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50 JAAR

Die Tydskrif

Op versoek van ons redakteur skryf ek iets oor hierdie verjaardag. Onwillekeurig dink mens nou aan die bekende teks: "want wie verag die dag van klein dinge . . .?" Die verskyning van die eerste nommer was so 'n dag, vyftig jaar gelede. Die vader van hierdie "klein ding" was professor Daan Pont, 'n jong professor aan die Universiteit van Pretoria. Hy was die regte man op die regte plek en ook op die regte tyd. In die dertiger jare van hierdie eeu was dit 'n voldonge feit dat die Afrikaners nie net 'n kultuurgroep was nie, maar 'n volk met 'n eie taal. Reeds in 1920 het die Universiteit van Stellenbosch 'n fakulteit regsgeleerdheid ingestel waar die regte in Afrikaans gedoseer is. Die Universiteit van Pretoria het in 1933 daarmee begin. Professor Pont het gevoel dat 'n regstydskrif in Afrikaans nodig was. Self beskryf hy uitvoerig die eerste 25 jaar van die *Tydskrif* in die nommer van Februarie 1963. Sy werk en dié van die paar mense wat hom gehelp het, was pionierswerk. Na 'n voorlopige komitee is 'n gesamentlike redaksie van juriste uit Suid-Afrika en Nederland saamgestel. Dit was nooit die bedoeling om uitsluitlik in Afrikaans of Nederlands te publiseer nie. Geskikte artikels in Engels is, en word nog altyd, verwelkom.

In Februarie 1937 hêt die eerste nommer van die eerste jaargang verskyn, gedruk in Nederland. Die intekenprys was vyftien sjielings en aan die einde van 1937 was daar ongeveër 150 intekenaars in Suid-Afrika en 50 in die buiteland. Om die *Tydskrif* aan die gang te hou, was nie 'n maklike taak nie, en dit is ook tans nog 'n taak wat alleen waardeer kan word wanneer die werk van die redakteur geken en begryp word. Na die uitbreek van die oorlog in 1939 moes die *Tydskrif* in Suid-Afrika gedruk word. Daar was ook 'n afname van intekenaars. Gelukkig kon deur subsidies van sekere instansies, veral van die Universiteit van Pretoria, met die publikasie voortgegaan word. Van 1953 af kon selfs 'n klein honorarium aan medewerkers toegeken word. In 1955 het die redaksie besluit om die *Tydskrif* oor te dra aan die Vereniging Hugo de Groot, wat wesenlik vir die doel gestig is. Die bestuur van die vereniging is verantwoordelik vir die publikasie van die *Tydskrif*, en die redaksie is verantwoordelik vir die inhoud en administrasie van die *Tydskrif*.

Tot in 1960 was professor Pont die sekretaris van die redaksie ofte wel die redakteur. Dit is vir ons 'n voorreg om tans, terwyl die *éminence grise* van ons juriste nog lewe – en DV in Maart 92 jaar oud word – hulde te bring aan professor Pont vir die liefde, geduld en volharding wat hy aan die *Tydskrif* getoon het.

In 1960 het professor Willem Joubert die taak van sekretaris van die redaksie oorgeneem. Wat 'n gelukkige keuse was dit nie. Hy het gesorg dat die sekretaris die status van redakteur gekry het en 'n redaksiekomitee is deur die bestuur van die vereniging benoem. Professor Joubert, 'n uitnemende juris en begaafde organisator, het vir byna 20 jaar die *Tydskrif* met groot sukses beheer en bestuur. Reeds in 1955 is die publikasie van die *Tydskrif* oorgedra aan die uitgewers Butterworth van Durban. Die kombinasie professor Joubert en Butterworth het

die *Tydskrif* laat groei tot 'n relatief groot omvang, sowel wat bladsye as intekenaars betref. Ons bring hulde aan professor Joubert, wat gelukkig ook tans nog leef, vir die geniale gawes wat hy aan die *Tydskrif* geskenk het.

In 1979, toe ons noodgedwonge van professor Joubert afskeid moes neem, was ons weer gelukkig om professor Daan van Rensburg as sy opvolger te kry. Sedertdien het hy as bekwame juris en talentvolle taalman met groot liefde en vaste hand die *Tydskrif* versorg en laat groei. Ons hoop dat hy nog lank by ons sal bly.

Sedert 1937 het daar 'n groot groei plaasgevind in die aantal Afrikaanse juriste, sommige waarvan werklik uitnemend is. Sekere universiteite publiseer nou ook hul eie Afrikaanse regstydskrifte. Eintlik beskou die *Tydskrif* daardie publikasies as sy dogters en ons is verheug dat daar 'n familie bestaan van Afrikaans regstydskrifte. Mag daardie familie steeds sterk en invloedryk bly.

F RUMPFF
Voorsitter van die Vereniging Hugo de Groot

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 ooreengekom 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.

Die regsgeldigheid van skuldoorname en kontraksoorname in die Suid-Afrikaanse reg*

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SUMMARY

The Validity of the Transfer of Debts and Contracts in South African Law

This article defends the juridical possibility and essential validity of a genuine *transfer* of debts (liabilities) and contracts (contractual relationships) in our law. This leads to the proposition that delegation (novation) is not the only, or even the usual, means by which the substitution of debtors or parties to a contract can be accomplished; that indeed the concept of delegation is somewhat outdated in our modern society.

On grounds of principle no objection can be raised against the recognition of the transfer of debts and contracts: it is not prohibited by law, neither the nature of the obligation nor the necessary consent of the creditor prevents it, while in addition it is sanctioned by the principle of contractual freedom. If the intention of the parties is given due consideration, it becomes clear that *animus novandi* will more often than not be absent in cases of the substitution of debtors, or parties to a contract.

It is submitted that these institutions could quite easily be incorporated into our positive law by the courts. This is possible because all that will be achieved in that way is a more sound juridical construction of a phenomenon that is already a part of legal reality. *Botha v Van Niekerk* 1983 3 SA 513 (W) clearly illustrates this point.

1 INLEIDING

Skuldoorname is 'n regsfeit wat deur ooreenkoms of van regsweë tot stand kom en wat tot gevolg het dat 'n nuwe skuldenaar in die plek van die huidige skuldenaar tree, met behoud van die identiteit van die verbintenis. Dit bring mee dat die vorige skuldenaar van sy verpligting teenoor die skuldeiser bevry word en dat die nuwe skuldenaar gelyktydig in sy plek aanspreeklik gestel word. Geen skuldvernuwing vind plaas nie; 'n *oordrag* van die oorspronklike skuldenaar se verpligting aan die nuwe skuldenaar word bewerkstellig tesame met al die *accessoria* van daardie skuld. Kontraksoorname is eweneens 'n regsfeit wat deur

* Hierdie artikel is 'n verwerking van 'n gedeelte van die skrywer se ongepubliseerde proefskrif: *Skuldoorname en Kontraksoorname: 'n Regsvergelykende Ondersoek met Besondere Verwysing na die Suid-Afrikaanse Reg* (Leiden, 1981), hierin aangehaal as *Skuldoorname en Kontraksoorname.*

ooreenkoms of van regsweë tot stand kom; dit het tot gevolg dat 'n nuwe kontraksparty die plek van 'n huidige kontraksparty inneem. As gevolg hiervan verloor die uittredende kontraksparty alle vorderingsregte, verpligtinge en bevoegdhede wat hy uit hoofde van die kontrak gehad het, terwyl die nuwe toetredende party dieselfde kontraksverhouding met die oorblywende party voortsit en beklee word met die vorige kontraksparty se bevoegdhede, regte en verpligtinge. Geen kontraksvernuwing vind derhalwe plaas nie; die nuwe kontraksparty volg die uittredende party op in sy regsposisie as kontraksparty.

Voor die uitspraak in *Botha v Van Niekerk*[1] was dit die eenparige standpunt in die Suid-Afrikaanse regspraak en regsliteratuur[2] dat die verwisseling van skuldenare alleen deur middel van delegasie, en die vervanging van kontrakspartye slegs met behulp van kontraksvernuwing ("assignment of contract") kan geskied. Delegasie is 'n vorm van novasie,[3] terwyl kontraksvernuwing as 'n kombinasie van sessie en delegasie bestempel word.[4] Dit beteken dat telkens wanneer dit beoog word om 'n skuldenaar of 'n kontraksparty te substitueer, daar 'n driesydige ooreenkoms tussen al die betrokke partye aangegaan moet word. Hierdie ooreenkoms is geen oordragsooreenkoms nie, aangesien die noverende werking van delegasie tot gevolg het dat die bestaande verbintenis of kontraksverhouding uitgewis en 'n nuwe regsverhouding in die plek daarvan gestel word. Daarteenoor kan die vervanging van skuldeisers deur middel van sessie, 'n ooreenkoms waardeur die *oordrag* van vorderingsregte bewerkstellig word, teweeggebring word.[5]

Hierdie standpunt van ons howe en skrywers is in ooreenstemming met die gemene reg.[6] Daarenteen is delegasie in verskeie Wes-Europese regstelsels (onder andere Duitsland en Nederland) algaande deur skuldoorname en kontraksoorname as hulpmiddel by die verwesenliking van skuldenaars- en kontrakspartyvervanging verdring.[7] Dit is weliswaar steeds geoorloof om dié resultaat *via* delegasie teweeg te bring, maar daar word selde van hierdie metode gebruik gemaak. Delegasie word trouens nie meer afsonderlik in byvoorbeeld die Duitse BGB of in die Nederlandse NBW gereël nie; in die *Toelichting* tot die NBW word onomwonde verklaar dat skuldoorname belangriker is vir die regspraktyk as delegasie aangesien aangeneem kan word dat

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1 1983 3 SA 513 (W).

2 Raadpleeg Wille en Millin *Mercantile Law of South Africa* (1984) 77–78; Gibson *South African Mercantile and Company Law* (1983) 101; Kerr *The Principles of the Law of Contract* (1980) 298 316; De Wet en Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) 241 334; Van Jaarsveld (red) *Suid-Afrikaanse Handelsreg* Vol 1 (1983) 113; Wille *Principles of South African Law* (1977) 356–373; Wessels *The Law of Contract in South Africa* (1951) par 2433 e v; Christie *The Law of Contract in South Africa* (1981) 456 464; *Rolfes, Nebel & Co v Zweigenhaft* 1903 TS 185; *Brenner v Hart* 1913 TPD 607; *Van Achterberg v Walters* 1950 3 SA 734 (T); *Milner v Union Dominion Corporation (SA) Ltd* 1959 3 SA 674 (K); *Gouws v Montesse Township & Investment Corporation (Pty) Ltd* 1964 3 SA 221 (T); *Froman v Robertson* 1971 1 SA 115 (A); *Talas Properties of Rhodesia (Pvt) Ltd v Abdullah* 1971 4 SA 369 (R); *Lorentz v Melle* 1978 3 SA 1044 (T).

3 Vgl bv *Brenner v Hart supra*; *Labuschagne v Denny* 1963 3 SA 538 (A); *Froman v Robertson supra*; *Lorentz v Melle supra*.

4 Vgl bv Gibson 101; Wille 377; *Talas Properties v Abdullah supra*.

5 Raadpleeg Scott *Sessie in die Suid-Afrikaanse Reg* (ongepubliseerde proefskrif UP 1977).

6 Raadpleeg *Skuldoorname en Kontraksoorname* 26–32.

7 Hierdie proses sal wat Nederland betref eers finaal voltooi word wanneer die sesde boek van die NBW in werking tree, waarskynlik in 1988.

> "partijen die een subjectswisseling beogen, ook niet meer dan dat beogen, en de verbintenis derhalwe voor het overige ongewijzigd . . . willen laten voortbestaan."[8]

Die opstellers van die BGB was blykens die *Motive*[9] ook sterk onder die indruk van die feit dat delegasie sy funksie in hierdie verband uitgedien het en op aandrang van die praktyk moes plek maak vir skuldoorname. Sedert die inwerkingtreding van die BGB in 1900, die eerste wetboek waarin 'n duidelike wetlike reëling van skuldoorname opgeneem is, het verskeie ander wetgewers hierdie voorbeeld nagevolg, soos blyk uit die Oostenrykse *Teilnovellen* tot wysiging van die ABGB in 1914–1916; Switserland se hersiene *Obligationenrecht* in 1936; Italië se nuwe wetboek in 1942; Griekeland, Hongarye en Pole se wetboeke van 1946, 1959 en 1964 respektiewelik en binnekort die NBW van Nederland. Die hedendaagse praktyk in hierdie regstelsels is net nie meer daarmee gediend om in hierdie verband tot delegasie beperk te word nie. Die aandrang dat, soos wat reeds lank tevore ten opsigte van vorderingsregte moontlik geword het, die *oordrag* van verpligtinge en kontraksverhoudinge veroorloof moet word, kon op die lange duur nie weerstaan word nie en vandag is skuldoorname en kontraksoorname reeds geykte reg in al die Europese regstelsels waaraan ons reg histories so nou verwant is.[10]

Ons gemene reg het hom sonder twyfel as 'n voortreflike regstelsel bewys, maar dateer desnieteenstaande uit die agtiende eeu. Daarom is daar van tyd tot tyd in ons howe daarvan gewag gemaak dat die Romeins-Hollandse reg voortdurend aangepas behoort te word, maar sonder om die basiese beginsels daarvan oorboord te gooi, sodat tred gehou kan word met veranderde omstandighede. Hoofregter Lord De Villiers verklaar byvoorbeeld in *Henderson v Hanekom*:[11]

> "However anxious the court may be to maintain the Roman-Dutch law in all its integrity, there must, in the ordinary course, be a progressive development of the law, keeping pace with modern requirements."[12]

Na my mening het ons reg egter in gebreke gebly om op die gebied van die vervanging van partye by 'n verbintenis of kontrak tred te hou met die behoeftes van die gemeenskap. Daar bestaan myns insiens geen twyfel nie dat die komplekse moderne samelewing, veral wat die handels- en ekonomiese sfeer betref, reeds 'n geruime tyd gelede die stadium bereik het waar daar met groot vrug van skuldoorname en kontraksoorname, in plaas van delegasie, gebruik gemaak sou kon word.[13]

'n Voorstel dat ons reg aangepas moet word om skuldoorname en kontraksoorname te akkommodeer, lei tot die vraag deur welke medium sodanige aanpassing verwesenlik behoort te word. Sou die howe dit kon bewerkstellig of lê dit op die weg van die wetgewer? Enersyds is dit 'n feit dat ons howe by verskeie

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8 *Memorie van Toelichting op het Ontwerp voor een nieuw Burgerlijk Wetboek* (1961) 627.

9 *Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich* Vol 2 (1888) 143.

10 met die uitsondering van Frankryk; raadpleeg *Skuldoorname en Kontraksoorname* 61–64.

11 (1903) 20 SC 513 519.

12 Hoofregter Innes verklaar in dieselfde trant 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 ancient 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."

13 Raadpleeg *Skuldoorname en Kontraksoorname* 291 e v. 'n Enkele voorbeeld wat uitgelig kan word, is die besondere nut van skuldoorname en kontraksoorname by die verkoop van besighede.

geleenthede daarop gewys het dat dit slegs hul funksie is om reg te spreek en nie om dit te skep nie (*iudicis est ius dicere non facere*),[14] maar andersyds was hulle ook bereid om die gemene reg progressief by veranderde omstandighede aan te pas en sodoende die reg in effek te wysig.

2 NOVASIE AS EKSKLUSIEWE HULPMIDDEL BY DIE VERVANGING VAN SKULDENAARS EN KONTRAKSPARTYE

Die feit dat delegasie as 'n metode van skuldenaarsvervanging in die Suid-Afrikaanse reg beskou word, spruit uit die erkenning daarvan in die gemene reg en is daarom vanselfsprekend. Die onverminderde behoud daarvan as *enigste* metode van skuldenaarsverwisseling is egter nie so vanselfsprekend nie en die vraag ontstaan of daar 'n besondere rede daarvoor bestaan. Die vervanging van skuldeisers deur middel van die *oordrag* van vorderingsregte (sessie) in plaas van delegasie was reeds volgens die Romeins-Hollandse reg van die agtiende eeu toelaatbaar en sessie is daarom ook geen onbekende verskynsel in ons reg nie. Skuldoorname, waardeur die vervanging van skuldenaars met behulp van 'n *oordrag* van skulde bewerkstellig is, het egter eers gedurende die tweede helfte van die negentiende eeu erkenning in Duitsland en die omliggende lande verwerf, sodat ons reg nie in hierdie ontwikkeling ten aansien van skuldoorname gedeel het nie. 'n Onafhanklike soortgelyke ontwikkeling het ook nie hier te lande plaasgevind nie.

Die redes waarom die vervanging van skuldenaars en kontrakspartye vandag steeds *via* skuldvernuwing geskied, kan kortliks soos volg saamgevat word:

a Die opvatting bestaan dat die persoonlike aard van die verbintenis veroorsaak dat die verbintenis tot niet gaan by subjekswisseling.[15]

b Skuldenaarsvervanging kan nie sonder die toestemming van die skuldeiser bewerkstellig word nie en daarom vereis dit die medewerking van minstens drie partye; daar kan dus nie, na die voorbeeld van sessie van vorderingsregte, sprake wees van 'n eenvoudige oordrag van verpligtinge tussen die ou en nuwe skuldenare nie.

c Die gemene reg het, anders as ten opsigte van die verwisseling van skuldeisers, die vervanging van skuldenaars *slegs* deur middel van delegasie, 'n vorm van novasie, veroorloof.

d Die eersgenoemde twee standpunte bring mee dat die gemeenregtelike figuur van delegasie *steeds* die aangewese hulpmiddel ter vervanging van skuldenaars is.

e Die standpunt dat die vervanging van skuldenaars deur middel van delegasie moet geskied, veroorsaak dat die verwisseling van kontrakspartye, waarby skuldenaarsvervanging inbegrepe is, ook slegs met behulp van novasie kan plaasvind.

Daar kan nie betwis word dat die positiewe reg skuldenaarsvervanging gelykstel aan novasie nie, maar daar moet terselfdertyd in gedagte gehou word dat die konstruksie van hierdie proses as delegasie 'n abstrakte gedagtekonstruksie is, soos tewens die konstruksie daarvan as skuldoorname in ander regstelsels.

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14 Vgl bv *Van Staden v Van Wyk* 1958 2 SA 682 (O) 684; *Barnard v Miller* 1963 4 SA 426 (K) 428.

15 De Wet en Yeats 2; vgl ook Scott 112–113.

Die suiwerheid van hierdie konstruksie kan alleen bepaal word deur dit aan die toets van die werklikheid te onderwerp. Wat gebeur normaalweg *de facto* by skuldenaarsvervanging? Heel eenvoudig die volgende: die skuldenaar aanvaar aanspreeklikheid vir 'n bepaalde skuld van die huidige skuldenaar teenoor die skuldeiser en onderneem (teenoor die ou skuldenaar of die skuldeiser of albei) om die skuld te vereffen. Dit is te betwyfel of daar altyd, of hoegenaamd, sprake is van 'n bedoeling om een skuld uit te wis en 'n ander te skep. Caney stel dit treffend soos volg:

> "This [*dat daar novasie plaasvind*] appears to be the technical view, but the practical approach is that the new debtor *takes over* liability for the debt of the old debtor."[16]

Hierdie standpunt kan heelhartig onderskryf word; die teenstelling tussen die "tegniese" en die "praktiese," oftewel tussen teorie en praktyk wat hier geskets word, word myns insiens heel dikwels in die werklikheid teruggevind. Dit kom daarop neer dat die konstruksie van skuldenaarsvervanging as die *oorname* van 'n verpligting, en nie die *vernuwing* daarvan nie, na alle waarskynlikheid groter ooreenkoms met die werklikheid sal vertoon. Na my mening is dit ook wel deeglik moontlik om, sonder om iets aan die praktiese verloop van die substitusieproses te verander, en sonder om die "basiese beginsels" van die Romeins-Hollandse reg aan te tas, skuldenaarsvervanging juridies tegnies as 'n oordrag of oorname, dit wil sê as skuldoorname, te konstrueer.

3 DIE PRINSIPIËLE REGSGELDIGHEID VAN SKULDOORNAME EN KONTRAKSOORNAME

3 1 Algemeen

By die besinning oor die vraag of skuldoorname en kontraksoorname juridies moontlik en toelaatbaar is, sou myns insiens as vertrekpunt aanvaar kon word dat dit wel deur die beginsel van kontraksvryheid veroorloof word.[17] Daar bestaan na my mening geen oorwegings van openbare belang, goeie sedes, billikheid of dergelike meer wat sou kon verhoed dat die kontraksvryheid die toelaatbaarheid van skuldoorname en kontraksoorname onderskryf nie; nog minder word dit deur wetgewing verbied. Die enigste beperking wat die reg wel stel, is dat sodanige oordrag die toestemming van die skuldeiser (of ander kontraksparty) behoef,[18] maar hierdie vereiste doen *per se* geen afbreuk aan die feit dat partye in die algemeen vry is om die oordrag van verpligtinge te beding nie. 'n Mens sou hierdie standpunt ook anders kon verwoord deur te verklaar dat verpligtinge nie "vryelik" oordraagbaar is nie;[19] sodanige beperkte vryheid sou egter nie verwys na 'n onvermoë of ontoelaatbaarheid om verpligtinge hoegenaamd oor te dra (in plaas van te vernuwe) nie, maar bloot na die feit dat so 'n oordrag nie sonder die skuldeiser se toestemming kan geskied nie.

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16 Caney *A Treatise on the Law relating to Novation* (1973) 37; my beklemtoning.

17 Die howe het al by herhaling bevestig dat die beginsel van kontraksvryheid 'n integrerende deel van die Suid-Afrikaanse verbintenisreg uitmaak. Vgl bv *Shifren v SA Sentrale Ko-op Graanmaatskappy Bpk* 1964 2 SA 343 (O) 346–347; *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531; *Wells v South African Alumenite Co* 1927 AD 69 73; *Botha v Van Niekerk* 1983 3 SA 513 (W) 526F.

18 Vgl *Labuschagne v Denny* 1963 3 SA 538 (A); *Froman v Robertson supra*; *Jacobs v Fall* 1981 2 SA 863 (K).

19 Vgl *Rolfes, Nebel & Co v Zweigenhaft supra.*

'n Tweede faktor wat oorweging verdien, is die feit dat 'n *oorname* van die skuld of kontrak (sonder dat die verbintenis of kontraksverhouding tot niet gaan) in die gewone loop van sake waarskynlik haarfyn met die bedoeling van die partye ooreenstem.[20] Die alternatiewe metode van substitusie, naamlik skuldvernuwing in die vorm van delegasie (wat eweneens deur die beginsel van kontraksvryheid gesanksioneer word), vereis 'n *animus novandi* by al die partye by die ooreenkoms. Die aanwesigheid van hierdie bedoeling moet gewoonweg bewys word; daar bestaan geen vermoede te dien effekte nie. *Animus novandi* sou daarom bepaald *nie* sonder meer afgelei of toegereken kon word bloot op grond van die feit dat die partye die vervanging van 'n skuldenaar of kontraksparty beoog nie, want dit sou in werklikheid gelyk wees aan 'n vermoede van *animus novandi.*

3 2 Skuldoorname en die verbintenisbegrip

Indien partye in beginsel vry is om 'n skuldoorname aan te gaan en dit inderdaad ook wil, sou enigiets verder hulle dan kon verhoed om hierdie resultaat regtens te verwesenlik? Dit wil voorkom asof 'n enkele struikelblok hulle in die weg sou kon staan, naamlik die feit dat die voorwerp van skuldoorname 'n regsverpligting is en hierdie verpligting 'n element van 'n verbintenis is. Daar bestaan naamlik 'n wydverbreide opvatting dat dit een van die belangrike kenmerke van 'n verbintenis is dat dit 'n regsverhouding tussen twee *bepaalde* persone is, wat tot gevolg het dat 'n vervanging van een van die subjekte van die verhouding noodwendig daartoe lei dat die verbintenis tot niet gaan. Daar kan dus hoegenaamd geen sprake wees van die *oorname* (oordrag, oorgang) van die verpligting in teenstelling met die *vernuwing* daarvan nie, juis omdat 'n mens hier met 'n element van 'n verbintenis te make het.[21]

'n Verbintenis (*obligatio*) word gewoonlik met 'n beroep op die *Corpus Juris Civilis*[22] omskryf as 'n regsverhouding tussen minstens twee persone, ingevolge waarvan die een (die skuldenaar) teenoor die ander (die skuldeiser) tot 'n bepaalde prestasie verplig is en laasgenoemde daarop geregtig is om die nakoming van hierdie verpligting te vorder.[23] Die Romeinse juriste was van mening dat die *obligatio* 'n persoonlike *vinculum iuris* tussen die partye bewerkstellig het; hierdie opvatting het op sy beurt tot die oortuiging gelei dat die vervanging van een van die partye by die verbintenis uiteraard tot die ontbinding van die bestaande verbintenis, en die skepping van 'n nuwe een in sy plek, moes lei. Die *oordrag* van regte en verpligtinge (eintlik *actiones*) is sodoende tot die gebied van die juridies onmoontlike gerelegeer.

Daar kan nie ontken word dat 'n verbintenis 'n regsverhouding tussen *persone* is nie; juis op grond hiervan word die persoonlike reg (vorderingsreg) wat daaruit

20 in dieselfde sin bv *Toelichting* (tot die NBW) 627.

21 Daar kan en is al veel oor die aard en wese van die verbintenis geskryf. Dit is egter nie vir die doeleindes hiervan nodig om die begrip in sy geheel te ontleed nie. Slegs 'n enkele aspek daarvan, die volgens gangbare opvatting persoonlike karakter van die verbintenis, verdien die aandag.

22 *I* 3 13*pr* en *D* 44 7 3*pr.*

23 Raadpleeg byvoorbeeld Schut *Rechtschandeling, Overeenkomst en Verbintenis* (1977) 63 e v. Die omskrywing van die verbintenisbegrip bly nietemin 'n saak waaroor daar nog nooit algehele eenstemmigheid verkry kon word nie. Schut wys tereg ook daarop dat "verbintenis" ook 'n sekondêre betekenis het, nl die van verpligting alleen.

voortspruit gewoonlik van 'n saaklike reg onderskei. Ek kan egter nie vrede vind met 'n opvatting dat die verbintenis 'n regsverhouding tussen twee (of meer) *bepaalde* persone alleen is nie, met as konsekwensie dat indien een van daardie persone aan die verhouding onttrek word, daardie verbintenis *noodwendig* tot niet gaan. So 'n opvatting kon sin gehad het in die relatief eenvoudige samelewing waarin die klassieke Romeinse reg moes opereer, toe dit onder andere algemeen gebruiklik was vir skuldeisers om ter voldoening van hul vorderinge letterlik op die persoon van hul skuldenare beslag te lê. In die moderne twintigste eeu bevind ons ons midde in 'n baie meer ontwikkelde samelewing, wat veral op ekonomiese gebied oneindig meer verwikkeld maar ook meer verfynd geword het. Die opvatting dat 'n verbintenis *altyd en noodwendig* 'n streng persoonlike karakter vertoon, is 'n anachronisme in die teenswoordige ekonomiese en sosiale milieu.[24] 'n Mens moet in gedagte hou dat die begrip "verbintenis" op slot van sake 'n abstrakte gedagtekonstruksie is wat juridiese gestalte aan 'n bepaalde werklikheidsverskynsel wil gee. Die regsteorie moet (en wil) werklikheidsgetrou wees ten einde *waar* te wees; daarom spreek dit vanself dat die teorie voortdurend rekening, en tred, moet hou met veranderinge wat in die werklikheid plaasvind.

Die teenswoordige *werklikheid* is na my mening dat die verhouding tussen skuldeiser en skuldenaar slegs by wyse van uitsondering 'n persoonlike karakter vertoon; die klem het deur die jare van die *persoon* na die *prestasie* verskuif, dit wil sê, van die *subjek* na die *objek* van die verbintenis. Dit gaan in die meeste gevalle nie vir die skuldeiser in eerste instansie soseer om *wie* die prestasie verrig nie; dit gaan primêr daarom *dat* dit verrig moet word soos ooreengekom.[25] Dit sou daarom onaanvaarbaar wees – omdat dit *onwaar* sou wees – om vandag nog die verbintenis aan die hand van die *subjekte* daarvan te identifiseer; die objek van die verbintenis – die te verrigte prestasie – is die onderskeidingsteken daarvan. Dit is die wesenlike van die verbintenis en solank die inhoud van die prestasie onveranderd bly, word die identiteit van die verbintenis gehandhaaf.

Die ontwikkelingsgeskiedenis van die erkenning van sessie van vorderingsregte toon ook duidelik aan dat die gedagte dat die verbintenis 'n streng persoonlike verhouding tussen die partye daarby is nie op die lange duur die toets van die tyd, en die praktyk, kon slaag nie. Die behoefte aan 'n metode waardeur die skuldeiser sy vorderingsreg aan 'n ander kon oordra, was reeds in die praktyk van die Romeinse reg gevoel.[26] Aan hierdie behoefte, wat met verloop van tyd in intensiteit toegeneem het, is mettertyd met die algemene erkenning van sessie

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24 Met verwysing na hierdie opvatting verklaar Asser-Rutten *Verbintenissenrecht* Deel 1 (1981) 411 saaklik en heel tereg: "Maar naar het moderne recht kan dit standpunt niet worden volgehouden. Het rechtsverkeer vereist de erkenning van die mogelijkheid om een schuld over te nemen."

25 Daar is weliswaar gevalle waar die persoon van die skuldenaar van sodanige kardinale belang vir die uitvoering van die verbintenis is dat dit as't ware deel van die inhoud van die prestasie is. Dit gaan hier om gevalle waar met 'n bepaalde skuldenaar gekontrakteer is vanweë sy besondere bekwaamheid, oordeelsvermoë of ander persoonlike eienskap; 'n mens dink bv aan die skilder van 'n portret, die beoordeling van 'n kompetisie om die beste wyn aan te wys; die vertolking van die hoofsangrol in 'n opera, ens. Die persoonlike stempel van hierdie regsverhouding vloei egter voort uit die aard van die prestasie wat *in casu* gelewer moet word en nie uit die regskarakter van die verbintenisbegrip as sodanig nie.

26 Dié behoefte is aanvanklik op onvolkome wyse met behulp van die figuur van *procuratio in rem suam* vervul.

volledig voldoen.[27] In die proses is die standpunt ingeneem, deur veral Duitse juriste (wat die meeste aandag aan die teoretiese aspekte van sessie gewy het), dat die voortbestaan van 'n verbintenis nie noodwendig onlosmaaklik aan die persoon van slegs 'n *bepaalde* skuldeiser of skuldenaar verbind is nie. Daar is toegegee dat die vervanging van een van die subjekte van die verbintenis weliswaar 'n verandering in 'n bepaalde aspek van die verbintenis teweegbring, maar terselfdertyd is daarop gewys dat voldoende aspekte van die verbintenis onveranderd bly om 'n gevolgtrekking dat die identiteit van die verbintenis nietemin behoue bly, te regverdig.[28] Die insig dat die vorderingsreg weens die ekonomiese waarde daarvan as vermoënsbestanddeel geobjektiveer kan word, het verder daartoe bygedra om die vermeende streng persoonlike karakter van die verbintenis te loën.[29]

Ek is van mening dat daar nòg vanuit regsteoretiese nòg vanuit praktiese oogpunt beskou enige dwingende oorwegings bestaan wat 'n opvatting dat die verbintenis deur 'n streng persoonlike karakter gekenmerk word, noodsaak. Die juridiese en ekonomiese milieu waarin die verbintenisbegrip teenswoordig moet opereer, is verder van so 'n aard dat 'n dusdanige standpunt onhoudbaar is. Daarom wil ek Meijers[30] graag gelyk gee as hy vanuit die oogpunt van die algemene regsleer konkludeer dat dit doelmatiger is om 'n verandering met betrekking tot die subjekte van 'n verbintenis as 'n *oorgang* van die desbetreffende reg of verpligting op die nuwe subjek aan te dui.

3 3 Skuldoorname en die Toestemming van die Skuldeiser

Die aanname dat die substitusie van die huidige skuldenaar noodwendig met die toestemming van die skuldeiser gepaard moet gaan, word klaarblyklik as 'n struikelblok in die weg van die erkenning van skuldoorname gereken. Die oordrag van vorderingsregte word erken omdat die skuldenaar se toestemming by die verwisseling van skuldeisers ontbeer kan word; aangesien die teendeel ten aansien van die skuldeiser se toestemming by skuldenaarsvervanging geld, word skynbaar aanvaar dat 'n soortgelyke ontwikkeling nie in daardie geval moontlik is nie en dat partye derhalwe altyd op delegasie aangewese is. Delegasie stel op sy beurt die eis van 'n driesydige ooreenkoms tussen die betrokkenes, terwyl die noodwendige toestemming van die skuldeiser in effek ook meebring dat drie partye aan die skuldenaarsvervanging moet meewerk. Bowendien is delegasie die enigste hulpmiddel wat in hierdie verband deur die gemene reg beskikbaar gestel word. So beskou, wek dit weinig verbasing dat sonder meer aanvaar word dat delegasie die enigste metode van skuldenaarsverwisseling is.

Die eerste fout met hierdie benadering is die feit dat aanvaar word dat die vereiste toestemming van die skuldeiser noodwendig meebring dat die regsfeit in die geheel as delegasie, 'n driesydige ooreenkoms, getipeer moet word.

Enersyds bestaan daar geen dwingende rede waarom die toestemmingshandeling as medewerking tot die sluiting van 'n ooreenkoms opgevat moet word

27 Vir 'n uitvoerige bespreking van die ontwikkelingsgeskiedenis van sessie word die leser verwys na Luig *Zur Geschichte der Zessionslehre* (1966). Raadpleeg ook Scott *Sessie in die Suid-Afrikaanse Reg* (1978) Afdeling A.

28 Raadpleeg *Skuldoorname en Kontraksoorname* 13–19.

29 Raadpleeg Luig 107 e v.

30 *Algemene Begrippen van het Burgerlijk Recht* 126–127.

nie; dit sou eenvoudig as 'n eensydige regshandeling wat voor of na 'n tweesydige ooreenkoms tussen die ou en nuwe skuldenaars verrig word, gekonstrueer kon word, dit wil sê as instemming vooraf tot 'n skuldenaarsvervanging wat in die vooruitsig gestel word of as bekragtiging of goedkeuring van verwisseling waartoe reeds ooreengekom is. Hierdie konstruksie sal veral toepaslik wees indien die twee komponente van die "delegasie," naamlik die afspraak tussen die ou en nuwe skuldenaar en die verlening van toestemming deur die skuldeiser, *de facto* tydens twee duidelik afsonderlike fases plaasvind. So beskou, sou 'n mens dan nie met egte delegasie te make hê nie en *a fortiori* ook nie met novasie nie; skuldenaarsvervanging word teenswoordig as novasie beskou bloot omdat dit noodwendig volg uit die konstruksie daarvan as delegasie.[31]

Andersyds, selfs indien dit duidelik is dat die betrokke partye 'n driesydige ooreenkoms aangegaan het, is dit glad nie vanselfsprekend dat dié regshandeling as skuldvernuwing opgevat moet word nie. Daar moet toegegee word dat skuldenaarswisseling deur middel van delegasie *kan* plaasvind, net soos *skuldeisers*vervanging *via* delegasie kan geskied. Partye bedoel normaalweg egter nie om die verwisseling van skuldeisers *via* delegasie te bewerkstellig nie, maar met behulp van sessie. Dit is immers 'n vereiste vir novasie, en dus ook vir delegasie, dat die partye daartoe oor die *animus novandi* moet beskik. Hierdie bedoeling is in die reël by skuldeisersvervanging afwesig; myns insiens geld dieselfde heel dikwels ten aansien van die skuldenaarsvervangingshandeling. Caney[32] se mening dat die "practical approach" tot skuldenaarsvervanging op die *oorname* van die ou skuldenaar se skuld deur die nuwe skuldenaar neerkom, en *nie* op die skepping van 'n nuwe skuld nie, bied steun vir hierdie standpunt. Daar moet onthou word dat daar geen vermoede ten gunste van *animus novandi* bestaan nie; dit moet gewoonweg op 'n oorwig van waarskynlikheid bewys word.[33] By gebrek aan 'n uitdruklike verklaring deur die partye dat hulle delegasie beoog, sou *animus novandi* weliswaar indirek uit die omringende omstandighede afgelei kon word,[34] maar dit moet benadruk word dat die blote feit dat partye 'n skuldenaarsvervanging beoog, *nie* voldoende is om *animus novandi* daar te stel nie; daar moet ook 'n duidelike aanduiding wees dat die partye bedoel om die oorspronklike skuld uit te wis.[35]

Die tweede gebrek in bogenoemde benadering is dat eweneens sonder meer aanvaar word dat die toestemming van die skuldeiser 'n essensiële ontstaansvereiste vir skuldenaarsvervanging is. Ek wil betwis dat dit 'n "basiese beginsel" van ons reg is dat skuldenaarsvervanging altyd met die toestemming van die skuldeiser moet plaasvind.[36] Die ware, dieperliggende beginsel waarom dit in

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31 Vgl bv *Labuschagne v Denny supra*; *Lorentz v Melle supra*. Hierdie standpunt word ook by elke skrywer oor die verbintenisreg aangetref.

32 *Novation* 37.

33 Vgl bv *Ewers v Resident Magistrate of Oudtshoorn* 1880 Foord 32; *Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T); *Electric Process Engraving & Stereo Co v Irwin* 1940 AD 220.

34 *ibid.*

35 Vgl bv die *Ewers*-gewysde *supra* en *Brenner v Hart* 1913 TPD 607.

36 De Wet en Yeats 334 is bv van mening dat die feit dat die koper van 'n huursaak as gevolg van die *huur gaat voor koop*-reël skuldenaar in die plek van die oorspronklike verhuurder word, "selfs teen die sin en wil van die huurder . . . 'n flagrante afwyking is van basiese en goeie beginsels van die verbintenisreg."

werklikheid hier gaan, is die beskerming van die skuldeiser; skuldenaarsvervanging hou potensiële ongeregverdigde benadeling vir 'n skuldeiser in en hy is daarop geregtig om daarteen gevrywaar te word. Daar kan nie betwis word nie dat die *ratio* vir die toestemmingsvereiste geleë is in die gevaar wat die skuldeiser andersins sou loop om met 'n swakker, selfs insolvente skuldenaar opgesaal te word.[37] Die toestemmingsvereiste gee uitdrukking aan die genoemde beskermingsbeginsel, dit is met ander woorde die gepositiveerde *regsreël* wat uit daardie regsbeginsel voortgekom het en nie *self* beginsel nie. 'n Beginsel bevat 'n element van onveranderlikheid en daarom sal die skuldeiser altyd aanspraak kan maak op beskerming teen benadeling by skuldenaarsvervanging. Die *wyse* waarop hierdie beskerming verwesenlik kan word, is daarenteen nie in beginsel vas en onveranderlik nie; selfs al sou daar op 'n gegewe tydstip in feite slegs 'n enkele metode beskikbaar wees waarop die beskerming verseker kan word, bly dit in teorie steeds moontlik om die verlangde beskerming langs alternatiewe weë te bewerkstellig.

Daar moet dadelik toegegee word dat dit voor die hand lê om *via* die toestemmingsreël gestalte te gee aan die skuldeiser se beskerming; dit is daarom nie vreemd dat die gemene reg en die geldende positiewe reg juis hierdie beskermingsmeganisme uitgekies het nie. Trouens, die vastelandse regstelsels wat erkenning verleen aan skuldoorname maak teenswoordig steeds gebruik van hierdie beskermingsmetode. Desnieteenstaande is ek van oordeel dat hoewel geen ander maatreël doeltreffender beskerming sal kan bied nie, daar langs ander weë minstens ewe effektiewe beskerming aan die skuldeiser verleen kan word. Minstens twee alternatiewe reëls ter beveiliging van die skuldeiser se belange kan geformuleer word: eerstens, die toekenning van 'n bevoegdheid aan die skuldeiser om, indien hy deur sodanige partyverwisseling benadeel word, daardie regshandeling retrospektief te vernietig, en, tweedens, die aanwysing van regsweë van die ou skuldenaar as borg vir die oornemer se skuld.[38] Enigeen van hierdie reëls sou in die Suid-Afrikaanse verbintenisreg aangewend kon word, die eersgenoemde reël as deliktuele regsmiddel na analogie van die *actio Pauliana* en laasgenoemde as 'n doelmatige oplossing wat gegrond is op die aanvaarding daarvan dat van die ou skuldenaar verwag kan word om die verantwoordelikheid vir die nakoming van die betrokke verpligting(e) deur sy opvolger te aanvaar, dit wil sê vir sover die opvolging sonder die skuldeiser se medewerking plaasgevind het. Nie een van hierdie reëls maak deel uit van die Suid-Afrikaanse positiewe reg insake skuldenaars- of kontrakspartyvervanging nie en dit lê dus op die weg van die bevoegde regsvormende orgaan om, indien dit aanvaarbaar en wenslik blyk te wees, een van die betrokke reëls – verkieslik die reël wat die ou skuldenaar/kontraksparty as *ex lege*-borg aanwys – in ons reg te inkorporeer.[39]

3 4 Sessie + Skuldoorname = Kontraksoorname?

Indien die vorderingsregte en verpligtinge wat uit die kontrak voortgespruit het die enigste bestanddele van die regsverhouding tussen die twee kontrakspartye is, spreek dit vanself dat die oorgang daarvan, en dus van die regsverhouding, deur middel van sessie en skuldoorname teweeggebring sou kon word.

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37 Vgl bv *Rolfes, Nebel & Co v Zweigenhaft supra* 195; Wille 373; Van Jaarsveld 113.

38 Ruimte ontbreek hier om die inhoud van en regverdiging vir hierdie alternatiewe reëls uitvoerig te bespreek. Raadpleeg *Skuldoorname en Kontraksoorname* 98–112 240–243 daarvoor.

39 In hierdie geval sal die bevoegde regsvormer die wetgewer wees.

Die algemeen aanvaarde opvatting in die hedendaagse regswetenskap is egter dat die geheel van die regsverhouding tussen kontrakspartye nie bloot gelyk is aan die somtotaal van die vorderingsregte en verpligtinge nie. Dit omvat ook bepaalde neweregte, neweverpligtinge en bevoegdhede, soos byvoorbeeld die bevoegdheid om die kontrak onder sekere omstandighede te ontbind, te vernietig of op te sê; die verpligting om die vereistes van goeie trou by die uitvoering van die kontrak na te kom; die verpligting om, ingeval van kontrakbreuk deur die ander party, die skade wat daaruit mag voortvloei, te beperk; ensovoorts. Hierdie toedrag van sake laat die vraag ontstaan of 'n kombinasie van sessie en skuldoorname hoegenaamd toereikend vir die bewerkstelliging van kontraksoorname sou kon wees. Op hierdie vraag is deur sommige bevestigend, maar deur die meerderheid van juriste ontkennend geantwoord. Eersgenoemde groep het die standpunt verdedig dat hierdie neweregte en -verpligtinge *ipso iure* as *accessoria* saam met die vorderinge en skulde as gevolg van sessie en skuldoorname oorgaan; laasgenoemde groep was egter van mening dat so 'n *ipso iure*-oorgang vanweë die aard van die onderhawige neweregte en -verpligtinge uitgesluit was.

Die ruimte ontbreek hier om elkeen van hierdie benaderings grondig te ontleed. Ek volstaan deur daarop te wys dat so 'n ontleding tot die gevolgtrekking lei dat kontraksoorname (as *resultaat*) deur sowel 'n kombinasie van sessie en skuldoorname as deur kontraksoorname as selfstandige regshandeling teweeggebring kan word.[40] Die prinsipiële regsgeldigheid van kontraksoorname staan dus vas: òf omdat dit bloot as 'n kombinasie van sessie en skuldoorname beskou kan word, òf omdat dit by wyse van regsanalogie op grond van die regsgeldigheid van sessie en skuldoorname geregverdig kan word. Trouens, daar dien op gewys te word dat daar in werklikheid selfs minder beswaar teen kontraksoorname ingebring kan word omdat, anders as die versnippering van die kontraksverhouding wat moontlik as gevolg van lukrake oordrag van individuele regte en verpligtinge veroorsaak sou kon word, dit die eenheid van die kontraksverhouding behoue laat bly.[41]

3 5 Samevatting en Gevolgtrekking

Die sogenaamd persoonlike karakter van die verbintenis is enersyds grotendeels 'n fiksie en andersyds lê dit logies geen onoorkomelike struikelblok in die weg van die erkenning van die oordraagbaarheid van verpligtinge nie, soos bewys word deur die feit dat vorderingsregte oordraagbaar is. Die vereiste toestemming van die skuldeiser by skuldenaarsvervanging kan ook nie daarin slaag om skuldoorname te belet nie; enersyds is dit nie vanselfsprekend dat dié toestemming as bestanddeel van 'n driesydige ooreenkoms wat gelyk is aan delegasie gekonstrueer moet word nie en andersyds, selfs al word dit as 'n driesydige ooreenkoms opgevat, is dit geensins nodig om daardie regshandeling as novasie, in die vorm van delegasie, te beskou nie. Die toestemming van die skuldeiser is selfs geen absolute voorvereiste vir 'n geldige skuldenaarsverwisseling nie; die skuldeiser sou ewe goed beskerm word indien die ou skuldenaar byvoorbeeld van regsweë as borg vir die oornemer van die skuld aangewys word. As 'n mens hierby voeg

40 Raadpleeg *Skuldoorname en Kontraksoorname* 201–221 vir 'n ontleding van hierdie twee benaderings en die gevolgtrekking dat daar ruimte bestaan vir beide teorieë.

41 Vgl bv Larenz *Lehrbuch des Schuldrechts* Vol 1 (1977) 483.

dat die regsgeldigheid van skuldoorname ook deur die beginsel van kontraksvryheid onderskryf word, voer dit onafwendbaar tot die gevolgtrekking dat skuldoorname, en daarom ook kontraksoorname, in beginsel in die Suid-Afrikaanse reg toelaatbaar is. Daar bestaan dus geen regverdiging vir 'n gelate berusting in die feit dat die gemene reg delegasie as enigste hulpmiddel by skuldenaarsvervanging veroorloof het nie.

Daar dien verder op gewys te word dat delegasie, weens die noverende werking daarvan, nie besonder geskik is om die gevolg wat die partye met skuldenaarsvervanging wil bereik, te verwesenlik nie.

Hierdie subjekswisseling het ten doel om die nuwe skuldenaar in die plek van die ou skuldenaar te stel sodat eersgenoemde voortaan alleen teenoor die skuldeiser aanspreeklik sal wees. Daar kan aanvaar word dat partye normaalweg nie meer as dit beoog nie, veral nie dat daar ook 'n uitwissing van die bestaande verbintenis, insluitende al die daaraan verbonde *accessoria*, sal plaasvind nie. Daar bestaan ook geen regverdiging vir die toerekening van so 'n *animus novandi* aan die partye nie, want dit is juridies moontlik om dit as 'n *oordrag* van verpligtinge met instandhouding van die verbintenis te konstrueer. Bowendien sou die ondergang van die *accessoria* in bepaalde gevalle juis die plaasvind van skuldenaarsvervanging kon belemmer; die nuwe skuldenaar sou veel eerder die vorige skuldenaar se verweermiddele, soos byvoorbeeld verjaring wat reeds begin loop het, wou behou, terwyl die skuldeiser synersyds nie graag genoë sal wil neem met die verval van baie waardevolle sekerheidsregte nie.

4 DIE INVOERING VAN SKULDOORNAME EN KONTRAKSOORNAME IN ONS POSITIEWE REG

In die voorgaande is aangetoon dat skuldoorname en kontraksoorname heeltemal verenigbaar is met die basiese beginsels van ons reg en dat 'n dienooreenkomstige aanpassing van die "viriele, lewende Romeins-Hollandse reg"[42] daarom moontlik is. Hierdie aanpassing kan myns insiens in ons howe deurgevoer word omdat dit van so 'n aard is dat dit nie die ingryping van die wetgewer behoef nie; die erkenning van skuldoorname sal, ten spyte van die uiterlike skyn, nie neerkom op die skepping van nuwe reg nie, maar bloot op 'n suiwerder juridiese konstruksie van 'n regsverskynsel wat reeds deur bestaande reg veroorloof word.

Die skuldoorname wat hier ter sprake is, word tot stand gebring òf *via* 'n driesydige ooreenkoms tussen al die betrokkenes, òf deur middel van 'n tweesydige ooreenkoms tussen die skuldenaar en die oornemer, gevolg of vooraf gegaan deur die toestemming van die skuldeiser, òf deur 'n tweesydige ooreenkoms tussen die oornemer en die skuldeiser. Hierdie totstandkomingswyses is volkome in ooreenstemming met die voorskrifte van die geldende reg ten aansien van skuldenaarsvervanging en die howe sal dus geen probleem in hierdie verband ondervind nie.[43]

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42 n a v Lord Tomlin se beskrywing van ons gemene reg in *Pearl Assurance Co v Union Government* 1934 AD 560 563.

43 *Idealiter* behoort skuldoorname ook sonder die skuldeiser se medewerking te kan plaasvind, maar alvorens dit in die Suid-Afrikaanse reg moontlik sal wees, sal die wetgewer alternatiewe beskerming vir die skuldeiser moet voorskryf.

Dit is egter goed denkbaar dat die howe huiwerig mag wees om die gevestigde opvatting dat ons hier met delegasie te doen het, oorboord te gooi. Sodanige aarseling is egter ongegrond. Enersyds is daar geen sprake daarvan dat gevestigde regte of die beginsel van regsekerheid daardeur aangetas sal word nie. Die erkenning van skuldoorname bring immers nie die afskaffing van delegasie mee nie. Partye sal ingevolge die algemene beginsels van die verbintenisreg steeds kan kies om van delegasie gebruik te maak; dit sal die geval wees indien die partye kan aantoon dat hulle die vervangingshandeling *animo novandi* verrig het. Die *onus* om dit te bewys, rus op die partye. Daar moet onthou word dat daar regtens geen vermoede ten gunste van novasie bestaan nie.

Andersyds bevestig verskeie oorwegings dat die konstruksie van skuldenaarsverwisseling as skuldoorname allesins verenigbaar is met die basiese beginsels van ons reg. Dit is eerstens in ooreenstemming met die fundamentele beginsel van kontraksvryheid. Tweedens onderskryf die beginsel wat hiermee saamhang, naamlik dat gevolg gegee moet word aan die bedoeling van die partye vir sover dit geoorloof is, op sy beurt ook die skuldoornamekonstruksie; dit is 'n feit dat die werklike (en geoorloofde) bedoeling van die partye normaalweg eerder met 'n *oordrag* van skulde versoen kan word. Die feit dat die oordrag van vorderingsregte *via* sessie regtens moontlik is in ons reg is verdere bewys daarvan dat subjekswisseling nie noodwendig met die ondergang van die verbintenis gepaard hoef te gaan nie; die aard van die verbintenis is ook nie daarmee in stryd nie.[44] Die vereiste dat die skuldeiser aan die skuldoorname moet meewerk, beteken ook geensins dat 'n mens *nie* met 'n egte oordrag te doen het nie; indien 'n skuldenaar in 'n bepaalde geval sy goedkeuring, ongevraagd al dan nie, ten opsigte van 'n beoogde of reeds ooreengekome sessie uitspreek, veroorsaak dit immers nie die omskepping van daardie sessie in delegasie nie.[45]

Die totstandkoming sowel as die gevolge wat normaalweg aan skuldoorname verbind word, kan derhalwe heeltemal versoen word met die positiewe reg. Ten aansien van die gevolge van skuldoorname moet slegs daarop gewys word dat die behoud van sekerheidsregte soos borgtog, pand en verband afhanklik sal wees van die toestemming van die sekerheidstellers tot voortgesette aanspreeklikheid ten opsigte van die nuwe skuldenaar. Hierdie sekerheidsregte kan by wyse van uitsondering volgens die geldende reg op dieselfde wyse voorbehou word.[46] Dit is natuurlik streng gesproke in stryd met die wese van delegasie as skuldvernuwing, maar die behoefte aan die moontlikheid van sodanige voorbehoud het hierdie uitsondering eenvoudig afgedwing. Hierdie feit is terselfdertyd 'n verdere bewys daarvan dat daar 'n behoefte bestaan aan die oordrag van verpligtinge, ten gevolge waarvan die sekerheidsregte in beginsel nie tot niet gaan nie.

Indien skuldoorname aldus deel van ons reg gemaak kan word, maak dit terselfdertyd die deur vir kontraksoorname oop. Hierbo is reeds daarop gewys dat die beginsel van kontraksvryheid en die regsgeldigheid van sessie en skuldoorname die grondslag vir die erkenning van kontraksoorname vorm. "Assignment" of kontraksvernuwing het die ondergang van die bestaande kontrak tot

44 Vgl 32 *supra*.

45 Indien A beoog om 'n gedeelte van sy vordering teen B aan X en die oorblywende gedeelte aan Y te sedeer, moet B se toestemming daartoe verkry word (*Lief v Dettmann* 1964 2 SA 252 (A)); nietemin is dit steeds sessie en *nie* skuldvernuwing nie.

46 Raadpleeg Caney *A Treatise on the Law relating to Novation* (1973) 34 en *The Law of Suretyship in South Africa* (1982) 167.

gevolg omdat dit beskou word as 'n gesamentlike sessie en delegasie; indien aanvaar word dat dit 'n gelyktydige sessie en skuldoorname is, verval die noodsaak daarvan om hierdie noverende werking daaraan toe te skryf.

Kontraksoorname sou eweneens in die Suid-Afrikaanse reg by wyse van 'n daarop gerigte kombinasie van sessie en skuldoorname, of as selfstandige regshandeling, kon plaasvind. Indien laasgenoemde die geval is, sou dit, ten einde in die huidige regsisteem in te pas, tot stand gebring moet word *via* òf 'n driesydige ooreenkoms tussen die uittredende, oorblywende en nuwe kontrakspartye, òf by wyse van 'n tweesydige ooreenkoms tussen die ou en nuwe partye, gevolg of voorafgegaan deur die goedkeuring van die oorblywende party.

By wyse van aanmoediging wil ek die oortuiging uitspreek dat indien die howe hul weg sou oopsien om hierdie aanpassing *cum* regstelling deur te voer, skuldoorname en kontraksoorname hom spoedig in ons reg sal inburger.[47] Hierdie oortuiging vind onder andere steun in die feit dat die "practical approach" waarvan Caney melding maak, reeds in 'n sekere opsig in die benadering wat die howe en skrywers met betrekking tot hierdie aangeleentheid volg, na vore kom. Ek verwys hier na die feit dat daar deurgaans ten aansien van skuldenaarsvervanging gespreek word van die "oordrag," "oorname" en "transfer" van verpligtinge.[48] Streng gesproke kan die gebruik van hierdie terme hoegenaamd nie met die begrip skuldvernuwing versoen word nie en sou 'n mens *prima facie* die gevolgtrekking kon maak dat dit inderdaad telkens om die egte oordrag van verpligtinge gaan. Ten spyte van hierdie terminologiese aansluiting by skuldoorname, maak die howe en skrywers dit nietemin duidelik dat dit vir hulle om delegasie gaan. Hierdie misleidende woordgebruik sou enersyds verklaar kon word deur te aanvaar dat die term "oordrag" 'n wyer en enger betekenis het en dat dit in 'n wye sin ook met betrekking tot delegasie aanwending kan vind. Andersyds, en ek is van oordeel dat hierdie verklaring op die keper beskou nader aan die waarheid is, sou hierdie terminologiese dualisme toegeskryf kon word aan die feit dat sowel die howe as die skrywers 'n definitiewe (intuïtiewe?) aanvoeling daarvoor het dat dit by skuldenaars- en kontrakspartyvervanging, soos by sessie, in werklikheid om 'n *oordragshandeling* gaan. Hulle voel hul op grond van die tradisionele regswetenskaplike beskouing hier te lande egter telkens verplig om aan te dui dat so 'n vervanging regtens op delegasie neerkom.

5 DIE NUWE BEGIN?

In *Botha v Van Niekerk*[49] het regter Flemming die eerste tree gegee op die pad na die volledige erkenning van kontraksoorname (en dus ook skuldoorname) in die Suid-Afrikaanse reg. Dit is terselfdertyd die tasbare bewys daarvoor dat die hierboverdedigde standpunt meriete het, dit wil sê dat die invoering van hierdie regsfigure wel deur die howe bereik kan word.

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47 Dit is presies wat reeds in Nederland gebeur het, dit wil sê nog voordat die NBW, waarin hierdie regsfigure spesifiek gereël word, ingevoer is.

48 Vgl bv Kerr 298; Gibson 101; Van Jaarsveld 113; *Froman v Robertson supra*; *Labuschagne v Denny supra*; *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 2 SA 709 (D); *London Chemists and Opticians Ltd v Shapiro* 1926 TPD 690; *Schwedhelm v Hauman* 1947 1 SA 127 (OK); *Jacobsz v Fall* 1981 2 SA 863 (K).

49 1983 3 SA 513 (W).

In die betrokke saak het dit gegaan oor die bekende geval waar 'n koopkontrak gesluit word tussen die verkoper en die koper of sy genomineerde. Die hof moes onder andere uitmaak "wat die regsaard is van 'n nominasie *soos wat die partye hier bedoel het*,"[50] ten einde te bepaal of die nominasiehandeling aan die vereistes van Wet 71 van 1969 moet voldoen. Die hof verwys daarna dat so 'n vervangingshandeling byvoorbeeld in *Hughes v Rademeyer* [51] as delegasie beskryf is, maar betwyfel of daarmee *egte* delegasie, synde novasie, bedoel is.

Regter Flemming wys daarop dat die beginsel van kontraksvryheid partye toelaat om ooreenkomste te sluit wat nie een van die "geykte kontrakstipes" is nie en gee dan 'n praktiese voorbeeld van hoe 'n mens 'n verwisseling van partye kan bewerkstellig sonder novasie. Sy gevolgtrekking ten opsigte van die onderhawige geval is dan ook:

> "Wat die onderhawige partye met uitoefening van hul kontrakvryheid bedoel het en na my mening reggekry het, is om partye te vervang sonder om die skuld te vervang. Hulle het ooreengekom dat eerste respondent iemand mag aanwys wat die kontrak as sulks oorneem deurdat dieselfde regte en verpligtinge wat reeds bestaan van een party na 'n ander oorgaan. Daardie regte en verpligtinge ondergaan geen wysiging wanneer dit so oorgaan nie."[52]

Hierdie tipe vervangingshandeling is inderdaad nie 'n "geykte kontrakstipe" in ons reg nie en die regter stel in aansluiting by my standpunt voor dat dit kontraksoorname genoem word.

Daar dien op gelet te word dat hier *nie* beweer word dat alle nominasies op kontraksoorname sal neerkom nie. Daar word deurentyd beklemtoon dat dit om die *bedoeling van die partye in die onderhawige geval* gaan. By delegasie, synde novasie, is die bedoeling van die partye deurslaggewend; indien *animus novandi* by die partye ontbreek, is delegasie onbestaanbaar. Daarby bestaan daar in ons reg geen vermoede ten gunste van *animus novandi* nie;[53] dit moet telkens behoorlik bewys word. Hoewel sodanige bedoeling ook met behulp van getuienis aangaande die optrede van die partye bewys sou kon word, lei die enkele feit dat een party by 'n kontrak deur 'n ander vervang word nie noodwendig tot die gevolgtrekking dat slegs 'n novasie bedoel kon gewees het nie.[54] Dit is juis wat regter Flemming na my mening wil bevestig. Partye is vry om nominasie deur middel van delegasie te bewerkstellig, maar *in casu* (soos myns insiens in die meeste gevalle) het hulle gekies om kontraksoorname te gebruik.

In 'n bespreking van hierdie uitspraak noem DJ Joubert[55] hierdie standpunt van regter Flemming "interessant," maar vra "of so-iets wel regtens bestaanbaar is." Na oorweging van 'n aantal relevante hofuitsprake en standpunte van ander skrywers, kom hy tot die verstommende gevolgtrekking dat "dit tot dusver onbekend is en *daarom* (juridies) onmoontlik is."[56] Om te stel dat onbekendheid

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50 525H, by beklemtoning.
51 1947 3 SA 133 (A).
52 526H.
53 Vgl bv *Adams v SA Motor Industry Employers Association* 1981 3 SA 1189 (A) 1198H 1199H.
54 Indien die teendeel waar is, is die erkenning van *sessie* moeilik te verklaar.
55 1984 *THRHR* 232–235.
56 233; my beklemtoning.

tot onmoontlikheid lei, is enersyds regswetenskaplik onverantwoord en andersyds regspolities onverantwoordelik in 'n ongekodifiseerde regstelsel waar regsontwikkeling nie slegs deur wetgewing plaasvind nie.[57] So 'n standpunt word in elk geval deur die regsgeskiedenis geloënstraf: die hedendaagse positiewe reg bevat talle voorbeelde van regsreëls en regsfigure, synde produkte van presedenteregsontwikkeling, wat vroeër heeltemal onbekend was.[58] 'n Mens moet waak daarteen om in effek "tradisionele" regsopvattinge te kanoniseer.

Dit is verder glad nie so seker dat kontraksoorname "tot dusver" in ons reg "onbekend is" nie. Regter Flemming noem die substitusie van verhuurders as gevolg van die reël *huur gaat voor koop* en die vervanging van 'n tussenpersoon deur 'n "skadu-prinsipaal" as voorbeelde van kontraksoorname wat van regsweë intree. Naas verskeie voorbeelde van statutêre kontraksoorname (en skuldoorname) in ons reg, kan die oorname van voorinlywingskontrakte deur nuut gestigte maatskappye ook as voorbeeld van kontraksoorname vermeld word.[59]

Joubert meen dat die twee analogieë waarop regter Flemming 'n beroep doen, sy standpunt nie steun nie. Hy wys daarop dat nie een van die twee leerstukke te doen het met 'n *ooreenkoms* ter vervanging van 'n kontraksparty, soos wat die geval is by nominasie nie. Dit is natuurlik waar, maar dit gaan egter nie in die eerste plek hier om die *totstandkomingswyse* van die partywisseling nie; trouens, regter Flemming wys self daarop dat die substitusie van verhuurders " 'n kwessie van regswerking" is.[60] Waaroor dit hier gaan, en waaroor die regter dit heel duidelik het, is die *resultaat* wat intree, naamlik die vervanging van partye *sonder dat* kontraksvernuwing plaasvind. Die twee genoemde leerstukke getuig baie duidelik van die moontlikheid dáárvan.

6 TEN SLOTTE

Prinsipieel beskou, is daar niks wat die erkenning van skuldoorname en kontraksoorname in ons reg in die weg staan nie. Dit is inderdaad volkome binne die bevoegdheid van die howe om die ontwikkelingslyn van delegasie na skuldoorname en kontraksoorname deur te trek. Laasgenoemde feit word juis geïllustreer in *Botha v Van Niekerk.*

Die Suid-Afrikaanse reg kan slegs baat vind by so 'n ontwikkeling. Die nut en bruikbaarheid van hierdie instellings staan bo alle twyfel vas – die ontwikkelingsgeskiedenis daarvan in Duitsland, Nederland en ander Europese regstelsels dui onomwonde daarop, terwyl die aanwendingsmoontlikhede in ons regspraktyk haas onbeperk is.[61] Dit sou daarom kortsigtig wees om krampagtig vas te hou aan die tradisionele opvatting dat die vervanging van skuldenaars of kontrakspartye slegs deur middel van delegasie bewerkstellig kan word.

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57 Die gevaar van so 'n standpunt en die tragiese gevolg daarvan vir regsontwikkeling word waarskynlik op sy beste geïllustreer deur die uitspraak in *Nortje v Pool* 1966 3 SA 96 (A), waardeur die ontwikkeling van 'n algemene verrykingsaksie effektief kortgeknip is.

58 Ek noem net een: die skuldlose aanspreeklikheid van die media vir laster. 'n Mens sou ook kon vra hoe die uiteindelike erkenning van sessie in ons gemene reg verklaar kan word as dit nie in die Romeinse reg bekend was nie.

59 Raadpleeg *Skuldoorname en Kontraksoorname* 291–324 vir 'n uitvoerige bespreking van die erkenning van skuldoorname en kontraksoorname in die Suid-Afrikaanse positiewe reg.

60 527B.

61 Raadpleeg *Skuldoorname en Kontraksoorname* 291–324, maar veral ook 325–346.

Karl Marx

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OPSOMMING

Karl Marx

Die doel van die lesing was nie om oor Marx se persoon, sy politieke, sy sosiale of sy ekonomiese beskouings te praat nie, maar om na sy beskouings aangaande die reg te kyk. Sy regsbeskouing is egter slegs verstaanbaar teen die agtergrond van sy persoon, sy opleiding en die maatskappy waarin hy geleef het, asook die mense wat op hom invloed gehad het. Die belangrikste faktore van hierdie geaardheid was seker die Duitse mistiek en intellektualisme wat hom in 'n groot mate deur Hegel en die jong liberale Hegeliaanse skool bereik het. Dan was daar ook nog sy eie ongelukkige lewe van stryd en armoede en die sosiale misstand wat hy, saam met Engels, leer ken het. Hoofsaaklik het die skerp teenstelling wat daar geheers het tussen die rykes en armes, die bevoorregtes en die onbevoorregtes, wat weer gereduseer kon word tot die teenstelling tussen kapitalis en arbeider, hom getref en sy lewensbeskouing beïnvloed. Hieruit vloei sy teorieë voort en ook sy beskouing aangaande die reg. Hy sien die reg slegs as weer een van die voorregte van die kapitalis waarmee hy die onbevoorregte in bedwang hou en onderdruk. Deur die reg word die sosiale en ekonomiese struktuur gehandhaaf ter wille van die bevoorregtes. Die sprekende voorbeeld, onder andere, het vir hom voorgekom in die sogenaamde *Holzdiebstahlgesetz* (die wet betreffende diefstal van hout) afkomstig uit die Rynland. Daarin is bepaal dat dit diefstal is om hout te versamel uit die woude (wat die arm man gedoen het om brandhout te kry), sodat die woude bewaar bly as terreine waarin die bevoorregtes die woude kon geniet. Volgens sy teorie, as die maatskappy omgekeer word en die arbeider (as 'n klas) die produksiemiddels in sy mag kry, sal die kapitalis verdwyn. As dit gebeur, sal die reg nie meer nodig wees om te dien as 'n middel tot onderdrukking van die onbevoorregtes nie, en die reg kan dan ook maar verdwyn. In die egalitêre gemeenskap wat dan sal kom, sal die reg die produk wees van die wil van almal en sal elkeen gelyk behandel word.

The name and works of Karl Marx call to mind, for a vast number of people, the vision of a way of life and of a future which will be one of happiness and peace for mankind. On the other hand, for an equally great number of people, he and his works conjure up the spectre of intensive evil, strife and oppression. A person who can have such an effect must be an impressive figure, one who has earned his place in history. It will, therefore, be understood that it is an invidious task for a person of my limited ability to attempt to assess the importance of such a figure and to do justice to a man of the stature of Marx – Marx, the centenary of whose death is and has been commemorated during 1983 in many parts of the world. His stature is the result of his views and theories on mankind within his sociological and economic context, views which inspired an entire way of life. But since this paper is being presented to a faculty of law, the emphasis will fall on his views and philosophy on law and of its function in society as he saw it. To be able to do so, however, it seems advisable briefly

to dwell on his life and works, and then also on his theories on mankind, on human society and on the political and economic aspects thereof. These points will be followed by a treatment of his legal philosophy.

Karl Heinrich Marx[1] was born in Trier in the Rhineland on 1818-05-05. He was of Jewish stock, but his father converted to Christianity in 1824. The adoption of Christianity as religion was, at that time, for many a Jew an act of progress – an act of social as well as of religious emancipation. He went to the High School at Trier from 1830 to 1835. The school was watched by the police, by reason of the liberal attitude which was adopted there. For a year, in 1835, he studied law, that is to say, jurisprudence, at Bonn. During the next year he became engaged to Jenny von Westphalen whom he was to marry in 1843. From Bonn he went to Berlin, where he continued his studies in law. There he was introduced to the philosophy of Hegel and became attached to a circle of so-called Young Hegelians. They formed the left wing of the Hegelians and their philosophy was, of course, mainly Hegelian. Undoubtedly the philosophy of Hegal and the line adopted by the Young Hegelians were of considerable importance in Marx's life. Hegelianism, if it is to be summarised briefly, is redolent of German mysticism and intellectualism. The first step is a belief in the absolute spirit and a unitary system transcending all particular and separate aspects of the whole. The whole is again subject only to one truth. There is a belief in an evolution in all reality.

This evolution again, is an evolution subject to dialectical movement in all elements, and within society this evolution consists in taking a position and then negating it: in a word, a movement to and fro leading finally to an ultimate absolute. Marx's dialectical materialism, which is the root of the communist doctrine, can be traced back to the philosophy of Hegel. That it was a philosophy which many found hard to understand and even harder to accept, led to reactions, such as that of Feuerbach, who considered the Hegelian philosophy to be nothing but a new religious belief. Feuerbach rejected Hegelism as a belief in phantoms, while he wished to have all the secrets of philosophy resolved by a contemplation of humanity and nature. This was a view that Marx could appreciate.

During his Berlin period, Marx started writing on political questions of the day in the *Rheinische Zeitung* – a paper that was to turn into an opposition paper. Because of its liberal views, it was finally suppressed by the government. Because he felt that his political views were being stifled in Germany, Marx left for Paris, where he was to publish the *Deutsch-Französische Jahrbücher*. There he stayed until 1843, when he was expelled by the government, because of pressure from the Prussian authorities. The importance of his stay in France, however, lies in the fact that he escaped from the restricted mental and intellectual atmosphere then prevailing in Germany and was introduced to, and stimulated by, the wide variety of trends in thought that were effervescing in

1 As can be expected, there is a vast literature on Marx, his works, his theories and Marxism in general. Unfortunately much of this is not available to me or is available only in translation. Among the best known works are Mehring *Karl Marx: Geschichte seines Lebens* (1918) (of which there is the English translation: *Karl Marx: The Story of his Life* (1935)); Ruhle *Karl Marx: Leben und Werk* (1928); Liebknecht *Karl Marx, zum Gedächtnis: Ein Lebensabriss* (1896); Berlin *Karl Marx: His Life and Environment* (1978); Korsch *Karl Marx* (1968).

France and came into contact with the high degree of civilisation which was only to be found in Paris. It was there that he associated with personalities such as Heine, Bakunin, Proudhon and, in particular, Engels. A life-long friendship and collaboration was born. Engels had the experience of industrial society in England and he knew all its degrading aspects. He and Marx worked together and complemented each other. One of their fairly early important joint productions was *Die Heilige Familie oder Kritik des kritischen Kritik, gegen Bruno Bauer und Konsorten* (1845).

From Paris Marx first went to Brussels and then on to London. There he stayed until his death and the most important works he produced were written there. It may be noted that Marx was a prolific writer. He even wrote poetry which deserves mention and which is of real literary merit. But life in London was a life of misery. His best years were up to about 1864. Thereafter he still read avidly but, in the declining years, produced little. His wife died in 1881 and he followed her on 1883-03-14. His best-known works are, of course, the *Manifest der Kommunistische Partei* which he and Engels drafted after the *Internationale* was established in 1848. It was written shortly before the February Revolution in Paris of the same year. Then there was his masterpiece: *Das Kapital – Kritik der politischen Ökonomie*, of which the first volume appeared in 1867, while the second volume was published by Engels after Marx's death in 1885.

To come to his personality and to sum it up in a few words: he was a man with a magnificent intellect and typically the learned German or intellectual of that time. Bakunin, also of the left, but nevertheless of a more extreme group, who was a close companion of Marx, until their relationship cooled off considerably, saw him as a Jew with all the merits and demerits of character traditionally ascribed to that race: nervous, malicious, quarrelsome, intolerant, clever, learned, and so on.[2] As for his philosophy, it can best be described by that rather obscure phrase: dialectical materialism.[3] It is founded on the premiss that man in his original state had to work to stay alive. He worked for his own welfare and for no one else's. That is then the material existence of man. In the communities, a relationship of production was created down the ages – a pattern of the material powers to produce. Thereby the economic structure of society was formed in each particular period of time. Thus the foundation of man's existence is its materialistic structure. Whereas Hegel saw history as the factor which brings the spirit into movement, Marx saw this development as depending on the economic movements: the political, legal and cultural superstructure of any specific period is built on this economic structure. In a word, political, legal or cultural facts do not exist in themselves. Mankind is aware of their existence, but it is not the mind of man that brings them about; it is the social structure

2 Cf Berlin *op cit* 80.

3 Much has, of course, been written about his philosophical and political views. To those mentioned in note 1, the following may be added: Kamenka *The Ethical Foundations of Marxism* (1972); Avineri *The Social and Political Thought of Karl Marx* (1968); Cole *The Meaning of Marxism* (1966); Coing *Grundzüge der Rechtsphilosophie* (2 Aufl 1969) 50 *et seq*; Karl Marx *Das Kapital.*

which brings them within the awareness of man.[4] Now he reasons further that history teaches that a conflict arises between the means of production (labour) and economic relationships. Within the context of history, there has always been a class struggle between the producer or worker and the owner of the means of production, that is to say the capitalist. In ancient times, it was the slave on the one hand, and the master on the other, the feudal lord against the serf; in modern times, that is to say, during his century, it was the clash between the worker or the masses against the capitalist or *bourgeois*.[5] The worker, however, is forced to produce the minimum for himself to remain alive, while the capitalist, as owner of the means of production, acquires the profit. This leads to the oppression of the masses by the capitalist who has the power to do so and uses all the means of the superstructure at his disposal to oppress the worker. The *bourgeoisie* have all the benefits of law, culture, religion, and have these as means for exploiting the worker. Such elements are, therefore, only there to support the privileged status of the *bourgeoisie*. But at some time or other the revolution has to come and upset this structure which will lead to an utopia in which there are no privileged classes or privileges, in which all will be equal and the means of production will belong as joint property to the masses.[6] But in the meantime, there is this struggle which constitutes the dialectics of materialism.

The division between *bourgeoisie* and proletariat is somewhat confused by the fact that the first word was given a further meaning, that is to say, of the well-to-do as opposed, of course, to the working class and the indigent, but also as opposed to the nobility and intellectuals. The *bourgeoisie* in this sense were not the capitalist in the ordinary sense of the word, but more in particular the priviliged class who had enough to eat and money to enjoy the good things of the earth.

Of course, the communist theory of dialectic materialism may be criticised with comparative ease. It is indeed correct that there has been, right through history, a struggle between classes, and it need not be doubted that the economic factor was important. It was, however, not the only factor, and perhaps not the most important one. The struggle was between the class or persons holding power and those who did not have it and were oppressed. In fact, the struggle frequently hardly came to the surface. In the empires of the Middle East or in Egypt of ancient times, the power was exercised by a king or similar potentate and the rest of the people were exploited to a considerable extent. The power of the ruler was, however, usually accepted as a necessity without too much resentment,

4 Coing *op cit* 51 quotes from Marx's *Zur Kritik der politischen Ökonomie*: "Es ist nich das Bewusstsein der Menschen, das ihr Sein, sondern umgekehrt ihr gesellschaftliches Sein, das ihr Bewusstsein bestimmt." Also Marx *Der achtzehnte Brumaire des Louis Bonaparte* (1946) 9: "Die Menschen machen ihre eigene Geschichte, aber sie machen sie nicht aus freien Stucken, nicht unter selbstgewählten, sondern unter unmittelbar vorgefundenen, gegebenen und überlieferten Umstanden."

5 Coing *op cit* 52 cites the following words of Marx: "Überall, wo ein Teil der Gesellschaft das Monopol der Produktionsmittel besitzt, muss der Arbeiter, frei oder unfrei, der zu seiner Selbsterhaltung notwendige Arbeitszeit überschüssige Arbeitszeit zusetzen, um die Lebensmittel für den Eigner der Produktionsmittel zu produzieren, sei dieser Eigentümer nun etruskischer Theokrat, civis romanus, normannisscher Baron, amerikanischer Sklavenhalter, walachischer Bojar, moderner Landlord oder Kapitalist."

6 For the way in which he sees it coming about cf Avinery *op cit* 204 *et seq.*

although resentment did occasionally occur and a tyrant would be removed. In Rome the nobility had the power originally and as a result the plebs even seceded from Rome. Today they would have gone on strike. But here again, the struggle was for political power and the privileges gained thereby. When the patricians had to give way and yield some of their privileges, the result was only that the *novus homo* arose out of the ranks and simply adopted the privileges of the nobility which he replaced. The same occurred in recent times when the *parvenu* or *nouveau riche* made his appearance. The economic question appeared only in the background. Perhaps the Spartacus rebellion of the gladiators in Rome may be viewed in a different light, as may some of the peasant revolts that came about later. But through the annals of history it would seem that the main bone of contention between the sovereign and the subject was the amount of power which the sovereign could hold. This struggle finally led up to the French revolution, and the cry for *liberté, égalité, fraternité* introduced the thinking which made the revolution an event of perhaps the greatest importance in the history of mankind. None the less, the liberty which was demanded was that of political freedom. On the other hand, the call for equality was directed at economic equality as well, in the sense that all citizens were equal and should not be underprivileged because of their birth. In a word, social equality was included among the ideals for which the revolution strove.

It is well known that Napoleon was the son of the revolution and he had in mind an empire covering Europe, consisting of separate states living in harmony and in which the emperor would be some sort of father figure. When nothing came of that, the fall of Napoleon meant a return to the days before the revolution. It was a movement back to square one and in France, in particular, the Bourbons came back without having learned anything or having forgotten anything. It was to be foreseen that such a return to the past would not be accepted and even in 1830 there was the July revolution which was again to replace the existing ruler by a system of government more acceptable to the people. But this was merely a beginning, and the important revolution was that of February 1848. It should be remembered that the period commencing with the July revolution coincides with the life of Marx and it is self-evident that his mind and thoughts were influenced by the events. Furthermore, the two revolutions of 1830 and of 1848 were of a political nature, but the one of 1848 was marked by the theories of social reform. And it is in that year in particular that the people came to the barricades and that a class war occurred between the worker and the indigent and the intellectual on the one hand, and the ruling class or the *bourgeoisie* on the other.[7] It was, however, a revolution for political power as well and led to the establishment, some years later, of the empire under Napoleon III. Marx expressed his disappointment with the sequel to the 1848 revolution in another well-known work *Der achtzehnte Brumaire des Louis Bonaparte*, which was written during 1851–1852.

The social trends were very strong during the period following the restoration after the downfall of Napoleon. Whether thinkers came from the extreme left, such as the anarchists who wanted to destroy the established system from top

7 Two quarters of Paris which were mainly districts inhabited by workers were isolated and practically transformed into fortresses. Two huge barricades were constructed there, the one of the *faubourg du Temple* constructed by Cournet and the other of the *faubourg Saint-Antoine* constructed by Barthélemy.

to bottom by force and who were swayed by leaders like Léon Blanc and at a later stage, Bakunin; or the communists who believed in a revolution of the existing structure of society without too much violence, when the workers would take over the means for production and abolish private property in those means and when those means became the joint property of the masses; or whether they were more moderate socialists: they had this in common, that they believed that the scourges of society were due to misery, poverty and ignorance; out of these were born the evils common to the underprivileged, such as crime, prostitution, hunger and inability to do much about it. Then there was also the intolerance of the privileged classes to the distress of the lower echelons of society.[8] The masses were induced and exhorted to revolution by the intellectuals, of whom the students formed an important section. The awareness of the evils of society go back to the philosophers of before the French revolution of 1789 and it was then that Jean-Jaques Rousseau made his famous saying that man is born free, but everywhere is in chains. The plea for political freedom was given a new meaning of social and economic liberty as well, while freedom of the mind, in the sense that the Greeks of old knew it, was part of this.

In this atmosphere, Marx and Engels strove for the equal distribution of the means of production. That would be sufficient, according to their view, for on such a foundation the other evils would disappear. The class struggle would no longer exist, nor would there be private property and mankind would enter into the final purpose of the evolution of class struggle. Marx saw the February revolution of 1848 as a great milestone in the process to the final solution. When the *Communards* took over in 1871 after the Franco-Prussian War, he considered this one of the greatest steps forward for mankind and those who fell in that struggle as the heroes and martyrs of the masses.

Marx and Engels would most probably have been extremely disappointed to know what was to become of communism in the century after Marx's death. Apart from the failed attempt to achieve communism by the *Communards* of 1871, communism only became a reality in 1917 with the October revolution in Russia. Furthermore, Marx's theories have given rise to several other modes of socialism: on the one hand militant communism, which is prepared to carry the ideals forward by force, and on the other, socialism in its manifold forms as it is to be found in so many states all over the world, to a lesser or greater degree. It is hardly necessary to mention that he could not have imagined Trotskyism, Leninism, Stalinism, the doctrine of Mao-Tse-Tung and a host of other social or communistic theories. It would seem that Marx and Engels, being typical German theorists, with their sound analysis of facts and sound reasoning for their conclusions, lost sight of one important fact, that is, human nature. Every living creature seems to want certain things, whether it is the dog which considers its drinking bowl as its, or the child who considers his toy as his, or all of us who want our own property and other benefits. The parent considers the children as his and the lover considers the beloved one as his or hers. And human beings have the drive to have power and privileges and are prepared to be predators who prey on others to get what they want.

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8 A graphic picture of society as it then was, is to be found in Victor Hugo's novel *Les Misérables*, which contains immortal characters such as Gavroche, Thenadier, Monsieur Gillenormand, Javert, who depict specific aspects of society and humanity.

Out of these socialistic ideas, the modern consumer society has developed, whereby man is forced to want more material benefits and therefore, to produce more and more to be able to consume more and more. There is a greater sharing in the means of production. Workers are urged to take up shares in the company for which they work, so that they can earn more, spend more, consume more.[9] The stress in modern society is laid on welfare and a welfare community which is materialistically orientated has been created. On the other hand[10] a reaction has also made its appearance. There are those who refuse and negate the materialism of society. They agree that what they reject is not without value, but claim that it has to be refused for that very reason. This attitude, which gave rise to the student clashes in Paris and elsewhere in 1969, is opposed to the striving for material gain, pleasure and profit; it wishes to put something in its place, but does not seem to have come forward with a feasible proposition. There is a desire for ideals and idealism, but such ideals simply do not seem to be produced. Perhaps when the human being achieves a new liberty of the mind as the Greeks of old knew it, something will arise which can be considered as a new idealism. A return to older ideals seems unlikely.

When we look at the views of Marx as far as the law is concerned, the trend has already appeared from what has been said before.[11] He looked mainly at the positive law as a superstructure built on the reality of society. The existence of a law of nature would hardly fit into such a philosophy, for the law of nature is in itself an ideal. Because society is based on dialectic materialism and the class struggle is the actual result of this, the law, in his philosophy, is nothing but an instrument of oppression. It is part of the superstructure of society created to maintain the power of the capitalist and to oppress the worker, thereby favouring the capitalist and securing him privileges which the masses do not have. It should be borne in mind that in his time the German historical schools flourished. Marx rejected their approach, for to him there is no such thing as legal history in the sense in which the legal historians saw it. There is no historical development of rules and concepts, for it is not the abstract rule which develops, but it is the reality of society and the changes within it which are reflected in the law. It is the will of the dominant class which establishes the law and, of

9 Marcuse *One Dimensional Man* (1970) 146: "This larger context of experience, this real empirical world, today is still that of the gas chambers and concentration camps, of Hiroshima and Nagasaki, of American Cadillacs and German Mercedes, of the Pentagon and the Kremlin, of the nuclear cities and the Chinese communes, of Cuba, of brainwashing and massacres. But the real empirical world is also that in which all these things are taken for granted or forgotten or repressed or unknown, in which people are free. It is a world in which the broom in the corner or the taste of something like pineapple is quite important, in which the daily comforts are perhaps the only items that make up all experience. And this second, restricted empirical universe is part of the first; the powers that rule the first also shape the restricted experience."

10 Marcuse *op cit* 255 *et seq* quotes Blanchot (*Le Refus*, in *Le 14 Juillet*, nr 2 Paris October 1958): "Ce que nous refusons n'est pas sans valeur ni sans importance. C'est bien à cause de cela que le refus est nécessaire. Il y a une raison que nous n'accepterons plus, il y a une a apparence de sagesse qui nous fait horreur, il y a une offre d'accord et de conciliation que nous n'entendrons pas. Une rupture s'est produite. Nous avons été ramenés à cette franchise qui ne tolère plus la complicité."

11 Apart from the literature referred to in notes 1 and 3, cf Wolf Paul *Marxistische Rechtstheorie als Kritik des Rechts* (1974); Phillips *Marx and Engels on Law and Laws* (1980); Schefeld *Die Rechtsphilosophie des jungen Marx von 1842* (1970); Stoyanovitch *La pensée marxiste et le droit* (1974); Stoyanovitch *Marxisme et le droit* (1964).

course, with the purpose of favouring the capitalist. He found numerous examples in the law of England, France and Germany to prove his point, whether rules dealing with child labour, working hours, trade unions. His famous example to prove his viewpoint is the so-called *Holdzdiebstahlgesetz* (the law relating to theft of firewood) passed in the Rhineland.[12] It used to be customary for the poor (the masses) to gather firewood in the Rhineland woods. This law made it a crime, namely the crime of theft, to gather such firewood. Hereby the masses were robbed of a benefit and the wealth and enjoyment of the rich were protected and favoured. In the same way he used other provisions to illustrate his points.

There is no doubt that his reasoning has its merits, but the question should be whether the law in general has the function of oppressing the masses and favouring the wealthy. It is common knowledge that the law is there to govern the relationships between individuals, but it is to be hoped that the law will be used to give to each man his due, or at least attempt to do so. If this does not happen, it is fairly obvious that the law will fail in its function to establish an orderly and peaceful society.

Marx, of course, does not believe that a philosophy of law exists, nor in a science of positive law. Law is a phenomenon of society and is but a manifestation of dialectic materialism. The right to private ownership occupies a central position in his views on the law. The fact that each person is entitled to ownership does not mean that the rights of each are the same. The privileged derive more rights from the fact that ownership exists and thereby the underprivileged are at a disadvantage. Property is at the root of diversified society and the struggle between the diverse classes must lead inevitably to the prolaterian revolution which will abolish private property and led to the establishment of collective property. Furthermore, all law is the result of the desire of the ruling class which shapes the law to its own interests and, therefore, law is a variable. It is only with the revolution that law will conform to the interests of the whole of society. Then the oppressed will take power and establish their own mode of production whereby the economic and social relationship which comes about of necessity will emerge. At that stage there is an historical advancement in the interest of everyone. A further point which emerges from the Marxist viewpoint is that state and law are one. This is so, because law is but part of the superstructure of society and society is the reality. It cannot, therefore, be said that the law is above the state or the state is above the law. Then again, as has been said before, law is there to serve the interests of the ruling class and this is so whether the law is customary, statutory or created by *ad hoc* decisions. Such would be the case even after the revolution. However, before the revolution, the law is oppressive, in the sense that the ruling class imposes its will by law upon the masses. After the revolution, however, that will no longer be the case, because then the law will represent the will of all. It must also be borne in mind that justice, as a notion in itself, does not exist. Such a notion flows from the materialistic social existence.

It is not necessary to evaluate Marx's philosophy of law. The revolution, as he saw it, has not yet arrived, even in the communist states where militant communism is the stage of development prevailing at present. Much of his theory may be admired, but it seems that he is mistaken when he believes that

12 Cf Wolf Paul *op cit* 90 *et seq* 101 *et seq.*

private property will eventually be abolished. Man is a predator and wants things. And even in present-day communist states it has been found necessary to modify his theory. It is, of course, true that law is established by those in power and in the interest of those in power. But those in power can represent society as a whole and work for the common interest. The distinction between worker and capitalist need not be so clear-cut and there need not inevitably be a class struggle.

A comparative study of the judicial attitudes of DH Botha and AF Williamson

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OPSOMMING

'n Vergelykende Studie van die Regterlike Houdings van DH Botha en AF Williamson

In hierdie artikel word 'n aantal beslissings wat tussen die jare 1962 en 1968 deur appèlregters Botha en Williamson gegee is, krities beoordeel. Daar word gepoog om die basiese uitgangspunte van dié twee appèlregters te bepaal na gelang van die persentasie "progressiewe" en "konserwatiewe" uitsprake wat deur elk van hulle gelewer is.

Die gevolgtrekking van die skrywer is dat hoewel regters 'n mate van speelruimte het om in hul beslissings aan hul persoonlike voorkeure uiting te gee, hierdie speelruimte nie oorskat moet word nie. Regters kan nie al die misstande in die samelewing uit die weg ruim of selfs 'n toonaangewende rol in die verband speel nie. Tot 'n groot hoogte is hul beslissings noodgedwonge 'n weerspieëling van die vooroordele van die gemeenskap waarbinne hulle opereer.

1 INTRODUCTION

"Show me the man and I'll show you the law." This old English proverb goes right to the heart of this proposed study. Take two "impartial"[1] judges, give them a similar set of facts, and their decisions will be unequivocal, just like the Delphic oracle. Or at least, such is the presumption regarding the judicial process. Our legal system is predicated upon the concept of judicial neutrality. To what extent is this true?

Our legal system has a strong tradition which often lends itself to conservatism. "To distrust the judiciary," wrote Honoré Balzac, "marks the beginning of the end of society." Is there any moral sense in testing whether judicial neutrality is a myth or not?[2] Three things are abundantly clear: First, honesty is almost always necessary in effecting progress. This is especially true of our judicial process. Second, examining judicial attitudes is not *per se* "distrust" of the judiciary. On the contrary, it is an indication of supreme faith because even

1 Braden's definition of "objectivity": "Where a rule has apparently the same result regardless of which judge applies it" quoted the Jerome Frank in *Courts on Trial* chapter X 155.

2 The reader is referred to Frank's *Courts on Trial* Ch X and Devlin's *The Judge* Ch I for two opposing opinions regarding this debate.

after discovering apparent tendencies, we must still submit our disputes to the judges and abide by their decisions. We still have no alternative arbitrator and so the judiciary will remain indispensable. Finally, in America where the realist tradition has become firmly rooted, it has not marked the end of society. Becoming aware of the fallacy of impartiality will not destroy our legal system. We would do well to remember Nietzsche's comment: "That which does not destroy me makes me stronger."

Two judges of the appellate division have been selected for this purpose: Botha JA and Williamson JA. Williamson served between 1962 and 1968 (when he died in office). Since Botha was a judge of appeal for a longer term, this six-year period has been analysed. This has several merits: the judges served together within the same political, economic and social framework of the 'sixties; they occasionally sat together, delivering illuminating judgments for the purposes of the study; and finally, the period is fairly recent history.

It has been presumed that judges make law, at least interstitially. This mild presumption is sufficient as a point of departure for this research.

The hypothesis underlying the study is, at least initially, that judges do have a choice, and that they can exercise it influentially. Rightly or wrongly, therefore, a judge has some measure of control in some cases before him. If he wishes to stamp a "liberal" or "conservative" mark on the case, he can often do so.

This paper does not amount to wild accusations of prejudice and bias, or at least not to conscious prejudice and bias. But it does attempt an examination of the subconscious preferences a judge might have – the so-called inarticulate premises.

The judgments which were chosen for study purposes all generally have a "political flavour." By "political" is not meant "party political", but political in the broad sense of "issues of public importance."[3] These cases were whittled down to a general study sample of 76 cases which were used to extract some statistical data. The specific study sample consists of 17 cases selected from the general study sample for closer inspection from which I have tried to draw some conclusions regarding the judicial tendencies of Williamson and Botha.

Despite the fact that the limitations inherent in such research are substantial, they do not altogether detract from its value.

2 PROBLEMS AND JUSTIFICATION

Any study of this nature faces nigh on insuperable objections, but the fact that the researcher is well aware of his limitations in this regard, and fully acknowledges the tentative nature of his conclusions should serve partially to placate those of a judicial realist inclination.

The problems may be listed as follows: first, only reported cases were used, and reported cases are not necessarily representative of all decided appellate division cases.

3 Corder *Judges at Work* 5.

Secondly, appellate division cases are not representative of judicial activity as a whole. This is for several reasons: The appellate division is the final court of the judiciary which occupies a very important position in the Westminster system, being the third element of the *trias politica*;[4] the media spotlight is often directed towards the appellate division; much judicial responsibility rests upon the appellate division because decisions which they make are binding on all other courts in the land; appeal can be very expensive, so many typical appeals never reach the appellate division; and finally, since the appellate division is the court of final appeal, much is usually at stake (large sums of money, serious criminal convictions and sentences, and so on). It should be borne in mind that the magistrates' courts deal with over 95% of judicial work, and in these cases considerable jurisdictional limits reduce the stakes being gambled.

Thirdly, it is proposed to follow the approach adopted by Corder in *Judges at Work* with regard to classifying judgments as conservative or progressive.

> "The guiding principle here is that the outcome of a case is deemed to have preserved the *status quo* if it did not disturb state authority, or the interest of the ruling group."[5]

Consequently, a decision would be liberal or progressive if it disturbed state authority or white interests. This concept of perpetuation or disturbance of the *status quo* is not without its own problems. It is possible that a judge may be liberal in the field of human rights yet conservative with regard to censorship of sexual or violent material. Also, a progressive decision in principle is not necessarily one favouring the freedom of the individual in practice although this will usually be the case.[6]

Furthermore, criminal-law cases can be hard to categorise. If the appellant is a murderer and an evidential, procedural or criminal-law principle is made more progressive, so that the murderer is discharged on what amounts to a technicality, then society must suffer the presence of a killer[7] – is this "liberal" or not? Obviously the most serious difficulty is encountered when one actually makes a decision categorising a judgment. This is highly subjective, and the researcher has been subjected mainly to white capitalist values and ideological preferences. One would do well to bear in mind the Marxist criticism of epistemology as an ideologically subjective endeavour. To assist the reader the reasons for categorisation will be supplied as far as is possible.

Fourthly, some 400 cases were decided by the appellate division in the period during which Botha and Williamson sat contemporaneously. A more scientific study would demand the reading of all 400 decisions, a knowledge of the real, non-legal issues at stake,[8] and a comprehensive knowledge, not only of the generally accepted law, but also of the different valid options available to a judge. Tax cases, patent cases and most commercial cases were completely ignored by the researcher.

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4 This is not to say that the AD is directly "politicised."

5 Corder *op cit* 221.

6 E g a progressive decision allowing the admission of certain evidence may be used to the detriment of a person charged with a "political" crime.

7 Cf *S v Naidoo* 1962 2 SA 625 (A), in which Williamson delivered the judgment.

8 E g in the case of *A Co v B Co* one would need to know that the A Co was a subsidiary of Anglo-American, and that the B Co was a small co-operative of farmers, and that the A Co were trying to squeeze the B Co out of the market.

Fifthly, as Jerome Frank has pointed out, it is the fact-finding process which is most likely to be influenced by subconscious judicial prejudice.[9] There is no record of this process in the appellate division reports. Furthermore, if there were, it might require a trained psychologist to highlight and explain judicial decisions on fact. However, appellate-division decisions are generally based on the facts of the court *a quo* which, to a degree, both minimises the issue of fact-finding and simultaneously exacerbates the problem of the uniqueness of appellate-division decisions (as opposed to the majority of judicial decisions handed down in South Africa).

It is conceded that the substantive legal knowledge required for this study escapes the researcher to a large degree. However, if study is to be done it must start somewhere. These might be humble beginnings, but it is also up to the critics to suggest more effective and empirical methods.

Certain cases do highlight judicial differences clearly, and this, ultimately, is the purpose of the article – it is an investigation into judicial tendencies.

Some statistical data have been proffered. Statistical data, being somewhat arbitrary, can usually be taken with a pinch of mathematical salt in that the general study sample is not representative of the judgments given. That Williamson dissented in 12% of the cases he was involved in and that Botha never dissented, however, is clear evidence that Williamson dissented and Botha did not. This might arguably be seen as an indication that Williamson was more single-minded and outspoken than Botha – an important judicial tendency.[10]

Thus, while this article will not reveal mathematically accurate truths, it may be valuable in that it may indicate some of the subconscious proclivities of two of our judges of appeal.

3 HISTORICAL BACKGROUND

Despite the fact that moral and political issues were generating furious debate, Muller states[11] that the sixties were marked by considerable peace and freedom from terrorism and other political opposition by dissidents.

Let us briefly consider the politico-legal developments of the 'fifties. The Suppression of Communism Act was adopted in 1950,[12] followed quickly by the Criminal Law Amendment Act[13] and the Public Safety Act,[14] both passed in 1953. In 1956 Albert Luthuli and 155 others were arrested (and finally acquitted

9 Frank is a "fact sceptic," and thus regards the fact-finding process by the judicial official as the time when inarticulate premises will play their greatest role.

10 Schmidhauser, in the 1962 *Toronto Law Journal*, found that conservative judges were more likely to write dissenting judgments than liberal judges. It is submitted that when the bench is liberal, a conservative judge will be more outspoken and in a conservative bench, a liberal judge will dissent more readily, possibly because an iconoclast is under pressure to justify his apparently deviant tendencies.

11 Muller (ed) *500 Years: South African History* (1969) ch 20.

12 44 of 1950.

13 8 of 1953. This was aimed at people who deliberately broke laws as a form of protest or resistance.

14 3 of 1953. By this act the government could declare a "state of emergency."

in 1961) and in 1959 Robert Sobukwe and the Pan Africanist Congress (PAC), an Africanist element of the African National Congress (ANC), finally broke away from the ANC.

The 'sixties opened with the notorious Sharpeville incident and the passing of the Unlawful Organizations Act,[15] and an unsuccessful attempt on the life of Verwoerd, South Africa's prime minister.

South Africa became a Republic in 1961. From this time on the National Party grew rapidly, especially as a rapport developed between English-speaking and Afrikaans-speaking whites. The Afrikaner commercial sector also expanded swiftly. Besides this, the South African military was becoming consistently more potent.

The Group Areas Act,[16] having been passed in 1957, was instrumental in effecting separate residential accommodation, while on a larger scale the Transkei assumed self-governing status in 1963.

Despite United-Nations pressure which was brought to bear on South Africa, paradoxically the period of 1963 to 1965 has been described as that of "the greatest industrial growth in the world in modern times."[17]

The year 1965 witnessed the unilateral declaration of independence by Rhodesia and a massive security clampdown in South Africa, resulting in, among many other things, Abram Fischer's life imprisonment in 1966.

The 1966 decision by the International Court of Justice favouring South Africa in the South West African cases was a turning point in South African political history.[18] In 1967 the Rhodesian "bush war" was stepped up with considerable South African involvement.

A historian described the situation in South Africa at the end of the decade in the following words:

> "South Africa's racial experiment is still at an early stage. . . Sabotage organized by forces within the Republic has virtually ceased. White and black revolutionary leaders, whether detained in prison or 'exiled' abroad, no longer play any significant part. Although the cost of living is rising rapidly, the years 1961 to 1968 have been relatively peaceful as far as racial and labour matters are concerned."[19]

4 BIOGRAPHICAL BACKGROUND

The following two extracts are from Comaroff's *Judges of the Appellate Division (1943–1970)*.

> "WILLIAMSON, Arthur Faure
>
> 1 Arbitration and award; Bailment; Banking; Carriage; Insolvency law; Partnership; Patents; Trade marks and copyrights; Suretyship. Annual survey of S.A. law: (1947) p.77
>
> 2 Patents, trade marks and copyright. Annual survey of S.A. LAW (1948) p.162
>
> Born in Johannesburg, Transvaal, 1899, Arthur Faure Williamson was educated at St. John's College and UCT., obtaining BA LLB degrees.

15 34 of 1960.
16 77 of 1957.
17 Muller *op cit* 413.
18 *ibid* 418.
19 *ibid* 417.

During World War I he served in France as officer in the City of London Regiment. From 1922 to 1940 he practised at the Cape Bar, after which he set up practice in Johannesburg. He took silk in 1944 and acted as Judge on the Transvaal Bench in 1948, 1952 and 1953. His permanent appointment was confirmed in 1954. In 1961 he was appointed Judge President of the Natal Bench and was elevated to the AD in 1963.[20] In 1952 he was Chairman of the Stock Exchange Appeal Board and Chairman of the Johannesburg Bar Council and Legal Aid Bureau.

He was a member of the SA Rugby Board and the disciplinary committee of the Transvaal Rugby and Football Union.

He died in April 1968 in his 68th year.

He was the son of an accountant who was Town Clerk of Johannesburg in the 1920's and a Labour[21] member of Parliament for Yeoville.

He married Miss Erna Templin, but later re-married. He has five sons and three daughters. One son is practising at the Bar and another as an attorney."

"BOTHA, David Hercules

Born in Oudtshoorn, Cape, November 1908, David Hercules Botha was educated at Ladybrand High School and UNISA (BA LLB). From 1940–1956 he was a law adviser to the Government. He took silk in 1949 and was appointed to the OPD Bench in 1956. He became Judge President of this Division in 1958 and was elevated to the AD in 1961. He was a member of the Law Revision Commission; of a Commission to promote SA Common Law Resources and sat as a one man Commission of enquiry into secret organisations. He was also Chairman of a Commission of enquiry into the law of Procedure and Evidence in criminal proceedings.

He is a member of the Board of Trustees for the National Museum, Bloemfontein and of the Free State Club, Bloemfontein. His recreations are tennis, gardening and reading."

5 COMPARATIVE STUDY

To be precise, 397 cases came before the appellate division in the period in which Botha and Williamson served – that is, 397 cases were reported. Botha sat in 165 of these cases and Williamson in 169. That gives us a loose average of 45% of cases each. They appeared together in about 15% of the total number of cases (59). Botha wrote judgments in approximately 30% of the cases in which he appeared, and Williamson, just under 25%.

In the general study sample, Botha concurred 100% of the time, while Williamson only concurred 88% of the time. The implications of Williamson's 12% of dissenting judgments are open to speculation. It is submitted that it indicates that Williamson was outspoken in issues which he felt warranted attention. The two judges sat together in 15 of the general study sample cases, agreed in 12 cases (80%) and disagreed in 3 (20%).

Let us now turn to the 17 specific study sample decisions. Each one in turn will be examined for evidence of an inarticulate major premise, and, more especially, evidence of either a "conservative" or a "liberal" (in the widest sense of the concepts) outlook.

The decisions have been loosely classified in one of five categories: "land occupation" (5), "administration – subject relationship" (3), "freedom of speech" (2), "police practice" (2) and "state security" (5).

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20 With respect, Williamson's first AD appearance in a reported case is that of *S v Radebe* 1962 2 SA 380 (A).

21 The Labour Party was a white exclusivist party which had supported the 1922 strike and consisted mainly of European "Uitlanders" adhering to a diluted form of socialism.

5 1 Land occupation

In chronological order, the first case is that of *S v Shangase*.[22] The appellant had been convicted in terms of the Prevention of Illegal Squatting Act[23] for disobeying an eviction notice. Without recourse to counsel, appellant raised 17 grounds of appeal and revision. What is noticeable is the patience of Williamson (Botha was not present) and his attempts to assist the appellant throughout, by entertaining all his possible grounds. However, the case appears to have been relatively clear-cut giving one little room in which to manoeuvre. Regarding the notice issued to Shangase, Williamson comments:

> "I also consider that it would be better if the notice more clearly indicated the reason for the superintendant's decision to cancel. A mere reference to sub-para (vi) of reg 7(1)(b) does not really tell the holder of a permit why he is going to lose his permit from a certain day."[24]

Because of Williamson's sympathetic attitude one might be inclined to regard the decision as "liberal." However, since the outcome had no effect on white interests it has been classified as "neither" progressive nor conservative, especially in view of the clear-cut facts.

In *S v Mapheele*[25] Botha wrote the judgment and Williamson concurred. Mapheele was legally residing in a certain area and his wife had been living (illegally) with him. She was ordered to leave in terms of section 10(4) of the Urban Areas Act.[26] The issue was whether Mrs Mapheele was "ordinarily residing" with her husband or not. If she was, she was entitled to remain with her husband in terms of section 10(1)(c) of the act. Botha placed emphasis on the dictionary definition of "ordinarily resides" saying there was a connotation of permanence. Since Mrs Mapheele's presence was unlawful and thus both punishable and terminable (section (9)(b)), it lacked any permanence. He added that appellant's interpretation of the act would result in overcrowding – an intention which could not be imputed to parliament.

However, Botha failed, with all due respect, to consider the ingenious argument of counsel for appellant,[27] or at any rate makes no mention of it. The contention was simply that if Mapheele's wife was in the area lawfully, section 10(1)(c) would be unnecessary, and, therefore, for the purposes of section 10(1)(c), unlawful residence is a logical necessity. The argument appears cogent but was perhaps too radical for its time, especially when one considers that it has only been with the *Komani* decision[28] that the courts have done away with the necessity of legal residence, although "legal entry" is still required. Consequently this decision has been classified as "conservative."

The third decision, *S v Motara*,[29] was also penned by Botha and received Williamson's concurring seal of approval. Appellant had been convicted of occupying land in a proclaimed white area in terms of the Group Areas Act,[30] after having been served an eviction notice in terms of section 30 of the act.

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22 1963 1 SA 132 (A).
23 52 of 1951.
24 145B.
25 1963 2 SA 651 (A).
26 25 of 1945.
27 652F.
28 *Komani v Bantu Affairs Administration Board, Peninsular Area* 1980 4 SA 448 (A).
29 1963 4 SA 849 (A).
30 77 of 1957.

The issue revolved around the interpretation of section 20(1) *bis* and section 20(1) *ter*, and around whether the minister needed to publish this determination of the date (of eviction of people from certain areas) in the *Government Gazette*. The arguments were somewhat technical and Botha held that the Minister's failure was not fatal to the determination.

In view of the fact that legislation depriving an individual of his rights may be interpreted strictly,[31] if a concerted progressive effort had been intended, the appeal could conceivably have been upheld. It was not, and thus it has been classified "conservative."

Fourthly, in *Lydenburg Properties v Minister of Community Development*[32] (Botha's judgment) the appellant company, which was Asiatic, claimed R35 000 for building improvements to property which had been forfeited to the state (in terms of the Group Areas Act). Botha rejected the claim, and in so doing applied the most obvious legal reasoning. Admittedly he had very little room to move in (although more than in *Shangase's* case) but it would not have been impossible to have interpreted section 37 of the Group Areas Act differently and to have found otherwise, especially in view of the amount forfeited to the state.[33] Such a severe deprivation of rights surely also warrants a strict interpretation. This, too, has been classified "conservative."

The final "land occupation" case was also decided by Botha. In *S v King*[34] the appellant, a "Chinaman," had been evicted for remaining in a proclaimed area. He attacked the conviction on grounds similar to those in *Motara's* case. His final contention was rejected by Botha who stated that the governor-general was not obliged, in the exercise of his discretion, to check whether there was sufficient accommodation available for Chinese people elsewhere. The "reasonableness" of the exercise of a discretion has been a bitter bone of contention. The cases give little leadership. Consequently, as Wiechers points out,[35] there was room to manoeuvre. Wiechers quotes with approval *S v Variawa*,[36] a later case, in which it was held that similar action to that in *King's* case amounted to an "improper and most unreasonable exercise of his discretion." This approach appears to have been open to one intent on a concerted liberal approach. This case has been classified as "conservative."

5 2 Administration – subject relationship

The first case to be considered here is that of *Springs Town Council v Soonah*.[37] It concerned an application for a hawking licence. In the court *a quo* the appellant had been ordered to issue such a licence to Soonah. The court was divided – Steyn CJ (with Botha and Wessels concurring and Williamson con-

31 Steyn *Die Uitleg van Wette* (1981) 267.
32 1964 2 SA 729 (A).
33 In *Principal Immigration Officer v Hawabu* 1936 AD 26 31, the court said that there is "an exceptional class of extreme cases in which Courts have felt themselves bound to 'modify' or 'cut down' or 'vary' the words used by the legislature where it might lead to absurdity or a result contrary to Parliament's intention." In *Storm v Durban Municipality* 1929 AD 49 55, De Villiers, JA describes it as "amputation rather than interpretation." This principle could have been applied here in view of this denial of a common-law right to compensation.
34 1966 1 SA 500 (A).
35 Wiechers *Administratiefreg* (1984) 280.
36 1968 1 SA 711 (T).
37 1963 1 SA 569 (A).

curring in a separate judgment) dismissed appellant's appeal. Rumpff, dissenting, indicated a more "executive-minded" approach. If either Botha or Williamson had wished to decide "conservatively" they could have followed Rumpff, whose judgment indicated the possibility of such an approach *in casu*. Both Botha and Williamson evinced a "progressive" outlook here.

Williamson handed down the second decision in this field, *Minister of Justice v Khoza*.[38] Khoza and a fellow constable, one Schoeman, had been guarding prisoners when Schoeman shot Khoza in a "display of bravado and puerile mentality." Khoza claimed compensation in terms of section 7 of the Workmen's Compensation Act[39] for "an accident arising out of and in the course of a workman's employment and resulting in a personal injury."[40] Williamson, in a separate concurring judgment, held that Khoza was entitled to such compensation. This is seen as a "progressive" judgment.

Pretoria City Council v Modimola[41] is the final judgment which falls to be considered here. Modimola's property had been expropriated by the Pretoria city council. The issue was whether, in the case of expropriation, a party has the right of *audi alteram partem*. In his concurring separate judgment, Botha stated unequivocally:

> "An owner of property about to be expropriated under s 24(1)(a) has no right to be heard prior to service upon him of the notice of expropriation."[42]

His reasons, briefly stated, were that expropriation affected everyone in the area, and thus there was no room for an individual hearing; expropriation was in favour of the community as a whole; and finally, while there were indeed indications of an implied *audi alteram partem* rule in section 24(1)(a), expropriation was not a quasi-judicial act. The judge said that no cases could be found by him to show that the *audi alteram partem* rule applied in the case of expropriation. This gives the impression of a relatively clear-cut case. However, in the court *a quo* Bekker J of the Transvaal provincial division had been moved to uphold Modimola's contentions. Furthermore, Wiechers fiercely denies that expropriation is "a purely administrative act"[43] and goes on to say how the decision should have been made[44] – in favour of Modimola. Hence the option was clearly open to Botha to adopt a liberal stand. Once again this has been classified as "conservative."

5 3 Freedom of speech

S v Hjul[45] concerns the Transkeian Proclamation 400 of 1960(c). Section 11(a) prohibits the publication of any written statement "intended to or likely to" subvert the authority of, *inter alia*, a headman. Apparently an article entitled

38 1966 1 SA 410 (A).
39 30 of 1941.
40 S 2.
41 1966 3 SA 250 (A).
42 264.
43 Wiechers *op cit* 151.
44 *ibid* 152.
45 1963 3 SA 647 (A).

"Home Guard Terror" claimed that a certain headman had terrorised people into protecting him. Appellant had argued that section 11(a) could not have been intended to prevent the publication of public grievances, an act which was in the public interest. The acts of terror had been shown by the state to be unsubstantiated. Botha, in dismissing the appeal, concluded tersely: "The dissemination of untruths can never be in the public interest."[46] On the facts, this case can only be categorized as neither conservative nor progressive.

Publications Control Board v William Heinemann[47] proved a far more contentious decision. It concerned the banning of Wilbur Smith's *When The Lion Feeds*. The majority of the split court held that the novel offended against morality to the degree that it should be banned. The dissenting minority consisted of Rumpff and Williamson. Williamson's attitude was clear:

> "Some may think it [the novel] unduly crude, or in parts over robust or even in bad taste, but that would not mean it was necessarily obscene or harmful or offensive to public morals."[48]

Ellison Kahn[49] approved of Rumpff's attitude of *in dubio pro libello*, and criticised the decision of the majority of the court. Clearly, Williamson's approach was "progressive," in view of the "conservative" option available.

In regard to this decision, it is notable that Williamson makes some illuminating remarks about the judicial realist philosophy. Perhaps made unwittingly, they are reminiscent of the likes of Jerome Frank and Benjamin Cardozo as they shed some frank light on the nature of the judicial process:

> "The decision can seldom if ever be entirely objective; it may often depend upon the background, the character, the surroundings, the experiences and the beliefs of the individual Judge or Judges dealing with the matter... That conclusion may be based upon different facts or factors altogether from those which induced the lower Court to issue the order it made; the outlook, background, philosophy of life and experience of the majority of the members of this Court may so differ from that of the Judge or Judges who decided the matter in the lower Court that their respective subjective approach as to the factual problems... may be entirely different."[50]

This approach resulted in Williamson's disagreeing with the chief justice regarding the necessity of evidence to determine the state of South African morals. Steyn said such evidence was unnecessary. However, Williamson points out [51] that judges lead an insular life, often far removed from moral reality, and that he would welcome and encourage some reliable evidence of such changes in moral standards. This is a remarkably open-minded attitude, and has therefore been classified as "progressive."

5 4 Police practice

The first case here is *S v Cele*,[52] a Williamson judgment. For the present purposes the issues in the case are of little interest. At the end of his judgment, however,

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46 656A.
47 1965 4 SA 137 (A).
48 164E.
49 "*When the Lion Feeds* – and the Censor Pounces: A Disquisition on the Banning of Immoral Publications in South Africa" 1966 *SALJ* 278.
50 163F–H.
51 164 165.
52 1965 1 SA 82 (A).

the judge refers to a vicious assault on the accused which had led to his hospitalisation. It had happened after the relevant confessions and identifications had been made by the accused. Williamson criticised the Court *a quo* for not acting on this:

> "A judicial officer can never close his eyes to the gravity of the fact that a prisoner has been assaulted whilst in the custody of the police ... There was strong independent corroborative evidence of the fact of such an assault. In such a case, it seems to me, a judicial officer, if he is not called upon himself to investigate the matter, or cannot do so, should cause some investigation to be officially initiated. . ."[53]

The registrar was then directed to inform the attorney-general for his attention. This too, has been classified as a "progressive" decision.

The second case, *S v Mkwanazi*,[54] was an appeal by a convicted robber. The decision itself is irrelevant[55] for our purposes, but as in *Cele's* case, *supra*, Williamson considered *mero motu* the effect of a prolonged police interrogation. He said it could undoubtedly affect the prisoner's state of mind. Williamson concluded that since the appellant had not even raised the issue, "there is really no basis for saying that the interrogation, however protracted, might have unduly influenced him."[56] Since there was no real "outcome" of this judgment it has been classified as "neutral." That does not mean that it is without value, since it clearly indicates Williamson's sympathetic proclivities towards the accused.

5 5 State security

S v Arenstein[57] is the first case under this section. Botha gave the judgment and Williamson concurred. Arenstein had been served with a notice in terms of the Suppression of Communism Act[58] and was thereby obliged to report daily to a local police station. He had been convicted for non-compliance and he then appealed, his defence being that he had forgotten to report. Botha said that *mens rea* was a requirement of the crime, and because the notice demanded a strict duty of circumspection, failure to comply because of forgetfulness constituted *mens rea*. This decision appears to be "conservative." Could Botha have taken a more liberal stance? Because of the wide ambit of the act there was little latitude available to Botha. Therefore this has been classified as "neither" conservative nor progressive.

The second case, *S v Jassat*,[59] was very similar to the previous case, except that appellant sought to distinguish it from *Arenstein's* case in that he was a medical doctor (Arenstein was a lawyer) working a fifteen-hour day with life-and-death cases. While Arenstein had taken no precautions, appellant had a big notice in his practice and had asked both his secretary and mother to remind him. Furthermore, he only had to report weekly which made it more difficult to remember. Williamson dismissed the appeal, following *Arenstein*. It is submitted that Williamson could have upheld the appeal by distinguishing *Arenstein* – formulated more moderately, there does appear to be such an option. In the

53 100A–B.
54 1966 1 SA 736 (A).
55 The decision was irrelevant as it did not concern a "political" issue, but a relatively straightforward appeal against a robbery conviction.
56 747A.
57 1964 1 SA 361 (A).
58 44 of 1950.
59 1965 3 SA 423 (A).

judgment there is none of Williamson's characteristic sympathy either. Consequently, with some deliberation, this has been classified "conservative."

S v Nathie[60] has been placed in the "progressive" category. Appellant, a banned person in terms of section 9(1) of the Suppression of Communism Act, had been visited by his brother and a friend to conclude some minor arrangements for the marriage of appellant's daughter. The legislation is draconian – a "gathering" for a "common purpose," whether illegal or not, is prohibited (section 1(1) of the act). In his judgment (Botha concurring) Williamson held that an element of "common purpose" is "concerted action." On the facts no concerted action was espoused by the parties concerned and the appeal was upheld. Obviously, someone with a very "conservative" outlook could have interpreted the legislation differently.

As in the wedding feast at Cana, where the best wine was served last, the most decisive cases of this study will now be considered. They exemplify two starkly contrasting judicial "styles" because both Botha and Williamson sat in the cases, and both disagreed with each other over very "political" issues. These two notorious cases are *Schermbrucker v Klindt*[61] and *SA Defence and Aid Fund v Minister of Justice.*[62]

Schermbrucker's case concerned the jurisdiction of the appellate division over a person detained under section 17 of Act 37 of 1963, the "90-day detention" provision. The crisp issue to be decided was whether the court could order such a detainee to appear before it for the purpose of giving oral evidence. The majority judgment, based on the "strained construction" rule (in favour of state security) and *Roussouw v Sachs*,[63] said that the court had no such jurisdiction. Botha concluded his chilling judgment with the following words:

> "Compliance by a detainee with an order requiring his personal attendance in a Court would result in an interruption of his detention and interrogation designed to induce him to speak."[64]

Williamson, dissenting, counters:

> "I find myself unable to gather from the section in question, as a necessary implication from its terms and from the circumstances giving rise thereto, an object or intention on the part of the legislature to place in the hands of the police a method of 'inducing' detainees 'to speak.' "[65]

On the contrary, the provisions are to effect "an isolation of the detainee until the interrogation is satisfactorily completed."[66] Both Williamson and Rumpff felt that the legislative purpose discovered in *Roussouw v Sachs* was incorrect.[67] Williamson also indicated that the court could ensure that the purpose of the

60 1966 2 SA 291 (A).
61 1965 4 SA 606 (A).
62 1967 1 SA 263 (A).
63 1964 2 SA 551 (A).
64 619.
65 620.
66 621.
67 Williamson, at 621: "With an alternative possible object or purpose such as I have suggested clearly inferable, it was, in my view, unnecessary, and I think respectfully, manifestly wrong in modern times to impute the extraordinary and unprecedented intention to Parliament of legalizing a system of compelling persons to speak. There is nothing to prevent Parliament from doing that if it decides so to do; but at least one would expect to find such intention disclosed with far greater clarity."

provision was fulfilled and still apply Supreme Court Rule 9 (concerning *viva voce* evidence).

There is no doubt here that clear paths could be found to either a "conservative" or "progressive" decision. The case lent itself to "political" preference. Botha is clearly "conservative" and Williamson, "progressive."

The polarisation of the two judges was not a "one-off" coincidence. In *SA Defence and Aid Fund v Minister of Justice* the two judges of appeal once again expressed the same attitudes as in *Schermbrucker's* case. The South African Defence and Aid Fund had been banned in terms of section 2(2) of the Suppression of Communism Act. The SADAF appealed, contending that, since the *audi alteram partem* principle had been ignored in this quasi-judicial act, the act was invalid. Botha, in dismissing the appeal, distinguished three steps in the banning process – a fact-finding committee was appointed by the minister; he considered the committee's report along with any information of his own; the State President then considered the facts and made a decision (the SADAF only requested a hearing before the fact-finding committee). In his majority judgment, Botha held:

> "The question whether Parliament has in any particular case either expressly or by clear implication excluded the incorporation of the maxim *audi alteram partem* can only arise where, upon the true construction of the enactment concerned, the incorporation of the maxim is implied, for, where it cannot be implied, there is obviously no need to exclude it. The first question to be determined must, therefore, always be whether the enactment concerned impliedly incorporates the maxim."[68]

This was the case only where the decision affected the rights of another. This was apparently not the case here because no direct causal link existed between the fact-finding committee's work and the decision of the state president.

Williamson, dissenting, adopted *R v Ngwevela*[69] as his point of departure and maintained that the maxim applied unless expressly excluded. Furthermore, although the bodies in the tripartite process are separate, this does not mean that there is no causal relationship between them. Thus the SADAF should be allowed to exercise their *audi alteram partem* right and submit a report to the fact-finding committee.

Wiechers expresses his disappointment in the appellate division for reversing an important jurisprudential trend. In his submission the logic of Botha's judgment is "moeilik om te begryp"[70] and constituted " 'n eng en gefragmenteerde siening."[71] He proceeds to outline a "progressive" argument which he feels the court should have followed.

The nature of the division of the appellate division and the criticism levelled at the majority decision indicates that such a "progressive" move would have been quite justifiable. Thus, once again, the case elicted a clear stand on policy.

6 JUDICIAL TENDENCIES REVEALED?

The above is by no means a rhetorical question – it merely emphasises the tentative nature of the assessment of the tendencies of the two judges in question.

The table displayed here attempts to assess judicial performance in terms of "conservative" and "progressive."[72]

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68 270.
69 1954 1 SA 123 (A).
70 Wiechers *op cit* 252.
71 *ibid* 253.
72 Corder *op cit* 227–231.

SPECIFIC STUDY SAMPLE (17)	BOTHA, JA	WILLIAMSON, JA
JUDGMENTS OR APPEARANCES	11	13
'PROGRESSIVE'	2 (18%)	7 (54%)
'CONSERVATIVE'	7 (64%)	3 (23%)
'NEITHER'	2 (18%)	3 (23%)

It is thus submitted that Williamson was a more enlightened individual than Botha, who displayed distinct "executive-mindedness."

Why is this so? Looking at Williamson's background it is noticeable that he had wide interests, from rugby to the stock exchange. He had obviously travelled (having fought in the Great War 1914–1918). One might wish to speculate that Botha, having not been involved in the Great War, was more patriotic and devoted to the new republican government, and hence appeared more conservative. His interests seem to be more insular. However, one should not forget that Botha was the chief state law adviser and had appeared in the International Court of Justice and the United Nations. This could either be seen as an indication that Botha, too, was internationally "wise", or that, having to argue the Union's case, he was influenced in a conservative manner.

Clearly the above speculation is very stretched. It affords some insight to the reader in that it highlights the difficulty of looking for explanations which might not exist and, more especially, the danger and ease of forcing facts to fit a theoretical speculation.

Williamson was of English extraction while Botha was Afrikaans-speaking. The difference in languages proves very little as only two judges have been studied, and the possibility of coincidence is not remote.

One thing is noticeable, and that is that Williamson sat in numerous reported cases on evidence and procedural issues, and usually delivered the judgments.[73] Once again, on a speculative note, one might wish to conclude that Williamson, being a more outspoken, progressive person, was mostly called upon to write the judgments of cases concerning issues not of substantive law. This, however, would be an incorrect analysis because human rights and other safeguards for the individual are more commonly procedural rights (especially in South Africa, where we only honour a procedural rule of law).

If we look at the "state security" cases briefly, some comments are in order. Remembering Williamson's sympathetic attitude in most other cases, *Jassat's* case provides an anomaly. Possibly there was no way out for Williamson, or possibly he felt strongly that once banned, one had to suffer the inconveniences inflicted by the state. In view of *Schermbrucker's* case, the latter possibility appears unlikely. The former possibility will be considered shortly.

73 E g the well-known cases of *S v Qolo* 1965 1 SA 174 (A), and *S v Fuge* 1966 4 SA 565 (A).

Botha's "conservative" approach appears clearly from the cases, especially in those of *Schermbrucker* and *SADAF*. Why he chose the reasoning and approach that he did in the *SADAF* case is unclear, especially in view of his presumably wide knowledge of the common law.

7 THE JUDICIARY – PLACEBO OR PANACEA?

The question whether the judges have a choice or not now demands consideration. At the outset the researcher had embarked with a healthy optimism, intending to disprove the conclusions of Corder that the judges have little or no choice.

Slowly, through looking at the cases and "playing judge" this optimism has diminished. Of the reasons proffered by Corder in his "Postscript,"[74] the fourth, namely the ideological role of the legal system, has, it is submitted, proved most conclusive for the researcher.[75]

While the judges definitely do have some choice (because of the dissenting judgments in various cases, this is the inevitable conclusion), it is of such a limited scope that the expectations of those "liberals" for strong judicial leadership are very hollow.

Besides, if one recalls the comments made regarding *Mapheele's* decision about the proposed "progressive" solution possibly being too radical,[76] especially in the light of *Komani's* case, the whole duty of the judiciary arises. Should the judiciary lead a society's morals or not? Is not a judiciary which makes decisions disagreeable to society (here, read: "white society") acting undemocratically?

While it appears that the judiciary has little choice, it is imperative to note that this does not serve to exculpate the judiciary. It merely points out their limited role. Liberal energies should be directed elsewhere.

The judiciary still plays an important role, and since our parliament enjoys sovereignty the judiciary has more pressure on it than if parliament was a democratically elected body, because as Jaffe puts it, the court is the only refuge for minorities[77] (here, read: "unrepresented majorities"). However, it is absurd to expect a small group of men to remedy the wrongs in South African society.

A society deserves the judiciary it gets – you cannot have a healthy judiciary in an ailing society . . .

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74 Corder *op cit* 242–245.

75 Cf Raymond Suttner's unpublished essay "The Ideological Role of the Judiciary in South Africa."

76 11 *supra.*

77 Jaffe *English and American Judges as Lawmakers* chapter II "The Democratic Character of Judicial Lawmaking."

Ignorance or mistake of law as a defence in criminal law*

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OPSOMMING

Regsonkunde of Regsdwaling as 'n Verweer in die Strafreg

Ten spyte van die jarelange erkenning van die *ignorantia iuris*-reël, het regsonkunde steeds endemies in ons samelewing gebly. Dit is eintlik eienaardig, aangesien reg so 'n fundamentele rol in 'n geordende samelewing speel. Voorts was hierdie reël teenstrydig met die *nulla poena sine culpa*-beginsel en die *mens rea*-begrip; en veral met die skuldvorm *dolus* wat wederregtelikheidsbewussyn vereis. As regverdiging vir die reël is aangevoer dat dit in stryd met die sosiale beleid sou wees om regsonkunde as 'n verweer toe te laat aangesien die erkenning van so 'n verweer die oortreding van die reg sonder straf as't ware sou aanmoedig.

Tog het die regverdiging vir die omgekeerde standpunt, naamlik dat regsonkunde wel 'n verweer behoort te wees, sterker geword, aangesien regsonkunde eerder toe as afgeneem het.

Hierdie reël was ook onvanpas in ons heterogene samelewing waarin 'n aansienlike persentasie mense ongeletterd is. Dit het dikwels daartoe gelei dat daar 'n gaping geskep is tussen die reg en die gewone mens, veral in gevalle waar onskadelike gedrag gekriminaliseer is.

In die *De Blom*-saak is hierdie reël deur die appèlhof opgehef as synde teenstrydig met die moderne siening omtrent *mens rea*. Gevolglik is regsonkunde, net soos feitelike onkunde, deesdae 'n volledige verweer, of sodanige onkunde redelik is of nie, met die voorbehoud dat dit eg moet wees.

Sommige akademici is ongelukkig omtrent die trefwydte van hierdie verweer omdat dit die oortreder 'n *carte blanche* mag gee en omdat dit gedrag wat tot dusver strafbaar was, weens bewysprobleme prakties buite die bereik van die strafreg plaas. Om hierdie rede staan hulle die gebruik van 'n redelikheidstoets voor.

Die vrese van diesulkes is ongegrond. Die uitspraak in *De Blom* stem ooreen met ons praktiese werklikheid. Voorts, in 'n aantal sake na *De Blom*, het die verweer nie sonder meer tot vryspraak gelei nie en gevolglik ook nie tot die algehele ineenstorting van ons regstelsel nie. Alhoewel die praktiese toepassing van die verweer probleme mag oplewer, lyk dit nie asof daar rede bestaan om dit uit beleidsoorwegings af te keur nie.

Deur hierdie verweer te steun, praat 'n mens nie regsonkunde goed nie. Die verweer is eenvoudig op praktiese oorwegings gegrond. Regsonkunde behoort verminder te word deur middel van die behoorlike opvoeding van die publiek in regsaangeleenthede. In hierdie verband kan universiteite 'n betekenisvolle rol vervul.

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* This is an adapted version of the writer's inaugural lecture delivered on 1985-05-09 at the University of Zululand in acceptance of the chair in Criminal and Procedural Law.

1 INTRODUCTION

To hold a discourse on ignorance or mistake of law as a defence in criminal law might at first sight appear to be flogging a dead horse[1] or to be patently unwarranted in the light of recent developments in our law.[2] Yet despite these developments, academic lawyers still continue to differ about the appropriateness of the defence of ignorance of law in criminal law.[3] But ignorance of the law is still with us. In 1780 Dunning had the following to say: "Ignorance of the law has increased, is increasing and ought to be diminished."[4]

It is rather paradoxical that law is a fundamental part of organised society, and yet for many remains a mystery deemed to be concerned only with the doings of evildoers, whereas it is part of the warp and woof of normal society.[5] This is a price we have to pay for living in a specialised society.

Ignorance of law often results in society's disillusionment with the administration of justice. Roscoe Pound[6] once observed:

> "As long as there have been laws and lawyers, conscientious and well-meaning men have believed that laws were mere technicalities and that the attempt to regulate the relations of mankind in accordance with them resulted largely in injustice."

A feeling of injustice resulting from the application of the law is detrimental to society's respect for law. This is particularly so in the field of criminal law where society's extreme sanction, namely punishment, is employed in the event of the breach of a criminal provision.

Abysmal ignorance of law is endemic both here[7] and abroad.[8] Educated and uneducated, black and white, rich and poor, are, in varying degrees, ignorant of

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1 Much has been written on the subject. See *inter alia* Davies "Ignorantia Iuris Non Excusat in Criminal Law" 1965 *Responsa Meridiana* 7 *et seq*; Van der Vyver "Wederregtelikheidsbewussyn by Strafregtelike Aanspreeklikheid" 1967 *THRHR* 4; Snyman "Die Verweer van Regsdwaling by Opsetsmisdade: 'n Regsvergelykende Studie" 1967 *Responsa Meridiana* 131 *et seq*; Gordon *Criminal Law* (1967) 286 *et seq*; Smith and Hogan *Criminal Law* (1973) 54 *et seq*; Van Rooyen "Regsdwaling en Dolus in die Strafreg" 1974 *THRHR* 18 *et seq*; Bertelsmann "The Essence of Mens Rea" 1974 *THRHR* 34 *et seq*; De Wet and Swanepoel *Strafreg* 3ed (1975) 146 *et seq*; Botha "Mens Rea in the Form of Culpa Founded Upon Ignorance of Law" 1975 *SALJ* 280; Botha "Verwytbare Regsonkunde en die Skuldsoort Culpa" 1975 *THRHR* 41 *et seq*; Rabie "Wederregtelikheidsbewussyn en die Reël Ignorantia Iuris Neminem Excusat in die Strafreg" 1977 *De Jure* 4 *et seq*; Stassen 1977 *TSAR* 259; Slome "Mens Rea and Knowledge of Unlawfulness in Statutory Offences" 1977 *SALJ* 86 *et seq*; Joubert (ed) *The Law of South Africa* vol 6 (1981) par 97; Kok "Skuldmetamorfose: De Blom, Dladla en Chretien" 1982 *SACC* 27 *et seq*; Whiting "Changing the Face of Mens Rea" 1978 *SALJ* 1 *et seq*; Leistner "Bewys van Wederregtelikheidsbewussyn: De Blom en Daarna" 1982 *De Jure* 34 *et seq*; Burchell and Hunt *South African Criminal Law and Procedure* vol 1 2 ed (1983) by Burchell, Hunt and Milton 160 *et seq*; Ashworth "Excusable Mistake of Law" 1974 *Criminal Law Review* 652 *et seq*; Turpin "Defence of Mistake of Law" 1978 *Cambridge Law Journal* 8 *et seq*; Matthews "Ignorance of the Law is No Excuse?" 1983 *Legal Studies* 174 *et seq*; Snyman *Criminal Law* (1984) 172 *et seq*.

2 *De Blom* 1977 3 SA 513 (A); see also Snyman 177; Burchell and Hunt 163 *et seq*.

3 See Snyman 178; Whiting 5 *et seq*; Stassen 261 *et seq*; cf Burchell and Hunt 164 *et seq*.

4 In a motion to the House of Commons cited by Furmston "Ignorance of the Law" 1981 *Legal Studies* 55.

5 Hahlo and Kahn *The South African Legal System and its Background* (1968) 1.

6 "The Causes of Popular Dissatisfaction with the Administration of Justice" in Glueck (ed) *Roscoe Pound and Criminal Justice* (1965) 57–58.

7 On ignorance in South Africa see Robertson "Popularization of Law" 1982 *CILSA* 1 *et seq*.

8 On the position in Britain see Furmston 37 *et seq*.

the law. Because ignorance and poverty often go together, most of the poor are ignorant; these are the people who are easily overreached. Worse still: not only laymen, but lawyers as well, manifest ignorance of the law to a greater or lesser extent.[9] A lawyer's ignorance of law may have disastrous results.[10]

A lawyer who intimates that lawyers are ignorant of the law may be accused of disloyalty to his colleagues. Alternatively, it may be argued that lawyers do not need to walk around with a knowledge of law in their heads; they only need to know where to find the law.[11] Although there may be truth in this, as Furmston points out,

> "it is certainly not the whole truth since often one needs to know quite a lot of law to know that one needs to know where to look it up."[12]

Yet one must admit that it is virtually impossible for any lawyer to acquire the knowledge of all law, whether written or unwritten. In the words of Beadle CJ:

> "It is ludicrous to suggest that even a lawyer with an encyclopaedic mind could learn the vast body of statute law."[13]

There is a plethora of acts and regulations which govern our lives. Moreover, there is often no effective communication of the legal message.[14] Even courts experience problems of interpretation, and sometimes give conflicting decisions in cases with similar facts. A decision of a lower court may be reversed on appeal, and judges of appeal also differ in their interpretation and application of the law. Occasionally the appellate division may discover that a previous decision was wrongly decided and deviate from it. For this reason it is difficult to know what the law is on certain points. Because of the complexity of some of the laws, it would be unrealistic to expect a layman to know all this.[15] Similar sentiments were aptly articulated by Van Heerden JA in *Oos-Randse Administrasieraad v Rikhoto*.[16]

In the light of the above, it might sound incongruous that the rule *ignorantia iuris neminem excusat* applied for such a long time in our law. The position was radically altered by the appellate division in *De Blom's* case in 1977.[17] None the less, it would be conducive to a better understanding of the effect of this judgment if the pre-1977 era were examined as well. The aim of this lecture is to demonstrate (i) that the *ignorantia iuris* rule was misconceived; (ii) that the decision of the *De Blom* case is in accord with modern realities; and (iii) that with proper care the new approach will not necessarily lead to the opening of the floodgates to the success of defences of ignorance of law, thus bringing about the collapse of the legal order. Before I examine the new approach, it is essential to make certain preliminary distinctions.

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9 Furmston 37 *et seq*; Robertson 14 *et seq*.
10 See *Colgate Palmolive* 1971 2 SA 149 (T).
11 Redgment *The Law Student's Companion* (1984) 1.
12 Furmston 45–46.
13 *Zemura* 1974 1 SA 584 (RA) 595.
14 Allott *The Limits of Law* (1980) 10,73; Robertson 7–8.
15 Snyman (1984) 175; Rabie 15.
16 1983 3 SA 595 (A) 610.
17 *De Blom supra*.

2 PRELIMINARY DISTINCTIONS

2 1 Ignorance and mistake of law

Although ignorance and mistake of law are often used as synonyms, they differ in principle. Ignorance implies lack of appropriate knowledge whereas mistake implies the presence of knowledge which is inaccurate. This inaccurate knowledge therefore amounts to a form of ignorance.[18] It has been suggested that the distinction between ignorance and mistake of law is misleading because it seeks to emphasise the nature of the ignorance or mistake rather than its impact. This has given rise to a mistaken impression that once an accused is mistaken as to the law or a legal aspect he is mistaken as to the unlawful nature of his conduct. This is not so. Ignorance or mistake of law should not be equated with ignorance or mistake as to the unlawfulness of the accused's conduct.[19] If the traditional distinction is used in the subsequent discussion, it will be for purposes of convenience.

2 2 Mistake of law and mistake of fact

Courts distinguish between mistake of law and mistake of fact. Whereas a mistake of fact has always been regarded as an excuse, a mistake of law has not.[20] The dichotomy is between fact and value, between "is" and "ought." Facts are regarded as objectively perceptible; values are not, since they exist in the mind of a person. It is, however, not always easy to distinguish between law and fact.[21] Thus a mistake of law may at the same time be a mistake of fact. Moreover, to differentiate between mistake of fact and mistake of law is a sterile exercise, because it often creates the wrong impression that as long as a mistake concerns any fact, it will exclude intention. It is only a mistake as to an essential fact that has that effect, i e a mistake as to the facts relating either to the element contained in the description of the prohibition or to the unlawfulness of the accused's conduct. Thus it is preferable to eschew this distinction and to refer to a mistake which concerns an element of the definition of the proscription.[22]

2 3 Ignorance of law and presumption of ignorance

It is necessary to distinguish between the rule that "ignorance of the law is no excuse" and the other rule which postulates that "everybody is presumed to know the law." Although they are often used interchangeably, they are not synonymous. That everybody is presumed to know the law means something entirely different from the rule that ignorance is no excuse. "Ignorantia" means that people may be ignorant, but that this is no excuse. The "everybody" maxim means that you know the law (unless the contrary appears) and it can therefore be inferred, where there has been a breach of the law, that you deliberately flaunted it. This is contrary to the presumption of innocence which pervades

18 Davies 7; Burchell and Hunt 168; Rabie 12; Snyman 172; Matthews 179; Williams 151–152.
19 Rabie "Aspects of the Distinction between Ignorance or Mistake of Fact and Ignorance or Mistake of Law in Criminal Law" 1985 *THRHR* 334–335.
20 Burchell and Hunt 172 *et seq*; Matthews 176.
21 Davies 8; Matthews 176–178; Gordon 293.
22 Rabie 1985 *THRHR* 333–334.

our law. Of course, the presumption that everybody knows the law was rejected in our law long before the demise of the *ignorantia* rule.[23]

Before I deal with the position in South African law, it will be appropriate to give a brief comparative survey describing the origin of this rule and touching on the competing concepts of *mens rea* that vie with each other for supremacy in South African legal theory.

3 COMPARATIVE SURVEY

3 1 Roman Law

There is diversity of opinion on the application of the *ignorantia iuris* rule in Roman criminal law. According to Snyman[24] ignorance of the law was no excuse because the law was regarded as both known and certain. Only certain categories of persons, such as women, minors and members of the farming community, were excluded.

Other authors, among them De Wet and Swanepoel[25] and Van Rooyen,[26] are of the view that this was not necessarily so. According to them, ignorance of law was an excuse in Roman criminal law. Although certain classes are traditionally regarded as the only persons exempted, a proper construction of the texts demonstrates that this was merely a rule of evidence, women and minors being easily believed if they raised the defence of ignorance of the law. It by no means implied, however, that other classes of persons could never plead ignorance of the law. Any passages in the *Digest* or *Code* to the contrary may be considered either as interpolated or as relating to private law.

Snyman,[27] on the other hand, correctly contends that although Roman law did distinguish between public law and private law, certain crimes such as theft, robbery and damage to property were regarded as delicts, so that it would not be possible to draw a clear-cut line between private law and public law. Yet this argument could lend some support to the view that the *ignorantia iuris* rule did not apply in Roman criminal law, because some modern crimes were then regarded as delicts. The ambit of the criminal law was therefore more limited.

What is clear is that even if the *ignorantia iuris* principle did apply, it applied in respect of the *ius civile* and not in respect of the *ius gentium*; everyone was, by virtue of the individual's inborn sense of justice, presumed to know the *ius gentium*. But even if ignorance of law was indeed an excuse in Roman law, such ignorance might have been justified in the light of the type of society, the nature

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23 *Evans v Bartlam* 1937 AC 473 479; *Tighy v Putter* 1949 1 SA 1087 (T); *Arundel Mansions (Pty) Ltd v Hendry* 1969 3 SA 576 (T).

24 Snyman (1967) 131–132; Snyman (1984) 173. The author relies on *D* 22 6 2: "In omni parte, error in iure non eodem loco quo facti ignorantia haberi debebit quum ius finitum et possit esse debeat." Cf also *D* 22 6 9 pr: "Regula est iuris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere."

25 149. According to Snyman 173 n 93, De Wet and Swanepoel rely on Mommsen 86–87 in support of their arguments and not on the passages of the *Digest*. In the passages they refer to Mommsen, he was not dealing with ignorance of law. In 92–94, according to the author, he unequivocally states that ignorance is no excuse except in the four cases mentioned in the texts.

26 19–21; *contra* Snyman 173 n 92.

27 Snyman (1967) 131–132; see also Davies 9; *contra* Matthews 175 referring to Karl Binding *Die Normen und ihre Ubertreutung* (1872) vol 3 par 53.

of law that applied at the time, and the limited scope of legislation. The early Roman law, the *ius civile*, was mostly of a customary nature, being a mixture of customary and religious rules; the society was more or less homogeneous; legislation was limited and largely concerned with political matters. When Roman law was codified, the Twelve Tables were merely a codification of the customary law.

Even in a later stage of its development, Roman law did not deviate considerably from the moral convictions of the people. This is in marked contrast to the position prevailing today.

Although some uncertainty exists, it may be said that the application of the *ignorantia iuris* rule did not come to South Africa specifically through Roman and Roman-Dutch law,[28] but through the influence of English law.

3 2 English Law

In English law, ignorance of law has never been regarded as an excuse. Maxims such as "ignorance of law is no excuse", and "everybody is presumed to know the law"[29] are too well known to need any further explanation. Although Mr Bumble in *Oliver Twist* was admittedly not referring to the *ignorantia iuris* rule when he said: "If the law supposes that,... the law is a ass – a idiot,"[30] his words are nevertheless appropriate here. Another English writer once wrote that the "maxim that everyone is conclusively presumed to know the law" is "a statement which to my mind resembles a forged release to a forged bond,"[31] and one English judge declared:

> "God forbid that it should be imagined that an attorney, or a counsel or even a judge is bound to know all the law..."[32]

And what of the layman?

The *ignorantia* rule was based on a pure fiction which is logically indefensible except on the grounds of policy. Many other English judges have expressed serious reservations about this rule.[33]

Although the maxim that "ignorance of law is no excuse" has been supported by the courts and institutional writers, they have not really followed a blanket approach, and although judges have expressed themselves generally on this issue, their remarks were in fact confined to particular offences at issue where no knowledge of the law was required and liability was strict. Many of the cases to which the abovementioned principle has been applied were private-law cases and not criminal cases and it is therefore not quite clear whether the same view would have been held in the sphere of criminal law.[34]

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28 On the position in Roman-Dutch law see Van Rooyen 23–24; De Wet and Swanepoel 148; Snyman (1967) 133–136; Snyman (1984) 174.

29 Van Rooyen 26–27; De Wet and Swanepoel 148; Snyman (1967) 142–143; Snyman (1984) 174–175; Matthews 174 *et seq.* The maxim "everybody is presumed to know the law" is attributed to Blackstone – Smith and Hogan 66; see also Matthews 179 *et seq.* He points out (185) that this was said by Serjeant Manwood in *Brett v Rigden* 1568 1 Plow 340 342. He doubts that this was so even at that time.

30 Charles Dickens *Oliver Twist* 51.

31 Stephen *History of Criminal Law* (1882) vol 2 114; see also Matthews 186.

32 Cited in *Honey and Blanckenberg v Law* 1966 2 SA 43 (SR) 46; see also Williams 290.

33 *Martindale v Falkner* 1846 2 CB 706; 135 ER 1124 719-729 cited by Matthews 186; *Kiriri Cotton v Dewani* 1960 AC 192 204; *André v Blanc* 1979 2 Lloyd's Rep 427 431.

34 174, 179 *et seq.*

A recognised exception to this harsh rule is that if a mistake of law assumes the form of a "claim of right" it constitutes a defence. Here a person is aware of the criminal prohibition but because of a mistaken belief, he thinks he is entitled to act in the way he has and consequently that his act does not fall within the prohibition.[35] This is actually a mistake of law. Yet to plead mistake of law where he is unaware of the existence of the criminal provision, is not permissible. This type of reasoning makes one agree with the Danish saying that "lawyers and painters can soon change white to black."[36]

Besides the exception of claim of right, it has been demonstrated that the *ignorantia iuris* rule has been considerably eroded by legislation which has had the effect of allowing a defence which might otherwise be excluded, as a mistake of law. This has had the effect of limiting the scope of the *ignorantia iuris* principle so that it is no longer of general application.[37] Its rejection has been strongly advocated. Although it still applies, it has been considerably watered down. The application of the principle in all its former vigour can be justified only in a society which is enlightened, knowledgeable and homogeneous.

Moreover, the application of the rule may have been justified initially, because of the nature of the law at that time which was mostly common law as opposed to statutory law, and a knowledge of the common law may be more readily imputed to the man in the street than a knowledge of statute law. Its importation into South African law lock, stock and barrel may therefore have been inappropriate.

3 3 German Law

In German law there are two schools of thought on the question whether ignorance or mistake of law excludes criminal liability. One upholds the "Vorsatztheorie" and the other adheres to the "Schuldtheorie."[38]

According to the "Vorsatztheorie" awareness of unlawfulness is an essential element of intention; such intention therefore cannot be colourless but must always be "evil" before it can lead to liability. This postulates intention as a form of *mens rea*. The "Vorsatztheorie" is connected with the psychological concept of *mens rea* according to which *mens rea* consists of a blameworthy state of mind and which involves a will directed at the achievement of a particular goal coupled with awareness of unlawfulness.[39] In accordance with this view, absence of knowledge of a criminal provision excludes *mens rea*.

According to the "Schuldtheorie," on the other hand, knowledge of the unlawfulness of the legally prohibited act is not part of intention, but part of *mens rea* or, in German terms, "Schuld" or blameworthiness.[40] This view is connected with the "finalistic" theory of the act which postulates that intention forms part

35 Smith and Hogan 56–57; Van Rooyen 27; Rabie 5, 8–9; De Wet and Swanepoel 148; Snyman (1984) 175.
36 Kahn "The Seven Lamps of Legal Humour" 1984 *De Rebus* 251.
37 Ashworth 652 *et seq.*
38 Snyman (1984) 175.
39 Snyman *idem* 154; Burchell and Hunt 130 *et seq*; De Wet and Swanepoel 136.
40 Snyman *idem* 175.

of the act and not of blameworthiness.[41] According to this view, knowledge of unlawfulness is not connected with the act or the description of the prohibition, but only forms part of "Schuld." Intention in accordance with this theory is "colourless." The "Schuldtheorie" is similar to the normative theory of *mens rea*. According to this theory, knowledge of the legal provision is not really required. It is sufficient if the court is satisfied that the accused could have possessed such knowledge; this implies that ignorance of the law constitutes a defence only if the ignorance is unavoidable and is not attributable to negligence.[42] This view is supported by Snyman in particular.[43]

This theory has led to some controversy in South Africa,[44] although it is said to be in vogue today in German criminal law.[45] South African courts, however, still follow the psychological approach to *mens rea*, while the normative approach has not yet found general acceptance[46] except among some academics.[47] I now come to the position in South Africa.

