderdaad die geskiktheid van komitees om eenstemmigheid tussen die huise deur middel van beraadslaging en onderhandeling te bevorder. Wat hierdie oogmerk betref, is tot dusver besonder goeie resultate behaal soos blyk uit die feit dat die komitees net oor een wetsontwerp nie eenstemmigheid kon bereik nie.[125]

g Komitees bied 'n nuttige forum vir die beslegting en regulering van konflik in die samelewing[126] en bevorder sodoende die legitimiteit en stabiliteit van die stelsel.[127] Komitees se bydrae in dié opsig hang natuurlik af van die resultate wat hulle behaal. Tot dusver dui die rol wat komitees gespeel het in die afskaffing van die Wet op die Verbod van Gemengde Huwelike en artikel 16 van die Ontugwet, die opstel van 'n wedersyds aanvaarbare wetsontwerp op streeksdiensterade en die kweek van 'n ingeligte, betrokke ledekorps daarop dat die komitees 'n wesenlike bydrae in hierdie verband kan lewer.

Enkele faktore wat komitees se bydrae tot die werkverrigting van 'n parlement beïnvloed, moet aangestip word:

a In regeringstelsels gekenmerk deur skeiding tussen die wetgewende en uitvoerende gesag tree komitees, in navolging van die wetgewer self, meer outonoom en inisiërend op en is hulle normaalweg in staat om 'n groter bydrae tot die wetgewende funksie te lewer as in stelsels waar die uitvoerende gesag in die parlement aanwesig is en 'n leidinggewende rol daarin speel.[128] Dit is waarskynlik die vernaamste enkele bepalende faktor vir die bydrae van komitees tot die verrigting van 'n parlement se werksaamhede.

In die driekamerparlement is die uitvoerende gesag se invloed steeds deurslaggewend, maar dit is betekenisvol dat ministers normaalweg nie die sittings

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121 Unekis & Rieselbach 6; Hamm "Patterns of Influence among Committees, Agencies and Interest Groups" 1983 *LSQ* 381; Mezey 214.

122 Shaw 427.

123 Grumm "The Consequences of Structural Change for the Performance of State Legislatures: A Quasi-Experiment" Welsch & Peters *Legislative Reform and Public Policy* (1977) 201–213.

124 Sundquist *A Decline and Resurgence of Congress* (1981) 218 e v; Oppenheimer "Policy Effects of U S House Reform: Decentralization and the Capacity to Resolve Energy Issues" 1980 *LSQ* 5 e v; Shaw 430; Hinckley *Stability and Change in Congress* (1978) 86 e v; Morrow 235.

125 Die Wetsontwerp op die Spesiale Rekening vir die Suid-Afrikaanse Polisie.

126 Jackson 188; Shaw 430; Jewell & Eldridge "Conclusion: The Legislature as Vehicle for National Integration" Eldridge *Legislatures in Plural Societies: The Search for Cohesion in National Development* (1977) 267; Lees *The Committee System of the United States Congress* (1967) 103.

127 Shaw 429.

128 Shaw 399; Mezey 87; Lees (1979) 13.

van staande komitees bywoon nie, wat komitees effens meer beweegruimte as voorheen gee.[129] Ten opsigte van minstens een wetsontwerp het 'n staande komitee dan ook presies die teenoorgestelde besluit as wat die uitvoerende gesag in gedagte gehad het. 'n Tweede ontwikkeling in dié verband is dat ingediende wetsontwerpe nie deur staande komitees as 'n voldonge feit beskou word nie. Die meeste komitees voer ten aanvang 'n debat oor die noodsaaklikheid van die wetsontwerp, wat die breë beginsel onderliggend daaraan insluit. Indien daaroor eenstemmigheid bereik word, word die ingediende wetsontwerp slegs as 'n basis vir verdere bespreking beskou. Indien hierdie twee tendense voortduur, kan verwag word dat komitees in 'n toenemende mate 'n eie stempel op wetgewing sal afdruk.

b Sterk partydigheid en partydissipline lei normaalweg tot minder invloedryke komitees omdat dit eenstemmige optrede en outonomie demp.[130] Daarenteen neig komitees tot minder partydigheid as die parlement self.[131] Sterk partydigheid en partydissipline is 'n diepgewortelde Westminster-erfenis wat in die geval van die volksraad steeds prominent is. In die geval van die ander huise is dié faktor onopvallend en soms selfs afwesig. Die noodsaaklikheid van samewerking tussen die regerende partye van elke huis verminder in elk geval die impak van partydissipline, terwyl opgemerk word dat agterbankers van die volksraad toenemende individualiteit openbaar. Definitiewe tendense sal nietemin eers later geïdentifiseer kan word.

c Te veel komitees lei tot fragmentasie[132] en verhoog die risiko van oneffektiwiteit van komitees, byvoorbeeld as gevolg van ooreensnyding.[133] Dit kom veral voor by meerkamerparlemente of parlemente met 'n groot ledetal.[134] Die instelling van 'n staande komitee vir elke ministeriële portefeulje oor algemene sake verteenwoordig 'n gesonde benadering omdat 'n beter werksverdeling bewerkstellig word en lede meer geleentheid vir deelname en spesialisasie kry sonder dat 'n oormatige proliferasie van komitees veroorsaak word. Die verwysing van elke wetsontwerp na 'n spesifieke staande komitee skakel ooreensnyding ten opsigte van wetsontwerpe in elke geval uit. Een nadeel is dat veranderinge aan die stelsel nodig is met elke herindeling van ministeries.

Hoe meer komitees daar is, hoe meer gedesentraliseer is die wetgewer se funksionering.[135] Verskeie skrywers het daarop gewys dat oordrewe desentralisasie en veral outonomie van komitees die gevaar van stuksgewyse in teenstelling met geïntegreerde, koherente optrede deur die wetgewer inhou.[136] Dodd[137] meen die outonomie van komitees lei tot gebrekkige leierskap, koördinasie en verantwoordelikheid omdat elke komitee sy eie kop volg. Afgesien daarvan dat die

129 Ministers is wel voorsitters van twee komitees, naamlik van staatkundige aangeleenthede en privaatlede se wetsontwerpe.

130 Unekis & Rieselbach 57, 162; Smith & Deering 76, 229; Shaw 391; Mezey 74; Nelson "Assessing the Congressional Committee System: Contributions from a Comparative Perspective" 1974 *Annals* 128.

131 Francis & Riddlesperger 468; Shaw 426; Morris 9.

132 Smith & Deering 62.

133 Parris "The Senate Reorganizes its Committees, 1977" *PSQ* 335.

134 Francis & Riddlesperger 465.

135 Francis & Riddlesperger 470; Polsby 166.

136 Hedlund 61, 79; Sundquist (1980) 197; Oppenheimer 5–30; Hinckley 92; Oleszek *Congressional Procedure and the Policy Process* (1978) 13; Huitt "Congress: Retrospect and Prospect" 1976 *Journal of Politics* 224.

137 277–278.

komiteestelsel van die driekamerparlement geensins as oordrewe desentralisasie beskou kan word nie, word hierdie waarneming gedoen met verwysing hoofsaaklik na wetgewende instellings wat inisiërend optree en waarin die uitvoerende gesag nie 'n leidinggewende rol speel nie. Die betrokkenheid van 'n uitvoerende gesag met 'n omvattende program van aksie by die wetgewende funksie verminder die moontlikheid van stuksgewyse optrede deur 'n parlement.

d Die geleentheid wat komitees 'n lid bied om te spesialiseer, verminder namate hy in meer komitees dien.[138] Dit geld veral vir lede van die Raad van Verteenwoordigers en die Raad van Afgevaardigdes wat in sommige gevalle in soveel as ses komitees dien. In die algemeen het klein partye 'n probleem in dié verband soos blyk uit die feit dat twee lede van die NRP elk in sewe komitees dien. Aan die ander kant dien lede van die Amerikaanse senaat in gemiddeld 10 komitees en lede van die Huis van Verteenwoordigers in gemiddeld vyf komitees.[139] Hamm en Moncrief meen dat die aanstelling van subkomitees spesialisasie aanmoedig en die probleem dus kan verlig.[140] Hoewel staande komitees oor die bevoegdheid beskik om subkomitees aan te stel,[141] het dit tot dusver nie gebeur nie, waarskynlik omdat die vraagstukke wat ondersoek is so multi-dissiplinêr van aard was dat lede van meer as een staande komitee betrek moes word.

e Die samestelling, bevoegdhede en funksionering van komitees dra ook by tot die werkverrigting van komitees as hulpmiddel vir 'n parlement:

In *kleiner* komitees slaag lede makliker daarin om mekaar te leer ken, 'n samehorigheidsgevoel te ontwikkel en ten spyte van uiteenlopende standpunte saam te werk.[142] Groot komitees is lomper en meer passiewe lede word daarin aangetref.[143] Die grootte en ook die sogenaamde "ideale" grootte van komitees word hoofsaaklik deur die grootte van die betrokke wetgewer self bepaal,[144] hoewel faktore soos individuele lede se ambisies, belonings aan bepaalde lede en senioriteit ook 'n invloed kan uitoefen.[145] Staande komitees van die driekamerparlement bestaan uit gemiddeld 23 lede elk, wat in die lig van die verskil in ledetal van die huise, die aantal staande komitees, naamlik 25 en die billike verteenwoordiging van partye, as min of meer ideaal beskou moet word. Daar moet ook op gelet word dat permanente komitees hulle beter leen tot die ontwikkeling van 'n gees van samehorigheid as *ad hoc*-komitees,[146] hoewel 'n hoë

138 Hamm & Moncrief "Effects of Structural Change in Legislative Committee Systems on their Performance in U S States" 1982 *LSQ* 385.
139 Smith & Deering 53.
140 385. Sien ook Deering "Subcommittee Government in the U S House: An Analysis of Bill Management" 1982 *LSQ* 544, in verband met die rol wat subkomitees speel om ledebetrokkenheid aan te moedig.
141 GRO 9(6)(a).
142 Shaw 416; Walkland "Committees in the British House of Commons" Lees & Shaw 254.
143 Sien veral Whiteman "A Theory of Congressional Organization: Committee Size in the U S House of Representatives" 1983 *American Politics Quarterly* 49–72 en Francis "Legislative Committee Systems, Optimal Committee Size and the Costs of Decision Making" 1982 *Journal of Politics* 822–837, oor die invloed van die grootte van komitees.
144 Smith & Deering 231.
145 Ray & Smith "Committee Size in the U S Congress" 1984 *LSQ* 681 e v; Eulau "Legislative Committee Assignments" 1984 *LSQ* 594.
146 Mezey 64.

lidomset hierdie faktor grootliks kan neutraliseer.[147] Ook hierdie aspek is belangrik in die lig van die konsensusgerigte benadering wat van staande komitees van die parlement verwag word.

Hoe wyer 'n komitee se *bevoegdhede* is, hoe invloedryker is daardie komitee. Italië, die VSA en Wes-Duitsland lewer die beste voorbeelde. In Italië het komitees van die parlement byvoorbeeld finale wetgewende bevoegdhede, wat die komitees se invloed dermate versterk dat sowat 75% van alle wetgewing deur komitees afgehandel word.[148] 'n Nuwe soortgelyke ontwikkeling word in die Australiese staat Victoria gevind waar 'n komitee aangestel om die voortbestaan van staatskorporasies te hersien, se aanbevelings outomaties na 12 maande in werking tree indien die parlement nie 'n besluit tot die teendeel neem nie.[149] Komitees van die driekamerparlement het nie soveel gesag nie, maar soos reeds aangetoon, het die feit dat wetsontwerpe vóór enige debat in die huise deur die komitees behandel word (die verreikendste nuwe strukturele element met betrekking tot komitees) tot gevolg dat die invloed van die komitees oor die finale inhoud van wetgewing reeds aansienlik meer is as dié van gekose komitees wat voorheen normaalweg op die toneel verskyn het nadat die parlement reeds beginselbesluite oor wetsontwerpe geneem het.[150] Toesig oor departemente is 'n bevoegdheid wat nie formeel aan die staande komitees toegeken is nie. 'n Ontwikkeling in daardie rigting sal ook hulle invloed verhoog.

Wat die *funksionering* van komitees betref, kan eerstens gemeld word dat informele prosedures van komitees bevorderlik is vir beraadslaging en bedinging.[151] Die werksaamhede van die staande komitees word ook deur gemakliker prosedures gekenmerk. Tweedens het besluitnemingsprosedures 'n invloed. Meerderheidstemming demp byvoorbeeld die bereidwilligheid van lede om tot 'n vergelyk te kom. Die vereiste van absolute eenparigheid daarenteen, kan 'n komitee heeltemal lamlê. Daar kan egter geen twyfel wees nie dat die moontlikheid van suksesvolle afhandeling van 'n wetsontwerp waaroor in 'n komitee konsensus bereik is, veel groter is as ten opsigte van ander wetsontwerpe.[152] In die besondere omstandighede van die driekamerparlement word dit as 'n werkbare uitweg beskou dat besluite deur samevallende meerderheid geneem word.[153]

Derdens bevorder geslote sittings 'n komitee se werksaamhede,[154] omdat dit vertroue en 'n bereidwilligheid tot kompromis aanmoedig en aanleiding gee tot vinniger resultate.[155] Oop sittings stimuleer partydigheid en lê klem op politieke eiebelang. In die meeste wetgewende liggame met invloedryke komiteestelsels

147 Unekis & Rieselbach 152.
148 a 72 van die Italiaanse Grondwet in Blaustein & Flanz VIII *Constitutions of the Countries of the World* en sien D'Onofrio "Committees in the Italian Parliament" Lees & Shaw 75.
149 Frazer "Victoria: A Novel System of Parliamentary Investigatory Committees" 1985 *Parliamentary Affairs* 107.
150 Sien Venter *Notes on Select Committee Procedure: Public Matters and Bills* (1979) 48.
151 McKelvey & Ordeshook "An Experimental Study of the Effects of Procedural Rules on Committee Behaviour" 1984 *Journal of Politics* 201; Shaw 422; Wheare 153.
152 Unekis & Rieselbach 98.
153 GRO 12.
154 Sartori "Will Democracy Kill Democracy? Decision Making by Majorities and by Committees" 1975 *Government and Opposition* 155.
155 Ameller 116.

werk komitees *in camera*.[156] Soos voorheen vergader komitees van die driekamerparlement agter geslote deure en besluit hulle self watter buitestaanders toegelaat word.[157] Boonop word nie *verbatim* rekord van komiteeverrigtinge gehou nie. Ter bereiking van die grootste moontlike mate van eenstemmigheid is sulke reëlings noodsaaklik.

As gevolg van die feit dat lede te veel ander komiteeverpligtinge het, het heelwat komitees tot dusver kworum-probleme ondervind. Verspreiding van komitee-werksaamhede oor die hele jaar kan dié probleem verlig, maar dit is afhanklik van gereelde verwysing van wetsontwerpe na die komitees deur die uitvoerende gesag.

Vierdens het die voorsitterskap van komitees 'n invloed op hul werksaamhede.[158] Hoewel dit te vroeg is om spesifieke tendense hieroor te bepaal, is die afwesigheid van die uitvoerende gesag in die komitees betekenisvol vir die moontlike ontwikkeling van invloedryke voorsitters wat inisiatief en sterk leiding openbaar. Die aanwysing van voorsitters op grond van senioriteit alleen kan so 'n ontwikkeling egter strem.

f 'n Ontwikkelde politieke stelsel beskik normaalweg oor 'n geïnstitusionaliseerde wetgewer,[159] maar 'n geïnstitusionaliseerde wetgewer wat byvoorbeeld 'n omvattende komiteestelsel het, impliseer nie noodwendig 'n hoë graad van politieke ontwikkeling nie.[160] Hoewel politieke ontwikkeling in Suid-Afrika al ver gevorder het, moet in ag geneem word dat die nuwe wetgewende instellings vir alle betrokkenes enigsins 'n nuwigheid is. Die parlement vertoon reeds 'n aansienlike mate van institusionalisering en teen bogenoemde agtergrond behoort gewaak te word teen die ongemotiveerde aanstelling van bykomende komitees. Alle betrokkenes behoort ook daarop ingestel te wees om hulle te skool in die hantering van die nuwe strukture.

g Groot ideologiese verskille tussen lede van 'n komitee moet noodwendig 'n negatiewe uitwerking hê op die komitee se werksaamhede.[161] Tot dusver kon die regerende partye van die drie huise daarin slaag om aansienlike ideologiese verskille binne die uitvoerende gesag en in komiteeverband te oorkom. Hoewel in aanmerking geneem word dat besluite oor besonder kontensieuse sake nog nie geneem moes word nie, is eenstemmigheid wel bereik oor sake soos die Wet op die Verbod van Gemengde Huwelike, artikel 16 van die Ontugwet en die Wet op die Verbod van Politieke Inmenging.

Dit blyk dus dat komitees en veral staande komitees van die parlement reeds 'n veel belangriker rol speel as komitees van die vorige parlement en dat groot verwagtinge van komitees gekoester word om 'n belangrike bydrae te maak tot die suksesvolle werkverrigting van die parlement. Komitees sal verskillend vertoon en daar moet gewaak word teen veralgemenings. Unekis en Rieselbach waarsku na hul studie van komitees van die Amerikaanse kongres:

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156 Shaw 423.
157 RO 175, wat ingevolge GRO 19 op staande komitees van toepassing is.
158 Unekis & Rieselbach 101; Smith & Deering 167 e v; Stanga & Farnsworth "Seniority and Democratic Reforms in the House of Representatives: Committees and Subcommittees" Rieselbach *Legislative Reform: The Policy Impact* (1978) 45.
159 Almond & Powell *Comparative Politics: A Developmental Approach* (1966) 159.
160 Shaw 409.
161 Unekis & Rieselbach 60; Eulau & McCluggage 216.

> "Paradoxically, perhaps, a first generalization about congressional committees is that it is dangerous to generalize about congressional committees."[162]

Indien die staande komitees daarin slaag om beleidsverskille suksesvol te hanteer en veral van die kant van die uitvoerende gesag toegelaat word om groter outonomie te verwerf en inisiatief aan die dag te lê, kan verwag word dat die tendens dat konsensusaanbevelings van die komitees voetstoots aanvaar word, sal toeneem. Hierdie tendens kan die komitees in besonder invloedryke instellings laat ontwikkel.

5 SAMEVATTING

Die nuwe komiteestelsel van die parlement is beskryf en daar is gepoog om die komitees te klassifiseer. Daar is gelet op die breedvoerige formele voorsiening wat vir die komitees gemaak word, en aan die hand van daardie prosedurereëls is die samestelling, bevoegdhede en funksionering van die komitees en hulle betrokkenheid by die wetgewende proses behandel. Innovasie en buigsaamheid is kenmerke van die betrokke reëls. Laasgenoemde kenmerk bring 'n noodsaaklike soepelheid mee in 'n situasie wat andersins tot langsame en rigiede wetgewende prosesse kon lei en dui op die inherente buigsaamheid van die Westminsterstelsel om aansienlike aanpassings te akkommodeer.

Daar is gelet op verskeie wyses waarop die nuwe komiteestelsel kan bydra tot die doeltreffende funksionering van die parlement en as bruikbare meganisme vir die regulering van konflik kan dien. Verskillende determinante wat die komitees se werkverrigting beïnvloed, is ook behandel. Hoewel dit te vroeg is vir finale gevolgtrekkings, verskaf die resultate tot dusver tog 'n aanduiding van die komitees se potensiaal.

Die komitees het 'n nuwe era ingelui wat parlementêre en spesifiek wetgewende prosedures in die Suid-Afrikaanse parlement betref. Die fokus van parlementêre werksaamhede het van die huise na die komitees begin skuif. Lede vind nuwe betrokkenheid en uitdagings in komitee-aktiwiteite. Veral by staande komitees sal die behoefte aan groter outonomie en inisiatief waarskynlik toeneem. Die toekenning van groter bevoegdhede en verantwoordelikhede aan die komitees behoort in die lig van die resultate tot dusver nie geblokkeer te word nie, omdat so 'n ontwikkeling doeltreffende parlementêre besluitneming net kan bevorder.

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162 Unekis & Rieselbach 160.

> *There is no guarantee of justice except the personality of the judge.* (per Ehrlich, aangehaal deur Cardozo in *The Nature of the Judicial Process* 17.)

Die relevansie van die normoortreding by statutêre nie-gevolgsmisdade

KJ Kemp
B Juris LLD
Professor in Privaatreg, Universiteit van Zululand

SUMMARY

The Relevance of the Fault Norm

The relevance of transgression of the fault norm as an integral part of a delict or crime has received but little attention in South African legal literature. Although it has always been recognised that the transgression of the fault norm must be relevant to the consequence for which the actor is sought to be held responsible, this has not become a separate enquiry in determining liability. The relevance of the transgression of the fault norm has simply become subsumed in the element of causation. If it becomes clear that the actor would still have caused the harmful consequence even if he had acted in a non-negligent manner, he is absolved by the simple conclusion that his negligence did not cause the reprehensible consequence. Although undoubtedly in strict theory an incorrect manner of expression, this approach has for practical purposes been grudgingly accepted by our writers, since the relevance of the transgression of the fault norm does in this way receive its due, albeit under a misnomer. Thus the relevance of the transgression of the fault norm as a separate enquiry is relegated to a purely theoretical exercise of no practical importance. This is indeed unfortunate, since the distinction between causation and the relevance of the transgression of the fault norm has many practical consequences. Perhaps the most important of the unfortunate results of the above confusion between and consequent fusion of what are really separate enquiries, is that the relevance of the transgression of the fault norm has not received its due in crimes where an act, and not a consequence, is prohibited. Yet the same rules of logic and fairness demand that the actor's fault must be relevant to the prohibited act or state of affairs. If this requirement is observed, it becomes very difficult for the state, which nowadays normally has the *onus* of proving *mens rea* and by implication, the relevance thereof, to do so in certain statutory offences. The solution to this is, however, not a change in *onus* but a change in the approach of investigative officers coupled with severe penalties where relevant *mens rea* is shown. This would have far-reaching consequences for motor traffic laws in particular, but would prevent a falling between two chairs: trivial penalties for serious offences for all, instead of no punishment for the innocent and severe punishment for the truly guilty.

1 INLEIDING

Kliënte verwag dikwels die onmoontlike van hul prokureurs. U word gevra om die onmoontlike te verrig in die volgende situasie. U klient word daarvan aangekla dat hy 'n motor bestuur het terwyl die remligte nie in 'n werkende toestand was nie. Feit: die remligte was defektief (die gloeilampie was uitgebrand) toe die verkeerspolisie hom voorgekeer het. Feit: hy was onbewus daarvan. Feit: hy het die afgelope twee weke nie die remligte nagegaan om vas te stel of dit in werkende

toestand was nie. Feit: hy het hierdie inligting aan die verkeerspolisie meegedeel. Feit: die dagvaarding is in orde. Feit: die staatsgetuies is beskikbaar.

Soms kan selfs 'n optimistiese prokureur nie kans sien om teen die feite te veg nie. Hierdie is so 'n geval. Is die klient dan skuldig en is u rol beperk tot 'n pleidooi vir strafversagting? Nieteenstaande die formidabele feite waarmee die verdediging gekonfronteer word, is die kanse op 'n onskuldigbevinding inderdaad uitstekend MITS die korrekte (en dikwels verwaarloosde, of selfs onbekende) regsbeginsels suiwer op die feite toegepas word.

Die sleutel tot bogenoemde probleem is die relevansie van die normoortreding. Hierdie artikel het dan ten doel om eers in die algemeen die relevansie van die normoortreding as onontbeerlike aaneenstrengelingsfaktor in alle misdade te analiseer en dan die resultaat hiervan op statutêre nie-gevolgsmisdade toe te pas. Ter wille van behoorlike perspektief is dit nodig om eers kortliks stil te staan by 'n ou strydvraag waaroor al veel geskryf is[1] en wat eers onlangs finaal in die presedentereg uitgestryk is. Dit is naamlik die vraag of skuld 'n bestanddeel is van 'n statutêre misdaad geskep deur 'n bepaling wat, sonder enige spesifieke verwysing na *mens rea*, bloot sekere gedrag tot misdaad verklaar.[2]

2 DIE SKULDVEREISTE BY STATUTÊRE MISDRYWE

Of skuld 'n element is van 'n misdaadskeppende bepaling wat geen uitdruklike voorskrif in die verband bevat nie, hang in wese van die wetgewer se bedoeling af.[3] Aanduidings van die wetgewende bedoeling ten opsigte hiervan is dikwels òf afwesig òf uiters vaag en dubbelsinnig.[4] Die mate waarin die voorsittende amptenaar *mens rea* as hoeksteen van 'n beskaafde strafregstelsel beskou, is gevolglik dikwels die onderliggende maar deurslaggewende faktor in die bevinding aangaande die bedoeling. Die sogenaamde oorwegings by vasstelling van die wetgewersbedoeling is al tereg by geleentheid deur die appèlhof as "ambivalent"[5] bestempel, omrede, afhangende van die basiese uitgangspunt, dit eweseer op die aan- of afwesigheid van *mens rea* as misdaadselement kan dui.

2 1 Die Aanvanklike Benadering

Gesanksioneer deur die appèlhofuitspraak in 1920 in *R v Wallendorf*[6] waarin beslis is dat die wetgewer die skuldelement deur blote verswyging kan uitsluit, het die howe aanvanklik geredelik statutêre verbodsbepalings uitgelê as sou hulle bedoel om skuldlose aanspreeklikheid te skep.[7] Hierdie benadering was geensins verrassend nie. Die Engelse reg waarop in die algemeen swaar gesteun is in daardie tydperk,[8] het 'n soortgelyke reël geken.[9] Die stand van die gemenereg het hom ook geleen tot die aanvaarbaarheid van skuldlose aanspreeklikheid.

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1 *S v Sibitane* 1973 2 SA 593 (T) 593H–594A: "So much writing has been expended on the question when *mens rea* is an element of a statutory offence . . ."
2 Vgl *LAWSA* vol 6 par 105–114 en 383.
3 *S v Arenstein* 1964 1 SA 361 (A) 365.
4 Vgl vn 5 *infra*.
5 *S v Qumbella* 1966 4 SA 356 (A) 364.
6 1920 AD 383.
7 Vgl *LAWSA* vol 6 par 111.
8 Kyk Snyman *Strafreg* (1981) 207 vn 2.
9 Kyk *R v Tolson* 1889 QBD 168.

Selfs in gevalle van ernstige misdade was skuldlose aanspreeklikheid weens die aanwending van die *versari*-leerstuk moontlik.[10] Ander gevalle van skuldlose aanspreeklikheid, byvoorbeeld minagting van die hof deur koerantredakteurs, was ook bekend.[11] Heel verstaanbaar het een van die sterkste argumente ten gunste van die inlees van *mens rea* in statutêre misdrywe, te wete die reël dat die wetgewer nie in die afwesigheid van 'n uitdruklike bepaling te dien effekte, stilswyend 'n drastiese afwyking van die gemenereg beoog nie,[12] min gewig gedra. Dieselfde geld ten opsigte van die kernbeswaar teen skuldlose aanspreeklikheid: die onredelikheid daarvan.[13] Terwyl skuldlose aanspreeklikheid in die gemenereg erken was, kon nouliks betoog word dat die wetgewer op grond van die onredelikheid daarvan nie 'n soortgelyke resultaat beoog het nie.

2 2 Die Huidige Benadering

Die verwerping van die *versari*-leerstuk en die geleidelike verdwyning van die ander gevalle van skuldlose aanspreeklikheid in die gemenereg,[14] asook die groeiende besef dat skuld die hoeksteen van 'n beskaafde regstelsel is,[15] het 'n kentering in die benadering tot die uitleg van statutêre misdrywe ingelei. Die volgende *dictum* in *S v Van Staden*[16] som die ontwikkeling goed op:

> "Since 1916 the subject of *mens rea* in relation to statutory offences has been considered time and again. The law in this connection has developed substantially while that has been happening, and the modern view, endorsed and indeed stimulated by the Appellate Division, is to recognise, more readily and frequently than used to be the case, the need for *mens rea* to accompany such offences."

Volgens die huidige benadering, wat opnuut deur die appèlhof bevestig is in *S v De Blom*,[17] *S v Ngwenya*,[18] *S v Gampel Bros and Barnett (Pty) Ltd*[19] *en S v Abrahams*,[20] kan van die skuldvereiste afgewyk word slegs as daar werklik duidelike en oortuigende aanduidings van so 'n bedoeling is. Resente regspraak bevat nie sulke voorbeelde nie.[21]

2 3 Die Oorwegings by Uitleg

Die hoofoorwegings ter bepaling van duidelike en oortuigende aanduidings van 'n wetgewende bedoeling om skuldlose aanspreeklikheid op te lê, is (i) die taal en konteks van die bepaling; (ii) die omvang en doel van die bepaling; (iii) die aard en omvang van die straf; (iv) die gemak waarmee die bepaling omseil kan

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10 Kyk Strauss en Strydom "Die Opkoms en Ondergang van die Leerstuk 'Versari in re illicita' " 1966 *THRHR* 147. Dit is treffend dat *R v Wallendorf* 1920 AD 383 juis 'n toepassing van die *versari*-reël is, asook die ontstaansbron van die aanvanklike benadering tot *mens rea* by statutêre misdrywe.

11 Kyk *LAWSA* vol 6 par 109 en 193.

12 *S v Naidoo* 1974 4 SA 574 (N) 598; *LAWSA* vol 6 par 111.

13 Kyk De Wet en Swanepoel *Strafreg* 3de uitg 101.

14 Kyk *LAWSA* vol 6 par 105–109.

15 Vgl *S v Bernardus* 1965 3 SA 387 (A) 398.

16 1976 2 SA 685 (N) 694.

17 1977 3 SA 513 (A) 532–533.

18 1979 2 SA 96 (A) 100.

19 1978 3 SA 772 (A) 784–785.

20 1983 1 SA 137 (A).

21 *Ismail v Durban Corp* 1971 2 SA 606 (N) 607 is die mees resente Suid-Afrikaanse gewysde wat pertinent skuldlose aanspreeklikheid oplê. Selfs die gelding van hierdie beslissing is tans twyfelagtig: Kyk ook *LAWSA* vol 6 par 111.

word as die beskuldigde hom op die afwesigheid van *mens rea* kan beroep; en (v) die redelikheid van die oplegging van skuldlose aanspreeklikheid.[22]

Belangrik vir huidige doeleindes is die oorweging dat deur *mens rea* as vereiste te stel, grootskaalse omseiling sal plaasvind omdat dit moeilik bewysbaar sal wees. Waar die aard van die verbode handeling sodanig is dat pleging daarvan 'n afleiding van *mens rea* regverdig of waar die stel van nalatigheid as skuldvorm, vanweë die objektiewe aard daarvan, bewys van *mens rea* moontlik maak, weeg hierdie oorweging nie swaar nie.[23] In verskeie gewysdes is omseiling voorkom deur 'n bewyslas met 'n oorwig van waarskynlikheid ten opsigte van die afwesigheid van *mens rea* op die beskuldigde te plaas.[24] Die verskuiwing van die bewyslas was die resultaat van regterlike interpretasie in stryd met die basiese beginsels van ons strafbewysreg.

'n Terugkeer tot die basiese beginsels het geleidelik in die regspraak plaasgevind en die appèlhofbeslissings in *S v Fouche*,[25] *S v De Blom*,[26] *S v Ngwenya*[27] en *S v Abrahams*[28] het dit duidelik gemaak dat in die afwesigheid van werklik oortuigende aanduidings tot die teendeel,[29] die bewyslas ten opsigte van al die misdaadselemente op die staat rus. Die hof kan nie meer die bewyslas op die beskuldigde plaas *bloot* omrede die staat *mens rea* moeilik kan bewys nie. Die korte mette wat die appèlhof in die 1983-beslissing in *S v Abrahams*[30] met die hele kwessie van *mens rea* en *onus* maak, weerspieël die huidige benadering. In twee sinne word die kwessie afgehandel:[31]

> "In regard to counts 3 and 4, relative to the contravention of s 37(1)(d) of the Act, there would seem to be no reason to conclude that *mens rea* is not an element of the completed offence. In the absence of any provision similar to that contained in s 18(4)(d) the State must bear the burden of proving the presence of *mens rea* on appellant's part."

3 DIE BETEKENIS VAN RELEVANSIE VAN NORMOORTREDING

Die Suid-Afrikaanse regspraak is braak van selfs 'n onregstreekse verwysing na die betekenis van die relevansie van normoortreding. Die regsliteratuur is byna ewe arm. Die strafreg-teksboeke maak geen direkte vermelding daarvan nie en, behalwe as die geykte stelling dat *mens rea* moet strek ten opsigte van elke (ander) misdaadselement, wyd genoeg gesien word om dit toevallig in te sluit, ook geen indirekte melding daarvan nie. Die wese en betekenis van die relevansie van normoortreding word egter glad nie deur gemelde cliché oorgedra nie.[32] Die

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22 *LAWSA* vol 6 par 111; Snyman *Strafreg* 209. Vir kritiek op hierdie oorwegings kyk veral De Wet en Swanepoel 101.

23 *LAWSA* vol 6 par 111 en 112.

24 Milton en Fuller *Criminal Law and Procedure* vol 3 (1971) 39 46–48; *LAWSA* vol 6 par 113.

25 1974 1 SA 96 (A) 101–102.

26 *supra* 532–533.

27 *supra* 100.

28 *supra.*

29 Vgl *R v Britz* 1949 3 SA 293 (A) 301. Die beginsel in dié gewysde vasgelê, is korrek ongeag twyfel omtrent die korrektheid van die toepassing daarvan op die besondere feite: kyk Hiemstra *Suid-Afrikaanse Strafproses* 3de uitg 98 312–313. Die redenasie in *S v Van der Westhuizen* 1976 4 SA 306 (K) 309–310 is eweseer op *mens rea* van toepassing.

30 *supra.*

31 147A–B.

32 As dit daardeur gedek word, is dit blote toeval: relevansie van normskending as misdaadsvereiste is nie beperk tot relevansie van skuldnormskending nie. Dit geld eweseer vir die skending van die wederregtelikheidsnorm: sien die bespreking *infra.*

enigste werklike bydrae is ook dan op die gebied van die deliktereg in die vorm van 'n artikel deur Van Rensburg.[33] Nogtans is die relevansie van normoortreding ongetwyfeld die samehegtende faktore in die misdaadsbegrip.

In Nederland staan die vereiste dat oortreding van die skuld- en wederregtelikheidsnorm relevant moet wees vir die ingetrede skade, bekend as die Demogue-Besier-teorie.[34] Van Rensburg verduidelik hierdie teorie deur die volgende voorbeeld:[35]

> "Gestel A, 'n apteker, verkoop aan B 'n hoeveelheid besonder giftige pille wat by die ontwikkeling van films gebruik word. A laat na om op die dosie aan te dui dat die pille giftig is. B se vrou, C, sien die pille vir hoofpynpille aan, drink daarvan en sterf.[18] Sover dit A se moontlike aanspreeklikheid vir C se dood betref (B se moontlike aanspreeklikheid laat ek daar), is dit nou 'n heeltemal sinvolle vraag om te vra hoe die gebeure waarskynlik sou verloop het as A wel op die pilledosie aangedui het dat die inhoud daarvan giftig is. As dit byvoorbeeld blyk dat C blind is, sodat sy in elk geval nie die waarskuwing sou kon gelees het nie, dan staan dit vas dat A se "nalatigheid" (as ek die woord in 'n losse betekenis mag gebruik) nie "oorsaak" (ook in 'n losse betekenis gebruik) van C se dood was nie, en dat hy gevolglik nie daarvoor aanspreeklik gehou kan word nie."

Dit is duidelik dat hoewel daar nie in die regspraak in hierdie terme daarna verwys word nie, die relevansie van normoortreding 'n deliksvereiste in die Suid-Afrikaanse deliktereg is.

In *Rondalia Assurance Corporation of SA Ltd v Gonya*[36] het die appellant beweer dat al sou hy op die uitkyk vir voetgangers gewees het, hy steeds die respondent sou raakgery het. Met ander woorde, selfs al was sy optrede ontdaan van die nalatige kwaliteit daarvan, sou die skade steeds ingetree het (en dus was sy skending van die nalatigheidsnorm irrelevant). Die hof tipeer die probleem as een van "a causal connection between this negligence and the accident which resulted"[37] en bevind dan dat "plaintiff did prove that Lallo's admitted negligence caused [sic] the collision with Theodora [die eiseres]"[38] Dit is duidelik dat in die afwesigheid van sodanige bewys die appellant nie aanspreeklik sou wees nie.[39]

Dat normskending relevant moet wees, word eweneens vereis in die strafreg.[40] Die apteker in Van Rensburg se voorbeeld is tog sekerlik nie skuldig aan strafbare manslag nie en sou die appellant in *Gonya* se bewering korrek gewees het, sou

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33 Van Rensburg "Nog Eens Conditio Sine Qua Non" 1977 *TSAR* 101. Kyk ook sy ongepubliseerde LLD proefskrif *Juridiese Kousaliteit en Aspekte van Aanspreeklikheidsbeperking by die Onregmatige Daad* (1970) Unisa 55–62. Vermelde artikel is 'n toepassing van die beginsels op hierdie bladsye uiteengesit op die beslissing in *Minister of Police v Skosana* 1977 1 SA 31 (A).

34 Dit het die eerste keer pertinent ter sprake gekom in die regspraak in 'n "Hoge Raad"-saak van 1928: Kyk Van Rensburg *Juridiese Kousaliteit* 58.

35 1977 *TSAR* 101 107.

36 1973 2 SA 550 (A).

37 554C.

38 555G.

39 behalwe in die mate, indien enige, wat respondent kan aantoon dat die nalatigheid relevant vir 'n vermeerderde skadeomvang was: 'n situasie soortgelyk aan die sitplekgordelgewysdes.

40 *S v Van Deventer* 1963 2 SA 475 (A) is miskien die duidelikste gesag. Die skuldigbevinding aan strafbare manslag word bevestig omrede die beskuldigde met verwysing na die moontlike gevolge, nalatig was om nie te rem nie. Dan word die relevansie daarvan in die volgende kousale terme bevestig (483E): "As mentioned earlier, the causal relationship between such failure to brake and the death of the deceased was duly established – and was not, indeed, contested."

hy ook nie daaraan skuldig gewees het indien die eiseres later beswyk het nie. Dit sal inderdaad absurd wees om hierdie persone aan strafbare manslag skuldig te bevind terwyl hulle deliktueel vry uitgaan.[41] 'n Persoon kan nalatig bestuur en 'n voetganger doodry sonder om hom aan strafbare manslag skuldig te maak as dit blyk dat hy die voetganger sou doodgery het al het hy soos die redelike man bestuur. Hy is wel skuldig aan nalatig bestuur maar omrede die nalatigheid nie relevant vir die intrede van die dood is nie, is hy nie skuldig aan strafbare manslag nie hoewel wederregtelikheid en die kousale verband tussen die bestuur en die dood vasstaan.

Om die apteker of motoris in bogenoemde voorbeelde aanspreeklik te hou, sal neerkom op 'n herlewing van die verwerplike *versari*-leerstuk, wat bestaan in die projektering van die skuld van een handeling op 'n ander handeling[42] of gevolg ten opsigte waarvan dit nie relevant is nie: die nalatigheid van die apteker of die motorbestuurder word geprojekteer op die dood van 'n persoon wat sou gesterf het weens die betrokke handeling selfs al het die nalatigheidsaard daarvan ontbreek. Daarom is dit sinvol, al staan die kousale verband tussen 'n nalatige handeling en 'n verbode gevolge vas, om te vra

> "of die gevolg ook sou ingetree het indien daardie handeling van sy nalatige aspek ontdaan was, dit wil sê indien die dader 'n handeling verrig het wat van die werklik verrigte handeling slegs sover verskil was wat nodig is om dit 'n nie-nalatige handeling te maak."[43]

Die rede waarom die relevansie van normoortreding nie selfstandige aandag in teksboeke en uitsprake geniet nie, is duidelik uit die aanhalings uit *Gonya* soos hierbo weergegee: dit word gesien as bloot deel van die kousaliteitsvraag en daar word gepraat van "causal negligence."[44] Van Rensburg beweer heel tereg dat howe en skrywers dikwels die vraag na kousaliteit en die relevansie van normoortreding verwar.[45] In gevalle waar die skending van die nalatigheidsnorm irrelevant is, word gesê dat daar nie 'n kousale verband tussen die handeling en die gevolg is nie.[46] Nalatigheid, synde 'n kwaliteit (die resultaat van 'n waarde-oordeel) van 'n handeling, kan nie, soos herhaaldelik deur skrywers uitgewys is, 'n gevolg veroorsaak nie.[47] Dit bring mee dat die vraag na kousaliteit en die vraag na die relevansie van normoortreding in beginsel verskil. Van Rensburg meen egter ten opsigte van die verwarring tussen kousaliteit en die relevansie van normoortreding dat

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41 Die afwesigheid van vergoeding bring groter onreg mee as die afwesigheid van straf, veral in die lig van die bekende strafregbeginsel dat dit beter is dat tien skuldiges vrygaan as een onskuldige boet.

42 Die *versari*-leerstuk is nie noodwendig gevolgsgerig nie. Kyk *R v Wallendorf* 1920 AD 383 (en die bespreking daarvan in *S v Van der Mescht* 1962 1 SA 512 (A) 534) vir 'n voorbeeld van hoe die skuld ten opsigte van een nie-gevolgsmisdaad geprojekteer word op 'n ander.

43 Van Rensburg 1977 *TSAR* 101 112.

44 1973 2 SA 550 (A). Vgl vn 40 *supra* asook *S v Motau* 1968 4 SA 670 (A) 678B; *S v Tuswa* 1975 3 SA 269(OK) 270E–G en *S v Grobler* 1972 4 SA 559 (O) 561 A–B: "Die beskuldigde se nalatigheid was die direkte en enigste oorsaak van die oorledene se dood."

45 1977 *TSAR* 108–109.

46 Vgl Williams "Causation in Law" 1961 *CLJ* 63 65 asook die gevalle vermeld deur Van Rensburg 1977 *TSAR* 101 108–109.

47 Vgl Van der Walt 1976 *TSAR* 101 107; Van Rensburg 1977 *TSAR* 101 108; Scott WE 1977 *De Jure* 399. In my tesis *Delictual Liability for Omissions* (1979) 38–43 het ek daarop gewys dat konsekwent beskou, nalatigheid wel as 'n gedragsvorm gesien kan word maar dat dit dan die resultaat is van 'n normatiewe oordeel wat glad nie gerig is op die konstruering van gedrag as kapstok vir 'n kousaliteitsbevinding nie. In wese het hierdie skrywers dus gelyk.

"[w]at 'n mens die betrokke toets en die betrokke verband noem, maak nie veel saak nie. Daar is talle regsgeleerdes wat hulle van dieselfde ietwat onakkurate terminologie as die hof bedien."[48]

Met hierdie toeskietlike benadering tot onpresiesheid kan glad nie akkoord gegaan word nie. 'n Helder beginsel- en terminologiese onderskeid tussen kousaliteit en relevansie van normoortreding is uiters noodsaaklik ten einde onaanvaarbare, ongewenste en weersprekende resultate te vermy. Die volgende is sommige van die redes waarom 'n helder onderskeid gehandhaaf moet word:

a Gestel X slaan op die gholfbaan af by 'n putjie waar mense dikwels oor die skoonveld loop. X kyk glad nie vooraf of daar mense in die omgewing is nie. Die bal tref W en hy sterf. By die verhoor blyk dit dat al het X behoorlike sorg geopenbaar (rondgekyk), hy nie vir W sou gesien het nie en hom in ieder geval sou getref het. X is klaarblyklik nie aanspreeklik nie want sy skuldnormskending is irrelevant. Diegene wat dit met kousaliteit verwar, sal beweer dat hier nie 'n kousale verband tussen X se positiewe handeling (die afslaan) en die hou teen W se hoof en dus sy dood is nie. Gestel egter dat W nie onmiddellik gesterf het nie en dat X sy lewe deur redelike optrede kon red maar nalatig versuim het om dit te doen. X is ongetwyfeld aanspreeklik vir W se dood op grond van 'n *omissio per commissionem*: al wat vir die ontstaan van 'n regsplig vereis word, is dat die nalater 'n gevaarsituasie (*in casu* W wat dreig om te beswyk weens die hou teen sy hoof) vir die slagoffer geskep het, wat andersins nie sou bestaan het nie.[49] Daar moet 'n kousale verband tussen sy positiewe optrede en die gevaarsituasie wees. Deur X aanspreeklik te hou vir W se dood op grond van 'n *omissio per commissionem* word hierdie ongetwyfelde kousale verband tussen X se optrede (die afslaan) en die hou teen W se hoof (wat sy dood veroorsaak) erken. As daar nie in eerste instansie gepoog word om X se aanspreeklikheid op die nalatige[50] afslaan te baseer nie, sou niemand seker twee keer oor die kousale verband tussen X se positiewe optrede en W se dood dink nie.

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48 1977 *TSAR* 101 113. Die "hof" verwys na die uitspraak in *Minister of Police v Skosana* 1977 1 SA 31 (A). In so 'n geval waar die onregmatige gedrag 'n late is, sal dit waarskynlik nie saak maak nie. By die late is die toets vir kousaliteit (anders as wat Van Rensburg impliseer) die ekwivalent van die vraag na die relevansie van die skending van die wederregtelikheids- en skuldnorm: Vgl my *Delictual Liability for Omissions* 14–17 52–55 637–641. In ander gevalle is dit, soos in die teks uitgewys word, wel deeglik van belang om die onderskeid te maak. (Die stellings in vn 47 en 48 verduidelik egter hoekom die howe geneig is om van kousale nalatigheid te praat. Die nalatigheidsversuim word as gedrag ('n late) gesien en deur die konstruksie van die hipotetiese gedrag, word beide kousaliteit en relevansie ondervang).

49 Vgl Kemp "In Defence of the *Omissio per Commissionem*-Doctrine" 1981 *Obiter* 51.

50 Skrywers beweer dikwels dat 'n persoon net nalatig kan wees ten opsigte van die gevolge van sy optrede (Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 5de uitg 139–140; Scott WE 1977 *De Jure* 399 401: "Dit [is] nie duidelik ... hoe nalatigheid vasgestel kan word indien die kousale verband tussen die handeling en gevolg nog nie vasgestel is nie." Stuart "More Wood for the Remoteness Fire" 1967 *SALJ* 76 79: "One cannot say that an act is negligent without referring to the consequences in respect of which there was an absence of care." MacIntosh and Norman-Scoble *Negligence in Delict* 5de uitg 14; Visser 1977 *De Jure* 386 397).
Suiwer gesien, kan gesê word dat 'n persoon nalatig kan wees ten opsigte van die moontlike gevolge van sy optrede selfs voordat die kousale verband tussen handeling en gevolge (wat onder die moontlikes resorteer) vasstaan. Die klem op voorsienbaarheid, die prognostiese aard van die nalatigheidskriterium maak dit duidelik. Die bestuurder wat skuldig is aan nalatige bestuur se nalatigheid word tog beoordeel aan die hand van die redelike man se gedrag inaggenome die moontlike gevare vir ander (die gevolge) spruitende uit die bestuur. Die nalatigheidstoets is tog nie 'n *ex post facto*-toets nie. Die feit dat 'n persoon nalatig is ten opsigte van 'n sekere gevolg beteken natuurlik nog glad nie dat die nalatigheid relevant is vir die gevolg nie.

Die volle absurditeit om X se nie-aanspreeklikheid in hierdie eerste geval op die afwesigheid van kousaliteit te baseer, kom nou na vore. Vir hierdie doeleindes is daar nie 'n kousale verband tussen X se afslaan, die hou teen W se hoof en sy dood nie, maar vir die doeleindes van die *omissio per commissionem*-leerstuk is daar 'n kousale verband tussen X se afslaan, die hou teen W se hoof en gevolglik sy dood.[51] As diegene wat irrelevansie van die normoortreding as afwesigheid van kousaliteit beskou, konsekwent wil wees, moet X ook nie op grond van 'n *omissio per commissionem* aanspreeklik wees nie. Aanspreeklikheid kan anders net verduidelik word deur die inkonsekwensie om nou 'n reeks gebeure as nie kousaal verbind nie te bestempel terwyl dieselfde reeks gebeure net daarna as kousaal verbind bestempel word. Min juriste sal met die uitlating dat die reg 'n esel is, saamstem. Terwyl sulke verwarde denke wat tot sulke inkonsekwensies lei, gehandhaaf word, is die reg egter niks anders as 'n kousaliteitsverkleurmannetjie nie, en 'n domme daarby.

b Verwarring tussen kousaliteit en relevansie van normoortreding hou die gevaar in dat in sommige gevalle van strafbare manslag nie voldoende aandag aan laasgenoemde vereiste verleen word nie.[52] Waar dit byvoorbeeld duidelik is dat 'n beskuldigde nalatig bestuur het en die feitelike kousale verband tussen bestuur en die dood van die slagoffer vasstaan, moet die versoeking groot wees om 'n skuldigbevinding hierop te baseer, en sodoende moeilike hipotetiese konstruksies te vermy ten opsigte van wat sou gebeur het as die beskuldigde soos 'n redelike man bestuur het. Veral waar die slagoffer bydraend nalatig is, is dit egter noodsaaklik dat dit wel gedoen word.[53]

c Gemelde verwarring kan daartoe lei dat nie behoorlike effek aan 'n verskuiwing van die bewyslas verleen word nie. Soms word die bewyslas ten opsigte van skuld uitdruklik of stilswyend deur wetgewing verskuif.[54]

Dit beteken dat die bewyslas ten opsigte van die relevansie van die skuldnormoortreding outomaties ook skuif: dit vorm deel van die skuldvereiste. As dit egter as 'n kousaliteitsvraag gesien word, sal die bewyslas verkeerdelik nie geskuif word nie.

d Die grootste gevaar van hierdie verwarring is egter dat dit meebring dat die rol wat die relevansie van normoortreding as moontlike verweer speel by niegevolgsmisdade, in teenstelling met gevolgsmisdade en die deliktereg wat gevolgsgeoriënteerd is, nie besef word nie. In die regspraak word dit nêrens pertinent vermeld nie; nòg deur die verdediging, nòg deur die staat, nòg deur die hof.[55]

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51 Die absurditeit blyk nog duideliker uit die volgende voorbeeld: A bestuur nalatig en ry B om. Selfs al het hy versigtig gery, sou hy B omgery het. B se arm en been word beseer. A kan deur positiewe optrede B se been maar nie sy arm red nie. A word op grond van 'n *omissio per commissionem* aanspreeklik gehou vir die verlies van die been: hy het sy reddingsplig, gebaseer op die veroorsaking van die besering, nie nagekom nie. A word nie aanspreeklik gehou vir die verlies van die arm nie; hy het nie die besering aan die arm veroorsaak nie. A ry B om. B se been en arm is in hierdie botsing beseer. A het die besering aan die been veroorsaak maar nie dié aan die arm nie! (Om die basis van die reddingsplig te beperk tot "prior conduct" is hierdie nie as teksvoorbeeld gebruik nie.)

52 Vgl die bevinding van die hof *a quo* in *S v Motau*.

53 Die feit dat die slagoffer deur sorgsame optrede die ongeluk kan vermy, is klaarblyklik in beginsel heel losstaande van die vraag na die relevansie van die beskuldigde se nalatigheid.

54 Vgl *LAWSA* vol 6 par 113; Hoffmann en Zeffert *The South African Law of Evidence* 3rd ed (1981) 400–402 en hfst 16.

55 Vgl die bespreking hieronder.

Tog is die bewysbaarheid van die relevansie van normoortreding van wesenlike belang by die ondersoek of *mens rea* 'n vereiste is vir 'n besondere statutêre nie-gevolgsmisdaad. Dit speel dikwels 'n groot rol by een van die erkende en belangrikste oorwegings by hierdie ondersoek: in hoe 'n mate die vereiste van *mens rea* die bewysbaarheid van die misdryf bemoeilik en sodoende die deur vir omseiling open.[56]

4 DIE RELEVANSIE VAN NORMOORTREDING EN STATUTÊRE NIE-GEVOLGSMISDADE

Dat skuldnormskending by statutêre nie-gevolgsmisdrywe relevant moet wees vir die verbode *actus reus*, val nie te betwyfel nie. Dit sal op anomaliese wyse afbreuk doen aan die eenheid van die misdaadsbegrip om dit wel as vereiste vir misdaadspleging by gevolgsmisdade te stel terwyl dit by nie-gevolgsmisdade geïgnoreer word. Suiwer gesien, hou dit nie verband met die kousaliteitsvraag nie.[57] Die feit dat kousaliteit nie 'n rol by nie-gevolgsmisdade speel nie, kan dus nie as regverdiging vir die verontagsaming van hierdie vereiste by sulke misdade dien nie.

Die verontagsaming van die relevansie van normskending lei voorts tot die totstandkoming van 'n toestand analoog aan, maar selfs meer verwerplik as dié geskep deur die reeds verwerpte *versari-* leerstuk. Ook by 'n nie-gevolgsmisdaad moet die vereiste skuld tog verband hou met die verbode *actus reus* anders word irrelevante "negligence in the air" bestraf.[58]

Ter illustrasie word verwys na die aanvanklike voorbeeld in die inleiding gestel: dié van die motoris wie se remligte defektief was en wat dit die laaste twee weke nie nagegaan het nie. Volgens die huidige benadering word skuld vir die betrokke misdryf vereis. Die motoris is verplig om redelike stappe te doen om te sorg dat sy remligte nie defektief is nie. Kennelik het hy dit versuim en in die lig van sy erkenning aan die verkeerspolisie, word *mens rea* deur die staat op wie die *onus* volgens die huidige benadering rus, bewys. Die staat moet egter ook bewys dat hierdie nalatigheid relevant vir die pleging van die *actus reus* is: die bestuur van 'n motor met defekte remligte. (Dit is tog nie enige verwytbare gedrag wat voldoende is nie; die motoris word verwyt omrede hy 'n motor in so 'n toestand bestuur.)[59] Die staat kan slegs die relevansie van die motoris se nalatige versuim bewys as bewys word dat as die beskuldigde die motor nagegaan het, hy die defek sou gevind het. Met ander woorde, die staat sal moet bewys dat die ligte defektief was gedurende een van die geleenthede waarop die motoris,

56 Vgl die bespreking van die oorwegings by die uitleg van statutêre bepalings hierbo, asook *LAWSA* vol 6 par 111.

57 Vgl die bespreking hierbo.

58 Dit sal later blyk dat wat dan gestraf word iets heel anders is as die ware misdaad soos formeel omskryf.

59 'n Wesenlike aspek van die skuldbegrip is tog dat in die afwesigheid van skuld die verbode *actus reus* voorkom sou word.

ooreenkomstig die nalatigheidsnorm, moes gekyk het.[60] Slegs dan kan gesê word dat hy skuld vir die pleging van die *actus reus* het. Bewys hiervan kan, afhangende van die omstandighede, 'n onmoontlike taak wees. 'n Remlig kan te eniger tyd defektief raak sonder dat die bestuurder dit agterkom[61] en daar kan nie uit die defek afgelei word dat dit reeds voor die rit bestaan het nie. Faal die staat om te bewys dat die bestuurder die defek sou agtergekom het, indien hy soos die redelike man sou opgetree het, is die relevansie van die skuldnormoortreding nie bewys nie en moet 'n onskuldigbevinding volg.[62] Dat enige ander benadering op iets meer verwerplik as die *versari*- leerstuk neerkom, word deur die volgende hipotese geïllustreer. Gestel die beskuldigde erken dat hy nalatig nie sy remligte die voorafgaande maand nagegaan het nie. Op die betrokke dag gewaar hy 'n verkeerskonstabel in sy truspieël en trap rem om rigtingaanwysings te vra. Net daarna word hy deur 'n ander verkeerskonstabel voorgekeer en beboet omrede sy remligte nie brand nie. Die eerste konstabel getuig dat die remligte gebrand het toe voor hom stilgehou is. Daar kan nouliks betoog word dat die motoris skuldig is: al het hy alles gedoen wat ingevolge die skuldnorm van hom verwag is, sou hy steeds die verbode *actus reus* begaan het—sy nalatigheid is heeltemal irrelevant ten opsigte van die verbode handeling. Dit is nie 'n misdryf om die motor nie na te gaan nie. 'n Skuldigbevinding op vermelde aanklag sal dus daarop neerkom dat die nalatigheid van 'n versuim wat nie eers 'n misdryf is nie, geprojekteer word op 'n verbode handeling waarvan die verrigting hoegenaamd nie daardeur geaffekteer is nie. Dit sal voorts kan lei tot 'n bevinding van strafbare manslag want dit is moeilik om die volgende logiese konsekwensie van so 'n skuldigbevinding te ontsnap waar hierdie motoris 'n noodlottige ongeluk gemaak toe hy voorgekeer is: hy was nalatig ten opsigte[63] van die werking van sy remligte en die defektiewe remlig het die oorledene se dood veroorsaak. Sy nalatigheid is dus relevant vir die dood van die oorledene terwyl dit inderdaad nie die geval is nie! Hiermee is ons volsirkel terug by die *versari*-leerstuk.[64] Die waarheid is dat net so min as wat die bestuurder se nalatigheid relevant is vir die slagoffer se dood en hy skuldig is aan strafbare manslag, net so min is sy nalatigheid relevant vir die bestuur van 'n motor met defekte remligte en hy skuldig aan sodanige misdryf.

Die noodwendige gevolgtrekking is dat die relevansie van normoortreding 'n wesenlike bestanddeel van statutêre nie-gevolgsmisdade vorm en dat waar *mens*

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60 In gevalle van ander meganiese defekte wat minder ooglopend is, sal die staat ook moet bewys dat 'n behoorlike ondersoek die defek aan die lig sou gebring het. Vgl *S v Pretorius* 1964 1 SA 735 (K) 740G: "Moreover, there are no doubt some defects which cannot be easily detected and might escape the attention of even a reasonably competent and vigilant expert."

61 Vgl *S v Sibitane* 1973 2 SA 593 (T) 595G: "A light globe can fuse at any moment, whether new or old . . ." Kyk ook *S v Pretorius supra* 595E–H en *S v Marangwe* 1967 1 SA 607 (T) 608E: "Daarenteen kan enige motor onverhoeds sonder waarskuwing defek raak, noukeurige voorafgaande aandag daaraan ten spyt."

62 Ongeag of 'n behoorlike inspeksie nie 'n bestaande defek aan die lig sou bring nie en of die defek nie op die relevante tyd reeds bestaan het nie.

63 Vgl vn 50 hierbo.

64 Nalatigheid is nie relevant tot die verbode *actus reus* of gevolg nie bloot omrede dit bestaan uit die versuim van die voorsorg wat die beskuldigde ten opsigte van die (voorsienbare) verbode *actus reus* of gevolg behoort te getref het. Dit sou 'n sirkelargument wees: nalatigheid is relevant omdat dit nalatigheid is. Sodoende word relevansie van nalatigheid as vereiste negeer.

rea vereis word, die skuldnormoortreding relevant moet wees vir die verbode *actus reus*.[65]

5 DIE SKULDVEREISTE BY STATUTÊRE MISDRYWE EN BEWYS VAN DIE RELEVANSIE VAN NORMOORTREDING

Soos reeds aangetoon, is die huidige regstand dat *mens rea*, in die afwesigheid van duidelike en oortuigende aanduidings tot die teendeel, in elke statutêre misdryf ingelees moet word en dat die staat in ooreenstemming met die basiese beginsel dat dit elke element van die misdryf moet bewys, die bewyslas ten opsigte van *mens rea* dra.[66] Die staat sal dan ook die relevansie van die normoortreding moet bewys. Dit het hierbo geblyk dat bewys daarvan in sekere gevalle (hierby kan gevoeg word gevalle soos bestuur sonder 'n nommerplaat, defektiewe rem-(stop-) ligte, flikkerligte en ander meganiese gebreke wat skielik en onverwags kan ontstaan en die beskuldigde nie vanweë die aard van die *actus reus* bewus sal of behoort te word van die defek nie[67]) feitlik onmoontlik is. Die vraag ontstaan dus nou watter effek hierdie bewysleweringsprobleme op die huidige regstand insake *mens rea* en *onus* het.

Ten einde die bewysleweringsprobleem in behoorlike perspektief te sien, kan met vrug gelet word op watter effek die verg van bewys van relevansie van normoortreding sou hê in gewysdes waar die tipe geval waaroor dit hier gaan, ter sprake gekom het.

In *Moonsamy v R*[68] is die tweede beskuldigde onskuldig bevind op 'n klagte dat hy toegelaat het dat sy motor bestuur word terwyl die handrem defek was. Die gedeeltelik blinde beskuldigde het die sorg van die motor aan 'n ander toevertrou en die staat het nie feite beweer wat 'n afleiding van *mens rea* regverdig nie. Die eerste beskuldigde, die bestuurder, is wel op 'n soortgelyke klag skuldig bevind. Dit is nie duidelik of *mens rea* in sy geval vereis is nie. Die geheelindruk is egter dat die aard van die defek die afleiding regverdig het dat dit reeds 'n tyd lank bestaan het en by behoorlike inspeksie na vore sou gekom het. Die aanwesigheid van relevante skuldnormskending was dus afleibaar uit die feite en sou nie bewysleweringsprobleme opgelewer het nie.

In *S v Pretorius*[69] is die beskuldigde, 'n buseienaar, daarvan aangekla dat hy 'n voertuig gebruik het wat weens defektiewe remme onpadwaardig was. Die defek, verslete remskoene en voerings, het geblyk reeds lank voor die rit te bestaan het.[70] Onmiddellik voor die rit het die beskuldigde egter die bus deur gekwalifiseerde persone laat versien. Die hof bevind dat *mens rea* 'n element van die misdryf is, dat die *onus* op die beskuldigde rus en dat hy deur die getuienis van behoorlike versiening hom daarvan gekwyt het. Volgens die hof

65 Die relevansie van normoortreding moet natuurlik behoorlik toegepas word. Iemand wat 'n motor toevallig bestuur (rigting snelheid ens) soos die redelike man, is steeds skuldig aan nalatige bestuur as hy sy aandag geensins by die pad bepaal nie sou daar 'n skielike gevaarsituasie ontstaan waarop hy nie kan reageer nie en dit is onder andere wat die nalatigheidsnorm van hom verg terwyl hy bestuur.

66 Vgl par 2 hierbo.

67 asook enige ander bestaande defek wat op die tydstip waarop 'n behoorlike inspeksie gehou moes word, nie daardeur geopenbaar sou word nie.

68 1942 NPD 135.

69 1964 1 SA 735 (K).

70 737H–738A.

sal 'n beskuldigde slegs die verwyt van nalatigheid ontkom deur op 'n oorwig van waarskynlikheid te toon dat hy nie van die defek geweet het nie en voorts alle redelike stappe gedoen het om die padwaardige toestand van die motor te verseker.[71] Dit is duidelik dat selfs al het die *onus* op die staat gerus, geen ernstige bewysprobleme ondervind sou word nie. Die aard van die defek regverdig die afleiding dat dit voor aanvang van die rit bestaan het en dít op sy beurt regverdig 'n *prima facie*-afleiding van relevante nalatigheid.

Die beskuldigde in *S v Marangwe*[72] is daaraan onskuldig bevind dat hy 'n voertuig met defektiewe flikkerligte bestuur het. Die hof bevind dat *mens rea* 'n vereiste vir die betrokke oortreding is en plaas die bewyslas op die beskuldigde wat hom daarvan kwyt deur getuienis dat hy voor die aanvang van die betrokke rit sy flikkerligte getoets en in orde gevind het. Die hof stel dit duidelik dat 'n beskuldigde nie alleen onbewustheid moet bewys nie maar dat hy ook "alles vooraf gedoen het wat 'n redelike man sou doen om seker te maak dat sy wysers in goeie werkende orde is en sal bly."[73]

Laastens die uitspraak in *S v Sibitane*.[74] Beskuldigde is ten laste gelê dat hy 'n motor met defektiewe remligte (dit het nie gebrand nie) bestuur het. *Mens rea* word vereis en die bewyslas op die beskuldigde geplaas. Die beskuldigde se weergawe dat hy met die hulp van sy seun die remligte getoets het, word deur die landdros verwerp en hy word skuldig bevind. By appèl word die verwerping gehandhaaf. Feitebevindings word gewoonlik nie akademies bevraagteken nie maar die blatante en ironiese "Catch 22"-inslag van hierdie geloofwaardigheidsbevinding, gesien een van die gronde waarop dit gebaseer is, laat 'n mens onwillekeurig regop sit.[75] Die beskuldigde se weergawe is verwerp onder andere omdat dit inherent onwaarskynlik bevind is.[76] Implisiet in die klem wat in *Marangwe* en *Sibitane* gelê word op die hoë mate van sorgsaamheid wat vereis word, is dat 'n versuim om flikker- en remligte voor 'n rit te inspekteer, nalatigheid daar sou stel.[77] Getuig die beskuldigde egter dat hy wel die sorgsaamheid aan die dag gelê het, word dit verwerp as inherent onwaarskynlik.[78] Doen hy nie wat die reg van hom verwag nie, tref die verwyt van nalatigheid hom: doen hy wel wat die reg van hom verwag, glo die hof hom nie en tref die verwyt van nalatigheid hom steeds!

Die bevinding dat voldoening aan die regsnorm inherent onwaarskynlik is, impliseer duidelik dat die regsnorm onredelik is (dit is tog nie inherent onwaarskynlik dat iemand redelike voorsorg sal tref nie). Die wese van die nalatigheidsnorm is die verging van *redelike* sorgsaamheid. Deur onrealistiese eise

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71 740C–E.
72 1967 1 SA 607 (T).
73 608H.
74 1973 2 SA 593 (T).
75 Of die hof van appèl korrek was in sy bevinding dat die beskuldigde se stilswye ten tyde van ondervraging deur die verkeerskonstabel teen hom gehou kan word, is nie nou ter sake nie.
76 596B–D.
77 Vgl ook die wyse waarop die appellant se advokaat in *Sibitane* die beslissing in *Marangwe* verstaan (593): "The test set out in *S v Marangwe* . . . is over stated . . . To require a person every time he drives his car to carry out a rear light test is requiring far too much."
78 Vgl egter in teenstelling die feitebevinding in *Marangwe supra* 607F–608A. Miskien is dit die dubbele toets van die remligte in *Sibitane* wat beskuldigde se weergawe verdag gemaak het: moontlik 'n geval van "the accused doth protest too much, methinks?"

aan die motoris in die naam van die nalatigheidsnorm te stel,[79] word die ware skuldnorm ondergrawe.

Tans moet aanvaar word dat die staat die bewyslas dra ten opsigte van sowel *mens rea* as relevansie van normoortreding. Hoe sou dit die bevindings in hierdie gewysdes raak? In sowel *Moonsamy* as *Pretorius* sou die staat relevante nalatigheid *prima facie* kon bewys. In alle gevalle waar die aard van die defek sodanig is dat daaruit afgelei kan word dat dit op die relevante tyd bestaan het *en* deur die nodige sorg ontdek sou kon word, ontstaan geen besondere bewysprobleme ten opsigte van relevante nalatigheid nie en grootskaalse omseiling is onwaarskynlik. In *Marangwe* en *Sibitane* sou die verging van bewys deur die staat van relevante nalatigheid 'n dramatiese handomkeer bewerkstellig. Die gewraakte defek kan uiteraard te eniger tyd ontstaan ('n gloeilampie, nuut of oud, kan enige tyd uitbrand)[80] en dit is bykans onmoontlik om *ex post facto* vas te stel wanneer dit gebeur het.[81] Dit is wel nog moontlik, hoewel moeilik, om *mens rea* te bewys. So kan die verkeerskonstabel die motoris vra wanneer laas hy sy motor nagegaan het. Sou die motoris die versekering gee dat dit nog dieselfde dag was en daar toe niks geskort het nie, sal die aantref van enige defek wat uiteraard 'n geruime tyd blyk te bestaan het, sy geloofwaardigheid sterk aantas. Swye kan, afhangende van omstandighede, dieselfde effek hê.[82] Voorts moet ook nie sonder meer aanvaar word dat motoriste meineed sal pleeg deur valse getuienis van behoorlike ondersoek nie. Doeltreffende kruisondervraging gerig op die gereeldheid van sulke ondersoeke, getuies daarvan ensovoorts kan leuens ontmasker.[83] Die blote feit dat groter doeltreffendheid en noukeurigheid van ondersoekbeamptes en aanklaers geverg sal word, kan nouliks die navolging van die ander alternatief – die plasing van die motoris op die brandstapel van strikte aanspreeklikheid – regverdig.[84] Om op grond van bewysmoeilikheid *mens rea* te negeer, "is strydig met elementêre billikheid, en ook die grondreël dat die bewyslas op die staat rus."[85] Die verskuiwing van die bewyslas na die staat kan dus nie in sake soos *Marangwe* en *Sibitane* die uitskakeling van *mens rea* regverdig nie.

Wat die relevansie van skuldnormoortreding betref, is die posisie anders: tensy die staat toevallig (en dit sal seker uiters selde wees) getuienis het dat die defek op die relevante tydstip reeds bestaan het, is dit onmoontlik om relevansie te bewys. Twee hipoteses is ewe moontlik: die defek het op die relevante tydstip bestaan — dus is die nalatigheid relevant; of die defek het nie bestaan nie —

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79 Vgl ook Carpenter "The Reasonable Motorist – A Modern Myth" 1978 1 *Codicillus* 15.

80 Kyk vne 60 61 en 62 *supra.*

81 Waar die relevansie draai om die vraag of redelike sorg 'n defek of potensiële defek op die relevante tydstip sou geopenbaar het, sal 'n antwoord dikwels moontlik hoewel moeilik verkrygbaar wees: vgl vn 60 *supra.*

82 Of die hof in *S v Sibitane supra* geregtig was om so 'n afleiding te maak, is twyfelagtig.

83 As die beskuldigde beweer dat hy altyd sy motor nagaan voor hy ry, kan 'n polisielid hom dophou en kyk of hy dit wel doen. Dit is ook nie 'n geval van 'n kanon gebruik om 'n muggie te dood nie. Soos sal blyk, is hierdie ernstige misdade en regverdig dit swaar strawwe. Die huidige stelsel van ligte strawwe en oppervlakkige ondersoeke is uiters onbevredigend. Die ligte aard van die straf is blykbaar 'n gewetensalf vir die onreg van 'n ongegronde skuldigbevinding weens 'n onvoldoende ondersoek.

84 Vgl die verwerping deur ar Steyn in *S v Bernardus* 1965 3 SA 287 (A) 297F–H van die argument dat die *versari* leerstuk behou moet word omdat dit bewysprobleme vir die staat uitskakel.

85 *S v Bernardus supra* 297G.

dus is die nalatigheid irrelevant. Omdat die betrokke defek enige tyd kon ontstaan het en daar nie getuienis is van wanneer nie, is die hipoteses ewe geldig.[86]

Waar die staat dan die bewyslas dra en daar twee ewe geldige hipoteses ten opsigte van 'n misdaadvereiste voor die hof is, een ten gunste van onskuld en die ander tot die teendeel, moet die beskuldigde vry uitgaan. In *Marangwe* en *Sibitane* en analoë gevalle sal die beskuldigde feitlik deur die bank onskuldig bevind moet word weens gebrek aan bewys van relevante skuldnormskending. Die vraag is nou wat gedoen kan word om te verhoed dat die misdaadsbepaling in hierdie gevalle 'n blote *brutum fulmen* word.

6 OPLOSSINGS VIR DIE BEWYSLEWERINGSPROBLEEM TEN OPSIGTE VAN DIE RELEVANSIE VAN NORMOORTREDING

Die voor-die-handliggende oplossing is om die betrokke bepalings in *Marangwe* en *Sibitane* (asook analoë bepalings) so uit te lê dat *mens rea* nie 'n misdaadselement is nie. In *Sibitane* waarsku regter Hiemstra juis dat

> "those who would impose the burden of disproving *mens rea* [en dus ook die relevansie van nalatigheid] on the State throughout (which is in principle correct) should be willing to accept absolute liability in all cases where proof of *mens rea* by the State is well-nigh impossible."[87]

Hoewel 'n uitleg van strikte aanspreeklikheid moontlik is in die lig van die wel erkende omseilingsoorweging, sou so 'n uitleg die kind saam met die badwater weggooi. Bewys van *mens rea* is moeilik maar moontlik – om in stryd met basiese regsbeginsels onregverdige strikte aanspreeklikheid op te lê bloot omrede bewys van die relevansie van skuldnormoortreding feitlik onmoontlik is, is onaanvaarbaar. Onnodige onregverdighede moet nie in ons reg ingevoer word bloot omdat dit by wyse van newe-effek 'n ander probleem "oplos" nie. Die oplossing moet gerig wees op die ware probleem – bewys van die relevansie van skuldnormoortreding.

Een moontlikheid is om die bewyslas ten opsigte van die relevansie van skuldnormskending op die beskuldigde te plaas.[88] Twee vrae ontstaan nou: (a) Is dit regverdig om die *onus* op die beskuldigde te plaas?; en (b) het die hof die inherente bevoegdheid om so 'n verskuiwing te maak?

In verskeie gewysdes in die "common-law"-stelsels is in deliksaksies die las op die verweerder geplaas om die afwesigheid van kousaliteit (en in sekere gevalle moontlik die relevansie van normoortreding) te bewys.[89] Die gemene deler in hierdie gewysdes is dat die "nalatigheid" van die skadeveroorsakende handeling juis die rede is waarom kousaliteit feitlik onbewysbaar is. Die Kanadese beslissing *Cook v Lewis*[90] illustreer dit uitstekend. A, B en C gaan jag saam. A en B sien iets beweeg en skiet daarop. Dit blyk C te wees wat noodlottig deur een koeël getref word. Hoewel dit duidelik is dat C deur A of B gedood is, is dit onmoontlik om vas te stel wie hom getref het. Albei was nalatig ten opsigte van C.[91] Die hof plaas die bewyslas om die afwesigheid van kousaliteit te bewys

86 Vgl vne 60 61 en 62 *supra.*
87 *supra* 595F–G.
88 soos aanvanklik die geval by "suiwer" *mens rea* was: kyk par 2 1 *supra.*
89 Vgl Kemp *Delictual Liability for Omissions* 640.
90 1952 1 DLR 1.
91 Vgl vn 50 *supra* en kyk ook *Frenkle E Co v Cadle* 1915 NPD 173.

op A en B en by gebrek aan weerlegging word altwee aanspreeklik gehou. Weinrib verduidelik die beslissing soos volg:

> "Whether or not the culpable defendant has caused the injury, he has caused the disappearance of the means of proof [deur sy nalatige optrede], and therefore it is unfair that the plaintiff should have to bear an onus which the defendant has rendered impossible to satisfy."[92]

Behoort dieselfde benadering by die onderhawige strafbewysregprobleem gevolg te word? Die beskuldigde is tog "nalatig" ten opsigte van die verbode *actus reus*; hy is feitlik al een wat in staat is om getuienis aangaande die relevansie van sy nalatigheid aan te voer en dit is juis aan sy nalatigheid te wyte dat die getuienis nie beskikbaar is nie. Myns insiens behoort die bewyslas nie by wyse van analogie verplaas te word nie. Hoewel bewyslasligging in wese 'n logiese en billikheidskwessie is,[93] geld in die strafreg ander oorwegings as in die deliktereg. In die deliktereg het uitspraak vir die eiser of verweerder nie 'n inherente vooropgestelde billikheidsbasis nie en enige billikheidsoorweging kan afwyking van die logiese reël, hy wat beweer moet bewys, regverdig. In die strafreg word hierdie logiese reël gerugsteun deur die basiese billikheidsoorweging dat dit beter is dat tien skuldiges vry gaan as dat een onskuldige boet. Die beskuldigde se nalatigheid sal meebring dat hy bykans in alle gevalle (behalwe waar hy deur toeval 'n getuie het dat die defek op die relevante tyd afwesig was) nie die irrelevansie daarvan sal kan bewys nie. Die verskuiwing van die bewyslas na die beskuldigde sal dus meebring dat 'n groot aantal persone wat nòg werklike oortreders nòg omseilers van die betrokke bepaling is, skuldig bevind sal word. Daardeur word die relevansie van normoortreding as misdaadsvereiste tot fiksie gereduseer. Onder die dekmantel van 'n bewyslasverskuiwing word die *versari*-leerstuk dus in 'n verbloemde vorm by die agterdeur ingelaat. Dit is voorts belangrik dat die omseilingskwessie in behoorlike perspektief geplaas word. Die mate van omseiling hou nie, soos soms verkeerdelik te kenne gegee is,[94] verband met die persentasie onskuldigbevindings nie. Die ware vraag is hoeveel persone wat inderdaad skuldig is aan die misdryf (omrede hulle van relevante *mens rea* verwyt kan word), hul geslaagd op die afwesigheid van relevante *mens rea* kan beroep.[95] Waar dit onseker is of die beskuldigde se normoortreding relevant is, is 'n onskuldigbevinding nie sonder meer die resultaat van omseiling nie. Deur-die-bank-skuldigbevindings kan dus net soveel, of selfs meer, onskuldiges as omseilers aan die pen laat ry.

Wat die bevoegdheid van die hof betref om 'n bewyslasverskuiwing te maak, moet daarop gewys word dat dit in stryd met basiese beginsels van die strafbewysreg is.[96] Daardeur word ook, soos aangedui, die reeds verwerpte *versari*-leerstuk in verbloemde vorm uit die dode opgewek. Dit is uiters twyfelagtig of 'n hof van inherente regskeppende bevoegdheid gebruik moet of kan maak waar die resultaat daarvan is om, in stryd met basiese beginsels van ons strafbewysreg, 'n regsposisie te skep wat lynreg in stryd met die basiese beginsels van ons materiële strafreg is.[97] Die plasing van 'n bewyslas op die beskuldigde deur die

92 "A Step Forward in Factual Causation" 1975 *Mod L R* 518 523–524.
93 *Pillay v Krishna* 1946 AD 946 953–954.
94 Vgl die Rhodesiese uitspraak in *S v Fernandes* 1974 2 SA 627 (RA) 630.
95 Kyk *LAWSA* vol 6 par 111 en 112.
96 Vgl *LAWSA* vol 6 par 113 en 383.
97 Kyk mbt die regskeppende bevoegdhede van die hof Kemp "Die Skuldvereiste by Laster" 1982 *De Jure* 141.

howe as oplossing vir die bewysprobleem ten opsigte van die relevansie van skuldnormoortreding is dus sowel ongewens as van twyfelagtige geldigheid.

Sonder wetgewende ingreep is daar dus geen oplossing[98] vir die bewysprobleem in gevalle soos, en analoog aan, dié in *Marangwe* en *Sibitane* nie. Sodra die regsprofessie die wese, beskikbaarheid en onaanvegbaarheid van die verweer van irrelevansie van skuldnormoortreding in sodanige gevalle besef, sal onskuldigbevindings aan die orde van die dag wees. Ingevolge die nuwe pleitprosedures sal landdroste verplig wees om selfs by 'n pleit van skuldig, 'n pleit van onskuldig aan te teken as dit uit die ondervraging volgens artikel 122(b) blyk dat die beskuldigde nie van die defek bewus was nie.[99] Sodanige misdrywe sal dan tereg as blote papiertiere afgemaak kan word.

Hoewel die wetgewer ongetwyfeld die bevoegdheid het om hierdie posisie te voorkom deur die bewyslas op die beskuldigde te plaas, sou so 'n stap om die redes hierbo vermeld ewe ongewens wees.

Daar word aan die hand gedoen dat die huidige probleem slegs opgelos kan word deur hervormingswetgewing, maar dan nie wetgewing geskool op die geykte hervormingsmodelle van verskuiwing van bewyslas deur vermoedens ensovoorts nie. 'n Bevredigende oplossing kan slegs gevind word indien die funksionaliteit en implementering van die strafreg in hierdie en soortgelyke gevalle realisties en onbevange benader word. Sonder om dit voor te hou as die finale of gedetailleerde antwoord, word die volgende benadering aan die hand gedoen. Die misdrywe wat in *Sibitane* en *Marangwe* ter sprake gekom het, is, soos die howe tereg uitgewys het,[100] baie ernstige misdrywe. Die verbode handelinge hou lewensgevaar vir andere in. Die betrokke strafwetgewing kan tereg bestempel word as "voorkomingswetgewing." Die *actus reus* is op sigself nie gevaarlik of afkeurenswaardig nie; die gevaar lê in die moontlike gevolge wat dit kan hê. Straf in hierdie gevalle is dus meer daarop gerig om die gevolge te voorkom as om die gemeenskap se wrewel teenoor die blote *actus reus* te weerspieël. In die lig hiervan is die huidige boetes en skulderkennings geheel en al onrealisties: in hierdie inflasionistiese tye is daar min verskil tussen die motoris met defektiewe remligte en 'n vet salaristjek en die klapuitdelende Romein gevolg deur sy beursdraende slaaf. Ewe onrealisties is dit om die motoris wat die pleging van die misdryf nie redelikerwys kon verhoed nie, òf omdat hy sorgsaam was en dit nogtans nie kon verhoed het nie, òf omdat sy gebrek aan sorgsaamheid heeltemal irrelevant is, te straf. Dit kan nouliks bydra tot voorkoming. 'n Meer realistiese siening sal wees om die maksimum boetes vir hierdie tipe oortredings tot R500

98 Soms word gesê dat daar 'n kategorie statutêre misdade is waar sodra die staat die *actus reus* beswys, die beskuldigde outomatiese 'n weerleggingslas ten opsigte van die afwesigheid van die ingeleesde *mens rea* dra: kyk *S v Zemura* 1974 1 SA (RA). Hoewel dit stellig die huidige posisie in Zimbabwe is en dalk ook die posisie in die vroeëre Suid-Afrikaanse regspraak weerspieël wat gekenmerk was deur 'n verwarring tussen bewys- en weerleggingslas, is dit nie die huidige posisie in die Suid-Afrikaanse reg nie. Die blote bewys van die *actus reus* plaas nooit outomaties 'n weerleggingslas op die beskuldigde nie. Dit is slegs as die aard van die *actus reus* logies 'n afleiding van *mens rea* regverdig, dat die beskuldigde met 'n weerleggingslas opgesaal word: kyk *S v De Blom* 1977 3 SA 513 (A) 532–533. Die aard van die *actus reus* in *Sibitane* en *Marangwe* leen, soos in die teks aangedui, dit nie tot 'n logiese afleiding van *mens rea* nie.

99 Sien Van der Merwe Barton en Kemp *Plea Procedure in Summary Criminal Trials* (1983) Afd B oor die toepassing vn a 112(1)(b).

100 *supra*.

te verhoog.[101] (As in gedagte gehou watter boetes opgelê word vir die onekonomiese gebruik van petrol deur motoriste[102] terwyl dit hier om menselewens kan gaan, is hierdie bedrag geensins onrealisties hoog nie.) Die staat moet dan relevante *mens rea* aan die kant van die beskuldigde bewys. Voorts moet die eise wat uit hoofde van die sorgvuldigheidsnorm aan die beskuldigde gestel word, nie onrealisties hoog wees nie. Gepaste strafversagtende faktore kan natuurlik altyd oorweeg word. Wat bewys van relevante *mens rea* betref, word aan die hand gedoen dat waar dit vir die ondersoekbeampte[103] blyk dat die defek te eniger tyd kon ontstaan het, 'n waarskuwing aan die motoris uitgereik word. Die inligting kan dan in 'n rekenaar geberg word. Indien dieselfde motoris vir dieselfde oortreding binne 'n kort tyd weer by die rekenaar gerapporteer word, kan hy formeel aangekla word. Die kanse op 'n skuldigbevinding is dan goed (die waarskuwing kan 'n verwysing na die moontlikheid van latere vervolging insluit). Voorts kan ook moontlik vereis word dat die motoris binne 'n sekere tydperk die herstelde defek aan die polisie moet toon. Daar word aan die hand gedoen dat wetgewing ooreenkomstig hierdie riglyne nie slegs effek sal gee aan korrekte en regverdige regsbeginsels nie, maar ook meer die ware doel van die skepping van sodanige "voorkomingsmisdrywe" sal dien. Ander newe-effekte kan die volgende wees: 'n meer doeltreffende (verkeers-) polisiemag vanweë die hoër eise gestel (met moontlik beter verhoudings met die publiek); effektiewer en realistieser strafregpleging sonder versaking van gesonde regsbeginsels; en 'n verligting van die las van die reeds oorlaaide howe. Miskien kan hierdie aangeleentheid met vrug die aandag van die regskommissie geniet.

7 SLOTSOM EN SAMEVATTING

By alle misdade word vereis dat die skending van die skuld- en wederregtelikheidsnorme relevant moet wees. Vanweë die verwarring tussen die relevansie van normoortreding en kousaliteit het eersgenoemde vereiste nie die nodige individuele aandag gekry nie. In beginsel en om onaanvaarbare resultate te vermy, is dit nodig om 'n helder onderskeid tussen hierdie vereistes te maak. Gemelde verwarring het onder andere daartoe gelei dat die rol van relevansie van die normoortreding by nie-gevolgsmisdade nie behoorlik besef is nie. Die vereiste dat skuldnormskending relevant moet wees vir die verbode *actus reus* geld net so sterk by hierdie misdade as by gevolgsmisdade. Word dit verontagsaam, word dieselfde resultaat bereik as wat die toepassing van die *versari*-leerstuk tot gevolg gehad het. Praktisyns behoort toe te sien dat aan die relevansie van normoortreding die nodige aandag gegee word.

Vanweë die ontwikkeling in die regspraak met betrekking tot statutêre misdrywe waarvolgens *mens rea* teenswoordig in die reël vereis word en die bewyslas op die staat geplaas word, word in sekere gevalle 'n ernstige bewysprobleem deur die vereiste van relevante skuldnormskending geskep. So kan misdrywe rakende die padwaardigheid van motors feitlik nooit bewys word nie waar die

101 Stemme het ondertussen opgegaan vir 'n verhoging van strawwe vir sekere oortredings.
102 Boetes van R500 en meer is alledaags.
103 Die ondersoekbeamptes moet 'n veel positiewer rol speel. Die huidige benadering van baie beamptes is om pleging van die *actus reus* met pleging van die misdryf te vereenselwig. Dit is bloot halwe werk en daar moet nie geskuil word agter bewysprobleme om dit te verberg nie; nog minder moet met bewyslasverskuiwings gepoog word om die gebreke in die staat se saak, te wyte aan sulke halwe werk, reg te stel.

aard van die defek (byvoorbeeld 'n uitgebrande remlig) nie 'n afleiding regverdig dat dit ten tyde van skuldnormskending reeds bestaan het nie. Die verweer van afwesigheid van relevante skuldnormskending sal in gevalle van nalatigheid bykans altyd beskikbaar wees en tot 'n onskuldigbevinding lei. Die howe behoort nie op grond van hierdie bewysprobleem strikte aanspreeklikheid te erken nie. Ook behoort die howe nie die probleem op te los deur die bewyslas op die beskuldigde te plaas nie – in die praktyk sal dit op die negering van die vereiste van relevansie van skuldnormoortreding neerkom. Die oplossing skyn te lê in die realistiese wetgewende hervorming van hierdie misdrywe. Hoër boetes in gevalle van *bewese relevante skuldnormskending* is geregverdig gesien die potensieël gevaarlike gevolg van hierdie misdrywe. Deur die rig van waarskuwings en gebruik van rekenaars kan bewys van relevante skuldnormskending bewerkstellig word, terwyl die voorkomende doel van die betrokke misdaadsbepalings, sonder die versaking van korrekte en regverdige regsbeginsels, beter gedien kan word.

Afdwinging van die volkereg deur weerwraak: wanneer geoorloof?

MG Erasmus
BJur LLB MA LLD
Professor in Publiekreg, Universiteit van Stellenbosch

SUMMARY

Enforcement of International Law Through Reprisals: When Permitted?

This article deals with South Africa's decision not to honour an undertaking given to a British court. Four South African nationals had to stand trial for contravening regulations prohibiting trade in military equipment. The South African government refused to return these people, officials of Armscor, and justified its decision as a lawful reprisal. According to the government the reprisal was taken in response to a British decision not to evict six refugees from their consulate in Durban. These people had fled there after detention orders had been issued by the minister of law and order.

The article contains a discussion of the factual background which includes the fact that the regulations have their origin in the 1977 arms embargo by the United Nations. The content of the exchanges between the two governments is also analysed.

The requirements for lawful reprisals are discussed and then applied to the facts of this case. These requirements include prior illegal behaviour by the state against whom the reprisal is directed, proportionality and the purpose of peaceful settlement of a dispute. In the context of the first the Vienna Convention on Consular Relations and the rules with respect to asylum are discussed. The distinction between asylum and temporary refuge (which was the relevant concept in this case) is pointed out.

It is concluded that South Africa's reaction cannot be described as a lawful reprisal, but that it was rather the pretext for not returning the "Coventry Four." Of special importance are the factors that show that South Africa was never interested in the legal settlement of the consulate dispute – the only acceptable purpose for which reprisals could have been taken.

Since the completion of this article a former legal adviser to the department of foreign affairs who was intimately involved in this matter, has published a booklet on the "Coventry Four." The addendum refers to its contents very briefly.

1 INLEIDING

Die volkereg word soms as 'n "primitiewe" regstelsel beskryf. 'n Rede hiervoor is die feit dat dit nie op dieselfde wyse as munisipale (nasionale) regstelsels nalewing van sy reëls kan verseker nie. Hierdie beskrywing van die volkereg is nie 'n baie gelukkige een nie. Dit spruit waarskynlik voort uit 'n geneigdheid om dit met munisipale regstelsels te vergelyk. So 'n analogie hou die voordeel in dat die onbekende dan aan die hand van die bekende verduidelik word. Die nadeel is waarskynlik groter. Dit verdoesel die feit dat die volkereg na sy aard

en funksie uniek is. Die volkereg bestaan uit die reëls wat verhoudinge tussen state reguleer. Die internasionale gemeenskap is die *societas* waarbinne die volkereg geld. Daarom behoort vrae met betrekking tot sy aard en nalewing primêr aan die hand van die realiteite van die stategemeenskap beantwoord te word.

Daar bestaan sterk verskille tussen die internasionale en nasionale gemeenskappe. Die gemeenskap van state ken geen enkelwetgewer met die bevoegdheid om vir sy lede bindende "wette" te maak nie. (Ten spyte van die populêre opvatting tot die teendeel, is die VVO beslis geen "wêreldregering" nie.) Ook beskik die internasionale gemeenskap nie oor 'n wêreldhof met outomatiese en dwingende jurisdiksie nie. Die internasionale geregshof in Den Haag en ander internasionale tribunale het slegs jurisdiksie wanneer state hulle daaraan onderwerp. Daar bestaan ook geen wêreldpolisiemag of uitvoerende gesag nie.

Die regstegniese verklaring vir hierdie stand van sake bestaan hoofsaaklik daarin dat state oor soewereiniteit beskik.[1] Die gevolg daarvan is onder andere dat geen verdrag 'n staat kan bind sonder dat hy daartoe toestem nie en dat geen internasionale forum jurisdiksie oor hom het tensy hy hom daaraan onderwerp nie. Die internasionale gemeenskap sou dus oor veel effektiewer regskeppende, -sprekende en -afdwingende instrumente kon beskik indien sy lede, die state, daartoe bereid sou wees. Die ironie is juis dat dieselfde state hulle gereeld bekla oor die afwesigheid van sodanige masjinerie, en dan die volkereg verwyt. Die volkereg kan egter net so effektief wees as wat die state toelaat.

Tog is die prentjie ook nie só eenvoudig nie. 'n Mens moet daarteen waak om te dink dat soewereiniteit in die volkeregtelike sin 'n almagtige en ondeurdringbare skild is. Die waarheid is dat geen enkele staat in isolasie kan bestaan nie. Elke lid van die internasionale gemeenskap is betrokke by internasionale handel, neem deel aan seeverkeer, benodig tegniese kontakte, het inwoners wat elders rondreis, het ondernemings wat in die buiteland sake doen ensovoorts. Die moderne behoeftes van die nasionale staat kan nie sonder samewerking met ander state bevredig word nie. Hy kan byvoorbeeld nie sy nasionale habitat teen besoedeling beskerm as die grens-oorskrydende bronne nie by hul oorsprong beheer word nie. Hy kan nie sy nasionale veiligheid verseker as daar nie 'n reël sou wees wat ander state verplig om toe te sien dat hul grondgebied nie tot nadeel van buurstate gebruik word nie. Hierdie belangrike waarheid kan met veel meer voorbeelde illustreer word.[2] Daar is dus reëls nodig om die samewerking tussen state te reguleer. Die volkereg vervul dié funksie en moet dit boonop met inagneming van alle subjekte se belange doen.

Soewereiniteit is 'n regsbegrip. Dit beteken dat die staat nie bo die volkereg verhewe is nie. Hy kan sy soewereiniteit net uitoefen vir sover dit met sy volkeregtelike verpligtinge teenoor ander state in pas is. So het die permanente hof van internasionale justisie by geleentheid gesê:

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1 Soewereiniteit het 'n nasionale en internasionale dimensie. Eg het betrekking op die binnestaatlike terrein waar die nasionale owerheidsorgane in beginsel oor volle staatsgesag beskik. Histories gesien het dit eerste ontstaan en wel na aanleiding van Jean Bodin se uiteensetting van die *summa potestas* in sy *De Republica*. Die begrip is toe geleen en aangepas om ook as 'n kenmerk van die staat in sy verhouding teenoor ander state te geld.

2 In die EEG en Europese Raad het die lidstate bv baie van hul nasionale bevoegdhede aan supranasionale organisasies oorgedra en selfs hul eie burgers toegelaat om sekere internasionale regte te verkry wat teen hul eie state afdwingbaar is.

> "The Court declines to see, in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty."[3]

In hierdie geval het Duitsland hom op sy soewereiniteit beroep toe hy 'n verdragregtelike verpligting om vreemde skeepsverkeer deur die Kiel-kanaal toe te laat, wou ontduik. Die hof het die argument verwerp.

Beperkinge op die soewereine vryheid van 'n staat spruit nie net uit verdrae voort nie, maar ook uit die volkeregtelike gewoontereg en uit die *jus cogens*. Soewereiniteit moet dus in harmonie met volkeregtelike verpligtinge bestaan.

Ten spyte van sy oënskynlike institusionele gebreke word die volkereg wel deeglik nageleef en eerbiedig. Net soos in die munisipale regsopset is dit die gevalle van nie-nakoming van regsreëls wat die sensasionele nuusberigte daarstel. Eerbiediging van voorskrifte is te "normaal" om die voorblaaie te haal. Niemand stel daarin belang om oor nie-gepleegde moorde te lees nie. 'n Mens moet dus nie verlei word om die patologie van die toestand met die ware stand van sake te verwar nie; ook nie ten opsigte van die internasionale regsverkeer nie.

Die oogmerk met hierdie artikel is nie om die volgende logiese vraag, naamlik waarom die volkereg tog nagevolg word, te probeer beantwoord nie. Dit word in ieder geval deur elke goeie handboek gedoen. 'n Mens kan met 'n enkele pragmatiese grond volstaan: Dit is in state se eie belang dat die reëls eerbiedig word. Wat eerder beoog word, is om aan die hand van bepaalde gebeure aan te toon dat die volkereg wel oor instellings beskik wat die nalewing van regsreëls help verseker. Die gebeure waarna verwys word, is die insident gedurende 1984 toe ses voortvlugtige persone in die Britse konsulaat in Durban gaan skuil het en die daaropvolgende Suid-Afrikaanse reaksie. Suid-Afrika het naamlik besluit om sy onderneming aan 'n Britse hof te verbreek en vier verhoorafwagtende Suid-Afrikaners nie na die hofverrigtinge in Coventry terug te stuur nie. Hierdie ingrypende stap is geregverdig deur dit 'n regmatige weerwraakhandeling (*reprisal*) te noem. Die aard en doel van hierdie figuur, asook die vereistes wat daarvoor gestel word, sal bespreek word. Daar sal dan bepaal word of daar in hierdie geval wel van regmatige weerwraak sprake was.

Ten aanvang word 'n kort uiteensetting van die feitelike gebeure gegee en die verskynsel van asiel in die volkereg bespreek.

2 DIE VOORAFGAANDE GEBEURE

2 1 Die Coventry-verhoor

Op 1984–03–31 word vier Suid-Afrikaners en 'n Britse sakeman in Brittanje gearresteer op 'n aanklag dat hulle doeane-regulasies wat handel in wapens verbied, oortree het. Die Britse wetgewing in hierdie verband spruit voort uit Veiligheidsraad-resolusie 418 van 1977–11–04. Hierdie resolusie het Suid-Afrika die onderskeiding besorg om die eerste VVO-lid te word teen wie 'n verpligte wapenembargo onder hoofstuk VII van die VVO-handves aanvaar is.[4]

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3 *Wimbledon*-saak PCIJ serie A no 1 25.

4 Soortgelyke maatreëls is in 1966 teen Rhodesië aanvaar, maar dié was nie 'n lid van die VVO nie.

In die lig van die belangrikheid van die VVO se stappe teen Suid-Afrika en ook omdat dit 'n voorbeeld is van hoe die volkereg soms deur middel van nasionale optrede toegepas word, is 'n kort *excursus* oor hierdie aspek miskien gepas. Al vyftien lede van die veiligheidsraad het ten gunste van die resolusie gestem. Hierdie drastiese stap het voortgevloei uit die optrede van die Suid-Afrikaanse regering teen sekere swart koerante en organisasies, arrestasies en inperkingsbevele, asook uit protes teen die dood, in aanhouding, van Steve Biko.[5] Maatreëls onder hoofstuk VII van die handves is spesifiek gerig teen dade wat 'n bedreiging vir die vrede, vredesbreuk of aggressie daarstel. Artikel 41 verleen magtiging tot die instel van sanksies wat nie die gebruik van gewapende geweld insluit nie.

Die volgende aanhaling uit die resolusie gee 'n aanduiding van die erns waarmee die saak bejeën is:

> "Convinced that a mandatory arms embargo needs to be universally applied against South Africa in the first instance, acting therefore under Chapter VII of the Charter of the United Nations, [the security council]
>
> 1 Determines, having regard to the policies and acts of the South African Government, that the acquisition by South Africa of arms and related material constitutes a threat to the maintenance of international peace and security;
>
> 2 Further decides that all States shall refrain from any co-operation with South Africa in the manufacture and development of nuclear weapons."

Uit hoofde van artikel 25 van die handves onderneem lidlande om besluite van die veiligheidsraad uit te voer. Paragraaf 2 van die resolusie bevat inderdaad so 'n "besluit" met betrekking tot toekomstige wapenhandel. Wat bestaande kontrakte betref, word state versoek ("The Security Council calls upon all States.") om dit te heroorweeg. Artikel 41 van die handves maak voorsiening vir besluite en beroepe ("The Security Council may decide . . . and may call upon the members."). Daar word redelik algemeen aanvaar dat beide dié begrippe eintlik bevele van die veiligheidsraad aandui.[6]

Deur sy interne posisie met die veiligheidsraad se besluit in pas te bring, het Brittanje sy volkeregtelike verpligtinge, voortspruitende uit sy lidmaatskap van die organisasie, eerbiedig. Die gevolg was die uitvaardiging van regulasies wat wapenhandel met Suid-Afrika verbied. Dit is 'n tipiese voorbeeld van hoe state volkeregtelike verpligtinge wat uit verdrae en besluite van internasionale organisasies voortspruit, nakom.[7] Daar sou selfs geargumenteer kon word dat 'n staat homself volkeregtelik aanspreeklik stel indien hy sou nalaat om dit te doen.[8]

Op 1984–04–02 verskyn die vyf persone in die magistraatshof in Coventry en word formeel aangekla. 'n Aansoek om borgtog word geweier, en wel op grond van die vrees dat die beskuldigdes sou vlug. Daar word beweer dat die

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5 Sien verder 1977 *South African Yearbook of International Law* (*SAYIL*) 250 e v vir 'n bespreking van die debatte tydens die dringende sitting van die veiligheidsraad.

6 Sien bv Akehurst *A Modern Introduction to International Law* (1982) 183.

7 Aan die ander kant geld volkeregtelike gewoontereg in lande soos Brittanje en Suid-Afrika as deel van die "law of the land" sonder dat dit deur wetgewing geïnkorporeer hoef te word. Sien bv *Trendtex Trading Corp v Central Bank of Virginia* 1977 QB 529 (CA); *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 1 SA 234 (K) 238; *Nduli v Minister of Justice* 1978 1 SA 893 (A); *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 2 SA 111 (T); *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 2 SA 207 (OK).

8 Brownlie *Principles of Public International Law* (1979) 38.

Suid-Afrikaners betrokke is by hul land se wapenindustrie.[9] Volgens persberigte word daar langs diplomatieke kanale gepoog om borgtog vir die beskuldigdes te verkry en word die Suid-Afrikaanse ambassadeur ook vir samesprekings ontbied.[10]

Daar is ook "gesuggereer" dat die Britse departement van buitelandse sake (*Foreign and Commonwealth Office*) die amptenare van die departement doeane en aksyns moes oorreed om die afkoop van die misdrywe toe te laat. Sodanige moontlikheid bestaan inderdaad en volgens artikel 152(a) van die Customs and Excise Management Act

> "the Commissioners may, as they see fit ... compound any proceedings for an offence or for the condemnation of anything as being forfeited under the customs and excise Acts."

Dit sou egter neerkom op 'n vorm van inmenging deur een staatsdepartement in die werksaamhede van 'n ander. Volgens die betrokke wetgewing het die kommissarisse van doeane en aksyns 'n onafhanklike diskresie. Hulle het ook die klagtes teen die Suid-Afrikaners aanhangig gemaak.

Hierdie besondere aspek is in die Britse laerhuis te berde gebring. 'n Minister (*Minister of State for the Treasury*) het toe die kriteria wat by sulke besluite ter sprake kom, verduidelik:[11]

> "The commissioners do not prosecute, nor apply other main sanctions such as compounding, unless there is a clear *prima facie* case. The decision whether to prosecute or to offer to compound proceedings is taken on the merits of each case. The general factors taken into consideration are the gravity of the offence and the best interests of law enforcement and of the revenue. In view of the pressure on the courts and on departmental resources, it is the commissioners' policy to offer compounding whenever appropriate. If that offer is refused, they then proceed with the prosecution of the alleged offender."

Die Britse regering se standpunt was dat hierdie geval soos alle ander hanteer moes word en dat geen spesiale behandeling gegee kon word nie. Die waarde van die goedere wat by die saak betrokke was, was minder as £300 000 en was nie wapens nie, maar wel komponente "capable of application in a weapon system."[12] Tog het die aanklaer die klag as ernstig beskou en was hy teen 'n afkoopprosedure gekant.

Enkele dae later word daar wel aan al die beskuldigdes borgtog van R50 000 elk toegestaan. Hul paspoorte moes egter ingedien word, hulle moes by 'n Londense adres woon en hulle moes daagliks aan die polisie rapporteer. Die eerste sekretaris van die Suid-Afrikaanse ambassade het persoonlik borg gestaan. Ten einde dit te kon doen, het hy van sy diplomatieke immuniteit afstand gedoen.

Gedurende Mei word 'n aansoek om wysiging van die borgvoorwaardes, wat dit vir die beskuldigdes sou moontlik maak om na Suid-Afrika terug te keer, geweier. Hierdie besluit word egter deur 'n hoër hof gewysig en sodanige toestemming word verleen. Die bedrag betrokke by die borgtog word verdubbel en 'n verdere R400 000 sekerheidstelling word vereis.

Die eerste sekretaris van die ambassade dra ook die staatspresident se persoonlike versekering dat die beskuldigdes in Junie by die verhoor sou opdaag,

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9 Een was 'n voormalige werknemer by Krygkor. Sien bronne vermeld in vn 27.
10 *Cape Times* (1984–10–22).
11 Dokumentasie in verband met die parlementêre debatte is deur plaaslike diplomate aan skrywer beskikbaar gestel. Die betrokke ministeriële antwoord is op 1984–04–25 gegee.
12 Oor die aard van die toerusting sien *Cape Times* (1984–5–14).

aan die hof oor. Dit gebeur dan ook. By hierdie geleentheid word die finale verhoordatum op 1984–10–22 vasgestel. Intussen soek ses voortvlugtiges in die Britse konsulaat in Durban skuiling. Op 1984–09–21 deel Suid-Afrika Brittanje mee dat die vier Suid-Afrikaners nie in Brittanje tereg sal staan nie. Dié optrede word later as 'n regmatige weerwraakhandeling geregverdig.

2 2 Die Konsulaat-drama

Die gebeure wat tot Suid-Afrika se weerwraakhandeling aanleiding gegee het, het op 1984–09–13 plaasgevind. Ses lede van die *United Democratic Front* en die *Natal Indian Congress* het sonder vooraf kennisgewing by die Britse konsulaat opgedaag en wou die konsul spreek. Hy was op daardie oomblik afwesig en hulle is versoek om te wag. Hierna weier hulle om die gebou te verlaat en soek "tydelike skuiling." Uit humanitêre oorwegings besluit die Britse regering om hulle nie uit te sit nie.[13]

Hierdie ses persone was in 'n sekere sin "voortvlugtiges." Hoewel hulle nie skuldig bevind is nie, of selfs aangekla is nie, is daar wel ingevolge plaaslike veiligheidswetgewing[14] op 1984–09–08 aanhoudingsbevele deur die minister van wet en orde ten opsigte van hulle uitgereik. Hierdie dokumente was nog nie aan hulle bestel nie. Die optrede wat hulle verkwalik is, het klaarblyklik in verband met hul betrokkenheid by die politieke onrus in die land gestaan. Die resultaat was aanhouding sonder verhoor. Gevolglik het daar natuurlik heelwat simpatie vir hulle in Brittanje en elders in die wêreld ontstaan. Hul skuiling in die konsulaat was dadelik internasionale voorbladnuus en het ook veroorsaak dat die insident in Brittanje 'n plaaslike politieke dimensie verkry het. Onder dié omstandighede en druk ag die Britse regering dit polities onmoontlik om die ses te dwing om die konsulaat te verlaat of om die Suid-Afrikaanse polisie toe te laat om hulle in die konsulaat te arresteer. Hulle is nie as gewone misdadigers beskou nie.

Die ses persone het nie om asiel aansoek gedoen nie en die Britse owerheid het dit gevolglik ook nie verleen nie. Wat wel gedoen is, was om hulle te versoek om die gebou self te verlaat, onder andere aangesien hul teenwoordigheid die werksaamhede in die konsulaat ontwrig het.[15] Die dilemma waarin die Britse owerheid hom bevind het, is verder vererger deur die feit dat hulle Suid-Afrika nie onnodig aanstoot wou gee nie, en deur die feit dat hulle self baie sensitief is omtrent enige misbruik van diplomatieke en konsulêre persele. Die onlangse ervaring met die Libiese ambassade in Londen het die gevare verbonde aan so 'n situasie deeglik tuisgebring. Daar het dus genoegsame gronde bestaan om te waak teen 'n ongunstige presedent ten koste van hulself. Die Britte het ook aanvaar dat daar geen reg op "politieke" asiel bestaan nie.

Die aanvanklike Suid-Afrikaanse reaksie was een van begrip. Die Britse optrede is selfs as korrek beskryf. Geen besondere druk is uitgeoefen nie. Die Britse

13 *British Information Services Press Release* gen no 13 (1984–10–23).

14 A 28 van die Wet op Binnelandse Veiligheid 74 van 1982 maak voorsiening vir bevele tot aanhouding in gevangenisse van persone wat volgens die oordeel van die minister van wet en orde in die toekoms sekere misdade teen die staatsveiligheid sal pleeg. Die minister beveel self die aanhouding en die howe kan nie die geldigheid daarvan toets nie.

15 *House of Commons* 1984–10–23, verklaring deur mnr Malcolm Rifkind. Sien ook *The Argus* (1984–09–2) 17.

ambassade het kort na die insident op 1984–09–13 self met die Suid-Afrikaanse regering in verbinding getree en aangedui dat hul nie as tussengangers of onderhandelaars in die politieke eise van die ses sou optree nie.[16] Op 1984–09–20 word die Britse regering egter wel "dringend versoek" om die ses voortvlugtiges uit te lewer of om toestemming tot hul arrestasie in die konsulaat te verleen. In die amptelike boodskap word onder meer die volgende beweer:

> "In accordance with customary international law (as codified by article 31(2) of the Vienna Convention on Consular Relations, 1963) the South African authorities also refrained from entering the consular premises in order to take the six into custody. As a result of the failure of the British Government to persuade the men to vacate the consular premises during what must, under the circumstances and given the initial expectations in this regard, be considered to be a prolonged period of time, it has now become necessary to give effect to the detention notices. Given the fact that the men may legally be taken into custody if the detention notices can be served on them and since it is considered necessary that they be taken into custody, their presence in the consulate and the resulting impossibility of serving the notices on them, amounts to an obstruction of law enforcement."[17]

Een dag later, op 1984–09–21, besoek die Suid-Afrikaanse ambassadeur in Londen die Britse minister van buitelandse sake. Hy word meegedeel dat die memorandum nog bestudeer word. 'n Vraag of die Britse houding verander het, word ontkennend beantwoord. Ongeveer 'n uur later word die tweede Suid-Afrikaanse *aide memoire* oorhandig. Dit verklaar heel bondig:

> "Considering that the British attitude amounts to an obstruction of the enforcement of South African Law, the South African government considers itself absolved from its undertaking to a United Kingdom court to ensure the return to the United Kingdom of four South Africans who have been charged with contravening British customs and excise legislation."

Daar is ook gewag gemaak van 'n versoek op 1984–09–19 om die ambassadeur toe te laat om 'n dringende boodskap van die staatspresident aan die Britse premier oor te dra. Die aard daarvan is nie bekend gemaak nie. Die versoek vir 'n persoonlike onderhoud is geweier. In die Britse verklaring van 1984–09–24 word verduidelik dat die boodskap op enige ander wyse oorgedra kon word.

Die implikasie van hierdie gebeure vir die regmatigheid al dan nie van die Suid-Afrikaanse optrede sal hieronder in groter detail bespreek word. Voorlopig kan net daarop gewys word dat daar nie vooraf gewaarsku is dat die twee insidente (Durban en Conventry) met mekaar in verband staan nie of dat weerwraakhandelinge oorweeg word nie. In die lig hiervan is die verklaring van die Suid-Afrikaanse minister van buitelandse sake dat Brittanje die situasie

> "kon ... vermy het [en] dit vir ons onmoontlik maak om die Volkereg te gebruik om nie die vier na Brittanje terug te stuur nie"[18]

ietwat onoortuigend.

In die daaropvolgende kontak tussen Brittanje en Suid-Afrika het die weë uiteengeloop. Londen weier volstrek om die gebeure in Durban en Coventry met mekaar in verband te bring en ontken ook dat die posisie in die konsulaat op 'n dwarsboming van die Suid-Afrikaanse regspleging neerkom. In Suid-Afrika se derde *aide memoire* van 1984–09–24 word die Britse verduideliking verwerp. Die Britse houding sou Suid-Afrika gedwing het

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16 *Aide memoire* van SA regering (1984–09–20).
17 *ibid.*
18 *Die Burger* (1984–10–10).

> "either to enter the consulate and take the men into custody, or to take action similar to that of the British Government and designed to reflect the South African Government's displeasure with the British Government's actions."

Laasgenoemde is gedoen. Daar word ook op die toekomstige gevare gewys wanneer "saboteurs en terroriste" toegelaat sou word om in vreemde ambassades en konsulate skuiling te soek. Suid Afrika se optrede sou ter gelegener tyd in die gepaste Britse hof verduidelik word.

2 3 Die Verdere Verloop

Die verdere verloop in die geskil is gekenmerk deur 'n onversoenbare houding tussen Pretoria en Londen. Suid-Afrika het die saak as afgehandel beskou vir sover dit die verhoor van die vier Suid-Afrikaners in Coventry betref. Hulle sou beslis nie terugkeer nie, selfs al sou die ses persone in die konsulaat uitgesit word of aan Suid-Afrikaanse beamptes toestemming verleen word om die gebou binne te gaan.[19] Die Suid-Afrikaanse minister van buitelandse sake het ook in 'n televisie-onderhoud beweer dat elke party nou sy "pond vleis" het en dat die kwessie afgehandel is. Al wat volgens hom nog gedoen moes word, was om die Suid-Afrikaanse optrede aan die hof in Coventry te verduidelik en om aansoek om terugbetaling van die borggeld te doen. Intussen het Brittanje aangedui dat hy nog steeds daarop staat maak dat die vier verhoorafwagtendes by die verhoor aanwesig sou wees.

Intussen het gerugte die rondte begin doen dat die VSA, Wes-Duitsland, Nederland en Frankryk versoek is om skuiling aan die ses te bied. Dit is na bewering gedoen omdat die Britse amptenare die lewe vir hulle toenemend onaangenaam gemaak het en uit vrees dat hulle dalk uitgesit sou word. Suid-Afrika reageer in geen onduidelike terme nie:

> "If any country so much as said it was favourably considering a request for sanctuary the South African Government would consider that to be an encouragement to commit an illegal act."[20]

Klaarblyklik het geeneen van hierdie lande lus gehad om hulself die Suid-Afrikaners se gramskap op die hals te haal nie. Op 1984–10–06 verlaat drie van die ses die konsulaat uit vrye wil en word deur die polisie gearresteer. Hul bewering dat dit gedoen is om druk uit te oefen dat die vier Suid-Afrikaners na Brittanje gestuur sou word, het nie die gewenste uitwerking gehad nie.

Namate die verhoordatum in Coventry nader gekom het, het verhoudinge tussen die twee state al hoe meer gespanne geraak. Diplomatieke kontak en die oordra van "belangrike standpunte" vind ter elfder ure plaas,[21] dog sonder enige resultate.

Op 1984–10–22 vind die verhoor in Coventry plaas. Die vier Suid-Afrikaners is nie aanwesig nie, maar hul regsverteenwoordigers hou 'n lang betoog waarom die Suid-Afrikaanse optrede volgens die volkereg regmatig sou wees. Die argumente is gegrond op die gedagte dat die optrede 'n regmatige weerwraakhandeling was. Die hof bevind soos volg:

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19 *Die Burger* (1984–09–25).
20 Minister RP Botha *The Argus* (1984–10–01).
21 *Cape Times* (1984–10–19). Besonderhede omtrent die standpunte wat deur SA oorgedra is, is nie openbaar gemaak nie.

> "Having listened very carefully to the submissions made to us by Counsel it seems clear to us that, in this unusual case, the four accused are not personally culpable for their failure to attend this court in accordance with their bail terms and that Mr Pelser, in that he acted as agent for his Government, is not personally to blame for their non-attendance. The solemn promises and undertakings made to this court by, and on behalf of, the four accused have been broken by the South African Government. It seems to us that this action must have been taken in the full knowledge of the consequences of any breach of them. That the South African Government believed it had some political or legal justification for so doing appears to us not to be a matter on which we are competent to rule. We therefore exercise our discretion that the security and sureties be forfeited in full. We also authorise the issue of warrants."[22]

Borggeld van altesaam R800 000 word verbeurd verklaar en lasbriewe vir die arrestasie van die vier beskuldigdes word uitgereik. In die lig hiervan is dit ietwat vreemd dat die Suid-Afrikaanse minister van buitelandse sake met blydskap op die uitspraak gereageer het en beweer het dat Suid-Afrika met eer uit die stryd getree het.[23] In ieder geval was die minister in so 'n mate tevrede met die uitslag dat hy besluit het om nie daarteen te appelleer nie.

Die Brit wat saam met die vier Suid-Afrikaners aangekla is, is ter strafsitting verwys. Die Britse regering het nog steeds daarop aangedring dat die vier Suid-Afrikaners teruggestuur word en het Suid-Afrika die verbreking van sy onderneming erg verkwalik. Die betrokke minister waarsku teen die "significant effect on bilateral relations" wat die gebeure sal hê.[24]

Uiteindelik, na drie maande, beëindig die oorblywende drie voortvlugtiges hul verblyf in die Britse konsulaat. Die aanhoudingsbevele deur die minister van wet en orde is vooraf teruggetrek. Twee van die drie is egter gearresteer om op klagtes van hoogverraad te verskyn.

2 4 'n Alternatiewe Verduideliking?

Wat was die ware rede vir Suid-Afrika se optrede? Die amptelike rede, naamlik dat Suid-Afrika eintlik net gesteld was op die ongehinderde toepassing van 'n regsproses en dus die verydeling daarvan wou straf, oortuig glad nie. Hierbo is 'n redelik volledige beskrywing van die gebeure gegee ten einde die nodige agtergrond te verskaf. Aangesien dit onwaarskynlik is dat enige amptenaar met 'n volledige uiteensetting vorendag sal kom, moet die beskikbare omstandigheidsgetuienis oorweeg word en afleidings daaruit gemaak word.

Die waarskynliker grond vir Suid-Afrika se optrede is dat hy die vier amptenare wat in Coventry tereg moes staan, nie wou terugstuur nie en 'n rede daarvoor gesoek het. Die gebeure in Durban het daardie rede verskaf. Ten einde hierdie ware oogmerk te verbloem, is daar heelwat klem op die regstegniese aspekte van die saak geplaas. Deur te beweer dat die verbreking van die onderneming 'n regmatige weerwraakhandeling was, moes die skyn van wettigheid bewaar word. Indien hierdie afleiding korrek is, hou dit waarskynlik ook bepaalde implikasies in vir die motief en korrektheid waarmee die regsfiguur van weerwraak gebruik is.

Die gebeure in Durban was 'n meevaller, hoewel dit nie onmiddellik as sodanig herken is nie. Die moontlikheid om die vier nie terug te stuur nie, is eers sowat

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22 *For the Record* no 5 (1984–10–23) uitgereik deur die Britse inligtingsdiens Johannesburg.
23 *Cape Times* (1984–10–23).
24 Mnr Rifkind *House of Commons* (1984–10–23).

vyf dae nadat die ses in die konsulaat skuiling gevind het, geopper.[25] Tot in daardie stadium was die Suid-Afrikaanse houding een van simpatie vir die Britse regering se dilemma. Indien hierdie afleiding korrek is, beteken dit dat die regering reeds voor die konsulaat-insident pogings aangewend het om die Britse regering te probeer oortuig dat die vier Suid-Afrikaners nie in Coventry verhoor moes word nie. Dit het blykbaar gebeur en een van die voorstelle wat in die verband gemaak is, was dat 'n afkoopboete betaal moes word. Hierdie "aanbod" is egter nie aanvaar nie.[26]

Daar het heelwat simpatie vir die vier in Suid-Afrika bestaan. Hulle was almal senior personeellede in diens van Krygkor[27] en gevolglik belangrike amptenare in 'n land met besondere probleme op die gebied van wapenvoorsiening. Dit is dus heeltemal begryplik dat alles moontlik gedoen sou word om te voorkom dat hulle in Brittanje tereg staan en die risiko van gevangenisstraf loop, hoewel laasgenoemde natuurlik nie 'n uitgemaakte saak was nie. Miskien het die moreel van hierdie besondere instansie en die res van die personeel in dié opsig ook 'n rol gespeel. Die minister van buitelandse sake het die Britse wetgewing in hierdie verband verder as voortspruitende "uit 'n onwettige VVO-besluit" beskryf en beklemtoon dat geen Suid-Afrikaanse wette oortree is nie.[28] Beide hierdie stellings is nouliks relevant, maar wel tiperend van die klimaat waarin die saak hanteer is.

Die Suid-Afrikaanse owerheid was boonop daarvan oortuig dat die betrokke vier amptenare teruggelok is na Brittanje, in 'n lokval gelei is en toe gearresteer is.[29] Dit sou beslis nie tot inskiklikheid aan Suid-Afrikaanse kant bydra nie. Tydens 'n perskonferensie waarby die vier betrokke was, is daar ook melding gemaak van die "traumatiese" aard van die aanhouding en die "fisiese en psigologiese vernedering" wat hulle ondergaan het.[30] Hulle het sewe dae in eensame opsluiting in 'n hoë-sekuriteit-gevangenis deurgebring.

Daar is reeds gewys op die spoed waarmee die besluit om die weerwraakhandeling te verrig, deurgevoer is.[31] Die Britse regering is slegs een dag tyd gegun om op die eerste *aide memoire* te antwoord. Hulle is ook nie gewaarsku dat 'n weerwraakhandeling, of die spesifieke een waarom dit hier gaan, oorweeg word nie.

In die lig van hierdie omstandighede lyk die afleiding geregverdig dat die Suid-Afrikaanse owerheid alles in sy vermoë wou doen om te voorkom dat die vier Suid-Afrikaners in Brittanje teregstaan. Die insident in die konsulaat was 'n onverwagte meevaller omdat dit die geleentheid gebied het om met oënskynlike regmatigheid en regverdiging hul "erewoord" te verbreek. Maar is dit inderdaad waar dat dit 'n regmatige weerwraakhandeling was?

3 DIE VEREISTES VIR WEERWRAAK

Daar is aan die begin van hierdie artikel beweer dat die volkereg op sy eie unieke manier wel oor meganismes beskik wat die nalewing van sy reëls bevorder. Skendings van die volkereg kom gereeld voor. Tog probeer die skenders altyd

25 per minister Botha *Die Burger* (1984–10–10).
26 *supra* 4.
27 *Cape Times* (1984–10–29); *The Argus* (1984–09–25).
28 *Die Burger* (1984–10–10).
29 *The Argus* (1984–09–25); *Cape Times* (1984–10–29).
30 *Cape Times* (1984–10–29).
31 *supra.*

voorgee dat hul optrede wel in pas met die volkereg is, of ten minste nie daardeur verbied word nie. Selfs wanneer hulle die reëls van die volkereg verbreek, ontken hulle nie die bestaan van die volkereg self nie, maar probeer hulle eerder om dit so te interpreteer dat dit hul eie optrede steun.[32]

Een van die opvallende kenmerke van Suid-Afrika se optrede in die onderhawige saak, en trouens in prakties alle kwessies waarby die volkeregtelike regmatigheid van sy optrede ter sprake kom, is die verdediging tot elke prys van die formele korrektheid daarvan. In die proses word daar soms van uiters legalistiese interpretasies gebruik gemaak. Ter stawing daarvan kan daar verwys word na die bewering dat die Britse wetgewing oor wapenhandel op onwettige VVO-optrede gebaseer is, asook na die bekende enge interpretasie wat aan artikel 2(7) van die VVO-handves gegee word. 'n Baie onlangse voorbeeld was die afmaak van skendings van die Nkomati-verdrag as "bloot tegnies" van aard.[33] Die indruk word geskep dat indien optrede formeel "wettig" is, dit bo alle verdenking staan en ook op meriete in orde is. Dit is ongelukkig 'n baie arm siening van die saak wat ook nie daarin slaag om die gewenste respek en aanvaarding te genereer nie. In 'n sekere sin kom dit eintlik op misbruik van die volkereg neer wat sinisme daaroor eerder as respek daarvoor tot gevolg het. Aangesien dit egter die raamwerk is waarbinne die saak benader is, moet die Suid-Afrikaanse optrede getoets word aan die kriteria wat Suid-Afrika self gestel het. Was dit inderdaad 'n regmatige weerwraakhandeling? Ten slotte kan die vraag of dit op meriete ook 'n "goeie" handeling was, behandel word.

3 1 Kenmerke en Vereistes

Weerwraakhandelinge is 'n vorm van eierigting (*self-help*). In die afwesigheid van verpligte regterlike beslegting van geskille (internasionale howe, tribunale en arbiters verkry hulle jurisdiksie van toestemmende state) laat die volkereg 'n groot mate van eierigting as sanksie toe. Dit sluit spesifieke regsfigure soos weerwraakhandelinge (*reprisals*), teenmaatreëls (*retorsion*) en vreedsame blokkades in.[34]

Weerwraakhandelinge se enigste regmatige funksie bestaan in die konteks van vreedsame geskillebeslegting. Dit mag slegs vir daardie doel aangewend word. Dit behoort ook duidelik van noodweer (as enigste basiese uitsondering op die geweldverbod) onderskei te word.

Daar bestaan algemene eenstemmigheid oor wat 'n weerwraakhandeling is. Oppenheim omskryf dit soos volg:

> "Reprisals are such injurious and otherwise internationally illegal acts of one state against another as are exceptionally permitted for the purpose of compelling the latter to a satisfactory settlement of a difference created by its own international delinquency."[35]

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32 Sien verder Lauterpacht *Oppenheim's International Law* 1 8e uitg 15.

33 Sien bv *The Natal Witness* (1985-09-20).

34 Sien in die algemeen Lauterpacht aw 2 132 e v; Brun Otto Bryde "Self-help" *Encyclopedia of Public International Law* 4 215; Von Glahn *Law Among Nations* 2e uitg 494; Verdross en Simma *Universelles Völkerrecht* (1976) 652; Skubiszewski "Use of Force by States and Collective Security - Law of War and Neutrality" in Sørensen *Manual of Public International Law* 753; Partsch "Repressalie" in Strupp- Schlochauer *Wörterbuch des Völkerrechts* 3 103; Règlement *Institut de Droit International* 1934 (teks o a in Verzijl *International Law in Historical Perspective* 8 40-42).

35 Lauterpacht a w 2 136.

Hierdie vereistes word algemeen aanvaar en is dan ook bevestig in die *locus classicus* op hierdie gebied, die *Naulilaa*-arbitrasie van 1928 tussen Portugal en Duitsland. Daarom sal die Suid-Afrikaanse optrede in die Coventry-insident aan die hand van die volgende vereistes bespreek word: die voorafgaande onregmatige optrede deur Brittanje, proporsionaliteit en die doel waarvoor weerwraak aangewend mag word. Laasgenoemde sluit ook die pogings om vooraf 'n vreedsame beslegting te bewerkstellig in.

Die regmatigheid van Suid-Afrika se optrede in die onderhawige aangeleentheid hang geheel en al saam met die regmatigheid van sy weerwraakhandeling. Dit is so nie slegs omdat die Suid-Afrikaanse verklarings dit erken nie, maar ook omdat die onderneming wat die *staat* Suid-Afrika in die hof in Coventry gegee het, 'n duidelike volkeregtelike verpligting geskep het. Die nie-nakoming hiervan is bo alle twyfel onregmatig. Slegs indien die verbreking van die onderneming aan die hof 'n weerwraakhandeling was, was Suid-Afrika se optrede regmatig. Hierdie argument staan of val dus met die vereistes wat vir 'n weerwraakhandeling gestel word. Is daar aan al die vereistes vir 'n weerwraakhandeling voldoen, kan dit ten minste gesê word dat Suid-Afrika formeel korrek gehandel het. Of dit polities en andersins 'n wyse besluit was, is egter 'n ander kwessie.

3 1 1 *Voorafgaande Onregmatige Britse Optrede*

Volgens Suid-Afrika bestaan die onregmatigheid wat hy Brittanje ten laste lê, in die

> "failure of the British Government to persuade the men to vacate the consular premises."[36]

In die tweede *aide memoire* word dit soos volg gestel:

> "Considering the fact that the British attitude amounts to an *obstruction of the enforcement of South African law,* the South African Government considers itself absolved from its undertaking to a United Kingdom court to ensure the return to the United Kingdom of four South Africans who have been charged with contravening British customs and excise legislation" (my beklemtoning).

Hierdie verpligting om nie die toepassing van die reg te verydel nie, is volgens Suid-Afrika deel van die volkeregtelike gewoontereg soos gekodifiseer in artikel 55 van die Weense konvensie oor konsulêre verhoudinge. Die relevante gedeelte lui soos volg:

> "Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state.
>
> The consular premises shall not be used in any manner incompatible with the exercise of consular functions."

Suid-Afrika was nie 'n party by hierdie konvensie nie, Brittanje wel. Dit kan egter aanvaar word dat artikel 55 grootliks gewoontereg weerspieël en Suid-Afrika dus bind.[37]

In teenstelling met politieke of territoriale asiel, is diplomatieke asiel

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36 Eerste *aide memoire* (1984–09–20).

37 Hierdie indruk word bevestig deur die voorbereidende werk van die internasionale regskomissie vir die Weense konvensie oor konsulêre verhoudinge. Sien VVO dok A/4843 (1961–50–01 – 1961–07–07).

> "a grant of refuge by a foreign state in its legation within the territory of the refugee's home state."[38]

Dit vind met ander woorde op die grondgebied van 'n vreemde staat plaas. Aangesien die ambassades en konsulate van vreemde state onskendbaarheid geniet, is die gevolg daarvan dat so 'n vlugteling veilig is solank hy op die diplomatieke perseel skuil. Die plaaslike polisie mag daar nie optree nie.

Die stategemeenskap is verdeeld oor die vraag of daar 'n reg op die verlening van diplomatieke asiel in die volkereg bestaan. Die kommunistiese state is sterk daarteen gekant. Verskeie Westerse lande, waaronder die VSA, Brittanje, België en Swede ontken die regmatigheid van diplomatieke asiel, maar beweer dat daar wel omstandighede kan voorkom waarin skuiling verleen sal word.[39] Sommige Latyns-Amerikaanse state erken wel so 'n reg, soos vervat in 'n verdrag van 1928.

Regsadviseurs van die Suid-Afrikaanse departement van buitelandse sake het die Britse posisie geskets met 'n aanhaling uit McNair se gevolgtrekking soos gebaseer op die opinies van die *Crown Law Officers*:

> "The UK Government recognizes no legal right to grant asylum upon diplomatic or consular premises and no legal right to demand it, but on humanitarian grounds it has frequently authorized its diplomatic and other officers to grant temporary asylum in cases of emergency."

Dit is blykbaar nog steeds die Britse standpunt en strek sover terug as 1896 – dus geen geringe tydsduur nie.[40]

Die Weense konvensie bevat ook geen uitdruklike reëling of verbod ten opsigte van die toekenning van asiel in konsulate nie. Tydens die voorbereidende werk van die internasionale regskommissie van die VVO het daar verdeeldheid oor die invoeging van so 'n bepaling geheers. Daarenteen het daar blykbaar wel eenstemmigheid bestaan dat

> "consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities."[41]

Hierdie uitgangspunt word skynbaar gekwalifiseer deur uitsonderings in gevalle van menslike nood.

Vir die huidige is dit belangrik dat die ses persone in die konsulaat in Durban nie aan 'n misdryf skuldig bevind is of op aanklagte daarvan verhoor is nie. Daar is slegs aanhoudingsbevele teen hulle deur die minister van wet en orde uitgereik.

Het Brittanje onregmatig opgetree deur na te laat om die ses voortvlugtiges te oortuig om die konsulaat te verlaat? Kan daar beweer word dat so 'n versuim neerkom op dwarsboming van die gereg of inmenging in die sake van Suid-Afrika?

Daar was geen aktiewe optrede aan Britse kant nie. Die voortvlugtiges is geen hulp aangebied nie, maar eerder onder druk geplaas om die konsulaat self te

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38 Porcino "Toward Codification of Diplomatic Asylum" 1976 *International Law and Politics* 436.

39 *ibid* 439.

40 Harris *Cases and Materials on International Law* 3e uitg 272 vn 81.

41 *Report of the Commission to the General Assembly* dok 17/4843 (1961–05–01 – 1961–07–07) Die posisie is soortgelyk in die ander Weense konvensie oor diplomatieke verhoudinge. Sien bv Brownlie a w 353.

verlaat. Die geval wat die internasionale regskommissie in hierdie verband as voorbeeld van onregmatige inmenging in plaaslike aangeleenthede noem, is aktivistiese optrede soos deelname aan politieke kampanjes.[42] Dit wil dus voorkom asof die Britse optrede nie sonder meer as inmenging beskou kan word nie.

Die verlening van skuiling kan regmatig wees. Die voorbereidende werk van die internasionale regskommissie skep nie die indruk dat ander gewoonteregtelike gebruike (byvoorbeeld tydelike skuiling) en verdrae deur die konvensie ongedaan gemaak is nie. Verskeie state het gevestigde praktyke ten opsigte hiervan[43] en die internasionale regskommissie spreek hom geensins hieroor uit nie. In die lig hiervan sou dit nie sonder meer beweer kon word dat daar 'n verpligting op Brittanje gerus het om die ses persone uit te sit of die plaaslike polisie toe te laat om hulle te arresteer nie. Wat waarskynliker is, is dat die enigste verpligting in hierdie verband een is waarvolgens

> "the refugee should not be allowed to communicate with his partisans from the shelter of his legation and should be removed the moment he is no longer exposed to summary treatment at the hands of his pursuers"[44]

en dié Brittanje ten opsigte van die ses in Durban nagekom.

Wat presies beteken "to respect the laws and regulations of the receiving state," ingevolge artikel 55? Suid-Afrika het nie uitdruklik beweer dat die plaaslike wette en regulasies nie respekteer is nie maar dat 'n "obstruction of the enforcement of South African law" gepleeg is. Dit is streng gesproke nie wat in artikel 55 gereël word nie, hoewel 'n staat uit hoofde van die vereistes van *bona fides* en uit eerbied vir soewereiniteit wel daartoe verplig is. Aan die ander kant bevestig die werk van die internasionale regskommissie dat hiermee eerder die persoonlike optrede van individuele konsulêre amptenare bedoel word, wat natuurlik tot verdere aanspreeklikheid van die staat kan lei. En selfs waar individuele amptenare plaaslike wette en regulasies sou oortree, verval hulle immuniteit nie. Die volgende aanhaling bevat die kommissie se eie interpretasie en kommentaar:

> "This article lays down the fundamental rule that consuls and any other persons enjoying consular privileges and immunities must respect the legislation of the receiving State, with the exception of those provisions from the observance of which they are relieved by these articles, by the consular conventions and other relevant agreements. In particular, legislation providing for the rendering of any kind of personal service (service in the militia, personal service in case of public disaster, service as juryman or lay judge, etc) is not binding on those members of the consular staff who are not nationals of the receiving State. Nor are such persons bound to comply with laws and regulations which manifestly conflict with the recognized principles of general international law (e g legislation providing for racial discrimination)."[45]

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42 1958 *Yearbook of the International Law Commission* 2 104; 1960 *Yearbook of the International Law Commission* 2 30.
43 Harris a w 273–274.
44 opdrag van Sir E Grey aan sy hoogheid se minister in Haiti 1913–05–30, aangehaal in Harris a w 273.
45 1960 *Yearbook of the International Law Commission* 2 30.

Die laaste sin uit bogenoemde aanhaling dui ook op 'n ander tendens, naamlik dat Suid-Afrika weinig eerbied vir sy staatshandelinge kan verwag as hulle toenemend deur die internasionale gemeenskap as growwe skendings van menseregte gesien word. Daar bestaan selfs die moontlikheid dat Brittanje ander verdragregtelike verpligtinge wat met die beskerming van menseregte te doen het, sou geskend indien hy aan die Suid-Afrikaanse versoek voldoen het.[46]

Asiel word ook toenemend belangrik geag as 'n instrument ter beskerming van menseregte (die grootskaalse skending daarvan word Suid-Afrika juis ten laste gelê).[47] Suid-Afrika beweer die Britse optrede was volkeregtelik onregmatig, onder andere omdat daar nagelaat is om die voortvlugtiges "te oortuig om die konsulaat te verlaat." Hoe word iemand oortuig om iets te doen wat duidelik tot sy nadeel is? Onder die omstandighede sou 'n goeie saak uitgemaak kon word dat Brittanje se uitdruklike versoeke, weiering om geriewe beskikbaar te stel en sy verbod op politieke optrede en kontak genoegsaam was.

Alhoewel dit nie so uit die beskikbare stukke blyk nie, wil dit voorkom asof die Suid-Afrikaanse argumente eerder gebaseer moes gewees het op 'n skending van sy territoriale soewereiniteit. Om iemand buite die bereik van die plaaslike uitvoerende gesag te neem deur hom in 'n konsulaat te laat skuil, onttrek hom aan die jurisdiksie van die staat waarin hy hom bevind. In dié sin is dit dus inmenging in 'n aangeleenthede waaroor die staat normaalweg eksklusiewe beheer uitoefen. Sodanige inbreuk op die soewereiniteit van 'n staat is onregmatig tensy daar die een of ander erkende uitsondering bestaan.[48] 'n Voorbeeld hiervan is die aansienlike statepraktyk ten gunste van die verlening van skuiling in gevalle van menslike nood. Dit is 'n baie ou praktyk en word deur verskeie state, ook in die Weste, erken en beoefen. Soos dit in 'n standaardwerk op hierdie gebied gestel word:

> "The practice of states, however, seems to show that although the right of diplomatic asylum is not recognized in law, a distinction is drawn between asylum and cases of temporary refuge in times of grave political emergency. The latter has often been permitted."[49]

Asiel en tydelike skuiling is dus twee verskillende verskynsels. Een van die verskille is daarin geleë dat laasgenoemde slegs van tydelike duur is en verstryk wanneer die nood wat tot die opsoek van 'n skuilplek aanleiding gegee het, verby is. Asiel is blykbaar permanent, of ten minste solank as wat daar gehou word aan die voorwaardes wat by die toekenning daarvan gestel is.

Kontemporêre ontwikkelinge op die gebied van die beskerming van menseregte neig tot die uitbreiding eerder as die inperking van so 'n vorm van beskerming. Dit sou geen maklike taak wees om te bewys dat die omstandighede waaronder die ses in die Britse konsulaat geskuil het, niks met menslike nood of 'n skending van menseregte te doen gehad het nie. Eerstens is hulle, voordat hul persoonlike vryheid hul ontneem is, die erkende reg van 'n verhoor deur 'n onpartydige hof ontsê. Meer fundamenteel nog is die apartheidskonteks en die miskenning van politieke regte wat daarmee saamgaan.

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46 a 3 van die Europese konvensie vir menseregte is ter sprake. In die *Amëkrane*-saak (Harris a w 493) het Brittanje vergoeding aan Amëkrane se familie betaal nadat hy aan Marokko uitgelewer is.

47 Porcino a w 448.

48 *Asylum*-saak 1951 2 ICJ 274–275.

49 Sien *A Diplomats Handbook of International Law and Practise* 2e uitg 358.

3 1 2 *Proporsionaliteit van die Weerwraakhandeling*

'n Weerwraakhandeling moet wesenlik in verhouding tot die onregmatige handeling waarteen dit gerig is, wees. Dit is 'n manifestasie van die konsep van verhoudingsmatigheid (*Verhältnismässigkeit*) wat as algemene regsbeginsel deel van die volkereg uitmaak.[50] Daarom het die arbiter in die *Naulilaa*-saak van 1928 ook geen twyfel gehad dat 'n growwe wanbalans tussen die eerste onregmatige handeling en die daaropvolgende weerwraakhandeling, tot onregmatigheid lei nie.

> "International law, as it is now developing in the light of the experience of the last war, certainly tends to limit the notion of lawful reprisals and to prohibit excesses . . . Even if one admitted that international law does not require that a reprisal should be approximately in proportion to the offence, one should certainly consider as excessive and illegal, a reprisal out of all proportion to the act justifying it."[51]

Die logika agter hierdie vereiste kan kwalik betwis word. Die doel waarmee 'n weerwraakhandeling verrig word, is om vreedsame geskille-beslegting te verseker en nie om wraak te neem nie.

> "Further, reprisals must be proportionate to the injury suffered, that is they cannot result in losses and injury disproportionately greater than those caused by the delinquent state, and cannot involve the application of compulsion in an amount that goes beyond what would be reasonably necessary to secure a settlement."[52]

Net soos ander vorme van eierigting, soos byvoorbeeld noodweer in die munisipale reg, geld die vereiste van proporsionaliteit ook hier. Hierdie gedagte is so fundamenteel vir enige regsorde dat dit orals aanvaar word.

Daar is 'n besondere rede waarom proporsionaliteit in die stategemeenskap behoort te geld. State is weliswaar soewerein gelyk, maar dit is 'n formele gelykheid. Materieel toon hulle groot verskille. Sou die vereiste van proporsionaliteit nie geld nie, sou die sterkeres die konsep maklik kon misbruik. Dit is 'n verdere rede waarom dit hier nie om wraak of om vergelding volgens die *talio*-beginsel kan handel nie.

Wat verder beklemtoon moet word, is die redelikheid van die weerwraakoptrede – redelikheid in die lig van die doelstelling om 'n vreedsame skikking te bereik. Gevolglik is dit 'n feitevraag of bepaalde optrede regmatige weerwraak was. Dit is so omdat geen absolute proporsionaliteit vereis word nie, maar slegs wesenlike proporsionaliteit.

Die skrywer Bryde voer die argument verder en toon aan dat die verpligting in artikel 2(3) van die VVO-handves (dat state hul geskille op 'n vreedsame wyse moet besleg) die proporsionaliteitsvereiste verder beperk. Nie slegs moet die weerwraakhandeling proporsioneel wees nie, maar dit moet ook noodsaaklik wees vir die beskerming of afdwinging van die regte van die gegriefde staat.[53]

Was Suid-Afrika se optrede redelik? Hierdie aspek is waarskynlik nooit ernstig oorweeg nie. Soos die voorafgaande beskrywing van die feitelike verloop van die gebeure aantoon, was daar nooit werklik die bedoeling om die regsprobleem rondom die teenwoordigheid van die ses voortvlugtiges in die konsulaat te oorweeg nie. As sodanige bedoeling ontbreek, kan daar van 'n ware weerwraakhandeling eintlik geen sprake wees nie. Die bespreking hieronder van hierdie

50 Verdross en Simma a w 653. Sien ook verder Oppenheim a w 2 141; Partsch a w 104.
51 Aanhaling uit *Naulilaa*-beslissing 2 RIAA 1012. Aangehaal in Harris a w 9–10.
52 Skubiszewski a w 753.
53 Brun-Otto Bryde *Encyclopedia of Public International Law* 4 216.

vereiste (die doel met die weerwraak) sal dit bevestig. Indien dit werklik op die oplossing van die regsgeskil gerig sou gewees het, sou daar miskien geargumenteer kon word dat 'n dreigement om die vier verhoorafwagtendes nie terug te stuur nie, nie buitensporig buite verhouding was nie. So 'n moontlikheid sou dan egter vooraf aan die Britte gestel moes gewees het en die vier sou teruggestuur moes gewees het onmiddellik na die ontruiming van die konsulaat.

3 1 3 *Die Doel met Weerwraakhandelinge*

Die begrip "weerwraak" is 'n ongelukkige een omdat dit die indruk mag skep dat dit hier om wraak handel. Die doel met 'n weerwraakhandeling is iets heel anders – om die skender van die volkereg deur skadetoevoeging tot nakoming van die reg te dwing. Die implikasie hiervan is dat die weerwraakhandeling beëindig moet word sodra hierdie oogmerk bereik is. (Die doel is nie om elke gegriefde staat sy "pond vleis" te laat toekom soos namens Suid-Afrika verklaar is onmiddellik na die besluit om die vier verhoorafwagtendes nie terug te stuur nie.) 'n Weerwraakhandeling kom natuurlik eers ter sprake nadat 'n bepaalde staat volkeregtelik onregmatig teenoor 'n ander een opgetree het. Deur die weerwraakhandeling word dan druk uitgeoefen om die onregmatigheid te staak of om herstellende vergoeding te verskaf. Weerwraakhandelinge is nie op vergelding as sodanig gerig nie.[54] Daarom is weerwraakhandelinge toelaatbaar

> "only after negotiations have been conducted in vain for the purpose of obtaining reparation from the delinquent state."[55]

Die uiteensetting hierbo het aangetoon dat Suid-Afrika nooit sulke onderhandelinge met Brittanje gevoer het nie. Daar het slegs een dag verloop tussen die eerste *aide memoire* en die skielike aankondiging dat die Suid-Afrikaanse regering homself as bevry van sy onderneming aan die hof in Conventry beskou. Hiervóór was die Suid-Afrikaanse standpunt een van begrip en simpatie vir die Britse dilemma. Suid-Afrika se aanvanklike toeskietlikheid is ook begryplik in die lig van die feite. Die ses vlugtelinge was *de facto* in "aanhouding" in die konsulaat. Daarmee is bereik wat die minister van wet en orde klaarblyklik voor oë gehad het, naamlik om te voorkom dat hierdie persone onaanvaarbare dade van politieke agitasie pleeg. En dit is boonop bereik op koste van die Britse belastingbetaler!

Selfs nadat 'n "demand for redress has been made,"[56] moet daar nog steeds 'n redelike tyd ter voorbereiding en uitvoering van die versoek verloop.[57] Dit behoef geen betoog nie dat 'n enkele dag beslis nie 'n redelike termyn kan wees nie. Die haas waarmee alles gedoen is, toon eerder aan dat daar by voorbaat besluit is om die vier nie na Coventry terug te stuur nie. Miskien was daar selfs 'n tikkie onsekerheid oor wat sou gebeur as die presiese aard en omvang van die beoogde "weerwraakhandeling" aan die Britte verduidelik sou word.

'n Weerwraakhandeling kan eers verrig word nadat aangedring is op *Wiedergutmachung* en dit onsuksesvol was. Wanneer daar wel aan die gestelde eis voldoen word, moet die weerwraakhandeling onmiddellik gestaak word.[58] Die oogmerk van beslegting en genoegdoening is dan mos bereik. Dit is op hierdie

54 Partsch a w 104.
55 Oppenheim a w 2 142.
56 Skubiszewski a w 753.
57 Oppenheim a w 2 142.
58 Verdross en Simma a w 652–653; Oppenheim a w 2 143.

punt dat die Suid-Afrikaanse optrede duidelik die toets faal. Was dit werklik 'n weerwraakhandeling sou die vier na Brittanje teruggestuur moes gewees het onmiddellik nadat die laaste vlugteling die konsulaat verlaat het. Nie alleen het Suid-Afrika dit nie gedoen nie, maar die minister van buitelandse sake het dadelik na die bekendmaking van die besluit by voorbaat aangekondig dat dit in so 'n geval nie sou gebeur nie.[59]

Weerwraakhandelinge is stappe van "last resort." State het 'n verpligting om hul geskille op 'n vreedsame wyse te besleg.[60] Eers nadat alle sodanige pogings aangewend is, kan daar tot eensydige eierigting soos weerwraak oorgegaan word.[61] Oppenheim stel dit dat daar vooraf samesprekings moet plaasvind en dat dié onsuksesvol moet wees.[62] Soos aangedui, het Suid-Afrika hierdie verpligting nie nagekom nie.

Was daar 'n verpligting om hierdie geskil langs regsweë te besleg? Daar bestaan waarskynlik geen algemene verpligting tot 'n regterlike beslegting van geskille nie. Aan die ander kant is dit wel deeglik 'n vorm van vreedsame geskillebeslegting en in dié sin in pas met artikel 2(3) van die VVO-handves. Dit is interessant om daarop te let dat daar 'n "Optional Protocol Concerning the Compulsory Settlement of Disputes" by die Weense konvensie oor konsulêre vehoudinge bygevoeg is. Daarvolgens word partye by die konvensie en die protokol verplig om uiteindelik geskille deur die internasionale geregshof te laat beslis. Die protokol skep dus jurisdiksie vir die hof soos voorsien in artikel 36(1) van die statuut van die hof.

Tog kan partye in 'n geskil oor die interpretasie of toepassing van die konvensie besluit om dit eerder na 'n arbiter te verwys of om dit deur bemiddeling op te los. Slaag hierdie weë nie, moet dit na die hof verwys word.

Hierdie protokol bind natuurlik slegs partye daarby. Suid-Afrika is geen party daarby nie en is dus nie tot skikking langs hierdie weg verplig nie. Nodeloos om te sê, sou dit hom natuurlik volkome vry staan om die geskil wel deur die internasionale geregshof, arbitrasie, bemiddeling, direkte onderhandeling of die goeie dienste van 'n derde staat te laat besleg.

4 GEVOLGTREKKINGS

Hierdie artikel het 'n redelik volledige skets van die feitelike gebeure rondom Suid-Afrika se weerwraakoptrede gegee. Dit is gedoen ten einde die afleidings wat met betrekking tot die oogmerk agter die Suid-Afrikaanse optrede gemaak is, te bewys. Die gevolgtrekking is dat die doel nie werklik was om die *regs*geskil rondom die konsulaat-insident op te los nie, maar om die besluit om 'n onderneming aan 'n Britse hof te verbreek, op hierdie wyse te probeer regverdig. Natuurlik sal geen regering so 'n besluit uitdruklik erken nie. Daarom is dit onvermydelik dat omstandigheidsgetuienis in die breë konteks eintlik die basis van die argument word. Iets soos die uitdruklike verklaring deur die betrokke minister onmiddellik na die besluit (om die vier verhoorafwagtendes onder geen omstandighede terug te stuur nie – ook nie indien diegene wat in die konsulaat geskuil het, uitgesit sou word nie) is selfs direkte en oorspronklike getuienis. Die

59 *supra.*
60 a (3) van die VVO-handves.
61 Bryde a w 216.
62 a w 2 142. In die *Nauliliaa*-saak word ook die vereistes van 'n "unsatisfied demand" gestel.

waarde daarvan word bepaal deur die feit dat hy nie in sy persoonlike hoedanigheid gehandel het nie. Sy stelling word direk aan die staat Suid-Afrika toegereken. Volkeregtelik gesien, is dit 'n staatshandeling. Volkeregtelike tribunale neem dit as sodanig in aanmerking. Omdat dit dus regshandelinge is, is dit direk relevant vir die aanspreeklikheid van die staat. Dat dit die regsposisie is, blyk duidelik uit die *Eastern Greenland*-saak .[63]

Die regsposisie met betrekking tot weerwraakhandelinge is ook ontleed. Die vereistes is op die Suid-Afrikaanse optrede toegepas en die slotsom was dat die doel met die Suid-Afrikaanse optrede nie die oplos van 'n regsgeskil of eerbiediging van sy regte of die verkryging van vergoeding was nie.

Pogings om die geskil eers langs ander weë te besleg, het ontbreek. Ten opsigte van die proporsionaliteitsvereiste is die posisie miskien minder eenduidig.

Suid-Afrika het ook beweer dat Brittanje asiel aan die voortvlugtiges verleen het. Omdat so 'n reg nie ten opsigte van konsulêre persele bestaan nie en omdat Brittanje self die toestaan van diplomatieke asiel bevraagteken, kan die afleiding gemaak word dat daar aan die vereiste van 'n voorafgaande onregmatige handeling voldoen is. Dit moet egter duidelik gestel word dat geen asiel versoek of verleen is nie. Wat wel verleen is, was tydelike skuiling. Brittanje se beweerde onregmatigheid moet ten opsigte daarvan bepaal word. Die *aide memoires* gee geen aanduiding dat hierdie belangrike verskil in ag geneem is nie.

Suid-Afrika se handeling was geen weerwraakhandeling nie en was dus onregmatig. Teen so 'n onregmatige optrede kan Brittanje weer 'n weerwraakhandeling onderneem mits hy natuurlik ook aan die vereistes van proporsionaliteit en pogings tot die vreedsame beslegting van 'n geskil voldoen.

Die *bona fide*-manier om die geskil te besleg sou gewees het om dit aan 'n tribunaal voor te lê of vir arbitrasie te verwys. As die Suid-Afrikaanse polisie sonder toestemming by die konsultaat ingestorm het en die ses gearresteer het, sou hulle optrede beslis onregmatig gewees het. Opinies deur plaaslike akademici dat so iets in orde sou wees, is klaarblyklik verkeerd.[64] Daar word algemeen aanvaar dat

> "individuals enjoying the privilege of extra-territoriality while abroad such as heads of states and diplomatic envoys, may not be made the object of reprisals."[65]

Die Weense konvensie bevestig die onskendbaarheid van konsulêre persele.[66] Die internasionale regskommissie het in sy voorbereidende werk die volgende hieroor gesê:

> "Failure to fulfil the duty laid down in this article [55] does not render article 20[67] inoperative, but on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission."[68]

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63 PCIJ Reports, series A/B no 53 (1933). Regter Anzilotti sê in hierdie saak: "In my opinion, it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs – the direct agent of the chief of the State – with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question. Declarations of this kind are binding upon the State."

64 Sien bv *Die Burger* (1984–09–26). Die Suid-Afrikaanse regering het dit self ook as onregmatig beskryf. Sien *The Argus* (1984–09–25).

65 Oppenheim a w 2 140. Konsulêre amptenare behoort hierby ingesluit te word.

66 a 37.

67 In die konvensie is dit a 31.

68 1958 *Yearbook of the ILC* 2 104.

Die sterkste vorm van diplomatieke protes is natuurlik om die konsul *persona non grata* te verklaar, te versoek dat die konsulaat gesluit word of om diplomatieke verhoudinge te verbreek. Dit word gewoonlik met soortgelyke optrede vergeld en benadeel die betrokke partye uitermate. In hierdie geval sou dit oordrewe en buite alle proporsie wees.

Maar kon Suid-Afrika dan niks aan die lot van die vier Suid-Afrikaners doen nie? Dit is geen troos om te beweer dat hul werk risiko's, soos betrapping, ingehou het nie. Tog is dit waar. Dit sou nog steeds verstandiger gewees het om die onderneming aan Brittanje gestand te doen (sulke ondernemings behoort nie ligtelik gegee te word nie) en wanneer die saak uiteindelik deur die howe afgehandel is en dus weer onder die uitvoerende gesag val, die probleem langs die diplomatieke weg op te los. Goeie verhoudinge tussen die twee regerings sal die moontlikheid van 'n bevredigende oplossing natuurlik bevorder, iets waarvan daar in die lig van die versuurde behouding tussen die twee regerings tans weinig sprake is.

'n Mens sou 'n meer siniese vertolking aan hierdie gebeure kon gee en beweer dat 'n regstegniese analise eintlik irrelevant is. Ondersteuners van so 'n benadering wys gewoonlik op die feit dat alle state tog maar die volkereg misbruik. Indien dit egter enige waarde het om interstaatlike verhoudings volgens die reëls van 'n *regs*orde te bedryf, dan moet weerwraakhandelinge beoefen word met inagneming van die regsvereistes wat daarvoor gestel word. 'n Internasionale regsorde, hoe rudimentêr ook al, is te verkies bo sy logiese teenpool, anargie. Laasgenoemde sou alle verhoudinge tot manipulasies van brute mag reduseer.

Dit is insiggewend dat Suid-Afrika duidelik gekies het om hierdie geskil as 'n *regs*geskil te tipeer, en nie as een wat bloot op grond van mag beslis sou word nie. Die rede hiervoor is heel eenvoudig – Suid-Afrika kan dit nie bekostig om sy verhoudinge met ander state op laasgenoemde basis te bedryf nie. Daarvoor is hy te kwesbaar. Dit geld egter alle state. Die interafhanklike aard van die internasionale samelewing vereis orde, voorspelbaarheid en die erkenning van regte. Die eenvoudige waarheid is dat orde soveel beter en voordeliger as wanorde is. 'n Regstegniese analise van hierdie probleem is dus ook ter sake omdat Suid-Afrika self aangedui het dat dit die spelreëls is waarvolgens hy sy optrede wil laat toets.

Daar moet ten slotte ook na die breër implikasies van Suid-Afrika se optrede gekyk word. Selfs al sou 'n staat geregtig wees om weerwraakhandelinge te onderneem, is hy natuurlik nie daartoe verplig nie. Die politieke, ekonomiese en ander gevolge van enige sodanige handeling behoort eers deeglik oorweeg te word. Suid-Afrika bevind hom alreeds in uiterste isolasie en kan dit beslis nie bekostig om die enkele vriende wat hy nog het, te vervreem nie. Brittanje is so 'n vriend. Hy was bereid om gereeld resolusies in die veiligheidsraad te veto en sanksiepogings te demp. Die Britse regering voel natuurlik uitermate gegrief oor die hele insident. Alhoewel hy nie noodwendig sy teenmaatreëls aan die groot klok sal hang nie, kan verwag word dat verhoudinge tussen die twee state sal versleg.[69] Sodanige waarskuwings is dan ook uitdruklik gegee.[70]

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69 Die Suid-Afrikaanse verteenwoordiger by die VVO het dit spesiaal nodig gevind om te verklaar dat 'n Britse stem ten gunste van 'n veiligheidsraadsresolusie wat Suid-Afrika se optrede in swart woonbuurte gedurende Oktober 1984 veroordeel het, nie aan die Coventry-insident gekoppel was nie. *The Argus* (1984–10–24).

70 en wel deur o a die betrokke Britse minister. Sien bv *The Argus* (1984–10–24); *Cape Times* (1984–10–24). Die Britse regering voel besonder gegrief omdat hy kort tevore nog die Suid Afrikaanse staatshoof ontvang het – 'n stap wat groot kritiek in sowel Brittanje as elders uitgelok het.

Suid-Afrikaanse ondernemings aan buitelandse howe en regerings, in Brittanje en elders, sal in die toekoms minder geredelik aanvaar word. Samewerking en regstoepassing tussen state berus grootliks op onderlinge vertroue. Die besondere aard van die volkereg bring mee dat aansienlike waarde aan *bona fides* geheg word. Sy optrede in hierdie geval sal Suid-Afrika se geloofwaardigheid orals in die wêreld ondermyn. Die werklike implikasie daarvan moet gemeet word aan die feit dat dit hier gaan om 'n staat wat alreeds in vele opsigte geïsoleer staan. Dan het dit boonop op 'n tydstip gekom toe die internasionale druk op Suid-Afrika aansienlik toegeneem het en alle oë gevestig was op sy skynbaar groeiende binnelandse spanning.

Die ongelukkige finale gevolgtrekking is dat hierdie episode nie voorgehou kan word as 'n voorbeeld van òf die korrekte toepassing van die volkereg òf 'n besonder kundige manier waarop die landsbelang gedien is nie.

5 ADDENDUM

Na voltooiing van hierdie artikel is 'n kort werk (78 bladsye) met die titel *The Coventry Four* deur doktor JC Heunis gepubliseer. Dit is opgedra aan die vier Suid-Afrikaners wat by die verhoor in Coventry betrokke was en handel oor die Suid-Afrikaanse standpunt in hierdie saak. Dit verskaf 'n feiteagtergrond asook 'n bespreking van die regsbeginsels wat ter sprake gekom het. Die skrywer was intiem by die hele aangeleentheid betrokke. Hy was in daardie stadium regsadviseur by die departement buitelandse sake.

Die inhoud van hierdie werk is nie by die skryf van bogenoemde artikel in ag geneem nie. Ten opsigte van die feite bestaan daar geen wesenlike verskille nie. Die rede hiervoor is dat die regering destyds volledige *aide memoires* vrygestel het. Wat die regsposisie betref, is daar geen twyfel in Heunis se gemoed dat Suid-Afrika volkome regmatig opgetree het nie. Sy argument kan nie hier bespreek word nie, behalwe om te meld dat hy die doel waarmee weerwraakhandelinge onderneem word, nie in enige diepte behandel nie. Dit was juis die belangrikste grond vir my gevolgtrekking hierbo dat die Suid-Afrikaanse optrede onregmatig was. In hierdie belangrike opsig verskil die twee opinies dus lynreg.

Bydraes vir publikasie, boeke vir resensie, korrespondensie met die redakteur en advertensies moet gestuur word aan die redakteur, posbus 1263 Pretoria 0001. Artikels moet in die reël nie langer wees nie as 7 000 woorde (20–25 bladsye getik op A4, dubbelspasiëring). Tensy vooraf met die redakteur oor-eengekom is, kan onmiddellike publikasie van bydraes nie beloof word nie.

Inskrywings op die blad moet gerig word aan die uitgewer: Butterworth, posbus 792, Durban 4000.

Kompensasie aan die slagoffer van misdaad: verdigsel of werklikheid?*

CH Cilliers
BA BA(Hons) MA DLitt et Phil
Mede-professor in die Penologie, Universiteit van Suid-Afrika

SUMMARY

Compensation to the Victim of Crime

In the study of the various compensatory systems, it has become evident that no complete agreement exists with regard to the basis and extent of compensating victims of crime. However, it was found that the insufficiency of traditional methods of victim compensation was the main reason for governments to establish state compensation schemes.

The administration of compensation schemes is divided into three broad categories, that is, administration by a new agency – for example, a tribunal; administration by an existing agency – for example, a workers compensation board; and administration by the courts. Victims are compensated in accordance with these systems for financial loss and non-financial prejudice such as pain and suffering.

The time has come for a compensation system to be implemented in the Republic of South Africa. Such a system should be administered by an independent tribunal and the compensation fund should be financed by a certain percentage of fine sentences and a levy penalty after conviction by a court of justice. No money from the fiscus should be used for this purpose.

1 INLEIDING

In die lig van die Republiek van Suid-Afrika se groot agterstand by die res van die Westerse wêreld ten opsigte van slagofferhulp in die algemeen en slagofferkompensasie in die besonder, is dit noodsaaklik dat 'n Suid-Afrikaanse penoloog dié toedrag van sake 'n keer onder die loep neem. Aangesien die kompensasiebegrip vir die meeste Suid-Afrikaners vreemd en nuut is, moet dié begrip binne die totale spektrum van slagoffervergoeding nader beskou word.

Kompensasie en restitusie is albei komponente van die oorkoepelende begrip "vergoeding," wat omskryf kan word as die verskaffing van die een of ander bepaalde voordeel of diens aan 'n benadeelde persoon deur middel van 'n restitusiebevel of kompensasie deur die staat. Kompensasie moet egter onderskei word van restitusie vir sover kompensasie betrekking het op die prosedures wat deur die staat ingestel is met die doel om 'n misdaadslagoffer uit 'n sentrale staatsfonds te kompenseer, terwyl restitusie betrekking het op die regsmiddele

* Hierdie artikel is die resultaat van navorsing wat met finansiële steun van die Raad vir Geesteswetenskaplike Navorsing gedoen is. Die menings hierin uitgespreek is egter dié van die skrywer en nie noodwendig dié van die RGN nie.

wat tot die slagoffer se beskikking staan om vergoeding van die oortreder te eis deur middel van 'n hofbevel, sy dit sivielregtelik dan wel strafregtelik.

2 HISTORIESE ONTWIKKELING VAN VERGOEDING AAN DIE MISDAADSLAGOFFER

By die bespreking van vergoeding aan die misdaadslagoffer word die fokus tradisioneel op die kode van Hammoerabie geplaas, as sou dit die oorsprong van die stelsel van slagoffervergoeding bevat.[1] Die doelstelling met dié kode was om die staat se gesag te versterk, die swakkeres teen die sterkeres te beskerm en die verhouding tussen oortreder en slagoffer te herstel.[2]

Vergoeding aan die misdaadslagoffer het tot aan die einde van die negentiende eeu baie min aandag geniet.[3] Die erkenning van die slagoffer in die strafproses kan toegeskryf word aan Bentham (1748–1832), wie se behandeling van slagoffervergoeding as onderwerp bo dié van die ander negentiende eeuse skrywers uittroon. Bentham het hom beywer vir 'n beter bedeling vir die misdaadslagoffer en was van mening dat die gemeenskap 'n verpligting teenoor die misdaadslagoffer het.

Die belangrikste twintigste-eeuse bydrae tot die inwerkingstelling van die stelsel van slagoffervergoeding is deur Fry, 'n strafhervormer, gelewer.[4] Fry se oorspronklike gedagte is gebou op die beginsel van restitusie, waarvolgens die oortreder die slagoffer direk vir sy skade vergoed. Dit was Fry se bedoeling om restitusiebewuste howe te skep,[5] want volgens haar het vergoeding as maatreël 'n sterk korrektiewe werking. Fry het in 'n artikel in die Britse dagblad *The Observer*[6] haar besorgdheid oor die onvermoë van die bestaande regsmiddele om misdaadslagoffers te beskerm uitgespreek en aangevoer dat die staat verantwoordelikheid vir die benadeling van sy onderdane deur misdaad moet aanvaar. Fry se gedagtes het die Britse en Nieu-Seelandse wetgewers dusdanig geïnspireer dat dié twee lande die eerstes geword het om kompensasiestelsels vir misdaadslagoffers in werking te stel.[7]

Na die inwerkingstelling van die kompensasiestelsels in Brittanje en Nieu-Seeland het dié gedagte dermate ingang gevind dat weinig Westerse lande vandag nie oor 'n kompensasiestelsel beskik nie. Die Republiek van Suid-Afrika is een van hulle.

3 DIE GRONDSLAE VAN 'N MISDAADSLAGOFFERKOMPENSASIESTELSEL

Met die totstandkoming van slagofferkompensasiestelsels is twee breë grondslae vir die implementering daarvan voorgehou, naamlik:

a 'n regsplig wat op die staat rus om misdaadslagoffers te kompenseer; of

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1 Knudten *Criminological Controversies* (1968) 324.
2 Schafer *Victimology: The Victim and His Criminal* (1977) 7.
3 Bouring in Edelhertz en Geis *Public Compensation to Victims of Crime* (1974) 8.
4 Lamborn "Developments in the Law Concerning Victims" 1978 *Victimology: An International Journal* 505.
5 Sy stel dit soos volg in "Justice for Victims" 1957 *Journal of Public Law* 126: "Repayment is the best first step towards reformation that a dishonest person can take. It is after all the ideal solution."
6 1963–07–07.
7 Met die inwerkingstelling van die Nieu-Seelandse kompensasiestelsel in 1964 het die behoefte wêreldwyd uitgekring, in so 'n mate dat nege van die twee-en-twintig stelsels wat in 1972 in werking was, op die lees van die Nieu-Seelandse stelsel geskoei was.

b 'n bloot morele verpligting wat op die staat rus om misdaadslagoffers te kompenseer.

3 1 Regsplig

Om die staat teenoor alle misdaadslagoffers verantwoordelik te hou en dit oor die boeg van 'n regsplig te gooi, skep heelwat probleme. So 'n benadering kom daarop neer dat die staat nie slegs 'n algemene verpligting het om sy inwoners en onderdane teen misdaad te beskerm nie maar ook 'n besondere verpligting om misdaadslagoffers te vergoed. Die staat se regsplig is daarin geleë dat misdaad voorkom moet word en die uitvoering van die plig berus by die polisie.[8] Die voorstanders van die benadering dat die staat 'n regsplig het om misdaadslagoffers te kompenseer, argumenteer soos volg:

a Die staat het 'n regsplig om misdaadslagoffers te kompenseer aangesien dit die staat is wat misdade laat plaasvind. Dié argument kom daarop neer dat hoewel die staat nie misdadigers skep nie, hy wel misdadigers in die geleentheid stel om misdade te pleeg.[9]

b Die staat het 'n regsplig om misdaadslagoffers te kompenseer aangesien dit die staat self is wat deur die oplegging van tronkstraf of 'n boete restitusie deur die oortreder bemoeilik of onmoontlik maak. Die argument kom daarop neer dat die staat die misdadiger onbekwaam tot restitusie maak deur hom te verhinder om geld te verdien waarmee die slagoffer vergoed kan word. Aangesien dit 'n bekende feit is dat die meeste oortreders nie oor die vermoë beskik om hul slagoffers te vergoed nie, kan dié argument nie aanvaar word nie.

c Die staat het 'n regsplig om misdaadslagoffers te kompenseer, aangesien dit die staat is wat misluk het in die proses van misdaadvoorkoming. Dié argument lui dat daar 'n stilswyende kontrak tussen die burgers en die staat bestaan, waarvolgens die staat verantwoordelik is vir almal se veiligheid en alles in sy vermoë moet doen om misdaad te voorkom. Waar die staat in hierdie opsig faal, is die staat verantwoordelik vir die gevolge van misdade wat gepleeg word, ook al het hy alle moontlike voorsorg getref.

Met die voorgaande argumente kan nie saamgestem word nie, omdat die siening dat die staat 'n kontraktuele plig het om misdaadslagoffers te kompenseer, te wyd is om algemene ondersteuning te geniet. Die siening dat die staat verantwoordelik mag wees vir die omstandighede wat misdade laat plaasvind, is miskien aanvaarbaar, maar die mening dat die staat restitusie aan die slagoffer onmoontlik maak, is nog nooit empiries nagevors nie. Die vraag of restitusie sal slaag al word die misdadiger nie finansieel deur strafoplegging benadeel nie, moet nog beantwoord word. Verdere argumente om die kompensasiegedagte te regverdig, moet dus gesoek word.

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8 In *O'Rourke v Schact* 1973 30 DLR (3d) 641 het hoofregter Schroeder die volgende uitlating gemaak: "The duties which I would lay upon (constables) stem not only from the relevant statutes . . . but from the common law, which recognizes the existence of a broad conventional or customary duty in the established constabulary as an arm of the state to protect the life, limb and property of the subject."

9 Dit was die standpunt van Margery Fry wat verantwoordelik was vir die daarstelling van die moderne kompensasieskemas. Fry sê in Burns *Criminal Injuries Compensation: Social Remedy or Political Palliative for Victims of Crime*? (1983) 102: "The state which forbids our going armed in self-defence, cannot disown all responsibility for its occasional failure to protect."

3 2 Morele Plig

'n Morele plig van die kant van die staat word meesal deur wetgewers as regverdiging vir kompensasieskemas aangevoer. Dié argument kom daarop neer dat die slagoffers van geweldsmisdade bevoorreg is om kompensasie van die staat te ontvang en nie 'n reg daarop het nie.[10] Die basis waarop kompensasie toegeken word, is simpatie, welwillendheid en menslikheid. Die benadering is dat die staat nie sonder meer vir die gevolge van alle misdade verantwoordelik gehou kan word nie.

Die staat verwag van al sy inwoners om hulp te verleen by die bekamping van misdaad, die aanmelding van ernstige misdade en die aflegging van getuienis tydens verhore. Die gemeenskap het ook 'n verantwoordelikheid teenoor misdaadslagoffers in die sin dat dié slagoffers deel van die gemeenskap uitmaak. Om hierdie rede is dit geregverdig dat die staat kompensasie namens die gemeenskap aan misdaadslagoffers betaal.

4 DIE AARD VAN KOMPENSASIESTELSELS

Die administrasie van kompensasiestelsels kan in drie breë kategorieë verdeel word, naamlik:

a *Administrasie deur 'n nuwe agentskap, soos 'n onafhanklike nuutgestigte raad of tribunaal wat verantwoordelik is vir die funksionering van die skema*[11] Die nadeel van 'n onafhanklike tribunaal is die hoë koste verbonde aan die inwerkingstelling en instandhouding daarvan, veral in klein jurisdiksies wat min aansoeke ontvang en beoordeel.

b *Administrasie deur 'n bestaande agentskap* In gevalle waar die administrasie van kompensasiestelsels deur bestaande instellings behartig word, geskied dit gewoonlik deur werkerskompensasieskemas of industriële versekeringstelsels.[12] Administrasie deur 'n bestaande agentskap het die voordeel dat dit gewoonlik koste-effektief is.

c *Administrasie deur die howe* Baie min stelsels maak gebruik van administrasie deur die howe,[13] omdat dit tot baie probleme lei. Burns stel dit só:[14]

> "Courts lack investigative staff, have case backlogs, are adversarial in character and conservative in applying legislative policy. As a result very few jurisdictions utilize the juridical administrative model."

5 DIE OMVANG VAN KOMPENSASIE

Sekerlik die belangrikste doelstelling van die meeste kompensasiestelsels is om die slagoffer vir sy vermoënsverlies te kompenseer. Alhoewel dit moeilik is om alle fisiese beserings te herstel, poog al die skemas om ten minste die finansieel

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10 Volgens die Britse stelsel neem kompensasie die vorm aan van 'n *ex gratia*-betaling.

11 Stelsels wat op hierdie wyse funksioneer, is bv dié van Brittanje (Engeland, Skotland en Wallis), Europa (Nederland), Kanada (Ontario, Saskatchewan, Newfoundland, Albertha en Manitoba), die Verenigde State van Amerika (New York, Hawaii, Maryland en New Jersey) en die oorspronklike Nieu-Seelandse stelsel.

12 Voorbeelde van sulke stelsels word aangetref in Kanada (Brits Columbië) en die Verenigde State van Amerika (Florida, Indiana, Montana, Noord-Dakota, Oregon, Texas, Virginia en Washington).

13 Stelsels wat wel op hierdie wyse funksioneer, is oa Kanada (New Brunswick), Brittanje (Noord-Ierland), die Verenigde State van Amerika (Delaware, Illinois, Massachusetts, Ohio, Rhode Island, Tennessee en Wes Virginia) en Australië (Nieu-Suid-Wallis).

14 Burns a w 4.

bepaalbare gevolge van beserings te vergoed. So maak die meeste stelsels voorsiening vir die kompensasie van mediese uitgawes.[15] Verliese aan inkomste word ook algemeen deur die stelsels vergoed.[16] Verder word begrafnisonkoste spesifiek in sekere jurisdiksies as 'n verhaalbare finansiële verlies genoem.

Verskeie faktore speel 'n rol by die toekenning van 'n kompensasiebedrag, waarvan die minimum en maksimum kompensasiebedrae sekerlik een van die belangrikstes is. Die belangrikste oorweging by die vasstelling van 'n minimum of maksimum bedrag is dat die stelsels so koste-effektief moontlik moet wees.

Die meeste stelsels verminder die kompensasiebedrag indien die slagoffer enige vergoeding uit 'n ander bron bekom, byvoorbeeld 'n maatskaplike sekuriteitsvoordeel.[17] Verder speel die gedrag van die slagoffer tydens die pleging van die misdryf 'n deurslaggewende rol by kompensasiebepaling.

Al die stelsels wend 'n poging aan om die slagoffer vir geldelike verlies te kompenseer. Dieselfde kan egter nie van nie-geldelike verlies gesê word nie. Onder nie-geldelike verlies word pyn en lyding asook verlies aan lewensgenietinge en vooruitsigte verstaan. Weens die feit dat die bepaling van 'n kompensasiebedrag baie moeilik is, word hierdie verliese deur die meeste stelsels uitgesluit.[18] Oor die algemeen word kompensasie vir die verlies van besittings ook nie gedek nie. Die belangrikste motivering vir hierdie weglating is dat die insluiting daarvan die stelsels baie duur sou maak.[19]

Elke kompensasiestelsel definieer die begrip "slagoffer" (dit wil sê 'n persoon wat op kompensasie geregtig is) na goeddunke. In die meeste jurisdiksies dek die begrip twee tipes slagoffer, naamlik:

a 'n persoon wat beserings as gevolg van 'n geweldsmisdaad opgedoen het en wat dus as 'n direkte slagoffer bestempel kan word, of so 'n persoon se afhanklike wat verlies of skade ly as gevolg van sy dood en wat dus 'n indirekte slagoffer is; en

b 'n persoon wat as 'n "barmhartige Samaritaan" bestempel kan word en wat beseer is in 'n poging om een van die volgende handelinge te verrig:

i die arrestasie van 'n misdadiger;

ii die verlening van bystand aan 'n wetstoepasser in die uitvoering van sy pligte of tydens laasgenoemde se arrestasie van 'n oortreder;

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15 Al drie-en-dertig Amerikaanse state wat oor kompensasiestelsels beskik, maak voorsiening vir mediese uitgawes, terwyl a 107 van die Nieu-Seelandse Accident Compensation Act 43 van 1972 bepaal dat "a victim may receive compensation for conveyance to a hospital" en a 111 bepaal dat "he may receive compensation for medical treatment."

16 Sewentien Amerikaanse state vergoed die verlies aan inkomste direk, terwyl drie state, nl Alaska, Hawaii en New Jersey "loss of earning power" vergoed. Die verlies aan toekomstige inkomste word deur Kalifornië, Illinois en Tennessee by die skema ingesluit, terwyl die Britse raad gelei word deur die prosedure wat vir 'n siviele geding waarby 'n verlies van inkomste deur die slagoffer betrokke is, geld.

17 Sekere stelsels, soos dié van die Amerikaanse staat Nebraska, sluit private assuransieskemas as 'n kollaterale bron uit.

18 In die Amerikaanse staat Hawaii word kompensasie vir pyn en lyding uitdruklik toegelaat en in Brittanje word kompensasie vir nie-geldelike verlies uitdruklik toegeken, want "compensation will be assessed on the basis of common law damages" (Elfde jaarverslag van die "Criminal Injuries Compensation Board" (1975) 28.

19 Slegs Hawaii in die Verenigde State van Amerika maak voorsiening vir dié soort kompensasie en dan slegs in die geval van "barmhartige Samaritane."

iii die voorkoming van misdaad; en

iv die herstel van orde en vrede.

Die versuim om die misdaad binne 'n redelike tydperk by die polisie aan te meld, dien in al die stelsels as 'n grond vir die weiering van kompensasie. Die weiering van kompensasie word gegrond op die volgende oorwegings: Eerstens vervul dit 'n opvoedingsfunksie, vir sover dit slagoffers in die toekoms sal aanmoedig om misdade aan te meld.[20] Tweedens word aanvaar dat waar die slagoffer of benadeelde nie met die polisie in verbinding getree het nie, daar geen misdaad plaasgevind het nie. Ten slotte word geredeneer dat waar 'n persoon nie sy pligte as goeie landsburger nakom nie, hy nie vir kompensasie in aanmerking geneem behoort te word nie. Hierdie pligte impliseer onder andere die aanmelding van misdaad by die polisie.

Om vir kompensasie in aanmerking geneem te word, word dit van die slagoffer verwag om die polisie met die ondersoek van die misdaad behulpsaam te wees. Indien die slagoffer in gebreke bly om sy volle samewerking te verleen, kan die beheerliggaam die aansoek afkeur of die goedgekeurde bedrag verminder. Die uitsluiting van familie of gesinslede van die misdaadslagoffer vir kompensasie-doeleindes kom heel dikwels voor.

6 'N SUID-AFRIKAANSE BEHOEFTE?

In die lig van die voorgaande word daar aan die hand gedoen dat die instelling van 'n kompensasiestelsel in Suid-Afrika dringend noodsaaklik geword het. Gesien die finansiële posisie van die meeste misdadigers, bied die reg van die slagoffer om sy skade by wyse van 'n siviele eis te verhaal, vir hom maar 'n skrale troos. Om dieselfde rede word die praktiese toepassing en deurvoering van die restitusiebepalings in die Strafproseswet[21] in 'n groot mate verydel. Om hierdie agterstand te bowe te kom, moet 'n kompensasiestelsel ingestel word wat deur regverdige en billike funksionering die inwoners van die Republiek van Suid-Afrika se vertroue in die regstelsel sal verstewig. As vertrekpunt word die volgende aan die hand gedoen:

a Die morele plig van die staat om misdaadslagoffers te kompenseer, moet as vertrekpunt vir die vestiging van 'n kompensasiestelsel dien. Die basis waarop kompensasie toegeken word, moet dus simpatie, welwillendheid, menslikheid en goedgesindheid wees.

b Die administrasie van die stelsel behoort deur 'n onafhanklike administratiewe tribunaal behartig te word, en die funksionering daarvan behoort onder die jurisdiksie van die minister van justisie te val. Die voorsitter van die tribunaal moet 'n persoon met wye regsondervinding wees.

c 'n Kompensasiefonds wat voorsiening maak vir kompensasie-uitbetalings, alle administratiewe uitgawes en die salarisse van personeel en toelaes van raadslede, behoort geskep te word. Die skepping en instandhouding van die fonds

20 Linden "Restitution, Compensation for Victims of Crime and Canadian Criminal Law" 1977 *Canadian Journal of Criminology and Corrections* 17 is 'n eksponent van dié benadering: "It may be that we could improve crime detection by providing financial assistance for crime victims. Many crimes are never reported to the police. If a crime victim has the opportunity of recovering financial aid from the state if he reports a crime, he might be more willing to do so."

21 51 van 1977 a 300 en 301.

moet nie uit algemene belastingfondse gedoen word nie, maar uit een of albei van die volgende twee inkomstebronne:

i 'n tiende van alle boetevonnisse wat in Suid-Afrikaanse howe opgelê word;

ii 'n strafaanslag of heffing van R10,00 bo en behalwe die opgelegde straf wat opgelê word aan elke persoon wat aan 'n misdryf in 'n strafhof in die Republiek van Suid-Afrika skuldig bevind word.

d Om vir kompensasie in aanmerking te kom, moet die aansoeker 'n slagoffer van 'n geweldsmisdaad wees. Die volgende persone moet vir kompensasie oorweeg word:

i 'n persoon wat as gevolg van 'n geweldsmisdaad beserings opgedoen het;

ii die afhanklikes van 'n persoon wat as gevolg van 'n geweldsmisdaad oorlede is; en

iii 'n persoon wat beseer is in 'n poging om 'n misdaad te voorkom of in 'n poging om 'n wetstoepasser behulpsaam te wees; met ander woorde, 'n "barmhartige Samaritaan."

e Besoekers of gasarbeiders wat in die Republiek van Suid-Afrika beserings as gevolg van geweldsmisdade opdoen, behoort deur die stelsel gekompenseer te word. 'n Verdere voorstel wat oorweging behoort te geniet, is dat die staat 'n subrogasiereg moet hê om namens die slagoffer 'n siviele eis teen die oortreder in te stel indien die slagoffer nie self 'n eis wil instel nie.

f Laastens moet die moontlikheid ondersoek word of die slagoffers van terreuraanvalle in Suid-Afrika by die stelsel ingesluit kan word. Die spesiale staatspresidentsfonds en die kompensasiefonds kan dus saamsmelt sodat alle slagoffers van geweldpleging in Suid-Afrika deur een sentrale raad gekompenseer word.

AANTEKENINGE

ACCESSIO DEUR DIE VERBINDING VAN ROERENDE SAKE IN HISTORIESE PERSPEKTIEF

1 Inleiding

Die onlangse beslissing in *J L Cohen Motors SWA (Pty) Ltd v Alberts* 1985 2 SA 427 (SWA) het interessante aspekte van eiendomsverkryging deur die *accessio* van twee roerende sake aan die lig gebring. Die tersaaklike feite van die beslissing is soos volg. Die eiser, Cohen Motors, het ses nuwe buitebande aan ene Gouws verkoop en oorhandig. Gouws het hiervoor per tjek betaal. Hierna het Gouws die ou buitebande van 'n vragmotor wat hy intussen van die verweerder, Cohen, gekoop het met dié nuwe bande vervang. Die ooreenkoms tussen Gouws en die verweerder ten opsigte van die vragmotor is egter gekanselleer. Daarna is die vragmotor met die ses nuwe buitebande daaraan aan die verweerder teruggelewer. Intussen is Gouws se tjek vir die buitebande onbetaald deur die bank aan Cohen teruggestuur. Een van die aspekte waaraan die regter aandag moes gee, was of die verweerder, omdat hy eienaar van die vragmotor was, ook eienaar geword het van die nuwe buitebande wat vir die ou buitebande op sy vragmotor omgeruil is.

Hierdie feitesituasie is tereg deur die hof behandel volgens die reëls wat vir eiendomsverkryging deur die verbinding van twee roerende sake geld. In die loop van sy uitspraak (433C) het die regter verwys na die vereistes wat normaalweg vir *accessio* van roerende sake in die moderne reg gestel word, naamlik:

a Die verbinding moet nie op saakvorming neerkom nie.

b In die verbinding moet duidelik tussen 'n hoofsaak en 'n bysaak onderskei word.

c Die verbinding moet nie maklik skeibaar wees nie.

Hierbenewens suggereer die regter (433H–434C) dat 'n onderskeid gemaak moet word tussen *accessio* as wyse van eiendomsverkryging en die aanverwante kwessie betreffende watter sake of saakdele as bysake of hulpsake van 'n bepaalde roerende hoofsaak beskou moet word.

Die doel van hierdie aantekening is om sowel die genoemde vereistes as die onderskeid waarna hierbo verwys is histories in perspektief te stel.

2 Die Vereistes vir *Accessio* deur die Verbinding van Roerende Sake

2 1 Algemeen

Die drie vereistes vir *accessio* deur die verbinding van roerende sake is daarop gemik om *accessio* van aanverwante maniere van eiendomsverkryging, te wete

saakvorming (*specificatio*), vereniging (*confusio*) en vermenging (*commixtio*) te onderskei. *Accessio* en *specificatio* verskil daarin dat by *accessio* die eienaar van die hoofsaak ook eienaar van die bysaak word terwyl by *specificatio* die saakvormer die eienaar word van die nuwe saak (*nova species*) wat deur sy arbeid geskep word. Die verskil tussen *accessio* en *confusio* bestaan weer daarin dat die sake wat by *accessio* verbind word altyd 'n hoofsaak en 'n bysaak is terwyl min of meer gelykwaardige sake by *confusio* verenig word. Wat *accessio* en *commixtio* betref, word 'n hegter fisiese verbinding by *accessio* vereis as in die geval van *commixtio*.

Bogenoemde onderskeidings is nie met dieselfde mate van helderheid in die Romeinse reg getref nie. *Accessio* is byvoorbeeld nie eers as 'n afsonderlike *genus* van eiendomsverkryging erken nie (sien Kaser *Das römische Privatrecht* 1 428; Bonfante *Corso di Diritto Romano* (1968) 2 91; Daube *Roman Law: Linguistic, Social and Philosophical Aspects* 16). Weliswaar is verskeie verskyningsvorme van *accessio*, soos *alluvio* (aanslibbing), *avulsio* (afskeuring), *inaedificatio* (bebouing), *plantatio* (plant) en *satio* (saai) asook bepaalde verbindings van twee roerende sake erken. Voorbeelde van laasgenoemde is die sweising van 'n ysterarm of -voet aan 'n ysterstandbeeld (*ferruminatio*), die kleuring van 'n stuk materiaal met 'n kleurstof (*tinctura*), die beskrywing van papier of perkament met ink of goue letters (*scriptura*), die inwewing van garing of wol in 'n kleed (*textura*) en die beskildering van 'n doek met verf (*pictura* of *tabula picta*). Hierdie verskyningsvorme van *accessio* van roerende sake is op hul beurt weer nie duidelik onderskei van aanverwante maniere van eiendomsverkryging soos *specificatio, confusio* en *commixtio* nie. In 'n paar geskrifte waarin die oorspronklike wyses van eiendomsverkryging sistematies behandel word, soos in die *Institute* van Gaius (70–78) en Justinianus (2 1 20–2 1 34), word die bogenoemde verbindings van roerende sake vervleg met *specificatio, confusio* en *commixtio* en word sommige verbindings soos *ferruminatio* en *tinctura* heeltemal verswyg.

Alhoewel die Romeins-Hollandse skrywers nie deurgaans eenvormige terminologie handhaaf nie, erken hulle nietemin *accessio* of natrekking as 'n vorm van oorspronklike eiendomsverkryging (sien bv De Groot 2 9 1 en 2 10 2; Voet 41 1 14; Van Leeuwen *R H R* 2 5 1; Van der Linden *Koopmans Handboek* 1 7 22; Huber *HR* 2 5 1 en 2 6 1). Onder die hoof *accessio* word die verbinding van roerende sake met mekaar aangetref (bv 'n diamant aan 'n ring, 'n deksel op 'n beker en die bekendes van *tinctura, scriptura, pictura* en *textura*), asook die verbinding van roerende sake met grond (*inaedificatio* en *plantatio et satio*). Hierdie gevalle van *accessio* word deur sommige skrywers as "kunsmatig" of "industrieel" aangemerk. As voorbeelde van "natuurlike" *accessio* word dan gewoonlik volstaan met gevalle waar grond met grond verbind (*alluvio* en *avulsio*). Anders as in die klassieke en na-klassieke Romeinse reg word hier dus tekens van 'n dogmatiese ordening gevind. Verskeie aspekte van die skrywers se sistematiek lyk egter vir die moderne juris eienaardig. Ondanks die feit dat *specificatio* en *confusio* deur sommige skrywers as afsonderlike wyses van oorspronklike eiendomsverkryging behandel word (sien bv De Groot 2 8 1 e v en 2 10 1 e v; Huber *HR* 2 7 1–2 7 5 en 2 7 6–2 7 11), tref ons dit by Voet (41 1 21 en 23) aan as voorbeelde van *accessio industrialis*. De Groot 2 8 3 sluit *scriptura* en *pictura* weer in as voorbeelde van "gedaent-geving" (*specificatio*) en nie van "natrecking" (*accessio*) nie. Alle formele skeidslyne vervaag waar Van Leeuwen (*RHR* 2 5 1) as inleiding tot sy behandeling van hierdie onderwerpe verklaar:

> "Na-trek door saaks-gevolg is, wanneer van twee t'samen gevoegde saken de waardiger den minder, of onwaardiger tot hem trekt, door gedaent-gevende vermenging."

2 2 Die vereiste dat die verbinding nie op saakvorming moet neerkom nie

In die Romeinse reg was die wesenlike kenmerk van *specificatio* dat 'n nuwe saak of *nova species* die resultaat van die vormgewende arbeid van die *specificator* moes wees. Voorbeelde van *specificatio* is waar 'n skip uit stompe gebou is of waar 'n kleed uit wol geweef is (*D* 41 1 7 8 en sien verder *D* 41 1 26 *pr*). By *accessio* van roerende sake daarenteen gaan dit oor die verbinding van twee roerende sake op so 'n wyse dat die minder belangrike saak (bysaak) opgaan in die meer belangrike saak (hoofsaak) en die identiteit van laasgenoemde saak aanneem. Die bydrae van die persoon wat die verbinding maak, is nie belangrik nie – dit is trouens van geen belang wie die verbinding bewerkstellig nie – en geen *nova species* word gevorm nie. Nogtans word die strydvraag in die klassieke Romeinse reg tussen die Sabiniani en die Proculiani, naamlik of die materie of die vorm die deurslag gee by *specificatio*, ook by die bespreking van die verbinding van roerende sake aangetref. Dit kom veral voor by die bespreking van die vraag welke van twee of meer samestellende sake of saakdele as die hoofsaak beskou word.

Die Romeins-Hollandse skrywers het ook die vervaardiging van 'n geheel nuwe saak as gevolg van die saakvormer se arbeid as die wese van *specificatio* beskou (De Groot 2 8 2; Voet 41 1 21 en 41 1 23; Van Leeuwen *R H R* 2 5 3; Schorer *ad Gr* 2 8 2; Huber *HR* 2 7 1). Daar is klaarblyklik ook *consensus* onder die skrywers dat die nuwe saak aan die saakvormer behoort, aangesien nie die materie of stof nie, maar die vorm die deurslag gee (De Groot 2 8 2; Van der Keessel *Praelectiones op Gr* 2 8 2; Van Leeuwen *RHR* 2 5 3).

Hierdie onderskeid tussen saakvorming en die verbinding van twee roerende sake blyk duidelik uit die beslissing in *Aldine Timber Co v Hlatwayo* 1932 TPD 337. In hierdie beslissing het die hof geweier om 'n roerende hout- en ystergebou wat vervaardig is uit gedeeltelik materiaal wat van 'n afgebreekte hout- en ystergebou verkry is en gedeeltelik nuwe materiaal wat by die eiser gekoop is, as 'n *nova species* te erken. Regter Barry verklaar soos volg (341):

> "It seems to me that the circumstances in this case show that the work done on the old material was not in the nature of specification, because no new species has been created and the original material has not ceased to exist as such."

Die regter gaan dan voort om die onderhawige verbinding as 'n geval van *accessio* van roerende sake uit te wys en beslis dat aangesien die nuwe materiaal die grootste massa gehad het en die meeste werd was, die finale produk aan die eiser behoort het.

2 3 Die vereiste dat die hoofsaak en die bysaak duidelik in die verbinding onderskei moet kan word

Die Romeinse juriste het nie duidelik tussen *accessio* van roerende sake en vereniging (*confusio*) onderskei nie. Die verklaring vir hierdie gebrekkige onderskeid is daarin geleë dat die Romeinse juriste nie ooreengestem het oor die maatstaf waarvolgens bepaal moes word welke van die samestellende dele van 'n verbinding van twee roerende sake die hoofsaak en welke die bysaak was nie. Die volgende uiteenlopende standpunte omtrent hierdie aangeleentheid word in die bronne aangetref:

a Die saak met die hoogste waarde is die hoofsaak (*D* 41 1 27 2; *I* 2 1 34 en vgl *D* 41 1 26 2 en *I* 2 1 33).

b Die saak met die grootste massa is die hoofsaak (*D* 6 1 23 4, 5; *D* 34 2 19 13; *D* 41 1 27 2).

c Die saak waarsonder die ander saak nie kan bestaan nie is die hoofsaak (*D* 6 1 23 3).

d Die saak wat aan die eienaar om wie se onthalwe die aanhegting gemaak is, behoort, is die hoofsaak (*D* 41 1 27 1).

e Die saak wat deur die aanhegting versier word, is die hoofsaak (*D* 34 2 19 13, 20).

f Die saak wat aan die eindproduk sy wese, vorm, naam of funksie gee, is die hoofsaak (*D* 34 2 29 1; *D* 41 1 26 *pr*).

Moderne Romaniste stem saam dat dié uiteenlopende standpunte teruggevoer kan word na 'n filosofiese meningsverskil tussen die Sabiniani en die Proculiani. Net soos in die geval van *specificatio* was die materie of stof waaruit die verbinding saamgestel is vir die Sabiniani deurslaggewend. Daarom het die Sabiniani die saak wat voor die verbinding die grootste omvang, massa of waarde gehad het as die hoofsaak beskou. Hulle het gelet op die *maior species* en die *maior pars* of *portio*, dit wil sê die materie wat oorheers het in die verbinding (sien veral *D* 6 1 23 5 (Cassius); *D* 34 2 19 13 (Sabinus)). Die Proculiani daarenteen het weer na die *qualitas* (vorm, funksie, bestemming, aard) van die eindproduk gekyk om te bepaal watter van die sake dié *qualitas* aan die eindproduk gegee het (*D* 41 1 7 2 *in fine*; *D* 41 1 26 *pr* en veral *D* 34 2 29 1: "utra autem utrius materia sit accessio, visu atque usu rei, consuetudinis patris familiae aestimandum est"). Hierby sluit die gedagte aan dat dié saak waarsonder die ander nie kan bestaan nie as die hoofsaak beskou is. Een gevolg van die verskil in benadering was dat die Sabiniani 'n veel wyer opvatting van *accessio* deur die verbinding van roerende sake gehad het as die Proculiani. In die geval waar twee ysterstawe aan mekaar gesweis is, sou die Sabiniani die finale produk aan die eienaar van die *maior portio* laat toekom. Die Proculiani sou nie kon besluit watter ysterstaaf die *propria qualitas* aan die eindproduk verleen het nie. Hulle sou hierdie voorbeeld dus as 'n geval van *confusio* beskou het en die vorige eienaars mede-eienaars van die eindproduk gemaak het (sien *D* 41 1 27 2 en bespreking daarvan deur De Zulueta *Digest 41 1 and 2*; Bonfante *op cit* 105–106; Voci *Modi di Acquisito della Proprietà* (1952) 259). Hierdie meningsverskil bevat die kiem van die vereiste dat die hoofsaak en die bysaak in 'n verbinding duidelik onderskei moet kan word voordat daar van *accessio* deur die verbinding van roerende sake sprake is. Vir 'n duidelik onderskeid tussen *accessio* van roerende sake en *confusio* is die Proculiaanse standpunt, wat ook deur Justinianus aanvaar is, verkieslik.

Uit die verklarings van verskeie Romeins-Hollandse skrywers kan afgelei word dat *accessio* van roerende sake volgens hulle voorkom in dié gevalle waar die samestellende dele van die verbinding as hoofsaak of bysaak uitgewys kan word (sien De Groot 2 9 1; Voet 41 1 27; Van Leeuwen *RHR* 2 5 1; Van der Keessel *Praelectiones* op Gr 2 9 1; Huber *HR* 2 5 1). Desnieteenstaande word die grense tussen *accessio* deur die verbinding van roerende sake en *confusio* nie in alle gevalle duidelik in die Romeins-Hollandse reg getrek nie. Skeidslyne vervaag juis in dié gevalle waar twee roerende sake onskeibaar verbind word maar daar

nie, wat die finale produk betref, 'n duidelike onderskeid tussen hoofsaak en bysaak gemaak kon word nie. Voet (41 1 27) bespreek ook die geval waar twee stukke yster aan mekaar gesweis word. Soos die Sabiniani sien Voet dit klaarblyklik nog as 'n voorbeeld van *accessio* en ken die finale produk toe aan dié persoon wie se bydrae tot die verbinding òf in massa òf in waarde die grootste was. Huber (*HR* 2 7 11) en miskien ook De Groot (2 8 8) neig egter na die Proculiaanse standpunt waarvolgens hierdie as 'n geval van *confusio* behandel sou word – die geheel word dus proporsioneel in mede-eiendom aan die twee vorige eienaars toegeken. Hieruit blyk dat daar net soos in die Romeinse reg nie deurgaans duidelik in die Romeins-Hollandse reg onderskei is tussen *accessio* van roerende sake en *confusio* nie.

Die onvermoë van ook die Romeins-Hollandse skrywers om effektief in hierdie verband te onderskei, is waarskynlik te wyte aan die feit dat die "suiwer" standpunt van die Proculiani wat hierbo verduidelik is nie heelhuids in die Romeins-Hollandse reg aanvaar is nie. Inteendeel, die meeste van die maatstawwe wat hierbo vermeld is in verband met die vasstelling van welke van twee eertydse selfstandige sake in 'n verbinding die hoofsaak en welke die bysaak vorm, word wel deur die skrywers vermeld sonder dat daar 'n meerderheidsopinie ten gunste van die Proculiaanse standpunt bestaan (sien by De Groot 2 9 1; Voet 41 1 14; Van der Keessel *Praelectiones* op Gr 2 9 1; Van der Linden *Koopmans Handboek* 1 7 2 2; Huber *HR* 2 5 1). Sommige skrywers kombineer van hierdie maatstawwe – wat dan 'n dubbelloop-toets tot gevolg het. Volgens Van der Keessel (*Dictata ad I* 2 1 37 4) is 'n versiering wat aan 'n ander saak geheg word altyd 'n bysaak; indien hierdie maatstaf egter nie bepalend is nie word na ander oorwegings soos waarde, massa en gebruik gekyk om te bepaal welke van die twee samestellende dele van die verbinding die hoofsaak is.

Wat die Suid-Afrikaanse regspraak betref, is daar aanduidinge dat die Sabiniaanse standpunt ongelukkig nog steeds aangehang word. Dit blyk uit die volgende *dictum* van regter Barry in *Aldine Timber Co v Hlatwayo* 1932 TPD 337 341–342:

> "The greater part of the material in the erection of the building ['n roerende hout- en ystergebou] was certainly the material which was purchased by the judgment debtor from the judgment creditor and there can also be no doubt that the most valuable part was what the judgment debtor bought. The difference in value was as 121 to 40 ... so it seems to me that, even applying the principles of *accessio*, it is of no assistance to the claimant, because the old material, being of less value, acceded to the more valuable new material."

Onses insiens kan die feitesituasie in die *Aldine Timber*-saak moontlik as 'n geval van *commixtio* gesien word – afhangende daarvan of die finale verbinding enigsins skeibaar was. Dit sou egter nog suiwerder wees om hierdie eerder as 'n geval van *specificatio* te hanteer: Omdat hier naamlik ou en nuwe materiaal aan mekaar getimmer is om die finale produk te bewerkstellig, het nòg die ou materiaal nòg die nuwe materiaal aan die eindproduk sy vorm en funksie verleen. Dit was tog die vormgewende arbeid van die persoon wat die gebou gekonstrueer het wat die vorm en funksie van die eindproduk bepaal het. Kontrasteer dit met die geval waar 'n bestaande hout- en ysterhut vergroot word deur verder planke en ysterstukke daaraan vas te timmer. In sodanige geval het 'n mens ongetwyfeld met *accessio* te doen omdat die bestaande hut en nie die bygevoegde planke en ysterstukke nie, die vorm, identiteit en funksie aan die eindproduk verleen. Hierdie siening strook met die standpunt van Windscheid (*Pandekten*

par 89) dat die hoofsaak daardie saak is wat die vorm en wese aan die geheel gee. Dit is ook die standpunt van Lee en Honoré (*Property, Family Relations and Succession* (1952) par 41):

> "A principal thing . . . retains its identity after the combination; an accessory is the thing which loses its identity in consequence of the combination."

Onses insiens kan daar slegs duidelik tussen *accessio* van roerende sake en *confusio* onderskei word indien hierdie standpunt ook vir die moderne Suid-Afrikaanse reg aanvaar word.

2 4 Die vereiste dat die verbinding nie maklik skeibaar moet wees nie

Aanknopingspunte vir die vereiste dat die samestellende dele van 'n verbinding nie maklik skeibaar moet wees nie word ook in die Romeinse reg aangetref, hoewel die standpunte van die Romeinse juriste ook in hierdie opsig op filosofiese oorwegings berus (sien Kaser *op cit* 382; Göppert *Uber einheitliche, zusammengesetzte und Gesamtsachen nach römischen Recht* (1871) 73; Sokolowski *Philosophie im Privatrecht* (1902) 1 111–118).

In die geval waar twee roerende sake sodanig met mekaar verenig is dat die resultaat van die verbinding 'n enkelvoudige saak (*corpus quod continentur uno spiritu*: *D* 41 3 30 *pr*) is, word die eienaar van die hoofsaak ook as eienaar van die bysaak wat in sy saak opgegaan het, beskou. Die eienaar van die bysaak het dus permanent sy eiendomsreg in sy saak wat 'n bestanddeel van die hoofsaak geword het, verloor (*D* 6 1 23 5; *D* 47 2 2 4). Voorbeelde van sodanige verbindings is die aansweising (*ferruminatio*) van 'n arm aan 'n standbeeld, die kleuring (*tinctura*) van materiaal met 'n kleurstof, die inwewing (*textura*, maar vgl Arno *Mélonges Girard* 1 27) van garing of wol in 'n kleed, die beskrywing (*scriptura*) van 'n stuk papyrus of perkament met ink of goue letters en die beskildering (*pictura*) van 'n doek met verf. In al hierdie gevalle is normaalweg aanvaar dat die twee roerende sake tot 'n enkelvoudige saak, naamlik 'n standbeeld, 'n gekleurde doek, 'n geborduurde kleed, 'n beskrewe perkament of 'n skildery verenig word en dat die eienaar van die hoofsaak permanent eienaar van die bysaak word (sien ook Bonfante *op cit* 97; Kaser *op cit* 429; Arangio-Ruiz *Instituzioni di Diritto Romano* (1960) 197).

Die bogenoemde gevalle is egter onderskei van ander waar twee roerende sake nie so eng met mekaar verenig was dat die verbinding 'n enkelvoudige saak gevorm het nie, maar die eindproduk 'n saamgestelde saak was. Voorbeelde van sodanige minder hegte fisiese verbindings is die geval waar 'n arm aan 'n standbeeld gesoldeer is (*adplumbatio*) of waar sake of saakdele by houtvoorwerpe gevoeg is, soos waar planke in 'n skip ingebou is of waar 'n houtdeur aan 'n kas vasgespyker is (*D* 6 1 6; *D* 6 1 23 5; *D* 47 12 2). In al hierdie gevalle was daar wel 'n fisiese verbinding tussen die samestellende dele van die eindproduk, maar was die dele nog steeds sigbaar in die verbinding. In hierdie gevalle is aanvaar dat die eienaar van die hoofsaak eienaar van die geheel geword het solank as wat die verbinding bestaan het. Hy kon dus die saamgestelde saak van enigiemand met sy *rei vindicatio* opeis (*D* 6 1 23 5; *D* 10 4 6; *D* 4 7 1-2). Terselfdertyd is egter aanvaar dat die eienaar van die bysaak tydens die bestaan van die verbinding steeds "sluimerende" eienaar (sien o a Windscheid *Pandekten* par 189 vn 4) van die bysaak gebly het en dat sy eiendomsreg "herleef" het sodra sy saak weer van die saamgestelde saak afgeskei is. In hierdie gevalle kon die "sluimerende" eienaar van die bysaak die besitter van die saamgestelde saak

aanspreek met die *actio ad exhibendum* om hom te dwing om sy gedeelte van die saamgestelde saak af te skei. Daarna kon hy die afgeskeide saak met die *rei vindicatio* opeis (*D* 6 1 23 7; *D* 6 1 59; *C* 3 32 2). Die saamgestelde saak as eenheid het dus aan die eienaar van die hoofsaak behoort, terwyl die eienaar van die bysaak nog steeds "sluimerende" eienaar van sy gedeelte van die saamgestelde saak gebly het (sien ook Kaser *op cit* 429).

Uit bostaande blyk dat die Romeine by meganiese verbindings duidelik tussen *ferruminatio* (sweising) en *adplumbatio* (soldering) onderskei het. Oor wat die eintlike onderskeid tussen hierdie twee verbindingsvorme was, is heelwat bespiegel (sien Bonfante *op cit* 108–110). Sommige Romaniste meen dat *ferruminatio* 'n verbinding tussen metale deur blote verhitting sonder enige kleefmiddel was; *adplumbatio* daarenteen het weer geslaan op 'n verbinding tussen metale deur gebruikmaking van 'n kleefmiddel, meestal tin of lood. 'n Variasie op hierdie tema met betrekking tot *adplumbatio* is dat die aanhegting by wyse van loodspykers of loodklampe geskied het. Later is oortuigend aangetoon dat alle meganiese verbindings in Romeinse tye deur middel van kleefmiddels geskied het en dat die kleefmiddels slegs in sekere gevalle onsigbaar geword het en nie in ander gevalle nie. Waar yster met yster, koper met koper en goud met goud verbind is, het die kleefmiddel (klei of kalmeisteen) onsigbaar in die verbinding geword – wat nie die geval was by ander verbindings nie, veral nie as ongelyksoortige metale met mekaar verbind is nie. Die algemene afleiding kan dus gemaak word dat *ferruminatio* tot 'n hegte, onsigbare verbinding aanleiding gegee het, terwyl *adplumbatio* op 'n minder hegte, steeds sigbare aanhegting geslaan het.

Hierdie kunsmatige onderskeid tussen hegte en minder hegte fisiese verbindings vind hier en daar weerklank in die Romeins-Hollandse reg. Die kompliserende rol wat die unieke aanwending van die *actio ad exhibendum* op hierdie gebied in die Romeinse reg gespeel het, ontbreek egter in die konteks van die Romeins-Hollandse reg. Die Romeins-Hollandse skrywers handhaaf dus ook nie die onderskeid tussen verbindings wat aanleiding gee tot enkelvoudige sake en verbindings wat aanleiding gee tot saamgestelde sake nie. Dit is verder opvallend dat die onderskeie probleemgevalle inkonsekwent gesistematiseer word en dat die motivering vir die oplossing daarvan òf uiteenlopend is òf heeltemal ontbreek. Die skrywers wat inwewing (*textura*) behandel, aanvaar byvoorbeeld dat die eienaar van die doek ook eienaar van die ingeweefde draad word – sonder dat die riglyne wat wel as motivering gegee word ons enigsins verder bring (sien De Groot 2 10 4; Voet 41 1 22; Van Leeuwen *RHR* 2 5 3; Van der Linden *Koopmans Handboek* 1 7 2 2). Waar 'n deksel aan iemand anders se kan of beker geheg word, aanvaar De Groot (*ibid*) en Van der Linden (*ibid*) dat die deksel sy selfstandigheid verloor en die saak word die van die eienaar van die beker sonder om hoegenaamd na die hegtheid van die verbinding te verwys. Huber (*HR* 2 6 2) kom tot dieselfde gevolgtrekking in bogenoemde geval (en die ander voorbeelde wat hy gee) en verskaf die volgende kleurlose verduideliking:

> "[D]e Wet heeft willen vermijden d' onseekerheit van de eygendom, over een en deselfde zake."

Slegs Voet (6 1 29; 41 1 27) beklemtoon die hegtheid van die verbinding as riglyn by die vraag of *accessio* by die verbinding van roerende sake plaasgevind het. By 'n hegte fisiese verbinding, soos waar twee sake aan mekaar gesweis is, aanvaar Voet dat *accessio* en gevolglike eiendomsoorgang plaasvind; in die geval

van soldering waar skeiding moontlik is, is daar egter geen sprake van *accessio* en gevolglike eiendomsoorgang nie. Die gevoel dat Voet in hierdie geval slegs die Romeinse juriste napraat, is egter oorweldigend.

Die vereiste van die Suid-Afrikaanse reg dat daar nie sprake van *accessio* van roerende sake kan wees indien die verbinding maklik skeibaar is nie, kan dus slegs by implikasie uit die Romeinse en Romeins-Hollandse reg afgelei word. In plaas daarvan om die skeibaarheid van fisiese verbindings oor die boeg van filosofiese oorwegings te gooi, laat die Suid-Afrikaanse en ander moderne regstelsels hul hedendaags lei deur ekonomiese oorwegings om te bepaal of 'n fisiese verbinding van twee sake so heg is dat *accessio* en gevolglike eiendomsoorgang kan plaasvind. Gewoonlik word fisiese verbindings as onskeibaar beskou, behalwe indien afskeiding sonder waardevermindering van die dele of van die geheel of sonder groot koste onderneem kan word. Indien die verbinding in hierdie sin maklik skeibaar is, vind eiendomsoorgang as gevolg van *accessio* nie plaas nie. Omdat die buitebande in die *Cohen Motors*-saak nie op 'n meganiese wyse in die vragmotor ingebou was nie en weer maklik afgehaal kon word, beslis die regter dus heeltemal tereg (434D) dat die buitebande die eiendom van die motorhawe gebly het.

3 Die Verband tussen *Accessio* as Wyse van Eiendomskryging en die Onderskeid tussen Hoofsake, Bysake en Hulpsake

Ons het reeds daarop gewys dat *accessio* as *genus* van oorspronklike eiendomsverkryging nie in die Romeinse reg bekend was nie en heel waarskynlik eers sy beslag in die middeleeue gekry het (sien Bonfante *op cit* 96). Die begrippe *accessio* en *accedere* het verskillende ander betekenisse in die klassieke Romeinse reg gehad en op die gebied van die sakereg is dit tuisgebring onder 'n bespreking van die begrip "saak" en sy bestanddele (sien Bonfante *op cit* 94). In die algemeen het die Romeinse juriste 'n wye begrip gehad van wat alles *accessiones*, naamlik bysake of toebehore van 'n hoofsaak vir bepaalde juridiese doeleindes, was (*D* 18 2 21; *D* 34 2 19 13; *D* 41 1 27 2; *D* 47 2 62 2). Nie slegs fisiese bestanddele van 'n hoofsaak nie, maar ook sake wat 'n funksionele of selfs slegs 'n ekonomiese eenheid met die hoofsaak gevorm het, is as *accessiones* beskou. Hoewel die Romeine nog nie tussen bysake en hulpsake onderskei het nie, is die uitdrukking *pars rei* ten opsigte van "bysake" en die uitdrukking *quasi pars rei* ten opsigte van "hulpsake" gebruik (*D* 6 1 44; *D* 19 1 13 31). Teenoor hierdie wye siening van wat alles as *accessiones* van 'n hoofsaak beskou is, het die Romeinse juriste, soos hierbo geblyk het, 'n baie streng vereiste van fisiese verbondenheid gestel voordat aanvaar is dat eiendomsreg in 'n saak wat met 'n hoofsaak verbind is op die eienaar van die hoofsaak oorgegaan het.

Ook by die Romeins-Hollandse skrywers is daar, soos aangetoon, nog nie 'n volledig uitgewerkte benadering ten opsigte van die onderhawige vorme van oorspronklike eiendomsverkryging te bespeur nie. Nietemin hanteer hulle hierdie gevalle onafhanklik van die vraag watter bestanddele van 'n saak vir doeleindes van juridiese handelinge as deel daarvan beskou moet word. Die bestaan van 'n fisiese band is nie vir die Romeins-Hollandse skrywers die enigste of selfs noodwendig die belangrikste oorweging in hierdie verband nie. Ook 'n bloot funksionele of selfs 'n suiwer ekonomiese band tussen 'n hoofsaak en 'n ander saak kan laasgenoemde effektief deel van die hoofsaak maak in die sin dat dit daarmee saam verkoop, verhuur, verpand of in 'n testament bemaak word.

Verskeie riglyne word deur die skrywers neergelê om te bepaal of daar in 'n bepaalde geval wel so 'n ekonomiese band bestaan. Sake wat permanent of voortdurend saam met die hoofsaak gebruik word, word juridies as deel daarvan beskou (Voet 19 1 5; Groenewegen *De Leg Abr* 18 1 76; Van der Keessel *Praelectiones* op Gr 2 1 13). Sake waarsonder die hoofsaak nie tot enige nut of voordeel gebruik kan word nie, boet tot op sekere hoogte hul selfstandigheid in en volg die hoofsaak as hulpsake (Voet 19 1 7, 8; Groenewegen *De Leg Abr* 33 4 7 29; Huber *HR* 3 3 39). Sake wat daarenteen slegs die gerief of algemene bruikbaarheid van die hoofsaak verhoog, bly juridies as onafhanklike sake voortbestaan (Huber *HR* 3 3 39).

Hierdie onderskeid tussen *accessio* as wyse van eiendomsverkryging en *accessio* as 'n fisiese bestanddeel, 'n bysaak of 'n hulpsaak van 'n hoofsaak, is in die Suid-Afrikaanse regspraak op die gebied van *inaedificatio* beklemtoon in die onlangse beslissings van *Senekal v Roodt* 1983 2 SA 602 (T) en *Falch v Wessels* 1983 4 SA 172 (T). Hierdie onderskeid word dan ook deur regter Strydom in die *Cohen Motors*-saak gesuggereer waar hy verklaar (433H-I):

> "Alhoewel dit so is dat buitebande 'n ekonomiese eenheid met 'n voertuig vorm is dit uiteraard 'n vervangbare eenheid wat na willekeur aan- en afgehaal kan word sonder beskadiging van die hoofsaak of van die band self. Die ekonomiese eenheidstoets is 'n handige maatstaf by die bepaling of 'n aanhegting skeibaar is al dan nie. Die versoeking is egter daar om, by die toepassing van die toets, en as dit een maal bepaal is dat die verbinding van die twee sake 'n ekonomiese eenheid vorm, die ander vereistes uit die oog te verloor. Selfs al sou die verbinding van twee sake 'n ekonomiese eenheid vorm, mag die aard en wyse van die aanhegting nie uit die oog verloor word nie."

In hierdie verband verwys die regter ook na die "integral part"-toets wat in *Caltex (Africa) Ltd v Director of Valuations* 1961 1 SA 525 (K) 529 aangewend is om te bepaal of 'n roerende saak wat 'n geïntegreerde deel van 'n onroerende produksiestelsel vorm, onroerend geword het deur die funksionele verbinding met dié stelsel. In die mees resente beslissing van die appèlhof oor *inaedificatio, Theatre Investments (Pty) Ltd v Butcher Brothers Ltd* 1978 3 SA 682 (A), is beslis dat die bedoeling van die eienaar van die roerende saak deurslaggewend is om te bepaal of die roerende saak deel van die grond geword het deur bebouing. Een van die faktore waaruit die bedoeling van die eienaar afgelei kan word, is die aard en doel van die roerende saak. Indien hieruit afgelei kan word dat dié saak bestem is om die grond permanent te dien, kan uit die funksie van die saak afgelei word dat dit die bedoeling van sy eienaar was dat dit permanent deel van die grond moes word. Indien hierdie afgeleide bedoeling nie met die werklike bedoeling van die eienaar bots nie, word aanvaar dat die saak deur bebouing deel van die grond geword het.

Regter Strydom meen egter dat die aangeleentheid voor hom nie slegs in die lig van die ekonomiese eenheidstoets nie, maar ook in die lig van die ander vereistes vir *accessio* behandel moet word. Hiermee lyk dit dus of die regter 'n onderskeid wil maak tussen die maatstawwe wat hedendaags vir eiendomsverkryging deur bebouing ('n roerende saak by 'n onroerende saak) geld en die maatstawwe wat volgens hom in die geval van *accessio* deur die verbinding van twee roerende sake geld. Deur die skeibaarheid van die verbinding so te beklemtoon, beklemtoon hy die aard en wyse van die aanhegting en beslis hy in werklikheid dat daar geen sprake van *accessio* by die verbinding van roerende sake kan wees tensy 'n hegte fisiese verbinding bestaan nie. Daarteenoor kan sake of saakdele wat 'n ekonomiese eenheid met 'n hoofsaak vorm deurdat hulle

funksioneel of ekonomies die hoofsaak beter aan sy doel laat beantwoord, wel as bysake of hulpsake van die hoofsaak beskou word. Hierdie sake volg dan gewoonweg die juridiese lotgevalle van die hoofsaak, tensy die teenoorgestelde bedoeling blyk. So word hierdie sake gewoonlik saam met die hoofsaak verkoop, bemaak, verpand of met verband beswaar (sien ook Van der Merwe *Sakereg* (1979) 37).

CG VAN DER MERWE
MJ DE WAAL
Universiteit van Stellenbosch

DAMAGES FOR PERSONAL INJURY AND DEATH

This note comments upon two recent judgments which deal with the date at which the value of personal or fatal injury losses should be determined: *Summers v General Accident Insurance Co SA Ltd* 1985 3 SA 417 (C) (dependants' action); and *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) (loss of earning capacity).

1 Introduction

It is trite law that the date with reference to which damages are to be assessed is the date of the delict (e g *Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 2 SA 420 (A) 428G–H 429F). This rule is well illustrated by the decision in *Voest Alpine Intertrading Gesellschaft MBH v Burwill & Co SA (Pty) Ltd* 1985 2 SA 149 (W). The claim before the court was one for damages for breach of contract expressed in terms of United States dollars. There was dispute as to whether the dollar amount should be converted at the dollar/rand exchange rate prevailing at the date of the trial or at the date of the delict. Despite the massive fall in the dollar/rand exchange rate the court ruled that the rate prevailing at the date of the delict should be applied.

In the event of bodily or fatal injury there arises at the date of the commission of the delict an uncertain indebtedness owing by the wrongdoer to the person who has suffered loss. Patrimonial loss is measured according to the principle of balancing gains and losses (*Southern Insurance Co Ltd v Bailey* 1984 1 SA 98 (A) 111D). If the value of lost future earning capacity or expectations of support is determined by reference to an actuarial calculation which has been discounted to the date of the trial this has the effect of awarding an amount equivalent to interest on the uncertain indebtedness for the full period from date of delict to date of trial. In *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 31–33 Innes CJ ruled that no interest is payable on a damages debt whose determination requires a long and complicated inquiry. The popular practice of discounting to the date of the trial thus awards indirectly what is not permitted directly.

The question of the date to which discounting at interest should be done came before the appellate division in *Sigournay v Gillbanks* 1960 2 SA 552 (A). Before the trial court (*Gillbanks v Sigournay* 1959 2 SA 11 (N) 15H) the actuary had presented figures discounted to the date of the accident, as was a common

practice at that time. The trial judge rejected the actuary's original figures and requested him to perform a recalculation based on discounting to the date of the trial, four and a half years after the date of the delict. On appeal Schreiner JA rejected the finding of the trial court and adopted instead the value arrived at by the actuary in his original calculations which had discounted both past and future losses to the date of the accident (557F–558A 565H–567D).

Discounting to the date of the delict is commonly associated with a single-stage calculation which does not distinguish between past losses and future losses. It deserves note that the actuary in his original calculations had used a multi-stage calculation (see the table at 566D–E of the *Sigournay* judgment). Actuarial techniques and the facts of the *Sigournay* case make it clear that a multi-stage calculation is as consistent with discounting to date of delict as it is with discounting to date of trial. In the *Sigournay* case (558A) Schreiner JA did condemn the introduction of unnecessary additional complications such as had been introduced by the trial court.

2 The *Summers* Judgment

In this matter Van den Heever J was asked to choose between two actuarial figures, one discounted to the date of the trial (R7 000) and the other to the date of the delict (R5 000). The learned judge ruled in favour of the figure discounted to the date of the trial. This was done on the grounds that the lesser figure was "intuitively distasteful" (420I–421B) and despite the fact that the court was in consequence indirectly making an award of interest on the damages.

It is submitted that the court was unduly sympathetic towards the plaintiff. In *Bay Passenger Transport Ltd v Franzen* 1975 1 SA 269 (A) 274H Trollip JA noted that

> "in. . . circumstances of difficulty and dubiety, defendants should be regarded with greater favour than plaintiffs, *favorabiliores rei potius quam actores habentur* (*D* 50 17 125)."

In *Hulley v Cox* 1923 AD 234 246 Innes CJ said:

> "We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment."

In *Dyssel v Shield Insurance Co Ltd* 1982 3 SA 1084 (C) at 1087G–H Van den Heever J took into consideration that the award that she was about to make would ultimately come from the taxpayers' pockets. (See too Corbett and Buchanan *The Quantum of Damages in Bodily and Fatal Injury Cases* (1985) 6 n 46–6 n 49.)

Certain points deserve note:

a *Personal injury and fatal accident claims distinguished* Van den Heever J avoided the implications of the *Sigournay* judgment by emphasising the anomalous and unique nature of the dependants' action (at 421C). The history of the dependants' action as traced by Feenstra (1972 *Acta Juridica* 227; 1958 *Acta Juridica* 27) indicates that the dependants' action is in fact an extension of the action for loss of earning capacity. This is particularly so in matters relating to the quantification of damages. One would thus expect the same principles to govern quantification regardless of the type of action. Thus Matthaeus *De Criminibus* 47 4 3 5 writes: "For what reason do we distinguish between fatal and non-fatal injuries?" In the *Summers* case Van den Heever J elected at 421I to adopt the method of calculation preferred by the court in *Wigham v British*

Traders Insurance Co Ltd 1963 3 SA 151 (W). It is ironic that the court in the *Wigham* case based its decision (156D–E) on the *Sigournay* judgment.

b *Distinction between hard assets and patrimonial expectations* It was argued by counsel for the defendant that if it had been a motor car that had been damaged plaintiff would have been awarded no more than the reduction in the market value of the vehicle *as at the date of the delict*. At 421C the judge rejected this analogy. Why the value of a dependant's loss should be distinguished from other forms of damages remains unclear. Reinecke "Die Elemente van die Begrip Skade" 1976 *TSAR* 26 30–31 expresses the opinion that there is no difference between patrimonial expectations and hard assets.

c *How wide is a wide discretion?* At 421D–H the judge placed considerable emphasis on a series of judgments by Holmes JA and the consideration there often repeated that a trial judge has a wide discretion to award what under the circumstances he considers right. The *Summers* decision raises interesting questions as to just how wide is the judicial discretion as to damages for bodily or fatal injury. If the court is to be guided by the result of an actuarial calculation there must surely be clear and unambiguous guidance as to how such calculations are to be performed? The courts do have a discretion to award value as at the date of the trial but this discretion is only available if there is an ongoing wrong such as occurred in *Mlombo v Fourie* 1964 3 SA 350 (T) 357H, or the defendant has acted maliciously or *mala fide* (*Mlombo v Fourie* 358B). In exercising its discretion a court must act "in a selective and discriminating manner, not arbitrarily or idiosyncratically" (*Cookson v Knowles* 1978 2 All ER 604 (HL) 606h/j).

d *Discount for interest independent of discount for contingencies* Van den Heever J followed the method of calculation adopted in *Wigham v British Traders Insurance Co Ltd* 1963 3 SA 151 (W). It is extremely difficult to reconcile the *Wigham* judgment and the *Sigournay* judgment as was noted by Boberg "Fact and Fantasy in the Assessment of Damages for Death" 1963 *SALJ* 538 547–548. Boberg's article is concerned with supervening events and does not once mention the question of discounting at interest. It is submitted that the date to which discounting is to be done is a separate and distinct issue from the question of making allowance for supervening events. Barwick CJ in his majority judgment in *Ruby v Marsh* 1975 ALJR 320 (HC) describes the correct approach. In *Graham v Dodds* 1983 2 All ER 953 (HL) it was held that for fatal accident claims the multiplier runs from the date of the death.

3 The *Carstens* Judgment

In this matter the facts closely matched those of the *Sigournay* case. Most notably some five years had elapsed since the accident (four and a half years in the *Sigournay* case). The earnings progresssions were by no means dissimilar. Aaron AJ was called upon by defendant to follow the same method of calculation which had found favour with the appellate division in the *Sigournay* case. He was thus required to choose between a value for lost earning capacity arrived at by discounting to the date of the trial (R139 709) and a lesser value arrived at by discounting to the date of the delict (R74 776). In both cases a two-stage calculation had been adopted. The difference between the two figures (R139 709 – R74 776 = R64 933) was entirely the result of the discount at interest. The

size of the difference is surprising to those unfamiliar with the detail of actuarial calculations and emphasises the extreme importance of an authoritative ruling on this issue. After some considerable deliberation the judge ruled in favour of the larger figure, thus adopting the value of lost earning capacity as at the date of the trial.

The judgment is closely and impressively substantiated. None the less there are a number of unfortunate flaws. Most prominent of these is the reason given by Aaron AJ for his finding (1019H–I) that the *Sigournay* judgment was not binding on him. This finding was based upon a failure by the judge to comprehend properly the words of Schreiner JA in the *Sigournay* judgment at 565H. Schreiner JA there spoke of

> "a figure given by the actuary as the value *at the date of judgment* of the estimated future earnings" (emphasis supplied).

Schreiner JA had, however, had before him two actuarial calculations, one discounted to the date of the accident and the other discounted to the date of the trial. The actual figures to which the appeal court gave preference are set out in detail at 566D–E. These are discounted to the date of the accident.

The misreading detracts substantially from the worth of the *Carstens* judgment which is, in consequence of this reason alone, of dubious authority on the question of the date to which discounting at interest is to be done.

There are a number of other points which deserve note:

i *Investment market expectations* At 1013G–H Aaron AJ recorded as agreed between the parties the use of a "net rate" of 2,5% per year. He went on to explain that

> "[t]his represents the agreed long-term differential between the estimated average annual rate of interest a prudent investor would be able to earn on the investment of any amount awarded as compensation, and the estimated average annual rate of inflation."

In actual fact this explanation of the 2,5% formed no part of the agreement between the parties and did not correctly reflect the point of view of defendant. The argument of defendant was that the plaintiff was only entitled to the objectively estimated market value of his loss and that the 2,5% per year was no more than a parameter of market value based upon the real rate of return expected by well-informed investors trading in long-dated fixed interest stocks such as those issued by Escom. Because the value is to be objectively determined it is inappropriate to take account of subjective issues such as the investment abilities of the plaintiff or what he might do with the money. The 2,5% per year represents, in point of fact, the long-term average difference between the yield currently expected by the investment market on risk free investments and the expected rate of increase in lost earnings.

ii *Which is the "new approach"?* At 1014E Aaron AJ described the approach suggested by defendant as being

> "a *new approach* to the quantification of damages for loss of earnings in claims arising out of personal injury" (emphasis supplied).

In so far as defendant was concerned there was nothing "new" about the method relied upon. Defendant was merely asking the court to apply the method adopted in the *Sigournay* case. It was the method proposed by plaintiff that was in fact "new" (1014H–I of the *Carstens* judgment). This latter method has, however, been commonly used for some twenty years, owing, it was submitted at 1018H,

to a failure by legal commentators to appreciate the significance of the *Sigournay* judgment.

iii *Judicial amnesia* At 1015H–I Aaron AJ correctly recorded the essence of defendant's argument that the question of supervening events and discounting for risk should be distinguished from the question of discounting at interest. In the light of statistical theory it is entirely reasonable to discount at interest to the date of the accident while discounting for risk (contingencies) to the date of the trial (Baye's theorem). In this way the value determined continues to relate to the date of the delict while taking full account of all new facts which become known up to the date of the trial (*Ruby v Marsh* 1975 ALJR 320 (HC)). Unfortunately the judge overlooked the fact that defendant had taken full account of subsequent contingencies and that the only point in issue was discounting at interest (1020H–J).

iv *The meaning of "earning capacity"* Defendant placed considerable emphasis on the numerous reminders by the appellate division that what is compensated is "loss of earning capacity" and not "loss of earnings" (1014C–1016D). It was submitted in evidence that earning capacity has in South African law acquired a special meaning of its own and reference was made to the statement by Rumpff JA in *Santam Versekeringsmpy Bpk v Byleveldt* 1973 2 SA 146 (A) 150C that

> "[d]ie verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie" (see too *Southern Insurance Co Ltd v Bailey* 1984 1 SA 98 (A) 111D)."

At 1020B–1021B Aaron AJ, in his discussion of "earning capacity," referred extensively to foreign authority and substantially ignored the attitude of our own appellate division. He placed considerable emphasis on the consideration that "earning capacity" in its dictionary sense implies the ability to generate income regardless of the manner in which such ability might be applied. Thus a highly skilled engineer may prefer to spend his time mending watches and thereby earn considerably less than his "capacity" to earn. In the passage quoted above Rumpff JA spoke of measuring earning capacity according to the standard of "expected income." The words "expected income" suggest that it is only *likely* income which may be taken into account. Had Aaron AJ paid attention to this *dictum* he may have found that in South African law the expression "earning capacity" has acquired a special legal meaning which requires, *inter alia*, that regard be had to the *likelihood* that income would have been generated by a particular activity.

v *Interest ON or AS damages* At 1021F–1022I Aaron AJ discussed the question of interest on damages. It deserves note that he failed to distinguish here between "interest *on* damages," awarded at the legal rate of interest, and "interest *as* damages" for which the plaintiff must adduce proof as to what would have been done with the money had it been timeously received (*Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) 316A–F). Interest *on* or *as* damages will be awarded only if properly claimed in the pleadings. It deserves note that plaintiff failed to claim interest *on* or *as* damages. This was therefore a case where, regardless of whether or not interest might have been allowable had it been duly claimed, *the fact that it had not been specifically claimed precluded the court from allowing interest.*

vi *What is "fair and just"?* At 1021C Aaron AJ identified the question of interest with the notion of a fair and just award. The award of interest *on* or *as*

damages is subject to decided rules of law. To argue in the circumstances of the case that the question of interest is to be decided by what is a fair and just award is to deny the authority of relevant precedent. In the final analysis (1022I) Aaron AJ admitted the logical force of defendant's argument but preferred to rely on considerations of what is "fair and just." There is a strong impression that in this case what is "fair and just" was determined with scant regard for the defendant's circumstances. The approach adopted by Aaron AJ had the effect of awarding interest on the damages *as from the date of the delict.* Surely, to be fair and just towards the defendant, this interest should have commenced running only as from the date of demand? What of a defendant who has made a payment into court a year before? If the plaintiff loses interest on this amount it is not by the fault of the defendant. The MVA fund is in financial difficulties (*Finance Week* 1985–08–22 572; *Financial Mail* 6 1985–09–06 48) and the funds to pay plaintiffs must eventually come from the pockets of motorists.

vii *The value of a chance* At 1023D–G Aaron AJ stated that the correctness of his ruling to discount to the date of the trial is demonstrated even more forcibly if one considers medical expenses. This conclusion is by no means obvious if one bears in mind that the plaintiff is awarded merely the *value of the chance* that such expenses will be incurred. All medical expenses are subject to a greater or lesser degree of uncertainty, not the least of these being that the plaintiff may not live to incur the expense. The leading cases on valuation of a chance are *Blyth v Van den Heever* 1980 1 SA 191 (A) 225H and *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) 75D–G. It is appropriate to reduce the value of medical expenses to allow for general contingencies (*Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980 3 SA 105 (A) 113G–114B). The value of the chance that medical expenses will arise in no way purports to be sufficient to meet the expenses when they arise. It merely represents an average amount which will be inadequate for many plaintiffs and excessive for others. The illusion of certainty is often attributed to the expectation of life by those who have failed to recognise that it is no more than a statistical average.

viii *Deduction for savings in living expenses* The *Carstens* judgment is notable in that Aaron AJ (at 1023G–1024G 1027I–J) reduced the actuarially calculated value to take account of the contingency that the plaintiff, now injured, was unlikely to marry and incur the expenses of maintaining a wife and family. Although agreeable to making the deduction, the judge refused to follow slavishly the actuarial value of the expected savings (1025F–1026B). This actuarial value was, however, borne in mind in arriving at a suitable deduction for contingencies (1024F–G). Had the court accepted the actuarial value for the savings, reduced it in respect of perceived contingencies and then deducted it, this procedure would have produced substantially the same numerical result as was arrived at by the court when the figure was merely "borne in mind." It deserves note that the special legal meaning to be attributed to "earning capacity" includes making such deductions for savings in living expenses. The expression "earning capacity" is perhaps somewhat misleading in this regard.

ix *Rough estimate preferred to actuarial calculation* Explicit use of the actuarial value of the savings from not having to support a wife and children was rejected by Aaron AJ on the grounds that it was based upon speculation (at 1024D–E). He was concerned that

> "[w]hatever statistics are available can at best indicate average figures, and there is no basis upon which to determine how Clive's position would have compared with the statistical average" (at 1024E).

This reflects a common fallacy that the court is required to "predict" the future. Mortality tables are all based on averages and yet they are readily accepted by the courts. The actuarial calculation, although speculative, had been based upon the *expectations of the reasonable man* as to what in all likelihood would have happened to Clive had he not been injured. It represented a reasonable average expected scenario. In the context of the "market value" approach advocated by defendant a court is not required to "predict" the future but rather to receive evidence as to, or itself to formulate in the light of the evidence, the expectations of a reasonable man (Koch *Damages for Lost Income* (1984) 160). Such expectations are then proper material upon which to base an actuarial calculation. In an investment market, values are dictated by what investors believe will happen in the future, not by what unfolding reality eventually reveals. In *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 113F–114F the appeal court approved, despite its speculative nature, the use of an actuarial calculation to determine the value of earning capacity lost by a young girlchild. Nicholas JA said (114D):

> "[W]hile the result of an actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' . . . as to what is fair and reasonable is nothing more than a blind guess."

x *Percentage extra mortality rating* At 1026D–1028I Aaron AJ dealt with the problem of the increased risk of death brought about by the injury. In most court cases this adjustment is introduced as a reduction to the expectation of life but in the *Carstens* case it was effected by a *percentage extra mortality rating* such as is used by life insurers to determine loadings to life insurance premiums. Such percentages are based on mortality tables used for life insurance purposes, an important consideration of which the court took judicial notice (1027I). The population mortality tables used by the actuaries in the *Carstens* case already included allowance for some 150% extra mortality occasioned by the fact that the general population dies off much more quickly than persons who have been granted life insurance. There is much to be said for using life insurance mortality (SA56/62) in those compensation cases where the plaintiff has recently been medically examined and accepted for life insurance at standard rates. In the *Carstens* case Aaron AJ elected to use an extra mortality rating of 50% in relation to population mortality and took this into account as a general contingency. This would appear to have been a correct assessment.

xi *Relevance of foreign authority* Aaron AJ at 1022J–1023C noted that in England, Australia and Canada it is the practice to quantify lost earning capacity by discounting to the date of the trial. He failed to perceive that in England (since 1934), and Australia, interest on damages is permitted by statute. Canadian law does not seem to have a rule against interest on damages (see indexes to Cooper-Stephenson and Saunders *Personal Injury Damages in Canada* (1981) and Anderson *Actuarial Evidence* (1983)). Such foreign authority does no more than perhaps suggest a need for legislation in South Africa similar to that promulgated in England. Members of the actuarial profession in South Africa have been largely trained in England or Scotland and their views may be substantially coloured by this foreign background.

xii *Forensic inertia* Judgment in the *Carstens* matter was handed down some six months after the trial hearing. Value was none the less based upon the trial date and not the date of judgment.

4 Conclusion

The defendants in both the *Summers* case and the *Carstens* case are awaiting leave to appeal. If the complexity of the issues is borne in mind it seems unlikely that such leave will be refused.

ROBERT J KOCH
Consulting Actuary

PASSPORTS – THE NEED FOR LAW REFORM

The right to travel abroad and to return to one's country is recognised as a fundamental human right in international law. (Cf *Universal Declaration of Human Rights* a 13(2); *International Covenant on Civil and Political Rights* a 12(2) and (4).)

This right is, however, not absolute. There are circumstances under which a state may prevent an individual from travelling abroad and this is usually achieved by refusing a passport.

It will come as a surprise to most people to learn that one does not have a right to a passport; it is in fact a privilege! The procedure for obtaining a passport is not regulated by statute. An application has to be submitted to the department of home affairs on a duly authorised form together with photographs and a prescribed fee.

The power to grant or refuse the application vests in the minister of home affairs. This he does, in terms of the prerogative powers (non-statutory) vested in the state president, which have been delegated to him. In exercising his discretion, the minister is not required to furnish reasons for turning down an application.

In terms of section 2 of the Departure from the RSA Regulation Act 34 of 1955 it is an offence to leave the country without a valid passport. There can be little doubt that a passport is a vital document; in fact it is essential in our modern age when technological advancement makes travel not only a growing desire of the individual South African, but also commonplace in a wide range of professional pursuits. In 1983, for example, more than 300 000 applications were received by the department of home affairs. The denial of a passport could be described as tantamount to diminution of individual liberty.

It was therefore predictable that wide media coverage would be given to the government's decision to withhold the passports of several persons on what would appear to be political grounds.

This leads one to the interesting question of whether the minister has the power to revoke a person's passport (which has been validly granted – usually for a period of five years) without showing good cause for doing so. The minister's powers were discussed in two appellate division cases (*Sachs v Dönges* 1950 2

SA 265 (A) and *Fellner v The Minister of the Interior* 1954 4 SA 523 (A)). More recently in *Tutu v The Minister of Internal Affairs* 1982 4 SA 571 (T) the Transvaal supreme court rejected an application by the bishop for the restoration of his passport. The court held that in exercising prerogative powers, the minister had the right to make a conditional grant of a passport. The court referred to the *Conditions of Issue* which appear in a South African passport. Among these are the following:

a The passport remains the property of the government. The holder does not own the passport nor does the payment of a fee entitle him to any contractual rights.

b It may at any time be amended, withdrawn or cancelled by the minister.

c Upon the request of the minister or an authorised officer in the department, it shall forthwith be surrendered by the bearer to the government.

It would appear from these conditions that the minister has the right to revoke a passport prior to expiry without giving reasons for his action.

While this reflects the present legal position, civil libertarians fear that a government may be tempted to use these powers to refuse passport facilities to an individual opposed to its policies. (In 1982, 108 applications were refused compared to 379 in 1978; more than seventy per cent of these were applications from blacks, Indians and Coloureds.)

As refusing a passport limits individual liberty, it would be, in my view, desirable to follow the practice adopted in democracies such as West Germany and the United States of America. There an aggrieved applicant is entitled to appeal to an independent tribunal or the supreme court. In view of the fact that encroachment on one's ability and freedom to travel can impinge upon one's chances of employment or promotion as well as one's freedom, such right to appeal is clearly very important.

The introduction of judicial control over the exercise of discretionary powers would enhance public confidence that passports are not refused or revoked on purely arbitrary grounds. A reference to the American experience may be instructive. Recently their Supreme Court in the case of *Haig v Agee* 453 US 280 69 LEd 2d 640 upheld the validity of a regulation which permitted the secretary of state to revoke a passport if the conduct of an individual threatened or was likely to threaten the national interest. In this case Agee, a former employee of the CIA, intended travelling abroad in order to expose officers and agents of the organisation. The court ruled that the right to travel abroad with a passport was subordinate to national security and foreign policy considerations.

While I am not pleading for passports to be granted as a right, there are, I believe, sound reasons for extending a right of appeal to the supreme court in order to afford protection to individual liberty. Perhaps the time has come to regulate the granting of passports by legislation. The notion of prerogative powers has come down to us from English law and is an integral part of the Westminster form of government which has now been abandoned in South Africa. It could be argued that the granting of passports on the basis of prerogative powers of the state president is an anachronism today (see Baxter *Administrative Law* 389–393).

At any rate Harry Street's incisive comment on the position in the United

Kingdom is equally apposite to the current position in South Africa when he stated that "it is startling that a citizen should seem so rightless" (*Freedom, the Individual and the Law* (1982) 294).

BHADRA RANCHOD
University of Durban-Westville

JUDICIAL MANAGEMENT – A CASE FOR LAW REFORM

1 Introduction

Judicial Management was first introduced into South Africa by the Companies Act 46 of 1926. This act introduced a novel concept and made a completely new departure in company law. Sections 195 to 198 of the act authorised the court, in certain cases where a winding-up order is applied for, to make an order for the appointment of a judicial manager.

When the bill was first introduced into parliament in 1923 the minister of justice who piloted the bill through the house, made the following comments:

> "In regard to the point made by the honourable member for Peninsula [South] [Sir Drummond Chaplin] ... these sections are derived from the practice in England and America under which receivers in equity are appointed, in the case of an important concern in regard to which there is some fear that it will go into liquidation; one which can pay its debts and which can be helped by someone officially appointed for this purpose. Powers of that kind would be used sparingly by the courts. To take a hypothetical case. You might have a large wool factory getting into difficulties and which ought to be helped because it is an institution which helps the country. Then your court could intervene, when it is shown that this concern is solvent, and thus help it through its difficulties. I quite admit that this is a power that would not be used in any country very much, and has not been used much in England or America, but it might be used to save a concern, and it is for such sparing use that it has been inserted in the bill. The concerns you would like to help with this power are industrial concerns such as factories manufacturing articles in South Africa. You might be able to help a few of these concerns out of the mire at times" (House of Assembly Debates vol 6 1926-02-25 col 996-997).

As far as I could ascertain, these remarks are the only official comments on record for the introduction of judicial management into our legal system. It is quite clear from these remarks that judicial management was to be applied only in very limited circumstances – the object being to protect a vital industry. This was considered a very desirable feature in a young country where primary industries and industrial undertakings needed every encouragement. However, nothing in the then new sections indicated that judicial management was to be restricted to companies which were of "help" to the country. In practice, this initial objective of aiding vital industries has been overlooked and judicial management is applied to any company of any size provided the court is satisfied that there is a probability that the company will overcome its difficulties. The act of 1926 therefore made a completely new departure in company law. It set up a system of judicial management for companies which were unable to pay their debts or whose affairs were in such a condition that, ordinarily, it would be just and equitable to wind them up. If the court was of the opinion that there was a reasonable probability that, if the company were placed under proper management, it would be enabled to meet its obligations, it was empowered to grant a judicial management order. The effect of such an order was to keep the

company alive but to take it out of the control of directors, who presumably had mismanaged the company's affairs.

The immediate object was to secure for the company a moratorium against its creditors. The ultimate object was that by providing the company with efficient management, it might be restored to normal control after paying off the creditors.

2 Criticism of the System

Over the years criticism has been levelled against the system because of an apparently low incidence of success.

The author researched all judicial management files which were available in the six master's offices in South Africa up to 1980. (*Judicial Management in South Africa – Its Origin and Development to Present-day Practice and a Comparison with the Australian System of Official Management* PhD Thesis University of Cape Town 1981.)

In all a total of 1 280 files were researched in the six master's offices. The results show the following:

807	cases went into liquidation
197	cases were offers of compromise
141	cases were successful
50	files were not available
19	cases show that the court refused to grant an order
43	cases were still in judicial management
23	files lacked information about the outcome
1 280	

Offers of compromise invariably mean that creditors are paid less than the full value of their claim and they therefore should be regarded as unsuccessful. If this premise is accepted then the figures show that out of 1 145 cases where a result could be determined, 1 004 cases were not successful, in other words an incidence of success of just over 12%.

Statistics were extracted by the various master's offices for both the Millin commission of enquiry (UC 69-1948) and the Van Wyk de Vries commission of enquiry (RP 45-70) but these covered limited periods only. The Millin commission (94 par 261) found that in the Transvaal between 1940 and 1947 only five cases were successful out of 36, and in the Cape from 1927 to 1947 only five cases were successful out of 30. These figures give a success ratio of 13,6%.

The Van Wyk de Vries commission (145 par 51/02) found "that in the whole of South Africa during the period 1960 to 1963, 175 orders were granted; 102 proceeded to winding-up; 21 were discharged and 45 not yet finalised." These figures do not tally but as a discharged order could be an offer of compromise, it is difficult to determine the success ratio. If we assume that all 21 orders which were discharged were successful, this gives an incidence of success out of the determinable results of 17%. It is evident therefore, from all statistics that are available, that the incidence of success is well below 20% and probably under 15%.

These results are disappointing but the system should not necessarily be abandoned because of the meagre results. There have been some notable successes and the system has merit.

The writer believes there are three basic reasons for the limited number of successes:

First, judicial management has historically been seen as an adjunct to liquidation. The 1926 Companies Act included it at the end of the chapter on winding-up. It was not till the 1973 act that it was placed in a separate chapter of its own. This error in association has traditionally led to professional liquidators being appointed as judicial managers of companies, whereas the objectives and the duties of these two categories of persons are diametrically opposed. The liquidator's function is to stop trading and sell the assets as soon as possible. In only very limited circumstances is he permitted to trade.

> "A liquidator must bear in mind that the chief object of a winding-up is the division of the assets of the company between creditors and members as soon as possible, and it is not his function to engage in speculative business with a view to increasing the dividends to creditors or members" (*Henochsberg on the Companies Act* (1975) 673).

A judicial manager's objective is to carry on the business with a view to restoring it to health. He may not, except with the leave of court, sell any of the company's assets except in the ordinary course of business (s 43 4(1) Act 61 of 1973). An essential qualification of a judicial manager should be that he is a good "on-going business manager." Such a qualification is not necessary in a liquidator. There have been, and there still are, some professional liquidators who have been successful judicial managers but the two fields of endeavour do not lie naturally together.

Secondly, it is more palatable for a businessman to accept judicial management rather than liquidation. For this reason a businessman who is in trouble will often be persuaded by his advisers to adopt the judicial management route. Because of the way the system operates, professional liquidators often come on the scene long before any application is made to court. They are more likely to secure the co-operation of the businessman by suggesting judicial management than liquidation. As the legislation is framed, there is nothing wrong with this; the business is entitled to apply for a provisional judicial management order if there is a hope of the business being able to become a successful concern.

The liquidator/judicial manager often needs the co-operation of the businessman to secure a list of creditors of the company in order to canvass their support for his appointment as judicial manager. Once he has been appointed it does not matter if, after careful investigation, it is found that the company should be placed in liquidation, because the judicial manager is invariably appointed as the liquidator. As the fees for a liquidation are often far higher than the fees awarded to the judicial management there is a possible conflict of interest which should be removed. But this is not the only conflict which may arise. A liquidator's duties include, *inter alia*, a duty to expose offences which may have occurred before winding up. This would include the judicial management period and thus the liquidator would be reporting on his own administration if he had also been the judicial manager.

For these two reasons, namely

1 that good liquidators are not necessarily good "on-going business managers" and

2 the possible conflict of interest where a judicial manager must recommend liquidation and then apply for the appointment as liquidator,

I believe that judicial managers should not be allowed to become liquidators of any company of which they have been judicial managers. This should also be extended to any partner, business associate, employer or employee of the judicial manager and should also apply to any other company within a group of companies which is in judicial management.

It must be made clear that such a restriction would not prevent or bar professional liquidators from being appointed as judicial managers; it would only prevent them from being appointed liquidators of a company of which they were judicial managers. Professional liquidators would therefore be reluctant to recommend judicial management as a form of first aid to an ailing company unless they were completely satisfied it would succeed.

The third reason why the success ratio of judicial management has been low, results from the large number of trivial or frivolous applications to court for judicial management orders. Statistics show (*Judicial Management in South Africa, supra*) that in the Cape over a fifteen-year period there were 137 judicial managements and that only seventeen of these companies had gross assets of over R500 000 at the date of provisional judicial management. There were sixteen cases where no information was available as regards the value of the assets, but of the rest there were 52 cases where the gross assets were R100 000 or less, and thirteen cases where the gross assets were less than R10 000.

It is unlikely that any company with gross assets of under R10 000 which is already in difficulties, can bear the burden of a judicial manager's fees and become a successful concern. Judicial managers are presently permitted to claim R50 per hour by the master of the supreme court (i e R96 000 p a working a 40-hour week and this excludes the cost of his assistants and administrative staff). Except in very big undertakings a judicial manager seldom devotes all his time to the running of the business as he can frequently rely on the assistance and feedback from the existing inhouse managers (financial, sales, technical etc). But in the "one-man" business he is replacing the only manager who presumably mismanaged the business in the first place and thus brought it to its present parlous state.

The judicial manager must either run the business with his own staff or employ an outside manager who still has to be supervised. It is clear that judicial management is not suited to, nor was it designed for, the corner cafe or the local video shop.

Statistics also show that a large proportion of the companies which have been placed in judicial management are small private companies whose demise would have little or no effect on the economy of the country. Doubts have been expressed by our courts in the past whether judicial management is a suitable remedy for small companies. In *Silverman v Doornhoek Mines Ltd* (1935 TPD 349 353; see also *Weinberg v Modern Motors (Cape) (Pty) Ltd* 1954 3 SA 998 (C) 1000) it was stated:

> "It is a special privilege given in favour of a company and is to be authorised only in very special circumstances."

In *Ronaasen v Ronaasen & Morgan (Pty) Ltd* 1935 CPD 562 563 Centlivres AJ said:

> "I doubt whether Section 195 of the Companies Act which provides for the placing of a company under judicial management, was intended to apply to a proprietary company of this description."

The judge went on to describe how the company had a limited share capital and only three shareholders and was in fact a partnership in the guise of a company.

Again, in the case of *Rustomjee v Rustomjee (Pty) Ltd* 1960 2 SA 753 (D) 758 Jansen J commented:

> "It seems doubtful whether in law judicial management proceedings are really appropriate to a small private company."

He went on to cite the case of *Ronaasen & Morgan (Pty) Ltd* referred to above.

In the unreported case of *Swarajia Naidoo v Sarkhot (Pty) Ltd* NPD 1959-08-12 Broome, JP of Natal said:

> "I share the doubts expressed in *Ronaasen's* case, 1935 CPD 562, whether the judicial management machinery was designed for a small proprietary concern of this sort."

The last judicial pronouncement on this topic appears in the case of *Tobacco Auctioneers Ltd v AW Hamilton (Pty) Ltd* 1966 2 SA 451 (R) 453. Here Goldin J had this to say:

> "Doubt has been expressed in several cases whether in law judicial management proceedings are really intended to apply to a small company (see *Ronaasen's* case and the *Rustomjee* case). In my respectful view the fact that a company is a private company with no more than two or three members or even with a few issued shares, is not in itself sufficient reason for holding that section 262 does not apply to it or is not an appropriate form of relief. *The extent and scope of the business activities of a company*, its assets and liabilities and the nature of its difficulties are all relevant factors in deciding whether Section 265 is applicable" (italics mine).

The aforementioned case (*Tobacco Auctioneers Ltd*), far from overruling the doubts expressed in previous cases, did in fact stress that the size of the company is one of the factors to be considered when granting a judicial management order. The earlier cases referred to small private companies but it is submitted that the judges in those cases were not necessarily confining their remarks to the capital structure of the company but also to the extent of the business activities of the company and the effect that its possible liquidation would have on the economy of the country. It is submitted that too many orders of judicial management are being granted in respect of "small" companies and that the courts should follow the dictates of Goldin J in the *Tobacco Auctioneers Ltd* case when deciding whether it is just and equitable to grant a judicial management order. Our courts have understandably shied away from defining "just and equitable" and refer to "special privilege" and "special circumstances" without further clarification. It is submitted that the effect on the economy or community should be a factor to be considered. The mere fact that a few creditors may benefit should not be the criterion, as creditors in the nature of their business expect to take commercial risks. Likewise, shareholders in a company must realise that they are venturing risk capital. Why should a special system be set up by the legislature to bail out shareholders and creditors who may have made unwise investments?

There is surely a further requirement – further special circumstances which should be present before an order is granted.

In testifying before the Van Wyk de Vries Commission of Enquiry into the Companies Act, the assistant master at Pietermaritzburg (Mr de Beer) said he could

> "still see the justification for a judicial management where the concern serves the required need of the country as a whole, e g manufacturers of medical equipment, medicines, steel products, etc but not a second rate proprietary hotel on the South Coast or a little family general dealer's business, etc" (*Commission of Enquiry into the Companies Act Working Paper* no 19: Judicial Management 19).

It is difficult to lay down exact criteria which must be applied but quite obviously judicial management was not introduced to protect the small one-man business, but to afford protection to a large public company employing a large labour force and whose liquidation would have an adverse effect on the economy and the community.

It is the writer's belief that the legislature should amend the act to make it clear that it is a "special privilege only to be granted in special circumstances." The debates in 1923 and 1926 show clearly that this was the intention of the legislature at the time. It is a pity that the courts have not developed the trend of questioning the applicability of judicial management to small business undertakings.

Primarily, a creditor is entitled to liquidation as a means of getting back his money or part of it once a company is unable to pay its debts (see *Kotze v Tulryk Bpk* 1977 3 SA 118 (T)). Judicial management is an exceptional means of redeeming the situation which should be used only when special circumstances are present. It must be borne in mind that it is an encroachment on the right of a creditor to demand the use of his money.

One possible solution would be to make the judicial management provisions applicable only to public companies. Some public companies are small and some private companies are large when one considers their impact on the economy and community, but usually public companies are larger than private companies and their demise is likely to have a far greater impact on the economy and community than the demise of a private company.

Perhaps the advent of the close corporation will remove the need for reform. Depending on how well the close corporation concept is accepted by the business community, a lot of small businesses may deregister as companies. As the Close Corporation Act 69 of 1984 makes no provision for judicial management this should reduce the number of frivolous applications to court for judicial management orders. For reasons advanced above, the legislature should avoid any attempt to make judicial management applicable to close corporations.

Although provision is made in the Close Corporation Act for conversion of a private company to a close corporation, there is no legislation at present allowing a speedy conversion of a close corporation to a private company. This will prevent close corporations from converting to private companies merely to be able to apply for a judicial management order.

† AH OLVER
Prior to his death attached to the University of Durban-Westville

VONNISSE

QUARRYING ENTERPRISES (PVT) LTD v JOHN VIOL (PVT) LTD 1985 3 SA 575 (ZHC)

Verbeterings – mala fide-*besitter* – *retensiereg*

1 Feite

1 1 Quarrying Enterprises, 'n maatskappy wat graniet uitgrawe, bewerk en verkoop, het 'n stuk grond by die Mutoko district council gehuur en steengroewe daarop bedryf. 'n Aantal bewerkte granietblokke is deur Quarrying Enterprises in 'n rivierbedding geplaas om 'n brug te vorm, ten einde toegang tot die steengroewe te vergemaklik. Die rivierbedding was buite die gehuurde grond geleë, en was onder beheer van die Mutoko district council. Die granietblokke in die rivierbedding en 'n aantal ander granietblokke op die huurperseel is deur Natural Stones, 'n filiaal van John Viol, van die betrokke persele verwyder nadat die Mutoko district council dit aan John Viol verkoop het. Daarna is die blokke vir en namens John Viol deur Terrier Services na Harare vervoer, waar dit deur Circlepave vir John Viol gehou word.

1. 2 Quarrying Enterprises vra in die geding vir 'n driedelige bevel, om

a John Viol te dwing om die granietblokke wat van die genoemde persele verwyder is, aan die applikant terug te gee, en hom te verbied om enige verdere granietblokke van die genoemde persele te verwyder;

b die Mutoko district council te verbied om enige verdere granietblokke wat aan die applikant behoort, te verkoop; en

c Circlepave te gebied om die granietblokke wat Circlepave vir John Viol hou, aan die applikant terug te besorg.

1 3 Hierdie bespreking is veral met die uitspraak ten aansien van die eerste en derde dele van die gevraagde bevel gemoeid, en spesifiek met die verskillende aspekte daarvan wat met die bestaan en aard van retensieregte verband hou.

2 Die Posisie van Circlepave

2 1 Die derde deel van die gevraagde bevel, waarvolgens die applikant as eienaar sy granietblokke opeis van Circlepave, wat dit vir en namens John Viol hou, is deur die hof eerste behandel. Die belangrike aspek van hierdie gedeelte

van die beslissing spruit voort uit die feit dat Circlepave die eis van die applikant met 'n aanspraak op 'n retensiereg teenstaan. Die retensiereg waarop Circlepave aanspraak maak, is gebaseer op die uitgawes aangegaan vir die vervoer, hantering en opberging van die granietblokke nadat dit deur John Viol gekoop is.

2 2 Hoewel hierdie aspek nie in die gerapporteerde uitspraak baie duidelik gemaak word nie, wil dit tog voorkom asof die posisie van Circlepave teenoor John Viol as dié van 'n soort subkontrakteur gesien moet word en nie as dié van 'n koper nie. Dit lyk naamlik asof Circlepave die blokke nie van John Viol gekoop het nie, maar dit vir en namens John Viol na Harare laat vervoer het, en die verdere hantering daarvan in Harare ook namens John Viol waargeneem het. Circlepave moet dus waarskynlik as 'n houer ten behoewe van John Viol gesien word. (Vgl 578A 578I.)

2 3 Die applikant het twee besware teen die moontlike bestaan van 'n retensiereg ten gunste van Circlepave geopper: eerstens dat die werklike koste nie deur Circlepave aangegaan is nie, maar deur Terrier Services, en tweedens dat die waarde van die granietblokke deur die vervoer daarvan na Harare nie verhoog is nie, maar inderdaad verminder is.

2 3 1 Die eerste beswaar word deur die hof van die hand gewys op grond van die argument dat Terrier Services net 'n subkontrakteur van Circlepave was, en dat die totale pakket wat by die vervoerkontrak betrokke was, nog steeds aan Circlepave 'n retensiereg kon verleen, aangesien die daadwerklike onkoste deur Circlepave as kontrakteur vir die pakket aangegaan is (578C). As aanvaar word dat Circlepave reeds vir Terrier Services vergoed het, kan hierdie argument voorlopig aanvaar word. Die verwerping van die applikant se eerste beswaar word egter op só 'n wyse geformuleer dat dit die indruk kan skep dat die hof ook die standpunt verwerp dat 'n retensiereg nie oordraagbaar is nie (578B). Hierdie indruk moet waarskynlik as bloot onversigtige formulering beskou word en behoort nie gevolg te word nie.

2 3 2 Applikant se tweede beswaar teen die moontlike bestaan van 'n retensiereg ten gunste van Circlepave is gegrond op die standpunt dat die vervoer van die granietblokke na Harare die waarde daarvan inderdaad verlaag het. Hierdie beswaar word ook deur die hof van die hand gewys, op grond van die argument dat die granietblokke bestem was om uiteindelik verkoop te word; dat dit dus in elk geval na Harare vervoer sou moes word; dat die vervoerkoste 'n groot gedeelte van die verkoopprys uitmaak; en dat die vervoer na Harare dus tot voordeel van die applikant was (578E). Dit mag waar wees dat die vervoer van die granietblokke na Harare die applikant bevoordeel het, maar dit wil tog voorkom asof hierdie argument van die hof ietwat wyd en algemeen geformuleer is. Dit is naamlik nie vanselfsprekend dat sodanige verskuiwing van die granietblokke noodwendig en altyd tot die applikant se voordeel sou wees nie; en dit is ook nie so vanselfsprekend dat die applikant regtens verplig was om sodanige voordeel te aanvaar nie. Feitelike omstandighede kon dit naamlik moontlik gemaak het dat die ontydige aanwesigheid van die granietblokke in Harare juis vir die applikant se besigheid nadeel kon inhou; en die hof se behandeling van die omringende omstandighede skep nie die indruk dat hierdie bevinding op 'n omvattende oorweging van al die feitlike omstandighede en moontlikhede gebaseer is nie. Dit is verder 'n vraag of enige moontlike voordeel op die applikant afgeforseer kon word. As die applikant, op grond van persoonlike besigheidsoorwegings, nie self die granietblokke op die spesifieke tydstip

na Harare sou laat vervoer het nie en ook nie op die tydstip van die aanwesigheid daarvan in Harare gebruik kon of wou maak nie, kan geargumenteer word dat die vervoer daarvan na Harare, wat die applikant betref, luuks eerder as nuttig was, of ten minste nadelig eerder as voordelig was. Hierdie moontlikheid is nie voldoende deur die hof oorweeg nie.

2 4 Na verwerping van die applikant se besware besluit die hof sonder meer dat die uitgawes wat vir die vervoer van die granietblokke na Harare aangegaan is, as *nuttige* uitgawes gesien moet word en dat die applikant dus daardeur ten koste van Circlepave verryk is (578F). Sodanige verryking gee, volgens die hof, aan Circlepave 'n verbeteringsretensiereg ter versekering van die verrykingsaanspraak teen die applikant. Hierdie retensiereg word tereg as 'n saaklike reg omskryf, wat los van enige kontraktuele verbintenis tot stand kom (578H). Die hantering en opberging van die granietblokke word egter as 'n besondere kontraktuele behoefte van John Viol gesien, waarby die applikant geen baat vind nie en die koste daarvan word dus van die retensiereg uitgesluit (578I-J).

2 5 Die toekenning van die verrykingsaanspraak vir verbeterings, en die meegaande retensiereg, word skynbaar gebaseer op die veronderstelling dat Circlepave 'n *bona fide possessor* van die granietblokke was toe die verbeterings aangebring is (578G). Hierdie veronderstelling berus klaarblyklik op die oorweging dat Circlepave onbewus was van die geskil oor eiendomsreg op die granietblokke en is kennelik deur die onlangse uitspraak in *Jot Motors (Edms) Bpk h/a Vaal Datsun v Standard Kredietkorporasie Bpk* 1984 2 SA 510 (T) geïnspireer. Die hof vermeld ook uitdruklik dat kennis aan die kant van Circlepave geen verskil sou maak nie, aangesien die *mala fide possessor* (met verwysing na die *Jot*-saak) dieselfde aanspraak as die *bona fide possessor* het. Verskeie opmerkings is in hierdie verband gepas.

2 5 1 Uit 'n verskeidenheid van hofuitsprake met betrekking tot die reg op vergoeding vir verbeterings en retensieregte is dit duidelik dat die onderskeid tussen die *possessor* in die juridiese sin en die houer of *detentor* vir doeleindes van hierdie afdeling van die reg besonder belangrik is. (Sien bv *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 632; *Scholtz v Faifer* 1910 TS 243 246; *Rubin v Botha* 1911 AD 568 574-576; *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A) 649C; asook De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1972) 214-216; Peiris "Possession and Policy in a Modern Civil Law System" 1983 *CILSA* 291 318-323.) Dit is ewe duidelik dat die kern van hierdie onderskeid vir huidige doeleindes in die aan- of afwesigheid van die *animus domini* geleë is. (Vgl, benewens bg bronne, veral r Innes se minderheidsuitspraak in *Rubin v Botha* 1911 AD 568 578-584.) Gesien die duidelike afwesigheid van die *animus domini* in sowel die *Jot*- as die *Quarrying Enterprises*-sake, is dit duidelik dat die betrokke aanspraakmakers op 'n retensiereg in beide gevalle as houers gesien moet word. Die feit dat die verrykingsaanspraak en retensiereg van houers soms as 'n uitbreiding van die besitter se aksie gesien word (vgl bv *Kommissaris van Binnelandse Inkomste v Anglo American (OFS) Housing Co Ltd* 1960 3 SA 642 (A) 649C-D), impliseer nie dat die houers sonder meer met die besitters gelykgestel moet of kan word nie, veral aangesien die berekening van die betrokke eise in die onderskeie gevalle aansienlik verskil (sien bv *Rubin v Botha* 1911 AD 568 576-577). In die onlangse appèl op die *Jot*-uitspraak is daar trouens uitdruklik gesê dat die beskrywing van die verweerder as *mala fide*

possessor nie sonder meer korrek was nie (*Standard Kredietkorporasie Bpk v Jot (Edms) Bpk h/a Vaal Motors* 1986 1 SA 223 (A) 235A–237F).

2 5 2 In die omstandighede moet Circlepave waarskynlik eerder as 'n *bona fide*-houer van die granietblokke gesien word: gesien die feit dat John Viol geen reg daarop kon vestig nie, is dit onregmatig in Circlepave se beheer geplaas, maar op grond van sy *bona fide*-oortuiging dat daar wel 'n geldige regsgrond vir sy beheer bestaan, is sy onregmatige beheer *bona fide*. Dit wil voorkom asof die *bona fide*-houer tans wel 'n verrykingsaanspraak en retensiereg geniet (sien bv *Rubin v Botha* 1911 AD 568 576).

2 5 3 Dit is egter nie vanselfsprekend dat Circlepave, selfs as *bona fide*-houer, in die omstandighede 'n verrykingsaanspraak het nie. Met betrekking tot nuttige verbeterings aan 'n saak, is die ontstaan van 'n verrykingaanspraak skynbaar deur verskeie beslissings tot *fisiese verbeterings* beperk, met die gevolg dat blote uitgawes, sonder fisiese verbeterings, waarskynlik nie sal kwalifiseer nie. (Sien bv *Nortje v Pool* 1966 3 SA 96 (A) 130D-F; *Brooklyn House Furnishers (Pty) Ltd v Knoetze* 1970 3 SA 264 (A) 270H; asook Delport en Olivier *Sakereg Vonnisbundel* (1985) 489 en die literatuur daar vermeld.)

2 5 4 Selfs as die bestaan van 'n verrykingsaanspraak ten gunste van Circlepave aanvaar word (wat onder die omstandighede foutief lyk), volg die bestaan van 'n meegaande retensiereg nie so vanselfsprekend daaruit as wat die hof voorgee nie. Die besluit of 'n retensiereg bestaan, is naamlik altyd in die diskresie van die hof en moet met verwysing na die spesifieke omstandighede van die geval beoordeel word (Delport en Olivier 514 (f)(ii)).

2 6 Met inagneming van al die omstandighede wil dit voorkom asof die uitspraak met betrekking tot die retensiereg van Circlepave verkeerd beslis is, aangesien die uitgawes vir die vervoer van die saak nie volgens die huidige reg noodwendig 'n verrykingsaanspraak regverdig nie.

3 Die Posisie van John Viol

3 1 In die tweede deel van die uitspraak behandel die hof, sonder dat dit duidelik is waarom hierdie ondersoek hoegenaamd nodig is, die verwydering van die granietblokke van die genoemde persele en die gevolglike posisie van Quarrying Enterprises en John Viol onderskeidelik. Die logika van hierdie gedeelte van die uitspraak is ongelukkig baie moeilik om te volg.

3 2 Die kern van die uitspraak is skynbaar dat die gevraagde regshulp teen die Mutoko district council en John Viol toegestaan moet word, aangesien geeneen van hulle geregtig was om die granietblokke van die betrokke perseel te verwyder nie. Die redes vir hierdie skynbaar eenvoudige bevinding is verwarrend.

3 2 1 Ten aansien van die granietblokke wat van die huurperseel verwyder is, bevind die hof kort en klaar dat die Mutoko district council en John Viol geen reg gehad het om dit te verwyder nie en dat die gevraagde bevel teen die Mutoko district council verleen moet word (579D- 580C).

3 2 2 Ten aansien van die granietblokke wat van die rivierbed verwyder is waar die applikant dit geplaas het, word die saak heelwat ingewikkelder gemaak as wat nodig is. Daar word aanvanklik gesê dat die applikant eiendomsreg op die granietblokke behou het, terwyl sy okkupasie van die rivierbed hom as 'n *mala fide*-okkupeerder van die rivierbedding kenmerk (580E). Op sigself is daar

met hierdie stelling geen fout te vind nie, selfs al is die rede vir die bevinding ten opsigte van die rivierbedding onduidelik. Later in die uitspraak (580I- 582F) word herhaal dat die applikant sy eiendomsreg op die granietblokke nie verloor het nie. Die enigste sinvolle afleiding wat daaruit gemaak kan word, selfs al is die juridiese maatstawwe daarvoor nooit uitdruklik toegepas nie, is dat die hof bevind het dat die granietblokke nie deur die applikant se plasing daarvan aan die rivierbedding vasgeheg is nie, maar dat dit roerend gebly het. Dit klop met die bevinding dat dit die bedoeling van die applikant was om die blokke later te verkoop (578E). In die omstandighede lyk 'n bevinding dat *accessio* nie plaasgevind het nie, geregverdig.

3 2 3 Die res van die beslissing is egter, in die lig van bogaande, totaal onbegryplik. As die applikant sy eiendomsreg in die granietblokke inderdaad behou het, kon die hof eenvoudig bevind het dat hy die fisiese beheer daarvan (op grond van sy eiendomsreg) van die huidige houer of houers kon terugvorder, omdat hulle geen regverdiging vir die verwydering van die blokke gehad het nie. Die hof verkies egter om dieselfde resultaat langs 'n omweg te bereik, wat hoofsaaklik op die implikasies van die applikant se *mala fide*-okkupasie van die rivierbedding berus. Dit lyk asof die kern van die argument is dat die applikant, as *mala fide*-okkupeerder van die rivierbedding, 'n verrykingsaanspraak en gepaardgaande retensiereg teenoor die Mutoko district council gehad het weens die plasing van die granietblokke, en dat die Mutoko district council daarom nie daarop geregtig was om die granietblokke te verwyder of te verkoop nie (581A- 582F). Hierdie argument moet om verskeie redes verwerp word:

a Die eiendomsreg van die applikant is voldoende rede vir dieselfde bevinding en daarom is die omweg onnodig en verwarrend.

b Dit is moeilik om in te sien hoe die kwessie van 'n verrykingseis en retensiereg eers geopper kan word nadat daar reeds bevind is dat die granietblokke die applikant se eiendom gebly het. As die granietblokke nie deur die applikant aan die rivierbedding aangeheg is nie, is daar geen verbetering, verryking of retensiereg ter sprake nie. Die hele uiteensetting oor die verrykingsaanspraak (581A-582F) is dus nie net onnodig nie, maar heeltemal misplaas.

c Die redenasie waarvolgens die hof bevind dat die *mala fide*-houer op 'n retensiereg geregtig is, is verdag. Daar word gesteun op die uitbreiding van die *bona fide possessor* se regte na die *mala fide possessor* enersyds (581C-G) en op die uitbreiding van die *mala fide possessor* se regte na die *mala fide*-houer andersyds (581B). Hierdie oorvereenvoudigde gelykstelling is reeds hierbo gekritiseer, en behoort nie gevolg te word nie. By die beoordeling van die bestaan van 'n verrykingsaanspraak moet die werklike posisie en omstandighede van elke vorm van beheer oor die saak telkens op eie meriete beoordeel word. Verder word daar nie in die uitspraak baie duidelik tussen die aanspraak op grond van egte *negotiorum gestio* en dié op grond van verryking onderskei nie (582A 582E), terwyl die twee gevalle om verskillende redes juis duidelik onderskei moet word. Die hele uiteensetting is onnodig en verwarrend.

4 Samevatting

Hierdie beslissing behoort nie nagevolg te word nie, omdat dit onnodige verwarring rondom die vraag na verryking en retensieregte skep. Dit wil voorkom asof die uitspraak veel eenvoudiger kon gewees het:

a Getoets aan die gewone vereistes vir *accessio*, was die granietblokke van die applikant nie aan die rivierbedding vasgeheg nie en dit het dus die eiendom van die applikant gebly. Die verwydering van die granietblokke van beide die persele was dus onregmatig en die applikant kon die fisiese beheer daarvan van die huidige houer of houers terugvorder.

b Afhangende van die presiese omstandighede kon die hof bevind het dat die huidige aanwesigheid van die granietblokke in Harare vir die eienaar van nut is, in welke geval hy die voordeel van die vervoer daarvan kan benut en op grond waarvan hy dan teenoor die vervoerkontrakteur verryk is. Die vervoerkontrakteur sal moontlik 'n retensiereg vir die verhaal van sy eis kan uitoefen. As die aanwesigheid vir die eienaar nadelig is, of as hy die moontlike voordeel daarvan nie kan of wil benut nie, kan hy van die huidige houer verg dat die granietblokke aan hom terugbesorg word waar hulle was.

AJ VAN DER WALT
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

SOTERIOU v RETCO POYNTONS (PTY) LTD 1985 2 SA 922 (A)

Voorkoopreg – regte en verpligtinge van partye

Die geskil tussen die partye het sy oorsprong gehad in 'n klousule in 'n huurkontrak wat soos volg gelui het:

> "2 (b) The lessee shall have the first refusal of entering into an extension of this lease for a further period of four years and 11 months upon such terms and conditions and at such rental as may be mutually agreed upon. In the event of the lessee wishing to exercise such right, the lessee shall give to the lessor three months' notice prior to the expiration of this lease of his intention so to do."

Hierdie klousule het die enigste besonderhede van die voorwaardes en omstandighede van hierdie "first refusal" uiteengesit. Die huurder het die vereiste kennisgewing aan die verhuurder gegee, maar die partye kon nie oor 'n verdere huurtermyn ooreenkom nie, aangesien die verhuurder nie gewillig was om die huur te verleng nie. Die verhuurder het in hierdie stadium reeds besluit om die perseel aan 'n derde te verhuur, en het 'n kontrak met die derde aangegaan. In die hof *a quo* het die verhuurder 'n aansoek om 'n uitsettingsbevel teen die huurder gevra, wat toegestaan is.

Daar is veral drie aspekte waaroor die appèlhof by monde van appèlregter Nicholas (meerderheidsuitspraak) en appèlregter AS Botha (minderheidsuitspraak) hom uitspreek, naamlik:

a die uitleg en betekenis van die bogenoemde klousule – die vraag handel eerstens daaroor of die klousule 'n opsie, 'n reg van eerste weiering of 'n ooreenkoms om ooreen te kom uitmaak;

b die regte en verpligtinge van die partye uit 'n kontrak waar 'n reg van eerste weiering geskep is;

c watter regsmiddels beskikbaar is vir 'n party wat die reg van eerste weiering het.

Dat die klousule in die kontrak wat hierbo aangehaal is, nie 'n voorbeeld van duidelikheid en helder formulering is nie, behoef geen betoog nie. Die hof *a quo* het dit onnodig gevind om te beslis of die klousule 'n opsie of 'n reg van eerste weiering uitmaak, aangesien die hof van mening was dat dit in elk geval nietig was omdat dit nie die wesenlike vereistes vir enige van die twee klousules bevat het nie. Appèlregter Nicholas bevind dat indien hierdie klousule veronderstel was om 'n opsie te skep, dit nietig was omdat daar nie 'n geldige aanbod daarin vervat is nie. 'n Opsie moet ten minste 'n aanbod behels waarin al die *essentialia* (soos die huurgeld en die huurtermyn) voorkom. Die uitgangspunt van die hof by die uitleg van die klousule is dat die partye bedoel het om 'n geldige beding daarin te beliggaam, met die gevolg dat, waar daar 'n dubbelsinnige bepaling bestaan, die hof voorkeur sal gee aan dié uitleg wat sal lei tot geldigheid eerder as aan die een wat sal lei tot nietigheid. Die meerderheid beslis dat die gebruik van die uitdrukking "first refusal" 'n spesifieke betekenis in ons reg dra, en dat waar dit in 'n kontrak voorkom daardie betekenis daaraan geheg moet word, tensy dit duidelik nie die bedoeling van die partye weerspieël nie. Die hof sê verder dat die gebruik van die term in hierdie klousule van die kontrak nie deur die res van die klousule weerspreek word nie. Die kwalifikasie dat die verlenging "upon such terms and conditions and at such rental as may be mutually agreed upon" sal geskied, doen nie afbreuk aan die hoofdoel van die partye, naamlik om 'n reg van eerste weiering te skep nie.

Die minderheidsuitspraak verskil van hierdie interpretasie van die kontrak. Appèlregter Botha sê dat die term "first refusal" in hierdie konteks twee moontlike betekenisse kan dra, eerstens die betekenis wat die meerderheid daaraan heg, of tweedens dat dit die geleentheid skep om oor 'n nuwe ooreenkoms te onderhandel. Laasgenoemde is "an agreement to agree" en is nietig in ons reg. Die minderheid meen dat hierdie uitleg die enigste redelike uitleg van die klousule is en dat die klousule daarom nietig is.

Myns insiens is die benadering wat die meerderheid gevolg het te verkies, aangesien dit uit die konteks van die artikel duidelik die bedoeling van die partye weerspieël. Die uitdrukking "first refusal" het 'n bekende betekenis in die handelswêreld welke betekenis klop met die betekenis wat die meerderheid van die hof aan die klousule heg.

Die onderskeid tussen 'n opsie en 'n "first refusal" is reeds in *Van Pletsen v Henning* 1913 AD 82 duidelik deur die appèlhof gemaak, waar die hof op 95 sê:

> "The remainder of the clause is that the seller should give to the other parties, not the option or right of purchase, but the preference of purchase which is a very different thing. The grant of a right of pre-emption does not compel the grantor to sell; it only compels him to give the grantee the preference in case he sells at all."

In hierdie verband wys die meerderheid daarop dat daar in beginsel geen verskil tussen 'n reg van eerste weiering en 'n voorkoopreg bestaan nie. 'n Voorkoopreg is maar 'n voorbeeld van 'n reg van eerste weiering wat by koopkontrakte van toepassing is. Hierdie standpunt van die hof is te verwelkom omdat dit die vereistes wat vir 'n reg van eerste weiering gestel word duideliker maak.

Die reëls by die voorkoopreg het al ietwat duideliker as dié by die reg van eerste weiering uitgekristalliseer.

Die verwarring oor die onderskeid tussen die opsie en die reg van eerste weiering spruit eerstens voort uit die taamlike losse gebruik van die begrip *opsie* in die algemene omgang. *Van Pletsen v Henning* bied 'n goeie voorbeeld van 'n klousule waar die term opsie gebruik is, terwyl die partye inderdaad bedoel het om 'n voorkoopreg te skep. Hierdie verwarring het egter ten spyte van duidelike uitsprake in die *Henning*-saak en in *Cohen v Behr* 1946 CPD 946 ook reeds in sommige howe voorgekom. Dit is veral die vereistes en gevolge van die onderskeid wat nie altyd duidelik ingesien is in sake soos *Hattingh v Van Rensburg* 1964 1 SA 578 (T), *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk* 1964 3 SA 702 (T) en *Krauze v Van Wyk* 1948 2 SA 702 (NK) nie.

Die onderskeid tussen die opsie en die reg van eerste weiering is eerstens geleë in die vereistes wat vir elk van hierdie kontraksoorte gestel word. 'n Opsie is 'n ooreenkoms tussen twee persone ingevolge waarvan die een 'n aanbod aan die ander maak en onderneem om vir 'n bepaalde tyd die aanbod nie terug te trek nie. Die opsie moet al die bedinge van die kontrak wat tot stand gaan kom, bevat, sodat die opsiehouer bloot deur aanvaarding die kontrak tot stand kan laat kom (*Van Pletsen v Henning* 98). Die reg van eerste weiering daarenteen plaas geen verpligting op die party om 'n aanbod te maak nie, maar indien die verpligte party die saak of reg wil vervreem of verhuur (afhangende van die ooreenkoms) moet hy aan die reghebbende die eerste geleentheid bied om te koop of te huur. Daar bestaan egter onsekerheid oor presies hoe die reg uitgeoefen moet word: moet die persoon wat die reg van eerste weiering het, die aanbod aan die teenparty maak (*Hartsrivier Boerderye* 707) of is dit eintlik andersom (*Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 3 SA 310 (A) 316D-E)?

Feitlik al die howe wat hulle oor hierdie aangeleentheid moes uitspreek, verwys na die Engelse beslissing *Manchester Ship Canal Co v Manchester Racecourse Co* (1900) 2 Ch 352 waar die volgende gesê word (364):

> "Now, a refusal to my mind, implies an offer. A thing is not in ordinary parlance refused before it is offered."

Appèlregter Nicholas gaan in die onderhawige saak akkoord met hierdie stelling in die *Manchester Ship Canal*-saak. Dat dit vanuit 'n praktiese oogpunt die enigste redelike benadering is, is duidelik. Hopelik sal die verkeerde rigting wat in *Hartsrivier Boerderye* (hierbo) ingeslaan is, naamlik dat die reghebbende die aanbod aan die ander party moet maak, nie verder gevolg word nie. Die aanbod moet dus deur die party wat die reg of saak wil vervreem of verhuur aan die persoon wat die reg van eerste weiering het, gemaak word, tensy die kontrak duidelik ander vereistes stel. Die uitgangspunt bly natuurlik steeds dat die inhoud en wyse van die uitoefening van die reg deur die partye gereël kan word en dat daaraan gevolg gegee moet word. Die partye kan dus in hulle ooreenkoms 'n prosedure bepaal ten opsigte van die uitoefening van die reg, sodat die gevolge dieselfde is as die reël wat die hof in die *Hartsrivier Boerderye*-saak gestel het. Dit gebeur egter dikwels dat die partye die prosedure nie volledig uiteensit nie, maar bloot na 'n reg van eerste weiering verwys. Hierdie beslissing is veral vir daardie gevalle van belang, omdat dit die regte en verpligtinge van die partye volledig uiteensit.

Die meerderheidsuitspraak stel duidelike riglyne oor die wyse waarop die partye by so 'n kontrak moet optree. Die eerste plig wat ingevolge so 'n ooreenkoms tot stand kom, is die verbod wat op die een party geplaas word om die saak te verkoop of te verhuur voordat hy aan die reghebbende geleentheid gebied het om die saak te koop of te huur (*Owsianick* 321F-G; *Soteriou* 932B-E). Indien die party egter oor die saak wil beskik, ontstaan die vraag op watter wyse hy die aanbod moet inklee en wat die inhoud van so 'n aanbod moet wees. Die hof verklaar op 932H-J:

> "Nothing was said in clause 2(b) as to the method of determining the rental to be stated in the offer, but Poynton's was not free to fix any rental it pleased. . . . Plainly Poynton's must act *bona fide*. Cf Corbin *On Contracts* s 261 at 477: 'The law will require performance 'in good faith' and the term 'offer' will be interpreted as denoting one that is not beyond the bounds of commercial reason and practice and made for the purpose of inducing a rejection.' "

Op 933F-G sê die hof dat die woorde "first refusal" impliseer dat die verhuurder bereid is om die perseel teenoor die reghebbende aan te bied teen dieselfde huur en op dieselfde voorwaardes as waarop hy dit aan derdes sal aanbied. Hierdie spesifieke oplossing moet nie gesien word as 'n omvattende formule wat in alle gevalle aangewend kan of moet word nie, maar eerder as die hof se interpretasie van wat onder hierdie omstandighede *bona fide* sou wees. Dit is hierdie aspek van die beslissing wat veral van belang is, aangesien dit groter duidelikheid bring oor die inhoud van die reg van eerste weiering. 'n Hof moet dus in die eerste plek vasstel of die aanbod onder die omstandighede *bona fide* gemaak is. Om dit vas te stel, moet die hof al die omringende omstandighede oorweeg.

In die onderhawige geval wou die verhuurder die perseel nie langer aan die appellant verhuur het nie, maar wou hy dit eerder aan 'n boekhandelaar verhuur. Onder die omstandighede sou dit 'n onredelike voorwaarde in die aanbod aan die appellant gewees het as die verhuurder die perseel verhuur het op voorwaarde dat die verhuurder net boeke daar mag verkoop. Dit sou in stryd met die *bona fides* wees, want al sou die verhuurder die voorwaarde aan die nuwe huurder stel, het hy in die stadium toe hy die reg van eerste weiering toegestaan het, hom versoen met die tipe besigheid wat die huidige huurder daar sou bedryf. Die bedinge behoort dus wesenlik ooreen te stem, met verwysing na huurgeld, termyn en die ander wesenlike bedinge van die kontrak, maar dit hoef nie noodwendig presies dieselfde te wees nie.

Dit bring 'n mens by 'n laaste aspek van die saak, wat aandag verdien. Appèlregter Botha, luidens sy minderheidsuitspraak, sou die appèl ook op 'n ander grond as die feit dat die klousule na sy mening nietig was, van die hand gewys het. Op 937E en verder verklaar hy dat selfs al sou die meerderheid se uitleg van die klousule korrek wees, waarmee hy nie saamstem nie, kan die appellant in elk geval nie slaag nie omdat hy nie van die regte remedie gebruik gemaak het nie:

> "In terms of the decision in the *Associated South African Bakeries* case (1982 3 SA 893 (A), which is mentioned in the judgment of Nicholas JA, the appellant's remedy, in principle, was to step into the shoes of CNA by means of a unilateral declaration of intent."

In die uitspraak in die *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A) waarin die hof die remedies wat tot die beskikking van 'n party is, ondersoek het, beslis die hof op 907E-G

met verwysing na die *Owsianick*-saak dat die reghebbende naas 'n reg op skadevergoeding, ook daarop geregtig is om deur 'n eensydige wilsverklaring in die plek van die derde te tree, dit wil sê hy kan die aanbod wat aan die derde gerig is, aanvaar. (In die *Owsianick*-saak word daar verder aangedui dat die reghebbende ook 'n interdik sou kon aanvra.) Die hof steun veral op die opmerkings van appèlregter Ogilvie Thomson in die *Owsianick*-saak (319H–320E) en die gemeenregtelike gesag daar aangehaal.

Dat die gemeenregtelike gesag waarop daar in albei daardie sake gesteun word, nie ondubbelsinnige steun vir hierdie standpunt bied nie, blyk uit appèlregter DH Botha se afwykende standpunt oor dieselfde gesag in die *Owsianick*-saak (321B–323E). Die gemeenregtelike gesag wat aangebied word, handel eerstens oor die remedies wat by 'n *ius retractus* en 'n naastingsreg bestaan.

Die naastingsreg was in die Romeins-Hollandse reg 'n *ius retractus* wat saaklike werking gehad het, dit wil sê 'n reg wat nie net *inter partes* gegeld het nie, maar ook afdwingbaar was teenoor onskuldige derdes wat nie kennis van die reg gedra het nie. Hierdie reg het *ex lege* ontstaan en was nie van ooreenkoms afhanklik nie. Die posisie by die voorkoopreg is slegs in die verbygaan met verwysing na bogenoemde regsfigure genoem. Uit die gesag is dit duidelik dat die reg om deur eensydige optrede in die plek van die derde te staan te kom, in eerste instansie by die naastingsreg en die *ius retractus* bestaan het.

Daar bestaan egter meningsverskil oor die toepaslikheid daarvan by die voorkoopreg, en by implikasie die reg van eerste weiering. Appèlregter Ogilvie Thomson (*Owsianick*-saak 320) en waarnemende appèlregter Van Heerden (*Associated Bakeries*-saak 904 ev) beslis albei dat hierdie remedie ook by die voorkoopreg beskikbaar is. Daarteenoor maak appèlregter DH Botha in die *Owsianick*-saak (323D-F) die volgende stelling:

> "The Dutch law of 'naesting' is not part of the modern law . . . and there is no procedure known to our law whereby the grantee of a right of pre-emption may, in the event of a sale to another in conflict with his rights, demand that he be allowed to step into the buyer's place."

Myns insiens lê die knelpunt by die saaklike werking van die naastingsreg, wat aanleiding tot hierdie buitengewone remedie wat in die Romeins-Hollandse reg beskikbaar was, gegee het. Dit is 'n vorm van eierigting, aangesien die benadeelde party deur 'n eensydige wilsverklaring sy naastingsreg teenoor die ander party afdwing. Terwyl 'n reg van eerste weiering uit 'n kontrak ontstaan, is dit duidelik dat die vraag hier eintlik om spesifieke nakoming draai, soos tereg deur appèlregter Ogilvie Thomson in die *Owsianick*-saak ingesien (320F). Die vraag is wat spesifieke nakoming by 'n reg van eerste weiering sou behels. Die reg van eerste weiering plaas 'n beperking op die verpligte party om vryelik oor die voorwerp van daardie reg te beskik. Wil hy wel daaroor beskik, rus daar 'n verpligting op hom om eers 'n *bona fide*-aanbod aan die reghebbende te maak. Indien die verpligte party in stryd met hierdie beperking optree, kan 'n eis om spesifieke nakoming slegs gerig wees op die afdwinging van die verpligting, naamlik om 'n *bona fide*-aanbod te maak. Sou die reghebbende die reg hê om deur 'n eensydige wilsverklaring die kontrak tot stand te bring, sou dit beteken dat die hof se diskresie om spesifieke nakoming toe te staan of te weier, omseil sou word.

Alhoewel die meerderheidsbeslissing in die onderhawige saak nie die benadering in die *Associated South African Bakeries*-saak in twyfel trek nie, word die reël tog in 'n belangrike opsig gekwalifiseer. Die hof sê (935B-E):

> "[I]f a seller concludes a contract of sale with a third party contrary to a pre-emptive right, the purchaser can step into the shoes of the third party by a unilateral declaration of intent. There would seem to be no reason in principle why the same should not apply where a lessee of premises has a right of first refusal of a new lease. But the lease concluded with the third party must be such that the grantee of the right can step into the third party's shoes."

Wat hierdie aspek betref, is die benadering in die meerderheidsbeslissing beslis te verkies bo dié in die minderheidsbeslissing, maar om die redes wat hierbo genoem is, kan dit ook nie heelhartig ondersteun word nie.

Die meerderheid se uiteensetting van die regte, verpligtinge en regsmiddele wat met 'n reg van eerste weiering verband hou, is nietemin te verwelkom, aangesien dit groter helderheid bring oor 'n onderwerp wat al te dikwels deur onversigtige formulering en verwarring gekenmerk is.

GTS EISELEN
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

NGAKE v MAHAHLE 1984 2 SA 216 (O)

Die oplossing van gesinsprobleme deur toepassing van gewoontereg by 'n gemeenregtelike huwelik van Swartmense – Phuthuma en die benadering van die Hoexter-kommissie tot versoening en bemiddeling.

Hierdie vonnis is reeds bespreek deur Bekker in 1985 *De Jure* 176-179. Dit word hier behandel met 'n ander uitgangspunt.

Readings in African Law (1970), 'n werk saamgestel deur Cortran en Rubin, bevat uittreksels van verskillende skrywers wat hoofsaaklik oor die gewoontereg in verskeie lande in Afrika handel. In hulle inleiding tot die gedeelte wat oor egskeiding handel, sê die samestellers die volgende (deel 1 209):

> "A notable feature of customary divorce procedure is its emphasis on machinery for conciliation and arbitration by the respective family groups of the disputant spouses. Indeed, the first step is almost invariably for the elders of each family group to meet and attempt a reconciliation of the spouses, only if this fails do the family groups – reconstituted frequently by the addition of some outsiders – meet to exercise the judicial role of deciding whether or not divorce is to be allowed."

In die uittreksel van Schapera *A Handbook of Tswana Law and Custom* (1938) 159-163 wat daarop volg, word die betrokkenheid van familiegroepe by die oplossing van huweliksprobleme in besonderhede beskryf. Ook ander uittreksels, soos dié van Holleman oor die Shona en dié van ander skrywers oor groepe verder noord, staaf die algemene beginsel uiteengesit in die inleiding. Algemene beginsels geld dikwels in die gewoontereg vir alle stamme suid van die Sahara, nieteenstaande verskille in besonderhede. Indien die algemene beginsels eers begryp word, word die besondere instellinge van die gewoontereg 'n logiese geheel. Ek kom later terug op die posisie in Suid-Afrika.

Dit lyk of daar sekere verrassende raakpunte is tussen die basiese benadering van die gewoontereg in Afrika oor die oplossing van gesinsprobleme, soos hierbo beskryf, en die benadering van die Hoexter-kommissie (RP 78/1983) wat die daarstelling van gesinshowe in Suid-Afrika bepleit. Na 'n uitvoerige ontleding van gesinshowe in ander lande sê die Hoexter-kommissie dat

> "[a]gter die daarstelling van 'n gesinshof orals basies dieselfde beweegrede gevind word: 'n besef dat die gesin as primêre maatskaplike instelling sover moontlik as 'n organiese instelling behandel moet word, en dat gesinsprobleme wat dreig om in geregshowe te beland ... 'n *spesiale benadering* verg" (deel 7 par 2 7, my kursivering).

Hierdie benadering lê nadruk op die noodsaaklikheid om alle sake betreffende die familie in sy verband te behandel, op 'n informele prosedure en op 'n gesinshof binne bereik van almal. Verder word beklemtoon dat so 'n hof 'n terapeutiese benadering moet volg, wat gemik is op die oplossing van probleme eerder as die blote beslegting van geskille (deel 7 par 2 8 (b) 423). Hierdie terapeutiese benadering moet veral ingestel wees op versoening en bemiddeling. Daar word aanbeveel (par 8 6 2 433) dat die gesinshof enersyds moet bestaan uit 'n konsiliasie-komponent, wat daarop ingestel is om, waar moontlik, gesinsprobleme sonder verhoor op te los, en andersyds 'n hof-komponent, wat eers in werking tree wanneer partye nié daarin geslaag het om 'n besondere gesinsprobleem op te los nie. Die hof-komponent moet 'n geregshof wees wat feitebevindings maak en regsbeginsels toepas (par 8 6 4 433), maar ook daar moet die benadering inkwisitories van aard wees en nie akkusatories nie.

Die instelling van 'n gesinshof is 'n stap verder gevoer met die publikasie in die *Staatskoerant* van 1985-05-03 van 'n wetsontwerp om 'n gesinshof in te stel en die Wysigingswetsontwerp op die Wet op Egskeidings 70 van 1979.

Die ooreenkomste tussen die benadering van die Hoexter-kommissie en die gewoontereg lyk duidelik. By huweliksprobleme tussen partye wat toon dat die familiebetrokkenheid in die oplossing van sulke probleme nie aan hulle vreemd is nie, kan sodanige betrokkenheid 'n baie positiewe bydrae tot die konsiliasiekomponent van die gesinshof lewer. Dit kan ook van nut wees indien huweliksprobleme deur die hof bereg moet word. Dit is nie instellings wat bots met die gemenereg nie. Dit is 'n gebied waar die twee regstelsels wat inheems is aan Suid-Afrika, die gemenereg en die swartmense se gewoontereg, mekaar vrugbaar kan aanvul. Teen dié agtergrond wil ek die voormelde vonnis bespreek.

Die saak gaan oor 'n swart egpaar wat 'n gemeenregtelike huwelik in gemeenskap van goed in die NG Kerk gesluit het. Teen die agtergrond van huweliksprobleme wat tussen hulle ontstaan het, doen die man aansoek om die sorg en bewaring van hul seuntjie van anderhalf jaar. Van 1979, toe hulle getroud is, tot Maart 1983, het die egpaar by die man se ouers ingewoon. Die man is die prinsipaal van 'n hoërskool te Welkom en die vrou 'n onderwyseres by dieselfde skool. Op 1983-03-24 verlaat die vrou vanweë onenigheid wat tussen haar en haar skoonmoeder opgebou het, die huis van haar skoonouers in Welkom en gaan sy met haar seuntjie na haar moeder, 'n weduwee, in Heilbron. Sy laat haar seuntjie daar en kry self losies in Welkom, hoogs waarskynlik omdat sy deur werksomstandighede daartoe gedwing is. Sy besoek die seuntjie gedurende naweke en vakansies. Heilbron is minder as twee uur se ry van Welkom af. Die hof bevind dat die vrou nie van die man se ouerhuis weggegaan het met die bedoeling om die huwelik tot 'n einde te bring nie. Haar standpunt was dat sy nie bereid is om langer by sy ouers in te woon nie (218). Ook word bevind

dat die man se houding en optrede in die saak in 'n groot mate deur sy ouers geïnspireer is (219A).

'n Belangrike faktor in die saak is die hemelsbreë verskil in agtergrond tussen die man se ouers en die vrou se moeder. Die man se vader is 'n gegradueerde, 'n voormalige minister van Kwa Kwa. Die vrou se moeder se huis word as *shebeen* (die regter noem dit 'n "smokkelkroeg") gebruik. Die hof bevind dat

> "min kinders die voordele gebied word wat daar by die huis van applikant [die man] se ouers en homself heers" (220D).

Daarenteen, wat die woning van die moeder van die vrou betref,

> "kan dit sekerlik nie gesê word dat die aktiwiteite wat daar bedryf word, 'n goeie voorbeeld vir hom sal wees nie" (221A).

Hierdie verskil kan heel moontlik 'n agterliggende rede wees waarom die verhouding tussen die vrou en haar skoonmoeder nie wou vlot nie en dit het, soos uit die uitspraak blyk, duidelik 'n rol gespeel by die beregting van die aansoek. Die voorkeur van die hof in sy keuse tussen die twee huise lyk begryplik, maar dit is tog 'n kwellende vraag of die standpunt die breë steun sal geniet van die deel van die swart gemeenskap wat teen die huidige bedeling gekant is. Volgens die siening van swartmense, soos bevestig in die dagbladpers, is 'n *shebeen* nie in die eerste plek 'n onwettige drinkplek nie, maar 'n bymekaarkomplek waar vasgestel word hoe mense in die swart stedelike gebiede (*townships*) werklik voel, en moet die eienaar 'n sterk, onafhanklike persoonlikheid hê. Ongelukkig het ek nie die geleentheid gehad om die posisie meer wetenskaplik na te vors nie, maar blankes wat reg spreek, moet daarteen waak om dit wat in die swart gemeenskap gebeur, deur 'n blanke bril te beoordeel.

Die hof som die feite soos volg op:

> "Uit die voorgaande is dit duidelik dat hierdie aansoek beslis moet word teen die agtergrond van 'n ouerpaar wat tydelik apart woon vanweë onmin tussen vrou en skoonmoeder. Applikant, aangepor deur sy ouers, poog om deur middel van die seuntjie in hierdie aansoek, sy eggenoot terug na sy ouerhuis te dwing, en sy, gehelp deur haar moeder, poog op haar beurt weer, ook deur middel van die seuntjie, om haar eggenoot te dwing om 'n aparte woonplek en huishouding tot stand te bring" (219B).

Die Hof bevind verder op die feite:

> "Die waarskynlikhede toon verder onteenseglik aan dat die applikant [man] goed geweet het dat eerste respondent [vrou se moeder] se weiering om die seuntjie vir hom te gee op 'n beroep op *phuthuma* gefundeer is, want dit verduidelik waarom *hy die weiering so gelate aanvaar het*, en nou hom liewers op die sanksies van die reg van die land beroep, eerder as om in 'n proses van ouerlike samesprekings betrokke te raak. Dit word verder as bewese bevind dat tweede respondent [vrou] se prokureur gepoog het ... om 'n samespreking tussen die party te reël, maar dat die applikant dit as 'n voorwaarde vir samesprekings gestel het dat die seuntjie eers teruggelewer moet word" (218H – 219A, my kursivering).

Die aansoek is gerig teen die moeder van die vrou vir oorhandiging van die seuntjie aan die applikant, die vader, en teen sowel die vrou as haar moeder vir koste. In die beantwoordende verklaring van die moeder word die volgende gemeld:

> "Sy [die vrou] het my verder meegedeel dat hierdie reëling [dat die kind by die ouma bly] slegs 'n tussentydse maatreël is tot tyd en wyl die huwelikspro bleme tussen haar en die applikant uitgesorteer is ... Volgens ons Bantoeregtelike gebruik ... keer die vrou na haar ouers se woning terug en dan wel saam met die minderjarige kinders en dan moet die man en dié se ouers dan na die vrou se ouers gaan om te gaan 'phuthuma.' Dit beteken dat daar versoening gedoen moet word, en dit word bereik deur so 'n samespreking" (218G).

Op die feite en die stukke voor die hof was daar skynbaar net twee oplossings vir die huweliksprobleme van die egpaar waarby die belange van die seuntjie, gesien die aard van die aansoek, deurslaggewend was, naamlik:

a Die hof kon gelas het dat die seuntjie aan die vader oorhandig word, om by laasgenoemde se ouers, by wie die vader steeds ingewoon het, te bly, sonder dat enige poging aangewend word om die ouers te versoen. So 'n bevel sou 'n finale bevel gewees het. Op die waarskynlikhede sou dit beteken het dat die seuntjie van sy moeder geskei sou moes word, tensy die moeder bereid sou wees om na haar skoonouers terug te keer. Waarskynlik is die vervreemding tussen die vrou en haar skoonouers vererger deur laasgenoemde se inmenging in die saak tussen haar en haar man en sou 'n versoening tussen hulle na die saak moeiliker gewees het. Nieteenstaande die gunstige omstandighede van die man se ouers, bly die vraag steeds of so 'n reëling in die beste belang van die kind sou wees.

b Die hof kon erken het dat die toekoms van die kind verweef is met die oplossing van die probleem tussen sy ouers en dat dit in die beste belang van kind sou wees dat daar eers 'n poging aangewend word om die ouers te versoen. Of so 'n poging suksesvol sou wees, is nie seker nie, maar die probleem blyk duidelik uit die stukke en die oplossing daarvan was eenvoudig, naamlik dat die man sy eie huis en huishouding tot stand bring. Die kans op 'n oplossing was dus baie goed. Hierdie sou dus tipies 'n geval vir versoening deur 'n gesinshof gewees het op die manier deur die Hoexter-kommissie aanbeveel. Dit is egter 'n vraag of die hof sonder 'n instelling soos 'n gesinshof en 'n wysiging van die reëls, by magte was om die prosedure aanbeveel deur die Hoexter-kommissie te volg. Volgens die verklarings van die partye sou die hof dus moes vasstel of hierdie 'n geval is waarin *phuthuma* 'n rol kon speel. Indien samesprekings tussen die betrokke partye volgens hierdie gewoonteregtelike instelling sou geskied en dit suksesvol sou wees, sou 'n oplossing bereik kon word wat nie alleen vir die partye aanvaarbaar sou wees nie, maar ook die steun van die ouers sou hê. Dit sou beteken dat die kind nie een van sy ouers sou ontbeer nie, maar in 'n normale huisgesin sou opgroei. Indien *phuthuma* erken sou word, sou die hof die aansoek kon uitstel in afwagting van die samesprekings tussen die vader van die kind en sy ouers en die vrou en haar familielede.

Die hof los egter die geskil op deur die aansoek van die man toe te staan. Op die feite van die saak was dit sowel vanuit die oogpunt van die belange van die kind as dié van sy ouers gesien, egter nie die beste oplossing vir die geskil nie.

Die redes wat die hof vir sy beslissing aanvoer, is dat die vader ongetwyfeld meer regte op die kind het as die vrou se moeder, dat die kind dan saans ten minste een van sy ouers by hom sal hê, asook die reeds genoemde beter huislike omstandighede by die vader se ouerhuis in vergelyking met dié by die *shebeen*. Hierdie oorwegings sou meer gewig gedra het as die verblyf van die seuntjie by die *shebeen* permanent was, en nie net 'n korttermynreëling was wat getref is om samesprekings tussen die partye en hulle ouers af te dwing nie. Die saak is volgens die akkusatoriese benadering beslis en die gesinsprobleme is nie in breër verband behandel nie.

Wat *phutuma* betref, spreek die hof sy twyfel uit of dit hier ter sprake kom, omdat die vrou self nie na haar ouerhuis teruggekeer het nie. Maar selfs al was dit ter sprake (iets waaroor die hof nie beslis nie), bevind die hof dat die

> "partye se onderlinge verbinding en daaglikse lewenswyse gesetel [is] in die reg van hierdie land en dit is al norm wat dus vir hulle geld."

Hier word verwys na die wyse waarop hulle getroud is, hulle opleiding daarna en dat hulle "daaglikse samesyn" in die huis van die man se ouers, waar hulle sedert hulle troue gewoon het, op westerse lees geskoei is. Ook word verwys na *Ex parte Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315.

Dit alles plaas die regsinstelling van *phuthuma* en die vraag of dit hier ter sprake is, direk onder die soeklig. Dit is interessant om daarop te let dat die hof nie vereis dat die aard van *phuthuma*, as gewoonteregtelike instelling, eers deur deskundige verklarings bewys moet word nie. Ook wys die hof die beroep op *phuthuma* nie kategories af nie, omdat geen instelling van die gewoontereg dan by 'n gemeenregtelike huwelik sou geld nie. Hierdie aspekte word deur Bekker (1985 *De Jure* 177-178) bespreek.

Phuthuma (bekend as *Ngala* by die Suid-Sotho, die groep waartoe ten minste die man behoort – sien Duncan *Sotho Laws and Customs* (1960)35) is 'n instelling wat duidelik inpas by die algemene benadering van die gewoontereg van Afrika dat gesinsprobleme eers bespreek moet word deur beide familiegroepe in 'n poging om versoening te bewerkstellig voordat regstappe gedoen word (sien die aanhaling aan die begin van hierdie bespreking). Om so 'n bespreking af te dwing, gaan die vrou na haar ouers terug:

> "Ho ngala means (of a wife) to return to her own parents because of dissatisfaction with her husband" (Duncan t a p).

Dat in elke geval haar jongste kinders ook met die vrou saamgaan, word geïmpliseer deur Duncan (36):

> "[W]here a woman ngalaed to her parents the court told her husband to go after her and discuss the whole matter if he wished to have his wife *and children* back again – *Seema v Musi* JC 231/49" (my kursivering).

Dit lyk logies.

Poulter (*Legal Dualism in Lesotho – A Study of the Choice of Law Questions in Family Matters* (1981)) behandel ook *ngala* as instelling. Hy sê onder meer:

> "[Where] neither party is seeking an immediate divorce the systems diverge. Whereas Sesotho law cases considerable emphasis on the desirability of reconciling the parties through the ngala custom, the common law has no comparable procedure" (99),

en verder:

> "In terms of public policy surely the emphasis placed on conciliation by Sesotho law is too valuable an institution to be confined to those who have contracted customary marriages *and should be freely available to parties to a civil marriage*" (101, my kursivering).

Dié instelling word ook beskryf deur Olivier (*Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1981) 180-181). In hulle bespreking daarvan sê Bekker en Coertze (*Seymour's Customary Law in Southern Africa* (1982) 180) die volgende:

> "When a husband has given his wife cause to leave him, it is not enough that he merely goes to fetch her; before it can be said that he has phuthumaed her he is obliged to make amends where possible, and to remove the cause of a just grievance."

Koyana (*Customary Law in a Changing Society* (1980) 18) sê op gesag van *Gova v Gushu* 1953 NAC 261 (S):

> "An action for return of a wife without prior phuthuma is premature, and will not be entertained by the courts."

Ook artikel 54 van Kwazulu-wet 6 van 1981 (die wetboek van Zoeloereg) maak dit verpligtend vir 'n man of vrou om, voor die instel van 'n egskeidingsgeding ten aansien van 'n gewoontereghuwelik eers die ontvanger van *lobolo*

vir die vrou, of sy opvolger, daarvan in kennis te stel. Laasgenoemde moet dan eers 'n poging aanwend om die partye te versoen en alleen as dit misluk, kan die aksie ingestel word. Dit is dus die benadering wat *phuthuma* op die onderhawige tipe geval tot gevolg het.

Dit blyk duidelik dat die funksie van *phuthuma* in die gewoontereg is om versoening tussen partye te bewerkstellig voordat gesinsprobleme na die hof geneem word. In plaas van die maatskaplike hulpdiens wat in die hierbo genoemde wetsontwerpe in die vooruitsig gestel word, word die familiegroep van die vrou hier betrek by versoening in onderhandeling met die man, en moontlik ook lede van sy familie. Veral in die geval waar die vader van die vrou reeds oorlede is, sal by die Sotho en Tswana die broer van haar moeder, die *malome*, en moontlik ook die *malome* van die man, 'n belangrike rol in sulke onderhandelings speel (Schapera *Handbook of Tswana Law and Custom* 189; Schapera (red) *Bantu Speaking Tribes of South Africa* (1937) 72-73; Bekker en Coertze 80-401; Olivier 81-82).

Die aanvaarde feite van die onderhawige saak skyn te toon dat nie alleen die vrou en haar moeder nie, maar aanvanklik ook die man, die geldigheid van die beroep op *phuthuma* erken het. Dit skyn die rede te wees waarom die man die weiering van sy skoonmoeder om die seuntjie aan hom terug te besorg "so gelate aanvaar het." Dit was blykbaar eers in 'n later stadium dat die man, waarskynlik aangepor deur sy ouers, besluit het om hom op die gemenereg te beroep. Ook blyk dit dat die beroep van die vrou op *phuthuma* volgens die gewoontereg, soos aangepas by die werklikhede van nuwe omstandighede, nie ongegrond was nie. Die vrou het immers nie die huis van haar skoonouers verlaat om in Welkom te gaan loseer nie, maar om na haar ouerhuis toe te gaan. As gevolg van haar werk moes sy egter gedurende die week in Welkom huisvesting vind en dan weer naweke en vakansies na die huis van haar moeder, 'n weduwee, terugkeer. Dit is juis 'n kenmerk van lewende regstelsels dat hulle by die werklikhede van die hede aanpas sonder verlies van hulle essensiële aard.

Die aanpassingsvermoë van die gewoontereg en sy aard as lewende volksreg het tot gevolg dat sy toepassing volgens die verwagting van die mense self nie beperk bly tot gewoonteregtelike instellings nie, maar uitgebrei word tot regsinstellings wat essensiëel beheers word deur die gemenereg, soos die gemeenregtelike huwelik. Daarvoor is daar voldoende gesag. Bennett en Peart ("The Dualism of Marriage Laws in Africa" in *Family Law in the Last Two Decades of the Twentieth Century* (1983) 148) bespreek die begrippe *dualism*, waaronder hulle verstaan twee soorte huwelike wat elk streng beheer word deur sy eie regsisteem, en *integration*, waarmee hulle bedoel dat beide regsisteme vir een soort huwelik kan geld:

> "Dualism ... and integration ... stood as opposing principles. The battle ground was frequently family law. This was no accident: family law is one of the most sensitive and conservative areas where legal change is concerned. One explanation for this phenomenon is that family law deals with primary relationships – husband/wife, parent/child – and these are relationships from which people derive much of their emotional and material security."

So ook sê Bekker en Coertze (245):

> "Except that most Blacks must by this time, realize the monogamous quality and peculiar binding force of the marriage, they are, on the average, inclined to regard it in some aspects as they do a customary union."

Dlamini, in die opsomming van sy doktorale proefskrif oor *ilobolo* ("The Modern Legal Significance of Ilobolo in Zulu Society" 1984 *De Jure* 148), stel op grond van empiriese navorsing die posisie omtrent die regverdiging van die regsinstelling *ilobolo* deur die mense self, soos volg:

> "To them it has a symbol of a nation's cultural heritage. Although the new functions are social in nature, they are not legally irrelevant. They express the community's legal convictions of what characterises a valid marriage, be it a customary or a civil marriage. To them even the binding effect and stability of a civil marriage is attributed to *ilobolo*" (165).

Deur *lobolo* raak families betrokke by die aangaan van huwelike tussen partye. Deur *phuthuma* raak die families betrokke by huweliksprobleme en die ontbinding van huwelike, en laasgenoemde kan weer 'n uitwerking op die teruggawe van *lobolo* hê. Daar is dus 'n verband tussen hierdie twee regsinstellings en, net soos by *lobolo*, is dit natuurlik dat die partye in baie gevalle verwag dat *phuthuma* 'n rol by gemeenregtelike huwelike moet speel. Dit is juis interessant dat in hierdie saak, wat nie op mondelinge getuienis nie, maar op verklarings gebaseer is, die verwagtinge van die partye in so 'n mate deurgeskemer het dat die hof bevindings daaroor gedoen het. Dit is tipies 'n gebied waar howe 'n skeppende rol kan speel in regsvorming in die uitvoering van hulle taak om aanvaarbare, regverdige oplossings vir werklike probleme van mense van vlees en bloed te vind. Dit word beklemtoon, alhoewel in 'n ander verband, in die toonaangewende vonnis van *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 388 (A).

Sal die erkenning van *phuthuma* nie tot regsonsekerheid lei nie? In die vonnis *Ex parte Minister of Native Affairs: In re Molefe v Molefe* 1946 AD 315 wat die hof aanhaal, is beslis dat die gemenereg altyd geld vir die vermoënsregtelike gevolge van 'n huwelik, tensy daar ander bindende wetgewing is of tensy partye die gevolge van hulle huwelik anders gereël het deur 'n huweliksvoorwaardekontrak. So 'n bevinding is natuurlik nodig vir regsekerheid. Is dit nie juis 'n algemene reël wat vir alle aspekte van die gemeenregtelike huwelik geld nie? Dit is altans die standpunt van Bekker, soos blyk uit sy bespreking van die saak:

> "Die regter kon dit eenvoudig kategories gestel het dat die 'phuthuma'-gebruik nie aanwending vind nie omdat die partye 'n siviele huwelik aangegaan het" (178).

Ek kom later terug op die positiefregtelike posisie, maar dit lyk nodig om hier 'n onderskeid te maak tussen regsinstellings wat met mekaar bots (daar waar ter wille van regsekerheid 'n keuse tussen twee regsisteme gemaak moet word) en regsinstellings wat mekaar aanvul, soos *phuthuma* en die gemeenregtelike egskeidingsreg. *Phuthuma* is 'n versoeningsprosedure bekend aan die gewoontereg. Dit is nie 'n instelling wat opgeweeg moet word teen 'n gemeenregtelike prosedure nie, want daar is geen regskonflik ter sprake nie. Dit skep nie regsonsekerheid om in gepaste gevalle *phuthuma* te erken nie. Dit bots nie met die egskeidingsreg of met die benadering van versoening by gesinsprobleme nie. As dit kategories verwerp word, dan word dit bloot gedoen om die dogmatiese rede dat enige instelling van die gewoontereg nie by 'n gemeenregtelike huwelik toegepas mag word nie. Dit sal op sy beurt lei tot starre onbuigsame regsvorming, wat vreemd aan die hele gees van ons reg en regspleging is.

Wat is dan die positiefregtelike posisie? Ek kon geen enkele gerapporteerde vonnis in Suid-Afrika vind waar *phuthuma* by 'n gemeenregtelike huwelik erken is nie. Dit is nie so verbasend soos dit lyk nie. *Phuthuma* kom hoofsaaklik in die egskeidingshof ter sprake en vir baie jare al word geen enkele saak van die

egskeidingshof vir swartes gerapporteer nie. Selfs by sake wat by appèl na die hooggeregshof gerapporteer is, soek mens tevergeefs na 'n verslag van 'n vonnis van die egskeidingshof (sien *Maobi v Maobi* 1969 3 SA 322 (T)). Dit is 'n verwaarloosde deel van ons reg wat ontwikkeling deur gerapporteerde vonnisse ontbeer. Die enigste bewys dat *phuthuma* wel in die egskeidingshof toegepas word, kon ek vind in die eerste uitgawe van Kloppers se praktiese handleiding by die egskeidingshof, *Native Divorce Courts, Guide to Practice and Procedure* (1955). Die skrywer wat in daardie stadium as griffier van die sentrale egskeidingshof met ongeveer sewe duisend sake oor 'n tydperk van sewe jaar te doen gehad het, stel dit só;

> "When the wife is the defendant, the court may order the plaintiff husband to putuma (*sic*) or fetch his wife" (20).

Geen gesag word aangehaal nie en die stelling word nie herhaal in die tweede uitgawe (1976) van dié boek deur Kloppers en Coertze nie. Tog moet aangeneem word dat *phuthuma* in daardie hof in daardie tyd in gepaste gevalle erken is.

Bekker baseer sy stelling dat die hof die beroep op *phuthuma* kategories moet verwerp, nie op 'n spesiale reël ten opsigte van *phuthuma* nie, maar op 'n algemene reël ten opsigte van die eksklusiewe toepassing van die gemenereg by gemeenregtelike huwelike. As gesag haal hy Bekker en Coertze (249) aan. Hy kon in dié verband ook na Olivier (241-249) wat die reël sorgvuldig aan die hand van vonnisse ontleed, verwys het. Dit word die sterkste gestel in die volgende aanhaling van Bekker uit DP Visser se doktorale proefskrif (*Die Suid-Afrikaanse Interne Aanwysingsreg* UP (1979)), waarin laasgenoemde sê:

> "'n Gemeenregtelike huwelik word *in toto* deur die landsreg beheers, 'n gewoonteregtelike huwelik deur 'n relevante outochtone regstelsel. Onderliggend aan hierdie reël is die feit dat 'n persoon wat 'n besondere tipe huwelik sluit, vanweë die diepgaande verskille tussen die aard van 'n huwelik volgens die landsreg en die outochtone reg, onherroeplik beskou moet word die besondere regstelsel (ingevolge waarvan hy 'n huwelik sluit) as die toepaslike regstelsel te kies" (468).

Wat hierdie aanhaling betref, is dit interessant dat Visser in sy intreerede (*Die Outochtone Reg as Deel van die Suid-Afrikaanse Privaatreg* (1979) 17 dit stel dat die "enigste houdbare beskouing" is dat outochtone (gewoonte-) regstelsels as deel van die Suid-Afrikaanse reg in breëre sin beskou word, in welke geval die hooggeregshof dan beskou behoort te word as draer van die inherente regsmag om dit toe te pas, met die noodwendige newebevoegdheid om judisiële daarvan kennis te neem.

In geeneen van die gevalle word *phuthuma* uitdruklik genoem nie. Die gevalle wat as voorbeelde genoem word, is gevalle waarin daar regskonflik is. Ek is oortuig dat versoening tussen partye in die familiereg nie 'n saak is waarin 'n dogmatiese benadering 'n rol mag speel nie, en dat dit hier gaan om die vind van 'n metode wat vir die partye self die aanvaarbaaste is en wat die beste oplossing vir gesinsprobleme kan oplewer. Die huwelik van swart mense, veral in stedelike gebiede, is te wankel in 'n vinnig veranderende samelewing om nog die sekuriteit van gevestigde instellings wat vir geslagte stewigheid aan die huwelik verleen het, te ontbeer.

In die onderhawige saak volg die hof self ook nie die algemene reël nie. Of *phuthuma* geld, word getoets aan "die partye se onderlinge verbinding" (dit is 'n kerklike huwelik binne gemeenskap van goed), hulle "daaglikse lewensgebruike" wat "gesetel is in die reg van hierdie land" en hulle "daaglikse samesyn"

in die huis van die man se vader, wat op Westerse voorbeeld geskoei is. Dit is dus 'n toets volgens die aard van die huwelik *en* die lewenstyl van die partye. Daar moet op gelet word dat die hof nie vasstel of *lobolo* in verband met die huwelik oorgedra is nie. Nou is lewenstyl ongetwyfeld 'n oorweging wat moet geld en in Lesotho word dit trouens as die vernaamste toets beskou, soos ook blyk uit die volgende woorde van regter Schreiner in die appèlhofbeslissing *Khatala v Khatala* (1963-1966) HC TLR 97):

> "It is unnecessary to express a view on whether all marriages by Basutos in Basutoland have identical proprietary consequences; it is enough to say that where, as here, Basutos 'living according to the Basuto custom' marry according to Basuto rites as well as according to Christian rites, their proprietary relations during their joint lives and their intestate succession rights after the death of one of them are governed by Basuto law" (100).

Dit is duidelik 'n poging om op die feite van die besondere saak 'n regverdige beginsel te vind waarop die keuse van die regstelsel bepaal kan word en nie 'n poging om 'n algemene reël te stel nie. Dit is presies in ooreenstemming met die toets wat regter Schreiner in die *Yako v Beyi*-saak (hierbo) voorgestaan het. Die belangrikste oorweging is nie om een toets te vind wat in alle gevalle moet geld nie, maar om 'n regverdige oplossing te vind vir die geskil op die feite van die besondere saak, en dit sal in baie gevalle ook saamval met die verwagtinge van die partye self. As die regter dus 'n diskresie het om *phuthuma* by gemeenregtelike huwelike te erken, dan moet die beslissing nie net bepaal word deur die lewenstyl van die partye nie, wat daardie toets ook al mag behels.

Ek het probeer om hierdie saak in diepte te bespreek, ook wat die feite betref. Dit toon basiese uitgangspunte en leemtes. Die oortuiging dat die bevel van die hof nie die beste oplossing vir die probleme van die partye bied nie, was die motief vir hierdie bespreking. Die vonnis is juis op hierdie tydstip belangrik om die volgende redes:

a Ek glo in regsontwikkeling deur gerapporteerde vonnisse. Veral op gebiede van die reg wat so nou gemoeid is met die lewe van mense kan wetgewing alleen nooit billike, aanvaarbare oplossings vind vir die ryke verskeidenheid van probleme van elke dag nie. Met sulke oplossings deur die howe waar mense van vlees en bloed met hulle werklike probleme voor hulle verskyn, sal daar gaandeweg reëls uitkristalliseer wat die toets van billikheid en aanvaarbaarheid sal kan deurstaan. Sulke reëls kan ook regsekerheid in die hand werk.

b In die huweliksreg behoort starre dogmatiese reëls tot 'n minimum beperk te word. Dit sou besonder jammer wees as 'n instelling soos *phuthuma* deur dogmatiese starheid nie in die oplossing van gesinsprobleme by gemeenregtelike huwelike toegepas kan word nie.

c Daar is 'n groot gebrek aan gesaghebbende vonnisse oor die gemeenregtelike huwelik onder swartmense. Om hierdie leemte te vul, moet elke vonnis wat gerapporteer kan word as 'n baken in die ontwikkeling van die reg dien, en met groot sorg oorweeg word.

d Die gemeenregtelike huwelik van swartmense is 'n belangrike regsinstelling. In 1976, die laaste jaar voor statistiese gegewens oor sulke huwelike in geografiese Suid-Afrika versnipper is tussen 'n veelheid van onafhanklike en nasionale state, was gemeenregtelike huwelike onder swartes al meer as die huwelike van al die ander bevolkingsgroepe saam (71 873, of 52% vir swartmense, 40 483 of 30%

vir blankes, 18 010 vir kleurlinge en 7 695 vir Asiërs). Vonnisse van die hooggeregshof geld vir die nasionale state, en het groot oorredingskrag in onafhanklike state.

e In hierdie tyd van groot gesinsontwrigting onder swartmense is dit noodsaaklik dat die huwelik as regsgrondslag van die gesin 'n aanvaarbare instelling, wat soveel sekuriteit as moontlik gee, moet wees.

f Met die uitfasering van aparte howe vir Swartes as gevolg van 'n ander aanbeveling van die Hoexter-kommissie word daar 'n swaar verantwoordelikheid in dié verband op die hooggeregshof geplaas.

g Die Suid-Afrikaanse regskommissie is besig om die hele huwelikswetgewing met betrekking tot swartmense te ondersoek. 'n Werkstuk en konsepwetsontwerpe is reeds vir kommentaar beskikbaar. Juis nou is dit noodsaaklik dat hulle nie in 'n lugleegte funksioneer nie, maar dat die probleme waarmee hulle handel reeds in die praktyk deur die howe ondersoek is.

h Bodenstein, later grondlegger van die regsfakulteit aan die Universiteit van Stellenbosch, het in sy intreerede as professor in Romeins-Hollandse reg aan die Universiteit van Amsterdam in 1912, na daardie regstelsel verwys as:

> „de innerlike waarde van ons oude recht, de brede geest van billikheid, die elk deel ervan beheerst, die afwezigheid van subtiliteiten en kunstmatig opgebouwde begrippen, de rekbaarheid en het gerede aanpassingsvermogen aan de omstandighede van het land en die opvattingen van het volk, in een woord, de gezonde, praktiese en billike zin van onze Hollandse voorgangers, die uit hun gemeen constumierrecht en het Romeins recht een stelsel hebben opgebouwd, dat wars van alle kunstmatigheid, ruimschoots voldoet aan de eisen van die moderne samenleving en in zich de kiemen draagt van grote levensvatbaarheid, omdat het niet staat buiten het volk, maar uit het volk is voortgekomen, zodat terecht ook van ons gemeen recht kan worden gezegd dat het niet is het produkt van de wijsheid van één persoon, of een vereniging van personen, in een bepaalde leeftijd, maar van de wijsheid, het overleg, de ondervinding en nauwkeurige waarneming van vele geslachten van wijze en verdienstelike mannen" LC Steyn "*Dr HDJ Bodenstein*" 1943 *THRHR* 66).

Dit is dié benadering wat waarskynlik ook die begin van regsonderrig aan die Universiteit van Stellenbosch bepaal het. Natuurlik is die beskrywing nie in alle opsigte op die gewoontereg van toepassing nie, maar daar is ongetwyfeld baie raakpunte – onder andere die aanpassingsvermoë by die omstandighede van die land en die opvattinge van die volk, en die oortuiging dat die regsisteem die produk is van die wysheid van baie geslagte van wyse en verdienstelike mense. Die gevoelswaarde wat instellings van die gewoontereg vir die mense self het, word ook gesien in die aanhaling van Dlamini oor *ilobolo* (hierbo).

Dit is nie dat gewoontereg kunsmatig aan die lewe gehou moet word nie, maar dit is bepaald ook nie die taak van blanke regsprekendes om die gewoontereg onnodig te verwerp waar die partye die gesag daarvan nog erken nie.

Die kopstuk van die saak bevat eienaardige terminologie. As die ontledings en gevolgtrekkings van hierdie bespreking korrek is, dan sou die toepassing van die "wette en gebruike" van Swartmense in verband met die "tradisionele ge-

bruik van *phuthuma*," tot 'n billiker, meer aanvaarbare en moderner oplossing van die gesinsprobleme van die partye gelei het as die eenlynige toepassing van die "reg van die land."

REEP VERLOREN VAN THEMAAT
Stellenbosch

FINBRO FURNISHERS (PTY) LTD v REGISTRAR OF DEEDS, BLOEMFONTEIN 1985 4 SA 773 (A)

Definition of "mineral" — section 3(1)(m) of the Deeds Registries Act 47 of 1937

Hattingh AJ's decision in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1983 3 SA 191(O) not "to elevate stone to the status of a mineral" (197F) was set aside by Hoexter JA (with Kotzé, Joubert, Trengove and Botha JJ A concurring). This is not the first time a South African court (or, for that matter, the appeal court) has had to define the word "mineral." Over the years, the courts, writers and the legislature have all busied themselves with a definition of this elusive concept. (For judicial contributions see: *Donovan v The Turffontein Estate Co* 1895 2 OR 218; *Brick and Potteries Co v Registrar of Deeds* 1903 TS 473; *Marshall v Registrar of Mining Rights* 1904 TH 210; *New Blue Sky Goldmining Co Ltd v Marshall* 1905 TS 363; *CIR v LP Syndicate* 1928 TPD 199; *Gotze v Estate Van der Westhuizen* 1935 AD 300; *Cape Coast Exploration Ltd v Registrar of Deeds* 1935 CPD 200; *Bazley v Bongwan Gas Springs (Pty) Ltd* 1935 NPD 247; *Gibb v Du Toit* 1938 1 PH M 36; *Boksburg Brick and Fire Clay Co Ltd v CIR* 1941 TPD 232; *Brick and Potteries Co Ltd v City Council of Johannesburg* 1945 TPD 194; *Glencairn Lime Co (Pty) Ltd v Minister of Labour and Minister of Justice* 1948 3 SA 894 (T); *R v Blom* 1951 1 SA 708 (T); *R v Day* 1952 4 SA 105 (N); *S v Funchall* 1961 4 SA 52 (T); *Nortje v Pool* 1966 3 SA 96(A); *Ex parte Erasmus* 1968 4 SA 788 (T); *Johannesburg City Council v Tuckers Land Holdings* 1971 2 SA 478 (T); *CD of Birnam (Suburban) (Pty) Ltd v Falcon Investments Ltd* 1973 3 SA 838 (WLD); *Falcon Investments Ltd v CD Birnam (Suburban) (Pty) Ltd* 1973 4 SA 384 (A); *SIR v Bozzone* 1974 3 SA 826 (N); *Bozzone v SIR* 1975 4 SA 579 (A); *Ex parte Wonderstone* 1937 *(Pty) Ltd* (TPD 1975–04–09 (unreported) M 672/75; 1976 *Annual Survey* 229); *Belville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 3 SA 583 (C); *Loubser v Suid-Afrikaanse Spoorweë en Hawens* 1976 4 SA 589 (T); *Lantern Trust (Pty) Ltd v Van Sittert* 1977 2 PH A 53; *Van Coller v Ocean Bentonite Co (Edms) Bpk* 1979 1 SA 1071 (O); *S v Twin Springs (Pty) Ltd* 1981 1 SA 562 (N); *Van Coller v Ocean Bentonite Co (Pty) Ltd* 1981 3 SA 1167 (A); *Ocean Bentonite Co (Pty) Ltd v Crause* 1981 3 SA 1177 (A); *Finbro Furnishers v Registrar of Deeds, Bloemfontein supra*; 1983 *Annual Survey* 251; 1983 *Bulletin* 44. For statutory definitions see: Mines and Works Act 27 of 1956, s 1 in respect of "minerals"; Precious Stones Act 73 of 1964, s 1 in respect of "precious stone"; Strategic

Mineral Resources Development Act 88 of 1964, s 1 in respect of "strategic mineral"; Mining Rights Act 20 of 1967, s 1 in respect of "base minerals", "precious metals" and "precious stones." For contributions by authors see: Kaplan "Much Ado about Stone" 1976 *SALJ* 139 481; Liesgang "Stones" 1976 *SALJ* 479; Viljoen "Wat is 'n Mineraal?" 1976 *De Jure* 212; Viljoen "*Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens* 1976 4 SA 589 (T)" 1977 *De Jure* 182; Van der Merwe *Sakereg* (1979) 398; Franklin and Kaplan *The Mining and Mineral Laws of South Africa* (1982) 26–35; Lamprecht "Is Klip 'n Mineraal?" 1983 *JJS* 102; Silberberg and Schoeman *The Law of Property* (1983) 421–423; Lamprecht "Die Verheffing van 'n Klip tot 'n Mineraal" 1984 *JJS* 98; Jones *Conveyancing in South Africa* (1985) 414–415 437–438.) On 1985-09-06 the appeal court added its authoritative voice to the existing array of opinion.

Briefly the facts of the case were as follows: Second, third and fourth respondents severally owned the farm "Smaldeel" in the Heilbron district of the Orange Free State. During February 1964 the third respondent ceded by notarial deed of cession all the rights to minerals in respect of the property to a private company, "Finger Brothers." Two years later "Finger Brothers" ceded all the rights to minerals in respect of the property to the appellant. All subdivisions into which the property had been divided were subject to a notarial deed of cession in favour of the appellant. In 1980 the second respondent granted rights to prospect for and extract stone from subdivisions two and three to a public company, "Hippo Quarries," which subsequently ceded such rights to a private company, "Constone." Legal advice given to "Constone" convinced them that, as the appellant was the holder of the mineral rights, the rights to stone in subdivisions two and three were also vested in him. So, during January 1982, the appellant sold to "Constone" all the rights to stone in respect of the property. The Registrar of Deeds for the Orange Free State refused to register a cession of the rights to stone in favour of "Constone" in terms of section 3(1)(m) of the Deeds Registries Act 47 of 1937. The reason tendered for this refusal was that the appellant's right to minerals did not include rights to stone. The rights to stone vested in the surface owners.

The court was faced with two questions:

a Did the "rights to minerals" ceded in terms of the notarial deed include rights to stone?

b If so, did the Registrar of Deeds have a legal duty to register such notarial cession in terms of section 3(1)(m) of the Deeds Registries Act, or, in other words, does the word "minerals" in section 3(1)(m) include stone?

Upon interpretation of the notarial deed, the court found that it did indeed include rights to stone. Subsequently it was found that the Registrar did have a duty to register the notarial cession in question. "Minerals" in section 3(1)(m) has a meaning "wide enough to include such stone as has a value apart from its mere bulk and weight and which is obtained from the crust of the earth for purposes of profit . . ." (per Hoexter JA 808D). The following aspects of the decision deserve further attention:

1 *English law* The court referred to English law although this appears to bear token value only (791E–F 794C 794H–795A 804G–H). One wonders whether this comparative exercise — minimal as it was — is justified. Ultimately, the comparative approach in a judicial decision is justified only if it bears causally

to the case in issue, and in the final instance contributes to the decision which, in this case, it would appear not to do. In the past, the argument raised has been that reference to English law, in so far as the definition of "mineral" is concerned, is totally unjustified in the light of the interpretation of "mineral" which, supposedly, is approached from a totally objective angle completely ignoring the intention of the parties to a deed (Wilmans *Minerale, Mineraleregte en Verbandhoudende Kontrakte* LLM Dissertation 1977 Unisa 48). English law has, however, undergone change. (Stewart "The Reservation or Exception of Mines and Minerals" 1962 *Canadian Bar Review* 329 344 367; Halsbury *The Laws of England* (1980) 11; *Hext v Gill* 1861–1873 All ER 388 392F–393I; *North British Ry Co v Budhill Coal and Sandstone Co* 1910 AC 116 130; *Caledonian Rly Co v Glenboig Union Fireclay Co* 1911–1913 All ER 307 308D; *O'Callaghan v Elliot* 1965 3 All ER 111 115A; *Earl of Lonsdale v Attorney General* 1982 3 All ER 579 609e 619e. For examples of statutory definitions see: Law of Property Act 1925, s 205(1)(ix); Land Registration Act 1925, s 3(xiv); Trustees Act 1925, s 68(6); Settled Land Act 1925, s 117(1)(xv); Universities and College Estates Act 1925, s 43(vii); Atomic Energy Act 1946, s 18(1); Mines and Quarries Act 1954, s 182(1); Opencast Coal Act 1958, s 51(1); Mines (Working Facilities and Support) Act 1966, s 14(1); Finance Act 1970, s 29(7); Town and Country Planning Act 1971, s 290(1); Development Land Tax Act 1976, s 47(1).) Halsbury, whom the court quotes with approval, bears this out (791E–F). It is stated: " 'Minerals' admits of a variety of meanings, and has no general definition. Whether in a particular case a substance is a mineral or not is primarily a question of fact. The test is what 'minerals' meant at the date of the instrument concerned in the vernacular of the mining world, the commercial world and among landowners, and in case of conflict this meaning must prevail over the purely scientific meaning. *Nevertheless 'minerals' is capable of limitation or expansion according to the intention with which it is used, and this intention may be inferred from the document itself or from consideration of the circumstances in which it was made*" (Halsbury *supra* 11 (emphasis ours)).

The parties' intention may be inferred from the document itself or from the circumstances in which the word "mineral" was used. Pointers to the parties' intentions which have crystallised from judicial decisions are, for example: Is the substance in question exceptional in use, in value and in character? (*Waring v Foden* 1931 All ER 291 297H). What is the general state of knowledge of the relevant substance at the date of agreement and in which way is it then regarded and treated as a commercial matter? (*Barnard v Farquharson* 1911–1913 All ER 190 193B). What express powers of working are conferred by the instrument in question? (193A).

English law has shed the purely objective approach to minerals and with increasing self-confidence is adopting the intention test as the primary test for the definition of minerals. Selective reference to English law is therefore justified only in so far as it displays a fundamental interest in the intention of the legislature or parties to a deed. The court's reference to Halsbury would appear justified though useless. South African law needs no English corroboration for the acceptance of the intention test. The reference to *Great Western Railway v Carpalla United China Clay Ltd* (1909 1 ChD 218 231 cited 794H) is not justified. Here mineral was defined from a purely objective angle, namely, in terms of its value without regard to the intention of the parties. If a comparative approach

were necessary, reference to Canadian law would have been more appropriate. Canadian law in respect of the definition of minerals is further advanced than English law in the application of the intention test (Stewart 1962 *Canadian Bar Review* 329; *Sunshine Valley Minerals Inc v Reyes* 1983 (43) 374 BCSC). In fact, English law indirectly owes its move away from a purely objective approach to Canada. In *Barnard v Farquharson* 1912 AC 864, an appeal from a judgment of the Court of Appeal affirming a judgment of the Chancellor of Ontario, the Privy Council held that "the only question for decision is, what, having regard to the time at which the instrument was executed, and the facts and circumstances then existing, the parties to this deed intended to express by the language they have used, or, in other words, what was their intention touching the substances to be excepted as revealed by that language?" (869).

2 *Expert evidence* Upon perusal of the record expert evidence is conspicuous by its absence. In *Falcon Investments v CD of Birnam* (*Suburban*) (*supra*) an affidavit in respect of the scientific connotation of "mineral" was filed on behalf of the appellant by Professor McIver, an associate Professor of Geology at the University of the Witwatersrand (*Falcon Investments v CD of Birnam* (*Suburban*) 395A–C). On behalf of the respondent affidavits were filed by the Chief Inspector of Mines (395D) and one J M La Grange (395E–G) a consulting geologist, practising in Johannesburg. Professor McIver opted for the narrow meaning of mineral defined by approximate identity of chemical composition and physical property (396A). Interestingly, La Grange preferred a wider meaning classifying any product of the bowels of the earth as a mineral (396A). The court considered this evidence and allocated a wide meaning to "mineral" as it appeared in section 18(a) of the Southern Johannesburg Region Town-Planning Scheme 1962 (405H).

Three years later, in *Loubser v SA Spoorweë en Hawens* (*supra*) the Transvaal provincial division had to decide whether brick clay was a mineral. On deciding that it was not, the court considered the expert opinion of three geologists, a brick manufacturer and an official of the Department of Mines (*Loubser v SA Spoorweë en Hawens* 597–598C). Also in *Ex parte Wonderstone* (*supra*), experts concluded that wonderstone is a type of well-known mineral pyrophillite, according to scientific meaning determined by experts.

Whenever the meaning of "mineral" is disputed, the basis for definition is the intention of either the legislature or the parties to a contract as determined by various objective pointers like vernacular or popular usage of the word and the commercial value of the disputed mineral. (Jones *supra* 414 seems to ignore the intention test and concentrate on an objective approach reminiscent of the early English trend.) Case law abounds in respect of the popular usage of the word. Expert evidence would, in such cases, be superfluous and amount to nothing more than a waste of time and money (Viljoen 1977 *De Jure* 183) — a practical hint well taken in the *Finbro*-case.

3 *The intention of the parties to the deed* (answering question a *supra*) Clause 1 of the deed which required interpretation reads as follows: "1 The said Appearer . . . does hereby cede, assign and transfer unto and in favour of *FINGER BROS (PROPRIETARY) LIMITED* its Successors-In-Title or Assigns, all the rights to minerals of whatsoever nature, including precious and base metals, precious stones and mineral oils, other than the rights to sand and clay, in, on, under and in respect of . . ." (here follows a definition of the property).

Obviously the enquiry must not be into what the parties had in mind, but into the common intention as expressed in the words of the contract (*Hansen, Schrader and Co v De Gasperi* 1903 TH 100 103; *Jonnes v Anglo-African Shipping Co (1936) Ltd* 1972 2 SA 827 (A) 834E; *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 1 SA 641 (A) 646B–D; *Van Rensburg v Taute* 1975 1 SA 279 (A) 303A; *Glyphis v Tuckers Land Holdings Ltd* 1978 1 SA 530 (A) 536H–537C; *List v Jungers* 1979 3 SA 106 (A) 119A). The language used by the parties must be given its ordinary grammatical meaning. In *casu* the appeal court did just that (802E–H). In rejecting the court *a quo's* interpretation that the language used did not classify stone as a mineral, the appeal court indicated that the parties were, in fact, at pains to classify stone as a mineral — otherwise they would specifically have excluded it as they did with sand and clay. This would appear to be the correct construction of the parties' intention.

4 *The intention of the legislature in section 3(1)(m) of Act 47 of 1937* (answering question b *supra*) The intention of the legislature must also be determined from the language used in the relevant statute. Section 3(1)(m) reads as follows:

> "The registrar shall subject to the provisions of this Act —
> register notarial cessions, leases or sub-leases of rights to minerals and notarial variations of such cessions, leases or sub-leases, notarial cessions of such registered leases or sub-leases, notarial cancellations of such leases or sub-leases, certificates of registration of such rights, and reservations of such rights made in grants or transfers of land, and notarial variations of such reservations."

The appeal court could either interpret minerals widely (thus referring to all substances which are neither vegetable nor animal and which are present in or on the crust of the earth) or narrowly (whereby a substance is required to comply with certain scientific criteria before being classed as a mineral). Obviously the need to construe "minerals" here became necessary only after the intention of the parties to the deed pointed to their acceptance of stone as mineral for the purposes of the deed.

Twice previously, the courts have been faced with the interpretation of "minerals" in section 3(1)(m). In both *Ex parte Erasmus* (*supra*) and *Ex parte Wonderstone* (*supra*) Rabie J and Moll J (as they then were) respectively construed "minerals" in a narrow sense. Jones seems partial to this approach when he states:

> "There would appear to be an ordinary, narrow meaning of the word at common law, which meaning, in the absence of a definition in the Deeds Registries Act, must be deemed to govern the registration of rights, and a much wider meaning for the purposes of special legislation and limited to the ambit of such legislation" (414).

In the present case the court referred only to the *Erasmus* case. The *Erasmus* case was distinguished on the facts and thus considered irrelevant for the purposes of this case (808E–H). The court proceeded to make a few general observations on the popular or ordinary meaning of minerals (803E–806E). This the court did in the light of South Africa's vast mineral resources, the exploitation of which represents a substantial portion of the national product, and the role of legislation which, by comprehensively regulating mining affairs, must necessarily have left its imprint on the definition of minerals (804B–C). "Minerals," however, is not a rigid concept but one subject to evolutionary change. The meaning in 1985 can certainly be different from the meaning fifty years ago. It is also true that the words of a statute must be construed as they would have

been interpreted on the day when the statute was passed, in this case 1937. This act does not define minerals, so the ordinary, grammatical meaning must be allocated. In order to do this, the court found it necessary to refer to definitions of "minerals" in earlier relevant statutes. The court referred to Act 12 of 1896, Act 16 of 1907, Act 35 of 1908, Act 12 of 1911, Act 36 of 1934 and Act 18 of 1936 (804J–805G). All these Acts have a common theme and that is the wide meaning allocated to the word mineral. To take but one example: section 3 of Act 35 of 1908 defines "base metals" as "quicksilver, iron, lead, copper, tin, zinc, cobalt, nickel, arsenic, manganese, antimony, bismuth, as well as the ore of such metals, and sulphur, coal, graphite, or any other mineral substances for the exploitation of which no special provision is made by law."

Upon completion of this historical statutory survey it did not take long for the court to decide that the legislature intended a wide meaning to be assigned to the word "mineral" in section 3(1)(m) — in fact, sufficiently wide to encompass stone (808C). The court did not find it necessary to specify what is meant exactly by narrow, wide, widest or intermediate meaning of "mineral" (807F–I). By "intermediate meaning" the court apparently means the ordinary, grammatical meaning which has evolved since 1937. Lamprecht (1983 *JJS* 102 104 and 1984 *JJS* 98) refers to this meaning as the "grey area". He erroneously attributes this terminology to Rumpff CJ in *Falcon Investments Ltd v CD of Birnam (Suburban) (Pty) Ltd* 396.

It is submitted that an historical survey of early statutes to enable the interpretation of a later statute is not only permissible but essential (Steyn *Die Uitleg van Wette* (1981) 153 and n 99 on that page). However, perusal of these statutes would not seem to indicate the legislature's intention to impart a wide meaning to "mineral." The legislature merely couched the statutes in flexible language so that, should any substance in the future be accepted as mineral in ordinary parlance, such substance would be covered by such statute. This certainly does not make the word "mineral" wide. In fact, just as new substances may be accepted as minerals in the future, so it is hypothetically possible for certain substances to lose their status as such. It would be far easier to do away with narrow, wide, widest or intermediate meanings. The only questions to be asked are: What was the meaning of "mineral" in 1937 and what is the meaning now?

If the present vernacular meaning, in spite of technological evolution, remains the same as in 1937, then such meaning must be attributed to section 3(1)(m). If the meaning has changed (that is, if new substances are added to ordinary parlance or, hypothetically, existing minerals lose such status) then the newly-determined meaning governs section 3(1)(m) because of the inherent statutory flexibility.

The determination of the legislature's intention as expressed from its words is dependent upon various objective pointers. Primarily, the ordinary, grammatical meaning of words serves this purpose. Determination of this meaning entails, for instance, consideration of the value of the substance apart from its mere bulk and weight where such substance is obtained from the crust of the earth for purposes of profit. This the court did (808C–E). However, it is insufficient to declare that stone has a value apart from its mere weight and bulk without leading evidence to this effect. The test to determine value would appear to be objective. No expert evidence, or for that matter, any other evidence, was led on the special characteristics which would give stone its value. On the other

hand, determination of profitability would appear to be a subjective concern. Once again no evidence was led in this regard. The court's conclusion that stone which has a value apart from its mere bulk and weight and which is obtained from the earth for purposes of profit is a mineral as contemplated in section 3(1)(m), would appear, on a balance of probability, to be unproved. Lamprecht (1984 *JJS* 98 99) raised the same argument in respect of the decision of the court *a quo*. It is submitted that, for these reasons, stone should not have been classified as a mineral.

As far as the ordinary, popular meaning of mineral is concerned, the writers sympathetically align themselves with the words of Hattingh J in the court *a quo* where he stated:

> "It is, I think, clear that the ordinary meaning of the word "mineral" in South Africa does not include stone, ground, sand and other like substance" (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein supra* 197E).

It is submitted that the court *a quo* decided correctly but for the wrong reasons. The intention of the parties as appears from the contract was to accept stone as mineral. The court *a quo* found to the contrary. Had they found that the parties had intended including stone, the construction of "minerals" in section 3(1)(m) in terms of its ordinary, popular meaning would anyway have prevented the registration of mineral rights to stone.

5 *The application of section 3(1)(m) (practical considerations)* Any one of four factual situations is possible:

a The intention of the parties to the deed is clear and their intention falls within the ambit of the legislature's intention in section 3(1)(m).

b The intention of the parties to the deed is not clear but is determinable by accepted objective pointers and their determined intention falls within the ambit of the legislature's intention in section 3(1)(m). This, in fact, occurred in the case under discussion.

c The intention of the parties to the deed is clear but their intention does not fall within the ambit of the legislature's intention in section 3(1)(m).

d The intention of the parties to the deed is not clear but determinable by accepted objective pointers. Once determined, the intention of the parties does not fall within the ambits of section 3(1)(m).

The above situations all deal with the inclusion of a substance as a mineral. Where, as in *Finbro a quo*, the court finds that a particular substance was not intended as a mineral by the parties, then it is not even necessary to determine the legislature's intention in section 3(1)(m), thus making that court's consideration of the legislature's intention as expressed in the *Erasmus* and *Wonderstone* cases (*supra*) superfluous.

When faced with registration of mineral rights in terms of section 3(1)(m) the following should be borne in mind:

a The intention of the parties to a deed should be determined first. The ordinary rules pertaining to interpretation of contracts apply.

b In order to determine the intention of the legislature from the statute itself, pre-determined limitations of such intention, like wide, widest, narrow or

intermediate meaning, should be avoided. Every issue should be tested independently and the legislature's intention should be tested anew for each particular case.

c In order to determine whether the parties' intention falls within the ambit of a statute, one must first search for a statutory definition of "minerals." In the absence of such a statutory definition (as is the case in the Deeds Registries Act 47 of 1937) the ordinary popular meaning of the word must prevail, bearing in mind the purpose of the act which is the registration of valuable rights.

6 *Conclusion* The appeal court has gone far in providing legal certainty in respect of the status of stone even though if only for this particular case. However, the final word has not yet been spoken — a fact admitted by the court itself when the statement was made that

> "[f]or purposes of the present appeal it is neither necessary nor desirable to determine more precisely the ambit of the word "mineral" in section 3(1)(m), and I expressly refrain from any such attempt" (808E).

GIORGIO RADESICH
University of South Africa

ANTON TRICHARDT
Department of Justice

As I have long since abandoned the profession of the law and ceased either to speak its language or to think its thoughts, I have become conscious of the dangerous and unprogressive conservatism of the legal profession, of its rigidity, of its unadaptability to new and perhaps necessary and beneficial advances. (per Lord Birkenhead in the House of Lords on the Rating and Valuation Bill.)

BOEKE

ADMINISTRATIVE LAW
by LAWRENCE BAXTER
Juta Cape Town Wetton and Johannesburg 1984; x + 796p
Price R75,00 + GST (hard cover) R58,00 + GST (soft cover)

This book, one of the first English books to be published on the subject of administrative law, is a very welcome addition to literature on this branch of the law and will, I am sure, make a considerable impact in legal circles.

The author has not approached the topic by enumerating the principles of administrative law, but has rather, as he puts it, presented an alternative approach to the matter. Although he does not specifically divide the subject matter into the various recognised grounds for judicial review, this appears to be the approach which he has adopted in the book, notably in part III.

In the introductory section (part I) he places administrative law and the administrative state in historical and comparative perspective, and examines the field occupied by administrative law. In part II he discusses abstract categories of the public administration and then draws an excellent outline of the structure of central government, regional government, local authorities and other fringe organisations. This discussion will be of particular use to students who are not yet *au fait* with the present structure of government. He points out in a concluding paragraph that at the time of going to print, the future of regional government was somewhat unclear; since publication of the book, the proposed abolition of provincial councils has been announced.

Part III is devoted to a discussion of administrative law as applied by the courts. This section will be of great assistance to practising lawyers as well as academics and students of administrative law, since the author discusses key decisions on administrative law which enunciate and illustrate the principles of administrative law.

The author starts from the basic premise that all administrative action is subject to the law. This golden thread — of government under law — is one which runs throughout the book, and influences the author's approach to questions such as unreasonable administrative behaviour and errors of fact and law. He concedes that the administration is best qualified to deal with certain issues which involve high policy or cases where the administrative official or body has special skills, knowledge or expertise in a particular field. He recognises that the courts are usually not equipped to question the merits of a discretionary power

exercised under these circumstances, but emphasises that the courts are equipped to determine whether the power has been validly exercised, that is, whether the decision has been arrived at in a legally correct manner. In other words, the manner and procedure whereby the decision is reached will always fall within the domain of the court's jurisdiction.

Baxter has removed much of the confusion which surrounds the question of the court's jurisdiction in question of fact and law, and he discusses the distinction between errors of fact and errors of law. In discussing the role of the courts in this sphere, he accepts the "jurisdictional facts" theory, whereby the courts cannot intervene where a decision is reasonable and the authority has considered all the relevant factors. The decision must have a rational basis in the light of the evidence before the administrative authority and must be in accordance with empowering legislation. It may be seen that Baxter aims at the reconciliation of administrative expertise with the need for judicial protection from erroneous administrative action.

As already mentioned, the underlying theme is that all administrative action is subject to the law, and this approach is again confirmed by Baxter's approach to reasonableness as an independent ground for the review of administrative action. He distinguishes between dialectical and substantive reasonableness, saying that the former relates to the decision-making process and the latter to the conclusion of the decision itself. He believes that the courts may review dialectical unreasonableness without breaching the barrier between appeal and review (that is, without deciding upon the merits of the decision). The principle is that the judge may monitor the decision-making process, but cannot adjudicate upon the conclusion or decision where he is excluded from the "reasonableness constituency" on account of his lack of specialised knowledge and expertise.

He advocates that all discretionary power must be exercised reasonably and his view of unreasonableness includes all the principles whereby an administrative act will amount to an abuse of a discretionary power, for example improper purpose, failure to consider relevant facts, failure to apply the rules of natural justice and so on. This is a very attractive approach, since a reasonable administration which is directed towards the promotion of the public good is the ideal of a democratic state. If Baxter's approach were to be adopted, reasonable administrative behaviour would be the minimum content of all administrative action.

The author also shows that an administrative authority must not only act reasonably, it must also act fairly. These two concepts do not necessarily overlap. The doctrine which he adopts is based on the duty to act fairly. The advantage in using this doctrine is that the classification of administrative action into various categories in order to determine whether the rules of natural justice find application is unnecessary. He concedes that this doctrine entails nothing more than the duty to apply the rules of natural justice, but sees the rules as an outward manifestation of the application of the rules. The fairness demanded in individual cases will vary, but he points out that the flexibility of the doctrine is well suited to meet these needs. For example, serious disciplinary cases call for strict procedural and evidentiary requirements, whilst other decisions may require consultation of an informal nature. In his view, the question whether the administration should have acted in a particular way, must be phrased as follows: "Did fairness require it?"

In view of the vastness of the subject-matter, it has been impossible to review each section of the book which comprises some 800 pages. The author has covered the entire field of administrative law and evidently the book was preceded by a great deal of research on the topic. This is clear from the comparative law referred to and the vast number of cases which he has included.

The author has used clear and concise language, has arranged the subject-matter systematically, and has also provided the reader with a comprehensive index which enables him to find his particular topic of interest very quickly. It only remains to repeat that this extremely comprehensive work will be of great use and benefit to academics, lawyers and students alike, and I would not hesitate to recommend it to anyone interested in administrative law.

YVONNE BURNS
University of South Africa

THE LAW OF DEFAMATION IN SOUTH AFRICA
deur JM BURCHELL
Juta Kaapstad Wetton en Johannesburg 1985; xxxii en 359 bl
Prys R58,00 + AVB (hardeband)

Die verskyning van 'n omvattende werk oor die Suid-Afrikaanse lasterreg op die hakke van die appèlhof se besliste en soms ingrypende standpuntinname en leiding ten aansien van sekere omstrede vraagstukke (veral met betrekking tot die elemente onregmatigheid en *animus iniuriandi*) op hierdie gebied die afgelope dekade, is sekerlik te verwelkom – te meer nog aangesien die werk in wese die proefskrif van die outeur is (waarvoor die PhD-graad deur die Universiteit van die Witwatersrand in 1985 aan hom toegeken is) en daarom nie net die Suid-Afrikaanse positiewe reg weergee nie, maar ook talryke regsvergelykende verwysings en veral teoretiese gesigspunte en aanbevelings oor regshervorming bevat.

Die boek het 27 hoofstukke wat in 10 dele ingedeel is. Deel een behels inleidende opmerkings oor die lasterreg, die belangrikheid van die *fama* of goeie naam, die doel van die lasterreg en die definisie van laster.

In deel twee word die persone bespreek wat as eisers of verweerders in 'n lastergeding betrokke kan wees. Veral die posisie van 'n regspersoon (onderneming, vakbond, universiteit en regering) as potensiële eiser geniet besondere aandag. Verskeie resente provinsiale beslissings (sien 42–44) – in teenstelling met vroeëre uitsprake (sien 42; sien nietemin ook *Multiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 3 SA 164 (D)) – huldig die opvatting dat 'n regspersoon (handeldrywende maatskappy) nie met die *actio iniuriarum* op grond van laster kan ageer nie. Die *actio iniuriarum* is in beginsel gerig op die verhaal van genoegdoening weens die krenking van die een of ander persoonlikheidsreg,

en aangesien 'n regspersoon volgens vermelde sake geen persoonlikheidsregte – die reg op die goeie naam of *fama* inbegrepe – het nie, word hierdie aksie uitgesluit. Die *fama* van die regspersoon word nietemin wel as bestanddeel van sy werfkrag ("goodwill") geag; gevolglik is slegs die Aquiliese aksie (en die interdik) relevant. Anders as die huidige skrywer (sien *Persoonlikheidsreg* (1985) 78–80), staan Burchell (44 e v) krities teenoor bedoelde opvattings. Volgens hom (44–46) is die beskerming wat die reg op die werfkrag in die huidige verband aan regspersone bied, onvoldoende. Hy redeneer dat 'n regspersoon, wat die Aquiliese aksie betref, baie moeilik vermoënskade sal kan bewys; en wat die interdik aangaan, sal die meeste nie-handeldrywende ondernemings probleme ondervind om die bestaan van 'n reg op die werfkrag aan te toon. Daarom behoort die regspersoon genoegdoening weens laster met die *actio iniuriarum* te kan verhaal (46–48). Hierdie besware gaan egter nie op nie. In eerste instansie kan nie ingesien word waarom 'n regspersoon moeiliker vemoënskade weens "laster" sal kan aantoon as byvoorbeeld enige ondernemer weens die neerhaling van sy prestasie as verskyningsvorm van onregmatige mededinging nie (vgl Van Heerden en Neethling *Onregmatige Mededinging* (1983) 170 e v). Tog sal niemand beweer dat aan die betrokke mededinger daarom 'n verdere aksie behoort toe te kom nie. Hierbenewens behoort dit vir enige (ook 'n nie-handeldrywende) regspersoon, wat 'n goeie naam of *fama* het, betreklik maklik te wees om vir doeleindes van 'n interdik die aanwesigheid van 'n reg op die werfkrag te bewys – 'n regspersoon se *fama* medebepaal tog juis sy werfkrag (sien in die algemeen oor die begrip werfkrag *ibid* 49 e v, veral 56–57). So gesien, bied die Aquiliese aksie en die interdik voldoende beskerming aan die regspersoon teen "belastering." Steun vir hierdie gevolgtrekking blyk ook uit die Engelse reg waar 'n analoë situasie bestaan (sien 49). Dit kom dus voor of aanvullende beskerming deur die *actio iniuriarum* onnodig is. Hierdie aksie is bowendien gerig op die toekenning van *solatium* vir die persoonlike leed wat met 'n aantasting van die persoonlikheid gepaard gaan – leed wat die regspersoon in sy onpersoonlikheid uit die aard van die saak nie kan ervaar nie (*Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 384). Daarom sal die toekenning van genoegdoening aan die regspersoon geen doel in hierdie verband dien nie – trouens, sodanige toekenning is dan bloot *bestraffend* van aard en dus direk strydig met die *kompenserende* aard wat eie aan deliktuele remedies behoort te wees.

Onregmatigheid as element van laster word in deel drie behandel. Aandag word veral gegee aan die algemene onregmatigheidsmaatstaf, die publikasievereiste, die lasterlikheid van woorde of gedrag, die vereiste dat die belastering op die eiser betrekking moet hê en kousaliteit. Nou val dit dadelik op dat die handeling (publikasie) en kousaliteit – op sigself selfstandige delikselemente – onder onregmatigheid as delikselement betrek word. Volgens Burchell (59 vn 2) kom dit "a little theoretical" voor om publikasie en onregmatigheid te skei. Snaaks genoeg, vind hy dit dan tog nodig om die twee elemente onder afsonderlike hoofde te bespreek (vgl hoofstukke 9 en 10). Die outeur staan in verband met onregmatigheid besonder krities teenoor die toepassing van die leerstuk van subjektiewe regte (sien 45 en veral 63 e v). Wat egter ook al die meriete van sommige van hierdie argumente mag wees, een feit staan vas; en dit is dat (subjektiewe) persoonlikheidsregte bestaan, in teorie en praktyk erkenning geniet en dat die wetenskaplike bewerking van hierdie regte die gebied van persoonlikheidsbeskerming prakties hanteerbaar maak. Dit is trouens presies wat die outeur

self doen deur laster (of die beskerming van die subjektiewe persoonlikheidsreg op die goeie naam) in besonderhede selfstandig van ander persoonlikheidsregte, byvoorbeeld die beskerming van die *reg op privaatheid*, te behandel (vgl die voorwoord vii). In verband met publikasie deur middel van 'n *omissio*, is die aanbeveling van die outeur (76) dat gewone deliksbeginsels met betrekking tot aanspreeklikheid vir 'n late ook hier toepassing behoort te vind, nie sonder meriete nie. Die bespreking van die belastering van afgestorwenes (136 e v) is heel interessant. Soos Lund (1985 *SALJ* 558) egter tereg daarop wys, gaan dit op die keper beskou nie om 'n potensiële lasteraksie nie, maar eerder om 'n krenking van die gevoelslewe van naby-familielede. Die reg aangaande laster is dus eintlik hier irrelevant. Die bespreking van *animus iniuriandi* in hierdie deel (sien bv 94–95 126–127 143) is myns insiens onvanpas. Hierdie besprekings hoort sistematies meer tuis onder deel vier wat juis oor skuld handel.

Deel vier betrek dan ook 'n historiese en kritiese beskouing van *animus iniuriandi*, asook 'n bespreking van nalatigheid as voldoende skuldverwyt vir die aanspreeklikheid van die verspreiders en verkopers van leesstof. Anders as wat Burchell (156) te kenne gee, hou die beslissings oor publikasie nie verband met skuld nie, maar met redelike voorsienbaarheid as juridiese kousaliteitsmaatstaf (sien *Persoonlikheidsreg* 126). Dit gaan naamlik om die vraag of die publikasie van lasterlike woorde of gedrag die verweerder toegereken moet word, dit wil sê of hy vir die publikasie *verantwoordelik* gehou moet word (sien *Pretorius v Niehaus* 1960 3 SA 109 (O) 112). Die outeur (155–157 174 193–195) se siening dat daar veel te sê is vir nalatigheid as voldoende skuldverwyt vir laster in minstens besondere gevalle, is beslis nie sonder grond nie. Een sodanige geval (174) is dat 'n *onredelike* (nalatige) dwaling (wat *animus iniuriandi* uitsluit) oor die bestaan van 'n regverdigingsgrond aanspreeklikheid behoort te vestig. Vir sover hy (172) egter met betrekking tot dwaling te kenne gee dat "[n]o Appellate Division judgment has specifically required that subjective knowledge of unlawfulness must extend to a defence excluding unlawfulness," het hy verkeerd. In *Naidoo v Vengtas* 1965 1 SA 1 (A) 15 word naamlik onomwonde verklaar:

> "Getuienis dat 'n verweerder eerlik gedink het dat sy lasterlike woorde met 'n *geoorloofde doel* gebesig word, hoewel volgens *objektiewe maatstaf die doel nie geoorloof is nie,* sou 'n afleiding regverdig dat hy nie die opset gehad het om te beledig [belaster] nie" (my kursivering).

Hieruit blyk duidelik dat ook 'n dwaling (wat subjektiewe onregmatigheidsbewussyn uitskakel) oor die bestaan van 'n regverdigingsgrond, *de lege lata, animus iniuriandi* en dus aanspreeklikheid weens laster uitsluit.

Die skuldlose aanspreeklikheid van die massa-publikasiemedia word in deel vyf aan 'n kritiese en regsvergelykende ondersoek onderwerp. Hierna word die verwere wat volgens hom onregmatigheid en skuld uitsluit in dele ses en sewe respektiewelik in besonderhede behandel. Die onregmatigheiduitsluitingsgronde wat aandag geniet, is waarheid en openbare belang, privilegie, billike kommentaar, toestemming, provokasie (*rixa*), noodweer, noodtoestand en *de minimis non curat lex*. Die gronde wat *animus iniuriandi* uitsluit, is weer dwaling, dronkenskap, kranksinnigheid, provokasie en skerts. In hierdie verband (248) kom dit my voor of die beslissing in *Zillie v Johnson* 1984 2 SA 186 (W) nie soseer oor privilegie gaan nie, maar eerder die *openbare belang* op sigself as regverdigingsgrond betrek (sien *Persoonlikheidsreg* 150). Met betrekking tot lasterlike bewerings gemaak gedurende regsgedinge (249 e v) is dit ter wille van volledigheid jammer dat die outeur nie die belangrike beslissing in *Joubert v Venter*

1985 1 SA 654 (A) kon bywerk nie (sien nietemin ix). In sy bespreking van toestemming (260 e v) maak Burchell hom aan 'n ongelukkige *lapsus* skuldig. Hy (262) sê naamlik eers dat "trapping" – weens oorwegings van "justice and public policy" – 'n regsgeldige toestemming tot belastering daarstel; daarna (264) verklaar hy weer, sonder motivering, dat sodanige toestemming *contra bonos mores* en daarom ongeldig is! Laastens moet vermeld word dat die outeur se duidelike uiteensetting van en standpunte oor provokasie volle instemming verdien.

Dele agt, nege en tien behandel ten slotte die remedies op grond van laster, strafregtelike laster en *de lege ferenda* aanbevelings oor die lasterreg in die algemeen. Veral sy aanbevelings oor alternatiewe remedies (311 e v) moet spesiaal vermeld word (sien ook Lund 1985 *SALJ* 558).

In die geheel is die werk 'n waardevolle bydrae, *de lege lata* sowel as *de lege ferenda*, tot die Suid-Afrikaanse regsliteratuur oor laster. Vir die regspraktisyn verskaf die boek 'n volledige positiefregtelike verwysingsraamwerk, en vir die dosent en student die nodige pitkos. Die enkele punte van kritiek of meningsverskil wat hierbo geopper is, doen hieraan geen afbreuk nie. Die werk word dus sonder voorbehoud vir alle belanghebbendes aanbeveel.

J NEETHLING
Universiteit van Suid-Afrika

THE SOUTH AFRICAN LAW OF TRUSTS
deur TONY HONORÉ
Derde uitgawe; Juta Kaapstad Wetton en Johannesburg 1985; lxvi en 551 bl
Prys R96,00 + AVB

Hierdie is reeds die derde uitgawe van professor Honoré se bekende werk oor die Suid-Afrikaanse trustreg. Die vorige uitgawes het in 1966 en 1976 verskyn en is onder andere bespreek deur Welsh 1966 *SALJ* 374, Joubert 1968 *THRHR* 124-176 262-281 en Erasmus 1977 *THRHR* 107-110. In sy resensie verklaar Erasmus (109) dat "hierdie boek met reg die standaardwerk oor die Suid-Afrikaanse trustreg [bly]. Vir regspraktisyns en andere wat met trusts gemoeid is, is dit 'n onontbeerlike handleiding." In die bykans 'n dekade wat sedert die 1976-uitgawe verloop het, is hierdie reputasie grootliks bevestig. Die derde uitgawe van 'n gevestigde standaardwerk behoef dan ook geen uitvoerige bespreking nie – enkele algemene opmerkings is voldoende.

In die voorwoord spel Honoré weer eens daardie aspekte uit wat vir hom ten grondslag van die Suid-Afrikaanse trustreg lê: Allereers die feit dat sowel die testamentêre trust as die trust *inter vivos* inheemse instellings is wat volgens die eie aard van die Suid-Afrikaanse reg ontwikkel het, sonder dat invloede van buite misken moet word; tweedens die idee dat die trustee essensieel 'n amp

beklee as gevolg waarvan hy dan ook aan die beheer en toesig van die hof onderworpe is sonder dat dit noodwendig hoef te beteken dat hy eienaar van die trustbates moet wees; en derdens die skeiding wat daar bestaan (of behoort te bestaan) tussen trustbates en die trustee se persoonlike bates. Dit is dan juis die wyse waarop hierdie breë temas op grond van nuwe verwikkelinge in die Suid-Afrikaanse trustreg verder verfyn, toegelig en gemotiveer word wat die leser se besondere aandag verdien. Hierdie proses vorm, soos Honoré dit self stel, "the substance of the book and the perennial fascination of South African trust law."

Sekerlik die belangrikste beslissing op die gebied van die trustreg sedert die vorige uitgawe van hierdie werk is dié in *Braun v Blann en Botha* 1984 2 SA 850 (A). Hierin het die appèlhof die gelykstelling tussen die trust en die *fideicommissum* wat sy oorsprong in *Estate Kemp v McDonald's Trustee* 1915 AD 491 gehad het, finaal verwerp. Inteendeel, so verklaar die hof by monde van (ironies genoeg) appèlregter Joubert (859):

> "Our courts have evolved and are still in the process of evolving our own law of trusts by adapting the trust idea to the principles of our own law."

Dit weerhou die hof egter nie daarvan om diskresionêre bevoegdhede wat tot in daardie stadium vir die *fiduciarius* voorbehou is ook na die trustee uit te brei nie. Daar is nie 'n enkele faset van hierdie beslissing wat nie op die een of ander wyse êrens in die boek behandel word nie. So word dit uit die aard van die saak bespreek by die vergelyking tussen die trust en die *fideicommissum* (sien egter *infra*); dit word teenoor *CIR v Sive's Estate* 1955 1 SA 249 (A) gestel by 'n bespreking van die omvang van die diskresie wat aan 'n trustee verleen kan word sonder om die geldigheid van die trust in gedrang te bring; verwysings daarna en 'n ontleding daarvan word ook gevind by die algemene behandeling van diskresionêre trusts en die verlening van bemakingsbevoegdhede (*powers of appointment*) aan trustees. Een aspek van Honoré se hantering van die *Braun*-beslissing hinder tog. Gesien in die lig van die feit dat die beslissing in 'n sekere sin die debat oor die aard en herkoms van die trust in die Suid-Afrikaanse reg afgesluit het, is dit jammer dat 'n ontleding van *Estate Kemp v McDonald's Trustee* steeds die skrywer se behandeling van die verband tussen die trust en die *fideicommissum* oorheers. 'n Meer prominente en diepgaande beoordeling van die appèlhof se weiering in die *Braun*-beslissing om die trust steeds op die grondslag van die *fideicommissum* te plaas, sou myns insiens tot 'n beter balans in hierdie afdeling gelei het.

Honoré se standpunt dat *beheer* oor die trustbates deur 'n trustee, en nie *eiendomsreg* nie, die wese van die trustinstelling vorm, word nog sterker in hierdie uitgawe as in die vorige gestel. Sy siening van die trust as "a single institution under which the ownership of the trust assets may or may not be vested in the administrator or trustee" (4) word dan ook nie soos voorheen slegs deur terminologiese en administratiewe oorwegings gemotiveer nie, maar nou ook deur wat hy praktiese of funksionele oorwegings noem. Wat laasgenoemde betref, lê Honoré onder andere klem daarop dat die trustee se bevoegdheid om trustbates te vervreem nie in die eerste plek afhanklik is van die vraag of hy eienaar van die bates is nie, maar van die bepalings wat in die trust se oprigtingsakte voorkom. Selfs die lotgevalle van die trustbates by die trustee se insolvensie is volgens hom miskien nie eers so eng gekoppel aan die vraag waar die eiendomsreg in die bates lê nie. Dit is veral in die konteks van die trustee

se insolvensie waar ook die ander aspek wat Honoré as grondliggend vir die trustgedagte sien, opnuut beklemtoning vind. Op gesag van onder andere die onlangse beslissing in *Magnum Financial Holdings (Pty) Ltd v Summerly* 1984 1 SA 160 (W) beklemtoon hy naamlik in nog duideliker terme as in die tweede uitgawe die skeiding wat daar in beginsel tussen trustbates en die trustee se persoonlike bates bestaan.

Die formele ordening van die stof bly in 'n groot mate onveranderd. Die volgorde en betiteling van hoofstukke volg in alle opsigte die patroon van die vorige uitgawe. Ook die indeling van die teks in paragrawe word gehandhaaf, alhoewel etlike nuwe paragrawe ingevoeg is. Onder die nuwe paragrawe tel die behandeling van onderwerpe soos die gevolge van nie-uitvoering van die trustdoel (par 106), die trustee se bevoegdheid om lenings te waarborg en geld te leen (par 185 en 186), eiendomsagente se trustrekeninge en die hantering daarvan (par 213 en 249), die belastingimplikasies van die tegeldemaking van kapitaalbates deur 'n trust (par 277) en sogenaamde *tax avoidance schemes* (par 282).

'n Klein maar welkome tegniese wysiging is die feit dat die voetnote in die nuwe uitgawe op die gewone wyse genommer word (d w s dat daar nie soos in die verlede telkens na 99 weer by 1 begin word nie). Die versorging van die werk is in die algemeen indrukwekkend. Tog val enkele steurende foute op: Aanhalingstekens wat nie gesluit word nie (7); 'n verwysing na die Trustgelde Beskermingswet 1943 (i p v 1934) (183); deurgaanse verwysing na *Baarnhoorn v Duvenhage* 1964 2 SA 486 (A) (i p v *Barnhoorn v Duvenage*); 'n foutiewe verwysing *Braun v Blann and Botha* in die voorwoord (1984 1 SA i p v 1984 2 SA).

Die prys van die boek (R107,00 AVB ingesluit) is ongelukkig onrusbarend hoog. Die troos vir elke akademikus, praktisyn en student behoort egter te wees dat hierdie geld in 'n voortreflike werk belê word.

MJ DE WAAL
Universiteit van Stellenbosch

SAKEREG VONNISBUNDEL
deur HJ DELPORT en NJJ OLIVIER
Juta Kaapstad Wetton en Johannesburg 1985; xxxix en 710 bl
Prys R54,00 (sagteband)

Nemo plus iuris ad alium transferre potest quam ipse haberet – Hierdie goue reël van die sakereg is aangepas van toepassing op die oordra van kennis in 'n regshandboek, veral 'n vonnisbundel, as *nemo plus scientiae transferre potest quam ipse haberet*. Dit is juis die opsteller/s se kennis van die vakgebied wat die aanbieding van die materiaal en sy/hul basiese uitsoekerigheid beïnvloed, en wat dus die sukses van 'n vonnisbundel bepaal.

In tweede uitgawe van die *Sakereg Vonnisbundel* slaag Delport en Olivier uitmuntend daarin om hulle doel met die oordra van kennis te verwesenlik, naamlik "om aan die hand van geselekteerde hofbeslissings en aanvullende bronnemateriaal bepaalde basiese beginsels van die Suid-Afrikaanse sakereg uiteen te sit."

Die skrywers se logiese en deeglike benadering vergemaklik die studie van die sakereg. In die kennis-soeke van student, dosent en praktisyn is die besondere aanbieding van onskatbare waarde te midde van 'n kennis-ontploffing.

'n Duidelike inhoudsopgawe dien as prikkelende vertrekpunt, gevolg deur 'n omvattende bibliografie waarby die nuutste vonnisbesprekings ook ingesluit is, daarna 'n tipografies-goedversorgde vonnisregister waarin aangehaalde sake duidelik deur vet druk aangedui word, en voorts aangehaalde wetgewing waaronder ook die Wet op die Ontwikkeling van Swart Gemeenskappe 4 van 1984 waarvan artikels 52-57 op 697 aangehaal word. Beslissings is tot en met Desember 1984 bygewerk.

'n Skema lei elke hoofstuk in en juis hieruit blyk hoe vernuftig die skrywers se leiding deur die gebied van die sakereg is. Ten eerste word 'n gemeenregtelike definisie van die onderwerp gegee, wat dan in 'n aantekening wat tipografies duidelik onderskei is, bespreek word op die skrywers se kenmerkende deeglike maar bondige manier. Toepaslike beslissings volg onder hoofde om die relevansie aan te dui en word boonop ook genommer om verwysings en kruisverwysing te vergemaklik. Elke beslissing word voorafgegaan deur 'n opsomming van die feite, gevolg deur aangehaalde gedeeltes. In die skrywers se volledige kernagtige aantekeninge wat op die feite volg, word die leser ook verwys na ander materiaal en menings (vgl 37-38 die aantekening op die uitspraak van r MT Steyn in saak nr 15, *Western Bank Bpk v Trust Bank van Afrika Bpk* 1977 2 SA 1008 (O); en 41-42 wat betref saak nr 16). Op oordeelkundige wyse word die leser ingelig wat die skrywers se siening is, maar hy word ook 'n geleentheid gebied om vir homself 'n mening te vorm.

Afgesien van die feit dat belangwekkende nuwe beslissings in die tweede uitgawe op kenmerkend voortreflike wyse weergegee word (vgl *Pienaar v Rabie* 1983 3 SA 126 (A) oor verjaring as oorspronklike wyse van eiendomsverkryging en die *JOT Motors*-saak met betrekking tot retensieregte wat in 1984 beslis is), word 'n beswaar wat deur Carole Lewis geopper is in haar bespreking van die eerste uitgawe in 1981 *SALJ* 433, uitgeskakel in hierdie uitgawe deurdat ook afwykende uitsprake relevant-volledig aangehaal word (vgl die uitspraak van ar Rumpff in die *Joohadien*-saak op 351-353).

Delport en Olivier se *Sakereg Vonnisbundel* het sedert sy eerste verskyning in 1981 'n haas onontbeerlike hulpmiddel by die studie van die sakereg geword. Hierdie verbeterde en bygewerkte tweede uitgawe sal ook 'n aanwins vir die kennis van die sakereg wees.

LONA TROSKIE
Kaapse Balie

Daedalus in the supreme court – the common law today*

D P Visser
BJur LLD D Jur
Professor of Roman-Dutch and Private Law, University of Cape Town

OPSOMMING

Daedalus in die Hooggeregshof – die Gemenereg Vandag

Die bronne-model van die Suid-Afrikaanse reg is onvolledig omdat dit as uitgangspunt aanvaar dat die gemenereg (in die sin van 'n residuele bron wanneer geen statuut, gewysde of gewoonteregsreël van toepassing is nie) 'n statiese entiteit is. Daar word hedendaags algemeen aanvaar dat die gemenereg in beginsel die Romeins-Hollandse reg is, waarin op sekere gebiede Engelse reg geresipieer is. Hierdie *corpus* kan dan deur regsvergelykende en regsfilosofiese analise ontwikkel word om by moderne omstandighede aan te pas.

In der waarheid is die basiese *corpus* van die gemenereg egter self 'n veranderlike entiteit. Aangesien die howe (a) toelaat dat twee verskillende regstelsels die rol van 'n gemenereg vervul maar een van dié stelsels nie as sodanig in die teoretiese bronne-model erken nie, en (b) geen definitiewe betekenis aan die term "Romeins-Hollandse" reg toeken nie, is dit vir 'n regter moontlik om die gemenereg op 'n bepaalde gebied te wysig – en dit veroorsaak 'n onaanvaarbare graad van onsekerheid wat die waardes van konsekwensie en samehangendheid in die Suid-Afrikaanse reg nadelig beïnvloed.

Omdat die Engelse reg ('n term wat na gelang van die geval òf moderne Engelse reg, òf 'n ouer, soms aangepaste, Engelse reg kan beteken) in die praktyk op verskeie gebiede as 'n gemenereg diens doen en dit aanvaarde praktyk geword het om Engelse beslissings in hierdie gevalle soos Suid-Afrikaanse beslissings te behandel, het dit moontlik geword om 'n beslissing oënskynlik in die lig van die toepaslike residuele reg te regverdig deur na die Engelse reg te verwys terwyl die Engelse reg inderdaad nie die residuele bron in daardie geval mag wees nie. Dit word onder andere geïllustreer deur die feit dat sogenaamde *Anton Piller*-bevele agt jaar lank erken is voordat hul herkoms en versoenbaarheid met die regstelsel as 'n geheel ondersoek is. Omdat, andersyds, die Engelse reg egter nie uitdruklik in die teoretiese bronne-model as 'n gemenereg erken word nie, is dit ook moontlik om met slegs 'n beroep op die Romeins-Hollandse reg ingeburgerde beginsels wat uit die Engelse reg stam in die ban te doen – soos blyk uit byvoorbeeld die beslissing in *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 4 SA 874 (A). In beide gevalle is regswysiging moontlik sonder dat die aanvaarde voorwaardes vir judisiële regskepping teenwoordig is. Dié toestand van sake word vererger deur die feit dat die oplossing van 'n bepaalde probleem grootliks kan verskil na gelang van die feit of die hof die gemenereg as die hele Europese *ius commune* of slegs as die reg van die provinsie Holland beskou – 'n saak ten opsigte waarvan daar nog geen uitsluitsel bestaan nie. Die feit dat dit vir regters moontlik is om tussen verskillende gemeneregstelsels (en verder ook tussen verskillende skakerings van hierdie stelsels) te "kies en te keur" dreig om die grens tussen judisiële ontwikkeling van die reg en "judisiële wetgewing" te oorskry – en dit kan slegs remedieer word deur die ontwikkeling van 'n nuwe teoretiese bronne-model wat in ooreenstemming met die Suid-Afrikaanse regswerklikheid is.

* Inaugural lecture, delivered on 1985-05-01.

1 INTRODUCTION

The list of past and present judges of the supreme court bench does not, of course, include Daedalus, the fabled epitome of fine craftsmanship of ancient times. Yet, when one views the intricate and delicately balanced structure that is South African private law today, it is easy to imagine that Daedalus might have had a hand in its construction. For, like the maze at Crete built for the minotaur, our private law is at the same time both a work of art and a trap for the unwary.

As we all know, a motley variety of strange creatures have wandered around in this maze, each suspecting the other of being the minotaur. They were, of course, the various manifestations of "purists" and "modernists." Today there seems to be wide consensus that we, the present-day wanderers in the maze, have a map to guide us through the most treacherous part, namely the common law.[1] The main indications on this map are as follows:

The law reports of the past decade or so show that in some instances the path leads to Roman-Dutch law (which constitutes binding authority, unless modified by the courts), while in others Roman-Dutch law has been replaced by English law either by legislation or through the process of "reception" of certain principles of English law. (In these areas the English roots must be accepted, and although English decisions may be referred to, they do not constitute binding authority.)[2]

With the common law thus identified, the path forward lies in the development of these principles through comparative and jurisprudential analysis.

But I shall argue that this map is incomplete because it mistakenly assumes that the common law is a static concept and therefore inaccurately reflects the relative authoritativeness of Roman-Dutch and English law. I hope to show that the common law displays a non-static character owing to, first of all, the unique connection between English and South African law, and secondly, the fact that the term "Roman-Dutch law" has no fixed meaning. I shall then argue further that this state of affairs creates an unacceptable degree of uncertainty which, in turn, has repercussions in regard to what MacCormick[3] would call the values of consistency and coherence in a legal system.

2 THE CONNECTION BETWEEN ENGLISH LAW AND SOUTH AFRICAN LAW

I conceive of a source of law in a Dooyeweerdian sense as being

> "iedere juridische vorm, waarin de organen der onderscheidenen juridische gemeenschaps- en maatschapskringen binnen hun materieelen kompetensiesfeer in wederkeerige

1 Used here in the sense of "residual law," applicable when there is no statutory, judge-made or customary law applicable in a given case.

2 See in general Hahlo and Kahn *The South African Legal System and its Background* (1973) 578 *et seq*, Zimmermann *Das römisch-holländische Recht in Südafrika* (1983) 39–41 (a work written for Continental comparative lawyers which here accurately reflects current thought on this matter); see further the judgment of Joubert JA in *Braun v Blann and Botha* 1984 2 SA 850 (A); Boberg *The Law of Delict*: vol I Aquilian Liability (1984) 26–29.

3 *Legal Reasoning and Legal Theory* (1978) 152 *et seq.* (chapters VII VIII).

> binding dezer kompetensiesferen, materieele rechtsbeginselen positiveren tot geldend recht."[4]

Like legislation, judicial precedents and custom, the "common law" in South Africa represents a distinct juridical form in which positive law is created. Whereas the competent organ in each of the first three instances is respectively a legislative body, a division of the supreme court or the community itself, the competent organ in regard to the common law may be either the legislature or the supreme court. In the present South African legal system we find that not only the legislature but also the supreme court in fact exercises its competence to declare Roman-Dutch law to be the common law in regard to specific areas of the law or generally,[5] and in doing so creates or confirms a separate judicial form from which binding[6] rules emanate. But while Roman-Dutch law is often expressly made the common law in a particular context, the courts have also on numerous occasions tacitly made English law – I hope to demonstrate – an alternative common law. That is to say, the idea that the only role of English law (apart from instances where it had been received into South African law in the past) is as a source of comparative material (with no greater authority than any other "foreign" legal system) is wrong: the reception of English law is an ongoing process – a process which has the effect that the roles fulfilled by both that legal system and Roman-Dutch law in respect of South African law, are identical.

A convenient place to start is *Letterstedt v Morgan*[7] where the first chief justice to be appointed to the newly created supreme court of the Cape Colony under the First Charter of Justice, Sir John Wylde, had the following to say in response to the attorney-general's quotation from Roman-Dutch authorities in support of a request that the judges should recuse themselves:

> "Quote what Dutch or Roman books you please – musty or otherwise – and they must be musty if they lay down such doctrines. I belong to a higher Court than they refer to – a Court not paralysed by their authority, much less by the maxims of philosophers dozing over the midnight lamp in their solitary chambers. My Queen has sent me here to administer justice under the Royal Charter and the practices of the Courts of Flanders, Batavia or Trinidad are no authority to me."

After conceding that there are "some great principles in Roman-Dutch law which like all great principles reflect their own light" he continued:

> "But when you speak of the Institutions of Holland and of binding myself down by the practice of Dutch Courts – I absolve myself from that bondage, I look to my Charter, to my duty . . . I therefore say that they are no authority for us, and although my pen laboured to follow the scrutiny of my learned friend, as I put them down in my book, I have them like visions, like mere spectral shadows in my mind."

I submit that, strange as it may seem, this unselfconscious assumption by the court that it is the arbiter of what constitutes the common law and what does

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4 Dooyeweerd "De Theorie van de Bronnen van het Stellig Recht in het Licht der Wetsidee" 1933 *Mensch en Maatschappij* 340 359. "Maatschaps – en gemeenschapskringen" are the two basic relations between people as social beings. Van der Vyver "Die Regsbegrip" 1962 *THRHR* 1 7 explains a relation of "maatschap" as being " 'n verhouding waarin persone teenoor mekaar staan sonder dat hulle as lede van 'n geheel fungeer" and a relation of "gemeenschap" as " 'n verhouding waar daar 'gemeenskaplike deelname as lede van 'n geheel is.' "

5 For a legislative example, see s 6 of the Admiralty Jurisdiction Act 105 of 1983. For a recent judicial example, see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A).

6 although not in an absolute sense: see the discussion below.

7 (1849) 55 373.

not, has not been superseded by the view reflected in the well-known dictum of Steyn CJ in *Trust Bank van Afrika Bpk v Eksteen*[8] delivered more than a hundred years later:

> "Die beskouing dat ons eie outoriteite deur hierdie en dergelike uitsprake regtens of vir alle praktiese doeleindes vervang is deur Engelse gewysdes, met die meegaande implikasie dat ons howe, en ook hierdie Hof aan Engelse gewysdes gebonde is, sou ek as klaarblyklik en geheel en al ongegrond moet verwerp. Geen Hof, ook nie hierdie Hof nie, besit die bevoegdheid om ons gemene reg met die reg van enige ander land te vervang nie. Dit kan alleen die wetgewer doen."

This dictum is open to criticism on two grounds:

First as Cameron[9] has correctly pointed out, the reference to the inability of the courts to replace "our common law" with English law contains a *petitio principii*: while it is certain that Roman-Dutch law is the common law in regard to areas such as the law of persons, marriage, things and unjustified enrichment,[10] there are definitely areas in which this is not the case or it is at least not certain.

One thinks immediately of those areas of our law controlled by enactments based on English law. When applying these acts the courts rely on English judgments as a matter of course: the reference to English decisions is usually justified on the basis of the similar wording of the acts, but just as often the English cases are quoted as if they were South African decisions. The result is that in areas such as insurance law (at least until the recent decision in *Mutual and Federal Insurance Co Ltd v Municipality of Oudtshoorn*),[11] company law, bills of exchange and the various divisions of intellectual property law (patents, copyright, designs and models) the most important residual source of law is English law. The acts controlling these areas should, according to orthodox theory, be interpreted in the light of Roman-Dutch law; and they are indeed interpreted in this light when coherence with the rest of the law is at stake.[12] But for all practical purposes only English law is referred to.[13] Of course, no one will seriously state that the courts are bound by English decisions – but then this is in the nature of a residual source of law. Nor are our courts absolutely bound by Roman-Dutch law, where that is the residual source of law: the supreme court has often alluded to the fact that Roman-Dutch law must be modified when changed circumstances require this. And if both English law and Roman-Dutch law are residual sources, why designate the one as "the common law" and not the other? To a large part of the law, English law is the common law.

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8 1964 3 SA 402 (A) 410–411.

9 "Legal Chauvinism, Executive-mindedness and Justice – LC Steyn's Impact on South African Law" 1982 *SALJ* 38 46.

10 which does not mean, however, that these areas have remained entirely free of English law.

11 1985 1 SA 419 (A).

12 See, eg, to quote a recent example, *Montres Rolex SA v Kleynhans* 1985 1 SA 55 (C).

13 This is amply demonstrated by the fact that in a single recent volume of the South African law reports, chosen at random (1984 3) the courts can be shown to regard English decisions as having persuasive value or to rely on English decisions in no fewer than thirteen cases relating to the areas of law just mentioned: *GATX-Fuller (Pty) Ltd v Shephard and Shephard Inc* 1984 3 SA 48 52 *in fine* – 53; *Rainbow Diamonds (Edms) Bpk v Sanlam* 1984 3 SA 1 (A) 10–12; *Multi Tube Systems v Ponting* 1984 3 SA 182 (D) 186B 189D–F; *General Chemical Corporation (Coastal) Ltd v Interskei (Pty) Ltd* 1984 3 SA 240 (D) 248H; *Sweet v Finbain* 1984 3 SA 441 (W) 445F; *Bethlehem Export Co (Pty) Ltd v Incorporated General Insurances Ltd* 1984 3 SA 449 (W); *Lehmbecker's Earthmoving and Excavators (Pty) Ltd v Incorporated General Insurances Ltd* 1984 3 SA 623 (A); *Homecraft Steel Industries (Pty)*

continued on page 131

Anyone who doubts this should take the trouble of paging through the law reports. In 1979 Cameron and Van Zyl-Smit[14] made the effort and found that in 1979, 193 English and Privy Council decisions were referred to – many of them discussed or quoted from – as well as 21 Commonwealth judgments and eleven from the USA. This is in contrast to the fact that in only five cases reference was made to modern Continental materials. I did the same count for last year and the statistics are essentially the same – indicating that a statement such as the recent one by Joubert JA that "South Africa . . . has a civil law legal system" does not tell the whole story even today.[15]

The dictum of Steyn CJ in the *Trust Bank* case may, in the second place, be criticised on the ground that it is simply a fact that the supreme court can and does vary the common law. This happens mainly in those areas where neither Roman-Dutch law nor English law holds the position of "exclusive" common law. This is strikingly illustrated by the subsequent development in regard to estoppel, the area of the law with which the chief justice was dealing when he delivered himself of that dictum. In *Sonday v Surrey Estate Modern Meat Market*[16] Tebbutt J related how the alien shrub estoppel passed customs control to be planted as one of the hedges in the maze. Referring with approval to the separate concurring judgment of Hoexter AJA in the *Trust Bank* case,[17] as well as the criticism of the remarks of the former chief justice by Cameron, his lordship came to the following conclusion (after commenting that Steyn CJ did not entirely rule out the use of English sources):

> "I feel therefore, that I am entitled to approach the question with which I am now faced on the basis of examining it in the light of what I believe to have been established as the foundation of our law of estoppel, viz the *exceptio doli* or by seeking guidance from, or comparing our law's approach to estoppel, if you will, with the English law in regard to this doctrine."

Certainly English law was largely the common law in this respect before the *Trust Bank* case.[18] Steyn CJ's very claim that the appellate division is not entitled to vary the common law, was paradoxically itself an attempt to vary the common

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Ltd v S M Hare & Son (Pty) Ltd 1984 3 SA 681; *Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner* 1984 3 SA 850 (W); *Heublin Inc v Golden Fried Chicken (Pty) Ltd* 1984 3 SA 974 (W). (These were by no means the only cases in which reference to English law was made. English decisions were referred to or relied upon in a further twelve cases relating to other matters. In two cases English law was found to be of no assistance – in the one, *Gilbert v Bekker* 1984 3 SA 774 (W), because "[t]here is . . . a completely different approach to insolvency administration in England," in the other, *Ranch Inter Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 862 (W), because Coetzee J found, after a four-page analysis of English law as explained in Australian and New Zealand cases, that "systematically and juridically the differences between our law and English law in this respect are huge and fundamental." In one case (*S v Ndlovu* 1984 3 SA 23 (A)) English law was only taken note of (though favourably) on a comparative basis (as was of Western European legal systems).

14 1979 *ASSAL* 538 *et seq.*

15 *Braun v Braun and Botha* 1984 2 SA 850 (A) 859.

16 1983 2 SA 521 (C).

17 in which he stated: "I bear in mind that our courts have pointed out over and over again that, in matters of estoppel, it is proper and safe to look for guidance in the decisions of the English courts" (415E).

18 although one should bear in mind that "[l]ike any other immigrant that has been here for some time, the original 'Englishness' has to a certain extent faded in favour of a more South African appearance" – per Tebbutt J in the *Sonday* case 527A.

law. And if he succeeded it was at most only partially as we can see clearly from *Sonday's* case.

The fate of *animus iniuriandi* in the law of defamation provides a further example. Before 1916 there was no doubt that *animus iniuriandi* was part and parcel of the law of defamation, but, under the influence of English law, a development occurred between 1916 and 1960 by which the requirement became nothing more than a fiction.[19] Subsequently the principle of Roman-Dutch law that there could be no liability for defamation without *animus iniuriandi* was re-established – only for one of the main actors in this reversal[20] to declare in 1982 in the *Pakendorf* case that *animus iniuriandi* is not a requirement where a defamatory statement has been made in the media, thus re-establishing the English common-law principle of strict liability of the news media for defamatory statements, albeit then an outdated version of English law.[21] Incidentally, this judgment shows that when we say that "English law" vies for a place as a common law within the legal system, the term has a peculiar meaning of its own. It is not necessarily the current English law. It may be that, but it may also be an older and adapted version of English law. Principles of English law received into South African law in this continuing process are, furthermore, not always of a pristine variety – novel principles of English law are sometimes to be found sprouting (often unnoticed for a long time) in the hedges of the maze. This is dramatically illustrated by another alien shrub, namely Anton Piller:

In England, as everywhere, holders of copyright in recorded music and video tapes experienced enormous problems in catching "pirates" who dealt in infringing copies. If one was caught out he could pass on his illicit stock to another pirate so that he could be successfully sued only in regard to the copies already discovered. In any event, this dealt only with that particular pirate: the network as a whole was unaffected.[22] As a result of this state of affairs an order was devised by a certain pleader specialising in intellectual property cases, and this order is now commonly known as an Anton Piller order. That was in 1975. By 1980 we notice that Anton Piller order has been transplanted to South Africa, for in the *Roamer Watch* case[23] it appears in the law reports for the first time. By that time, however, as Erasmus[24] points out, some 200 Anton Piller orders had already been obtained for a particular film distributor. These orders afford

19 See McKerron 1931 *SALJ* 154. See too the description of this development by Burchell, *The Law of Defamation in South Africa* (1985) 147 and also Zimmermann *op cit* 37; Kemp "Die Skuldvereiste by Laster: 'n Onlangse Belangwekkende Beslissing" 1980 *De Jure* 344 as well as Coenraad Visser "Valediction of a Chief Justice: Strict Liability of the Press for Defamation" 1983 *SALJ* 3.

20 Rumpff CJ – see his judgments in *Jordaan v Van Biljon* 1962 1 SA 286 (A), *Craig v Voortrekker Pers Bpk* 1963 1 SA 149 (A), *Nydoo v Vengtas* 1965 1 SA 1 (A) and *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 394 (A).

21 S 4 of the United Kingdom Defamation Act 1952 provides a certain measure of protection for persons who have published defamatory statements innocently. See Burchell *op cit* 197 *et seq*.

22 See *Ex parte Island Records Ltd* (1978) Ch 122 (CA) 133 (per Lord Denning MR) and Erasmus "Anton Piller Orders in South Africa" 1984 *SALJ* 327. The order derives its name from the case of *Anton Piller KG v Manufacturing Process Ltd* (1976) Ch 55 (CA).

23 *Roamer Watch Co (SA) v African Textile Distributors* also *t/a M K Patel Wholesale Merchants and Direct Importers* 1980 2 SA 254 (W).

24 *op cit* 332.

the applicant far-reaching powers which are capable of abuse. This appears clearly from the following description of the nature of these orders:[25]

> "[T]he local variety has developed into a secretly obtained search warrant by means of which a person's premises can be invaded and turned inside out to look for papers and documents and other material which the applicant believes to be relevant to some action (its nature depending on what he discovers) which he will still institute. In addition, it may provide that the respondent is compelled to respond to questioning by the deputy sheriff or to provide post-haste, affidavits containing much information about all these documents and the transactions which they reflect. It authorises the applicant to remove and copy all the material. He need, however, never institute any action."[26]

Since the *Roamer Watch* case this order was granted time and again without any enquiry whether the English principles embodied in it, form part of South African law – and so "by practice" it had become part of South African law. However, in *Economic Data Processing (Pty) Ltd v Pentreath*[27] Coetzee J examined its roots, found that Roman-Dutch law does not contain a trace of the key elements of this order and stated that "[b]eing English it is not part of our law." He rejected the submission by counsel that this was an appropriate case where our law should be developed. Referring to Learned Hand J's dictum[28] that it is not

> "desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant,"

he remarked that Anton Piller had in the first place not been in the womb of time long enough (there was no trace of him before 1976) and, in any event (to return to the original metaphor!) the judge found that because of the objectionable features of the graft it was not compatible with the rootstock.[29]

The irony is, of course, that this decision did not prevent a graft: it removed one of eight years' standing. It is also significant to note that in reading the judgment one gains the distinct impression that the judge did not primarily object to the remedy because of its roots, but rather because of its inherent dangers and that, had this order proved to be a health-giving herb and not a bramble bush, he might have been prepared to allow it to remain in our law.

Soon afterwards the Transvaal full bench had the opportunity to consider Anton Piller orders in the *Cerebos Foods* case[30] and it confirmed Coetzee J's findings on the basic conflict of certain elements of Anton Piller orders with Roman-Dutch law. But the court framed its decision in such a way that in a subsequent case[31] it could be advanced by counsel that the full bench had not specifically stated that Anton Piller orders are not part of our law. (Indeed Van Dijkhorst J stated in the *Cerebos* case that the decision that the court had to make was "whether to prune the growth of this alien shrub or to eradicate it as a noxious weed.")[32] The court in the later case (again in the person of Coetzee J) rejected this submission by counsel, but it still remains to be seen whether Anton Piller has indeed been removed from the maze.

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25 in *Economic Data Processing (Pty) Ltd v Pentreath* 1984 2 605 (W) 609D–E.
26 He was also at pains to point out that the remedy did not only have procedural significance, but in fact created substantive rights (608D–E).
27 *supra*.
28 in *Spectator Motor Service Inc v Walsh* 139 F 2nd 808 823.
29 610D *et seq*.
30 in *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* 1984 4 SA 143 (T).
31 *Trade Fairs & Promotions v Thomson* 1984 4 SA 177 (T).
32 *Cerebos Foods Corporation Ltd v Diverse Foods SA (Pty) Ltd* 163C.

Of course the continuing reception of English law should not be exaggerated. For instance, the English remedy of a so-called "account of profits" – a remedy not nearly as radical as an Anton Piller order – was not allowed through customs control: In *Montres Rolex SA v Kleynhans*[33] it was contended by counsel for the applicant (in a case involving the infringement of the trade mark of the applicant) that the court should adopt the practice of the English courts in trade mark cases in granting such an order, which essentially entails that the person who has infringed the trade mark is obliged to "disgorge the profits he has made in breach of the plaintiff's rights."[34] This remedy conflicts with an established principle of the law of delict, namely that the plaintiff is entitled only to actual (or likely to be sustained) loss, and the court refused the remedy. The judge, not denying the ability of the court to fashion new remedies, stated that "the over-hasty grafting of an alien remedy onto inhospitable terrain is to be resisted and will not advance the principled development of our legal system."[35] This shows that, in an area where the common law is essentially English, Roman-Dutch law is not without influence and it is clearly invoked here for the sake of coherence in the legal system.

Furthermore, the continuing reception of English law does not mean that it is in the process of completely ousting Roman-Dutch law as the common law. Although the courts have since the seventies displayed a more mature attitude towards English law[36] (not finding it necessary to disapprove of principles merely because of their English origin[37] and indeed establishing and re-establishing English principles in our law, as we have seen) Roman-Dutch principles are still at times substituted for English principles of long standing. Here we may mention the recent decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*.[38]

In this case the appellate division reversed, amongst other things, the traditional rule received from English law that an agreement in restraint of trade is *prima facie* invalid and that the party seeking to enforce it must prove that the restraint is reasonable. The court found that there was nothing in Roman-Dutch law which made an agreement in restraint of trade invalid or unenforceable.[39] The court said that this did not mean that agreements in restraint of trade would always be enforceable and where the public interest was affected such an agreement would not in fact be enforced. But the rule following English law, that the onus to prove reasonableness rested on the person seeking to enforce such an agreement, was illogical in the light of the principle that contracts should be honoured (*pacta sunt servanda*). In taking this stand the court, of course, preferred the principle of sanctity of contract to the principle of freedom of trade (which was inherent in the traditional doctrine). I shall return to this at a later stage.

The developments which I have just sketched illustrate clearly how judges can and do replace Roman-Dutch law with English law and *vice versa*. The maze

33 1985 1 SA 55 (C).
34 61D.
35 He referred here to the decision in *Economic Data Processing v Pentreath*.
36 See Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 487.
37 See the judgment of Joubert JA in *Braun v Blann and Botha*.
38 1984 4 SA 874 (A).
39 although it must be noted that the courts' perception of the Roman-Dutch law pertaining to this area is suspect: see Schoombee "Agreements in Restraint of Trade: The Appellate Division Confirms New Principles" 1985 *THRHR* 127.

is not only complicated because of its dual Roman-Dutch and English elements: it is also a shifting maze, which at a moment's notice may change its configuration. A hedge which blocks a path today, may tomorrow be a mere spectral shadow.

3 THE MEANING OF THE TERM "ROMAN-DUTCH LAW"

In *Tjollo Ateljees (Edms) Bpk v Small*[40] Van den Heever JA stated:

> "Since we observe the law of Holland we must exclude the Romanists of other countries as well as the pragmatists from neighbouring regions."

And this is still the orthodox position: the term Roman-Dutch law refers to the law of the province of Holland in the Netherlands of old. But once again, just as the courts expressly declare Roman-Dutch law to be the common law of South Africa but tacitly also declare English law as such, they limit the term Roman-Dutch law to the province of Holland only when expressly dealing with the subject, and even then they do not always limit it in this way. Tacitly they often extend the meaning of the term to include writers from all the phases of development of the *ius commune*, which has led more than one author to the conclusion that perhaps not Roman-Dutch law *strictu sensu* but rather the *ius commune* should be regarded as the common law of South Africa.[41]

As an early example of this approach we may take *Rooth v The State*,[42] a case dealing with the *condictio indebiti*. In this case the court decided that "recourse [must be had] to the civil law" to decide the question whether an error of law should bar the *condictio* or not.

Now throughout the development of the European *ius commune* the question whether error of law bars the *condictio indebiti* has been controversial. Indeed, it is still controversial today.

How, then, did the court go about resolving the issue? It proceeded to list writers for and against the proposition that error of law bars the *condictio*. In each list it included Dutch writers of the 17th and 18th centuries, members of the *usus modernus pandectarum*, French humanists and pandectists.[43] It found, after analysis of the views of some of these writers, that the weight of authority favoured the view of refusal of the *condictio* where payment was made in error of law.

Had the court employed the historical method, which requires a diachronic, critical and period-related assessment of the authors of the *ius commune*, it would have realised that the great controversy surrounding this question had its origins in the difference between classical and Justinian law.[44]

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40 1949 1 SA 865–866.

41 See, e g, the analysis of Zimmermann, "Roman-Dutch law in South Africa: Aspects of the Reception Process" 1985 *Lesotho Law Journal* 97 101; see also by the same author *Das römisch-holländische Recht in Südafrika* 62 *et seq* and Van Zyl *op cit* 492.

42 (1888) 2 SAR 259.

43 Those who support the proposition that a payment made *errore iuris* should be reclaimable are listed as being Van Leeuwen, Huber, Cocceius, Peckius, Carpzovius, Vinnius, D' Aguesseu, the *Hollandsche Consultatien*, Leyser and Muhlenbruch. Those against the proposition are listed as being Cujacius, Donellus, Merula, Brunneman, Domat, Voet, Bluck, Savigny, Mackelday, Goudsmit and Windscheid.

44 See, in regard to this and the following comments on the *condictio indebiti*, my unpublished thesis *Die Rol van Dwaling by die* Condictio Indebiti (Leiden 1985).

In classical law the underlying ratio of the *condictio* was that when the object or the purpose of a performance had failed, this indicated the absence of a *causa retinendi*. When payment of a debt which was not owing was made, the object of the performance, namely payment, necessarily failed. Since the object would fail both when the payment was made in error of law and when it was made in error of fact, it is not surprising to find that classical law did not distinguish between payments made in error of law or in error of fact.

In Justinian law, however, the basis of the *condictio* was disregarded and the rule *error iuris nocet* was also made applicable to the *condictio indebiti* (under the influence of an Aristotelian principle which was developed for entirely different purposes).

In the subsequent development we find that the medieval jurists adopted a view which corresponded with that of the classical law, while on the other hand the French humanists adopted the Justinian view. Roman-Dutch authors who were influenced by the medieval tradition naturally adopted the view that error of law was not a bar to the *condictio indebiti*. Those influenced by the humanists adopted the opposite view.

If the court in *Rooth v The State* had adopted the historical method it might obviously have been swayed by the fact that the view of those who bar the *condictio* if error of law is present, was essentially based on an inappropriate application of the Aristotelian principle, an application which did not take account of the true basis of the *condictio indebiti*. Had it further regarded only Roman-Dutch writers as authoritative, it would have found (although the position in Roman-Dutch law is unclear as well) that the majority see it as no bar to the *condictio*.