4 SOUTH AFRICAN LAW

4 1 Before *De Blom*

As a general rule there can be no punishment without culpability.[48] This implies that, for an accused to be liable, his conduct must not only conform to the description of the prohibition; he must also have the requisite *mens rea*, which must relate to the various elements of the offence in question.[49] What actually is meant by *mens rea* is a controversial issue.[50] Although intention is often regarded as forming part of *mens rea*,[51] it has been contended that this causes confusion, and that a better explanation is that *mens rea* should be construed as knowledge of unlawfulness.[52]

The question is: what is the effect of the absence of knowledge of unlawfulness on the part of the accused, for example where he mistakenly believed that he

41 On the "finalistic" theory see in general Snyman "The 'Finalistic' Theory of an Act in Criminal Law" 1979 *SACC* 3 *et seq* 1979 *SACC* 136 *et seq*; Snyman (1984) 38–39.

42 Snyman (1984) 176; for the normative concept of *mens rea* see Jescheck "The Doctrine of Mens Rea in German Criminal Law – its Historical Background and Present State" 1975 *CILSA* 112 *et seq.*

43 *idem* 176–180. This view is also supported by Whiting 6; Stassen 259–265. See Van der Merwe "The Cumulative Effect of 'Partial Excuse' and Error Iuris – Ntuli and De Blom Revisited" 1982 *SALJ* 430 436.

44 See Du Plessis "Hans Welzel's Final Conduct Doctrine – An Importation from Germany we could well do Without" 1984 *SALJ* 301 *et seq*; *contra* Snyman "The Attack on German Criminal Legal Theory – A Retort" 1985 *SALJ* 120; see further Du Plessis "A Reply to Professor Snyman's Retort: Mission Accomplished" 1985 *SALJ* 503.

45 Snyman (1984) 176; Van der Merwe 436; Jescheck 117–120.

46 Snyman (1984) 116. In *Bailey* 1982 3 SA 772 (A) the court delivered a judgment which may be interpreted as being in support of the normative approach.

47 Snyman (1984) 114–116; Van der Merwe 430–436; Kok "Skuldmetamorfose: De Blom, Dladla en Chretien" 1982 *SACC* 27–34; Van der Merwe "Die Verband Tussen Mens Rea en Skuld" 1976 *SALJ* 280.

48 Bertelsmann 34; *Van der Mescht* 1962 1 SA 521 (A); *Arenstein* 1964 1 SA 361 (A); *Bernardus* 1965 3 SA 287 (A); *Qumbella* 1966 4 SA 356 (A).

49 *LAWSA* (6) par 97 n 2.

50 Botha "What Precisely does Constitute Mens Rea?" 1975 *SALJ* 380 *et seq.*

51 Burchell and Hunt.

52 Botha 381.

was acting lawfully, like a person who killed a child mistaking him for a "tikoloshe,"[53] or where he slaughtered an animal unaware that a permit was required by statute,[54] or where he wrongly believed that it was lawful for a chief to mete out corporal punishment,[55] or where he killed another person because he believed the latter had bewitched his relative and would also eliminate him through witchcraft?[56]

In a legal system which upholds the principle of *nulla poena sine culpa*, the answer should be obvious. All the accused should have been acquitted, because they lacked the guilty mind which is essential to liability. Because they acted in ignorance of the proscription, there was no conscious wrongdoing and consequently no culpability. But until 1977 the position was not quite clear. A long list of cases supported the view that knowledge of unlawfulness was an essential requirement for the conviction of an accused for offences where intention was required,[57] and an equally lengthy list of cases, for policy reasons, upheld the *ignorantia iuris* rule and supported the principle of guilt without knowledge of unlawfulness.[58]

In the case of *Smith*[59] Solomon JP emphasised the requirement of knowledge of unlawfulness. In *Tshwape*,[60] on the other hand, where the accused appealed against a conviction of slaughtering a slaughter animal without a permit required by statute, and where conscious wrong-doing was absent, Corbett J emphatically dismissed the defence of ignorance of law.

Those decisions where knowledge of unlawfulness was required, were cases involving a claim of right.[61] What is meant by claim of right has already been explained above; it is instanced in a person who, while aware that his action is *prima facie* unlawful, mistakenly believes that he is entitled to act as he has done, for instance where he believes that he is acting in self-defence whereas he has in fact exceeded the bounds of such defence.[62] The courts, however, did not accept that every claim of right is an exception to the *ignorantia iuris* rule, but no clear indication was given as to when it would succeed and when it would not.[63] This caused a great deal of uncertainty in the law and gave rise to conflicting decisions. This is regrettable because certainty is one of the essential attributes of justice. In *Rabson*,[64] a case in which the accused relied successfully

53 *Mbombela* 1933 AD 269.
54 *Tshwape* 1964 4 SA 327 (C).
55 *Kumalo* 1952 1 SA 381 (A).
56 *Mokonto* 1971 2 SA 319 (A).
57 Burchell and Hunt 162 n 304; Van Rooyen 30 n 111–120.
58 Burchell and Hunt 161 n 295–297 cf Rabie 5; *LAWSA* par 97 n 8.
59 17 SC 561. Similar sentiments were expressed in *Marshall* 1967 1 SA 171 (O) 174.
60 1964 4 SA 327 (C). See also *Kazi* 1963 4 SA 742 (W) 749–750.
61 Burchell and Hunt 161 n 296.
62 *Ntuli* 1975 1 SA 429 (A); *Ngomane* 1979 3 SA 859 (A).
63 Burchell and Hunt 163; *LAWSA* par 97; Rabie 5; Van Rooyen 1973 *De Jure* 82–84 expressed approval of the judgment in *Rabson* 1972 4 SA 574 (T), where the court decided that although mistake of law generally does not excuse, an exception is made in cases of claim of right; see also *Zemura* 1974 1 SA 584 (RA).
64 1972 4 SA 574 (T). Snyman 1973 *THRHR* 185 criticises the *Rabson* case as being in conflict with the *ignorantia iuris* rule which had been incorporated into our law and was applied by the courts. Van Rooyen 1973 *De Jure* 84 holds a contrary opinion. He accordingly regards the convictions in *Mabai* 1966 2 SA 533 (E) and *Colgate Palmolive* 1971 2 SA 149 (T) as undeserved.

on a claim of right, the court admitted that these cases amount to mistake of law "in the guise of a claim of right." This decision demonstrates the absurdity of not recognising mistake of law as a defence. In any case, where a person is mistaken as to the law, he is under the impression that he is entitled to act – he acts under this mistaken impression of a claim of right.[65]

Prior to 1977, therefore, where the defence of ignorance or mistake of law was raised in naked form

> "it was almost invariably rejected, but where it was raised in the guise of a claim of right it was usually accepted".[66]

The only exception is the case of *Zakwe*.[67]

This position was radically altered in 1977 when the appellate division decided that ignorance of law does constitute a defence.[68] Before this case is discussed, it will be illuminating to analyse critically, albeit briefly, some of the justifications for the *ignorantia iuris* rule.[69]

4 2 Justifications

The *ignorantia iuris* rule has been severely criticised on the grounds that it results in injustice owing to its harshness and is in conflict with the purposes of punishment.[70] The assumption that everybody knows the law has already been rejected as nothing more than a polite fiction. The very existence of a legal profession is ample evidence that the general public does not necessarily consist of expert lawyers.[71] The injustice of the *ignorantia iuris* rule is also manifested in the unequal treatment meted out to offenders: those who acted knowingly and unlawfully were often treated in the same way as those who acted in ignorance. This meant that these would be punished not so much for the commission of the offence, but for their ignorance *via* the offence. It is unjustifiable to punish somebody who could not have known that what he was doing was unlawful, because there is no moral reprehensibility in his conduct and the punishment cannot be justified on the ground of retribution. Nor can it be reconciled with preventive theories of punishment.

Those who advocate the retention of the *ignorantia iuris* rule, albeit in limited form, have advanced various reasons to buttress their argument.[72]

It has been alleged that to allow ignorance of law as a defence would exacerbate the already difficult task of the prosecution to prove that the accused knew that

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65 Van Rooyen 1973 *De Jure* 84.

66 Burchell and Hunt 163.

67 1967 1 SA 298 (A). This decision is criticised by ID 1967 *SALJ* 266–267 as being in conflict with many cases where ignorance of law was rejected. See also *Mdladla* 1972 3 SA 53 (N). Reliance on *Nxumalo* 1965 2 PH 149 was regarded as inappropriate because in that case the owner of a business was away and the employee did not know that.

68 1977 3 SA 513 (A). This case was discussed by Loubser 1977 *SACC* 294–296; Stassen 1977 *TSAR* 259–265; Whiting 1978 *SALJ* 1–8; Labuschagne 1978 *De Jure* 386–387; see also Leisner 1982 *De Jure* 34 *et seq*; Snyman 177–180; Burchell and Hunt 163 *et seq*; Turpin *Cambridge Law Journal* 8 *et seq*.

69 Rabie 1977 *De Jure* 11 *et seq*; De Wet and Swanepoel 149; Van Rooyen 1974 *THRHR* 35–37; Botha 1974 *SALJ* 284–285; *LAWSA* par 97.

70 Rabie 1977 *De Jure* 18–19.

71 Rabie *idem* 12–13.

72 See in general Gordon 295–296; Smith and Hogan 55–56; Williams 289–293; Davies 13; Hall *General Principles of Criminal Law* 2ed (1960) 378 *et seq*; Snyman (1984) 172–173.

his conduct was forbidden by the law. This would lead to spurious claims of ignorance of law which it would be arduous for the prosecution to refute. A court would have to consider a number of factors such as a person's education, degree of intellectual advancement, the books he reads and the company he keeps in order to ascertain whether he was really ignorant. It is contended that this could lead to many people's escaping liability.

This argument is unconvincing: it is no more difficult to discharge the above-mentioned burden of proof in cases involving ignorance of law than in cases of ignorance of fact.[73] It also arises in all cases concerned with a person's state of mind including a denial of *mens rea*.[74] That it may make the court's task more difficult is undeniable. The court's inability to assess the evidence of the state of mind of the accused is, however, insufficient reason for excluding from investigation a "fundamental element in a rational and humane criminal code."[75] Even if it is conceded that determining this is time-consuming, it is submitted that it is time well spent, and it is to be preferred to a situation where a person is convicted because of the court's inability to assess his guilt. Punishment in that event is not deserved and serves no useful purpose.[76] That approach also undermines the principle that the state must prove the guilt of the accused.

It has also been contended that if ignorance of law were an excuse, members of society would become lax and omit to take the trouble to find out what the law required because they would know that an individual could escape punishment if he pleaded ignorance of the law. By excluding the plea of ignorance of the law, the criminal law would perform an educative function, that of encouraging the public to acquaint itself with the law.

The contention that to allow the excuse would be to encourage ignorance is, in the words of Matthews[77]

> "one of the many empirical generalizations that courts rely on without adducing evidence for their truth."

He continues:

> "Why is there no equivalent assumption that excusing defendants for being ignorant of facts encourages them to shun knowledge of the world about them lest they be made liable for doing some harm? In any case, why must the opponents of the excuse assume that full and actual knowledge of the law would invariably be the requirement for conviction, when in relation to facts the law usually accepts recklessness or even negligence as sufficient, and when in a large number of (usually) regulatory offences liability is strict?"

The argument that this *ignorantia* rule is aimed at encouraging the public to find out what the law is, is, to say the least, absurd, because a person who seeks legal advice and secures the wrong legal advice, is not excused thereby. It is premissed on a mistaken assumption that members of the public are capable of unravelling the complexity of statutory enactments with their (at times) less than acute powers of analysis, which is open to considerable doubt.[78] It also

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73 Snyman (1984) 179 n 36 disputes Van Rooyen's contention in 1974 *THRHR* 35 that it is no more difficult for a court to determine X's legal knowledge than it is to determine his factual knowledge (see also Rabie 1977 *De Jure* 14). He also disagrees with Van Rooyen's contention (35) that there is no difference between mistakes of fact and mistakes of law.

74 Matthews 187.

75 Matthews *ibid.*

76 Rabie 1977 *De Jure* 14.

77 187.

78 Matthews 188.

overlooks the fact that people often act in the belief that their assumptions are accurate.

In South Africa, a country where the overwhelming majority of black people can hardly read and write, and where most of them are poor, it is scarcely reasonable to expect them to be so conscientious as to want to find out what the law is on a particular matter. They may not even know that they have to know the law. This approach in fact introduces discrimination through the back door. It would perhaps be understandable if all members of the South African society had a compulsory education up to a certain standard so as at least to be able to read. But even that would not really solve the problem. When it was indicated above that even judges of the highest court in the country seldom agree on what the law is, it is hardly conceivable by any stretch of the imagination that a layman would be able to predict with certainty that his interpretation would coincide with that of the judge. Although the realist philosophy is not without its flaws, it none the less remains true that, in the last instance, the law is what judges declare it to be.

To say that the rule also serves to prevent persons from facilely relying on ignorance of the law, gives rise to the misapprehension that the plea of ignorance of law automatically leads to an acquittal, whereas in fact the contrary may be true.[79]

That the rule is intended to have a didactic function is a will-o'-the-wisp, a goal more easily longed for than achieved. It has not been shown to have anything to do with practical realities. To dispute this is not by any means to encourage ignorance of law. Nor is it meant to accord more favourable treatment to an ignorant person as if ignorance is a virtue. Far from it. It is merely that his ignorance precludes one of the essential elements for culpability, namely awareness of unlawfulness. That the end result seems to condone ignorance is a mere coincidence. To educate the public effectively in law one must adopt a positive approach and not rely on a negative one.

By far the strongest argument in favour of the *ignorantia iuris* rule is that if ignorance of the law were allowed as a defence, it would deprive the law of its objectivity in determining the guilt of the accused, in that the law would depend on the individual's subjective assertion of what he thought the law was. This would be contrary to the principle of legality which demands the general and equal application of the law to all members of society. Instead of there being one legal system in a particular society, there would be one law for Peter and another law for Paul.

This view, it is submitted, is based on a *non sequitur.* That an accused pleads ignorance does not imply that his conduct is lawful. His conduct remains unlawful, but he is held not guilty because he is not morally blameworthy. This is not peculiar to the defence of ignorance of the law. To allege that such a defence amounts to a postulation of the accused's idiosyncratic behaviour as law, is an exaggeration. There are many defences available to an accused person – yet the availability of these defences has not led anyone to suggest that these create a multiplicity of legal systems within one legal system. Moreover, even

79 Rabie *idem* 14; De Wet and Swanepoel 148–149.

courts give conflicting decisions on a particular point of law, and yet these form part of a single system.

It is quite clear from the above that the supposed justifications for the *ignorantia iuris* rule are not justifications at all but merely rationalisations for an otherwise irrational rule. They may be based on a desire to adhere to a well-known principle despite its unreasonableness. Its demise is therefore not to be lamented. It would have been supportable if it applied to crimes involving moral reprehensibility. And this is why, perhaps, some have advocated the distinction between *mala in se* and *mala prohibita*,[80] a distinction which is, in any case, notoriously vague. But as matters stand, the criminal law is often used for purposes which are incompatible with its proper function. Punishing a person for conduct motivated by a mind devoid of any moral turpitude, and without consciousness of unlawfulness, deprives punishment of its stigmatising function and diminishes society's respect for the law.[81] In fact, the crimes which present problems are not the common-law offences but statutory offences – because they should not have been crimes in the first instance. Nobody can seriously contend that he does not know that murder or theft or robbery is a crime. It is only technical offences that present problems. Perhaps one might contend that the appropriate method therefore is not to abolish the *ignorantia iuris* rule but to decriminalise those statutory provisions. That may well be so, but that is another issue altogether.

The *ignorantia iuris* rule was all the more unsuited to the heterogeneous society of South Africa, where the criminalisation of certain conduct is sometimes in conflict with accepted customary practices of the black races. To punish a person for conduct which is not only not frowned upon, but which may be approved of, makes the law much more incomprehensible to the ordinary man. The disadvantages inherent in maintaining the rule seem to have outweighed the policy reasons for its retention. Its demise is therefore to be welcomed.

4 3 The *De Blom* case

The appellant in this epoch-making case had been convicted by the court *a quo* on two counts of contravening the exchange control regulations. The appellant pleaded ignorance of these regulations. Relying on the views of several South African jurists,[82] but without referring to earlier appellate division decisions which followed the *ignorantia iuris* rule, Rumpff CJ (with whom Jansen JA, Rabie JA, Muller JA and Joubert JA concurred) boldly declared that at this stage of our legal development, the cliché that "every person is presumed to

80 Bertelsmann 42 *et seq.*

81 For a discussion of the purposes of the criminal law, punishment and disadvantages of our criminalisation see Rabie "Decriminalization of Law – Ideal and Reality" in Sanders (ed) *Southern Africa in Need of Law Reform* (1981) 99 *et seq*; Rabie and Strauss *Punishment: An Introduction to Principles* 3ed (1981) 8 *et seq*; Morris "The Overreach of the Criminal Law" in *Law Crime Community* (1976) 42.

82 De Wet and Swanepoel 148–149; Van der Vyver 1967 *THRHR* 271; Van Rooyen 1974 *THRHR* 35; Botha *Wederregtelikheidsbewussyn in die Strafreg* unpublished LLD thesis UP (1973) 331; Botha 1975 *THRHR* 50. Snyman (1984) 178 laments the fact that Rumpff CJ departed from a well-established rule and previous decisions without even referring to any of the common-law authorities and being content with references to the contemporary South African academics, most of whom drew their inspiration from De Wet and Swanepoel who in turn relied on a theory that is regarded as outdated in German legal theory.

know the law" has become a meaningless shibboleth with no ground for existence and that the view that "ignorance of the law is no excuse" is legally untenable in the light of the contemporary concept of *mens rea* in our law.[83]

With those iconoclastic utterances the chief justice, in the words of Burchell and Hunt[84]

> "boldly swept the ignorantia juris non excusat rule from our criminal law with the dramatic result that, in line with principle and logic, knowledge on the part of the accused of the unlawfulness of his conduct is now always a requirement of mens rea in the form of intention, from which it follows that ignorance or mistake of law invariably negatives mens rea in respect of the unlawfulness element and hence excludes liability."

Although it was once said that "the life of the law has not been logic, it has been experience," it has equally been asserted that logic should not be sacrificed on the altar of experience, but that it is one of the considerations to be taken into account.[85] It is therefore submitted that reason has at last prevailed over sentiment and experience.

4 4 The Effect of the *De Blom* case

The effect of the *De Blom* case is that ignorance or mistake of law, like ignorance of fact, or to be more precise, ignorance of a material fact, is now a defence in the case of absence of awareness of unlawfulness and therefore negatives *mens rea*. It is no longer necessary to distinguish between law and fact, a distinction which, as was pointed out, is misleading. It further dispenses with the consideration of exceptions to the *ignorantia iuris* rule and the circumstances where, on grounds of policy, the rule has to be applied. This is to be welcomed because in the past it was like cutting the Gordian knot, and the outcome sometimes left one with the feeling of dismay reminiscent of that experienced by Solon who said, in the seventh century BC:

> "Laws are like spiders' webs which, if anything small falls into them they ensnare it, but large things break through and escape."[86]

This decision has been lauded as being in accord

> "not only with the basic principle of *nulla poena sine culpa*, and the requirements of *mens rea* but also with the best notions of fairness and justice, particularly in respect of the countless, and ever-growing number of, statutory offences."[87]

In those cases where ignorance does not succeed as a defence, it could at least serve as a mitigating factor.[88]

The *De Blom* case has already been followed in an ever-growing number of decisions.[89] Some of these decisions have reversed what had been decided before 1977.[90] Whether or not a person was unaware of the unlawfulness of his conduct is a question that has to be determined by the court on all the available evidence. It is not simply dependent upon the accused's own *ipse dixit*.[91]

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83 529.
84 163.
85 Cardozo *The Nature of the Judicial Process* (1921) 33 citing Holmes.
86 Quoted by Kahn 1984 *De Rebus* 251.
87 Burchell and Hunt 165.
88 Du Toit *Straf in Suid-Afrika* (1981) 72.
89 Burchell and Hunt *ibid* n 329. See further *Reids Transport (Pty) Ltd* 1982 4 SA 197 (E); *Evans* 1982 4 SA 346 (C); *Hoffman* 1983 4 SA 563 (T); *Abrahams* 1983 1 SA 137 (A); *Simoko* 1985 2 SA 252 (E); *Dhlamini* 1985 1 SA 714 (N).
90 *Seatholo* 1978 4 SA 368 (T); *Botha* 1978 2 SA 544 (N); *Abrahams* 1981 4 SA 982 (C).
91 *Abrahams* supra n 91.

Although the *De Blom* decision has generally been welcomed by academic writers,[92] some reservations have been expressed as to the potential abuse of the ignorance of law excuse and the prospect that the approach followed in the *De Blom* case might give the wrongdoer *carte blanche*. It has been suggested that

> "the fairest and most practical solution would be to have a general rule that (ignorance or) mistake of law will not negative liability even for crimes requiring dolus unless it is reasonable."[93]

This view is an unwarranted departure from the well-established principle that intention is evaluated subjectively and not objectively. The criterion of reasonableness implies the use of an objective test which should be used only in cases in which negligence is an element.[94]

Further reservations that have been expressed about the *De Blom* decision are that it could result in the removal of conduct which is still regarded as criminal from the field of criminal law and that it could reduce the criminality of conduct to an unacceptable degree.[95] Moreover, it is contended that even though the *De Blom* judgment lays down a rule which is desirable in principle, the rule will be difficult to apply in practice. It is not easy to determine accurately the genuineness of a mistake, and this could open the door to

> "an unacceptably large number of spurious claims of mistake of law which the prosecution will be unable to refute."[96]

These objections are not new, and some of them have been mentioned above.[97] All that can be said about them is that, with the benefit of hindsight, they have proved not to have been altogether justified. In a number of cases decided after *De Blom*, not all the pleas of ignorance of law have succeeded; in fact in most of them this defence failed.[98] Even in the *De Blom* case itself, the plea failed on the first count because the evidence as to the surrounding circumstances resulted in the claim of ignorance of law being refuted. It would appear, therefore, that the difficulty of disproving ignorance is not insurmountable. No doubt there will be isolated cases where this would be so, but this is not peculiar to the ignorance of law defence. However, this should not necessarily justify the introduction of another difficult rule. The new rule seems to have worked so well that it does not appear that failure to disprove ignorance will occur on such a great scale that the ignorance of law defence will prove to be patently undesirable on policy grounds.[99]

It might well be contended that relying on reported cases where the accused has not escaped liability by pleading ignorance of law is a dangerous generalisation, because only a fraction of cases are reported and only those cases are prosecuted where the attorney-general is reasonably confident of a conviction. There are no statistics as to how the availability of the defence of ignorance has

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92 Stassen 1977 *TSAR* 261; Loubser 1977 *SACC* 296; Turpin 1978 *Cambridge LJ* 8; Burchell and Hunt 163; Snyman (1984) 178.
93 Whiting 6; Snyman 179.
94 Van der Vyver 1967 *THRHR* 277.
95 Whiting 6; Snyman (1984).
96 Whiting 7; Stassen 261–3.
97 See also Van Rooyen 1974 *THRHR* 35–36; Rabie 14.
98 For a discussion of some of these see 1981 *Annual Survey of South Africa Law* 429; see also Burchell and Hunt 165 n 333.
99 This is amply demonstrated in a number of cases discussed by Leisner 1982 *De Jure* 34–41.

influenced his decision not to prosecute. Be that as it may: the point that I am making here, is that recognition of the principle that ignorance may constitute a defence does not imply that once this defence is raised the accused will invariably be acquitted.

Even the suggestion by Snyman[100] that the German approach should have been adopted (namely that ignorance of the law should be an excuse only if the ignorance is reasonable or unavoidable) seems to cloud the issue. Although he is of the view that as long as there is a difference of approach among lawyers to the concept of *mens rea* the approach to the ignorance of law defence will differ,[101] in my opinion there is no reason why the present rule should not work well, even for those who support the normative approach to *mens rea.*

Underlying the reasonableness qualification is apparently the concern that South Africa has gone further than any of the Western countries in abolishing the *ignorantia* rule. That in itself is cause for a re-evaluation. It may be felt that the uniqueness of the South African situation may be used as a pretext to foist on us excesses that have been rejected or never accepted anywhere else in the world. That, however, is not a serious objection. That the rest of the Western world has not gone so far may be dictated by their peculiar circumstances. Moreover, as Rumpff CJ rightly contended, the recognition of the defence is more in line with our modern concept of *mens rea* which requires awareness of unlawfulness.

In any case, the courts have already developed rules for testing the genuineness of the mistake of law. In a number of such cases the courts have adopted the attitude that the fact that the accused is charged with an offence relating to the carrying on of a particular trade or occupation or activity in which he is involved, means that he must acquaint himself with the laws concerning that activity.[102]

This implies that the reasonableness criterion will be of use in those cases where negligence is the requisite form of *mens rea.*[103] What is unacceptable is its indiscriminate use even in those cases where *dolus* is the form of *mens rea* required. As remarked above, the fears expressed above are not new, but have been raised in relation to other defences[104] or the granting of certain remedies. They exemplify man's nebulous fear, perhaps sometimes justified, of the unknown which sometimes makes him a timorous faintheart, who, instead of taking a bold plunge into the arms of Lady Justitia, often in somewhat chameleon-like fashion, takes a hesitant step forward. It is reminiscent of Shakespeare's famous words: "To be, or not to be, that is the question" and that it is our fear of the unknown that "makes us rather bear those ills we have than fly to others that we know not of."[105]

One instance where similar fears have been expressed, is in relation to damages for pure economic loss in the law of delict, where for a long time the remedy for the recovery of such loss was withheld because of the fear of "indeterminate liability to an indeterminate number" until in 1979 Rumpff CJ decided to bring

100 (1984) 178–179; Stassen 263.
101 *idem* 179 n 39.
102 Burchell and Hunt 166 n 340; 1982 *Annual Survey* 370–371; *Simoko* 1985 2 SA 263 (E).
103 Botha 1975 *SALJ* 280 *et seq*; Van der Vyver 1967 *THRHR* 277.
104 Turpin 1978 *Cambridge LJ* 8.
105 *Hamlet* act 3 scene 1.

this new legal principle into the world even if it had to be by caesarean section. In his words:

> "In die onderhawige geval duur die geboortepyne reeds so lank dat die tyd aangebreek het om selfs miskien met 'n keisersnee die kind in die wêreld te laat kom. Ek dink dat mens dadelik moet byvoeg dit voorspelbaar is dat hierdie 'n probleemkind gaan word. Met die nodige liefde, en veral dissipline, kan dit egter 'n nuttige rol in die regslewe speel."[106]

These words apply equally to the defence of ignorance of law in criminal law. And, as pointed out above, the courts have shown a tendency not to allow the defence to be abused. Perhaps they have in a sense used the reasonableness criterion after all, by taking into account all the relevant circumstances of a case.

5 CONCLUSION

As the law stands at present, ignorance or mistake of law, whether reasonable or unreasonable, provided it is *bona fide* or genuine, is a defence in criminal law. One American said that one of the reasons why the *ignorantia iuris* rule caused problems was because it entered the arena of criminal-law theory like a roaring lion in occupation of a vast terrain, but after drastic reduction in current case law it made its exit like a timid shorn lamb.[107] However, in our criminal law it may be seen as a fox that has taken its leave unceremoniously.

It has also been said that "[i]gnorance is not innocence, but sin."[108] But I say: blessed are the truly ignorant, for they shall be found not guilty. This is not to encourage ignorance of law. To discourage ignorance of law one must effectively educate the public and make the laws easily accessible and readily understandable to the ordinary man. But the *ignorantia iuris* rule did not serve this purpose, since ignorance of law flourished rather than diminished under the rule. Obviously, educating the public about the law is a mammoth task, but it is a task in which universities can and must play a meaningful role.

The important effect of the *De Blom* case is that ignorance of law is now a defence in criminal law. As to whether the ignorance or mistake should be reasonable or unreasonable, views may differ. The main thing is that it is now a defence and that makes all the difference.

It has been said that an inaugural lecture is a personal credo of one's basic approach to a particular branch of science or learning.[109] If this lecture has indicated my predilections, it has served its purpose.

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106 *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 831.
107 Hall 323 cited by Burchell and Hunt 163.
108 Browning *The Inn Album* cited by Matthews 174.
109 Bertelsmann 34.

The *boni mores* in historical perspective*

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OPSOMMING

Die *Boni Mores* in Historiese Perspektief

Die verwysing na die *boni mores* wat in moderne regstelsels voorkom, kan na die Romeinse reg herlei word. Tekste waarin na die *boni mores* verwys word, is nie die resultaat van 'n moralisme uit die na-klassieke en Justiniaanse era nie maar kom uit die klassieke Romeinse reg. Die vernaamste onderwerpe waarby die *boni mores* ter sprake kom, is *iniuria, pacta* en *condiciones*, en grondliggende beginsels van die familieverband. Vandag dien die regsgebiede waar die *boni mores* wel 'n rol speel om state met gekodifiseerde regstelsels nader aan die state met ongekodifiseerde stelsels te bring.

1 THE FUNCTION AND IMPORTANCE OF THE *BONI MORES* IN MODERN SYSTEMS OF PRIVATE LAW

The ideas laymen have about the meaning of the concept of good morals (*boni mores*) in law often seem to lack foundation – at least if one considers the journalists of the mass media as representing the laymen's views. It often happens that the *boni mores* are represented as a bundle of antiquated restrictions which related primarily to the sexual sphere and in general to family life. Thus some years ago the county court (*Amtsgericht*) of Emden[1] was vehemently criticised when it agreed with the owner of a double bedroom who refused to let it to a couple who were not married (something he did not know at the time the contract was entered into). The German Federal Administrative Court (*Bundesverwaltungsgericht*) found itself in a similar situation, when it stated that peep-shows were against good morals.[2] The vehement criticism on the part of progressive journalists and sexologists met with resistance only when feminists argued in favour of the Federal Administrative Court and thus found themselves suddenly in the arms of reason. The large number of decisions dealing with the permissible amount of interest charged, which have arisen during the past five years[3] in the Federal Republic of Germany, shows that the *boni mores* may also play an important part where it is not sex, but money which is involved. It is

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1 1975 *Neue Juristische Wochenschrift* 1363.

2 1982 *Neue Juristische Wochenschrift* 664.

3 Cf Bunte 1985 *Neue Juristische Wochenschrift* 1 *et seq.*

obviously the court's wish to have a maximum limit set for interest charged by instalment credit institutions (to be distinguished from commercial banks). As no *centesimae usurae* or other taxes exist, the fight over interest centres around para 138 – the provision relating to the invalidity of immoral legal transactions. The courts regard an exorbitant interest rate as an irrefutable indication that the borrower has at least been negligently exploited by the bank.[4] In spite of the fact that the conclusion is a pure fiction and is therefore dubious, it meets with the mass media's approval. In this case even the most progressive journalist does not mind the appeal to good morals. Legal sociologists could possibly explain this by stating that journalists are more often borrowers than lenders.

If one considers recent legal developments in continental European countries, it may be observed that the *boni mores* frequently serve as the basis and standard for attempts to solve legal problems, problems which the legislator has not provided for or has provided for only in a very summary fashion. I have already mentioned the limitation on interest rates. The question whether general assignments of future claims are permitted was also decided with reference to the *boni mores*, because the disregard of the interest of subsequent creditors – which would be the consequence of such a general assignment – would infringe the *boni mores*.[5] In Germany and Austria the border-line between lawful and unlawful behaviour in economic competition has been drawn with reference to the *boni mores*. In both states para 1 of the statute prohibiting unfair competition refers to *boni mores*. It is characteristic of the codificatory principle that long series of decisions on important problems have developed in those states which do not want to confer a wide discretion on the courts.

References to *boni mores* are mainly found in the following spheres: the validity of legal transactions,[6] the law of damages,[7] the law of unfair competition and, sometimes, cartel law. As Teubner[8] has shown in his interesting monograph on general (blanket) clauses, the legislator's reference to *boni mores* has three functions: reception (ie turning a normative system into law), transformation (thus reflecting changing values in society) and legitimisation (providing a dogmatic basis for judge-made law).

Yet, the question: what are *boni mores*? is a controversial one. First of all, it is still doubtful whether they can be found in law or whether they depend – maybe even exclusively – on extra-legal normative systems as ethics or morals. As regards the claim for damages in para 826 of the German Civil Code (*BGB*), the German courts[9] have developed the formula that *boni mores* are that which the sense of decency of all fair and just-thinking people calls for.[10] Even though this formula raised many smiles, it was just as often put into practice – even outside Germany.[11] Today one prefers to regard the *boni mores* as an expression of legal ethics, inherent in the ruling economic and social system.[12] But attempts

4 *BGHZ* 80 153.
5 *BGHZ* 30 149.
6 § 138 *BGB*, § 879 *ABGB*.
7 § 826 *BGB*, § 1295 *ABGB*.
8 *Standards und Direktiven in Generalklauseln* (1971) 65.
9 *RGZ* 48 114 124.
10 Cf Haberstumpf *Die Formel vom Anstandsgefühl aller billig und gerecht Denkenden* (1976).
11 Austrian Supreme court *SZ* 38/217.
12 Schricker *Gesetzesverletzung und Sittenverstoß* (1970) 197.

have also been made to interpret *boni mores* neutrally. Konstantin Simitis[13] thus equates them with the *ordre public*. This idea, by the way, has a tradition: According to the *Codex Maximilaneus Bavaricus Civilis* (IV 1 16), dating from 1756, contracts were not valid if they were "against respectability, law and order." In Austria, some colleagues maintain particularly emphatically that the *boni mores* are independent of extra-legal normative systems.[14] Close to this view are the court decisions[15] which equate an infringement of the *boni mores* with an obvious illegality which need not be deduced from specific laws, but which is evident[16] from the legal system as a whole. My opinion is that the *boni mores* cannot be deduced from a specific moral code, but that they nevertheless represent an extra-legal order. They stem from the minimum of common evaluations which no legal community can dispense with. Therefore they are often based on "everyday ethics." In the *Münchener Kommentar* (*ad* para 138 *BGB*) I have tried to show that the evaluation of a transaction as *contra bonos mores* is as a rule the result of the interaction of more than one element indicating the infringement of the *boni mores*. Among those indicative elements we find: taking advantage of one's (economic) superiority, disproportion between performance and counter-performance, infringement of economic freedom and the danger of damage to interests of third parties.

2 THE EVALUATION OF WAY OF LIFE AS THE REFERENCE-POINT FOR *BONI MORES* BY (LEGAL AND NON-LEGAL) AUTHORS OF ANTIQUITY

If we look at ancient sources, we will first of all look for correspondences with and differences between the functions of the *boni mores* in antiquity and today. What did the term mean? For the solution of which problems were the *boni mores* taken into consideration?

I shall confine myself to texts where the *boni mores* are expressly mentioned. In doing this, I do not overlook the fact that other words and notions play a role in the context of our problem.[17] This is true, for instance, for *turpis* and *turpitudo*,[18] as well as for *improbus* and *improbare*, and finally for *honestas*. These expressions, however, do not cover the meaning of *boni mores* absolutely. The natural lawyers of the 17th and 18th centuries obscured these nuances in the terminology of our sources. It was art 1133 of the *Code Civil* which led back to the *boni mores*. There the *cause illicite* is not only the one prohibited by law but also any cause which is *contraire aux bonnes moeurs ou à l'ordre public*.[19]

Of course, it is not only jurists who have devoted themselves to the *boni mores*. For example, Plautus[20] mentions the *mores meliores*, where the personal conduct of life (of girls eager to marry) is concerned. In particular, Cicero and Seneca frequently speak of the *boni mores*. When doing so, they are usually

13 *Gute Sitten und Ordre Public* (1960).
14 Krejci in Rummel *Kommentar zum ABGB*, (1983) § 879 n 56.
15 Austrian Supreme Court *SZ* 39/113; *SZ* 47/22.
16 Cf Mayer-Maly "Der Jurist und die Evidenz" in *Festschrift Verdroß*, (1971) 259 *et seq.*
17 Cf Kaser *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht* (1977) 69.
18 Cf *D* 17 1 6 3.
19 Art 1133 *Code civil*: "La cause est illicite, quand elle est prohibée par la loi, quand elle est contraire aux bonnes moeurs ou à l'ordre public."
20 *Aulularia* 492.

concerned with the moral evaluation of the personal conduct of one's life. On occasion they also describe the state of a community at large, for instance the Germanic community as described by Tacitus.[21] When he says that, for them, *boni mores* were more valid than *boni leges*, he is already being influenced by legal language, whose distinction between statutory and customary law has as little to do with the *boni mores* as with the *mos maiorum*, to which Cicero[22] refers more than once – in one case he quotes Tubero.[23] In one passage of the *Metamorphosis* of Apuleius,[24] which probably refers to the *SC Silanianum*, legal diction seems to have exercised its influence. The text of this *SC*, however, does not deal with the problem whether something has been done *contra bonos mores*.[25]

On the other hand, some texts by jurists use everyday language without any technical refinement. Somehow Ulpian's *dictum*[26] on the question who is to be regarded as a *mater familias* found its way into the title of the *Digest* on definitions (*D* 50 16). It originally referred to the title of the Edict *Qui neque sequantur neque ducantur* (Lenel *EP* Tit XXXVII para 201). A *mater familias* was exempt from personal execution: but whether a woman was regarded as a *mater familias* should – according to Ulpian – depend neither on the fact whether she was free-born or a freed slave nor on whether she was unmarried or married, but only on the *boni mores*. These were the woman's *mores*. Of course one could also say: it was the standard which was the measure for her conduct.

Roman society was a man's society, which made greater allowances for a man than for a reputable woman.[27] In procedures *de adulteriis* the judges were, however, bound by a rescript to examine whether the husband had guided the wife with regard to the *boni mores*, or whether he only asked for *pudicitia*, which he himself lacked. Caracalla's rescript is characterised by a multiple, partly indirect tradition. It was contained in the *Codex Gregorianus*. From there Saint Augustin *ad Pollentium*[28] took it over, while Ulpian[29] used it without quoting it.

When we read in *Pauli Sententiae*[30] that a prodigal may regain his right to make a last will if he returns to the *boni mores*, then the everyday meaning of the word *boni mores* is used to evaluate a person's conduct legally. Transferred into the sphere of the Christian Church, this is also done by the 10th Sirmond constitution[31] with reference to the question which women could be allowed to

21 *Germania* 19: "plusque ibi boni mores valent quam alibi bonae leges."
22 *Pro Domo* 68 (*contra leges moresque maiorum*); *Pro Roscio* 100.
23 *De Officiis* 3 63: "Hecatonem quidem Rhodium, discipulum Panaetii, vides in iis libris quos de officiis scripsit, Qu. Tuberoni dicere: Sapientis esse nihil contra mores, leges, instituta facientem habere rationem rei familiaris."
24 *Metamorphosae* 7 27.
25 On the relationship between the text of Apuleius and the SC Silanianum cf Mezger *Stipulationen und letztwillige Verfügungen 'contra bonos mores' im klassisch-römischen und nachklassischen Recht* (1929) 12.
26 *Ulp* 59 *ad ed D* 50 16 46 1: " 'Matrem familias' accipere debemus eam, quae non inhoneste vixit: matrem enim familias a ceteris feminis mores discernunt atque separant. proinde nihil intererit, nupta sit an vidua, ingenua sit an libertina: nam neque nuptiae neque natales faciunt matrem familias, sed boni mores." Cf Woodkiewicz *Studi Sanfilippo* III (1983) 733, 749.
27 Cf Peppe *Posizione giuridica e ruolo sociale della donna romana in età repubblicana* (1984).
28 II 7 (*Patrologia Latina* 40 475).
29 *D* 48 5 14 (13) 5; cf Gualandi *Legislazione imperiale e giurisprudenza* II (1963) 45.
30 *PS* 3 4a 12.
31 *C Sirm* 10 2 (agit enim moribus); cf also *Cod Theod* 16 2 44.

keep house for a cleric – a question which is still of importance. A *mulier externa* was not accepted. Mothers, sisters and daughters were, however, tolerated.

3 THE SPECIFIC LEGAL MEANING OF THE *BONI MORES*

Apart from these cases which are based on everyday language, legal texts dealing with *boni mores* may be limited to certain topics. These are the following:

a the definition of injuries as well as of *vis* and *metus*;

b the limitation of freedom of legal transactions, especially the possibility of certain *pacta* and *condiciones*;

c the analysis of fundamental elements of the family structure, for instance *reverentia* towards *parentes* and *patrones*, the freedom of marriage or of divorce.

The *boni mores* are not used in other fields. In particular, one finds no random reference to the *boni mores* in individual cases. There seems to be a tacit assumption, underlying the sources, that the reference to *boni mores* is appropriate only for certain problems. In many allegations concerning interpolation it was maintained that the interest in the *boni mores* increased in postclassical times, but this cannot be substantiated from the contemporary *Constitutiones*. The *Codex Theodosianus* refers only very rarely to the *boni mores* and they are not mentioned frequently in Justinian's *Constitutiones*.[32] The only text in Justinian's *Institutiones* where we find the *boni mores* mentioned (*Inst* 3 26 7) is derived from Gaius (*Inst* 3 157). *Pauli Sententiae*[33] and, in particular, the *Consultatio cuiusdam veteri iuris consulti*,[34] on the other hand, place much emphasis on the *boni mores*.

4 *BONI MORES* AND *INIURIA*

The importance of the *boni mores* for liability for *iniuria* is clearly apparent from the fact that three relevant edicts name them expressly. These are the *edict de convicio* (Lenel *EP* § 191), the *edict de adtemptata pudicitia* (Lenel *EP*) and the *edict de iniuriis quae servis fiunt* (Lenel *EP* § 194). In these cases the situation is very similar to that in modern legal systems, where express provisions of positive law refer to the *boni mores* (for instance para 138 and 826 *BGB*). Their legal importance derives from a kind of delegation.

The *Edictum de convicio* has been handed down to us by Ulpian [77] [57] *ad ed D* 47 10 15 2:

> "Ait praetor: Qui adversus bonos mores convicium cui fecisse cuiusve opera factum esse dicetur, quo adversus bonos mores convicium fieret: in eum iudicium dabo."

The *convicium*[35] was a joint abuse usually committed in front of the house of the victim. It probably contained magic elements originally, and later deteriorated to a kind of "caterwauling." It is amusing to think that at such occasions the lower part of the body was sometimes exposed, as we are told in a text of

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32 *C* 2 3 30 3 is of importance here.

33 *PS* 1 1 4 1; 3 4a 12 1; 3 4b 2 1; 5 4 13 1; 5 4 21 1.

34 *Cons* 4 7 2; 4 8 2; 9 4 3; 4 10 4; 7 1 1; 7 4 2; 7 7 4; 9 10 2. The Collatio, however, has just one text relating to *boni mores*: 2 5 2.

35 Festus 36; cf Kaser *SZ* 60 (1940) 130; Raber *Grundlagen klassischer Injurienansprüche* (1969) 23.

Pauli Sententiae;[36] this text, however, confuses *convicium* and *adtemptata pudicitia*. Not each *convicium* was regarded as an *iniuria*,[37] but only one which was *contra bonos mores*.[38] The function of the reference to *boni mores* in the edict accordingly lies in the fact that a line was drawn between permissible and non-permissible *convicia*. The edict itself did not indicate this limit; it was left to the *boni mores*. The *boni mores* referred to are not those of the person participating in the *convicium*, but those of the whole town. The meaning of *boni mores*, as used in everyday life, as an expression of an evaluation of the conduct of a certain person, is here expressly rejected in favour of an orientation on the *standards of the civitas*.[39]

The text of the *edict de adtemptata pudicitia* is not as well known to us as is that of the *edict de convicio*. Most probably it read as follows:[40]

> "Si quis matrifamilias aut praetextato praetextatave comitem abduxisse sive quis eum eamve adversus bonos mores appellasse adsectatusve esse dicetur. . ."

Here again the reference to *boni mores* served to draw a dividing line, which the *praetor's* edict was not itself able to do. Not each chase after a woman (*adsectari*) and not each accosting of a woman (*appellare*) resulted in the edict's sanctions.[41] *Adtemptata pudicitia* was committed only if such conduct was *contra bonos mores*. Whoever chased or accosted a woman just for fun or who fulfilled an *officium honestum* in this manner, did not act *contra bonos mores*.[42]

The exact text of the edict *De iniuriis quae servis fiunt* is handed down to us by *ULP D* 47 10 15 34:

> "Praetor ait: 'Qui servum alienum adversus bonos mores verberavisse deve eo iniusso domini quaestionem habuisse dicetur, in eum iudicium dabo. Item si quid aliud factum esse dicetur, causa cognita iudicium dabo'."

In this edict, too, the *boni mores* fulfilled a delimitation function. Not every punishment of someone else's slave constituted an *iniuria*. If the punishment was inflicted *corrigendi aut emendandi animo* it was not regarded as *contra bonos mores*.[43] Someone used to the exact differentiation of categories in modern dogmatics will find these examples difficult. All of them are based on the lack of an *animus iniuriandi* and are not obviously connected with criteria of good morals. But even in late classical times it should not surprise us if a sharp distinction is not made between the objective and subjective elements of an offence. The case of the flogging of a slave by a municipal magistrate, which

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36 *PS* 5 4 21: "Convicium contra bonos mores fieri videtur, si obscaeno nomine aut inferiore parte corporis nudatus aliquis intersectatus sit." Cf Kaser (fn 35) 131; Raber (fn35) 26; Manfredini *La diffamazione verbale nel diritto romano* I (1979) 88; not very useful Santa Cruz Teijeiro *St Sanfilippo* II (1982) 523 *et seq.*

37 Cf however, *Labeo/Ulp D* 47 10 15 3: "Convicium iniuriam esse Labeo ait."

38 *Ulp D* 47 10 15 5: "Sed quod adicitur a praetore 'adversus bonos mores' ostendit non omnem in unum collatam vociferationem praetorem notare, sed eam, quae bonis moribus improbature quaeque ad infamiam vel invidiam alicuius spectaret."

39 *Ulp D* 47 10 15 6: "Idem ait 'adversus bonos mores' sic accipiendum non eius qui fecit, sed generaliter accipiendum adversus bonos mores huius civitatis." Cf Raber (fn 35) 24; Wittmann *SZ* 91 (1974) 314.

40 Lenel *EP*[3] 400.

41 On *appellare* see *Ulp D* 47 10 15 20.

42 *Ulp D* 47 10 15 23.

43 *Ulp D* 47 10 15 38: "Adicitur 'adversus bonos mores', ut non omnis omnino qui verberavit, sed qui adversus bonos more verberavit, teneatur: ceterum, si quis corrigendi animo aut si quis emendandi, non tenetur."

goes back to Labeo and was commented on by Ulpian,[44] shows that one considered the cause of the punishment when deciding whether the act it was *adversus bonos mores.*

The fact that three edicts contained a reference to *boni mores* in texts on *iniuria* proves that, at the time of the formulation of these three edicts (ie before Labeo or his time) there existed fairly precise ideas of what the *boni mores* were. A vague expression would not have been embodied in the edict. It is very important to keep this in mind, because our sources provide only indirect information on the Romans' ideas about the contents of the *boni mores.*

The reference to *boni mores* as part of the definition of *iniuria* was not confined to the three titles of edicts with which we have dealt. Conduct which corresponds to the *boni mores* cannot represent an *iniuria.* According to Paul,[45] this is true for an action performed in the public interest, even if it is connected with *contumelia.* The infringement of the *boni mores* became a common element of all cases of *iniuria.* This already becomes clear if we consider the corresponding fragments: *Pauli 5 Sent D* 47 11 1 1:

> "Fit iniuria contra bonos mores, veluti si quis fimo corrupto aliquem perfudierit, caeno luto oblinierit, aquas spurcaverit, fistulas lacus quidve aliud ad iniuriam publicam contaminaverit: in quos graviter animadverti solet"

and *Pauli Sent* 5 4 13:

> "Fit iniuria contra bonos mores, veluti si quis fimo corrupto aliquem perfuderit, caeno luto oblinierit, aquas spurcaverit, fistulas lacus quidve aliud in iniuriam publicam contaminaverit, in quos graviter animadverti solet."

First, it is generally stated that to commit an *iniuria* is a breach of the *boni mores.* The following examples bring to mind cases which may have been classified as *iniuria* only because they are *contra bonos mores.* Among these examples we find: to throw mud (*fimus*), which, moreover, was of extremely bad quality; to besmirch someone with excrement (for which there were two words: *caenum* and *lutum*), to pollute water, waterducts and ponds – in the latter two cases, if the action was aimed against the public.

From these various ways of committing *iniuria*, according to the criterion of the *boni mores*, which is typical of the two quoted texts *PS* 5 4 13 and *D* 47 11 1 1, it is only a small step towards the remarkably general statement which we find in a *liber singularis* of Paul concerning *iniuria* (*Coll 2 5 2 Paulus libro singulari et* (sic) *titulo de iniuriis*):

> "Commune omnibus iniuriis est, quod semper adversus bonos mores, fit idque non fieri alicuius interest."

In all these texts the *boni mores* have a totally different function from that embodied in the three edicts. There the *praetor* left the differentiation, which he himself did not want to make, to the *boni mores.* In the latter instances the common feature of all cases of *iniuria* was emphasised. It was no longer a matter

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44 *Ulp D* 47 10 15 39: "Unde quaerit Labeo, si magistratus municipalis servum meum loris ruperit, an possim cum eo experiri, quasi adversus bonos mores verberaverit. et ait iudicem debere inquirere, quid facientem servum meum verberaverit: nam si honorem ornamentaque petulanter adtemptantem ceciderit, absolvendum eum."

45 *Paul 10 ad Sab D* 47 10 33: "Quod rei publicae venerandae causa secundum bonos mores fit, etiamsi ad contumeliam alicuius pertinent, quia tamen non ea mente magistratus facit, ut iniuriam faciat, sed ad vindictam maiestatis publicae respiciat, actione iniuriarum non tenetur." Cf Wittmann *SZ* 91 (1974) 298 304.

of differentiation, but of reducing a diffuse bundle of possible actions to a common denominator. It is not astonishing that this interest became more effective only at the end of the classical period.

5 THE IMPORTANCE OF *BONI MORES* FOR *VIS* AND *METUS*

Boni mores are also involved in three texts on *vis*, one of which is also concerned with *metus*. They have nothing to do with the elements of the praetorian delicts *vis* and *metus*, but relate to the prerequisites of *integrum restitutio*, to the possessory qualification and also to defects of will. Ulpian said that *vis* inflicted *contra bonos mores* was regarded as *vis atrox* (*Ulp 11 ad ex D* 4 2 3 1):

> "Sed vim accipimus atrocem et eam, quae adversus bonos mores fiat, non eam, quam magistratus recte intulit, scilicet iure licito et iure honoris quem sustinet. ceterum si per iniuriam quid fecit populi Romani magistratus vel provinciae Praeses, Pomponius scribit hoc edictum locum habere: si forte, inquit, mortis aut verberum terrore pecuniam alicui extorserit."

We are concerned here with the edict *Quod metus causa gestum erit*, which originally dealt with *vis* as well (*Ulp D* 4 2 1). When the *boni mores* is applied as a standard, the intention is to differentiate among different kinds of *vis*. Just as a number of texts singled out *iniuria atrox* from *iniuriae* in general,[46] so *vis atrox* gains a special status.[47] As Kaser[48] has correctly observed, cases of both *iniuria* and *vis* are characterised by a legitimate action of the public authority, and therefore do not violate the *boni mores*; in this connection Kaser refers to Paul *D* 47 10 33.

Furthermore, the *boni mores* are of importance in Ulpian's definition of *vi possidere* in *Ulp 69 ad ed D* 43 16 1 28:

> "Vi possidere eum definiendum est qui expulso vetere possessore adquisitum per vim possessionem optinet aut qui in hoc ipsum aptatus et praeparatus venit ut (Mo: et) contra bonos mores auxilio, ne prohibui possit in ingrediens in possessionem, facit. Sed qui per vim possessione, suam retinuerit, Labeo ait non vi possidere."

According to the interdicts *unde vi* and *de vi armata*, a person retains possession forcibly not only if he does so after the expulsion of the former possessor, but also if he appears prepared and armed to take possession in such a way that he cannot be repelled. The well-prepared use of force in this case is classified as *contra bonos mores*. If someone merely retains possession forcibly it is not regarded as *possidere vi*.

Vis and *metus* as defects of will are decisive in *Ulp 11 ad ed D* 50 17 116 *pr*:

> "Nihil consensui tam contrarium est, qui ac bonae fidei iudicia sustinet, quam vis atque metus: quem comprobare contra bonos mores est."

The question whether this text is the result of a generalising interpolation may be left undecided.[49] Indeed, the statement seems to be distorted. It was not necessary to emphasise the consensual basis of *negotia bonae fidei*, but rather, that of transactions of the *negotia stricti iuris*. We are interested only in the relationship between *vis* and *boni mores*, which we find again in this text. The application of *vis* as well as the provocation of *metus* is not only illegal, but also *contra bonos mores*.

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46 See *Coll* 1 2.
47 Cf *Ulp 69 ad ed D* 43 16 1 3.
48 *SZ* 60 (1940) 132 *et seq.*
49 Thus Kaser *RP* II 334, A 18.

6 THE *BONI MORES* AS A LIMITATION ON *PACTA* AND OTHER LEGAL TRANSACTIONS

The limitation of the freedom of legal transactions (*Privatautonomie*) today belongs to the most important functions of the *boni mores*. Of all the ancient texts dealing with the *boni mores*, those which deal with their limiting function have received the most attention in legal dogmatics. In Grotius's work, however, this finds expression only in the *Inleydinge*[50] but not in *De iure belli ac pacis*. Vinnius[51] rates among legally impossible stipulations, not only those *contra legem* and *in fraudem legis*, but also those *contra bonos mores, quae et turpia dicuntur*. All his examples are related to delicts: payment for a delict committed, involvement in a present or invitation to a future delict. Voet deals with the problem in a similar way in his *Commentarius ad Pandectas*.[52]

The sources which form the basis for all statements of the Roman common law on the contract *contra bonos mores* are mainly a considerable number of passages where the invalidity of *pacta* which conflict with the *leges* or *boni mores* is dealt with generally. Among them we find the following:

C 2 3 6 (Carac 213):

> "Pacta, quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere indubitati iuris est."

Pauli Sent 1 1 4 = *Cons* 4 7:

> "Neque contra leges neque contra bonos mores pacisci possumus."

Cons 4 8 (cf *Pauli Sent* 3 4b 2):

> "Pacta vel conditiones contra leges vel decreta principum vel bonos mores nullius sunt momenti."

Gordian Cons 9 10 (241):

> "Pacta, quae contra bonos mores interponuntur, iuris ratio non tuetur."

Diocl Cons 4 9 9 (*ex corpore Hermogeniani* 293):

> "Neque ex nudo nascitur pacto actio, neque si contra bonos mores verborum intercessit obligatio, ex his actionem dari convenit et reliqua."

Diocl Cons 4 10 (*ex corpore Hermogeniani* 293):

> "Pactum neque contra bonos mores neque contra leges emissum valet."

The *edictum de pactis*, known to us from *Ulp 4 ad ed D* 2 14 7 7, exempted from legal protection all those *pacta* which contradicted an established source of law, but did not refer to the *boni mores*. The text[53] which is of importance here, reads (*Ulp 4 ad ed D* 2 14 7 7):

> "Ait praetor: 'Pacta conventa, quae neque dolo malo, neque adversus leges plebiscita senatus consulta decreta edicta principum, neque quo fraus cui eorum fiat, facta erunt, servabo!"

Kaser[54] has again recently subscribed to the view that the opinion that *pacta contra bonos mores* were null and void, was deduced from the edict's wording

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50 III 42 ("wet ende zeden oneerlick werd ghehouden"); III 43 ("oneerlicke oorzach"); cf Schmidt, *Die Lehre von der Sittenwidrigkeit der Rechtsgeschäfte in historischer Sicht* (1973) 65 *et seq*.

51 *Jurisprudentiae contractae sive Partitionum iuris civilis libri* IV *Rotterdam* (1663) II 9 (235).

52 ed Haag 1723 n 16 to *D* 2 14 (172).

53 On this text cf Honsell *FS Kaser* (1976) 111 *et seq*; Behrends *Die fraus legis* (1982) 29 *et seq*; Fascione *Fraus legi* (1983) 166 *et seq*.

54 *Über Verbotsgesetze und verbotswidrige Geschäfte im römischen Recht* (1977) 109.

neque dolo malo. This view cannot, however, be reconciled with the fact that the words *neque dolo malo* refers to a defect of will: an infringement of the *boni mores* means a conflict with a normative system, which is not mentioned by the edict, but which was obviously equated with the one established by *leges, plebiscita, senatusconsulta, decreta,* and *edicta*. This tallies with the fact that many texts dealing with legal transactions *contra bonos mores*, include the *boni mores* in a kind of catalogue of legal sources. I shall be returning to this point later.

Here I should like to emphasise that all texts stating – in a very general and abstract way – the invalidity of *pacta contra bonos mores*, go back according to their inscriptions to the third century AD. Mezger[55] regarded them as interpolated because they placed a moral code on a par with the law. Kaser[56] disagreed with this even when the search for interpolations was at the height of its popularity. Mezger's hypothesis fails because it cannot be taken for granted that the texts in question were referring to a moral code (the rules of ethics) when speaking of *mores*. The *mores* should rather be understood as standards which characterised the Roman *civitas*, and whose contents we can determine only by careful investigation into the recorded cases of application.

Taking the sources as they have been handed down to us, we are first of all confronted with the question whether they offer any indication that in the period between the *edictum de pactis* and the quoted texts from the third century AD, the *boni mores* had already been equated with the norms mentioned in the *edictum de pactis*. We do not lack such indications. I want to mention even at this stage that Papinian plays a decisive role among these.

The following testimony of the invalidity of a mandate given *contra bonos mores* is virtually immune to textual criticism: (*Gai Inst* 3 157):

> "Illud constat, si quis de ea re mandet, quae contra bonos mores est, non contrahi obligationem; veluti si tibi mandem, ut Titio furtum aut iniuriam facias."

Above all, this text shows that invalidity of a transaction because of an infringement of the *boni mores* did not apply to *pacta* only but also to (normal) contracts. The infringement of the *boni mores* resulted from the delictual character of the act in question.

According to the sources handed down to us, the main areas where contractual freedom was limited by the *boni mores* were the exemption from liability for *dolus*,[57] *litem redimere*,[58] and the remunerated transfer of a legal dispute to an agent similar to the contract on the *quota litis*, which is widely rejected today. And finally, all agreements relating to the succession upon death of a living person[59] should be mentioned in this context. The law governing conditions was, however, central to this development.

General statements like the ones quoted concerning the invalidity of *pacta contra bonos mores* may also be found with regard to the invalidity of conditions *contra bonos mores*, probably even at an earlier stage.

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55 *Stipulationen und letztwillige Verfügungen 'contra bonos moes' im klassisch-römischen und nachklassischen Recht* (1929) 25 *et seq.*

56 *SZ* 60 (1940) 145.

57 *Ulp 30 ad ed D* 16 3 1 7.

58 *Pap e Resp D* 17 1 7 and *Diocl C* 2 12 15 (293).

59 *Iul 2 ad Urs Feroc D* 45 1 61; *Pap 12 Resp D* 39 5 29 2; *Diocl C* 8 38 4 (293); *Const C Th* 2 24 2 (327).

The late classical state of opinion is reflected in the following text (*Paul 45 ad ed D* 28 7 9):

> "Condiciones, quae contra bonos mores inseruntur, remittendae sunt, veluti 'si ab hostibus patrem suum non redemerit', 'si parentibus suis patronove alimenta non praestituit'."

It is worth noting that the examples given by Paul are all taken from the realm of *reverentia*, the disregard of which was, according to reliable sources, regarded as an infringement of the *boni mores*.[60] That the author of the *Sententiae* kept mostly to Paul's material is shown by the parallel text in *PS* 3 4b 2 which is also contained in the *Consultatio* (4 8) in a changed and abbreviated version:[61]

Pauli Sent 3 4b 2:

> "Condiciones contra leges et decreta principum vel bonos mores ad scriptae nullius sunt momenti: veluti 'si uxorem non duxeris', 'si filios non susceperis', 'si homicidium feceris', 'si larvali habitu processeris' et his similiter."

Pauli 3 Sent Cons 4 8:

> "Pacta vel condiciones contra leges vel decreta principum vel bonos mores nullius sunt momenti."

Both texts are concerned with the institution of heirs, ie with wills. The examples in *PS* 3 46 2 are clearly distinguishable from those in *Paul D* 28 7 9. There all cases are related to *reverentia versus parentes* and *patroni*, whereas *PS* 3 46 2 refers to the freedom of family life, then to atrocities (thusfar similar to *Ep Gai* 2 9 18) and finally to the obligation not to appear in public dressed ridiculously.[62] More strictly than in *Paul D* 28 7 9 the *boni mores* are placed in a catalogue of relevant norms. As far as conditions are concerned – again this relates to testamentary conditions – this is illustrated more clearly in *Marcian 4 Inst D* 28 7 14:

> "Condiciones contra edicta imperatorum aut contra leges aut quae legis vicem optinent scriptae vel quae contra bonos mores vel derisoriae sunt aut huiusmodi quas praetores improbaverunt pro non scriptis habentur, et perinde, ac si condicio hereditati sive legato adiecta non esset, capitur hereditas legatum."

As Kaser[63] has correctly observed, the fragment uses the language of classical law in its legal-technical statements (*pro non scripto haberi, ac si condicio adiecta non esset*). The long and rather overexpanded catalogue of conflicting systems may be explained with reference to the uncertainty of the late classical lawyers about the system of the relevant legal sources.[64] This leads us to a further catalogue of legal sources by Marcian: (*Marcian 6 inst D* 30 112 3):

> "Si quis scripserit testamento fieri quod contra ius est vel bonos mores non valet, veluti si quis scripserit contra legem aliquid vel contra edictum praetoris vel etiam turpe aliquid."

D 30 112 3 attracts attention because here, as elsewhere, the general statements on legal transactions *contra bonos mores* or on conditions *contra bonos mores* are placed in a kind of catalogue of legal sources.[65] There was obviously a tendency to relate the *boni mores* to other normative systems, which on their part

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60 See *Ulp 76 ad ed D* 44 4 4 16; *Sev Alex C* 2 1 1 (230); eventually, *Ulp 36 ad ed D* 24 3 14 1 as well.

61 Cf Schindler *Labeo* (1962) 16 23 *et seq.*

62 Cf *Derisoriae in Marcian D* 28 7 14. See also Cicero *De Off* 3 93; *Sen Epist* 24 18; *Codex Maximilianeus Bavaricus civilis* III 3 10.

63 *Verbotsgesetze* (fn 54) 103.

64 On *qua legis vicem optinent* cf *Gai Inst* 1 4 5 7; *Jul D* 1 3 32 1; *Ulp D* 1 4 1 pr.

65 On Roman catalogues of legal sources see Kaser *Festschrift Flume* I (1978) 101 *et seq*; Kaser *Festschrift Wieacker* (1978) 90 *et seq*; Kaser *Festschrift Schwind* (1978) 115 *et seq.*

can lead to the invalidity of legal transactions. In *PS 1 1 4 and Cons* 4 7 the *boni mores* appear next to *leges*. Other texts pay more regard to the new imperial law: in *C* 2 3 6 the *boni mores* appear next to *leges* and *constitutiones*: *PS* 3 46 2 (= *Cons* 4 8) places them next to *leges* and *decreta principum*. Most differentiated are the schedules into which Marcian places the *boni mores*: in *D* 30 112 3 he quotes *ius, boni mores, lex, edictum* and the rejection of *turpe*; and in *D* 28 7 14 he mentions *edicta imperatorum, leges*, sources equal to *leges* (*quae legis vicem optinent*) and *boni mores* at the same time.

If we keep in mind the intensity of this inclination to combine statements on legal transactions *contra bonos mores* with a kind of catalogue of the legal sources, it becomes clear that the urge to obtain certainty about the scope of relevant normative systems had increased in late classical law. Moreover, it may be suggested that these statements (now quite frequent), about the invalidity of a condition, a *pactum* or another disposition which was *contra bonos mores*, had at the same time sparked off efforts to elucidate the relation between the *boni mores* and proper legal sources. These efforts also characterise the much-discussed text[66] of *Pap 16 Quaest D* 28 7 15:

> "Filius, qui fuit in potestate, sub condicione scriptus heres, quam senatus aut princeps improbant, testamentum infirmet patris, ac si condicio non esset in eius potestate: nam quae facta laedunt pietatem existimationem verecundiam nostram et, ut generaliter dixerim, contra bonos mores fiunt, nec facere nos posse credendum est."

The relevance of this fragment to the history of dogma lies in the idea, expressed here for the first time, that something legally disapproved of is the same as something which is legally impossible. This construction was received eagerly by mediaeval and humanistic jurisprudence.[67] Only Thomasius[68] criticised it.

This idea of equating the forbidden with the impossible undisputably creates certain doubts about the authenticity of the text. Further doubts arise, if we look more closely into the statements about the kind of obstacles to validity. First, attention is drawn to the disapproval of a conditional institution of an heir by the Senate or the *princeps*. Thus we are dealing here with an obstacle which had already become positive law. The sentence starting with *nam*, however, brings in unwritten standards of evaluation: *pietas, existimatio, verecundia*. These, in a questionable generalisation, are subsumed under the *boni mores*.

On the other hand, there are strong indications that we are confronted with a classical text, more specifically by Papinian. One such indication is the reference to *verecundia*; this reference gave rise to suspicion in earlier times.[69] Going through the texts on *verecundia*, as handed down to us, we have to conclude, however, that the usual reasons for such a suspicion (for example, post-classical moralism) do not apply here. The preserved protocol-summary of the *decretum divi Marci* on self-help in *D* 48 7 7 proves that *verecundia* – as well as *pietas* – definitely played a role in legal thinking during the times of Marcus Aurelius and in the writings of the imperial chancellery. The mention of *verecundia* in

66 Cf Wieacker *Textstufen klassischer Juristen* (1960) 334; Kaser *Verbotsgesetze* (fn 54) 106 *et seq.*

67 On Freigius, Sichard and Mynsinger see Schmidt (fn 50) 19.

68 *Institutiones Jurisprudentia Divinae* VI § 108: "Turpe vero conditiones . . . neque adeo sunt species impossibilium, ut communiter interpretes legum civilium ob non recte intellectam legem Pandectarum volunt."

69 Kaser *SZ* 60 (1940) 149 A 1.

Ulp 35 ad ed D 26 10 1 7 goes back to a rescript of Septimus Severus. *Callistratus 1 Quaest D* 5 1 47 quotes a rescript of Hadrian, where *verecundia* is mentioned. In the Severian rescripts, of which *C* 2 12 9 and *C* 10 5 1 *pr* have come down to us, *verecundia* appears again. Thus it had its importance in the language used by the chancellery for a precisely determinable time. In addition, we come across the terminological preference of one author, and this is Papinian. Apart from *D* 28 7 15, the following texts containing *verecundia* go back to him – at least according to their inscriptions: *Pap 27 quaest D* 49 14 14 1; *Pap 27 Quaest D* 18 7 6 pr.; *Pap 8 Quaest D* 13 5 25 1; *Pap 12 Resp D* 39 5 31 1; *Pap 5 Resp D* 38 1.

The view that Papinian himself is speaking to us in *D* 28 7 15 is supported by one aspect of the problem, discussed in *D* 28 7 15 emphasised by Kaser;[70] this discussion renders it less strange than it appears at first sight that the condition *contra bonos mores* is taken to be impossible. *Patres familias* could make the institution of a *filius in potestate* as an heir subject to no conditions other than potestative ones.[71] Thus the text does not raise the general distinction in accordance with the possibility of the condition's fulfilment, but merely determines whether a certain condition was to be regarded as potestative. Under these circumstances, it might not seem inappropriate to say that a condition, fulfilment of which resulted in conduct disapproved of by the Senate or the Emperor, had to be assessed in the same way as a condition, occurrence or non-occurrence of which did not depend only on the person who wanted to acquire a right from the conditional transaction.

Finally, it is of importance that Papinian features strongly among the texts on the invalidity of transactions and conditions *contra bonos mores*, whereas Ulpian for instance is very much "underrepresented." Among the very general and more elementary statements from the third century, which we have already dealt with, the texts going back to Papinian are clearly distinguishable because of their close relation to specific cases and their concern for detail. This is true for the above-mentioned text, which relates to *redimere litem*, *Pap 3 Resp D* 17 1 7. *Pap 12 Resp D* 39 5 29 2 belongs to the field of disapproved transactions about inheritances of living persons:

> "Donationem quidem partis bonorum proximae cognatae viventis nullam fuisse constabat: verum ei, qui donavit ac postea iure praetoris successit, quoniam adversus bonos mores et ius gentium festinasset, actiones hereditarias in totum denegandas respondit."

Someone had donated a part of the property of a close relative, who was still alive, to another person. This donation was undoubtedly ineffective. The donor subsequently became the heir (according to *ius honorarium*) of this relative. According to Papinian, however, all *actiones hereditariae* should be denied to him, because his improper haste had violated the *boni mores* as well as the *ius gentium*. Again, Papinian's personal terminology explains this surprising equation of *boni mores* and *ius gentium*. *Pap 36 Quaest D* 48 5 39 2 makes it clear that Papinian regarded the *ius gentium* as a normative system independent of positive enactment.[72] This provided a common denominator with the *boni mores*.

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70 *Verbotsgesetze* (fn 54) 107.

71 *Ulp 4 ad Sab D* 28 5 4 pr ("et quidem sub ea condicione, quae est in potestate ipsius, potest").

72 Cf Mayer-Maly in *Ius humanitatis* (*Festschrift Verdroß*) (1980) 147 164.

The Papinianic assumption of a correspondence between *boni mores* and *ius gentium* makes it easier to understand his only statement on *boni mores* which is not related to a specific case, namely *Pap 28 Quaest D* 22 1 5:

> "Generaliter observari convenit bonae fidei iudicium non recipere praestationem, quae contra bonos mores desideretur."

What is against the *boni mores* cannot be claimed *ex fide bona*. The emphasis is not on the possibility of performing the legal transaction, but on the applicability of a *iudicium bonae fidei* for the enforcement of the contents agreed upon.

Thus I would venture to say that Papinian participated substantially in a controversy on the legal importance of the *boni mores* at the beginning of post-classical times. His statements were always related to cases. They can be considered the basis of those general and abstract statements on the invalidity of *pacta contra bonos mores* and of *condiciones contra bonos mores* which we find in the third century AD – mainly in elementary texts. At about the time of these attempts – mainly on the part of Papinian and *Pauli Sententiae* – to grasp the importance of the *boni mores* for contracts and wills, interest also arose in the relevance of *boni mores* for *iniuria*, and also for *vis* and *metus*. Protagonists here are Ulpian as well as Paul and *Pauli Sententiae*. However, even Labeo might have known the edictal clause on *iniuria*, where the *boni mores* were mentioned three times.

Of course, one might object that this sketch of the development has been conditioned by the disproportionate contributions of the early classical, classical and the post-classical laywers to the sources that have come down to us. On the other hand, the "overrepresentation" of a certain author and certain sources (Papinian, *Pauli Sententiae, Consultatio*) is an important factor in the evaluation and calls for an explanation. Moreover, it is to be presumed that controversies on such a fundamental problem in early classical and classical times would have left traces such as reports on discussions, quotations or at least on occasional *magis*.

The second text on *boni mores* handed down to us (besides *Gai* 3 157) from the height of the classical period draws our attention to the immorality of all agreements and stipulations which are directed at the curtailment of the testator's freedom of will. This text is *Iul 2 ad Urseium Ferocem D* 45 1 51:

> "Stipulatio hoc modo concepta: 'Si heredem me non feceris, tantum dare spondes?' inutilis est, quia contra bonos mores est haec stipulatio."

A conventional penalty for not appointing someone as an heir was stipulated. The rejection of each premature commitment on the part of the testator led to the invalidity of such a stipulation. As far as the style is concerned, the final sentence of *D* 45 1 61 has weaknesses. The words *haec stipulatio* could be left out without detracting from the meaning of this text. Nevertheless it is probable that Julian had based the invalidity of a stipulation on its incompatibility with the *boni mores*. Another piece of evidence for the principle that dispositions relating to an inheritance or a share of the inheritance before the occurrence of death were *contra bonos mores*, is to be found in the above-mentioned text of *Pap 12 Resp D* 39 5 29 2. In a considerable number of passages[73] the *pacta de*

73 See, for instance, *Marcian 11 Inst D* 34 9 2 3; *Ulp 6 ad Sab D* 28 6 2 2.

hereditate viventis and similar legal transactions are not recognised without express reference to the *boni mores.*

Diocletian's chancellery upheld the rejection of all contracts about the inheritance of a living third party. This is substantiated by *Diocl C* 8 38 4 (293):

> Ex eo instrumento nullum vos habere actionem, quia contra bonos mores de successione futura interposita fuit stipulatio, manifestum est, cum omnia, quae contra bonos mores vel in pacto vel in stipulatione deducuntur, nullius momenti sint."

One can presume that the draft of an instrument based on local law played a role in the case underlying this rescript. The generalisation relating to *pacta* and *stipulationes* should not strike us as strange, because the statements on *pacta contra bonos mores* and on *stipulationes contra bonos mores* were originally handed down in two different strands – as we have already seen. In the time between Diocletian and Constantine, however, as in so many other instances, a break becomes visible. A predivision by a mother became permissible in 327 AD (*Const Cod Theod* 2 24 2):

> "Nulli quidem de bonis usurpandis vivorum nec dividundis contra bonos mores concessa licentia est: sed si praecipiente matre bona eius inter se liberi diverserunt, placuit omnifariam nobis huiusmodi divisionem durare, si modo usque ad extremum eius vivendi spatium voluntas eadem perseverasse doceatur."

As far as Justinian's own opinion on *pacta contra bonos mores* is concerned, we have clear evidence in *Just C* 2 3 30 3 (531):

> "Secundum veteres itaque regulas sancimus omnimodo huiusmodi pacta, quae contra bonos mores inita sunt, repelli et nihil ex his pactionibus observari, nisi ipse forte, de cuius hereditate pactum est, voluntatem suam eis accommodaverit et in ea usque ad extremum vitae spatium, perseveraverit: tunc enim sublata acerbissima spe licebit eis illo sciente et iubente huiusmodi pactiones servare."

In this particular case Justinian was concerned only with *pacta de hereditate viventis.* He expresses a point of view which had already appeared in *Const Cod Theod* 2 24 2. The words *usque ad extremum vitae spatium* are contained in Justinian's as well as in Constantine's law. They are preceded by a generalising review of the classical system.

A tendency towards a greater recourse to the *boni mores* can be observed neither with regard to Justinian, nor generally for the post-classical time. The number of texts after the post-classical period of Diocletian and Constantine which take the *boni mores* into consideration is very small. It has already been pointed out that *Const Sirmond* 10 raises no specific legal questions. In the ITP to *Cod Theod* 8 12 1 we find a *condicio contra bonos mores.* In *Cons* VIII 1 we find the *boni mores* in one passage, which does not quote an older source, but which stems from the pen of the editor of the *Consultatio.* His extraordinary interest in the *boni mores* must not be overlooked, but it does not provide a sufficient basis for Mezger's erroneous assumption[74] that in post-classical times the infringement of what was morally offensive came to be considered as a breach of the law in addition to that which was legally prohibited.

The picture we get from our sources about the increase and decrease of references to the *boni mores* is more plausible than any other construction which has been put forward so far in connection with assumptions of interpolation. Yet it leaves certain questions open.

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74 Mezger (fn 25) 57.

One of these questions concerns the sanction for a legal transaction *contra bonos mores*. Many sources indicate that it was not necessary specifically to assert an infringement of the *boni mores* in court. Here one may mention the texts containing expressions like *nullius momenti* (*PS* 3 46 3) and *nullam vim* (*C* 2 3 6), but also texts which simply deny the possibility of such regulations (*neque – possumus*: *PS* 1 1 4). This tallies with the case where elements of a legal transaction which were *contra bonos mores* were regarded as non-existent (*pro non scripto*). As the most important procedural consequence, denial of the intended *actio* came into consideration.[75] Mezger[76] attempted to distinguish between stipulations which were based on an illicit *causa* and those which were directly aimed at an illicit performance. Agreements of the first kind he regarded as valid according to *ius civile* but not according to the *ius honorarium*. This differentiation cannot be substantiated from the sources.

In the jurisprudence of the 16th century, however, we do discover first attempts to distinguish with regard to sanctions for infringements of the *boni mores*. According to Freigius,[77] infringement of the *boni mores* by both parties should lead to *ipso iure* nullity. An infringement of the *boni mores* by one party only should make an *exceptio* available to the innocent party.

The most interesting among the open questions is the one relating to the substantial (material) contents of the *boni mores*. Were they derived from some kind of ethics, from tradition or from the opinions and the outlook of society? Was there perhaps some kind of formula for them similar to the "sense of decency of all fair and just thinking people"?

It has to be stated quite categorically that no Roman jurist ever tried to describe, let alone define, the nature of the *boni mores*. Obviously they were naturally taken for granted and not subject to any doubt.

Most of the attempts in recent writings to provide a general formula have to be rejected. This applies, for example, to Mezger's theory,[78] according to which an act *contra bonos mores* meant an act against the law in classical times. If Mezger's view were correct, then the classical lawyers would have understood the *boni mores* approximately in the same way as Konstantin Simitis[79] did some time ago. Here, as in so many other cases, an unfortunate tendency of many writers in the area of interpolation research becomes evident: the tendency to impose the views of our own times on the sources and to question the authenticity of texts which do not fit in. In this way one arrives at an inferior version of the "Pandektenharmonistics" of the 19th century.

Kaser's view[80] that the expression *boni mores* had from ancient times characterised the relation to the moral values of the community at large, is much more attractive. When, however, he goes on to say[81] that this applied largely to the moral integrity of family life in the widest sense, then the limits seem to be

75 Diocl 4 7 5: "tamen ex huiusmodi stipulatione contra bonos mores interpositu denegandas esse actiones iuris auctoritate demonstratur." Cf Kaser *Verbotsgesetze* (fn 54) 87.
76 fn 25 46.
77 In *Pandectas Commentarii ad D* 45 1 123.
78 fn 25 25.
79 *Gute Sitten und Ordre Public* (1960).
80 *SZ* 60 (1940) 103.
81 *SZ* 60 (1940) 130.

drawn too narrowly. *Redimere litem* is against the *boni mores*, but has nevertheless nothing to do with the moral integrity of family life. The edicts referring to *boni mores* provide evidence, as well, that the *boni mores* have to be understood in a wider sense. At the same time these edicts suggest that the *boni mores* refer to an "ought" (a "Sollen") from a sphere outside the law. They appeal to standards whose binding force was unquestioned and self-evident, even if they were not transformed into written or unwritten law. One comes closest to grasping their content, if one looks at the values:[82] *pietas, existimatio, verecundia.* Such categories make it easy to understand that a relationship was established between *boni mores* and *bona fides* (*Pap D* 22 1 5) and *ius gentium* (*Pap D* 39 5 29 2) – in both cases by Papinian. This late classical lawyer came closer to a characterisation of the *boni mores* than any other Roman lawyer. The reason for this might well be that the content of the *boni mores* was no longer self-evident in his time.

The authorities of the Roman common law ("*ius commune*") quite rightly referred mainly to *D* 28 7 15 when they tried to characterise the nature of *boni mores*. Donellus[83] provides a good example. First of all he equated the *mores* with *consuetudo*. Then he proceeded to qualify this:

> "Boni mores sunt ii, qui sunt cum honestate coniuncti, vel potius cum natura e iure gentium."

Next came the reference to *D* 28 7 15:

> "Nam bonum id appellamus, cuiusmodi est, si quid ex religione, si quid ex pietate, si ex ea reverentia, quam maioribus, et iis, quorum in potestate sumus, debemus, si ex veritate fiat."

After this, Cicero *De Inventione* 2 is quoted, and it is said that what is against the values indicated by him (*religio, pietas, gratia, vindicatio, observantia, veritas*) is *adversus bonos mores. Pacta, quae sunt contra bonos mores* are divided by Donellus into two groups. In one group we find the *pactum* which is *per se turpe*. To the other group belong those *pacta* which invite *ad deliquendum* only.

Voet,[84] too, refers to *Pap D* 28 7 15 with regard to the question when a contract is *contra bonos mores*. Bynkershoek[85] merely says shortly:

> "Boni mores sunt viri honesti et probi."

7 SUMMARY

To sum up: the reference in modern codifications to the *boni mores* has important precursors in Roman law. The relevant texts are not the result of post-classical or Justinianic moralism but evidence of classical law. A number of official legal texts referred to the *boni mores*: three edicts concerning *iniuria* and one of Caracalla's Constitutions (*D* 48 5 14 5). We can clearly isolate certain main areas of reference to the *boni mores*: *iniuria*; *pacta* and *condiciones*; and fundamental principles of family structure. We can make out who was mainly interested in the *boni mores*: Papinian, *Pauli Sententiae* and *Consultatio*. The *boni mores* are not part of the law but are understood as a system which is

82 Cf Winkler *Wertbetrachtung im Recht und ihre Grenzen* (1969); Stein *Legal Values in Western Society* (1974).
83 *Opera omnia* (ed Macerata (1830)) VII 133.
84 *Commentarius ad Pandectas* I[4] (ed Haag (1723)) n 16 zu *D* 2 14 (172).
85 *Observationum Juris Romani* VI 25 11 (*Opera omnia* I[4] (Köln 1761)) 200.

legally relevant to certain problems. In such cases they are even inserted in the catalogues of legal sources.

Mediaeval jurisprudence showed very little interest in the *boni mores*. This changes in some writings of the humanistic school and then mainly in rationalistic natural law. Codifications of the first codification wave do not refer to the *boni mores* as often as more recent laws. They are obviously more concerned with providing a dogmatic basis for precedents.

Today, the areas of law which do take the *boni mores* into account contribute towards a closer relationship between states with codified law and the common-law countries.

To use the courts of justice as an instrument for the achievement of political ends necessarily brings the law into disrepute and prepares the way for political upheaval. (per Keeton in 1962 *Journal of the Society of Public Teachers of Law* 67.)

AANTEKENINGE

IMPROPERLY OBTAINED CONSENSUS

South African law has long accepted that a contract may be avoided on the grounds of misrepresentation, duress or undue influence during the negotiations which precede a contract. (The question of a claim for damages is not considered in this note.) Although these grounds for avoiding a contract have developed as separate legal concepts they do not appear to represent three distinct principles of law. They are much rather examples of one general principle, namely that a contract may be avoided if the underlying consensus has been obtained in an "improper" manner. (Although misrepresentation differs from duress and undue influence in so far as in the case of the former there is an error in motive involved, the essential reason for allowing the party who has been misled to set up such an error is also the manner in which the consensus was obtained.) In recent years this general principle has enjoyed the attention of both authors and the courts. Thus Van Huyssteen (*Onbehoorlike Beïnvloeding en Misbruik van Omstandighede in die Suid-Afrikaanse Verbintenisreg* 1980) has submitted that at least the specific ground of undue influence should be extended to become the more general "abuse of circumstances." A number of decided cases also provide some measure of authority for the recognition of such a general principle. Apart from the cases already discussed in the literature (Van Huyssteen 108–126) some recent decisions deserve attention.

In *Savvides v Savvides* (1986 2 SA 325 (T)) the applicant requested *inter alia* that a power of attorney which she had executed in favour of her husband be declared void on the ground of what she called duress (327D), inasmuch as her husband threatened to leave the matrimonial home permanently. (Although the case does not deal directly with a contract *stricto sensu* it does address the question of a declaration of intent which has been obtained in an improper manner.) In *Malilang v MV Houda Pearl* (1986 2 SA 714 (A)) the defendant, in answer to a claim for performance under certain contracts, pleaded that the contracts could be avoided on the ground of duress in that the plaintiffs had threatened to "black" the defendant's ship. In *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* (1986 1 SA 819 (A)) the respondent attempted to avoid a contract on the ground that the plaintiff had bribed respondent's agent to persuade the respondent to conclude the contract with the plaintiff.

The decisions in these cases display a common thread: the court in each case seeks to determine whether consensus has been obtained in an improper manner, and the specific ground for avoiding the contract would seem to be a particular instance of the broader principle. In *Malilang's* case the court had to deal with "economic duress" in the sense of "commercial pressure exerted on one party to a contract in order to induce him to enter into the contract" (730B). Corbett JA refers to the fact that the consent was obtained by "improper pressure"

(730E). The judge states that the analogy of duress to undue influence is valid since "the rationale for the avoidance of contracts on grounds of duress is similar to that which underlies the avoidability of contracts entered into under undue influence" (731D–E). Although the court was applying English law these words may also be applied to South African law, as appears from the statement by Myburgh J in *Savvides v Savvides* that "[i]n certain circumstances undue influence and duress may overlap" (329F).

That the grounds for avoidance are not confined to misrepresentation, duress and undue influence speaks even more clearly from the decision in *Plaaslike Boeredienste v Chemfos*. The court there held that a principal whose agent has been bribed to obtain his consent to a contract, is entitled to avoid that contract, not on the ground of fraud (as was decided in *Davies v Donald* 1923 CPD 295 and *Mangold Bros v Minnaar and Minnaar* 1936 TPD 48), but because the consent has been obtained by improper means ("die ongeoorloofdheid van die metode" – 848C). The same considerations may be distinguished in earlier decisions such as *Preller v Jordaan* (1956 1 SA 483 (A), where the attempt by Fagan CJ to interpret the common-law concept of *dolus* extensively – although probably not justifiably so – see the minority judgment by Van den Heever JA; Van Huyssteen 116–117 – may well be explained in terms of such a broad principle of "improperly obtained consensus;" Fagan CJ in fact speaks of consent which was obtained improperly – "op ongeoorloofde wyse" – 496F) and similar cases (see the decisions referred to below).

It is probably trite that the aforementioned broad principle underlies the particular grounds of avoidance which have crystallised. *Apropos* of the above decisions, however, the question arises whether the emphasis should not be *entirely* on the underlying principle. This would mean that there is actually but one ground for avoiding a contract, namely obtaining consensus in an improper manner, although of course, depending on the facts involved, a contractant may rely directly on one of the specific grounds referred to above.

Should our law recognise such a shift of emphasis, the advantage would be that a court could give effect to the requirements of equity in a particular case without having to resort to a particular category which has crystallised (cf *Savvides v Savvides* 329F). This cannot mean that a court would receive an unlimited discretion to decide according to what it regards as fair and just. The conduct in point, namely obtaining the consensus, must be *improper*.

A plaintiff will have to prove, for instance, that the other party to the contract acted unscrupulously or unconscionably ("gewetenloos" – *Preller v Jordaan* 492H; *Patel v Grobbelaar* 1974 1 SA 532 (A)) or that he exploited the plaintiff's circumstances (Van Huyssteen 135–138), in other words that he acted in a manner which according to the generally recognised norms of conduct is not acceptable and reasonable. This is nothing other than the element of wrongfulness of the conduct by which the consensus was obtained. (Wrongfulness may be construed either as infringement of a right or acting contrary to a legal norm; see *LAWSA* vol 8 par 19 *et seq.*) From the decisions dealing with misrepresentation and duress it is clear that the conduct in point is unacceptable because it is unlawful and not merely because it is a particular type of act (such as an incorrect statement or threat). (See e g *LAWSA* vol 5 par 133 and 138 and the authority quoted there; the argument advanced by Olivier 1965 *THRHR* 199–203; the examples quoted in *Arend v Astra Furnishers (Pty) Ltd* 1974 1 SA 298 (C) 306 *et seq*; and

cf the requirement of an act *contra bonos mores* as formulated in *Broodryk v Smuts* 1942 TPD 47 52.) This can also be said of undue influence although in this regard the element of wrongfulness may not have been expressly distinguished by the courts. (Cf e g the elements of undue influence stated in *Patel v Grobbelaar* 534A.) The same should apply to other, as yet uncrystallised, instances of conduct of this nature, such as bribing the agent of the other party to the contract (*Plaaslike Boeredienste v Chemfos ante*), or abusing the other's unfortunate circumstances (Van Huyssteen 135–138), or compounding a crime (*Arend v Astra Furnishers ante*).

As in other cases, the element of wrongfulness must in these circumstances comply with certain requirements. (See e g *Minister van Polisie v Ewels* 1975 3 SA 590 (A); *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); *LAWSA* vol 8 par 22 *et seq.*) To some extent these requirements have already been formulated. Misrepresentation is generally required to relate to material facts. (See e g *Karroo & Eastern Board of Executors & Trust Co v Farr* 1921 AD 413, and the cases quoted by Van der Merwe 1977 *THRHR* 6 *et seq.*) In cases of duress requirements such as a considerable evil which must be imminent or inevitable have been laid down (*Broodryk v Smuts* 52). Undue influence has been said to require unconscionable exertion of influence ("invloed op gewetenlose wyse gebruik" – *Patel v Grobbelaar* 534A).

A further requirement – which may apply as an independent requirement or one *in addition* to the requirements mentioned above – could relate to the particular intention with which the wrongdoer acted. The most obvious form of such an intention would be the intention to induce the other party to conclude a contract which he would not have concluded. Such an intention may well be an additional requirement (cf e g *Preller v Jordaan* 492H; *Patel v Grobbelaar* 534A), even though the intention may appear from an act which precedes the actual unlawful conduct (as would appear to have been the case in *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) and similar decisions, as discussed by Van der Merwe and Van Huyssteen 1986 *THRHR* 350). The intention to induce the contract may conceivably develop into an independent requirement for wrongfulness, thereby extending the parameters of wrongful conduct. Such a development does not seem to be taking place in South African law (but cf the allegation by the plaintiff in its combined summons in *Phame (Pty) Ltd v Paizes* 1973 3 SA 397 (A) 408A), although it may serve a useful purpose in the context of an estoppel without fault (see e g *Usher v AWS Louw Elektriese Kontrakteurs* 1972 2 SA 1059 (O)). A more likely development would be to the effect that a party's *dolus* may serve to make his conduct wrongful in so far as his directing his will in a blameworthy state of mind may make his conduct socially unacceptable to such an extent that it becomes juridically unreasonable. (This would be analogous to the requirement of an *animus vicino nocendi* in cases of so-called abuse of rights. See Van der Merwe 1977 *THRHR* 10; *LAWSA* vol 8 par 20 27.)

Another form of such an intention would be an intention to cause damage (or perhaps even harm in the wider sense of the word?) to the other party to the contract. (Cf *Ex parte Coetzee* 1984 2 SA 363 (W) where Coetzee J dealt with "good cause" for the cancellation of an antenuptial contract.) This is apparently not a requirement for the wrongfulness of a misrepresentation; nor does it seem to be a general requirement for the wrongfulness of duress, since the

threat will often involve conduct which in itself is wrongful (such as physical violence or restriction of freedom – *Broodryk v Smuts ante*). The intention to cause damage could conceivably be a requirement for some forms of duress, especially where a party is threatened with conduct which is lawful *per se* but which is made for an improper purpose (see e g *Arend v Astra Furnishers ante*), or cases of undue influence. There is, however, no direct evidence that this consideration has played a rôle in the decisions of our courts. One must therefore assume that the courts have hitherto not found it necessary to qualify wrongfulness in this manner.

An intention which has apparently been taken into account is the intention to gain an advantage which in the circumstances of a particular case is unfair. This, for example, seems to have been part of the *ratio* of decisions concerning the effect of duress by way of a threat of criminal prosecution, namely that the party who exerted the duress intended to gain an advantage which he could otherwise not prove to be due to him. (See e g *Ilanga Wholesalers v Ebrahim* 1974 2 SA 292 (D) ("to use the threat of prosecution to extort an undertaking to pay an amount which he knows he cannot prove to be due in a court of law" – 298A); *Jans Rautenbach Produksies (Edms) Bpk v Wijma* 1970 4 SA 31 (T); and cf *Arend v Astra Furnishers ante* where the matter was left open. Of course, duress of this kind will often, if not always, lead to the stifling of a prosecution or compounding a crime. The ensuing contract could for that reason be against public policy and therefore void. See *Arend's* case 311G–H; *LAWSA* vol 5 par 138 n 10 *Oos-Transvaalse Koöperasie Bpk v Heyns* 1986 4 SA 1059 (O).)

All told, the courts would probably at most regard the particular intention of the wrongdoer as but one of the factors indicating that his conduct was wrongful. The question of an intention to cause damage as discussed above must not be confused with the question whether the eventual contract must be detrimental to the other party. The courts have on more than one occasion expressed this as a requirement, particularly in cases of duress and undue influence (see e g *Broodryk v Smuts*; *Arend's* case; *Preller v Jordaan*; *Patel v Grobbelaar ante*. As far as misrepresentation is concerned the requirement is not generally set; *LAWSA* vol 5 paras 133 and 134). It is submitted, however, that detriment in the form of damage is a requirement only for a claim for damages (*LAWSA* vol 5 par 134) and not for a claim for avoidance, which is based simply on the existence of a defective will ("wilsgebrek") brought about by wrongful conduct (Van Huyssteen 138–140).

The latter principle then constitutes the true basis for avoiding a contract. Although the presence of a misrepresentation, of duress or of undue influence would facilitate a decision about the avoidance of a particular contract, the absence of these grounds would not necessarily prevent avoidance. In its quest for justice between contractants the law should not be compelled to operate within the strictures of a *numerus clausus* of grounds for avoidance. It should rather give effect to a more basic consideration, namely that a person should not be bound against his will to the consequence of the wrongful act of another. Such an approach provides the foundation for a less formalistic attitude towards defects in will without, however, leading to unlimited liability. (Cf the development of our law regarding liability for pure economic loss; *LAWSA* vol 8 par 24; *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A).) There appears to be good reason to assume that the South African law of contract not

only recognises the sanctity of contracts (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A)) but also protects the reasonable expectations of contractants, whether by holding one contractant to the expectations of the other (as in the case of estoppel or where the reliance theory is applied), or by allowing, as in the cases being discussed, the latter to withdraw from a contract in which his expectations have been affected in an unreasonable way.

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TOEKOMSTIGE ONTWIKKELINGE IN DIE INHEEMSE REG*

1 Belangrikheid van Ontwikkeling

Sommige juriste en politici is steeds bevooroordeel teenoor inheemse reg. Daar word nog beweer dat inheemse reg primitief is, dat dit ondergeskik aan die algemene Suid-Afrikaanse landsreg is, dat dit op die punt staan om uit te sterf, dat kennis daarvan dus van geen praktiese nut is nie en dat die toepassing daarvan neerkom op die ondersteuning van die beleid van apartheid. Hierdie ideologiese struikelblokke is geensins bevorderlik vir die studie en ontwikkeling van inheemse reg nie (kyk ook Dlamini "Obstacles in the Teaching of Customary Law" 1985 *Bulletin of the Institute for Public Service and Vocational Training* (UZ) 9 2, 5–12).

Iemand wat inheemse reg as primitief (onbeskaaf of onbeholpe) beskou, ly aan etnosentrisme en het 'n selfondersoek nodig. Inheemse reg is 'n lewende reg en word deur 'n groot deel van die bevolking in suider-Afrika nageleef. Dit is in staat om by veranderende omstandighede aan te pas en omvat op baie terreine regverdiger reëls as die gespesialiseerde Westerse regstelsels. Ingevolge die interne Suid-Afrikaanse aanwysingsreg word inheemse reg ook nie as ondergeskik aan die algemene landsreg beskou nie (kyk *In re Yako v Beyi* 1948 1 SA 388 (A) 399–400; *Umvovo v Umvovo* 1953 1 SA 195 (A) 201).

Die toepassing van inheemse reg moet nie beskou word as 'n ondersteuning van 'n beleid van apartheid nie, maar as 'n erkenning van die persoonlike regstelsels in Suid-Afrika op grond van geregtigheid. Bennett (*The Application of Customary Law in Southern Africa* (1985) viii 10 106) bevestig dit en voeg by dat 'n persoon se kulturele oriëntering erkenning verdien. Bowendien word persoonlike regstelsels algemeen erken in lande met meerdere groepe wat elk 'n eie regstelsel het. In die Engelssprekende Afrikalande is die vraag nie meer of die inheemse regstelsels sal voortbestaan nie, maar of dit as aparte stelsels sal voortbestaan (kyk Allott "What is to be done with African Customary Law" 1984 *JAL* 67 70–71).

In Suid-Afrika word inheemse reg tans in verskillende mate nageleef na gelang die persoonlike keuse van leefwyse en die plek. In die nasionale state word die regering op derde vlak, die stamregering, hoofsaaklik deur inheemse reg beheers.

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* Toe hierdie onderwerp onlangs met die lede van die Sentrum vir Inheemse Reg aan die Universiteit van Suid-Afrika bespreek is, het hulle die belangrikheid daarvan benadruk. Hulle opbouende kommentaar het tot verbetering van die oorspronklike aantekening gelei.

Op die terrein van die huweliksreg leef 35% van die stedelike swartes en 56% van die landelike swartes ooreenkomstig inheemse reg (Henegan, Nurse en Olwage *Huwelike en Gebruiklike Verbindings van Swart Persone* (1985) 164). Indien die hele swart bevolking van die Republiek van Suid-Afrika en die TBVC-lande saam gereken word, is die persentasie inheemsregtelike huwelike nog hoër; volgens die 1970-sensussyfers was 67% van die swart vroue ingevolge inheemse reg getroud (kyk VerLoren van Themaat *Law Reform by Legislation in Bophuthatswana – a Valuable Product for Internal Use and for Export* (1983)). In die jare sewentig het die kommissarishowe in Natal ongeveer 90% van hulle tyd vir hofwerk bestee aan sake waarin inheemse reg toegepas is (kyk Suttner "The Social and Ideological Function of African Customary Law in South Africa" 1984 *Social Dynamics* 62).

In die res van Afrika is inheemse reg nog steeds die belangrikste reg wat die persoonlike verhoudinge binne die swart bevolkings beheers (kyk Sevareid "The Future of Customary Law" 1983 *Africana Journal* 34). In die Franssprekende Afrikalande leef 80% van die bevolking volgens inheemse reg (Schaeffer "Die Entwicklung des afrikanischen Rechts zwischen Tradition und Entfremdung" 1981 *Jahrbuch für Afrikanisches Recht* 114). Dit is ook die regstelsel wat die persoonlike verhoudinge van ongeveer 90% van die bevolkings van Kenia, Uganda en Tanzanië reël (Cotran "The Place and Future of Customary Law in East Africa" in *BIICL* (red): *East African Law Today* (1966) 74).

Aanvanklik was die uitgangspunt van die Suid-Afrikaanse regering (of sy raadgewers) dat die Westerse kultuur, veral die Westerse ekonomie en onderwys, die swart bevolking sou beïnvloed om volgens die algemene landsreg, die Westerse en sogenaamde moderne reg, te leef. Daarom is die amptelike erkenning en toepassing van inheemse reg as 'n tydelike maatreël beskou. In 1959 is daar egter oorgegaan tot 'n permanente erkenning van inheemse reg. In die meeste Engels- en Franssprekende Afrikalande is daar ook van 'n tydelike erkenning na 'n permanente erkenning van inheemse reg oorgegaan op grond van die wil van die swart bevolkings, en geniet die ontwikkeling van inheemse reg besondere aandag (kyk Allott 56–71; Schaeffer 107–117; Sevareid 107–117). Die ervaring het die volgende geleer: inheemse reg is by veranderende omstandighede aanpasbaar; tussenpersoonlike verhoudinge hang nie van 'n individu se opvoedkundige kwalifikasies af nie, maar van die groep se gedrag; die onderlinge verhoudinge tussen lede van 'n etniese groep word deur die groep se kultuur met inbegrip van sy reg beheers; dit is nie alleen onuitvoerbaar nie, maar onregverdig en selfs onmoontlik om 'n volk sy reg te ontneem.

Oor die laaste dertig jaar was daar 'n aanmerklike toename in die navorsing oor inheemse regstelsels in Afrika. Dit word onder meer bevestig deur die publikasies van die Sentrum vir Inheemse Reg aan die Universiteit van Suid-Afrika, verskeie ander Suid-Afrikaanse universiteite, die *School of Oriental and African Studies* by die Universiteit van Londen en die *Gesellschaft für afrikanisches Recht* te Heidelberg.

2 Verwagte Ontwikkelingsrigtings

In die onderstaande bespreking word kortliks na die verwagte ontwikkelinge in die Republiek van Suid-Afrika en die TBVC-lande verwys.

2 1 Regswetenskaplike Verwerking van Inheemse Reg

Die grootste gedeelte van die inheemse regstelsels is nog ongeskrewe en moet op 'n regswetenskaplike wyse geboekstaaf word. Boekstawing van inheemse reg is 'n voorvereiste vir behoorlike regsontwikkeling en noodsaaklik as akademiese en praktiese inligtingsbronne. Boekstawing word met die dag dringender omdat die landdroshowe en hooggeregshof sedert 1986-08-01 in die Republiek van Suid-Afrika belas is met die toepassing van inheemse reg en die regterlike beamptes van hierdie howe 'n groter behoefte aan regshandboeke oor inheemse reg as hulle voorgangers het. Daar is nog probleme wat spoedige boekstawing van inheemse reg vereis, soos die uitsterf van goeie regskenners en die vergroting van die gaping tussen die inheemse reg wat die hoër howe skep en dit wat die volk naleef: "the gap between judicial and popular customary law" soos Allott (60) dit stel.

'n Geskikte navorsingsmetode vir optekening van die verskillende inheemse regstelsels verdien besondere aandag. Die huidige metode van veldwerk in Suid-Afrika is heelwat verbeter, maar vereis nog te veel gespesialiseerde mannekrag, koste en tyd. Dit kom voor of in Kenia en Tanzanië 'n doeltreffender navorsingsmetode gevolg word deur die medewerking van die owerheid en die gebruik van regspanele. (Vir 'n beskrywing van die "Law Panel System" kyk Cotran (1966) 84–88 en Cotran "Integration of Courts and Application of Customary Law in Tanganyika" 1965 *East African Law Journal* 119–120.)

2 2 Hervorming van die Howe

Hervorming van die howe gaan om verskillende aspekte.

2 2 1 Integrasie van die Hofstelsel

Ten eerste moet die spesiale howe vir die toepassing van inheemse reg afgeskaf word en moet die gewone howe toeganklik wees vir alle persone en verantwoordelik wees vir die toepassing van inheemse reg. Hierdie stadium is heel onlangs in die Republiek van Suid-Afrika bereik (kyk Wet 34 van 1986). In die TBVC-lande is die howe in verskillende mate geïntegreer. Met 'n geïntegreerde hofstelsel sal die isolasie van inheemse reg, wat 'n oorheersende kenmerk van die stelsel van spesiale howe is, verdwyn. Daar sal na verwagting nie net groter belangstelling nie, maar ook beter regspleging in inheemse reg wees.

Ten tweede moet alle howe gemagtig word om jurisdiksie oor alle persone, ongeag hulle ras, uit te oefen. Dit is teenswoordig die posisie in die meeste Afrikalande. In Suid-Afrika kan kapteinshowe egter net sake verhoor waarin swartes betrokke is.

2 2 2 Professionalisering van die Tradisionele Stamhowe

Met professionalisering van die tradisionele stamhowe word bedoel die vervanging van die tradisionele hoflede met opgeleide regterlike beamptes en ander hofpersoneel. Dit kan geleidelik geskied deur eers net opgeleide hofklerke aan te stel en in die finale stadium al die tradisionele hoflede deur opgeleide regterlike beamptes te vervang (kyk ook Allott 58). Nog 'n aspek van professionalisering van genoemde howe is die toelating van regsverteenwoordiging. Tot dusver word prokureurs en advokate verbied om in kapteinshowe op te tree omdat dit as

onregverdig beskou word om professionele juriste in howe met onopgeleide voorsittende beamptes te laat verskyn.

Professionalisering van stamhowe is in belang van hoër gehalte regspleging. Opgeleide regterlike beamptes en regsverteenwoordiging is 'n beveiliging teen magsmisbruik, verskaf hoër judisiële integriteit teen omkopery en lewer 'n groter bydrae tot regsontwikkeling onder die moderne omstandighede (kyk Spalding "The Legacy of Colonial Ideas" 1970 *Zambia Law Journal* 36–48).

2 2 3 Meer Swart Hofbeamptes

Vermeerdering van die swart hofbeamptes, soos landdroste, regters, aanklaers, prokureurs en advokate, in belang van groter vertroue in die Suid-Afrikaanse regspleging verdien aandag (kyk Kemp *Race and Access to Justice* (ongepubliseerde RGN-verslag 1984) 14–17).

2 3 Groter Erkenning van Inheemse Reg

Inheemse reg behoort meer erken te word om onregverdighede uit te skakel en vir nuwe verwikkelinge voorsiening te maak. Hier gaan dit veral om die volledige erkenning van die inheemsregtelike huwelik (kyk Henegan, Nurse en Olwage 66–76 178–185).

'n Ander aspek wat ook oorweging verdien, is die toepassing van inheemse reg op nie-swartes. Dit is toenemend die posisie in ander Afrikalande. Die toepassing van inheemse reg in Tanzanië hang nie meer af van die betrokkene se ras, dit wil sê of hy 'n swarte of nie-swarte is nie, maar van sy lidmaatskap van 'n gemeenskap (Cotran (1966) 83). In Zimbabwe is die rassegrondslag vir die toepassing van inheemse reg ook uitgeskakel (Bennett 62). In Suid-Afrika behoort daar ook geen beletsel teen die toepassing van inheemse reg te wees indien 'n nie-swarte byvoorbeeld 'n onregmatige daad teen 'n swarte gepleeg het nie.

2 4 Interne Aanwysingsregsisteem

Die ontwikkeling en verfyning van 'n interne aanwysingsregsisteem vir die Republiek van Suid-Afrika en nasionale state (selfregerende en onafhanklike) is nodig omdat die huidige interne aanwysingsreg verouderd raak as gevolg van die onafhanklikwording van nasionale state en omdat die gereelde en grootskaalse migrasie in Suider-Afrika 'n interne aanwysingsreg vir die nasionale state en die RSA vereis.

2 5 Hervorming van Inheemse Reg

Regshervorming is 'n doelbewuste en beplande aktiwiteit en uit die ervaring van ander Afrikalande en volgens die behoeftes in Suider-Afrika behoort dit die volgende in te sluit: unifisering of integrasie, modernisering en afrikanisering (kyk ook Allott "Reforming the Law in Africa – Aims, Difficulties and Techniques" in Sanders (red): *Southern Africa in need of Law Reform* (1981) 228–236).

Hoewel 'n regering deur regshervorming bepaalde oogmerke kan bereik, moet in ag geneem word dat die reg beperkinge het; 'n mens kan nie elke denkbare oogmerk deur regshervorming bereik nie en die doeltreffendheid van die reg is afhanklik van die gemeenskap se aanvaarding van die betrokke regsreëls (kyk Allott (1981) 228–229; (1984) 64).

2 5 1 Unifisering of Integrasie

In 'n land met meer as een regstelsel is unifisering of integrasie wenslik. Unifisering is die skepping van eenvormige reëls vir alle onderdane en integrasie beteken die ineenskakeling van meerdere regstelsels tot een regstelsel. In elke nasionale staat moet ten eerste die unifisering van die verskillende stamregstelsels tot 'n eenvormige inheemse regstelsel, en ten tweede die unifisering of integrasie van die inheemse en die moderne reg ondersoek word. Unifisering is 'n moeilike stap en verg tyd; in geen enkele Afrikaland is dit al bereik nie ondanks die feit dat dié doelstelling meer as twee dekades nagestreef word (kyk Allott (1984) 69). In die Republiek van Suid-Afrika (buite die selfregerende nasionale state) behoort integrasie van die inheemse en die algemene Suid-Afrikaanse reg, in die besonder ten opsigte van huweliksreg, erfopvolging en regte ten aansien van grond, aandag te kry.

2 5 2 Modernisering

Inheemse reg moet gemoderniseer word om verouderde reëls, soos sommige ten opsigte van huwelike, erfopvolging en grond, by die hedendaagse sosiale en ekonomiese omstandighede aan te pas. Dit omvat ook wat in ander Afrikalande bekend is as liberalisering van inheemse reg, soos die uitskakeling van onbevoegdhede op grond van geslag of ander irrelevante faktore.

2 5 3 Afrikanisering

Afrikanisering van die reg behels om die algemene landsreg of die geïntegreerde inheemse en algemene landsreg meer in lyn met die vereistes van die swart bevolking te bring. Dit is 'n algemene verskynsel in ander Afrikalande en is byvoorbeeld in Transkei op die gebied van die huweliksreg gedoen. In Suid-Afrika kan afrikanisering van die proses- en bewysreg ondersoek word.

2 6 Inheemse Regspleging in Stedelike Gebiede

'n Paar ondersoeke oor inheemse regspleging in swart dorpe is reeds gedoen (kyk Labuschagne en Swanepoel *Inheemse Regspleging in Mamelodi* (1979) ongepubliseerde KION-verslag; Ndaki "What is to be said for Makgotla?" in Sanders (red): *Southern Africa in Need of Law Reform* (1981) 176–184; Hund en Rammopo "Justice in a South African Township: the Sociology of Makgotla" 1983 *CILSA* 179–208). Hierdie nie-amptelike howe wissel in samestelling en ontleen hulle gesag aan verskillende instansies, byvoorbeeld die *lekgotla* wat ooreenkom met die inheemse stamhof en sy gesag aan die owerheid van 'n nasionale staat ontleen, die wykshof wat deur 'n wykskomitee van die dorp ingestel is en deel van die plaaslike owerheidstelsel vorm of bendes wat op eie houtjie optree en hulle eie reëls toepas.

Aangesien hierdie howe steeds bestaan en selfs toeneem, behoort hulle deeglik ondersoek te word. Aspekte wat aandag verdien, is die omvang van hierdie nieamptelike howe, hulle gesagsbasis en legitimiteit, hulle samestelling en funksionering asook die reëls wat hierdie howe toepas.

3 Stappe vir Ontwikkeling

Benewens die skenk van aandag aan genoemde ontwikkelingsrigtings deur navorsing en opleiding, behoort die volgende stappe oorweeg te word:

3 1 Die inrig van nuwe adviserende en koördinerende liggame en die aanpas van bestaande liggame vir die ontwikkeling van inheemse reg, soos die Suid-Afrikaanse Regskommissie, RGN en die Multilaterale Juridiese Komitee;

3 2 die aanname van wetgewing deur die Suid-Afrikaanse regering ter wysiging van inheemse reg om in die besondere behoeftes van die swart bevolking van die Republiek van Suid-Afrika te voorsien (tot dusver is die Suid-Afrikaanse regering se beleid dat die regerings van die nasionale state sover moontlik as die aangewese wetgewer ten opsigte van die inheemse reg vir alle swartes in Suider-Afrika beskou moet word);

3 3 die vergemakliking van die bewys van inheemse reg in die landdros- en hooggeregshof en die stigting van 'n instituut of uitbouing van 'n bestaande liggaam, soos die Sentrum vir Inheemse Reg, om hierdie doel te bereik.

4 Opleiding

Wat Roberts-Wray dertig jaar gelede ten opsigte van Afrika in sy artikel "The Need for Study of Native Law" (1957 *JAL* 82–86) gesê het, geld vandag net so goed vir suider-Afrika omdat daar in hierdie streek miljoene swartes is wie se lewe deur inheemse reg beheers word. Ons kan dit reguit stel dat 'n regsleergang sonder 'n kursus in inheemse reg nie volledig is nie. Onder die bedeling van die spesiale howe vir swartes was die toepassing van inheemse reg as die geïsoleerde domein van die personeel van die spesiale howe beskou. Onder die nuwe bedeling van 'n geïntegreerde hofstelsel is 'n studie van inheemse reg vir alle regstudente noodsaaklik.

Die toename in materiaal as gevolg van bovermelde ontwikkelinge behoort nie noodwendig tot die uitbreiding van kursusse te lei nie. Regsleergange van universiteite moet eerder so saamgestel wees dat dit 'n basiese opleiding in inheemse reg insluit. Besondere aandag moet geskenk word aan die aard en kenmerke van inheemse reg, asook die verskil tussen inheemse reg en die algemene Suid-Afrikaanse reg en die ooreenkomste in genoemde regstelsels. Dit sal tot groter aanvaarbaarheid en verstaanbaarheid van inheemse reg en die algemene Suid-Afrikaanse reg lei en beter tussengroepverhoudinge bevorder.

'n Regsvergelykende studie kan ook 'n goeie bydrae tot regshervorming, veral ten opsigte van unifisering of integrasie van die meerdere regstelsels en modernisering van inheemse reg, lewer (kyk ook Visser "Die Betekenis van die Regsvergelykende Studie vir Bantoegewoontereg in Suid-Afrika 1977 *De Jure* 327–329; Sanders "In Search of Disciplined Law Reform" in *Southern Africa in Need of Law Reform* (1981) 243–244).

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VERJARING IN DIE INHEEMSE REG

1 Inleiding

Artikel 20 van die Verjaringswet 68 van 1969 bepaal soos volg:

> "Vir sover as wat 'n reg of verpligting van een persoon teen 'n ander persoon deur Swart reg gereël word, is die bepalings van hierdie Wet nie van toepassing nie."

Aangesien genoemde wet nie van toepassing is nie, is die vraag: watter reëls is dan in so 'n geval van toepassing? In dié aantekening word die effek van tydsverloop op eise volgens die inheemse reg onder die loep geneem. Daar word aanvanklik aandag gegee aan inligting bekom uit etnografiese studies. Daarna word die gewysdereg bespreek en ten slotte word 'n analise en evaluering van die regsposisie in die inheemse reg gedoen.

2 Etnografiese Gegewens

Schapera (*Handbook of Tswana Law and Custom* (1970) 286–287) sê ten aansien van die Tswana die volgende:

> "It may be noted here that there is no law of prescription among the Tswana. *Molato ga o bole, go bola nama*, goes the saying: 'A wrong does not go bad, it is meat that goes bad,' i e a case can be heard against a person at any time that he can be found. A case cannot be tried in the absence of one of the parties, save in very exceptional instances. In case of theft, e g, if the complainant dies before the case is heard, his son can take it up instead; while, in case of debt, action can be taken against the debtor's heirs if he died before paying what he owes. But it is held that the sooner the case is dealt with the better. This applies particularly in cases of assault. *Dinthô di sekwa di sa le metse*, it is said: 'Wounds are prosecuted while they are still fresh.' But instances do occur – and they appear to have grown more frequent now that flight to European labour centres is possible – where people run away or hide if they know that they have committed an offence. It is for this reason that the complainant has the right to take up his case whenever the opportunity occurs, even if it is years after the offence was committed. But he is expected to lodge his complaint with defendant's people immediately he has been wronged, even if defendant himself has fled. This will justify him in taking up the matter afterwards; whereas if he fails to lodge his complaint at the time, any subsequent attempt to bring it forward will be regarded with suspicion and may even be dismissed."

(Sien ook Coertze *Die Familie-, Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* (1971) 158–159.)

Cloete verklaar dat die Venda nie so iets soos verjaring ken nie. 'n Saak moet egter so gou moontlik formeel aangemeld word en in geval van onnodige versuim, byvoorbeeld 'n jaar na die betrokke voorval, sal die hof weier om die saak aan te hoor "veral omdat die geloofwaardigheid van die eiser reeds onder verdenking staan . . ." (*Die Geslagsonregmatighede en Judisiële Stelsel van die Vhavenda van Dzanani* (LLD-proefskrif PU vir CHO 1980) 266).

Jacobs wys daarop dat 'n eis by die imiDushane nie deur verjaring tot niet gaan nie, maar die hof kan weier om 'n eis aan te hoor as dit nie tydig aangemeld is nie (*Die Judisiële Stelsel en die Familie-, Erf- en Opvolgingsreg van die imiDushane* (D Phil-proefskrif UP 1974) 122). Dit is ook die posisie by die Changana-Tsonga (sien Boonzaaier *Die Inheemse Bestuurstelsel en Hofsisteem van die Nkuna van Ritavi met Verwysing na hulle Herkoms* (MA-verhandeling UP 1980) 252; Hartman *Die Samehang in die Privaatreg van die Changana-Tsonga van Mhala, met verwysing na die Administratiefregtelike en Prosesregtelike Funksionering* (D Phil-proefskrif UP 1978) 171).

De Clercq wys daarop dat die tydsverloop van die

> "oomblik waarop die onregmatige dood gepleeg is totdat die saak aangemeld moet word, nie deur die abakwaMzimela vasgelê word nie, aangesien hulle glo dat 'n saak nie vrot word nie (*icala aliboli*)."

Daar word egter vereis dat die verweerder in kennis gestel word dat 'n saak teen hom hangende is (*Die Familie-, Erf- en Opvolgingsreg van die abakwaMzimela met Verwysing na Prosesregtelike Aspekte* (D Phil-proefskrif UP 1975) 112).

Volgens De Beer verval 'n saak volgens die reg van die Noord-Ndebele as algemene reël nie as gevolg van 'n lang tydsverloop nie. Sekere sake, soos 'n geding met betrekking tot die delik "beswangering van 'n ongehude meisie," verval egter wel na 'n lang tydsverloop. (*Groepsgebondenheid in die Familie-, Opvolgings- en Erfreg van die Noord-Ndebele* (D Phil-proefskrif UP 1986) 170–171).

In die lig van bogaande uiteensetting kan twee gevolgtrekkings gemaak word:

a Daar kan as algemene reël gestel word dat die inheemse reg nie verjaring, in Westersregtelike sin, ken nie (sien ook Van den Heever *'n Sistematiek vir die Inheemse Deliktereg van die Swartman* (LLD-proefskrif UP 1984) 367–373; Elias *The Nature of African Customary Law* (1972) 166). Hierdie konklusie word bevestig deur artikel 152 (2) van die Natalse Wetboek van Zoeloereg.

b In sekere gevalle verval 'n eis tog as gevolg van 'n lang tydsverloop. Daar is egter in dié verband 'n behoefte aan meer gedetailleerde inligting. Dit blyk nietemin duidelik dat daar nie vasgestelde termyne, soos in die breëre Suid-Afrikaanse reg, gestel word nie.

3 Die Gewysdereg

Ten aanvang kan genoem word dat daar verskeie delikte en transaksies is wat aan sowel die gemenereg as die inheemse reg bekend is (sien bv *Mhlongo v Mhlongo* 1937 NAC (N + T) 124 125; *Warosi v Zotimba* 1942 NAC (C + O) 55 56; *Magidela v Sawintshi* 1943 NAC (C + O) 52; *Sawintshi v Magidela* 1944 NAC (C + O) 47). In so 'n geval moet die hof eers ooreenkomstig die interne aanwysingsregsreëls bepaal watter regsisteem toepaslik is (sien hieroor Visser *Die Suid-Afrikaanse Interne Aanwysingsreg* (LLD-proefskrif UP 1979) 289 e v; Bennett *The Application of Customary Law in Southern Africa* (1985) 63–118).

In veral vroeëre beslissings word bloot verklaar dat die inheemse reg nie so iets soos verjaring ken nie (sien *Mgugumali v Duntsuka* 4 NAC 82 (Lusikisiki); *Mayekiso v Mayekiso* 1944 NAC (C + O) 81 82).

Die toonaangewende saak oor verjaring in die inheemse reg is tans *Lequoa v Sipamla* 1944 NAC (C + O) 85. Die hof wys daarop dat die inheemse reg nie verjaring van 'n skuld wat erken of deur 'n hofbevel bevestig is, ken nie en vervolg (85–86):

> "But where a debt, claim, or liability is open to denial, or dispute, or is a matter where time is important in fixing an event, e g a seduction, or the whereabouts of an individual, e g a catch in an adultery case, delay in instituting action by report, demand or summons is regarded in Native Law as prejudicing the defence if the delay is unreasonable.
>
> The principle, or rather, the process involved is tantamount to a diminution of the probative value of the evidence, which becomes progressively less probable and convincing with the lapse of time – a process almost of fading out of the evidence; so that ultimately in a case of conflict of evidence or credibility any doubt must accrue to the benefit of the defendant. The probabilities become more and more unlikely if a man fails to take action when another man in similar circumstances would or should have acted. The stage is reached in some cases when the delay is fatal to a plaintiff's case though in no sense is there anything in the nature of the extinctive prescription of the Common Law. An action lies but the result is governed by the probative value or lack thereof resulting from the delay.
>
> If the obligation arises from delict, Native Custom demands that the wrongdoer or his people be informed immediately the claimant becomes aware of the wrong. Unreasonable delay prejudices a defence. The longer the delay in laying a charge or making complaint the greater the degree of proof required to establish plaintiff's case, since it

becomes increasingly more improbable with the passage of time when reasonable men would normally have taken action earlier in the same circumstances.

Where an obligation arises from a contract and a denial of liability ensues subsequently the liability must be established by the claimant immediately or as soon as is reasonably possible thereafter. If delay ensues, the position of the defendant in such cases becomes the stronger with the passing of time, until it may become almost unassailable for the simple reason that in such cases the probabilities would favour a defence of non-liability either by discharge of an obligation or of its non-existence, which the long delay would tend strongly to confirm, otherwise why the inaction?"

(Sien ook *Mafuleka v Dinga* 1945 NAC (N + T) 54 55–56; *Mkize v Pungula* 1946 NAC (N + T) 11; *Matholo v Moquena* 1946 NAC (C + O) 17 18; *Mchunu v Mchunu* 1981 ACCC (N–E) 76 79.)

In *Ndhlovu v Masuka* 1953 NAC (N–E) 161 163 word daarop gewys dat 'n eis as gevolg van 'n lang tydsverloop skipbreuk kan ly tensy daar (i) duidelike bewys is dat die eis gegrond is; (ii) daar voldoende redes vir die vertraging by die instelling van die geding aangevoer word; en (iii) bewys word dat die teenparty nie as gevolg van die vertraging benadeel word nie (sien ook *Zungu v Mlungwana* 1966 BAC (N–E) 2 3; *Dhlamini v Dhlamini* 1934 NAC (N + T) 21 22; *Dhludhla v Dube* 1937 NAC (N + T) 1 2; *Zulu v Zulu* 1938 NAC (N + T) 145 146; *Sitole v Mbata* 1938 NAC (N + T) 73; *Mtetwa v Mtetwa* 1939 NAC (N + T) 136 137; *Theomble v Lebenya* 1940 NAC (C + O) 22; *Manyate v Manyate* 1941 NAC (N + T) 7 8; *Ngcobo v Ngcobo* 1941 NAC (N + T) 14 15; *Nkosi v Sikosana* 1942 NAC (N + T) 78; *Gebekhulu v Gebekhulu* 1947 NAC (N + T) 78 79; *Ntanzi v Magwaza* 1947 NAC (N + T) 100 101; *Ngcobo v Ngobo* 1946 NAC (N + T) 14 15; *Ndezi v Gxonono* 1941 NAC (C + O) 36 38).

Die verweerder kan veral maklik deur 'n vertraging in die aanmelding aan die beweerde delikpleger of sy mense (wat inheemsregtelik *litis contestatio* daarstel) in geval van geslagsdelikte benadeel word. In *Dalisile v Dungulu* 1940 NAC (C + O) 83 86 word verklaar:

"The excuse given by the girl for failing to report her condition is a lame one. As was indicated failure to report timeously is in Native Law a most detrimental feature in a case for seduction. True it is that Basuto Custom is involved in that case, but the basic principle is the same among other tribes. The rule is that once a youth or man is shown to be intimate with a girl as metsha or otherwise, the condition of the girl is ascribed to him until he can prove his innocence. But to enable him to do so report must be made forthwith on the seduction otherwise it is held that the girl is screening some one else, for Natives recognise that a girl may have more than one lover or metsha, though this is not usual."

(Sien ook my artikel "Regspluralisme, Regsakkulturasie en Deflorasie in die Inheemse Reg" 1983 *TSAR* 1 20; *Ngovuza v Xelo* 3 NAC 9 (Umtata) 11.)

Wat kontrakte betref, vat Bekker en Coertze (*Seymour's Customary Law in Southern Africa* (1982) 68) die regsposisie soos volg saam:

"In matters of contract Blacks sometimes allow prolonged credit. A man may lend a friend a beast for use or slaughter, and wait years before demanding its repayment; or may sell a beast to another, who may promise to replace it or pay for it at some unspecified future time. Usually the creditor speaks to the debtor from time to time about the matter, the object being more to probe the defendant regarding his ability and willingness to pay rather than to obtain satisfaction; this is known as 'keeping the case alive;' it is observed by any people who are present that the defendant does not dispute the liability; eventually, when the plaintiff requires payment the delay cannot militate against him. If, however, the plaintiff has not kept the matter before the defendant in this way, he is liable, when he sues after a considerable lapse of time, to have difficulty in explaining why he did not do so."

(Sien ook *Ngqandulwana v Comba* 4 NAC 132 (Butterworth); *Mabilikwana v Jakeni* 1930 NAC (C + O) 91 92; *Nohele v Nohele* 6 NAC 19 (Engcobo) 20; *Cebe v Silimela* 6 NAC 14 (Mount Frere) 15; *Kunene v Kunene* 1940 NAC (N + T) 10 11.)

Dit wil voorkom of die howe onderskei tussen kontrakte wat verband hou met kraalaangeleenthede en handelskontrakte. In *Mtetwa v Mcunu* 1914 NHC 80 90 word verklaar:

> "It is true that there is no prescription in native cases; but in matters arising out of trade transactions, which have not the same notoriety as purely native cases connected with kraal affairs, little sympathy can be extended to parties who deliberately delay litigation until the issues are obscure. The appellant has elected to wait for nearly ten years before bringing forward claims which should have been decided long ago, and has chiefly himself to blame if an injustice is done."

4 Analise en Konklusie

In die lig van bogaande uiteensetting kan gekonkludeer word dat die inheemse reg nie so iets soos termynverjaring ken nie, dit wil sê 'n eis verval nie na verstryking van 'n sekere vasgestelde tydperk nie. Tog blyk dit dat 'n eis in effek na die verloop van 'n lang tydperk verval indien sekere omstandighede, soos hierbo uiteengesit, teenwoordig is. Die inheemse reg ken derhalwe wel so iets soos omstandigheidsverjaring. Om te beweer dat die inheemse reg nie 'n (bevrydende) verjaringsbegrip ken nie, is nie korrek nie. Ook verkrygende omstandigheidsverjaring bestaan in die inheemse reg.

Soos Bekker en Coertze (67) tereg verduidelik:

> "The idea of the acquisition or extinction of rights by prescriptive rules has not developed in customary law. But when a Black person has been in possession of certain property for a considerable time, and his possession or ownership is challenged by another, he may plead that he is the owner; since the onus is then generally on the claimant, any delay which he incurred before attempting to establish his claim gives emphasis to any weakness or obscurity in his case, and may tell against his credibility in the manner set forth below; consequently the defendant may succeed in obtaining a judgment in his favour which, if the action was vindicatory in nature, is in effect a declaration of rights as between himself and the claimant. In this sense, customary law possesses a rough and ready equivalent to acquisitive prescription, and in a corresponding sense, to extinctive prescription. No doubt, it is from this difficulty in dislodging a long-time possessor that prescription by rule of law eventually evolves in a society."

Omstandigheidsverjaring is meer in ooreenstemming met natuurregtelike konsepte. In dié verband is by geleentheid tereg gesê:

> "Dealing with ground 4 of the appeal, that it is contrary to the principles of natural justice to reject a plea of prescription, we must avoid the pitfall of applying principles of ethics of one community to another and especially avoid fallacious reasoning from one system of jurisprudence to another.
>
> The law of nature, i e natural justice, is ignorant of statutes of limitation of action. It knows only that a debt has been incurred and that it must be repaid. In this respect, then, Native law is nearer nature and must be held to be in accord with natural justice" (*Moima v Matladi* 1937 NAC (N & T) 40 45).

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THE LAW OF DELICT AND THE ILLEGAL BREADWINNER

In a country such as South Africa, where even official unemployment statistics are high and the economy is regulated by countless statutory provisions, it can be expected that large numbers of people depend, either partially or entirely, on

illegal earnings to secure a living. In the area of the law of delict our courts have handed down a series of judgments which have seriously prejudiced the participants in the informal economic sector as well as their dependants. These decisions have clearly been based on policy considerations which were applied by a process of analogy. But, it is submitted, due regard was not paid to the appropriateness of the analogy to the issues which our courts had to decide.

The first judgment in this series was that of Rumpff CJ in *Dhlamini v Protea Assurance Co Ltd* (1974 4 SA 906 (A)). In this case a hawker, who was injured in a motor vehicle accident, instituted an action for loss of income against the insurer of the party who was responsible for the accident. The plaintiff was not licensed to be a hawker and this fact led to the failure of her action. Rumpff CJ states:

> "Skade wat bereken word volgens die maatstaf van inkomste verkry uit 'n aktiwiteit wat teen die goeie sedes of wat misdadig is, sal dus nie vergoed word omdat dit teen die publieke beleid sou wees om dit wel te vergoed" (915B–C).

Boberg (*Law of Delict* 1984 vol 1 591–592) submits that the court in *Dhlamini's* case argued that, since the activity of hawking was subject to administrative control *inter alia* for health reasons it was not merely a criminal offence to hawk without a licence but it was also an activity which, if not controlled properly, could pose a threat to the public interest. The matter is, however, more complicated than this. Rumpff CJ continues to say (and this is a critical portion of his judgment):

> "Hierdie reël sou ook van toepassing wees op inkomste van 'n kleurlose statutêr verbode aktiwiteit (kleurloos in die sin dat dit nie as misdadig of teen die goeie sedes beskryf kan word nie) wanneer die inkomste van so 'n aktiwiteit nie afdwingbaar is nie weens ongeldigheid" (915B–C).

It would appear from this statement that the enforceability of the claim relating to the prohibited activity would have an influence on the success of a plaintiff's action even if the prohibition were not one in respect of an activity that would *endanger* the public interest. It is suggested, therefore, that the true principle that can be extracted from *Dhlamini's* case is as follows: it is against the public interest to grant an action for damages to a plaintiff who was wrongfully and culpably injured where the claim is based on income which is derived from an activity prohibited in such terms that it can be inferred from the legislation concerned that the conclusion of contracts in respect of that activity is also prohibited.

But when is income derived from " 'n kleurlose statutêr verbode aktiwiteit" unenforceable "weens ongeldigheid"? In *Dhlamini's* case Rumpff CJ concluded that:

> "Na my mening het die Wetgewer beoog dat daar geen handeldryf mag plaasvind deur 'n marskramer sonder lisensie nie. Om dit wel te doen, is nie alleen strafbaar nie, maar weens belangrike oorwegings van publieke beleid, behoort die gevolge van so 'n handeldryf ook nie regsgeldig te wees nie.
>
> Na my mening was die inkomste van die eerste appellante dus nie-regmatige inkomste" (917D–E).

The unenforceability of a contractual obligation, however, cannot always be said to depend on considerations of public policy. Our courts have developed guidelines to determine the validity of contracts concluded pursuant to statutorily prohibited activities, these guide-lines very often being constructed solely with reference to the wording of the legislation (*Metro Western Cape (Pty) Ltd v Ross*

1986 3 SA 181 (A)). An example of how they operate in practice is to be found in the case of *Lende v Goldberg* (1983 2 SA 284 (C)). The court had to decide whether contracts of employment which were concluded between black workers and white employers, while the workers did not have permission to work in a "prescribed area" (s 9*bis* of the Black (Urban Areas) Consolidation Act 25 of 1945), were valid, despite the express legislative prohibition on the employment of such workers. Section 10*bis* of Act 25 of 1945 reads:

> "*Employment of Blacks in prescribed areas.* (1) No person shall take any Black into his employment in a prescribed area or have such Black in his employment unless permission to take up employment has been granted to such Black by the officer appointed to manage the labour bureau having jurisdiction in such area."

The court held that the contract in issue was unenforceable, *inter alia*, because the provision was couched in the negative and the legislation made use of the word "shall" (1983 2 SA 284 (C) 288F–289A). Admittedly, the court also had regard to the purpose of the legislation but, so far as the enforceability of the contract was concerned, neither public interest nor matters of public policy were the overriding consideration. It was the purpose of the provision that was important and that purpose had to be ascertained with reference to the wording of the legislation.

It could still be argued, of course, that the influx legislation served the public interest and that, had the court in *Lende's* case been asked, it would have stated that public policy also demanded that the contract be unenforceable. A number of objections may be raised against such an argument: First, in a country such as South Africa, it is dangerous in the extreme to argue that legislation should be the sole determinant of considerations of public policy. This can be demonstrated by the fact that the government of the day made it quite clear that it was prepared to accept the recommendations of the President's Council (*Report on Urbanisation* 1985 ch 9 130–176) in respect of influx control long before any attempt was made to repeal the legislation. Secondly, it is obvious that when the courts strike down contracts pursuant to an activity prohibited by statute, they do not always pronounce on matters of public policy. For example, it is often said that statutory prohibitions that are *pro fisco* do not, as a general rule, invalidate contracts concluded in contravention of these provisions (White paper on Urbanisation 1986). Even though the adoption of a hard and fast approach in matters like these severely limits the ability of the courts to interpret every statute with an open mind, this approach seems to be consistently followed, which illustrates that the criterion adopted in nullifying contracts cannot *mutatis mutandis* be applied to delictual claims. If the *dicta* of Rumpff CJ in *Dhlamini's* case are supposed to refer to all cases where contracts related to the earning of income are unenforceable, they should not be followed unless our courts are prepared to state that the plaintiff in such a case is relying on an infringement of a personal right to claim income. There is no room for such an argument. If it is possible for a person to base a claim for damages on loss of future income (*Southern Insurance v Bailey* 1984 1 SA 98 (A)) that can only mean that the right which is infringed is the plaintiff's right to physical integrity. One of the capacities flowing from a right to physical integrity is an income-earning capacity (Boberg *op cit* 594 n 3) and it is that *capacity* which is protected by our courts where claims for damages are based on future loss of earnings.

As has already been stated, Rumpff CJ was of the opinion that it would be contrary to public policy to award damages where the claim is based on the

income that the plaintiff earned illegally at least in those cases where the plaintiff's actions could be classified as criminal or immoral (915B). It is submitted, therefore, that this judgment should be restrictively interpreted to apply only to such cases and that the reference to situations where the plaintiff's conduct amounts to the contravention of a "colourless legislative prohibition" (915C) should be regarded as *obiter dictum*. Joubert JA in *Santam Insurance Ltd v Ferguson* (1985 4 SA 843 (A)) held that Rumpff CJ in *Dhlamini's* case was of the opinion that the hawking carried on by the plaintiff in that case was opposed to the interests of public health and hence contrary to public policy. Thus Joubert JA held that the remarks of Rumpff CJ in connection with the application of the rule to income derived from a statutorily prohibited colourless activity were *obiter dicta*.

The principle in *Dhlamini's* case was subsequently extended to actions for damages for loss of support instituted by a dependant of an "illegal breadwinner," that is a person whose income was derived from illegal or immoral activities. In *Booysen v Shield Insurance Co Ltd* (1980 3 SA 1211 (SEC)) the activities of the deceased breadwinner were unlicensed and unauthorised. It was contended on behalf of the plaintiff that a claim for loss of support by a widow differed from a claim by the injured party himself. The unenforceability of the injured person's own claim did not affect the claim for loss of support; in other words, it was argued that the illegality of the deceased's income was unimportant (1216B). The court defined the question of law as being

> "not whether the dependant has a right of action against the defendant where the deceased might not, but whether on grounds of public policy, that right includes the right to compensation for loss which arose out of illegal activity; in other words, whether the pecuniary loss for which the defendant is bound to compensate the dependants can be held to include loss arising from ' 'n aktiwiteit wat teen die goeie sedes is of aan *permanens turpitudo* ly . . .' " (1216D–F).

From what is said above in respect of *Dhlamini's* case, it should already be clear that this formulation does not take proper account of the complexity of the legal problem in hand. The two ways in which the legal question was stated do not appear to correspond. Is there a difference between an illegal activity and an activity suffering from "*permanens turpitudo*"? Furthermore, it should be noted that the loss which the dependant sought to recover was loss which arose from the death of the breadwinner and surely not "loss which arose from an illegal activity"! The imprecision of the *dicta* in *Booysen's* case is all the more disappointing if it is remembered that as was said in that case:

> "[I]n the absence of authority in our courts and especially in the Appellate Division, the position in South Africa is open to debate . . ." (*supra* 1217B).

The court did, however, consider the following arguments:

a "[The] claim for loss of support by a widow differed in principle from a claim by the injured party himself and the unenforceability of the claim by that injured person did not extend to the unenforceability of the claim for loss of support consequent on the death of such a person, irrespective of the 'illegality' of the deceased's source of income" (1216A–B).

b In New Zealand and Canada the courts seem to be prepared to accept that "[w]here the deceased's earnings came from illegal activities . . . an award of damages may be based thereon but . . . the possibility of a sudden diminution at any time through the operation of the law should go in reduction of the award" (1216G).

c "[T]he dependant does not seek to enforce or rely on the illegal activity itself but merely calls it in aid as evidence of what the deceased could have earned . . . and that it may

> seem callous to hold that in such circumstances the dependant is entitled to such compensation as the deceased might have been able to earn had he engaged in a lawful activity" (1217E–F).

These arguments were not accepted because the court held that considerations of public policy dictated that even in the case of a dependant, an action for loss of support would not be successful where the breadwinner engaged in an unlawful activity in order to earn income (1218A). What these considerations of public policy are, is not at all clear. The court conceded that

> "[t]here may be room for contending that a distinction should be drawn in those cases where the illegality is merely 'technical' but would not have prevented the deceased from continuing with the activity in question or enforcing payment for the goods he had supplied or the services he had rendered" (1217G).

But this statement seems to implement the approach taken in *Dhlamini's* case even more drastically than Rumpff CJ might have contemplated. It is submitted that at least in that case the "distinction" had been drawn between the situation involving a living plaintiff and that involving dependants of a deceased. What appears to be an attempt to express some of the policy considerations prompting the decision of the court in *Booysen's* case to come to its decision also serves to summarise the practical effect of the judgment in an extreme situation:

> "[I]t is difficult to conceive that our courts would allow the husband or the child of a deceased prostitute to recover compensation based on the claim that during her lifetime she had maintained them – and would have continued to maintain them – on the proceeds of her prostitution" (1217H).

The question concerning an action for damages by the dependant of an illegal breadwinner came before the courts once more in *Ferguson v Santam Insurance Ltd* (1985 1 SA 207 (C)). Again the activity from which the deceased derived his income was illegal in that it was not licensed by the relevant authorities. Vos J was clearly of the opinion that, had the deceased himself performed the unlicensed activity, he would have been able to claim earnings due to him by virtue of a contract concluded in pursuance of such an activity. Thus he states:

> "I am of the opinion that the *Dhlamini* principle should be confined. In fact I am respectfully of the opinion that the principle has been too widely formulated and requires review. I would suggest that it should only apply in cases where the income of the injured party was not legally recoverable. Accordingly I hold that a widow is not non-suited where her deceased husband carried on illegal activities of such a kind that he could in law recover the price of the goods sold or services rendered" (209B).

In this case Vos J had no problem with the activities of the deceased and granted the widow's claim. On an analysis of *Dhlamini's* case it is clear that the appellate division never intended to debar any delictual claim where an injured plaintiff based the action on lost income from contracts in respect of illegal activities which would have been enforceable.

On appeal (*Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A)) it was held by the appellate division (per Joubert JA) that the court *a quo* had erred in calculating the *quantum* of damages due to dependants since it was based on income that had been earned illegally. For its finding that the income was illegal income, the appellate division relied on the reference to "nie-regmatige inkomste" in *Dhlamini's* case and came to the conclusion that the income of the deceased was illegal since his operation of an unlicensed panelbeating business constituted an offence to the public interest (850D). In the appellate division it was, for the first time, contended that, during his career as panelbeater, the deceased had earned at least some of his income in circumstances where a claim

to such income would have been enforceable (851H–852B). It was held that because this was not in issue before the court *a quo*, there was no proper basis on which this contention could be investigated on appeal and accordingly absolution from the instance was granted (852E). The judgment of Joubert JA in this case is a disappointing one. The legal issues raised by the court *a quo* were never specifically dealt with despite the remark by Vos J that the principle as stated in *Dhlamini's* case needed to be reviewed (*Ferguson v Santam Insurance Ltd* 1985 4 SA 207 (C) 209B). It would appear that the only basis on which Joubert JA altered the decision in the court *a quo* was that the income on which the claim was based constituted illegal earnings. The only definition of illegal income is the reference to "nie-regmatige inkomste" in *Dhlamini's* case. It is unclear which portions of the judgment in *Dhlamini's* case are meant to be included in the definition of "nie-regmatige inkomste."

Since *Dhlamini's* case is not *in pari materia* with *Ferguson's* case, it would seem that the only authority direct in point and cited in the judgment is the case of *Booysen v Shield Insurance Co Ltd* (1980 3 SA 1211 SEC) which was discussed above. In view of the imprecise formulation of the law in that case, it is to be regretted that the appellate division did not make a clearer statement of the principle involved.

In *Mankebe v AA Mutual Insurance Assoc Ltd* (1986 2 SA 196 (D)) the issue arose again. The parties had agreed that the court be asked, in terms of rule 33, to decide whether the plaintiff (dependant) had the right to recover damages before hearing evidence in the action (198A). This question at least had already been satisfactorily answered by the appellate division in the *Ferguson* case (*Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) 852). The principle was admittedly not clearly stated by Joubert JA, but it would appear that where a court grants absolution from the instance, after refusing to base a claim for damages on "nie-regmatige inkomste," an action for support can still be based on income which was earned legally (or which does not qualify as "nie-regmatige inkomste"). The question therefore should not have been whether the dependant has a right to claim income for loss of support, but rather to which income the court should refer in deciding the quantum of that claim. It is evident that the court in *Mankebe's* case erred when it held that the right of a dependant in such circumstances will depend on the nature of the trade or business carried on and the nature of the prohibition against such trade or business and the reasons therefor (1986 2 SA 196 (D) 203J–204A). It is not the right to claim damages which is in issue, but the question whether illegal earnings can be used to assist in substantiating the claim.

It is suggested that in this area of the law there is still ample scope for the creative drafting of pleadings. Even where an injured person institutes an action for damages arising from his injuries, our courts have failed to make it absolutely clear what income will be regarded as income which cannot be utilised in the calculation of the quantum. It is a pity that the principle in *Dhlamini's* case was ever extended to the action instituted by a dependant. The suggestion in *Booysen's* case that the child of a prostitute should not expect any sympathy from the courts in an action for loss of support (where it was maintained from its mother's income) is not only unjust but also unfounded in law. Public policy should not lie entirely in the hands of the legislature. Extreme examples of an

hypothetical nature cannot establish a sound legal principle of universal applicability.

> "Judgment must be based, not on the social and legal structure of a past century, but on the present changed and changing conditions of society and the proliferating controls of conduct in the pervasive juridical system by which it is governed" (*Tallow v Tailfeathers* 1973 6 WWR (Alta CA)).

The case of *Metro Western Cape (Pty) Ltd v Ross* (1986 3 SA 181 (A)) demonstrates clearly the dilemma with which our courts are faced in dealing with the question of contractual illegality. This case, like *Ferguson's* case concerned non-compliance with Ordinance 15 of 1953(C). The claim of the plaintiff (appellant) was for the purchase price of goods sold and delivered. The defence contended that the contracts were void and therefore unenforceable since they were concluded by a trader who carried on business without a certificate of registration or a licence, in contravention of Ordinance 15 of 1953(C). The defendant (respondent) relied on the cases of *Dhlamini* and *Ferguson*. Boshoff JA in this case, however, drew a clear distinction between the cases of *Dhlamini* and *Ferguson* on the one hand and the *Metro* case on the other, on the ground that neither the *Dhlamini* nor the *Ferguson* case purported to decide on the validity of contracts concluded with innocent customers in the course of such illegal trading. Boshoff JA found that "different considerations" applied in those cases which did not entail a need to construe the legislation to determine whether the legislature intended to render such contracts void and unenforceable. Furthermore, in the *Dhlamini* and *Ferguson* cases, the court did not recognise that income derived from illegal trading afforded a proper basis for the award of damages mainly on grounds of public policy, whereas in the *Metro* case public policy did not demand that transactions concluded by unlicensed traders should be "visited with nullity" and hence rendered unenforceable on grounds of illegality. The distinction drawn by Boshoff JA between these cases raises the question of the comparative functions of the law of contract and delict. No clear indication has been given by our courts as to which contracts concluded in contravention of legislation will be regarded as enforceable. The "enforceability" test (discussed by Rumpff CJ in *Dhlamini*), as a criterion for the determination of which illegal earnings may assist in substantiating a claim for damages in a delictual claim, fails owing to the lack of consistent criteria for determining enforceability. Public policy, in the sense of moral opprobrium, would appear to be the only determining factor.

Thus, to conclude, it appears that the courts follow totally different approaches to the same legislation in the spheres of contract and delict. Our courts' approach seems to indicate a readiness to promote business in the interest of innocent customers but not to protect the interest of the injured party or the innocent dependant in respect of a claim for an award of damages based on illegal income. The compensatory principle in the law of delict would appear to have been sacrificed, while in the law of contract the inviolable principle of consensus of the contracting parties remains intact. It is somewhat incongruous that our courts appear to regard certain income derived from illegal contracts as "nie-regmatige inkomste" and hence of no assistance in substantiating an innocent dependant's claim, whereas the courts would regard the same contracts as enforceable by innocent traders. It is submitted that a better approach for the courts to adopt would be to examine the income-earning capacity of the injured party or the deceased. By following this approach, the courts could refuse to give effect to

immoral conduct. This approach has its disadvantages, but it is submitted that the process of classification is preferable to the use of artificial criteria to disallow a claim for compensation brought by an innocent person.

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BUTTERWORTH-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworth-prys vir die beste eersteling-bydrae van 1986 toegeken is aan:

Professor AJ van der Walt, Universiteit van Suid-Afrika

Die Butterworth-prys – regsboeke ter waarde van R250 – word deur die uitgewer beskikbaar gestel aan die outeur wat in die bepaalde kalenderjaar die beste eersteling-artikel vir publikasie in die Tydskrif *aan die redakteur stuur.*

Die artikel moet die eerste substansiële bydrae wees wat die skrywer vir publikasie in 'n regswetenskaplike tydskrif aanbied. Dit moet by voorkeur oor 'n onderwerp van die Suid-Afrikaanse reg handel. Die manuskrip moet getik en in alle opsigte persklaar wees. Die redaksiekomitee behartig die beoordeling aan die einde van die kalenderjaar. Die redaksiekomitee behou hom die vryheid voor om die prys nie toe te ken nie indien die artikels wat ontvang is, na sy mening toekenning nie regverdig nie. Verskeie bydraes van 'n besondere outeur kan gesamentlik in aanmerking geneem word.

VONNISSE

DIE GELDING VAN 'N RETENSIEREG TEENOOR 'N HUURKOOPVERKOPER EN SY OPVOLGERS

Standard Kredietkorporasie Bpk v JOT Motors (Edms) Bpk h/a Vaal Motors 1986 1 SA 223 (A)

Respondent (JOT) was die eienaar van 'n vragmotor wat hy kragtens 'n huurkoopkontrak aan ene Marogane (M) verkoop en gelewer het. Die huurkoopkontrak is daarna deur JOT aan appellant (S, 'n finansieringsinstansie) verdiskonteer. Een van die bepalings van die huurkoopkontrak het gelui dat die koper (M) die huurkoopgoedere "in sy bewaring en in goeie toestand hou vrygestel van enige retensiereg of beswaring." Drie maande later het M die voertuig vir noodsaaklike herstelwerk ("waarsonder die vragmotor feitlik waardeloos en heeltemal nutteloos as 'n vragmotor" sou wees) by JOT ingelewer. Aangesien M nie die herstelbedrag (R10 774,67) vergoed het nie, het JOT (in wie se beheer die voertuig was) aanspraak op 'n retensiereg teenoor S (die eienaar) gemaak. M het egter ook nie sy huurkoopverpligtinge teenoor S nagekom nie. S het in die hof van eerste instansie (die Witwatersrandse Plaaslike Afdeling) suksesvol van sy *rei vindicatio* gebruik gemaak, en JOT se beroep op 'n retensiereg is van die hand gewys weens die feit dat JOT bewus was van die hierbovermelde bepaling van die huurkoopkontrak.

By appèl het die Transvaalse Provinsiale Afdeling (by wyse van 'n volbankbeslissing) in *JOT Motors (Edms) Beperk h/a Vaal Datsun v Standard Kredietkorporasie Bpk* 1984 2 SA 510 (T) egter die appèl van JOT (op die basis van sy retensiereg) gehandhaaf. Die hof beslis dat:

a die algemene beginsels van *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) ten aansien van die *bona fide possessor* se aanspraak op 'n retensiereg vir *noodsaaklike uitgawes* uitgebrei kan word na die erkenning van 'n retensiereg vir *verbeterings* in die geval van die *mala fide possessor* (volgens die hof was JOT *in casu mala fide* weens sy kennis van die verbodsbepaling); en dat

b 'n retensiereg ook tot stand kom waar 'n derde – wat bewus is van die feit dat iemand anders as die (vorige) houer (die persoon wat beheer aan die derde oorgedra het) eienaar was en nogtans nie laasgenoemde se toestemming (probeer) verkry het nie – verbeterings aan 'n saak aangebring het (vgl vir 'n bespreking

van hierdie uitspraak Delport en Olivier *Sakereg Vonnisbundel* (1985) 513–515, asook Van der Merwe "The Law of Property" 1984 *ASSAL* 284–285).

By verdere appèl is daar onder meer betoog dat klousule 6 van die algemene verdiskonteringsooreenkoms tussen JOT en S eersgenoemde enige aanspraak teen S ontneem. Die bepaling lui soos volg:

> "I/We (JOT Motors (Pty) Ltd) hereby indemnify you and undertake to hold you harmless against any claim, loss or expense which you may sustain in consequence of any condition or warranty expressed or implied in an agreement as to the quality, description, fitness for any purpose or otherwise of the goods or in respect of any obligation for service replacement or maintenance in relation to the goods or in respect of any other cause arising out of such agreement."

Die uitspraak van die appèlhof kan soos volg weergegee word:

1 Die hof verwerp die standpunt van die hof *a quo* (1984 2 SA 510 (T) 511B–C) dat die aanvaarde en korrekte Afrikaanse term vir retensieregte *liens* is, en beslis dat dié term geen bestaansreg in Afrikaans het nie (233A–D).

2 Daar word vervolgens ingegaan op die vraag of JOT wel (soos die hof *a quo* gemeen het – 1984 2 SA 510 (T) 513D–E) 'n *mala fide* besitter was. Die appèlhof wys daarop dat JOT nòg in die hof *a quo* nòg by appèl so betoog het (235B–C). Dit wil voorkom asof die hof *a quo* hierdie standpunt ingeneem het op grond van die feit dat JOT ten tyde van die herstelwerk bewus was van die feit dat Marogane nie eienaar van die vragmotor was nie en verder ook kennis gedra het van die voorbehoudsbepaling soos vervat in klousule 3(a) van die huurkoopooreenkoms (235D).

3 Die hof wys daarop dat die standpunt van die hof *a quo* foutief is dat dit gaan om nuttige (en nie noodsaaklike nie) uitgawes wat met die oog op die herstel van die vragmotor aangegaan is (235F) – veral aangesien regter Coetzee die herstelwerk as "noodsaaklik" aangedui het (1984 2 SA 510 (T) 511C–D E–F) en JOT se bewering in die hof *a quo* dat die voertuig op die tydstip van inlewering vir herstelwerk "feitlik waardeloos en heeltemal nutteloos as 'n vragmotor" was nie betwis is nie (235F–G).

4 Die hof bespreek vervolgens die vraag of *kennis* van die eiendomsreg van 'n ander persoon of kennis van die bestaan van 'n verbodsbepaling deur die eienaar opgelê daartoe kan lei dat daar nie 'n retensiereg teen sodanige eienaar gevestig kan word nie. In hierdie verband het die hof *a quo* (1984 2 SA 511 (T) 512D–513D) na *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) 276F–G verwys waar soos volg beslis is:

> "Indien die respondent van die ware toedrag van sake bewus sou gewees het, kon dit die posisie moontlik verander het, maar hy het inderdaad te goeder trou geglo dat mev Bond die eienares van die meubels was, en het op daardie grondslag met haar gekontrakteer."

In laasgenoemde saak word daar ook na *United Building Society v Smookler's Trustees* 1906 TS 623 633 verwys waar die volgende standpunt *obiter* ingeneem is:

> "It may well be that if a builder had noticed that he was building on land which did not belong to his employer he would be in a position analogous to that of a *mala fide* possessor, and would have no *jus retentionis* against the true owner."

Die appèlhof handhaaf die standpunt van die hof *a quo* dat bogenoemde *dicta* bloot *obiter* was (234I–J). In die *UBS*-saak word daar *obiter* verwys na die moontlikheid dat selfs konstruktiewe (toegeskrewe) kennis van die feit dat die saak aan 'n derde behoort of dat sodanige eienaar 'n verbodsbepaling opgelê

het, die totstandkoming van 'n retensiereg *vis-à-vis* sodanige eienaar kan uitsluit (633). 'n Soortgelyke benadering word deur Silberberg en Schoeman (*Law of Property* 487 vn 235) bepleit – in ieder geval met betrekking tot "major improvements to immovable property."

5 Die hof bevestig in 'n *obiter dictum* dat die *mala fide possessor* wel oor 'n retensiereg vir noodsaaklike uitgawes beskik (235G–H).

6 Die hof bespreek vervolgens S se verskillende betoë soos volg:

6 1 Ten aansien van die betoog dat dit onsuiwer is om van iemand wat in opdrag van iemand anders 'n saak in ontvangs neem en herstel en dan bly behou totdat hy vir sy uitgawes vergoed is, as 'n *possessor* (hetsy *bona fide* of *mala fide*) van die saak te praat, neem die appèlhof die standpunt in dat die aangeleentheid nie beslis hoef te word nie. Daar word egter ter oorweging gegee dat JOT in die onderhawige geval nie 'n *possessor* was nie, maar bloot 'n *houer* – aangesien die *animus domini* hom ontbreek het. (Vgl verder oor die kardinale onderskeid tussen *besit* en *houerskap* De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 215; Delport & Olivier 69–70; die verwysing na en die bespreking van literatuur en hofbeslissings deur Van der Walt in 1986 *THRHR* 90 92 en *Die Ontwikkeling van Houerskap* (proefskrif PU vir CHO 1986) 607–635. Vgl ook Van der Merwe 1984 *ASSAL* 284 285 wat enersyds na die onderskeid tussen *regmatige* en *onregmatige besit* verwys (vgl hieroor 6 3 hieronder), maar andersyds – sonder vermelding van die betrokke kriteria – onderskei tussen *besit* en *houerskap*.)

6 2 Ten aansien van die betoog dat die uitgawes wat JOT aangegaan het slegs nuttige uitgawes was, en nie noodsaaklik nie, beslis die hof dat hierdie vraag irrelevant is (235I–J).

6 3 Ten aansien van die betoog dat JOT nie *bona fide* was nie, nie oor S se toestemming beskik het om die herstelwerk te doen nie, en gevolglik nie 'n retensiereg verkry het nie, neem die appèlhof die standpunt in dat JOT wel op 'n retensiereg aanspraak mag maak. Volgens die hof se benadering is JOT deur M versoek om die voertuig te herstel en gevolglik het JOT op *regmatige wyse* in beheer daarvan gekom (die hof praat van *besit*; vgl in hierdie verband die soortgelyke mening van Van der Vyver 1970 *THRHR* 231–243 en Visser 1985 *SALJ* 570). Die standpunt word ingeneem dat "sy besit daarna ook regmatig sal wees" (236C–D). Sonder verdere bespreking en sonder om die punt te beslis, opper die hof die standpunt dat JOT se beheer moontlik onregmatig jeens S geword het weens eersgenoemde se beweerde *mala fides* (236C–D; vgl in hierdie verband Delport en Olivier 514–515). Die hof bevestig die welbekende regsreël dat waar herstelwerk aan 'n saak in opdrag van 'n derde nie-eienaar gedoen word, 'n retensiereg ook teenoor die eienaar kan ontstaan. Die vraag wat die hof vervolgens moes beantwoord, is of

a die kennis van S se eiendomsreg, of

b die bestaan van die hierbovermelde klousule 3(a)

die regsposisie (met betrekking tot die bestaan van die retensiereg) kan beïnvloed. Die eerste vraag is (soos reeds vermeld) bevestigend deur die appèlhof beantwoord. Ten aansien van die tweede vraag gee die appèlhof die volgende uitleg aan klousule 3:

> "[Dit] hou . . . niks meer in nie as dat Marogane moes sorg dra dat hy betaal vir herstelwerk wat hy laat doen sodat daar nie 'n retensiereg ten opsigte van die voertuig teenoor

> appellant ontstaan nie. Dit hou nie in dat 'n persoon wat herstelwerk aan die voertuig doen nie 'n retensiereg kan verwerf nie. . . . [Daar is] niks in die stukke te vind . . . wat enigsins die gevolg regverdig dat respondent [JOT] geweet het, of moes verwag het, dat Marogane hom nie vir die herstelwerk sou, of kon, betaal nie" (236G–I).

Na 'n bespreking van *Tyre and Motor Supply Co Ltd v Leibrandt* 1926 CPD 421, waar daar 'n soortgelyke klousule as die hierbovermelde klousule 3(a) voorgekom het, weier die hof om hom oor die korrektheid van die beslissing uit te spreek (236H–237E). Die hof maak daarna die kardinale beslissing dat

> "[daar] nie op grond van klousule 3(a) gesê kan word dat die respondent [JOT] se herstelwerk aan die voertuig teen die 'express instructions' of verbod van appellant geskied het nie" (237E).

Daar is reeds hierbo (4) gewys op die benadering van die appèlhof dat kennis van die feit dat die eienaar 'n verbod op die vestiging van 'n retensiereg geplaas het, nie die totstandkoming van 'n retensiereg ook teen hom in die weg kan staan nie.

Gevolglik word beslis dat JOT nie *mala fide* opgetree het nie, en dat hierdie betoog dus ook nie kan slaag nie (237F).

6 4 Ten aansien van die betoog dat appellant (S) nie verryk of onregmatig verryk is nie, of, indien hy wel verryk is, dan nie ten koste van die respondent nie, en dat hy dus nie op 'n retensiereg aanspraak kon maak nie, beslis die hof dat die handhawing van hierdie betoog op 'n afwyking van die *Brooklyn House Furnishers (Pty) Ltd v Knoetze* 1970 3 SA 264 (A) sou neerkom – 'n aangeleentheid ten aansien waarvan die hof die appellant nie gelyk wou gee nie (237G–H). Dit wil voorkom asof die volgende woorde van die hof moontlik die vraag vir verdere oorweging kan ooplaat:

> "Ek vind dit voldoende om te sê dat appellant se betoog my nie daarvan oortuig het dat ons moes bevind het dat die beslissing in daardie saak verkeerd is nie" (237H).

Dit is egter so dat heelwat skrywers van mening is dat die *Brooklyn House*-saak ten aansien van die *ten-koste-van-vereiste* verkeerd beslis is; in die onderhawige geval sou hulle benadering daartoe lei dat daar nie sprake van verryking kon wees nie. (Vgl hieroor onder meer De Vos *Verrykingsaanspreeklikheid* 296–311; "Ongeregverdigde Verryking 'ten koste van' Iemand" 1957 *Butterworths Law Review* 36; "Enrichment at Whose Expense? A Reply" 1969 *SALJ* 227; "Retensieregte weens Verryking" 1970 *THRHR* 357; "Aspekte van Verrykingsaanspreeklikheid" 1970 *AJ* 231 236; en vir die teenoorgestelde standpunt dat daar wel aan die *ten-koste-van*-vereiste voldoen word Scholtens "Enrichment at Whose Expense?" 1968 *SALJ* 372; Joubert "Boekbespreking" De Vos *Verrykingsaanspreeklikheid* 1959 *SALJ* 475; asook Van der Merwe *Sakereg* 506; Silberberg & Schoeman 487–488.)

6 5 Ten aansien van die betoog dat die hierbovermelde klousule 6 van die *algemene verdiskonteringsooreenkoms* tussen JOT en S daarop sou neerkom dat JOT onderneem het om namens S herstelwerk aan die betrokke voertuie aan te bring asook om S skadeloos te stel, en daar dus nie sprake van ongeregverdige verryking kan wees nie, beslis die hof soos volg:

> "Die betoog is ongegrond. Die klousule slaan wat die onderhawige geval betref, op verpligtinge ten opsigte van 'service replacement or maintenance' wat vir respondent ingevolge die bogemelde huurkoopooreenkoms mag ontstaan. Dit het nie betrekking op 'n geval soos dié waarmee ons in die saak te doen het nie" (238B).

Daar word ter oorweging gegee dat 'n noukeurige analise van die hierbovermelde klousule 6 juis tot 'n teenoorgestelde interpretasie moet lei; dit blyk duidelik dat JOT onderneem het om alle huurkoopsake in 'n goeie toestand te hou en

om S skadeloos te stel. Feit bly staan dat JOT in die stadium toe hy die voertuig van M met die oog op reparasiewerk in ontvangs geneem het, wel terdeë bewus was van die bestaan van klousule 6, en om die waarheid te sê, 'n party by die algemene verdiskonteringsooreenkoms was.

7 Samevattend kan die volgende ten aansien van die appèlhof se beslissing vermeld word:

7 1 'n Ander interpretasie van sowel klousule 3 van die betrokke kredietooreenkoms as klousule 6 van die algemene verdiskonteringskontrak sou moontlik aangewese kon wees; dit sou uiteraard tot 'n teenoorgestelde beslissing gelei het.

7 2 Die vraag is steeds of daar werklik sprake van verryking is. Dit wil voorkom asof daar weer indringend na die *ten-koste-van*-vereiste gekyk sal moet word.

7 3 Die vraag ontstaan of dit vanuit *regspolitieke oorwegings* korrek is om aan 'n derde wat *domino prohibente* verbeteringe aan 'n saak aanbring – wel wetende dat hy *ex contractu* geen aanspraak vir vergoeding teen sodanige eienaar kan hê nie – 'n retensiereg teen die eienaar te verleen. Daar word ter oorweging gegee dat die retensiereg *domino prohibente* en waar kennis (werklik of konstruktief) van die verbod bestaan, nie teenoor daardie eienaar gehandhaaf behoort te word nie. (Dit hou egter nie in dat die verarmde nie wel oor 'n retensiereg teenoor ander persone mag beskik nie.) Daar sou in hierdie verband geargumenteer kon word dat die toekenning van 'n retensiereg in so 'n geval op die handhawing van bedrieglike optrede – in gepaste gevalle – sou kon neerkom.

7 4 Dit wil voorkom asof daar 'n al hoe groter noodsaak bestaan om duidelikheid oor die verhouding tussen *besit* en *houerskap* te verkry.

7 5 Die hof beskik altyd oor 'n diskresie om 'n retensiereg te erken (*Weilbach v Grobler* 1982 2 SA 15 (O) 28E; *Lydenburg Properties Ltd v Minister of Community Development* 1963 1 SA 167 (T); *Earljay Holdings (Pty) Ltd v Moldenhauer* 1984 3 SA 354 (OK) 358F–G; Delport en Olivier 514; Van der Merwe 1980 *ASSAL* 222 249; Silberberg & Schoeman 154 156). Daar word ter oorweging gegee dat die hof in die onderhawige geval wel sy diskresie teen JOT se aanspraak op 'n retensiereg behoort uit te geoefen het.

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DIE OORDRAG VAN BATES INGEVOLGE ARTIKEL 7(3)–(6) VAN DIE EGSKEIDINGSWET

MacGregor v MacGregor 1986 3 SA 644 (K)

Artikel 36 van die Wet op Huweliksgoedere 88 van 1984 wysig die Wet op Egskeiding 70 van 1979 deur die invoeging van artikel 7(3) tot 7(6). Hierdie subartikels verleen aan die hof wat 'n egskeiding toestaan 'n judisiële diskresie

om, soos hy billik ag, te gelas dat al die bates, of sommige van die bates van die een gade oorgedra word aan die ander gade. Die hof het hierdie diskresie slegs indien die gades voor 1984–11–01 buite gemeenskap van goed en van wins en verlies getroud is met uitsluiting van enige vorm van aanwasbedeling en hulle geen ooreenkoms betreffende die verdeling van hulle bates aangegaan het nie (a 7(3)). Indien aan hierdie vereistes voldoen word, kan een van die gades op grond daarvan dat hy of sy gedurende die huwelik direk of indirek bygedra het tot die groei of instandhouding van die boedel van die ander gade, aansoek om bedoelde oordrag van bates doen (a 7(4)). Benewens die bydrae van die aansoeker tot die groei of instandhouding van die boedel van die ander gade slaan die hof ook ag op die bestaande finansiële vermoëns en verpligtinge van die partye, enige skenkings wat tussen die gades gemaak is, 'n moontlike verbeuringsbevel ingevolge artikel 9 van die Wet op Egskeiding en enige ander faktor wat na die oordeel van die hof in aanmerking geneem moet word (a 7(5)). Wanneer die hof oordrag van bates beveel, kan hy voorwaardes stel wat hy billik ag vir voldoening aan die bevel (a 7(6)).

Tot en met die skryf van hierdie bespreking is daar nog net drie gerapporteerde beslissings oor die toepassing van artikel 7(3) tot 7(6). In die eerste beslissing, *Beaumont v Beaumont* 1985 4 SA 171 (W), is beslis dat die oordrag van bates saam met die vraag na onderhoud oorweeg moet word. Vir sover dit onderhoud aangaan, word die verwagte toekomstige situasie van die gades in ag geneem terwyl by moontlike oordrag van bates die huweliksgeskiedenis en die omstandighede ten tyde van die verrigtinge in ag geneem word. Verder verwys die hof na die Engelsregtelike een derde-reël. Hierdie "reël" slaan op die praktyk om by egskeiding aan 'n onderhoudsbehoeftige gade een derde van die gesamentlike inkomste van beide gades as onderhoud toe te ken. Dieselfde benadering word gevolg waar oordrag van bates ter sprake is, naamlik een derde van die totale waarde van beide gades se boedels word aan die gade met die kleiner boedel toegeken. Hierdie een derde-reël is eintlik geen reël nie maar slegs 'n beginpunt om die hof in staat te stel om 'n billike onderhoudsbevel of bevel tot oordrag van bates te maak (*Wachtel v Wachtel* 1973 2 All ER 839–840). (Dit sou dus beter wees om van die een derde-uitgangspunt as van die een derde-reël te praat.) In *Beaumont v Beaumont* gebruik die hof ook hierdie een derde-"reël" as uitgangspunt. Aangesien die hof geen faktore kan vind wat daarop dui dat meer of minder as een derde van die bates oorgedra moet word nie, beveel die hof dat een derde van die man se boedel aan die vrou, wat feitlik niks besit het nie, oorgedra moet word.

In die tweede beslissing, *Van Gysen v Van Gysen* 1986 1 SA 56 (K), is ook na die een derde-"reël" verwys en is sterk klem daarop gelê dat dit bloot as 'n beginpunt of riglyn moet dien. Die hof het in hierdie geval beveel dat elke gade sy eie bates moet behou. In effek het dit wel op 'n verdeling van een derde teenoor twee derdes neergekom.

In die jongste beslissing, *MacGregor v MacGregor* 1986 3 SA 644 (K), het die gades gedurende die duur van die huwelik hulle inkomstes saamgegooi en saam huise aangekoop en gerestoureer. Elke huis is teen 'n wins verkoop. Die laaste huis wat hulle aangekoop het, is in die naam van die vrou geregistreer met die gevolg dat sy by huweliksontbinding 'n baie groter boedel as haar man gehad het. By egskeiding doen die man onder andere aansoek om 'n oordrag van bates.

In sy uitspraak wys regter Nel daarop dat beide gades bygedra het tot die aankoop en restourasie van die huise. Die regter verwys ook na die aandeel van elke party in die huweliksverbrokkeling. Alhoewel die bydrae van die gades tot die huweliksverbrokkeling nie uitdruklik in artikel 7(5) genoem word nie, ag die hof dit tog relevant. Die getuienis in die saak dui egter nie daarop dat een van die gades 'n groter aandeel as die ander in die huweliksverbrokkeling gehad het nie. 'n Verdere faktor wat deur die hof in ag geneem word, is die feit dat die vrou se verdienvermoë baie kleiner is as dié van haar man. Op grond van hierdie feite ken die hof een derde van die gades se totale bates aan die man toe.

Die rede waarom die hof juis een derde van die bates aan die man toeken, is onduidelik. Daar is nêrens in die uitspraak 'n verwysing na die *Beaumont* en *Van Gysen*-beslissings of die een derde-"reël" nie. Dit wil egter voorkom of regter Nel tog die een derde-"reël" toegepas het sonder om enige opinie oor die gewenstheid al dan nie van die "reël" uit te spreek. Indien 'n een derde-oordrag beveel word sonder dat in gedagte gehou word dat die een derde bloot as uitgangspunt gebruik moet word, kan dit daartoe lei dat die verdeling van een derde teenoor twee derdes tot 'n vaste reël ontwikkel. Waarna die hof moet streef, is 'n billike verdeling en indien 'n verdeling van een derde teenoor twee derdes deurgaans gemaak word, sal die resultaat beslis nie altyd billik wees nie. Daar moet baie sterk beklemtoon word dat die een derde-"reël" deurentyd slegs as 'n uitgangspunt moet dien en nooit tot regsreël verhef moet word nie.

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DISCOUNTING TO DATE OF DELICT: FAIR OR UNFAIR?

Nhlumayo v General Accident Insurance Co of SA Ltd 1986 3 SA 859 (D)
and
Majele v Guardian National Insurance Co Ltd 1986 4 SA 326 (T)

Introduction

In the note published in 1986 *THRHR* 215 the writer discussed the rulings in *Summers v General Accident Insurance Co of SA Ltd* 1985 3 SA 417 (C) and *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) that, on the grounds of fairness, an actuarial calculation should discount future losses to the date of the trial. The practice of discounting to the date of the trial had been challenged on the grounds that in law Aquilian damages are assessed as at the date of the delict. Appeals have been noted against both these judgments.

In the *Nhlumayo* case the court identified itself with the reasoning of the *Carstens* judgment. The arguments of defendent were rejected as follows:

> "The foundation of the defendent's argument appears to rest upon the premise that the plaintiff's claim for compensation is to be dealt with strictly in accordance with the *lex Aquilia*. This argument overlooks the hybrid nature of the plaintiff's claim which contains elements of loss which are both patrimonial and non-patrimonial and it also overlooks the discretion of the Court to award what it considers fair.
>
> In the application and the extension of the *lex Aquilia* the direction in our law has been forward: a continuing extension. This forward movement is no doubt based upon the desire to do justice between man and man and State."

One cannot deny the heartfelt warmth of these words. Van Zyl (1986 *De Jure* 110) provides a most revealing discussion of "billikheid," its history and its place in the modern South African law. In general, reliance upon "fairness" creates uncertainty but it also provides a vehicle for meaningful change. What we need also to remember, however, is that the common law reflects a standard of what has been considered in the past to be fair "between man and man and man and state." If we are to take the drastic step of refusing to apply the common law we should do so with great circumspection lest the emotions of the moment have clouded our judgment.

There seems to be little doubt that in strict law Aquilian damages are to be valued as at the date of the delict. This rule may be traced back to Roman times (see Erasmus 1975 *THRHR* 104 106) where the formula *quanti ea res erat* pointed to a value in the past. The formula *quanti ea res erit* (will be at the time of the trial) was used in spoliation actions which were concerned with a continuing wrong (see *Mlombo v Fourie* 1964 3 SA 350 (T)). Where there has been *dolus*, as distinct from mere negligence, the Roman-Dutch law gave the judge a discretion to use a punitive measure of damages. This included the discretion to award value as at the date of the trial and to abandon an objective standard of value in favour of value to the plaintiff (see *Mlombo v Fourie* 358B).

The range of actions which may be described as Aquilian has been extended over the years and in modern South African law the adjective "Aquilian" would seem to denote no more than a claim for patrimonial loss as distinct from a claim for non-patrimonial loss in the form of a *solatium* (Boberg *The Law of Delict* vol 1 (1984) 18). In Roman-Dutch law, an award for pain and suffering and loss of the amenities of life was permitted only by way of special exception *if such was demanded by the plaintiff* (Grotius *Inleiding* 3 34 2; Voet *Ad Pandectas* 9 2 11). In modern South African law, little would seem to have changed, for the rules of court (rule 18(10)) require that the amount claimed for loss of earning capacity be stated separately from any amount claimed for pain and suffering and loss of the amenities of life. In *Nhlumayo* the general damages had been agreed at R30 000 and the court was therefore concerned solely with patrimonial loss, in other words it had been asked to adjudicate upon an issue which fell fairly and squarely under what is in modern law considered to be Aquilian damages.

The Roman-Dutch law was quite emphatic that no interest was permitted on damages. Van Bynkershoek (*Obs Tumultuariae* II case 1478) and Voet (*Ad Pandectas* 46 1 11) amplifies this by stating that it is iniquitous to claim damages for the late payment of damages. The primary motivation for these rules, which reflect a strong sense of what was fair in Roman-Dutch times, was concern for the welfare of the state and the avoidance of excessive claims for damages that might ruin a defendant.

South Africa today, we may do well to bear in mind, is beset with a financial and political crisis as serious as any which faced the Dutch states in the seventeenth century.

The majority of claims for personal injury and death in South Africa are these days paid by insurers or from public funds, such as the MVA fund. The MVA fund is known to be struggling to meet its liabilities and yet in both the *Carstens* and the *Mhlumayo* judgments it is presumed in the plaintiff's favour that the Fund has had the use of the plaintiff's money and has earned substantial interest on it. There is authority for the proposition that, in the absence of adequate evidence, a court is required to be conservative and to prefer the defendant to the plaintiff (Erasmus 1975 *THRHR* 104 269; *Bay Passenger Transport v Franzen* 1975 1 SA 269 (A) 274H; Corbett & Buchanan *The Quantum of Damages* 3 ed 6). This was the view which prevailed in the *Carstens* and *Nhlumayo* cases.

The decision to allow discounting to the date of the trial has the same effect, financially speaking, as adding interest to damages. When a country is rich and can afford social welfare benefits on a large and generous scale, there is every reason to allow to plaintiffs interest on their damages and legislation to this effect has been passed in most industrialised common-law countries, notably the United Kingdom and Australia. South Africa is presently facing a severe economic crisis and may continue to do so for many years to come. Can it be said that the courts are acting responsibly if in such circumstances they impose a burden upon the public finances to pay interest on damages for personal injury or death when the law does not oblige them to do so? Surely the question of interest on damages is one that should in these hard times be left to the legislature? Such legislation as does exist reads:

> "No interest shall be payable on the amount of any compensation which a court awards to any third party unless 14 days have elapsed from the date of the court's relevant order" (s 21 (1A) of the Compulsory Motor Vehicle Insurance Act 56 of 1972).

It is important that a court should distinguish between that part of the award which relates to the principal indebtedness and that part which represents interest, for interest on a judgment debt only runs on the principal indebtedness (*Stroebel v Stroebel* 1973 2 SA 137 (T) 139G–H; Voet *Ad Pandectas* 45 1 11). In addition, interest may not accumulate to more than the original indebtedness (*Van Coppenhagen v Van Coppenhagen* 1947 1 SA 576 (T)). The method of discounting to the date of the trial ensures that neither the court nor anyone else is aware of how much interest is included in the compensation. How then is a court expected to give proper effect to the law?

If interest is to be allowed on damages for personal injury and death, ought it not, if one is to be fair, to be allowed on all forms of damages? On the other hand, what of that very large band of persons who suffer serious injury or loss by death but who have no claim in law for compensation, or a limited claim: innocent victims of terrorist bomb attacks; the passengers in vehicles whose damages are limited to R12 000 (soon, it is hoped to be raised to R25 000); the divorced woman who has no claim for the lost expectation of support when the man who pays her maintenance is wrongfully killed? If public funds are to be applied to alleviate the condition of those who have suffered loss, ought these persons not to be considered for some compensation ahead of the fortunate few who do have a claim in law? The interest on money held in trust by attorneys does not accrue to the persons entitled to the trust money. Actuarial willingness

to pay interest from public funds does not extend to their life insurance companies when late claims are made under life insurance policies (see *Financial Mail* 1985-08-30 "Losing Interest"). It would be fitting if the interest earned on the money held by the MVA fund were applied to the extension of the range of persons entitled to compensation, such as divorced women and victims of terrorist bombs.

The writer recently had occasion to visit the Independent Living Centre in Cape Town and mentioned that lump-sum awards, even when discounted to date of trial, were inadequate to pay for the recommended prostheses. He received the curt reply: "So what, they who receive some compensation are the fortunate few."Damages, we may do well to remember, are a legal phenomenon, not social welfare. Historically the amount awarded as damages is the price to buy off the spears and the fearful justice of an eye for an eye.

In the *Nhlumayo* judgment the court placed great weight on the evidence of the plaintiff's actuary that, when discounting is done to the date of the trial, the amount so calculated may be invested and by consuming interest and capital, used to replace the lost income (861I, 862G). The notion that a lump-sum award may be used to replace the lost income, as distinct from the value of that income, is a fallacy which may conveniently be described as the "functional fiction" which is popular among legal practitioners. In fact the value calculated by an actuary is but an abstract value based upon the averages of a life table. Actuaries do not make use of expectations of life. The modern actuarial approach to these calculations is to value each possible future year separately by means of what is best described as "the principle of valuation of a chance" (See *Blyth v Van den Heever* 1980 1 SA 191 (A) 225H; see too Koch *Damages for Lost Income* 44–47). The total value is obtained by adding up all the separate values.

The principle of valuation of a chance, which forms the basis of a calculation done by an actuary, requires that the value of the loss in any year be determined as though it were a certainty. This value is then reduced by a percentage which reflects the percentage chance that the loss would not have occured. From an actuary's point of view, the primary contingency for which he makes allowance is the chance that the plaintiff, or the breadwinner and dependent jointly, would not have been alive in the relevant year. Consider a plaintiff who diligently invests the award precisely in accordance with the actuary's investment assumptions. When the year arrives when the money is needed, the amount available will fall short to the extent of the deduction for the contingency of death. The value of an income lost over a working lifetime is but the sum total of a number of such inadequate values of the chances and is thus itself inadequate to replace the lost income.

For those who remain unconvinced: consider a plaintiff aged 40 who receives an amount discounted at interest to the date that payment is made (ie every endeavour is made according to popular standards to ensure an adequate amount). The expectation of life of a coloured male aged 40 is 25,32 years. This implies an expected age at death of 65,32. The capital amount is calculated to provide exactly the amount which will be consumed with interest and capital over the next 25,32 years to produce the desired income. At the age of 50 the plaintiff expected age at death will have become 68,40, three years beyond the court's original assessment. The capital that remains will, by the effluction of time, have been rendered inadequate to meet its original need. At the age of 60 the expected

age of death will have become 72,96 and the shortfall in capital larger still. It is a foolish plaintiff indeed who seeks to consume interest and capital in accordance with the functional fiction. Statistical theory demands that some 50% of the plaintiffs will outlive the expected term.

It is submitted that it was an awareness of this functional inadequacy of a lump-sum award, based upon life-table averages, which led Rumpff JA to observe that:

> "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" (*Santam Versekeringsmpy Bpk v Byleveldt* 1973 2 SA 146 (A) 150A–C; cited with approval in *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 111D).

This statement does not purport so much to lay down a rule of law but rather to give expression to a perception of the real nature of a lump-sum award for the loss of the expectation of an income.

The simplistic reasoning of the "functional fiction" is inadequate to accommodate or explain the principle of valuation of a chance which is fundamental to every actuarial calculation concerned with future or past hypothetical loss of income or any other financial expectation such as an inheritance.

It is conceivable that the appellate division may elect to adopt as the basis for compensation for personal injury and death the fiction that the award can in fact be used to replace the lost income. If that line is adopted, however, then the courts are condemned to an endless charade of make-believe which will forever elude any sort of rigorous analysis. The building brick of lump-sum compensation is the principle of valuation of a chance applied on a year-by-year basis. That is the key to carrying the assessment of compensation for personal injury and death into the computer age. Business managers now make extensive use of microcomputers and financial modelling techniques. Is it not fitting that the courts should also adapt their ways?

In both the *Carstens* and the *Nhlumayo* judgments it was said that to discount to the date of the delict would be "to take a step backwards." Ironically the real step backward would be to follow the guidance of these courts and to discount to the date of the trial. This is so for several reasons.

a The South African economy is currently being subjected to major financial stresses and there is a large question mark over whether our society can in fact afford to pay for a generous measure of compensation comparable to that accorded by the wealthier Western nations. If parliament considers that there are sufficient public funds to provide deprived dependants and the disabled with interest on their damages, then this can readily be done, even retrospectively.

b If rules of law governing the assessment of damages can be ignored by courts with impunity on the pretext of "unfairness" this will impede the coming into being of a structured and disciplined body of rules governing the assessment of compensation. Reliance on fairness does not make the task of claims managers any easier and is likely to increase rather than reduce the number of compensation cases which need to be heard by the courts.

c Recognition of the contingent nature of a lump-sum award as being no more than the value of the chance of winning earnings or receiving support is essential if the courts are to permit meaningful use of computers and financial modelling techniques in the field of compensation for personal injury or death, and the

number of other valuation problems besides. How, for instance, other than by the year-by-year use of valuation of a chance, does one calculate a value for the expectation that a wife has of inheriting from her husband, since this value is based upon the contingency that she will not predecease him? Do those lawyers who profess to be experts on this subject understand how such a calculation is done?

In the *Nhlumayo* judgment Leon AJP relied on the consideration that:

> "Even though Mr Koch's approach may be logically defensible, it operates unfairly to the plaintiff. There is no corresponding unfairness to the defendent" (862J–863A).

The assumption that discounting to date of trial carries no unfairness to the defendent is by no means valid and in many cases the method will give rise to injustice of a greater or lesser degree. For instance:

i Discounting to date of trial ensures that any payment into court is automatically rendered inadequate merely by the effluction of time owing to the clandestine addition of interest. Surely it is preferable that a payment into court be based upon value at date of delict and thus remain substantially unchanged by the passage of time? The uplifting of a payment into court does not deprive a plaintiff of the right to claim interest on that amount (*Government of RSA v Midkon (Pty) Ltd* 1984 3 SA 552 (T) 567E).

ii Where a dependent has received an inheritance, the plaintiff cannot be said to have been deprived of their money to that extent and interest, if it is to be added, should be added only to that part of the award which, at date of death, exceeded the inheritance. It is important to distinguish between the amount inherited and the value of the expectation of inheriting at a later date. The accelerated value is the difference between these two amounts (See *Groenewald v Snyders* 1966 3 SA 237 (A) 248E). To what date should the value of the expectation be discounted?

iii Where a plaintiff has received an insurance payment which at date of accident exceeds his loss and which has been left out of account as being *res inter alios acta*, it cannot in fairness to the defendent be said that that plaintiff has been kept out of his money. It is then appropriate to take value at the date of the delict (*Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 All ER 225 (CA) 228–229).

If interest is to be allowed on damages but equity maintained between plaintiff and defendent, then it is essential that full account be taken in the discounting process of the *timing* of every gain or loss. This result will be achieved if all gains and losses are valued as at the date of the delict, or breach of contract, and then a separate amount awarded in respect of such interest as is found to be fair after all relevant considerations have been taken into account. The technique of discounting to the date of trial is a relatively crude approach which gives rise to the clandestine inclusion of prohibited interest on a plaintiff's damages. The open development and discussion of a more refined and equitable approach is effectively prevented by the rule against interest on damages.

Deficient Evidence, Pleadings and Prayers

In *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) damages were claimed for the loss of the use of money owing to the late registration of a mortgage bond. The court declined to award compensation in this regard:

> "He . . . argued that the plaintiff's real damage arose from the fact that because of the delay the plaintiff was without the proceeds of the loan, namely R220 000, during the period of delay. He asked the Court to fix such damage on the basis of the 7,5% interest which was payable on the money and was thus paid by the plaintiff without having the benefit of the use of the money during that period" (315H–316A).

The Court continued:

> "No evidence was adduced to what use the plaintiff intended to put the balance of the loan. It will depend on the circumstances and the nature of the investment whether or not he suffered damage by reason of the delay. No evidence was led in this regard" (316E–F).

In *Voest Alpine Intertrading v Burwill SA* 1985 2 SA 149 (W) the damages for breach of contract were measured in US dollars. The dollar/rand exchange rate had altered dramatically by the date of the trial:

> "Seeing the price of the goods was payable in US dollars, it can be assumed that the plaintiff's claim for damages would be similarly payable. It would be due when the breach occured. Though only quantified by the judgment, the damages are assessed as at this date. Accordingly defendant's liability in rand must likewise be determined. Subsequent fluctuations in the value of currency are to be ignored. In a case such as the present, defendant's refusal to then pay, will of course have led to the plaintiff suffering a large additional loss. It may be (the point was not in issue and was therefore not argued) that *this could be claimed as a further head of damages.* It would not, however, in my view, justify the quite fortuitous and often delayed date of judgment, which may only be established on appeal, being taken as the relevant date for converting the defendant's dollar liability to rand" (151B–C; emphasis supplied).

In *Roberts v London Assurance Co Ltd* (2) 1948 2 SA 840 (W) (applied in *Muller v Government of RSA* 1980 3 SA 970 (T) 976D) the question of fairness and an allowance for interest arose in connection with damages for the loss of expectation of support:

> "He applied for interest on the sum which may be awarded to the plaintiff in the action. He submitted that by reason of the abortive application to re-open the case his client had been kept out of any damages she might be awarded from the time when judgment would normally have been given to the time when it actually was given, that is, today, and that she had some claim for interest on the sum awarded. *There may be something to be said on equitable grounds for such a claim, but I cannot see how on legal grounds I can make such an award"* (emphasis supplied).

More recently in *Majele v Guardian National Insurance* 1986 4 SA 326 (T) the court was asked to choose, in a matter involving compensation for personal injury, between an actuarial calculation discounted to the date of the trial and another value discounted to the date of the injury:

> "The point on which the parties could not agree was that of the date from which the claim is to be assessed. Is it the date of collision or date of judgment? . . . It has been authoritatively established that in general the date of the delict is the correct date from which to calculate damages . . . In *Carstens v Southern Insurance Assn Ltd* 1985 3 SA 1010 (C) Aaron AJ used the 'split method'. He found that there were special circumstances justifying that approach, including the fact that there was a long period between the loss and the trial, and that relevant events had in the meantime occured. No such circumstances were mentioned in this case. There was nothing to indicate why the *Gilbanks* [*Sigournay v Gilbanks* 1960 2 SA 552 (A) 557F–558A] approach should not be adopted. In my view a straight single calculation from the time of the loss is called for" (327D–H).

It deserves note that even when discounting is done to the date of the accident, the fact that actuaries use a year-by-year method to execute their calculations renders a split between past and future classes of loss very simple and the issue is in fact irrelevant to the question of the date at which value should be determined or whether interest is permissible on damages. (In *Sigournay v Gillbanks* 1960 2 SA 552 (A) 566D–E it is evident that the method of calculation preferred

by the appellate division was split at convenient points notwithstanding that discounting at interest had been done to the date of the delict.) In the *Majele* case, it deserves note, no actuary gave evidence and the court was not misled into the false belief that the lump sum could in fact be used, by the consumption of interest and capital, to replace the lost income. The plaintiff in the *Majele* case was placed in the position he would have been in, as at the date of the delict, by awarding the amount needed to top up his *patrimonium* at that time to its pre-injury level.

The *Carstens*, *Summers* and *Nhlumayo* judgments have been taken on appeal.

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Consulting Actuary

The law is like a deep well wherefrom each man draweth according to the strength of his understanding. (per Lord Coke.)

BOEKE

DIE PUBLIEKREGTELIKE VERHOUDING
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Laat ek dit sommer ten aanvang sê: dit was lankal reeds nodig dat 'n publikasie soos hierdie die lig sien. Kenners van die publiekreg in enger sin (en daarmee bedoel ek die staats-, administratief-, en in 'n mindere mate ook die volkereg) sal dadelik die tersaaklikheid van die sentrale probleemstelling aan die hand waarvan Venter se uiteensetting gaandeweg ontplooi, besef (1):

> "Hoe kan die regsverhouding tussen die staat en ander regsubjekte konsekwent met wetenskaplik-verantwoordbare terminologie beskryf en verklaar word?"

Dat dit hier nie bloot gaan om 'n akademikus wat as tydverdryf van 'n bietjie oortollige denkenergie ontslae wil raak nie, word heel gou duidelik wanneer die outeur sommer al in die eerste hoofstuk aantoon tot watter praktiese probleme onnette taalgebruik en, erger nog, ondeurdagte begrippe-onderskeidings in die Suid-Afrikaanse publiekreg aanleiding gee:

a Die volle omvang en implikasies van die gevolgseed ("oath of allegiance") kan kwalik besef word – die "adres" van so 'n eed het trouens totaal en al soek geraak (2–4).

b Onder dekking van die *Grundnorm* van parlementêre soewereiniteit tier uitvoerende absolutisme op vele sleutelterreine haas onbeperk voort (4–6).

c Ten aansien van 'n verskeidenheid terreine en aangeleenthede binne die publiekreg (bv die paspoortreg, saaklike regte van die burger teenoor die staat, onteiening en diensplig tiges se reg op hersiening teenoor die militêre owerheid) moes ons howe hulle al gesaghebbend uitspreek sonder dat hulle dit werklik rigting- en leidinggewend kon doen – dít alles omdat 'n gepaste begrippeapparaat vir die hantering van eietydse publiekregverskynsels ontbreek (6–11).

En dan, soos die outeur deurentyd tereg betoog, is die daadwerklike beoefening van 'n publiekreg*wetenskap* sonder 'n betroubare en hanteerbare begrippesisteem, 'n saak van onmoontlikheid. Hy stel hom dit derhalwe tot taak om – na analogie van die nou reeds enigermate gevestigde subjektiewe regteleer in die privaatreg – 'n sisteem van publieke subjektiewe regte as basis vir wetenskaplik verantwoordbare en prakties hanteerbare publiekregtelike onderskeidings te ontwerp.

In hoofstukke 2 tot 4 ondersoek hy die rol van publieke subjektiewe regte (of dan die ekwivalente daarvan) in agtereenvolgens die Duitse, Nederlandse en

Anglo-Amerikaanse reg, hoofsaaklik aan die hand van die uiteensettings van skrywers. In hoofstuk 5 skets hy die stand van sake in die Suid-Afrikaanse reg deur eers op die stand van die subjektiewe regteleer in die privaatreg (na aanleiding van die baanbrekerswerk van WA Joubert) te dui en vervolgens bekende regsakademici – soos IM Rautenbach, M Wiechers, AJGM Sanders, J Neethling, JV van der Westhuizen en DH van Wyk – wat hulle al oor publieke subjektiewe regte uitgelaat het, se standpunte analiserend weer te gee.

In die pas voormelde gedeeltes van *Die Publiekregtelike Verhouding* kom 'n bepaalde aspek van Venter se akademiese meesterskap sterk na vore, naamlik sy vermoë om andere se standpunte op die punt af en kernagtig dog tegelyk waarheidsgetrou weer te gee. Dit maak van die werk meteens ook 'n waardevolle "publiekregsteoretiese kortbegrip" wat 'n uitstekende handboek vir veral senior studente sal wees.

Die laaste twee hoofstukke (6 en 7) is 'n sistematiese weergawe van Venter se eie bydrae oor die onderwerp. Hoofstuk 6 handel oor die publiekregtelike verhouding, en in hierdie hoofstuk maak die skrywer 'n diepgaande analise van onderwerpe wat gewoonlik in nie-regsfilosofies geskrifte té lukraak aangesny word: die aard, doel en funksie van die reg; die werklike aard van die staat; die aard van publieke subjektiewe regte (met 'n meegaande skematiese voorstelling) en die aard en "werking" van kompetensies in die publiekreg (eweneens vergesel van 'n skematiese voorstelling). Die laaste hoofstuk handel oor die behorenseise wat aan die publiekreg gestel word en daarin bespreek Venter onder andere die tersaaklikheid van die leerstuk van menseregte vir die publiekreg. In die slotparagraaf van hierdie hoofstuk trek hy sekere kontoere vir 'n alternatiewe publiekregsidee mede aan die hand van 'n bepaalde geregtigheidsbeskouing.

Uit wat ek tot dusver gesê het, behoort dit ten oorvloede toe duidelik te wees dat ek baie waardering vir Venter se werk het, dat ek heelwat vet regmerkies plaas agter die outeur se inisiatief om so 'n boek aan te durf, en dat ek daarom ook nie veins wanneer ek dit by publiekregsgeleerdes ten sterkste en by ander juriste van harte aanbeveel nie.

Ek wil egter, ter wille van die diskussie en om hierdie bespreking ook vir die outeur ter sake te maak, krities waarderend vertoef by enkele aangeleenthede wat veral in hoofstukke 6 en 7 aangesny word. Ek doen dit nie (noodwendig) sistematies nie, en my kritiek is ook nie volledig en omvattend nie. (Ek vertrou trouens dat van die outeur se regstreekse vakgenote op 'n uitgebreide skaal oor veral bepaalde tegniese kwessies met hom in debat sal tree.)

1 Die outeur se regsbeskouing

In paragraaf 2 van hoofstuk 6 onder die opskrif "Die aard, doel en funksie van die reg" sit die outeur bepaalde (vir sy studie ter sake) kernelemente van sy regsbeskouing uiteen. Tereg voer hy aan dat –

- hierdie ekskursie vir sy ondersoek noodsaaklik is;
- die reg nie omskryf kan word deur uitsluitlik van regskonsepte gebruik te maak nie; en
- dit tegelyk ook nie met behulp van konsepte uit ander wetenskappe beskryf of verklaar kan word nie (131).

Hy begin dan sy eie betoog met 'n uiteensetting van 'n bepaalde (Christelike) skeppingsidee, en hy stel dit duidelik dat hy die reg as 'n spesifiek mens-gerigte, eiesoortige skeppingsgegewe beskou (131–133). Ten einde te probeer ontkom

aan die "ooglopend verkeerde" ervaring van die reg "as 'n funksie van die een of ander menslike vermoë of eienskap" (133 – ek gebruik die outeur se eie woorde) meen hy dat die wese van die reg in die begrip *orde* – in die besonder as teenkant van wanorde – te vinde is.

As ordeningsinstrument in die wydste sin van die woord is die reg in die kosmos ingeskep – dit is dus deel of 'n faset van die skeppingsdaad:

> "Wat hier met 'die reg' in sy wydste betekenis bedoel word, is dat die reg alle ordenende wetmatighede in die kosmos, dit wil sê vanaf die vir die mens onoortreebare natuurwette tot die vir die (tydelike) mens onverstaanbare wetmatighede van die uitverkiesing omvat" (134).

Hoewel orde by ander aspekte van die skepping ook ter sake is, is dit (aldus Venter) die sentrale tema van die reg. Aan die ander kant, indien ek die outeur korrek verstaan, appelleer alles wat ordelik is in die skepping weer op die reg as ordeningsinstrument in die wydste sin van die woord (vgl 134 en hierbo).

Reeds in hierdie stadium van sy uiteensetting is daar iets van 'n sirkelredenasie te bemerk: orde staan sentraal binne die reg en die reg staan sentraal (binne) alle orde. En dan kan 'n mens tereg vra: Watter een is konstituerend vir watter een? Maar, merk Venter op, gewoonlik is nie die reg in sy (voormelde) wydste sin nie "maar wel dit wat primêr by die juridiese aspek van die kosmos ter sprake is" vir doeleindes van die vraag na die aard, doel en funksie van die reg ter sake. Dit laat die vraag ontstaan: waarom *überhaupt* dan by die reg in sy kosmiese wye sin begin om (wetenskaplik) by die aard ensovoorts van "dit wat primêr by die juridiese aspek van die kosmos ter sprake is" uit te kom? Niks in Venter se eie uiteensetting beantwoord hierdie vraag regstreeks nie. Wat hy egter wel (135–136) betoog, is dat die reg in sy enger (juridiese) sin primêr met die mens te doen het en meer bepaald aan die mens gegee is om, net soos God die reg in sy skeppingsdaad benut het, "ordenend binne sy vermoë oor die skepping wat aan hom onderwerp is, te beskik." In die voorgaande proses stel die skeppingsreg egter bepaalde eise – en verleen dit bepaalde kenmerke – aan die juridiese reg, byvoorbeeld die "sentrale element, orde" (of dit 'n eis of 'n kenmerk is, sê die outeur nie), die kenmerk van beperkte reikwydte wat "beteken dat juridiese reg nie in stryd *kan* wees met skeppingsreg nie" (dit kan nie van een ses of van bo links of van die geskiedenis toekomsgebeure of "die Woord vals" maak nie) en die kenmerk dat dit voorskriftelik is (135–136).

Laat ek dadelik sê: ek kan nie lekker vat aan die voorgaande argumentslyn van die skrywer kry nie – en ek dink nie dit is my skuld alleen nie. Waar staan ons in hierdie stadium met sy argument? Daar is 'n omvattende skeppingsgegewe (X) wat hy "die reg" noem, met orde (Y) as sy sentrale kenmerk. God het X ordenend in sy skeppingsdaad benut, en Hy het ook 'n bepaalde soort reg (x) aan die mens laat toekom met orde (y) as sentrale kenmerk sodat hy (die mens) ordenend oor die skepping kan beskik. (Kleinletter) x beskik ook nog oor kenmerke soos beperkte reikwydte (z) en voorskriftelikheid (q) wat albei deur X bepaal word. Dit wil dus voorkom asof (kleinletter) z en q as kenmerke van x ook hulle (hoofletter) Z en Q pendante in X (as grond vir x) vind.

Hier moet 'n mens in gedagte hou dat die outeur iets oor die reg in sy *wesensuniekheid* moet sê, want die onderwerp wat hy bespreek is die *aard, doel en funksie van die reg*. Sê hy iets oor die wesensuniekheid van X? Sy eie antwoord sal waarskynlik "ja" wees: orde is die wesenskenmerk van die reg. Nou wil 'n mens sommer ten aanvang al vra: Wat is die wesenskenmerk van orde? Is dit bloot die teenkant van wanorde? En kan 'orde' hoegenaamd (taalkundig) wesenstiperend van enigiets anders behalwe orde self wees?

Goed en wel, kom ons aanvaar vir 'n oomblik dat my pas vermelde besware so 'n bietjie baie van 'n gespeel met woorde is. Dan bly daar steeds 'n ander, ernstiger kernbeswaar staan wat ek soos volg kan toelig:

Die outeur sê self (135) dat dit gewoonlik, wanneer na die aard, doel en funksie (en bygevolg dus 'n wesentipering) van die reg gevra word, om x gaan. Wat sê hy egter nou besonder van x wat as wesentiperend daarvan aangemerk kan word? Met eerbied niks meer nie as dat dit 'n soort verkleinde spieëlbeeld, 'n analogie, van X is met 'n eie y as pendant vir X se Y, 'n eie z as pendant vir X se Z ensovoorts. En van X het hy eintlik ook geen wesenstipering gegee nie behalwe Y, maar Y (en bygevolg ook X) is kosmies universeel, sodat dit veel meer as net regtens beagtenswaardige gegewes omvat – tensy die outeur bedoel om te sê alles in die skepping is reg (wat te betwyfel is). Kortom, die probleem is dat hy wat eintlik bedoel is om 'n wesensunieke faset of onderdeel of (sou 'n mens selfs kon sê) verskyningsvorm van 'n (skeppings-)geheelorde te wees, tot wesenskenmerk van die orde self verhef, daarmee die eenheidskarakter van die orde verabsoluteer en die moontlikheid vir verskeidenheid binne die orde ophef.

Hierdie denkfout wreek hom ook in die voorbeelde wat hy van die kenmerkende beperkte reikwydte van x (die juridiese reg) gee: om van een ses of van bo links of van die geskiedenis toekoms of die Woord vals te probeer maak, hoef nie per definisie 'n juridies ondeugdelike poging te wees nie: dit is ook fisies en matematies en histories en eties en teologies onmoontlik! Wat Venter dus voorgee 'n wesenskenmerkend beperkte reikwydte van die reg is, is op 'n soortgelyke wyse wesenskenmerkend van ander nie-regsgegewes, en daarmee is x nog nie van hierdie gegewes onderskei nie.

In die tradisionele (radikale) natuurregsleer – waaraan Venter se uiteensetting 'n mens sterk herinner – word gepoog om dieselfde fout te vermy, deur nie met louter X-x, Y-y, Z-z en Q-q analogieë vir doeleindes van die wesenstipering van x te werk nie. (Kleinletter) x, word geredeneer, vind sy oorsprong in X en wel in dié sin dat x X soos afgeprent in die rede van die mens is. Tot sover staan die analogie nog, maar dan word gewoonlik gesê dat kenmerkend van x die feit is dat dit *verhoudings tussen mense* rig – dit het dus kenmerkend met mense se betrokkenheid by mekaar in sosiale verhoudings te make – en nie 'n ordeningsinstrument is met behulp waarvan die mens al sy skeppingsbeheersende en -ordenende aktiwiteite verrig nie. Venter verbreek – of sou 'n mens sê verruim – egter nie die gemelde analogie op 'n soortgelyke wyse nie en vandaar die absolute *impasse* waarin sy argument hom laat beland.

Teen die voorgaande agtergrond is Venter se ponering van die feit dat 'n mens in die juridiese aspek van die kosmos drie hoofentiteite aantref, naamlik regsreëls, mense of groepe mense vir wie die regsreëls geld en "tasbare en ontasbare skepsels of . . . toestande" waarop die reëls betrekking het bepaald nodig vir die verdere gang van sy geheelbetoog maar onoortuigend in die lig van sy voorafgaande uiteensetting. Want wat hy oor die reg sê, mag bes moontlik die noodsaak aan reël- of normmatigheid impliseer, maar hoe kom subjektiwiteit en objektiwiteit nou ewe skielik in die prentjie?

Die outeur gaan egter verder en voer die vernietiging van die ontologiese basis waarop sy betoog oor publieke *subjektiewe regte* sou kon berus, tot sy finale konsekwensies deur opsetlik die reg (met behulp van 'n definisie) slegs in terme van regsreëls (d w s as positiewe of objektiewe reg) te tipeer (137–138). Later, op 154, wanneer hy dit oor subjektiewe regte het, kom hy weliswaar weer enigermate op sy (wat hy noem) "terminologiese afbakening" in paragraaf 2

terug, maar dan bloot met die mededeling dat die reg (en "die reg" kan niks anders as positiewe reg wees nie) onvermydelik aan mense en groepe mense 'n status en rol in die regsverkeer *toeken* (ek beklemtoon). Nou is die grond vir menslike regstatus lankal nie meer enigiets (omvattends of enger) juridies-kosmies nie, maar louter "positiewe reg." Vir die outeur het die pendulum vanaf 'n radikaal natuurregtelike begronding van regsnorme tot by 'n radikaal wetties-positivistiese begronding van regstatus deurbeweeg! En ek vermoed dat 'n oormaat aan versigtigheid om nie die reg wesenstiperend as die een of ander menslike vermoë of eienskap aan te dui nie (vgl 133 en hierbo), tot die gemelde teëspraak ('n mens kan dit nie anders verstaan nie) aanleiding gegee het.

Origens sou die met eerbied oormaat aan wollerigheid in die outeur se beredeneringe aan 'n gebrek aan metodologiese dissipline toegeskryf kon word. Hy gee homself (en aan sy lesers) nòg uitdruklik nòg stilswyend rekenskap van die metode wat hy volg om by 'n wesenstipering van die reg uit te kom. Hy eindig met 'n definisie, maar juis sy eie opmerking aan die begin van sy uiteensetting dat die reg nie uitsluitlik met behulp van òf regskonsepte òf konsepte uit ander wetenskappe omskryf kan word nie, sluit definisie as 'n wesenstiperingsmetode uit. Ten slotte toon die outeur se definisie self dat hy nie definisie as 'n metode moes gebruik het nie (vgl 138). Dit is immers toutologies-niksseggend om te beweer dat die *reg* 'n *regs*gemeenskap *juridies* orden en op *regsubjekte* betrekking het. Of anders, indien dit iets sê, is daardie iets niks wesensnuut nie.

Eienaardig soos wat dit ook al mag klink, vernietig die wesenlike tekortkominge in Venter se regsbeskouing nie die res van sy betoog nie, aangesien hy met die gang van sy eie argument, soos hierbo aangetoon, in effek sy siening van die wesensaard van die reg van subjektiwiteit in die breë (en bygevolg ook publiekregtelike regsubjektiwiteit) losmaak. Wat 'n mens hoogstens kan sê, is dat sy uiteensetting (na dese) 'n leemte bevat.

2 Die Staat

Venter se konklusies oor die aard en struktuur van die staat is myns insiens van die verhelderendste wat nog in 'n Suid-Afrikaanse regspublikasie verskyn het en – in teenstelling met sy regsbeskouing – ondervang dit 'n hele aantal (skyn-) probleme waarmee veral juriste (maar by geleentheid ook politieke wetenskaplikes) stoei.

Die staat, sê hy, is 'n regspersoon op die ledebasis van 'n staatsvolk gekonstrueer (145). Staatsgesag kom nie primêr "van onder" (volksoewereiniteit) of "van bo" (wetgewersoewereiniteit) nie: dit berus by die staatlike regspersoon self. As 'n mens so 'n bietjie sou kon interpoleer: soos enige ander menslike samelewingsinstelling wat vir regspersoonlikheid kwalifiseer, is dit ook van die staat waar dat (owerheids-) gesag integrerend deel van die tipiese struktuur daarvan uitmaak.

Die staatlike regspersoon as organisme handel deur (owerheids-)organe wat staatsgesag "sigbaar maak," ofskoon hulle nie self die setel(s) van daardie gesag is nie (145). Burgers wat met gesag beklee is om owerheidsorgaansfunksies te vervul, is nie méér lede van die staat as "onderdaansburgers" nie, en alle burgers is ewe veel aan staatsgesag *onderworpe* (147).

Die positiewe reg tref reëlings in verband met die lokalisering van staatsgesag by en die uitoefening daarvan deur owerheidsorgane, maar hierdeur op sigself word die kwaliteit van owerheidsgesagsuitoefening nie noodwendig gewaarborg nie:

> "Juis regmatige gesagsuitoefening kan onder omstandighede die duidelikste aanduiding daarvoor wees dat die reg hervorm moet word,"

stel Venter dit treffend (147).

Tereg spreek die outeur ook bedenkinge uit oor die gebruik om na burgers van die staat (na analogie van die Engelsregtelike "subjects of the Crown") bloot as *onderdane* te verwys (147). Ek is van mening dat Venter met sy staatsbeskouing daarin slaag om aan die onverkwiklike *impasses* van die klassiek liberale staatsbeskouing (wat "staat" en "individu" beskou as teenpole van 'n verhouding waarin die eersgenoemde die laasgenoemde "van nature" bedreig) te ontkom. Hy doen dit egter nie met behulp van 'n universalistiese teenmiddel nie, maar deur rolle in staatsverband sinvol te verdeel. Op hierdie wyse kan sowel "staat/owerheid" as "individu/onderdaan" ewe veel "staat" wees sonder dat die een die ander bedreig.

Daarom kan hy later in sy uiteensetting met stelligheid (en geloofwaardigheid) bewerings soos die volgende maak:

> "Die burger word dus nie in die publiekreg gekonfronteer met 'n gewelddadige draak wat sy gesag uit 'n onkenbare bron genereer en slegs deur sy eie, soewereine wil beheer word nie, maar hy staan teenoor 'n regsubjek (genoem 'die staat') aan wie die reg bepaalde kompetensies, regte en verpligtinge verleen het ten einde die regsgemeenskap te kan orden" (151).

Of:

> Dit is "prinsipeel foutief om die staat as een party tot die publiekregtelike verhouding altyd noodwendig as oorheersende party in die verhouding te sien en dan tot die gevolgtrekking te kom dat die nie-staatlike party in die verhouding altyd in 'n ondergeskikte posisie verkeer" (154).

Ek het wel ook bepaalde probleme met die wyse waarop Venter die voorgaande beskouings – veral met verwysing na 'n bepaalde gesagsopvatting – fundeer (138–144). Dit sou goed gewees het indien hy byvoorbeeld sou kon vra in welke mate die struktuur van die staat as sosiale instelling met die strukture van ander tipes (tipiese) samelewingsinstellings ooreenstem. Ek dink dat hy plek-plek ook te veel van die rol van owerheidsgesag maak (moet hy nie die moontlikheid oorweeg dat elke mens as gevolmagtigde skepsel – dalk – met gesag beklee is nie?) en soms 'n ooroptimistiese gesagsbeskouing openbaar. Hierdie gebreke word egter deur die verdienste van sy uiteindelike staatsbeskouing oorskadu.

3 Die Onderskeid Publiek- en Privaatreg en Publiekregtelike Kompetensies

Ofskoon die outeur die twee aangeleenthede in die opskrif hierbo apart behandel, maak dit met die oog op die huidige bespreking meer sin om hulle saam te voeg, veral ook omdat wat hy oor die onderskeid tussen publiek- en privaatreg sê, in effek nóú van sy siening van staatskompetensies afhanklik is.

Oor die onderskeid tussen publiek- en privaatreg huldig hy die volgende interessante opvatting: die regsubjekte wat gewoonlik in 'n privaatregtelike verhouding figureer, sê hy, se regsbevoegdheid is onafhanklik van die vraag of hulle organe van die staat is; in die publiekregtelike verhouding, daarenteen, is een of albei van die betrokke partye se regsbevoegdheid geheel en al bestem deur die feit dat hy 'n orgaan van die staat is (149). Venter se opvatting breek dus met die tradisionele siening dat in die publiekreg altyd van (owerheids-)gesag teenoor (en immer bowegeskik aan) (onderdaans-)ondergeskiktheid – in teenstelling met privaatregtelike gelykheidsverhoudinge – sprake is, maar skep twee nuwe probleme (wat ek in die omgekeerde volgorde van wat die outeur dit doen, noem en bespreek):

a Eerstens ontstaan die vraag hoe die staat se publiekregtelike optrede van sy privaatregtelike optrede verskil. Hierop antwoord Venter eenvoudig dat die staat as akteur in die privaatreg nie op die besondere staatlike kompetensies steun wat hy kragtens sy staat-wees het nie, terwyl die publiekreg

> "juis gekwalifiseer word deur die feit dat dit 'n ordenings- en dus 'n gesagsfunksie veronderstel . . . [D]ie publiekreg onderskei hom van die privaatreg deurdat staatsgesag daarin 'n rol speel" (151).

'n Mens sou egter tereg kon vra waarom die outeur dan met so 'n ompad hoef te beweer dat by 'n publiekregtelike verhouding een of meer van die regsubjekte wat daarby betrokke is 'n orgaan of organe van die staat is. Dié kenmerk van 'n staatsorgaan – blyk dit immers uit sy eie betoog – is dat dit met staatsgesag beklee is (en 'n mens sou ook kon vra of die omskrywing van 'n *staats*orgaan as synde 'n entiteit wat met *staats*gesag beklee is nie toutologies is nie) en daarom behoort 'n mens die knoop te kan deurhak deur gewoon te beweer dat in die publiekreg (-telike verhouding) een van die betrokke regsubjekte altyd met staatsgesag (en meer bepaald staatlike owerheidsgesag) beklee is. Die outeur se tweede vraag en sy eie voorgestelde antwoord daarop (tesame met sy siening van staatlike kompetensies wat hy mettertyd uitvoeriger ontwikkel) laat die noodsaak aan en die sin van so 'n regstreekse onderskeidstipering myns insiens duideliker blyk.

b Die vraag is naamlik of twee of meer organe van dieselfde regspersoon (*in casu* die staat) in 'n losstaande (publiekregtelike) verhouding teenoor mekaar te staan sou kon kom of dalk selfs in konflik met mekaar kan verkeer (150). Dit wil voorkom asof – en soms is dit ook noodsaaklik dat – dit in die praktyk gebeur of behoort te kan gebeur. Blykbaar omdat hy sukkel om die teoretiese knoop ter verklaring van hierdie praktiese verskynsel of noodsaak daaraan deur te hak, kom Venter op 151 tot die gevolgtrekking dat

> "die probleem op 'n wyse wat nie hier vasgelê kan word nie, wel oplosbaar is."

Myns insiens is die probleem egter wel wetenskaplik teoreties oplosbaar deur behoorlike ("strukturele") erkenning aan *de facto* – sowel as die moontlikhede tot – gesags- (insluitend funksie- en kompetensie-) differensiasie in die moderne staat te gee. Venter doen dit self op 'n baie bekwame, genuanseerde en bepaald insiggewende wyse wanneer hy die kwessie van kompetensies in die publiekreg bespreek (165–172). Ek vind dit egter vreemd dat hy nêrens uitdruklik te kenne gee dat hierdie waardevolle insigte van hom 'n stewige teoretiese antwoord kan gee op die vraag of organe van een en dieselfde regspersoon in publiekregtelike verhoudings naas of selfs teenoor mekaar te staan kan kom nie. Op 169 suggereer hy iets in hierdie rigting maar hy verbind sy suggestie nie juis weer aan sy aanvanklike probleemstelling op 150–151 nie. Ek meen dat hy so 'n verbintenis makliker sou kon smee indien hy van die begin af gewoon sou beweer dat in die publiekregtelike verhouding een of meer van die betrokke subjekte met *die een of ander vorm van owerheidsgesag beklee is en bygevolg die een of ander owerheidskompetensie uitoefen of owerheidsfunksie vervul.*

Ek vind Venter se insig dat owerheidsgesag en die uitoefening daarvan in terme van 'n sisteem van publiekregtelike kompetensies verklaarbaar is, verhelderend. Van sy tipering van owerheidsgesag as *voorskriftelik* eerder as *dwangmatig* het ek ook met groot instemming kennis geneem – net soos ook van sy (voorlopige) begrippesisteem op 168. Ten slotte hou sy sisteem van kompetensieklassifikasie aan die hand van Jellinek se statusteorie na my oordeel eweneens interessante moontlikhede in (169–171).

4 Publieke Subjektiewe Regte

Die outeur se opvatting van publieke subjektiewe regte is in beginsel op dieselfde lees as WA Joubert se nou reeds klassiek geworde uiteensetting van privaatregtelike subjektiewe regte geskoei. Op 154–156 verduidelik Venter hierdie "tradisionele" (privaatregtelike) subjektieweregteteorie op 'n vars en insiggewende wyse. Hy konsipieer sy teorie oor publieke subjektiewe regte met verwysing na dieselfde basiese subjek-objek-derdes relasie aan die hand waarvan privaatregtelike subjektiewe regte gewoonlik ook gekonstrueer word, (tereg) beginnende met die kernvraag of daar so iets soos publiekregtelike regsobjekte bestaan, en indien wel, wat hulle aard is en hoe hulle geklassifiseer kan word.

Dit is ongelukkig egter juis in sy beredeneringe oor die aard van publiekregtelike regsobjekte – en veral hulle onderskeidende kenmerke – dat die skrywer se gebrek aan 'n behoorlike teoretiese fundering van (reg-)subjektiwiteit en (regs-)objektiwiteit in korrelasie of samehang met – maar ook soos te onderskei van – (regs-)ordelikheid hom markant wreek. Want hy maak dié eienaardige stelling dat 'n regsobjek daardeur gekenmerk word dat dit *juridies gesproke* waarde (vir die regsubjek) het (en ek het volle waardering vir sy verklaarde voorneme om van 'n eng – slegs – ekonomies gedetermineerde waardebegrip te probeer loskom) deurdat – en dít is vir my problematies – *dit oor bepaalde ordeningskwaliteite in die regsverkeer beskik*:

> "Of iets dus 'n resobjek is al dan nie, moet in 'n bepaalde geval beoordeel word aan die hand van die vraag of die 'iets' in die juridiese ordeningsproses aangewend kan word om die regsgemeenskap te orden . . ." (158).

Hierdie stelling is met eerbied ondeurdag en dit lyk so asof die skrywer 'n teoretiese kruk gesoek het om sy argumente oor regsobjektiwiteit te help staan maak in die afwesigheid van die kruk van (primêr) ekonomiese waarde wat hy self vroeër (tereg) prysgegee het. Dit is vir my onbegryplik hoedat 'n mens van 'n "dooie," onaktiewe (stoflike of nie-stoflike) regsobjek kan beweer dat dit oor ordening*skwaliteite* beskik of so nie aangewend kan word om die regsgemeenskap te orden. Dit is immers mense met gesag wat die gemeenskap orden en die middele wat hiertoe gebruik word, is regsnorme. Sou, volgens die skrywer se argument, regsnorme ook regsobjekte wees? Wat 'n mens wel tereg kan beweer, is dat om 'n regsobjek te kan wees, 'n entiteit oor die "kwaliteit" of, liewer, kenmerk van *ordenbaarheid* moet beskik. 'n Objek kan egter ordenbaar wees sonder dat dit 'n regsobjek is of geword het.

Ek dink dat dit wel moontlik is om steeds die regsobjektiwiteit van 'n "iets" (liggaamlik of onliggaamlik) aan die waarde (*qua* "diens tot behoeftebevrediging") te knoop wat dit vir die subjek het sonder om "waarde" eensydig ekonomies te verstaan (kyk bv Van Zyl en Van der Vyver *Inleiding tot die Regswetenskap* (1982) 402–411). Waar privaatregtelike regsobjekte daartoe bestem is om bepaalde behoeftes van individue as individue te bevredig, bevredig publiekregtelike regsobjekte bepaalde behoeftes van die "individuals as all" (soos dit soms op Engels genoem word), dit wil sê die behoeftes van die publiek of behoeftes wat openbare belangonthalwe bestaan.

Ek vind ten slotte ook Venter se tipering van bepaalde publiekregtelik relevante toestande (*qua* regsfeite) as regsobjekte vreemd. Hierdie tipering vind geen teenhanger(s) in die privaatreg nie: niemand het nog ooit daaraan gedink om van byvoorbeeld minderjarigheid of insolvensie of swangerskap of kranksinnigheid as privaatregtelik tersaaklike toestande, regsobjekte te probeer maak nie.

'n Toestand is immers 'n toedrag van sake waarin regsubjekte en regsobjekte hulle bevind, en as sodanig oefen dit invloed op die status en kompetensies van die regsubjek uit. Toestande bepaal dus kenmerkend die aard en omvang van die "kompetensiehebbendheid" van die regsubjek wat die gemelde "langdurige regsfeit" deurleef. Dat dit egter objek van 'n subjektiewe aanspraak kan wees wat aan die aanspraakmaker bepaalde bevoegdhede verleen om oor die toedrag van sake te beskik, is kwalik te bedink – tensy publieke subjektiewe regte iets so totaal anders as privaatregtelike subjektiewe regte is, dat 'n deurmekaarloop van feitelikheid en objektiwiteit binne een en dieselfde konteks teoreties moontlik en houdbaar is.

Ek sou dus verkies om "burgerskap," wat Venter as 'n regsobjektiewe toestand beskryf, eerder as 'n statusverlenende regsfeit (van langdurige aard) te bestempel (161). "Staatsveiligheid" en "wet en orde" wat die skrywer onder dieselfde hoof tuisbring, is toestande wat vir hulle ontstaan en voortbestaan van die ordeningsaktiwiteite van die owerheid afhanklik is. Dit is nie deel van die "regsobjekte- en kompetensie-arsenaal" waaroor 'n owerheid in ieder geval van die begin af beskik nie; die toestand ontstaan juis indien – en is vir sy voortbestaan daarvan afhanklik dat – owerheidsorgane die voormelde arsenaal "korrek" gebruik.

Wat ek pas in verband met die objektivering van regsfeite gesê het, word oënskynlik deur die feit dat in die privaatreg handelinge – wat eweneens regsfeite is – as objekte van die vorderingsreg aangedui word, weerspreek. Venter self onderskei tewens ook etlike soorte handelinge as publieke regsobjekte (160). Sonder om tans in die geleentheid te wees om die aangeleentheid uitvoerig te beredeneer, doen ek met eerbied aan die hand dat die té gemaklike stelling dat 'n handeling (as *dare, facere* of *non facere*) objek van die vorderingsreg (in die privaatreg) is, heroorweging verdien. 'n Handeling "bestaan" immers slegs in die stadium dat en vir sover die *verrig* word, en tog het die krediteur reeds op 'n vroeëre stadium 'n vorderingsreg. Wat meer is, sodra gepresteer is (dit wil sê die handeling volledig verrig is), verval ook die vorderingsreg. Ek wil dus beweer dat teoreties korrek beoordeel 'n krediteur nie aanspraak op 'n handeling as sodanig van 'n debiteur het nie maar op 'n "sal handel," dit wil sê die vermoë of die in staat wees van die debiteur om te kan handel of, beter nog, sy verpligting om te handel. Sonder om in detail te verval, meen ek dat dieselfde basiese argument op die voorbeelde van publiekregtelike handelinge wat Venter op 160–161 noem, toegepas sal kan word.

Waaroor ek dit wel met die outeur roerend eens is, is dat bestaande teorieë oor subjektiewe regte en onderskeidings wat in terme van daardie teorieë gemaak word, nie 'n *numerus clausus* aan regsobjekte en meegaande subjektiewe regte hoef op te lewer nie: die sisteem bly oop (en in 'n sekere sin onaf) (159). My kritiek op sy uiteensetting is dus hoogstens kritiek in terme van die sisteem soos wat dit tans daar uitsien. Dit sluit nie die moontlikheid uit dat verder aan die sisteem getimmer en geskaaf sou kon word (of dat 'n geheel nuwe sisteem ontwerp sou kon word) om kritiek soos die voorgaande te ondervang nie.

5 Behorenseise aan die Publiekreg

Oor die laaste hoofstuk van sy boek waarin Venter die voormelde onderwerp bespreek, maak ek slegs enkele algemene en relatief losstaande opmerkings.

By al die waardering wat 'n mens het vir die feit dat die kwessie van behorenseise in die publiekreg aangesny word, laat die deurlees van hierdie laaste

hoofstuk 'n mens tog met iets van 'n onbehae: jy is geneig om te vra hoedat die uiteensetting en argumentslyn hierin logies met die uiteensetting(s) in voorafgaande hoofstukke ineenskakel. Slegs wanneer hy hom in meer besonderhede oor (wat hy noem) "die fundamentele juridiese regsbeginsel" uitlaat, beroep Venter hom enigermate sistematies op 'n vroeëre uiteensetting (naamlik sy eksplisering van die wesensaard van die reg as orde) (185–186).

Hoe dit ook al sy, die argument verloop min of meer op die trant dat die menseregteleerstuk as regsideële maatstaf in die publiekreg aangewend sou kon word, maar dat as gevolg van heelwat (praktiese en teoretiese) probleme wat rondom 'n dusdanige aanwending van die leerstuk na vore kom, 'n alternatiewe publiekregsidee volgens die leerstuk van regsbeginsels asook 'n bepaalde geregtigheidsidee ontwikkel moet of kan word.

Ofskoon die skrywer die leerstuk van menseregte nie sonder meer wil afskiet nie – en bereid is om selfs in 'n beperkte mate daarmee te werk – het ek probleme met sekere van sy besondere probleme daarmee. Hy beweer byvoorbeeld dat 'n radikale menseregteleer geen ruimte laat vir 'n publiekregsistematiek wat owerheidsgesag as onmisbare element in die publiekregsverhouding aanvaar nie (180). *In abstracto* beskou, mag sy stelling moontlik enigermate steek hou. In die praktyk en in feite weet ek egter nie van een menseregteteorie (veral in die Suid-Afrikaanse konteks) wat presies só radikaal is nie – ek is met ander woorde van die beskeie oordeel dat hy teen 'n windmeul baklei.

Hy maak voorts (180) die sleutelstelling dat

> "in Suid-Afrika (soos in enige land) alleen sinvol met menseregte (soos met enige regsideële konsepsie) omgegaan word wanneer die menseregtebegrip waarmee gewerk word, in ooreenstemming is met die regsideële regsopvattings van die regsgemeenskap."

Nadat hy verklaar het dat dit utopies is om te dink dat enige ander mensregtemodel in die wêreld net so op die Suid-Afrikaanse regsgemeenskap oorgeplant sal kan word, vervolg hy:

> "Om vas te stel wat dan nou die Suid-Afrikaanse etnies- en kultureel-plurale regsgemeenskap se gemeenskaplike regsideële voorstellings is waarop 'n realistiese menseregteteorie gebou kan word, laat ek graag aan diegene oor wat ernstig-oortuigde eksponente van die idee van mensregte wil wees."

Ek dink eerlikwaar dat hierdie houding van die outeur die debat nie 'n (sinvolle) tree verder voer nie. Wat het hy self immers gedoen om sy eie teorieë oor publieke subjektiewe regte en publiekregtelike kompetensies te ver-Suid-Afrikaans – en wat is besonder Suid-Afrikaans aan sy daaraan grondliggende regs- en staatsbeskouing? Of, indien verinheemsing slegs van toepassing is by die uitbou en ontwikkeling van regsideële gegewes, wat stel hy as gemeenskaplike regsideële voorstellings vir 'n eie Suid-Afrikaanse leerstuk van regsbeginsels of geregtigheid voor? Nee wat, met alle eerbied: die outeur se wesenlik afsydige houding teenoor die idee van menseregte huisves bepaalde onuitgesproke (miskien self tipies Suid-Afrikaanse) vooroordele jeens die mensregteleer – vooroordele wat 'n onbevange beoordeling van die leerstuk in 'n groot mate in die weg staan.

Ek ag my geëerd dat die outeur my eie geregtigheidsbeskouing as een moontlike element vir 'n alternatiewe publiekregsidee oorweeg (189–193). Die opsommende geskrif waarop hy hom vir hierdie doel beroep, maak dit egter duidelik dat ek menseregte en geregtigheid nie as wedersyds uitsluitende leerstukke of idees beskou nie: daar is myns insiens volop plek vir die idee en praktyk van menseregte in die kaders van 'n oorkoepelende geregtigheidsisteem soos dié een wat die outeur self gunstig oorweeg.

Ten slotte meen ek dat Venter se beroep op regs*beginsels* ter fundering van 'n (alternatiewe publiek-) regs*idee* sistematies-metodologies misplaas is: regsbeginsels het op die *konstitutiwiteit* – dit wil sê die "is" of die "dat" –van die positiewe reg en nie op die regulatiwiteit – die "behoort te wees" – daarvan betrekking nie. Deur beginsel en idee op hierdie wyse te vermeng, word die onderskeid tussen konstitutiwiteit en regulatiwiteit in effek opgehef en maak dit eintlik nie meer sin om van *behorenseise* aan die publiekreg te praat nie.

Heel ten slotte kortliks iets oor die tegniese versorging van die boek. Ek is daarvan bewus dat die outeur die meesterkopie vir die drukwerk self met behulp van 'n woordverwerker geskep en op 'n termiese drukker vervaardig het. 'n Mens staan verstom oor die gehalte van die eindproduk – en die moontlikhede wat die hedendaagse tegnologie op hierdie terrein bied. Tog dink ek dat die teks nie altyd noukeurig genoeg geproeflees is nie, met die gevolg dat té veel hinderlike setfoute deurgeglip het. Op 'n paar plekke is "òf . . . òf" byvoorbeeld "$f . . .$f" (sien bv 157 165), of vervang 'n aanhalingsteken wat eintlik 'n"ë" moes wees (sien bv 153 154 163) en by geleentheid is "publiekreg" "fubliekreg" (148), "bestem" "betem" (149) en "delik" "telik". Waarom deel van die gewone teks op 142 in die tweede laaste paragraaf klein gedruk is, is ook nie duidelik nie.

In die geheel genome beskou ek *Die Publiekregtelike Verhouding* as 'n sonderlinge bydrae tot die Suid-Afrikaanse publiekregsliteratuur en 'n verdienstelike bydrae tot ons regsliteratuur as 'n geheel.

LOURENS DU PLESSIS
Potchefstroomse Universiteit vir CHO

DRANK DWELMMIDDELS EN PADVERKEER
deur JH du PLESSIS
JH du Plessis Sibasa 1985; xx en 99 bl
Prys R27,00

Hierdie boekie, 'n verwerkte LLM – verhandeling, is deur die skrywer self uitgegee. Die resensie-eksemplaar was vergesel van 'n reklamepamflet met 'n uittreksel uit die voorwoord tot die boek. Dieselfde uittreksel is prominent op die boek se omslag aangebring. Beide is deurspek met drukfoute. Die versorging van hierdie reklamemateriaal weerspieël inderdaad die standaard van die hele boek se versorging wat beslis die swakste is wat hierdie resensent nog teengekom het. Dit wemel van druk-, spel- en taalfoute. Voordat 'n mens bladsy 10 bereik, is daar reeds meer as 30 sulke foute. Uit die aard van die saak is drukfoute hinderlik (bv "weterregtiglikheid" op xix; "wederregterlikheid" op xix 6). Wat egter uiters irriterend is, is die herhaaldelike voorkoms van spelfoute (bv "onmiddelik" op 11 15; "vonis" twee maal op xx; "Rhodesiëse op 20 21; "materieël" op 39) en taalfoute (bv "kan 'n saak daarvoor uitgemaak word dat indien die

dader nie enige voorkennis het dat hy 'n voertuig sou moes bestuur nadat hy hom dronk gedrink het nie, kan die plaas in 'n dronk toestand nie as handeling aangemerk word nie" (8); "[is] vervang met 'n bepaling wat byna woordeliks ooreenstem daarmee maar dat die woord 'motorrijtuig' is vervang met die woord 'motorvoertuig' (1); "beslis die hof dat die enigste verdowingsmiddel wat 'onskuldig' is, is geneesstowwe" (38); "[a]an die ander kant van die spektrum is die persoon wie, nieteenstaande die inname van alkohol, die alkohol geen effek op sy geestesvermoëns gehad het nie" (65); "[X] gram per honderd milliliter van bloed" (vii 1 39). Indien die toestand van die reklamemateriaal nie 'n genoegsame waarskuwing was nie, blyk die werk se swak versorgingspeil in elk geval ook uit die inhoudsopgawe: "Hoofstuk 2: DIE HANDLEIDING" word daar verkondig. Die hoofstuk gaan oor die *handeling*.

Afgesien van die jammerlike taalversorging en proefleeswerk is daar nog boonop die onakkurate aanhaal van bewysplase (bv "*S v Adams* 1983 (2) SA 589 (i p v 577) (A)" op xiii) en foutering met die name van sommige van ons bekende akademiese skrywers (bv "Buchell" op 73; "Van den Vyfer" in die bibliografie op xviii). Dieselfde verontagsaming van die noodsaaklikheid van akkuraatheid word byvoorbeeld geopenbaar deur die verwysing na 'n statutêre bloedalkoholpersentasie van "*0,8* (i p v 0,08)" g/100 ml – 'n syfer wat wesenlik vir die hele werk is.

Wat die inhoud van die werk betref, is dit opvallend dat die verwerking van die verhandeling tot praktiese handleiding nie volkome bevredig nie. Die "historiese ondersoek" na die herkoms van die misdryf dronkbestuur word byvoorbeeld beperk tot vroeë Transvaalse wetgewing (waartoe die verhandeling beperk was), terwyl die boek bedoel is om die hele Republiek te dek. Het dié feit die skrywer dalk ontgaan?

Onder die enigsins grandiose opskrif "Regsvergelykende Ondersoek" verklaar die skrywer dat so 'n ondersoek van weinig waarde sal wees! Tog word die leser gemaan dat die Suid-Afrikaanse misdryf "slegs in perspektief gesien [kan] word teen die agtergrond van . . . die ooreenstemmende reëlings in Nederland." Hoekom? En waarom kwansuis Nederland? Die leser word nie by dié geheime ingelaat nie. 'n Mens sou egter – veral wat vonnis betref – minstens 'n behandeling van maatreëls in die Skandinawiese lande, wat die toonaangewers op die gebied is, wou sien.

In die teks gee die skrywer 'n nuttige uiteensetting van die elemente van die verskillende misdrywe wat ter sprake is. Die betekenis van wesenlike begrippe soos "motorvoertuig," "bestuur," "probeer bestuur," "openbare pad," ensovoorts word bondig aan die hand van vonnisbesprekings weergegee. Hier is die skrywer se metodiek uiters geslaag. Dit is egter jammer dat voetnote eers aan die einde van elke hoofstuk verskyn, aangesien dit 'n onnodige beslommernis vir die haastige praktisyn skep – en meermale vind 'n mens dat 'n besondere voetnoot niks oplewer nie (bv vn 1, 6, 42, 43 op 8, 9). 'n Mens sou ook verwag het dat die skrywer jonger uitgawes van teksboeke (bv Burchell en Hunt; Schmidt; De Wet en Swanepoel) en onlangse hofbeslissings (bv *S v Dillon* 1983 4 SA 877 (N)) sou bygewerk het. Laasgenoemde uitspraak het byvoorbeeld dié in *S v Christodoulou* 1967 3 SA 269 (N) omvergewerp; desnieteenstaande word 24–33 gewy aan 'n bespreking van die begrip "openbare pad" aan die hand van die verouderde uitspraak.

Die werk bevat ook 'n nuttige bespreking van vonnisoorwegings en oorwegings by die opskorting van lisensies. In bylae verskyn die teks van die relevante wetgewing, sowel as 'n lys van die nodige vrae wat 'n aanklaer aan sy getuies behoort te stel. (Dié lys, tesame met die ietwat agterdogtige verwysing na "die verdediging" (*passim*), wek die indruk dat die boekie eintlik gerig is op die vergemakliking van vervolgings.)

Die boek word afgesluit met 'n bruikbare register (maar kyk bv "opgeskorte vonnis" waaraan geen bladsynommer toegeken is nie, en wat ook nie as 'n onderafdeling van "vonnis" verskyn nie).

Ter opsomming: hierdie boekie, hoewel enigsins oppervlakkig en onkrities, het bepaald meriete. Dit sluit mooi aan by 'n werk wat deur Cooper, Schwär en Smith met 'n enersluidende Engelse titel gepubliseer is. 'n Mens is egter bevrees dat die meriete van die werk verdoesel sal bly deur die blywende indruk van traak-my-nie-agtigheid waarvan die algemene slordigheid daarvan getuig.

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DEEDS REGISTRIES ACT 47 OF 1937/REGISTRASIE VAN AKTES WET 47 VAN 1937

compiled and edited by C VOSLOO

Cape Town Juta 1985

R40,00 + GST

As is aptly stated in the publisher's note, there has been "a longfelt need for the more important statutes to be published individually and bilingually in a form that can be readily kept up to date."

As the Deeds Registries Act is one of the more important and frequently used pieces of legislation, the publication of this act, together with the regulations, table of cases and index in both official languages is most welcome indeed.

We have come to expect from publishers that a variety of additional information be included in material of this nature. This publication certainly does not disappoint and has been very well compiled and edited. Included are, *inter alia*, a list of amending acts and their commencement dates, a list of regulations and full references to the tracing of such regulations.

The procedure whereby amended sections, both in the act and in the regulations, indicate amending legislation, makes it possible to ascertain immediately when the amendment was made and also facilitates the tracing of the original text.

The table of cases is arranged according to the section in the act or relevant regulation.

An index divided into two parts contains entries referring to the section in the act or the regulation number. Usually works of this nature contain very cryptic indexes. This one is wide and complete.

The loose-leaf format of this publication has the usual advantages and disadvantages of similar material: advantages are that it can be kept up to date by the insertion of replacement pages and that it is inexpensive; a major disadvantage, experienced particularly by users who have little time to insert replacement pages, is that these get misfiled, are lost, and even go missing in the post, resulting in a useless, out-of-date publication.

The appearance of this *Deeds Registries Act* compilation meets a need long felt and our appreciation goes to the publisher.

A BURDZIK
University of South Africa

In the application and the extension of the lex Aquilia *the direction in our law has been forward: a continuing extension . . . This forward movement is no doubt based upon the desire to do justice between man and man and man and state.* (per Leon ADJP in *Nhlumayo v General Accident Insurance Co of SA Ltd* 1986 4 SA 859 (D) 863.)

Eigendomsovergang bij koop en terugvorderingsrecht van de onbetaalde verkoper: Romeins recht en Middeleeuws handelsrecht

Robert Feenstra
LLD
Professor emeritus, *Leiden*

Opgedragen aan professor D Pont bij het halve eeuwfeest van het *Tydskrif

SUMMARY

The Passage of Ownership in Sale and the Right of the Unpaid Seller to Reclaim: Roman Law and Medieval Commercial Law

The rule of *I* 2 1 41 that ownership does not pass in sale unless the price is paid or credit is given, is still applicable in South Africa although in 1880 it was already stated that in this respect "our law is at variance with every well-considered modern system of mercantile law throughout the world." This statement would seem not to have taken into account the existence of a right of revindication of the unpaid vendor – "recht van reclame" – in the Dutch codes of 1838; this right is even maintained in the new civil code of the Netherlands. There is a clear affinity between South African and Dutch law as to the position of the unpaid vendor, an affinity which can be traced back to the Roman-Dutch Law of the 17th and 18th century.

The history of the link between the Roman-Dutch "recht van reclame" and the Roman rule of *I* 2 1 41 has been the subject of the author's thesis *Reclame en Revindicatie* (1949), in which he has also tried to explain the development of the Roman rule from the Twelve Tables up to Justinian. In the present paper he revisits both aspects.

For the Roman Law proper he discusses the most recent contributions to the subject, especially that by Honoré. He insists on his own view – put forward in an article of 1955 — that the clause on *fidem sequi* in *I* 2 1 41 is of classical origin and was originally meant as a nullification of the rule of the Twelve Tables. As to the fundamental texts in the Digest, *D* 18 1 19 and *D* 18 1 53, some interpretations, advanced in 1955 but not with much success, are repeated.

The origins of the "recht van reclame" are sought in medieval Italian commercial law: statutes of Pisa (1161), different enactments of the Genoese law, etc. The Postglossators have made the link between these statutes and the Roman rule of *I* 2 1 41. The difficulty was that the statutes dealt with cases of bankruptcy and that the Roman rule did not say anything about that particular aspect. Several theories were developed to solve this problem. Most influential in the Netherlands was a theory of Baldus and Angelus, which was eventually codified in the statutes of Antwerp of 1582. It was accepted by the courts of Holland in the beginning of the 17th century and most Roman-Dutch authorities agreed that it was the law of the land. A

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* Door deze opdracht wil de schrijver niet alleen de *nestor* van het *Tydskrif* eren doch tevens trachten goed te maken dat hij in 1970 door tijdsgebrek niet in staat was een oorspronkelijk toegezegde bijdrage aan de *Huldigingsbundel Pont* te leveren. Met betrekking tot het karakter van het hier volgende artikel zie *infra* vn 8.

different theory, launched by Salycetus, was much more restrictive of the rights of the unpaid vendor. It influenced the statutes of Genoa of 1588–1589 and might have inspired the English doctrine of the right of stoppage *in transitu*.

Het is niet aan twijfel onderhevig dat de zogenaamde prijsbetalingsregel van *I* 2 1 41: eigendom van een verkochte en geleverde zaak gaat niet op de koper over dan na betaling van de koopprijs of verlening van krediet, in beginsel in het Zuid-Afrikaanse recht nog geldt. Men behoeft daarvoor slechts een van de vele handboeken op te slaan. [1] De vraag is echter welke praktische betekenis deze regel in het huidige recht nog heeft. Er bestaan daarover een aantal rechterlijke uitspraken waarop hier niet nader kan worden ingegaan. Slechts de oudste en bekendste moge hier worden vermeld: *Daniels v Cooper*, daterend van December 1880.[2] Daarin wordt onder andere aangenomen dat wanneer er geen omstandigheden zijn die wijzen op een verkoop "on credit" elke verkoop moet worden verondersteld te zijn geschied "for cash" en dat in dit laatste geval de zaak door de onbetaalde verkoper kan worden opgevorderd onder derden, mits dit geschiedt "within a reasonable time." Een van de rechters, Shippard, merkte daarbij echter wel op dat op dit punt "our law is at variance with every well-considered modern system of mercantile law throughout the world" en dat "it is high time this rule of the Civil Law, which has been found incompatible with commercial progress in other countries, should be abolished by the Legislature."

Voor de Nederlandse jurist is er – zowel vandaag als honderd jaar geleden – reden om de oren te spitsen bij een dergelijke uitspraak. Hij kent toch immers nog steeds een "recht van reclame" van de onbetaalde verkoper (artikelen 1191 e v van het *Burgerlijk Wetboek*, artikelen 230 e v van het *Wetboek van Koophandel*) en hij weet dat dit recht van reclame, zij het in gewijzigde vorm, gehandhaafd zal worden in het *Nieuw Burgerlijk Wetboek* (artikelen 7 1 8 1 e v, waarvan het de bedoeling is dat zij tegelijk met de boeken 3, 5 en 6 van het *Nieuw BW* zullen worden ingevoerd). Weliswaar wordt dit reclamerecht in Nederland niet *expressis verbis* uit de Romeinsrechtelijke prijsbetalingsregel afgeleid en was het, althans in de 19e eeuw, omstreden of het wel op eigendom gebaseerd was, maar het lijdt geen twijfel dat het werking tegen derden heeft. In het *Nieuw Burgerlijk Wetboek* wordt een duidelike nieuwe constructie gegeven: door uitoefening van het reclamerecht "wordt de koop ontbonden en herkrijgt de verkoper eigendom van de zaak" (artikel 7 1 8 1 lid 1). Geen toepassing van de prijsbetalingsregel dus, maar wel basering op eigendom.

In Zuid-Afrika is de prijsbetalingsregel nog steeds niet, zoals rechter Shippard wenste, afgeschaft. Vanuit rechtsvergelijkend oogpunt bezien nemen Nederland en Zuid-Afrika min of meer een uitzonderingspositie in ten aanzien van de bescherming van de onbetaalde verkoper. Andere landen gaan hierin veel minder ver. Ik moge hier volstaan met alleen het Engelse recht te noemen, dat het zogenaamd "right of stoppage *in transitu*" kent: de onbetaalde verkoper mag,

1 Zie bijv *Hackwill* in *Mackeurtan's Sale of Goods in South Africa* 5 ed (1984) 25–28; Kerr *The Law of Sale and Lease* (1984) 112–119 (die de regel als "residual" kwalificeert); CG van der Merwe *Sakereg* (1979) 203–204; De Wet en Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (De Wet en Van Wyk, 1978) 312. Vgl ook Zimmermann *Das römisch-holländische Recht in Südafrika* (1983) 125–126.

2 1880 1 EDC 174.

onder bepaalde omstandigheden, de reeds uit zijn bezit geraakte goederen nog terugvorderen zolang zij nog niet definitief bij de koper zijn terechtgekomen (een soortgelijke regeling is, onder invloed van het Engelse recht, ook in het Franse Wetboek van Koophandel van 1807 – artikel 576 – opgenomen). Verband met de Romeinsrechtelijke prijsbetalingsregel lijkt hier op het eerste gezicht weinig waarschijnlijk.[3] Voor het Nederlandse recht zou een dergelijk verband veel eerder voor de hand liggen, vooral wanneer men weet dat de Nederlandse wetboeken van 1838 op dit punt weliswaar door de Franse wetboeken van 1804 en 1807 geïnspireerd zijn maar toch juist enkele wijzigingen hebben ondergaan die terug te voeren zijn tot in het Romeins-Hollandse recht aanvaarde rechtsregels.

Aan de geschiedenis van het verband tussen het Nederlandse recht van reclame en de Romeinsrechtelijke prijsbetalingsregel heb ik 38 jaar geleden het grootste gedeelte van mijn proefschrift[4] gewijd; voor het overige heb ik daarin aandacht geschonken aan de ontwikkelingsgeschiedenis van deze regel in het Romeinse recht, van de Twaalf Tafelen tot en met de wetgeving van Justinianus. Reeds geruime tijd heb ik de behoefte gevoeld op beide onderwerpen terug te komen.[5] Zo ben ik ertoe gekomen hieraan in 1985 mijn laatste gewone colleges en een deel van mijn afscheidsrede in Leiden[6] te wijden en vervolgens er lezingen over te geven in Schotland en Zuid-Afrika.[7] Hetgeen hier volgt is een voorlopige weergave van de voornaamste daarbij naar voren gebrachte opvattingen.[8]

Om te beginnen enkele opmerkingen over de geschiedenis van de prijsbetalingsregel in het Romeinse recht van de oudheid en over de voornaamste teksten uit het *Corpus iuris civilis* die daarbij een rol spelen. Er bestaat nog steeds geen *communis opinio* over de uitleg van deze teksten. Hoewel ik met voldoening geconstateerd heb dat enkele van de meer dan 30 jaar geleden door mij verkondigde opvattingen – die destijds tegen sommige wijdverspreide zienswijzen ingingen – intussen door gezaghebbende auteurs als Watson, Kaser en Honoré aanvaard zijn, ben ik van mening dat enkele andere van mijn toenmalige veronderstellingen – gedeeltelijk als *obiter dicta* geplaatst – nog niet voldoende aandacht hebben gekregen. Anderzijds zijn er verschillende nieuwe theorieën verkondigd waarmee ik mij niet kan verenigen. Ik geef hieronder slechts enkele

3 Vgl echter voor een indirect verband het slot van dit artikel.

4 *Reclame en Revindicatie, Onderzoekingen omtrent de rol in de ontwikkelingsgeschiedenis van het recht van reclame gespeeld door den Romeinsrechtelijken regel omtrent eigendomsovergang en prijsbetaling bij koop (Inst 2 1 41)* (1949) (hierna *R en R*).

5 Kort na het verschijnen van mijn proefschrift heb ik dat reeds gedaan in twee artikelen. Het eerste is "Inst 2 1 41 et les origines de la 'revendication' du vendeur non payé" *Revue internationale des droits de l'Antiquité* 4 (1950) 455–465 (hierna *RIDA*); dit bevat, behalve een samenvatting van de voornaamste resultaten van mijn proefschrift, enkele aanvullingen met betrekking tot de middeleeuwse Italiaanse statuten. Het tweede is "Fidem emptoris sequi" *Studi in onore di Ugo Enrico Paoli* (1955) 273–287 (hierna *Studi Paoli*); hierin wordt vooral betoogd dat de slotzin van *I* 2 1 41 betreffende het geval dat de verkoper *fidem emptoris secutus fuerit* van klassieke oorsprong moet zijn geweest. In beide artikelen wordt het voornemen vermeld om binnenkort op het onderwerp terug te komen; dat is echter tot nu toe niet geschied.

6 Deze afscheidsrede is niet gepubliceerd.

7 Aan de universiteiten van Edinburgh, Aberdeen en Glasgow in juni 1986 en aan dié van Port Elizabeth, Wes-Kaapland en Witwatersrand in maart resp mei 1987.

8 De tekst is een slechts licht bewerkte Nederlandse versie van de genoemde lezingen. Van een verdere documentatie heb ik moeten afzien. In dit verband moet ik – nogmaals – de hoop uitspreken dat ik later op het onderwerp zal kunnen terugkomen!

voorbeelden en neem daarbij als uitgangspunt de meest recente studie over het onderwerp, het artikel van Honoré "Sale and Transfer of Ownership: The Compilers' Point of View"[9]; dit artikel werpt indirect ook enig nieuw licht op het recht van vóór de tijd van Justinianus.

De belangrijkste tekst is ongetwijfeld nog steeds *I* 2 1 41, een tekst die in nauw verband met de voorafgaande gedachtegang in *I* 2 1 40 moet worden beschouwd:

> "(40) Per traditionem quoque iure naturali res nobis adquiruntur: nihil enim tam conveniens est naturali aequitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi. Et ideo cuiuscumque generis sit corporalis res, tradi potest et a domino tradita alienatur. . . . (41) Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferuntur: venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. Quod cavetur quidem etiam lege duodecim tabularum: tamen recte dicitur et iure gentium, id est iure naturali, id effici. Sed et si is qui vendidit fidem emptoris secutus fuerit, dicendum est, statim rem emptoris fieri."
>
> "(40) Ook door *traditio* verkrijgen wij naar natuurrecht zaken. Niets is immers zo in harmonie met de natuurlijke billijkheid als dat de wil van de eigenaar die zijn zaak aan een ander wil overdragen voor geldig wordt gehouden. Daarom kan een lichamelijke zaak, van wat voor aard zij ook is, getradeerd worden en wanneer dit is gedaan door de eigenaar, wordt zij vervreemd . . . (41) Nu worden zaken die op grond van schenking of van verschaffing van een bruidsschat of op enige andere grond worden getradeerd zonder twijfel in eigendom overgedragen. Zaken die op grond van verkoop getradeerd zijn worden evenwel door de koper alleen dan in eigendom verworven, indien deze aan de verkoper de koopprijs betaald heeft dan wel hem op een andere wijze genoegdoening heeft verschaft, bijv door het stellen van een *expromissor* of door het geven van een pand. Dit wordt weliswaar ook bepaald door de Wet van de Twaalf Tafelen, maar men kan met recht zeggen dat dit eveneens voortvoeit uit het *ius gentium*, dat wil zeggen het natuurrecht. Indien echter de verkoper aan de koper krediet heeft verleend, moet gezegd worden dat de zaak terstond eigendom van de koper wordt."

Op de betekenis van de term *expromissor* kom ik hieronder terug. Vooreerst moge ik vooral de aandacht vestigen op de laatste zinsnede van § 41. *Fidem emptoris sequi* betekent niet dat de verkoper uitdrukkelijk krediet moet hebben verleend aan de koper. Hij kan dit impliciet doen door hem het bezit van de zaak te laten hebben zonder betaling of enigerlei vorm van genoegdoening te eisen;[10] aldus verleent hij "op informele wijze" krediet.

Hetzelfde kan gezegd worden van *fidem habuerimus emptori* in *D* 18 1 19 (Pomponius 31 *ad Quintum Mucium*):

> "Quod vendidi non aliter fit accipientis quam si aut pretium nobis solutum sit aut satis eo nomine factum vel etiam fidem habuerimus emptori sine ulla satisfactione."
>
> "Hetgeen ik verkocht heb wordt op geen andere wijze van de verkrijger dan wanneer ons òf de prijs is betaald òf daarvoor genoegdoening is verschaft of ook wanneer wij zonder enige genoegdoening de koper krediet hebben gegeven."

Volgens Honoré[11] geven deze twee teksten (*I* 2 1 41 en *D* 18 1 19) de "final view of the compilers" weer, doch doet de Justiniaanse codificatie, in haar geheel genomen, "two other views of the law relating to the transfer of title under a sale" naar voren komen:

> "One is the same as the final view, but without the alternative of credit. This view is to be found in a number of Digest texts . . ."

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9 *Studies in Justinian's Institutes in Memory of JAC Thomas* (1983) 56–72 (hierna *Studies Thomas*).

10 Zo thans o a ook Honoré *Studies Thomas* 57.

11 *Studies Thomas* 56–58.

> "Finally, there is another and simpler view. Gaius in his Institutes plainly states that when things are delivered by *traditio* under a sale they fall at once (*statim*) into the ownership of the buyer . . . [This rule] is supported by a number of texts in the *Codex Iustinianus*, which are derived from the *Codex Gregorianus* or *Codex Hermogenianus* . . ."

Voor de eerste van deze twee "other views" verwijst Honoré vooral naar een tekst – welke "appears to be largely genuine" – te wete *D* 18 1 53 (Gaius 28 *ad edictum provinciale*):

> "Ut res emptoris fiat, nihil interest utrum solutum sit pretium an eo nomine fideiussor datus sit. Quod autem de fideiussore diximus, plenius acceptum est, qualibet ratione si venditori de pretio satisfactum est, velut expromissore aut pignore dato . . . [ut?] . . . proinde sit ac si pretium solutum esset."

> "Om te bereiken dat de zaak eigendom van de koper wordt maakt het geen verschil of de prijs betaald is dan wel een *fideiussor* gegeven is. Hetgeen wij echter over een *fideiussor* gezegd hebben is in ruimere zin aanvaard indien op welke wijze dan ook aan de verkoper genoegdoening voor de prijs is verschaft, bijv. door het stellen van een *expromissor* of door het geven van een pand . . . [zodat?] . . . het is alsof de prijs betaald was."

Deze tekst is naar mijn mening corrupt. Waar ik de puntjes geplaatst heb – en daartussen "[*ut?*]" – hebben de edities geen onderbreking van de tekst: "*proinde sit*" volgt onmiddellijk op "*dato*," waardoor de zin niet goed loopt. De 16e eeuwse Duitse humanist Haloander heeft getracht het probleem op te lossen door op deze plaats het woordje "*ut*" in te voegen, doch ik heb in 1955 al het vermoeden uitgesproken dat hier in de *Codex Florentinus* een hele regel uitgevallen kan zijn.[12] Ik acht dit nog steeds waarschijnlijk en kom hieronder daarop terug.

Voor de tweede van de door Honoré onderscheiden "other views" – dat zaken die door *traditio* geleverd zijn onmiddellijk (*statim*) eigendom van de koper worden – is het voornaamste steunpunt *Gai Inst* 2 20. Gaius stelt daar de levering door *traditio* van *res nec mancipi* tegenover de vormelijke overdracht van *res mancipi* door *mancipatio:*

> "Itaque, si tibi vestem vel aurum vel argentum tradidero, sive ex venditionis causa sive ex donationis sive quavis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim."

> "Als ik U dus een kledingstuk, goud of zilver tradeer op grond van verkoop, van schenking of op enige andere grond, wordt de zaak onmiddellijk Uw eigendom, aangenomen althans dat ik daarvan de eigenaar ben."

Deze zienswijze wordt volgens Honoré gesteund door een aantal teksten uit de *Codex*, die leren dat als zaken eenmaal aan de koper geleverd zijn, de verkoper deze niet kan vindiceren als eigenaar maar in plaats daarvan de actie uit het koopcontract moet instellen.

De vraag is echter of deze bij Gaius en in een aantal *Codex*-teksten gesignaleerde opvatting niet overeenstemt met – of althans praktisch op hetzelfde neerkomt als – de "final view" van de compilatoren dat de eigendom van een verkochte zaak ook op de koper kan overgaan wanneer de verkoper hem impliciet (of informeel) krediet heeft verleend; dan zouden er uiteindelijk in de Justiniaanse wetgeving niet drie, maar slechts twee zienswijzen worden aangetroffen. Honoré[13] ontkent dit ten stelligste:

> "If ownership passes on delivery plus payment of the price, satisfaction or credit (express or implied), does it not in effect pass automatically on delivery? The answer is that it

12 *Studi Paoli* 276 vn 1. Zie ook *infra* vn 22 en 23.
13 *Studies Thomas* 58.

> does not, even if we take *fidem sequi* to include an implicit giving of credit, by trusting the buyer's good faith. For it is quite possible for the seller to make clear that he does not rely on the buyer's good faith alone, though he does not, at the moment of delivery, obtain payment or satisfaction either. Thus, he may ask the buyer to provide security e g to get a friend to guarantee payment of the price. The buyer may promise to do this, yet fail to carry out his promise. If, then, the seller parts with possession on the faith of such a promise, he does not rely on the buyer's good faith, he does not *fidem emptoris sequi*, but neither does he obtain payment or satisfaction."

Hetzelfde moet volgens Honoré gezegd worden in het geval dat de koper onmiddellijke betalling toezegt, maar niet betaalt.

Deze gevallen zullen in de praktijk inderdaad zijn voorgekomen, doch naar mijn mening zullen zij niet tot een *reivindicatio* aanleiding gegeven hebben, noch in de klassieke tijd noch ten tijde van Justinianus. Hetgeen Honoré in dit verband zegt[14]: "The seller does not trust the buyer's good faith but the buyer abuses the seller's good faith" spreekt mij geenszins aan. Ik zou eerder zeggen "The seller had indeed trusted the buyer's good faith but that good faith has been abused;" voor deze gevallen zal de "final view" van de compilatoren – anders dan Honoré meent – geen bescherming hebben geboden. De clausule met betrekking tot het *fidem sequi* was een hulpmiddel dat door de klassieke juristen was uitgedacht om de prijsbetalingsregel terzijde te stellen; zij was niet bedoeld als een regel die eventueel ook in de genoemde gevallen uitkomst kon bieden. De compilatoren zullen haar overgenomen hebben zonder daar bepaalde nieuwe bedoelingen mee te hebben.

De klassiciteit van de *fidem sequi* clausule als middel om de prijsbetalingsregel terzijde te stellen is in 1955 door mij met tal van argumenten verdedigd.[15] Deze opvatting is nog geenszins algemeen aanvaard maar zij heeft onder andere steun gevonden bij Watson,[16] die de oorspronkelijke hoofdregel – eigendomsovergang bij koop alleen bij betaling of genoegdoening – als republikeins (vóórklassiek) ziet en de terzijdestelling als een oplossing van de vroeg-klassieke juristen beschouwt.[17] Ik zou nogmaals naar voren willen brengen dat die terzijdestelling gedeeltelijk al zal zijn geschied door de *praetor*, die de *exceptio rei venditae et traditae* en de *actio Publiciana* verleende ook wanneer de prijs nog niet was betaald. Maar dit kon niet in alle gevallen een oplossing brengen. Men zal hier

14 *Studies Thomas* 58–59.

15 *supra* vn 5.

16 *The Law of Obligations in the Later Roman Republic* (1965) 62–63; vgl ook zijn *Rome of the Twelve Tables: Persons and Property* (1975) 146 vn 146, waar hij kort ingaat op de kritiek tegen zijn betoog uit 1965 welke geuit is door JAC Thomas "Institutes 2 1 41 and the Passage of Property on Sale" 1973 *SALJ* 150 e v.

17 Hij bestrijdt naar mijn mening ook met recht de opvatting dat de regel oorspronkelijk niet op eigendomsovergang doch op de verlening van de *actio auctoritatis* (en dus alleen op *mancipatio*) betrekking had, zoals laatstelijk nog door Thomas 1973 *SALJ* 150 e v is betoogd. Waarschijnlijk was de regel juist alleen toepasselijk op *traditio*; zie daarover vooral *Rome and the Twelve Tables* 145–147. Naar aanleiding van zijn betoog met betrekking tot de vermoedelijke inhoud van de bepaling van de Twaalf Tafelen – waarbij hij o a opmerkt: "One may.. question whether at this early period contract and conveyance were sharply distinguished" (147) – zou ik mijn veronderstelling uit 1949 (*R en R* 96) in herinnering willen roepen dat de Twaalf Tafelen slechts een bepaling bevatten waarin *verboden* werd een koop te sluiten waarbij niet òf contant betaald òf genoegdoening voor het betalen van de koopprijs werd gegeven. Een nauwkeurig geformuleerde sanctie op dit verbod zal niet bestaan hebben; die zal eerst door de oudste juristen daaraan verbonden zijn (in de vorm van het niet laten overgaan van de eigendom).

aandacht moeten schenken aan teksten uit *De re rustica* van Varro, waarin deze voor leken de regels met betrekking tot het kopen en verkopen van vee uiteenzet.[18]

In dit verband kom ik terug op het voorkomen van de term *expromissor* in *I* 2 1 41 en *D* 18 1 53. In deze teksten moet *expromissor* zoiets betekenen als een persoonlijke zekerheid. Een *expromissor* is echter niet een normale borg, zoals de *sponsor*, de *fidepromissor* of de *fideiussor*. Hij is iemand die andermans schuld overneemt; hij is niet een tweede, accessoire, debiteur naast de hoofddebiteur maar hij treedt in diens plaats. Wij weten helaas niet veel over het functioneren van dergelijke *expromissores*. Nu komt de term *expromittere* in de genoemde tekst van Varro voor; hij wordt daar niet gebruikt in verband met een derde persoon doch met de koper zelf. In zijn beschrijving van een koop suggereert Varro dat het voor de overgang van de eigendom onder andere nodig is dat er òf betaling van òf *stipulatio* voor de koopprijs plaatsvindt; deze laatste vorm wordt eenmaal aldus aangeduid dat de koper *expromisit nummos*. Dat zou betekenen dat de koper zelf – en niet een derde – als *expromissor* kon optreden. Daarin zou men een extensieve interpretatie kunnen zien van de term *satisfacere* ("genoegdoening verschaffen") in de prijsbetalingsregel, een interpretatie die in Varro's tijd reeds door een meerderheid van juristen was aanvaard.

Sommige andere juristen zullen reeds toen of kort na Varro een stap verder zijn gegaan door aan te nemen dat geen beroep op de prijsbetalingsregel kon worden gedaan wanneer de verkoper, in plaats van een *stipulatio* te laten afleggen, eenvoudig zich met de *actio venditi* tevreden stelde. Zij zullen dit dan niet meer onder *satisfacere* hebben gebracht maar de clausule over *fidem sequi* als nadere uitleg aan de regel hebben toegevoegd.[19]

In de klassieke teksten kunnen beide standpunten zijn voorgekomen; dit zou kunnen verklaren dat een aantal teksten alleen over *satisfacere* spreekt maar een enkele ook de gedachte van het *fidem sequi* vermeldt. Men hoeft niet te veronderstellen dat in dit laatste geval een interpolatie – zij het ook een vóórjustiniaanse – heeft plaatsgehad. Ik denk hier uiteraard aan *D* 18 1 19 met de slotzin: *vel etiam fidem habuerimus emptori sine ulla satisfactione*; ik houd het voor mogelijk dat deze slotzin van Pomponius stamt als een toevoeging aan de tekst van Mucius Scaevola waarop hij commentaar leverde.[20]

D 18 1 53 zou kunnen worden gezien als een tekst die het oudere standpunt weergaf. Maar er is ook een andere oplossing mogelijk, die meer bevrediging kan schenken wanneer men in aanmerking neemt dat deze tekst op naam van Gaius staat en dat *I* 2 1 41 waarschijnlijk ook van Gaius stamt, zij het dan uit een niet-authentiek werk, de zogenaamde *Res cottidianae*.[21] Daarvoor moet ik mijn vermoeden in herinnering roepen dat hier een hele regel uitgevallen zou kunnen zijn.[22] Dit vermoeden zou steun kunnen vinden in een scholion in de

18 Zie over deze Varro-teksten, behalve *R en R* 87 e v, nog Watson *The Law of Obligations* 66–67.
19 Vgl *Studi Paoli* 287.
20 *Studi Paoli* 286 vn 3; vgl thans ook Watson *the Law of Obligations* 64.
21 Vgl laatstelijk Honoré *Studies Thomas* 67 e v.
22 Vgl *supra* vn 12.

Basilica.[23] In de uitgevallen regel zou zoiets hebben kunnen staan als "ook als de verkoper de koper krediet zou hebben verleend" en dan zou men verder lezen "moet het zijn alsof de prijs was betaald."

Tot zover mijn opmerkingen over de geschiedenis van de prijsbetalingsregel in de oudheid. Mijn conclusie voor het Justiniaanse recht zou luiden dat de regel toen reeds – met al zijn nuances – een historisch relict was en dat het weinig waarschijnlijk is dat de compilatoren er veel bewuste bemoeienis mee hebben gehad. In ieder geval lijkt het mij niet goed denkbaar dat de regel toen veel betekenis voor de rechtspraktijk had.

Dit laatste is van belang voor het tweede onderdeel van mijn beschouwingen, het historisch verband tussen het Nederlandse recht van reclame (en eventueel het Engelse "right of stoppage *in transitu*") enerzijds en de Romeinsrechtelijke regel anderzijds. In mijn proefschrift heb ik het recht van reclame voorgesteld als afkomstig van een regel van Italiaans handelsrecht van de 12e eeuw, waarvan het vroegste spoor wordt aangetroffen in een optekening van het recht van de stad Pisa in 1161. Hoewel ik daarbij opmerkte dat eerst later – vooral door de Postglossatoren in de 14e eeuw – uitdrukkelijk verband is gelegd tussen deze handelsrechtelijke regel en het Romeinse recht, achtte ik het niettemin waarschijnlijk dat deze regel uiteindelijk via de handel met het Oosten uit het Byzantijnse rijk gekomen zou zijn en "dus" ook direct verband zou kunnen houden met de Romeinsrechtelijke regel in zijn Justiniaanse vorm, waarvan de Italiaanse gewoonte een "vervorming" zou zijn. Dit laatste zie ik thans als een absolute overschatting van de betekenis van de Justiniaanse regel in de praktijk.

Afgezien hiervan ben ik echter ook op andere punten teruggekomen van mijn opvattingen van destijds over het karakter van de genoemde Italiaanse handelsrechtelijke regel en de latere derivaten daarvan in Frankrijk en Nederland, zulks onder andere onder invloed van de kritiek die Scholtens in dit tijdschrift[24] op mijn proefschrift gegeven heeft. Ik zal mij hier tot slechts enkele aspecten moeten beperken.

Als uitgangspunt neem ik de reeds vermelde bepaling uit de statuten van Pisa uit 1161.[25] Aan het slot van titel 15, handelend over degenen die niet in staat zijn hun schuldeisers te betalen, leest men:

> "Cum bona debitoris, qui factus est non solvendo, creditoribus per libram conceduntur, si aliquis creditorum rem, quam ei vendidit vel alia ex causa ei dedit vel concessit, ex qua pretium vel id quod inde conventum sibi fuerat non habuerit, inter res alias debitoris invenerit, precipuam, equitatis ratione suadente, eam habeat."
>
> "Indien, bij een pondsgelijke verdeling van de goederen van een insolvent geworden debiteur onder diens crediteuren, een van hen een zaak, welke hij aan de debiteur heeft verkocht of op een andere grond heeft gegeven en waarvan hij de koopprijs of datgene wat hij als tegenprestatie had bedongen niet heeft ontvangen, onder de overige goederen van de debiteur aantreft, zal hij, om redenen van billijkheid, deze zaak bij voorrang tot zich mogen nemen."

Het gaat hier niet alleen om verkopers maar ook om degenen die "op een andere grond iets hebben gegeven;" daarmee wordt waarschijnlijk vooral gedoeld op vennoten bij de *commenda*, voor wie de failliet als *tractator* is opgetreden (bij de *commenda* geven een of meer personen aan een ander, *tractator*, geld of zaken

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23 Nadere bijzonderheden in *Studi Paoli* 276 vn 1. Naar aanleiding van hetgeen daar gezegd wordt over de kritiek van Scheltema op de editie van dit scholion door Zachariae – door welke kritiek de basis aan mijn veronderstelling zou ontvallen – merk ik op dat in de twee jaren later verschenen editie van dit scholion door Scheltema en Holwerda – *Basilicorum libri LX, Series B volumen III* (1975) 1086 – de tekst precies hetzelfde luidt als in de editie van Zachariae.

24 1952 *THRHR* 90–97.

25 Voor deze tekst en voor de hieronder terloops vermelde andere Italiaanse statuten zie *R en R* 256 e v; vgl bovendien *RIDA* 459 vn 10 (cf *supra* vn 5).

waarmee deze op reis gaat en handel drijft). In de Statuten van Piacenza van 1391 worden verkopers genoemd naast degenen met wier geld de zaak gekocht of hersteld is; bij deze geldschieters kan men ook aan vennoten in geval van *commenda* denken.

Worden de verkopers in de genoemde statuten op één lijn gesteld met vennoten, in andere krijgen zij nog voorrang boven de vennoten. Dit is met name het geval in statuten die Genuees recht weergeven. Zo bijvoorbeeld in de statuten van Pera (van vóór 1300); Pera was een kolonie van Genua aan de Bosporus, tegenwoordig een wijk van Istanboel. Een soortgelijke bepaling vindt men in de 14e eeuwse statuten van Albenga, een havenstad aan de Ligurische kust die ook onder invloed van Genua stond; daar wordt echter niet alleen van voorrang van de verkoper gesproken doch ook van de revindicatie die hij heeft *donec sibi de pretio fuerit satisfactum*. Deze toevoeging klinkt Romeinsrechtelijk; waarschijnlijk heeft een "geleerde" redacteur haar aangebracht.

In de statuten van Siena van 1262 staat een afzonderlijke bepaling over terugvordering door een onbetaalde verkoper in het geval dat de koper gevlucht is (*c q* "suspect" of overleden is); men zal ook hier vooral mogen denken aan faillissement, dat vroeger veelal met vlucht gepaard ging. Opvordering bij een tweede of volgende koper – dus bij derden – wordt uitgesloten tenzij er bedrog in het spel is.

De statuten van Sassari (Sardinië) van 1316 spreken niet over faillissement doch over verkoop op termijn van roerend goed, waarbij een openbare notariële akte is opgemaakt. De verkoper kan dan niet gehinderd worden door crediteuren aan wie de verkochte zaak reeds eerder "verbonden" was (blijkbaar een "generaal pandrecht"); hij heeft zelf een – gepriviligieerd – pandrecht.

Deze opvatting dat het recht van de onbetaalde verkoper berust op een – stilzwijgend – pandrecht vindt men onder andere ook in de statuten van Marseille van 1253 (die door het recht van Pisa beïnvloed waren). Daar wordt gezegd dat de verkoper zijn zaak mag *veluti suam vendicare aut quasi prae omnibus aliis pro dicto pretio . . . obligatam* ("vindiceren als de zijne of als aan hem vóór alle anderen wegens de onbetaalde koopprijs verpand"); de meerwaarde moet hij aan de overige crediteuren afgeven. Uitoefening van het recht tegen derden is mogelijk, doch dezen worden beschermd indien zij de zaak een jaar te goeder trouw hebben bezeten.[26]

Bij deze constructie als pandrecht zal men – zowel in Frankrijk als in Italië – niet in de eerste plaats aan een Romeinsrechtelijk pandrecht moeten denken doch aan de zogenaamd "obligation spéciale," een in het inheemse recht van zowel Noord-Italië als Frankrijk voorkomende rechtsfiguur die ertoe diende om goederen van een debiteur vatbaar te maken voor executie (iets wat zij zonder een clausule van "obligation spéciale" destijds niet waren; de debiteur was alleen met zijn persoon aansprakelijk). Deze gedachte treft men in nog veel meer praktijkteksten over het recht van de onbetaalde verkoper aan, niet alleen in de middeleeuwen maar ook nog in de bepalingen van de *Coutume de Paris*, zowel in haar redactie van 1510 als in die van 1580.[27] Aan deze gedachte heb ik in mijn proefschrift geen aandacht besteed; daardoor ben ik ten aanzien van de

26 Voor meer details over deze statuten van Marseille zie *R en R* 253–255 (waar zij ten onrechte op 1255 gedateerd worden). De tekst is intussen opnieuw uitgegeven door Regine Pernoud.
27 Zie *R en R* 208 e v.

"pandconstructie" te kritisch geweest en heb ik vaak ten onrechte verondersteld dat aan bepaalde gewoonterechtelijke teksten de gedachte van behouden eigendom ten grondslag lag.[28]

Deze interpretatie van het recht van de onbetaalde verkoper als berustend op behouden eigendom is vrijwel geheel toe te schrijven aan de Postglossatoren, die de speciale positie van de onbetaalde verkoper wilden inpassen in het Romeinse recht.[29] Het is in de eerste plaats Baldus geweest die daartoe pogingen heeft ondernomen. Hoewel hij ook een theorie heeft ontwikkeld waarbij het recht van de onbetaalde verkoper als een stilzwijgend pandrecht volgens het Romeinse recht wordt gezien,[30] heeft hij voornamelijk invloed gehad door zijn leer dat dit recht van de verkoper op behouden eigendom en dus op de Romeinsrechtelijke prijsbetalingsregel berustte.

Het aantonen van verband tussen de gewoonterechtelijke regelingen ten aanzien van de onbetaalde verkoper en de prijsbetalingsregel leverde wel enkele moeilijkheden op. Enerzijds waren deze regelingen grotendeels gegeven voor het geval van faillissement van de koper en daarvan werd in de Romeinsrechtelijke teksten met geen woord gerept. Anderzijds golden de genoemde regelingen blijkbaar ook in het geval dat de verkoper krediet had verleend (*fidem sequi*) en dan was volgens de Romeinsrechtelijke regel de eigendom nu juist wél overgegaan.

Twee theorieën werden ontwikkeld om deze moeilijkheden op te lossen.

De eerste bouwde voort op een interpretatie die reeds door de *Glosse* aan de prijsbetalingsregel was gegeven: verkoop waarbij aan de koper een korte termijn voor de betaling van de koopprijs wordt gelaten – meestal wordt een termijn van tien dagen genoemd – geldt niet als een verkoop op krediet (met *fidem sequi*). Deze theorie is algemeen aanvaard; in het Romeins-Hollands recht vindt men haar zelfs neergelegd in stedelijke keuren, zoals bijvoorbeeld die van Amsterdam waarin de termijn werd verlengd tot zes weken.

De tweede theorie luidde dat dat zelfs wanneer er *fidem sequi* had plaatsgehad (krediet was gegeven) de eigendomsovergang ongeldig kon worden verklaard omdat in het geval dat de koper *iam cogitaverat fugam* ("reeds gedacht had aan een vlucht," de traditionele vorm waarin een debiteur zich aan zijn verplichtingen placht te onttrekken en waardoor de faillissementsprocedure in werking werd gezet), de *fides* van de verkoper door bedrog tot stand was gebracht: *dolus dedit causam habendae fidei de pretio.* Deze theorie is voor het eerst door Baldus ontwikkeld. Zijn broer Angelus de Ubaldis heeft haar nog uitgebreid door aan te nemen dat er een vermoeden van bedrog bestaat wanneer de koper kort na het sluiten van de koop de vlucht neemt. Ook deze theorie heeft, hoewel zij omstreden was, veel invloed uitgeoefend, met name in de Nederlanden.

In dit laatste verband is het van groot belang dat zij was opgenomen in de *Costumen* van Antwerpen van 1582,[31] titel 58 artikel 7:

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28 Met name heb ik op dit punt teveel kritiek uitgeoefend op het verdienstelijke Leidse proefschrift van J van Raalte (1886), vgl *R en R* 210 e v.

29 Voor het volgende zie *R en R* 268 e v.

30 Deze theorie heeft merkwaardigerwijze een zeker gezag gehad bij enkele 15e en 16e eeuwse moraaltheologen; ik hoop daar elders op terug te komen.

31 Voor de Costumen van Antwerpen zie *R en R* 125 e v alsmede 139 e v (op 140 wordt de latere redactie van deze Costumen, die van de zgn *Compilatae*, ten onrechte op 1592 gedateerd in plaats van 1608).

> "Item degene, die syn goet vercocht ende geleverd heeft, 't sy om met gereeden gelde ofte op dach betaelt te worden, indien de cooper corts daer nae failleert, wech loopt oft hem versteect sonder betaelen, sulcs dat de Rechter daer uit de quade trouwe ende bedrogh des coopers can bemercken, mach de vercooper syn goet vervolghen, arresteren, vindiceren ende syn maecken."

De *Costumen* van Antwerpen hadden in het algemeen veel gezag in de Noordelijke Nederlanden. Wat de hier geciteerde bepaling betreft, is het vermeldenswaard dat er door Simon Groenewegen van der Made naar verwezen is in zijn aantekeningen op de *Inleidinge tot de Hollandsche Rechtsgeleerdheid* van Hugo de Groot. Deze had de Romeinsrechtelijke prijsbetalingsregel min of meer letterlijk weergegeven,[32] als deel uitmakend van het Hollandse recht, in *Inleidinge* 2 5 14:

> "Doch wat levering aengaet die op koop volgt van tilbaer goed, staet te letten dat daer mede den eigendom niet over en gaet, 't en zy den kooper de kooppenning heeft betaelt, ofte den verkooper daer voor zeecker gedaen, of dat hem de verkooper de selve penningen heeft geborgt."

Deze paragraaf van de *Inleidinge* zou wellicht weinig praktische betekenis hebben gehad indien Groenewegen haar niet met het artikel uit de *Costumen* van Antwerpen in verband had gebracht. Hoewel er discussie was over de vraag of deze *Costumen* rechtstreeks gelding hadden in Holland, had Groenewegen ongetwijfeld gelijk met ernaar te verwijzen omdat de leer die in het geciteerde artikel was neergelegd door uitspraken van het Hof en de Hoge Raad in Holland reeds in 1617 was aanvaard.

In dit verband moge worden opgemerkt dat Van der Keessel in zijn *Dictaten op de Inleidinge van De Groot* bij deze plaats, na vermelding van de rechterlijke uitspraken van 1617, aantekent dat hij geen enkele latere uitspraak van het Hof van Holland of de Hoge Raad in tegengestelde zin kent. Hij beschikte uiteraard niet over de tekst van de *Observationes Tumultuariae* van Bynkershoek en Pauw, die ons tegenwoordig toegankelijk zijn. Inderdaad vindt men daar echter geen tegengestelde uitspraken. In een door Bynkershoek besproken geval[33] wordt de theorie van het verondersteld bedrog in geval van vlucht alleen *obiter* vermeld als een enkele maal toegepast door beide gerechtshoven. In de *Observationes* van Pauw vindt men deze theorie geheel niet genoemd maar daar wordt wel een belangrijke restrictie aangebracht ten aanzien van de andere hierboven vermelde theorie, te weten dat verkoop met een korte betalingstermijn (bijvoorbeeld zes weken) als een verkoop *à contant* geldt, waardoor de verkoper op grond van behouden eigendom de zaak kan terugvorderen. Pauw legt er de nadruk op dat ook deze regel alleen moet worden toegepast in geval van faillissement;[34] in andere gevallen moet de verkoper de *actio venditi* gebruiken:

> "Si in universum vindicationem largiares, vergeret id in summum rei mercatoriae detrimentum."
>
> "Als men de revindicatie algemeen zou toelaten, zou dit tot uiterste schade van de koophandel strekken."

In het geval waarin hij deze uitspraak deed (uit 1751) besliste de Hoge Raad in overeenstemming met zijn zienswijze, maar dat geschiedde voornamelijk op grond van de feiten. In een later geval, uit 1786,[35] werd hij echter niet door zijn

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32 De belangrijkste afwijking is dat hij hem beperkt tot roerend goed ("tilbaer goed").
33 *Obs Tum* nr 2221 uit 1725 (uitgegeven in deel III, 1946).
34 *Obs Tum Nov* nr 383 uit 1751 (uitgegeven in deel I, 1964).
35 *Obs Tum Nov* nr 1783 (uitgegeven in deel III, 1972).

collega's gevolgd. De ruime interpretatie die de Hoge Raad toen aan het recht van reclame in geval van contante verkoop gaf lijkt in overeenstemming met de 19e en 20e eeuwse regeling van dit recht.

Hierboven is er al op gezinspeeld dat Baldus' theorieën niet onomstreden waren. Het was onder andere Salycetus die er van afweek. Volgens hem kon in geval van *fidem sequi* de verkoper hoogstens enig recht pretenderen zolang de verkochte zaak nog niet werkelijk in het bezit van de koper geraakt was; na bezitsverkrijging zou de eigendom zijn overgegaan en was, volgens zijn Romeinsrechtelijke conceptie, geen opvordering meer mogelijk.[36] Deze opvatting van Salycetus kreeg veel steun, van Jason de Mayno en van Benvenuto Straccha. Waarschijnlijk onder de invloed van deze schrijvers bepaalden de statuten van Genua van 1588–1589[37] dat de verkoper zijn recht van preferentie kan uitoefenen zolang de goederen nog niet eigendom van de koper geworden zijn. Daardoor was de oorspronkelijke middeleeuwse statutaire regeling – die de eigendomskwestie niet aan de orde stelde – in Romeinsrechtelijke zin omgebogen.

Deze Genuese regeling doet sterk denken aan de Engelse doctrine van het "right of stoppage *in transitu*." Deze doctrine komt eerst aan het eind van de 17e eeuw op; de oudste rechterlijke uitspraak hierover is *Wiseman v Vandeput* uit 1690. De oorsprong van deze doctrine is geenszins duidelijk. In een latere uitspraak wordt zij toegeschreven aan *lex mercatoria*. Het lijkt niet onwaarschijnlijk dat er een verband heeft bestaan met de bovengenoemde statuten van Genua.[38]

Wanneer wij de ontwikkelingen op het punt van de rechten van de onbetaalde verkoper sinds de 12e eeuw overzien, kunnen wij het volgende vaststellen. Oorspronkelijk bestond er een handelsrechtelijke regel krachtens welke de verkoper in ieder geval de verkochte en geleverde zaak kon terugvorderen uit de failliete boedel van de koper en soms ook haar bij derden kon opeisen. De postglossatoren hebben deze regel in verband gebracht met de Romeinsrechtelijke prijsbetalingsregel en daardoor het accent gelegd op het probleem van de eigendomsovergang (terwijl naar inheemse opvattingen er hoogstens sprake was van een – niet Romeinse – vorm van pandrecht). Deze aanpassing aan het Romeinse recht geschiedde echter op twee verschillende manieren. Baldus lanceerde een theorie die tot een ruime toepassing zowel van de handelsrechtelijke als van de Romeinsrechtelijke regel voerde; deze theorie had vooral succes in de Nederlanden en leidde in het Romeins-Hollands recht tot een sterk ontwikkeld recht van reclame, dat nu nog in het Nederlandse en het Zuid-Afrikaanse recht voortleeft. Salycetus stelde daar een andere doctrine tegenover, die tot een veel beperktere interpretatie van beide regels leidde; deze leer werd onder andere in het 16e eeuwse Genuese recht aanvaard en vond later verbreiding in de vorm van het Engelse "right of stoppage *in transitu*."

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36 Vgl hiervoor en voor het volgende *R en R* 273 e v.
37 Zie *R en R* 261 e v.
38 Aldus reeds *R en R* 273 vn 5.

Die beskerming van besit en houerskap in die Suid-Afrikaanse reg[1]

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SUMMARY

The Protection of Possession and *Detentio* in South African Law

The analysis of CG van der Merwe is used as basis for a discussion of the theoretical framework in which the so-called possessory remedies must be dealt with. According to the generally accepted view of Van der Merwe, the relevant remedies are seen as basically protecting the position of the possessor (which originally was restricted to possessors *animo domini*). As a result of the granting of some of these remedies to people who were technically not real possessors, the basis of protected possession was broadened, while the distinction between possession and *detentio* became vague.

On the basis of an analysis of the practical working of the so-called possessory remedies a distinction is made between remedies requiring a right to the thing (declaratory order, interdict, possessory action and delictual action) and those not requiring such a right (spoliation action and enrichment action). It is concluded that, while the true possessor *animo domini* could never meet the *onus* of proof in the first category of remedies, and could meet the *onus* of proof in the second group only because the nature of the applicant's or claimant's control over the thing is not the main feature of those remedies, the true possessor is actually not entitled to any form of true *possessory protection.*

Starting from these analyses the theoretical framework of Van der Merwe is criticised, and an alternative approach to the theoretical explanation of these remedies is suggested.

1 INLEIDING

Een van die belangrikste en moeilikste probleme rondom die beskerming van besit en houerskap handel oor die vraag of daar enige wesenlike onderskeid tussen besit enersyds en houerskap andersyds bestaan wat betref hulle onderskeie aansprake op beskerming.

CG van der Merwe verwoord in sy gesaghebbende handboek[2] oor die moderne Suid-Afrikaanse sakereg 'n standpunt[3] wat vandag in die sakereg algemeen aanvaar word wanneer hy die stelling maak dat die onderskeid tussen besit en

1 HL Swanepoel-lesing gelewer voor die Fakulteit Regte, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, 1986–05–06. Die finansiële bystand van die volgende instansies, waardeur gedeeltes van die navorsing vir hierdie artikel moontlik gemaak is, word met dank erken: die Getrouheidswaarborgfonds vir Prokureurs, Notarisse en Transportbesorgers; die Raad vir Geesteswetenskaplike Navorsing.
2 *Sakereg* (1979).
3 77–79.

houerskap besig is om te vervaag sover dit besitsbeskerming betref.[4] Hierdie stelling berus op die standpunt dat die beskerming wat tradisioneel slegs aan besitters verleen is na steeds meer persone wat tradisioneel as houers beskou is, uitgebrei word. Daar word van die veronderstelling uitgegaan dat hierdie ontwikkeling "vir vanselfsprekende redes"[5] as 'n terminologiese uitbreiding van die *besitsbegrip*, eerder as van die *besitsremedies*, gesien moet word. Daar word dus aanvaar dat die houers wat op beskerming geregtig is, vandag as besitters gesien moet word. Sodoende kan die tradisionele standpunt, waarvolgens houers in beginsel onbeskermd is,[6] gehandhaaf word terwyl die beskerming van bepaalde houers terselfdertyd verklaar word. Die vraag wat in hierdie artikel aan die orde gestel sal word, is of hierdie teorie houdbaar is, en of dit die enigste aanvaarbare verklaring vir die beskerming van houerskap in die moderne Suid-Afrikaanse reg bied. Hierdie ondersoek sal in drie hoofdele uiteenval: eerstens sal Van der Merwe se standpunt (as die verteenwoordigende weergawe van die algemeen aanvaarde standpunt oor die huidige regsposisie) kortliks saamgevat en geanaliseer word ten einde die presiese inhoud en implikasies daarvan te bepaal; tweedens sal 'n kort sistematiese analise van die werking van die sogenaamde besitsremedies aangepak word ten einde die omvang en implikasies daarvan vas te stel; en ten slotte sal bepaalde gevolgtrekkings op die basis van die voorafgaande analises uiteengesit word.

2 CG VAN DER MERWE SE WEERGAWE VAN SOGENAAMDE BESITSBESKERMING

Van der Merwe se uiteensetting van die sogenaamde besitsremedies sluit aan by die teoretiese verklaringsmodel van FC von Savigny (1779–1861).[7] Dit hou veral in dat die onderskeid tussen besit en houerskap, met besondere verwysing na die beskerming daarvan, aan die hand van drie opeenvolgende stellings verduidelik word:

a Die oorspronklike inhoudelike verskil tussen besit (*possessio*) en houerskap (*detentio*) bestaan in die aanwesigheid van die *animus domini* in die geval van besitters, en die afwesigheid daarvan by houers. Besit is dus 'n regsverhouding tussen 'n regsubjek en 'n saak wat na sy inhoud bestaan uit 'n fisiese element (*corpus*) en 'n geestelike of wilselement (*animus*) waarby die geestelike element spesifiek in die vorm van die *animus domini* aanwesig is. Daarenteen is houerskap 'n regsverhouding tussen 'n regsubjek en 'n saak wat uit dieselfde fisiese en geestelike elemente bestaan, maar dan met die kwalifikasie dat die geestelike element 'n ander inhoud as die *animus domini* aanneem.[8]

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4 Vgl verder Schoeman *Silberberg and Schoeman – The Law of Property* (1983) 128; Mathews "The Mental Element in Possession" 1962 *SALJ* 179; Van der Vyver "Die Juridiese Grondslag van Besitsbeskerming" 1970 *THRHR* 237. Van der Vyver soek gesag vir sy standpunt by Middelberg "Die Beskerming van Houerskap in die Suid-Afrikaanse Reg" 1954 *THRHR* 268, maar dit wil voorkom asof Middelberg nie die nodige steun verskaf nie.

5 wat origens nie verder verduidelik word nie, vlg Van der Merwe *Sakereg* 79.

6 Vgl Van der Merwe *Sakereg* 77.

7 Sien veral *Das Recht des Besitzes: eine civilistische Abhandlung* (1803), herdruk van die 7e uitg (1864) deur Rudorff (1967) 110–121. Vgl die kort verduideliking van Delport en Olivier *Sakereg Vonnisbundel* (1985) 66–67, en in meer detail Van der Walt *Die Ontwikkeling van Houerskap* (ongepubliseerde proefskrif PU vir CHO, 1986) 314–322.

8 Vgl Van der Merwe *Sakereg* 75–76; von Savigny *Recht des Besitzes* 110–111.

b Afgesien van hierdie inhoudelike verskil moet daar ook in beginsel tussen besit en houerskap onderskei word op grond van die regsgevolge van elkeen: besit is 'n beskermde regsverhouding, en houerskap is 'n onbeskermde regsverhouding.[9]

c Die beskerming wat in beginsel slegs aan die besitter *stricto sensu* toekom, is egter op grond van bepaalde oorwegings mettertyd na sekere houers uitgebrei. Volgens Van der Merwe het hierdie ontwikkeling tans in die Suid-Afrikaanse sakereg die posisie bereik waar die onderskeid tussen besit en houerskap, sover dit besitsbeskerming betref, besig is om te vervaag.[10] Diegene wat inhoudelik (fisiese beheer plus 'n *animus* anders as die *animus domini*) houers is, maar wat tog die beskerming van die ware besitter (fisiese beheer plus die *animus domini*) geniet, is deur von Savigny as die sogenaamde *afgeleide besitters* omskryf – 'n term wat skerp kritiek uitgelok het.[11] Van der Merwe verkies self om hierdie ontwikkeling as 'n terminologiese uitbreiding van die *besitsbegrip* eerder as 'n sistematiese uitbreiding van die *besitsremedies* te verklaar.[12] 'n Bepaalde groep houers word dus as gevolg van hierdie ontwikkeling as't ware in besitters omgetower, hoewel hulle inhoudelik nog steeds in dieselfde verhouding as voorheen tot die saak staan.

Enkele verdere opmerkings oor hierdie teoretiese verklaringsmodel vir die werking van die sogenaamde besitsremedies is noodsaaklik ten einde die strekking van latere kritiek daarop te begryp.

a Dit is opvallend dat die hele teorie van Van der Merwe sterk op sy weergawe van die toepassing van een spesifieke besitsremedie, naamlik die mandament van spolie, berus. Wanneer Van der Merwe die verlening van die sogenaamde besitsremedies aan verskillende houers illustreer, maak hy uitsluitlik van voorbeelde gebruik waar die toepassing van die mandament van spolie ter sprake kom.[13] Dieselfde afleiding kan gemaak word uit die redes waarom Van der Merwe hierdie ontwikkeling verwelkom: enersyds omdat die onbillike situasie waarin die dief beskerm is en die huurder nie, nou wegval;[14] en andersyds omdat "besitsbeskerming hedendaags in die eerste plek teen eierigting gemik is."[15] Albei oorwegings verwys kennelik na die een spesifieke remedie, naamlik die mandament van spolie. Daar sal in die res van hierdie ondersoek besondere aandag aan die verhouding tussen die mandament van spolie en ander sogenaamde besitsremedies geskenk word.

b Omdat die geledere van die besitters deur die hierbo beskrewe ontwikkeling uitgebrei is na persone wat nie met die *animus domini* beheer oor die saak uitoefen nie, is dit natuurlik moeilik om nog steeds 'n enkele inhoudelike omskrywing van besit te gee. Juis daarom gryp Van der Merwe die teorie oor die

9 Vgl Van der Merwe *Sakereg* 75; von Savigny *Recht des Besitzes* 112–121.
10 Vgl par 1 hierbo, asook Van der Merwe *Sakereg* 77 79; von Savigny *Recht des Besitzes* 112–121. Sien ook Schoeman *Silberberg and Schoeman* 128.
11 von Savigny *Recht des Besitzes* 112–121; vgl Delport en Olivier *Sakereg Vonnisbundel* 66–67.
12 *Sakereg* 79.
13 *Sakereg* 78–79, vgl ook 89; asook Schoeman *Silberberg and Schoeman* 128.
14 *Sakereg* 77.
15 *ibid.*

sogenaamde besitsfunksies[16] aan om die omskrywing van die nuwe besitsbegrip te vergemaklik. Dit word gedoen deur te aanvaar dat besit verskillende funksies het,[17] en dat *besit* telkens vir elke funksie 'n eie inhoud het. Daarom moet die regte omskrywing vir elke funksie ook telkens met verwysing na daardie funksie bepaal word. Prakties kom dit daarop neer dat *besit* ten aansien van die saaklike en bewysregtelike funksies na *corpus* plus die *animus domini* verwys, terwyl dit ten aansien van die regspolitieke, sekuriteits- en ander funksies na *corpus* plus 'n ander (wyer omskrewe) *animus* verwys.[18] Dit is verder opvallend dat Van der Vyver in 'n vroeër artikel[19] en Peiris in 'n later artikel[20] 'n vergelykbare standpunt inneem, wanneer hulle besit met verwysing na verkrygende verjaring, die toepassing van die mandament van spolie en die verhaal van vergoeding vir verbeterings telkens anders omskryf. Hierdie benadering, waarvolgens die inhoud van besit dus vir verskillende funksies daarvan telkens anders kan wees, sal later in die ondersoek krities beoordeel word.

3 ANALISE VAN DIE WERKING VAN DIE SOGENAAMDE BESITSREMEDIES

3 1 Inleiding

In die lig van die ontwikkeling wat hierbo aan die hand van Van der Merwe se verduideliking daarvan weergegee is, het die onderskeid tussen besit en houerskap – vir sover dit die inhoudelike verskil tussen die omskrywings van elkeen betref – grootliks verval. Op sterkte van Van der Merwe se uiteensetting kan beweer word dat die onderskeid tussen besit en houerskap in die hedendaagse reg tot die verskillende gevolge daarvan beperk is, en dan meer spesifiek tot die feit dat besit beskerm word terwyl houerskap steeds (vir sover dit nog bestaan) onbeskermd is. Selfs hierdie onderskeid is egter besig om te vervaag namate die beskerming van die besitter na al meer houers uitgebrei word.

In hierdie gedeelte van die ondersoek sal die verskillende sogenaamde besitsremedies sistematies geanaliseer word ten einde te bepaal of dit moontlik is om Van der Merwe se teorie oor die uitbreiding van die besitsremedies te ondersteun al dan nie. Vir hierdie doel word die verskillende remedies wat gewoonlik as besitsremedies aangemerk word, volgens 'n ander sisteem aangepak as wat gebruiklik is. Gewoonlik word hierdie remedies volgens hulle opeenvolging in tyd chronologies behandel: eers die remedies wat voor daadwerklike

16 Die verskillende funksies van besit is vir die eerste keer deur Van Oven in sy proefskrif *De Bezitsbescherming en hare Functies* (1905) onderskei, en spesifiek met verwysing na die feit dat die term *besit* in die konteks van eiendomsverkryging enersyds (die sogenaamde saaklike funksie) en van die toepassing van die mandament van spolie andersyds (die sogenaamde *politioneele* of regspolitieke funksie) verskillend omskryf word; in die eerste geval word die *animus domini* vereis, en in die tweede geval nie.