It is therefore clear that it is of cardinal importance whether the court adopts a wide or narrow view of "Roman-Dutch" law, because it may materially influence the conclusion reached by the court.

It remains to be seen along which path the courts will continue. There are indications of a new awareness of the historical method among judges. In this respect the erudite judgment of Joubert JA in *Braun v Blann and Botha*[45] on the law of trusts is an excellent example.

Until the practice settles one way or another, the fact that the term "Roman-Dutch law" may be construed widely or narrowly will continue to add a further dimension of uncertainty to the concept "common law."

4 CONCLUSION

Lastly then, what is the implication of the non-static character of the common law for the legal system as a whole?

MacCormick[46] argues that it is a shared thesis between positivistic and natural law schools of thought

> "that all legal systems have criteria, (sustained by 'acceptance' in the society whose system it is) satisfaction of which is at least presumptively sufficient for the existence of a rule as a 'valid rule' of that system."

45 *Supra*. See too Rumpff 1978 *TSAR* 87 105.
46 *op cit* 62.

This he calls the "validity thesis."

The "validity thesis" supposes that law comprises a valid set of rules regulating conduct, which rules must satisfy the requirements of consistency and coherence.

Judicial reasoning is therefore limited by these two requirements of consistency and coherence. That means that if a particular ruling appeals to a judge on consequentialist grounds he can adopt it only if by doing so he does not transgress the "fundamental judicial commandment: Thou shalt not controvert established and binding rules of law."[47] (Of course the device of distinguishing precedent allows some leeway in this respect, but it has obvious limits.) He can, furthermore, adopt it only if it accords with existing established principles within the legal system as a whole.[48]

Now in South Africa judges generally have, I venture to say, sufficient regard for the requirements of consistency and coherence. But the fact that two systems of law fulfil the role of "common law" (without having exclusive spheres of operation) poses the constant threat that a well-established principle of law emanating from one of those systems (English law) may be abrogated if recourse is had to the device of stating that it does not accord with Roman-Dutch law and since the court is bound by the common law it has to apply it. This was the device resorted to in the *Magna Alloys* case. The court in this case, as we have seen, preferred the principle of sanctity of contract to that of freedom of trade. Since the last principle (freedom of trade) had always been preferred by the courts, it was obliged to find, in the nature of the limits placed on judicial development of the law, "incontrovertible reasons" to overthrow such an established principle. Invoking the notion of sanctity of contract would, I submit, not have been enough to supply this "incontrovertible reason." But Roman-Dutch law (and ironically, as Schoombee[49] points out, a flawed version of Roman-Dutch law) could be invoked to supply this reason.

This was possible only because the theoretical model of the sources of our law recognises only Roman-Dutch law as the common law. Had it been recognised that English law had been established at least partially as the common law in this area, it would obviously have been much more difficult to recognise this new principle.[50] Conversely, because English law in fact operates as a common law in certain areas, it is also possible to controvert established principles of Roman-Dutch law by resorting to the device of stating that English law has been received into our law in a particular respect. This was the device resorted to in the *Pakendorf* case,[51] with grave consequences for the freedom of the press.

The fact that the sources model does not adequately define the legitimate spheres of operation of the two competing systems obviously subverts the requirement of consistency to a great degree. Furthermore, the effect of the dichotomous approach to the concept of "Roman-Dutch law" on the requirement of consistency is, I think, also patently clear, seeing that completely opposite

47 *op cit* 195 *et seq* and 106–107.
48 *op cit* 107 *et seq*. See, too, in general, chapters VII and VIII.
49 See the article quoted in n 39 above.
50 This does not mean that this particular new rule is necessarily objectionable. Only the means of achieving it is objectionable.
51 where the decision relied upon by Rumpff CJ as establishing the principle of strict liability of the press, did not in fact support this contention: Burchell *op cit* 186 *et seq*.

principles may be justified by "Roman-Dutch law," depending on whether a wide or a narrow approach to this concept is taken.

Not only the requirement of consistency, but also the requirement of coherence is affected by the inadequate sources model. Again, because English law operates as a common law (and, in certain areas, it has become established practice to quote English decisions without justification) it has become possible seemingly to justify a decision in terms of the applicable residual law by quoting English law, while English law might not in fact be the residual law in that instance. This makes it possible for principles such as those embodied in an Anton Piller order to be imported while, at least according to some judges, they are completely unacceptable within the framework of South African law.

To summarise then: The concept of "common law" in South Africa is uncertain because two systems of law, English law and Roman-Dutch law, compete for the position of common law. Each has established spheres of operation, but there is always the possibility that the English law may claim operation in an area where Roman-Dutch law is the established system or *vice versa*. This possibility is even greater in those areas of the law where neither the one nor the other is firmly established as the "common law." Added to this is the fact that the concept of "English law" in this context is a peculiar mixture of current, developing English law and English law (sometimes modified) of the past. On top of this, the concept of "Roman-Dutch law" has no fixed meaning.

The inadequate sources model leaves the tempting possibility that judges may "pick and choose" between these different possibilities – and this threatens the fine balance between judicial development of the law and judicial legislation.

Daedalus was eventually trapped in the very maze that he designed. We need to draw a new map, a new theoretical model of sources, to cater for the practical realities of South African law, lest we too become lost in a maze of our own making.

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Conflict of the *locus regit actum* rule and the *lex causae*

Erwin Spiro
LLB Dr Juris Utriusque LLD (hc)
Advocate of the Supreme Court of South Africa,
Kammergerichtsanwalt

OPSOMMING

Botsing tussen die Locus Regit Actum-Reël en die Lex Causae

In hierdie artikel word 'n botsing van die *locus regit actum*-stelsel en die *lex causae* ten opsigte van kontrakte en veral van huweliksvoorwaardes ondersoek. Volgens *Ex parte Spinazze* 1985 3 SA 650 (A) doen nie-nakoming van die gebiedende formaliteite ten aansien van die plek van verrigting nie afbreuk aan afdwingbaarheid onder die *lex causae* (*proper law*) nie. Hierdie beslissing is nie regstreeks op enige *favor validitatis* of soortgelyke regsbeginsel gebaseer nie, maar klem word gelê op die regsvergelykende metode, 'n benadering wat geregverdig is in die lig van die gebrek aan eensgesindheid onder die ou skrywers.

1 INTRODUCTION

This article proposes to deal with the influence of the *locus regit actum* rule and the *lex causae* on each other in questions of form. In order to prepare the ground for the enquiry, some general principles will first be discussed.

First, the fact that a stipulation is valid in the law of one country and invalid in that of another may be of importance[1] – I would add, provided that the stipulation has some connection with either country.

Further, the parties cannot be presumed to have contemplated a law which would defeat their engagements[2] – an application of the maxim *ut res magis valeat quam pereat*[3] or rather *ut res in tuto sit*.[4]

1 Anton *Private International Law* (1967) 195 referring to *P & O Steam Navigation Co v Shand* (1865) 3 MooPC (NS) 272 291–292; *Re Missouri Steamship Co* (1889) 42 CHD 321; *Hamlyn & Co v Talisker Distillery* (1894) 21 R (HL) 21; *NV Handel My J Smits Import-Export v English Exporters (London)* (1955) 2 Lloyd's Rep 317.

2 *Pritchard v Norton* 106 US 104 137 (1882) (Louisiana, referring to 4 Phillimore *International Law* par DCLIV 470–471).

3 *D* 45 1 (*De Verborum Obligationibus*) 80, originally apparently confined to the interpretation of (ambiguous) oral agreements, but applied to documents e g in *Rheeder v Kruger* 1972 3 SA 912 (O) per Smuts J 916D.

4 See Wolff *Private International Law* (1950) par 28.

And, most of all, in the words of Corbin *On Contracts*,[5] if a court is convinced that the contract was made as alleged and that there has been no fraud or perjury, it has no sympathy for a party whose only excuse for repudiation is lack of a statutory formality.

In this connection Rabel[6] speaks of the law most favourable to the (validity of the) contract, and Ehrenzweig refers similarily to the rule of validation (*lex validitatis*)[7] and to a presumption of validity.[8] To Scoles and Hay[9] the decision in *Pritchard v Norton*[2] shows the court's concern to protect the expectations of the parties.

Whatever one calls the various rules or principles – if they are such at all – they clearly have a common trend: to maintain the validity of an act (contract) if there is any chance to do so. This is, in my view, a sound trend. It is a modern trend, too. As I showed elsewhere,[10] since the international conference at the Hague there is now legislation in many countries making it practically impossible for a will to be formally invalid as far as the conflict of laws is concerned. This is an example worthy to be followed within the four corners of the possible.

2 (ANTENUPTIAL) CONTRACTS

The appellate division of the supreme court of the Republic of South Africa was recently[11] seized with the problem in connection with an antenuptial contract. Shortly before their marriage in Italy on 1956–05–05, the spouses had entered into an antenuptial contract in writing, signed before, and attested by the British vice-consul in Turin and in the presence of two witnesses. On the expert evidence on Italian law, placed on record by way of affidavits, the court was satisfied that at the time it was entered into the antenuptial contract failed to comply with its formal requirements in the law of Italy – where the contract had been entered into – and was – according to Italian law – null and void *ab initio* and of no force or effect, either *inter partes* or against third parties.[12]

It now becomes necessary to enquire into the contents and effect of the law of South Africa, which is where the husband was domiciled at the time of the marriage. As in Roman-Dutch, so in South African law, an antenuptial contract does not require any form, although in later Roman-Dutch law as in the law of

5 par 293, referred to by Ehrenzweig *Treatise on the Conflict of Laws* (1962) par 177 and Lando "On the Form of Contracts and the Conflict of Laws" in *Law and International Trade* (1973) 253 et seq 256 n 15.

6 *Conflict of Laws* 2 (1947) 474 *et seq.*

7 *op cit* 465 *et seq.* See also Ehrenzweig and Jayme *Private International Law* (1977) 17.

8 Ehrenzweig and Jayme *op cit* 16.

9 *Conflict of Laws* (1982) 654.

10 Spiro *General Principles of the Conflict of Laws* (1982) 63 n 26.

11 *Ex parte Spinazze* 1985 3 SA 650 (A), per Corbett JA, Cillié JA, Hoexter JA, Hefer JA and Vivier AJA concurring, hereinafter referred to as *Spinazze*'s case.

12 *Spinazze*'s case 655H–656A. As may be added, in terms of art 26(1) of the *Disposizioni sulla legge in generale* of the *Codice Civile* of 1943–03–13 (subject, however, to the provision of art 26(2) *ibid*, dealing with certain instances of *lex rei sitae*), the form of an act is governed by the *lex loci actus* or the law to which the contents of the act are subject or the law of the common nationality of the contracting parties. See Ballarino *Diritto Internazionale Privato* (1982) 682 *et seq* and 740 and on the *favor validitatis* (*ut res magis valeat quam pereat*) – in a rather negative sense – (685) though this goes against the "traditional" interpretation.

South Africa an unregistered antenuptial contract was valid and effective only as between the parties thereto.[13]

Next, what are the applicable conflicts rules in South Africa?

Huber is an advocate of a rigid and imperative rule that, in general, the formal validity of a transaction or act, including a contract, stands or falls by whether it complies with the law of the place of execution, in the case of a contract the *lex loci contractus*: if it does, it is formally valid everywhere (positive aspect); if it does not, it is formally invalid everywhere (negative aspect).[14]

Other writers, particularly Rodenburg, J Voet, Arntzenius and Van der Keessel, adopted a less rigid, and what has been described as a "facultative" approach, namely that in certain instances formal validity could alternatively be tested by another system of law connected with the transaction or act in question.[15] The reference to the Roman-Dutch writers showed, in the view of Corbett JA, that there was a movement away from a strict adherence under all circumstances to the *locus regit actum* rule in the sphere of the formal validity of juristic acts, including contracts and the particular species of contract, namely antenuptial contracts, and towards a more facultative approach, which in certain circumstances permitted formal validity to be tested, in the alternative, by another relevant system of law.[16] In a few South African cases the positive aspect of the *locus regit actum* rule was accepted in respect of antenuptial contracts,[17] but there was no decision holding that, where the formal validity of a foreign antenuptial contract was in issue in a South African court, only the *lex loci contractus* may be looked to.[18] Corbett JA then continued:

> "Having regard to the state of common law, I am of the opinion that it is open to this court to decide whether an imperative or facultative approach should be adopted to the rule of our law to the effect that the formal validity of an antenuptial contract should be determined by reference to the *lex loci contractus*; and, if the latter [i e the facultative] be the proper approach, what alternative system, or systems, of law may be looked to when formal validity is in issue. In pursuing this enquiry, it will be instructive to see what the modern thinking on this topic is in other Western jurisdictions."[19]

The judge then referred to the following Western legal systems: the Netherlands (facultative approach);[20] England[21] (where the decision in *Van Grutten v Digby*[22] has been generally interpreted as an application of the proper law of the contract to the question of the formal validity of a marriage settlement[23] and where the formal validity of contracts in general is governed by the law of the country where the contract is made or by the proper law of the contract);[24] Scotland (whose law in this respect is basically the same[25] as that of England); Canada (according to Castel the formalities of a marriage contract depend on the *lex*

13 *Spinazze*'s case 656D.
14 660D and see also Kosters-Dubbink *Nederlands Internationaal Privaatrecht* (1962) 448–449.
15 *Spinazze*'s case 660E–661D.
16 661E.
17 661F-G.
18 661G-H, also referring to (Kahn in) Hahlo *Law of Husband and Wife* (1975) 632.
19 *Spinazze*'s case 661H-I.
20 661–662.
21 662–663.
22 (1862) 31 Beav 561.
23 *Spinazze*'s case 663C.
24 663E-G.
25 663G–H.

contractus or its proper law, the rule being permissive,[26] the proper law also protecting the reasonable expectations of the parties);[27] Australia (compliance with formalities of either the *lex loci contractus* or alternatively the proper law being sufficient);[28] United States of America (proper law applying, but compliance with the requirements of the *lex loci contractus* "usually" being acceptable,[29] although American case-law is not as clear-cut);[30] France (either *lex loci contractus* or proper law);[31] Belgium (like France[32] and West Germany[33] proper law, but compliance with the formal requirements of the *lex loci contractus* sufficing, matters of marital property generally being governed by the husband's national law at the time of marriage).[34]

The judge then continued:

> "Having regard to the aforegoing, I am of the opinion that modern South African law should adopt a facultative approach to the well-entrenched rule that an antenuptial contract executed in accordance with the forms required by the *lex loci contractus* is formally valid, and hold that a contract which alternatively complies as to form with the *lex causae* or proper law, is formally valid, even though it may not comply with the formal requirements of the *lex loci contractus*. Such an approach would maintain in South Africa a conformity to modern jurisprudential trends in the Western World in this sphere of private international law. It also has the advantage that the reasonable expectations of the parties would not be defeated by the fact that, possibly fortuitously, the antenuptial contract was executed in a country which was in other respects unconnected with the transaction."[35]

What, then, was the proper law or *lex causae* of the antenuptial contract in issue? The answer Corbett JA gave was: "unquestionably South African law."[36] He did not refer to any general principle,[37] but emphasised the following facts. The contract was in South African form, entered into in order to avoid a matrimonial property régime (namely community of property) which obtained in South Africa at the time, but not in Italy; at the time when the contract was executed the husband was domiciled and resident in South Africa as the parties also obviously intended South Africa to be their matrimonial home and the country where the contract was to operate. These were, in the view of the judge, factors which could be taken either as indicating a tacit choice of South African law or, at any rate, as showing that South African law was the system with which the contract had its closest and most real connection.[38]

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26 664B.
27 664A.
28 664C.
29 664D–E, referring to the second restatement, the number of the paragraph being 199.
30 *Spinazze*'s case 664F. See also Scoles and Hay *op cit* 805 n 13.
31 *Spinazze*'s case 664H.
32 664I.
33 *ibid.*
34 665 *in principio*, but the judgment of the constitution court of 1983–02–22 declared this provision null and void as violating the principle of the equality of the sexes (1 Bvl 17/81 published in the *Federal Gazette* I 525).
35 *Spinazze*'s case 665A–C.
36 665E.
37 Referring to the prevailing view in England, viz that the law intended is presumed, in the absence of express or implied choice by the parties to the contrary, to be the law of the husband's domicile at the time of the marriage, Kahn in Hahlo *op cit* 635 anticipates that this rule, giving full expression to the intention of the parties and thus to the underlying basis of the Roman-Dutch principle, will be followed by the courts of South Africa.
38 *Spinazze*'s case 665G–H.

Consequently, adopting the facultative approach, the judge held that the antenuptial contract before the court was not vitiated by reason of the fact that it did not comply, when executed, with the imperative formal requirements of Italian law, while its formal validity might alternatively be adjudged by the *lex causae*. The court *a quo* was, therefore, correct in refusing to make an order declaring that the marriage which formerly subsisted between the wife and her deceased husband was one in community.[39]

It was not necessary in the case to determine what qualifications, if any, should be attached to the general rule.[40]

Further, in the decided case the *lex causae* (South African law) coincided with the *lex fori*, it therefore being unnecessary to enquire into the question whether the *lex causae* did not violate the distinctive policy of the forum.[41]

3 CONTRACTS OTHER THAN ANTENUPTIAL CONTRACTS

Spinazze's case had to give a decision on an antenuptial contract. It was therefore not necessary for the court to apply itself to other contracts or contracts in general, as indeed the court refused to do. But the court did not fail to express the view that the survey made by it indicated the desirability of adopting the same approach in regard to the formal execution of contracts generally.[42]

4 CONCLUSION

4 1 *Ratio decidendi*

An antenuptial contract which did not comply, when executed, with the imperative formal requirements of the *lex loci contractus*, is nevertheless formally valid if it is so under the *lex causae* (proper law).[43] The basis of the decision in *Spinazze*'s case was not directly any *favor validitatis* or similar consideration, but a proper regard to comparative law,[44] this being a remedy open to the court if there is no solution under the common law.[45]

4 2 *Dicta*

The *lex causae* (proper law) of an antenuptial contract is the system of law chosen by the parties or that with which it had its closest and most real connection.[46]

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39 665H–I.
40 665E.
41 Spiro 1984 *CILSA* 197 *et seq* 208.
42 665D–E.
43 665H–I.
44 661H–I 665A–C.
45 661H–I.
46 665G–H and Spiro 1984 *THRHR* 140 *et seq* 146 148 155.

Locus regit actum

AB EDWARDS
BA LLB PhD
Professor of Law, University of South Africa

OPSOMMING

Locus Regit Actum

Die appèlhof-beslissing in *Ex Parte Spinazze* 1985 3 SA 650(A) beklemtoon sekere fundamentele geskilpunte in die Suid-Afrikaanse internasionale privaatreg. Bondig gestel, moes die appèlhof in hierdie geval beslis of 'n huweliksvoorwaardeskontrak gesluit buite die Republiek van Suid-Afrika aan die formele geldigheidsvereistes voldoen; ten einde dit te bepaal, moes 'n herformulering van die Suid-Afrikaanse regskeusereël (aanduidende reël) geskied. Op grond van deskundige getuienis aangebied by wyse van beëdigde verklarings het die hof aanvaar dat die Italiaanse reg, naamlik die reg van die plek van verlyding, 'n informele huweliksvoorwaardeskontrak aangegaan in stryd met die *locus actus* nie erken nie.

Appèlregter Corbett kom tot die gevolgtrekking dat daar eensgesindheid was onder die ou skrywers, byvoorbeeld Rodenburg, Voet *père et fils*, Arntzenius en Van der Keessel, in die onderskrywing van die fakultatiewe benadering ten opsigte van die *locus regit actum*-leerstuk (659C–661E). Met ander woorde, die formele geldigheid van 'n huweliksvoorwaardeskontrak kan getoets word deur "another relevant system of law" (661F) bo en behalwe die *lex loci actus*. Slegs Huber verskil hiermee (660D). In sy poging om die Suid-Afrikaanse regskeusereël te herformuleer met betrekking tot vreemde huweliksvoorwaardeskontrakte, verklaar die regter dat 'n fakultatiewe benadering ten opsigte van die *locus regit actum*-leerstuk in ooreenstemming is met die benadering wat deur moderne Westerse regstelsels voorgestaan word (661J–665D).

Die skrywer ontleed die drie hoofprobleemareas in die Suid-Afrikaanse internasionale privaatreg teen die agtergrond van *Spinazze*, naamlik die bewys van vreemde reg in Suid-Afrikaanse en oorsese howe; die vasstelling van die regskeusereëls deur te steun op die ou skrywers; en die rol van die vergelykende metodiek ten einde die *lacunae* te vul wat in die Suid-Afrikaanse internasionale privaatreg bestaan.

Wat die eerste vraagstuk betref, kritiseer die skrywer die voortdurende aanwending van die sogenaamde "feiteleerstuk" deur die howe, wat uit die Engelse praktyk oorgeneem is. Hy stel ondersoek in na sekere veranderinge wat alreeds plaasgevind het in 'n poging om die sogenaamde "feite-leerstuk" die nek in te slaan met spesifieke verwysing na die Verenigde State van Amerika ingevolge die federale reël van siviele prosedure 44 1.

Die skrywer staan die ou skrywers se *communis opinio* ten aansien van die konflikvraagstukke voor, byvoorbeeld *locus regit actum*, maar wys daarop dat sekere van hierdie idees met omsigtigheid benader moet word in die lig van die hedendaagse sosio-politieke milieu. Daar is beslis 'n behoefte aan 'n herformulering van ons konfliktereg; miskien selfs 'n kodifikasie. Ten slotte doen die skrywer *de lege ferenda* aan die hand dat die *lacunae* in die Suid-Afrikaanse internasionale privaatreg aangevul word met beklemtoning van die "objects of comparison."

1 INTRODUCTORY

Some fundamental issues in the conflict of laws were raised by the decision of Esselen J in *Ex parte Spinazze*,[1] and, later on appeal,[2] by the decision of Corbett JA.[3] In the course of their judgments reference was made, albeit cursorily, and, on occasion, even obliquely, to such issues as: the proof of foreign law in South African courts; the role of the old authorities in South African conflicts law; the use of comparative methodology in the development of South African conflicts law; the role of the judiciary in the exposition of South African private international law; and, in the finest of glancing allusions, the *renvoi* doctrine.

At present private international law does not enjoy nearly enough exposure as a field of taught law in our law faculties. The appearance then in the law reports of *Spinazze*, both *a quo* and on appeal, is surely a windfall not to be missed by the law teacher.

In reviewing the judgments of both the court of first instance and of appeal, as seen as *one* process, I shall not follow the strict order of things as reported in the *South African Law Reports* but, instead, I shall attempt to achieve greater clarity by an exposition which takes into account the theoretical underpinnings of our subject. In brief, it is necessary to expound the relevant private international-law issues in a logically coherent way, and when appraising the judgments it will be necessary, now and again, to make articulate the inarticulate.

1 1 The Material Facts of Spinazze

Pietro and Antonia Spinazze married each other in Italy in 1957. At the time of the marriage Mr Spinazze was domiciled and resident in Johannesburg, Transvaal. Immediately prior to the marriage the couple had concluded an antenuptial contract in writing. It appeared that the contract was executed upon a standard printed form of the type then available in South Africa. Their signatures were witnessed by two persons and the agreement was attested by the British vice-consul in Turin, Italy. Some three months after the wedding the spouses returned to Johannesburg and the antenuptial contract was duly registered by the registrar of deeds, Pretoria.

On the demise of Mr Spinazze, and upon the ensuing winding-up of his estate, the validity and force of the antenuptial contract, executed outside South Africa, was put in issue (in an application for a declaratory order) because, it was alleged, it had not been executed according to the relevant provisions of the Deeds Registries Act.[4]

Both the court *a quo* and the appellate division found that the written antenuptial contract was formally defective and, in terms of the statutory rule, invalid as against third parties.[5] It was held, however, that an informal agreement existed between the spouses and, as such, bound them to an "out of community" proprietary régime.

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1 1983 4 SA 751 (T).
2 1985 3 SA 650 (A).
3 concurred in by Cillié, Hoexter, Hefer JJA, and Vivier AJA.
4 ss 86 and 87(2) Act 47 of 1937 (as amended). See *infra*.
5 *Spinazze* (1) 757B; *Spinazze* (2) 657J 665I.

The dismissal of the appeal brought by the executors of the deceased estate against the judgment of Esselen J in the court *a quo* meant, in essence, that –

1 the marriage which formerly subsisted between Mr and Mrs Spinazze was, as between them and their estates, *out* of community;

2 with regard to third parties their martimonial-property régime was to be regarded as having been *in* community of property.[6]

The upshot of this was that the dutiable amount payable in this "very substantial estate"[7] would now be considerably less than it would have been had the contract been binding against the commissioner of inland revenue as a third party.

2 STATUTORY REQUIREMENTS: ANTENUPTIAL CONTRACTS EXECUTED OUTSIDE SOUTH AFRICA

The provisions of the Deeds Registries Act[8] (as they existed in 1957) and which were in issue in *Spinazze* are as follows:

> "*Section 86 Antenuptial contracts to be registered*:
> An antenuptial contract executed before and not registered at the commencement of this Act or executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section *eighty-seven*, and unless so registered shall be of no force or effect as against any person who is not a party thereto."
>
> "*Section 87 Manner and time of registration of antenuptial contracts*:
> 1 ...
> 2 An antenuptial contract executed outside the Union shall not be registered unless it has been attested by a notary public or has been otherwise entered into in accordance with the law of the place of execution and unless it has been tendered for registration in a deeds registry within six months after the date of its execution or the commencement of this Act, whichever may be the later date, or within such extended period as the court may on application allow."
>
> "*Section 102 Definitions*:
> '[N]otary public'
> means ... in relation to any document executed outside the Union, a person practising as such in the place where the document is executed ..."

If the material facts are considered and the matter is viewed through the eyes of the *lex fori* it is clear that the requirements for a "foreign"[9] antenuptial contract having force against third parties are, tersely put:

1 execution

a attestation by a notary public

or

b otherwise entered into in accordance with the law of the place of execution (*lex loci actus*)

and

2 registration

in a South African deeds registry.

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6 *Spinazze* (2) 665I 666B.
7 654D.
8 47 of 1937.
9 This terminology is borrowed from Corbett JA in *Spinazze* (2) 658E.

Now it appears that the abovementioned statutory package contains both a *particular* and a *general* conflicts rule. Conflicts rules[10] are indicative or selective[11] in that they point to the specific legal system (*lex causae*) which should be applied to the cause of action.

The reference to a "notary public" in section 87(2) is to a particular conflicts rule since it indicates, when section 102 is taken into account, what the South African legislator (and thereafter the judge when he applies the legal norm) will regard as the *equivalent* of the South African notary public. The reference to the "law of the place of execution" is, of course, a general conflicts rule;[12] for it does no more than indicate the legal system applicable to the issue (the dispositive rule in Lederman's parlance)[13] and its very generality indicates that it is applicable *wherever* the antenuptial contract may have been executed.

3 THE SELECTION, PROOF, AND APPLICATION OF FOREIGN LAW

In the first part of the case under review it was noted that the selection of the appropriate foreign *lex causae* presented no difficulty since the relevant conflicts rule had been statutorily defined. But the matter does not rest here, for in a case involving a foreign element the appellate division has indicated[14] that once the foreign law decisive of the issue has been selected, the full scope of this law (the *lex causae*) must be heeded. That is to say, the matter cannot be approached from the narrow confines of the South African domestic law, but, instead, the operation of the applicable foreign rule(s) must be seen in the context of the foreign legal system as a whole and completely freed, too, from the prejudgments of one viewing the matter through the eyes of the domestic law alone.

Should the above submission be unfounded then there would be little point in our legislature referring to foreign legal régimes for decision on such matters as the formal requirements for testaments, contracts, and marriages executed or performed outside the Republic of South Africa.

It is precisely here that the demands of practice manifest themselves. For how sure can we be that the foreign law, correctly enunciated, is immediately available for application in cases such as the one under review?

3 1 The Theory of the Factual Nature of Foreign Law

The way in which parties bring foreign law to the attention of courts in South Africa must now be considered. South African practice adheres to the so-called "fact doctrine."[15] This doctrine is the offspring of the law and practice of England. It has been said often enough that the South African legal system is a hybrid

10 i e choice-of-law rules in the conflict of laws of a particular law district. Such a rule does no more than define the legal system applicable to the issue.

11 On this terminology, see further Lederman "Classification in Private International Law" 1951 *Canadian Bar Rev* 3.

12 On particular and general conflicts rules, see further Morris "The Choice of Law Clause in Statutes" 1946 *LQR* 170; Lipstein 1972 *Hague Recueil* 135 I 204; Mann "Statutes and the Conflict of Laws" 1972–3 *BYIL* 117.

13 *supra* n 11.

14 *Sperling v Sperling* 1975 3 SA 707 (A) per Corbett JA 716–723.

15 See, generally, Sass "Foreign Law in Civil Litigation" 1968 *Am Jour Comp L* 335 *et seq*; Zajtay *International Encyclopedia of Comparative Law* (1972) vol 3 ch 14 par 5.

or "mixed" one.[16] One striking example of this amalgam of Roman-Dutch law (broadly defined)[17] and English law is reflected in the *modus operandi* adopted by our courts in the application of foreign law. For, as in England, proof of foreign law and its contents is taken to be a question of fact. This means that a knowledge of foreign law cannot be imputed to judges, and that they do not inquire *sua sponte* into foreign law. In the instant case, then, what the law of Italy happens to be on a particular point is a question of fact of which our courts cannot take judicial cognisance, even though such law has already been proved before it in another case. Hence the party relying on foreign law must prove it as other facts are proved, by appropriate evidence, namely, the evidence of experts.[18]

3 2 Mode of Proof: Expert Evidence[19]

There is no precise answer to the question: who is an expert witness? The question has been considered by our courts in a number of cases, and likewise by English courts which have also taken the view that the foreign law can be proved only by the *peritus virtute officii*. In a span of some 160 years courts in the Anglo-South African sphere have regarded a wide variety of persons as typifying the *peritus*. For example:

- "a learned professor;"[20]
- "gentlemen resident in Pretoria who hold Dutch degrees and have studied at Dutch universities;"[21]
- "a reader in Roman-Dutch law for the Council of Legal Education; although he had not been in practice where that legal system prevailed;"[22]
- "a doctor of law who had been called to the bars of England, Madrid and three Spanish-speaking countries in South America;"[23]
- "someone who practises the profession of law in the country with regard to which the question is raised;"[24]
- "an advocate practising in South Africa and with a qualification in the legal system in contention."[25]

Yet, it should be noted, negatively framed, that a "consul's evidence of the law of the country he represents is *not* in itself conclusive evidence of the foreign law."[26]

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16 See Hahlo & Kahn *The South African Legal System and its Background* (1968) 575 *et seq*; Hosten *et al Introduction to South African Law and Legal Theory* (rev rep 1980) 871; David & Brierley *Major Legal Systems in the World Today* (1968) par 55.

17 Cf Hosten *et al op cit* 215.

18 See *Schlesinger v Commissioner for Inland Revenue* 1964 3 SA 389 (A) 396; Kahn "Proving the Laws of Our Friends and Neighbours" 1965 *SALJ* 133; Schmidt *Bewysreg* (1982) 203 *et seq*.

19 See later.

20 *Dalrymple v Dalrymple* (1811) 2 Hag Con 54.

21 *Hulscher v Voorschotkas voor Zuid-Afrika* 1908 TS 542 548–9.

22 *Brailey v Rhodesia Consolidated Ltd* [1910] 2 Ch 95 102–3.

23 *Bradford v Bradford & McLeod* [1918] P 140.

24 *Ep Hiddingh's Estate* 1940 CPD 121 123.

25 *Sperling*'s case 713.

26 *Levy v Levy* 1904 18 EDL 164. My emphasis.

In my opinion academic knowledge alone is insufficient; the lawyer *qua peritus* should have practical knowledge of the legal system in question.[27] It should be observed that, according to the accepted practice, although the court does not *suo motu* look into foreign law, once a *peritus* tenders a copy of a foreign statute, or decision of a foreign court, or refers to a textbook, then such material becomes part of the evidence and the court is free to peruse it. The uncontroverted testimony of the *peritus* is not necessarily accepted by the court which remains free to cross-examine the *peritus* and, if need be, ultimately to form its own opinion of the foreign law in question.[28]

In the instant case, neither Esselen J nor Corbett JA elaborated on what the court deemed to be sufficient for the admission of a *peritus*. Esselen J accepted Messrs Sutej and Sanders as experts or exponents[29] of Italian law without further comment, and Corbett JA referred to the "expert evidence placed on record by way of affidavits."[30] Then again the *curator ad litem*, representing the deceased's minor children, is also reported as having conducted his own research into Italian law.[31] The disadvantages of introducing foreign law in this fashion will become apparent when we turn to a consideration of the *locus actus* in *Spinazze*.

3 3 Interpretation of the *locus actus*

It has been pointed out that private international law deals mainly with the problem of deciding "which of several simultaneously valid legal systems is applicable to a given set of facts."[32] In any assessment of this definition it should be borne in mind that both the spatial and temporal frames are equally important. Hence, when the statutory conflicts rule is applied, it is submitted that the court should look at the subject-matter before it in the context of the simultaneously valid legal systems as they existed in 1957.

In reconstructing the history of the antenuptial contract at least two important points are disclosed. First, the deceased and his intended spouse appeared before the British vice-consul who, in terms of his powers under United Kingdom statutory law[33] attested the agreement between the parties. On the execution of this notarial act, the British vice-consul's certification became probative of the facts certified. Secondly, it is trite law that the deceased and his spouse were

27 In England a person who is qualified to do so on account of his knowledge or experience is competent to give expert evidence of foreign law regardless of whether he has practised as a legal practitioner in the country in question: s 4(1) Civil Evidence Act 1972 20–21 Eliz 2 c 30.

28 See further *Cheshire and North's Private International Law* 10th ed (1979) 125 *et seq*.; *Dicey and Morris on the Conflict of Laws* 10th ed (1980) 1211 *et seq*; Kahn 1965 *SALJ* 133; Schmidt *supra* n 18 203 *et seq*; *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 294.

29 *Spinazze* (1) 754H 756F.

30 *Spinazze* (2) 655G.

31 *Spinazze* (1) 756H.

32 Wolff *Private International Law* 2nd ed (1950) 5.

33 Commissioners for Oaths Act 1889 52–53 Vict c 10 reads as follows: "6(1) Every British ambassador . . . and every British . . . vice-consul . . . exercising his functions in any foreign place, may, in that country or place . . . do any notarial act which any notary public can do within the United Kingdom and every . . . notarial act . . . done by or before any such person shall be as effectual as if . . . done by or before any lawful authority in any part of the United Kingdom."

subject to the laws of Italy while they remained within that sovereign state's territorial jurisdiction.

In both the court *a quo* and the appeal court it was common cause that the United Kingdom statute was not of application.[34] However, I believe the United Kingdom statute requires closer consideration in the ascertainment of the *locus actus*.

At the time when the agreement between the deceased and his intended spouse was attested by the British vice-consul it would appear that two potentially applicable legal systems were in contention: First, the law of the land, Italian law, which may be considered as being the *prima facie* applicable *lex loci actus* since the British vice-consul executed the notarial act on Italian soil, and second, the law of the United Kingdom as expressed in the aforementioned statute.

Before discussing the applicability of these competing laws, as at 1957-05-03, I should mention that the deceased's widow made a deposition in February 1982 in which she stated, *inter alia*, that her marriage to the deceased had been arranged through the post and that no mention had been made at that time about the matrimonial proprietary régime which was to apply subsequently. The deposition disclosed that she was merely "told" to accompany the deceased to the British Consulate where the antenuptial contract would be signed;[35] it did not say *why* the parties should have appeared before the British vice-consul in the first place. However, it is not necessary to speculate on their motives for so doing, save to notice that at that time (1957) domiciliaries of the Union of South Africa were in a special position with regard to vice-consuls of the United Kingdom, since it is common cause that at that time the Union of South Africa was a member of the so-called British commonwealth of nations. Evidence of the then current customs and usages may well show that Union domiciliaries, when sojourning in Italy, sought out the assistance of British functionaries when their South African equivalents were not available. It is not necessary to pursue this point, however, since in terms of the United Kingdom statute it would appear that a British vice-consul may perform any notarial act which any notary public can do within the United Kingdom, and with regard to all classes of persons before him; the performance of such an act is not done in respect of British nationals or "commonwealth citizens" alone.

In weighing up the competing claims of the Italian law against that of the United Kingdom statutory law to see which of the two *leges causae* qualifies as the "proper law" of the place of execution, it is my submission that the Italian law may have stood aside to enable the United Kingdom statute to have full rein within the Italian territorial area or *rechtskring*.

The authority for this submission does not lie in the fiction that the notarial act of the vice-consul is to be regarded as having taken place within the territory of the state which he represents, namely, the United Kingdom.[36] Instead, the authority is to be found in the usage which developed among the European nations from the 18th century onwards, and which became firmly established by the late 19th century. This usage relates to, *inter alia*, the granting by the receiving state of a privilege to the consular officials of the sending state to

34 *Spinazze* (2) 656C.
35 *Spinazze* (2) 654B.
36 Cf counsel for the appellant's submission, *Spinazze* (2) 651E.

perform certain functions without let or hindrance from the judicial and administrative authorities of the receiving state. In other words, besides their more usual consular functions in the commercial field, certain consular officers were enabled to attest signatures, administer oaths and conduct marriages in accordance with the legal system of the sending state.[37] The fact that Italian law is displaced by the United Kingdom statutory law does not mean that there has been a derogation from Italian sovereignty; it merely means that Italy, as the receiving state, recognises (by way of an exequatur) the privilege accorded to the consular officials of the sending state to execute notarial deeds, and the like.[38]

It is noteworthy that the consular convention between the United Kingdom and Italy came into operation some seven months after the Spinazzes had appeared before the British vice-consul.[39] In terms of the treaty between the two sovereign powers, many of the existing usages and practices relating to consuls were given concrete expression. For our purposes it may be noted that a consular officer was now permitted, *inter alia,* to

> "perform notarial acts, draw up and receive declarations, and legalise, authenticate or certify signatures or documents, or translate documents, in any case where these services are required by a person of any nationality for use in the sending state or under the law in force in the sending state . . ."[40]

Assuming for the moment that the abovementioned argument holds water and that in certain instances Italian law allows the United Kingdom statute full sway within its territorial domain; the court would still require the services of a *peritus* to inform it whether, in terms of English law, an antenuptial contract could be validly executed before a British vice-consul. It is clear from one of the leading books of reference[41] on the subject of the notarial functions of British vice-consuls that although great importance is attached to these functions, vice-consuls are "not made notaries public and there are certain important qualifications attaching to the peformance of their notarial functions . . . [and] their function is confined to notarial acts stricto sensu and does not extend to the drawing up of documents."[42] It would appear, too, that consuls, in terms of instructions issued by the Foreign Office, are advised to refer applicants to local notaries where contracts require notarisation. The fact remains, however, that it would not be correct to require that such a procedure be the equivalent of that performed in South Africa. To do so would mean that the disjunctive "or" in section 87(2) of the Act has been ignored. The legislator has obviously provided for the possibility that parties outside South Africa may have their agreement validly executed in a country which does not require the stringent notarisation of antenuptial contracts.

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37 On the development of this customary law in Europe, see Von Bar *The Theory and Practice of Private International Law* transl Gillespie 2nd ed (1892) 278–280.

38 See generally Brownlie *Principles of Public International Law* 2nd ed (1973) 347 *et seq*; O'Connell *International Law* 3rd ed (1970) vol 2 914 *et seq.*

39 Signed at Rome 1954-06-01, and in force on 1957-12-29. See further *UN Treaty Series* No 5798 Vol 403 276.

40 art 20(2) refers.

41 *A British Digest of International Law* (1965) vol 8 266.

42 *id* 267.

3 4 The *Renvoi* Doctrine

In deciding that Italian law was to be applied to determine the formal validity of the antenuptial contract, the court was, in effect, following the hallowed territorialist approach, namely, to allow the connecting factor (place of execution) to indicate the relevant country and then to apply its legal system (the *lex loci actus*) to resolve the issue. Clearly the court did not consider the possibility that another legal system may be simultaneously valid and applicable at the *locus actus*, and hence the role of English law was excluded.

When the court *a quo* turned to a consideration of the relevant provisions of Italian law it was in the lands of the *periti*. In accepting their rendition of Italian law Esselen J did not advert to the possibility of a *renvoi* situation.[43] The train of reasoning characteristic of the *renvoi* approach is brought into play once it is thought that a distinction may be drawn between the "internal" and the "whole law" of a law district. The internal or domestic law of a country, it is argued, is that which is applicable in the normal course of events to matters of a substantive-law nature. But once the forum refers, say, to the law of district B for the law to govern a dispute involving a foreign element and that reference is taken to include B's choice-of-law or conflicts rules, then the forum (A) has embarked on a consideration of the *renvoi* approach. The "whole law" of B, with the emphasis on its conflicts rules, may now call for the application of either A's or B's or even law district C's substantive law.[44]

In the interpretation of the thrust of section 87(2) of the Deeds Registries Act it appears to me that the meaning of the general conflicts rule contained therein suggests the avoidance of *renvoi*; for it is the substantive legal rules prevailing at the place of contracting which should be applied.[45] That there may be simultaneously valid substantive legal rules of another legal system applicable at that place has already been mooted, but it is quite another thing to suggest that Italian conflicts rules should also be consulted.

It is difficult to cite authority for the avoidance of *renvoi* in the circumstances of the instant case. Indeed, to my knowledge, there has only been one decision in Southern Africa touching on the *renvoi* doctrine, and it is of doubtful authority.[46] However, highly persuasive sources of authority do exist. For example, the English court of appeal has pointed out (in an *obiter dictum*) that "the principle of *renvoi* finds no place in the field of contract."[47] More recently, the EEC Convention on the Law Applicable to Contractual Obligations[48] has unequivocally excluded the *renvoi* approach. Courts, within the EEC are enjoined to interpret any reference to the law of a country, other than that in which they

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43 See Kahn 1983 *Annual Survey of SA Law* 503.

44 The terms generally employed in this description are a *Rückverweisung*; an agreement; or a *Weiterverweisung*, respectively. See further *Cheshire-North op cit* 60 *et seq*; *Dicey-Morris op cit* 64 *et seq*; Hosten *et al op cit* 858–860.

45 Cf Lerebours-Pigeonnière cited in Batiffol "Form and Capacity in International Contracts" *Lectures on the Conflict of Laws* (Ann Arbor 1951) 107.

46 *Ex parte Low in re Estate of Mangan* 1915 SR 147.

47 per Jenkins LJ *Re United Railways of Havana and Regla Warehouses Ltd* [1959] 1 All ER 214 (CA) 236.

48 Opened for signature in Rome on 19 June 1980. The text is published in the *Official Journal of the European Communities* (1980–10-09) *OJ* 1980 L 266/1.

sit, as being a reference to "the rules of law in force in that country other than its rules of private international law."[49]

When Corbett JA came to formulate his decision, which had as one of its concerns the application of Italian law *qua lex loci actus*, he excluded the possibility of a *renvoi* by referring specifically to Italian domestic law.[50] With all due respect, I can see no reason why the appellate division could not have mentioned the possibility of *renvoi* explicitly, and indicated why it was not of application under the circumstances of the instant case.[51]

3 5 The Application of Italian Law and its Upshot

Even though the court was advised, in terms of the Italian law prevailing in 1957, that "the antenuptial contract was null and void and of no force or effect, either *inter partes* or as against third parties,"[52] this did not conclude the matter; for although a conflicts rule may urge the application of foreign law, the local forum is not bound unconditionally to follow the legislation or court decisions of the foreign country. And it is precisely at this juncture that the court's knowledge of its own law can no longer be suppressed; for a rule of South African domestic law provides that an informal pre-marriage agreement is binding *inter partes* and against the universal successors of the parties.[53] The courts now turned to a consideration of this legal rule in its private international-law dimension.

4 THE VALIDITY OF A CONTRACT AS REGARDS FORM

A reconstruction of the judges' reasoning must now be attempted, making, as I have already mentioned, the inarticulate articulate.

First, the antenuptial contract was formally defective at its place of execution. In this case the requisite of form is more than merely a question of evidence; it directly affects the material validity of the contract.[54] In this regard the South African court's conception of the formal requisites, superintended by the notary public,[55] coincides in great measure with the role of the notary in the civil-law

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49 art 15.

50 *Spinazze* (2) 655F–G 659B.

51 I am aware of the late Mr Justice Steyn's admonition that judges are there to decide cases and not to give an exposition on the law for the benefit of academics (1967 *THRHR* 104). The fact is, however, that it is extremely difficult to develop a theory of conflicts law, as an expositional aid for students, if the highest court in the land does not answer questions which go to the heart of a conflicts methodology. I hope the judiciary will consider my comments as both "objective and well reasoned" Rabie CJ "Regbank en Akademie" 1983 *De Jure* 24.

52 *Spinazze* (2) 656B.

53 Esselen J was content to rely on two cases of the CPD (*Ex parte Anderson* 1964 2 SA 75 77B and *Ex parte Jacobson et Uxor* 1949 4 SA 360 364) in support of the rule, and cited with approval the enunciation of the rule by Hahlo in *The South African Law of Husband and Wife* 4th ed 262-3. (*Spinazze* (1) 754C–E.) Corbett JA, however, gave a full description of the development of antenuptial contracts in Holland, and, in turn, confirmed beyond all doubt that the rule is part of the South African common law (*Spinazze* (2) 656D–657B).

54 If this were not so, the traditional substance-procedure dichotomy would be relevant here. The concomitant doctrine has a history which antedates Bartolus (1314–1357), and it means, in practical terms, that the *lex fori* governs the production of evidence, and so on. See further *Cheshire-North op cit* 692 *et seq.*

55 *Spinazze* 657D–658A.

countries.[56] The notarisation of the contract is not just a matter of certification of signatures, but is regarded as a public act where a highly qualified lawyer gives advice to both parties before drawing up the document; where "the presumption is that every statement contained in a notarial deed is true, and that all proper solemnities have been observed by the notary."[57] And what is more, the formally defective contract cannot be cured by registration in the deeds registry.[58]

Secondly, having determined from the facts that the informal agreement was concluded outside South Africa, the court had to determine from the principles of private international law what law governs the material validity of this agreement. As long as the South African forum subscribes to the fundamentals of private international law it cannot apply its own law without further ado. It must first rule out the possibility that the legal régime at the place of contracting is decisive in determining the material validity of the parties' purported pre-marriage agreement.

Thirdly, since statutory law derogates as little as possible from the common law, and as the statutory conflicts rule applies, in this case, only to contracts executed outside South Africa and explicity in respect of third parties, the court, must, in effect, set about formulating a choice-of-law rule which will indicate what legal system is to be applied to determine the validity of an informal antenuptial contract. Once it had been apprised of the fact that Italian law would invalidate an informal antenuptial contract even *inter partes*, the court should surely have contemplated the possibility of an alternative to the conflicts rule: *locus regit actum*. For if one takes a realistic view of the circumstances surrounding the creation of the purported pre-marriage agreement there are indeed several factors, associated with the mutual intention of the parties, which would incline the court towards the possibility of testing the validity of that agreement by the law with which it is most closely connected, which in this case is the *lex fori*. First of all, the parties, having struck their bargain in Italy in 1957, were of a mind to return to Johannesburg and settle there permanently; in which case the *locus solutionis* of their purported antenuptial contract would be within the jurisdiction of a South African court. Furthermore the parties wished to depart from the "in-community-of-property" régime which, at that time and in the absence of a valid antenuptial contract to the contrary, would have ensued *ex lege* in South Africa.[59]

There can be little doubt that the deceased, by tendering the purported antenuptial contract for registration at the Deeds Office, Pretoria, assumed that a valid pre-marriage agreement had been constituted. He surely intended "to give notice to the world of, and to bind creditors to give effect to" a matrimonial régime of separate estates.[60] In the light of the widow's subsequent deposition, it would appear that the legal basis of the informal pre-marriage agreement was put in question. Indeed, counsel for the appellant denied the existence of an

56 See further Ehrenzweig and Jayme *Private International Law* (1977) vol 3 51–52; Zweigert and Kötz *An Introduction to Comparative Law* (1977) vol 2 39 *et seq.*
57 per Solomon J in *Transvaal Land Co v Registrar of Deeds* 1909 TS 759 764–5.
58 See *Edelstein v Edelstein* 1952 3 SA 1 (A).
59 *Spinazze* (2) 665F–G.
60 Cf *Ex parte Kloosman* 1947 1 SA 342 (T).

implied agreement between the parties to constitute a valid antenuptial contract.[61] However, the *curator ad litem*, representing the minor children, argued that "the parties must have intended to bind themselves to whatever was contained in the document signed by them . . . [and] agreement was reached by their conduct and there was *consensus ad idem* to be bound by the terms of the document signed by them."[62] It would appear that both the court *a quo*[63] and the appellate division accepted the latter argument.

Whereas both judges were fully aware that an alternative legal system would have to be sought to test the validity of the Spinazzes' marriage settlement entered into in Italy, their search for the necessary indicative or choice-of-law rule differed radically. Esselen J, believing that "conclusive South African authority"[64] was lacking in this matter, found himself persuaded that English law in this instance would have "more than normal persuasive value insofar as the question of formalities relating to marriage settlements is concerned."[65] The judge believed that the policy consideration of uniformity was strong enough to justify his somewhat precipitate recourse to *Dicey and Morris*.[66] Corbett JA, on the other hand, believed that a consultation with the old authorities would have to constitute the first step in any attempt to fill what appeared to be a *lacuna* in the South African private international law. I shall explain and criticise their contrasting approaches to this problem against the background of the historical basis of the principle *locus regit actum* and modern jurisprudential thought on the matter.

5 THE HISTORICAL BASIS OF THE PRINCIPLE *LOCUS REGIT ACTUM*

Corbett JA began his investigation into the Roman-Dutch version of the *locus-regit-actum* principle[67] by citing Huber's general rule[68] to the effect that a juristic act valid at its place of execution will be regarded as valid everywhere. He noted that this positive version of the rule is to be found in other texts of the old authorities,[69] and that the rule does apply to antenuptial contracts.[70] But, as he pointed out,[71] Huber also derived a negative rule from the *locus-regit-actum* principle, namely, juristic acts performed in conflict with the *lex loci actus* were to be regarded as invalid everywhere; and this is true in respect of those domiciled or those temporarily resident at the place of contracting.[72] Furthermore, and more importantly, Corbett JA regarded Huber as having subscribed to an

61 *Spinazze* (2) 652C.
62 *Spinazze* (2) 652J–653A.
63 *Spinazze* (1) 754F.
64 *Spinazze* (1) 755B.
65 *ibid.*
66 *The Conflict of Laws* 10th ed; see *Spinazze* (1) 755F.
67 *Spinazze* (2) 659C–661F.
68 *Praelectiones Juris Civilis Romani et hodierni* (1689) II 1 3 3.
69 Rodenburg *De Iure Quod Oritur e Statutorum Diversitate* 2 3 1; J Voet *Comm ad Pand* 1 4 App 13; Arntzenius *Institutiones* 1 2 27; Van der Keessel *Theses selectae* 39 and *Praelectiones* Th 39.
70 J Voet *Comm ad Pand* 23 4 4; Arntzenius *op cit.*
71 *Spinazze* (2) 660A.
72 *supra* n 68.

imperative interpretation to the *locus-regit-actum* principle, namely that a transaction, including an antenuptial contract, "stands or falls by whether it complies with the law of the place of execution."[73]

On the other hand, Corbett JA pointed out, there were other writers in the Netherlands who adopted a facultative approach to the *locus-regit-actum* principle. They believed that "in certain instances formal validity could alternatively be tested by another system of law connected with the transaction or act in question."[74] Corbett JA listed the following writers among supporters of the facultative approach: Johannes Voet,[75] Van der Keessel,[76] Arntzenius,[77] Rodenburg,[78] and Paulus Voet.[79] His reading of these old authorities led him to believe that, in the sphere of the formal validity of juristic acts, there was a move away from the imperative approach towards a facultative approach, "which in certain circumstances permitted formal validity to be tested, in the alternative, by another relevant system of law."[80]

It may well be asked: is it necessary to reconcile these warring authorities? Perhaps if we look at the *locus-regit-actum* principle against the general theoretical considerations of the Dutch comity school, and also have regard to developments in private international law in Europe as a whole, we shall see why Huber differed from the others and, indeed, why the imperative interpretation gained ascendancy in the first place.

The origins and historical development of the *locus-regit-actum* principle[81] attracted the attentions of several commentators from the mid-19th century to the first decades of the 20th century. Included among these writers were such scholars as: Von Savigny,[82] Von Bar,[83] Lainé,[84] Lorenzen,[85] Meijers,[86] Kollewijn[87] and Barmat.[88] Their writings indicate that Bartolus was the first to publicise the proposition: *lex loci actus*. Through some three centuries of development by, especially, the French school of the 16th century and its successor, the Dutch comity school of the late 17th century, *locus regit actum* became a characteristic feature of European private international law.

Bartolus was dedicated to upholding the statutist doctrine in the Italian city-states, and this implied a universalistic approach to the resolution of conflicts

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73 *Spinazze* (2) 660D.
74 *Spinazze* (2) 660E.
75 *Comm ad Pand.* 1 4 App 15.
76 *Theses* 41 and *Praelectiones Th* 41.
77 *Institutiones* 1 2 27.
78 *De Jure Quod Oritur e Statutorum Diversitate* 2 3 2.
79 *De Statutis* 9 2 9 exc 4. Corbett JA made an oblique reference to this text by reference to Kollewijn *Geschiedenis van De Nederlandse Wetenschap van Het Internationaal Privaatrecht tot 1880* (1937) 95.
80 *Spinazze* (2) 661F.
81 It was formally labelled as such in the celebrated case *In re Pommereuil* decided by the Parliament of Paris on 1721-01-15. See further Tötterman "Functional Bases of the Rule Locus Regit Actum in English Conflict Rules" 1953 *Int & Comp LQ* 27.
82 System des heutigen römischen Rechts vol 8 transl Guthrie as *Private International Law* 2nd ed (1880).
83 *supra* n 37.
84 *Introduction au droit international privé* vol 2 (1892).
85 "Huber's De Conflictu Legum" 1919 *Illinois LR* 375. Subsequently published in *Selected Articles in the Conflict of Laws* (1947) 136 *et seq.*
86 (1934) *Hague Recueil* 49 III 543.
87 *supra* n 79.
88 *De Regel "Locus Regit Actum" in het International Privaatrecht* (1936).

among the *statuta* of medieval Italy. These *statuta* were the restatement of the city-states' customary and business laws supplemented, where necessary, by new ordinances. Along with the laws of the feudal principalities, the law of the church, and other customary or indigenous or local laws, they were held to co-exist with the re-discovered law of Justinian which was then regarded as the general or subsidiary law of the Holy Roman Empire. Bartolus's approach was universalistic because it represented an attempt to decide from the nature of the *statuta* themselves when foreign law was to be applied. Hence he re-affirmed the basic divisions of the statutist doctrine: statutes are real if they relate to things and personal if they relate to persons.[89] Real statutes were regarded as having a territorial effect only, while personal statutes had an extra-territorial effect since they followed the person everywhere. Secondly, Bartolus set down a number of propositions which were to govern especially contracts, delicts (in the wide sense of "offences"), wills, the status of persons, and rights in property. Questions of form, for instance, were to be governed by the *lex loci actus*.[90] It would appear that in medieval times conformity to the *lex loci actus* was regarded as sufficient regardless of the domicile of the actors. Furthermore, the Italian statutists did not appear to assert the nullity of an act done contrary to the *lex loci actus*. One must assume that the right of foreigners to avail themselves of the local statute was introduced out of the convenience for those wishing to execute juristic acts away from home.

By the 16th century the leading proponents of the statutist doctrine were to be found in the politically united kingdom of France. The doctrine of conflicts of law found its expression there in the disputes between the inhabitants of the various provinces which, at that time, were noted for their diversity of custom. In the process of the modification which the statutist doctrine now underwent, two jurists are worthy of mention. D'Argentré (1519–1590), in opposing the teachings of Dumoulin (1500–1566), a follower of the Bartolist tradition, extended the number of rules which could be accommodated within the division of real statutes, and, correspondingly, restricted the ambit of the personal statute. In his opinion, whenever doubt existed about the nature of a statute (and this of course was the focal point for disagreement among the statutists over some five centuries or so) it should be construed as *realis* and therefore of territorial operation only. Personal statutes, that is, those having extra-territorial effect, were to be regarded as those dealing solely with status and capacity. So committed to territoriality was D'Argentré that he regarded the third division of statutes, *statuta mixta*, precisely as real statutes in their operation. Adherents of D'Argentré's doctrine were excessively territorialist in their outlook. Adherents of Dumoulin's doctrine, on the other hand, believed that the intention of contracting parties, express or implied, transcended the territoriality of the real statute. Despite their radical differences as regards the content and operation of the *statuta*, both schools of though remained within the orbit of the statutists and accepted that the enforcement of certain statutes outside their area of enactment was observed because of the nature of the rules. It was left to the Dutch school to deny that foreign *statuta* had any extra-territorial operation by the force of law itself. At the close of the 17th century *locus regit actum* had come to be regarded as obligatory in France.[91]

89 See the assessment of Meijers *supra* n 86 602.
90 *Ad legem cunctos populos C* 1 1 1 Nos 14 32.
91 Lainé *supra* n 84 400 *et seq.*

Whereas questions of the conflict of laws had presented themselves in Italy as intermunicipal and in France as interprovincial, they appeared to the Roman-Dutch jurists as international. Each of the seven provinces of the United Netherlands (established initially by the Union of Utrecht, 1579) jealously guarded its hard-won independence and uncompromisingly advanced its sovereignty. The booming commerce between these provinces, combined with their mercantilistic aspirations, thrust the United Netherlands into the international arena. Following the separation of the Dutch provinces from the Holy Roman Empire, the application of foreign law within their territories could no longer be based upon an obligation emanating from the imperial law.

The tripartite division of the statutes, as formulated by the Italian and French schools, was received into the Netherlands during the 17th century, largely through the works of D'Argentré and Burgundus (1586–1649).[92] The starting-point of the Dutch school, however, lay in the fundamental concept of territorial sovereignty whereby laws have force within the territory of the sovereign, but not elsewhere unless permitted by comity.[93] It is against the abovementioned historical background that the opinions of the six Netherlandish writers referred to by Corbett JA should be viewed. Their conception of the *locus-regit-actum* principle may well have been coloured by their attitude towards the larger issue, namely, the reconciliation of the universalistic statutist doctrine with absolute territorial sovereignty.

Rodenburg (1608–1668)[94] occupied a special place in the transition from the traditional statutist doctrine to the prescriptions of the Dutch territorialists. He adhered to a simple dichotomy of the statutes, rejecting the division of the *statuta mixta*,[95] and, like the traditionalists, believed that the extra-territoriality of the *statuta personalia* could be explained on the basis of the universal applicability of such statutes, that is, they had a legal basis in themselves (*ipsa rei natura ac necessitas*).[96] Rodenburg used the language of the statutists and worked within the parameters of the statutist doctrine. He does not appear to have realised what the implications of an absolute territorial sovereignty would have for conflicts doctrine, for he made but a passing reference to the concept of territorial sovereignty.[97]

It was left to the three revolutionaries, namely, P Voet (1619–1677),[98] J Voet (1647–1713),[99] and U Huber (1636–1694)[100] to attempt a reconciliation between

92 His *Tractatus Controversiarum ad Consuetudines Flandriae* (Antwerp 1621) was one of the first publications to deal with the conflict of laws in the Netherlands.

93 Much has been written about this complex concept; see especially Yntema "The Comity Doctrine" *Festschrift Dölle* (1963) vol 2 65; Kahn "The 'Territorial and Comity School' of the Conflict of Laws of the Roman-Dutch Era" *Huldigingsbundel Daniel Pont* (1970) 219; Scholten *Comitas* (1952).

94 A judge of the supreme court of Utrecht and author of *Tractatus de Jure Conjugum* (1653), in which was inserted his monograph on conflicts law: *De Jure quod Oritur ex Statutorum, vel Consuetudinum Discrepantium Conflictu.*

95 Despite this he recognised the *lex loci actus* as decisive in regulating the formalities of juristic acts.

96 *Tractatus de Jure Conjugum* 1 3 4.

97 *De Jure Conjugum* 1 3 1.

98 professor at the Academy of Utrecht and author of, *inter alia, De Statutis eorumque Concursu* (1661).

99 professor at Leyden University and author of, *inter alia, Commentarius ad Pandectas* (1698).

100 both a judge and professor in Friesland. He was the author of, *inter alia, Praelectiones Juris Civilis* (1689), *De Jure Civitatis* (1672) and *Hedendaegse Rechtsgeleertheyt* (1686).

the concept of territorial sovereignty and the received statutist doctrine. In this case one may speak of a revolution, since the advent of the doctrine of territorial sovereignty had brought about a transformation in the very fundamentals of conflicts law. That it was a successful revolution is evidenced by the writings of the three above-named jurists. Whereas the Voets adhered to the language and classification of the statutists they both conceded that the extra-territoriality of certain statutes was no longer explicable by the notion of universality, but had to be ascribed to the doctrine of comity. On the other hand, Huber broke new ground altogether; he departed completely from the tradition of the statutists by not even mentioning the classification of statutes. He saw the conflict of laws as an aspect of the law which governed the administration of public affairs.

When it is stated that the doctrine of comity was the ground upon which the extra-territoriality of law now rested, it should be noted that this doctrine covered a wide variety of approaches. It is not necessary for the purpose of this essay to examine these approaches in detail. It will suffice to notice that, according to the Voets, international goodwill, as the basis of comity, had nothing to do with courtesy; it arose from the exigencies of international intercourse, from the desire to obviate the incongruities and inequities which would otherwise arise in commercial contracts and the other institutions of a trading nation. On the other hand, it is clear that Huber, by saying that respect is paid to foreign laws *ex commodis et tacito populorum consensu*,[101] was indicating that states no longer had a choice in the matter of applying foreign law. For, by implied consent, they are bound to apply each other's laws. And nothing could be more profitable for the states concerned, since it would be inconvenient indeed for international commerce if what was regarded as valid law in one place was forthwith invalidated elsewhere simply by the diversity of laws.[102] The implication of this is that Huber saw the extra-territorial effects of legal rules as being explicable in terms of the *ius gentium*.

When one turns to a consideration of the two remaining jurists considered by Corbett JA, namely, Arntzenius (1735–1797)[103] and Van der Keessel (1738–1816),[104] it is to be observed that at the time of their commentaries the revolution in conflicts doctrine had long since been accomplished. Indeed, Arntzenius, eschewing the language of the statutists altogether, and Van der Keessel, admittedly using their terminology, merely amplified the findings of the Voets and Huber.

In a consideration of the views of our old authorities on the permissive or obligatory nature of the *locus-regit-actum* principle it should be noted at the outset that the civilians did not distinguish sharply, as did their counterparts in the common law, between the forms and solemnities associated with the variety

101 *Praelectiones* I 1 3 2.

102 *ibid.*

103 professor at Groningen and later Utrecht, and author of, *inter alia, Institutiones Juris Belgici de Conditione Hominum* (1783–98). This was translated by Van den Heever as *Introduction to the Civil Law of the Netherlands* (1963); see, in particular, the translator's valuable introduction.

104 professor at Groningen and later Leyden, and renowned for his *Praelectiones ad Gr* (1793–1806). These lectures are available in Afrikaans translation by Van Warmelo, Coertze, Gonin and Pont as *Voorlesinge oor die Hedendaagse Reg na Aanleiding van De Groot se Inleiding tot de Hollandse Rechtsgeleerdheid* (5 vols, 1961).

of juristic acts giving rise to, say, contractual obligations, transfers of property, testaments, and marriages.

Paulus Voet stressed this when he said that the same rules which he stated about contracts may also be applied to the formalities touching on wills.[105]

Although Rodenburg's digression on the diversity of laws was directed at a discussion of the rights of married persons he did deal in general with the topic of formalities and solemnities of juristic acts. For instance, whilst on the subject of wills, he said[106] that although these instruments, like transfers *inter vivos*, are methods of transmitting title to property and should be subject to the *lex rei sitae*, reasons of necessity and favour (*necessitatis rationem summumque favorem*) led to the view that conformity to the *lex loci actus*[107] should be sufficient. If, however, someone has not chosen to avail himself of the facilities afforded him, perhaps by reason that it was easier for him to express his last will in the form prescribed by the *lex rei sitae*, then his choice should not render his testament void *ab initio*. There is, he said,[108] no reason of law or equity (*nulla juris ratio aut aequitatis benignitas*) which requires that measures introduced for the benefit of anyone should be construed to his disadvantage. It would appear then that there is some justification for regarding Rodenburg as the first of the Netherlands jurists to defend the facultative application of the *locus-regit-actum* principle.[109]

According to Paul Voet[110] the imperative character of *locus regit actum* was relaxed (*ex aequo et bono*) in the case of a contract or will which was not executed according to the formalities of the place of acting if it complied with the formalities of the *lex domicilii*. And, be it noted, he also assumed that the laws of the domicile and the forum are coincident. Some of the writers who have made an intensive study of the old authorities and their relevance for the conflict of laws, such as Kollewijn,[111] classify Paul Voet as an adherent of the facultative approach to *locus regit actum*. On the other hand, Barmat said that Voet expressly rejected the facultative aspect of *locus regit actum* and "laat slechts één speciale uitzondering toe op die imperatieve werking van den regel."[112] In Barmat's view, supporters of the facultative aspect of the rule are those who accept a juristic act as valid everywhere (and not just in the forum of a particular domiciliary as contemplated by Voet) if it conforms either to the *lex loci actus* or another pertinent law.

Johannes Voet, relying on both Rodenburg and his father Paul,[113] appeared to favour the relaxation of the compulsory force of *locus regit actum*. He

105 *De Statutis* 9 2 9 exc 4. See also in this connection Arntzenius *Institutiones* 1 2 27 and Huber *Praelectiones* II 1 3 4 and 5 and 8 where he treats of the formalities required for marriages, wills and contracts as mutually interchangeable.

106 *De Jure Conjugum* 2 3 2.

107 It bears mention, on theoretical grounds, that Rodenburg conceded the application of the *lex loci actus* without departing from his rigid adherence to a bipartite division of the statutes. He was no iconoclast. See further Kollewijn *supra* n 79 66; Suijling *De Statutentheorie in Nederland gedurende de 17de eeuw* (unpublished doctoral thesis 1893) 71.

108 *De Jure Conjugum* 2 3 2.

109 Cf Barmat *supra* n 88 144.

110 *De Statutis* 9 2 9 exc 4.

111 *supra* n 79 95.

112 Barmat *supra* n 88 145.

113 *Comm ad Pand* 1 4 App 15.

indicated[114] that parties are not absolutely obliged to observe the formalities of the place where the act was concluded; they may also follow the formalities prescribed by the *lex domicilii* or *lex rei sitae*. It would appear, then, that the Voets and Rodenburg were prepared to mitigate the compulsory force of *locus regit actum*; a notion received from the French school. In ascribing compulsory force to the rule, the lawyers of the 16th century overlooked the initial purpose of the principle, namely, that it had been introduced as a concession to foreigners; it was both useful and convenient for parties to resort to the law of the place where they happened to be at the time of the conclusion of their transaction.

When one turns to a consideration of Huber's standpoint[115] then, in contradistinction to the previous trio who put practical considerations ahead of theoretical ones, we find a theorist caught up in his own dogmatic persuasions. It admits of little doubt that Huber was an unabashed supporter of *locus regit actum* in its compulsory aspect.[116]

As we have seen, Huber avoided any reference to the traditional statutist doctrine in his attempt to solve conflicts problems. His theory of conflicts law flowed logically from the premisses which he had adopted, namely, the principle of absolute sovereignty which applied to all found within a particular *rechtskring* (whether they were citizens or *subditi temporarii*) and the concept of *comitas gentium*. These fundamental notions are expressed in his three axioms[117] and are further strengthened by his first practical rule[118] to the effect that all juristic acts (whether judicial or extra-judicial, whether *mortis causa* or *inter vivos*) are valid when concluded in accordance with the *lex loci actus* even if, they would be regarded as invalid had they been concluded in the same manner in a place where the law is different. (This is the positive aspect of *locus regit actum* referred to by Corbett JA.)[119] On the other hand, juristic acts invalid *ab initio* according to the *lex loci actus* are nowhere to be regarded as valid. (This is the negative aspect of *locus regit actum* referred to by Corbett JA.)[120]

With reference to the effects or consequences of a contract it is true that a court may refuse to give effect to its performance if it will prove prejudicial to the interest of the forum to do so.[121] However, when it has to be decided whether *locus regit actum* has a facultative aspect, it is the initial validity or invalidity of the contract which is at stake. Huber was clear on this point, and, unlike the Voets, he was not prepared to allow a domiciliary of the forum to follow the formalities of his domicile as an alternative to those of the *locus actum*. Admittedly some have sought to mitigate the inflexibility of Huber's doctrine by

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114 *ibid.*

115 See in particular, *Praelectiones* II 1 3 4 and *Hedendaegse Rechtsgeleertheyt* (*HR*) 1 3 12.

116 See eg Kollewijn *supra* n 79 147; Barmat *supra* n 88 145; Lorenzen *Selected Articles* 143; Kosters and Dubbink *Algemeen Deel van het Nederlandse Internationaal Privaatrecht* (1962) 45; Meijers *supra* n 86 661 n2.

117 *Praelectiones* II 1 3 2; *HR* 1 3 2, 1 3 3, 1 3 4.

118 *Praelectiones* II 1 3 3; *HR* 1 3 8.

119 *Spinazze* (2) 660D.

120 *ibid.*

121 In support of this (and anticipating the doctrine of public policy) Huber noted that an agreement to alienate immovables in contravention of the *lex loci rei sitae* cannot be upheld: *Praelectiones* II 1 3 14 15; *HR* 1 3 44 – 1 3 46.

citing his reference to the case of *Maria van Hannenburg v Fokel van Sijdtsma.*[122] Van Rooyen assumes[123] from this case that the court adopted a facultative standpoint.[124] It appears to me, however, that the Frisian court upheld the will because it conformed to the *lex fori.* This surely was a case of the home court preferring its own law. That it contradicts Huber's theory of conflicts law is undeniable, but Huber could not escape from the toils of the absolute principle of territoriality.

It is evident that, at least with regard to contract law, Huber cannot be regarded as adopting anything but an imperativist approach to *locus regit actum.* In Huber's view, compliance with the local formalities was not only sufficient, but *necessary.*

First, Huber distinguished clearly between the creation of a contract, on the one hand, and the consequences of a contract on the other.[125] In the former case, he indicated, one is concerned with formalities and extrinsic validity, and in the latter with matters relevant to the content or effect of the contract once it has been validly concluded.

Secondly, Huber held that the basis of the conflicts doctrine resides in the subjection of persons to the laws of any country so long as they reside in it. And from this, as we have seen, it follows that an act which is valid or invalid from the beginning is also valid or invalid elsewhere.[126] Whereas Huber would have conceded that the effects of a contract might well be regulated by the *lex loci solutionis*, he was wedded to the idea that an obligation is "born" within the territory of a sovereign and must be governed by the conditions imposed there. Put at its simplest, Huber's line of thought proceeds as follows: if the concept of subjection is the basis of conflicts law, and on the understanding that one applies law to the facts as they occur in a given locality, how can the *lex loci solutionis* (or put wider still, the "proper law") have the power to give legal force to a set of facts which did not occur within its *rechtskring*? And once again, stressing the concept of absolute territoriality, the *lex loci solutionis* is intended to have force only within its *rechtskring* and not outside it in a place where the parties concerned may well have entered into their contractual relationship.[127]

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122 decided in the Supreme Court of Friesland 1683–10–27. In this case a Frisian had made a will in Overijssel according to Frisian form which did not conform to the requirements of the law prevailing there. The Frisian court upheld the will, however, because it was legal and regular according to Frisian law. See *HR* 1 3 15, Gane's translation.

123 *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 20.

124 For a contrary opinion, see Meijers *supra* n 86 661 n2; Barmat *supra* n 88 146.

125 *Praelectiones* II 1 3 9.

126 *Praelectiones* II 1 3 14, 1 3 15.

127 Huber's influence in this regard is discernible in Burge (*Commentaries on Colonial and Foreign Laws* (1838) vol 3 764) and Story (*Conflict of Laws* (1834) s 18). Indeed, much later, Beale, too, had the notion that the voluntary agreement of the parties requires the authority of a territorial sovereign to give it the character of a binding contract. And "any attempt to make the law of the place of performance govern the act of contracting is an attempt to give that law exterritorial effect. It enables the parties to confer upon their acts a legal effect which the law under which the acts are done refuses to confer upon them" *A Treatise on the Conflict of Laws* (1935) vol 2 1086. This notion has persisted to the present day, for many still ask: how, without being a legislator, can we move on our bootstraps into another legal system? In Ehrenzweig's view one must assume the presence of a customary conflicts rule conferring autonomy on the parties (see *Private International Law* general part (1967) 182.) Morris uses the concept of the putative proper law (see *The Conflict of Laws* 3rd ed (1984) 282.)

It has already been stressed that both Arntzenius and Van der Keessel wrote their treatises when the Roman-Dutch law pertaining to the formalities of juristic acts had been adumbrated by the likes of the Voets and Huber. Arntzenius, in contradistinction to Huber, clearly supported the facultative aspect of *locus regit actum*.[128] Then reference to Van der Keessel leaves one in little doubt that he, too, departed from the rigid standpoint of Huber and would uphold the formal validity of an agreement invalid according to the *lex loci actus*, but valid according to the *lex domicilii* or *lex rei sitae*.[129]

In sum, it would appear that the old authorities made a firm distinction between the creative factors of a contract, such as the formation of the contract, formalities, and the capacity of the parties, on the one hand, and the rights and duties flowing from the contract, once it had come into existence, on the other. Such a standpoint necessitates the presence of a system of law at the *locus actum* (the *lex loci contractus*) to oversee the agreement of the parties. This is the law that regulates matters pertaining to the creation of the contractual relationship. The only variation[130] permitted to the regulation of formalities, seen as an aspect of the creation of a contract, was, as we have seen, that the forum would accept compliance by one of its domiciliaries, whilst acting aboard, with the formalities laid down by the *lex domicilii*, or the *lex rei sitae*, instead of those required by the *lex loci actus*. This was the majority opinion among the old authorities, but Huber would not even concede this much.

The old authorities realised, however, that the *lex loci contractus* could not always be applied successfully to decide on the terms and effects of a contract once it had come into being. In response to this state of affairs one may read in Huber,[131] P Voet,[132] and J Voet[133] how the *lex-loci-contractus-solutionis* rule came to be formulated. Seemingly all the old authorities were *ad idem* that when a contract was to be performed not in the country where it was entered into, but in some other country, it was the law of the place of performance (*lex loci solutionis*) and not the *lex loci contractus* which would be decisive in the regulation of the consequences of that contract. This notion of applying the *lex loci solutionis* to determine the effects of a validly concluded contract was subsequently publicised in England and America by commentators such as Burge[134] and Story.[135] Some have chosen to regard the *lex loci solutionis* as the proper law of the contract in the sense that it is the law which regulates the rights and

128 *Institutiones* 1 2 27 *in fine*. Although he refers specifically to wills here, I think the general trend of his argument, in favour of the necessity of recognising an alternative to the *lex loci actus*, will cover the case of antenuptial contracts.

129 *Praelectiones* 98; see Van Warmelo *et al Voorlesinge* 127–128. Cf Van Rooyen who classifies Van der Keessel "as 'n gematigde imperativus" *Die Kontrak* 23.

130 Although this was not an issue in *Spinazze*, it should be noted that a further variation applied in the case of an act *in fraudem legis fori* where a domiciliary entered into a transaction in a foreign country in order to evade the provisions of the *lex fori*. Such a transaction, albeit valid according to the *lex loci actus*, would be regarded as a nullity by the forum. See further Huber *Praelectiones* II 1 3 8; P Voet *De Statutis* 9 2 9 exc 3; J Voet *Comm ad Pand* 1 4, App 14; Van der Keessel *Praelectiones* 96, see Van Warmelo *et al, Voorlesinge* 124 *et seq.*

131 *Praelectiones* II 1 3 10.

132 *De Statutis* 9 2 12.

133 *Comm ad Pand* 4 1 29.

134 *Commentaries* vol 3 771.

135 *Conflict of Laws* s 280.

duties of parties to a contract valid *ab initio*.[136] However, the proper law of the contract, as generally regarded today, is interpreted as the law which governs the contract in most respects. According to such a view the pertinent legal system need not necessarily be either the *lex loci contractus* or the *lex loci solutionis*.[137]

It was clear to Corbett JA that the rigid *locus-regit-actum* principle had been mitigated to a certain extent by the majority of the old authorities, but it remained unclear whether a foreign contract could be cast in the form prescribed by another pertinent legal system or, indeed, whether it could be formless. If, then, there is to be an alternative to the *lex loci actus*, in certain matters touching on the formalities of a foreign contract, what is that law to be? Reference to the South African positive law[138] having failed to persuade him whether to follow a facultative approach, Corbett JA, as he was obliged to do, now set about filling an obvious *lacuna* in the South African private international law.

6 THE REFORMULATION OF A CONFLICTS RULE

In *Spinazze* it is clear that both the judge of first instance and the judge of appeal had to decide a point of conflicts law unassisted by authority. Tersely put, they had to establish what law governs the formal aspects of an antenuptial contract concluded outside South Africa, but whose substance was closely connected with this country. Both judges decided that the written instrument must be regarded as invalid according to the *lex loci actus* (Italian law). Corbett JA went further, saying that the antenuptial contract "did not satisfy the formal requirements for registration laid down by sec 87(2) of the Act and originally ought not to have been registered."[139]

The judges' reasoning in the reformulation of the appropriate conflicts rule may be formalised as follows:

Step 1 Although the antenuptial contract is formally defective and cannot be registered, thus failing to give notice to the world of its existence and thereby unable to bind persons who are not parties thereto,[140] there is a rule of South African domestic law which says that informal antenuptial contracts are binding *inter partes*.

Step 2 Let us fashion the proposed conflicts rule in order to accommodate the aforementioned substantive rule of the Roman-Dutch or South African law.

Step 3 Let the conflicts rule regulating the formal validity of antenuptial contracts be either the law of the place of acting or of the place to which the juristic act properly belongs.

In deciding that the contents of the potentially applicable rule of domestic law should help regulate the issue, it seems that the judges employed circular reasoning. This may be justified, however, if the policy of fulfilling the reasonable

136 See Hackwill "The Roman-Dutch Foundations of Rhodesian and South African Private International Law, with Particular Reference to Contracts". Unpublished PhD Thesis University of London (1972) 208.

137 For a discussion of the doctrine of the proper law of the contract, see Edwards "Some Reflections on the Reception of the 'Proper Law' Doctrine into SA Law" *Huldigingsbundel Paul van Warmelo* (1984) 38 *et seq.*

138 *Spinazze* (2) 661F–H.

139 *Spinazze* (2) 658I.

140 *Spinazze* (2) 658D.

expectations of the parties is of paramount importance. At all events the *ratio* behind this rule of validation is undoubtedly that of *favor negotii*, and is supported by the long-established rule of interpretation: *ut res magis valeat quam pereat*. And, in fact, the facultative application of *locus regit actum*, as advocated by some of the old authorities and later on, in a more benign fashion, by Von Savigny,[141] is nothing but an application of the abovementioned maxim.

Esselen J chose to ignore the old authorities and looked to English law for further guidance. The conflicts rules which have crystallised in South Africa, however, emerged from the substratum of Roman-Dutch private law which attained its peak in the mid-18th century. There have been changes in South Africa by way of decisional rules,[142] but by and large recourse must still be had to the old authorities when there is doubt about the content of our conflicts rules. This should be done, as I have indicated, in historical perspective,[143] but it does not mean that every single writer need be canvassed; for, in truth, the six jurists referred to by Corbett JA, in establishing the position of *locus regit actum* represent the experts of the Roman-Dutch epoch in our conflicts law. Indeed, if a generally agreed approach to a conflicts problem cannot be gathered from their works, then little purpose will be served by searching among the folios of the more obscure and less expert writers.[144]

Our basic sources in conflicts law could be made more accessible by the compilation of a restatement of conflicts rules. In this field there is a need for "a well thought out, compact, but efficient code."[145]

In his search for persuasive authority Corbett JA examined some ten or so legal systems operative in "other Western jurisdictions"[146] and representative of "modern jurisprudential trends in the Western World."[147] The judgment of Corbett JA must surely give an impetus in the future to the use of the techniques of comparative analysis. It is also worth noting that he paid particular attention to the jurisprudential aspects of the comparative discipline. In this sense "jurisprudential" would include the reasons for the rule *locus regit actum*, the purposes to be achieved by it, and so on.[148] I do think, however, that in his choice of the "objects of comparison"[149] the judge was unduly conservative in adhering rigidly to examples from the Western bloc. No doubt there are fundamental

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141 See *Private International Law* 2nd ed (Guthrie translation) 324–325. In keeping with the trend away from the rigid adherence to the demands of state sovereignty, and in line with a consideration for private interests, Von Savigny supported the choice between observance of the form in use at the place of acting, or that of the place to which the juristic act properly belonged.

142 Cf the appellate division's ruling on the doctrine of the intended matrimonial domicile in *Frankel's Estate v The Master* 1950 1 SA 220 (A).

143 Bluntly put, we must read the Roman-Dutch writers in their context and analyse what they are saying, bearing in mind always that the changes in our socio-political milieu may necessitate bringing in modifications.

144 In this exercise we do *not* need the antiquarian who "seems to feel that he has reached the pinnacle of achievement if he can quote a writer of whom nobody has ever heard before." Proculus "Bellum Juridicum" 1951 *SALJ* 306 307.

145 Wessels "The Future of Roman Dutch Law in South Africa" 1920 *SALJ* 265 284.

146 *Spinazze* (2) 661J.

147 *Spinazze* (2) 665C.

148 See Von Mehren "The Contribution of Comparative Law to the Theory and Practice of Private International Law" (1978) 26 (supp) *Am Jour Comp L* 31.

149 See further Edwards "Choice of Law in Delict: Rules or Approach?" 1979 *SALJ* 48 71.

ideological divergencies between capitalistic and socialistic jurisdictions, but if one approaches the problem in a functional way (namely, "formalities of transactions": how regulated?) then I believe there is material aplenty for comparison in the socialist legal systems. Indeed, the end result of Corbett JA's researches in the "Western world" are faithfully reflected in, for example, the conflicts statute of the German Democratic Republic.[150]

It is not necessary to appraise the judge's references to, for example, the English and Commonwealth legal systems, or the legal systems of civil-law countries such as The Netherlands, France, Belgium and West Germany, or for that matter the American Restatement. Indeed, his researches merely bear out what has today become the accepted trend in the majority of legal systems, including most of the countries on the European continent, namely, that in matters of form the role of the *lex loci contractus* is permissive. Today it is accepted[151] that a juristic act will be formally valid if it conforms either to the proper law of the transaction or the law of the place where it was done (*lex loci actus*).[152] In opting for the formulation of a conflicts rule with connecting factors framed in the alternative, it is clear that respect has been accorded to the utilitarian principle which seeks to facilitate transactions outside the *locus fori*. It is clear, too, that the role of the *locus actus* is now seen as one of *favor gerentis*, as one more in keeping with the original *ratio* of the *locus-regit-actum* principle. It should not be thought, however, that the intention of the parties has a role to play here; for it is not asked: did the parties intend the *lex loci actus* or the *lex causae* to govern the formal validity of their transactions? It is for the court to make an objective choice; the principle of convenience, reflected in the law of the place of acting, has to be weighed against the principle of validation, reflected in a legal system which favours validity. There is no room here for the subjective criterion of the parties' intention.[153] In saying that the *locus-regit-actum* principle is to be applied facultatively we mean no more than that the formal validity of a transaction

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150 s 16 *Rechtsanwendungsgesetz*, and see Juenger "The Conflicts Statute of the German Democratic Republic" 1977 *Am Jour Comp L* 332.

151 Cf Lando *Int Encyclopedia of Comparative Law* (1976) vol 3 ch 24 97 *et seq.*

152 This trend is quite marked in the *EEC Convention on the Law Applicable to Contractual Obligations* (1980–06–19) where a commercial contract concluded *inter praesentes* is regarded as formally valid if it satisfies the formal requirements of the law which governs it under the convention or the law of the country where it is concluded (art 9). When it is borne in mind that, in the eyes of the convention, the applicable law in the absence of a choice by the parties is that of the law of the country with which the contract is most closely connected, it will be realised that the concept of the proper law of the contract has found favour with the EEC countries. No doubt Corbett JA was justified in not referring to the EEC convention, since art 1(2)(b) specifically excludes its operation in the field of antenuptial contracts. However, the demands of individual utility are so clearly met by the alternative application of the *lex loci actus* and the *lex causae* (in the sense of the law governing the substantial validity of the transaction) that to differentiate between commercial and non-commercial contracts, in the case of the requisites for formal validity, would be retrogressive. The above observation is fully borne out by reference to the Hague *Convention on the Law Applicable to Matrimonial Property Regimes* (1978–03–14) which provides that marriage contracts shall be valid as to form if they comply either with the *lex causae* or with the *lex loci actus*. See further Philip "Hague Draft Convention on Matrimonial Property" 1976 *Am Jour Comp L* 307 314; Reese "The Thirteenth Session of the Hague Conference" 1977 *Am Jour Comp L* 393 396–397; "Comment" 1984 *Netherlands Int Law Rev* 274.

153 See further Kahn-Freund "Locus regit actum" 1943 *Modern LR* 238 240.

will be upheld by one of two possibly applicable laws, namely, the *lex loci actus* or the *lex causae* (proper law).

In *Spinazze* Corbett JA held that the proper law of the antenuptial contract was given by South African law; for it

> "was in South African form; it was entered into in order to avoid a matrimonial property régime, viz community of property, which obtained in South Africa at the time . . .; at the time when the contract was executed the deceased was domiciled and resident in South Africa; and the parties to the contract obviously intended South Africa to be their matrimonial home and the country where the contract was to operate."[154]

Content merely to adduce these factors Corbett JA avoided any discussion whatsoever of the seminal dictum given some sixty years previously by De Villiers JA,[155] and recalled recently in the Cape Provincial Division by Grosskopf J,[156] and said:[157]

> "These factors may be taken either as indicating a tacit choice of South African law or, at any rate, as showing that South African law was the system with which the contract had its closest and most real connection."

In contrast to the judge of appeal, Esselen J decided, on the policy consideration of uniformity,[158] that he should follow English law, as set down in *Dicey-Morris*,[159] and held that the antenuptial contract be regarded as formally valid "if it complies with the formalities prescribed either by the *lex loci contractus* or its proper law, namely the law of the matrimonial domicile . . ."[160] It has been pointed out elsewhere that Esselen J assumed too readily that the proper law of an antenuptial contract would necessarily be given by the *lex domicilii*.[161] Moreover, *pace Dicey-Morris*, the position under English law as regards the formal validity of a contract is uncertain, for although compliance with the *lex loci actus* is sufficient, there is but indirect authority for the view that compliance with the proper law is also sufficient.[162] It has already been suggested that had Esselen J wished to extend the criteria (for testing the formal validity of an antenuptial contract facultatively) to include the *lex domicilii* of parties acting outside the forum, then he could have relied on Voet *père et fils*.[163]

Finally, it is to be observed that yet another decisional conflicts rule (in contrast to the few existing statutory ones) has been added to South African private international law. Whilst it is clear that the formal validity of an antenuptial contract may alternatively be adjudged by either the *lex loci actus* or its proper law (*lex causae*), this does not cover all contracts. It would seem that the position is open in the case of commercial contracts.[164]

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154 *Spinazze* (2) 665F–G.
155 *Standard Bank of South Africa v Efroiken and Newman* 1924 AD 171 185. See further Edwards *supra* n 137 47–49.
156 *Improvair Cape (Pty) Ltd v Establissement Neu* 1983 2 SA 138(C) 145–146.
157 *Spinazze* (2) 665H.
158 *Spinazze* (1) 755B. On policy considerations, or guidelines for judges, see Kahn-Freund *General Problems of Private International Law* (1976) 318 *et seq.*
159 *The Conflict of Laws* 10th ed (1980) 663.
160 *Spinazze* (1) 755F.
161 Kahn 1983 *Annual Survey of SA Law* 503.
162 Cf Morris *The Conflict of Laws* 3rd ed (1984) 284–5.
163 P Voet *De Statutis* 9 2 9 exc 4; J Voet *Comm ad Pand* 1 4 App 15.
164 *Spinazze* (2) 661H 665A–B read with 665E.

7 CONCLUSIONS

A study of *Spinazze* has convinced me that certain important issues in the practice of private international law require further investigation. My observations should be seen, in Kahn's words,[165] as a jolt to the quivering hand of reform. Doubtless law-reforming legislation will be necessary to remedy, what I perceive to be at least one patent shortcoming in our approach to the conflict of laws, namely, the proof of foreign law. The judiciary itself, however, may well take the initiative in bringing about a few necessary changes in the practice of private international law. In my opinion it has the power to do so both under common law and statute.[166]

The policy of realism[167] has played a major role in that part of private international law developed by decisional law. This policy is well illustrated by our courts' treatment of foreign law. The decisional rules relating to the procedural status of foreign law do not form a logical and coherent system in South African law. Indeed, since judges are presumed to know the *lex fori* and not foreign law, considerations of practical order rather than a reliance on theoretical notions have guided them in their approach to the procedural status of foreign law. This holds true for the development of this subject in English law as much as for its development in South African law.[168]

In conflicts issues involving the proof of foreign law it appears to me that we should move away from the die-hard "fact" doctrine inherited from the English law. In other words, changes should be made in our practice with regard to the invocation of foreign law, in the first place, and, secondly, to the methods used in determining both its content and meaning. I envisage the introduction of a short statute permitting courts at their discretion to enquire into the choice-of-law issue of their own motion and, further, to consider any relevant material or source, including oral or written testimony, whether or not submitted by a party or admissible under the prevailing rules of evidence, in the determination of foreign law. Before elaborating on the advantages which, I believe, the adoption of such a provision will bring, the disadvantages of the present methods used in determining the content and meaning of foreign law, as reflected in *Spinazze*, must be noticed.

In keeping with the "fact" doctrine the burden of proving foreign law lay, in *Spinazze*, with the applicant, and, in the *ex parte* application which ensued, the evidence of the experts on foreign law was given by affidavit. Now according to the old English tradition when evidence of foreign law has to be produced, the expert shows up in court and is subject to cross-examination. Furthermore, even where such expert evidence has been uncontradicted by other expert testimony the court has been at liberty to examine the sources relied upon and to reach its own conclusions.[169] And only in exceptional circumstances has the

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165 Review *Butterworths' The Law of South Africa* in 1978 *SALJ* 136 137.

166 Of relevance here are the Rules and Practice of the Supreme Court of SA and the provisions for their amendment in terms of s 43(2)(a) of the Supreme Court Act 1959.

167 Used simply to denote "the facts of life;" see further Kahn-Freund *supra* n 158 321.

168 See further Graveson "Comparative Aspects of the General Principles of Private International Law" 1963 *Hague Recueil* 109 II 146; Zajtay "The Application of Foreign Law" 1973 *CILSA* 245 249.

169 See authorities *supra* n 28.

of the expert been given on affidavit.[170] In South Africa, however, there has been a marked tendency, dictated by financial considerations no doubt, to adduce expert evidence by way of affidavit. Not surprisingly, when the court of first instance is confronted with the uncontradicted evidence of the expert it will be reluctant to reject it. And should the *ex parte* application go on appeal the court of appeal will not disturb the court *a quo*'s finding on fact. In this way the expert's findings on foreign law, as a fact, go unchallenged in the highest court of the land.

But why, it may be asked, this seeming distrust of expert evidence adduced by way of affidavit? In the first place, in both *ex parte* applications and civil actions, the experts are appointed and paid by the litigants, and this must surely endanger their objectivity and independence. Furthermore, the expert's finding on foreign law as a fact may be conditioned by the result which the instructing attorney wishes to achieve, making of the expert little more than a "hired mercenary."[171] Admittedly there is an ethical obligation on the lawyer to present the court with a fair statement of the foreign law which he claims supports his position. It may be argued, too, that the experts, who may be scholars with reputations to uphold, will be even more conscientious than the attorney who retains them, when they present their opinions. Despite this, however, it is submitted that judges should be able to enquire of the expert whether he is aware of any authorities which may be in conflict with the material which he has produced. An amendment to the rules of court should be made which would, in the case of civil actions at least, provide for the holding of a conference in the judge's chambers. At this meeting between the experts, counsel, and court, the expert evidence on foreign law adduced by way of affidavit could be debated.[172]

Supporters of the adversary process will be quick to point out that my proposal attempts to do the impossible, namely, to bridge the gap between the "fact" and "law" doctrines.[173] For, it is argued, once foreign law is characterised as law, then, since it is equated with domestic law, the judicial-notice rule comes into play – in which case, our judge's role becomes similar to that of his counterpart in inquisitorial proceedings; he now takes the lead in establishing foreign law and thus the maxim *iura novit curia* is extended to include foreign law.[174] Indeed, it may be asked, why not go the whole hog and plead for the introduction of the German procedure? In such a case the court would have a duty *ex officio* to establish the foreign law by all the means at its disposal. In this endeavour it is common practice in Germany for the judge to seek assistance from the university institutes of foreign and comparative law and ask for a memorandum

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170 Phipson on Evidence 13th ed (1982) 582. It is beyond the scope of this essay to examine the fortunes of the "fact" doctrine in other countries influenced by the English common law; suffice it to mention that there are wide differences. Israel admits expert evidence by way of affidavit, but this is not permitted in certain provinces in Canada. See further Shava "Proof of Foreign law in Israel" 1984 *International Law and Politics* 211 225; McLeod *The Conflict of Laws* (1983) 38.

171 Zweigert "Some Reflections on the Sociological Dimensions of Private International law" 1973 *Univ Colorado LR* 283 298.

172 See Hunter "Proving Foreign and International Law in the Courts of England and Wales" 1978 *Virginia Jour Int L* 665 668 *et seq.*

173 On the history of the two doctrines, see Sass "Foreign Law in Civil Litigation" 1968 *Am Jour Comp L* 332.

174 On the nuances attached to the maxim, see Sass *id* 350 n 55.

either on involved questions of German conflicts law or on the content of the applicable foreign law. No doubt this practice works well enough in Germany, though some doubts have been raised. It has been said, for instance, that a detailed memorandum tends to dispose of the dispute definitely and thus oust the judicial decision completely.[175]

In defence of my proposal for statutory intervention, suffice it to say, in the context of these comments on the application of foreign law in the South African forum, that the adversary nature of our civil procedure should be retained. Having said this, however, I feel that our judges should adopt a less passive approach toward foreign law. Surely there is a *via media* between, on the one hand, making the application of foreign law depend solely upon the parties' initiative and, at the opposite pole, having it applied *ex officio*, regardless of the parties' will? Furthermore, just as the ascertainment of the content of the applicable foreign law should not depend on the efforts of the interested parties, neither should it be left solely to the researches of the judge. The intent of my statutory rule would not be to equate foreign law and domestic law for all purposes; for if this were ever contemplated, then the court would have to be given the complete responsibility for ascertaining the foreign law. My proposal merely leaves to the court's discretion the decision whether to take judicial notice of a foreign rule. Hence counsel are not relieved of the task of providing the material necessary for the determination of the foreign law. The new rule merely provides that in determining this law the court is not limited by the material adduced by the parties. The court will now be permitted to engage upon its own research; for it may well have at its disposal better sources than counsel have adduced. In any case, it should be free to re-examine and supplement material which has been presented by counsel in a partisan fashion, or in insufficient detail. In the light of *Spinazze* it does seem passing strange that Corbett JA should carefully research foreign sources to supplement a *lacuna* in our conflicts rules and yet not examine for himself the foreign law relied upon by the applicant. One can but echo Spiro's remark that the "fact" doctrine "can only be justified as a makeshift solution to meet the case where a judge who does not know a particular foreign law is also not in a position to ascertain it."[176]

The statutory change envisaged will modify the "fact" approach to foreign law and allow us to move closer to an intermediate practice where there is co-operation between the court and the parties in the ascertainment of the proper law. Such an intermediate practice is discernible too in a number of civil-law oriented countries.[177] In France, for example, the court clings to the proof-by-the-parties rule,[178] yet there are at least two significant departures from the fact doctrine as we know it in South Africa. First, the French judge may make use of his personal knowledge of foreign law or enquire into it and reach his own conclusions. Secondly, instead of the rigid insistence on the burden-of-proof

175 "Zur Verbesserung der deutschen Zivilrechtsprechung in internationalen Sachen" 1971 *RabelsZ* 323. See also Zweigert *supra* n 171 297; Siehr "Special Courts for Conflicts Cases" 1977 *Am Jour Comp L* 663 679.

176 *Conflict of Laws* (1973) 39.

177 For a survey see Zajtay *International Encyclopedia supra* n 15 9 *et seq*; Sass *supra* n 173 354–7.

178 Herzog "Proof of International Law and Foreign Law Before a French Judge" 1978 *Virginia Jour Int Law* 651 658.

requirement the applicable foreign law is determined by a collaborative endeavour between the court and the parties. In Italy, too, there has been a move towards replacing the burden-of-proof requirement by co-operation between the court and the parties.[179]

One fairly recent example of an amendment to the common-law-"fact" approach is provided in the United States by the Federal Rule of Civil Procedure 44 1 which came into operation in 1966.[180] The American law-giver has explicitly recognised the difficulties involved in the ascertainment of foreign law and the general reluctance of judges to engage in their own research; for the new rule[181] does not oblige but only authorises the court to ascertain the content of such law, and in doing so it has given the court a free hand unfettered by the usual rules of evidence. Admittedly the rule has been applied with varying degrees of enthusiasm in the federal courts,[182] and it has come in for criticism,[183] but it has cut ties to the out-dated common-law "fact" doctrine in at least two important respects. The court may now allow the party with the burden of proof to introduce the means of information on foreign law which were previously regarded as inadmissible; for example, English language translations of foreign textbooks and even unauthenticated copies of foreign laws may be tendered.

Such evidence may be instead of, or supplementary to, evidence by experts, and may be adduced by a party without being met by technical objections under the usual rules of evidence.[184] And, finally and importantly, on appeal, the reviewing court may, as with any question of law, substitute its own interpretation of the foreign law.[185]

Clearly an exhaustive and comprehensive treatment of the problems raised by the application of foreign law in our civil courts has been beyond the scope of this article. By the very nature of my comments, directed as they are to a consideration of an appeal court case where foreign law was both pleaded and proved, I have been unable to consider even such other closely related problems

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179 See further Shava *supra* n 170 218 *et seq*; Sass *supra* n 173 356. The flexible nature of the Continental rules of evidence has been cited as one reason for the tendency towards a collaborative endeavour, see Nussbaum *Principles of Private International Law* (1943) 255.

180 Its essential details are set out in Scoles and Hay *Conflict of Laws* (1984) 409–411. For a full commentary on its historical background, see Miller "Federal Rule 44 1 and the 'Fact' Approach to Determining Foreign Law" 1967 *Michigan LR* 613.

181 FRCP 44 1 provides: "A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony whether or not submitted by a party, or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law." (This amended version came into effect on 1975–07–01.)

182 For a commentary on the impact of Rule 44 1 on the American practice, over some 13 years or so, see Sass "Foreign Law in Federal Courts" 1981 *Am Jour Comp L* 97. Cf Schmertz "The Establishment of Foreign and International Law in American Courts" 1978 *Virginia Jour Int L* 697.

183 See Pollack "Proof of Foreign Law" 1978 *Am Jour Comp L* 470.

184 See further Scoles and Hay *supra* n 180 411; Sass (2) *supra* n 182 108 *et seq.*

185 *ibid.*

where there has been a failure, first, to plead a foreign rule,[186] and secondly, to prove the applicable foreign rule.[187]

(*Postscript*: Since this article was submitted for publication an important recommendation concerning the proof of foreign law has emanated from the South African Law Commission. It is now proposed that courts be allowed "to take notice of foreign law in so far as it can be readily ascertained with certainty, provided that the parties are not prohibited from adducing evidence on such law.")[188]

186 Here certain cases spring to mind, such as custody cases (where the welfare of the child is paramount) and those involving the status of married persons, which indicate that the applicable foreign law should be applied *ex officio*. See Ehrenzweig *supra* n 127 182–183.

187 In this case there has been too ready a recourse to the fiction which presumes an identity between the *lex fori* and the applicable foreign law; see further Zajtay *supra* n 168 254.

188 Working Paper 11 Project 6 (*Review of the Law of Evidence* – March 1986) 8 3.

If I believe that judicial wisdom outranks academic speculation, I feel with equal strength that legal science has the duty to guide the courts so as to reach the limited generalizations upon which legal rules must be formed. (per Rabel 46 *Michigan Law Review* 638.)

Aanleuning: skending van 'n handelsmerk en die reg op werfkrag buite mededingingsverband*

Frederick Mostert
BA LLB

SUMMARY

In this article the misappropriation of a trade mark on non-competing goods is examined. Three forms of damage are likely to result from the unauthorised use of a trade mark on non-competing goods. In the first place, such use can give rise to a confusion of sponsorship or business connection. This leads to the likelihood that the ill repute of the unauthorised user's goods may be visited upon the trade mark holder's non-competing goods. Secondly, the unauthorised use on non-competing goods is likely to cause a serious attrition of the advertising function of a trade mark. Both these forms of damage lead to an impairment of goodwill. Thirdly, the unauthorised exploitation of the commercial magnetism and advertising value embodied in a trade mark constitutes an independent form of injury: infringement of the right to the advertising image. These three forms of damage which are likely to arise from the unauthorised use of a trade mark on non-competing goods, are examined in some detail in this article.

1 INLEIDING

Die parasitiese gebruik van 'n handelsmerk op nie-mededingende ware of dienste is 'n toenemende verskynsel in die moderne handelswêreld. Dit is gewoonlik 'n bekende handelsmerk soos "TIFFANY," "ROLLS-ROYCE" of "COCA-COLA" wat deur 'n parasiet of ongeoorloofde gebruiker as 'n lokmiddel ten aansien van sy ware of dienste benut word. Sy oogmerk hiermee is om die kommersiële magnetisme, lokkrag of reklamewaarde beliggaam in so 'n handelsmerk ten gunste van sy eie ware of dienste uit te buit.[1]

* Teenoor die Raad vir Geesteswetenskaplike Navorsing wil ek graag my dank uitspreek vir 'n studiebeurs. Menings in hierdie artikel uitgespreek of gevolgtrekkings waartoe geraak is, is egter myne en moet nie noodwendig beskou word as dié van die bovermelde instansie nie. (Hierdie artikel is 'n gewysigde weergawe van 'n artikel wat verskyn in die *International Review of Industrial Property and Copy Right Law* – red.)

1 So verklaar Yves Saint-Gal *Protection et Défense des Marques de Fabrique et Concurrence Déloyale* (1982) W18 ivm die parasitiese gebruik van oa 'n handelsmerk tav nie-mededingende ware of dienste in die Franse reg: "La concurrence parasitaire, comme son nom l'indique, consiste pour un tiers à vivre en 'parasite' dans le sillage d'un autre, en profitant des efforts qu'il a réalisés et de la réputation de son nom, de ses activités, et de ses produits ou services." Sien ook Van Heerden en Neethling *Onregmatige Mededinging* (1983) 121–122.

Deur sulke optrede kan die ongeoorloofde gebruiker egter skade berokken aan die betrokke handelsmerk en die werfkrag van die produk of diens waaraan die betrokke handelsmerk oorspronklik verbind is. Die skade kom hier nie in die tradisionele vorm van 'n afkeer van kliënte voor soos by die gewone gevalle van 'n skending van 'n handelsmerk of 'n daad van onregmatige mededinging binne mededingingsverband nie. Die volgende drie vorme van nadeel kan deur die ongeoorloofde gebruiker se parasitiese benutting van die betrokke handelsmerk op sy nie-mededingende ware of dienste veroorsaak word. Deur die betrokke handelsmerk op sy nie-mededingende ware of dienste te benut, kan die ongeoorloofde gebruiker eerstens meebring dat die slegte reputasie van sy ware of dienste op die ware of dienste waaraan die betrokke handelsmerk oorspronklik verbind is, oorgedra word. Tweedens kan die ongeoorloofde gebruiker se optrede tot gevolg hê dat die betrokke handelsmerk se advertensiefunksie ten aansien van die ware of dienste waaraan dit oorspronklik verbind is ingrypend aangetas word. Derdens word daar in sommige gevalle ook erken dat die uitbuiting van die kommersiële magnetisme, lokkrag of reklamewaarde beliggaam in die betrokke handelsmerk op sigself 'n vorm van skade verteenwoordig. Hierdie drie vorme van nadeel wat kan voortvloei uit die ongeoorloofde gebruik van 'n handelsmerk op nie-mededingende ware of dienste, sal vervolgens elkeen nader ondersoek word.[2]

2 'n EIS VIR MISLEIDING EN VERWARRING TEN OPSIGTE VAN VERWANTSKAP

2 1 Algemeen

Misleiding en verwarring ten opsigte van verwantskap kom voor wanneer die eiser se handelsmerk op ongeoorloofde wyse deur die verweerder ten aansien van sy nie-mededingende ware of dienste gebruik word. Alhoewel die eiser se handelsmerk ten aansien van die verweerder se nie-mededingende ware of dienste gebruik word, kan die eiser en verweerder se onderskeie ware of dienste nogtans so 'n verwantskap toon dat die ongeoorloofde gebruik van die eiser se handelsmerk ten aansien van die verweerder se ware of dienste, die valse indruk wek dat daar 'n besigheidsverwantskap of affiliasie tussen die verweerder se ware of dienste en die eiser se onderneming bestaan.[3] Deur die eiser se handelsmerk sonder toestemming ten aansien van sy nie-mededingende maar verwante ware of dienste te gebruik, kan die verweerder dus die valse voorstelling by die afnemerspubliek wek dat sy ware of dienste dieselfde oorsprong as die eiser s'n het of dat sy ware of dienste onder beheer of met goedkeuring van die eiser vervaardig word. So kan die afnemerspubliek, as die handelsmerk "LAMBDA"[4] wat oorspronklik ten aansien van rekenaarapparatuur gebruik word, op ongeoorloofde wyse deur die verweerder ten aansien van rekenaarprogrammatuur

2 "Aanleuning" beteken in hierdie artikel die ongeoorloofde gebruik van 'n handelsmerk op nie-mededingende ware of dienste, asook dit wat deur Van Heerden en Neethling 123–129 onder die opskrif "Bedekte Aanleuning" bespreek word.

3 McCarthy *Trademarks and Unfair Competition* (1984) par 24:1–3 162–169. Sien ook in dié verband tov "*Verwechlungsgefahr im weiteren Sinne*" in die Duitse reg Raumbach en Hefermehl *Wettbewerbsrecht* I (1983); par 16 UWG 1544; Sack "Die Schmarotzerkonkurrenz in der deutschen Rechtsprechung" in *La Concurrence Parasitaire en Droit Comparé* (1981) 66 68.

4 *Lambda Electronics Corp v Lambda Technology Inc* 515 F Supp 915 (1981).

gebruik word, meen dat die eiser waarskynlik sy besigheid uitgebrei het. Sodoende kan die valse indruk gewek word dat die verweerder se rekenaarprogrammatuur dieselfde oorsprong het as die eiser se rekenaarapparatuur of onder die eiser se beheer en toesig vervaardig word. So 'n ongemagtigde gebruik op nie-mededingende maar verwante ware is, soos regter Learned Hand in die bekende *Yale* saak uitgewys het, op grond van die volgende oorwegings ongeoorloof:

> "However, it has of recent years been recognized that a merchant may have a sufficient economic interest in the use of his mark outside the field of his own exploitation to justify interposition by a court. His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful."[5]

Wanneer die eiser se handelsmerk sonder toestemming op die verweerder se nie-mededingende maar verwante ware of dienste gebruik word, kan die valse voorstelling gewek word dat daar 'n besigheidsverwantskap tussen die verweerder se ware of dienste en die eiser se onderneming bestaan. Sodoende word die moontlikheid geskep dat enige slegte reputasie wat aan die verweerder se ware of dienste kleef op die eiser se ware of dienste oorgedra kan word. So sal 'n koper, as hy ontevrede is met die slegte kwaliteit van die verweerder se rekenaarprogrammatuur wat onder die "LAMBDA"-merk verkoop word, na alle waarskynlikheid ook nie meer bereid wees om die eiser se rekenaarapparatuur wat ook onder die "LAMBDA"-merk bemark word, te koop nie, weens die vermeende verwantskap van oorsprong of affiliasie tussen die eiser en verweerder se ware. Hierdie vorm van nadeel word besonder raak in die *Restatement of Torts* soos volg beskryf:

> "One's interest in a trade-mark or trade name came to be protected against simulation, therefore, not only on competing goods, but on goods so related in the market to those on which the trade-mark or trade name is used that the good or ill repute of the one type of goods is likely to be visited upon the other. Thus one's interest in a trade-mark or trade name is protected against being subjected to the hazards of another's business."[6]

Deur aan 'n handelsmerk in hierdie omstandighede beskerming te verleen, word die handelsmerkreghebbende dus in staat gestel om die reputasie van sy ware of dienste en dienooreenkomstig ook die werfkrag van sy ware of dienste te beskerm. Ingevolge die eis weens misleiding en verwarring ten opsigte van verwantskap, word die handelsmerkreghebbende dus in wese in staat gestel om die werfkrag na sy ware of dienste te beskerm.[7]

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5 *Yale Electric Corp v Robertson* 26 F 2d 972 974 (2nd Cir 1928).

6 *Restatement of Torts* (1938) par 730 Comment a 597–598.

7 By 'n eis weens misleiding en verwarring tov verwantskap behoort daar nie van die eiser vereis te word om te bewys dat die verweerder se ware of dienste van 'n laer gehalte as die eiser s'n is nie. Die rede hiervoor is eerstens dat daar nie van die howe verwag kan word om 'n oordeel uit te spreek oor die onderskeie gehalte van die eiser en verweerder se ware of dienste nie. Tweedens, al besit die verweerder se ware of dienste 'n goeie gehalte wat die hede betref, is dit onseker wat met die gehalte van sy ware of dienste in die toekoms kan gebeur. Daar kan nie van die eiser verwag word om die reputasie van sy ware of dienste in die hande van die verweerder te plaas nie. Die blote moontlikheid dat die slegte reputasie van die verweerder se ware of dienste op die eiser se ware of dienste oorgedra kan word, weens die gebruik van dieselfde handelsmerk op beide die eiser en verweerder se ware of dienste, behoort derhalwe 'n voldoende eisgrond daar te stel vir 'n eis weens misleiding en verwarring tov verwantskap. Sien McCarthy par 24:5A.

Die ongeoorloofde gebruik van 'n handelsmerk op nie-mededingende maar verwante ware of dienste sal ook tot gevolg hê dat die afnemerspubliek mislei en verwar word oor die oorsprong, verwantskap of affiliasie van die verweerder se ware of dienste. 'n Eis weens misleiding en verwarring ten opsigte van verwantskap verhoed dus dat die afnemerspubliek mislei word deur hierdie soort ongeoorloofde optrede deur 'n verweerder.[8]

'n Eis weens misleiding en verwarring ten opsigte van verwantskap dien derhalwe ter vervulling van die twee basiese oogmerke van die handelsmerkereg. Dit dien ter beskerming van die reputasie en werfkrag van die handelsmerkreghebbende se ware of dienste asook ter voorkoming van die misleiding van die afnemerspubliek.[9] Hierbenewens maak 'n eis weens misleiding en verwarring ten opsigte van verwantskap ook voorsiening daarvoor dat die hof in oorweging kan neem dat die eiser moontlik sy onderneming sal uitbrei onder sy handelsmerk om ware of dienste te vervaardig soortgelyk aan dié wat die verweerder tans op ongeoorloofde wyse onder dieselfde handelsmerk bemark. Die hof kan ook in ag neem dat aangesien die verweerder op die rug ry van die kommersiële magnetisme wat die eiser rondom sy handelsmerk opgebou het, die verweerder ten koste van die eiser ongeregverdig verryk word.[10]

By die vasstelling of die verweerder die valse voorstelling by die afnemerspubliek wek dat daar 'n besigheidsverwantskap of affiliasie, tussen sy ware of dienste en die eiser s'n bestaan, deur op ongeoorloofde wyse dieselfde handelsmerk as die eiser s'n ten aansien van sy ware of dienste te gebruik, word die volgende faktore onder meer as riglyne in ag geneem:[11] Die verwantskap en nabyheid van die eiser en verweerder se onderskeie ware of dienste; die sterkte van die eiser se handelsmerk; die mate van ooreenkoms tussen die handelsmerke wat die eiser en verweerder onderskeidelik gebruik; die moontlikheid dat die eiser sy ondernemingsfeer sal uitbrei om soortgelyke ware of dienste as die verweerder te bemark; die afnemerspubliek se bewustheid van korporatiewe diversifikasie en die moontlikheid daarvan ten opsigte van die eiser se onderneming; die mate waartoe die eiser en verweerder hulle onderskeie ware of dienste deur dieselfde kanale bemark; en die bewys van daadwerklike misleiding en verwarring by die afnemerspubliek.

Die volgende gevalle dien as voorbeelde van gevalle waar die Amerikaanse en Duitse howe al bevind het dat die ongeoorloofde gebruik van die eiser se handelsmerk op die verweerder se nie-mededingende maar verwante ware, die afnemerspubliek waarskynlik onder die valse indruk sal bring dat daar 'n besigheidsverwantskap of affiliasie tussen die verweerder se ware of dienste en die eiser se onderneming bestaan: die ongemagtigde gebruik van die "ROLLS-ROYCE"-merk ten aansien van die verweerder se radiobuise, waar dit oorspronklik ten aansien van die eiser se motorvoertuie en vliegtuie gebruik word;[12]

8 McCarthy par 24:5B.
9 Vgl ook *James Burrough Ltd v Sign of Beefeater Inc* 540 F 2d 266 274 (7th Cir 1976).
10 McCarthy par 24:5C–D.
11 Sien oor die algemeen *Polaroid Corp v Polarad Electronics Corp* 287 F 2d 492 (2nd Cir 1961); McCarthy par 24:6–8; Gilson *Trademark Protection and Practice* (1983) par 5:05 [1]–[8]; Goldberg Borchard Shereff "Mushrooms Revisted: More on Related Goods in the Seca Circuit" (1984) *Trade-Mark Reporter* 207. Sien ook tov die Duitse reg Baumbach en Hefermehl I par 16 UWG 1545–1546.
12 *Wall v Rolls-Royce of America Inc* 4 F 2d 333 (3d Cir 1925).

die ongemagtigde gebruik van die "BEEFEATER"-merk ten aansien van die verweerder se restaurant, waar dit oorspronklik ten aansien van die eiser se jenewer gebruik word;[13] die ongemagtide gebruik van die "LLOYD'S OF LONDON"-merk ten aansien van die verweerder se naskeer cologne, waar dit oorspronklik ten aansien van die eiser se versekeringsbesigheid gebruik word;[14] die ongemagtigde gebruik van die "WHITE HORSE"-merk ten aansien van die verweerder se kosmetiekware, waar dit oorspronklik ten aansien van die eiser se whisky gebruik word;[15] die ongemagtigde gebruik van die "G-MAN"-merk ten aansien van die verweerder se drukwerkkleurstowwe, waar dit oorspronklik as "MAN" ten aansien van die eiser se vragmotors, masjiene en drukmasjiene gebruik word;[16] die ongemagtigde gebruik van die "JOHN PLAYER SPECIAL" -merk ten aansien van die verweerder se klereware, waar dit oorspronklik ten aansien van die eiser se sigarette en tabakprodukte gebruik word.[17]

2 2 Misleiding en Verwarring ten opsigte van Verwantskap in die Engelse en Suid-Afrikaanse Reg

In die Engelse reg word 'n eis vir misleiding en verwarring ten opsigte van verwantskap nie as sodanig erken nie.[18] Nietemin het die Engelse howe wel in sommige gevalle die *tort of passing off* uitgebrei om aan 'n handelsmerk beskerming te verleen teen die ongeoorloofde gebruik daarvan op nie-mededingende maar verwante ware of dienste. 'n Goeie illustrasie hiervan word gevind in *Annabel's (Berkeley Square) Ltd v G Schock.*[19] In die onderhawige saak het die eisers 'n welbekende nagklub met die naam "Annabel's" bedryf. Die verweerder het 'n agentskap vir damesmetgeselle ook onder die naam van "Annabel's" geopen. Die hof bevind dat aangesien die eisers en die verweerder se onderskeie ondernemings albei verband hou met die naglewe en aandvermaaklikheid, die afnemerspubliek waarskynlik sou meen dat daar 'n besigheidsverwantskap bestaan tussen die verweerder se agentskap vir damesmetgeselle en die eisers se nagklub. Op grond hiervan staan die hof 'n interdik toe ten einde die goeie reputasie en werfkrag van die eisers se onderneming te beskerm en te verhoed dat die ongunstige konnotasie wat deur die publiek vereenselwig word

13 *James Burrough Ltd v Sign of Beefeater Inc* 540 F 2d 266 (7th Cir 1976).
14 *The Corporation of Lloyd's v Louis D'Or of France Inc* 202 USPQ 313 (1979).
15 *White Horse* BHG 1966 *GRUR* 267.
16 *MAN* BGH 1981 *EIPR* D–178.
17 *John Player* OLG München 1981 *GRUR* Int 180.
18 Die rede hiervoor is waarskynlik dat die Engelse reg nie soos die Amerikaanse en Duitse reg 'n algemene aanspreeklikheidsbasis vir onregmatige mededingingsgevalle erken nie. Derhalwe bestaan daar geen algemene basis waaruit 'n eis vir misleiding en verwarring tov verwantskap in die Engelse reg kan ontwikkel nie. 'n Handelsmerkreghebbende sal in die Engelse reg slegs teen 'n geval van onregmatige mededinging beskerm word as so 'n geval binne die kader van die *tort of passing off* val. Dit is egter insiggewend om daarop te let dat die *House of Lords* die *tort of passing off* in die *Advocaat* saak (*Erven Waarnink Besloten Vennootschap v J Townend en Sons (Hull) Ltd* 1979 AC 731) uitgebrei het, wat vertolk kan word as 'n stap in die rigting van die erkenning van 'n meer algemene basis van aanspreeklikheid vir onregmatige mededingingsgevalle.
19 1972 *RPC* 838.

met agentskappe vir damesmetgeselle soos die verweerder s'n op die goeie reputasie van die eisers se nagklub oorgedra word.[20]

Interessant genoeg bestaan daar in die Engelse reg 'n statutêre reëling wat voorsiening maak vir die beskerming van 'n handelsmerk teen die gebruik daarvan op nie-mededingende ware. Ingevolge paragraaf 27 van die *Trade Marks Act* 1938 kan die "eienaar" van 'n handelsmerk dit defensief registreer ten aansien van klasse goedere ten opsigte waarvan hy nie van voorneme is om dit te gebruik nie. Hierdie maatreël kan waarskynlik onder meer gebruik word om 'n handelsmerk teen die gevaar van misleiding en verwarring ten opsigte van verwantskap te beskerm. Weens die streng vereistes wat gestel word vir die defensiewe registrasie van 'n handelsmerk,[21] asook die howe se konserwatiewe toepassing van hierdie maatreël, is defensiewe registrasie egter nie 'n besonder suksesvolle maatreël nie en word dit gevolglik ook weinig in die praktyk aangewend.[22]

In die Suid-Afrikaanse reg word 'n handelsmerk ook ingevolge 'n uitgebreide aanklampingsaksie beskerm teen die ongeoorloofde gebruik daarvan op nie-mededingende ware of dienste. Dit word weerspieël in die appèlhof se uitspraak in *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc.*[23] In hierdie saak is die eiser se "HOLIDAY INNS"-merk wat oorspronklik ten aansien van die eiser se hotelle gebruik word, sonder toestemming deur die verweerders ten aansien van 'n winkelsentrum en 'n vakansieoord gebruik. Appèlregter Rabie bevind dat die afnemerspubliek waarskynlik hierdeur onder die valse indruk sal verkeer dat daar 'n besigheidsverwantskap tussen die verweerders se dienste en die eiser se onderneming bestaan. Hy wys ook op die moontlikheid dat indien die verweerders se winkelsentrum en vakansieoord op 'n onbevredigende wyse bestuur word, die resulterende slegte reputasie oorgedra kan word op die goeie reputasie van die eiser se hotelbesigheid. Dienooreenkomstig word 'n interdik

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20 In die volgende sake het die howe ook bv bevind dat die afnemerspubliek waarskynlik mislei sal word oor die bestaan van 'n besigheidsverwantskap tussen die verweerder se ware of dienste en die eiser se onderneming weens die ongeoorloofde gebruik van die eiser se handelsmerk tav die verweerder se ware of dienste: *The Eastman Photographic Materials Company Ld v The John Griffiths Cycle Corporation Ld* 1898 *RPC* 105 (die ongemagtigde gebruik van die "KODAK"-merk tav die verweerder se trapfietse is verbied, waar dit oorspronklik tav die eiser se kameras gebruik word); *Harrods Ltd v R Harrod Ltd* 1924 *RPC* 74 (ongemagtigde gebruik van die merk "R HARROD LIMITED" tav die verweerder se geldeen besigheid is verbied waar dit oorspronklik as "HARRODS LIMITED" tav die eiser se omvattende besigheid wat 'n bankafdeling insluit, gebruik is); *Ames Crosta Ltd v Pionex International Ltd* 1977 *FSR* 46 (ongemagtigde gebruik van die "*PIONEX*"-merk die verweerder se bemarking van oorpakke vir beskerming is verbied, waar dit oorspronklik tav die eiser se besigheid van beheer oor industriële besoedeling gebruik word); *Television Broadcasts Ltd v Home Guide Publication Co* 1928 *FSR* 505 (SC Hong Kong) (ongemagtigde gebruik van die titel "NEW LOOKS OF WOMEN" vir die verweerder se familie tydskrif is verbied, waar dit oorspronklik tav die eiser se televisieprogram vir dames gebruik word).

21 Voordat 'n "eienaar" sy handelsmerk defensief kan registreer, moet hy aan die volgende streng vereistes voldoen: Afgesien daarvan dat hy bewys moet lewer dat sy handelsmerk so bekend geword het dat diè gebruik daarvan op ander (onverwante) goedere waarskynlik 'n misleiding tov 'n handelsverwantskap sal wek, moet hy oa boonop ook aantoon dat sy handelsmerk 'n "invented word" verteenwoordig.

22 Sien meer hieroor in Blanco White en Jacob *Kerly's Law of Trade Marks and Trade Names* (1983) par 8–81; Cornish *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981) 541–544.

23 1977 2 SA 916 (A).

teen die verweerders toegestaan waarkragtens hulle verbied word om die "HOLIDAY INN"-merk ten aansien van die winkelsentrum en vakansieoord te gebruik.[24]

Aangesien daar in ons reg, net soos in die Amerikaanse en Duitse reg, 'n algemene basis van aanspreeklikheid vir onregmatige mededingingsgevalle erken word, is dit onwenslik om 'n handelsmerk teen die misleidende gebruik daarvan op nie-mededingende ware of dienste deur middel van 'n uitgebreide aanklampingsaksie soos in die Engelse reg te beskerm. 'n Eis vir misleiding en verwarring ten opsigte van verwantskap behoort ook in ons reg as 'n selfstandige eisgrond erken te word wat gebaseer is op die algemene basis van aanspreeklikheid vir onregmatige mededingingsgevalle. 'n Aanklampingsaksie is tradisioneel gerig op die beskerming van 'n handelsmerk waar daar 'n mededingingstryd tussen die eiser en verweerder bestaan. 'n Eis vir misleiding en verwarring ten opsigte van verwantskap, daarenteen, is gerig op die beskerming van 'n handelsmerk teen die misleidende gebruik daarvan op die verweerder se ware of dienste wat nie in mededinging met die eiser se ware of dienste aangebied word nie. Indien hierdie onderskeid in gedagte gehou word, kan die erkenning van 'n eis vir misleiding en verwarring ten opsigte van verwantskap as 'n selfstandige eisgrond in ons reg tot groter regsekerheid en 'n gesonde regspleging lei.[25]

Dit is interessant om daarop te let dat daar in ons reg, net soos in die Engelse reg, ook voorsiening gemaak word vir die statutêre beskerming van 'n handelsmerk teen die ongeoorloofde gebruik daarvan op nie-mededingende ware deur middel van die defensiewe registrasie van 'n handelsmerk.[26] Die defensiewe registrasie van 'n handelsmerk kan waarskynlik ook in ons reg aangewend word om 'n handelsmerk te beskerm teen die gevaar van 'n misleidende gebruik daarvan op nie-mededingende ware. Aangesien daar nie in ons reg vereis word dat 'n handelsmerk, soos in die Engelse reg, uit 'n *invented word* (versonne woord) hoef te bestaan, om vir defensiewe registrasie in aanmerking te kom nie, sal die defensiewe registrasie van 'n handelsmerk in ons reg 'n wyer mate van beskerming kan bied aan handelsmerke teen die ongeoorloofde gebruik daarvan op nie-mededingende ware.[27]

24 Vgl egter *Miriam Glick Trading (Pty) Ltd v Clicks Stores (Transvaal) (Pty) Ltd* 1979 2 SA 290 (T) (bevind dat die gebruik van die "GLICKS"-naam tav 'n meubelbesigheid waarskynlik nie die afnemerspubliek onder die valse indruk sal bring dat daar 'n besigheidsverwantskap bestaan met die eiser se selfbedieningswinkel wat hoofsaaklik huishoudelike ware verkoop en onder die naam "CLICKS" bedryf word nie); *Searles Industrials (Pty) Ltd v International Power Marketing (Pty) Ltd* 1982 4 SA (T) 123 130–131 (Bevind dat die gebruik van 'n perdekop saam met die naam "JORDACHE" tav klerasie waarskynlik nie die afnemerspubliek onder die valse indruk sal bring dat daar 'n besigheidsverwantskap bestaan met die applikant se skoene wat ook onder 'n perdekopsimbool en die naam "Watson" bemark word nie.)

25 Sien ook Van Heerden en Neethling 114–116 123–126.

26 par 53 van die Wet op Handelsmerke 62 van 1963. Defensiewe registrasie maak voorsiening vir die beskerming van 'n handelsmerk tav goedere waarop die reghebbende nie sy handelsmerk gebruik of van voorneme is om dit te doen nie; dws buite mededingingsverband. Ten einde 'n handelsmerk defensief te registreer tav ander goedere as dit waarvoor so 'n handelsmerk geregistreer en gebruik word, moet die reghebbende oa aantoon dat die moontlike gebruik van die betrokke handelsmerk op hierdie ander (nie-mededingende) goedere waarskynlik beskou sal word as 'n aanduiding van 'n handelsverwantskap tussen hierdie goedere en die reghebbende op die betrokke handelsmerk (par 53(1) van die Wet op Handelsmerke 62 van 1963).

27 Sien oor die algemeen hieroor Webster en Page *South African Law of Trademarks, Company Names and Trading Styles* (1972) 160–167.

3 'n EIS GEGROND OP DIE EROSIE VAN 'n HANDELSMERK

3 1 Algemeen

Die erosie van 'n handelsmerk kom ook voor wanneer 'n handelsmerk sonder toestemming op nie-mededingende ware of dienste gebruik word. By erosie van 'n handelsmerk is die ware of dienste van die verweerder egter nie so verwant aan die eiser se ware of dienste dat die ongeoorloofde gebruik van die eiser se handelsmerk ten aansien van die verweerder se ware of dienste die afnemerspubliek sal mislei deur die wanindruk te wek dat daar 'n besigheidsverwantskap tussen die verweerder se ware of dienste en die eiser se onderneming bestaan nie. By die erosie van 'n handelsmerk gaan dit egter om die uitmergeling van die advertensiefunksie van 'n handelsmerk.

Die belang van die advertensiefunksie van 'n handelsmerk word op treffende wyse aangetoon deur regter Frankfurter in die volgende bekende passasie:

> "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. A trade-mark is a merchandising short-cut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same – to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trade-mark owner has something of value. If another poaches upon the commercial magnetism of the symbol he has created, the owner can obtain legal redress.[28]

Die advertensiefunksie van 'n handelsmerk behels onder meer om weens die onderskeidingswaarde, uniekheid en aantrekkingskrag wat 'n handelsmerk op sigself inhou, by die afnemerspubliek 'n spesifieke produk of diens in die geheue op te roep en die aandag daarop te vestig. Die advertensiefunksie van 'n handelsmerk omvat die identiteitswaarde van en houvas wat 'n handelsmerk op die afnemerspubliek het, om hulle na 'n spesifieke produk of diens aan te trek. So byvoorbeeld roep die onderskeidende "COCA-COLA"-merk onmiddellik die beeld van 'n spesifieke, donker koeldrankproduk by 'n koper op. Deur 'n sekere produk of diens in die geestesoog van die koper vas te pen, is so 'n handelsmerk ook 'n effektiewe skakelmiddel waardeur bevrediging en begeerlikheid geheg kan word aan 'n spesifieke produk of diens. 'n Handelsmerk simboliseer en weerspieël die bevrediging en begeerlikheid van die spesifieke produk of diens waaraan dit gekoppel is. As sodanig is 'n handelsmerk 'n belangrike stimulant vir die verdere aanvraag na die spesifieke produk of diens waaraan dit verbonde is. 'n Handelsmerk is gevolglik 'n besonder doeltreffende verkoopsinstrument waardeur inligting aan die afnemerspubliek oorgedra kan word oor die aantreklikheid van die spesifieke produk of diens waaraan die handelsmerk gekoppel is. So byvoorbeeld simboliseer die "COCA-COLA"-merk die bevrediging en begeerlikheid van die aangename koeldrank ten aansien waarvan dit gebruik word en weerspieël die "ROLLS-ROYCE"-merk weer die hoë gehalte van die motor ten aansien waarvan dit gebruik word.

'n Handelsmerk besit derhalwe advertensiewaarde indien dit 'n sekere produk of diens aandui en by die afnemerspubliek oproep en 'n gunstige assosiasie opwek oor die bevrediging en begeerlikheid van die spesifieke produk of diens waaraan

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28 *Mishawaka Rubber en Woolen Mfg Co v SS Kresge Co* 316 US 203 205 86 L Ed 1381 1384–1385 62 S Ct 1022 (1942).

dit verbonde is. Op grond van hierdie advertensiefunksie wat 'n handelsmerk verrig, dien dit om die afnemersaanvraag te kanaliseer na die spesifieke produk of diens waaraan die handelsmerk gekoppel is, om sodoende by te dra tot die vorming van werfkrag rondom hierdie spesifieke produk of diens waaraan die handelsmerk verbonde is.[29]

By 'n eis weens die erosie van 'n handelsmerk[30] gaan dit om die beskerming van hierdie waardevolle belang beliggaam in die advertensiewaarde van 'n handelsmerk. Die belang van die beskerming van die advertensiewaarde beliggaam in 'n handelsmerk is soos volg deur die Duitse *Bundesgerichtshof* toegelig:

> "Diesem Sonderschutz aus dem Rechtsgedanken der Verwässerung liegt die Erwägung zugrunde, dass der Inhaber eines solchen Kennzeichens ein berechtigtes Interesse daran hat, dass ihm seine unter grossem Aufwand von Zeit und Geld erworbene Alleinstellung erhalten bleibt und dass alles vermieden wird, was die Eigenart und den kennzeichnenden Charakter seiner Kennzeichnung verwässern und damit die auf deren Einmaligkeit beruhende starke Werbewirkung beeinträchtigen könnte . . . Es geht also im Grunde darum, einen erworbenen Besitzstand gegen Beeinträchtigungen zu schützen, nicht dagegen darum, irgendwelche Verwechslungen zu verhindern.[31]

'n Eis gegrond op erosie dien derhalwe ter beskerming van 'n handelsmerk teen die ongeoorloofde gebruik daarvan op nie-mededingende ware of dienste wat die erosie daarvan veroorsaak. Erosie behels die uitmergeling van die advertensiefunksie van 'n handelsmerk. Erosie kan hoofsaaklik op die volgende twee wyses plaasvind.[32]

3 2 Versplintering van 'n Handelsmerk

Eerstens kan die ongeoorloofde gebruik van 'n handelsmerk op nie-mededingende ware of dienste tot gevolg hê dat die onderskeidingswaarde, identiteit en aantrekkingskrag van 'n handelsmerk verwater en verdof word om 'n spesifieke produk of diens by die afnemerspubliek op te roep. So 'n ongeoorloofde gebruik veroorsaak die geleidelike versplintering en afslyting van die identiteitswaarde van en houvas wat 'n handelsmerk op die afnemerspubliek het, om hulle na 'n spesifieke produk of diens aan te trek.[33] 'n Ongeoorloofde gebruik van 'n handelsmerk ten aansien van nie-mededingende ware of dienste veroorsaak 'n versplintering van die eksklusiewe assosiasie daarvan met die eiser se ware of dienste waaraan dit oorspronklik verbind is. Hoe meer 'n sekere handelsmerk op verskeie ware of dienste gebruik en daarmee geassosieer word hoe minder sal dit dan neig om slegs die eiser se ware of dienste waaraan dit oorspronklik verbind

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29 Sien oor die algemeen oor die advertensiefunksie van 'n handelsmerk: *Wedgewood Homes Inc v Lund* 659 P 2d 377 380 (1983) (*en banc*); Wolf "Trademark Dilution: The Need for Reform" 1984 *Trade-Mark Reporter* 311 322; Schecter "The Rational Basis of Trademark Protection" 1927 *Harv L Rev* 813 818–819; Callmann-Altman *The Law of Unfair Competition, Trademarks and Monopolies* (1983) par 17 04; Baumbach en Hefermehl *Warenzeichenrecht* II (1979) *Ein1WZG* 74–75.

30 Erosie van 'n handelsmerk in die Duitse reg staan bekend as *"Verwässerung."*

31 *Quick* BGH 1959 *GRUR* 182 186.

32 Sien oor die algemeen hieroor die nota *"Dilution, Trademark Infringement or Will-o'-the-Wisp?"* 1964 *Harv L Rev* 520 531; Wolf 1984 *Trade-Mark Reporter* 311 322–323; Feder "Trademark-§ 368-d Dilution Relief in New York – Abandoning the Confusion/Competition Requirement" 1978 46 *Fordham L Rev* 1315 1336–1337; Gilson par 5 05 [9] 5–41. Sien ook Baumbach en Hefermehl 1 Allg 119; Van Heerden en Neethling 126–127.

33 Schecter 1927 *Harv L Rev* 813 825 342; Callmann-Altman par 21 11 34.

is, op te roep en die aandag daarop te vestig.[34] Indien die "TIFFANY"-merk wat oorspronklik eksklusief met juweliersware geassosieer word, nou byvoorbeeld op ongeoorloofde wyse ook ten aansien van sjokolade, klere, 'n rolprenthuis, 'n restaurant of ander ware of dienste gebruik word, sal die waarskynlikheid dat die "TIFFANY"-merk nog die juweliersware waaraan dit oorspronklik verbind is, by die afnemerspubliek sal oproep en die aandag daarop sal vestig, toenemend afneem. Die eksklusiewe assosiasie van "TIFFANY" met die juweliersware waaraan dit oorspronklik verbind is, sal deur sulke ongeoorloofde gebruik op nie-mededingende ware of dienste, versplinter word en afgeslyt raak. Sodoende word die identiteitswaarde van en houvas wat die "TIFFANY"-merk op die afnemerspubliek het, om hulle spesifiek na "TIFFANY"-juweliersware aan te trek, ingrypend aangetas.

In die volgende gevalle het die Amerikaanse en Duitse howe byvoorbeeld die ongeoorloofde gebruik van 'n handelsmerk op nie-mededingende ware of dienste in sulke omstandighede teen die erosie daarvan beskerm: die ongemagtigde gebruik van die "HYATT"-merk is verbied ten aansien van die verweerder se groep wat regsdienste lewer, waar dit oorspronklik ten aansien van die eiser se hotelgroep gebruik word;[35] ongemagtigde gebruik van die naam "TOWER OF BABBLE" in die advertensie van die verweerder se aspirin is verbied, waar dit oorspronklik ten aansien van die eiser se taalspel gebruik word;[36] ongemagtigde gebruik van die merk "KUPFERBERG" is verbied ten aansien van die verweerder se besigheid wat hout, plaatmetaal, masjinerie en gereedskap in- en uitvoer, waar dit oorspronklik ten aansien van die eiser se sjampanje gebruik word;[37] die ongemagtigde voornemende gebruik van die merk "GUT ROSENTAL" is verbied ten aansien van die verweerder se visprodukte, spiritualieë en likeure, waar dit oorspronklik as "ROSENTHAL" ten aansien van die eiser se huishoudelike en sierporseleinware gebruik word.[38]

3 3 Generiese Gebruik van 'n Handelsmerk

Die bovermelde vorm van die erosie van 'n handelsmerk kan ook deur die generiese gebruik daarvan teweeggebring word. Die onderskeidingswaarde, identiteit en aantrekkingskrag van 'n handelsmerk wat dien om 'n spesifieke produk of diens by die afnemerspubliek op te roep, kan verwater en verdof word indien dit in 'n generiese sin deur die publiek en veral deur nuusblaaie, tydskrifte, woordeboeke en ander publikasies gebruik word. Voorbeelde hiervan is die generieswording van die merk "ASPIRIN"[39] en "CELLOPHANE."[40] In hierdie stadium kan die handelsmerkreghebbende waarskynlik nie veel meer doen om sy handelsmerk teen die generieswording daarvan te beskerm nie, as om 'n vriendelike versoekbrief te skryf aan die publiseerders van nuusblaaie, tydskrifte,

34 Sien Pattishall "Dawning Acceptance of the Dilution Rationale for Trademark – Trade Identity Protection" 1984 *Trade-Mark Reporter* 289 300; Callmann-Altman par 21 12 49–51; Schricker "Protection of Famous Trademarks Against Dilution in Germany" 1980 *IIC* 166 171.

35 *Hyatt Corp v Hyatt Legal Services* 736 F 2d 1153 (7th Cir 1984).

36 *Dawn v Sterling Drug Inc* 319 F Supp 358 (1970).

37 *Kupferberg* BGH 1966 *GRUR* 623.

38 *Rosenthal* OLG Düsseldorf 1983 *GRUR* 389.

39 *Bayer Co v United Drug Co* 272 Fed 50 (1921).

40 *DuPont Cellophane Co Inc v Waxed Products Co Inc* 85 F 2d 75 (2nd Cir 1936).

woordeboeke en ander publikasies, waarin hy versoek dat sy handelsmerk nie in 'n generiese sin gebruik moet word nie. 'n Eis gegrond op erosie behoort egter in hierdie omstandighede beskikbaar te wees om 'n handelsmerk teen die generieswording daarvan te beskerm.[41]

3 4 Besoedeling van 'n Handelsmerk deur die Gebruik Daarvan in 'n Ongunstige Verband

Tweedens kan die ongemagtigde gebruik van 'n handelsmerk in 'n ongunstige verband veroorsaak dat die gunstige assosiasie wat dit by die afnemerspubliek opwek oor die bevrediging en begeerlikheid van 'n spesifieke produk of diens, besoedel word. Wanneer 'n handelsmerk op ongeoorloofde wyse op nie-mededingende ware of dienste in 'n onwelvoeglike, aanstootlike of onaanvaarbare konnotasie gebruik word, kan die gunstige assosiasie wat dit by die afnemerspubliek opwek, ernstig belemmer word.[42] So het die Amerikaanse en Duitse howe al 'n handelsmerk in die volgende gevalle teen hierdie soort van erosie beskerm: die ongemagtigde gebruik van die woorde "ENJOY COCAINE" op die verweerder se plakkaat in dieselfde stilistiese formaat as die eiser se "COCA-COLA"-merk wat oorspronklik ten aansien van sy koeldrankproduk gebruik word, is verbied;[43] die vervaardiger van 'n insekdodende vloerpolitoer is verbied om die slagspreuk "WHERE THERE'S LIFE . . . THERE'S BUGS" ten aansien van sy ware te gebruik, waar dit oorspronklik deur die eiser, Budweiser, in die vorm "WHERE THERE'S LIFE . . . THERE'S BUD" ten aansien van sy bier gebruik word;[44] ongemagtigde gebruik van die eiser, 'n bank, se "COOKIE JAR"-merk ten aansien van die verweerde se *topless go-go bar* wat reg oorkant die straat van die bank se hooftak geleë is, is verbied;[45] die merk "4711," wat oorspronklik ten aansien van die eiser se parfuum gebruik word, se ongemagtigde gebruik op 'n onwelriekende tenkvragmotor van 'n rioleringsbesigheid is verbied, ten spyte daarvan dat hierdie syfers die rioleringsbesigheid se telefoonnommer was.[46]

Die ongeoorloofde gebruik van 'n handelsmerk op 'n nie-mededingende produk of diens kan dus op hierdie twee bovermelde wyses tot gevolg hê dat die effektiwiteit van so 'n handelsmerk om die afnemerspubliek te kanaliseer na die spesifieke produk of diens waaraan dit gekoppel is, drasties gekortwiek word.

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41 Sien McCarthy par 24:13 F; Wolf 1984 *Trade-Mark Reporter* 311 319–322; Derenberg "The Problem of Trademark Dilution and the Antidilution Statutes" 1956 *Calif L Rev* 439 463–476; Callmann-Altman 21 12 50–51.

42 Sien McCarthy par 24:13 E; Gilson par 5 05 [2][b].

43 *Coca-Cola Co v Gemini Rising Inc* 346 F Supp 1183 (1972).

44 *Chemical Corp of America v Anheuser-Busch Inc* 306 F 2d 433 (5th Cir 1962). (Alhoewel die hof sy beslissing op 'n eis weens misleiding en verwarring van verwantskap gegrond het, verteenwoordig hierdie saak 'n goeie voorbeeld van erosie in die bovermelde sin. Sien McCarthy par 24:15. Interessant genoeg word 'n slagspreuk in die Duitse reg ook as sodanig teen die erosie daarvan beskerm. Sien Baumbach en Hefermehl I par 1 UWG 758–759.

45 *Community Federal Sav and Loan Ass'n v Orondorff* 678 F 2d 1034 (11th Cir 1982).

46 *4711* BGH (1958–07–08, ongepubliseerd – Schriker 1980 *IIC* 167). Die bovermelde vorm van erosie kan ook plaasvind wanneer die hoë gehalte wat 'n merk simboliseer deur die ongeoorloofde gebruik daarvan op 'n nie-mededingende produk of diens besoedel word. Sien bv *Steinway & Sons v Robert Demars & Friends* 1981 *USPQ* 954 waar die ongeoorloofde gebruik van die STEINWAY-merk tav die verweerder se aanknip-bierkan handvatsels verbied is, waar dit oorspronklik tav die eiser se klaviere, wat bekend is vir hulle hoë gehalte, gebruik is. Sien ook hieroor McCarthy par 24:13 E 222.

Sodoende kan die vorming van die werfkrag na hierdie spesifieke produk of diens waaraan die handelsmerk verbonde is, ernstige belemmer word. 'n Eis gegrond op erosie is derhalwe daarop gerig om hierdie soort nadelige gevolge wat kan voortvloei uit die ongeoorloofde gebruik van 'n handelsmerk op niemededingende en onverwante ware of dienste, hok te slaan.[47]

3 5 Die Konserwatiewe Benadering ten Opsigte van 'n Eis Gegrond op Erosie

'n Konserwatiewe benadering word by die Amerikaanse[48] en Duitse[49] howe aangetref wanneer dit kom by die beskerming van 'n handelsmerk teen erosie. Dit kan waarskynlik toegeskryf word aan die volgende faktore: 'n Eis gegrond op erosie dien slegs ter beskerming van die handelsmerkreghebbende se belang in die advertensiewaarde van sy handelsmerk en die werfkrag van sy produk of diens. 'n Eis gegrond op erosie vervul egter nie ook die tweede basiese oogmerk van die handelsmerkereg om die misleiding van die afnemerspubliek te voorkom nie. By 'n eis gegrond op erosie kom die tradisionele geykte vereiste by 'n handelsmerkaksie, 'n waarskynlikheid van misleiding, hoegenaamd nie ter sprake nie. 'n Eis gegrond op erosie is hoofsaaklik gerig op die beskerming van die handelsmerkreghebbende se belang. Hierbenewens verleen 'n eis gegrond op erosie beskerming in 'n nuwe en besonder wye verband, naamlik ten aansien van nie-mededingende en onverwante ware of dienste. Die feit dat 'n eis gegrond op erosie 'n nuwe en besonder wye eisgrond vir die beskerming van 'n handelsmerk daarstel, het waarskynlik daartoe gelei dat die howe uit 'n vrees vir oorbeskerming en oewerlose aanspreeklikheid 'n konserwatiewe benadering gevolg het by die beskerming van 'n handelsmerk teen erosie.

Ongelukkig het sowel die howe as sommige skrywers, waarskynlik uit die vrees vir oormatige beskerming en oewerlose aanspreeklikheid, nie net gebly by 'n konserwatiewe benadering ten opsigte van die beskerming van 'n handelsmerk teen erosie nie, maar is daar ook kunsmatige vereistes gestel vir die toepassing van 'n eis gegrond op erosie. In die Amerikaanse reg is daar byvoorbeeld aangevoer dat slegs sterk[50] of arbitrêre, sonderlinge en versonne[51] merke teen erosie beskerm moet word. In die Duitse reg word 'n handelsmerk slegs teen erosie beskerm as dit 'n beroemde merk is. Die vraag of 'n handelsmerk beroemd genoeg is om in die Duitse reg deur 'n eis gegrond op erosie beskerm te word, word aan die hand van die volgende faktore bepaal:[52] die bekendheid van die

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47 In die Engelse reg word 'n selfstandige eis gegrond op die erosie van 'n handelsmerk nie erken nie. 'n Handelsmerkreghebbende kan waarskynlik ook hier defensiewe registrasie van 'n handelsmerk aanwend om sy handelsmerk teen die erosie daarvan te beskerm. Aangesien die defensiewe registrasie van 'n handelsmerk nie 'n besonder suksesvolle maatreël is nie (sien teks by 21–23), sal dit nie van groot hulp by die beskerming van 'n handelsmerk teen die erosie daarvan kan wees nie.

48 Sien McCarthy par 24:13 B. In die afgelope ruk word die eise gegrond op erosie egter al hoe meer deur die Amerikaanse howe erken en toegepas. Sien McCarthy par 24:13 D; Pattishall 1984 *Trade-Mark Reporter* 289 291.

49 Sien Schricker 1980 *IIC* 166–167.

50 McCarthy par 24:14.

51 Schecter 1927 *Harv L Rev* 813 828–830 343–345; 1964 *Harv L Rev* 520 530–531.

52 Sien oor die algemeen Schricker 1980 *IIC* 166 169–170; Baumbach en Hefermehl I par 16 UWG 548–549; Sack 68–69.

merk onder die afnemerspubliek, die feit dat dit eksklusief gebruik word,[53] die feit dat dit 'n versonne merk is en die spesiale aansien wat die merk by die afnemerspubliek geniet.

Indien daar egter helderheid en sekerheid bestaan oor wat deur 'n eis gegrond op erosie beskerm word, blyk dit dat bogenoemde kunsmatige vereistes wat gestel word vir die toepassing van 'n eis gegrond op erosie, oorbodig is en belemmerend inwerk op die behoorlike beskerming van 'n handelsmerk teen erosie en dat die vrees vir oorbeskerming en oewerlose aanspreeklikheid oordrewe is.

By 'n eis gegrond op erosie gaan dit om die beskerming van die advertensiewaarde van 'n handelsmerk.[54] Dienooreenkomstig moet die eiser by 'n eis gegrond op erosie aantoon dat sy betrokke handelsmerk kommersiële magnetisme en advertensiewaarde besit. Soos reeds aangetoon,[55] besit 'n handelsmerk advertensiewaarde indien dit 'n spesifieke produk of diens oproep en die aandag daarop vestig en 'n gunstige assosiasie opwek oor die bevrediging en begeerlikheid van die spesifieke produk of diens waaraan dit verbonde is. 'n Eiser moet derhalwe by 'n eis gegrond op erosie aantoon dat die verweerder se ongeoorloofde gebruik van sy handelsmerk ten aansien van nie-mededingende ware of dienste, veroorsaak dat hierdie kommersiële magnetisme en advertensiewaarde van sy handelsmerk verwater en besoedel word. In die lig hiervan is dit natuurlik heeltemal oorbodig om te vereis dat die eiser se handelsmerk beroemd moet wees, want 'n minder bekende handelsmerk kan ook, net soos 'n beroemde handelsmerk, kommersiële magnetisme en advertensiewaarde besit wat behoefte het aan die beskerming daarvan teen erosie.[56] Hiermee word daar natuurlik nie ontken nie dat hoe bekender 'n handelsmerk onder die afnemerspubliek is, hoe makliker sal dit wees om te bewys dat so 'n handelsmerk kommersiële magnetisme of advertensiewaarde besit wat vir 'n eis gegrond op erosie vereis word.[57]

Benewens die aantoon van die bovermelde feit deur die eiser, moet die volgende vereistes ook vir 'n eis gegrond op erosie gestel word. Die eiser moet bewys lewer dat sy betrokke merk inderdaad as 'n handelsmerk gebruik word[58] en dat daar 'n wesenlike ooreenkoms bestaan tussen sy handelsmerk en die een wat op die nie-mededingende ware of dienste van die verweerder gebruik word.[59]

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53 Beier, in sy vonnisbespreking van *Kupferberg* 1966 *GRUR* 627 627–628, kritiseer hierdie vereiste by 'n eis gegrond op erosie. Hy spreek die mening uit dat die advertensiewaarde van 'n handelsmerk as uitgangspunt geneem moet word as vereiste by die beskerming en skending van 'n handelsmerk deur erosie.

54 Sien teks by vn 30.

55 Sien teks by vn 28–29.

56 Daar moet met die volgende stelling van die hof in *Wedgewood Homes Inc v Lund* 659 P 2d 377 381 (1983) (*en banc*) saamgestem word: "In summary, it is not the manner by which distinctiveness is acquired nor the span of mark's notoriety but rather the degree of advertising value the mark has gained which determines the applicability of ORS 647, 107 [Oregon antidilution statute].' Sien ook *Allied Maintenance v Allied Mechanical Trades Inc* 399 NYS 2d 628 633 (1977 Cooke J, afwykende uitspraak). Sien verder Callmann-Altmann par 21 12 53; Pattishall "The Dilution Rationale for Trademark – Trade Identity Protection, Its Progress and Prospects" 1977 *Trade-Mark Reporter* 607 619–622; Wolf 1984 *Trade-Mark Reporter* 311 322. Vgl ook Beier 1966 *GRUR* 627–628.

57 Dit is natuurlik 'n erkende feit in die handelsmerkereg dat 'n sterk handelsmerk oor die algemeen wyer beskerming geniet as 'n swak handelsmerk. Sien Callmann-Altman par 20 43.

58 Sien ook Pattishall 1977 *Trade-Mark Reporter* 607 621.

59 Gilson par 05 [9] 5–42 43; Sack 69.

Sonder die bewys hiervan kan daar immers nie 'n gevestigde belang of reg en kousale nadeel aangetoon word nie.

Verder moet daar ook in gedagte gehou word dat 'n eis gegrond op erosie beperk word deur die beginsels wat vrye spraak onderlê.[60] Die vrye-spraak-beginsel sal die gebruik van 'n handelsmerk vir 'n satire en parodie[61] of vir doeleindes van sosiale en politieke spraak[62] veroorloof. Kommersiële spraak sal byvoorbeeld ook vereis dat 'n handelsmerk in vergelykende reklame gebruik moet kan word vir sover dit 'n informatiewe gebruik en nie 'n bloot oorredende gebruik verteenwoordig nie.[63]

Indien hierdie bovermelde uiteensetting van die eis gegrond op erosie in gedagte gehou word, behoort dit duidelik te wees dat 'n behoorlike toepassing van hierdie eisgrond nie in werklikheid 'n oormatige beskerming en oewerlose aanspreeklikheid tot gevolg sal hê nie.

'n Eis gegrond op erosie is gerig op die beskerming van die advertensiefunksie van 'n handelsmerk, wat dien om die afnemerspubliek te kanaliseer na die spesifieke produk of diens waaraan die betrokke handelsmerk gekoppel is. Die advertensiefunksie van 'n handelsmerk is derhalwe 'n belangrike komponent in die vorming van die werfkrag na die spesifieke produk of diens waaraan die betrokke handelsmerk verbonde is. Deur die betrokke handelsmerk te beskerm, dien die eis gegrond op erosie dus in werklikheid ter beskerming van die vorming van die werfkrag na die spesifieke produk of diens waaraan die betrokke handelsmerk verbonde is.[64] Dit is dan ook niks minder as billik nie dat 'n handelsmerkreghebbende geregtig moet wees op die werfkrag wat hy rondom sy produk of diens opgebou het, deur sy eie inspanning en arbeid.[65] Daarbenewens sal die beskerming van die werfkrag van die handelsmerkreghebbende se onderneming deur middel van 'n eis gegrond op erosie, ook dien ter beloning en aansporing van die handelsmerkreghebbende om werfkrag rondom sy produk of diens op te bou. Dit sal natuurlik weer lei tot die produsering van kwaliteitsware en kwaliteitsmededinging wat slegs tot voordeel van die gemeenskap strek.[66]

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60 Sien oor die algemeen oor die verband tussen die beskerming van 'n handelsmerk en die beginsels onderliggend aan vrye spraak McCarthy pars 31:37–38; Gilson pars 05 [2] 5–32 4–32 6.

61 Sien bv *Tetley Inc v Topps Chewing Gum Inc* 556 F Supp 785 (1983) (bevind dat die gebruik van die eiser se "TETLEY"-merk op die verweerder se "Wacky Pack stickers" vir kinders in die vorm "PETLEY FLEA BAGS" as parodie en satire veroorloof is).

62 Sien bv *Stop the Olympic Prison v United States Olympic Committee* 489 F Supp 1112 (1980) (bevind dat die gebruik van die Olimpiese spele simbool en woord "OLYMPIC" op 'n plakkaat, wat gebruik word om protes aan te teken teen die plan om die "1980 Winter Olympic Games" fasiliteite in 'n tronk te omskep, geoorloof is).

63 Sien meer hieroor in Greiwe "Antidilution Statutes: A New Attack on Comparative Advertising" 1982 *Trade-Mark Reporter* 178.

64 So verklaar die hof in *Quick* BGH 1959 *GRUR* 182 186: "Die berühmte Marke geniesst in ihrer Alleinstellung, ihrem Berühmtsein, als wertvoller Bestandteil des eingerichteten und ausgeübten Gewerbebetriebs Schutz gegen objektiv widerrechtliche Störung."

65 So sê die hof bv in *Polaroid Corporation v Polaroid Inc* 319 F 2d 830 837 (7th Cir 1963) by die toestaan van 'n eis gegrond op erosie: "It was a name which through much effort and the expenditure of large amounts of money had acquired a widespread reputation and much good will, which plaintiff should not be required to share with defendant."

66 Daar is al aangevoer dat die beskerming van 'n handelsmerk teen erosie neerkom op oormatige beskerming van 'n handelsmerk en die verlening van 'n monopolie ten aansien daarvan. Die antwoord hierop is dat vir sover die beskerming van die advertensiewaarde van 'n handelsmerk op die verlening van 'n monopolie neerkom, dit deur die bovermelde beleidsoorwegings verantwoord word. Daarbenewens is die advertensiefunksie van 'n han-

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4 BESKERMING TEEN UITBUITING VAN DIE KOMMERSIËLE MAGNETISME EN REPUTASIE VERVAT IN 'N HANDELSMERK OP SIGSELF

In die Duitse reg word die reputasie van 'n bekende handelsmerk beskerm teen die ongemagtigde uitbuiting daarvan nie alleen ten aansien van mededingende nie, maar ook ten aansien van nie-mededingende ware of dienste op grond van 'n selfstandige eisgrond.[67] Die uitgangspunt is dat dit ongeoorloof is om die lokkrag van 'n handelsmerk wat met moeite en koste opgebou is, ongemagtig by die bemarking van nie-mededingende ware of dienste uit te buit.

'n Treffende voorbeeld hiervan word in die *Rolls-Royce*-saak[68] aangetref. In hierdie saak was die onderwerp van dispuut 'n volblad-kleuradvertensie in 'n tydskrif waarin "Jim Beam"-whisky geadverteer word. In hierdie advertensie is daar onder andere 'n foto van die voorkant van 'n "ROLLS-ROYCE"-motor gebruik wat die volgende kenmerke insluit: 'n figuur "The Flying Lady," die "RR" embleem en die kenmerkende koelerraam. Elkeen van hierdie kenmerke is as handelsmerke geregistreer. Die eiser, vervaardiger van "ROLLS-ROYCE" -motors, beweer dat hierdie uitbuiting van die "ROLLS-ROYCE"-kenmerke onregmatig is en doen derhalwe aansoek om 'n interdik. Die *Bundesgerichtshof* beslis dat alhoewel die eiser geen eiendomsbelang in die reputasie van sy produk het nie, dit nietemin *contra bonos mores* is kragtens paragraaf 1 van die *Gesetz gegen den unlauteren Wettbewerb* om die reputasie van 'n produk, wat bekend is vir sy kwaliteit en eksklusiwiteit, uit te buit. Dit word volgens die hof ook ondersteun deur die feit dat die eiser se aandrang op vergoeding vir die gebruik van sy "ROLLS-ROYCE"-merk gewoonlik deur die handelslui nagekom word. Die hof toon ook aan dat die eiser se lisensiëringsaktiwiteite deur die verweerder se optrede belemmer sal word. Daar word verder ook beslis dat die eksploitasie

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delsmerk, as meehanger tot die bron-identifiserings- en kwaliteitsfunksie van 'n handelsmerk 'n besonder belangrike instrument waardeur mededinging en spesifiek kwaliteitsmededinging juis bevorder kan word. Sien oor die algemeen tov die kritiek oor die opvatting van 'n handelsmerk as 'n monopolie: McCarthy par 2:5; Pattishall "Trade-Marks and the Monopoly Phobia" 1952 *Mich L Rev* 967. Brown "Advertising and the Public Interest: Legal Protection of Trade Symbols" 1948 *Yale LJ* 1165 spreek ook die volgende kritiek uit teen die beskerming van 'n handelsmerk teen erosie: Hy toon aan dat daar onderskei moet word tussen informatiewe en oorredende advertensie. Informatiewe advertensie bevorder die intelligente aankoop van ware deur die afnemerspubliek. Oorredende advertensie is daarenteen volgens hom waardeloos, skep slegs kunsmatige en irrasionele behoeftes by die koperspubliek en beperk vrye mededinging. Vir sover die advertensiefunksie van 'n handelsmerk deel vorm van oorredende advertensie, behoort dit derhalwe volgens hom nie van regsweë teen erosie beskerm te word nie. Die probleem met hierdie benadering is die volgende: Eerstens is dit besonder moeilik om die informatiewe en oorredende elemente van 'n advertensie van mekaar te skei, aangesien dit dikwels hand aan hand gaan. Hierbenewens moet daar weer eens aangetoon word dat die advertensiefunksie van 'n handelsmerk 'n belangrike middel is waardeur mededinging juis bevorder word. Sien oor die algemeen vir kritiek op Brown se benadering Oppenheim "The Public Interest in Legal Protection of Industrial and Intellectual Property" 1950 *Trade-Mark Reporter* 613 630–633; McCarthy par 2:14, Callmann-Altman par 17 04 14.

67 Hierdie eisgrond staan bekend as "*Rufausbeutung*". (Sien hieroor Baumbach en Hefermehl I par 1 UWG 774–776; Sack 68.)

68 *Rolls-Royce* 86 *BGHZ* 90. 1983 *GRUR* 247, 1984 *IIC* 240.

van 'n ander se reputasie ter reklamering van 'n persoon se eie ware ongeoorloof is, al bestaan daar geen mededingingstryd tussen die partye nie.[69]

Die beskerming van die reputasie van 'n bekende handelsmerk in die Duitse reg, soos in die *Rolls-Royce*-beslissing weerspieël word, kom natuurlik naby aan die beskerming en erkenning van die reputasie en kommersiële magnetisme van 'n handelsmerk as 'n selfstandige regsbelang. In die Amerikaanse reg is daar ook al aangevoer dat die kommersiële magnetisme of *persona* van 'n handelsmerk op sigself beskerming en erkenning moet verkry.[70]

Wanneer die kommersiële magnetisme en reklamewaarde beliggaam in 'n handelsmerk op sigself teen uitbuiting beskerm word, gaan dit natuurlik in werklikheid om die beskerming van so 'n handelsmerk as 'n reklamebeeld en behoort dit derhalwe na regte deur 'n selfstandige immaterieelgoedereg, die reg op die reklamebeeld, beskerm te word.[71]

5 SLOTOPMERKING

Die ontwikkeling van die tegniek in veral die media in hierdie eeu het die aandag toegespits op die reklamewese en die belang van die advertensiefunksie van 'n handelsmerk aan die lig gebring. Hierdie ontwikkeling het terselfdertyd 'n nuwe dimensie gegee aan die lokkrag beliggaam in 'n persoonlikheidskenmerk, fiktiewe karakter of simbool.[72] Die nodige erkenning en beskerming van hierdie nuwe waardes weerspieël weer eens dat die reg aanpasbaar en vatbaar moet wees vir dinamiese groei om tred te hou met die toenemende behoefte aan die beskerming van immateriële vermoënsbelange in die moderne samelewing.

Gedagtig aan die volgende woorde van Warren en Brandeis, word die hoop uitgespreek dat die Suid-Afrikaanse gemenereg, net soos die Amerikaanse, Duitse en in 'n mate die Engelse reg, grotendeels deur die regspraak sal ontwikkel om aan hierdie nuwe regsbelange erkenning en beskerming te verleen om sodoende tred te hou met die ontwikkeling van die samelewing op die handelsterrein:

> 'Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society'.[73]

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69 Sien ook in dié verband die uitspraak in *Bambi* BGH 1960 *GRUR* 144. In hierdie saak het die verweerder sjokolade onder die naam "BAMBI" bemark, wat ontleen is aan die rolprent "BAMBI" wat deur die eiser, "Walt Disney Productions Inc" vervaardig is. Die *Bundesgerichtshof* bevind dat die verweerder kragtens die reg insake onregmatige mededinging op ongeoorloofde wyse die reputasie beliggaam in die "BAMBI" dierekarakter, waarin die eiser outeursreg het, uitbuit. Die hof bevind ook dat die lisensiëringsaktiwiteite van die eiser wat op outeursreg berus, ernstig benadeel word deur die verweerder se optrede en staan derhalwe 'n interdik ten gunste van die eiser toe.

70 Winner "Right of Identity: Right of Publicity and Protection for a Trademark's 'Persona'" 1981 *Trade-Mark Reporter* 193. Sien ook in dié verband *Boston Professional Hockey Association Inc v Dallas Cap en Emblem MFG Inc* 510 F 2d 1004 (5th Cir 1975). Die beslissing in hierdie saak kan moontlik ook vertolk word as sou die kommersiële magnetisme van die eisers se handelsmerke, hokkiespanne se kentekens, op sigself teen uitbuiting beskerm wees.

71 Mostert *Grondslae van die Reg op die Reklamebeeld* (ongepubliseerde proefskrif RAU (1985)) 281 ev en spesifiek 309 ev.

72 Sien oor die algemeen hieroor Mostert "The Right to the Advertising Image" 1982 *SALJ* 413; Mostert proefskrif.

73 Warren en Brandeis "The Right to Privacy" 1890 *Harv L Rev* 193.

The nature of a contract and exemption clauses

JL van Dorsten
BA LLB LLM MBA
Advocate of the Supreme Court of South Africa

OPSOMMING

Die Aard van 'n Kontrak en Vrywaringsklousules

Die regte en verpligtinge wat ontstaan wanneer 'n kontrak gesluit word kan as primêr en sekondêr geklassifiseer word. Só 'n indeling vergemaklik die bepaling van die aard en uitwerking van afsonderlike bepalings en in besonder dié van vrywaringsklousules. Laasgenoemde kan ook ingedeel word in ooreenstemming met hulle uitwerking wat òf substantief òf prosedureregtelik kan wees. Daar kan dus bepaal word of primêre, sekondêre en prosedureregte uitgesluit of ingekort word deur die verskillende soorte vrywaringsklousules. Daardeur kan die opstel en interpretasie van kontrakte vergemaklik word.

1 INTRODUCTION

As a general rule, the parties to a contract may determine for themselves what the content of their contractual obligations (their rights and duties) shall be, provided they act within the law.[1] Because the basis of a contract is the agreement – whether real or presumed – between the parties, a contract need not have any particular content to be valid.[2]

There are, however, various well-developed classes or specific types of contracts – for example, sale, lease and deposit – which are commonly found in day-to-day transactions and contracting parties who intend to enter into these contracts must comply with the requirements laid down by law for such contracts.[3] The contents and consequences of the recognised contracts become fairly well known and laymen such as consumers come to expect that when they enter into specific contracts the usual and expected rights and duties will arise and will be protected or enforced in terms of the general law.

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1 See Voet 2 14 16; Grotius *Inl* 3 1 10–12 and *De Iure Belli ac Pacis* 2 12 8–10; *Wells v SA Alumenite Co* 1927 AD 69 73; *Marlin v Durban Turf Club* 1942 AD 112 113; *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 4 SA 760 (A) 766–767; *Stocks and Stocks (Pty) Ltd v TJ Daly and Sons (Pty) Ltd* 1979 3 SA 754 (A) 764C.

2 See *LAWSA* 5 111; De Wet and Yeats *Kontraktereg en Handelsreg* (1978) 5 7. For an example of a *sui generis* contract see *Farmer's Co-operative Society v Berry* 1912 AD 319 324.

3 Eg, in sale, agreement must be reached as to the *merx* and the purchase price: *Weiman v Malcomess Ltd* 1950 2 SA 115 (E) 121.

However, the normal scope of a particular type of contract or rights, duties and remedies under the general law, may be extended, restricted or excluded by special provisions in the contract or by additional or subsequent agreements. Such provisions may be introduced with the knowledge and consent of the contracting parties, but in today's mass markets they are frequently imposed unilaterally by the economically stronger party and are often contained in the fine print of prolix documents and couched in complex legal terminology so that the other party either remains unaware of them or cannot understand them. Because the use of standard form contracts and exemption clauses is widespread, it is important, for purposes of litigation and settlement, to have a clear understanding of the nature of a contract and the nature and effect of exemption clauses; this will assist in determining the effect of the clauses on the contractual rights and duties, and establishing the exact content of the contractual obligation.

2 THE NATURE OF A CONTRACT

Generally speaking, a contract is an agreement which is entered into with the intention of creating, and which in fact does create, a legal obligation. In other words, a contract is an obligation-creating agreement.[4]

As the essential element of an obligation is the legal bond or *vinculum iuris*,[5] the essence of a contract is that the duties which the parties seriously and deliberately undertake will be legally binding on them.[6] With the conclusion of a contract one party,[7] the obligor or debtor, assumes a duty, or duties, and is liable to perform them in the agreed manner, and the other party, the creditor or obligee, acquires the right to the proper performance of the duties or the obligation as a whole.[8]

The term "obligation" requires some clarification. It may be used to refer to the legal bond or *vinculum iuris*,[9] i e to signify the state or condition of being bound or answerable under the contract;[10] however, "obligation" is also commonly used to refer to the duty, debt or liability that results from the contract. This may lead to confusion because it can then be said that an obligation gives rise to an obligation. Therefore, for the purposes of clarity and consistency, the term "obligation" will be used to refer to the legal bond and the terms "duty" or "liability" will be used as the correlatives of the rights that are created by the contract. Thus seen from the debtor's side, the contractual obligation is a duty or liability to perform and from the creditor's side it is a right or a claim against the debtor for performance.[11]

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4 See De Wet and Yeats 4 7 ('n verbintenisskeppende ooreenkoms); *LAWSA* 5 110; Lee and Honoré *The South African Law of Obligations* (1978) par 51.

5 *Inst* 3 13*pr*; *D* 44 7 3; Van Leeuwen *CF* 1 4 1 2; De Wet and Yeats 1. See also *Nicholas v Wigglesworth* 1937 NPD 376 380; *Jones v Raad* 1940 CPD 376 378 ("cause of action").

6 *Wilken v Kohler* 1913 AD 135 140; *Conradie v Rossouw* 1919 AD 279 320; Wille and Millin *Mercantile Law of South Africa* (1975) 1.

7 As a contract is a bilateral juristic act there must be at least two parties to the contract. Any number of persons may, however, enter the agreement on either side, but, to simplify matters, reference will be made only to two parties.

8 *Inst* 3 3*pr*; *D* 44 7 3*pr*; Voet 12 1 1 44 7 4; Wessels *The Law of Contract in South Africa* (1951) par 27.

9 See n 5 above.

10 See *Fairlands Ltd v Inter-Continental Motors Ltd* 1972 2 SA 270 (A) 276 (where "liability" is discussed).

11 De Wet and Yeats 1; Grotius *Inl* 3 1 24.

In order to enforce his contractual rights the creditor is given a number of remedies which, along with the other rights and duties, arise at the time the contract is concluded and avail the creditor if the debtor commits breach of contract.[12] The remedies are generally aimed at proper performance but may also in special circumstances, be used to resile from the contract, or to claim compensation.

A claim for performance may take two forms: a claim for performance *in forma specifica*, that is, specific performance or *reële eksekusie*;[13] or a claim for a sum of money in lieu of the whole or incomplete part of the performance, in other words, damages as a surrogate for performance.[14] The injured party may choose which form the claim will take, subject to the court's discretion.[15]

The remedies directed towards cancellation or rescission may be said to run counter to the initial purpose or intention of the parties[16] because the contract was concluded primarily with a view to performance. Although such remedies arise at the time the contract is concluded, they are not available to the creditor until breach of contract is committed by the debtor, and then only in special circumstances.[17]

A further remedy is the claim for damages in respect of foreseeable loss suffered as a result of a breach, that is, the right to consequential damages;[18] damages that flow from and arise out of the breach itself must be distinguished from the damages as surrogate for performance. Once again this remedy, which also arises at the time of contracting, obviously avails the creditor only after a breach has occurred.

Thus it can be seen that although all the remedies arise with the obligation, they are not all immediately available to the creditor and they are not all aimed at performance. The primary object of the contractual obligation is, nevertheless, to ensure that proper performance takes place. There is, however, also a secondary object namely, to compel the debtor to compensate the creditor for any loss suffered as a result of a breach.[19]

To distinguish among the various rights and duties referred to above, it may be argued, in jurisprudential terms, that a contract gives rise, simultaneously, to primary and secondary rights and duties. This does not mean that a separate and distinct obligation or legal bond is created for each class, but merely that

12 *LAWSA* 5 200.
13 De Wet and Yeats 188–190; *LAWSA* 5 235.
14 *LAWSA* 5 233 236; De Wet and Yeats 188. This must not be confused with cancellation as the contract remains in force. See however *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).
15 See generally Grotius *Inl* 3 15 6; Van der Keessel *Prael* 3 3 41 3 15 6 and *Thes Sel* 512; *Farmer's Co-operative Society (Reg) v Berry* 1912 AD 319 324–325; *Woods v Walters* 1921 AD 303 309–310; *Shill v Milner* 1937 AD 101 106–107; *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 1 SA 312 (C) 330–331; *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378. *Gengan v Pathur* 1977 1 SA 826 (D) 830–831.
16 *LAWSA* 5 200; De Wet and Yeats 176.
17 See the *Radiotronic's* case, *supra* 300–301. The special circumstances are listed in *LAWSA* 5 238.
18 *LAWSA* 5 233 243; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 46–47; the *Radiotronic's* case, *supra* 300–301.
19 Van Zijl Steyn *Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg* (Annals of the University of Stellenbosch sec B vol 7 (1929)) 3.

the contract gives rise to various types of rights and duties that may be distinguished and grouped.

According to this analysis, the primary duty is the duty to perform in the agreed or required manner,[20] and the corresponding primary right is the right that entitles the creditor to demand performance. The primary right may in the event of a breach be enforced by means of a remedy, namely, a claim for performance (either *in forma specifica* or the equivalent in money) which is enforceable by means of a court order.[21] This remedy may be termed a primary remedy or a sanctioning right. Where money debts are concerned there is, in effect, no difference between the right to demand performance and the remedy to claim performance. In other cases, however, the creditor's right to demand the performance due and the remedy to claim damages as a surrogate for performance may be distinguished, because such damages may only be claimed after a breach occurs. The primary rights and duties are binding and effective *ab initio* and may be resorted to immediately the performance becomes due. The primary remedy gives effect to the initial purpose of the parties and is directed towards the intended outcome, namely, performance.

Turning now to what may be termed the secondary rights and duties, one sees not only that there are sufficient differences to justify this distinction but also that it provides a useful conceptual framework within which to discuss various kinds of contractual provision.

The secondary rights are the rights of the creditor or injured party to the remedies that entitle him to claim consequential damages and rescission. The corresponding secondary duty is the duty of the debtor to make reparation for the foreseeable damage caused by a breach of contract.[22] The secondary rights or remedies may be resorted to and the secondary duty becomes enforceable only after a breach of contract occurs. Moreover, the secondary rights and duties do not merely give effect to the initial purpose of the parties and are not only aimed at performance, but are directed at both the money value of proper performance and the losses caused by the breach.[23]

Thus it may be seen that there is a clear difference between the primary rights and duties, which are effective immediately and are aimed at performance, and the secondary rights and duties, which lie dormant until activated by a breach and then to some extent run counter to the intended outcome.[24]

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20 See *Naylor v Munnik* (1859) 3 Searle 187 191; *Medallie and Schiff v Roux* (1903) 20 SC 438 440. The primary duties based upon agreement are contained in the *essentialia* and *incidentalia*. The *naturalia*, i e terms which arise by operation of law, also impose legal duties which give rise to correlative rights (*Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531); these duties may also be classified as primary ones.

21 LAWSA 5 236.

22 Unlike in the law of delict where the payment of damages is a primary duty.

23 A further significant factor lending support to this analysis is that prescription starts running only after a breach has occurred, in other words, from the time the secondary rights and duties come into operation.

24 See De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1971) 310. The distinction between primary (or principal, original, antecedent) and secondary (or remedial, sanctioning, subsidiary) rights and duties is known to the English and Continental legal systems. For the position in English law see Paton *A Text-Book of Jurisprudence* (1972) 276–277; Coote "Discharge for Breach and Exception Clauses since Harbutt's 'Plasticine' " 1977 *MLR* 31; *C Czarnikow v Koufos* 1966 1 Lloyd's Rep 595 (CA) 607; *LEP Air Services v Rolleswin* 1973 AC 331 (HL) 350.

continued on page 193

These differences may be illustrated by the following hypothetical case. A and B enter into a contract in terms of which A is to deliver a television set with an aerial to B for R800, performance to take place immediately. As soon as the contract is concluded all the primary and secondary rights and duties arise. However, only the primary rights and duties may be enforced immediately. Thus A may demand the purchase price and B the delivery of the goods. Should either commit a breach, the injured party may resort to his primary remedy to sue for performance. The primary right and remedy of A, to claim the R800, amounts to the same thing, but not those of B. B's primary right entitles him to claim the television set and aerial. Should A fail to perform, B's remedy is to claim either delivery of the goods or the equivalent in money. In other words, the right entitles him to performance, and the remedy, to either specific performance or R800 in damages as surrogate for performance.

B's right to claim the R800 is in the alternative; unless a breach has been committed, he may not substitute the damages for the performance due and claim only the money.

Moreover, if the breach is serious enough to entitle B to cancel the contract[25] or if B suffers foreseeable loss, then only at this stage do the secondary rights and remedies of B come into operation and enable him to cancel the contract and/or sue for consequential damages.

Both primary and secondary rights and duties may arise expressly or be imported by operation of law. Primary rights and duties based on agreement are reflected in the *essentialia* and the *incidentalia*, and those imported by law in the *naturalia*.[26] Although secondary rights and duties are constituent elements of an obligation, they may also be provided for expressly, for example in cancellation clauses and penalty stipulations.[27]

In the law of the Netherlands a distinction is drawn between "principale (primaire, oorspronkelijke) en secundaire (vervangende, subsidiaire, bijkomende) verbintenissen." These secondary obligations may arise by way of statutory provisions (BW s 1272 and s 1275) or by agreement (*strafbeding*). Sometimes they arise alongside the original duty (e g payment of interest) and in other cases instead of the original duty (s 1275). See generally Asser *Verbintenissenrecht* (1978) part 1 vol 4 111 227. Both the French *Code Civile* (s 1152) and the Louisiana Civil Code (s 2117) define a penal clause as a secondary obligation stipulated for the purpose of enforcing the performance of a primary obligation. Pothier in his *Traité des Obligationes* 2 1 5 (vol 1 par 183–185) distinguishes between primary and secondary obligations: "The primary obligation is that, which is contracted principally in the first place, and on its own account. The secondary obligation is that, which is contracted in case of the non-performance of a primary obligation" (Evan's translation). Using the contract of sale to illustrate this distinction he writes that the seller's primary obligation is to deliver and warrant the thing sold, and his secondary obligation is that of paying the buyer damages if he is unable to deliver or warrant the thing. Pothier further subdivides secondary obligations into two kinds: Firstly, the secondary obligations which replace the primary ones, namely the obligation of damages, and secondly, the secondary obligations which "accede to the primary obligation without destroying it," eg, the obligation of interest when the debtor delays the payment of a money debt (par 185). Pothier's contention that the secondary obligation of damages is substituted for the first and entirely replaces or destroys the primary obligation cannot be accepted. The creditor retains the right to claim either specific performance or damages as surrogate for performance and his right to the latter in no way prejudices his right to the former despite the fact that his claim is subject to courts discretion. See the authorities cited in n 12 above.

25 Eg, repudiation of the contract by A: *Inrybelange (Edms) Bpk v Pretorius* 1966 2 SA 416 (A) 427A.

26 See Grotius *Inl* 3 6 10.

27 See n 24 above and Pothier *Obl* 2 1 5 par 184.

The benefit of this analysis is that it facilitates an examination of the nature and effect of individual contractual provisions. Thus where exemption clauses are concerned, the particular right, duty or remedy that the clause limits or excludes, can be pin-pointed and, as will be seen, the effect of the provision on the contract as a whole can be determined. However, before looking at the effect of individual provisions on particular contracts, it is necessary to discuss the general nature and effect of exemption clauses.

3 THE NATURE AND EFFECT OF EXEMPTION CLAUSES

The expression "exemption clause"[28] is a generic term which encompasses a variety of provisions that in some way exclude or restrict the scope of legal rights and liabilities. The nature of a particular provision is determined by the real effect it has despite its apparent purpose. Some provisions are clearly designed to operate as exemption clauses and their wording expressly provides for the exclusion or restriction of rights, liabilities, or remedies. What is meant by "restriction" may be illustrated by the following examples: clauses that impose some liability on parties who exercise a right or enforce a remedy; that restrict the time within which rights and remedies may be enforced; or that alter the onus of proof or provide that certain matters are conclusive proof of others.[29]

There are, however, other provisions which, although intended for a different purpose, may be regarded as exemption clauses because they are capable of producing the same result as exemption clauses. Thus a clause which provides that disputed matters are to be decided by one of the parties and that such decision is to be final, clearly affects the other party's remedies.[29]

An exemption clause, in its ordinary or dictionary sense, is a clause which removes or omits something or grants relief from liability to which others are subject.[30] In its legal sense, an exemption clause can therefore have one of two functions. First, it can restrict or exclude rights, liabilities and remedies which, but for the exemption clause, would form part of the contract or be available to the parties: these are the *naturalia* of specific contracts, the inherent remedies (or secondary rights and duties), and the adjectival or procedural rights of enforcement; in the latter case the effect is procedural whereas in the former it is substantive.

The second function an exemption clause may have is to restrict or exclude the effect of earlier express provisions contained in contractual documents; this can be done by inserting later specific provisions that contradict earlier ones.[31] However, strictly speaking, it cannot be argued that rights and duties are created by the earlier provisions only to be restricted or excluded by later ones. The rights and duties reflected in the *essentialia* and the *incidentalia* are created by and based on agreement – whether real or presumed – and the contract as a

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28 Also exception clause, protective clause, restrictive term, non-liability clause, exoneration clause, exculpatory clause, disclaimer clause.

29 See par 161–164 of *Exemption Clauses: Second Report* The Law Commission No 69 and The Scottish Law Commission No 39 (1975) where the meaning of "exemption clause" is discussed.

30 See, *ia*, Claassen *Dictionary of Legal Words and Phrases*; Jowitts and Walsh *Dictionary of English Law* (1977); *Suisse Atlantique Société D'Armament Maritime SA v NV Rotterdamsche Kolen Centrale* 1967 1 AC 361 (HL) 420 (per Lord Upjohn).

31 See, eg, *Hayne and Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 371. See also *Second Report* par 141 143.

whole must be construed to determine the limits of the contractual obligation or the scope of the substantive rights and duties.

4 PROCEDURAL OR SUBSTANTIVE EFFECT?

A clear distinction must be drawn between the procedural and the substantive effects of an exemption clause. In Roman law this was to a large extent determined by the nature of the provisions agreed upon. In general, the formal stipulations had a substantive effect whereas the informal *pacta* merely operated as procedural bars to litigation.

A *pactum* in Roman law was an agreement which fell outside the recognised categories of contracts and was consequently not actionable, though it might give rise to a defence, or *exceptio*, in litigation.[32] However, in the classical and later Roman law a number of pacts were recognised as enforceable; of these only the *pacta adiecta* are relevant here.[32a]

Pacta adiecta were added to recognised contracts[33] and were in some cases allowed by the praetors to modify the normal rights and duties under such contracts. A distinction was drawn between pacts that were made at the time the original contract was entered into, the *pacta continua* or *pacta in continenti adiecta*, and those that were made subsequently, the *pacta ex intervallo*. A further distinction was drawn between pacts made to diminish a debtor's liability, the *pacta ad minuendam obligationem*, and pacts made for the purpose of increasing the debtor's liability, the *pacta ad augendam obligationem*.[34] The effect of the *pacta adiecta* varied according to the nature of the contract to which they were added.

In an informal *bonae fidei* contract a *pactum continuum*, whether it increased or decreased the debtor's liability, was considered to be a term in the original or main contract; the *pactum continuum* was enforceable because good faith required that it be honoured.[35] However, *pacta ex intervallo* neither formed part of the main contract nor conferred a right of action:

> "[S]i ex intervallo, non inerunt nec valebunt, si agat, ne ex pacto actio nascatur."[36]

Although there is no evidence, it has been argued that this general rule was to some extent qualified where *pacta ad minuendam obligationem* were subsequently added to consensual contracts, the reasoning being that as a consensual contract could be

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32 *D* 2 14 7*pr*, 1,4; *C* 2 3; *C* 4 65 27.

32a The other enforceable pacts were the *pacta vestita* which were independent of other contracts and were enforceable by praetorian action (the *pacta praetoria*) or due to an imperial provision (the *pacta legitima*). The *pacta praetoria*, enforceable by way of an *actio in factum*, included the *receptum arbitrii* (*D* 4 8 3 1; *D* 4 8 11 1,3; and *C* 2 (55) 56 4 4), the *receptum nautae argentarii* (*C* 4 18 2*pr*, 1 abolished by Justinian), the *pactum de constituto* (*Inst* 4 6 8,9; *C* 4 18 2 1; *D* 13 5 1 1,6–8; *D* 13 5 14 3) and the *pactum de iureiurando* (*D* 12 2 3*pr*, 7,9pr 1, 11 1; *D* 44 5 1 3; *C* 4 1 1). The *pacta legitima* were enforceable by provisions of the emperors in the later empire and included the *compromissum* (*D* 4 8 11 1,3 and *C* 2 (55) 56 5*pr*) the *pactum donationis* (*Inst* 2 7 2 and *C* 8 (53) 54 35 5) and *pactum dotis* (*C* 5 11 6). See generally Buckland *A Text-Book of Roman Law from Augustus to Justinian* (1963) 527–531; Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) par 180–186; Van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) par 515–531.

33 *D* 2 14 7 5,6.

34 Van Warmelo par 516.

35 *D* 2 14 7 5 and *D* 18 5 3.

36 *D* 2 14 7 5. See also *D* 18 1 72*pr*.

set aside by a *consensus contrarius*,[37] there was no reason why it could not be diminished by a *pactum ex intervallo*;[38] but for such an agreement to be construed as altering the main contract it had to affect essential terms, because a *pactum ex intervallo* that altered incidental matters or increased the debtor's liability gave rise only to an *exceptio*.[39]

Where *stricti iuris* contracts were concerned, all *pacta adiecta* were initially unenforceable in terms of the rule *ex nudo pacto non oritur actio*.[40] Later a few exceptions were allowed in the case of *pacta in continenti*. For example, in *mutuum*, where a loan of money was involved, an informal agreement that interest should be paid was eventually regarded as being enforceable;[41] such an agreement is a *pactum ad augendam obligationem*. It appears that *pacta in continenti ad minuendam obligationem* remained unenforceable and merely gave rise to the *exceptio pacti*.

It can be seen, therefore, that exemption clauses were well known to the Roman law where they took one of two forms: formal contractual stipulations, which had a substantive effect, and informal *pacta adiecta* known as *pacta ad minuendam obligationem*, which with a few exceptions, merely had the procedural effect of providing a defence based on the agreement (known as the *exceptio pacti conventi*) which was available to the debtor if sued by the creditor on the original contract.[42] Exemption clauses could be agreed to at the time or after the conclusion of a contract to affect both the *naturalia* and the *essentialia* of specific contracts, thereby limiting or excluding certain of the rights, duties and remedies of the contracting parties.[43]

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37 *D* 18 5 3,5; *D* 46 4 8*pr*, 23; *Inst* 3 29 1,4.

38 *D* 2 14 7 6 and *D* 2 14 27 2.

39 *D* 2 14 7 5,6; *D* 18 1 72*pr*; *D* 18 5 2; *C* 4 54 4. See also Buckland 528 and Van Warmelo par 517 619. A subsequent pact to increase the debtor's liability could also have the effect of terminating the main contract. Thus where parties to a contract of sale entered into a *pactum ex intervallo* to increase the purchase price it was held that they had withdrawn from the original contract and had contracted anew (*D* 18 1 72*pr* and Voet 2 14 8).

40 *D* 2 14 4 3; *D* 2 14 7 4,5; *C* 2 3 10; *C* 4 65 27. See also Van Warmelo par 515 518.

41 *D* 22 2 7 and *C* 4 32. Limits were placed on interest rates and compound interest was forbidden (*C* 4 32 26). It is stated in *D* 12 1 40 that a *pactum in continenti* to pay interest formed part of the *stipulatio*. See also *D* 2 14 4 3.

42 *D* 2 14 7 4,5; *D* 12 1 40; *D* 18 1 72*pr*. See also Voet 2 14 7; Van Warmelo par 518; Buckland 528.

43 See, eg: (a) *naturalia* – the limitation or exclusion of the liability for eviction (*D* 19 1 11 18) and for latent defects (*D* 19 1 6 9 and *D* 21 1 14 9) in sale; (b) *essentialia* – the amount owed by a debtor could be reduced by agreement (*D* 2 14 27 5) and it could be agreed to deduct something from the property purchased after a sales contract had been concluded (*D* 18 1 72), the subsequent agreement was construed as a renewal of the first (*D* 2 14 7 6 and *D* 2 14 27 2). Rights and remedies could also be qualified by *pacta de non petendo* (agreements not to sue) or by agreements not to rely on exceptions or defences available to the parties (*C* 2 3 29). Were an *exceptio* to be raised in breach of the latter agreement it could be met by a *replicatio pacti* (*Gai* 4 126). A *pactum de non petendo* gave rise to a praetorian defence or *exceptio pacti* against any creditor who sued contrary to such an agreement. The pact could be general, personal, conditional or temporary; its effect could be *limited*, as a temporary procedural bar to litigation (*D* 12 1 40 and *D* 2 14 4 3); or *complete*, to extinguish the creditor's right of action (*D* 2 14 27 6; *C* 8 (13) 14 23; Voet 2 14 3). See generally *D* 2 14 2 1; *D* 2 14 7 8; *D* 2 14 17 2; *D* 2 14 41. The rights of a creditor could also be affected by arbitration provision. Two agreements were entered into, first the *compromissum* between the parties to abide by the arbiter's decision and not to take the dispute to court (*D* 4 8 11 1–3 and *C* 2 (55) 56 5*pr*); and secondly, the *receptum arbitrii*, between the parties and the arbiter agreeing to arbitrate (*D* 4 8 3 1). A penalty provision was usually incorporated into the arbitration agreement in terms of which a party who was dissatisfied with the outcome was bound to pay the agreed penalty if he appealed to another court. (*D* 4 8 3 2 and *Nov* 6 11). Such agreements clearly placed a restriction on the normal rights available to parties to a dispute. The parties could not agree to exclude the remedies available to the injured party where fraud was concerned; the *pactum ne dolus praestetur* was invalid as being *contra bonos mores* and against good faith. See generally *D* 2 14 7 7; D 2 14 9 10; *D* 2 14 27 3; *D* 19 1 6 8; *D* 19 1 11 5,8; *C* 4 54 6.

However, the value of the Roman law as regards the nature and effect of exemption clauses, is limited by the formalism that prevailed at the time; the relatively strict demarcation between the formal stipulations and the informal *pacta* no longer exists in our law, and consequently guidance must be sought from more recent authorities.

In the classical Roman-Dutch law the formalism of Roman law was dispensed with and all lawful agreements with *iusta causa* or *redelijke oorzaak* were enforceable.[44] The established or specific contracts were still recognised and the parties could freely vary them by way of extending or exempting provisions in the form of agreements or express promises. This is clearly explained by Grotius in his *Inleidinge*:[45]

> "Toezegging welcke dient tot eenige andere handelinge geschied of tot verstercking van de ghewoonelicke rechten tot die handeling behoorende; of om iet daer buiten te bevoorwaerden: want met voorwaerden, ghelijckmen zeit, gaet een man uit sijn kleederen, dat is, sijn recht: ende mag daerom hem een ider verbinden tot iet dat nae ghewoonte in de handeling niet en is begrepen, ofte oock sijne mede-handelaer van iet dat nae gewoonte daar in zoude zijn begrepen te ontlasten, 't en waer de burgerlicke wet zodanighe verbintenisse ofte onlastinge verrietigde."[46]

Therefore, according to Grotius, added agreements may be used to confirm, enlarge or to limit the normal incidents of a contract. The term "toezegging" means an express verbal promise or agreement and includes both the *stipulatio* and the *pactum* of Roman law.[47]

In his commentary on *D* 2 14, Voet sheds further light on the nature and effect of added agreements. These, if seriously and deliberately entered into, are all valid and enforceable, whether or not they increase or diminish the normal scope of contracts, or were added at the time or after the contract was concluded.[48] This is true whether they are incidental to or varied other contracts; incidental provisions relate to matters that may be present in or absent from a contract without altering its nature.[49] Added provisions may also be essential if framed on matters that vary the usual nature of contracts.[50] Where special terms diverge from the normal nature of a contract they will have to be observed, but as far as the remainder of the contract is concerned, the general law still applies.[51] However where special provisions are added so as to destroy the very essence of a contract, there is no general rule that can be applied.[52] The provisions may, in some cases, invalidate the whole contract, for example, where they introduce impossibilities;[53] in others, the added agreement is void but the main transaction remains valid.[54] Finally, the added agreement, if contrary

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44 See Voet 2 14 3,9; Grotius *Inl* 3 1 53; Van der Keessel *Prael* 3 1 51–53 and *Thes Sel* 484.
45 *Inl* 3 3 1.
46 See also Voet 2 14 5,9 and 20 1 21.
47 Lee *Commentary on 'The Jurisprudence of Holland' by Hugo Grotius* (1936) 3 3 1.
48 Voet 2 14 8,9. See also Van der Keessel *Prael* 3 3 1.
49 Voet 2 14 5.
50 *ibid.*
51 *ibid.*
52 *ibid.*
53 *ibid.*
54 *ibid.* Eg, in *depositum*, an added agreement which provides that the thing deposited may not be reclaimed within a specific time is void but does not affect the validity of the contract of deposit: *D* 16 3 1 45,46. This text indicates that the Roman law principles were largely adopted into Roman-Dutch law.

to the essence of a contract, may transform the nature of the main contract so that a different contract comes into being.[55]

The foregoing brief discussion of added provisions (including exemption clauses) illustrates the fact that in the classical Roman-Dutch law, formal and specific rules gave way to informal and general principles that blurred the substantive/procedural distinction; also that the effect of serious and deliberate added agreements was clearly considered to be substantive in nature.

5 PROCEDURAL EFFECT

In the modern South African law one finds that the courts do not have a uniform approach as regards the effect of exemption clauses. In a number of cases it appears that the view is held that exemption clauses operate procedurally, as qualifications of liability or as shields to claims for damages. The approach adopted in such cases is to ascertain the liability of the *proferens* under the contract without reference to the exemption clause, and then to determine whether or not the limitation or exclusion contained in the exemption clause is sufficient to exempt the *proferens* from that liability.[56] This is illustrated in *Galloon v Modern Burglar Alarms (Pty) Ltd*.[57] The facts are briefly that the plaintiff entered into a contract with the defendant for the leasing, installation and maintenance of a burglar alarm system. When the plaintiff's premises were burgled the system failed to operate due to the negligence of the defendant's employees. Although the contract contained a clause excluding liability "for any damage whatsoever, whether by burglary or any other means, caused to the lessee by non-operation of the alarm for any reason," the plaintiff sued the defendant for the loss suffered, alleging negligence in contract and delict. Baker AJ said:

> "[T]he question before the court is whether the exemption clause in the contract serves to protect the defendant against liability for its own negligence."[58]

He then cited with approval a passage from *Rutter v Palmer*[59] where Scrutton LJ said *inter alia*:

> "[T]he liability of the defendant apart from the exempting words must be ascertained."[60]

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55 *ibid.* Eg, if the parties to a contract of purchase and sale provide by a subsequent special or added agreement that the price need not be paid the former contract is altered and is then taken to be a donation. However, if an agreement that appears to be a contract of purchase and sale contains a special provision that the price need not be paid, then only one contract, a donation, comes into being.

56 This is the traditional juristic view and approach in England. See *Rutter v Palmer* 1922 2 KB 87 92; *Istros v Dahlstroem* 1931 1 KB 252-253; *Karsales v Wallis* 1965 1 WLR 936 (CA) 940; the *Suisse Atlantique* case, *supra* 420; see also the discussion by Coote *Exception Clauses* (1964) 1 *et seq* and Wright "Exception Clauses Rationale and Effect" 1972 *New LJ* 490.

57 1973 3 SA 647 (C).

58 650B.

59 *supra* 92.

60 See also *SAR & H v Lyle Shipping Co Ltd* 1958 3 SA 416 (A) 419C ("the clause . . . is open to the interpretation that it bars actions arising from causes."); *Hall-Thermotank Natal (Pty) Ltd v Hardman* 1968 4 SA 818 (D) 835G ("the clause is . . . to be construed as affording limited protection."); *Wijtenburg Holdings, trading as Flamingo Dry Cleaners v Bobroff* 1970 4 SA 197 (T) 209 ("the exemption clause was intended to apply only if the risk eventuated while the defendant performed."); *Bristow v Lycett* 1971 4 SA 223 (R AD) 226 235 237; *Government of the RSA (Department of Industries) v Fibre Spinners and Weavers* 1977 2 SA 324 (D) 332 336–337; and the same case on appeal 1978 2 SA 794 (A) 806B G ("the protection of an exemption clause."); Hosten "Insake: *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 3 SA 178 (W)" 1960 *THRHR* 292.

According to this view the function of exemption clauses is apparently to prevent the enforcement of substantive rights and duties by defeating actions for breach. The obligation created by the contract is not affected and any failure to perform amounts to a breach. The exemption clauses merely operate as defences by providing a bar to claims envisaged by the contract.[61]

The basic error in the reasoning here is that it fails to recognise that if the exemption clauses have the effect of excluding liability for non-performance, the purported rights and duties to which they relate will not arise, or at best a unilaterally binding contract (i e a donation) will come into operation. Moreover, the parties cannot legally create contractual rights which they intend to be unenforceable; to have a right without a remedy is the same as having no right at all.[62]

There is, however, a limited area where exemption clauses do have a procedural effect, and this is where they operate to limit or exclude adjectival or procedural rights of enforcement. For example, certain arbitration clauses, clauses affecting the burden of proof, and clauses that limit the time within which an action may be brought. Outside these narrow confines it must be accepted that the effect of exemption clauses is substantive.

6 SUBSTANTIVE EFFECT

The traditional juristic view is that exemption clauses operate to modify substantive liability.[63] A fundamental principle of construction of a contract is that the contract as a whole must be interpreted and effect must be given to all its provisions.[64] Exemption clauses are treated as nothing more than contractual provisions and their meaning is ascertained by determining what the parties' intentions were as regards individual provisions;[65] in other words, exemption clauses are taken to reflect the actual or presumed intentions of the parties.

The approach of the courts is, therefore, to establish the actual content of the contractual obligation (as intended by the parties and reflected in the terms of the contract as a whole); this differs from determining the extent to which the contractual obligation is affected by exemption clauses because that would imply that rights and duties come into existence before being affected.

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61 See Coote 3 12.

62 See *Amod v Parsotham* 1929 NPD 163 167; *Minister of the Interior v Harris* 1952 4 SA 769 (A) 781; Coote 7 and the discussion on secondary exclusion clauses below.

63 A statement that clearly illustrates the substantive effect of an owner's risk clause in a contract of *depositum*/bailment is that of Murray J in *Rosenthal v Marks* 1944 TPD 172 178: "[T]he whole method of approach of the discussion of the effect of this clause on ordinary bailment ... in a series of South African decisions starting in 1859 with *Naylor v Munnik* and ending in 1943 with *Weinberg v Oliver* shows that it is not a question of method of proof but of modification of substantive liability." See further *Naylor v Munnik* (1859) 3 Searle 187 191–192; *CSAR v Adlington and Co* 1906 TS 964 974–975; *The Farm Implement Co of Kroonstad v The Minister of Railways* 1916 OPD 183 190–191; *Mahomed v Teubes* 1918 CPD 398 400; *Weber and Pretorius v Pretoria Municipality* 1921 TPD 19 24; *Nightingale and Adams v SAR & H* 1921 EDL 91 100–101; *SAR & H v Conradie* 1922 AD 137 156; *SAR & H v Williams* 1930 TPD 514 521–522; *Weinberg v Oliver* 1943 AD 181 188; *Essa v Divaris* 1947 1 SA 753 (A) 774; *Frocks Ltd v Dent and Goodwin (Pty) Ltd* 1950 2 SA 717 (C) 725–726; *Beinashowitz and Sons (Pty) Ltd v Night Watch Patrol (Pty) Ltd* 1958 3 SA 61 (W) 64–65; *King's Car Hire (Pty) Ltd v Wakeling* 1970 4 SA 640 (N) 642–643.

64 *Britz v Du Preez* 1950 2 SA 756 (T) 760.

65 *Bristow v Lycett* 1971 4 SA 223 (R AD) 236.

This approach is clearly reflected in the *dicta* of Corbett JA in *Stocks and Stocks (Pty) Ltd v TJ Daly and Sons (Pty) Ltd*:[66]

> "I am unable to see how a party who, in the course of negotiating a contract, agrees to a term which will have the effect of varying what otherwise would have been one of the normal incidents of the contract, can be said to waive a right. After all, the only relevant rights are contractual ones and until the contract, incorporating the terms in question, has been concluded no contractual rights can arise. Contractual rights cannot exist *in vacuo*. And by the time that the contract is concluded, the so-called 'waiver' has already taken place."[67]

There can be no doubt then that exemption clauses are substantive in their effect and the rights and duties to which they pertain do not, and are not intended to, come into existence. This is illustrated in the case of *Agricultural Supply Association v Olivier*,[68] which concerned the effect of a non-warranty clause. The plaintiff[69] had ordered Rutgers tomato seeds from the defendant who supplied seeds which, although similar in appearance, turned out, after germination, to be a different type known as Samazana; as a result the plaintiff suffered losses which he claimed from the defendant. The defendant raised the defence that both the catalogue, which was supplied by the defendant, and the invoice, which was handed to the plaintiff when the seeds were delivered, contained a non-warranty clause that had been brought to the plaintiff's notice.

To determine the effect of the lengthy clause the judges divided it into the recital/preamble and the operative part.[70] The recital/preamble was further divided into two parts: first, the statement that

> "[w]e take the utmost care to supply seeds, plants etc true to name and character, of good germinating strength and genuine in every way."

and secondly, the reason for the clause,

> "but owing to the fact that certain seeds are indistinguishable in appearance from other seeds of different name and/or character and owing to changeable climatic conditions, different modes of cultivation and various causes over which we have no control."

The following was held to be the operative part:

> "[W]e give no warranty, express or implied, as to the description, name and/or character of any seeds or as to the germination, productiveness, quality or growth of any seeds or plants supplied by us and we will not be in any way responsible for results. Goods not accepted on these conditions are to be returned at once."

The plaintiff contended that the words of the recital qualify both the exclusion of the warranty and the liability; however, both judges rejected this contention. De Wet J held that the operative part was unambiguous and, therefore, the recital was irrelevant and not open to construction.[71] Steyn J construed the clause as a whole but found nothing in the preamble that qualified the exclusion of the warranty and the seller's liability.[72] Consequently it was held by De Wet J that the plaintiff

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66 1979 3 SA 754 (A).
67 763. Agreeing with what was stated by Flemming J in this connection in *Havenga v De Lange* 1978 3 SA 873 (O).
68 1952 2 SA 661 (T).
69 The successful plaintiff in the court *a quo* and respondent on appeal; the judge continued referring to him as the plaintiff.
70 664 665.
71 664G.
72 666.

> "had no cause of action based on the implied warranty which he would otherwise have had namely that the seeds supplied to him were not the seeds ordered and that there was a breach of contract."[73]

The non-warranty clause performed a substantive function here by preventing the plaintiff from acquiring a right to demand that a particular type of seed be delivered to him; failure to supply the desired type, therefore, did not amount to breach. What the buyer actually bought was not the specified seeds, but a *spes* of obtaining the correct type.[74]

The incorporation of exemption clauses into specific contracts may have the effect of altering the nature of the contract. The case of *Welgemoed v Sauer*[75] affords a good example of how the apparent nature of a contract can be affected by the inclusion of a special clause that contradicts an earlier express provision in a contractual document. In this case the appellants sold a farm to the respondent; the agreed purchase price, stated in clause 1, was R40 per morgen. According to the figures listed in the contract, the various portions of the farm amounted to 1079,6935 morgen, making the purchase price R43 187,74. However, the actual size of the farm turned out to be 978,4982 morgen. The buyer paid the sellers R39 139,93, based on the actual size of the farm at R40 per morgen. The sellers sued for the balance, claiming that on a proper interpretation of the contract the purchase price had to be determined, not according to the actual size, but in accordance with the size as indicated in the contract. Reliance was placed on clause 5 which provided that the property was sold

> "soos dit tans lê in uitgestrektheid, daar die verkoper nie begeer deur enige grotere uitgestrektheid voordeel te trek, of enige tekortkoming in die grootte van die eiendom goed te maak nie."

Jansen JA examined in detail the nature of sales by measure (*ad quantitatem*) and sales by the price (*ad corpus*) and the consequences of such sales. What is relevant is that, if there is an excess or a shortfall in the property sold, a proportionate adjustment of the purchase price takes place. It was found that the contract under consideration had the characteristics of a sale *ad quantitatem* but that this was contradicted by the wording of clause 5 which excluded the normal consequences of such a sale.[76] Jansen JA held that the specific and express provision in clause 5 carried the greatest weight and this meant that the normal interpretation and legal consequences of stating the measurement and the fixing of the price per unit, were excluded.

Consequently the correct interpretation of the contract was that the purchase price was the number of morgen mentioned in the contract at R40 per morgen.[77]

Muller JA held that the only acceptable interpretation that could be placed on the clause is that if it should be found that there is an excess or a shortfall, it would make no difference to the purchase price. The purchase price would always be calculated on the size of the farm as mentioned in the agreement.[78] The judge went on to criticise the approach adopted by the court *a quo*, in terms of which the contract was construed without reference to clause 5 after which

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73 664H.
74 See Christie "Exemption Clauses and Misdescription" 1975 *Rhod LJ* 108.
75 1974 4 SA 1 (A).
76 20.
77 *ibid.*
78 21F.

an attempt was made to reconcile clause 5 with the conclusion reached; he stated that there was no justification for such an approach.

The substantive effect of this clause is clear: instead of the apparent (and expected) sale *ad quantitatem*, a contract with a different substantive content came into operation because the right to demand a reduction in the purchase price for any shortfall had been excluded. Consequently the buyer actually paid R43,73 per morgen, instead of R40, as was expressly provided for in clause 1.[79]

To sum up, then, exemption clauses can have both a procedural and a substantive effect, the former being limited to adjectival or procedural rights, whereas the latter applies where substantive rights in general are concerned and, as was seen, the effect may be such as to alter the apparent nature of specific contracts.

Having examined both the nature of a contract and the nature and effect of exemption clauses one can gather that the usual primary and secondary rights and duties in contracts may be affected in various ways by individual exemption clauses. The effect of such provisions on specific contracts can more readily be established if exemption clauses are categorised according to the manner in which they affect particular rights and duties.

7 CATEGORIES OF EXEMPTION CLAUSES

Exemption clauses may be categorised according to whether they exclude or merely limit certain rights and duties that would otherwise have come into operation or would have been available to the parties. In the following analysis distinctions will be drawn between the exclusionary and limiting effects of exemption clauses on primary, secondary and procedural rights, after which exemption clauses relating to special defences will be discussed.

1 Primary Exemption Clauses

These clauses exclude or limit the usual substantive primary rights or duties under specific contracts; they affect the normal consequences by excluding or limiting the *naturalia* or the primary remedies to claim either specific performance or damages as surrogate for performance.

a *Primary exclusion clauses* These provisions are intended to prevent specific *naturalia* or primary remedies (sanctioning rights) from arising. The effect of such provisions is to diminish the substantive content of individual contracts and may have one of the following as a consequence:

The first possibility is that no contract arises. This occurs where the provision excludes both the primary remedies. The legal position is no different from that where a person apparently assumes a liability on condition that the performance or non-performance of the duty is made dependent upon his will; such acts are

79 21–22.

deemed to be acts without legal consequences or non-juristic acts.[80] An agreement without primary remedies is not a contract, because no obligation or *vinculum iuris* is created.[81]

The second possibility is that a contract of a different nature or a unilateral contract is created. Thus in *Welgemoed v Sauer*[82] the clause in question excluded the normal right to adjust the price, thereby altering the nature of the apparent (and expected) sale *ad quantitatem*. A unilateral contract would be created if the parties to what was initially a bilateral contract agree to exclude one party's primary duty (for example, where parties to a sale subsequently agree that the purchase price need not be paid) or his primary rights (for example, where they enter into a subsequent *pactum de non petendo* not to claim repayment of a loan); in both instances a unilateral contract (donation) is created.

The third possibility, which occurs most frequently, is that, although the substantive content is diminished, the nature of the contract remains unaltered. The *essentialia*, which make it possible to identify the contract, arise, but some or all of the *naturalia* are excluded. Thus, if parties to a contract of purchase and sale agree to exclude the so-called implied terms relating to risk, latent defects and eviction, the resultant contract remains one of purchase and sale despite the fact that its substantive content is less than that of other such contracts.

b *Primary limiting clauses* These provisions limit or qualify the *naturalia* or primary remedies without excluding them. For example, in *Olivier's* case[83] the "non-warranty" clause qualified, without excluding, the right to demand performance by limiting it to the right to demand damages as surrogate for performance; the alternative right to claim specific performance (for the correct type of seed) was excluded by the clause. An example of a clause limiting a *naturale* is a time limit or guarantee clause that guarantees sales goods for a shorter period than that allowed by the general law, thereby limiting the availability of the implied warranty against latent defects; the warranty is extinguished once the time limit expires.

2 Secondary Exemption Clauses

These clauses affect the substantive secondary rights and duties by excluding or limiting the constituent secondary remedies that entitle the creditor or injured party to claim consequential damages or rescission.

a *Secondary exclusion clauses* The effect of secondary exclusion clauses is to exclude some or all of the secondary remedies that normally avail the creditor or obligee when a breach of contract occurs. Thus the parties may agree that in

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80 *Theron v Joynt* 1951 1 SA 498 (A) 506; *D* 45 1 17; *D* 45 1 46 3; *D* 45 1 108 1; Pothier *Oblig* 1 1 1 3 6 (No 47) and 2 3 1 2 (No 205); cf *Deetleefs v Wright* 1977 2 SA 560 (A).

81 By the very nature of legal rights there must be a remedy for the infringement of a right – *ubi ius ibi remedium*; to have a right without a remedy is the same as having no right at all (*Amod v Parsotham* 1929 NPD 163 167; see also *Minister of the Interior v Harris* 1952 4 SA 769 (A) 781.) Eg, if a person agrees to donate something but imposes a provision that the donee acquires no right to claim the gift, the agreement would not be a contract because there is no binding force; the "obligor" enters into the agreement without the intention to be bound.

82 *supra*.

83 *supra*.

the event of breach neither may resile from the contract;[84] this excludes the right of rescission but does not affect the right to claim consequential damages. Conversely, they may agree that the debtor or obligor will not be liable to make reparation for any foreseeable damage caused by a breach. However, the exemption clause will only afford protection in respect of risks which ordinarily arise out of the performance required by the contract in question. If the contract is breached in a way that increases the risk of loss or damage, the exemption clause cannot be relied upon in respect of the loss that resulted from the increased risk.[85]

If both the secondary remedies are excluded, leaving the creditor or injured party no remedy for the infringement of his rights, then once again no contract arises because the remedies are constituent elements of the obligation and provide the requisite *vinculum iuris*.[86] The difference between the exclusion of primary and secondary remedies is that in the former case the right to demand performance cannot be enforced whereas in the latter case the right of rescission and the right to claim compensation (for damage sustained as a result of the infringement of a primary right) are nullified. The *vinculum iuris* consists of remedies to enforce both primary and secondary rights and if either group of remedies is entirely excluded the binding force is broken, with the result that no contract arises.

b *Secondary limiting clauses* These provisions limit, without excluding, the creditor's rights or remedies in the event of late or defective performance or non-performance.

They are used, *inter alia*, to place a limit on the amount of damages that may be claimed,[87] or to limit the time within which the claim must be brought.[88] By merely qualifying the secondary rights and remedies they do not destroy the contract's binding force; the debtor remains liable, albeit in a limited way, to compensate the creditor for damage suffered. Secondary limiting clauses must be distinguished from penalty stipulations. With the former, damage must still

84 See, eg, *Wells v SA Alumenite Co*, *supra* 72 (although here the clause excluded the right to rely for cancellation upon misrepresentations).

85 *Weinberg v Oliver*, *supra* 188–189. In direct breach of his obligation the defendant's servant removed the plaintiff's car from the garage premises, thereby exposing it to an additional risk of damage. As a result the owner's risk clause did not relieve the defendant from liability; cf *Beinashowitz and Sons (Pty) Ltd v Night Watch Patrol (Pty) Ltd* 1958 3 SA 61 (W)).

86 See the authorities in n 80 and 81 above.

87 Eg, the Post Office limits its liability in respect of registered articles to R50; the South African Airways' liability in respect of lost baggage is limited to R18,14 per kilogram (Hague Protocol and Special Drawing Rights No 17) and $75 000 in respect of loss of life or proven injuries. The *Second Report* par 141 gives the example of a clause in a building contract which provides that liability for failure to complete the work within the contractual period shall not exceed £x.

88 Eg, a clause providing that a carrier is not liable for loss unless advised in writing within seven days from the date of delivery: *Second Report* par 141. In *Lawn v Rhodesian Eagle Insurance Co Ltd* 1977 3 SA 80 (R) the company unsuccessfully relied on a time limitation clause. Liability may also be qualified by clauses requiring that specified notice be given before commencement of proceedings as a condition precedent to liability; if such notice is not given the applicant cannot succeed in a claim (see *Gaza v Motor Insurer's Association* 1964 3 SA 273 (D) – concerning claims against the MIA). The manner in which secondary rights or remedies are to be invoked may also be prescribed by agreement in which case they must be adhered to (*Swart v Vosloo* 1965 1 SA 100 (A) 112).

be proved and if the damages are less than the amount provided for in the limiting clause then only the actual damages need be made good; the limitation in the clause comes into operation only if the proven damages exceed the agreed amount. With penalty stipulations the agreed amount, if not out of proportion to the prejudice suffered,[89] becomes payable when the breach occurs and damage need not be proved.[90]

Clauses that place a time limit on secondary rights have the effect of extinguishing the right to damages at the end of the limitation period. Similarly, once the stipulated damages have been claimed, the right to compensation is extinguished by its fulfilment. These provisions are therefore directed at the limitation and extinction of the constituent secondary rights.

3 Procedural Exemption Clauses

Procedural exemption clauses exclude or qualify the procedural rights of enforcement. Although the rights that are affected do not form part of a contract the provisions may nevertheless be regarded as exemption clauses because they affect the rights that are normally available to contractors to enforce substantive rights. Here too, a distinction can be drawn between provisions that exclude, and those that merely qualify, procedural rights.

a *Procedural exclusion clauses* Provisions that exclude procedural rights have the effect of extinguishing the rights of enforcement or ousting the jurisdiction of the courts; the latter are against public policy and therefore void.[91] The former prevent the enforcement of substantive rights with the result that no contract arises, or if agreed to subsequent to the formation of a contract, the *vinculum iuris* is broken and only a moral obligation remains. An example of such a provision is a *pactum de non petendo in rem*, an agreement that no action will be brought against anyone, which may be raised as a defence by all persons who may be liable in terms of the obligation in question.[91a] Such provisions do not affect the substantive content of contracts; they merely ensure that no actions may be brought.

b *Procedural qualifying clauses* These clauses provide, *inter alia*, for alternative procedures to settle disputes without attempting to exclude procedural rights. Arbitration clauses afford a good example. The jurisdiction of the court is not ousted when a party to a contract wishes to rely on an arbitration clause when sued on that contract. Usually the matter must first be submitted to arbitration but the court has a discretion whether or not the proceedings should be stayed pending the outcome or whether it should itself settle the dispute;[92] this discretion "must be judicially exercised and a very strong case for this exercise must be made."[93] Moreover, the defendant may raise the defence that submission to arbitration is a condition precedent to a claim on the contract by virtue of the provisions of the contract itself.[94]

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89 s 3 of the Conventional Penalties Act 15 of 1962.
90 See also as regards demurrage clauses the *Suisse Atlantique* case, *supra* 395 420 436.
91 *Yenapergasam v Naidoo* 1932 NPD 96; Wille and Millin 524.
91a *D* 2 14 17 5.
92 *Yorigami Maritime Construction Co Ltd v Nissho – Iwai Co Ltd* 1977 4 SA 682 (C) 692–694.
93 *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 375.
94 *Davies v South British Insurance* 3 Juta SC 416; *Sherry v Stewart* 1902 TH 252 257; *Glanfield v Asp Development Syndicate Ltd* 1911 AD 374 383.

Procedural rights may also be qualified by means of clauses that restrict rules of evidence or procedure or impose a time limit within which claims must be made. If the stipulated time is shorter than the time allowed in terms of the general law then no claim may thereafter be brought if this provision is not complied with.[95]

In other words, time limitation clauses have the effect of extinguishing not only primary and secondary rights but also procedural rights.

4 Special Defence Exemption Clauses

Contracting parties may agree to exclude the right of either party to rely on most of the special defences available to them. These special defences relate to surrounding factors such as defects in the formation of the contract or supervening impossibility. Examples of defects in the formation of contracts are misrepresentation, mistake and fraud. Clauses excluding the right to raise misrepresentation[96] and in certain minor cases mistake,[97] as a defence, will be upheld. However, the consequences of fraud may not be excluded as this is against public policy.[98]

The view of the present writer is that the right to raise these defences is a special category of the procedural rights which exists by virtue of the general law and operates as a bar to litigation. It does not form part of the contractual obligation and its effect does not diminish the latter's substantive content. When it is resorted to without the intention of resiling, it amounts to a confession and avoidance; the contract is not disputed but the party setting up the special defence seeks to avoid some of its legal consequences. The effect of the exemption clause here is to exclude or limit the right to raise the special defence without affecting the contract. However, if the special defence (e g *iustus error*) is aimed at nullifying the contract then the exemption clause may not be relied upon because the contract as a whole, including the exemption clause, is void *ab initio*.[99]

8 CONCLUSION

In this article an attempt was made to analyse the nature of a contract and the nature, effect and various categories of exemption clauses with a view to providing a framework within which the effect of exemption clauses on contractual and other relevant rights can be determined. It can be seen from the foregoing that this is a complex area and unless matters are reduced to their essentials it is not possible to gain a full understanding of the effect of exemption clauses on particular rights or the contract as a whole. This analysis may, in addition,

95 See, eg, *Dave Zick Timbers (Pty) Ltd v Progress Steamship Co Ltd* 1974 4 SA 381 (D).

96 See *Trollip v Jordaan* 1961 1 SA 238 (A) 256; *Joubert v Faure* 1978 3 SA 1025 (C).

97 The mistake must not be induced by fraud or go to the root of the contract (*Wells v SA Alumenite Co* 1927 AD 69 72–73 (honest mistake); *Sisson v Lloyd* 1960 1 SA 367 (SR) 370 (mere mistake)). Cf *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D) 171–172; *Papadopoulous v Trans-State Properties and Investments* 1979 1 SA 682 (W) 689.

98 *D* 50 17 23; *Wells v SA Alumenite Co, supra* 72–73; *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) 803A 806C.

99 See as regards material *iustus error Allen's* case, *supra* 171–172; *Papadopoulous'* case, *supra* 689.

assist in the drafting of clauses because they can then be framed to limit or exclude only the desired rights or duties without extending their effect too far and could thereby prevent unnecessary litigation. Finally, it may also facilitate the interpretation of contracts because it can be used to establish the exact limits of the contractual obligation.

AANTEKENINGE

FORMALITEITSVOORSKRIFTE, VOORKOOPREGTE EN OPSIES

1 Die Formaliteitsvoorskrifte vir die Vervreemding van Grond

Volgens artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981 (hierna die "wet" genoem) is geen vervreemding van grond geldig nie tensy dit in 'n vervreemdingsakte vervat is en deur elk van die partye of sy agent handelende op sy skriftelike gesag onderteken is. In wese is dit 'n herverordening van die formaliteitsvoorskrifte wat sedert die begin van die eeu in die Vrystaat en Transvaal en sedert 1957 in die land as geheel vir grondkoopkontrakte geld (sien proklamasie 8 van 1902, Tvl; ordonnansie 12 van 1906, OVS; Wet 68 van 1957; en Wet 71 van 1969). Die belangrikste nuwigheid is dat die formaliteitsvoorskrifte nou ook op skenkings- en ruilkontrakte van toepassing gemaak is (sien die definisie van "vervreem" in a 1 van die wet).

Hoewel die betrokke wetgewing aanvanklik daarop gerig was om die betaling van hereregte te verseker, word algemeen aanvaar dat die oogmerk intussen totaal verander het. Deesdae is die doelwitte eerder om regsekerheid te bevorder, om bedrog en meineed te bekamp en om dispute en litigasie teen te werk (sien bv *Neethling v Klopper* 1967 4 SA 459 (A) 464E–G; *Johnston v Leal* 1980 3 SA 927 (A) 939C–D; en *Hirschowitz v Moolman* 1985 3 739 (A) 757I–J). Hierdie doelwitte word beswaarlik bereik. Trouens, die indruk wat 'n mens by die lees van die vonnisverslae kry, is onontwykbaar dat die formaliteitsvoorskrifte meestal aangegryp word deur diegene wat wil probeer ontkom aan grondtransaksies wat hulle waarskynlik in alle erns gesluit het, maar wat by nabetragting blyk minder voordelig te wees as wat hulle verwag het (sien bv *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 988; en *Senekal v Home Sites (Pty) Ltd* 1950 1 SA 139 (W) 150). Aan die ander kant, hoe oneffektief of selfs teenproduktief die wetgewing ook al mag wees, één ding staan vas: in hierdie stadium moet dit in die lig van die duidelik geformuleerde oogmerke daarvan uitgelê en toegepas word.

Uit die regspraak blyk dit dat die volgende besonderhede in 'n dokument (of meer as een dokument) moet voorkom voordat dit as 'n grondvervreemdingskontrak kan geld:

a watter persoon die grond vervreem (bv die verkoper) en aan watter persoon dit vervreem word (bv die koper) en dat hulle bewustelik met mekaar wou kontrakteer (hier word meestal op elliptiese wyse gesê dat die identiteit van die partye uit die skriftelike stuk moet blyk);

b die *essentialia* van die betrokke tipe vervreemding (bv by 'n koopkontrak dat die een party onderneem om 'n bepaalde entiteit grond aan die ander te

lewer, dat laasgenoemde aan eersgenoemde 'n bedrag in ruil vir die grond moet betaal, en dat dit die bedoeling van die partye is dat die party aan wie die grond gelewer word vroeër of later die genots- en beskikkingsbevoegdhede van 'n eienaar ten opsigte daarvan moet verkry);

c enige addisionele bedinge ten opsigte waarvan die partye die bedoeling het om hul oor en weer te verbind (gewoonlik kortweg die materiële of wesenlike bedinge genoem: dié kan bv slaan op eienskappe van die saak wat vervreem word; op die tyd wanneer, die plek waar of die wyse waarop die een of die ander party moet presteer; op enige voorwaarde, lasbepaling of veronderstelling wat aan enige van die prestasieverpligtinge gekoppel is; op die samewerking wat die een party aan die ander moet verleen wanneer laasgenoemde presteer; en enige spesiale remedies waaroor 'n party in geval van kontrakbreuk deur die ander sal beskik); en

d die handtekening van elke party of dié van sy gevolgmagtigde agent.

(Volledigheidshalwe moet wat (c) betref, eerstens beklemtoon word dat 'n vervreemdingsakte geen materiële bedinge buiten die *essentialia* van die betrokke tipe kontrak hoef te bevat nie – in so 'n geval word die gevolge van die kontrak mede-bepaal deur die *naturalia* van kontrakte in die algemeen en veral van die besondere tipe kontrak – en tweedens dat "wesenlik" of "materieel" hier 'n veel omvattender betekenis het as by die vereiste dat 'n "wesenlike beding" verbreek moet wees voordat 'n mens op grond van positiewe wanprestasie uit 'n kontrak mag terugtree; in die huidige verband beteken "wesenlike beding" elke liewe beding wat vir die partye erns is – hoe onbelangrik dit objektief gesproke ook al mag wees.)

2 Voorkoopregte en die Formaliteitsvoorskrifte

Die vraag is nou watter betekenis die formaliteitsvoorskrifte het vir voorkoopkontrakte en die koopkontrakte wat daaruit mag voortvloei.

'n Voorkoopreg (of 'n "reg van eerste weiering" met betrekking tot koop) is 'n reg wat die reghebbende (die "grantee") het dat die gewer van die reg (die "grantor") nie 'n besondere saak sal verkoop nie voordat die reghebbende die keuse gegun is om die saak te koop teen 'n prys en volgens bedinge wat bepaald of objektief bepaalbaar is of wat, met sekere voorbehoude, binne die diskresie van die voorkoopreggewer lê (*Hattingh v Van Rensburg* 1964 1 SA 578 (T) 582C–D; *Bellairs v Hodnett* 1978 1 SA 1109 (A) 1138E–1139H). Die voorkoopreggewer is nie verplig om te verkoop nie, maar indien hy sou besluit om te verkoop, het die voorkoopreghebbende die eerste keuse om die saak te koop – gewoonlik teen 'n prys waarvoor en die bedinge waarvolgens die voorkoopreggewer bereid is om die saak aan 'n derde te verkoop.

Die probleem hier is om te bepaal hoe die aanbod om te verkoop aan die voorkoopreghebbende gemaak moet word sodat hy sy keuse (om te koop of nie te koop nie) na behore kan uitoefen. Uit die jongste regspraak blyk dit dat daar hoofsaaklik drie moontlikhede bestaan:

a Die partye kan in die voorkoopkontrak presies bepaal hoe die aanbod gemaak moet word, byvoorbeeld daar mag bepaal word dat die voorkoopreggewer, voordat hy aan iemand anders verkoop, 'n skriftelike aanbod aan die voorkoopreghebbende moet rig en dat laasgenoemde ten minste 10 dae gegun moet word om die aanbod te oorweeg. In so 'n geval word aan die betrokke bepalings van

die voorkoopkontrak uitvoering gegee: die voorkoopreghebbende kan waarskynlik daarop aandring dat 'n aanbod *in forma specifica* aan hom gemaak word (*Van der Hoven v Cutting* 1903 TS 299; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 3 SA 310 (A) 318H–320H; *Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A) 932G–I; sien egter die *obiter dictum* in die *Bellairs*-saak 1139F–H).

b In elk geval, indien die voorkoopreggewer in stryd met die voorkoopreghebbende se voorkoopreg die saak aan 'n derde verkoop, kan die voorkoopreghebbende deur 'n eensydige wilsverklaring in die plek van die derde tree en 'n koopkontrak tussen hom en die voorkoopreggewer tot stand bring ooreenkomstig die bepalings van die koopkontrak tussen die voorkoopreggewer en die derde (*ASA Bakeries (Pty) Ltd v Oryx Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A) 907E–908D). In hierdie verband moet daar op die volgende gelet word: (i) Waarskynlik kan die voorkoopreghebbende op dié wyse optree slegs indien al die *incidentalia* van die koopkontrak tussen die voorkoopreggewer en die derde sinvol op hom van toepassing gemaak kan word; as die derde byvoorbeeld, anders as die voorkoopreghebbende, 'n kerkgenootskap is wat die eiendom koop onderworpe aan die lasbepaling dat dit slegs vir kerklike doeleindes gebruik mag word, sal die derde se koopkontrak nie as 'n aanbod aan die voorkoopreghebbende kan geld nie (*Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A) 935B–C). (ii) Die voorkoopreghebbende kan waarskynlik in die plek van die derde tree selfs al het die voorkoopreggewer nog maar net 'n aanbod aan die derde gemaak; dit is blykbaar nie nodig dat laasgenoemde die aanbod al moes aanvaar het nie (dié punt is uitdruklik in die *ASA Bakeries*-saak 908F oopgelaat, maar in *Hirschowitz v Moolman* 763F–G *supra* is aanvaar dat die gee van 'n opsie aan 'n derde sonder meer die voorkoopreghebbende in staat stel om in die derde se plek te tree en om sodoende 'n kontrak tussen hom en die voorkoopreggewer tot stand te bring). (iii) Die feit dat die voorkoopreghebbende "in die plek van die derde tree" beteken nie dat die verbintenisse tussen voorkoopreggewer en die derde verval nie; die twee koopkontrakte bly naas mekaar geld (*ASA Bakeries* 919C–E). (iv) Wat die mededingende vorderingsregte van die voorkoopreghebbende en die derde in so 'n geval betref, word aan dié van eersgenoemde voorrang verleen (*Krauze v Van Wyk* 1986 1 SA 158 (A) 172B–E). Indien lewering aan die derde egter reeds plaasgevind het – sodat hy nou oor 'n saaklike reg beskik – kan die voorkoopreghebbende nie die saak van hom opvorder nie, tensy hy (die derde) van die voorkoopreg bewus was of op die laatste voor lewering aan hom daarvan bewus geword het (in die *ASA Bakeries*-saak 907G–H is die vraag oopgelaat of die derde voor kontraksluiting tussen hom en die voorkoopreggewer van die voorkoopreg moes geweet het, en of dit voldoende is as hy maar net voor lewering daarvan bewus geword het; sien egter *Strydom v De Lange* 1970 2 SA 6 (T) 14D–G; en *Botes v Botes* 1964 1 SA 623 (O) 629G–H).

c Indien die voorkoopkontrak oor die wyse van uitoefening van die voorkoopreg swyg en indien die voorkoopreghebbende nie van die metode onder (b) genoem, gebruik kan maak nie, kan die voorkoopreghebbende eis dat die voorkoopreggewer 'n *bona-fide*-aanbod aan hom maak sodat hy sy voorkoopkeuse kan uitoefen. So 'n aanbod moet nie meer beswarend wees as dié wat die voorkoopreggewer aan 'n derde party maak, of bereid is om te maak, of wat hy bereid is om van 'n derde te aanvaar nie. Die essensiële elemente van die twee aanbiedinge (bv die koopprys en die wyse van die betaling daarvan) sal normaalweg

ooreenstem, maar hulle hoef nie in die fynste besonderhede te klop nie (sien die *Soteriou*-saak 932G–H 933F–J 935C; hierdie saak het weliswaar oor 'n "voor*huur*reg" gegaan, maar die appèlhof aanvaar uitdruklik dat die beginsels dieselfde is as dié wat vir 'n voorkoopreg geld 932E–F). Aanvanklik was dit onseker of dit die voorkoopreghebbende se plig was om by 'n verkoop of dreigende verkoop aan 'n derde, tussenbeide te kom en 'n aanbod aan die voorkoopreggewer te maak (soos beslis in *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk* 1964 3 SA 702 (T) 706H–707A) en of dit die voorkoopreggewer was wat 'n aanbod aan die voorkoopreghebbende moes maak (*Sher v Allan* 1929 OPD 137; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 3 SA 310 (A) 316D–E 320G–H). In die *Soteriou*-saak laat waarnemende appèlregter Nicholas egter geen twyfel daaroor dat, tensy die voorkoopkontrak anders bepaal, laasgenoemde die korrekte prosedure is nie:

> "Refusal imports an offer... Poynton's [die voorhuurreggewer] was accordingly under an obligation to offer Soteriou [die voorhuurreghebbende] a new lease of shop 18. Plainly any offer had to be one which was capable of being turned into a contract by acceptance. It had therefore to state a rental and any other terms and conditions which Poynton's required... Plainly Poynton's must act *bona fide*" (932G–J).

Hy vervolg:

> "[T]he words 'first refusal' import that the rental and other terms and conditions to be contained in the offer will be those upon which the lessor will offer the premises to other would-be lessees in the event that Soteriou is not willing to exercise his right" (933F–G).

In hierdie saak het die voorhuurreghebbende by appèl slegs tersydestelling van 'n verklarende en uitsettingsbevel van die hof *a quo* gevra. Daar bestaan egter geen rede waarom 'n voorhuurreghebbende of voorkoopreghebbende nie sou kon eis dat 'n *bona fide*-aanbod *in forma specifica* aan hom gemaak word nie, onderworpe natuurlik aan die hof se algemene diskresie om in sekere omstandighede 'n bevel tot daadwerklike vervulling te weier (die *Owsianick*-saak 320E–H).

Die vraag is nou hoe die vermelde metodes van uitoefening van 'n voorkoopreg geraak word deur die formaliteitsvoorskrifte wat vir grondkoopkontrakte geld.

'n Goeie beginpunt is die geval onder (b) genoem, naamlik waar die voorkoopreggewer grond in stryd met die voorkoopreg aan 'n derde verkoop. Gestel die koopkontrak tussen die voorkoopreggewer, A, en die derde, C, is formeel in orde, dit wil sê die essensiële en ander wesenlike bedinge is op skrif en die kontrak is deur elk van die partye of sy agent onderteken. Gestel verder dat die voorkoopreghebbende, B, na vore kom en voorgee om deur 'n skriftelike, deur hom ondertekende wilsverklaring in die plek van die derde, C, te tree: ontstaan daar nou 'n formeel geldige koopkontrak tussen die voorkoopreggewer, A, en voorkoopreghebbende, B?

In hierdie stadium het 'n mens 'n skriftelike ondertekende aanbod vervat in 'n kontrak tussen A en C welke aanbod oënskynlik deur B aanvaar is. As dit ál is wat op skrif verskyn, is dit duidelik dat daar nie aan die formaliteitsvoorskrifte voldoen word nie aangesien dit nie uit die betrokke dokument of dokumente blyk dat *A bewustelik met B* wou kontrakteer nie. (*Baker v Crowie* 1962 2 SA 48 (N); *Godfrey v Paruk* 1965 2 SA 738 (D) 741F–742C is in dié opsig verkeerd beslis; sien Van Rensburg en Treisman *The Practitioner's Guide to the Alienation of Land Act* 2de uitg 41). Om die kloutjie by die oor te bring, is dit nodig dat

die aanvanklike voorkoopkontrak (d w s die kontrak waardeur die voorkoopreg geskep is), self op skrif gestel en deur A en B onderteken moes gewees het. Bestaan daar wel so 'n skriftelike, ondertekende voorkoopkontrak is dit nie moeilik om uit die gesamentlike geskrifte 'n grondkoopkontrak tussen A en B te konstrueer nie.

Die duidelik omlynde doelwitte van die formaliteitswetgewing sou gefnuik word indien 'n informele of selfs mondelinge voorkoopkontrak die verband kon lê tussen die "aanbod" vervat in die kontrak en die "aanvaarding" daarvan deur die beweerde voorkoopreghebbende. Dit sou die deur open vir dié tipe onwenslike situasie wat die wetgewing juis voorgee om te bekamp. Met so 'n benadering sou dit by enige grondkoopkontrak vir 'n derde moontlik wees om na vore te kom en op grond van 'n beweerde informele voorkoopkontrak voor te gee dat hy die aanbod vervat in die grondkoopkontrak aanvaar. Die geleentheid vir bedrog en meineed sou daardeur wyd oopgegooi word.

Die posisie is ook nie anders indien die aanspraakmaker op die voorkoopreg, B, in 'n besondere geval nie sonder meer in die plek van die derde, C, kan tree nie, byvoorbeeld omdat hy nie ten volle op hoogte is van die inhoud van die grondkoopkontrak tussen die voorkoopreggewer, A, en die derde, C, nie of omdat sommige van die *incidentalia* van die kontrak tussen A en C nie vir sy besondere omstandighede gepas is nie. In die reël sal B in so 'n geval vir A kan dwing om aan hom, B, 'n geldige *bona fide*-aanbod te maak, dit wil sê 'n skriftelike, ondertekende aanbod waarvan die bepalings nie meer beswarend is as dié waarvolgens A bereid sou wees om aan 'n buitestaander te verkoop nie. Dit sou egter in stryd met die doelwitte van die formaliteitswetgewing wees indien B op grond van so 'n informele en selfs mondelinge voorkoopkontrak op so 'n aanbod sou kon aandring. Dit sou beteken dat in sekere omstandighede die mondelinge voorkoopkontrak 'n verloop van gebeure aan die gang sit wat onvermydelik op 'n koopkontrak tussen A en B uitloop. A word by voorbaat gebind om, as sekere feite volg, uiteindelik die grond aan B te lewer, en dit teen 'n prys en volgens bedinge wat grotendeels deur objektiewe faktore bepaal word. Die enigste keuse wat A onteenseglik behou, is die keuse of hy hoegenaamd wil verkoop of nie. Indien hy definitief wíl of móét verkoop, kan B hom dwing om die grond aan hom (B) te verkoop teen die beste prys en volgens die beste bedinge wat A van 'n derde sou kon kry.

Die voorgaande lei noodwendig tot dieselfde konklusie as dié van appèlregter Corbett in *Hirschowitz v Moolman*:

> "It seems to me that in order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor's failing to recognise or honour his right, to claim specific performance against the grantor . . . the right of pre-emption itself [die regter bedoel klaarblyklik die kontrak waardeur die voorkoopreg geskep word] should comply with the formalities act. Were this not so, the anomalous situation would arise that on the strength of a verbal contract the grantee of the right of pre-emption could, on the happening of the relevant contingencies, become the purchaser of land. This would be contrary to the intention and objects of the formalities act" (767G–H).

Ongelukkig vind regter Corbett dit egter nodig om hom in die loop van sy uitspraak in die algemeen oor *pacta de contrahendo* uit te laat. Hy stel dit só:

> "In general a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves" (766D–E).

Met hierdie benadering bring die regter opsies in die gedrang.

3 Opsies en die Formaliteitsvoorskrifte

'n Opsie is 'n keuse wat die opsiehouer het om 'n aanbod te aanvaar welke aanbod, volgens 'n kontrak tussen die partye (d w s die opsiekontrak wat 'n tipe *pactum de contrahendo* is) deur die opsiegewer oopgehou moet word, gewoonlik vir 'n vasgestelde termyn.

Die keuse wat die opsiehouer het, is geen besondere bevoegdheid, kompetensie of reg nie. Dit is prinsipieel dieselfde keuse as wat enige geadresseerde het om 'n aanbod te aanvaar. Die enigste verskil lê in die aard van die *aanbod*; die aanbod aan die opsiehouer is verskans deur 'n opsiekontrak en dáárom word sy keuse met die benaming "opsie" vereer.

Die opsiehouer het wel 'n persoonlike (of "vorderings-") reg. Hierdie reg is egter nie die opsie self nie maar die reg dat die opsiegewer niks moet doen wat die totstandkoming van 'n effektiewe hoofkontrak sou verhinder nie, dit wil sê indien die opsiehouer sou besluit om sy opsie uit te oefen. By 'n opsie om te koop mag die opsiegewer byvoorbeeld nie die koopsaak vernietig of beskadig of aan 'n derde vervreem nie; afgesien daarvan dat hy natuurlik nie sy aanbod om te verkoop mag herroep nie.

'n Opsie kom in wese deur twee aanbiedinge tot stand:

a die substantiewe aanbod, byvoorbeeld die aanbod om die plaas "Rietfontein 319" teen R500 000 betaalbaar teen transport te verkoop of te koop na gelang die aanbod deur die potensiële verkoper of koper gemaak word.

b 'n aanbod dat die substantiewe aanbod, gewoonlik vir 'n bepaalde termyn, oopgehou word (hierdie aanbod kan deur òf die aanbieder òf die geadresseerde van die substantiewe aanbod gemaak word).

Indien aanbod (b) nou aanvaar word, kom daar 'n opsiekontrak (wat, soos gesê, 'n tipe *pactum de contrahendo* is) tot stand ingevolge waarvan die opsiehouer die verskanste keuse het om voor verstryking van die opsietermyn die substantiewe aanbod te aanvaar of nie te aanvaar nie.

Voor die *Hirschowitz*-beslissing was daar rede om te aanvaar dat dit vir doeleindes van die formaliteitsvoorskrifte voldoende sou wees indien die substantiewe aanbod om te verkoop of te koop op skrif gestel en deur die aanbieder onderteken is. Indien die geadresseerde dan (deur uitoefening van sy opsie) hierdie aanbod skriftelik sou aanvaar en die aanvaarding sou onderteken, het daar, volgens hierdie siening, 'n geldige grondkoopkontrak tot stand gekom. Immers, al die elemente van die grondkoopkontrak sou dan op skrif wees, naamlik die "identiteit van die partye" (sien hierbo wat hiermee bedoel word), die essensiële en wesenlike bedinge van die kontrak asook die handtekening van elke party of sy agent handelende op sy skriftelike gesag. (Sien bv *Brandt v Spies* 1960 4 SA 14 (OK) 16F–17F; *Venter v Birchholtz* 1972 1 SA 276 (A) 284B–D; *Driftwood Properties (Pty) Ltd v McLean* 1971 3 SA 591 (A) 596E–F.)

Die feit dat die opsiekontrak self (dit wil sê die kontrak wat by aanvaarding van aanbod (b) hierbo ontstaan) nie aan die formaliteitsvoorskrifte voldoen het nie, sou geen afbreuk doen aan die formele geldigheid van die hoofkontrak (dit wil sê die kontrak wat by aanvaarding van aanbod (a) ontstaan) nie. Met ander woorde die *pactum de contrahendo* kon informeel en selfs mondeling gesluit gewees het, en mits die substantiewe aanbod maar op skrif gestel en onderteken

was, kon die skriftelike, ondertekende aanvaarding daarvan die ontstaan van 'n geldige hoofkontrak meebring (sien Nienaber 1964 *THRHR* 44 44–47).

Regter Corbett se veralgemening dat 'n *pactum de contrahendo* in die rëel ("in general") moet voldoen aan die formaliteitsvereistes wat vir die hoofkontrak geld, mag nou die indruk skep dat 'n opsiekontrak vir die verkoop van grond die grondslag van 'n geldige hoofkontrak kan wees slegs indien dit op skrif gestel en deur elke party of sy agent onderteken is (766D–E).

Myns insiens sou hierdie indruk verkeerd wees. Die *Hirschowitz*-uitspraak het nie die posisie ten opsigte van opsiekontrakte verander nie. 'n Informele opsiekontrak kan nog steeds die ontstaan van 'n formeel geldige hoofkontrak tot gevolg hê.

Die redes vir hierdie standpunt is die volgende:

a Regter Corbett se opmerkings omtrent die opsiekontrak en *pacta de contrahendo* in die algemeen is *obiter*. Vir doeleindes van die betrokke saak was dit slegs nodig dat hy hom moet uitspreek oor die formaliteitsvoorskrifte wat vir voorkoopkontrakte geld.

b In sake waar opsiekontrakte vir die verkoop van grond voorheen ter sprake gekom het, is die klem steeds daarop gelê dat die substantiewe aanbod op skrif en onderteken moet wees. Nêrens word spesifiek gesê dat die opsiekontrak self ook aan die formaliteitsvoorskrifte moet voldoen nie (sien bv *Brandt v Spies*; *Venter v Birshholtz*; en *Driftwood Properties (Pty) Ltd v McLean supra*).

c Dit is opvallend dat regter Corbett self in sy opmerkings oor die opsie, die klem op die substantiewe aanbod lê. Hy stel dit só:

> "In the case of an option, *the option itself contains the offer* which, when the option is exercised by acceptance, forms the basis of the ensuing contract. It follows that in the case of an option to purchase land *the option must be in writing and signed by the grantor of the option* (767F – ek kursiveer).

Indien die formaliteitsvoorskrifte, soos regter Corbett te kenne gee, sonder meer vir opsiekontrakte sou geld, sou die opsiekontrak tog deur sowel die opsiegewer as die opsienemer onderteken moes gewees het. Die feit dat die regter self die klem op die substantiewe aanbod lê en slegs ondertekening deur die aanbieder noem, dui aan dat dit vir hom blykbaar ook in die eerste plek om die opskrifstelling en ondertekening van die eventuele hoofkontrak gaan.

d Wetgewing wat in afwyking van die gemenereg formaliteite vir bepaalde kontrakte voorskryf, moet beperkend uitgelê word (sien bv *Pretoria Townships Ltd v Pretoria Municipality* 1913 TPD 362 368; *Mader v Mallin Diamond Mines Ltd* 1964 1 SA 572; *Neethling v Klopper* 1967 4 SA 459 (A) 464H–465C). Die geldingsfeer daarvan behoort nie verder uitgebrei te word as wat streng genome vir die bereiking van die wetgewer se oogmerke nodig is nie.

e Die standpunt wat ek voorstaan, sal geensins die geïdentifiseerde doelwitte van die betrokke wetgewing fnuik nie. Die enigste gevaar is dat 'n geadresseerde kan kom beweer dat die aanbod wat hy aanvaar het nog gegeld het omdat dit deur 'n opsiekontrak gerugsteun is, terwyl die aanbod, volgens die reëls wat andersins vir aanbiedinge geld, al mag verval het. Hierdie probleem bestaan egter ten aansien van aanbiedinge in die algemeen. Dit is nie moeiliker om getuienis van 'n beweerde opsiekontrak te weerlê as om te bewys dat 'n aanbod deur 'n onredelik lang tydsverloop of deur herroeping verval het nie. 'n Mens

moet in gedagte hou dat 'n opsiekontrak dikwels ook tot voordeel van die opsiegewer strek, dit wil sê vir sover dit die geldigheidsduur van die substantiewe aanbod vaspen. Dit is veral van belang vir byvoorbeeld 'n koper wat oorweeg om een van 'n aantal eiendomme te koop en wat dan 'n substantiewe aanbod aan die eienaar van een van die eiendomme maak maar tegelykertyd deur 'n meegaande opsiekontrak die geldigheidsduur van die substantiewe aanbod beperk. Vir die koper is dit van belang om die tydstip waarop die eerste aanbod verval, vas te pen, sodat hy met vrymoedigheid 'n volgende aanbod kan maak.

f As gesag vir sy veralgemeende standpunt oor *pacta de contrahendo* beroep appèlregter Corbett hom op Goudsmit (*Pandecten-Systeem* 2de deel par 27) en Windscheid (*Lehrbuch des Pandektenrechts* bd 2 par 310). Dié twee pandektiste behoort nie tot ons gemeenregtelike skrywers nie en hul geskrifte behoort dus ook nie met enige besondere gesag beklee te word nie. Indien hul standpunte hoegenaamd in Suid-Afrika nagevolg behoort te word, moet dit in eerste instansie vanweë die innerlike oorredingskrag daarvan wees; die Romeinsregtelike wortels van ons reg regverdig nie 'n klakkelose aanvaarding van 19de eeuse teoretiese uitbouings van veronderstelde Romeinsregtelike beginsels nie.

Lees 'n mens nou die betrokke paragrawe in Goudsmit en Windscheid is dit in elk geval duidelik dat albei skrywers dit het oor 'n besondere Romeinsregtelike verskynsel waarvolgens 'n persoon in sekere omstandighede deur 'n testamentêre bepaling, 'n regterlike vonnis, 'n regsreël of 'n kontrak onder verpligting kon staan om met 'n ander 'n kontrak te sluit. Sowel Goudsmit (98 vn 4) as Windscheid (251 vn 2) behandel die probleem hoe so 'n verpligting afgedwing kan word: moet die regter namens die betrokke party handel en moet die gevolglike "kontrak" dan aan laasgenoemde toegereken word of is die ander party se enigste remedie 'n eis om skadevergoeding? In samehang hiermee word daar dan gesê dieselfde vereistes geld vir die "Vorvertrag" as vir die hoofkontrak, en laasgenoemde moet veral "niet van de willekeur van ééne der partijen afhankelijk wordt gemaakt" (Goudsmit 98–99). Dit is duidelik dat die skrywers die posisie met betrekking tot opsiekontrakte (en selfs voorkoopkontrakte) hoegenaamd nie in hierdie verband oorweeg het nie.

4 Samevatting

Om op te som: Dit lyk korrek dat 'n voorkoopkontrak aan die formaliteitsvoorskrifte vir die vervreemding van grond moet voldoen om tot 'n geldige grondkoopkontrak aanleiding te kan gee. Dieselfde geld egter nie vir opsiekontrakte nie. Mits die substantiewe aanbod om grond te koop of te verkoop maar op skrif gestel en onderteken is, behoort die vorm van die opsiekontrak as sodanig geensins saak te maak nie. So 'n opsiekontrak waardeur die substantiewe aanbod verskans word, behoort informeel en selfs mondeling gesluit te kan word.

ADJ VAN RENSBURG
Universiteit van Wes-Kaapland

DAMAGES FOR PERSONAL INJURY AND DEATH

This note comments upon the recent decision by the appellate division on the question of whether or not the adoption of a child is a factor to be brought into account in assessing the child's loss of expectations of support. The relevant

cases are *Constantia Versekeringsmpy Bpk v Victor* 1986 1 SA 601 (A) and *Victor v Constantia Insurance Co Ltd* 1985 1 SA 118 (C).

1 Introduction

A widow has a claim for compensation for lost expectations of support arising from the wrongful killing of her husband. In the computation of her loss it is settled law that account is to be taken of the financial value of the expectation that she has of reinstating her right to support by remarriage (*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376D; the *Victor* appeal 612E–I).

At first blush one might have thought that a similar principle would apply when a child who has lost its parents is then adopted, for the effect of the adoption is to reinstate the child's right to support. In the *Victor* appeal the appellate division has ruled that the fact of adoption is to be left out of account in the determination of the child's loss of expectations of support. It follows that any expectation of adoption is similarly to be left out of account.

2 The Differencing Principle

In *Union Government v Warneke* 1911 AD 657 665 Innes J observed:

> "In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between that *universitas* as it was after the act of damage, and as it would have been if the act had not been committed (*Grueber* 269) . . . the compensation payable under the *Lex Aquilia* was only for patrimonial damages, that is loss in respect of *property, business or prospective gains*" (emphasis supplied).

The statement of this principle by the German romanist Mommsen has received approval on more than one occasion (see *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 111D–F and the cases there cited). Mommsen stated the relevant criterion as

> "[t]he difference between a person's patrimony at a given point in time and the value which this patrimony would, at the same point in time, have had in the absence of the intervention of the particular event causing damage" (*Beiträge zum Obligationenrecht* (1853) 3, author's translation).

3 The Value of a Chance

It matters a great deal which assets are to be included in the post-delict patrimony, for the value of such assets is to be deducted from the value of all assets in the pre-delict patrimony. There is no difficulty with assets of the tangible or immediately tradeable variety, such as stock-market shares. Assets whose valuation is occasion for some confusion are those described in *Warneke's* case as "business, or prospective gains." The major difficulty with such assets lies in the fact that their value is highly contingent, based upon uncertainties about the future and frequently about what would have happened in the past. There is only one way to value such assets, that is, by use of the principle of valuation of a chance (*Burger v Union National South British Insurance Co* 1975 4 SA 72 (W) 75D–G; Koch *Damages for Lost Income* (1984) 42–47). This principle requires that the value of the expected loss or financial advantage be determined as a *certainty* and then this certain value reduced by a percentage reflecting the chance that the contingent event may not have arisen at all. The determination of a suitable percentage by which to discount for the risk will often be a somewhat

unscientific estimate based upon the expectations of a reasonable man. A greater degree of objectivity is achieved when mortality or other statistical tables are used. The percentage is not a prediction of the future but rather a reflection of current beliefs governing the forces which will mould the future.

4 The *Spes* of Support

The receipt of support from a breadwinner is never certain. He may die or lose his employment or leave home and pay maintenance at a level lower than the value of support which would have been provided in a joint household. All actuarial calculations of the value of lost expectations of support have as their basis a year-by-year application of the principle of valuation of a chance, the chance of the death of the breadwinner had he not died when he did. A widow's claim will have been reduced further to allow for the chance of her decease. The court will then usually make a further deduction for general contingencies. A fact regrettably little recognised by our courts is that the value of lost expectations of support is no more than the *value of the chance* of receiving such support.

A wife has at all times during her marriage the prospect that at some time her husband may predecease her and that she may remarry and derive financial benefit from a second marriage. While her husband lives the value of this chance is small. It may even be negligible, if not non-existent, for older wives and others whose remarriage prospects might for religious or other reasons be somewhat restricted. For many wives the fact of the death of the husband brings about a massive increase in the chance of remarriage and an according increase in the financial value of that chance. In the computation of damages it is the enhanced value of this chance which is being deducted when allowance is made for the remarriage prospects of the widow. If the widow has in fact remarried, then one may adduce evidence not only of this fact but also of the financial standing of the new husband.

The right of a child to claim support from its mother may be analysed in a like manner. In *Groenewald v Snyders* 1966 3 SA 237 (A) 247B Holmes JA observed that:

> "In the present case, however, what financial benefit have they received as a result of his death? The right to look to their mother for some maintenance? They always had that right. *What they have now is a potentially more fruitful right against her*" (emphasis supplied).

The same reasoning, but with somewhat lower chances, is appropriate to the prospects that a child has of being adopted.

The above considerations notwithstanding, it was said by Rabie CJ in the *Victor* appeal (614B–C) that

> "Die hertroue van 'n weduwee, of die aanneming van 'n kind, is egter nie gevolge wat uit die dood van die betrokke eggenoot of vader *voortvloei nie*, en kan dus nie juis *op logiese gronde* gesien word as faktore wat by die bepaling van 'n weduwee of kind se vergoeding in aanmerking geneem moet word nie" (emphasis supplied).

Whatever the causal relationship between the death of the breadwinner and the subsequent adoption or remarriage, the hard reality remains that the fact of the death vastly increased the chance of such an event. Surely a reasonable man would anticipate the remarriage of a widow or the adoption of a child as a natural sequel to the breadwinner's death?

The logic of the balancing principle is an economic fact well recognised in a number of appellate division judgments as the fundamental measure of damages. There may be good reasons for limiting its application in the case of adoption but to suggest that *there is no logic* by which adoption or remarriage should be taken into account is to beg the question.

5 *Quo vadimus?*

In *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614 Holmes JA restated the basis for a claim under the dependants' action as follows:

> "It aims at placing them in as good a position, *as regards maintenance*, as they would have been if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered" (emphasis supplied)

In *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376 Holmes JA ruled that a widow is not obliged to mitigate her damages by seeking employment. The further development of the dependants' action in South Africa was then given a new direction when it was in the same case ruled that even if the widow had taken up employment that fact was also to be ignored. The differencing principle was thereby restricted in its application. The next step in removing the principle as the measure of damages under the dependants' action took place in *Groenewald v Snyders* 1966 3 SA 237 (A) 247 when Holmes JA extended his focus upon *maintenance provided by the deceased* to rule that in the assessment of the damages of dependent children the latter are not obliged to bring into account the value of any right they may have to claim support from their mother or, it seems, from the *estate of their deceased father.*

The Assessment of Damages Act 9 of 1969 was passed in 1969. In consequence of this act dependants are now no longer required to offset against their loss the value of life insurance and pension benefits accruing to them as a result of the death.

The appellate division in the *Victor* case has now ruled that the fact of adoption is to be ignored for purposes of assessing a dependant's loss of expectation of support.

In the *Victor* appeal (614B–C) Rabie CJ noted that the remarriage of a widow is not an event which flows from the death of the breadwinner and states that he himself would not have considered a widow's prospects of remarriage as a factor to be taken into account in assessing her compensation for lost prospects of support. Despite this view, the appellate division did not go so far, on this occasion, as to upset the long line of authority in support of making allowance for remarriage. This does not mean to say that well-meaning reformists will not now take the opportunity to press for legislation abolishing the making of a deduction for remarriage.

The trend of development in our law has been to eliminate one by one the various values which a strictly economic test would have included in the patrimonial estate of the dependant immediately after the death. In effect the trend has been to eliminate the differencing principle from the dependants' action and to award compensation on the basis of the total value of the dependant's patrimonial estate immediately prior to the death. The only significant compensating advantages whose deduction continues to be permissible are in respect of inheritances and workmen's compensation benefits. Perhaps in time judicial

or reformist generosity will find ways and means for eliminating these deductions as well.

6 A Quotation

England has experienced a line of development similar to our own. Of these developments Lord Diplock had occasion to say in *Cookson v Knowles* 1978 2 All ER 604 (HL) 608E–G:

> "Today the assessment of damages in fatal accident cases has become an artificial and conjectural exercise. Its purpose is no longer to put dependants, particularly widows, into the same economic position as they would have been in had their late husband lived. Section 4 of the Fatal Accidents Act 1976 requires the court in assessing damages to leave out of account any insurance money or benefit under national insurance or social security legislation or other pension or gratuity which becomes payable to the widow on her husband's death, while s 3(2) forbids the court to take into account the remarriage of the widow or her prospects of remarriage. Nevertheless the measure of the damages recoverable under the statute remains the same as if the widow were really worse off by an annual sum representing the money value of the benefits which she would have received each year of the period during which her husband would have provided her with them had he not been killed."

The appellate division in the *Victor* case was aware of such sentiments (615D–F) but remained unmoved.

The article by Parmanand "An Exercise in Altruism" 1985 *De Rebus* 617 strongly criticises the lower court judgment by Friedman J.

7 Equity

The developments traced above suggest that the incisive economic logic of the differencing principle is losing sway as a criterion for the measure of damages under the dependants' action. An alternative measure which deserves consideration is that much approved of by Feenstra 1972 *Acta Juridica* 227 234, and associated with Thomas Aquinas, who maintained that compensation should be awarded *secundum arbitrium probi viri* (according to the judgment of an honest man) and *considerata conditione utriusque personae* (taking account of the condition of both plaintiff and defendant). For present purposes it is appropriate to focus attention on the condition of both plaintiff and defendant.

As a general rule, the defendant is an insurance company or is backed by an insurance company or is a large corporation. There is usually little question of the defendant's ability to pay. Insurance companies derive their funds from the premiums paid by their policyholders. They provide financial conduits by which the large losses of a few are spread among many. In the case of the MVA fund the contributions come from the entire motoring public. If the courts are unduly generous with the funds of insurers it is ultimately the general public who must foot the bill with higher premiums or petrol levies. The courts, with rare exceptions (see, e g, *Dyssel v Shield Insurance Co Ltd* 1982 3 SA 1084 (C) 1087G–H) display little awareness of their social responsibility in this regard.

In the lower court judgment in the *Victor* case Friedman J had occasion to say (124I) in relation to collateral benefits that "[i]n each case public policy was a determining factor." He went on to say (125A) that "[i]t would not be in the public interest to allow a wrongdoer to benefit." The defendant insurance company is, however, in no way a *wrongdoer*. The person who actually perpetrated the wrongful act has no financial liability. It is the public at large, through the

conduit of the insurer, which has stepped into the perpetrator's shoes to ensure compensation for a loss which would otherwise *have gone uncompensated* as a result of the impecuniosity of the average motorist. The public at large may be described as a *wrongdoer* in the sense that the use of motor transport provides a public benefit and thus that the public must carry the cost of the damage which is associated with the use of this modern technology. The public is, however, entitled to have its funds distributed in an astute manner and in keeping with the level of compensation which the common weal can afford. We may all aspire to drive a Rolls-Royce or a Ferrari but economic reality dictates that most of us do not do so. One wonders how many straws of judicial generosity are needed to break the public camel's back? It deserves consideration that one court judgment may be applied in numerous out-of-court settlements.

It needs to be borne in mind, in speaking of "wrongdoers," that the persons who claim compensation are themselves beneficiaries of the transport system and thus do not come to court with entirely clean hands.

8 Who Should Bear the Loss?

8 1 *Breadwinner at fault* If the deceased breadwinner had been totally at fault his widow, or other relatives upon whom the law places a burden of support, would have had to bear the financial burden of providing support and hence suffer a financial loss.

8 2 *Duty of support by relatives* If the differencing principle is to be applied in its full and strictest sense and account is to be taken in the determination of damages of the financial value which a dependant has, after the death of the breadwinner, of claiming support from some other person, then the dependant will be compensated only for that part of the loss which the financial resources of the relatives are unable to bear. It is the relatives who would carry the financial burden. The relatives themselves have no direct claim in law for the financial burden which the death would place upon them. By ruling that children are not required to bring into account the value of the expectation of support from their mother or grandparents or uncles, the court is indirectly allowing such persons relief from a burden which the law would otherwise have placed upon them. It is in this sense that the ruling in *Groenewald v Snyders* discussed above is a desirable principle in our law. If a person who had an obligation *ex lege* to support a needy child were to adopt that child, it would be appropriate in such circumstances to ignore the fact of adoption.

8 3 *Pure liberality* The adoption of an orphan child or the marriage of a widow have the characteristic that the person who thereby undertakes liability for the burden of support does so *voluntarily*. If such adoption or marriage takes place out of *pure liberality* then it seems correct that such event be viewed as *res inter alios acta* and be left out of account. As a rule, however, it is doubtful that such seeming altruism is done without the expectation of a suitable *quid pro quo*. There is in South Africa a serious shortage of children available for adoption by childless couples. The adopting parent does expect to derive some benefit in terms of quality of life and it is to be doubted that such an act of adoption can truthfully be described as *pure liberality*. The trial court in the *Victor* case (125A) described the act of adoption as being "through entirely altruistic and charitable motives." There is nothing in the judgment, however, to suggest that the court

ever in fact investigated the reasons for adoption and the reference to "charity" and "altruism" suggests a degree of unmotivated wish-fulfilment on the part of the court. In *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (C) 409G recognition was given to the consideration that the classification *res inter alios acta* should only be applied to acts of "pure benevolence or liberality."

8 4 *Remarriage prospects* The man who marries a widow can seldom, if ever, be said to do so as an act of "pure benevolence or liberality." He may be expected to be doing so in the expectation of taking on a homemaker (see the *Erdmann* case) and possible financial partner and companion. It seems undesirable that a second husband should enjoy a higher standard of living at the public expense. As far as a widow is concerned it also needs to be borne in mind that, should she be severely injured *subsequent to the death of her husband*, she would be entitled to claim compensation for the loss of the financial benefits of contracting a second marriage (*Commercial Union Assurance Co of SA Ltd v Stanley* 1973 1 SA 699 (A) 704G).

8 5 *Protection of widow's privacy* A major objection to the making of a deduction for prospects of remarriage is the humiliation of the investigation of intimately private affairs that all too often takes place. This difficulty could largely be overcome if courts would rule as inadmissible evidence relating to intimate personal relationships. The deduction for remarriage could then be assessed in a decently objective way on the basis of statistical tables (see Koch *op cit* 330; Newdigate and Honey *MVA Handbook* (1985) 303 and other less sensitive information such as the number of children. It is to be hoped that economic conservatism will prevail over liberality and that the remarriage deduction will be retained in our law.

8 6 *Widow's earnings* A widow who has taken up employment otherwise than would have been the case had the death not occurred, is not required to bring this fact into account in the determination of her loss (see the *Munarin* case above). It is difficult to perceive why the public at large should be obliged to compensate her as though she were still an unemployed housewife rendering services as a homemaker. Some widows are delighted with the new-found opportunity to seek employment without objections from their husbands. This is not to suggest, however, that a widow is obliged to mitigate her damages by seeking employment.

8 7 *Pension and insurance benefits* A breadwinner will commonly have substantial life insurance or pension cover to provide for his dependants in the event of his untimely death. If one bears in mind that death benefits under life and pension funds are provided from premiums paid by a large number of insured members of the general public it seems unnecessarily generous to allow the dependants to leave out of account such benefits when computing damages which the general public are effectively having to pay. In *Groenewald v Snyders* discussed above the children had a right to claim support from their mother who had been enriched by some R10 000 of life insurance benefits *in excess of the value of her loss*. Such benefits derived from premiums paid by the general public, which was thus required by the court to enrich a widow *and* compensate the children.

8 8 *Maintenance from the deceased estate* A child has a right to claim support from the estate of a deceased father (Spiro *Law of Parent and Child* (1971)

365–366). The financial value of this right is to be ignored in the determination of compensation (see *Groenewald v Snyders* discussed above). From the point of view of the general public, however, it seems wholly unnecessary to ignore an estate whose value had been earmarked by the deceased for the provision of support after his death and which was probably utilised prior to the death to meet the burden of support. A full discussion of this issue is beyond the scope of this note but suffice it to say that, in general, it would do little injustice to deduct from the value of a dependant's loss the value of a right to claim maintenance from the deceased's estate.

8 9 *Intellectual discipline* It is well-established that the dependants' action compensates only patrimonial loss. There is a suspicion that, by liberally ignoring various assets in the post-death patrimony, the courts are in fact introducing a degree of sentimentality, a back-door *solatium*, into the compensation for dependants. We should do well to bear in mind the words of Innes CJ in *Hulley v Cox* 1923 AD 234 246:

> "We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment."

It is submitted that Innes CJ had in mind the consequences of a strict application of the differencing principle. Holmes JA, however, severely undermined the binding force of precedent and principle when he said in *Legal Insurance Co Ltd v Botes* 1963 1 SA 608 (A) 614F–G:

> "In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right."

"*Right* by what criterion?" one may ask. One may note that in *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) the strict economic test of the differencing principle was effectively reinstated in respect of the deduction of pension benefits.

It is to be hoped that our courts, when appropriate, will not lose sight of the fact that from time to time cases do arise where the defendant is uninsured (see, e g, *King v Geldenhuys*; Corbett and Buchanan *The Quantum of Damages in Bodily and Fatal Injury Cases* (1985) 379). Special considerations are appropriate in such circumstances.

9 Use of Award to Provide Maintenance

In the *Victor* appeal (613D–E) Rabie CJ observed that it is usual for a court (when suitable evidence is available) to assess damages as the amount which by investment and the consumption of interest and capital can be used to replace the lost income. In consequence, he concludes that the capital sum awarded to a child has the nature of income rather than capital and that it is therefore permissible for a child to consume such capital in replacing its lost support. Although one cannot find fault with the proposition that a child dependant's award be consumed in providing for the child's support, the reasons given for permitting such consumption are not entirely sound:

The notion of consuming capital and interest may conveniently be described as the "functional approach." There are factual difficulties with the "functional approach," the most significant being that it is a *legal fiction.* Even if discounting at interest is done to the date that the plaintiff receives his award (which is never so) the amount awarded will almost without exception have been reduced in

respect of various contingencies. The court will usually have made a deduction in respect of general contingencies and any actuary engaged to perform calculations will have reduced the amount in respect of the contingencies of survival of the breadwinner had he not died when he did. The effect of these contingency deductions is that the amount awarded is *prima facie* inadequate for use in the manner so fondly imagined by the adherents of the "functional approach."

The functional fiction would seem to have come to us either through English law or from actuaries who have sought to give a simple and plausible, if unrealistic, explanation for the process of discounting. The fiction has created a trail of anomalies, most notably the difficulties experienced by the courts in grasping the principle of valuation of a chance and the absurd notion that a court is required to *predict* the future (Koch *op cit* 9). The fundamental test that was used by the Roman-Dutch jurists would seem to have been a "market value" test (see Koch *op cit* 14–17).

The fact that the functional fiction has gained such widespread popularity amongst intelligent men is largely to be ascribed to a mistaken understanding of the expectation of life. This is not a term certain, as many think, but rather the sum of the chances of survival to each and every possible future year. Some 50% of plaintiffs will, by definition, outlive their expectations of life (and exhaust their awards while still in need). What is also little realised, is that every actuary who performs calculations for a court does so by the year-by-year application for the principle of valuation of a chance (see Koch *op cit* 44–47). Each year's loss is assessed separately and the total loss computed by summing these separate values. It follows, as has been observed earlier, that any value computed by an actuary which takes account of mortality will reflect merely the *value of the chance* of receiving such income.

This hard fact was recognised by Rumpff CJ in *Santam Versekeringsmpy Bpk v Byleveldt* 1973 2 SA 146 (A) 150A–C:

> "Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie."

Grotius has expressed similar sentiments in the *Inleiding* (3 32 16):

> "A man is bound also to compensate another not only for taking from him or injuring what belonged to him, but also for depriving him of what he was likely to get: subject, however, to the consideration that *uncertain* and *future* advantages are not worth so much as what is *certain* and *present*" (emphasis supplied, Lee's translation).

An award of damages has and always has had the same quality as the Germanic *wergild*; it is essentially a buying-off price. That is a necessary consequence of paying compensation by a lump sum. And those who believe the solution lies in payment by instalments should be warned that they cannot escape the imperfections of reality. How, otherwise than by use of valuation of a chance, does one award compensation to a dependant contingent upon when the deceased breadwinner would otherwise have died? We cannot resurrect the deceased breadwinner. The actual incidence of his death in the absence of the accident remains an eternal mystery and the payments, reduced for the chance of his death, remain inadequate to replace the lost income in a functional sense. In addition, allowance must be made for general contingencies other than death.

10 *Restitutio in Integrum*

If, for 50% of plaintiffs, the compensation paid is inadequate to be used in a functional sense to replace the lost income, then how can it be said that the award places the plaintiff in the same position he would have been in had the delict not occurred? The solution to this conundrum is to be found in the differencing principle which puts the plaintiff in the position he would have been in in the sense of *topping up his* patrimonium *at a particular point in time to the level it would have had had the delict not occurred.* It is the lump-sum present value of the *patrimonium* which is topped up, not the income of the plaintiff in years to come (for more detailed reasoning see Koch *op cit* 25–32). This topping up may be done either at the date of the delict or at the date of the award, whichever is prescribed by law.

ROBERT J KOCH
Consulting Actuary

ADVOCATES' FEES: MAKING A MOCKERY OF THE RIGHT TO COUNSEL

A few introductory remarks should be in order: first, this note, albeit a criticism, is not intended to be an attack on the bar at large; secondly, it is prompted not entirely by sour grapes. It is hoped, furthermore, that the writer's occasional indulgence in the use of exclamation marks will be forgiven – in the context of advocates' fees they do not seem to be out of place. So on to business.

Much has been written of late about the inaccessibility of the law to the ordinary man in the street who is neither rich nor indigent. The lack of a refined and extensive legal aid system is partly to blame for the average man's reluctance or inability to litigate. Another factor contributing towards this deficiency is the magnitude of legal fees charged by advocates, particularly in supreme court litigation.

South Africa supports a large number of advocates. Some of them are outstanding, a few perhaps even brilliant; most are able and diligent; but an uncomfortably large number of advocates are not particularly skilful. Yet some of the less competent command substantial fees, while many of the more eminent counsel charge fees which can only be described as enormous. Often, as will be seen below, fees bear no relation to the complexity of the work (or even its quality). Too often fees relate only to the eminence (imagined or real) of the man performing the work. It is this glaring weakness in a system which should levy a "rate for the job" which has led to public unhappiness (and acrimony between bar and side-bar) over counsel's fees in recent times.

Many instances of excessive fees charged by advocates were related to the "Commission of Inquiry into the Structure and Functioning of the Courts" ("*Hoexter Commission Report*"). Alarming examples were the following (*Hoexter Report* vol 1 118):

a In Durban, costs of two counsel for each litigant amounted to at least R4000 per day;

b In an ordinary action in the Transvaal, senior counsel would frequently charge R3000 and junior counsel R1500 for the first day;

c In a Cape case, argument over the amendment of pleadings continued for four days, and senior counsel's fee was R32 000!

An indication of the level at which counsel mark their fees is also to be found in the evidence of a former Natal judge president who expressed his surprise at the high fees charged for trials (*Hoexter Report* vol 1 120), and Milne JP who wrote to the commission as follows (*Hoexter Report* vol 1 120):

> "It is, I believe, not unknown for the top men at the Johannesburg bar to earn R250 000 per annum. It is quite commonplace for them to earn R125 000 at a comparatively small bar like the Natal bar. I am aware of two *juniors* at the Natal bar who have been at the bar respectively eight and nine years, who earned, last year (1981), R85 000 and R75 000 *nett*" (my italics).

A former chief justice, during a television interview, was asked to comment on fees of the order of those mentioned above. His reply, clearly in defence of such fees, was that advocates had to pay a large slice of their income to the receiver of revenue. This is undoubtedly true, but is it proper for an advocate to mark a fee which will compensate him for his sacrificial offering to the receiver? In *Reef Lefebvre (Pty) Ltd v SAR and H* 1978 4 SA 961 (W) 967C–D Coetzee J had the following to say in this regard:

> "I have been given to understand that some counsel feel that the higher charges are due to the rate of taxation. *An advocate's tax liability, to my mind, is an improper consideration.* Clearly the marginal rate of tax applicable to a particular advocate's income cannot possibly influence the reasonableness of his charges, as the remuneration of identical tasks might then vary considerably. In any event, the burden of taxation is something to be borne by all citizens, by each according to his own income, *and it has nothing to do with the proper assessment of work performed for others.* If it were otherwise, it would be tantamount to partial transference of one's own tax liability to other members of society" (my italics).

Advocates are entitled to reasonable remuneration for the work they perform. Often they spend many hours agonising over a case and put in a lot of work preparing for it, only to be answered with spurious complaints over their fees. However, the time spent on a brief is not the only criterion applicable to an assessment of counsel's fee. What is required is "an objective assessment of a proper fee for that work" (*Reef Lefebvre (Pty) Ltd v SAR and H supra* 964C: and see *Scott v Poupard* 1972 1 SA 686 (A) 690; *City Deep Ltd v Johannesburg City Council* 1973 2 SA 109 (W) 114).

In attempting to make an "objective assessment" of the fee to be charged for a particular task performed, advocates will often have regard to fees charged by themselves or by colleagues for similar work performed in the past. When doing so, it will be quite acceptable for counsel to make adjustments in accordance with the falling value of money. However, such adjustments are not always realistic. Thus Coetzee J in *Reef Lefebvre (Pty) Ltd v SAR and H supra* 964G remarked:

> "I have a clear impression that counsel's fees in opposed matters have increased at a substantially greater rate than is warranted by the falling value of money."

The result is that

> "there are juniors of no great seniority, experience or skill whose charges are already appreciably in excess of [a realistically adjusted fee]" (967B).

The problem does not seem insurmountable, nor even particularly complex. It is submitted that the bar should in the first place deal more realistically with complaints over fees (see *Reef Lefebvre (Pty) Ltd v SAR and H supra* 967B–C). However, the internal investigations and hearings of the bar do not satisfy the ideal that justice should be seen to be done, and smacks of trade-union protection. For this reason the simple solution of unilateral action by the bar is unacceptable to both attorneys and the lay public (see *Hoexter Report* vol 1 121). As a solution to the problem of excessive advocates' fees, bar investigations have been criticised by the Hoexter commission for the following inadequacies (*Hoexter Report* vol 1 121):

a Complaints are investigated by advocates only.

b Investigations are closed to outsiders.

c Reasons for findings are not disclosed.

d The criteria according to which fees are judged remain unknown.

Perhaps open discussion of a complaint over fees, in the presence of the instructing attorney, should be adopted as practice.

Another possibility is to require as the invariable practice that attorneys mark the fee before delivering the brief (see *Hoexter Report* vol 1 123; *Galgut Report* 11–12).

Taxation is, of course, another avenue open to those dissatisfied with counsel's fee. The problem arising here is that fees taxed off are often simply added to the attorney-client bill (see *Hoexter Report* vol 1 122).

Furthermore, taxing masters are often inexperienced and therefore unable to assist a litigant to the full. However, in the recent case of *Ocean Commodities Inc v Standard Bank of SA Ltd* 1984 3 SA 15 (A) one finds an outstanding example of firm and well-reasoned action by a taxing master. The facts relevant to taxation of counsel's fees were that:

a the applicants were the successful respondents in an appeal before the appellate division, and were awarded, *inter alia*, the costs of two counsel;

b senior counsel marked a separate fee for heads of argument (R1 200) as did junior counsel (R800);

c senior counsel charged R10 500, and junior counsel R7 000 for arguing the appeal;

d the taxing master taxed off the entire fee for heads of argument, and reduced senior counsel's fee for arguing the appeal from R10 500 to R4 000, and junior counsel's from R7 000 to R2 700.

With regard to the fee for *heads of argument* it was argued (one is inclined to say, on counsel's behalf) that the fact that heads were required by the court well in advance of the appeal meant that counsel had to prepare anew once the appeal date loomed near. Rabie CJ replied as follows;

> "The submission has no real substance. Heads of argument are drawn when counsel has done his research and prepared for the appeal. They reflect the result of that research and preparation." (19C).

Counsel's fees for *arguing the appeal* came in for somewhat sterner criticism. The taxing master regarded the fees as "exceptionally" and even "shockingly" high, and out of all proportion to the work done (22B). It was submitted that

the appeal had been argued by "eminent counsel." However, Rabie CJ observed that

> "the measure for determining what is a reasonable fee is the value of the work that was done, and the eminence of counsel is not by itself a good reason for allowing a larger fee" (22H).

It is interesting to note that counsel arguing the application for review of the taxation did not seek to move the court to uphold the fee charged by counsel for the appeal: he merely argued that the fee allowed by the taxing master was "too low" (21I 22I). One is not in the least surprised that he refrained from an attempt to justify advocates' fees of R19 500 for the appeal (expenses excluded!). Rather, one is surprised at the fee. Evidently the court disapproved of this type of fee which bears no relation to the work done, for in his judgment dismissing the application Rabie CJ labelled counsel's fee "grossly excessive" (23B).

If fees such as those mentioned above are to become the order of the day, with no regard to the competence of counsel or the complexity of the work performed, the feud between the bar and side-bar will become difficult to resolve. As matters stand, it is submitted that taxing masters should be trained as a matter of urgency (see also *Hoexter Report* vol 1 122) and that the bar should seriously investigate ways in which advocates' fees can be limited and monitored – lest the current concern over advocates remaining undeterred "at the helm of their clinging cash registers" (*S v Van Niekerk* 1972 3 SA 711 (A) 716) becomes the public view and deals the profession's image a blow which may undermine the ordinary man's confidence in the bar.

J VAN DER BERG
University of the Western Cape

The spiritual nature of man is stronger than codes or constitution. No government can endure which does not recognize that for its foundation, and no legislation lasts which does not flow from this foundation. (per Disraeli *Rector University of Glasgow* 1873.)

VONNISSE

LACONIAN MARITIME ENTERPRISES LTD V AGROMAR LINEAS LTD 1984 3 SA 233 (D)

Attachment and arbitration awards

The decision in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* could be described as breaking new ground in the law of jurisdiction; it is certainly the only case in recent years which has permitted a *peregrinus* to bring an action against another *peregrinus* where none of the accepted *rationes jurisdictionis* was present. The circumstances were, however, coloured by the fact that the action was based on statute.

The basic dispute between the parties, who were both peregrines in the Republic, had arisen out of a charterparty and had been settled in 1979 by a foreign arbitration award. The purpose of the present action was to enforce the arbitration award in South Africa by making use of the procedure provided in the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the act). In earlier proceedings the applicant had sought an order:

a granting leave to sue the respondent by edictal citation;

b calling upon the respondent to show cause why the arbitrator's award should not be made an order of court; and

c that the respondent be interdicted from removing certain bunkers on board a vessel belonging to it or disposing thereof (234G).

The court granted the order requested under (a) and, in addition, ordered the attachment *ad fundandam et confirmandam jurisdictionem* of the said bunkers and the respondent's right to various freight monies (234H–I). When the applicant subsequently sought a variation of the terms of the order, the respondent launched a counter-application seeking the setting aside of the attachment order on the gounds of lack of jurisdiction (see 235F–236B; the order in which the facts are set out in the report is slightly confusing).

Before the substance of this argument is considered, it is necessary to make a few remarks about the original order. Because the full report of the judgment was not given, any comment has to be made with caution; it does, however,

seem very strange that the attachment granted was described as being *ad fundandam et confirmandam jurisdictionem*. Although the terms *fundandam* and *confirmandam* have in the past been used carelessly or interchangeably, it seems to be generally accepted that the former relates to a situation where no other *ratio jurisdictionis* is present (see Forsyth *Private International Law* (1981) 174–175) and is not available where both parties are peregrines: *Maritime & Industrial Services Ltd v Macierta Compania Naviera SA* 1969 3 SA 28 (D). The latter relates to a situation where some *ratio jurisdictionis* exists; the attachment is necessary to "confirm" the jurisidiction of the court. Although Forsyth claims that the distinction is "no mere play on words" (174), it is submitted that there is much to be said for having only one type of attachment; the qualification is that it may not be invoked where both parties are peregrines and no other *ratio jurisdictionis* exists. Whatever the merits of the argument may be, however, there seems to be no possible justification for ordering both types of attachment, especially – if the report is correct – as no attachment at all had been requested.

Now to the argument in the main case. It can be seen that this hinges on one question: does the statute permit the enforcement of all foreign arbitral awards, or must one of the conventional grounds of jurisdiction exist in order for the applicant to approach the court? It should be mentioned that section 4 of the act provides that the court may refuse to make the foreign award an order of court only in certain specified circumstances and this, Booysen J considered, was a strong indication that the court was empowered to recognise a foreign award even without common-law jurisdiction (238I). The judge was strengthened in his view by reference to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which leant strongly in favour of international recognition of such awards (238I–239E). The court therefore concluded that any foreign award would be recognised *subject only to there being that degree of effectiveness which is provided by an attachment of property or person* (239F).

Now the act makes no provision for attachment and the last statement is inconsistent with the sentiments expressed earlier by the judge which, in effect, formed the basis of his decision. Kahn, commenting on this case (1984 *Annual Survey* 556 570–571) points out that this is in effect reading something into the statute. He argues that there is a good case for the jurisdictional question to be decided on the basis of the "international competency" of the foreign tribunal and that no jurisdictional factor need be established in order to connect the matter with a South African court. I must agree with the first part of his criticism: there is no basis on which an attachment can be made unless the act itself can be regarded as creating a *ratio jurisdictionis*, which seems to be stretching the concept beyond acceptable limits. I feel, however, that it may be going too far to say that an award is enforceable on the application of any person, regardless of his connection with a South African court.

In the *Maritime & Industrial Services* case, *supra*, Van Heerden J made an important policy statement in connection with jurisdiction:

> "There seems to be no good reason why by mere attachment peregrine defendants should be put to the inconvenience and expense of defending actions in South African courts at the instance of peregrine plaintiffs and why in the process the time of South African courts . . . and State funds should be taken up with disputes which are unconnected with South Africa and between persons who have no connection with South Africa" (34H; this passage was actually referred to in the *Laconian* case 237A–B).

It is submitted that this is one of the most important judicial pronouncements which a South African court has ever made in this regard because it expresses the essence of jurisdiction: there must be a connection between the parties and the court. Section 4 (1)(a)(ii) of the act provides that a court may refuse to enforce a foreign award if "enforcement of the award concerned would be contrary to public policy in the Republic" and it is submitted that this is where the answer to the problem is to be found; it is clearly not the policy of South African courts to be a forum for the whole world. If this is the general rule, then there does not seem to be any cogent reason why the position should be any different in respect of foreign arbitral awards; there will certainly be no reluctance to enforce such awards provided only that the court is the proper forum to approach. Even without such a statutory provision, however, it could be argued that a court must first consider whether it has jurisdiction before making a decision on the merits. This appears to have been the approach adopted by the court in *Benidai Trading Co Ltd v Gouws & Gouws (Pty) Ltd* 1977 3 SA 1020 (T) where Viljoen J held that the proper course was for the appellant to seek recognition of the award in the court to which the respondent as defendant was amenable (1038H; the reference to this case in *Laconian* (238I) as support for the views there expressed is somewhat misleading – the judge in *Benidai Trading* was referring to an extension of jurisdiction to include foreign arbitral awards not already subject to the jurisdiction of South African courts before the passing of the act; he did not suggest that the conventional principles of jurisdiction should be flouted in the application for recognition of the award).

On the other hand, would the approach contended for lead to hardship? It is submitted that it would not. Whilst it may be argued that the case in point is an example of an instance where it was necessary to act while the vessel was at hand, it seems that this cannot be accepted. If it is true that an attachment is not permissible, then the respondent could have removed its ship immediately (and the question whether an interdict similar to a Mareva injunction should have been granted was not canvassed). Furthermore, it seems that this type of hardship would be confined largely to maritime cases, and this raises further points about the *Laconian* decision.

In terms of the Admiralty Jurisdiction Regulation Act 105 of 1983, any claim for the enforcement of an arbitration award relating to a charterparty is a maritime claim (s 1(x) read with s 1(i)) and is therefore subject to the admiralty jurisdiction of the supreme court (s 2(1)). This would mean that the claim could have been instituted by an action *in rem* commencing with the arrest of the ship (s 5(a)). Thus the situation in the present case would have been covered by these provisions and no dispute as to jurisdiction would have arisen.

Why, then, was this not argued? The Admiralty Jurisdiction Regulation Act only came into force on 1983-11-01, that is after the first application between the parties took place, and the question whether the act has retrospective operation has caused some difficulty: in *Euromarine International of Mauren v The Ship Berg* 1984 4 SA 647 (N) the majority of the full bench of the Natal provincial division held that the act did not operate retrospectively to create any new rights or remedies (664C) and Milne JP stated that

> "[i]t is by no means clear to me that before the Admiralty Act of 1983 came into operation, claims, 'relating to any charterparty or the use of hire of a ship' fell within the admiralty jurisdiction of the courts of the Republic" (664F).

While this matter was not decided, it seems that there may have been obstacles to finding that the *Laconian* case fell within the court's admiralty jurisdiction. This is not the position any longer, however, and it may be that hard cases will accordingly be less frequent in the future.

AC BECK
University of Bophuthatswana

BRIAN BOSWELL CIRCUS (PTY) LTD v BOSWELL-WILKIE CIRCUS (PTY) LTD 1985 4 SA 466 (A)

Aanklamping ("passing off") – gebruik van eie naam as handelsnaam

Die "Boswell-Wilkie Circus," onder bestuur van die respondent (applikant in die hof *a quo*), is die produk van 'n samesmelting in 1963 van twee bekende Suid-Afrikaanse sirkusondernemings, naamlik "Boswell's Circus" en "Wilkie's Circus." Eersgenoemde het 'n lang geskiedenis in Suid-Afrika gehad – die ontstaan daarvan strek so ver terug as 1913 – en was altyd in besit van die Boswell familie. Wilkie weer het in 1955 'n mededingende sirkus begin. Die appellant (respondent in die hof *a quo*), wat homself beskryf as "a fifth-generation Boswell to be involved in the circus industry," het toe so onlangs as 1982 'n eie sirkus onder die naam "Brian Boswell Circus" tot stand gebring. Die respondent het 'n interdik aangevra ten einde die appellant te verbied om die naam Boswell ten aansien van sy onderneming te gebruik aangesien sodanige gebruik op onregmatige aanklamping ("passing off") sou neerkom. Die aansoek slaag in die hof *a quo*. Teen hierdie bevinding kom die appellant nou in hoër beroep.

Ten aanvang stel appèlregter Corbett die positiefregtelike reëling wat in die algemeen met betrekking tot aanklamping geld, soos volg (478E-479E):

> "The wrong known as passing off is constituted by a representation, express or implied, by one person that his business or merchandise, or both, are, or are connected with, those of another. In the present case we are concerned with businesses which provide entertainment to the public and which do not market merchandise. I shall, therefore, confine my further discussion of the legal principles involved to wrongful representations concerning the wrongdoer's business. Where they are implied, such representations are usually made by the wrongdoer adopting a name for his business which resembles that of the aggrieved party's business; and the test then is whether in all the circumstances the resemblance is such that there is a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the business of the alleged wrongdoer is that of the aggrieved party, or is connected therewith. Whether there is such a reasonable likelihood of confusion or deception is a question of fact to be determined in the light of the particular circumstances of the case . . . *Passing off is a form of wrongful competition.* It is unlawful because it results, or at any rate is calculated to result, in the improper filching of another's trade and an improper infringement of his goodwill and/or because it may cause injury to that other's trade reputation . . .
>
> In a passing off action factors of importance are: (1) whether the defendant is engaged in the same field of business activity as the plaintiff, and (2) whether the plaintiff's trade

> or business name has required a *reputation, i e has become distinctive of, or in the minds of the public is associated with, the business carried on by the plaintiff. Engagement in the same field of business activity is not a pre-requisite to success* . . . , but clearly the existence of this factor would tend to enhance the likelihood of confusion or deception as far as the general public is concerned. The importance of the acquisition by plaintiff of a reputation in the trade name is twofold. Firstly, whether the general public will be confused or deceived into thinking, because of identity or similarity of names, that the business of the defendant is that of the plaintiff, or is connected therewith, must, as a matter of logic, depend on the extent to which that name is associated in the minds of members of the public with the business carried on by the plaintiff, i e the extent to which plaintiff has acquired a reputation in that trade name. Secondly, as the rationale of the wrong of passing off is the protection of the plaintiff's trade and goodwill, a valid cause of action would seem to postulate the existence of a *goodwill, i e reputation*, attaching to that trade name. Whether reputation, in this sense, is always a *sine qua non* of a successful passing off action need not now be decided" (my kursivering).

Vervolgens wys die regter – in navolging van *Policansky Bros Ltd v L and H Policansky* 1935 AD 89 101-103 – op die besondere reëls wat in verband met die gebruik van die eie naam op die gebied van aanklamping uitgekristalliseer het (479F-480H). As uitgangspunt word aanvaar dat

> "[a] person has a property right or a quasi-property right to the use and enjoyment of his own family name as well in carrying on a business and selling his goods as he has to any other species of property . . . Consequently every person has a *prima facie* right honestly to use his own name in his own business and to sell his goods under his own name, and any injury resulting therefrom is a *damnum absque injuria*" (*Policansky*-saak *supra* 101).

Dit beteken egter nie dat 'n mededinger onbeperk bevoeg is om sy eie naam as handelsnaam of handelsmerk te gebruik nie. In die *Policansky*-saak (*supra* 102-103) word 'n aantal beperkings genoem wat soos volg saamgevat kan word: Eerstens moet die tweede gebruiker hom tot die blote aanwending van sy eie naam beperk. Hy mag dus nie (verdere) verwarring in die hand werk deur 'n gewysigde naam te gebruik, of deur die verpakking van die eerste gebruiker se ware na te boots, of deur hoe ook al in sy advertensies die indruk te wek dat sy ware, sy dienste of sy onderneming dié van die eerste gebruiker is nie. Kortweg, die eerste gebruiker hoef slegs verwarring te duld wat enkel en alleen uit die tweede se gebruik van sy eie naam voortvloei. Tweedens, as die eerste gebruiker se naam sekondêre betekenis of reputasie verkry het, mag die tweede sy eie naam gebruik slegs indien hy op die een of ander manier duidelik laat blyk dat daar geen verband tussen hul ondernemings, hul dienste of hul ware bestaan nie. Derdens kan die tweede gebruiker verbied word om sy naam te gebruik indien dit juis sy bedoeling is om by die onderneming, dienste of die ware van die eerste aan te klamp (sien ook Van Heerden en Neethling *Onregmatige Mededinging* (1983) 106).

Toegepas op die feite *in casu* beslis appèlregter Corbett dat, aangesien die respondent se naam 'n sekondêre betekenis ten aansien van sy onderneming verwerf het (481G-482G) en daar boonop 'n redelike waarskynlikheid van verwarring of misleiding by die gewone publiek aanwesig is (482H e v), aanklamping bewys is. Dienooreenkomstig word die appellant verbied om die naam Boswell ten aansien van sy sirkus te gebruik "without clearly distinguishing [his] circus or performance from the circus of the applicant [respondent]" (485A).

Alhoewel nou met die resultaat van die uitspraak saamgestem word, is daar tog 'n paar opmerkings wat nadere beskouing regverdig. Hierdie opmerkings hou (a) enersyds verband met die algemene positiefregtelike reëls aangaande

aanklamping, en (b) andersyds met die besondere reëls omtrent die gebruik van die eie naam op die onderhawige gebied.

a Eerstens verklaar appèlregter Corbett in navolging van *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A) 929-931 (sien die aangehaalde *dictum* hierbo) dat "passing off... a form of wrongful competition" is maar dat "[e]ngagement in the same field of business activity is not a pre-requisite to success." Nou kan met die standpunt dat die ongemagtigde gebruik van 'n ondernemer se handelsmerk of handelsnaam deur 'n *nie-mededingende* ondernemer (dit wil sê waar 'n gemeenskaplike mededingingsveld ontbreek) onregmatig kan wees, nie fout gevind word nie. (Dit gaan naamlik hier oor *bedekte aanleuning* wat 'n inwerking op die reg op die werfkrag van 'n onderneming *buite mededingingsverband* meebring: sien in die algemeen Van Heerden en Neethling 123 e v.) Wat wel ten sterkste bevraagteken word, is die opvatting dat dit hier oor aanklamping gaan. Soos bekend (sien Van Heerden en Neethling 58 e v 94-95), kom by aanklamping in eerste instansie 'n aantasting van die reg op die onderskeidingsteken ter sprake, dit wil sê 'n inwerking op die onderskeidingswaarde wat byvoorbeeld die handelsmerk van 'n produk teenoor ander *soortgelyke* produkte het. Die aanklamper verwek met ander woorde die skyn dat sy prestasie die soortgelyke prestasie van 'n ander ondernemer is. Hieruit volg dat aanklamping 'n *mededingingstryd* tussen ondernemers veronderstel en juis om dié rede 'n *verskyningsvorm van onregmatige mededinging* is. In *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 3 SA 1129 (T) 1141 merk regter Van Dijkhorst in hierdie verband op:

> "In general terms competition involves the idea of a struggle between rivals endeavouring to obtain the same end. It may be said to exist whenever there is a potential diversion of trade from one to another. For competition to exist the articles or services of the competitors should be related to the same purpose or must satisfy the same need."

So gesien, behoef dit geen betoog nie dat in die afwesigheid van "the same field of business activity" 'n mededingingstryd beslis ontbreek. Soos Ulmer (*Het Recht inzake oneerlijke Mededinging in de Lidstaten der EEG* (deel 1, 1968) 33) tereg daarop wys, "strijdt [die ongemagtigde gebruiker] niet met de merkhouder om dezelfde wederpartij." Van die moontlikheid van 'n "diversion of trade from one to the other" is daar dus hoegenaamd nie sprake nie. Bygevolg is 'n aantasting van die reg op die onderskeidingsteken ook uitgesluit. Daarom is die aanmatiging van 'n ondernemer se handelsmerk of handelsnaam in omstandighede waar 'n gemeenskaplike mededigingsveld ontbreek, beslis nie aanklamping of "passing off" in die tradisionele betekenis van dié figuur nie (sien ook Van Heerden en Neethling 116 en die gesag waarop dáár gesteun word).

Tweedens gebruik appèlregter Corbett die begrip "reputation" in die huidige verband as sinoniem vir die begrip "goodwill" (sien die aangehaalde *dictum* hierbo). Onder reputasie verstaan hy klaarblyklik die *bekendheid* van die betrokke handelsnaam, oftewel "the extent to which that name is associated in the minds of members of the public with the business carried on by the plaintiff." Nou is dit so dat die bekendheid of reputasie van die handelsnaam (of handelsmerk) 'n vereiste vir 'n suksesvolle beroep op aanklamping in minstens sommige gevalle is (soos by beskrywende woorde of die "get up" van 'n onderneming of produk: sien Van Heerden en Neethling 101-102 104). Die rede hiervoor is dat bekendheid aanduidend is van en dus die nodige *bewys* voorsien

dat die betrokke naam of merk onderskeidend van ("distinctive of") die onderneming of produk geword het en daarom as beskermingswaardige *onderskeidingsteken* kwalifiseer (sien *ibid* 101 102 104). (Die feit dat bekendheid volgens regter Corbett óók aanduidend van verwarring of misleiding by die publiek kan wees, is in die huidige opsig irrelevant.) So gesien, is reputasie beslis nie in hierdie omstandighede die sinoniem vir werfkrag ("goodwill") nie, te meer nog aangesien selfs 'n onderskeidingsteken maar net 'n – weliswaar belangrike – faktor in die vorming van die werfkrag van 'n onderneming daarstel (sien *ibid* 59 61-62). Afgesien van die funksie in verband met onderskeidingstekens, kan die bekendheid van 'n produk of onderneming in die algemeen ook nie met die werfkrag van die onderneming gelyk gestel word nie. Bekendheid (berugtheid) kan inteendeel in bepaalde omstandighede die werfkrag verminder of selfs totaal ruïneer – dink maar aan die opspraakwekkende Thalidomide-geval. Daarom kan bekendheid hoogstens 'n faktor in die vorming van werfkrag wees (vgl *ibid* 49-51 oor die betekenis van werfkrag).

Reputasie, nie in die sin van bekendheid nie, maar in die sin van die *goeie naam* (*fama*) van 'n onderneming word veelal ook met die werfkrag ("goodwill") van die onderneming gelyk gestel (sien bv die *Lorimar Productions*-saak *supra* 1138-1139) of daarmee in verband gebring (sien bv *Protea Holdings Ltd v Herzberg* 1982 4 SA 773 (K) 786-787). Werfkrag is egter veel meer as net die reputasie of goeie naam van 'n onderneming. In die mededingingstryd kan die werfkrag trouens aangetas word sonder dat die goeie naam van die onderneming enigsins daaronder hoef te ly, soos waar 'n mededinger onware reklame vir sy eie produkte maak. Dit beteken natuurlik nie dat die goeie naam van 'n onderneming geen rol in hierdie verband speel nie. Inderdaad is die goeie naam 'n faktor wat die werfkrag medebepaal (*Universiteit van Pretoria v Tommie Meyer Films* (*Edms*) *Bpk* 1977 4 SA 376 (T) 385; Van Heerden en Neethling 57).

b In verband met die besondere beginsels wat te pas kom by die gebruik van die eie naam as handelsnaam of -merk, is daar een aspek wat onder die loep geneem moet word. Dit is naamlik die aard van die reg wat 'n verband met gebruik van die naam ter sprake kom. Menings hieroor is uiteenlopend. Aan die een kant is die appèlhof in die *Policansky*-saak, soos gestel, van mening dat die "reg" wat 'n persoon het om sy eie naam in verband met 'n onderneming of produk aan te wend, uit hoofde van 'n "property right" of "quasi-property right" geskied. Hierteenoor huldig die advokate vir die appellant die opvatting dat bedoelde bevoegdheid deur die persoonlikheidsreg op identiteit gegrondves word. Hulle sê naamlik (467H-468B):

> "A person's name is part of his overall 'identity'. J Neethling, in his thesis for a Doctorate in Laws of the University of South Africa which is entitled *Die Reg op Privaatheid*, describes the right to identity as consisting of the following: 'fasette van 'n persoon se persoonlikheid wat hom as 'n *bepaalde persoon* identifiseer; wat dus kenmerkend van of eie aan hom is, en hom sodoende van andere onderskei, d w s sy lewensgeskiedenis, sy karakter, sy stem, sy handskrif, sy gestaltebeeld, sy naam ens'. Being a part of his personal identity, an individual must acquire certain rights both to protect his name and also to exploit it in the manner which to him seems appropriate. In choosing a name under which to carry on a business activity, a person or group of persons may choose his or their own names or the name of someone else or the name of some thing or place or he or they may invent a completely new name which is not associated with any known person or thing. If a surname is chosen it should be done in the knowledge that any other person bearing that surname has certain rights in it and, in particular, may assert and make known his own identity by using it."

Hierdie opvatting van die reg op identiteit word egter deur die advokate vir die respondent weerspreek. Hulle verklaar (475D-E) weer:

> "The quotation by appellants from Neethling's thesis *Die Reg op Privaatheid* is repeated in his book *Persoonlikheidsreg* at 50. When read in its context it is clear that *Neethling* is here concerned with the right to an identity – an individual personality. *Neethling's* reference (footnote 53) to W A Joubert *Grondslae van die Persoonlikheidsreg* at 134 reinforces that interpretation. The emphasis is on the social attributes to one's own name and own identity and not the right to its commercial exploitation."

Nou kom dit my voor of daar in hierdie verband vooraf baie noukeurig tussen *regsbevoegdheid* aan die een kant, en *persoonlikheidsregte* en *immaterieelgoedereregte* as *subjektiewe regte* aan die ander kant onderskei moet word. Joubert (*Grondslae van die Persoonlikheidsreg* (1953) 123) stel dié onderskeid soos volg:

> "Heeltemal apart van mekaar staan die regspersoonlikheid van die mens, *die funksie waarvolgens hy doende in die reg optree*, waarin ook opgesluit is sy bevoegdheid om subjektiewe regte en verpligtinge te kan dra, en die subjektiewe regte self wat hy kragtens sy subjeksfunksie het of kan verwerf" (my kursivering).

Die funksie om doende te wees, of, anders gestel, die *vryheid* om doende te wees is dus 'n algemeen menslike kenmerk of eienskap wat "die hele gebied van die die menslike wilsuiting en selfuitlewing binne die grense van die reg" omvat; in kort, "die selfbestemmingsvryheid van die mens in die samelewing" (*ibid* 127; sien ook my bespreking in *Persoonlikheidsreg* (1985) 30-31). Gesien in hierdie lig is die "reg" van 'n persoon om handel te dryf en sy familienaam 'n verband met sy onderneming of produkte te gebruik, myns insiens niks anders nie as aspekte van sy funksie om doende te wees oftewel van sy selfbestemmingsvryheid binne die perke van die reg (vgl in hierdie verband Van Heerden en Neethling 36 41-42 54-55 oor die sg "right to trade" of die "right to carry on a trade"). As sodanig hoort dit by die regsubjektiwiteit self. Daarom kan die "reg" om 'n familienaam in die handel te gebruik nòg deur 'n "property right," nòg deur 'n persoonlikheidsreg fundeer word.

Hierdie opvatting beteken nietemin nie dat 'n persoon nie in verband met sy eie naam subjektiewe regte het of kan verwerf nie. Inteendeel. Die naam van 'n persoon is in eerste instansie persoonlikheidsgoed, 'n faset van die individu se eieaard of identiteit wat hom individualiseer en sodoende van andere onderskei (sien *Persoonlikheidsreg* 47). Waar 'n ondernemer egter sy eie naam ter onderskeiding van sy onderneming (of ook sy produk) aanwend en dit sodoende sy onderneming individualiseer, val dit ongetwyfeld buite die persoonlikheidsfeer van die ondernemer. Dat dit so is, blyk uit die feit dat na oordrag van 'n onderneming die verkryger dit onder die ou naam kan voortsit; des te meer blyk dit uit die voortbestaan van die handelsnaam nadat die oorspronklike ondernemer te sterwe gekom het. Die eenvoudige feit is dat die handelsnaam nie die ondernemer nie, maar wel die onderneming individualiseer. Daarom dien die eie naam hier as objek van 'n immaterieelgoedereregte op die onderskeidingsteken (sien Van Heerden en Neethling 63-64). Samevattend kan gestel word dat ek as persoon aanspraak kan maak op die erkenning van my identiteit of individualiteit en as ondernemer op die individualiteit van my onderneming; en alhoewel dieselfde woorde my persoon en onderneming individualiseer, het mens tog hier met twee aparte regsgoedere en derhalwe objekte van verskillende regte te doen.

Ten slotte moet genoem word dat afgesien van die *onderskeidingswaarde* wat die eie naam met betrekking tot die individu self asook sy onderneming het of

kan hê, die naam beslis ook *reklamewaarde* binne sowel as buite ondernemingsverband kan besit. Mostert ("The Right to the Advertising Image" 1982 *SALJ* 413) voer in hierdie verband oortuigende argumente ten gunste van die erkenning van 'n selfstandige *immaterieelgoedereg op die reklameteken* aan. Sodoende sal 'n persoon (soos 'n bekende akteur of sportman) in staat gestel word om byvoorbeeld die reklamewaarde van sy eie naam vir advertensie- of ander kommersiële doeleindes te benut (sien in die algemeen ook *Persoonlikheidsreg* 48 vn 60; Van Heerden en Neethling 121 e v 127-128).

J NEETHLING
Universiteit van Suid-Afrika

MARITZ v MARITZ KPA A410/85: Ongerapporteer

Egskeiding – vrou se belang in man se pensioen

Dit gebeur selde dat so 'n fundamentele regsvraag soos of die een gade 'n reg (al dan nie) by egskeiding het om in die ander gade se pensioenbelang te deel, in 'n landdroshof ter sprake kom. As die saak dan boonop in appèl gaan, verkry die aangeleentheid nog verdere momentum. 'n Mens kan egter nie anders as om teleurgesteld te wees as daar niks van dié fundamentele regsvraag tereg kom nie.

Die feite in *Maritz v Maritz* was kortliks die volgende: Eiseres en verweerder was in gemeenskap van goed getroud. Die huwelik is in 1982 ontbind en in 1984 ontvang die verweerder 'n bedrag van R2 758,38 aan pensioengeld. Wat die presiese aard van die uitbetaling was of wat die verhouding tussen die verweerder en die pensioenfonds was, word nie voor die hof gelê nie. Eiseres stel nou 'n eis vir die helfte daarvan (met rente *a tempore morae*) in die landdroshof in. Sy beweer dat die bedrag deel gevorm het van die gemeenskaplike boedel ten tyde van egskeiding, alhoewel dit nog nie gerealiseer was nie. Die landdros wys die eis van die hand en die eiseres appelleer na die Kaapse provinsiale afdeling. Die appèl is op twee gronde gebaseer: eerstens, dat die landdros gefouteer het deur te bevind dat dit die respondent as persoon is wat 'n vorderingsreg teen die pensioenfonds gehad het en eerder moes bevind het dat die vorderingsreg ten gunste van die gesamentlike boedel ontstaan het; en tweedens, dat die landdros gefouteer het deur te bevind dat die appellant nie op 'n halwe aandeel van die vorderingsreg geregtig is nie.

Ten aansien van die hantering deur die landdros van die meriete van die eis, beslis regter Van Heerden myns insiens tereg dat die stukke voor die hof sodanige karige gegewens oor die bydraes uit die gesamentlike boedel, die aard van die pensioen en uitbetaling, die reëls van die fonds ensovoorts bevat het, dat die landdros nie daarop uitsluitsel kon gee nie. Pensioenregte is 'n hoogs komplekse aangeleentheid wat met verwysing na talle faktore beoordeel moet word. (Vgl my aantekening "The Nature of a Pension Right" 1985 *Obiter* 101.)

Ook oor die meriete van die appellant se saak laat die hof hom tereg onder die omstandighede nie uit nie. Dit is egter jammer dat die regter dit nodig vind om hom *obiter* oor die aangeleentheid uit te laat. Hy verklaar naamlik met verwysing na *Ex Parte De Wet* 1952 4 SA 122 (O) en *Gillingham v Gillingham* 1904 TS 609:

> "Nou wil dit voorkom uit hierdie uitspraak dat na die ontbinding van 'n huwelik binne gemeenskap van goed, *dit nie een party vrystaan om 'n ander party te dagvaar vir 'n halwe aandeel in enige spesifieke bate van daardie boedel nie.* Die boedel moet as geheel verdeel word, dit wil sê, die bates en laste moet op so 'n wyse verdeel word dat elkeen 'n helfte sou kry van wat oorbly nadat die boedel gelikwideer is en die laste vereffen is.
>
> In hierdie geval is daar nie 'n ontvanger aangestel nie. Blykbaar het die partye nie daarvoor gevra nie, maar dit blyk wel uit die alternatiewe pleit dat daar 'n ooreenkoms aangegaan is deur die partye. Of dit so is of nie, sal van al die feite afhang, maar dit bly nogtans staan dat eiseres volgens die outoriteit waarna ek verwys het, *nie by magte is om nou die verweerder te dagvaar en 'n helfte te eis van 'n bate wat sy beweer, binne die gemeenskaplike boedel val nie*" (my beklemtoning).

Mens aanvaar die wysheid van die beginsel dat partye nie toegelaat behoort te word om in die howe te kibbel oor elke indiwiduele besitting wat deel was van die gemeenskaplike boedel nie. Of dié beginsel egter so absoluut is soos wat die regter dit wou hê, is nie 'n uitgemaakte saak nie.

Dit is gevestigde reg dat by egskeiding van partye wat in gemeenskap van goed getroud was, daar 'n verdeling van bates plaasvind. Indien die partye ooreenstem oor 'n verdelingswyse is daar geen probleem nie en word die ooreenkoms uitgevoer. Kan hulle nie ooreenkom nie, "the duty devolves upon the court to divide the estate and the court has the power to appoint some person to effect the division on its behalf" (per hr Innes in *Gillingham supra*). In die afwesigheid van 'n hofbevel om 'n likwidateur aan te stel, bly die man in besit van die bates hangende verdeling. Sou die partye dus met dié toedrag van sake tevrede wees, is dit onnodig om die hof te nader met 'n versoek dat 'n likwidateur aangestel word (*Revill v Revill* 1969 1 SA 325 (K) 327F). Die man, wat in besit van die bates is, moet dan toesien dat 'n verdeling geskied. In dié opsig is sy funksie dus dieselfde as dié van 'n likwidateur. Sou die likwidateur (of die gewese man) versuim om sy verpligting tot verdeling na te kom, of weier om 'n sekere bate in die gemeenskaplike boedel vir verdeling in aanmerking te neem, sou mens met reg kon argumenteer dat die veronregte met 'n beroep op die hof kan slaag teen die likwidateur, maar nie teen die man nie? Of moet die veronregte eers 'n aansoek tot die hof bring om 'n onpartydige likwidateur te laat aanstel alvorens sy kan ageer? Dit lyk na louter rompslomp. Die hof het hierdie metode juis nie in *Wertheim v Wertheim* 1976 4 SA 633 (W) 636–7 gevolg nie. Regter Coetzee beslis:

> "Moreoever, in suitable cases, Courts have in the process of performing the task of effecting such a division of assets . . . awarded specific assets to one or other of the parties . . . It appears, therefore, that the Court has a discretion (a) as to whether it could embark upon a division of the estate without appointing a receiver, and (b) as to the actual method of division."

Alhoewel dit in *Wertheim* om verdeling van 'n boedel gegaan het waar 'n verbeuringsbevel ter sprake was, is daar geen rede om te aanvaar dat die hof nie dieselfde diskresie het in die geval waar 'n blote verdeling sonder 'n verbeuringsbevel ter sake is nie.

Daar word verder ter oorweging gegee dat die aangehaalde sake nie die gevolgtrekking dat gewese eggenotes nie teen mekaar oor die verdeling van die

gemeenskaplike boedel kan ageer, ondersteun nie. In *Ex Parte De Wet* is beslis dat 'n likwidateur nie 'n bepaalde bate sonder toestemming van die man deur private ooreenkoms kan verkoop nie (vgl 127E–F van die verslag). In *Gillingham* was die bevoegdhede van die likwidateurs en die voormalige eggenoot se weiering om sy samewerking te verleen die onderwerp van die uitspraak. In daardie saak het hoofregter Innes die algemene bevoegdheid van die hof om likwidateurs aan te stel en hul bevoegdhede te omskryf, uiteengesit. In sowel *Ex Parte De Wet* as *Gillingham* is likwidateurs aangestel. In so 'n geval is dit 'n aanvaarde reël dat die partye geen *locus standi* het om mekaar oor en weer aan te spreek nie (Hahlo *The South African Law of Husband and Wife* (1985) 382). Daaruit volg nie noodwendig dat die partye ook in die afwesigheid van 'n likwidateur *locus standi* ontsê moet word om mekaar oor die verdeling van die gemeenskaplike boedel aan te spreek nie. Die teendeel skyn egter waar te wees: as die partye (in geval waar 'n likwidateur aangestel is) mekaar nie kan aanspreek nie, volg dit myns insiens logies dat hulle dit wel kan doen waar geen likwidateur aangestel is nie.

Daar word aan die hand gedoen dat die deur vir 'n gesaghebbende uitspraak oor die reg (al dan nie) van 'n persoon om in die pensioenvoordele van sy of haar voormalige gade te deel, nie gesluit is nie: die drumpel is net hoër as wat 'n mens gedink het. Partye wat hulle in litigasie op hierdie gebied wil begewe, word aangeraai om alle tersaaklike feite voor die hof te plaas ten einde die hof in staat te stel om die situasie sinvol te evalueer. Die logiese beginpunt is die reëls of statute van die pensioenfonds. Artikel 13 van die Wet op Pensioenfondse 24 van 1956 bepaal:

> "Behoudens die bepalings van hierdie wet bind die statute van 'n geregistreerde fonds die fonds en die lede, aandeelhouers en beamptes daarvan, en enige persoon wat 'n vordering kragtens die statute instel of wat sy vordering van 'n persoon wat aldus vorder, verkry."

Die bestaan al dan nie van die eiseres se vorderingsreg hang dus primêr van die reëls van die fonds af. Sou die reëls, soos meestal die geval is, bepaal dat slegs afhanklikes (wat gewoonlik nie gewese eggenotes insluit nie) op 'n vordering geregtig is, dan *cadit quaestio*. Sou die reëls egter, soos soms gebeur, aan die gewese eggenote die een of ander vorderingsreg gee, word die omvang daarvan bepaal deur die reëls van die fonds en nie bloot deur die huweliksgoederebedeling van die partye *stante matrimonio* nie.

Die saak is dus allermins so eenvoudig as wat die appellante in *Maritz* in hul gronde van appèl te kenne wou gee. Die hoop word uitgespreek dat partye nie weens dié uitspraak afgeskrik sal word om hulle regte op te vorder nie, maar dat litigasie langs die korrekte weë en met verwysing na die reëls van die toepaslike fonds gevoer sal word.

P ELLIS
SA Regskommissie

BOEKE

PRINCIPLES OF UNFAIR LABOUR PRACTICES

by THEO POOLMAN

Juta Cape Town Wetton and Johannesburg 1985; xxx and 243p

Price R28,00 + GST (soft cover)

Unfair labour practices (ulps) are a source of concern in any enlightened community. In our country parliament has defined the concept of an ulp (s 1 of the Labour Relations Act 28 of 1956) and entrusted the task of determining (identifying) and remedying such practices to the industrial court. The work under review extensively considers the origins of the concept, explores its meaning and surveys similar concepts in international law and the Anglo-American world.

The writer's thesis (he was awarded a PhD for his original thesis) is that the statutory concept of an ulp is a contraction of the term "unfair labour *relations* practice." This submission is supported by less than a page of argument which is hardly adequate – given the complex and widely differing conceptions of labour (industrial) relations which are discussed and the consequent difficulties in interpreting such an expanded concept. One would have expected some demonstration that parliament intended something other than that which it enacted.

The writer's methodology calls for some comment. He has gone to considerable lengths to collect analogous authority to support his statements and submissions. South African common and statutory law is rich in references to fairness, equity, reasonableness, and so on, but the writer's attempt to create a cohesive body of rules applicable to ulps is less than convincing and one is left with the impression that many statements would be more persuasive if reliance were not placed on incongruous authority. There is little to be gained by making observations such as "the powers of management have their origin in the law of partnership and as developed by the *Lex Mercator*" (95). Other statements which are made are simply too wide and, bereft of their original context, serve little purpose, for example:

> "An accruing right is an interest which is growing, i e a right in the course of being acquired, which will accrue by effluxion of time. A right, though not vested, will by virtue of some machinery in existence, become a vested right at some future time, when it becomes claimable" (93).

The phraseology stems from an early appellate division decision dealing with a section of the South Africa Act of 1909 concerning pension rights of pre-Union public servants.

In chapter one the writer analyses an ulp and offers his own definition of the concept; one which bears little resemblance to the statutory concept in the Labour Relations Act of 1956. The purpose of this extra-statutory definition is not explained. It can be seriously questioned whether it is an essential element that the perpetrator of an ulp should "knowingly or intentionally cause substantial prejudice to another." In my opinion an ulp may come into existence innocently or inadvertently – its very existence calls for its removal. The state of mind of its author is not generally relevant in determining the existence of an ulp.

The chapter dealing with international fair labour standards is comprehensive and useful. However, it is liberally spiced with references to South African national law which makes for an incongruous blend.

The treatment of ulps in Britain and the United States is, within the confines of the available space, more than adequate. South African labour law draws heavily on these two systems. The chapter ends with a comparison of these systems but unfortunately no attempt is made to relate them to the South African context.

The chapter on South Africa's system of labour relations deals with the history of this system and the sources of our labour law but not with the present structure of our system. The normative effect of international standards must be acknowledged but the writer's statement that South African courts are bound to ascertain and apply customary international law provided it does not conflict with our legislation and common law is questionable, to say the least. The cases upon which this statement is based deal with public international law which is the body of rules governing the relations between states. These rules have no application to domestic labour relationships. Moreover, the attempt to equate international labour organisation standards with customary international labour standards (187) is fallacious, given the fact that a member-country of the ILO is not bound by recommendations or conventions which it does not adopt. It seems incorrect to suggest that a non-member will be bound to them whilst a member has the choice to bind itself or not. However, these remarks are not intended to detract from the normative value of ILO standards which are often applied in our industrial court, not as legal rules *stricto sensu*, but as suitable expressions of principles of our labour law.

The chapter dealing with ulp dispute settlements and determinations is not exhaustive but deals adequately with positive law at the time it was written.

In summary, the work provides a useful introduction to the domestic, international and Anglo-American concept of unfair labour practices. It requires discerning and cautious reading, but it does contain many valuable pointers and statements which can profitably be extracted for practical application by the seasoned practitioner.

AA LANDMAN
University of South Africa

JUDGES AT WORK

by H Corder

Juta Cape Town Wetton and Johannesburg 1984; xxxii and 252 pp

Price R38,50 + GST (hard cover)

This publication is the product of research-work undertaken by the author, in the years 1979–1982, for the D Phil-degree at the University of Oxford. It is sub-titled "The Role and Attitudes of the South African Appellate Judiciary, 1910–1950" and its aim is

> "to provide an accurate account of appellate judicial performance in the period 1910 to 1950, as a basis for a critical assessment of the judges' approach to their work" (2).

Corder focuses on decisions which dealt with those "issues of public importance" which had "political" overtones (4–5). A legal dispute has political overtones

> "if the result of that dispute, or the issues raised by it, have the potential to affect the socio-economic, or power, relationships of larger societal groups, not directly involved in the litigation" (5).

The fastidious reader would probably prefer a more precise definition: the use of open-ended terminology such as "affect," "socio-economic" and "societal groups" leaves the door open for disputes which are not "political" in character, to be included within the ambit of the definition, such as the dispute concerning the applicability of the *laesio enormis* doctrine or the disputes centring around immoral or unlawful contracts.

Although he is not the first writer to enquire into the "political" role of the courts and judicial officers in South African society, the scope and depth of his investigation makes Corder something of a pioneer in this branch of legal theoretical study in South Africa. This fact alone makes Corder's book a welcome addition to South African legal literature. In the multi-faceted and conflict-ridden South African society, the need for ongoing debate on the proper function of law, and those who practise law in such a society, is both urgent and necessary. The "foundation of fact" (5) provided by Corder's book is a valuable contribution to such a debate.

The author has chosen two hundred and sixteen cases for discussion. This represents one-eighth of the total number of cases decided by the appellate division in the years 1910–1950 and nine-tenths of the "political" disputes in this period. Corder focuses on the period preceding the accession to power of the present National Party government (in 1948), i e before the adoption of "grand apartheid" as official government policy. Although (as Corder readily admits (3)) the choice of 1950 as cut-off point is necessarily arbitrary, it is, therefore, as good a point as any other. The cases are subsumed under six separate categories, each dealing with an aspect of the political issues which the appellate

division dealt with in this period, to wit "civil liberties," "resistance and rebellion," "industrial relations," "race relations," "immigration by Asians" and "land ownership and occupation in the Transvaal." In line with his intention to provide "a minimum of theoretical discussion" and merely to "attempt to present facts about judicial behaviour" (vii), this categorisation is the result, "not [of] any preconceived framework, but of the frequency of occurrence of certain types of dispute" (217). Apart from the fourth category ("race relations"), I have no real quarrel with the author's choice of categories. The *ratio* for the creation of the fourth category, namely that the distinguishing feature of the cases discussed is that "the racial factor [was] the central aspect" (132), is inadequate. The "racial factor" in these cases is but a tenuous bond to hold the diversity of cases discussed together.

Before embarking on an analysis of the cases themselves, the author speculates, in the introductory chapter (6–19), on those factors which could, on the one hand, have fostered, and on the other, have militated against, the assumption by the appellate judiciary of an active role as protector of the politically and economically deprived members of South African society. Of the many factors highlighted by Corder, I would attach the most importance to those factors emanating, on the one hand, from the background and personality of the judges themselves and, on the other hand, from their legal and broadly intellectual heritage. Corder seems to be of the same opinion: apart from discussing these circumstances in the introductory chapter, his second chapter, devoted to the structure and judicial personnel of the appellate division, is in essence an in-depth discussion of these circumstances. In this well-researched and well-written chapter, Corder comes to the following conclusion (48):

> "This [i.e the circumstances mentioned above] would seem to have engendered a tolerant, and sometimes liberal, acceptance of views outside the conventional political spectrum, prompted by a basic sense of fairness, but always tempered by an acute awareness of the political reality of early twentieth-century Southern Africa. Such factors would seem to provide a guarantee for the continued stability of the political *status quo* and the established order in times of social stress."

The main body of the work is a critical analysis of the cases, in the various categories chosen by the author. It is more than simply a "foundation of fact" or an "attempt to present facts about judicial behaviour." It is also an evaluation of these decisions, based on such perceptions as "fairness," "(in)justice" and "(in)equality" (237). It is on this point that I must take issue with the author. If a researcher's intention is to move beyond a mere description of the human thoughts and acts he observes, if he is, in other words, intent upon analysis, he is of necessity engaged in an evaluative process. Such a process can be meaningful and proceed along constructive lines only if it is conducted within a theoretical framework of reference, which must be properly defined and substantiated. This Corder has failed to do, apparently because it is not his intention "to prove a particular theory" (vii). But the provision of an adequate framework of reference within which to survey and analyse the facts, by no means forces the researcher to prove or disprove particular theories. It does force him, however, to state, define and substantiate the fundamental perceptions and values which underpin his analytical activity. It is insufficient for Corder merely to state that his approach was "influenced by realism and liberalism" (vii) or to recognise "the subjective nature of the endeavour" (2).

Corder's analysis of the cases is, in fact, an invitation to the reader to forego the traditional "black-letter law" approach to the judgments of the appellate

division. Each chapter ends with a summary of his findings in each category of cases. The ninth and final chapter is a general summary and assessment of the performance of the appellate division in all the cases discussed. This chapter also contains a number of interesting statistical tables of judicial performance, which are well worth the obvious effort the author went to in compiling them. Corder sums up his findings as follows (237):

> "In the final analysis, the overall picture which emerges is one of a group of men who saw their dominant role as the protectors of a stability in the social formation of which they formed an integral part. This conception of their task was, doubtless, influenced by their racial and class backgrounds, education, and training. The judges expressed it in terms of a positivistic acceptance of the concept of legislative sovereignty despite a patently racist political structure, and of a desire to preserve the existing order of legal relations, notwithstanding its basis in manifest social inequalities."

Corder has, on the whole, convinced even the most sceptical reader that the appellate judiciary, when faced with a "political issue," were often motivated (whether consciously or otherwise) by extraneous factors in their interpretation of the law to fit the facts of the case before them. Especially well-written in this regard is chapter five ("Industrial Relations"). Another example of incisive criticism of, and telling comment on, judicial performance, is the section "Civil Rights and Race" in chapter six ("Race Relations"). Corder has also succeeded in indicating that, in certain cases, the court did not practise what one of its chief justices, Stratford CJ, on occasion preached:

> "The practice of law, as a living system, is based . . . on human necessities and experience of the actual affairs of men . . ." (in *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue* 1939 AD 487 504).

The author acknowledges (236) that his analysis of the cases must be "based on the principle that the judge is faced with a choice when he interprets the law and facts of the case before him." Although Corder often indicates what other course of action, in his opinion, was available to a judge in a particular case, in many instances he neglects to inform his reader adequately of the options which, in his opinion, were open to the judge. As a result, his comments on the decisions often lack the necessary cogency. His discussion of *R v Christian* 1924 AD 101 (74–76 79) is a case in point. Corder submits (76) that it was possible, on the law as it stood, to have answered the question of law posed by the court *a quo* (namely, "whether the charge as laid discloses the crime of high treason") in Christian's favour. However, he does not substantiate his submission. He seems to suggest (79) that the court should have construed the charge as an act of "criminal disobedience." I fail to comprehend what Corder means by this. True enough, the decision has been criticised, but no critic has suggested, as Corder does, that the court could have interpreted the law in Christian's favour.

On occasion, Corder exhibits an unfortunate tendency to draw conclusions from or make assumptions about judgments which simply are not warranted. For example, Corder draws a comparison (76 79) between the decision in *R v Christian* and the decisions in four appellate division cases concerning Afrikaners who had taken part in the 1914 rebellion. Such a comparison is misconceived. Not only was *R v Christian* a criminal case, whereas the rebel cases were civil actions, but in *R v Christian* the court was concerned solely with a consideration of a question of law, and not with the facts of the case (Corder

acknowledges this (75–76)). To suggest, on the basis of such a comparison, that "the court treated the rebels' acts as conventional delicts" (79) (the court had no other choice), because it was dealing with white Afrikaners, whereas the court found against Christian because he was not a white person (76) is, quite frankly, far-fetched.

Similarly, Corder's statement that the decision in *R v Harrison and Dryburgh* 1922 AD 320 is "strongly civil libertarian" in character (53) and his speculation on possible political motivations underlying Innes CJ's judgment, is not warranted. This decision simply revolved around a question of law ("Whether the Placaat or Ordinance of the States of Holland and West Friesland, dated the 7th March 1754 is of legal force and effect in the Cape Province") reserved by the court *a quo*. The facts of the case and the circumstances surrounding the events did not form part of the judges' deliberations. Neither are there any *obiter* remarks by Innes CJ which could give an indication of his views on the topic.

Equally unfounded, in my opinion, is the author's contention that Schreiner JA's judgment in *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A) can be construed to mean that "it stressed the aim of a single system of law applicable, in time, to all South Africans" (137). On the contrary, I understand the judgment to stress the point that, when confronted with a decision which of two systems of law, South African common law or indigenous law, to apply to a given set of facts, "the primary desideratum of an equitable decision" (397 of the report) should govern the eventual choice. The judgment cannot be taken to imply that a single system of law should, ideally, govern legal relations between all South Africans; it does imply, though, that, in the judge's view, the common denominator of the two legal systems is equity or fairness.

A final comment in this regard: I have no quarrel with Corder's comment on the decisions in *Sillo v Naude* 1929 AD 21 and *De Jager v Sisana* 1930 AD 71, namely "there is little indication in the judgments of an attempt to comprehend the tenuous position in which blacks on farms found themselves" (99). One must bear in mind, though, that the so-called "bywoners," i e indigent white Afrikaners, occupied positions on farms in this period not substantially dissimilar from those of the black labourers in the two decisions. I think, therefore, that the inadequacy of these decisions should be viewed, not as a reflection of racial attitudes, but as a reflection of social attitudes based on class distinction, though not, for that reason, more acceptable.

As far as the external presentation of the work is concerned, it is of the high quality one has come to expect from Juta publications down the years. The eleven illustrations and eight statistical tables included in the book, definitely enhance its value. There are typographical errors, but they do not abound. An *error iuris* I noticed, is the author's identification of malice with *animus iniuriandi* (56).

In sum: Despite my reservations outlined above, I found the book stimulating reading and I recommend it to all those who are concerned with the fundamentals of South African law.

DEREK VAN DER MERWE
University of South Africa

DIE REG INSAKE OPENBARE ORDE EN STAATSVEILIGHEID

MF ACKERMANN

Butterworth Durban en Pretoria 1985; 230 bl

Prys R39,00 + AVB

In die lig van 'n uiters gespanne toestand in Suid-Afrika is dit glad nie verbasend dat 'n boek oor staatsveiligheid en openbare orde gepubliseer sou word nie. In die kort inleiding tot die werk verskaf die skrywer riglyne tot sy werkwyse. Hy stel dit eerstens duidelik dat die een of ander definisie of omskrywing van staatsveiligheid en die openbare orde noodsaaklik is. Hy volstaan met 'n baie pragmatiese definisie, naamlik die staat se onaangetaste "vermoë en vasberadenheid om buitelandse dwang te weerstaan en binnelandse wanorde te beheer." Vervolgens verskaf die skrywer "voorbeelde" van verskillende wyses en die terreine waarop staatsondermynend of staatsvernietigend te werk gegaan kan word.

Die leser moet hom egter na die voorwoord wend om vas te stel vanuit watter hoek die skrywer staatsveiligheid en openbare orde benader. Die skrywer erken van meet af dat die regsterrein van staatsveiligheid en die openbare orde haas eindeloos is. Om dié rede is 'n aanknopingspunt noodsaaklik en die skrywer pak die onderwerp dan vanuit 'n strafregperspektief aan.

Na die kort inleiding volg 15 hoofstukke ingedeel in twee afdelings (afdelings A en B wat handel oor staatsveiligheid en openbare orde onderskeidelik). Die veld wat in die bestek van 230 bladsye gedek word, is besonder wyd. Hoofstuk 1 handel oor hoogverraad en sedisie; hoofstuk 2 oor terrorisme, subversie en sabotasie; hoofstuk 3 oor die bevordering van kommunisme; hoofstuk 4 oor die beveiliging van inligting; hoofstuk 5 oor (sekere) aspekte van die Verdedigingswet, te wete die aanwending van die weermag, diensweiering en godsdiensbesware, beperkings op publikasie en die verbod op die werwing van huursoldate; hoofstuk 6 oor voorkomende veiligheidsoptrede en verbandhoudende misdrywe – waaronder ressorteer die beperkings op lidmaatskap van organisasies en liggame, die verbod op die bywoning van byeenkomste, voorkomende aanhouding, diskwalifikasie van sekere regsberoepe, en so meer; en hoofstuk 7 oor een van die mees sensitiewe kwessies op die terrein van staatsveiligheid, naamlik aanhouding sonder verhoor. Die res van die hoofstuk word gewy aan aangeleenthede wat, hoewel nie direk verbandhoudend met staatsveiligheid nie, tog behandel word vanweë oorwegings van "aktualiteit en volledigheid." Hieronder word verwysings na onder meer statutêre veiligheidsinstansies betrek.

Die volgende agt hoofstukke omvat 'n bespreking van die aspek van die openbare orde. Hoofstuk 8 handel oor openbare geweld; hoofstuk 9 oor intimidasie; hoofstuk 10 oor oproerige en verbode byeenkomste; hoofstuk 11 oor versetkampanjes; hoofstuk 12 oor bevolkingsvrede en politieke inmenging, waaronder onder meer vyandiggesindheid tussen bevolkingsgroepe, partypolitieke skeiding

en buitelandse hulp vir politieke partye onder oë geneem word; hoofstuk 13 oor ontplofbare stowwe, wapens en ammunisie; en hoofstuk 14 oor sekere aspekte van die Polisiewet. Die aspekte van die Polisiewet waaraan aandag geskenk word, sluit in: die aanwending van die mag, bevoegdhede en verpligtinge van die mag, misdrywe teen die mag (byvoorbeeld die belemmering van die mag se werksaamhede), die verbod op die ongemagtigde invoer, verkryging, gebruik of besit van kamoefleerdrag en beperkings op vrye publikasie. In die laaste hoofstuk (15) word allerlei aspekte bespreek wat, ofskoon hulle losstaande is, tog verband hou met openbare orde. Hulle is onder meer misdrywe teen burgerlugvaart, lugvaartuie en die lugvaartbedryf; misdrywe ten opsigte van gevangenisse en by uitstek 'n bespreking van artikel 44 van die Wet op Gevangenisse 1959 – 'n misdryfbepaling wat beperkings plaas op publikasies, beweging en so meer. In dié onderafdeling word ook die inmenging in die werksaamhede van die gevangenisdiens behandel, asook die verbod op die maak van sketse, die neem van foto's en beperkings op publikasie. Vervolgens word stakings en uitsluitings bespreek, asook die beperking op die insameling van bydraes; onregmatige betreding en plakkery en laastens skending van die landsvlag ingevolge artikel 92(1) van die 1983-Grondwet.

In sy aanbieding van die stof is die skrywer deurgaans konsekwent. Eerstens word die misdryf omskryf, hetsy gemeenregtelik, hetsy statutêr (in welke geval die woorde van die betrokke wetsbepaling *verbatim* aangehaal word). Vervolgens word die elemente van die misdryf behandel, dit is die handeling, opset en wederregtelikheid. Daarna volg 'n bespreking van straftoemeting (dit wil sê strafbepalings). Hier en daar staan die skrywer ook ruimte af aan 'n bespreking van die strafproses- en bewysaspekte (vgl bv die hoofstukke oor terrorisme, subversie, sabotasie en beveiliging van inligting).

Uit bostaande aanduiding van die hoofstuk-indeling blyk dat die veld wat gedek word uiters wyd is. Dit laat duidelik geen ruimte vir 'n werklik diepgaande wetenskaplike studie van die onderhawige terrein nie. Daar word byvoorbeeld nie gepoog om in diepte in te gaan op die noodsaaklikheid en wenslikheid van staatsveiligheid *per se* nie. Met ander woorde, die klem val eerder op die formele as die materiële sy van staatsveiligheid. Bes moontlik kan dan beswaar gemaak word teen die enigsins misleidende titel van die werk, maar dié beswaar kan weer grootliks geneutraliseer word deur die feit dat sekere aspekte wat wel behandel word, nie verband hou met die strafreg nie.

Die skrywer se grootste bydrae lê in die samevoeging van 'n haas onoorsigtelike massa wetgewing. Die werk is egter nie net om dié rede aan te beveel nie. Aangesien die werk grootliks praktyksgerig is, maar tog praktiese veiligheidsprobleme uitwys, is dit 'n allerbruikbare gids (nie net ten aansien van die beslissings aangaande die relevante wetsbepalings nie, maar ook die veiligheidsreg in die algemeen) vir aanklaers, verdedigingsadvokate, die veiligheidshandhawers en selfs private sekuriteitsorganisasies. (Van belang vir laasgenoemde is byvoorbeeld die gedeelte oor nasionale sleutelpunte in hoofstuk 7.) Die blote feit dat 'n werk in Afrikaans oor 'n uiters kontensieuse onderwerp gepubliseer is, is prysenswaardig.

M BEUKES
Universiteit van Suid-Afrika

WISSELREG EN TJEKREG

by FR MALAN and CR DE BEER

Butterworth Durban and Pretoria 1981; pp xiv and 490

Price R47,50 + GST (hard cover) R37,50 (soft cover)

The law of negotiable instruments is regarded by many practitioners, students and academic lawyers as being a branch of the law of singular difficulty. This is so up to a point. However, it is also so that it is a subject both stimulating and of enduring interest. In common parlance, once the negotiable instruments bug has bitten you, you are infected for life. Up to the time of the publication of Malan's book the only textbook, apart from fairly elementary chapters in various text books on mercantile law in general, was Denis Cowen's admirable work. Admirable though this latter work undoubtedly is, it is hardly suitable for students coming to the subject of negotiable instruments for the first time; nor, indeed was it, I am sure, intended or designed for the neophyte. To the personal knowledge of this reviewer even practitioners frequently encountered difficulty in attempting to find the answer to their problem in a hurry. There was accordingly a great need for a concise and readily understandable text-book suitable both for students and practitioners. Not only does Malan fill this need; he goes further and has produced an excellent book. One has only to glance at the bibliography to realise what an enormous amount of scholarly research of the highest quality must have preceded the work.

The book is divided into four sections, namely general principles, the bill of exchange, the cheque and the promissory note. The Bills of Exchange Act No 34 of 1964 is set out with a table of references. In most books based on a statute the statute in question appears as an appendix. The inclusion of the Bills of Exchange Act in Malan's book is particularly welcome because that act is out of print. The separate table of references is very useful. The author has adopted the now generally accepted method of numbering paragraphs which provides an orderly and systematic presentation of the subject matter. Fortunately the paragraphs are reasonably short so that references to decisions and to sections of the act can easily be traced.

That all-important but often neglected part of any text book, the index, is sufficiently comprehensive without being over-detailed.

This book is highly recommended for students, law teachers and practitioners.

It is also available in English under the title *Bills of Exchange, Cheques and Promissory Notes in South African Law.*

CH SMITH
University of South Africa

THE ALIENATION OF LAND (Being a supplement to THE LAW OF CREDIT AGREEMENTS AND HIRE-PURCHASE by DIEMONT and ARONSTAM)
by PJ ARONSTAM
Juta Cape Town Wetton and Johannesburg 1985; pp xxviii and 186
Price R28,00 + GST

Aronstam's promise in the preface to his 1982 edition of *Law of Credit Agreements and Hire-Purchase* to publish an updating supplement to that work when the new Alienation of Land Act 68 of 1981 came into operation (vii) has finally been fulfilled with the release of *The Alienation of Land.*

In the first chapter the purpose, scope and application of the act are discussed. Inaccurate statements which have crept in are:

- "For the purposes of Chapters I and II of the Act, land includes any interest in land, other than a right or interest registered or capable of being registered under the Mining Titles Registration Act 1967" (3). Here the relevant chapters are I and III.
- "The rule *huur gaat voor koop*, for example, creates real rights in leased land" (7) whereas it is a lease *per se* which constitutes a real right.
- "In the case where future registration in a deeds registry is contemplated as the date of final payment, and it is unlikely that registration will occur within one year because it will take longer to have the township, of which the land forms a part, proclaimed, the intention will be to 'contract' subject to the Act" (18). This example in any case amounts to a prohibited transaction.
- "The right of pre-emption itself, therefore, need not comply with the Alienation Act to ensure its validity" (22). This statement would appear inaccurate in the light of *Hirschowitz v Moolman* 1985 3 SA 739 (A) 767G.

The second chapter deals with the formation of agreements. This entails a survey of the content of a deed of alienation, sale by public auction, the content of "contracts" (sales of land on instalment) and the consequences of non-compliance with formalities. Where Aronstam restates the general principles of the law of contract covering offer and acceptance (36) a reference to *Associated SA Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A) would not have come amiss. A minor error which appears in the second last sentence on page 41 is the word "this" which should read "thus."

Chapter three deals with the statutory provisions governing the performance of the parties under an agreement of alienation or a "contract." No mention is made of the common-law rules governing performance. This does not detract from the value of the chapter because this work, and particularly this chapter, must be supplemented by Aronstam's *Credit Agreements.* The same can be said for chapter four, which is also limited to an analytical discussion of the statutory provisions governing the rights and duties of the parties. Once again, relevant common-law rules are not discussed and this chapter, too, needs to be supplemented by standard works on contract, sale and donation or Aronstam's *Credit Agreements.*

The final chapter deals with insolvency and specifically the insolvency of the owner or seller of the land, or attachment of the land in execution prior to its transfer to the purchaser.

Aronstam's work is well written, readable and easy to handle. The information is perhaps not as easily accessible as is the case in Van Rensburg and Treisman *The Practitioner's Guide to the Alienation of Land Act,* where all the main propositions have been put in bold print forming a logical and readable entity. Nevertheless, Aronstam provides a detailed table of contents (vii), a list of principal works cited and his method of citation (xiii), a table of statutes and cases (xv and xxiii respectively), a general index (173), as well as the Alienation of Land Act (141), GN R2205 GG 8416 of 1982–10–15 (164), GN 2815 GG 1007 of 1983–12–23 (170) and GN 1997 GG 9412 of 1984–09–07 (171) as appendices A, B, C and D respectively, all of which facilitate the reader's task.

Although this work would appear merely to be an addition to an already saturated market for books on the Alienation of Land Act, there must be few practitioners and students alike who would not find this work as useful a *vade mecum* as other previous analytical works.

GIORGIO RADESICH
University of South Africa

SUPERVENING IMPOSSIBILITY OF PERFORMANCE IN THE SOUTH AFRICAN LAW OF CONTRACT

deur WA RAMSDEN

Juta Kaapstad Wetton en Johannesburg 1985; xxiv en 116 bl

Prys R26,00 + AVB (sagteband)

In hierdie werk bespreek die skrywer 'n klein aspek van die kontraktereg, naamlik onmoontlikwording van prestasie. Die grootste gedeelte van die werk is geneem uit die skrywer se ongepubliseerde meestersgraad-verhandeling. Indien hierdie feit moontlik die indruk kan wek dat die werk bloot 'n akademiese en teoretiese bespreking van onmoontlikwording is, is dit verkeerd want die skrywer

stel hom ten doel om die Suid-Afrikaanse reg insake onmoontlikwording van prestasie so akkuraat en volledig moontlik weer te gee (sien 1). Die skrywer wy dan ook die grootste gedeelte van sy werk aan 'n uiteensetting van die Suid-Afrikaanse positiewe reg. Die res van die werk (die historiese uiteensetting en regsvergelyking) is vir die skrywer slegs van belang vir sover dit die Suid-Afrikaanse reg duideliker maak (sien 1).

Na 'n kort uiteensetting van sy doelstellings en sekere regsbegrippe in die eerste hoofstuk, gee die skrywer 'n oorsig in hoofstuk 2 van die historiese ontwikkeling van onmoontlikwording van prestasie. Hoewel dit enigsins vreemd opval dat die skrywer in sy bespreking van die Romeins-Hollandse reg na Pothier en Windscheid as gesag verwys, is dit nie 'n ernstige punt van kritiek nie aangesien ons howe dit ook doen (sien Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 489–492).

Die skrywer bespreek in hoofstuk 3 die toepasbaarheid en relevansie van vreemde reg vir ons reg oor onmoontlikwording van prestasie. Hy laat die klem veral val op die Engelse reg aangesien ons howe gereeld na dié stelsel verwys. Hy bespreek die ooreenkomste en verskille wat bestaan tussen die Engelse en Suid-Afrikaanse reg en toon dan aan welke dele van die Engelse reg vir regsvergelyking vatbaar is. Hierin is juis die belang van hierdie hoofstuk geleë. Die skrywer volstaan met 'n kort oorsig van ander relevante regstelsels.

In hoofstuk 4 tot 8 bespreek die skrywer die Suid-Afrikaanse positiewe reg volledig (*vis major* en *casus fortuitus*, absolute onmoontlikwording, gedeeltelike onmoontlikwording, tydelike onmoontlikwording en die gevolge van onmoontlikwording van prestasie). Hoofstuk 9 bevat ten slotte 'n kort bespreking van sekere bewysregtelike aspekte.

Die werk is tegnies goed versorg en voorsien van al die nodige registers. Dit kan sonder voorbehoud aanbeveel word vir enigeen wat 'n belangstelling in die betrokke onderwerp het.

TB FLOYD
Universiteit van Suid-Afrika

THE LAW OF SUCCESSION THROUGH THE CASES
deur LILA ISAKOW
Juta Kaapstad Wetton en Johannesburg 1985; xxviii en 413 bl
Prys R54,00 + AVB (sagteband)

Gedurende die afgelope aantal jare het daar heelwat boeke op die gebied van die erfreg verskyn, hetsy as werke uitsluitlik oor daardie gebied, soos Corbett en andere se *The Law of Succession in South Africa* en Van der Merwe en Rowland se *Die Suid-Afrikaanse Erfreg*, of as 'n onderafdeling in 'n werk wat meerdere gedeeltes van die privaatreg behandel. Andere, soos Honoré se *The*

South African Law of Trusts bespreek weer bepaalde gedeeltes van die erfreg. Soos op baie ander gebiede van die reg is die groot gemis tans maklik beskikbare werke waar die belangrikste gewysdes oor die erfreg saamgevat is. Aan hierdie behoefte het die skryfster op voortreflike wyse voldoen. In hierdie boek, wat inhoudelik die volgorde van Corbett volg, word die regsposisie kortliks weergegee en daarna volg dan uittreksels uit uitsprake oor daardie aspek van die reg. Op hierdie wyse word 324 sake beskikbaar gestel aan die besige praktisyn sowel as die akademikus en student wat vinnige toegang tot relevante regspraak verlang. Aangesien die skryfster se doelstelling dié van "stating the law" is, is daar min kritiese evaluering van die regsposisie.

Die skryfster en die uitgewer moet gelukgewens word met 'n werk wat netjies versorg is, van 'n baie bruikbare indeks en vonnisregister voorsien is en voldoen aan 'n langgevoelde behoefte.

NJ WIECHERS
Universiteit van Suid-Afrika

De rechtwetenschap maakt van de massa van voorschriften, die haar gegeven zijn, een systeem, waardoor de stof tot een zoo gering mogelyk getal hoofdregels word herleid. (per Schotten *Algemeen Deel* 60.)

Die voorkoopreg

TB Floyd
BA LLB
Senior Lektor in Privaatreg, Universiteit van Suid-Afrika

SUMMARY

Right of Pre-emption

A right of pre-emption is a subjective right to purchase a certain thing before any other third party. There still exists some uncertainty regarding the right of pre-emption in the South African law. Our law regarding the right of pre-emption is primarily Roman Dutch law, although it has been influenced by English law. Two duties rest on the grantor of a right of pre-emption: In the first instance a negative duty rests on the grantor not to sell the thing to a third party subject to a resolutive condition, that is the making of a *bona fide* offer of sale to the grantee which is not accepted by the grantee. There is also a positive duty on the grantor to offer the thing for sale to the grantee subject to a suspensive condition, namely the arising of a desire to sell on the part of the grantor. This duty to make an offer has to be performed within a specific period of time, that is between the arising of the desire to sell and the actual conclusion of a contract of sale with a third party. In this article different remedies of the grantee are discussed. The construction of the right of pre-emption as a positive and negative right is reconsidered in the light of the special remedy which the grantee has to conclude a contract of sale with the grantor by way of a unilateral declaration of intent. This remedy is in actual fact a form of specific performance and therefore cannot be exercised independent of a court order. An order for specific performance to compel the grantor to offer the thing for sale to the grantee is discussed and the conclusion reached is that such an order should be allowed in principle. If a grantor offers the thing for sale to a third party or grants him an option without first offering the thing for sale to the grantee, the grantor is in fact repudiating the contract. An order for specific performance can be obtained, although this order cannot be enforced before the final date on which performance (consisting in the making of an offer to the grantee) has to be rendered.

1 INLEIDING

'n Voorkoopreg kan kortliks omskryf word as die subjektiewe reg wat iemand het om 'n bepaalde saak te koop voordat dit aan 'n derde verkoop word.[1]

Daar bestaan nog heelwat onsekerheid oor die voorkoopreg in die Suid-Afrikaanse reg, al het die appèlhof in verskeie resente beslissings[2] 'n groot mate van duidelikheid gebring. Een van die aspekte van die voorkoopreg waaroor nog heelwat onsekerheid bestaan, is die konstruksie daarvan. Die onduidelikhede

1 Van Hattum en Rooseboom *Glossarium van Oude Nederlandse Rechtstermen* (1977): sien *voorkoop*. Vir 'n volledige definisie van die voorkoopreg in die Suid-Afrikaanse reg sien Van Rensburg "Formaliteitsvoorskrifte, Verkoopregte en Opsies" 1986 *THRHR* 208 209.

2 *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 3 SA 893 (A); *Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A); *Hirschowitz v Moolman* 1985 3 SA 739 (A).

wat wel bestaan, is dikwels terug te voer na ons gemenereg. 'n Uiteensetting van die gemenereg is derhalwe nodig om hierdie onduidelikhede beter te verstaan. Die Engelse reg is ook van belang omdat dit invloed uitgeoefen het op die Suid-Afrikaanse reg en omdat die Suid-Afrikaanse en die Engelse reg oor voorkoop in 'n groot mate ooreenstem.

2 VERSKYNINGSVORME VAN DIE VOORKOOPREG EN ANDER VERWANTE REGTE

2 1 Romeinse Reg

Weinig is bekend oor die voorkoopreg in die Romeinse reg.[3] Daar het sowel 'n kontraktuele as 'n statutêre voorkoopreg voorgekom. Twee verskyningsvorme van die kontraktuele voorkoopreg is bekend. Die eerste is waar die koper in 'n koopkontrak onderneem om, indien hy later begerig sou wees om te verkoop,[4] slegs aan die verkoper te verkoop en nie aan 'n derde nie. Die tweede is waar die mede-erfgename van stuk grond met mekaar ooreenkom om nie die grond onder hulle te verdeel nie en verder dat as een sy aandeel wil vervreem hy dit aan die ander moet verkoop teen 'n bepaalde prys.[5] Die statutêre voorkoopreg[6] in die Romeinse reg is egter nie die voorganger van die gemeenregtelike statutêre naastingreg nie,[7] maar die wyse van uitoefening daarvan is waarskynlik in die gemeenregtelike kontraktuele naastingreg en -voorkoopreg oorgeneem.[8]

2 2 Die Gemenereg

Die reëling van die voorkoopreg in ons gemenereg is nie heeltemal glashelder nie, al is veel meer hier bekend oor die voorkoopreg as in die Romeinse reg. Die kontraktuele voorkoopreg van die Romeinse reg is geresipieer in die gemenereg.[9] Die beding waardeur 'n voorkoopreg geskep word, kan nou deel vorm van enige ooreenkoms.[10] Naas die kontraktuele voorkoopreg is ook nog 'n kontraktuele naastingreg en statutêre naastingregte bekend.[11] 'n Naastingreg is die reg van iemand om 'n bepaalde saak wat reeds verkoop is, oor te neem teen dieselfde prys as waaroor die koper en verkoper ooreengekom het.[12] Daar was

3 Daar is slegs vier tekste: *D* 18 1 75; *D* 19 1 21 5; *D* 45 1 122 3; *C* 4 66 3. Die beding in 'n ooreenkoms waardeur 'n verkoopreg geskep word, is bekend as 'n *pactum protimeseos* in die Romeinse reg – oor die oorsprong van hierdie benaming sien Peters *Die Rücktritts-vorbehalte des Römischen Kaufrechts* (1973) 282–283.

4 *D* 18 1 75; *D* 19 1 21 5.

5 *D* 45 1 122 3.

6 *C* 4 66 3.

7 De Zulueta *The Roman Law of Sale* (1945) 58 n 4; De Blécourt *Kort Begrip van het Oud-Vaderlands Burgerlijk Recht* 7e uitg (1959) 101; Fockema Andreae en Van Apeldoorn *Inleidinge tot de Hollandsche rechtsgeleerdheid beschreven bij Hugo de Groot met Aanteekeningen* 3e uitg (1926) deel 2: aantekening oor Gr 3 16 1, 4; Van der Keessel *Praelectiones* op Gr 3 16 1.

8 *infra* par 3 2.

9 Voet 18 1 2; Van der Keessel *Praelectiones* op Gr 3 16 1; Schrassert *Obser Prac* 92 3.

10 Voet 18 1 2; Van Zutphen *Nederlandsche Practycke* s v *voorcoop* 8 huldig egter die mening dat dit nie in 'n eenvoudige skenking opgeneem kan word nie.

11 Voet 18 3 9, 10; Van Leeuwen *RHR* 4 19 1, *CF* 1 4 20 4.

12 Van Hattum en Rooseboom: sien *voorkoop*.

geen gemeenskaplike statutêre naastingreg in die Nederlande nie maar wel verskeie statutêre naastingregte.[13]

'n Mens vind ook in die gemenereg dat daar in 'n groot mate 'n gelykstelling tussen die reëling en gevolge van die voorkoopreg, en die statutêre- en kontraktuele naastingreg was.[14] Die terme voorkoop en naasting is byvoorbeeld as sinonieme gebruik[15] en daar is selfs 'n opvatting dat die naastingreg uit die voorkoopreg ontstaan het.[16] Hierdie gelykstelling is verstaanbaar indien 'n mens in ag neem dat 'n voorkoopreg ook die werking van 'n naastingreg behoort te hê (en inderdaad grotendeels het),[17] waar 'n koopkontrak met 'n derde gesluit word sonder dat die reghebbende geleentheid gehad het om sy reg uit te oefen. 'n Voorkoopreg en kontraktuele naastingreg het gewoonlik slegs persoonlike werking, in teenstelling met die statutêre naastingregte wat wel saaklike werking het.[18]

2 3 Die Suid-Afrikaanse reg

Die gemeenregtelike statutêre en kontraktuele naastingreg is nie in die Suid-Afrikaanse reg geresipieer nie.[19] Die kontraktuele voorkoopreg kom nog steeds voor en so ook 'n statutêre voorkoopreg.[20] Die terme "voorkoopreg" en "reg van eerste weiering" word as sinonieme gebruik vir sover dit die reg van die reghebbende betref om 'n koopkontrak te sluit, terwyl die reg van eerste weiering die enigste term is om die reg van die reghebbende om 'n ander kontrak as 'n koopkontrak te sluit, aan te dui.[21] Die regsreëls by alle vorme van regte van eerste weiering is in beginsel dieselfde[22] en daarom sal volstaan word met 'n uiteensetting van die voorkoopreg.

3 UITOEFENING VAN DIE VOORKOOPREG

3 1 Romeinse reg

Niks is bekend oor die uitoefening van die kontraktuele voorkoopreg nie behalwe dat die koopprys reeds vasgestel kan wees in die ooreenkoms wat die voorkoopreg skep.[23]

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13 Vir 'n bespreking van die verskillende statutêre naastingregte sien Fockema Andreae *Het Oud-Nederlandsch Burgerlijk Recht* (1906) deel 2 268–276.

14 *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* 906B–D 907E; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 188; *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 3 SA 310 (A) 319F.

15 *Van Hattum en Rooseboom*: sien *voorkoop*; Moorman van Kappen "Voorkeurs- of voorkoopsrecht?" 1976 *NJB* 831 832.

16 Fockema Andreae deel 2 267; *contra* De Blécourt 101.

17 *infra* par 4 2.

18 Van Zutphen *Nederlandsche Practycke* s v *voorcoop* 5; Voet 18 3 24. Berlichius *Conclusiones Practicabiles* 2 40 56, 57; Van Bynkershoek *Obs Tum* 285. 'n Voorkoopreg oor onroerende goed kan ook saaklike werking hê indien aan sekere formaliteitsvoorskrifte voldoen word (sien De Blécourt 285–287).

19 *The South African Breweries Ltd v Frances & Son* 27 NLR 648 659. Die ooreenkoms in *Transvaal Silver Mines v Jacobs, Le Grange and Fox* 4 SAR 116 117 119 lyk soos 'n naastingreg maar die hof het dit as 'n voorkoopreg beskou.

20 a 18 B van die Wet op Deeltitels 1971; Van der Merwe en Butler *Sectional Titles, Share Blocks and Time-Sharing* (1985) 136–138.

21 *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932B E.

22 *ibid* 932E.

23 *D* 45 1 122 3. Die ander moontlikhede genoem deur De Zulueta 57, Moyle *The Contract of Sale in the Civil Law* (1892) 176 en Buckland *A Text-book of Roman Law from Augustus to Justinian* 3e uitg (1963) 495 berus op blote spekulasie.

Die statutêre voorkoopreg word uitgeoefen deur kennis te gee aan die reghebbende dat verkoop wil word en wat die prys is wat van 'n derde verkry kan word.[24] Indien die reghebbende die prys wil betaal, moet aan hom voorkeur verleen word om te koop.[25] Indien 'n tydperk van twee maande na kennisgewing verstryk, en die reghebbende versuim om te koop, kan vryelik aan 'n derde verkoop word.[26]

3 2 Die Gemenereg

Daar rus geen plig op die voorkoopreggewer om aan die voorkoopreghebbende te verkoop nie.[27] Indien hy egter van voorneme is om te verkoop, moet hy die reghebbende in kennis stel van sy voorneme.[28] Indien die reghebbende nie binne twee maande wil koop nie, verloor hy sy voorkoopreg.[29] Hier eindig die beskrywing van die wyse van uitoefening van die voorkoopreg sonder dat enige verdere stappe deur die gewer of reghebbende beskryf word. Dit wil voorkom asof die wyse van uitoefening van die Romeinsregtelike statutêre voorkoopreg in die Nederlande ingevoer is.[30]

Die wyse van uitoefening van die kontraktuele naastingreg is dieselfde, behalwe dat uitdruklik vereis word dat die prys wat die derde bereid is om te betaal in die kennisgewing vermeld moet word.[31] Dit is egter moontlik dat die prys ook genoem moet word in die kennisgewing ingevolge 'n voorkoopreg en dat daar in werklikheid geen verskil tussen die wyses van uitoefening van die voorkoopreg en die kontraktuele naastingreg bestaan nie.[32]

Die voorkoopreg tree in werking sodra die voorkoopreggewer van voorneme is om die saak te verkoop.[33] Die verpligting om kennis te gee kan deur die partye uitgebrei word na byvoorbeeld die voorneme om 'n ruil- of skenkingskontrak te sluit.[34]

Dit is onseker of die kennisgewing aan die reghebbende inderdaad 'n aanbod uitmaak. In *Sher v Allan*[35] word die gemeenregtelike posisie bespreek maar daar word geensins uitgemaak of die kennisgewing 'n aanbod is of nie. Daar word wel na Sande[36] verwys as sou hy sê dat die reghebbende 'n aanbod maak,[37] maar die posisie is nie so eenvoudig nie. Die Sande-teks is wel vatbaar vir die interpretasie dat die voorkoopreggewer deur middel van die kennisgewing 'n aanbod

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24 *C* 4 66 3.
25 *ibid.*
26 *ibid.*
27 Voet 18 1 2.
28 *ibid*; Sande *DF* 3 4 4.
29 Voet 18 1 2; Sande *DF* 3 4 4.
30 *C* 4 66 3; sien par 3 1.
31 Voet 18 3 10; Berlichius *Conclusiones Practicabiles* 2 40 54, 55; Van Leeuwen *RHR* 4 19 14.
32 In *Sher v Allan* 1929 OPD 137 140 word die mening uitgespreek dat Voet 18 1 2 gelees moet word in die lig van Voet 18 3 10. *C* 4 66 3 bepaal ook dat die prys wat die derde bereid is om te betaal in die kennisgewing genoem moet word. Sien ook Sande *DF* 3 4 4 waar dit lyk asof die prys in die kennisgewing genoem is.
33 Sien vn 27 en ar Ogilvie Thompson se bespreking van Voet 18 1 2 in *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 319D–E.
34 Moorman van Kappen 834; sien ook t a v die kontraktuele naastingreg Voet 18 3 10 en Van Leeuwen *CF* 1 4 20 6.
35 *supra* 140–143.
36 *DF* 3 4 4.
37 *Sher v Allan, supra* 140.

maak, maar dit is geensins seker nie. In *Cohen v Behr*[38] word ook beweer dat die kennisgewing 'n aanbod uitmaak.

3 3 Die Suid-Afrikaanse reg

Alhoewel die reëlings van elke voorkoopreg afhang van die betrokke bepalings van die voorkoopooreenkoms,[39] bestaan daar sekere algemeen geldende reëls (*naturalia*) vir die geval waar die partye nie self oor 'n ander reëling ooreengekom het nie.[40] In dit wat volg, val die klem op 'n bespreking van die gewone vorm wat die voorkoop aanneem.

Daar bestaan eenstemmigheid daaroor dat daar in die eerste plek 'n negatiewe verpligting onderworpe aan 'n ontbindende voorwaarde op die voorkoopreggewer rus om nie die saak, waaroor die voorkoopreg bestaan, aan 'n derde te verkoop nie.[41] Die ontbindende voorwaarde behels twee aspekte, naamlik die rig van 'n *bona fide*-aanbod deur die voorkoopreggewer aan die reghebbende en die verval van hierdie aanbod deur afwysing of tydsverloop.[42] Die hof moet na al die omringende omstandighede kyk om vas te stel of die aanbod te goeder trou gemaak is al dan nie.[43] Indien aan 'n derde verkoop word teen 'n laer prys of 'n makliker wyse van afbetaling, dui dit aan dat die aanbod nie *bona fide* was nie.[44] Ek kom later terug op die vraag of die gewone maatstaf waarvolgens die bedinge van die aanbod aan die voorkoopreghebbende vasgestel word, objektief genoeg is om te kan bepaal of die aanbod *bona fide* is.[45]

Net soos in die gemenereg[46] is daar geen verpligting op die voorkoopreggewer om aan die reghebbende te verkoop nie.[47] In teenstelling met die gemenereg

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38 1946 CPD 942 949.

39 Sien bv *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 316E–F 321D 326B; Van Rensburg en Treisman *The Practitioner's Guide to the Alienation of Land Act* 2e uitg (1984) 71.

40 Van Rensburg en Treisman 71; Eiselen 1986 *THRHR* 95 97; *Breytenbach v Steward* 1985 1 SA 165 (T) 176B–C; *Sher v Allan, supra* 139.

41 *Van Pletsen v Henning* 1913 AD 82 95; *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk* 1964 3 SA 702 (T) 705H; *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 316G–H 321F; *Bellairs v Hodnett* 1978 1 SA 1109 (A) 1141A (hierdie opmerking het gehandel oor die spesifieke bepalings van die ooreenkoms waardeur die voorkoopreg in die lewe geroep is); *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932C–D. Dit is ook die posisie in die Engelse reg (sien *Halsbury's Laws of England* 4e uitg vol 42 par 26; *Manchester Ship Canal Co v Manchester Racecourse Co* 1901 2 Ch 37 (CA) 46–47 51).

42 In *Ex parte Snijman* 1913 OPD 43 het die hof te kenne gegee dat 'n voorkoopreg wat testamentêr geskep is, bly voortbestaan al het die reghebbende die aanbod afgewys indien daar nie aan dieselfde derde wat 'n aanbod gemaak het, verkoop word nie. In *Crossroads Properties Private (Pty) Ltd v AI Taxi Service Co (Private) Ltd* 1954 4 SA 514 (SR) 516B is beslis dat die voorkoopreg sonder meer verval na die weiering van die eerste aanbod al word die saak nie aan die derde wat die aanbod gemaak het, verkoop nie. Hier het dit gegaan oor die uitleg van die besondere voorkoopregooreenkoms. Belcher *Norman's Purchase and Sale in South Africa* 4e uitg (1972) 98 doen aan die hand dat hierdie uitspraak ook die algemene posisie weergee. Hy is korrek omdat dit ook die posisie in die gemenereg is (sien vn 29 *supra*).

43 Eiselen 98; *Soteriou v Retco Poynton's (Pty) Ltd, supra* 932J; sien ook Corbin *On Contracts* (1963) par 261 477.

44 Ons reg behoort in hierdie verband dieselfde te wees as die Engelse reg (sien *Manchester Ship Canal Co v Manchester Racecourse Co, supra* 48 en in die algemeen *Smith v Morgan* 1971 2 All ER 1500 (Ch) 1504F).

45 *infra* teks tussen vn 68 en 71.

46 Voet 18 1 2.

47 *Soteriou v Retco Poynton's (Pty) Ltd supra* 932B. Dit is ook die posisie in die Engelse reg: *Gardner v Coutts & Co* 1967 3 All ER 1064 (Ch); *Du Sautoy v Symes* 1967 Ch 1146.

waar bloot 'n kennisgewing aan die reghebbende vereis word indien die voorkoopreggewer begerig sou word om te verkoop,[48] word tans in die Suid-Afrikaanse reg van die voorkoopreggewer verwag om 'n aanbod aan die reghebbende te maak indien hy die saak wil verkoop.[49] Die posisie was aanvanklik geensins so duidelik nie.[50] Ons reg is in hierdie verband deur die Engelse reg beïnvloed.[51]

Die verpligting om 'n aanbod te maak is dus onderworpe aan 'n opskortende voorwaarde, naamlik die ontstaan by die voorkoopreggewer van 'n begeerte om te verkoop.[52] Die begeerte om te verkoop moet na buite manifesteer.[53] Hierdie bedoeling om te verkoop is wel deeglik aanwesig waar die voorkoopreggewer met 'n derde 'n koopkontrak ten aansien van die betrokke saak sluit, of ten aansien van 'n gedeelte van dié saak, of van dié saak tesame met iets anders.[54] Die bedoeling om te verkoop is aanwesig selfs al word die koopkontrak met die derde later gekanselleer of al word die koopkontrak onderworpe gestel aan die voorkoopreg (hetsy in die vorm van 'n opskortende of ontbindende voorwaarde).[55] Die bedoeling om te verkoop is nie aanwesig as 'n ruilkontrak of skenking of 'n verkoping in eksekusie plaasvind nie.[56] Dit is wel aanwesig as die voorkoopreggewer aan 'n derde 'n aanbod om te verkoop, maak, of 'n opsie om te koop, verleen.[57] Die partye kan natuurlik self in die ooreenkoms waardeur

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48 *supra* par 3 2.

49 *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932E; Eiselen 97.

50 In 'n aantal sake is die standpunt gehuldig dat daar geen sodanige verpligting op die voorkoopreggewer rus nie: *Van Pletsen v Henning, supra* 82 95; *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk, supra* 705H 707D–E; *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 321F 328G–H. Daarteenoor is 'n teenoorgestelde standpunt gehuldig in *Van der Hoven v Cutting* 1903 TS 299 306 310; *McGregor v Jordaan* 1920 CPD 209; *Cohen v Behr* 1946 CPD 942 948–949; *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 316 D–E; *Hirschowitz v Moolman* 1983 4 SA 1 (T) 6D–E; *Bellairs v Hodnett, supra* 1139F; *Hirschowitz v Moolman* 1985 3 SA 739 (A) 762C.

51 *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932G. Vir 'n uiteensetting van die Engelse reg sien *Manchester Ship Canal Co v Manchester Racecourse Co, supra* 48; *Homfray v Fothergill* LR 1 Eq 567 574–575.

52 *Robinson v Randfontein Estates Goldmining Co Ltd, supra* 188 (*obiter*); *Van Pletsen v Henning, supra* 95; *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 316D 319D 327B; *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932E; *Rogers v Phillips* 1985 3 SA 183 (ECD) 187D; Kerr *The Principles of the Law of Contract* 3e uitg (1980) 46. In *Sher v Allan, supra* 142 word naas die wil om te verkoop ook nog 'n aanbod van 'n derde vereis. Lg is slegs 'n vereiste waar die partye uitdruklik ooreengekom het dat die prys bepaal moet word deur 'n aanbod van 'n derde en is nie die algemene reël nie.

53 Ar Wessels in *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 327H: "Desire, like intention, resides in the mind, and its existence, sometimes settled and at other times ephemeral, is to be determined in the light of the available, relevant evidential material, such as considered, or even unguarded, confessions or other conduct which points unequivocally to its existence."

54 *McGregor v Jordaan, supra* 213; *Sher v Allan, supra* 143–144; *Soteriou v Retco Poyntons (Pty) Ltd, supra.* Vir die Engelse reg sien *Manchester Ship Canal Co v Manchester Racecourse Co, supra* 1069C.

55 Voet 18 3 24 wat handel oor die statutêre naastingreg. Dit behoort ook te geld by die voorkoopreg.

56 *Edwards (Waaikraal) GM Co Ltd v Mamogale and Bakwena Mines Ltd* 1927 TPD 288 294–295; *Bodasing v Christie* 1961 3 SA 553 (A) 561A–B; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd* 1985 4 SA 615 (T) 626D–E. In die Engelse reg is 'n skenking aan 'n derde wel kontrakbreuk (*Gardner v Coutts & Co, supra*).

57 Van Rensburg en Treisman 71. In *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 323H–325D 327H–328A het ar Wessels en ar Botha egter beslis dat 'n "desire to sell" slegs tot uiting kan kom in 'n koopkontrak. Hierdie uitsprake berus egter geheel en al op

die voorkoopreg geskep word, die inhoud van die opskortende voorwaarde bepaal.[58]

Die verpligting om 'n aanbod te maak moet *binne 'n spesifieke tydperk* gemaak word, naamlik ná die ontstaan van die begeerte om te verkoop maar voordat die voorkoopreggewer aan 'n derde verkoop.[59] Hierdie verpligting verskil dus van gewone verpligtinge waar daar binne 'n redelike tyd gepresteer moet word. Hierdie feit is van belang by die latere bespreking van die bevel tot spesifieke nakoming.[60]

Die reghebbende is in die gemenereg twee maande na ontvangs van die kennisgewing toegelaat om die voorkoopreg uit te oefen.[61] Hierdie tydperk het in onbruik verval en die aanbod aan die reghebbende bly nou oop vir 'n redelike tyd na ontvangs van die kennisgewing.[62] Die aanbod aan die reghebbende is onherroeplik, behalwe in die geval waar die voorkoopreggewer besluit om glad nie meer te verkoop nie, in welke geval hy sy aanbod mag herroep.[63] Die voortbestaan van die voorkoopreg word nie deur herroeping van die aanbod geraak nie.

Die vraag is nou welke bedinge die aanbod van die voorkoopreggewer moet bevat om as 'n *bona fide*-aanbod te kan geld. Hierdie vraag is reeds ten dele bespreek.[64] Waar die partye glad nie in die voorkoopregooreenkoms oor die prys en ander bedinge ooreengekom het nie, word dit vasgestel met verwysing na die bedinge van die aanbod deur 'n derde welke aanbod vir die verkoopreggewer aanvaarbaar is of, indien daar geen aanbod deur 'n derde is nie, met verwysing na die bedinge wat die gewer van 'n derde sou verlang as hy 'n aanbod aan die

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die uitleg van die betrokke huurkontrak waardeur die voorkoopreg geskep word. Die voorkoopreg het slegs gegeld vir die duur van dié huurkontrak. Die voorkoopreggewer het tydens die bestaan van hierdie huurkontrak 'n tweede huurkontrak met 'n derde gesluit wat sou geld vanaf afloop van die eerste huurkontrak. 'n Opsie om te koop is in die tweede huurkontrak vervat. Dit is duidelik dat hier nie ten tyde van die bestaan van die voorkoopreg 'n wil aanwesig was om te verkoop nie. Die beslissings dat 'n begeerte om te verkoop slegs voorkom waar 'n koopkontrak met 'n derde gesluit word, is dus nie die algemene reël nie. In *Hirschowitz v Moolman* 1985 3 SA 739 (A) 763F het die appèlhof bloot aangeneem dat 'n opsie wel die voorkoopreg in werking laat tree.

58 Sien bv die bespreking van *Sher v Allan* in vn 52 en *Manchester Ship Canal Co v Manchester Racecourse Co, supra* 49.

59 In *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 316D–E maak ar Ogilvie Thompson die opmerking: "The grantor of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, *before executing his decision to sell*, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right" (my kursivering). Vgl ook ar Wessels se opmerking (328D): "The lessor may, therefore, submit the offer to the lessee at any time, provided only such time is a time *before he enters into a binding contract of sale with a third party*" (my kursivering). Hierdie opmerkings word bevestig deur *Skinner v Goldberg* 1943 WLD 42 44 waar beslis is dat die datum van kontraksluiting met die derde die datum is waarop die omvang van die skade bereken moet word.

60 *infra* teks tussen vn 150 en 155.

61 *supra* vn29.

62 *Skinner v Goldberg*, supra 44; *Cohen v Behr supra* 949; *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 319H; *Wissekerke v Wissekerke* 1970 2 SA 550 (A) 553G–H 555F–557D.

63 *Wissekerke v Wissekerke, supra* 560C–F; Kerr *The Principles of the Law of Contract* 3e uitg 47 vereis nog verder dat die voorkoopreggewer te goeder trou moet wees.

64 *supra* teks tussen vn 42 en 45.

derde sou maak.[65] Hierdie reël is 'n uitbreiding van die gemenereg[66] en wel onder die invloed van die Engelse reg.[67] Die koopprys wat op een van hierdie twee wyses vasgestel word, is nie noodwendig gelykstaande aan die markprys nie.[68]

Kritiek is al uitgespreek dat die vasstelling van die bedinge aan die hand van dit wat die voorkoopreggewer (in die afwesigheid van 'n aanbod van 'n derde) sou verlang van 'n derde, te vaag is en die deur ooplaat vir spekulasie oor wat 'n *bona fide*-prys is.[69] Die werklike of markwaarde van die saak behoort egter in ag geneem te word om te bepaal wat 'n *bona fide*-aanbod is, waar onvoldoende getuienis aanwesig is oor welke prys vir die voorkoopreggewer aanvaarbaar sou wees.[70] Indien daar geen wesenlike verskil bestaan tussen die werklike of markwaarde en die prys wat die voorkoopreggewer inderdaad in sy aanbod aan die reghebbende verlang nie, is die aanbod *bona fide.*

Waar 'n aanbod van 'n derde ontvang word wat aanvaarbaar is vir die voorkoopreggewer, moet die gewer die saak te koop aanbied aan die reghebbende teen dieselfde of wesenlik dieselfde bedinge (persoonlike bedinge uitgesluit) ten einde te voldoen aan die vereiste dat sy aanbod aan die reghebbende *bona fide* moet wees.[71] 'n Verhoging of verlaging van die koopprys of 'n verandering van die wyse van afbetaling van die koopprys kan moontlik vir die persoonlike bedinge in die derde se aanbod kompenseer, sodat die aanbod aan die reghebbende nog steeds *bona fide* is.

Die partye kan ook self in die voorkoopooreenkoms die koopprys en ander bedinge vasstel of die wyse voorskryf waarop dit vasgestel kan word. Die volgende voorbeelde bestaan:

Die koopprys en wyse van betaling kan uitdruklik voorgeskryf word;[72] "a price not exceeding £500 sterling;"[73] die prys sal vasgestel word deur 'n aangewese

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65 *Sher v Allan, supra* 140–143; *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932I–933I. In *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd, supra* 622J–623B gee r Preiss te kenne dat die prys slegs bepaal word met verwysing na die aanbod van 'n derde. Dit is verkeerd (sien ook *Hirschowitz v Moolman* 1983 4 SA 1 (T) 6E).

66 *supra* teks tussen vn 30 en 33.

67 Die Engelse saak wat in hierdie verband aangehaal word is *Manchester Ship Canal Co v Manchester Race Course Co, supra* 46–47. Sien *Sher v Allan, supra* 142; *Soteriou v Retco Poyntons (Pty) Ltd, supra* 933A–E; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd, supra* 622J–623A. Sien verder vir die Engelse reg *Smith v Morgan, supra* 1504F–G.

68 *Dithaba Platinum v Erconovaal Ltd, supra* 622F–623C. Dit is ook die posisie in die Anglo-Amerikaanse reg: Corbin par 261 477 en *Smith v Morgan, supra* 1504d.

69 Radesich 1985 *De Jure* 407 409–410. Sien ook *Manchester Ship Canal Co Manchester Race Course Co, supra* 47.

70 In *Bellairs v Hodnett, supra* 1138F–1139H het die voorkoopregooreenkoms bepaal dat die gewer van die voorkoopreg vry was om enige prys vas te stel wat hy wou. Die gewer het egter verkoop aan 'n derde sonder om die aandele eers aan die reghebbende te koop aan te bied. Ten einde vas te stel of die reghebbende enige skade gely het, het die hof probeer vasstel watter prys die gewer waarskynlik van die reghebbende sou verlang. Die hof bevind dat hy die aandele waarskynlik teen hulle werklike waarde aan die reghebbende sou aanbied (1140E–F). Dieselfde oorweging behoort te geld by vasstelling of die aanbod aan die reghebbende inderdaad 'n *bona fide*-aanbod is.

71 Eiselen 96 98; *Soteriou v Retco Poyntons (Pty) Ltd, supra* 937H.

72 *Van Pletsen v Henning, supra* 83; *Cohen v Behr, supra* 948; *Wissekerke v Wissekerke, supra* 553G–H.

73 *McGregor v Jordaan, supra* 210.

derde party;[74] die voorkoopreggewer is volkome vry om die prys vas te stel soos hy wil;[75] en die koopprys is die markprys.[76]

Die opsie en voorkoopreg word soms verkeerdelik met mekaar gelykgestel wat die vasstelling van die koopprys betref. Daar word dan vereis dat die koopprys in die voorkoopooreenkoms bepaald of bepaalbaar moet wees ten einde 'n geldige voorkoopreg te skep.[77] Hierdie vereiste is verkeerd omdat daar uit die oog verloor word dat 'n opsiekontrak reeds 'n aanbod om te koop of verkoop aan die reghebbende bevat, terwyl 'n voorkoopooreenkoms, soos uit die voorgaande blyk, geen sodanige aanbod bevat nie.[78] Die prys kan ook in die voorkoopooreenkoms, aan die willekeur van die voorkoopreggewer oorgelaat word, omdat die gewer eers later 'n aanbod aan die reghebbende rig.[79] Die prys moet dan in dié aanbod bepaald of bepaalbaar wees.

Naas die gewone vorm van die voorkoop kan die voorkoop ook 'n ander vorm aanneem indien die partye uitdruklik so ooreenkom: Hiervolgens is die voorkoopreggewer slegs verplig om die reghebbende in kennis te stel van sy voorneme om te verkoop.[80] die reghebbende het dan 'n redelike tyd om te oorweeg of hy wil koop.[81] Indien hy wil koop maak hy 'n aanbod aan die gewer,[82] welke aanbod die gewer kan aanvaar of weier.[83] Indien hy die aanbod weier, bly die voorkoopreg voortbestaan.

4 DIE REMEDIES VAN DIE VOORKOOPREGHEBBENDE BY KONTRAKBREUK

4 1 Die Romeinse Reg

Niks is bekend oor die remedies van die reghebbende van 'n statutêre voorkoopreg nie behalwe dat hierdie voorkoopreg moontlik saaklike werking gehad het.[84] Ietwat meer is bekend oor die remedies van die reghebbende van die kontraktuele voorkoopreg. Indien die kontrak 'n strafbeding bevat het, kon die strafbedrag verhaal word.[85] Die *actio venditi* was die enigste aksie wat by name

74 *Lyle & Scott v Scott's Trustees* 1959 AC 763.
75 *Bellairs v Hodnett, supra* 1138E–1139H.
76 *Smith v Morgan, supra* 1504D.
77 *Hattingh v Van Rensburg* 1964 1 SA 578 (T) 582C–D. Hierdie verkeerde uitgangspunt het daartoe gelei dat beslis is dat die prysbepaling "teen sodanige prys as wat hulle mag ooreenkom" in die voorkoopooreenkoms 'n geval is waar die partye 'n materiële beding oopgelaat het vir latere onderhandeling en ooreenkoms (582H). Eers nadat lg plaasgevind het, het die voorkoopreg gelding (583F–H). Sien ook *Krauze v Van Wyk* 1984 2 702 (NC) en die bespreking daarvan deur Lubbe 1984 *Annual Survey of South African Law* 157–158. *Contra Soteriou v Retco Poyntons (Pty) Ltd, supra* 933J–934J waar 'n soortgelyke frase deur die appèlhof uitgelê is om die algemene geval van bedingvasstelling aan te dui waar die partye dit geensins doen in die voorkoopooreenkoms nie. Sien ook *McGregor v Jordaan, supra* 213. Die appèlhof het in *Krauze v Van Wyk* 1986 1 SA 158 (A) 174B die bespreking van hierdie vereiste tersyde gelaat omdat die hof dit onnodig gevind het ten einde die saak te beslis.
78 *Soteriou v Retco Poyntons (Pty) Ltd, supra* 932D–E.
79 *Bellairs v Hodnett, supra* 1138E–F.
80 *Hartsrivier Boerderye (Edms) Bpk v Van Nierkerk, supra* 706B.
81 *ibid* 706B.
82 *ibid* 705H.
83 *ibid* 707C–D.
84 De Zulueta 58 n 2.
85 *D* 45 1 122 3.

genoem word en dié was beskikbaar waar die voorkoopreg uit 'n koopkontrak ontstaan.[86] Dit is egter onseker wat presies met die *actio venditi* geëis kon word. Peters bespreek hierdie vraag indringend en kom tot die gevolgtrekking dat die *actio venditi* gerig was op die verhaal van skadevergoeding.[87]

4 2 Die Gemenereg

Die voorkoopreghebbende kon nie sy voorkoopreg afdwing voordat die voorkoopreggewer 'n koopkontrak met 'n derde gesluit het nie.[88]

Die remedies van die reghebbende waar die gewer aan 'n derde verkoop het sonder om die reghebbende geleentheid te gee om sy voorkoopreg uit te oefen, is in 'n groot mate beïnvloed deur die regte van die reghebbende van 'n kontraktuele naastingreg.[89] 'n Kort uiteensetting van die regte van die reghebbende by die statutêre- en kontraktuele naastingreg is nodig as agtergrond om die voorkoopreghebbende se remedies beter te begryp. Die statutêre naastingreg het, soos reeds gesê, saaklike werking gehad.[90] Die reghebbende van 'n statutêre naastingreg het, in die algemeen gesproke, in die plek van die derde getree asof hy van die begin af die koper was.[91] Daar was sprake van slegs een koopkontrak en dit was die koopkontrak wat die derde gesluit het.[92] Die verkoper moes teen die reghebbende optree vir die uitstaande deel van die koopprys.[93] Die reghebbende moes die koopprys of deel daarvan (as slegs 'n deel deur die derde betaal is) aan die derde betaal, asook die *arrha*, enige boetes (*laudimia*) en belastings deur die derde betaal en die waarde van verbeterings deur die derde aangebring.[94] Die reghebbende kon teen die verkoper optree as die derde benadeel is deur bedrog;[95] of indien die reghebbende uitgewin is.[96] Sekere saaklike en vorderingsregte wat geskep is deur die koopkontrak met die derde het ook die reghebbende gebind.[97] Alle regte (soos regte uit 'n huurkontrak, vruggebruik en ander serwitute) wat uitgewis is deur die verkryging van eiendomsreg deur die derde, het herleef.[98]

Wat die kontraktuele naastingreg betref, is dit geensins duidelik of, by uitoefening van die naastingreg, 'n nuwe koopkontrak tot stand gekom en of die reghebbende in die plek van die derde getree het nie.[99] Die kontraktuele naastingreg het in elk geval nie saaklike werking gehad nie.[100] Die regte van die

86 *D* 18 1 75; *D* 19 1 21 5.
87 283–286.
88 Ar Ogilvie Thompson huldig 'n ander mening in *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* 319H–320A. Hy verwys na Van Zutphen *Nederlandsche Praktyk sv voorcoop* 1, Berlichius *Conclusiones Practicabiles* 2 40 54, 55 en Schrassert *Obser Prac* 92 4 as gesag, maar hulle almal bespreek die geval waar reeds aan 'n derde verkoop is. Hy verwys ook na *D* 18 1 75 wat hom egter nie steun nie.
89 *supra* vn 14.
90 *supra* vn 18.
91 Voet 18 3 27; Van der Keessel *Th* 660, *Praelectiones* op Gr 3 16 1, 11.
92 Voet 18 3 29; Van der Keessel *Praelectiones* op Gr 3 16 1.
93 Voet 18 3 28.
94 Voet 18 3 26.
95 Voet 18 3 28.
96 Van der Keessel *Praelectiones* op Gr 3 16 11.
97 Voet 18 3 24, 29.
98 Voet 18 3 27.
99 Voet 18 3 9; Van Leeuwen *RHR* 4 19 2.
100 Berlichius *Conclusiones Practicabiles* 2 40 56, 57.

reghebbende teenoor die naastingreggewer en die derde was dieselfde as dié van die voorkoopreghebbende, behalwe dat daar ook nog bykomende reëls was wat die verhouding tussen die derde en die naastingreghebbende verder gereël het.[101]

Die voorkoopreghebbende het 'n aksie om skadevergoeding teen die voorkoopreggewer gehad waar die gewer aan 'n derde verkoop het (hoewel lewering nog nie plaasgevind het nie) sonder dat die reghebbende geleentheid gegee is om sy reg uit te oefen.[102] Die reghebbende kon ook tussenbeide tree en self lewering van die saak eis.[103] Dit is geensins seker dat die kontrak tussen die derde en die gewer dan tot 'n einde gekom het nie.[104] Daar is egter wel sake in die Suid-Afrikaanse reg waarin gesê word dat kansellasie van die kontrak met die derde geëis kon word.[105]

Waar die saak reeds gelewer is aan 'n derde wat onbewus van die bestaan van die voorkoopreg was, het die reghebbende slegs 'n aksie vir skadevergoeding teen die voorkoopreggewer gehad, terwyl die koopkontrak met die derde bly voortbestaan het en nie vernietig is nie.[106] Waar die saak egter gelewer is aan 'n derde wat bewus was van die bestaan van die voorkoopreg, kon die reghebbende die saak van die derde opeis.[107] Die uitwerking hiervan op die koopkontrak met die derde is weer eens onseker.[108] Niks is verder bekend oor die reëling van die verhouding tussen die derde en die reghebbende nie. Waarskynlik het die reëls wat geld by die kontraktuele naastingreg ook hier gegeld.[109] Die voorkoopreggewer moes in elke geval die koopprys (*koop-pennighen*) van die reghebbende, en nie die derde nie, eis.[110]

Daar is hiernaas geen ander remedie teen die derde of die voorkoopreggewer bekend nie.[111]

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101 Berlichius *Conclusiones Practicabiles* 2 40 54–57, 64. Vir die bykomende reëls sien Van Leeuwen *RHR* 4 19 1, 2.

102 Voet 18 1 2. Ar Ogilvie Thompson in *Owsianick v African Conoslidated Theatres (Pty) Ltd, supra* 319E meen dat Voet hier die geval bespreek waar die saak reeds aan 'n *bona fide* derde verkoop en gelewer is. Sien ook *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* 906H–907A. Die reghebbende behoort egter die keuse te hê om skadevergoeding te eis al het lewering aan die derde nog nie plaasgevind nie. Voet 18 1 2 kan ook so 'n geval wees. Indien die partye in die verkoopregooreenkoms ooreengekom het oor 'n strafbedrag kan dit geëis word (Berlichius *Conclusiones Practicabiles* 2 40 58).

103 Van Zutphen *Nederlandsche Practyke* sv *voorcoop* 4; Berlichius *Conclusiones Practicabiles* 2 40 54, 55.

104 Die tekste in die vorige vn sê glad nie uitdruklik dat die kontrak met die derde beëindig word nie. Die tekste oor die geval waar aan 'n *bona fide* derde gelewer is, sê egter uitdruklik dat die kontrak met die derde nie beëindig word nie (sien Van Zutphen *Nederlandsche Practycke* sv *voorcoop* 5; Berlichius *Conclusiones Practicabiles* 2 40 58).

105 *infra* vn 119.

106 Van Zutphen *Nederlandsche Practycke* sv *voorcoop* 5; Berlichius *Conclusiones Practicabiles* 2 40 56, 57; Schrassert *Obser prac* 92 4.

107 Van Zutphen *Nederlandsche Practycke* sv *voorcoop* 6; Berlichius *Conclusiones Practicabiles* 2 40 64.

108 vn 104.

109 vn 101.

110 Van Zutphen *Nederlandsche Practycke* sv *voorcoop* 9.

111 Van der Keessel *Praelectiones* op Gr 3 16 1 sê dat die voorkoopreggewer deur die *actio venditi* verplig kan word om hom aan die voorkoopregooreenkoms te hou. Wat die behels word nie gesê nie. Dit is skynbaar bloot 'n herhaling van die Romeinse reg (*supra* par 4 1).

4 3 Die Suid-Afrikaanse reg

4 3 1 *Die Vorm van Kontrakbreuk*

Waar die voorkoopreggewer die saak waaroor die voorkoopreg bestaan, te koop adverteer, te koop aanbied aan 'n derde, of 'n opsie daaroor aan 'n derde verleen, word die opskortende voorwaarde vervul waaraan die verpligting om 'n aanbod aan die reghebbende te maak onderworpe is. Deur die genoemde optrede repudieer die gewer ook die voorkoopooreenkoms, omdat 'n redelike man tot die gevolgtrekking sou kom dat die gewer nie van voornemens is om te presteer nie.[112] Indien 'n koopkontrak met 'n derde gesluit word sonder dat 'n *bona fide*-aanbod eers aan die reghebbende gemaak word, pleeg die voorkoopreggewer positiewe wanprestasie ten opsigte van sy negatiewe verpligting om nie aan 'n derde te verkoop nie, en verval hy in *mora ex re* ten opsigte van sy verpligting om 'n *bona fide*-aanbod aan die reghebbende te maak.[113]

4 3 2 *Interdik*

Die reghebbende kan by wyse van 'n interdik die voorkoopreggewer verbied om die derde se aanbod te aanvaar of om aan die derde te verkoop waar 'n koopkontrak nog nie met die derde gesluit is nie.[114] Waar daar reeds 'n koopkontrak met die derde gesluit is, kan die reghebbende by wyse van 'n interdik lewering van die saak aan die derde verhoed.[115]

4 3 3 *Skadevergoeding*

Die reghebbende kan terugtree uit die kontrak en skadevergoeding eis op grond van die voorkoopreggewer se repudiëring.[116] Die reghebbende kan ook skadevergoeding eis waar 'n koopkontrak met 'n derde gesluit is, of die reghebbende terugtree of nie.[117] Die gewone beginsels ten aansien van berekening van skadevergoeding geld.[118]

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112 *Tuckers Land and Development Co (Pty) Ltd v Hovis* 1980 1 SA 645 (A). Kerr *The Law of Sale and Lease* (1984) 298 meen ook dat die voorkoopreggewer kontrakbreuk pleeg indien hy 'n aanbod aan 'n derde maak, maar hy sê nie welke vorm van kontrakbreuk ter sprake is nie. Die feit dat die gewer objektief gesproke nog in staat is om 'n aanbod aan die reghebbende te maak, beteken nie dat sy optrede nie meer neerkom op repudiëring nie (*contra Hartsrivier Boerderye (Edms) Bpk v Van Niekerk, supra* 707).

113 Joubert (red) *LAWSA* vol 5 par 204 219. In *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd, supra* 631E word bloot gesê dat die gewer se optrede kontrakbreuk uitmaak, terwyl in *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk, supra* 707 die opinie gehuldig word dat dit neerkom op repudiëring.

114 *Bellairs v Hodnett, supra* 1140H–1141A (*obiter*).

115 *Ibid; Smith v Momberg* 1895 SC 295.

116 *NKP Kunsmisverspreiders (Edms) Bpk v Sentrale Kunsmiskorporasie (Edms) Bpk* 1973 2 SA 680 (T).

117 *Joseph's Executor v Peacock* 1868 B 247; *Sher v Allan, supra; Skinner v Goldberg, supra; Bellairs v Hodnett, supra* 1139H 1140H.

118 *Ibid.* Let egter op twee aspekte: Die reghebbende moet eerstens bewys dat hy die voorkoopreg sou uitgeoefen het as hy eis om geplaas te word in die posisie waarin hy sou gewees het as die voorkoopreg uitgeoefen was. Hierdie reël geld wel t a v opsies (*Sommer v Wilding* 1984 3 SA 647 (A)). In *Sher v Allan, supra* 147 is bloot aanvaar dat die reghebbende teen dieselfde prys as die reghebbende sou gekoop het. In *Bellairs v Hodnett, supra* het dit wel ter sprake gekom maar dit was onnodig om te beslis omdat geen skade bewys is nie. Ten tweede is die datum waarop die omvang van skade bereken moet word, die datum van kontraksluiting met die derde (*Skinner v Goldberg, supra*).

4 3 4 *Tersydestelling van die Koopkontrak met die Derde*

In 'n aantal sake word te kenne gegee dat die reghebbende die koopkontrak tussen die *mala fide*-derde en die voorkoopreggewer tersyde kan laat stel.[119] Die gemeenregtelike gesag hiervoor is bra wankelrig.[120] In *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd*[121] word egter ook beslis dat die koopkontrak met die derde nie tot 'n einde kom as die reghebbende by wyse van 'n eensydige wilsverklaring 'n koopkontrak tussen hom en die gewer tot stand bring nie. Daar bestaan eintlik geen rede waarom die reghebbende die bevoegdheid moet hê om die koopkontrak tussen die derde en die gewer tersyde te laat stel nie. Sy moontlike aanspraak op die saak of regte teenoor die voorkoopreggewer word nie deur die bestaan van dié kontrak as sodanig geraak nie.

4 3 5 *Spesifieke Nakoming*

Twee vorme van spesifieke nakoming kom voor:

a *Die verkorte vorm van spesifieke nakoming* Waar 'n koopkontrak met 'n derde gesluit word, kan die voorkoopreghebbende deur 'n eensydige wilsverklaring 'n selfstandige koopkontrak tussen hom en die voorkoopreggewer tot stand bring met dieselfde of wesenlik dieselfde bedinge as dié vervat in die koopkontrak met die derde.[122] Die koopkontrak tussen die reghebbende en die gewer kom deur regswerking tot stand.[123] Die koopkontrak tussen die gewer en die derde bly egter voortbestaan.[124] Die eensydige wilsverklaring van die reghebbende moet voldoen aan al die vereistes vir 'n geldige aanname van 'n aanbod.[125]

Die bedinge van die koopkontrak tussen die reghebbende en die gewer is dieselfde of wesenlik dieselfde as dié van die koopkontrak tussen die derde en die gewer. Die presiese werking van hierdie reël is nog nie volledig deur ons howe uitgewerk nie. Hierdie reël kom ook ter sprake waar dit gaan om die vraag of 'n aanbod aan die reghebbende 'n *bona fide*-aanbod is.[126] In *Associated South African Bakeries Pty Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* het die probleem nie direk in die meerderheidsbeslissing ter sprake gekom nie, maar daar word wel na Glück[127] verwys.[128] Glück is van mening dat die reghebbende bereid moet wees om *al* die verpligtinge na te kom waartoe die derde hom kontraktueel teenoor die gewer verbind het. Dit herinner sterk aan die gemeenregtelike, statutêre naastingreg waar die reghebbende inderdaad in die plek van die derde tree.[129]

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119 *Transvaal Silver Mines v Jacobs, Le Grange and Fox, supra* 119–120; *Bellairs v Hodnett, supra* 1140H–1141A (*obiter*).
120 *supra* n 104.
121 *supra* 919B–D.
122 *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* 907F.
123 *ibid; Hirschowitz v Moolman* 1985 3 SA 739 (A) 763G.
124 *Associated South African Bakeries (Pty) Ltd v Dryx & Vereinigte Bäckereien (Pty) Ltd, supra* 919C–D. Dit is die posisie al gebruik die hof die uitdrukking dat die reghebbende in die plek van die derde tree (907F).
125 Kerr *The Law of Sale and Lease* 298 n 31. Dit word bevestig deur die minderheidsuitspraak in *Soteriou v Retco Poyntons (Pty) Ltd, supra* 937E–938D wat vereis dat die eensydige wilsverklaring "unequivocal and unqualified" moet wees.
126 *supra* teks tussen vn 42 en 45 asook tussen vn 63 en 72.
127 *Erläuterung der Pandekten* band 16 157.
128 *supra* 906H.
129 *supra* vn 91.

Die meerderheidsbeslissing in *Soteriou v Retco Poyntons (Pty) Ltd*[130] vereis dat die bedinge van die kontrak met die derde van só 'n aard moet wees dat die reghebbende in die plek van die derde kan tree. Die minderheid beslis dat die bedinge van die huurkontrak met die derde ook bedinge in die huurkontrak tussen die gewer van die reg van eerste weiering en die reghebbende is, behalwe vir sover die voorgeskrewe gebruik van die perseel in die kontrak met die derde bots met die gebruik van die perseel soos voorsien deur die gewer en reghebbende van die reg van eerste weiering.[131]

In *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd*[132] word die koopprys wel in geld gespesifiseer in die koopkontrak met die derde, maar dit sou betaalbaar wees deur die oordrag van aandele in 'n sekere maatskappy. Die hof beslis egter:[133]

> "If the grantor of the rights chooses to accept satisfaction of money in a form which is impossible for the grantee to match, he cannot complain if the grantee offers him the cash for which he stipulated in the bargain."

Dieselfde behoort te geld waar die koopkontrak met die derde 'n sogenaamde inruilkontrak is en daar 'n waarde geplaas is op die ingeruilde saak.

Uit die voorafgaande is dit egter duidelik dat daar gevalle kan voorkom waar die persoonlike verpligtinge van die derde so 'n wesenlike deel van die kontrak vorm, dat die reghebbende nie van die verkorte vorm van spesifieke nakoming gebruik kan maak nie. Ons reg ken nie die spesiale reël wat geld by die *Vorkaufrecht* in die Duitse reg nie:[134] Die *Vorkaufrecht* word ook uitgeoefen deur 'n eensydige wilsverklaring deur die reghebbende[135] en die koopkontrak tussen die gewer en die derde bly ook voortbestaan na uitoefening.[136] Na uitoefening van die *Vorkaufrecht* kom 'n koopkontrak ook tussen die gewer en die reghebbende tot stand met dieselfde bedinge as die koopkontrak met die derde.[137] Die belangrike is egter dat indien die koopkontrak met die derde ook addisionele bedinge bevat naas dié wat gewoonlik in 'n koopkontrak voorkom, die reghebbende in die plek van die betrokke prestasies hulle geldelike waarde kan lewer, mits dié prestasies wel op geld waardeerbaar is.[138]

Die vraag is of die reghebbende sonder die tussenkoms van 'n hof deur 'n eensydige wilsverklaring die voorkoopreg kan uitoefen. Die gesag hieroor is teenstrydig. Aan die een kant is daar gesag vir 'n bevestigende antwoord.[139] Hierdie opvatting gaan dan ook gepaard met ander konstruksies van die voorkoopreg as die die reeds vermelde konstruksie waarvolgens dit die keersy is van 'n negatiewe verpligting om nie aan derdes te verkoop nie, gekoppel aan 'n positiewe verpligting om 'n aanbod aan die reghebbende te maak.[140] Geeneen

130 *supra* 935C.
131 937H.
132 *supra* 626B–C.
133 626F.
134 a 504–514 van die BGB.
135 a 504 van die BGB.
136 a 505 van die BGB.
137 *ibid.*
138 a 507 van die BGB.
139 *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* 922C–D; *Hirschowitz v Moolman* 1985 3 SA 739 (A) 763H (dit is bloot aanvaar sonder bespreking); *contra* Kerr *The Law of Sale and Lease* 298 n 31.
140 *supra* par 3 3.

van die alternatiewe konstruksies is egter bevredigend nie. Daar bestaan byvoorbeeld 'n opvatting dat 'n voorkoopreg in 'n opsie verander sodra die voorkoopreg in werking tree.[141] Die een verklaring vir hierdie verandering in 'n opsie is dan dat 'n voorkoopreg in werklikheid 'n voorwaardelike opsie is.[142] Die ontstaan van die voorkoopreggewer se begeerte om te verkoop, is die opskortende voorwaarde. Die voorkoopregooreenkoms bevat egter, soos reeds aangetoon is, geen aanbod nie.[143] 'n Tweede moontlike verklaring is dat sodra die voorkoopreg in werking tree daar van regsweë geag word dat die voorkoopreggewer 'n aanbod aan die reghebbende gemaak het ('n fiktiewe aanbod dus).[144] Daar is egter ernstige besware teen die fiktiewe aanbod-teorie. Dit is nie toepaslik in alle gevalle van voorkoop nie.[145] Dit is ook kwalik te rym met die gesag wat uitdruklik vereis dat die voorkoopreggewer werklik 'n aanbod aan die reghebbende moet maak.[146]

Aan die ander kant bestaan daar gesag vir die standpunt dat die uitoefening van 'n voorkoopreg by wyse van 'n eensydige wilsverklaring beskou moet word as 'n wyse waarop die reghebbende spesifieke nakoming van sy voorkoopreg kan verkry.[147] 'n Voorkoopreg kan dus by wyse van 'n eensydige wilsverklaring uitgeoefen word indien dit geskied met die tussenkoms van 'n hof.[148] Hierdie standpunt sluit ook aan by konstruksie van die voorkoopreg wat hierbo uiteengesit is.[149] Die hof het 'n diskresie om hierdie vorm van spesifieke nakoming te weier.[150]

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141 Cooper *The South African Law of Landlord and Tenant* (1973) 128. Sien ook Corbin IA par 261 473–474; *Krauze v Van Wyk* 1984 2 SA 702 (NK).

142 Lubbe 1982 *Annual Survey of South African Law* 130. Hierdie konstruksie kom ook in die Nederlandse regsliteratuur voor (Bloembergen en Kleyn *Contractenrecht* par 425).

143 *supra* par 3 3. Sien ook *Krauze v Van Wyk* 1986 1 SA 158 (A) 171D.

144 Lubbe 1982 *Annual Survey of South African Law* 130; Van Rensburg en Treisman 71; Corbin IA par 261 473–474; Radesich 409.

145 Bv: a 'n Geval soos wat in *Bellairs v Hodnett, supra* voorgekom het (die voorkoopreggewer mag self vryelik die bedinge van die aanbod aan die reghebbende bepaal).

b Die persoonlike bedinge van die kontrak met die derde vorm 'n wesenlike deel van die kontrak.

c Die partye kan in die voorkoopregooreenkoms ooreenkom dat die voorkoopreg ook in werking tree by die ontstaan van die begeerte om die saak te ruil of te skenk.

146 *supra* vn 49; Lubbe 1982 *Annual Survey of South African Law* 130. Vir verdere kritiek sien Radesich 409.

147 *Hirschowitz v Moolman* 1985 3 SA 739 (A) 762E: *Hirschowitz v Moolman* 1983 4 SA 1(T) 4H–5A; *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd, supra* 672C–D; Eiselen 99. Die meerderheidsbeslissing van w ar *Van Heerden* in *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* neem geen duidelike standpunt in nie. Aan die een kant word hierdie wyse van uitoefening direk gekoppel aan *Owsianick v African Consolidated Theatres (Pty) Ltd, supra* waar dit gegaan het oor die gewone geval van spesifieke nakoming van 'n voorkoopreg (904E–905B; *contra* minderheidsbeslissing 922D). Aan die ander kant word verwys na die Duitse en Amerikaanse reg waar dit gaan oor 'n buiteregtelike uitoefening (905E–908A; sien ook Corbin IA par 261 en a 504 van die BGB).

148 Die uitwerking van hierdie standpunt is grotendeels dieselfde as dié van 'n buitegeregtelike eensydige wilsverklaring behalwe wat die tydstip betref waarop verjaring begin loop. Sien ook verder vn 150.

149 *supra* par 3 3.

150 *Soteriou v Retco Poyntons (Pty) Ltd, supra* 922F–923A 921C; *Krauze v Van Wyk* 1986 1 SA 158 (A) 173I–J (*obiter*); *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd, supra* 627D–628I. In *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty), supra* 913B–919A word twyfel uitgespreek of die hof wel 'n diskresie het. Uit die voorafgaande

Waar die voorkoopreggewer 'n aanbod aan 'n derde rig of 'n opsie aan 'n derde verleen, behoort die reghebbende ook by wyse van 'n eensydige wilsverklaring sy voorkoopreg te kan uitoefen.[151] Daar moet egter onthou word dat dit hier gaan om 'n bevel tot spesifieke nakoming asook dat die gewer se optrede neerkom op repudiëring van 'n verpligting wat binne 'n spesifieke tydperk nagekom moet word.[152] Repudiëring vervroeg nie die datum van prestasie nie.[153] 'n Bevel tot spesifieke nakoming kan verkry word voordat die laaste dag vir prestasie aangebreek het (in ons geval, die dag waarop die gewer 'n koopkontrak met die derde sluit), maar die bevel is nie afdwingbaar voordat bogenoemde dag aangebreek het nie.[154]

b *Die gewone bevel tot spesifieke nakoming* Die verkorte vorm van spesifieke nakoming is nie aanwendbaar in alle gevalle nie.[155] Dit sou ook onwys wees vir die reghebbende om dit te gebruik waar die bedinge van die koopkontrak met die derde of die aanbod aan die derde onbekend is. Daar bestaan dus behoefte aan 'n gewone bevel tot spesifieke nakoming om die voorkoopreggewer te dwing om 'n aanbod aan die reghebbende te maak.

Die diskresie van die hof om 'n bevel tot spesifieke nakoming te weier is nie beperk tot bepaalde kategorieë gevalle nie, maar elke saak moet in die lig van sy eie omstandighede beoordeel word.[156] 'n Relevante groep gevalle waar die hof gewoonlik 'n bevel tot spesifieke nakoming sal weier, is dié waar dit vir die hof moeilik sou wees om toesig oor die uitvoering van die bevel te hou.[157] Die vraag of so 'n bevel nagekom is of nie, is soms moeilik bepaalbaar. Hierdie feit word deur sommige regsgeleerdes as die rede beskou waarom ons howe onwillig is om in hierdie gevalle 'n bevel tot spesifieke nakoming te verleen.[158] Daar word dan ook ernstige kritiek uitgespreek teen die weiering van 'n bevel tot spesifieke

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vervolg van vorige bladsy

sake is dit duidelik dat dit vir die howe gaan om die vraag of spesifieke nakoming van die *koopkontrak* geweier kan word. Eiselen 99 meen dat indien 'n buitegeregtelike eensydige wilsverklaring erken word, die howe se diskresie om spesifieke nakoming van die voorkoopreg te weier, omseil kan word. Die hof se diskresie t a v die koopkontrak is egter wyd genoeg om ook die omstandighede rondom die afdwinging van die voorkoopreg in ag te neem (*Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* 926H). Dit maak ook glad nie 'n verskil t a v die berekening van skadevergoeding by weiering van spesifieke nakoming nie, omdat die voorkoopreghebbende altyd kan bewys dat hy die voorkoopreg sou uit geoefen het (sien vn 118).

151 Van Rensburg en Treisman 70–71. In *Hirschowitz v Moolman, supra* 763F het die hof sonder bespreking bloot aanvaar dat die verlening van 'n opsie aan 'n derde die voorkoopreg in werking laat tree en dat die reghebbende deur 'n eensydige wilsverklaring die voorkoopreg kan uitoefen.

152 *Supra* par 4 3 1.

153 De Wet en Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4e uitg (1978) 155 n 84.

154 Joubert (red) *LAWSA* vol 5 par 227; Kerr *The Principles of the Law of Contract* 345; Nienaber "Enkele Beskrywinge oor Kontrakbreuk in Anticipando" 1963 *THRHR* 19 36–37; *Erasmus v Pienaar* 1984 4 SA 9 (T) 21B; *Hasham v Zenab* 1960 AC 316 (PC); Jaeger *Williston on Contracts* 3e uitg (1968) vol 11 par 1309.