17 In *Sakereg* 62–65 onderskei Van der Merwe tussen die saaklike, regspolitieke, sekuriteits- en strafbaarheidsvestigende funksies van besit. In die artikel van Van Rensburg en Van der Merwe "Die Aard van Besit en die *Animus*-element daarvan" 1978 *THRHR* 113–130, wat die basis vir die latere hoofstuk oor besit in Van der Merwe se handboek vorm, word hierdie funksies fyner onderverdeel. Vgl ook Delport en Olivier *Sakereg Vonnisbundel* 57; Schoeman *Silberberg and Schoeman* 123.

18 Vgl Van der Merwe *Sakereg* 65; Van Rensburg en Van der Merwe 1978 *THRHR* 113 116 122–130; Schoeman *Silberberg and Schoeman* 123–124 128.

19 Van der Vyver "Die Juridiese Grondslag van Besitsbeskerming" 1970 *THRHR* 231–243.

20 Peiris "Possession and Policy in a Modern Civil Law System" 1983 *CILSA* 291–324.

versteuring ter sprake kom (verklarende bevel, interdik); dan die remedies wat tydens die versteuring self of baie kort daarna ter sprake kom (contra-spolie en mandament van spolie) en dan die remedies wat na die versteuring ter sprake kom (besitsaksie, deliktuele aksies en die verrykingsaksies). Vir huidige doeleindes word die betrokke remedies egter nie chronologies nie maar met verwysing na die vereistes daarvan ingedeel, en wel in twee groepe:

a remedies waarvoor dit 'n vereiste is dat die eiser of applikant 'n *reg op die saak* of op beheer oor die saak moet bewys; en

b remedies waarvan die vereistes nie 'n reg op die saak of op beheer daaroor insluit nie.

In die finale gevolgtrekkings sal weer op die meriete van hierdie indeling teruggekom word. Waar dit wel vereis word dat die applikant of eiser 'n reg op die saak of op beheer oor die saak moet bewys, sal die ander vereistes wat vir die remedie geld nie ook behandel word nie. Daar sal slegs, aan die hand van 'n kort uiteensetting van die doel van elke remedie, na die betrokke vereiste en die implikasies daarvan gekyk word. Waar 'n reg op die saak egter nie vereis word nie, sal al die vereistes vir die betrokke remedie met verwysing na die doel daarvan en die implikasies wat daaruit voortspruit, behandel word.

3 2 Remedies wat op Grond van hulle Vereistes kennelik op die Reg op Beheer Fokus

3 2 1 Die Verklarende Bevel

Die hof se inherente kompetensie om 'n bevinding oor die regte van 'n applikant te maak,[21] is uitgebrei deur artikel 19(1)(a)(iii) van die Wet op die Hooggeregshof 59 van 1959, om die hof in staat te stel om sodanige bevinding ook te maak in gevalle waar nog geen daadwerklike inbreukmaking op enige beweerde reg plaasgevind het nie. Die doel van hierdie remedie is geleë in die moontlikheid om die party of partye se onderskeie regte ten aansien van beheer oor 'n saak teenoor mekaar gesaghebbend vas te stel en af te baken. Die vereiste vir die verlening van die verklarende bevel wat hier direk ter sake is, is dat die applikant die hof moet oortuig van die bestaan van 'n *werklike reg*, wat vanselfsprekend in die konteks van die sakereg 'n *reg op 'n saak* moet wees, en verder dat hy die een of ander belang by daardie reg het.[22] Uit hoofde van hierdie vereiste is dit duidelik dat die remedie in die eerste plek op die applikant se reg op die betrokke saak fokus, en die implikasie daarvan is dat die remedie alleen verleen sal word aan diegene wat 'n regsgeldige aanspraak op beheer oor die saak kan bewys. Sodanige beheer moet uiteraard regmatige beheer wees, aangesien die reg wat bewys moet word 'n regserkende grond vir die bestaan en voortbestaan van die beheer moet wees.

3 2 2 Die Interdik

Die doel van 'n interdik is, met spesifieke verwysing na die sakereg, om by wyse van 'n summiere en buitengewone regsmiddel die applikant se reg op 'n saak of op beheer oor die saak te beskerm teen nadeel wat uit deurlopende of dreigende onregmatige inbreukmaking op daardie reg voortspruit of sal voortspruit.

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21 Vgl daaroor Van Winsen ea *Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa* (1979) 521.

22 *Reinecke v Incorporated General Insurances Ltd* 1974 2 SA 84 (A) 93A–B.

Vir die interdik geld eweneens 'n spesifieke vereiste wat dit duidelik maak dat die remedie in die eerste plek op die reg van die applikant ten aansien van die saak fokus: die suksesvolle applikant moet naamlik bewys dat hy ooreenkomstig die materiële regsbeginsels wat toepassing mag vind,[23] 'n *duidelike reg* of sogenaamde *clear right* op die saak het.[24] Hierdie vereiste impliseer ook, soos in die geval van die verklarende bevel, dat die beskerming van hierdie remedie slegs verleen kan word aan persone met 'n regsgeldige aanspraak op beheer oor die saak. Diegene wat onregmatig beheer oor die saak uitoefen, kan na alle waarskynlikheid nie aan hierdie spesifieke vereiste voldoen nie.

3 2 3 Die Besitsaksie

Die doel van die besitsaksie is om die eiser in staat te stel om 'n saak, of die waarde daarvan by wyse van skadevergoeding, te verhaal van 'n verweerder met 'n swakker reg op die betrokke saak as die eiser self, wanneer die eiser se reg versteur is deur die onregmatige verwydering of vernietiging van die saak.[25] Afgesien van die skadevergoedingsaspek van hierdie remedie, wat ten beste hieronder by die deliktuele aksies behandel kan word,[26] is dit uit die vereistes duidelik dat die opvordering van fisiese beheer oor die saak op die eiser se sterker reg op die saak berus. Daar kan dus ook hier aanvaar word dat die eis beperk is tot diegene wat in staat is om 'n regserkende grond vir regmatige beheer oor die saak aan te voer en te bewys. Daar word naamlik van die eiser verwag dat hy teenoor die betrokke verweerder 'n sterker reg of aanspraak op die saak of op beheer daaroor moet aantoon.[27]

Nogtans het 'n uitsondering in die Suid-Afrikaanse reg tot stand gekom as gevolg van die praktyksgebruik[28] waarvolgens die eiser aanvanklik slegs kan bewys dat die verweerder as gevolg van onregmatige spoliasie in beheer van die saak gekom het, waarop die verweerder vervolgens 'n regsgeldige grond vir sy beheer oor die saak sal moet aantoon alvorens daar van die eiser verwag word om sy sterker aanspraak teenoor die verweerder te bewys.[29] Bloot logies gesproke, is dit op grond van hierdie uitsonderingsgeval teoreties moontlik dat die besitsaksie verleen kan word aan 'n eiser wat self geen regmatige aanspraak op die saak kon bewys nie, maar wat teen 'n verweerder optree wat ook geen aanspraak kan bewys nie, en wat die saak op grond van onregmatige spoliasie in beheer verkry het. Die uitsonderlike bewysreëling wat hier geld, en wat kennelik deur verwarring geïnspireer is, kan egter nie die geldigheid van die standpunt dat die eiser hier in beginsel 'n regmatige aanspraak op die saak moet bewys, ondermyn nie.

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23 Vgl Pretorius *Burgerlike Prosesreg in die Landdroshowe* (1986) 727 731.
24 *Setlogelo v Setlogelo* 1914 AD 221 227.
25 Vgl Van der Merwe *Sakereg* 96; Delport en Olivier *Sakereg Vonnisbundel* 117; Schoeman *Silberberg and Schoeman* 149; De Vos "Bespreking van Sekere Aspekte van die Regsposisie van Besitters" 1959 *Acta Juridica* 184–199.
26 Vgl hieroor Van der Walt *Ontwikkeling van Houerskap* 727–731, waar die standpunt dat hier met 'n deliktuele aksie gewerk word, gemotiveer word.
27 Van der Merwe *Sakereg* 96; *Kemp v Roper* (1886) BAC 141 143; *Pretoria Stadsraad v Ebrahim* 1979 4 SA 193 (T) 196A–C; *Bucholtz v Bucholtz* 1980 3 SA 424 (W) 425C.
28 wat kennelik op 'n verwarring tussen die besitsaksie en die mandament van spolie berus: vgl Van der Walt *Ontwikkeling van Houerskap* 733.
29 Van der Merwe *Sakereg* 96; *Loots v Van Wijk* (1899) 16 SC 419 420; *Bester v Grundlingh* 1917 TPD 492 495; *Hoosen v Bourne and Co* 1962 3 SA 182 (D) 185A.

3 2 4 Die Deliktuele Aksies

In die algemeen kan die doel van 'n deliktuele aksie omskryf word as herstel van die eiser se vermoënsbelang (vir huidige doeleindes met betrekking tot 'n saak) nadat dit as gevolg van onregmatige veroorsaking van vermoënsnadeel (*damnum iniuria datum*) deur 'n delikpleger versteur is. Alhoewel daar 'n reeks uiteenlopende remedies bestaan wat almal onder hierdie doel tuisgebring kan word,[30] sal die onderhawige uiteensetting ter illustrasie tot die eis onder die *lex Aquilia* beperk word. In daardie geval is die tersaaklike vereiste dat 'n vermoënsbelang van die eiser (en vir huidige doeleindes sal dit 'n vermoënsbelang met betrekking tot 'n saak wees) op onregmatige en skuldige wyse aangetas moet wees deur die optrede van die verweerder.[31] Die hele debat oor die bestaanbaarheid en die teoretiese verklaarbaarheid van die sogenaamde uitbreiding van die deliktuele aksie na houers[32] berus op die teoretiese uitgangspunt[33] dat skade, synde vermoënskade, in die eerste plek die skade van die eienaar (van 'n saak) is aangesien die saak deel van die eienaar se vermoë uitmaak. Op basis van dieselfde argument, maar met deeglike kennisname van die feit dat die hedendaagse reg erken dat ander persone naas die eienaar ook 'n vermoënsbelang by die saak of beheer daaroor mag verkry,[34] kan in beginsel gestel word dat 'n persoon slegs deliktuele skadevergoeding op die basis van die *lex Aquilia* kan verhaal vir onregmatige aantastings van sy vermoënsbelang in 'n saak of die beheer daaroor, indien hy 'n regmatige aanspraak op die saak of op beheer daaroor het. Dit impliseer dat die deliktuele aksie in beginsel ook net tot die beskikking is van diegene wat 'n regmatige vermoënsbelang in die saak kan bewys.

Die feit dat die deliktuele aksie aan die *bona fide possessor*[35] verleen word deur middel van 'n *actio utilis* skep 'n uitsondering op hierdie teoretiese beginsel.[36] Weer eens kan betoog word dat die uitsondering die reël nie ongedaan maak nie, maar dat dit juis moeilik is om te sien hoedat die aksie in die hedendaagse reg aan die oorspronklike besitter *animo domini* verleen sal word, aangesien dit uiters moeilik sal wees om 'n afsonderlike *reg* op 'n vermoënsbelang in die saak te bewys. In die meeste gevalle word hierdie uitsonderlike geval

30 Sowel die deliktuele aksie gegrond op skuldaanspreeklikheid as die een gegrond op skuldlose aanspreeklikheid behoort hierby ingesluit te word, aangesien die verskille tussen die twee nie die huidige uiteensetting beïnvloed nie; vgl Van der Walt *Ontwikkeling van Houerskap* 738–789.

31 Vgl Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 226–227; Van der Walt *Delict: Principles and Cases* (1979) 20; Boberg *The Law of Delict Vol 1: Aquilian Liability* (1984) 24–25.

32 Vgl daaroor Van der Walt *Ontwikkeling van Houerskap* 739–768; Schoeman *Silberberg and Schoeman* 150–152; Klopper "Die Aard van die Juridiese Belang van Houers by Skadevergoeding" 1983 *Obiter* 71–112.

33 Volgens Van der Walt *Die Sommeskadeleer en die 'once and for all'-Reël* (ongepubliseerde proefskrif Unisa 1977) 224 vn 78 79 is dit geen vaste regsbeginsel nie, maar slegs 'n logiese rigtingwyser.

34 Die belangrikste regspraak is *Smit v Saipem* 1974 4 SA 918 (A) en *Refrigerated Transport v Mainline Carriers* 1983 3 SA 121 (A); lees daarby Van der Walt se vonnisbespreking van lg saak 1984 *THRHR* 109–112.

35 en moontlik ook die *mala fide possessor*: vgl veral De Vos 1959 *Acta Juridica* 184 188 vn 22; Delport en Olivier *Sakereg Vonnisbundel* 110.

36 *Erasmus v Mittel and Reichmann* 1913 TPD 617 622; *Setlogelo v Setlogelo* 1921 OPD 161 165; *Hudson's Transport v Du Toit* 1952 3 SA 726 (T) 729H; *Swart v Van der Vyver* 1970 1 SA 633 (A) 647G.

alleen nog geregverdig deur die wyer gebruik van die term *besit*, waarby 'n aantal regmatige belange van die sogenaamde afgeleide besitters ingesluit word.

3 2 5 Gevolgtrekking

Met betrekking tot die voorafgaande aantal remedies, wat almal as sogenaamde besitsremedies bekend staan, kan die algemene teoretiese gevolgtrekking gemaak word dat hierdie groep remedies almal op die reg van die betrokke beheerder van die saak fokus, en dat die beskikbaarheid van die remedie en die beskermende waarde daarvan van daardie reg afhanklik is. Die aan- of afwesigheid van die *animus domini* is egter by geeneen van die remedies 'n belangrike faktor nie. Daar kan dus beweer word dat die beskerming van hierdie betrokke groep remedies, op grond van die besondere vereistes daarvan, berus op die regmatigheid van die beheer wat deur die reghebbende oor die saak uitgeoefen word (of minstens op die regmatigheid van sy belang by die saak). Hierdie remedies beskerm dus in die ware sin van die woord *regte*, en wel regte met betrekking tot 'n saak. Sonder sodanige reg kan daar nie van die remedies gebruik gemaak word nie, en daarom is enigeen wat 'n onregmatige belang by of beheer oor die saak het, nie op sodanige beskerming geregtig nie. Die enkele uitsonderings waarop gewys is, behoort nie die aandag van die inherente aard van hierdie remedies af te lei nie.

3 3 Remedies wat nie op die Eiser of Applikant se Reg op die Saak Fokus nie

3 3 1 Contra-spolie en die Mandament van Spolie

Aangesien die toepassingsverskille tussen die mandament van spolie en die beskermende maatreëls rondom *contra*-spolie nie hier enige wesenlike invloed het nie, word die twee saam behandel. Die doel van die toepaslike regsbeginsels rondom spoliasie is, soos Van der Merwe tereg[37] opmerk, die voorkoming van eierigting. Meer akkuraat kan die mandament van spolie omskryf word as 'n summiere en buitengewone remedie wat bestem is om op unieke wyse die regsorde teen eierigting wat tot vredesbreuk kan lei, te beskerm deur die gevolge van sodanige eierigting (vir sover dit bestaande beheersverhoudinge versteur het) summier ongedaan te maak sonder enige verwysing na die regmatigheid al dan nie van die vooraf bestaande beheer wat herstel moet word.[38] Reeds uit hierdie formulering, wat basies terugval op die beginsel dat *spoliatus ante omnia restituendus est*, kan afgelei word dat die fokuspunt van die mandament van spolie nie die betrokke partye se *regte* ten aansien van die saak en beheer daaroor is nie, maar juis die *feitelike* bestaan van beheer en die beskerming daarvan teen

37 hoewel met verwysing na alle sogenaamde besitsremedies: vgl *Sakereg* 77–78. Die veralgemening sluit aan by Middelberg *Bescherming van het Houderschap* (proefskrif Pretoria, 1953) 83, wat die mandament van spolie as die enigste egte besitsremedie beskou, aangesien dit die enigste remedie is wat besit sonder verwysing na die regmatigheid daarvan beskerm. Hierop word later teruggekom.

38 Gesag vir hierdie stelling is te volop om volledig aan te haal; vgl Van der Merwe *Sakereg* 88; Delport en Olivier *Sakereg Vonnisbundel* 111; Schoeman *Silberberg and Schoeman* 135; *Curatoren van Pioneer Lodge No 1 v Champion* 1879 OFS 51 54; *Nino Bonino v De Lange* 1906 TS 120 125; *Yeko v Qana* 1973 4 SA 735 (A) 739G; en verder Van der Walt "Nog eens *Naidoo v Moodley* – 'n Repliek" 1984 *THRHR* 429–439; Van der Walt *Ontwikkeling van Houerskap* 662–673.

onregmatige eierigting, *ter wille van die handhawing van die regsorde*. Die fokuspunt is dus nie die applikant se reg op die saak nie, maar eintlik die respondent se onregmatige eierigting en die implikasies daarvan vir die handhawing van orde en vrede in die regstelsel as 'n geheel. Hierdie argument word versterk deur die oorweging dat die applikant wat met die aansoek om 'n mandament van spolie geslaag het, nie daardeur die seën van die hof oor sy beheer uitgespreek kry nie – die hof kondoneer nie die bestaan of die regmatigheid van die *status quo ante* wanneer dit summier herstel word nie,[39] maar veroordeel wel die onregmatigheid van die eierigting waardeur die spoliasiehandeling gekenmerk word.

Juis op grond van hierdie allesoorheersende regspolitieke oorweging is die mandament van spolie aan alle persone beskikbaar wat die vereistes kan bevredig, *afgesien van die presiese inhoud, aard, omskrywing of regmatigheid van die beheer wat hulle oor die saak gehad het*. Die vereiste dat die applikant moet bewys dat hy vreedsame en ongesteurde voorafgaande beheer oor die saak gehad het, bestaan dus nie om 'n kwalifikasie daar te stel ten opsigte van die meriete waaraan die applikant se beheer oor die saak moet voldoen nie, maar is net bedoel om aan die hof te bewys dat daar 'n stabiele beheerverhouding bestaan het (afgesien van die regmatigheid daarvan) voordat die onregmatige versteuring ingetree het.[40] Die implikasie is dat hierdie remedie *in sy wese* 'n remedie is wat nie eintlik van die presiese aard en meriete van beheerverhoudinge oor sake kennis neem nie, solank die verhouding van só 'n aard is dat 'n eiemagtige versteuring daarvan op onregmatige eierigting sal neerkom. Logies gesproke sluit dit alle eienaars wat self hulle sake beheer, alle besitters *animo domini* en alle houers (regmatig en onregmatig) in. Die enigste persone wat hierby uitgesluit behoort te word, is diegene wat 'n saak wel fisies beheer, maar wat nie die bedoeling het om enige ander persoon (of 'n spesifieke ander persoon) van daardie beheer uit te sluit nie. Daarom word aan die hand gedoen dat alle sogenaamde beperkende hofuitsprake, waarin die mandament van spolie "nog nie" aan hierdie of daardie houer verleen is nie,[41] nie as 'n aanduiding gesien moet word dat die "uitbreiding" van die mandament van spolie van besitters na houers nog onvoltooid is nie, maar as beslissings waarin die wye trefkrag en ware aard van die mandament van spolie as sodanig nie na behore waardeer en toegepas is nie. 'n Bepaalde applikant kan nie op die mandament van spolie aanspraak maak omdat hy as besitter beskou kan word nie, maar juis omdat die mandament van spolie nie op sy regte ten aansien van die saak fokus nie, met die gevolg dat die onderskeid tussen besitters en houers vir die doeleindes van die mandament streng genome irrelevant is.

3 3 2 Die Verrykingsaksies

Hoewel daar meer as een verrykingsaksie bestaan wat deur besitters en houers gebruik kan word om hulle belange by sake en die beheer oor daardie sake te beskerm, kan die beginsels wat op die sogenaamde uitgebreide saakwaarnemingsaksie van toepassing is, hier as voldoende illustrasie dien. Die doel van hierdie aksie is om die herstel van ongeregverdigde vermoënsverskuiwing, wat

39 Vgl veral *Mans v Marais* 1932 CPD 352 356; Taitz "Spoliation Proceedings and the 'Grubby-handed' Possessor" 1981 *SALJ* 36–41.
40 *Ness v Greef* 1985 4 SA 641 (K) 647D–G.
41 Vgl Van der Merwe *Sakereg* 89.

uit die beheer oor 'n ander se saak voortgespruit het, te bewerkstellig.[42] Die grondslag van die aksie is ongeregverdigde verryking, aangesien die eiser met hierdie aksie uitgawes van die eienaar van 'n saak verhaal wat deur die eiser ten aansien van die saak aangegaan is, en waardeur die eienaar ten koste van die eiser ongeregverdig verryk is.[43] Die implikasie is weer eens, gegrond op die doel van die remedie, dat daar nie op die *reg* gefokus word uit hoofde waarvan die eiser die saak beheer het nie, maar eerder op die feit van die *ongeregverdigde verryking* as sodanig. Die ongeregverdigde verryking is nie van die presiese aard en inhoud van die eiser se verhouding teenoor die saak afhanklik nie, hoewel die presiese omvang van die verryking wel daardeur bepaal kan word. Daarom is die remedie weer eens nie 'n remedie wat in beginsel net aan besitters *animo domini* toekom en vandaar na sekere houers uitgebrei is nie, maar eerder 'n remedie wat aan enigeen kan toekom wat kan bewys dat hy beheer oor die saak uitgeoefen het (wat die aard en regmatigheid daarvan ook al was), dat hy in die proses verbeterings aangebring of uitgawes met betrekking tot die saak aangegaan het, en dat die eienaar dientengevolge ongeregverdig teenoor hom verryk is.[44] Die omvang van die verryking sal wel deur die omstandighede van die besondere saak (waaronder die presiese aard en inhoud van die eiser se verhouding teenoor die saak) beïnvloed word,[45] maar die bestaan van die verryking is nie daarvan afhanklik nie.

3 3 3 Gevolgtrekking

Uit bogemelde gegewens kan die afleiding gemaak word dat in gevalle van die remedies waarin daar nie besonder op die eiser of applikant se reg ten aansien van die saak gefokus word nie, die besondere remedie aan enige besitter of houer beskikbaar kan wees wat aan die besondere vereistes (en veral die vereiste waarop die remedie wel fokus) kan voldoen. Gewoonlik beteken dit dat die onderskeid tussen besit en houerskap, wat die inhoud en omskrywing daarvan betref, vir doeleindes van hierdie remedies òf geen nie òf sekondêre betekenis het. Dieselfde geld vir die onderskeid tussen regmatige en onregmatige beheer oor die saak. Daar kan dus skaars geargumenteer word dat hierdie remedies in beginsel net vir die besitter beskikbaar was of is, en dat dit na bepaalde houers uitgebrei is of word. Dit is per definisie remedies wat aan besitters en houers beskikbaar is, juis omdat dit nie die onderskeid tussen die besitter en die houer beklemtoon nie aangesien die aan- of afwesigheid van die *animus domini* en regmatigheid geen rol by die toekenning van hierdie remedies speel nie. Daarmee word natuurlik nie geïmpliseer dat die betrokke remedies (die mandament van spolie

42 Sien veral De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1971) 40–41 79–81 190–195 199–237; Van Zyl *Die Saakwaarnemingsaksie as Verrykingsaksie in die Suid-Afrikaanse Reg* (proefskrif Leiden, 1970) 147–169; Schoeman *Silberberg and Schoeman* 152–158; Delport en Olivier *Sakereg Vonnisbundel* 126–128.

43 Vgl meer volledig Van der Walt *Ontwikkeling van Houerskap* 804–850.

44 Vgl *Lechoana v Cloete* 1925 AD 536 547; *Brooklyn House Furnishers v Knoetze and Sons* 1970 3 SA 264 (A) 275A–B.

45 Vgl *De Beers Consolidated Mines v London and South African Exploration Co* (1893) 10 SC 359 372; *Peens v Botha-Odendaal* 1980 2 SA 381 (O) 391C; *Rubin v Botha* 1911 AD 568 577; *Fletcher and Fletcher v Bulawayo Waterworks* 1915 AD 636 647. Die hof het in *Weilbach v Grobler* 1982 2 SA 15 (O) 28A–30A te veel waarde aan die betekenis van die *animus domini* gegee (vgl die bespreking van Van der Walt in 1984 *SALJ* 257–265). Dieselfde kritiek kan teen die beslissing in *Quarrying Enterprises v John Viol* 1985 3 SA 575 (ZH) geopper word (vgl die bespreking daarvan deur Van der Walt in 1986 *THRHR* 90–95).

en die verrykingsaksies) sonder meer met mekaar gelykgestel of self vergelyk kan word nie – hulle kom alleen maar met mekaar ooreen vir sover geeneen van die twee in die eerste plek oor die reg van die beheerder handel nie.

4 KRITIESE BEOORDELING

4 1 Samevatting van Resultate

Tot dusver is vasgestel dat die remedies wat deur Van der Merwe as besitsremedies aangedui word, die volgende algemene kenmerke vertoon:

a Vir geeneen van hierdie remedies is dit 'n vereiste dat die eiser of applikant die aanwesigheid van die *animus domini* moet bewys nie.

b Die een groep remedies fokus op die reg van die eiser of applikant ten aansien van die saak, en vereis dus dat die betrokkene se beheer oor die saak regmatig moet wees.

c Die ander groep remedies fokus op besondere vergeldingsdoelwitte in die regsorde, en neem daarom nie eintlik kennis van die onderskeid tussen besit en houerskap enersyds en tussen regmatige en onregmatige beheer andersyds nie, solank die betrokke beheersverhouding deur 'n bepaalde ongewenste verskuiwing in die regsorde versteur is. Die aan- of afwesigheid van die *animus domini* of van 'n reg op beheer mag in sommige gevalle wel 'n sekondêre rol by die bepaling van die inhoud en omvang van die vergeldingsreëling speel, maar is nooit die sentrale fokuspunt vir die beskikbaarheid van die remedie as sodanig nie. Insgelyks speel regmatigheid ook geen primêre rol by hierdie remedies nie.

Daar kan dus van geeneen van hierdie remedies beweer word dat dit in beginsel 'n remedie vir die beskerming van besit *animo domini* is nie, aangesien die aan- of afwesigheid van sodanige bedoeling nie by een van die remedies die primêre oorweging is nie. Om dieselfde rede kan daar ook nie beweer word dat die houers wat oor bepaalde remedies beskik, dit by wyse van uitbreiding van die remedie of as 'n vergunning verkry het nie: in die geval van die eerste groep remedies kan die houer dit alleen verkry as hy aan die vereistes (en veral regmatigheid) voldoen, en in die tweede groep is die onderskeid tussen besitter en houer eintlik *ab initio* irrelevant.

4 2 Sistematiese Analise van Besit *animo domini* en van Houerskap

Ten einde bogemelde resultate in die korrekte perspektief te kan beoordeel, is dit nodig om 'n sistematiese analise van besit *animo domini* te maak. Van der Merwe het tereg aangetoon dat die streng of enger betekenis van besit histories met die aanwesigheid van die *animus domini* gepaard gaan. Die *animus domini* impliseer dat die betrokke persoon fisiese beheer oor die saak uitoefen met 'n bepaalde bedoeling of geestesingesteldheid, naamlik dié van die eienaar, terwyl hy in werklikheid volgens die objektiewe reg nie eienaar is nie. Die *animus domini* van die *bona fide possessor*, wat ook as die *opinio domini* omskryf kan word, berus op die verkeerde veronderstelling van eiendomsreg, terwyl die *affectus domini* van die *mala fide possessor* op die bedrieglike houding berus

van iemand wat weet dat hy nie eienaar is nie, maar wat homself desnieteenstaande as sodanig beskou en voordoen.[46] Die implikasie hiervan is logies, selfs al lyk dit met die eerste oogopslag nogal vreemd: besit *animo domini* is per definisie *onregmatig*.[47] Dit bestaan per definisie uit 'n regsverhouding wat geen geldige regsgrond het nie, aangesien die objektiewe reg nie die aanspraak van die regsubjek op die regsobjek erken nie. Dit beteken egter nie dat die besitter sy beheer noodwendig langs onregmatige weg verkry het nie, maar alleen dat die bepaalde aanspraak wat hy (as eienaar) op die saak maak nie deur die reg erken en as sodanig beskerm en gereël word nie.

Houerskap word gekenmerk deur die afwesigheid van die *animus domini*, en die aanwesigheid van 'n ander geestesingesteldheid ten aansien van die beheer wat die houer oor die saak het. Die handboeke[48] en die howe[49] is geneig om die *animus ex re commodum acquirendi* as die tipiese bedoeling van die houer te beskou, hoewel daar skrywers is wat reeds die mening uitgespreek het dat 'n wyer omskrywing nodig is.[50] As sodanig kan houerskap regmatig of onregmatig wees, afhangende van die vraag of daar 'n geldige regsgrond vir die beheer bestaan al dan nie.

4 3 Gevolgtrekking

Op grond van bogaande analise van Van der Merwe se verteenwoordigende weergawe van die heersende besitsbeskermingsteorie enersyds en van die praktiese werking van die sogenaamde besitsremedies andersyds, kan die volgende gevolgtrekkings gemaak word:

a Die standpunt dat besit in beginsel die beskermde saaklike verhouding was, terwyl houerskap oorspronklik onbeskermd was, is *regshistories misleidend*. Historiese ondersoek toon aan dat dit misleidend is om hierdie vereenvoudigde teenstelling te maak, aangesien daar nooit in die lang ontwikkelingsgeskiedenis van die Romeinse reg 'n duidelike, eenvormige of sistematiese onderskeid tussen *possessio* en *detentio* gemaak is nie. *Detentio* of houerskap is hoogstens negatief as die nie-besitsverhoudings aangedui, sonder om enige eie inhoud daaraan te verleen. Daarom is dit misleidend om 'n sistematiese onderskeid tussen besit en houerskap op die basis van die beskerming van besit en die nie-beskerming van houerskap te baseer.[51]

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46 Hiervan is die dief die klassieke voorbeeld. 'n Ander voorbeeld is die persoon wat daarvan bewus raak dat die grensdraad tussen sy eie en die buurman se grond verkeerd gespan is, met die gevolg dat hy nog altyd 'n stuk van die buurman se grond as sy eie okkupeer. Voordat die persoon van die ware toedrag van sake bewus was, was hy 'n *bona fide possessor*, maar sodra hy die waarheid uitvind, word hy *mala fide*. Stilswye en kontinuering van die *status quo* kan natuurlik tot verkrygende verjaring lei, aangesien *bona fides* nie daarvoor 'n vereiste is nie: al van die Verjaringswet 68 van 1969; vgl Schoeman *Silberberg and Schoeman* 233.

47 Vgl Schoeman *Silberberg and Schoeman* 232: "[A]cquisitive prescription always operates against the will of the true owner and the claimant's possession is always unlawful in the sense that he does not have any *iustus titulus* to it . . ."

48 Vgl Van der Merwe *Sakereg* 74; Schoeman *Silberberg and Schoeman* 128.

49 Vgl *Yeko v Qana* 1973 4 SA 735 (A) 739.

50 Schoeman *Silberberg and Schoeman* 129 praat van "witting physical control." Vgl ook Middelberg "Beskerming van die Houerskap in die Suid-Afrikaanse Reg" 1954 *THRHR* 268 274.

51 Vgl Van der Walt *Ontwikkeling van Houerskap* hfst 19.

b Die standpunt dat al bogenoemde remedies basies vir die beskerming van *besit* bedoel was, maar van daar ook na bepaalde houers *uitgebrei* is, is *sistematies* misleidend. Dit skep naamlik die indruk dat:

i Alle besitters oorspronklik op die beskerming van hierdie remedies geregtig was.

ii Alle houers oorspronklik geen aanspraak op die beskerming van hierdie remedies gehad het nie.

Daarenteen het die bogaande analise van die praktiese werking van die remedies aangetoon dat:

i Besitters en houers almal van huis uit op die remedies kan aanspraak maak waarin daar nie bewys van 'n reg op die saak vereis word nie, juis omdat die betrokke remedie 'n unieke fokuspunt het waarop die regmatigheid van die beheer en die aan- of afwesigheid van die *animus domini* geen wesenlike invloed het nie. Hierdie remedies is dus nie in werklikheid tot die beskerming van besit beperk nie, en kon dus ook nie van die besitters *stricto sensu* na houers uitgebrei word nie, juis omdat die onderskeid tussen besit en houerskap vir doeleindes van die betrokke remedies nie van wesenlike belang is nie. Vir sover die regspraak wel die indruk skep dat die remedie tot besitters beperk is, is dit op 'n wanindruk of op 'n wye interpretasie van die besitsbegrip gegrond.

ii Die remedies waarvoor daar wel bewys van 'n reg op die saak vereis word, kom streng genome nie die besitter in die oorspronklike sin (*animo domini*) ten goede nie, omdat sy beheer oor die saak streng gesproke onregmatig is. Daarom is dit ook misleidend om te beweer dat die verlening van hierdie remedies aan die regmatige houer op 'n uitbreiding van die besitsbegrip berus. Die regmatige houer verkry die beskerming van hierdie remedies juis omdat hy nie 'n besitter in die streng sin van die woord is nie – hy verkry dit op grond van sy regmatige beheer oor die saak.

c Sistematies gesproke, kan daar dus skaars in die Suid-Afrikaanse reg beweer word dat beskerming aanvanklik en in beginsel tot besit beperk is, dat dit van daar na bepaalde houers uitgebrei is, en dat die betrokke houers sedertdien vir die bepaalde aspek van besit as besitters geld. Die waarheid is dat besitters *animo domini* geen egte beskerming geniet nie:

i Die remedies waarvoor bewys van 'n reg op die saak vereis word, kom hulle nie ten goede nie omdat hulle geen reg op beheer kan bewys nie (hierop bestaan enkele verklaarbare uitsonderings).

ii Die remedies waarvoor geen bewys van 'n reg op die saak vereis word nie, kom wel die besitters ten goede, maar dan nie as besitters nie, maar op grond van die aanwesigheid van 'n bepaalde omstandigheid waarop die betrokke remedie in die eerste plek gerig is. Hierdie remedies kom in werklikheid alle beheerders van 'n saak toe, solank die betrokke omstandigheid waarop die remedie ingestel is (spoliasie of ongeregverdigde vermoënsverskuiwing) aanwesig is.

Aan die ander kant kan daar ook nie by die standpunt berus word dat die term *besitsbeskerming* in hierdie konteks behou moet word as 'n verwysing na die beskerming of handhawing van besit as feit, sonder verwysing na die regsgrond daarvoor nie. Sodanige beskerming word alleen deur die mandament van spolie verleen en daarom sluit dit alle ander remedies uit. Terselfdertyd speel besit in die enger sin (*animo domini*) wel 'n (sekondêre) rol by enkele van die ander

remedies, waardeur die skyn gewek kan word dat die term *besitsbeskerming* in werklikheid na die beskerming van 'n reg op besit verwys. Sodoende word baie verwarring veroorsaak.[52]

d Streng gesproke, behoort daar in die geval van die remedies waarvoor bewys van 'n reg op die saak nie vereis word nie (dit is die mandament van spolie en die verrykingsaksies) glad nie van besitsbeskerming of die beskerming van houerskap gepraat te word nie, aangesien die verlening van die betrokke remedie aan die besitter en die houer insidenteel is. Die beste term is dan waarskynlik *die beskerming van beheer oor 'n saak en belange daarby vir bepaalde omskrewe doeleindes* (spoliasie of ongeregverdigde verryking). In die geval van remedies waarvoor bewys van 'n reg op die saak vereis word, is dit streng gesproke ook verkeerd om van besitsbeskerming of die beskerming van houerskap te praat, aangesien besitters die beskerming glad nie kan bekom nie terwyl net bepaalde houers (die regmatige houers) dit kan bekom. Dan is die beste term waarskynlik *die beskerming van regmatige beheer oor 'n saak en belange daarby.*

Op grond van bogaande kan die standpunt dus gestel word dat die begrip *besitsbeskerming* in sy huidige betekenis, en volgens die teoretiese raamwerk waarbinne skrywers soos Van der Merwe dit plaas, nie met die praktiese funksionering van die hedendaagse sakereg strook nie. Hierdie misleidende term behoort in die handboeke en ander wetenskaplike geskrifte vermy te word ten gunste van 'n meer genuanseerde en gemotiveerde omskrywing van die aard en doel van die verskillende remedies wat daarby betrokke is.

'n Vraag wat deur hierdie kritiek op Van der Merwe se standpunt opgeroep word, is of die onderskeid tussen besit in die oorspronklike sin (*animo domini*) en houerskap dan nog enige bestaansreg het. Hoewel Van der Merwe se stelling dat die onderskeid besig is om te vervaag kennelik op 'n verkeerde interpretasie van die ontwikkeling berus, skep bogaande kritiek die indruk dat die onderskeid tussen besit en houerskap in ieder geval geen rol speel nie, aangesien die aanwesigheid van die *animus domini* by geeneen van die betrokke remedies 'n voorvereiste is nie. Is dit dan moontlik dat die onderskeid eintlik maar laat vaar kan word, soos wat Van der Vyver voorstel?[53]

Die antwoord op hierdie vraag is gebaseer op die feit dat elke regsverhouding, en daarom ook besit en houerskap, 'n verskeidenheid regsgevolge het. Die beskerming wat die reg aan die betrokke verhouding mag verleen, is maar een van daardie gevolge. Terwyl die reg op grond van bogaande uiteensetting geen egte beskerming aan besit verleen nie, heg dit desnieteenstaande wel 'n hele verskeidenheid gevolge aan daardie besondere verhouding tussen regsubjek en saak. Besit *animo domini* is byvoorbeeld 'n vereiste vir al die oorspronklike wyses van eiendomsverkryging; dit beïnvloed die berekening van die besitter se verrykingseis; en so meer – regsgevolge wat eie is aan saaklike verhoudings waarvan

52 Die verwarring word duidelik geïllustreer deur Van der Vyver 1970 *THRHR* 240–243, waar die skrywer tot die onverkwiklike gevolgtrekking kom dat die dief 'n beskermde subjektiewe reg op die saak het, bloot omdat hy deur die mandament van spolie beskerm word. Vgl ook Van Zyl en Van der Vyver *Inleiding tot die Regswetenskap* (1982) 511, waar besit omskryf word as 'n regsfeit wat vir bepaalde doeleindes onregmatig is (heeltemal tereg), maar wat andersyds vir bepaalde doeleindes regmatig is omdat dit deur die mandament van spolie beskerm word. Hierdie soort verwarring word onnodig veroorsaak deur die onakkurate gebruik van die begrip *besitsbeskerming* en kan vermy word.

53 1970 *THRHR* 237.

die *animus domini* 'n element is en wat by houerskap nie intree nie. Die onderskeid tussen besit *animo domini* en ander saaklike verhoudings soos eiendomsreg en houerskap is dus vir die Suid-Afrikaanse sakereg relevant, en moet behou word – dit is alleen maar net nie die basis vir die toekenning van die verskillende remedies wat so gemaklik as besitsbeskerming aangedui word nie.

Afgesien daarvan dat die onderskeid tussen besit *animo domini* en houerskap nog steeds vir doeleindes van die verkryging van eiendomsreg (die sogenaamde saaklike funksie van besit) relevant bly, is dit ook nog relevant vir bepaalde fasette van die remedies wat vir besitters en houers beskikbaar mag wees. Hiervan is die berekening van die omvang van 'n verrykingseis die beste voorbeeld: hoewel die aan- of afwesigheid van die *animus domini* nie die bestaan van die aanspraak op vergoeding as sodanig raak nie, word die omvang van die vergoeding wel deeglik daardeur beïnvloed, soos hierbo aangetoon is. Op grond van hierdie oorweging moet die benadering wat by Van der Merwe, Van der Vyver, Peiris en Schoeman aangemerk is, waarvolgens die term *besit* telkens vir verskillende funksies van besit 'n eiesoortige inhoud en omskrywing het, afgewys word. Afgesien van die feit dat hierdie benadering wetenskaplik moeilik verantwoord kan word, bestaan daar duidelike aanknopingspunte vir 'n eenvoudige onderskeid tussen besit enersyds (wat dan tot onregmatige beheer *animo domini* beperk is) en houerskap andersyds (waar die beheer met 'n bedoeling anders as die *animus domini* van die egte besitter gepaard gaan) wat vir alle funksies van beheer oor sake geldig is. Met verwysing na die saaklike funksie, wat betrekking het op die vestiging van saaklike regte deur middel van fisiese beheer, moet daar onderskei word tussen die vestiging van *eiendomsreg* enersyds (waarvoor beheer *animo domini* die vereiste is) en van ander saaklike regte soos pand- en retensieregte andersyds (waarvoor beheer met 'n mindere bedoeling voldoende is). Met verwysing na die regspolitieke funksie (spesifiek die mandament van spolie) speel die onderskeid tussen besit en houerskap kennelik geen rol nie, terwyl dit in die geval van bepaalde remedies waardeur *regte* op die saak beskerm word wel belangrik is. Hierdie eenvoudige onderskeid is dus vir alle sogenaamde funksies van besit (eintlik beheer of besit in die wye sin) geldig, en dit skakel die potensiële verwarring van 'n meersinnige besitsbegrip uit.

'n Strenger dissipline in hierdie verband waarvolgens besit in sy egte beperkte sin duidelik en konsekwent van eiendomsreg en houerskap onderskei word, kan alleen heilsame gevolge meebring. Terwyl dit duidelik is dat daar drie regsverhoudinge tussen 'n regsubjek en 'n saak moontlik is, waaraan die reg telkens eiesoortige regsgevolge heg (naamlik eiendomsreg, besit *animo domini* en houerskap), en terwyl dit teoreties moontlik is om die gevolge van al drie die verhoudinge sinvol te verklaar aan die hand van hierdie onderskeid, is daar geen goeie rede waarom die drie nie maar konsekwent terminologies van mekaar onderskei kan word nie. Die oorkoepelende element van fisiese beheer oor 'n saak wat by al drie die verhoudinge kan voorkom, hoef (en behoort) ook nie as *besit* aangedui te word nie – die term *beheer* berus op goeie historiese gronde, dit is duidelik verstaanbaar en dit is onderskeibaar van al drie die verhoudinge waarvan dit 'n element uitmaak. Wetenskaplike duidelikheid vereis soms 'n mate van terminologiese dissipline sonder dat dit noodwendig tot dogmatiese verstarring hoef te lei, en 'n groter mate van dissipline in hierdie besondere geval kan dalk net daartoe bydra dat die spook van besit sonder veel moeite besweer word.

Justice and Equity in Cicero

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OPSOMMING

Geregtigheid en Billikheid by Cicero

In hierdie bydrae word die voorkoms en aanwendingsgebied van twee kernbegrippe, naamlik geregtigheid (*iustitia*) en billikheid (*aequitas*), in Cicero se werke nader beskou. Hierdie begrippe, wat in sekere opsigte nou saamhang met mekaar, het reeds in die Griekse regsleer van Plato en Aristoteles 'n rol gespeel. Cicero het die begrippe geneem en in 'n Romeinse kader geplaas. Hy dui aan dat geregtigheid uit die natuurreg ontstaan en die grondslag vorm van die beste hoedanighede waaroor 'n mens kan beskik. Dit is veral in *De Officiis* dat die praktiese belang van geregtigheid na vore tree, sowel wat die verheffing van die indiwidu as die skep van goeie menseverhoudings in die samelewing betref. Die billikheidsbegrip het weer sterk gefigureer in die regsontwikkeling en wel reeds voor Cicero se tyd, toe dit aangewend is om die gestrengheid van die *ius civile* te temper. Aristoteles se billikheidsleer was in hierdie verband 'n belangrike voorbeeld vir Cicero en die Romeinse juriste. *Aequitas* word, net soos *iustitia*, dikwels in Cicero se werke aangetref as grondliggend tot die bespreking van die reg in die algemeen. Daarbenewens verskyn dit in samehang met 'n hele aantal verdere hoedanighede wat vir die Romein van sy tyd groot waarde ingehou het.

In a recent contribution on Cicero (106–43 BC) as a legal philosopher, it was pointed out, with regard to Cicero's philosophy of life, that the cardinal virtues, derived from the Platonic doctrine and expressed by Cicero as the foundation of moral goodness (*honestum*) or virtue (*virtus*) may be summarised as wisdom (*prudentia* or *sapientia*), justice (*iustitia*), fortitude (*fortitudo*) and temperance (*temperantia*).[1] Of these virtues, justice (*iustitia*) has probably received the most attention and is dealt with at length in various of his works.

A similarly important concept appearing from Cicero's philosophy of law is that of equity (*aequitas*), which is encountered throughout his works and appears to be closely linked to his concepts of justice and the law of nature.[2]

In the present contribution it is proposed to examine the meaning and ambit of justice and equity as dealt with by Cicero in his works and to define the role played by these concepts in his philosophy of law.[3]

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1 See Van Zyl "Cicero as a Legal Philosopher" in *Huldigingsbundel Paul van Warmelo* (1984) 238–255. The relevant texts are *Inv* 2 53 159; *Off* 1 4 13 and 1 5 15; *Rep* 1 1 1. Reference may also be made to my article "The Role and Importance of Cicero's Philosophy of Life and Political Philosophy in the Evolution of his Legal Philosophy" in 1986 *TSAR* 35–43 164–172.

2 See my article "Cicero and the Law of Nature" in 1986 *SALJ* 55–68.

3 This subject is dealt with in greater detail in Van Zyl *Cicero's Legal Philosophy* (1986) 49–68.

1 JUSTICE

By far the most important legal concept appearing in Cicero's works, it is submitted, is justice (*iustitia*), which is accorded special treatment in many of his works, in particular in the *De Officiis*.[4]

1 1 Greek Antecedents

In his discussion of justice Cicero was greatly indebted to the Greek philosophers Plato and Aristotle. In order to understand his thoughts on this concept, a brief *exposé* of the Platonic and Aristotelian concepts of justice in their various forms, classifications and meanings may be useful.[5]

a *Plato*

It is not easy to find a textbook definition of justice in either of Plato's major works on law and legal philosophy, namely the *Republic* (*Politeía*) and the *Laws* (*Nómoi*).[6] Early on in his treatise on the *Republic*, he emphasises the importance of justice as a virtue of the pious man by declaring that a man lives out of his days "in justice and piety."[7] A little later, he affirms what Simonides says about justice, namely "that it is just to render to each what he deserves."[8]

Plato analyses justice with reference to injustice, by asking what the nature of injustice (*adikía*) is as compared with justice (*dikaiosynè*):

> "Injustice, it has been said, has a greater effect and power than justice, but in so far as justice contains a virtue (*aretè*) and wisdom (*sophia*), it will easily prove to be stronger than injustice, since injustice is ignorance (*amathía*)."[9]

This identification of justice with virtue and wisdom, as opposed to injustice, which is synonymous with ignorance, is of particular interest, since it indicates a close link between justice and the other cardinal virtues, as discussed by Cicero many years later.[10]

Elsewhere Plato again debates the issue of justice and injustice in an attempt to establish the nature and origin of justice. He suggests that justice is a compromise between good and evil arising from an agreement neither to commit nor to suffer injustice. This is in fact the stimulus for legislation in the public sphere or agreements between private individuals.[11]

The distinction between public and private interests relates, it would seem, to his discussion of justice as a universal requirement, as opposed to justice

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4 See, in general, on Cicero's concept of *iustitia*, Voigt *Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer* 206–207; Costa *Cicerone giureconsulto* (1927) 19–20; Litman *Cicero's Doctrine of Nature and Man* (1930) 25–27 35; Dieter "Der iustitia-Begriff Ciceros" in 1967 *Eirene* 69–81; Tanzola *A Comparative Study of the Cardinal Virtues in Cicero's De Officiis and in Ambrose's De Officiis Ministrorum* (1975) 88–115; Du Plessis *Die Juridiese Relevansie van Christelike Geregtigheid* (1978) 127–144, esp 134–144.

5 See Du Plessis *op cit* 29–126. He deals with the various phases of development of the ancient and classical Greek concept of justice ("geregtigheid"), including the Sophists, Socrates, Plato, Aristotle and the Stoics. See also Van Eikema Hommes, *Hoofdlijnen van de Geschiedenis der Rechtsfilosofie* (1972) 3–29.

6 See Du Plessis *op cit* 65–88; Hommes *op cit* 12–16.

7 Plato *Rep* 1 5 331A.

8 Plato *Rep* 1 6 331E.

9 Plato *Rep* 1 22 351A.

10 See 1 4 below.

11 Plato *Rep* 2 2 358E–359A.

relating to the individual. Universal justice deals with the moral obligation resting upon each member of a state to perform some service or other in accordance with his talents, for the benefit of the state. This implies that no one should have what belongs to another, nor be deprived of that which is his own.[12] Individual justice, on the other hand, relates to the performance by each person of his own affairs.[13] By implication, the "own affairs" should be performed in such a way that they do not infringe upon the interests of another, although it is not clear whether this is what Plato intended.[14]

In his treatise on the laws, Plato has very little to say on the subject of justice, except with regard to the relationship between justice on the one hand and temperance and wisdom on the other.[15] He does, however, aver that justice between men is a thing of beauty, which has uplifted all things human[16] and that justice is essential for happiness.[17]

b *Aristotle*

Aristotle devoted the whole of book five of his *Nicomachean Ethics* (*Ethiká Nikomacheía*) to the moral virtue of justice (*dikaiosynè*) and its counterpart, injustice (*adikía*).[18] A somewhat over-simplified definition of justice, as opposed to injustice, appears in it in the following terms:

> "We see then that all people consider justice to be that state of mind which inclines them to do what is just and has the effect that they act justly and desire just things. The same considerations apply to injustice in that it disposes people to act unjustly and to desire unjust things."[19]

He points out, however, that the terms are used in several different senses[20] and that "just" (*díkaios*) refers to "lawful" (*nómimos*) and "fair" (*ísos*), whereas "unjust" (*ádikon*) is "unlawful" (*paránomon*) and "unfair" (*ánison*).[21]

Aristotle distinguishes between justice in a general sense and justice in a special sense. In a general sense it is "perfect virtue" (*aretè teleía*) which is displayed towards others (*pròs heteron*). For this reason, he says, it is frequently regarded as being the most important of the virtues. Its perfection as a virtue lies therein that it is the practice of perfect virtue, a perfection which has a special sense, since the bearer can practise his virtue towards others and not merely for himself. The fact that it relates to others gives rise to the statement that, of all the virtues, justice alone is for the good of another, in that it benefits another, whether he be a ruler or a colleague. This form of justice is therefore not merely a part of virtue but virtue as a whole, just as, on the other hand, injustice is not a part

12 Plato *Rep* 4 10 433A–B; 4 10 433E. Cf Plato *Rep* 4 16 443B; 4 19 445A–E.
13 Plato *Rep* 4 16 441D–E.
14 See the critical analysis of universal and individual justice in Plato in Du Plessis *op cit* 66–69.
15 Plato *Laws* 3 696C–E. See Du Plessis *op cit* 80–87.
16 Plato *Laws* 11 937E.
17 Plato *Laws* 2 662A–663E. In this regard he holds strong views on equality. See Du Plessis *op cit* 83–87.
18 See in general Du Plessis *op cit* 88–120; Hommes *op cit* 16–27.
19 Aristotle *Eth Nic* 5 1 3 (1129a).
20 Aristotle *Eth Nic* 5 1 7 (1129a).
21 Aristotle *Eth Nic* 5 1 8 (1129b).

of vice but all of vice.[22] As justice is the practice of virtue, so injustice is the practice of vice.[23]

In a special sense, justice is presented by Aristotle in the negative, namely by explaining how injustice in the special sense differs from universal or general injustice. Particular injustice, he avers, relates to honour, money or safety and its aim is the pleasure of gain or making a profit, whereas universal injustice relates to all things concerning the virtuous man.[24]

Particular justice, in turn, is divided into distributive and corrective justice. The former deals with the distribution of honour, money and other community assets which may be distributed among community members in equal or unequal shares. The latter is directed at correcting private transactions, which may be of a voluntary or an involuntary nature. Voluntary transactions include purchase and sale, loan with or without interest, pledge, deposit, letting and hiring and similar legal acts voluntarily concluded by the parties thereto. Transactions of an involuntary nature may be secretive, such as theft and adultery, or violent, such as homicide, assault or armed robbery.[25]

It is the task of the judge, who is the personification of justice, to see that justice is done. He does this by restoring harmony or "equality" between the parties.[26] Justice is therefore a mean between inflicting and suffering injustice.[27]

A distinction is also drawn between absolute and political justice.[28] Political justice may be one of two kinds: natural justice, which enjoys universal validity without having to be formally accepted, and legal or conventional justice, which first has to be accepted by virtue of statutory enactment in the form of decrees, ordinances or other kinds of legislation.[29]

In his treatise on *Politics* (*Politika*), Aristotle refers to justice as a virtue beside temperance (*sòphrosynè*) and courage (*andreía*).[30] Elsewhere the just man is discussed in connection with virtue (*aretè*) and prudence (*phrónèsis*) as sources of happiness to man.[31] He gives the assurance, however, that justice does not amount to the equality of the unequal![32]

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22 Aristotle *Eth Nic* 5 1 15–19 (1129b).

23 Aristotle *Eth Nic* 5 2 10 (1130b). Du Plessis *op cit* 106 suggests the following definition for Aristotle's concept of general or universal justice: "Algemene geregtigheid is die op die medemens betrokke sosiaal-polities sig verwerklikende deug wat in sy gestalte as 'n faset van praktiese wysheid 'n mens lei tot die insig van wat besonderlik regverdig is vir alle mense oor die algemeen en wat vir jouself aantoon hoedat besonderlik regverdig wees jou tot 'n goeie of geluksalige lewe sal lei."

24 Aristotle *Eth Nic* 5 2 6 (1130b); Du Plessis *op cit* 106–114.

25 Aristotle *Eth Nic* 5 2 12–13 (1130b–1131a).

26 Aristotle *Eth Nic* 5 4 7–8 (1132a).

27 Aristotle *Eth Nic* 5 5 17 (1133b).

28 Aristotle *Eth Nic* 5 6 4 (1134a).

29 Aristotle *Eth Nic* 5 7 1–3 (1134b). He also refers to political justice as that pertaining between free and equal persons, and "despotic" justice (*despotikòn dikaion*) or "paternal" justice (*patrikòn dikaion*). The latter relates to justice between master and slave or father and child and cannot be classified as either political or absolute. At best it merely bears an analogy to such forms of justice. See Aristotle *Eth Nic* 5 6 4 (1134a); 5 6 8 (1134b).

30 Aristotle *Pol* 1 5 3 (1259b).

31 Aristotle *Pol* 7 1 5 (1323b).

32 *Aristotle Pol* 3 5 8 (1279b). On the Greek Stoic approach to the concept of justice in the post-Aristotelian phase of development thereof, see Du Plessis *op cit* 120–126.

1 2 Cicero's Definition of Justice

In his treatise on ethics entitled *De finibus bonorum et malorum* ("on the ends of good and evil"), Cicero indicates clearly that justice is closely related to ethical and moral considerations.[33] After stating that all the virtues and the moral goodness (*honestum*) which arise from it and adhere to it, should be sought for what they are,[34] he proceeds:

> "In every aspect of moral goodness (*honestum*), which we are discussing, nothing is more illustrious, nor more extensive in its application, than the union of all mankind – that sharing and community of interests, as it were, and that very affection of the human race, which experiences the commencement of its development at birth, since offspring are cherished by their parents and the whole household is joined by marriage and parenthood. This gradually spreads beyond the domestic sphere, firstly by virtue of bloodties, then by means of relationships by marriage, thereafter by friendships, followed up by the bonds of neighbourliness, political alliances and acquaintances, and finally, by embracing the entire human race. This deposition, which urges that each should be granted his own, and which munificently and fairly protects this community of the human alliance, as I refer to it, is called justice (*iustitia*) and its adjuncts are piety (*pietas*), goodness (*bonitas*), generosity (*liberalitas*), kindness (*benignitas*), courtesy (*comitas*) and other characteristics of the same nature. And these traits are as much peculiar to justice as they are common to the remaining virtues. For since the nature of man has been so generated that it has some form of innate civic and social character, which the Greeks refer to as *politikón*, whatever each virtue performs will not shrink from that community of interests, affection and human fellowship which I have explained. And justice, in turn, will pour itself forth for the benefit of the other virtues and in this manner will attain their excellence. For justice can be preserved by none but the just and wise man. Therefore the nature of this, what I may call, entire conglomerate and harmony of virtues is the same as that of moral goodness istelf, since moral goodness is either virtue itself or that which has been achieved by virtue. A life in harmony with these things and in accordance with the virtues can be regarded as upright, honourable, steadfast and in harmony with nature."[35]

This universal concept of *iustitia*, embracing all the virtues and a good many other positive characteristics besides, has in common with *lex* and *ius* an inextricable and intimate bond with nature. Cicero's definition of justice may, indeed,

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33 See my article "The Role of Moral and Religious Considerations in Cicero's Legal Philosophy" in 1986 *TRW* 58–70.

34 *De Finibus* 5 23 64: "virtutes omnes et honestum illud quod ex iis oritur et in illis haeret per se esse expetendum."

35 *De Finibus* 5 23 65–66: "In omni autem honesto de quo loquimur nihil est tam illustre nec quod latius pateat quam coninunctio inter homines hominum et quasi quaedam societas et communicatio utilitatum et ipsa caritas generis humani, quae nata a primo satu, quod a procreatoribus nati diliguntur et tota domus coniugio et stirpe coniungitur, serpit sensim foras, cognationibus primum, tum affinitatibus, deinde amicitiis, post vicinitatibus, tum civibus et iis qui publice socii atque amici sunt, deinde totius complexu gentis humanae; quae animi affectio suum cuique tribuens atque hanc quam dico societatem coniunctionis humanae munifice et aeque tuens iustitia dicitur, cui sunt adiunctae pietas, bonitas, liberalitas, benignitas, comitas, quaeque sunt generis eiusdem. Atque haec ita iustitiae propria sunt ut sint virtutum reliquarum communia. Nam cum sic hominis natura generata sit ut habeat quiddam ingenitum quasi civile atque populare, quod Graeci "politikón" vocant, quidquid aget quaeque virtus, id a communitate et ea quam exposui caritate ac societate humana non abhorrebit, vicissimque iustitia, ut ipsa fundet se usu in ceteras virtutes, sic illas expetet. Servari enim iustitia nisi a forti viro, nisi a sapiente non potest. Qualis est igitur omnis haec quam dico conspiratio consensusque virtutum, tale est illud ipsum honestum; quando quidem honestum aut ipsa virtus est aut res gesta virtute; quibus rebus vita consentiens virtutibusque respondens recta et honesta et constans et naturae congruens existimari potest." See Du Plessis *op cit* 137–138, who points out that this all-embracing virtue smacks strongly of the Platonic and is in fact universal or general justice in a sociopolitical and cosmopolitan form, as borne out by the *communitas* concept.

be described as the definition of morally good and virtuous conduct in accordance with the tenets of natural law. Justice is therefore rooted in nature and arises from the practical application of the *ius naturale*. It is nature which inspires patriotism, charity towards one's neighbour and the relationship between man and God. These sentiments are expressed in an elevated manner in another famous passage in which Cicero describes the nature and ambit of justice. After stating that it is most foolish (*stultissimum*) to consider that all things which are founded on the institutions or laws of people are just, he proceeds:

> "For there is one form of law (*ius*), by which the community of men is bound, and which constitutes one all-embracing law (*lex*). This law is right reason (*recta ratio*), directed at commanding and prohibiting. The person who is ignorant of it, whether it be recorded somewhere or nowhere, is unjust. But if justice is compliance with written laws and institutions of the people and if, as those same persons declare, all things must be measured in terms of expediency (*utilitas*), then the person who believes that this matter will be to his advantage will disregard and violate the laws, if he is able to do so. It hence follows that there is no justice at all if nature does not exist and if that which is established by virtue of expediency is destroyed by that very expediency. And if law should not be confirmed by nature, [moral values] will be erased. For where will generosity, affection for one's country, piety, the desire to deserve well in respect of another or to convey gratitude, be able to exist? For these virtues arise from the fact that we are disposed, by nature, to love our fellow-men – a propensity which is the foundation of law. And it is not only services for the benefit of men, but also veneration for and religious observances in honour of the gods which are destroyed. I am of the opinion that these things should be preserved, not as a result of fear, but by virtue of that union existing between man and God."[36]

The ambit of justice is cast widely in this definition: not only is it the basis of a virtuous life and hamonious relationships between people, but it is opposed to practical convenience and expediency which, in general, tend to the immoral and unethical. This is emphasised by the reference to the veneration of the gods and the respect for religious observances. Cicero therefore sees justice as a virtue and attribute which is as far-reaching as nature and natural law itself and which provides a foundation for the relationship between man and man and between man and God.

That *iustitia* is based on nature and relates to both human and divine relationships, likewise appears from the well-known textbook definition of *iustitia* appearing in the *De Inventione*:

> "*Iustitia* is a state of mind which preserves the common good by recognising the dignity of all men. Its conception proceeded from nature, whereafter certain principles became

36 *De Legibus* 1 15 42–43: "Iam vero illud stultissimum, existimare omnia iusta esse, quae sita sint in populorum institutis aut legibus . . . Est enim unum ius, quo devincta est hominum societas, et quod lex constituit una; quae lex est recta ratio imperandi atque prohibendi; quam qui ignorat, is est iniustus, sive est illa scripta uspiam sive nusquam. Quodsi iustitia est obtemperatio scriptis legibus institutisque populorum, et si, ut eidem dicunt, utilitate omnia metienda sunt, negleget leges easque perrumpet, si poterit, is, qui sibi eam rem fructuosam putabit fore. Ita fit, ut nulla sit omnino iustitia, si neque natura est, eaque quae propter utilitatem constituitur, utilitate illa convellitur. Atque si natura confirmatura ius non erit, tollantur . . .; ubi enim liberalitas, ubi patriae caritas, ubi pietas, ubi aut bene merendi de altero aut referendae gratiae voluntas poterit existere? Nam haec nascuntur ex eo, quia natura propensi sumus ad diligendos homines, quod fundamentum iuris est. Neque solum in homines obsequia, sed etiam in deos caerimoniae religionesque tolluntur, quas non metu, sed ea coniunctione, quae est homini cum deo, conservandas puto." According to Voigt *op cit* 206 this definition of justice probably emanates from Carneades. See also Costa *op cit* 20.

customary by virtue of convenience. Eventually the principles arising from nature and those approved by custom were sanctioned by the fear of laws and religion."[37]

Small wonder, then, that Cicero declares that we are "born for justice"[38] and that "the seeds of justice lie in the good of the soul."[39]

1 3 Justice in the *De Officiis*

After discussing wisdom as the first of the cardinal virtues, Cicero deals, in the first book of the *De Officiis*, with the application of justice as the most extensive and far-reaching of the remaining three virtues. He refers in this regard to "the principle (*ratio*) embracing the society of men among themselves and their sharing of life, as it were," and points out that the preservation of the social and community life of men rests upon two pillars, namely justice (*iustitia*), in which "the most glorious of virtues" is contained and in accordance with which men are called "good" (*boni*), and kindness (*beneficentia*), which may also be referred to as benevolence (*benignitas*) or generosity (*liberalitas*). The first function of justice, he tells us, is to prevent one man from harming another, unless the former has been wrongfully provoked, and the second is to induce men to use common property for common interests and private property for themselves.[40] This may be contrasted with an earlier passage in which he describes justice as "that which preserves the fellowship of men, renders to each his due and observes the fulfilment, in good faith, of contractual obligations."[41] Together with fortitude (*fortitudo*) and self-restraint (*temperantia*), justice is compelled to provide and protect those things which relate to the practical activities of life, "so that the society and fellowship of men may be preserved."[42]

Cicero then proceeds to note a number of instances of the practical application of justice, accompanied by an explanation of the circumstances which may

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37 *De Inventione* 2 53 160: "Iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem. Eius initium est ab natura profectum; deinde quaedam in consuetudinem ex utilitatis ratione venerunt; postea res et ab natura profectas et ab consuetudine probatas legum metus et religio sanxit." See also *De Officiis* 3 5 24; 3 6 27–28; *De Finibus 18 59. Cf De Finibus* 3 3 11; 3 20 66; *Academica* 1 6 23.

38 *De Legibus* 1 10 28: "plane intellegi nos ad iustitiam esse natos."

39 *De Finibus* 4 7 17: "de animi bonis accuratius exquirebant, in primisque reperiebant esse in iis iustitiae semina."

40 *De Officiis* 1 7 20: "De tribus autem reliquis latissime patet ea ratio, qua societas hominum inter ipsos et vitae quasi communitas continetur; cuius partes duae, iustitia, in qua virtutis est splendor maximus, ex qua viri boni nominantur, et huic coniuncta beneficentia, quam eandem vel benignitatem vel liberalitatem appellari licet. Sed iustitiae, primum munus est, ut ne cui quis noceat nisi lacessitus iniuria, deinde ut communibus pro communibus ututar, privatis ut suis."

41 *De Officiis* 1 5 15: "in hominum societate tuenda tribuendoque suum cuique et rerum contractarum fide.

42 *De Officiis* 1 5 17: "Reliquis autem tribus virtutibus necessitates propositae sunt ad eas res parandas tuendasque, quibus actio vitae continetur, ut et societas hominum coniunctioque servetur . . ." From these principles Tanzola *A Comparative Study of the Cardinal Virtues in Cicero's De Officiis and in Ambrose's De Officiis Ministrorum* (1975) 88–115 distinguishes between justice as a *genus* and *species*, in so far as it is used in a generic and a specific sense: in *De Officiis* 1 7 20 the "generic" virtue of *iustitia* is mentioned as that which characterises "good men" (*boni viri*), whereas *De Officiis* 1 5 15 and 17 deal with *iustitia* in the "specific" sense of creating good relations between people with a view to achieving a harmonious society. This appears to be a reference to Cicero's adherence to the Platonic concept of general and particular justice – see n 34 above.

prevail and the principles of law which may be applicable when considering and evaluating the nature of the justice (or injustice):

a Private ownership is not established by nature, as in the case of common property, but by virtue of lengthy occupation, as when vacant property is occupied and held for a long period of time, or by conquest, as occurs when things are taken in war, or by law (*lex*), agreement (*pactio* or *condicio*) or allotment (*sors*). Hence, when things which were previously common property by nature are acquired in private ownership, each person should retain what has fallen to him. Should he attempt to acquire more than this, he will be violating the "law of human society."[43]

b In this context Cicero refers to a saying of Plato that "we are not born for ourselves alone, but our country and friends claim a part of our life." Similarly, the Stoics recognise the principle that all that is produced on earth is created for the use of men, while men, in turn, are born for the sake of other men in order that they may be able to benefit one another. To this extent we must follow nature and direct our efforts towards the good of the community at large by means of an exchange of services (*officia*), by giving and receiving, and in this way we should create a social bond among men by the application of skill, work and talent.[44]

c Good faith is the foundation of justice, in the sense that undertakings and agreements should be upheld and the obligations arising therefrom discharged in a spirit of steadfastness and truth.[45]

d A distinction is made between "active" and "passive" injustice as the counterpart of justice. Active injustice comes to the fore when the unjust person himself inflicts the wrong on another, while injustice in its passive form arises when the unjust person does nothing to avoid the infliction of a wrong on another.[46]

e A warning is sounded on the wrongfulness and injustice which may arise from unfettered or totally selfish ambition. Cicero has no objection to the seeking

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43 *De Officiis* 1 7 21: "Sunt autem privata nulla natura, sed aut vetere occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt, aut lege, pactione, condicione, sorte . . . Ex quo, quia suum cuiusque fit eorum, quia natura fuerant communia, quod cuique obtigit, id quisque teneat; e quo si quis sibi appetet, violabit ius humanae societatis." The acquisition of ownership by prescription was effected, in Roman law, by *usucapio*, *longi temporis praescriptio* or *longissimi temporis praescriptio*. The reference to the occupation of *vacua* appears to relate to the *occupatio* of a *res nullius*, which was a totally different form of acquisition of ownership. See Van Zyl *History and Principles of Roman Private Law* (1983) 147–155. This is an illustration of Cicero's disregard, from time to time, of accuracy in the description or application of legal principles. The *pactio* was an informal agreement, as was the *condicio*, although the latter was more frequently used in the sense of a condition attaching to an agreement.

44 *De Officiis* 1 7 22. On the concept of *officium* as used here by Cicero, see Du Plessis *op cit* 138–140.

45 *De Officiis* 1 7 23: "Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas." The term *dicta* refers to oral undertakings and is closely allied to *promissa*, "promises," which played an important role, as *dicta et promissa*, in the aedilitian liability for latent defects in the object of a sale. See Van Zyl *op cit* 296–299. *Conventa* were simply "agreements" (from *convenire* – a meeting of minds).

46 *De Officiis* 1 7 23: "Sed iniustitiae genera duo sunt, unum eorum, qui inferunt, alterum eorum, qui ab iis, quibus infertur, si possunt, non propulsant iniuriam." A modern equivalent of this distinction is that between delictual commissions and omissions.

of wealth for essentials, comfort or pleasure. He disapproves, however, of the case where it is sought with a view to acquiring power and influence and for the granting (and buying of) favours, as by the *triumvir* Crassus. Yet he does not criticise the accumulation of personal wealth as long as it has not been acquired by unjust means or caused anyone harm or injury. On the other hand, to accumulate wealth for the sake of gaining official authority (*imperium*), offices (*honores*) or glory (*gloria*) is wrongful and unjust, when it is accompanied by a disregard of "divine and human laws" (*iura divina et humana*) as was the case with Julius Caesar, in his striving for the dictatorship and absolute power.[47] This is a form of "active" injustice.

f The infliction of wrong as a form of active injustice is not always equally culpable. A wrong which is inflicted as a result of some "confusion of the mind" (such as impulse or passion) and which is usually of brief duration, differs considerably from that inflicted deliberately and with premeditation. For wrongs which are committed on some sudden impulse are less serious than those inflicted with premeditation and designedly.[48]

g "Passive" injustice is usually the result of an unwillingness, in the case of an omission, to incur enmity, trouble or expense. It may even be that, because of one's negligence, indolence, incompetence or preoccupation with one's own interests, one may allow those persons whom one ought to protect, to be neglected.[49]

h When there is doubt whether something is equitable or inequitable, one should refrain from doing it, for equity glows on its own, whereas doubt indicates the consideration of a wrong.[50]

i There often come times when those duties, which appear particularly worthy of a just man and of the man whom we call good, are subject to change and become negative. Thus it may become acceptable not to return an article held in safe-keeping, nor to keep a promise. In fact, it may sometimes be considered just to avoid and disregard those matters which pertain to truth and good faith. For it is right to take note of those fundamental principles of justice, namely, to refrain from harming anyone and to serve the interests of the community. When these principles are changed as a result of altered circumstances, however, the particular duty likewise changes and does not always remain the same. In this way it could happen that, if the obligations arising from a promise or

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47 *De Officiis* 1 8 25–26. The *imperium* was the essence of the power and authority arising from important magistracies, such as that of *consul* and *praetor*. *Honor* literally means "honour," but in the political context it referred to the office of a Roman magistrate as such, the reason being that it was in fact an honour to occupy the important magistracies. The holding of a succession of such offices, eg *quaestor*, *aedilis curulis*, *praetor* and *consul*, was therefore known as the *cursus honorum*. See Van Zyl *op cit* 15–23.

48 *De Officiis* 1 8 27: "Sed in omni iniustitia permultum interest, utrum perturbatione aliqua animi, quae plerumque brevis est et ad tempus, an consulto et cogitata fiat iniuria. Leviora enim sunt, ea, quae repentino aliquo motu accidunt, quam ea, quae meditata et praeparata inferuntur."

49 *De Officiis* 1 9 28–29: "Praetermittendae autem defensionis deserendique officii plures solent esse causae; nam aut inimicitias aut laborem aut sumptus suscipere nolunt aut etiam negligentia, pigritia, inertia aut suis studiis quibusdam occupationisve sic impediuntur, ut eos, quos tutari debeant, desertos esse patiantur."

50 *De Officiis* 1 9 30: "Quocirca bene praecipiunt, qui vetant quicquam agere, quod dubites aequum sit an iniquum. Aequitas enim lucet ipsa per se, dubitatio cogitationem significat iniuriae.

agreement should be discharged, the result may be disadvantageous to the promissee or promissor. Promises should therefore not be kept if their fulfilment should prove disadvantageous to the promissees. Similarly, if their fulfilment should prove more harmful to the promissor than to the promissee, it is not in conflict with duty that the lesser interest should yield to the greater. In addition, those promises which are coerced by fear or deceitfully elicited by means of fraud, are generally invalidated by praetorian law or, at times, by statutory enactments.[51]

j Wrongs often arise from the perversion of justice (*calumnia*) or from a crafty and malicious interpretation of law. This, in turn, has given rise to the now trite maxim:

> "The more the law the greater the injustice" (literally: "the greatest law the greatest injustice"; *summum ius summa iniuria*).[52]

k There are certain duties which have to be performed even towards those by whom one has been wronged. In this regard he points out that there are limits to the retribution and punishment which an injured person may exact. It is sufficient if the wrongdoer should repent of his wrong and refrain from repeating a similar wrong at a later stage and that other persons should likewise refrain from inflicting wrongs.[53] Similarly, in the case of a state and its international relations, the "rights of war" (*iura belli*) must be specially observed. Physical force (*vis*) must be applied only when negotiation (*disceptatio*) fails. The only acceptable reason for going to war is to live in peace without being harmed (*ut sine iniuria in pace vivatur*). Those who have been conquered or who have surrendered, must be treated with consideration and justice. In this regard the Roman laws and policy relating to the conduct of war have been most equitable and humane and they have been scrupulously observed. These very principles

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51 *De Officiis* 1 10 31–32: Sed incidunt saepe tempora, cum ea, quae maxime videntur digna esse iusto homine eoque, quem virum bonum dicimus, commutantur fiuntque contraria, ut reddere depositum, facere promissum quaeque pertinent ad veritatem et ad fidem, ea migrare interdum et non servare fit iustum. Referri enim decet ad ea, quae posui principio, fundamenta iustitiae, primum ut ne cui noceatur deinde ut communi utilitati serviatur. Ea cum tempore commutantur, commutatur officium et non semper est idem. Potest enim accidere promissum aliquod et conventum, ut id effici sit inutile vel ei, cui promissum sit, vel ei, qui promiserit . . . Nec promissa igitur servanda sunt ea, quae sint iis, quibus promiseris, inutilia, nec, si plus tibi ea noceant quam illi possint, cui promiseris, contra officium est maius anteponi minori . . . Iam illis promissis standum non esse quis non videt, quae coactus quis metu, quae deceptus dolo promiserit? Quae quidem pleraque iure praetorio liberantur, non nulla legibus." On the positive and negative aspects of justice in this sense see Costa *op cit* 19. The contract of *depositum* was concluded when one person entrusted a movable thing to another and the latter undertook to care for it gratuitously and to return it at the request of the depositor. See Van Zyl *op cit* 280–282. The "praetorian delicts" of *metus* and *dolus* gave rise to actions and defences, namely the *actio quod metus causa* and *exceptio metus* on the one hand and the *actio doli* and *exceptio doli* on the other. See Van Zyl *op cit* 348–351.

52 *De Officiis* 1 10 33: "Exsistunt etiam saepe iniuriae calumnia quadam et nimis callida, sed malitiosa iuris interpretatione. Ex quo illud 'summum ius summa iniuria' factum est iam tritum sermone proverbium." On this maxim see Büchner "Summum Ius Summa Iniuria" 1953 *Historisches Jahrbuch* 11–35; Magne "Summum Ius, Summa Iniuria" 1959 *Romanitas* 37–40. In general *summum ius* is opposed to *aequitas*. See n 109 below.

53 *De Officiis* 1 11 33: "Sunt autem quaedam officia etiam adversus eos servanda, a quibus iniuriam acceperis. Est enim ulciscendi et puniendi modus; atque haud scio an satis sit eum, qui lacesserit, iniuriae suae paenitere, ut et ipse ne quid tale posthac et ceteri sint ad iniuriam tardiores."

are applicable when a state seeks power (*imperium*) and glory (*gloria*) by means of war. Where, by force of circumstance, promises have been made to the enemy, they must be kept.[54]

l Justice must be observed even towards the most humble, which means that even slaves, who occupy the lowest status, should be treated as hired servants. In so far as they are required to work, justice must be displayed towards them.[55]

m A wrong may be inflicted in two ways, namely by violence (*vis*) or fraud (*fraus*). The former is associated with the lion and the latter with the fox. Both are totally alien to man, but fraud is the more contemptible of the two. Of all injustice, however, nothing is more criminal than that of the hypocrite who, while engaged in the most deceitful of activities, creates the impression that he is a good man.[56]

n Justice is closely linked with kindness (*beneficentia*) and generosity (*liberalitas*) which, together, are directed at the preservation of the social and community life of men, as was pointed out at the commencement of this discussion of Cicero's concept of justice in the *De Officiis*. In this regard Cicero sounds a note of caution in the exercise and application of these virtues: although nothing is more appropriate to human nature than *beneficentia* and *liberalitas*, care must be taken, first, that one's kindness (*benignitas*) should not be harmful to the recipients or to anyone else; in the second place it should be commensurate with one's means and, thirdly, it should be in accordance with the merits of the recipient: "For this is the basis of justice at which all these things must be directed."[57] The motivation prompting this generosity should be benevolence or affection (*benivolentia*) (*sic*), gratitude (*gratia*), the needs of the recipient, rather than self-interest, and the particular relationship between the donor and the recipient of the generosity. The relationship between such persons is of importance, since the fellowship and society of men are best preserved if kindness is bestowed in accordance with the intimacy of the relationship between the parties.[58] The nature of the duties to be performed, however, may vary

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54 *De Officiis* 1 11 34–37; 1 12 38; 1 13 39–40. As an illustration of the necessity to keep promises (*fides conservanda*) of this nature, he refers to the famous case of Regulus, the Roman general who was taken prisoner by the Carthaginians and sent to Rome on parole to negotiate an exchange of prisoners. On his own motion in the senate it was resolved not to effect the exchange and Regulus voluntarily returned to Carthage to be put to death.

55 *De Officiis* 1 13 41: "Meminerimus autem etiam adversus infimos iustitiam esse servandam. Est autem infima condicio et fortuna servorum, quibus non male praecipiunt qui ita iubent uti, ut mercennariis: operam exigendam, iusta praebenda."

56 *De Officiis* 1 13 41: "Cum autem duobus modis, id est aut vi aut fraude, fiat iniuria, fraus quasi vulpeculae, vis leonis videtur; utrumque homine alienissimum, sed fraus odio digna maiore. Totius autem iniustitiae nulla capitalior quam eorum, qui tum, cum maxime fallunt, id agunt, ut viri boni esse videantur."

57 *De Officiis* 1 14 42: "Deinceps, ut erat propositum, de beneficentia ac de liberalitate dicatur, qua quidem nihil est naturae hominis accommodatius, sed habet multas cautiones. Videndum est enim, primum ne obsit benignitas et iis ipsis, quibus benigne videbitur fieri et ceteris, deinde ne maior benignitas sit quam facultates, tum ut pro dignitate cuique tribuatur; id enim est iustitiae fundamentum, ad quam haec referenda sunt omnia." In 1 14 42–45 and 1 15 46 he illustrates these principles with reference to examples. Du Plessis *op cit* 142 suggests that these prerequisites reflect something of the geometrical measure of equality appearing in Aristotle (see *idem op cit* 109–113).

58 *De Officiis* 1 15 47–49; 1 16 50–52. This last principle is described in 1 16 50: "Optime autem societas hominum coniunctique servabitur, si, ut quisque erit coniunctissimus, ita in eum benignitatis plurimum conferetur." In 1 17 53–58 he enumerates the degrees of social relationship (*gradus societatis hominum*) as citizenship, kinship, friendship and patriotism.

according to the circumstances, and in each case consideration must be given to what each person needs most and to what extent each is able or unable to do without assistance.[59]

The basic principle emanating from Cicero's definition of justice and his discussion of this all-important virtue in the *De Officiis* and in other works, is that the dignity of man should be respected and that each should receive his due. This principle is usually expressed by the words *suum cuique tribuere*.[60] If this principle is adhered to, the fellowship and social relationship (*communitas*) existing between men will be peaceful and harmonious, and so also will be that between men and God, since justice is achieved by realising the will of God while piety is, in fact, justice towards God.[61] This, in turn, leads to the conclusion that a man is not considered good and just when he refrains from wrongfulness solely to avoid harm.[62] Furthermore, if he does not live justly and righteously, he can never achieve happiness.[63]

1 4 Justice and other Virtues

That justice and other virtues go hand in hand has already been seen in the discussion of Cicero's definition of justice, on the one hand, and of his concept of justice in the *De Officiis*, on the other.[64] Thus, in the *De Finibus*, dutiful conduct or piety (*pietas*), goodness (*bonitas*), generosity (*liberalitas*), kindness (*benignitas*) and courtesy (*comitas*) were referred to as adjuncts of justice (*iustitia*).[65] Similarly, in the *De Officiis, iustitia* is allied with *beneficentia*, which is equated with *benignitas* and *liberalitas*.[66] This is none too strange when it is

59 *De Officiis* 1 18 59: "Sed in his omnibus officiis tribuendis videndum erit, quid cuique maxime necesse sit, et quid quisque vel sine nobis aut possit consequi aut non possit."

60 See *De Finibus* 5 23 65 (quoted in n 34 above); 5 23 67; *De Inventione* 2 53 160 (quoted in n 36 above); *De Officiis* 1 14 42; *De Natura Deorum* 3 15 38. In *De Re Publica* 3 15 24 it is said that justice teaches one to spare all people, to act in the interests of the human race, to give each his due and to keep one's hands off sacred or public property, or off that which belongs to another: "iustitia autem praecepti parcere omnibus, consulere generi hominum, suum cuique reddere, sacra, publica, aliena non tangere." The expression, *suum cuique tribuere* or *reddere*, was readily taken over by the classical jurists, as appears from *D* 1 1 10*pr*–1 (Ulpianus): "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi. 1 Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere; *Institutiones Justiniani* 1 1 *pr*: "Iustitia est constans et perpetua voluntas ius suum cuique tribuens;" 1 1 3 (A literal transcription of *D* 1 1 10 1).

61 *De Finibus* 4 5 11: "iustitiam etiam, cum cognitum habeas quod sit summi rectoris ac domini numen, quod consilium, quae voluntas; cuius ad naturam apta ratio vera illa et summa lex a philosophis dicitur;" *De Natura Deorum* 1 41 116: "Est enim pietas iustitia adversum deos." Cf *De Partitione Oratoria* 22 78; *De Officiis* 1 28 99; *De Natura Deorum* 3 15 38; *Philippicae* 9 5 10. See also Costa *op cit* 20.

62 *De Finibus* 2 22 71: "Nam nec vir bonus ac iustus haberi debet qui ne malum habeat abstinet se ab iniuria."

63 *De Finibus* 1 18 57: "non posse iucunde vivi nisi sapienter, honeste iusteque vivatur, nec sapienter, honeste, iuste nisi iucunde." Cf 2 16 51. Du Plessis *op cit* 142–143 relates Cicero's discussion of justice to his particular approach to equality. It is an equality expressed in moral and ethical terms and is divorced from the formalistic approach based on the purely arithmetical or geometric view – probably a reference to Aristotle. Cicero appears to have been influenced by the Stoics in this regard.

64 See 1 2 and 1 3 above.

65 *De Finibus* 5 23 65–66, quoted in n 35 above. See also the reference to *liberalitas, patriae caritas* and *pietas* in *De Legibus* 1 15 42–43, quoted in n 36 above.

66 *De Officiis* 1 7 20, quoted in n 40 above.

borne in mind that *iustitia* was, and remained throughout, one of the four cardinal virtues – if not *the* cardinal virtue – namely *iustitia*, *prudentia* (*sapientia*), *fortitudo* and *temperantia*.[67]

The relationship between *iustitia* and good faith (*fides*) likewise appears from the discussion of justice in the *De Officiis*, where *fides* is described as constancy and truth in respect of promises and agreements.[68] It is also the basis of all honourable conduct or moral goodness (*honestum*), "since nothing can be honourable when it is lacking in *iustitia*."[69] Hence knowledge (*scientia*), which is remote from justice, should be referred to as cunning (*calliditas*) rather than wisdom (*sapientia*), and it is required

> "that courageous and magnanimous men should simultaneously be good and uncomplicated, lovers of truth and totally lacking in deceit, for these characteristics are at the centre of that which is praiseworthy in justice."[70]

In this way the virtues of *sapientia* and *fortitudo* are unmistakably linked with *iustitia*, as is the case in numerous other texts, which also include self-restraint (*temperantia*) and other virtues, as virtues relating to justice.[71] Furthermore, in so far as the principles of the *ius naturae* accord with *honestum* and *rectum*, *iustitia* must likewise accord with *honestum* (*honestas*).[72]

Although *iustitia* is related to *prudentia* (*sapientia*), *fortitudo* and *temperantia*, in that they are all cardinal virtues, it does not always appear to enjoy primacy among such virtues, since Cicero suggests, in the *De Officiis*, that wisdom, in the sense of *sapientia*, as opposed to prudence or the practical knowledge of things to be aimed at or avoided (*prudentia*), is described as "the chief of all virtues." *Sapientia* is thus

> "the knowledge of divine and human things, in which is contained the community of gods and men and the fellowship of men in their relationships with one another."

The duty (*officium*) derived from the relationship between man and God and man and man is the most important duty, if wisdom should be, as it certainly is, the chief virtue.[73] Yet, a little further on in this discussion, he states that the duties arising from *iustitia* should be given precedence over devotion to and duties arising from mere knowledge (*scientia*), since the duties emanating from

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67 See *De Inventione* 2 53 159 and also *De Re Publica* 1 1 1; *De Officiis* 1 4 13; 1 5 15; 2 5 18; *De Finibus* 2 14 46–47.

68 *De Officiis* 1 7 23, quoted in n 45 above.

69 *De Officiis* 1 19 62: "nihil enim honestum esse potest, quod iustitia vacat." Cf 1 25 86: "iustitiae honestatique adhaerescet."

70 *De Officiis* 1 19 63: "scientia, quae est remota ab iustitia, calliditas potius quam sapientia est appellanda ... Itaque viros fortes et magnanimos eosdem bonos et simplices, veritatis amicos minimeque fallaces esse volumus; quae sunt ex media laude iustitiae."

71 See, for example, *De Officiis* 2 5 18; 2 9 32; *De Oratore* 1 19 85–87; 2 11 46; 2 14 61; 2 84 343–344; *De Finibus* 1 16 50; 1 18 57; 2 16 51; 3 7 25; 4 2 4; 5 13 36; 5 21 58; *De Re Publica* 1 2 2.

72 *De Officiis* 1 5 15; *De Finibus* 2 11 34; 2 14 45; 4 6 15; *De Legibus* 1 18 48. See also Costa *op cit* 20.

73 *De Officiis* 1 43 153: "Princepsque omnium virtutum illa sapientia quam 'sophian' Graeci vocant – prudentiam enim, quam Graeci 'phrónèsin" dicunt, aliam quandam intellegimus, quae est rerum expetendarum fugiendarumque scientia; illa autem sapientia, quam principem dixi, rerum est divinarum et humanarum scientia, in qua continetur deorum et hominum communitas et societas inter ipsos; ea si maxima est, ut est certe, necesse est, quod a communitate ducatur officium, id esse maximum." The concepts *prudentia* and *iurisprudentia* in Cicero are dealt with by Robleda, "Cicerón y el derecho romano" in 1958 *Humanidades* 45–47. See also Costa *op cit* 45.

justice relate to the welfare of men, which is, to man, the most important aim to be achieved.[74]

In similar vein, justice is presented as a more desirable virtue than *fortitudo*, but not necessarily more desirable than *temperantia*.[75]

In his discussion of how to influence the masses and hence to win popularity, Cicero suggests that *fides*, in the sense of "confidence," should be inspired by joining *iustitia* and *prudentia* in one's relationships with one's fellows, and by reposing confidence in men who are just and loyal, that is, in good men. It is justice, however, which has the greater power to inspire confidence of this nature, for even without wisdom, it still enjoys sufficient authority, whereas wisdom without justice has no value in creating confidence.[76]

Justice is also valuable for its expediency (*utilitas*), in so far as it is indicative of the inseparability of expediency and virtue.[77] It is, in fact, more valuable than gold[78] and is the way to the achievement of honour and glory.[79] Although it is not necessarily desirable *per se*, it is the source of the greatest happiness.[80] Small wonder then that Cicero refers to *iustitia* as "a virtue which is the mistress and queen of all virtues"[81] and "the faithful guardian of human society."[82]

2 EQUITY

The concept of equity (*aequitas*) was well known to Roman jurists even before the time of Cicero, in so far as it was employed to restrain the harshness of the strict civil law (*strictum ius*) by means of actions based on what was "good and fair" (*actiones in bonum et aequum conceptae*). In this manner a very real and extremely important relationship evolved between *bona fides* and *aequitas*, particularly in the law of procedure and obligations.[83]

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74 *De Officiis* 1 43 155: "Quibus rebus intellegitur studiis officiisque scientiae praeponenda esse officia iustitiae, quae pertinent ad hominum utilitatem, qua nihil homini esse debet antiquius."

75 *De Officiis* 1 44 157; 1 45 159.

76 *De Officiis* 2 9 33–34. In the latter text he says: "Harum igitur duarum ad fidem faciendam iustitia plus pollet, quippe cum ea sine prudentia satis habeat auctoritatis, prudentia sine iustitia nihil valet ad faciendam fidem . . .; iustitia sine prudentia multum poterit, sine iustitia nihil valebit prudentia." See also 2 11 38–39. In 2 11 40 he states that justice is also necessary for the management of affairs: "iustitia ad rem gerendam necessaria est."

77 *De Finibus* 2 18 59; *De Officiis* 3 25 96; 3 28 101.

78 *De Re Publica* 3 5 8: "iustitiam . . . rem multo omni auro cariorem."

79 *De Officiis* 2 12 42; 2 13 43; 2 20 71: "fundamentum enim est perpetuae commendationis et famae iustitia, sine qua nihil potest esse laudabile."

80 *De Finibus* 1 16 53: "Itaque ne iustitiam quidem recte quis dixerit per se ipsam optabilem, sed quia iucunditatis vel plurimum afferat."

81 *De Officiis* 3 6 28: "haec enim una virtus omnium est domina et regina virtutum."

82 *De Finibus* 2 24 113: "ad humanam societatem iustitiae fida custodia."

83 Quintus Mucius Scaevola, the consul of 95 BC, refers in his *Quaestiones publice tractarum* to the accession of possession, which defies a general definition, and proceeds (in *Digesta* 44 3 14 pr): "consistunt enim in sola aequitate." On Scaevola, see Van Zyl *op cit* 41. In regard to the *actiones in bonum et aequum conceptae*, a distinction was made between *iudicia stricti iuris* and *iudicia bonae fidei* (*iudicia* being used in the sense of *actiones*). In the former the judge had to make his decision on the basis of the principles emanating from the "strict" *ius civile*, whereas in the latter the adjudication was to be in accordance with the requirements of good faith (*bona fides*). Greenidge *The Legal Procedure of Cicero's Time* (1971) 202 explains the nature of the actions based on good faith as follows: "The action of good faith (*bonae fidei actio*) introduces more distinctly the idea of equity, the

During Cicero's time, the Roman magistrate known as the *praetor* played an extremely important role in making the strict *ius civile* more flexible in its application, by widening its scope, supplementing and improving it. This he did, for the most part, by granting remedies in cases where equity (*aequitas*) and good faith (*bona fides*) required it. Thus he granted actions on analogous facts, in accordance with the circumstances (*actiones in factum*) and likewise where the requirements of equity and reasonableness demanded it (*actiones utiles*). The equitable legal principles thus evolved were referred to as the *ius praetorium* or *ius honorarium* (with reference to the *praetor's* office, known as *honor*) and were published in praetorian edicts (*edicta*) which became an important source of law.[84]

Cicero fully realised the significance of the concept of *aequitas* and gave it ample recognition in his various discussions of law and legal philosophy.[85]

2 1 Greek Antecedents

As was the case with Cicero's approach to justice, he was strongly influenced by the legal philosophy relating to equity as propounded by the Greek scholars, Plato and Aristotle.[86] For present purposes a cursory glance at the views put forward by these famous philosophers will suffice.

a *Plato*

Although Plato has strong views on equality (*isótès*), he presents no clear concept of equity in the legal-philosophical sense. He professes, in the *Laws*, that equality nurtures good relations among people, but is loath to define this form of equality. In this regard he distinguishes between the equality applied by the state or legislature in assigning honours, and the equality which is measured by the

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modification by ethical considerations of the hard, strict outline of the facts, which is all the law can be. The aim of equity is to transcend the abstract relation expressed in *ius* and to view the inter-connexions between two parties from the assumed standpoint of their higher personality. The law takes the standard of their honourable and scrupulous treatment of one another's claims, of the *fides Romana*, which should animate certain relations of life, as its own, and boldly expresses it in the action; by so doing it hopes to fill up the gaps or to smooth away the projections which the circlet of a legal definition always leaves in the ethical relations which it professes to enclose." See also Biondi, "Equità e buona fede" in Biondi *Scritti giuridici* (1965) 93–95. *Aequitas und Bona Fides; Festgabe zum 70. Geburtstag von August Simonius* (1955); Pringsheim "Aequitas und bona fides" in Pringsheim *Gesammelte Abhandlungen* (1961) 156–173.

84 Praetorian law is defined by Papinian, the post-classical jurist, in *Digesta* 1 1 7 1: "Ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam quod et honorarium dicitur ad honorem praetorum sic nominatum."

85 See in general on Cicero and equity Voigt *op cit* 529–541; Costa *op cit* 29–30, 39–40; Ragusa "Diritto ed equità da Cicerone ai giureconsulti classici" in 1930 *Archivio giuridico* 87–114, 224–254; Robleda "La 'aequitas' en Cicerón" in 1950 *Humanidades* 31–57 (a contribution unfortunately abounding with inaccuracies); Mayer *Humanitas bei Cicero* (1951) 150–165; Mazeaud "Les notions de 'droit', de 'justice' en d'équité'" in *Aequitas und Bona Fides* (1955) 229–233; Riposati "Una singolare nozione di 'aequitas' in Cicerone" in *Studi Biondi* 2 (1965) 445–465; Zamboni "L'aequitas in Cicerone" in 1966 *Archivio giuridico* 167–203; Ciulei *L'équité chez Cicéron* (1972).

86 See 1 1 above and further Ciulei "Éléments de la philosophie grecque dans la conception cicéronienne de l'équité" in *Études Macqueron* (1970) 201–207; Van Eikema Hommes *Hoofdlijnen van de Geschiedenis der Rechtsfilosofie* (1972) 25–27.

judgment of God (*Diòs krísis*) and gives rise to all good things (*pánt'agathà*) by attributing to each his due in accordance with nature (*physis*).

This then is what he refers to as "political justice" (*polithikòn díkaion*), being the "natural equality granted to unequal things" and which should, at least in some measure, be applied by the state as well.[87] This approach accords, to some extent, with that adopted by Plato in his appraisal of justice as opposed to injustice.[88]

b *Aristotle*

In contrast with Plato, Aristotle has a clearly defined view of equity, which he refers to as *epieíkeia* in the sense of "equity," "reasonableness" or "fairness." He discusses this concept in relation to justice (*díkaiosynè*) and that which is just or right (*díkaios*), stating that, when these concepts are considered, they appear to be neither wholly similar nor different in respect of their genus.[89] He explains this by saying that although equity is in fact better than a particular form of justice, it is just in itself. Nor is it better because it comes from a different stock: justice and equity are similar and both are good, although equity is the superior of the two. The root of the problem is that, although equity is just, it does not constitute justice according to law (*katà nómov*), but is a rectification of legal justice.[90] This then is the nature (*physis*) of equity: it is a rectification of law which falls short in its general application.[91]

Aristotle's approach to the relationship between justice and equity is evaluated positively by Du Plessis, who sees it as an important breach of the barrier created by Aristotle's predecessors, particularly Plato, against a clear definition of equity.[92] At the same time it presented Cicero with a highly interesting stimulus, if not a precedent, for thinking and writing about equity in its peculiarly Roman context.

2 2 Cicero's Definition of Equity

Ius civile is defined by Cicero as

> "the equity (*aequitas*) constituted for those who belong to the same state so that each may secure his own"[93]

87 Plato *Laws* 6 757A–E. See also the discussion in Du Plessis *op cit* 83–87.

88 See 1 1 a above. Ciulei *L'equité chez Cicéron* (1972) 202 refers to further passages in Plato which may support the existence of equity as a legal-philosophical concept. Such passages, however, deal mainly with the concepts of justice and injustice and do not purport to give any clear view on equity or related concepts.

89 Aristotle *Nic Eth* 5 10 1 (1137a).

90 Aristotle *Nic Eth* 4 10 2–3 (1137b).

91 Aristotle *Nic Eth* 5 10 6 (1137b).

92 Du Plessis *op cit* 115: "Deur hierdie konsekwente fundering van billikheid op sy aanvanklike geregtigheidsuitgangspunte, slaan Aristotles 'n belangrike slag. Sommige van sy voorgangers, waaronder veral Plato, het maar taamlik langtand aan die idee van billikheid geproe. Dit is verstaanbaar dat, in die lig van Plato se geregtigheidsisteem, die oënskynlike inkonsekwensies gepaardgaande met die toepassing van 'n billikheidsreg, nie vir hom in 'n (konsekwent) regverdige (ware) staat aanvaarbaar sou wees nie . . . Aristoteles lewer nie alleen op 'n heelwat outoritêre wyse 'n bydrae tot hierdie belangrike debat nie, maar hy toon ook (in terme van sy eie sisteem oortuigend) aan dat die toepassing van billikheid geen inkonsekwensie ten aansien van die fundamentele uitgangspunte in 'n geregtigheidsmodel hoef mee te bring nie." On Aristotle's concept of justice see 1 1 b above.

93 *Topica* 2 9.

and is divided into *lex, mos* and *aequitas*.[94] This link between *ius* and *aequitas* occurs frequently in Cicero's works.[95] It is also encountered in respect of *lex*, which Cicero describes as the *fons aequitatis*,[96] and likewise in respect of *iustitia*, the most prominent of the cardinal virtues.[97] It is therefore to be expected that *aequitas* should, as in the case of law and justice in its various forms, emanate from the *ius naturae*.[98]

The most important passages in Cicero dealing with the concept of *aequitas* relate to expositions of law in general and the correlation between its various forms. Hence, in the *De Partitione Oratoria*, it is discussed in Cicero's exposé of the "theory of law" (*ratio iuris*):

> "This (the *ratio iuris*) is divided into two basic categories, namely nature (*natura*) and law (*lex*). The effectiveness of each of these divisions arises from divine law (*divinum ius*) and human law (*humanum ius*) respectively, one of which relates to equity (*aequitas*) and the other to religion (*religio*). The force of equity, however, is twofold: on the one hand it rests on the direct principle of truth, justice and, as it is called, the fair and good (*aequum et bonum*) and, on the other, it pertains to the exchange of a recompense, which, in the case of a kindness, is called thanks and, in the case of a wrong, revenge. These aspects are common to nature (*natura*) and to law (*lex*), but those principles which have been written and also those unwritten principles which have been preserved by the law of nations (*ius gentium*) or by the customs of the forefathers (*mos maiorum*), are peculiar to law (*lex*). A part of the written principles is private and a part public. The public portion refers to law (*lex*), senatorial resolutions (*senatus consultum*) and treaties (*foedus*), whereas the private relates to deeds, formal agreements and contracts by stipulation (*stipulatio*). These principles, which are unwritten, are observed either by custom or by agreement and, as it were, by consent of men. Moreover, it has been particularly prescribed by natural law (*ius naturale*) that we should protect our customs (*mores*) and laws (*leges*). And since the sources of equity (*aequitas*) have, as it were, been briefly disclosed, we should consider, in regard to this class of cases, what should be said in orations relating to nature (*natura*), laws (*leges*) and the ancestral customs (*mos maiorum*), the warding off of and retribution for wrongful deeds and to every aspect of law (*ius*). If a person has carelessly, by force of necessity or by mistake, done anything which is not permissible, in the case of persons who have acted voluntarily and deliberately, and indulgence, which is taken from several topics of *aequitas*, must be sought with a view to pleading forgiveness for that deed."[99]

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94 *Topica* 7 31. See also 5 28, which includes in this classification *senatus consulta, res iudicatae, auctoritas iurisperitorum* and *edicta magistratuum*.

95 See, for example, *De Legibus* 1 18 48: *omnes viri boni ipsam aequitatem et ius ipsum amant*.

96 *Pro Cluentio* 53 146. See also 57 156; *De Legibus* 1 6 18–19; *In Verrem* 2 3 16 42; 2 3 78 181; 2 3 88 205; 2 3 95 220.

97 *De Officiis* 1 16 50; 1 19 64; *De Re Publica* 1 2 2; *Topica* 23 90; *De Finibus* 1 16 52; 2 18 59; 3 21 70; *De Oratore* 1 19 86; 2 85 345; *De Amicitia* 5 19; 22 82; *Phillippicae* 2 29 72; 9 5 10–11; *Academica* 1 6 23.

98 Voigt *op cit* 213–219; Costa *op cit* 29–30.

99 *De Partitione Oratoria* 37 129–131: "Quod dividitur in duas partes primas, naturam atque legem, et utriusque generis vis in divinum et humanum ius est distributa, quorum aequitatis est unum, alterum religionis. Aequitatis autem vis est duplex, cuius altera directa et veri et iusti et ut dicitur aequi et boni ratione defenditur, altera ad vicissitudinem referendae gratiae pertinet, quod in beneficio gratia, in iniuria ultro nominatur. Atque haec communia sunt naturae atque legis, sed propria legis et ea quae scripta sunt et ea quae sine litteris aut gentium iure aut maiorum more retinentur. Scriptorum autem privatum aliud est, publicum aliud: publicum lex, senatus consultum, foedus, privatum tabulae, pactum conventum, stipulatio. Quae autem scripta non sunt, ea aut consuetudine aut conventis hominum et quasi consensu obtinentur, atque etiam hoc in primis, ut nostros mores legesque tueamur quodammodo naturali iure praescriptum est. Et quoniam breviter aperti fontes sunt quasi quidam aequitatis, meditata nobis ad hoc causarum genus esse debebunt ea quae dicenda erunt in orationibus de natura, de legibus, de more maiorum, de propulsanda iniuria, de ulciscenda, de omni parte iuris. Si imprudenter aut necessitate aut casu quippiam fecerit quod non concederetur eis qui sua sponte et voluntate fecissent, ad eius facti deprecationem ignoscendi petenda venia est quae sumetur ex plerisque locis aequitatis."

Similarly, in the *Topica*, a somewhat briefer discussion of equity is initiated by an inquiry into "fair" or "just" (*aequum*) and "unfair" or "unjust" (*iniquum*):

> "When the concepts of fairness (*aequum*) and unfairness (*iniquum*) are discussed, topics relating to equity (*aequitas*) come to the fore. These are divided into two categories, arising from nature (*natura*) and human institutions (*institutum*) respectively. Nature has two sides, namely the principle of rendering to each his own and the right of retribution. The institutions based on equity are threefold: the one relates to law, the next to agreements and the third to long-established custom. Equity itself is said to have three sides: the one pertains to the gods of the upper world, the second to the gods of the lower world and the third to men. The first is called piety (*pietas*), the second sanctity (*sanctitas*) and the third justice (*iustitia*) or equity (*aequitas*)."[100]

From this discussion it appears that Cicero has drawn generously from Greek sources, particularly Plato and Aristotle, but also from the Stoic school.[101] By resorting to the Greek approach, he appears to have elevated the ancient Roman concept of *bonum et aequum*, after changing it to read *aequum et bonum*, to the notion of *aequitas*.[102] The concept *aequum et bonum* recurs throughout his works,[103] although he sometimes uses the term *aequum* on its own, usually to indicate the contrast between *ius aequum* and *ius strictum*.[104] In similar vein, *aequum* is encountered in connection with *iustum*,[105] *rectum*[106] or *iniquum*.[107] A related concept is *aequabilitas*, which occurs in the sense of equability, equality, impartiality or equity as such.[108]

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100 *Topica* 23 90: "Cum autem de aequo et iniquo disseritur, aequitatis loci colligentur. Hi cernuntur bipertito, et natura et instituto. Natura partes habet duas, tributionem sui cuique et ulciscendi ius. Institutio autem aequitatis tripertita est: una pars legitima est, altera conveniens, tertia moris vetustate firmata. Atque etiam aequitas tripertita dicitur esse: una ad superos deos, altera ad manes, tertia ad homines pertinere. Prima pietas, secunda sanctitas, tertia iustitia aut aequitas nominatur."

101 Ciulei "Éléments de la philosophie grecque dans la conception cicéronienne de l'équiteé" in *Études Macqueron* (1970) 201–207.

102 Ciulei "Note in legatura cu expresia aequum et bonum in opera lui Cicero" in 1966 *Studii clasice* 121–129, avers that Cicero converted the expression *bonum et aequum* to *aequum et bonum* and thence related it to the *actiones bonae fidei* before developing his doctrine of *aequitas*. Zamboni "L'aequitas in Cicerone" in 1966 *Archivio giuridico* 167–203, suggests that Cicero's thought on *aequitas* is not original. In his (Cicero's) conviction that Roman tradition is analogous to the Greek culture, in respect of its practical and empirical system, he is led to idealise conceptual or institutional forms in accordance with Roman traditions. Even this idealisation is nothing more than a juxtaposition of heterogeneous notions. Yet he preserves, virtually intact, the sources which he has consulted. The abstract term, *aequitas*, appears to have been in current usage in juridical-rhetorical Roman practice to express the notion rendered uniquely by *aequum et bonum*. These two expressions existed simultaneously and have the same practical signification. Cicero attempts, according to Zamboni, to bypass this duality, which he (Cicero) considers anachronistic, and absorbs the concept of *aequum et bonum* into that of *aequitas*. See also Voigt *op cit* 213–219; Pringsheim "Bonum et aequum" in Pringsheim *Gesammelte Abhandlungen* 1 (1961) 174–223.

103 See *De Partitione Oratoria* 28 100; 37 130; *De Finibus* 3 21 70–71; *Topica* 17 66; *De Oratore* 3 27 107; *De Inventione* 1 19 27; *Brutus* 38 143; 39 145; *Pro Caecina* 23 65; 28 81; *Epistulae ad Atticum* 7 7.

104 Pringsheim "Ius aequum und ius strictum" Pringsheim *Gesammelte Abhandlungen* 2 (1961) 133–155. See also *De Inventione* 2 4 12, where *aequum* is contrasted with *honestum* and *utile*.

105 *De Finibus* 3 21 71.

106 *De Inventione* 1 11 14.

107 *Topica* 22 84; *De Inventione* 2 23 69; 2 36 109; *Philippicae* 2 37 95.

108 See *De Oratore* 1 42 188; 2 52 209; 2 85 345; *De Inventione* 1 2 2; 1 53 102; 2 22 68; 2 54 162; *Pro Murena* 41; *De Officiis* 1 25 88; *Pro Caecina* 25 70. In *De Re Publica* 1 27 43, 1 34 53,

In the passage from *De Partitione Oratoria* quoted above, Cicero divides *ius* in its widest sense into *ius naturae* and *lex*, the former being equated with divine law (*divinum ius*) and the latter with man-made law (*humanum ius*). *Aequitas* is then placed on a par with the *ius naturae* as divine law, whereas the law of men is related to *religio*, which signifies the religious aspect and awe men have for law. The twofold division of *aequitas* into the principle upholding truth, justice and *aequum et bonum*, on the one hand, and the principle of retribution for right and wrong, on the other, is of some interest, since it indicates that *aequitas* is a virtue and moral norm, and also an instrument to effect retribution for wrongs and gratitude for kindness. Yet in both cases equity shares a common aspect with *ius naturae* and *lex*. The latter (*lex*) refers to written law, *ius gentium* or the *mos maiorum*.

The *Topica* text in turn distinguishes between the *ius naturae* and *institutiones* rather than *lex*. The *ius naturae* preaches the principle of "to each his own" and the right of retribution, whereas *aequitas* is immediately brought under the aegis of an *institutio* (of the man-made *lex*), with a threefold division into *lex*, *conventum* and *mos maiorum*. As in the previous text, *aequitas* is once again elevated to the status of a virtue from which the principles of retribution and gratitude flow, but, otherwise than in that text, *aequitas* is not merely placed on the same footing as *ius naturae* and *lex*, but is itself the source which engenders *lex*, *conventum* and *mos maiorum*.

Its close relationship with the *ius naturae* is emphasised in the *Topica* text, in that it is characterised as pertaining to the gods (of the upper and nether regions) and to men. The strongly religious aspect of natural law (and hence of *aequitas*) comes to the fore when Cicero refers to *pietas* and *sanctitas* as the equitable principles relating to the upper and nether gods respectively. In the human context, however, he prefers the simple concepts of *aequitas* (in a narrower sense, as pertaining to human affairs) and *iustitia*. The correlation between *aequitas* and *iustitia* further indicates that Cicero virtually equates these concepts, or at least considers them as virtues of equal force and effect.[109]

In conclusion, it should be pointed out that *aequitas* is sometimes opposed to the *strictum ius* or *summum ius*: hence the maxim, *summum ius summa iniuria* ("the more the law the greater the injustice").[110]

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1 45 69 and 2 23 42–43, *aequabilitas* is used in the sense of equality of political rights. See Fantham "Aequabilitas in Cicero's Political Theory and the Greek Tradition of Proportional Justice" in 1973 *Classical Quarterly* 285–290. The term *ius aequabile* occurs in *De Officiis* 2 12 42: "Ius enim semper est quaesitum aequabile." *Aequalitas* ("equality") as such also occurs, as in *De Legibus* 1 18 49 – a use of the word which is strongly reminiscent of the Platonic concept of equality.

109 Ciulei "Les rapports de l'équité avec le droit et la justice dans l'oeuvre de Cicéron" in 1968 *Revue Historique de Droit Français et Étranger* 639–647, points out that in the *Topica* text equity is, on the one hand, a more far-reaching notion than justice but, on the other hand, has a more restricted meaning and is in fact identified with justice (645). He attributes this to an evolution of Cicero's thought on the subject: initially he considered equity as distinct from law and justice but at a later stage he began to draw law and morality closer together, as a result of which equity began to merge with law and justice. See also Voigt *op cit* 529, who states that there is a threefold concept of *aequitas* in Cicero's works as a whole, namely a "common" ("vulgären"), "technical-juristic" ("juristisch-wissenschaftlichen") and a "legal-philosophical" ("rechtsphilosophischen") concept.

110 See *De Officiis* 1 10 33 (quoted in n 51 above). Cf *Pro Caecina* 23 65 (*summo iure*). See also Büchner "Summum ius summa iniuria" in 1953 *Historisches Jahrbuch* 11–35, who deals with the problem of the equitable interpretation of law as posed to Roman philosophers and writers, especially Cicero. Cf Magne "Summum Ius, Summa Iniuria" 1959 *Romanitas* 37–40.

2 3 Equity and other Virtues

As in the case of justice,[111] Cicero's concept of equity is related to a large number of virtues apart from *iustitia*.[112] *Aequitas* is encountered in juxtaposition with all the remaining cardinal virtues, namely wisdom (*sapientia* and *prudentia*),[113] fortitude (*fortitudo*)[114] and self-restraint (*temperantia*).[115] Beyond the ambit of the cardinal virtues, there are numerous other virtues which are, from time to time, linked with the concept of equity. Friendship (*amicitia*) for instance, is mentioned with *iustitia* and *aequitas* as emanating from nature.[116] *Aequitas* likewise occurs in connection with the virtues of goodness (*bonitas*),[117] harmony (*concordia*),[118] constancy or steadfastness (*constantia*),[119] continence (*continentia*),[120] dignity (*dignitas*),[121] diligence (*diligentia*),[122] trust or (good) faith (*fides*),[123] honourableness or probity (*honestas*),[124] honour (*honor*),[125] humanity or human fellowship (*humanitas*),[126] industry or assiduity (*industria*),[127] integrity (*integritas*),[128] generosity (*liberalitas*),[129] magnanimity (*magnitudo animi*),[130] gentleness (*mansuetudo*),[131] compassion (*misericordia*),[132] modesty (*modestia*),[133] dutifulness or service (*officium*),[134] piety or dutiful conduct (*pietas*),[135] decency (*pudor*),[136] rectitude (*recta*),[137] religion or conscientiousness (*religio*),[138] utility or expediency (*utilitas*),[139] truthfulness (*veritas*)[140] and virtue (*virtus*) as such.[141]

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111 See 1 4 above.
112 See n 97 above.
113 *De Officiis* 2 23 83; *De Re Publica* 2 36 61; *In Catilinam* 2 25; *Pro Cluentio* 49 137.
114 *De Officiis* 1 19 62; *In Catilinam* 2 25; *De Re Publica* 1 2 2.
115 *De Oratore* 1 13 52; *In Catilinam* 2 25; *Epistualae ad Quintam Fratrem* 1 1 16 45; *In Verrem* 2 4 37 81.
116 *Academica* 1 6 23; "naturae, unde et amicitia existebat et iustitia atque aequitas."
117 *De Officiis* 1 16 50, which relates *aequitas* to *iustitia* as well.
118 *De Oratore* 1 13 56.
119 *In Catilinam* 2 25.
120 *In Catilinam* 2 25; *Epistulae ad Familiares* 15 4 1; 15 5 14; *De Re Publica* 1 2 2.
121 *De Finibus* 2 23 76; *Pro Caecina* 23 65; *Pro Cluentio* 42 118; *De Oratore* 1 31 141 ; 3 27 107.
122 *Pro Caecina* 17 49; *Pro Rege Deiotaro* 2 7; *De Inventione* 1 11 14; *Pro Murena* 42.
123 *De Re Publica* 1 2 2; 1 35 55; *De Officiis* 2 8 27; 2 11 38; *De Finibus* 1 16 52; 2 18 59; 2 23 76; *Academica* 2 8 23.
124 *Topica* 24 94; *De Finibus* 2 23 76; 3 21 71.
125 *De Oratore* 3 27 107; *Epistulae ad Familiares* 13 37; *Pro Fonteio* 7 15; *In Verrem* 2 5 32 84.
126 *In Verrem* 2 2 35 86; *De Officiis* 2 5 18; *De Domo Sua* 1 2; *De Partitione Oratoria* 29 102.
127 *In Verrem* 2 4 37 81.
128 *De Amicitia* 5 19; *Epistulae ad Quintum Fratrem* 1 1 16 45.
129 *De Amicitia* 5 19.
130 *De Oratore* 1 13 56.
131 *Pro Cluentio* 70 199; *Pro Scauro* 8 17.
132 *Pro Marcello* 4 12; *In Verrem* 2 1 51 136.
133 *De Finibus* 2 26 83.
134 *De Officiis* 3 10 43; *De Oratore* 3 27 107; *In Verrem* 2 5 32 84.
135 *In Catilinam* 2 25; *De Oratore* 1 13 56; *De Re Publica* 1 2 2.
136 *Pro Cluentio* 70 200; *Pro Fonteio* 10 23; *De Re Publica* 1 2 2.
137 *De Finibus* 2 23 76; *De Partitione Oratoria* 29 102; *De Re Publica* 1 2 2. The term *rectitudo* is not Ciceronian.
138 *De Domo Sua* 1 2; *Pro Fonteio* 10 23; *De Partitione Oratoria* 37 130–131; *Pro Cluentio* 58 159; *De Re Publica* 1 2 2.
139 *Topica* 24 94; *Pro Caecina* 17 49; 27 77; 28 81; *De Oratore* 1 31 141; 3 27 107; 3 29 115; *De Finibus* 3 21 70; *De Inventione* 1 1 2; 2 48 142.
140 *Pro Cluentio* 30 81; 70 200; *De Partitione Oratoria* 29 102; *Pro Quinctio* 1 4.
141 *De Oratore* 1 13 56; 3 27 107; *Pro Cluentio* 70 200; *De Re Publica* 1 2 2; In *De Officiis* 1 25 89 and *Pro Fonteio* 7 15 *aequitas* is opposed to *iracundia* (irascibility).

Where there is doubt, Cicero says, whether a thing is equitable or inequitable, it should not be done, since equity shines as a light on its own, whereas doubt indicates thoughts about wrong.[142]

This is why Cicero can acclaim the "equity of the gods"[143] and Costa can state that *aequitas* (as seen by Cicero) constitutes the whole purpose of law.[144]

142 *De Officiis* 1 9 30: "Quocirca bene praecipiunt, qui vetant quicquam agere, quod dubites aequum sit an iniquum. Aequitas enim lucet ipsa per se, dubitatio cogitationem significat iniuriae."

143 *De Natura Deorum* 3 38 90: "O miram aequitatem deorum."

144 Costa *op cit* 40: "L'*aequitas* o *aequum bonum*, piuttosto che un fonte del diritto, è la finalità, come si notò dianzi, a cui il diritto intende." The importance of *aequitas* was accepted without question in the classical and post-classical Roman law. See, for example, *Digesta* 1 1 1 *pr* – 1 (Ulpian): "Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatam: nam, ut eleganter Celsus definit, ius est ars boni et aequi. 1 Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur. Aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatem affectantes." See also 50 17 90 (Paul): "In omnibus quidem, maxime tamen in iure aequitas spectanda est."

Verpanding van vorderingsregte: uiteindelik sekerheid?*

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SUMMARY

Pledge of Personal Rights: Legal Certainty at Last?

Cession *in securitatem debiti* is a controversial issue in South African law. Juridically, such a cession can be construed in two ways: it may be regarded as an out-and-out cession, or as a means of creating a pledge on personal rights (claims). An out-and-out cession is more acceptable dogmatically, whereas a pledge is more in accordance with the needs of practice. After several decades of dissent among academics and in the positive law on the true construction of the giving of security by means of claims, the appellate division has now in three recent decisions decided that such a cession should be regarded as a pledge.

This article examines the nature of a pledge of incorporeals and determines the extent to which the latest decisions are in accordance with the generally accepted effect of such a pledge. The conclusion is that in this regard the law is so unsatisfactory that the needs of practice and dogma can only be satisfied by legislation.

1 INLEIDING

In *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy*,[1] *Marais v Ruskin*[2] en *Bank of Lisbon and SA Ltd v The Master*[3] het die appèlhof sy benadering in *National Bank of South Africa Ltd v Cohen's Trustee*[4] ten opsigte van sessie *in securitatem debiti* bevestig en daarmee die verpandingskonstruksie aanvaar.

In die *Leyds*-saak[5] was die feite, eenvoudig gestel, die volgende: Die appellant was likwidateur in die insolvente boedel van die sedent (Sentramark). Die respondente was die skuldenare ten opsigte van vorderingsregte wat *in securitatem debiti* aan die Landbank gesedeer is. Die likwidateur het die skuldenare (aandeelhouers van 'n koöperatiewe landboumaatskappy met beperkte aanspreeklikheid) as kontribuante in sy kontribusierekening getoon op grond van 'n tekort

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1 1985 2 SA 769 (A).
2 1985 4 SA 659 (A).
3 1987 1 SA 276 (A).
4 1911 AD 235.
5 *supra*.

en hul aanspreeklikheid vir betaling van onbetaalde aandelekapitaal. Die respondente voer aan dat daardie regte aan die Landbank oorgedra is, dat die sedent se likwidateur dus nie daarop aanspraak kon maak nie en dat hulle gevolglik nie as kontribuante beskou moet word nie. In hierdie saak word die beginsel gehandhaaf dat die *dominium* van die vorderingsreg by die sedent bly en dat die trustee van sy insolvente boedel daarop geregtig is om die vorderingsreg as 'n bate in die insolvente boedel te administreer.[6] Die volgende motivering word vir die handhawing van die beginsel gegee:

> "Dit kom nie voor dat dit aanleiding gegee het tot enige onreg of tot praktiese probleme nie aangesien die sessionaris sy voorkeurreg behou op betaling uit die opbrengs van die gesedeerde vordering en terselfdertyd voorsiening gemaak word vir die belange van die boedel en van ander skuldeisers ten opsigte veral van enige oorskot wat daar mag wees na betaling van die sessionaris se eis."[7]

Die hof bevind dan dat die respondente (skuldenaars) by die lys van kontribuante ingesluit moes gewees het,[8] met ander woorde dat die sedent nog skuldeiser was. Met hierdie uitspraak en die effek daarvan kan weinig fout gevind word. Die advokate vir die respondente het in elk geval net die algehele sekerheidsessiekonstruksie gebruik omdat hulle verkeerdelik[9] van mening was dat so 'n sessie ook by insolvensie sy algehele karakter behou.

In die *Marais*-saak[10] was die feite soos volg: Moll het 'n skuldvordering van R88 730,40 teen die Moll-trust gehad. In April 1982 het hy R16 000 van Marais, trustee van die trust, persoonlik geleen en sy "reg en titel" teen die trust as sekuriteit aan Marais gesedeer. Op 1982-10-13 het Moll as deel van 'n skikkingsooreenkoms sy vorderingsregte teen die trust aan mevrou Moll gesedeer. Op 1983–04–19 is Moll insolvent verklaar. Die respondent (kurator van Moll se insolvente boedel) het in September 1983 Moll se skuld aan Marais betaal en terugsessie van Marais ontvang. Die respondent het daarna die eerste twee appellante (Marais en Benadé as trustees van die trust) gevra om die volle bedrag van die skuld aan hom te betaal. Hulle het geweier omdat mevrou Moll volgens hulle daarop geregtig was vanweë die sessie aan haar. In hierdie beslissing word die benadering in die *Leyds*-saak bevestig.[11] Die hof gaan egter ook in op die regsposisie van die sedent (pandgewer) en die sessionaris (pandhouer). Vir doeleindes van die uitspraak word aanvaar dat die *reversionary interest* sedeerbaar is, sonder dat die hof daaroor beslis.[12] Daar word ook bevind dat die sedent en sessionaris nie die bedoeling gehad het om die *reversionary interest* te sedeer nie, maar die vorderingsreg self.[13] Oor die aard van die sessionaris (pandhouer) se reg laat die hof hom soos volg uit:

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6 780A e v.
7 780F–G.
8 781B.
9 In regstelsels, soos die Duitse reg, waar hierdie soort fidusiêre sekerheidsessies algemeen erken word, word die algehele oordrag van die reg by beslaglegging en insolvensie beperk sodat dit in daardie gevalle tog nog as deel van die insolvente sedent se boedel beskou word: sien Scott *The Law of Cession* (1980) 136.
10 *supra.*
11 669I–670A.
12 670C.
13 670G: "Die sessie slaan, volgens die bewoording daarvan, op die vorderingsregte ('claims') wat Moll op 13 Oktober 1982 teen die trust gehad het, en dit is na my mening onrealisties om te sê dat dit bedoel was om op 'n begrip soos 'n 'reversionary right' ten opsigte van daardie vorderingsregte betrekking te hê."

> "Hierdie sessie het aan Marais die reg[14] verleen om, indien Moll nie sy skuld aan hom betaal nie, die trust aan te spreek vir die volle bedrag wat die trust aan Moll verskuldig was."[15]

Oor die aard van die *reversionary right* word gesê:

> "[H]ierdie 'reversionary right' [is] 'n reg ... wat Moll (as sedent) teen Marais (as sessionaris) gehad het om, by betaling van die skuld aan Marais, 'n terugsessie te ontvang van die vorderingsregte wat hy aan Marais gesedeer het. Dit was nie 'n reg wat Moll teen die trust gehad het nie."[16]

In die *Bank of Lisbon*-saak[17] was die feite kortliks die volgende: Die sedent het sy boekskulde aan Nedbank gesedeer *in securitatem debiti*. Daarna, op 1977–12–10, het hy ook aan die *Bank of Lisbon* sy boekskulde *in securitatem debiti* gesedeer. Die sedent ('n maatskappy) is op 1979–05–29 in likwidasie geplaas. In 'n later stadium ontstaan daar, in verband met die vraag of die Bank of Lisbon 'n bydrae tot die koste van realisasie van die boekskulde of tot die likwidasiekoste moet maak, 'n dispuut daaroor of die bank wel 'n versekerde skuldeiser was of nie. Die dispuut beland uiteindelik voor die appèlafdeling van die hooggeregshof. Met verwysing na die *Leyds*-saak bevestig die appèlhof die benadering ten opsigte van sessie *in securitatem debiti* wat hy in die *Cohen*-saak gevolg het en bevind gevolglik dat die *dominium*[18] van die vorderingsreg by die sedent bly en dat die sedent sy *reversionary right* verder kan verpand en sedeer.[19] Die hof wys daarop dat daardie appèlhofuitsprake waarin te kenne gegee word dat 'n algehele sekerheidsessie die enigste erkende vorm van sekerheidstelling deur middel van vorderingsregte is, bestaande gesag wat strydig hiermee is, negeer,[20] of op gesag berus wat later gekwalifiseer[21] is. Die appèl slaag dus en die hof bevind dat die bank 'n versekerde skuldeiser was.[22] Hierdie drie beslissings ruim ongelukkig nie die onduidelikheid wat in die praktyk oor sessies *in securitatem debiti* heers, uit die weg nie, maar vergroot dit eerder.

Die *Leyds*-saak het ten minste een onduidelikheid uit die weg geruim deurdat daar beslis is dat sessies *in securitatem debiti* 'n vorm van verpanding is. Alhoewel die hof dit nie uitdruklik so gestel het nie, is so 'n afleiding noodsaaklik omdat dit die houding van die hof in die *National Bank*-saak[23] was en omdat die hof bevind het dat die *dominium* steeds in die sedent (pandgewer) setel. Ongelukkig het die hof nie die presiese inhoud van die pandkonstruksie uiteengesit nie.[24]

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14 As "bevoegdheid" hier gebruik sou gewees het, sou dit volkome korrek gewees het, aangesien dit een van die realiseringsmoontlikhede by pandgewing is om die skuld te in: sien bespreking hieronder.

15 670I–J.

16 671E–F.

17 *supra*.

18 294B e v.

19 294G e v.

20 292F. Sien ook Scott *Cession* 143.

21 292B. Sien ook Scott *Cession* 142 vn 96.

22 44: "The company in clause 23 of the second cession pledged and ceded to the Bank all its reversionary rights in the first cession. This reversionary right, pledged and ceded by clause 23, was owned by the company before it was wound up. This right the company, before its winding up, ceded *in securitatem debiti* to the Bank. It was not ceding a '*spes* or expectation'. It was ceding an existing right. This right had a money value. It was this right which constituted the security on which the Bank relied when proving its claim. It was thus a secured creditor."

23 en sake wat daardie beslissing gevolg het: sien Scott *Cession* 139 e v.

24 Harker "Cession *in securitatem debiti*: In the Nature of a Quasi-Pledge" 1986 *SALJ* 200 201 opper dieselfde beswaar teen hierdie uitspraak.

Die *Marais*-saak bevestig bogenoemde standpunt, maar pas dan tog die beginsels van 'n algehele sekerheidsessie toe.[25] Hierdie uitspraak is verkeerd omdat pandregbeginsels nie suiwer toegepas is nie en die aard van die *dominium* of *reversionary interest* verkeerd vertolk is.

In die *Bank of Lisbon*-saak word na die *Cohen*- en *Leyds*-saak verwys, maar nie na die *Marais*-saak nie.[26] Die hantering van daardie vroeëre appèlhof-uitsprake waarin beslis is dat sessie *in securitatem debiti* slegs die vorm van 'n algehele regsoordrag kan aanneem, skep die indruk dat die hof hier slegs wou aantoon dat verpanding van vorderingsregte naas 'n algehele sekerheidsessie[27] kan voorkom en dat laasgenoemde nie die enigste wyse van sekerheidstelling deur middel van vorderingsregte is nie.[28] Die inhoud van die *dominium* en *reversionary interest* word nie duidelik omskryf nie en die hof bevind, vreemd genoeg, dat die objek van die betrokke sekerheid die sedent se reg op terugsessie is.

Vervolgens sal die verpanding van vorderingsregte ontleed word en aangedui word wat die algemeen aanvaarde effek daarvan is. Daar sal dan aangedui word in watter mate bogenoemde beslissings daarmee ooreenstem of daarvan afwyk. Vergelykenderwys sal na die Duitse reg[29] verwys word waar verpanding van vorderingsregte in die wetboek[30] neerslag gevind het nadat die dogmatiese besware daarteen voor praktyksbehoeftes moes swig.

2 WAAROM *VERPANDING* VAN VORDERINGSREGTE?

Ten spyte van dogmatiese besware daarteen,[31] is daar in die praktyk 'n behoefte aan 'n verpanding van vorderingsregte. Die rede is dat die partye hier dieselfde beoog as wat by 'n verpanding van liggaamlike sake beoog word,[32] naamlik dat

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25 Boraine 1986 *De Jure* 171 174 aanvaar dat die hof bedoel het om die beginsels van 'n algehele sekerheidsessie toe te pas. So 'n standpunt is egter nie te rym met die hof se uitdruklike bevestiging van die *Leyds*-saak nie.

26 Dit is interessant om daarop te let dat ar Joubert by al drie beslissings betrokke was; hr Rabie in die *Marais*- en *Bank of Lisbon*-sake, en so ook ar Jansen.

27 Oor die presiese aard van sodanige sessies sien Scott *Cession* 135 e v.

28 Die hof gee nêrens te kenne dat 'n algehele sekerheidsessie nie in ons reg bestaan nie, maar toon slegs aan dat die gesag waarin beweer word dat dit die *enigste* vorm van sekerheidstelling deur middel van vorderingsregte is, verkeerd is.

29 Sien Pahl *Die Aanwending van Vorderingsregte ter Versekering van Skulde* (proefskrif US 1972) 159 e v vir die posisie in die Engelse, Franse, Switserse en Nederlandse reg.

30 *BGB* par 1273–1296.

31 De Wet en Yeats *Kontraktereg en Handelsreg* (1978) 365 e v; Pahl 177 e v; Harker "*Cession in securitatem debiti*" 1981 *SALJ* 56 61; Van Warmelo "Saaklike Sekerheidsregte oor Onliggaamlike en Roerende Goedere" 1981 *TSAR* 65. Hierdie dogmatiese besware is egter reeds teen die einde van die vorige eeu in Duitsland die nek ingeslaan; sien Westermann *Sachenrecht* (1966) par 136 I 2: "Die Frage nach dem Wesen des Pfandrechts an Rechten hat lange Zeit zu den 'berühmt-berüchtigten Konstruktionsfragen' gehört: die begriffliche Erfassung eines Pfandrechts, d.h. eines absoluten Rechts an einer Forderung, also an einem relativen Recht, hat zu endlosen Kontroversen geführt. Uberwegend wird aber heute anerkannt, dass es sich beim Pfandrecht um ein Recht am verpfändeten Recht handelt, . . . so dass der Streit vor allem um die dingliche oder schuldrechtliche Natur des Pfandrechts geht. Als herrschend kann heute die Ansicht angesehen werden, die im Pfandrecht ein Recht des gleichen Inhalts wie das verpfändete Recht sieht, danach ist z.B. ein Forderungspfandrecht ein relatives Recht. . ."

32 Van der Merwe *Sakereg* (1979) 462; Wille *Mortgage and Pledge* (1987) 4. Die wese van verpanding van regte en verpanding van liggaamlike sake is dus dieselfde: Scholz/Lwowski *Das Recht der Kreditsicherung* (1986) par 472.

die sekerheidsnemer sy vorderingsreg verseker deur 'n beperkte saaklike reg[33] op 'n vermoënsbestanddeel (onliggaamlike saak) van sy skuldenaar te verkry wat hom in staat stel om by wanbetaling sy skuld deur middel van die verpande vorderingsreg te delg.[34] Die verpande objek bied op tweërlei wyse sekerheid: by wanbetaling kan die sekerheidsnemer die objek ter bevrediging van sy skuld realiseer en by beslaglegging of insolvensie van die sekerheidsgewer word voorkeur aan die sekerheidsnemer verleen. Albei partye se behoeftes word dus bevredig: die sekerheidsnemer verkry sekuriteit vir nakoming van die sekerheidsgewer se verpligting, met ander woorde sy vorderingsreg word verseker, en die sekerheidsgewer behou die sekerheidsobjek as deel van sy boedel, sodat die belange van ander skuldeisers ook beskerm word.[35] Hier vind dus nie soos by 'n algehele sekerheidsessie 'n vermoënsverskuiwing plaas nie.[36]

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33 Die pandreg moet dus nie alleen deur die pandgewer nie, maar ook deur derdes gerespekteer word: Scholz/Lwowski par 478. Harker 1981 *SALJ* 56 61 erken dat dit presies is wat die skuldeiser verlang, maar verwerp die bestaan van 'n saaklike reg op vorderingsregte dan weer as "a conclusion which *seems to be*, notionally, jurisprudentially impossible to achieve." (my kursivering). Uit sy hele artikel blyk dit nie waarom dit dogmaties onaanvaarbaar, en gevolglik verkeerd is nie. Hy wys op die gebreke van 'n algehele sekerheidsessie soos dit by ons voorkom (64) en verwerp ook hierdie vorm van sekerheidstelling. Harker bepleit 'n sekerheidsreg *sui generis* (65). Hiervolgens verkry die sessionaris die volle reg en die sedent die reg op terugsessie uit die *pactum fiduciae*. Die sessionaris mag die reg nie verder oordra nie vanweë die *nemo dat quid non habet*-reël. Hierdie argument gaan nie op nie want as die sessionaris reghebbende geword het, het hy ook die beskikkingsbevoegdheid en is die *nemo plus juris*-reël nie van toepassing nie. Sy verdere argument dat die sessionaris die skuldenaar nie kan kwytskeld nie omdat dit 'n verbreking van die sedent en sessionaris se kontrak is, gaan ook nie op nie want derdes word nie deur sodanige ooreenkoms gebind nie, behalwe as die beginsels van die kennisleer van toepassing is. By insolvensie van die sessionaris, argumenteer Harker, kan die trustee slegs soveel vorder as wat nodig is om die sedent se skuld te delg. Al wat hy meer vorder, vorder hy as trustee vir die sedent. Harker toon nie aan wat die basis van hierdie argument is nie, behalwe dat hy dit as "manifestly unfair" beskou om die sedent as konkurrente skuldeiser te beskou (67). By insolvensie van die sedent, argumenteer Harker, setel die *reversionary interest* in die trustee en deur die Insolvensiewet word hy verplig om alle roerende sake wat deur skuldeisers as sekuriteit gehou word, te vorder. Gevolglik moet die vorderingsreg wat oorgedra word as 'n bate van die insolvente boedel geadministreer word waarop die sessionaris dan 'n voorkeurreg verkry. Omdat die definisie van "security" in die Insolvensiewet nie hierdie vorm van sekerheid dek nie, argumenteer hy, moet dit as 'n *quasi*-pand beskou word wat dan blykbaar wel deur die definisie gedek sou wees. Hierdie konstruksie van Harker is myns insiens verkeerd: dit misken die aard van 'n algehele regsoordrag; hy pas die *nemo plus juris*-reël verkeerd toe en by insolvensie val hy tog maar weer op pandregbeginsels terug, maar noem die sekerheidsvorm dan 'n *quasi*-pand. Die vraag ontstaan of 'n *quasi*-pand wel deur die woord "pand" in die wet gedek word? In 'n bespreking (1986 *SALJ* 200) van die *Leyds*- en *Marais*-sake herhaal Harker sy standpunt soos hierbo uiteengesit en maak die volgende eienaardige uitlating: "It will be appreciated that this theory [dat 'n sessie *in securitatem debiti* 'n eiesoortige (*sui generis*) vorm van sekerheidstelling is] is in essence an adaptation of the so-called pledge theory of a cession *in securitatem debiti* and an attempt to explain the nature of such a cession on dogmatically sound principles of law. There surely can be no harm in recognizing a cession by way of security as being in the nature of a *quasi*-pledge, provided that it is appreciated that the use of terminology of pledge is merely for purposes of description and convenience."

34 Die pandnemer verkry dus 'n saaklike reg om die pandvoorwerp (die vorderingsreg) by wanbetaling te realiseer: sien *National Bank of SA v Cohen's Trustee supra* 245; *Kuranda v Boustred* 1933 WLD 49 53: "That is usually the reason why it is given as security and it means then that the creditor has the right to utilise such right for the purpose of liquidating the claim which he has against the debtor with the obligation of accounting for any balance that may be over." Sien ook die bespreking hieronder.

35 Sien ook *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy supra* 780F–G.

36 soos wat verkeerdelik in die *Marais*-saak 670I gemeen word: "Moll het al sy vorderingsregte teen die Trust aan Marais gesedeer. . . "

3 TOEPASLIKE BEGINSELS

Die algemene beginsels van pandreg kan met vrug hier toegepas word,[37] behalwe in soverre die aard van die sekerheidsobjek dit onmoontlik maak.[38]

Die grondbeginsels van publisiteit,[39] bepaaldheid en aksessoriteit[40] moet dus gehandhaaf word. Aangesien 'n mens met 'n saaklike sekerheidsreg te doen het, *moet* publisiteit daaraan gegee word.[41] Volgens die howe[42] is sessie van onliggaamlike sake (vorderingsregte) die ekwivalent van lewering van ligaamlike sake. Gevolglik word gesê dat waar 'n pandreg op liggaamlike sake deur die oordrag van besit (lewering) gevestig word, 'n pandreg op onliggaamlike sake deur die oordrag van *quasi*-besit verskaf word. Laasgenoemde oordrag geskied deur middel van sessie en hierdie besitsverskuiwing is voldoening aan die publisiteitsvereiste.[43] Hierdie houding van die howe is op twee gronde aanvegbaar: die aard van die sekerheidsobjek is verskillend. By 'n saakpand word besit van die saak self oorgedra, terwyl by die verpanding van vorderingsregte slegs die bevoegdheid om te realiseer[44] oorgedra word en nie die saak (vorderingsreg) self nie. By 'n gewone sessie word die vorderingsreg self deur die sessie oorgedra, met ander woorde die sessie bewerkstellig 'n vermoënsverskuiwing terwyl dit by 'n verpanding slegs een van die bevoegdhede van die vorderingsreghebbende ter vestiging van 'n saaklike sekerheidsreg laat oorgaan.[45] Tweedens is lewering van die saak 'n uiterlik waarneembare feit waardeur aan die publisiteitsvereiste voldoen

37 Dit is ook in ooreenstemming met die regspraak: sien *De Hart v Virginia Land and Estate Co Ltd* 1957 4 SA 501(O) 505A; *Volhand & Molenaar (Pty) Ltd v Ruskin* 1959 2 SA 751 (W) 754E; *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A) 186; *Muller v Trust Bank of Africa Ltd* 1981 2 SA 117 (N) 124H. Macaulay "Cessions of Reversionary Rights in Book Debts' 1983 *De Rebus* 526 530 voorsien "logical difficulties" by die toepassing van pandregbeginsels, maar soos die Duitse reg reeds vir meer as 100 jaar ervaar het, is dit nie onoorkomelik nie.

38 Bauer *Sachenrecht* (1983) par 62 II; Bülow *Recht der Kreditsicherheiten* (1984) par 122.

39 Wille 48.

40 Wille 5 166.

41 Van der Merwe 12; Sonnekus "Die Publisiteits- en *paritas creditorum*-beginsel by Mobiliêre Sekerheidsregte in die Duitse Reg" 1984 *TSAR* 53; Wille 48.

42 *Smith v Farrelly's Trustee* 1904 TS 949 955; *Volhand & Molenaar (Pty) Ltd v Ruskin supra* 754G–H; *Guman v Latib* 1965 4 SA 715 (A) 722D; *Oertel v Brink* 1972 3 SA 669 (W) 674D. Pahl 139 179 kritiseer hierdie houding van die howe.

43 Harker 1981 *SALJ* 56 61 meen dat nie aan hierdie vereiste voldoen kan word by vorderingsregte nie en dat 'n verpanding daarom nie moontlik is nie. Hy is skynbaar onbewus van bg *dicta* waarin gesê word dat *quasi*-besit van 'n reg oorgedra kan word en van die Duitsers se reëling om aan die publisiteitsvereiste te voldoen. Hy beskou oorhandiging van die dokument as voldoening aan die publisiteitsvereiste by algehele sekerheidsessies. Oorhandiging van die dokument voldoen egter net aan die publisiteitsvereiste waar die vorderingsreg vereenselwig word met die dokument waarin dit beliggaam is: sien *Münchener Kommentar BGB* par 1279 II 2; Soergel-Baur *Kommentar BGB* par 1280 2.

44 Daar mag moontlik geargumenteer word dat die *quasi*-besit waarna die howe verwys as die bevoegdheid om te realiseer, gesien kan word: sien veral *Oertel v Brink supra* 674D.

45 Volgens Pahl 139 e v 179 is sessie altyd die oordrag van 'n vorderingsreg in sy geheel. Waar daar dus 'n sessie was, het 'n vermoënsverskuiwing plaasgevind. Dit beteken blykbaar egter nie dat 'n verpanding nie ook moontlik is nie – hierdie pandreg kan net nie deur sessie gevestig word nie. Ongelukkig verduidelik Pahl nie hoe dit gevestig moet word nie: sien Pahl 152 156.

kan word, terwyl sessie nie sodanige feit is waardeur derdes, en veral die skuldenaar, op hulle hoede gestel word nie.[46] In die Duitse reg word kennisgewing aan die skuldenaar dus vereis om aan die publisiteitsvereiste te voldoen,[47] terwyl ons howe die blote sessie as genoegsame publisiteit beskou. Waar lewering van die dokument waarin die reg beliggaam is as geldigheidsvereiste[48] vir die sessie self betrek word, kan dit moontlik as voldoening aan die publisiteitsvereiste gesien word.[49]

Wat die bepaaldheidsvereiste[50] betref, moet dit uit die sessie duidelik wees wat die objek van die oordrag is. Meestal word vorderingsregte, gerig op die betaling van 'n geldsom, verpand, maar hulle kan ook op ander prestasies soos die lewering van 'n saak gerig wees.[51]

Die aksessore karakter van pandreg het tot gevolg dat die pandreg outomaties verval wanneer die hoofskuld gedelg word.[52] Waar die pandhouer by 'n saakpand nog in fisiese beheer van die saak is, moet hy dit aan die eienaar teruglewer. By die verpanding van regte, waar die bevoegdheid om die vorderingsreg te realiseer oorgedra is, is dit nie nodig om hierdie bevoegdheid terug oor te dra nie aangesien dit outomaties verval.[53]

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46 Westermann 638 671.

47 *Münchener Kommentar BGB* par 1280 I 1: "Die Anzeige soll – entsprechend der Übergabe bei der Verpfändung beweglicher Sachen – die (bedingte) Aussonderung aus dem Vermögen des Verpfänders/Glaübigers äusserlich erkenbar machen;" Scholz/Lwowski par 507; Bülow par 128; Baur par 62 B I 1; B II 1 2; Riedel *Abtretung und Verpfändung von Forderungen und anderen Rechten* (1982) par 4 62. Hierdie vereiste was in hoofsaak die oorsaak vir die ontwikkeling van algehele sekerheidsessies in Duitsland, aangesien die sedent nie die feit wil openbaar dat hy sy regte as sekuriteit oordra nie: sien Serick *Eigentumsvorbehalt und Sicherungsübertragung* II (1965) 35.

48 By sekere *Wertpapiere* is dit 'n vereiste en kan die regte daaruit slegs verpand word vanweë die afhanklikheid van die vorderingsreg van die dokument.

49 By *Wertpapiere* is kennisgewing dan ook nie nodig nie, maar is oorhandiging van die dokumente genoegsaam. Die *Cohen*-saak handel oor 'n brandversekeringspolis wat gesedeer is en omdat hr De Villiers oorhandiging van die dokument waarin die reg beliggaam is as geldigheidsvereiste vir sessie stel (sien Scott *Cession* 19 e v) beskou hy in hierdie saak waarskynlik oorhandiging van die dokument as voldoening aan die publisiteitsvereiste. Die *Oertel*-saak handel oor aandele waar lewering van die dokument ook 'n geldigheidsvereiste vir die sessie is.

50 Baur par 62 A II; Weber *Sicherungsgeschäfte* (1986) 208.

51 Bülow par 122; *Münchener Kommentar BGB* par 1279 1965; Westermann par 137 I; Weber 211.

52 Van der Merwe 472; Wille 5 166. *Standard Bank of SA Ltd v Neethling* 1958 2 SA 25 (K) 30A–D. In die meeste Suid-Afrikaanse beslissings oor verpanding van vorderingsregte word nie uitdruklik hieraan aandag gegee nie, maar uit die strekking blyk dit dat die beginsel toegepas word. In die *Marais*-saak 671A is die aksessore karakter van pandreg egter ook uit die oog verloor.

53 Hierdie beginsel is gehandhaaf in *National Bank of SA Ltd v Cohen's Trustee supra* 246 en in *Bank of Lisbon and SA Ltd v The Master supra* 294E. In *Marais v Ruskin supra* 671A e v word hierdie beginsel egter nie toegepas nie en 'n terugsessie word vereis. Pahl 192 meen dat 'n terugsessie by 'n verpanding ook noodsaaklik is omdat "besit" van die reg terugoorgedra moet word. As die analogie met 'n saakpand volkome deurgetrek word, het hy moontlik reg. Sien ook *Botha's Executor v Du Plooy and Dreyer* (1897) 14 SC 414 420 e v. Volgens *George Loader & Co v Vosloo* 1939 OPD 151 157 en *Oertel v Brink supra* 675A e v moet die *quasi*-besit ook teruggesedeer word. Lg twee sake het oor aandele gehandel en daar is beslis dat, alhoewel die pandreg verval het, die aandeelsertifikate teruggelewer moes word. Hier word die reg weer met die dokument waarin dit beliggaam is, vereenselwig sodat 'n mens, soos by *Wertpapiere*, eintlik met die verpanding van 'n liggaamlike saak te doen het.

4 VESTIGING

Vir die vestiging van 'n pandreg op vorderingsregte word 'n sekerheidsooreenkoms, 'n sessie en kennisgewing vereis. Die sekerheidsooreenkoms is 'n verbintenisskeppende ooreenkoms waarin die pandgewer onder andere onderneem om te sedeer. Uit hierdie ooreenkoms moet ook duidelik blyk dat die partye 'n verpanding en nie 'n ander vorm van sekerheidstelling soos 'n algehele sekerheidsessie,[54] 'n invorderingsessie of 'n invorderingsvolmag beoog nie. In die *Bank of Lisbon*-saak[55] lê die hof ook klem op hierdie vereiste waardeur die vermoede myns insiens versterk word dat die hof 'n algehele sekerheidsessie nie absoluut wou uitskakel nie. Wanneer pandgewing die oogmerk van die sekerheidsooreenkoms is, word dit gewoonlik 'n pandgewingsooreenkoms genoem.

Sessie[56] is die oordragshandeling waardeur die pandvoorwerp aan die pandnemer oorgedra word. Die oordragsooreenkoms kan in die pandgewingsooreenkoms opgeneem word, maar die twee ooreenkomste moet duidelik onderskei word.[57] Die objek van die sessie moet in die oordragsooreenkoms baie duidelik omskryf word. Waar 'n vorderingsreg verpand word, word slegs die bevoegdheid om dié reg te realiseer deur die sessie oorgedra en die *dominium* berus nog by die sedent.

Kennisgewing van die sessie aan die skuldenaar is die wyse waarop aan die publisiteitsvereiste[58] voldoen word. Eers na kennisgewing ontstaan die sessionaris se pandreg. Waar 'n vorderingsreg vereenselwig word met die dokument waarin dit beliggaam is, is lewering van die dokument 'n geldigheidsvereiste vir sessie en word dit ook as nakoming van die publisiteitsvereiste gesien.

5 REGSPOSISIE VAN DIE PARTYE

Die regsposisie van die pandgewer[59] (sedent, sekerheidsgewer,[60] pandskulde-

54 D w s as algehele sekerheidsessies ook as 'n vorm van sekerheidstelling d m v vorderingsregte erken word. Verder kan nie aanvaar word dat die partye 'n algehele sekerheidsessie beoog het bloot vanweë 'n versuim om kennis van die vepanding aan die skuldenaar te gee nie. Sien ook Pahl 136 152 156.

55 *supra* 294D–E. Die hof doen dit met verwysing na die volgende aanhaling uit *National Bank of SA Ltd v Cohen's Trustee supra* 252: "if it was clear that the parties did not intend it [eiendomsreg] to pass."

56 Sessie geskied deur blote ooreenkoms, alhoewel daar ook bykomstige vereistes is: sien Scott *Cession* 17 e v. Riedel par 4.32 en Bülow par 123 verwys hier na die oordragsooreenkoms as 'n "*dinglicher Vertrag*," waarskynlik omdat dit oor die vestiging van 'n saaklike reg gaan. Ander skrywers noem dit hier ook 'n "*Abtretungsvertrag*:" sien Westermann par 137 II 1; *Münchener Kommentar BGB* par 1279 1967.

57 Scott *Cession* 5 e v. Dit is dus verkeerd om sessie as 'n kontrak te beskou soos wat in die *Bank of Lisbon*-saak 294E gedoen is: "In cessions *in securitatem debiti*, as *in all contracts*, the purpose and object which the parties had in mind must not be ignored" (my kursivering).

58 *Münchener Kommentar BGB* par 1279 1967; Bülow par 128 137; Baur par 62 II 1 2; Scholz/Lwowski par 455; Riedel par 4 62. Sien verder Soergel-Baur *Kommentar BGB* par 1280 2.

59 Voortaan sal die term "pandgewer" gebruik word om die persoon wat sekerheid stel aan te dui. Hy is ook sedent, maar dit is slegs 'n gevolg van die feit dat hy pandgewer is. Om die pandreg te vestig, sedeer hy sy bevoegdheid om te gelde te maak.

60 Die pandgewer is sekerheidsgewer. Hy kan egter nie net vir 'n eie skuld sekerheid gee nie, maar ook vir die skuld van 'n derde.

naar,[61] skuldeiser[62]) en die pandnemer[63] (sessionaris, pandhouer, pandskuldeiser[64]) sal vervolgens van nader bekyk word. Die skuldenaar[65] se posisie is dieselfde as enige ander skuldenaar s'n by sessie.

5 1 Pandgewer

Volgens die pandkonstruksie behou die sedent die *dominium*,[66] met ander woorde hy bly reghebbende[67] (skuldeiser) en al wat hy aan die sessionaris oordra, is die bevoegdheid om die vorderingsreg te realiseer.[68] Aangesien hy reghebbende bly, kan hy oor die vorderingsreg beskik vir sover dit nie die pandreg aantas nie.[69] Hy kan dus die vorderingsreg self oordra. Wanneer die pandgewer die vorderingsreg self, of tewel die *dominium*[70] aan 'n derde oordra, word die derde reghebbende. Hierdie oordrag geskied ook deur middel van sessie en die derde

61 Waar die pandgewer vir sy eie skuld sekerheid verskaf, is hy ook pandskuldenaar, m a w skuldenaar t o v die hoofskuld.

62 Die pandgewer is ook skuldeiser van die vorderingsreg wat verpand word.

63 Voortaan sal die terme "pandnemer of -houer" gebruik word om die persoon aan wie sekerheid gestel word, aan te dui. Hy is ook sessionaris maar dit is hy slegs as gevolg van die feit dat die pandreg deur sessie gevestig word.

64 Die pandnemer is ook skuldeiser t o v die hoofskuld.

65 Die skuldenaar is die skuldenaar t o v die vorderingsreg wat as sekuriteit dien. Die pandhouer kan ook skuldenaar wees van die vorderingsreg wat as sekerheid dien, bv waar 'n kliënt sy vorderingsreg teen die bank aan die bank verpand as sekuriteit vir 'n eis wat die bank teen hom het. Die Duitse reg noem die skuldenaar hier "*der Drittschuldner*."

66 *National Bank of SA Ltd v Cohen's Trustee supra* 245 252; *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy supra* 670A 780B; *Marais v Ruskin supra*; *Bank of Lisbon and SA Ltd v The Master supra* 294B e v. In *Trust Bank of Africa Ltd v Standard Bank of SA Ltd supra* 186 word die volgende oor die *dominium* gesê: "[O]ur law recognises a measure of residual *dominium*, however *tenuous and ill-defined*, in the cedent . . ." (my kursivering).

67 Riedel par 4 322: "Die Verpfändung hat nicht wie die Abtretung einen Gläubigerwechsel in Rechtsnachfolge als Wirkung . . ., sondern die Wirkungen sind andersartig, nämlich eine Belastung des Rechts mit dem Inhalt, dass der Pfandgläubiger berechtigt ist, Befriedigung aus dem Pfandgegenstand zu suchen . . .;" par 4 361: "Es tritt kein Gläubigerwechsel ein, sondern die Substanz des Rechts verbleibt beim Verpfänder . . .;" Scholz/Lwowski par 473: "Es [die pandreg] vermittelt dem Sicherungsnehmer nur die vom Gesetz umgrenzten Befugnisse, nicht die rechtliche Stellung eines Inhabers des verpfandeten Rechts."

68 Riedel par 4 322; Baur par 62 A I: "wird bei dem Pfandrecht an einem Recht die Verwertungsbefugnis aus der Substanz des Rechts ausgegliedert;" *Münchener Kommentar BGB* par 1273 1913; Weber 122 118: "Wie bei der Verpfändung einer Sache die Verwertungsbefugnis aus dem Eigentum 'abgespalten' wird und auf den Pfändgläubiger übergeht, wird die Verwertungsbefugnis auch beim Rechtspfand aus der Substanz des verpfändeten Rechts herausgelöst und auf den Pfandgläubiger übertragen." Sien ook *Colyvas v Standard Bank* 1926 AD 56 57.

69 Bülow par 126: "Verfügungen, die das Pfandrecht nicht beeinträchtigen, sind dagegen wirksam. So kann das Recht z.B. auf einem Dritten übertragen werden: Das Pfandrecht bleibt dann trotzdem bestehen;" Weber 118: "Das Pfandrecht lastet auf dem verpfändeten Recht und wird durch Verfügungen über dieses Recht nicht berührt. Tritt der Inhaber das verpfändete Recht an einem Dritten ab, so erwirbt dieser es *belastet*, er muss die Verwertung durch den Pfandgläubiger also hinnehmen." Sien ook *Frankfurt v Rand Tea Rooms Ltd and Sheffield* 1924 WLD 256.

70 Sien die minderheidsuitspraak in *Bank of Lisbon and SA Ltd v The Master* 1984–12–19 (T) (ongerapporteer) 37. Macaulay 1983 *De Rebus* 526 530 stel die volgende vraag in hierdie verband: "How can the residual *dominium* be delivered when the first cessionary alone can enforce the cause of action on which the right of action depends?" Die wyse van oordrag, nl sessie, maak dit moontlik om die *dominium* oor te dra; die sessionaris het in elk geval net die bevoegdheid om by wanbetaling die pandobjek te realiseer. As lewering van die dokument 'n geldigheidsvereiste vir die eerste sessie is, mag dit egter hier in die weg van

verkry dieselfde regte as wat die sedent gehad het. Die derde moet aan die skuldenaar kennis van die sessie gee sodat die skuldenaar, nadat die pandreg verval het, nie meer bevrydend aan die sedent kan betaal nie. Omdat die derde dieselfde regte verkry as wat die sedent gehad het,[71] het hy nie die bevoegdheid om die reg te realiseer nie – dit kan hy alleen doen nadat die pandreg verval het. Vanweë die feit dat die derde met die *dominium* beklee is, word hy na delging van die skuld outomaties volreghebbende aangesien pandreg 'n aksessore karakter het.

Die behoud van die *dominium* stel die pandgewer ook in staat om verdere pandgewingsooreenkomste ten opsigte van die vorderingsreg aan te gaan. Net soos by liggaamlike sake kan meerdere pandregte nie gelyktydig oor dieselfde vorderingsreg gevestig word nie. Ten einde die daadwerklike vestiging van die latere pandregte waarop ooreengekom is uit die hande van die pandgewer te neem, kan die oordragsooreenkoms egter *in anticipando* aangegaan word.[72] Om die rangorde van meerdere pandhouers te bepaal, word na die datums van die oordragsooreenkomste gekyk en of aan al die ander vereistes[73] vir sessie voldoen is.

Die behoud van die *dominium* bring voorts mee dat die vorderingsreg vir doeleindes van beslaglegging of insolvensie deel van die pandgewer se boedel uitmaak.[74] Voorts kan die pandgewer van aandele nog steeds sy stemreg uitoefen.[75] Die pandgewer kan egter nie sonder die toestemming van die pandhouer die vorderingsreg deur ooreenkoms met die skuldenaar verander of wysig nie.[76]

By die verpanding van vorderingsregte word die bevoegdhede van die reghebbende (eienaar) dus opgebreek, net soos by vruggebruik of die verpanding van liggaamlike sake,[77] en sommige daarvan word oorgedra terwyl die reg in

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vervolg van vorige bladsy

'n latere sessie van die *dominium* staan. Dit sal wel die geval wees by regte wat met die dokument vereenselwig word, bv *Wertpapiere*: sien Malan *Collective Securities Depositories and the Transfer of Securities* (1984) 7. Oor die problematiek van sessie van eiendomsreg sien Scott *Cession* 13 e v.

71 Weber 118.

72 Riedel par 4 323. As 'n oordragsooreenkoms die enigste vereiste vir sessie is, kan dit vooraf aangegaan word en die sedent kan dit nie eensydig herroep nie aangesien dit 'n voltooide regshandeling is: sien Bülow 212; Nörr/Scheyhing *Handbuch des Schuldrechts 2 Sukzessionen* (1983) 139. In ons reg word ook nou erken dat 'n sessie *in anticipando* aangegaan kan word en dat die partye, behalwe in die geval van insolvensie, daaraan gebonde is: sien *Muller v Trust Bank of Africa supra*; *Bank of Lisbon and SA Ltd v The Master supra* 294G.

73 Lewering van die dokument en die bepaaldheidsvereiste mag hier probleme verskaf: sien Scott "Sessie en *Factoring* in die Suid-Afrikaanse Reg" 1987 *De Jure* 15.

74 soos wat na die *Cohen*-saak algemeen aanvaar word. Macaulay 1983 *De Rebus* 526 529 wys tereg daarop dat by 'n algehele sekerheidsessie die vorderingsreg in sy geheel op die sessionaris oorgaan en dat nie meer geargumenteer kan word dat die eis "property of his [die sedent se] estate" ingevolge a 83 van die Insolvensiewet is nie. Die belang van die onderskeid tussen verpanding en algehele sekerheidsessies word dus duidelik: sien ook Scott *Cession* 136.

75 Scholz/Lwowski par 473.

76 Bülow par 126; Scholz/Lwowski par 514.

77 Riedel 128 132; *Münchener Kommentar BGB* par 1276 I 1; Weber 118; Heck *Grundriss des Sachenrechts* (1930 1960 heruitg) par 120.

wese by die pandgewer bly.[78] Dit behoort dus duidelik te wees dat die volgende algemeen aangehaalde gedeelte uit *Barclays Bank (DC & O) v Riverside Dried Fruit Co (Pty) Ltd*[79] verkeerd is:

> "The term '*dominium*' for this almost nothing is too sanctified by authority for me to quarrel with it, but I think it may be misleading unless it is carefully kept in mind that it is, as Watermeyer, J., said, 'a sort of reversionary interest' and, as Stratford, J., said, an interest which gives the owner of the *dominium* no right to exercise the rights of a *dominus*."

Hierdie argument[80] gaan egter nie op nie aangesien die konsekwente toepassing daarvan sou meebring dat die eienaar tydens die bestaan van 'n vruggebruik en die pandgewer van 'n liggaamlike saak ook geen regte het nie, want hulle kan nie al die bevoegdhede van 'n eienaar uitoefen nie.[81]

Dié verwatering van *dominium* tot 'n *reversionary interest* het later ook tot groot onsekerheid en verwarring aanleiding gegee. Wanneer die woorde "reversionary interest (right)"[82] dus gebruik word, moet vasgestel word wát presies daarmee bedoel word en of dit in 'n gegewe geval die bedoelde betekenis kán hê. Aanvanklik is *reversionary interest* as sinoniem vir *dominium* gebruik.[83] Later is dit aangewend om 'n reg op terugsessie aan te dui.[84]

By 'n verpanding, waar die pandgewer die *dominium*[85] behou, kan *reversionary interest* slegs dui op die outomatiese terugval van die bevoegdheid om te realiseer

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78 Harker 1981 *SALJ* 56 62 sê die volgende t o v eiendomsreg van liggaamlike sake: "For ownership is really an idea, an imaginary conception which consists of a conglomeration of all the various interests or rights which may exist between a person and a thing. It is, therefore, possible to split up the various rights which together make up the concept of ownership, and to vest some of these rights in the creditor while the rest remain vested in the debtor." T o v van onliggaamlike sake verklaar hy egter dat "this solution is conceptually impossible." Alhoewel hy sê daar is net een reg, nl die persoonlike reg om die skuldenaar te dwing om te presteer, verwys hy self later na die "*power* to enforce the right" (my kursivering). Vir hom het 'n vorderingsreg dus net verbintenisregtelike betekenis en geen sakeregtelike waarde as oordraagbare bate in 'n persoon se boedel nie. Pahl 165 kritiseer ook hierdie opsplitsing van die vorderingsreg.

79 1948 CPD 937 946.

80 'n Soortgelyke argument word in *Moola v Estate Moola* 1957 2 SA 463 (N) 464 gebruik: "Ownership of a right of action would seem to imply the right to sue, and if the right to sue has passed to the cessionary it is difficult to imagine what can remain with the cedent."

81 Die absurditeit van hierdie argument word ook in die minderheidsuitspraak in *Bank of Lisbon and SA Ltd v The Master* (T) *supra* 36 soos volg geïllustreer: "If I may permit myself a little rhetoric: what, I ask, remains with the pledgor of a gold watch once he has delivered it? The bare ownership, of course, will be the retort. And, may I transfer that bare ownership to another while the pledgee has possession of the watch? Certainly must be the reply, it is merely a question of how that transfer is to be effected."

82 Dit is interessant om daarop te let dat daar aanvanklik van 'n "interest" gepraat is (*Barclays Bank (DC & O) v Riverside Dried Fruit Co (Pty) Ltd supra* 946) en later van 'n "right" (*Moola v Estate Moola supra* 464C; *Italtrafo SpA v Electricity Supply Commission* 1978 2 SA 750 (W); *Big Sixteen (Pty) Ltd v Trust Bank of Africa Ltd* 1978 3 SA 1032 (C) 1035G; *Marais v Ruskin supra* 669A e v; *Bank of Lisbon and SA Ltd v The Master supra* 294G e v).

83 *Barclays Bank (DC & O) v Riverside Dried Fruit Co (Pty) Ltd supra* 946. Sien ook Pahl 150.

84 Hier verwys dit na die reg op terugsessie wat by algehele sekerheidsessies uit die *pactum fiduciae* ontstaan; sien ook Harker 1981 *SALJ* 56 63.

85 Soos hierbo aangetoon, behels die behoud van die *dominium* meer as die *reversionary interest.*

na delging van die hoofskuld[86] of die pandgewer se reg op die oorskot[87] nadat die vorderingsreg deur die pandnemer ter delging van die hoofskuld gerealiseer is. Dit is die noodwendige inhoud van die behoud van die *dominium*.

By 'n algehele sekerheidsessie waar die vorderingsreg in sy geheel oorgedra word, kan *reversionary right* dui op die reg op terugsessie van die vorderingsreg nadat die skuld betaal is[88] of op die reg op oorbetaling van die oorskot nadat die vorderingsreg afgedwing is en die skuld bevredig is. Albei hierdie regte ontstaan uit die *pactum fiduciae*.

In die lig van bogenoemde betekenisse wat *reversionary interest* kan hê, moet vasgestel word of dit sedeerbaar is.

a Waar *reversionary interest* as sinoniem vir *dominium*[89] gebruik word, is dit 'n bestaande reg wat gesedeer kan word, soos reeds hierbo uiteengesit.[90]

b Waar *reversionary interest* gebruik word om die reg op terugsessie van die vorderingsreg self aan te dui, is dit ook 'n bestaande reg[91] wat sedeerbaar is. Dit is 'n vorderingsreg uit die *pactum fiduciae* wat aan 'n opskortende voorwaarde onderworpe is, naamlik dat die sedent sy skuld moet delg.[92]

c Waar *reversionary interest* dui op die reg op oorbetaling van die oorskot nadat die pandvoorwerp te gelde gemaak is, is dit ook 'n bestaande reg wat uit die behoud van die *dominium* voortvloei by 'n verpanding[93] en by 'n algehele sekerheidsessie uit die *pactum fiduciae*. Albei regte is egter onderworpe aan die voorwaarde dat daar wel 'n oorskot is. As voorwaardelike regte is hulle egter ook sedeerbaar.[94]

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86 In *Moola v Estate Moola supra* 464 word die *reversionary right* soos volg omskryf: "The truth probably is that the cedent by way of security retains only his 'reversionary right', that is to say his right to enforce the ceded right of action after the debt to secure which the cession was given has been discharged."

87 *Union Bank v Gous* 1885 4 SC 33 35; *Heydenryck v Mackie, Young & Co's Trustee and the Standard Bank* 1906 2 Buch AC 279 286; *Kuranda v Boustred supra* 53; *Rixom v Mashonaland Building Loan and Agency Co* 1938 SR 207 213. Hier kan daar sprake wees van die oorskot nadat die vorderingsreg verkoop is en die hoofskuld uit die opbrengs bevredig is of waar die vorderingsreg in sy volle omvang afgedwing is en daar 'n oorskot is. Die grondslag van hierdie reg op die oorskot word nêrens duidelik uiteengesit nie. Die rede is egter die feit dat die pandgewer reghebbende is. Die volgende uitlating in *Rixom v Mashonaland Building Loan and Agency Co supra* 213 dui moontlik ook op so 'n siening: "Where the proceeds of a policy are received by the cessionary before insolvency he is a *trustee* of the balance of the money and must account to the cedent . . ."

88 Scott *Cession* 136; Harker 1986 *SALJ* 200 203.

89 Dit sou die geval wees waar die vorderingsreg self oorgedra word.

90 Sien bespreking hierbo in teks by vn 62 e v.

91 In sommige uitsprake word hierdie tipe voorwaardelike vorderingsregte as toekomstige vorderingsregte gesien (*Muller v Trust Bank of Africa Ltd supra*). As gevolg hiervan word die *reversionary interest* dan as onoordraagbaar beskou – sien die meerderheidsuitspraak in *Bank of Lisbon and SA Ltd v The Master* (T) *supra* 30. Ook Macaulay 1983 *De Rebus* 526 530 sien hierdie reg as 'n *spes* of 'n *contingent right*. Dit is egter nie 'n *spes* nie en slegs *contingent* in die sin dat dit voorwaardelik is. Waar die sedent sy reg op terugsessie sedeer het en daarna insolvent geraak het, verval die sessionaris se reg omdat die voorwaarde vervul is – die sessionaris kan nie meer regte hê as wat die sedent gehad het nie.

92 *Big Sixteen (Pty) Ltd v Trust Bank of Africa Ltd supra* 1035H. Vir die posisie t o v voorwaardelike regte in die algemeen sien Scott *Cession* 30. Sien ook Harker 1986 *SALJ* 200 203.

93 In *Tayler and Ries Ltd v Clift* 1935 GWL 1 11 word gesê dat hierdie reg op die oorskot van 'n kontraktuele aard is wat sedeerbaar is. In *National Bank of SA Ltd v Cohen's Trustee supra* 251 word verwys na "a necessarily implied obligation . . . to return and account."

94 *Tayler and Ries Ltd v Clift supra* 9; *Motala v Latib* 1964 1 SA 851 (T) 854G.

Om die inhoud van die *reversionary interest* in 'n gegewe geval te bepaal, is dit dus noodsaaklik om vas te stel of dit in die konteks van verpanding of van 'n algehele sekerheidsessie gebruik word, aangesien die inhoud daarvan wissel afhangende van die tipe sekerheidstelling[95] waarmee 'n mens te doen het.

5 2 Pandhouer[96]

Die gewone beginsels van pandreg geld[97] en hier sal slegs daardie aspekte bespreek word wat by 'n verpanding van vorderingsregte 'n eiesoortige behandeling verdien.[98] By hierdie bespreking moet 'n onderskeid gemaak word tussen die posisie voor pandrypheid[99] en daarna.

5 2 1 Voor Pandrypheid

Die pandhouer kan sy sekuriteit eers na pandrypheid realiseer.[100] Sy saaklike sekerheidsreg bestaan daarin dat hy die pandvoorwerp as sekerheid vir betaling van die skuld mag hou en dit onder sekere omstandighede ter delging van die skuld mag aanwend. Voor daardie tyd kan hy nie betaling van die skuldenaar ontvang of op enige ander wyse oor die vorderingsreg beskik nie.[101] As die skuldenaar wat van die verpanding weet egter die skuld wil betaal, ontstaan 'n probleem aangesien hy nòg aan die pandgewer nòg aan die pandnemer bevrydend kan betaal. Hy kan nie aan die pandgewer betaal nie omdat laasgenoemde sy bevoegdheid om die vorderingsreg te realiseer aan die pandnemer oorgedra het.[102] Aan die pandnemer kan hy ook nie betaal nie omdat hy daardie bevoegdheid eers mag uitoefen nadat die pandgewer se skuld opeisbaar is en hy nie kan betaal nie.[103] In die Duitse reg[104] moet hy dan aan albei gesamentlik betaal en die geld moet belê word. Die sedent kan die aard van die belegging bepaal en die sessionaris verkry 'n pandreg op die gevorderde prestasie. Die sedent en sessionaris kan ook net gesamentlik betaling van die skuldenaar se

95 Daarom kan gesag wat oor altwee vorms van sekerheidstelling handel nie aangehaal word om die inhoud van die *reversionary interest* in 'n bepaalde geval vas te stel nie, soos wat verkeerdelik in die meerderheids- en minderheidsuitspraak in *Bank of Lisbon and SA Ltd v The Master* (T) *supra* gedoen is.

96 Van der Merwe 469 e v; Wille 128 e v. Vir die verpligtinge van die pandhouer sien Van der Merwe 472; Scott 142; Wille 140.

97 Van der Merwe *Sakereg* 469; Wille 128 e v.

98 Vir 'n volledige uiteensetting van die posisie in die Duitse reg sien *Münchener Kommentar BGB* par 1277–1288; Scholz/Lwowski 524 e v; Riedel 142 e v; Baur par 62 B II.

99 Pandrypheid is my vertaling van die Duitse term "*Pfandreife*." Die term word gebruik om aan te dui dat die skuld wat deur die pandreg verseker word, opeisbaar is en dat die skuldenaar nie kan betaal nie.

100 Sien *Volhand & Molenaar (Pty) Ltd v Ruskin supra* 753F: "The cessionary may not start collecting immediately. He may only do so if and when his own debtor (the cedent) defaults."

101 Wille 128. *National Bank of SA Ltd v Cohen's Trustee supra* 245 251; *Rixom v Mashonaland Building Loan and Agency Co Ltd supra* 213: "The cessionary's right under such a cession is not absolute. He cannot, for instance, compromise the claim without regard to the cedent's interests."

102 Pahl 180 stel die vraag waarom die sekerheidsgewer wat dan nog skuldeiser is na die verpanding nie meer van die skuldenaar kan vorder nie. Die antwoord is dat sy bevoegdheid om dit te doen aan die sekerheidsnemer oorgedra is.

103 *Freeman Cohen's Consolidated Ltd v General Mining and Finance Corporation* 1906 TS 585 591; *Volhand & Molenaar (Pty) Ltd v Ruskin supra* 753B.

104 Scholz/Lwowski 523 e v; Baur par 62 B II 3; Riedel 142 e v.

skuld afdwing. Hierdie reëling word deur die wetboek[105] getref en by ons sou so 'n reëling ook wenslik wees, maar tans word nie daarvoor voorsiening gemaak nie. Die pandnemer kan in sy kennisgewing aan die skuldenaar meld dat betaling voor pandrypheid aan hom en die sedent gesamentlik moet geskied. Die pandgewer en die pandnemer kan deur ooreenkoms ook 'n ander reëling tref, byvoorbeeld dat die pandhouer selfs voor pandrypheid geregtig sal wees om prestasie te vorder of te ontvang. Hy tree dan as verteenwoordiger van die pandgewer op en die regsposisie word deur die verteenwoordigingsreg beheers.

5 2 2 Na Pandrypheid

Realisering van die vorderingsreg by wanbetaling is een van die oogmerke van verpanding.[106] Indien die pandskuldenaar nie sy skuld kan betaal nie, kan die pandskuldeiser vonnis teen hom verkry en die verpande saak in eksekusie deur die adjunk-balju of geregsbode laat verkoop.[107] Die pandhouer mag nie die pandvoorwerp te gelde maak sonder tussenkoms van die hof nie,[108] behalwe as die partye 'n beding tot aparte eksekusie in die pandgewingsooreenkoms opgeneem het. In laasgenoemde geval kan die pandvoorwerp op 'n openbare veiling aan die hoogste bieder verkoop[109] word.[110] As die verkoop meer oplewer as wat nodig is om die skuld te delg, kan die pandgewer die oorskot met die *actio pignoratitia directa* opeis.[111]

Die vraag ontstaan of die pandnemer ook geregtig is om die skuld te vorder. Volgens die Duitse reg[112] kan hy dit doen aangesien daardie bevoegdheid wetlik aan hom verleen word. Hy mag egter net 'n bedrag gelykstaande aan sy skuld vorder.[113] As sy skuld nie ten volle deur die invordering gedek word nie, het hy natuurlik nog steeds 'n vorderingsreg vir die res teen die pandskuldenaar. Die pandhouer kan ook eis dat die vorderingsreg tot die hoogte van die skuld aan hom gesedeer word ter delging van die skuld.[114] Waar die vorderingsreg wat verpand is op lewering van 'n saak gerig is, verkry die pandnemer wat dit vorder die eiendomsreg namens die pandgewer en 'n pandreg op die saak wat daarna,

105 par 1281; sien ook *Münchener Kommentar BGB* par 1281.
106 Wille 128.
107 *Mercantile Bank of India Ltd v Davis* 1947 2 SA 723 (C) 736–737; *Dorasamy v Messenger of the Court Pinetown* 1956 4 SA 286 (D). Sien ook Wille 231 en 248 t o v die oorskot.
108 De Groot *Inleidinge* 2 48 41; Groenewegen *De Legibus ad C* 828; Van Leeuwen *Censura Forensis* 1 4 10 9; *Cape of Good Hope Bank v Mellé* (1893) 10 SC 280 289; *Mercantile Bank of India Ltd v Davis supra* 737; Wille 128.
109 Na die verkoping moet die bevoegdheid om te realiseer nog aan die koper sedeer word. Eers na sodanige verkoop en sessie verval die pandgewer se eiendomsreg: sien Wille 128 190 191.
110 Voet *Commentarius* 20 1 21; *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531.
111 Van der Merwe 471.
112 Scholz/Lwowski 527 e v; Baur par 62 B II 4; Riedel 147; *Münchener Kommentar BGB* par 1282.
113 Riedel 143; Scholz/Lwowski 528; *Münchener Kommentar BGB* par 1282 II 2. Hierdie beperking word in die wetboek uitdruklik neergelê en is gerig op die beskerming van die pandgewer. As die skuldenaar meer aan die pandhouer betaal het, is hy t o v daardie gedeelte van die vorderingsreg wat die hoofskuld oorskry, nie bevry nie, maar kan hy 'n verrykingsaksie teen die pandhouer instel: Riedel 147.
114 *Münchener Kommentar BGB* par 1282; Riedel 143. In die Suid-Afrikaanse reg sal die toestemming van die skuldenaar vir sodanige sessie verkry moet word aangesien dit op 'n verdeling van die vorderingsreg neerkom.

sonder tussenkoms van 'n verdere pandgewingsooreenkoms, as saakpand gerealiseer kan word.[115] Waar die vorderingsreg gerig is op betaling van 'n geldsom, geld die ingevorderde bedrag as betaling deur die pandskuldenaar en die pandhouer word eienaar van die geld ten bedrae van sy eis.[116]

In die Suid-Afrikaanse reg mag die pandhouer ook die skuld invorder en wel die hele vordering – nie slegs ten bedrae van die pandskuldenaar se skuld nie.[117] Dit wil ook voorkom asof dit in ons reg sonder tussenkoms van die hof geskied. Die pandhouer moet die oorskot egter aan die pandgewer oorbetaal. Hierdie reëling skyn billiker teenoor die skuldenaar te werk aangesien hy slegs aan een persoon hoef te betaal. Aan die ander kant beskerm die Duitse reëling die pandgewer en sy skuldeisers deurdat die oorskot op geen stadium in die boedel van die pandnemer val nie en hy dus nie daaroor kan beskik nie.[118]

Die grondslag van hierdie reël in die Suid-Afrikaanse reg is onduidelik. Aangesien die pandhouer nie as reghebbende kan optree voordat die vorderingsreg self aan hom oorgedra is nie en die bevoegdheid om te realiseer hom normaalweg slegs in staat stel om die pandvoorwerp by wanbetaling te verkoop, kan geargumenteer word dat hy as 'n verteenwoordiger *in rem suam* optree. Dié verteenwoordigingsbevoegdheid kan, in die afwesigheid van 'n uitdruklike ooreenkoms te dien effekte, afgelei word uit die feit dat die bevoegdheid om die vorderingsreg te realiseer aan hom oorgedra is; hier moet onthou word dat by vorderingsregte invordering een van die geskikste realiseringsmoontlikhede is. By insolvensie word verteenwoordigingsbevoegdheid egter beëindig, maar dan verkry die skuldeiser weer ingevolge die Insolvensiewet[119] die bevoegdheid om die vorderingsreg met toestemming van die trustee of die meester te realiseer, wat invordering sal insluit. Waar hierdie bevoegdheid in die Duitse reg *ex lege* ontstaan, kan miskien geargumenteer word dat dit by ons *ipso iure* ontstaan.

'n Beding in die pandgewingsooreenkoms dat die pandnemer die oorskot mag behou, is ongeldig as synde 'n *pactum commissorium*.[120]

Die pandhouer kan ook op ander wyses sy sekuriteit realiseer, byvoorbeeld deur skuldvergelyking te laat plaasvind.[121]

6 TENIETGAAN VAN PANDREG

Die belangrikste wyse waarop pandreg tenietgaan, is deur uitwissing van die hoofskuld. Vanweë die aksessore aard van pandreg verval die saaklike sekerheidsreg outomaties.[122]

7 ONLANGSE REGSPRAAK

Daar sal vervolgens vasgestel word in watter mate bogenoemde uiteensetting van die verpanding van vorderingsregte met die onlangse appèlhofuitsprake ooreenstem al dan nie.

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115 *Münchener Kommentar BGB* par 1282 I 1. Pahl 186 kritiseer hierdie heersende mening.
116 *Münchener Kommentar BGB* par 1288 III 4; Baur par 62 B II 4.
117 *Union Bank v Gous supra* 35; *Heydenryck v Mackie, Young & Co's Trustee and the Standard Bank supra* 286; *Kuranda v Boustred supra* 53; *Rixom v Mashonaland Building Loan and Agency Co supra* 213; *Marais v Ruskin supra* 670I.
118 In die *Leyds*-saak 780F–G word ook aangedui dat die belange van die boedel en die skuldeisers van die boedel op die oorskot sover moontlik beskerm moet word.
119 a 83(8)(c) Wet 24 van 1936.
120 *Sun Life Assurance Co of Canada v Kuranda* 1924 AD 20.
121 *Münchener Kommentar BGB* par 1282 II 6.
122 Van der Merwe 472; Wille 165 e v.

In die *Leyds*-saak is slegs bevestig dat die *dominium*[123] steeds by die sedent berus en dat die vorderingsreg as bate in sy insolvente boedel geadministreer kan word.

In die *Marais*-saak is die *reversionary right* bestempel as die reg op terugsessie van die vorderingsreg self.[124] Dit is dus duidelik dat die hof, ten spyte van die verklaarde aanvaarding van die pandkonstruksie, tog die beginsels van 'n algehele sekerheidsessie toepas want by 'n verpanding behou die sedent die vorderingsreg; al wat oorgedra word, is die bevoegdheid om te realiseer en hierdie bevoegdheid verval outomaties na delging van die hoofskuld.[125] By 'n algehele sekerheidsessie word die vorderingsreg self oorgedra en die sedent verkry 'n reg op terugsessie daarvan uit hoofde van die *pactum fiduciae*.[126]

Volgens die korrekte siening van pandgewing van vorderingsregte was Moll, (die sedent in die *Marais*-saak) nog steeds reghebbende en het hy met ander woorde nog steeds 'n vorderingsreg teen die trust (skuldenaar) gehad. Omdat die hof in die *Marais*-saak verkeerdelik meen dat Moll geen regte meer teen die trust gehad het nie, word egter bevind dat Moll met die sessie van 13 Oktober[127] slegs sy *reversionary right* teen Marais (sessionaris) aan mevrou Moll kon gesedeer het. Soos die hof tereg bevind,[128] het Moll dit egter nie gedoen nie.

In werklikheid was die betrokke partye se siening van wat gesedeer kon word korrek en hulle bedoeling is dienooreenkomstig in die bewoording van die sessie vervat. Hulle het gemeen dat mevrou Moll Moll se vorderingregte teen die trust sou verkry, met ander woorde dat mevrou Moll reghebbende[129] in die plek van Moll sou word.

As gevolg van bogenoemde verkeerde interpretasie van 'n verpanding van vorderingsregte kom die hof dus tot die volgende gevolgtrekking:[130]

> "[H]ierdie sessie[131] kon dus nie respondent se reg op terugsessie deur Marais van die regte wat Moll aan hom gesedeer het, aangetas het nie. Dit volg dus dat respondent, wat

123 In *Holzman v Knights Engineering and Precision Works (Pty) Ltd* 1979 2 SA 784 (W) 791 *in fin* – 792 word verkeerdelik gemeen dat *dominium* betrekking het op die persoonlike reg tot terugsessie.

124 *Marais v Ruskin supra* 671A–C. Harker 1986 *SALJ* 200 203 is van mening dat die *reversionary interest* by sy *quasi*- pandreg "constitutes the 'dominium' which remains vested in the cedent according to 'the pledge theory' . . ." Sien ook Boraine 1986 *De Jure* 171.

125 Harker 1986 *SALJ* 200 208 verstaan onder verpanding dat die reg om te vorder gelyktydig in twee persone setel en verwerp so 'n moontlikheid as "conceptually impossible." So iets is natuurlik nie moontlik nie, maar dit is ook nie die effek van verpanding nie: sien bespreking hierbo.

126 'n Algehele sekerheidsessie is 'n fidusiêre en nie 'n aksessore regshandeling nie en daarom moet die vorderingsreg weer terug oorgedra word.

127 Uit die verslag is dit nie duidelik of die sessie op 3 of 13 Oktober plaasgevind het nie: sien 668D 670B en 670G.

128 Dit blyk duidelik uit die bewoording van die sessie: "[T]he husband hereby cedes to the wife all claims which he presently has against the Christiaan Lodewyk Moll Trust" (668D).

129 Hulle het waarskynlik net nie besef dat die *nemo-plus-juris*-reël hier toepassing vind en dat Moll nie meer regte kon oordra as wat hyself gehad het nie: Mev Moll se vorderingsreg is dus ook deur die pandreg beperk, m a w sy het nie die bevoegdheid gehad om die vorderingsreg af te dwing totdat die skuld gedelg was nie.

130 671F–G. Boraine 1986 *De Jure* 171 175 stem saam met die uiteindelike bevinding, maar hy motiveer nie sy siening nie.

131 Die sessie aan mev Moll.

so 'n terugsessie[132] van Marais ontvang het, geregtig is om Moll se vorderingsregte teen die trust af te dwing en om betaling van die betrokke bedrag te ontvang."

Myns insiens moes die hof presies die teenoorgestelde bevinding gemaak het: Moll het sy regte teen die trust aan Marais gesedeer as sekuriteit. Die implikasie van die hof se bevestiging van die *Leyds*-saak is dat die hof hierdie sessie as 'n verpanding beskou het en nie as 'n algehele sessie[133] nie. Moll het dus slegs die bevoegdheid om te realiseer aan Marais oorgedra.[134] Omdat Moll die *dominium* behou het, kon en het hy dit aan mevrou Moll gesedeer.[135] Hierdie sessie het Moll, en na sy insolvensie sy kurator (respondent), alle aanspraak op die vorderingsreg teen die trust ontneem omdat dit die *dominium* uit sy boedel geneem het.[136] Na delging van die skuld het mevrou Moll vanweë die aksessore aard van verpanding outomaties volreghebbende geword en kon sy die trust vir betaling van die volle skuld aanspreek. Marais (in sy hoedanigheid van trustee van die skuldenaar) wat kennis van Moll se sessie aan mevrou Moll gehad het, kon ook net bevrydend aan haar betaal. Benadé en Marais was dus geregtig en verplig om betaling aan die trustee te weier.

In die *Bank of Lisbon*-saak word die pandkonstruksie ook nie suiwer toegepas nie. Dit is veral onduidelik wat die hof met *reversionary right*[137] bedoel. Daar word aanvaar dat die sedent die *dominium* behou en die objek van die sessie word beskryf as "all its reversionary rights in the first cession."[138]

Die omskrywing van die objek van die sessie is egter veel wyer aangesien die tweede sessie 'n verpanding van die sedent se boekskulde aan die bank is met 'n kwalifikasie daarby dat as dit blyk dat die boekskulde reeds verpand of gesedeer is, dan sedeer die sedent

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132 Vanweë die aksessore karakter van verpanding het die pandnemer se bevoegdheid outomaties verval en het sy sessie aan die trustee in elk geval geen objek gehad nie, soos appellante ook tereg betoog het: 671D.

133 Die hof se bevinding t o v die terugsessie sou korrek gewees het as hy met 'n algehele sekerheidsessiekonstruksie gewerk het.

134 Hierdie bevoegdheid word egter soos volg deur die hof beskryf: "Hierdie sessie het aan Marais die reg verleen om, indien Moll nie sy skuld aan hom betaal nie, die trust aan te spreek vir die volle bedrag wat die trust aan Moll verskuldig was" (670I).

135 Hierdie sessie is die "iets" waarna in die volgende aanhaling verwys word: "tensy 'n mens kan sê dat daar iets plaasgevind het wat Moll (of respondent) die reg ontneem het om by betaling van Moll se skuld aan Marais te eis dat Marais die *vorderingsregte* wat aan Moll ter versekering van die skuld aan hom gesedeer het, moet terugsedeer" (my kursivering). Die vorderings*regte* is nie gesedeer nie, maar verpand; deur die sessie is die *bevoegdheid* om te realiseer oorgedra.

136 'n Volkome parallel kan met 'n saakpand getrek word: Waar A (eienaar) sy saak aan B verpand, moet hy B in besit van die saak stel. Tydens bestaan van die pandreg kan A egter deur middel van *attornment* sy eiendomsreg in die verpande saak aan C oordra. Nadat die skuld gedelg is, moet B die saak aan C oordra omdat C eienaar is. As A insolvent raak terwyl B nog in besit van die saak is en A se kurator betaal die skuld, moet B nog steeds die saak aan C, die eienaar, oordra want sy pandreg het verval by delging van die hoofskuld. Voordat A se skuld ten volle gedelg is, het C egter geen aanspraak op die saak nie.

137 Alhoewel die hof die pandkonstruksie aanvaar, dui sy verwysing na *Big Sixteen v Trust Bank of Africa supra* 1035H daarop dat hy *reversionary right* hier sien as die reg op terugsessie by 'n algehele sekerheidsessie aangesien r Watermeyer in lg saak die *reversionary right* omskryf met verwysing na *Lief v Dettmann supra*. Lg uitspraak word uitdruklik in die *Bank of Lisbon*-saak gekritiseer.

138 294G–H.

> "all my/our reversionary rights and all my/our remaining right(s), title and interest in and to such particular security(ies) and the subject matter thereof, as well as all my/our rights of action and recourse against the prior pledgee(s) and/or cessionary(ies) thereof."[139]

Hieruit is dit duidelik dat die partye beoog het om 'n verdere pandreg oor dieselfde boekskulde te vestig. Dit is ook duidelik dat die partye nie presies seker was hoe om dit te bewerkstellig nie en dus die objek van die sessie so wyd moontlik met verwysing na die bestaande sessie omskryf het. Die hof het bevind dat die bank wel 'n versekerde skuldeiser was omdat hy 'n pandreg op die *reversionary right* gehad het.[140]

Die hof is dus duidelik van mening dat die pandgewer nie sy *dominium* self verder oorgedra het nie, maar slegs "all its reversionary rights in the first cession" verpand het. Om vas te stel presies wat daarmee bedoel word, moet die hof se siening van 'n sessie *in securitatem debiti* van nader ontleed word. Die wese van sodanige sessie word soos volg omskryf:

> "[T]he cedent cedes to the cessionary the exclusive right to claim and receive from the existing and future 'book debtors' the amounts owing by them. The amounts so collected by the cessionary are credited to the account of the cedent. Any amount collected in excess of the cedent's debt belongs to the latter."[141]

Geen verwysing word na pandrypheid gemaak nie en dit lyk asof die hof van mening is dat die vorderingsreg self oorgedra word (*the exclusive right to claim*), maar dat dit slegs 'n invorderingsessie[142] is aangesien die sedent met die ingevorderde bedrag gekrediteer word en die oorskot hom ook toekom.[143] As dit inderdaad die hof se siening was, het 'n mens natuurlik nie met 'n verpanding te doen nie, maar met 'n algehele regsoordrag.[144] By 'n verpanding behou die pandgewer die vorderingsreg self, terwyl slegs die bevoegdheid om te realiseer oorgedra word. Die hof stel dit ook uitdruklik dat die *dominium* in die sedent setel en dat geen terugsessie nodig[145] is nie, met ander woorde hy pas die aksessoriteitsbeginsel van pandreg suiwer toe.

Die hof se standpunt dat die bank wel 'n versekerde skuldeiser was, kan net verklaar word as die bank 'n pandreg op die boekskulde self verkry het deur middel van die sessie *in anticipando* wat op die oomblik toe die bank se eis bevredig is, gematerialiseer het.[146] In daardie stadium was die sedent in elk geval ook nog nie insolvent nie en kon die latere pandreg gevestig word.[147]

Dit is dus glad nie duidelik wat die hof met die verpanding van die *reversionary right* bedoel nie, maar as die pandkonstruksie korrek toegepas word, kon die bank slegs 'n versekerde skuldeiser gewees het as 'n pandreg op die oorspronklike vorderingsregte op bogenoemde[148] wyse gevestig was. *Reversionary right* kan hier

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139 284C–D.
140 294I.
141 294C.
142 Nörr/Scheyhing par 10 II 1. Die ooreenkoms tussen die partye dat die sedent se rekening gekrediteer word, het egter slegs verbintenisregtelike werking.
143 Hierdie bewoording sou ook kon dui op 'n bedoeling om die "sessionaris" slegs as verteenwoordiger te laat optree, in welke geval die verteenwoordigingsbevoegdheid by insolvensie verval. Hierdie uitleg is weer nie te versoen met die eerste gedeelte van die aanhaling wat dui op 'n algehele regsoordrag nie.
144 of met verteenwoordiging: sien vn 134 hierbo.
145 294E.
146 Sien die bespreking hierbo in die teks by vn 68.
147 Sien vn 68 hierbo.
148 Sien die bespreking in die teks by vn 68 hierbo.

nie verwys na die reg op terugsessie wat by 'n algehele sekerheidsessie voorkom nie, want volgens die hof se eie siening bestaan daar nie so 'n reg nie.[149]

Met die hof se gevolgtrekking kan saamgestem word, maar of die gevolgtrekking op die korrekte premisse berus, is nie duidelik nie.

8 GEVOLGTREKKING

Die presiese aard van 'n sessie *in securitatem debiti* in die Suid-Afrikaanse reg is na die pas bespreekte appèlhofuitsprake nog onsekerder as tevore. Die appèlhof aanvaar uitdruklik die verpandingskonstruksie sonder om die noodwendige konsekwensies daarvan deur te trek. Hierdie versuim is verstaanbaar aangesien die eiesoortige aard van die sekerheidsobjek, naamlik 'n vorderingsreg, sodanig is dat pandregbeginsels nie ongekwalifiseerd toegepas kan word nie.[150] Daar kan slegs 'n analoë toepassing wees en met sodanige toepassing word probleme ondervind. Om hierdie probleme uit te skakel, het die Duitsers in hulle wetboek die verpanding van regte, insluitende vorderingsregte, uitdruklik aanvaar,[151] analoë toepassing van algemene pandregbeginsels voorgeskryf,[152] maar ook spesiale voorskrifte[153] vir die verpanding van regte gemaak.

Die grootste probleem in die positiewe reg is die feit dat daar nie duidelik onderskei word tussen die twee vorme van sessie *in securitatem debiti* wat juridies moontlik is nie, te wete 'n verpanding en 'n algehele sekerheidsessie. Hierdie twee regsfigure het eiesoortige reëls wat nie *mutatis mutandis* op mekaar toegepas kan word nie.[154] By 'n verpanding bly die vorderingsreg by die pandgewer en geen vermoënsverskuiwing vind dus plaas nie, terwyl die vorderingsreg by 'n algehele sekerheidsessie oorgedra word, met ander woorde 'n vermoënsverskuiwing vind wel plaas. Voorts het eersgenoemde 'n aksessore[155] en laasgenoemde 'n fidusiêre karakter.[156]

Aangesien daar geen duidelikheid oor hierdie onderskeid is nie, word terminologie in die howe aangewend wat nie behoorlik gedefinieer is nie, of, waar dit wel gedefinieer is, dikwels nie die bedoelde betekenis kan hê nie.[157] Aanvanklik[158] het die howe 'n verpanding van vorderingsregte aanvaar omdat

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149 *Bank of Lisbon and SA Ltd v The Master supra* 294E. Dit is die gevolg van die toepassing van die aksessoriteitsbeginsel waarvolgens die sedent na delging van die skuld weer outomaties volreghebbende word.

150 Sien bv *Frankfurt v Rand Tea Rooms Ltd and Sheffield supra* 256: "In examining the nature of the rights of a pledgor of a right *in personam* the analogy with the position of a pledgor of a movable should not be pressed too far."

151 *BGB* par 1273(1).

152 *BGB* par 1273(3).

153 *BGB* par 1274–1291.

154 Sien bv ar Innes se uitspraak in *National Bank of SA Ltd v Cohen's Trustee supra* 251 waar hy na die Romeinsregtelike *fiducia* verwys. Ten spyte daarvan dat hy die verpandingskonstruksie aanvaar, dui hierdie en verskeie ander uitlatings daarop dat hy tog maar 'n algehele sekerheidsessie in gedagte het. Dieselfde geld vir die *Marais*-saak waar beslis is dat die sedent na die sessie slegs sy reg op terugsessie van die vorderingsreg verder kan sedeer, en die *Bank of Lisbon*-saak waarin na die *Big Sixteen*-saak verwys word wat *Lief v Dettman supra* volg.

155 Scholz/Lwowski 44 e v.

156 Scholz/Lwowski 44 e v; Riedel 114 e v; Lwowski *Kreditsicherheiten* (1979) 16.

157 Sien die bespreking hierbo oor die betekenis van *reversionary interest*.

158 Voet *Commentarius* 20 3 1; Van der Linden *Merkwaardige Gewysden* 23; *Smith v Farrelly's Trustee supra; National Bank of SA Ltd v Cohen's Trustee supra* 246.

die verpanding van onliggaamlike sake volgens die Romeins-Hollandse reg moontlik was en die oogmerk van die partye hier dieselfde is as by die verpanding van liggaamlike sake. Daar is dus gevolg gegee aan 'n praktyksbehoefte binne die kader van bestaande regsbeginsels. Al gou het die analoë toepassing dogmatiese probleme opgelewer waaraan nie indringend aandag gegee is nie, maar waarvan die howe tog nie onbewus was nie.[159] Later[160] het die howe meer aandag aan die dogmatiek begin gee[161] en tot die gevolgtrekking gekom dat 'n vorderingsreg nie verpand kan word nie, maar slegs in sy geheel oorgedra kan word. 'n Algehele regsoordrag was egter weer nie in ooreenstemming met die oogmerk van sekerheidstelling nie en het by insolvensie nie die gewenste uitwerking gehad nie. Gevolglik het 'n vermenging van die twee vorms van sekerheidstelling plaasgevind. Die onhoudbare resultaat hiervan is die erkenning van 'n verpanding van vorderingsregte met as inhoud 'n algehele regsoordrag wat by insolvensie[162] weer 'n pandregagtige karakter verkry.[163]

Hierdie juridies onhoudbare situasie en die daarmee gepaardgaande onsekerheid kan net deur wetgewing uit die weg geruim word. Een van of albei hierdie vorms van sekerheidstelling kan erken word of 'n nuwe vorm van sekerheidstelling kan geskep word, maar die presiese aard en gevolge, asook die vereistes van die aanvaarde vorm(e) moet duidelik omskryf word. Alleen deur wetgewing kan die dogmatiese probleme oorbrug word en die praktyksbehoeftes bevredig word. By die opstel van hierdie wetgewing kan met vrug van die Duitse wetboek en literatuur gebruik gemaak word.

159 Sien die bespreking hierbo oor die verwatering van *dominium*.

160 *Lief v Dettmann supra; Trust Bank of Africa Ltd v Standard Bank of SA Ltd supra.*

161 De Wet en Yeats het 'n belangrike invloed op hierdie wending gehad.

162 By insolvensie verskaf die algehele regsoordrag probleme want die vorderingsreg is dan nie meer deel van die insolvente sedent se boedel nie. Dit word tereg as 'n onbillike gevolg teenoor die sedent en sy ander skuldeisers gesien aangesien die vorderingsreg bloot as sekuriteit gesedeer is. Gevolglik word teruggeval op pandregbeginsels waarvolgens die vorderingsreg nog as "property of the estate" en die sessionaris as 'n versekerde skuldeiser beskou kan word.

163 By 'n algehele sekerheidsessie in Duitsland het 'n mens dieselfde posisie, maar daar word in die eerste plek tussen 'n verpanding en 'n algehele sekerheidsessie onderskei en bogenoemde resultaat word bewerkstellig deur die toepassing van hulle insolvensiereg op 'n algehele sekerheidsessie as fidusiêre regshandeling.

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AANTEKENINGE

TOWARDS A NEW LEGISLATIVE AND ADMINISTRATIVE DISPENSATION FOR COASTAL ZONE MANAGEMENT

Although South Africa relative to its land area has a long coastline of over 3 000 km, its population of some 25 million would have standing room only along the coast if it is realised that theoretically only approximately 12 cm of coastal access to the sea per person is available. The South African coastal environment constitutes a unique area and comprises a diversity of components, such as coastal forests, dunes, beaches, estuaries (some 343 of them), the intertidal and infratidal zones and the continental shelf. It should be noted that the exact or even approximate boundaries of the coastal zone, both with regard to the coastal terrestrial area and the sea, are uncertain. Moreover, the coastal zone as such is not a legal concept. Certain components of the coastal zone are nevertheless defined in a variety of legislative measures such as the concepts of "sea," "sea-shore," "high-water mark," "low-water mark," "tidal river," "tidal lagoon," "territorial waters" and "fishing zone."

Each of the components of the coastal zone has its own range of habitat types and benefits for mankind. These benefits include use of the coastal land and its resources as well as of the sea and of marine resources. The accelerated utilisation and exploitation of these benefits have led to the imposition of ever increasing environmental stresses. The coastal zone has become severely threatened on account of pressure brought about by a variety of activities such as catering for man's recreational needs, residential and industrial development, mining (both in the sea and on land), power stations, provision of infra-structure such as roads, railways, airports and harbours, military installations, agriculture, forestry, solid waste and water pollution and generally the exploitation of living marine resources, especially through fishing.

Environmentalists and others have for a long time been pointing out the dangers attendant upon the abuse of the coastal zone. These concerns have stimulated some action on the part of the relevant authorities resulting in the promulgation of legislation as a necessary basis for control. Before the seventies, however, the only coastal zone legislation with some conservation emphasis was the Sea-shore Act of 1935, while the Sea Fisheries Act of 1940 (which has since been replaced by the act of 1973) also had some environmental significance. Neither of these acts was, however, designed primarily as a conservation measure nor were they administered by a conservation authority. It should be noted, though, that the Tsitsikamma coastal national park was established in 1964 by virtue of the National Parks Act of 1962 (now replaced by the act of 1976), while certain rock lobster sanctuaries had been established in the South Western Cape in 1940 by virtue of the Sea Fisheries Act of 1940. The first exclusive environmental statute relating to the coastal zone was enacted only

after 1970, i e the Prevention and Combating of Pollution of the Sea by Oil Act of 1971 (now replaced by the act of 1981). Since then quite a number of further environmental statutes have been promulgated with a view to conserving the coastal zone or elements thereof.

An extremely wide variety of legislation is currently applicable to the coastal zone. In the first place there is a number of acts that are aimed either exclusively or at least partly at the conservation of natural resources and the control of environmental pollution, such as the Sea-shore Act 21 of 1935, the Water Act 54 of 1956, the Sea Birds and Seals Protection Act 46 of 1973, the Sea Fisheries Act 58 of 1973, the Lake Areas Development Act 39 of 1975, the National Parks Act 57 of 1976, the Dumping at Sea Control Act 73 of 1980, the Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981, the Forest Act 122 of 1984 as well as the Nature Conservation Ordinance 15 of 1974 (Natal) and the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape). In addition to this legislation aimed at environmental conservation, there are a great many statutes which, although not necessarily designed for conservation, nevertheless have important environmental implications, such as legislation relating to health, agriculture, shipping, mining, industrial development, town and regional planning, recreation, roads and railways, harbours, electricity supply, nuclear installations and military purposes.

It is significant that before the eighties no single public authority was responsible for the conservation of the coastal zone and that, in fact, the principal coastal zone legislation was administered by departments that had no conservation assignment. Thus the Sea-shore Act was previously administered by the ministry of agriculture, the ministry of community development (land affairs branch) and the department of public works and land affairs, respectively, and even the National Parks Act was administered by the ministry of agriculture, while the Sea Fisheries Act was assigned initially to the ministry of commerce and industries and later to the department of industries under the ministry of economic affairs.

A government department at national level charged with environmental conservation made its appearance in embryo stage during 1973 when the department of planning was transformed into the department of planning and the environment. During 1979 this department became the department of environmental planning and energy. As a result of the process of rationalisation in the civil service that commenced in 1980, a new department, namely the department of water affairs, forestry and environmental conservation, was formed, subsequently renamed the department of environment affairs. Thus the Water Act and the Forest Act became the responsibility of the same ministry, and although the department of water affairs had since 1984 been excised from it, it has since 1986 again been assigned to the portfolio of the same minister, now titled the minister of environment affairs and of water affairs. Meanwhile, during 1982, a significant step forward was taken with the transfer of the Institute of Sea Fisheries to the ministry of environment affairs, to form the marine development branch, now the chief directorate: marine development. This meant that the Sea Fisheries Act as well as the Sea Birds and Seals Protection Act for the first time came within the jurisdiction of a ministry entrusted with environmental conservation. Further significant developments as far as the coastal zone is concerned, have been the transfer during 1983 of the National Parks Act and the

Lake Areas Development Act; during 1984 of the Dumping at Sea Control Act; and the partial transfer during 1986 of the Prevention and Combating of Pollution of the Sea by Oil Act to the ministry of environment affairs. With this amalgamation of responsibility for the administration of coastal environmental legislation within one conservation authority, a potentially great improvement has been effected.

It should be remembered, however, that, as has been noted, a vast body of legislation that cannot be classified as conservation legislation, but which nevertheless has important consequences for the environment, is applicable to the coastal zone. This legislation is administered by a host of different departments at all levels of government as well as by certain statutory bodies. Most of these administrative authorities have functioned in a more or less autonomous fashion enjoying rather wide powers and not being subject to any control by the minister of environment affairs, save for his function of co-ordinating actions that have an influence upon the (coastal) environment. These problems have particularly detrimental consequences as far as the environment is concerned, because there never has been a uniform and binding environmental policy governing the administration of the coastal zone. Neither are administrative bodies or private individuals obliged to undertake an environmental impact analysis and assessment of their proposed actions that are potentially harmful to the environment. Moreoever, many of the bodies that are entrusted with the implementation of coastal zone legislation do not have conservation as an objective; in fact there frequently is no statutory obligation even to consider environmental factors in their decision making. This has allowed exploitative considerations to override and even exclude conservation considerations in so far as the implementation of coastal zone legislation is concerned.

The ideal position from an ecological perspective would seem to be for the whole coastal zone to be regarded as a type of conservation area, necessitating the application of conservation principles to the entire area as the only way of ensuring the future of our coastal natural resources. This does not mean that no development should take place, but only that development should be carefully planned, that it should take ecological factors into account and that it should not exceed the ecological limits beyond which natural processes break down.

It is probably with this aim in view that the minister of environment affairs in December 1986 adopted a new strategy in the struggle for effective coastal zone management, by issuing a set of regulations in terms of the Environment Conservation Act 100 of 1982 (GN R2587 of 1986–12–12). The act empowers the minister to make regulations relating to the control and combating of certain environmental problems, namely solid waste, including littering (s 12(2)(a)) and noise (s 12(2)(b)), besides a general power to make regulations for the conservation and utilisation of the environment in order to attain or to further the objects of the act (s 12(2)(c)). It is this latter power which the minister has purported to exercise in issuing the above-mentioned regulations.

Control over the coastal zone is sought to be exercised through a prohibition imposed upon any person (including the state) to undertake any activity in the limited area, namely a strip of land 1000 metres wide in the Cape and Natal, measured landwards from the high-water mark of the sea, save under the authority of a permit (reg 2(1)). "Activity" means any activity as set out in the first schedule to the regulations, and which leads or may lead to the disturbance

of the natural state of the vegetation, soil, water or other natural surface (reg 1). The following activities are set out in the relevant schedule:

(i) the clearing of land and the removal of vegetation;
(ii) the development of picnic areas, caravan parks or mobile home parks;
(iii) the erection of any buildings;
(iv) the construction of railways, airports, landing strips, slipways or jetties;
(v) the building of dams, canals, reservoirs, water purification plants or sewerage works;
(vi) the construction of pipelines, power-lines or fencing;
(vii) the construction of waste disposal sites or the dumping of refuse;
(viii) the opening of land for cultivation or for the establishment of pasture; and
(ix) the construction of roads, including local or private roads and permanent footpaths.

Provision is made for exemption from the prohibition in that the administrator may by notice in the provincial gazette define any area within the limited area and exclude any activity within the defined area from the provisions of the regulations (reg 2(2)).

Application for a permit authorising an activity within the limited area must be made to the administrator (who may delegate his authority to an official of his administration or to a local authority (reg 3(4)), or, in the case of an activity to be undertaken by a state department, government or statutory institution, to the minister (reg 3(1)). Elaborate rules govern applications for a permit, the consideration thereof and appeals against eventual decisions (regs 3, 4 and 5).

Finally, the regulations are buttressed by two different types of sanction, namely a criminal sanction and an administrative sanction. It is an offence to contravene or fail to comply with any provision of the regulations (reg 7, read with s 12(5) of the Environment Conservation Act). Moreover, the minister, administrator or local authority concerned, may in respect of any activity undertaken in contravention of the abovementioned prohibition, instruct the person or body who is responsible for such activity (and who thereby already commits an offence) immediately to cease the activity and to rehabilitate the affected environment at its own expense to the satisfaction of the authority in question (reg 6 (a)). Failure to comply with such an instruction (besides amounting to a further offence), entitles the authority concerned to take such steps as are reasonable to rehabilitate the environment affected, and to recover the costs of such steps from such person or body (reg 6(b)).

At first glance it would seem as if these regulations indeed provide at long last for the much-needed effective conservation of the coastal zone. (Some may nevertheless question the arbitrary demarcation of the limited area and may have preferred a demarcation along ecological boundaries.) However much one may wish to agree with the aim and even the contents of the regulations as a tool to effect sound coastal zone management, it may none the less be doubted whether these regulations will indeed serve to achieve this much desired aim.

The first problem relates to comprehensive control through regulations, rather than through an act. The issuing of regulations is normally viewed as a technique whereby the practical and technical detail of principal legislation is supplied. Regulations provide a flexible tool since they can readily and easily be promulgated and amended to adapt to new situations; their promulgation is much easier than the promulgation of an act of parliament. But there is a good reason for this difference. Matters of principle and basic control provisions should be thoroughly prepared and debated in parliament. Moreover, while regulations, as subordinate legislation, may be declared void by the courts if they are *ultra*

vires, vague or unreasonable, no such unstable and subordinate status is attached to parliamentary legislation. The main reason for this difference is that whereas parliamentary legislation is enacted by elected representatives, regulations are made by an executive body.

The next issue – and an even more fundamental one – is that the regulations would seem to be *ultra vires*. It is clear that the minister has the power to make regulations relating to the control of solid waste and of noise. However, it is not equally clear that the Environment Conservation Act empowers the minister to make regulations in respect of the coastal zone. The provision of the act upon which the minister has relied for issuing the regulations in question (s 12(2)(c)), empowers him only to make regulations relating to the conservation and utilisation of the environment in order to attain or to further the objects of the act. The prime object of the act, according to its long title, is to make provision for the co-ordination of all actions directed at or liable to have an influence on the environment. It may thus be argued with a considerable degree of persuasiveness that any regulations relating to environmental aspects other than solid waste or noise would be *ultra vires* in so far as they go beyond merely providing for the co-ordination of environmental actions – as is indeed the case with the coastal-zone regulations. In spite of the fact that the regulations would seem to be *ultra vires*, some remarks will nevertheless be made concerning their contents.

The most striking feature of the regulations is the extremely wide ambit of the concept "activities" as set out in schedule 1 to the regulations. Almost every gardening activity and most agricultural activities would, for instance, fall within the scope of the relevant prohibition because they would amount to "the clearing of land and the removal of vegetation," or, at least, to "the opening of land for cultivation or for the establishment of pasture," while "the erection of any buildings" would bring within its ambit almost the entire building industry, besides private enterprise, along the coast. The nine categories included in the concept of "activities," in fact, are all worded in such an all-embracing fashion that the activities affected are well-nigh unlimited. An argument may even be made out to the effect that the regulations are void for vagueness or for unreasonableness. It should be borne in mind, as I have submitted before, that parliament did not even empower the minister to make regulations relating to direct control over coastal zone development, let alone by means of such sweeping provisions. In any case, the department of environment affairs and especially the provincial administrations concerned would hardly be able satisfactorily to handle all the applications for permits should those wishing to undertake activities falling within the scope of the schedule in question, seek to legalise their potentially criminal actions. It is true that the administrator may by notice in the provincial gazette exclude any activity from the provisions of the regulations (reg 2 (2)). However, no such exemptions have yet been made. Moreover, such an exclusion may relate only to activities within a defined portion of the limited area and not generally to all activities of a certain nature, unless it would be possible to bring the entire limited area within the scope of the defined area in question. It may furthermore prove to be difficult exactly to define the activity to be excluded. It would perhaps have been more satisfactory had the categories of activities been defined more precisely and more restrictively in the first place, leaving less room for uncertainty and speculation as to which actions are intended to be included in the concept of "activities." It is realised, however, that this may prove to be a rather difficult task.

The effect of this exemption provision, taken together with the provision by which control has been established over the granting or refusal of permits, is that the final authority in respect of private coastal zone development has practically been delegated to the administrator, who is himself empowered to delegate his authority relating to the granting or refusal of permits (reg 3(4)). This would not, according to strict principle, seem to be an unauthorised delegation of power since the minister has not delegated his power to make regulations. He has, however, for all practical purposes completely divested himself of control over the limited area in so far as non-state activities are concerned. This nevertheless seems to be in accordance with the new philosophy of devolution of executive functions. (If the regulations are *ultra vires*, as has been submitted, the provisions by which powers have purportedly been granted to the administrator, likewise, would have no effect.)

A further aspect is that the administrative sanction employed by the regulations (reg 6) would also seem to be *ultra vires* the Environment Conservation Act. The act provides expressly for criminal sanctions only (s 12(5)). It does not seem that any room has been left – not even through an interpretation by necessary implication – for the utilisation in regulations of an administrative sanction such as has been provided, however desirable the prescription of such a potentially effective and powerful sanction may be.

A last issue that merits consideration is the provision in the Environment Conservation Act which lays down that is provisions may not be construed as amending or superseding any provision of any other act of parliament. This provision would seem to render the act and regulations issued by virtue thereof subordinate to all other parliamentary legislation. This would seem to mean that the provisions of the act and regulations would always have to be measured against existing parliamentary legislation affecting the coastal zone. It furthermore would tend to confer a rather fragile status on regulations passed in terms of the act (where they do not already at the time of promulgation overlap or conflict with existing parliamentary legislation) since future parliamentary legislation on the same subject, in this case the coastal zone, may later amend or supersede them.

In conclusion, it is submitted that a re-examination aimed at the consolidation and reform of all legislation applicable to the coastal zone is necessary, in order to promote the integrated management of the coastal zone. Since the boundaries of the coastal zone are somewhat uncertain, it may be difficult to decide what legislation should qualify for inclusion in such consolidation. It may well prove to be desirable at least to amalgamate the coastal zone regulations and the Seashore Act, besides certain other relevant coastal zone provisions, into an entirely new Coastal Zone Management Act. It is important, however, that such management should encompass not only the activities of conservation bodies, but also – and especially – development-oriented activities such as industrial and residential development, mining, agriculture, the provision of infra-structure, the establishment and operation of nuclear and military installations, and so on. One of the greatest benefits of the abovementioned regulations is that such activities are in principle brought within their compass.

An attempt is presently being made to consolidate some legislation relating to marine affairs (cf notice 712 of 1985-11-01). Perhaps the proposed reform process should include the promulgation of two sister acts, namely a Coastal

Zone Management Act and a Marine Affairs Act. These proposed acts should then be administered by the ministry of environment affairs and of water affairs, with a possible devolution of certain functions to other bodies such as the administrators concerned, in accordance with the current philosophy of centralisation of broad policy and decentralisation of implementation. It is hoped that in this way a comprehensive and effective basis for the integrated management of the coastal zone and of marine affairs may be established.

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DIE BEGRIPPE "AKKUSATORIES," "ADVERSATIEF" EN "INKWISITORIES" EN DIE HERVORMING VAN DIE BURGERLIKE (SIVIELE) LITIGASIEPROSES*

In die huidige gesprek rondom die hervorming van die burgerlike litigasieproses wat in ons howe toegepas word, vind die begrippe "akkusatories," "adversatief" en "inkwisitories" in 'n toenemende mate aanwending sonder dat daar duidelik tussen dié begrippe onderskei word. (Vgl bv "Van die Redakteur" 1987 *De Rebus* 143 en Middleton "Nog 'n Standpunt" aw 144.)

Die begrip "akkusatories" is, soos die naam aandui, 'n suiwer strafprosesregtelike begrip wat met die burgerlike prosesreg niks te make het nie. Die Suid-Afrikaanse burgerlike prosesreg is soos dié van alle ander Westerse lande, geskoei op die *adversatiewe* stelsel van gedingvoering. Die tradisionele Suid-Afrikaanse burgerlike prosesreg is dus *adversatief* van aard. Dit beteken dat die proses uit 'n geskil tussen twee teenoorstaande, gedingvoerende partye voortspruit en daarop gemik is om die geskil tussen dié twee partye te besleg. Die Suid-Afrikaanse burgerlike prosesreg is dus, net soos dié van ander Westerse lande (bv die Bondsrepubliek van Duitsland) 'n instelling van die staat waardeur versteurde privaatregtelike regte in ewewig gebring kan word. Die handhawing en beskerming van die algemene (regs-)orde en vrede in die gemeenskap is dus bloot 'n uitvloeisel van hierdie oogmerk van die burgerlike prosesreg, oftewel die sekondêre funksie daarvan.

Weens die "individualistiese" aard van die adversatiewe *stelsel* van gedingvoering vertoon dit sekere wesenskenmerke wat behels dat die partye oor die reg beskik (a) om die aksie na gelang van die geval in te stel, te verdedig of te beëindig, (b) om die aard en omvang van die aksie te bepaal, (c) om te bepaal welke getuienis ingesamel en voorgelê sal word ter bewys van hulle onderskeie sake en (d) om deur 'n onafhanklike en onpartydige hof aangehoor te word. Binne die raamwerk van die adversatiewe stelsel kan egter verskeie *litigasiemodelle* aangetref word wat ingebed lê in die kulturele, ekonomiese, sosiale en politieke bodems van die onderskeie Westerse lande en waar die rol van die hof *vis-à-vis* dié van die partye kan wissel. In een model (bv dié van Suid-Afrika)

* Hierdie bydrae spruit voort uit die skrywer se doktorale proefskrif *Hofbeheer en Partybeheer in die Burgerlike Litigasieproses: 'n Regshervormingsondersoek* (UPE 1987) wat moontlik gemaak is gedeeltelik deur finansiële steun van die Getrouheidswaarborgfonds vir Prokureurs, Notarisse en Aktevervaardigers en die Raad vir Geesteswetenskaplike Navorsing.

speel die hof tradisioneel 'n passiewe rol. Vir sover dit die ontplooiing van die litigasieproses betref, kan daar dus van "partybeheer" gepraat word. In 'n ander model (bv dié van Wes-Duitsland) speel die hof 'n aktiewe, leidinggewende en ondervragende rol. Die hof is met ander woorde in beheer van die *ontplooiing* van die proses en is verplig om die partye te help om hulle sake op 'n behoorlike wyse voor te lê; "hofbeheer" vind dus plaas. Laasgenoemde vorm van beheer vind egter sonder 'n skending van die wesenskenmerke van die adversatiewe stelsel plaas. In hierdie verband kan gevolglik van 'n *hofaktiewe* (adversatiewe) model van gedingvoering gepraat word. So kan, in die woorde van Jolowicz (Cappelletti en Jolowicz *Public Interest, Parties and the Active role of the Judge in Civil Litigation* (1975) 276), verklaar word:

> "[N]otwithstanding [the active judge's] powers of initiative, the parties' role in the formulation of the issues and in the presentation of evidence and argument is substantially maintained."

Die aktiewe optrede van die hof in die adversatiewe stelsel moet duidelik onderskei word van die *ondersoekende* optrede van die hof in die inkwisitoriese stelsel van burgerlike gedingvoering. Cappelletti en Garth (*International Encyclopedia of Comparative Law* bd 16 (1984) 255) verklaar tereg in hierdie verband:

> "The active judicial role does not necessarily contradict the notion that the civil suit 'belongs' primarily to the parties. Nevertheless . . . this role makes some observers nervous about potential inquisitorialness."

In teenstelling met die adversatiewe stelsel, word in die inkwisitoriese stelsel besonder baie klem gelê op die handhawing en bevordering van die belange en oogmerke van die staat. Volgens kommunistiese regsdenke bestaan die primêre funksie van die burgerlike prosesreg in die handhawing en beskerming van die staat se belange en ideologiese oogmerke. Die beslegting van geskille tussen regsubjekte is slegs deel van hierdie breëre funksie en beklee dus 'n sekondêre plek. Vanweë hierdie rede is die wyse waarop die litigasieproses plaasvind, en die rol wat die hof daarin speel, wesenlik anders as dié van die adversatiewe stelsel.

Ten einde sy primêre doelwit te bereik, speel die kommunistiese hof 'n *ondersoekende* oftewel 'n inkwisitoriese rol. Zivs (Cappelletti en Tallon *Fundamental Guarantees of the Parties in Civil Litigation* (1973) 805) wys byvoorbeeld daarop dat die hof onder 'n verpligting is

> "to utilize all the means provided by law to assure an overall, complete, and objective search into the real facts of the case."

In dié verband is dit interessant om daarop te let dat die hof byvoorbeeld *mero motu* (a) getuies, anders as die getuies wat die partye genomineer het, kan gelas om getuienis af te lê en (b) die aard en omvang van die skuldoorsaak kan verander. Voorts kan die hof onder bepaalde omstandighede weier om 'n skikking wat die partye onderling bewerkstellig het, te aanvaar.

Omdat die adversatiewe en inkwisitoriese stelsels van twee duidelik verskillende uitgangspunte vertrek, moet daar versigtig beweeg word alvorens 'n bepaalde litigasiemodel as "adversatief" of "inkwisitories" beskryf word. In die eerste plek moet die model altyd beoordeel word in die lig van die staatsregtelike struktuur en ideologiese raamwerk waarbinne dit aanwending vind. In die tweede plek moet daarteen gewaak word om nie die model te kategoriseer bloot op

grond van sekere terme en begrippe wat die beeld van "adversatief" of "inkwisitories" skep nie. Die vraag of 'n bepaalde litigasiemodel adversatief of inkwisitories is, is dus 'n baie fundamentele vraag. Insgelyks moet besef word dat 'n suggestie dat die tradisionele Suid-Afrikaanse litigasiemodel in 'n inkwisitoriese model omgeskep behoort te word, nie alleen 'n totaal nuwe en vreemde litigasieproses tot gevolg sou hê nie, maar ook 'n totaal nuwe en vreemde lewens- en wêreldbeskouing (insluitende 'n nuwe en vreemde staatsbeskouing) sou veronderstel.

Wat die hervorming van die burgerlike prosesreg in Suid-Afrika betref, is dit dus duidelik dat sodanige hervorming nie die grense van die adversatiewe stelsel moet oorskry nie. In hierdie verband kan diegene wat met regshervorming gemoeid is, veel put uit lesse wat geleer is in verband met die kontinentale adversatiewe modelle waar die hof, soos reeds genoem, 'n aktiewe, leidinggewende en ondervragende rol speel.

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INCORPORATION BY REFERENCE

The South African Law Commission discusses the principle of incorporation by reference in its latest review of succession (working paper 14 project 22 *Review of the Law of Succession, Formalities of a Will* June 1986 110–113). The commission concludes that it "does not recommend any change to the existing position" (113). However, when one scrutinises *Kohlberg v Burnett* 1986 3 SA 12 (A), and especially the decision of the court *a quo*, one cannot agree with the commission that the legal position concerning incorporation is "satisfactory" (112).

Before analysing the *Kohlberg* case, I shall briefly discuss our common law, the provincial statutes, the Wills Act 7 of 1953 and relevant case law concerning incorporation.

Common Law

In book 28 of Voet's *Commentarius ad Pandectas* there is ample evidence that incorporation was permissible in Roman and Roman-Dutch Law (see Gane's translation vol 4).

Voet writes that "in written wills the testator can refer to a codicil in regard to the naming of the heir or to the allocating of shares in the inheritance" (28 1 11). Further on he states:

> "[T]here is also nothing novel in a person instituting as heirs in his written will persons who are not plainly named, but are named by reference to another screed, such as those whom he will name in a codicil, or whom he will expressly state with his very own hand in his last will which for the rest is completed" (28 5 15).

He continues:

> "There is also no doubt that a testator correctly institutes heirs in his last will by reference to a definite statute, as by instituting those whom *Schependoms law* or those whom *Aasdoms law* or the law of some other places fixes to succeed in intestacy, as can be inferred from what is found in the work cited below" (*ibid*; *cf* Grotius 2 29 4).

(Concerning incorporation in Roman and Roman-Dutch law, see in addition Corbett Hahlo Hofmeyr *The Law of Succession in South Africa* 56, *Moses v Abinader* 1951 4 SA 537 (A) 551H and *Estate Orpen v Estate Atkinson* 1966 2 SA 639 (C) 644A–B.)

It is interesting to note that our common law is more lenient in respect of incorporation than English law. In English law the document referred to must be in existence at the date of the will (see Clark *Theobold on Wills* 14 ed 55 and Miller *The Machinery of Succession* 215). In our common law the document referred to need not be in existence when the will is executed.

The Provincial Statutes and the Wills Act

Before 1954–01–01, wills executed in Natal were governed by Act 2 of 1868. Although this act did not refer to incorporation, the Natal courts deemed it possible to incorporate a non-testamentary document in a will (*Mack v Watt* 1927 NPD 47 48; *Ex parte Sieberhagen* 1946 CPD 83 95).

In the other provinces, the various statutes prescribed strict formalities for the execution of a will. It was held by the courts that a document which had not been executed in accordance with these formalities could not by reference and incorporation become part of a valid will (*Van Reenen v Board of Executors* 1876 Buch 44; *Ex parte Webber's Executors* (1902) 19 SC 427; *Moses v Abinader* 1951 4 SA 537 (A); but cf *Re Estate Marks* 1921 TPD 180 201).

The Wills Act applies to all wills executed in South Africa since 1954–01–01. The formalities required for the execution of a valid will are similar to those prescribed by the provincial statutes of the Transvaal, Orange Free State and Cape Province (Transvaal ord 14 of 1903, OFS ord 11 of 1904 and Cape ord 15 of 1845). The similarity between the provisions of the Wills Act and those of the provincial statutes lead Corbett to conclude that "the position is the same as it had previously been in the other provinces other than Natal, namely that incorporation by reference is not possible" (*Law of Succession* 57).

Other textbook-writers agree that incorporation is not possible and this conclusion is generally accepted in our law (Erasmus Van der Merwe Van Wyk *Lee and Honoré: Family Things Succession* 2 ed 392; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 5 ed 203).

If incorporation is not possible, then one must assume that the following stipulations in a will would be invalid:

a a stipulation by a testator that an earlier invalid will is his will (cf English cases *Re Nicholls* 1921 2 Ch 11 and *Re White, Knight v Briggs* 1925 Ch 179);

b a stipulation that the name of the testator's beneficiary will be disclosed in a letter addressed to his executors (*Ex parte Estate Davies* 1957 3 SA 471 (N));

c a stipulation that the testator's furniture or jewellery must be divided among his children in accordance with an inventory drawn up and signed by him (see Murray 1951 *Annual Survey* 105 109);

d a stipulation that the testator's closest relative whose name appears in a certain Bible text is his heir.

Even if the documents referred to in such stipulations were executed in compliance with the provisions of the Wills Act they could not by reference and incorporation form part of the testator's will (Corbett 56; Lila Isakow *The Law*

of Succession through the Cases 27; *Estate Orpen v Estate Atkinson* 1966 2 SA 639 (C) 645A–C; *Burnett v Kohlberg* 1984 2 SA 137 (C) 143C–D).

Case Law

The reason for the rejection of incorporation was given by Schreiner JA in *Moses v Abinader* (*supra*):

> "I think that it is clear that whatever may be the position under other statutes, it is not possible under Ord 14 of 1903 (T) or similar statutes to incorporate the terms of a document, not executed in terms of the statute, in a duly executed instrument, so as to make the former an effective part of the latter. Whatever language were used in the duly executed instrument it could not be shown that the earlier document was executed on every sheet by the testator and the attesting witnesses all present at the time when the later instrument was executed" (547C–G; also 552D and 553G–H; see too Corbett J in *Estate Orpen v Estate Atkinson supra* 644H–645B; *Van Reenen v Board of Executors supra* 44 47; *In re Webber's Estate* 19 SC 427 and Corbett 56–57).

Van der Merwe and Rowland discuss *Moses v Abinader* in detail and come to the conclusion that

> "die onderhawige beslissing [het] darem een ding duidelik gestel en dit is dat die Engelse leerstuk van 'incorporation by reference' nie deel van ons reg vorm nie" (*Die Suid-Afrikaanse Erfreg* 201).

If emphasis is placed on the word "Engelse" then one is forced to accept this conclusion. There is evidence in both the *Moses* case and the later *Davies* case that incorporation cannot take place here as freely as in England. However, there is no merit in the viewpoint that incorporation is not permissible in our law.

Moses v Abinader could possibly be used as authority for the argument that according to our law incorporation can take place in certain circumstances. Van den Heever JA stated that "incorporation by reference (save in situations not relevant to this appeal) has now been rendered invalid by the provisions of sec 1 of Ord 14 of 1903 (T)" (552B–C). Unfortunately, he failed to define the "situations not relevant to this appeal" in which incorporation would be allowed.

In *Ex parte Estate Davies* Broome JP held that if the testator stipulated in his will that his beneficiary was a person whose name would be disclosed in a letter addressed to his executors, the bequest would fail because the letter was a testamentary writing and as such had to comply with the formalities required for a valid will in terms of the Wills Act (474C–D).

If one supports Broome's opinion, then there can be no objection to the acceptance of incorporation in a will of the following documents:

a documents which cannot be characterised as testamentary writings in terms of the Wills Act; and

b documents which are independently executed in accordance with section 2(1)(a) of the Wills Act (Law Commission Review 112 par 11 7).

Regrettably, Broome JP gave a rather vague definition of what "testamentary writings" might be:

> "There are of course cases where extrinsic evidence is necessary in order to identify the property bequeathed or the beneficiary, and some of that evidence may be in the form of documents. Such documents would not necessarily be testamentary writings. But we are concerned here with a document signed by the testator. In as much as that document contains the sole expression of the testator's intention as to the identity of the beneficiary, it is testamentary in character and so is a testamentary writing. As such it is invalid for want of compliance with the statutory formalities" (474B–C).

Another case relevant to incorporation is *Estate Orpen v Estate Atkinson* 1966 4 SA 589 (A). The facts of the case were briefly as follows: The testator and his surviving spouse had executed a joint will in which they stipulated *inter alia* that the survivor and their only daughter were to be the usufructuaries of the income of a trust established by them.

The will provided that should the daughter die leaving no issue, twenty percent of the residual capital "shall devolve on such a person or persons, or in such shares or portions as she may by last will and testament or other writing direct." The daughter predeceased the testator leaving no issue. She had stipulated in her will that the twenty percent residual capital should be paid to her husband.

The judgment concerns the power of appointment which is irrelevant to this discussion. However, the decision given by Trollip AJA is of importance to the doctrine of incorporation by reference. The judge remarked that he was aware that a testator "does sometimes appoint as his heir or legatee 'the testamentary heir' of a third party" (597C–D). He expressed the opinion that such an appointment in a will could possibly be valid because it would be the "testator's own appointment" (597D–E).

The Kohlberg case

The most recent case concerning incorporation is *Burnett v Kohlberg* (*supra*). This case went on appeal (*Kohlberg v Burnett supra*).

Briefly the facts of the case were as follows:

The testator had two notarial deeds of donation and trust drawn up in terms of which two trusts were established *inter vivos*. The trusts were to be known as the "Kohlberg Kohlberg Trust" and the "Kohlberg Moony Trust." On the same day the testator signed a will in which certain bequests were made. The testator stipulated *inter alia* in clause 3 of the will:

> "I leave and bequeath the rest, residue and remainder of my estate and effects . . .
>
> a As to thirty-five per centum (35%) to the Kohlberg Kohlberg Trust to be administered, dealt with and distributed as part of the capital and according to the conditions of that trust; and
>
> b As to sixty-five per centum (65%) to the Kohlberg Moony Trust to be administered, dealt with and distributed as part of the capital and according to the conditions of that trust."

Burnett (applicant), a chartered accountant, administered the estate and prepared a first and final liquidation and distribution account. In terms of the account the residue of the estate was awarded to the Kohlberg Kohlberg Trust and the Kohlberg Moony Trust as was stipulated in clause 3 of the testator's will.

Kohlberg (co-executor and first respondent) refused to sign the liquidation and distribution account, advancing the following reasons:

a the bequest to a trust *inter vivos* was not possible and

b the incorporation by reference of the terms and conditions of the two trust deeds in the testator's will was not permissible in our law (see Jaffe and Wunsh 1982 *De Rebus* 529).

The first respondent concluded that the testator had died intestate in respect of the residue of his estate.

Burnett sought an order directing Kohlberg (first respondent) to sign the account. The first respondent, in a counter-claim, asked for a declaratory order

that the bequest to the two trusts was invalid and that the residue of the testator's estate should devolve *ab intestato.*

In my analysis of the decisions of the Court *a quo* and of the appeal court, I shall confine myself to what was said about incorporation. The correctness of the decision that trusts *inter vivos* may be appointed as testamentary beneficiaries will not be dealt with here. (The matter is discussed by Wunsh 1986 *De Rebus* 433).

Clause 3 of the testator's will expressly stipulated that the residue of the estate had to devolve on the Kohlberg Kohlberg Trust and the Kohlberg Moony Trust.

Kannemeyer J in the court *a quo* was of the opinion that if property is bequeathed to a trust *inter vivos*, the bequest will not fail simply because the trust is not a legal *persona.* He held that the intention of the testator was obvious. The bequeathed property "should vest in the trustees in order that they may administer it for the benefit of the trust" (141E–F).

He added:

> "It makes no difference if the bequest is to the trust and not the trustee so long as the intention is clearly to benefit the trust, which can only happen if the trustee takes the property" (142E–F).

The judge's contention that "the bequest is not to someone whose identity has to be sought in the trust deed . . ." (144A) is debatable.

In clause 4 of the will the testator stipulated the following:

> "I nominate, constitute and appoint Peter Carl Kohlberg together with John David Enraght-Moony and Harold Moulsdale Burnett . . . to be the executors of this my will and administrators of my estate and effects with all such power and authority as are allowed in law and especially that of assumption as well as the right to dispose of any immovable property by private treaty or public auction and in the event of the failure of any one or more of them the remaining one . . . shall be entitled to act alone . . ."

Clause 4 did not stipulate clearly whether the executors and administrators of the estate were also the trustees of the trusts which were created by the testator in the two notarial deeds of donation and trust. The trustees of the Kohlberg Kohlberg Trust and the Kohlberg Moony Trust could be identified only by consulting the relevant notarial deeds.

If one is forced to consult documents other than the will in order to determine a testator's last wishes, incorporation by reference takes place. In this case it was necessary to refer to the two notarial deeds to identify the trustees, to ascertain their specific instructions and to determine the eventual beneficiaries of the trusts. In clause 3 of Kohlberg's will he stipulated that the respective trusts had to be "administered, dealt with and distributed as part of the capital *and according to the conditions of that Trust*" (my italics). To give effect to Kohlberg's last wishes, the will and the notarial deeds had to be read together.

In the light of the foregoing, it is difficult to understand how Kannemeyer J could conclude: "there has been no incorporation by reference" (143E) in the case of Kohlberg's will. The judge rejected the doctrine of incorporation by reference outright. Without referring to any authority, he held that "no document, irrespective of its nature, can be incorporated in a will by reference" (143C–D). Yet he incorporated the notarial deeds into the will.

Had Kannemeyer J found the trust *inter vivos* to be a legal *persona*, I would have had no problem understanding the judgment. The trust would have been the beneficiary like any natural person and it would have been unnecessary to

consult other documents. The principle of incorporation by reference would not have applied. I would then have agreed with the judge where he stated that "reference to the trust deed is as necessary as would be reference to the articles and memorandum of an association not for gain . . ." (144A–B). I could also not have faulted the judge where he continued:

> "[W]hen a bequest is made to a trust or to trustees for a trust, the testator is not incorporating anything in his will. He is leaving property to persons whose power of dealing with it is limited by the terms of their appointment as administrators of the trust; just as when he leaves property to an association incorporated not for gain the use to which it may be put is governed and limited by the memorandum and articles thereof" (144E–F).

However, in light of the judge's express (and most probably correct) finding that a trust is not a legal *persona*, the *ratio decidendi* of the case becomes incomprehensible. The "persons" of whom the judge speaks and "the terms of their appointment" are not disclosed in the testator's will, but have to be found in the relevant notarial deeds. (This was in fact the first respondent's argument: 142H–143A.)

The judge maintained:

> "[T]he mere fact that in the first instance the bequest is to trustees of a trust which does not have legal personality and in the other to a corporate body cannot alter the position" (144A–B).

But one cannot speak of a company and of a trust in the same breath. The former is endowed with legal personality while the latter is not, as the judge himself points out (144B).

The appeal court decision was handed down by Rabie CJ. With all due respect, I find the decision most disappointing. The judge seems to have side-stepped the question of incorporation when he stated that the

> "short but crucial question is, therefore, whether counsel [for the appellant] is correct in contending that the bequest of the residue of the estate was a bequest to the beneficiaries under the two trusts, and not to the trusts, or to the trustees, as representing the trusts" (25E).

He concluded that the deceased had not failed to appoint beneficiaries in clause 3 of his will (25H–I). He admitted that a trust cannot hold or acquire property because it is not a legal *persona*. However, he continued:

> "[T]his fact does not bring about that the two trusts were not properly appointed as beneficiaries in clause 3 of the will. The trustees of the two trusts are in law entitled to act on behalf of the trusts and to hold, in their capacities as trustees, property for the purposes of the trusts" (25G–H).

When the judge considered the submission by appellant's counsel that the bequest in clause 3 of the will was to the trust beneficiaries, he admitted that the trustees did not receive any personal benefit from the trust. They merely acquired the property in their representative capacity as trustees of the particular trust. The only persons who really benefited from a trust were the beneficiaries (25I–J).

The judge then drew an interesting conclusion:

> "This does not mean, however, that the beneficiaries under the two trusts are to be regarded as the beneficiaries whom the deceased sought to appoint as his beneficiaries in clause 3 of his will, but whose identity he left to be determined by reference to the trust deeds. The deceased did not appoint them as beneficiaries in his will. Their rights to receive benefits are not derived from the deceased's will, but from the terms of the trust deeds" (26A–B).

When one considers this judgment carefully, one can deduce that the judge by implication approved of incorporation by reference in our law. The same conclusion is reached by the law commission in their review (*supra* 112 par 11 6 and 11 7).

Unfortunately, nothing explicit is said in the appeal court's decision about incorporation by reference. Rabie CJ did not reject the doctrine as Kannemeyer J had in the court *a quo*. However, Rabie also did not address the problems arising from his judgment that the "rights [of the beneficiaries] to receive benefits are [in this case] not derived from the deceased's will." Questions like: in which circumstances will the doctine of incorporation by reference be permitted? or: what are the requirements that must be met before the doctrine will be applied? are left unanswered. Rabie's judgment can be criticised for the lack of a clear and definite approach to the doctrine of incorporation by reference.

Readers of the appeal court's decision will have to interpret the judgment and reach their own conclusions. The law commission, for example, interprets this case as authority for the view that incorporation of non-testamentary writings in a will is permissible according to our law (112 par 11 7).

It is most unsatisfactory, however, to have to rely on deductions of this nature rather than on precise findings when the enforcement of a testator's last wishes is at stake. The judgment in *Kohlberg v Burnett* belies the view that the appeal court rejects the doctrine of incorporation by reference. At the same time the extent to which incorporation is permitted remains unresolved. The court failed to seize the opportunity to clarify our law on incorporation by reference.

Conclusion and Proposals

There is no need for a comparative study to justify the acceptance of the doctrine of incorporation in our law. It is absurd to allow written or oral evidence which will shed light on the testator's intention (Corbett 490) but to disallow incorporation by reference. Apart from this incongruity, a total prohibition of incorporation is in conflict with the liberal and benevolent approach of our courts towards the interpretation of wills (Corbett 462 *et seq*).

As I have pointed out, incorporation was permissible in our common law. After the promulgation of the provincial statutes and the later Wills Act, legal opinion was that incorporation had become impossible. But a rigid disallowance of incorporation has proved untenable, as I have attempted to show in my analysis of the *Kohlberg* case.

The law commission does not recommend any change to the existing position regarding incorporation. I agree that the law does not necessarily have to be amended, although an unequivocal approach to incorporation – and indeed specific indications as to when incorporation may take place – is required if the law is to be left unchanged.

One could attempt to solve the problems related to incorporation in two different ways. First, one could maintain the traditional, conservative view that a will must adhere to all the rigorisms of the Wills Act, while allowing incorporation in the case of certain, specified types of documents referred to in a will. Secondly, one could digress from this approach and recommend a new and more liberal solution.

a *A conservative proposal* Court decisions such as the judgment of Broome JP indicate that certain types of document can be incorporated by reference without contravening the Wills Act. Consequently, it is not necessary to amend the law to establish conditions under which incorporation may take place.

Incorporation would be allowed if the testator refers to the following types of documents:

i documents which have been executed independently of the will, but which comply with section 2(1)(a) of the Wills Act; or

ii documents which cannot be characterised as testamentary writings in terms of the Wills Act.

If a testator refers to documents which comply with one of the aforementioned conditions, such documents should be read as part of the testator's will.

An uncertainty which presents itself when one tries to resolve the difficulties accompanying incorporation in the abovementioned way, is the exact nature of the so-called "other testamentary writings" to which the Wills Act applies. Which types of documents referred to by a testator could be exempted from the prescriptions of the Wills Act – and could thus be incorporated by reference – because they cannot be characterised as testamentary writings?

An attempt to allow for incorporaton by reference without amending the law would thus require a careful definition of what the phrase "other testamentary writings" includes and excludes. It is indeed unfortunate that the Law Commission did not recommend that "other testamentary writings" should be defined. (See their *Review* 110 *et seq* and their recommendations 129–133.) A circumspect definition of "other testamentary writings" could, for instance, prevent a testator from reflecting his last wishes in one document and then executing a brief will in which he simply states that his estate must devolve in terms of that document.

b *A liberal proposal* A more liberal solution to the problems of incorporation is also feasible. This solution rests on the premise that a distinction should be made between incorporation and the execution of a valid will. Incorporation and execution should be made subject to different requirements.
One could indeed ask whether incorporation has not unfairly been confused with execution.

In English law, incorporation is "the product of judicial decision" (Miller *supra* 215). Execution, on the other hand, is governed by section 9 of the English Wills Act 1837. There are specific requirements for the execution of a valid will and different requirements for incorporation (see *Theobold on Wills* 55).

If the requirements for incorporation were clearly formulated in our law, it would be possible to separate these requirements from the requirements for the execution of a valid will. This would be consistent with Roman-Dutch law which recognised the distinction between execution and incorporation. In Roman-Dutch law there were certain formalities with which one had to comply when executing a valid will and, apart from this, incorporation was also permissible.

I propose that the words "any other testamentary writing" be deleted from the Wills Act. In addition, I propose that incorporation by reference should be allowed if the following requirements are met:

i the testator must refer to the document in his will or codicil; and

ii the testator must clearly identify the document in his will or codicil.

Oral evidence should be allowed regarding the identity of the document(s) referred to in the testator's will. The onus of proving the existence and authenticity of the document(s) should rest on the person averring such fact.

The effect of incorporation should be that the document to which the testator refers becomes part of the testator's will. Therefore, although the document might not comply with the formalities of the Wills Act, it would attain validity as a testamentary disposition by reason of incorporation. Being accepted as part of the will, the document will be subject to all the common-law rules governing wills, for example ademption.

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DIE EFFEK VAN TYDSVERLOOP OP STRAFREGTELIKE AANSPREEKLIKHEID

1 Inleiding

In skrille kontras met (veral) die Europese regstelsels het die vraag na die effek van tydsverloop (verjaring) op strafregtelike aanspreeklikheid nog weinig aandag, sowel in gewysdes as regswetenskaplik, in Suid-Afrika geniet. Terwyl die Suid-Afrikaanse strafprosesreëls 'n sterk Engelse aksent dra, is die verskynsel van "verjaring van misdade," behalwe ten aansien van sekere minder ernstige misdade, aan die Engelse reg onbekend (sien Hazewinkel-Suringa-Remmelink *Inleiding tot de Studie van het Nederlandse Strafrecht* (1984) 502). In dié verband kan dus nie op die Engelse reg vir leiding gesteun word nie, maar moet teruggegaan word na ons gemeneregskrywers. Daar bestaan 'n uitlegsvermoede in ons reg dat wetgewing die bestaande reg (insluitende die gemenereg) slegs waar nodig wysig (sien Steyn *Die Uitleg van Wette* (1981) 97; Labuschagne "Die Uitlegsvermoede teen Wysiging van die Bestaande Reg" 1981 De *Jure* 333).

In Europese strafkodes word twee tipes verjaring aangetref, naamlik (a) vervolgingsverjaring, dit wil sê 'n vervolging kan na 'n sekere tydsverloop nie meer ingestel word nie en (b) strafvoltrekkingsverjaring, dit wil sê die owerheid word verbied om 'n opgelegde straf na 'n sekere tydsverloop te voltrek (sien Hazewinkel-Suringa-Remmelink 502; Stree-Schönke-Schröder *Strafgesetzbuch Kommentar* (1982) 777 789; a 111–114 van die Griekse strafkode (vertaal deur Lolis en Mangakis, 1973)). Die prinsipiële effek van sowel vervolgings- as strafvoltrekkingsverjaring is dat 'n straf na 'n sekere tydsverloop nie uitgevoer kan word nie en daar funksiestrafregtelik dus geen misdaad gepleeg is nie (sien my aantekeninge "Die Strafregnorm" 1982 *THRHR* 312; "Die Uitskakeling van Toeval by Strafregtelike Aanspreeklikheid" 1985 *De Jure* 155). Slegs indien 'n straf opgelê en (geheel of gedeeltelik) uitgevoer word, kan daar funksiestrafregtelik van 'n misdaad sprake wees. Hier kan ook genoem word dat die begrip "verjaring van 'n misdaad" nie doenlik is nie omdat 'n misdaad eers (funksiestrafregtelik en daarom werklik) bestaan as 'n betrokke persoon skuldig bevind is en 'n straf opgelê en (geheel of gedeeltelik) uitgevoer is. Om te beweer dat 'n misdaad verjaar, is 'n *contradictio in terminis*.

Ten aansien van verjaring in strafregtelike sin kan onderskei word tussen termynverjaring en omstandigheidsverjaring.

2 Termynverjaring

Hieronder kan weer onderskei word tussen vervolgingsverjaring en strafvoltrekkingsverjaring.

2 1 Vervolgingsverjaring

2 1 1 Gemenereg

Ons gemeneregskrywers het in hoofsaak die Romeinse reg nagevolg. As algemene reël het gegeld dat 'n vervolging na twintig jaar verjaar (sien *Cod* 9 22 12; Rein *Das Kriminalrecht der Römer* (1844) 278; Mommsen *Römisches Strafrecht* (1899) 488). Dit was ook die posisie in die Europese fase van die ontwikkeling van ons gemenereg (sien Bassanus *Theorico-Praxis Criminalis* 6 1 141–191; Van Leeuwen *RHR* 2 8 6; Carpzovius *Verhandeling der Lyfstraffelyke Misdaaden* hfst 133 4; Matthaeus *De Criminibus* 48 19 4 1; Leyser *Meditationes ad Pandectas spec* 515; Perezius *Praelectiones in Duodecim Libros Codicis* 9 22 12; Püttmann *Elementa Juris Criminalis* par 1047; Van der Linden *Regtsgeleerd Practicaal en Koopmans Handboek* 2 9 5; Van der Keessel *Praelectiones ad Ius Criminale* 48 2 23; Maes *Vijf Eeuwen Stedelijk Strafrecht* (1947) 104). Op hierdie algemene reël het die volgende uitsonderinge bestaan:

a *In geval van sekere misdade verjaar vervolgbaarheid nooit nie.* Die vervolgbaarheid van *parricidium* (vadermoord) en *apostasia* (apostasie; geloofsafvalligheid) het nooit verjaar nie (sien Rein 278; Mommsen 489; Carpzovius hfst 133 18; Leyser *spec* 515 12; Matthaeus 48 19 4 2–4; Van der Keessel 48 2 23).

b *Vir sekere misdade word 'n korter termyn gestel.* Die vervolgbaarheid van die misdade kragtens die *lex Julia de adulteriis coercendis* het na vyf jaar verjaar. Hieronder sorteer misdade soos owerspel, bloedskande, strafregtelike *stuprum* (uitgesonderd *stuprum violentum*) en "onnatuurlike" geslagsmisdade (sien *Inst* 4 18 4; Carpzovius hfst 52 1–6, 133 14–17; Leyser spec 515 9; Van der Keessel 48 2 23; Püttmann par 1048–1049; Van der Linden 2 9 5). Volgens Van der Keessel verjaar die vervolgbaarheid van vervalsing en misdade gepleeg kragtens die *Senatusconsultum Sylanianum* ook na vyf jaar (48 2 23). Volgens Carpzovius verjaar die vervolgbaarheid van "woordelyke hoon" na een jaar (hfst 133 22).

Vervolgens word sekere probleemtemas van verjaring van die vervolgbaarheid van misdade onder die loep geneem.

2 1 1 1 Kennis

In een van sy adviese beweer Barels dat verjaring slegs ter sprake kom as dit bekend is dat 'n misdaad gepleeg is (*Crimineele Advysen* adv 58). Hierdie mening is egter in stryd met die oorwig van gesag. Rein wys daarop dat die verjaringstermyn in die Romeinse reg 'n *tempus continuum* was, dit wil sê dit het geloop selfs as geen stappe teen die betrokke dader oorweeg word nie (279). Carpzovius verklaar dat die verjaringstermyn loop vanaf die tyd waarop die misdaad gepleeg is en nie die dag waarop die klaer of regter daarvan bewus geword het nie (hfst 133 9). Hierdie benadering word deur ander skrywers bevestig (sien Matthaeus 48 19 4 9; Leyser *spec* 515 4).

2 1 1 2 Termynberekening

Uit wat Carpzovius meedeel, blyk dat die verjaringstermyn *de momento in momentum* bereken word, dit wil sê vanaf die oomblik waarop die misdaad gepleeg is (hfst 133 24). Die meer realistiese benadering is dat dit volgens die siviele metode bereken word, dit wil sê vanaf die eerste oomblik van die dag van die voltooiing van die misdaad tot op die eerste oomblik van die laaste dag van die bepaalde termyn (sien Püttmann par 1051; sien ook Steyn 169; De Villiers "Oor Juridiese Tydsberekening in Derdepartyversekeringsgewysdes" 1970 *Speculum Juris* 3 5–6).

2 1 1 3 Onderbreking

Volgens Rein is die loop van die verjaringstermyn in die Romeinse reg deur 'n *postulatio* onderbreek (279). Uit wat ons skrywers meedeel, blyk dat verjaring gestuit word deur die uitreik van 'n dagvaarding aan of die inhegtenisname van die beskuldigde (sien Groenewegen *De Legibus Abrogatis* ad Cod 9 22 12; Carpzovius hfst 133 19; Leyser spec 515 6; Matthaeus 48 19 4 10; Van der Linden 2 9 5). Püttmann (par 1055) verklaar soos volg:

> "interrumpitur autem citatione quacumque rei legitima, qua verbali qua reali, qua privata qua publica."

Volgens Van der Keessel word die verjaring onderbreek as 'n klag gelê word, dit wil sê as 'n klagstaat aan die beskuldigde bestel word of, indien hy afwesig is, as hy in kennis gestel word dat hy benodig word. In dié gevalle moet 'n nuwe periode van twintig jaar bereken word vanaf die datum van die klagstaat of die kennisgewing (48 2 23; sien ook Gardiner en Lansdown *South African Criminal Law and Procedure* vol 1 (1957) 14).

2 1 1 4 Poging en Gevolgsmisdade

In geval van pogingsmisdade vang die verjaringstermyn aan by die voltooiing van die poging (Püttmann par 1052). Sowel Püttmann as Van der Keessel wys daarop dat die verjaringstermyn by voltooiing van die misdaad 'n aanvang neem, dit wil sê in geval van gevolgsmisdade ten tyde van die intree van die gevolg (Püttmann par 1050; Van der Keessel 48 2 23). In geval van misdade wat meer as een maal gepleeg word, soos owerspel, loop die verjaringstermyn vanaf die laaste daad (Van der Keessel 48 2 23).

2 1 1 5 Verjaring het 'n Dwingende Aard

Van der Keessel wys daarop dat verjaring in strafregtelike sin die beskuldigde van straf onthef en daaraan kan nie verander word nie selfs al sou hy 'n vrywillige bekentenis maak of eis dat hy gestraf word (48 2 23; hy beroep hom op Leyser *spec* 515 1). In die Suid-Afrikaanse kontraktereg geld die reël dat voldoening aan 'n verjaarde skuld nie met die *condictio indebiti* teruggevorder kan word nie (sien De Wet en Van Wyk *Kontraktereg en Handelsreg* (1978) 258). Die effek van verjaring in die kontraktereg is dus anders as in die strafreg.

2 1 2 Wetgewing en Gewysdes

Artikel 18 van die Strafproseswet 51 van 1977 vorm die basis van die huidige Suid-Afrikaanse reg en lui soos volg:

> "18(1) Die reg om 'n vervolging in te stel vir 'n misdryf, behalwe 'n misdryf ten opsigte waarvan die doodstraf opgelê mag word, verval by verstryking van 'n tydperk van twintig

jaar vanaf die tyd toe die misdryf gepleeg is, tensy 'n ander tydperk regtens uitdruklik bepaal word.

(2) Die reg om 'n vervolging in te stel vir 'n misdryf ten opsigte waarvan die doodstraf opgelê mag word verval nie weens tydsverloop nie."

2 1 2 1 Halsmisdade Verjaar nie

Kragtens artikel 388 van die vorige Strafproseswet 56 van 1955 het die vervolgbaarheid van slegs moord nooit verjaar nie. Daar is hedendaags nege misdade waarvoor die doodstraf opgelê kan word (sien artikel 277 van die Strafproseswet en Hiemstra *Suid-Afrikaanse Strafprosesreg* (1981) 26). In geval van roof en huisbraak, of poging daartoe, sal die hof eers getuienis moet aanhoor om vas te stel of verswarende omstandighede teenwoordig is (Hiemstra 26). Dit gaan hier nie oor die vraag of die hof in 'n betrokke geval die doodstraf sal oplê nie, maar of die doodstraf 'n bevoegde straf is.

2 1 2 2 Termynberekening

Die sinsnede "vanaf die tyd toe die misdryf gepleeg is" wat in artikel 18(1) gebruik word, dui daarop dat die tydperk *de momento in momentum* bereken word. Indien dié uitleg korrek is, sal die hof eers getuienis moet aanhoor om vas te stel wanneer die misdaad gepleeg is. Daar word aan die hand gedoen dat in geval van twyfel oor presies op watter tydstip die misdaad gepleeg is die tydstip wat die beskuldigde die meeste begunstig, gebruik moet word.

2 1 2 3 Onderbreking

Hiemstra voer aan dat verjaring gestuit word deur die instel van vervolging (26). Die howe het beslis dat die instel van vervolging plaasvind by die uitreik van 'n dagvaarding (sien *R v Bradshaw* 1925 CPD 53 56; *R v Priest* 1931 AD 356; *R v Friedman* 1948 2 SA 1034 (K) 1037; *R v Magcayi* 1951 4 SA 356 (E); Hiemstra 26). In *Herold v Johannesburg City Council* 1949 2 SA 1257 (A) 1268 is beslis dat indien 'n beskuldigde wat in die dagvaarding genoem word deur 'n ander beskuldigde vervang word die verjaringstermyn vanaf die datum van vervanging loop. 'n Dagvaarding word uitgereik as dit volledig opgestel, deur die klerk van die hof onderteken, afgestempel en gedateer is sodat dit gereed is vir betekening deur die geregsbode (Hiemstra 119 met verwysing na *S v Swart* 1969 3 SA 138 (T)). Dieselfde behoort myns insiens te geld in geval van 'n skriftelike kennisgewing aan die beskuldigde om in die hof te verskyn (sien Hiemstra 118). In die lig van ons gemenereg hierbo uiteengesit, behoort dieselfde ook ten aansien van 'n lasbrief vir inhegtenisname te geld. In dié verband is verjaring in 'n sekere sin misdaadgerig: indien 'n beskuldigde byvoorbeeld gedagvaar word om in die hof te verskyn op 'n aanklag dat hy 'n sekere misdaad gepleeg het, geld die stuiting van die verjaring van die vervolgbaarheid slegs ten aansien van daardie betrokke misdaad en nie ook ten aansien van ander misdade wat hy na bewering gepleeg het nie. Verjaring is in 'n ander sin dadergerig: indien 'n dagvaarding byvoorbeeld ten aansien van 'n sekere beskuldigde uitgereik word, word die verjaring slegs ten aansien van hom gestuit en nie ten aansien van ander moontlike beskuldigdes nie. Waarom die verjaring in dié gevalle juis gestuit word en nie bloot opgeskort word nie, is nie vir my duidelik nie.

2 1 3 Regsvergelyking

2 1 3 1 Termyn

In Nederland wissel die verjaringstermyn van twee tot agtien jaar (sien Hazewinkel-Suringa-Remmelink 504). Die verjaring van die vervolgbaarheid van oorlogsmisdade is in Nederland afgeskaf (Hazewinkel-Suringa-Remmelink 503). In Duitsland wissel die verjaringstermyn van drie tot dertig jaar (a 78 van die Duitse strafkode). Die vervolgbaarheid van moord en volksmoord verjaar egter nie (a 78(2) van die strafkode). In Griekeland wissel die verjaringstermyn van een tot twintig jaar (a 111 van die Griekse strafkode). Halsmisdade verjaar ook in Griekeland, naamlik na twintig jaar (a 111(1) van die strafkode). Daar bestaan in die reël 'n korrelasie tussen die erns van die misdaad (die maksimum straf wat opgelê kan word) en die verjaringstermyn (sien Stree-Schönke-Schröder 788; Preisendanz *Strafgesetzbuch* (1978) 371; Hazewinkel-Suringa-Remmelink 504; sien egter Rombach "De Vervolgingsverjaring van Misdrijven, Waarop meer dan 12 Jaar Staat" 1965 *NJB* 561).

In Nederland en Duitsland geld dieselfde termyn ook vir pogers en deelnemers (sien Stree-Schönke-Schröder 777; Hazewinkel-Suringa-Remmelink 505). Hazewinkel-Suringa-Remmelink wys op die uitsonderlike posisie ten aansien van misdade gepleeg deur jeugdiges:

> "Voor minderjarigen, die toen ze een strafbaar feit begingen nog geen achttien jaar waren, zijn de termijnen tot een derde ingekort (art 70 lid 2). Als motieven daarvoor golden, dat een vervolging lang na het feit haar pedagogische werking toch zou missen en voorts dat misstappen in de jeugd begaan niet te lang moeten worden nagehouden. Dit voorschrift dateert van 1905 en vloeit voort uit de veranderde houding tegenover de kinder criminaliteit. Mocht geen jeugdige onbezonnenheid zich hierin hebben geuit maar een misdadige aard, dan zal, aldus werd overwogen, een nieuw delict toch wel niet lang op zich laten wachten."

Hierdie benadering is as uitgangspunt sinvol.

2 1 3 2 Aanvang en Termynberekening

In Nederland begin die verjaring loop op die dag nadat die misdaad gepleeg is (a 71 van die Nederlandse strafwetboek). In Griekeland loop die verjaring vanaf die dag waarop die handeling (of late) gepleeg is (a 112 van die Griekse strafkode).

In geval van gevolgsmisdade begin die verjaring, sowel in Nederland as Duitsland, loop wanneer die gevolg intree. Dit geld ook vir nalatigheidsmisdade (sien Stree-Schönke-Schröder 779; Bruns "Wann beginnt die Verfolgungsverjährung beim unbewusst fahrlässigen Erfolgsdelikt?" 1958 *NJW* 1257). Hazewinkel-Suringa-Remmelink verklaar (506):

> "Bij de behandeling van de tijd van het delict kwam reeds ter sprake, dat bij het instituut van die verjaring daaronder beter niet ware te verstaan het moment waarop de dader het zijne deed, maar dat van de vervulling van de delictsinhoud; bij materiële delicten dus niet de tijd van de gedraging, maar van het intreden van het gevolg; bij delicten met een bijkomende voorwaarde van strafbaarheid het moment van de verwezenlijking daarvan; bij feiten door middel van een instrument gepleegd, het oogenblik waarop dit zijn werking doet."

In Nederland bestaan sekere uitsonderinge waarvan ek twee (belangrike) gevalle hier wil noem:

a In geval van munt- of ander vervalsingsmisdade neem die verjaringstermyn 'n aanvang op die dag waarop gebruik gemaak is van die vervalsingsobjek.

b In geval van misdade teen persoonlike vryheid neem die verjaringstermyn 'n aanvang op die dag na bevryding of dood van die slagoffer (Hazewinkel-Suringa-Remmelink 506–507; sien verder Reimert-Oosting "Verjaring en Milieudelicten" 1986 *Delikt en Delinkwent* 774 779). Hierdie reëling is myns insiens logies en sinvol.

By voortdurende misdade begin die verjaringstermyn in Nederland loop op die dag nadat die toestand beëindig is (sien Hazewinkel-Suringa-Remmelink 507; sien ook Stree-Schönke-Schröder 780). By latemisdade begin die verjaringstermyn in Nederland loop op die dag na die laaste dag waarop die verpligting nagekom moes word (Hazewinkel-Suringa-Remmelink 507; sien ook Stree-Schönke-Schröder 779).

2 1 3 3 Skorsing en Stuiting

In Nederland en ook in Duitsland stuit elke daad van vervolging verjaring (sien Hazewinkel-Suringa-Remmelink 507; Bockwinkel "Stuit de Verstekmededeling van 366 S v de Verjaring van het Recht tot Strafvordering?" 1968 *NJB* 422; a 78c van die Duitse strafkode en Stree-Schönke-Schröder 783). Indien die vervolging gestaak word, loop die verjaring van nuuts af.

In Duitsland word verjaring geskors solank "die Verfolgung nicht begonnen oder nicht fortgesetz werden kann" (a 78b van die Duitse strafkode; sien ook Stree-Schönke-Schröder 781). In Nederland word die verjaring geskors as die vervolging onderbreek word "ter zake van een praejudicieel geschil" (a 73 van die Nederlandse strafkode; Hazewinkel-Suringa-Remmelink 509). Ook as die beskuldigde na die pleeg van die misdaad geesteskrank geword het, word die verjaring geskors. Kragtens artikel 113 van die Griekse strafkode word 'n maksimum van drie jaar skorsingstydperk toegestaan. Dit is in ooreenstemming met die internasionale eis dat strafgedinge sonder "undue delay" afgehandel moet word (sien ook Hazewinkel-Suringa-Remmelink 510). Die tydperk van drie jaar is miskien nog te lank.

2 1 4 Konklusie

2 1 4 1 Redes vir die Verjaringsinstelling

In dié verband kan die volgende onderskei word:

2 1 4 1 1 Strafteorieë

Daar word soms aangevoer dat tydsverloop die nodigheid van straf uitskakel. Rüter verklaar in dié verband:

> "De waarde, die men er aan toekent, hangt in hoge mate af van de opvatting, die men heeft, over de taak van de strafrechtspleging. Beschouwt men deze uitsluitend als middel ter vergelding van onrecht naar de mate van de schuld van de dader, dan zal het tijdsverloop pas tot verjaring kunnen leiden, indien het in zich een strafsurrogaat is. Dit heeft men wel gezien in de onrust, wroeging en in de gedwongen ballingschap van de dader. Ziet men hem als middel van sociale controle, dan zal men tot acceptatie van de verjaring komen, indien de samenleving door de vervolging meer geschaad dan gebaat wordt, waarbij onder schade van de samenleving ook de schade moet worden gerekend, haar toegebracht in één van haar samenstellende bestanddelen: het slachtoffer ca en de dader ca. De onevenredigheid tussen een aan de dader door de strafvervolging toegevoegd nadeel en een door de gemeenschap als geheel daaruit verkregen bate, stijgt door tijdsverloop. Daardoor verminderen immers de onder de onmiddelijke indruk van het delict ontstane gevoelens van verontwaardiging en onveiligheid. Blijkt na enige tijd zo 'n feit

> zich bij deze dader niet te herhalen, dan wordt de strafgrond gelegen in de speciale preventie dubieus. Hetzelfde geldt bij gebreke van herhaling van zo 'n feit in de gemeenschap met betrekking tot die der generale preventie."

("Oorlogsmisdrijven, Misdrijven tegen de Menselijkheid en hun Verjaring" 1970 *TvS* 109 149–150. Sien ook Pawlowski "Der Stand der rechtlichen Diskussion in der Frage der strafrechtlichen Verjährung" 1969 *NJW* 594; Hazewinkel-Suringa-Remmelink 503.) Hierdie wyse van argumentering het meriete vir sommige gevalle maar beslis nie vir alle gevalle nie. Die verjaringstermyn geld egter ook ten aansien van dié gevalle waar genoemde argument nie toepaslik is nie. Geregtigheid en strafsinvolheid word gevolglik nie altyd deur die verjaringsinstelling gedien nie.

2 1 4 1 2 Bewysproblematiek

Daar word soms aangevoer dat bewysprobleme die instelling van verjaring regverdig – met die verloop van jare word die bewys van 'n misdaad bemoeilik (sien Rüter 150; Hazewinkel-Suringa-Remmelink 503). Hierdie teorie verklaar nie waarom misdade wat nog bewysbaar is ook moet verjaar nie.

2 1 4 1 3 Vervolgingskeuse

Hieroor sê Rüter (150) die volgende:

> "Tenslotte is er het punt van de vervolgingseconomie. Zou niet de verjaring door tijdsverloop een einde aan de vervolgbaarheid maken, dan zou via het opportuniteitsbeginsel een keuze moeten worden gedaan. Pompe meent, dat de wetgever ook een verjaringsregeling achterwege en de vraag naar de doelmatigheid en mogelijkheid van het strafvervolging ter beoordeling van het OM had kunnen laten. Anderen achten dit ter vermijding van willekeur en ter waarborging van de rechtszekerheid ongewenst en zien juist hierin de rechtvaardiging van het verjaringsstelsel."

Die prokureur-generaal (of sy verteenwoordiger) beslis in ieder geval altyd of vervolg sal word of nie. Regsekerheid is nie matematieseksak bereikbaar nie (sien my artikel "Die Uitlegsvermoede teen Staatsgebondenheid" 1978 *TRW* 42 63).

2 1 4 1 4 Dit Bekamp Laksheid by die Amptenary

Seibert verklaar in dié verband:

> "Das Institut der Verjärung ist im Interesse des Rechtsfriedens und der Bekämpfung der Untätigheit von Behörden sicherlich eine segensreiche Errungenschaft der Neuzeit" ("Sinn und Unsinn der Strafrechtlichen Verjährung"1952 *NJW* 1361).

Dit verklaar egter nie waarom misdade ten aansien waarvan die polisie en ander staatsamptenare nie laks of traag was ook verjaar nie.

2 1 4 2 Wegdoen met Vervolgingsverjaring

Die belangrikste beswaar teen die idee van vervolgingsverjaring is die sterk element van willekeur by die vasstelling van die termyne en die feit, soos hierbo aangetoon, dat nie voorsiening gemaak word vir individuele gevalle nie. Dit maak myns insiens onnodig inbreuk op die individu-gerigtheid van die strafreg. Tydsverloop behoort egter in gepaste omstandighede 'n effek te hê op die straf wat opgelê word (sien Leyser spec 515 3 en daarteenoor Carpzovius hfst 133 34). Dit behoort in besonder die geval te wees as dit blyk dat die beskuldigde homself

intussen gerehabiliteer het. In sommige gevalle sal die oplê van straf selfs ondoenlik wees. In so 'n geval kom omstandigheidsverjaring, soos hieronder genoem, ter sprake en verval die misdaad in funksiestrafregtelike (en daarom in werklike) sin (sien my opmerkinge in "Gevolgsaanspreeklikheid, Regsgevoel en Strafsinvolheid" 1982 *THRHR* 201 en "Strafsinvolheid: Opmerkinge oor die Wese van Strafregtelike Aanspreeklikheid" in Joubert (red) *EM Hamman-Gedenkbundel* (1984) 209 219).

2 2 Strafvoltrekkingsverjaring

Dieselfde argumente wat teen vervolgingsverjaring geopper kan word, geld ook vir strafvoltrekkingsverjaring. Sover my kennis strek, bestaan daar in die Suid-Afrikaanse reg geen strafvoltrekkingsverjaringstermyne nie. In gepaste omstandighede behoort die gevangenisowerheid 'n lang tydsverloop tussen die oplê en voltrekking van die straf in aanmerking te neem by parooltoegewings.

3 Omstandigheidsverjaring

Vervolging kan "verjaar" omdat die misdaad nie meer bewys kan word nie, soos wanneer die getuie(s) oorlede is of die bewysstukke vernietig of verlore is, of indien die beskuldigde self oorlede is. Insgelyks kan die voltrekking van 'n straf "verjaar" omdat die beskuldigde byvoorbeeld oorlede is of permanent geesteskrank of bewusteloos is. In dié verband gebruik ek die begrip "omstandigheidsverjaring" in teenstelling met termynverjaring. Leyser se bewering dat verjaring uit die natuur ontspring, is myns insiens korrek ten aansien van omstandigheidsverjaring, maar nie ten aansien van termynverjaring nie (*spec* 515 İ). Daarvoor is laasgenoemde instelling te arbitrêr.

JMT LABUSCHAGNE
Universiteit van Pretoria

Slechte boeken bederven de zeden. Wat heefd de zeden dan bedorven vóór de menzen konden lesen? (per Georges van Acker).

VONNISSE

DIE JEHOVASGETUIE EN DIENSPLIGWEIERING*

S v Lewis 1985 4 SA 26 (T)

In hierdie beslissing het dit gehandel oor twee beskuldigdes wat ingevolge artikel 72D(1)(a)(iii) van die Verdedigingswet 44 van 1957 as godsdiensbeswaardes geklassifiseer is omdat dit volgens hulle godsdienstige oortuigings verkeerd is om enige militêre diens te doen, of militêre opleiding te ondergaan, of enige taak in verband met enige gewapende mag te verrig. Uit hoofde van hierdie klassifikasie deur die raad vir godsdienstige beswaar is die beskuldigdes kragtens artikel 72E(3)(a) gelas om gemeenskapsdiens soos in artikel 72E bedoel, te verrig. Die beskuldigdes is deur die raad beveel om ooreenkomstig artikel 72E(4) vir die uitdiening van hulle onderskeie tydperke van gemeenskapsdiens by die departement van mannekrag aan te meld. (Kragtens artikel 72E(3)(a) wat bepaal dat hierdie diens verrig moet word in 'n enkele, ononderbroke dienstydperk wat een en 'n half maal so lank as die totaal van alle dienstydperke wat andersins ingevolge die artikel van toepassing sou wees, sou dit *in casu* 'n tydperk van 2 175 dae beloop.) Die beskuldigdes het egter versuim om die opdrag na te kom en het hulle daardeur aan vervolging ingevolge artikel 72I(2)(a) blootgestel.

Die vraag voor die hof was of artikel 72I(2) aan die hof 'n diskresie by die oplegging van vonnis laat. Ofskoon dit streng gesproke nie op die hof se weg gelê het nie, betrek die hof ook artikel 72I(5), welke artikel soos volg lui:

> "'n Hof wat iemand 'n vonnis van gevangenisstraf of detensie ingevolge subart (1) of (2)(a) oplê, kan die tenuitvoerlegging daarvan opskort slegs indien die opskortingsvoorwaardes bepaal dat die in art 72E(2) bedoelde diens of gemeenskapsdiens, na gelang van die geval, ooreenkomstig hierdie Wet deur daardie persoon gedoen of verrig moet word: Met dien verstande dat die tenuitvoerlegging van 'n vonnis ingevolge subart 2(a) opgelê wat aldus opgeskort word, ondanks andersluidende wetsbepalings nie opgeskort word nie vir 'n tydperk wat korter is as die oorblywende tydperk van gemeenskapsdiens wat nog deur die betrokke persoon verrig moet word."

Hierdie vonnisbespreking sal veral rondom die voorskrif van artikel 72I(5) sentreer. Dit is bekend dat daar in die nuwe bedeling vir geloofsbeswaarde militêre

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* Vir doeleindes van hierdie vonnisbespreking is daar vryelik van die werk van Penton *Jehovah's Witnesses and the Secular State: A Historical Analysis of Doctrine in a Journal of Church and State* vol 21 (1979) gebruik gemaak.

diensplichtiges spesifiek vir daardie geloofsbeswaardes voorsiening gemaak word wat vanweë hulle geloofsoortuigings steeds nie hulle weg oopsien om gemeenskapsdiens as alternatief vir militêre diens te verrig nie (*Hansard* 8, 1983-03-21 tot 1983-03-25 3627). Dit is veral lede van die Jehovasgetuie-godsdiens wat deur hierdie bepaling getref word. Die praktiese gevolg van die tegemoetkoming wat in artikel 72I(5) neerslag gevind het, is dat die betrokke geloofsbeswaarde militêre diensplichtige *as alternatief vir gevangenisstraf* en terwyl hy op parool is, gemeenskapsdiens verrig, maar nie as alternatief vir militêre diens self nie. Hierdie ietwat eienaardige resultaat word vervolgens kortliks vanuit 'n historiese perspektief ontleed. Sodoende kan hierdie paradoks en die enigsins pragmatiese oplossing daarvan verduidelik word.

Die Jehovasgetuies se konsep van die sekulêre staat is deurentyd gebaseer op die pre-duisendjarige eskatologie soos dit aanvanklik deur Charles T Russel geformuleer is. Russel, onder die invloed van die adventiste se spekulasie rakende die wederkoms van Christus, het geredeneer dat die Griekse woord *parousia* soos dit in Matteus 24:3 voorkom, eerder "teenwoordigheid" as "koms" beteken. Hierdie feit het Russel tot die gevolgtrekking laat kom dat Christus in 1874 met 'n onsigbare, geestelike teenwoordigheid in hemelse heerlikheid begin het. Hy het ook vasgestel dat die tyd van die heidennasies soos dit deur Christus in Lukas 21:24 bedoel word, reeds in 606 vC 'n aanvang geneem het en dat dit in 1914 sou eindig. Spoedig daarna sou die valse geloof en die wêreldse koninkryke en republieke tot 'n val kom en deur die *Duisendjarige Ryk van Christus* vervang word.

Russel het dit van meet af duidelik gestel dat hy die volkere van die wêreld as ondiere beskou wat buite die genade van God staan, maar dit was eers in die reeks *Studies in the Scriptures* (1886–1904) dat hy sy siening oor die sekulêre staat verduidelik het en die behoorlike verhouding wat Christene daarteenoor behoort in te neem, beskryf het. Dit is veral in die eerste band, *The Divine Plan of the Ages*, waarin hy sy konsep van die geskiedenis as 'n botsing tussen Jehova en Satan uiteensit, welke botsing reeds in die tuin van Eden begin het en voortduur tot aan die einde van die duisendjarige ryk van Christus. Volgens sy uiteensetting het God oorspronklik aan die volmaakte mens die beheer oor die aarde gegee – dit was die eerste vestiging van die koninkryk van God op die aarde. Met die sondeval van Adam is hierdie koninkryk verbreek en dit is nie weer herstel nie, behalwe vir 'n kort tydperk in Israel. Ander regerings as dié in Israel is egter deur God toegelaat "for a wise purpose." Die mens is gevolglik toegelaat om homself na goeddunke te regeer sodat sy onvolkomenheid en wanregering vir hom 'n les sou wees van sy uiterste sondigheid en sy gevolglike onvermoë om homself (selfs tot sy eie bevrediging) te regeer. Aangesien die heidense nasies in toenemende mate verdierlik en totaal selfsugtig optree, moet die Christen vooruitsien na die heerlike ryk van Christus as die vervanging van die wêreldse heerskappye. Russel het egter ook tot die gevolgtrekking gekom dat selfs hierdie dierlike wêreldse regerings beter was as die situasie waar daar geen regering sou wees nie. Ofskoon Satan self die nasies regeer, is sy heerskappy beperk aangesien die oënskynlike doel van alle regerings daarin bestaan om geregtigheid en die welvaart van alle mense te bevorder. Russel het gevolglik verklaar dat alle Christene in afwagting van die herbevestiging van die koninkryk van God, die sekulêre owerhede in 'n groot mate moes gehoorsaam. Hy wys daarop dat Christus nooit met die aardse regeerders ingemeng het nie, maar inteendeel die kerk geleer het

om hom aan hierdie gesag te onderwerp, selfs al het die kerk onder die misbruik daarvan gely. Christus en die dissipels het geleer dat die kerk die staatlike wette moes gehoorsaam, die regeerders in gesagsposisies moes respekteer, die voorgeskrewe belastings moes betaal, en, behalwe waar dit in konflik sou wees met die wette van God, (Handelinge 4:19 5:29) geen weerstand moet bied teen die "established law" nie (Romeine 13:1–7). Jesus en sy dissipels was wetsgehoorsame burgers, maar het geen aandeel in die wêreldse regerings gehad nie.

Volgens Russel is alle nasies demonies, sonder God, en behoort hulle nie aktief deur Christene ondersteun te word nie. Hy het egter die probleem gehad om presies te bepaal in welke mate dit vir 'n Christen toelaatbaar sou wees om opdragte van die staat te gehoorsaam indien die opdragte onbehoorlik en immoreel sou wees. Hy het medelede gewaarsku om nie deel te hê aan 'n verkiesing of militêre diens nie en om ook geen openbare ampte te beklee nie. Lidmate van die nuwe skepping, dit is die kerk, moes hulself as vreemdelinge en pelgrims op aarde beskou. Omdat Russel egter geglo het dat God aan die nasies die tydelike reg verleen het om hulself te regeer en dat hierdie regerings 'n verordening van God was, het hy ook aanvaar dat indien 'n regering van 'n Christen sou vorder om te stem of om militêre diens te verrig, hy daaraan gehoor moes gee. Hy druk dit soos volg uit:

> "[I]f required we would be obliged to obey the powers that be, and should consider that the Lord's providence had permitted the conscription and that he was able to overrule it to the good of ourselves or others. In such event we would consider it not amiss to make a partial explanation to the proper officers, and to request a transference to the medical or hospital department, where our services could be used with the full consent of our consciences; but even if compelled to serve in the ranks and to fire our guns we need not feel compelled to shoot a fellow-creature" (*The New Creation, Studies in the Scriptures* reeks 6 (1925) 594).

Dit is egter bekend dat Russel se houding jeens die sekulêre owerheid aansienlik verhard het as gevolg van die wreedhede van die Eerste Wêreldoorlog en veral die steun van die kerkleiers vir militêre werwing.

Russel se opvolger was die regsgeleerde JF Rutherford wat gedurende die tydperk 1917–1918 'n reeks traktate en boeke die lig laat sien het. Hierin het hy Russel se latere sienings waarin hy sy afsku in die kerkleiers, die Eerste Wêreldoorlog en die heidense volkere uitgespel het, bevestig. Dit het daartoe gelei dat hy onder spioenasiewetgewing aangekla is en tot twintig jaar gevangenisstraf veroordeel is. Lede van die *American Bible Students*, soos die hedendaagse Jehovasgetuies toe nog bekend gestaan het, wat geweier het om militêre diens te verrig, is hardhandig behandel ten einde hulle te verplig om sodanige diens te verrig. Hierdie faktore het tot ernstige onsekerheid in die geledere van die Jehovasgetuies aanleiding gegee.

'n Verdere faktor wat in hierdie periode tot 'n skeuring in die geledere van die Jehovasgetuies gelei het, was die feit dat daar onsekerheid oor die sterk standpunt van Rutherford ontstaan het in die lig van die vroëre uitsprake van Russel dat hulle hulle aan die staatsgesag moet onderwerp. Sommige lede het sterk standpunt ingeneem teen die leerstellinge van Rutherford en in 'n poging om die eenheid te herstel, is sekere bladsye uit die meer militante werke van Rutherford verwyder. In die *Watch Tower* van 1918-06-01 word daar 'n resolusie van die Amerikaanse Kongres selfs ondersteun dat die datum van 1918-05-30 'n dag van gebed en voorbidding in die Verenigde State van Amerika verklaar word. Daar is ook danksegging gebring vir die geallieerde oorwinning oor die

sentrale Europese magte. Die verwarring in die geledere van die Jehovasgetuies was in hierdie stadium so groot dat die beweging vir alle praktiese doeleindes doodgeloop het. Rutherford is egter in Maart 1919 ontslaan en het summier enige kompromieë met die sekulêre owerhede as moreel onaanvaarbaar verwerp. Daarna het hy die sekulêre owerhede uiters fel aangeval en gekritiseer, maar ten spyte hiervan kon hy nie die onsekerheid in die geledere van die Jehovasgetuies rakende die gesagsposisie van die staatlike owerhede besweer nie. Die *Watch Tower* het gevolglik in 1929 'n nuwe standpunt ingeneem ten opsigte van die sekulêre owerhede, welke standpunt spoedig die amptelike standpunt van die beweging geword het. In twee artikels, "The Higher Powers" en "The Higher Powers (Part 2)," is daar tot die gevolgtrekking geraak dat 'n verkeerde verklaring van die voorskrifte van Romeine 13 tot in daardie stadium verkondig is. Hierdie verkeerde verklaring is dan die basis van die valse leer van die goddelike reg van die konings of regeerders wat tot die onderdrukking van mense gelei het. Romeine 13 was gevolglik slegs van toepassing op owerhede binne kerkverband en het geen betrekking op die heidense ("gentile") regerings gehad nie ("The Higher Powers" *Watch Tower* 1929-06-01 163–169).

'n Belangrike oorweging wat tot hierdie nuwe insig gelei het, was die feit dat die getuies aanmerklike probleme ondervind het met statutêre voorskrifte in verskeie lande waar hulle onder andere verplig is om militêre diens te verrig (die Verenigde State van Amerika, Kanada, Duitsland en andere) of vervolg is vanweë hulle verkondiging van die Woord van deur tot deur. Daar het in 1929 gevolglik eensgesindheid bestaan dat Bybelse voorskrifte enige betrokkenheid in oorlogsaktiwiteite verbied het en dat hulle 'n goddelike opdrag ontvang het om die evangelie van Christus se koninkryk aan alle mense, ongeag enige weerstand daarteen, te verkondig. Betreffende militêre diensplig word gevra:

> "[H]as God delegated the power to these [sekulêre] governments to order men to kill each other, and are the anointed sons of God bound to obey the laws of the land which require killing, when at the same time God's own law commands that he shall not kill?"

Die antwoord wat hierop gebied word, lui dat indien 'n kind van God deel het aan 'n oorlog en 'n ander opsetlik om die lewe bring, hy nooit die ewige koninkryk van Christus sal binnegaan nie ("The Higher Powers" 163 169).

Die vraag wat voorts gestel word en wat betrekking het op die verbod dat hulle hulle boodskap van deur tot deur mag preek, word herlei na 'n diepere vraag, naamlik hoe die getuies kan aanvaar dat staatlike voorskrifte goddelike instellings kan wees. As voorbeeld word die konstitusionele erkenning van godsdiensvryheid in die Verenigde State gestel teenoor die posisie in Rusland waar 'n permit van die owerheid vereis word om die evangelie te preek. In die Verenigde State is daar in sekere state ook 'n verbod om die evangelie op sekere plekke en onder sekere voorwaardes te verkondig. Die oortreding hiervan is op straf verbied en die vraag word na aanleiding hiervan gestel of dit moontlik is dat God aan die onderskeie volkere die reg en gesag verleen het om wette te maak en af te dwing wat nie in ooreenstemming met die uitdruklike wil van God is nie ("The Higher Powers" 163 169).

Hierdie vrae het tot 'n radikale nuwe eksegese gelei en daar word gestel dat God almagtig was, maar dat hierdie mag aan Christus oorgedra is (Matteus 28:18). Daar word ook geargumenteer dat Jesus van daardie mag kan delegeer (Markus 13:34). Daar word vervolgens geargumenteer dat die woord 'mag' uit die Griekse woord *exousia* afgelei is en dat dit uit hoofde van Romeine 13

duidelik is dat die woord "mag" wat daar gebruik word op die gesag "in God's organization" betrekking het. Hierdie organisasie moet gevolglik ondersoek word ten einde die betekenis van die gesag te bepaal. Daar is gevolglik in die lig van hierdie eksegese weer 'n ontleding van veral Romeine 13 gedoen ten einde te bepaal of Christene werklik aan staatlike owerhede gehoorsaam moet wees.

In die poging tot 'n nuwe uitleg het dit geblyk dat veral twee gedeeltes problematies was. Eerstens is daar na die voorskrif in 1 Petrus 2:13 14 verwys wat bepaal dat omdat die Here dit wil, die Christen hom aan elke menslike owerheid moet onderwerp, hetsy dit aan die keiser as die hoogste gesag is, hetsy dit aan die goewerneurs as sy gevolmagtigdes is, aangesien hulle daardie mense wat kwaad doen, moet straf en dié wat goed doen, moet prys. Die interpretasie wat egter hieraan gegee word, is dat elke menslike owerheid verstaan moet word as synde menslike owerheid *binne kerkverband.* Die keiser sou die persoon Jesus wees en die goewerneurs sou die dissipels wees. Die motivering vir hierdie argument word in vers 14 gevind wat dit het oor die straf vir die kwaaddoeners en die lof vir die mense wat goed doen; dit is die rede waarom die goewerneurs uitgestuur word, want lui die retoriese vraag, is daar al ooit van 'n regeerder van 'n heidense nasie gehoor wat as gevolg van absolute gehoorsaamheid aan Jesus Christus iemand prys wat goed doen?

Die tweede probleem wat oorkom moes word, is te vinde in Romeine 13:6 waar die regverdiging vir die betaling van belasting aan die owerhede daarin gevind word dat hulle dienaars van God is en besig is om hulle opdrag uit te voer. Die skrywer van "The Higher Powers" erken dat dit hier oor die betaling van belasting handel, en dat hierdie hele hoofstuk op die heidennasies betrekking het. Maar, die lees van hierdie hoofstuk teen die agtergrond van die uitleg dat Romeine 13 eerder op die gesag binne kerkverband slaan, maak dit dan vir die skrywer duidelik dat die motivering vir die betaling van belasting 'n parentetiese stelling is wat bloot dien om die apostel se argument te staaf. Na die insig van die skrywer word belasting slegs betaal om die gewete se onthalwe; dit is slegs billik dat daar betaal word vir dienste wat ontvang word.

Die gevolge van hierdie nuwe uitleg was ingrypend. Na die leringe van Russel het die Jehovasgetuies aanvaar dat hulle 'n verantwoordelikheid teenoor die sekulêre owerheid het as gevolg waarvan daar dikwels by hulle twyfel ontstaan het wat aan God en wat aan die keiser toekom. Na die verskyning van "The Higher Powers" is aanvaar dat hulle geen verantwoordelikheid hoegenaamd teenoor die staatlike owerhede het nie, behalwe om belasting te betaal aangesien dit blote betaling was vir dienste waarvan hulle ook die voordeel gehad het. Uit hoefde van hierdie uitgangspunt is enige vorm van sekulêre owerheid veroordeel en is enige voorskrifte van sulke owerhede wat nie volgens die Jehovasgetuies se opvatting ooreenkomstig Bybelse voorskrifte was nie, as satanies verwerp. Hierdie standpunt het die Jehovasgetuies ook tot 'n militante standpunt jeens nasionalisme en patriotiese optrede genoop. So het hulle tydens die Duitse derde ryk geweier om "Heil Hitler" uit te roep wat tot vervolging onder die Nazi-regime aanleiding gegee het. In die Verenigde State het hulle onder andere geweier om die vlag te salueer welke optrede ook tot (geregtelike) vervolging gelei het.

Uit hierdie vervolgings het daar vir die Jehovasgetuies praktiese en leerstellige probleme gevloei. As gevolg van hulle optrede is baie van hulle weens hoogverraad aangekla. Die leerstellige probleme het veral uit die feit gevloei dat

hulle hulle na die howe vir die verlening van regshulp gewend het – hulle het hulle gevolglik tot daardie instansies gewend wat volgens hulle leringe satanies geïnspireer was. In hierdie verband moet daarop gewys word dat ofskoon die Getuies hulle vervolgers veroordeel het, hulle steeds 'n bepaalde agting vir baie aspekte van die staatlike owerheid gehad het, waaronder die regsproses. Daar is ook 'n hoë premie op die vlag as simbool van vryheid geplaas – hulle het slegs geweier om dit te salueer. Daar het selfs verskeie artikels in die *Watch Tower* verskyn waarin die Amerikaanse *bill of rights* aangeprys word.

Daar moet egter beklemtoon word dat die Jehovasgetuies hulself nooit as revolusionêr beskou het nie; hulle ag hulself bloot nie aan staatlike voorskrifte gebonde wat nie voldoen aan hulle konsep van die goddelike reg nie. Volgens hulle oortuiging moet hulle in vrede met alle mense leef en aan hulle vyande goed doen. Die Jehovasgetuies het merkwaardige sukses in die Amerikaanse howe behaal in hulle reaksie teen staatlike optrede en dit is juis hierdie feit wat, ironies genoeg, tot die leerstellige probleme bygedra het; as dit dan so is dat sekulêre owerhede nie die seën van die Here geniet nie, hoe is dit moontlik dat sommige van hulle die Jehovasgetuies en hulle aktiwiteite beskerm het? Hierdie probleem het die Getuies daartoe genoop om weer te besin oor hulle leerstellings oor die sekulêre owerheid en die Christen se korrekte verhouding daartoe.

Vanaf 1962 verskyn daar 'n reeks artikels in die *Watch Tower* wat daarop gerig is om die 1929-posisie te repudieer. In die eerste van hierdie reeks word daar veral op die voorskrifte in Titus 3:1 gelet. Hierdie teks vermaan die Christen om onderdanig en gehoorsaam aan die "authorities as rulers" te wees en om vir elke goeie werk reg te wees. Aan die hand van hierdie teks word daar tot die gevolgtrekking gekom dat die Christen wel gehoorsaamheid aan die sekulêre owerheid verskuldig is, maar dat met inagneming van die feit dat die Satan die onsigbare regeerder van die wêreldse owerhede is, en met verwysing daarna dat Paulus vereis dat vrouens aan hulle mans onderdanig moet wees en dat slawe aan hulle meesters gehoorsaam moet wees, welke voorbeelde eerder op 'n relatiewe as absolute gehoorsaamheid dui, hierdie verpligting tot gehoorsaamheid ook eerder relatief as absoluut geld. In die lig van hierdie nuwe standpunt wat ingeneem word, word daar gevolglik ook aanvaar dat die titels van *keiser* en *goewerneurs* wel 'n tipies sekulêre betekenis het, en nie, soos in die *post*-1929-periode te kenne gegee is, 'n betekenis wat slegs in die hiërargie van die koninkryk van Christus bestaanbaar is nie. 'n Belangrike argument ter verwerping van die 1929-posisie is die feit dat daar nou geargumenteer word dat Romeine 13:1, wat na hulle mening beteken dat Jehova vir algemene orde en regering voorsiening gemaak het waardeur alle mense geregeer kan word sonder dat Hy vir spesifieke regering voorsiening gemaak het, daarop dui dat God aan die regerings die gesag om te regeer, verleen het sodat dit vir hulle in beperkte en tydelike sin selfs moontlik is om aan die goddelike opdrag gehoorsaam te wees. Daar is gevolglik niks fout daarmee te vind dat Christene menslike wette gehoorsaam nie; *die enigste wette wat nie nagekom mag word nie is dié wat 'n skending van Bybelse beginsels postuleer soos dit deur die christelike gewete verstaan word.*

Dit is duidelik dat daar in die *post*-1962-periode terugbeweeg is na die meer gematigde siening soos deur Russel uiteengesit. Die praktiese gevolg van hierdie verandering lê veral daarin dat dit van die Jehovasgetuies beter staatsburgers maak. Dit word deur die huidige situasie bevestig deurdat daar van die getuies verwag word om staatlike owerhede te gehoorsaam, om die openbare orde te

respekteer en om alle belastings te betaal. Die voorwaarde bly egter steeds dat hierdie sekulêre owerhede nie in stryd met die goddelike reg gehoorsaam mag word nie. Dit situasie bestaan gevolglik tans dat 'n Getuie wat staatlike sekulêre voorskrifte oortree, benewens die staatlike owerheid ook deur sy eie gemeente getug kan word. Dit lei daartoe dat die Jehovasgetuies groot erns daarmee maak om staatlike voorskrifte te gehoorsaam en daar is al by geleentheid verklaar dat hulle as groep 'n baie sobere lewenswyse het en hoë morele waardes handhaaf.

Die publiekregtelike verhouding in Suid-Afrika is nie op 'n formele menseregte-akte of 'n grondregkatalogus geskoei nie. Die raad vir godsdiensbeswaar het gevolglik geen formele staatsregtelike basis waarop hy die posisie van die godsdiensbeswaarde militêre diensplig tige, wat in wese tuishoort by die problematiek rakende die publiekregtelike verhouding, kan fundeer nie. Hierdie gebrek word oorkom deur van die standpunt uit te gaan dat die samelewing op twee groot waardepilare gevestig is wat albei in die voorskrifte rakende gewetensbeswaarde militêre diensplig weiering vervat word (Steyn MT *Compendium Juris Religionis* 276). Enersyds bestaan daar die wederkerige reg-plig-dienslewerings-verhouding tussen die individu en die gemeenskap en andersyds is daar die pilaar van die godsdiensvryheid. Die dienslewerings verhouding bestaan nie daarin dat die owerheid die individu "besit" en hom as "rou materiaal" na willekeur mag aanwend nie, maar daarin dat die owerheid 'n ordeningsmeganisme is wat deur die gemeenskap self daargestel is om die gemeenskap te dien. Die owerheid lewer gevolglik in hierdie geordende verskyningsvorm talle dienste aan die gemeenskap waarvan die individu daagliks gebruik maak om sy eie lewe volledig en sinryk te maak, byvoorbeeld die verskaffing van elektrisiteit, instandhouding van paaie ensovoorts. Daar kan trouens gestel word dat die individu se volle menswees van die verskaffing van daardie dienste afhanklik gestel word (*ibid*). Dit is daarom slegs billik dat die individu wat gebruik maak van al hierdie dienste wat deur die gemeenskap aan hom gebied word, ook 'n diens aan die gemeenskap moet lewer om dit in stand te hou (*ibid* 277).

Die raad vir godsdiensbeswaar sien sy funksie teen die agtergrond van die kompeterende eise van hierdie waardestelsels en soek in die bepalings van die gewysigde Verdedigingswet die balanseringsmeganisme vir die afweging van hierdie botsende aansprake.

Die Jehovasgetuie tree met 'n ernstige aanspraak na vore in sy weiering om hoegenaamd aan militêre aktiwiteite deel te hê. Sy onverbiddelikheid word daarin geïllustreer dat hy nie bereid is om gemeenskapsdiens as alternatief vir die militêre diens te verrig nie, maar wel as alternatief vir gevangenisstraf. Dit is hierdie totale geloofsgeïnspireerde verset wat ook in die bepaling van artikel 72I(5) beliggaam word as een van die waardepilare waarop die geordende gemeenskap berus. Aangesien hierdie pilaar met die ander van dienslewering gebalanseer moet word, skyn die gewysigde Verdedigingswet wel 'n billike oplossing te bied vir hierdie absoluut geloofsbeswaarde militêre diensplig tiges deurdat daar ook, volgens die verklaring van die publiekregtelike verhouding deur Steyn, van hulle verwag word om die waardepilaar van die diensplig verhouding in stand te hou.