155 sien vn 145.

156 *Haynes v Kingwilliamstown Municipality* 1951 2 SA 371 (A) 378.

157 *Lottering v Lombaard* 1971 3 SA 270 (T); *Keyter v Terblanche* 1935 EDL 186; *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 1 SA 246 (W); *Barker v Beckett & Co Ltd* 1911 TPD 151; *Lucerne Asbestor Co v Becker* 1928 WLD 311.

158 De Wet en Van Wyk 190; *Ranch International Pipelines (Tvl) (Pty) Ltd v LMG Construction (City) (Pty) Ltd* 1984 3 SA 850 (W) 880G–881B.

nakoming in hierdie gevalle.[159] 'n Dispuut oor die vraag of so 'n bevel behoorlik nagekom is, sal immers slegs ontstaan indien die skuldeiser in wie se guns so 'n bevel verleen is, kom kla dat die bevel nie nagekom is nie, en bowendien sal hy moet aantoon dat die bevel nie nagekom is nie. Die feitelike vraag wat die hof dan moet uitmaak, is nie noodwendig moeilik nie. Christie gaan egter verder en beskou die blote moontlikheid van 'n uitgerekte dispuut as die rede waarom die howe onwillig is om in hierdie gevalle 'n bevel tot spesifieke nakoming te verleen.[160] Sy argument gaan egter nie op nie, want ons howe laat 'n skuldeiser toe om, nadat 'n bevel tot spesifieke nakoming aan hom verleen is, skadevergoeding te eis.[161] So 'n opvolgende eis kan uitgerek wees en ook moeilik wees om te beslis. Ons howe oefen inderdaad reeds 'n kontroleringsfunksie uit by die vraag of 'n voorkoopreg verval het omrede 'n *bona fide*-aanbod aan die reghebbende gemaak en nie aanvaar is nie.[162] 'n Hof behoort dus, in die algemeen gesproke, 'n bevel tot spesifieke nakoming van 'n voorkoopreg te verleen.[163] Slegs appèlregter Ogilvie Thompson in *Owsianick v African Consolidated Theatres (Pty) Ltd* het tot dusver in 'n minderheidsuitspraak uitdruklik beslis dat die gewer van 'n voorkoopreg by wyse van 'n bevel tot spesifieke nakoming verplig kan word om 'n *bona fide*-aanbod aan die reghebbende te maak.[164] Hy is van mening dat so 'n bevel verkry kan word selfs voordat die voorkoopreggewer inderdaad 'n koopkontrak met die derde sluit:

> "Subject, however, to the discretion of the Court to decline in any particular case to order specific performance I am of opinion that the holder of a right of pre-emption is, once the contingency giving rise to that right has supervened, entitled by due exercise of his right to become a purchaser."[165]

Hierdie opmerking van die regter moet gesien word in die lig van sy opmerking dat die verpligting om 'n aanbod te maak aan die reghebbende binne 'n spesifieke tydperk moet geskied.[166] 'n Bevel tot spesifieke nakoming kan dus teen die voorkoopreggewer verkry word by repudiëring van die voorkoopregooreenkoms selfs voordat die kontrak met die derde gesluit word, op voorwaarde dat die bevel eers vanaf laasgenoemde tydstip afgedwing kan word.[167]

4 3 6 *'n Aksie om Lewering van die Koopsaak deur die Derde*

Waar die voorkoopreggewer 'n koopkontrak met 'n derde sluit en die reghebbende sy voorkoopreg uitoefen, geniet die reghebbende se vorderingsreg op

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159 *ibid.*
160 512.
161 *Industrial & Mercantile Co v Anastassiou Brothers* 1973 2 SA 601 (W) 610E–G en die sake aldaar aangehaal.
162 *supra* teks tussen vn 42 en 45.
163 'n Geval wat nie vatbaar is vir kontrolering nie is waar die reghebbende vryelik die koopprys kan bepaal (*Bellairs v Hodnett, supra* 1139F–G).
164 *supra* 318H–320H. Dit word *obiter* bevestig deur ar Williamson in dieselfde saak (326F–327E) en deur die volbankbeslissing van die appèlhof in *Bellairs v Hodnett, supra* 1139F–G. Sien egter w ar Botha in *Associated South African Bakeries (Pty) Ltd, supra* 919H wat *obiter* sterk twyfel uitspreek of so 'n bevel verleen kan word. 'n Bevel tot spesifieke nakoming is al in die Engelse reg verleen (*Lyle & Scott v Scott's Trustees, supra*). So 'n bevel word ook in die Nederlandse reg verleen (Rb Utrecht 11 Mei 1949, 1950 NJ 489), maar is nie eintlik bekend in die Duitse reg nie (Henrich *Vorvertrag, Optionsvertrag, Vorrechtsvertrag* (1965) 184–188, 356 veral n 60).
165 320G.
166 316D–E. Dit word volledig aangehaal in vn 59.
167 *supra* vn 154.

lewering van die koopsaak voorkeur bo dié van die derde.[168] Indien die koopsaak reeds aan die derde gelewer is, sodat hy 'n saaklike reg op die saak verkry het, kan die reghebbende slegs die saak van hom opeis indien eersgenoemde van die bestaan van die voorkoopreg bewus was.[169] Dit is nog onseker of die derde reeds voor kontraksluiting tussen om en die voorkoopreggewer van die bestaan van die voorkoopreg bewus moes gewees het en of hy net voor lewering van die koopsaak aan hom daarvan bewus moes geword het.[170]

5 FORMALITEITSVOORSKRIFTE VIR EN OORDRAAGBAARHEID VAN VOORKOOPREGTE

Die voorkoopregkontrak ten aansien van grond moet aan dieselfde formaliteitsvoorskrifte as 'n grondkoopkontrak voldoen (op skrif gestel en deur sowel die voorkoopreggewer as -reghebbende onderteken).[171]

'n Voorkoopreg is vryelik sedeerbaar, tensy die voorkoopkontrak uitdruklik of stilswyend anders bepaal.[172] 'n Voorkoopreg kan vererf en bind die voorkoopreggewer se boedel by sy dood.[173]

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168 *Krauze v Van Wyk* 1986 1 SA 158 (A).

169 *De Jager v Sisana* 1930 AD 71; *Le Roux v Odendaal* 1954 4 SA 432 (N).

170 *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd, supra* 908G–H; *Strydom v De Lange* 1970 2 SA 6 (T) 14D–G; *Botes v Botes* 1964 1 SA 623 (O) 629G–H.

171 *Hirschowitz v Moolman* 1985 3 SA 739 (A). Vir 'n volledige bespreking sien Van Rensburg 208–212. Vir 'n bespreking van die uitoefening van 'n voorkoopreg t a v grond deur 'n eensydige wilsverklaring sien Van Rensburg en Treisman 70–71.

172 Van Leeuwen *RHR* 4 19 1, *CF* 1 4 20 3 (dié tekste handel wel oor die kontraktuele naastingreg, maar dit behoort ook te geld vir voorkoopregte); *McGregor v Jordaan, supra* 210.

173 Van Zutphen *Nederlandsche Practijke* sv *voorcoop* 7; Berlichius *Conclusiones Practicabiles* 2 40 70, 71; Van Leeuwen *CF* 1 4 20 3; *Joseph's Executor v Peacock, supra* 250.

Bydraes vir publikasie, boeke vir resensie, korrespondensie met die redakteur en advertensies moet gestuur word aan die redakteur, posbus 1263 Pretoria 0001. Artikels moet in die reël nie langer wees nie as 7 000 woorde (20–25 bladsye getik op A4, dubbelspasiëring). Tensy vooraf met die redakteur oor-eengekom is, kan onmiddellike publikasie van bydraes nie beloof word nie.

Inskrywings op die blad moet gerig word aan die uitgewer: Butterworth, posbus 792, Durban 4000.

Proof of paternity: consent or compulsion*

KJ Kemp
B Iuris LLD
Professor of Private Law, University of Zululand

OPSOMMING

Bewys van Vaderskap: Toestemming of Dwang

Die waarde van bloedtoetse by die bewys van vaderskap word allerweë erken. Omrede die vrywillige samewerking van alle partye benodig word, het dit egter dikwels in die praktyk nie tot sy reg gekom nie. Die beslissing in *Seetal v Pravitha* 1983 3 827 (D) dat die hooggeregshof 'n inherente bevoegdheid het om partye te beveel om hulle aan sodanige toetse te onderwerp, is dus te verwelkom en in beginsel is hierdie afwyking van die vorige regspraak korrek. Of die hof so 'n bevel sal verleen, hang volgens *Seetal* in wese daarvan af aan watter van twee botsende belange, dat die waarheid moet seëvier of beskerming van die reg op privaatheid van die nietoestemmende party, die hof prioriteit sal verleen. Wanneer die keuse eers gemaak is, sal dit feitlik sonder uitsondering nagevolg word. *In casu* het die hof egter nie die keuse gemaak nie, omdat hy van mening was dat hierdie keuse net ten opsigte van volwassenes geld. Kinders kan nie self psigies weier nie; daarom kan daar geen sprake van dwang deur 'n bevel wees nie. Die hof kan dus slegs as oppervoog namens die kind toestem en dan slegs as dit in die beste belang van die kind is. In hierdie artikel word uitgewys dat dié uitspraak die man in 'n nog onbenydenswaardiger bewysregtelike posisie plaas as wat tans die geval is. Daar word vervolgens aangevoer dat die beslissing dat die kind nie beveel kan word om bloedtoetse te ondergaan (gebaseer op die beginsel dat die waarheid moet seëvier) nie, in stryd is met verskeie beginsels van ons reg; dat dit tot absurditeite sal lei en dat dit onaanvaarbare beleidsresultate het. Die gevolgtrekking is dat die hof wel die diskresionêre bevoegdheid het om alle partye te beveel om bloedtoetse te ondergaan en die plig het om algar oor dieselfde kam te skeer. As reël behoort die hof dan ook voorkeur te gee aan die oorweging dat die waarheid moet seëvier en behoort in alle twyfelgevalle, bloedtoetse beveel te word.

1 INTRODUCTION

The substantial evidential value of blood tests in disputed paternity matters, is well recognised by the South African law.[1] The procurement of such tests, however, has until recently rested on the tenuous basis of the consent of all concerned: the mother, the child,[2] the man (or men). Unless there was co-operation by all these parties, this important material, often vital for a decision reflecting the real truth about paternity, would never reach the court despite its ready availability. Since the parties involved are already at arms length in an important

* This article was submitted for publication on 1985–03–20 (ed).

1 See *Ranjith v Sheela* 1965 3 SA 103 (D); *Van der Harst v Viljoen* 1977 1 SA 795 (C).

2 In the case of young children, this is to be supplied on their behalf by someone with the necessary authority. This point is discussed in 4 3 below in greater detail.

legal dispute, and the truth will damage one party's case irreparably, co-operation is the exception rather than the rule.[3]

That the production of available and vital evidential material depended wholly on the consent and co-operation of the disputing parties, was clearly unsatisfactory, especially since the various presumptions that find application in paternity cases,[4] may well have placed one of the parties in a legal position which is virtually unassailable, except by means of blood tests.[5] It was therefore just a matter of time and opportunity before this rule would be challenged in court. The inevitable challenge came in *Seetal v Pravitha*[6] where the court had to decide whether it had the authority to compel an unwilling party to undergo a blood test, which necessarily involved an investigation into the nature of such authority and into the way in which such a power, if it exists, should be exercised. Didcott J delivered a decision which was lauded by one commentator as

> "a judgment of rare erudition, of an almost exhaustive comparative sweep, and of probing and closely reasoned analysis."[7]

While there is complete agreement with the high praise lavished on the *quality* of the judgment, the decision itself cannot be supported in all aspects. Even high-quality reasoning can be incorrect and opinions may well legitimately differ on the controversial issues the court had to decide. Didcott J, in explaining the detailed nature of the comparative review undertaken in his judgment, recognised this:

> "[T]he account I have furnished illustrates, I trust, how extraordinarily controversial the debate elsewhere has proved to be, how sharply opinions have differed, how widely even those who take the same view have disagreed in their reasons for it, how much there is to be said on both sides."[8]

The purpose of this article is to investigate the question of compulsory blood tests in paternity cases. This will be done by analysing the reasoning in the *Seetal*[9] case against the backdrop of the various rules governing proof of paternity.

2 BLOOD TESTS IN PATERNITY MATTERS

Two types of blood tests can be utilised in determining paternity.[10] The one test (the red blood cell test) involves an analyses of the red blood cells. This test can only be conclusive in excluding a specific male as the father; it can show that he is not the father by showing that he belongs to a different bloodgroup to the one, or ones, to which the father must have belonged. But if it shows that he does belong to such a group (or one of such groups), it only means that he could, along with all the other thousands of males belonging to such a group (or groups), have been the father. This test can never prove that he is the father.[11]

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3 Exceptions do occur: see e g the two English cases decided together in *S v S; W v Official Solicitor* 1972 AC 24 and also *Van der Harst v Viljoen supra.*

4 See on this point Boberg *The Law of Persons and Family* (1977) 323–333.

5 See below 4 2 1.

6 1983 3 SA 827 (N).

7 Case note by Zeffert in 1984 *SALJ* 62.

8 860D.

9 *supra.*

10 See generally Van der Vyver and Joubert *Persone- en Familiereg* (1980) 182–183; Boberg *op cit* 332 n 32.

11 See *Ranjith v Sheela and Another supra.*

The other test is the HLA test, which makes use of an analysis of the white blood cells and is, strictly speaking, not a blood test, although, from the parties' point of view, it involves simply the giving of a blood sample. This test can, depending on the tissue types involved, indicate the biogenetic father with a high degree of probability. In *Van der Harst v Viljoen*[12] the court accepted that the odds were 200 to 1 against the possibility that a person selected at random, would fit into the physiological picture of the father. This test can then offer reliable and positive proof of biogenetic paternity.

For present purposes four important aspects of these tests must be noted:

a They relate to biogenetic paternity, that which is really in dispute, in contrast with the presumptions of paternity which operate on proof or deemed proof of intercourse.[13]

b These tests involve little risk or discomfort to the person undergoing them; little more than a pinprick is experienced.

c Although the man usually relies on these tests, the HLA test can greatly assist the woman in pin-pointing the father[14] especially where she is unsure which of two men is the real father.

d The blood of the man, the woman and the child are all absolutely essential to the conduct of these tests.

The decision in *Seetal* can be considered against this brief background.

3 THE DECISION IN *SEETAL*

3 1 The Facts

The applicant sued the first respondent for a divorce alleging that she had wrecked the marriage by committing adultery. He also sought an order declaring illegitimate the four-year-old son conceived during their marriage while the spouses were still living as man and wife, claiming that the boy was the product of the aforementioned adultery. The sole basis of the averment of illegitimacy was the difference in physical features between the applicant and the young boy. This in turn produced the basis for the inference of adultery. Since physical similarity or dissimilarity is rightly regarded by our courts as of little evidential value,[15] it was essential that the applicant obtained more reliable proof to rebut the presumption of *pater est quem nuptiae demonstrant*. Since the spouses were on intimate terms at the time, his only real chance of success lay in disproving paternity through blood tests. His enstranged wife refused to submit herself or the boy, who was in her custody at the time, to such tests. The applicant then applied for an order directing the first respondent to allow samples of her own and the boy's blood to be taken. This application was resisted by the wife as first respondent and a *curator ad litem*, on behalf of the boy, as second respondent.

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12 *supra*.

13 See below 4 2 1.

14 See *Van Der Harst v Viljoen supra*. It can also be of great assistance where it is uncertain who the mother is: see n 25 below and also *Petersen v Kruger* 1975 4 SA 171 (C) where the tests were decisive in this regard.

15 See Van der Vyver en Joubert *op cit* 183. Cf, however, both cases cited in the previous note.

3 2 The Law

The court distinguished between an application to compel an unwilling adult to undergo a blood test and an application to compel a child to do likewise. With reference to adults, the court held that it had the inherent common-law power to compel persons to submit to blood tests. In exercising this power, the court has to choose between the competing considerations: discovery of the truth or respect for the individuals' right to privacy.[16] It was not necessary to exercise such a choice in *Seetal* because of the different approach the court adopted with regard to children. Since children could not make a decision, there could be no question of compulsion. The court as upper guardian of minors could, however, override the refusal of the custodial parent and consent on the minor's behalf. The sole consideration in this decision was the best interests of the child. In *casu* the court held that, since there were no factors indicating real doubt about the child's paternity, the tests could only be to the child's detriment in that they could prove illegitimacy with consequent loss of maintenance. The application was therefore refused.[17]

4 THE REASONING IN *SEETAL*

4 1 The Power to Compel

The court in *Seetal* came to the conclusion that it did have the inherent common-law power to compel a person to submit to a blood test. In this respect Didcott J took a different view from that expressed in the rather cursory early Transvaal decision of *E v E*[18] where the court denied the existence of such a power. The decision in *Seetal* is clearly correct in this respect. The supreme court has the inherent common-law power to order the search for and discovery of evidence so that the truth will out and justice prevail in litigation. There is no logical reason for limiting this power to procedural matters and there is in fact, as the court indicated, considerable case-law support both in and out of South Africa for the recognition of a wider inherent power.[19] Obviously this power belongs only to the supreme court, the magistrate's court being a creature of statute. The real question is whether it is proper for the court to utilise this power to order blood tests to be done in paternity disputes.[20]

4 2 Compulsion

The court held that different considerations apply to adults and children in respect of whom an order of compulsory blood testing is sought.[21] These two situations will be considered separately.

4 2 1 *Adults*

The court first stated[22] that the mere fact that the result of a compulsory blood test is more likely to aid one party, could not prevail against the consideration that, since the tests may reveal the truth, the interests of justice call for them.[23]

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16 See 830E–834E 860E–862C.
17 862C–866B.
18 1940 TPD 333.
19 See *Seetal* 831H–833E for South African and 834H–860E for other jurisdictions.
20 Didcott J stated that, before the court will use this power, it must be convinced more good than harm will come from judicial intervention (833C).
21 862C: "I turn next to blood tests on children, a different matter altogether, I believe."
22 860F.
23 *ibid.*

An analogous situation exists with regard to the discovery of documents.[24] This approach is undoubtedly correct; a party can hardly rely on the fact that blood tests may show that his case is false, to exclude such evidence from the courtroom.

The court further pointed out that the idea that the truth must be discovered to ensure that justice prevails, cannot be accepted, in its unqualified form, as the guiding principle. Policy demands that the truth shall be discovered only by approved means, hence the bar on illegally obtained evidence, such as forced confessions, irrespective of the truth thereof. Since the single-minded pursuit of truth may cause a person subjected to it harm, other than the emergence of the truth, the harm brought about by the *manner* of the truth seeking, must always be weighed against the idea that the truth must out. The court considered that the only real injustice to a party compelled to submit to a blood test, lies in the invasion of the personal privacy of the party concerned. In other words, the real question is not what price the truth, but what price getting to the truth.[25] As previously pointed out, Didcott J found it unnecessary to decide which of the two competing ideas of respecting privacy and discovery of the truth should prevail. He did, however, make the very valid point that once one is given precedence, it will be decisive of the vast majority of cases as virtually a matter of course.[26] This is surely correct; the choice is really between the two ideas in the abstract, for in the vast majority of paternity cases, the considerations for or against the respective ideas, are very much of a muchness. Also correct is the court's statement that refusals on medical or religious grounds will be excluded from this mainstream, even if the idea of discovering the truth should prevail. These would be special cases. Equally welcome and correct is the robust attitude the court has, by implication, taken with regard to possible charges that compulsory blood tests are akin to an assault.[27] Apart from the (unconvincing) technical reason that the court order justifies the pinprick that is involved,[28] it is (notwithstanding *dicta* in the case law that even the smallest unauthorised physical infringement constitutes an assault)[29] surely a case of *de minimis non curat*

24 See Darrol "We be of One Blood, Ye and I" 1965 *SALJ* 317 321–323 and see also 1961 *MLR* 313, the gist of which is summarised in *Seetal* 836G–H.

25 This is a brief but accurate summary of the court's reasoning on 860H–861C. Yet this holds true only for the "ordinary" paternity dispute. There may well be cases where compulsion will cause more harm than good or, rather, where the truth will bring about a harmful change in the *status quo* (see n 20 above). In the case of "child-switching", e g, the effect could be to wrest a child away from what he has grown to consider as his family (cf the Australian case discussed in *Seetal* (839–840)). In such a case the harmful effects of the truth may legitimately be considered (cf *Petersen v Kruger supra* on such effects). The point is that the court may in these cases, even after the truth has emerged, refuse to grant a change in custody. This is, however, a far cry from the "ordinary" paternity case where money is often the main consideration. Here hiding the truth results in the extortion money that is not due. On a party-to-party basis the protection of the child's interests can never justify the protection of a possible falsehood simply so that he has a source of money at his disposal.

26 861H–862A.

27 861B.

28 See Darrol 1965 *SALJ* 317 321. This is surely a case of picking yourself up by your own bootstraps: the order becomes one of the arguments at a premature stage. The court must decide whether it will order a course of action which prior to its order constitutes an assault. The question is whether the making of the order is justified, not whether the order, if made, justifies the conduct ordered.

29 See e g *Stoffberg v Elliot* 1923 CPD 148.

lex. Taking a blood sample is a routine affair of minor proportions involving very little discomfort and minimal danger which is often readily made compulsory by the legislature.[30]

Having admirably defined the two competing ideas which will (depending on which is preferred), determine whether the court will exercise its inherent powers to compel blood tests, Didcott J refused to state a preference, deciding the case on the issue of testing the child. Indeed, he intimated that it is not really possible to argue on a preference; it is ultimately a matter of personal premise:

> "The clash between the two does not really lend itself to argument. How the conflict is resolved in this country when the law on the point is eventually settled will depend largely on the store the Court then sets by each idea, on its own sense of priority in that regard."[31]

But arguments will have to be found, for judges must give reasons for their decisions. Just as it is possible to argue for the preference of one of these ideas in a special case involving, for example, a health risk, so it is possible to argue for a preference on the general level. Indeed, given the embracing impact of a preference at that level, the point should be argued. It is submitted that in the "ordinary" paternity case, preference should be given to the truth; blood tests should be ordered as a matter of course unless the unwilling party proves special circumstances favouring the preservation of personal privacy.

At present, proof of paternity is dominated by a number of presumptions operating against the male who has had sexual intercourse (or deemed sexual intercourse) with the mother.[32] This is the real basis of the presumption relating to extra-marital intercourse and also of *pater est quem nuptiae demonstrant*.[33] The male who is the victim of either presumption, is in the invidious position that he cannot rebut the presumptions by showing that they also operate against others, for example, other men with whom the woman had intercourse even, if on a purely statistical basis, this may reduce the likelihood of his being the father by 90%.[34] Even if such a defence (akin to the *exceptio plurium concubentium*)

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30 Cf s 37 of the Criminal Procedure Act 51 of 1977 and also the overseas jurisdictions cited in *Seetal* 834H-861A with specific reference to paternity suits.

31 861G.

32 See, *i a*, Labuschagne "Biogenetiese Vaderskap: Bewysregtelike en Regspluralistiese Problematiek" 1984 *De Jure* 58; Davids "Strict Liability in Paternity Cases or Nemo me Impune Tangit" 1965 *SALJ* 448.

33 It is not submitted that this is the sole basis of the presumption of *pater est . . .*: See Labuschagne 1984 *De Jure* 58 66–67 and the instance of children conceived before marriage who are also covered by this presumption. It seems as if the consideration of favouring legitimacy also enters the matter as an additional criterion. It is, however, maintained that this is peripheral. The basis of the institution of marriage is the biological difference between the parties which makes procreative sex possible (see *Joshua v Joshua* 1961 1 SA 455 (G); Van der Vyver and Joubert *op cit* 398–99; *W v W* 1976 2 SA 308 (W) and the *una caro* doctrine). Moreover, the consummation of the marriage played an important role in the early law of marriage in particular. Marriage is almost synonymous with intercourse at a certain stage and unless there is total inconsistency of thought with regard to the presumption arising from pre-marital intercourse, this must form the basis of the *pater est . . .* presumption with legitimacy an additional bonus. Perhaps even more conclusively, the law presumes unmarried women to be virgins; widows and divorcees are not presumed to be virgins, but only to be chaste: Schmidt *Bewysreg* (1982) 161.

34 Cf the sources cited in n 32 as well as Boberg *op cit* 326 n 19. Even if the woman had intercourse with a hundred men during the possible period of conception, the man she indicates is presumed to be the father: this is also the clear result of the view taken in Van der Heever *Breach of Promise and Seduction in South African Law* (1954) 63 and *S v Jeggels* 1962 3 SA 704 (C). Although *LAWSA* vol 9 (1979) par 540 still expresses doubt in this regard, it is difficult to see how the principle in *S v Swart* 1965 3 SA 454 (A) can be interpreted to give a different result.

were open to him, sex is basically a private matter, and, since the woman's sexual partners are most unlikely to offer themselves as witnesses, proof of sexual liaisons with other men may be hard to come by. What the male has to do to rebut the presumption, is to show that he cannot be[35] the biogenetic father by proving that effective intercourse did not take place during the extended period of conception the courts allow.[36] The net result of these common-law presumptions is that once intercourse at any time with the woman in question is proved or presumed,[37] the male can escape liability only if he proves absence of biogenetic paternity by showing that no effective intercourse took place during the possible period of conception. If he cannot, he is regarded as the father. In other words, the common law equated virility with paternity. This equation is not necessarily true, but very little option remained since there was no reliable way of determining the real issue, biogenetic paternity. Indeed, this type of rule whereby a consequence is presumed to have been caused by a certain act if it occurs within a specific period, is not uncommon in the common law.[38] The most obvious example is the rule that if the victim of an assault died within a year and a day, his death was said to have been caused by the assault and *vice versa* where death occurred after this period. The fate of this rule[39] is interesting: it has been rejected in modern law because it owed its origin to the absence of medical expertise which could prove the real issue: namely, whether the assault actually caused the death in question.[40] Once medical proof became available, there was no room for a rule which may well reflect an untruth in a particular case. In spite of the obvious analogy, it is not submitted that the various presumptions regarding paternity be judicially abolished *in toto* as outdated. Medical science cannot, as yet, in each case indicate the father with overwhelming certainty.[41] Medical science and the presumptions should correct each other at this stage of development. But the woman cannot have her cake and eat it; the very basis of these presumptions which lend almost invincibility veracity to her identification of a father, has been seriously eroded by the development of reliable medical techniques aimed at proving the real issue in dispute, biogenetic paternity. She cannot simply refuse to have anything to do with these techniques and rely on these presumptions which originated in a bygone age. Moreover, presumptions find their justification in some logical *nexus* between what is presumed and what is necessary to trigger the presumption coupled, sometimes, with the difficulty of proving what is to be presumed.[42] The presumptions of paternity, the way in which they could be rebutted, and paternity itself had a certain *nexus* in the common law where birth control was at a very primitive stage and pre-marital sex, especially with a number of persons, was very much

35 Cf Boberg *op cit* 326 n 19: "[H]e must prove he is not the father, not that he may not be the father".

36 See Labuschagne 1984 *De Jure* 58 64–66. By "effective" is meant intercourse resulting in conception, not the quality of love-making.

37 in the case of marriage. See n 33.

38 The presumptions of paternity differ in that they contain an inference of continuity to bring intercourse within the possible period of conception: see Davids 1965 *SALJ* 448 450.

39 Although termed a rule, it was not absolute and could be rebutted, at least as regards deaths within the period. It operated, therefore, more like a presumption.

40 See *S v Gabriel* 1970 3 SA 442 (R).

41 See *Van der Harst v Viljoen supra.*

42 See e g Van der Merwe Morkel Paizes Skeen *Evidence* (1983) 371–372.

taboo. In modern society birth control and pre-marital sex (and perhaps extra-marital sex too?) are rather commonplace[43] and since this is a matter of logic, the morality of these practices is irrelevant to the present enquiry. Both the reason for, and the logic behind, the presumptions which favour a mother's testimony on paternity, have therefore disappeared. This, together with the judicial removal of the need for corroboration of her statement that intercourse did take place,[44] make it imperative that if our legal system is to maintain its reputation for virility by adapting to changing circumstances,[45] the present law should be modified. The obvious modification would be to allow the medical evidence offered by blood tests full rein by insisting on it whenever paternity is disputed. The small price the woman (and the child) has to pay, the slight infringement of her right to personal privacy, is not even a *quid pro quo* for the benefit of the various presumptions which lend credence to her version of paternity.[46] It must always be borne in mind that the fact that the blood tests may prove her wrong, is not a valid consideration: the presumptions were intended to reflect the truth and not to be used to deny it. If the mothers in paternity cases could not rely on these presumptions, they would surely be the first to apply for compulsory blood tests. Having created an imbalance when no alternative was available,[47] it is now the law's task to redress that imbalance.

The second main reason why the discovery of the truth should prevail over a right of privacy, is concerned with the right of privacy itself. The exact ambit of the right is by no means clear in our law.[48] Obviously, it does not *in casu* relate to the negligible amount of discomfort caused by the physical infringement involved in the taking of a blood sample. This physical infringement relates more to the right to one's person (*corpus*),[49] and may for the reasons stated above, be dismissed from consideration. In general and simple terms, one's right to privacy relates to one's right to be left alone, to have an inviolable sphere of personal security.

It is difficult to see how this can play a significant role in the present enquiry. The parties are in open court often enquiring into and exposing, the most intimate details of each other's personal life. Past affairs, impotency, sexual habits are but some of the issues aired in open court. Surely, the inherent infringement of privacy in compelling a blood test pales into insignificance next to these issues – especially if it is considered that such a test may well obviate the need for the humiliating experience of undergoing a searching examination of one's personal and intimate experiences by strangers. Apart from the actual physical discomfort

43 Cf Labuschagne 1984 *De Jure* 58 58–59 on the numbers of illegitimate children.

44 *Mayer v Williams* 1981 3 SA 348 (A).

45 Cf the oft-cited dictum in *Blower v Van Noorden* 1909 TS 890 905: "There come times in the growth of every living system of law when old practice and formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions."

46 The interests of the child are very much identical to those of the mother: a source of income or legitimacy.

47 It seems as if at least some of the uncompromising features of these presumptions were the result of relatively recent case law (up to 1965, the decision in *S v Swart supra*): cf the sources cited in n 32.

48 See McQuoid-Mason *Law of Privacy in South Africa* (1978) ch 1. This work is the first real South African attempt to give doctrinal credence to this right.

49 McQuoid-Mason *op cit* 164 regards certain infringements of bodily integrity such as blood tests without consent as infringements of privacy.

which is not *in pari materia*, (but is in any event minimal), it is difficult to accord high priority to privacy in cases of paternity, especially since the legislature has indicated a policy preference by allowing like invasions to prevent fraudulent claims.[50]

It is therefore submitted that both legal reasoning and policy favour an order compelling unwilling parties to undergo blood tests in disputed paternity matters. Especially if the serious consequences for the innocent defendant, who is condemned as a result of mere presumptions, are taken into consideration, the inescapable conclusion is that the discovery of the truth should enjoy precedence over the infringement of the right to privacy in run-of-the-mill matters.[51]

4 2 2 *Children*

Merely compelling the supposed parents to undergo a blood test will, of course, be a futile exercise unless a sample can be obtained from the child in question. In *Seetal* the court took the following view of compulsion in this respect:

> "What makes the difference is the nature of the problem, which concerns not compulsion so much as consent. No longer is one dealing with an adult who might have consented to a blood test on himself but has not, and considering as a result whether the Court should compel him to be tested. The enquiry has now to do with a child incapable in the first place of either giving or withholding consent, with a consent which can be given or withheld only by another acting on his behalf. No issue of compulsion really arises in such a case. Should the person whose consent is required decline to furnish it, a Court determined to overrule him has no occasion to compel him to give it or the child to be tested without it. The Court simply exercises the power of an upper guardian, as we call it here, by supplying its own consent."[52]

The supreme court as upper guardian of all minors can, in other words, consent to the taking of a blood sample for forensic purposes on behalf of a minor, in the process overriding the refusal of the person who is required to give it. Functioning as upper guardian in this respect, the only consideration the court must take into account is the best interests of the child. This is the only way in which a parent's refusal to let a blood sample be taken from the child, can be overcome.[53]

If the judgment in *Seetal* is open to fundamental criticism, it is on this very point, namely, that the supreme court's consent based on the best interests of the child, is the only way in which a blood sample can be obtained, once the required consent has been refused. This view is open to criticism on a wide front. First of all, it overemphasises the supreme court's role as upper guardian at the expense of the judicial function of the court. Its primary function is to dispense justice according to the law of the land on an equal basis to all parties appearing before it. Minors or children are not entitled in this process to any treatment different to that meted out to any other person. If an adult can be compelled to submit to a blood test, precisely the same considerations should

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50 See McQuoid-Mason *op cit* 163 who cites compulsory medical examinations in personal injury cases.

51 In order to avoid needless repetition, I have not attempted to give an exhaustive account of all the pros and cons of compulsory blood tests; these have been canvassed elsewhere: see, *i a*, Darrol 1965 *SALJ* 317; the arguments in the overseas cases and articles cited in *Seetal* 834H–860; McQuoid-Mason *op cit* 163–164.

52 860D–E.

53 860F–861A.

apply in deciding whether the child should likewise be compelled.[54] The only considerations here are once again the idea that the truth should be discovered as opposed to the protection of the right to privacy. The supreme court's role as upper guardian is very different: it really supervises the parental power exercised over the minor and can interfere when this is not exercised in accordance with the sole criterion, the best interests of the child.[55] Provided then that compulsion is possible with regard to a child, the supreme court can play a dual role in paternity cases: as upper guardian of all minors, it can, even if the relevant parent has refused permission, consent on behalf of the minor to a blood test if it is convinced that this is in the best interests of the child. But it can also compel the child, who is to be treated on the same basis as an adult for this purpose, to undergo a blood test if the search for the truth prevails over the child's right to privacy.

The central question is whether a child can be compelled to undergo a blood test, for if this is a legal impossibility, *Seetal* must be correct in holding that the only alternative is the overriding consent of the supreme court as upper guardian. The court in *Seetal* answered this question in the negative owing to the child's inability to give personal consent. Consent of others on his behalf was not regarded as sufficient to give rise to such a clash of wills that compulsion could enter into the picture at all. The problem with this view, backed as it is by scant explanation, is that it runs counter to established principles of our law. The persons (usually the parents) whose consent is required, have been described as the agents of the child;[56] their refusal is in law the child's refusal. This is not only a technical argument: it must be so, otherwise the consent of his parents or even the supreme court is still not the child's consent and cannot justify a blood test. This leaves the spectacle of a non-consenting consenting child. The

54 Cf, eg, the minor's liability for delict. The court's function is to establish whether the requirements for liability, which may take age into consideration, have been met. No favouritism is shown the minor purely because the supreme court happens to be his upper guardian. In such cases the court's only "extra" concern should be on procedural issues, that the minor is adequately represented. It exercises its functions of arbitrament (see *S v S; W Official Solicitor supra*) not its functions as upper guardian. To prefer the interests of a minor on an *a priori* basis to that of a male who may be wholly "innocent," is an unwarranted deviation from equal treatment (especially if the male also happens to be a minor!) Where a minor claims from his "parent," he is to be treated as an ordinary litigant. Also cf n 33.

55 Cf *Petersen v Kruger supra* 175: "Die beperkings hierbo na verwys vloei voort uit die gesag van die hof as oppervoog van alle kinders verleen om, waar die belange van 'n kind dit vereis, die ouerlike regte ten opsigte van sy kind in te kort . . . enige grond wat op die welsyn van die kind betrekking het kan as rede vir die hof se inmenging dien. By 'n hof weeg die belange van die kind die swaarste, maar die regte van die ouers moet nie buite rekening gelaat word nie." See also Boberg *op cit* 421 n 2 and the cases there cited, as well as the exposition by Van der Vyver and Joubert *op cit* 533–535.

56 Spiro *Law of Parent and Child* (1971) 101. See also Van der Vyver and Joubert *op cit* 123 who state with reference to the conclusion of contracts: "Hy moet van 'n orgaan gebruik maak om vir en namens hom . . . die bedoelde soort kontrakte te sluit. Die (psigiese) wilsuiting van die orgaan word juridies aan die infans toegereken." The parent can, it seems, refuse on two grounds: he may refuse on his own behalf in the exercise of his paternal power in the same way that he can refuse permission to go to a disco, or, he may refuse on behalf of the child in the exercise of his guardianship. This distinction is of no significance for present purposes. Irrespective of the ground for refusal, the court, may, as upper guardian, override it and the main point remains: consent by the child *via* the relevant organ is possible.

point is that once consent on behalf of the child has been refused, albeit by the supreme court, there is no logical reason why compulsion to override this refusal cannot be brought to bear.

Moreover, it is doubtful whether it is a logical axiom that before you can compel someone to do something, he must actively declare his resistance to it.[57] Parties can be compelled to give further particulars without being first required to refuse to do so. Similarly, section 37 of the Criminal Procedure Act 51 of 1977 allows the taking of a blood sample for certain purposes. It is obviously wide enough to authorise compulsion where a person who is "willoos dronk," resists.[58]

If the court's construction is carried to its logical conclusion there will be no authority to compel the defendant in the following hypothetical case:

X, a 24-year-old male, has an adulterous relationship with Z. As a result she falls pregnant and gives birth to a son. Anxious to ensure a good start for the boy she sues X. In the light of the *pater est* . . . presumption her best chance of proving paternity is to obtain blood tests. X was, however, before the action was instituted, involved in an accident and the prognosis is that he may remain in a coma for the next twenty years. His curator refuses permission for blood tests, holding that they are not in X's interest. X is a millionaire, Z and her husband penniless.

If *Seetal* is followed, the court cannot order compulsory blood tests on X, X cannot consent or refuse and his curator is only someone acting on his behalf. Nor can the court consent on X's behalf; he is not a minor. Such a result is absurd, and although an extreme example, it shows that the reasoning in *Seetal* is faulty in this respect. The same absurdity follows if the "father" waits till the child is twenty-one and then institutes proceedings; compulsion would then be possible.[59]

It is therefore submitted that the decision in *Seetal* is wrong in holding that the court's power to authorise a blood test on a child is limited to the giving of overriding consent as upper guardian of minors acting in the best interest of the child. The child, like any adult, can be compelled to undergo a blood test. Indeed, since the child cannot himself object, one deals in a sense with a less serious infringement of privacy than is the case where an adult expressly refuses to undergo a test, but is compelled by the court to do so.[60]

4 3 Consent

It is quite clear that blood tests may be performed on all the parties involved with their consent. But this matter is free from difficulty only if there is full co-operation between all the parties. If not, a number of difficulties may arise.

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57 Depending on the circumstances, the mere fact that a person has not consented, as opposed to an active and express refusal, qualifies coercive efforts as compulsion. It seems that once the person is *nolens volens*, compulsion is possible: *SAR & H v Cruywagen* 1938 CPD 219 223. Once it is accepted that there *can be* a refusal by the *infans* through his representative, compulsion becomes a logical reality. Moreover, a child under 14 who commits a "crime" in the presence of a parent is presumed to have acted under coercion (compulsion). See Claassen *Dictionary of Legal Words and Phrases* 1 (1975) 268–269. Must it then be assumed that 7 years is the start of compulsion?

58 In such a state consent is impossible; similarly, where the presumed father becomes insane. Applied to other fields, it would mean that a company can never be compelled to do something.

59 Presumptions of paternity may apparently be rebutted at any time – there is no time limit: see Spiro "Legitimate and Illegitimate Children" 1964 *Acta Juridica* 53 58.

60 Compulsion in the face of express refusal seems more severe than compulsion in the absence thereof. Moreover, the right to privacy relates to one's feelings of personal dignity which are not yet so developed in the *infans* in this special sense.

4 3 1 *Consent on Behalf of the Child*

In the case of an obviously illegitimate child, this gives rise to no problem. His mother is the person who must furnish consent on his behalf. Difficulties arise where the parties are married and illegitimacy is alleged. Can the "father" and husband take the child to have a blood test without the wife's consent? After all, he is the child's legal guardian, at least until the parties are divorced.

The situations in *Seetal* and *E v E*[61] were very similar to the case put forward here. In both cases the parties had been married and a divorce was pending with the child in the custody of the mother. The issue now canvassed did not arise directly in *Seetal*, but the court assumed that the mother's consent was necessary. In *E* the father, *inter alia*, requested access to the child in order to obtain a blood sample. This was refused by the court since the purpose was not to advance parental interest or the child's welfare. What would have been the situation if the "father" in these two cases had been cunning enough to postpone separation until after he had obtained the blood samples? Or, if, in *E* (where the wife was willing to give a sample but refused on the child's behalf) the "father" first obtained a sample from the mother and then while visiting him, whisked the child off and had a sample taken?

Although no clear guide-lines exist, the following approach seems sound: The consent of both married parties is required before a child may be submitted to a blood test (this is consistent with the idea that parental power is exercised jointly). Although it is attractive to argue that the mother alone can furnish consent where she has custody, this leads to difficulty. First of all, it favours the custodian parent (who may be the father) unfairly at the expense of the other. Custody was never meant to give an opportunity to obtain evidence in paternity cases.[62] Other problems will arise where the non-custodian parent has temporary custody or where custody has not been clearly separated, that is, for example, where the parties are still living together. In principle, the court should refuse to allow any blood test as evidence unless both "parents" have agreed that the child submits to it; if procured in other ways, it must be excluded as being illegally obtained evidence.

This is the only sound policy to prevent "kidnapping" and other dishonest means to obtain samples – practices which would reduce the child to a mere pawn in litigation. In the vast majority of cases it would mean that the mother's consent is required. If it is refused, the court can be asked either to compel the giving of a sample or to lend its overriding consent to it.

4 3 2 *Minor Child's Consent*

The question arises whether the child himself can give the necessary consent as soon as he is old enough to appreciate the nature of the proceedings and, if not, whether his consent at such a stage becomes an additional requirement. This is a valid enquiry since the *volenti non fit injuria* doctrine which would justify the infringement of his bodily integrity which the taking of the sample involves, applies to minors as soon as they have the necessary appreciation of what is

61 *supra*. Similar difficulties can arise whenever there has been a marriage and the parties are divorced and alive.

62 This is clearly implied in *E v E supra*.

involved.[63] Similarly, legislation provides that 18-year-olds can validly consent to a medical operation without parental consent.[64] It is submitted that the consent of a minor child, even if he is capable of giving it in the sense expressed above, is neither sufficient on its own, nor necessary in addition to that of the person who must consent on his behalf. The main issues at stake in paternity issues are financial: maintenance and inheritance in particular.[65] Minors do not have full contractual capacity, and, given the issues at stake in paternity proceedings, the analogy is clear: the pinprick to obtain the sample is not the heart of the matter.

Such problems will arise very infrequently, since proceedings will almost always take place while the child in question is still an *infans*; but what about the mother and the "father"? It is by no means rare in this country for the parents of illegitimate children to be minors themselves. Can they themselves consent to blood tests? If not, and if the female or the male's guardian refuses consent because it would not be in the best interests of the party concerned, has the supreme court no powers of compulsion? It is submitted that, since what is at stake is mainly patrimonial interests, the guardian's consent is necessary and that in the event of a refusal, the supreme court, *contra* to what was stated in *Seetal*, does have the power to compel blood tests.

4 3 3 *Consent by the Supreme Court*

The court in *Seetal* had the power to consent to the taking of a blood sample from the child, the guiding principle in deciding whether to give or withhold consent being the best interests of the child. Consent was refused, since the court held that the tests could in the circumstances be relevant only if they proved illegitimacy. This would not be in the child's interests, for illegitimacy still carries some stigma in our society; what is more, and this was held to be decisive, this would also deprive the child of the financial provision which the husband would otherwise have to provide. The general approach was said to be that of a reasonable parent, mindful of the child's interests.

The court's findings on this aspect can be wholly endorsed. The one benefit from a blood test proving the applicant to be the father, namely, that he would then act as a true father of the child[66] rather than a resentful source of revenue, was, not surprisingly, not mentioned by the court. In the circumstances, the parties being in the process of an acrimonious divorce, this was a rather dubious possibility. What is noteworthy is how radically the court's role as a guardian deciding on consent differs from its role as a court of law *stricto sensu* in deciding on compulsion. The only consideration in the giving of consent is the best interests of the child. Indeed, here the decisive factor is that the truth may well be unpalatable and is thus to be avoided; while, in the issue of compulsion, the consequences the truth may hold for the parties are irrelevant. There the only[67]

63 See Strauss 1964 *THRHR* 116 123–125, Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 95.

64 See Boberg *op cit* 455–56. This raises the interesting question: exactly when does compulsion become possible, if *Seetal* is assumed to be correct?

65 See *Seetal* 865H–866B.

66 Cf Darrol 1965 *SALJ* 317 322.

67 but see n 25.

consideration is not: "what price the truth?" – that is irrelevant – but: "what price getting to the truth?"

The only dubious part of the court's reasoning is the argument that if the child were discovered to be illegitimate *in casu*, he would have no substitute to turn to for maintenance. The husband, after all, did not name any party as the adulterer. There seems to be a ready answer to this. If the husband is not the father, some one else must be and that person should be known to the mother. The husband can hardly bear the responsibility of identifying him. Yet, from the child's point of view, this approach is correct: a bird in the hand is worth two in the bush, especially since the court is in a position very different to that of the mother.

4 3 4 *Refusal of Consent and Adverse Inferences*

It is a moot point in our law whether an adverse inference may be drawn from a party's refusal to submit to a blood test. In English law there is legislation providing that inferences may be drawn from such a refusal[68] but even as an expression of policy, it is not quite in line with the South African situation. The English legislation envisages, first, a court order to submit to tests, then a legitimate refusal by the one party to comply with the court order, and then the drawing of an adverse inference from this refusal which may lead, in certain circumstances, to the dismissal of the claim without evidence if the claimant (refuser) relies on a presumption of paternity.[69] No doubt the South African courts can legitimately take the same view once a party refuses to comply with an order to submit; it is in any event better to take this line of action than the one which strict law demands: since there is no right of refusal the party must comply with the court order or find himself in contempt of court.[70]

The South African problem lies at an earlier stage: if a party refuses the request of the other to submit to a blood test, may an adverse inference be drawn? On principle there seems no reason why it should not. Blood tests may affirm or establish the truth; they cannot cause unjustified doubt and therefore no party would refuse to undergo them unless he fears the truth. Unless there is therefore a sound reason (for example, religion or health) for it, a court may justifiably infer that a refusal was inspired by a fear that the truth would emerge.[71]

This was clearly also the view held by Didcott J in *Seetal* although it was obviously not necessary to decide on this.[72] The trouble is that if the reasoning in *Seetal* is correct, an adverse inference cannot be drawn from a refusal if the person concerned also has to consent to the child's test. It must always be borne in mind that samples from the man, woman and child are necessary. If any one is missing, the exercise is futile. In *Seetal* the wife had to decide whether the child should submit to a blood test. She refused. Obviously no adverse inference can be drawn from this: she has done her job of looking after the child's interests most properly. The supreme court came to exactly the same conclusion when cast in the same role, that of guardian. It can hardly draw an adverse inference

68 See the Family Law Reform Act 1969 s 20 21 23.
69 s 21.
70 See, as regards the various alternatives, Darrol 1965 *SALJ* 317.
71 *ibid.*
72 See *Seetal* 830D 849C–D.

if the parent comes to the same conclusion as it did. The point is that in deciding whether consent should be given on behalf of the child, the parent must consider the child's best interest only and that may well be served by not pursuing the truth too arduously. If the child does not stand to gain appreciably from such tests, consent must be refused. Since the child's blood is vital, it would simply be perverse to draw an adverse inference from the mother's refusal to consent to a blood test on herself. As far as the man is concerned, different considerations apply. Should an unmarried mother request a blood test and he refuses, an adverse inference may be drawn.[73] If *Seetal* is correct in holding that blood from a child can only be obtained *via* consent and not compulsion, adverse inferences can almost never be drawn from the mother's refusal to submit herself or the child to blood tests. The position of the man has thus worsened in this evidential respect *vis-à-vis* that of the woman.

5 THE RESULT OF SEETAL

The concern is with the effect of *Seetal* on the run-of-the-mill paternity case. Assume that X, an unmarried mother, sues Y in a paternity dispute and proves that sexual intercourse has taken place. Not being impotent or sterile, Y realises that his only real chance of proving that he is not the biogenetic father, is by submitting to blood tests. He requests X to consent to a test on herself and the child. She refuses. He asks the court for a compulsion order. The court is willing to grant one in X's case, holding that the truth should prevail over her right to privacy. The order in respect of the child is refused; Y is wealthy and X has a strong case against him: blood tests can only reveal a truth detrimental to the child. Obviously the child's best interest, the sole criterion, demands a refusal. Y goes to the trial court and asks that an adverse inference be drawn from X's refusal to consent. The court holds that this is impossible, her refusal flows from the proper discharge of her duties as a guardian, vindicated by the earlier supreme-court decision.

Yet if the situation is reversed in such a manner that it is the woman who seeks the tests, the chances are very good that the court will compel the man to undergo them. Any refusal by him will, unless a sound reason for it is given, almost certainly serve as the basis of an adverse inference. The net result is that the medical proof afforded by blood tests, instead of serving to rectify the inherent uncertainties in time-worn presumptions which equate virility with paternity, in practice provides another weapon to be used mainly against the man in paternity disputes.

The objection is not against the loading of the judicial dice against the man in favour of the truth in the run-of-the-mill paternity case; it is against the imbalance that is caused by not also loading it against the woman in favour of the truth. The root of the trouble is the finding in *Seetal* that the child cannot be compelled to undergo a blood test.

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73 Even if the court has decided not to compel him to undergo it, if such preliminary proceedings are brought, an adverse inference may yet be drawn in appropriate circumstances. Different considerations apply; the court may shrink from compulsion for a variety of reasons, while the individual's refusal may be prompted by entirely different reasons.

6 CONCLUSION

The fundamental flaw in *Seetal v Pravitha* is the notion that unlike an adult, a child, cannot be compelled to undergo a blood test; the court can only supply overriding consent on the basis of the best interests of the child. The supreme court's role is thus limited to that of upper guardian in such an application, it being impossible to discharge its fundamental function of dispensing justice equally to those before it in terms of the law of the land. It is submitted that the incorrect nature of this approach and the untenable results to which it leads have been clearly demonstrated.

The correct approach holds that the court can compel any of the parties to a paternity dispute to submit to a blood test and that this should be the *standard* approach, since the idea that the truth should be discovered, should in this respect prevail over the idea that personal privacy should be respected. Should a party fail to heed the order to submit to a blood test, his case, whether as plaintiff or defendant, should simply be dismissed on the basis of a conclusive adverse inference. In addition, the court has, as upper guardian, the authority to supply overriding consent on behalf of a child to a blood test if this is in the best interests of the child. If compulsion becomes the norm, instances where consent is sought will obviously be rare. This will spare our legal system the discomforting phenomenon of a court, albeit in its role as guardian, electing not to search for the truth for fear that it may destroy the benefits a falsehood created by presumptions, has brought the child.

It is submitted that the proposed approach is not only logical and in accordance with legal principles, but also fair and in keeping with the *mores* of modern times. The existing presumptions of paternity originated from the equation of virility with paternity in a time when medical proof of paternity was non-existent. The proposed approach amalgamates the presumptions and medical proof to ensure that what is really in dispute, biogenetic paternity, can be established with a fair degree of certainty. Medical proof must take its rightful place in paternity matters to ensure that justice is done to all parties. In contrast the approach in *Seetal* results, quite unintentionally, in an unfair advantage for the female litigant in the run-of-the-mill paternity dispute.

But, at the end of the day, when all has been said and done, one feels that perhaps all the intricate legal arguments have obscured, rather than highlighted, what is perhaps the most important consideration in the compulsion/consent debate regarding blood tests in paternity cases: that is the gut feeling the ordinary person has that all this talk about rights of privacy and interests is simply eyewash; the real reason why a party refuses to submit to blood tests, is that he fears the truth.[74]

74 This distinguishes this situation from the truthful confession extracted by torture. There the method is more feared than the truth, here the truth is more feared than the method.

Die nalatige veroorsaking van suiwer ekonomiese verlies – aanspreeklikheidsbegrensing

E Schoeman
BLC LLB
Lektrise in Inleiding tot die Regswetenskap, Universiteit van Suid-Afrika

SUMMARY

Pure Economic Loss Caused Negligently – Limitation of Liability

In principle pure economic loss, caused negligently, can be recovered *ex lege Aquiliae*. However, our courts seem hesitant to grant such claims for fear of indeterminate liability. Thus the question is how to limit liability effectively.

A brief survey of Anglo-American case law (with specific reference to English and Australian case law) reveals two main criteria which are used, namely foreseeability and policy. Foreseeability had its origin in the "neighbour principle" in the well-known case of *Donoghue v Stevenson* 1832 AC 562. Its subsequent development through the cases culminated in a redefinition of the foreseeability test in respect of pure economic loss, namely the test of the "specifically foreseeable plaintiff." It is submitted that, in the South African context, this test should rather be formulated in terms of a subjective knowledge test in order to avoid confusion between unlawfulness and negligence. This test implies that if the defendant *knew* that, as a result of his conduct, the plaintiff as an identified individual or as a member of a limited class would suffer a loss, the defendant had a duty (*regsplig*) to avert the loss.

Policy factors, on the other hand, are rather vague and undefined. Policy as such proves to be an ineffective means of limiting liability in cases concerning pure economic loss. It is submitted that legislation will provide more certainty in this regard.

1 INLEIDING

Op die gebied van Aquiliese aanspreeklikheid het die term "suiwer ekonomiese verlies" betrekking op finansiële verlies wat nie voortspruit uit die fisiese beskadiging van die eiser se saak of besering aan die persoon van die eiser self nie. 'n Eenvoudige feitestel kan ter illustrasie dien: A bestuur 'n stootskraper. Deur die nalatige optrede van A word 'n elektrisiteitskabel beskadig. As gevolg hiervan word die elektrisiteitstoevoer na fabrieke B, C en D vir twee dae onderbreek. Die fabrieke ly onderskeidelik R500 000, R200 000 en R300 000 skade ("suiwer ekonomiese verlies") weens die staking van produksie.

Daar bestaan geen twyfel meer dat suiwer ekonomiese verlies in beginsel *ex lege Aquiliae* in die Suid-Afrikaanse reg verhaalbaar is nie.[1] Probleme ontstaan

1 Boberg *The Law of Delict* (1984) 107 en die gesag daar aangehaal. Van der Walt *Delict: Principles and Cases* (1979) 35.

egter met betrekking tot die vraag na aanspreeklikheidsbegrensing. Aangesien suiwer ekonomiese verlies enorme bedrae kan beloop (sien die voorbeeld hierbo), is oewerlose aanspreeklikheid 'n wesenlike gevaar.[2] In die bespreking wat volg, word die probleem van aanspreeklikheidsbegrensing met betrekking tot die nalatige veroorsaking van suiwer ekonomiese verlies ondersoek. Die veroorsaking van suiwer ekonomiese verlies weens nalatige wanvoorstelling word grootliks buite rekening gelaat, aangesien die aanwesigheid van 'n wanvoorstelling ander oorwegings na vore bring.[3]

Ten einde die probleem van aanspreeklikheidsbegrensing in perspektief te plaas, word vervolgens baie kortliks aandag geskenk aan die Engelsregtelike *duty of care*-leerstuk.

2 DIE *DUTY OF CARE*-LEERSTUK

Volgens Millner stel die reg twee toetse vir die bepaling van 'n *duty of care*:

a die skade moes sodanige gewees het dat 'n redelike man dit sou voorsien en daarteen sou gewaak het;

b die aard van die belang waarop inbreuk gemaak is, moet 'n belang wees wat deur die reg teen nalatige optrede beskerm word.[4]

Hieruit blyk dit duidelik dat die toets vir die redelike voorsienbaarheid en voorkombaarheid van skade by die bepaling van die *duty* terminologies presies dieselfde toets is as die redelike-man-toets by nalatigheid.[5] Volgens Millner se formulering is dit egter duidelik dat die tweede toets niks met redelike voorsienbaarheid te doen het nie, maar eerder 'n metode verskaf om op grond van beleidsoorwegings beheer oor aanspreeklikheid uit te oefen:

> " 'Duty' in this sense is logically antecedent to 'duty' in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature."[6]

Van der Walt onderskei ook duidelik tussen die voorsienbaarheidstoets ter bepaling van 'n *duty* en die voorsienbaarheidstoets vir nalatigheid. Volgens hom het eersgenoemde toets met beleidsoorwegings te doen:

> "The foreseeability test as a determinant of duty is therefore more often than not founded on considerations of reason and policy."[7]

Die *duty of care*-leerstuk was al, weens die dualiteit daarvan, die skyf van baie kritiek.[8] Ten spyte hiervan figureer dit prominent in die Engelse reg; trouens,

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2 Die waarskuwing van Cardozo CJ word dikwels in hierdie verband aangehaal: "If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class" – *Ultrameres Corporation v Touche* 1931 174 NE 441 444. Dit staan ook bekend as die "floodgates argument": Rogers *Winfield and Jolowicz on Tort* (1984) 78.

3 Sien in hierdie verband Neethling en Potgieter "Nalatige Wanvoorstelling as Deliktuele Aksiegrond" 1980 *De Rebus* 179.

4 Millner *Negligence in Modern Law* (1967) 25.

5 *Kruger v Coetzee* 1966 2 SA 428 (A) 430E–F.

6 Millner *op cit* 230.

7 Van der Walt *op cit* 26.

8 Sien bv Winfield "Duty in Tortious Negligence" 1934 *Col L R* 41 43 en aan die Suid-Afrikaanse kant Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 134; Boberg *op cit* 31; hr Rumpff in *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833C.

dit vorm die hoeksteen van die *tort of negligence*. Ook in Suid-Afrikaanse beslissings word meermale met die *duty of care*-leerstuk gewerk. Dit is juis twee aspekte van die leerstuk, naamlik redelike voorsienbaarheid en beleidsoorwegings,[9] wat in ons reg in twee probleemkinders ontaard het. Derhalwe is dit insiggewend om in hierdie verband op ontwikkelinge in die Anglo-Amerikaanse reg ag te slaan.[10]

3 ANGLO-AMERIKAANSE REG – ENKELE BELANGWEKKENDE BESLISSINGS

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[11] is aanspreeklikheid vir suiwer ekonomiese verlies vir die eerste keer in beginsel erken. Hierdie saak het egter op 'n nalatige wanvoorstelling wat suiwer ekonomiese verlies veroorsaak het, betrekking gehad. Ten einde 'n *duty of care* daar te stel, moes daar volgens die hof 'n *special relationship* tussen die partye bestaan het. Aangesien die *special relationship* aan die hand van faktore soos die erns waarin die stelling gemaak is, bepaal moes word,[12] is dit duidelik dat hierdie toets nie aangewend kan word in gevalle van suiwer ekonomiese verlies wat buite die sfeer van nalatige wanvoorstelling val nie.

Voor die beslissing in *Hedley Byrne* het die howe die *neighbour principle* van *Donoghue v Stevenson*[13] gebruik om nuwe *duty-situations* te skep. Die *neighbour principle* berus op redelike voorsienbaarheid:

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts which you can reasonably foresee would be likely to injure your neighbour... The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question."[14]

Die *neighbour principle* is egter, volgens Symmons, dikwels gebruik om as dekmantel vir die aanwending van beleidsoorwegings te dien.[15] Symmons is trouens van mening dat Lord Pearce in die *Hedley Byrne*-saak die voorsienbaarheidstoets van *Donoghue v Stevenson* 'n gevoelige slag toedien deur te verklaar dat dit hoofsaaklik sekere beleidsoorwegings was wat die oplegging van 'n *duty* in die geval van suiwer ekonomiese verlies weens nalatige wanvoorstelling in die verlede

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9 Ek verkies om 'n duidelike onderskeid tussen redelike voorsienbaarheid en beleidsoorwegings te maak. Hoewel beleidsoorwegings moontlik aanvanklik by redelike voorsienbaarheid betrokke was, of tot die redelike voorsienbaarheidstoets aanleiding gegee het, het redelike voorsienbaarheid as 'n konkrete maatstaf uitgekristalliseer. (Hierop word later in die artikel uitgebrei.) Beleidsoorwegings, daarenteen, is faktore wat nie eksakte maatstawwe verteenwoordig nie, maar soos die naam aandui, blote oorwegings is.

10 Dit is nie my bedoeling om die hele spektrum van Anglo-Amerikaanse reg m b t suiwer ekonomiese verlies te bespreek nie. Ek sal slegs op Engelse beslissings en 'n enkele Australiese beslissing konsentreer. Vgl ook die volgende woorde van hr Rumpff in die *Trustbank*-saak *supra* 832H: "Dat by 'n oplossing van die begrensingsprobleem sekere faktore in die Engelse reg in aanmerking geneem word wat ook in ons reg oorweeg sou kon word, val natuurlik nie te ontken nie."

11 1964 AC 465.

12 Sien 529.

13 1932 AC 562.

14 580.

15 Symmons "The Duty of Care in Negligence: Recently Expressed Policy Elements" 1971 *MLR* 394.

verhinder het.[16] Dat Lord Pearce se stelling egter nie 'n einde gemaak het aan die toepassing van die *neighbour principle* in gevalle van suiwer ekonomiese verlies nie, selfs waar wanvoorstelling ter sprake kom, sal aanstons duidelik blyk.

In *Weller & Co v Foot and Mouth Disease Research Institute*[17] het 'n virus as gevolg van die nalatigheid van die verweerders (die instituut) ontsnap. Slagvee is besmet en die eisers (afslaers) stel 'n eis in vir suiwer ekonomiese verlies weens die sluiting van die mark vir ses dae. Die verweerders het die verweer geopper dat al sou hulle erken dat hulle nalatig was, dat die verlies van die eisers voorsienbaar was en dat hulle die skade veroorsaak het, die eisers nogtans geen aksie sou hê nie, aangesien die spesifieke tipe skade (naamlik verlies aan wins) nie verhaalbaar is nie. Die verweer word gehandhaaf. Volgens *Clerk and Lindsell*

> "[t]his shows the relevance to a duty of care situation of the recognition of the kind of harm and that a plaintiff fails *in limine* unless the damage in suit is recognised at law. This requirement is independent of carelessness and foreseeability of harm to the plaintiff."[18]

Dit is duidelik dat die hof in hierdie saak gekonfronteer is met 'n stel feite wat hul tot oewerlose aanspreeklikheid geleen het. Die redelike voorsienbaarheidstoets, soos uiteengesit in *Donoghue v Stevenson*,[19] sou ook nie in hierdie geval aanspreeklikheid bevredigend kon beperk nie. Die regter se vae verwysings na beleid:

> "The world of commerce would come to a halt and ordinary life would become intolerable if the law imposed a duty on all persons at all times to refrain from any conduct which might foreseeably cause detriment to another,"[20]

vorm maar 'n bra wankelrige grondslag vir die beslissing dat die verweerders geen *duty* aan die eisers verskuldig was nie.

In *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd*[21] is 'n kabel, wat elektrisiteit na die eiser se fabriek vervoer het, deur die nalatigheid van die verweerders beskadig. Die verweerders het *geweet*[22] dat die kabel elektrisiteit aan die fabriek voorsien. In die daaropvolgende kragonderbreking ly die eiser fisiese skade sowel as verlies aan wins ten aansien van metaal wat in daardie stadium in die smeltproses was, aangesien die proses nie voltooi kon word nie. Die eiser ly nog 'n verdere verlies aan winste, aangesien nog vier smeltprosesse tydens die duur van die kragonderbreking voltooi sou kon word. Die eis vir die fisiese skade en die verlies aan wins wat daaruit voortgespruit het, word toegestaan. Die eis vir verlies aan winste ten aansien van die vier smeltprosesse wat nie onderneem kon word nie, word egter geweier omdat dit suiwer ekonomiese verlies is wat nie uit fisiese skade voortgespruit het nie. Edmund Davies LJ het egter op hierdie punt verskil – volgens hom is verlies aan winste wel verhaalbaar solank die verlies direk en voorsienbaar is.[23]

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16 395.
17 1966 1 QB 569.
18 Dias (red) *Clerk and Lindsell on Torts* (1982) 372.
19 d w s in sy oorspronklike vorm, sonder enige kwalifikasies. Mi sou die toets van 'n "spesifiek voorsienbare eiser" in hierdie geval 'n effektiewe maatstaf daargestel het – sien *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* 1976 136 C L R 529 en ook *Ross v Caunters* 1980 Ch 297, wat albei *infra* bespreek word.
20 585D.
21 1973 QB 27.
22 Vgl die aanhaling uit *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 386 A–B wat *infra* (sien vn 87) gegee word.
23 46D.

Lord Denning MR wys daarop dat die onderliggende vraagstuk 'n beleidskwessie is. Wanneer die howe die omvang van die *duty* omskryf en beperk, is dit in werklikheid beleidsfaktore wat aangewend word om aanspreeklikheid te beperk. Lord Denning gaan voort om die betrokke beleidsoorwegings uiteen te sit.

In die eerste plek oorweeg hy die posisie van statutêre ondernemers, soos munisipaliteite, wat onderneem om elektrisiteit aan inwoners te verskaf. Hy voer aan dat sodanige ondernemers nie aanspreeklik is vir suiwer ekonomiese verlies veroorsaak deur 'n kragonderbreking nie, selfs al was dit te wyte aan hul eie nalatigheid. Indien die ondernemers deur nalatige optrede direk fisiese skade aan eiendom of besering aan persoon veroorsaak, is hulle wel aanspreeklik. Volgens Lord Denning behoort dieselfde benadering in die geval van privaatkontrakteurs gevolg te word. Dus behoort privaat kontrakteurs nie aanspreeklik te wees vir suiwer ekonomiese verlies weens kragonderbrekings wat aan hul nalatigheid te wyte is nie.[24]

Hartford kritiseer bogenoemde standpunt van Lord Denning. Volgens haar is dit te verstane dat publieke elektrisiteitsvoorsieners teen aanspreeklikheid beskerm moet word aangesien hulle dienste (wat in openbare belang is) op groot skaal aan die breë publiek voorsien. Privaat kontrakteurs behoort egter nie oor dieselfde kam geskeer te word nie, aangesien hulle op veel kleiner skaal en hoofsaaklik in hul eie belang dienste lewer.[25]

'n Verdere punt van kritiek teen Lord Denning se standpunt is die onderskeid wat hy tussen fisiese skade en suiwer ekonomiese verlies maak. Indien sy standpunt ten aansien van publieke ondernemers konsekwent deurgevoer word na privaatkontrakteurs, sal dit beteken dat laasgenoemde slegs vir die nalatige veroorsaking van fisiese skade, in teenstelling met suiwer ekonomiese verlies, aanspreeklik sal wees. Dit is juis van hierdie onderskeid wat die howe weg beweeg.[26]

Tweedens het Lord Denning die aard van die bedreiging oorweeg. Hy wys daarop dat dit ('n kragonderbreking) 'n risiko vir almal inhou. 'n Mens kan byvoorbeeld teen sulke risiko's verseker of alternatiewe kragbronne gereed hou. Party ondernemings kan die verlies absorbeer deur die volgende dag meer te werk. Volgens hom aanvaar die meeste mense die betrokke risiko dat hulle ekonomiese verliese mag ly. Derhalwe hardloop hulle nie dadelik hof toe nie, maar probeer dit self absorbeer.[27] Hierdie mening is vatbaar vir kritiek: kan daar werklik van mense verwag word om genoeë te neem met verliese van suiwer ekonomiese aard wat miljoene rande (of ponde) beloop? Hierdie standpunt werk uiters onbillik teen die "klein man" wat "groot ekonomiese verlies" ly.[28]

In die derde plek is Lord Denning van mening dat die toelating van eise vir suiwer ekonomiese verlies weens kragonderbrekings tot gevolg sal hê dat daar geen einde aan al die eise is nie, en

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24 37H–38D.
25 Hartford "Some Problems on Unlawfulness in Aquilian Actions for Damages for Pure Economic Loss" 1984 *SALJ* 42 47.
26 Vgl *Caltex Oil supra*; *Ross v Caunters supra*. Sien ook Dias en Markesinis *Tort Law* (1984) 51: "[I]t would seem that the distinction between physical and non-physical loss has largely disappeared."
27 38E–G.
28 Vgl ook Hartford 1984 *SALJ* 42 47.

> "[r]ather than expose claimants to such temptation ... it is better to disallow economic loss altogether, at any rate when it stands alone, independent of any physical damage."[29]

Dié standpunt, dat alle eise vir suiwer ekonomiese verlies weens kragonderbrekings geweier moet word bloot omdat die moontlikheid van menigvuldige aksies bestaan, is onverdedigbaar. Wanneer 'n mens na die hofverslae kyk, is sake waarin daar werklik 'n gevaar van oewerlose aanspreeklikheid bestaan het, in die minderheid.[30] Die oplossing is dus nie geleë in die summiere weiering van eise vir suiwer ekonomiese verlies nie, maar eerder in die formulering van 'n maatstaf of maatstawwe om aanspreeklikheid te begrens.

Vierdens beweer Lord Denning dat in gevalle soos hierdie (naamlik kragonderbrekings) die verlies eerder deur die hele gemeenskap gedra moet word as deur 'n enkele persoon of maatskappy. Sy regverdiging hiervoor is dat die hele gemeenskap baie, maar vergelykenderwys klein, verliese mag ly, terwyl die eis teen 'n enkele kontrakteur enorm mag wees.[31] Dieselfde kritiek wat teen Lord Denning se tweede redenasie uitgespreek is, geld ook hier. Dit mag net vir die indiwidue in daardie gemeenskap onmoontlik wees om die verlies te dra, veral as daar nie veel indiwidue in die gemeenskap is nie.[32]

Die vyfde punt wat Lord Denning stel, is dat die reg wel vir sake met die nodige meriete voorsiening maak.[33] Weer eens beweer Lord Denning dat sodanige sake gevalle sal wees waar suiwer ekonomiese verlies uit fisiese skade voortvloei.[34]

Uit die voorafgaande is dit baie duidelik welke beleidsfaktore deur Lord Denning oorweeg is, maar steeds baie onduidelik presies hóé die faktore aanspreeklikheid kan begrens. Al wat wel moontlik is, is om die verhaal van suiwer ekonomiese verlies uit die staanspoor te weier, soos Lord Denning ten aansien van kragonderbrekings aan die hand doen. Dit is egter interessant om daarop te let dat Edmund Davies LJ se standpunt in daaropvolgende sake, waarin eise vir suiwer ekonomiese verlies wel toegestaan is, weerklank vind.[35]

In *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*[36] is 'n onderwaterpyp, wat deur die eisers gebruik is om olie te vervoer, nalatig beskadig. Die eisers was nie die eienaars van die pyp nie. Die eis is dus een vir suiwer ekonomiese verlies – alternatiewe middele van olietoevoer moes aangewend word onderwyl die pyp herstel is. In hoër beroep is die eis vir suiwer ekonomiese verlies uiteindelik toegestaan, maar die regters het verskillende redes vir die beslissing verskaf.

Gibbs J aanvaar die tradisionele beginsel,[37] maar is bereid om 'n uitsondering op dié reël toe te laat in gevalle waar die verweerder *weet* of behoort te weet dat die eiser indiwidueel, en nie slegs as lid van 'n onbepaalde klas nie, moontlik

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29 38H–39A.
30 Dit blyk ook uit die sake wat in hierdie artikel bespreek word.
31 39B.
32 Vir verdere kritiek, sien Hartford 1984 *SALJ* 42 48.
33 39C.
34 Sien die kritiek op Lord Denning se eerste argument *supra*.
35 Vgl *Ross v Caunters supra* en ook *Caltex Oil supra* wat *infra* bespreek word.
36 *supra*.
37 Tradisioneel was suiwer ekonomiese verlies veroorsaak deur die nalatigheid van 'n ander, in die afwesigheid van fisiese skade aan die eiser se eiendom of sy persoon, nie verhaalbaar nie. Sien verder in verband met die "exclusory rule" Partlett "Recovery of Economic Loss for Negligence in Australia" 1980 *Sydney LR* 121.

ekonomiese verlies mag ly.[38] Mason J erken nie die tradisionele beginsel nie, maar wend 'n soortgelyke "spesifiek-voorsienbare-eiser"-toets aan. Hy voer aan dat die toets van die spesifiek voorsienbare eiser net so 'n effektiewe beheermaatreël is as die tradisionele beginsel, en dat dit regverdiger en meer logies is.[39] Stephen J verwerp die tradisionele reël en vervang dit deur 'n toets van *sufficient proximity* tussen die eiser en die verweerder. Hy voer aan dat die toets van redelike voorsienbaarheid, soos dit algemeen in gevalle van nalatigheid toegepas word, nie voldoende kontrole oor aanspreeklikheid verskaf nie.[40] Murphy J is van mening dat alle verlies wat nalatig veroorsaak is, verhaalbaar moet wees tensy daar beleidsoorwegings is wat aanspreeklikheid negativeer.[41] Vir doeleindes van hierdie bespreking word daar nie op Jacobs J se uitspraak, waarin 'n herformulering van die tradisionele beginsel verskaf word, ingegaan nie.[42]

Rogers voer aan dat Gibbs J en Mason J se idee van 'n "spesifiek voorsienbare eiser" aantreklik mag klink, maar dat druk uitgeoefen sal word vir uitbreiding van die toets tot 'n beperkte klas eisers en later vir verdere uitbreiding van dié klas.[43] Myns insiens behoort die toets van 'n "spesifiek voorsienbare eiser" nie probleme op te lewer nie. In beginsel sou elke "spesifiek voorsienbare eiser" 'n aksie hê en die feit dat daar meer as een sodanige eiser is, behoort nie die sukses van die eise te beïnvloed nie; die eisers mag ook as lede van 'n bepaalde klas spesifiek voorsienbaar wees, byvoorbeeld 'n klas krediteure.[44] Myns insiens is die formulering van die toets deur Gibbs J, wat van *weet* (met ander woorde *kennis*) in plaas van voorsien praat, te verkies bó die van Mason J. Ek sal in die slot van die artikel hierop terugkom.

Ná die *Caltex*-saak het daar nog steeds onsekerheid geheers oor die aanwending van maatstawwe om aanspreeklikheid weens suiwer ekonomiese verlies te begrens. Die onsekerheid van beleidsoorwegings as begrensingsmaatstaf is juis deur die *Caltex*-saak beklemtoon.[45] Die aanwending van die "spesifiek-voorsienbare-eiser"-toets of kennistoets het ook probleme verskaf.[46]

In *Ross v Caunters*[47] het 'n bemaking in 'n testament misluk weens die nalatigheid van die opsteller daarvan. Die eis vir suiwer ekonomiese verlies word toegestaan. Megarry V-C baseer sy beslissing op die *neighbour principle*, maar dui ook aan dat daar geen beleidsfaktore is wat aanspreeklikheid negativeer nie. Uit die uitspraak is dit duidelik dat die beginsel van *Donoghue v Stevenson* so deur die hofbeslissings ontwikkel is dat dit ook in die geval van nalatige wanvoorstelling toegepas kan word.[48] Street stel dit soos volg:

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38 555.
39 593.
40 575–576.
41 606.
42 604.
43 Rogers "Economic Loss in the High Court of Australia" 1978 *CLJ* 27 29.
44 Vgl die bespreking van die subjektiewe kennistoets *infra*.
45 Die woorde van Murphy J 605 is insiggewend in die verband: "The difficulties in this branch of the law arise mainly from the doctrine of foreseeability but also form *unresolved questions of public policy*." (eie kursivering).
46 Vgl bv *George Hudson Pty Ltd v Bank of New South Wales* 1978 3 ACLR 366 369 waar gesê word dat die vereiste van kennis is "directed rather to knowledge that the plaintiff is peculiarly exposed to damage." Vir kritiek op hierdie saak, sien Partlett 1980 *Sydney LR* 159.
47 *supra*.
48 315A 320D–G 322H.

> "Where the plaintiff is in close proximity to the defendant and the defendant has undertaken towards a third party a duty to benefit the plaintiff, and to hold the defendant liable would be to impose a liability towards the plaintiff and nobody else, then the broad rule of *Donoghue v Stevenson* will afford a remedy for economic loss by negligent statements. *Ross v Caunters* may point the way towards *Hedley Byrne's* gradually ceasing to be regarded as a sub-rule of negligence and to its being absorbed within the broad rule of *Donoghue*."[49]

Hierdie saak beklemtoon die belangrikheid van die voorsienbaarheidstoets en dit is interessant dat Megarry V-C dieselfde kwalifikasie op die voorsienbaarheidstoets plaas as wat in die *Caltex*-saak daarop geplaas is, naamlik die voorsienbaarheid van verlies aan die eiser as geïdentifiseerde indiwidu, en nie slegs as lid van 'n onbepaalde klas nie.[50]

Die *neighbour principle* is ook verkies in *Junior Books Ltd v Veitchi Co Ltd.*[51] In hierdie saak het subkontrakteurs 'n vloer in 'n fabriek gelê. As gevolg van hul nalatigheid met die lê van die vloer moes die vloer vervang word. Die eisers eis onder andere vir ekonomiese verlies in die vorm van verlies aan produksie tydens die vervanging van die vloer. Die eis word toegestaan. Die hof beslis dat die deurslaggewende vraag is of daar 'n *sufficient relationship of proximity* tussen die partye was. Hoewel daar geen kontraktuele verhouding tussen die partye bestaan het nie, was daar volgens die feite 'n *sufficient relationship of proximity.* Derhalwe kon die voorsienbare ekonomiese verlies verhaal word aangesien daar geen beleidsoorwegings was wat die verhaal daarvan verhinder het nie. In hierdie saak is die toets vir die bepaling van 'n *duty* dus soos volg gestel:

a Was verlies voorsienbaar aan die eiser? (Volgens die feite was dit wel.)

b Is daar enige beleidsoorwegings wat aanspreeklikheid negativeer of beperk?[52]

In hierdie saak was daar nie werklik 'n gevaar van oewerlose aanspreeklikheid nie; daar was ook 'n baie *close proximity* tussen die partye. Lord Fraser merk op dat, met verwysing na die toets van 'n "spesifiek voorsienbare eiser" in die *Caltex*-saak, dit te betwyfel is of hierdie kennis van die identiteit van 'n moontlike eiser relevant is vir doeleindes van die saak onder bespreking. Indien dit egter relevant sou wees, sou die eisers dit kon bevredig. Dit was egter nie nodig om oor die aangeleentheid te beslis nie.[53] Besonder insiggewend is Lord Roskill se gedagtes oor beleidsoorwegings:

> "[I]t cannot be denied that policy considerations have from time to time been allowed to play their part in the tort of negligence . . . yet today I think its scope is best determined by considerations of principle rather than policy . . . I see no reason why . . . that remedy should be denied simply because it will . . . become available to many rather than few."[54]

Ook die beslissing in *Schiffahrt & Kohlen GmbH v Chelsea Maritime Ltd*[55] is op redelike voorsienbaarheid baseer. Die eisers was die kopers van 'n vrag kooks

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49 Street *The Law of Torts* (1983) 205. Dit is interessant om daarop te let dat in twee onlangse sake wat oor nalatige wanvoorstelling gehandel het, nl *JEB Fasteners Ltd v Marks, Bloom and Co* 1981 3 All ER 289 en *Yianni v Edwin Evans & Sons* 1982 QB 438, aanspreeklikheid vir suiwer ekonomiese verlies op *Donoghue v Stevenson* baseer is.

50 Sien 308G waar Megarry V-C o m die volgende sê: "Their contemplation of the plaintiff was actual, nominate and direct." Vgl ook 320 waar die *Caltex*-saak bespreek word en 322–323 waar Megarry V-C sy gevolgtrekkings opsom.

51 1982 3 All ER 201.

52 Sien ook *Anns v Merton London Borough Council* 1978 AC 728 (HL) 751H–752A.

53 482D–E.

54 488D–E.

55 1982 QB 481.

wat op die verweerders se skip vervoer is. Weens die verweerders se nalatigheid is die vrag kooks beskadig. In daardie stadium was die eisers nog nie eienaar van die vrag nie en hulle eis dus vir suiwer ekonomiese verlies. Die eis word toegestaan – dit was voorsienbaar dat skade aan die vrag verlies vir die eisers kon meebring.[56]

Na aanleiding van bogenoemde sake voer Dias en Markesinis aan dat die ontwikkeling, wat suiwer ekonomiese verlies betref, *Hedley Byrne* verby gesteek het en dat aanspreeklikheid voortaan op die *neighbour principle* van *Donoghue v Stevenson* sal berus. Volgens hierdie beginsel hoef geen *special relationship*[57] bewys te word nie.[58]

Uit die bespreking van die Engelse beslissings ten aansien van die nalatige veroorsaking van suiwer ekonomiese verlies blyk dit dat die redelike voorsienbaarheidstoets 'n belangrike rol speel by die bepaling van die *duty*. Selfs in sake wat oor nalatige wanvoorstelling handel, word die *neighbour principle* van *Donoghue v Stevenson* aangewend.[59] Dit is egter belangrik om op die kwalifikasie, wat onder andere in die *Caltex*-saak en in *Ross v Caunters* op die voorsienbaarheidstoets geplaas is, te let – die toets van 'n spesifiek voorsienbare eiser verskaf 'n meer effektiewe maatstaf vir aanspreeklikheidsbegrensing. In *Clerk and Lindsell* word dit duidelik gestel dat juis laasgenoemde kwalifikasie suiwer ekonomiese verlies van fisiese skade onderskei:

> "With physical damage, the particular plaintiff or his property need not be specifically identifiable; whereas economic damage may have to be foreseeable to an identified plaintiff and not just a member of an indeterminate class."[60]

Dit is dus nie nodig om aparte *duty situations* vir ekonomiese verlies te formuleer nie – daar is net spesiale kwalifikasies nodig vir die aanwending van die voorsienbaarheidstoets.

Uit die beslissings is dit duidelik dat beleidsoorwegings ook 'n belangrike rol speel ten aansien van aanspreeklikheidsbegrensing in gevalle van suiwer ekonomiese verlies. Dit is egter moeilik om vas te stel presies hóé beleidsfaktore aangewend kan word om aanspreeklikheid te begrens. Partlett merk tereg op:

> "The dilemma is how to admit policy reasons and yet inculcate that necessary certainty in the judicial process."[61]

Volgens *Clerk and Lindsell* is dit belangrik dat die howe geregtigheid moet laat geskied "according to law."[62] Daar moet effek gegee word aan beleidsoorwegings met behulp van die middele wat die reg daarstel. Daar moet met groot omsigtigheid te werk gegaan word sodat beleid nie sonder meer in die plek van die "technical apparatus of the law" gestel word nie.[63]

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56 485A.
57 Vgl *Hedley Byrne supra.*
58 Dias en Markesinis *op cit* 48.
59 Vgl *JEB Fasteners Ltd v Marks, Bloom and Co supra*, asook *Yianni v Edwin Evans & Sons supra.*
60 Dias (red) *op cit* 385.
61 Partlett 1982 *Sydney LR* 126.
62 Dias (red) *op cit* 591.
63 *ibid.*

Vervolgens word na 'n paar resente beslissings in verband met die nalatige veroorsaking van suiwer ekonomiese verlies in die Suid-Afrikaanse reg gekyk.[64]

4 DIE SUID-AFRIKAANSE REG

In die Suid-Afrikaanse reg is dit veral die onregmatigheidselement van die onregmatige daad wat in gevalle van die nalatige veroorsaking van suiwer ekonomiese verlies onder skoot kom. Dias en Markesinis skryf die volgende:

> "In Roman Law and Romanesque systems, the concept corresponding to 'duty' is 'unlawfulness.' "[65]

Aangesien die Suid-Afrikaanse reg en die Engelse reg op beginselgronde verskil, ontstaan die vraag of sowel voorsienbaarheid as beleidsfaktore (wat in die Engelse reg by bepaling van die *duty* 'n rol speel) onder onregmatigheid oorweeg moet word.

Onregmatigheid is geleë in die inbreukmaking op 'n subjektiewe reg of die nie-nakoming van 'n regsplig.[66] In gevalle van suiwer ekonomiese verlies kan daar wel soms 'n subjektiewe reg geïdentifiseer word, maar in die meeste gevalle word gevra of daar 'n regsplig op die verweerder gerus het om redelik op te tree.[67] Die redelikheidstoets vir onregmatigheid (die maatstaf van die *boni mores*) is 'n suiwer objektiewe, *ex post facto*- toets – daar word gekyk na die redelikheid van die dader se optrede in die lig van die benadeling wat die getroffene ly.[68] Die toets behels dus 'n voortdurende belangeafweging tussen die eiser en die verweerder volgens die regsgevoel van die gemeenskap.[69]

In *Greenfield Engineering Works (Pty) Ltd v NKR Construction*[70] het die verweerders, ter vereffening van hul skuld, 'n tjek aan die eiser gepos. Weens die nalatige voltooiing van die tjekvorm was 'n dief, wat die tjek onderskep het, in staat om 'n rekening by 'n bank te open en die grootste gedeelte van die tjek weer te trek. Die hoofeis (gegrond op 'n kontrak) slaag, en daarna oorweeg die hof die alternatiewe eis vir die verhaal van suiwer ekonomiese verlies.

Regter Hoexter beslis dat 'n redelike man (in die posisie van die verweerders) wel die moontlikheid van skade, as gevolg van die onbehoorlike voltooiing van die tjekvorm, sou voorsien het en stappe sou gedoen het om dit te voorkom. Daar het dus 'n *duty of care* op die verweerder gerus, welke *duty* verbreek is. Derhalwe het die verweerder nalatig opgetree.[71] Die regter toon verder aan dat die gevaar van oewerlose aanspreeklikheid nie in hierdie geval bestaan nie: die omvang van die potensiële verlies is beperk; die identiteit van die eiser is bekend; dis 'n eenmalige verlies en die moontlikheid van 'n hele string aksies is uitgesluit en die verlies is die direkte gevolg van die verweerder se nalatigheid.

> "Trying to balance the individual interests of the claimant against the broader ones of the community I am unable to perceive that the imposition of liability in a case such

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64 Dit is onmoontlik om binne die omvang van hierdie artikel al die Suid-Afrikaanse beslissings in hierdie verband te dek; derhalwe word die aandag op 'n paar onlangse rigtinggewende beslissings gevestig.
65 Dias en Markesinis *op cit* 97.
66 Van der Walt *op cit* 21.
67 Vgl *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596H–597C.
68 Van der Merwe en Olivier *op cit* 61.
69 *ibid.*
70 1978 4 SA 901 (W).
71 912A–H.

> as this is likely to prove socially calamitous . . . considerations both of justice and convenience point to the granting of relief."[72]

Van der Walt kritiseer die beslissing vir sover dit impliseer dat 'n regter, nadat onregmatigheid en nalatigheid reeds vasstaan, nogtans die eis op grond van 'n belangeafweging (wat byvoorbeeld kan aandui dat die toestaan van die eis regspolities onwenslik is) kan weier. Volgens Van der Walt behoort alle regspolitieke faktore en belange in die eerste plek 'n rol te speel by die bepaling van die regsplig. Die tradisionele voorsienbaarheidstoets wat die hof aanwend om te bepaal of daar 'n *duty* was, is nie die ware kriterium vir die aan- of afwesigheid van 'n regsplig nie. Van der Walt gaan voort deur onder andere Engelse beslissings aan te haal ter staving van dié standpunt dat 'n waarde-oordeel die korrekte maatstaf is.[73]

Ek stem saam met Van der Walt dat 'n eis nie, nadat onregmatigheid en nalatigheid reeds vasstaan, steeds op grond van beleidsoorwegings geweier kan word nie.[74] Ek kan egter nie saamstem met die stelling dat beleidsoorwegings, eerder as die voorsienbaarheidstoets, by die bepaling van die aan- of afwesigheid van 'n regsplig deurslaggewend behoort te wees nie. Met verwysing na die paar resente Engelse beslissings wat hierbo bespreek is, is dit insiggewend om daarop te let dat sowel die tradisionele voorsienbaarheidstoets van *Donoghue v Stevenson* as beleidsoorwegings 'n rol speel by die bepaling van 'n *duty*. Dit wil inderdaad voorkom asof die *neighbour principle* van krag tot krag gaan en dat selfs eise weens nalatige wanvoorstelling voortaan op die *neighbour principle* sal berus.[75] Hierbenewens is beleid 'n baie vae en onseker kriterium; myns insiens het beleid geen rol te speel by die bepaling van die aan- of afwesigheid van 'n regsplig nie. In die saak onder bespreking dui die regter nie aan presies wanneer die oplegging van aanspreeklikheid "socially calamitous" sal wees nie. Die verwysing na "considerations of justice and convenience" verskaf ook nie 'n effektiewe maatstaf vir aanspreeklikheidsbegrensing nie.[76]

In *Shell & BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA*[77] is 'n meerboei nalatig beskadig. Benewens die fisiese skade is daar ook 'n eis ingestel weens suiwer ekonomiese verlies, aangesien skepe meer lêgeld moes betaal weens die vertraging in die aflaai van die olie. Die tweede eiser was die huurder en bevragter van 'n tenker (Mobil Petroleum) wat olie wou aflaai en gevolglik meer lêgeld moes betaal. (Slegs hierdie eis is van belang vir dié bespreking.)

Die tenker *Mobil Petroleum* was nie in sig van die meerboei toe die botsing plaasgevind het nie. Uit die getuienis blyk dit dat 'n redelike voorsienbare gevolg

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72 916H–917B. Vgl ook *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 3 SA 55 (Z) 65D waar soortgelyke faktore in ag geneem is: "The loss is decidedly finite, it is single and will occur only once." Sien ook *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 2 SA 157 (W) 172 G: "Indeed, justice and convenience appear to me to point in favour of recognition of such a duty of care."

73 Van der Walt "Nalatige Wanvoorstelling en Vermoënskade" 1979 *TSAR* 145 153–154.

74 Vgl ook in hierdie verband Neethling se standpunt dat die onregmatige optrede van 'n verweerder nie omgetower kan word na "regmatig" deur regspolitieke oorwegings nie – sien Neethling 1981 *THRHR* 78 80.

75 Hierdie stelling van Dias en Markesinis is *supra* aangehaal – sien vn 58. Vgl ook die aanhaling van Street – sien vn 49.

76 Soos reeds aangetoon, is die regter nie gekonfronteer met oewerlose aanspreeklikheid nie; dus was dit nie werklik nodig om na begrensingsmaatstawwe te soek nie.

77 *supra*.

van die botsing en die skade aan die meerboei, suiwer ekonomiese verlies (in die vorm van vertragings en aanspreeklikheid vir lêgeld) aan die eienaars en huurders van skepe wat olie wou aflaai, was. Volgens die regter is dit op sigself nie voldoende om tot aanspreeklikheid te lei nie – die verweerder moes 'n *duty of care* aan die eiser verskuldig gewees het. Die regter stel dit duidelik dat hy na die "policy-based" aspek van die *duty of care* verwys, dit wil sê onregmatigheid.[78] Onregmatigheid is die aangewese element om aanspreeklikheid binne perke te hou. Daar is egter nie bewys dat die verweerder die moontlikheid van verlies aan die eiser spesifiek behoort te voorsien het nie[79] – die verlies was slegs voorsienbaar aan 'n onbepaalde klas potensiële slagoffers, naamlik diegene wat olie wou aflaai. Dit is slegs omdat die eiser 'n lid van die onbepaalde klas is dat sy skade redelikerwys voorsienbaar was. Daar is ook nie beleidsoorwegings wat in die eiser se guns tel nie. Die hof beslis gevolglik dat die verweerder geen *duty of care* aan die eiser verskuldig was nie en die eis misluk.

Neethling kritiseer die aanwending van die redelike voorsienbaarheidstoets ter bepaling van 'n *duty of care*. Onregmatigheid word *ex post facto* aan die hand van die *boni mores* (wat 'n belangeafweging behels) bepaal. Volgens hom het redelike voorsienbaarheid egter 'n rol te speel by aanspreeklikheidsbegrensing:

> "In hierdie verband kan met redelike sekerheid aanvaar word dat die benadeling van 'n besondere persoon redelikerwys voorsienbaar is indien sy *identiteit* op die oomblik van die dader se onregmatige en nalatige optrede reeds *vasstaan*, of indien die dader op daardie oomblik *geweet* het wie deur sy optrede benadeel *gaan* (nie *kan* nie) word."[80]

Dus: indien die Mobil Petroleum in sig van die verweerder was toe die meerboei beskadig is, en die verweerder *geweet* het dat die huurder van die skip deur die botsing benadeel sou word, sou die eis waarskynlik geslaag het.

Burchell kritiseer Neethling se aanwending van die voorsienbaarheidstoets (soos hierbo uiteengesit) by aanspreeklikheidsbegrensing. Hy voer aan dat dit tot 'n onnodige duplikasie van ondersoeke lei.[81] Neethling dui egter aan dat die voorsienbaarheidstoets by nalatigheid en die voorsienbaarheidstoets by aanspreeklikheidsbegrensing nie dieselfde toets is nie.[82]

In die saak onder bespreking was daar werklik 'n gevaar van oewerlose aanspreeklikheid.[83] Regter Howard wend egter die toets van die spesifiek voorsienbare eiser baie effektief aan: daar is nie bewys dat die verweerder die moontlikheid van verlies aan die eiser spesifiek voorsien het nie; daarom was die verweerder nie 'n *duty* teenoor die eiser verskuldig nie. Hoewel die regter sê dat daar geen beleidsoorwegings is wat in die eiser se guns tel nie, is dit in werklikheid die toets van die "spesifiek voorsienbare eiser" en nie beleidsoorwegings nie, wat aanspreeklikheid in hierdie geval in toom hou.

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78 659A–D.

79 Vgl die "spesifiek voorsienbare eiser"-toets van die *Caltex*-saak *supra* en vgl ook die gekwalifiseerde voorsienbaarheidstoets van *Ross v Caunters supra*.

80 Neethling 1981 *THRHR* 80. Die voorsienbaarheidstoets kom dan ter sprake by die toerekenbaarheid van skade, d w s nadat onregmatigheid en nalatigheid reeds bepaal is. Onregmatigheid en toerekenbaarheid van skade word dus deeglik onderskei.

81 Burchell "Recent Cases"1981 *SALJ* 1 4.

82 Sien Neethling en Potgieter *Unisa Studiegids vir PLW302-R* (1983) 133. Vgl ook t a v die toerekenbaarheid van skade *Brown v Hoffman* 1977 2 SA 556 (NK); Potgieter en Van Rensburg "Die Toerekening van Gevolge aan 'n Delikpleger" 1979 *THRHR* 385.

83 659H.

Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd[84] is 'n saak wat baie bespreking uitgelok het. Deur die nalatigheid van 'n stootskraperbestuurder is 'n elektrisiteitskabel wat elektrisiteit aan die eiser se fabriek voorsien het, beskadig. As gevolg van die kragonderbreking ly die eiser suiwer ekonomiese verlies (produksie vir 27½ uur gestaak). Die eiser het aangevoer dat die verweerder op die tydstip toe die kabels afgesny is, *geweet* het of behoort te geweet het (a) dat die kabel elektrisiteit aan die eiser voorsien; (b) dat, indien die kabel afgesny word, die fabrieke 'n kragonderbreking sou ondervind en (c) dat die eiser verlies aan inkomste sou ly weens die staking van produksie. In beginsel is die eis vir suiwer ekonomiese verlies op eksepsiestadium erken.

Ten aansien van die onregmatigheidselement sê regter Booysen dat

> "the court must carefully balance and evaluate the interests of the concerned parties, the relationship of the parties and the social consequences of the imposition of liability in that particular type of situation."[85]

Die hof moet aandag gee aan

> "the probable or possible extent of the foreseeable or foreseen loss; the degree of risk that the loss would be suffered as a result of the conduct complained of, the value to defendant and/or society of the object which the defendant was seeking to achieve when he conducted himself in the manner complained of; whether there were reasonably practical measures available to the defendant to avert the loss; what the chances had been that those measures would have been successful; and whether the costs of such measures would have been reasonably proportionate to the loss which plaintiff could have suffered."[86]

Die regter kom tot die gevolgtrekking dat die verweerder se optrede morele verontwaardiging ontlok en dat dit in stryd met die regsoortuiging van die gemeenskap is. Die gemeenskap sou waarskynlik sê:

> "But for heaven's sake, you knew precisely where the cables were; you knew that if they were cut plaintiff would suffer a substantial loss of income, surely there was a legal duty on you to take measures to avert the loss."[87]

Vervolgens onderskei die regter die *Shell & BP*-saak van die onderhawige geval. In die geval onder bespreking is aangevoer dat die verweerder geweet het dat die eiser spesifiek verlies sou ly tewyl die verlies in *Shell & BP* nie spesifiek aan die eiser voorsienbaar was nie.[88] Die regter beslis dat daar geen gevaar van oewerlose aanspreeklikheid bestaan nie. Die verweerder was 'n *duty* aan 'n spesifieke gebruiker van elektrisiteit verskuldig en hy het die *duty* verbreek. Dit beteken nie dat die verweerder 'n *duty* aan alle gebruikers verskuldig is, dit wil sê ook waar hy onbewus van hul identiteit was of waar hy nie geweet het dat hulle skade sou ly nie.[89]

Hoewel die regter na beleidsoorwegings verwys, is dit in werklikheid die feit dat die verweerder geweet het dat spesifiek die eiser verlies sou ly, wat die

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84 *supra.*
85 384E.
86 384F–G.
87 386A–B.
88 386D–E. Die feit dat die verlies nie spesifiek aan die eiser voorsienbaar was nie, kan ook as rede vir die weiering van die eis vir suiwer ekonomiese verlies (op eksepsiestadium) aangevoer word: *Franschhoekse Wynkelder (Ko-operatief) Bpk v South African Railways and Harbours* 1981 3 SA 36 (K). In bg saak het r Vos gesê dat sowel die *Caltex*-saak *supra* as *Ross v Caunters supra* duidelik van die *Franschhoekse Wynkelder*-saak onderskei moet word (42A–C). Moet dit dan nie juis onderskei word o g v die feit dat die verlies in die *Franschhoekse Wynkelder*-saak nie spesifiek aan die eiser voorsienbaar was nie?
89 386H–387A.

deurslag gee. Dit is juis as gevolg hiervan dat daar geen gevaar van oewerlose aanspreeklikheid bestaan nie.

In sy bespreking van die saak, beklemtoon Neethling wéér die belangrike rol wat redelike voorsienbaarheid by die toerekenbaarheid van skade speel.[90] Hy kritiseer ook die rol wat die howe by die vasstelling van 'n regsplig aan beleidsoorwegings toeken.[91] Volgens Neethling vervul beleidsoorwegings 'n soortgelyke rol as die *de minimus non curat lex*-leerstuk: al is ál die elemente van die onregmatige daad aanwesig, word die skade die verweerder nie toegereken nie. Hy voel ook dat 'n oorweging soos "an overwhelming potential liability" nie werklik sinvol en rasioneel deur die howe toegepas kan word nie, en dat die beperking van aanspreeklikheid buite om die beginsels van die onregmatige daad waarskynlik 'n taak vir die wetgewer is.[92]

Basson verkies die hof se benadering dat die dader se subjektiewe voorsienbaarheid van skade 'n rol moet speel by die bepaling van 'n regsplig. Volgens hom bly die toets vir onregmatigheid basies objektief:

> "Gewapen met die volledige inligting van die gebeure tydens die gewraakte optrede (sowel wat die omstandighede as die kennis van die dader betref) word die handeling van die dader getoets vir onregmatigheid aan die hand van die *boni mores*."[93]

Hy beklemtoon dat dié toets vir onregmatigheid verskil van die toets vir nalatigheid. Nalatigheid word getoets aan die tradisionele voorsienbaarheid en voorkombaarheid van skade – die redelike-man-toets. Die toets vir onregmatigheid is 'n objektiewe beoordeling (volgens die gemeenskap se regsoortuiging) van die dader se optrede "in die lig van wat hy inderdaad voorsien het."[94] Volgens *Coronation Brick* sal daar dan slegs 'n regsplig bestaan indien die dader skade aan 'n spesifieke benadeelde voorsien het en nie aan 'n onbepaalde klas potensiële slagoffers nie.[95] Basson kom tot die slotsom dat die elemente van die onregmatige daad aanspreeklikheid voldoende kan beperk; daarom is die voorsienbaarheidstoets (soos deur Neethling uiteengesit) nie nodig nie. Hy voeg egter by dat indien aanspreeklikheid uitgesluit behoort te word, nieteenstaande die feit dat al die elemente van die onregmatige daad aanwesig is, die wetgewer sal moet ingryp.[96]

Boberg kritiseer Neethling se standpunt heftig.[97] Soos Basson egter tereg aantoon, maak dit geen verskil aan die eindresultaat indien 'n mens die redelike voorsienbaarheidstoets by onregmatigheid of as 'n aparte aanspreeklikheidsbegrensingsmaatstaf aan die einde aanwend nie.[98] Myns insiens hoort die redelike voorsienbaarheidstoets onder onregmatigheid tuis. Boberg stem saam met Basson se uiteensetting van subjektiewe voorsienbaarheid by onregmatigheid, terwyl die basiese toets vir onregmatigheid volgens hom nog steeds objektief van aard

90 Neethling "Die Onregmatigheidsvereiste by Deliktuele Aanspreeklikheid weens die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies" 1983 *THRHR* 205.
91 208.
92 211.
93 Basson "Die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies" 1983 1 *Codicillus* 8 11.
94 *ibid.*
95 386D–E.
96 Basson 1983 1 *Codicillus* 14.
97 Boberg *op cit* 146–147.
98 Basson *op cit* 11.

bly. Boberg is ook van mening dat beleidsfaktore onder onregmatigheid tuishoort.[99] Hy kritiseer egter Neethling en Basson se standpunt dat die hulp van die wetgewer heel moontlik ingeroep sal moet word om aanspreeklikheid te begrens. Boberg is van mening dat die howe heeltemal in staat is om die situasies self te hanteer.[100] Daar word egter aan die hand gedoen dat hierdie 'n probleemgebied vir die howe kan word. Indien wetgewing slegs in uiterste gevalle aanspreeklikheid reguleer, kan dit verhoed dat die hof moontlik uit oorversigtigheid 'n eis weier, terwyl die eis in werklikheid toegestaan moes gewees het.

In *Zimbabwe Banking Corporation v Pyramid Motor Corporation*[101] is beslis dat 'n invorderingsbank 'n *duty of care* aan die eienaar van 'n gesteelde tjek verskuldig is ten einde te voorkom dat die eienaar van die tjek weens die nalatigheid van die bankier skade ly. Al drie die regters is van mening dat die *lex Aquilia* die grondslag van hierdie *duty of care* vorm. Weer eens was daar in hierdie geval geen gevaar van oewerlowe aanspreeklikheid nie:

> "The parties to whom a duty of care may be owed are strictly limited by the writing on the document itself. The amount of the potential liability is written for all to see on the face of the cheque."[102]

Regter Gubbay is van mening dat

> "considerations of justice and convenience warrant a recognition of a common law duty of care."[103]

Tot op hede wil dit dus voorkom asof die *Coronation Brick*-saak die toonaangewende beslissing met betrekking tot suiwer ekonomiese verlies is. Dit sal interessant wees om te sien hoe ons howe in die toekoms op dié beslissing sal reageer.

5 SLOT

Uit die voorafgaande besprekings van die Anglo-Amerikaanse en die Suid-Afrikaanse regspraak blyk dit dat daar heelwat raakpunte tussen dié twee regstelsels ten aansien van die nalatige veroorsaking van suiwer ekonomiese verlies bestaan. Dit is veral die voorsienbaarheidstoets (met die kwalifikasie wat op die *neighbour principle* van *Donoghue v Stevenson*[104] geplaas is) en die kwessie van beleidsoorwegings wat in beide regstelsels 'n belangrike rol ten aansien van aanspreeklikheidsbegrensing speel. Desnieteenstaande moet gewaak word teen die heelhuidse oorname van die Engelsregtelike *duty of care*-leerstuk in die Suid-Afrikaanse reg. Daar moet voortdurend in gedagte gehou word dat die Engelse reg 'n stelsel van *torts*, elk met sy eie vereistes, het. In die Suid-Afrikaanse reg, waar ons met algemene deliksbeginsels werk, moet gepoog word om aanspreeklikheidsbegrensing by die bestaande beginsels in te werk. Om vir 'n delik soos die nalatige veroorsaking van suiwer ekonomiese verlies bykomende "elemente" (benewens die bestaande elemente van die onregmatige daad, naamlik handeling, onregmatigheid, skuld, kousaliteit en skade) as vereiste te stel, sou gelykstaande wees aan die skepping van 'n *tort*.

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99 Boberg *op cit* 147.
100 148.
101 1985 4 SA 553 (Z).
102 560I.
103 568D.
104 Sien bv die *Caltex*-saak en *Ross v Caunters supra*.

Uit die bespreking van die Suid-Afrikaanse reg blyk dit dat onregmatigheid die aangewese element van die onregmatige daad is om die subjektiewe voorsienbaarheidstoets te akkommodeer.[105] Die subjektiewe voorsienbaarheidstoets behoort die vertrekpunt te wees by die bepaling van die aanwesigheid van 'n regsplig. Die vraag wat hier ter sprake kom, is: het die verweerder ten tyde van sy optrede inderdaad voorsien dat sy optrede die betrokke eiser(s) gaan benadeel? Die gebruik van die term "voorsien" kan maklik verwarring in die hand werk, veral in die lig van die toets van redelike voorsienbaarheid en voorkombaarheid van skade wat ter bepaling van nalatigheid aangewend word. Om hierdie rede is dit miskien verkieslik om eerder met 'n *subjektiewe kennistoets* te werk. Die betrokke vraag sal dus soos volg lui: het die verweerder ten tyde van sy optrede geweet dat sy optrede die *betrokke eiser(s) gaan* benadeel? Met ander woorde, het die *identiteit* van die betrokke eiser(s) reeds op daardie oomblik *vasgestaan*?[106]

Hierdie subjektiewe kennistoets beperk dus alle moontlike eisers tot slegs diegene wie se identiteit òf indiwidueel òf as lede van 'n bepaalde klas ten tyde van die verweerder se optrede aan hom bekend was. Die aanwesigheid van hierdie tipe kennis by die verweerder speel die deurslaggewende rol by die bepaling van die aanwesigheid van 'n regsplig. Die gemeenskap sal waarskynlik sê:

> "[B]ut for heaven's sake, you knew precisely where the cables were; you knew that if they were cut plaintiff would suffer a substantial loss of income, surely there was a legal duty on you to take measures to avert the loss."[107]

Dit is hierdie morele aspek van die dader se optrede, naamlik die feit dat hy ten spyte van die besondere kennis waaroor hy beskik het nogtans met sy optrede voortgegaan het, wat die morele verontwaardiging van die gemeenskap ontlok.[108] Dit volg dus dat hierdie subjektiewe kennistoets geen afbreuk doen aan die objektiewe, *ex post facto*-aard van die onregmatigheidselement nie. Die aanwesigheid van hierdie besondere kennis aan die kant van die verweerder impliseer dat daar 'n regsplig op die verweerder gerus het en dat hy prinsipieel onregmatig opgetree het deur die regsplig te verbreek.

Ander faktore wat volgens die howe 'n rol kan speel by die bepaling van die bestaan van 'n regsplig is byvoorbeeld die bestaan al dan nie van praktiese maniere waarop die verweerder die verlies kon voorkom het, die moontlike sukses van sodanige stappe, die redelikheid al dan nie van koste verbonde aan sodanige stappe in verhouding tot die skade wat die eiser gely het, asook die grootte van die risiko dat die verlies deur die eiser gely sou word.[109] In die lig van die subjektiewe kennistoets blyk bogenoemde oorwegings oorbodig te wees: die vraag is eenvoudig of die verweerder *geweet* het *wie* benadeel gaan word – indien wel, het daar prinsipieel 'n regsplig op hom gerus om benadeling te voorkom.[110]

Die huidige posisie ten aansien van die rol van beleidsoorwegings in die geval van die nalatige veroorsaking van suiwer ekonomiese verlies is onbevredigend.

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105 Vgl ook Basson en Boberg se standpunte *supra*.

106 Vgl Neethling 1981 *THRHR* 80. Sien ook Basson 1983 1 *Codicillus* 11, wat 'n soortgelyke subjektiewe kennistoets voorstaan. Die eisers kan ook as lede van 'n bepaalde klas "voorsienbaar" wees soos in *Tobacco Finance (Pvt) v Zimnat Ins Co supra* 65E.

107 *supra* vn 87.

108 Vgl *Minister van Polisie v Ewels supra* vn 67.

109 *Coronation Brick*-saak *supra* vn 86.

110 Die verweerder kan hom natuurlik nog altyd op regverdigingsgronde beroep.

Die begrip "beleidsoorwegings" word nie deur ons howe en ook nie deur skrywers bevredigend verklaar nie. Ons vind wel voorbeelde van sogenaamde beleidsoorwegings, naamlik *overwhelming potential liability*, die kwessie van versekering, die maatskaplike nut van die gewraakte handeling en die menigvuldigheid van aksies, om maar net 'n paar te noem. Geen aanduidings word egter verskaf presies hoe hierdie beleidsoorwegings aangewend moet word nie. Wanneer bestaan daar in werklikheid *overwhelming potential liability*? In welke gevalle moet versekering 'n rol speel? So ontstaan daar ten aansien van elke beleidsoorweging vrae na die inhoud, grense en aanwending daarvan. In die lig hiervan is Neethling se standpunt, dat hierdie beleidsoorwegings nie vir sinvolle en rasionele toepassing deur die howe vatbaar is nie, korrek.[111] Dit is immers onmoontlik om vae en onsekere beleidsoorwegings, wat nog nie as eksakte maatstawwe uitgekristalliseer het nie, aan te wend ten einde aanspreeklikheid te begrens. Ter wille van regsekerheid behoort beleidsoorwegings geen aanwending by die bepaling van die onregmatigheid te vind nie. Hierdie standpunt word om die volgende redes gehuldig:

a Die vrees vir oewerlose aanspreeklikheid is ongegrond. Die subjektiewe kennistoets beperk alle moontlike eisers tot slegs diegene wie se identiteit òf individueel òf as lede van 'n bepaalde klas ten tyde van die verweerder se optrede aan laasgenoemde bekend was. Die korrekte aanwending van hierdie kennistoets maak die oorweging van beleidsfaktore soos die omvang van die eis(e), *overwhelming potential liability* en menigvuldigheid van aksies oorbodig. Daar bestaan geen gevaar van onbeperkte, onbeheerbare aanspreeklikheid nie – solank elke eiser ingevolge die subjektiewe kennistoets geïdentifiseer is, behoort nòg die aantal eise nòg die omvang van die eis(e) 'n aksie vir suiwer ekonomiese verlies te negativeer.

b Daar bestaan 'n neiging om in die geval van suiwer ekonomiese verlies noodwendig aan uiterste gevalle (dit wil sê eise wat enorme bedrae kan beloop) te dink en dan vir hierdie gevalle 'n oplossing te probeer vind. In die tussentyd is daar baie relatief "gemiddelde" eise wat sonder enige probleme aan die hand van die beginsels van die onregmatige daad opgelos kan word. Derhalwe is dit onnodig en onwenslik om vae en onsekere beleidsoorwegings (wat in elk geval nie uiterste gevalle doeltreffend kan reguleer nie) in te voer en sodoende regsekerheid prys te gee.

c Indien die begrensing van aanspreeklikheid in die geval van suiwer ekonomiese verlies steeds 'n wesenlike probleem blyk te wees, is wetgewing 'n oplossing. Op hierdie wyse kan 'n eksakte inhoud aan byvoorbeeld vae en onsekere beleidsoorwegings gegee word.[112]

d Beleidsoorwegings speel nie 'n rol by ander vorme van Aquiliese aanspreeklikheid nie. Niemand sou byvoorbeeld ontken nie dat, in die geval van 'n vliegtuig wat met 200 passassiers aan boord in die see neerstort en niemand die ramp oorleef nie, die lugredery in beginsel aanspreeklik is, ongeag die miljoene rande wat sodanige eise mag beloop. Daar blyk geen rede te wees waarom beleidsoorwegings in die geval van suiwer ekonomiese verlies 'n rol te speel het by die bepaling van onregmatigheid nie.

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111 Neethling 1983 *THRHR* 211.

112 Vgl a 82(2) van die Verordeninge van die Stadsraad van Pretoria m b t elektrisiteitsvoorsiening waarvolgens die stadsraad o a nie aanspreeklik is vir verlies weens kragonderbrekings nie – moontlik weens die groter maatskaplike nut van elektrisiteitsvoorsiening?

'n Laaste gedagte: Nadat aanspreeklikheid weens suiwer ekonomiese verlies deur so 'n lang en moeilike ontwikkelingstadium gegaan het, met behulp van 'n keisersnee[113] in die wêreld gebring is en sodoende uiteindelik die status van Aquiliese aanspreeklikheid verwerf het, is dit werklik nodig om hierdie "probleemkind" met nog probleme, in die vorm van beleidsoorwegings, te belas?

113 hr Rumpff in die *Trust Bank*-saak *supra* 831B.

Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu[1]

AJ van der Walt
B Jur Honns LLB LLD
Senior lektor, Potchefstroomse Universiteit vir Christelike Hoër Onderwys

SUMMARY

Bartolus's definition of *dominium* and interpretations thereof since the fifteenth century.

A formal definition of ownership was unknown to Roman law of property up to the fourteenth century. Bartolus de Saxoferrato (1313–1357) formulated the first formal definition of *dominium* in his commentary on *D* 45 1 58: "dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur." The main thrust of this definition seems to have been the intention to clarify the distinction between *dominium* and *possessio*. In the content of a duplex *dominium*, as recognised by Bartolus, two interpretations of this definition are possible: (a) with reference to the *dominium directum* of the *dominus directus*, it would be natural to place the main emphasis on the owner's capacity to sell or burden the thing; whereas (b) with reference to the *dominium utile* of the *dominus utilis*, the emphasis would rather fall on the owner's capacity to use the thing. Jurists have tended to follow one or other of these interpretations since the fifteenth century, with the result that two approaches to the definition of ownership may be discerned in legal treatises: on the one hand, with the emphasis falling on the exclusive capacity to sell or burden the thing; and on the other, with the emphasis on the (unlimited) capacity to use (and abuse) the thing. Modern Western law, and South African law, tend to move away from the definition according to which the owner has an unlimited right of use. Different possibilities for future developments are discussed in the final part of the article.

1 INLEIDING

1 1 In die voor-klassieke en klassieke Romeinse reg het daar geen formele omskrywing van eiendomsreg bestaan nie. Die begrip *dominium* is na alle waarskynlikheid vir die eerste keer in die voor-klassieke Romeinse reg deur Labeo gebruik.[2] Hoewel die sekondêre bronne,[3] in navolging van Kaser,[4] aanvaar dat

1 Die skrywer erken met dank die finansiële ondersteuning van die volgende instansies, waardeur gedeeltes van die navorsing vir hierdie artikel moontlik gemaak is: Die Getrouheidswaarborgfonds vir Prokureurs, Notarisse en Transportbesorgers; die Raad vir Geesteswetenskaplike Navorsing; en die Komitee vir Buitelandse Betrekkinge van die Potchefstroomse Universiteit vir Christelike Hoër Onderwys.

2 *D* 18 1 80 3: "Nemo potest videri eam rem vendidisse, de cuius domino id agitur, ne ad emptorem transeat, sed hoc aut locatio est aut aliud genus contractus."

3 Bv Diosdi *Ownership in Ancient and Pre-classical Roman Law* (1970) 131.

4 Kaser *Eigentum und Besitz im älteren römischen Recht* (1943) 306 ev; *Der römische Eigentumsbegriff in Deutsche Landesreferate zur VI internationalen Kongress für rechtsvergeleichung in Hamburg 1962* (1962) 19–38 29 31; *Das römische Privatrecht* (1971) band 1 373–374.

die *dominium*-begrip sedert die voor-klassieke reg 'n proses van vertegnisering ondergaan het, impliseer dit nie dat die *dominium*-begrip van die voor-klassieke of die klassieke Romeinse reg sonder meer met die moderne eiendomsbegrip gelykgestel kan word nie. Feenstra[5] vestig tewens die aandag daarop dat, afgesien van die inhoudelike verskille tussen die voor-klassieke en die moderne eiendomsbegrippe, die Romeinse eiendomsreg reeds in die na-klassieke tydperk ingrypende veranderinge ondergaan het, en dat die ongelyksoortigheid van die Romeinse en die moderne eiendomsbegrippe daar reeds bevestig is. Feenstra[6] beklemtoon ook die gevare van 'n oppervlakkige gelykstelling van die Romeinse en die moderne eiendomsbegrippe. Die vertegnisering van die voor-klassieke Romeinse begrip *dominium* moet, in die lig van bogemelde oorwegings, gesien word as 'n duideliker afbakening van *dominium* teenoor *possessio*, en niks meer nie. Hierdie afbakening hou dan ook niks meer in nie as die beklemtoning van die *feitelike* aard van *possessio* enersyds, en die *juridiese* aard van *dominium* andersyds. Die juridiese aard van *dominium* word hoofsaaklik betrek op die feit dat dit, anders as *possessio*, deur die saaklike *rei vindicatio* beskerm word.[7]

Die voor-klassieke *dominium* is ook aangevul deur die sogenaamde bonitêre eiendomsreg of *in bonis esse*, waardeur die oënskynlik moderne voorkoms van die Romeinse eiendomsbegrip nogal gerelativeer word.[8] Hoewel dit redelik duidelik is dat die *actio Publiciana*, wat sedert die laaste eeu voor Christus deur die praetor verleen is, aanvanklik op die fiksie van *usucapio* berus het in gevalle waar die termyn daarvoor nog nie werklik afgeloop het nie,[9] bestaan daar 'n uitgebreide debat oor die aard en inhoud van *in bonis esse*.[10] Sonder om hier enigsins op die debat in te gaan, kan gesê word dat die bestaan en funksie van hierdie regsfiguur kennelik bepaalde verskille tussen die Romeinse en die moderne eiendomsreg impliseer. Die verhouding tussen *dominium ex iure Quiritium* en *in bonis esse* is juis vandag onduidelik as gevolg van die feit dat daar geen formele omskrywing van enige van die twee begrippe bestaan het nie.

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5 Feenstra *Romeinsrechtelijke Grondslagen van het Nederlands Privaatrecht – Inleidende Hoofdstukken* (1984) 38–41.

6 Feenstra "Les Origines du Dominium utile chez les Glossateurs" in *Fata Iuris Romani – Etudes d'Histoire du Droit* (1974) 215–259 (oorspronklik in *Flores Legum HJ Scheltema Antecessori Groningano Oblati* (1971) 49–93) 222: "Ceux-si ne supposent plus que le Romains aient toujours le même concept de la propriété que nous autres juristes modernes; à notre avis ce point de vue ne vaut seulement pour l'epoque préclassique, mais encore pour les juristes classiques et ceux de l'epoque justinienne"; asook Van den Bergh *Eigendom: Grepen uit die Geschiedenis van een Omstreden Begrip* (1979) (*Rechtshistorische cahiers* 1) Deventer 16: "Het is fantastisch om te veronderstellen dat eigendom precies dezelve plaats en functie zou hebben in twee maatschappijvormen die zo hemelsbreed van elkaar verschillen als de oude Romeinse en de onze."

7 Vgl veral Kaser *Privatrecht* 1 401.

8 Vgl veral Feenstra *Grondslagen* 39 par 83, asook "Historische Aspecten van die Private Eigendom als Rechtsinstituut" 1976 *Rechtsgeleerd Magazijn Themis* 248–275 260.

9 G 4 36; vgl met G 1 54.

10 Veral Wubbe "Quelques Remarques sur la Fonction et l'Origine die l'Action Publicienne" 1961 *Revue Internationale des Droits de l'Antiquité* 417–440; Sturm "Zur ursprünglichen Funktion der Actio Publiciana" 1962 *RIDA* 357–416; Kiefner "Klassizität der 'Probatio Diabolica'?" 1964 *Zeitschrift der Savigny-Stiftung* 212–232. Feenstra "Action Publicienne et Preuve de la Propriété, Principalement d'apres quelques Romanistes du Moyen Age" in *Fata Iuris Romani – Études d'Histoire du Droit* (1974) 119–138 (oorspronklik in *Mélanges Phillipe Meylan* (1963) bd 1 91–112); "Duplex Dominium" in Ankum ea (reds) *Symbolae Juridicae et Historiae Martino David Dedicatae* (1968) band 1 55–71; Diosdi *Ownership* 154–155 160–165; Kaser "Nochmals zu 'in Bonis Habere' " in Van der Westhuizen ea (reds) *Huldigingsbundel P van Warmelo* (1984) 144–163.

Afgesien van die vraag of *in bonis esse* wel 'n alternatiewe vorm van eiendomsreg in die voor-klassieke Romeinse reg was al dan nie, is dit duidelik dat die klassieke Romeinse reg meer as een vorm van eiendomsreg geken het. Naas *dominium ex iure Quiritium* en *in bonis esse* moet daar ook nog die eiendomsreg van *peregrini* volgens die *ius gentium*,[11] regte op provinsiale grond,[12] en eiendomsreg op die *dos*[13] onderskei word. Elkeen van hierdie gevalle was skynbaar 'n eiesoortige verskyningsvorm van eiendomsreg of *dominium*, maar desnieteenstaande is daar van geeneen 'n formele omskrywing verskaf nie.

Die enigste gemeenskaplike kenmerk van die verskillende eiendomsvorme van die Romeinse reg waaruit iets oor die aard van *dominium* in die klassieke Romeinse reg afgelei kan word, hou verband met die beskerming van *dominium* deur die *rei vindicatio*, wat 'n *actio in rem* was, en wat dus in beginsel teen enige persoon wat passief tot 'n verweer teen die *rei vindicatio* gelegitimeer was, afgedwing kon word.[14] Uit die feit dat al bogemelde eiendomsvorme deur die saaklike aksie gehandhaaf is, kan afgelei word dat die saaklike beskerming van die eienaar as een van die karakteristieke elemente van eiendomsreg gesien moet word. Dit is juis hierdie beskerming wat die klassieke *dominium* onderskei van die oud-Romeinse *meum esse*.[15] In die afwesigheid van enige formele omskrywing van *dominium* kan dus beweer word dat die teenstelling tussen *dominium* en *possessio*, en die daarmee gepaardgaande saaklike beskerming van *dominium* teenoor alle derdes, as die belangrikste kenmerke van *dominium* in die klassieke Romeinse reg gesien moet word.

1 2 In die sogenaamde vulgêre na-klassieke Romeinse reg het die onderskeid tussen *dominium* en *possessio* grotendeels verlore geraak.[16] In die vulgêre reg bestaan daar net een soort eiendomsreg, wat nie formeel omskryf word nie, maar wat as gevolg van die ongespesifiseerde terminologie wyd genoeg is om al die eiendomsvorme van die klassieke reg, asook *possessio* en bepaalde gebruiksregte soos *ususfructus*, in te sluit. In 'n beperkte sin het die eiendomsaksie gedurende die vulgêre reg ook sy absolute karakter verloor.[17] Die onderskeid tussen *dominium* en *possessio* het ook grootliks verdwyn, veral as gevolg van die vulgêre gebruik om *dominium* in terme van *iure possidere* te omskryf.[18]

Hoewel Justinianus en die samestellers van die *Corpus Iuris Civilis* probeer het om die klassieke onderskeide te herstel, is die inkonsekwente toekenning

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11 Vgl Feenstra *Grondslagen* 38; en verder Buckland *A Text-book of Roman Law from Augustus to Justinian* (1975) 190; Thomas *Textbook of Roman Law* (1976) 135; Kaser *Privatrecht* 1 402; Feenstra 1976 *RMT* 248 260.

12 Vgl veral Kaser *Privatrecht* 1 402–403; Feenstra *Grondslagen* 38; Thomas *Roman Law* 136; Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 62.

13 *D* 23 3 75; vgl veral Thomas *Roman Law* 428.

14 Vgl oor die saaklike aard van die *rei vindicatio* Feenstra *Grondslagen* 41–42.

15 In die terminolgie van Kaser *Privatrecht* 1 400–401 (vgl verder *Eigentum* 6; *Eigentumsbegriff* 22) is *meum esse* slegs 'n *relatiewe* aanspraak, omdat dit slegs in die konteks van die relatiewe houdbaarheid van die betrokke partye se aansprake teenoor mekaar beoordeel is, terwyl *dominium* teenoor alle moontlike aanspraakmakers gewaarborg is, en daarom 'n *absolute* aanspraak is.

16 Vgl veral Levy *West-Roman Vulgar Law: The Law of Property* (1951) 32 34; asook Kaser *Privatrecht* 2 238–239 246–248 261–262; *Eigentumsbegriff* 36; *Zum Begriff des spätrömischen Vulgarrechts* (1961) 551; *Wesen und Wirkungen der Detention in den antiken Recht in Deutsche landesreferate zum III internationalen Kongress für Rechtsvergleichung in London 1950* (1950) 1–35 24–28.

17 Vgl veral Levy *Vulgar Law* 238.

18 Voorbeelde by Levy *Vulgar Law* 64–67.

van die *actio in rem* aan bepaalde persone wat nie goed in die sisteem inpas nie[19] 'n voorbeeld van die invloed van die vulgêre reg gedurende die na-klassieke periode van die Romeinse reg. In na-Justiniaanse geskrifte uit die twaalfde eeu soos die *Brachylogus*[20] en *Lo codi*[21] kom daar uitsprake voor wat die indruk laat dat daar teen die twaalfde eeu wel weer 'n bepaalde onderskeid tussen *dominium* en ander saaklike aansprake soos *ususfrutus* erken is.

Ten opsigte van die na-klassieke Romeinse reg kan daar dus gesê word dat die onderskeid tussen *dominium* en *possessio* wel in 'n groot mate vervaag het, maar dat die saaklike beskerming van die eienaar waarskynlik nog een van die kenmerkende eienskappe van eiendomsreg was. Daar het egter steeds geen formele omskrywings van eiendomsreg bestaan nie.

1 3 Die Glossatore verskaf ook geen formele omskrywing van *dominium* nie, hoewel hulle 'n belangrike nuwe ontwikkeling in die eiendomsreg tot stand gebring het. Hoewel daar 'n debat oor die ontstaan van die onderskeid tussen *dominium directum* en *dominium utile* bestaan,[22] word daar vandag algemeen aanvaar dat *dominium utile* sy oorsprong gehad het by Pillius se vraag *utrum vasallus habeat aliquod dominium feudi*, en die bevestigende antwoord daarop: die vasal het *dominium utile* van die leengrond, terwyl die leenheer die *dominium directum* daarvan behou.[23]

Die Glossatore verskaf egter geen formele omskrywing van enige van die eiendomsvorme nie, en die aard en inhoud van *dominium* moet tot in die vyftiende eeu nog steeds uit indirekte omskrywings afgelei word.

1 4 Die Franse Romaniste of *Ultramontani* van die dertiende eeu gee ook geen formele omskrywing van *dominium* nie, maar stel tog twee nuwe gedagtes bekend, waardeur die aard en inhoud van *dominium* ietwat duideliker na vore kom. In die eerste plek word 'n tendens, wat reeds by die Glossatore op onvoltooide wyse aanwesig was,[24] by die *Ultramontani* duideliker, te wete die

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19 Voorbeelde by Levy *Vulgar Law* 239.

20 *Corpus Legum sive Brachylogus Iuris Civilis* Böcking (red) (1829) 2 16: "Usus autem est ius utendi; ususfructus ius utendi fruendi re aliena."

21 *Lo codi* in Latyn vertaal deur Pisanus, heruitgawe van Fitting 1906 3 28: "Ususfructus est drictura usandi et fruendi rem alienam"; 8 8: "Superficiarius, id est ille qui habet domum hedificatam super terram alterius cum voluntati illius cuius est terra."

22 Veral Lang *Commentatio de Dominii Utilis Natura, Indole atque Historia eiusque in Iure Romano et Germano Vestigiis* (1793); Thibaut *Über Dominium Directum und Utile in Versuche über einzelne Theile der Theorie des Rechts* (1801 herdruk 1970) band II deel III 67–99; Phillips *Grundsätze des gemeinen deutschen Privatrechts mit Einsluss des Lehnrechts* (1828); Duncker "Über Dominium directum und Utile" 1839 *Zeitschrift für Deutsches Recht und Deutsche Rechtswissenschaft* 177–212; Lautz *Entwicklungsgeschichte des Dominium Utile* (dissertasie Göttingen) (1916 geskryf 1886); Meynial *Notes sur la Formation de la Théorie du Domaine Divise Domaine Direct et Domaine Utile du XIIe au XIVe Siécle dans le Romanistes – Étude de Dogmatique Juridique in Mélanges Fitting* II 409–461 (1908 herdruk 1969) Wagner *Das geteilte Eigentum im Naturrecht und Positivismus* (1938); Feenstra *Origines* 215–259. Feenstra se bydrae is nie alleen chronologies die nuutste nie, maar is in die algemeen die mees gesaghebbende bydrae oor en verteenwoordigende weergawe van die hedendaagse siening van *dominium utile.*

23 Glos *de suis rebus* by libri Feudorum (LF 2 3 pr; en glos *tertiam personam* by LF 2 34 3: "Dominium utile penes vasallos: directum penes dominium." Vgl daarby Meijers "Les Glossateurs et le Droit Féodal" 1934 *Tijdschrift voor Rechtsgeschiedenis* 129–149 132–133 135–137; Feenstra 1976 *RMT* 248 265; *Origines* 243.

24 Sien veral glos *facere licet* by *D* 8 5 8 5: "suae quisque rei iustus est moderator, et arbiter, ut in eo quisque faciat, quod animo lubeat"; glos *prohibetur* op *C* 3 34 8: "videtur ergo, quod quoalibet praedium praesumitur liberum, nisi prohibetur contrarium, est enim eius usque ad coelum, cuius est solum"; en verder Schrage *Actio en Subjectief Recht: Over Romeinse en Middeleeuwse Wortels van een Modern Begrip* (1977) 30 e v.

tendens waarvolgens die inhoud van eiendomsreg eerder benader word vanuit die inhoud van die eienaar se reg as vanuit die remedies van derdes wat deur die uitoefening van die reg benadeel is.[25] Daardeur word 'n nuwe benadering tot eiendomsreg aangedui: eiendomsreg word aan die hand van die inhoud van die eienaar se bevoegdhede ten opsigte van handelinge met sy saak omskryf. Hierdie nuwe benadering is eintlik 'n voorvereiste vir die totstandkoming van 'n formele omskrywing van eiendomsreg. Omdat dit volgens die Romeinse styl gebruiklik was om op die onderskeie aksies en remedies van partye in 'n regsgeskil te konsentreer, kan 'n formele omskrywing van die reg van een van die partye as sodanig in die Romeinse reg skaars verwag word. Eers wanneer die aandag van die aksies na die reg agter die aksies verskuif, kan só 'n omskrywing voorkom.

In die tweede plek bring die *Ultramontani* vernuwing deurdat die verskynsel van *dominium utile* nie net verdere nuansering ondergaan nie,[26] maar ook inderdaad as die werklike eiendomsreg aangedui word.[27]

1 5 Om saam te vat: voor die veertiende eeu het daar geen formele omskrywing van eiendomsreg bestaan nie. Seker die belangrikste rede hiervoor was dat een van die voorvereistes vir die totstandkoming van sodanige omskrywing voor die dertiende eeu inderdaad ontbreek het, naamlik die verklaring van die verskynsel van eiendomsreg vanuit die inhoud van die eienaar se bevoegdhede ten aansien van die saak. Die feit dat die saaklike beskerming van die eienaar se bevoegdhede met die *rei vindicatio* tot met die veertiende eeu 'n belangrike aspek van eiendomsreg uitgemaak het, moet verklaar word in die lig van die feit dat die aandag van die Romeinse juriste nie op die reg van die eienaar gevestig was nie, maar juis op sy aksies (en op die aksies van derdes teenoor hom).

2 BARTOLUS SE OMSKRYWING VAN DOMINIUM

2 1 Bartolus de Saxoferrato (1313–1357) se omskrywing van *dominium* is die eerste formele omskrywing van eiendomsreg wat in die ontwikkelingsgeskiedenis van die Romeinse reg aangetref word. Bartolus omskryf *dominium* soos volg:

"Dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur."[28]

2 2 Die verskillende elemente van hierdie omskrywing word soos volg in die sekondêre bronne verduidelik:

a *ius de re corporali* Hierdie omskrywing is spesifiek op die enger betekenis van *dominium* ingestel, en sluit die sogenaamde *dominium* van onliggaamlike sake (of regte) uit. Bartolus verskaf egter, naas hierdie omskrywing, ook 'n wyer

25 Vgl veral De Révigny op D 8 2 10 (Manuskrip d'Ablaing 2 Leiden UB fol 160 v); De Belleperche op 1 1 7; Johannes Faber op 1 1 7; en verder Schrage *Subjectief Recht* 32 e v.

26 Veral by Johannes Faber; vgl Faber op 1 4 6 1 n 4–7, veral 5; asook Feenstra 1976 *RMT* 248 266–267.

27 Veral by De Révigny op 1 2 1 39 1 4 6 1; vgl Feenstra *Origines* 253.

28 Bartolus op *D* 41 2 17 1 n 4. Vir besprekings van hierdie definisie, sien veral Feenstra 1976 *RMT* 248 249–254; asook Coing "Zur Eigentumslehre de Bartolus" 1953 *ZSS* 348–371; Willoweit "Dominium und Proprietas – zur Entwicklung die Eigentumsbegriffs in der mittelalterlichen und neuzeitlichen Rechtswissenschaft" 1974 *Historisches Jahrbuch des Görres-Gesellschaft* 131–156 144; Schrage *Subjectief Recht* 68; Van den Bergh *Eigendom* 24.

omskrywing, waarby die sogenaamde onliggaamlike sake wel ingesluit is.[29] Volgens Bartolus is die enger omskrywing 'n *species* van die groter *genus* van *dominium*.[30]

b *perfecte* Uit die konteks van die omskrywing, asook die sekondêre interpretasies daarvan,[31] blyk dit duidelik dat die woord *perfecte* nie daarop gemik was om enigiets oor die absolute of onbeperkte uitoefening van die eienaar se bevoegdhede ten aansien van die saak te sê nie, maar bloot om *dominium* (as die *ius de re disponendi*) met *possessio* (as die *ius in re insistendi*) te kontrasteer.

c *disponendi* Hierdie begrip is kennelik gebruik om *dominium* met *possessio* te kontrasteer, in die sin dat die *dominus* oor die saak kan beskik, terwyl die *possessor* dit slegs kan beheer. Dit was nie Bartolus se bedoeling om daarmee te sê dat die eienaar vryelik met die saak kan handel nie.[32] Die afwesigheid van sodanige bedoeling blyk juis uit die konteks van Bartolus se behandeling van *dominium*, aangesien hy hierdie omskrywing van hom op drie verskillende soorte *dominium* betrek.[33] Dit is, logies gesproke, onmoontlik om drie verskillende soorte eiendomsreg, wat tegelyk aan verskillende persone kan toekom, in terme van 'n absolute beskikkingsbevoegdheid ten aansien van die saak te omskryf. Die omskrywing kontrasteer dus bloot die verskillende eienaars se beskikkingsbevoegdheid met die blote beheerbevoegdheid van die *possessor*.

d *nisi lege prohibeatur* Hierdie kwalifikasie plaas die eienaar se *ius disponendi* in die regte perspektief, deur aan te dui dat die eienaar se beskikkingsbevoegdheid binne die grense van die reg uitgeoefen moet word.[34]

2 3 Dit blyk dus dat Bartolus se omskrywing van *dominium* in die eerste plek geformuleer is om een van die kenmerke wat sedert die klassieke Romeinse reg belangrik was, naamlik die kontras met *possessio*, te beklemtoon. Dit was duidelik nie die bedoeling om met die omskrywing van *dominium* te sê dat eiendomsreg 'n absolute of onbeperkte beskikkingsbevoegdheid ten aansien van die saak verleen nie, hoewel die omskrywing tog impliseer dat *dominium* in terme van 'n beskikkingsbevoegdheid omskryf kan of moet word.

3 INTERPRETASIES VAN BARTOLUS SE OMSKRYWING VOOR DIE SEWENTIENDE EEU

3 1 Kroeschell[35] maak die interessante waarneming dat die terminologie van Bartolus se omskrywing van *dominium* 'n besondere interpretasieprobleem skep. In die konteks van 'n dubbele eiendomsbegrip, waarop Bartolus sy eie omskrywing betrek, ontstaan die vraag wie van die *domini* eintlik die werklike of effektiewe eienaar van die saak is. Die vraag skep die moontlikheid vir veral twee verskillende interpretasies van Bartolus se omskrywing:

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29 Bartolus op *D* 41 2 17 vn 4: "Quero sit dominium, et potest appellari largissime pro omni iure incorporali, ut habeo dominium obligationis, ut puta usufructus."

30 Bartolus op *D* 45 1 58 n 3.

31 Sien veral Feenstra 1976 *RMT* 248 270; maar ook Coing 1953 *ZSS* 348 353–354; Willoweit 1974 *HJGG* 131 145; Van den Bergh *Eigendom* 24.

32 Sien veral Feenstra 1976 *RMT* 248 251–252; Coing 1953 *ZSS* 348 353–354.

33 Te wete *dominium directum, dominium utile*, en *quasi-dominium*: vgl Bartolus op *D* 21 2 39 1 n 3: "Tria sunt dominia, directum et utile et quasi dominium."

34 Feenstra 1976 *RMT* 248 253–254 vermeld *D* 1 5 4 en *C* 4 38 14 as moontlike bronne vir die formulering van hierdie kwalifikasie.

35 Kroeschell "Zur Lehre vom 'germanischen' eigentumsbegriff in Rechtshistorische Studien" in *Festschrift H Thieme* (1977) 34–71 37. Vgl verder Seelmann *Die Lehre des Fernando Vazquez de Menchaca vom Dominium* (1979) 65–68.

a Indien *dominium directum* as die werklike eiendomsreg beskou word, sal die kenmerkende bevoegdhede van die *dominus directus* (byvoorbeeld die leenheer) uiteraard beklemtoon word as die kenmerkende eienskappe van *dominium*. In hierdie konteks sal die *vervreemdingsbevoegdheid* van die leenheer belangrik wees, omdat dít juis die bevoegdheid is wat aan hom toekom, en nie aan enigiemand anders nie.

b As *dominium utile* as die werklike of effektiewe eiendomsreg gesien word, sal die kenmerkende eienskappe van die *dominus utilis* uiteraard as die kenmerkende eienskappe van *dominium* beklemtoon word, en dan sal die *gebruiksbevoegdheid* (van byvoorbeeld die leenman) belangrik wees, omdat dít die bevoegdheid is wat by uitstek aan hom toekom.

Die verskillende interpretasies van Bartolus se omskrywing van *dominium* sedert die vyftiende eeu lewer ook inderdaad voorbeelde van hierdie twee benaderings op. In die proses is daar mettertyd belangrike bydraes tot die ontwikkeling van die moderne eiendomsbegrip gemaak.

3 2 Reeds baie kort na Bartolus kom daar twee uiteenlopende rigtings onder die latere Post-Glossatore na vore. Aan die een kant beklemtoon Baldus de Ubaldis (1327–1400) die vervreemdingsbevoegdheid van die *dominus directus* in sy omskrywing:[36]

> "[D]ominium absolute dictum est plena proprietas cum alienandi potentia."

Hierdie interpretasie is gebaseer op die gedagte, wat reeds by die Glossatore[37]opgemerk kan word, en wat op 'n bekende teks in die *Institutiones*[38] teruggryp, dat daar tussen twee verskyningsvorme van *dominium* onderskei moet word: enersyds *dominium plenum*, en andersyds *proprietas nuda*. Eersgenoemde word daardeur gekenmerk dat dit nie alleen die vervreemdingsbevoegdheid oor die saak insluit nie, maar ook die daadwerklike genot en gebruik daarvan. Laasgenoemde bestaan egter alleen uit die formele vervreemdingsbevoegdheid, terwyl die daadwerklike gebruik by iemand anders berus. Baldus betrek Bartolus se omskrywing van *dominium*, in hierdie konteks, op die bevoegdheid wat meer as die gebruiksbevoegdheid insluit, en by name die vervreemdingsbevoegdheid. Dit word dan met die blote gebruiksbevoegdheid van die *dominus utilis* gekontrasteer.

Naas die interpretasie van Baldus is daar van die later Post-Glossatore wat juis die gebruiksbevoegdhede van die *dominus utilis* beklemtoon. Voorbeelde hiervan is veral Paulus de Castro (1394–1441),[39] Alexander van Imola (Tartagnus) (1424–1477),[40] en Jason de Mayno (1435–1519).[41] Hierdie interpretasie van

36 Baldus op *C* 5 9 3 n 1. Dieselfde benadering is ook in die veertiende eeu deur Franciscus de Accoltis gevolg: sien Accoltis op *D* 41 2 17 n 7.

37 Sien glos *servitus sit* by *D* 50 16 25: "Placen. vero sic, quod ususfructus est pars dominii, et non est pars dominii, utrumque verum secundum dialecticis est pars dominii legalis, non est pars dominii praedicativa sive subiectiva, ut posita specie, ponatur genus, ut homo ergo animal. Nam non sequitur, est fructus, ergo dominium scilicet plenum sed est legalis. Id est integralis quia simul iuncta proprietas et fructus faciunt dominium scilicet plenum."

38 1 2 4 4: "Cum autem finitus fuerit usus fructus, revertitur scilicet ad proprietatem et ex eo tempore nudae proprietatis dominus incipit plenam habere in re potestatem."

39 Paulus de Castro op *C* 4 19 4 n 2.

40 Alexander van Imola op *D* 41 2 17 1 n 6.

41 Jason de Mayno op *D* 41 2 12 1 n 28.

Bartolus se omskrywing word daardeur gekenmerk dat Bartolus se woorde *perfecte disponendi* met die woorde *libere disponendi* vervang word, met die implikasie of uitdruklike veronderstelling dat hierdie woorde na die vrye of onbeperkte *gebruiksbevoegdheid* van die eienaar verwys. In hierdie omskrywings, waarin die gebruiksbevoegdheid van die eienaar beklemtoon word, word die eienaar se reg op gebruik met ander gebruiksregte gekontrasteer op grond van die feit dat die eienaar se gebruiksreg vryelik uitgeoefen kan word. Juis daarom is die gebruik van die term *libere* van soveel betekenis.

3 3 By die skrywers oor die *Mos Italicus* gedurende die sestiende eeu kan dieselfde verdeling waargeneem word. Enersyds bestaan daar interpretasies van Bartolus se omskrywing waardeur die *vervreemdingsbevoegdheid* beklemtoon word,[42] en andersyds bestaan daar weer interpretasies waardeur die volledige *gebruiksbevoegdheid* beklemtoon word.[43]

Onder die tweede groep is dit, soos in die geval van die Post-Glossatore wat hierbo vermeld is, gebruiklik om die beklemtoning van die vrye gebruiksbevoegdheid van die eienaar te bewerkstellig deur Bartolus se woorde *perfecte disponendi* met *libere disponendi* te vervang. Dit is veral in die geval van Menochius duidelik dat die doel van hierdie alternatiewe formulering was om die vrye beskikkingsbevoegdheid wat met gebruik van die saak gepaard gaan, te beklemtoon:

> "Dominium proprium sit, ut dominus valet de re sua ad libitum disponere.[44] Hinc dicimus, rei dominum posse illam etiam in mare proiicere."[45]

Hieruit blyk dat hierdie besondere interpretasie van Bartolus se omskrywing daartoe neig om die omvang van die gebruiker se bevoegdhede ten aansien van gebruik van die saak te beklemtoon. Hoewel die omskrywing van Menochius, deur beklemtoning van die eienaar se reg om die saak te vernietig, die bevoegdheid om te vervreem veronderstel, word die eienaar se gebruiksbevoegdheid duidelik as uitgangspunt gebruik. Hierdie tendens is waarskynlik (minstens onder andere) geïnspireer deur die ontwikkeling van die eiendomsbegrip in die Fransiskaanse armoedestryd, wat daarop uitgeloop het dat die *vrye gebruiksbevoegdheid* van die eienaar skerp teen die *blote gebruiksbevoegdheid* van die nie-eienaar afgeteken staan.[46]

3 4 Die Franse humanisme of *mos Gallicus* van die sestiende eeu gee eweneens blyke van dieselfde verdeeldheid oor Bartolus se omskrywing van *dominium*, selfs al neig hierdie groep skrywers om die tipies Middeleeuse beskouings van die geleerde Romaniste agterweë te laat, in 'n poging om die klassieke denkbeelde

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42 Voorbeelde is veral Philippus Decius (1454–1536) *Consilia sive Responsa* (1588) 468 n 9 n 11 558 n 5; Matthaeus de Afflictis (1448–1528) *In Tres Libros Feudorum* (1560) 3 30 3 32 n 11–17.

43 Voorbeelde is veral Jacob Menochius (1532–1607) *Consilia sive Responsa* (1625) 226 n 4–8 492 n 12; Aymon Cravetta (laat 16e eeu) *Consiliorum sive Responsorum* (1572) 4 n 3 6 n 121; Giovanni Cephalus (1510–1579) *Consiliorum sive Responsorum* (1579) 1 3 n 84 3 307 n 84; J Bertrandus (16e eeu) *Consiliorum sive Responsorum* (1603) 3 308 n 1.

44 Menochius *Consilia* 492 n 12.

45 Menochius *Consilia* 226 n 6.

46 Sien in hierdie verband veral Schrage *Subjectief Recht* 39–69; en verder Kölmel "Apologia Pauperum – die Armutslehre Bonaventuras da Bagnoregio als soziale Theorie" 1974 *HJGG* 46–68; Gagnér *Vorbemerkungen zum Thema 'Dominium' bei Ockham* in *Antiqui und Moderni, Traditionsbewusstzein und Fortschrittsbewusstzein in späten Mittelalter* (*Miscellanea Medievalea Veröffentlichungen des Thomas-Instituts der Universität zu Köln* 9) 293–327; Boehmer *Analekten zur Geschichte des Franciscus von Assisi* (1904).

in ere te herstel.[47] Daar is dus een groep humaniste wat die *vervreemdingsbevoegdheid* van die eienaar beklemtoon,[48] en 'n ander groep wat die vrye *gebruiksbevoegdheid* van die eienaar beklemtoon.[49] Laasgenoemde groep neig om in hulle omskrywing die absoluutheid of die omvangrykheid van die eienaar se bevoegdheid met betrekking tot gebruik van die saak te beklemtoon, en om sodoende Bartolus se woorde *perfecte disponendi* in 'n nuwe konteks te interpreteer, waarvolgens dit op die volledigheid of onbeperktheid van die eienaar se gebruiksbevoegdheid sou dui. Deur hierdie benadering word Bartolus se omskrywing van *dominium* omgeskep in 'n heel nuwe omskrywing, waarin die sogenaamde *ius abutendi* van die eienaar voorop staan.[50] Dit lyk asof hierdie *ius abutendi* ook deur die debat rondom die Fransiskaanse armoedeleer geïnspireer kon wees.[51]

3 5 In die Spaanse moraalfilosofie of sogenaamde laat-skolastiek van die sestiende eeu word *dominium* in die eerste plek, na aanleiding van Thomas van Aquino (1225–1274) se omskrywing daarvan,[52] as 'n menslike *facultas* omskryf, en daarom is die interpretasie van Bartolus se *perfecte disponendi*, waarvolgens die vryheid van die eienaar se *gebruiksbevoegdheid* beklemtoon word, onder hierdie skrywers die mees algemene benadering.[53] In die konteks van die moraalfilosofie is dit juis die Spaanse laat-skolastici, en by name Molina,[54] wat die finale stap doen om Bartolus se omskrywing van *dominium* in 'n definisie van vrye gebruiksbevoegdheid te omskep. Die onbeperkte bevoegdheid van die eienaar om met sy saak te handel, word dus die kern van die eiendomsomskrywing.

Die enigste afwykende interpretasie onder die moraalfilosowe is dié van Fernando Vazquez de Menchaca (1512–1566), wat juis krities teen Bartolus se omskrywing staan.[55] Vazquez de Menchaca interpreteer Bartolus se woorde *perfecte*

47 Veral die onderskeid tussen *dominium directum* en *dominium utile* word in die reël verwerp; vgl bv Franciscus Duarenus (1509–1559) "Disputatio Anniversariarum" in *Omnia quae quidem hactenus Edita Fuerunt Opera* (1962) 1 17; Hubert Giphanius (1534–1604) op 1 2 2; Antonius Faber (1557–1624) op *D* 6 2 12 2.

48 Voorbeelde is Jacobus Cujacius (1522–1590) op *D* 41 1; Giphanius op 1 2 2.

49 Voorbeelde is veral Duarenus *Disputatio* 1 17; Franciscus Connanus (1508–1551) *Commentariorum Iuris Civilis* (1558) 3 3; Udalricus Zasius (1461–1535) op *D* 41 2 17 1 n 11; Matthaeus Wesenbecius (1531–1586) op *D* 41 n 4; maar veral Francois Hotman (1524–1590) *Commentarius Verborum Iuris* (1558) in *Opera* (1559) 1 by *dominium*, waar *dominium* omskryf word as die "ius ac potestas re quapiam tum utendi tum abutendi, quatenus iure civili permittitur."

50 Vgl veral die omskrywing van Hotman in die vorige voetnoot.

51 Vgl vn 47 hierbo.

52 Veral in *Summa Theologica* 11a 11ae q 66 a 1–2. Vgl oor Thomas se omskrywing Feenstra 1976 *RMT* 248 268: Feenstra "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen" in *Festschrift Franz Wieacker* (1978) 209–234 214; Spicq "Dominium, Possessio, Proprietas chez S Thomas et chez les Juristes Romains" 1929 *Revue des Sciences Philosophiques et Théologiques* 269–281; "La Notion Analogique de Dominium et le Droit de Propriété" 1931 *RSPT* 52–76; "Potestas Procurandi et Dispensandi (S Thomas, Sum Theol 11a 11ae q 66 a 2)" 1934 *RSPT* 82–93.

53 Vgl Francisco de Vitoria (1492–1546) *De Iustitia* (uitgegee deur RPVB de Heredia (1934)) band 1 2 2 62 1 n 8; Domingo de Soto (1494–1560) *De Iustitia et Iure* (1589) 4 1; Luis de Molina (1536–1600) *De Iustitia et Iure* (1613) 2 3 1.

54 Molina *De Iustitia* 2 3 16: "In definitione solum dominium proprietatis plenum et utroque capite explicato fuisse definitum. Solum enim is qui ex utroque capite habet dominium plenum potest de re perfecte disponere, cuius est dominus."

55 Vgl Vazquez de Menchaca *Controversiarum Illustrium Aliarumque Usu Frequentium* (1564) (herdruk 1931–1934) Vallodolid 1 17 n 6. Vgl daaroor verder Seelmann *Die Lehre des Fernando Vazquez de Menchaca vom Dominium* 57 70.

disponendi as verwysende na die eienaar se *vervreemdingsbevoegdheid.* Antonius Gomezius (1501–1562 of 1572), wat ewe goed by die moraalfilosofie as by die *mos Italicus* van die sestiende eeu tuishoort, beklemtoon in sy kommentaar op die *leges Tauri*[56] die eienaar se *vindikasiebevoegdheid* as die kenmerkende eienskap van *dominium*, maar dit lyk uit die konteks, en veral na aanleiding van die verwysings na skrywers soos Duarenus, asof Gomezius in hierdie verband sterk deur die juridiese humanisme beïnvloed is.

3 6 Dit blyk dus dat Bartolus se omskrywing van *dominium* tussen die vyftiende en die sewentiende eeue gewoonlik op een van twee moontlike wyses geïnterpreteer is: òf met beklemtoning van die eienaar se *vervreemdingsbevoegdheid* (wat by implikasie veral na die *dominus directus* verwys); òf met beklemtoning van die onbeperkte of absolute aard van die eienaar se *gebruiksbevoegdheid* ten aansien van die saak (wat by implikasie veral na die *dominus utilis* verwys). Tot aan die einde van die sestiende eeu het albei interpretasies heelwat aanhang geniet.

4 INTERPRETASIES VAN BARTOLUS SE OMSKRYWING SEDERT DIE SEWENTIENDE EEU

4 1 Alhoewel daar voor die sewentiende eeu nog geen duidelike voorkeur vir die een of die ander interpretasie van Bartolus se omskrywing aangetoon kan word nie, vertoon regsontwikkeling sedert die sewentiende eeu wel 'n voorkeur vir die interpretasie waarvolgens die vrye aard of die wye omvang van die eienaar se *gebruiksbevoegdheid* ten aansien van die saak beklemtoon word. Dit blyk uit die rigting wat in die verskillende ontwikkelende nasionale regstelsels ingeslaan is.

4 2 In die Duitse *usus modernus Pandectarum*, waar die onderskeid tussen *dominium directum* en *dominium utile* taamlik sterk in die vorm van *Ober-Eigenthum* en *Minder Eigenthum* onderskeidelik aanvaar is,[57] is dit die beklemtoning van die *dominus utilis* se *gebruiksbevoegdheid* wat in die omskrywing van *dominium* die deurslag gee. Dit kom die duidelikste na vore in die feit dat 'n gedeelte van die *proprietas* ook aan die *dominus utilis* toegeskryf word.[58]

Hierdie tendens was sterk genoeg om die natuurregsgeleerde skrywers van die sestiende en sewentiende eeue[59] en die formulering van die *Allgemeines Landrecht für die Preussische Staaten* (1794)[60] te beïnvloed.

4 3 Die Duitse historiese skool en Pandektewetenskap het eweneens die rigting van die *gebruiksbevoegdheid* ingeslaan, en die duidelikste formulerings daarvan word onderskeidelik by Georg Friedrich Puchta (1798–1846) en Bernhard Windscheid (1817–1892) aangetref. In albei gevalle is die filosofiese invloed van die Duitse idealisme waarskynlik 'n versterkende faktor, waardeur die betekenis van die menslike wil en die veruiterliking daarvan op die voorgrond kom. Daarom

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56 Gomezius *Ad Leges Tauri Commentarius* (1628) 45 n 5.

57 Vgl veral Johann Gottlieb Heineccius (1681–1741) op *D* 41 1 par 161, asook op 1 2 1 par 291–292; Wolfgang Adam Lauterbach (1618–1678) op *D* 41 1 n 4.

58 Vgl veral Heineccius op 1 2 1 par 291; en verder Kroeschell *Eigentumsbegriff* 38.

59 Vgl Samuel Pufendorf (1632–1694) *Elementorum Jurisprudentiae Universalis* (1672 fotografiese uitg 1931) 1 5 3; Christian Wolff (1679–1754) *Ius Naturae Methodo Scientifica Pertractum* (1740–1748) 2 2 131; Christian Thomasius (1655–1728) *Institutionum Jurisprudentiae Divinae* (1710) 4 4 4.

60 *Allegemeines Landrecht* (teksuitg 1970) 18 1, 18 12 18 16; vgl 8 9: "Zum vollen Eigenthume gehört das Recht, die Sache zu besitzen, zu gebrauchen, und sich derselber zu begeben."

word eiendomsreg so uitdruklik by Puchta[61] as die *totale juridiese onderwerping van die saak aan die menslike wil* omskryf:

> "Das Eigenthum ist die volle rechtliche Unterwerfung einer Sache, die vollkommene rechtliche Herrschaft über einen körperlichen Gegenstand. Die volle Ausübung des Eigenthums ist die totale factische Unterwerfung der Sache, also der Besitz. Als die Totalität aller dinglichen Rechten enthält das Eigenthum an sich die ausschliessliche Befugniss zu jeder Anwendung der Sache, zu jeder Verfügung über sie.[62]

In hierdie geval is die onbeperktheid van die eienaar se *gebruiksbevoegdheid* dus beklemtoon, en dit word versterk deur die bykomende filosofiese motief van die idealisme, waardeur die wilsuiting van die mens by die uitoefening van die bevoegdheid betrek word. Die invloed van die idealisme kan ook in 'n verdere (nuwe) aspek van Puchta se omskrywing gesien word: eiendomsreg word as die *totaliteit* van die verskillende bevoegdhede ten aansien van die saak omskryf. Dit lui 'n nuwe era vir die omskrywing van eiendomsreg aan die hand van die eienaar se gebruiksbevoegdheid ten aansien van die saak in. Die omskrywing bly in beginsel nog dieselfde, omdat die omvangrykheid van die eienaar se gebruiksbevoegdhede steeds die uitgangspunt is, maar die vorm waarin die omskrywing gegiet word, is nuut. Hierdie nuwe vorm is die aanknopingspunt vir omskrywings van eiendomsreg in die terminologie van die subjektiewe-regteteorie sedert die negentiende eeu.

Die opvallende kenmerk van hierdie nuwe vorm waarin die omskrywing van eiendomsreg volgens die onbeperkte gebruiksbevoegdhede van die eienaar gegiet word, is dat dit die onderskeid tussen die twee interpretasies van Bartolus se omskrywing van *dominium* laat vervaag. As die eienaar se reg ten opsigte van die saak as die mees omvattende versameling van bevoegdhede ten aansien van die saak omskryf word, kan die vervreemdingsbevoegdheid of die vindikasiebevoegdheid natuurlik ook daarby inbegryp word, en sodoende smelt die twee interpretasies van Bartolus as't ware saam. In werklikheid kan die twee egter nog steeds onderskei word. Die interpretasies waardeur die eienaar se vervreemdingsbevoegdheid beklemtoon is, het ten diepste uitgegaan van die veronderstelling dat die eienaar se reg getipeer moet word aan die hand van daardie bevoegdhede wat nie deur die eienaar aan derdes afgestaan kan word nie. Die interpretasie waardeur die volledigheid van die eienaar se gebruiksreg beklemtoon is, het egter juis op een van die eienaar se vervreembare bevoegdhede gekonsentreer, en dan die eienaar se uitoefening van daardie bevoegdheid uitgesonder op grond van die sogenaamde onbeperktheid van sy bevoegdhede. In die nuwe omskrywing van eiendomsreg as die mees omvattende versameling van bevoegdhede word daar eintlik ook ten diepste veronderstel dat die eienaar nie al sy bevoegdhede kan vervreem sonder om sy eiendomsreg te verloor nie, en dit word dan gekombineer met die gedagte dat sy gebruiksbevoegdheid onbeperk is. Die twee benaderings kan dus nog in die nuwe omskrywing van mekaar onderskei word, hoewel dit met mekaar vermeng is.

In die geval van Windscheid geld dieselfde oorwegings. Windscheid[63] omskryf eiendomsreg eweneens as die volledige heerskappy van die menslike wil oor die saak:

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61 Puchta *Pandekten* (1848 heruitg deur Rudorff) 207; *Cursus der Institutionen* (1851 heruitg deur Rudorff) 579.
62 Puchta *Pandekten* 207
63 Windscheid *Lehrbuch des Pandektenrechts* (1891) 490–493.

> "Dass aber Jemandem eine Sache nach dem Rechte eigen ist, will sagen, dass nach dem Rechte sein Wille für sie entscheidend ist in der Gesammtheit ihrer Beziehungen. Aber man darf nicht sagen, dass das Eigenthum einer Summe einzelner Befugnisse bestehe, dass es eine Verbindung einzelner Befugnisse sei. Das Eigenthum ist die Fülle des Rechts an der Sache, und die Einzelnen in ihn zu unterscheidenden Befugnisse sind nür Äusserungen und Manifestationen dieser Fülle."[64]

Die ontwikkelende Duitse nasionale reg het dus, onder andere op grond van die bykomende invloed van die filosofiese idealisme, 'n bepaalde vorm en inhoud aan die interpretasie van Bartolus se omskrywing gegee, waarvolgens die omvang en onbeperktheid van die eienaar se bevoegdhede ten aansien van gebruik van sy saak voorop staan, maar dan in 'n nuwe vorm, waarby die teorie van subjektiewe regte aansluiting kan vind vir 'n omskrywing van eiendomsreg wat wesenlik van dieselfde veronderstelling uitgaan as die ouer interpretasie waardeur die eienaar se vervreemdingsbevoegdheid beklemtoon is. Hierna kan die twee interpretasies nog onderskei word, maar dit word meesal in 'n gekombineerde weergawe aangetref.

4 4 Die skrywers oor die Franse nasionale reg tydens die sewentiende en agtiende eeue, en spesifiek Robert-Josèph Pothier (1699–1772), beskou *dominium utile* as die werklike eiendomsreg. Hierdie benadering, wat reeds by die *Ultramontani* in die Middeleeue opgemerk is,[65] moet onder andere verklaar word in die lig van die proses van eiendomsverskuiwing wat sedert die afloopfase van die Middeleeuse leenstelsel plaasgevind en in die Franse revolusie van 1789 sy politieke voltooiing bereik het.[66] Pothier vertoon tekens van die invloed van die juridiese humanisme wanneer hy die omskrywing van Hotman omskep in 'n nuwe vorm wat vir die kodifikasiegeskiedenis van die Wes-Europese regstelsels gedurende die negentiende eeu gesaghebbend sou wees:

> "Ce droit de propriété, consideré par rapport à ses effets, doit se définir le droit de disposer à son gré d'une chose, sans donner neanmoins atteinte au droit d'autrui, ni aux loix: jus de re libere disponendi, ou jus utendi et abutendi."[67]

In hierdie omskrywing van Pothier is die interpretasie van Bartolus se omskrywing, wat op die *gebruiksbevoegdheid* van die eienaar konsentreer, in 'n duidelike en gesaghebbende vorm vervat, waarby regsontwikkeling gedurende die negentiende eeu sou aansluit vir die formulering van die gekodifiseerde omskrywings van eiendomsreg.

4 5 In die Romeins-Hollandse reg is die tendens eweneens om eiendomsreg aan die hand van die eienaar se *gebruiksreg* te omskryf.[68] Vir doeleindes van die Romeins-Hollandse reg is hierdie tendens verder versterk deur die feit dat Hugo de Groot (1583–1645), wat 'n geweldige groot invloed op die vorming van

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64 Windscheid *Pandekten* 490–493.

65 Vgl 1 4 hierbo.

66 Sien Pothier op *D* 6 1 n 2 1 9, asook *Traité du Droit de Domaine de Propriété* in *Oeuvres Complétes* (1835 uitgegee deur Rogron en Firbach) 1 1 3. Oor die proses van eiendomsverskuiwing, sien veral Van Iterson "Beschouwingen over Rolverwisseling of Eigendomsverschuiving" in *Verslagen en Mededelingen van de Vereniging tot Uitgave der Bronnen van het Oud-vaderlands Recht* (1971) deel XIII no 3 407–466. Oor die Franse Revolusie, sien veral Van den Bergh *Eigendom* 30 e v.

67 Pothier *Propriété* 1 1 4. Vgl ook Pothier op *D* 41 1 n 1.

68 Vroegste voorbeelde is by die Skool van Leuven Henricus Zoesius (1571–1627) op D 41 1 n 1; Petrus Gudelinus (1550–1619) *Commentariorum de Iure Novissimo* (1643) 2 1; Paulus Christinaeus (1543–1631) *Practicarum Quaestionum Rerumque in Supremis Belgarum Curiis Actorum et Observatorum Decisiones* (1636) 6 22 1.

die Romeins-Hollandse reg uitgeoefen het, sterk onder die invloed van die Spaanse Moraalfilosowe gestaan het.[69]

De Groot se weergawe daarvan kan beskou word as een van die belangrikste faktore in die totstandkoming van die moderne eiendomsbegrip. Dit het nie net die basis gevorm vir die aanvaarding van die omskrywing van eiendomsreg uit hoofde van die eienaar se gebruiksbevoegdheid in die Romeins-Hollandse reg nie, maar het inderdaad ook daartoe bygedra dat hierdie omskrywing in sowel die Duitse as die Romeins-Hollandse reg in die vorm gegiet is waarby die subjektiewe-regte-leer later aansluiting sou vind.[70]

Feenstra[71] omskryf die behandeling van die saaklike regte in De Groot se *Inleidinge tot die Hollandsche Rechtsgeleerdheid*[72] as

> "een duidelike prefiguratie van de tegenstelling tussen dominium en iura in re aliena als twee verschillende soorten (subjectieven) zakelijke rechten."

Die onderskeid tussen die twee soorte regte, wat vir die hedendaagse reg so belangrik is, berus onder andere op 'n beklemtoning van die volledigheid van die eienaar se gebruiksbevoegdheid ten aansien van die saak, teenoor die beperktheid van nie-eienaars se gebruiksregte ten aansien van iemand anders se saak. Sodoende is die interpretasie van eiendomsreg uit hoofde van die eienaar se gebruiksbevoegdhede vir die Romeins-Hollandse reg gesaghebbend vasgelê.

Hierdie benadering blyk duidelik uit De Groot se *Inleidinge*. Dit blyk in die eerste plek uit die feit dat eiendomsreg omskryf word as die reg om verlore besit, as voorwaarde vir die gebruik van die saak, te herwin,[73] maar veral uit die omskrywing van *volle eigendom*:

> "VOLLE is den EIGENDOM waer door iemand met die zake alles mag doen nae sijn gelieften ende t'sijnen bate dat by de wette onverboden is."[74]

In hierdie aanhaling is die verwantskap met die oorspronklike omskrywing van Bartolus duidelik, maar terselfdertyd is dit klaarblyklik 'n nuwe omskrywing. Die volledigheid of omvangrykheid van die reg word naamlik slegs op sogenaamde *volle* eiendomsreg betrek, en dit word dan met alle ander gebruiksregte ten aansien van die saak gekontrasteer, op grond van die beperktheid van sodanige ander gebruiksregte. Die invloed van die Spaanse laat-skolastiek is in hierdie verband opmerklik.

Die benadering van De Groot is deur verskeie skrywers oor die Romeins-Hollandse reg van die sewentiende en agtiende eeue nagevolg.[75] Voorbeelde

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69 Oor die invloed van die moraalfilosofie op De Groot se eiendomsbegrip, sien hoofsaaklik Feenstra *Eigentumsbegriff* 209–234; asook 1976 *RMT* 248–275; "Hugo de Groot's Eerste Beschouwingen over Dominium en over de Oorsprong van die Private Eigendom: *Mare Liberum* en zijn Bronnen" 1976 *Acta Juridica* 269–282. Vgl verder Visser "Die Invloede op Hugo de Groot" 1983 *THRHR* 136–150.

70 Vgl veral Feenstra 1976 *RMT* 248 270 ev; asook Dubischar *Über die Grundlagen der schulsystematischen Zweiteilung der Rechte in sogenannte absolute und relative: ein dogmengeschichtlicher Beitrag zur Lehre vom subjektiven Privatrecht* (1961) 62.

71 1976 *RMT* 248 273.

72 Die uitg van Dovring, Fischer en Meijers (1952).

73 De Groot *Inleidinge* 2 3 4.

74 De Groot *Inleidinge* 2 3 10.

75 Die begrip *Romeins-Hollandse reg* word hier in 'n wye sin gebruik, en sluit skrywers soos Huber, wat vir die moderne Suid-Afrikaanse reg belangrik is, ook in.

daarvan kan by Simon van Leeuwen (1626–1682),[76] Ulrich Huber (1636–1694),[77] en Johannes van der Linden (1756–1835)[78] gevind word. Hierdeur is die omskrywing van eiendomsreg aan die hand van die omvang van die eienaar se gebruiksbevoegdhede ten aansien van sy saak vir die Romeins-Hollandse reg vasgelê.

4 6 Dit blyk dus dat die een interpretasie van Bartolus se omskrywing van *dominium*, waarin die omvang van die eienaar se gebruiksbevoegdhede ten aansien van sy saak beklemtoon word, sedert die sewentiende eeu sterker na vore getree het. Waar die vervreemdingsbevoegdheid of die vindikasiebevoegdheid van die eienaar steeds as een van die tipiese kenmerke van eiendomsreg genoem word, geskied dit in die konteks van die totaliteit van die eienaar se bevoegdhede. Hierbo is reeds vermeld dat hierdie nuwe formulering 'n samevoeging van die twee interpretasies is, waarin die onderskeie interpretasies herken kan word. Op grond van die moraalfilosofiese invloed op De Groot is die beklemtoning van die omvattendheid van die eienaar se gebruiksbevoegdhede egter in die Romeinse-Hollandse reg baie sterk op die voorgrond.

5 REGSVERGELYKENDE OORSIG

5 1 Die gesaghebbende omskrywings van die onderskeie ontwikkelende nasionale regstelsels gedurende die negentiende eeu het almal die een interpretasie van Bartolus se omskrywing beklemtoon, en dit word ook in die gekodifiseerde Wes-Europese wetboek weerspieël.

5 2 Die omskrywing van eiendomsreg in die eerste belangrike moderne kodifikasie van die Romeins-Germaanse regsfamilie, die Franse *Code Civil* (1804), is duidelik na die voorbeeld van Pothier se omskrywing geformuleer:

> CC 544: "La propriété est le droit de jouir et disposer des choses de la manière plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements."

Hierdie bepaling het vir die meeste kodifikasies daarna as voorbeeld gedien, en daarom word die formulering daarvan ook in die Nederlandse *Burgerlijk Wetboek* (1838),[79] die Duitse *Bürgerliches Gesetzbuch* (1900),[80] die Switserse *Zivilgesetzbuch* (1912),[81] en die Italiaanse *Codice Civile* (1942)[82] teruggevind.[83]

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76 *RHR* 2 2 1: "Volle eygendom is, als yemand beneffens het regt van eygendom, ook het volkomen gebruik heeft."

77 *HR* 2 2 7: "Volle eygendom wordt genoemt, daer het vrucht-gebruik mede te zamen gevoegt is."

78 *Koopmans Handboek* 1 6 2: "Eigendom is dat recht, waar door eenige zaak aan iemand, met uitsluiting van anderen, toekomt. Het is inzonderheid kenbaar aan deszelfs gevolgen," en wat daarop volg.

79 *BW* 625: "Eigendom is het regt om van eene zaak het vrij genot te hebben en daarover op het volstrekste wijze te beschikken, mits men er geen gebruik van make, strijdende tegen de wetten of de openbare verordeningen, daargesteld door zoodanige macht, die daartoe, volgens de Grondwet, de bevoegdheid heeft, en mits men aan de regten van anderen geen hinder toebrenge."

80 *BGB* 903: "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschliessen."

81 *ZGB* 641 1: "Wer Eigentümer einer Sache ist, kann in den Schranken der Rechtsordnung über sie nach Belieben verfügen."

82 *ICC* 832: "Il proprietario ha diritto di godere e disporre delle cose in modo pieno ed esclusivo, entro i limiti e con l'osservazna degli obblighi stabiliti dall'ordinamento guiridico."

83 In die Spaanse *Codigo Civil* (1889) ontbreek die een element, waarvolgens die eienaar *vryelik* oor die saak kan beskik. SCC 348: "La propriedad es el derecho de gozar y disponer de una cosa, sin mas limitaciones que las establecidas en las leyes."

5 3 Hoewel die Wes-Europese wetboeke, na die voorbeeld van die *Code Civil* (1804), almal in die terminologie van Pothier geformuleer is, word die nuwer formulering van dieselfde omskrywing, wat van De Groot en die Duitse skrywers sedert die negentiende eeu afkomstig is, en waarvolgens eiendomsreg as die volledigste eenheid van bevoegdhede ten aansien van die saak gesien moet word, deur die handboekskrywers by die gekodifiseerde omskrywings ingelees.[84] Die omskrywing van eiendomsreg in die moderne gekodifiseerde stelsels is dus 'n kombinasie van die twee interpretasies van Bartolus, wat geformuleer word in die terminologie van die interpretasie waarvolgens die vryheid van die gebruiksbevoegdheid beklemtoon word, maar wat in die konteks van die teorie van subjektiewe regte wyer geïnterpreteer word.

5 4 In die nuutste kodifikasie, die Nederlandse *Nieuwe Burgerlijk Wetboek* (1980), word die ou omskrywing verlaat, en word die nuwer formulering uit hoofde van die volledigheid van die eienaar se saaklike reg uitdruklik in die plek daarvan gestel:

> NBW 5 1 1 1: "Eigendom is het meest omvattende recht dat een persoon op een zaak kan hebben."

Soos hierbo reeds betoog is, verteenwoordig hierdie nuwe formulering geen afwyking van die bepaalde interpretasie van Bartolus se omskrywing nie, aangesien die omvang van die eienaar se bevoegdhede ten aansien van sy saak nog steeds die uitgangspunt bly. Die onaanvaarbaarheid van die gedagte dat die eienaar met die saak kan doen wat hy wil, soos deur die ouer formulering van hierdie omskrywing geïmpliseer is, het daartoe aanleiding gegee dat 'n versigtiger formulering, volgens die moderne leer van subjektiewe regte, verkies word. Die nuwe formulering maak dus nog steeds 'n kombinasie van die twee interpretasies van Bartolus moontlik, maar die beklemtoning van die een interpretasie word deur die meer neutrale formulering volgens die teorie van subjektiewe regte vervang.

6 DIE SUID-AFRIKAANSE REG

6 1 Van der Merwe se omskrywing van eiendomsreg kan as gesaghebbend vir die moderne Suid-Afrikaanse reg beskou word:

> "Om eiendom van beperkte saaklike regte te onderskei, word dit omskryf as die saaklike reg wat die mees omvangryke heerskappy oor 'n saak verleen. 'n Eienaar kan binne die grense deur die publiek- en privaatreg gestel na geliewe met die saak handel.[85]

Uit hierdie omskrywing is dit duidelik dat die interpretasie van Bartolus se omskrywing, waarvolgens die omvang van die eienaar se gebruiksbevoegdhede ten aansien van sy saak beklemtoon word, ook in die Suid-Afrikaanse reg aanvaar word. Soos in die kommentare op die gekodifiseerde Wes-Europese wetboeke, word hierdie omskrywing egter met die omskrywing volgens die

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84 Vgl bv Ferid *Das französische Zivilrecht* (1971) deel 2 917; Beekhuis *Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* (1977) deel 3/2 15; Bauer *Lehrbuch des Sachenrechts* (1983) 221; *Schweizerisches Privatrecht* (uitg van A Meier-Bayoz (1977)) deel 5 3–4 16.

85 Van der Merwe *Sakereg* (1979) 110. Vir voorlopers van dieselfde benadering in die ouer Suid-Afrikaanse literatuur, sien Josson *Schets van het Recht van de Zuid-Afrikaanse Republiek* (1897) 407; Maasdorp *The Institutes of Cape Law* (1903) deel 3 31; Roos en Reitz *Principles of Roman-Dutch Law* (1909) 39; Bell *South African Legal Dictionary* (1910) by *dominium*; Lee *An Introduction to Roman-Dutch Law* (1915) 111; Wille *Principles of South African Law* (1937) 121.

omvattendheid van die saaklike reg gekombineer. Sodoende word selfs die uitdruklike omskrywings van eiendomsreg na aanleiding van die eienaar se vervreemdingsbevoegdheid binne dieselfde konteks as aspekte van die eienaar se saaklike reg beskou. Die gekombineerde omskrywing van eiendomsreg, waarin beide interpretasies van Bartolus herkenbaar is, maak dit moontlik om die voorheen botsende interpretasies met mekaar te versoen.

6 2 Uit verskillende hofuitsprake kan afgelei word dat die interpretasie waarvolgens eiendomsreg basies aan die hand van die omvattendheid van die eienaar se gebruiksbevoegdhede ten aansien van sy saak omskryf word, as gesaghebbend in die moderne Suid-Afrikaanse reg aanvaar word. In hierdie verband word daar soms na die sogenaamde *absoluutheid* van eiendomsreg verwys.[86]

Die duidelikste voorbeeld van regspraak in hierdie verband is die beslissing in *Gien v Gien*,[87] waarin die volgende stelling aangetref word:

> "Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas."

Die uitgangspunt vir die omskrywing van wat eiendomsreg is, word dus gesoek in die moontlikhede vir die uitoefening van die eienaar se gebruiksbevoegdhede ten aansien van die saak. Dit is duidelik dat hierdie benadering ten diepste nog steeds terugverwys na die oorspronklike omskrywing van Bartolus, hoewel 'n bepaalde interpretasie daarvan nou voorop staan. Dit is ewe duidelik dat hierdie benadering teoreties gemaklik versoen kan word met die vandag redelik algemeen aanvaarde standpunt dat eiendomsreg, in die konteks van die leerstuk van subjektiewe regte, as die mees omvattende saaklike reg gesien moet word.

6 3 Die toenemende ontevredenheid met die implikasies van die interpretasie waarvolgens die eienaar met sy saak kan handel soos hy wil, kan reeds in die Suid-Afrikaanse reg opgemerk word uit die omvang van die besprekings oor die beperkings op die eienaar se bevoegdhede. Dit is dus moontlik dat hierdie bepaalde formulering van die interpretasie mettertyd laat vaar kan word. Die alternatiewe omskrywings van eiendomsreg wat in die plek daarvan gebruik kan word, is skynbaar die volgende:

a Daar kan, soos in die Nederlandse *Nieuwe Burgerlijk Wetboek* (1980), na die alternatiewe formulering van dieselfde interpretasie oorgeslaan word, met die gevolg dat die omvangrykheid van eiendomsreg as saaklike reg, gesien teenoor ander saaklike regte, die kern van die omskrywing uitmaak. Dit bly nog wesenlik dieselfde interpretasie van Bartolus se omskrywing.

b Daar kan na 'n heel ander omskrywing van eiendomsreg oorgeslaan word, waarin bepaalde bevoegdhede van die eienaar, soos byvoorbeeld die vindikasiebevoegdheid, beklemtoon word. Solank die omskrywing aan die hand van die onvervreembare bevoegdhede van die eienaar binne die konteks van die teorie van subjektiewe regte geïnterpreteer word, sal dit nog steeds met die omskrywing volgens die onbeperkte bevoegdhede van die eienaar gekombineer word. Soos in die geval van die Nederlandse reg, impliseer dit geen radikaal nuwe omskrywing van, of benadering tot, eiendomsreg nie.

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86 Vgl Van der Merwe *Sakereg* 111. Sien verder Schoeman *Silberberg and Schoeman: The Law of Property* (1983) 162.

87 1979 2 SA 1113 (T) 1120C–E.

6 4 In hierdie stadium is dit moeilik om te voorspel wat die waarskynlike rigting van toekomstige ontwikkelinge in die omskrywing van eiendomsreg sal wees. In die lig van die hedendaagse debat oor die plek van eiendomsreg in die reg en in die samelewing, is dit dalk wenslik om sodanige ontwikkeling vroegtydig by wyse van deeglike besinning te antisipeer. Die toepaslikheid van die omskrywing van eiendomsreg as die volledigste saaklike reg moet nie sonder meer aanvaar word nie, maar daar moet eerder onbevange na die omskrywing gesoek word wat die plek en funksie van eiendomsreg in die samelewing van die laat-twintigste eeu ten beste weergee.

Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless . . . it is to be deemed to be that thing. (per Cave J in *R v Norfolk County Council* (1891) 60 LJQB 379 quoted in *Pinkey v Race Classification Board* 1966 2 SA 73 (ECD) 77A.)

Die hedendaagse aanwending van kantskrifte en artikelopskrifte by wetsuitleg*

PD Badenhorst
B Iur LLB LLM
Hoofregsadviseur, Kaapse Provinsiale Administrasie

SUMMARY

The Modern Application of Marginal Notes and Headings to Sections in the Interpretation of Statutes

In the consideration of the application of captions to sections or chapters in legislation as aids to the interpretation of statutes a distinction is made, on the authority of a 1919 appellate decision, between headings to chapters or sections and marginal notes to sections. It was ruled that, as marginal notes are not considered or passed by our legislature, the maxim *rubrica non est lex* should be applied and consequently marginal notes are not applied as aids to interpretation.

The said decision is debatable as it appears that in 1919, the South African legislature did, in fact, consider and pass marginal notes, and it is therefore not correct to infer *per se* that marginal notes are not part of the statute. The present position is that certain legislatures consider marginal notes while others do not.

In view of the modern technique of legal drafting and the way in which legislation is published by various printers, serious confusion exists about the true difference between marginal notes and headings to sections.

There should be no distinction between the various captions in legislation. In the interpretation of a doubtful provision, the interpreter ought to consider or examine every part of the act. The statute as it is published in its final form in the statute book must be considered, and the *manner* in which it was passed should play no part in the interpretation of statutes.

1 INLEIDING

By die aanwending van byskrifte by artikels of hoofstukke in wetgewende maatreëls as hulpmiddels van wetsuitleg word daar onderskei tussen opskrifte bo hoofstukke of artikels en kantskrifte by artikels. Daar word ook al te dikwels verwys na die stelreël *rubrica non est lex*. Daar word geleer dat aangesien kantskrifte nie in ons wetgewingsproses deur die wetgewer oorweeg of aangeneem word nie, die genoemde stelreël toegepas word en dat kantskrifte gevolglik nie as 'n hulpmiddel van wetsuitleg aangewend kan word nie. Die vraag ontstaan of dié leerstuk, in die moderne bestel, nie gewysig of gekwalifiseer behoort te word nie, en of dit werklik nog dienlik is om tussen die betrokke byskrifte te

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onderskei. Die vraag ontstaan ook of die stelreël *rubrica non est lex* inderdaad nog vir die onderhawige hulpmiddel van wetsuitleg ter sake is.

Wanneer Steyn[1] opskrifte bo hoofstukke of artikels as een van die hulpmiddels by wetsuitleg behandel, sê hy dat sodanige opskrifte die rubriek aantoon waartoe die bepalings wat daaronder staan, behoort. Hy gaan dan voort en toon aan dat aangesien sodanige opskrifte geag word in die wet self beliggaam te wees, dit aangewend kan word om 'n twyfelagtige teks te verklaar.[2]

Wat kantskrifte betref, sê Steyn[3] dat dit teenoor elke artikel aan die kant daarvan verskyn as aanduiding van die inhoud daarvan. Kantskrifte word nie as deel van die wet beskou nie en kan dus nie aangewend word om 'n duistere bepaling te verklaar nie, aldus Steyn.[4] As gesag vir dié siening verwys hy na die *locus classicus, Durban Corporation v Estate Whittaker*,[5] waarin beslis is dat aangesien kantskrifte ("marginal notes") nie in ons wetgewingsproses deur die wetgewer oorweeg of aangeneem word nie, die stelreël *rubrica non est lex* toepassing vind.

Steyn ondervind nie probleme met die aantoon van die waarde of belang van die verskil tussen kantskrifte by en opskrifte bo artikels by wetsuitleg nie. In die lig van die hedendaagse styl van wetsopstelling en die wyse waarop die verskillende drukkers wetgewing in sy finale vorm aan die publiek beskikbaar stel, kan daar egter by Steyn se lesers verwarring ontstaan oor die presiese verskil tussen dié twee tipes geskrif by wetgewing. Deur bloot te sê dat opskrifte die rubriek aantoon waartoe die bepalings behoort wat daaronder staan, en kantskrifte "teenoor elke artikel aan die kant daarvan verskyn as aanduiding van die inhoud,"[6] deug, in die veranderende omstandighede soos hieronder aangetoon sal word, net nie meer nie. Die feit dat gesê word dat kantskrifte aan die "kant" van 'n artikel aangetref word, lei tot verdere verwarring. Dadelik moet bygevoeg word dat dit nie noodwendig 'n foutiewe stelling is nie, maar dat dit 'n stelling is wat, in die lig van die moderne tegniek en die verskillende gerieflike wyses waarop wetgewing gepubliseer word, gekwalifiseer behoort te word. In dié verband kan mens regter Didcott dus nie kwalik neem nie dat hy in *S v Liberty and Forwarding (Pty) Ltd*[7] vele probleme ondervind het om tussen 'n artikelopskrif en 'n kantskrif te onderskei, en om vas te stel of die wetgewer dan een sou goedgekeur het en die ander nie. Regter Didcott doen dan ook aan die hand dat, indien die onderskeid tussen kantskrifte en artikelopskrifte behou moet word, daar leiding behoort te wees oor hoe tussen hulle onderskei moet word, en dat dit 'n aangeleentheid is wat deur die appèlafdeling heroorweeg behoort te word.[8]

Steyn[9] groepeer opskrifte bo hoofstukke en artikels saam. Klaarblyklik het hy by sy bespreking van opskrifte bo artikels daardie tipe byskrif in gedagte wat

1 Die *Uitleg van Wette* (1981) 147.
2 aw 148–149.
3 aw 148–149.
4 aw 149.
5 1919 AD 195 201.
6 aw 149.
7 1982 4 SA 281 (D) 285–286.
8 286.
9 aw 147–149.

minder dikwels bokant 'n *groep* artikels verskyn. In dié opsig dien *S v Kellner*[10] as 'n goeie voorbeeld. Daar het dit gegaan oor die uitleg van artikel 254 van die vorige Strafproseswet 56 van 1955. Bokant artikel 254 staan die woorde "Getuienis van Mededaders," en hoofregter Steyn verwys na dié byskrif as die "heading." Langs die kant van dié artikel verskyn die woorde "Mededaders wat vir vervolging getuienis aflê, is van vervolging vrygestel." Onmiddellik bokant die volgende artikel is daar egter geen byskrif nie, en die bedoeling is klaarblyklik dat die woorde "Getuienis van Mededaders" ook as opskrif vir artikel 255 moet dien. Die huidige Strafproseswet 51 van 1977 volg nie meer hierdie patroon nie en slegs hoofstukopskrifte word aangetref. Die nuutste parlementswet wat opgespoor kon word waarin nog van artikelopskrifte as sodanig gebruik gemaak word, is die Koöperasiewet 91 van 1981. Geen provinsiale ordonnansie van die afgelope tien jaar kon gevind word waar van dié metode gebruik gemaak is nie. Dit lyk dus of dié wyse van wetsopstelling vinnig besig is om in onbruik te verval.

Wat opskrifte bo *hoofstukke* betref, is daar nie probleme nie, aangesien dit nog 'n alledaagse verskynsel is en in redelik baie wetgewing gebruik word.

2 PUBLIKASIE VAN WETGEWING

Navorsing wat gedoen is, lewer die volgende resultate op:

2 1 Die verandering in die wyse van die druk van wette het in die jare 1929/1930 ontstaan. In die oorspronklike 1929-band van parlementswette verskyn alle byskrifte by artikels nog bokant die betrokke artikel, en dit lyk dan almal soos artikelopskrifte. Artikel 3 van die Vanwyksvlei Nedersettings (Plaaslike Bestuursraad) Wet 10 van 1929 het byvoorbeeld as opskrif die woorde "Funksies van Raad." So verskyn byvoorbeeld ook bokant artikel 7 die woorde "Wysiging van Wet No. 29 van 1908, Kaap die Goeie Hoop," en bokant artikel 9 die woorde "Kort Tietel."

2 2 Sedert die 1930-wette, wat, terloops, soos hul voorgangers deur die staatsdrukker versorg is, verskyn alle byskrifte by artikels langs die kant van die betrokke artikel, en dit lyk dan almal soos kantskrifte. Artikel 3 van die Wet op Kleurlingnedersettingstreke (Kaap) 3 van 1930 het as byskrif langs die kant die woorde "Werksaamhede van raad," artikel 13 "Woordbepaling" en artikel 14 "Kort tietel." Net die volgende wet, wat duidelik slegs 'n wysigingswet is, naamlik die Wysigingswet op Publieke Veilings en Transaksies in Lewende Hawe en Landbouprodukte 4 van 1930 het die gewone formele (tegniese) byskrifte langs die kante van die artikels, naamlik "Wysiging van artikel . . ."

2 3 In die staatskoerant, ook deur die staatsdrukker versorg, waarin die oorspronklike wette gepubliseer is, verskyn sowel wet 10 van 1929 as wet 3 van 1930 se artikelbyskrifte egter langs die kant van die artikels en lyk dit almal soos kantskrifte. Tot heden toe word alle byskrifte by artikels in die staatskoerant deurgaans so gedruk. Insiggewend is verder die feit dat daar nie net 'n verskil tussen die staatskoerant en die jaarbundel is wat betref die *plek* waar die byskrif staan nie, maar dat die drukkers ook duidelik hulle eie diskresie gebruik met betrekking tot *hoe* hulle dit druk. So lui die byskrif by artikel 102 van die

10 1963 2 SA 435 (A) 443, juis aangehaal deur Steyn aw 148 vn 64.

herroepe Drankwet 30 van 1928 in die betrokke jaarbundel soos volg: "Indiensneming van Vroue en Seker Ander Persone in Beperkte Gedeelte van Gelisensieerde Gebou." In die staatskoerant word egter slegs die eerste woord met 'n hoofletter gespel.

2 4 In Butterworths se geklassifiseerde en geannoteerde wette van die Republiek van Suid-Afrika (die sogenaamde losblad-statute), wat in die gewone loop van sake by regslui as eerste bron dien wanneer watter stuk wetgewing ook al hanteer word, word byskrifte by artikels reeds vanaf die begin van dié diens deurgaans in vet letters in dieselfde reël en onmiddellik volgende op die nommer van die artikel gedruk. Dit lyk soos 'n opskrif, maar dit staan nie tegnies bokant die artikel nie.

2 5 By die appèlhof in Bloemfontein waar alle deur die staatspresident getekende wette kragtens artikel 35 van die Grondwet van die Republiek van Suid-Afrika 110 van 1983 netjies met 'n groen lint ingebind, geliasseer word, is die wette ook gedruk soos in die geval van staatskoerante, dit wil sê met byskrifte as "kantskrifte." Dit geld vir alle wette vanaf die Kroon Aansprakelikheid Wet 1 van 1910 tot die nuutste wet deur die parlement aangeneem, naamlik die Wet tot Aanvulling van Pensioene 124 van 1984.

2 6 Wat provinsiale rade se wetgewing betref, is daar 'n mate van eenvormigheid in die vier provinsies deurdat in elke provinsie se jaarbande die ordonnansies se byskrifte by artikels langs die artikel gedruk word, terwyl die gekonsolideerde losbladordonnansies se byskrifte bokant die artikel verskyn. In laasgenoemde opsig verskil dit op hul beurt van parlementêre wetgewing.

2 7 Dat die howe soms, heeltemal verstaanbaar, sukkel om te onderskei tussen kant- en artikelopskrifte, blyk duidelik uit *S v Qualinga*[11] waar regter-president Jacobs na die byskrif by artikel 4 van die Wet op Gevaarlike Wapens 71 van 1968 verwys as 'n "opskrif." Die byskrifte in die oorspronklike wet soos dit in die staatskoerant gepubliseer is, verskyn langs die artikels, maar in die Butterworths-losbladstatute lyk dit soos opskrifte.

3 DIE WETGEWINGSPROSES

Die hoofrede vir die nie-aanwending van kantskrifte by wetsuitleg blyk geleë te wees in die feit dat kantskrifte nie formeel deur die wetgewer oorweeg of aangeneem word nie. Of dit nog 'n geldige maatstaf in die hedendaagse regspraktyk is, moet ernstig bevraagteken word.

3 1 Reeds in 1919 toe die hof in *Durban Corporation v Estate Whittaker*[12] die onderhawige reël gestel het, was dit nie korrek om sonder meer te sê dat die toentertydse *Suid-Afrikaanse* wetgewer nie kantskrifte oorweeg of aangeneem het nie. Soos hieronder aangetoon sal word, het die hof klaarblyklik die Engelse parlementêre prosedure in gedagte gehad toe hy na dié aspek verwys het. Wat provinsiale rade se wetgewing betref, het mens reeds die posisie dat die prosedure in die komiteestadium van die wetgewingsproses van raad tot raad verskil. Ingevolge artikel 73 van die Wet op Provinsiale Bestuur 32 van 1961 kan elke

11 1978 4 SA 556 (NK) 558.

12 *supra*. Dit is, terloops, interessant dat Wet 19 van 1872 wat in *Whittaker* se saak ter sprake was, geen byskrifte hoegenaamd bevat soos dit in sy oorspronklike vorm in *The Natal Government Gazette* van 1872–12–24 gepubliseer is nie. In die jaarband van ordonnansies is daar wel kantskrifte.

raad sy eie reëls maak. Dit is dan ook inderdaad so dat in die Transvaalse en Natalse rade kantskrifte nie in komitee gestel en oorweeg word nie. In die Vrystaat en Kaapland is daar egter 'n uitdruklike reël in die reglement van orde wat bepaal dat die voorsitter van komitees die klousules van die konsepordonnansie in volgorde stel deur die nommer en die "kanttekening" ("marginal note") van elke klousule te lees.[13] Wat laasgenoemde twee provinsies betref, word dié reëls in die praktyk toegepas, en 'n mens moet dus aanvaar dat kantskrifte in hierdie twee provinsies deel van die wet vorm.

3 2 In 1909 was die posisie wat parlementêre prosedure betref volgens *Clough's South African Parliamentary Manual* soos volg:

> "When the House has resolved itself into a Committee of the Whole House the Chairman proceeds to read the number and marginal note of each clause."[14]

Hierdie prosedure is in 1946 deur Kilpin in sy *Parliamentary Procedure* bevestig.[15]

Die ooreenstemmende reël van die *Standing Orders of the House of Assembly* van 1912 lui soos volg:

> "The Chairman upon seating himself at the table, will proceed to read the number and the marginal note of each clause in succession, . . . the words of enactment at the head of the bill are not put to the committee."[16]

Die bewoording in die ander amptelike taal lui:

> "Nadat de Voorzitter aan de Tafel heeft plaats genomen leest hij het nummer en de kanttekening van elke klausule in volgorde . . . De verordeningswoorden aan het hoofd van het wetsontwerp worden niet aan het komitee gesteld."

3 3 Teen 1938 het die posisie ietwat verander en die betrokke reël soos volg gelui:

> "Die hoofde in 'n wetsontwerp word aan die komitee gestel, maar nie die verordeningwoorde aan die begin daarvan nie."[17]

Die Engelse weergawe lui:

> "Headings in a bill shall be put to the committee, but not the words of enactment at the commencement thereof."

Dit was nog die posisie in 1957.[18]

3 4 Teen 1972 het die posisie drasties verander, en het die betrokke reël van die volksraad se reglement van orde soos volg gelui:

> "(1) In komitee van die hele Raad oor 'n wetsontwerp stel die Voorsitter die klousules en die bylaes (as daar bylaes is) van die wetsontwerp ná mekaar.
>
> (2) Die titel en die aanhef (as daar 'n aanhef is) word oorweeg nadat die klousules en die bylaes (as daar bylaes is) afgehandel is."[19]

Eers toe is daar weggebreek van die gebruik om kantskrifte en hoofde in wetsontwerpe in die komiteestadium te stel. Gevolglik kan met veiligheid aanvaar word dat die stelling in 1919 in *Whittaker* se saak, naamlik dat kantskrifte nie deur die wetgewer oorweeg en aangeneem word nie, nie korrek was nie. Dit is

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13 Sien die huidige reglement van orde: OVS reël 54; Kaapland reël 101. Kaapland het reeds in 1962 'n gelykluidende reël 99 gehad.

14 Clough *The South African Parliamentary Manual* (1909) IV 51.

15 Kilpin *Parliamentary Procedure* (1946) 10. Volgens die *Cape Argus* van 1946-01-21 was Kilpin vir baie jare lank die klerk van die volksraad. Sien ook die *Cape Times* van 1946-01-21 1950-02-23; *Die Burger* 1946-01-22. Sien ook Kilpin se 3e uitg (1955) 10.

16 reël 157.

17 reël 164.

18 reël 169.

19 deel 1 reël 56.

bloot toevallig dat die beslissing in *Whittaker* se saak in vandag se omstandighede korrek is, maar dan ook net wat parlementêre wetgewing betref.

3 5 Soos reeds vroeër angedui, het die hof in *Whittaker* se saak klaarblyklik die Engelse parlementêre prosedure in gedagte gehad. In 1904 het die onderhawige prosedurereëling in die Engelse parlement soos volg gelui:

> "When a bill is under consideration in committee, the chairman calls the several clauses in order, by reading the number of each clause."[20]

Dit sluit aan by May se *Parliamentary Practice* waar hy dit soos volg stel:

> "The marginal notes or short titles of clauses and the headings of parts of a bill, however, do not form part of the bill and are not open to amendment."[21]

In *R v Hare* word gesê opskrifte net soos kantskrifte

> "[are] not voted on or passed by Parliament but are inserted after the Bill has become law."[22]

Dit is ook al gesê, wat die posisie in Engeland betref, dat kantskrifte ("marginal notes")

> "are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons."[23]

In *Chandler v D P P*[24] word gesê:

> "Side notes in the original Bill are inserted by the draftsman."

3 6 Wat betref parlementêre wetgewingsprosedure vandag, is die posisie dat nie net kantskrifte nie, maar ook artikel- en hoofstukopskrifte glad nie in die komiteestadium aan die orde gestel en dus oorweeg of aangeneem word nie. Die reedsgenoemde prosedure wat in 1972 gegeld het, word nog steeds gevolg.[25] Daar kan dus gesê word dat dié tipe byskrifte nie meer deel van die wet vorm nie. In *Turffontein Estate Ltd v Mining Commissioner Johannesburg*[26] het hoofregter Innes met betrekking tot 'n hoofstukopskrif soos volg opgemerk:

> "[T]he heading has been expressly incorporated in the Statute. We are therefore fully entitled to refer to it for the elucidation of any clause to which it relates."

In die lig van veranderende omstandighede kan ook dié woorde vandag nie meer sonder meer aanvaar word nie.

3 7 Die toekomstige posisie in die nuwe owerheidsbestel kan egter erg vertroebel word as in gedagte gehou word dat ingevolge artikel 63 van die Grondwet van die Republiek van Suid-Afrika[27] elkeen van die drie huise van die parlement sy eie reëls oor eie sake kan maak, terwyl daar ook, ingevolge artikel 102(6), reëls vir gesamentlike sittings van dié huise gemaak kan word. Die parlement beskik inderdaad reeds oor vier verskillende stelle reëls. Dit is wel moontlik dat daar in die toekoms besluit mag word dat een huis kantskrifte in die komiteestadium stel terwyl 'n ander huis anders mag besluit, of dat die prosedure in

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20 die *house of commons* se *Manual of Procedure in the Public Business* (1904) reël 177.

21 May *Parliamentary Practice* (1983) 554. Volgens al May se vorige uitgawes was dit deurgaans die posisie – sien bv die 11e uitg (1906) 484.

22 1934 1 KB 354 355.

23 *Maxwell on the Interpretation of Statutes* (1969) 10 waar aangehaal word uit *Re Working Urban Council (Basingstoke Canal) Act 1911* 1914 1 Ch 300 322.

24 1964 AC 763.

25 Die nuutste reglement van orde, nl dié van die raad van verteenwoordigers (deel 1 – publieke sake) (1984) reël 58 kan as voorbeeld geneem word. Dit stem presies ooreen met die ander twee huise se reëls.

26 1917 AD 419 431.

27 *supra.*

gesamentlike sittings op sy beurt mag verskil van dié van die drie afsonderlike huise.

4 BESTAAN DAAR NOG 'N BEHOEFTE OM TUSSEN KANTSKRIFTE EN ARTIKELOPSKRIFTE TE ONDERSKEI?

Om behoorlik tussen die verskillende tipes byskrifte in wetgewing te kan onderskei, sal die wetsuitlêer nie net telkens moet gaan vasstel op watter een van die verskillende wyses die betrokke verordening gepubliseer is nie, maar hy sal ook moet gaan naspeur hoe die betrokke wetgewer daardie stuk wetgewing behandel het voordat dit op die wetboek verskyn het. Soos uit die voorgaande blyk, kan so 'n ondersoek 'n uitputtende en tydrowende proses wees, en is dit eintlik 'n onbegonne taak. Dit is veral dan wanneer die vraag ontstaan of so 'n tydrowende proses nog enige nuttige doel dien en of dit werklik nog nodig is om tussen artikelopskrifte en -kantskrifte te onderskei.

Insiggewend is dat waar Lord de Villiers in *Chotabhai v Union Government and Registrar of Asiatics*[28] die waarde van hoofstukopskrifte by wetsuitleg behandel, hy nêrens sy siening koppel aan die vraag of byskrifte deur die wetgewer oorweeg of aangeneem word al dan nie. Hy verwys nie eens na dié aspek nie. Nadat hy aangedui het dat hy kennis neem van die opskrif sê hy:

> "Such a construction would be in accordance with the rule that the language of every part of a Statute should be so construed as to be consistent, so far as possible, with every other part of that Statute."[29]

Hy gaan voort deur daarop te wys dat 'n bepaalde opskrif aangewend kan word om enige twyfelagtige bepaling in 'n artikel wat onder sodanige opskrif staan te verklaar. Wat van groot belang is, is dat Lord de Villiers meld dat *elke deel* van 'n wet deur die wetsuitlegger aangewend kan word, met ander woorde, elke onderdeel van die wet soos mens dit in sy finale vorm vind, en mens kan aflei dat dit by hom nie saak maak *hoe* die verskillende fasette van die wet op die wetboek gekom het nie. So gesien, behoort daar dan ook nie 'n lang polemiek te wees oor die vraag of sekere byskrifte deur die wetgewer oorweeg is of nie, en oor wie nou eintlik die byskrif aangebring het nie. Dit is in elk geval erkende praktyk dat die staat se regsadviseurs in hul hoedanigheid van wetsopstellers verantwoordelik is vir *alle* wetgewing en vir *elke* aspek daarvan. Dit is ook gemene saak dat alle wetgewing met alle byskrifte, ensovoorts, persklaar voorberei word deur die regsadviseurs en in daardie vorm aan die parlement of provinsiale rade voorgelê word. Wat die Suid-Afrikaanse wetgewingsproses betref, kan daar met ander woorde ook nie beweer word dat byskrifte, en by name kantskrifte, bygevoeg word nadat die wetsontwerp voor die wetgewer gedien het nie.

Wat *Chotabhai* se saak nog interessanter maak, is die feit dat Lord de Villiers glad nie verwys na die stelreël *rubrica non est lex* nie. Mens kry die indruk dat dié begrip, wat algemeen vertaal word as "the title is not the law,"[30] in latere sake eenvoudig gekoppel is aan dinge waarmee dit hoogstens 'n ver verwyderde verband hou. Sover vasgestel kon word, hou *rubrica non est lex* ook geen verband

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28 1911 AD 13.
29 24.
30 Sisson *The South African Judicial Dictionary* 704; Claassen *Dictionary of Legal Words and Phrases* 4 33.

met dit wat die wetgewer gedurende die wetgewingsproses sou oorweeg het of nie.

5 SLOTSOM

Daar word ter oorweging gegee dat die reël in *Chotabhai* se saak die suiwere is, dit wil sê by die uitleg van duistere bepalinge behoort die wetsuitlêer te kyk na elke deel van die wet. Die wet soos dit in sy finale vorm op die wetboek verskyn, moet bekyk word, en die *wyse* waarop 'n wet gemaak is, behoort nie in hierdie verband 'n rol te speel nie. Dit volg dat 'n ondersoek na die verskil tussen kantskrifte en artikelopskrifte of opskrifte bo 'n groep artikels geen praktiese waarde meer het nie. Ook die vraag waarom 'n opskrif dan meer gewig sou dra as 'n kantskrif terwyl albei uiteindelik tog maar deur die wetgewer in die wet as geheel goedgekeur word, kan dan gerieflik onbeantwoord gelaat word. Die subtiele verskil wat daar tussen byskrifte gemaak word, behoort nie die pad van die wetsuitlêer verder te bemoeilik nie. Die uitleg van wette is reeds nie 'n maklike taak nie.[31] Daar moet verder in gedagte gehou word dat die stelreël *rubrica non est lex*, wat ook al sy oorsprong en inhoud, onafhanklik van enige ander maatstaf aangewend behoort te word. Die vraag wat presies met die "titel" van 'n wet bedoel word, sal 'n ondersoek op sy eie verg.

31 Sien Lategan "Die Uitleg van Wetgewing in Hermeneutiese Perspektief" 1980 *Tydskrif vir Suid-Afrikaanse Reg* 107 110 waar hy wys op die tans onbevredigende toestand op die gebied van die uitleg van wette. Du Plessis "A Tentative Reflection on the Systematisation of the Rules and Presumptions of Statutory Interpretation" 1981 *SALJ* 211 215 verwys na die uitleg van wette as 'n "minefield of problems."

Equality should mean measuring of equal things by equal standards. (per Rabel in 46 *Michigan Law Review* 629.)

AANTEKENINGE

DIE WEL EN WEE VAN 'N PASPOORT INGEVOLGE DIE NUWE GRONDWET

Klaarblyklik duur 'n motorrit van die landdroshof in Malmesbury tot by die kantoor van die distrikskommandant van die Suid-Afrikaanse Polisie te Bellville een uur en 15 minute. Dit is in elk geval hoe lank dit doktor Allan Boesak geneem het om die afstand op 1985–11–04 af te lê. Die doel van sy besoek was ook heel ernstig. Hy wou sy paspoort waarop ingevolge 'n vorige beslissing van dieselfde landdroshof beslag gelê is en wat deur die distrikskommandant in Bellville gehou is, gaan afhaal. Die landdros te Malmesbury het so pas daardie oggend die borgvoorwaardes met betrekking tot doktor Boesak gewysig. Hy kon nou weer sy paspoort terugkry. (Doktor Boesak het op 1985–09–20 die eerste keer in die landdroshof in Malmesbury op 'n aanklag van oortreding van artikel 54 van die Wet op Binnelandse Veiligheid 74 van 1982 verskyn.)

Die landdros in Malmesbury het geoordeel dat hy goeie redes het om doktor Boesak se paspoort terug te gee. Een van die staatsgetuies, 'n lid van die veiligheidspolisie, moes onder kruisverhoor toegee dat doktor Boesak op die dag wat hy na bewering studente van die Universiteit van Wes-Kaapland toegespreek het (en wat na bewering onmiddellik daarna deur ernstige oproer gevolg is) in die buiteland was. Ook ander bewerings oor sy subversiewe aktiwiteite het nie geklop nie. Die beskuldigde het verder onderneem om, terwyl sy verhoor hangende is, nie disinvestering, onderwysersboikotte of die boikot van besighede te propageer nie.

Doktor Boesak se besoek aan die kantoor van die distrikskommandant was tevergeefs. In opdrag van 'n lid van die veiligheidspolisie is hy meegedeel dat sy paspoort teruggetrek is. 'n Kwartier later is die tyding deur 'n brief van die direkteur-generaal van binnelandse sake bevestig. Die besluit self is deur die minister van binnelandse sake geneem.

Hierna word twee telekse aan die minister van binnelandse sake gestuur waarin oor die volgende sake navraag gedoen word: onder watter magtiging die paspoort teruggetrek is en wat die redes daarvoor was; wanneer die besluit geneem is; of sodanige bevoegdheid aan die minister gedelegeer is; of die minister persoonlik die besluit geneem het.

Die minister begin sy antwoord deur daarop te wys dat

> "it is not regarded necessary nor expedient to reply to the statements and enquiries contained in your telexes in detail. However as a matter of courtesy and in good faith I shall reply to your telexes in general" (saak 1168/1985 KPA 4).

Die antwoord lui dat die bevoegdheid om paspoorte terug te trek deel is van die prerogatiewe magte van die staatspresident en namens hom deur die minister van binnelandse sake uitgeoefen word. Die saak van *Tutu v Minister of Internal Affairs* 1982 3 SA 571 (T) word as gesag aangehaal.

Hierop doen doktor Boesak by die hooggeregshof (Kaapse afdeling) aansoek om 'n bevel vir die tersydestelling van die minister se besluit en om teruggawe van sy paspoort. Op 1985–12–19 gee regter Friedman uitspraak ten gunste van die minister van binnelandse sake (saaknommer 1168/1985; ten tyde van hierdie skrywe nog ongerapporteer.) Regters van den Heever en Vivier stem saam.

Die applikant beweer dat die intrekking van sy paspoort ongeldig is. As eerste grond voer hy aan dat die intrekking deur die verkeerde besluitnemer gelas is. Hy beweer dat slegs die staatspresident oor hierdie bevoegdheid beskik. (Dit is belangrik om daarop te let dat die minister nooit beweer het dat sodanige mag aan hom gedelegeer is nie.) Dit is die "staatsregtelike" aspek van die saak en vir die doeleindes van hierdie bespreking die interessantste.

Namens die applikant word geargumenteer dat die intrek van paspoorte onder die prerogatief van die staatspresident ressorteer. Prerogatiewe bevoegdhede moet teen die agtergrond van die bepalings van die 1983-grondwet gesien word. Artikel 6(3) daarvan bevat 'n lys van spesifieke (meestal prerogatiewe) bevoegdhede soos om huise van die parlement toe te spreek, eerbewyse toe te ken, ambassadeurs te ontvang en aan te stel, krygswet af te kondig, ensovoorts. Artikel 6(4) bepaal dat die staatspresident daarbenewens ook

> "dieselfde bevoegdhede en funksies [het] as wat die staatspresident onmiddellik voor die inwerkingtreding van hierdie Wet by wyse van prerogatief gehad het."

Artikel 19 omskryf die verder kategorieë magte van die staatspresident. Ten opsigte van *eie sake* handel hy "op advies van die betrokke Ministersraad" (a 19(1)(a)). Ten opsigte van *algemene sake* handel hy "in oorleg met die Ministers wat lede van die Kabinet is" (a 19(1)(b)). Die grondwet bevat verder op verskeie plekke bepalings wat die staatspresident magtig om ander funksies te vervul. Hierdie lys word in artikel 19(2) opgesom en sluit sake soos die volgende in: aanstelling van kabinetslede, lede van ministersrade en adjunk-ministers; toestemming tot wetgewing; ontbinding van huise; byeenroep van 'n huis tydens resestyd; en tenuitvoerlegging van wetgewing deur 'n minister. Hierdie optredes word wesenlik deur die staatspresident self onderneem.

Die sentrale probleem in hierdie dispuut behels die vraag of daar bo en behalwe die genoemde kategorieë nog 'n verdere groep bevoegdhede bestaan wat uitgeoefen word op 'n wyse anders as deur artikel 19 bepaal. Die presiese betekenis van artikel 6(4) en die samehang daarvan met die bepalings van artikel 19(1) oor die wyse waarop eie en algemene sake behartig word, moes bepaal word. Hoe en deur wie word die prerogatiewe waarna artikel 6(4) verwys, uitgeoefen?

Dat dit om 'n prerogatief ingevolge artikel 6(4) handel wanneer 'n paspoort ingetrek word, was gemene saak. Die hof gee die volgende vertolking daarvan:

> "When the State President acts in terms of s 6(4) i.e. when he exercises a prerogative power, his powers are the same as those which vested in the State President under the 1961 Constitution. Under that Constitution the State President was a non-executive head of State: save in the case of certain constitutional conventions where he could act on his own initiative, the State President under the 1961 Constitution always acted on the advice of his Ministers. That meant that although a power was exercised in his name, it was in fact exercised by the appropriate Minister" (21).

Die posisie voor die 1983-grondwet was dus dat 'n paspoort deur die betrokke minister self ingetrek kon word. Namens doktor Boesak word beweer dat hierdie posisie verander het met die aanname van die nuwe grondwet. Die saak moes

as 'n "algemene" saak behandel word, dit wil sê die bepalings van artikel 19(1)(b) moes geld. Die applikant betoog dat die uitoefening van die prerogatief 'n algemene saak is. Eintlik is alle aangeleenthede "algemene" sake, totdat dit deur die staatspresident ingevolge artikel 16(1)(a) as "eie" saak geklassifiseer is, of tensy dit natuurlik onder bylae 1 ressorteer. Artikel 15 bepaal duidelik dat aangeleenthede wat nie eie sake is nie, algemene sake is.

Applikante haal Booysen en Van Wyk (laasgenoemde word in die uitspraak Van Dyk genoem) se *Die '83-Grondwet* (59) ter ondersteuning aan:

> "Wat algemene sake betref, is die staatspresident ingevolge die grondwet staats- en regeringshoof en handel hy in dié hoedanigheid slegs *in oorleg* met sy kabinet. Aangesien die kabinet van sý wil afhanklik is en nie hý van die kabinet nie, beteken die feit dat hy in oorleg met sy ministers handel nie veel nie.
>
> In effek verkry die staatspresident nou self die prerogatiewe magte. Hulle kom hom nou persoonlik toe in sy hoedanigheid as regeringshoof en staatshoof. Die enigste beperking is dat die uitoefening van die mag mede-onderteken moet word deur 'n minister. Alhoewel artikel 6 van die nuwe grondwet wat oor die algemene prerogatiewe handel omtrent woordeliks met artikel 7 van die 1961-grondwet ooreenkom, is daar staatsregtelik 'n wesenlike verskil in dié sin dat die staatspresident nou self die genoemde magte kan uitoefen."

Die hof verwerp hierdie redenasie. Daar word na die "struktuur van die grondwet"-argument van Booysen en Van Wyk verwys en dan beslis dat die feit dat die prerogatiewe magte nie in die eerste bylae genoem word nie, nie beteken dat hul daarom algemene sake word nie. Die regter skep in werklikheid 'n verdere, nuwe kategorie van handelinge. Dit is handelinge wat nòg eie, nòg algemene sake is (24). Hulle het hul oorsprong in artikel 6(4) en het dus as't ware vanuit die stelsel vóór 1983 herleef. (Volledigheidshalwe kan daarop gewys word dat Van den Vyver *Die Grondwet van die Republiek van Suid-Afrika* 16–17 ook meld dat prerogatiewe onveranderd bly voortbestaan maar dat daar eintlik van 'n *casus omissus* sprake is.)

Hierdie redenasie lyk nie oortuigend nie. Die nuwe grondwet bevat nie slegs 'n nuwe formele struktuur nie. Dit skep 'n heeltemal nuwe uitvoerende orde. Die posisie van die staatspresident het ingrypend verander. Die beste "formele" aanduiding hiervan is die feit dat daar geen eerste minister meer bestaan nie. In 'n sekere sin is die 1983-grondwet te vergelyk met die Franse grondwet van die vyfde republiek. Dit is doelbewus so ontwerp om aan die staatspresident 'n sentrale, uitvoerende en aktiewe rol te gee. Onder bepaalde omstandighede sal die nuwe grondwet nie kan funksioneer as die staatspresident nie self handel nie. Ook by die aanname van wetgewing speel hy 'n belangrike rol (a 32(1)(d)).

Die uitgangspunt van die huidige grondwet is die verdeling van wetgewende en uitvoerende aangeleenthede in òf eie òf algemene sake. Prerogatiewe is uitvoerende magte van 'n gemeenregtelike aard. Dit is "non-statutory powers of the executive" (ar Schreiner in *Sachs v Dönges* 1950 2 SA 265 (A) 306). Die nuwe grondwet het nie slegs die setel van die uitvoerende gesag gewysig nie; dit het ook die wyse waarop gesag uitgeoefen word, verander. Die politieke *raison d'être* van die huidige bestel is om ander bevolkingsgroepe in die wetgewende en uitvoerende proses te laat deel. Dit word gedoen deur die indeling in eie en algemene sake. In geval van onsekerheid bepaal die staatspresident of iets 'n eie saak van 'n bepaalde bevolkingsgroep is. Hy moet dit boonop doen op so 'n wyse

> "dat die owerheidsinstellings wat die belange van die bevolkingsgroep behartig, nie deur die beslissing in staat gestel word om die belange van enige ander bevolkingsgroep te raak nie" (a 16(1)(a)).

In sodanige besluite tree die staatspresident slegs in oorleg met die kabinet op, aangesien dit gaan om 'n algemene saak (a 16(1)(b)). Hy is dus nie meer, soos dit voor die 1983-grondwet gegeld het, aan die advies van die kabinet gebonde nie. Teen dié agtergrond gesien, lyk die afleiding dat die gemeenregtelike posisie gewysig is, geregverdig. Waar artikel 6(4) nog steeds na die prerogatief verwys soos dit voor die 1983-grondwet gegeld het, moet dit geïnterpreteer word as bevoeghede wat die staatspresident *binne die kader van die nuwe grondwet* kan uitoefen. Slegs op hierdie wyse kan die bepalings van artikels 6(4) en 15 sinvol versoen word. Word die wesenskenmerke van die nuwe grondwet nie gevolg nie, kan dit beteken dat die basiese oogmerk (verdeling in eie en algemene sake) verydel word. 'n Vae *residuum* van bevoegdhede uit die ou stelsel kan tot gevolg hê dat besluite deur die verkeerde orgaan geneem word.

Dit beteken nie dat die staatspresident persoonlik elke paspoort moet uitreik nie. Dit beteken slegs dat hy die oorspronklike setel van daardie bevoegdheid is – soos hy dit vir alle ander algemene sake is. Die daadwerklike uitvoering word natuurlik aan ministers en staatsdepartemente opgedra. Die 1983-grondwet maak hiervoor voorsiening (a 24). Om hierdie redes kan daar ook nie heeltemal met die volgende uitspraak van die hof saamgestem word nie.

> "In any event, even if the issue and withdrawal of passports could be regarded as a general affair, it does not follow that the State President, in relation to such matters, acts personally. There is nothing in the 1983 Constitution which obliges the executive State President to exercise a personal discretion in all general affairs decisions. He is empowered by s 24 to appoint persons to administer departments of State, which means that he is entitled to exercise his powers (even in matters classifiable as general affairs) vicariously through the appropriate Minister, in this case First Respondent. There is nothing in the 1983 Constitution to suggest that the executive State President is obliged, as opposed to being entitled, to exercise a personal discretion on each and every matter that may require decision as a general affair and there is no warrant for such a construction being placed on the 1983 Constitution."

Dit is korrek dat die staatspresident nie in iedere algemene saak persoonlik hoef te handel nie. As dit egter aanvaar word dat 'n bepaalde aangeleentheid 'n algemene saak is, dan geld die voorskrifte van artikel 19(1)(b). Die ministers van die verskeie staatsdepartemente kan dan deur die staatspresident gemagtig word om bepaalde handelinge te verrig. Ten opsigte van roetine-sake kan dit natuurlik ook by voorbaat gedoen word. Sonder so 'n delegasie kon die betrokke minister nie handel nie, aangesien hy oor geen inherente bevoegdhede beskik nie.

Die belangrike implikasie wat uit die totstandkoming van die nuwe grondwet voortspruit, is dat vorige staatsregtelike gebruike vertolk en ingepas moet word binne die nuwe *Grundnorm*. Dat die howe bereid is om hierdie benadering te volg, word deur die ongerapporteerde beslissing van *Nkwinti v Commissioner of Police* 1986 2 SA 421 (OK) bewys. Dáár is beslis dat die afkondiging van die onlangse noodtoestand ingevolge die Wet op Openbare Veiligheid 3 van 1953 'n algemene saak is wat volgens die voorskrifte van artikel 19(1)(b) hanteer moes word. Regter Friedman beskou hierdie beslissing as nie toepaslik nie, en wel omdat dit geen steun bied vir die bewering dat

> "the issue and withdrawals of passports are classifiable as general affairs" (25).

Hieruit moet dus afgelei word dat indien dit wel as 'n algemene saak klassifiseerbaar sou wees, hy applikant gelyk sou gegee het.
Hierdie uitspraak berus dus op die korrektheid van die bewering dat daar 'n derde kategorie handelinge oorgebly het wat *sui generis* is. Soos reeds betoog, lyk dit na 'n interpretasie wat die oogmerke van die nuwe stelsel nie na behore in ag neem nie. Dit is die wyse van uitoefening, nie die bestaan van die prerogatiewe magte nie, wat nuut gereël word. Die betekenis wat aan artikel 6(4) geheg behoort te word, is dat bepaalde gemeenregtelike bevoegdhede bly voortbestaan. Dit bepaal nie hoe hulle uitgeoefen word nie. Die uitoefening van die prerogatiewe bevoegdhede is tipiese handelinge van die uitvoerende gesag en behoort dus soos alle uitvoerende handelinge onder die voorskrifte van artikel 19 te ressorteer. Die hof voer nie gesag aan vir die bewering dat daar so 'n derde kategorie bestaan nie. Wat wel gedoen word, is om die historiese ontwikkeling van die prerogatief in die Suid-Afrikaanse reg kortliks te skets. Tot en met die grondwet van 1961 was die posisie dat die staatspresident altyd "op advies van die uitvoerende raad" gehandel het. Die 1983-grondwet het hierdie posisie ten opsigte van algemene sake ingrypend gewysig.

Die applikant het nog verdere gronde aangevoer waarom die intrekking van die paspoort onregmatig sou wees. Dit was dat die reëls van natuurlike geregtigheid nie nagekom is nie, dat daar nie behoorlik aandag aan die saak bestee is nie, dat die besluit onredelik was en deur onbehoorlike politieke motiewe beïnvloed is en dat dit boonop op verkeerde inligting van die veiligheidspolisie gebaseer is.

Namens doktor Boesak is betoog dat vryheid van beweging "a basic fundamental common-law right" is. 'n Paspoort is nodig om aan hierdie reg gevolg te gee. Ter ondersteuning word onder andere na gewysdes van Ierse, Indiese en Amerikaanse howe verwys. Die hof gaan nie met hierdie argument akkoord nie. Die buitelandse regspraak word onderskei omdat die genoemde lande elk oor 'n geskrewe handves van menseregte in hul grondwette beskik. Met verwysing na plaaslike wetgewing, die Wet tot Reëling van Vertrek uit die Unie 34 van 1955, kom die hof tot die gevolgtrekking dat daar nie 'n ongekwalifiseerde reg bestaan om Suid-Afrika te verlaat of binne te gaan nie.

Die regulering van binnekoms en vertrek uit die land het nie direk met die bestaan van die reg op vryheid van beweging te doen nie. 'n Mens sou selfs in die algemeen kon beweer dat alle regte in hierdie sin relatief is. Fundamentele menseregte is nie van absolute aard nie. Die feit dat hierdie regte soms *qua* hul oorsprong verskil, dit wil sê dat sommige lande dit in grondwette omskryf terwyl dit in ander uit die gemenereg voortspruit, maak hulle ook nie daarom inhoudelik verskillend nie. Die meer tersaaklike vraag is hoe hulle effektief beskerm kan word, en veral watter rol die howe kan speel om inbreukmaking deur die owerheid te voorkom. Die doel van die Wet tot Reëling van Vertrek uit die Unie is primêr die regulering van personeverkeer (eie burgers en vreemdelinge) oor internasionale grense. Hier kom ook volkeregtelike aspekte ter sprake.

Die hof hou hom vervolgens met die vraag besig onder watter omstandighede die besluit om 'n paspoort in te trek, beregbaar is. Weer eens word die ongelukkige suggestie gemaak dat individue in lande sonder 'n "bill of rights," soos Engeland (30), klaarblyklik slegter daaraan toe is met betrekking tot paspoorte as die inwoners van lande wat dit wel het. 'n Omvattende vergelyking en studie van die posisie in 'n land soos Brittanje, wat boonop lid van die Europese

konvensie vir die beskerming van fundamentele regte met direkte klaagreg vir onderdane is, sal waarskynlik bevestig dat dit eerder gaan om hoe effektief die beskerming van sulke regte is, as om die formele aard van die beskerming daarvan.

Van besondere belang is die vraag omtrent die hersiening van 'n prerogatiewe handeling. Die tradisionele posisie is deur appèlregter Van den Heever in sy minderheidsuitspraak in *Sachs v Dönges* uiteengesit en word deur regter Friedman herhaal (31–32). Daarvolgens bepaal die howe die omvang van die prerogatief en die regmatigheid van sodanige handelinge. Suiwer diskresionêre aspekte kan egter nie gekontroleer word nie. Die hof word na 'n belangrike onlangse Engelse beslissing verwys (*Council of Civil Service Unions v Minister for the Civil Service* 1984 3 All ER 935) waarin die hof wel bereid was om prerogatiewe handelinge te hersien en dit in die algemeen soos statutêre bevoegdhede te behandel. Essensieel buitelandse en politieke kwessies word egter uitgesluit. In die betrokke beslissing is die reëls van natuurlike geregtigheid wel toegepas.

Die hof spreek hom nie regstreeks oor die relevansie van hierdie Engelse saak uit nie, maar bevind eerder dat daar geen feitegronde bestaan om die intrek van die paspoort ter syde te stel nie. Sou dit egter blyk dat die besluitnemer nie behoorlik aandag bestee het nie of so grof onredelik opgetree het dat *mala fides* of onbehoorlike motiewe aanvaar moet word, dan sou tersydestelling gelas kon word. Dit is basies die tradisionele Suid-Afrikaanse posisie. Op die beskikbare feite bevind die regter geen growwe onredelikheid nie, en in die lig van "the wide discretion vested in first respondent" is daar ook nie aanduidings van 'n nalate om behoorlik aandag te bestee of dat irrelevante oorwegings in ag geneem is nie. (Respondent het 'n breedvoerige beëdigde verklaring ingelewer met betrekking tot sy persoonlike oorweging van verskeie rapporte oor die veiligheidsituasie en wat die redes vir sy besluit was.)

In die bespreking van die vraag of die *audi alteram partem*-reël in hierdie geval aanwending moes vind, hou die regter hom weer eens by die tradisionele Suid-Afrikaanse posisie. Statutêre en prerogatiewe bevoegdhede word onderskei. Vir laasgenoemde geld die *audi alteram partem*-reël blykbaar nie (38). Waarop hierdie gedeelte van die beslissing neerkom, is dat 'n instansie wat onder die prerogatief handel algaande self die aard en omvang daarvan bepaal en dit ook voortdurend meer beperkend vir die onderdaan kan formuleer. Hierdie wysigings kan eensydig geskied. So gesien, het die prerogatief natuurlik geen vaste inhoud nie en kom daar van appèlregter Van den Heever se uitspraak in *Sachs v Dönges* (" it is for the Courts, therefore, to define the limits of prerogative powers and the legality of acts alleged to be within the ambit of the prerogative" (311)) ook niks tereg nie.

Na die destydse beslissing ten gunste van Sachs is daar eensydig nuwe bepalings in alle paspoorte ingevoeg wat soos volg bepaal het:

> "Hierdie paspoort bly die eiendom van die Regering van die Republiek van Suid-Afrika en kan te eniger tyd na goedvinde van die Minister van Binnelandse Aangeleenthede namens genoemde Regering gewysig, ingetrek of gekanselleer word, en moet op versoek van genoemde Minister of 'n amptenaar deur hom daartoe gemagtig, onverwyld deur die houer aan genoemde Regering teruggegee word."

Hieruit lei die regter af dat daar absoluut geen ruimte vir die *audi alteram partem*-reël is nie. ("It is totally inconsistent with any suggestion that Applicant should be given a hearing"(39).) Daar word ook bevind:

> "The object of the prerogative power to withdraw a passport is to prevent a particular person from leaving the country" (38).

Hierdie saak bevestig dat daar oor die presiese inhoud van hierdie bepaalde prerogatief geen finale sekerheid bestaan nie. Dit lei tot uiters onbevredigende gevolge. So is die voorwaardes wat na *Sachs* se saak in paspoorte ingevoeg is, bloot by wyse van ministeriële opdrag gedoen. Geen wetgewing tot daardie effek is aanvaar nie. Dit behoef geen betoog dat 'n bestaande regsposisie slegs deur wetgewing verander kan word nie. Dit sluit natuurlik die gemenereg in. Die ander nadelige gevolg is dat daar van regterlike kontrole oor hierdie tipe uitvoerende handeling prakties geen sprake is nie – die bevinding van appèlregter Van den Heever ten spyt.

Hierbo is geargumenteer dat daar in beginsel geen verskil gemaak behoort te word tussen fundamentele regte wat uit die gemenereg kom en dié wat grondwetlik omskryf is nie. Die belangrike vraag is of hulle effektief is, dit wil sê of hulle deur die howe beskerm word. Hierdie beslissing toon aan dat vae regte wat deur nog vaer prerogatiewe opgehef kan word, weinig effektiwiteit het. Die essensiële doel met basiese regte vir die onderdaan is juis om hom teen die owerheid te beskerm. 'n Vae, ongedefinieerde en bykans onbeperkte bron van owerheidsoptrede soos die prerogatief wat hier bespreek is, hef alle regsbeskerming op. Dit is die howe se taak om vaste inhoud aan die prerogatief te gee.

GERHARD ERASMUS
Universiteit van Stellenbosch

"DEÏNJURIËRING" VAN OWERSPEL

In dié aantekening word die vraag of owerspel tot deliktuele aanspreeklikheid aanleiding behoort te gee, onder die loep geneem.

1 Terminologiese Problematiek

As 'n handeling wat tot strafregtelike aanspreeklikheid aanleiding gee sy strafkarakter ontneem word, word gesê dat dit gedekriminaliseer word. Wat noem 'n mens die geval as 'n handeling van sy deliksaard (kompensasieaard) ontneem word? Die eerste moontlikheid wat na vore tree, is om die woord "delik" as basis te gebruik en dan te omvorm na "dedeliktifisering" of "dedeliktiëring" ensovoorts. 'n Ander moontlikheid is om die Latynse woord *injuria*, in sy wyer betekenis, as sinoniem vir die Afrikaanse woord "delik," as basis te gebruik en te omvorm na "deïnjuriëring." Soos uit die opskrif van die aantekening blyk, verkies ek laasgenoemde alternatief. Ek doen dit bloot omdat dit beter op die oor val.

2 Die Onderskeid tussen die Fases van die Alter- en Egosentraat

By 'n ander geleentheid het ek daarop gewys dat die vroulike geslagsidentiteit en -waardigheid in die altersentraat primêr om 'n ander (alter) gesentreer het, naamlik haar vader of voog of haar man (as sy getroud is) of haar *ukungenavennoot* (na haar man se dood indien sy nog kan voortplant) (sien "Regspluralisme, Regsakkulturasie en Deflorasie in die Inheemse Reg" 1983 *TSAR I*).

In die lig hiervan het die deflorering (of beswangering) van 'n ongehude meisie 'n onreg teen haar vader of voog daargestel. Geslagsomgang (of beswangering) van 'n gehude vrou (of weduwee) deur iemand anders as haar man (of ingeval sy 'n weduwee is, deur iemand anders as haar *ukungena*-vennoot) het in die fase van die altersentraat tot deliktuele aanspreeklikheid aanleiding gegee. Kenmerkend van die fase van die altersentraat is die regsongelykheid wat tussen die geslagte bestaan. 'n Getroude vrou het byvoorbeeld nie 'n deliktuele eis teen 'n ander vrou wat met haar man geslagsomgang het nie, terwyl 'n man, soos hierbo aangetoon, wel so 'n eis het teen 'n ander man wat met sy vrou geslagsomgang het.

Die inheemse reg van die swartman verkeer nog in die fase van die altersentraat (sien Van den Heever *'n Sistematiek vir die Inheemse Deliktereg van die Swartman* (LLD-proefskrif UP 1984) 832 e v).

In die fase van die egosentraat, daarenteen, sentreer die vroulike geslagsidentiteit en -waardigheid primêr om haarself (*ego*). Vandaar dat die Suid-Afrikaanse seduksiedelik 'n onreg teenoor die meisie *self* is. In ons gemenereg het 'n getroude vrou klaarblyklik nie 'n deliktuele eis gehad teen 'n vrou wat met haar man geslagtelik verkeer het nie (sien die interessante artikel van Barlow "A Wife's Claim to Damages against a Female Co-respondent" 1940 *SALJ* 6). Ons howe het egter ook aan die vrou 'n deliktuele eis toegeken. In *Rosenbaum v Margolis* 1944 WLD 147 158 sê regter Blackwell:

> "The criminal sanction for adultery having disappeared, the only remedy left to an injured husband is an action for divorce against his wife, with the claims ancillary thereto, and for damages against the adulterer. In so far as the latter may be regarded as a deterrent and in the public interest, I can see no good reason why it should not enure equally in favour of the wife. There is something, in my opinion, to be said for the view that an action for damages against an adulterous third party is out of harmony with modern concepts of marriage and should be abolished. But as long as the action remains, it should remain in favour of both sexes alike."

(Sien ook *Strydom v Saayman* 1948 2 SA 736 (T); *Fuller v Viljoen* 1949 3 SA 852 (G).)

In *Foulds v Smith* 1950 1 SA 1 (A) het die Suid-Afrikaanse appèlhof dié benadering bevestig en alle twyfel uit die weg geruim. Die feit bly egter staan: 'n getroude vrou se geslagsidentiteit (haar liggaam dus) het nog steeds betekenis vir 'n ander, naamlik vir haar man aangesien geslagsomgang met haar deur iemand anders as haar man aan laasgenoemde 'n deliktuele eis teen genoemde iemand anders gee. Dieselfde geld, soos hierbo genoem, waar 'n getroude man geslagsomgang met 'n ander vrou het. Dit bring ons by die kernvraag van die onderhawige ondersoek, naamlik: moet die reste van die altersentraat nie finaal afgeskud en die fase van die egosentraat volledig betree word nie? Met ander woorde: is die tyd nie ryp om weg te doen met die owerspeldelik nie? Voordat 'n antwoord gegee kan word, is dit gepas om die positiewe reg ten aansien van die delik owerspel nader te betrag.

3 Owerspel as Delik

3 1 Daar Moet 'n Huwelik Bestaan

Die deliktuele eis vir owerspel kan slegs bestaan as die eiser ten tyde van die beweerde daad van geslagsomgang getroud was met die persoon met wie die verweerder na bewering geslagsomgang gehad het (sien Van Zyl "The Theory

of Judicial Practice" 1890 *Cape Law Journal* 201 203 met beroep op *Nanto v Malgas* 5 Juta 108). Aangesien die inheemsregtelike huwelik (gebruiklike verbinding) nie deur die howe as 'n geldige huwelik erken word nie, sal die eiser nie 'n eis volgens die gemenereg kan instel teen 'n persoon wat met sy of haar inheemsregtelike gade geslagomgang het nie (sien *Santam v Fondo* 1960 2 SA 467 (A)). 'n Swarte wat, daarenteen, volgens die gemenereg getroud is, kan slegs ooreenkomstig die gemenereg vir owerspel eis (sien bv *Mwanda v Simeyile* (1926) 5 NAC 7 8; *Nkomentaba v Mtinde* (1925) 5 NAC 127 130; *Sogoni v Magqadaza* 1935 NAC (K en O) 18 19; *Nontenjwa v Mafeke* 1940 NAC (K en O) 146; *Nazo v Lubisi* 1946 NAC (K en O) 18).

3 2 Die Begrip "Geslagsomgang"

In *Kat v Kat* 1910 TPD 436 443 word ten aansien van sodomie gesê:

> "[N]o doubt, the offence would be the most depraved form of sexual infidelity" (sien ook *Croft v Croft* 1923 2 PH B34 (G)).

Volgens *Cunningham v Cunningham* 1952 1 SA 167 (K) 170 is die een of ander vorm van penetrasie 'n vereiste vir owerspel. Sodomie, wat deur geslagsomgang *per anum* gepleeg word, sou derhalwe wel owerspel kon wees, maar nie die pleeg van 'n onnatuurlike geslagsdaad (soos masturbasie van 'n ander) nie aangesien daar in so 'n geval nie penetrasie plaasvind nie. Hierdie reël is, om die minste daarvan te sê, onsinnig.

Dit blyk derhalwe dat die vrou van 'n getroude man wat met 'n ander man sodomie pleeg, 'n deliktuele eis teen genoemde ander man het. 'n Getroude man wat met 'n ander vrou geslagsomgang *per anum* (en blykbaar ook *in ore*) het, pleeg ook owerspel.

3 3 Eis tussen Gades

Volgens ons positiewe reg skep owerspel deur een van die gades nie 'n delik op grond waarvan die ander gade van die skuldige gade kan eis nie (sien *Ex parte AB* 1910 TPD 1332; *Currie v Currie* 1942 NPD 362 366; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 457).

Sterk stemme het al opgegaan ten gunste van die erkenning van so 'n eis tussen gades (sien MAD "A Wife's Right to Claim Damages from Her Adulterous Husband" 1943 *SALJ* 222; Olivier "Owerspel as Onregmatige Daad tussen Eggenotes" in *Huldigingsbundel Daniël Pont* (1970) 272). In die lig van die standpunt wat ek hieronder inneem, sou so 'n eis onvanpas wees.

3 4 Interdik

In die lig van die spreuk *ubi ius ibi remedium* word in *Wassenaar v Jameson* 1969 2 SA 349 (W) 353 *obiter* verklaar dat aangesien owerspel met 'n derde party 'n *injuria* teen die onskuldige gade daarstel, "the remedy of interdict" in gepaste omstandighede beskikbaar behoort te wees. In *Arma v Arma* 1971 4 SA 409 (D) 410 is twyfel uitgespreek of 'n interdik 'n toepaslike remedie in geval van owerspel is (sien ook Hahlo "Interdicting Adultery" 1969 *SALJ* 267 271).

In die lig van die standpunt wat hieronder ingeneem word, verval die problematiek in dié verband.

3 5 Aard van die Eis

Die aksie weens oorspel staan prinsipieel op twee bene:

a Vergoeding van ideële skade (*sentimental damages*) kan geëis word weens *injuria* bestaande uit *contumelia* en verlies van *consortium*. (Sien *Joubert v Bruwer* 1966 1 PH B 5 (G); Amerasinghe "Adultery as an *Injuria* in the Modern Roman-Dutch Legal Systems" 1963 *Acta Juridica* 52 106–107; sien ook *Biccard v Biccard* (1892) 9 SC 473 477; *Michael v Michael* 1909 TH 292; *Sutcliffe v Sutcliffe* 1913 TPD 686 688; *Groundland v Groundland* 1923 WLD 217 221; *Mason v Mason* 1932 NPD 393 394; *Harris v Harris* 1946 2 PH B 99 (D); *Pearce v Kevan* 1954 3 SA 910 (D) 915; *Woodwiss v Woodwiss* 1958 3 SA 609 (D) 618.) In *Viviers v Kilian* 1927 AD 449 455 verklaar hoofregter Solomon:

> "Damages in a claim against the adulterer are recoverable on two entirely separate and distinct grounds; first on ground of the injury or contumelia inflicted upon the husband, and secondly on the ground of the loss of the comfort, society, and services of his wife."

(Sien ook *Mulock-Bentley v Curtoys* 1935 OPD 8 14; *Valken v Berger* 1948 3 SA 532 (W) 533; *Bruwer v Joubert* 1966 3 SA 334 (A) 337; *Smit v Arthur* 1976 3 SA 378 (A) 386; *Fraser v De Villiers* 1981 1 SA 378 (D) 382.)

Volgens die uitspraak in *Gradwell v Hayward* 1932 EDL 329 328 slaan *contumelia* op "sentimental damages inflicted upon . . . honour and good name." (Oor die ontwikkeling van die begrip *contumelia*, sien Joubert *Grondslae van die Persoonlikheidsreg* (1951) 79 92 108). In *Mulock-Bentley v Curtoys* 1835 OPD 8 15 haal regter-president Krause die volgende definisie van *contumelia* van De Villiers *Law of Injuries* 17 met goedkeuring aan:

> "A wrongful act committed in contempt of a free man by another who thereby, with evil intention, impairs either his person, his dignity or his reputation."

Consortium omvat, daarenteen, kameraadskap, liefde, toegeneentheid, vertroosting, wedersydse dienste en geslagsomgang (sien *Grobbelaar v Havenga* 1964 3 SA 522 (N) 525; *Van den Berg v Jooste* 1960 3 SA 71 (W) 73; *Xaba v Ngwenya* 1964 NAC (N–E) 11). Die begrip "wedersydse dienste" (*mutual services*) stel ook 'n ekonomiese komponent vir die begrip *consortium* daar (sien *Joubert v Bruwer* 1966 1 PH B 5 (G); *Diemer v Solomon* 1982 4 SA 13 (K) 16; sien in die algemeen McKerron *The Law of Delict* (1971) 166; Neethling *Persoonlikheidsreg* (1979) 167–168).

Indien die man en vrou na die owerspel voortgaan om as man en vrou saam te leef, verval die eis op grond van die verlies van *consortium* (sien *Viviers v Kilian supra* 456; *Gradwell v Hayward supra* 328; *Nodada v Mokoena* 1942 NAC (K en O) 80 81). Teen dié agtergrond beveel Neethling aan dat dit meer

> "korrek en ook wenslik is om die ideële skade weens verlies van *consortium* onder die toepassingsgebied van die *actio iniuriarum* tuis te bring, te meer omdat die gevaar bestaan dat die gevoelslewe van die onskuldige gade onbeskerm gelaat word in omstandighede waar die fisiese sy van *consortium* nie as gevolg van die owerspel geskend is nie" (164).

In die lig van die bestaande reg is dié aanbeveling onderskryfbaar.

b Vermoënskade wat ontstaan as gevolg van die verlies van dié ander gade se dienste, soos hierbo aangedui, en "other material damage resulting from the adultery" (*Joubert v Bruwer* 1966 1 PH B5 (G); sien ook *Doyle v Doyle* 1957 2 PH F85 (SR); Amerasinghe 107).

3 6 Quantum

In dié verband het die howe al verskeie riglyne gestel:

a Indien geen *contumelia* en verlies van *consortium* as gevolg van die owerspel bewys kan word nie, word geen kompensasie toegestaan nie (sien *Mason v Mason* 1932 NPD 393; *Mwanda v Simayile* (1926) 5 NAC 7 9). In *Viviers v Kilian supra* 456 is die opmerking gemaak dat indien eiser met 'n prosituut getroud is, kompensasie nie toegestaan sal word nie. Die hof laat ook nie toe dat 'n man handeldryf "upon his wife's dishonour" nie (*Biccard v Biccard* (1892) 9 SC 473 476). Verder het die hof beslis dat kompensasie nie toegestaan word as albei partye owerspel gepleeg het nie (sien *Biccard v Biccard supra* 475; *Mbele v Tshobo* (1912) 3 NAC 8; *Tomose v Jele* (1926) 5 NAC 6).

b In *Harris v Harris* 1946 2 PH B 99 (D) word verklaar dat indien 'n man sy vrou se owerspel kondoneer, daar nie verlies van *consortium* in fisiese sin bestaan nie

> "but the adulterer is still liable for damages under this head, for it is inevitable that the relationship of husband and wife can never be quite the same as before."

Die algemene standpunt is egter dat in so 'n geval slegs vir *contumelia* geëis kan word (sien *Chapman v Chapman* 1977 4 SA 142 (NK) 144; *Viviers v Kilian supra* 451). In die saak *Benliti v Mgwadleka* (1912) 3 NAC 5 was appellant en sy vrou, albei swartes, volgens die gemenereg getroud. Appellant het, nadat hy vir 3 jaar weens sy werk van die huis af was, teruggekeer en gevind dat sy vrou deur 'n ander man swanger gemaak is. Hy het haar as gevolg daarvan weggejaag en sy het vir 4 jaar openlik saam met respondent gewoon en 2 kinders is uit dié verhouding gebore. Hy stel vervolgens 'n eis in vir die owerspel met sy vrou, maar nie vir ontbinding van die huwelik nie. Die hof verwerp die eis en verklaar:

> "Leading Roman-Dutch law authorities lay down the principle that a man who commits adultery with a married woman inflicts an injury on the husband, but the same authorities also state that a man cannot benefit by repeated acts of immorality on the part of his wife, and the trend of decisions in the Higher Courts is to withhold damages even in cases where divorce is asked for and obtained, and especially so in cases where the treatment of the wife by the husband before the adultery has been harsh and cruel."

c Die aard van die verlies wat eiser ly, is ook relevant. In *Chapman v Chapman supra* 144 word verklaar dat

> "if the spouse that has strayed was in any event a poor bargain, plaintiff cannot expect substantial damages."

In dieselfde saak word daarop gewys dat 'n vrou meer skade ly as gevolg van die verlies van haar eggenoot as omgekeerd:

> "[D]espite altered *mores* a woman ... remains the hunted rather than the huntress."

'n Man kan hiervolgens makliker 'n plaasvervanger vir sy owerspelige vrou vind.

d Die ekonomiese en sosiale omstandighede van die partye is ook relevant by die berekening van die *quantum* (sien bv *Valken v Berger* 1948 3 SA 532 (W) 535; *Mulock-Bentley v Curtoys supra* 15 21; *Chapman v Chapman supra* 144; *Harris v Harris supra*). Die howe beskou die verlies van 'n moderne "liberated" vrou as minder ernstig as dié van haar voorganger (*Chapman v Chapman supra* 144).

e Indien die verweerder in die owerspelaksie "grossly impudent and unrepentant" is, sal dit as 'n verswarende faktor in aanmerking geneem word (sien *Chapman v Chapman supra* 144; *Harris v Harris supra*).

f Verder geld dit as 'n verswarende faktor as die gasvryheid of afwesigheid van die eiser uitgebuit word om met sy vrou geslagsomgang te hê *Olivier v Olivier* (1891) 1 CTR 51; *Harris v Harris supra*; *Ndodoza v Tshaniwa* 1939 NAC (N en T) 64 65; *Mgomezulu v Makubo* 1957 NAC (C) 101; *Mwanda v Kuse* 1962 NAC (S) 64. Dit geld ook as 'n gade doelbewus weggelok word met die doel om owerspel te pleeg. In *Valken v Berger supra* 536 sê regter Ramsbottom:

> "The defendant has inflicted upon the plaintiff a continued and oft-repeated wrong, and by her conduct has heaped and is heaping ignominy upon her. Those are matters which must have an important bearing upon the damages. The plaintiff appears to me to be a woman of some refinement and sensitiveness. I have not seen her husband, but until the advent of the defendant he showed himself to be a faithful, loving and dutiful husband."

(Sien ook *Bruwer v Joubert* 1966 3 SA 334 (A) 338; *Cayeux v Cayeux* 1956 2 PH B 23 (D); *Potgieter v Potgieter* 1959 1 SA 194 (W) 195; *Biccard v Biccard supra* 476; *Masinga v Ndhlovu* 1919 NHC 94; *Viviers v Kilian supra* 456; *Steynberg v De Deere* 1959 2 PH B 20 (O).)

g Die howe wat spesiaal vir swartmense daargestel is, het beslis dat die bedrag wat inheemsregtelik as kompensasie vir owerspel toegestaan word, as leidraad gebruik moet word waar die partye volgens die gemenereg getroud is (sien *Nozo v Lubisi* 1946 NAC (K en O) 18; *Bekulu v Cebisa* 1946 NAC (K en O) 45; *Zibaya v Maguga* 1947 NAC (K en O) 7; *Tyalita v Shenxane* 1952 NAC (S) 161; *Yeni v Jaca* 1953 NAC (N–E) 31; *Mdolo v Vanda* 1969 BAC (S) 25).

3 7 Verwere

In dié verband word bloot op die volgende gewys:

a *Kondonasie* Selfs indien iemand die owerspel van sy of haar gade kondoneer, verval die eis teen die derde nie. In *Mlotana v Rundwana* (1905) 1 NAC 92 93 word verklaar:

> "It is highly conceivable that a man loving his wife and not wishing to deprive his children of the mother's care may forgive her, but it by no means follows that this lessens his just resentment against the adulterer or that he has suffered no injury by the offence, for in addition to the loss of the wife's society which . . . constitutes one of the main elements in the estimation of damages, there are other elements, such as the dishonour to the husband and the breach it must occasion, if only for a time, between the wife and himself.
>
> Again, the action for damages by the husband who has forgiven his wife may be regarded as a protective measure against the adulterer with the object of putting on him a penalty which will deter him from attempting to continue his criminal intimacy. If such an action cannot be maintained then the wives in such cases would be subject to the attempts of dissolute men and the husbands be without a remedy."

Daar moet verder in gedagte gehou word dat kondonasie by swartes die reël en nie die uitsondering is nie (sien ook *Binqela v Sifile* (1909) 1 NAC 243; *Bell v Bell* 1909 TS 500 508).

b *Toestemming* In *Bell v Bell supra* 511 wys hoofregter Innes daarop dat die reël *volenti non fit injuria* ook ten aansien van owerspel geld:

> "[O]ne married person cannot be heard to complain of the acts of the other to which he gave the concurrence of his will" (sien ook *Du Plessis v Du Plessis* 1928 OPD 1 10).

In *Kunene v Kunene* 1938 NAC (N en T) 159 is beslis dat indien 'n eggenoot uit 'n gemeenregtelike huwelik as *ukungena*-vennoot van sy broer se weduwee optree en dit geskied met sy vrou se toestemming, laasgenoemde nie 'n eis weens owerspel kan instel nie.

Die howe het bevind dat samespanning en oogluikende toelating op toestemming dui (sien *Benya v Benya* (1921) 4 NAC 3; *Ngqo v Twalana* (1927) 5 NAC 9).

Terloops kan vermeld word dat die hof nie maklik 'n afleiding maak dat owerspel gepleeg is nie. Daar word naamlik vereis:

> "[P]roof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal" (*Gates v Gates* 1939 AD 150 155; sien ook *Daysh v Daysh* 1939 NPD 65; *Roux v Roux* 1939 NPD 256 258).

4 Deïnjuriëring van Owerspel

In *Green v Fitzgerald* 1914 AD 88 is beslis dat owerspel as misdaad in Suid-Afrika verval het. Dit is ook die posisie in 'n groot aantal moderne state (sien Mirvahabi "Adultery: A Comparative Study of Criminal Sanctions" 1978 *Journal of Criminal Law* 109 173). In verskeie lande, soos die Verenigde State van Amerika en Engeland, is die deliktuele aksie weens owerspel reeds afgeskaf (sien Church "Consortium Omnis Vitae" 1979 *THRHR* 376 384).

Church het reeds geargumenteer dat die aksie weens owerspel ook in Suid-Afrika afgeskaf behoort te word. Sy gee die volgende redes:

> "The reasons underlying abolition include the following: (i) the action provides opportunity for blackmail in that the defendant rather than risk reputation and public exposure of his private life, settles out of court at any cost; (ii) reasonably definite standards for assessing damages are lacking; and (iii) the action is based upon 'psychological assumptions that are contrary to fact.' The third is the most significant reason. The marriage in which the spouses are living in harmony is hardly likely to be broken up by the third party adulterer or seducer and the deterrent effect of the action is questionable. In both cases of adultery and enticement the spouse concerned is a willing party and it is inequitable that the third party should be liable in damages while the perhaps morally more blameworthy spouse is not. Furthermore the action is out of place in the light of a modern divorce law which recognizes that the marriage breakdown is not based solely on the fault of one party. It may even be argued that de facto if not de iure, the marriage relationship has already broken down at the time the adultery or desertion takes place."

Hoewel ek met die redes wat sy noem akkoord gaan, is daar, moreel gesproke, 'n baie meer basiese rede waarom die aksie afgeskaf behoort te word. In *Strydom v Saayman* 1949 2 SA 736 (T) 738 word verklaar dat die partye op huwelikstrou geregtig is en dat albei huweliksgenote geregtig is op "the sole use of each other's body." Die effek hiervan is dat die een eggenoot deur huweliksluiting 'n soort "pandreg" op die ander eggenoot se liggaam verkry. Dit is myns insiens onverdedigbaar aangesien een mens nie moreel gesproke 'n reg op die gebruik van 'n ander mens se liggaam kan hê nie. Die basiese reg wat 'n mens op sy individualiteit en op die gebruik van sy liggaam tot emosionele selfverwesenliking het, word deur die aksie weens owerspel geskend. Dit is nie die taak van die deliktereg om 'n huwelik in stand te hou nie. Persoonlike toegeneentheid (liefde) en respek vir mekaar is die fondamente waarop 'n standhoudende huwelik gebou word en nie regsreëls nie.

Daar is by geleentheid beweer dat dit die taak van die deliktereg is om "socially desirable behaviour" te bevorder (Sugarman "Doing Away with Tort Law" 1985 *California Law Review* 555 559). Genoemde taak funksioneer myns insiens egter binne sekere morele grense. Die aksie weens owerspel staan (hedendaags) buite genoemde grense.

5 Konklusie

In die lig van bogenoemde argumente kan die aksie weens owerspel as sodanig afgeskaf word. Werklike ekonomiese skade wat as gevolg van owerspel opgedoen word, behoort egter in gepaste omstandighede met die *actio legis Aquiliae* verhaal te kan word.

JMT LABUSCHAGNE
Universiteit van Pretoria

WEER EENS SKADEVERGOEDING WEENS DIE VERLIES VAN TOEKOMSTIGE VERDIENSTE OF ONDERHOUD, EN ONWETTIGE INKOMSTE IN DIE VERLEDE

In 'n vorige aantekening ("Skadevergoeding weens die Verlies aan Toekomstige Verdienste of Onderhoud, en Onregmatige Bedrywighede in die Verlede" 1984 *THRHR* 439 e v) het ek 'n interpretasie van *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) bepleit wat op die beweerde en bewese feite van die betrokke saak gebaseer is. Die feitebevinding, soos deur die pleitstukke uiteengesit, was dat die eiseres ook in die toekoms haar inkomste uit 'n onwettige bedrywigheid sou verdien ('n geval van *permanens turpitudo* dus). Omdat die eis vir die verlies van toekomstige inkomste slegs op die voortsetting van 'n onwettige bedrywigheid gebaseer is, is dit tereg afgewys. Die *Dhlamini*-saak is egter geen gesag nie vir 'n algemene regsreël dat indien 'n persoon onmiddellik voor sy onregmatige en skuldige besering inkomste uit 'n nie-regmatige bedrywigheid verdien het, hy deur die privaatreg gestraf word vir sover sy eis vir verlies van *toekomstige* verdienste (*loss of earning capacity*), ongeag of dit wettig sou wees of nie, sonder meer afgewys word. Om dit met 'n voorbeeld te illustreer: A is 'n pas gekwalifiseerde persoon, byvoorbeeld 'n prokureur, ingenieur, tandarts, elektrisiën of loodgieter, wat weens die ekonomiese slapte vir ten minste 12 maande nie onmiddellik by sy gekose vennootskap met sy werk 'n begin kan maak nie. Hy is egter baie ondernemend en doen intussen in sy motorhuis vir kennisse en vriende onwettige duikklopwerk – wat hy as seun by sy pa geleer het – en maak 'n goeie bestaan daaruit. Hy word na 10 maande egter onregmatig en skuldig omgery en 'n invalide gelaat, wat geen werk, insluitend dit waarvoor hy gekwalifiseer is, kan doen nie. 'n Regsbelang wat onder andere aangetas is, is sy verdienvermoë (*earning capacity*) of sy geskiktheid om toekomstige inkomste te verdien, soos die appèlhof dit beskryf (*Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150A–C; *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917B–D; *Southern Insurance Association Ltd v Bailey* 1984 1 98 (A) 111C–D). Indien A nie 'n eis vir verlies van geskiktheid om toekomstige inkomste te verdien het nie, sal dit so teenstrydig met praktiese realiteit, logika en billikheid wees dat die reg alle kredietwaardigheid sal inboet. In die reeds vermelde aantekening is pleitsbesorgers gewaarsku om nie hul pleitstukke so op te stel dat die eis vir verlies aan *toekomstige* verdienste op die verbode inkomste in die verlede en op die voortsetting daarvan gebaseer word nie.

Dit is belangrik dat die belang waaroor dit hier gaan behoorlik begryp word. Wat A deur die onregmatige en skuldige optrede van die onregpleger verloor

het, is sy verdienvermoë, *earning capacity*, of "geskiktheid om inkomste te verdien," soos ons appèlhof dit beskryf. Die verdienvermoë is die individu se belangrikste *vermoënsbate*; inderdaad 'n volk se grootste ekonomiese bate. Die Japanese of Taiwanese ekonomiese situasie dien as 'n sprekende voorbeeld hiervan. Hierdie lande het behalwe hulle mense se verdienvermoë geen noemenswaardige minerale- of ander natuurlike hulpbronne nie. Met hul verdienvermoë het hulle egter van die grootste ekonomiese vermoëns in die wêreld opgebou. Behalwe as 'n persoon totaal sonder verstand of liggaamlik ongeskik is, het hy noodwendig die een of ander verdienvermoë. Dit is 'n vermoë om inkomste te genereer. Die omvang van hierdie vermoë wissel van persoon tot persoon omdat dit bepaal word deur die hoogs persoonlike eienskappe van elke regsubjek. Dit kan egter nie onder die persoonlikheidsregte ingedeel word nie, want soos reeds verduidelik, is dit 'n vermoënsbron; die aantasting daarvan het vermoënskade tot gevolg, verhaalbaar met die *actio legis Aquiliae*, welke skade aktuarieel bereken word. Dit is met ander woorde 'n vermoënsbelang. Dit is juis die berekeningsmetode van die verlies van geskiktheid om inkomste in die toekoms te verdien wat van die aard van hierdie belang aanduidend is. Daar word gewerk met die hipotetiese verwesenliking van vorderingsregte wat aan die benadeelde sou toegekom het. Die juridiese belang is daarom die potensiële vorderingsregte van die reghebbende. As 'n persoon so kapitaalkragtig is dat hy in die verlede nooit gewerk het nie en ook in die toekoms nooit sal werk nie, kan daar van skadevergoeding vir die aantasting van sy verdienvermoë geen sprake wees nie. Die saak moet egter nie met die gepaardgaande aantasting van ander regte, soos byvoorbeeld sy fisiese integriteit, verwar word nie. Daarvoor ontvang die benadeelde 'n genoegdoeningsbedrag.

Feitelik het 'n persoon 'n verdienvermoë ongeag of hy dit in die verlede vir wettige of onwettige doeleindes aangewend het. Die wettigheid of onwettigheid van sy optrede speel egter 'n deurslaggewende rol by die vraag of sy verdienvermoë regtens beskermwaardig is. Indien die benadeelde in die toekoms met die onwettigheid sou voortgaan, sou die besmette "vorderingsreg" regtens onbeskermingswaardig bly. Daarom is dit van kardinale belang of die pleitstukke van 'n eiser en die bewese feite op 'n oorwig van waarskynlikhede op die *voortsetting* van die onwettige bedrywigheid dui al dan nie. Dit was onteenseglik die feitebevinding van die hof *a quo* en die appèlhof in die *Dhlamini*-saak:

> "Sy sou hiermee *voortgegaan het* totdat sy haar kinders grootgemaak het" (910G). "[S]he 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" [onwettige handel] (910H). "[T]he only evidence relating to her earnings, past *or future* . . . has been based entirely on her trade" [onwettige handel] (910H–911A).

Indien daar bewerings en getuienis was dat die eiseres in die toekoms regmatige vorderingsregte sou gehad het, sou sy suksesvol gewees het, maar

> "there is no evidence whatsoever to suggest that she could or would have earned any income in any legitimate way. The damages that she claims . . . are to compensate her for income that she *would have earned* illegally" (911B ek kursiveer).

Die eis is afgewys omdat die betrokke skade nie-regmatige inkomste sou wees. Sy sou voortgaan met die onwettige bedryf. Die bedrag wat sy vorder, sou uit die onwettige bedryf resulteer.

Die *Dhlamini*-saak is een honderd persent korrek beslis, maar geen gesag vir 'n rigiede reël dat as die eiser in die verlede 'n nie-regmatige inkomste verdien

het, hy sy eis vir toekomstige verdienste moet baseer op sy nie-regmatige inkomste in die verlede, met die gevolg dat dit outomaties afgewys sal word nie. Inteendeel, die hele bevinding bots lynreg met so 'n reël. Die alternatiewe siening sou beteken dat dieselfde hof wat die verwerplike *versari in re illicita*-leerstuk in die sestigerjare uit die strafreg geweer het, dit weer huid en haar in die privaatreg ingevoer het deurdat 'n onwettige gedraging in die verlede nou op 'n onbesproke toekomstige vorderingsreg projekteer word.

Dieselfde argument is gebruik om die posisie van afhanklikes te verdedig waar die broodwinner hulle voor sy dood uit onwettige bedrywighede onderhou het (1984 *THRHR* 442–447). Die regswetenskaplike grondslag van hierdie aksie, waarmee ek my vereenselwig, word deeglik deur Van der Merwe en Olivier uiteengesit (Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 342–348). Die posisie van afhanklikes behoort egter in hierdie omstandighede nog meer beskermswaardig te wees, indien toegegee word dat die onregpleger 'n onregmatige daad direk teen die afhanklikes pleeg (vgl a 2(1B) en die voorbehoudsbepaling van a 2(6) van die Wet op Verdeling van Skadevergoeding 34 van 1956).

'n Afhanklike het *ex lege* 'n vorderingsreg teen sy broodwinner. Die vorderingsreg bestaan ongeag of die afhanklike hom inderdaad uit onwettige bedrywighede onderhou. Geen broodwinner kan hierdie verpligting ontduik deur byvoorbeeld by 'n egskeidingsgeding te pleit en te bewys dat hy sy inkomste in die verlede uit onwettige bedrywighede gekry het en waarskynlik in die toekoms sal verkry nie; of verdwyn die vorderingsreg in die niet sodra die broodwinner byvoorbeeld ná 'n egskeidingsbevel 'n onwettige bedrywigheid begin? Sal ons reg die onwettige optrede van 'n broodwinner projekteer op die onafhanklike en selfstandige vorderingsreg van 'n afhanklike? (Vgl *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376 (K).) Die basiese reël in die strafreg is dat slegs die misdadiger gestraf word. Moet 'n mens dan nou aanvaar dat die delikteregreëls met hierdie basiese regsbeginsel bots sodat onskuldige derdes vir onregmatige en skuldige optredes van ander "gestraf" word? Die enigste verklaring vir die afwysing van afhanklikes se eise in sulke omstandighede is dat daar nie aan die onregmatigheidsvereiste voldoen word nie. Die afhanklikes kan nie 'n verlies aan toekomstige onderhoud vorder indien hierdie onderhoud uit onwettige bedrywighede spruit nie. Die argument teen die absolute afwysing van afhanklikes se eise op toekomstige onderhoud indien die broodwinner hulle in die verlede uit onwettige bedrywighede onderhou het, kan weer aan die hand van die voorbeeld van A hierbo verduidelik word: Indien A getroud was en afhanklikes gehad het, sal die afwysing van hul eis vir toekomstige onderhoud gebaseer op sy verdienvermoë (*earning capacity*) net so onhoudbaar en onverdedigbaar wees. In die volgende sake is van die afhanklikes se eise tereg afgewys omdat die pleitstukke en getuienis gedui het op die verwerwing van onderhoud deur die *voortsetting* van die broodwinner se onwettige bedrywigheid: In *Booysen v Shield Insurance Co Ltd* 1980 3 SA 1211 (SOK) waar die hof die "earning capacity" en "probable future earnings" van die oorlede broodwinner moes bepaal (1213C), word die afhanklikes se eis gedeeltelik afgewys omdat dit gebaseer is op die *voortsetting* van die onwettige bedrywigheid:

> "[T]he root of the question . . . is . . . whether, on grounds of public policy [wat slaan op die onregmatigheidselement] that right includes the right to compensation for loss . . . arising from ' 'n aktiwiteit wat teen die goeie sedes is of aan *permanens turpitudo* ly' (per Rumpff CJ in *Dhlamini's* case . . .)" (1216E) en

> "the question is one of public policy, whether it is the injured party himself or the dependants of such a person, who seeks to recover compensation based on the earnings from illegal activities" (1217C).

In *Mba v Southern Insurance Association Ltd* 1981 1 SA 122 (Tk) faal die afhanklikes se eis ook omdat hulle nie skadevergoeding vir verlies aan toekomstige onderhoud kan eis nie, welke onderhoud

> "would in future have been derived from the deceased's illegally earned income" (124H).

Die hof verklaar dan ook uitdruklik dat die saak anders beslis sou gewees het indien die pleitstukke beweer het dat die oorledene potensieel daartoe in staat was om die afhanklikes te onderhou en in die toekoms wettig sou onderhou het, dit wil sê indien sy onwettige bedrywighede stopgesit sou word. Volgens die hof beweer die pleitstukke dat

> "the plaintiff's and the children's maintenance and support ... would in future have been furnished, from income of the deceased derived from activities which are illegal."

Die hof vervolg:

> "For the purposes of the exception that averment must be accepted as fact. It may very well be that plaintiff at a trial and if necessary with an appropriate amendment of her particulars of claim may be able to prove a loss of support unaffected by any illegal earnings of the deceased" (125H–126A).

Die onregmatigheidsgebrek word aangesuiwer in *Fortuin v Commercial Union Assurance Co of SA Ltd* 1983 2 SA 444 (K), waar die hof op 'n oorwig van waarskynlikheid bevind dat die oorlede broodwinner 'n lisensie sou bekom het en in die toekoms uit wettige inkomste sy afhanklike sou onderhou het. Daarom is die eiseres suksesvol, ongeag die feit dat die oorledene haar tot en met sy dood uit 'n onwettige inkomste onderhou het.

Waar die gewysdes rakende die eis van afhanklikes aansluit by die *ratio decidendi* van die *Dhlamini*-saak, pas hulle dit korrek toe vir sover die eise afgewys is waar die pleitstukke en getuienis steun op die *voortsetting* van 'n onwettige bedrywigheid as eisoorsaak. My vorige aantekening het ek dan ook geskryf om praktisyns op hul hoede te stel teen soortgelyke gedingvoering, want dit is vanselfsprekend dat die oorledene in al die gevalle wel oor 'n verdienvermoë (*earning capacity*) beskik het en op 'n oorwig van waarskynlikheid wel 'n wettige bedryf sou gevind het indien die lang arm van die gereg sy onwettige bedrywigheid uiteindelik sou stopgesit het. Veral kan saamgestem word met die appèlhof se benadering in *Shield Insurance Co Ltd v Booysen* 1979 3 SA 953 (A) dat die *quantum* van die afhanklikes se eis op die "earning capacity" van die oorledene baseer word (964B–C), dat die onwettige bedrywighede

> "can nevertheless be relied upon as some indication of his earning capacity" (964D),

dat die appèlhof

> "can see no reason why the income derived from his side lines [onwettige bedrywighede] ... cannot be used to measure his future earning capacity" (965C),

en dat 'n vermindering van vyftien persent vir "contingencies," wat onder andere die moontlikheid ingesluit het dat hy aan onwettige bedrywighede mog deelneem nie te min was nie (965H–966A). Die billike en regverdige afhandeling van 'n eiser se eis vir verlies van geskiktheid om inkomste te verdien of van 'n afhanklike se eis vir verlies aan toekomstige onderhoud in die bespreekte omstandighede, sou wees dat pleitbesorgers hulle kliënte se pleitstukke korrek opstel en, afhangende van die feite, dat 'n persentasievermindering op grond van 'n moontlike voortsetting van die onwettige aktiwiteit ten opsigte van so 'n eis toegelaat word. Dit is onrealisties om te aanvaar dat mense in Suid-Afrika

ongestoord sal voortgaan met 'n onwettige bedrywigheid of dat 'n broodwinner of eiser as redelike persoon nie 'n wettige manier om inkomste te verdien sou kon vind as sy onwettige bedrywigheid stopgesit sou word nie.

Groot was my vreugde toe die uitspraak van regter Vos in *Ferguson v Santam Insurance Ltd* 1985 1 207 (K) verskyn.

Onafhanklik en sonder enige verwysing na my vroeëre aantekening spreek die regter sentimente identies aan my eie daarin uit. *In casu* het die broodwinner 'n onwettige duikklopbesigheid bedryf. Die hof bevind dat die *Dhlamini*-beginsel beperk uitgelê moet word (209B), asook dat die betrokke oorledene regtens vergoeding van sy kliënte uit gelewerde dienste kon vorder en dat sy dienste daarom nie as *turpis* of onwettig geklassifiseer kan word nie. In elk geval bevind die hof dat

> "the Roman-Dutch law has advanced far beyond the principle that the sins of the father are visited upon the next generations" (208G).

Vergelyk my standpunt dat Exodus 20 : 5 waarvolgens die misdade van die vaders aan die kinders besoek word, as middellike strafnorm regtens onaanvaarbaar is (1984 *THRHR* 439), asook die hof se belangrike insig dat

> "it does not follow that in the future he is necessarily going to carry on his illegal business or activities" (208H)

en dat

> "if the illegality was discovered and stopped, it is obvious that the *paterfamilias* would have resorted to some other form of livelihood" (209A).

Verder is regter Vos van oordeel dat die afwysing van 'n vrou of ongebore kind se onderhoudseis weens die broodwinner se onwettige verkoop van byvoorbeeld lusernsaad aan ongemagtigde handelaars "unjust and on principle unsound" is (208I). Hoewel geen direkte terminologiese ondersteuning daarvoor in die uitspraak gevind kan word nie, adem die hele uitspraak 'n gees van die korrekte regswetenskaplike siening van die afhanklikes se eis, naamlik as 'n eis gebaseer op 'n onafhanklike en selfstandige reg wat die afhanklike direk toekom en wat direk aangetas word deur die onregpleger wat die broodwinner onregmatig en skuldig dood. Om dus die onwettigheid van die broodwinner se aktiwiteite ongekwalifiseerd op 'n onskuldige derde se eis te projekteer, is om weer lewe in die verwerplike *versari in re illicita*-idee te blaas.

Net so groot was my teleurstelling toe die appèlhof by appèl in dieselfde saak in *'n enkele sin* en sonder enige motivering, by monde van appèlregter Joubert, bevind:

> "Dit is na my mening onteenseglik so dat die berekening van die *quantum* van haar skadevergoeding noodwendig gebaseer moet word op die nie-regmatige inkomste wat die oorledene as broodwinner uit die onwettige beoefening van sy ongelisensieerde besigheid van duikklopwerk verdien het" (*Santam Insurance Ltd v Ferguson* 1985 4 843 (A) 851E–F).

En aangesien hierdie inkomste nie-regmatige inkomste was, word die eis afgewys.

Dié uitspraak was in die lig van die voorafgaande standpunt (welke standpunt ondersteun word deur die korrekte interpretasie op die feite van die *Dhlamini*-saak deur die *Booysen*-saak *a quo*, die *Mba*-saak en die *Fortuin*-saak *a quo*, *en veral deur die appèlhof self* in *Shield Insurance Co Ltd v Booysen-supra*) so onstellend dat ek die volledige pleitstukke en verslag van die verhoorverrigtinge aangevra het om te sien of daarin regverdiging vir die appèlhof se uitspraak gevind kan word.

Eerstens het die partye slegs 'n enkele regsvraag voor die appèlhof laat dien, naamlik

> "of die respondente as afhanklike se eis om skadevergoeding vir die verlies van haar reg op onderhoud wat deur die dood van die oorledene teweeggebring is, beïnvloed word deur die feit dat die oorledene haar uit sy nie-regmatige inkomste onderhou het" (851D–E).

Die advokaat vir die respondente het voor die appèlhof betoog dat die oorledene sy inkomste in die verlede nie uitsluitlik uit onwettige duikklopwerk verdien het nie. Streng gesproke was dit ontoelaatbaar, omdat daar nòg in die pleitstukke nòg in die verhoor 'n feitebasis daarvoor gelê is, en kon die appèlhof nie daarop ingaan nie; weer eens 'n aanduiding van die noodsaaklikheid van versigtige hantering van hierdie situasie deur regsverteenwoordigers.

Tweedens word die verweerder spesifiek in die nadere besonderhede omtrent die verweer van onwettige inkomste gevra:

> "Is it alleged that the deceased would have continued in future to carry on business as alleged but for the accident?"

Die verweerder se antwoord op hierdie versoek om nadere besonderhede is dat hy geen kennis daarvan dra nie maar dat dit die eiseres is wat in dié verband bewys moet aanvoer. Vermoedelik gaan dit om bewys dat oorledene in die toekoms dalk wettige inkomste sou verdien het, want in die alternatief beweer die verweerder dat indien die oorledene na sy dood so voortgegaan het om die betrokke besigheid te bedryf, hy dit steeds sonder lisensie sou gedoen het. By die verhoor is die eiseres se eis deur 'n ander advokaat behartig as die een wat die pleitstukke opgestel het, en in die verslag is daar nie 'n jota of titel te vind van 'n feitebasis dat die oorledene moontlik 'n wettige inkomste sou verdien het as sy onwettige bedrywighede stopgesit sou gewees het nie. Vir sover die regsverteenwoordigers van die eiseres blykbaar nie aan hierdie aspek aandag gegee het nie, kon die appèlhof nie 'n feitebasis vind op grond waarvan die eiseres tegemoet gekom kon word nie.

Derdens blyk dit uit die getuienis dat die oorledene sedert sy troue met die eiseres vir ongeveer twintig jaar die onwettige bedrywigheid beoefen het, dat die owerheid dit ooglopend toegelaat het en dat daar van een klagte in dié verband etlike jare vantevore niks tereg gekom het nie. Op 'n oorwig van waarskynlikheid skyn die enigste gevolgtrekking op die feite dat hy daarom vir die volgende 21 jaar (die tydperk relevant vir die eisoorsaak) waarskynlik met die onwettige bedrywigheid sou voortgegaan het. Die eis vir toekomstige onderhoud behoort dus in elk geval weens nie-nakoming van die onregmatigheidsvereiste afgewys te gewees het.

In die lig van hierdie drie opmerkings kan daar met die resultaat van die appèlhof se beslissing saamgestem word, maar die ongekwalifiseerde *dictum* van appèlregter Joubert kan slegs beteken dat iemand soos A in my voorbeeld hierbo, of sy afhanklikes, die *quantum* van hul eise slegs op sy vorige nie-regmatige inkomste kan fundeer, en sonder meer gediskwalifiseer word om ooit hul eise anders te bereken. Hiermee kan nie saamgestem word nie. Dit gaan per slot van rekening om *toekomstige* verdienste of onderhoud en die onregmatige optrede van die oorledene kan tog nie in die naam van *quantum*-berekening op regmatige toekomstige vorderingsregte geprojekteer word nie. Dit is totaal uit pas met die feitelike werklikheid en enige regsreël wat kontak met die werklikheid verloor, kan net tot onbillikheid en onregverdigheid aanleiding gee (Van Heerden en Neethling *Onregmatige Mededinging* (1983) 35). Teenoor appèlregter Joubert se

gewraakte *dictum* staan die vroeëre appèlhofuitspraak in *Shield Insurance Co Ltd v Booysen supra* waarna hy nie verwys of van kennis geneem het nie. Die vroeëre uitspraak stel dit duidelik dat onwettige bedrywighede in die verlede wel gebruik kan word om 'n oorledene se "*future* earning capacity" te bereken en dat so 'n persoon

> "woud probably have found other ways of replacing the income from any of those sidelines"

(die onwettige bedrywighede) indien dit in die toekoms stopgesit sou word (*Shield Insurance Co Ltd v Booysen supra* 965C–D). Hierdie uitspraak trek baie duidelik *nie* 'n streep deur 'n eiser of sy afhanklikes se eise weens verlies van *toekomstige* verdienste of onderhoud, bloot omdat sy inkomste in die *verlede* op 'n onwettige manier verkry is nie. Oënskynlik het 'n mens dus nou twee teenstrydige presedente. Die oplossing van die dilemma is waarskynlik òf om die jongste beslissing as 'n beslissing *per incuriam* te beskou òf om dit vanweë die besondere feite daarvan te onderskei.

Die kernvraag bly of die oorledene of beseerde in die toekoms met die onwettige bedrywighede sou voortgegaan het, dit wil sê of dit 'n geval van *premanens turpitudo* sou wees. Indien dít vasstaan, is onderhoud of verlies van verdienste nie verhaalbaar nie. Indien bewys word dat dit nie die geval is nie, moet die eis ten volle suksesvol wees. Indien dit onseker is, behoort 'n persentasievermindering vir gebeurlikhede teen die eis toegestaan te word.

JY CLAASEN
Universiteit van die Oranje Vrystaat

If we must find a fundamental idea in the common law, it is relation, not will. (per R Pound *Interpretations* 96.)

VONNISSE

SPINDRIFTER (PTY) LTD v LESTER DONOVAN (PTY) LTD 1986 1 SA 303 (A)

When can an error *be said to be* iustus?

The question of the effect of a mistake about the consequences of an intended contract (often called a "material" mistake) remains crucial to the law of contract. It seems that the appellate division generally prefers to deal with this question by applying the so-called *iustus error* approach. In particular, this approach has recently been applied to the situation where a contracting party, having been brought under a certain impression, signs without reading a document which has a contrary effect. Such a situation recently arose for decision in *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 839 (A) (discussed by Reinecke and Van der Merwe in 1985 *TSAR* 318). Hard upon the heels of that decision now follows the decision in *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd.*

In this case the appellant, a clothing manufacturer, was controlled by one Levinson. The respondent was an organiser of trade exhibitions. In 1981 the appellant, through Levinson, concluded with the respondent, represented by Mrs Katz, an exhibitor's contract for a fashion trade fair to be organised by the respondent. The contract resulted from negotiations between Levinson and Mrs Katz, during the course of which she informed him that the dates for the fair would be 1981-07-24 to 1981-07-27. In due course Levinson signed a standard application form which contained the terms of the contract. The dates of 24–27 July 1981 appeared prominently in bold print on the face of the form, which contained a clause (par 1) which also referred to the "General Conditions" printed on the reverse side. Clause 13 of these general conditions provided that if the fair were postponed it would "be deemed to be the exhibition to which this agreement relates."

Some time after the form had been signed the applicant was notified that the fair had been postponed to 1981-07-30 to 1981-08-01. Levinson immediately attempted to cancel the agreement because of the change in the dates. The respondent refused to accept the cancellation and eventually instituted an action in the Cape provincial division in which it claimed rentals as well as a penalty in terms of the contract. Appellant's main defence was that the parties had not

reached consensus in that the respondent intended to conclude a contract incorporating the general conditions, whereas the appellant had no such intention. Accordingly the appellant maintained that there was no "enforceable agreement" on which the respondent could rely (312G). Appellant, in other words, relied on a material mistake which excluded consensus.

The court *a quo* gave judgment in favour of the respondent. The appellant then appealed to the appellate division.

The main defence of lack of consensus was also the main ground of appeal. The court upheld the appeal, basing its decision on what it called the principle enunciated in *Du Toit's* case (318I–J) and *Shepherd v Farrell's Estate Agency* 1921 TPD 62 (317J). According to this principle, a signatory to a document in whose mind the other party has implanted a certain belief and who is misled at the time of contracting by the silence of the other, can rely on a *iustus error* to avoid liability.

This is a restatement of an approach which has repeatedly been followed by the appeal court in recent years. Assuming consensus to be the basis of a contract in South African law (*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173; *Diamond v Kernick* 1947 3 SA 69 (A); *Ocean Cargo Line Ltd v FR Waring (Pty) Ltd* 1963 4 SA 64 (A)) one would expect the above principle to substantiate the main ground of appeal to the effect that the *iustus error* excluded consensus and accordingly any contract whatever. The decision in *Spindrifter's* case, however, contains no clear statement to this effect. In fact the court found it necessary only to find that

> "as the result of the appellant's *iustus error* in regard to the effect of the contract, the respondent is not entitled to hold the appellant liable in respect of an exhibition held on dates other than 24–27 July 1981 by invoking those provisions of clause 13 of the General Conditions which govern the postponement of exhibitions" (319B–C).

One cannot help wondering why the court was not prepared to uphold the ground of appeal specifically as it was raised. Could it be that the court did not wish to preclude the possibility that an objective contract could be recognised, at least where the intention of the parties was reduced to writing? (Cf *South African Railways and Harbours v National Bank Ltd* 1924 AD 704; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A).)

Within the ambit of the *iustus error* approach as applied by the courts, the appellate division has now cast some further light on the requirement of fault in relation to a misrepresentation leading to a *iustus error*. In *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 471D the court stated that such a misrepresentation might be "innocent or fraudulent." These words are ambiguous in so far as it is not clear whether "innocent" includes a misrepresentation unaccompanied by fault even in the form of negligence. In *Sprindrifter's* case the court held Mrs Katz's misrepresentation to be operative although it was "perhaps an entirely innocent one" (316I). Fault, whether intent or negligence, would therefore not seem to be a requirement for a misrepresentation which renders an error *iustus*.

The application by the court in *Sprindrifter's* case of the maxim *caveat subscriptor* deserves attention. Firstly, it is not quite clear what the court meant when it implied that if the maxim applies the signatory is regarded as having "constructive notice" (318J–319A) of the relevant clauses. One would hope that the court was not referring to constructive notice or knowledge in the technical sense of that doctrine. Secondly, the scope of the maxim has apparently been

restricted by the fact that the parameter of the misrepresentor's duty to speak has been drawn widely: the reference to the general conditions was printed clearly and could be read "with ease and comfort" (310F). Levinson clearly "knew that he was signing a document which contained terms of his contract" (*George's* case 472G). Nevertheless the court did not hold that Levinson was "taking the risk of being bound" (*George's* case 472H–473A) but in fact held that Mrs Katz was in duty bound to draw Levinson's attention to clause 13 of the general conditions. In effect the court has, as it were, put the maxim of *caveat subscriptor* in its place. It signifies not so much a rule or even a maxim but rather reflects a situation in which a signatory has made a representation of assent to which he may be held bound. In *casu*, however, the signatory was not bound because Mrs Katz had made a representation causing Levinson to err and therefore to put his signature to the document.

In the light of decisions such as *Shepherd, George, Du Toit* and *Spindrifter*, one can possibly distinguish a trend towards accepting a criterion of wrongful conduct underlying the adjudication of situations such as these. An error is apparently *iustus* and therefore excludes liability if it was caused by a wrongful representation by the other party. The convictions of the community as to what constitutes unreasonable conduct *in contrahendo* are reflected in the norm requiring good faith and truthfulness between the parties. In the present context the norm is expressed by the so-called duty to speak. The existence of this duty is determined by a variety of factors. One such factor would be a clear and unequivocal prior representation made with the intention that it should be acted upon as it was. Another is the materiality of the facts to which the representation relates (cf e g the reference in *Spindrifter's* case 316F to the fact that the dates of the exhibition represented the very substratum of the negotiations). The fact that the other party knew or ought to have known of the first party's ignorance or at least had no reason to believe that the other party would have consented (*Spindrifter's* case 316) would also be a factor. In *George's* case, the error was not *iustus* as there was no representation of the kind mentioned above, nor was Miss Gurek aware or did she have any reason to believe that George did not know that he was signing a contract.

The considerations underlying the above-mentioned norm would of course also apply to positive misstatements. *Mutatis mutandis* this basis for the *iustus error* approach could also apply if the courts were to prefer employing the wills theory qualified by estoppel or the reliance theory (cf 1985 *TSAR* 321; Van der Merwe *JC Noster 'n Feesbundel* 13ff; De Vos *Essays in Honour of Ben Beinart* 1 177).

It may therefore well be that the courts regard the requirement of an *unlawful* representation as sufficient for holding an error to be operative, and have therefore discarded the requirement of fault. This may even serve as a general foundation for the development of a doctrine of innocent misrepresentation as a ground for rescinding a contract.

Irrespective of the exact theory or doctrine which is applied, the approach of our courts to the matter in hand reflects a basic morality in the construction of contracts, in accordance with the good faith which is said to underlie contracts in our law (*Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980

1 SA 645 (A); *Meskin v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W)).

SCHALK VAN DER MERWE

LF VAN HUYSSTEEN
University of the Western Cape

BARCLAYS NATIONAL BANK v WALL 1983 1 SA 149 (A)

Gekruiste tjek – risiko vir verlies – ware eienaarskap

Hierdie beslissing is 'n appèl teen 'n beslissing van die Witwatersrandse plaaslike afdeling waarin 'n aksie van die nemer van 'n gekruiste tjek waarop die woorde "nie verhandelbaar nie" aangebring is, toegestaan is. Die aksie spruit uit die feit dat 'n aantal tjeks ten gunste van die nemer (appellant) uitgemaak, ná die versending daarvan deur die trekker, in die pos verlore geraak het en nadat dit deur die hande van die respondent gegaan het aan 'n ongemagtigde uitbetaal is. Die nemer van die verlore tjeks het as *ware eienaar* uit hoofde van artikel 81 (1) van die Wisselwet 34 van 1964, soos gewysig, 'n aksie ingestel teen die respondent as besitter van die tjek nadat dit gesteel is of verlore geraak het.

Ingevolge artikel 81(1) verkry die ware eienaar van 'n gekruiste tjek wat gesteel is of verlore geraak het, 'n verhaalsreg op iemand wat 'n besitter van die tjek was nadat dit gesteel is of verlore geraak het, en wat òf 'n teenprestasie daarvoor gegee het òf dit as 'n begiftigde geneem het. Die aksie van die ware eienaar is daarvan afhanklik dat die uitbetaling van die tjek deur die bankier waarop dit getrek is, plaasgevind het onder omstandighede wat sodanige bankier nie ingevolge die wet teenoor die ware eienaar van die tjek vir enige skade wat hy ly omdat die tjek betaal is, aanspreeklik stel nie ('n verwysing na artikel 78 van die Wisselwet). Die omvang van die eis van die ware eienaar is die bedrag gelyk aan die skade wat hy gely het, of die bedrag van die tjek, welke die minste is.

In appèl word die geskilpunte tussen die partye soos volg geformuleer:

1 Is die nemer (respondent) die ware eienaar van die gesteelde tjeks?

2 Moet die appellant ingevolge artikel 81(3) van die Wisselwet 1964 geag word 'n besitter van die tjek te wees wat 'n teenprestasie daarvoor gelewer het, of dit as begiftigde ontvang het?

Die uitspraak waartoe die hof ten aansien van die eerste geskilpunt kom, maak 'n uitspraak oor laasgenoemde onnodig.

Vir die doeleindes van hierdie bespreking is dit verder onnodig om in te gaan op die detail van die feite wat die pos van die tjek, die adres waarheen die tjek uiteindelik gepos is ensovoorts, omring het. Dit is voldoende om hieroor op te merk dat die interpretasie wat deur die meerderheid van die hof aan die feite

gegee word, waarskynlik korrek is. Oor sommige van die perspektiewe wat die hof openbaar, bestaan daar egter bedenkinge.

In die beslissing stel die hof breedvoerig ondersoek in na die vraag wat die effek van die pos van 'n tjek op die bestaande skuldverpligting van die trekker is (156–159). Die hof steun in hierdie verband op 'n aantal bekende beslissings (*Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (T) 769; *Dadoo and Sons Ltd v Administrator of the Transvaal* 1954 2 SA 442 (T) 445; en *HK Outfitters (Pty) Ltd v Legal and General Assurance Society Ltd* 1975 1 SA 55 (T) 61; waarby die belangrike beslissing *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) gevoeg kan word). Die tersaaklike beginsel word deur regter Rumpff (soos hy toe was) in die *Dadoo*-beslissing soos volg geformuleer (445):

> "The legal position appears to be that if a creditor requests a debtor to settle his debt by sending a cheque through the post he agrees to run the risk of loss in the transit. By making this request he does not appoint the post office his agent but he authorises the manner of payment. It will depend on the facts of each case whether or not the request was actually made by the creditor."

'n Perspektief op hierdie stand van die Suid-Afrikaanse reg word in my bespreking van die *Greenfield*-beslissing (1972 *TSAR* 157) gestel. Dit kom daarop neer dat, by die afwesigheid van 'n beding tussen die partye tot die teendeel, die onderliggende skuldverpligting alleen beïnvloed kan word nadat *lewering* van die tjek aan die skuldeiser plaasgevind het. (Steun vir hierdie standpunt word veral gevind in *Gerber v Van Eyssen* 1947 1 SA 705 (T) 708; *Goldfields Confectionery and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 2 SA 763 (T) 767–768; *Bruyns v Beestekraal Supply Stores (Pty) Ltd* 1959 3 SA 219 (T) 221G en die uitspraak van regter Blackwell in *Dadoo and Sons Ltd v Administrator of the Transvaal* 1954 2 SA 442 (T) 445C–E.) Word betaling per tjek deur die pos gedoen, is die kernvraag dus of lewering daarvan by die pos van die tjek plaasvind, of by die aflewering daarvan aan die geadresseerde.

Die lewering van 'n tjek wat per pos versend is, vind in die reël plaas by die bestelling daarvan deur die poskantoor aan die geadresseerde. (Sien artikel 22 van die Poswet 44 van 1958 oor die vraag wanneer 'n posstuk geag word onderweg te wees, aan die poskantoor afgelewer te wees en aan die geadresseerde bestel te wees.) Maar, "if a creditor requests a debtor to settle his debt by sending a cheque through the post he agrees to run the risk of loss in the transit" (*Dadoo*-beslissing 445). Elders (1977 *TSAR* 134–135) is aangetoon dat die risiko vir verlies hier impliseer dat die eiendomsreg op die stoflike saak as komponent van die waardepapier volgens sakeregtelike norme by die pos van die tjek oorgegaan het. Daar is dus aan die vereistes vir *traditio* voldoen en wel in die besonder dat lewering van die saak plaasgevind het. Hierdie benadering word onder meer genoodsaak ten einde inhoud aan die begrip ware eienaar te gee ooreenkomstig die dogmatiek van die waardepapierreg. In hierdie verband bevind die hof egter (159):

> "[P]laintiff has failed to show that Martin & Co 'delivered' the cheques to her through the channel of the post office or that she had at any time assumed the risk of loss of the cheques."

Later (160C) word hierdie bevinding van die hof in dieselfde woorde herhaal, en word die volgende bygevoeg:

> "Hence she has not shown that she acquired any right of ownership or otherwise to the cheques."

Die feit dat die hof (met verwysing na die effek van die pos van 'n tjek op versoek van die skuldeiser ingevolge die bestaande skuldverpligting) lewering in *aanhalingstekens* as vereiste stel en die aanvaarding bloot van die risiko vir verlies van die tjek as *alternatief* vir lewering daarvan vermeld, is 'n aanduiding daarvan dat die grondbeginsels van die waardepapierreg nie sonder voorbehoud aanvaar word nie. Wat meer is, daar word ruimte gelaat vir die negering daarvan. Dit is moontlik omdat die verskuiwing van die risiko vir verlies van die geposte tjek, as alternatief vir die verwerwing van saaklike aansprake op die tjek, vermeld word. Die verskuiwing deur ooreenkoms van die risiko vir verlies, is op hierdie wyse prinsipieël moontlik. Hierdie konstruksie is *in casu* onvanpas soos sal blyk uit die bespreking wat volg.

Verder is dit van belang om daarop te wys dat daar (ingevolge die standpunt ingeneem in 1977 *TSAR* 122 e v en 1982 *TSAR* 151 e v t o v ware eienaarskap van 'n tjek) 'n wisselwerking bestaan tussen die voorwaardelike uitwissing van 'n bestaande skuldverpligting en die verwisseling van ware eienaarskap. Dit is so omdat *lewering* die bepalende moment is van sowel die ontstaan van die *nexus* tussen die grondliggende skuldverpligting en die tjekverbintenis, as vir die behoud of verlies van ware eienaarskap.

In die beslissing onder bespreking stel die hof breedvoerig ondersoek in na die omstandighede waaronder die tjek verlore geraak het en kom tot die gevolgtrekking dat die tjek nie deur die trekker aan die begunstigde deur die pos gelewer is nie. Die risiko vir die verlies daarvan het verder ook, aldus die hof, in die trekker gesetel gebly (159H). Die hof staan derhalwe die appèl toe.

Die kardinale vraag is egter: *Met die oog waarop het die hof bogenoemde ondersoek onderneem*?

Na aanleiding van die ondersoek bevind die hof (159):

> "It follows with what has been said above that plaintiff has failed to show that Martin & Co 'delivered' the cheques to her through the channel of the post office or that she had at any time assumed the risk of the loss of the cheques if posted to the flat address."

Daar moet nie uit die oog verloor word nie dat die onderhawige beslissing die aksie van die ware eienaar teenoor 'n besitter ingevolge artikel 81(1) van die Wisselwet 1964 as onderwerp het. Hierdie feit word deur die hof pertinent (159–160) gestel:

> "It is a prerequisite of these subsections that the plaintiff must prove that she is the 'true owner' of the cheques."

Die ondersoek wat die hof onderneem het rondom die omstandighede waaronder die tjek verlore geraak het, is inderdaad relevant. Uit die perspektiewe waarna hierbo verwys is, is dit eweneens duidelik dat die beslissing van die hof aan die hand van hierdie omstandighede – dat die risiko vir verlies van die tjek in die trekker gesetel gebly het – noodwendig ook 'n beslissing ten aansien van ware eienaarskap is. Die hof neem egter die standpunt in dat dit onnodig is om oor ware eienaarskap te beslis:

> "There is *thus* no need to decide what is meant by 'true owner', more especially as we did not have the benefit of full argument on this question."

Die standpunt dat dit onnodig is om oor ware eienaarskap te beslis, is verbasend. Dit is die kernvraag wat beslis moes word omdat die aksie wat uit hoofde van artikel 81(1) bestaan eksplisiet, soos wat die hof ook aanvaar, aan die ware eienaar toegeken word. Verder dui hierdie standpunt daarop dat die feit dat

lewering bepalend is vir sowel die vaslegging van die *nexus* tussen die grondliggende skuldvordering en die tjekverbintenis as vir die behoud of verlies van ware eienaarskap, deur nòg die hof, nòg die advokate raakgesien is.

Dit is uiters jammer dat die appèlhof, omdat die noodwendige verbande nie ingesien is nie, 'n gulde geleentheid om pertinente inhoud aan die begrip ware eienaar te gee, onbenut laat verbygaan het.

CR DE BEER
Die Potchefstroomse Universiteit vir CHO

DE VRIES v WHOLESALE CARS 1986 2 SA 22 (O)

Grounds for an actio redhibitoria

The purchaser of a second-hand motor car brought an *actio redhibitoria* against the seller in the magistrate's court in Bloemfontein. It was proved that there were at the time of the sale certain defects which later caused the collapse of the left front wheel (24A–I). The magistrate held that the defects were not sufficiently important to found an *actio redhibitoria* and that at most an *actio quanti minoris* was competent but had not been sought (23I–J). On appeal the court pointed out that the defect made it dangerous to drive the car, that it could not be quickly repaired and that repairs would, considering the price of the car, be relatively costly (26C–E) and held that the *actio redhibitoria* could be brought.

At 25B–D Smuts J, with whom Steyn J concurred, said:

> "Die vraag wat voor hierdie Hof beredeneer is, was of die gebreke wat die landdros bevind het aanwesig was, wesenlik was en kansellasie geregverdig het.
>
> Die vraag wat beantwoord moet word is of die gebreke so ernstig was dat 'n koper nie sou gekoop het nie indien hy daarvan bewus was toe die ooreenkoms aangegaan is."

However, the two ways of putting the question are not the same and the second is open to criticism. There are circumstances in which the *actio quanti minoris* can be brought but not the *actio redhibitoria* because the disease or defect is not sufficiently material (see the authorities referred to in my *The Law of Sale and Lease* (1984) 67–68), so the first sentence quoted above is unexceptionable. However, whenever there are grounds for an *actio redhibitoria*, the aggrieved party has the choice of that action or the *actio quanti minoris* (*ibid*). Hence the *actio redhibitoria* is available even if the purchaser were to say:

> "Had I known the true circumstances I might have bought if the price had been lower; but now, in all the circumstances, I prefer to cancel the contract and to claim restitution. In similar circumstances in future I may well elect to bring an *actio quanti minoris*."

It follows, it is suggested, that, emphasis being added to the additional phrase in this note to draw attention to it, the legal position is that where the disease or defect is of sufficient importance in the eyes of the court, the question being considered from the point of view of a reasonable man in the position of the

purchaser (*Curtaincrafts (Pty) Ltd v Wilson* 1969 4 SA 221(E) 222H–223E; *De Vries's* case *supra* 25F–G), the *actio redhibitoria* lies if the purchaser would not have bought *or would not have bought on the terms agreed upon.* The distinction is not without its importance in other branches of the law as well (see my *The Principles of the Law of Contact* (1980) 157).

In support of its proposition the court cited De Wet and Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (4 ed by JC de Wet and AH van Wyk) 304, *Weinberg v Aristo Egyptian Cigarette Co* 1905 TS 760 and *Reed Bros v Bosch* 1914 TPD 578 582. None of the cases cited in De Wet and Yeats *loc cit*, one of which is the *Reed Bros'* case, is authority for the inclusion of the word "slegs" in the learned proposition that

> "Met die *actio redhibitoria* kan die koper slegs ageer indien hy nie sou gekoop het as hy van die gebrek geweet het nie; of indien die gebrek so ernstig is dat dit die saak nutteloos maak, anders moet hy maar tevrede wees met die *actio quanti minoris.*"

The word "only" does not appear in the proposition in *Weinberg's* case cited by the court in *De Vries's* case (25E) so the statement by Innes CJ quoted by Smuts J, though correct in itself, is not conclusive, particularly as in *Weinberg's* case (765) Innes CJ said:

> "As the declaration stands there is nothing to show that an expenditure of one or two pounds would not have put the machines right; the purchaser relies entirely upon the seller's refusal or neglect to carry out his undertaking to repair. If that declaration is sufficient to support an action for rescission, then the respondent must go the length of maintaining that any breach of a contract of sale gives ground for such an action. And I certainly do not think that is so."

It is clear both from this passage and from the references to the factual position elsewhere in the opinion that the problem raised in this note was not before the court in *Weinberg's* case. Further, Innes CJ, with whom the other members of the court concurred, said in *SA Oil and Fat Industries Ltd v Park Rynie Whaling Co Ltd* 1916 AD 400 413:

> "The *quanti minoris* action which has descended to us from the Civil Law, entitled the purchaser who after delivery became aware of redhibitory defects to claim back a proportionate share of the purchase price."

It is clear from this statement that the appellate division considered that the presence of a redhibitory defect allows the purchaser to choose which of the aedilitian actions he will bring. Hence it is necessary to add to the test "he would not have bought," proposed by De Wet and Yeats and adopted by the court in *De Vries's* case, the phrase "or would not have bought on the terms agreed upon."

AJ KERR
Rhodes University

KARAPARK (PTY) LTD v TOWN BOARD OF SHELLEY BEACH (N) 1985–08–07 (UNREPORTED)

"Plettenberg" – a caravan or mobile home?

This was an appeal from a decision in the Durban and Coast local division where the appellants had sought an order that a unit known by the trade-name "Plettenberg" was a "caravan" as defined in by-law 1 of chapter XV of the

standard by-laws, published on 1953-03-10 under provincial notice No 87 of 1953, and as amended from time to time. The application had been dismissed with costs by the court *a quo*.

The first appellant was the owner of a property on which it conducted the business of a caravan park. It had been selling and wished to continue selling the right of use and occupation of sites in the caravan park for the use of caravans, and contended that the "Plettenberg" was a caravan as defined. The second appellant (CI Industries (Pty) Ltd) was the manufacturer of the "Plettenberg" and it emerged from the evidence that this unit had been developed in the context that the standard by-laws now provide that twenty per cent of the approved stands in a caravan park must be set aside for the permanent siting of caravans.

The caravan park was situated within the respondent's area of jurisdiction, and it took the view that the "Plettenberg" did not fall within the definition of a caravan and that it was therefore entitled to prohibit the siting of such in the caravan park. The respondent was particularly concerned because each of these units was capable of housing eight people, and the effect of allowing such units to take up the permanent allocation in the caravan park would create a situation akin to a housing development over which it had no control and for which it must provide essential services while being entitled to a rate revenue on the basis of the land value only.

These considerations explained the attitude of the various parties but were of no assistance to the court in the decision of the question whether the "Plettenberg" was a caravan. This was simply a matter of construction.

The definition of a caravan in by-law 1 of chapter XV of the standard by-laws reads as follows:

> "Caravan means any vehicle or similar portable or movable or towable structures having no foundation other than wheels or jacks and so designed or constructed as to permit human occupation for dwelling or sleeping purposes and includes without limiting the definition, a trailer."

The evidence with regard to the characteristics of a "Plettenberg" may be briefly summarised: It is a structure, rectangular in shape, and mounted on what is described as a "chassis" which, in turn, stands on a number of wheels. It is fitted with an A-frame and hitch to enable it to be towed. Apart from its wheelbase, it has the appearance of a small home of rectangular shape. Its floor area varies from eighteen to thirty seven square metres, and its width is a constant 3,3 metres. Its weight varies between 2,5 and 4 tons. Its height is said to be 2,9 metres. Once the Plettenberg has been sited, panels which simulate brick skirting may be placed in position so as to hide the chassis and wheels of the unit, and when thus adorned, the Plettenberg has the appearance of a conventional dwelling.

In the court *a quo*, Friedman J concluded that the "Plettenberg" was obviously not a "vehicle" because:

> "A vehicle is an object which, by means of road, possibly also by means of rail, moves and transports persons and things from one point to another. It is something intended to be used for transportation or movement on a frequent basis."

The appropriate portion of the Oxford Dictionary's definition of "vehicle" was also considered, which reads as follows:

> "A means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge or similar contrivance."

The appeal court approved these definitions, and Shearer J expressed the view that mobility was an intrinsic or integral quality of a "vehicle" properly so called. He went on to say:

> "Where mobility is simply an incidental quality, the object does not qualify for the description, nor is it 'similar' to a vehicle. Remove the mobility from a vehicle or a trailer and it loses its character. It follows, I conclude, that 'similar portable or movable or towable structure' means a structure having mobility as an integral or intrinsic feature."

It appeared from affidavits lodged on behalf of the appellants that the "Plettenberg" units were manufactured in the second appellant's factory and transported as an "abnormal load" on low-bed transporters from there to the caravan parks where they were to be located. Although the unit could be moved, its mobility was severely limited by its dimensions and general structure. While it was also theoretically possible to draw the "Plettenberg" behind some large, powerful vehicle, this was not the purpose for which it was essentially designed.

Accordingly, the court came to the conclusion that the "Plettenberg" was not a vehicle, similar to a vehicle, nor a trailer, and thus did not fall within the definition of a "caravan."

Shearer J then went on to point out (albeit *obiter*) that a "Plettenberg" did, however, in his view, fall within the definition of a "mobile home" which was promulgated in 1977. Provincial notice No 144 of 1977, dated 1977–03–24, added a chapter XVI to the standard by-laws. The heading was "By-Laws relating to Mobile Home Estates." The following definition appeared in by-law 1(e):

> "[M]obile home . . . means a factory assembled structure or structures with the necessary service connections made so as to be movable on the side as a unit or units on its or their own wheels and designed to be used as a permanent dwelling."

In the opinion of Shearer J, the "Plettenberg" fell squarely within that definition. The definition was, however, amended by provincial notice No 340 of 1978, dated 1978–07–06. The amendment inserted after the word "structures" the following:

> "constructed in accordance with the requirements of the SABS specifications for mobile homes SABS 1122 of 1976."

That specification laid down a number of requirements with regard to dimensions, wall thickness, details of construction and durability with which the "Plettenberg" did *not* conform.

In the result, the "Plettenberg" was neither a "caravan" nor a "mobile home" as defined, and the appeal was thus dismissed with costs.

This decision will, no doubt, be welcomed by town planners and local authorities. Both groups are, quite understandably, anxious to prevent a proliferation of informal, uncontrolled housing schemes in caravan parks, and to ensure that the maximum rate revenue is derived from orderly development in terms of an approved town-planning scheme.

On the other hand, at a time when cheap, cost-effective housing is an urgent necessity for so many in the population, it is unfortunate that this particular avenue is now closed to them – a "Plettenberg" being neither a "caravan" nor a "mobile home" as defined. The cost of up-grading the "Plettenberg" to the SABS specification for mobile homes would, in all probability, make the units a far less attractive proposition. Perhaps, as an alternative, the relevant authorities could give consideration to the amendment of the standard by-laws in

order to make provision for sub-economic housing schemes incorporating such units. The need for low-cost schemes of this type will become increasingly apparent as social and economic pressures intensify.

AJ OOSTHUIZEN
University of Durban-Westville

The two chief dangers in law-making are reluctance to change and too great readiness to change; the Egyptians show the first and the Greeks and the Americans the second. The Romans avoided both perils. (per TR Glover The Ancient World: A Beginning.)

BOEKE

PERSOONLIKHEIDSREG

deur J NEETHLING

Butterworth Durban, 2de uitg 1985; xlvi en 267 bl

Prys R44.00 + AVB (sagte band)

Die tweede uitgawe van hierdie bekende werk verskyn ses jaar nadat die eerste die lig gesien het. Oor die algemeen is dit hoogstens 'n bywerking van nuwe gesag, met die gevolg dat die werk op een belangrike uitsondering na struktureel nie van die eerste uitgawe verskil nie.

In voorwoord stel die skrywer hom dit primêr ten doel om aan die student

> " 'n eerste kennismaking met die teorie van die persoonlikheidsreg en die toepassing daarvan op die Suid-Afrikaanse reg aangaande persoonlikheidsbeskerming [te bied]; om voorts 'n belangstelling te wek vir 'n nóg diepergaande studie van hierdie interessante afdeling van die privaatreg."

Die praktisyn word egter nie uit die oog verloor nie.

Die werk is inderdaad sowel nuttig as indrukwekkend. Die gebied van persoonlikheidsbeskerming is nog aan die ontplooi in ons reg: die gedagtes van Melius de Villiers, Joubert en andere werk soms na baie jare eers deur tot in die uitsprake van ons howe. Een van die redes hiervoor is die verwarring wat deur die invloed van die Engelse reg hier te lande meegebring is. (Alhoewel die skrywer na dié aspek verwys, sou 'n afdeling daaroor met vrug by die andersins nuttige regsvergelyking ingesluit kon word.) 'n Ander rede is seer sekerlik die gekompliseerde aard van die terrein. (Professor Neethling slaag by uitnemendheid daarin om die materiaal sistematies en verstaanbaar aan te bied, sodat sowel die student as die praktisyn wat maar selde die gebied van die persoonlikheidsreg hoef na te vors, met redelike gemak die stof kan baasraak.)

Voorts ondergaan die inhoud en beskermingsbehoefte van persoonlikheidsbelange voortdurend verandering en uitbreiding of beperking, onder meer as gevolg van die veranderende behoeftes van individue én die gemeenskap, wat toegeskryf kan word aan faktore soos verstedeliking en tegnologiese ontwikkeling. (Ook dié veranderlikheid van beskermingsoorwegings op hierdie gebied word duidelik by die leser tuisgebring.)

'n Ander faktor wat die veranderlikheid van die reg op hierdie gebied bepaal, is die belangrikheid daarvan dat privaat of persoonlike belange soos reputasie of eergevoel opgeweeg word teenoor gemeenskapsbelange soos vryheid van spraak ('n aspek wat ongelukkig deur die skrywer afgeskeep word). Gevolglik word van

die howe verwag om telkens 'n waardeoordeel te vel oor handelinge wat in die lig van veranderde omstandighede anders as in die verlede beoordeel behoort te word. Juis hierdie ewolusie maak die vakgebied so uiters interessant vir die student. Dit is daarom jammer dat die meeste praktisyns maar weinig met sommige aspekte van persoonlikheidsbeskerming in aanraking kom, en gevolglik maar min daarvan weet of daarin belangstel.

Net soos in die eerste uitgawe gee die skrywer eerstens 'n oorsig van die leer van die persoonlikheidsreg (hoofstuk 1). Daardeur gee hy 'n konkrete beslag aan begrippe wat deur Joubert in sy baanbrekersproefskrif enigsins abstrak en noodwendig spekulatief aangebied is. 'n Mens word redelik omvattend ingelig omtrent die ontwikkeling van die persoonlikheidsregsleer (3–10). Vir 'n begrip van die materiaal is dit inderdaad noodsaaklik dat die ontwikkelingsproses nagespeur word. Die skrywer behandel dan ook sulke skrywers soos Gareis, Gierke en Kant, en onderskei die leer van die immaterieelgoedereregte wat deur Kohler geskep is. 'n Mens sou egter graag meer wou agterkom omtrent die leerstukke van die vroeë natuurreggeleerdes soos die humaniste Donellus en De Groot, aangesien aspekte van die beskerming van persoonlikheidsregte vandag skyn terug te slaan op die gedagtes van dié skrywers.

Die teoretiese analise van die persoonlikheidsreg (24–35) is insiggewend. Daar word onder meer ingegaan op die kwessies soos die algemene persoonlikheidsreg, persoonlikheidsregte op vermoëns en die outeurspersoonlikheidsreg. In dié bespreking word aansluiting bewerkstellig tussen die leerstukke van skrywers soos Kant en Kohler en die moderne sienings van skrywers soos Joubert, Van der Walt en Van Heerden. In verband met die bespreking van persoonlikheidsregte op vermoëns kan 'n mens die skrywer se kritiek (31) op Van der Walt se siening van die mens se verdienvermoë as 'n selfstandige persoonlikheidsfaset onderskraag. Die verdienvermoë is immers 'n uitdrukking van die onderliggende persoonlikheid en nie 'n aspek daarvan nie. Daar kan met die skrywer saamgestem word dat die erkenning van persoonlikheidsbelange soos die reg om te verdien, te beweeg, te eet, te slaap, ensovoorts onnodig en onwenslik is, want dit kan slegs vaagheid en verwarring in die hand werk.

In verband met die outeurspersoonlikheidsreg (en meer bepaald die onderskeid tussen persoonlikheidsregte en outeursreg) blyk die skrywer egter oorhaastig te wees met sy kritiek op 'n stelling van Copeling, wat soos volg gestel word:

> "So beweer Copeling (*Copyright Law in South Africa* (1969)) 178–9 ten onregte dat 'n aksie gegrond op 'the author's right to privacy . . . when used to protect confidential ideas or information existing in the fields of literature or art . . . is likely to be regarded as an action concerned with the protection of a right in the nature of copyright'."

Op bladsy 178 van sy werk erken Copeling juis die ware aard van die reg op privaatheid, en spreek hy bloot die *vrees* uit dat 'n aksie wat gegrond is op die skending van 'n outeur se privaatheid deur openbaarmaking van 'n vertroulike idee *gesien sal word* as 'n aksie wat ingespan word om outeursreg te beskerm en derhalwe *deur die bepalings van die Wet op Outeursreg 63 van 1965 uitgesluit sal wees.*

In sy behandeling van die grondslag vir persoonlikheidsbeskerming in die Suid-Afrikaanse reg (hoofstuk 2) gaan die skrywer eers in op die ontstaan en ontwikkeling van 'n soort persoonlikheidsreg by die Romeine (alhoewel 'n mens

in gedagte moet hou dat hul benadering erg kasuïsties was) (51–57) en die menings van ons ou skrywers. 'n Mens sou graag 'n sistematisering van die Romeins-Hollandse skrywers wou sien; die hantering van skrywers soos Matthaeus, Voet, Vinnius, De Groot, Van Leeuwen, Van der Linden en Van der Keessel, in daardie volgorde (58–60), verbloem die ontwikkelingsdraad wat andersins deur hul werke geopenbaar sou word.

Ná die twee inleidende hoofstukke behandel die skrywer die reg op die *corpus* of fisiese integriteit (hoofstuk 3), regte met betrekking tot die *dignitas* (hoofstuk 5) en die reg op die *fama* of goeie naam (hoofstuk 4). Laasgenoemde is die bovermelde uitsondering op die andersins behoue struktuur van die werk se eerste uitgawe. Die afwesigheid van 'n afdeling oor die persoonlikheidsreg op die goeie naam was bepaald 'n leemte in die eerste uitgawe: Die verontagsaming van laster deur die skrywer het meegebring dat die werk uiteraard onvolledig was en dat besprekings van byvoorbeeld die "persoonlikheidsgoedere" van regspersone nie volkome bevredig het nie. Hierdie leemte is nou grootliks gevul deur 'n omvattende bespreking van laster en verwante persoonlikheidskrenkende handelinge. Dit is jammer dat die afsnypunt vir bywerking van hofverslae toevallig die Julie 1985-aflewering van die verslae was (sien die voorwoord), anders sou die beslissing in *Multiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 3 SA 164 (D) waarskynlik nie die skrywer se aandag ontglip het nie. In dié uitspraak word in 'n Durbanse saak afgewyk van die beskouing in sake soos *Church of Scientology in SA (Inc Association not for Gain) v Reader's Digest Association SA (Pty) Ltd* 1980 4 SA 313 (K) 317–318 dat selfs handeldrywende regspersone nie persoonlikheidsregte het nie (en dus nie belaster kan word nie).

In ons hoogs gekommersialiseerde en mededingende samelewing kan dit verwag word dat die *actio iniuriarum* toenemend deur handeldrywende regspersone ingespan sal word ten einde hul sakereputasie te beskerm. Daarom is hierdie aspek van die lasterreg 'n dinamiese ontwikkelingsgebied wat meer aandag verdien as wat die skrywer daaraan verleen. Daar moet in gedagte gehou word dat dit reeds in *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 6 verkondig is dat die *actio iniuriarum* beskikbaar is waar 'n handeldrywende regspersoon belaster is. Ten spyte daarvan het die Kaapse hof in die *Church of Scientology*-saak (*supra*) die *Fichardt*-uitspraak (*supra*) as *obiter* bestempel en terselfdertyd ook die uitspraak in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) vertolk as gesag vir die stelling dat selfs 'n *handelsmaatskappy* nie belaster kan word nie. Myns insiens voer regter Howard in die onlangse *Multiplan*-saak (*supra*) gegronde redes aan waarom die Kaapse benadering onjuis is. 'n Mens sou graag 'n bespreking van hierdie botsende benaderings wou sien, in plaas daarvan dat sowel die *Church of Scientology*-saak (*supra*) as die *Multiplan*-saak (*supra*) sonder kritiek deur die skrywer aangehaal word. (Alhoewel die skrywer op 79 vn 38 en 80 vn 42 na die *Multiplan*-uitspraak verwys, soek 'n mens tevergeefs daarna in die sakeregister.)

'n Ander aspek van laster wat 'n meer uitgebreide bespreking verdien as wat die skrywer daaraan wy, is die verweer van *rixa* of toorn. Tot onlangs is die beskouing wyd gehuldig dat *rixa animus iniuriandi* of opset uitsluit (sien by 155–6 vn 88; Burchell *The Law of Defamation in South Africa* (1985) 266). In *Bester v Calitz* 1982 3 SA 864 (O) is die mening uitgespreek dat *rixa* eerder onregmatigheid uitsluit (sien ook die gesag wat op 876–877 van die hofverslag

aangehaal word). Van der Mewe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 435–436 vn 96 is skerp krities teenoor die beslissing in *Bester v Calitz* (*supra*), en is onbereidwillig om *rixa* as òf regverdigingsgrond òf skulduitsluitingsgrond te aanvaar. Burchell *op cit* 273 en Van der Walt *Delict: Principles and Cases* (1979) par 33, daarenteen, spreek die mening uit dat *rixa* in 'n gepaste geval regverdigingsgrond òf skulduitsluitingsgrond kan uitmaak. Sonder om die aangeleentheid te bespreek, maak die skrywer egter die stelling dat *rixa* 'n regverdigingsgrond is (155) en dat die houding dat dit skuld uitsluit, "onaanvaarbaar" is (156).

Insgelyks is die kwessie van skuldlose aanspreeklikheid van die pers weens laster hoogs kontensieus: dit negeer die skuldvereiste ten koste van die publiek se reg om ingelig te word en die gewone man (insluitende die pers) se reg op vryheid van spraak (vgl bv *Zillie v Johnson* 1984 2 SA 186 (W) 196; *S v Gibson* 1979 4 SA 115 (D); Burchell *op cit* 189). Daar is myns insiens veel meriete in Burchell *op cit* 190 se stelling dat

> "while the rights and privileges of the press should be no greater than that of the individual, the position of the press and other mass media should certainly not be substantially inferior to that of the individual."

Die hele geskil, met al sy morele en praktiese implikasies, word egter deur die skrywer geïgnoreer, en die onderwerp word in 'n enkele paragraaf afgemaak.

In die hoofstuk oor skending van die *dignitas* verskaf die skrywer 'n goedgemotiveerde betoog vir die erkenning van 'n aanspreeklikheidsgrond wat gebaseer is op die skending van die reg op die gevoelslewe. Dit sal interessant wees om te sien in hoe 'n mate die howe beslag gaan gee aan oorwegings soos piëteitsgevoel, kuisheidsgevoel en geloofsgevoel – fasette van die persoonlikheid wat onderskei moet word van die eergevoel (41 197 ev).

Ook wys die skrywer tereg op die onderskeid tussen privaatheid en identiteit (47 216–260). Privaatheidskending vind plaas wanneer my geheimhoudingswil oortree word: wanneer ware besonderhede omtrent my teen my sin openbaar gemaak word, word my reg op privaatheid geskend. Identiteitskending, daarenteen, vind plaas wanneer *indicia* van my identiteit op 'n wyse gebruik word wat 'n valse beeld van my skep. Alhoewel dié onderskeid wel deeglik in die Verenigde State van Amerika erken word, het dit nog nooit in Suid-Afrika tot die howe deurgedring nie (vgl bv die bekende *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (K), waar identiteitskending as privaatheidskending aangesien is). Op hierdie gebied is die skrywer, wat Suid-Afrika betref, ook 'n baanbreker. Dit is te hope dat sy sienswyse erkenning van die howe sal kry.

Die werk is aantreklik gebind en god versorg. Setfoute is skaars, en die taalversorging is van hoogstaande gehalte. Die gebruiklike registers is nuttig en oor die algemeen volledig.

Ter opsomming: die tweede uitgawe van Neethling se werk is 'n uitbreiding van en verbetering op die eerste. Die boek is 'n noodsaaklike toevoeging tot, en inderdaad 'n aanwins vir ons literatuur op die gebied van die onregmatige daad.

Die besondere verdienste van hierdie werk is egter die benadering van die gebied vanuit die oogpunt van *beskermde persoonlikheidsbelange*, eerder as onregmatige dade.

J VAN DER BERG
Universiteit van Wes-Kaapland

HENOCHSBERG ON THE COMPANIES ACT

deur PM MESKIN in medewerking met MS BLACKMAN, MD GLASER, IE KONYN en SF MULLINS

Butterworth Durban, 4de uitg 1985; 1134 bl

Prys R70 + AVB (Vol I) R70 + AVB (Vol II)

Henochsberg het geen bekendstelling nodig nie. Sedert die publikasie van die eerste uitgawe in 1953 het hierdie boek 'n waardevolle bydrae tot die Suid-Afrikaanse literatuur oor die maatskappyereg gelewer. Die vierde uitgawe van *Henochsberg* bestendig die boek se reputasie as 'n gesaghebbende naslaanwerk. Hierdie uitgawe word verwelkom aangesien die toenemende literatuur oor die onderwerp 'n nuwe uitgawe genoodsaak het. Die redakteur en die medewerkers word gelukgewens met die bekwame wyse waarop hulle die boek bygewerk het. Dit was 'n ontsaglike onderneming. Die vierde uitgawe is aansienlik uitgebrei en bestaan uit twee bande. Die boeke is netjies en stewig gebind en die tegniese afronding is uitstaande.

Omrede die vorige uitgawes van die boek reeds by verskeie geleenthede bespreek is, volstaan ek met enkele opmerkings. Ofskoon die outeurs wel na die akademiese bydraes van sekere akademici verwys (bv die verwysing na EM de la Rey se ongepubliseerde LLD-proefskrif van die Universiteit van Pretoria, *Skikkings in die Suid-Afrikaanse Maatskappyereg* (1983) op 498), is hierdie verwysings myns insiens té selektief. Ek noem enkele *voorbeelde*: Die bespreking van die *Turquand*-reël (103–107) kon baat gevind het deur 'n verwysing na professor MJ Oosthuizen se ongepubliseerde LLD-proefskrif van die Universiteit van Suid-Afrika, *Die Turquand-reël in die Suid-Afrikaanse Maatskappyereg* (1976). Oosthuizen het myns insiens gelyk dat die toepassing van die *Turquand*-reël in Suid-Afrika nie dieselfde as in die Engelse reg is nie omrede daar te veel klem in laasgenoemde regstelsel op die beginsels van estoppel gelê word. Daar word net met die beginsels van estoppel gewerk in dié gevalle waar die verteenwoordigingshandeling buite die bestek van die *Turquand*-reël val (Oosthuizen 69–117). Die bespreking van artikel 252 van die Maatskappyewet (396–400) kon gerus ook na die uitmuntende artikel van professor Oosthuizen, "Statutêre Minderheidsbeskerming in die Maatskappyereg" 1981 *TSAR* 105 ver-

wys het. Dieselfde geld ten aansien van die bespreking van die sogenaamde afgeleide aksie ten behoewe van 'n maatskappy deur 'n lid ingevolge artikel 266 van die Maatskappyewet (423–426), waar 'n verwysing na professor L van Rooyen se ongepubliseerde LLD-proefskrif van die Randse Afrikaanse Universiteit, *Die Geldigheid van Besluite van 'n Algemene Vergadering in die Maatskappyereg* (1983), ontbreek.

Daar word volstaan met enkele opmerkings wat die inhoud van die vierde uitgawe betref. Die stelling dat artikel 36 van die Maatskappyewet "operates irrespective of whether or not the company or the other party affected by the act knew that the doing of it was *ultra vires* the company" (55) is heeltemal korrek. Die teenoorgestelde standpunt in die vorige uitgawe is klaarblyklik verkeerd (JS McLennan 1976 *SALJ* 486 487). Die skrywers bly egter in gebreke om te verduidelik wat bedoel word met die verwysing na "direkteure" in artikel 36: verwys dit na die optrede van die direksie of die optrede van 'n enkele direkteur? Indien "direkteure" gelyk gestel word aan die "direksie," bied artikel 36 weinig beskerming (MJ Oosthuizen "Aanpassing van die Verteenwoordigingsreg in Maatskappyverband" 1979 *TSAR* 1 3; vgl SJ Naudé "Company Contracts: The Effect of Section 36 of the New Act" 1974 *SALJ* 315 333). "Direkteur" sluit heel moontlik die optrede van die besturende direkteur in asook verteenwoordigers van die maatskappy wat deur die maatskappy gemagtig word om namens die maatskappy op te tree.

Die stelling dat die wysiging van artikel 50(1)(c) van die Maatskappyewet (deur artikel 1 van Wet 29 van 1985 wat vereis dat die naam en *registrasienommer* in leesbare tekens moet verskyn in alle kennisgewings en publikasies) irrelevant is vir die ondertekenaar van 'n verhandelbare dokument se persoonlike aanspreeklikheid ingevolge artikel 50(3), is myns insiens korrek. Alhoewel die wetgewer na alle waarskynlikheid 'n soortgelyke reëling wou skep as wat ingevolge artikel 23 van die Wet op Beslote Korporasies 69 van 1984 geld, was hierdie poging nie suksesvol nie. Na regte behoort die reëling ingevolge artikel 50(3) van die Maatskappyewet en artikel 23(2)(b) van die Wet op Beslote Korporasies geskrap te word. Die oogmerk van die vereiste dat die naam van die maatskappy in leesbare tekens moet verskyn, was bloot om derdes in kennis te stel dat daar met 'n maatskappy met beperkte aanspreeklikheid onderhandel word (sien die toespraak van Edward Cardwell MP tydens die eerste lesing van die Limited Liability Act 18 & 19 Vict c 133 (*Hansard* (3rd series) vol 139 kol 344 (1855–06–29)), – die eerste maatskappyewet wat 'n soortgelyke bepaling bevat het). Maatskappye met beperkte aanspreeklikheid is nie meer 'n nuwigheid soos dit in 1855 die geval was nie. Die wyse waarop hierdie artikel deur die howe geïnterpreteer is, gee aanleiding tot onbillikhede (bv *Durham Fancy Goods Ltd v Michael Jackson* (*Fancy Goods Ltd*) (1968) 2 QB 839).

Die skrywers het besluit om nie die gemeenregtelike aanspreeklikheid vir onware verklarings in 'n maatskappyprospektus te bespreek nie (243) en volstaan met 'n verwysing na Cilliers en Benade *Company Law* (1982) 242–244. Laasgenoemde skrywers se bespreking van die onderwerp is egter vir kritiek vatbaar omrede dié bespreking die belangrike beslissings in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) en *Kern Trust* (*Edms*) *Bpk v Hurter* 1981 3 SA 607 (K) uit die oog verloor. Hierdie oorsig word ook nie in die 1985-noteerder van Cilliers en Benade reggestel nie.

Die nuwe *Henochsberg* sal sy volwaardige plek inneem in die boekery van elke juris wat met hierdie gedeelte van die reg gemoeid is. Ofskoon die prys ietwat hoog voorkom, is die woorde van regter Didcott in die voorwoord gepas:

> "The most he ['n skrywer] can expect to earn from the project will never remunerate him adequately for the years of hard labour he must devote to it, years not easily spared if he happens to be a busy practitioner who might have occupied himself more lucratively" (v).

JT PRETORIUS
Universiteit van Suid-Afrika

SAKEREG VONNISBUNDEL
deur HJ DELPORT en NJJ OLIVIER
Juta Kaapstad Wetton en Johannesburg, 2e uitg 1985; xxxix en 710 bl
Prys R54,00 + AVB (sagteband)

Sedert Delport en Olivier se vonnisbundel vir die eerste keer in 1980 verskyn het, het dit 'n geëerde plek op die rak van menige student en regspraktisyn verwerf. Die gehalte van die bundel is allerweë aangeprys en talle studente het tot die besef gekom dat dit 'n onmisbare hulpmiddel by die studie van 'n kursus oor sakereg is. Die nut van 'n vonnisbundel is juis daarin geleë dat die mees resente regspraak en wetgewing daarin opgeneem is. Daarom is dit verblydend om 'n nuwe uitgawe van die vonnisbundel in 1985 te kan verwelkom.

Die werk volg die patroon van die eerste uitgawe. Uittreksels uit hofsake, wetgewing en die werke van Romeins-Hollandse skrywers word in oorspronklike vorm weergegee en, waar nodig, van 'n pittige kommentaar voorsien. Die kommentaar dien nie slegs om byvoorbeeld 'n bepaalde hofsaak te ontleed nie, maar ook om dié beslissing in perspektief te plaas deur aan te dui hoe dit in die sakeregsistematiek inpas. In die tweede uitgawe word omtrent al die hofsake, wetgewing en uittreksels uit Romeins-Hollandse skrywers wat in die eerste uitgawe vervat is, herhaal. Hierdie uittreksels word aangevul deur verskeie belangwekkende nuwe uitsprake wat na 1980 gelewer is. Die bestaande aantekeninge bly ook in 'n groot mate behoue en word hier en daar aangevul deur verwysings na resente hofsake en tydskrifartikels wat oor die onderwerp handel. Hoewel die materiaal in hierdie uitgawe nog goed gerangskik is en die logiese vloei van die aanbieding nie onnodig verbreek word nie, sal die skrywers by die volgende uitgawe groot sorg aan die dag moet lê om die indruk van lapwerk te vermy. Dan sal hulle ook die mes moet inlê en sommige van die verouderde hofsake met meer resente beslissings moet uitruil.

Twee nuwe onderafdelings verskyn in die tweede uitgawe. In die hoofstuk oor die indeling van sake word 'n afdeling gewy aan die onderskeid tussen hoofsake, bysake en hulpsake (45–54). Dit neem die vorm aan van 'n lang uittreksel uit die belangwekkende beslissing in *Senekal v Roodt* 1983 2 SA 602 (T). In die aantekening op die saak word ook verwys na die beslissing in *Falch v Wessels* 1983 4 SA 172 (T). Vir verdere kommentaar rondom die problematiek of fisiese,

funksionele of selfs ook ekonomiese verbindings tussen 'n roerende en onroerende saak aanleiding gee tot eiendomsverkryging deur *inaedificatio*, sien ook die kort verwysing na *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 2 SA 214 (W) (30–31). In die hoofstuk oor die aard en omvang van eiendomsreg verskyn 'n nuwe onderafdeling oor die bekamping van gevare by die gedeelte oor die toepassing van die burereg (198). Die kernvraag hier is in hoeverre van grondeienaars verwag kan word om gevare in die vorm van onder andere giftige plante en ongediertes op hul grondstuk in toom te hou. Die kapstok waaraan die bespreking gehang word, is die beslissing in *Sambo v Union Government* 1936 TPD 182 wat in hierdie opsig bevestig is deur die beslissing in *Mblele v Natal Parks, Game and Fish Preservation Board* 1980 4 SA 303 (D&K) 308. Hierdie beslissings handhaaf die standpunt dat die versuim van 'n grondeienaar om ontslae te raak van leeus (of pofadders) wat op sy grond aanwesig is, nie as onredelike optrede aan sy kant beskou kan word nie.

Afgesien van die bovermelde, verskyn uittreksels uit verskeie nuwe hofbeslissings in die bundel. In die hoofstuk oor besit, word 'n kort uittreksel uit *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 4 SA 250 (NK) aangehaal met die hoofdoel om die wanopvattings verkondig in dié beslissing aan die kaak te stel (84–85). Uittreksels oor die toonaangewende resente appèlhofbeslissing oor verjaring, naamlik *Pienaar v Rabie* 1983 3 SA 126 (A), verskyn op 221–225. Wat fiktiewe wyses van lewering betref, is uittreksels uit *Mankowitz v Loewenthal* 1982 3 SA 758 (A) (*constitutum possessorium* en *traditio longa manu*) en *Airkel (Edms) Bpk H/A Merkel Motors v Bodenstein* 1980 3 SA 917 (A) ("attornment") op 297–299 en 308–313 onderskeidelik in die bundel opgeneem. In die aantekening by laasgenoemde saak word die interessante vraag geopper oor die presiese aard van die kennisgewing (of opdrag) aan die derde om die saak voortaan namens die verkryger te hou. Nog 'n beslissing waaruit uittreksels in die bundel verskyn, is *Mngadi v Ntuli* 1981 3 SA 478 (D&K) wat oor die bewyslas by die *rei vindicatio* handel. Uittreksels uit twee belangrike beslissings oor retensieregte van houers, naamlik *Peens v Botha-Odendaal* 1980 2 SA 381 (O) en *Jot Motors (Edms) Beperk h/a Vaal Datsun v Standard Kredietkorporasie Bpk* 1984 2 SA 510 (T), is ook in die bundel opgeneem. Laasgenoemde saak het intussen na die appèlhof beweeg en is gerapporteer in 1986 1 SA 223 (A) van die Suid-Afrikaanse hofverslae.

In die kommentare op bepaalde hofsake word na talle resente hofsake verwys, onder andere *Mbuku v Mdinwa* 1982 1 SA 219 (TkSC) oor die vraag of 'n dienaar (of agent) die mandament van spolie kan instel (99); *Moskeeplein (Edms) Bpk v Die Vereniging van Advokate (TPA)* 1983 3 SA 896 (T) oor die bepaling van die redelikheid al dan nie van stedelike oorlasstigtende geraas (174); *Durban City Council v Minister of Agriculture* 1982 2 SA 361 (D&K) oor die onderskeid tussen *agri limitati* en *agri non limitati*, in verband met natuurlike aanwas (210); *Wollach v Barclays National Bank* 1983 2 SA 543 (A) oor die vraag wanneer 'n verbandakte voldoende likied is om 'n voorlopige vonnis daarop te kan verkry (449 458); *Oceana Leasing Services (Pty) Ltd v BG Motors (Pty) Ltd* 1980 3 SA 267 (W) oor die tenietgaan van retensieregte (523); *Soane v Lyle* 1980 3 SA 183 (D) oor die voortbestaan van 'n retensiereg na die insolvensie van die skuldenaar (488 531); en *Ocean Bentonite Co (Pty) Ltd v Crause* 1981 3 SA 1177 (A) oor die tenietgaan van regte op minerale (681). Na my mening is die implikasies van die *Wollach*-beslissing (*supra*) so belangrik vir die verbandpraktyk dat groot uittreksels daarvan in die vonnisbundel geregverdig sou gewees het.

Die enigste verwysing na nuwe statutêre materiaal wat ek kan opspoor, is 'n verwysing na die woordomskrywing van 'n "afbetalingsverkooptransaksie" in artikel 1 van die Wet op Kredietooreenkomste 75 van 1980. Die kommentare word meesterlik aangevul met verwysings na die nuutste regswetenskaplike literatuur, onder andere die polemiek tussen De Waal en Van der Walt oor die ware grondslag van die mandament van spolie (112) en die uitstekende bydrae van Lubbe oor pand en verband in 17 *LAWSA*. Daar word wel na die beslissing in *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 4 SA 174 (OK) verwys, maar sonder om die beslissing te probeer versoen met *Lorentz v Melle* 1978 3 SA 1044 (T). 'n Verwysing na die LLD-proefskrif van RC Lourens "Die Ontstaan en Tenietgaan van Saaklike Regte in die Lig van die Suid-Afrikaanse Stelsel van Aktesregistrasie" (Unisa 1980), wat die netelige onderskeid tussen saaklike en persoonlike regte navors, sou nuttig gewees het in hierdie verband.

Alles in ag genome, word die hoë gehalte van die eerste uitgawe in die tweede uitgawe gehandhaaf. Die skrywers moet van harte geluk gewens word met hul poging om die geheime van die sakereg meer toeganklik te maak en die bundel kan weer eens sterk aanbeveel word by studente en praktisyns.

CG VAN DER MERWE
Universiteit van Stellenbosch

ENVIRONMENTAL CONCERNS IN SOUTH AFRICA (TECHNICAL AND LEGAL PERSPECTIVES)

Ed RF FUGGLE & MA RABIE

Juta Cape Town Wetton, Johannesburg 1983; ix and 587 pp

Price R45 + GST (hard cover)

Readers of Professor André Rabie's earlier monograph, *South African Environmental Legislation* (IFCOL Publications, 1976), must have regretted that that work was confined to a consideration of the legislation directly aimed at environmental conservation and must have been tantalised by Rabie's references to the different and wider approach adopted by Professor RF Fuggle in some of his earlier work. In the work under review, the views of both writers have been brought together and, in conjunction with twenty other experts on environmental matters and various aspects of the conservation of our natural resources, Rabie and Fuggle have pooled their extensive knowledge to produce a comprehensive survey of the major environmental issues which are currently of concern to South Africa. The book is divided into seven parts. The first part, consisting of three introductory chapters, is written by Professor Fuggle, who is a professor of environmental studies at the University of Cape Town. Important aspects of these introductory chapters are Professor Fuggle's classification of environmental problems (including a distinction between those which are re-

versible and those which have or will shortly pass the point of no return) his discussion of the ethical reasons for conservation, his careful analysis of the delicate structure of our South African habitat and his chilling prognosis regarding the effects upon it of unfettered population growth. Parts II and IV of the book have been written by Professor Rabie in collaboration with his academic colleagues Professor MG Erasmus of the law faculty of the University of Stellenbosch, Professor Fuggle, Mr CD Schweizer of the School of Environmental Studies, UCT, Mr JGS Malan, a senior official of the Department of Environmental Affairs, and Mr KH Cooper of the Wildlife Society of Southern Africa. These chapters deal with environmental law and the administration of environmental matters, highlighting the fragmentary nature of the relevant legislation, the problems of co-ordinating the administrative efforts of the numerous government bodies and private organisations involved, and the difficulties attendant upon devising legal procedures and sanctions which will prevent violations of the environment rather than merely punish them or exact damages *ex post facto.*

In part III of the book, Mr RB Strauth of the School of Environmental Studies, UCT, deals with the economics of protecting the environment and advances some interesting theories regarding the evaluation in monetary terms of environmental components. In parts V and VI of the book, Professor Rabie collaborates with a number of academics and experts in their respective fields in discussing the conservation of natural resources and the prevention of pollution. These two parts, consisting of eleven chapters and comprising more than half the book, contain a wealth of information and underscore very heavily the vital necessity for what might be called careful environmental husbandry and hygiene. The book could conceivably have ended very effectively on this note, but, recognising that the key to a practical environmental policy is control of the use of land and that the effective implementation of any policy requires constant evaluation and monitoring, the editors follow through and conclude with a final part comprising three chapters on, respectively, the tenure of land in South Africa; land-use, planning and control; and environmental evaluation. Of this part the last chapter, on environmental evaluation, written by Professor Fuggle, is of particular interest. He brings home clearly the necessity for such evaluation on a multi-disciplinary basis, the possible methods of achieving it and the difficulties attendant upon gleaning the necessary information. This chapter, as well as that on land-use and planning, does, however, conjure up visions of long delays while applications in relation to land-use are vetted in terms of the various disciplines involved and of landowners and others completing long questionnaires reflecting the state of their husbandry. It is hoped that they will all have read the book and understand why the information and evaluation is of such vital importance.

Although the book abounds with enough technical material to constitute a useful manual for those directly concerned with the administration of environmental affairs, the way in which it is written and the background detail it contains, combine to make it fascinating reading for the layman interested in environmental matters.

AJ MIDDLETON
University of South Africa

THE LAW OF NEGOTIABLE INSTRUMENTS IN SOUTH AFRICA VOLUME 1 GENERAL PRINCIPLES

by COWEN and GERING

Juta Cape Town Wetton and Johannesburg, 5th ed 1985; xxiv and 587 pp

Price R75 + GST

The fourth edition of this highly-acclaimed book appeared in 1966. The developments in this field of the law have been remarkable. Case law alone would have rendered desirable a new edition but unprecedented advancement in the field of electronic banking has not only necessitated a new edition but also a greatly expanded new edition. Consequently the fourth edition has grown into a three-volume treatise. At this stage only volume 1 has appeared, which makes the reviewer's task rather more difficult – it is like attempting to review a third of a book. A final assessment can only be fairly given when volumes 2 and 3 are available.

However, a review of the first volume has been called for and must be attempted.

The first volume consists of four chapters, namely:

Chapter 1 – The negotiability concept and the definition of a negotiable instrument
Negotiability and negotiable instruments are thoroughly discussed as well as the different approaches to an understanding of the basic concepts, namely the historical approach, the functional policy approach, the comparative approach and the analytical-systematic approach – all very interesting and enlightening to the advanced student but of doubtful usefulness to the busy practitioner. Of particular interest in chapter 1 is the attempted definition of a negotiable instrument. There is, of course, no statutory definition of a negotiable instrument and it is, in the nature of things, extremely difficult to formulate a definition. However, the suggested definition, bearing in mind the characteristic features of a negotiable instrument, is eminently suitable. The authors devote some time to an analysis and amplification of the definition since, as they rightly point out, a definition may be crucial in certain situations. Firstly the term is used in a number of statutes (amongst others section 10 of the Credit Agreements Act 75 of 1980 and section 51(2) of the Insurance Act 27 of 1943) without definition. Secondly, when it is sought to include new kinds in the category of negotiable instruments it is necessary to determine what the essential requirements specified in the definition are. Thirdly, we have the position where A, the owner of documents recording an undertaking to pay to the bearer thereof, entrusts the documents to B for safekeeping and B, in fraud of the true owner, alienates the documents to C who takes them in good faith and for value. The answer to a dispute between A and C to determine ownership of the documents depends upon whether or not they are negotiable documents. The authors quote from Lord Herschell's judgment in *London Joint Stock Bank v Simmons* 1892 AC 201 as follows:

> "The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner. . .
>
> There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even though he is acting in fraud of the true owner. . ."

Chapter 2 – Theoretical Foundations, Concepts, Classifications and Terminology The authors have spent a great deal of time examining the theoretical foundations relating to the law of negotiable instruments. Although there is a growing interest in the Republic in the theoretical foundations, it is suggested with respect that theory without an exposition of the practical workings is of little value. No doubt, however, the practical workings which, in the opinion of this reviewer, are of crucial importance, will become apparent in the two volumes to follow. Indeed, they make their embryonic appearance in the admirable chapter 4 of the first volume, but more of this later. The authors mention with approval the remarks of Mr Justice Barak who said that writers had ceased to give any thought to the theoretical nature of negotiable instruments; this is regrettable because theory is very often a matter of great practical importance. If this is in fact so, then a final assessment of volume 1 must be suspended until it can be seen as part of the three-volume whole.

Of particular interest is the investigation of the *Wertpapier* concept. The conclusion the authors reach – correctly, it is submitted – is that the *Wertpapier* category sheds little, if any, more light on the true nature of a negotiable instrument than is already shed by its classification as a negotiable instrument; nor, it would seem, does the category have significant problem-solving qualities.

Chapter 3 – Sources of the Law and the Recognition of New Negotiable Instruments The aims of this chapter are:

a to explain the nature and significance of the *lex mercatoria* as a historical source of South African law, and more particularly, to explain the ongoing role of the *lex mercatoria* as a legal source of a constantly developing body of relevant law;

b to call attention, against the background of comparative legislation, to different ways in which the governing law may be codified;

c to state the main differences between the world's two great patterns or systems;

d to explain the nature and structure of the South African Bills of Exchange Act;

e to consider the criteria for the recognition of the new kinds of negotiable instruments.

The authors achieve these aims with great clarity and insight. The entire chapter is both interesting and instructive.

Chapter 4 Having taught the subject of negotiable instruments to university students for many years I have found the use of illustrations, either on a blackboard or on a screen, an indispensable concomitant to a readily understandable explanation of this interesting, but difficult subject (especially for the student coming to it for the first time). Now for the first time in a South African textbook, illustrative documents are provided ranging from a simple promissory note to a rather complicated negotiable certificate of deposit. Altogether there are seventy-five illustrations which fall into three different groups, namely:

1 documents whose status as negotiable instruments is well established;

2 documents which have been held not to be negotiable instruments but which play an important role in commerce and merit inclusion for purposes of comparison and contrast;

3 documents whose status as negotiable instruments has not been judicially settled in the Republic.

Each illustration is accompanied by a lucid explanation. At 196 the authors discuss pre-encoded numerals at the bottom of the face of the cheque, stating that the last two numerals represent the type of document concerned. This is not so – the last two numerals in fact represent the name of the printers of the documents. The discussion on travellers' cheques is illuminating and instructive. Chapter 4 constitutes an excellent and praiseworthy contribution to South African literature on this topic.

There are five appendices to volume 1:

1 The Bills of Exchange Act 34 of 1986;

2 The Uniform Commercial Code: article 3, commercial paper;

3 The Uniform Commercial Code: article 4, bank deposits and collections;

4 The Geneva Uniform Law: bills of exchange and promissory notes;

5 The Geneva Uniform Law: cheques.

Appendices 2 and 3 have their own separate indices – a very useful feature.

A good book may often be ruined and its usefulness impaired by a poor index. It is essential that law teacher, student and practitioner be able to lay his finger on whatever point he seeks without undue delay. The general index to volume 1 is comprehensive and clear. Whoever was responsible for drawing up this index is to be congratulated.

In conclusion, a few general remarks.

The book has been written with the discerning and meticulous care that we have become accustomed to expect from these authors. It is a work for advanced students but as it stands, at present, on its own, it is to be doubted whether it will be of great use to practitioners apart from the unquestionable value of chapter 4. A final assessment, as stated previously, can be made only when all three volumes have been published. Precision in terminology and clarity of style make the book a pleasure to read but, more important still, one must mention and pay tribute to the scholarly and comprehensive research which is a notable feature of the first volume.

CH SMITH
University of South Africa

Law reform without social purpose is mere futility. (per W Ivor Jennings *LVR* Vol LI 181.)

Die aard en rol van die stelreël *lex non cogit ad impossibilia* in die strafreg

FFW van Oosten
BA LLD
Professor in die Strafreg, Universiteit van Pretoria

SUMMARY

The Nature and Role of the Maxim *Lex Non Cogit ad Impossibilia* in Criminal Law

This article examines the nature and role of impossibility as a criminal law defence. The law of impossibility in South Africa and a number of Anglo-American and European countries is systematised and expounded. Against this background a critical analysis of the requirements of the defence, its position in the criminal law system, the problems it pose and the solutions offered to them is undertaken. From this it emerges that impossibility is more often than not either linked with or distinguished from necessity as a ground of justification. However, it is also sometimes accorded the status of a ground which negatives the voluntariness of the act and in rare instances it is even made out to be a ground which negatives *mens rea*. In particular, in South African law the generally accepted view appears to be that impossibility is a defence to the unlawfulness of the act, and that it is distinct from necessity in that the former signifies a failure to comply with a positive obligation imposed by law, whereas the latter denotes a transgression of a prohibitory provision of the law. It is, however, pointed out that this omission/commission/injunction/prohibition distinction between these two defences and the restriction of impossibility as a defence to the unlawfulness element of criminal liability is untenable. First, situations of impossibility do not only occur in respect of crimes defined in terms of an omission and, hence, an injunction, but also in respect of crimes defined in terms of a commission and, hence, a prohibition. Secondly, situations of necessity, likewise, do not only arise in respect of crimes defined in terms of a commission and, hence, a prohibition, but also in respect of crimes defined in terms of an omission and, hence, an injunction. Thirdly, impossibility can occur in two varieties, namely absolute impossibility and relative impossibility. Accordingly, it is submitted that (i) since absolute impossibility relates to cases of *vis absoluta* and automatism and, therefore, involuntariness, it should operate as a ground which excludes the *actus reus* element of criminal liability; (ii) since relative impossibility relates to cases of *vis relativa* and invariably involves a situation of necessity, it should be included in necessity as a ground of justification. The upshot of these proposals is the recognition of the principle that involuntariness and necessity can be defences to both *commissiones* and *omissiones* and, consequently, to violations of both prohibitions and injunctions, and the abolition of impossibility as a defence *eo nomine*.

1 INLEIDING

Onmoontlikheid as verweer, soos beliggaam in die stelreël *lex non cogit ad impossibilia* en sy variante *nemo tenetur ad impossibilia*, *impossibilium nulla obligatio est* en *impossibilium nemo tenetur*, het tot dusver betreklik selde in

ons gerapporteerde strafregspraak ter sprake gekom. Die onlangse beslissing in *S v Mxhosa*[1] is 'n goeie voorbeeld van die kursoriese aandag wat hierdie verweer in ons regspraktyk ontvang het. Die beskuldigde is daarvan aangekla dat hy artikel 10(4) van die Swart (Stadsgebiede) Konsolidasiewet 25 van 1945, saamgelees met artikels 10(1) en 10(5) van daardie wet, oortree het deur vir meer as twee en sewentig uur sonder die toestemming van 'n arbeidsbeampte in 'n voorgeskrewe gebied, hier die Kaapse Skiereiland, aanwesig te wees. Die beskuldigde is deur die kommissarishof skuldig bevind en het ter strafversagting aangevoer dat hy in dieselfde gebied verhoorafwagtend was en op borgtog vrygelaat is. Dit blyk dat die beskuldigde op 1981-11-13 op aanklag van besit van 'n ongelisensieerde vuurwapen in die landdroshof te Bishop Lavis verskyn het. Die saak teen hom is uitgestel tot 1981-12-11 en hy is op borgtog vrygelaat op voorwaarde dat hy daagliks, hangende sy verhoor, by die polisiestasie te Langa moes rapporteer. Op 1981-11-26 word hy in hegtenis geneem op die vermelde aanklag en dieselfde dag nog skuldig bevind en gevonnis.

By hersiening beslis die hooggeregshof, by monde van regter Rose Innes, dat die kommissaris se aanbeveling aan die registrateur van die hof dat die boetevonnis gewysig moet word na 'n waarskuwing en ontslag, korrek is vir sover die boetevonnis in die betrokke omstandighede onvanpas was en bygevolg ter syde gestel moet word.[2] Regter Rose Innes gaan egter voort deur te beslis dat ook die skuldigbevinding ter syde gestel moet word in die lig van die moontlikheid van ontbrekende skuld aan die kant van die beskuldigde enersyds en die regmatigheid van sy optrede in die besondere omstandighede andersyds.[3] Met betrekking tot skuld verklaar regter Rose Innes dat indien die beskuldigde geglo het dat hy uit hoofde van die hofbevel toegelaat of geregtig of verplig was om binne die gebied van die Kaapse Skiereiland te bly, hy nie aan die skuldvereiste vir die gemelde oortreding sou voldoen nie.[4]

Met betrekking tot die wederregtelikheidsvereiste verklaar regter Rose Innes dat dit wil voorkom of die beskuldigde hier botsende regspligte moes nakom. Aan die een kant was hy kragtens hofbevel verplig om hom daagliks by die polisiestasie in Langa aan te meld en aan die ander kant was daar 'n verbod op sy aanwesigheid binne die voorgeskrewe gebied. Die beskuldigde kon dus òf aan die hofbevel voldoen, wat sy aanwesigheid in die voorgeskrewe gebied sou noodsaak, òf aan artikel 10 voldoen, wat op sy beurt 'n nie-nakoming van die hofbevel sou noodsaak.[5] Regter Rose Innes laat hom soos volg uit:

> "Conflicting duties may sometimes be imposed by different statutes or regulations or administrative orders upon the same person at the same time, as where a witness is subpoenaed to appear simultaneously in two courts in different places.[6] In a conflict of

1 1986 1 SA 346 (K).
2 349–350.
3 350. Dit is opvallend dat r Rose Innes eers op die skuldvereiste en daarna op die wederregtelikheidsvereiste vir die ten laste gelegde misdaad ingaan, terwyl eg hier, anders as in die omgekeerde geval, hoegenaamd nie sonder vooraf voldoening aan lg ter sprake kom nie.
4 350–351, klaarblyklik vanweë ontbrekende wederregtelikheidsbewussyn. Volgens r Rose Innes: "Whether accused had an innocent state of mind in intending to comply with the order of court to which he was subject, or had a guilty state of mind, is a question of subjective fact which can only be determined by evidence. It cannot be determined on the record in this review, since there was no evidence on the merits of the conviction" (350).
5 351.
6 Sien ook Snyman *Strafreg* (1981) 102.

> duty situation compliance with the one obligation necessarily entails breach of the other. The person in the dilemma may be able to plead that his compliance with the one duty necessitated his breach of the other since it was impossible to comply with both."[7]

Indien die verpligting van die beskuldigde om die hofbevel na te kom, sy verblyf in die voorgeskrewe gebied genoodsaak het, sou sy aanwesigheid aldaar regmatig gewees het.[8] Gevolglik word die saak na die kommissaris terugverwys vir beslissing ingeval die staat sou besluit om met die vervolging voort te gaan.[9]

Alvorens daar op enkele aspekte van die beslissing kommentaar gelewer word, word daar eers op die heersende vereistes vir en aard van onmoontlikheid as verweer in ons strafreg ingegaan. Ofskoon geen regskrywer en geen hofbeslissing na enige gemeneregtelike strafreggesag in dié verband verwys nie, aanvaar hulle die bestaan van onmoontlikheid as verweer in ons strafreg sonder teenspraak.[10]

2 DIE VEREISTES VIR DIE VERWEER

2 1 Regsplig tot Positiewe Optrede

Daar moet 'n regsplig op die beskuldigde rus om positief op te tree. Die gangbare uitgangspunt is dat die handeling van die beskuldigde uit 'n *omissio* moet bestaan, anders as by noodtoestand, waar die handeling van die beskuldigde die vorm van 'n *commissio* aanneem. Tussen onmoontlikheid en noodtoestand is die verskil dat dit by eersgenoemde onmoontlik is om 'n gebodsbepaling na te kom, terwyl dit by laasgenoemde noodsaaklik is om 'n verbodsbepaling te oortree.[11]

Onmoontlikheid as verweer het in ons regspraktyk dan ook meesal ter sprake gekom waar die beskuldigde versuim het om 'n regsplig na te kom, soos waar hy of sy in stryd met 'n regsvoorskrif: (i) nagelaat het om 'n formele kwitansie uit te reik omdat daar geen inkomsteseël beskikbaar of bekombaar was nie;[12] (ii) geen meter in sy huurmotor gehad het nie omdat huurmotormeters tydens die oorlog onbekombaar was;[13] (iii) versuim het om 'n ledelys aan die registrateur van maatskappy te stuur omdat daar geen jaarlikse algemene vergadering

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7 352, met 'n beroep op *R v Hargovan* 1948 1 SA 764 (A); *S v Moeng* 1977 3 SA 986 (O).

8 353. Volgens r Rose Innes: "Here again the question whether the accused was compelled as of necessity to remain in the area in order to comply with the order of court is a question of fact for evidence" (tap).

9 355. Dit is opmerklik dat die saak van sy aanvang tot die onderhawige beslissing oor 'n tydperk van bykans *vier jaar* gestrek het, "en noch was het einde niet!"

10 Sien die regskrywers en hofbeslissings waarna hieronder verwys word.

11 Sien Loubser *LAWSA 6* (red Joubert) (1981) par 56; Snyman 103; Visser en Vorster *General Principles of Criminal Law through the Cases* (1982) 142–146; Burchell, Milton en Burchell *South African Criminal Law and Procedure* 1 (1983) 352–353 en vgl Gardiner en Lansdown *South African Criminal Law and Procedure* 1 (1957) 114; Lansdown *Outlines of South African Criminal Law and Procedure* (1960) 65–66. Vgl egter Goldstein "Onmoontlikheid in die Suid-Afrikaanse Strafregsisteem" 1966 *THRHR* 366 368.

12 *R v Mostert* 1915 CPD 266. R Searle verklaar: "The accused was under no obligation to keep stamps in his house" (269). Sien ook *Shifren v R* 1945 1 PH K 4 (O).

13 *R v De Jager* 1917 CPD 558. De Wet *Strafreg* (1985) 92 vn 133 wys tereg daarop dat dit in hierdie saak eintlik nie oor onmoontlikheid as regverdigingsgrond gegaan het nie, maar oor die geldigheid van 'n regulasie wat die onmoontlike voorgeskryf het (sien ook *LAWSA* par 57). Ongelukkig word die regulasie wat die beskuldigde in hierdie saak na bewering oortree het nie in die hofverslag aangehaal nie, maar op grond van die feite soos uiteengesit, nl dat die beskuldigde daarvan aangekla is dat hy *versuim* het om sy huurmotor van 'n goedgekeurde meter te voorsien (559–560 560–561), kan Burchell, Milton en Burchell 352 vn 267 se kritiek dat by ontstentenis van 'n bevinding dat die betrokke regulasies onredelik was, die beskuldigde hom op *noodtoestand* sou moes beroep het, nie aanvaar word nie. Uit hoofde van hulle eie uitgangspunt sou die beskuldigde hom in so 'n geval op noodtoestand kon beroep indien hy bv 'n *verbod op die gebruik of besit vir besigheidsdoeleindes van 'n huurmotor sonder 'n meter oortree het* (vgl ook *S v Concalves* 1975 2 SA 51 (T) 53 vir 'n soortgelyke interpretasie).

in die betrokke jaar gehou is nie;[14] (iv) nagelaat het om sy vee te dip omdat die voorman dit weens die beskuldigde se versuim om die nodige koepon te toon, geweier het;[15] (v) 'n vergadering van krediteure nie bygewoon het nie omdat hy die land intussen verlaat het;[16] (vi) nie die voorgeskrewe minimum salaris aan sy werknemer betaal het nie omdat hy nie oor voldoende fondse beskik het nie;[17] (vii) nagelaat het om belasting te betaal omdat hy in die tronk was;[18] (viii) versuim het om ingevolge die oorlogsregulasies voedsel aan die sekretaris van landbou te lewer waar hy dit aan die voedselkontroleur, wat eweneens die bevoegdheid gehad het om dit op te vorder, moes lewer;[19] (ix) nie in besit was van 'n bewysboek nie en versuim het om op aanvraag 'n bewysboek te toon omdat die uitreikingsbeampte geweier het om haar van 'n tydelike identiteitsdokument te voorsien.[20]

Daarteenoor was onmoontlikheid as verweer volgens ons regpraktyk streng gesproke nie toepaslik waar die beskuldigde in stryd met 'n wetteregtelike bepaling: (i) as lisensiehouer met water verdunde brandewyn verkoop het omdat hy nie oor die middele beskik het om die verdunning vas te stel of te verhinder nie;[21] (ii) 'n passasier op 'n plesiervlug geneem het in 'n vliegtuig wat nie aan die statutêre voorskrifte voldoen het nie omdat veranderinge aan die betrokke soort vliegtuig nog nie goedgekeur was nie;[22] (iii) vis onder die statutêr toelaatbare grootte gevang het omdat hy as visserman sy lewe uit visvangs gemaak het;[23] (iv) sy motor by 'n parkeermeter parkeer het sonder om geld in die meter te gooi omdat die meter net deur nuwe vyfsentstukke in werking gestel kon word en hy net ou vyfsentstukke by hom gehad het;[24] (v) 'n motor sonder 'n rybewys bestuur het omdat hy 'n ingeperkte kragtens veiligheidswetgewing was en die lisensiekantoor buite sy inperkingsgebied geleë was;[25] (vi) spykertafelspel by 'n perseel onder sy beheer en toesig toegelaat het sonder dat die betrokke spykertafels aan die statutêre voorskrifte voldoen het omdat dit fisies onmoontlik was om daardie voorskrifte na te kom.[26]

Hierteenoor is die beskuldigde in *S v Mafu*[27] op grond van onmoontlikheid as verweer onskuldig bevind waar hy die aandklokreël te Alice oortree het deurdat hy hom na nege uur die aand in die dorp bevind het omdat sy motor buite

14 *R v Close Settlement Corporation* 1922 AD 294.
15 *R v Korsten* 1927 NPD 12. Die beskuldigde se enigste verskoning was dat hy nie geweet het dat hy koepons moes hê nie. Sien ook *R v Dabulamanzi*; *R v Nkombo* 1924 SR 66.
16 *Jetha v R* 1929 NPD 91. Volgens rp Dove-Wilson was die beskuldigde "under no obligation to attend any meeting" (tap).
17 *Attorney-General v Grieve* 1934 CPD 187. Vgl *R v Oliver* 1929 CPD 320 325.
18 *R v Hoko* 1941 SR 211.
19 *R v Hargovan* 769–770: die situasie wat deur ar Greenberg geskets word.
20 *S v Moeng*. Vgl verder die voorbeelde van Lansdown 65–66: 'n nalate om 'n statutêr voorgeskrewe vergadering by te woon omdat 'n ernstige siekte die beskuldigde verplig om in die bed te bly lê; Snyman 103: die versuim om vir militêre diensplig aan te meld (in bv dieselfde omstandighede).
21 *R v Harris* 1919 CPD 216. Vgl *R v Bolt*; *R v Mons* 1917 TPD 89 92 96.
22 *R v Adcock* 1948 2 SA 818 (K). Wn r Ogilvie Thompson verklaar dat die beskuldigde "was in no way obliged to take this man for a flip" (822). *R v Mostert* en *R v De Jager* word onderskei.
23 *R v Canestra* 1951 2 SA 317 (A).
24 *S v Block* 1967 4 SA 313 (K).
25 *S v Leeuw* 1975 1 SA 439 (O).
26 *S v Concalves*.
27 1966 2 SA 240 (OK).

die dorp onklaar geraak het en hy die dorp moes binnegaan om 'n werktuigkundige te soek. Regter O'Hagan laat hom soos volg uit:

> "Now, if a person to whom curfew regulations apply finds himself stranded on the road through a breakdown of his car and cannot reach the place where he is obliged to sleep without passing through an urban area, it is impossible for him to comply with the regulations; and the law does not demand performance of the impossible. If the circumstances showed that the accused had not been in good faith, but that he had flouted the law, the position would be different."[28]

Dié beslissing word dan ook gekritiseer op grond daarvan dat aangesien die beskuldigde 'n *ver*bodsbepaling deur middel van 'n *positiewe* dadigheid oortree het, die korrekte verweer hier *noodtoestand* was en nie onmoontlikheid nie. Dit was immers nie vir die beskuldigde onmoontlik om *nie* die dorp binne te gaan nie. Hy kon byvoorbeeld die nag in sy motor buite die dorp deurgebring het.[29]

Uitdruklike gesag tot die teendeel van die beslissing in *S v Mafu* is dié opmerkings van appèlregter Schreiner in *R v Canestra*:

> "I turn now to the defence based on the maxim *lex non cogit ad impossibilia*. Strictly speaking this maxim and the variant *nemo tenetur ad impossibilia* seem to be applicable only to a failure to carry out a positive obligation imposed by law . . . The maxims can only be applied to prohibitory provisions by translating them into the language of necessity, namely, that it was impossible to refrain from doing the prohibited act because it was necessary to do it."[30]

In dieselfde trant verklaar regter-president De Villiers in *S v Leeuw* die volgende omtrent die betrokke wetsartikel:

> "[It] does not impose a positive obligation on anybody to acquire a driver's licence. It merely prohibits anybody from driving a motor vehicle without one, and there is much to be said for the proposition that the defence of impossibility of performance is only available where the provision alleged to have been contravened imposes a positive obligation to do something."[31]

Weens die feit dat gemeneregtelike misdade hoofsaaklik uit verbodsbepalings bestaan, word onmoontlikheid grotendeels by wetteregtelike misdade as verweer geopper.[32]

2 2 Objektiewe Onmoontlikheid

Dit moet vir die beskuldigde objektief onmoontlik wees om die regsplig na te kom. Blote ongerief, onvermoë, opoffering of moeite is nie genoegsaam nie. Die vereiste wat gestel word, is dat dit vir enige persoon in die posisie van die

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28 241.

29 *LAWSA* par 56; Snyman 103 (sien ook vn 9); Visser en Vorster 143 144; Burchell, Milton en Burchell 353 en vgl De Wet 92 vn 133.

30 324 (sien ook *S v Adams* 1979 4 SA 793 (T) 798, waarin r King dieselfde sê, maar daaraan toevoeg dat hy nie daarmee noodtoestand met onmoontlikheid wil verwar en vereenselwig nie, "the two being distinguishable legal concepts"). Vgl ar Schreiner se uitlating: "The regulations envisage trek-net fishing as a lawful occupation but they do not oblige anyone to pursue it" (tap). Burchell, Milton en Burchell 352 doen aan die hand dat ar Schreiner se woorde "seem to be applicable" in die aanhaling nie bloot 'n algemene reël impliseer nie, maar "that the rule is invariable" en derhalwe tot daardie soort geval beperk behoort te word (351 vn 260).

31 440, met 'n beroep op *R v Canestra*. Sien ook die uitlating van r Coetzee in *S v Concalves* 53 dat daar in die betrokke geval "geen dergelike positiewe optrede (is) wat vereis word nie," met verwysing na *R v De Jager*.

32 Burchell, Milton en Burchell 353; Snyman 104. Trouens, in ons gerapporteerde regspraak het die gevalle van onmoontlikheid wat voorgekom het, uitsluitlik op wetteregtelike oortredings betrekking gehad. Dit beteken egter geensins dat onmoontlikheid nie ook by die nie-nakoming van gemeneregtelike verpligtings ter sprake kan kom nie (sien ook Burchell, Milton en Burchell 353 vn 269 en 4 2–4 7 hieronder vir voorbeelde).

beskuldigde onmoontlik moet wees om die gebodsbepaling na te kom en nie slegs vir die beskuldigde self nie.[33] Volgens sommige skrywers[34] beteken dit dat die onmoontlikheid fisies of absoluut en nie relatief nie moet wees, terwyl ander skrywers[35] die gangbare verkeersopvattings as die maatstaf waarvolgens die onmoontlikheid beoordeel word, aanmerk. Daarbenewens is sommige skrywers[36] van mening dat ekonomiese onmoontlikheid geen verweer uitmaak nie.

Gevalle van objektiewe onmoontlikheid wat in ons regspraktyk voorgekom het, is: (i) die nalate om 'n formele kwitansie uit te reik omdat daar geen inkomsteseël beskikbaar of bekombaar was nie;[37] (ii) die versuim om 'n meter aan 'n huurmotor te hê omdat huurmotormeters tydens die oorlog onbekombaar was;[38] (iii) die nalate om 'n ledelys aan die registrateur van maatskappye te stuur omdat daar geen jaarlikse algemene vergadering in die betrokke jaar gehou is nie;[39] (iv) die versuim om 'n vergadering van krediteure by te woon wat gereël is nadat die beskuldigde die land verlaat het en waarvan hy nie bewus was of kon gewees het nie, sodat dit vir hom fisies onmoontlik was om die vergadering by te woon;[40] (v) die nalate om ingevolge die oorlogsregulasies voedsel aan die sekretaris van landbou te lewer waar hy dit aan die voedselkontroleur, wat insgelyks 'n aanspraak daarop gehad het, moes lewer;[41] (vi) die versuim om 'n bewysboek in besit te hê en op aanvraag te toon omdat die uitreikingsbeampte geweier het om die beskuldigde van 'n tydelike identiteitsdokument te voorsien.[42]

Daarenteen is die verweer op grond van ontbrekende onmoontlikheid verwerp in die volgende gevalle: (i) waar die beskuldigde met water verdunde brandewyn

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33 Sien Gardiner en Lansdown 115; Lansdown 66; *LAWSA* par 57; Snyman 104; Visser en Vorster 144–145; Burchell, Milton en Burchell 353; De Wet 93.

34 Gardiner en Lansdown 115; Lansdown 66; Snyman 104; Burchell, Milton en Burchell 353; Goldstein 1966 *THRHR* 367–368. Sien ook wat ons regspraak betref *Jetha v R* 92; *S v Leeuw* 440 en vgl *R v Harris* 221; *R v Hoko* 212; *S v Block* 316.

35 *LAWSA* par 57; Visser en Vorster 145, wat ook van "reasonably impossible" praat (142); De Wet 93, wat verklaar: "'n Handeling kan miskien fisies onmoontlik of moontlik wees, maar beoordeel volgens verkeersmaatstawwe tog moontlik of onmoontlik," met verwysing na *Jetha v R*, waar dit volgens hom miskien fisies moontlik (*contra* die hof wat dit as fisies onmoontlik bestempel het (92)) was vir die beskuldigde om die vergadering by te woon, maar volgens gewone verkeersopvattings onmoontlik; *R v Hoko,* waar dit volgens hom fisies onmoontlik (*contra* die beslissing van die hof (212)) was om belasting te betaal, maar volgens verkeersmaatstawwe moontlik omdat hy dit dmv 'n verteenwoordiger kon doen; en *R v Mostert* (wat egter klaarblyklik ook 'n geval van fisiese onmoontlikheid was). (Sien ook Goldstein 1966 *THRHR* 366 368 vn 12 vir soortgelyke besware teen De Wet se siening van hierdie sake.) Genoemde skrywers verklaar uitdruklik dat die onmoontlikheid nie fisies of absoluut hoef te wees nie. Vgl vn 83.

36 Gardiner en Lansdown 115; Lansdown 66, wat in dié verband verklaar: "A person who is unable to carry on an undertaking in accordance with the legal requirements governing it must, as a rule, abandon it, unless it appears that the social prejudice attendant upon the abandonment will be so harmful that the abandonment could not have been intended," waarmee hy skynbaar bedoel dat ekonomiese onmoontlikheid alleen in gevalle van nood as verweer sal kan geld; *LAWSA* par 57; Visser en Vorster 144–145. Die sake waarop hier 'n beroep gedoen word, is *Attorney-General v Grieve* (vgl *R v Oliver*), *R v Hoko* en *R v Canestra* (waarin beslis is dat ekonomiese noodtoestand geen verweer daarstel nie (324)). Vgl verder *R v Dabulamanzi*; *R v Nkombo* 68.

37 *R v Mostert* 269. Vgl ook *Shifren v R.*

38 *R v De Jager* 560–561.

39 *R v Close Settlement Corporation* 300.

40 *Jetha v R* 91–92.

41 *R v Hargovan* 769–770: die situasie wat deur ar Greenberg geskets word.

42 *S v Moeng* 991, met 'n beroep op *Jetha v R, R v Hargovan, R v Adcock, R v Canestra* en *S v Mafu.*

verkoop het omdat hy nie oor 'n hidrometer beskik het om die vloeistof te toets nie (die hof bevind dat daar geen getuienis was dat dit vir die beskuldigde onmoontlik was om sodanige verkoop te verhinder nie omdat dit nie vasstaan dat die hidrometer die enigste middel is waarmee die vloeistof getoets kan word nie; die feit dat dit tydens die oorlog baie moeilik was om hidrometers te bekom, het hieraan geen verskil gemaak nie, want die hof het die saak beslis op die veronderstelling dat hidrometers inderdaad weens die oorlog feitlik onbekombaar ("practically unprocurable") was);[43] (ii) waar die beskuldigde nagelaat het om sy vee te dip omdat die voorman dit weens sy versuim om die nodige koepon te bekom, geweier het (volgens die hof was die beskuldigde se eie onkunde die oorsaak van sy nie-nakoming van die betrokke verpligting);[44] (iii) waar die beskuldigde nie die voorgeskrewe minimum loon aan sy werknemer betaal het nie omdat hy nie oor voldoende fondse beskik het nie (die hof beslis dat die beskuldigde feitlik van die begin af geweet het dat hy nie die volle loon sal kan bekostig nie);[45] (iv) waar die beskuldigde versuim het om belasting te betaal omdat hy in die tronk was (volgens die hof was hier geen fisiese ommoontlikheid nie, aangesien dit geen vereiste is dat die beskuldigde self by die belastingkantoor moes aanmeld nie; hy kon 'n verteenwoordiger verkry het om vir en namens hom die verskuldigde belasting te betaal);[46] (v) waar die beskuldigde 'n passasier op 'n plesiervlug geneem het in 'n vliegtuig wat nie aan die statutêre voorskrifte voldoen het nie (die hof beslis dat dit nie vir die beskuldigde onmoontlik was om aansoek te gedoen het vir goedkeuring van die nodige veranderinge aan sy vliegtuig nie);[47] (vi) waar die beskuldigde sy motor by 'n parkeermeter parkeer het sonder om geld daarin te gooi omdat die meter net deur nuwe vyfsentstukke in werking gestel kon word en hy net ou vyfstentstukke by hom gehad het (die hof bevind dat dit heeltemal moontlik ("perfectly possible") vir die beskuldigde was om die regulasievereistes na te kom, klaarblyklik omdat hy geweet het dat die meter net nuwe vyfsentstukke neem en kon gesorg het dat hy nuwe vyfsentstukke in die hande kry);[48] (vi) waar die beskuldigde 'n motor sonder 'n rybewys bestuur het omdat hy 'n ingeperkte kragtens veiligheidswetgewing was en die lisensiekantoor buite sy inperkingsgebied geleë was (volgens die hof was dit nie vir die beskuldigde fisies onmoontlik om 'n bestuurderslisensie te bekom nie, maar bloot ongerieflik of moeilik; hy kon aansoek gedoen het vir 'n bestuurderslisensie, in welke geval reëlings getref kon word dat hy dit bekom).[49]

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43 *R v Harris* 221 222 223, afgesien daarvan dat die beskuldigde nooit vantevore 'n hidrometer besit het nie. Vgl egter *R v Bolt*; *R v Mons* 92 96, waarin daar op die feite in dieselfde soort geval die teenoorgestelde beslissing bereik is.

44 *R v Korsten* 13. Vgl *R v Dabulamanzi*; *R v Nkombo* 67–68.

45 *Attorney-General v Grieve* 189 191.

46 *R v Hoko* 212. Hr Russell verklaar: "It is no defence for a native to show that he has not got the money to pay" (tap).

47 *R v Adcock* 823.

48 *S v Block* 315–316. R Corbett ag dit onnodig om op hipotetiese soortgelyke gevalle, soos waar 'n vreemdeling wat vir die eerste keer in Kaapstad kom sy motor wil parkeer, maar slegs ou vyfsentstukke by hom het, in te gaan (315).

49 *S v Leeuw* 440, met 'n beroep op *Attorney-General v Grieve* en *R v Adcock*. Vgl ook rp De Villiers se stelling: "This is also not a case where on the facts appellant was able to plead the defence of necessity since he apparently drove the car for his own convenience" (tap). Vgl verder Snyman 103 vn 9, waarvolgens daar ook in *S v Mafu* slegs van blote ongerief sprake was en nie van absolute onmoontlikheid, of dan noodtoestand, nie.

2 3 Botsende Regspligte

By botsende regspligte moet die beskuldigde een regsplig nakom alvorens hy hom op onmoontlikheid ten opsigte van die ander kan beroep. Kom hy geeneen van die botsende regspligte na nie, handel hy wederregtelik. Alhoewel die beskuldigde 'n keuse het welke van die botsende regspligte hy wil nakom, mag hy nie 'n minder belangrike regsplig nakom ten koste van 'n belangriker regsplig nie.[50]

2 4 Onmoontlikheid nie Self Geskep

Die onmoontlikheid moet nie aan die beskuldigde self te wyte wees nie. In *R v Close Settlement Corporation* het appèlregter De Villiers hom soos volg oor dié vereiste uitgelaat:

> "A person cannot be allowed to plead his own default either in extenuation or to escape the consequences of his offence. For he is not the less guilty of not complying with the law because through his own default he has made it impossible for himself to do so. This proposition ... accords with the demands of justice ... According to the clear wording of the Act it is imperative that an annual list on a definite date should be made in every year, and the company cannot escape that duty by refusing to do its antecedent duty of calling a general meeting, thus making a literal compliance with the law impossible. Impossibility to comply with the law is under such circumstances no defence in law, and the defaulter would therefore be liable."[51]

De Wet[52] en Snyman[53] se beswaar teen dié vereiste is egter dat dit die ongeoorloofdheid of afkeurenswaardigheid van die skepping van die onmoontlikheid projekteer op die versuim om as gevolg van onmoontlikheid die betrokke regsplig na te kom en dus op 'n toepassing van die verwerplike (en inmiddels verwerpte)[54] *versari in re illicita*-leerstuk neerkom. Volgens hulle moet die skepping van onmoontlikheid van die gevolglike versuim om positief op te tree, onderskei word. Indien die skepping van 'n toestand van onmoontlikheid as sodanig 'n misdaad daarstel, behoort die beskuldigde daarvoor aanspreeklikheid te kan opdoen.[55] Snyman gaan egter verder en verklaar dat ook waar die beskuldigde

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50 De Wet 93; *S v Mxhosa* 352 (aanhaling onder 1 hierbo). Vgl ook *R v Hargovan* 769–770, waarin ar Greenberg die mening uitspreek dat die stelreël *lex non cogit ad impossibilia* by die nie-nakoming van botsende regspligte van toepassing is, maar verklaar dat dit nie nodig is om daaroor te beslis of beide regspligte verontagsaam mag word (wat terloops daarop sou neerkom dat onmoontlikheid as verweer tov albei sou verval) en of die beskuldigde 'n keuse het welke van die twee regspligte hy wil gehoorsaam nie; Snyman 102 se botsende hofsakevoorbeeld.

51 300. Sien ook *R v Korsten* 13, waarin rp Dove-Wilson verklaar: "The accused had to dip and had to arrange accordingly, either by providing a tank for himself or making use of one belonging to somebody else; and it is no excuse for him to say that he was ignorant of a condition precedent to the use of the tank which he elected to dip at. It was his duty to make himself aware of it, and if his neglect to do so has brought about his failure to dip in accordance with the law, he has contravened the law"; *R v Adcock* 822 823 en vgl *R v Harris* 221; *R v Dabulamanzi*; *R v Nkombo* 68; *Attorney-General v Grieve* 189; *R v Hoko* 212; *S v Block* 315; Gardiner en Lansdown 115; Lansdown 66; *LAWSA* par 58; Visser en Vorster 142 146; Burchell, Milton en Burchell 354.

52 93–94 (vgl 107), met verwysing na *R v Close Settlement Corporation*, waarin die beskuldigde volgens hom eintlik gestraf is omdat die vergadering nie gehou is nie.

53 104.

54 Sien *S v Van der Mescht* 1962 1 SA 521 (A); *S v Bernardus* 1965 3 SA 287 (A); *S v Van As* 1976 2 SA 921 (A); *S v Chretien* 1981 1 SA 1097 (A), wat almal na *R v Close Settlement Corporation, R v Korsten* en *R v Adcock* beslis is.

55 De Wet 93–94; Snyman 104.

vooraf voorsien dat hy 'n toestand van onmoontlikheid skep, hy hom na analogie van die *actio libera in causa* by dronkenskap nie daarop sal kan beroep nie.[56]

3 DIE AARD VAN DIE VERWEER

In weerwil van die feit dat die verweer van onmoontlikheid al telkemale in ons gerapporteerde regspraak voorgekom het, is dit slegs in *S v Mxhosa*[57] dat onmoontlikheid pertinent met regmatigheid in verband gebring word en kennelik as regverdigingsgrond beskou is. In geeneen van die ander gerapporteerde sake waarin onmoontlikheid te berde gebring is, is daar op die aard van dié verweer ingegaan nie.

Hierteenoor is ons skrywers[58] dit, op 'n enkele uitsondering na, eens dat onmoontlikheid 'n regverdigingsgrond daarstel. So verklaar De Wet:

> "Dat onmoontlikheid wel 'n regverdigingsgrond is, skyn vanselfsprekend te wees. Geen verstandige regsreëling kan van die mens op straf verg dat hy die onmoontlike sal doen nie – *lex non cogit ad impossibilia.* As noodtoestand 'n regverdigingsgrond kan wees, moet onmoontlikheid soveel te meer as regverdigingsgrond erken word."[59]

Dit bring mee dat onmoontlikheid 'n verweer is ongeag of die betrokke misdaad skuld vereis al dan nie.[60]

Die uitsondering is Goldstein,[61] wat van mening is dat onmoontlikheid nie 'n regverdigingsgrond is nie, maar wel 'n handelingsuitsluitingsgrond. Volgens hom kom die willekeurigheidstoets by die handeling in die praktiese toepassing daarvan daarop neer dat die beskuldigde oor die vermoë moet beskik om sy daad[62] te verhoed. Dit doen hy indien hy dit moontlik vind om sy daad te verhoed. Vind hy dit onmoontlik om die betrokke doen of late te verhoed, tree hy onwillekeurig op. Aangesien die vraag na onmoontlikheid dus reeds beantwoord word in die ondersoek na willekeurigheid, verdien onmoontlikheid nie 'n aparte bestaan naas onwillekeurigheid in ons strafreg nie.[63] Dit bring volgens Goldstein mee dat (a) die onmoontlikheid absoluut moet wees en bygevolg dat

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56 Snyman 104. Vgl egter De Wet 91 vn 127, wat so 'n reël by noodtoestand betwyfel.

57 351 352 353. Vgl De Wet 92–93, waarvolgens dit die gees van die ander beslissings weerspieël. Of *R v Mostert* 269 en *Jetha v R* 91 inderdaad te kenne gee dat onmoontlikheid 'n skulduitsluitingsgrond is, soos Snyman 103 beweer, val te betwyfel. Dit lyk eerder of die hof in die twee sake te kenne wou gee dat 'n afwesigheid van skuld aan die kant van die beskuldigde 'n verweer kan wees waar dit *nie* vir die beskuldigde *on*moontlik is om die betrokke regsplig na te kom nie (sien ook *LAWSA* par 56 en vgl *Attorney General v Grieve* 189).

58 *LAWSA* par 56; Snyman 102–103; Visser en Vorster 142; Burchell, Milton en Burchell 352; De Wet 92–93. Gardiner en Lansdown 115 en Lansdown 66 bestempel onmoontlikheid bloot as 'n "defence" en "excuse."

59 92.

60 Burchell, Milton en Burchell 352. Vgl *Attorney-General v Grieve* 189; *R v Adcock* 820–821; *R v Canestra* 324; *S v Moeng* 189–191.

61 1966 *THRHR* 367, met verwysing na *Jetha v R*, waarin die belangrikste faktor volgens hom afstand was en ten aansien waarvan hy verklaar: "Daar is tog geen beginselverskil tussen willekeurigheid uitgeskakel deur afstand en willekeurigheid uitgeskakel deur 'n sterker persoon wat 'n ander dwing om iets te doen nie. Waarom dan die eerste geval as regverdigingsgrond bestempel en die tweede as willekeurigheidsuitsluitingsfaktor?"

62 volgens hom 'n doen of 'n late (366 vn 3).

63 367 (sien ook vn 9). Vgl egter Burchell, Milton en Burchell 352 vn 262, wat Goldstein se siening verwerp op grond daarvan dat dit "would in any event cover only those cases where the accused was prevented by *vis major* from complying with the law."

dit nie aan die hand van 'n verkeersmaatstaf[64] bepaal kan word nie;[65] en (b) onmoontlikheid nie alleen by 'n late[66] nie, maar ook by 'n doen[67] willekeurigheid kan uitsluit.[68]

Waar 'n beroep op onmoontlikheid nie slaag nie omdat daar nie aan al die vereistes vir die verweer voldoen word nie, kan dit 'n strafversagtende werking hê.[69]

4 ANALISE EN KRITIEK

4 1 Probleemidentifisering

Met die eenparige standpunt van ons regspraak en skrywers dat onmoontlikheid op die een of ander wyse 'n verweer in die strafreg daarstel, kan daar geen fout gevind word nie. Soos De Wet tereg opmerk,[70] as noodtoestand 'n verweer in die strafreg uitmaak, behoort onmoontlikheid dit des te meer te doen. Die probleme rondom onmoontlikheid raak dus nie die regverdiging en bestaan daarvan as verweer nie, maar wel die aard en inhoud daarvan. Knelpunte wat uit die soms uiteenlopende en botsende standpunte van ons regspraak en skrywers oor onmoontlikheid na vore getree het,[71] is of onmoontlikheid alleen by gebodsbepalings of ook by verbodbepalings as regsvoorskrifte kan voorkom; of onmoontlikheid alleen by *omissiones* of ook by *commissiones* as handelingsvorme ter sprake kom; of onmoontlikheid as handelingsuitsluitingsgrond kan dien; of daar naas absolute onmoontlikheid ook so iets soos relatiewe onmoontlikheid bestaan; of noodtoestand alleen by *commissiones* of ook by *omissiones* kan voorkom; of noodtoestand alleen by verbodsbepalings of ook by gebodsbepalings ter sprake kom; of daar naas noodtoestand plek vir onmoontlikheid as 'n regverdigingsgrond bestaan; en of onmoontlikheid *eo nomine* 'n verweer in die strafreg uitmaak en of dit onder ander bestaande verwere tuisgebring kan word. Op hierdie knelpunte word daar vervolgens ingegaan met oog daarop om vas te stel welke van die verskillende en teenoorstaande standpunte dienaangaande die meeste steek hou en of daar 'n middeweg tussen hulle of alternatiewe vir hulle

64 Hy verklaar dat dié toets "vloei blykbaar voort uit die veronderstelling dat ons by onmoontlikheid met 'n regverdigingsgrond te doen het. Aangesien dit nie so is nie en aangesien genoemde standpunt daartoe kan lei dat 'n betrokke dader wat onmoontlik 'n regsvoorskrif kan nakom (wat deur ander wel nagekom kan word) en wat dus nie handel nie, gestraf word, moet dié vereiste verwerp word" (367 vn 11).

65 367–368.

66 Vgl sy stelling dat "*(o)nmoontlik vind om 'n late te verhoed* beteken, natuurlik, onmoontlik vind om die doen wat die keersy van genoemde late uitmaak, te verrig" (367 vn 8).

67 Volgens hom is elke onwillekeurige doen niks anders nie as 'n doen wat onmoontlik vermy kan word (368 vn 17).

68 368, wat volgens hom meebring dat noodtoestand ook by 'n late van toepassing kan wees. Hy verklaar dat "noodtoestand slegs van toepassing kan wees waar onmoontlikheid nie aanwesig is nie, en willekeurigheid dus bestaan. Hier sal die late gevolglik 'n willekeurige late wees. Bv., die inwoners van 'n stad word verplig om op die straat te verskyn, op 'n sekere tyd, om die koning toe te juig. A is so siek dat sy verskyning op die koue straat sy dood sou veroorsaak. Dit is egter nie onmoontlik vir hom om sy verskyning te maak nie – dus kan onmoontlikheid, ten spyte daarvan dat ons met 'n late te doen het, nie opgewerp word nie. Sy versuim om te verskyn kan egter, m.i., geregverdig word deur noodtoestand" (368 vn 18).

69 *R v Close Settlement Corporation* 300 (aanhaling onder 2 4 hierbo); *Attorney-General v Grieve* 190; *R v Hoko* 213.

70 Sien hierbo onder 3.

71 ofskoon hulle nie almal altyd duidelik uitgespel word nie.

bestaan. Omdat sommige van die knelpunte meer intiem as ander met mekaar verweef is, word sommige van hulle gesamentlik en ander afsonderlik behandel. Uiteindelik hou al hierdie knelpunte egter met mekaar verband en is die handhawing van 'n waterdigte skeiding in die behandeling daarvan ondoenlik.

4 2 Onmoontlikheid by Verbodsbepalings

Gaan 'n mens van die min of meer algemeen aanvaarde[72] standpunt uit dat dit by onmoontlikheid om die nie-nakoming van 'n gebodsbepaling (by wyse van 'n late) gaan, terwyl dit by noodtoestand om die oortreding van 'n verbodsbepaling (by wyse van 'n doen) gaan, ontstaan die eerste probleem al, te wete 'n verontagsaming van die onderskeid tussen handelingsmisdade en gevolgsmisdade.[73] By handelingsmisdade is die gangbare opvatting dat waar 'n motoris die spoedgrens oorskry om 'n sterwende passasier betyds by die naaste hospitaal te kry, hy noodtoestand as regverdigingsgrond kan opper.[74] Versuim 'n getuie egter om ooreenkomstig 'n dagvaarding in die hof te verskyn omdat hy na 'n motorongeluk in 'n hospitaal in traksie lê, kan hy hom op onmoontlikheid as verweer beroep.[75] En siedaar, die voormelde waterdigte onderskeid tussen noodtoestand en onmoontlikheid staan soos 'n paal bo water. So eenvoudig is die saak egter nie.

Wat ook al die posisie by formeel omskrewe misdade mag wees, val dit nie te ontken nie dat onmoontlikheid *minstens by materieel omskrewe misdade* wel as verweer by die *oortreding van 'n verbodsbepaling* geopper kan word.[76] Dat 'n dokter hom op onmoontlikheid as verweer op 'n aanklag van moord (of strafbare manslag) sal kan beroep waar hy versuim om betyds by 'n pasiënt, wat so pas 'n hartaanval gehad het en na wie hy dringend ontbied is, op te daag omdat die dokter in 'n motorongeluk betrokke geraak of in 'n verkeersknoop beland het, sal ook diegene[77] wat die onderskeid tussen noodtoestand en onmoontlikheid in die verbodsbepaling/gebodsbepaling-kriterium sien, toegee. Die rede daarvoor is voor die-hand-liggend. Uit hoofde van die dokter se besondere verhouding

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72 met die uitsondering van Goldstein; sien 3 hierbo.

73 asook handelings- en gevolgsmisdade, wat itv beide 'n handeling en 'n gevolg omskryf word (sien daaroor Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse Strafreg – 'n Prinsipiële Ondersoek" 1982 *De Jure* 4 7). Trouens, ons regspraak en skrywers behandel onmoontlikheid uitsluitlik met verwysing na handelingsmisdade (sien 2 1 hierbo).

74 Vgl *S v Pretorius* 1975 2 SA 85 (SWA); Snyman 103; Burchell, Milton en Burchell 353 vn 267.

75 Vgl *S v Mxhosa.*

76 Waar formeel omskrewe misdade volgens gangbare opvattings itv 'n bepaalde *commissio* of *omissio* omskryf word, word materieel omskrewe misdade itv 'n bepaalde gevolg omskryf. Dat 'n gevolg deur 'n *commissio* of 'n *omissio* veroorsaak kan word, is algemene kennis. By moord, bv, kan die verbode gevolg (die dood van 'n medemens) veroorsaak word deur die versuim om jou minnares daarvan te weerhou om haar kind om die lewe te bring (vgl *R v Chenjere* 1960 1 SA 473 (FH)), of die verwurging van die kind terwyl jou minnares hom vashou. Vir die doeleindes van die veroorsaking van die verbode gevolg as daadsvereiste vir moord, maak dit hier geen verskil of die handeling die vorm van 'n doen dan wel van 'n late aanneem nie. Die resultaat bly dieselfde, nl die dood van die kind. Mits daar verder 'n regsplig op die betrokke persoon gerus het om die verbode gevolg deur 'n positiewe dadigheid te verhinder en daar geen regverdigingsgrond vir die betrokke persoon se optrede bestaan het nie, is sy versuim om die kind se lewe te red net soseer wederregtelik as sy verwurging van die kind sonder 'n regverdigingsgrond. Vir voorbeelde van onmoontlikheid by verbodsbepalings igv relatiewe dwang, sien 4 6 en 4 7 hieronder.

77 Sien die gesag waarna daar in vn 11, 30 en 31 verwys word.

tot en ooreenkoms met sy pasiënt het daar 'n regsplig op hom gerus om sy pasiënt se lewe te probeer red. Sy versuim om dit te doen, kom op 'n nie-nakoming van dié gebodsbepaling neer en gevolglik word daar aan dié vereiste vir onmoontlikheid as verweer voldoen. Dit neem egter nie weg dat dié versuim 'n verbode gevolg (vir die doeleindes van moord of strafbare manslag) teweeggebring het en dat onmoontlikheid juis 'n verweer ten opsigte van dié verbode gevolg daarstel nie. Met ander woorde, hier was weliswaar 'n *doodsveroorsakende nie-nakoming van 'n gebodsbepaling*, maar omdat moord (en so ook strafbare manslag) uiteindelik 'n materieel omskrewe misdaad is, sal onmoontlikheid 'n verweer ten aansien van die *dood van die pasiënt as verbode gevolg* uitmaak. In die onderhawige geval funksioneer die betrokke gebodsbepaling mos binne die raamwerk van die betrokke verbodsbepaling en nie as 'n regsvoorskrif wat op eie bene staan nie.[78]

Afgesien daarvan moet daarop gewys word dat aangesien dieselfde versuim sowel 'n handelingsmisdaad kan daarstel as 'n gevolgsmisdaad tot gevolg kan hê, dieselfde onmoontlikheid ten opsigte van beide 'n verweer kan wees. Versuim 'n dokter om in ooreenstemming met 'n statutêre plig sy pasiënte teen 'n aansteeklike siekte in te ent omdat die nodige entstof nòg beskikbaar nòg bekombaar is, sou hy hom nie alleen op onmoontlikheid as verweer kon beroep op aanklag dat hy die statutêre gebodsbepaling nie nagekom het nie, maar ook op aanklag dat hy die pasiënte wat weens dié versuim die lewe gelaat het, se dood (vir die doeleindes van moord of strafbare manslag) as verbode gevolg veroorsaak het.

Kortom, selfs al hou 'n mens vas aan die doen/late-onderskeid[79] tussen noodtoestand en onmoontlikheid, gaan die kategoriese standpunt dat dit by onmoontlikheid noodwendig om die nie-nakoming van 'n gebodsbepaling gaan, minstens by gevolgsmisdade nie ongekwalifiseerd op nie. Daarmee val die eerste pilaar waarop die huidige onmoontlikheidstruktuur rus reeds.

Op die vraag of onmoontlikheid as verweer nie ook ter sprake kan kom by misdade wat in terme van verbode handelinge omskryf is nie, word daar, om redes wat weldra sal blyk,[80] ná die behandeling van die vraag of onmoontlikheid as handelingsuitsluitingsgrond kan dien, ingegaan.

4 3 Onmoontlikheid as Handelingsuitsluitingsgrond

Alvorens daar op onmoontlikheid as handelingsuitsluitingsgrond ingegaan word, is dit allereers nodig om die volgende gevalle van die voormelde voorbeelde[81] van onmoontlikheidsituasies te onderskei, te wete waar 'n pasiënt na 'n motorongeluk bewusteloos in 'n hospitaal lê en dientengevolge versuim om ingevolge 'n dagvaarding wat daarna aan hom bestel is, in die hof te verskyn; of waar 'n ouer wat 'n hartaanval of epileptiese aanval beleef terwyl sy kind wat

78 soos by handelingsmisdade wat itv 'n *omissio* omskryf is. Omgekeerd is dit natuurlik ook so dat die intrede van die verbode gevolg in die onderhawige geval afhanklik is van die nie-nakoming van die betrokke gebodsbepaling.

79 Word dit egter eenmaal aanvaar dat onmoontlikheid hom ook by 'n doen kan voordoen, is die logiese gevolg daarvan dat dié verweer hom dus ook by 'n *verbode handeling* kan voordoen. Sien daaroor 4 4 hieronder.

80 Sien 4 3, 4 4 hieronder en vn 96.

81 Die hospitaal-, hartaanval- en inentingsvoorbeelde wat onder 4 2 hierbo bespreek is.

nie kan swem nie in die swembad val, as gevolg daarvan versuim om die kind daaruit te haal, met noodlottige gevolg vir die kind.[82]

Waar die beskuldigde in die voormelde voorbeelde van onmoontlikheidsituasies *darem minstens bewus* was van die feit dat dit vir hom in die betrokke omstandighede onmoontlik was om sy regsplig na te kom, het die beskuldigde in die onderhawige gevalle *nie eens geweet* dat dit vir hom onmoontlik is om sy regsplig na te kom nie. In die onderhawige gevalle was dit naamlik die *toestand van outomatisme* waarin die beskuldigde verkeer het wat dit vir hom onmoontlik gemaak het om sy regsplig na te kom, terwyl dit in die voormelde voorbeelde die *dwang van omstandighede* was wat dit vir die beskuldigde onmoontlik gemaak het om sy regsplig na te kom. In geeneen van die twee stelle feitesituasies was die beskuldigde se late egter *willekeurig* in die sin dat dit *onderworpe was aan of beheer is deur sy wil*, of anders gestel, dat hy oor die *vermoë beskik het om 'n besluit oor sy gedraginge* te neem of uit te voer nie.[83] In albei die stelle feitesituasies was die regtens verwagte positiewe optrede ter nakoming van sy regsplig vir die beskuldigde weens onwillekeurigheid ewe onmoontlik en lyk die

82 Vgl De Wet 49–50 se voorbeeld van die sinjaalwagter wat versuim om die gevaarteken aan te skakel omdat hy bewusteloos in sy kajuit lê.

83 Sien Snyman 42; Visser en Vorster 35; Burchell, Milton en Burchell 110; De Wet 49–50. Aangesien dit in die voormelde voorbeelde, anders as in die onderhawige voorbeelde waar dit vanweë bewusteloosheid om die onvermoë om 'n besluit *te neem* gaan, eerder, vanweë die feit dat die beskuldigde geweet het dat hy nie in staat was om sy regsplig na te kom nie, om die onvermoë om 'n bepaalde besluit *uit te voer* gaan, word albei dié terme hier gebruik. 'n Kwadrupleeg kan dalk nog subjektief 'n onrealistiese besluit neem om handelinge waartoe hy objektief en fisies nie in staat is nie te verrig, maar sal doodgewoon nie in staat wees om sodanige besluit uit te voer nie. Om hier te beweer dat 'n dusdanig onrealistiese en onuitvoerbare besluit geen besluit uitmaak nie en dat die kwadrupleeg bygevolg nie sodanige besluit kon neem nie, deug nie, want ofskoon besluituitvoering afhanklik is van besluitneming (lg gaan eg logies vooraf), is die omgekeerde nie die geval nie. Die onvermoë om 'n besluit uit te voer, maak 'n doen of late egter net soseer onwillekeurig as die onvermoë om 'n besluit te neem. Daarvan getuig die feit dat sowel outomatisme as *vis absoluta* algemeen as handelingsuitsluitingsgronde in ons strafreg erken en aanvaar word (sien *LAWSA* par 26; Snyman 42–44; Burchell, Milton en Burchell 111; De Wet 49). Die volgende stellings van die voormelde skrywers skyn in ieder geval wyd genoeg te wees om die voorgaande uitleg te akkommodeer: Snyman 42: "Die dader moet in staat wees om 'n besluit *te neem* ten opsigte van sy doen of late, *en* die *verbode* handeling of gevolg *te kan verhoed*, indien hy sy aandag daaraan bestee" (my kursivering); Burchell, Milton en Burchell 110: "An act for legal purposes must be voluntary in the sense that *it* is *subject to*, *or* could be *controlled by*, the accused's will" (my kursivering); De Wet 50: "Willekeurig is 'n doen of late indien die persoon oor die vermoë beskik om sy liggaamsbewegings deur sy verstand *te beheers*" (my kursivering; sien ook Visser en Vorster 35). Vanselfsprekend is De Wet se stelling net te versoen met die voorgaande uitleg indien die vermoë om sy liggaamsbewegings deur sy verstand te beheers op die *gewraakte* doen of late as sodanig betrekking het en nie indien dit slegs op die beskuldigde se vermoë om enige spierbewegings in die algemeen te beheer betrekking het nie. Waar 'n voetganger deur 'n rukwind rondgeslinger word, mag hy in staat wees tot spierbewegings om hom daarteen te verset, maar nie in staat wees om te verhinder dat die wind hom deur 'n winkelvenster waai nie. Netso mag die betrokkenes in die hospitaal-, hartaanval- en inentingsvoorbeelde hierbo in staat wees tot bepaalde spierbewegings, maar nie in staat wees om die positiewe dadigheid wat die nakoming van die betrokke regsplig vereis, te verrig nie. Dieselfde geld ook die vermoë om 'n besluit *te neem* waar die beskuldigde wel by sy bewussyn was, maar weens omstandighede buite sy beheer nie van die *betrokke* regsplig *geweet* het nie (sien *Jetha v R*) en dus nie die *verlangde* besluit kon neem nie, ook al kon hy *ander* besluite neem (vgl Goldstein se aangehaalde opmerking in vn 61).

gevolgtrekking dat die onmoontlikheidsituasies daarin op die handeling as misdaadvereiste betrekking het, geregverdig. Trouens, onmoontlikheid val hier vierkant binne die raamwerk van outomatisme en *vis absoluta* as handelingsuitsluitingsgronde en kan sodoende met vrug daaronder tuisgebring word. Tussen die twee stelle voorbeelde van onmoontlikheidsituasies is die ooreenkoms dus dat daar in albei van onwillekeurige lates sprake is en die verskil dat die onwillekeurige late in die een geval veroorsaak is deur outomatisme en in die ander geval die gevolg is van *vis absoluta*.[84]

Dat *vis absoluta* sodoende as verweer by 'n late as handelingsvorm opduik, behoort hier geen verskil te maak nie, want dwang of oormag kan seer sekerlik in 'n *facere* of *non facere*, oftewel 'n *commissio* of *omissio*, resulteer. Wat betref die dwangaspek is daar geen verskil tussen dié geval waar die beskuldigde 'n verbode oproerige byeenkoms bywoon omdat sy makkers hom fisies daar ingesleep het en dié geval waar hy versuim om op versoek 'n verbode oproerige byeenkoms te verlaat omdat sy makkers hom met geweld daar hou nie. In die een geval word die beskuldigde deur oormag tot 'n positiewe dadigheid gedwing en in die ander geval word hy deur oormag tot 'n negatiewe dadigheid gedwing.[85]

Dat onmoontlikheid ten minste in bepaalde gevalle as handelingsuitsluitingsgrond *kan* dien, lyk dus na 'n uitgemaakte saak. Of onmoontlikheid egter, soos Goldstein aanvoer, ongekwalifiseerd en noodwendig 'n handelingsuitsluitingsgrond *sal* daarstel, moet eers ondersoek word alvorens daaroor uitsluitsel gegee kan word.

4 4 Onmoontlikheid by 'n Positiewe Dadigheid

Word dit eenmaal aanvaar dat onmoontlikheid met onwillekeurigheid kan saamval en sodoende 'n handelingsuitsluitingsgrond kan daarstel, ontstaan die vraag of onmoonlikheid hom ook by 'n *commissio* as handelingsvorm kan voordoen. Tot dusver het al die bespreekte voorbeelde van onmoontlikheidsituasies op *omissiones* as handelingsvorm betrekking gehad. In die hierbo bespreekte voorbeelde van die persoon wat fisies deur sy makkers by 'n oproerige vergadering

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84 net soos noodtoestand deur 'n medemens of natuurkragte geskep kan word.

85 Dat die beskuldigde hier met geweld deur sy makkers fisies daarvan weerhou is om die vergadering te verlaat, doen geen afbreuk aan die geldigheid van dié voorbeeld nie. In die inperkingsbevelvoorbeeld wat onder 4 4 hieronder bespreek word, word die ingeperkte eweseer deur die geweld van die natuur fisies daarvan weerhou om sy regsplig na te kom. Maar 'n mens kan ook sonder geweld fisies daarvan weerhou word om sy regsplig na te kom op so 'n wyse dat hy geen keuse dienaangaande het nie. So kan 'n parapleeg om op fisiese onmoontlikheid beroep waar hy versuim het om ooreenkomstig 'n opdrag van 'n polisieman behulpsaam te wees by die inhegtenisneming van 'n misdadiger, of 'n onderhoudspligtige hom op fisiese onmoontlikheid beroep waar hy versuim om onderhoud te betaal omdat hy vanweë die haglike ekonomiese toestand uit sy werk ontslaan is en vanweë drastiese werkskaarste nie in staat was om ander werk te kry nie en geen ander finansiële middele beskikbaar het om sy regsplig mee na te kom nie. (Vgl *Attorney-General v Grieve*; *S v Siebert* 1972 1 SA 351 (NK) 352; *S v Phikwa* 1978 1 SA 397 (OK) 398; *S v Munro* 1986 2 SA 19 (K) 21; Lansdown 66 se aangehaalde opmerking en die kommentaar daarop in vn 36. Dit is vir die doeleindes van hierdie skrywe egter nie nodig om op die vraag of ekonomiese onmoontlikheid en ekonomiese nood 'n verweer in ons strafreg behoort te kan uitmaak, in te gaan nie (vgl *R v Canestra*)). Ook hier word die parapleeg en die onderhoudspligtige deur die betrokke omstandighede tot 'n negatiewe dadigheid gedwing.

ingedra word[86] en die persoon wat deur 'n rukwind deur 'n winkelvenster geslinger word,[87] kan 'n mens egter redeneer dat dit vir hom weens *vis absoluta* eenvoudig onmoontlik was om die gewraakte bywoning van die vergadering of breek van die venster *te verhoed.* Dié argument verkry verdere sanksie indien 'n mens in gedagte hou dat daar *kwalitatief* geen verskil bestaan tussen onmoontlikheid in hierdie gevalle en in daardie gevalle waar die beskuldigde versuim om die verbode oproerige byeenkoms op versoek te verlaat omdat sy makkers hom met geweld daar hou, of waar die beskuldigde versuim om hom kragtens die bepalings van 'n inperkingsbevel by die naaste polisiestasie aan te meld omdat 'n wolkbreuk en gepaardgaande vloedwater hom verhinder om daar uit te kom nie. In geeneen van die twee stelle gevalle *kon*[88] die beskuldigde die betrokke regsvoorskrif gehoorsaam nie en in albei was hy eweseer regtens daartoe *verplig.*[89] Die verskil tussen die twee soorte onmoontlikheid is veeleer geleë in die *formulering* daarvan: Waar dit in laasgenoemde gevalle onmoontlik was om die betrokke *commissio* te verrig, was dit in eersgenoemde gevalle onmoontlik om die betrokke *commissio* te verhinder.[90]

In stryd met die algemene opvatting daaromtrent en op een lyn met die standpunt van Goldstein lyk dit na 'n voldonge feit dat onmoontlikheid nie alleen by 'n late nie, maar ook by 'n doen, en bygevolg by 'n *verbode handeling*, as verweer geopper kan word.

4 5 Die Onderskeid tussen Absolute en Relatiewe Onmoontlikheid

Ter beantwoording van die vraag of onmoontlikheid naas 'n handelingsuitsluitingsgrond ook 'n regverdigingsgrond kan uitmaak, is 'n onderskeid tussen die volgende feitesituasies en die hierbo bespreekte[91] onmoontlikheidsituasies allereers nodig, naamlik waar 'n polisieman versuim om die identiteit van 'n gevaarlike misdadiger wat aan hom bekend is aan die polisie te openbaar;[92] of waar 'n tronkbewaarder versuim om 'n dokter te ontbied om na 'n ernstig aangerande gevangene om te sien met noodlottige gevolge vir die gevangene,

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86 Vgl ook die voorbeelde van *vis absoluta* wat genoem word deur Snyman 42–43; Burchell, Milton en Burchell 111; De Wet 49 vn 8 en vgl verder *R v Achterdam* 1911 EDL 336; *S v Cupido* 1975 1 SA 537 (K).