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SECTION 228 OF THE COMPANIES ACT

Levy v Zalrut Investments (Pty) Ltd 1986 4 SA 479 (W)

Section 228 of the Companies Act 61 of 1973 determines that notwithstanding anything contained in the memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting, to dispose of (a) the whole or substantially the whole of the undertaking of the company, or (b) the whole or the greater part of the assets of the company. In order to be effective the resolution approving of such disposal must specifically authorise or ratify the transaction in question. In *Levy v Zalrut Investments (Pty) Ltd* the court was called upon to interpret certain aspects pertaining to this section. The pertinent facts of the case were as follows:

S and R were the only two shareholders in Zalrut Investments. Each held 50 per cent of the shares in the company. When S died his wife (H) became a major beneficiary in his estate. Although it is not clear at what stage she became a director of Zalrut, H, acting in this capacity and on behalf of the company, granted an option to Levy Brothers Estates (Pty) Ltd or its assigns to purchase certain property owned by Zalrut. Levy Brothers in turn ceded all their rights in the option to the plaintiffs who were acting as trustees for a company to be formed. When the plaintiffs exercised the option Zalrut purported to withdraw from the sale. It pleaded that since (a) the granting of the option or its acceptance by the plaintiffs constituted a disposal of (i) the whole or substantially the whole of the undertaking of the company, or (ii) the whole or the greater part of the company's assets, and (b) Levy Brothers and the plaintiffs knew that at all material times before the granting of the option the specific transaction had not been approved by the company in general meeting, the contract of sale, which allegedly came into existence upon its acceptance by the plaintiffs, contravened section 228 and was accordingly of no force and effect.

In replication the plaintiffs contended (a) that since the option had been approved by all the shareholders and directors of the defendant, the prescribed requirement of approval by the general meeting had been complied with; alternatively (b) that by its actions (eg authorising H to sign the option and all documents required for the transfer of the property) Zalrut led Levy Brothers or the plaintiffs reasonably to believe that the grant of the option was duly authorised by the required number of members, that the said parties acted to their prejudice on the basis of this belief, and that the company was therefore estopped from relying upon an alleged absence of specific approval of the said transaction. The defendant thereupon applied for the striking out of, alternatively excepted to, plaintiffs' replication on the basis that it did not found estoppel.

Van Zyl J took the opportunity to reaffirm (at 485) a principle enunciated in *Sugden v Beaconhurst Dairies (Pty) Ltd* (1963 2 SA 174 (E) 180–181), namely that the unanimous consent of members instead of approval by the general

meeting constituted compliance with the relevant provisions of section 228. In view of the fact that the defendant's application was directed only at estoppel, it was, strictly speaking, not necessary for the judge to address the issue of unanimous consent. In dealing with it he accepted that *in casu* one of the relevant shareholders "remains the [S's] estate." According to him, since H was a major beneficiary in that estate, she would be in position "to control the shareholding" (486). He was satisfied that in the circumstances the approval of the transaction by H and R met the requirement of the unanimous consent of shareholders for the disposal of the property. I submit that the judge's reasoning on this point is not convincing.

Section 103 of the Companies Act states which persons are or could be regarded as members of a company. They include the executor of the estate of a deceased member *nomine officii* (s 103(3)), but not any of the beneficiaries in such an estate. Incidentally, it may also be mentioned that the incorporators of Zalrut accepted table A as the basis for the company's articles (the company was incorporated under the Companies Act 1926) and concomitantly effected some essential and other modifications to table A so that the articles could conform to Zalrut's status as a private company and meet its particular requirements. Table A's arrangements in respect of the transfer and transmission of shares were left virtually intact. I wish to refer to two of these provisions. Article 25 (see art 16 table B) states that the executor of the estate of a deceased sole holder of a share shall be the only person recognised by the company as having any title to the share. Article 28 (see art 19 table B) determines *inter alia* that a person entitled to a share by reason of the death of the holder

> "shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company".

On the basis of Van Zyl J's proposition that "the relevant shareholder remains the estate," the inference may be drawn that at the time the dispute arose, the administration of S's estate had not reached the stage where the shares held by S in Zalrut had been transferred to the beneficiaries in his estate. It is submitted that the substitution of unanimous consent for the approval of the general meeting requires the consent of the parties concerned in their capacity as members of the company. There is no indication in the excerpts from the pleadings cited in the reported judgment as to who actually provided the required unanimous consent. On the available information it would appear that the only persons who could have done so were R and the executor of S's estate. Therefore, if Van Zyl J's remarks (486) to the effect that H, as a major beneficiary in S's estate, would be in a position "to control the shareholding" were intended to suggest that H could participate in providing the aforementioned unanimous consent without formally being a member of Zalrut, I must differ from him.

In regard to estoppel, the court found that there was no indication that the public interest or public policy had featured in the thinking of the legislature when it enacted section 228. There was accordingly no consideration of public policy which militated against the recognition of estoppel in the application of section 228, and defendant's contention that the plaintiffs were not entitled to raise it could therefore not be sustained (487–488).

Although the plaintiffs did not attempt to seek redress on the basis of the rule in *Royal British Bank v Turquand* ((1856) 5 E&B 248, 119 ER 474 886), there

is a parenthetic, *obiter* suggestion of a *nexus* between it and section 228 by Van Zyl J (487B–C). This has prompted me to reflect on the issue. (For a discussion of various other aspects pertaining to s 228 see Ribbens 1976 *THRHR* 162 and Hodes 1978 *SACLJ* F6.)

The conferment of authority on one or more persons to represent a company and any limitation on (say) the period for which such authority is to operate or on the type and extent of contracts to which it applies, is usually regulated in the company's articles. Persons who deal with a company are deemed to be aware of these arrangements. This entails that in the absence of certain other considerations (eg estoppel), a company would not be contractually bound if someone other than the person(s) nominated in the articles purported to act on its behalf, or if an authorised representative acted beyond the stated duration or scope of his authority.

Sometimes the articles make the conferment or an extension to the parameters of authority conditional upon compliance with an internal formality which enjoys no publicity, such as the passing of a resolution by the general meeting. The Turquand rule was designed to remedy this type of situation and provides in essence that third parties may presume that the relevant acts of internal management of the company have been performed. The rule cannot be relied on by an outsider if he knew the person purporting to act on the company's behalf was in fact acting beyond his authority, or if the circumstances were such as to put him on enquiry (*Wolpert v Uitzigt Properties (Pty) Ltd* 1961 2 SA 257 (W) 266). If the articles empower the company to confer authority on an ordinary director or officer of the company without specifying any particular person, a third party cannot assume (on the basis of the Turquand rule) that someone falling in this category of persons has authority to bind the company. In this case the rule will take effect only if it can be shown that authority had been conferred on a particular person, but that the actual exercise of this authority was made dependent upon compliance with some act of internal organisation (*Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 2 SA 11 (T)).

Notwithstanding the surprising viewpoint of the Van Wyk de Vries commission of enquiry into the Companies Act (Main Report RP 45/1970 rec 104(a)), it is clear that section 228 of the Companies Act imposes a limitation not on the capacity of a company but on the authority of the directors (see dissenting opinion of Suzman Appendix C to the report par 903, and Wunsh 1971 *SALJ* 351 352).

It has been suggested that, since the limitation which section 228 imposes on the authority of the directors could be removed with the approval of the general meeting, the Turquand rule would need to be applied in the appropriate circumstances to determine whether a third party to whom an invalid disposal was made would be entitled to enforce the contract against the company (*Henochsberg on the Companies Act* 4 ed (1985) vol 1 364). There is merit in this contention. After all, it should in principle make no difference in the application of the rule whether compliance with an internal formality which enjoys no publicity is prescribed in the articles or by statute.

However, the question which then arises is whether the application of the Turquand rule in the context of section 228 is reconcilable with the view that the section "is clearly directed at protecting the interests of shareholders" (Van

Zyl J *Levy* case 486J). If one accepts that in the implementation of section 228 the interests of third parties who contract with the company are, indeed, subordinate to those of the shareholders, it could be argued that the interests of the latter would be better served if section 228 were interpreted in a way which required the directors to be expressly authorised to act.

This approach would negate the relevance of the Turquand rule in the interpretation of section 228. I believe it could be countered by the argument that the common-law restrictions on the scope of the rule which have evolved in respect of its application in those instances where a third party contracts with an ordinary director, manager or secretary of a company, constitute sufficient protection for the shareholders which is also equitable and adequate for the purposes of its application in the context of section 228.

It is interesting to note that in Britain the Jenkins Committee's recommendations on the disposal of the whole or substantially the whole of the undertaking or assets of the company included a proposal that a third party, dealing in good faith and for valuable consideration, should not be concerned to see that any necessary approval had been obtained in general meeting for any transaction by which he acquired any assets of the company (Cmnd 1749 (1962) par 122(f). This clearly reflects a bias in favour of the interests of outsiders. These particular recommendations were never implemented, but subsequently, first in the European Communities Act 1972 (section 9) and now in the Companies Act 1985 (section 35), the legislature in that country has determined that the authority of the directors to bind the company is deemed to be free of any limitation under the memorandum or articles.

Finally, it is submitted that although there may be divergent interpretations concerning the impact which section 228 has on the authority of directors to bind the company, such interpretations must take cognisance of and are perforce subject to any unambiguous, unconditional restrictions which the articles may place on the authority of the directors.

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DIE SKENDING VAN DIE REG OP DIE WERFKRAG VAN 'N HANDELDRYWENDE REGSPERSOON IN GEVAL VAN GROEPLASTER

A Newmann CC v Beauty Without Cruelty International 1986 4 SA 675 (K)

In hierdie saak moes die hof die volgende vraag beantwoord (677):

> "Is a poster depicting a woman dragging a fur coat from which blood is dripping, with the captions 'It takes up to 40 dumb animals to make a fur coat. But only one to wear

> it' and 'If you don't want millions of animals tortured and killed in leg-hold traps, don't buy a fur coat', defamatory of a furrier who sells fur coats?"

Die applikant is 'n beslote korporasie wat as pelser vir byna 50 jaar in die pelsbedryf betrokke is by die ontwerp, vervaardiging, verkoop en herstel van jasse en ander pelskledingstukke. As sodanig het die applikant "a reputation for quality service, personalised attention and absolute commerical integrity" (677–678) opgebou, 'n indrukwekkende lys van klante getrek en wêreldbekendheid verwerf. Die respondent is 'n vrywillige vereniging wat beskryf word as 'n "non-denominational, non-political, charitable educational trust" (678).

Die applikant bekla hom daaroor dat die respondent bedoelde plakkaat deur die Suid-Afrikaanse Vervoerdienste op 'n groot en opvallende advertensie-aanplakbord laat aanbring het. Alhoewel dié plakkaat op versoek van die applikant weer deur die Vervoerdienste verwyder is, vra die applikant nogtans 'n interdik aan om die respondent te verbied om die plakkaat verder te publiseer op grond daarvan dat dit "defamatory to plaintiff or *disparaging of its products and/or goods*" sou wees (my kursivering). Die hof (679) word gevra om twee vrae in eksepsie te behandel, te wete "(a) whether the poster in question is reasonably capable of being understood as referring to applicant; and (b) if it is, whether the poster is reasonably defamatory of applicant in its primary sense." Albei vrae word negatief beantwoord.

Die uitspraak is veral om drie oorwegings van besondere belang. Die eerste is dat die hof die regsreëls aangaande groeplaster ("group or class defamation") duidelik uiteensit. Tweedens bevestig die beslissing hoe moeilik dit soms is om 'n verweerder in geval van (groep-) laster aanspreeklik te stel. Die vraag ontstaan dan of die applikant nie eerder langs 'n ander weg – dit is die (dreigende) inwerking op sy werkrag – die gevraagde regshulp moes probeer bekom het nie. Derdens aanvaar die hof ten onregte sonder meer dat 'n regspersoon belaster kan word.

a **Groeplaster** 'n Eiser kan vanselfsprekend – soos regter Tebbutt ten aanvang beklemtoon (679–680) – slegs op grond van laster ageer indien die gewraakte publikasie op hom persoonlik betrekking het of na hom verwys. Daarom moet die eiser uitdruklik beweer en bewys dat die laster *sy* goeie naam betrek. Die toets om hierdie betrekking te bepaal, is die objektiewe redelike-man-toets, te wete of volgens die oordeel van die redelike man die lasterlike publikasie aan die eiser gekoppel kan word (sien ook Neethling *Persoonlikheidsreg* (1985) 133). Met betrekking tot die publikasie *in casu* verklaar die regter dan (680):

> "If they [die woorde op die plakkaat] are defamatory at all, they are defamatory of a class or group. There are no special rules of law which apply to cases of class or group libel where an individual member of the class or group institutes a defamation action based on defamatory matter which refers to the class or group. Here, too, the plaintiff or applicant can only succeed if he can show that the matter complained of, though expressed to be in respect of a class or group of which he is a member, is in fact a publication of and concerning him personally."

Hy vervolg (681):

> "In determining whether the element of identification of the plaintiff or applicant with the defamation has been proved, the Court does not look merely to the words complained of but must have regard as well to the surrounding circumstances. In this regard the following factors are important: the size of the class or group, the generality of the charge and the extravagance of the accusation . . . None of them is, however, conclusive. The enquiry always remains: are the words in conjunction with the relevant circumstances reasonably capable of being understood to apply to the plaintiff or applicant?"

Pas 'n mens nou bostaande beginsels op besondere gevalle toe, dan beteken dit volgens die regter (683) dat indien 'n groep so klein of so maklik bepaalbaar is dat wat van die groep gesê word noodwendig ook op elke lid daarvan van toepassing is, elke lid in geval van groeplaster 'n lasteraksie tot sy beskikking het. Die rede is dat elke lid van die groep, "it being so small, is identified in the libel or, as it has been put, is 'individually aspersed'. " *In casu* is die posisie egter gans anders. Regter Tebbutt laat hierop volg (684):

> "The poster and its captions represent, in my opinion, a campaign against a certain type of wearing apparel, i e fur coats and garments; it is an attack on a fashion cult or a clothing fad. Those who have mounted that campaign have directed their attack against all those involved in the fur trade, be they the wearers of fur garments or those involved in the production, supplying, manufacture or selling of such garments. This involves a very large and wholly indeterminate body of persons. It is clearly not an attack on any individual and it is emphatically not an attack on the applicant. It is, if anything, an attack on a wide group or class in which it would be impossible to identify applicant individually. It is a campaign against a cult; it is not an attack on individuals."

Die regter gaan voort (685):

> "As I have pointed out, the words and the surrounding circumstances must be considered in deciding whether the alleged defamatory matter is reasonably capable of applying to the applicant, and such surrounding circumstances include the size of the class, the generality of the charge and the extravagance of the accusation. Here the class is a large one, the charge couched in very general and extravagant terms. As Goddard LJ, in my respectful view, so aptly put it in the Court of Appeal in *Knupffer's* case *supra* at 561B: 'The Court must in my opinion, pose the question: Is the article an attack on the policy or objects of a society or association or is it an attack on individuals?'
>
> Applying that test to the present case, the poster and its captions that we are considering are, in my view, an attack on the activities of those involved in the fur trade including the traders and dealers. It is not an attack on individuals. It is, in my view, emphatically not an attack on the applicant as an individual."

Ten slotte wys die regter (686) tereg daarop dat aangesien die toets of die laster op 'n persoon betrekking het, objektief is, die feit dat omstanders inderdaad (subjektief) die laster met daardie persoon verbind het, irrelevant is. (Terloops, dit bevestig weer eens die feit dat die vraag na 'n *feitelike* krenking van die goeie naam in die onregmatigheidsbeoordeling by laster negeer word: vgl Neethling 128–130 133 vn 87).

Uit bostaande blyk duidelik dat die reëls aangaande groeplaster in beginsel nie van dié met betrekking tot die belastering van 'n enkeling verskil nie. Die onderskeid is bloot prakties van aard in die sin dat waar 'n persoon nie by name genoem word of andersins geredelik identifiseerbaar is nie, hy in die reël – soos *in casu* – 'n *bewysnood* het om aan te toon dat die beweerde laster op hom persoonlik van toepassing is.

b **Reg op die werfkrag** Gesien die applikant se bewysnood met betrekking tot groeplaster, ontstaan die vraag of hy as *ondernemer* nie eerder op grond van 'n (dreigende) onregmatige skending van die werfkrag van sy onderneming die interdik moes probeer verkry het nie. 'n Mens het naamlik hier – om die knoop deur te hak – met neerhalende bewerings ten aansien van 'n ondernemer se prestasie (ware of goedere) as verskyningsvorm van 'n *regstreekse* inwerking op die werfkrag te make (sien hieroor Van Heerden en Neethling *Onregmatige Mededinging* (1983) 170 e v). Snaaks genoeg, het die applikant hierdie bewering óók gemaak, maar dit ongelukkig nie verder in dispuut geplaas nie (697F–G). Daarom word hier verder daaroor uitgewei.

Ten aanvang moet beklemtoon word dat *neerhaling* hier in die wydste betekenis van die woord opgevat moet word en geensins met "laster" gelykgestel moet word nie. Enige bewering ten aansien van 'n ondernemer se prestasie wat die effek het om die publiek of 'n deel van die publiek van afname daarvan te weerhou, moet as 'n neerhaling van die betrokke prestasie aangemerk word. Hierbenewens moet onthou word dat regstreekse inwerkings op die werfkrag prinsipieel of *prima facie* onregmatig is. Die *onus* is dan op die verweerder (respondent) om 'n regverdigingsgrond vir sy optrede aan te toon (sien Van Heerden en Neethling 72–73 169–170).

Nou behoef dit nie veel betoog nie dat die publikasie van neerhalende, *onware* bewerings aangaande 'n ondernemer se ware wat sy werfkrag nadelig tref, summier onregmatig behoort te wees. Van 'n regverdigingsgrond kan daar tog nie sprake wees nie. Nietemin word ons reg in verband met "injurious falsehood" gekniehalter deur beslissings wat *opset* as 'n vereiste vir sowel die *actio legis Aquiliae* (soos *International Tobacco Co (SA) Ltd v United Tobacco Co (South) Ltd (1)* 1955 2 SA 1 (W) 24) as die interdik (soos *ECA(SA) v BIF(SA) (1)* 1980 2 SA 506 (W) 510) stel. In die lig van die gemeenregtelike grondslae van die twee remedies is hierdie beslissings egter geheel en al verkeerd en behoort hulle daarom nie nagevolg te word nie (sien Van Heerden en Neethling 16–23 26 29–30 178–179). Nalatigheid is tog voldoende vir die Aquiliese aksie terwyl skuld hoegenaamd nie 'n vereiste vir die interdik is nie (sien *ibid*). Wat die onderhawige beslissing betref, kan 'n mens dit met redelike sekerheid stel dat die gewraakte plakkaat neerhalend (in genoemde sin) van pelsware is en dat minstens die tweede byskrif 'n klaarblyklike onwaarheid bevat – beslis nie alle pelsdiere (soos karakoellammers) word in strikke gemartel en gedood nie. Daarom behoort die plakkaat dan ook summier as onregmatig geag te word mits natuurlik die neerhaling boonop die applikant se werfkrag bedreig of inderdaad krenk (hierop word hieronder ingegaan).

Slaag die applikant nie daarin om die onwaarheid van die neerhalende plakkaat te bewys nie, moet in gedagte gehou word dat daar geen rede bestaan waarom *ware* neerhalende bewerings wat 'n ondernemer se werfkrag tref – synde 'n regstreekse inwerking – nie ook in beginsel in ons reg as onregmatig beskou moet word nie (sien Van Heerden en Neethling 185–189). Hierdie beskouing word klaarblyklik deur regter Van Dijkhorst in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 187 onderskryf waar hy die regmatigheid van 'n "truthful disparagement by one trader of the goods ... of his competitor" bevraagteken.

'n Ondernemer wat aantoon dat sy handelsware deur ware of onware bewerings neergehaal word, bewys daarmee nog nie – soos hierbo afgelei kan word – dat daar onregmatig *teenoor homself* opgetree is nie. Hy kan vanselfsprekend op grond van die gewraakte neerhaling slegs ageer indien die werfkrag van sy onderneming inderdaad daardeur getref is of bedreig word. Anders as wat vroeër in die regspraak te kenne gegee is (sien Van Heerden en Neethling 179–180), hoef die applikant vir doeleindes hiervan nie "special damage" te bewys nie, maar bloot aan te toon, soos regter Margo dit in *Helios Ltd v Letraset Graphic Art Products (Pty) Ltd* 1973 4 SA 81 (T) 90 stel, dat "the loss of customers is likely to result," dit wil sê dat benadeling of 'n inwerking op die werking *waarskynlik* is; en hier word die applikant se taak vanselfsprekend vergemaklik indien hy daadwerklik benadeling of verlies van klante kan bewys (na analogie van die

posisie m b t aanklamping: sien Van Heerden en Neethling 114). Keer 'n mens nou terug na die posisie *in casu*, dan blyk die waarskynlikheid van benadeling van die applikant reeds voldoende uit die volgende *dicta* (678 684):

> "[The applicant] says that as a result of the posters she has received a number of telephone calls from clients expressing their concern at the adverse image created by the poster. Several had returned their fur garments for storage as the owners no longer felt able to wear them as a result of the poster."
>
> "It is not without significance that in her affidavit [the applicant] says that she has received telephone calls from clients of applicant expressing their concern 'at the adverse image' created by the poster. She says further that in Europe and elsewhere 'where anti-fur campaigns have been launched and posters such as the (present) one have been widely used' the fur trade and fur industry have suffered substantial loss and that 'anti-fur campaign psychologically inhibits such people' (i e sensitive, intelligent people involved in society and public life) from wearing and purchasing fur."

'n Mens kan dus tot die slotsom kom dat daar in hierdie saak oënskynlik 'n *prima facie*-skending van die applikant se reg op die werfkrag voorhande was. Die *onus* is dan op die respondent – in die geval van ware bewerings – om sy optrede te regverdig. Die klaarblyklike wyse waarop hy dit *in casu* sou kon doen, is om te bewys dat die plakkaat in die *openbare belang* is (sien hieroor Van Heerden en Neethling 211–213). Of die respondent hierin sou kon slaag, kan – in die lig van die emosionele aard van die plakkaat en sy byskrifte – bevraagteken word.

So gesien, het die applikant langs hierdie weg minstens 'n groter kans op sukses gehad as in die geval van laster as skuldoorsaak.

c **Laster ten opsigte van regspersone** Die hof (688) aanvaar sonder meer dat "if words are defamatory of a trading corporation it has a remedy by way of action for libel (see eg *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1; *Multiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 (3) SA 164 (D))." Sodoende negeer die hof die reeks resente beslissings waarin te kenne gegee is dat 'n regspersoon (ook 'n handeldrywende maatskappy) om klaarblyklike redes geen persoonlikheidsregte ('n reg op die goeie naam inbegrepe) het nie en daarom ook nie op grond van laster kan ageer nie (sien oor die meriete van hierdie siening Van Heerden en Neethling 184–185; Neethling *Persoonlikheidsreg* 78–80; 1986 *THRHR* 120–121). Die *fama* of goeie naam van 'n regspersoon word volgens hierdie gewysdes tereg slegs as 'n bestanddeel van sy werfkrag geag en as sodanig beskerm (*ibid*). Indien die hof wel van hierdie siening kennis geneem het, kon die uitspraak in die lig van wat hierbo onder (b) gesê is, miskien anders verloop het.

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DAMAGES FOR BREACH OF CONTRACT PAYABLE IN FOREIGN CURRENCY

Voest Alpine Intertrading Gesellschaft v Burwill SA 1985 2 SA 149 (W)

The facts of the case were quite simple: The plaintiff purchased 3 000 metric tons of ferrochrome from the defendant in terms of three written contracts. The price was payable in United States dollars. At a later date the defendant repudiated all three contracts and the plaintiff sued the defendant for damages –

the quantum of which was the increased cost of purchasing the ferrochrome elsewhere. From the evidence it appeared that the total loss suffered by the plaintiff was US $777 612,38. This amount was not contested by either the plaintiff or the defendant.

Without referring to any authority Nestadt J stated that the court was obliged to give judgment only in rand and not in a foreign currency (150F). This being the case, the only issue to be resolved was at what date the amount expressed in United States dollars was to be converted to rand. Two possible dates of conversion were submitted, namely, the date of the breach of contract (1981) on behalf of the defendant and the date of judgment (1984) on behalf of the plaintiff. Since world currencies are subject to the risk of periodic revaluations or devaluations, a three-year difference could signify a substantial difference in rate of exchange. In this particular instance the difference was substantial. The rand equivalent for the amount expressed in dollars at the date of breach was R731 840,71 whilst at the date of judgment it was R1 207 423,52 – a difference of R475 582,81.

Nestadt J concluded that the relevant date of conversion was the date of the breach of contract. He referred by analogy to *Barry Colne and Co Ltd v Jacksons Ltd* 1922 CPD 372 (150H). Here it was held that where the purchase price of a *res vendita* is given in a foreign currency, it may be paid in the local currency of the place where this payment will be made unless the contract prohibits this. Turning to the case in issue he remarked:

> "The same rule would, I consider, apply to a contractual claim for damages of the type which is in issue here. Seeing the price of the goods was payable in US dollars, it can be assumed that the plaintiff's claim for damages should be similarly payable. It would be due when the breach occurred. Though only quantified by the judgment, the damages are assessed as at this date. Accordingly, defendant's liability in rand must likewise be determined. Subsequent fluctuations in the value of currency are to be ignored. In a case such as the present, defendant's refusal to then pay, will of course have led to the plaintiff sustaining a large additional loss. It may be (the point was not in issue and was therefore not argued) that this could be claimed as a further head of damages. It would not, however, in my view, justify the quite fortuitous and often delayed date of judgment, which may only be established on appeal, being taken as the relevant date for converting defendant's dollar liability to rand" (151A–C).

The following aspects of the judgment now deserve closer attention:

1 *The type of breach* It is necessary to determine the type of breach which occurred here, because the time at which damages are calculated is not the same for all types of breach. For instance, in the case of cancellation for *mora*, a creditor who has justifiably cancelled is entitled to claim damages and these must be calculated at the time of cancellation (*Celliers v Papenfus and Rooth* 1904 TS 73 84). However, in the case of a non-performance or a positive malperformance at the time performance was due, ensuing damages should be calculated at the time of breach (*Bester v Visser* 1957 1 SA 628 (T) 629E), whilst the amount of damages on the ground of repudiation is calculated with reference to the date on which performance was due, subject to the mitigation rule, and not with reference to the date of repudiation (*Novick v Benjamin* 1972 2 SA 842 (A) 858D).

In this particular report all that is stated is that the defendant wrongfully repudiated the written contracts and that this repudiation was "accepted" by the plaintiff (150C). The specific form of the breach is not described, as it appears from the report that the facts which constituted the breach and the considerations

which assisted the judge in calculating the precise quantum of damages were omitted (150D). It is regrettable that this important part of the judgment was omitted. Be that as it may, "repudiation" in its usual sense as a specific type of breach of contract *in anticipando* takes place when a party to a contract by his conduct leads the other party to conclude with reasonable certainty that the former will not render performance at all or will not render further performance irrespective of whether this occurs before, during or after the time fixed for performance. In this case, therefore, a reference to the "acceptance" of the repudiation is unfortunate and reminiscent of English law where a repudiation was originally regarded as an offer to rescind which could be accepted or refused like any other offer (Nienaber "Enkele Beskouinge oor Kontrakbreuk in Anticipando" 1963 *THRHR* 19 22–29). It is now settled law in South Africa that repudiation *per se* constitutes a breach of contract (*Tuckers Land Development Corporation v Hovis* 1980 1 SA 645 (A) 652F–G) and "acceptance" thereof merely means that the plaintiff resiled from the contract.

2 *The calculation of damages in United States dollars and the conversion thereof to rand* Once it is established that a party has suffered damage as a result of breach of contract, the other party must place the former in the same patrimonial position in which he would have been had proper and timeous performance taken place (*Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22; *Svorinic v Biggs* 1985 (2) SA 573 (W); Sharrock "Damages for Breach of Contract: The Recovery of Lost Opportunities" 1985 *SALJ* 616; Feldman & Lebling "Inflation and the Duty to Mitigate" 1979 *Law Quarterly Review* 271; Burgess "Avoiding Inflation Loss in Contract Damages Awards: The Equitable Damages Solution" 1985 *ICLO* 317). On the other hand, the innocent party has a duty to mitigate his loss (*Brown v Sessel* 1908 TS 1137 1143; *Victoria Falls and Tvl Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22; *Versfeld v SA Citrus Farms Ltd* 1930 AD 452 454).

In this case the total loss suffered by the plaintiff was US $777 612,83, being the increased cost of purchasing the ferrochrome elsewhere. How the damages were calculated was omitted from the report. Be that as it may, there is nothing to indicate that this was not done in accordance with general principles of contract and in accordance with these principles the relevant date of calculation would be the date on which the rule on the mitigation of loss was applied, as in fact it was in this particular judgment (De Wet and Yeats *Kontraktereg en Handelsreg* (1987) 207–208; Kerr *The Law of Sale and Lease* (1984) 103–104; Kerr "Date for Determining Loss through Breach of Contract: Fluctuating Exchange Rates" 1986 *SALJ* 339 340). Furthermore, both the plaintiff and defendant were satisfied with the quantum of damages (150E). One must therefore disagree with Kerr's contention that the relevant date on which damages were calculated was the date of breach (Kerr "Date for Determining Loss through Breach of Contract: Fluctuating Exchange Rates" 1986 *SALJ* 339 340). Two separate issues ought to be distinguished here, namely, the determination or calculation of damages expressed in United States dollars and the conversion of these damages to rand. This latter calculation is separate from the calculation of the actual damages and, purportedly, according to Roman-Dutch authority the relevant date for conversion is the date of breach (see *Barry Colne and Co Ltd v Jackson's Ltd* 1922 CPD 372 and the sources cited and discussed at 376–378; *Bassa Ltd v East Asiatic (SA) Co Ltd* 1932 NPD 386). This rule is not a rule of

contract but one of procedure, as is the rule that our courts are obliged to give judgment only in rand (Spiro *The General Principles of the Conflict of Laws* (1982) 79; Cheshire-North *Private International Law* (1979) 716). Whether these rules truly reflect our law on this point or whether they are desirable is another question (see 3 *infra*). Nevertheless, even if these rules are incorrect, the dates relevant to calculation of damages and conversion respectively ought not to be confused and the view that *in casu* damages were calculated at the time of breach cannot be supported.

3 *The competence of South African courts to express orders in foreign currency* Without referring to any authority (but admitting that he could not trace the source of the rule) Nestadt J stated that the court was obliged to give judgment only in rand (150F). No other South African case could be traced which supports this rule. The only decisions which could be traced where a South African court is obliged to order payments in South African currency are those of South African courts of admiralty which exercise jurisdiction in terms of the Colonial Courts of Admiralty Act of 1890. The act requires that the court should apply English admiralty law as administered by the English high court exercising jurisdiction in 1890 (Admiralty Jurisdiction Regulation Act 105 of 1983 s 6(a); *Malilang v MV Houda Pearl* 1986 2 SA 714 (A) 722I–723D; see also *Malilang v MV Houda Pearl* 1986 3 SA 960 (A) 965A–967A where the "breach-date rule" was confirmed but not applied (967B–I)). Therefore these decisions do not reflect Roman-Dutch Law.

Interestingly, there are also no statutes in South Africa which require our courts to order payments in South African currency only (Spiro *Conflict of Laws* 79 *ad notam* 117; Christie *The Law of Contract in South Africa* (1981) 408–409; Currency and Exchange Act 9 of 1933 s 2(1); South African Mint and Coinage Act 78 of 1964 s 14; Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 s 2(2)).

The source of this rule is English law as it was prior to recent developments. The English law on this point was that an English court could not give judgment for the payment of an amount in foreign currency and a debt expressed in foreign currency had to be converted to sterling. This was known as the "sterling-judgment rule." Furthermore, this conversion had to be made with reference to the rate of exchange prevailing on the day when the debt was payable. This, in its turn, was known as the "breach-date rule" (*Manners v Pearson & Son* 1898 1 Ch 581; *SS Celia v SS Volturno* 1921 2 AC 544; *In re United Railways of Havana and Regla Warehouses Ltd* 1960 2 All ER 332 (HL)). Since then English law has changed. It is now settled law in England that an English court may express an order in the foreign currency of a foreign country if the proper law of the contract was the law of that country and the money of account and payment was that of the same country. If it is necessary to enforce the judgment, the amount in foreign currency is to be converted into sterling at the date when leave was given to enforce the judgment. (See *Schorsch GmbH v Hennin* 1975 QB 416; *Miliangos v George Frank (Textiles) Ltd* 1975 3 All ER 801 (HL); *Barclays Bank International Ltd v Levin Bros (Bradford) Ltd* 1976 3 All ER 900 (QB); *Federal Commerce and Navigation Co Ltd v Tradex Export SA The Maratha Envoy* 1977 2 All ER 41 (CA). For an extension of the rule to damages for a tortious act see *The Despina R* 1977 3 WLR 597 (CA); *The "Federal Huron"*

1985 2 Lloyd's Rep 189 (QB); *Ozalid Group (Export) Ltd v African Continental Bank Ltd* 1979 2 Lloyd's Rep 231 QB.)

In other Commonwealth jurisdictions the English precedents have either been followed expressly or the tendency to follow them subject to qualification is apparent. (For the position in Australia see *Maschinenfabrik Augsburg-Nurenburg Aktiengesellschaft v Alticar Pty Ltd* 1984 3 NSWLR 152; *Mitsuiosk Lines v Ship "Mineral Transporter"* 1983 2 NSWLR 564. In New York state the "breach date-rule" applies. See *Vishipco Line et al v Chase Manhattan Bank* 754 F 2d 452. However, if the proper law of a contract is not United States law, the courts will allow a conversion on the date of judgment. See *Anibal Conte v Flota Mercante del Estado* 277 F 2d 664. In Canada the "breach-date rule" applies. See in general Robinson "Canada Adopts a Currency Conversion Code" 1984 *International Financial Law Review* 27.)

Recent developments in foreign legal systems compatible with ours provide sufficient persuasive authority for the acceptance of the rule not only that a court order may be expressed in foreign currency but also that an amount in foreign currency is to be converted into local currency at the date when leave was given to enforce the judgment. Other reasons which might justify the acceptance of these rules are the absence of statutes and case law enforcing our courts to make orders in South African currency only, fluctuations in world currencies as well as the urgent need to attract foreign investment to South Africa (see in general Spiro "Currency Problems in Transactions Extending Beyond One Legal Unit" 1985 *CILSA* 377–384).

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DIE VEREISTE *CONTRA NATURAM SUI GENERIS* EN SKULD AAN DIE KANT VAN DIE BENADEELDE BY DIE *ACTIO DE PAUPERIE*

Da Silva v Otto 1986 3 SA 538 (T)

Op die gebied van skade veroorsaak deur diere kom daar in ons regspraak van tyd tot tyd kostelike uitlatings oor die geaardheid, sielelewe en gedragspatrone van huisdiere voor. Reeds in 1912 het regter Wessels in *Boyce v Robertson* 1912 TPD 381 383 die volgende getuigskrif vir honde gegee:

> "But dogs have been domesticated for ages: I am not quite sure, but I believe we find the dog associated with Neolithic man. The dog has been for ages the companion and hunting agent of man."

In *Swart v Honeyborne* 1981 1 SA 974 (K) 979D–E wou regter Rose Innes glad nie aanvaar dat 'n waghond wat sy baas se agterplaas beskerm enigsins blameer kan word indien die hond skade veroorsaak nie:

> "Dit word egter in my opinie nie verwag dat 'n goed gemanierde en gehoorsame hond agteroor op die rug liggend en gedwee sal bly in die geval van 'n oënskynlike dreigement teen die persele wat dit sy natuurlike funksie is om oor wag te hou. In my opinie het

verweerder se hond nie *contra naturam* opgetree deur eiser te byt toe eiser op die heining van verweerder se agterplaas met 'n baksteen gehamer het nie. Eiser het op 'n wyse wat die hond aangehits het opgetree en daardeur veroorsaak dat die hond hom aanval. Al het die eiser dit nie bedoel nie, het sy gehamer teen die heining die hond provokeer en so ontstel dat dit nie onder die omstandighede as teen die geaardheid van 'n ordentlike hond beskou kan word dat die hond hom op die hand gebyt het nie."

Die nuutste juweeltjie kom uit die pen van regter Nestadt in die onderhawige saak waar hy (542E–G) verklaar:

"Dieselfde beginsel geld, myns insiens, in die geval waar dit op die feite bevind word dat die hond gebyt het slegs omdat hy geslaan is, mits die beseerde regmatig en redelikerwys opgetree het. In so 'n geval sal dit geag word dat die hond *contra naturam* opgetree het. 'n Objektiewe toets van die redelike hond word toegepas. *Dit sal verwag word dat sulke (sic) hond 'n onderskeid sal tref tussen 'n geregverdigde aanval op hom en 'n ongeregverdigde een.* Wat eersgenoemde betref, sal hy moet swig voor die mens se gesag. Met ander woorde, 'n regmatige aanhitsing negeer nie die *actio de pauperie* nie. Dit sou gekunsteld wees om te bevind dat 'n persoon wat gepoog het om homself te beskerm teen die dreigende aanval van 'n hond, geen aksie teen die hond se eienaar het nie, terwyl 'n ander persoon wat gelate toegekyk het dat die hond hom byt wel so 'n aksie sal hê" (my kursivering).

Die feite van die saak is soos volg: Appellant het een Sondagmiddag, gewapen met 'n ligte rottang om lastige honde te verwilder, met sy hond aan 'n leiband 'n wandeling deur die strate van Pretoria onderneem. Terwyl hy verby die respondent se erf gestap het, het laasgenoemde se boerboel by 'n oop syhekkie uitgestorm en op die appellant se hond afgestorm. Die honde het aan mekaar gespring en die appellant het die honde probeer uitmekaar maak deur die boerboel met sy rottang te slaan. Daarna het die boerboel die appellant aan sy regter onderbeen gebyt. Eers nadat die honde met 'n tuinslang natgespuit is, het die boerboel appellant se hond gelos en kon hy teruggejaag word in die respondent se perseel. Na aanleiding van sy besering het die appellant 'n aksie om skadevergoeding ten bedrae van R1 500 in die Pretoriase landdroshof ingestel. Die aksie was gebaseer op die *actio de pauperie* en in die alternatief op die *actio legis Aquiliae. In casu* kom die appellant in hoër beroep teen 'n bevel van absolusie van instansie deur die landdroshof.

In sy uitspraak aanvaar regter Nestadt (met wie wnr O'Donovan saamgestem het) die verhoorhof se bevinding dat die respondent nie nalatig opgetree het deur die boerboel op sy perseel aan te hou nie. In die vyf jaar wat hy eienaar van die hond was, het die hond nooit iemand gebyt nie. In ieder geval was die perseel omhein met 'n ses-voet hoë betonmuur en was die syhekkie waaruit die boerboel gestorm het, gewoonlik gesluit. Die feit dat die bediende op die betrokke dag vermoedelik die hekkie gebruik en oopgelaat het, kan nie volgens die regter as nalatigheid aan die kant van die respondent gekonstrueer word nie.

Met verwysing na die appèlhofsake *South African Railways and Harbours v Edwards* 1930 AD 3 9–10 en *Solomon v De Waal* 1972 1 SA 575 (A) 581 aanvaar regter Nestadt dat vir aanspreeklikheid ingevolge die *actio de pauperie* die volgende vereistes *in casu* toepaslik is:

a dat die respondent die eienaar van die dier is;

b dat die dier *contra naturam sui generis* opgetree het;

c dat die eiser nie nalatig of met onbesonnenheid teenoor die dier opgetree het en nie die dier geprovokeer het nie; en

d dat die appellant regmatig op die plek was waar die dier hom beseer het.

Aangesien die respondent erken het dat hy die eienaar van die boerboel was en dat die appellant regmatig aanwesig was in die publieke straat waar hy beseer is, konsentreer die regter op vereistes (b) en (c) hierbo genoem, naamlik of die hond, toe dit appellant gebyt het *contra naturam* opgetree het, en of appellant se besering aan sy eie skuld te wyte is. Hoewel die regter toegee dat hierdie aangeleenthede dikwels eng met mekaar verstrengel is, behandel hy nogtans die twee aspekte afsonderlik.

Met betrekking tot die verweer van skuld aan die kant van die benadeelde, aanvaar regter Nestadt die volgende *dictum* van hoofregter Innes in *O'Callaghan v Chaplin* 1927 AD 310 329:

> "[T]here must have been no 'substantial negligence or imprudence' on the part of the person injured – by which I understand no unreasonable conduct contributing to the injury.... If the injury were due to provocation by the injured person no compensation could be claimed *de pauperie*.... So that there is direct authority for the application in pauperien actions of the fundamental principle that no man can recover damages for an injury for which he has himself to thank."

In die lig van die omstandighede van die geval bevind regter Nestadt dat die appellant se optrede nòg nalatig nòg onverstandig was. Die feit dat die boerboel in dié omstandighede geslaan is, kan volgens hom nie as provokasie in die sin van skuld aan die kant van die eiser beskou word nie. Op hierdie punt beslis die regter soos volg (541A):

> "[Die appellant] was geregtig, en trouens, as 'n besorgde eienaar geroepe, om sy hond te probeer red of beskerm teen respondent se hond se aanval op hom. Dit het hy gedoen en wel op die enigste redelike wyse wat beskikbaar was."

Hoewel daar geen provokasie in die sin van direkte aanhitsing aan die kant van die appellant was nie, moes die appellant myns insiens ten minste wel deeglik besef het dat hy met sy inmenging in die geveg tussen die twee honde die risiko loop dat hy beseer kan word. Hy het dus vrywillig die risiko van besering aanvaar wat in normale omstandighede op skuld aan sy kant sou neerkom. *In casu* het die appellant egter in 'n noodtoestand ter beskerming van sy hond opgetree. Aangesien hy dus op regmatige wyse die skade op homself gebring het, was sy optrede geensins onredelik nie en dus was daar geen skuld aan sy kant nie. 'n Regmatige daad kan nooit as skuldig tipeer word nie.

In hierdie opsig is die feite van die beslissing in *Joubert v Combrink* 1980 3 SA 680 (T) ter sake. Die eiseres was die huurder van 'n afsonderlike woonstel op die kleinhoewe van die verweerder. Sy eis skadevergoeding nadat sy deur die verweerder se waghonde op sy perseel gebyt is. Die regter weier om uit die blote feit dat sy as huurder die ongekwalifiseerde reg gehad het om op die perseel te kom en gaan ten einde haar woonstel te bereik, af te lei dat sy kennis daarvan moes gehad het dat die waghonde haar kon aanval en dat sy daarom toegestem het tot die risiko van benadeling. *In casu* is bevind dat aangesien nie gepleit en bewys is dat die eiseres inderdaad bewus was van die mate van gevaar waaraan sy haar blootgestel het nie, daar nie bevind kon word dat sy die risiko van benadeling aanvaar het nie (682G–H). Myns insiens sou daar nog steeds geen skuld aan die kant van die eiseres gewees het nie selfs indien sy ten volle bewus was van die mate van gevaar waaraan sy haar met betrekking tot die waghonde blootgestel het. Haar doel en optrede om na haar woonstel te kom en gaan was nie onredelik of onregmatig nie en dus was daar nie skuld aan haar kant nie. Slegs indien bewys kon word dat sy die waghonde geprovokeer of uitgetart het, sou daar skuld aan haar kant gewees het. (Sien ook die ou Engelse saak

Clayards v Dethick 1848 12 QB 439 soos bevestig in *AC Billings & Sons Ltd v Riden* 1958 AC 240.)

Regter Nestadt is van mening dat die bevinding dat daar geen skuld aan die kant van die benadeelde was nie, voldoende vir afhandeling van die saak is. Namens die respondent is egter betoog dat die boerboel geensins *contra naturam* gehandel het deur die appellant te byt nadat die appellant die hond geslaan het nie. Die regter voel hom dus geroepe om te bepaal of aan die vereiste van *contra naturam* voldoen is. Die kernvraag in hierdie verband is of die boerboel *contra naturam* opgetree het deur die appellant te byt nadat dit deur laasgenoemde geslaan is in 'n poging om sy eie hond teen die boerboel te beskerm. Die regter pas die objektiewe toets van die redelike hond toe en bevind dat die boerboel as mak huisdier 'n onderskeid behoort te kon gemaak het tussen 'n geregverdigde aanval op hom en 'n ongeregverdigde een. Indien die aanval geregverdig is, soos in hierdie geval, bevind die hof dat die boerboel moes swig voor die mens se gesag en dus nie 'n teenaanval op die slaner behoort te gerig het nie. Die boerboel se optrede was dus *contra naturam.* Hierdie gedagtegang herinner aan die bekende stelling dat 'n hond kan onderskei wanneer hy geslaan word of wanneer bloot oor hom gestruikel word.

Die regter probeer hierdie standpunt verduidelik deur na die feite van en *dicta* in *Doig v Forbes* 1890 7 SC 119 te verwys. Volgens die feite van dié saak het die eiser die hond van verweerder met klippe van sy perseel probeer verjaag. Die hond is egter so hierdeur aangehits dat hy die eiser gebyt het. Die eis was in hierdie geval op die nalatigheid van die eienaar van die hond gebaseer. Die hof bevind dat die eiser nie bydraend nalatig was nie omdat nege uit die tien honde volgens hom in sodanige omstandighede sou weghardloop eerder as om die klipgooier aan te val. Die verwysing na hierdie bevinding impliseer dat regter Nestadt die aanval van die hond op die eiser as *contra naturam* sou beskou het as die eisoorsaak op die *actio de pauperie* berus het.

Samevattend bevind die regter dus dat die respondent se hond *contra naturam* opgetree het deur die appellant se hond aan te val en (waarskynlik) te byt. Die optrede van die boerboel het hierin afgewyk van die standaard van 'n ordentlike en goedgemanierde huishond. Die appellant se poging om die honde uitmekaar te maak deur gebruikmaking van sy rottang was 'n regmatige en redelike beskerming van sy hond. Daarom moet die hond se optrede deur appellant in hierdie omstandighede te byt, al was hy blykbaar deur hom seer gemaak, as *contra naturam* beskou word.

Myns insiens fouteer die advokaat van die respondent deur die slaan van die boerboel te beskou los van die aanval van die boerboel op die hond van die appellant. Indien slegs op hierdie feite na die saak gekyk word, word die regter myns insiens gebind deur die uitsprake in *Svamvur v Portwood* 1970 1 SA 144 (R) en *Swart v Honeyborne* 1981 1 SA 974 (K). In eersgenoemde saak is die eiser deur 'n groot Doberman-Pinscher wat met sy agterpote in die ogiesdraad van sy voorhek vasgesit het, drie keer op die hand gebyt toe hy probeer het om die hond los te kry. Die hof het bevind dat die hond se reaksie die gevolg van pyn en paniek was en nie die gevolg van innerlike boosaardigheid nie. In daardie omstandighede is dus bevind dat die hond nie *contra naturam* opgetree het nie. In *Swart v Honeyborne supra* is beslis dat die boerboel wat as waghond geteel was nie *contra naturam* opgetree het deur die eiser se hond te byt nadat hy deur die gehamer op die houtafskorting geprovokeer was nie. Toegepas op die feite

van die onderhawige geval, het die aanval van die appellant op die boerboel, in isolasie gesien, in die woorde van die regter in *Cowell v Friedman* 5 HCG 22 47 direk tot die sinne van die boerboel deurgedring en het hy dus nie *contra naturam* opgetree toe hy weens pyn die appellant gebyt het nie.

Deur die slaan van die hond te isoleer van die aanleidende oorsaak daarvan, word die regter myns insiens genoodsaak om te diep op die sielelewe van die dier in te gaan. Tans word nog steeds vereis dat die skadeveroorsakende gedraging uit innerlike boosaardigheid en wreedaardigheid moet voortvloei of teen die gedraging van 'n goedgemanierde dier van sy soort moet wees ten einde te bevind dat die dier *contra naturam* opgetree het. Myns insiens behoort sodanige sielkundige ontleding van die reaksies van diere (ten einde te bepaal of die diere "verwytbaar" is?) tot 'n minimum beperk te word. Regter Nestadt erken self dat die *contra naturam*-reël so willekeurig toegepas word dat dit in laaste instansie daarop neerkom dat enige optrede van 'n dier waarvoor op regspolitieke gronde skadevergoeding toegestaan behoort te word as *contra naturam* getipeer word (541H–I).

Die regter verwys ten slotte na 'n ander benadering (543C–D) wat gevolg kan word ten einde die boerboel se gedraging as *contra naturam* aan te merk, sonder om die aanval op die hond en die daaropvolgende besering van die appellant van die omringende omstandighede te isoleer. Volgens dié benadering, wat myns insiens verkieslik is, moet die boerboel se optrede as deel van een globale handeling beskou word, naamlik 'n aanval deur die boerboel as gevolg van innerlike opgewondenheid en kwaaiheid. Dit impliseer dat nie slegs die aanval op die appellant se hond nie, maar ook die aanval op die appellant nadat dit geslaan is in die konteks van die hele voorval as onredelik en dus as *contra naturam* beskou moet word. Indien daar bevind word dat die aanval as sodanig *contra naturam* was, maak dit nie saak hoe ernstig die aanvanklike houe was wat die boerboel toegedien is nie. Die appellant was volkome geregtig om sy eie hond te beskerm op welke redelike manier ook al nodig was. Skuld aan sy kant sou slegs aanwesig wees indien hy die perke van noodtoestand oorskry het.

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THE LEGALITY OF CONTRACTS IMPLIEDLY PROHIBITED BY STATUTE

Metro Western Cape (Pty) Ltd v Ross 1986 3 SA 181 (A)

Statutory illegality of contracts made three appearances in the law reports during 1986 (*Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A); *Shillings v Cronje* 1986 3 SA 420 (T) and *Essop v Abdullah* 1986 4 SA 11 (C)). Of these the first case is the most interesting and warrants discussion.

It is a general principle of the law of contract that contracts which contravene some rule of law are unenforceable. It is not necessary that a statute expressly prohibits the contract, since, according to case law,

> "it is a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no effect . . . whether the lawgiver has expressly so decreed or not . . ." (*Schierhout v Minister of Justice* 1926 AD 99 109).

This implies that where a statute imposes a criminal sanction all contracts concluded in relation to the forbidden conduct are, in principle, to be regarded as null and void (Steyn *Die Uitleg van Wette* 5th ed (1981) 197 *et seq*; Christie *The Law of Contract in South Africa* (1981) 337; *Standard Bank v Estate Van Rhyn* 1925 AD 266 274; *contra* Kerr *The Principles of the Law of Contract* (1980) 100).

It is particularly these implied statutory prohibitions which can have widespread and inequitable results. Thus Cooper (*Law of Landlord and Tenant* (1973) 11) declares:

> "[I]f the rent is in excess of that prescribed by statute or by a rent board . . . the lease because of its content is illegal . . . the lease is void, i e a nullity."

The consequences of such a contract being regarded as void, are that the lessee is denied all protection afforded him by the Rent Control Act 80 of 1976.

To eliminate these and other unjust results, the courts have introduced certain qualifications. In *Standard Bank v Estate Van Rhyn* 1925 AD 266 274–275 Solomon JA said:

> "The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it and the effect of the prohibition is to render the act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was."

It is impossible to provide a general set of rules by which to determine the legislator's intention and thus only certain indications have evolved (Steyn 196 *et seq*). A distinction has been made between the case where the imposition of a penalty is for the purpose of protecting the revenue and where it is for the protection of the public. In the first instance the contract is not affected, while in the latter the transaction is invalidated (*McLoughlin v Turner* 1921 AD 537 544; Christie 338.)

Christie (338) however, qualifies this position by stating that

> "This principle cannot be applied if the object of the legislation is not simply fiscal but is, even if only partly, the protection of the public" (see *Delport v Viljoen* 1953 (2) SA 511 (T) 516G).

The law on the matter was laid down in *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) 915B–C:

> "Die verkoop van vrugte op sigself is volkome wettig. Indien die verkoop van vrugte onderhewig gestel word aan die besit van 'n lisensie wat op sy beurt uitgereik word met inagneming van oorwegings van openbare gesondheid, of ander oorwegings van openbare belang, sou kon bevind word dat enige verkoop van vrugte sonder lisensie ongeldig is."

Elsewhere the judgment reads (917A–E):

> "In die lig van hierdie wetgewing moet die uitreiking van 'n lisensie aan 'n marskramer m i behou word as 'n handeling deur die plaaslike instansie waarby oorwegings van openbare belang en veral volksgesondheid 'n belangrike rol speel . . . Na my mening het die Wetgewer beoog dat daar geen handeldryf mag plaasvind deur 'n marskramer sonder

> lisensie nie. Om dit wel te doen is nie alleen strafbaar nie, maar, weens belangrike oorwegings van publieke beleid, behoort die gevolge van so 'n handeldryf ook nie regsgeldig te wees nie."

The *Dhlamini* case was followed in *Santam Insurance Ltd v Ferguson* 1985 4 SA 843 (A) where Joubert JA stated (850B–C):

> "Na my mening is dit duidelik dat die ordonnansie nie suiwer fiskale wetgewing is nie. Die verbod om die besigheid van duikklopwerk binne die regsgebied van 'n plaaslike owerheid sonder lisensie te dryf, is ook nie 'n kleurlose statutêr verbode aktiwiteit nie aangesien oortreding van die verbod strafbaar as 'n misdryf is . . . Dit is verder duidelik dat baie belangrike oorwegings van publieke belang met betrekking tot gesondheid, veiligheid, brandgevaar en die woongeriewe van die omgewing 'n belangrike rol speel by die uitreiking van 'n lisensie aan 'n duikklopper. Dit volg dan dat waar die besigheid van duikklopwerk sonder lisensie plaasvind die gevolge van so 'n besigheid nie regsgeldig is nie en dat die inkomste wat daardeur verkry word nie-regsgeldige inkomste is."

This brings us to the facts of *Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) which are briefly the following:

In 1980 the respondent obtained a concession to operate a take-away and restaurant business in South West Africa. He arranged with a wholesale business trading as Gelb Brothers to supply him as required on 30 days' credit. He began trading and ceased business in May 1981. He failed to pay a sum of R25 785,44 for goods purchased during the period March 1981 to May 1981. The appellant company claiming to be trading as Gelb Brothers instituted an action against the respondent for payment of the outstanding debt. On the trial date the court allowed an application for an amendment of the declaration so as to allege that a company known as Metro Cash and Carry (Pty) Ltd (hereafter referred to as MCC), and not the appellant, sold and delivered the goods to the respondent and that MCC had ceded its claim in respect of the purchase price of the goods to the appellant. In consequence of this amendment, the respondent was allowed to amend his plea to raise the defence that appellant's claim was unenforceable because MCC, when it sold and delivered the goods to the respondent, was trading illegally. The defence was based on the fact that MCC carried on the business of a general dealer as defined in item 3 of the First Schedule to the Registration and Licensing of Businesses Ordinance section 15 of 1953 (C) as amended. In terms of section 3 of the Ordinance, MCC was prohibited from carrying on such business unless it was in possession of a certificate of registration and a licence issued to it in terms of the ordinance. MCC was not in possession of such a certificate of registration or licence. Furthermore, in terms of section 21 of the ordinance, any person who contravenes or fails to comply with any provision of the ordinance is guilty of a criminal offence and liable on conviction to a fine not exceeding R200 or to imprisonment for a period not exceeding 6 months, or to both. MCC thus committed a criminal offence in carrying on business as a general dealer and each contract of sale between MCC and the respondent constituted a criminal offence. Consequently it was argued that such contracts of sale were void for illegality and of no effect.

The court *a quo* upheld this defence and dismissed the appellant's action. In deciding that trading without a licence is illegal and that acts performed in the course of such business are legally void the court relied upon *Delport v Viljoen* 1953 2 SA 511 (T) and *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A).

The first issue dealt with by the court was the interpretation of section 3 of the Registration and Licensing of Businesses Ordinance 15 of 1953 (C) in conjunction with item 3 of the First Schedule to the ordinance as well as section 21(1)(a) of the ordinance. The conclusion was that

> "since the section prohibits a general dealer from carrying on business by entering into particular contracts on or from fixed premises without the required certificate of registration and licence, the contracts themselves are prohibited by implication" (188F).

The judge pointed out that the general rule according to which a contract impliedly prohibited by statute is void and unenforceable is not inflexible (188F–G). Ultimately it depends on the intention of the legislature. Reference was made to *Standard Bank v Estate Van Rhyn supra* in which Solomon JA (188I–J) cited Voet 1 3 16:

> "But that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it . . . The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law."

The court then considered the purpose and context of the ordinance. After setting out the procedure and requirements which should be met in order to qualify for registration and a licence in terms of the ordinance, the conclusion was reached that

> "the ordinance is almost exclusively concerned with the running of the businesses specified . . . by suitable persons on suitable premises in the public interest" (190I–J).

As a general rule, the fact that it is the legislator's intention to protect the public interest justifies the conclusion that the contracts are void (Christie 338).

However, the court noted:

> "To construe s 3 read with s 21(1)(a) as affecting contractual rights and as rendering the specific contracts concluded by the trader with his customers void and unenforceable would cause grave inconvenience and injustice to innocent members of the public. It would inevitably follow that innocent customers will be without their contractual remedies and will for example have no claim for damages against the guilty trader in respect of defective goods sold and delivered or goods not conforming to a guarantee given in respect thereof" (191E–F).

The judge rephrased the remaining question:

> "Whether the legislation in addition to the penalties provided in s 21(1)(a), intended to render the trader's contracts void and unenforceable *in order to deter him from trading in contravention of the provisions of the ordinance*" (191G) (my emphasis).

Finally, the court noted that the disadvantages attached to the use of contract law to supplement the deficiencies of the criminal law outweigh any usefulness it could have (191H–192). Reference was made to the following *dictum* by Fagan JA in *Pottie v Kotze* 1954 3 SA 718 (A) 726–727:

> "The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent."

In the same case Fagan JA, however, also remarked (727E–G):

> "A further compulsory penalty of invalidity would . . . have capricious effects, the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned . . . To say that we are compelled to imply such consequences . . . seems to me to make us the slaves of maxims of interpretation which should serve us as guides and not be allowed to tyrannise over us as masters."

In the *Metro Western* case (192I) Boshoff JA therefore came to the following conclusion:

> "I am consequently of the view that on a proper construction of the ordinance the purpose thereof is sufficiently served by the penalties prescribed for illegal trading . . . [T]he avoidance of the contracts concluded by a trader with his customer would cause grave inconvenience and injustice to innocent members of the public without furthering the object of the ordinance."

As the court *a quo* had relied on the cases of *Delport v Viljoen* (*supra*) and *Dhlamini v Protea Assurance Co Ltd* (*supra*) the appeal court ended by distinguishing these cases. This is correct, since *Delport's* case did not touch upon the validity of contracts concluded in the course of illegal trading, but merely held that the relevant act was *inter alia* intended to regulate trade, and prohibited the carrying on of a trade until a licence had been obtained.

In the *Dhlamini* case the court was called upon to consider whether a person who had been injured in a motor collision as a result of negligence was entitled to claim, as delictual damages, loss of earnings and future loss of earnings, based on income from illegal trading as a hawker, selling fruit without a licence. The court concluded (915B–C):

> "Skade wat bereken word volgens die maatstaf van inkomste verkry uit 'n aktiwiteit wat teen die goeie sedes of wat misdadig is, sal dus nie vergoed word nie omdat dit teen die publieke beleid sou wees om dit wel te vergoed. Hierdie reël sou ook van toepassing wees op inkomste van 'n kleurlose statutêre verbode aktiwiteit (kleurloos in die sin dat dit nie as misdadig of teen die goeie sedes beskryf kan word nie) wanneer die inkomste van so 'n aktiwiteit nie afdwingbaar is nie weens ongeldigheid. Vergoeding van gederfde inkomste van so 'n aard sou ook teen die publieke beleid wees . . .
>
> Die verkoop van vrugte op sigself is volkome wettig. Indien die verkoop van vrugte onderhewig gestel word aan die besit van 'n lisensie wat op sy beurt uitgereik word met inagneming van oorwegings van openbare gesondheid, of ander oorwegings van openbare belang, sou bevind word dat enige verkoop van vrugte sonder lisensie ongeldig is. Indien dit die geval sou wees, sou eerste appellante (eiseres) haar eis gebaseer het op nie-regmatige inkomste, en sou haar inkomste van dieselfde aard moet beskou word as die inkomste verkry deur, bv 'n dief, wie se inkomste as nie-regmatige inkomste beskou moet word. Dit word namens appellante toegegee. Die vraag is dus of oorwegings van openbare belang 'n rol speel by die verleen van 'n marskramerslisensie."

Furthermore, the provisions of the legislation in terms of which a hawker's licence was issued, were considered and the court concluded (917D–E):

> "In die lig van hierdie wetgewing moet die uitreiking van 'n lisensie aan 'n marskramer m i beskou word as 'n handeling deur die plaaslike instansie waarby oorwegings van openbare belang en veral van volksgesondheid 'n belangrike rol speel . . .
>
> Na my mening het die Wetgewer beoog dat daar geen handeldryf mag plaasvind deur 'n marskramer sonder lisensie nie. Om dit wel te doen is nie alleen strafbaar nie, maar weens belangrike oorwegings van publieke beleid, behoort die gevolge van so 'n handeldryf ook nie regsgeldig te wees nie.
>
> Na my mening was die inkomste van die eerste appellante dus nie-regmatige inkomste."

Boshoff JA states (195A–B):

> "The court in this case [*Dhlamini's*] did not intend nor purport to decide on the validity of contracts concluded with innocent customers in the course of such illegal trading. Different considerations would have applied and it would have been necessary to construe the legislation in order to determine whether the Legislature intended to render such contracts void and unenforceable."

This is difficult to reconcile with the following statement:

> "Om dit wel te doen [i e to trade without a licence] is nie alleen strafbaar nie, maar, weens belangrike oorwegings van publieke beleid, *behoort die gevolge van so 'n handeldryf*

> *ook nie regsgeldig te wees nie*" (my emphasis) (*Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A) 917E).

The danger inherent in a criterion as vague as "the intention of the legislature" is clearly highlighted by the current situation. In view of the facts of the *Metro Western* case, the decision of Boshoff JA is to be applauded and a return to Voet might appeal to protagonists of pure Roman-Dutch law.

On the other hand, the undermining of a general principle of the law of contract and in particular the method according to which this was done, is to be viewed with concern. The court sought justification in the disadvantages of the use of the law of contract to supplement the criminal law. However, as Fagan JA said in *Pottie v Kotze* (*supra*):

> "The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the court will bring about, or give legal sanction to, the very situation which the legislature wishes to prevent."

Moreover,

> "In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, for it cannot be intended that a statute would inflict a penalty for a lawful act" (Craies on *Statute Law* 522 cited in *Delport's* case at 516A).

The result is that the court made the protection of the interests of innocent customers of the illegal traders of paramount importance in its interpretation of the relevant ordinance (1911 192A–B 195A). These interests are, however, protected by other non-contractual remedies. To paraphrase Fagan JA, it is a matter of concern that the court decided to free itself of the tyranny of rules and principles and break the bondage of maxims of interpretation, without replacing these with new maxims, rules and principles to provide guidance for the future.

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Simplicity of administration is a merit that does not inhere in a federal system of government (per Jackson J in *Davies Warehouse Company v Bowles* (1944) 321 US 144 153).

BOEKE

MOTOR LAW (VOLUME I)
by WE COOPER
Juta & Co 1982; xxvi — 740 pp
Price R75 + GST

ROAD TRANSPORT
by WE COOPER
Juta & Co 1985; 370 pp
Price R52 + GST

The publication of both these works is to be welcomed. The motor vehicle has received extensive attention from the legislature and the courts, and these works, which deal with road traffic legislation and motor transport respectively, meet a long-felt want. The 1965 publication *South African Motor Law* by WE Cooper and BR Bamford has in many respects become obsolete. It is, for example, noteworthy that at the date of its publication the speed limit on a public road in an urban area was 35 miles per hour, that there was no speed limit on public roads outside urban areas and that the offence of driving while the concentration of alcohol in the blood exceeds the prescribed limit did not exist. Since that time the oil crisis has come and gone (?) and various general speed limits have been prescribed for public roads outside urban areas. Further, very few people, if any, still think in terms of miles per hour and the offence of driving while the concentration of alcohol in the blood exceeds the limit of 0,08 grams per 100 millilitres is so well established that it is sometimes overlooked that, when first introduced, the limit was 0,15 grams per 100 millilitres.

Motor Law does not purport to be a second edition of Cooper and Bamford's *South African Motor Law*. According to the author, *Motor Law* is an entirely new work, although it bears traces of its predecessor. Compared with *South African Motor Law*, it is clear that the subject-matter has to a large extent been resystematised. *Motor Law* (volume I), published in 1982, is devoted to the road traffic ordinances and the road traffic regulations of the four provinces of the Republic of South Africa. Volume II, due to be published shortly, will, according to the introductory chapter of volume I, deal with the common-law principles

pertaining to, and those provisions of the road traffic legislation bearing upon, the road-user's duties and the determination of liability in road traffic collision cases. Part 6 (chapter 41) of *South African Motor Law*, which deals with motor carrier transportation, has been rendered obsolete by the Road Transportation Act 74 of 1977, which repealed the Motor Carrier Transportation Act 39 of 1930. This part of the subject-matter is now dealt with in the separate publication, *Road Transport*, by WE Cooper. This publication takes the form of a loose-leaf edition with a revision service.

Motor Law (volume I) is now four years old, and it is therefore regrettable that volume II has not yet been published. According to the author (in the preface to volume I) the inevitability of amendments to the ordinances and regulations which could have affected the contents of volume I have made it impossible to publish both works simultaneously.

The first part of volume I is an introduction to the work. Chapter 1 gives a brief outline of the work. Chapter 2 deals with the history, purpose and scope of the road traffic legislation. The historical survey stretches from 1908 to 1966, when the uniform road traffic ordinances were promulgated in the four provinces of the Republic. Apart from putting the present road traffic legislation into perspective, the historical survey shows that the need to legislate to prevent injury and damage caused on the roads arose long before the advent of the motor car.

With regard to the road traffic ordinances of 1966, the view is expressed that although a limited measure of success has been achieved in the attempt to create a uniform body of laws relating to road traffic, complete uniformity will probably only be achieved by the enactment by parliament of a Road Traffic Act and the promulgation of regulations by one central authority. The differences in the legislation are, however, mainly in the area of the registration and licensing of motor vehicles and other administrative matters. In the more crucial areas, such as the provisions relating to offences, there is substantial uniformity between the ordinances. The role played in this regard by the National Road Safety Council and the machinery provided for in section 26 of the Road Safety Council Act 9 of 1972, which made it possible for the minister of transport in effect to overrule the provincial councils if the councils do not accept a recommendation by the National Road Safety Council, should perhaps not be underestimated.

In view of the uniformity which exists between the road traffic ordinances in the four provinces, reference is made throughout the work to a single ordinance, section or regulation. Where differences exist in the legislation of the various provinces, this difference is expressly pointed out.

Part two of the work (chapters 3 and 4) contains the verbatim definitions in the ordinances and regulations, with a discussion of some of the definitions where necessary.

Part three (chapters 5 to 7) deals with the administration of road traffic. The administrative machinery is discussed in detail in chapter 5. These powers are

at present vested in the administrator, the provincial administration, local authorities, other statutory bodies (e g the Transvaal Board for the Development of Peri-Urban Areas) and officials and officers in the employ of these bodies (e g traffic officers, inspectors of licences etc). The power of the administrator and local authorities to make regulations is discussed in chapter 6 and the apportionment of fees in chapter 7. It must, however, be borne in mind that the abolition of the provincial councils may to some extent affect this part of the work.

Part four (chapters 8 to 10) is devoted to registration and licensing, that is, the registration and licensing of motor vehicles, the authority of motor dealers, transport contractors and manufacturers to operate vehicles on public roads and the licensing of drivers.

Under the heading "The Roadworthiness of Vehicles," part five deals with the construction and equipment of vehicles (chapter 11) and the dimensions of vehicles and their loads (chapter 12). The provisions of the ordinances and regulations relating to public motor vehicles (chapter 13) and buses (chapter 14) are discussed in part six of the work.

Part 7 (chapters 15 and 16) deals with road traffic signs, the powers to display such signs, the classification of and offences relating to road traffic signs and driving and traffic signals.

The rules of the road as well as those rules relating to privileged vehicles (e g ambulances, fire-engines), special vehicles (e g animal-drawn vehicles), non-vehicular traffic (e g animals and pedestrians) and the special restrictions affecting the use of public roads, are dealt with in part 8 of the work (chapters 17 to 21). In the discussion of the rules of the road, it is pointed out that a breach of a rule does not constitute negligence *per se*, but that it is a factor to be considered in determining negligence. A valuable aspect of the work is that, in the discussion of these statutory rules, reference is made to decided cases in which the negligence of a driver breaching the rules was considered, that is the so-called common-law duties of a driver covered by the rules which are particularly relevant to delictual liability.

Part nine (chapters 22 to 36) deals with all the offences created by the ordinances and the regulations as well as the common-law offence of culpable homicide.

In chapter 22 some aspects of the general principles of criminal liability which are of particular relevance to road traffic offences, are discussed. Although it is not intended to be a comprehensive exposition of the general principles of criminal liability, a few aspects call for comment. In the discussion of the nature of the defence of automatism, it was not pertinently pointed out that the difference between the decisions in *Victor* 1943 TPD 77 and *Schoonwinkel* 1953 3 SA 136(C) can be explained on the basis that in *Victor* the accused was convicted on the basis of antecedent responsibility. With regard to traffic cases, antecedent responsibility means that if an accused drives a motor car, knowing that he may have an epileptic fit, or that he may suffer a "blackout" or fall asleep while

driving, he can be held criminally liable for crimes such as negligent driving or culpable homicide. In these circumstances he cannot rely on the defence of automatism, because his voluntary act takes place when he starts driving the car. The accused sets in motion a causal chain of events which leads to the harmful and unlawful result, and he is at liberty to choose not to drive at the moment he commences his driving (see Snyman *Criminal Law* 41).

With regard to the degrees of participation, the use of the words "aiding and abetting" to describe an accomplice, is an adoption of the terminology of English law and may lead to confusion. Further, it is not pointed out that it is a controversial issue whether the doctrine of common purpose can be applied to the crime of culpable homicide.

The specific offences are discussed comprehensively with ample reference to decided cases. The table of contents in part nine is sufficiently clear to enable a reader to trace a specific offence without difficulty.

The practical approach adopted to the discussion of offences makes the work invaluable to the practitioner dealing with motoring offences. For example, in the discussion of the offence of reckless and negligent driving, the meaning of reckless driving as opposed to negligent driving is explained, and attention is also given to matters such as the role played by the maxim *res ipsa loquitur* in criminal cases and the defences most commonly advanced. Further, in the chapter dealing with driving under the influence of liquor or a drug and related offences, the discussion covers matters such as when expert evidence is necessary to prove intoxication, the provisions empowering the taking of specimens of blood from suspected offenders, evidence in regard to the possible contamination of the specimen and the evidential value of the blood analyses.

The well-known chapter by the late Professor HA Shapiro on medico-legal aspects of acute alcoholic intoxication in *South African Motor Law* 1965 has been replaced by a chapter on blood alcohol calculations by Professor TG Schwär, professor and head of the department of forensic medicine in the University of Stellenbosch. This chapter is contained in an appendix to the work and embodies material taken from chapter 13 of Cooper, Schwär and Smith *Alcohol, Drugs and Road Traffic.* In view of the increasing use by traffic authorities of the "breathalyser" type of alcohol breath-tester in road-blocks, it is noteworthy that it is pointed out in this chapter that the ratio between breath and blood alcohol concentration may manifest discrepancies and that conversions should be treated with reserve. (On the legal problems of the breathalyser test, see also Strauss *Doctor, Patient and the Law* 406.)

The index to *Motor Law* occupies 61 pages and the table of cases 29 pages, which gives some indication of the comprehensiveness of the work. The law as stated on 1981-03-31 is incorporated in the work, but the legislation promulgated or published between that date and 1981-08-31 is listed in an addendum. These amendments include, *inter alia*, the repeal of the provisions in the Orange Free State and Natal making the suspension or cancellation of a driver's licence or permit obligatory on conviction of certain offences (Transvaal and the Cape having previously repealed this provision) and the withdrawal of the conditions

and requirements prescribed by the minister of justice in terms of the Criminal Procedure Act 51 of 1977 which had to be complied with before a reading on certain electronic speed-measuring devices could be accepted as proof of fact.

Since the publication of *Motor Law* in 1982, there have been, as can be expected, amendments to the road traffic legislation. In the area of offences relating to exceeding limits, for example, some sweeping amendments were made. The provisions in the regulations relating to the saving of petroleum products which deal with speed limits of motor vehicles propelled by fuel, were repealed in 1984. The provision in these regulations which imposed a speed limit of 80 kilometres per hour on vehicles with a mass in excess of 9 000 kg was, however, re-enacted in the road traffic regulations in all four of the provinces. In 1985, sections 102 and 103 of the ordinances, which deal with speed limits and speeding offences, were amended *inter alia* to make provision for the general speed limit on public roads (which are not freeways) to be increased to a maximum of 120 kilometres per hour by the displaying of an appropriate road traffic sign. Prior to the amendment of these sections, sections 102 and 103 of the ordinances provided that "[u]nless an appropriate road traffic sign is displayed to the contrary," the general speed limit applied. These exceptions were not re-enacted, so that it appears that in prosecutions of the offences of exceeding the general speed limits, the state will now have to prove in every instance that the general speed limit was not cancelled by the displaying of appropriate road traffic signs (*Gibbs* 1963 4 SA 302(C)). Prior to 1985, the ordinances also contained a provision to the effect that if an accused could not reasonably have been aware that he was on a public road within an urban area (e g where no buildings had yet been erected), the general speed limit of 60 kilometres per hour did not apply. This provision has now been repealed, but as negligence is an element of the particular offence, it was, in any event, unnecessary to have such a provision.

The definition of a public road as it appears in the ordinances will probably now be interpreted in accordance with the literal meaning of the language used by the legislature in all the provinces. The case of *Christodoulou* 1967 3 SA 269(N), in which it was held that the language in a definition had to be modified, was overruled by the Natal full bench in *Dillon* 1983 4 SA 877(N).

Road Transport consists of a commentary on the Road Transportation Act 74 of 1977, as well as the complete bilingual texts of the Act, regulations and notices of the administrative acts by the minister of transport in terms of the powers conferred upon him by the act. The work further contains certain provisions of the Transport (Co-ordination) Act 44 of 1948 and various regulations promulgated in terms of certain other acts which are relevant to road transportation.

In terms of the revision service available for this loose-leaf publication, new and replacement pages will regularly be issued which incorporate changes resulting from amending legislations, administrative acts and new decided cases.

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50 JAAR

'n Goue jubileum: en nou?

'n Jubeljaar behoort nie verby te gaan sonder 'n terugkyk, 'n kyk na binne en 'n kyk vorentoe nie.

Maar wat sal 'n mens vandag oor die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* sê? Professor Daan Pont, die geëerde vader van die *Tydskrif*, het reeds die "uitwendige geskiedenis" van die ontstaan van die *Tydskrif* volledig opgeteken (1963 *THRHR* 1–18).

Tog het sommige dinge ongesê gebly. Dié wat miskien as te persoonlik, té na aan die hart beleef is. 'n Gesindheid, 'n gees, 'n visie wat tot iets groots soos die *Tydskrif* aanleiding gee, ontstaan nie in een dag, in een jaar of selfs in 'n dekade nie.

Eintlik het die aanloop reeds in 1880 begin, met die eerste Transvaalse vryheidsoorlog. Dié oorlog, en veral die suksesvolle afloop daarvan, het in Nederland tot 'n opwelling van simpatie vir die Boere en 'n hernieude belangstelling in hul lotgevalle gelei. Die redes vir die Nederlanders se meelewing met die Boere in dié tyd lê voor die hand. Dit het nie net of selfs hoofsaaklik om die bande van herkoms, godsdiens, taal en kultuur gegaan nie; dié bande het altyd bestaan; tog was die verhouding tussen die Afrikaners en die Hollanders tot in daardie stadium nie besonder heg nie. Nee! die nuwe golf van welwillendheid het eerder met die Hollanders se onblusbare *vryheidsliefde* verband gehou. Het hulle dan nie self 80 jaar lank geveg om die juk van Spaanse onderdrukking af te gooi nie? En die gedagte van 'n jong Boererepubliek wat die magtige Britse ryk aandurf om sy vryheid los te veg, en dan die stryd nog wen ook, het vanselfsprekend die emosies in Nederland hoog laat loop.

Een Nederlander wat deur die opwelling van entoesiasme meegevoer is, was die jong Amsterdamse student, Johan Willem Pont. Hy sou sy belangstelling in die Afrikaner nooit weer verloor nie. Later toe hy as predikant in Utrecht in die bediening staan, stem hy toe om op 'n deeltydse basis sekeretaris van die studiefonds vir Suid-Afrikaanse studente te word. Die doel van hierdie fonds was om jong manne van die Transvaal en in 'n mindere mate van die Vrystaat en die Kaapkolonie, in staat te stel om in Nederland te kom studeer; hoofsaaklik in die teologie, maar ook in die regte en die medisyne. Die sekretariële pligte van dominee Pont (later word hy professor in die teologie aan die Universiteit van Amsterdam) het tot voortdurende kontak met studente uit Suid-Afrika gelei. Trouens, talle studente is aan huis van die Pontgesin, eers in Utrecht en later te Bussum, ontvang en versorg. Ons Daniel (Daan) Pont is op 29 Maart 1895 uit dié gesin gebore, die tweede van vyf kinders. Van kleins af word hy hom van 'n pro-Afrikaanse stemming, 'n pro-Afrikaanse gevoelslewe, bewus. Van sy vroegste herinneringe – nog van voor die Anglo-Boereoorlog – is dié van die blou broek en bruin skoene (selfs vir daardie tyd 'n ongewone kombinasie) van 'n Afrikanerstudent wat vir die kleuter 'n "paardje" beloof as hy saam met hom Transvaal toe sou kom; die bolyf en gesig van die beloftemaker was nog te ver

daarbó, buite die onmiddellike gesigveld van die vierjarige kind, om 'n blywende indruk op hom te maak.

En toe breek die Anglo-Boereoorlog uit. Op 'n donker, nat Novemberdag in 1899 kom twee studente, Mortie Malherbe[1] en Dewald Bodenstein[2] om van die Pont-gesin afskeid te neem. Hulle moet vort, om te gaan veg teen die Engelse. By die kind Daan Pont bly die herinnering steek van die reënwater wat weerskante by Mortie se hoed afstroom en van die trane van sy moeder wat vrees dat sy nooit weer die jongmanne lewendig gaan sien nie.

Aanvanklik gaan dit goed met die Boere. Elke berig van 'n Boereoorwinning word deur die Pont-gesin gevier. Daar was twee vlagpale wat by die boonste verdieping van die huis (toe nog in Utrecht) uitgesteek het. Hieraan word die Hollandse driekleur en die Transvaalse vierkleur gehys. Telkens drom skoolkinders uit die omgewing by dié skouspel saam. Hulle klap spontaan die hande en soms word daar ook gesing. Daar was geen twyfel daaroor by wie die Nederlandse volk se simpatie destyds gelê het nie.

Na die Anglo-Boereoorlog het die Hollanders se geesdrif vir die Afrikanersaak heelwat afgeneem. Die mense was teleurgesteld. Hulle was verslae.

Mettertyd het daar weer studente uit Suid-Afrika gekom om in Nederland te studeer. Van die heel eerstes was Willie Joubert, die vader van die tweede redakteur van die *Tydskrif*. Dit sou egter 'n hele tyd duur voordat die ou entoesiasme weer 'n hoogtepunt sou bereik.

Teen 1914 het Daan Pont sy skoolopleiding aan die Utrechtse gimnasium voltooi en voorbereidings getref om aan die universiteit van Utrecht in die regte te gaan studeer. Toe breek die Eerste Wêreldoorlog uit, en die jonge Pont wat hom voorheen vir die opleiding as reserwe-offisier ingeskryf het, word vir voltydse militêre diens opgeroep. Hy het egter so tussen die soldatelewe deur, tóg in Januarie 1916 by die universiteit ingeskryf en met die hulp van 'n *repetitor* hom voorberei vir die kandidaatseksamen wat hy teen Junie 1916 suksesvol aflê. Hy sit sy deeltydse studie voort – oor naweke en saans soos sy verpligtinge hom toelaat – tot met demobilisasie in November 1918. Hierna gaan dit voluit totdat hy in Junie 1921 sy studie met die doktorsgraad afsluit.

Intussen het daar 'n oplewing in die verhouding tussen die Hollanders en Afrikaners gekom. Tydens 'n groot nasionale kongres wat in Januarie 1919 in

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1 Ter wille van die jonger geslag: WMR Malherbe het na sy promosie in Nederland hom as advokaat by die Middle Temple in Londen bekwaam. Nadat hy 'n tyd lank advokaat, redakteur van 'n tydskrif en staatsamptenaar was, word hy in 1921 op 45-jarige ouderdom professor in die regte aan die universiteit van Stellenbosch. Dié betrekking het hy met die hoogste onderskeiding beklee totdat hy in 1955 op 80-jarige ouderdom afgetree het. In die woorde van professor JC de Wet "was hy die siel van die regsfakulteit, wat hy help skep het en as dekaan beheer en gelei het." En verder: "Hy was 'n onoortreflike leermeester, 'n veelsydige en skerpsinnige regsgeleerde en 'n hulpvaardige kollega" (1964 *THRHR* 91).

2 Die Ponts het hom so genoem. By andere was hy blykbaar as "Helgard" (sy eerste naam) bekend. HDJ Bodenstein was in 1899 nog as leerling by 'n Nederlandse gimnasium ingeskryf. Hy keer kort na die oorlog terug en promoveer in 1907 *cum laude* met die proefskrif *Huur van Huizen en Landen volgens het Hedendaagsch Romeinsch Hollandsch Recht* aan die universiteit van Leiden. Gedurende 1912–1919 beklee hy 'n professoraat in die Romeins-Hollandse (oud-vaderlandse) reg aan die universiteit van Amsterdam. Aan die begin van 1921 (d w s dieselfde tyd as professor Malherbe) aanvaar hy 'n professoraat aan die universiteit van Stellenbosch. Hy het dié betrekking sewe jaar lank beklee totdat hy in 1927 sekretaris (deesdae sou dit direkteur-generaal wees) van die departement buitelandse sake word. Kort na sy aftrede is hy in 1943 oorlede. Sien 1943 *THRHR* 1–2 en 65–67.

Bloemfontein gehou word, word daar besluit om 'n afvaardiging onder leiding van generaal JBM Hertzog na die vredeskonferensie in Parys te stuur om daar vir die onafhanklikheid van die eertydse boererepublieke te gaan pleit. Hulle beroep hulle op president Wilson se verklaring dat klein nasies oor hul eie toekoms sou mag besluit. Die afvaardiging, wat as die vryheidsdeputasie bekend sou staan, doen eers in Nederland aan om aldaar steun vir hul saak te werf. Die ontvangs is oorweldigend. Toe generaal Hertzog in die ou Hotel L'Europe in Amsterdam 'n toespraak lewer, bevind Daan Pont hom onder die geesdriftige toehoorders. Generaal Hertzog se spreekstyl was moeilik om te volg; "hy het in raaisels gepraat" herinner professor Pont hom vandag, maar die krag en oortuiging van generaal Hertzog se standpunt dat die Afrikaner die reg het om homself te regeer, dié het helder deurgekom.

Die vredesdeputasie se sending na die vredeskonferensie was nie suksesvol nie. In Nederland het die deputasie se besoek egter 'n warme gevoel, 'n gevoel van meelewing met die Afrikanervolk, agtergelaat. Allerlei instansies is gestimuleer om self ook deel te neem aan pogings om die Afrikanerstrewe te bevorder. Soos later sal blyk, kan die ontstaan van die *Tydskrif* grootliks na hierdie oplewing van belangstelling teruggevoer word.

Die pas afgestudeerde doktor Daan Pont ontvang uit verskillende oorde aanbiedinge van werk, onder andere uit Arnhem en Nederlands Oos-Indië. Sy kop staan egter Suid-Afrika toe. Met die oog op 'n loopbaan in die Suid-Afrikaanse praktyk – moontlik as prokureur en later as advokaat – bring hy eers 'n jaar in Londen deur. Hy werk by 'n aksepbank om iets te leer van die Engelse sakelewe soos dit ook in Suid-Afrika bedryf word. Tegelykertyd maak hy eerstehands kennis met die Engelse manier van doen en leer hy om vlot Engels te praat.

In Februarie 1923 land die jong doktor Pont aan die Kaap. In sy ouerhuis het hy met talle Suid-Afrikaners kennis gemaak en vriendskappe gesluit. Dié mense staan hom nou op allerlei wyses by. Hy gaan in Kaapstad by oud-president Reitz tuis – twee van die Reitz–seuns het in Nederland in die medisyne gestudeer. Advokaat Willie Beyers (die latere appèlregter wat in 1919 lid van die vryheidsdeputasie was) se raad is baie bondig: "Pont, gaan na die Noorde!" Gesprekke met doktor Bodenstein en professor Malherbe op Stellenbosch oortuig doktor Pont dat voltydse LLB –studie in hierdie stadium nie vir hom finansieel haalbaar sou wees nie; hy sou twee jaar lank in sy eie onderhoud moet voorsien. Doktor Pont besluit dus om as leerklerk by 'n Johannesburgse prokureursfirma in te skryf en om die LLB deeltyds by die Universiteit van Suid-Afrika te behaal. Op pad Johannesburg toe bring hy nog 'n paar heerlike dae op die Vrystaatse dorpie Senekal deur. Hy is gas in die huis van die plaaslike dokter, dokter AD Keet. Dokter Keet, die bekende Afrikaanse digter, het gedurende sy mediese studie in Nederland met die Pont-gesin kennis gemaak.

Daan Pont se empatie vir die Afrikaner was nie die uitvloeisel van 'n bekrompe, eksklusief nasionalistiese ingesteldheid nie. Inteendeel, hy was 'n berese, wyd belese jong man wat hom in vier moderne tale kon behelp, en wat hom in die wêreldstad Londen en in die snel groeiende Johannesburg net so tuis gevoel het soos op die platteland. Hy geniet die paar jaar in Johannesburg ten volle. Die feit dat hy deur medium van Engels moet studeer en dat die voertaal in die praktyk feitlik uitsluitlik Engels is, verskaf vir hom geen probleme nie. Trouens, dit is net die aandrang van vriende wat hom daartoe bring om in 1926 om die

nuut ingestelde leerstoel in Romeins–Hollandse reg aan die Transvaalse universiteitskollege in Pretoria aansoek te doen. Sy aansoek is suksesvol, en met ingang 1927 aanvaar hy, as enigste voltydse regsdosent, die verantwoordelikheid vir die opleiding van regstudente aan dié inrigting. Hy word deur tien deeltydse dosente uit die geledere van die prokureurs en advokate van Pretoria bygestaan.

Die volgende tien jaar is deurslaggewend vir die vorming van professor Pont se beskouings omtrent die rigting wat die Suid-Afrikaanse regsonderrig en -praktyk behoort in te slaan. Dat die Afrikaner se belange in daardie tyd nog erg misken en vertrap is, is 'n bekende feit. Die medium van onderrig aan die Transvaalse universiteitskollege was Engels, en dít terwyl meer as 80% van die studente Afrikaanssprekend was. Selfs toe die universiteitskollege op 10 Oktober 1930 tot die universiteit van Pretoria verhef word, bly die voertaal oorwegend Engels. Eers deur 'n besluit van die raad van die universiteit in September 1932 word Afrikaans tot voertaal van die universiteit verklaar, 'n besluit wat met die nodige oorgangsmaatreëls aan die begin van die akademiese jaar in 1933 in werking tree. Intussen is die inhoud van die leerplanne en die metode van onderrig aangepas by die Romeins-Hollandse bronne en by die voorbeeld wat sedert 1920 deur die universiteit van Stellenbosch gestel is. Uit die geledere van die regspraktisyns en die amptenary word heelwat teenkanting teen hierdie verwikkelinge ervaar. Daar is selfs aanduidings dat amptenare van die departement van justisie afgeraai is om by die universiteit van Pretoria in te skryf.

Hierdie gebeure is egter net die uiterlike manifestasie van 'n veel dieperliggende teenstelling waarvan professor Pont hom in daardie stadium bewus word, hoewel hy dit miskien nie toe reeds ten volle kon verwoord nie.

Ten diepste gaan dit vir professor Pont (en nou stel ek dit in my eie woorde) om die onderskeid tussen monargisme en republikanisme; tussen feodalisme en 'n allodiale stelsel van grondbesit; tussen die bevoorregting van sommiges en die gelykberegting van almal; tussen 'n hiërargies gestruktureerde samelewing en 'n samelewing gekenmerk deur sosiale beweeglikheid en gelykheid van geleenthede. Volgens die Engelse stelsel is al die mag uiteindelik in die koning gesentreer. Hy staan aan die hoof van die kerk, van die gewapende magte, van die regspraak, van die uitvoerende mag en van die wetgewende mag. Al die grond behoort in finale instansie aan hom. Aangesien hy nie al die meegaande magte en bevoegdhede self kan of wil uitoefen nie, stel hy mense aan om dit namens en ten behoewe van hom te doen. Dié mense is trou aan hom verskuldig. By ampsaanvaarding lê hulle 'n eed van getrouheid teenoor hom af; hetsy as biskop, minister, regter, offisier of selfs as advokaat of prokureur.

Hierdie Engelse ingesteldheid het 'n verreikende invloed op die regsbedeling. Dit lei tot 'n baie geslote, op mekaar ingestelde, monopoliserende regbank en advokatuur. Die Suid-Afrikaanse regters van destyds beskou hulleself as 'n soort tak, 'n verlengstuk van die Engelse "judiciary." Hulle bevoegdhede, verantwoordelikhede en werkswyse word bepaal deur dít wat in Engeland bestaan. Die advokate dra aan die regter voor wat die reg is en die regter pas dan die "common law," soos hy dit sien, op die besondere feitestel toe. In dié proses word die Romeins-Hollandse reg dikwels sonder meer aan die Engelse reg gelykgestel. Die privaatreg wat in die sewentiende en agtiende eeu aan die Kaap gegeld het en in die negentiende eeu in die Zuid-Afrikaansche republiek en die republiek van die Oranje-Vrystaat, is nou die reg van die dominium van Suid-Afrika en dus van 'n onderdeel van die Britse ryk. Dit is maar 'n klein stap om dié

privaatreg met die Engelse privaatreg te vereenselwig. Volgens Engelse tradisie word die reg induktief met verwysing na 'n menigte vorige beslissings vasgestel, en aangesien die regspraak van voor 1806 nie geredelik toeganklik is nie en die regspraak daarna nog betreklik beperk is, word daar eenvoudig op Engelse beslissings teruggeval. Dikwels word so 'n ondersoek afgesluit met die gevolgtrekking "on this point the Roman Dutch Law appears to be the same as English law" sonder dat Romeins-Hollandse regsbronne enigsins grondig ondersoek is. Met hierdie stand van sake het die universiteite eintlik nie iets te sê oor wat die reg van die land is nie en nog minder oor wat dit behoort te wees. Die "judiciary" en die advokatuur stel saam vas wat die reg is. Die literatuur kan daarvan kennis neem, maar kan niks daartoe bydra nie.

Hierteenoor staan die standpunt van die regsfakulteite van die universiteit van Stellenbosch en van die toe pas outonoom geworde universiteit van Pretoria: die hedendaagse Romeins-Hollandse reg is die Hollandse reg van die sestiende, sewentiende en agtiende eeu soos in die twintigste eeu in Suid-Afrika gekontinueer in ooreenstemming met die eise wat gestel word deur die samelewing van Suid-Afrika as selfstandige staat. Die koning as staatshoof het geen rol in die privaatreg te speel nie.

Mosey Bliss[3] was een van die eerste groep studente met wie professor Pont by die destydse Transvaalse universiteitskollege te doen gekry het. Na voltooiing van die LLB meld Bliss hom by professor Pont aan; hy wil verder gaan studeer. Deur bemiddeling van professor Pont kom Bliss by professor Meijers van die fakulteit regsgeleerdheid aan die universiteit van Leiden tereg. Dié gebeure was die regstreekse aanleiding daartoe dat professor Pont in Januarie 1933 tydens 'n kort besoek aan Nederland vir professor Meijers by die Leidse universiteit opsoek. In die loop van hul gesprek word die moontlikheid genoem van 'n tydskrif gerig op die beoefening en bevordering van die hedendaagse Romeins-Hollandse reg. In Suid-Afrika het die kragte egter ontbreek om so 'n tydskrif op die been te kry en aan die gang te hou. Daarom was dit vir professor Pont 'n besonder aangename verrassing toe daar in die loop van 1933 'n konkrete voorstel vir die stigting van so 'n tydskrif uit Nederland kom. Die voorstel is vervat in 'n brief wat doktor Idenburg namens die kuratore van die universiteit van Leiden geskryf het. Die inhoud van die beoogde tydskrif sou ongeveer om die helfte in Afrikaans en Nederlands wees en die redaksie sou uit Nederlandse en Suid-Afrikaanse juriste bestaan. Indien die inkomste verkry uit intekengeld nie voldoende sou wees om die koste van die tydskrif te dek nie, sou die tekort uit Nederland aangevul word.

Na heelwat teenslae en vertraging het die eerste nommer van die *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg* toe in Februarie 1937, vanjaar vyftig jaar gelede, die lig gesien. Die gebeure rondom die eerste bestaansjare van die *Tydskrif* is, soos gesê, reeds volledig deur professor Pont beskryf (1963 *THRHR* 1–18). Die jare van die Tweede Wêreldoorlog was veral 'n groot beproewing. Afgesny van die bron van ongeveer die helfte van sy inhoud en van die geheel van sy dekking vir finansiële tekorte, het die *Tydskrif* by tye gedreig om tot niet

3 M Bliss het in 1933 met die proefskrif *Belediging in die Suid-Afrikaanse Reg* gepromoveer. Hy het tot met sy dood ongeveer drie jaar gelede as advokaat aan die Pretoriase balie gepraktiseer en was ook vir baie jare as deeltydse dosent aan die universiteit van Pretoria verbonde.

te gaan. Teen die einde van die oorlog het die publikasie van die *Tydskrif* so ver agter geraak dat die grootste deel van die tiende jaargang eers in 1947 in plaas van 1946 verskyn het. Daar is toe besluit om die elfde jaargang, wat streng genome met 1947 moes saamgeval het, met 1948 te laat begin. Dit verklaar waarom die *Tydskrif* na voltooiing aan die einde van 1986 van vyftig bestaansjare, vanjaar eers sy vyftigste jaargang beleef.

Dat die *Tydskrif* in sy aanvanklike oogmerke en doelstellings geslaag het, ly geen twyfel nie. Hierdie oogmerke en doelstellings staan nêrens volledig uitgewerk in 'n notule of amptelike stuk van die *Tydskrif* opgeteken nie. En tog word dit vir 'n mens duidelik by die deurblaai van die eerste klompie jaargange, dat die redaksie en medewerkers van die *Tydskrif* 'n baie definitiewe, indien onuitgesproke, visie gehad het omtrent die doel en funksie van hul tydskrif. En die lys van name van die eerste aantal jare se bydraers tot die *Tydskrif* kon nouliks meer indrukwekkend gewees het. Dit bevat name soos JC de Wet, AA Roberts, LC Steyn, H VerLoren van Themaat, JP Yeats, HL Swanepoel, LI Coertze, HA Fagan, FP (Toon) van den Heever (wat onder die skuilnaam Aquilius skryf), F Rumpff, EM Hamman, B Beinart, DP de Villiers, AM Conradie, WM van der Westhuizen, P van Warmelo, JP VerLoren van Themaat, VG Hiemstra en CP Joubert, en dan laat ek sekerlik name uit wat genoem behoort te geword het.

Maar hoeveel van die visie en strewes van destyds word deur die huidige geslag gedeel? Hoeveel daarvan is aan die huidige geslag bekend? Hoeveel daarvan is hoegenaamd vir ons huidige situasie relevant?

Graag haal ek aan uit 'n brief wat professor Pont op 28 Augustus 1985 aan my geskryf het:

> "Namate ons besprekings gevorder het en jou vrae ou herinnerings by my wakker geroep het, het ek al hoe meer besef hoe belangrik dit is dat die informasie en die bespieëling daaroor op skrif gestel moet word met die oog op die vorming van 'n goeie begrip van dit waaroor dit alles in die verlede gegaan het. Ook waaroor dit vandag en in die toekoms wat voorlê nog gaan, in geval die redaksie en die medewerkers sou beoog om aan die ou roeping wat ons in die dertiger jare (en daarvóór reeds) nog ongeartikuleerd aangevoel het en probeer uitleef het, getrou te bly en dit verder uit te bou vir sover dit vandag nog van wesenlike betekenis is vir die toekoms. Die vraag is dus in wese of die verslag tot die jong manne wat die leiding moet neem en voer, sal spreek as geskiedenis alleen of ook as inspirasie om te bou aan die toekoms. As dit só is dat die vraag werklik gestel behoort te word om deur die huidige generasie en dié wat volg beantwoord te word, dan het iets gebeur wat aan die geslag van vandag nie onthou mág word nie. En dan is ek baie dankbaar dat [ek die geleentheid gehad het] om op hierdie tydstip in die lewe nog daaraan mee te werk."

Dit is ironies dat die grootste uitdaging vir die voortbestaan van die *Tydskrif* vandag juis met sy sukses verband hou. In die afgelope dekade is 'n hele aantal nuwe regstydskrifte en jaarblaaie, geskoei op die *Tydskrif* se lees, in die lewe geroep. Hier dink ek veral aan die *Tydskrif vir die Suid-Afrikaanse Reg*, *De Jure*, *Die Tydskrif vir die Regswetenskap* en *Obiter*, om tydskrifte van 'n meer gespesialiseerde aard soos die *Suid-Afrikaanse Tydskrif vir Strafreg en Kriminologie* nie eens te noem nie. Die *Tydskrif* gun al hierdie nuwelinge hul bestaansreg. Die vraag moet egter deurlopend gestel word of die Suid-Afrikaanse juriste oor die werkkrag beskik om al hierdie tydskrifte met bydraes *van gehalte* te vul. Anders as in die beginjare van die *Tydskrif* is daar geen tekort aan kopie nie. Maar het daar nie 'n algemene vervlakking in die standaard van tydskrifbydraes in Suid-Afrika ingetree nie? En verder: waar lê die eerste lojaliteit van die lede

van 'n regsfakulteit wat hul eie regstydskrif uitgee? Steeds by die *Tydskrif*? of by hul eie?

Meer nog: moet die *Tydskrif* maar net nog 'n regstydskrif tussen vele soortgelykes wees of behoort hy as oudste Afrikaanse regstydskrif 'n besondere funksie te vervul? Die stryd van die verlede is grootliks volstry. Behoort daar nou na 'n nuwe samebindende visie gesoek te word?

Oor hierdie en dergelike vrae behoort opnuut deur die *Tydskrif* en sy redaksie nagedink te word; miskien juis wanneer ek DV die einde van die jaar as redakteur uittree. My agt en 'n half jaar as redakteur het ten spyte van die gewone probleme en frustrasies vir my groot plesier verskaf en ek is oortuig dat dit die moeite werd is om by die versorging en uitbou van die *Tydskrif* betrokke te wees. Ek wens by voorbaat die nuwe redakteur alles van die beste toe.

DAAN VAN RENSBURG

Die beskerming van die belegger in langtermynversekering

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SUMMARY

The Protection of the Investor in Long-term Insurance

Long-term insurance is nowadays increasingly seen as a medium of saving and investment. The Insurance Act of 1943 contains several provisions designed to ensure that insurers will honour their future obligations, but some of these provisions fail to protect the policy holder properly. Areas where the state does exercise control but where problems are still experienced, concern financial solvency and the conducting of insurance business, especially the marketing of policies. Legislative reform and better education of the public are therefore recommended.

1 INLEIDING

Benewens sy funksie as voorsorgmaatreël vir die polishouer en sy afhanklikes in geval van afsterwe, ongeluk of ongeskiktheid, verskaf langtermynversekering[1] ook 'n medium van besparing en belegging op 'n stelselmatige grondslag. Uit 'n beleggingsoogpunt is veral die volgende produkte in die versekeringsbedryf van belang:

a *Winsdelende lewenspolisse* By hierdie polisse bestaan die betaalbare voordele uit 'n gewaarborgde versekerde bedrag plus bonusse wat in toekomstige jare bygevoeg word. Die bonusse is die gedeeltes (op die oog af oorgelaat aan die vae diskresie van die versekeraar) van die opgeloopte winste uit beleggings in aandele of eiendom wat tot voordeel van die polishouers verdeel word.

b *Gekoppelde lewenspolisse* Hier word die voordele van die polishouer bepaal met verwysing na die waarde van, of inkomste uit gespesifiseerde bates of groepe bates wat deur die versekeraar gehou word. Sodoende word die polishouer die geleentheid gebied om op meer regstreekse wyse in 'n versekeraar se beleggingsgroei te deel. 'n Versekeraar kan hom egter die reg voorbehou om na eie goeddunke die samestelling van sy bateportefeulje te wissel volgens die waarde daarvan of inkomste daaruit verkry.[2]

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1 Daarteenoor staan korttermynversekering wat beskerming bied teen verliese en nie as 'n medium van belegging beskou kan word nie.

2 Sien die *Verslag van die Kommissie van Ondersoek na die Langtermynversekeringsbedryf* RP 97/1976 42.

Beheer en kontrole is nodig om te verseker dat langtermynversekeraars op 'n gesonde grondslag voorsiening maak vir hul toekomstige kontraktuele verpligtinge gedurende die lang tydperke voordat hierdie verpligtinge nagekom moet word. In die lig van die spesiale kenmerke en ingewikkeldheid van lewensversekering en om gesonde mededinging te bevorder, is toesig oor die versekeringsbedryf, veral wat die bemarkingsaspek betref, ook noodsaaklik.

2 WYSES WAAROP BEHEER EN TOESIG UITGEOEFEN WORD

Beheer en toesig oor die versekeringsbedryf word uitgeoefen deur drie instansies, naamlik die howe, die wetgewer en administratiewe owerheidsorgane.

2 1 Die Howe

Die howe moet in die eerste plek geskille tussen die versekeraar en polishouer oplos. Deur interpretasie van 'n versekeringskontrak word die verpligtinge en die regte van die versekeraar bepaal. Verder beskerm die howe die polishouer deur die afdwing van strafsanksies teen diegene wat bepalings van die Versekeringswet oortree.[3] Die rol van die howe in die reguleringsproses is egter relatief klein teenoor dié van die registrateur van versekeringswese (hierna die registrateur genoem).

2 2 Administratiewe Owerheidsorgane

Aan die registrateur is die meeste bevoegdhede en pligte opgedra om toesig te hou oor die versekeringsbedryf, veral wat die registrasie, finansiële soliditeit en praktyke van versekeraars betref.[4] In baie gevalle word die toestemming van die minister van finansies (hierna die minister genoem) vereis alvorens die registrateur kan optree.[5] Die minister is ook verantwoordelik vir die uitvaardiging van regulasies om die oogmerke van die Versekeringswet te bereik.[6]

2 3 Die Wetgewer

Deur uitvaardiging van die Versekeringswet verskaf die wetgewer die raamwerk waarbinne die ander twee instansies moet opereer in die toepassing en afdwinging van die betrokke wet.

3 AREAS VAN STAATSBEHEER EN KONTROLE

Gesien teen die agtergrond dat die publiek so baie geld in die versekeringsbedryf belê en die rol wat die versekeraar in die ekonomie as mobiliseerder van spaargeld speel, is dit te verstane dat staatsbeheer en kontrole oor die versekeringsbedryf omvattend is.

Die verskillende areas van staatsbeheer en kontrole kan onder die volgende hoofde ontleed word:

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3 aa 73 73*ter* 74 en 75 Wet 27 van 1943.
4 Meer besonderhede oor die registrateur se rol in die verband word in par 3 *infra* weergegee.
5 bv aa 23B en 29*bis* Wet 27 van 1943.
6 a 76.

3 1 Registrasie

Slegs instansies wat as 'n versekeraar geregistreer is, mag versekeringsbesigheid bedryf.[7] Registrasie is onderworpe aan die voldoening aan finansiële en ander standaarde soos toegepas deur die registrateur.[8] In sekere omstandighede kan die registrateur die versekeraar se registrasie intrek.[9]

3 2 Finansiële Soliditeit

Vir likwiditeitsdoeleindes moet die versekeraar 'n sekere som geld of goedgekeurde effekte by die tesourie deponeer.[10] Ten einde die belange van polishouers te beskerm, moet die binnelandse versekeraar oor die algemeen oor bates beskik met 'n gesamentlike waarde ten minste gelyk aan die bedrag van sy netto verbintenisse.[11] Ten opsigte van besigheid in die republiek bedryf, moet tot 53% van die verbintenisse betreffende besigheid met pensioen- en uittredingsannuïteitsfondse en 33% van die restant van die langtermynverbintenisse[12] in voorgeskrewe bates[13] belê word.[14]

Om uitvoering van die finansiële voorskrifte te verseker, is daar talle bekendmakingsvoorskrifte wat die versekeraar teenoor die registrateur moet nakom.[15] Die vervalsing van state is 'n misdryf[16] en die registrateur kan 'n versekeraar ook beboet wat versuim om sy opgawes betyds in te dien.[17] Benewens strafrente wat die registrateur by nie-nakoming van die finansiële voorskrifte kan oplê,[18] kan hy met die toestemming van die minister in geval van sodanige versuim die uitreiking van polisse verbied.[19]

Vanweë die hoë inflasiekoers en lae rentekoers op voorgeskrewe beleggings, belê versekeraars, vir sover toelaatbaar, al hoe meer in nie-voorgeskrewe beleggings soos gewone aandele en eiendomme. Die verwagting is dat die toenemende inkomste hulle in staat sal stel om groter monetêre voordele aan polishouers te laat toekom ten einde die uitwerking van inflasie op spaargeld in 'n mate te neutraliseer. Ook hier word die belegger beskerm deurdat die Wet op Finansiële Instellings (Belegging van Fondse)[20] bepaal dat 'n direkteur of ander persoon in diens van die versekeraar by die maak van 'n belegging die hoogste trou aan die dag moet lê, behoorlike sorg en vlyt moet beoefen en geen voordeel vir homself ten koste van die versekeraar mag verkry nie.[21]

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7 a 5. Verontagsaming van die verbod stel 'n misdryf daar (a 73).
8 Oor die presiese inhoud van hierdie standaarde, sien a 4.
9 a 4*ter*.
10 aa 4(3)*bis* (c) (t o v nuwe versekeraars) en 6(2) (t o v bestaande versekeraars). Na 20 jaar kan die versekeraar versoek dat die tesouriedeposito terugbetaal word (a 6(6)).
11 a 17(1). Die voorgeskrewe batevereistes vir buitelandse versekeraars word gereël in a 18.
12 a 17(2).
13 Bylae 3. Ingevolge a 17(1) word die tesouriedeposito uitdruklik uitgesluit.
14 a 17(1)(b).
15 Vgl aa 11 12 14 15 en 16. Opgawes van bates en verbintenisse wat aan registrateur verskaf moet word, moet deur 'n ouditeur en waardeerder gewaarmerk word (aa 9 10).
16 a 74.
17 a 73*bis*.
18 a 73*ter*.
19 a 29*bis*.
20 Wet 39 van 1984.
21 a 2.

3 3 Dryf van Versekeringsbesigheid

3 3 1 Tipe Besigheid wat Gedryf Word

Die Versekeringswet verbied nie 'n versekeraar om ander sake as versekeringsbesigheid te doen nie, maar 'n versekeraar wat sodanige ander sake doen, moet die bates en inkomste van sy versekeringsbesigheid apart hou van dié van sy ander besigheid.[22] Die registrateur kan met die toestemming van die minister egter 'n bepaalde praktyk of metode van besigheid doen tot 'n "onreëlmatige of ongewenste praktyk" of "ongewenste metode van besigheid doen" verklaar.[23]

Ten einde vas te stel watter soort besigheid 'n versekeraar bedryf, kan die registrateur inligting van die versekeraar of ander persone aanvra[24] of van sy inspeksiebevoegdhede[25] gebruik maak om sodanige inligting te bekom.

3 3 2 Oornames, Samesmelting en Veranderings in Beheer oor Versekeraars

Aangesien polishouers moontlik benadeel kan word, is streng toesig nodig indien daar 'n verandering in die beheer van 'n langtermynversekeraar intree. Die plan van oordrag of samesmelting van versekeraars moet derhalwe vooraf aan die polishouers bekend gemaak word en daarna deur die hof of die registrateur bekragtig word om regskrag te verkry.[26]

3 3 3 Die Poliskontrak

Waar 'n polishouer in die verlede niksvermoedend die waarheid van stellings deur hom in die aansoekvorm om 'n polis gewaarborg het, het dit dikwels gebeur dat 'n versekeraar later aanspreeklikheid op grond van geringe onakkuraathede ontken het. Ten einde die polishouer hierteen te beskerm, bepaal die Versekeringswet tans dat 'n versekeraar aanspreeklikheid ingevolge 'n poliskontrak kan ontken slegs indien 'n voorstelling waarskynlik die berekening van die risiko onder bedoelde polis wesenlik sou beïnvloed het.[27] As 'n versekeraar by lewenspolisse enige onderskeid wil maak wat polisvoorwaardes en ander bepalings betref, moet dit op aktuariële grondslag geregverdig wees.[28]

3 3 4 Bemarking van Polisse

3 3 4 1 Gebruikmaking van Tussengangers

Aangesien lewensversekering nie 'n produk is wat tasbaar en vir onmiddellike gebruik of verbruik beskikbaar is nie, gaan die publiek nie uit om lewensversekering te koop soos hulle baie ander produkte koop nie. Om hul produkte te verkoop, gebruik versekeraars 'n verskeidenheid tussengangers soos versekeringsagente, deeltydse agente, versekeringsmakelaars en finansiële instellings wat lewensversekering as sekuriteit vir kredietverskaffing vereis.[29]

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22 a 19 Wet 27 van 1943.
23 a 23B.
24 a 28 28*bis*. Iemand wat versuim om inligting te verstrek, kan deur die registrateur beboet word (a 73*bis*).
25 a 29.
26 aa 25 (t o v binnelandse versekeraars) en 26 (t o v buitelandse versekeraars).
27 a 63(3). Sien ook *Fransba Vervoer v Incorporated General Insurances* 1976 4 SA 970 (W) 974.
28 a 51(1).
29 Sodanige instellings reël meesal self die versekering op die lewens van hul kliënte waarvoor hulle dan kommissie ontvang van die versekeraar by wie besigheid geplaas word (RP 97/1976 63).

Wat die beheer van tussengangers betref, word van hulle vereis om ontvangde premies binne 'n sekere tydperk aan die versekeraar te stuur of eers in 'n aparte trustrekening te stort of om sekerheid te verskaf.[30] 'n Gewaarmerkte staat van premies deur 'n tussenganger verskuldig, moet ook jaarliks aan die registrateur verskaf word.[31]

Enige aanmoediging deur 'n tussenganger (ook versekeraar) aan 'n persoon om by 'n maatskappy te verseker deur die aanbied of gee van enige teenprestasie is verbode.[32] 'n Finansiële instelling kan lewensversekering as sekuriteit vir die verlening van kredietfasiliteite vereis slegs waar dit redelikerwys noodsaaklik is, en die premies vereis vir 'n polis moet ook redelik wees in verhouding tot premies wat in die algemeen ten opsigte van so 'n polis gehef word.[33]

In die verlede is makelaars beïnvloed deur die moontlikheid van produksiebonusse om by 'n kliënt die polis van 'n versekeraar met wie vantevore besigheid gedoen is, aan te beveel ongeag die geskiktheid van die versekeraar se polis vir die kliënt.[34] Dit kan nie tot voordeel van die publiek wees om versekeraars toe te laat om op 'n onbehoorlike wyse mee te ding in die verkoop van hul polisse deur die eskalering van kommissiegelde aan makelaars nie. Behalwe dat dit tot minder onafhanklikheid van makelaars lei, kan dit op die ou end meebring dat die publiek meer moet betaal vir polisse of met verminderde voordele tevrede moet wees. Die minister het daarom by wyse van regulasie die maksimum kommissiegelde wat aan 'n onafhanklike tussenganger betaal mag word, voorgeskryf.[35]

3 3 4 2 Kontrole oor Versekeraars

Benewens die verbod om op sekere wyses 'n persoon aan te moedig om 'n polis te koop, is die versekeraar ook verplig om uitstel te verleen waar 'n versekerde nie sy premie op die vervaldag betaal nie.[36] Die premietariewe wat 'n versekeraar vra en die voordele wat hy onderneem, moet ooreenstem met die premietabel en voordelestaat wat aan die registrateur verskaf word.[37] Indien dit in die lig van 'n versekeraar se finansiële stand of algemene ekonomiese omstandighede sou blyk dat so 'n versekeraar onredelike of onrealistiese voordeelverwagtings skep, kan hy op informele wyse deur die registrateur versoek word om sy verkoopprojeksies te wysig. By misleidende advertensies in dié verband kan 'n beroep op die departement van handel en nywerheid gedoen word vir verdere optredes.[38] Indien die registrateur van mening sou wees dat in die lig van die

30 a 20*bis*. Ingevolge a 20*bis*(5) vorm 'n bedrag in die trustrekening gestort ook nie deel van die bates van die tussenganger nie.
31 R10 GKR 1285 van 1985-08-27 soos gewysig deur GKR 252 van 1986-02-23.
32 a 51(2).
33 a 23C.
34 *Financial Mail* (1984-08-10) 43.
35 R28 en 29 van GKR 1285 van 1965-08-27 soos gewysig deur GKR 333 van 1977-03-01 en R2 van GKR 353 van 1981-02-20.
36 a 62. Dit bring tydelike verligting mee in die gevalle waar 'n versekerde 'n polis onder druk van 'n finansiële instelling gekoop het of deur 'n versekeringsagent omgepraat is om in 'n polis te belê wat hy nie nodig het of kan bekostig nie.
37 a 34.
38 Benewens 'n algemene verbod op misleidende advertensies ingevolge a 9 van die Wet op Handelspraktyke 76 van 1976, kan die minister van handel en nywerheid ingevolge aa 14 en 17 'n advertensie verbied of die besonderhede daarvan voorskryf.

voordeelverwagtings wat geskep word, die versekeraar nie sy toekomstige verpligtinge sal kan nakom nie, kan hy die maatskappy versoek om sy tesouriedeposito terug te betaal[39] of by die hof aansoek doen om die geregtelike bestuur of likwidasie van die maatskappy.[40] Indien'n bepaalde kategorie of kategorieë van versekeraars onredelik optimistiese voordeelverwagtings skep, kan die registrateur sodanige metode van besigheid doen ongewens verklaar.[41]

3 4 Likwidasie of Geregtelike Bestuur

Waar 'n versekeraar in finansiële moeilikheid verkeer, word die polishouer beskerm deur hoofstuk II van die Versekeringswet wat die kwessie van likwidasie of geregtelike bestuur uitdruklik reël. Die versekeraar of die registrateur kan indien hulle van mening is dat dit "om watter rede ook al wenslik is"[42] by die hof aansoek doen om die geregtelike bestuur of likwidasie van so 'n maatskappy. Hierdie wye diskresie[43] maak dit vir die registrateur moontlik om aansoek te doen om likwidasie waar 'n maatskappy se voortbestaan nie in belang van die polishouers of algemene publiek sou wees nie.[44] In besonder is dit die registrateur se plig om te waak teen insolvente versekeraars wat voortgaan om polisse uit te reik.[45]

Enige polishouer aan wie se eise nie voldoen is nie, kan by die hof aansoek doen om die aanstelling van 'n inspekteur vir 'n ondersoek van die versekeraar se sake, of die geregtelike bestuur of likwidasie van die maatskappy. Die hof moet by die oorweging van so 'n aansoek "in die eerste plek handel in belang van die eienaars van binnelandse polisse."[46]

4 TEKORTKOMINGE IN STAATSBEHEER

Talle bepalings in die Versekeringswet verskaf die een of ander vorm van beheer of toesig oor die versekeringsbedryf, maar skiet in sekere opsigte tekort in die behoorlike beskerming van die polishouer. Die hooftekortkominge van staatsbeheer in Suid-Afrika is ten opsigte van finansiële soliditeit en die dryf van versekeringsbesigheid.

4 1 Finansiële Soliditeit

Hoofsaaklik vanweë die veiligheidsmaatreëls in die Versekeringswet blyk die finansiële struktuur van die lewensversekeringsbedryf in Suid-Afrika gesond te wees en is dit reeds vir talle jare vry van enige skandaal of insolvensie.

Die verpligting wat die staat op 'n versekeraar plaas om byna die helfte[47] van sy beleggings in voorgeskrewe eersterangse effekte te belê, plaas egter 'n groot

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39 a 6(7).
40 a 30(1).
41 a 23B.
42 a 30(1).
43 wyer as in die geval van ander maatskappye (*Registrar of Insurance v Johannesburg Insurance Co Ltd* (*2*) 1962 4 SA 548 (W) 550).
44 *ibid.*
45 *Financial Mail v Registrar of Insurance* 1966 2 SA 219 (W) 221.
46 a 30(2). In teenstelling met 'n aansoek deur die registrateur of versekeraar, is die wenslikheid van so 'n aansoek nie 'n faktor nie.
47 Volgens die vereniging van lewensversekeraars beloop beleggings in die owerheidsektor ongeveer 41% ('n verteenwoordiging van R11 833 m) van al die versekeringsbedryf se beleggings (*Financial Mail* (1985–05–10) 5).

belemmering op 'n maatskappy se vermoë om maksimaal doeltreffend te funksioneer.[48] Indien versekeraars nie verplig sou wees om in voorgeskrewe beleggings te belê nie, kon hul rendement veel hoër gewees het aangesien daar dan om fondse deur die verskillende beleggingsinstansies meegeding sou moes word.[49] Aangesien rentekoerse op voorgeskrewe beleggings laer is as die vryemarkkoerse beteken dit geringer voordele vir die belegger. Voorgeskrewe beleggings plaas ook 'n belemmering op die mobilisering van geld na areas waar dit die meeste nodig is,[50] soos die minder digbewoonde gedeeltes van die land of die ontwikkelingskorporasie vir die klein sakeman.[51]

Voorgeskrewe beleggings verhoog nie werklik die beskerming van die polishouer nie. 'n Hoë inflasiekoers verlaag die effektiewe rendement op voorgeskrewe bates in so 'n mate dat dit as van geringe waarde beskou kan word by die uitbetaling van eise op polisse wat hoofsaaklik daarop gemik is om die negatiewe uitwerking van inflasie te neutraliseer. Daarbenewens kan verbintenisse ten opsigte van lopende lewenspolisse waaraan 'n versekeraar se bates ingevolge artikel 17(1) gelykstaande moet wees, op 'n minimum grondslag bereken word[52] en hoef dit dus nie 'n ware weerspieëling van 'n versekeraar se verbintenisse te wees nie. Meesal ondervind gevestigde langtermynversekeraars 'n oorskot van inkomste bo uitgawe sodat likiditeit normaalweg nie 'n kritieke element in hul besigheid is nie.[53] Voorgeskrewe bates is ook nie noodwendig makliker bemarkbaar as ander bates, soos genoteerde aandele, nie.

In die geval van nuwe versekeraars hang die kapitaalvereistes af van faktore soos –

a die klas besigheid;

b die tipes polisse;

c voorgestelde kommisiekoerse;

d herversekeringsreëlings;

e onderskrywingsbeleid; en

f die verwagte volume besigheid.

In die lig van die wye reeks faktore wat die kapitaalvereistes bepaal, sal dit van geen nut wees om 'n standaard minimumbedrag vir nuwe aansoekers om registrasie voor te skryf nie.[54]

Uit die voorafgaande wil dit voorkom asof die aanvanklike redes vir die belegging in voorgeskrewe bates, naamlik die beskerming van polishouers en

48 Vgl Tommey "No Shortage of Investment Opportunities in SA, Steyn says" *The Argus* (1985–05–01) 17.

49 Franzsen (voors) *Die Kommissie van Ondersoek na Fiskale en Monetêre Beleid in Suid-Afrika* Derde Verslag RP 87/1970 168–170; Johnson en Hofflander "The Impact of Investment Regulation in the Life Insurance Industry" 1965 *The Insurance Law Journal* 389 392.

50 *The Argus* (1985–05–01) 17; RP 97/1976 38.

51 Ingevolge par 6 van die derde bylae kan moontlik in so 'n instelling belê word, maar dan sal die toestemming van registrateur eers vooraf verkry moet word.

52 par 4 van die tweede bylae.

53 RP 97/1976 35.

54 124–125.

likiditeit, op die agtergrond geskuif het en dat die voorgeskrewe beleggingsvereiste al hoe meer beskou kan word as 'n verpligte vorm van geldelike hulpverlening aan die staat.[55]

4 2 Toesig oor Dryf van Besigheid

4 2 1 Tipe Besigheid wat Bedryf Word

Soos hierbo aangetoon, is die registrateur se bevoegdheid om 'n bepaalde praktyk of metode van besigheid doen ongewens te verklaar, 'n langsame proses en daarom tree hy dan meestal informeel op.[56] 'n Traagheid word ook ondervind om inspeksies te gelas.[57] 'n Sisteem van voorafgoedkeuring sal ook meer in die belang van polishouers wees as 'n sisteem van latere afkeuring.[58]

4 2 2 Die Poliskontrak

Ten einde tred te hou met die hoë inflasiekoers en omvattende belastingsisteem het versekeraars al hoe meer ingewikkelde en verfynde vorme van polisse ontwikkel.[59] Die ingewikkelde bewoording van die meeste poliskontrakte en talle uitsonderings en voorbehoudsbepalings daarin vervat, maak dit onverstaanbaar vir die gemiddelde koper van 'n polis.[60] Dikwels sal 'n polishouer met 'n spesifieke versekeraar kontrakteer, nie oor die omvang van die lewensdekking of waarde wat hy vir sy geld kry nie, maar eerder op grond van die versekeraar se reputasie en die sukses van sy reklameveldtogte.[61]

Die versekeraar as sterker party dikteer die kontraksbedinge en dikwels word gewetenlose en onbillike bedinge op die polishouer afgedwing. Die kontraksbedinge is gewoonlik nie onderhandelbaar nie en meesal is dit 'n geval van "take it or leave it."[62] Die verpligting opgelê deur 'n finansiële instelling om 'n polis as sekuriteit vir 'n skuldtransaksie uit te neem of omstandighede (soos afhanklikes) wat lewensdekking noodsaak, plaas die polishouer in 'n posisie waar hy moeilik 'n polis van die hand kan wys.

Benewens 'n beperking op 'n versekeraar se vrywaring van aanspreeklikheid op grond van 'n onware voorstelling deur die polishouer en die vereiste dat

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55 Vgl Friedland "Life Assurance, Retirement and Pension Benefits" 1978 *BML* 56.

56 bv omsendbriewe RV 72 van 1982–08–12 (praktyk deur lewensversekeraars dat lede van pensioen- en uittredingsannuïteitsfondse lenings kan terugbetaal uit voordele betaalbaar met aftrede of afsterwe, as ongewens beskou) en RV 75 van 1982–04–19 (onreëlmatige praktyk betreffende die koop en verkoop van effekte deur versekeraars en die openbaarmaking van boekwinste en verliese).

57 Dit kan toegeskryf word aan faktore soos – (a) mannetekort; (b) geldtekort; (c) vrees dat 'n ondersoek 'n onderneming in 'n swak lig sal stel; en (d) die feit dat daar slegs op 'n substansiële klagte gehandel word. (Vgl Rider and Hew "The Regulation of Corporation and Securities Laws in Britain – The Beginning of the Real Debate" 1977 *Malaya Law Review* 144 145–150; Rider and Hew "The Structure of Regulation and Supervision in the Field of Corporation and Securities Law in Britain" 1977 *Revue de la Banque* 83 84–87; Hadden "Fraud in the City: Enforcing the Rules" 1980 *Company Lawyer* 9 12.)

58 bv a 34(3) (voorondersoek van premietariewe en voordele).

59 Vgl Friedland 56.

60 veral vir die Swarte (*Die Ekonoom* (1985–02–28) 24.) Sien ook Atkins "Plain Language Policies" 1984 *BML* 68.

61 Sien Takirumbudde "State Regulation and Control of the Insurance Business. The Case of Swaziland" 1981 *Zimbabwe Law Journal* 100 101.

62 Vgl ook Van Niekerk "The Reform of South African Insurance Law: A Preliminary Inquiry" 1983 *MB* 88 90–91; Kahn "Standard Form Contracts" 1971 *BML* 49.

onderskeidings tussen polisse op 'n aktuariële grondslag geregverdig moet wees,[63] bevat die Versekeringswet geen definitiewe voorskrifte betreffende die inhoud van 'n poliskontrak nie. Die beginsel dat die reg hom nie sommer bemoei of inmeng met onbillike of onredelike kontraksbedinge nadat 'n kontrak gesluit is nie,[64] kan moeilik geregverdig word in gevalle soos hierdie waar daar van kontrakteervryheid in die ware sin van die woord eintlik nie sprake is nie. In teenstelling met baie ander terreine van die kontraktereg[65] het die behoefte aan verbruikersbeskerming teen onbillike kontraksbedinge nog nie tot 'n genoegsame graad in die versekeringswêreld erkenning begin kry nie.

By die aansoek om 'n polis word dit nie vereis dat 'n afskrif van die polis self ter insae van die aansoeker gestel word nie. Eers na aanvaarding van sy aansoek word 'n poliskontrak aan die versekerde versend. Die polishouer weet met ander woorde eers na kontraksluiting vir seker wat sy regte en verpligtinge jeens die versekeraar is. Dit bemoeilik sake vir die polishouer indien 'n poliskontrak nie sou ooreenstem met voorstellings deur 'n tussenganger gemaak nie. Indien 'n tussenganger geen volmag gehad het om so 'n voorstelling namens die versekeraar te maak nie, kom geen kontrak tussen die versekeraar en polishouer tot stand nie en kan die polishouer reeds betaalde premies van die versekeraar op grond van verryking verhaal.[66] Anders kan die tussenganger deur die polishouer deliktueel aanspreeklik gehou word vir skade gely op grond van bedrieglike of nalatige wanvoorstelling.[67] Dit alles kon voorkom gewees het deur vooraf 'n afskrif van die uiteindelike poliskontrak aan die voornemende polishouer beskikbaar te gestel het.

Die versekeraar word tans ook nie verplig om die versekerde van 'n afskrif van die aansoekvorm, wat die basis van die poliskontrak vorm, te voorsien nie. Op daardie aansoekvorm moet die voornemende polishouer egter talle vrae beantwoord. Indien enige van die vrae verkeerd beantwoord word, is dit vir die versekeraar moontlik om, behoudens artikel 63(3), aanspreeklikheid ingevolge die kontrak te ontken. Dit is belangrik dat die polishouer van 'n afskrif van die aansoekvorm voorsien word om hom in staat te stel om die korrektheid van die gegewens daarin na te gaan en, ingeval die versekeraar dit vereis, hom van veranderde of nuwe gegewens te voorsien.[68]

4 2 3 Bemarking van Polisse

4 2 3 1 Gebruikmaking van Tussengangers

Tans word geen maatstaf gestel om te onderskei tussen 'n tussenganger wat 'n kliënt verteenwoordig en een wat 'n versekeraar verteenwoordig nie. Dit is vir die versekeraar maklik om aanspreeklikheid te ontken vir foute gemaak deur

63 Sien par 3 3 3 *supra.*

64 Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 43–45.

65 Ingevolge a 3 van die Wet op Strafbedinge 15 van 1962 kan die hof 'n strafbedrag op grond van billikheid verminder. Die howe het ingevolge a 24(1) van die Wet op Vervreemding van Grond 68 van 1981 ook magtiging om finansieringskostekoerse te verminder of om 'n bevel vir regstelling van 'n kontrak toe te staan.

66 Sien De Wet en Yeats *Kontraktereg en Handelsreg* (1978) 103–105.

67 *Wille's Principles of South African Law* (1977) 517.

68 In *Whyte's Estate v Insurance* 1945 TPD 382 406–407 het die hof al op hierdie onbevredigende situasie gewys en gevra vir wetgewende optrede. Tot op hede (meer as 40 jaar later) is nog niks daaromtrent gedoen nie.

sy versekeringsverteenwoordiger wat buite sy volmag sou handel[69] deur hom as "agent" van die versekerde voor te hou en aansoekvorms foutief namens die versekerde in te vul.[70] Alhoewel 'n makelaar veronderstel is om as agent van die versekerde op te tree en daar op hom 'n plig rus om homself nie in 'n posisie te plaas wat 'n botsing van sy belange met dié van die versekerde sou meebring nie,[71] verhoed niks hom om die toestemming van sy prinsipaal tot die teendeel te verkry nie.

Vanweë die feit dat registrasie nie vereis word nie kan enigiemand homself as 'n makelaar voordoen indien hy 'n versekeraar kan oorreed om sy besigheid te onderskryf. Selfs versekeringsagente of "binnenshuise makelaars"[72] kan hulle aan die publiek as "onafhanklike" makelaars[73] voordoen en polisse aanbeveel van die maatskappy wat hulle in diens hou of aan hulle werkruimte verskaf.

'n Makelaar of versekeringsagent hoef ook aan geen gedragskode of finansiële voorskrifte te voldoen nie. Geen minimum standaard van bekwaamheid, wat moontlik kan bydra tot die opgradering van makelaars en versekeringsagente, word voorgeskryf nie. Die uitneem van 'n verpligte skadeloosstellingspolis of die maak van bydraes tot 'n waarborgfonds word ook nie vereis nie.

Alhoewel die Versekeringswet sekere maatreëls in dié verband bevat,[74] is daar geen algemene bepaling wat misleidende stellings om 'n persoon tot kontraksluiting te beweeg, in die algemeen verbied nie. Enige polishouer wat 'n kontrak op grond van 'n bewese wanvoorstelling aangegaan het, kan moontlik die kontrak ter syde laat stel,[75] maar daar is geen voorsiening in die Versekeringswet vir enige straf vir 'n oortredende verkoopsman nie. Hoewel so 'n persoon moontlik ingevolge die Wet op Handelspraktyke, wat 'n algemene verbod op misleidende advertensies en voorstellings bevat, vervolg kan word,[76] is die probleem dat die persone wat verantwoordelik is vir die toepassing van die wet nie 'n intieme kennis van die versekeringsbedryf het nie en waarskynlik eers sal optree na kennisgewing deur die registrateur.

5 SLOTSOM EN VOORSTELLE

Beheermaatreëls deur die staat behoort opgeweeg te word teen die moontlike remmende uitwerking op die vermoë van die versekeringsbedryf om vernuwend op te tree ten einde in die veranderde behoeftes van die versekerde publiek te voorsien en om sy rol in die ekonomie as 'n mobiliseerder van spaargeld te handhaaf. Sommige beheermaatreëls is nogtans nodig in die belang van die polishouers, die bedryf as sodanig en die ekonomie as 'n geheel.

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69 *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika* 1964 4 SA 722 (T) 730.
70 Sien ook Borrowdale "Insurance Intermediaries: A Confusion of Roles" 1983 *MB* 97.
71 *Rabinowitz v Ned-Equity Ins* 1980 1 SA 403 (W) 407; Gordon *The South African Law of Insurance* (1983) 151.
72 Dit is persone wat hulleself as onafhanklike tussengangers voordoen maar wat deur 'n versekeraar van werkruimte of ander voordele voorsien word op voorwaarde dat 'n sekere hoeveelheid of persentasie van die besigheid wat hulle verkry by die onderhawige versekeraar geplaas word (RP 97/1976 62).
73 Geoordeel aan die indirekte beheer wat groot versekeraars deur middel van filiale oor die grootste makelaars het, word die onafhanklikheid van die meeste makelaars betwyfel (*Finansies en Tegniek* (1985-06-07) 9).
74 Sien par 3 3 4 1 *supra*.
75 Sien De Wet en Yeats 36–43.
76 aa 9 en 19 Wet 76 van 1976.

Die belange van polishouers word tans nie in 'n voldoende mate deur bestaande wetgewing beskerm nie. Nuwe wetgewing is nodig om die areas te beheer waaroor geen of onvoldoende beheer of toesig uitgeoefen word. Hervorming word in die volgende areas voorgestel.

5 1 Finansiële Soliditeit

Veranderde ekonomiese omstandighede[77] noodsaak 'n verandering in die regulering van versekeraars betreffende finansiële voorskrifte.

Aangesien 'n standaard minimumbedrag vir nuwe aansoekers om registrasie van geen nut blyk te wees nie, word 'n buigsamer benadering voorgestel[78] deur dit aan die registrateur oor te laat om in die lig van die omstandighede van 'n spesifieke aansoek self die kapitaalbedrag te bepaal. In dié verband kan 'n sakeplan opgestel deur 'n aktuaris van die betrokke aansoeker, met vooruitskouings van beplande nuwe besigheid en aanduidings van die uitwerking daarvan op die versekeraar se kapitaalvoordele, vir die registrateur van groot hulp wees.[79]

Ten einde aanpassings vanweë veranderde omstandighede te bespoedig, behoort die voorgeskrewe waarderingsgrondslae van verbintenisse en die tipe bates wat besit moet word, by wyse van regulasie voorgeskryf te word in stede van in die Versekeringswet self.

Die bevoegdhede van die registrateur behoort uitgebrei te word sodat hy opdragte aan versekeraars kan gee ten opsigte van hul bates indien dit in die belang van polishouers sou wees of as die versekeraar sou nalaat om sekere bepalings van die Versekeringswet (insluitende regulasies) na te kom. Benewens 'n algemene bevoegdheid[80] behoort die registrateur die bevoegdheid te hê om –

a 'n versekeraar se keuse van toekomstige beleggings te beperk;[81]

b te vereis dat hy spesifieke bestaande beleggings van die hand sit;[82]

c die verkope van sekere beleggings sonder sy toestemming te verbied; en

d van 'n versekeraar te vereis dat hy sekere of alle bates onder die beheer van 'n trustee, benoem deur die registrateur, plaas.

5 2 Dryf van Versekeringsbesigheid

Dit is duidelik dat die Versekeringswet talle voorskrifte bevat om te verseker dat versekeraars hul toekomstige verpligtinge nakom. Daarenteen is daar weinig of geen maatreëls om die bemarking van polisse te beheer of billike en redelike kontraksbedinge te verseker nie.

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77 soos – (a) 'n skerp stygende inflasiekoers; (b) 'n neiging by private individue om hul spaargeld regstreeks in vaste eiendom en aandele te belê; en (c) die verskyning van nuwe soorte spaarinstellings, spaarskemas deur die staat begin en sterker mededinging aan die kant van bestaande instellings, wat almal in mededinging met die langtermynversekeringsbedryf is om die publiek se spaargeld. (Sien ook RP 97/1976 10.)

78 Van die aanbevelings betreffende finansiële soliditeit wat hieronder gemaak word, kom ook voor in die 1976–Kommissie van Ondersoek (RP 97/1976) 125. Ongelukkig is daar aan die meeste van die aanbevelings nog nie uitvoering gegee nie.

79 Die registrateur kan ook groot baat vind by so 'n sakeplan waar 'n gevestigde versekeraar nie finansieël sterk blyk te wees nie.

80 bv: "[T]ake such action as appears . . . to be appropriate for the purpose of protecting policy holders or potential policy holders . . . against the risk that the company may be unable to meet its liabilities or, in the case of long term business, to fulfil the reasonable expectations of policy holders" (a 45(1) van die Insurance Companies Act 1982 in Brittanje).

81 Vgl a 38(1)(a) van die Insurance Companies Act 1982.

82 Vgl a 38(1)(b) van die Insurance Companies Act 1982.

5 2 1 Poliskontrakte

5 2 1 1 Moontlikheid van Geregtelike Kontrole

Vanweë die talle probleme[83] daaraan verbonde om op 'n *ad hoc*-basis by wyse van wetsbepalings 'n skuldenaar (in hierdie geval die polishouer) teen uitbuiting te beskerm, kan die vraag gestel word of die tyd nie al aangebreek het nie vir die verlening van meer mag aan die howe om onbillike of gewetenlose poliskontraksbedinge te wysig of om te weier om dit af te dwing. Die argument dat terme soos "goeie trou," "redelikheid" en "billikheid" tot regsonsekerheid kan lei, gaan nie heeltemal op nie aangesien die howe spoedig riglyne behoort neer te lê vir die uitoefening van hul diskresie in die toepassing van hierdie kriteria.[84]

Daar is egter talle ander probleme wat die uitbreiding van geregtelike kontrole onwaarskynlik maak.[85] Afhangende van die gebeurtenis van litigasie sal die beskerming van die polishouer teen uitbuiting noodwendig broksgewys geskied. Die nodigheid van hervorming om die belange van polishouers te beskerm, is vandag te dringend. Hervorming by wyse van een saak op 'n slag sal heelwaarskynlik onvoldoende wees. Enige beslissing teen 'n versekeraar het een voorspelbare gevolg, naamlik 'n aanpassing van kontraksbedinge om die effek van 'n beslissing te omseil. Dit kan lei tot 'n oneindige stryd tussen howe en versekeraars. Hoë litigasiekoste, oorvol hofrolle en die uitgerektheid van 'n litigasieproses het ook 'n negatiewe uitwerking op die bereidwilligheid van 'n polishouer om 'n poliskontrak aan te veg.

Ons howe is nie gretig om die billikheid van kontraksbedinge op grond van openbare beleid te ondersoek nie. Die howe beskou dit as hul enigste taak om regte te vind en nie te skep nie; om die wil van partye vas te stel in stede van om kontrakte vir hulle te skryf.[86]

5 2 1 2 Moontlikheid van Selfregulering

Daar kan moontlik geredeneer word dat die versekeringsbedryf toegelaat moet word om deur middel van 'n selfregulerende liggaam, soos die vereniging van versekeraars van Suid-Afrika (LOA), die vorm en inhoud van poliskontrakte te beheer. Selfregulering deur 'n informele liggaam soos die LOA wat geen statutêre erkenning geniet nie, hou egter talle nadele in, soos –[87]

a Reëls is dikwels vaag en onduidelik.

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83 Dit is 'n onbegonne taak om van 'n wetgewer te verwag om alle moontlike gevalle van uitbuiting in 'n wet self te reël. Die resultaat is gewoonlik 'n ingewikkelde stuk wetgewing. 'n Skuldenaar wat graag kennis wil hê van sy regte en verpligtinge vind dit ook moeilik om in die doolhof van talle ingewikkelde bepalings enige tersaaklike voorskrifte op te spoor. Sy taak word deur onkunde en 'n gebrek aan bedrewendheid in dié verband gekortwiek (sien ook Aronstam 48).

84 In die verband kan die toepassing van die Franse *Code Civil* en Duitse *BGB*, die Israeliese "Standard Contracts Act, 1964" en "The Uniform Commercial Code" van die VSA leiding verskaf. (Sien Aronstam 190–200 211–226; Kahn 49; Harker "The Role of Contract and the Object of Remedies for Breach of Contract in Contemporary Western Society" 1984 *SALJ* 121 126; Van Eeden "Verbruikersprobleme: Gedagtes oor Enkele Handelspraktyke" 1976 *De Jure* 334.)

85 Sien ook Van Niekerk 93.

86 Aronstam 43–46.

87 Sien ook Rider and Hew 1977 *Malaya Law Review* 169–170; Margo "Take-overs and Mergers: The City Panel and the Position in South Africa" 1983 *De Rebus* 476 492.

b Aangesien die LOA aanvanklik in die lewe geroep is om te sien na die belange van versekeraars, kan dit maklik gebeur dat reëls nie ver genoeg strek om die belange van polishouers te beskerm nie. Publieke vertroue kan daardeur 'n knou toegedien word.

c Die feit dat professionele persone aan die beheer van die LOA staan, kan 'n isolering van die publiek teweegbring.

d Tugstappe kan nie teen nie-lede gedoen word nie.

e Benewens die moontlikheid van opskorting of beëindiging van lidmaatskap, het die LOA geen verdere effektiewe sanksies om nakoming van reëls en gedragskodes te verseker nie.

Hoewel die plasing van die LOA binne 'n statutêre raamwerk talle van hierdie nadele kan uitskakel, is dit te betwyfel of die regering tot so 'n stap sal oorgaan, aangesien die registrateur reeds sedert die totstandkoming van die Versekeringswet in 1943 verantwoordelik is vir die beheer en toesig oor versekeraars en hul bedrywighede.

5 2 1 3 Wetgewende en Administratiewe Hervorming

In die lig van die besware teen en probleme verbonde aan geregtelike kontrole en selfregulering, is die voorskryf van statutêre minimum algemene[88] en spesifieke standaarde[89] waaraan enige poliskontrak moet voldoen, waarskynliker. Die doel met die voorgeskrewe standaardbepalings moet wees om slegs die minimum vereistes vir elke lewenspolis daar te stel ten einde billike behandeling van 'n polishouer te verseker. Dit staan die versekeraar andersins vry om enige standaardkontrak te gebruik solank dit net nie minder begunstigend vir die versekerde as die minimum standaarde is nie. Sodoende word daar nie 'n te drastiese inbreuk op kontrakteervryheid gemaak nie. In elk geval bestaan daar by poliskontrakte nie meer so iets soos kontrakteervryheid in die ware sin van die woord nie.[90] Die feit dat standaard- minimum voorskrifte vereis word, bied die polishouer ook die geleentheid om op 'n eenvormige wyse vergelykings tussen polisse van verskillende versekeraars te tref. Dit wakker op die ou end kompetisie tussen die verskillende versekeraars aan.[91]

Ten einde te verseker dat die minimum standaardvoorskrifte nagekom word, behoort geen dokumente waarin 'n poliskontrak beliggaam is, gebruik te word alvorens dit deur die registrateur goedgekeur is nie.

By 'n aansoek om 'n polis behoort 'n tussenganger ook 'n afskrif van die betrokke polis ter insae byderhand te hê. Die versekeraar behoort verder verplig te word om 'n kopie van die aansoekvorm aan die poliskontrak te heg wat hy aan die polishouer stuur.

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88 bv: "An insurance contract must not be unjust, ambiguous, unfair, misleading or encouraging misrepresentations" (Takirumbudde 108).

89 bv – (a) vermelding van afkoelperiode waarbinne versekerde sy reg tot kansellasie kan uitoefen; (b) t o v gekoppelde polisse, 'n beskrywing van die bates waaraan gekoppel; (c) 'n verbod op 'n vrywaring van aanspreeklikheid op grond van geringe onakkuraathede in aansoekvorm of bloot tegniese redes; en (d) die moontlikheid van herstelling van 'n vervalde polis binne 'n sekere tydperk. (Sien ook Huebner and Black *Life Insurance* (1976) 140–145.)

90 par 4 2 2 *supra*.

91 Vgl Van Niekerk 92; Birds "The Reform of Insurance Law" 1982 *Journal of Business Law* 449 456.

5 2 2 Bemarking van Polisse

In die lig van die kritiek teen en klagtes[92] oor optredes van makelaars, tesame met die feit dat voornemende polishouers al hoe meer afhanklik is van hul standaard en integriteit,[93] word 'n stelsel van verpligte registrasie van makelaarsake, min of meer soortgelyk as dié in Engeland,[94] aanbeveel. Dit sal nie net 'n meer ordelike bemarking van polisse verseker nie, maar ook help om die publiek se vertroue in makelaars as onafhanklike raadgewers te herstel. Die Suid-Afrikaanse Versekerings-Makelaarsvereniging (SAVMV) het al by meer as een geleentheid konsepwetgewing aan die registrateur voorgelê ingevolge waarvan makelaars statutêr verplig sou word om by 'n sentrale raad te registreer. In Augustus 1983 is op regeringsvlak alle vorme van statutêre registrasie verbied. As redes is aangevoer

a dat so 'n stap teenstrydig sou wees met die regering se verklaarde beleid om groter vryheid aan die privaat-sektor te verleen ten einde sy rol in die ekonomie te speel; en

b dat daar nie afdoende bewys van ongewenste praktyke aangevoer is wat 'n verandering van die huidige reëling regverdig nie.[95]

Indien registrasie oorgelaat word aan 'n statutêre selfregulerende raad bestaande uit verteenwoordigers van die makelaarsindustrie, lede van ander versekeringsverenigings en verbruikersliggame, met 'n minimum van staatsbeheer, kan egter nie ingesien word hoe daar inbreuk gemaak kan word op die vrye marksisteem nie. Inteendeel, die erkening van 'n selfregulerende raad kan meebring dat die registrateur op die ou end slegs 'n geringe oorhoofse toesighoudingsfunksie hoef te vervul. Indien gelet word op die talle klagtes wat in die pers gepubliseer word, tesame met die hordes van ongepubliseerde griewe, blyk die tweede rede ook ongegrond te wees.[96]

Voortgesette samesprekings deur die SAVMV het daartoe gelei dat die minister van finansies teen die einde van 1984 ingestem het tot die heropening van samesprekings met die registrateur oor die statutêre registrasie van makelaars. Die minimum statutêre beheer en die maksimum selfregulering is as voorwaarde vir nuwe wetgewing gestel. Die SAVMV beoog om in dié verband 'n konsepwetsontwerp aan die registrateur voor te lê.

Alhoewel dit nie moontlik is om vooruit te skat wat die presiese inhoud van so 'n wet sal wees nie, word vertrou dat die volgende aanbevelings daarin vervat sal wees:[97]

a Geen persoon of firma mag hom as makelaar[98] voordoen of makelaarsake bedryf nie tensy hy geregistreer is by 'n raad wat ingevolge die nuwe wet saamgestel is.

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92 Atkins "Control through Registration. When is a Broker . . . ?" 1985 *BML* 53 54.
93 hoofsaaklik toe te skryf aan die onkunde van die algemene publiek en 'n toename in ingewikkeldheid van polisse wat tans uitgereik word (Friedland 56).
94 The Insurance Brokers (Registration) Act 1977 wat op 1981-12-01 in werking getree het.
95 Sien *Beeld* (1983-10-06) 20; *Rand Daily Mail* (1983-10-01) 10.
96 Vgl Atkins "Insurance in the Free Market. When is a Broker . . . ?" 1985 *BML* 3 4.
97 Sien ook RP 97/1976 70; Atkins 1985 *BML* 53-54.
98 Hierby word ingereken alle onafhanklike tussengangers soos finansiële instellings, makelaarsake en hul werknemers.

b 'n Versekeringsmakelaar behoort duidelik omskryf te word ten einde hom te onderskei van 'n tussenganger wat as verteenwoordiger van 'n versekeraar optree.

c 'n Aansoeker om registrasie moet minstens aan die minimum standaard van bekwaamheid, soos vasgestel deur die raad, voldoen.

d 'n Aansoeker moet ook bewys lewer van sy finansiële soliditeit en die raad verseker dat hy geen ooreenkoms of finansiële reëling met 'n versekeraar sal sluit wat sy onafhanklikheid as makelaar sal aantas nie.

e Die raad behoort die diskresie te hê om registrasie te weier indien dit nie in die belang van die versekerde publiek sou wees nie.

f Die beperking op kommissiegelde en ander voordele aan 'n makelaar behoort deur die raad bepaal te word. Die raad behoort ook bevoeg te wees om 'n verklaring van enige makelaar aan te vra dat hy nie meer kommissiegelde ontvang het as wat voorgeskryf is nie.

g Die raad behoort ook bevoeg te wees om die voorlegging van gepaste gereelde opgawes te vereis, inligting aan te vra en inspeksies te doen.

h Van geregistreerde makelaars behoort vereis te word dat hulle toereikende skadeloosstellingsversekering uitneem.

i Geregistreerde makelaars sal ook verplig wees om die gedragskode, soos voorgeskryf deur die raad en goedgekeur deur die registrateur, na te kom.

j Benewens die bevoegdheid om die registrasie van makelaars in te trek, behoort die raad ook bevoeg te wees om 'n boete op te lê by nie-nakoming van voorskrifte deur die raad.

k 'n Makelaar wat hom veronreg voel deur 'n besluit van die raad behoort 'n reg van appèl te hê na die hof of 'n onafhanklike tribunaal.