87 Vgl die voorbeeld van Burchell, Milton en Burchell 111.

88 Om hier te beweer dat dit in eg gevalle vir die beskuldigde *noodsaaklik* was om die betrokke *commissio* te verrig, deug ook nie, want dit was nie vir die beskuldigde noodsaaklik om die gewraakte *commissio* ter beskerming van 'n bepaalde regsgoed te verrig nie en om bygevolg 'n bepaalde keuse uit te oefen nie. Die fisiese oormag was hier van so 'n aard dat hy doodgewoon, net soos in lg gevalle, nie anders kon optree as wat hy opgetree het nie en derhalwe geen keuse tov sy *commissio* gelaat is nie. Sien daaroor 4 3 hierbo en 4 5 en 4 7 hieronder. Vgl verder Goldstein se aangehaalde standpunt in vn 67.

89 Sonder om daarmee te kenne te gee dat 'n verbodsbepaling en 'n gebodsbepaling dieselfde ding is, kan daarop gewys word dat die een die keersy van die ander is. Die verbod om iets te doen hou noodwendig die gebod om dit na te laat in, net soos die gebod om iets te doen noodwendig die verbod om dit na te laat inhou. Vgl die aanhaling uit *R v Canestra* onder 2 1 hierbo en *S v Adams* (sien vn 30); Goldstein se aangehaalde stelling in vn 66.

90 In die geval van materieel omskrewe misdade wat itv 'n verbode gevolg omskryf is, sal 'n geslaagde beroep op onmoontlikheid beteken dat dit vir die beskuldigde onmoontlik was om die verbode gevolg te verhoed. Sien 4 2 hierbo en vgl Goldstein se aangehaalde opmerking in vn 66.

91 dié onder 4 2, 4 3 en 4 4 hierbo.

92 Vgl *S v Gaba* 1981 3 SA 745 (O), waarin die beskuldigde op soortgelyke feite aan poging tot regsverydeling skuldig bevind is.

omdat die polisieman of die tronkbewaarder, al na gelang die geval, met die dood of ernstige liggaamlike leed gedreig word indien hy dit wel sou doen.

Word die onderhawige feitesituasies vergelyk met dié wat in die voorgaande bespreking onder *vis absoluta* tuisgebring is, blyk dit dat die beskuldigde in die onderhawige gevalle, anders as die beskuldigde in die *vis absoluta*-voorbeelde, 'n *keuse* gehad het om òf die dreigement te verontagsaam en te poog om die betrokke regsplig na te kom, òf om hom aan die dreigement te steur en die betrokke regsplig nie na te kom nie. Gevolglik val die onderhawige gevalle onder *vis relativa*. Omdat 'n mens in gevalle van *vis relativa* wel oor die vermoë beskik om 'n besluit oor sy gedraginge te neem of uit te voer, kan onmoontlikheid daar nie as *handelingsuitsluitingsgrond* dien nie.[93] Dit laat die vraag ontstaan watter rol, indien enige, onmoontlikheid by *vis relativa* te speel het. By die beantwoording van dié vraag is die byhaal van die gangbare verweer by *vis relativa*, te wete noodtoestand as regverdigingsgrond,[94] onvermydelik. Immers, as die polisieman of tronkbewaarder in die onderhawige gevalle onder dieselfde dreigemente valse inligting aangaande die identiteit van die betrokke misdadiger aan die polisie verskaf het, of deelgeneem het aan die aanranding op die betrokke gevangene, sou hy volgens die tradisionele uitgangspunt dat die handeling by noodtoestand uit 'n *commissio* bestaan, daardie verweer kon opper. Bestaan die handeling van die beskuldigde daarenteen uit 'n *omissio* soos in die onderhawige gevalle, moet uitgemaak word met watter verweer 'n mens hier te doen het. Volgens die tradisionele uitgangspunt dat die handeling by onmoontlikheid uit 'n late bestaan,[95] sou hier 'n beroep op daardie verweer gedoen kon word.

Op die oog af skyn dit dus of onmoontlikheid nie alleen by *vis absoluta* nie, maar ook by *vis relativa* as verweer ter sprake kan kom. Alvorens daar egter op die meriete van onmoontlikheid as verweer in gevalle van *vis relativa* ingegaan kan word, moet die vraag of noodtoestand as verweer by 'n late, en derhalwe ook by 'n gebodsbepaling kan voorkom al dan nie, beantwoord word.

4 6 Noodtoestand by 'n Negatiewe Dadigheid en Gebodsbepalings

Dat noodtoestand wel by 'n late en derhalwe ook by 'n gebodsbepaling[96] ter sprake kan kom, kan aan die hand van die volgende voorbeeld geïllustreer word: Waar 'n dokter *versuim* om na 'n botsing waarby hy betrokke was, stil te hou

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93 *Vis relativa* sluit immers die vrywilligheid van die daad (handeling en/of gevolg) uit en veronderstel sodoende die willekeurigheid daarvan.

94 *LAWSA* par 49; Snyman 43; Burchell, Milton en Burchell 335–336. Vir die doeleindes van hierdie bespreking is dit nie nodig om op die vraag of daar 'n verskil tussen dwang en noodtoestand bestaan en of noodtoestand naas 'n regverdigingsgrond ook 'n skulduitsluitingsgrond daarstel, in te gaan nie.

95 wat, soos aangetoon, minstens by *vis absoluta* nie die geval hoef te wees nie (sien 4 4 hierbo) en sonder inagneming van die meningsverskil wat daar in ons strafreg bestaan oor die vraag of die onmoontlikheid absoluut moet of relatief kan wees (sien 2 2 hierbo).

96 Omdat die vrae of noodtoestand by 'n late en by 'n gebodsbepaling kan voorkom, anders as die vrae of onmoontlikheid by 'n verbodsbepaling en by 'n doen kan voorkom (sien daaroor 4 2 en 4 4 hierbo), noodwendig saamval, word hulle hier saam behandel. By onmoontlikheid hoef die aanvaarding van die standpunt dat onmoontlikheid (minstens by materieel omskrewe misdade) by 'n verbodsbepaling kan voorkom nie noodwendig die aanvaarding van die standpunt dat onmoontlikheid ook by 'n doen (en derhalwe by 'n verbode handeling) kan voorkom, tot gevolg te hê nie. By noodtoestand het die aanvaarding van die standpunt dat noodtoestand by 'n late kan voorkom noodwendig tot gevolg dat dit ook by 'n gebodsbepaling kan voorkom, ongeag of so 'n gebodsbepaling op eie bene staan (in gevalle van handelingsmisdade wat itv 'n gebode handeling omskryf is) en of dit binne die raamwerk van 'n verbodsbepaling (in gevalle van gevolgsmisdade waar die verbode gevolg deur òf 'n doen òf 'n late veroorsaak kan word) val. Vir voorbeelde van noodtoestand by 'n gebode handeling en by veroorsaking deur 'n late, sien 4 6 hieronder.

of om hulp aan die beseerdes te verleen omdat hy haastig met sy sterwende pasiënt op pad na die naaste hospitaal toe is, val dit nie te ontken nie dat dit vir die dokter in die betrokke omstandighede *noodsaaklik* was om nie stil te hou of hulp te verleen nie om sodoende die lewe van sy pasiënt te probeer red. Weliswaar het daar in ieder geval 'n regsplig op die dokter gerus om die pasiënt teen nadeel te beskerm, net soos daar 'n regsplig op hom gerus het om na die ongeluk stil te hou en hulp te verleen, maar dit was die lewensgevaar waarin sy pasiënt verkeer het wat die dokter genoodsaak het om sy stilhouplig en hulpverleningsplig te verontagsaam. Ook die feit dat die regsplig tot lewensredding die belangrikste van die onderhawige botsende regspligte was en daarom gehoorsaam moes word,[97] doen hieraan geen afbreuk nie, omdat dit juis die noodsituasie was wat dit tot die belangrikste regsplig verhef het. Selfs die betoog dat dit onmoontlik[98] vir die dokter was om stil te hou en hulp te verleen omdat dit vir hom noodsaaklik was om die pasiënt se lewe te probeer red, maak geen hond haaraf nie, want dit bevestig weer eens die feit dat noodtoestand, en nie onmoontlikheid nie, hier die oorsaak van en rede vir die nie-nakoming van die nagelate regspligte is.

Dit blyk dus dat minstens in die onderhawige voorbeeld noodtoestand, in stryd met die tradisionele opvattings daaromtrent en in ooreenstemming met die standpunt van Goldstein, nie alleen by 'n doen en 'n verbodsbepaling nie, maar ook by 'n late en bygevolg by 'n *gebodsbepaling*,[99] as verweer geopper kan word.[100] Daarmee val dan ook die laaste pilaar van die huidige onmoontlikheidstruktuur.

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97 met die gevolg dat onmoontlikheid volgens die tradisionele opvatting net as verweer tav van die minder belangrike regspligte geopper kan word. Vgl egter Van der Westhuizen *Noodtoestand as Regverdigingsgrond in die Strafreg* (ongepubliseerde LLD-proefskrif UP (1979)) 5–6, waarvolgens beide noodtoestand en onmoontlikheid hier as verwere geopper sou kon word, ten spyte van sy standpunt dat eg 'n keuse veronderstel en lg nie (vgl vn 108 en die meegaande teks).

98 waarby die vraag of relatiewe onmoontlikheid genoegsaam vir 'n geslaagde beroep op dié verweer is, vireers buite rekening gelaat word. Sien daaroor 4 7 hieronder en vgl 4 5 hierbo.

99 ongeag of dit op 'n handelingsmisdaad of gevolgmisdaad betrekking het. Geen voorbeeld van 'n strafregtelik gebode gevolg kon egter opgespoor of bedink word nie.

100 'n Voorbeeld waarin noodtoestand ook noodwendigerwys met 'n late verband hou, maar waarin daar in stede van 'n keuse tussen botsende *omissiones* 'n keuse tussen 'n *commissio* en gepaardgaande *omissio* enersyds teenoor die opoffering van die bedreigde regsgoed andersyds bestaan, is die volgende: Waar 'n verpleegster in noodtoestand êrens op die oop see of 'n afgeleë plek 'n vrugafdrywing bewerkstellig om die lewe van die swanger vrou te red of omdat die betrokke meisie as gevolg van verkragting of bloedskande beswanger is in omstandighede waar dit fisies onmoontlik is om die statutêre voorskrifte vir 'n regmatige vrugafdrywing (soos dat dit deur 'n geneesheer in 'n staatshospitaal uitgevoer moet word en die nodige sertifikate en magtiging daarvoor verkry moet word) na te kom. Die statutêre verbod op vrugafdrywings (behalwe ooreenkomstig die voorskrifte wat daarvoor neergelê is) het tot gevolg dat die onderhawige oortreding van dié verbodsbepaling noodwendig ook 'n nie-nakoming van die daarmee gepaardgaande gebodsbepalings inhou en daarmee saam dat die *commissio* van vrugafdrywing noodwendig vergesel word deur een of meerdere *omissiones* om die toepaslike statutêre voorskrifte na te kom. Sien hieroor Van Oosten "Regmatige Vrugafdrywing" 1977 *De Jure* 377 384–385. Immers, vrugafdrywing in noodtoestand sonder gepaardgaande onmoontlikheid om aan die statutêre voorskrifte vir 'n regmatige vrugafdrywing te voldoen, is byna ondenkbaar, want by moontlikheid van voldoening aan die statutêre voorskrifte vir 'n regmatige vrugafdrywing sal die toepaslike verweer wetteregtelike bevoegdheid eerder as noodtoestand wees (vgl De Wet 90 vn 122). Vgl oor dié doen/late-kombinasie by onmoontlikheid *R v Harris*; *R v Adcock*; *S v Concalves*.

4 7 Die Verhouding tussen Onmoontlikheid en Noodtoestand

Uit die voorgaande bespreking is dit duidelik dat die doen/late/verbodsbepaling/gebodsbepaling-onderskeid tussen noodtoestand en onmoontlikheid nie alleen op wankele bene staan nie, maar ook weinig grond onder die voete het. Soos aangetoon,[101] kan onmoontlikheid, ongeag of dit absoluut of relatief is, wel by 'n verbodsbepaling voorkom en, indien dit absoluut is, by 'n doen en bygevolg ook by 'n verbode handeling voorkom, en kan noodtoestand, ten minste in bepaalde gevalle, by 'n late en bygevolg ook by 'n gebode handeling ter sprake kom. Dit laat die vraag ontstaan watter verskil, indien enige, daar tussen noodtoestand en onmoontlikheid oorbly en of laasgenoemde enige bestaansreg naas eersgenoemde het.

Die voor-die-hand-liggendste verskil tussen noodtoestand en onmoontlikheid is dat laasgenoemde, soos aangetoon, in bepaalde gevalle as handelingsuitsluitingsgrond kan dien, terwyl eersgenoemde hoegenaamd nie by *vis absoluta* en outomatisme ter sprake kom nie. Inteendeel, noodtoestand doen hom juis by *vis relativa* of onafwendbare euwel voor, wat 'n keuse tussen twee alternatiewe en derhalwe 'n willekeurige (al is dit dan onvrywillige) daad veronderstel.[102] In die voorgaande bespreking is die moontlikheid van onmoontlikheid as verweer by *vis relativa* egter ook al meerdere male geopper,[103] sonder om daaroor uitsluitsel te gee. Die vraag of onmoontlikheid hom ook as verweer by *vis relativa* kan voordoen, kan dus nie los gesien word van die verhouding tussen onmoontlikheid en noodtoestand en die vereiste graad van onmoontlikheid vir 'n geslaagde beroep op dié verweer nie. Indien relatiewe onmoontlikheid genoegsaam vir voldoening aan dié verweer is, sal noodtoestand en onmoontlikheid ooreenval. Indien absolute onmoontlikheid egter 'n vereiste vir dié verweer is, sal noodtoestand en onmoontlikheid mekaar wederkerig uitsluit.

Word die hierbo bespreekte gevalle[104] van *vis relativa* ontleed, blyk dit dat (net soos in die motorongeluk- en vrugafdrywingvoorbeelde)[105] dit nie vir die polisieman en die tronkbewaarder *onmoontlik* was om hulle onderskeie regspligte na te kom nie. Hulle het immers 'n *keuse* gehad tussen die nie-nakoming van hulle onderskeie regspligte en die uitvoering van die betrokke dreigemente (of verwerkliking van die betrokke gevaar);[106] die polisieman kon die identiteit

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101 Sien 4 2–4 6 hierbo.

102 Sien vn 93.

103 Sien 4 5 en 4 6 hierbo.

104 Die polisieman- en tronkbewaardervoorbeelde onder 4 5 hierbo. Sien ook Goldstein se aangehaalde voorbeeld in vn 68.

105 In die motorongelukvoorbeeld onder 4 6 hierbo *kon* die dokter immers, weliswaar strydig met sy voorrangsregsplig, besluit het om stil te hou en hulp te verleen in stede daarvan om sy pasiënt se lewe te probeer red, net soos die verpleegster in die vrugafdrywingvoorbeeld in vn 100 *kon* besluit het, weliswaar ten koste van die swanger vrou, om nie die vrugafdrywing uit te voer nie en om bygevolg nie strydig met die statutêre voorskrifte vir 'n regmatige vrugafdrywing op te tree nie.

106 in die motorongeluk- en vrugafdrywingvoorbeelde (vgl vn 105), aangesien daar nie van menslike dreigemente, soos in die polisieman- en tronkbewaardervoorbeelde (sien ook die kindermishandelingvoorbeeld hieronder), sprake was nie, maar van 'n gevaar wat deur 'n medemens of natuurkragte geskep is (sien ook die haelbuivoorbeeld hieronder). Of dit egter die een dan wel die ander is, maak vir die doeleindes van die bestaan van 'n keuse tussen twee alternatiewe en vir die toepaslikheid van noodtoestand (relatiewe onmoontlikheid) geen verskil nie, want in noodtoestandskonteks impliseer 'n dreigement 'n gevaar vir die een of ander regsgoed, net soos 'n gevaar die bedreiging van die een of ander regsgoed impliseer.

van die gevangene openbaar en die tronkbewaarder kon die dokter ontbied. Wat hulle verhinder het om dit te doen, was dus nie dat hulle dit nie *kon* doen nie, maar dat hulle dit slegs *ten koste* van die betrokke regsgoed kon doen. Gevolglik kan hier geredeneer word dat dit nie soseer vir die polisieman en tronkbewaarder onmoontlik was om hulle onderskeie regspligte na te kom nie, as dat dit vir hulle *noodsaaklik* was om die betrokke regsgoed te beskerm. Anders gestel, dit lyk dus veeleer of hulle lewe en liggaam *moes* beskerm as dat die polisieman nie die identiteit van die gevangene kon openbaar of die tronkbewaarder nie die dokter kon ontbied nie. Begripsmatig skep dit dan ook probleme om van onmoontlikheid te praat in gevalle waar dit inderdaad fisies[107] vir die beskuldigde moontlik was om die betrokke regsplig na te kom, maar hy in die proses die een of ander regsgoed sou moes opoffer. Waar noodtoestand gangbaar tot inhoud het dat die enigste ander alternatief tot die verwerkliking van die dreigende gevaar die gewraakte handeling van die noodoptreder is, en dus noodwendig 'n keuse tussen twee alternatiewe impliseer, beteken onmoontlikheid streng gesproke dat daar vir die beskuldigde geen ander alternatief was nie, wat eintlik 'n keuse buite die kwessie laat.[108]

Maar selfs al sou daar geargumenteer word dat relatiewe onmoontlikheid wel voldoen vir 'n beroep op dié verweer, wil dit voorkom of dit in die onderhawige gevalle nie van noodtoestand ontkoppel kan word nie. Indien daar betoog sou word dat, al was daar 'n keuse tussen twee euwels, die noodsaak om die betrokke regsgoed in die onderhawige gevalle te beskerm die nakoming van die betrokke regspligte onmoontlik gemaak het, word die bestaan van onmoontlikheid daarmee afhanklik gestel van die bestaan van 'n noodsituasie. Met ander woorde, indien daar aangevoer word dat dit hier vir die polisieman onmoontlik was om die identiteit van die gevangene te openbaar en vir die tronkbewaarder onmoontlik was om 'n dokter te ontbied *omdat* hulle lewe en liggaam *moes* beskerm, en dit tog nie moontlik was om *sowel* hulle regspligte na te kom *as* hulle regsgoed te beskerm nie,[109] word daarmee toegegee dat as dit nie was vir die

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107 In 'n saak soos *R v Hoko* kon die beskuldigde weliswaar nie *self* die verskuldigde belasting betaal nie, maar omdat hy dit deur 'n verteenwoordiger kon doen, was dit inderdaad *fisies* moontlik om dit te betaal. "Fisies moontlik" en "fisies onmoontlik" het dus betrekking op die regtens verpligte positiewe dadigheid eerder as op die regspligtige persoon, alhoewel dié twee uiteraard veelal sal saamval. Vgl egter vn 35 vir De Wet se standpunt en die kommentaar daarop.

108 Sien ook Labuschagne "Noodtoestand" 1974 *Acta Juridica* 73 92 vn 130, waarvolgens daar igv onmoontlikheid by enkel regspligte geen keuse bestaan nie; Van der Westhuizen 5–6, wat absolute onmoontlikheid vereis en 'n keusemoontlikheid by onmoontlikheid as verweer ontken, 'n standpunt wat nie te rym is met sy standpunt waarna in vn 97 verwys word nie. Vgl die botsende hofsakevoorbeeld hieronder waarin daar wel 'n keuse bestaan, wat vir die voorstanders van 'n absolute onmoontlikheidstoets die dilemma inhou dat hulle seer sekerlik ook strafregtelike aanspreeklikheid vir die nie-nagekome regsplig sal wil ontken, maar dit dan nie op grond van onmoontlikheid sal kan doen nie, wat weer die vraag laat ontstaan watter verweer hier dan wel toepaslik is. Daarteenoor lewer botsende regspligte vir die aanhangers van 'n relatiewe onmoontlikheidstoets geen besondere probleme op nie. Sien ook Labuschagne 92 vn 130, waarvolgens daar igv onmoontlikheid by botsende regspligte wel 'n keuse bestaan (vgl Van der Westhuizen se aangehaalde teenstrydige standpunt in vn 97).

109 Om sowel hulle regspligte na te kom as hulle regsgoed te beskerm, is waarskynlik absoluut onmoontlik (vgl die botsende hofsakevoorbeeld hieronder). Met die motorongelukvoorbeeld onder 4 6 hierbo, stem die onderhawige voorbeelde daarin ooreen dat daar in albei eweseer van 'n noodsituasie sprake is, maar verskil hulle daarin dat daar in eg van botsende regspligte en in lg van enkel regspligte sprake is.

noodsaak om die betrokke regsgoed te beskerm nie, daar in die onderhawige gevalle van onmoontlikheid geen sprake sou gewees het nie.

Dit bring egter die vraag na vore of daar dan geen gevalle van relatiewe onmoontlikheid is waarin noodtoestand geen rol te speel het nie. Die enigste moontlike geval wat hier voor die gees geroep kan word, is dié waarin daar 'n botsing tussen twee positiewe regspligte bestaan, soos waar 'n gedagvaarde getuie op dieselfde dag dieselfde tyd in twee verskillende hofsake op twee verskillende plekke moet verskyn.[110] Dat die nakoming van *albei* dié regspligte absoluut onmoontlik is, behoef geen betoog nie. Aangesien die getuie egter by ontbrekende ander hindernisse[111] wel die *een of die ander* van die twee hofsake *kan* en *moet* bywoon, en 'n *besluit* kan neem[112] of 'n *keuse* kan uitoefen[113] watter een van die twee hy gaan bywoon, is hier van absolute onmoontlikheid om in die nagelate hofsaak te verskyn, geen sprake nie. Is die een hofsaak belangriker[114] as die ander, is die getuie natuurlik regtens verplig om sy opwagting by die belangrikste hofsaak te maak, wat terselfdertyd sy verskyning in die minder belangrike hofsaak *relatief* onmoontlik maak, omdat die getuie steeds sou kon besluit om die minder belangrike regsplig ten koste van die belangriker regsplig na te kom.[115] Woon die getuie egter die belangrikste hofsaak by, kan daar aangevoer word dat dit vir hom uit hoofde van die gemelde regsplig *noodsaaklik* was om dit te doen. Is die twee hofsake ewe belangrik,[116] het die getuie regtens in elk geval 'n keuse by watter een van die twee hy sy opwagting wil maak en is dit eweneens vir hom *relatief* onmoontlik om die ander een by te woon.[117] Omdat hy egter regtens verplig is om in een van die twee hofsake, al is dit dan die een van sy keuse, te verskyn, kan hier weer eens betoog word dat dit vir hom uit hoofde van die genoemde regsplig *noodsaaklik* was om 'n keuse te maak

110 Sien *S v Mxhosa* 352, waaruit die relevante aanhaling onder 1 hierbo verskyn; Snyman 102 en vgl *R v Hargovan* 769–770, waaruit die relevante opmerkings in vn 50 verskyn. Vanselfsprekend hoef dit nie noodwendig presies dieselfde tyd en heeltemal verskillende plekke te wees nie. Die hofsake sou bv ook in dieselfde dorp of stad in twee verskillende howe kon voorkom, of die oggend in een hof en die middag in 'n ander hof waar die plekke egter so ver uit mekaar geleë is dat die bywoning van albei die hofsake onmoontlik is.

111 soos dat hy na 'n beroerte in 'n koma in 'n hospitaal lê of weens veiligheidsmisdade in aanhouding verkeer (in welke geval hier absolute onmoontlikheid voorhande is), of waar hy deur omstandighede soos in die haelbuivoorbeeld hieronder of dreigemente van ernstige liggaamlike leed verhinder word om die een of die ander van die twee hofsake by te woon ('n geval van relatiewe onmoontlikheid).

112 en kan uitvoer (sien vn 83).

113 ongeag of sy keuse uiteindelik die betrokke regsvoorskrif gehoorsaam of verontagsaam.

114 wat waarskynlik meesal die geval sal wees.

115 Woon hy die minder belangrike hofsaak by, kan hy hom, by 'n ontbrekende hindernis om die belangrikste hofsaak by te woon, uiteraard nie op relatiewe onmoontlikheid (noodtoestand) tov sy afwesigheid by die belangriker hofsaak beroep nie. Vgl die motorongelukvoorbeeld onder 4 6 hierbo asook vn 105 en 111.

116 wat dalk baie moeilik bepaalbaar mag wees. Vgl bv die posisie van die tronkbewaarder in die aanrandingvoorbeeld (sien 4 5 hierbo) indien hy voor die keuse gestel sou word om die lewe van òf die gevangene òf die lewe van 'n familielid op te offer, of dié van die dokter in die motorongelukvoorbeeld (sien 4 6 hierbo) indien hy 'n keuse moet maak tussen die lewe van sy pasiënt en dié van sy ongelukslagoffer.

117 Verskyn hy in geeneen van die twee hofsake nie, behoef dit kwalik enige betoog dat hy by ontbrekende ander hindernisse (sien vn 111) aan minagting van die hof skuldig bevind kan word.

en in die hofsaak van sy keuse te verskyn. Dit is dus telkens die noodsaak[118] om die een hofsaak by te woon wat die getuie se verskyning in die ander hofsaak relatief onmoontlik maak.[119] Gevolglik weerlê ook hierdie voorbeeld[120] van botsende regspligte nie die onafwendbare wisselwerking tussen relatiewe onmoontlikheid en noodtoestand by *vis relativa* nie.

Uit die voorgaande is dit dus duidelik dat relatiewe onmoontlikheid onlosmaaklik aan noodtoestand verbind is. Trouens, dit is juis die noodsaak om 'n bepaalde regsgoed te beskerm[121] wat die nie-nakoming van 'n bepaalde regsplig tot gevolg het. Bestaan daar geen noodsituasie nie, is relatiewe onmoontlikheid nouliks denkbaar.[122] Indien 'n dokter sou versuim om ooreenkomstig sy statutêre plig 'n geval van kindermishandeling aan te meld omdat die kind se ouers dreig om dan sy praktyk te verlaat, is dit moeilik om in te sien hoe hier by ontbrekende noodtoestand[123] van onmoontlikheid sprake kan wees. Daarmee word natuurlik geensins voorgegee dat daar alleen van relatiewe onmoontlikheid sprake sal wees waar die beskermde regsgoed lewe of liggaam is nie. Waar 'n gedagvaarde getuie versuim om in die hof te verskyn omdat daar 'n verwoestende haelbui oor sy woongebied woed wat sy duur motor vol duike sou slaan indien hy wel hof toe sou ry, sou hy kon aanvoer dat die noodsaak om sy vermoë[124] te beskerm dit

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118 Daar kan tog beswaarlik beweer word dat 'n regs*plig* geen juridiese *noodsaak* tot die nakoming daarvan skep nie. Die strafregtelike pligte waarom dit hier gaan, is juis *gebiedende* regsvoorskrifte wat gehoorsaming *vereis*. In die onderhawige gevalle *moet* die getuie, al na gelang die geval, òf die voorgeskrewe (belangrikste) hofsaak òf die gekose hofsaak (waar albei ewe belangrik is) bywoon. Doen hy dit nie (vgl vn 115), skend hy nie alleen die waardigheid, aansien en gesag van die betrokke geregshof nie, maar stel hy homself ook aan vervolging, skuldigbevinding en bestraffing weens minagting van die hof bloot. Deur die *dreigement* van straf as regsgevolg vir die verontagsaming van 'n strafregtelike plig word daar (relatiewe) *dwang* op die getuie geplaas om in ten minste een van die twee hofsake te verskyn. Alleen indien hy sy opwagting by een van die hofsake maak (vgl vn 117), word sy afwesigheid by die ander as regtens toelaatbaar of geoorloof beskou. Dat dit vir die getuie in hierdie omstandighede *noodsaaklik* is om die voorgeskrewe of gekose hofsaak ten koste van die nagelate hofsaak by te woon, behoort dus duidelik te wees.

119 Andersom beteken dit dat dit relatief onmoontlik vir die getuie was om sy opwagting by die een hofsaak te maak omdat dit vir hom noodsaaklik was om in die ander hofsaak te verskyn. Sien ook die aanhaling uit *S v Mxhosa* onder 1 hierbo.

120 *In casu* is die maklikste oplossing vir die getuie natuurlik om, indien dit moontlik is en die hof daarmee akkoord gaan, die hof daarvan in kennis te stel dat hy weens botsende regspligte nie sy verskyning in die betrokke saak sal maak nie, wat beteken dat sodanige geval in die praktyk (vgl die gerapporteerde sake tot dusver) nie alleen selde indien ooit sal voorkom nie, maar ook dat daar in die lig van dié potensiële alternatiewe reëlings, selde indien ooit 'n beroep op relatiewe onmoontlikheid (noodtoestand) gedoen sal word.

121 Die beskerming van 'n bepaalde regsgoed in 'n noodsituasie word allerweë as vereiste vir noodtoestand in ons strafreg gestel: sien *LAWSA* par 50; Snyman 95 96; Visser en Vorster 124; Burchell, Milton en Burchell 338–339 341–342; De Wet 90–91.

122 Omgekeerd is die bestaan van noodtoestand uiteraard nie afhanklik van die bestaan van relatiewe onmoontlikheid nie, ook al sou 'n mens beweer dat die noodsaak om iets te doen die keersy van die relatiewe onmoontlikheid om dit na te laat daarstel (vgl die aangehaalde stelling uit *R v Canestra* (sien ook *S v Adams* 798) onder 2 1 hierbo)).

123 waaroor daar *in casu* weinig twyfel kan bestaan (vgl vn 125).

124 Vir die beskerming van ander regsgoed, sien die vrugafdrywingvoorbeeld in vn 100, mbt verkragting en bloedskande as gronde vir vrugafdrywing, en die botsende hofsakevoorbeeld hierbo mbt die waardigheid, aansien en gesag van 'n geregshof en die sanksie wat die regsongehoorsame kan tref (sien vn 118). By botsende regspligte sal die beskermde regsgoed vanselfsprekend van die aard van die betrokke regspligte afhang en aangesien die regspligte nie identies hoef te wees (soos in die botsende hofsakevoorbeeld hierbo) nie, kan die beskermde regsgoed ook verskil (soos in die motorongelukvoorbeeld hierbo). Vgl vn 125.

vir hom onmoontlik gemaak het om sy regsplig na te kom.[125] Of daar in 'n bepaalde geval 'n noodsituasie in samehang met relatiewe onmoontlikheid bestaan, sal dus van die feite en omstandighede van die betrokke geval afhang.[126] Elke geval sal op sy eie meriete beoordeel moet word.

Kortom, gevalle van relatiewe onmoontlikheid waarby noodtoestand uitgesluit is, is haas onvoorstelbaar. Dit bring die vraag na vore of relatiewe onmoontlikheid dan nie maar met vrug in noodtoestand as regverdigingsgrond opgeneem kan word nie.

4 8 Samevatting

Die voorgaande bespreking en ontleding van die aard en werking van onmoontlikheid in die strafreg lewer die volgende resultate op:

a Die tradisionele onderskeid tussen onmoontlikheid en noodtoestand volgens die *commissio/omissio*/verbodsbepaling/gebodsbepaling-kriterium hou geen water nie.

b Indien absolute onmoontlikheid, soos die oorwig van gesag te kenne gee,[127] 'n vereiste vir 'n geslaagde beroep op dié verweer is, stel onmoontlikheid, strydig met die tradisionele indeling daarvan,[128] nie 'n regverdigingsgrond[129] nie, maar wel 'n handelingsuitsluitingsgrond[130] daar.

c Indien relatiewe onmoontlikheid, in stryd met die oorwig van gesag op dié punt,[131] wel as genoegsaam vir 'n geslaagde beroep op dié verweer beskou word, kom dit telkens in samehang met noodtoestand voor.[132]

Vervolgens word op die konsekwensies van elk van dié drie gevolgtrekkings gewys en afleidings daaruit gemaak:

Ad a: Uit die bespreekte voorbeelde in dié verband blyk dat *absolute* onmoontlikheid as *handelingsuitsluitingsgrond* nie alleen by 'n late en 'n gebodsbepaling

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125 tensy die getuie se versuim om die hofsaak by te woon skade sal veroorsaak wat buite verhouding is met die skade wat hy sal ly as hy wel hof toe sou ry, want by noodtoestand vind daar telkens 'n opweging van belange plaas en normaalweg mag 'n groter belang nie opgeoffer word ter beskerming van 'n kleiner belang nie. Vgl die botsende hofsakevoorbeeld hierbo en vn 116.

126 al na gelang daar aan die vereistes van noodtoestand voldoen word al dan nie. Sien daaroor *LAWSA* par 49 ev; Snyman 92 ev; Visser en Vorster 124 ev; Burchell, Milton en Burchell 335 ev; De Wet 81 ev.

127 Sien vn 34.

128 Sien 3 hierbo.

129 waarmee diegene wat absolute onmoontlikheid as vereiste vir 'n geslaagde beroep op dié verweer stel, eintlik in teenspraak met hulleself kom, vir sover geeneen van die (ander) erkende en aanvaarde regverdigingsgronde met absolute gegewes te doen het nie. By al die (ander) regverdigingsgronde word die persoon wat hom potensieel daarop kan beroep, voor 'n keuse gestel om die betrokke handeling te doen of na te laat, terwyl daar by absolute onmoontlikheid van 'n keuse tot die regtens verpligte optrede geen sprake is nie. Wat dit betref is diegene wat relatiewe onmoontlikheid as genoegsaam vir 'n geslaagde beroep op dié verweer beskou, dus meer konsekwent. Vgl Goldstein se aangehaalde standpunt in vn 64.

130 Sake waarin daar op grond van absolute onmoontlikheid aangevoer sou kon word dat daar vanweë onwillekeurigheid geen handeling aan die kant van die beskuldigde was nie, is *R v Mostert*; *R v De Jager*; *Jetha v R*; *S v Moeng*.

131 sien vn 35.

132 Sake waarin daar nòg van absolute onmoontlikheid nòg van relatiewe onmoontlikheid in samehang met noodtoestand sprake was, is *R v Harris*; *Attorney-General v Grieve*; *R v Hoko*; *R v Adcock*; *S v Block*.

nie, maar ook by 'n doen en 'n verbodsbepaling kan voorkom. Insgelyks kan *noodtoestand* as *regverdigingsgrond* hom nie alleen by 'n doen en 'n verbodsbepaling nie, maar ook by 'n late en gebodsbepaling voordoen. Daarmee skyn die enigste oorblywende aanwendingsgebied[133] van die *commissio/omissio*/verbodsbepaling/gebodsbepaling-onderskeid tussen onmoontlikheid en noodtoestand tot gevalle van *vis relativa* by *handelingsmisdade* afgebaken te wees.

Ad b: Indien absolute onmoontlikheid, soos hier aan die hand gedoen word, 'n handelingsuitsluitingsgrond daarstel, kan een van twee benaderingswyses gevolg word, naamlik dat dit òf as selfstandige en afsonderlike handelingsuitsluitingsgrond funksioneer òf in die twee bestaande handelingsuitsluitingsgronde, te wete *vis absoluta* en *outomatisme*, opgeneem word. Word absolute onmoontlikheid as 'n selfstandige en afsonderlike handelingsuitsluitingsgrond beskou, sou daar uit hoofde van die tradisionele opvatting dat die handeling by onmoontlikheid uit 'n late bestaan, 'n onderskeid gemaak moes word tussen onwillekeurigheid by 'n *commissio*, ten aansien waarvan *vis absoluta* en outomatisme dan handelingsuitsluitingsgronde sou wees, en onwillekeurigheid by 'n *omissio*, ten opsigte waarvan onmoontlikheid dan 'n handelingsuitsluitingsgrond sou wees. So 'n siening sou egter lynreg in botsing kom met die hier verkondigde standpunt dat onmoontlikheid hom eweseer by 'n doen as 'n late en *vis absoluta* en outomatisme hulle eweseer by 'n late as 'n doen kan voordoen. Word absolute onmoontlikheid daarenteen bloot as 'n verskyningsvorm van *vis absoluta* en outomatisme gesien, beteken dit dat onwillekeurigheid, hétsy in die vorm van *vis absoluta* hétsy in die vorm van outomatisme, by sowel 'n *commissio* as 'n *omissio* kan voorkom. Voorts, indien absolute onmoontlikheid 'n vereiste vir 'n geslaagde beroep op dié verweer is, sluit onmoontlikheid as handelingsuitsluitingsgrond en noodtoestand as regverdigingsgrond mekaar wederkerig uit. Indien daar geen strafregtelike handeling was nie, kom 'n regverdigingsgrond nie eens ter sprake nie. Origens, indien absolute onmoontlikheid 'n vereiste vir 'n geslaagde beroep op dié verweer is, sal relatiewe onmoontlikheid onder geen omstandighede 'n verweer daarstel nie, wat meebring dat die enigste oorblywende verweer in gevalle van relatiewe onmoontlikheid noodtoestand is.

Ad c: Omdat relatiewe onmoontlikheid afhanklik is van die bestaan van noodtoestand, kan een van twee moontlike benaderingswyses gevolg word: Daar kan òf uitgegaan word van die standpunt dat indien die gewraakte handeling die vorm van 'n late[134] aanneem, relatiewe onmoontlikheid as sodanig steeds die toepaslike verweer sal daarstel, òf van die standpunt dat relatiewe onmoontlikheid, siende dat dit nie van noodtoestand geskei kan word nie, in noodtoestand as regverdigingsgrond opgaan en 'n verskyningsvorm daarvan uitmaak. Word eersgenoemde uitweg gevolg, word die doen/late onderskeid tussen onmoontlikheid en noodtoestand op hierdie uiters beperkte gebied gehandhaaf.[135] Word laasgenoemde uitweg gevolg, word daarmee erkenning verleen aan die reeds

133 Sien c hieronder.

134 ongeag of dit 'n formeel omskrewe of materieel omskrewe misdaad is en ongeag die feit dat lg in die praktyk 'n verbodsbepaling behels, wat meebring dat al sou relatiewe onmoontlikheid die toepaslike verweer by 'n late in gevalle van *vis relativa* wees, dit steeds by 'n *verbodsbepaling* kan voorkom. Bowendien lewer die vrugafdrywingvoorbeeld in vn 100 dié probleem dat dit daar primêr om 'n verbode *doen* gaan en sekondêr om die gewraakte late.

135 Vgl a hierbo.

bespreekte en hier aanvaarde beginsel dat dwang[136] 'n *facere* of 'n *non facere*[137] tot gevolg kan hê.[138]

5 REGSVERGELYKENDE OORSIG

5 1 Algemeen

In ander regstelsels word onmoontlikheid selde as 'n selfstandige en afsonderlike verweer behandel. Waar dit wel gedoen word, is die aard en rol daarvan onseker. Waar dit nie as 'n aparte verweer bespreek word nie, word dit veelal tuisgebring onder die handeling, absolute dwang en/of relatiewe noodtoestand en skuld. Vervolgens word eers op die posisie in die Anglo-Amerikaanse en daarna op die posisie in enkele Vastelandse regstelsels gewys.

5 2 Anglo-Amerikaanse Regstelsels

5 2 1 Engeland

In Engeland word onmoontlikheid, in weerwil van Smith en Hogan se stelling dat

> "[i]t cannot be asserted . . . that any general defence of impossibility is recognised at the present time,"[139]

skynbaar tog onder bepaalde omstandighede deur die Engelse howe as verweer erken.[140] Waar dit wel as verweer aanvaar word, word dit volgens Williams veelal in verband gebring met *mens rea*, nalatigheid of dwang.[141] Volgens hom behoort onmoontlikheid egter in twee soorte gevalle as 'n selfstandige en afsonderlike verweer erken te word, te wete (a) by misdade wat in terme van 'n late omskryf word[142]; en (b) by botsende regspligte.[143] Vir onmoontlikheid om as verweer

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136 ongeag of dit absoluut dan wel relatief is en of dit deur 'n medemens dan wel deur natuurkragte uitgeoefen word.

137 Sien ook Goldstein se aangehaalde standpunt in vn 68.

138 Ook by ander regverdigingsgronde kan die betrokke grond 'n *facere* en 'n *non facere* regverdig, bv bevel (vgl *R v Smith* (1900) 17 SC 561 teenoor *R v Van Vuuren* 1944 OPA 35), wat soms niks anders as 'n afgewaterde vorm van dwang is nie en soms selfs hand aan hand met dwang gaan (sien bv *R v Werner* 1947 2 SA 828 (A)). Ook by bevoegdheid, toestemming, saakwaarneming (waarvoor 'n noodsituasie 'n vereiste is) en selfs by noodweer is dit allesbehalwe moeilik om gevalle van *commissiones* en *omissiones* te bedink waarin dié regverdigingsgronde toepaslik sal wees.

139 *Criminal Law* (1978) 211.

140 Sien Smith en Hogan 210–211; Gross *A Theory of Criminal Justice* (1979) 158; Williams *Textbook of Criminal Law* (1983) 618–619.

141 618. Self bespreek hy onmoontlikheid onder "Necessity." Vgl egter vn 142.

142 Smith en Hogan 210–211 vereis 'n late as handelingsvorm vir onmoontlikheid as verweer. Vgl egter Gross tap, wat weliswaar een voorbeeld van 'n late gee, maar daaraan toevoeg dat "(i)f the presence in the country of an unregistered enemy alien is against the law, but the alien has been forcibly brought into the country by the authorities and kept unregistered in their custody, that fact again will provide the substance of an exculpatory claim that points to the impossibility of doing what the law requires" (vgl 480), waarmee hy oënskynlik 'n doen (met 'n gepaardgaande late) as genoegsaam vir onmoontlikheid as verweer beskou en waarmee hy te kenne gee dat onmoontlikheid 'n handelingsuitsluitingsgrond kan wees. Ook Elliott en Wood *Casebook on Criminal Law* (1974) 50 (die 1982-uitg maak geen melding van onmoontlikheid as verweer nie) beskou onmoont-

aanvaar te word, moet dit vasstaan dat dit nie deur die beskuldigde self geskep is nie en dat daar 'n regsplig tot positiewe optrede bestaan het.[144] Of fisiese of absolute onmoontlikheid 'n vereiste vir 'n geslaagde beroep op dié verweer is al dan nie, is onseker.[145]

5 2 2 Skotland

Volgens Gordon het onmoontlikheid as verweer in Skotland nog nie in verband met gemeneregtelike misdade ter sprake gekom nie, maar

> "[t]he best approach is probably to regard an omission as voluntary where it consists in a failure to do something which it was physically possible for the accused to have done, that is to say, something he was not prevented from doing by some physical inability or by external force of a kind amounting to duress or rendering performance of the act physically impossible."[146]

Waar die beskuldigde self die onmoontlikheidsituasie geskep het, sal dit volgens Gordon normaalweg geen verweer uitmaak nie.[147] Onmoontlikheid skyn by wetteregtelike misdade geen verweer daar te stel indien die handeling van die beskuldigde uit 'n doen bestaan het nie.[148] Insgelyks skyn onmoontlikheid geen

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likheid (volgens hulle voorbeeld absoluut, meer bepaald 'n toestand van outomatisme) skynbaar as 'n handelingsuitsluitingsgrond.

143 Williams 618–619. Waarom hy hierdie twee gevalle uitsonder, is nie duidelik nie. Botsende regspligte ontstaan volgens hom waar 'n vliegtuig se enjin onklaar raak en die piloot onder 'n verpligting staan om nie die mense in die sportstadion en nie die mense op straat te dood nie, in welke geval "he best reconciles the conflicting demands of the law by killing the smaller number of people in the street" (619). Daarmee gee hy te kenne dat onmoontlikheid ook by 'n doen as handelingsvorm kan voorkom en dat relatiewe onmoontlikheid (inderwaarheid *noodtoestand*) hier 'n verweer is. Wat die posisie is waar die twee botsende regpsligte ewe belangrik is, vertel Williams ons nie.

144 Smith en Hogan 210–211; Williams 618–619, in wie se vliegtuigvoorbeeld (sien vn 143) daar egter 'n regsplig tot 'n negatiewe dadigheid bestaan.

145 Smith en Hogan laat hulle nie daaroor uit nie en Williams se uitlatings gee geen uitsluitsel daaroor nie. In sy *Textbook* 618 verklaar Williams mbt misdade wat itv 'n late omskryf is: "(*S*)*heer* impossibility (wat dit ook al beteken, suiwer of absolute onmoontlikheid) should be an excuse for not performing a positive obligation. It is no use the law's butting its head against a brick wall" (my kursivering), maar mbt botsende regspligte gee hy 'n voorbeeld (619) waarvolgens relatiewe onmoontlikheid klaarblyklik genoegsaam is (sien vn 143). In sy *Criminal Law: The General Part* (1961) 747 verklaar Williams egter: "Thus it may be laid down as a general proposition that where the law imposes a duty to act, non-compliance with the duty will be excused where compliance is *physically impossible*" (my kursivering), net nadat hy verklaar het: "Although closely related to necessity, the defence of impossibility is theoretically distinct" (746) en voordat hy verklaar: "(W)here it is impossible to carry on an undertaking in accordance with the law, the general rule is that the undertaking must be abandoned rather than the law be violated" (747). Volgens Williams is die "defence of moral (as opposed to physical) impossibility . . . in fact identical with that of necessity" (748). Met hierdie stellings verwar en vereenselwig hy absolute en relatiewe onmoontlikheid met mekaar.

146 *The Criminal Law of Scotland* (1978) 82, wat tesame met die feit dat hy onmoontlikheid onder die opskrifte "The Criminal Act" en "Criminal Conduct" behandel, die afleiding regverdig dat hy onmoontlikheid as 'n handelingsuitsluitingsgrond beskou, ofskoon die woorde "or by external force of a kind amounting to duress" ruimte vir relatiewe onmoontlikheid, gekoppel aan noodtoestand, laat (vgl 429 ev) en sodoende 'n potensiële teenstrydigheid daarstel. Elders verklaar Gordon: "The defence of Act of God may be equated with impossibility" (289).

147 82 vn 28. In watter gevalle onmoontlikheid, ondanks die skepping daarvan deur die beskuldigde self, wel 'n verweer sal uitmaak, vertel Gordon ons nie.

148 288, soos waar die beskuldigde 'n motor sonder ligte bestuur het nadat die ligte deur 'n stormwind gedoof is.

verweer te wees waar 'n wet voorskryf dat 'n bepaalde voorwerp gebruik of 'n bepaalde handeling verrig moet word onder bepaalde omstandighede nie. Indien die gestelde voorwaardes nie nagekom word nie, kan die beskuldigde, enige onmoontlikheidsituasie ten spyt, skuldig bevind word aan die betrokke misdaad.[149]

5 2 3 Australië

Howard verwys kortliks na onmoontlikheid in die Australiese reg onder die opskrif "Non-Homicidal Necessity" en verklaar dat

> "the courts do take into account impossibility of compliance through no fault of the defendant."[150]

Uit die voorbeelde wat Howard noem, wil dit voorkom of die handeling by onmoontlikheid die vorm van sowel 'n late as 'n doen kan aanneem.[151]

5 2 4 Die Verenigde State van Amerika

By wyse van uitsondering onder die Amerikaanse skrywers, bespreek Hall onmoontlikheid, en wel onder die opskrif "Necessity and Coercion," en meer bepaald "Physical Causation." Daaronder noem hy dan 'n aantal voorbeelde van absolute onmoontlikheid (*physical impossibility*) wat gevalle van *omissiones*, al is dit dan gekoppel aan *commissiones*, behels.[152] Hy wend egter geen poging aan om hulle van gevalle van positiewe optrede in noodtoestand (*physical necessity*) te onderskei nie.

5 2 5 Kanada

Schmeiser verwys vlugtig na onmoontlikheid as verweer *eo nomine* in die Kanadese reg, met voorbeelde van absolute onmoontlikheidsituasies.[153] Van enige poging tot 'n onderskeid tussen *omissiones* en *commissiones* by onmoontlikheid as verweer is daar by hom egter geen sprake nie, maar uit sy voorbeelde wil dit voorkom of 'n onmoontlikheidsituasie waaraan die betrokke persoon skuld gehad het, geen verweer sal uitmaak nie.[154]

5 3 Vastelandse Regstelsels

5 3 1 Nederland

In die Nederlandse reg word onmoontlikheid onder *overmacht* tuisgebring.[155] Artikel 40 van die *Wetboek van Strafrecht* bepaal:

> "Niet strafbaar is hij die een feit begaat waartoe hij door overmacht is gedrongen."

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149 tap.

150 *Criminal Law* (1977) 430. Waarom Howard onmoontlikheid tot "non-homicidal" gevalle beperk, verduidelik hy nie.

151 Sien 414 430.

152 *General Principles of Criminal Law* (1960) 421 422–424, insluitende gevalle van absolute dwang en outomatisme.

153 *Criminal Law* (1973) 254–255.

154 255.

155 Sien Hazewinkel-Suringa *Inleiding tot de Studie van het Nederlandse Strafrecht* (1984) 249 250; Van Bemmelen *Ons Strafrecht* 1 (1975) 207, alhoewel die begrip "onmogelijkheid" gangbaar nie as sodanig in hierdie verband gebesig word nie, behalwe vir sover Hazewinkel-Suringa 250 verklaar: "Van straf zal dan worden afgezien, indien de dader daaraan geen weerstand *kon* bieden. Betekent dan *niet kunnen* de abzolute onmogelijkheid van verzet daartegen, dus dat iedereen gedaan zou hebben, wat de dader deed?" en vir haar verwysing na die stelreëls *feci quod potui, et ultra posse non tenetur* en *ad impossibile nemo tenetur* (249 vn 459). Met dié stelling lyk dit of Hazewinkel-Suringa die aanwendingsgebied van die begrip "onmogelijkheid" nie tot 'n late beperk nie, maar ook 'n doen daarby insluit.

Met betrekking tot *vis absoluta*, oftewel fisiese oormag, as handelingsuitsluitingsgrond[156] by misdade wat in terme van 'n late omskryf is, verklaar Hazewinkel-Suringa:

> "Bij omissiedelicten, evenwel, die geen wilshandeling vereisen, kan ondanks volledige fysieke dwang toch door de gedwongene een gedraging, een nalaten worden verricht. Dáár kan derhalve alleen het beroep op overmacht uitkomst brengen."[157]

As voorbeeld van 'n absoluut verhinderde late[158] noem sy iemand wat vasgebind word en sodoende geen aangifte van 'n geboorte kan doen nie.[159] Met betrekking tot *vis relativa*, oftewel psigiese oormag, word aanvaar dat noodtoestand by die nie-nakoming van een van twee botsende regspligte tot positiewe optrede 'n regverdigingsgrond kan wees.[160] Het die beskuldigde self die oormag geskep, kan hy hom gewoonlik nie daarop beroep nie.[161]

5 3 2 België

In die Belgiese reg word onmoontlikheid onder *dwang* tuisgebring.[162] Artikel 71 van die *Strafwetboek* bepaal:

> "Wanneer de dader gedrongen wordt door een macht waaraan hij niet kan weerstaan, is er geen misdrijf."

Daarop lewer Vanhoudt en Calewaert die volgende kommentaar:

> "Dwang veronderstelt aldus dat de dader niet de mogelijkheid bezat, noch over de keuze beschikte, het misdrijf te plegen, hetzij dit een handeling of een onthouding betreft."[163]

Vereistes vir dwang as regverdigingsgrond is eerstens dat die dwang "moet van beslissende invloed geweest zijn."[164] Blote ernstige probleme om regsvoorskrifte na te kom, is nie voldoende nie; die wilsvryheid moet volledig[165] uitgeskakel word. Die moontlikheid tot weerstand moet gevolglik uitgesluit wees voor of op die tydstip van die betrokke daad, anders is daar van onweerstaanbaarheid geen sprake nie.[166] Die onweerstaanbare aard van die dwang word *in concreto* in verhouding tot die dader beoordeel: Rekening word gehou met die ouderdom, geslag en sosiale stand van die dader.[167] Tweedens moet die dwang "vreemd . . . zijn aan de dader," wat beteken dat dit nie vir die dader moontlik was om die dwang te voorsien of te vermy nie.[168] Die dwang "moet de dader immers opgelegd

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156 Sien ook Van Bemmelen tap.
157 250.
158 waarmee sy natuurlik eintlik bedoel 'n absoluut verhinderde *doen*.
159 tap. Volgens haar kan ook natuurkragte so 'n fisiese onmoontlikheid veroorsaak, bv waar 'n plaas deur 'n oorstroming afgesonder word.
160 Hazewinkel-Suringa 256–257, waarvolgens die persoon wat by gelykwaardige regspligte "gewetensvol kiest . . . geen onrecht begaat, en . . . zijn optreden wordt gerechtvaardigd" (257); Van Bemmelen 213–214, wat te kenne gee dat indien die een regsplig belangriker as die ander is, die belangrikste regsplig voorkeur moet geniet.
161 Hazelwinkel-Suringa 261–262.
162 Vanhoudt en Calewaert *Belgisch Strafrecht* 2 (1976) 405. *Dwang* sluit volgens dié skrywers toeval en oormag in (tap).
163 tap, waarmee hulle erken dat onmoontlikheid ook by 'n doen as handelingsvorm kan voorkom.
164 tap.
165 "een vermindering ervan volstaat niet" (tap).
166 405–406.
167 406. Vgl 408.
168 406. "Het begrip dwang is onverenigbaar met nalatigheid of gebrek aan vooruitzicht toe te schrijven aan de dader" (tap). Sien ook 408–409, waar die woorde "vrijwillig en opzettelijk" gebesig word.

zijn" en hy mag nie aktief of passief tot die ontstaan daarvan bygedra het nie.[169] Ten slotte moet die dwang die misdryf voorafgaan of gelyktydig daarmee voorkom; dwang na die misdryf is nie genoegsaam nie.[170] Die vorme wat dwang kan aanneem, is tweërlei: Enersyds fisiese dwang of materiële oormag en andersyds psigiese dwang of morele oormag.[171] Eersgenoemde word veral veroorsaak deur natuurverskynsels, siekte en die optrede van 'n dier of 'n derde en word veral by misdade wat in terme van 'n late omskryf is, aangetref.[172] Laasgenoemde[173] vloei voort uit "de onmiddellijke dreiging van een ernstig kwaad" wat net vermy kan word deur die pleging van die strafbare daad.[174]

5 3 3 Wes-Duitsland

Onmoontlikheid word in Wes-Duitsland gangbaar onder *Pflichtenkollision* as verweer tuisgebring,[175] maar dit is dan ook min of meer waar die eenstemmigheid oor hierdie verweer ophou. *Pflichtenkollision* as verweer kan hom blykbaar in twee gedaantes voordoen, te wete as regverdigingsgrond en as skulduitsluitingsgrond, maar oor die vraag waarom en wanneer dit die een dan wel die ander is, bestaan daar reeds skerp meningsverskille.

Wat *eine rechtfertigende Pflichtenkollision* betref, is daar twee grondliggend verskillende uitgangspunte: Enersyds is daar diegene wat *Pflichtenkollision* as 'n selfstandige en afsonderlike regverdigingsgrond beskou,[176] teenoor diegene wat dit bloot as 'n verskyningsvorm van noodtoestand sien.[177] Andersyds is daar

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169 406.

170 tap. Hierdie vereiste is op een lyn met die beginsel dat die moontlikheid tot weerstand voor of ten tyde van die bepaalde daad uitgesluit moet wees (tap).

171 406–407.

172 407. Vir voorbeelde, sien 407 vn 1.

173 wat onderskei moet word van noodweer en noodtoestand (407).

174 tap. Vir 'n voorbeeld van 'n late in hierdie soort gevalle, vgl 408 vn 2.

175 Sien Welzel *Das Deutsche Strafrecht* (1969) 90 ev 184 ev; Schmidhäuser *Strafrecht AT* (1975) 476 ev; Baumann *Strafrecht AT* 1 (1977) 363 ev 479 ev; Jescheck *Lehrbuch des Strafrechts AT* (1978) 293 ev 406 ev; Lenckner in Schönke/Schröder *Strafgesetzbuch Kommentar* (1982) 401 ev 444 ev; Blei *Strafrecht 1 AT* (1983) 212 ev 331 ev; Jakobs *Strafrecht AT* (1983) 365 ev 487 ev; Maurach/Zipf *Strafrecht AT* 1 (1983) 367 ev; Samson in *Systematischer Kommentar zum Strafgesetzbuch* 1 *AT* (1983) §34 *Rdn* 26 ev; Hirsch in *Strafgesetzbuch Leipziger Kommentar* 2 (1985) *Vor* §32 *Rdn* 71 ev 200 ev, waarvan Baumann 364; Jescheck 295; Lenckner 402; Blei 331; Maurach/Zipf 425 en Samson §34 *Rdn* 29 pertinent na *Unmöglichkeit* en *impossibilium nulla obligatio* verwys. Vir die doeleindes van hierdie skrywe is dit nie nodig om op die verskillende soorte handelingspligte en regspligte wat in die Duitse reg onderskei word en hulle gradering en rangorde in te gaan nie. Vgl verder Baumann 242 280, wat *Unmöglichkeit der Gebotserfüllung* as 'n spesiale regverdigingsgrond beskou en die standpunt dat dit 'n handelingsuitsluitingsgrond of skulduitsluitingsgrond is, verwerp. Vereiste vir hierdie regverdigingsgrond, wat nie deur Baumann van *Pflichtenkollision* onderskei word nie, is 'n onmoontlike doen (gewoonlik) of late (uitsonderlik), maar skynbaar nie botsende regspligte nie. Met die uitsondering van Baumann, maak die skrywers waarna hier verwys word, geen melding van onmoontlikheid as verweer by enkel (teenoor botsende) regspligte nie, wat die vraag laat ontstaan wat die posisie by enkel regspligte is.

176 Welzel 219; Schmidhäuser 476; Baumann 363; Lenckner 401 402; Blei 334; Jakobs 366; Samsom §34 *Rdn* 27; Hirsch *Vor* §32 *Rdn* 74.

177 Jescheck 293; Maurach/Zipf 368–369, wat egter verklaar: "Dennoch weist die recthfertigende Pflichtenkollision in zwei punkten Unterschiede gegenüber dem rechtfertigenden Notstand auf. Zunächst steht der von der Pflichtenkollision Betroffene stets under *Handlungszwang*, während dies beim Notstandstäter nicht der Fall sein musz ... Zweitens

diegene waarvolgens twee botsende regspligte tot positiewe optrede (gebodsbepalings) 'n vereiste vir *Pflichtenkollision* is,[178] teenoor diegene waarvolgens 'n regsplig tot negatiewe optrede (verbodsbepaling) wat met 'n regsplig tot positiewe optrede (gebodsbepaling) in botsing kom, genoegsaam vir dié verweer is.[179] Hierdie benaderingsverskil blyk duidelik uit die omskrywing van *Pflichtenkollision* deur Jescheck:

> "Ein *Unterfall des Notstands* ist die Pflichtenkollision. Eine solche liegt vor, wenn jemand eine ihm obliegende Rechtspflicht nur auf Kosten einer anderen ihm gleichfalls obliegenden Rechtspflicht erfüllen kann, wobei die Verletzung der Pflicht, gegen die er verstöszt, eine mit Strafe bedrohte *Handlung oder Unterlassung* darstellt,"[180]

teenoor dié van Lenckner:

> "Die *Pflichtenkollision* kommt als *selbständiger Rechtfertigungsgrund* bei Unterlassungsdelikten in Betracht, wenn den Täter *mehrere Handlungspflichten* treffen, er aber nur die eine oder andere erfüllen kann."[181]

Daarbenewens is daar onder diegene wat *Pflichtenkollision* as 'n selfstandige en afsonderlike regverdigingsgrond beskou, weer skrywers wat die botsing tussen 'n negatiewe en 'n positiewe regsplig onder noodtoestand tuisbring,[182] teenoor skrywers wat ook sodanige botsende regspligte onder *Pflichtenkollision* as aparte regverdigingsgrond tuisbring.[183] Een van die weinige punte waaroor daar skynbaar eensgesindheid heers, is dat waar die beskuldigde die belangrikste[184] van twee of meer ongelykwaardige botsende regspligte nagekom het, hy hom op

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verletzt der von der Pflichtenkollision Betroffene eine Pflicht und damit ein Rechtsgut stets durch ein *Unterlassen*, während dies beim Notstandstäter nicht immer vorzuliegen braucht" (369); sien ook Hirsch *Vor* §32 *Rdn* 75, wat daaraan toevoeg: "Der sachliche Unterschied der beiden Rechtfertigungsgründe besteht in folgendem: Die rechtfertigende Pflichtenkollision setzt im Gegensatz zum Notstand nicht voraus, dasz ein Rechtsgut in Gefahr geraten ist. Zwar wird es im Strafrecht regelmäszig so liegen, dasz ein Handlungsgebot zum Schutze eines gefährdeten Rechtsguts aufgestellt ist. Aber die Pflichtenkollision ist kein spezifisch deliktsrechtliches Problem, und in anderen Rechtsgebieten wird es an einer Gefahr für ein Rechtsgut nicht selten fehlen"; *contra* Maurach/Zipf 368: "(J)ede Pflichtenkollision stellt nicht nur zugleich eine Interessenkollision dar, sondern ist auch der Güterabwägung zugänglich. Dies ergibt sich zwangsläufig aus der Objektivierbarkeit jeder Pflicht. Pflichten ohne besonderen Sachbezug sind nicht denkbar. Vielmehr ist jede Pflicht an ein bestimmtes Rechtsgut gebunden."

178 Welzel 91; Lenckner 401 402; Blei 331 332–333 334; Maurach/Zipf 367 369; Samson §34 *Rdn* 27; Hirsch *Vor* §32 *Rdn* 71 75 76, wat hier van 'n "echte Pflichtenkollision" praat. Volgens dié standpunt moet die handeling by *Pflichtenkollision* dus uit 'n late bestaan.

179 Schmidhäuser 179; Baumann 363; Jescheck 293; Jakobs 366 369. Volgens dié standpunt kan die handeling by *Pflichtenkollision* dus die vorm van 'n late of 'n doen aanneem.

180 293 (my kursivering).

181 401. Vgl Blei 332, wat hieraan toevoeg: "Eine Pflichtenkollision setzt . . . begrifflich voraus, dasz im Einzelfalle wirklich die mehreren Pflichten Geltung beanspruchen. In den problembereich der rechtfertigenden Pflichtenkollision gehören daher nicht die Fälle, in denen eine Pflicht die andere verdrängt, der Rechtsunterworfene also überhaupt nur *eine Pflicht* hat."

182 Lenckner 401 444–445, wat hier van 'n "Pflichtennotstand" praat; Blei 333; Samson §34 *Rdn* 26, wat hier van 'n "Interessenkollision" praat; Hirsch *Vor* §32 *Rdn* 76.

183 Schmidhäuser 476; Baumann 363; Jakobs 369.

184 'n Geringe verskil is genoegsaam: Jescheck 294–295; Jakobs 366; Maurach/Zipf 369; Samson §34 *Rdn* 28; Hirsch *Vor* §32 *Rdn* 78. 'n Belangeopweging geskied breedweg volgens dieselfde beginsels as dié by noodtoestand: Jescheck 294–295; Lenckner 402 444; Blei 333–334; Maurach/Zipf 369; Samson §34 *Rdn* 28; Hirsch *Vor* §32 *Rdn* 76 78.

Pflichtenkollision[185] as regverdigingsgrond ten opsigte van die nagelate regsplig(te) kan beroep.[186] Het die beskuldigde by twee of meer gelykwaardige botsende regspligte een van sy keuse nagekom, is die skrywers dit weliswaar eens dat hy *Pflichtenkollision* as verweer ten aansien van die nagelate regsplig(te) kan opper, maar verskil hulle vir sover sommiges[187] *Pflichtenkollision* ook hier as 'n regverdigingsgrond, maar ander[188] dit weer as 'n skulduitsluitingsgrond sien.[189] Het die beskuldigde geeneen van twee of meer botsende regspligte nagekom nie,[190] of 'n minder belangrike regsplig ten koste van 'n belangriker regsplig nagekom, word eenparig aanvaar dat sy nalate wederregtelik is.[191] Volgens sommige skrywers geniet 'n negatiewe regsplig, waar dit in botsing met 'n gelykwaardige positiewe regsplig kom, voorrang en kan *Pflichtenkollision* by die nakoming daarvan as regverdigingsgrond geopper word.[192] Daarteenoor ontken ander skrywers sodanige voorrang en moet daar volgens hulle by die nakoming van die een sodanige regsplig ten koste van die ander 'n beroep op *Pflichtenkollision* as skulduitsluitingsgrond gedoen word.[193]

Vir sover dit *eine übergesetzliche entschuldigende Pflichtenkollision* aangaan, kan daar ook twee denkrigtings onderskei word: Aan die een kant is daar diegene wat *Pflichtenkollision* onder bepaalde omstandighede as skulduitsluitingsgrond bestempel[194] en aan die ander kant is daar diegene waarvolgens die nie-nakoming

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185 ongeag of dit 'n aparte regverdigingsgrond of 'n verskyningsvorm van noodtoestand is en ongeag of twee botsende positiewe regspligte vereis word en of 'n negatiewe regsplig wat met 'n positiewe regsplig bots, voldoende is.

186 Welzel 91; Baumann 364 365–366; Jescheck 293–294 406; Lenckner 401–402; Blei 331 333; Jakobs 366; Maurach/Zipf 369; Samson §34 *Rdn* 28; Hirsch *Vor* §32 *Rdn* 71 75 78 79.

187 Baumann 364–365 366; Lenckner 401–402; Jakobs 366; Maurach/Zipf 369; Samson §34 *Rdn* 29; Hirsch *Vor* §32 *Rdn* 71 73 75 78 79.

188 Welzel 91 184; Schmidhäuser 476; Jescheck 294–295.

189 *Contra* Blei 334, wat beide skulduitsluiting en regverdiging verwerp en verklaar dat die beskuldigde se versuim in hierdie soort gevalle nie wederregtelik ("nicht identisch mit 'gerechtfertigt': das Recht kann hier keine Wertung treffen und enthält sich demgemäsz einer solchen") is nie. Vgl Jakobs 366, wat verklaar: "Für die Wahl zwischen gleichen Pflichten gibt es aber keine *rechtlich* verbindlichen Maximen," waaraan hy toevoeg: "Insoweit und nur insoweit stimmt die These, es gehe um einen 'rechtsfreien Raum' ... Rechtsfrei ist allein die Wahl des Lösungswegs, nicht die Bewertung des Lösungsergebnisses" (366 vn 11).

190 Die opmerking in vn 184 geld ook hier.

191 Baumann 364; Jescheck 406; Blei 333 334; Maurach/Zipf 369 426; Hirsch *Vor* §32 *Rdn* 78 81.

192 Jakobs 367; Samson §34 *Rdn* 26. Vgl Schmidhäuser 476, wat verklaar: "Soweit die Unterlassungspflicht zugunsten einer *vorrangigen* Handlungspflicht verletzt wird, kann die Verletzung der Unterlassungspflicht ... nur *gerechtfertigt* sein."

193 Jescheck 294–295. Vgl Schmidhäuser 476, wat verklaar: "*Für die Entschuldigung* bleiben ... *allenfalls die Fälle* übrig, in denen keine der in Betracht kommenden Handlungs- und Unterlassungspflichten den Vorrang hat oder in denen gar die Unterlassungspflicht den Vorrang hat, aber dann in zwar rechtswidriger, aber doch verständlicher Weise zugunsten der Handlungspflicht verletzt wird." Vgl wat lg betref ook Jakobs 487–489.

194 Welzel 184–185; Schmidhäuser 478–479; Baumann 365–366 479–481; Jescheck 294–295; Lenckner 416 444; Rudolphi in *Systematischer Kommentar zum Strafgesetzbuch* 1 (1984) *Vor* §19 *Rdn* 8; Hirsch *Vor* §32 *Rdn* 200 201, waarvolgens die beskuldigde hom egter nie op *Pflichtenkollision* as skulduitsluitingsgrond kan beroep as hy dit self geskep het nie (*Rdn* 206). Vgl ook Maurach/Zipf 426. Vir 'n bespreking van die vereistes vir *Pflichtenkollision* as skulduitsluitingsgrond, sien Welzel 185; Jakobs 488–489; Hirsch *Vor* §32 *Rdn* 203–208 en vgl Schmidhäuser 480; Rudolphi *Vor* §19 *Rdn* 8 9. Oor dwaling as skulduitsluitingsgrond by *Pflichtenkollision*, sien Jescheck 406–407; Blei 334; Hirsch *Vor* §32 *Rdn* 208.

van botsende regspligte in dieselfde omstandighede nòg geregverdig nòg wederregtelik is.[195] Die voorbeeld wat hier meer as enige ander genoem word, is dié van die geneeshere wat tydens die Nazi-bewind se genadedoodaksie enkele pasiënte in die sielsieke inrigtings waar hulle werksaam was om die lewe gebring het, om te verhoed dat hulle deur geneeshere vervang sou word wat bereid was om alle sielsieke pasiënte om die lewe te bring. Volgens eersgenoemde groep skrywers is hier van *Pflichtenkollision* as regverdigingsgrond geen sprake nie. So skryf Welzel:

> "Der strafrechtliche Notstand . . . baut auf dem Gedanken auf, dasz in Leibes- und Lebensnot der Rechtsgehorsam ein so groszes Opfer dem Täter auferlegen würde, dasz ihm ein rechtmäsziges Verhalten mit Rücksicht auf seinen Selbsterhaltungstrieb in aller Regel nicht zuzumuten ist . . . Aber die Rechtsordnung kann ihm daraus keinen Schuldvorwurf machen, dasz er geringeres Unrecht auf sich nahm, um schwereres Unrecht zu verhüten. Sie musz Nachsicht üben, weil jeder andere Rechtsgenosse an Stelle des Täters richtigerweise ebenso handeln muszte wie der Täter."[196]

Daarteenoor is hier volgens laasgenoemde groep skrywers geen sprake van *Pflichtenkollision* as skulduitsluitingsgrond nie. Jakobs stel dit soos volg:

> "Eine *Pflichten*kollision ohne gerechtfertigten Ausweg, sondern nur mit einer entschuldigenden Lösung, gibt es nicht, da das Recht nicht ein Verhalten zugleich fordern und als rechtswidrig bewerten kann, ohne sich selbst zu Widersprechen. Enthält die geschriebene Rechtsordnung dem Wortlaut nach Widersprüche, so ist deren Auflösung eine geläufige Aufgabe der Interpretation."[197]

Vereiste vir 'n geslaagde beroep op *Pflichtenkollision* as regverdigingsgrond is volgens sommige skrywers dat die beskuldigde van die regverdigende situasie bewus moes gewees het,[198] en volgens ander skrywers dat hy die een regsplig nagelaat het met die doel om die ander regsplig na te kom.[199] Daarenteen word sodanige inagneming van subjektiewe faktore by die beoordeling daarvan of die beskuldigde *Pflichtenkollision* suksesvol as regverdigingsgrond kan opper deur 'n derde groep skrywers verwerp en 'n suiwer objektiewe toets voorgestaan.[200]

5 4 Gevolgtrekking

Wat uit die voorgaande bespreking blyk, is dat onmoontlikheid as verweer in sommige regstelsels 'n taamlik stiefmoederlike behandeling ontvang het, en dat daar in dié regstelsels waar dié verweer deegliker uitgepluis is, dikwels lynreg botsende standpunte oor die aard en rol daarvan bestaan. In bykans geeneen van die bespreekte regstelsels word onmoontlikheid uitsluitlik as verweer by absolute onmoontlikheid en ten opsigte van 'n late en 'n gebodsbepaling, of as 'n regverdigingsgrond beskou nie. Inteendeel, in amper al die bespreekte regstelsels word daar uitdruklik of implisiet ruimte gelaat vir onmoontlikheid as verweer by relatiewe onmoontlikheid en ten aansien van 'n doen en 'n ver-

195 Blei 213–214; Jakobs 487–489.
196 184.
197 487.
198 Lenckner 402; Jakobs 489.
199 Welzel 185; Hirsch *Vor* §32 *Rdn* 82 207.
200 Baumann 365, waarvolgens die beskuldigde in so 'n geval aan poging tot die betrokke misdaad skuldig bevind kan word (vgl ook Blei 334), maar waarvolgens kennis aan die kant van die beskuldigde van die *Pflichtenkollision* wel 'n vereiste is indien dit as skulduitsluitingsgrond geopper word.

bodsbepaling, asook as handelingsuitsluitingsgrond en selfs as skulduitsluitingsgrond. Absolute onmoontlikheid word veelal onder die handeling en relatiewe onmoontlikheid veelal onder noodtoestand tuisgebring. In sommige regstelsels word die verweer van onmoontlikheid hoofsaaklik beperk tot gevalle van botsende regspligte, terwyl ander regstelsels ook gevalle van enkel regspligte daarby insluit. Dan ook word daar vrywel algemeen van die standpunt uitgegaan dat indien die beskuldigde self die onmoontlikheid geskep het, hy dit nie as verweer kan opper nie en soms selfs dat onmoontlikheidsbewussyn of onmoontlikheidsoogmerk 'n vereiste vir 'n geslaagde beroep op dié verweer is.

Dat daar diepliggende en verreikende verskille tussen die verskillende regstelsels en selfs binne dieselfde regstelsel oor onmoontlikheid as verweer bestaan, met die gevolg dat die vereistes vir en inhoud van dié verweer allesbehalwe wis en seker is, is dus duidelik. Behalwe vir die feit dat dit aantoon dat die doen/late/verbodsbepaling/gebodsbepaling-onderskeid tussen noodtoestand en onmoontlikheid as verwere geensins algemene erkenning geniet nie, asook dat dit glad geen uitgemaakte saak is of die onmoontlikheid absoluut moet of ook relatief kan wees, en daarmee saam of dit 'n handelingsuitsluitingsgrond, 'n aparte verweer of 'n verskyningsvorm van noodtoestand uitmaak nie, dra die onderhawige regsvergelykende ondersoek dus nie veel by tot die oplossing van die probleme wat onmoontlikheid as verweer oplewer nie.

6 STELLINGNAME

Die slotsom waartoe hier geraak word, is die volgende:

a *Gevalle van absolute onmoontlikheid behoort onder onwillekeurigheid as handelingsuitsluitingsgrond tuisgebring te word.*[201] Daarvolgens sal *vis absoluta* en outomatisme[202] nie alleen handelinge in die vorm van *commissiones* nie, maar ook handelinge in die vorm van *omissiones* uitsluit vir die doeleindes van strafregtelike aanspreeklikheid.[203] Dié voorgestelde konstruksie is volkome versoenbaar met die algemeen erkende en aanvaarde beginsel in ons strafreg dat

201 In dié mate word met Goldstein akkoord gegaan. Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 87–88 onderskryf Goldstein se standpunt met die voorbehoud dat "'n mens versigting (moet) wees om nie bloot vanweë die feit dat dit vir 'n persoon op 'n gegewe tydstip onmoontlik was om 'n gevolg te verhoed, tot die gevolgtrekking te kom dat daar geen willekeurige handeling aan die kant van die vermelde persoon was wat die gevolg veroorsaak het nie. Ondersoek mag dalk aan die lig bring dat 'n vroeëre willekeurige gedraging aan die kant van die verweerder in kousale verband staan met die relevante gevolg, bv. waar die verweerder deur 'n willekeurige gedraging die latere toestand van absolute onmoontlikheid in die lewe geroep het" (87). Daar dien op gelet te word dat die algemeen erkende en aanvaarde handelingstoets in ons strafreg (sien daaroor 4 3 hierbo) as basis vir die voormelde voorstel dien.

202 Burchell, Milton en Burchell se aangehaalde kritiek in vn 63 teen Goldstein se standpunt ignoreer outomatisme as handelingsuitsluitingsgrond by onmoontlikheid. Sien daaroor 4 3 hierbo.

203 Ook by 'n blote *toestand*, soos besit van dagga of dronkenskap in die openbaar, is situasies van absolute (en selfs relatiewe) onmoontlikheid om sodanige toestand te voorkom of te beëindig allermins moeilik voorstelbaar.

onwillekeurigheid 'n *handelings*uitsluitingsgrond daarstel en nie net 'n *doen*uitsluitingsgrond nie. Afgesien daarvan het *vis absoluta* en outomatisme in die bespreekte voorbeelde geblyk die rede vir die onmoontlikheid van die gewraakte doen of late en derhalwe die oorsaak van die onwillekeurigheid daarvan te wees.

b *Gevalle van relatiewe onmoontlikheid behoort onder noodtoestand as regverdigingsgrond tuisgebring te word.*[204] Aangesien noodtoestand onbetwisbaar ook by 'n late en bygevolg by 'n gebodsbepaling kan voorkom, dieselfde relatiewe dwang 'n doen of 'n late tot gevolg kan hê en, soos in oorweging gegee, daar by absolute dwang ook nie twee verwere, een vir 'n *commissio* en 'n ander vir 'n *omissio* bestaan nie, is 'n sinvolle onderskeid op dié basis tussen noodtoestand en relatiewe onmoontlikheid nie haalbaar nie. Uiteindelik gaan dit by relatiewe dwang om die uitwerking daarvan, naamlik *dat* dit die gewraakte doen of late tot gevolg het, eerder as om die *vorm* van die handeling wat dit tot gevolg het as sodanig.[205] Ook omskep noodtoestand as regverdigingsgrond in gevalle van 'n late nie gebodsbepalings in verbodsbepalings nie, maar brei dit bloot die aanwendingsgebied van dié regverdigingsgrond na gebodsbepalings uit.[206]

c *Gevolglik bestaan daar geen behoefte aan onmoontlikheid as 'n selfstandige en afsonderlike verweer nie.*

Bekyk 'n mens nou die beslissing in *S v Mxhosa* teen die agtergrond van die voorgaande bespreking, val die volgende op: (i) Dit is die eerste gerapporteerde beslissing in ons strafreg waarin die kwessie van botsende regspligte ter sprake gekom het. (ii) Die botsende regspligte het hier[207] 'n negatiewe regsplig (die verbod op aanwesigheid in die Kaapse Skiereiland) teenoor 'n positiewe regsplig (die gebod tot aanmelding by die polisiestasie te Langa) behels. (iii) Die hof stel die skuldigbevinding en vonnis ter syde, onder meer[208] op grond daarvan dat dit vir die beskuldigde in die betrokke omstandighede noodsaaklik was om die verbodsbepaling te oortree, asook dat dit vir hom onmoontlik was om die gebodsbepaling na te kom sonder om die verbodsbepaling te oortree.[209] (iv) Aangesien die beskuldigde hier 'n besluit kon neem en uitoefen oor welke van die twee regspligte hy wou nakom, was die onmoontlikheid of dwang om die een dan wel die ander te gehoorsaam, relatief.[210] (v) Die hof gee geen aanduiding welke van die twee botsende regspligte die belangrikste was nie, met die gevolg dat die beskuldigde enigeen van die twee sou kon nagekom het en noodtoestand

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204 In wese is dit ook wat Goldstein voorstaan. Vgl ook Van der Merwe en Olivier 88, wat eweneens gevalle van relatiewe onmoontlikheid onder noodtoestand tuisbring. Daar kan op gewys word dat selfs al sou noodtoestand onder bepaalde omstandighede as 'n skuld-uitsluitingsgrond beskou word, relatiewe onmoontlikheid in sodanige omstandighede steeds daaronder sal val.

205 Sien die polisieman- en tronkbewaardervoorbeelde onder 4 5 hierbo, waar dieselfde dwang 'n doen of 'n late tot gevolg het.

206 Vgl in dié verband vn 89.

207 anders as in die voorbeeld van Snyman 102 en die bespreking van De Wet 93.

208 Die ander grond vir die tersydestelling van die skuldigbevinding en vonnis was ontbrekende skuld (sien daaroor 1 hierbo). Ontbrekende wederregtelikheidsbewussyn sal bv voorkom by dwaling of onkunde aangaande die betrokke regsplig(te) by en die bestaan van 'n onmoontlikheidsituasie. Vir ander sake waarin 'n afwesigheid van skuld ter sprake gekom het, sien vn 60 en vgl vn 57.

209 Sien die aanhaling onder 1 hierbo.

210 Vanselfsprekend was die nakoming van albei regspligte hier absoluut onmoontlik, maar die nakoming van die een dan wel die ander was slegs relatief onmoontlik. Sien daaroor 4 7 hierbo en vgl 4 5 hierbo.

of onmoontlikheid, al na gelang van die geval,[211] ten opsigte van die nagelate regsplig sou kon geopper het; (vi) Die hof skeer vir die doeleindes van onmoontlikheid die feite waaroor hy moes beslis (verbodsbepaling/gebodsbepaling) en die botsende hofsakevoorbeeld wat hy noem, oor een kam en verklaar trouens pertinent dat die gehoorsaming van een van twee botsende regspligte[212] in albei dié gevalle die verontagsaming van die ander noodsaak. (vii) Die uiteindelike grond vir die tersydestelling van die skuldigbevinding en vonnis op grond van ontbrekende wederregtelikheid was klaarblyklik noodtoestand.[213] (viii) Die hof beskou onmoontlikheid kennelik as 'n regverdigingsgrond.[214] (ix) Die hof het die skuldigbevinding en vonnis ter syde gestel nieteenstaande die feit dat die beskuldigde (deur sy besit van 'n ongelisensieerde vuurwapen) die noodtoestand/onmoontlikheid self geskep het. (x) Die hof stel oënskynlik *bona fide*-optrede in 'n noodsituasie/onmoontlikheidsituasie as vereiste vir 'n suksesvolle beroep op dié verwere.[215]

Enkele van dié aspekte verdien kommentaar: Eerstens, of 'n mens nou die tradisionele siening van onmoontlikheid as verweer huldig, dan wel die hier voorgestelde alternatief, daar kan met die hof se bevinding saamgestem word dat dit vir die beskuldigde onmoontlik was om albei regspligte na te kom en dat hy hom gevolglik op noodtoestand as regverdigingsgrond ten aansien van die oortreding van die verbodsbepaling deur sy *commissio* kon beroep. Met een voorbehoud beteken dit dat indien die omgekeerde sou gebeur het en die beskuldigde die verbodsbepaling sou gehoorsaam en die gebodsbepaling sou verontagsaam het, hy volgens die tradisionele siening van onmoontlikheid dié verweer sou kon opper. Die voorbehoud betref diegene wat absolute onmoontlikheid as vereiste vir dié verweer stel.[216] Uit hoofde van hulle standpunt sal 'n beroep op onmoontlikheid hier[217] vanweë die relatiwiteit daarvan nie kan slaag nie. Maar ook noodtoestand sal hier uit hoofde van hulle standpunt geen verweer daarstel nie, omdat die beskuldigde 'n gebodsbepaling deur middel van 'n late oortree het. Gevolglik sal nòg onmoontlikheid nòg noodtoestand uit hoofde van hulle standpunt hier 'n verweer uitmaak, wat beteken dat die beskuldigde se *omissio* in die betrokke omstandighede by ontstentenis van 'n ander toepaslike regverdigingsgrond verkeerdelik as wederregtelik aangemerk sou moes word.

Tweedens kan hier met die hof saamgestem word dat, ongeag of dit 'n negatiewe en 'n positiewe regsplig of twee positiewe regspligte is wat met mekaar in botsing kom, die gehoorsaming van die een die verontagsaming van die ander noodsaak. Anders gestel, kom dit daarop neer dat die noodsaak om die een

211 hy die verbodsbepaling of die gebodsbepaling oortree het, itv die tradisionele siening van dié verwere.

212 In teenstelling met twee positiewe regspligte (soos in die botsende hofsakevoorbeeld) is 'n geval van twee *negatiewe* regspligte, waarin dit onmoontlik is om albei die verbode *commissiones* na te laat, moeilik voorstelbaar.

213 weliswaar gekoppel aan onmoontlikheid.

214 Sien 3 hierbo.

215 Sien die aanhaling in vn 4.

216 Sien die skrywers en beslissings genoem in vn 34, met die uitsondering van Goldstein, wat die tradisionele siening van onmoontlikheid verwerp. Sien daaroor 3 hierbo en vn 108 en 129 ivm botsende positiewe regspligte.

217 anders as uit hoofde van die standpunt van die skrywers (genoem in vn 35) wat 'n relatiewe onmoontlikheidstoets voorstaan.

regsplig te gehoorsaam, die gehoorsaming van die ander regsplig relatief onmoontlik maak. Hoe 'n mens dit ook al formuleer, die afhanklikheid van relatiewe onmoontlikheid van noodtoestand val nòg in die besondere feite nòg in die botsende hofsakevoorbeeld te ontken.[218]

Derdens het die hof tereg geen gewag gemaak van die feit dat die beskuldigde self die noodtoestand/onmoontlikheid geskep het nie. By ontbrekende voorafgaande skuld[219] en in die afwesigheid van 'n misdaad wat deur die skepping van die noodtoestand/onmoontlikheid as sodanig gepleeg word, behoort die handeling in noodtoestand/onmoontlikheid los daarvan beoordeel te word.[220]

Vierdens skyn die hof tereg 'n noodtoestandsbewussyn/onmoontlikheidsbewussyn in ag te neem. Ofskoon die vraag of doelbewuste optrede in noodtoestand 'n vereiste vir dié verweer is,[221] enigsins omstrede is, kan dieselfde nie

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218 Die versigtigheid waarmee die aangehaalde (sien 2 1 hierbo) uitsprake in *R v Canestra* (vgl *S v Adams*) en *S v Leeuw* geformuleer is en wat deur Burchell, Milton en Burchell gekritiseer word (sien vn 30), is in die lig van dié wisselwerking tussen relatiewe onmoontlikheid en noodtoestand dus bepaald nie onvanpas nie.

219 opset of nalatigheid, al na gelang die betrokke misdaad die een of die ander vereis. Sien oor voorafgaande skuld *LAWSA* par 27; Snyman 44; Visser en Vorster 48–49; Burchell, Milton en Burchell 111 vn 52; De Wet 51 vn 20.

220 waarmee die standpunte van Snyman en De Wet onder 2 4 hierbo in beginsel onderskryf word. By onmoontlikheid is ons beslissings egter andersins eenduidig dat die beskuldigde hom nie daarop kan beroep as hy dit self geskep het nie. Sien die sake waarna daar onder 2 4 hierbo en in vn 51 verwys word. By noodtoestand is daar egter gesag na weerskante toe. Gesag vir die beginsel dat die beskuldigde hom nie op noodtoestand kan beroep as hy dit self geskep het nie, is *R v Staalmeister* 1912 EDL 308 309; *R v Garnsworthy* 1923 WLD 17 21; *R v Mneke* 1961 2 SA 240 (N) 243; *S v Bradbury* 1967 1 SA 387 (A) 393 394; *S v Kibi* 1978 4 SA 173 (OK) 179; *LAWSA* par 49; Burchell, Milton en Burchell 340–341. Gesag tot die teendeel is *R v Mahomed* 1938 AD 30; *S v Pretorius* 90; *S v Adams* 799; Snyman 96; Visser en Vorster 126 (in teenstelling met hulle standpunt by onmoontlikheid); De Wet 91; Van der Westhuizen 608; Paley "Compulsion, Fear and the Doctrine of Necessity" 1971 *Acta Juridica* 205 220–221; Labuschagne 1974 *Acta Juridica* 95–96; Stoker 1979 *SASK* 80 81–82. Daar dien egter op gelet te word dat die skepping van die onmoontlikheid deur die beskuldigde natuurlik die vraag of die nakoming van die betrokke regsplig hoegenaamd onmoontlik was, mag beïnvloed. Dan ook kan daar nie sonder meer met die uitlating van wn r Le Grange in *S v Pretorius* 90 saamgestem word dat dit nie van die beskuldigde verwag sou kon word om sy regsplig teenoor sy kind te versaak indien hy tot die noodtoestand waarin die kind verkeer het, bygedra het nie. Indien dit inderdaad vir die beskuldigde redelikerwys voorsienbaar was dat die laat rondlê van die pille die spoedoortreding tot gevolg sou hê, behoort hy aan dié oortreding skuldig bevind te gewees het. Indien hy die keuse sou uitgeoefen het om sy kind se gesondheid in gevaar te stel, sou hy die belangrikste regsplig versaak het, in welke geval hy nie onmoontlikheid op 'n aanklag van moord of strafbare manslag sou kon geopper het indien die kind sou gesterf het nie. Vgl die motorongelukvoorbeeld onder 4 6 hierbo. Ten slotte, sonder om die onderhawige punt verder te debatteer, daar kan geen fout gevind word met die beginsel dat 'n motorbestuurder wat versuim om die onklaar remme van sy motor te laat herstel en deur sy nalate om betyds te rem die dood van 'n voetganger veroorsaak, aan moord of strafbare manslag skuldig bevind kan word indien hy die moontlikheid daarvan voorsien het en hom daarmee versoen het of indien dit vir hom redelikerwys voorsienbaar was nie. Trouens, selfs indien die voetganger slegs beseer word, behoort 'n skuldigbevinding aan aanranding by voorafgaande *dolus eventualis* nie uitgesluit te wees nie. By ontbrekende voorafgaande opset of nalatigheid behoort die beskuldigde hier egter onmoontlikheid as verweer mbt die voetganger te kan opper en aan die toepaslike verkeersmisdrywe skuldig bevind te kan word. Vgl ook Paley 220–221; Stoker 81–82.

221 Pertinente gesag vir onmoontlikheidsgerigtheid as vereiste vir dié verweer is te vinde in die aanhaling uit *S v Mafu* onder 2 1 hierbo. Vgl ook *R v Mostert* 269; *R v Olivier* 325; *S v Block* 315–316. Voorstanders van noodtoestandsgerigtheid as vereiste vir dié verweer

van die vereiste van 'n doelbewuste nalate weens onmoontlikheid gesê word nie.[222]

Gevolglik kan daar in breë trekke met die beslissing in *S v Mxhosa* saamgestem word. Dieselfde geld die standpunt van Goldstein.

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vervolg van vorige bladsy

is Snyman 91; Labuschagne 1974 *Acta Juridica* 103–104; Van Oosten "Wederregtelikheid – 'n Skuldtoets?" 1977 *THRHR* 90–93. 'n Teenstander daarvan is Van der Westhuizen 603 (vgl *LAWSA* par 44; Burchell, Milton en Burchell 326 vn 57; De Wet 76–77; Van Rooyen "Wederregtelikheid en Poging" *EM Hammann-Gedenkbundel* (1984) 165 172; Van der Merwe "Die Verband tussen Mens Rea en Skuld" 1976 *SALJ* 280 281–282; Morkel en Verschoor "Oor die Bedoeling om te Verdedig by Noodweer" 1981 *TRW* 73 ev, wat hulle teen 'n noodweersbedoeling as vereiste vir daardie verweer uitspreek; *contra* Van Oosten 93; Labuschagne "Die Uitskakeling van Toeval by Strafregtelike Aanspreeklikheid" 1985 *De Jure* 155 ev). Sonder om die punt enigsins te debatteer (omdat dit uiteindelik al die regverdigingsgronde raak), wil dit voorkom of 'n regverdiging van die beskuldigde se gewraakte optrede deur 'n noodsituasie/onmoontlikheidsituasie waarvan hy onbewus was of geen kennis gedra het nie en wat vir hom dus blote toeval was, die objektiewe toets vir wederregtelikheid (waarop daar in ieder geval uitsonderinge bestaan) te ver voer. Die moontlikheid van 'n skuldigbevinding aan ondeugdelike poging skyn hier ook geen bevredigende oplossing te bied nie. Vgl Van Oosten 93; Labuschagne 1985 *De Jure* 155 ev.

222 Uiteraard kom onmoontlikheidsbewussyn nie by outomatisme ter sprake nie en kan dit by *vis absoluta* ontbreek. Dit bring mee dat onmoontlikheidsbewussyn hoofsaaklik by relatiewe onmoontlikheid (noodtoestand) as vereiste gestel kan word. Vgl rp Dove-Wilson se uitlating in *Jetha v R* dat "it is clear that he (die beskuldigde) never knew, nor could have known, of the date of the meeting until long after it was held and even if he had been made aware of the date of the meeting it would have been physically impossible for him to attend."

The sale of movable property by a factor or an agent for sale and the *rei vindicatio*

JR Harker
B Com LLM PhD
Professor of Law, Rhodes University

OPSOMMING

Die Verkoop van Roerende Eiendom deur 'n Faktoor of Verteenwoordiger en die *Rei Vindicatio*

Daar word in oorweging gegee dat die beslissing in *Pretorius v Loudon* 1985 3 SA 845 (A) nie nagevolg moet word nie. Die behoefte in die handelswêreld om beperkings te plaas op die reg van 'n eienaar om sy eiendom by 'n *bona fide*-verkryger te vindiseer, word lank reeds erken; en voldoening aan hierdie behoefte is net so gebiedend in die Suid-Afrikaanse reg as wat dit in die sewentiende eeuse Holland was, of inderdaad tans in die Engelse, Amerikaanse, Franse en Duitse reg die geval is. Hierdie stelsels het dit nodig gevind om vermelde reg van 'n eienaar te beperk in omstandighede waar die *bona fide*-verkryger geregtig was om, soos 'n redelike man, aan te neem dat die persoon van wie hy die saak verkry het òf *dominium* òf 'n *ius disponendi* gehad het. Nòg die leerstuk van estoppel nòg dié van oënskynlike magtiging kan geregtigheid laat geskied in omstandighede waar die eiendom van 'n faktoor of verteenwoordiger verkry is. Daar word aan die hand gedoen dat daar voldoende gesag vir aanvaarding van die sogenaamde "factor or agent for sale"-reël in die Suid-Afrikaanse reg is.

The recent decision of *Pretorius v Loudon*[1] raises important socio-economic considerations pertaining to the right of an owner to vindicate property which has been sold by an agent to a *bona fide* purchaser, but in contravention of the instructions of the principal. The facts of the case were as follows. The respondent, Mrs Loudon, wishing to sell her BMW Cabriolet, advertised this fact in the press. On 1983-03-23, a certain Mr Jesseman, as representative of a company, Ramanch Motors (Pty) Ltd, trading under the name of JP Motors, contacted respondent's husband by telephone. Jesseman informed Mr Loudon that he had a client in Parys who might be interested in the motor car. During this conversation, Loudon, on behalf of his wife, authorised Jesseman to try to sell the car to his client in Parys. It was agreed that the car would be sold *voetstoots* for a cash price of R23 500 and that any amount for which JP Motors sold the car in excess of that amount would be retained by JP Motors as commission. It was further agreed that Mrs Loudon would deliver the BMW to Jesseman so that he could show it to his client, after which the car would be returned to Mrs Loudon. A few days later, Jesseman telephoned Mr Loudon to inform him that

1 1985 3 SA 845 (A).

his client had decided to buy the BMW and had already paid a deposit of R2 400. Jesseman explained that this amount would be paid over immediately: further, that JP Motors would prepare the car for delivery and make the necessary arrangements for the payment of the balance of the price through a financial institution before delivery of the car to the client. At the same time, Jesseman asked to be furnished with a letter declaring that Mrs Loudon was the lawful owner of the vehicle. On March 29 a letter signed by Wium, the managing director of SA Farm Investments (Pty) Ltd, of which Mr Loudon was a director, was addressed to JP Motors. This letter confirmed that a BMW 320, registration number FGG 700 T, was the sole property of Mrs JD Loudon, that it was fully paid for and that nothing was owing to any person, company or institution in respect thereof. On 31 March Jesseman handed to Mrs Loudon a cheque in the amount of R2 400, for which she gave him a receipt. She also handed to Jesseman the registration certificate of the BMW so as to place JP Motors in a position to prepare the necessary documents for transfer of ownership in the car. Thereafter, things did not go according to plan for the Loudons. Jesseman kept making excuses as to why the matter was dragging on and why the balance of the purchase price had not been paid. Ultimately, it was discovered that JP Motors had ceased to do business. Mrs Loudon then consulted her attorney. The attorney's investigation revealed that Mrs Loudon's signature had been forged on the requisite forms and that the BMW had been registered in the name of JP Motors. Further investigation revealed that the car was registered in the name of the appellant, Mr Pretorius. According to the official sales tax receipt, dated 1983-04-11, the vehicle had been sold by Independent Leasing Co (Pty) Ltd, a financial institution, to Pretorius.

What had apparently happened was that Pretorius had seen the BMW displayed for sale in the show-room of JP Motors. Pretorius, himself a dealer in heavy commercial vehicles, realised the need to make sure about the ownership of the vehicle and asked Jesseman for evidence that he would run no risk in making the purchase. Jesseman showed him the letter written by Wium, dated 1983-03-29. Pretorius was aware of the fact that the BMW was registered in the name of JP Motors. This letter apparently satisfied him that there was no danger in entering into the transaction. The letter made it clear that the respondent was lawfully entitled to sell the car and led him to believe that she could not at a later stage deny the dealer's authority to sell. He believed that the letter had been written with her approval and clothed JP Motors with authority to sell the BMW.[2] The fact that the car was registered in the name of JP Motors did not perturb him, for he said that it was not uncommon for a dealer to purchase a vehicle outright from the previous owner, have it registered in the name of the dealer and thereafter sell the vehicle to the ultimate purchaser. This practice, he said, was to avoid the purchaser's knowing what the dealer had paid for the car.[3] Satisfied that he would not run into difficulty should he decide to buy, he then negotiated a loan with Independent Leasing Company in order to be able to make the purchase. In order to give it the desired security for the repayment of the loan, Independent Leasing Company purchased the BMW from JP Motors and resold to Pretorius on hire-purchase, subject to the usual *pactum reservati*

2 856A–C.
3 856F.

dominii until the full price had been paid. Independent Leasing Company paid an amount of R20 000 to JP Motors, which effected delivery of the car direct to Pretorius on behalf of Independent Leasing Company.

The case arose out of an appeal against the decision of the court *a quo* upholding the right of Mrs Loudon, the respondent, to vindicate the BMW. The Independent Leasing Company (second appellant in the lower court) did not adduce any evidence before, and was not represented in the proceedings in, the court *a quo*. Nor was it a party to the proceedings on appeal. The appeal seems (it is not entirely clear from the report) to have been based upon two grounds: First, that if JP Motors could not be said to have actual authority to dispose of the vehicle, it nevertheless had apparent authority to do so;[4] the respondent was thus estopped from denying that ownership of the BMW had passed.[5] Secondly, that by virtue of the special rule pertaining to the sale of movable property by a factor or an agent for sale to a *bona fide* purchaser, the owner was not entitled to reclaim the property unless he compensated the purchaser in the amount of the purchase price. The defence based upon the apparent authority of JP Motors to dispose of the vehicle was rejected out of hand for two reasons. First, Rabie CJ said that appellant was faced with the problem that it was not he, but Independent Leasing Company, that had concluded the contract for the purchase of the car with JP Motors. It followed, therefore, that even if the appellant had contracted under the mistaken belief that JP Motors had authority to dispose of the car, that did not assist him. This was so, because there was nothing to show that Independent Leasing Company had contracted on the basis of or in the belief that JP Motors had authority of the respondent, Mrs Loudon, to sell the car.[6] Moreover, said the chief justice, there were allegations in the pleadings which indicated that appellant regarded JP Motors as the owner of the BMW and that it transferred ownership to Independent Leasing Co (Pty) Ltd. But, said the chief justice:[7]

> "[Daar] moet bygevoeg word dat die handelaar nooit bedoel het om namens respondent op te tree en namens haar haar eiendomsreg op die motor aan Independent Leasing oor te dra nie. Hy het die motor toegeëien en het dit verkoop en oorgedra asof dit sy eie was. Daar kan myns insiens dus nie gesê word dat respondent op grond van magtiging wat sy werklik of oënskynlik aan die handelaar sou verleen het om haar motor te verkoop, belet word om dit van appellant op te eis nie."

Clearly, had the appeal been based solely upon an application of the doctrine of apparent authority, the judgment is correct. To hold the principal bound on

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4 Incidentally, Rabie CJ correctly, it is submitted, rejected any contention that Mrs Loudon, the respondent, could be said to have conferred actual authority on JP Motors to sell and deliver the BMW to anyone. The chief justice said: "Appellant se advokaat het in hierdie hof nie betoog dat die handelaar inderdaad volmag gehad het om die BMW aan Independent Leasing te verkoop nie, en dit sou ook nie betoog kon word nie. Wat 'n handelaar se werklike volmag is, is 'n feitlike vraag en die stukke toon dat die handelaar se werklike volmag beperk was tot die sluit van 'n ooreenkoms met iemand in Parys" (858B–C). It is true that the identity of the purchaser was not a material factor in the mind of the respondent. She did not know who the client in Parys was, she had never met him and had no interest in meeting him. She was content to rely upon her instructions to Jesseman that the sale should be for cash. On the other hand, it must be borne in mind that respondent was under no obligation to sell at all. It was her right to select any one of a number of prospective purchasers and her reason for choosing one rather than another is irrelevant (see *Bird v Summerville* 1961 3 SA 194 (A) 203). Her choice was to sell to Jesseman's client in Parys.

5 858H.

6 858D–E.

7 858F–G.

the ground of apparent authority, one of the essential requirements which must be satisfied, is that the third party contracted with the purported agent in a representative capacity and not as a principal.[8] In the circumstances of the case this essential requirement was not satisfied. It seems from the pleadings that both Pretorius and Independent Leasing Company contracted on the basis that JP Motors was the owner of the BMW and that ownership was being acquired from JP Motors and not from the respondent. The contention that Mrs Loudon, the respondent, was estopped from asserting her right of ownership was also rejected. The court was not satisfied that anything which respondent had done was sufficient to create the impression that JP Motors had been appointed by the respondent to sell the BMW to simply anyone. The letter written by Wium, dated 1983-03-29, did no more than state that Mrs Loudon was the rightful owner of the vehicle.[9] The handing over of the registration certificate of the vehicle was regarded as taking the matter no further. It was not a document of title and could not be regarded as evidence of the fact that JP Motors had been appointed as agent to sell and transfer ownership of the BMW to simply anyone. Further, said Rabie CJ:[10]

> "Die handelaar het, soos reeds gesê, eiendomsoordragvorms ten opsigte van die motor op sy naam geregistreer, net asof hy die eienaar daarvan was. Hy het die registrasiesertifikaat, wat aangedui het dat die motor op sy naam geregistreer was, aan die appellant getoon, en appellant het onder die indruk gekom dat die handelaar die motor by die 'previous owner' gekoop het en die eienaar daarvan geword het. Hierdie valse indruk, wat daartoe gelei het dat appellant (soos hy sê) die motor by Independent Leasing gekoop in die geloof dat laasgenoemde die eienaar daarvan was, is deur die bedrog van die handelaar veroorsaak, en nie deur die optrede van die kant van respondent nie."

Moreover, there was no allegation of any negligence on the part of the respondent.[11] Once again, if the appeal was based solely upon the ground of estoppel, the correctness of the decision could not be queried. For the appellant to succeed on the ground of estoppel, it was essential for him to prove that respondent, by her conduct, represented or permitted the representation to be made that JP Motors was acting as her authorised agent and was negligent in permitting this erroneous impression to be created in the mind of a *bona fide* third party.[12]

The alternative ground of appeal, namely, that by virtue of the special rule applicable to the sale of movable property by a factor or agent for sale, the respondent was not entitled to reclaim the car unless she compensated appellant in the amount of the price paid, also did not meet with success. In the first place, Rabie CJ queried whether this rule, which formed part of the law of Holland in the seventeenth century, had become part of South African law and indeed whether it should be recognised as part of modern South African law. The chief justice seemed to be of the opinion that the rule had in fact been supplanted by the doctrine of estoppel and the principles applicable in our modern law of agency. Rabie CJ said:[13]

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8 See *Strachan v Blackbeard & Son* 1910 AD 282 287; *Monzali v Smith* 1929 AD 382 385.
9 859E–F.
10 859H–I.
11 859I–860B.
12 See *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 3 SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 1 SA 394 (A); *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 1 SA 441 (A).
13 860F–G.

> "Dit ly geen twyfel dat daar in die sewentiende eeu in Holland 'n reël van bogemelde aard bestaan het nie, maar ek sou huiwer om te sê dat daar vandag volkome duidelikheid oor die presiese inhoud en toepassing van die reël bestaan. Daar is ook die vraag of die reël deel van ons reg in Suid-Afrika geword het, of as deel van ons reg erken moet word, gesien veral die bestaan van die leerstuk van estoppel soos in ons regspraak erken, asook die beginsels van ons verteenwoordigingsreg."

Rabie CJ found it unnecessary to decide whether this rule was part of our law and what the precise scope of the rule was. This was so because even if it were assumed, but without being decided, in the appellant's favour that JP Motors was an agent for sale, the appellant could not succeed in preventing vindication on the part of respondent on the basis of the rule. He said:[14]

> "Die reël plaas 'n beperking op 'n eienaar se *rei vindicatio* waar hy sy saak aan 'n *institor* toevertrou en die *institor* dan die saak aan 'n *bona fide* derde verkoop en lewer. Die *bona fide* derde se besit is teen die eis van die eienaar van die saak beskerm. In die onderhawige saak het appellant nie respondent se motor by die persoon aan wie sy dit toevertrou het, gekoop nie. Dit was Independent Leasing wat die motor by die handelaar gekoop het, en appellant het dit weer by Independent Leasing gekoop. (Soos reeds hierbo gesê is, is dit nie appellant se saak dat Independent Leasing se rol sodanig was dat hy (appellant) gesien moet word as die persoon wat die motor by die handelaar gekoop het nie.) Daar is niks bekend wat 'n bevinding sou kon regverdig dat Independent Leasing as 'n *bona fide* koper beskou moet word nie, en appellant sal derhalwe ook nie kan sê dat sy besit van die motor beskerm moet word omdat hy dit aan 'n *bona fide* koper en besitter ontleen nie."

This decision cannot be supported. The difficulty arises out of the failure to recognise the need for a special rule relating to the sale of movable property by a factor or agent for sale and the erroneous assumption that the rule has been rendered redundant by the application of the doctrine of estoppel and the principles applicable to the law of agency in modern South African law. The facts of this case clearly illustrate the inability of either the doctrine of estoppel or the doctrine of apparent authority in the law of agency to do justice in circumstances where a *bona fide* third party has purchased movable property from a factor or an agent for sale, appointed by the owner to dispose of the property. This is so because the factor normally deals in his own name.[15] Likewise, in the case where an agent for sale has been appointed by the owner, there exists no compulsion on the agent to use the name of the principal in circumstances where the interests of the principal would not be prejudiced, for example, in the case of a cash sale.[16] It follows, therefore, that the third party may not even be appraised of the fact that the person from whom he makes the purchase is acting in a representative capacity. Clearly, in these circumstances the doctrine of apparent authority would be of no assistance to the third party. It is an essential requirement for the operation of this doctrine that the third party must have dealt with the purported agent as the agent of the principal and not as a principal himself. Likewise, with regard to the doctrine of estoppel, the mere fact that the owner has entrusted his property to another, is not in itself sufficient to constitute a representation on the part of the owner that the person has the authority of the owner to dispose of the property.[17] There must have been a repre-

14 863B–D.

15 See De Villiers and MacIntosh *The Law of Agency in South Africa* (1981) 220; Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 205; Gibson *South African Mercantile and Company Law* (1983) 258.

16 See Joubert *loc cit.*

17 See Joubert *op cit* 124; *Electrolux (Pty) Ltd v Khota* 1961 4 SA 244 (W). Incidentally, the

sentation made by the owner, or permitted to be made by the owner, that the person to whom the property has been entrusted is the *dominus* or has a *jus disponendi*. Furthermore, in relation to estoppel, it is essential for the third party to prove negligence on the part of the owner. To impose this burden on a *bona fide* purchaser who acquired the property from a factor or agent for sale would give rise to an unbearable situation and seriously hamper commerce and trade.[18]

It was for this reason, namely, to uphold the needs of commerce and trade, that the rule pertaining to the sale of movable property by a factor or an agent for sale, together with other exceptions to the *rei vindicatio* of the owner, arose in Europe during the seventeenth and eighteenth centuries. Some of the other examples were, for instance, the rule that stolen money could not be vindicated[19] and the rule that stolen goods purchased at an open market could not be recovered by the owner unless he compensated the purchaser in the amount of the purchase price.[20] It is true that this latter rule would now seem to have been rejected in modern South African law.[21] The rejection of the rule, however, is understandable since the sale of goods at an open market no longer forms a significant consideration in modern commerce and trade. Thus Voet 6 1 12 in discussing some of the exceptions to the right of an owner to vindicate his property says:

> "This appears to have been brought in with the object of cutting down on law suits, and especially in the interest of commercial dealings, which would be thrown into no small confusion through buyers tending to approach their purchases charily if eviction from movable property should be so readily granted to its original owners."

He continues:

> "Yet since this divorce from Roman law is propped mainly on the favour shown to commercial dealings, others have for that reason rather held that this view should only be passed if it is found to be so expressly provided by statute or is supported by long-standing usage.
>
> Thus since factors and [agents for sale][22] are of the greatest use in trading, and without them it does not go on quite regularly, it is not suprising that the rule prevails almost

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statement by Trollip J (as he then was) that "[t]he fact that the possessor is a dealer or a trader in the particular article is by itself of no significance" (247) is stating the matter too strongly. That may be the case in relation to the application of the doctrine of estoppel, but not in relation to the application of the rule relating to the sale of movable property by a factor or an agent for sale. The two English cases cited by Trollip J in support of the proposition were concerned with estoppel and not with the acquisition of movable property from a dealer or trader.

18 See Rumpff CJ in *Johaadien v Stanley Porter (Paarl) (Pty) Ltd supra* 412A–B; Amicus Curiae 1977 *SALJ* 256 257.

19 See Grotius *Inleiding* 2 3 6; Voet 6 1 8; Van der Keessel *Praelectiones ad Gr* 2 3 6; *Th* 184.

20 Voet 6 1 8; Schorer *ad Gr* 2 3 6; Van der Keessel *Praelectiones ad Gr* 2 3 6.

21 The precise position with regard to this rule in modern South African law is not clear. In *Van der Merwe v Webb* (1883) 3 EDC 97, Barry JP held that the rule had not been accepted as part of South African law. This decision was cited with approval in *Woodhead Plant and Co v Gunn* (1894) 11 SC 4 and *Kotze v Prins* (1903) 20 SC 156. However, contrast *Retief v Hammerslach* 1884 ZAR 171. The matter has not been authoritatively determined by the appellate division: see *Johaadien v Stanley Porter (Paarl) (Pty) Ltd supra* 408G.

22 Voet used the expression *institorum ac proxenatarum* which Gane translated as "factors and brokers." It seems, however, that Voet could not have meant a broker in the same sense as that used in 50 14 1 — viz a "negotiator," "reconciler," "go-between," and "intermediary." Such a person, being merely a mediator, would not normally have possession of the property nor would he be likely to conclude a contract with or for either of the parties

> everywhere that in selling off or binding the property of owners entrusted to their fidelity such persons prejudice the owners, who will not recover it unless after return of the price or payment of what was due. In other respects they consider that there should be no departure at all from Roman law in this matter."

While it is true that a man should not be lightly deprived of his right of ownership, there clearly are circumstances in which the application of the *rei vindicatio* has to be curtailed in the interest of public policy and in order to do justice between two innocent parties. In modern South African law, however, there would almost seem to be a tendency to treat the right of an owner to vindicate as something sacroscant. Thus it is interesting to note that whilst reference was made to a number of decided cases in which the rule pertaining to the sale of movables by a factor or agent for sale had been discussed or referred to,[23] Rabie CJ made no mention whatever of two South African cases in which the rule indeed found application. These are the cases of *United Cape Fisheries (Pty) Ltd v Silverman*[24] and *Akojee v Sibanyoni*.[25] It is true that in neither of these cases was the rule expressly mentioned: there can be little doubt, however, that that was the basis upon which the decision in each case was reached. Thus in *United Cape Fisheries v Silverman*, after reference to the cases of *Adams v Mocke* [26] and *Morum Bros Ltd v Nepgen*,[27] Blackwell J cited a passage out of the judgment of Baron De Villiers in *Adams v Mocke* [28] and said:[29]

> "But I do not think it necessary for me to go further into the case law on the subject or to consider the numerous cases that have been referred to by Mr. *Mendelow* in his industrious argument on behalf of the respondent in his appeal. I am prepared to base this judgment on the statement that I have already quoted and to apply this test
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> . . . unless he had so entrusted his goods under circumstances which might fairly and reasonably induce third persons to believe that the ostensible owner was the true owner, or had authority from the true owner to dispose of the goods."

The judge continued:[30]

> "[The refrigerator] was sent there with the knowledge that in the ordinary course it would be displayed for sale, exposed for sale presumably in that portion of the person's premises where goods normally were exposed for sale . . . We proceed, therefore, on the assumption

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for whom he was acting as a mediator. There is no certainty as to the precise meaning of these words in Roman-Dutch law (see De Villiers and MacIntosh *op cit* 219; Joubert *op cit* 241; *Pretorius v Loudon supra* 860E–F). In Roman Law the *institor* was the manager of a business, normally a shop, but not necessarily so (see *D* 14 3 3; Voet 14 3 1). Later, however, the tendency was to extend the meaning as widely as possible to give the third party a right of action against the employer (see Pothier *Obligations* par 82). The term *institor* tended to be equated with the Roman-Dutch *factoor* (see Voet 14 3 1; Kersteman *Hollansch Rechtgeleert Woordenboek* sv *reivindicatie* and sv *factoor*), while Grotius *Inleiding* 2 48 21 speaks of a "koopmansbewindhebber en gemagtigde." In *Adams v Mocke* (1906) 23 SC 782 788 De Villiers CJ translated the expression *institores ac proxenetae* as "agents for sale and factors." Likewise, in *Morum Bros Ltd v Nepgen* 1916 CPD 392 395, with reference to Voet 6 1 12, Juta JP talks of goods being entrusted to agents for sale and factors.

23 860J–861B.

24 1951 2 SA 612 (T).

25 1976 3 SA 440 (W); see also the comments on the case by Amicus Curiae in 1977 *SALJ* 256; Kerr 1977 *SALJ* 260.

26 *supra*.

27 *supra*.

28 *supra* 788.

29 615C–D.

30 616A–D.

> that this was part of the stock exposed for sale in the ordinary course of business, and that Mr Saks believed and was entitled to believe that it was part of the stock-in-trade. In such circumstances we think it impossible for the owner to vindicate his property. He had clothed the shopkeeper with authority to sell that refrigerator as if it were part of his own stock, and the public was not concerned with any underhand agreement or instructions passing from the owner to that shopkeeper. I find it impossible to distinguish this case from the ordinary case where goods are sent to a shopkeeper on consignment. That is to say, as between the supplier and the shopkeeper, they still remain the property of the supplier, but if they are put up with other goods on the shelves of the shopkeeper then a member of the public who makes his purchase in that shop is not put under any duty to make inquiries as to the title of the shopkeeper to sell."

Similarly, although not specifically mentioned and notwithstanding that the court speaks of the applicant's being estopped from vindicating, there can be little doubt that the rule relating to the sale of movables by a factor or agent for sale formed the basis of the decision in the case of *Akojee v Sibanyoni*.[31] In this case Nicholas J said:[32]

> "On the applicant's own case, he delivered the vehicle to Power, a firm of motor dealers, for the purpose of selling it, and he must have contemplated that Power would exhibit the vehicle for sale at its business premises with its other stock-in-trade. Power therefore dealt with the vehicle with the applicant's consent in such a manner as to proclaim that the *dominium* or *jus disponendi* was vested in it. In these circumstances, the applicant is estopped[33] from vindicating the vehicle from the second respondent who is an innocent third party (see *Electrolux (Pty.) Ltd. v. Khota and Another*, 1961 (4) S.A. 244 (W) at p. 247, and cases there cited). The applicant clothed Power with the apparent authority to sell the vehicle as if it were part of Power's own stock and he cannot set up his private instructions that Power was not to deliver the vehicle to a purchaser until the applicant had been paid the purchase price (see *United Cape Fisheries (Pty.) Ltd. v. Silverman*, 1951 (2) S.A. 612 (T))."

The overwhelming need for a special rule relating the sale of movable property to a *bona fide* third party by a factor or agent for sale appointed by the owner, it is believed, cannot be denied. The outcome in the case of *Pretorius v Loudon*[34] clearly illustrates that the doctrine of estoppel and the doctrine of apparent authority in the law of agency are simply not able to do justice to the innocent third party who has, in good faith, purchased from such an agent. In view of the doubt cast, by Rabie CJ in the *Pretorius* case,[35] upon the applicability, nay, indeed, the desirability of this rule in modern South African law, it seems apposite to look at the position in this regard in other legal systems. In the interests of commerce and trade, the major legal systems of the Western world have had, in one way or another, to provide a means of curtailing the right of an owner to reclaim the property purchased by a *bona fide* third person in similar circumstances.

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31 *supra*.
32 442F–H.
33 In the light of the decision of the appellate division in *Grosvenor Motors (Potchefstroom) Ltd v Douglas supra, Johaadien v Stanley Porter (Paarl) (Pty) Ltd supra* and *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd supra* it seems difficult to conceive how, in the total absence of any allegation of negligence on the part of the applicant, Akojee, Nicholas J could have reached his decision upon an application of the doctrine of estoppel. (However, see the comment by Amicus Curiae on the case in 1977 *SALJ* 256 259–260.)
34 *supra*.
35 860F–G.

In English law the position is regulated by the Factors' Act of 1889.[36] Section 2(1) of the Factors' Act provides as follows:

> "Where a mercantile agent is, with the consent of the owner, in possession of goods or documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

A mercantile agent is, for the purposes of the Factors' Act, defined as

> "having in the ordinary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to raise money on security of goods."[37]

There are a number of requirements which must be satisfied for the provisions of the Factors' Act to be applicable. First, the person dealing with the property must have been in possession as a mercantile agent.[38] Secondly, he must be in possession with the consent of the owner. The owner must consent to his having possession for a purpose which is in some way or other connected with his business as a mercantile agent. This has been interpreted to mean that consent to the agent's having possession, not necessarily consent to the sale, is required. It follows, therefore, that even if a sale required prior approval of the owner, but which was not obtained, the transaction would still fall within the scope of the act.[39] Moreover, since the object of the act is to protect innocent purchasers from agents who have been put in a position of being able to deal with the goods as if they had authority to do so, as a result of some conscious act of the owner, it is the act of the owner which is important, and not the state of mind of the owner. It follows, therefore, that the fact that the owner parted with possession as a result of the fraud or false pretences of the agent is immaterial to the operation of the provisions of the act.[40] Thirdly, the disposition by the agent must have been made by him in the ordinary course of business of a mercantile agent. This has been held to mean that the agent must have been acting in a way in which one would expect a mercantile agent to act — within business hours, at a proper place of business and in other respects in the ordinary way in which a mercantile agent would act.[41] Finally, the Factors' Act requires that the person acquiring the property from the agent must have acted in good faith and without notice, at the time of the acquisition, of the agent's want of authority. The test applied is an objective one. Thus if the circumstances of the particular case are such as would lead a reasonable man to believe that the agent was exceeding his authority or acting in bad faith, that would amount to notice of bad faith on the part of the third party.[42]

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36 It may be noted that although the position is now regulated by statute in English law, the Factors' Act in fact enshrines the decisions under the common law and extends the scope of the common law by making it applicable to other people. Thus the protection afforded to the *bona fide* third party is no longer confined to transactions entered into by factors, but extends to various other types of mercantile agents (see Fridman *The Law of Agency* (1976) 28.

37 s 1(1).

38 i e with one of the kinds of authority specified in s 1(1).

39 See *Astley Industrial Trust Ltd v Miller* 1968 2 All ER 36.

40 See Fridman *op cit* 224.

41 See *Oppenheimer v Attenborough & Son* 1908 1 KB 221 230–231; *Halsbury's Laws of England* (1973) vol 1 par 711.

42 See Fridman *op cit* 227; Powell *The Law of Agency* (1961) 233.

Similar provisions exist in American law. Thus the Factors' Acts of the various states previously provided that an agent entrusted by his principal with possession of merchandise for the purpose of sale or as security for advances thereon shall be deemed to be the true owner thereof so far as is necessary to validate his contract for the sale of the merchandise.[43] The provisions of the various Factors' Acts have now been largely superseded by the provisions of the Uniform Commercial Code. Thus section 2–403(2) provides that possession of goods entrusted to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business. A buyer in good faith is defined[44] as a person who buys in the ordinary course from a person in the business of selling goods of that kind, in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods. "Entrusting" for this purpose includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's dispossession of the goods have been such as to be larcenous under the criminal law.[45] The *Restatement Second, Agency* in section 175[46] and in section 201[47] contains essentially similar provisions aimed at protecting the interests of a *bona fide* acquirer of the property. These sections are almost identical in terms and provide as follows:

> "(3) If the principal delivers a chattel to a dealer in such chattels to be sold or exhibited for sale, an unauthorised sale of the chattel in accordance with the normal business practices to one who reasonably believes the dealer to be authorised to sell the chattel,[48] binds the owner although the dealer was not authorised to sell it without the consent of the owner, or was not authorised to sell it to the person to whom it was sold, or at the price at which it was sold."

It will be noticed that both English and American law have far-reaching provisions which aim at providing protection to the *bona fide* acquirer of property from an agent whom, by the very nature of his business, the purchaser was entitled to assume was the *dominus* or had a *jus disponendi*. These provisions are instructive for, it is submitted, they would clearly have covered the factual situation which arose in the *Pretorius v Loudon* case.[49] Moreover, they provide ample persuasive authority for the meaning to be attributed to an "agent for sale" for the purposes of South African law.[50]

French and German law have no special rule pertaining to the sale of movable property by an agent who is a factor or an agent for sale. This is because of the limitations which are placed on the right of an owner to vindicate his property in circumstances where he has voluntarily parted with possession to a person

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43 *Williston on Contracts* (1967) vol 10 s 1288A; *Restatement Second, Agency* s 175 comment (d).
44 in s 1–201(9).
45 s 2–403(3).
46 This section deals with the situation where the existence of the principal is known to the third party.
47 This section deals with the situation where the third party believes the agent to be the owner of the property, i e with the case of an undisclosed principal.
48 The difference is that s 201 provides that the third party reasonably believes the dealer "to be the owner."
49 *supra*.
50 See *infra*.

who, in breach of confidence, disposed of the property to a person who took in good faith. The history of this rule in French law is instructive. French law, initially, true to the Germanic principle expressed by the maxim *mobilia non habent sequelam*, did not permit the owner of a movable to follow the property into the hands of a *bona fide* third person. With the reception of Roman law, however, the right of the owner to vindicate his movable property came to be established. In the result, the *mobilia non habent sequelam* rule was confined in its application to mortgagees. With the triumph of the right of the owner to vindicate, however, it came to be recognised in the seventeenth century that the availability of the *rei vindicatio* against third parties who had acquired the property in good faith hampered commercial activity. Two lines were followed in an attempt to combat the disastrous effects of the reception of the right of vindication of movables. First, various jurists sought to reduce the duration of the right of action granted to the owner.[51] Secondly, by the eighteenth century it came to be recognised that the owner lost the right to vindicate

> "whenever the owner had confided his thing to a third party and the latter had irregularly disposed of it. This hypothesis, formerly called the violation of deposit, has been called by modern French law, abuse of confidence. The owner who is the victim of abuse of confidence, is limited to a personal action against the unfaithful borrower, depositary."[52]

Article 2279 of the French Civil Code provides as follows:

> "Possession is equivalent to a title with respect to personal property.
>
> Nevertheless, a person who has lost a thing, or from whom it has been stolen, can claim it from the person in whose hands he finds it, during three years from the day of the loss or of the theft; but the latter has a remedy against the individual from whom he has received it."[53]

In a comment upon the article Planiol and Ripert point out:[54]

> "The law denies the owner any action against this third party. It does not say so clearly. The history of our old adjudged cases has, however, shown that such was the meaning of the maxim 'as regards movables possession is equivalent to title.' It set forth in an enigmatic form, precise and well known solutions. The presence of this maxim in the Civil Code is therefore tantamount to the maintenance, in its entirety, of the entire previous jurisprudence. To give to the law a clearer formula it would have been better to say something like this: 'Movables confided to a third party may not be followed.' "

Moreover, it may be noted that whilst, as a general rule, the right of the owner to vindicate is retained in cases where he did not voluntarily part with possession, but the movable property was stolen or lost, certain exceptions to this rule are recognised in the interest of commerce and trade. Thus in terms of article 2280 of the French Civil Code, the owner is entitled to reclaim his property only from a possessor who bought it at a fair or at an open market or at a public sale or from a tradesman selling similar goods upon reimbursement of the price paid by the purchaser for the property. To defeat the claim of the owner for the property, there are two requirements with which the third party must comply. First, he must in fact be in possession of the property. Secondly, he must have acquired the property in good faith. This requirement is not expressly stated in article 2279, but it is in article 1141, which is in fact merely a special application

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51 See Planiol and Ripert *Treatise on The Civil Law* 12 ed vol 1 part 2 par 2468 (translated by Louisiana State Law Institute).

52 Planiol and Ripert *op cit* par 2469.

53 Revised ed translated by Henry Cachard (1930).

54 *op cit* par 2478.

of the general principle stated in article 2279.[55] Moreover, since the rule was introduced in the interests of commerce,

> "[t]he present view that the rule safeguards solely those acquisitions that have been made in good faith, is thus undoubtedly correct."[56]

The position is essentially the same in German law. Thus section 929 of the *BGB* provides:

> "[F]or the transfer of ownership of a movable thing, it is necessary that the owner of the thing deliver it to the acquirer and that both agree that the ownership be transferred. If the acquirer is in possession of the thing, the agreement on transfer of ownership is sufficient."[57]

Section 932 deals with the acquisition of a movable from an unauthorised person. It is in this section provided that

> "(1) By virtue of a transfer effected in accordance with s 929, the acquirer also becomes the owner when the thing does not belong to the seller, unless he is not in good faith at the time when, by virtue of these provisions, he would acquire ownership. In case s 929, Sent. 2 applies this, however, is applicable only if the purchaser had obtained possession from the disposer.
>
> (2) The acquirer is not in good faith if he knows, or owning to gross negligence does not know, that the thing does not belong to the disposer."

Like French law, German law preserves the right of the owner to recover his property in those circumstances in which he had not voluntarily parted with possession to someone, who in breach of good faith, disposed of the property, but when the property was lost or stolen from him. This right of the owner, however, is qualified to the extent that the right to recover lost or stolen property does not apply to money, bearer instruments or to things which are sold by public auction.[58]

In conclusion, it is submitted that the decision of the court in *Pretorius v Loudon*[59] cannot be supported. The need to place limitations on the right of the owner to vindicate his property in the hands of a *bona fide* acquirer, in the interests of commerce and trade, has been long recognised. This need can hardly be less compelling in modern South African law than it was in seventeenth century Holland or indeed, than it is in English, American, French and German law. These major legal systems of the Western world have found it necessary to limit the right of an owner to recover his property from a *bona fide* acquirer in circumstances in which he was entitled, as a reasonable man, to assume that the person from whom he made the acquisition either had *dominium* or a *jus disponendi*. It is submitted that there was ample authority for the application of the so-called 'factor or agent for sale rule' in South African law. It is true, as was pointed out[60] by Rabie CJ, that the scope and application of the rule has never been authoritatively determined in our law, but was this not an ideal opportunity for the scope and application of the rule to have been authoritatively laid down for South African law? The rule, after all, is based upon considerations of equity and justice. For as Voet states:[61]

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55 *op cit* par 2479.
56 per Planiol and Ripert *loc cit*.
57 Translated by Forrester, Goren and Ilgen (1975).
58 See s 935.
59 *supra*.
60 860G.
61 6 1 12.

> "Nor is such a view devoid of all ground of fairness. It is certain that an owner should blame his own pliability in having entrusted the use, care, safekeeping or detention of his property to one so evil-minded, whose reliability he had not yet investigated; and that he ought not to have been ignorant of the condition of the person with whom he was contracting. And if perchance he is not able to obtain indemnity from those to whom he had entrusted his movable property, he ought not to count that as damage for which he was himself the first to give cause through his own excessive trustfulness and rashness."

Whatever might have been the position in Roman-Dutch law,[62] the term *factor* has a fairly clearly defined and accepted meaning in South African law.[63] There is ample persuasive authority to be found in other legal systems for the meaning to be attributed to an *agent for sale* for the purposes of modern South African law — "mercantile agent" of the English law;[64] "dealer in similar chattels" in American law;[65] a "tradesman selling similar goods" in French law.[66] Further, there are clear examples to be found in our own decided cases of the sort of person who would be regarded as falling within the scope of the expression for the purposes of modern South African law.[67] Indeed, Rabie CJ was prepared to assume, without deciding, that JP Motors was to be regarded as an "agent for sale" for the purposes of the case.[68] As we have seen, however, it was held that Pretorius could not succeed on the basis of the application of the rule since he did not himself purchase the BMW from JP Motors; further that Independent Leasing Company could not be treated as a *bona fide* purchaser. It is difficult to understand upon what grounds the court came to the conclusion that Independent Leasing Company could not be regarded as a *bona fide* purchaser. There is no indication contained in the report as to what it was that led the court to this conclusion. Was it because Independent Leasing Co (Pty) Ltd did not purchase the car on the basis of a belief or on the understanding that JP Motors was acting in a representative capacity on behalf of the respondent, Mrs Loudon, and for that reason could not be regarded as a *bona fide* purchaser for the purpose of the application of the rule relating to the sale of movable property by a factor or agent for sale? That surely could not be a relevant consideration in the application of the rule. It certainly is relevant in so far as the application of the doctrine of estoppel and the doctrine of apparent authority of an agent is concerned, but not in the case of the sale of property by a factor or agent for sale. The very object of the rule is to protect the innocent purchaser in circumstances in which he is entitled, as a reasonable man, to assume that the person from whom he makes the acquisition is either the *dominus* or has a *jus disponendi.*

The outright rejection of the rule which was recognised in seventeenth century Holland[69] would seem to be a retrograde step, especially since the principles of Roman-Dutch law have displayed tremendous resilience and have proved to

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62 See n 22 *supra.*
63 See De Villiers and MacIntosh *op cit* 219; Joubert *op cit* 241; Gibson *op cit* 258; *Norman's Purchase and Sale in South Africa* (1972) 413.
64 See n 13 *supra.*
65 See n 15 *supra.*
66 See n 18 *supra.*
67 *Morum Bros Ltd v Nepgen supra* 404; *United Cape Fisheries (Pty) Ltd v Silverman supra; Akojee v Sibanyoni supra.*
68 862J.
69 Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 669.

be capable of adapting themselves to meet the needs of modern society.[70] Clearly the precise scope and application of the rule will have to be worked out in future decisions of the courts. For instance, what is the effect of the application of the rule? Does ownership in the movable property in fact pass to the *bona fide* acquirer of the property, as is the position in French, German, English and American law? That would seem to the case according to Voet 14 3 4 and Van der Keessel.[71] On the other hand, Voet 6 1 12 seems to be of the opposite opinion, for he says that the owner is nevertheless entitled to reclaim the property, provided that he compensates the *bona fide* purchaser in the amount of the price paid.[72] If this is the rule to be applied in South African law, a further complication may arise. In a case such as that of *Pretorius v Loudon*, what is the price which must be restored by the owner seeking to vindicate his property — the price paid by the person who acquired the property from the factor or agent for sale (in this case Independent Leasing Company) or the price paid by the person in possession and against whom the vindicatory action is instituted?[73]

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70 Voet 6 1 12; Van der Keessel *Praelectiones ad Gr* 2 3 5. Van der Keessel 368 n 14 indicates several decisions of the court of Holland to this effect.

71 *Praelectiones ad Gr* 2 3 5; see also *Morum v Nepgen supra* 396–397. See also Delport and Olivier *Sakereg Vonnisbundel* (1981) note to case 132 at 333–334 (1981).

72 See *Barclays Western Bank Ltd v Fourie* 1979 4 SA 157 (C) 161A–162E. Watermeyer J, with reference to Voet 6 1 12, said: "Indeed, the reference to the owner's ability to get back his goods provided he refunds the price paid would seem to indicate that he does not lose *dominium*" (162D). This is the position in French law where *stolen* goods are acquired by a *bona fide* acquirer at a fair, or at a market, or at a public sale, or from a tradesman selling similar goods (see a 2280 of the French Civil Code; Planiol and Ripert *op cit* par 2486; *Amos and Walton's Introduction to French Law* (1967) 114. Kerr, 1977 *SALJ* 260 265 on the other hand, prefers the view expressed by Voet in 14 3 4 to the effect that ownership in fact passes to the acquirer.

73 See in this regard Planiol and Ripert *op cit* par 2486.

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Dominium, possessio en *detentatio* in Antonius Gomezius se kommentaar op die *leges Tauri*[1]

AJ van der Walt
B Jur Honns (BA) LLB LLD
Senior Lektor, Potchefstroomse Universiteit vir Christelike Hoër Onderwys

SUMMARY

Dominium, Possessio* and *Detentatio* in Gomezius's Commentary on the *Leges Tauri

Antonius Gomezius's commentary on the *leges Tauri* offers an interesting analysis of the relationship between *dominium, possessio* and *detentatio* in the sixteenth century. Contrary to the *communis opinio* of the medieval Romanists, *dominium* is limited to *dominium directum*, and *possessio* to *possessio civilis*. As a result *detentatio* is seen as a physical relationship that does not qualify as *dominium* or *possessio*. Accordingly *detentatio* is unprotected. Although Gomezius is sometimes classified as one of the Spanish scholasticists of the sixteenth century, or as one of the authors practising the *mos Italicus* of the sixteenth century, his analysis seems to be most closely related to the humanist *mos Gallicus* of the sixteenth century.

1 INLEIDING

Antonius Gomezius (Antonio Gomez), een van die geleerdes wat tydens die sestiende eeu die Universiteit van Salamanca in Spanje beroemd gemaak het, is in 1501 gebore en tussen 1562 en 1572 oorlede.[2] Hoewel Gomezius een van die belangriker Spaanse juriste van die sestiende eeu was, is sy werke tot op hede in Suid-Afrika relatief onbekend. Van Zyl[3] vermeld Gomezius se naam op vier verskillende plekke, maar behandel nie sy werke as sodanig nie.[4] Roberts vermeld slegs twee uitgawes van Gomezius se bekendste werk, naamlik die *Commentariorum variarumque resolutionum juris civilis communis et regii tomi tres*.[5] Visser[6] vermeld Gomezius onder die Spaanse skrywers waarop Hugo de

1 Die navorsing wat vir hierdie artikel onderneem is, is onder andere deur die finansiële steun van die volgende instansies moontlik gemaak: die Getrouheidswaarborgfonds vir Prokureurs, Notarisse en Transportbesorgers, die Raad vir Geesteswetenskaplike Navorsing, en die Komitee vir Buitelandse Betrekkinge (Potchefstroomse Universiteit vir Christelike Hoër Onderwys).

2 Sien Roberts *A South African Legal Bibliography* (1942) 134.

3 *Geskiedenis van die Romeins-Hollandse Reg* (1979).

4 Vgl Van Zyl 193 vn 202 270 313 364.

5 Vgl Roberts 134, waar die uitgawes van 1597 (Frankfurt) en 1615 (Antwerpen) vermeld word.

6 "Die Invloede op Hugo de Groot" 1983 *THRHR* 136–150 140.

Groot (1583–1645) hom beroep het, maar deel ook niks verder oor sy werke mee nie. In twee onlangse proefskrifte het Olivier[7] en Davel[8] in verskillende kontekste na Gomezius se *Commentariorum variarumque resolutionum juris civilis communis et regii tomi tres* verwys.[9] Dit wil egter voorkom asof geen Suid-Afrikaanse outeur nog na Gomezius se *Ad leges Tauri commentarius* verwys het, of daaraan aandag geskenk het nie. Tog bevat hierdie werk 'n uitgebreide behandeling van die onderlinge verband tussen *dominium, possessio* en *detentatio*, wat vir sowel die eksterne as die interne regsgeskiedenis, maar ook vir die moderne reg, interessant is. Dit is die doel van hierdie artikel om aspekte van Gomezius se standpunte in hierdie verband wyer bekend te stel.

Gomezius se kommentaar op die *leges de Toro*, die plaaslike reg van Toro,[10] is aanvanklik in 1552 in Salamanca onder die titel *Opus praeclarum et commentum super legibus Tauri* (*ad leges Taurinas collatio iuris Hispanici cum vetere Romano*) gepubliseer. Daarna het dit, met periodieke titelwysigings, talle uitgawes dwarsdeur Europa beleef.[11] Bloot op basis van die verskillende uitgawes beoordeel, lyk dit asof Holthöfer[12] se stelling dat Gomezius se werk dwarsdeur Europa bekend was, vir beide bogenoemde werke moet geld. Tog is die afwesigheid van verwysings na sy kommentaar op die *leges Tauri* nie net in die moderne Suid-Afrikaanse literatuur nie, maar ook in die historiese bronne sedert die sestiende eeu opvallend. Daar kan dus aanvaar word dat hierdie kommentaar weinig direkte invloed op latere skrywers uitgeoefen het. Die standpunte daarin gestel, is nietemin interessant en verteenwoordig waarskynlik 'n bepaalde denkstroming van die sestiende eeu.

Gomezius se plek in die nogal komplekse versameling van skole en groepe juriste gedurende die sestiende eeu is op sigself problematies. Van Zyl[13] en Visser[14] vermeld Gomezius saam met 'n groep Spaanse geleerdes, wat gewoonlik as die Spaanse laat-skolastici of moraalfilosowe bestempel word, maar sonder om hom uitdruklik 'n moraalfilosoof te noem. Van Zyl[15] skep trouens die indruk dat Gomezius in die geledere van die skrywers oor die natuurreg tuishoort. Davel[16] noem Gomezius, ook in die geselskap van laat-skolastici soos Leonardus Lessius (1554–1623) en Domingo de Soto (1494–1560), 'n lid van die Spaanse natuurregskool. Daarteenoor behandel Olivier[17] Gomezius as een van die Spaanse

7 *Die Aksie weens die Ralatige Veroorsaking van Pyn en Lyding – 'n Regshistoriese Ondersoek met 'n Regsvergelykende Ekskursus* (1978, Leiden).

8 *Die Dood van 'n Broodwinner as Skadevergoedingsoorsaak* (1984, Pretoria).

9 Olivier 116–117 behandel Gomezius se standpunt oor die *liberum corpus*-reël mbt geldelike vergoeding vir pyn en lyding; Davel 122–123 behandel Gomezius se standpunt oor die aansprake van persone wat deur 'n oorledene onderhou is vir die verlies wat uit sy dood voortvloei. Albei outeurs verwys na die uitgawe van Venesië (1572).

10 Toro is noord van Salamanca, in die provinsie Léon, geleë.

11 Dit is tussen 1552 en die agtiende eeu in Frankfurt, Keulen, Antwerpen, Lyon, Genève, Maastricht en Venesië gepubliseer; vgl daaroor verder Holthöfer *Die Literatur zum gemeinen und partikularen Recht in Italien, Frankreich, Spanien und Portugal* in Coing red *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* (1977) vol 2 deel 1 103–499 305. Vir doeleindes van hierdie artikel is die uitgawe van Keulen (1628) geraadpleeg.

12 153.

13 193 vn 202 270.

14 136 140.

15 270.

16 122.

17 116.

praktisyns wat in die geledere van die beoefenaars van die *mos Italicus* gedurende die sestiende eeu tuishoort. Op hierdie probleem word hieronder weer teruggekom.

Die gedeelte van Gomezius se kommentaar op die *leges Tauri* waarin hy die verband tussen *dominium, possessio* en *detentatio* behandel, word in sy kommentaar op *lex* 45 aangetref. *Lex* 45 handel oor die sogenaamde *maioratus* of eersgeboortereg. Verskeie plaaslike regstelsels het in hierdie verband 'n eiesoortige reëling getref om vir die behoud van die eersgeboortereg voorsiening te maak.[18] Die bepaling wat in *lex* 45 vervat is, kom daarop neer dat sowel *civilis possessio* as *naturalis possessio* van die sake waarop die eersgeboortereg betrekking het, onmiddellik by die dood van die houer van die eersgeboortereg, sonder enige verdere handeling of daadwerklike inbesitname, op die opvolger van die eersgeboortereg oorgaan. Dit geld selfs waar besit tydens die lewe van die vorige besitter deur iemand anders afgeneem is of aan iemand anders oorgedra is.[19] In die loop van sy kommentaar op hierdie reëling maak Gomezius verskeie interessante opmerkings oor die onderlinge verband tussen *dominium*, *possessio* en *detentatio*.

2 DIE VERBAND TUSSEN DOMINIUM, POSSESSIO EN DETENTATIO IN GOMEZIUS SE KOMMENTAAR OP LEX 45

Gomezius se bespreking van *lex* 45 word ingelui met 'n verwysing na Bartolus de Saxoferrato (1313–1357) se omskrywing van *dominium*:[20]

> "Et istud dominium sic declaratum de quo loquimur, est ius de re corporali perfecte disponendi nis lege prohibeatur."

In 'n daaropvolgende passasie wyk Gomezius egter wesenlik van Bartolus se benadering tot *dominium* af wanneer hy die eienaar se *vindikasiebevoegdheid* as dié kenmerkende eienskap van die werklike eienaar uitsonder:[21]

> "Item etiam subinfertur quod ille qui est dominus rei potest eam a quocunque possessore vendicare, modo habeat titulum, modo non, mediante actione reali vendicationis per quam declaratur dominus, et in consequentiam fit restitutio rei."

In hierdie konteks is dit vanselfsprekend dat Gomezius net één soort eiendomsreg kan erken: dit is onmoontlik om die vindikasiebevoegdheid aan meer as een eienaar ten aansien van dieselfde saak te verleen sonder om die onderlinge

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18 Vgl Feenstra *Romeinsrechtelijke Grondslagen van het Nederlands Privaatrecht – Inleidende Hoofdstukken* (1984) 284.

19 Gomezius verskaf ter inleiding van sy bespreking beide die Spaanse en die Latynse tekste van die *lex*: "Mandamos que las cosas que son de mayorazgo, agora sean, villas, o fortalezas, o de otra qualquier calidad que sean, muerto el tenedor del mayorazgo, luego, sin otro actoo de reprehension de possession se trapasse la possession civil y natural en el siguiente en grado que segun la disposicion del mayorazgo deviere succeder en el aun que aya otro tomado la possession dellas en vida del tenedor del mayorazgo, o el muerto, o el dicho tenedor le aya dado possession dellas. Id est: Praecipimus ut rerum quae sunt maioratus, sive oppida sint, sive arces, aut cuiusuis alterius qualitatis, defuncto maioratus possessore, statim absque ullo alio reprehensibilis possessionis actu civilis et naturalis possessio transferatur in sequentem in eo gradu, qui iuxta dispositionem maioratus successurus in eo est, etiam si quisquam alius possessionem earum (arcium sive oppidorum) vivente maioratus possessore ceperit, aut defunctus sive possessor earum possessionem tradiderit."

20 *Commentarius* 45 n 5. Alle verwysings na Gomezius wat hierop volg, het op *Commentarius* 45 betrekking, en daar word dus met die verwysing van die betrokke numerus volstaan. Vgl Bartolus op *D* 41 2 17 1 n 4: "Dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur."

21 n 5.

toepassing daarvan te reël. In hierdie opsig wyk Gomezius wesenlik af van Bartolus se benadering tot *dominium*, aangesien Bartolus sy omskrywing van *dominium* uitdruklik op drie soorte eiendomsreg betrek het.[22] Gomezius laat hom dan ook in soveel woorde oor die sogenaamde verdeelde eiendomsbegrip van Bartolus uit:[23]

> "An sit autem duplex dominium directum et utile aut unum tantum sit, est controversum inter doctores et Bartolum. Sed unicum tantum dominium esse in puncto iuris posset defendi cum Duarenus."

Dit is onduidelik waarop die *controversum* waarna Gomezius verwys, presies betrekking het. Henricus Hostiensis (–1271) het weliswaar reeds in die dertiende eeu, met verwysing na Jacobus Balduinus (–1235), verklaar dat "dominus meus dicit quod utile dominium est chimaera,"[24] en dit is bekend dat Bartolus[25] terloops die opmerking gemaak het dat 'n bepaalde groep juriste teen die gedagte van 'n verdeelde eiendomsbegrip gekant was, maar dit is onduidelik wie die betrokke groep presies was. Siende dat een van die vroegste lede van die skool van Orléans (die *Ultramontani*), naamlik Guido de Cumis, 'n leerling van Balduinus was, is dit seker redelik om te veronderstel dat die verwysing op die *Ultramontani* betrekking het. Meynial[26] veronderstel dan ook inderdaad dat dit die geval is, maar Feenstra[27] het oortuigend aangetoon dat die *Ultramontani* die verdeling van *dominium* wel aanvaar het. Hoe dit ook al sy, Gomezius val op Bartolus se verwysing na die debat oor *dominium utile* terug, en aanvaar self dat daar slegs een *dominium* bestaan.[28]

Gomezius lig sy argument in hierdie verband toe aan die hand van 'n onderskeid tussen eiendomsreg aan die een kant, en blote fisiese beheer aan die ander kant. Sodoende konstrueer hy 'n baie duidelike tweedeling tussen *dominium* enersyds, en *detentatio* anderyds:[29]

> "Sed unicum tantum dominium esse in puncto iuris posset defendi cum Duarenus. Alias dixi quod est detentatio, et illa nihil aliud est quam sola, nuda, et simplex insistentia rei quae consistit in facto, ex qua nec dominium nec possessio aliqua resultat propter qualitatem personae vel rei, vel ex ipsa natura actus."

Die ooreenkoms van Gomezius se onderskeid tussen *dominium* en *detentatio* met Bartolus se onderskeid tussen *dominium* en *possessio* is opvallend, aangesien

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22 Bartolus op *D* 21 2 39 1 n 3: "Tria sunt dominia, directum et utile et quasi dominium." Die sg funksionele verdeling van eiendomsreg was sedert die Glossatore gebruiklik; vgl verder daaroor Feenstra *Les origines du dominium utile chez les Glossateurs* in Feenstra *Fata iuris romani – études d'histoire du droit* (1974) 215–259 (oorspronklik in *Flores legum HJ Scheltema, Antecessori Groningano, oblati* (1971) 49–93).

23 n 5–6.

24 Verwysings by Feenstra *Origines* 241–242; Meynial *Notes sur la formation de la théorie du domaine divise (domaine direct et domaine utile) du XIIe au XIVe siécle dans les romanistes – étude de dogmatique juridique in Mélanges Fitting* (1908) vol 2 409–461 (herdruk 1969) 426. Vgl dieselfde passasie in die sg "pseudo Summa super feudis" van Hugolinus, soos gepubliseer deur Palmieri (*Summa feudorum* van Jacobus Columbi, in 1892 deur Palmieri op naam van Hugolinus uitgegee in *Bibliotheca iuridica medii aevi* Bologna 2 181–194; vgl Feenstra *Origines* 241 vn 158). Vgl verder Franciscus Liparulus Partenopeius se aantekening *utilis dominus* by Odofredus *Summa in usus feudorum* (1584) 61, waar Hostiensis se opmerking ook vermeld word.

25 Bartolus op *D* 41 2 17 1 n 4.

26 427–428.

27 *Origines* 253–259.

28 Vgl die enersluidende standpunt van die laaste van die Post-Glossatore, Jason de Mayno (1435–1519) op *D* 41 2 3 4 n 16: "Dominium utile non est verum, et proprium dominium."

29 n 5–6.

albei die bloot feitelike *insistentia rei* met *dominium* kontrasteer.[30] Streng gesproke tref Gomezius dus 'n uitputtende onderskeid tussen eienaars en alle ander persone wat beheer oor 'n saak uitoefen: daar kan slegs een eienaar wees, en alle ander persone kan slegs *detentatio* van die saak verkry. Die eienaar word daaraan uitgeken dat hy oor die *ius vindicandi* beskik. Die feit dat iemand slegs *detentatio* en nie *dominium* nie van 'n saak vestig, kan herlei word na òf die betrokke persoon se kwaliteite, òf die betrokke saak, òf die betrokke oordragshandeling.

Op basis hiervan onderskei Gomezius die volgende groepe *detentatores*:

a Diegene wat 'n saak sonder geldige titel ontvang.[31]

b Persone soos die *commodatarius*, die *depositarius* of die *locator*, ten aansien van wie die bedoeling nie is om *dominium* oor te dra nie, maar slegs fisiese beheer.[32]

c Die oordragnemer wat nie *possessio* verkry het nie.[33]

d Persone soos die *procurator*, die *tutor*, die *colonus*, die *inquilinus*, die *filius* en die *servus*, wat die saak vir of namens die *dominus* hou of beheer.[34]

e Die *possessor naturalis* wie se beheer versteur word, sonder dat die *possessor civilis* se *possessio* verlore gaan.[35]

f Persone soos diegene wat die saak bloot vir sekuriteitsdoeleindes beheer of hou.[36]

g Die ontvanger van 'n saak wat onbevoeg is om *possessio* te vestig omdat die nodige wilsbevoegdheid ontbreek.[37]

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30 Vgl Bartolus op *D* 41 2 1 *pr* n 8–10, waar *possessio* in al drie sy verskyningsvorme (*possessio civilis, possessio naturalis, possessio corporalis*) as die *ius insistendi rei* omskryf word.

31 n 7: "prius actus est, quando quis simpliciter tradit alteri suam rem nullo titulo, vel causa determinata nec expressa: quia tunc sola detentatio transit in accipientem, et non sit translatum dominium nec possessio in accipientem."

32 n 8: "Secundus casus, in quo solo detentatio transit ex traditione vel apprehensione secuta, est quando expressa traditur res ex causa vel titulo non habili ad translationem dominii: ut si traditur ex causa commodati, vel ex causa depositi, vel ex causa locationis: cuius ratio est, quia traditio tantum fuit facta ad usum vel custodiam, et non respectu alterius plenae acquisitionis."

33 n 8: "Tertius casus in quo sola detentatio transit in accipientem est, quando utraque possessio rei est occupata. Modo per ipsum dominum, modo per alium quemlibet possessorem rei, et utramque possessionem retinet: quia est praesens et sic est in ipsa re: vel dato quod non sit actualiter in ea, est in conspectu vel est propre rem, taliter quod cito posset ingredi: quo casu utramque possessionem dominus vel possessor retinet."

34 n 8: "quando utramque possessionem habeo mediante persona alterius, ut per procuratorem, tutorem, colonum, inquilinum, filium vel servum: quo casu etiam eis existentibus in absentia rei retineo utramque possessionem. Utrobique commun. opin. isto ergo casu si forte res occupetur ab aliquo vel per alium sibi tradatur, nulla possessio transit in accipientem, sed tantum sola nuda et simplex detentatio."

35 n 8: "quando utraque possessio est penes duos, quia unus habet civilem alius naturalem, ut in eo qui est ingressus naturalem vacantem, retenta civili possessionem per alium in absentia, vel in proprietario et fructuario, vel in precario rogante, vel in similibus casibus, nam in his casibus et similibus, si dicta res occupetur per aliquem terium, vel sibi tradatur ab alio, quam a possessore, sola transit detentatio."

36 n 9: "quando iudicis authoritate causa custodiae, indemnitatis, vel causa rei et iuris conservandi traditur aliqua res: quibus casibus talis missus non consequitur possessionem rerum, sed tantum nudam detentationem."

37 n 10: "ut puta servus cui res tradita est quando persona recipiens non est capax possessionis, sed tantum nudae detentationis."

h Persone wat die saak van die *possessor maioratus* verkry en nie *possessio* nie, maar slegs *detentatio* daarop vestig, weens die aard van die betrokke saak.[38]

Uit bogaande uiteensetting van die onderskeid tussen *dominium* en *detentatio* blyk reeds dat daar by Gomezius 'n onlosmaaklike verband tussen *dominium, possessio* en *detentatio* bestaan. Die verskille tussen *dominium* en *detentatio* word trouens beoordeel vanuit 'n vertrekpunt waarin die vestiging van eiendomsreg voorop staan. Dit impliseer dat *detentatio* in beginsel gesien kan word as daardie vorme van fisiese beheer oor 'n saak wat nie tot eiendomsverkryging kan lei nie omdat die vereistes vir *civilis possessio* ontbreek. *Detentatio* is dus die beheer van die nie-eienaar wat ook nie deur middel van daardie beheer eienaar kan word nie. Hierdie afleiding word gestaaf deur die onderskeid wat Gomezius tussen *possessio* en *detentatio* maak. Gomezius omskryf *possessio* met die volgende woorde:[39]

> "Possessio est ius habendi, retinendi atque recuperandi rem, praesumptionemque domini inducens fructusque percipiendi, atque usucapiendi, et praescribendi conditionem."

Dit is duidelik dat hierdie omskrywing *possessio* tot *civilis possessio* beperk, net soos die omskrywing van *dominium* ook tot *dominium directum* beperk was. Daar bestaan dus 'n direkte korrelasie tussen *dominium* en *possessio civilis*, en dit word met *detentatio* as bloot feitelike beheer sonder regsgevolge gekontrasteer.

Die gevalle wat in die Middeleeue deur die Romaniste met *dominium utile* in verband gebring is, en spesifiek gevalle soos *emphyteusis, ususfructus* en dies meer, word deur Gomezius met 'n kunsgreep weggeredeneer. Hy skryf naamlik aan hierdie gevalle *naturalis possessio* van die saak toe, asook *quasi possessio civilis* van die *ius incorporale utendi et fruendi*.[40] Die *naturalis possessio* van die saak self beteken prakties niks aangesien dit geen regsgevolge het nie. Slegs *civilis possessio* kwalifiseer as egte *possessio* en kan gevolglik enige regsgevolge hê. *Naturalis possessio* is vir alle praktiese doeleindes dieselfde as *detentatio* wat die regsgevolge daarvan betref. Die regsbeskerming wat wel aan hierdie uitsonderlike groep nie-eienaars toekom, word deur Gomezius verduidelik aan die hand van die *quasi possessio civilis* van die *ius incorporale utendi et fruendi*, en sodoende word die Romaniste se *dominium utile* in 'n blote beskermde gebruiksreg omgeskep.

Die belangrikste gevolg van die onderskeid tussen *possessio* en *detentatio* bestaan daarin dat *detentatio* geen regsgevolge het nie. Beide die belangrikste groepe regsgevolge wat vandag as onderskeidelik die regspolitieke en die saaklike funksies van besit omskryf word, naamlik die regspolitieke beskerming van onregmatig versteurde besit enersyds en toegang tot eiendomsverkryging deur verjaring andersyds, word tot *possessio civilis* beperk.[41] Deur die onderskeid tussen *possessio* en *detentatio* bereik Gomezius dus die resultaat dat *detentatio* 'n onbeskermde feitelike verhouding bly, waaraan die reg geen gevolge heg nie.

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38 n 8: "quod in successorum maioratus transit possessio, mortuo possessore, quia si alius tertius apprehendat, vel ingrediatur rem, vel ab alio tradatur cum titulo vel sine titulo, non acquirit possessionem sed nudam detentationem."

39 n 17.

40 n 100.

41 n 11: "Item non competunt sibi aliqua remedia possessoria, unde si talis detentator per vim expellatur de possessione, non habet remedium recuperandae, unde vi, quod datur possessoribus", en "similiter si talis detentator turbetur vel molestetur in sua detentatione, non habet remedium uti possessorium retinendi, uti possidetis, ut defendatur a turbatione vel molestia: quid illud solum competit possessoribus"; asook n 10: "Et adde quod effectus maximus resultat ad hoc, an solum detineat vel possideat, quia si quis solam habet detentationem, non potest usucapere nec praescribere."

3 GOMEZIUS SE STANDPUNT IN DIE KONTEKS VAN DIE SESTIENDE EEU

Hierbo is reeds vermeld dat Gomezius se naam deur bepaalde skrywers in die konteks van die laat-skolastiek of Spaanse moraalfilosofie van die sestiende eeu vermeld word. Dit sal dus interessant wees om Gomezius se standpunte met dié van die meer bekende moraalfilosowe te vergelyk. Dit is dadelik opvallend dat die Spaanse moraalfilosowe, en by name Francisco de Vitoria (1492–1546) en Domingo de Soto (1494–1560), *dominium* (anders as Gomezius) glad nie binne die konteks van Bartolus se omskrywing benader nie.[42] Dit is eers Luis de Molina (1536–1600) wat Bartolus se omskrywing van *dominium* by die moraalfilosofiese benadering tot *dominium* betrek.[43] Molina interpreteer Bartolus se woorde *perfecte disponendi*, anders as wat Bartolus dit bedoel het, uitdruklik as synde 'n verwysing na die feit dat die eienaar 'n *onbeperkte gebruiksbevoegdheid* ten aansien van die saak het. Dit bevestig die feit dat die Spaanse moraalfilosowe, anders as Gomezius, in hulle benadering tot *dominium* die klem op die feit plaas dat *dominium* 'n menslike *facultas* ten opsigte van die saak is. Hierdie benadering, wat by Molina met die omskrywing van Bartolus gesintetiseer word, is 'n direkte gevolg van die moraalfilosowe se navolging van Thomas van Aquino (1225–1274). Die enigste figuur binne die kader van die moraalfilosofie van die sestiende eeu wat hoegenaamd met Gomezius vergelyk kan word, is Fernando Vazquez de Menchaca (1512–1566), wat in sy kritiek teen Bartolus se omskrywing 'n afwykende omskrywing van *dominium* formuleer, waarin die eienaar se *vervreemdingsbevoegdheid* sterk na vore tree. Gomezius se uiteensetting hoort egter, veral in die lig van die afwesigheid van enige verwysings na Thomas of die Moraalfilosofie as sodanig, duidelik nie in hierdie geselskap tuis nie. Dit word bevestig deur die feit dat Gomezius se relatief gedetailleerde uiteensetting oor *possessio* en *detentatio* glad nie by enige van die Spaanse moraalfilosowe aansluiting vind nie, aangesien die moraalfilosowe byna uitsluitlik op *dominium* gekonsentreer het.

Daar is ook reeds hierbo verwys na die feit dat Olivier vir Gomezius as een van die beoefenaars van die *mos Italicus* gedurende die sestiende eeu beskou. Hierdie benadering vind verdere steun wat Gomezius se bespreking van die *leges Tauri* betref in die stelling van Wesenberg-Wesener[44] dat dit tiperend van die *mos Italicus* is om plaaslike regreëls in die lig van Romeinse beginsels te bespreek. Uit Olivier[45] se uiteensetting is dit ook duidelik dat Gomezius se werkswyse in die *Commentariorum variarumque resolutionum juris civilis* tipies van die *mos Italicus* gedurende die sestiende eeu is, veral wat die besondere belangstelling in die regspraktyk betref. Wat die kommentaar op die *leges Tauri* betref, is dit onmiddellik opvallend dat Gomezius wesenlik van die benadering

42 Vgl De Vitoria *De iustitia* (1934) vol 1 op 11a 11ae q 62 a 1n 8, n 29; De Soto *De iustitia et iure* (1589) 4 q 1.

43 Vgl De Molina 1613 *De iustitia et iure* (1613) 2 disp 3 n 16: "Solum enim is qui ex utroque capite habet dominium plenum potest de re perfecta disponere, cuius est dominus." Vgl verder Feenstra *Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen* in *Festschrift Franz Wieacker* (1978) 209–234 223; Feenstra "Historische Aspecten van de Private Eigendom als Rechtsinstituut" 1976 *Rechtsgeleerd Magazijn Themis* 248–275 270.

44 Wesener *Wesenberg-Wesener: neuere deutsche Privatrechtsgeschichte im Rahmen der europäischen Rechtsentwicklung* (1976) 107.

45 116.

van die ander outeurs binne die kring van skrywers oor die *mos Italicus* afwyk, aangesien hy *dominium* tot *dominium directum* beperk. Die algemene tendens onder die skrywers oor die *mos Italicus* is juis om, op gesag van Bartolus, die indeling van *dominium directum* en *dominium utile* te aanvaar.[46] Die ander skrywers oor die *mos Italicus* konsentreer in hulle omskrywings van *dominium* ook glad nie op die eienaar se vindikasiebevoegdheid nie, maar juis op òf die vervreemdingsbevoegdheid[47] òf die vrye gebruiksbevoegdheid.[48] Gomezius hoort dus, wat sy omskrywing van *dominium* betref, ook nie sonder meer onder hierdie groep tuis nie.

Die leidraad vir die konteks waarin Gomezius se onderhawige uiteensetting gelees moet word, word deur homself verskaf. Gomezius verwys naamlik in die kommentaar op *lex* 45 taamlik gereeld en uitvoerig na outeurs soos Franciscus Duarenus (1509–1559) en Andreas Alciatus (1492–1550), wat onder die juridiese humanisme of *mos Gallicus* tuishoort. Die oorsprong van die invloed van die humanisme op skrywers soos Gomezius word deur Holthöfer verduidelik in die opmerking dat daar gedurende die sestiende eeu in Spanje 'n sintese van die humanisme en die skolastiek plaasgevind het, en dat die resultate van hierdie sintese onder ander deur die werke van Gomezius deur Europa versprei is.[49] Daar kan dus aanvaar word dat Gomezius in sy werk bepaalde invloede van die juridiese humanisme sal vertoon.

Binne die konteks van die humanisme word etlike fasette van Gomezius se uiteensetting duideliker. Dit is naamlik juis tiperend van die *mos Gallicus* dat die Middeleeuse onderskeid tussen *dominium directum* en *dominium utile* as on-Romeins verwerp word.[50] Dit is verder begryplik dat die humaniste, in hulle teruggrype na die klassieke Romeinse reg, die een kenmerk van eiendomsreg sou beklemtoon wat aantoonbaar Romeins van oorsprong was, naamlik die feit dat die eienaar deur die saaklike *rei vindicatio* beskerm is, en dat hy deur die aan- of afwesigheid van hierdie beskerming van alle nie-eienaars onderskei kon word.[51] Alle oorwegings dui dus daarop dat Gomezius, wat sy uiteensetting van die verband tussen *dominium*, *possessio* en *detentatio* betref, deur die humanisme of *mos Gallicus* beïnvloed is, en dat sy uiteensetting in hierdie konteks gesien en beoordeel moet word.

4 SLOTBESKOUING

Die oplettende leser sou reeds die ooreenkomste tussen Gomezius se uiteensetting en die gangbare weergawe van die verhouding tussen eiendomsreg, besit en houerskap in die moderne Suid-Afrikaanse reg raakgesien het. Te oordeel aan die moderne Suid-Afrikaanse handboeke moet houerskap ook as 'n onbeskermde en bloot feitelike verhouding gesien word. Dit verklaar waarom die

46 Vgl bv Matthaeus de Afflictis (1448–1528) *In tres libros feudorum* (1560) 1 7 19, 3 30 3; Philippus Decius (1454–1536) 1588 *Consilia sive responsa* (1588) 410 n 13; Bertrandus 1603 *Consiliorum sive responsorum* (1603) 7 34 2.

47 Nav Baldus op *C* 5 9 3 n 1; vgl veral Decius *Consilia* 498 n 9.

48 Nav Paulus de Castro op *C* 4 19 4 n 2; Alexander von Imola op *D* 41 2 17 1 n 6; Jason de Mayno op *D* 41 2 12 1 n 18; vgl veral Jacob Menochius (1532–1607) *Consilia sive responsa* (1625) 492 n 12.

49 Holthöfer 153.

50 Vgl Duarenus *Disputatio* 1 17 in *Omnia quae quidem hactenus edita fuerunt opera* (1692); Hubert Giphanius (1534–1604) 1 2 2; Antonius Faber (1557–1624) op *D* 6 2 12 2.

51 Vgl Jacobus Cujacius (1522–1590) op *D* 41 1; Giphanius op 1 2 2.

moderne Suid-Afrikaanse handboeke oor die sakereg die beskerming van eiendomsreg en van besit behandel, maar niks oor die beskerming van houerskap rep nie. Die skrywers stel ook uitdruklik die standpunt dat houerskap, anders as besit, in beginsel 'n onbeskermde feitelike verhouding is.[52] Die feit dat bepaalde verhoudings, wat kennelik as vorme van houerskap gesien moet word, wel 'n mate van beskerming geniet, word deur byvoorbeeld Van der Merwe[53] as 'n terminologiese uitbreiding van die besitsbegrip beskou, wat sou inhou dat die grense tussen beskermde besit en onbeskermde houerskap besig is om te vervaag, met die gevolg dat houerskap in besit opgeneem sou word. Dit is nog 'n vraag of hierdie teoretiese beskouing, sowel histories as met verwysing na die moderne Suid-Afrikaanse reg, die enigste houdbare verklaring van die verhouding tussen eiendomsreg, besit en houerskap bied. Die beantwoording van hierdie vraag sou die huidige ondersoek egter te ver voer.

Hoewel Gomezius se uiteensetting interessante ooreenkomste met en daarom aansluitingspunte by die gemelde weergawe van die moderne Suid-Afrikaanse reg bied, is dit duidelik dat die betrokke werk van Gomezius nie genoegsame invloed uitgeoefen het om as die oorsprong van hierdie moderne sienswyse te kwalifiseer nie. Na alle waarskynlikheid kan Gomezius se uiteensetting hoogstens as simptomaties van 'n bepaalde benadering, wat vir die invloedryke *mos Gallicus* van die sestiende eeu aanvaarbaar was, beskou word. Hierdie standpunt is waarskynlik *via* die humanisme in die Romeins-Hollandse reg van die sewentiende en agtiende eeue opgeneem. Dit is desnieteenstaande interessant om daarop te let dat hierdie benadering vir die sestiende eeu minder gebruiklik was, en dat daar alternatiewe benaderings bestaan het waarvolgens die posisie van die houer glad nie so negatief beoordeel is nie. 'n Beoordeling van die plek en funksie van houerskap in die moderne reg kan dus met vrug teen die agtergrond van die posisie voor die sewentiende eeu onderneem word.

52 Vgl bv Van der Merwe *Sakereg* (1979) 75.
53 *Sakereg* 77, 79.

A deep reverence for human life is worth more than a thousand executions in the prevention of murder; and is, in fact, the great security of human life. The law of capital punishment, whilst pretending to support this reverence, does in fact tend to destroy it. (per John Bright.)

Dekriminalisasie van godslaster

JMT Labuschagne
MA DPhil LLD
Professor in Inheemse reg, Universiteit van Pretoria

SUMMARY

Decriminalisation of Blasphemy

In this article the need for the crime of blasphemy is investigated. The history of the crime as well as the elements of blasphemy in South African law are set out and critically analysed. References are made throughout to the position in other legal systems. The theories explaining the existence of the crime of blasphemy are discussed and criticised. It is finally contended that the crime of blasphemy should be abolished.

1 INLEIDING

In dié artikel word die vraag ondersoek of die misdaad godslaster(ing) in ons tyd nog bestaansreg het. Voordat 'n mening egter daaroor uitgespreek kan word, is dit nodig om die misdaad in 'n historiese en positiefregtelike perspektief te plaas.

2 HISTORIES

2 1 Romeinse Reg

In die ou testamentiese tyd is godslaster met die dood gestraf.[1] In die Romeinse reg is vergrype teen die gode aanvanklik nie gestraf nie. Toe die Christelike godsdiens die staatsgodsdiens geword het, is openlike godslaster weer soos in die Ou Testament met die dood gestraf.[2] Daarbenewens is sekere vorme van kettery ook gestraf.[3] Verskeie ander misdade was daarop gerig om heilige plekke en byeenkomste te beskerm.[4]

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1 Sien *Lev* 24 16; Gewin "Openlijke Godslastering" 1903 *TvS* 247 248. De Roo *Godslastering* (1970) wys daarop dat die mens vanaf die vroegste tye daarvoor teruggedeins het om die godheid te beledig. Godslaster is van vroeg af strafbaar gestel; in die primigene gemeenskappe geniet die beeld en in die groot wêreldgodsdienste die naam van die godheid strafregtelike beskerming.

2 *Nov* 77; Gewin 248; De Roo 5.

3 *C* 1 5. Vgl ook Hunt en Milton *South African Criminal Law and Procedure* 2 (1981) 292.

4 Vgl Mommsen *Römisches Strafrecht* (1899) 595–611; Rein *Das Kriminalrecht der Römer* (1844) 896–901.

2 2 Romeins-Europese Reg

Damhouder,[5] onder die titel "[v]an de misdaad der gequetste," wys daarop dat die ernstigste vorm van kwetsing dié van die "Goddelijke Majesteyt" is[6] en daarom word dit met die dood gestraf. Godslaster bestaan wanneer opsetlik kwaad teen God gespreek word.[7]

Volgens Carpzovius[8] kan die begrip oppergesag twee vorme aanneem, naamlik goddelike en menslike. Godslaster beskryf hy as "een woord of bedryf ter verachtinge van God gesproken of uitgevoerd."[9] Jode kan ook godslaster pleeg[10] en die misdaad kan ook gepleeg word ten opsigte van die maagd Maria en ander heiliges.[11] Opset[12] word as vereiste gestel en die straf wat opgelê is, was in die diskresie van die regspreker.[13]

Ook Voet[14] wys daarop dat *laesa majestas* twee vorme kan aanneem: *Majestas* (oppergesag) kan verwys na dié van God en dié van die mens. *Laesa majestas* sluit in kettery, apostasie (afvalligheid), ateïsme en godslaster. Godslaster bestaan uit lasterlike verklarings wat gemaak word in stryd met die Goddelike aard en onskendbaarheid. Die straf vir godslaster was volgens Voet bykans in die diskresie van die regspreker: dit was soms die doodstraf en soms die deurboring van die tong of die afsny van die lippe.

Van Leeuwen[15] omskryf "blasphemie" of godslaster as "allerhande soort van vloek en schending van Gods naam en heilig woord." Godslaster kan van 'n ernstige of ligter aard wees. Eersgenoemde sluit in die ontkenning of skending van "Gods Hoogheit en magt."[16] Laasgenoemde vorm van godslaster word ligter gestraf en geskied meer uit "quade gewoonte als uit quaad opset en boos voornemen."[17]

Moorman[18] onderskei insgelyks tussen Goddelike en menslike "majesteitschennis." Die Goddelike majesteit kan op verskeie wyses gekwets word, naamlik deur kettery, afvalligheid, "Godsverloochening," godslaster, meineed, towery, ensovoorts.[19] "Godsverloochening" bestaan uit die openlike ontkenning van die Opperwese of die maak van beweringe waaruit die ontkenning noodwendig voortvloei.[20] Mense wat *bona fide* oortuig is van wat hulle sê, word nie gestraf nie. Godslaster

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5 *Practyke van Civile en Crimineele Saken* afd *Crimineele Saken* hfst 61.
6 Gewin 248 toon aan dat in die loop van die Middeleeue die idee veld gewen het om openlike godslaster as *crimen laesae majestatis divinae* te beskou, d w s "als gequalificeerde majesteitsschennis, als onmiddellijke injuria tegen God. De opvatting van den pentateuch trad dus weer op den voorgrond."
7 Vgl ook Maes *Vijf Eeuwen Stedelijk Strafrecht* (1947) 173.
8 Hfst 41.
9 42 4.
10 42 8. Volgens Huber *HR* 6 20 3 is heidene nie gestraf nie.
11 42 16. Vgl egter Matthaeus 48 10 7.
12 42 14. Vgl ook *Boehmer Meditationes* in *CCC* 106 1.
13 42 4. Vgl ook Boehmer 106 5.
14 48 4 1.
15 *RHR* 4 33 5.
16 Sien ook Gomezius *Variae Resolutiones* 1 3 2.
17 Vgl ook Carpzovius 42 18; Huber *HR* 6 20 2.
18 1 1 1.
19 1 1 2. Vgl ook Van der Linden *Koopmans Handboek* 2 3 1.
20 1 1 11. Vgl ook Heineccius *Operum Iur Nat et Gent* 1 5 par 128.

"is Gode iet toeschryven, dat tot hem nie behoort, of iet van hem ontkennen, dat hem enigen is of verachtelyk van hem spreeken."[21]

Hy onderskei tussen godslaster wat middellik en onmiddellik geskied en vervolg:[22]

"De onmiddelyke, die Gode of onmaght, of sterflykheit, of onrechtvaerdigheit, of eenigh ander gebrek, of ondeugt, toeëigent, of in Hem eenigerhande deugt, of volmaektheit ontkent, wordt in Saxen met de doot, of met verlies, of verminking van eenigh lid, of leden, gestraft. Voor middelyke Godslastering wordt gehouden, als iemant of sweert, of een ander vloekt by het bloed, het lyden, de wonden, of de Sacramenten van Christus. Waer over de straf in Duitschland willekeurigh is, en gemeenlyk de eerstemael in eene ernstige bestraffing bestaet: Doch de tweedemael wordt verswaert met eene geldboete, gevankenisse, ofte selfs in Saxen wel met bannissement."

Püttmann[23] omskryf godslaster as *verbum factumve ad contumeliam Dei directum.*[24]

Volgens Van der Linden[25] word onder godslaster verstaan

"alle zulken woorden of daaden, waar door men het Opperwezen smaadt, lastert of vervloekt."

Hieronder is inbegrepe die opsetlike verspreiding van 'n ontkenning van die bestaan van God, die veragtende toeskrywe van dade aan God wat strydig is met sy eienskappe en "het beschimpen, en vooral het stooren van den openbaaren Godsdienst." Godslaster word gestraf omdat dit die openbare rus versteur en die straf is in die diskresie van die hof.[26]

Van der Keessel[27] omskryf godslaster as *injuriam dolo malo in divinam majestatem commissam.*[28] Dit kan by wyse van woorde of dade geskied.

Wanneer die Suid-Afrikaanse positiewe reg onder die loep geneem word, word weer terugverwys na die gemeenregtelike skrywers en word sekere konklusies in dié verband getrek.[29]

2 3 Die Engelse Reg

Blackstone[30] verwys na

"blasphemy against the Almighty, by denying his being or providence; or by contumelious reproach of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule ... [F]or Christianity is part of the laws of England."

Oor die latere ontwikkeling in die Engelse reg word later die een en ander meegedeel.

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21 1 1 12.
22 1 1 13. Vgl ook Püttmann *Elementa Iuris Criminalis* par 99.
23 Par 98.
24 Vgl ook Boey *Woorden – Tolk sv Blasphemie* wat godslaster omskryf as "alle woorden en daden, ingerigt tot veragting of smaat van't Goddelyke Opperwezen." Volgens hom word die ganse mensdom deur godslaster beledig.
25 2 3 2.
26 Vgl ook t a v straf Van Zurck *Codex Batavus sv Majesteit.*
27 *Praelectiones ad Ius Criminale* 48 13 10.
28 Vgl ook Leyser *ad P* spec 565.
29 Vgl in die algemeen t a v die historiese ontwikkeling en variasies Baelde *Studiën over Godsdienstdelicten* (1935).
30 *Commentaries* 59 aangehaal deur Anoniem "Blasphemy" 1970 *Columbia LR* 694. Vgl ook t a v die Amerikaanse regsgeskiedenis MB "Offense of Blasphemy" 14 *ALR* 880.

3 POSITIEWE REG

In die Suid-Afrikaanse reg is daar slegs een gerapporteerde saak[31] wat oor godslaster handel. Die gegewens is gevolglik baie karig. In die bespreking wat volg, word ook ter wille van vergelyking na die posisie in enkele ander regstelsels verwys.

3 1 Omskrywings

Gardiner en Lansdown[32] omskryf godslaster as

> "slandering, or . . . denying the existence of, the Supreme Being."

De Wet en Swanepoel[33] omskryf godslaster as die

> "wederregtelike, opsetlike minagting of ontkenning van die Goddelike wese."

Hunt en Milton[34] verklaar:

> "Blasphemy consists in unlawfully, intentionally and publicly acting contemptuously towards God."

Volgens Snyman[35] is godslaster die

> "wederregtelike, opsetlike publikasie van woorde of gedrag waardeur God beledig word."

Uit die definisies blyk reeds duidelik dat daar nie eenstemmigheid bestaan oor die inhoud van die misdaad godslaster nie. In 1941 het Gie [36] reeds tereg die volgende gesê:

> "Ons reg sit opgeskeep met 'n totaal onbruikbare deliksomskrywing en 'n feitlik onbepaalde begrip van wat die misdaad van godslastering is. Alleen die sporadiese voorkoms van sekere misdade en die diskresie van die Prokureur-generaal om nie te vervolg nie, verhoed dat die treurige toestand voortdurend aan die lig kom."

In stede van self 'n omskrywing van dié misdaad te gee, word sekere probleemtemas daarvan bespreek. Sinvolle omskrywing kan in ieder geval slegs deur gedetailleerde beskrywing geskied.

3 2 Die Handeling

In dié verband kan die volgende onderskei word:

3 2 1 Minagting of Belediging van God

Volgens ons gemeneregskrywers word godslaster gepleeg deur kwaadspreek teen God (Damhouder), veragting van God (Carpzovius, Moorman en Boey), verklarings gemaak in stryd met die Goddelike aard en onskendbaarheid (Voet), vloek en skending van Godsnaam (Van Leeuwen), Godssmaad, laster of vervloek (Van der Linden) en die pleeg van *contumelia* en *injuria* teenoor God

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31 *R v Webb* 1934 AD 493. Wulfsohn "Separation of Church and State in South African Law" 1964 *SALJ* 90 93 wys daarop dat daar enkele vervolgings in die laerhowe vir godslaster was.

32 *South African Criminal Law and Procedure* 2 (1957) 1200.

33 *Die Suid-Afrikaanse Strafreg* (1960) 437.

34 294.

35 *Strafreg* (1981) 362. Die begrip "godslaster" word soms ook in 'n wyer sin gebruik. Gewin 253 wys op die volgende onderskeid: (a) *blasphemia directa et attributiva*, waaronder godslaster in enger sin verstaan word; (b) *blasphemia directa et derogativa*, waaronder die aantasting van godsdienstige genootskappe en dié se gebruike val; en (c) *blasphemia realis seu symbolica*, waaronder verstaan word die beskerming van godsdienstige plekke van samekoms. In die onderhawige artikel word die begrip "godslaster" in enger sin gebruik, soos blyk uit bogenoemde omskrywings.

36 *'n Kritiek op die Grondslae van die Strafreg in Suid-Afrika* (1941) 42.

(Püttmann, Leyser en Van der Keessel). Nadere inligting oor presies wat bedoel word, word egter nie verskaf nie.

In *R v Webb*[37] is 'n non in 'n erotiese hallusinasie voorgestel waarin sy haar verbeel dat sy geslagsomgang met Christus het.[38] Die hof verwys hierna as "a crude, vulgar and indecent production" en bevind dat dit godslaster daarstel.[39] Met beroep op Moorman en Van der Linden verklaar die hof dat godslaster bestaan "in denial of the existence of God or in slandering God."

In die Amerikaanse saak *State of Maine v Mockus*[40] is beslis dat iemand wat in 'n openbare lesing

> "impugns the immaculate conception of Christ in coarse and vulgar language, and characterizes religion as a humbug and deception, in a manner to provoke laughter and applause from the audience"

hom aan godslaster skuldig maak.

In die Engelse saak *R v Lemon and Gay News*[41] was die beskuldigdes die redakteur en uitgewer van 'n koerant vir homoseksuele. In die betrokke uitgawe van die koerant is 'n gedig gepubliseer waarin dade van sodomie en *fellatio* met die liggaam van Christus onmiddellik na sy dood in detail beskryf is. Hulle is van godslaster aangekla en skuldig bevind. Die skuldigbevinding word by appèl bevestig. Roskill LJ haal in sy uitspraak met goedkeuring die volgende passasie uit *R v Hetheringtong*[42] aan:[43]

> "Now, gentlemen, upon the question whether it is blasphemous or not I have this general observation to make, which I have often heard from Lord Tenderden in cases of this description namely, that the question is not altogether a matter of opinion, but that it must be, in a great degree, a question as to the tone, and style, and spirit, in which such enquiries are conducted. Because, a difference of opinion may subsist, not only as between different sections of Christians, but also with regard to the great doctrines of Christianity itself; and I have heard that great judge declare, that even discussions upon that subject may be by no means a matter of criminal prosecution, but, if they be carried on in a sober and temperate and decent style, even those discussions may be tolerated, and may take place without criminality attaching to them: but that, if the tone and spirit is that of offence, and insult, and ridicule, which leaves the judgment really not free to act, and, therefore, cannot be truly called an appeal to the judgment, but an appeal to the wild and improper feelings of the human mind, more particularly in the younger part of the community, in that case the jury will hardly feel it possible to say that such opinions so expressed, do not deserve the character which is affixed to them in this indictment. With that general observation, I leave the question of libel to you."

'n Vraag wat bespreking verdien, is of die misdaad godslaster verband hou met die delik (en ook misdaad) laster wat in ons reg voorkom. Moet God se *fama* (aansien) in geval van godslaster geskend word? Dit moet aanvanklik gestel word dat God 'n geloofsfenomeen is: 'n mens glo in God of jy glo nie in Hom

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37 hierbo.

38 In die betrokke saak het die bekende skrywer Herman Charles Bosman die betrokke prosagedig geskryf. Hy is in die landdroshof skuldig bevind. Webb, die redakteur van die tydskrif *The Ringhals* waarin die prosagedig geskryf is, is ook skuldig bevind maar het tot by die appèlhof geappelleer. Bosman het egter nie geappelleer nie: sien Van Oosten "Rex v Herman Charles Bosman 1926 WPA Ongerapporteerd; R v Webb 1934 A 493 – Twee Betekenisvolle Beslissings" 1979 *Tydskrif vir Letterkunde* 24 30.

39 495.

40 1921 14 *ALR* 871 (Maine SJC).

41 1978 3 ALL ER 175 (CCA). Vir 'n uiteensetting van die misdaad godslaster in die Ierse reg, sien O'Higgens "Blasphemy in Irish Law" 1960 *Mod LR* 151.

41 1841 4 State Tr NS 563 590.

43 182.

nie. In geval van godslaster kan God se aansien by nie-gelowiges nie daal nie, want Hy bestaan nie vir hulle nie; iets of iemand wat nie bestaan nie, kan tog nie 'n aansien hê wat aangetas kan word nie. By gelowiges kan sy aansien ook nie in geval van godslaster daal nie, want Hy is in die oë van die gelowiges almagtig en onaantasbaar. By godslaster kan dit myns insiens nie om die *fama* van God gaan nie. Die begrip godslaster is derhalwe misleidend. In geval van godslaster gaan dit meer om die "objektiewe" belediging of minagting van God, ongeag die vraag watter aansien Hy by die betrokke dader of enige ander groep mense het.

3 2 2 Ontkenning van die Bestaan van God

Dit blyk dat die ontkenning van die bestaan van God volgens sowel die Romeins-Europese reg[44] as die oud-Engelse reg[45] as godslaster strafbaar was.

In *R v Webb*[46] sê hoofregter Wessels uitdruklik dat ons reg ten aansien van godslaster in die bespreking daarvan deur Moorman en Van der Linden gevind word. Sowel Moorman as Van der Linden voer aan dat die ontkenning van die bestaan van God godslaster daarstel. Dit is dan ook die posisie in die huidige Suid-Afrikaanse reg. In die hedendaagse Engelse reg is dit nie meer godslaster nie.[47]

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44 Vgl Van Leeuwen, Moorman en Van der Linden hierbo.

45 Vgl Blackstone hierbo. Kenny "The Evolution of the Law of Blasphemy" 1922 *Cam LJ* 127 128 verklaar: "For some generations past it had been a question disputed amongst lawyers whether the common law rendered punishable *all* open expressions of a disbelief in Christianity, or only such as were couched in language so irreverent and scurrilous as to be likely to offend ordinary Christians deeply enough to provoke some of them to a breach of the peace. To put it briefly, could the mere Matter of an expression of disbelief constitute it an offence of criminal blasphemy, or would the offence arise only when the Matter was aggravated by the Manner?" en "The former and severer view seemed to be established, if not by any actual decision, yet certainly by a chain of unchallenged *obiter dicta* continuing throughout more than a century down into the reign of Queen Victoria."

46 hierbo 496.

48 In *R v Ramsay and Foote* (1883) 15 Cox CC 231 236 haal Coleridge hr die volgende passasie uit *Starkie on Libel* (4de uit) 599 met goedkeuring aan: "There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of His creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions; yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinion for the benefit of others. When learned and acute men enter upon those discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders, so long as they are honest ones, justly considering that society is more than compensated for the partial and limited mischief which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals – a state of apathy and indifference to the interests of society – is the broad boundary between right and wrong." Sien ook *Bowman v Secular Society Limited* 1917 AC 406.

Daar is Suid-Afrikaanse skrywers[48] wat aan die hand doen dat indien 'n persoon van godslaster aangekla word omdat hy die bestaan van God ontken, die hof moet bevind dat dié deel van godslaster in onbruik verval het. Dit is so onrealisties om in die tydsgewrig waarin ons lewe iemand aan 'n misdryf skuldig te bevind omdat hy die bestaan van God ontken, dat ek genoop is om die aanbeveling van genoemde skrywers te onderskryf.

3 2 3 Wat Omvat die Begrip "God"?

Nieteenstaande die feit dat die misdaad godslaster volgens Carpzovius ook teen die maagd Maria en ander heiliges gepleeg kan word, het die appèlhof in *R v Webb*[49] beslis dat godslaster teen God of Christus gerig moet wees.

In sowel Suid-Afrika[50] as Engeland[51] verwys "God" in godslaster slegs na die Christelike godsbegrip. In die lig van die Christelike protestantse tradisie van ons reg word aan die hand gedoen dat godslaster gepleeg kan word teen God, Christus en die Heilige Gees. Dit verteenwoordig immers die Godsbegrip volgens genoemde tradisie.

3 3 Opset

Dat opset gemeenregtelik 'n vereiste vir godslaster was, blyk duidelik uit bogenoemde uiteensetting van ons gemenereg. In *R v Webb*[52] verklaar hoofregter Wessels, nieteenstaande genoemde gemeenregtelike gesag tot die teendeel, die volgende:

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48 Vgl die hierbo aangehaalde omskrywings van Hunt en Milton en Snyman. Vgl ook Van Rooyen *Publikasiebeheer in Suid-Afrika* (1978) 103; Wulfsohn 1964 *SALJ* 95.

49 hierbo 496. Vgl ook *Levy v Von Moltke* 1934 EDL 296 306.

50 Vgl *R v Webb* hierbo 498; *Publication Control Board v Gallo (Africa) Ltd* 1975 3 SA 665 (A) 671. A 47(2)(b) van die Wet op Publikasies 42 van 1974 bepaal dat 'n publikasie, voorwerp, rolprent of openbare vermaaklikheid of voorgenome openbare vermaaklikheid geag word ongewens te wees indien of 'n deel daarvan godslasterlik is of dit vir die godsdienstige oortuiging of gevoelens van enige bevolkingsdeel aanstootlik is. Sien Van Rooyen 97. Volgens Van Rooyen 102 word die begrip "godslaster" in sy juridiese sin in dié artikel verstaan. In die lig van a 1 van die Wet op Publikasies en konsiderans van die Suid-Afrikaanse Grondwet word slegs die Christelike godskonsep beskerm. Vgl ook *Buren Uitgewers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 1 SA 379 (K) 406 418; Van der Vyver *Die Juridiese Funksie van Staat en Kerk* (1972) 166–167.

51 In *R v Taylor* (1676) 1 Vent 293 het die beskuldigde gesê dat "Jesus Christ was a bastard, a whoremaster, religion was a cheat, and he neither feared God, the devil, or man." Die hof bevind dat die Christelike geloof "is parcel of the laws of England" en dat "to reproach the Christian religion is to speak in subversion of the law." In *R v Gathercole* (1838) 2 Lew CC 237 is beslis dat vreemde godsdienste aangeval mag word, maar nie die Christelike godsdiens nie, aangesien dit die erkende staatsgodsdiens is. Vgl ook *R v Waddigton* (1822) 1 B and C 26; *Bowman v Secular Society Limited* hierbo 428: "It has been repeatedly laid down by the Courts that Christianity is part of the law of the land, and it is a fact that our civil polity is to a large extent based upon the Christian religion. This is notably so with regard to the law of marriage and the law affecting the family. The statement that Christianity is part of the law of the land has been often given as a reason for punishing criminally contumelious attacks upon Christianity. It is true that expressions have in some cases been used which would seem to imply that any attack upon Christianity, however decently conducted, would be criminal. For the reasons I have already given I do not think that this view can be accepted as having represented the common law of England at any time. But the fact that Christianity is recognized by the law as the basis to a great extent of our civil polity is quite sufficient reason for holding that the law will not help endeavours to undermine it."

52 hierbo 495.

> "The intent however is not of the essence of the crime of blasphemy and none of the authorities cited to us say so. They all agree that the question of intent is important in determining the punishment but that is all. If the words are blasphemous the intent is inferred."

Hunt en Milton[53] voer aan dat nieteenstaande dié uitdruklike *dictum* daar tog uit *Webb* se saak afgelei kan word dat opset 'n vereiste vir godslaster is. Hoewel ek nie kan insien hoe 'n mens hierdie uitdruklike *dictum* deur afleidings ongedaan kan maak nie, word aan die hand gedoen dat die hof in die toekoms, indien 'n saak van godslaster voor hom sou dien, opset as vereiste sal stel. So 'n benadering sou inpas by die moderne neiging in ons strafreg.

In die Engelse saak *R v Lemon and Gay News*[54] het die House of Lords beslis dat dit voldoende is vir die staat om te bewys dat daar 'n bedoeling was om godslasterlike woorde te publiseer. Dit is nie nodig om te bewys dat die beskuldigde die opset gehad het om godslaster te pleeg nie. Verskeie skrywers het hulle sterk teen hierdie benadering uitgespreek.[55] Reeds voordat die saak by die House of Lords uitgekom het, het Buxton[56] die volgende aanbeveel:

> "What should be required, in blasphemy as in almost all other common law crimes, is intention or recklessness as to all the elements in the *actus reus*. That state of mind should be required on the part of the accused himself, so that if he publishes words written by someone else he should not be guilty unless his own mind goes to the effect of those words. But the motive of the accused would not be relevant, again in this as in any other crime, once he was shown to be subjectively reckless as to the blasphemous or vilificatory effect of what he said. This leaves very few cases where an accused who had committed the *actus reus* of blasphemy would not be convicted. But we respectfully submit that both the history of the offence and the general principles of the criminal law require it to be defined so as to demand proof of subjective *mens rea*."

3 4 Vredebreuk en Publikasie

Van der Linden het, soos hierbo aangetoon, reeds daarop gewys dat godslaster gestraf word omdat die openbare vrede daardeur versteur word. In dieselfde trant verklaar hoofregter Wessels in *R v Webb*:[57]

> "It was a matter of public policy to create the crime of blasphemy for the reviling of what the great majority of people in a state hold to be sacred would lead to a breach of the peace."[58]

Dit is ook die posisie in Engeland,[59] Duitsland[60] en Nederland.[61]

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53 295.

54 1979 1 All ER 898 (HL).

55 Vgl Spencer "Blasphemous Libel Resurrected – Gay News and Grim Tidings" 1979 *CLJ* 245 249; Orchard "Blasphemy and Mens Rea" 1979 *NZLJ* 347.

56 "The Case of Blasphemous Libel" 1978 *Crim LR* 673 682.

57 hierbo 496.

58 Vgl ook Wulfsohn 1964 *SALJ* 95.

59 In *R v Gott* (1922) 16 Cr App Rep 87 word die beslissing van die hof in die kopstuk soos volg saamgevat: "The essence of the crime consists in the publication of words concerning the Christian religion so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathizer with Christianity. In considering whether these limits have been passed the circumstances in which the words are published should be taken into account. The limits of decent controversy would certainly be passed if the circumstances in which the words were published were such that the publication was likely to lead to a breach of the peace."

60 Sien par 166 van hulle strafwetboek, wat soos volg bepaal: "(1) Wer öffentlich oder durch Verbreiten von Schriften den Inhalt des religiösen oder weltanschaulichen Bekenntnisses anderer in einer Weise beshcimpft, die geeignet ist, den öffentlichen Frieden zu stören, wird

Hunt en Milton[62] wys tereg daarop dat publikasie in die lig hiervan 'n vereiste vir die misdaad godslaster is: Die godslasterlike optrede moet ten minste tot een medemens gerig wees.

4 DEKRIMINALISASIE VAN GODSLASTER

4 1 Grondslag vir Bestraffing van Godslaster

In dié afdeling word verskeie teorieë wat aangebied is ter verklaring van en regverdiging vir die bestaan van die misdaad godslaster kortliks bespreek:

4 1 1 Beskerming van die Persoon of Eer van God[63]

Daar word dikwels voorgehou dat godslaster bestraf word omdat die persoon of die eer van God daardeur beskerm word. Die volgende besware kan teen dié teorie geopper word:

a Die verhouding tussen God en die mens val buite die staatsterrein, behalwe in 'n teokrasie soos die ou-testamentiese Israel. Die tyd van die teokrasie is, ten minste in die Westerse wêreld, vergoed verby. Hierdie tipe staatsvorm is in ieder geval in stryd met die idee van godsdiensvryheid.

b So 'n teorie sou beteken dat 'n sekere godsbegrip genormeer word. Dit is insgelyks in stryd met die basiese reg van godsdiensvryheid.

4 1 2 Krenking van Godsdienstige Gevoelens[64]

Die beskermingsobjek van godslaster is hiervolgens die godsdienstige gevoelens van die individu. Dit is klaarblyklik gedeeltelik die grondslag van artikel 166(1) van die Duitse strafkode[65] en artikel 147 van die Nederlandse strafkode.[66]

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vervolg van vorige bladsy

mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft. (2) Ebenso wird bestraft, wer öffentlich oder durch Verbreiten von Schriften . . . eine im Inland bestehende Kirche oder andere Religionsgesellschaft oder Weltanschauungsvereinigung, ihre Einrichtungen oder Gebräuche in einer Weise beschimpft, die geeignet ist, den öffentlichen Frieden zu stören." Dit gaan hier spesifiek om die beskerming van die openbare vrede. Vgl ook Lenckner-Schönke-Schröder *Strafgesetzbuch* (1982) 1077; Preisendanz *Strafgesetzbuch* (1978) 563; Dreher-Tröndle *Strafgesetzbuch* (1983) 798; Rudolphi-Horn-Samson *Systematischer Kommentar zum Strafgesetzbuch* (1984) *ad* par 166; Zipf "Die Delikte gegen den öffentlichen Frieden im religiös – weltanschaulichen Bereich" 1969 *NJW* 1944. Vgl verder die bespreking van Henkel "Strafrecht und religionschutz" 1931 *ZStrw* 916 923.

61 147 van hulle strafwetboek bepaal: "Met gevangenisstraf van ten hoogste drie maanden of geldboete van de tweede categorie wordt gestraft: 1° hij die zich in het openbaar, mondeling of bij geschrift of afbeelding, door smalende Goldslasteringen op voor godsdienstige gevoelens krenkende wijze uitlaat; 2° hij die een bedienaar van de godsdienst in de geoorloofde waarneming van zijn bediening bespot; 3° hij die voorwerpen aan een eredienst gewijd, waar en wanneer de uitoefening van die dienst geoorloofd is, beschimpt." Remmelink *Het Wetboek van Strafrecht* (1985) 286 wys daarop dat dié bepaling ten doel het "beschermen van de openbare orde door het tegengaan van voor godsdienstige gevoelens krenkende uitingen." Vgl ook a 260 van die Kanadese strafkode en *R v Renhard* 65 CCC 344.

62 295. Vgl ook Snyman 364.

63 Sien de Roo 23–31.

64 Sien de Roo 31–35; Baelde "De Praktijk der Godslasteringswet in Duitschland" 1932 *TvS* 244 247.

65 Sien vn 60.

66 Sien vn 61.

Die probleem met dié benadering is dat godsdienstige gevoelens 'n persoonlik-individuele aangeleentheid is. Hoofregter Rumpff sê in dié verband:[67]

> "The religious convictions or feelings of any person is a completely subjective matter, dependent, inter alia, on his upbringing, education, temperament, character and life-involvement."

Daar bestaan so 'n wyduiteenlopende verskeidenheid van godsdienstige gevoelens dat die beskerming daarvan onprakties is. 'n Mens sou weinig oor 'n godsdiens kan sê wat nie die een of ander persoon se gevoel krenk nie.

4 1 3 Beskerming van Godsdiens as Kultuurgoed[68]

Hierdie teorie hang saam met die opkoms van die historiese regskool. Wat volgens dié teorie beskerm word, is die tradisionele godsdiens as gemeenskap-geestelike volksbesit.

In 'n land soos Suid-Afrika waar 'n groot verskeidenheid godsdienste aangetref word, is dié teorie onprakties. Dit berus verder op die fiksie dat die staat in 'n godsdienstig plurale gemeenskap godsdiens op 'n onpartydige basis kan beskerm; die godsdiens waartoe die bewindhebbers behoort, sal altyd bevoordeel word.[69]

4 1 4 Beskerming van die Openbare Vrede[70]

Dié teorie gaan van die standpunt uit dat die moderne Westerse staat aan sowel die kerkgenootskappe as die individu 'n groot godsdiens- en gewetensvryheid toeken. Dit is die taak van die staat om toe te sien dat die vryheid nie misbruik word deur inbreukmaking op die vryheid van 'n ander nie. Die interne vrede binne die staatsgebied word versteur deur godsdienswandade, soos godslaster. Daarvan getuig die vele godsdiensoorloë van die verlede. Die besware teen dié teorie is die volgende:

a Die godsdiensvrede word eerder deur die latere strafprosedure as deur die besondere (godslasterlike) handeling in gevaar gestel. Van Oven[71] sê tereg:

> "Bovendien: wie voorsiet niet, tot welk een stuitende, pijnlijke procedures deze strafbepalingen aanleiding kunnen geven? Wanneer daar straks een Tribune-redacteur terecht zal staan, is het dan niet onvermijdelijk, dat hij juist die procedure zal aangrijpen als welkome gelegenheid voor het voeren van anti-religieuse propaganda? Zal niet het Godsbegrip en het in de wet niet nader omschreven en inderdaad zeer moeilijk te omvatten begrip Godslastering in de rechtszaal besproken worden op een wijze, die nu juist voor godsdienstige gevoelens het allerkrenkendst zal zijn? En zal niet, als de rechter pogen mocht, hieraan paal en perk te stellen, door den verdachte of zijn verdediger te belemmeren in zijn vrijheid van spreken, dit nieuwe olie op het vuur beteekenen en aanleiding geven tot nog hartstochtelijker pers- en meetingpropaganda, die de zaak, welke men bevorderen wil, eer zal schaden?"

b Niemand wat werklik van 'n sekere saak oortuig is, sal hom deur strafbedreiging daarvan weerhou om dit onder woorde te bring nie.

c Die belangrikste punt van kritiek teen dié teorie is dat alle gevalle van godslaster nie die openbare vrede bedreig nie. Inteendeel, dit sou in die gemeenskap waarin ons lewe die uitsondering wees.

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67 *Publication Control Board v Gallo (Africa) Ltd* hierbo 672.
68 Sien de Roo 35–39.
69 Sien Baelde 1932 *TvS* 248.
70 Sien de Roo 39–42; Baelde 1932 *TvS* 249.
71 "Strafbaarstelling van Godslastering" 1931 *NJ* 313 315.

Soos hieronder aangetoon, is die bestaan van 'n misdaad godslaster nie nodig vir die beskerming van die openbare vrede nie. Dit kan op 'n ander wyse deur die strafreg beskerm word.

4 1 5 Vryheid as Regsgoed

Godsdiensvryheid is een van die belangrikste postulate van die moderne regstaat. De Roo[72] verklaar in dié verband:

> "Doch het waarborgen van de godsdienstvrijheid houdt meer in dan uitsluitend de eerbiediging van de vrije keuze der staatsburgers: De overheid zal ook de geloofsvrijheid van hen die geloven dienen te beschermen tegen de inbreuken daarop door kwaadwilligen."

Hy wys daarop dat godslaster in die geval van 'n enger omskrywing daarvan nie hieronder sou val nie. Hy voeg egter hieraan toe:[73]

> "In een wat wijder – rechtswijsgerig – anthropologisch – perspectief zou men deze aantasting echter wèl kunnen zien als een 'vryheidsberoving', nl als het niet ontzien van's mensen recht gevrijwaard te worden voor militante – zij het 'verbale' – agressie van zijn intieme persoonlijkheid, waartoe dan gerekend wordt zijn diepste levensovertuiging, zijn geloof in God. Ook die 'waardigheid' van de mens zelf zal daardoor zijn aangerand."

Hierdie wyse van argumentering is kunsmatig en geforseerd.

4 2 Godsdiensvryheid en Godslaster

Daar kan ten aanvang gestel word dat daar in Suid-Afrika nie 'n staatskerk bestaan nie.[74] 'n Groot mate van godsdiensvryheid word inderdaad toegelaat.[75] Godsdiensvryheid sluit ook die reg in om ander godsdienste aan te val.[76] Samehangend hiermee word vryheid van spraak as "the best process for advancing knowledge and discovering truth" beskou.[77]

In dié verband is dit gepas om te verwys na die Amerikaanse saak *State of Maryland v West*.[78] In dié saak het dit gegaan oor die vraag of die volgende bepaling onkonstitusioneel was:

> "If any person, by writing or speaking, shall blaspheme or curse God, or shall write or utter any profane words of and concerning our Saviour Jesus Christ, or of and concerning the Trinity, or any of the persons thereof, he shall on conviction be fined not more than one hundred dollars, or imprisoned not more than six months, or both fined and imprisoned as aforesaid, at the discretion of the court."

Die eerste wysiging van die federale konstitusie was hier van toepassing wat bepaal:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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72 42.

73 43.

74 Sien *Aronson v Estate Hart* 1950 1 SA 539 (A) 561. Van der Vyver *Seven Lectures on Human Rights* (1976) 35 wys daarop dat die Suid-Afrikaanse reg 'n sterk Christelike kleur dra.

75 Sien *Holland v Holland* 1975 3 SA 553 (A) 561; *Simonlanga v Masinga* 1976 2 SA 732 (W) 740.

76 Sien *Church of Scientology in SA Incorporated Association Not for Gain v Reader's Digest Association SA (Pty) Ltd* 1980 4 SA 313 (K) 317. Sien ook die Amerikaanse saak *Murdoch v Pennsylvania* 319 US 105.

77 Sien die uitstekende artikel van Emerson "Toward a General Theory of the First Amendment" 1963 *Yale LJ* 877 881. Oor die rol van die howe in dié verband, sien Oppenheim "Judicial Review in the United States: Religion and Race" 1961 *SALJ* 392.

78 41 ALR 3d 512 (Maryland CSA).

Regter Mason[79] verklaar dat die betrokke statutêre bepaling

> "was intended to protect and preserve and perpetuate the Christian religion in the State. It obviously was intended to serve and, if allowed to stand, would continue to serve as a mantle of protection by the State to believers in Christian orthodoxy and extend to these individuals the aid, comfort and support of the State."

Die hof bevind gevolglik dat die betrokke statutêre bepaling in stryd met die konstitusie is.[80]

In dieselfde trant voer Robertson[81] aan dat die Engelse godslastermisdaad in stryd is met artikels 9 en 14 van die Europese konvensie van menseregte.

Ek stem saam dat die tradisionele godslastermisdaad nie met godsdiensvryheid versoenbaar is nie.

4 3 Moet die Godslastermisdaad Alle Godsdienste Beskerm?

Daar het al sterk stemme opgegaan vir die standpunt dat alle godsdienste deur die godslastermisdaad beskerm moet word; in 'n godsdienstig plurale gemeenskap kan nie slegs een godsdiens beskerm word nie.[82]

Die Suid-Afrikaanse skrywer Wulfsohn[83] verklaar in dié verband soos volg:

> "In fact one can justifiably make out a case for extending the crime of blasphemy by legislation to other fields as well, by making it a criminal offence to heap licentious and contumelious abuse upon, or to slander, or make scurrilous remarks in relation to the members of any particular group and their beliefs, i e protect not only Christianity, but all religions against wanton insult. Such a law would do much for the protection of minority groups; for instance, the Jews would benefit greatly as anti-semitic attacks on them would be made a punishable offence."

In Nederland[84] en Duitsland[85] word alle godsdienste beskerm, hoewel die betrokke misdade nie slegs na godslaster verwys nie. Dat hierdie benadering in

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79 517–518.

80 Die hof verwys met goedkeuring na die saak *Epperson v Arkansas* 393 US 97 103–104, waarin gesê word: "Government in a democracy, state and national, must be neutral in matters of religious theory, doctrine and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The first Amendment mandates governmental neutrality between religion, and between religion and nonreligion." Vgl ook Brazener "Validity of Blasphemy Statutes or Ordinances" 41 *ALR* 3d 519 520–521; Anoniem 1970 *Columbia LR* 711 e v.

81 *Obscenity* (1979) 247. Vgl ook Ott "Ist die Strafbarkeit der Religionsbeschimpfung mit dem Grundgesetz vereinbar?" 1966 *NJW* 639.

82 Sien in dié verband Blom-Cooper and Drewry *Law and Morality* (1976) 236–260; Hart *Law, Liberty and Morality* (1968) 44; Street *Freedom, the Individual and the Law* (1982) 190–205; Supperstone *Brownlie's Law of Public Order and National Security* (1981) 201. Reeds in 1922 het Kenny 141 gesê: "But, not to speak of the rights of the dissenting Christian sects or of the Jews, the presence in England to-day of many followers of Muhammad and of Buddha suggests the importance of extension, even to those faiths, of the protection – what is now the moderate and just protection – which the law gives to Christianity. A century and a-half ago, Voltaire's tragedy of *Mahomet*, with its hostile portrayment of Islam, used to be performed with general applause both in France and England. To-day such a performance would be impossible. So great, indeed, is the respect shown now to Oriental faiths that we have recently seen the Lord Chamberlain prohibit the use of the word 'Mecca' as the title of a play; so that 'Cairo' was accordingly substituted."

83 95.

84 Sien Remmelink 283: "Men heeft hier echter niet de godsdienst willen beschermen maar aan de ene kant de vrije belijdenis van eigen godsdienstige overtuigen gewaarborgd en daartegenover de kritiek daarop, zelfs waar de spottend of schimpend mocht zijn, niet

beginsel korrek is, kan nie betwyfel word nie. Dit gaan in 'n sekere sin egter nie ver genoeg nie. Soos Ten[86] tereg aandui:

> "But the law will still be unfair if we extend the crime of blasphemy to cover the religions of substantial minorities. For if one is justified in making blasphemy a crime simply because substantial minorities are shocked by blasphemous remarks, then why is it that the law should only protect *religious* groups? Substantial political, social, racial or sexual minorities may be shocked as much as religious minorities by unfavourable comments. If all of them have their sensitivities protected by the law, then there is little that anyone can say which will not run foul of the law."

Die probleme wat Ten in dié verband noem, kan ondervang word deur slegs optrede wat die openbare vrede in gevaar stel, strafbaar te maak.

4 4 Dekriminalisasie van Godslaster

In sekere Westerse lande bestaan godslaster nie meer as misdaad nie.[87] Soos uit die bespreking hierbo blyk, is ek ten gunste daarvan dat godslaster as misdaad in Suid-Afrika deurgehaal word. Daar hoef ook nie eens 'n nuwe misdaad geskep te word nie, want artikel 1 van die Tweede Algemene Regswysigingswet 94 van 1974, is hier van toepassing. Dié artikel bepaal naamlik soos volg:[88]

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vervolg van vorige bladsy

belemmerd. Alleen wanneer godsdienstoefening gehouden of een kerkelijke plechtigheid verricht wordt, en zij, die er aan deelnemen en onder de onmiddellijke indruk er van verkeren, stoornis ondervinden, ook zelfs al wordt de godsdienstoefening of de plechtigheid in haar geheel er niet door gestoord, zijn de spot en de schimp strafbaar omdat, zoals de memorie van toelichting op de art. 143–146 zegt, de pijnlijke indruk de prikkelbaarheid van hen wier godsdienstige overtuigen wordt aangetast, en daarmede het gevaar voor algemene rustverstoring verhoogt."

85 Sien bv Lenckner – Schönke – Schröder 1076. Sien ook a 120 in die Transkeise strafkode 24 van 1886 (K), wat soos volg bepaal: "Whoever wilfully and without lawful justification or excuse, the proof whereof shall be on him, disquiets or disturbs any meeting, assembly, or congregation of persons lawfully assembled for religious worship, and whoever in any way disturbs, molests, or misuses any preacher, teacher, or person lawfully officiating at such meeting, assembly, or congregation, or any persons there assembled, shall be punished with a fine not exceeding ten pounds sterling, and in default of payment with imprisonment, with or without hard labour, for a term which may extend to three months, unless such fine be sooner paid."

86 "Blasphemy and Obscenity" 1978 *British Journal of Law and Society* 89 91. Vgl ook Robilliard "Offences Against Religion and Public Workship" 1981 *Mod LR* 856; Micklewright "Blasphemy and the Law" 1979 (60–61) *Law and Justice* 20 31; Gordon "Blasphemy in English Criminal Law" 1985(5) *The Jewish Law Annual* 92 96. Robilliard "Religious Freedom as Part of a Bill of Rights" 1979 (60–61) *Law and Justice* 8 12 verklaar in dié verband: "If blasphemy were to be extended to other religions fresh problems might be created considering that strong religious belief might induce a man to attack another religion that he considers to be in error. Would the courts have to decide between two religions in such a case? Perhaps a more acceptable answer would be the abolition of the offence of blasphemy followed by the creation of a new crime of incitement to religious hatred (following the present crime of incitement to racial hatred). This should cope with the worst cases of religious intolerance whilst leaving freedom of speech in this area on a securer footing that it is at present." Vgl ook Smith and Hogan *Criminal Law* (1978) 710.

87 België en Frankryk is voorbeelde in dié verband. Sien Gewin 250; Van Oven 313; de Roo 18 175. Gordon *The Criminal Law of Scotland* (1978) 997 wys daarop dat die laaste gerapporteerde aanklag van godslaster in Skotland in 1843 was. Hy beweer dat godslaster moontlik nie meer 'n misdaad in Skotland is nie.

88 Sien my artikel "Ras en Rassisme: Strafregtelike Manifestasie" 1982 *THRHR* 41 54. Sien verder in die algemeen Schepper "Het gevaar voor die Vrijheid van Godsdienstige Belijdenis te Duchten van het in Art 156 N I Sw Omschreven 'Haatzaai'-delict" 1936 *NJ* 361.

> "Iemand wat iets sê of iets anders doen met die opset om vyandiggesindheid tussen verskillende bevolkingsgroepe van die Republiek te veroorsaak, aan te moedig of aan te sterk, is aan 'n misdryf skuldig."

Bevolkingsgroep sluit ook 'n godsdiensgroep in. Dit gaan hier basies om die handhawing van die openbare vrede binne die staatsgebied.

Ek wil ten slotte verwys na die standpunt wat Sangharakshita in sy werk *Buddhism and Blasphemy*[89] inneem. Hy kritiseer die bestaan van die misdaad godslaster en beveel aan dat dit bloot afgeskaf kan word en nie na ander godsdienste uitgebrei moet word nie. Boeddhisme het volgens hom nie die beskerming van die reg nodig nie. Hy vervolg dan:[90]

> "Blasphemy should be recognized as healthy, and as necessary to the moral and spiritual development of the individual, especially when he has been directly subject to the oppressive and coercive influence of Christianity or any other form of theological monarchism. Far from being prosecuted, it should be encouraged."

Hierdie voorstel kan betekenis hê vir nie-Christene, en veral vir voormalige Christene, maar dit sal groot verwarring, onsekerheid en skuldgevoelens by belydende Christene veroorsaak en moet daarom afgewys word.

5 SLOT

In die lig van bogaande uiteensetting kan godslaster as misdaad deurgehaal word. Daar bestaan in ons positiewe reg voldoende beskerming teen die aantasting van godsdienstige gevoelens, wat tot 'n openbare vredebreuk aanleiding kan gee.

89 (1978) 24.
90 24.

Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power. (per Harker in *Ecclesiastical Policy* Book I S 18.8)

AANTEKENINGE

DIE GRONDSLAG VAN KONTRAKTUELE GEBONDENHEID

Afgesien van enkele afwykende standpunte, word algemeen in die Suid-Afrikaanse regspraak en -literatuur aanvaar dat wilsooreenstemming die grondslag van kontraktuele gebondenheid is, ten minste in die oorgrote meerderheid gevalle waar daar geen rede bestaan om aan te neem dat 'n kontraksparty iets anders bedoel het as wat sy gedrag na buite te kenne gegee het nie. Ook word vry algemeen aanvaar dat wilsooreenstemming nie in alle gevalle 'n bevredigende grondslag vir kontraktuele gebondenheid kan bied nie, veral nie waar 'n party se gedrag 'n vertroue skep wat nie met sy psigiese ingesteldheid klop nie. Oor die vereistes wat in hierdie uitsonderingsgevalle vir kontraktuele gebondenheid gestel moet word, asook oor die teoretiese verklaring van sodanige gebondenheid, loop die menings sterk uiteen.

My indruk is dat die skerp meningsverskil in 'n groot mate veroorsaak word deur die abstrak teoretiese wyse waarop die verskillende standpunte gestel word. My oogmerk met hierdie aantekening is om die *praktiese uitwerking* van die verskillende teorieë en benaderingswyses te ondersoek en na aanleiding daarvan 'n kort evaluering te doen.

Die Praktiese Toepassing en Uitwerking van die Verskillende Teorieë en Benaderingswyses

Wilsooreenstemming as sodanig is nie voldoende om 'n kontrak tot stand te laat kom nie. Dit moet *juis bewuste wilsooreenstemming* wees. As X byvoorbeeld dink hy wil Y se 1979-Mercedes Benz 350 SE vir R15 000 koop en Y dink terselfdertyd hy wil die Mercedes Benz vir R15 000 aan X verkoop, kom daar nog geen kontrak tot stand nie. 'n Kontrak ontstaan slegs as X en Y hul ooreenstemmende wil oor en weer aan mekaar bekend maak. Dit geskied by wyse van *wilsuitinge*. Die ooreenstemmende wilsuitinge kan die vorm van gesproke woorde, of geskrewe woorde of gedrag aanneem. Dit mag blyk uit byvoorbeeld die ondertekening van 'n dokument deur albei partye, of uit briefwisseling tussen die partye, of uit 'n faktuur uitgereik deur die een party welke faktuur met instemming deur die ander party aanvaar word, of uit die ondertekening deur die een party van 'n hotelregister wat deur die ander party (die hoteleienaar) gehou word, of deur die opsteek van 'n hand of die knik met die kop by 'n veiling waar die afslaer (die verteenwoordiger van die ander party) aanbiedinge uit die aanwesiges probeer ontlok, ensovoorts.

In die meeste gevalle stem die indruk of vertroue wat 'n persoon se woorde of gedrag na buite wek ooreen met sy *wil* of *psigiese ingesteldheid* ten opsigte van die situasie.

'n Persoon wat 'n kontrak tussen hom en 'n ander persoon wil bewys, hoef dus as uitgangspunt niks meer te doen as om hul *ooreenstemmende wilsuitinge*, en meer spesifiek die wilsuitinge soos hulle dit *teenoor mekaar* gemaak het, te bewys nie. Slaag hy daarin om die hof *op 'n oorwig van waarskynlikheid* te oortuig dat hy en die ander persoon oor en weer *hul ooreenstemmende wil geuit* het, het hy die kontrak bewys en kan hy op 'n gepaste kontraktuele remedie aanspraak maak.

Moeilike praktiese en teoretiese probleme ontstaan egter wanneer die een persoon beweer dat daar 'n kontrak tussen hom en die ander persoon tot stand gekom het terwyl laasgenoemde dit ontken. Kortweg verwys ek na eersgenoemde as die *kontrakbeweerder* en na laasgenoemde as die *kontrakontkenner*.

Dit is belangrik om daarop te let dat volgens *al* die verskillende teorieë en benaderingswyses 'n kontrakbeweerder nie in 'n hofgeding sal slaag nie tensy hy ten minste die volgende op 'n oorwig van waarskynlikheid bewys; naamlik:

i 'n *wilsuiting* aan sy kant en

ii 'n ooreenstemmende *wilsuiting* of ten minste *oënskynlike wilsuiting* aan die kant van die kontrakontkenner.

(Met 'n oënskynlike wilsuiting bedoel ek gedrag of woorde wat na die uiterlike geoordeel soos 'n wilsuiting lyk maar inderdaad nie 'n wilsuiting is nie omdat die nodige psigiese ingesteldheid, die nodige wil, ontbreek. Waar die wilsuiting van die een party met die oënskynlike wilsuiting van die ander party klop, praat ek van 'n *oënskynlike kontrak*.)

Voorbeelde uit ons regspraak waar 'n kontrakbeweerder in sy aksie misluk het omdat hy nie oor hierdie eerste hekkie kon kom deur ten minste 'n oënskynlike kontrak te bewys nie, is *Saambou Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A), *Spes Bona Bank v Portals Water Treatment* 1983 1 SA 978 (A) en moontlik ook *Horty Investments (Pty) Ltd v Interior Acousties (Pty) Ltd* 1984 3 SA 537 (W) en *Maritz v Pratley* (1894) 11 SC 345.

Die standpunte loop eers uiteen wanneer die kontrakbeweerder 'n wilsuiting aan sy kant en òf 'n ooreenstemmende wilsuiting òf 'n oënskynlike, ooreenstemmende wilsuiting aan die kontrakontkenner se kant bewys het, en laasgenoemde nou kom beweer dat daar in der waarheid geen egte wilsuiting aan sy kant was nie omdat sy wil nooit op die sluiting van die beweerde kontrak of kontraktuele beding gerig was nie.

Vanuit die oogpunt van die verskillende teorieë en benaderingswyses sal hierdie situasie soos volg benader word:

a *Die Verklaringsteorie*

Volgens hierdie teorie in ongekwalifiseerde vorm sal die kontrakbeweerder sonder meer slaag. Immers dié teorie verg van hom niks meer as dat hy ooreenstemmende verklarings (of uitings) moet bewys nie. Of dié verklarings nou deur 'n gepaardgaande wil gesteun word of nie, is volgens hierdie teorie irrelevant.

b *Die Wilsteorie*

Volgens hierdie teorie in sy ongekwalifiseerde vorm rus die bewyslas op die kontrakbeweerder om onder andere te bewys dat die kontrakontkenner se wil inderdaad op die sluiting van die beweerde kontrak gerig was. Dit beteken dat, indien die kontrakontkenner aanvoer dat sy wil nie op die sluiting van die beweerde kontrak gerig was nie en daarby getuienis voorlê wat dit, beoordeel

saam met die kontrakbeweerder se getuienis, ten minste ewe waarskynlik maak dat sy wil nie op die kontrak gerig was nie as omgekeerd, die kontrakbeweerder in sy aksie sal misluk. Anders gestel: die hof moet aan die einde van die verhoor op 'n oorwig van waarskynlikheid oortuig wees dat die kontrakontkenner die wil gehad het om homself kontraktueel te bind. As die hof nòg na die een kant nòg na die ander kant oortuig word, misluk die kontrakbeweerder, selfs al het hy aanvanklik daarin geslaag om 'n oënskynlike kontrak te bewys.

c *Die Vertrouensteorie*

By 'n regstreekse toepassing van die vertrouensteorie verloop die proses in effek soos volg (hoewel nie noodwendig so afgebaken in chronologiese volgorde nie):

Die kontrakbeweerder bewys 'n oënskynlike kontrak op 'n oorwig van waarskynlikheid (die eerste hekkie waarna ek hierbo verwys het). Die kontrakontkenner voer weerleggende getuienis aan wat die hof in onsekerheid laat of sy wil inderdaad op die sluiting van die kontrak gerig was of nie. Nou moet die kontrakbeweerder 'n alternatiewe grondslag vir die kontraktuele gebondenheid van die kontrakontkenner aanvoer, naamlik dat die kontrakontkenner spesifiek teenoor hom, die kontrakbeweerder, *die vertroue geskep het* dat hy, die kontrakontkenner, die wil gehad het om hom kontraktueel teenoor die kontrakbeweerder te bind.

Blykbaar is sommige skrywers van mening dat 'n kontrakbeweerder, sonder om ten minste 'n oënskynlike kontrak te bewys, regstreeks op die vertrouensteorie kan staatmaak om kontraktuele aanspreeklikheid te vestig. In so 'n geval sal die kontrakbeweerder vermoedelik dan ten minste 'n *wilsuiting* aan sy kant en 'n inhoudelik ooreenstemmende *vertroueskepping* aan die kontrakontkenner se kant moet bewys. Anders gestel: die kontrakbeweerder sal onder andere moet bewys dat die kontrakontkenner hom só gedra het dat dit by hom, die kontrakbeweerder, die indruk geskep het dat die kontrakontkenner se wil op die sluiting van die beweerde kontrak gerig was. 'n Gedraging wat dié indruk skep, sal egter noodwendig ook 'n oënskynlike uiting van 'n wil gerig op sluiting van die beweerde kontrak behels. Dit is vir die kontrakbeweerder waarskynlik makliker om ten aanvang die hof te oortuig dat die kontrakontkenner se gedrag, na die uiterlike geoordeel, op so 'n wilsuiting neerkom, as wat dit sou wees om die hof te oortuig dat dieselfde gedrag 'n skepping van vertroue van 'n wil tot kontraktuele gebondenheid daarstel. Soos weldra sal blyk, moet die kontrakbeweerder volgens die vertrouensteorie boonop bewys dat sy vertroue *redelik* was en moontlik selfs ook dat daar *skuld* by die kontrakontkenner aanwesig was. Met ander woorde, 'n gegewe stel feite wat volgens die regstreekse toepassing van die vertrouensteorie op die bestaan van 'n kontrak dui, sal noodwendig ook as bewys van 'n oënskynlike kontrak geïnterpreteer kan word; en die bewys van die oënskynlike kontrak sal as 'n eerste stap in die proses uiteraard veel eenvoudiger as die bewys van die kontrak volgens die vertrouensteorie wees.

Weliswaar het die howe by geleentheid reeds in verband met die *vestiging* van kontraktuele aanspreeklikheid na die vertrouensteorie verwys, maar dit was feitlik sonder uitsondering gevalle waar die kontrakbeweerder nie daarin kon slaag om òf 'n oënskynlike kontrak òf 'n kontrak volgens welke teorie of benadering ook al te bewys nie. Dit is onjuis om te beweer dat die howe die vertrouensteorie aanvaar waar 'n oënskynlike kontrak nog nie bewys is nie, maar dit negeer wanneer dit om ontkenning van gebondenheid aan 'n oënskynlike kontrak gaan. 'n Mens sou miskien appèlregter Jansen se minderheidsuitspraak

in *Mondorp Eiendomsagentskap v Kemp en De Beer* (1979 4 SA 74 (A) 78–79) as 'n regstreekse aanwending van die vertrouensteorie ter vestiging van kontraktuele aanspreeklikheid kon sien. By nader ontleding kom dit egter voor of appèlregter Jansen die brief wat namens die appellant, die kontrakontkenner, geskryf is, wel as die beliggaming van 'n oënskynlike kontrak beskou het, maar dat "werklike *consensus*" volgens die regter ontbreek het omdat die verteenwoordiger van die kontrakontkenner "nie bedoel [het] om 'n onderneming te gee nie" (78E–F). (Vanweë die strekking van die brief was dit nie vir die kontrakbeweerder nodig om aan die kontrakontkenner van sy ooreenstemmende wilsuiting kennis te gee nie (79A). By kontraksluiting hang dit naamlik van die bedoeling van die aanbieder af *of* en, indien wel, *hoe* kennis van aanvaarding van die aanbod aan hom gekommunikeer moet word.)

In aansluiting by die voorgaande sou 'n mens kon aanneem dat die wilsuiting van die kontrakontkenner meestal op sigself reeds op 'n vertroueskeppende gedraging neerkom. Die probleem is *wat* die kontrakbeweerder meer as die oënskynlike wilsuiting van kontrakontkenner moet bewys om volgens die vertrouensteorie in sy eis te kan slaag. Die standpunte hieroor loop uiteen:

i Volgens De Vos ("Mistake in Contract" *Essays in Honour of Ben Beinart* bd 1 180 e v; en 1976 *Acta Juridica* 177 e v) moet dit blyk dat die kontrakontkenner op *skuldige wyse* die vertroue van die wil tot kontraktuele gebondenheid by die kontrakbeweerder geskep het, dit wil sê die kontrakbeweerder sal op 'n oorwig van waarskynlikheid opset of nalatigheid aan die kant van die kontrakontkenner moet bewys. In die praktyk behoort dié bewyslas nie te groot probleme vir die kontrakbeweerder te veroorsaak nie aangesien die feite meestal vanself spreek: 'n persoon wat byvoorbeeld 'n dokument onderteken sonder om hom van die inhoud daarvan te vergewis, tree *prima facie* nalatig op en behoort as uitgangspunt aanspreeklik te wees tensy daar besondere omstandighede aanwesig is wat sy onagsame optrede verklaar. Skuld aan die kant van die kontrakontkenner is tot dusver nie onomwonde in die regspraak as aanspreeklikheidvestigende vereiste gestel nie (sien egter *Mondorp Eiendomsagentskap v Kemp en De Beer supra* 78G–H; en vgl *Saambou Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 996A–D).

ii Daar word gewoonlik gesê dat die vertroue van die kontrakbeweerder 'n *redelike* vertroue moet wees. Indien die kontrakbeweerder die kontrakontkenner mislei het ten opsigte van die aard of inhoud van die transaksie, kan hy nie daarop aanspraak maak dat sy vertroue redelik was nie. Of dit in so 'n geval boonop moet blyk dat daar skuld aan die kontrakbeweerder se kant aanwesig moet gewees het voordat die kontrakontkenner aanspreeklikheid kan vryspring, is 'n vraag waarop ek hieronder in verband met die *iustus error*-benadering terugkom.

'n Besondere geval waar die redelikheid van die kontrakbeweerder se vertroue in die gedrang kom, is die geval waar dit blyk dat die kontrakbeweerder *geweet het* dat die kontrakontkenner se wil nie op die sluiting van die kontrak (of die insluiting van 'n besondere beding) gerig was nie (soos volgens die feitebevindings die geval was in *Van Wyk v Otten* 1963 1 SA 415 (O) en *Du Toit v Atkinson's Motors* 1985 2 SA 893 (A)). Twee benaderings is hier moontlik: Enersyds sou 'n mens kon redeneer dat daar in so 'n geval *geen vertroue* by die kontrakbeweerder geskep is nie; immers, wat die kontrakontkenner se gedrag

ook al na buite te kenne mag gee, die kontrakbeweerder weet van beter. Andersyds sou 'n mens kon redeneer dat die kontrakbeweerder se vertroue in dié geval nie redelik was nie omdat dit hý is wat die kontrakontkenner mislei het. In die besondere omstandighede het daar naamlik 'n regsplig op hom gerus om die kontrakontkenner reg te help. Doen hy dit nie, pleeg hy 'n wanvoorstelling deur 'n late.

d *Die Estoppel-benadering*

Die estoppel-benadering kom neer op 'n aanpassing of kwalifikasie van die wilsteorie. Die toepassing daarvan sou noodwendig die volgende prosessuele verloop vereis. Die kontrakbeweerder voer in sy dagvaarding of deklarasie aan dat daar 'n kontrak tussen hom en die kontrakontkenner tot stand gekom het. In sy verweerskrif ontken die kontrakontkenner die bestaan van die kontrak op grond daarvan dat sy wil nie op sluiting van die beweerde kontrak gerig was nie. Op sy beurt antwoord die kontrakbeweerder dan in sy replikasie dat indien dit sou blyk dat die kontrakontkenner se wil nie op die sluiting van die kontrak gerig was nie, die kontrakontkenner in elk geval estop (verhinder) word om hom op die afwesigheid van wilsooreenstemming te beroep omdat hy, die kontrakontkenner, skuldig die skyn teenoor hom, die kontrakbeweerder, geskep het dat hy hom kontraktueel wil verbind en omdat die kontrakbeweerder toe as gevolg van die skynverwekking tot sy eie nadeel gehandel het.

In die hofproses moet die kontrakbeweerder ten minste 'n wilsuiting aan sy kant en 'n ooreenstemmende oënskynlike wilsuiting aan die kontrakontkenner se kant bewys. Indien die kontrakontkenner dan op sy beurt daarin slaag om by die hof onsekerheid te laat ontstaan of sy wil inderdaad op die sluiting van die kontrak gerig was of nie, kan die kontrakbeweerder slegs met sy aksie slaag indien hy op 'n oorwig van waarskynlikheid die volgende bewys:

i dat die kontrakontkenner 'n *wanvoorstelling* teenoor hom gepleeg het deur die indruk te skep dat hy, die kontrakontkenner hom kontraktueel wil verbind (die kontrakontkenner se oënskynlike wilsuiting kom waarskynlik reeds op so 'n wanvoorstelling neer);

ii dat daar *skuld* in die vorm van opset of nalatigheid by die kontrakontkenner aanwesig was;

iii dat hy, die kontrakbeweerder, tot sy *eie nadeel* gehandel het; en

iv dat daar 'n *kousale verband* was tussen die wanvoorstelling van die kontrakontkenner en die handeling tot eie nadeel van die kontrakbeweerder.

Die estoppel-benadering is in slegs twee gevalle onomwonde deur ons howe in verband met dwaling by kontraksluiting gevolg, naamlik in *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 en *Peri-Urban Areas Health Board v Breedt* 1958 3 SA 783 (T). (Sien Smuts r se ontleding van die regspraak in *Usher v AWS Louw Elektriese Kontrakteurs* 1979 2 SA 1059 (O) 1062H–1064D). In die *Peri-Urban Areas-saak* is die nadeel-vereiste in so 'n mate verwater dat die blote feit dat die kontrakbeweerder vanweë die wanvoorstelling tot 'n meersydige kontrak met die kontrakontkenner toetree, as voldoening aan dié vereiste beskou is (789H–790G). Ook die skuld-vereiste word nie uitdruklik gestel waar die estoppel-benadering in hierdie verband ter sprake gekom het nie (vgl *Coetzee v Van der Westhuizen* 1958 3 SA 847 (T) 851G–H en *Credit Corporation of SA Ltd v Botha* 1968 4 SA 837 (N) 847G–H).

Dit ly geen twyfel nie dat 'n kontrakbeweerder hom inderdaad in die huidige verband op estoppel sou kon beroep indien hy dit sou verkies. Of dit egter

volgens die regspraak nodig is dat hy vir hom hierdie swaar las op die hals haal, is 'n vraag waarop ek later terugkom. In elk geval

> "sou dit tot groter helderheid van denke lei om in hierdie verband nie van estoppel te praat nie as ware estoppel nie bedoel word nie" (volgens Jansen ar in *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 1002D–E).

e *Die Iustus Error-benadering*

Die *iustus error*-benadering dien ook as aanpassing of kwalifikasie van die wilsteorie. By die praktiese toepassing daarvan word uitgegaan van die *verklaringsteorie* (hoewel dit nie uitdruklik gesê word nie) maar in die finale analise kom die *iustus error*-benadering tog op 'n *indirekte toepassing van die vertrouensteorie* neer.

Volgens hierdie benadering hoef die kontrakbeweerder ten aanvang slegs 'n oënskynlike kontrak tussen hom en die kontrakontkenner te beweer en te bewys, dit wil sê 'n wilsuiting aan sy kant en 'n ooreenstemmende (minstens oënskynlike) wilsuiting aan die kontrakontkenner se kant. Indien die kontrakontkenner nou aanspreeklikheid wil vryspring, moet hy in sy pleitstukke *beweer* en by die verhoor op 'n oorwig van waarskynlikheid *bewys* dat daar ten tyde van die beweerde kontraksluiting 'n *iustus error* ('n redelike dwaling) by hom aanwesig was (*National and Overseas Distributors v Potato Board* 1958 2 SA 473 (A) 479H; *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 470A–B).

Die howe praat in dié verband gewoonlik van 'n *eensydige dwaling* aan die kant van die kontrakontkenner. Inderdaad het 'n mens gewoonlik hier met 'n wedersydse dwaling ("mutual error") te doen, want normaalweg dwaal die kontrakbeweerder net so seer omtrent die kontrakontkenner se bedoeling as wat laasgenoemde omtrent eersgenoemde se bedoeling dwaal. (Ek kom later terug op die uitsonderingsgevalle waar dit nie so is nie.) Die gebruik van die uitdrukking "eensydige dwaling" dui op die besondere belangrikheid wat die howe aan die oënskynlike kontrak toeken. Dié kontrak word as uitgangspunt geneem (en trouens ook dikwels "die kontrak" genoem, bv in *National and Overseas Distributors v Potato Board* 1958 2 SA 473 (A) 479G) en die party wat beweer dat hy 'n ander wil (of bedoeling) gehad het as dié wat uit die oënskynlike kontrak blyk, word sonder meer aangemerk as die (enigste) party wat onder 'n dwaling verkeer; vandaar die benaming "eensydige dwaling."

Soos gesê: waar die kontrakbeweerder 'n oënskynlike kontrak tussen hom en die kontrakontkenner op 'n oorwig van waarskynlikheid bewys het, rus die bewyslas (nie bloot die weerleggingslas nie) volgens die *iustus error*-benadering op die kontrakontkenner om op 'n oorwig van waarskynlikheid aan te toon dat hy ten tyde van die aangaan van die transaksie onder 'n *wesenlike dwaling* verkeer het en dat die *dwaling redelik* was (sien die *National and Overseas Distributors*- en *George*-saak *supra* t a p).

In hierdie verband sou 'n mens kortweg kon sê dat dwaling aangaande die inhoud van die beweerde kontrak as wesenlik geld, byvoorbeeld 'n dwaling omtrent 'n prestasie wat gelewer moet word of enige beweerde beding wat verband hou met die tyd, plek of wyse van prestasie of met enige waarborg, voorwaarde, lasbepaling of kwytskeldingsbeding ("exemption clause") waaraan die prestasieverpligting onderworpe mag wees.

Die omstandighede waaronder die kontrakontkenner se dwaling as redelik beskou word, het reeds taamlik duidelik in die regspraak uitgekristalliseer:

Dit staan naamlik vas dat die kontrakontkenner se dwaling redelik was indien dit op 'n oorwig van waarskynlikheid blyk dat die kontrakbeweerder deur 'n *wanvoorstelling* die dwaling aan die kant van die kontrakontkenner veroorsaak het (*George v Fairmead (Pty) Ltd* 1958 2 465 (A) 471C–D *National and Overseas Distributors v Potato Board* 1958 2 SA 473 (A) 479G–H). So 'n wanvoorstelling kan òf deur *'n positiewe handeling* òf deur *'n late* aan die kant van die kontrakbeweerder begaan gewees het. Skuld is nie 'n vereiste nie. Met ander woorde ook 'n *onskuldige wanvoorstelling* deur die kontrakbeweerder omtrent die aard of inhoud van die handeling of transaksie maak die kontrakontkenner se dwaling redelik (*George v Fairmead (Pty) Ltd ibid*: "[i]f his mistake is due to a misrepresentation whether *innocent* or fraudulent . . . [he] is not bound" – ek kursiveer; en *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 316I–J).

Uit die aard van die saak moet die wanvoorstelling *onregmatig* wees, dit wil sê, objektief onredelik of, anders gestel, in stryd met die regsopvattinge van die gemeenskap. Die onregmatigheidsvereiste word meestal nie spesifiek genoem nie en veroorsaak ook geen probleme waar die wanvoorstelling deur 'n positiewe handeling begaan word nie. Die rede hiervoor is eenvoudig: 'n kontraksparty tree ongetwyfeld onregmatig (onredelik, *contra bonos mores*) op indien hy die ander party positief mislei omtrent die aard of inhoud van die transaksie waarin laasgenoemde hom begeef (*George v Fairmead (Pty) Ltd supra* 471D–E 472A).

By 'n wanvoorstelling deur 'n late word die vereiste egter gestel dat daar 'n *regsplig om te spreek* op die kontrakbeweerder moet gerus het (bv in *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd supra* 316I). So 'n regsplig is byvoorbeeld aanwesig:

(a) as die kontrakbeweerder inderdaad *weet* dat die kontrakontkenner onder 'n dwaling verkeer en hom nie reghelp nie (soos in *Van Wyk v Otten supra*; let daarop dat 'n mens in hierdie geval met 'n egte eensydige dwaling te doen het— die misleier dwaal nie, hy weet immers dat die ander party onder 'n wanindruk verkeer); of

(b) indien daar voor die sluiting van die beweerde kontrak 'n indruk deur die kontrakbeweerder geskep is wat direk in stryd is met die inhoud van die skriftelike stuk wat volgens die kontrakbeweerder die kontrak beliggaam (soos in *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A); en *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd supra*).

Die vraag in laasgenoemde geval is of die kontrakbeweerder rede gehad het om te glo dat die kontrakontkenner bereid sou gewees het om die skriftelike stuk te onderteken indien hy daarvan bewus was dat die skriftelike stuk afwyk van dit wat vooraf te kenne gegee is. As die kontrakbeweerder nie rede gehad het om so te glo nie, het daar 'n regsplig op hom gerus om die kontrakontkenner se aandag op die betrokke gedeeltes van die skriftelike stuk te vestig (*Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd supra* 316H–J). As die kontrakbeweerder in dié omstandighede stilbly, pleeg hy 'n wanvoorstelling, en of daar by hom skuld aanwesig is of nie, is totaal irrelevant (*ibid*).

Of die kontrakontkenner se dwaling ook as redelik bevind kan word in omstandighede waar daar geen wanvoorstelling (hetsy deur 'n doen hetsy deur 'n late) deur die kontrakbeweerder gepleeg is nie, lyk twyfelagtig. Daar kom wel *dicta* in die regspraak voor wat skynbaar die deur vir die kontrakontkenner ooplaat om ook ander omstandighede aan te voer om die redelikheid van sy

dwaling te bewys (sien die bekende opmerking van Schreiner ar in *National and Overseas Distributors v Potato Board supra* 479G–H en die nog toegeefliker standpunt van Steyn hr in *Trollip v Jordaan* 1961 1 SA 238 (A) 248H–249B). Ek is egter nie van 'n enkele uitspraak bewus waar 'n kontrakontkenner aanspreeklikheid kon vryspring sonder om 'n wanvoorstelling (in die sin soos hierbo verduidelik) aan die kontrakbeweerder se kant te bewys nie. Die één geval wat soms in dié verband aangevoer word, is dié van *Maritz v Pratley* (1894) 11 SC 345. Die uitspraak in hierdie saak is egter so kripties dat dit moeilik is om die ware grondslag daarvan te bepaal. Hoewel hoofregter De Villiers van die dwaling van die kontrakontkenner gewag maak en dit as 'n "*bona fide* mistake" bestempel, kom dit my voor asof die kontrakbeweerder misluk het eenvoudig omdat uit die bewese feite nie eens 'n oënskynlike kontrak afgelei kon word nie: "the defendant did not [na die uiterlike geoordeel] agree to purchase the same thing which the plaintiff was endeavouring to sell . . ." (347).

Soms word beweer dat 'n kontrakontkenner se dwaling sonder meer *on*redelik is indien daar skuld by hom aanwesig was (sien die voorbeeld genoem deur Van der Merwe "Die Duiwel die Hof en die Wil van 'n Kontraktant" *JC Noster – 'n Feesbundel* 13 e v 33). As gesag hiervoor word byvoorbeeld na *Diedericks v Minister of Lands* 1964 1 SA 49 (N) (57D–E) verwys. Afgesien daarvan dat die betrokke *dictum* van regter Miller *obiter* was (hy het in daardie stadium reeds bevind dat die beweerde dwaling nie wesenlik was nie) word dit in elk geval onmiddellik gevolg deur die volgende stelling:

> "[D]efendant's error was not due to any misrepresentation by plaintiff who neither knew of the error nor was concerned with defendant's motives or reasons or beliefs in making the offer. In such circumstances the mistake cannot successfully be set up as a defence by the erring party . . ." (57E–F).

Hiermee is 'n mens terug by die geykte verweer wanvoorstelling, daar gelaat of die wanvoorstelling tot 'n wesenlike dwaling aanleiding gegee het of nie. In *Osman v Standard Bank National Credit Corporation Ltd* 1985 2 SA 378 (K) 387G waar die moontlike skuld van die kontrakontkenner as deurslaggewend beskou is, het dit klaarblyklik ook om 'n nie-wesenlike dwaling in die beweegrede gegaan (sien Reinecke en Van der Merwe 1985 *TSAR* 318 e v 318).

Die meer aanvaarbare standpunt skyn te wees dat die moontlike nalatigheid van die kontrakontkenner hom nie daarvan weerhou om kontraktuele gebondenheid vry te spring nie, mits hy maar 'n wanvoorstelling ten aansien van die aard of inhoud van die transaksie aan die kant van die kontrakbeweerder kan bewys. Om 'n geskrif te onderteken sonder om 'n mens van die aard en inhoud daarvan te vergewis is ongetwyfeld nalatig. Nogtans het die kontrakontkenner in elkeen van die sake soos *Van Wyk v Otten supra*, *Du Toit v Atkinson's Motors supra*, en *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd supra* ten spyte van sy eie nalatigheid geslaag, omdat dit telkens vir hom moontlik was om aan te toon dat die betrokke kontrakbeweerder 'n wanvoorstelling gepleeg het. Dit is nie immoreel of onregmatig om op onagsame wyse 'n skriftelike stuk te onderteken sonder om 'n mens van die presiese aard en inhoud daarvan te vergewis nie; normaalweg moet jy maar net die gevolge van jou onagsaamheid dra. Dit is egter wel moreel en juridies afkeurenswaardig om iemand anders ten opsigte van die aard en inhoud van die skriftelike stuk wat hy onderteken te mislei, en hom dan boonop daaraan gebonde te wil hou. Geen wonder dus dat ons howe voorrang gee aan die belange van die misleide kontrakontkenner bo dié van die

wanvoorsteller, die kontrakbeweerder nie. En die beginsel bly natuurlik dieselfde, of daar nou van 'n skriftelike stuk sprake is of nie.

Waar dit blyk dat die kontrakontkenner se dwaling wesenlik was, maar nie redelik nie (soos in *National and Overseas Distributors v Potato Board*; en *George v Fairmead (Pty) Ltd supra*), word hy kontraktueel aanspreeklik gehou ten spyte van die bewese afwesigheid van wilsooreenstemming. Die wilsteorie kan in so 'n geval nie 'n verklaring vir sy aanspreeklikheid bied nie; dié moet waarskynlik gesoek word in die vertrouensteorie. Die vertrouensteorie word hier weliswaar nie regstreeks toegepas nie, maar onregstreeks. Die agterliggende gedagte is klaarblyklik dat 'n mens normaalweg gebonde gehou word aan die indruk wat jou wilsuitinge na buite skep, dit wil sê die vertroue wat jy wek by die persoon met wie jy, na die uiterlike geoordeel, 'n regshandeling aangaan. Hierdie gebondenheid kan jy slegs vryspring as jy onregmatigheid aan die kant van die ander persoon kan bewys.

'n Evaluering van die Teorieë en Benaderingswyses

'n Mens sou verwag dat die verskillende teorieë getoets behoort te word aan die hand van kriteria soos die volgende:

i Is dit billik?

ii Is dit ekonomies doelmatig? Hoe affekteer dit die handelsverkeer en die alledaagse kontak tussen individuele regsgenote?

iii Kan dit op 'n eenvoudige, verstaanbare wyse in die praktyk toegepas word? Lewer dit nie byvoorbeeld probleme op by die opstel van prosesstukke of die bewys van feite in die hof nie?

iv Hoe pas dit by die dogmatiese grondslae en sistematiek van ons reg in?

Nou is dit opvallend dat regsteoretici geneig is om die laasgenoemde kriterium as die belangrikste (of selfs enigste) te beskou aan die hand waarvan die verskillende teorieë en benaderingswyses beoordeel behoort te word. In die regsliteratuur vind 'n mens dat 'n bepaalde teorie of benaderingswyse aangehang word omdat dit dan "dogmaties suiwerder" sou wees as 'n ander teorie (bv in De Wet en Van Wyk *Kontraktereg en Handelsreg* 4de uitg 19; en vgl ook NJ van der Merwe 1978 *SALJ* 317 e v).

Hierdie dogmaties gefundeerde voorkeure berus dikwels op 'n *petitio principii*. As 'n mens byvoorbeeld die wilsteorie tot 'n dogma verhef, volg dit weliswaar dat die estoppel-benadering minder daaraan afbreuk doen as die *iustus error*-benadering. So 'n dogma (en 'n "dogma" is per definisie onomstootlik – *Woordeboek van die Afrikaanse Taal s v* "dogma") is egter nie uit die positiewe reg af te lei nie, inteendeel.

Die estoppelbenadering is in verskeie opsigte onbevredigend: Eerstens plaas dit 'n *onbillike* swaar las op 'n kontrakbeweerder. Dit is nie genoeg dat hy onberispelik opgetree het in sy omgang met die kontrakontkenner en dat hy kan bewys dat die kontrakontkenner se uiterlike optrede by hom die vertroue gewek het dat die kontrakontkenner homself kontraktueel wil bind nie. Slaag die kontrakontkenner maar net daarin om genoegsame getuienis aan te voer wat dit, gesien saam met die kontrakbeweerder se getuienis, ewe waarskynlik as onwaarskynlik maak dat sy uiterlike gedrag deur 'n gepaardgaande wil gerugsteun is, rus die verdere las op die kontrakbeweerder om 'n *wanvoorstelling* en *skuld*

aan die kant van die kontrakontkenner, en *gevolglike nadeel* aan sy eie kant te bewys. Die trant van ons regspraak bied 'n genoegsame aanduiding dat so 'n benadering nie in ons gemeenskap as billik beskou word nie. Tweedens sal 'n konsekwente toepassing van die estoppel-benadering waarskynlik 'n belemmering van die handelsverkeer meebring. Die rede hiervoor is dat 'n suksesvolle beroep op estoppel deur die kontrakbeweerder nie meebring dat daar 'n kontrak tussen hom en die kontrakontkenner bevind word nie. Daar is nog steeds geen kontrak en verbintenisse (of regte en verpligtinge) wat daaruit voortvloei nie. Die kontrakontkenner word slegs verhoed om hom op die afwesigheid van 'n kontrak te beroep. Indien die kontrakbeweerder intussen sou voorgegee het om sy "regte" uit die "kontrak" aan 'n derde te sedeer, sal die derde hom in die onbenydenswaardige posisie bevind dat hy nie die "regte" teenoor die kontrakontkenner sal kan afdwing nie. Immers daar *is* geen kontrak of daaruit voortvloeiende regte nie en die derde kan hom ook nie teenoor die kontrakontkenner op estoppel beroep nie; per slot van rekening het die kontrakontkenner geen wanvoorstelling teenoor hom, die derde, gemaak nie. Die onwenslikheid van hierdie situasie vir die handelsverkeer blyk duidelik as 'n mens in gedagte hou hoeveel huurkoop- en bruikhuurkontrakte daagliks by finansiële instellings "verdiskonteer" word. So 'n finansiële instelling sal hom nooit kan beroep op die vertroue van gebondenheid wat die kontrakontkenner oorspronklik by die "verkoper" of "verhuurder" (dit wil sê, die kontrakbeweerder) gewek het nie.

Derdens staan die estoppel-benadering, ook vanuit 'n regsteoretiese oogpunt gesien, nie bo verdenking nie. Die toepassing daarvan loop uit op 'n resultaat wat nie met èn die verkondigde grondslag van kontraktuele gebondenheid èn die bevinde feite versoen kan word nie. Die redenasie verloop só: Wilsooreenstemming is die enigste grondslag van kontraktuele aanspreeklikheid. Ons wéét dat daar in hierdie besondere geval geen wilsooreenstemming was nie. Aangesien daar egter sekere ander feite aanwesig was, sluit ons ons oë vir die werklikheid en laat ons sekere gevolge intree *asof* daar tog 'n kontrak tot stand gekom het, en dít terwyl ons steeds ter wille van "dogmatiese suiwerheid" die bestaan van die kontrak ten sterkste ontken. Op dié manier "you can have your cake and eat it." Inderdaad kom dit neer op 'n ontoelaatbare fiksie wat hoogstens in 'n oorgangstadium van die betrokke regsfiguur geduld behoort te word. Die volgende stap in die regsontwikkeling sou wees om te erken dat kontraktuele aanspreeklikheid ook uit ander feite as wilsooreenstemming kan voortvloei. Die taak van die regsteoretikus is dan om sy teorie só aan te pas dat dit ook hierdie uitsonderingsgevalle kan dek. So 'n aanpassing kom nie op 'n versaking van regsteorie neer nie, maar op 'n verfyning daarvan.

Om vanselfsprekende redes geniet die ongekwalifiseerde wilsteorie en die ongekwalifiseerde verklaringsteorie geen aanhang in die regsliteratuur nie. (Die enigste uitsondering onder die skrywers is miskien NJ van der Merwe wat onwrikbaar aan die wilsteorie vashou en die onbillike uitwerking daarvan hoogstens in gepaste omstandighede deur die toestaan van 'n deliksaksie wil probeer temper – "Aspects of the Law of Contractual Torts" 1978 *SALJ* 317 e v 321–323.) 'n Onbuigsame toepassing van die wilsteorie sou meebring dat 'n oënskynlike kontraksparty hom sonder uitsondering op sy ontbrekende wil kan beroep – selfs al het hy op 'n geheel onbehoorlike wyse en selfs opsetlik die indruk van die aanwesigheid van so 'n wil geskep – terwyl die verklaringsteorie in sy "suiwer"

vorm daarop kan uitloop dat persone gebonde gehou word aan 'n "kontrak" wat nòg die een nòg die ander eintlik wou gehad het.

'n Evaluering van die vertrouensteorie soos dit in uitsonderingsgevalle ter aanvulling van die wilsteorie toegepas word, is nie so maklik nie:

Die vertrouensteorie word in die genoemde rol algemeen as billik beskou. Dit lewer na my wete geen besondere probleme vir die handelsverkeer op nie en kan ook sonder oormatige akrobatiek by ons regsistematiek ingepas word.

Die regstreekse toepassing daarvan kan egter tot prosessuele en praktiese probleme aanleiding gee. In hierdie rol verg die vertrouensteorie dat 'n kontrakbeweerder òf wilsooreenstemming òf 'n (skuldige) vertrouenskepping deur die ander party (en 'n ooreenstemmende wil aan sy, die kontrakbeweerder, se kant) moet bewys voordat hy die ander party kontraktueel aanspreeklik kan hou. Die kontrakontkenner kan aanspreeklikheid vryspring as hy genoegsame weerleggende getuienis aanvoer om dit vir die hof onmoontlik te maak om te sê watter kant die oorwig van waarskynlikheid lê, dit wil sê wat òf die moontlike wil van òf die moontlike (skuldige) vertroueskepping deur die kontrakontkenner betref. Die kontrakbeweerder sit die proses aan die gang deur in sy dagvaarding of deklarasie te beweer dat daar 'n kontrak tussen hom en die kontrakontkenner tot stand gekom het. Die kontrakontkenner hoef in sy verweerskrif niks meer te doen as om die bestaan van die kontrak te ontken nie. Immers, hy hoef geen besondere verweer aan te voer of te bewys nie; sy saak is eenvoudig dat die kontrakbeweerder nie wilsooreenstemming of 'n (skuldige) vertroueskepping deur hom (die kontrakontkenner) kan bewys nie. By die verhoor kan dit nou maklik gebeur dat die niksvermoedende kontrakbeweerder gekonfronteer word met die kontrakontkenner se storie dat sy wil, ten spyte van die onmiskenbare indruk wat sy gedrag mag geskep het, hoegenaamd nie op sluiting van die kontrak gerig was nie. Myns insiens sou dit onbillik wees om in daardie stadium van die kontrakbeweerder te verwag om te begin rondval vir getuienis wat op 'n (skuldige) vertroueskepping deur die kontrakontkenner dui (vgl *Usher v AWS Louw Elektriese Kontrakteurs supra* – sien veral Smuts r se opmerkings op 1064F–1065B). En buitendien: hoekom moet die bewyslas op die kontrakbeweerder rus? Die kontrakontkenner is tog by uitstek die persoon wat sal weet hoekom sy uiterlike optrede nie met sy innerlike wil gestrook het nie. Laat hóm bewys waarom hy onder 'n misverstand verkeer het. 'n Mens moet in gedagte hou dat die tipe wilsuiting wat na die uiterlike geoordeel soos toestemming tot kontraktuele gebondenheid lyk, in feitlik alle gevalle *'n doelbewuste handeling* van die betrokke persoon verg. In verreweg die meeste gevalle uit die regspraak waar die kontrakbeweerder ten aanvang daarin geslaag het om 'n oënskynlike kontrak te bewys, is dit duidelik dat die kontrakontkenner goed geweet het dat hy besig was om hom kontraktueel te bind of ten minste dat sy handeling op die een of ander wyse met 'n kontrak tussen hom en die kontrakbeweerder verband gehou het. (Dink aan die feite van *Diedericks v Minister of Lands supra* – 'n onomwonde skriftelike aanbod is deur die kontrakontkenner gemaak; *Trollip v Jordaan supra* – 'n formeel korrekte koopkontrak van grond is gesluit; *Du Toit v Atkinson's Motors Bpk supra* – die kontrakontkenner het 'n dokument onderteken waarvan hy vermoed het dat dit kontraktuele bedinge bevat; *Shepherd v Farrell's Estate supra* en *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* – in elkeen van die twee gevalle het die kontrakontkenner 'n dokument onderteken waarvan hy

geweet het dat dit bedoel is om die kontrak tussen hom en die kontrakbeweerder te beliggaam; *National and Overseas Distributors v Potato Board supra* – die kontrakontkenner het 'n brief van aanname van die kontrakbeweerder se tender aan laasgenoemde gestuur; *George v Fairmead supra* – die kontrakontkenner het 'n hotelregister geteken waarvan hy geweet het dat dit bedinge van die kontrak tussen hom en die kontrakbeweerder bevat, om maar 'n paar voorbeelde te noem.) Dat 'n persoon, ten minste as uitgangspunt, vir sy doelbewuste ("deliberate") handelinge moet instaan, lyk eenvoudig billik. Na my mening is dit ook betekenisvol dat die oorwig van ons regspraak die bewyslas klaarblyklik op die kontrakontkenner lê, dit wil sê waar die kontrakbeweerder ten minste 'n oënskynlike kontrak bewys het. Die billikheidsgevoel van opeenvolgende geslagte regters moet nie ligtelik genegeer word nie.

Die skrywers wat 'n regstreekse toepassing van die vertrouensteorie voorstaan, doen dit waarskynlik onder andere vanweë die teoretiese aantreklikheid van so 'n benadering: as vertroueskepping dan nou 'n aanvullende grondslag vir kontraktuele aanspreeklikheid móét wees, lyk dit "logies" en konsekwent dat 'n mens dit voluit moet erken, en uitdruklik die bewys van vertroueskepping moet vereis (vgl Reinecke en Van der Merwe 1984 *TSAR* 290 e v 294). Die doel van 'n regsteorie is egter in die eerste plek om die positiewe reg te verklaar, te sistematiseer en toegankliker te maak en nié om as uitgangspunt by die formulering van regsreëls te dien nie. 'n Mens moet nie die kar voor die perde span nie. Die vertrouensteorie bied 'n aanneemlike *verklaring* vir die *iustus error*-benadering. Die rol van die teorie moet egter nie oorspeel word nie.

Die *iustus error*-benadering toon 'n opvallende ooreenkoms met die howe se benadering tot die bewys van laster. By laasgenoemde word ten aanvang van 'n eiser slegs vereis om te bewys dat die verweerder, na die uiterlike geoordeel, lasterlike woorde aangaande hom, die eiser, gepubliseer het. Kwyt hy hom van hierdie bewyslas, rus die bewyslas vervolgens op die verweerder (wat aanspreeklikheid wil ontkom) om aan te toon dat sy optrede geregverdig was of dat daar geen *animus iniuriandi* by hom aanwesig was nie. Indien die hof dan by afloop van die verhoor nòg na die een kant nòg na die ander kant oortuig is sover dit die aanwesigheid van 'n regverdigingsgrond of die afwesigheid van *animus iniuriandi* betref, slaag die eiser met sy eis selfs al het die verweerder miskien inderdaad nie die bedoeling gehad om die eiser te belaster nie. Sover ek weet, skep hierdie benadering geen besondere beginselprobleme vir ons teoretici nie.

Positiewe regsreëls moet nie finaal beoordeel word volgens hoe goed en simmetries hulle by 'n bepaalde teorie inpas nie. Regsreëls se aanvaarbaarheid hang uiteindelik daarvan af of hulle duidelik, eenvoudig, billik, doelmatig, ekonomies en sosiaal verantwoord, en prakties toepasbaar is.

Na my mening voldoen die *iustus error*-benadering aan al hierdie vereistes.

ADJ VAN RENSBURG
Universiteit van Wes-Kaapland

MILITÊRE REG EN MUSIEK: 'N POSITIEWE NOTA

1 Inleiding

Op die stofomslag van sy werk *Military Justice is to Justice as Military Music is to Music* (1970) maak Sherril die volgende stelling:

> "Every year 100 000 Americans in uniform find themselves facing court-martial. They get no bail, no trial by peers, no guarantee of an impartial judge, no due process. Ninety-five percent of the defendants are convicted, for military justice is prefabricated according

> to the wishes of the local commander, and trial is tantamount to a verdict of guilty. And, for the many thousands of men thrown into military prisons, conviction is tantamount to the loss of all human rights. In prison they often encounter unbelievable filth, unbelievable cruelty and degradation. Some are driven insane, some to suicide. For the first aim of military justice is not justice but discipline – discipline by any means including debasement and vengeance."

Van hierdie sentimente sal sekerlik deur talle Suid-Afrikaanse weermagslede beaam word. Die militêre regspleging word as "oerwoudgeregtigheid" bestempel en daar word beweer dat gewone burgervryhede onnodig ingeperk word vanweë die elastisiteit van "militêre noodsaak." In die Verenigde State van Amerika is daar al op indringende wyse na die militêre regspleging ondersoek ingestel (vgl Rose *A Prayer for Relief* (1973)), maar hier te lande is die onderwerp vreemd vir die publieke oog, asook vir juriste.

Daar bestaan verskeie kontraste tussen die militêre reg en die gewone strafstelsel (vgl *S v Kloppers* 1986 1 SA 657 (T) 660B–E), maar in hierdie aantekening word op slegs een aspek gekonsentreer, naamlik die beskerming wat weermaglede geniet teen dubbele blootstelling. Daar word eerstens na 'n beslissing verwys, wat daarna aan die hand van toepaslike wetgewing en regsbeginsels bespreek word.

2 S v Fredericks

Die beskuldigde in *S v Fredericks* (Wynberg-Streekshof SH/D 88/85) is weens beweerde diefstal van geld voor 'n krygsraad aangekla van 'n oortreding van artikel 20(a) van die eerste bylae (oftewel Reglement van Dissipline – hierna "RVD") tot die Verdedigingswet 44 van 1957. Nadat getuienis gelei is, is hy onskuldig bevind, maar daarna weens gemeenregtelike diefstal voor die streekshof van Wynberg gedaag. Streekslanddros Du Raan handhaaf sy pleit van *autrefois acquit*.

In die loop van sy uitspraak verwys die landdros na die vereistes vir sodanige pleit, soos uiteengesit in *S v Ndou* 1971 4 SA 668 (A). Dit behels dat die beskuldigde weens dieselfde misdaad deur 'n bevoegde hof op die meriete vrygespreek moes gewees het. Na die aanhoor van die aanklaer in die krygsraad se getuienis, asook 'n vergelyking van die oorkonde, word bevind dat die beskuldigde wel weens wesenlik dieselfde misdaad teregstaan, en dat die vryspraak op die meriete was. Daarna oorweeg die hof die oorblywende vereiste, naamlik dié van 'n "bevoegde hof," wat soos volg deur die landdros benader word:

> "Dit volg vanselfsprekend dat die hof wat die eerste verhoor waargeneem het, jurisdiksie moes gehad het op 'n geldige aanklag. Dit behoef geen betoog dat die beskuldigde, wat 'n lid van die Staande Mag van die Weermag is, as sulks onderworpe is aan die bepalings van die Verdedigingswet nommer 44 van 1957 en dat die krygsraad jurisdiksie het om die beskuldigde te verhoor nie. Die vraag wat ter sprake kom is of die krygsraad 'n bevoegde hof is vir die doeleindes van artikel 106(1)(d) van die Strafproseswet. Hiemstra aangehaalde werk bladsy 233 is die mening toegedaan dat:
>
> > 'Ook 'n geldige bevinding deur 'n tribunaal soos 'n krygsraad of 'n offisiershof sluit 'n latere aanklag van dieselfde misdaad uit . . . Artikel 106 van die [Verdedigingswet] bepaal dat iemand wat aan militêre reg onderworpe is en wat deur 'n Suid-Afrikaanse burgerlike hof verhoor is, nie weer 'ten opsigte van daardie misdryf' deur 'n militêre hof verhoor mag word nie. Andersom is die posisie dieselfde.
>
> Laasgenoemde artikel verwys na die regsbevoegdheid van gewone howe en militêre howe. Subartikel (2) is van belang. Dit . . . [lùi]:

> 'Wanneer iemand wat deur 'n militêre hof weens 'n misdryf gestraf is deur 'n afdeling van die Hooggeregshof van Suid-Afrika of deur 'n magistraatshof aan dieselfde misdryf skuldig bevind word, moet die hof by die oplê van straf rekening hou met die straf wat vir die misdryf deur die militêre hof opgelê is.'

Uit laasgenoemde blyk dit dus dat Hiemstra se stelling, met respek, nie ongekwalifiseerd aanvaar kan word nie en dat iemand wat deur 'n militêre hof gestraf is, wel later in 'n burgerlike hof aangekla kan word vir dieselfde misdaad.

Die vraag is nou of artikel 106(2) van genoemde [wet] aanwending vind waar 'n persoon vrygespreek [is] ... deur 'n bevoegde militêre hof. Kan hy daarna van dieselfde misdaad in 'n burgerlike hof aangekla word? Daar bestaan 'n vermoede téén sodanige interpretasie. Dit word vermoed dat die wetgewer nié die gemene reg meer wil wysig as wat nodig is nie. Sien Steyn *Uitleg van Wette* Vyfde uitgawe 97 tot 98.

In *Casserley v Stubbs* 1916 TPD 310 312 stel die Hof die vermoede soos volg:

> 'It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislator to alter the common law, or the inference from the ordinance must be such that we can come to no other conclusion than that the legislator did have such an intention.'

Die artikel verwys alleenlik na persone wat gestraf is deur militêre howe en swyg oor diegene wat vrygespreek was. Gevolglik kan aanvaar word dat die gemene reg onveranderd gelaat is ten opsigte van laasgenoemde kategorie en gevolglik ook ten opsigte van die pleit van *autrefois acquit*.

In die finale ontleding het die Strafproseswet sterker krag en is die hof daaraan gebonde. Die hof is dus tevrede dat die krygsraad voor wie die beskuldigde tereggestaan het 'n bevoegde hof was wat jurisdiksie gehad het om die beskuldigde te verhoor op genoemde aanklagtes."

3 Bespreking

Die volgende aspekte van die problematiek wat die hof gekonfronteer het, vereis verdere bespreking:

3 1 Die Betekenis van "Bevoegde Hof"

Soos so dikwels met regsbegrippe die geval is, kan die begrip "hof" nie simplisties gedefinieer word nie, te meer omdat dié begrip so 'n sentrale plek in die reg beklee en in wyd uiteenlopende situasies figureer. Dit is derhalwe nuttig om twee sodanige gevalle te onderskei: "Hof" as deel van 'n bepaalde misdaadomskrywing teenoor "bevoegde hof" as vereiste vir 'n pleit van dubbele blootstelling.

3 1 1 Misdaadomskrywing Waar regsprekende verrigtinge deel uitmaak van 'n bepaalde misdaadomskrywing, is die benadering van ons howe dat dissiplinêre tribunale of tugverhore nie daarby ingesluit kan word nie. Dit is natuurlik moontlik dat 'n spesifieke misdaad ten aansien van so 'n liggaam geskep kan word (vgl bv 34(1)(d) en 151(1) van die RVD). Desondanks is die algemene beginsel steeds dat sodanige organe nie voor die voet dieselfde status as gewone burgerlike howe geniet nie. Daar kan met twee voorbeelde volstaan word:

In *S v Motloba* 1969 3 SA 314 (T) bevind regter Rabie dat die misdaad minagting van die hof, nie ten opsigte van 'n offisiershof ingestel kragtens die Polisiewet 7 van 1958, gepleeg kan word nie. Die hof meen (317A)

> "dat 'n mens nie hier met 'n geregshof te doen het soos daardie woord gewoonlik verstaan word in die normale regspraak van die land nie."

Dieselfde gedagtegang word gevind in *S v Thompson* 1968 3 SA 425 (OK) 429C:

> "To extend the scope of the offence of defeating the ends of justice to include proceedings before a meeting of creditors in insolvency, or before a rent board, or to disciplinary enquiries before the Medical Council would, to my mind, be flying in the face of the very clear definition of this offence contained in the authorities referred to by me above. By the very nature of its constitution the Medical Council or its disciplinary committee can never aspire to be called a court of justice nor can it be said to be concerned with the administration of justice. It follows therefore that conduct relating to enquiries before the Medical Council cannot found a charge of attempting to defeat or obstruct the course of justice and, to my mind, the exception taken to the charge was well taken."

Die vraag ontstaan nou wat die aard van militêre howe is? Kan dit wel as 'n regsprekende instansie in dieselfde lig as 'n burgerlike hof beskou word? Indien volgens die erkende beginsels van die administratiefreg geoordeel word, blyk die antwoord negatief te wees. 'n Skuldigbevinding deur 'n krygsraad moet eers bekragtig word voordat dit afdwingbaar is, maar 'n skuldigbevinding deur 'n summiere verhoor geld reeds met die aankondiging daarvan. Hierteenoor vertoon 'n krygsraad weer ander eienskappe wat ooreenstem met dié van 'n burgerlike hof.

Hier kan verwys word na die reg op regsverteenwoordiging, die bevoegdheid om feitlik enige gemeenregtelike misdryf te verhoor (a 47 en 56 RVD) en vonnisse soos gevangenisstraf, of selfs die doodstraf op te lê. Weliswaar het die lede van 'n krygsraad selde enige regskwalifikasies ('n laaste vesting van die juriestelsel?), maar volgens weermagbeleid moet die president wel regsgekwalifiseerd wees.

Desondanks is dit duidelik dat 'n militêre hof nie as 'n onafhanklike, deskundige geregshof in die gewone sin van die woord bestempel kan word nie. In *Van Duyker v District Court Martial* 1948 4 SA 691 (A) 694 is bloot gesê dat krygsrade "statutêre tribunale" is. Dieselfde kan van summiere verhore gesê word (vgl ook die omskrywing van "militêre hof" in a 1(1) van die RVD). Die gevolgtrekking dat 'n militêre hof nie as 'n algemene reël as 'n hof vir doeleindes van 'n misdaadbeskrywing beskou kan word nie, handel egter net 'n deel van die ondersoek af. Die vraag is nou of die beginsels rakende dubbele blootstelling nie 'n wyer siening van die begrip "hof" regverdig nie?

3 1 2 Dubbele Blootstelling Wanneer oorweeg moet word of 'n bepaalde liggaam 'n pleit van dubbele blootstelling kan fundeer, behoort nie net na die streng betekenis van "hof" (soos in 2 1 1 *supra*) gekyk te word nie. Die rede hiervoor is dat daar tribunale bestaan wat wel 'n persoon kan verhoor weens 'n beweerde misdaad, alhoewel dit streng gesproke nie 'n "hof" is nie. Daar die beginsels rakende dubbele blootstelling meerdere vervolgings weens dieselfde strafwaardige handeling wil voorkom, moet "hof" hier nie eng uitgelê word nie. Die klem moet dus nie soseer op die uitwendige kenmerke van 'n dissiplinêre tribunaal geplaas word nie, maar eerder op sy jurisdiksie om 'n bepaalde misdaad te verhoor.

Daar word aan die hand gedoen dat gemelde oorwegings ook op 'n militêre hof van toepassing is. Laasgenoemde is dus 'n "bevoegde hof" vir doeleindes van die pleite van *autrefois acquit* en *convict*, synde 'n tribunaal wat jurisdiksie het om 'n persoon weens 'n misdaad te verhoor en te straf – dít is die toets (Snyman en Morkel *Strafprosesreg* (1985) 396). Hierdie posisie behoort selfs in

die afwesigheid van spesifieke statutêre bepalings te geld. Dit is egter nie Lansdown en Campbell *South African Criminal Law and Procedure* 5 (1982) 440 se siening nie:

> "A conviction or acquittal under martial law cannot, in the absence of statutory provision under which civil courts may take cognizance of it, bar subsequent proceedings in a civil court upon the same charge."

Oënskynlik word die posisie tydens krygsreg hier gestel, maar die gesag waarna verwys word vir hierdie stelling, toon dat krygsreg en militêre howe se gewone funksionering verwar word. Daar word naamlik gesteun op *R v Klaas* 1915 CPD 58 asook artikel 106(2) van die Verdedigingswet. Laasgenoemde bepaling bied hoogstens gesag vir 'n burgerlike verhoor ná 'n skuldigbevinding deur 'n militêre hof in normale militêrregtelike toestande. Onskuldigbevindings word gehandhaaf sonder statutêre magtiging.

Selfs ten aansien van krygswet is hierdie standpunt nie regverdigbaar nie. Die aangehaalde gedeelte is bloot 'n *obiter dictum* van regter Searle in genoemde beslissing. In werklikheid is die uitspraak op 'n ander punt gebaseer (vgl 63). Het die betrokke tribunaal die bevoegdheid gehad om die misdryf te verhoor, is hy 'n "bevoegde hof." Die blote feit dat 'n persoon teregstaan voor twee regterlike amptenare wat albei hulle jurisdiksie deur wetgewing verkry, maak geen verskil nie (Swift en Harcourt *Strafprosesreg van Suid-Afrika* (1957) 241).

Die posisie is egter nie so eenvoudig nie, daar nie alle tugverhore 'n daaropvolgende burgerlike strafverhoor kan verhoed nie. 'n Riglyn wat in hierdie verband aangewend kan word, is om te kyk na die aard van staatsbetrokkenheid by die dissiplinêre verhoor.

1 2 1 Aard van staatsbetrokkenheid Die staat beïnvloed feitlik die hele spektrum van 'n gemeenskap se juridiese verhoudinge. Dit is moeilik om aan 'n terrein in die reg te dink waar die staat nie 'n rol speel nie. Vanweë die geweldige kompleksiteit van die moderne samelewing is die staat ook dikwels in verskeie hoedanighede by 'n bepaalde aangeleentheid betrokke, byvoorbeeld as gedingsparty by geregtelike verrigtinge. Hierdie feit het belangrike implikasies vir die vraagstuk tans onder bespreking.

Bogenoemde standpunt kan soos volg toegelig word: Gestel iemand word deliktueel aangespreek, maar later weens dieselfde feite ook strafregtelik vervolg. Die vroeëre verrigtinge sal nie as *res iudicata* opgewerp kan word nie. Die rede hiervoor is dat die strafsaak tussen ander gedingspartye is (Schmidt *Bewysreg* (1982) 578). Is die aanvanklike privaatregtelike geding egter tussen 'n individu en die staat, word dit nodig om te onderskei tussen die *aard* van die staat se betrokkenheid by die verrigtinge. In een geval is die staat 'n gelyke party en 'n subjek van die privaatreg, en in die ander 'n publiekregtelike gesagshandhawer, met die gevolg dat daar 'n oneweredige verhouding tussen die partye is.

'n Individu kan natuurlik ook as vervolgende gesag in 'n strafsaak betrokke wees (a 7 van die Strafproseswet 51 van 1977), maar dit is gewoonlik die staat wat die ongelyke verhouding veroorsaak. Die staat kan egter wel die bevoegdheid tot vervolging (a 2(1) van die Strafproseswet) op 'n permanente basis aan 'n bepaalde instansie verleen (vgl bv a 8(1) en (2) van genoemde wet), maar die staat bly die gesag wat die prioriteit op vervolging het. (Hoe hierdie "konkurrente jurisdiksie" by tugverhore gereël behoort te word, word later – vgl 4 *infra* –

bespreek.) Met die perspektief van staatsbetrokkenheid wat van geval tot geval kan wissel, word nou na twee verskyningsvorme van die tugverhoor gekyk:

1 2 2 Mediese en Militêre Tug Daar is opvallende ooreenkomste tussen die tugverhore van die soldaat en die geneesheer. Beide word verhoor op 'n statutêr voorgeskrewe wyse. Die oortredings wat bereg mag word, asook die tribunale wat hulle verhoor, is eweneens deur wetgewing ingestel. Die "verhore" word ook waargeneem deur persone wat self binne die organisasie val. Verder word ook strawwe opgelê wat eie aan die bepaalde instelling is, byvoorbeeld die skorsing van 'n geneesheer, of die verlaging in rang of ontslag van 'n soldaat. Tog behoort 'n bevinding deur 'n dissiplinêre komitee van die mediese raad nie 'n strafverhoor wat op dieselfde feite gebaseer word, uit te sluit nie.

Strauss *Doctor, Patient and the Law* (1984) 418 is van mening dat so 'n dissiplinêre ondersoek 'n verhoor in elke sin van die woord is, en vir alle doeleindes as 'n hof beskou kan word. Daar kan toegegee word dat so 'n ondersoek sekerlik nie 'n mindere inslag van gewone prosesregbeginsels as 'n militêre hof het nie. Afgesien van *prosedure* het sodanige verrigtinge egter nie die volle eienskappe van 'n *bevoegde* hof nie – daar is geen jurisdiksie om 'n misdaad te verhoor nie.

Die mediese raad kan wel as owerheidsliggaam kwalifiseer (Wiechers *Administratiefreg* (1984) 76) maar die aard van die staat se betrokkenheid is bloot om 'n statutêre basis vir interne beroepsregulering asook tug en kontrole daar te stel. Kan daar derhalwe gesê word dat die staat as uitoefenaar van die swaardmag betrokke is en dat die verrigtinge oor 'n publiekregtelike strafkarakter beskik? Die antwoord moet negatief wees. Daar was wel 'n uitspraak op feite wat (ook) 'n latere strafverhoor kan fundeer, maar geen kriminele oortreding is bereg nie. In die woorde van Packer *The Limits of the Criminal Sanction* (1968) 18:

> "A crime is not merely any conduct forbidden by law; it is forbidden conduct for which punishment is prescribed and which is formally described as a crime by an agency of government having the power to do so."

Oor die kwessie of 'n handeling wat sowel 'n tugregtelike as 'n strafregtelike oortreding uitmaak, 'n geneesheer ten onregte aan optrede van sowel sy groep as die breë gemeenskap blootstel, sê Viljoen (1981 *THRHR* 33 41) dat van die groepslid verwag word om bo en behalwe die norme van die gemeenskap ook die norme van sy groep na te lewe – hy het dus sekere verpligtinge wat ander lede van die gemeenskap nie het nie. Waar die groepslid dus die groepsnorme deur 'n strafregtelike handeling skend, kan hy nie die verweer van *ne bis in idem* opwerp nie. Dieselfde skrywer meld dat medici lede is van 'n groep, waarvoor die *noblesse oblige* geld – die lede moet onder andere die eer van die stand beskerm (36).

Die vraag ontstaan nou wanneer daar van 'n groep in bogenoemde sin gepraat kan word en wanneer die gepaardgaande implikasies sal intree. Die vrywilligheid van toetrede tot die groep is 'n belangrike, indien nie deurslaggewende nie, faktor. Hiervolgens sal slegs lede van die staande mag kwalifiseer, terwyl nie alle dienspligtiges hulle vrywillig by die weermagorganisasie voeg nie. 'n Verdere faktor (Viljoen 1981 *THRHR* 36) is die mate van gelykheid van groepslede. Onder weermaglede is dit afwesig, veral omdat vir behoorlike funksionering daar juis 'n ongelyke verhouding moet wees. Hierdie oorwegings, asook die besondere belang van die staat by die voorskryf en afdwinging van gedragsreëls vir weermaglede, ontmasker die weermag se "groepsnorme." Dit is eintlik misdaadomskrywings in vermomming.

Faust 1967 *Revue de Droit Penal Militaire et de Droit de la Guerre* 7 19 sien die verband tussen die interne militêre verhoor en die algemene regsorde soos volg:

> "Der Zweck des Strafrechts ist darin zu sehen, dass der Rechtsfrieden geschützt wird. Begeht der Bürger eine Straftat, so wird er wegen Bruchs der allgemeinen Rechtsordnung bestraft. Er muss dann für seine Tat büssen.
>
> Das Disziplinarrecht dient dagegen dem Schutz des besonderen Gewaltverhältnisses, des internen Rechtsverhältnisses zwischen dem Soldaten und dem Staat. Verletzt ein Soldat innerhalb dieses Rechtsverhältnisses seine Pflichten, so wird gegen ihn in der Regel eine einfache Disziplinarstrafe ausgesprochen, um ihn auf diese Art und Weise zu zukünftiger Pflichterfüllung anzuhalten bzw zu zwingen. Erweist sich seine Dienstverfehlung als so schwerwiegend, dass er für den Dienst in den Streitkräften untragbar ist, so kann er auch aus dem besonderen Gewaltverhältnis entlassen werden. Im militärischen Bereich soll durch das Disziplinarrecht die Disziplin aufrechterhalten werden. Bei Verstössen gegen die militärische Disziplin soll der Soldat einerseits erzogen und andererseits, wenn die Disziplinarstrafen nicht zum Erfolg führen, die Bundeswehr von unerwünschten Personen gesäubert werden. Die Disziplinarstrafe hat nicht die Aufgabe, den Bruch der allgemeinen Rechtsordnung zu sühnen, sondern die Zucht und Ordnung innerhalb des besonderen Gewaltverhältnisses zu sichern. Ihr Zweck ist damit in erster Linie die *Erziehung* des einzelnen. Nicht Tatvergeltung und Generalprävention, sondern die Spezialprävention steht im Disziplinarrecht im Vordergrund. Bei geringen Pflichtverletzungen spricht man daher zu Recht von der Disziplinarstrafe als einer 'Pflichtenmahnung'. Erst in zweiter Linie soll durch die verhängte Disziplinarstrafe eine abschreckende Wirkung für die Kameraden oder den gesamten Truppenteil und die Verhütung weiterer Disziplinlosigkeiten erzielt werden."

Op grond van hierdie oorwegings meen hy dat dit geoorloof is om 'n soldaat ná 'n dissiplinêre verhoor weer strafregtelik te vervolg indien die feite 'n burgerlike misdryf uitmaak (17). Hierdie siening kan nie aanvaar word nie.

Daar kan onderskei word tussen tipies dissiplinêre oortredings (soos afwesigheid sonder verlof of slaap tydens 'n wagbeurt) en "werklike" misdade (soos diefstal of aanranding). Die probleem in die Suid-Afrikaanse reg (anders as in die Duitse reg) is dat selfs die tipies dissiplinêre oortreding (wat inderdaad nie die algemene regsorde raak nie) weer deur 'n burgerlike hof verhoor kan word. As hierdie oortredings dan nie die burgerlike strafreg interesseer nie, waarom dan 'n herverhoor vir dieselfde "misdaad"? Die verklaring dat die burgerlike howe in elk geval altyd "primêre" jurisdiksie oor sodanige oortredings het, gaan nie op nie. Die beskuldigde is tog reeds ten volle deur die militêre gemeenskap vir sy "dissiplinêre" oortreding gestraf. Wat is egter die posisie van 'n handeling wat wel die breër belange van die gemeenskap skend?

Dat die militêre tugverhoor die oogmerke van rehabilitasie, dissiplinering en groepsuiwering nastreef, word nie ontken nie. Daar moet egter perke gestel word aan die begrip *Disziplinarstrafe*. Om te beweer dat 'n soldaat wat gevangenisstraf uitdien weens moord of roof, slegs opgevoed word en nie leed toegevoeg word weens 'n verbreking van die breë en algemeen geldende regsorde nie, is onrealisties en verg konseptuele gimnastiek. Die "dissiplinêre" oortreding het sy onskuld onherroeplik verloor en die sfeer van die burgerlike strafreg, met sy kenmerkende vergeldingsbenadering, is betree. Tereg beskou Enschede en Heyder, twee Nederlandse juriste, die militêre tug as 'n verskyningsvorm van die strafreg (Viljoen 1981 *THRHR* 44).

Indien derhalwe aanvaar word dat die soldaat (steeds) in 'n bepaalde gesagsverhouding teenoor die staat (bly) staan – soos Faust (19) te kenne gee – word die korrekte perspektief op die opgelegde vonnis verkry. Dit is 'n uitdrukking

van sowel die intern militêre afkeur jeens die dissiplineverbreking as (belangriker) die breë gemeenskap se verontwaardiging vanweë 'n skending van (ook) hulle gedragskode. Dit is 'n erkende beginsel dat 'n vonnis meerdere oogmerke kan nastreef (Rabie en Strauss *Punishment* (1981) 113). Dat dit deur meerdere strafverhore gedoen mag word, is nie!

Die geval van die geneesheer kan steeds gekontrasteer word. Hy is vir 'n dissiplinêre oortreding *qua* dissiplinêre oortreding "gestraf." Dat laasgenoemde ook 'n misdaad uitmaak, is bloot insidenteel. Die "dissiplinêre" oortreding van die soldaat daarenteen, word as 'n misdaad *eo nomine* (wat dit ook is) bestraf.

Weliswaar kan die "straf" (bv skorsing) wat die mediese raad oplê tot net so veel leed aanleiding gee as die vonnis van 'n krygsraad, maar die grondslae verskil wel en dit bevredig die regsgevoel (Viljoen 1981 *THRHR* 41). Gemelde skorsing bly egter steeds relevant by vonnisoplegging deur 'n strafhof (Du Toit *Straf in Suid-Afrika* (1981) 82).

Vanuit die gesigspunt dat 'n militêre hof wel as 'n "bevoegde hof" beskou kan word, moet vervolgens gekyk word na 'n verdere aangeleentheid wat in die *Fredericks*-beslissing ter sprake was – naamlik die houdbaarheid van artikel 106(2) van die Verdedigingswet.

3 2 Het Artikel 106(2) Bestaansreg?

3 2 1 Historiese Oorwegings Tussen die Suid-Afrikaanse en die Britse militêre regstelsels is daar 'n noue band (vgl Joubert (red) *LAWSA* bd 7 (1979) 226). Dit is dus verstaanbaar dat artikel 106(2) grootliks ooreenstem met die aanvanklike bewoording van artikel 133(2) van die *Army Act* 1955 (voor Ig se wysiging in 1966). Ook artikel 133(1) van die *Army Act* het wesenlik dieselfde strekking as artikel 54 van ons RVD. Laasgenoemde bepaal dat 'n burgerlike hof se regsbevoegdheid om oortredings binne sy bevoegdheid te verhoor, nie deur die bepalings van die reglement geraak word nie.

Friedland *Double Jeopardy* (1969) 337 meen dat daar geen gerapporteerde Engelse beslissing is wat spesifiek 'n reël gestel het dat 'n soldaat ná 'n verhoor deur 'n krygsraad, weer deur 'n burgerlike hof verhoor mag word nie. In sy ondersoek na die oorsprong van hierdie vermeende "reël" oorweeg hy, onder andere, die geskiedenis van genoemde artikel 133 van die *Army Act*. Volgens hom is die reël nie op artikel 155(1) van die *Army Discipline and Regulation Act* 1879 – die voorganger van artikel 133(2) – gegrond nie (341). Die reël moet alreeds vroeër onafhanklik bestaan het. Ook die eerste weergawe van artikel 133(1), artikel 6 van die eerste *Mutiny Act* 1689, steun nie hierdie sogenaamde "reël" nie. Die doel van laasgenoemde bepaling was bloot om voorsiening te maak vir 'n burgerlike *of* 'n militêre verhoor (343).

By die tweede moontlike oorsprong, naamlik staatsregtelike oorwegings, is veral drie faktore ter sprake (345). Dit is die vrees wat vroeër in Engeland (en tans in Suid-Afrika?) geheers het vir 'n staande leër of vir krygswet, asook die moontlikheid dat die militêre howe die burgerlike howe se *paramountcy* sou verdring. Friedland (347) kom egter tot die gevolgtrekking dat hierdie faktore nie tot die kern van die "reël" deurdring nie.

Die werklike rede is dat militêre howe vir die grootste deel van die negentiende eeu slegs gevalle van *immoralities, misbehaviour, or neglect of duty* kon verhoor (349). Hierdie tipe oortredings word vandag tuisgebring onder artikel 46 van

die RVD, wat gedrag tot nadeel van militêre dissipline strafbaar stel. Burgerlike misdrywe kon nie verhoor word nie, en die strafjurisdiksie was in elk geval beperk tot lyfstraf of kassering. Hierdie eenvoudige jurisdiksiebepalings is egter deur skrywers tot 'n beginsel van die staatsreg verhef. Hierdie sienings het egter nie tred gehou met die toekenning (in 1879) van jurisdiksie om soldate vir burgerlike misdrywe te verhoor nie (350). Aldus het hierdie "reël" van die staatsreg ontwikkel.

Oor die ware historiese grondslag van 'n bepaling soos artikel 106(2) kan moontlik met Friedland verskil word. Waaroor egter wel met hom saamgestem moet word, is dat so 'n bepaling nie hendendaagse realiteite en die reg se benadering tot opeenvolgende vervolgings reflekteer nie (351). Kan die lede van die *Bundeswehr*, wat volgens Faust (24) dikwels nie die sin en doel van dubbele bestrawwing begryp nie, dus verkwalik word?

3 2 2 Strafmaat 'n Verdere moontlikheid is dat beginsels van straftoemeting die artikel se bestaan noodsaak. Om welke (regmatige) rede behoort 'n soldaat egter weer vir verhoor verwys te word? Die onwillekeurige afleiding is dat indien die "verdiende" straf nog nie ontvang is nie, hy op hierdie wyse "ordentlik" gestraf kan word. Tog moet die reeds opgelegde vonnis in aanmerking geneem word.

Hierdie situasie herinner enigsins aan die posisie by die inwerkingstelling van opgeskorte vonnisse, waar die kumulatiewe effek van laasgenoemde en die voorgenome vonnis oorweeg moet word. Dit bring egter nie noodwendig 'n ligter vonnis mee nie (*S v Visser* 1970 3 SA 730 (SWA) 731E; *R v Kruger* 1959 2 SA 223 (T) 226B). Die belangrikste verskil is egter dat artikel 106(2) die oorweging van die gesamentlike effek van twee vonnisse vir *dieselfde* strafwaardige feit beveel.

Indien die *ratio* vir die bepaling bloot is om as veiligheidsklep te dien vir 'n "te ligte" vonnis, word die aanvegbaarheid van hierdie artikel geensins daardeur verminder nie. Die kern van die probleem is dan die strafmaat, wat op 'n meer bevredigende wyse opgelos kan word, naamlik deur aan die militêre hersieningsowerhede (wat meestal oor gekwalifiseerde regsadviseurs beskik) die bevoegdheid te verleen om 'n onvanpas ligte vonnis te verstel. Aldus word die prinsipiële finaliteit van 'n verhoor ook nie bloot vir doeleindes van vonnisverskerping aangetas nie.

3 2 3 Volgordegeregtigheid word Geskep Met "volgordegeregtigheid" word bedoel dat, afhangende van die tipe hof voor wie 'n weermaglid (eerste) verhoor word, hy teen 'n verdere vervolging vrywaring kan geniet. Finaliteit of regsekerheid is natuurlik net een aspek van geregtigheid in strafprosessuele verband. Ewe belangrik is die vereiste dat 'n uitspraak sover moontlik materiëel korrek en in ooreenstemming met die (vasstelbare) werklikheid moet wees. Bedrog of meineed kan derhalwe 'n *prima facie* reëlmatige bevinding se finaliteit in gedrang bring (vgl hieroor De Jager 1985 *TSAR* 161 165–169).

Tans word sodanige opweging van die komponente van regsekerheid en materiële korrektheid, en daarmee gepaardgaande implikasies, egter nie betrek nie. Daar word slegs standpunt ingeneem oor die vraag of die bevinding van 'n militêre hof, in beginsel, die pleit van vorige vryspraak of skuldigbevinding behoort te fundeer.

Dat dit vir 'n weermaglid "voordeliger" kan wees om deur 'n burgerlike hof verhoor te word, is duidelik. Indien die hof hom skuldig sou bevind, kan hy nie weer verhoor word nie. Is hy egter eers verhoor en skuldig bevind deur 'n militêre hof en daarna deur 'n burgerlike hof, sal selfs 'n ligter gesamentlike vonnis (as wat 'n burgerlike hof as enigste hof sou oplê) nie wegneem dat die beskuldigde hier onnodig aan twee verhore blootgestel is nie. Ook waar die burgerlike hof se vonnis swaarder is as wat 'n gesamentlike vonnis sou wees, is die soldaat steeds net een keer verhoor. Dit is moeilik om te sê in watter geval die beskuldigde die meeste "bevoordeel" is. Tog word aan die hand gedoen dat 'n ligte vonnis, *per se*, nie deurslaggewend is nie.

Vind 'n burgerlike hof aan die ander kant 'n weermaglid onskuldig, is verdere verrigtinge (eweneens) uitgesluit. Word 'n weermaglid deur 'n burgerlike hof vrygespreek, ná 'n skuldigbevinding deur 'n militêre hof, is suspisie jeens die militêre regspleging moontlik. Die ironie van artikel 106(2) is dat 'n mens sou verwag dat 'n vryspraak, veel eerder as 'n skuldigbevinding, 'n herverhoor moontlik sou maak – as tussen twee euwels gekies moet word!

Verre daarvandaan dat hierdie stelling afbreuk moet doen aan die korrektheid van die *Fredericks*-beslissing (vgl Friedland 341), moet dit juis dien om die onaanvaarbaarheid van artikel 106(2) weer eens te beklemtoon. 'n Uiters aanvegbare bepaling moet immers nie as hefboom dien om 'n bevinding wat *wel* op normale regsbeginsels gefundeer is, onder verdenking te plaas nie.

Daar word ter oorweging gegee dat die beginsels van die Engelse reg, in hierdie opsig, navolgenswaardig is. Artikel 133(1) van die *Army Act* bepaal dat

> "[w]here a person subject to military law –
>
> (a) has been tried for an offence by a court-martial or has had an offence committed by him taken into consideration by a court-martial in sentencing him, or
>
> (b) has been charged with an offence under this Act and has had the charge dealt with summarily by his commanding officer or the appropriate superior authority,
>
> a civil court shall be debarred from trying him subsequently for an offence substantially the same as that offence."

4 'n Moontlike Newe-effek

Dit is moontlik dat artikel 106(2) ook die bepalings van die RVD kan kleur. So bepaal artikel 55:

> "Niemand wat deur 'n bevoegde burgerlike of militêre hof weens 'n misdryf skuldig bevind of ontslaan is, kan deur 'n militêre hof verhoor word nie weens 'n misdryf waaraan hy deur die hof wat hom in die eerste instansie verhoor het, skuldig bevind kon gewees het."

Die probleem wat hier bestaan, is die posisie van misdade waaraan die hof van eerste instansie *nie* kon skuldig bevind nie – sluit vermelding van die een die ander uit?

Daar word eerstens 'n voorbeeld in die militêre sfeer geneem. 'n Summiere verhoor bevind iemand skuldig aan 'n oortreding van artikel 46 van die RVD, omdat hy sy uitrusting beskadig het. Op grond van dieselfde feite word hy voor 'n krygsraad gedaag weens 'n klag van saakbeskadiging. Hierdie is inderdaad 'n misdaad wat nie summier verhoorbaar is nie, en waaraan hy dus nie deur die hof van eerste instansie skuldig bevind kon word nie.

Tweedens 'n geval in die burgerlike howe. Buite die Republiek van Suid-Afrika veroorsaak 'n weermaglid iemand se dood terwyl hulle aan boord van 'n Suid-Afrikaanse vliegtuig was. Hy word deur 'n streekshof aan strafbare manslag skuldig bevind (vgl artikels 2(1) en 18 van die Lugvaartwet 74 van 1962). Artikel 106(1) van die Verdedigingswet is skynbaar relevant:

> "Iemand aan die militêre reg onderworpe wat deur 'n afdeling van die Hooggeregshof van Suid-Afrika of deur 'n magistraatshof weens 'n misdryf verhoor is, kan nie ten opsigte van daardie misdryf deur 'n militêre hof verhoor word nie."

Die beskuldigde is wel deur 'n "burgerlike hof" verhoor, maar nie deur 'n magistraatshof" of 'n "afdeling van die Hooggeregshof" nie. Al word hierdie punt afgemaak, kan dit steeds aangevoer word dat hy voor 'n krygsraad gedaag kan word weens moord, synde 'n misdaad wat buite die verhoorbevoegdheid van die hof van eerste instansie val.

Twee benaderings kan ten opsigte van die uitleg van artikel 55 gevolg word: Die eerste is dat artikel 106(2) 'n verdere vervolging weens dieselfde misdaad magtig, ook waar die misdaad deur albei howe bereg kan word. Daarom is dit des te meer moontlik om 'n ander misdaad, wat inderdaad nie deur die hof van eerste instansie verhoor kon word nie, wel te bereg. Dit is dan die rede waarom artikel 55 nie na "dieselfde" nie, maar bloot na "'n" misdryf verwys.

Die tweede benadering is om herverhore te beperk tot 'n verhoor deur 'n burgerlike hof, ná 'n skuldigbevinding deur 'n militêre hof. 'n Verhoor deur enige bevoegde hof (wat 'n streekshof sal insluit) weens wesenlik dieselfde misdaad (*S v Ndou* 680E) sal dus wel 'n beletsel teen verdere (militêre) vervolging wees. Hierdie benadering word onderskryf en stem wesenlik ooreen met die bepalings van artikel 134(1) van die *Army Act*:

> "Where a person subject to military law –
>
> (a) has been tried for an offence by a competent civil court, wherever situated, or a court-martial (whether held under this Act, the Air Force Act 1955 or the Naval Discipline Act 1957), or
>
> (aa) has had an offence committed by him taken into consideration when being sentenced by a competent civil court in the United Kingdom or any such court-martial as is referred to in the foregoing paragraph; or
>
> (b) has been charged with an offence under this Act, the Naval Discipline Act or the Air Force Act, 1955, and has had the charge dismissed, or has been found guilty on the charge, by his commanding officer or the appropriate superior authority, or
>
> (c) has had an offence condoned by his commanding officer (whether military, naval or air-force),
>
> he shall not be liable in respect of that offence to be tried by court-martial or to have the case dealt with summarily by his commanding officer or the appropriate superior authority."

5 Die Analoë Posisie van Gevangenes

Die posisie van gevangenes ten aansien van verdere vervolgings laat die juris die eweneens onbenydenswaardige keuse tussen 'n relatief duidelike implikasie en regverdigheid. Hier word verwys na artikel 60 van die Wet op Gevangenisse 8 van 1959, wat uitgelê is om gevangenes die pleit van dubbele blootstelling te ontneem, omdat dit wel aan spesifiek vermelde persone verleen is (*S v Makoko* 1984 2 SA 62 (O); Snyman en Morkel 405; Snyman en Alberts 1985 *THRHR* 237). Alhoewel die bepalings van artikel 336 van die Strafproseswet hierdie moontlikheid kan teëstaan indien eie regsgevoel dit toelaat (Snyman en Alberts

THRHR 242), is dit duidelik dat artikel 60 wel die voorbehoud by artikel 336, naamlik dat "tensy die teendeel blyk" iemand nie weens meer as een wetsbepaling strafbaar is nie, kan aktiveer.

Die wrange wiskunde wat uit 'n vergelyking van die *Makoko* en *Fredericks*-gewysdes blyk, is dat *Makoko* se regte "weggeneem" is deurdat soortgelyke regte aan spesifieke persone verleen is. Daarteenoor is 'n pleit van *autrefois acquit* in *Fredericks* se geval gehandhaaf, ondanks die uitdruklike inperking van die pleit van *autrefois convict*. (Die posisie van 'n aangehoudene in 'n detensiekaserne weerspieël meteens die benarde posisie van sowel 'n weermagslid as 'n gevangene – vgl hfst 4 van die detensiekaserneregulasies soos vervat in GK R1190 van 1961-12-08).

Dit is duidelik dat die regsposisie van persone wat deur tribunale in die weermag en gevangenisse verhoor word, dringende aandag van die wetgewer verg. As vertrekpunt vir wetswysiging kan na artikel 16 van die Polisiewet gekyk word. Hierdie bepaling verleen wyer beskerming aan lede van die polisie as wat weermagslede en gevangenes tans geniet.

Indien die staat aan 'n bepaalde instansie die bevoegdheid verleen om misdrywe in sekere omstandighede te vervolg, moet hy hom in die bevinding van so 'n instansie berus. Dit is onregverdigbaar dat 'n beskuldigde benadeel word deurdat die staat sy swaard weer eens mag opneem nadat 'n ander vervolger dit reeds gebruik het.

6 Belang van *S v Fredericks*

Suid-Afrika beleef tans 'n tydvak wat gekenmerk word deur voortdurende evaluasie van die staatsbestel, soms vanuit radikaal uiteenlopende gesigspunte. Hoe die staatsregtelike struktuur van die toekoms ook al daar gaan uitsien, is dit duidelik dat daar steeds *'n* weermag sal wees, met persone wat in die woorde van appèlregter Schreiner in *Burger v Roos* 1959 4 SA 393 (A) 399F

> "[l]ive in a world of some limitation and restraint."

Daarom moet daar steeds gestreef word na beginsels wat politieke skommelinge en veranderinge kan oorleef. Die pleite van *autrefois acquit* en *convict* verteenwoordig só 'n beginsel. Die *Fredericks*-beslissing is dan ook 'n dapper poging om dié beginsel lewendig te hou, maar die grootste belang van hierdie saak is dat dit bevestig dat billikheid geen kleurdiskriminasie toepas nie – ook nie teen regsubjekte geklee in bruin nie. Dit is 'n positiewe noot!

RW ALBERTS
Advokaat van die Hooggeregshof

Then are we said to know the law when we apprehend the reason of the law, that is when we bring the reason of the law so to our reason that we perfectly understand it as our own. (per Lord Coke.)

VONNISSE

KOMMISSARIS VAN BINNELANDSE INKOMSTE v VAN DER WALT 1986 4 SA 303 (T)

Belastingaftrekkings: 'n belangrike beslissing vir akademici

1 Inleiding

Dit gebeur nie aldag dat 'n hofuitspraak van *praktiese* ("brood-en-botter") betekenis vir *regsakademici* is nie. Die beslissing in *Kommissaris van Binnelandse Inkomste v Van der Walt* by monde van adjunk regter-president Eloff (waarmee regter Grosskopf en regter Kirk-Cohen saamgestem het) is 'n veelseggende uitsondering. Dit beïnvloed naamlik regstreeks die gedeelte van sy of haar swaarverdiende sente wat 'n (regs-)dosent met (onder andere) 'n studeerkamer en vaktydskrifte tuis, aan Jan Taks moet afstaan.

Die gemelde uitspraak is egter van meer belang as slegs dít:

a Dit is een van baie min (bekende en bekombare) beslissings wat uitsluitlik oor toelaatbare belastingaftrekkings ten opsigte van die "bedryf" van die universiteitsdosent (vgl ook artikel 1 van die *Inkomstebelastingwet* 58 van 1962 – hierna "die wet" genoem) handel.

b Dit bevestig bepaalde tendense met betrekking tot die interpretasie van artikel 11(a) van die wet, welke tendense reeds in vroeëre uitsprake merkbaar begin posvat het.

c Dit gee gesaghebbend uitsluitsel oor die korrekte saamlees van die onderskeie subartikels van artikel 23 van die wet, en dan in besonder die vraag in welke mate (indien enige) artikel 23 (g) só uitgelê kan word dat dit die voorafgaande subartikels (a) tot (f) (en in die besonder subartikel (b)) (beperkend) kwalifiseer.

Ek dui vervolgens op die belang van die *Van der Walt*-beslissing met die voorgaande drie aangeleenthede as riglyne in gedagte.

2 Vorige Regspraak

Belastingaftrekkings wat akademici ten opsigte van hulle "bedryf" kan eis, was voorheen (ook in die Transvaalse hof) regstreeks in die ongerapporteerde saak van *The Secretary for Inland Revenue v Davis* (TPA A1845/79) ter sprake.

D, 'n lektor in Biochemie aan die Universiteit van die Witwatersrand, het 'n aftrekking ten aansien van sekere oorsese reisuitgawes geëis. Hy het naamlik verskillende universiteite in Europa met die oog op die ontwerp en bou van sekere wetenskaplike toerusting by sy eie universiteit besoek. Hierdie aftrekking is geweier. D se departementshoof meld in 'n brief wat aan die hof voorgelê is dat D se navorsing intrinsiek deel van sy werk is. Dat D hierdie navorsing sou doen, vloei voort uit wat sy departementshoof 'n "mutual, but non-contractual agreement" (tussen D en die universiteit) noem. Met betrekking tot D se submissie dat die voormelde reiskoste, net soos byvoorbeeld studiegelde, as onkoste wat hy vir die verbetering van sy werkverrigting met die oog op 'n uiteindelike verhoging aan salarisinkomste aangegaan het, beskou en behandel moet word, sê die Transvaalse inkomstebelasting-spesiale hof – in 'n uitspraak wat by appèl onveranderd deur die Transvaalse provinsiale afdeling bevestig word – onder andere die volgende (54–56):

> "If one understands the arrangements at the University properly, it certainly has to some extent that effect. By proving himself to be a valuable researcher to the satisfaction of the Professor, his chances for promotion are improved. The predominant element, however, is the earning of salary and in the scheme of things at the University, his duty to do research is part of the functioning of research teams under the control of the University. I am of the view, therefore, that it has been established that these amounts were spent in producing the income and that it was not expenditure of a capital nature in order to improve the earning capacity of the appellant.
>
> The matter must be considered, in my view, not on only one feature of his employment but on the totality of all such features. The evidence before us is overwhelmingly in favour of the case for the appellant that the amounts were spent in earning the salary. Improving his earning capacity in this way is merely a corollary on the same basis that any person employed in a particular job gradually through experience improves his earning capacity and, therefore, the expenses incurred in this case cannot be excluded, for that reason, from his deductible expenses."

Anders as in Van der Walt se saak word die besondere effek van die bepalings van artikel 11(a) van die wet vir sover dit 'n *nexus* vereis tussen onkoste aangegaan en verliese gely aan die een kant en inkomste voortgebring aan die ander kant, nie *eo nomine* oorweeg nie. Waarop wel ingegaan word, is die vraag of die gelde wat Davis bestee het onkoste en verliese van 'n kapitale aard – soos in artikel 11(a) bedoel – is of nie.

In *ITC* 1410 48(2) *SATC* 32 het die belastingpligtige studeerkameruitgawes as belastingaftrekking geëis onder omstandighede waar hy as vryskut lektor sy studeerkamer tuis vir die voorbereiding van klasaantekeninge gebruik het. Die Transvaalse spesiale hof sien in dat die aangeleentheid in die lig van artikel 11(a) van die wet maar in die besonder ook artikels 23(b) en (g) beoordeel moet word. Dit is egter nie duidelik op watter argument die hof sy konklusie (35) baseer nie. Aan die een kant wil dit voorkom asof die hof van mening is dat die bepalings van artikel 23(g) die bepalings van artikel 23(b) beperkend kwalifiseer en dat as gevolg van die dusdanige saamlees van die twee subartikels die belastingpligtige nie geregtig is om studeerkameruitgawes as 'n aftrekking te eis nie, aangesien hy sy studeerkamer ook vir byvoorbeeld privaat leeswerk gebruik. (Probleme in verband met die uitleg van die verskillende subartikels van artikel 23 in verhouding tot mekaar word in par 5 hieronder uitvoeriger bespreek). Aan die ander kant wil dit voorkom asof die hof boonop ook onseker was oor presies hoe die belastingpligtige die totale bedrag aan huishoudelike uitgawes bereken het waarop hy sy studeerkameruitgawes baseer. Die aftrekking vir studeerkameruitgawes is in ieder geval nie toegestaan nie.

3 Die Feite

Die respondent (hierna ook "die belastingpligtige" genoem) is 'n regsdosent aan die PU vir CHO. Gedurende die 1983/1984-belastingjaar verdien hy benewens sy salaris, ook 'n verdere vergoeding van R110,00 (as onder andere outeur van tydskrifartikels). Hy eis belastingaftrekkings ten opsigte van sy studeerkameruitgawes (R1803,19), tydskrifte en skryfbehoeftes (R1059,06) asook fotostate (R500,00). (Die voormelde studeerkameruitgawes is as 'n persentasie van die belastingpligtige se totale huishoudelike uitgawes – gebaseer op die verhouding tussen die vloeroppervlakte van sy studeerkamer en die totale vloeroppervlakte van sy woning – bereken.) Die appellant (hierna ook "die kommissaris" genoem) weier om hierdie uitgawes as aftrekkings toe te laat. Die belastingpligtige beroep hom op die Transvaalse inkomstebelasting-spesiale hof en dié laat die gemelde aftrekkings toe. Die Kommissaris appelleer na die Transvaalse provinsiale afdeling.

In die spesiale hof het die belastingpligtige onbetwiste getuienis aangebied tot die effek dat, hoewel hy nie kontraktueel daartoe verplig word nie, bepaalde eise wat sy werkgewer aan hom stel die aanhou van 'n studeerkamer tuis noop. Voorts getuig hy dat hy koste in verband met die fotokopiëring van navorsingsmateriaal moes aangaan, en hy deel die hof *a quo* mee dat dit gerieflik is as hy – veral met die oog op tye wanneer die universiteitsbiblioteek gesluit is – vaktydskrifte tuis aanhou. Hy bestee uit sy eie sak sekere bedrae aan skryfbehoeftes aangesien fondse wat by die universiteit vir hierdie doel beskikbaar gestel word uit 'n beperkte begroting afkomstig is.

Die hof *a quo* het onder andere inderdaad bevind dat die belastingpligtige nie kragtens sy dienskontrak met sy werkgewer absoluut verplig is om 'n studeerkamer tuis aan te hou nie. Voorts is dit gemene saak dat die nie-aanhou van 'n studeerkamer nie die bedrag aan salaris wat die belastingpligtige by die universiteit ontvang, beïnvloed nie. Die respondent gebruik ook nie sy studeerkamer slegs vir "bedryfsdoeleindes" *stricto sensu* nie, maar ook vir byvoorbeeld sy verdere studie. Hierby moet egter by wyse van tussenwerpsel opgemerk word dat sowel die hof van appèl as die hof *a quo* nie eksplisiet ingaan op die vraag of studie-uitgawes "onkoste en verliese . . . aangegaan of gely by die voortbrenging van . . . inkomste" vir die doeleindes van aftrekkings kragtens artikel 11(a) is nie. Tog vind albei hierdie howe dit nodig om op te merk dat die belastingpligtige se persoonlike verdere studie nie van sy navorsing vir doeleindes van onderrig losgemaak kan word nie, en dat verdere studie veronderstel is om 'n universiteitsdosent te verryk (vgl 307C–D). Gekoppel aan die *ratio decidendi* in die *Davis*-saak (*supra*) meen ek dat daar – op basis van hierdie argumentslyn – meer as slegs 'n skrale moontlikheid bestaan dat 'n hof onder gepaste omstandighede kan bevind dat studie-uitgawes toelaatbare aftrekkings ingevolge artikel 11(a) is en dat 'n studeerkamer tuis, vir sover dit vir studiedoeleindes gebruik word, steeds vir bedryfsdoeleindes soos in artikel 23(b) bedoel, geokkupeer word.

Ten opsigte van die aftrekkings wat die respondent vir intekening op vaktydskrifte eis, bevind die hof – in ooreenstemming met die getuienis wat *a quo* aangebied is – dat hy (die respondent) inderdaad bloot uit geriefsoorwegings (en nie omdat dit nie by die universiteitsbiblioteek beskikbaar is nie) vaktydskrifte tuis aanhou.

By appèl word al die feitebevindings van die hof *a quo* onveranderd gehandhaaf.

4 Die Interpretasie van Artikel 11(a)

Artikel 11(a) van die wet lui soos volg:

> "11 By die vasstelling van die belasbare inkomste deur 'n persoon verkry uit die beoefening van 'n bedryf in die Republiek, word daar as aftrekkings van so 'n persoon se aldus verkreë inkomste toegelaat-
>
> (a) onkoste en verliese werklik in die Republiek aangegaan of gely by die voortbrenging van die inkomste, mits sodanige inkomste en verliese nie van 'n kapitale aard is nie."

Voordat die hof op die kwessie van die interpretasie van artikel 11(a) (en artikel 23(b) en (g)) ingaan, bevestig hy eers in die algemeen – en in navolging van *ITC* 1158 33 *SATC* 177 179 – dat die belastingpligtige se beroep van universiteitsdosent binne die woordomskrywing van "bedryf" in artikel 1 van die wet val (308F–G).

Meer spesifiek wat die bepalings van artikel 11(a) betref, is namens die appellant (met 'n beroep op gewysdes soos *CIR v Nemojim (Pty) Ltd* 1983 4 SA 935 (A) 947F en *CIR v Genn & Co (Pty) Ltd* 1955 3 SA 293 (A) 299A–B) aangevoer dat daar 'n *nexus* tussen die belastingpligtige se aangaan van uitgawes en verdienste van inkomste moet bestaan. In die betrokke geval, so lui die betoog, ontbreek hierdie *nexus* aangesien die respondent nie kan aantoon dat hy kragtens sy dienskontrak verplig is om 'n studeerkamer by die huis aan te hou nie. Die aanhou of nie van 'n studeerkamer beïnvloed trouens nie die bedrag aan inkomste wat die belastingpligtige van die universiteit ontvang nie, en indien hy nie 'n studeerkamer sou aanhou nie, sou hy ook nie gevaar geloop het om ontslaan te word nie. Oor hierdie argumente namens die kommissaris laat die hof hom (308I–309B) soos volg uit:

> "Volgens my mening het die las wat die belastingpligtige gehad het om die Spesiale Hof te oortuig dat die betrokke uitgaaf by die voortbrenging van inkomste aangegaan is, nie geverg dat hy moet toon dat hy 'n spesifieke kontraktuele verpligting gehad het om 'n studeerkamer aan te hou nie. Dit was voldoende indien hy kon bewys dat ten einde sy deel van die diensooreenkoms na te kom dit vir hom nodig was om 'n studeerkamer aan te hou en die ander uitgawes wat reeds genoem is aan te gaan. Ek dink ook nie dit was vir die belastingpligtige nodig, ten einde te slaag, om te toon dat hy nie sy volle salaris sou kon eis, of gevaar sou loop om ontslaan te word, indien hy nie 'n studeerkamer aanhou nie. Die vereiste dat hy 'n *nexus* tussen die aangaan van die uitgaaf en die ontvangs van sy salaris moet toon hou nie in dat hy 'n kousale faktor in die vorm van 'n absolute *sine qua non* hoef te bewys nie."

Met besondere verwysing na 'n *dictum* van waarnemende regter-president Watermeyer in *Port Elizabeth Electric Tramway Co v CIR* 1936 KPA 241 246 kom regter Eloff tot die gevolgtrekking dat die trant van beskikbare gewysdes oor hierdie aangeleentheid slegs is dat daar 'n verband tussen die aangaan van die uitgaaf en die voortbrenging van inkomste hoef te wees (309).

Voorts is namens die kommissaris – met 'n beroep op 'n *dictum* van appèlregter Corbett in *CIR v Nemojim (Pty) Ltd, supra* 947H – aangevoer dat gelet moet word op "what the expenditure actually effects," dit wil sê

> "dat daar 'n demonstreerbare resultaat moet wees by die belastingpligtige se inkomsteposisie as gevolg van die betrokke uitgawe" (309F).

Ten opsigte van hierdie standpunt merk die hof op dat die toets wat toegepas moet word nie is of die belastingpligtige steeds nog sy salaris sou ontvang het indien hy nie 'n studeerkamer aangehou het nie. Die tersaakliker vraag is:

> "Sou die belastingpligtige 'n studeerkamer aangehou het as dit nie vir sy besondere dienspligte was nie?"

So 'n interpretasie, meen die hof, is in ieder geval steeds in lyn met die tersaaklike *dictum* in die *Nemojim*-saak, *supra* (309I).

Van besondere betekenis is die feit dat die hof – met die oog op die interpretasie en toepassing van die bepalings van artikel 11(a) – goedkeurend na die volgende *dictum* uit *Secretary for Inland Revenue v Ineson* 1980 3 SA 852 (A) 858E–F verwys:

> "The only question is, for what purpose was the expenditure incurred? This raises a question of fact, and the finding made in regard thereto would virtually be decisive" (310A).

(Vgl ook *CIR v Genn & Co (Pty) Ltd, supra* 299C–D.)

Afgesien dus van die feit dat 'n hof van eerste instansie se bevindinge ten aansien van die vraag na die doel waarvoor 'n belastingpligtige 'n uitgawe aangegaan het – as *feitebevinding* – by appèl deurslaggewend kan wees (310B–D), bevat hierdie *dictum* ook 'n implisiete waarskuwing dat nie alle dosente sonder meer oor dieselfde kam as die respondent geskeer kan word nie. Met die spesifieke omstandighede in elkeen se eie besondere geval sal dus, in die toekoms (wanneer ander dosente hulle ook op hierdie presedent wil beroep), deeglik rekening gehou moet word. Ek meen egter dat die meeste "akademies praktiserende" regsdosente (en ander dosente in die geesteswetenskappe) in Suid-Afrika hulle ten minste min of meer in Van der Walt se posisie bevind.

5 Die Interpretasie van die Subartikels van Artikel 23

Die tersaaklike bepalings van artikel 23 lui soos volg:

> "23 *Aftrekkings nie by vasstelling van belasbare inkomste toegestaan nie.* Aftrekkings vind in geen geval ten opsigte van die volgende aangeleenthede plaas nie, te wete–
>
> (b) Huishoudelike of private onkoste, met inbegrip van die huur of koste van herstel van 'n perseel wat nie vir bedryfsdoeleindes geokkupeer word nie of onkoste in verband met so 'n perseel, of van 'n woonhuis of woonperseel, behalwe ten aansien van enige gedeelte wat vir bedryfsdoeleindes geokkupeer word;
>
> (g) geld geëis as 'n aftrekking van inkomste uit 'n bedryf verkry, wat nie geheel en al of uitsluitlik vir bedryfsdoeleindes bestee of uitgegee is nie."

In betoog by appèl is die volgende in verband met die uitleg van die hierbo aangehaalde bepalings van artikel 23 namens die appellant ter oorweging gegee:

- Die algemene bepalings van artikel 23(g) kwalifiseer die besondere bepalings van 23(b) en in die besonder ook die vrystelling in 23(b) ten aansien die gedeelte van 'n woonhuis of woonperseel wat vir bedryfsdoeleindes gebruik word.
- Omdat artikel 23(b) soos voormeld gekwalifiseer word, moet die uitgawes onder die vrystelling in (b) aangegaan geheel en al en uitsluitlik vir bedryfsdoeleindes bestee of uitgegee gewees het.
- Siende dat die respondent sy studeerkamer en tydskrifte ook vir sy eie studiedoeleindes gebruik, word geld wat hy daaraan bestee nie geheel en al of uitsluitlik vir bedryfsdoeleindes bestee nie. Derhalwe verbied art 23(g) dat onkoste in voormelde verband aangegaan ingevolge art 11(a) afgetrek kan word.

Silke (*South African Income Tax* 10de uitg 396 par 7 45) voer ten aansien van die interpretasie van artikel 23(b) en (g) in verhouding tot mekaar aan "that s 23(b) overrides s 23(g), otherwise the exception in s 23(b) would be meaningless." Op hierdie slotsom het die hof *a quo* in die *Van der Walt*-saak ook gesteun.

Die hof van appèl is dus die eerste keer in die posisie om met die gesag van 'n volle regbank van 'n provinsiale afdeling oor die korrekte interpretasie van artikels 23(b) en (g) in verhouding tot mekaar uitsluitsel te gee.

Die hof het hier voor die klassieke situasie te staan gekom waar 'n latere bepaling 'n vroeëre bepaling van een en dieselfde wet (op die oog af) weerspreek (of onverenigbaar daarmee is). Die bekende reël in *Principal Immigration Officer v Bhula* 1931 AD 323 335 is dat in so 'n geval eers probeer moet word om telkens aan elkeen van die twee bepalings afsonderlik gevolg te gee. Dit geld veral indien die latere bepaling boonop regte aantas wat in die vroeëre bepaling beskerm word.

Die hof verkies egter om nie die aangeleentheid op die basis van hierdie reël te beredeneer nie, maar maak ten aanvang gewag van die feit dat artikels 23(b) en (g) (onderskeidelik) verskillende of andersoortige gegewens behandel. Dit gaan by 23(b) naamlik oor die spesifieke geval waar 'n *perseel* deels vir private en deels vir bedryfsdoeleindes gebruik word (en die afwesigheid van eksklusiwiteit, voeg die hof by, is inherent in dit waarvoor voorsiening gemaak word), terwyl 23(g) op *gelde* wat nie geheel en al vir bedryfsdoeleindes bestee word nie betrekking het (310H). Hiermee gee die hof by implikasie gevolg aan 'n ander wyd erkende reël van wetsuitleg, naamlik dat aan elke betekeniseenheid in 'n wet sover moontlik 'n eie betekenis gegee moet word (sien bv *Israelsohn v Commissioner for Inland Revenue* 1952 3 SA 529 (A) 536; *S v Weinberg* 1979 3 SA 89 (A) 98).

Hierdie reël hang nou saam – en is trouens 'n uitvloeisel van – die vermoede dat 'n wet nie kragtelose of doellose bepalings bevat nie (*S v McBride* 1979 4 SA 313 (W) 319).

Artikels 23(b) en (g) moet daarom, so kan geredeneer word, sover moontlik elkeen 'n eie betekenis kry – veral ook omdat indien hulle saamgelees word, artikel 23(g) subartikel (b) in stryd met die vermoede kragteloos laat.

Die hof volg egter nie uitdruklik hierdie redenasie nie maar kom tot die interessante gevolgtrekking dat 'n mens in artikel 23 (en in die besonder met verwysing na die opeenvolging van die subartikels daarvan) met 'n *generalia-specialibus-non-derogant*-situasie te make het, en dat daarom artikel 23(g) (die algemene bepaling) nie artikel 23(b) (die besondere bepaling) kan kwalifiseer nie. Die skema van artikel 23 is dat eers (in subartikel (b)) spesifieke items wat nie as aftrekkings kwalifiseer nie *tesame met die uitsonderings daarop* vermeld word, en dat 'n algemene bepaling soos subartikel (g) vervolgens gebruik word om voorbeelde van gevalle wat "deurglip" – dit wil sê nie reeds in die besondere bepalings (van bv subartikel (b)) voor voorsiening gemaak is nie – te ondervang. Artikel 23(g) handel dan egter nie weer met die besondere gevalle wat afgehandel is nie, en tref vanselfsprekend ook nie die uitsonderings wat in besondere gevalle gemaak word nie – anders is die uitsonderings, soos Silke ook betoog, sinloos (310I).

Hierdie bevinding van die hof is myns insiens in twee opsigte van besondere belang:

a In die eerste plek gee dit uitdruklik uitsluitsel oor die wyse waarop artikels 23(b) en (g) van die wet in verhouding tot mekaar verstaan moet word. Dit sê by implikasie egter ook hoe daar aan die ander besondere bepalings van artikel

23 (asook – siende dat artikel 23 die negatiewe teenkant van artikel 11 verteenwoordig (vgl 308E) – sekere besondere bepalings van artikel 11 in verhouding tot die algemene voorskrifte van subartikel (g)) gevolg gegee moet word. In laasgenoemde verband bevestig die hof byvoorbeeld die korrektheid van die benadering wat regter Miller in *ITC* 1158 (*supra* 180) met betrekking tot die uitleg van die bepalings van artikel 11(2)(b)(*bis*) – wat indertyd vir die aftrek van onthaaltoelaes voorsiening gemaak het – in verhouding tot die bepalings van artikel 23(g) gevolg het. Die hof is ook van mening dat vir sy algemene benadering in *Smith v Secretary for Inland Revenue* 1968 2 SA 480 (A) 491 *in fine* – 492B steun te vind is.

b In die tweede plek is dit na my wete die eerste geval waar 'n hof met soveel woorde te kenne gee dat 'n *generalia-spesialibus-non-derogant*-argumentslyn ten aansien van die gevolggewing aan latere algemene bepalings van 'n wet in verhouding tot vroeëre besondere bepalings van *een en dieselfde wet* gevolg kan word. Gewoonlik beperk hierdie argument die geïmpliseerde wysiging van die bepalings van 'n *vroeëre wet* deur die strydige of onversoenbare bepalings van 'n *latere wet* op 'n *lex-posterior-priori-derogat*-basis. Ek is egter van oordeel dat – soos die hof inderdaad bevind het – daar geen beginselrede bestaan waarom hierdie beperking nie ook op oënskynlik strydige bepalings binne een en dieselfde wet toegepas kan word nie. Die reël in *Principal Immigration Officer v Bhula*, waarna hierbo reeds verwys is, sal steeds geld in gevalle waar die (op die oog af) botsing tussen 'n latere en 'n vroeëre bepaling van een en dieselfde wet, nie ook 'n botsing tussen (onderskeidelik) 'n algemene en 'n besondere bepaling is nie.

6 Samevatting en Gevolgtrekkings

Die *ratio decidendi* in die *Van der Walt*-saak is myns insiens gesag vir die volgende stellings:

a Die beroep van 'n dosent is 'n "bedryf" soos in artikel 1 van die *Inkomstebelastingwet* bedoel.

b Artikel 11(a) van die wet vereis vir belastingaftrekkingsdoeleindes 'n *nexus* tussen onkoste en verlies werklik aangegaan of gely aan die een kant en inkomste voortgebring aan die ander kant. Hierdie kousale verband hoef egter nie van 'n absolute *sine qua non*-geaardheid te wees nie.

c Die vraag met watter doel 'n belastingpligtige 'n uitgawe aangegaan het, is 'n feitelike vraag ten opsigte waarvan die bevinding van 'n hof *a quo* deurslaggewend kan wees.

d Die algemene bepalings van artikel 23(g) van die wet kwalifiseer nie die besondere bepalings van die voorafgaande subartikels van artikel 23 – en in die besonder subartikel (b) – nie.

e 'n *Generalia-specialibus-non-derogant*-benadering is nie slegs van pas in gevalle waar algemene bepalings van 'n latere wet die besondere bepalings van 'n vroeëre wet of van die gemenereg (moontlik kan) kwalifiseer of wysig nie, maar geld ook waar die latere algemene bepalings van 'n wet saam met vroeëre besondere bepalings van een en dieselfde wet gelees word.

Oor die algemeen gesproke adem die uitspraak in die *Van der Walt*-saak 'n gees wat mettertyd toenemend by die uitleg van belastingbepalings (en in die besonder die bepalings van die *Inkomstebelastingwet*) posgevat het. Volgens 'n vroeëre,

gangbare benadering tot die uitleg van belastingbepalings, is aanvaar dat sodanige bepalings nooit billik geïnterpreteer (kan) word nie: waar bepaalde konkrete gevalle van belastingoplegging binne die letter van die wet val, moet – so is geredeneer – aan die letter van die betrokke bepaling gevolg gegee word afgesien van die "hardheid" van die gevolge daarvan vir die belastingpligtige (*Pardington v The Attorney-General* 21 LT 370 375 met goedkeuring aangehaal in *Commissioner for Inland Revenue v George Forest Timber Co Ltd* 1924 AD 516 531–532; sien ook *Commissioner for Inland Revenue v Simpson* 1949 4 SA 678 (A) 695).

Die voormelde ongenuanseerde benadering moes mettertyd plek maak vir 'n veel realistieser een. Daar is naamlik weggedoen met die gedagte dat 'n besonder beswarende of letterknegtige benadering tot die uitleg van belastingbepalings gevolg moet word (*Commissioner for Inland Revenue v Delfos* 1933 AD 242 254; *Secretary for Inland Revenue v Kirsch* 1978 3 SA 93 (T) 94).

Soos by alle ander lasopleggende wetsbepalings word na die gewone betekenis van belastingbepalings gekyk en die vermoede *contra fiscum* word in gevalle van onduidelikheid en dubbelsinnigheid ten gunste van die belastingpligtige toegepas (*Estate Reynolds v Commissioner for Inland Revenue* 1937 AD 57 70; *Sekretaris van Binnelandse Inkomste v Raubenheimer* 1969 4 SA 314 (A) 322; *Rand Bank Bpk v Regering van die Republiek van Suid-Afrika* 1974 4 SA 764 (T) 767; *Trust Bank of Africa Ltd v Secretary for Inland Revenue* 1978 4 SA 850 (K)).

Veral in die geval van beswarende bepalings word die stelreël *interpretatio quae parit absurdam, non est admittenda* as 'n selfstandige uitvloeisel van die vermoede teen onbillikheid en onregverdigheid toegepas. (Sien oor die algemeen Steyn *Die Uitleg van Wette* (1981) 119–120; vgl ook *S v Seekoei* 1982 3 SA 97 (A). Vir meer besondere toepassings van die stelreël om onredelike resultate te vermy, sien *S v De Abreu* 1981 1 SA 417 (T); *Rogut v Rogut* 1982 3 SA 928 (A); *Oos-Randse Administrasieraad v Rikhoto* 1983 3 SA 595 (A).)

Aan hierdie "absurditeitsreël" sowel as aan die algemene reël dat waar ook al redelikerwys meer as een uitleg van 'n beswarende wetsbepaling moontlik is, die vir die te beswaarde onderdaan regverdigste en billikste uitleg gevolg moet word (vgl *Principal Immigration Officer v Bhula* 1931 AD 323 336–337; *R v Sachs* 1953 1 SA 392 (A) 399; *Arenstein v Secretary for Justice* 1970 4 SA 273 (T) 281; *Cornelissen v Universal Caravan Sales (Pty) Ltd* 1971 3 SA 158 (A) 175), kan en behoort as algemene riglyn by die uitleg van belastingbepalings gevolg gegee te word.

Ek is ten slotte van oordeel dat die uiteindelike betekenis van die uitspraak in die *Van der Walt*-saak daarin geleë is dat dit ook – al sê die hof dit nie altyd noodwendig uitdruklik nie – die voorgaande algemene benadering tot en beginsels betrokke by die uitleg van belastingwette (as beswarende wetsbepalings) herbevestig. Die hof het met ander woorde:

- in sy uitleg van artikels 11(a) en 23(b) en (g) hom nie onnodig deur die streng letterlike betekenis van tersaaklike woorde, sinne en sinsnedes laat knot nie;
- moontlike absurditeite waartoe 'n té eng, letterlike lees van die betrokke wetsbepalings aanleiding sou kon gee (en daar is heelwat sulke absurditeite wat 'n mens jou kan indink) vermy; en

- uiteindelik, in effek, in plaas van die beswarende letterlike of eng louter taalkundige of grammatikale uitleg van die betrokke bepalings, 'n vir die belastingpligtige gunstiger, ruimer uitleg verkies.

LOURENS M DU PLESSIS
Potchefstroomse Universiteit vir CHO

PHONE-A-COPY WORLDWIDE (PTY) LTD v ORKIN 1986 1 SA 729 (A)

Formaliteite met betrekking tot koopkontrak van 'n deeltiteleenheid

Die formaliteite wat nagekom moet word met betrekking tot 'n koopkontrak van 'n deeltiteleenheid het reeds tot heelwat litigasie aanleiding gegee. Hierdie probleem is weer onder oë geneem in die beslissing van regter Le Roux in *Orkin v Phone-A-Copy Worldwide (Pty) Ltd* 1983 3 SA 881 (T) en die bogemelde volbankbeslissing in die appèlafdeling.

Ingevolge artikel 1 (1) van die Wet op Formaliteite met betrekking tot Koopkontrakte van Grond 71 van 1969, en artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981, moet koopkontrakte van grond op skrif gestel en deur beide partye onderteken word. Voorts moet die *res vendita* sodanig omskryf wees dat dit sonder gebruikmaking van ekstrinsieke getuienis met betrekking tot die onderhandelings en konsensus van die partye geïdentifiseer kan word. Appèlregter Holmes beslis in hierdie verband in *Clements v Simpson* 1971 3 SA 1 (A) 7:

> "The test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by a reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and *consensus*."

Die toepassing van hierdie beginsel by deeltitelkontrakte, veral in die geval waar 'n deeltitelregister nog nie geopen is nie, skep egter dikwels probleme. Gedurende Julie 1975 het die respondente (eisers in die hof *a quo*) 'n skriftelike koopkontrak vir die aankoop van twaalf woonstelle met die appellant (verweerder) gesluit. Die partye was eenstemmig daaroor dat die gebou waarin die woonstelle geleë was alreeds by kontraksluiting opgerig was, maar dat 'n deeltitelregister nog nie geopen was nie. Die appellant het in die kontrak onderneem om toe te sien dat 'n deeltitelregister wel geopen word, maar indien dit nie moontlik sou wees nie, sou die verkoper (appellant)

> "be entitled to cause to be transferred into the name of the purchaser, in lieu of passing transfer of the unit, such number of shares in the owner company as the seller deems commensurate with the purchaser's right to occupy the section."

Die eenhede wat verkoop is, is soos volg omskryf:

> "(a) Flat numbers ('the section') in the block of flats known as Unicadia 402, 403, 404, 405, 406, 407, 202, 203, 204, 205, 304, 305 (12 flats);
>
> (b) An undivided share in the common property, as defined in the Act and as applicable under the scheme, to be apportioned to the section in accordance with the participation

> quota (as defined in section 24 of the Act) of the section; (the section and the said undivided share being collectively referred to as 'the unit')."

Die partye was ook eenstemmig daaroor dat geen planne by die kontrak aangeheg of deur verwysing ingelyf is nie en dat die deeltitelregister eers gedurende 1980 geopen is. Die respondente het in die hof *a quo* twee geskilpunte ingevolge reël 33 van die hooggeregshofreëls vir beslissing voorgelê, waarvan net die volgende vir hierdie bespreking van belang is:

Voldoen die beskrywing van die *res vendita* aan die voorgeskrewe formaliteite met betrekking tot grondkoopkontrakte?

Regter Le Roux het in sy uitspraak in die hof *a quo* sterk gesteun op die onderskeid wat in *Clements v Simpson* 1971 3 SA 1 (A) 7 gemaak is tussen 'n koopkontrak van 'n gespesifiseerde saak (in welke geval die koopsaak sodanig in die kontrak omskryf moet word dat dit sonder ekstrinsieke getuienis identifiseerbaar is), en 'n koopkontrak waar een van die partye die *res vendita* uit 'n bepaalde *genus* of klas mag kies. In laasgenoemde geval kom daar 'n geldige kontrak tot stand sonder dat die spesifieke *res vendita* volledig omskryf hoef te word deurdat die *res vendita* in 'n later stadium deur een van die partye eensydig geïdentifiseer word. Die bedoeling om 'n *genus*koop aan te gaan, moet egter duidelik uit die bewoording van die kontrak blyk (vgl ook *Botha v Niddrie* 1958 4 SA 446 (A)).

Aangesien 'n deeltiteleenhied eers by die opening van die deeltitelregister tot stand kom, het die *res vendita* in hierdie geval nog nie tydens kontraksluiting bestaan nie. Indien daar net na 'n woonstelnommer in die kontrak verwys sou word (sonder aanhegting van of verwysing na enige planne), sou die koopsaak nie na behore in die kontrak omskryf wees nie aangesien daar in so 'n geval van ekstrinsieke getuienis gebruik gemaak sou moes word om die die koopsaak te bepaal (vgl *Naude v Schutte* 1983 4 SA 74 (T)). Die regter onderskei egter die onderhawige uitspraak van dié in *Naude v Schutte* deurdat daar in hierdie geval uit die bewoording van die kontrak blyk dat die partye beoog het om 'n *genus*-koop te sluit. Hy beslis (895B):

> "Dit kom my voor asof dit duidelik is uit die kontrak self dat die partye nie beoog het om *woonstelle* te koop of te verkoop nie, hoewel die beskrywing verwys na woonstelle. Tot die mate waarin die beskrywing vervat in klousule 3(1)(a) verwys na woonstelle volgens die nommers wat bo die deure voorkom, beteken dit tog nie dat dit daardie woonstelle is wat die partye wil koop en verkoop nie. Hulle wil eintlik *eenhede* op 'n deeltitelplan koop en verkoop. Hierdie eenhede is klaarblyklik nog nie vasgestel nie. Die gebruik van die nommers van die woonstelle is slegs om die grondslag te lê vir die bepaling van die eenheid self, die deel wat dan deel vorm van die eenheid. Dit is 'n aanduiding aan die persoon wat die deeltitelaansoek moet loods en wat die plan moet opstel, dat hierdie woonstelle soos dit binne die vier mure gevind word van die bestaande gebou, die basis moet vorm van die eenheid self. Dit beteken dat dit 'n aanduiding is van 'n *genus* en nie van die werklike *res vendita* of die *merx* self nie.... Dit, na my mening, oortree nie die vereistes dat die *res vendita* behoorlik beskryf moet word nie. Om die waarheid te sê, dit val in daardie kategorie waar die bepaling van die voorwerp aan 'n derde oorgelaat word – die derde in hierdie geval is klaarblyklik die verkoper of die eienaar van die blok woonstelle."

Sonder om krities die moontlikheid te oorweeg dat die partye eerder bedoel het om 'n koop *ad mensuram* te sluit, aanvaar ek vir die doeleindes van hierdie bespreking dat daar in hierdie geval wel 'n *genus*koop aangegaan is. Die probleem gaan hier oor die omskrywing van 'n toekomstige saak in 'n kontrak, waar in die geval van sowel 'n *genus*koop as 'n koop *ad mensuram* bepaalde uitsonderings met betrekking tot formaliteite van toepassing is.

In sy uitspraak in die appèlafdeling bevestig appèlregter Nicholas die uitspraak van regter Le Roux dat die *res vendita* na behore omskryf was deurdat daar bloot na die woonstelnommer van 'n reedsbestaande woonstelblok verwys is, maar daar word nie uitdruklik bevestig dat dit slegs die regsposisie in die geval van 'n *genus*koop is nie (soos in die hof *a quo* wel uitdruklik vermeld is). Regter Nicholas steun in sy uitspraak ten opsigte van hierdie regspunt op die beslissings in *Clements v Simpson, supra*; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 1005 en *Forsyth v Josi* 1982 2 SA 164 (N) 172–173.

Die omstandighede in die *Phone-A-Copy*-saak kan ten opsigte van wesenlike aspekte van dié in die *Clements*-, *Van Wyk*- en *Forsyth*-beslissings onderskei word. In die geval van die *Clements*- en *Van Wyk*-sake het die koopsaak ('n stuk grond) reeds bestaan, terwyl 'n deeltiteleenheid eers *coram lege loci* tot stand kom wanneer die deeltitelregister geopen is (*Botes v Toti Development Co (Pty) Ltd* 1978 1 SA 205 (T) 210; *Naude v Schutte* 1983 4 SA 74 (T) 76; *Den Dunnen v Kreder* 1985 3 SA 616 (T) 624). In laasgenoemde twee uitsprake is beslis dat dit voldoende is om in die geval van 'n deeltiteleenheid wat reeds tot stand gekom het ten opsigte van die beskrywing van die koopsaak in die kontrak net na die aktekantooromskrywing te verwys. Indien die eenheid egter nog nie tot stand gekom het omdat 'n deeltitelregister ten tyde van kontraksluiting nog nie geopen was nie, is dit nie genoegsaam om net na die aktekantooromskrywing of die woonstelnommer te verwys nie, selfs nie in gevalle waar die gebou alreeds opgerig is nie. In die geval van die *Forsyth*-gewysde is daar nie vasgestel of dit die bedoeling van die partye was om 'n *genus*koop aan te gaan nie, welke bedoeling ingevolge die uitspraak in *Clements v Simpson, supra* wesenlik is alvorens van die vereiste dat die koopsaak uit die kontrak bepaal moet kan word, afgewyk mag word.

Alhoewel dit nie deur appèlregter Nicholas in die *Phone-A-Copy*-saak uitdruklik so gestel word nie, skep die verwysing na die *Van Wyk*- en *Forsyth*-uitsprake die indruk dat dit by alle kontrakte vir die verkoop van deeltiteleenhede genoegsaam is indien daar net na die woonstelnommer verwys word in die geval van 'n gebou wat alreeds opgerig is. Dat dit wel in die geval van 'n *genus*koop voldoende is, skep nie 'n probleem nie, maar die vraag ontstaan of hierdie beginsel sonder meer van toepassing gemaak kan word op deeltitelkontrakte waar die deeltiteleenheid nog nie tot stand gekom het en dit ook nie 'n *genus*koop is nie. Twee kwelvrae ontstaan na aanleiding van die uitspraak in die appèlafdeling:

a Indien daar in die uitspraak bevestig word dat 'n toekomstige deeltiteleenheid slegs in die geval van 'n *genus*koop aan die hand van 'n woonstelnommer in die kontrak omskryf kan word (soos in die hof *a quo* beslis is), is die verwysing na die *Van Wyk*- en *Forsyth*-uitsprake toepaslik?

b Indien die omskrywing van die koopsaak met verwysing na slegs 'n woonstelnommer in alle kontrakte as voldoende geag word, geld dit net in die geval waar die gebou reeds opgerig is, of ook in gevalle waar die gebou nog nie opgerig is nie maar daar alreeds bouplanne bestaan?

In die *Phone-A-Copy*-beslissing is ten opsigte van die omskrywing van die deeltiteleenheid bevestig dat die eenheid aan die hand van die deel en die onverdeelde aandeel in die gemeenskaplike eiendom omskryf moet word (744D). Wat die omskrywing van die deel betref, steun appèlregter Nicholas op die beslissing in die *Van Wyk*- en *Forsyth*-sake vir sy standpunt dat die verwysing na 'n straatnommer (in die geval van 'n erf) of 'n woonstelnommer (in die geval

van 'n deeltiteleenheid) voldoende is om die *res vendita* te omskryf. In nie een van gemelde sake was die kwessie van 'n *genus*koop egter ter sprake nie en in die *Forsyth* -saak was die deeltitelregister nog nie geopen nie. Op die oog af wil dit dus voorkom asof beslis is dat dit voldoende is om 'n deel in 'n toekomstige deeltiteleenheid bloot aan die hand van die woonstelnommer in 'n bestaande woonstelblok te omskryf, ongeag die aard van die kontrak.

Tog is die *Forsyth*-gewysde onderskeibaar van die *Phone-A-Copy*-saak. In die eersgenoemde saak was al die besonderhede wat die basis van 'n deelplan vorm, bekend en het dit by implikasie deel van die skriftelike ooreenkoms tussen die partye gevorm. Dit was dus toelaatbaar ter identifikasie van die koopsaak en het nie as getuienis van die onderhandelings van partye gedien nie (vgl *Den Dunnen v Kreder* 1985 3 SA 616 (T) 624). In die *Phone-A-Copy*-saak was daar geen planne van enige aard aangeheg of vermeld nie. Ten opsigte van hierdie aspek is in die *Den Dunnen*-uitspraak (624D) beslis:

> "[T]ensy . . . daar 'n *genus*koop was, is dit vir 'n behoorlike omskrywing van 'n deeltiteleenheid nodig dat 'n deeltitelplan reeds geskep is en in die ooreenkoms geïnkorporeer word of dat die besonderhede wat die basis van so 'n plan sal vorm ten volle bekend is en in skrif vervat is by die beskrywing van die eenheid."

Dit sou myns insiens voldoende wees as sodanige besonderhede deur verwysing by die skriftelike kontrak ingelyf is.

In sowel die *Forsyth*- as die *Phone-A-Copy*-saak het die partye nie die bedoeling gehad om 'n woonstel nie, maar wel 'n deeltiteleenheid te koop en het die partye voorts die bedoeling gehad om deur die gebruik van woonstelnommers in die kontrak die grondslag vir die bepaling van die eenheid deur die verkoper te lê. Regter Le Roux tipeer hierdie bedoeling in die *Phone-A-Copy*-uitspraak in die hof *a quo* as die bedoeling om 'n *genus*koop te sluit, terwyl hierdie aspek glad nie in die *Forsyth*-uitspraak oorweeg word nie. Dat die partye nie noodwendig altyd sodanige bedoeling het nie, blyk uit die *Den Dunnen*-uitspraak. Die afleiding kan dus nie te ligtelik gemaak word dat dit in alle gevalle voldoende is om net na 'n woonstelnommer te verwys in die koopkontrak van 'n deeltiteleenheid wat nog nie tot stand gekom het nie, aangesien die partye nie altyd in sodanige omstandighede die bedoeling het om 'n *genus*koop te sluit nie.

Daar is voorts in die *Phone-A-Copy*-uitspraak beslis dat die onverdeelde aandeel in die gemeenskaplike eiendom, wat nie in die kontrak omskryf is nie, eers omskryf sal kan word na die opening van die deeltitelregister. In hierdie geval is die deeltitelregister egter eers vyf jaar na ondertekening van die kontrak geopen. Die praktiese implikasie hiervan is dat die koopsaak nie by ondertekening bepaal of bepaalbaar hoef te wees nie, maar eers wanneer die deeltitelregister geopen word (indien ooit). Dit is die gevolg van die feit dat die koopsaak in die geval van 'n *genus*koop dikwels nog nie by kontraksluiting bestaan of bepaalbaar is nie. Ter beveiliging van die koper is dit in sodanige omstandighede dus noodsaaklik dat 'n tydsbepaling met betrekking tot die opening van die deeltitelregister in die kontrak gestel word. Ingevolge artikels 6(1)(q) en 6(4) van die Wet op Vervreemding van Grond 68 van 1981, is die koper daarop geregtig om die kontrak te kanselleer indien hy nie transport van die eiendom binne vyf jaar na sluiting van die kontrak verkry nie. Hierdie bepalings ondervang die probleem in 'n mate. Hulle is egter slegs op afbetalingskoopkontrakte van toepassing.

In 'n reeks Transvaalse beslissings is telkens as uitgangspunt gestel dat dit nie voldoende is om die deeltiteleenheid net aan die hand van die woonstelnommer

te omskryf alvorens die deeltiteleenheid nie *coram lege loci* ontstaan het nie, dit wil sê voordat die deeltitelregister geopen is nie. Die vereistes wat vir die omskrywing van 'n deeltiteleenheid voor opening van 'n deeltitelregister gestel word, is dat die deel omskryf moet word aan die hand van die drie dimensies waaruit dit saamgestel is, naamlik 'n noukeurig boekstawing van die afmetings van die lengte, breedte en hoogte of 'n verwysing na 'n plan waarop hierdie afmetings aangebring is. Daarbenewens moet die onverdeelde aandeel in die gemeenskaplike eiendom ook omskryf word òf aan die hand van die deelnemingskwota òf aan die hand van ('n) plan(ne) waaruit die aandeel in die gemeenskaplike eiendom deur berekening bepaalbaar is (vgl in die geval waar daar nog geen woonstelgebou opgerig is nie *Botes v Toti Development Co (Pty) Ltd* 1978 1 SA 205 (T) en *Richtown Development (Pty) Ltd v Dusterwald* 1981 3 SA 691 (W); vgl in die geval waar daar wel 'n woonstelgebou opgerig was, maar nog geen deeltitelregister geopen is nie, *Naude v Schutte* 1983 4 SA 74 (T); *Kendrick v Community Development Board* 1983 4 SA 532 (W) en *Den Dunnen v Kreder* 1985 3 SA 616 (T)).

By die omskrywing in 'n kontrak van 'n toekomstige deeltiteleenheid in 'n bestaande gebou ten opsigte waarvan daar nog nie 'n deeltitelregister geopen is nie, ontstaan die probleem telkens dat die vloeroppervlakte van die verskeie dele, alhoewel dit bestaan, alleen by wyse van ekstrinsieke getuienis vasgestel kan word indien daar nie planne aangeheg is of na verwys word in die kontrak nie. Dit is moeilik met die voorskrifte in *Clements v Simpson, supra* versoenbaar.

Met die uitspraak van regter Le Roux en die bevestiging daarvan deur die appèlafdeling dat die koopsaak in die geval van 'n *genus*koop nie volledig in die kontrak omskryf hoef te word of deur inlywing identifiseerbaar hoef te wees nie, kan geen fout gevind word nie. Dit is egter jammer dat daar nie in die appèluitspraak uitdruklik daarvan melding gemaak is dat dit net die geval by 'n *genus*koop (of 'n koop *ad mensuram*) is nie, want die uitspraak is tans vatbaar vir die vertolking dat dit op alle deeltitelkontrakte van toepassing is. Die vereistes met betrekking tot die omskrywing van 'n deeltiteleenheid in 'n koopkontrak is myns insiens korrek toegepas in die saak *McKechnie v Augousti Brothers (Edms) Bpk* 1986 3 SA 405 (O) 409B, waar beslis is dat die bouplanne wel gebruik kan word ter identifisering van die koopsaak op grond van die feit dat daar uitdruklik in die kontrak na die bouplanne verwys word en dit gevolglik nie dien as getuienis ten opsigte van die onderhandelings tussen die partye nie. In die alternatief blyk dit uit die ooreenkoms dat die partye die bedoeling gehad het om 'n *genus*koop te sluit en is dit derhalwe nie 'n vereiste dat die koopsaak volledig in die kontrak omskryf hoef te word nie (410G–I).

GERRIT PIENAAR
Potchefstroomse Universiteit vir CHO

S v T 1986 2 112 (O)

Jeugdige oortreders – nalatigheidstoets – maatstaf dié van die "redelike man" of dié van die "redelike kind"

In resente hofbeslissings, artikels en aantekeninge is die toets vir toerekeningsvatbaarheid en nalatigheid van kinders in die deliktereg behandel. (Vgl De Bruin "Kinders en die Toets vir Nalatigheid in die Privaatreg" 1979 *THRHR* 175;

Van der Vyver "Subjectivity or Objectivity of Fault" 1983 *SALJ* 575; Claasen "Toets vir Toerekeningsvatbaarheid en Nalatigheid van Kinders in die Deliktereg" 1984 *TRW* 90; Caiger 1983 *THRHR* 477; *Jones v Santam Bpk* 1965 2 SA 542 (A); *Roxa v Mtshayi* 1975 3 SA 761 (A); *Santam Bpk v Weber* 1983 1 SA 381 (A).) Aanvanklik het onduidelikheid in die deliktereg onder skrywers en selfs ons howe geheers of die kind aan dieselfde norm (dié van die *diligens paterfamilias* of redelike man) as dié wat in die geval van grootmense geld, of eerder aan die "redelike kind"-toets onderwerp moet word. (Sien Van der Walt *Delict Principles and Cases* (1979) 73–76; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 133–138; Boberg *Law of Delict* bd 1 (1984) 673–682).

Die appèlhof bestendig en bevestig onomwonde in die deliktereg dat sodra 'n persoon toerekeningsvatbaar is (*doli et culpae capax*) net een nalatigheidstoets geld, naamlik dié van die redelike man waaraan almal moet voldoen. Jeugdigheid is 'n faktor wat by toerekeningsvatbaarheid in aanmerking kom, maar nie by nalatigheid nie. Slegs by medewerkende nalatigheid vind daar 'n mate van kompensasie plaas waar een van die partye 'n kind en die ander 'n volwassene is. In sodanige gevalle verswaar die nalatigheidstoets vir die volwassene terwyl die toerekeningsvatbare kind steeds aan die gewone nalatigheidstoets gemeet word (*Weber*-saak 400–401).

Geld daar nou 'n ander nalatigheidstoets in die strafreg? Regter Steyn in *S v T*, meen so. Appellant, 'n 16-jarige skoolseun, is deur 'n landdros skuldig bevind aan strafbare manslag op grond daarvan dat hy tydens 'n worsteling met 'n mede-skolier laasgenoemde met 'n vuurwapen doodgeskiet het. Daar was 'n lang aanloop tot die gebeure aangesien daar 'n geruime tyd voor die voorval reeds 'n gespanne verhouding tussen appellant en die oorledene bestaan het – oorledene het die gewoonte gehad om die appellant, wat jonger, kleiner gebou en sensitiewer van geaardheid was as hyself, gedurig te verneder en te intimideer. By appèl teen die skuldigbevinding en vonnis van vyf maande gevangenisstraf wat vir drie jaar opgeskort is, het die hof bevind dat die landdros gefouteer het deur, onder andere, die maatstaf van "die redelike man" op appellant toe te pas om vas te stel of hy nalatig was met betrekking tot die doding al dan nie, in plaas van dié van die "redelike 16-*jarige skoolseun*" (127E). Laasgenoemde se insig, oordeelsvermoë en selfbeheer is weens sy onvolwassenheid gewoonlik veel swakker as dié van 'n volwassene, en daar kan van 'n redelike kind van 16 jaar nie dieselfde mate van verantwoordelikheid en omsigtige optrede verwag word as van 'n volwasse redelike man nie. Aangesien 'n te streng maatstaf van beoordeling derhalwe op appellant toegepas is, het geregtigheid nie teenoor hom geskied nie.

Miskien is dit gepas om te begin deur te verwys na die gesag waarop regter Steyn hom beroep vir sy stelling dat 'n "redelike kind" -toets en nie 'n "redelike man" -toets nie, op die 16-jarige beskuldigde toegepas moes word. Die enigste gesag waarna hy verwys, is *S v J* 1975 3 SA 146 (O) en *S v Lehnberg* 1975 4 SA 553 (A) 560–561. Die twee sake handel oor die toets vir *versagtende omstandighede* by mooŕd en jeugdigheid as faktore in die oorwegingsproses of tienderjariges die doodsvonnis opgelê moet word. Dié toets verskil *caelo toto* van die nalatigheidstoets en dus is die beroep op die sake onvanpas. Die besonder tergende regsvraag het egter reeds dekades lank die aandag van ons howe en skrywers geniet.

In *R v Meiring* 1927 AD 41 verklaar hoofregter Innes met wie vier ander appèlregters saamgestem het:

> "A consideration of those and other authorities does not, I think, justify us in drawing a hard and fast distinction between the ngeligence necessary to establish liability in civil and in criminal cases respectively. In civil actions we have adopted as the simple test that standard of care and skill which would be observed by the reasonable man. And it seems right as well as convenient to apply the same test in criminal trials . . . the test of liability should be the same in both."

Dit is 'n duidelike bevinding dat ons appèlhof dieselfde toets vir sowel die strafreg as die privaatreg aanwend. In die onlangse beslissing in *S v Van As* 1976 2 SA 921 (A) 929, wyk die appèlhof nie van die *Meiring*-saak af nie en bestendig die eenvormigheid tussen die privaatreg en strafreg sover dit die nalatigheidsbegrip betref deur slegs 'n fyner onderskeid met betrekking tot die aard van die vereiste voorsienbaarheid by die nalatigheidstoets in die privaatreg in teenstelling met die strafreg te maak. In die privaatreg hoef 'n persoon slegs die algemene feit van skade te voorsien en die strafreg die werklike feit wat bewys moet word. *In casu* (waar dit om strafbare manslag gaan) word beslis dat die voorsienbaarheid van ernstige liggaamlike beserings nie gelyk gestel moet word aan die voorsienbaarheid van die dood self nie.

'n Mens sou daarom verwag het dat regter Steyn van die belangwekkende ontwikkeling in die privaatregtelike nalatigheidstoets by kinders kennis sou geneem het; veral as in gedagte gehou word dat dit in die *Weber*- en *Jones*-saak oor *impubes* gehandel het, dit wil sê kinders onder die puberteitsouderdomme van 14 en 12 jaar, wat veel jonger is as die 16-jarige beskuldigde in die betrokke saak.

Die probleem gaan natuurlik dieper, aangesien dit aanklamp by die polemiek oor die psigologiese en normatiewe skuldbegrip en die vraag of die nalatigheidstoets hoofsaaklik objektief of subjektief is. Hieroor is daar baie geskryf en regter Steyn kon vanuit hierdie gesprekke sy standpunt gemotiveer het. (Sien De Wet *Strafreg* (1985) 156–163; Snyman *Strafreg* (1981) 119 e v veral 196–203; Burchell en Hunt *South African Criminal Law and Procedure* (1983) 192 e v veral 196–203; Botha "Verwytbare Regsonkunde en die Skuldsoort Culpa" 1975 *THRHR* 50; Botha "Culpa – A Form of Mens Rea or a Mode of Conduct?" 1977 *SALJ* 29; Bertelsmann "What Happened to Luxuria? Some Observations on Criminal Negligence, Recklessness and Dolus Eventualis" 1975 *SALJ* 59; Schäfer "The Swing towards the Subjective Test for Negligence in Criminal Law" 1978 *THRHR* 201; Goosen "The Objective Test for Criminal Negligence – A Revaluation" 1979 *Obiter* 60.) Dit is vir doeleindes van hierdie aantekening nie nodig om die verskillende standpunte uiteen te sit nie. Vir sover dit die nalatigheidstoets van kinders aangaan, verwys sowel Snyman (202 vn 44) as Burchell en Hunt (247) na die delikte reggesag aangaande die redelike-man-toets vir *impubes* en steun hulle nie dieselfde benadering in die strafreg nie. Burchell en Hunt stel dit egter baie duidelik dat die verskillende benadering net toepassing moet vind op kinders tussen die ouderdom nie van 7 jaar en 14 jaar. Sodra 'n kind die ouderdom van 14 jaar bereik, word hy wat die skuldvraag betref oor dieselfde kam as 'n grootmens geskeer maar sy jeug bly relevant as strafversagtende faktor by vonnis.

Dat regter Steyn nie gelyk het as hy sê dat die landdros gefouteer het deur die redelike man-toets in plaas van die redelike kind-toets toe te pas nie, word onteenseglik gestaaf deur ons positiewe reg. So verklaar Burchell en Hunt (248):

> "[E]ven if the view was correct that in our criminal law a subjective test of negligence in the case of children between the ages of 7 and 14 should be applied, *R v Fortuin* (1934 GWL 16) and *R v Wemyss* (1960 (1) PH H 76 (SR)) were against the extension of any exception to young persons above the age of 14."

Dan is jeugdigheid slegs 'n faktor by vonnis (*R v Gufakwezne* (1916) 37 NLR 423; *S v Mohlobane* 1969 1 SA 561 (A) 565). 'n Magdom gesag bevestig dat die tradisionele toets vir nalatigheid in die strafreg dieselfde is as in die privaatreg (*R v Meiring* 1927 AD 41 45; *R v Victor* 1943 TPD 77 82; *R v Swanepoel* 1945 AD 444 448; *R v Mhlongo* 1948 1 SA 1109 (T) 1118; *R v Wells* 1949 3 SA 83 (A) 88; *S v Fernandez* 1966 2 SA 259 (A) 204) en objektief is (*R v Meiring*; *R v Wells*; *S v Van Deventer* 1963 2 SA 475 (A) 483; *S v Mini* 1963 3 SA 188 (A) 196; *S v Mahlalela* 1966 1 SA 226 (A) 229; *S v Qumbella* 1966 4 SA 356 (A) 366; *S v Ntuli* 1975 1 SA 429 (A) 436 en 437; *S v Burger* 1975 4 SA 877 (A) 887–879.) Steun vir 'n suiwer subjektiewe toets word gevind in die argumente van De Wet (156 e v) omdat 'n objektiewe toets grootliks die subjektiewe blaamwaardigheid waaroor dit in die strafreg gaan, by 'n dader ignoreer. Die sterkste aanduiding in ons positiewe reg van 'n gedeeltelik subjektiewe benadering is die uitspraak van *S v Van As* (928 E), waarin hoofregter Rumpff die redelike mantoets soos volg omskryf:

> "In application of the law he is viewed 'objectively', but in essence he is viewed both 'objectively' [and] 'subjectively' because he represents a particular group or type of persons who are in the same circumstances as he is with the same ability and knowledge."

Tog is in later sake, soos *S v Burger* 1975 4 SA 877 (A) 878–879 en *S v Smith* 1981 4 SA 140 (C) 143B, weer die tradisionele objektiewe benadering gevolg.

In twee resente appèlhofuitsprake is die nalatigheidstoets weer eens onder die loep geneem. In *S v Nkwenja* 1985 2 560 (A) was die beskuldigdes in hulle laat tiender- of vroeë twintigerjare aan strafbare manslag skuldig bevind. Die appèlhof bevind die vraag na strafbare manslag behels onder andere

> "die vraag of 'n redelike mens (*bonus pater familias*) in die omstandighede die moontlikheid van die dood sou voorsien het (572G).

Die hof is bewus van die *Van As*-saak, want hy sê uitdruklik dat

> "[d]ie bevinding in 'n saak soos *S v Van As* 1976 (2) SA 921 (A) staan hierdie gevolgtrekking nie in die weg nie" (572J).

In *S v Ngubane* 1985 3 667 (A) bevestig die appèlhof weer eens

> "that culpa is constituted by conduct falling short of a particular standard viz that of the reasonable man. Although the reasonable man may to some effect be individualized in certain circumstances, it remains an objective standard." (686 E–F).

Die hof spreek ook twyfel uit of *S v Van As* 'n swaai na die subjektiewe benadering verteenwoordig en of dit nie net op die konvensionele objektiewe toets, alhoewel ietwat geïndividualiseerd, neerkom nie.

Die voorgestelde toets van regter Steyn, naamlik "dié van die redelike skoolseun wat so pas 16 jaar oud geword het" (127C–D), dwing 'n persoon uit die aard van die saak in 'n doolhof van onbeperkte moontlikhede. Die skiet met 'n handwapen hou geen verband met "skoolseun"-aktiwiteite nie – dink aan die sinvolle subjektivering van deskundiges se nalatigheidstoets weens gedraginge binne hulle spesialiteitsgebied. Elke seun sal daarvolgens getoets moet word aan skoolseun, nie-skoolgaande seun, plaasseun, dorpseun, universiteitsseun, ensovoorts. Daarby kom nog die moontlikhede van geslag, nasionaliteit, ras, stamverband, ensovoorts, en die ouderdomme, 7 jaar, 8 jaar, 9 jaar, so pas 14 jaar, amper 15 jaar, ensovoorts. Waar hou ouderdom op om relevant te wees? Op

21 jaar? Hoekom? Op 18 kan jy immers al stem. 'n Persoon se insig, oordeelsvermoë en selfbeheer word nie magies verhoog op die moment wat hy byvoorbeeld 20, 21, 22 ensovoorts word nie. Wanneer presies hou 'n mens op om 'n kind volgens die strafreg te wees?

Die beter mening is dié van die appèlhof in die *Weber*-saak, naamlik dat die individuele dader se werklik subjektiewe intellektuele ontwikkeling, geestelike rypheid, temperament, agtergrond, impulsiwiteit, onderskeidingsvermoë as faktore by toerekeningsvatbaarheid tuishoort. Dit behoef 'n korrekte hantering van die intensiwiteitsvereistes vir die bewyslas om die vermoede teen en ten gunste van toerekeningsvatbaarheid te weerlê na gelang van die ouderdomsafstand van die *infantes*- tot die *puberes*-stadium of, in die geval van die strafreg, tot die ouderdom van 14 jaar. Sodra die beskuldigde dié hekkie oor is, behoort net een toets te geld, naamlik die hof se oordeel omtrent wat van 'n redelik man in die totaal van omstandighede waarin die hof homself plaas, verwag kan word. Die voorvereiste vir skuld waaroor almal dit eens is, is toerekeningsvatbaarheid. Oor die inhoud en juridiese implikasie van laasgenoemde is almal dit ook eens, naamlik dat vir doeleindes van die skuldvraag (a) die betrokke dader (kind, vrou, man) die nodige geestesvermoëns om te onderskei tussen reg en verkeerd moet hê, en (b) in staat moet wees om volgens daardie insigte op te tree. So 'n positiewe bevinding het klaar sy rasionele "insig, oordeelsvermoë en selfbeheer" waaroor regter Steyn (127C–D) dit het, juridies uitgeklaar. Indien toerekeningsvatbaarheid bewustelik gerelativeer word tot die betrokke feite sal selfs De Wet se baar inboorling wat 'n dinamietdoppie langs die pad optel en aan kinders gee om te speel nooit deur dié skuldverwyt getref kan word nie, omdat toerekeningsvatbaarheid ontbreek. Daar is 'n aanduiding van 'n teenstrydigheid om aan die een kant die dader toerekeningsvatbaar vir enige skuld te bevind en in dieselfde asem te sê hy het nie die nodige insig, oordeelsvermoë en selfbeheer nie. Die onbillikheid waaroor skrywers dit het, lê nie in die norm van die redelike man nie, maar in hulle eie toerekeningsvatbaarheidsbevinding. Daarom stem ek heelhartig saam dat die nalatigheidstoets – soos by deskundiges – net verswaar maar nie verlig kan word nie. Dieselfde spanning is egter teenwoordig in die appèlhof se benadering in die *Weber*-saak dat 'n verhoogde nalatigheidstoets by die medewerkende skuldvraag vir die volwassene geld wat saam met toerekeningsvatbare kinders 'n bepaalde benadering onregmatig veroorsaak. Die toerekeningsvatbare kind word aan die redelike man getoets, maar in dieselfde asem word paradoksaal gesê die volwasse moes rekening gehou het met die onbesonne optrede van 'n kind. Met ander woorde, by die volwassene se skuld is die toerekeningsvatbare teenparty wel 'n onbesonne kind, maar by die toerekeningsvatbare kind se skuld is hy (die kind) 'n volwasse redelike man.

By die deurlees van *S v T* is die oorweldigende indruk dat die bevinding van skuld by toerekeningsvatbaarheid gefaal het. Geen aandag is egter aan dié aspek gewy nie. Dwarsdeur die uitspraak kom appellant se vreesbevange toestand na vore. Die vrees word so geïntensiveer deur die verloop van die feitlike gebeure

> "dat hy onthuts en wild aan't prate gaan" – "steeds banger en meer gespanne raak" – "meer vreesbevange as vantevore raak" – "in beklemmende oomblikke van angs alleen teen 'n dreigende oormag gestaan het" – "heeltemal in 'n waas was en nie geweet het wat om hom aangaan nie" – "totaal onbewus was dat hy 'n pistool uit sy sak gehaal en gevuur het" – "die psigiater nie die moontlikheid kon uitsluit dat hy instinkmatig opgetree het weens die vrees en spanning, wat hy toe beleef het nie" *passim*.

Die hof bevind uitdruklik dat hy nie vir sy vreesbevange benoudheid onder daardie omstandighede gefouteer kan word nie (130H–I). Miskien moes die hof die skuldbevinding eerder op grond van ontoerekeningsvatbaarheid gebaseer het en nie die polemiese terrein van die "redelike-kind"-nalatigheidstoets betree het nie. *In casu* slaag die appèl egter weens noodweer.

JY CLAASEN
Universiteit van die Oranje Vrystaat

The principal feature that controls the creation or the survival of a legal system is the rise and persistence of a body of technical legal ideas; and this body of legal ideas is itself the result of the existence of a professional class of legal thinkers or practitioners, who created and preserved something independent of the identity of the political system and independent of the purity of the race-stock. In short, the rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class. (per JH Wigmore in 1926 *Journal Society Public Teachers of Law* 8.)

BOEKE

CONSTITUTIONS OF TRANSKEI BOPHUTHATSWANA VENDA AND CISKEI

deur MP VORSTER, M WIECHERS en DJ VAN VUUREN (redakteurs)

Butterworth Durban 1985; ix + 269 bl

Prys R35 (hardeband)

Dit is verstaanbaar dat die veranderings wat gedurende die afgelope drie dekades in die Suid-Afrikaanse staatsregtelike struktuur aangebring is, wye belangstelling geniet. Aandag is tot onlangs toe veral geskenk aan die skepping van selfregerende nasionale state in die Suid-Afrikaanse staatsbestel, met die daaropvolgende onafhanklikheidswording van vier van die nasionale state. Die verskyning van bogenoemde publikasie is dus 'n verdere en welkome bydrae tot die literatuur oor die onderwerp; welkom in die sin dat die volledige konstitusie, met 'n kort kommentaar, van elk van die vier onafhanklike nasionale state nou in een publikasie beskikbaar is. Die boek bevat vyf hoofstukke, elk deur 'n ander medewerker, naamlik 'n algemene inleidende hoofstuk oor die historiese aanloop en enkele basiese begrippe, en dan 'n hoofstuk oor elk van die vier onafhanklike nasionale state, te wete die Republieke van Transkei, Bophuthatswana, Venda en Ciskei.

Volgens Venter, wat verantwoordelik is vir die eerste hoofstuk, is die doel van die boek

> "not so much to comment on the constitutions of the former South African 'national states', but to provide the basis on which significant comment may be construed."

Om die bespreking aan die rol te sit, verduidelik hy: waarop begrippe soos "staat," "burgerskap" en "nasionaliteit," en "federasie" en "konfederasie" dui; kortliks hoe die proses na onafhanklikheid verloop het; en in watter mate die gemelde vier state "local constitutional law" of "foreign concepts" in hulle konstitusies opgeneem het. Hoe interessant hierdie bespreking ook al mag wees, sou Venter 'n beter basis vir verdere bespreking gebied het as hy meer van die strukturele model gebruik gemaak het. In die ontvoogdingsproses van die nasionale state is verskeie nuwe komponente in die Suid-Afrikaanse staatstruktuur geskep wat in 'n bepaalde verhouding tot die reeds bestaande komponente in die struktuur te staan gekom het, byvoorbeeld die verhouding tussen die wetgewende vergadering van 'n selfregerende nasionale staat en die parlement van Suid-Afrika; tussen die kabinet van 'n nasionale staat en die uitvoerende gesag van Suid-Afrika; en die verhouding tussen die wetgewende mag in die nasionale staat en die Suid-Afrikaanse staatshoof. Met onafhanklikheidswording is die

gebiede van die Suid-Afrikaanse staatstruktuur afgeskei elk met sy eie staatsbestel met komponente wat volgens eie interne relasies funksioneer.

Met die strukturele model as basis kon Venter en die ander medewerkers 'n sinvoller bespreking voer oor wat tans in die suider-Afrikaanse bestel aan die gang is. So sou Venter in sy bespreking van 'n federale of konfederale bestel vir suider-Afrika nie vasgevang gesit het met 'n bespreking van die gewone kenmerke van dié stelsels nie. Wat van belang is, is die samewerkingstruktuur wat in so 'n staatsbestel geskep word, en dit kan verskil van geval tot geval. Dit is moontlik dat in die suider-Afrikaanse bestel 'n komponent geskep word met owerheidsgesag om afdwingbare besluite te neem, byvoorbeeld oor nasionaliteit en reisdokumente of oor landbou om maar twee sake te noem, al vertoon die staatsbestel die basiese kenmerke van 'n konfederasie. Om effektief in die breër suider-Afrikaanse verband te wees, sal die samewerkingstruktuur meer as 'n assosiasie of konfederasie van state moet wees, met kenmerke van sowel 'n federale as 'n konfederale stelsel.

'n Staatkundige model ingevolge die strukturalisme sou verder vir Venter in staat gestel het om in sy bespreking 'n sinvoller en duideliker vergelyking te tref tussen die staatsregtelike ontwikkeling van die "British possessions" en dié van die selfregerende nasionale state. Dit is nie duidelik nie of Venter net verwys na die Britse kolonies in Afrika wat sedert die sestiger jare onafhanklik geword het en of hy in sy vergelyking ook die ontvoogding van die gemenebeslande, waaronder Suid-Afrika, insluit. In beide gevalle sou 'n identifisering van die komponente in die staatsbestel (wat die Britse ryk of Statebond insluit), die interne verhoudingstruktuur en die verandering wat met die ontvoogdingsproses daarin ingetree het, vir die leser 'n duideliker beeld gegee het van wat tans in Suid-Afrika aan die gang is. Wat die uitvoerende en wetgewende magte in die selfregerende nasionale state betref, kan na die volgende aspekte verwys word: Die Suid-Afrikaanse staatspresident is wel staatshoof van 'n selfregerende nasionale staat, maar hy het geen verteenwoordiger wat namens hom in die nasionale staat optree nie; die owerheid van die nasionale staat behartig self na eie goeddunke, sonder medewerking van die staatspresident of die Suid-Afrikaanse regering, sake wat aan hom oorgedra is; die staatspresident kan ook nie wetgewing van die nasionale staat beïnvloed nie, aangesien hy nie deelneem aan die wetgewende proses nie, maar slegs sy toestemming tot 'n wet verleen as staatshoof; die wetgewende bevoegdheid van die wetgewer in 'n nasionale staat moet uitbreidend uitgelê word wat meebring dat dit Suid-Afrikaanse wetgewing kan wysig of selfs kan herroep.

Vergelyk hierdie verhoudingstruktuur met dié wat van toepassing was in die Britse ryk tussen Brittanje en haar Afrika-kolonies, en dit is duidelik dat, afgesien van "remarkable similarities," daar ook merkwaardige verskille was. As die proses tot onafhanklikheid vergelyk word, blyk dit dat die staatkundige ontvoogding van die nasionale state 'n geforseerde en gerigte dewolusie van magte deur die Suid-Afrikaanse owerheid is, in teenstelling met die proses in veral die "ou" Britse ryk betreffende die vrygeweste, waar die klem op *de facto* of funksioneel pragmatiese aspek geval het, met 'n spontane dewolusie van magte.

Soos in die voorwoord aangedui, kon die onderskeie medewerkers volgens eie goeddunke sonder enige voorskrif van die redakteurs te werk gaan. Die resultaat is vier hoofstukke waarin die staatstruktuur van die vier onafhanklike

state behandel word, elk met sy eie styl en benadering. Indien die vier medewerkers egter met 'n bepaalde staatsregtelike struktuur as basis kon verduidelik het hoedanig eie (en miskien eiesoortige) strukture in die vier onafhanklike state ontwikkel het, sou dit 'n sinvoller bydrae tot die saak onder bespreking gelewer het.

Die Transkeise konstitusie word in hoofstuk 2 behandel. Vorster se kommentaar is insiggewend en voldoen saam met die bydrae van Barrie oor die konstitusie van Venda, die beste aan die doelwit van die boek, naamlik "to provide the basis on which significant comment may be construed." Vorster slaag daarin om die staatstruktuur soos dit in Transkei ontwikkel het, dit wil sê die samestelling van die verskillende staatskomponente en die verhoudingstruktuur wat aldus geskep is, sodanig te beskrywe dat die leser 'n beter idee kry van die staatsbestel soos in die konstitusie vervat. Van al die medewerkers slaag Vorster die beste daarin om die staatsbestel as 'n geheel-eenheid aan te bied. Die paar aspekte wat spesifiek en vollediger aangeroer word, soos die outochtonie van die konstitusie, die voorrede tot die konstitusie, die sentrale posisie wat die president inneem en die integrasie van stamhoofde in die staatsbestel, sal beslis verdere kommentaar uitlok.

Die konstitusie van die Republiek van Bophuthatswana word deur Devenish in hoofstuk 3 behandel. Hy het verkies om in sy kommentaar veral klem te lê op die "Declaration of Rights" wat in die konstitusie vervat is, en die beskerming van mensregte in die nuwe staat. Hierdie aspek word in 'n sekere mate oorbeklemtoon met die volgende as resultaat:

a Die bespreking van die ander aspekte van die konstitusie, soos die presidentsamp, die wetgewende mag, burgerskap en die howe, staan los van mekaar en vorm nie 'n duidelike geheelbeeld nie.

b Die skrywer se subjektiewe oordeel kry soms die oorhand. Vergelyk byvoorbeeld sy verwysing na "the notorius South African Terrorism Act," sy aanprysing van die onlangse wysiging tot die konstitusie waarvolgens 'n professor in die regte as regter aangestel kan word (hoeveel regslui sal saamstem dat hierdie bepaling Bophuthatswana "in the vanguard of innovative constitutional development" plaas?), en sy gevolgtrekking dat

> "Bophuthatswana has a far better human rights record than the other three independent Black states"

asook dat

> "the declaration of rights has acquired a place in the hearts and minds of the people and leaders of Bophuthatswana which also acts as a powerful form of entrenchment."

Hierdie subjektiewe en by tye emosionele stellings kon vermy gewees het as 'n duidelike strukturele raamwerk gegee is waarbinne die medewerkers hulle kommentaar kon aanbied.

Devenish het wel na 'n paar belangrike aspekte verwys, maar ongelukkig verkies om dit baie oppervlakkig, soms in net een sin, af te handel. Vergelyk byvoorbeeld sy bespreking van die konstitusie as *fundamental law* of *Grundnorm*, die outochtonie van die konstitusie en die posisie van stamhoofde in die wetgewende mag. Die gedeelte oor verdrae en ooreenkomste gesluit tussen 'n selfregerende Bophuthatswana voor onafhanklikheid en Suid-Afrika word egter vollediger behandel en sal verdere bespreking stimuleer. Twee van die ander medewerkers, Barrie en Cilliers, bespreek ook hierdie aspek en lig dit verder toe.

Barrie behandel die konstitusie van die Republiek van Venda in hoofstuk 4. Hy het verkies om eers aan die leser 'n breë agtergrond tot die wese van 'n konstitusie te gee, om dan die bepalings van die konstitusie te gee, en om dan die bepalings van die konstitusie in die lig daarvan kortliks te behandel. In die eerste deel van die hoofstuk word verwys na watter bepalings in 'n "ideale" konstitusie opgeneem moet word, die effek van 'n voorrede tot 'n konstitusie, outochtonie en die *Grundnorm*-idee, en na die algemene klassifikasie van konstitusies. Die Venda-konstitusie bevat, in ooreenstemming met die posisie in Suid-Afrika, geen handves of verklaring van menseregte nie. Barrie bespreek hierdie aspek breedvoerig, steun die Venda-owerheid en neem duidelik standpunt in teenoor dié van Devenish. Barrie se motivering is logies en objektief en sal beslis verdere bespreking stimuleer. In die volgende hoofstuk verwys Cilliers in sy bydrae oor Ciskei verder hierna, aangesien die Ciskeise konstitusie wel 'n verklaring van menseregte bevat. Dit is egter jammer dat Barrie in sy bespreking van die verskillende staatskomponente nie die interne verhoudingstruktuur duideliker uiteensit nie.

In die laaste hoofstuk behartig Cilliers die konstitusie van die Republiek van Ciskei. Behalwe die twee gedeeltes oor verdrae aangegaan voor onafhanklikheid en die verklaring van menseregte, waarna alreeds verwys is, bevat die res van die hoofstuk 'n bespreking van die Republiek van Ciskei Grondwet 20 van 1981. Cilliers het verkies om hom suiwer by die bepalings van die grondwet te hou en die artikels een vir een te behandel, met hier en daar 'n verwysing na die ooreenstemmende bepaling in die Suid-Afrikaanse grondwet. Alhoewel die leser 'n idee kry van die samestelling en funksies van die verskillende komponente in die staatsbestel, is dit bloot 'n herhaling van wat in die wet staan en sal dit waarskynlik nie tot enige verdere gedagtewisseling aanleiding gee nie.

Die boek is netjies gebind en het 'n handige formaat. Die taal is keurig versorg en die drukkersduiwel het net in enkele gevalle, veral die eerste twee hoofstukke, sy kop uitgesteek. 'n Register wat sowel die kommentare as die konstitusies dek, verskyn agter in die boek. Dit is miskien jammer dat daar nie 'n bronnelys na elk van die konstitusies ingevoeg is nie, veral vir die leser wie se belangstelling dermate geprikkel is dat hy meer van sekere aspekte wil weet.

Hierdie publikasie word met vrymoedigheid aanbeveel nie alleen vir diegene wat belangstel in die historiese verloop tot en met die huidige stand van die suider-Afrikaanse staatstruktuur nie, maar ook vir diegene wat sinvol wil deelneem aan die gesprek oor die verdere ontplooiing van 'n staatsbestel in hierdie deel van Afrika.

MG ERASMUS
Universiteit van Zululand

EUROPÄISCHES PRIVATRECHT
BAND I ÄLTERES GEMEINES RECHT (1500 bis 1800)
deur HELMUT COING
CH Beck'sche Verlagsbuchhandlung München 1985; xvi en 665 bl
Prys DM 138,00

Die skrywer van die werk hier onder bespreking het oor talle jare 'n groot naam in regshistoriese kringe verwerf, ten aansien van sowel die Romeinse reg as die

regsontwikkelinge gedurende die tydperk na Justinianus se omvattende wetgewende bedrywighede. Met verloop van tyd het hy hom egter al hoe meer op die nuwere geskiedenis van die reg, veral dié na die voleinding van die resepsie van die Romeinse reg in die gestalte wat dit in al die dele van die *Corpus iuris civilis* gekry het, toegespits. Hierdie belangstelling het tot die oprigting van die *Max-Planck-Institut für Europäische Rechtsgeschichte* te Frankfurt (Duitsland) gelei, waarvan die skrywer van 1964 tot 1980 die eerste direkteur was.

Die eerste gedeelte van die vrugte van die regshistoriese navorsing soos deur die skrywer self en binne die raamwerk van sy Instituut onderneem, word in die nuwe boek aangebied.

Die opset van die werk is 'n omvattende beskrywing van die Europese privaatreg soos dit na die resepsie in Wes-Europa ontwikkel en toegepas is. Hierdie tydperk strek van ongeveer 1500 tot die opkoms van die nasionale regstelsels wat 'n eerste hoogtepunt met die bekende vroeë kodifikasiebewegings bereik en tegelykertyd die aflossing en die einde van die ouer reg beteken het.

Hierdie ouer reg is volgens die skrywer die Romeins-Kanonieke reg soos dit deur die Europese regswetenskap sedert Bologna vanaf die 11de eeu uitgewerk en in die praktyk toegepas is. Dié reg is die Europese *ius commune*, die (Europese) gemenereg, en gesien uit die oogpunt van die regspraktyk is dit die reg wat om en by tussen 1500 en 1800 deur die kenmerkende *terminus usus modernus* (*Pandectarum*) omskryf word (4 13).

Hierdie *ius commune* toon verskeie tipiese eienskappe, waarvan die merkwaardigste dié is dat dit in die regspraktyk ingang gevind het sonder die tussenkoms van enige wetgewende liggaam, en sonder die bestaan van 'n gemeenskaplike Europese hoogste hof wat gesaghebbende uitsprake kon gee. Sy gesag steun derhalwe slegs op dié van die regsgeleerdes wat dit in onderrig en navorsing beoefen het. Hierdie geleerde reg het as gevolg daarvan die universele gemeenskaplike reg vir die hele Wes-Europa geword, onderhewig, soos bekend, aan enkele uitsonderings, veral dié van die Engelse *common law*. Die wetenskaplike uiteensetting van die reg het 'n eenvormige regsliteratuur voortgebring, gekenmerk deur 'n breë *consensus* van alle juriste wat hul werke dwarsdeur die lande van die resepsie oor en weer gebruik en aanhaal (37 e v).

Hierdie "juristereg" is uit die aard van die saak nie die opperste gesag in regsgeskille en hofgedinge nie; sy geldigheid is slegs aanvullend van aard. Waar daar plaaslike wette of gewoontes aangetref word, veral op die gebiede van die leenreg, die huweliksgoedereneg en die erfreg, is hulle in eerste instansie van toepassing; waar daar egter leemtes voorkom – en hulle is talryk gedurende die tydperk onder bespreking – word daar na die *ius commune* vir leiding en gesag gekyk.

Hier het ons met 'n algemene Europese verskynsel te make, met 'n regstelsel wat later die grondslag van die ontwikkeling van eiesoortige nasionale stelsels sou vorm, en hierdie feit bemoedig die skrywer om 'n poging tot 'n omvattende beskrywing daarvan aan te wend, ongeag die probleme wat noodwendig in die pad van so 'n voorneme staan: Die oorweldigende massa materiaal en kenbronne van die uiteenlopendste aard. Nogtans het die skrywer die taak wat hy self 'n *Wagnis* noem (1), aangepak, en die leser wat enigsins regstreeks met die ou skrywers in aanraking gekom het, sal die resultaat ongeag al die tekortkominge, waarvan die skrywer self deeglik bewus is (1), met respek en dank aanvaar.

Die aanbieding van die stof neem die vorm van Institute aan, 'n literatuursoort waarmee ook die Suid-Afrikaanse juris baie goed vertroud is. In die middelpunt van die 29 hoofstukke oor die *ius commune* of die sogenaamde "ouer gemenereg," wat op hul beurt weer in 136 paragrawe onderverdeel is, staan, soos reeds deur die titel aangedui, die privaatreg. Die klem val op die regstoestande in die middel van die 17de eeu.

Die betoog begin met 'n uiteensetting van die grondslae en die kulturele agtergrond van die *ius commune* tot by die opkoms van die natuurreg en die *ius patrium*, die vaderlandse reg, en vervolg met die algemene leerstellings soos die regsbronne, die uitleg en die toepassing van die reg, die geldigheid van die reg volgens ruimte en tyd, die verhouding van privaatreg en staatsgesag, en die sistematiese grondbegrippe soos *status* – *persona* – regsubjek, subjektiewe reg en so meer.

Die besonderhede word in die volgorde van die *Institute* meegedeel: Persone- en familiereg, sakereg, verbintenisreg en erfreg. Die bespreking van die verbintenisreg bevat ook een hoofstuk elk oor die handels- en die seehandelsreg.

Dit sou 'n onbegonne taak wees om tans 'n poging tot 'n enigsins volledige oorsig van die inhoud van en die stellings oor die verskeie gebiede van die privaatreg te gee. Vir die lesers in ons land sal dit eerder insiggewend wees om na die vernaamste aangehaalde werke te kyk. Die lys is indrukwekkend en bevat onder meer die name van baie bekendes soos Baldus en Bartolus, Carpzov(ius), Cujacius, Dumoulin, Gail, Glück, Groenewegen, De Groot, Huber, Stair, Vinnius en Voet.

Die leser kry die indruk dat na die geskrifte van die ou skrywers, en nie net die vernaamstes nie, deurgaans so volledig moontlik verwys word, aangevul deur verwysings na die resultate van navorsing soos byvoorbeeld in die *Enciclopedia del Diritto* (bd 1 Milaan 1958) of die *Handwörterbuch zur deutschen Rechtsgeschichte* (bd 1 Berlyn 1964) vervat. Daarbenewens word grondig en vryelik van die regsbronne gebruik gemaak. Hoofstukke en paragrawe word deur "kopnote" voorafgegaan wat die verwysings na die relevante dele van die *Corpus Iuris* (meestal titels uit die *Digesta*, *Codex* en *Institutiones*) saam met verwysings na die bronne van die kanonieke reg soos versamel in die *Corpus Iuris Canonici*, en na belangrike geskrifte asook die vroeë kodifikasies soos versprei oor die hele gebied van die *ius commune*. Die voetnote verwys ten aansien van die besonderhede na verdere bronne en literatuur.

Met hierdie werk het die skrywer daarvan sonder twyfel 'n besonder uitstaande bydrae tot die regsliteratuur gelewer. Dit bevat 'n skatkamer van regshistoriese gegewens wat die Romeins-Hollandse reg ten volle dek, en wel dié reg in die trant van wyle regter Van den Heever se alombekende opmerking waarvolgens "*that system was for centuries the common law of Western Europe.*" In 'n land met 'n regstelsel waarin die skrywers van die Europese gemenereg nog 'n gewigtige rol speel, moet die verskyning van die onderhawige werk derhalwe uiteraard hoogs welkom wees.

Veral as 'n naslaanwerk sal die werk uiters nuttig wees. Die bruikbaarheid van die boek in dié opsig word nog deur die vierledige register verhoog wat persoonsname, plekname, bronne en onderwerpe afsonderlik bevat.

Die tipografiese versorging van die boek is puik. Drukfoute is min en meestal onbeduidend. In register B moet die verwysing *sv Kap der guten Hoffnung* na

526 in plaas van 562 wees. Die afkorting LF (*Libri Feudorum*; bv op 312, 358 359 en 607) ontbreek in die lys van afkortings op xii.

Daar word met groot verwagting na die verskyning van band II uitgesien, waarin die skrywer hoop om die verdere ontwikkelinge van die Europese privaatreg gedurende die 19de eeu te kan beskryf.

R DANNENBRING
Universiteit van Suid-Afrika

SECTIONAL TITLES, SHARE BLOCKS AND TIME-SHARING
deur CG van der MERWE en DW BUTLER
Butterworth Durban en Pretoria 1985; xxviii en 573 bl
Prys R80,00 + AVB (hardeband)

Eiendomsreg op onroerende goed het sedert die inwerkingtreding van die Wet op Deeltitels 66 van 1971 ingrypende wysigings ondergaan. Die inwerkingstelling van die Wet op die Beheer van Aandeleblokke 59 van 1980, en die Wet op die Beheer van Eiendomstydsdeling 75 van 1983, het voorts meegebring dat 'n aantal nuwe begrippe met betrekking tot gebruiksregte op onroerende goed, wat weens veral sosiale en ekonomiese redes noodsaaklik was, in die Suid-Afrikaanse reg posgevat het. Baie van hierdie begrippe is nog nie tevore deeglik omskryf of begrond nie en die outeurs lewer hiermee 'n nuttige bydrae tot die teoretiese fundering van die bogemelde onderwerpe.

Hierdie omvattende handboek is nie die eerste werk oor deeltitels wat gepubliseer word nie, maar dit is ongetwyfeld die volledigste en indringendste bespreking van die Wet op Deeltitels. Die gedeeltes wat oor aandeleblokke en eiendoms-
tydsdeling handel, word eweneens verwelkom, aangesien daar oor hierdie onderwerpe nog net enkele tydskrifartikels verskyn het.

In die voorwoord stel die outeurs hulle ten doel om aan regspraktisyns en regstudente 'n sistematiese en volledige uiteensetting te verskaf van die beginsels en wetgewing wat op die verkryging van (regte op) gedeeltes van geboue van toepassing is. Hulle slaag besonder goed daarin om sowel die teoretiese fundering as praktiese aspekte van deeltitels, aandeleblokke en eiendomstydsdeling volledig te behandel. Gevolglik is dit 'n boek wat met vrymoedigheid by sowel regspraktisyns, eiendomsontwikkelaars en gevorderde sakeregstudente aanbeveel kan word. Vir praktisyns behoort veral die gedeeltes oor die terminologie by deeltitels (hoofstuk 3); die deelnemingskwota en deelplan (hoofstukke 4 en 5); die totstandkoming van 'n deeltitelskema (hoofstuk 6); die statutêre beskerming van kopers en huurders (hoofstuk 7); fase-ontwikkeling (hoofstuk 11); die totstandkoming van 'n aandeleblokskema (hoofstuk 17); die bemarking van aandeleblokke (hoofstuk 18); en eiendomstydsdeling (hoofstukke 23 en 24) nuttig te wees.

Die outeurs het deurgaans gepoog om ook kortliks na die regsposisie in ander regstelsels te verwys (veral in voetnote) en dit maak hierdie werk vir navorsers bruikbaar. Trefwoordindekse vir deeltitels, aandeleblokke en eiendomstydsdeling onderskeidelik, verhoog die toeganklikheid van die boek, en die indekse vir hofsake en statutêre bepalings waarna in die boek verwys word, is volledig en nuttig.

Sonder om afbreuk te doen aan die meriete van hierdie boek, is daar 'n aantal opmerkings wat met betrekking tot die inhoud gemaak moet word:

In voetnoot 4 (1) word verwys na die begrippe *dominium eminens* en *dominium utile* as sou dit begrippe van die Germaanse reg wees. In die Germaanse reg is daar egter nooit met die *dominium*-begrip gewerk nie; hierdie begrip is eers gedurende die Middeleeue uit die Romeinse reg in bepaalde Europese regstelsels oorgeneem. Die begrippe *dominium directum* en *dominium utile* was byvoorbeeld van interpretasies van *Corpus Iuris Civilis*-tekste deur Middeleeuse Romaniste afkomstig (vergelyk Feenstra "Historische Aspecten van de Private Eigendom als Rechtsinstituut" 1976 *RM Themis* 265–266). Dit sou duideliker wees indien die outeurs 'n aanduiding gegee het van wat hulle met die "Germanic period" (2) bedoel of daarop gewys het dat hierdie terminologie uit die Romeinse reg oorgeneem is.

Van 26 tot 36 word die aard van 'n deeltiteleenheid as 'n saamgestelde onroerende saak en die gepaardgaande saamgevoegde eiendomsreg op 'n deeltiteleenheid bespreek. Met die uiteensetting van eiendomsreg op 'n deeltiteleenheid as eiendomsreg op 'n deel waaraan onlosmaaklik gesamentlike eiendomsreg op die gemeenskaplike eiendom ooreenkomstig die deeleienaar se deelnemingskwota verbind is, kan nie fout gevind word nie. Wat egter probleme skep, is die outeurs se siening dat 'n deeltiteleenheid bestaan uit 'n deel as hoofsaak en 'n aandeel in die gemeenskaplike eiendom as bysaak wat deur *accessio* saamgevoeg is (30). Dit is wel so dat 'n eenheid ingevolge die woordomskrywing van die Wet op Deeltitels as 'n deel tesame met 'n onverdeelde aandeel in die gemeenskaplike eiendom omskryf word. Ingevolge artikel 3(2) word dit egter as stedelike onroerende goed *geag* en artikel 12(3) lui dat 'n deel en 'n onverdeelde aandeel in die gemeenskaplike eiendom saam *geag word* een eenheid te wees. Dit sou dus suiwerder wees om te volstaan met die verduideliking dat 'n eenheid 'n statutêr geskepte onroerende saak is (waarskynlik vir registrasiedoeleindes), of selfs dat dit 'n statutêr geskepte fiksie is (in die wet word die woorde *geag* telkens gebruik).

Die probleem kan terugherlei word na die (teoreties onsuiwere) omskrywing van 'n deeltiteleenheid in die Wet op Deeltitels. Dit los egter nie die probleem op deur hierdie statutêre omskrywing van 'n deeltiteleenheid aan die hand van die gemeenregtelike *accessio*-beginsel te probeer verklaar nie. *Accessio*, selfs in moderne uitgebreide vorm, dui altyd op die samevoeging van twee liggaamlike sake (roerend of onroerend). Dat 'n *deel* 'n stoflike of liggaamlike saak is, spreek vanself, maar hoewel die gemeenskaplike eiendom as 'n liggaamlike saak of 'n versameling liggaamlike sake getipeer kan word, is dit egter teoreties onsuiwer om 'n *aandeel in die gemeenskaplike eiendom* as 'n liggaamlike saak te tipeer. Dit is òf 'n reg (mede-eiendomsreg) òf 'n onliggaamlike saak ('n aandeel; vgl in hierdie verband Delport en Olivier *Sakereg Vonnisbundel* (1985) 16). Dit lyk vir my foutief om van die *accessio*-begrip (selfs in uitgebreide vorm) gebruik te maak om hierdie statutêre samevoeging van 'n liggaamlike saak met 'n reg (of

'n onliggaamlike saak) te probeer verklaar (raadpleeg ook Silberberg en Schoeman *The Law of Property* (1983) 369–370).

Die duidelike uiteensetting van die standpunt dat die kenmerke van absoluutheid en individualiteit van eiendomsreg nie uit die klassieke Romeinse reg afkomstig is nie, maar veral sedert die Franse revolusie en gedurende die negentiende eeu deur die Pandektiste gepropageer is, word verwelkom (34).

Op 42 word tereg gestel dat die beheersregspersoon, wat aan die hand van statutêre voorskrifte ontstaan, aan verskeie gemeenregtelike vereistes vir die toekenning van regspersoonlikheid voldoen. Dit is wel so dat die beheersregspersoon die eienaar van afsonderlike bates kan wees, byvoorbeeld die heffingsfonds waarmee die gebou geadministreer word. Die outeurs verloor egter uit die oog dat die vereiste van "property apart" op meer dui as net afsonderlike bates, maar wel op die vermoë van 'n regspersoon om draer van regte en verpligtinge afsonderlik van dié van die individuele lede te wees (*Webb and Co v Northern Rifles* 1908 TS 464; *Morrison v Standard Building Society* 1932 AD 229 238). 'n Afgesonderde vermoë kan ook by nie-regspersone, byvoorbeeld 'n vennootskap, aangetref word, terwyl dit juis 'n onderskeidende kenmerk van 'n regspersoon is dat dit draer van afsonderlike regte en verpligtinge is. In die *Morrison*-saak word byvoorbeeld beslis:

> "Nor can a member of such a society be held liable for the debts of the society" (238).

Alhoewel dit nie afbreuk doen aan die regspersoonlikheid van die statutêr geskepte beheersregspersoon nie, is die voorskrif van artikel 35 van die Wet op Deeltitels dat die deeleienaars persoonlik aanspreeklik gehou kan word indien die beheersregspersoon nie aan 'n vonnisskuld voldoen nie, 'n belangrike afwyking van die regsposisie van gemeenregtelike regspersone waar die lede nie persoonlik vir die skulde van die regspersoon aanspreeklik gehou kan word nie (vgl in hierdie verband bv die regsposisie van lidmate van 'n kerk met dié van lede van die beheersregspersoon).

Gewoonlik is die voorskrifte van die Wet op Vervreemding van Grond 68 van 1981 op die verkoop van 'n deeltiteleenheid van toepassing (45). Waar 'n mens egter ten opsigte van 'n deeltiteleenheid te doen het met 'n afbetalingstransaksie ingevolge waarvan die paaiemente oor 'n tydperk van korter as een jaar of ná registrasie van die deeltiteleenheid in die koper se naam betaal moet word, dit wil sê 'n transaksie wat nie binne die voorskrifte van hoofstuk 2 van die Wet op Vervreemding van Grond val nie, moet daar aan die vereistes soos gestel in die Wet op Beperking en Bekendmaking van Finansieringskoste 73 van 1968, voldoen word.

Daar word op 124 op die woordomskrywing van "verkoop" in artikel 8A(5) van die Wet op deeltitels gewys, naamlik dat dit ook verkoop onderworpe aan 'n opskortende voorwaarde of ruil of vervreem vir enige teenwaarde insluit. Dit is jammer dat die wetgewer nie die term "verkoop" in dieselfde betekenis as "vervreem" in die Wet op Vervreemding van Grond omskryf het nie. Dit is tans moontlik dat 'n ontwikkelaar deeltiteleenhede voor die opening van 'n deeltitelregister (in die geval van 'n gebou wat voor 1981–02–25 opgerig is) aan ander persone kan skenk. Alhoewel die ontvanger van sodanige skenking waarskynlik nie op enige wyse benadeel kan word nie, kan sodanige skenking wel skuldeisers van die ontwikkelaar benadeel.

Op 125 word tereg melding gemaak van die feit dat 'n koper van 'n eenheid wat in stryd met die verbodsbepalings wat in artikel 8A van die Wet op Deeltitels

vervat is, weens die nietigheid van die kontrak alle bedrae wat reeds aan die verkoper gepresteer is (behoudens sekere aftrekkings wat die verkoper mag maak) en gevolgskade mag eis. Die feit dat gevolgskade ingevolge artikel 8A geëis mag word, is uitsonderlik in dié opsig dat dit nie ingevolge die Wet op Vervreemding van Grond (artikel 28) of die Wet op die Beheer van Eiendomstydsdeling (artikel 9) in die geval van nietige kontrakte geëis kan word nie. Dit is 'n nuttige beskermingsmaatreël vir die koper wat ook in die Wet op Vervreemding van Grond en die Wet op die Beheer van Eiendomstydsdeling in die geval van nietige kontrakte opgeneem behoort te word.

Die outeurs maak op 127–128 nuttige voorstelle vir die verdere beskerming van kopers van deeltiteleenhede. Wat die derde voorstel op 128 betref, naamlik dat die koper die reg van kansellasie behoort te verkry indien die verkoper die gebou nie binne 'n statutêr gestelde maksimum tydperk sodanig voltooi het dat dit vir okkupasie gereed is en 'n deeltitelregister geopen kan word nie, moet daar in gedagte gehou word dat die kopers van eenhede wat ingevolge 'n afbetalingstransaksie wat onderworpe is aan die voorskrifte van hoofstuk 2 van die Wet op Vervreemding van Grond, ingevolge die bepalings van artikels 6(1)(q), 6(4) en 6(5) van die Wet alreeds sodanige beskerming geniet.

Die stelling op 240 en 243 dat die reëls van 'n deeltitelskema die interne verbandsreg van die skema vorm ("the rules flow from the legislative power of an autonomous sectional title community"), maar dat dit nie kontraktueel van aard is nie, word ondersteun (oor die aard van die interne verbandsreg by regspersone kan Pienaar *Die Gemeenregtelike Regspersoon in die Suid-Afrikaanse Reg* (1982) 162 211–212 en die gesag daar aangehaal, geraadpleeg word).

Die stelling word op 301 gemaak dat by die vernietiging van die gebou "a new lease of life" aan die beheersregspersoon verleen word (in Van der Merwe *Sakereg* (1979) 319 word gestel dat die beheersregspersoon "herleef") om die oordrags- of heroprigtingshandelinge uit te voer. Dit kan egter nie as 'n herlewing van die regspersoon beskou word nie, want so lank as wat die deeltitelskema as sodanige in die Akteskantoor geregistreer is en daar meer as een (deel)eienaar is, is die eienaars lede van die beheersregspersoon. Indien 'n deel vernietig is of geag word vernietig te wees ingevolge die bepalings van artikel 36, bly 'n (deel)eienaar as mede-eienaar lid van die beheersregspersoon (artikels 28(2) en 37(3)). Die beheersregspersoon word slegs ontbind deur die hof of wanneer die deeltitelskema van die register geskrap word. Ingevolge die bepalings van artikels 28(2) en 37(3) van die Wet op Deeltitels is dit dus heeltemal moontlik dat die beheersregspersoon bly voortbestaan ongeag die feit dat een of meer dele vernietig is.

Dit is belangrik om in die geval van 'n aandeleblokskema in gedagte te hou dat die aandeelhouer se gebruiksreg van 'n woonstel of kantoor uit sy aandeelhouding voortvloei, maar dat hierdie gebruiksreg deur middel van die gebruiksooreenkoms gereël word (325–332). Dit is opvallend dat daar met betrekking tot onroerende goed tans veel meer klem op die beskerming van gebruiksregte gelê word as vantevore, soos ook in die geval van deeltitels (die gemeenskaplike eiendom) en eiendomstydsdeling blyk.

Verskeie voordele van 'n aandeleblokskema bo 'n deeltitelskema word op 453–457 geboekstaaf. Die grootste nadeel verbonde aan 'n aandeleblokskema is die feit dat 'n aandeelhouer nie verbandfinansiering vir die aankoop van 'n

aandeleblok kan bekom nie, en gevolglik meestal verplig word om 'n afbetalingsooreenkoms met die aandeleblokmaatskappy aan te gaan. Dié praktyk verhoog die risiko dat die aandeleblokmaatskappy, by nie-nakoming van die bepalings van die afbetalingsooreenkoms deur die koper, nie sy eie finansiële verpligtinge sal kan nakom nie (387–388) (sien in hierdie verband ook die outeurs se uiteensetting van die probleem in "Beheerde Aandeleblokskemas v Deeltitelskemas" 1982 *THRHR* 278–281).

Op 459 word die stelling ongekwalifiseerd gemaak dat met eiendomstydsdeling 'n vierde dimensie, naamlik eiendomsreg op tyd, beoog word. ("Time-sharing envisages the ownership of time, thus adding a fourth dimension.") Hoewel daar op 467 wel gestel word dat eiendomstydsdeling in Suid-Afrika nie op "interval ownership" berus nie, is die bogenoemde stelling verwarrend en behoort dit nie sonder 'n verdere verduideliking in 'n boek wat moontlik vir studente voorgeskryf gaan word, gebruik te word nie. Eerstens is daar in die geval van eiendomstydsdeling verskeie wyses waarop 'n gebruiksreg verkry kan word sonder dat die reghebbende eiendomsreg op 'n gedeelte van 'n gebou verkry, byvoorbeeld in die geval van 'n eiendomstydsdelingsbelang wat in 'n aandeleblokskema of by wyse van lidmaatskap aan 'n klub of 'n lantermynhuurkontrak verkry word. Tweedens verkry die reghebbende van 'n eiendomstydsdelingsbelang in 'n deeltitelskema nie eiendomsreg op tyd nie, maar 'n onverdeelde mede-eiendomsaandeel in 'n deeltiteleenheid en word die gebruiksreg (as inhoudsbevoegdheid van die mede-eiendomsreg) op 'n tydsbasis verdeel. Die reghebbende is dus voortdurend mede-eienaar van 'n deeltiteleenheid, maar die gebruiksreg word op 'n tydsbasis tussen die mede-eienaars verdeel. Daar kan dus onder geen omstandighede in die Suid-Afrikaanse reg van "ownership of time" gepraat word nie.

Daar word saamgestem met die outeurs se stelling op 504 dat 'n gebou ten opsigte waarvan 'n eiendomstydsdelingskema bedryf word, nie as grond wat vir (permanente) woondoeleindes ("residential purposes") bestem is, omskryf kan word nie. Dit het egter die gevolg dat 'n kontrak vir die aankoop van 'n eiendomstydsdelingsbelang in 'n deeltitelskema wat ingevolge 'n afbetalingsooreenkoms gekoop word, nie aan die voorskrifte van hoofstuk 2 van die Wet op Vervreemding van Grond nie, maar wel aan die voorskrifte van die Wet op Beperking en Bekendmaking van Finansieringskoste moet voldoen. Dit skep ongetwyfeld verwarring in die praktyk en behoort op die een of ander wyse deur wetswysiging reggestel te word.

GERRIT PIENAAR
Potchefstroomse Universiteit vir Christelike Hoër Onderwys

STRAFRECHT NACH LOGISCH-ANALYTISCHER METHODE
by JOACHIM HRUSCHKA
Walter de Gruyter Berlin 1983; xx and 435 pp
Price DM 34,00 (soft cover)

In this textbook for students, the author, a professor of criminal law and legal philosophy at the University of Erlangen in West Germany, deals with certain

aspects of the general principles of criminal liability. The author is not so much concerned with the generally accepted principles themselves, but seeks to illustrate the rational structure and interrelationship which underlies these principles. In doing so, he adopts the familiar case-book format, systematically presenting factual situations, and then analysing them in order to demonstrate the application of the principles he seeks to expound. The author does not, however, confine himself to decisions of the courts, but also uses many hypothetical situations in order to illustrate aspects of the application of the theories he pro pounds for which there are not reported precedents.

The book consists of four relatively long chapters and two appendices. In the first chapter the author deals with certain problems in relation to the subjective element of the *Tatbestand* and the generally accepted requirement that all the elements of the *Tatbestand* should exist simultaneously. As the author illustrates in his examples, materially defined offences, where the act of the offender and punishable consequence are separated in time, such as homicide, and offences committed in a state of intoxication, are fraught with particular problems in this connection. The second chapter is devoted to consideration and analysis of the rights and duties which exist in a state of necessity, whether that state arises as a result of the unlawful act of another or not. The author points out that one frequently encounters strange anomalies in such situations, such as, for example, the fact that the "right" to protect one's property or physical integrity does not always involve a corresponding obligation on another to submit to such protective action. The third chapter deals exhaustively with the problem of error on the part of the offender in relation to the various elements of an offence. The fourth and final chapter, entitled *Fälle zur Verantwortlichkeit des Täters für das Fehlen eines Verbrechensmerkmals*, is devoted to a consideration of the effect of antecedent acts upon the liability of offenders. In the course of this chapter the author considers, *inter alia*, the implications of R Maurach's extensive interpretation of the *actio libera in causa* doctrine and the effects which the prior conduct of the accused may have upon his ability to raise successfully defences such as compulsion, necessity and private defence. The two appendices contain, respectively, a short exposition of the German doctrine in relation to the duplication of convictions and an exposition of the sense in which the author uses certain logical and legal terms. The book is equipped with a loose annexure containing all the examples to which the author refers. As there is considerable comparison of the various examples, this annexure saves much tedious paging about in the text.

Although it is written within the framework of the German criminal codes, and although at times the author presumes a more extensive knowledge of these statutes than the average South African reader will have, this work is, nevertheless, an interesting, though somewhat *avant-garde* approach to some difficult aspects of the general principles of criminal law.

AJ MIDDLETON
University of South Africa