Benewens voorskrifte wat 'n versekeraar mag uitvaardig ten opsigte van versekeringsagente in sy diens, is versekeringsagente aan dieselfde minimum kontrole onderworpe as die makelaars. Gevolglik word aanbeveel dat oorweging geskenk word aan die moontlikheid om versekeringsagente aan dieselfde registrasiestelsel as makelaars te onderwerp.[99] Omdat daar so baie versekeringsagente is en hulle voortdurend wissel, sal dit prakties onuitvoerbaar wees om registrasie van elke agent te vereis. Derhalwe word aanbeveel dat agente van versekeraars, geregistreer ingevolge die Versekeringswet, nie hoef te registreer nie, op voorwaarde dat sodanige versekeraars volle verantwoordelikheid vir die aktiwiteite van sy agente (insluitende persone in eie diens wat op deeltydse basis as agente optree) aanvaar.[100] Sodanige registrasiestelsel kan die algemene standaard van versekeringsagente verhoog en help met die uitskakeling van wanpraktyke.

Misleidende advertensies behoort in openbare belang verbied te word en tot 'n misdryf verklaar te word. As uiterste strafmaatreël kan intrekking van 'n versekeraar, versekeringsagent of makelaar se registrasie gestel word. Hoewel bepalings van die Wet op Handelspraktyke van toepassing mag wees, word

99 'n Soortgelyke stelsel van lisensiëring word deur die 1976-Kommissie van Ondersoek voorgestel (RP 97/1976 71–72).

100 Sien ook Gower *Review of Investor Protection* Part 1 (1985) Cmnd 9125 119.

voorgestel dat versekeringsadvertensies direk ingevolge die Versekeringswet gereguleer word, en dat die registrateur met sy binnekennis van die versekeringsbedryf gemagtig word om misleidende advertensies te verbied of voorskrifte in dié verband uit te vaardig.

As beskermingsmaatreël teen oorgretige versekeringsagente of makelaars, behoort 'n afkoelperiode waarbinne 'n polishouer 'n statutêre reg tot kansellasie kan uitoefen[101] ingevolge die Versekeringswet vereis te word. Dit sal help om die groot getal polisse te verminder wat, ondanks die respyttydperk in artikel 62, verval vanweë die onvermoë van polishouers om hul premies te betaal.

5 3 Beter Opvoeding van die Publiek

Voorkoming is altyd beter as genesing en baie van die probleme wat tans deur polishouers ondervind word, kan verminder of vermy word deur voornemende polishouers beter in te lig en op te voed oor versekeringsaangeleenthede. Sonder die nodige kennis is die blote bestaan van regte en remedies in die Versekeringswet vir die polishouer nutteloos.[102] In die skoling van die publiek van hoe om geld op 'n verstandige wyse en teen die bes moontlike bedinge in versekering te belê, kan verbeterde inligting, geskikte opvoeding en maklike toegang tot behoorlike advies van groot waarde wees. In hierdie verband kan die ombudsman vir versekeringswese en 'n algemene inligtingsentrum 'n belangrike rol speel. Die rol van die huidige ombudsman vir versekering behoort uitgebrei te word om ook die aanhoor van klagtes teen tussengangers in te sluit. Die doelstellinge van 'n algemene inligtingsentrum behoort onder andere te wees om die publiek van advies te dien en inligting te versprei[103] aangaande die aard en doel van lewensversekering asook die rol wat tussengangers (veral makelaars) in die versekeringsbedryf speel.

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101 soos in a 13 van die Wet op Kredietooreenkomste 75 van 1980.
102 "One cannot legislate for fools" - Van Niekerk 96.
103 bv deur pamflette en geskrifte uit te stuur of inligtingsveldtogte te loods.

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.

Negligent attorneys and disappointed beneficiaries[1]

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OPSOMMING

Nalatige Prokureurs en Teleurgestelde Begunstigdes

In hierdie artikel word daar gepoog om die volgende vraag te beantwoord: Indien 'n prokureur nalatig is by die opstel of verlyding van 'n testament en 'n begunstigde word sodoende die voordeel ontneem wat aan hom nagelaat is, kan die begunstigde ingevolge die Suid-Afrikaanse reg van die nalatige prokureur skadevergoeding eis?

Die Suid-Afrikaanse howe het hierdie vraag nog nie pertinent beantwoord nie. Die Anglo-Amerikaanse reg bied wel 'n antwoord. 'n Regsvergelykende studie van die Engelse reg en die Amerikaanse reg dui naamlik aan dat 'n begunstigde in hierdie geval wel 'n askie teen die nalatige prokureur het. Dié aksie is deliktueel van aard. Om sukses te behaal, moet daar dus aan al die vereistes van 'n delik voldoen word.

Ingevolge die Suid-Afrikaanse reg kan enige potensiële aksie van die begunstigde nie kontraktueel van aard wees nie maar deliktueel. Twee van die vereistes wat ons reg vir 'n delik neerlê, kan in hierdie geval probleme skep. Dié twee vereistes is onregmatigheid en skade.

Onregmatigheid is nie net in die skending van 'n subjektiewe reg geleë nie, maar ook in die verbreking van 'n regsplig ("legal duty"). Of 'n regsplig enigsins bestaan, hang van die *boni mores* af. Om vas te stel of daar volgens die *boni mores* wel 'n regsplig in 'n bepaalde situasie bestaan, moet die beleidsoorwegings ten gunste van die bestaan van 'n regsplig en dié daarteen afgeweeg word. Uit so 'n afweging blyk dit dat die *boni mores* wel ten gunste is van die bestaan van 'n regsplig aan die kant van 'n prokureur, en gevolglik 'n korrelate reg aan die kant van die begunstigde.

Verskeie standpunte oor die juridiese betekenis van skade word bespreek. Daar word aan die hand gedoen dat as dit eenmaal vasstaan dat daar 'n regsplig in 'n bepaalde situasie op die prokureur rus en hy weens sy nalatigheid nie sy regsplig nakom nie, enige verlies wat uit sy nalatigheid voortvloei wel skade in 'n juridiese sin sal wees.

Aangesien daar aan al die vereistes vir 'n delik voldoen word, bestaan daar geen rede waarom 'n begunstigde ingevolge die Suid-Afrikaanse reg nie met 'n deliktuele eis teen 'n nalatige prokureur kan slaag nie.

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1 Although for purposes of convenience in this article attention is focussed on the attorney as negligent drafter of a will, banks and other professional drafters are in the same position as attorneys. The practice of drafting and executing wills constitutes the practice of law, particularly for two reasons: (a) because of the profound legal knowledge necessary for one who makes a practice of this work; and (b) because such instruments, before they become effective, must be filed in and administered by an official of the supreme court. All will drafters therefore render a legal service – a service requiring skill, judgment and foresight. They are then also subject to similar standards of professionalism. It follows that if professional will drafters share the same bases of liability towards their client, there is no reason why they should not share in the extension of delictual liability towards third party beneficiaries should our law take that course. *Contra* Briel "Free Wills" 1981 *De Rebus* 565.

1 COSMOLOGY DELINEATED

Undoubtedly attorneys often enthusiastically toast the testator who makes his own will because a sound basis for lucrative litigation is thus established. Perhaps this self-satisfaction is unfounded. Not only testators but attorneys too, at times, fail to comprehend the intricacies of will drafting and do not approach this task with the necessary circumspection. Will drafting, by its very nature, lends itself to potential prejudice and those most likely to be prejudiced by the negligent attorney are the intended beneficiaries who are not his immediate clients. The client himself is usually deceased by the time the mistake is discovered and one's immediate sympathy lies with the disappointed beneficiary. One feels that to deny recovery in this instance would allow the attorney to escape liability for negligently causing patrimonial damage to the beneficiary. Indignant demands for reparation on the part of the beneficiary should therefore come as no surprise.

Our law, unlike that of the United States and Commonwealth countries, has not yet specifically dealt with this issue.[2] This has prompted me (and others before me[3]) to attempt to answer the following question: If an attorney negligently drafts and executes a will depriving a beneficiary of his inheritance, will the beneficiary be able to recover damages from the attorney under South African law?

Although in South Africa the basis of delictual liability for pure economic loss has taken root and form in various decisions, a discussion of this field as a whole is not contemplated here. I have opted for the discussion of a specific case of pure economic loss in the belief that once the broad principle of recoverability is recognised (as in *Administrateur Natal v Trust Bank van Afrika Bpk*[4]) liability in each particular case can then be established by the application of general principles of delict.[5]

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2 Flemming J in *Louw v Engelbrecht* 1979 4 SA 841 (O) 846 maintained *en passant* that high standards of skill and expertise are required by will drafters whilst in *Tshabalala v Tshabalala* 1980 1 SA 134 (O) the same judge at 141C toyed with the idea of an action for damages in favour of third parties. The closest our law has come to dealing with this issue was in 1981 when one Cecilie Antoinette Trumpelman, a prejudiced beneficiary, instituted an action against Barclays National Bank Ltd, the negligent drafters of the will. Judgment was never passed as the parties settled out of court (case I 57 of 1981). Whether Barclays Bank expected and avoided an unfavourable decision or whether they merely tried to avoid negative publicity is not certain. Be that as it may, claims of this nature are bound to crop up again in the future and then a judicial commitment may be unavoidable.

3 Reinecke "Die Elemente van die Begrip Skade" 1976 *TSAR* 26 55–56; Burchell "Law of Delict" 1977 *Annual Survey* 175; Van Schalkwyk "Die Verlyding en Interpretasie van Testamente" 1977 *JJS* 63 65; Burchell "The Birth of a Legal Principle – Negligent Misstatements Causing Pure Economic Loss" 1980 *SALJ* 1 7–8 10; Cilliers "On the Drawing of Wills – Caveat Iuris Peritus" 1980 *De Rebus* 388; Erasmus "Wills: The Price of Negligence" 1980 *De Rebus* 389; Sonnekus "*Tshabalala v Tshabalala* 1980 1 SA 134 (O)" 1981 *TSAR* 172; Cronjé and Roos "Een en Ander oor Testamentsformaliteite" 1984 *De Rebus* 157 n 10; Isakow *The Law of Succession Through the Cases* (1985) 27–28; *Suid-Afrikaanse Regskommissie Projek 22* "Hersiening van die Erfreg: Testamentsformaliteite" 1986–06–22; Rogers "The Action of the Disappointed Beneficiary" 1986 *SALJ* 583. No further references have been made to this article because it appeared after my article had been presented for publication.

4 1979 3 SA 824 (A).

5 See also Malan's approach in dealing with the question whether a collecting bank should be delictually liable for negligence to the owner of a lost, stolen or forged cheque: "Profes-

In order to answer the question, English law (as the most progressive exponent of Commonwealth law) and United States law have been briefly surveyed primarily because interesting developments (and to my mind developments worthy of emulation) have taken place there. Our courts have also not hesitated to consult common law in respect of issues of pure economic loss.

It is realised, however, that mere wholesale reception of foreign law is not necessarily beneficial to our law. In this regard Steyn CJ's warning in *Trust Bank van Afrika Bpk v Eksteen*[6] has not gone unheeded; neither have the words of Rumpff CJ in *Administrateur Natal v Trust Bank van Afrika Bpk.*[7] For this reason current South African law is considered independently of the foreign legal systems to allow any potential compatibility to speak for itself.

2 A COMPARATIVE STUDY

2 1 United States and English Approaches Contrasted

Although there are some differences among the jurisdictions in the United States and even a few recent differences emerging within the Commonwealth, it is largely possible to generalise accurately about the law in these legal systems and to contrast them in so far as economic loss is concerned.[8]

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continued from previous page

sional Responsibility and the Payment and Collection of Cheques" 1978 *De Jure* 326; 1979 *De Jure* 31; "Once More on Professional Responsibility" 1979 *De Jure* 363. Malan's view and, by implication his approach, was endorsed in *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd* 1985 4 SA 553 (Z). See also Pretorius *Aanspreeklikheid van Maatskappyouditeure teenoor Derdes op grond van Wanvoorstelling in die Finansiële State* (1985); Burchell "Book Reviews" 1985 *SALJ* 744 746. Contrast, however, Sonnekus's view, rejecting a casuistic approach: "Die Suid-Afrikaanse reg wat op uitgewerkte algemene beginsels fundeer is, behoort dus nie sonder meer die tipies kasuïstiese houding van die Engelse, Amerikaanse en Kanadese regstelsels in hierdie verband na te volg nie" (1981 *TSAR supra* 172 176). The fact that common-law systems adopt a casuistic approach does not mean that they have not embraced a broad principle of recoverability. A principle is usually extracted from repetitive factual situations. The principle, in its turn, is then employed to adjudicate later cases and thus influences these subsequent decisions to the extent that they are aligned with the principle. This means that the relationship between a "casuistic approach" and a "principle approach" is a circular interaction. It is therefore almost impossible and definitely illogical to make any clear separation between these two approaches. In fact, it is logically better to adjudicate each factual situation on its own merits than to force a particular judgment of a factual situation so that it is aligned with a particular principle. For this reason, English and United States law may be consulted to assist in the solution of this particular issue without any fear of relying on invalid sources.

6 1964 3 SA 402 (A) 410F–411E.

7 *supra* 831C–832H.

8 For differences among the jurisdictions in the United States see *infra* 2 3. New Zealand and Australia have not consistently supported the English view that a frustrated beneficiary can successfully claim damages from the solicitor who negligently drafts a will. The English view was approved in New Zealand but distinguished and not applied in *Sutherland v Public Trustees* 1980 2 NZLR 536 (SC), whilst it was extensively criticised and rejected in *Gartside v Sheffield, Young and Ellis* 1981 2 NZLR (HC). The English view was, however, adopted in *Gartside v Sheffield, Young and Ellis* 1983 NZLR 37 (CA). In Australia, the English view was followed and applied in *Watts v Public Trustee* 1980 WAR 97 (SC), but criticised and not followed in *Seale v Perry* 1982 VR 193 (SC).

The single greatest difference between United States law and English law lies in the difference of approach.[9] In the United States four different categories of economic loss cases are identifiable: (a) negligent misrepresentation; (b) negligent performance of a service; (c) negligent manufacture of shoddy products; and (d) relational economic loss. Each of these categories, with the exception of the second which is still *in statu nascendi*, has a separate history and can be independently analysed. This tendency to compartmentalise so much is perhaps greater in the United States than elsewhere precisely because so many cases are adjudicated there. An analysis of negligent misrepresentation, for instance, is found in articles concerning the liability of accountants, surveyors, attorneys and so forth. This approach may have its advantages, but it certainly hampers the development of a general theory of economic loss.

English law, on the other hand, has tended to group all pure economic loss claims together as if they were essentially the same issue and then to extract categories of cases corresponding to the four categories in United States law for separate consideration. It is not surprising to find an English court which deals with a case falling within a particular category, referring to the law governing another when there is no logical or functional connection between the two.[10] An important reason for this grouping approach in English law is the impact of *Hedley Byrne & Co Ltd v Heller and Partners*.[11] Since this judgment was handed down in 1963 most economic loss cases have to a greater or lesser extent relied upon it, even if it meant distorting the issues to fit them within its principles.[12]

English courts have, however, not hesitated to criticise case-by-case decisions in the United States;[13] countercriticism has also followed.[14] Nevertheless, in spite of independent development and different conceptual approaches, the principles governing recovery for pure economic loss in the United States and England are so similar that one can safely speak of a single body of common-law rules.

2 2 England

In 1979 the Chancery division in *Ross v Caunters*[15] held that a solicitor was liable in tort to the beneficiary of a will where the latter was precluded from inheriting as a result of the solicitor's negligent drafting of the will. This, however,

9 See in general Feldthusen "Pure Economic Loss Consequent Upon Physical Damage to a Third Party" 1977 *University of Western Ontario Law Review* 1; Smellie "Negligence and Economic Loss" 1982 *University of Toronto Law Journal* 231; Hodgin "Economic Loss in the House of Lords" 1983 *Northern Ireland Legal Quarterly* 156; Feldthusen *Economic Negligence* (1984) 1–17.

10 See for instance *Junior Books Ltd v The Veitchi Co 1* 1982 3 WLR 477 495; Kidner "Economic Loss: Ann's Junior Books and Bills of Lading" 1985 *MLR* 352; *Leigh & Sillavan v Aliakmon Shipping Co Ltd* 1985 2 All ER 44; Spruce & Smith "Economic Loss: Aliakmon and After" 1986 1 *Hong Kong Law Journal* 58.

11 1964 AC 465 (HL).

12 *Ministry of Housing and Local Government v Sharp* 1970 2 QB 223 (CA); *Dutton v Bognor Regis United Building Co Ltd* 1972 1 All ER 462. Contrast, however, the approach in *Ross v Caunters* 1979 3 All ER 580.

13 *Boys v Chaplin* 1971 AC 356 391–392 *per* Lord Wilberforce.

14 Morris *The Conflict of Laws* (1980) 272: "But surely Lord Wilberforce went too far when he said that 'if one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice.' For if that is true, then we might as well scrap not only the conflict of laws but also the common law itself."

15 *supra* n 12.

was not always the accepted view.[16] The obvious judicial obstacles in the path of the disappointed beneficiary were the following: firstly, a solicitor could be professionally liable in negligence only to his client and this liability was rooted in contract and not in tort; secondly, there was no cause of action in negligence for mere economic loss.

How these obstacles were eventually overcome makes interesting research.[17] The first obstacle resulted from the way in which negligence developed from a mere element to an independent specific tort. Today negligence as an independent tort differs vastly from negligence as employed in the early common law. Early common law employed negligence only in the context of certain kinds of relationships, for instance, contractual or fiduciary relationships. Later, negligence, although an independent tort, continued to bear the mark of its contractual or fiduciary origins and it was held that a duty of care could be established only where privity of contract existed between the parties thereto. The views expressed in *Winterbottom v Wright*[18] are therefore hardly surprising. Here it was held that where B contracts with C, the contract exhausts B's obligation, and if by a breach of it A is injured, A can have no claim. However, in *Donoghue v Stevenson*[19] it was held that a defendant may under certain circumstances owe a duty of care to a plaintiff even though there is no contract between them. It was here that Lord Atkin formulated what became known as the "neighbour test" to be used in determining whether, in specific circumstances, a duty of care exists.[20]

The mellowing effect of the *Donoghue* case seemed to facilitate the argument that a solicitor could be liable to someone other than his immediate client. However, the argument that a solicitor was liable in contract only to his client remained valid. If the solicitor was not even liable in tort to his client, how could his tortious liability be extended to third parties?

Midland Bank Trust Co Ltd v Hett Stubbs & Kemp[21] proved to be the catalyst for change. Here a firm of solicitors incurred tortious liability *vis-à-vis* their client for negligently failing to register an option, thus causing that client financial loss. Somehow it seemed easier now to proceed along the path of extending tortious liability to third party beneficiaries too. The transition from the rigid

16 *Robertson v Fleming* 1861 4 Macq 167.

17 See in general James and Brown *General Principles of the Law of Torts* (1978); Bingham *The Modern Cases on Negligence* (1978) 3–17; Smellie "Fifty Steps and More" 1981 *New Zealand Law Journal* 511; Dugdale and Stanton *Professional Negligence* (1982) 1–8; 18–48; Jackson and Powell *Professional Negligence* (1982) 1–28; 136–191.

18 1942 11 LJR 415.

19 1932 AC 562 (HL).

20 *ibid* 580: "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 or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my 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 so affected when I am directing my mind to the acts or omissions which are called in question." Lord Atkin actually formulated this test by interpreting the doctrine of *Heaven v Pender* 11 QBD 503 509 laid down by Lord Esher, then Brett MR.

21 1978 3 All ER 571 (Ch); Stanton "Solicitors and Professional Liabilities: A Step Forwards" 1979 *MLR* 209.

contractual privity approach to the extension of tortious liability had been achieved.

In so far as the removal of the second obstacle was concerned, *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[22] proved to be the important decision. It was held that a negligent misrepresentation may give rise to an action for damages for financial loss caused thereby, apart from any contract or fiduciary relationship, since the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care and the latter knew or ought to have known that reliance was being placed on his skill and judgment. The principle enunciated in this case was, however, not restricted to loss caused by negligent misstatements only.[23]

In *Ross v Caunters*,[24] however, it was considered unimportant whether the result was reached by merely applying the *Hedley Byrne* principle,[25] or whether it was reached by relying on *Donoghue v Stevenson*[26] and then using *Hedley Byrne*[27] to extend these principles to cases of pure financial loss. What remains of importance here is that the disappointed beneficiary was held to be entitled to recover damages for the loss of expected benefits as a result of the solicitor's negligent failure to tell the testator that a will should not be witnessed by the spouse of any beneficiary.

Four aspects of this judgment deserve to be mentioned:

a The duty owed by a solicitor to his client sounds not only in contract but also in tort. *A fortiori* the extension of liability in tort to a third party should be possible.

b The plaintiff's loss was one of expectation. Traditionally these losses were only recoverable in the law of contract. However, *in casu* it was recognised that, although there was no agreement between the defendent and the third party that the latter would receive the benefit, the expectation thereof was a legitimate one in that it flowed from the voluntary exercise of a professional skill requiring reasonable care in its performance. Furthermore, the terms of the will clearly quantified the expected benefit.

c The scope of the solicitor's liability should be determined on the basis of the test which requires a degree of proximity between the plaintiff and the defendant greater than reasonable foreseeability. In other words, the defendant must have directly contemplated that the plaintiff was likely to be closely and directly affected by his acts. If the facts of a particular case (as *in casu*) establish this proximity, it may be said that a duty of care rests upon the solicitor.

d Once it is established that a duty of care rests upon the solicitor, an enquiry should be made of any policy reasons which could possibly exclude, restrict or modify this duty.

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22 1963 2 All ER 575 (HL).
23 *supra.*
24 *ibid* 595H–596B
25 *supra.*
26 *supra.*
27 *supra.*

This judgment has been both hailed and slated.[28] However, recent statutory developments may have eliminated the necessity for judgments like this.[29] Section 20 of the Administration of Justice Act 1982 states that a court may rectify a will if it fails to carry out a testator's intention either as a result of a clerical error or a failure to understand his intentions. Be that as it may, statutory intervention cannot erase the developments which have already occurred in the English law of torts with regard to pure economic loss.

2 3 The United States

It is trite law here that in order to enable a person to enforce an obligation, privity must exist between him and the obligee. This requirement is said to be based on principles of policy and intended to enable parties to control their own contracts.[30] As a result of this general rule, it was held for many years that an attorney could not in the absence of fraud or collusion be liable to anyone other than his client in an action arising out of his professional duties.[31] This rule precluded, and in certain states still precludes, the attorney's liability for negligent drafting or execution of wills.[32] After all, privity presupposes that the attorney's duty to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession, is owed only to his immediate client.

It appears from the judicial decisions, however, that neither the strict privity doctrine which precludes an attorney's liability for negligence nor the complete rejection of privity with its vast ensuing range of potential liability, presented a workable solution. Once the judiciary established that a loss of expectation constituted a legitimate loss at law, it became necessary to determine the basis of a negligent attorney's liability. Piecemeal development was the only way out. The issue had to be determined on a case-by-case basis. This approach led to the result that a beneficiary deprived of his inheritance by an attorney's negligent

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28 *supra* n 8; Caney "Negligent Solicitors and Disappointed Beneficiaries" 1980 *LQR* 182; Caney "Negligent Solicitors and Doubly Disappointed Beneficiaries" 1983 *LQR* 346; Veljanovski and Whelan "Professional Negligence and the Quality of Legal Services – An Economic Perspective" 1983 *MLR* 700 706–709; Lunz "Solicitors' Liability to Third Parties" 1983 *Oxford Journal of Legal Studies* 284; Feldthusen *Economic Negligence supra* 149–151.

29 Sonnekus "Melvill v The Master 1984 3 SA 387 (C)" 1984 *TSAR* 294 300.

30 *Texas and PR Co v Watson* 190 US 287; *Bank v Grand Lodge* 98 US 123; *US v Driscoll* 96 US 421; *Pike v Anglo-South American Trust Co* 64 ALR 1184; *Cincinnati, H and DR Co v Metropolitan National Bank* 42 NE 700; *Ocean Accident and G Corp v Southwestern Bell Tel Co* 100 F 2d 441; *Buckley v Gray* 42 P 900 (see also 45 ALR 3d 1191 n 7); *Lorillard v Clyde* 122 NYS 498, 25 NE 917.

31 *National Sav Bank v Ward* 100 US 195; *Re Cushman* 160 NYS 661; *Hakala v Van Schaick* 12 NYS 2d 928; *Kasen v Morrell* 183 NYS 2d 928; *Maneri v Amodeo* 238 NYS 2d 302; *Sachs v Levy* 216 F Supp 44.

32 For the position in New York State see *supra* n 31. For the position in Washington State see *Schirmer v Nethercutt* 288 P 265. Here an intended beneficiary was entitled to recover the value of the legacy from the attorney for his negligent act. However, the beneficiary claimed to have employed the attorney to draw up the will. This was denied by the attorney. The court in passing judgment in the favour of the beneficiary did not discuss the question whether the beneficiary was in fact a client of the attorney. This renders the position in this state somewhat unclear. Was this judgment based upon policy consideration, third-party beneficiary contracts or privity? In Illinois the same theoretical confusion exists. See *infra* n 42.

will drafting could recover his damages either by relying on the theory that the attorney's employment constituted a third-party beneficiary contract for breach of which such beneficiary could sue,[33] or by maintaining that the issue was a matter of public policy involving the balancing of a number of factors.[34] These factors were the extent to which the transaction involved the third party, the foreseeability of harm to the third party, the closeness of the connection between the negligence and the injury suffered, and the policy preventing future harm.[35]

Legal development *à propos* this issue has not been consistent in so far as the various states are concerned. Californian courts, for instance, were initially loath to abandon the privity theory. In *Buckley v Gray*[36] an attorney negligently allowed one of the residuary legatees to become a subscribing witness to the will, thus rendering the bequest to the witness void. Further, he negligently drafted the will to allow half of the estate to pass to the persons intended to be excluded. The court disallowed the legatee recovery as a third-party beneficiary of the contract between the testator and the attorney. Reasons for this decision were that the attorney owed the legatee no duty and that to maintain such an action would restrict the rights to make contracts by burdening them with obligations and liabilities to others which the parties would not voluntarily assume. Furthermore, a duty to the general public could only open doors to unlimited liability. Surely, if this court or others were to go one step beyond the parties to the contract in determining liability, there would be no reason why they should not go further by granting rights in a contract to third parties who were not parties to the contract.

Although sixty-two years later the Californian district court of appeal in *Mickel v Murphy*[37] followed very much the same reasoning as in *Buckley v Gray*,[38] in 1958 the supreme court of California in *Biakanja v Irving*[39] disapproved of both the *Buckley* and the *Mickel* cases. Here a notary public drafted a will which was signed by the testator but not in the presence of the required two witnesses. The two witnesses later signed the will but not in each other's presence as required by law. The plaintiff, by intestate succession, received only one-eighth of the estate and now claimed the difference between the amount distributed to her and the amount she would have received under the will had it been valid. Despite the absence of privity of contract she was allowed recovery.[40]

Since then Californian courts have at regular intervals confirmed the tortious liability of the negligent attorney *vis-à-vis* the prejudiced beneficiary.[41]

In Illinois the rule that no negligent liability exists in the absence of privity has also been greatly liberalised. In *Ogle v Fuiten*[42] the Illinois supreme court

33 *Lucas v Hamm* 368 US 987; Gilmore *The Death of Contract* (1974) 92.
34 *Biakanja v Irving* 320 P 2d 16; *Heyer v Flaig* 449 P 2d 161; *Licata v Spector* 225 A 2d 28.
35 *Biakanja v Irving supra*; *Lucas v Hamm supra*; *Heyer v Flaig supra*; *Licata v Spector supra*; *Donald v Carry* 45 ALR 3d 1177; *Glanzer v Shepard* 320 P 2d 16.
36 *supra.*
37 305 P 2d 993.
38 *supra.*
39 *supra.* See also 1958 *Harvard Law Review* 380–382; "Odd Notes From the U.S.A." 1958 *SALJ* 213-215; Boberg "New Torts From the New World: III" 1960 *SALJ* 371–373; Megarry 1965 *LQR* 478–481.
40 See text between notes 34 and 35.
41 *Lucas v Hamm supra*; *Heyer v Flaig supra*; *Hiemstra v Huston* 91 Cal Rptr 269, 45 ALR 3d 1198.
42 Case 6/29/84 in 53 LW 2058.

found a lawyer liable to beneficiaries or non-clients for negligence or breach of contract in the drafting of a will even though it was not evident from the express terms of the will that the non-clients were in fact the intended beneficiaries of the testator-lawyer relationship. It is interesting that the court did not even deem it necessary to specify the basis of the lawyer's liability. Be that as it may, the fact remains that in Illinois negligent drafters do not enjoy protection afforded by the privity theory.

Finally, the predominant view in the United States appears to be that a lawyer's liability to a prejudiced beneficiary is a matter of policy involving the balancing of various factors.[43] These factors generally highlight an accepted rationale for negligence liability, the issue of proximate cause and the moral blame attached to a defendant lawyer's conduct.

3 THE SOUTH AFRICAN POSITION

The duty owed by an attorney to his client stems from both contract and delict.[44] Assuming that an attorney who drafts a will owes his client's beneficiaries a duty too (and this will be shown below), there is no reason why this duty should not also be contractual and delictual. However, no real contractual bond exists between the drafter and the beneficiaries under the will and if such beneficiaries suffer a loss as a result of negligent drafting they have no contractual claim. At the very most, one could construe a contract between these parties along the lines of the American doctrine of third-party beneficiary contracts in order to justify a contractual claim. If one bears in mind, however, that one cannot work here with the construction of a contract for the benefit of a third party,[45] the success of a contractual claim would seem highly unlikely.

As indicated above, an attorney's delictual liability to his client is established law here,[46] as is the delictual recovery of damage arising from a negligent misstatement.[47] In our law there are also specific examples of the delictual liability of professionals for negligent misstatements to third parties.[48] Although these decisions revolve around negligent misstatements, there is no reason why principles embodied in these cases may not be extended to cover those situations where there is no negligent misstatement but merely a service which is rendered negligently. Should this extension be accepted, recovery of a beneficiary's loss by means of a delictual action would necessarily ensue. For this action to be

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43 *supra* n 34 and 35.

44 *Mouton v Die Mynwerkersunie* 1977 1 SA 119 (A); *Rampal v Brett, Wills and Partners* 1981 4 SA 360 (D); *Slomowitz v Kok* 1983 1 SA 130 (A); Van der Walt *Delict: Principles and Cases* (1979) 7–11; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1980) 484–486; Boberg *The Law of Delict* I (1984) 1–16.

45 For a general discussion of contracts for the benefit of third parties see De Wet and Yeats *Kontraktereg en Handelsreg* (1978) 92–99; Christie *The Law of Contract in South Africa* (1981) 254–266.

46 See n 44 *supra.*

47 *Perlman v Zoutendyk* 1934 CPD 151; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N); *Administrator, Natal v Bijo* 1978 2 SA 256 (N); *Administrateur, Natal v Trust Bank van Afrika Bpk supra.*

48 See for instance *Barlow Rand Ltd v Lebos* 1985 4 SA 341 (T) (attorney); *Zimbabwe Banking Corporation Ltd v Pyramid Motor Corporation (Pty) Ltd supra* (bank); For the liability of auditors to third parties see in general Pretorius *supra.*

successful, the general requirements of delict should be satisfied.[49] Of these, only the requirements of unlawfulness and damage pose problems and they therefore deserve closer attention.

3 1 Unlawfulness

Unlawfulness may be defined as the infringement of a legal right or the breach of a legal duty.[50] Certain categories of legal rights have developed and have been accorded separate status as a result of the legal convictions of the community. These recognised rights are real rights, personal rights, intellectual property rights and personality rights.[51] It is evident that an attorney's negligent will drafting does not amount to the infringement of any of the beneficiary's recognised rights. However, as indicated above, an act is not unlawful only if it infringes recognised classes of rights; unlawfulness is also vested in the breach of a duty recognised by the legal convictions of the community but not classified as an independent class.[52] To determine whether a duty has been breached, regard must first be had to whether public policy favours the existence of a duty and secondly to whether it has in fact been breached. The second question actually entails determining whether the conduct is negligent and falls beyond the scope of the present discussion.

Whether public policy favours the existence of a duty owed by an attorney to a beneficiary is a question which must be answered by balancing policy considerations in favour of the existence of a duty against those policy considerations excluding, restricting or modifying this duty.

3 1 1 Policy Considerations Favouring the Existence of a Duty

a *Subjective foreseeability or knowledge on the part of the attorney* This consideration raises two fundamental questions: Should subjective foreseeability play a role in the determination of a duty of care? If so, should it be the only consideration?

The answer to the first question is yes.[53] This is also reflected in the treatment of this consideration as a determination of a duty in this article.

The second question is somewhat more difficult. In *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd*[54] Booysen J does not accord exclusive status to subjective foreseeability when he states that

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49 For the requirements of a delict see in general Van der Walt *supra*; Van der Merwe and Olivier *supra*; Boberg *supra*.

50 Van der Walt *supra* 21; Boberg *Delict* 32.

51 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 381E–382A.

52 *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597.

53 *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd supra*; *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D); *Pilkington Brothers (SA) (Pty) v Lillicrap, Wassenaar & Partners* 1983 2 SA 157 (W). For debate on this point see: Neethling "Die Onregmatigheidsvereiste by Deliktuele Aanspreeklikheid weens die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies" 1983 *THRHR* 205; Basson "Die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies" 1983 *Codicillus* 8; Boberg *Delict* 144-149; Schoeman "Die Nalatige Veroorsaking van Suiwer Ekonomiese Verlies – Aanspreeklikheidsbegrensing" 1986 *THRHR* 287.

54 *supra* 384E–G.

> "in determining whether conduct is of such a nature as to be determined unlawful ... the Court should, *inter alia*, have regard to 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 reasonable practicable 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."

Like Booysen J, most of the writers also do not accord exclusive status to subjective foreseeability, even though they may differ from the courts as to which considerations are valid or more important.[55] Recently, however, a writer has argued that

> "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."[56]

Each case, however, must be decided on its own facts and merits and under (b) *infra* it will be argued that mere subjective foreseeability is insufficient to establish the existence of an attorney's duty to a beneficiary.

To return briefly to the consideration under discussion: The attorney actually foresees both the existence of the beneficiary and the latter's expectation. A beneficiary is always identified and/or named in a will and his expectation is quantified or quantifiable. This places both the beneficiary and his expectation in the attorney's actual contemplation.

This consideration is sufficiently flexible to incorporate most of the factors mentioned in *Biakanja v Irving*,[57] namely the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the closeness of the connection between the defendant's conduct and the injury suffered as well as the argument that allowing recovery would not create excessive liability for the attorney either in terms of the number of potential plaintiffs or the amounts involved.

b *Objective expectations of the profession and the general public* As indicated in (a) *supra* the mere fact that an attorney subjectively foresees specific harm to a specific plaintiff is not the only reason why a duty exists. A duty of care exists here for the attorney not only because of subjective foreseeability, but also because objectively his profession requires him to carry on a business of giving skilled advice. To do this the attorney must possess special skills or competences in the legal field. Therefore, in the eyes of the profession, the duty owed by an attorney to his client is paramount. It involves protecting and promoting his client's property in accordance with current professional standards. Equally important are the objective expectations from the public who place their trust in the legal profession.[58] Van den Heever JA verbalises these expectations in *Herchel v Mrupe*[59] where he states:

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55 Van der Walt "Nalatige Wanvoorstelling en Suiwer Vermoënskade" 1979 *TSAR* 145 154; Burchell "Case Law" 1982 *Annual Survey of South African Law* 171–176; Basson *supra* 12–14; Hartford "Some Problems on Unlawfulness in Aquilian Actions for Damages for Pure Economic Loss" 1984 *SALJ* 42 45 49; Boberg *Delict* 146–149.

56 Schoeman *supra* 33.

57 *supra*.

58 By way of analogy see Neethling and Potgieter "Nalatige Wanvoorstelling as Deliktuele Aksiegrond" 1980 *De Rebus* 179 180.

59 1954 3 SA 464 (A) 488C–D.

> "[C]ertain functionaries such as sworn appraisers, notaries and the like have had a kind of patent of credibility and efficiency conferred upon them by public authority. Members of the public are invited and entitled to repose confidence and trust in the acts of such persons performed in their respective capacities. If the event should prove that such confidence and trust were misplaced, it cannot be said of the persons who trusted, '*de se queri debet*'."

The duty owed to a beneficiary, on the other hand, is real but different. An attorney does not have to act in the beneficiary's interests but merely owes it to such beneficiary to carry out the testator's instructions properly. It might well be that an attorney actually subjectively foresees that by carrying out the testator's instructions properly a potential beneficiary may be prejudiced. In spite of this foreseeability, it cannot be argued here that the attorney has the duty to promote the beneficiary's interests by creating opportunities for a potential financial gain. In short, the relationship between the attorney and the beneficiary is not merely coincidental but flows directly from the attorney-testator relationship. If this relationship is healthy no problems are envisaged.

3 2 1 Policy Considerations Excluding, Restricting or Modifying a Duty

Three considerations come to mind here:

a The imposition on an attorney of a duty to a beneficiary would conflict with an attorney's duty to his client.[60] The difference between an attorney's duty to his client and the beneficiary has been discussed above.[61] It appears from that discussion that this consideration is in essence futile.

b To allow the beneficiary's action would undermine the *ratio* of the Wills Act.[62] This act lays down the formalities for the execution of a valid will. The primary reason for laying down the formalities statutorily is to prevent fraud and thus ensure the authenticity of a will. However, in the case under discussion, one usually finds that the authenticity of the will is never in issue. It is usually accepted that the will is that of the testator and reflects the true intention of the testator. The beneficiary is no longer competent to benefit under this will merely because of non-compliance with some formality or other prescribed by the statute. Because the Wills Act is irrelevant in this case, the circumvention of its *ratio* as a policy consideration excluding the attorney's duty is likewise irrelevant and unfounded.

c To allow recovery for pure economic loss would lead to a multiplicity of actions. The courts maintain that this consideration militates against recovery for pure economic loss.[63] However, in this particular case this consideration is irrelevant. The prejudiced party is always identified in the will or at least identifiable from its provisions. Furthermore, the quantum of loss is also always

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60 Van Zyl *The Theory of the Judicial Practice of South Africa* (1902) 733–762; Lewis *Legal Ethics* (1982) 15 49–50 89. See also the arguments raised for the excipients in the *Barlow Rand Ltd v Lebos* case *supra* 345F–G.

61 3 1 1(b).

62 Act 7 of 1953.

63 *Greenfield Engineering Works (Pty) Ltd v NKR Construction supra* 916H–917B; *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 3 SA 55 (Z) 65D; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd supra* 386D; *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners supra* 172F; *Zimbabwe Banking Corporation v Pyramid Motor Corporation supra* 568D.

determined or determinable. There is therefore no possibility of an avalanche of claims from all quarters of society.

3 1 3 Conclusion

From a balance of the available factors it appears that in all probability public policy favours the existence of an attorney's duty to a beneficiary and a correlative right for the beneficiary. Any act by an attorney which breaches such duty must then necessarily be termed unlawful.

3 2 Damage

Our law allows recovery for pure economic loss.[64] However, whether a beneficiary's loss of expected inheritance in particular constitutes a juridically recoverable loss (damage) is an open question. It cannot be doubted that in a colloquial sense the beneficiary has suffered a loss in that his patrimonial position would have been better had he received the benefit, than it actually is; otherwise no initial claim would have been instituted.

The problem, however, lies with the juridical meaning of "loss." One line of argument holds that a beneficiary only has a *spes successionis* until the testator dies and subsequently suffers no damage if this *spes* does not materialise upon the testator's death as a result of an attorney's negligent drafting.[65] To raise this argument, though, is to put the cart before the horse. Surely, the whole issue is precisely to determine whether this loss ought to be recognised as damage. Another line of argument is that in a particular sense an attorney's negligence does not cause damage but rather a transfer payment. The plaintiff's loss is balanced by an equal gain to another coincidental beneficiary. Proponents of this approach then suggest that a proper solution would be to allow disappointed beneficiaries a right of action against unintended beneficiaries or to empower courts to order that a will take effect in accordance with the testator's intention.[66]

A third line of argument holds that the determination of what actually constitutes damage is really a policy-orientated question.[67] A loss is juridically recoverable when society determines that it should be. Should this argument be adopted one must look at the relationship between the parties and then say as a matter of policy on whom the damage should fall. This entails considering various *indicia* or refinements of these not unlike those which delineate unlawfulness. Apart from the fact that the attorney undertakes to confer a benefit upon the beneficiary and that the attorney has a direct contemplation of both the identity of the beneficiary and the extent of the latter's expectation, the fact that the testator makes no attempt to alter his will before his death although he retains the right to do so, should be a further indication to the attorney that the

64 Boberg *Delict* 103–149.

65 Reinecke *supra* 55–56; Sonnekus 1981 *TSAR* 175–176.

66 Bishop "Economic Loss in Tort" 1982 2 *Oxford Journal of Legal Studies* 1 28–29; Caney 1983 *LQR* 346 348; Lunz *supra* 288–289; See n 67 *infra*.

67 Reinecke *supra* 32 55; Reinecke "Versekering Sonder Versekerbare Belang?" 1971 *CILSA* 193–223; 324–338 336. For English case law on this aspect see: *Rondel v Worsley* 1967 3 All ER 993; *Home Office v Dorset Yacht Co Ltd* 1970 2 All 294; *SCM (UK) Ltd v W J Whittall & Son Ltd* 1970 3 All ER 345; *Launchbury v Margans* 1971 1 All ER 624; *Dutton v Bognor Regis Building Co supra* 462 474d–f, 480c–418d, 489f–490e; *Ross v Caunters supra* 598f.

testator wishes to give effect to his will. Finally, it ought to be remembered that after the testator's death the beneficiary's potential benefit is transformed into an assured benefit and the loss of an assured benefit constitutes damage.

This argument, however, promotes duplication of policy testing and in order to avoid such duplication it is preferable that, once it is determined that an attorney owes a beneficiary a duty of care, any loss emanating from a breach thereof constitutes damage. Whether this damage is ultimately recoverable depends, of course, on the fulfilment of all the other requirements of a delict.

4 CONCLUSION

A study of the Anglo-American positive law reveals that courts favour the existence of a duty owed by an attorney to a beneficiary and the principle that breach thereof ought to culminate in tortious recoverability. Although the common-law doctrine of a duty to take care is foreign to our legal culture, it has been received in South African law and certain pointers or criteria determining the existence of a duty in a specific case ought nevertheless to serve as trendsetters for our law.[68] By relying on these pointers it is possible to establish that in South African law, too, it would appear that public policy favours the existence of a duty owed by an attorney to a beneficiary. Any breach of this duty constitutes unlawful conduct and any loss emanating from this unlawful conduct amounts to damage. This damage is recoverable on the basis of delict if all the other requirements for a delict apart from unlawfulness and damage are met.

Although the temptation to call for regulatory legislation may be great, the principles of Roman-Dutch law are sufficiently flexible to cater for this emerging issue – at least in so far as delictual recoverability is concerned. As far as the desirability of legislation empowering courts to condone faulty wills is concerned, this falls beyond the scope of this article but has already enjoyed the attention of other writers.[69]

A topic which also falls outside the scope of this article but which is nevertheless of interest is the question whether an attorney may by contract with his client exclude liability for negligence, and if so, whether this disclaimer is effective against the beneficiary too.[70] One is tempted to say that anyone professing a particular skill or knowledge ought not to be allowed to disclaim responsibility to his client for negligence in the exercise of that skill. *A fortiori* no disclaimer ought to be allowed to operate against a beneficiary either, specifically because no party ought to be allowed to curb a third party's right of action without the latter's consent.

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68 *Administrateur, Natal v Trust Bank van Afrika Bpk supra* 833C–834E; *Kern Trust (Edms) Bpk v Hurter* 1981 3 SA 607(C) 614H.

69 Van der Westhuizen "Ons Stelsel van Testamente en Boedelbereddering" 1975 *De Rebus* 167 172; Van Schalkwyk *supra* 63 65 68–70; Sonnekus 1981 *TSAR* 172 176; Sonnekus "Kidwell v The Master 1983 1 SA 509 (OK)" 1983 *TSAR* 188 193; *Suid-Afrikaanse Regskommissie* Projek *supra* 51–56.

70 Tetterborn "Bad Advice, Third Parties and Limitation of Liability" 1982 *Northern Ireland Legal Quarterly* 256; Caney 1983 LQR 346 347. For the role of disclaimers in the auditor's profession see Pretorius *supra* 308–319 542–544.

'n Regsteoretiese ondersoek na die begrip "openbare belang"*

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SUMMARY

A Definition of the Concept of "Public Interest"

The concept of "public interest" is applied in all branches of law. It is inadequately defined in South African statute as well as case law and especially in the context of public law. This article is an attempt to define the concept of "public interest." It does not primarily deal with individual or sectional (for example the state's or a political party's) interests but with the interests of individuals as all. Different interests, for example state security, administrative, strategic and social interests are referred to as public interest. Public interest can be defined as a collective noun for a variety of economic, strategic, administrative, social and legal interests that have emerged throughout the history of a state as being worthy of legal protection, and are maintained in the interest of the state. These interests also uphold the balance in a community between the conflicting interests of individuals in their relation to the state. A philosophical investigation highlights the need for a proper definition of these interests.

1 INLEIDING

Die "openbare belang" is 'n begrip wat in feitlik al die vertakkinge van die reg gebruik word.[1] Dit is daarom vreemd dat dié begrip tot nog toe so ontoereikend geformuleer is. Die begrip word nie deur almal dieselfde verstaan nie en dit word gewoonlik heel kasuïsties na gelang van elke geval (privaatregtelik of publiekregtelik) omskryf.

Die "openbare belang" het reeds in die gevalle waar dit in die privaatreg ter sprake kom 'n bepaalde betekenis verkry. In hierdie artikel sal egter gepoog word om 'n definisie te gee van die openbare belang soos dit in die publiekregtelike sin gebruik word. Dit word gedoen deur verskillende belange te identifiseer wat gewoonlik as die openbare belang getipeer word. Sodanige identifisering is ook vir die privaatreg van belang in die gevalle waar 'n persoon se privaatbelange deur publiekregtelike optredes geraak word.

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1 Sien Du Plessis *The Interpretation of Statutes* (1986) 67–68.

2 DIE "ONGEDEFINIEERDE OPENBARE BELANG"

Beroepe op die openbare belang word dikwels gebruik om bepaalde politieke of staatsoptredes te regverdig, omdat aanvaar word dat die staat in die belang van al sy inwoners optree.[2] Dit is 'n baie wye begrip[3] wat van tyd tot tyd, van plek tot plek en van omstandigheid tot omstandigheid kan verskil en waarvan die inhoud saam met die veranderde waardes van die gemeenskap wissel.[4] In gedinge moet die hof dikwels bepaal wat die "openbare belang" in 'n gegewe geval is.[5] Die "openbare belang" sluit die belange van meer as een persoon in en handel oor die belange van al die inwoners van 'n staat: die "individuals as all."

Die "openbare belang" kom in verskillende gevalle ter sprake waar die staat sake van gemeenskaplike belang behartig.[6] Dit het op die gemeenskap as 'n geheel betrekking.[7] Die individu se belange word nie opgehef nie, maar word saam met dié van ander beskerm ten einde vreedsame naasbestaan in 'n ordelike samelewing moontlik te maak.[8]

Die belange van die een groep persone sal nie noodwendig met dié van ander groepe ooreenkom nie, maar dit gee nog nie aan 'n bepaalde groep die reg om sy seksionele eiebelang ("self-interest") bo die openbare belang ("public interest") te stel nie. 'n Individu kan nie losgemaak word van sy verantwoordelikhede teenoor die gemeenskap nie. Hy moet ander altyd in ag neem.[9]

3 DIE BELANGE VAN DIE "INDIVIDUALS AS ALL"

Daar moet 'n balans tussen die belange van die individue as 'n geheel ("individuals as all") en die vryhede van elke afsonderlike individu as individu gehandhaaf word.[10] Waar 'n individu in konflik met die samelewing kom, is sy beskermingswaardige belange meestal persoonlik van aard en het dit onder andere betrekking op sy fisiese vryheid, sy privaatheid en die wil om afgesonderd van ander te lewe.[11] Elke individu moet die vryheid hê om sy amp en verantwoordelikheid as mens uit te leef. Hy het nie totale vryheid om dit te doen nie omdat sy optrede deur die vryhede en regte van ander individue beperk word.[12] Die individu se privaatheids- en uitlewingsbelange kan in konfliksituasies tussen (individuele) reg en (publieke) orde beperk word. In hierdie gevalle moet 'n fyn

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2 Sien o a Flathman *The Public Interest* (1966) 4; Berry *Lobbying for the People* (1977) 6.
3 Du Toit *Straf in Suid-Afrika* (1981) 92; Hiemstra *Suid-Afrikaanse Strafproses* (1981) 404.
4 *Stanley v Central News Agency* 1909 TS 488 491; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 422; *Verslag van die Kommissie van Ondersoek na die Massamedia* (1981) 935; Flathman 442.
5 Du Toit 92; McQuoid-Mason "Public Interest and Privacy" 1973 *SALJ* 256.
6 Sien o a Du Plessis *Interpretation of Statutes* 64; Du Toit 92; Krabbe *De Moderne Staatsidee* (1915) 156 161–164; Neethling *Persoonlikheidsreg* (1985) 241; Snyman en Morkel *Strafprosesreg* (1985) 319; *Kommissie Massamedia* 935 1282; Van der Merwe en Olivier 422; Van der Vyver *Die Beskerming van Menseregte* (1975) 39–40.
7 Du Toit 92.
8 Sien ook Du Plessis *Interpretation of Statutes* 65–66; "Thoughts on Law, Order and State Security" 1985 *TSAR* 236.
9 Flathman 37–39; Du Plessis *Interpretation of Statutes* 64; Addisson *Censorship of the Press in South Africa during the Angolan War: A Case Study of News Manipulation and Suppression* (1980) 202–203.
10 Du Plessis *Interpretation of Statutes* 64.
11 Snyman "Is Publieke Figure Openbare Besit?" 1984 *Woord en Daad* 19; Mathews *Law, Order and Liberty* (1971) 275.
12 Mathews *Law, Order* 275–276.

balans gehandhaaf word en behoort die redelikheidskriterium aangewend te word om 'n middeweg tussen die verskeidenheid belange te vind.[13]

Die individuele belang is die vryheid van 'n persoon om sy amp uit te oefen en sy verantwoordelikhede te volvoer soos afgebaken deur die vryhede van ander individue en die beskermingswaardige belange van die gemeenskap. Die individu se "persoonlike" regte word meestal privaatregtelik teen aantasting beskerm. Waar die belange van "individuals as all" egter geraak word, word hulle regte kollektief deur openbare middele beskerm. Daarom het die individuele belang raakpunte met die openbare belang. Hierdie beskerming van kollektiewe belange deur openbare middele verleen 'n openbare sy aan die beskerming van die individu se belange. Sy individuele belange word nou as't ware in die openbare belang opgeneem en beskerm. Dit ontneem hom egter nie sy privaatregtelike remedies nie.

4 STATUTÊRE BESKERMING VAN "INDIVIDUALS AS ALL"

Sommige wette lê die staat en bepaalde kategorieë persone sekere verpligtinge op in die openbare belang — wat individuele belange insluit. Dit moet duidelik uit sodanige wette self blyk dat dit die bedoeling van die wetgewer is.[14] Die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsberoepe 56 van 1974 beskerm individue byvoorbeeld teen die optredes van ongeregistreerde medici, omdat die aktiwiteite van sodanige persone vir individue en gevolglik ook vir die gemeenskap bepaalde risiko's inhou.[15]

Individuele belange in die ekonomie,[16] in die beskerming teen die staat se hantering van potensieel gevaarlike dinge soos elektrisiteit[17] en in die beveiliging van openbare paaie teen dronk motoriste[18] is ook voorbeelde van individuele belange wat kollektief deur middel van wetgewing beskerm word. In al hierdie gevalle word openbare middele gebruik, maar die belange van die individu bly op die voorgrond omdat hy regstreeks geraak kan word. Sy beskerming kan egter nie losgemaak word van die beskerming van al die ander individue nie.

In bepaalde gevalle vind 'n klemverskuiwing plaas. Die belange, hoewel hulle individue en die gemeenskap raak, word op maatskaplike en sosiale gronde geregverdig. Hierdie gronde word dan as norm gestel. Die gemelde belange kan van tyd tot tyd en van die een gemeenskap na die ander wissel en daar kan dus nie 'n vaste inhoud aan hulle verleen word nie. Voorbeelde van wetgewing wat hierdie belange beskerm, is onder andere die Kinderwet 33 van 1960, die Wet op Menslike Weefsel 65 van 1983 en die Wet op Publikasies 42 van 1974.

5 HOE WORD DIE "OPENBARE BELANG" BEPAAL?

Die toets wat aangewend word, het sowel 'n objektiewe as 'n subjektiewe kant. Die belange van die een individu word teenoor dié van 'n ander afgeweeg om te bepaal of enige regte aangetas is (subjektiewe sy). Hiermee word egter nie

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13 Neethling 242; Mathews *Law, Order* 276; sien ook *Graham v Ker* 1892 AD 185.
14 Van der Walt *Delict: Principles and Cases* (1979) 38–39; *Ellis v Vickerman* 1954 3 SA 1001 (K).
15 *S v Posel* 1977 4 SA 476 (N) 492–493.
16 *African Life Assurance Society v South African Mutual Life Assurance Society* 1909 AD 102.
17 *PMB Armature Winders v Pietermaritzburg City Council* 1981 2 SA 129 (N) 133–134.
18 *S v Kent* 1981 3 SA 23 (A) 29.

volstaan nie, want daar moet ook 'n objektiewe oordeel gevel word om te bepaal of die skending van die betrokke belange met die gemeenskap se oordeel strook of nie. Dit kan in bepaalde gevalle gebeur dat dit blyk dat 'n persoon, subjektief beoordeel, nie op 'n bepaalde wyse moes opgetree het nie. Wanneer dit objektief beoordeel word, mag die gemeenskap egter die optrede goedkeur. In so 'n geval sou die optrede nie strydig met die openbare belang wees nie. Beoordeling word uiteraard bemoeilik deurdat uitgangspuntverskille tussen mense hulle oordeel kan beïnvloed. Die gemeenskap se opvatting moet eers uitkristalliseer alvorens 'n oordeel gevel kan word.[19] Dit veroorsaak dat dit nie altyd moontlik is om die "openbare belang" te definieer nie maar dié begrip kan nie daarom as toetssteen verwerp word nie.[20]

Flathman[21] definieer die "openbare belang" as

> "a general commendatory concept used in selecting and justifying public policy. It has no general or descriptive meaning applicable to all policy decisions, but can be determined for particular cases."

Dit word vasgestel deur

> "reasoned discourse which attempts to relate the anticipated effects of a policy to community values and to test that relation by formal principles."

Hieruit blyk dat dit as 'n versamelnaam vir faktore wat op die welsyn van die samelewing betrekking het, beskou kan word.[22] Die staat kan vanweë sy grotere wilsmag voorskrifte neerlê wat die regte en vryhede van sy inwoners beperk. Sodanige ingrype word meestal aan die hand van die "openbare belang" geregverdig.[23] Die volgende is besondere aspekte van die "openbare belang:"

* Staatsveiligheid;[24]
* Ekonomiese belange;[25]
* Individuele belange as kollektiewe belange;[26]
* Regsbelange;[27]

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19 Flathman 47.
20 Flathman 83.
21 82.
22 Du Toit 92.
23 Neethling 241; sien ook Snyman en Morkel 227.
24 Sien Du Plessis *Interpretation of Statutes* 67; Hiemstra 409; Neethling 241; Van der Merwe en Olivier 422; Van der Vyver 40; *Sigaba v Minister of Defence and Police* 1980 3 SA 535 (Tk) 541; *Ex parte Hathorn: in re OC Durban Prison Command* 1960 2 SA 767 (D) 771; *Rossouw v Sachs* 1964 2 SA 551 (A) 562; *Brink v Commissioner of Police* 1960 3 SA 65 (T) 68–69; *Minister van Justisie v Alexander* 1975 4 SA 530 (A) 544–545.
25 Lombard *National Security* (1978) 84–99; *Kommissie Massamedia* 1282; *Ellis v Vickerman* 1954 3 SA 1001 (K); *Govender v Sona Development Co (Pty) Ltd* 1980 1 SA 602 (D) 608; *Mabaso v Nel's Melkery (Pty) Ltd* 1979 4 SA 358 (W) 361–362; *Cape Town Municipality v Frerich Holdings (Pty) Ltd* 1981 3 SA 1200 (A) 1211; *Oertel v Director of Local Government* 1981 4 SA 491 (T) 504–505.
26 Du Toit 95; Neethling 242; Snyman 1984 *Woord en Daad* 18–19; Van der Walt 38; *S v Posel* 1977 4 SA 476 (N); *PMB Armature Winders v Pietermaritzburg City Council* 1981 2 SA 129 (N) 133; *S v Kent* 1981 3 SA 23 (A) 28; *African Life Assurance Society Ltd v South African Mutual Life Assurance Society* 1909 AD 102 105–106; *Graham v Ker* 1892 AD 185 187–188; *Mohamed v Kassim* 1973 2 SA 1 (RA) 10–11.
27 Baxter *Administrative Law* (1984) 725–754; *Nyangeni v Minister of Bantu Administration and Development* 1961 1 SA 547 (OK) 574H–575A; *Van der Linde v Calitz* 1967 2 SA 239 (A); *Schermbrucker v Klindt* 1965 4 SA 606 (A) 618–619; *S v Mulder* 1980 1 SA 113 (T) 120 122; *Economic Data Processing v Pentreath* 1984 2 SA 605 (W) 607; *Zillie v Johnson* 1984 2 SA 181 (W).

* Administratiewe belange;[28]
* Strategiese belange.[29]

5 1 Staatsveiligheid

Die begrip staatsveiligheid word onvoldoende in wetgewing, in die regspraak en ook in die literatuur gedefinieer.[30] Dit word soms gekoppel aan die spreuk *salus reipublicae suprema lex.*[31] Indien ongekwalifiseerd aanvaar sou word dat die staat die "hoogste reg" sou hê in alle gevalle waar dit om sy selfbehoud gaan, sou dit hom in 'n onaantasbare posisie plaas[32] en sou staatsoptrede nie getoets kan word nie.

In die gevalle waar staatsveiligheid in wetgewing ter sprake kom, word dit gewoonlik toutologies gedefinieer.[33] Waar dit in hofsake vermeld word, word aanvaar dat die individu se vryhede hom ontneem kan word indien die staat in "extreme emergency" soos ten tyde van oorlog, noodtoestand, krygswet en gewelddadige opstande optree.[34]

Die howe ag hulself oor die algemeen gebonde aan die beslissings van die funksionarisse van die uitvoerende gesag oor wanneer daar 'n "extreme emergency" bestaan en probeer as 'n reël nie self bepaal of die oordeel geregverdig is of nie.[35] Artikel 29 van die Wet op Binnelandse Veiligheid 74 van 1982 sluit byvoorbeeld die howe se oordeel by voorbaat uit sodat die optrede van die betrokke uitvoerende funksionarisse hoegenaamd nie getoets kan word nie. Daar kan nie sonder meer aanvaar word dat die voormelde funksionarisse se oordeel altyd juis is nie. Trouens, omdat staatsveiligheid nie behoorlik gedefinieer word nie, kan feitlik enigiets wat vir die uitvoerende gesag ongemaklik is daaronder tuisgebring word.[36] Dit skep 'n gulde geleentheid vir uitvoerende magsmisbruik.

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28 Baxter 726; Van der Merwe en Olivier 442; *Van der Linde v Calitz* 1967 2 SA 239 (A); *Nyangeni v Minister of Bantu Administration and Development* 1961 1 SA 547 (OK); *Durban City Council v Glenore Supermarket and Café* 1981 1 SA 470 (D) 478–479; *Hayes v Baldachin* 1981 1 SA 749 754 e v; *Association of Rhodesian Industries v Brookes* 1972 2 SA 680 (R) 196.

29 Louw *National Security* (1978) 25; Lombard 84–99.

30 Du Plessis 1985 *TSAR* 233; "Staatsveiligheid in Teoreties-Prinsipiële Perspektief" 1981 *KOERS* 250–258; *Verslag van die Kommissie van Ondersoek na Veiligheidswetgewing* (1981) 5.

31 Van der Vyver 141; Du Plessis 1981 *Koers* 249; Venter "Salus Reipublicae Suprema Lex" 1977 *THRHR* 233–252; Wiechers "Wette alleen geen Waarborg vir Vrede" 1982 *Beeld* (1982-03-10) 15; *Ex parte Hathorn: in re OC Durban Prison Command* 1960 2 SA 767 (D) 771.

32 Du Plessis 1981 *Koers* 249.

33 Sien o a die Wet op Beveiliging van Inligting 84 van 1982; die Wet op Binnelandse Veiligheid 74 van 1982; die Verdedigingswet 44 van 1957; die Wet op Openbare Veiligheid 3 van 1953. Sien ook Du Plessis 1981 *Koers* 250–251 256; 1985 *TSAR* 238.

34 Sien *Sigaba v Minister of Defence and Police* 1980 3 SA 535 (Tk) 541–542; *Brink v Commissioner of Police* 1960 3 SA 65 (T) 68–69; *Krohn v Minister of Defence* 1915 AD 191 196; *Rossouw v Sachs* 1964 2 SA 551 (A) 562–563; *Ex parte Hathorn: in re OC Durban Prison Command* 1960 2 SA 767 (D) 771–772. Sien ook Van der Vyver 40; Wiechers 1982 *Beeld* (1982-03-10) 15; *Kommissie Veiligheidswetgewing 7–8*; Internationale Juristen-Kommission *Rechtsstaatlichkeit und Menschenrechte* (1967) 17–19.

35 *Minister van Justisie v Alexander* 1975 4 SA 530 (A) 546; *Sigaba v Minister of Defence and Police* 1980 3 SA 535 (Tk) 542–544; *Ex parte Hathorn: in re OC Durban Prison Command* 1960 2 SA 767 (D) 772.

36 Du Plessis 1981 *Koers* 256–257; Calvacoressi *Freedom to Publish* (1980) 29; Van der Vyver 72; sien ook die minderheidsuitspraak van r Corbett in *Minister van Justisie v Alexander* 1974 4 SA 530 (A) 546 548–550.

Hoe kan staatsveiligheid gedefinieer word? Daar bestaan verskillende benaderings in die literatuur. Daar is diegene wat aan die individu 'n reg op staatsveiligheid toeken. Die staat moet toesien dat daar nie situasies van uiterste gevaar vir die individu ontstaan nie. Wanneer dit wel gebeur, is die staat gemagtig om op individuele vryhede en regte inbreuk te maak.[37]

Venter[38] beskou staatsveiligheid as 'n toestand wat die objek van 'n publieke subjektiewe reg van die staat in verhouding tot ander regsubjekte kan wees. Die voortbestaan van die heersende staatsregtelike orde en die handhawing van die regsorde is onmiskenbare ordeningswaardige objekte vir die staatlike regspersoon. Hy omskryf egter nie staatsveiligheid nie. In 'n ander konteks definieer hy staatsveiligheid negatief, naamlik dat dit die ideale toestand is waar daar geen bedreiging vir die staat ophande is nie; dit is die voorbestaan van die staat soos dit regtens gekonstitueer is.[39] Ook Louw[40] definieer staatsveiligheid negatief. Hy sien dit as 'n toestand van vrywees van uitwendige fisiese bedreigings. Dit kan egter ook 'n verskeidenheid ander toestande behels. Ackermann[41] definieer staatsveiligheid as die onaantasbaarheid van "die staat se vermoë en vasberadenheid om buitelandse dwang te weerstaan en binnelandse wanorde te beheer."

Dit blyk uit hierdie definisies dat staatsveiligheid eers ter sprake kom wanneer daar 'n bedreiging ontstaan.[42] Tog maak almal melding van die voortbestaan van die staat. Die staat bestaan ten spyte van die wisseling van regerings of klein verskuiwings van die landsgrense voort. Dit bestaan immers uit meer as 'n regering — dit sluit ook inwoners en grondgebied in.[43]

Daar moet met Du Plessis[44] se omskrywing van staatsveiligheid saamgestem word. Staatsveiligheid is 'n toestand wat berus op die harmoniëring van verskillende ordes in die staat, naamlik die basis-, doels- of beleidsorde. Die basisorde is die steierwerk waarop die staatlike organisasie berus — die regsorde. Die primêre doelsorde het die ordelike saamleef van subjekte binne 'n bepaalde grondgebied ten doel. Elke staat rig sy organisasie volgens 'n ander plan in — dit is die beleidsorde.[45] Wanneer die harmonie tussen hierdie ordes versteur word, word staatsveiligheid bedreig. Die bedreiging bestaan dus nie van die begin af nie. Wanneer harmonie bestaan, sal afhang van die stand van sake in elke staatsgemeenskap.[46]

Daar bestaan egter nog probleme. Staatsveiligheid hang steeds van elke staat se eie ontwikkeling af. 'n Staat is polities, ekonomies en militêr afhanklik van

37 Pienaar *Perssensuur en Staatsveiligheid* (1968) 5; Wiechers 1982 *Beeld* (1982-03-10) 15; Mathews *Freedom and State Security in the South African Plural Society* (1971) 1 14.
38 *Die Publiekregtelike Verhouding* (1985) 161–163.
39 Venter "Ondermyning, Ondervraging en Hersiening Volgens die Rabie-Verslag" 1982 *Woord en Daad* 8.
40 10; sien ook Rautenbach *Die Rule of Law en Staatsveiligheid* (1977) 4–5; Potgieter *Kommissie van Ondersoek na Aangeleenthede Betreffende die Veiligheid van die Staat* (1970) 7–8.
41 *Die Reg insake Openbare Orde en Staatsveiligheid* (1984) 1.
42 Sien ook Du Plessis 1985 *TSAR* 240–241 en 1981 *Koers* 257–258 vir ander kritiek.
43 Sien Du Plessis 1985 *TSAR* 241-242; Ackermann 1; Rautenbach 5.
44 Du Plessis 1981 *Koers* 259–261; 1985 *TSAR* 242–243.
45 Sien Du Plessis 1979 *Koers* 342–343; 1985 *TSAR* 242–243.
46 Du Plessis 1981 *Koers* 264; 1979 *Koers* 365–352; Louw 10.

ander state[47] en dit bring mee dat die beleidsorde voortdurend aangepas moet word. Die harmonie tussen die verskillende ordes kan alleen gehandhaaf word indien die beleidsorde op regsgesag, en nie ideologiese of geloofsgesag nie, berus.[48] Die staat kan self 'n bedreiging vir sy eie veiligheid inhou indien hy toelaat dat sy beleidsorde verkeerdelik die ander ordes gaan oorwoeker.

5 2 Ekonomiese Belange

Die openbare belang kom ter sprake waar die gemeenskaplike ekonomiese belange van die gemeenskap in gevaar gestel word. Ekonomiese sabotasie raak die gemeenskap in sy geheel.[49]

Sekere ekonomiese beplanningstrategieë raak ook die hele gemeenskap of ten minste 'n groot deel daarvan. Die bedingingsmag van persone, kontrakteervryheid,[50] die aanwending van grond,[51] verkrygende verjaring ten gunste van die staat en laasgenoemde se optrede as skuldeiser[52] raak die ekonomiese belange van die gemeenskap. In die ekonomiese verhouding tussen werkgewer en werknemer kom die openbare belang ook ter sprake. Dit sou byvoorbeeld nie in die openbare belang wees om 'n werknemer op 'n onwillige werkgewer af te dwing nie. In hierdie geval word sowel die belange van die individu as die gemeenskap getref.

In verskeie wette word algemene ekonomiese belange soos die sake van persone, firmas en ondernemings in die algemeen beskerm sodat hulle ekonomiese bedingingsposisie nie benadeel word nie. Voorbeelde hiervan is die Wet op die Suid-Afrikaanse Reserwebank 29 van 1944, die Wet op Arbeidsverhoudinge 28 van 1956, die Loonwet 5 van 1957 en die Wet op Basiese Diensvoorwaardes 3 van 1983.

Hierdie wetgewing handel oor die handhawing van die ekonomiese bestel waar die aantasting van individuele belange dié van die gemeenskap ook raak.

Ekonomiese belange kan omskryf word as daardie handelsaangeleenthede waarin die individu en die gemeenskap in belang van die welvaart van die land optree en wat deur inbreukmaking daarop in gevaar gestel word.

5 3 Strategiese Belange

Die staat het middele nodig om sy posisie as staat, internasionaal sowel as binnelands, effektiek te bestendig en te handhaaf. Hierdie middele is in vredes- en oorlogstyd van ewe veel belang. Die staat is trouens soms verplig om die gewone ekonomie te gebruik om staatsveiligheid te handhaaf. Onderhandelinge oor die aankoop, ontwikkeling en ontwerp van beskermingsmiddele soos kernenergie, petroleumprodukte, olie en krygstuig word as hoogs sensitiewe aangeleenthede beskou.[53] Dit word onder andere deur die Wet op Kernenergie 93 van

47 Louw 10; sien ook Rautenbach 6.
48 Sien Du Plessis 1979 *Koers* 266 e v.
49 Du Toit 95.
50 *Govender v Sona Development Co (Pty) Ltd* 1980 1 SA 602 (D) 608–609.
51 *Cape Town Municipality v Frerich Holdings (Pty) Ltd* 1981 3 SA 1200 (A) 1211.
52 *Oertel v Director of Local Government* 1981 4 SA 491 (T) 504–505.
53 Lombard 87–90.

1982, die Wet op Petroleumprodukte 120 van 1977, die Wet op die Staatsoliefonds 38 van 1977 en die Wet op Krygstuigontwikkeling 57 van 1968 beskerm.[54]

Strategiese belange is daardie aangeleenthede wat die beskerming van middele wat die behoud van die staat binne- en buitelands verseker, tot inhoud het. Die wetgewing wat tans strategiese belange beskerm, het 'n sterk ekonomiese kleur en daarom kan die behoud van die landsekonomie ook as 'n strategiese belang aangemerk word.

5 4 Administratiewe Belange

'n Staat kan alleen behoorlik funksioneer deur middel van 'n effektiewe administrasie of uitvoerende staatsgesag.[55] Daar word trouens 'n hoë premie op die integriteit, bekwaamheid en bestuursvermoë van staatsamptenare geplaas.[56] Aan die ander kant moet die publiek teen wanadministrasie en die *ultra-vires*- optrede van amptenare beskerm word.[57]

Die hoof van 'n staatsdepartement kan hom byvoorbeeld op privilegie beroep wanneer daar 'n aansoek om insae in die dokumente van daardie departement gebring word en sodanige insae staatsveiligheid of buitelandse betrekkinge kan benadeel.[58] Die staatsadministrasie dring gewoonlik daarop aan dat hul belange beskerm moet word omdat dit (a) doeltreffendheid en (b) gelyke behandeling bevorder, (c) die geleentheid bied om die publiek se vertroue te wen en (d) die goeie beeld van die departement uitbou.[59]

Die administrasie moet in staat wees om die verskillende bedrywighede van die staat te monitor en aan te pas ten einde belangebotsings te vermy.[60] Wanneer beslissings van hierdie aard geneem word, moet die openbare belang, en nie die belange van die staatsdepartement as sodanig nie, voorrang geniet. Die openbare belang mag dalk vereis dat anders opgetree moet word as wat beoog is.[61]

Die belange van die staatsadministrasie en ander openbare instansies word onder andere in die Wet op Basiese Diensvoorwaardes 3 van 1983, die Wet op Mannekragopleiding 56 van 1981, die Wet op die Ontwikkeling van Swart Gemeenskappe 4 van 1984 en die Wet op Huurbeheer 80 van 1976 beskerm. Die behoorlike funksionering van die staat kan dan as administratiewe belang aangemerk word.

5 5 Regsbelange

In *Van der Linde v Calitz*[62] verklaar regter Steyn dat "onbelemmerde regsadministrasie . . . ook 'n saak van die hoogste openbare belang" is. Die goeie en ordelike handhawing van die reg is in die belang van die individu sowel as die

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54 sien ook Lane e a *Stuart's The Newspaperman's Guide to the Law* (1986) 128–144; Mathews *The Darker Reaches of Government* (1978) 104–105; Bierman *Suid-Afrika en die Suidelike Halfrond* (1972) 3–4.

55 *Van der Linde v Calitz* 1967 2 SA 239 (A) 261.

56 Van der Merwe en Olivier 422.

57 Baxter 726; *Van der Linde v Calitz* 1967 2 SA 239 (A) 261F–261G.

58 Sien Baxter 751; *Van der Linde v Calitz* 1967 2 SA 239 (A) 260; *Association of Rhodesian Industries v Brookes* 1972 2 SA 680 (R).

59 Vaughn 7; *Van der Linde v Calitz* 1967 2 SA 239 (A) 256.

60 Vaughn 34.

61 *Durban City Council v Glenore Supermarket and Café* 1981 1 SA 470 (D) 478–479; *Hayes v Baldachin* 1981 1 SA 749 (ZA) 755.

62 1967 2 SA 239 (A).

gemeenskap. So byvoorbeeld word hofsake in die openbaar gehou sodat die publiek kan help toesien dat behoorlike regspleging geskied.[63]

Regsbelange word gekoppel aan administratiewe belange. Beslissings wat deur administratiewe liggame of persone gemaak word, moet deur die hof getoets word. Dit is in regsbelang dat administratiewe optredes beoordeel kan word ten einde te bepaal of die individuele of gemeenskapsbelange nie benadeel word nie.[64]

Individue word ook in openbare belang deur die reg beskerm. 'n Getuie by 'n kommissie van ondersoek hoef byvoorbeeld net op die vrae te antwoord wat op die openbare belang betrekking het. Daardeur word die ondervraging afgegrens.[65] In artikel 152 van die Strafproseswet 51 van 1977, artikel 5(11)(a) van die Kinderwet 33 van 1960, artikel 5(1) van die Die Wet op Onderhoud 23 van 1963 en artikel 5 van die Algemene Regswysigingswet 68 van 1957 word voorsiening gemaak vir die beskerming van getuies en beskuldigdes in strafsake.[66]

Die ordening van die gemeenskap deur die reg skep 'n toestand waar daar in vrede en harmonie geleef kan word. Om dit te verseker, moet die aansprake van individue en die gemeenskap beskerm word. Hierdie aansprake kan regsbelange genoem word.

6 OMSKRYWING VAN DIE OPENBARE BELANG

Die individu het 'n reg om sy wesenlike belange te beskerm. Indien hy egter hierdie belange onbeperk en onbegrens kan beskerm en die regte wat daaruit voortvloei, wil uitoefen, sal hy in botsing met soortgelyke belange van ander individue en die staat kom. Die openbare belang word as maatstaf gebruik om die balans tussen aldus botsende belange te handhaaf.

Die openbare belang kan na aanleiding van die voorgaande uiteensetting omskryf word as *die versamelnaam vir 'n aantal histories uitgekristalliseerde, beskermingswaardige staatsveiligheids-, ekonomiese, strategiese, administratiewe, sosiale en regsbelange wat op 'n gegewe moment subjektief en objektief bepaalbaar is en in 'n gemeenskap die balans tussen die botsende belange van individue onderling en individue in verhouding tot die staat handhaaf.*

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63 Sien ook *Economic Data Processing (Pty) Ltd v Pentreath* 1984 2 SA 605 (W) 607; *Schermbrucker v Klindt* 1965 4 SA 606 (A) 618–619; *Hayes v Baldachin* 1981 1 SA 749 (ZA) 757.
64 Sien Baxter 725–728.
65 *S v Mulder* 1980 1 SA 113 (T) 120 122.
66 Sien ook Hiemstra 323–324.

Das Recht is nicht blosser Gedanke, sondern lebendige Kraft (per Jhering in *Kampf ums Recht* 1).

'n Taksonomie van doelstellings as grondslag vir 'n teoretiese model van regsopleiding

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SUMMARY

A Taxonomy of Objectives as a Basis for a Theoretical Model of Legal Training

Tertiary legal education is essentially academic. The teaching of law forms a distinct part of a law faculty's academic curriculum. Academic legal education should be relevant and should serve the interests of society.

The dual nature of academic legal education is stressed. Attention is focused upon the division of responsibility for legal education between tertiary institutions and professional organisations. Although it is impossible to construe rigid dividing lines, it is emphasised that legal education comprises three indivisible but distinguishable phases, namely academic legal education (sometimes referred to as theoretical legal education), vocational (professional or institutionalized) legal education and continuing legal education. The responsibility for academic legal education, which in essence is scientific-theoretical, lies with tertiary institutions. The different branches of the legal profession should accept responsibility for vocational or practical professional training, whilst the responsibility for continuing legal education lies with both tertiary institutions and the different professions.

A theoretical model or framework for academic legal education based on a taxonomy of aims and objectives (the primary element of the educational cycle) is suggested. This model accommodates theoretically as well as practically orientated elements which complement one another. The suggested system of post-graduate diploma courses concentrates on academic professional training and the development of basic practical skills. It illuminates the traditional antithesis between theoretical and practical legal education. The model does not provide for undergraduate diplomas or legal education for para-legals, for example.

1 INLEIDING

Die vernaamste doelstelling van die moderne universiteit is myns insiens om studente op te voed en te vorm. Algemene akademiese vorming beoog 'n vaste wetenskaplike gesindheid en behels 'n fundamenteel dissipline-georiënteerde skoling in sekere basiese wetenskappe waardeur die student toegerus word met 'n duidelike verwysingsraamwerk van waaruit nuwe probleme benader kan word.[1] Akademiese vorming berus op 'n strewe na diepgaande insig en lei tot die vermoë

1 Garbers JG "Die Universiteit en Beroepsopleiding" 1980 *Koers* 93–102 100.

om werklikhede indringend te kan verklaar. 'n Openheid behoort by studente aangekweek te word vir 'n interdissiplinêre aanpak van voorgraadse studie.

Die aard, wese en funksies van die moderne universiteit hang ten nouste saam met voortdurende maatskaplike, sosiale en wetenskaplike verandering binne die kosmiese werklikheid. Gevolglik is die universiteit nie meer wat dit oorspronklik was nie, alhoewel sekere gemeenskaplike faktore behoue gebly het, byvoorbeeld die feit dat die universiteit 'n inrigting is waar wetenskapsbeoefening plaasvind en onderrig aan studente geskied. Tans bestaan daar aansienlike meningsverskil oor die aard en wese van die moderne universiteit en is daar ook nie eenstemmigheid oor die funksies daarvan nie.

Die universiteit besit die onderskiedende kenmerke van navorsing en basiese, klassieke algemeen vormende opleiding. Bingle[2] gaan van die veronderstelling uit dat dit op universiteit in eerste instansie gaan om basiese kennis en navorsing en nie om die toegepaste of beroepsgerigte nie. Hiermee kan saamgestem word, met die voorbehoud dat die universiteit as dinamiese instelling in sy doelformulering en doelwitbepaling tred moet hou met gemeenskapseise en die ontwikkeling van samelewingsverbande. Die invloed wat die gemeenskap op die universiteit as dinamiese maatskaplike instelling het, blyk duidelik uit die geskiedkundige ontwikkeling van universiteite. Die wese van die universiteit verander as't ware gedurig. Gevolglik is dit die taak van die universiteit om voortdurend in 'n besondere tydvak self te besin oor sy wese, aard en funksie.

Daar kan gekonkludeer word dat die moderne Suid-Afrikaanse universiteit 'n dinamiese maatskaplike instelling is – 'n gemeenskap van administratiewe amptenare, dosente en studente, geïnkorporeer met as doel wetenskapsbeoefening, navorsing, onderrig en gemeenskapsdiens. Die taak van die universiteit behels dus die uitbouing en bevordering van die wetenskap, opvoeding, beroepsopleiding en opvoeding tot diensbaarheid in die gemeenskap en goeie burgerskap.

2 DIE UNIVERSITEIT EN BEROEPSOPLEIDING

2 1 Algemeen

Die universiteit as maatskaplike instelling kan nie afsydig staan teenoor veranderinge binne samelewingsverbande en -strukture nie. Reeds gedurende die Middeleeue het die universiteit aan die eise van beroepsopleiding voldoen en sodoende diens aan die gemeenskap gelewer.

Die universiteit voorsien in die behoeftes van die gemeenskap, onder andere deur vakwetenskaplikes vir die hoër professies van die volkshuishouding op te lei. Die vraag is egter of en hoe die funksies van beroepsvoorbereiding met die wese van die universiteit versoenbaar is. Die kernvraag waarmee die universiteit tans gekonfronteer word, is die vraag hoe die gemeenskapseise van beroepsvoorbereiding van studente versoen kan word met die eise van fundamenteel wetenskaplike vorming en opleiding. Du Plessis[3] verklaar dat die universiteit sy rol in beroepsgerigte onderwys kan regverdig as hy die student 'n breë wetenskaplike agtergrond en opvoeding gee sodat hy goed toegerus is met kennis en vaardigheid om sy eie oordeel te gebruik.

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2 Bingle HJJ "Die Universiteit in die Branding" in *Die Atoomeeu – in U Lig* (1969 Potchefstroom) 254–268 261.

3 Du Plessis SJP *Die Universiteit* (1983 Potchefstroom) 44.

Le Roux[4] wys op gesag van Dejeni dat twee denkskole rakende tersiêre onderwys getipeer kan word. Volgens die *klassieke denkrigting* word onderwys in ekonomiese terme gesien waardeur investering in onderwys vir spesifieke beroepe aanleiding sou gee tot 'n verhoogde vraag na opgeleides wat op sy beurt tot modernisering en versnelde ontwikkeling lei. In Europese lande bestaan daar 'n hoë korrelasie tussen formele onderwys en ekonomiese groei. Hierdie denkrigting gaan van die veronderstelling uit dat onderwys outomaties tot ekonomiese groei aanleiding gee en dat ekonomiese groei sinoniem is met ontwikkeling. Ekonomiese groei vereis vaardighede van 'n geskoolde arbeiderskorps wat op tegniese, bestuurs- en entrepreneursvlak leiding kan gee. Universiteite het deel aan die opleiding van hierdie arbeidsubjekte. Binne die samelewing word kulturele heterogeniteit behou, aangesien onderwys nie kulturele ongelykheid uitwis nie. Onderwys en opvoeding lewer egter 'n belangrike bydrae tot kulturele ontwikkeling en verrig 'n belangrike versoeningstaak op kulturele gebied. Die *reformistiese denkrigting* koppel onderwysvoorsiening aan mannekragbeplanning. Huidige en toekomstige behoeftes moet geanaliseer word ten einde persone op te lei wat deur die ekonomie geabsorbeer kan word.

Met die inhoudelike van bogenoemde denkrigtings kan nie veel fout gevind word nie, aangesien albei sekere waarheidsmomente bevat. Dit bly egter die taak van die universiteit om sy funksies te sinchroniseer en daarby alle funksies in sy doelstellings en doelwitte te beliggaam en tot uitvoering te bring. Word, byvoorbeeld, die navorsingsfunksie en die funksies van wetenskapsbeoefening, algemene onderwys en opvoeding verwaarloos ten koste van beroepsopleiding, kan sodanige opleiding beter aan 'n ander inrigting as 'n universiteit geskied.

2 2 Die Uitdagings wat Veranderinge in Samelewingsverbande en -strukture aan Akademiese Opleiding (die Universiteit) Stel

Beroepsdifferensiasie en samelewingsdinamiek binne 'n dinamiese samelewingsopset vereis professionalisering. Veranderinge binne die samelewing is 'n feit waarvan universiteite kennis moet neem en waarmee rekening gehou moet word. Die dinamiese aard van die tydsgewrig word deur 'n verskeidenheid sogenaamde "ontploffings" *inter alia* die "kennisontploffing" gekenmerk.[5]

'n Toenemende mate van spesialisering van funksies vind in samelewingsverband plaas en professionalisering speel hom ten opsigte van 'n verskeidenheid beroepsfunksies in die samelewing af. Dit alles impliseer dat daar toenemend gespesialiseerde opleiding gegee moet word aan persone wat gespesialiseerde take in die samelewing moet verrig.[6] Die funksies en die rol van die universiteit in hierdie verband kom dus in gedrang en noodsaak duidelike begrensing. Tegnologiese verandering en industrialisasie skep 'n nuwe verhouding tussen die opvoedeling, sy opvoeding en sy beroep, in welke verhouding die opvoeding direk tussen die opvoedeling en sy beroep staan.

'n Verskeidenheid faktore het tot professionalisering aanleiding gegee, onder andere:

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4 Le Roux L "Onderwys in Afrika: Ontwikkeling of Onderontwikkeling?" 1982 *Koers* 189–198 191.

5 Jacobz FP "Die Aanspraak van die Beroepswêreld op die Universiteit" in *Die Uitdaging aan die Moderne Universiteit* (1977 UPE Publikasiereeks B3) 22.

6 Garbers aw 94.

a Daar het 'n akkumulasie plaasgevind van nuwe kennis wat vinnig en doeltreffend geassimileer moet word ten einde samelewingsverbande beter te begryp en te orden. Daar word beweer dat meer nuwe kennis en feite in die afgelope dekades ontbloot en ontgin is as in die hele geskiedenis van die mensdom.[7] Garbers[8] beweer dat die sogenaamde kennis- en tegnologiese ontploffings basiese wetenskaplike inligting in die praktyk tot toepassing gebring het. Veranderinge verloop teen 'n versnelde tempo en vereis voortdurend voortgesette onderwys, herskoling, omskoling, en opknapping.

b Geografiese versperrings het algaande verdwyn en sodoende kommunikasieontwikkeling wat isolasieversperrings uitwis en groepskontak wêreldwyd bevorder, in die hand gewerk.

c Veranderinge in die ekonomiese lewe het ingrypende veranderinge in arbeidsverdeling tot gevolg gehad sodat 'n groot verskeidenheid beroepe ontwikkel het.[9]

d Binne 'n dinamiese samelewing vervul beroepsopleiding met die oog op professionalisering, veral op universitêre vlak, 'n sleutelrol.

e Die snel veranderende samelewingsverbande stel hoë eise aan universitêre opleiding ten opsigte van studente wat uiteindelik professionele vakatures moet vul.

2 3 Klassieke Algemeen Vormende Opleiding teenoor Loopbaangerigte Opleiding

Klassieke algemeen vormende opleiding en daarmee gepaardgaande onderrig in kultuurvakke het eeue lank feitlik die kern gevorm van die Wes-Europese opvoedkundige stelsels. In sy beoordeling van die plek van kultuurvakke in die onderwysstelsel maan Du Plessis[10] teen die opleiding van kleurlose beroepsopgeleide outomate sonder individualisme en vryheid van gees. 'n Eng siening van kultuur en vorming kan bydra tot eensydige klem en vorming. 'n Balans tussen die kulturele en meer beroepsgerigte behoort gehandhaaf te word.

Reeds gedurende die Middeleeue is die herontdekte werke van Aristoteles met ywer bestudeer teenoor beroepsgerigte studies wat aandag geniet het as gevolg van groter sosiale en ekonomiese druk en ander faktore soos verstedeliking. Gedurende die Renaissance is die balans tussen die klassieke en die moderne nie gehandhaaf nie. Die universiteite het krampagtig aan die tradisionele leerinhoud vasgehou, terwyl die vernaamste vernuwings in die praktyk plaasgevind het. Gedurende die 17de eeu speel praktyksontwikkeling 'n belangrike rol, terwyl universiteite in die 19de eeu wel deeglik met praktyksontwikkeling rekening gehou het.

Met betrekking tot die rol van die universiteit in die voorsiening van têrsiëre onderwys word verwyte dikwels gemaak dat die navorsing aan universiteite nie relevant vir die probleme van die dag is nie en dat studente nie werklik vir 'n loopbaan in die tegnologies snelveranderende wêreld voorberei is nie.[11] Tans

7 Jacobz aw 22.
8 aw 94.
9 Garbers aw 94.
10 aw 7.
11 Smit P "Die Universiteit in Afrika: Lesse vir Suid-Afrika?" 1983 *Bulletin Afrika Instituut* 133–144 133.

word toenemend klem gelê op die behoefte dat die universiteit sterker tot diens van die gemeenskap moet staan. Daar word dikwels beklemtoon dat behoeftes en prioriteite in die samelewing bepaal moet word en daaraan voldoen moet word. Universiteite moet relevant bly ten opsigte van die ontwikkelingsbehoeftes en probleme van hul voedingsbron en -gebied en terselfdertyd moet 'n hoë standaard wat aan internasionale vereistes voldoen, gehandhaaf word.

Smit[12] wys daarop dat daar in sommige Afrika-lande 'n besonder hoë premie geplaas word op onderrig in die klassieke. Sir Eric Ashby, 'n welbekende Britse opvoedkundige, dui aan dat dit niks ongewoons is vir 'n Nigeriër om selfs akademiese kwalifikasies te verwerf sonder enige kennis van die geskiedenis van sy eie land nie; daar is selfs Nigeriërs wie se huise slegs met voetpaaie bereik kan word, maar wat glo dat Latyn die towertaal is waarmee 'n geslaagde toekoms bereik kan word. In Malawi word Grieks en Latyn deur buitelandse akademici in 'n skool vir begaafde kinders aangebied.

Die volgende gegewens ten opsigte van ingeskrewe studente (volgens studierigting) aan swart residensiële universiteite in Suid-Afrika is vir 1982 verstrek:[13]

Studierigting	Persentasie van studentetotaal
Lettere en Wysbegeerte	34%
Handel en Publieke Administrasie	16,7%
Opvoedkunde	16,4%
Natuurwetenskappe	11,7%
Regswetenskap	10,9%
Medies en aanverwante studierigtings	7,0%
Landbou	2,2%
Teologie	1,1%

Uit bogenoemde tabel blyk dit dat in baie gevalle kwalifikasies met 'n relatief lae praktiese toepassingswaarde verwerf word. Opvoedkunde en landbou is byvoorbeeld studierigtings wat meer aandag verdien as gekyk word na die geweldige agterstand op landboukundige en onderwysgebied. In teenstelling hiermee wys Dreyer[14] op die uitsonderlike bevindinge van Louw (1978) en Moulder (1980) wat ten opsigte van die swart ontwikkelende lande bevind het dat foutiewelik aanvaar word dat formele primêre en sekondêre onderwys 'n absolute vereiste is vir gemeenskapsontwikkeling, veral wat industrialisasie of sosiale en ekonomiese vooruitgang betref. Formele onderwys is nie noodwendig 'n effektiewe faktor in die remediëring van sogenaamde "*social and economic inequalities*" nie. Die universiteit in ontwikkelende lande behoort, aldus Dreyer[15] deur navorsing vas te stel wat die mannekragbehoeftes binne 'n gemeenskap is en daarvolgens beroepsgerigte opleiding te gee.

Jacobz[16] is van mening dat dit eerder die taak van die universiteit is om 'n breër basiese opleiding te verskaf wat as beroepsvoorbereiding kan dien. Sodanige opleiding sal die student in staat stel om aan te pas by veranderde omstandighede binne sy latere beroep en hom toerus vir *beroepsafrigting* deur

12 aw 134.
13 Smit aw 137.
14 Dreyer HJ "The University in a Developing Society" 1982 *Koers* 45–54 50.
15 aw 52.
16 aw 24.

professionele liggame binne sy beroep. In die Verenigde State van Amerika is bevind dat 'n aansienlike persentasie van sogenaamd kultuuropgeleide werknemers besonder goed in die sakewêreld, staatsdiens en ander vertakkings van die samelewing vaar. Hierteenoor het 'n eensydige beklemtoning van die beroepsopleiding daartoe aanleiding gegee dat voortgesette opleiding in kultuurvakke aan beroepslui en andere, algemene praktyk geword het.

Du Plessis[17] verklaar dat sommige studierigtings as gevolg van hul klaarblyklik praktiese nut hulle baie min op algemeen vormende waarde beroem. Dit beteken egter nie dat kultuurbou en -vorming nie plaasvind nie. As die vakman die regte perspektief het, moet algemene vorming plaasvind.

Die waarde van kultuurvakke en die vereiste van algemeen vormende opleiding kan nie ontken word nie. Universitêre opleiding moet egter noodwendig kennis neem van die verwagtinge van die beroepswêreld of- praktyk en rekening hou in sy kurrikulumbeplanning met die vereistes van die praktyk. Die strewe na beroepsgerigtheid gaan universitêre opleiding nader aan die praktyk en beroepsgerigte opleiding bring en vereis dat sodanige opleiding steeds op vernuwing ingestel moet wees. Universitêre opleiding vir bepaalde professies behoort in voldoende mate sensitief te wees vir nuwe probleme, uitdagings en eise wat in die samelewing ontstaan. Toegepaste sosiale of gedragswetenskappe blyk egter in toenemende mate die noodsaaklike aanvulling te wees wat in feitlik alle professies benodig word. Bykans alle professies vereis beoefenaars met diagnostiese vaardighede ten opsigte van 'n verskeidenheid sosiale probleme, onder andere vaardighede om met kliënte saam te werk en om onderliggende waardes te kan peil wat aan professionele praktyke ten grondslag lê.[18]

3 BESONDERE DOELSTELLINGS VAN REGSOPLEIDING IN DIE LIG VAN DIE ALGEMEEN VORMENDE DOELSTELLINGS VAN DIE MODERNE UNIVERSITEIT

3 1 Algemeen

Uit die omvattende regsliteratuur oor regsopleiding en die bestaande regspraktyk blyk duidelik dat regsopleiding as *geïntegreerde opleiding* beskou kan word wat normaalweg volgens drie opeenvolgende beplande fases geskied, naamlik: akademiese regsopleiding (soms ook teoretiese opleiding genoem), professionele opleiding (geïnstitusioneerde praktiese opleiding of indiensopleiding) en voortgesette regsopleiding. Hierdie opeenvolgende fases van regsopleiding is, hoewel onderskeibaar, nie skeibaar nie en vorm dus in totaliteit die geheel van regsopleiding.[19] Die *onderskeibaarheid* van die verskillende fases van geïntegreerde regsopleiding het sedert die vroegste jare van regsopleiding regsakademici, -praktisyns, -verenigings en -instansies gestel voor die probleem wat die funksie

17 aw 8.
18 Garbers aw 96.
19 Kaplan MI "What are the objectives for academic and professional training for lawyers?" in Loots *Konferensie oor Regsopleiding* (1983 Johannesburg) 17 verklaar: "Education is a ongoing process. What I am saying is that education should not be looked upon as a segment in one's life that begins and ends with university."

van elke fase behoort te wees.[20] Hosten[21] verwys in hierdie verband na die *probleem van twee kontrasterende doelstellings van regsopleiding* betreffende die praktiese behoeftes van studente met die oog op hulle uiteindelike beroepsbeoefening enersyds en die meer teoretiese vereistes van die regswetenskap in die algemeen, andersyds.

'n Wetenskaplike benadering tot regsopleiding vereis 'n strategie van doel- en doelwitformulering wat die *onderskeidbaarheid* van bogenoemde fases van regsopleiding sal ophelder en wat as grondslag vir 'n effektiewe opleidingsmodel kan dien. Op die terrein van regsopleiding word voortdurend antwoorde geëis op *inter alia* die volgende vrae: Wat is die doelstellings van akademiese en professionele regsopleiding? Wie is verantwoordelik vir die praktiese opleiding van regsgeleerdes? Beantwoord regsopleiding aan vereiste standaarde? Wat behoort die aard van 'n regsgraad te wees? Watter standaarde en maatstawwe geld? Word kurrikula voortdurend op mikrovlak hersien? Wat behoort die rol van die Raad vir die Erkenning van Regseksamens met betrekking tot die LLB-graad en die rol van statutêre liggame in die bepaling van leerplanne te wees? Om hierdie en ook 'n verskeidenheid ander vrae te beantwoord, is dit myns insiens wenslik om, nie bloot intuïtief nie, maar vooraf op wetenskaplik geverifieerde wyse, 'n taksonomie van doelstellings en doelwitte te formuleer. Milton[22] beweer tereg:

> "I have suggested that part of an attempt to achieve a theory of lawyer education requires that the curricula for University law study should be construed according to some scientifically derived and goal-orientated policy."

Dit beteken egter nie dat sodanige taksonomie geslote is in die sin dat daar geen ruimte vir verbetering, voortdurende wysiging en vernuwing bestaan nie.[23] Pont[24] bevestig dat die *inrigting* van regsopleiding nie voltooi is nie, maar aan die eise van die tyd moet voldoen.

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20 Van der Walt JC "Wie behoort die aanspreeklikheid vir praktiese regsopleiding te dra?" in Loots (red) *Konferensie oor Regsopleiding* (1983 Johannesburg) 89 beweer: "The question of allocation of responsibility in respect of legal education is likely to evoke a variety of responses. This is no doubt because no universally acceptable model for legal training has been designed and applied in any country of the world. The lack of a generally acceptable model is not surprising if one takes cognisance of the great variety of factors involved in the design of an educational model. We are, I am sure, agreed that the university should, in principle, accept responsiblity for the academic education of lawyers. The allocation of responsibility in respect of the professional training is a more difficult problem. As far as South Africa is concerned, it has always been fairly generally accepted that the profession carries the responsibility for the vocational training of its potential entrants." Hy vervolg dan: "My standpunt dat die universiteit en die professie self verantwoordelikheid dra vir die akademiese en praktiese opleiding van die student respektiewelik, wil ek onmiddellik kwalifiseer deur die bewering dat 'n mens nie akademiese en beroepsopleiding dogmatiesrigied van mekaar kan afbaken of losmaak nie."

21 "Romeinse Reg, Regsgeskiedenis en Regsvergelyking" 1962 *THRHR* 16–35 16.

22 "Constructing a Curriculum for University Study of Law" 1975 *De Jure* 109–116 116.

23 Wilson KA "What are the objectives of academical and professional training for lawyers?" in Loots C (red) *Konferensie oor Regsopleiding* (1983 Johannesburg) 26–32 28 openbaar myns insiens ten onregte 'n mate van skepsis teenoor 'n te gedetailleerde doelformulering. Hy verklaar: "In other words, I think it is vitally important that in setting our objectives – and we do need to set objectives initially – we must be very careful not to set those objectives in too great a detail. Going into too much detail has the effect of putting the cart before the horse."

24 Pont D "Die Opleiding van die Juris in Suid-Afrika" 1961 *Acta Juridica* 58–117 102.

3 2 Die Doelformuleringsproblematiek van Akademiese Regsopleiding

'n Belangrike vereiste vir die ontwikkeling van akademiese regsopleiding is die formulering van duidelike doelstellings en doelwitte. Doelformulering is rigtinggewend in die sin dat duidelike riglyne gestel word aan die hand waarvan regsopleiding oorhoofs beplan en geëvalueer kan word. Daar kan onderskei word tussen vormingsdoelstellings, doelstellings op makro-, meso- en mikrovlak en doelwitte.[25]

Die begrip vormingsdoelstellings met betrekking tot regsopleiding is 'n omvattende of oorkoepelende begrip ten opsigte van die algemene en besondere doelstellings van regsopleiding en spesifieke doelwitte van regsonderrig en dui meer bepaald op die ontsluiting van die regstudent as totale mens met betrekking tot sy lewens- en wêreldbeskouing, kennis, insig, vermoëns, vaardighede en waardes.[26]

Die hedendaagse Suid-Afrikaanse universiteit as 'n statutêre skepping is staatsgesubsidieërd en funksioneer binne 'n onderwysstelsel wat vervleg is met verskeie staatsdepartemente, provinsiale owerhede, openbare instansies en rade. Die universiteit funksioneer dus as 'n geheel ingevolge owerheidsbeleid wat onder andere bepaal word deur die departement van onderwys en kultuur, die raad en senaat van die universiteit en uitvoerende liggame. Die doelstellings op makrovlak behels en inkorporeer die breëre beleid en raamwerk vir ontwikkeling en aktiwiteit binne die universitêre bestel. Die minister van onderwys en kultuur is verantwoordelik vir die oorhoofse beplanning van die universiteitswese en moet uiteindelik aan die parlement verslag doen. Hy oefen beheer uit oor die subsidiestelsel, toekenning van akademiese kwalifikasies aan universiteite en die effektiwiteit van studie- en kwalifikasieprogramme. Owerheidsbeleid is dus ook by regsopleiding van deurslaggewende belang.[27] Uit hoofde van hierdie oorkoepelende beleid en binne die raamwerk daarvan funksioneer die verskillende regsfakulteite en -departemente wat verantwoordelik is vir akademiese regsopleiding, en meer bepaald vir kurrikulumbeplanning, op mesovlak.

Op laasgenoemde vlak moet onder meer rekening gehou word met statutêre vereistes, vereistes wat deur professionele liggame gestel word en gemeenskapsvereistes.

Die inwerkingstelling van die regskurrikulum geskied op mikrovlak deur die dosent. Op hierdie vlak moet alle elemente van die beplande onderrig geïmplementeer word.

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25 Strydom AH en Helm CAG *Die Suksesvolle Dosent* (1981 Bloemfontein) 32 onderskei tussen algemene doelstellings, besondere doelstellings en spesifieke doelwitte en verklaar: "Algemene doelstellings dien as riglyne by kurrikulumontwikkeling van 'n tersiêre instelling, besondere doelstellings is riglyne by die beplanning van die kursusse, departemente en afdelings en spesifieke doelwitte word as riglyne gebruik by die beplanning van 'n didaktiese of onderrigontwerp."

26 'n Vollediger bespreking volg hieronder.

27 Van der Walt JC "Wie behoort die aanspreeklikheid vir praktiese regsopleiding te dra?" in Loots C (red) *Konferensie oor regsopleiding* (1983 Johannesburg) 89–93 92 verklaar dat owerheidsbeleid – of ons daarvan hou of nie – 'n belangrike faktor by regsopleiding is en verklaar tereg dat verdere uitbreiding van beroepsopleiding aan regsfakulteite, vanuit nasionale tersiêre beleid, problematies gaan wees.

3 2 1 Vormingsdoelstellings van Regsopleiding

Hierbo is aangedui dat die begrip vormingsdoelstellings 'n omvattende of oorkoepelende begrip ten opsigte van die algemene en besondere doelstellings van regsopleiding is en meer bepaald dui op die religieuse beïnvloeding van die student as *totale mens*. Vorming is onlosmaaklik deel van 'n mens se lewe en bestaan en word omskryf as "die totale beïnvloeding of wisselwerking tussen die individu en sy totale wêreld wat op hom inwerk en die verandering wat hy daardeur ondergaan."[28] Dit het betrekking op die spesifieke omstandighede, gebeurlikhede en invloede wat meewerk om vorm te gee aan sy lewe, en meer bepaald die toestand, aard en kwaliteit daarvan.[29]

Vormingsdoelstellings in hierdie verband verwys dus na die regstudent as totale mens in sy wisselwerkende verband of betrekking met die kosmiese werklikheid. Akademiese opleiding vorm deel van die totale beïnvloedingsfeer wat 'n in- en uitwerking op sy psigiese ontwikkeling en karaktervorming het. Dit gaan dus in eerste instansie om die vorming van belangrike insigte, vermoëns, houdings en gesindhede – om die uitbouing van die persoonlikheidstoerusting van die regstudent om hom in staat te stel om aan die eise van die regsberoep te voldoen.

Die ontwikkeling van die persoonlikheidstoerusting sluit behalwe intellektuele vermoëns, ook karakter, sosiale bewussyn en aanpasbaarheid in.[30]

Akademiese regsopleiding is dus primêr gerig op die ontwikkeling en ontplooiing van die totale mens met die oog op sy beroep en die verwerwing van 'n gesonde teosentriese lewens- en wêreldbeskouing. Du Plessis[31] verklaar:

> "In die strategiese beplanningsopset van akademiese regsopleiding kan en behoort dus 'n opsetlike ruimte geskep te word waarbinne veral die persoonlikheidseienskappe waaroor 'n juris moet beskik, tot ontplooiing gelei word."

Die einddoel behoort die wetenskaplike toerusting en vorming van die regstudent met die oog op roepingsvervulling en dienslewering te wees.[32]

Akademiese opleiding is verreweg die belangrikste faktor in die vorming van die jong juris tot 'n juristepersoonlikheid.[33] Dit is gerig op bevordering van die individuele vermoëns van studente om op wetenskaplike, professionele en algemeen persoonlike vlak bruikbaar en produktief te wees. Die regstudent moet in alle basiese regsdissiplines die nodige kennis, vaardighede en gesindhede verwerf om as regswetenskaplike en regsgeleerde oordeelkundig 'n beroepskeuse te kan uitoefen en sy beroep suksusvol te kan beoefen. Wat die gemeenskap en regsberoep dus van regsakademici sou kan vereis, is dat hulle regsgeleerdes, geskool ooreenkomstig die hoogste standaarde en eise van die regswetenskap,

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28 Roos SG "Die Verhouding: Wysgerige Antropologie, Fundamentele Pedagogiek, Pedagogie" in Landman WA en Roos SG *Fundamentele Pedagogiek en die Opvoedingswerklikheid* (1973 Durban) 1–96 75.

29 De Vries C *Oriëntering in die Fundamentele Opvoedkunde* (1978 Stellenbosch) 33.

30 Du Toit "Vormingsdoelstellings van Regsopleiding" 1975 *De Jure* 117–121 119.

31 Du Plessis LM *Regsteorie in Praktyk, Regspraktyk in Teorie en Regsopleiding* (1981 Reeks H: Inougurele rede nr 80 Potchefstroom) 20.

32 Pretorius "Leerstofseleksie vir Burgerlike Prosesreg" 1982 *Tydskrif vir Regswetenskap* 133–144 134.

33 Dannenbring "Regsopleiding in Duitsland: Grondslae, Huidige Posisie en Hervorming" 1962 *THRHR* 79–92 90.

die regswêreld instuur.[34] Die vorming en ontwikkeling van die student as regsgeleerde kan dus beskryf word as 'n globale proses waarin kognitiewe, affektiewe en psigo-motoriese aspekte vervleg is en wat gerig, georden en gekenmerk behoort te word deur bepaalde noukeurig geformuleerde doelstellings en doelwitte.

3 2 2 Doelstellings van Regsopleiding

a *Begripsbepaling*

Die doelstellings van regsopleiding is in der waarheid 'n konkretisering van vormingsdoelstellings in 'n verskeidenheid raamwerke waarbinne doelwitte op mikrovlak van die regskurrikulum verbesonder word. Vormingsdoelstellings word deur noukeurige doelformulering op meso- en mikrovlak meer beskrywend in konkrete handelingsverband.[35]

Met betrekking tot die wese, aard en omvang van akademiese regsopleiding bestaan 'n verskeidenheid uitgangspunte. Akademici huldig onder andere die standpunt dat akademiese regsopleiding fundamenteel teoreties wetenskaplik is; dat regsopleiding aan universiteite meer prakties georiënteerd moet wees; dat kliniese regsopleiding as primêre metode van regsonderrig moet geld; of dat akademiese regsopleiding basies deel van 'n breër, algemeen vormende opleiding in die geestes- en gedragswetenskappe moet wees. Bogenoemde standpunte besit elk gekwalifiseerde meriete, maar kan nie op sigself as enkele uitgangspunt verabsoluteer word nie. 'n Sintese moet tussen bogenoemde standpunte bewerkstellig word op grond waarvan 'n taksonomie van doelstellings geformuleer kan word. My oogmerk is om op grond van sodanige sintese die algemene doelstellings van akademiese regsopleiding wetenskaplik te klassifiseer of te orden. Die geformuleerde taksonomie kan dan as grondslag vir 'n teoretiese model van regsopleiding dien.

b *Kognitiewe doelstellings*

i *Kennisverwerwing (respektief-reproduktief)* Bloom omskryf kennis as gedragsvorme wat bestaan uit die reproduksie van feite, terme, idees, reëls, beginsels, ensovoorts, in die vorm waarin sodanige gegewens geleer is.[36] Kennisverwerwing is 'n belangrike doelstelling van regsopleiding, is primêr en essensiëel en vorm die basis waarop ander doelstellings verwesenlik kan word. Bloom[37] verklaar:

> "Knowledge is quite frequently regarded as basic to all the other ends and purposes of education. Productive thinking cannot be carried out in a vacuum but must be based on the knowledge of some of the realities."

Vir die ontwikkeling van 'n bepaalde juridiese gees is 'n voedingsbodem van regskennis onontbeerlik.[38] Leerinhoude is van belang, aangesien onderrigdoelstellings en -doelwitte aan die hand van verworwe kennis bereik en verwesenlik word en regsverskynsels aan die hand daarvan bemeester en verklaar word.

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34 Du Plessis LM "Regsopleiding: Beroepskoling of Akademiese Vorming?" *Regsdosente Kongresreferate* (1975) 250–258 257.

35 Calitz LP Du Plessis SJP en Steyn IN *Die Kurrikulum: 'n Handleiding vir Dosente en Onderwysers* (1982 Durban) 25.

36 Bloom BS Hastings JT en Maduas GF *Handbook on Formative and Summative Evaluation* (1971 New York) 67.

37 Bloom BS *Taxonomy of Educational Objectives* bd 1 (1956 London) 33.

38 Du Toit aw 118.

Akademiese regsopleiding behels 'n georganiseerde en sistematiese studie van 'n verskeidenheid regsdissiplines en dui op 'n voortdurende proses van toerusting met doeltreffende basiese regskennis, kennis en begrip van suiwer regsbeginsels.[39] Dit dui egter nie slegs op kennisoordrag nie, maar op die verwerwing van 'n arsenaal van regskennis wat nie in afsonderlike kompartemente nie, maar as 'n geïntegreerde geheel ook op selfstandige wyse ontsluit en bemagtig word. Wilson[40] verklaar:

> "The first priority of academic training is the imparting to students of a specialised body of knowledge, principles or theory organised in a systematic way."

Die hoeveelheid regskennis is so omvangryk dat dit onmoontlik is om die totaliteit daarvan te bemeester.[41] Dit is egter 'n vereiste dat in elke regsdissipline 'n noodsaaklike hoeveelheid regskennis in die leerinhoude gereflekteer moet word ten einde funksioneel in die gemeenskap en by beroepsbeoefening te wees. Wanneer die regstudent die universiteit verlaat, moet sy teoretiese kennis voldoende wees om die brug tussen teorie en praktyk te span.[42] Om hierdie rede is dit van die groot belang dat tydens akademiese regsopleiding klem gelê word op die leer van regsbegrippe, veralgemenings, tegnieke en maatstawwe wat nodig is vir probleemoplossing. Verder het die voornemende regspraktisyn 'n deeglike kennis van die regslewe nodig; van die praktiese funksie wat die reg in die gemeenskap vervul. Hierdie kennis kan nie deur akademiese regsopleiding oorgedra word nie – slegs in en deur die regspraktyk self kan die bekwaamhede wat 'n goeie praktisyn kenmerk, ontwikkel word.[43]

Akademiese regsopleiding moet noodwendig die volgende insluit: die bybring van kennis van die inligtingsbronne van die reg en die ontsluiting daarvan; van die ontstaansbronne van die reg van die regsterminologie; van die institusionele raamwerke van die regstelsel; van algemene en spesifieke regsteorieë; van die verskillende regsvakke (basiese beginsels); van sekere *capita selecta* in besonderhede; en van die regsontwikkeling en regspraak.[44] Daar moet egter gewaak word teen 'n oorbeklemtoning van regskennis, aangesien die reg dinamies van aard is.

ii *Begrip* In hierdie verband kan onderskei word tussen begrip ten opsigte van vakkennis en begrip ten opsigte van regskennis in wyer sin. Eersgenoemde hou in dat regstudente oor sodanige begrip van bepaalde kursusleerinhoude beskik dat hulle in staat is om inligting in hulle eie woorde weer te gee, op te som of te verduidelik. Laasgenoemde verwys onder meer na 'n begrip van die doel,

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39 Kotze "Universiteitsopleiding in Suid-Afrika – 'n Kritiese Beskouing" 1975 *De Jure* 102–108 102.

40 aw 27.

41 Scott WE "Wat is die oogmerke van akademiese en professionele opleiding van juriste?" in Loots C (red) *Konferensie oor Regsopleiding* (1983 Johannesburg) 48–49 48; Milton 1975 *De Jure* 109 113.

42 Broomberg ED "Constructing Exercises to Develop Mental Skills Required by Lawyers" *Regsdosente Kongresreferate* (1975) 39–56 46 betwyfel die algemene opvatting van akademici dat 'n hoeveelheid basiese kennis van feite, reëls en strukture van leerinhoude nodig is alvorens oorgegaan kan word na analise, sintese of evaluering.

43 Dannenbring aw 81.

44 Die volgende psigologies-opvoedkundige riglyne vergemaklik die bemeestering van regskennis: organisering, rangskikking en ordening van leerinhoude, identifikasie van betekenisvolle strukture en verbande, aanbieding van leerstof in die vorm waarin dit bemeester moet word, selfstandige ontsluiting en bemeestering van leerinhoude en toepassing en herhaling van kennis.

aard en funksie van die reg; van die werking van die reg; en van die doel en funksionering van 'n verskeidenheid regsinstellings.[45]

iii *Toepassing* Regsopleiding behoort te gaan om die vorming van 'n *volledige juris* wat meer is as bloot 'n regskundige. Naas sy regskennis moet hy ten minste ook oor 'n korrekte insig omtrent die *toepassing* van die reg en die werklike rol van die regspraktisyn, hetsy binne of buite formele litigasie, in 'n geregshof beskik.[46] Die regstudent moet in staat wees om voorafverworwe kennis in nuwe probleemsituasies te kan toepas, om regsprobleme te identifiseer en te formuleer en antwoorde op bepaalde probleme te vind – dus om 'n verskeidenheid vaardighede aan te leer om regsprobleme vanuit 'n juridies-analitiese perspektief te benader en op te los. Die regstudent moet metodologies gevorm word om regsbeginsels te kan toepas en deur verwerking van regsmateriaal prakties-juridiese behoeftes te bevredig.[47] Toepassing behels dus die gebruik van reëls, wette, metodes, beginsels, prosedures en ander veralgemenings om gevolge van situasies te antisipeer, in te sien en te voorspel.[48]

iv *Analise* Akademiese regsopleiding vereis analitiese regsdenke en vermoëns – die vermoë om verskillende geïntegreerde en samestellende elemente van die geheel van regsreël te identifiseer, te organiseer en die onderlinge verhoudinge en verbande daarvan te bepaal. Dit behels ook 'n historiese en regsvergelykende analise van die reg, dit wil sê, dit moet histories gefundeerd wees. Regsreëls moet in historiese perspektief en verband bestudeer word. 'n Historiese analise van die reg is onontbeerlik vir begrip van die geldende reg.[49]

v *Sintese* Die regstudent moet in staat wees om aan die hand van verworwe kennis losstaande elemente, regsreëls en verskillende leereenhede tot 'n sinvolle geheel te konstrueer. In hierdie verband word ook verwys na 'n eenheidsiening van die reg, nie slegs van 'n bepaalde afdeling nie, maar ook ten opsigte van die geheel van regsreëls. Vir 'n geslaagde sintese word oorspronklike, kreatiewe denke vereis. Sintese het as einddoel die skepping van 'n gestruktureerde geheel deur 'n kombinasie van afsonderlike gegewens.[50]

vi *Evaluering* Evaluering behels die hoogste vlak van kognitiewe vermoë. Die regstudent moet oor die hele terrein van regsopleiding aan die hand van verworwe kennis en bepaalde kriteria voortdurend sekere waardebeoordelings met betrekking tot regsvrae en -probleme, standpunte en teorieë maak. 'n Omvattende waardebeoordeling op evalueringsvlak sal inhou dat die student 'n saak sal analiseer, waardebeoordelings van elk van die komponente maak en die resultate deur sintese sal saamvoeg in 'n omvattende, doelgerigte waardebeoordeling.[51]

c *Affektiewe doelstellings*

Affektiewe doelstellings het betrekking op die houdings, gesindhede en ingesteldheid van regstudente teenoor 'n verskeidenheid aangeleenthede, *inter alia* die aard en doel van regstudie, eerbied vir die reg en regsinstellings, verwerkliking van reg en geregtigheid in die samelewing, vakverwante opvattings en

45 Milton aw 112.
46 Flemming "Openingstoespraak: *Colloquia Iuridica*" 1982 *Tydskrif vir Regswetenskap* 92–101 94.
47 Du Toit aw 118.
48 Du Plessis *Doelformulering* (BUO-reeks 2 1 Potchefstroom) 7.
49 Dias "Empirical Approach to the Teaching of Jurisprudence" 1956 *Law Quarterly Review* 556 558.
50 De Corte *Onderwijsdoelstellingen* (1973 Leuven) 121.
51 Du Plessis *Doelformulering* (*supra*) 8.

gewoontes, en voorkeure en afkeure ten opsigte van waardestelsels. Houdings impliseer 'n toestand van gemotiveerdheid en ingesteldheid wat die gedrag van studente in 'n bepaalde rigting lei. Dit is belangrik dat doelstellings op affektiewe gebied gestel en verwesenlik word, aangesien belangrike uitdagings in die regspraktyk verband hou met etiese standaarde en morele waardes. Die bereiking van reg en geregtigheid in die samelewing is 'n alleroorheersende doel. Gevolglik moet regstudente se optrede deurentyd met die allerstrengste integriteitsmaatstawwe gemeet word.[52] 'n Negatiewe afbrekende houding of ingesteldheid ondermyn die beklemtoning en aanvaarding van die positiewe etiese beginsel dat regsgeleerdes almal meewerk aan die bereiking en verwerkliking van reg en geregtigheid in die samelewing. Navorsingsresultate in die opvoedkunde dui 'n hoë korrelasie tussen houdings en gesindhede (byvoorbeeld belangstelling en motivering) enersyds en akademiese prestasie andersyds aan.

d *Psigo-motoriese doelstellings*

Die regstudent moet gedurende sy akademiese regsopleiding sekere tegniese vaardighede en bekwaamhede ontwikkel. Hy moet die vermoë aankweek om die relevansie van feite te bepaal, dit wil sê om tussen relevante en irrelevante feite te onderskei; om regsbeginsels te kan toepas en regsmateriaal te kan verwerk; en om kennis selfstandig te ontsluit en te bemagtig. In sy latere beroepsbeoefening word vereis dat hy sy werk nougeset, stiptelik, deeglik, sorgvuldig en behendig moet verrig en leerinhoude met vaardigheid toepas. Psigo-motoriese doelstellings verwys onder meer na die volgende: vermoë om regsbronne en literatuur te raadpleeg, 'n relevantheidsbewussyn met betrekking tot regsfeite, -reëls en -beginsels, denk- en redenasievermoë, helderheid van uitdrukking en formulering, objektiwiteit, kreatiwiteit, 'n juridiese denkwyse en algemene taalvaardigheid.

'n Onderskeid kan getref word tussen dialektiese bekwaamhede en tegniese vaardighede. Eersgenoemde verwys na die onderskeiding van feite (insluitend die vermoë om feitegeskille te analiseer ten einde die relevantheid van sekere feitelike gegewens vas te stel), die analise van hofuitsprake, wetsuitleg, die formulering van begrippe, konsepte, feitegeskille en die vermoë om relevante reëls en beginsels op feitegegewens toe te pas ten einde tot probleemoplossing te geraak. Laasgenoemde verwys na taalvaardigheid, navorsingsvermoë, hofoptrede, dokumentering en pleitbesorging. Milton[53] verklaar:

> "I would suggest that it behoves the universities to seek to undertake some education and training in these capacities."

Taalvaardigheid is dus van wesenlike belang.[54]

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52 Du Plessis *Regsteorie in Praktyk, Regspraktyk in Teorie en Regsopleiding* (*supra*) 20.

53 1975 *De Jure* 115.

54 Corbett "Training in the Humanities for Lawyers" *Regsdosente Kongresreferate* (1975) 71–79 72 verklaar: "Now, language is of the essence of the law. Words form its warp and woof. Without language the law could not exist. It is only through the accurate and sensitive use of appropriate language that legal concepts can be conveyed form one person to another: from legislator to citizen; from practitioner to judicial officer; from judicial officer to litigant; from academic writer to the bench! It is of prime importance that the embryo lawyer should be trained to be articulate; to be skilled in the use of language; to be adept in expressing his ideas clearly, succinctly and in a logical orderly fashion, and, particularly, when he has to put pen to paper, with due regard for the rules of syntax." Sien ook Harms LTC "Wat is die oogmerke van akademiese en professionele opleiding van juriste?" in Loots C (red) *Konferensie oor Regsopleiding* (1983 Johannesburg) 10–15 12; Mullins TM "Legal Education" *Regsdosente Kongresreferate* (1975) 23–29 26.

4 FUNDERINGSKRITERIA VIR 'N TEORETIESE MODEL VAN AKADEMIESE REGSOPLEIDING

Die volgende *funderingskriteria* vir 'n teoretiese model van akademiese regsopleiding kan uit hoofde van die voorafgaande uiteensetting geidentifiseer word:

4 1 Akademiese regsopleiding is nie hoofsaaklik professioneel nie, maar eerder suiwer teoreties wetenskaplik

Uit voorgaande blyk duidelik dat die primêre taak van regsfakulteite en -departemente aan Suid-Afrikaanse universiteite is om studente fundamenteel regswetenskaplik te skool. Die toekomstige regsgeleerde moet wetenskaplik metodologies gevorm word deur intensiewe opleiding in die teorie en beginsels van die basiese regsdissiplines wat as grondslag dien vir die meer toegepaste en beroepsgerigte regsdissiplines. Akademiese regsopleiding is gerig op die blootlegging en toeganklikmaking van basiese regsbeginsels en teoretiese leerinhoude.

Die regstudent moet sodanig wetenskaplik gevorm word dat hy oor die teoretiese toerusting sal beskik om nuwe probleme op 'n selfstandige, oorspronklike wyse op te los en te bemagtig. Hy moet wetenskaplik sistematiese kennis en begrip ontwikkel om die regswetenskap in praktykverwante situasies toe te pas. *Akademiese regsopleiding moet 'n breë algemene akademiese skoling en vorming bied wat praktiese beroepsvoorbereiding of geïnstitusioneerde opleiding voorafgaan.*[55] Dit behoort 'n grondslag te verskaf waarop praktiese opleiding kan voortbou.

4 2 Akademiese regsopleiding is, hoewel teoreties wetenskaplik van aard, nie werklikheidsvreemd nie, maar inteendeel altyd werklikheidsrelevant

Die doel-funksie-problematiek van akademiese regsopleiding bring telkens die polemiese vraag na vore, hoe die balans tussen akademiese en geïnstitusioneerde opleiding (praktiese opleiding) gehandhaaf moet word en watter mate van klem in akademiese regsopleiding op die praktykgerigte faset moet val. Dit het ongelukkig gebeur dat daar in die polemiek rondom hierdie vraag 'n kunsmatige kloof geskep is wat nòg die akademie nòg die praktyk tot voordeel strek – akademiese regsopleiding en geïnstitusioneerde regsopleiding is onderskeibaar dog nie skeibaar nie; is nie onversoenbare teenoorgesteldes nie, maar vul mekaar aan. Albei fases van regsopleiding behoort saam aangewend te word om die bes moontlik gekwalifiseerde meehelpers vir die verwesenliking van die geregtigheidsideaal in die samelewing te lewer.[56]

Die vraag kan dus geopper word: wat is die relevansie van akademiese regsopleiding met die oog op latere beroepsbeoefening? Akademiese regsopleiding

55 Dias aw 557; De Vos "Spesifieke Doelstellings van 'n Kursus in Burgerlike Prosesreg" 1982 *Tydskrif vir Regswetenskap* 122–132; Dean "Searching for Competence" 1983 *De Rebus* 346–350 347; Du Plessis *Regsteorie in Praktyk, Regspraktyk in Teorie en Regsopleiding* (*supra*) 16; Corbett aw 71; Kahn E "A Review of South African Legal Education" *Legal Aid in South Africa* (1974) 139–159 142 151; Turpin 1958 *Acta Juridica* 153 154; Grodecki "Legal Education – Dilemmas and Opportunities" 1967 *Leicester University Press* 1–20 1 15.

56 Pretorius aw 136.

hou verband met beroepsbeoefening vir sover dit ook 'n praktiese inslag het deur praktykgerig te wees. Agell[57] verklaar:

> "One objective of the basic education in law is to prepare the students for practical work. One question then is to what extent the basic education should be aimed not only at theoretical and methodological knowledge and experience but also at more practical skills . . . "

Harms[58] beweer dat, alhoewel die hoofdoelwit van akademiese regsopleiding weliswaar is om die student in die reg te onderrig, 'n kennis van die werking van die reg belangriker is – dat gegradueerdes onmiddellik resultate van opleiding in die praktyk ten toon moet kan stel en in 'n hoë mate aan die eise van die praktyk moet voldoen. Hierdie siening is simplisties, seksioneel en eensydig en eis dat akademiese regsopleiding in hoofsaak praktykgerig of- georiënteer moet wees. Nienaber[59] verklaar tereg:

> "It is not the function of the law faculties, as part of the primary law degree, to train their students in the skills and techniques of the practice of law, to teach them their craft, to equip them to step out of law school and straight into court."

Akademiese regsopleiding is nie primêr gerig op die lewering van volledig afgeronde juriste of regspraktisyns nie. Sowel akademiese regsopleiding as geïnstitusioneerde regsopleiding lewer 'n eiesoortige bydrae tot die vorming van volledig afgeronde juriste.[60]

Akademiese regsopleiding (hoewel in hoofsaak teoreties wetenskaplik) wat wil aanspraak maak op beïnvloeding van die regsberoep en -werklikheid sal egter in die besonder aan relevantheidsvereistes moet voldoen.

5 'N TEORETIESE MODEL VAN AKADEMIESE REGSOPLEIDING

Uit hoofde van die voorafgaande doelstellings en funderingskriteria van akademiese regsopleiding, word die volgende toeretiese model vir akademiese regsopleiding voorgestel (sien figuur 1 *infra* 315):

5 1 'n Vierjarige geïntegreerde beroepsgerigte baccalaureusgraad (*Baccalaureus Legum*) met 'n sterk onderbou waarin die basiese algemeenvormende regswetenskappe en ander vakwetenskappe prominent figureer. (Sien figuur 2 *infra* 315.)

Gedurende die eerste drie jaar word regsopleiding gekonsentreer rondom 'n kern van algemeen toepaslike basiese regswetenskappe en ander basiese wetenskappe (waarna soms as "humanities" verwys word) met die moontlikheid van volkome studiemobiliteit in verskillende fakulteite. Gedurende die finale jaar word in hoofsaak op die meer toegepaste en praktykgerigte regswetenskappe gekonsentreer. Die meer beroepsgerigte inslag van akademiese regsopleiding word in

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57 Agell A "Co-operation with Legal Professions and with Research Institutions" *Proceedings of the Third European Conference of Law Faculties* (1974) 73–84 114–120 114.

58 aw 12.

59 Nienaber PM "Wat behoort die aard van 'n regsgraad te wees?" in Loots C (red *Konferensie oor Regsopleiding* (1983 Johannesburg) 163–178 172.

60 Du Plessis *Regsteorie in Praktyk, Regspraktyk in Teorie en Regsopleiding* (*supra*) 10; sien ook: Selb W "The Aims of Law Teaching" *Proceedings of the Third European Conference of Law Faculties* (1974) 27–29 19; Kaplan MI "What are the objectives for academic and professional training for lawyers?" in Loots C (red) *Konferensie oor Regsopleiding* (1983 Johannesburg) 15–19 19; Kenny C "Legal Education: Academical and Professional" 1913 *The Law Quarterly Review* 406–417 406 408; Broomberg aw 41.

hierdie studiejaar weerspieël. Die klem val nie soseer op die vereistes wat deur 'n bepaalde vertakking van die regsprofessie gestel word nie en daar word geensins afgewyk van die tradisionele beskouing oor die inhoud van 'n universiteitsgraad nie. Inteendeel, die klem val juis op 'n basiese fundamenteel wetenskaplike skoling wat die regstudent toerus met kennis van regsbeginsels en die grondslae van die reg en met insigte wat hom meervoudige aanwendingsmoontlikhede van sy opvoeding, kennis en opleiding bied. Hierdie graad vervang alle eerste regsgrade en voorgraadse regsdiplomas asook aanverwante voorbereidende regsopleiding. Die huidige Baccalaureus Legum word vervang deur hierdie vierjarige graad PLUS 'n eenjarige nagraadse uitsluitlik beroepsgerigte regsdiploma (Diploma Legum) wat dan as minimum vereiste geld vir toelating as 'n advokaat van die Hooggeregshof van Suid-Afrika (sien 5 2 hieronder).

5 2 'n Stelsel van uitsluitlik beroepsgerigte gevorderde nagraadse diplomas (*Diploma Legum, Diploma Procuratoriis*) spesifiek ontwerp met die oog op die meer praktykgerigte faset van akademiese regsopleiding

Hierdie gevorderde nagraadse diplomas beoog nie in hoofsaak fundamenteelteoretiese opleiding nie, maar is doelgerig gestruktureer met die oog op beroepsafrigting of -voorbereiding en word gekenmerk deur 'n element van gespesialiseerdheid. Dit behels 'n afgeronde studie met die oog op wat nuttig en prakties vir beroepsbeoefening is (sien figuur 1 en 2 *infra* 315). Die kurrikulum behoort saamgestel te word met die oog op die vereistes van die verskillende balierade en die vereniging van prokureursordes. Hierdie fase behels dus gespesialiseerde regsopleiding met die oog op beroepsbeoefening of professionele kennisverbreding, maar val nogtans binne die kader van die algemeen fundamenteel wetenskaplike opleidingsdoel van 'n universiteit.

5 3 'n Stelsel van honneurs- en magistergrade en nagraadse gevorderde diplomas wat spesifiek ontwerp is met die oog op vakspesialisasie

6 SAMEVATTING

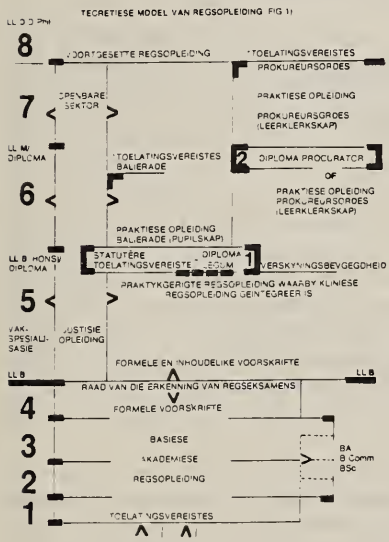
Hierbo is aangedui dat universitêre opleiding in wese klassieke algemeen vormend van aard is, maar dat die universiteit se rol in beroepsgerigte opleiding ook geregverdig kan word. Uit die omvattende regsliteratuur oor regsopleiding word gekonkludeer dat akademiese regsopleiding hoofsaaklik teoreties wetenskaplik van aard is. In 'n ondersoek na die opleiding van prokureursklerke in Suid-Afrika word verklaar:[61]

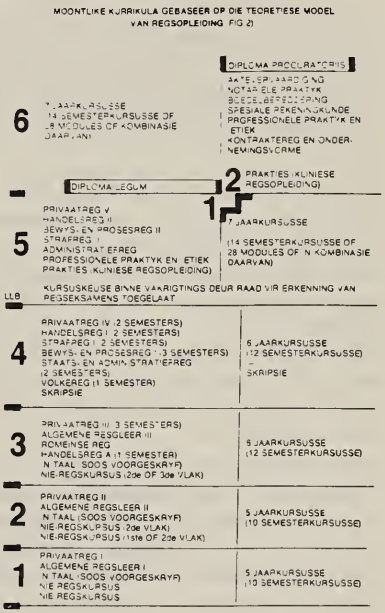
> "The university should be responsible for teaching students the system of law, the relevant legal concepts and principles, the social relevance of legal principles and rules, and should also take responsibility for the initial development of certain basic intellectual skills, viz the analytical, logical and communication skills. .... the chief concern of academic training in relation to any profession is to impart to students the specialised body of knowledge, principles or theories, organised in a systematic way which the members of that profession apply in the solution of problems, or the meeting of needs of clients, or of the community."

Op grond van 'n taksonomie van doelstellings van akademiese regsopleiding is 'n teoretiese opleidingsmodel geformuleer. Laasgenoemde akkommodeer basiese

61 Van der Walt JC en Wilson KA *The Training of Candidate Attorneys in South Africa* (1983 Pretoria) 14 104.

teoretiese wetenskaplike opleiding en maak ook voorsiening vir praktykgerigte of- georiënteerde regsopleiding. Dit lei tot eenvormigheid van basiese akademiese regsopleiding wat vir alle rassegroepe toeganklik is en kanaliseer regstudente noodwendig in verskillende beroepsrigtings. Ten opsigte van nagraadse akademiese regsopleiding word voldoende geleentheid geskep vir inspraak deur professionele liggame en ander instansies. Hierdie opleidingsmodel doen geen afbreuk aan die bestaande regsopleiding nie; inteendeel, dit bied 'n grondslag vir volkome mobiliteit tussen 'n verskeidenheid beroepsrigtings in die reg.





AANTEKENINGE

PERSOONLIKE IMMATERIEELGOEDEREREGTE: 'N NUWE KATEGORIE SUBJEKTIEWE REGTE?

Professor WA Joubert word algemeen in Suid-Afrika as die vader van die nou reeds klassiek geworde leer van privaatregtelike subjektiewe regte erken (sien bv LM du Plessis "Boekbespreking" 1987 *THRHR* 120; W du Plessis *Die Reg op Inligting en die Openbare Belang* (ongepubliseerde proefskrif PU vir CHO 1986) 16; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 381). Sy uiteensetting (*Grondslae van die Persoonlikheidsreg* (1953) 119–121; "'n Realistiese Benadering van die Subjektiewe Reg" 1958 *THRHR* 12 e v 98 e v) van die aard en hoedanighede van die subjektiewe reg en die kategorieë subjektiewe regte wat bestaan, word trouens tot op hede nog onomwonde as die juiste stand van sake in die regswetenskap deur verskeie juriste aanvaar (sien bv Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 54 e v; Van Heerden en Neethling *Onregmatige Mededinging* (1983) 33 e v; Neethling *Persoonlikheidsreg* (1985) 25 e v; Van der Walt *Delict: Principles and Cases* (1979) 22–23) en geniet ook reeds erkenning in die regspraak (sien *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk supra* 381–383).

Die belangrikste momente van die figuur subjektiewe reg sien volgens die huidige posisie soos volg daar uit (sien die gesag in die vorige par): Die basiese kenmerk van die subjektiewe reg is 'n *regsverhouding* of *regsbetrekking* tussen 'n *regsubjek* en 'n bepaalde *regsobjek*. Die inhoud van hierdie regsbetrekking omsluit al daardie *beskikkings- en genotsbevoegdhede* wat die regsubjek uit hoofde van die norme van die objektiewe reg ten aansien van sy objek kan uitoefen. Subjektiewe regte ontstaan deurdat die objektiewe reg *erkenning* verleen aan beskermingsbehoeftige *individuele belange* wat reeds voor-juridies of in die feitelike werklikheid selfstandig bestaan; die reg *skep* gevolglik nie die individuele belang nie en die subjektiewe reg kan daarom nie uit die regsnorme herlei word nie. Alvorens 'n individuele belang as *regsobjek* binne die subjektiewe reg kan dien, moet dit aan twee kwalifikasies voldoen: eerstens moet dit van *ekonomiese waarde* (ook 'n *pretium affectionis*) vir die reghebbende – oftewel relatief skaars – wees; en tweedens moet dit so 'n mate van *bepaaldheid, omlyndheid en selfstandigheid* besit dat beskikking daaroor en genot daarvan moontlik is. Die *aard* van die regsobjek is bepalend vir die soort subjektiewe reg wat daarop bestaan. Vier klasse of kategorieë subjektiewe regte word op dié basis onderskei, te wete *saaklike, vorderings-, persoonlikheids-* en *immaterieelgoedereregte*. Die objekte van hierdie regte is respektiewelik *sake* of eenhede uit die stoflike natuur, *prestasies* of menslike handelinge, *persoonlikheidsgoedere* of onafskeibare bestanddele van die menslike persoonlikheid en *immateriële goedere* of onstof-

like produkte van die menslike gees en werksaamheid wat geskei van sy persoonlikheid kan bestaan.

Die feit dat hierdie uiteensetting van die leerstuk van subjektiewe regte algemeen as korrek aanvaar word, sluit natuurlik nie die verdere ontwikkeling of ontplooiing van die leerstuk uit nie (sien Potgieter "Vonnisbespreking" 1978 *THRHR* 328). Daar bestaan in eerste instansie beslis geen *numerus clausus* subjektiewe regte binne een van die erkende kategorieë nie, soos duidelik blyk uit die betreklik resente erkenning van die regte op privaatheid en identiteit as persoonlikheidsregte (sien Neethling 212 e v 253 e v), en dié op die werfkrag en handelsgeheim as immaterieelgoedereregte (sien Van Heerden en Neethling 54 e v 132–133; sien ook Mostert *Grondslae van die Reg op die Reklamebeeld* (ongepubliseerde proefskrif RAU 1985) oor hierdie reg as "nuwer" immaterieelgoedereregte). Hierbenewens – en dit is 'n baie belangrike gesigspunt vir doeleindes van die onderhawige bespreking – bestaan daar ook geen beletsel teen die erkenning van nuwe *kategorieë* subjektiewe regte nie (sien Potgieter 1978 *THRHR* 328) mits maar die betrokke individuele belang(e) as regsobjek kwalifiseer en bowendien nie onder een van die bestaande vier groepe regsobjekte geklassifiseer kan word nie.

Met die oog op die identifisering en omlyning van 'n nuwe kategorie regsobjekte, is dit noodsaaklik om weer eens die selfstandige bestaan van individuele belange in die feitelike werklikheid – onafhanklik van juridiese erkenning – te onderstreep. Hierdie beklemtoning van die voor-juridiese bestaan van individuele belange het nie slegs filosofiese betekenis nie, maar is inderdaad van kardinale regswetenskaplike en praktiese belang. Dit bring naamlik die insig na vore dat 'n begrip aangaande die hoedanighede van hierdie belange nie deur middel van regsnorme bepaal kan word nie, maar alleen met verwysing na hulle voorkoms in die feitelike werklikheid. 'n Regswetenskaplike afbakening en omlyning van individuele belange, wat absoluut noodsaaklik is vir die vermoë om beskermende maatreëls noukeurig in die praktyk toe te pas, doen nie afbreuk aan hierdie waarheid nie. Hierin lê juis die taak van die regswetenskap, wat immers dien tot sistematisering, omskrywing en gevolglike hanteerbaarmaking van verskynsels van die feitelike sowel as die regswerklikheid. Indien die regswetenskaplike bewerking van 'n individuele belang egter 'n ander begrip daaraan toedig as wat dit in die feitelike werklikheid het, verdien dit nie die naam van wetenskaplike begrip nie. Boonop sal regsreëls wat op sodanige onjuiste opvatting oor die feitelike werklikheid gegrond is, noodwendig tot onsekerheid, inkonsekwensies en gevolglike onbillikhede lei. Daarom is 'n gelykskakeling deur die reg van byvoorbeeld 'n vermoënsbelang met 'n persoonlikheidsbelang onaanvaarbaar, nie alleen omdat dit onwetenskaplik en in stryd met die feitelike werklikheid is nie, maar ook omdat dit 'n geleibuis vir regsonsekerheid en doellose regsontwikkeling is (sien hieroor Neethling en Van Heerden 35; Neethling 36–37).

In die lig hiervan is daar myns insiens inderdaad sprake van die bestaan van 'n vyfde kategorie subjektiewe regte, die objekte waarvan totaal verskil van die erkende vier groepe omdat hulle tegelyk bepaalde kenmerke van sowel persoonlikheidsgoed as vermoënsgoed vertoon. Hierdie objekte kan dan ook as *persoonlike immateriële goedere* geklassifiseer word en, om die knoop deur te hak, kan tans die individu se *verdienvermoë* en sy *kredietwaardigheid* as sodanige goedere geïdentifiseer word. Om dit te verduidelik, moet enigsins uitgewei word.

Omdat persoonlikheidseienskappe 'n belangrike rol by die vorming van 'n persoon se verdienvermoë en kredietwaardigheid speel, bestaan die opvatting lank reeds dat hierdie goedere daarom persoonlikheidsgoedere is. So verklaar Van der Walt (*Die Sommeskadeleer en die "once and for all"-Reël* (ongepubliseerde proefskrif Unisa 1977) 289) met betrekking tot verdienvermoë:

> "'n Mens se verdienvermoë word bepaal deur hoogs persoonlike feite soos intelligensie, kundigheid en opleiding, ondernemingsgees, geaardheid, gesondheid, ensovoorts. Die verdienvermoë moet gevolglik na my mening as 'n persoonlikheidsaspek van die mens beskou word" (sien ook Wiehahn *Boikot as Onregmatige Daad* (ongepubliseerde proefskrif Unisa 1973) 191–193 m b t arbeidsvermoë).

Wat kredietwaardigheid betref, is Joubert (*Grondslae* 134) insgelyks van mening dat die goeie naam van 'n persoon (as persoonlikheidsaspek) sy kredietwaardigheid medebepaal; trouens, die oorwig van mening is dat kredietwaardigheid en die goeie naam een en dieselfde begrip is en dat kredietwaardigheid daarom 'n persoonlikheidsgoed is (sien hieroor Klopper *Die Beskerming van Kredietwaardigheid in die Suid-Afrikaanse Reg* (ongepubliseerde proefskrif UOVS 1986) 201 e v).

Hierdie beskouing gaan weens drie oorwegings egter nie op nie. *Eerstens* skep die beskouing die gevaar dat ander regsgoedere (soos die werfkrag van 'n onderneming wat tog ook deels deur die persoonlikheid van die ondernemer gevorm kan word (sien Van Heerden en Neethling 50–51)) wat klaarblyklik nie persoonlikheidsgoedere is nie, ten onregte as sodanig bestempel kan word. *Tweedens* lei die feit dat bedoelde twee regsgoedere deur die individu se persoonlikheid of sy persoonlikheidseienskappe (mede)bepaal word, myns insiens noodwendig tot die slotsom dat hulle daarom hoogstens 'n *manifestasie of uitdrukking* van die agterliggende persoonlikheid is; op sigself is hulle dus nie selfstandige persoonlikheidsaspekte nie. Hierdie siening word bevestig deur die feit dat verlies van verdienvermoë of 'n inwerking op 'n persoon se kredietwaardigheid op sigself nie 'n persoonlikheidskrenking daarstel nie, maar veelal die *gevolg* van 'n persoonlikheidskrenking is. 'n Voorbeeld met betrekking tot die verdienvermoë kan ter illustrasie dien: Wanneer 'n persoon in 'n ongeluk beserings opdoen en permanent arbeidsongeskik raak, stel die arbeidsongeskiktheid beslis nie 'n persoonlikheidskrenking daar nie, maar wel die beserings (krenking van die fisiese integriteit) wat dan die verlies van verdienvermoë tot gevolg het. Daarom is verdienvermoë en kredietwaardigheid nie selfstandige persoonlikheidsgoedere nie (vgl Neethling 31). *Derdens* word bedoelde twee goedere meesal nie slegs deur persoonlikheidseienskappe nie, maar ook deur vermoënsgoedere medebepaal; 'n persoon se kredietwaardigheid hang tog in 'n groot mate van sy vermoënsbates af (sien Klopper 24–27), terwyl sy verdienvermoë veelal eers deur stoflike sake tot sy reg kan kom ('n messelaar of advokaat bv beskik beslis nie sonder sy troffel of regsboeke oor sy volle verdienvermoë nie). So gesien, kan op 'n persoon se verdienvermoë of kredietwaardigheid ingewerk word sonder dat daar hoegenaamd eers van 'n voorafgaande persoonlikheidskrenking sprake is (soos waar 'n advokaat se boekery verwoes word). 'n Mens kan dus tot die slotsom kom dat die beskouing dat hierdie twee goedere selfstandige persoonlikheidsaspekte is, nie met hulle hoedanigheid in die feitelike werklikheid strook nie en daarom ook nie nagevolg behoort te word nie.

Met die voorafgaande word egter nie te kenne gegee dat verdienvermoë en kredietwaardigheid geen ooreenkoms met persoonlikheidsgoedere toon nie. Inteendeel, as mens die hoedanighede van bedoelde twee goedere met die eienskappe van persoonlikheidsgoedere (sien hieroor Joubert *Grondslae* 146–147;

Neethling 28) vergelyk, dan blyk dit dat hulle – net soos persoonlikheidsgoedere – nie geskei en selfstandig van die persoonlikheid kan bestaan nie; hulle is dus *onoordraagbaar, onvererflik* en *onvatbaar vir beslaglegging* (vgl hier Klopper 242–243 se beskouing oor kredietwaardigheid). Anders as persoonlikheidsgoedere, ontstaan hulle egter nie noodwendig met die *geboorte* van die mens en gaan eers tot niet met sy *dood* nie; 'n baba beskik byvoorbeeld in die reël nie oor verdienvermoë nie terwyl 'n volwassene weens insolvensie sy kredietwaardigheid kan verloor oftewel *prysgee*. Desnietemin moet weer eens beklemtoon word dat hierdie goedere net gedurende die leeftyd van die mens – en dus persoonlikheidsverbonde – kan bestaan (vgl Klopper 241–242 249).

Die slotsom dat bedoelde goedere nie selfstandige persoonlikheidsgoedere is nie maar slegs bepaalde eienskappe van 'n persoonlikheidsgoed vertoon, laat die vraag onstaan of mens nie hier – in die lig van die tradisionele teenstelling van die persoonlikheidsreg teenoor die vermoënsreg (vgl Neethling 27–28) – met vermoënsgoedere te make het nie. Nou is dit inderdaad so dat 'n aantasting van kredietwaardigheid (sien Klopper 268) en verlies van verdienvermoë in die reël vermoënskade teweegbring; en gesien die gevolgtrekking dat hierdie goedere nie persoonlikheidsgoedere is nie – die krenking waarvan hier bloot tot *vermoensregtelike gevolge* aanleiding sou gegee het sonder dat die persoonlikheidsgoed daarmee die karakter van 'n vermoënsgoed sou verkry het (vgl Joubert *Grondslae* 144; Neethling 28) – is die enigste afleiding dat hulle dan inderdaad vermoënsgoedere is. Die feit dat *vermoënskade* ingetree het, dui dus – in die afwesigheid van 'n persoonlikheidsgoed – onvermydelik op die vermoënsregtelike aard van bedoelde twee goedere (vgl Klopper 244 254). Hierbenewens blyk die vermoënsregtelike karakter van die verdienvermoë en die kredietwaardigheid ook daaruit dat hulle 'n besliste *markwaarde* kan hê. Anders as wat Wiehahn (192) en Van der Merwe en Olivier (183 vn 11) ten aansien van verdienvermoë te kenne gee, kan 'n persoon dus met hierdie goedere "handel dryf" (in die sin dat hy sy verdienvermoë in ruil vir 'n bepaalde finansiële vergoeding of sy kredietwaardigheid as sekuriteit vir 'n kredietverlening van bepaalde omvang kan aanbied) en vorm hulle bestanddele of bates van sy boedel (sien hieroor *infra*).

Vervolgens kom die vraag na die *vermoënsregtelike hoedanigheid* van bedoelde twee goedere aan die orde. Aangesien daar nie van 'n *saak* of *prestasie* sprake is nie, is die enigste ander moontlikheid dat hulle *immateriële goedere* is. Hierdie afleiding word gerugsteun deur die feit dat mens hier, op die keper beskou, inderdaad met onstoflike *skeppings* of produkte van die menslike gees en werksaamheid op ekonomiese gebied te make het (sien Klopper 248 m b t kredietwaardigheid). Dit kan soos volg verduidelik word. Alhoewel 'n persoon in uitsonderingsgevalle by geboorte reeds kredietwaardig kan wees of oor 'n verdienvermoë kan beskik (dink maar aan baba-kompetisies), word hierdie goedere in die reël geleidelik deur energie, inspanning, inisiatief, studie, ondervinding, finansiële uitgawes ensovoorts planmatig gedurende sy leeftyd ontwikkel totdat dit volle wasdom bereik. Hierdie skeppings is beslis vergelykbaar met ander onstoflike skeppings op ekonomiese gebied, veral die werfkrag van 'n onderneming (sien hieroor Van Heerden en Neethling 50–51). Anders as die werfkrag van 'n onderneming en ander immateriële skeppings op ekonomiese, kulturele en tegniese gebied kan, soos reeds beklemtoon is, bedoelde goedere egter nie selfstandig en geskei van hulle skepper bestaan of voortbestaan nie (sien Van Heerden en

Neethling 48–49). Daarom word dan ook verskil met Klopper (248–249) vir sover hy kredietwaardigheid as "afsonderlike immateriële regsgoed" sien wat onder die immaterieelgoedereregte ingedeel kan word.

Die slotsom is gevolglik dat verdienvermoë en kredietwaardigheid nòg suiwer persoonlikheidsgoed, nòg suiwer immateriële goed is. Soos duidelik hierbo blyk, bevat hulle eienskappe of elemente van sowel persoonlikheids- as immateriële goed. Mens sou hulle dus met reg as *persoonlike immateriële goedere* kan beskryf. *Persoonlike immateriële goedere is dan daardie immateriële vermoënsgoed wat aan die persoonlikheid verbonde is.*

Deur juridiese erkenning van hierdie goedere sou daar dus inderdaad 'n vyfde klas subjektiewe regte tot stand kom, mits hulle maar voldoen aan die twee vereistes wat gestel word om as regsobjekte te kwalifiseer (sien *supra*). Nou is daar reeds beklemtoon dat hierdie goedere van *ekonomiese waarde* vir die individu is. Hierbenewens blyk dit uit die omskrywings van arbeidsvermoë deur Wiehahn (192) en van kredietwaardigheid deur Klopper (244 248) dat die twee goedere wel so 'n mate van *bepaaldheid, omlyndheid* en *selfstandigheid* besit dat beskikking daaroor en genot daarvan moontlik is. Daarom kan hierdie persoonlike immateriële goedere as regsobjekte dien.

Vir sover die verdienvermoë en kredietwaardigheid as regsgoedere en objekte van persoonlike immaterieelgoedereregte kan fungeer, is die erkenning van hierdie subjektiewe regte in laaste instansie die taak van die positiewe reg. Inderdaad blyk die identifisering, erkenning en beskerming van die verdienvermoë as vermoënsgoed reeds onomwonde uit die regspraak. In byvoorbeeld *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) 917 verklaar die hof met betrekking tot die *lex Aquilia*:

> "In the present case there has been a *loss of earning capacity* the value of which must be calculated in terms of what the plaintiff would have earned in money if he had not become incapacitated . . . *The capacity to earn money is considered to be part of a person's estate* and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate" (my kursivering).

Ook in *Krugell v Shield Versekeringsmaatskappy Bpk* 1982 4 SA 95 (T) 99 word gepraat van "verlies aan verdienvermoë wat tot geldelike skade aanleiding gee." (Sien verder *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 3 SA 577 (A) 612; *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 111; *Ferguson v Santam Insurance Ltd* 1985 1 SA 207 (K) 208; Boberg *The Law of Delict Vol I* (1984) 531; Van der Walt *Sommeskadeleer* 461; vgl ook Roos en Clark "The Law of Delict and the Illegal Breadwinner" 1987 *THRHR* 93 waar hulle sê: "One of the capacities flowing from a right to physical integrity [vgl egter *supra*] is an income-earning capacity . . . and it is that *capacity* which is protected by our courts where claims for damages are based on future loss of earnings.")

Die erkenning van verdienvermoë as regsgoed, sy dit dan ook by wyse van minder gelukkige formulering, blyk ook uit die onlangse baanbrekende beslissing van regter Howie in *Hawker v Life Offices Association of SA* 1987 3 SA 777 (K) in omstandighede waar daar nie van verlies van verdienvermoë nie, maar wel van 'n *verhindering om verdienvermoë uit te oefen,* sprake was. In hierdie saak is die applikant, 'n versekeringsagent, deur sy werkgewer weens wangedrag op 'n swartlys van sy professie geplaas ('n sogenaamde "S-reference"). Ingevolge

hiervan word hy vir 'n periode van tot 20 jaar van indiensneming in die versekeringsindustrie uitgesluit. Die applikant vra 'n interdik aan ten einde sy vorige werkgewer te gebied om sy naam van die swartlys te verwyder. Regter Howie verklaar (780):

> "In the absence of legal and contractual restrictions, applicant has the *subjective right to exercise his chosen calling without unlawful interference from others: Matthews & others v Young* 1922 AD 492 at 507 . . . *That right does not solely relate to factors of personality. It has a monetary component* . . . Furthermore, the nature and extent of the interference caused to applicant's right by giving him an S reference is squarely comparable with the results of the boycotts involved in *Tothill's* case *supra* and the case of *Murdoch v Bullough* 1923 TPD 495. As Van Heerden & Neethling *Onregmatige Mededinging* point out at 191–7, instigation of boycotts against the traders in those cases was a civil wrong.
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> Although the learned authors referred to are of the view (at 77–8) that unlawful interference with an *employee's liberty to earn his livelihood* in his chosen sphere is not juridically the same as unlawful interference with *a trader's right to goodwill, the two situations are,* in my opinion, so *closely analogous,* especially as regards the instigation of a boycott, that the law they state (and I respectively agree with their view) must constitute important guide-lines in the instant case" (my kursivering).

Hierdie *dictum* verg nadere beskouing. *Eerstens* kom die aanname en konstruksie van 'n persoon se "subjective right to exercise his chosen calling" ooreen met die formulering van 'n "reg" op "the free exercise of his trade, profession or calling" – veral deur vroeëre regspraak (sien bv *Patz v Greene and Co* 1907 TS 427 436; *Matthews v Young* 1922 AD 492 507) – op die gebied van onregmatige mededinging (sien Van Heerden en Neethling 42 54–55). Volgens woordlui is hierdie regte egter niks meer nie as abstrakte *vryheidsbevoegdhede* (regter Howie praat ook van "an employee's *liberty* to earn his livelihood") wat elkeen toekom en kan daarom net so min subjektiewe regte wees as wat 'n reg om te werk of om mee te ding, of, op 'n ander vlak, 'n reg om te eet of te slaap dit kan wees. (Vir uitvoeriger kritiek op die beskouing dat *vryheid van doenigheid* 'n subjektiewe reg is, sien Van Heerden en Neethling 35–36 40–44; Neethling 35–36.) Nietemin kan die erkenning van 'n persoon se "subjective right to exercise his chosen calling," suiwer gesien, alleen as die erkenning van sy reg op verdienvermoë (wat, heel algemeen beskou, in hierdie verband sy persoonlike werfkrag t o v persone soos werkgewers en klante omvat in omstandighede waar hy nie 'n onderneming daarop nahou nie: vgl Van Heerden en Neethling 78) opgevat word – net soos die erkenning van sy "right to carry on his trade" in ondernemingsverband alleen as 'n erkenning van die reg op die werfkrag van sy onderneming geskou kon word (vgl Van Heerden en Neethling 55). *Tweedens* word die waarheid tereg beklemtoon dat verdienvermoë as regsgoed "factors of personality" sowel as "a monetary component" bevat; dit is dus niks anders nie as 'n persoonlike immateriële vermoënsgoed. *Derdens* word ook tereg op die analogie tussen verdienvermoë (as persoonlike werfkrag) en die werfkrag van 'n onderneming gewys. Daarom is dit dan ook moontlik om die beginsels wat ten aansien van boikot as verskyningsvorm van onregmatige mededinging geld, hier toe te pas (vgl ook Wiehahn 191). So gesien, het 'n boikotopwekking teen die werknemer tot gevolg – net soos 'n boikotopwekking teen 'n ondernemer (sien Van Heerden en Neethling 190–191) – dat hy verhinder word om sy prestasie (hier sy verdienvermoë) op die mark te plaas. (Let daarop dat alhoewel daar hier nie sprake van 'n inwerking op of verlies van die verdienvermoë van die werknemer as sodanig is nie, sy aanwending van sy verdienvermoë (oftewel sy gebruik en genot daarvan) aan bande gelê is.) En synde

'n "direkte aanval" op die werknemer, behoort sodanige sekondêre boikot prinsipieel of *prima facie* as onregmatig geag te word. Die enigste verdere vraag is dan of daar 'n regverdigingsgrond tot die dader se beskikking staan (vgl Van Heerden en Neethling 169–170 190–191; vgl nietemin regter Howie se opmerkings (781 e v) wat die *onus* ten onregte op die werknemer (applikant) plaas om aan te toon dat regverdiging vir die gewraakte boikotopwekking ontbreek het). Hierteenoor behoort 'n primêre boikot, dit is waar 'n werkgewer *self* besluit om nie 'n potensiële werknemer in diens te neem nie, net soos by onregmatige mededinging in die reël weer regmatig te wees. Per slot van sake staan dit normaalweg elke persoon vry om te besluit aan wie hy werk wil verskaf (vgl Van Heerden en Neethling 189–190). (In verband met 'n primêre boikot is dit van belang om daarop te wys dat dit in die algemeen natuurlik ook 'n potensiële werknemer vrystaan om te besluit vir wie hy wil werk en om bygevolg nie sy verdienvermoë tot beskikking van 'n bepaalde werkgewer te stel nie. Nou het 'n mens, op die keper beskou, hier bloot te doen met die uitoefening van die vryheid wat hom in elke subjektiewe reg – ook dié op die verdienvermoë – openbaar, te wete in die beskikkings- en genotsbevoegdhede van die regsubjek oor die regsobjek. As reghebbende is 'n persoon tog "vry" om met sy regsobjek (verdienvermoë) te handel vir sover dit hom regtens nie verbode is nie (vgl Van Heerden en Neethling 36). Dit is dan ook in hierdie lig wat die sogenaamde "*reg om te staak*" (sien hieroor Claasen "Die Sogenaamde Privaatregtelike 'Reg om te Staak'" 1983 *THRHR* 32 e v) gesien moet word. Hierdie "reg" beteken dat 'n werknemer – binne die perke wat die regsorde stel – "vryelik oor sy arbeidskragte [verdienvermoë] [kan] beskik en besluit om dit nie meer tot die beskikking van sy werkgewer te stel nie" (Claasen 41), dit wil sê om te staak. So gestel, het mens dus in der waarheid hier met die uitoefening van die subjektiewe reg op die verdienvermoë te make. Daarom word met Claasen verskil (41–42) vir sover hy te kenne gee dat die "reg om te staak" net 'n faset van die algemene handelingsvryheid of -bevoegdheid as 'n aspek van die regsubjektiwiteit is.)

Kredietwaardigheid word ten onregte in die regspraak meesal net onder die vaandel van die *fama* of goeie naam erken en beskerm (sien Klopper 203 e v; *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 2 SA 373 (0) 384 e v; sien ook Neethling 136). Daar is nietemin ook blyke van die erkenning daarvan as vermoënsbelang (sien Klopper 205). In *Trust Bank v Marques* 1968 2 SA 796 (T) 799 verklaar die hof met betrekking tot 'n geval waar 'n bank 'n tjek onregmatig onteer het:

> "In regard to the alternative claim based on negligence, there is no case in which it has been held that such a claim will lie ... If there is such a claim, it would be in respect of damage to the plaintiff's patrimony by reason of loss of business reputation or creditworthiness."

Volgens Klopper (248–249) kan hierdie erkenning ook uit *Informa Confidential Reports (Pty) Ltd v Abro* 1975 2 SA 760 (T) 763 afgelei word aangesien *nalatigheid* as voldoende vir die beskerming van kredietwaardigheid geag is. Hierdie tendens behoort gevestigde reg te word na mate die ware aard van kredietwaardigheid onder die howe se aandag kom.

Die positiefregtelike erkenning van subjektiewe regte op die verdienvermoë en die kredietwaardigheid bring uiteraard die probleem van afbakening van hierdie regte na vore, dit wil sê die vraag na die grens of skeidslyn tussen 'n

regmatige en 'n onregmatige aantasting van hierdie regsgoedere. Nou is onregmatigheid in ons reg basies in die skending van 'n subjektiewe reg – dus ook 'n persoonlike immaterieelgoederereg – geleë (sien *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk supra* 381 387; *Bester v Calitz* 1982 3 SA 864 (O) 879; Van der Merwe en Olivier 54 e v; Van der Walt *Delict* 22–23; Van Heerden en Neethling 65 e v; Neethling 66–68; sien ook Klopper 269 m b t kredietwaardigheid). Sodanige skending kom voor wanneer die *verhouding* tussen die subjek en objek *feitelik* versteur word (meesal deur 'n inwerking op die objek) in omstandighede waar die versteuring *onredelik* of *contra bonos mores* (d w s normstrydig) is. In eersgenoemde verband kom – soos reeds hierbo blyk – dus nie net *verlies* van verdienvermoë nie, maar ook enige *belemmering* van die reghebbende se *beskikking* daaroor of *genot* daarvan as 'n skending van sy reg daarop in aanmerking. Die sogenaamde regverdigingsgronde speel in laasgenoemde verband 'n belangrike rol. (Let daarop dat dit in die huidige verband dikwels onnodig sal wees om die *boni mores*-maatstaf toe te pas. Dit sal naamlik die geval wees indien 'n aantasting van kredietwaardigheid of 'n verlies van verdienvermoë *voortgevloei* het uit die aantasting van 'n ander selfstandige subjektiewe reg (soos die persoonlikheidsreg op die fisiese integriteit of eiendomsreg) van die benadeelde persoon. In sodanige omstandighede is die onregmatigheid van die skending van die ander subjektiewe reg bloot van 'n deurlopende aard sodat ook die daaropvolgende inwerking op enige van die twee persoonlike immateriële goedere as onregmatig aangesien moet word.)

Die toepassing van die *boni mores*-maatstaf op die gebied van die reg op verdienvermoë word treffend geïllustreer deur die beslissing in *Hawker v Life Offices Association of SA* (*supra*). Daar verklaar die hof (781):

> "If interference with another's subjective right is unreasonable according to the standard of the boni mores of the community then it is unjustifiable and thus unlawful: Van Heerden & Neethling at 67–72; *The Law of South Africa* vol 8 pars 20–1 at 21–2; Boberg at 146. Reverting to the matter of malice, it can be a factor to be taken into account in determining reasonableness or not in a borderline case (*The Law of South Africa* vol 8 par 27 at 42; Boberg at 206–8). But, logically, if there are reasons enough to show that the giving of the S reference was unreasonable it will be unneccessary to consider whether on anyone's part there was malice. Conversely, if it is clearly apparent that there were reasonable grounds for giving that reference then the question of malice is irrelevant – cf *Tsose v Minister of Justice & others* 1951 (3) SA 10 (A) at 17H."
>
> "Whether respondent's action in the present matter was unreasonable and thus unlawful involves a weighing-up of the particular conflicting interests of the parties, their relationship to one another, the circumstances of the case and considerations of social policy: *The Law of South Africa* vol 8 par 20; and see the dicta quoted by Van Heerden & Neethling at 70, especially in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others* 1981 (2) SA 173 (T) at 188H–189A, where the importance is stressed of having regard to 'the morals of the market place, the business ethics of that section of the community where the norm is to be applied'."

Na deeglike en uitvoerige oorweging van alle relevante faktore (sien 781–790) kom die hof tot die slotsom – wat volle instemming verdien – dat die aansoek slaag. Regter Howie (790) stel dit soos volg:

> "The community at large, in formulating its legal convictions, its boni mores, would have regard to all the aforegoing features concerning the conflicting interests of the parties and the interests of the industry. It would also take into account the disproportion between the 'offence' and the punishment imposed. It is in the public interest that dishonesty be effectively and firmly dealt with, especially in an industry where so much is done on the strength of information given and taken in good faith. It is also in the public interest, however, that trained personnel with ability not be lost to the industry and that, as far as it is reasonable to allow, a man be at liberty to pursue his chosen calling.

> Having regard to the cumulative effect of all the aforementioned features I have come to the conclusion that respondent's act of giving applicant an S reference was so disproportionate to the 'offence' that such reference was unreasonable and therefore, delictually speaking, wrongful."

'n Laaste opmerking: Alhoewel die eiesoortige aard van kredietwaardigheid en verdienvermoë in die feitelike werklikheid vasstaan en, so gesien, die behoefte aan die erkenning van 'n nuwe kategorie subjektiewe regte duidelik onderstreep word, is die finale woord oor die hoedanighede van die verdienvermoë en die wyse van beskerming daarvan nog lank nie gespreek nie. Dit is trouens die ideale onderwerp vir 'n meesters- of doktorale studie – soos Klopper reeds in verband met kredietwaardigheid onderneem het. Sodoende kan duidelike riglyne uitgestippel word waarlangs die persoonlike immaterieëlgoederereg in die Suid-Afrikaanse reg kan ontplooi.

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INDORSEMENT BY A WRONGLY DESIGNATED PAYEE OR INDORSEE: SEC 30 (5) OF ACT 34 OF 1964

Section 30(5) of the Bills of Exchange Act 34 of 1964 provides:

> "If in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he must, in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding his proper signature."

The corresponding provisions in the negotiable instruments legislation of other common-law countries are modelled largely on section 32(4) of the English Act, which reads:

> "Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding if he thinks fit, his proper signature."

The only common-law country, apart from South Africa, to have deviated slightly from this model is Canada, which omits the words "if he thinks fit" and inserts the words "or he may indorse by his own proper signature." The Canadian section, however, remains discretionary. In contrast, the South African section 30(5) is mandatory.

Why the Deviation?

The effect of section 30(5) is that, should its requirements not be met, no negotiation in terms of section 29(1) takes place, and the person in possession of the instrument cannot qualify as a holder. (See *S J Jonker v M Bacher Holdings (Pty) Ltd In Liquidation* TPD 1 1979 Case 177 (b), unreported; the section, of course, will not be applicable to bearer instruments or instruments which may be treated as payable to bearer: see s 5(3).) At most, a cession will have taken place and the transferee will take title subject to equities, and will not be able to sue by summary judgment or provisional sentence. (See F R Malan *Bills of Exchange, Cheques and Promissory Notes in South African Law* (1983) para 90 and para 90 fn 59; see also *Brick v P Wilson and E Mansfield and Co* 1971 4

SA 338 (T) 339D–F.) Under the corresponding section of the English act, however, an effective negotiation by normal indorsement is quite possible, despite the discrepancy between the name of the payee or indorsee and that of the indorser. Because of the discretionary nature of the English provision, the transferee will qualify as a holder. (See Malan para 90 fn 57 and also *Arab Bank v Ross* 1952 1 All ER 709 (CA); *Leonard v Wilson* (1834) 2 C and M 589 and *Bird and Co (London) Ltd v Thomas Cook and Son (Bankers) Ltd* 1937 2 All ER 227 (KB).)

The history of section 30(5) is briefly as follows: The old (pre-1964) Cape and Natal statutes (s 30(4) Cape; s 31 Natal.) were modelled on the English provision: under those statutes, because the wording was discretionary, the payee or indorsee could choose either to indorse with his correct name, or to sign as he was described, adding if he thought fit, his proper signature. The old Transvaal and Orange Free State statutes, (Transvaal proc 11 of 1902, s 30(4) and OFS ord 28 of 1902, s 30(4)) however, made the second option compulsory. In the 1964 act, the legislature chose to settle the matter by following the Transvaal and OFS provisions. The reasons for this decision are not clear: Although the then clause 30(5) of the Bills of Exchange bill was discussed in the house of assembly debates, the report of the relevant debate is far from helpful. The most that can be gleaned from the speech by the minister of finance is that where there was a difference in the wording between one province and another, the guiding principle was taken to be the "actual banking practice." (*House of Assembly Debates* vol 10, 1964-03-09 to 1964-05-01 4078.) Even if it were the case that the established banking practice were to follow the Transvaal and OFS requirements, it cannot be said that this practice should have been made mandatory merely because of what became the norm, since potential holders are prejudiced by the mandatory nature of the section. It is unfortunate that nowhere in the house of assembly debates is it made clear why the mandatory provision was preferred to the discretionary provision.

The Effect of Section 30(5)

If the name of the payee or indorsee is mis-spelt, or if he is in any way wrongly designated, and he does not comply with the mandatory requirements of section 30(5) (i e he merely signs his true signature), then no negotiation of the bill will take place and the person to whom it is 'transferred' in this way does not become a holder. (See Malan para 90.) For the purposes of negotiation to the transferee it may be taken as *pro non scripto*; however, the transferor, by signing in this way, may still incur liability in terms of section 21(a) and possibly also section 54.

Of relevance to a study of section 30(5) is section 5(1), which provides that if a bill is not payable to bearer, the payee, to qualify as a holder, need only be named or otherwise indicated with reasonable certainty. It should be noted that the latter section does not concern itself with negotiation — merely qualification by the payee as holder. (This is why it is permissible to lead extrinsic evidence to identify the payee. See *Soref Bros (SA) (Pty) Ltd v Khan Brothers Wholesale* 1976 3 SA 339 (D) 340 (A) and *Rovic Noord Kaap v Roux* 1980 4 SA 59 (O) 61. It appears, however, from the mandatory wording of s 30(5) that extrinsic evidence may not be led to avoid the operation of the section when the wrongly designated payee merely signs his correct signature.) Thus if the payee is wrongly designated, as long as he is indicated within the bounds of reasonable certainty,

he may qualify as a holder. Section 30(5), however, concerns itself only with negotiation of the instrument by such payee and not with his qualification as holder. In order to negotiate it, he must indorse it exactly as he is described (incorrectly), then adding his proper signature. The two provisions are reconcilable, since the one deals with qualification by the payee as a holder, and the other with the requirements for a valid negotiation by him. In the result, section 5(1) in no way impedes the operation of section 30(5). This view, it is submitted, is supported by the cases *Brick v P Wilson and E Mansfield & Co* 1971 4 SA 338 (T) 339D–G and *Soref Bros (SA) (Pty) Ltd v Khan Brothers Wholesale* 1976 3 SA 339 (D) 339H–340B.

The Case Law

Section 30(5) has been relied upon in several South African cases. A brief analysis of these cases will, it is hoped, illustrate the need for an amendment of the section. It will be seen that the trend has been to hold that section 30(5) does not apply in circumstances where, on a strict application of the section, it should have applied. The courts have apparently had to avoid applying the section, to avoid inequity.

In *New York Shipping Co (Pty) Ltd v Lion Hill Manufacturing Co (Pty) Ltd* 1972 3 SA 362 (W) the payee was described as 'Messrs Frank Shaft Concession Store (Pty) Ltd.' Its indorsement read 'Frankshaft Concession Stores (Pty) Ltd.' It was contended by counsel for the defendants, relying on section 30(5), that this was not a valid indorsement to the plaintiff. Hiemstra J rejected this contention, stating (362G) that 'this was a triviality' and later (363B):

> "This difference is so insignificant that I am not going to hold that the indorsement is bad. I do not regard it as a 'wrong designation', or 'mis-spelling' as intended by the section."

The matter went on appeal to the Transvaal provincial division, and in *Lion Mill Manufacturing Co (Pty) Ltd v New York Shipping Co (Pty) Ltd* 1974 4 SA 984 (T) Galgut J held (989D) that, despite the fact that section 30(5) had not strictly been complied with, this would not relieve the maker of the note from liability. He held that to hold that the indorsement would relieve the maker of the note on the grounds that it did not comply with section 30(5),

> "would be paying too much attention to form, and not enough to the realities of the case" (989B).

With respect, the wording of section 30(5) is clear. Whether insignificant or not, the section covers any wrong designation or mis-spelling. On a true application of the section it should not have been ignored in this way. The duty of the courts is to apply the law, and not to disregard it on the grounds that a particular law may prove inequitable.

In *Mourgelas v Maidanos* 1973 4 SA 297 (T) the payee was described on a cheque as "Theod Alexopoulos." The indorsement on the back of it, purporting to be that of the payee, read "Alexopoulos Theodozos." Marais J, relying on section 27(1), held that the plaintiff was a holder, but not a holder in due course, since the instrument, because of the indorsement, was "not regular on the face of it." It is submitted that the judge erred in holding that the plaintiff was a holder as all, since he failed to consider section 30(5) in his judgment. It is submitted that on a true application of the section as intended by the legislature, a negotiation did not take place in *Mourgelas's* case, and the plaintiff did not

qualify as a holder. (See Malan para 90 fn 59.) Although the judge did not mention section 30(5) in his judgment, he did make the following comment (298F):

> "It is not every discrepance between the payee's name and the indorsing signature which would render a cheque irregular within the terms of section 27. As long as there is no reasonable doubt as to the single identity of the payee and the indorser, differences between the description and the signature would not constitute an 'irregularity'. Thus a mis-spelling which is obviously a mis-spelling would not be regarded as such."

It is submitted that this dictum is in clear conflict with section 30(5) which appears to have been overlooked. (Malan too, although he does not elaborate, submits that the plaintiff did not qualify as a holder – see par 90 fn 59.) In argument, it appears that even had Marais J considered section 30(5), he would not have considered slight discrepancies to be affected by it.

In *Soref Bros (SA) (Pty) Ltd v Khan Brothers Wholesale* 1976 3 SA 339 (D) certain cheques were drawn in favour of Soreff (with two "f"'s) Bros (SA) (Pty) Ltd. The plaintiff's name, correctly spelt, contained only one "f". The cheques bore blank indorsements under the plaintiff's correct name. The defendant argued that this did not render the cheques bearer instruments, since the provisions of section 30(5) had not been complied with. Thus the plaintiff, it was argued, was not the holder, since it was not the payee (because of the mis-spelling) and was not the bearer (because s 30(5) had not been complied with in making the indorsement – thus the indorsements were inoperative to convert the instrument to bearer). Hefer J held that there was no need to rely on the indorsements, since section 5(1) rendered the plaintiff a valid payee. Nevertheless, the judge did make certain comments which appear to have relevance to section 30(5) and its applicability in this situation. These comments were clearly *obiter*, but are nevertheless of interest with regard to the present topic. Citing *Brick's case and the New York Shipping* case, the judge stated:

> "In such a case insignificant differences are indeed insignificant" (340B).

It appears, then, from this brief study of the case law, that the courts, and indeed academics, are finding it necessary to avoid the harsh effects of section 30(5) by holding that mis-spelling and wrong designations are not mis-spellings and wrong designations as contemplated by the section. (See e g Malan para 90 fn 59 who submits that mis-spelling such as Broer for Brower and the omission of an initial, etc should not be regarded as a mis-spelling or wrong designation in terms of s 30(5). This view is an admirable one in policy, since it seeks to avoid the injustice of the section, but it is submitted that it is in conflict with a true reading of the section which plainly covers any mis-spelling or wrong designation.) This avoidance of the section, although admirable in policy, is to be criticised in law, since the wording of the section is clear: *any* mis-spelling or wrong designation falls within the ambit of the section. The courts, in effect, are having to circumvent the results of the section, and the framework within which they have been doing so is not always the sturdiest. (In particular the courts have often relied on s 5(1) to avoid the harshness of s 30(5).) With this in mind, I have submitted that the two sections deal with different issues – the one with qualification as a holder, and the other with valid negotiation of the bill. The two sections are therefore reconcilable and reliance cannot be placed on section 5(1) to avoid the operation of section 30(5). It is hoped that the legislature will recognise the fact that the courts are having to seize upon various means to escape the effect of section 30(5), and will amend the section accordingly.

A Brief Criticism of the Section

It is submitted that section 30(5) is unecessarily prejudicial to the potential holder because of its mandatory wording. It is not difficult to envisage a situation where a payee or indorsee whose name has been slightly mis-spelt indorses, *animo indorsandi*, merely by signing his true signature, ignorant of section 30(5). In effect, he has unintentionally precluded his creditor from qualifying as a holder. It seems inequitable that the creditor should not be able to qualify as a holder of the instrument, contrary to the intention of the payee/debtor, merely because the drawer mis-spelt the payee's name. The expectation of the parties was clearly that the last-named 'indorsee' in possession should have the rights of a holder, whether the payee was designated with absolute correctness or not. Section 30(5) clearly undermines this expectation. (It is clearly of great importance that the indorsee expects to be a holder, since it is his qualification as a holder which entitles him to sue on the instrument as a liquid document, and which is one of the requisites for his entitlement to the rights of the holder in due course, whether by s 27(1) or 27(3). S 30(5), should its requirements not be met, prevents the indorsee from qualifying as a holder, and renders the instrument irregular in terms of s 27(1).)

The policy underlying the section seems to be that a bill payable to one person should not be indorsed by another person, (see *Arab Bank v Ross* (*supra* n 4) 716C–E 718C) or that the name of the payee or indorsee should be regularised for the purpose of further negotiation (see *Brick v P Wilson and E Mansfield and Co* (*supra*) 339F–G). This philosophy is an admirable one, but it is not true to say that in terms of the section 30(5) situation the payee and indorser are *de facto* different people: the payee was merely wrongly designated to some degree on the procedural, formal contract. The intention of the parties is that the person to whom the drawer has made the bill payable, even though he is not designated with exact correctness, should be able to indorse the instrument further in the normal fashion. A slight discrepancy in designation should not prevent this.

If the payee has been wrongly designated and he makes a blank "indorsement" merely by signing his true name, it seems that there has been no blank indorsement since, in terms of section 30(5), there has been no indorsement at all. The instrument, then, is not converted into a bearer instrument, and so the person in possession of it, who would otherwise have qualified as a bearer, cannot be a holder. (*A fortiori* he cannot be a holder in due course because he is not a holder, and because the instrument is not complete and regular in terms of s 27(1) read with s 30(5).) Again, in this situation, the intention of the parties has been unnecessarily undermined by section 30(5).

It is clear that the effects of section 30(5) are extremely far-reaching in that the section prevents negotiation when a payee whose name has been mis-spelt signs in the ordinary way. It is submitted that the effects produced by the section are unnecessary, prejudicial and indesirable. (Falconbridge *Banking and Bills of Exchange* 6th ed (1956) 648 disagrees, but fails to furnish any reasons for his opinion.)

A Brief Comparative Study

It is submitted that the discretionary nature of corresponding sections in the bills statutes of other countries is to be preferred to the mandatory wording of the South African section. A discretionary section would enable our courts to

achieve a just solution where the payee or indorsee has been wrongly designated, without having to avoid the effects of the sections in any way, and yet without ignoring commercial practice. Cases decided on the English discretionary section illustrate this point: *Leonard v Wilson* (1834) 2 C & M 589 (149 ER 895): *Bird & Co (London) Ltd v Thomas Cook & Son Ltd and Thomas Cook & Son (Bankers) Ltd* 1937 2 All ER 227 (KB); and *Arab Bank v Ross* 1952 1 All ER 709 (CA).

In *Leonard v Wilson* a bill was indorsed "Pay Messrs Terney & Farley, or order" and then further indorsed "Thomas Terney & Farelly." It was held that the indorsement was valid and that the indorsee had become holder. This decision was, it is submitted, a just one, and did not in any way conflict with the English act. Had the case been decided in South Africa, in terms of section 30(5), this result would simply not have been possible without avoiding the section in some way, namely by holding that the wrong designation was not a wrong designation in terms of the section.

In *Bird's* case, a bill was indorsed "Pay to the order of Messrs Thomas Cook & Sons Ltd" but delivered to a separate entity, namely Thomas Cook and Son (Bankers) Ltd. Despite the incorrect indorsement, it was held that Thomas Cook and Son (Bankers) Ltd became holders of the instrument. The court held that

> "it is the intention of the indorser that matters, and the indorser intended it to go to the company which would actually cash the cheque" (231).

It has been submitted that our section 30(5) often undermines the intention of the indorser. On a true reading of the section, a decision like that in the *Thomas Cook* case would have been impossible.

In *In Arab Bank v Ross*, certain notes were drawn in favour of "Fathi and Faysal Nabulsi Co or order" and then indorsed in the name of a partnership (not a company) "Fathi and Faysal Nabulsy." The court held that this indorsement was irregular, and thus the plaintiffs did not qualify as holders in due course. They did, however, qualify as holders for value since (per Denning LJ 715):

> "by a misnomer, a payee may be described on the face of the bill by the wrong name, nevertheless, if it is quite plain that the drawer intended him as payee, then an indorsement on the back by the payee in his own true name is valid and sufficient to pass the property in the bill."

Such a dictum could not correctly have been possible in our law without a failure to give effect to the true meaning of section 30(5). It is submitted that it was of central importance to the English cases mentioned that, in English law, a valid indorsement in the normal manner is possible by a wrongly designated payee or indorsee. It seems clear that the underlying current in these cases (and, it is submitted, in the South African cases in which the courts avoided the operation of s 30(5)) is that the effect must be given to the intention of the parties: despite the incorrect designation; title still passed if this was the intention of the indorser, and due consideration could be given to this intention in English law, because of the discretionary nature of section 32(4) of the English act. Due consideration, the case law has shown, can be given to this intention in South African law, only by sidestepping section 30(5), since its wording is mandatory.

Conclusion and Recommendation

It is hoped that this brief comparative analysis will draw attention to the possible injustices that the stringency of section 30(5) might cause. There is no need for its mandatory requirements, but there is a need for its amendment, in order to

protect prospective transferees. Perhaps a section along the following lines would be acceptable:

> "If, in a bill payable to order, the payee or indorsee is wrongly designated or his name is mis-spelt, he may, in order to effect a negotiation of the bill, indorse the bill as he is therein described, adding his proper signature, or he may indorse in his own name only. Provided that an indorsement in both the incorrect name and the correct name may be required by a person paying or taking the bill."

It is to be hoped that, when the time comes for our Bills of Exchange Act to be revised, the legislature will see fit to address itself to this problem and amend section 30(5) accordingly.

N A MATZUKIS

The plain man, in entrusting his confidence to the specialist, knows that the latter's judgment on a particular issue will be merely the technical application of principles and traditions shared by both (per Zuminern *Learning and Leadership* 14).

VONNISSE

EGSKEIDING: DIE MAATSTAWWE BY DIE TOEPASSING VAN DIE DISKRESIE VIR HERVERDELING VAN BATES EN VIR ONDERHOUD

Beaumont v Beaumont 1987 1 SA 967 (A)

1 In die Suid-Afrikaanse reg is die eerste gerapporteerde appèlhofuitspraak oor die interpretasie en toepassing van 'n geheel nuwe regsnorm van deurslaggewende belang. Artikel 7 van die Egskeidingswet 70 van 1979 soos gewysig deur artikel 36 van Wet 88 van 1984 is in die onderhawige uitspraak van appèlregter Botha, waarmee die res van die hof saamgestem het, behoorlik onder die loep geneem.

Die uitspraak moet verwelkom word alleen reeds vir die bydrae wat dit tot groter regsekerheid op hierdie vlottende gebied bring. Van wesenlike belang is dat die appèlhof in die uitspraak kennis geneem het van die verwysings na vreemde reg wat in die betoë van die advokate vermeld is en dat appèlregter Botha deeglik gelet het op regsvergelykende aspekte in hierdie verband (vgl 971–974 990E e v). Veral ten aansien van so 'n relatief nuwe regsnorm kan altyd met vrug kennis geneem word van vreemde reg wat, binne die grense van regsvergelyking, vanuit dieselfde vertrekpunte spreek. Hoewel sodanige vreemde reg uiteraard nie enige dwingende gesag vir die Suid-Afrikaanse reg kan inhou nie, kan dit wel bevrugtend werk en help om duidelikheid oor die bes moontlike ontwikkelingslyn vir die Suid-Afrikaanse reg te verkry. (Vgl oor die algemene vertrekpunte oor regsvergelyking binne die breër verband van Romanistiese én Germaanse regsfamilies Bloembergen *Schadevergoeding bij Onrechtmatige Daad* (1965) 4–5.)

In die lig van voorgaande moet ook die traagheid van appèlregter Botha vertolk word om, soos die advokaat van die appellant versoek het, riglyne te verskaf oor maatstawwe wat aangewend moet word by die toepassing van hierdie artikel maar wat nie *per se* in die onderhawige saak in geskil was nie. Dit is nie vir die hoogste hof geleë om ten aansien van hierdie herverdelingsaangeleenthede suiwer hipoteties sodanige maatstawwe te verskaf nie aangesien elke geval van sy eie feitelike omstandighede afhanklik sal wees en 'n ander afdeling van die hof hom verplig mag ag om nie van die gestelde riglyne van die appèlafdeling af te wyk nie (990D–991H).

Die uitspraak van regter Kriegler in die *Beaumont*-saak in die hof *a quo* (1985 4 SA 171 (W)) was die eerste gerapporteerde uitspraak oor die toepassing van die nuwe diskresionêre herverdelingsbevoegdheid van die hof ingevolge die onderhawige wetswysiging (sien 1985 *TSAR* 342). (Serdertdien is die volgende uitsprake oor dieselfde artikel gerapporteer: *Van Gysen v Van Gysen* 1986 1 SA

56 (K), *MacGregor v MacGregor* 1986 3 SA 644 (K) en *Kroon v Kroon* 1986 4 SA 616 (OK).) Dit moet verwelkom word dat die appèlhof so relatief gou die rigtinggewende uitspraak kon lewer.

2 Die tersake feite kan kort saamgevat word: Die Beaumont-egpaar is in 1964 getroud ingevolge 'n stereotiepe huwelikskontrak waarvolgens nie voorsiening gemaak is vir enige vorm van gemeenskap van goed of wins en verlies of vir aanwasdeling nie. In 1983 het die appellant die gesinswoning verlaat en daarop 'n egskeidingsgeding teen sy vrou, die respondent, aanhangig gemaak, gebaseer op die onherstelbare verbrokkeling van die huwelik. Die egskeidingsbevel wat in die gemelde uitspraak van regter Kriegler toegestaan is, was by appèl nie in geskil nie. Die appèl sentreer om bepaalde aspekte van die herverdelingsbevel wat in die egskeidingsbevel geïnkorporeer is in antwoord op die bede daartoe deur die respondent én om die gebruiklike onderhoudsbevel ingevolge artikel 7(2) van die Egskeidingswet.

Die feite van die geval spreek vir die billikheid van die beginsel van 'n herverdelingsbevel en die appèl was nie wesenlik gemik teen die beginsel van herverdeling nie maar wel teen die beweerde toepassing van bepaalde norme *in casu*.

Die respondente het gedurende die duur van die huwelik van byna twintig jaar haarself prakties afgesloof vir die gesin en vir die besigheid van die appellant. Sy het benewens haar rol as huisvrou en moeder vir die vier kinders uit die huwelik ook deurentyd die appellant in sy kwekerybesigheid gehelp sonder om 'n markverwante vergoeding daarvoor te ontvang. Regter Kriegler het reeds opgemerk dat die vrou die volgende rolle gedurende die huwelik vervul het en dienooreenkomstig 'n bydrae tot haar man se boedel gemaak het:

> "[She] made innumerable contributions to the growth of the plaintiff's estate. She gave him her wages; she rendered services in his business and in his home. . . . She contributed directly, indirectly, continuously and capably, to the maintenance and increase of his estate. That contribution was very substantial indeed. The plaintiff had a secretary and general assistant in his business, a mistress, a housemaid, a cook, a seamstress, a scullery maid, a laundress, a nanny, a governess, a general domestic manager and a messenger" (177C–F).

Met hierdie uiteensetting van die uitgebreide bydrae van die applikant tot die groei van haar man se boedel het appèlregter Botha hom vereenselwig (985B–E). Getrou aan die algemene uitgangspunt sal 'n hof by appèl nie sommer van 'n bevinding van die feitelike omstandighede deur 'n hof van eerste instansie afwyk nie.

Dit is billik dat 'n persoon wat soveel energie tot voordeel van die boedelgroei van die ander gade bestee het, 'n aanspraak op deling in daardie boedelgroei het. Om hierdie rede is die beginsel onderliggend aan die onderhawige herverdelingsdiskresie van die hof buite betoog. Wat egter nie voor hierdie appèlhofuitspraak vasgestaan het nie, is die feitelike toepassing of die meganika van die billikheidsbeginsel. Uit die oogpunt van regsekerheid en billikheid moet dit dus verwelkom word dat die appèlhof by monde van appèlregter Botha die geleentheid ten baat geneem het om van die beginsels wat by sodanige herverdeling ter sprake behoort te kom, te bespreek – selfs al is sommige van die aangeleenthede *obiter* aangeraak.

Regter Kriegler het beslis dat 'n herverdeling van die omvangryke bates van die man binne die konteks van die wysiging van artikel 7(3)–(5) van Wet 70

van 1979 in hierdie omstandighede gebillik is. Dienooreenkomstig het die regter beveel dat 'n bedrag van R150 000 uit sy onbeswaarde bates van ongeveer R450 000 aan die vrou betaal word. Benewens bogenoemde bedrag het hy ook 'n onderhoudsbedrag ingevolge artikel 7(2) van dieselfde wet aan die vrou gelas ten bedrae van R1 400 per maand totdat aan die voormelde herverdelingsbevel gevolg gegee is, waarna die onderhoudsbedrag verminder word na R700 per maand (184J–185D). Sowel die toegekende bedrag ingevolge die herverdelingsbevoegdheid as die uiteindelike maandelikse onderhoudsbedrag het neergekom op ongeveer 'n derde van onderskeidelik die huidige bates van die man en sy te wagte onbelaste inkomste.

3 Die appèl het hoofsaaklik gesentreer om die bewering dat regter Kriegler in die hof *a quo* nie sy tersake diskresie behoorlik uitgeoefen het nie aangesien die kumulatiewe effek van die herverdelingsbevel en die bevel tot voortgesette onderhoud na egskeiding nie behoorlik oorweeg sou gewees het nie (997I).

Dit raak die maatstawwe wat by 'n herverdelingsbevel aangewend moet word (bv of die vertrekpunt van een-derde wat in verwante aangeleenthede in die Engelse reg aanwending vind ook in die Suid-Afrikaanse reg toegepas behoort te word) en ook die maatstawwe wat by so 'n onderhoudsbevel van toepassing is.

4 Die volgende aspekte van toepassing op die herverdelingsbevel was egter by implikasie by appèl ook in geskil:

i Die onderlinge verband tussen subartikel 7(2) en 7(3) (991I).

ii Die sogenaamde "clean break"-beginsel soos dit in onder andere die Engelse reg na die wetswysiging van 1984 aldaar toepassing vind (992H–993H).

iii Die belang van die wangedrag van een van die gades by die berekening van die toe te kende bedrag *qua* herverdelingsbedrag (993I–995D).

iv Die bepaalde aard van die bydrae van die applikant tot die ander gade se boedel (996A–997H).

5 Alvorens kortliks gelet word op wat die appèlhof ten aansien van elk van die bogenoemde aspekte beslis het, word ook verwys na enkele van die ander aangeleenthede wat terloops deur die appèlhof aangeraak is.

Benewens die bogenoemde aspekte wat uitdruklik in geskil was, het die appèlregter ook belangrike opmerkings oor onder andere die volgende gemaak:

a Dit is nie nodig dat aanwasdeling *per se* in die huwelikskontrak uitgesluit moet wees alvorens 'n bede vir herverdeling ontvanklik is nie. Die hof kan van die feit kennis neem (998C–F). Dit is 'n logiese gevolg van die feit dat die wetswysiging eers op 1984–11–01 in werking getree het. Dit is hoogs onwaarskynlik dat in ouer huwelikskontrakte van aanwasdeling melding gemaak sou word.

b Dit is ook klaarblyklik volgens die appèlhof nie fataal vir die ontvanklikheid van 'n pleit om herverdeling indien nie uitdruklik in die pleitstukke uitgespel is presies vir welke bedrag as billike herverdelingsbedrag gepleit word en hoe dit bereken is nie. Ook in die onderhawige saak (soos trouens in klaarblyklik al die reeds gerapporteerde uitsprake die geval was) het die pleitstukke van die applikant bloot gemeld dat 'n bydrae tot die ander gade se boedel gemaak is en dan 'n bede bevat om 'n billike herverdeling. *In casu* meld appèlregter Botha slegs dat die afwesigheid van meer eksakte bewerings gerugsteun deur tersake

berekenings nie in geskil was nie, waaruit af te lei is dat die hof dit nie as fataal beskou het nie (998F).

Met dié opmerking besweer appèlregter Botha moontlik bedenkinge wat kon bestaan teen die ontvanklikheid van 'n aansoek om herverdeling indien hierdie aangeleentheid nie behoorlik in die pleitstukke uitgespel is nie – iets wat uit die aard van die saak baie moeilik is (vgl 1985 *TSAR* 342 343; 1986 *SALJ* 367 369). Aan die ander kant moet rekening gehou word met die taktiese probleem van 'n litigant wat moet besluit of 'n bepaalde bedrag wat in sy oë in ooreenstemming met 'n billike bydrae is, formeel met inagneming van reël 34 van die Eenvormige Hofreëls "getender" moet word. Indien dit nie reeds uit die applikant se pleitstukke (soos aangevul) hoef te blyk vir welke bedrag as billike herverdelingsbedrag gevra word nie, en hoe dit bereken word nie, kan die teenparty kwalik oordeel of sy moontlike "tender" vir die doeleindes van 'n geregtelike inbetaling by wyse van 'n aanbod tot skikking realisties is (vgl 997J). (Vgl reëls 34 1 a en 34.2 saamgelees met 34.7 en 34.9.a – Nathan, Barnett en Brink *Eenvormige Hofreëls* (1984) 203–211 en Herbstein en Van Winsen *The Civil Practice of The Superior Courts in South Africa* (1979) 330–337.) Dit is van wesenlike belang aangesien 'n vordering om 'n billike herverdelingsbevel as regshulp ingevolge artikel 7(3) slegs ontvanklik is "by ontstentenis van 'n ooreenkoms tussen hulle betreffende verdeling van hul bates." Dit is dus moontlik dat 'n applikant gedurende die voorverhoor-bedingingsfase eenvoudig die aanbod deur die ander gade om 'n deel van sy boedel effektief kan afwys bloot deur nooit kenbaar te maak wat as billike deel gevorder word en hoe dit bereken is nie, ten einde aan die hof te kan sê dat geen ooreenkoms bereik is nie.

Appèlregter Botha sluit hom ook ten aansien van hierdie aangeleentheid by regter Kriegler (175F) aan as hy by herhaling beklemtoon dat die wetgewer 'n besonder wye diskresie aan die hof verleen het om 'n herverdelingsbevel binne die konteks van die gewysigde artikel 7 te maak en dat die vasstelling van die herverdelingsbedrag ook aan die hof se diskresie oorgelaat word (988G 989A–H 990H). Dit is inderdaad juis dat die hof met 'n wye diskresie beklee is maar binne die algemene konteks van die Suid-Afrikaanse gemenereg sou dit vreemd wees indien die diskresie werklik onbegrens sou wees. Daar word aan die hand gedoen dat redelike perke tog aan die wye diskresie gestel sou word indien nougeset gelet word op die voorvereistes wat wel in die wet gestel word.

c Daar is met goedkeuring verwys na die formulering van wat, in teenstelling met die formele voorvereistes (soos die tipe huweliksgoedere-bedeling en wanneer die huwelik gesluit is – vgl a 7(3) van Wet 70 van 1979), genoem kan word die materiële voorvereistes vir die uitoefening van die herverdelingsdiskresie, te wete: (i) die bewys dat die aansoeker wel 'n bydrae tot die boedel van die ander gade gemaak het en (ii) die hof moet oortuig wees van die billikheid van die verlening van 'n herverdelingsbevel (988H–J).

Die eerste van hierdie twee voorvereistes is volgens appèlregter Botha 'n suiwer feitelike vraag terwyl die tweede 'n uitoefening van diskresie deur die hof verlang (988J). Dit veronderstel dat 'n feitelike bydrae tot *die boedel van die ander gade* inderdaad bewys moet word. *In casu* was juis die vraag welke bydraes as 'n bydrae tot die boedel van die ander gade kwalifiseer in geskil.

6 Elders is reeds aangetoon dat juis in die formulering van hierdie voorvereiste 'n wesenlike verskil met die andersins vergelykbare posisie in die Engelse "Matrimonial Causes Act" van 1973 soos gewysig deur die "Matrimonial and Family Proceedings Act" van 1984 opgesluit lê (1986 *SALJ* 370 e v).

Soos reeds aangetoon, interpreteer ook appèlregter Botha die aspekte in subartikel 7(5) vermeld as faktore wat die hof eers in aanmerking neem by die vasstelling van die presiese omvang van die bates wat ingevolge die herverdeling uit die boedel van die een gade aan die ander gade billikerwys toegeken moet word. Dit kom dus hoegenaamd nie ter sprake alvorens aan die eerste twee voorvereistes voldoen is nie. In hierdie opsig bevestig die uitspraak die interpretasie wat ook deur skrywers aan die bepaling geheg is (vgl Sonnekus "Artikel 36 van die Wet Huweliksgoedere 88 van 1984 – Enkele Opmerkings oor 'n Hof se Diskresie ten aansien van 'n 'Billike Deel' en Onderhoudsaansprake" 1985 *DR* 327; Barnard, Cronjé en Olivier *Die Suid-Afrikaanse Persone- en Familiereg* (1986) 261; Van der Vyver en Joubert *Persone- en Familiereg* (1985) 684–685; Sonnekus 1985 *TSAR* 342 345–346; en Sonnekus 1986 *SALJ* 367 370–371). Ook hier is die werklike bydrae tot die groei of instandhouding van die ander gade se boedel deur die applikant, sowel wat die aard as die omvang daarvan betref, van deurslaggende belang (989B). Dit is dus klaarblyklik ook volgens die appèlhof onmoontlik om binne die raamwerk van die wet soos dit tans geformuleer is 'n herverdeling van bates te oorweeg alvorens 'n werklike bydrae tot die groei of instandhouding van die ander gade se boedel bewys is. Ondanks voorgaande gevolgtrekking is 'n blote bewering dat bygedra is tot die "welfare of the family, including any contribution by looking after the home or caring for the family" (soos dit in die Engelse wet geformuleer is) klaarblyklik tog volgens appèlregter Botha voldoende om die hof te oortuig

> "dat die party ten gunste van wie die bevel gegee word *tydens die duur* van die huwelik direk of indirek bygedra het tot die instandhouding of groei van die boedel van die ander party, hetsy deur die lewering van dienste, of die besparing van uitgawes wat andersins aangegaan sou moes word of op enige ander wyse" (a 7(4) – my kursivering).

7 Terloops kan daarop gewys word dat hoewel dit nie in hierdie saak in geskil was nie, die applikant in *Purnell v Purnell* (saaknommer 84/11294 – 'n ongerapporteerde uitspraak wat op 1986–07–01 in die Witwatersrandse afdeling van die hooggeregshof gelewer is) nie alleen gesteun het op haar beweerde bydrae gedurende die duur van die huwelik nie maar selfs op haar bydrae voor die huwelik toe die partye nog bloot "samgehok" het. In daardie saak het regter Van der Merwe ter regverdiging vir die kennisname van die voorhuwelikse bydraes gesteun op die algemene, wye diskresie wat die wet onder andere in artikel 7(5)(d) aan die hof verleen om 'n billike herverdelingsbevel te maak:

> "In my opinion a court is entitled in terms of section 7(5)(d) of the Act to take into account financial arrangements between the parties and contributions made by them prior to their marriage" (56 van die getikte uitspraak).

Myns insiens is hierdie siening nie in ooreenstemming met die bedoeling van die wetgewer soos beliggaam in die artikels nie. Behalwe dat die wet uitdruklik meld "tydens die duur van die huwelik" (a 7(4)) sou sodanige wydlopige interpretasie die deur open vir die effektiewe sanksionering van buite-huwelikse saamblyverhoudings mits dit maar net uitgeloop het op 'n latere huwelik gevolg deur 'n egskeiding. Slegs indien 'n egskeiding op die eerstydse saamblyery volg, is die deur dan oop vir die "vergoeding" van daardie voorhuwelikse bydraes. In alle ander gevalle, hetsy omdat geen huwelik daarop gevolg het nie of omdat die latere huwelik uiteindelik deur die dood ontbind is, bestaan die moontlikheid tot geregtelike vergoeding van bydraes gelewer tydens die eertydse saamblyery nie.

8 Dit is opmerklik dat die appèlhof skynbaar geneig is om in navolging van die Engelse uitsprake 'n besonder soepel toets aan te wend ten einde te bepaal of wel aan die voorvereiste van 'n bydrae tot die ander gade se boedel voldoen is – selfs al is daar 'n wesenlike verskil tussen die oorspronklike onderliggende vertrekpunt en ook die formulering van die Engelse en die Suid-Afrikaanse statuut in hierdie verband.

Elders is betoog dat die formulering van die betrokke subartikels in Wet 88 van 1984 moontlik nie suksesvol is nie en straks nie die ware bedoeling van die wetgewer juis uitdruk nie (1986 *SALJ* 367 372 e v). Dit is onduidelik of die wetgewer werklik bedoel het om iedere doodgewone pligsvervulling binne die konteks van die gemeenregtelike huweliksplig te deur egliede as 'n bydrae tot die ander se boedel te kwantifiseer vir herverdelingsdoeleindes.

Ook Van der Vyver en Joubert meld dat "'n soort verrykingsaanspraak" van die applikant die herverdelingsdiskresie ten grondslag lê (684 685: sien ook 1986 *SALJ* 379). Indien dit juis is, sou dit vreemd wees om 'n billikheidsaanspraak soos 'n verrykingseis te verleen waar die verarming waaroor die applikant hom bekla nie *sine causa* nie dog in ooreenstemming met 'n erkende regsplig plaasgevind het. Moontlik moet die klem nie op die aanwesigheid van of gebrek aan 'n juridies relevante rede vir die vermoënsverskuiwing geplaas word nie, maar bloot op die feitelike vraag of 'n vermeerdering van die verweerder se bates inderdaad veroorsaak is. Indien egter bloot die vervulling van die normale egtelike pligte reeds as "bydrae" vir doeleindes van hierdie herverdelingsdiskresie geag word, sal dit daartoe kan lei dat in iedere egskeidingsgeding met twee teenoor mekaar staande aansoeke van man en vrou te doen gekry moet word, waar elk sy vordering om billike herverdeling van die ander se boedel vir die doeleindes van hierdie artikel baseer op bloot die nakoming van sy of haar "gewone" huweliksplig te. Die vrou sou kon beweer dat sy na die kinders gekyk en as tuisteskepper die huishouding hanteer het en sodoende die man uitgawes bespaar het. Die man sou egter eweseer kon beweer dat hy, omdat hy die broodwinner was, indirek tot die instandhouding van die vrou se boedel bygedra het deur haar die uitgawes aan die verkryging van 'n onderdak en lewensmiddels soos voedsel en kleding te bespaar. Dit sou effektief daarop neerkom dat hierdie gemeenregtelik verpligte bydraes van die gades eintlik mekaar oor en weer behoort uit te balanseer. Die partye het dit in die *Van Gysen*-saak inderdaad toegegee (63J–64A 65I–J). In werklikheid kan dan slegs juridies relevant wees daardie bydraes deur 'n gade gemaak bo en behalwe die gemeenregtelik verpligte bydraes (vgl 1986 *SALJ* 373–375).

Hierdie argument verkry verder steun uit die uitspraak van regter Van der Merwe in die *Purnell*-saak. Daar is beslis dat hoewel die man kon bewys dat hy 'n aansienlike bydrae tot die groei en ook verder tot die instandhouding van die vrou se boedel gemaak het, hy desnieteenstaande nie slaag met sy vordering vir 'n billike herverdeling van haar bates nie, omdat 'n wesenlike deel van die bydraes wat hy gemaak het bloot ter nakoming van die verpligting daartoe ingevolge die huwelikskontrak gemaak was.

> "I am satisfied that the defendant did contribute to the increase of the plaintiff's estate. ... It must also be kept in mind that part of the so-called contribution was in fact to perform in terms of the antenuptial contract" (53 van die getikte uitspraak).

Indien die hof (myns insiens tereg) kan beslis dat 'n bepaalde bydrae – om dit so te stel – uit hoofde van 'n verpligting (*in casu* uit hoofde van die skenkingsooreenkoms soos vervat in die voorhuwelikse kontrak) gemaak is en om daardie

rede – hoewel dit feitelik 'n bydrae tot die ander gade se boedel was – nie in aanmerking geneem kan word as grondslag vir 'n verdeling ingevolge artikel 7(3–5) van die Wet op Egskeidings nie, dan is daar sekerlik ook geen rede hoekom 'n "bydrae" wat bloot ter vervulling van 'n gemeenregtelike verpligting gemaak is, wel as grondslag vir 'n herverdeling kan dien nie. In beide gevalle was die "verarming" nie *sine causa* nie, hoewel die "bydrae" in albei gevalle 'n vermeerdering van die ander gade se bates *veroorsaak* het. Anders as wat hierbo ter oorweging gestel is, kan dus klaarblyklik nie slegs met die vasstelling van feitelike veroorsaking van boedelgroei volstaan word nie.

Benewens bogenoemde argumente bly die argument steeds geldig dat 'n toepassing van die herverdelingsdiskresie bloot op sterkte van 'n nakoming van die gemeenregtelike, gewone egtelike verpligtinge deur die applikant-gade in effek 'n uiters onbillike voordeel aan slegs gades wat voor inwerkingtrede van Wet 88 van 1984 ingevolge 'n huwelikskontrak getroud is én wie se huwelike deur egskeiding beëindig word, teenoor alle ander gades wat presies net so pligsgetrou hul egtelike verpligtinge nakom maar nie op die "regte" wyse getroud is nie of "ongelukkig" nie hul huwelike deur egskeiding beëindig nie. Hoewel die wetgewer as soewerein selfs uiters onbillike reëlings statutêr kan verskans, spreek die hele gees van die wet en ook die aanloop tot die wet teen so 'n drastiese bevoordeling van 'n beperkte deel van die getroude bevolking. Appèlregter Botha wou nie kennis neem van die voorgeskiedenis van die wet hier te lande nie (997H), maar dit is vreemd indien dit negeer word terwyl tog kennis geneem is van vreemde reg en die ontwikkeling daarvan (994E–H).

Daar is sekerlik geen twyfel nie dat die feite van die saak juis dui op 'n situasie waar die vrou inderdaad sodanige méér-bydrae tot die groei en instandhouding van haar man se boedel gemaak het (996E). Haar bydrae tot sy besigheid het juis veel verder gestrek as die normale egtelike bystands- en ondersteuningspligte. Dit neem egter nie weg dat wat hier deur die appèlhof beslis is algemene toepassing op ander feitestelle sal vind waar die billikheid nie eweneens duidelik ten gunste van 'n herverdeling vir die vrou spreek nie.

Indien die interpretasie van die appèlhof voortaan gevolg gaan word, beteken dit in effek dat 'n streep deur die besondere faktore gemeld in subartikel 7(5) getrek kan word en ook dat die voorvereiste van 'n bewese bydrae wat uitdruklik deur die wetgewer as voorvereiste gestel is, deur die appèlhof geskrap is. Dit spreek vanself dat in waarskynlik by verre die meerderheid huwelike gevind sal word dat die gades oor en weer hul gemeenregtelike egtelike verpligtinge redelik bevredigend nagekom en hul onderskeie take vervul het. Indien dit by voorbaat reeds vasstaan dat in alle gevalle aan die gestelde voorvereiste en die so geïnterpreteerde maatstawwe voldoen sal word, is daar geen wafferse sprake van 'n voorvereiste of 'n maatstaf nie. Dit is immers sinloos om telkens die see se water te toets ten einde te bepaal of dit nog water is.

9 Hoewel die hof die bydrae in 1986 *SALJ* 367 e v onder oë gehad het, verwerp appèlregter Botha daardie standpunt (997A). Die hierbo gesketste scenario ('n opvyseling deur iedere gade van sy/haar voortreflike nakoming van sy/haar egtelike verpligtinge) kan dus in die vervolg in iedere egskeidingsgeding voorkom. Uiteraard skrik dit waarskynlik die hof nie af nie. Per slot van sake het die appèlregter by herhaling gewys op die onbegrensde diskresie van die hof en in elke geval sal die hof die diskresie moet toepas op die tersake feite. Dit besweer

egter steeds nie die bedenkinge wat geuiter is teen die patente onbillikheid daarvan en teen die nut van sodanige opvyseling nie, aangesien dit billikerwys slegs behoort te behels dat die man en die vrou se pligsgetrouheid onderling min of meer uitbalanseer – 'n vorm van skuldvergelyking dus?

Behoort 'n vrou bloot omrede sy haar egtelike verpligtinge nagekom het ook 'n vordering om 'n billike deel te hê indien die enigste rede hoekom die man se boedel noemenswaardig gedurende die huwelik gegroei het, 'n erfporsie is wat hom kort voor ontbinding van die huwelik uit die boedel van 'n derde en sonder toedoen van sy vrou toegeval het, of as die groei te danke was aan 'n gunstige uitslag van die perdeweddenskap waaraan hy eenmalig deelgeneem het? Ten aansien van die voorbeeld van die erfporsie verkies appèlregter Botha om geen mening te uit nie (997E–F). Met respek, juis dít sou die inherente onhoudbaarheid van 'n uitgangspunt waarvolgens 'n gade "vergoed" word vir die blote nakoming van sy/haar egtelike pligte duidelik aan die kaak gestel het. Indien dit die bedoeling van die wetgewer was dat hierdie as bydraes kwalifiseer, sou dit verkieslik wees indien dit as sodanig duideliker geformuleer was.

Nie een van die gestelde argumente wat deur die advokate vir die appellant aan die hof voorgehou is, is *per se* in die uitspraak ontsenu nie. Appèlregter Botha het eenvoudig verwys na die algemene, wye formulering van die wet en beslis:

> "Our legislation does refer specifically to contributions made 'directly or indirectly . . . by the rendering of services, or the saving of expenses . . . or in any other manner'. In my view there can be no doubt that the plain meaning of these words is so wide that they embrace the performance by the wife of her ordinary duties of 'looking after the home' and 'caring for the family'; by doing that, she is assuredly rendering services and saving expenses which must necessarily contribute indirectly to the maintenance or increase of the husband's estate" (997F–H).

10 Die "clean break"-beginsel wat die laaste aantal jare en veral na die wysiging van die "Matrimonial Causes Act" van 1973 deur die "Matrimonial and Family Proceedings Act" van 1984 met die toevoeging van die nuwe artikel 25A in die Engelse egskeidingsreg prominent na vore gekom het, vorm nie deel van die Suid-Afrikaanse statuutreg nie (993A–B). (Vgl oor die toepassing van die beginsel in daardie regstelsel Cretney *Principles of Family Law* (1984) 820 e v.) Hoewel dit nie deel van die Suid-Afrikaanse statutêre reëling vorm nie, sluit dit volgens die appèlhof sekerlik nie die toepassing van gelykluidende beginsels onder die vaandel van billikheid jeens alle betrokkenes én die breër gemeenskap hier te lande uit nie:

> "[T]here is no doubt in my mind that our Courts will always bear in mind the possibility of using their powers under the new dispensation in such a way as to achieve a complete termination of the financial dependence of the one party on the other, if the circumstances permit" (993B).

Laasgenoemde is egter 'n wesenlike kwalifikasie. Appèlregter Botha het nie in besonderhede uitgespel met welke omstandighede in hierdie verband alles rekening gehou moet word en wat die geweegde invloed van elk sal wees nie, maar bepaalde vertrekpunte wat ook in ander regstelsels toepassing vind, behoort ook hier as uitgangspunt te kan dien.

Dit is in beginsel aanbevelenswaardig dat die voormalige gades na hul egskeiding so onbelemmerd as moontlik kan poog om 'n nuwe begin te maak. Dit impliseer dat die swakker vat ook na die egskeiding, ideaal gesproke, die geleentheid behoort te hê om, soos haar ongetroude, selfstandige suster, selfversorgend ten aansien van haar toekomstige onderhoudsbehoeftes te wees en

omgekeerd dat die voormalige man nie ook na die egskeiding steeds gestrem word deur 'n voortslepende maandelikse onderhoudsverpligting jeens sy gewese gade nie.

Die stereotipe onderhoudsbevele belemmer noodwendig die man se kanse om, by wyse van spreke, 'n nuwe begin met 'n skoon blaadjie te maak, aansienlik (onder andere aangesien onderhoudsbedrae gewoonlik periodiek verhoog word en hy net nie in 'n posisie kom om weer op 'n aanvaarbare peil vir 'n eventuele nuwe verbintenis behoorlik te sorg nie). Hierbenewens is so 'n voortslepende onderhoudsaanspraak van 'n geskeide op die lange duur vir die ekonomiese en morele gesondheid van die hele gemeenskap kontra-produktief. Die uitgangspunt is sekerlik steeds dat elke volwasse indiwidu so ver as moontlik in sy eie onderhoudsbehoeftes moet voorsien en binne sy eie vermoëns behoort te leef:

> "Gedwongen alimentatieoplegging na (echt)scheiding is een inbreuk . . . op de regel dat in principe elke meerderjarige voor zichzelf dient te zorgen; het huwelijk brengt daarin een fundamentele verandering . . . na ontbinding van het huwelijk herneemt voornoemde regel zijn werking . . . . Alimentatierecht is derhalve uitzonderingsrecht en moet als zodanig strikt worden toegepas" – "Rapport van de Commissie Alimentatienormen" (1978) in Van Zeben "Inleiding" *Personen- en Familierecht* par 3 17. (Sien ook Hoefnagels "Rechtsgrond en Duur van de Alimentatie" 1979 *NJB* 917; Hammerstein-Schoonderwoerd "Alimentatie na Echtscheiding" 1980 *NJB* 1204.)

Dit impliseer dat 'n vrou nie bloot danksy die feit dat sy toevallig met 'n goed gekwalifiseerde en relatief welvarende persoon getroud was, ook ná die egskeiding steeds sonder meer op haar louere durf rus en bloot kan teer op haar voormalige man vir die behoud van haar voormalige lewenspeil nie (vgl die feite in *Kroon v Kroon* 1986 4 SA 616 (OK)). Die huwelik word immers soos in ander moderne regstelsels ook nie in die moderne Romeins-Hollandse reg as 'n verskuilde onderhoudsversekeringspolis vir die oudag beskou nie (vgl Sinclair "Marriage: Is it Still a Commitment for Life Entailing a Lifelong Duty of Support?" 1983 *Acta Juridica* 75 87; Sonnekus "Legitieme Porsie of Verlengde Onderhoudsaanspraak?" 1984 *De Rebus* 119).

Die wetgewer het weliswaar 'n maksimum grens vir die duur van so 'n dame se onderhoudsaanspraak gestel, te wete

> "die betaling van onderhoud deur die een party aan die ander vir enige tydperk tot die dood of hertroue van die party ten gunste van wie die bevel gegee is, na gelang die een of die ander eerste plaasvind" (a 7(2) van die Egskeidingswet).

In die praktyk blyk dat hierdie begrensing nie altyd so effektief is as wat waarskynlik bedoel was nie. Niks verhoed 'n dame met 'n bepaalde morele kode om haar vriend/e eenvoudig by haar te laat "aanklamp" ten koste van haar voormalige gade en dit bloot deur nie te hertrou nie. Sodanige parasitisme is nie bevorderlik vir die welsyn van die gemeenskap in die breë nie.

In verband met die stel van beperkende voorwaardes waaraan voldoen moet word alvorens 'n langer onderhoudsaanspraak na egskeiding erken word, kan ook binne die bestaande diskresie van die hof met vrug kennis geneem word van die tersake maatstawwe in die moderne Duitse en Nederlandse reg. Daar behoort ook in hierdie opsig gewaak te word teen 'n tendens by sommige juriste om hulle in hul regsvergelykende arbeid te beperk tot die Engelse reg – nie soseer omrede dit soveel meer raakpunte met die Suid-Afrikaanse gemenereg vertoon nie as bloot dat dit taalsgewys maklik toeganklik is. (Vgl die uitgebreide verwysings deur regter Baker in die *Kroon*-saak na *Rayden on Divorce* (14 e uitg) 623A–638J). In die Duitse en die Nederlandse reg is duidelik gebreek met die

oud-modiese gedagte van 'n byna lewenslange "meal ticket" vir die geskeide vrou (vgl ook *Portinho v Portinho* 1981 2 SA 595 (T) 597F–G; *Rousalis v Rousalis* 1980 3 SA 446 (K) 450D–G en 1984 *DR* 119–121; 1985 *DR* 331–332). Onder andere word aanvaar dat 'n vrou wat haar in 'n buite-egtelike saamblyverhouding begeef nie langer op onderhoud geregtig kan wees nie en so ook word gelet op elke aspek wat die billikheid van die onderhoudsaanspraak van 'n geskeide kan beïnvloed (sien ook Scholz "Trennungs- und Scheidungsunterhalt bei Aufnahme einer nichtehelichen Lebensgemeinschaft" 1983 *MDR* 441–444). Die verdienvermoë van die derde party met wie so 'n dame in 'n saamblyverhouding betrokke is, word ook as tersake aspek in aanmerking geneem ten gunste van 'n onmiddellike beëindiging van of stel van 'n aflooptermyn vir onderhoudsaansprake in ooreenstemming met die skoonbreuk-beginsel.

11 Die wysiging in Wet 88 van 1984 van gemelde artikel 7(2) te dien effekte dat by die vasstelling van die onderhoudsbedrag gelet word op "'n bevel ingevolge subartikel (3)" dui daarop dat 'n vrou aan wie 'n relatief wesenlike bedrag as billike deel van haar man se boedel ingevolge 'n herverdelingsbevel toegewys word met inagneming van sodanige bedrag waarskynlik voortaan in staat is om in haar eie onderhoudsbehoeftes te voorsien en nie sonder meer onderhoudsbehoeftig is nie (993C–F). Dit impliseer terselfdertyd dat die onderhoudsbevel eers nadat oor die herverdelingsaansoek beslis is, aan die orde behoort te kom. In beginsel kan die dame self besluit hoe sy die uitgekeerde bates gaan aanwend wat ingevolge die herverdelingsbevel haar toekom, maar indien sy sou besluit om dit op 'n wêreldreis te spandeer, kan sy sekerlik nie by haar terugkeer haar oor haar onderhoudsbehoeftigheid ten laste van haar gewese gade bekla nie. Dieselfde bates kon sinvoller aangewend gewees het en sodoende 'n opbrengs ter voldoening van haar toekomstige onderhoudsbehoeftes gegenereer het (vgl die verskillende moontlikhede wat in die *Kroon*-saak bespreek is – 629C e v).

In die *Beaumont*-saak het die hof *a quo* by monde van die regter Kriegler juis hierdie aspek beklemtoon (1808B). Die bevel het voorsiening gemaak vir 'n drastiese vermindering van die onderhoudsbedrag op die oomblik toe aan die herverdelingsbevel gevolg gegee is.

Appèlregter Botha wys egter daarop dat in baie gevalle, soos ook in die onderhawige *Beaumont*-geval, die feitelike omstandighede teen die billikheid vir alle partye sou spreek indien 'n bevel verleen is wat slegs vir die herverdeling van bates voorsiening maak en nie ook vir 'n toekomstige onderhoudsaanspraak nie. Ten einde aan die vrou byvoorbeeld 'n afdoende kans op onafhanklikheid te bied, sou die herverdelingsbevel 'n onbillike groot deel van die boedel van die man moes beslaan wat teenoor hom nie aan die toets van billikheid sou voldoen nie (993G).

Hoewel hierdie argument in bepaalde gevalle geldig mag wees, is die universele aanwendbaarheid daarvan beperk en is dit dus slegs skynbaar oortuigend. Dit berus op die premis dat die vrou na die egskeiding òf danksy die omvang van die herverdelingsbedrag òf danksy die omvang van die onderhoudsaanspraak nie self vir haar onderhoudsbehoeftes verantwoordelik hoef te wees nie.

Die vertrekpunt is in stryd met die algemeen gangbare uitgangspunt ook in vergelykbare regstelsels waarvolgens slegs in uitsonderingsgevalle wegbeweeg word van die premis dat elke volwasse persoon self in sy of haar onderhoudsbehoeftes moet voorsien. As uitsondering kan byvoorbeeld gelet word op die gesondheid en ouderdom van die potensieel onderhoudsbehoeftige, op die feit

dat juis die huweliksluiting haar potensiële ontwikkelingsmoontlikhede in haar beroep gestrem of gestuit het en ook op die feit dat sy nog vir skoolgaande kinders uit die verbrokkelde huwelik moet sorg en dus nie 'n heeltydse betrekking kan aanvaar nie (vgl die kategorieë gemeld in die gewysigde par 1572–1578 *BGB*). Laasgenoemde faktor veronderstel egter reeds dat die vrou so gou as wat redelikerwys moontlik is 'n heeltydse betrekking ooreenkomstig haar eie bekwaamhede en kwalifikasies sal aanvaar én haar lewenspeil soos alle ander lede van die gemeenskap ooreenkomstig haar eie verdienvermoë sal aanpas. Indien die vrou reeds redelik bejaard of kranklik is, kan nie van haar verwag word om sommer enige ou werkie te aanvaar en daarvolgens te leef nie. Aan die ander kant behoort sy nie bloot onbeperk agter haar verouderde kwalifikasies en die gebrekkige kans wat dit op 'n arbeidsgeleentheid bied, te kan skuil nie. In so 'n geval behoort oorbruggingsalimentasie wel toegestaan te word maar dan bloot vir die tydperk wat dit nodig sou wees om haar te herskool. Dit is ook die standpunt in onlangse uitsprake in die Duitse reg (vgl ook Hahlo *The South African Law of Husband and Wife* (1985) 363–364).

Slegs indien dit onmoontlik is, staan dit vas dat die persoon onderhoudsbehoeftig is – maar dit is sekerlik nie sinoniem met 'n outomatiese toename van die onderhoudsverpligting van die persoon met wie sy toevallig vroeër getroud was nie. Veeleer behoort oorweeg te word of die onderhoudslas nie in so 'n geval die staat toeval nie. Dit is nie billik om eenvoudig die voormalige eggenoot op te saal met die lewenslange onderhoudsverpligting vir sy voormalige gade bloot omrede sy sonder sy toedoen nie in staat is om in haar eie onderhoudsbehoeftes te voorsien nie. Daarteenoor behoort in aanmerking geneem te word in welke mate die omstandighede met die huweliksluiting juis die waarskynlike arbeidsmoontlikhede van die vrou nadelig beïnvloed het. Die bekende spreuk vanuit die deliktereg behoort nie aangepas te lui: "A husband must take his ex-wife as he finds her" nie.

In die Duitse reg word byvoorbeeld ook aanvaar dat die voormalige gade nie onbeperk aanspreeklik gehou kan word vir die onderhoudsbehoeftes van sy gewese gade bloot omrede hulle eens getroud was nie. Na die jongste wysiging van artikel 1578 *BGB* deur die "Gesetz zur Änderung unterhaltsrechtlicher, verfahrensrechtlicher und andere Vorschriften" (UAndG) van 1986–02–20 watop 1986–04–01 aldaar in werking getree het, word aanvaar dat die onderhoudsaanspraak teen die eertydse gade tydsbegrensd moet wees en dat die voormalige lewenspeil van die egpaar nie na die egskeiding steeds as maatstaf vir die onderhoudsbehoeftes van die geskeide vrou kan dien nie (vgl Perschel-Gutzeit "Das Unterhaltsänderungsgesetz" 1986 *MDR* 455–457). Indien die vrou byvoorbeeld vanweë haar alkoholafhanklikheid nie in staat is om 'n bevredigende werk te kry en te hou nie, het die hof in Oos-Duitsland reeds beslis dat die man slegs oorbruggingsonderhoud vir 'n tydperk van twee maande moet verskaf waarna van die vrou verwag word om in haar eie behoeftes te voorsien. Anders kom dit daarop neer dat die voormalige man opgesaal word met die subsidiëring van haar alkoholgebruik – iets wat onbillik sou wees (1986 *Neue Justiz* 37). (Sien egter die teenoorgestelde standpunt van regter Baker: "Bridegrooms must take their brides as they find them; and if they marry wives who probably cannot obtain or retain employment they are not entitled to expect a Court to attribute a notional earning capacity to those wives upon divorce" – *Kroon v Kroon* 1986 4 SA 616 (OK) 631H–I.)

Ten aansien van die onderlinge verhouding tussen die onderhoudsbevel en die herverdelingsbevel merk appèlregter Botha in die *Beaumont*-saak op dat hoewel slegs in artikel 7(2) van die moontlikheid van 'n bevel ingevolge artikel 7(3) gewag gemaak word dit nie die betoog van die advokaat vir die appellant regverdig dat regter Kriegler (181G en 184D–E van daardie uitspraak) gefouteer het deur kennis te neem van die onderhoudsbehoeftes van die applikant alvorens die bede om 'n herverdelingsbevel afgehandel was nie (992C 993H). Hy beslis dat dit nie 'n geval is van die kar voor die perde span nie. Hy is van mening dat selfs onder die vaandel van die algemene formulering van subartikel 7(5)(d) ook kennis geneem kan word van 'n reeds toegekende onderhoudsbedrag. Met hierdie interpretasie kan nie onvoorwaardelik akkoord gegaan word nie. Dit spreek teen die onderliggende gedagte van 'n skoon breuk met egskeiding. Dit is tog meer logies indien eers terugskouend 'n billike herverdeling van die gades se bestaande bates oorweeg word en indien pas daarna, wanneer die prentjie voltooi is, bepaal word of die vrou byvoorbeeld nog steeds 'n regmatige aanspraak op onderhoud het. Onderhoudsvorderings is immers toekomsgerig ten einde in die toekomstige onderhoudsbehoeftes van die eiser te voldoen (vgl Sonnekus "Artikel 36 van die Wet op Huweliksgoedere 88 van 1984" 1985 *DR* 327 331). *In casu* het die appèlhof die berekening van die onderhoudsbehoeftes van mevrou Beaumont deur regter Kriegler (183B–I) aanvaar (986C 998H–999B). Dit is egter vreemd dat in hierdie verband die verwysing na *Nilsson v Nilsson* 1984 2 SA 294 (K) 297F met oënskynlike goedkeuring aangehaal is (987F–G). Die mate van ontbering of verguising wat 'n vrou beleef het, kan net soos haar spaarsamigheid of verdraagsaamheid gedurende die huwelik kwalik haar toekomstige onderhoudsbehoeftes beïnvloed.

12 Die appèlhofuitspraak besweer gelukkig hopelik finaal die klakkelose naskryf van Engelse beslissings waarvolgens die onderhoudsaanspraak en selfs die herverdelingsdiskresie immers een derde van die man se bates as vertrekpunt neem. Appèlregter Botha beslis dat nie ten aansien van enige toekenningspos met 'n vaste vertrekpunt gewerk kan word nie (998D–G).

13 Die uitspraak bevestig ook die standpunt dat slegs in uitsonderlike omstandighede gelet word op die sogenaamde wangedrag van een van die eggenote vir doeleindes van artikel 7(2) of 7(3). Hoewel die wye formulering van artikel 7(5)(d) sekerlik geïnterpreteer sou kon word om vir iedere aspek van wangedrag ook voorsiening te maak, is dit nie die bedoeling om iedere huwelikstwis of buite-egtelike flirtasie vir doeleindes van die berekening van die herverdelingsdiskresie of die onderhoudsbedrag te kwantifiseer nie (993H–995E). Die Engelse wet dien ook in hierdie opsig die appèlhof as voorbeeld. Artikel 25(1)(g) van die Engelse wet verwys na die gedrag van 'n gade wat dermate is dat negering daarvan deur die hof op 'n onbillike benadeling jeens die ander sou neerkom (994E–H). Nie iedere faktor hoef dus rekeningmatig waardeer te word vir hierdie doeleindes nie – die hof moet bloot alles in ag genome 'n billike beslissing bereik. *In casu* is dit billik dat die skaalbakke ten gunste van mevrou Beaumont teen meneer Beaumont geswaai het (995H).

14 Hierdie uitspraak van die appèlhof sal waarskynlik vir die volgende jare toonaangewend bly ten aansien van die veeltal aspekte van die egskeidings- en onderhoudsreg wat hierin ter sprake gekom het.

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SAAKLIKE REGTE EN PERSOONLIKE SERWITUTE

Cowley v Hahn 1987 1 SA 440 (OK)

1 Feite

Op 5 Mei 1983 het H deur die bemiddeling van eiendomsagent D 'n skriftelike aanbod gemaak om 'n stuk grond vir R50 000 van C te koop, welke aanbod die volgende dag skriftelik deur C aanvaar is (441I). In die skriftelike aanbod het H onderneem om die aanbod nie terug te trek nie, en om D se kommissie te vergoed indien die kontrak gekanselleer sou word as gevolg van nie-nakoming van die kontraktuele bedinge deur hom (441I–442A). Op 8 Junie het H egter vir D ingelig dat hy nie meer belangstel om die grond te koop nie, en dat hy hom nie aan die ooreenkoms gebonde ag nie (442B–D). Op 14 Junie is H deur C se prokureur in kennis gestel dat C die repudiasie van H aanvaar, en dat sy die grond sou probeer herverkoop, maar dat sy H vir enige verlies in die koopprys aanspreeklik sou hou. Verder is H in kennis gestel dat D hom steeds vir die kommissie aanspreeklik hou (442F–G).

2 Eis

Die beslissing handel oor twee eise wat teen H ingestel is, en wat albei op die geldigheid van die ooreenkoms berus (442I):

a C eis van H R6 000 skadevergoeding, synde die verskil tussen die prys waarop C en H aanvanklik ooreengekom het en die prys waarteen die grond uiteindelik deur C aan X verkoop is; en

b D eis van H R2 500, synde die kommissie waarop aanvanklik ooreengekom is, en wat deur H aan D verskuldig sou wees selfs al sou die kontrak as gevolg van H se optrede nie uitgevoer word nie.

Sowel C as D se eise berus dus op die standpunt dat die ooreenkoms geldig was. D se eis berus op die kontrak self en nakoming daarvan, en C se eis berus op skade wat sy as gevolg van H se kontrakbreuk gely het.

3 Verweer

H se verweer teen die twee eise berus op twee gronde:

a Dat hy nie aan die aanvanklike ooreenkoms gebonde is nie omdat die skriftelike ooreenkoms gebrekkig en daarom nietig was (443A); en in die alternatief

b dat hy die reg gehad het om uit die ooreenkoms terug te tree (443C–F) omdat hy die aanbod gemaak het op grond van bepaalde wanindrukke aangaande die grondstuk wat op 'n bedrieglike of roekeloos nalatige wyse deur D by hom geskep is.

Die wanindrukke waarna in die alternatiewe verweer verwys word, het betrekking op die bestaan van twee serwitute wat op die betrokke grondstuk sou rus, welke serwitute albei gereserveer is toe die grond aanvanklik op C se naam geregistreer is. Die een serwituut is 'n geregistreerde reg van weg oor die grondstuk ten gunste van die eienaar van 'n aanliggende grondstuk, en die ander is 'n lewenslange vruggebruik ten gunste van W (443I–444F). Hierdie tweede verweer is egter tydens die saak laat vaar (444F–G). Die hof het nogtans *obiter* die mening uitgespreek dat die bestaan van 'n vruggebruik wat nie aan die voornemende koper geopenbaar is nie, moontlik wel tot kansellasie van die ooreenkoms op grond van wesenlike wanvoorstelling aanleiding mag gee, maar dat dit 'n afsonderlike vraagstuk is wat nie in die onderhawige geval ter sprake is nie (446C).

Die oorblywende argument waarop die verweerder sy verweer gegrond het, is dus die bewering dat die aanvanklike ooreenkoms nietig is omdat dit gebrekkig is, en wel omdat dit nie aan die vereistes van die Wet op Vervreemding van Grond 68 van 1981 sou voldoen nie. Die argument berus hoofsaaklik op 'n bepaalde interpretasie van artikel 2(1) van die wet, wat vereis dat enige vervreemding van grond wat aan die wet onderworpe is in 'n skriftelike vervreemdingsakte vervat moet wees wat deur alle partye daarby onderteken moet wees om enige effek te hê. H baseer sy argument op die feit dat W reeds voor die sluiting van die ooreenkoms tussen H en C op informele wyse van die vruggebruik afstand gedoen het sonder dat dit formeel gekanselleer is. Formeel dui die voortbestaan van die registrasie dus nog aan dat die vruggebruik steeds bestaan, maar tussen C en W is reeds informeel ooreengekom dat dit nie meer bestaan nie. H argumenteer dat die kooptransaksie tussen C en hom 'n vervreemding vry van die vruggebruik is, en dat die vruggebruik self dus ook eintlik oorgedra word. Aangesien die omskrywing van *grond* in artikel 1 ook *enige belang in grond* insluit, en aangesien die transaksie tussen H en C volgens H se siening ook die vervreemding van W se belang in die grond (die vruggebruik) insluit, behoort W volgens H se interpretasie ook ingevolge artikel 2(1) 'n party by die skriftelike kontrak te wees om dit geldig en afdwingbaar te maak (444J–445J).

4 Regsvraag

Die kern van die onderhawige saak draai om die vraag of die betrokke koopooreenkoms tussen C en H geldig was of nie. As die ooreenkoms geldig was, sou sowel C as D met hulle eise kon slaag. As die ooreenkoms ongeldig was, sou H nie aanspreeklik wees nie. Die regsvraag op grond waarvan hierdie saak beslis moes word, kan soos volg saamgevat word:

a Is dit feitelik korrek dat die ooreenkoms tussen C en H in die onderhawige feitestel 'n vervreemding van die geregistreerde vruggebruik impliseer, bloot omdat die bedoeling van die partye was om die grond vry van sodanige serwituut te verkoop en te koop?

b Is 'n geregistreerde serwituut van vruggebruik 'n saaklike las waardeur die eienaar van die dienende saak se *dominium* verminder word, met die gevolg dat die vruggebruik 'n *belang in grond* in gevolge artikel 2(1) van die Wet op die Vervreemding van Grond 68 van 1981 is; met die verdere gevolg dat 'n vruggebruiker ingevolge die artikel, as die vruggebruik inderdaad ook vervreem

sou word, die vervreemdingsakte van die dienende saak ook moet onderteken om dit geldig en afdwingbaar te maak?

5 Beslissing

Die hof bevind uiteindelik dat die verweer ongeldig is, en dat die ooreenkoms tussen C en H geldig was. Die volgende redes word vir hierdie beslissing aangevoer:

a Die hof verwerp die verweer omdat die betrokke vruggebruik in ieder geval, selfs al was dit wel 'n belang in grond vir doeleindes van die wet, inderdaad nie 'n objek van die vervreemding was nie; eerstens omdat die vruggebruik reeds voor die vervreemding van die grond verval het (446I–447A); en tweedens omdat grond onderworpe aan 'n vruggebruik vervreem kan word sonder die vruggebruiker se deelname aan die ooreenkoms (446E). Dit spreek vanself dat die vruggebruik, indien dit geregistreer is, in só 'n geval ten spyte van die vervreemding van die dienende saak bly voortbestaan. Die hof het dit in hierdie verband onnodig gevind om te beslis oor die vraag of 'n vruggebruik tydens die lewe van die vruggebruiker hoegenaamd deur hom vervreem kan word (446G), maar dit is tog insiggewend om daarvan kennis te neem dat die blote feit dat 'n vruggebruik nie vervreem kan word nie, die basis van hierdie verweer wesenlik vernietig. (Vgl hierby *Durban City Council v Woodhaven* 1987 3 SA 555 (A) 561E–562D.)

b Die hof verwerp die verweer ook op grond van die stelling dat 'n vruggebruik nie vir die doeleindes van artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981 as 'n *belang in grond* beskou kan word nie. Dit word soos volg gemotiveer (445I–446B):

> "A usufruct is a personal right, held by the usufructuary only, to the use of the property and its fruits. It does not diminish the rights of ownership such as a real or *praedial* servitude does, and which confers on the holder of the servitude a right *in* the property adverse to the *dominium* holder. The existence of the usufruct may well limit or restrict the enjoyment by the owner of certain rights of possession, and of benefits accruing from the property, but it does not diminish in any way any of the rights of ownership or *dominium*."

Die hof argumenteer dus dat die vruggebruik 'n bloot persoonlike reg is, wat nie 'n vermindering van die *dominium* van die eienaar meebring nie, en wat daarom nie as 'n *belang in die grond* gesien kan word nie.

H se verweer word dus op twee verskillende gronde van die hand gewys: op grond van die feitelike bevinding dat die ooreenkoms tussen C en H inderdaad nie die vervreemding van die vruggebruik ingesluit het nie; en op grond van die regsargument dat vervreemding van 'n vruggebruik in ieder geval nie 'n vervreemding van 'n belang in grond vir doeleindes van die betrokke wet daar sou stel nie, aangesien dit 'n bloot persoonlike reg is.

In finale instansie kan daar nie met die hof se uiteindelike beslissing, dat die ooreenkoms tussen C en H 'n geldige vervreemdingsakte volgens die vereistes van die Wet op Vervreemding van Grond 68 van 1981 was, en dat die optrede van H dus kontrakbreuk is as gevolg waarvan C R6 000 skadevergoeding en D R2 500 kommissie kan eis, fout gevind word nie. (Hoewel die hof die vraag na die skade van C ondersoek het (447C–449B), word hierdie vraagstuk nie hier verder behandel nie, aangesien geen nuwe beginsels of probleme daaruit voortspruit nie.) Daar moet egter versigtig na die *ratio* vir hierdie beslissing gekyk word. Met die argument dat die vruggebruik nie in die onderhawige geval vervreem is nie, en dat die verweer daarom moet faal, kan geen fout gevind word

nie. Die stelling dat 'n vruggebruik 'n persoonlike reg is en daarom nie 'n belang in grond kan wees nie, berus egter op 'n foutiewe interpretasie en uiteensetting van die toepaslike regsbeginsels en is daarom ongeldig.

Die wyse waarop die twee redes deur die hof uiteengesit word, regverdig waarskynlik die afleiding dat die werklike *ratio* van hierdie beslissing is dat die vruggebruik nie vervreem is nie, en dat die argument oor die aard van die vruggebruik as 'n *obiter dictum* gesien kan word (446I). Dit sou ook gewens wees om op hierdie wyse tussen die twee argumente van die hof te onderskei, en om die hele argument oor die regsaard van die vruggebruik nie met enige gesag te beklee nie aangesien dit op 'n aantal vaaghede en onakkuraathede berus wat liefs aan die vergetelheid oorgelaat kan word. Ten einde hierdie standpunt te motiveer, sal enkele aspekte van die hof se standpunte in hierdie verband in die hieropvolgende deel van die bespreking ondersoek word.

6 Kommentaar

Die hof maak in die loop van die uitspraak verskeie stellings oor die aard van 'n vruggebruik, wat kommentaar regverdig. Die belangrikste van hierdie stellings is die volgende:

a 'n Vruggebruik is 'n persoonlike reg op die gebruik van die saak en die vrugte daarvan (446B).

b Hierdie persoonlike reg begrens wel bepaalde regte van die eienaar van die saak, maar anders as 'n saaklike of erfdiensbaarheid bring dit geen vermindering van die eienaar se *dominium* mee nie (446B–C).

c Die vruggebruik hoef nie teen die titelakte geregistreer te word nie, en is nieteenstaande afwesigheid van registrasie *inter partes* bindend. Die vervreemding van 'n grondstuk wat aan 'n ongeregistreerde vruggebruik onderworpe is, kan nie deur die vruggebruiker tersyde gestel word nie, en die vruggebruiker sal vir sy verlies op 'n skadevergoedingsaksie teen die verkoper aangewese wees (446H).

d Terwyl vruggebruik 'n bloot persoonlike reg is, sal afstanddoening daarvan deur die reghebbende die gevolg hê dat die voortgesette registrasie daarvan teen die titelakte van die dienende grond geensins die regte van die eienaar verminder nie (447A).

e Die hof het dit onnodig gevind om oor die vervreembaarheid van 'n vruggebruik tydens die lewe van die reghebbende te beslis, maar het wel bevind dat die vruggebruik nie na die dood van die reghebbende kan voortbestaan nie (446G).

6 1 Die stelling dat 'n vruggebruik 'n *persoonlike* reg is, is waarskynlik die gevolg van verwarring wat deur die terminologie rondom serwitute in die algemeen veroorsaak word. Dit is nogtans jammer dat só 'n ernstige mistasting in 'n gerapporteerde uitspraak van die hooggeregshof ingesluip het, en regspraktisyns, regsdosente en regstudente sal versigtig moet wees om nie hierdie uitspraak na te volg nie. 'n Kort uiteensetting van die toepaslike terminologie is nodig om die kommentaar hierop in perspektief te stel.

'n *Saaklike reg* is 'n aanspraak van 'n regsubjek op 'n *saak* (roerend of onroerend) teenoor ander regsubjekte, en impliseer volgens die teoretiese verklaringsmodel van die subjektiewe-regte-teorie (sien daaroor in die algemeen Van

Zyl en Van der Vyver *Inleiding tot die Regswetenskap* (2e uitg 1982) 412–439, veral 415–420 421–429) twee regsverhoudings:

a 'n Verhouding tussen die regsubjek en die saak (die sogenaamde subjek-objekverhouding), wat impliseer dat die regsubjek bepaalde bevoegdhede ten opsigte van die saak het uit hoofde waarvan hy bepaalde handelinge ten aansien van die saak mag verrig. Hierdie verhouding neem by elkeen van die subjektiewe regte 'n eiesoortige vorm en inhoud aan waardeur die besondere subjektiewe reg van ander subjektiewe regte onderskei word. Die direkte verhouding tussen die reghebbende en die saak is kenmerkend van saaklike regte.

b 'n Verhouding tussen die regsubjek en ander regsubjekte (die sogenaamde subjek-derdesverhouding), wat impliseer dat ander regsubjekte die subjek-objekverhouding moet respekteer en nie daarop inbreuk moet maak nie. Hierdie verhouding lyk by al die subjektiewe regte (vgl 1986 *TSAR* 173–179, veral 174 176) in beginsel dieselfde, omdat dit in die eerste plek oor die handhawing van die subjektiewe reg teen buitestaanders handel.

6 2 Die term *persoonlike reg* word soms gebruik om te verwys na wat volgens die subjektiewe-regte-teorie as 'n *vorderingsreg* bekend staan (vgl Van Zyl en Van der Vyver 424), en kan op sy beurt omskryf word as die aanspraak van 'n regsubjek op 'n *prestasie* of 'n vordering, wat ook uit twee vergelykbare verhoudings bestaan:

a 'n Verhouding tussen die regsubjek en die prestasie of vordering, wat daarin bestaan dat iemand anders aan die reghebbende iets moet gee, iets moet doen of iets nie moet doen nie. Die direkte band bestaan in hierdie geval tussen die reghebbende regsubjek en 'n ander persoon wat die betrokke prestasie moet lewer. Selfs al hou die besondere prestasie met 'n saak verband (die persoon moet byvoorbeeld 'n saak lewer) is die reg nog steeds 'n persoonlike of vorderingsreg, aangesien die verhouding tussen die reghebbende en die saak voor lewering nog nie 'n direkte verhouding is nie, maar 'n indirekte verhouding, wat van die direkte subjek-objekverhouding tussen die reghebbende en die prestasie van die ander persoon onderskei moet word. As die aanspraak van die reghebbende in die eerste plek direk op 'n saak gerig is, is dit 'n saaklike reg; maar as die aanspraak in die eerste plek direk op die prestasie van 'n ander persoon gerig is, is dit 'n vorderingsreg of persoonlike reg, selfs al hou die prestasie byvoorbeeld met die lewering van 'n saak verband. Die koper van 'n motor verkry uit die koopkontrak 'n aanspraak nie op die motor self nie, maar op die prestasie van die verkoper wat die motor ingevolge die ooreenkoms aan die koper moet lewer, en daarom is dit 'n vorderingsreg. Daarteenoor vestig die koper 'n saaklike reg op die motor self sodra die motor aan hom gelewer word, waardeur die saaklike ooreenkoms voltooi en die saaklike reg oorgedra word.

b 'n Subjek-derdesverhouding wat wesenlik dieselfde elemente as in die geval van die saaklike reg bevat.

6 3 Die kenmerkende onderskeid tussen 'n *saaklike reg* en 'n *persoonlike* of *vorderingsreg* moet dus op die terrein van die onderskeie subjek-objekverhoudinge gesoek word: 'n saaklike reg impliseer 'n direkte aanspraak van die regsubjek op die saak self, terwyl vorderingsregte ten opsigte van sake (in die vorm van 'n *ius in personam ad rem adquirendam* en soortgelyke aansprake) 'n direkte aanspraak van die regsubjek teenoor 'n ander persoon impliseer, op grond waarvan die regsubjek van die ander persoon 'n bepaalde prestasie (met betrekking

tot 'n saak) kan vorder. Daar is in laasgenoemde geval egter geen direkte aanspraak op die saak self nie.

6 4 Dieselfde beginsels moet in die geval van serwitute toegepas word (vgl hierby 1986 *TSAR* 173–179, veral 178). 'n Serwituut is 'n beperkte saaklike reg wat aan die reghebbende nie-eienaar van 'n saak bepaalde inhoudsbevoegdhede ten aansien van (hoofsaaklik die gebruik van) die saak van iemand anders verleen (sien *Lorentz v Melle* 1978 3 SA 1044 (T) 1049A; asook Hall *Maasdorp's Institutes of South African Law Volume II: The Law of Property* (1971) 127; Van der Merwe *Sakereg* (1979) 322; Silberberg en Schoeman *The Law of Property* (1983) 380; Erasmus, Van der Merwe en Van Wyk *Lee and Honoré: Family, Things and Succession* (1983) 300; Delport en Olivier *Sakereg Vonnisbundel* (1985) 534). Alle serwitute, afgesien van onderlinge verskille, vertoon die gemeenskaplike kenmerk dat die serwituutooreenkoms voor registrasie aan die serwituutverkryger net 'n persoonlike of vorderingsreg verleen, waarvan die inhoud is dat die serwituutverkryger op grond van die ooreenkoms van die serwituutverlener kan vorder dat hy registrasie van die serwituut moet bewerkstellig. (Aangesien 'n serwituut oor roerende sake 'n relatief skaars verskynsel is, wat net in die geval van die persoonlike serwitute aangetref kan word, en omdat dit nie in die onderhawige saak ter sprake gekom het nie, sal dit hier buite rekening gelaat word. Die beginsel bly egter nog steeds dat lewering dan die plek van registrasie by onroerende sake inneem. Vgl hieroor Hall *Maasdorp's Institutes* 165; Van der Merwe 324; Silberberg en Schoeman 382; Erasmus, Van der Merwe en Van Wyk 300; Delport en Olivier 542; *Lorentz v Melle* 1978 3 SA 1044 (T) 1049A–C.) In gevalle waar serwitute anders as deur ooreenkoms tot stand kom, sal die serwituutverkryger in die reël geen saaklike reg vestig voordat registrasie bewerkstellig is nie. 'n Uitsondering hierop is die gevalle waar registrasie nie vir die saaklike werking van die serwituut vereis word nie, soos by verjaring of noodweg (sien *Van Rensburg v Coetzee* 1979 4 SA 655 (A) 676). In enkele gevalle mag die serwituutverkryger ook op tussentydse uitoefening van die serwituutbevoegdhede geregtig wees, maar dan sal dit wees op grond van die ooreenkoms (en dus 'n vorderingsreg op die *non facere* van die eienaar), en nie op grond van enige saaklike reg nie (1986 *TSAR* 173–179, veral 178). Eers nadat registrasie van die serwituut voltooi is (of die ander vereistes vir die saaklike werking daarvan bevredig is, in die gevalle waar registrasie nie vereis word nie), sal die aanspraak van die serwituutverkryger die aard van 'n beperkte saaklike reg aanneem, terwyl dit voor registrasie hoogstens 'n vorderingsreg kan wees. Die algemene beginsel is, soos by alle ander saaklike regte, dat die saaklike reg eers vestig sodra die saaklike ooreenkoms of ander vereistes vir die vestiging van die saaklike reg voltooi is. In die algemeen is die vereiste vir die vestiging van saaklike regte lewering (in die geval van roerende sake) of registrasie in die akteskantoor (in die geval van onroerende sake). (Vgl verder hieroor Hall *Maasdorp's Institutes* 132–133 135; Van der Merwe 375–378; Silberberg en Schoeman 395–397; Erasmus, Van der Merwe en Van Wyk 318; Delport en Olivier 590 en verdere gesag daar aangehaal; 1986 *TSAR* 173–179.) Hoewel Van der Vyver (Van der Vyver en Joubert *Persone- en Familiereg* (1985) 13–22) te kenne gee dat die serwituutooreenkoms voor registrasie 'n saaklike reg (in Van der Vyver se terminologie 'n sogenaamde relatiewe saaklike reg) skep wat tot by registrasie slegs *inter partes* werking het, is die meer aanvaarbare standpunt dat die serwituutskeppende ooreenkoms voor registrasie bloot vorderingsregte skep wat

slegs op basis van die kennisleer teen derdes afgedwing sal word, en wat eers na registrasie saaklike werking verkry (vgl 1986 *TSAR* 173–179; asook Van der Merwe 1962 *THRHR* 155; Van der Merwe 376; Schoeman 395–397; Delport en Olivier 594–606).

6 5 Dit is verder 'n kenmerk van alle beperkte saaklike regte, en trouens een van die belangrikste toetse vir die bestaan van 'n beperkte saaklike reg, dat dit 'n vermindering van of beperking op die *dominium* van die eienaar meebring (vgl Van der Merwe 50–55; Silberberg en Schoeman 47–53; Delport en Olivier 1–16). Die begrip *saaklike las* word ook soms in hierdie verband aangetref. Daar kan geen twyfel daaroor bestaan nie dat 'n behoorlik geregistreerde serwituut in die algemeen (sowel 'n erfdiensbaarheid as 'n persoonlike diensbaarheid) wel 'n beperkte saaklike reg daarstel en wel 'n vermindering van die eienaar se *dominium* meebring. Voor registrasie skep alle serwituutskeppende ooreenkomste bepaalde vorderingsregte of persoonlike regte ten gunste van die serwituutverkrygers, en na registrasie is alle serwitute saaklike regte ten gunste van die serwituuthouers. Die vorderingsregte wat voor registrasie bestaan, verleen aan die serwituutverkrygers bepaalde aansprake teenoor die serwituutverleners, en die saaklike regte wat na registrasie ontstaan, verleen aan die serwituuthouers bepaalde aansprake op die betrokke sake self. Registrasie verander nie 'n vorderingsreg in 'n saaklike reg nie (vgl Delport en Olivier 590). Voor registrasie bestaan daar nog in werklikheid geen serwituut nie, maar slegs die serwituutskeppende ooreenkoms met die daaruit voortspruitende vorderingsregte, waaronder die aanspraak om die serwituut te laat registreer. Registrasie roep eers die serwituut, wat 'n saaklike reg is, in die lewe. (Vgl ook Scott 1987 *De Jure* 184.)

6 6 Die verwarring in die onderhawige saak is waarskynlik die gevolg van onduidelikheid oor die begrippe *persoonlike reg* en *persoonlike serwituut*. Hierbo is reeds aangetoon dat alle serwituutskeppende ooreenkomste voor registrasie slegs bepaalde persoonlike of vorderingsregte ten gunste van die serwituutverkryger skep, en dat registrasie die serwituut ('n saaklike reg) tot stand bring. Alle serwitute is, sodra die vereistes vir die totstandkoming van saaklike regte bevredig is, saaklike regte. Die feit dat bepaalde serwitute as *persoonlike serwitute* bestempel word, het egter niks met die saaklike aard van die serwituutreg te doen nie, maar verwys na die feit dat bepaalde serwitute daardeur gekenmerk word dat die serwituutbevoegdhede aan die reghebbende in sy *persoonlike hoedanigheid* toekom, sonder eiendomsreg op enige heersende saak. Anders as in die geval van *saaklike serwitute* of sogenaamde erfdiensbaarhede, waar dit 'n vereiste is dat die serwituutbevoegdhede juis aan die reghebbende in sy hoedanigheid van eienaar van die heersende erf toekom, is 'n persoonlike diensbaarheid nie op die waarde daarvan vir 'n heersende erf afgestem nie, maar op die persoonlike waarde vir die spesifieke reghebbende. Twee serwitute kan natuurlik uiterlik presies dieselfde lyk (bv die reg om oor die dienende erf te ry), terwyl hulle inhoudelik daarin van mekaar verskil dat die een 'n persoonlike serwituut is (verleen aan die spesifieke persoon, afgesien van sy eiendomsreg op die aanliggende grond) en die ander 'n saaklike serwituut (verleen aan die eienaar van die aanliggende grond in daardie spesifieke hoedanigheid en bedoel om die aanliggende grond te verbeter). In die eerste geval sal die serwituut ten gunste van die spesifieke persoon bly voortbestaan as hy sy (aanliggende) grond verkoop, maar nog steeds voordeel uit die serwituut kan verkry, en dit sal tot niet

gaan as hy sou sterf of as die serwituut vir hom geen waarde meer sou hê nie. Daarom is dit 'n persoonlike serwituut. In die tweede geval sal die serwituutbevoegdhede aan die grond kleef, en sodoende op elke nuwe eienaar van die heersende erf oorgaan afgesien van wie hy mag wees. Dit verander egter niks aan die feit dat albei hierdie soorte serwituut na registrasie saaklike regte is nie (vgl in die algemeen hieroor Van der Merwe 323–326; Silberberg en Schoeman 381–382; Delport en Olivier 542).

Die verskil tussen 'n saaklike en 'n persoonlike serwituut is dus geleë in die bestemming van die betrokke diensbaarheid, soos dit uit die skeppingsakte daarvan afgelei kan word. Dit moet egter nie die feit verbloem nie dat albei hierdie soorte serwitute steeds beperkte saaklike regte is. Die persoonlike serwituut is dus, anders as wat die hof in die onderhawige saak bevind het, 'n beperkte saaklike reg. Die *persoonlike* of die *saaklike* bestemming van die *serwituut* moet met ander woorde onderskei word van die *persoonlike* of die *saaklike* aard van die *reg* wat aan alle serwituuthouers toekom.

6 7 'n Geregistreerde serwituut is 'n beperkte saaklike reg, en is daarom wel, anders as wat die hof bevind, 'n aanspraak wat die eienaar se *dominium* op die dienende saak verminder. Daarom moet dit in beginsel wel as 'n *belang in grond* vir doeleindes van artikel 2(1) van die wet gesien word (vgl Van Rensburg en Treisman *The Practitioner's Guide to the Alienation of Land Act* (1984) 26–30). En daarom is dit ook misleidend om te beweer dat dit onnodig is om 'n vruggebruik of persoonlike serwituut te registreer. Streng gesproke is dit onnodig om enige serwituutskeppende ooreenkoms te registreer, maar feit is dat die serwituutskeppende ooreenkoms voor registrasie slegs persoonlike of vorderingsregte kan skep; en daarom is dit in die geval van sowel die saaklike as die persoonlike serwituut noodsaaklik om die serwituut te laat registreer ten einde saaklike werking daaraan te verleen (in bepaalde gevalle, soos reeds vermeld is, is registrasie natuurlik nie nodig nie: vgl *Van Rensburg v Coetzee* 1979 4 SA 655 (A) m b t noodweg.)

6 8 Een van die interessante vrae wat deur die feitestel in die onderhawige saak na vore gebring is, is of 'n vruggebruik (en enige geregistreerde serwituut) onmiddellik deur afstanddoening tot niet gaan, selfs al word die kansellasie nie geregistreer nie. Die hof aanvaar dat dit wel die geval is, en dat die registrasie van die kansellasie nie vir die beëindiging van die serwituut noodsaaklik is nie (vgl ook Hall en Kellaway *Servitudes* (1973) 140–141; Van der Merwe 384; Silberberg en Schoeman 398; Delport en Olivier 648; Scott 1987 *De Jure* 183). Laurens *Die Ontstaan en Tenietgaan van Saaklike Regte in die Lig van die Suid-Afrikaanse Stelsel van Aktesregistrasie* (1980) 230–235 onderskei in hierdie verband tussen 'n egte afstanddoening en 'n ooreenkoms om te kanselleer. Hierdie aspek sal nog vollediger ondersoek moet word (vgl bv ook *Durban City Council v Woodhaven* 1987 3 SA 555 (A) 559A).

Dit is egter interessant om daarop te let dat die voortbestaan van die registrasie in bepaalde gevalle tot onreg kan lei, en dan is dit dalk nodig om die beginsel te verfyn. Dit kan naamlik gebeur dat 'n persoon 'n bepaalde heersende erf koop met kennis van die registrasie van 'n serwituut ten gunste van die erf, maar onbewus van die feit dat die serwituut self reeds deur afstanddoening verval het. Die onreg wat daaruit kan voortspruit, vertoon interessante ooreenkomste met die omgekeerde geval van die persoon wat grond koop sonder kennis van

die ongeregistreerde serwituut wat ten laste van die grond geskep is. Enkele opmerkings kan in hierdie stadium oor die moontlike oplossing van hierdie teoretiese probleem gemaak word:

a Na analogie van die geval van die koper van grond waaroor daar 'n ongeregistreerde serwituutskeppende ooreenkoms bestaan, kan die kennisleer toegepas word (vgl hieroor Delport en Olivier 594–606) om tot die gevolgtrekking te kom dat die koper met kennis van die voorafgaande afstanddoening hom nie op die voortbestaan van die registrasie kan beroep om die verkoper aan te spreek nie (vgl Van der Merwe 384; Silberberg en Schoeman 398; Delport en Olivier 648).

b Aangesien dit moeilik is om 'n mens 'n voorbeeld in te dink waarin hierdie probleem ten opsigte van persoonlike serwitute kan voorkom, is dit waarskynlik tot erfdiensbaarhede beperk.

6 9 Die hof het dit onnodig gevind om in die onderhawige saak oor die vervreembaarheid al dan nie van vruggebruike en persoonlike serwitute uitspraak te lewer, maar dit is belangrik om daarop te let dat die saak as sodanig op hierdie basis beslis kon word. Hoewel daar in bepaalde hofuitsprake aanvaar is dat spesifiek die vruggebruiker sy inhoudsbevoegdhede ten aansien van die saak kan vervreem (sien Van der Merwe 366–367; Silberberg en Schoeman 404; Delport en Olivier 542), is die reël dat geen serwituuthouer sy saaklike reg as sodanig kan oordra nie (Van der Merwe 326; Delport en Olivier 542). Die houer van 'n saaklike serwituut kan sy serwituutreg nie los van sy eiendomsreg op die heersende erf oordra nie, maar in die geval van persoonlike serwitute is die uitwerking van hierdie onoordraagbaarheid selfs nog meer opvallend omdat die persoonlike serwituut nie op titelopvolgers van die reghebbende oorgaan soos die geval by erfdiensbaarhede is nie (vgl ook *Durban City Council v Woodhaven* 1987 3 SA 555 (A) 561G). Daarom kan daar in beginsel gesê word dat persoonlike serwitute, vir doeleindes van artikel 2(1) van die Wet op Vervreemding van Grond 68 van 1981, nie vervreem kan word nie, selfs al is 'n serwituut in beginsel 'n saaklike reg en daarom 'n reg wat 'n vermindering van die eienaar se *dominium* tot gevolg het (vgl De Jager *Vervreemding van Grond* (1982) 141–145; Van Rensburg en Treisman 26–28, maar veral 28–30). Van Rensburg en Treisman (29) opper die probleem dat dit eintlik, streng gesproke, onmoontlik is om bestaande serwitute te vervreem, maar stel dan dat die skepping van 'n serwituut deur ooreenkoms op die vervreemding van 'n belang in die dienende grond mag neerkom. Hierdie interpretasie van *vervreemding* skep dan ook waarskynlik die enigste denkbare geval waarin serwitute die objek van 'n vervreemding vir doeleindes van hierdie wet kan wees; maar dit kan moeilik gesien word dat *bestaande* serwitute hoegenaamd vir doeleindes van hierdie wet vervreem kan word. Die hof is dus in beginsel reg dat 'n vruggebruik nie vir doeleindes van hierdie wet 'n belang in grond is nie, maar dan nie omdat die serwituut net 'n persoonlike reg is nie maar omdat bestaande serwitute (insluitend sowel die saaklike serwitute of erfdiensbaarhede as persoonlike serwitute of persoonlike diensbaarhede) nie vir doeleindes van die wet vervreembaar is nie. Dit skep dan ook die maklikste uitweg vir die beslissing van die vraag wat deur die verweer van H geopper is: die verweer kan nie slaag nie omdat die medewerking van die

vruggebruiker nooit 'n vereiste vir die geldigheid van die vervreemdingsakte kan wees nie, aangesien die vruggebruik as sodanig nie vervreem kan word nie.

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USUFRUCT: A PERSONAL OR A REAL RIGHT? A GROUND OF EVICTION OR A LATENT DEFECT?

Cowley v Hahn 1987 1 SA 440 (E)

The facts of the case are as follows:

Certain land subject to a (registered) usufruct had been sold by the owner. The usufructuary and the owner of the land had, prior to the deed of sale, entered into a written agreement whereby the property was released from the usufruct, but the parties had omitted to have the usufruct deleted in the title deeds of the property, that is to say, they had failed to have the cancellation "noted" on the title deeds of the property. (S 68(2) of the Deeds Registries Act 47 of 1937 was also not complied with.)

The buyer repudiated the sale, averring, *inter alia*, that the sale was not valid because of the provisions of section 2(1) of the Alienation of Land Act 68 of 1981. This provision requires the alienation of land or an "interest in land" to be in writing and signed by the parties thereto, or by their agents acting on their written authority.

The buyer maintained that the usufructuary had an "interest in land;" therefore the deed of sale (of the land) had to be signed by the usufructuary as well.

The court decided that the usufruct was not alienated by a deed of sale of the land. The relevant section applies to rights in land that are alienated; in other words, by way of analogy, the relevant section does not require the holder of a bond over land to be a co-signatory to a contract of sale in respect of the land, apart from other requirements for purposes of transfer of the land (see Jones *Conveyancing in South Africa* 3rd ed 128).

Some statements of the court, however, require closer attention.

According to the court a

> "usufruct is a personal right . . . it does not diminish the rights of ownership such as a real or praedial servitude does, . . . " (446B).

Usufruct is one of the personal servitudes in contrast to real or praedial servitudes. Although usufruct is a personal servitude, it does not confer a personal right; it confers a real right on the holder of the right (Van der Merwe *Sakereg* 321 *et seq*; Gibson *Wille's Principles of South African Law* 7th ed 221 *et seq*).

The distinction between *servitutes rerum* and *servitutes personarum* has its basis in Roman law (Van Warmelo *Introduction to the Principles of Roman Civil Law* 102 *et seq*).

As Van Oven (*Leerboek van Romeinsch Privaatrecht* 153) explains, however, the distinction between *res* and *persona* in this instance is not related to the object of the right but to the subject, the holder, of the right. In the case of a real servitude, the servitude attached to land irrespective of who the owner of the land is, while in the instance of a personal servitude the right attached to a specific person. A personal servitude could not be alienated as such.

Ususfructus was the most important personal servitude in Roman law; the other personal servitudes were *usus*, *habitatio* and *operae servorum.*

An *actio in rem* was available to the holder of a usufruct to protect his interests. In earlier times the action was called the *vindicatio ususfructus*; in later Roman law it became the *actio confessoria.*

In Roman-Dutch law the position remained basically unaltered (Voet *Commentarius ad Pandectas* 7 6 2 & 4; Van Leeuwen *Censura Forensis* 2 4 1–3). The *actio confessoria* was still used to protect the right of the usufructuary and it was still an action *in rem*, that is, an action for the protection of a real right. Usufruct ("lijftocht") was furthermore treated as one of the rights which restricted/diminished ownership. De Groot (L J van Apeldoorn *De Groot Inleidinge* with notes by Fockema Andreae 4th ed 2 33) for example, treats usufruct under the heading "Van gebreekelicken eigendom in't gemeen." (See also Van Warmelo, Coertze, Gonin and Pont *D G van der Keessel Voorlesinge* 3 33 136–159.)

In South African law usufruct is generally treated as one of the *iura in re aliena.* A personal servitude such as a usufruct therefore diminishes the right of ownership in that particular thing (Van der Merwe 321 *et seq*; *Wille's Principles* 221 *et seq*).

This last mentioned attribute, namely the dimunition or restriction of the right of ownership in the thing, is one of the tests used by South African courts to determine whether a right is a real or personal right (*Ex parte Geldenhuys* 1926 OPD 155; *Odendaalsrus Gold General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (C)).

According to Delport and Olivier (*Sakereg Vonnisbundel* 2nd ed 6) a better test to determine whether a right is a *ius in re aliena* is that the right should, to some extent, entail control of the thing of another (*Wille's Principles* 217 *et seq*; Van der Merwe 60–61) or some competence in respect of the property of another. A usufruct conforms to the requirements contained in both the abovementioned tests for *iura in re aliena*, that is, it detracts from the ownership in the thing and it gives control or a competence in respect of a *res aliena.*

Apart from the issues discussed above, a number of further questions might arise from the circumstances of *Cowley's* case, such as whether a registered (real) right is terminated by agreement between the holder of the right (usufructuary) and the owner of the thing without the relevant entry in the deeds office on the title deeds of the property. Section 68(1) & (2) of the Deeds Registries Act 47 of 1937 requires the cancellation of a personal servitude "in pursuance of an agreement between the owner of the land encumbered and the holder of the servitude" to be by way of notarial deed and registered by the registrar (*Crause v Ocean Bentonite Co* (*Edms*) *Bpk* 1979 1 SA 1076 (O) 1081H).

Being a real right of such a personal nature (though not a personal right), a usufruct may not be transferred to any person but the holder of the bare *dominium* (s 66 Deeds Registries Act 47 of 1937).

It is submitted that a difficulty in describing the personal attributes of the right (usufruct *inter alia*) has previously lead to erroneous terminology, that of "personal right" (*Van der Merwe v Van Wyk* 1921 EDL 298).

If, furthermore, section 16 of the mentioned act is not complied with, as in the present case, according to the ordinary grammatical meaning of the words of the section, the right is not transferred from the usufructuary to the owner of the land. (S 16 Act 47 of 1937 requires the conveyance of a real right from one person to another to be "only by means of" a notarially executed cession, registered by the registrar of the deeds office: see also *Crause v Ocean Bentonite supra.*)

The agreement between the owner of the land and the usufructuary whereby the usufruct is cancelled, or, in other words, ceded to the owner, confers a personal right to performance of the contract, that is co-operation for the necessary formalities for the transfer/cancellation/cession to be completed.

If one looks at the facts of the case under consideration, the correct steps to be taken by the purchaser are the following: He has presumably bought land on which there is a usufruct without being aware of the usufruct and he is not willing to accept the land subject to this burden. If the contract for the sale of the land is still *res integra*, the buyer may refuse to accept delivery unless satisfactory security is given against eviction (Coaker and Zeffert *Wille and Millin's Mercantile Law of South Africa* 18th ed 192).

Should transfer of the property subject to the usufruct be tendered to the purchaser, he could reject such transfer as not being proper transfer, that is, breach of contract in the form of positive malperformance. The purchaser would be entitled to the usual remedies for breach of contract, that is rescission and damages, or specific performance and damages. Should the purchase price be claimed by the seller after such improper performance, the buyer would be entitled to rely on the *exceptio non adimpleti contractus.* It is also possible that the buyer might decide to accept the defective performance, pay the purchase price and claim damages for the breach.

Another question which might arise under the circumstances of the present case is, for example, whether the mere existence of the usufruct on the property is sufficient to entitle a purchaser to the remedies for eviction. Obviously there can be no question of eviction prior to delivery of the property. If the buyer has indeed taken delivery of the property, would the mere existence of the usufruct without actual exercise of it, entitle the purchaser to the remedies for eviction; is something more than the existence of the usufruct necessary to constitute eviction; or would the existence of a servitude be a latent defect? In other words, is actual physical deprivation or disturbance of possession, or a threat of such deprivation or disturbance necessary to constitute eviction and is the existence of a usufruct to be regarded as such a threat? There seems to be conflicting authority on this point (De Wet and Van Wyk *De Wet & Yeats Kontraktereg en Handelsreg* 4th ed 293 and the authorities cited by the authors. In fn 104 the authors prefer the view that a defect in title such as in the present case may lead to eviction).

In early Roman law, apparently, physical deprivation of possession was required before a buyer was entitled to the remedies for eviction. It is therefore found that only the *vindicatio ususfructus* instituted by the usufructuary entitled

a purchaser to the remedy for eviction; on the other hand, the *vindicatio servitutis* in respect of other servitudes did not entail eviction of the purchaser. In classical Roman law, the purchaser was, in this respect, entitled to the "rustig en vreedzaam bezit" of the purchased thing (Van Oven 3 2 6 146). Any disturbance of possession would entitle a purchaser to the remedy for eviction (Van Warmelo 174 175).

The question whether the existence of a servitude on a purchased object results in a failure by the seller to give *vacua possessio* or may result in eviction or whether such an object suffers from a latent defect, seems to be of importance in so far as it would determine the remedy of the purchaser: in the instance of eviction, a buyer would be entitled to his *id quod interest*, while in the case of a latent defect his remedy would, in a proper case, be for either redhibition or a reduction of the purchase price. It would appear that some Roman-Dutch authors regard the claim to a usufruct on the purchased object as eviction, but some of these authors create the impression that liability (of the seller) will ensue only if there has been some express representation on the part of the seller that the object of the sale was free of servitudes (Voet 21 1 1; 21 1 10; 21 2 16; Henry *Van der Linden's Institutes* 1 8 & 9; Van Leeuwen *CF* 4 19 15).

Although Voet mentions the aedilitian *actio quanti minoris*, as well as the *actio empti*, he states that according to the law of his time the buyer could claim his *id quod interest* (Voet 21 2 16; Van Leeuwen *CF* 4 19 15 also refers to the aedilitian edict; both these authors refer to *D* 21 1 61 (see also *D* 19 1 13 *pr*) but seem to overlook the fact that in Roman law at some stage there was an overlapping between the *actio empti* and the aedilitian actions; the *actio empti* could, for example, be instituted in some instances for a *quanti minoris* of the purchase price).

It is submitted that the more acceptable view is that of Grotius (3 15 5; *cf* Huber *Hedendaegse Rechts-Geleertheyt* 3 5 60–63 who, although writing about the law of Friesland, is of the same opinion) who regards a servitude on a purchased article as constituting eviction and the seller as liable to compensate the purchaser "'t gunt den Kooper daer aen was gheleghen," that is, his *id quod interest*. The aedilitian edict is not mentioned in this regard.

In South African law, in as far as liability for *vacua possessio* is concerned, the seller "impliedly guarantees" to the purchaser the "free and undisturbed possession" of the purchased article. This is said to involve a duty to deliver the object of the sale "free from any burden not specifically stated at the time of the sale" (*Wille and Millin's Mercantile Law* 182; *De Wet en Yeats* 292 & 303; *Dibley v Furter* 1951 4 SA 73 (C); *Curtaincrafts (Pty) Ltd v Wilson* 1969 4 SA 221 (E)).

Concerning the distinction between eviction and latent defects, even in Roman law there was no clear definition of latent defects and the distinction was not straightforward in every matter (Van Warmelo 175). In South African law, latent defects in the purchased article are defined as "defects or vices which are of a nature to render it unfit for the purpose for which it is bought or for which it is normally sold" (*Wille and Millin's Mercantile Law* 231 *et seq*) or an abnormality in the *res vendita* which makes it less useful for its usual purpose (*Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A)).

In conclusion, therefore, it may be said that in South African law a buyer to whom the purchased thing is delivered, but who finds that the latter is subject to a servitude, is entitled to the remedies for breach of contract based on improper delivery, and not to the remedies for latent defects.

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ONTVANKLIKHEID VAN 'N NUWE BORGAANSOEK NA BORGINTREKKING

S v Barnard 1985 4 SA 439 (W); S v Nkosi 1987 1 SA 581 (T)

1 Inleiding

Die vraag of 'n beskuldigde wie se borgtog en borggeld kragtens artikel 67 van die Strafproseswet 51 van 1977 ingetrek en verbeurd verklaar is opnuut (vir 'n tweede keer) ingevolge artikel 60 om vrylating op borgtog aansoek kan doen, is in twee uitsprake van onderskeidelik die Witwatersrandse en Transvaalse afdelings van die hooggeregshof op uiteenlopende wyse beantwoord. Die betrokke beslissings is dié in *Barnard* 1985 4 SA 439 (W) en *Nkosi* 1987 1 SA 581 (T). In *Barnard* is die vraag ontkennend en in *Nkosi* bevestigend beantwoord. Gesien die praktiese belangrikheid (vanuit 'n strafprosessuele oogpunt) van wat die juiste antwoord op dié vraag is, of behoort te wees, behoef die benaderings wat in gemelde twee sake gevolg is, dus nadere toeligting.

2 Die Barnard-benadering

In casu het die beskuldigde, nadat borgtog reeds aan hom toegestaan is, versuim om na 'n verdaging van sy verhoor die hofverrigtinge verder by te woon. Op aansoek van die prokureur-generaal is 'n lasbrief vir sy inhegtenisneming deur die hof uitgereik. Die hof het ook gelas dat die verhoor in sy afwesigheid kon voortgaan. Vier dae na sy verdwyning het hy egter vrywillig na sy verhoor teruggekeer. Sy verduideliking vir sy vier-dae-lange afwesigheid was dat die stremming van die verhoor (wat ten tyde van sy verdwyning al vier weke aan die gang was) hom geknak het en dat hy as gevolg daarvan impulsief besluit het om te vlug. Hy het eenvoudig na 'n stasie gegaan en 'n trein na Florida geneem. Volgens hom het hy twee uur na hierdie optrede berou gehad en besef dat hy totaal verkeerd opgetree het. Ten spyte van hierdie besef het hy egter nie dadelik na sy verhoor teruggekeer nie, maar die volgende paar dae op vrye voet en onder moeilike omstandighede deurgebring. Hy is in dié tyd nooit in hegtenis geneem nie. Op die vierde dag van sy afwesigheid het hy uit vrye wil met 'n adjudant-offisier van die Suid-Afrikaanse polisie kontak gemaak met die versoek dat dié hom na die hof moet vergesel. So het hy saam met die betrokke adjudant-offisier by sy verhoor opgedaag, sonder dat hy in hegtenis was.

In hierdie omstandighede het sy advokaat by die hof aansoek gedoen dat hy vir die res van die verhoor weer op borgtog vrygelaat word. Hierdie aansoek is deur die hof afgewys, nie op die meriete daarvan nie, maar op 'n regsbasis, naamlik dat so 'n aansoek, gesien in die lig van die feit dat die beskuldigde reeds op borgtog vrygelaat was, nie vir oorweging of beregting deur die hof ontvanklik

was nie. 'n Borgaansoek ingevolge artikel 60 verwys vir die hof na slegs een geval en dit is waar daar nog nie vantevore borgtog bestaan het nie (443B). Die hof motiveer sy standpunt deur te sê dat die hele skema wat die wetgewer met die bepalings van artikels 60 en 67 bedoel het, op die volgende neerkom: indien borgtog eenmaal toegestaan is, duur dit voort totdat uitspraak gegee word en indien vonnis nie dadelik na uitspraak opgelê word nie, totdat dit opgelê word (441E). Versuim die beskuldigde om by sy verhoor op te daag, of om weer te verskyn na 'n verdaging van die verhoor, of om aldaar aanwesig te bly, *moet* 'n lasbrief vir sy inhegtenisneming uitgereik word en tesame daarmee die borgtog en die borggeld onderskeidelik voorlopig ingetrek en verbeurd verklaar word. Behalwe as sy versuim nie aan sy skuld te wyte was nie, *moet* die voorlopige bevel finaal gemaak word (442B–G).

Namens die beskuldigde is egter betoog dat artikel 60 magtiging verleen vir die rig van 'n borgaansoek "in enige stadium" na die beskuldigde se eerste verskyning voor 'n hof. Uit hoofde hiervan, so is betoog, is af te lei dat die onderhawige aansoek dus wel deur die hof ontvanklik is. Hierop word die volgende beslis:

> "Wanneer die twee artikels saamgelees word, en die skema wat ontwerp is vir borgtog en hierdie besondere basis van intrekking van borgtog in aanmerking geneem word, skyn dit my dat om artikel 60 te beskou as van toepassing in 'n geval soos die huidige, neerkom op negering van die binne-logika van hierdie skema. Om as deel van die binne-logika daarvan 'n skema te ontwerp wat gebiedend bepaal wat moet volg by sekere gebeure (in hierdie geval is dit die versuim om die verrigtinge by te woon) en aan die ander kant, in dieselfde asem, te bepaal dat onmiddellik daarna dit ongedaan gemaak kan word deurdat weer 'n aansoek aan die hof gerig kan word, is vir my onaanvaarbare onsin.
>
> Ek dink artikel 60 verwys na slegs een geval en dit is waar daar nog nie vantevore borgtog bestaan het nie" (442I–443B).

Laasgenoemde gevolgtrekking lei die hof klaarblyklik nie af van die bewoording van artikel 60 nie. Klaarblyklik lei die hof dit af uit die sogenaamde "binne-logika" van die "skema" van artikel 60 saamgelees met artikel 67. Dit blyk uit die volgende:

> "Dit is myns insiens absurd, iets wat hoegenaamd nie in lyn lê met die binne-logika van hierdie skema nie, om dit so uit te lê as sou sekere dinge, gebiedend, plaasvind soos bekragtiging van voorlopige intrekking, die finaliteit van bevele en dan terselfdertyd dit te ontsenu deur te impliseer dat daar nou onmiddellik weer 'n verdere aansoek gedoen kan word. Die Wetgewer het dit nie so bepaal nie en die Hof self het geen inherente mag van enige aard op hierdie gebied om dit te beveel nie. Hierdie bepalings bevat die totaliteit van die magte van die Hof. Indien die beskuldigde se aanvanklike reg om uit bewaring te kom by wyse van borgtog uitgeput is, is dit slegs binne hierdie verdere bepalings dat sy regte en die Hof se magte by latere gebeure bestaan" (443D–F).

Die hof doen ook 'n beroep op die bepalings van artikel 68 om die gevolgtrekking waartoe hy gekom het, te staaf:

> "Daar is ander artikels wat op ander toestande van toepassing is wat op hierdie vertolkingsprobleem lig werp. 'n Interessante een is byvoorbeeld art 68 vir die geval waar 'n beskuldigde wil vlug, nie een wat reeds nagelaat het om die verrigtinge by te woon nie. In so 'n geval waar hy nog steeds die Hof bywoon, en wanneer die Hof onder subart (2) so 'n lasbrief vir inhegtenisneming uitreik, dan bly dit van krag, tensy '. . . die Hof voor wie die verrigtinge hangende is die borgtog eerder *herstel*. . .' (my kursivering). Hierdie verskil in taalgebruik dui duidelik aan hoedat hier in 'n totaal verskillende situasie die Hof borgtog 'herstel'. Slegs in hierdie geval kan dit 'herstel' word. Dit versterk my mening dat borgtog iets is wat deurlopend is. Eenmaal toegestaan, loop dit tot op die einde en kan dit slegs by onderbreking daarvan, indien die Wetgewer so sê, 'herstel' word. Daar is geen sprake van 'herstel' in art 67 nie" (443F–H).

Bygevolg beslis die hof dan dat aan die hand van die feite in die onderhawige saak, die bepalings van die Strafproseswet geen ruimte laat vir 'n nuwe borgaansoek nie en "dat die posisie [dus voortduur] dat beskuldigde onder arres is" (443I).

3 Die Nkosi-benadering

In *Nkosi* is appèl aangeteken teen 'n streeklanddros se weiering om uit hoofde van wat in *Barnard* beslis is, ontvanklikheid te verleen aan 'n nuwe borgaansoek deur die beskuldigdes nadat die betrokke streeklanddros die beskuldigdes se borgtog en borggeld ingevolge artikel 67 van die Strafproseswet ingetrek en verbeurd verklaar het. Die feite in dié saak was soos volg: Borgtog van R50 elk is aan die drie beskuldigdes (appellante) toegestaan. Hul verhoor kon maar net nie koers kry nie en is herhaaldelik uitgestel. Appellante het aanvanklik gereeld en tydig by die hof opgedaag tot op 'n dag toe al drie laat (derde appellant selfs 'n dag laat) by hul verhoor opgedaag het. Eerste appellant het op dié betrokke dag om 11h35 in plaas van 09h00 opgedaag. Sy verskoning was dat sy motor na bewering gebreek het. Die tweede appellant het om 10h30 opgedaag en aangevoer dat hy nie busgeld gehad het nie en reeds om 07h30 hof toe begin stap het. Die derde appellant het, soos reeds genoem, 'n dag laat – en boonop by die verkeerde hofsaal – opgedaag. Die hofsaal waar hy sy verskyning gemaak het, was die saal waar die saak die vorige geleenthede geroep is. Die streeklanddros was nie deur hierdie verskonings oortuig dat hulle versuim nie aan hulle skuld te wyte was nie. (Soos by appèl te kenne gegee word – 583H – is *culpa levissima* immers moeilik weerlegbaar.) Die voorlopige intrekking en verbeuring van die borgtog en borggeld is toe bekragtig. Nuwe aansoeke om borg het, soos reeds gesê, misluk op die basis dat die hof onder die omstandighede nie 'n nuwe borgaansoek mag oorweeg nie.

Die woorde "in enige stadium" soos in artikel 60 gebesig, was, soos in *Barnard* die geval was, ook in *Nkosi* 'n beginpunt vir die hof se uiteindelike beslissing. Vir die *Nkosi*-hof is die woord "enige" in sy gewone konteks 'n begrip sonder beperkings, tensy die konteks self 'n beperking daarop plaas (584B). In dié sin verkies die hof dus om 'n wyer aanloop tot die vraag te neem as wat in *Barnard* geneem is.

Tereg word daarop gewys (584F–J) dat die bepalings van artikels 63, 66, 67 en 68 van die Strafproseswet (wat almal te make het met die nie-nakoming, of dreigende nie-nakoming, van borgvoorwaardes) nie misdryfskeppende bepalings is nie. Oortredings van borgvoorwaardes asook die nie-verskyning van 'n beskuldigde wat op borg vrygelaat is, is dus nie kragtens dié bepalings strafbaar nie. Wat wel kan (artikel 66) of moet (artikel 67) gebeur, is dat die *bestaande* borgtog en borggeld ingetrek en verbeur kan word (584I). Vir die hof is daar geen aanduiding dat indien borgtog en borggeld ingevolge artikel 66 ingetrek en verbeur word, die beskuldigde nie weer om borgtog aansoek kan doen nie. Dit is ook nie 'n noodwendige implikasie van so 'n intrekking en verbeuring nie (584 *in fine*).

Vir die hof is daar ook nie so 'n aanduiding in artikel 67 te vinde nie. Die plig wat artikel 67 die hof oplê (in teenstelling met die diskresie vervat in artikel 66) om 'n lasbrief tot inhegtenisname uit te reik en die borgtog en borggeld in te trek en verbeurd te verklaar, is 'n oorweging wat vir die *Nkosi*-hof, anders as in die *Barnard*-hof, nie swaar genoeg weeg om artikel 67 met betrekking tot

die gestelde vraag van artikel 66 te onderskei nie. Die *Nkosi*-hof verklaar die verskil in gevolgtrekking soos volg:

> "[E]k [is] van oordeel . . . dat intrekking en verbeurding in beide gevalle [d w s ingevolge aa 66 en 67] dieselfde gevolge het. Dit is irrelevant dat in een geval intrekking en verbeurding *mag* plaasvind [d w s ingevolge a 66] en in die ander geval *moet* plaasvind. Die vraag is immers wat . . . die posisie van die beskuldigde [is] met betrekking tot sy aanspraak op borgtog nadat die intrekking en verbeurding plaasgevind het."

Bygevolg is die hof (by implikasie) van oordeel dat daar geen beginselrede bestaan waarom daar 'n onderskeid – sover dit die ontvanklikheid van 'n nuwe borgaansoek na die intrekking en verbeuring van die bestaande borgtog en borggeld aangaan – gemaak moet word tussen artikels 67 en 66 nie. Die hof se standpunt is dus: omrede 'n nuwe borgaansoek aangehoor kan word na die intrekking en verbeuring van die bestaande borgtog en borggeld ingevolge artikel 66, kan so 'n aansoek ook aangehoor word na sodanige intrekking en verbeuring kragtens artikel 67.

Die doel van die lasbrief tot inhegtenisname wat ingevolge artikel 67 uitgereik word, is vir die hof bloot om die beskuldigde voor die hof te bring. Dit is, volgens die hof, nie 'n metode om die beskuldigde se inhegtenishouding tot afhandeling van die verhoor te bewerkstellig nie (585C). Die *Barnard*-benadering beteken vir die *Nkosi*-hof dat die nie-verskyning ingevolge artikel 67, hoewel nie 'n misdaad nie, tog strafbaar is. Die straf is egter indirek, naamlik die verlies van die bevoegdheid om weer aansoek om borg te doen. Aangesien artikel 67 geen misdryf skep nie, is dit vir die *Nkosi*-hof moeilik om by implikasie so 'n straf in artikel 67 in te lees (584E).

Gevolglik vind die *Nkosi*-hof niks in die skema van die Strafproseswet in die algemeen of in die bepalings van artikel 67 in die besonder wat enige beperkings op artikel 60 plaas wat nie in woorde in laasgenoemde bepaling uitgedruk is nie (584E–F). Dit beteken dat die hof inderdaad bevind dat die woorde "in enige stadium," soos in artikel 60 gebruik, 'n begrip sonder beperkings is. Artikel 66, en bygevolg artikel 67, plaas dus geen beperkings daarop nie.

Die *Nkosi*-hof het ook gereageer op die *Barnard*-hof se verwysing na artikel 68 van die Strafproseswet om die beslissing van laasgenoemde hof te staaf. Volgens *Nkosi* is die rede waarom dié artikel na 'n "herstel" van borgtog verwys die volgende:

> "Dit [a 68] handel met die geval waar 'n beskuldigde 'op die punt staan om aan die gereg te ontkom of op die punt staan om te ontvlug ten einde aan die gereg te ontkom.' Die gevolg van 'n aansoek onder hierdie artikel is dat die borgtog ingetrek word sonder dat die borggeld verbeur word. Dit is klaarblyklik so omdat die beskuldigde nog niks verkeerd gedoen het nie maar net van voorneme is om iets verkeerd te doen. Dit is daarom dat die artikel verwys na 'n 'herstel' van die 'borgtog'. Die beskuldigde word in sy vorige stand teruggeplaas. 'n Herstel van borgtog is onder art 67 nie moontlik nie. Dit beteken egter nie dat 'n nuwe aansoek om borgtog op die feite wat heers ten tyde van daardie nuwe aansoek nie aangehoor kan word nie" (585F–H).

'n Groter waarheidsmoment van artikel 68 is vir die *Nkosi*-hof geleë in die feit dat artikel 68 uitdruklik verklaar dat indien die borgtog ingetrek word, die beskuldigde in 'n gevangenis gevange gesit word, "welke gevangesetting tot by die beëindiging van die betrokke strafregtelike verrigtinge van krag bly." Volgens *Nkosi* vind die *Barnard*-hof hierdie woorde, vermoedelik by implikasie, ook in artikel 67. Die *Nkosi*-hof stem nie met so 'n benadering saam nie:

> "Dit is, myns insiens, ondenkbaar dat die Wetgewer in twee direk opeenvolgende artikels dieselfde gevolg sou gewil het maar dit in net een van die twee artikels sou uitgespreek

het. Ek ken nie 'n reël van wetsuitleg wat so 'n metode van interpretasie kan regverdig nie."

Uit hoofde van bogenoemde uiteensetting is die hof dan van oordeel dat 'n intrekking en verbeurdverklaring van borgtog en borggeld ingevolge artikel 67 nie 'n nuwe aansoek om borgtog ingevolge artikel 60 onontvanklik maak nie. Die feit dat borgtog ingetrek is, sal volgens die hof natuurlik 'n relevante feit wees wat in aanmerking geneem kan word by die oorweging van die nuwe aansoek om borgtog (586A–B). Bygevolg het die appèl geslaag. Die landdros se weiering om borgtog toe te staan, word ter syde gestel en die borgaansoek word na die betrokke streekhof vir oorweging daarvan op die meriete terugverwys.

4 Die Korrekte Benadering

Welke van dié twee beslissings is te verkies en welke benadering behoort in die toekoms gevolg te word? Die ironie van die saak is dat die eindresultaat in beide beslissings, naamlik die weiering van borgtog in die *Barnard*-saak en die moontlike verlening daarvan in die *Nkosi*-saak, tog die regsgevoel bevredig. Dit is ook so dat die regsbeginsel wat in *Barnard* uitgespel is, tot onbillikhede sou lei indien dit net so in *Nkosi* (veral in die lig van die feite en omstandighede van dié saak) toegepas sou gewees het (vlg *Nkosi* 583I–J). Hierteenoor sou die *Nkosi*-standpunt nie onbillikhede in die hand gewerk het indien dit in *Barnard* toegepas sou gewees het nie. Die *Barnard*-hof sou stellig, veral in die lig van die omstandighede waaronder die beskuldigde se borgtog ingetrek is, nie 'n nuwe borgaansoek op die meriete daarvan toegestaan het nie.

Nietemin word aan die hand gedoen dat die *Nkosi*-benadering die korrekte benadering is. Dit blyk uit 'n vergelyking tussen dié twee sake dat die eintlike twispunt geleë is in die betekenis wat geheg moet word aan die woorde "in enige stadium," soos in artikel 60 gebesig. Na my mening moet die *Nkosi*-hof gelyk gegee word in sy standpunt dat nie een van die bepalings in artikels 63, 66 of 67 van die Strafproseswet afbreuk doen aan die wye betekenis wat dié gevleuelde woorde dra nie. "In enige stadium" beteken dus letterlik "in enige stadium." Dit omvat gevolglik ook die stadium na borgintrekking. In *Nkosi* is die mening tereg uitgespreek dat die intrekking en verbeuring van die borgtog en borggeld (ingevolge artikel 67) 'n intrekking en verbeuring van die *bestaande* borgtog en borggeld is. Sodanige intrekking bring nie die onontvanklikheid van 'n latere borgaansoek mee nie: dit negativeer nie in absolute sin die moontlikheid van 'n latere borgaansoek nie. Hoewel die vorige intrekking en verbeuring van sy borgtog en borggeld die *onus* wat op 'n applikant by 'n latere borgaansoek rus, bemoeilik, plaas dit hom nie onder belet om wel so 'n latere aansoek te rig nie. Om anders te redeneer, soos die "binne-logika-van-die-skema"-argument van die *Barnard*-hof dit wil hê, kan lei tot onbillikhede en resultate wat die wetgewer moeilik kon gewil het. Beteken dit dan byvoorbeeld dat indien die omstandighede wat meegebring het dat sy borgtog en borggeld ingevolge artikel 67 ingetrek en verbeurd verklaar is, na sodanige intrekking en verbeurdverklaring ophou om te bestaan, of nie weer kan ontstaan nie, die beskuldigde hoegenaamd nie weer 'n borgaansoek kan rig nie? Daar word aan die hand gedoen dat die wetgewer in artikels 60 en 67 nie so 'n resultaat voor oë gehad het nie.

Iedere borgaansoek kragtens artikel 60 word tog aangehoor en beoordeel aan die hand van die feite wat heers ten tyde van daardie borgaansoek. Dieselfde oorweging behoort dan ook te geld ten opsigte van 'n beskuldigde wat, na die

intrekking en verbeuring van sy bestaande borgtog, 'n nuwe borgaansoek aan die hof wil rig. Dié siening word inderdaad dan ook deur die *Nkosi*-hof (585H) bevestig. Die skuld van die beskuldigde vir sy nie-verskyning en as gevolg waarvan sy borgtog en borggeld ingevolge artikel 67 ingetrek en verbeurd verklaar is, kan hierbenewens ook in graad wissel. Indien die begrip skuld, soos in artikel 67 gebesig, op 'n verwytbare gesindheid aan die kant van die beskuldigde dui, volg dit dat daardie verwyt ernstig of minder ernstig kan wees. Kan daar nie dalk gesê word dat die verwytbaarheid van die beskuldigde, vir sy nie-verskyning, in *Barnard* groter is as die verwytbaarheid, wat, vir soortgelyke optrede, aan die beskuldigdes in *Nkosi* kleef nie? Oënskynlik tog. Trouens, die *Nkosi*-hof besef dit ook (583I). Hierdie wisselende graad van verwytbaarheid kan juis, myns insiens, 'n faktor wees wat 'n rol mag speel by die beoordeling, op die meriete, van 'n nuwe borgaansoek. Hoe ernstiger die verwyt teen die beskuldigde vir sy nie-verskyning, hoe minder kans op sukses sal hy hê met sy nuwe borgaansoek. *E contrario* volg dit dat sy suksesmoontlikhede met sy nuwe borgaansoek sal vergroot namate sy verwytbaarheid vir sy nie-verskyning verklein. Is die beskuldigde erg verwytbaar vir sy nie-verskyning, beteken dit nie dat hy as gevolg daarvan nie weer om borgtog aansoek kan doen nie. Hoewel hy dus nog kan aansoek doen om borgtog, kan die graad van sy verwytbaarheid beslis 'n deurslaggewende invloed hê op sy suksesmoontlikhede met sy nuwe aansoek. Dit is presies wat die *Nkosi*-hof ook beslis het (586A–B). By nadere ontleding van die *Barnard*- en *Nkosi*-sake, blyk dié oorweging 'n vername *ratio* te wees vir die onderskeie standpunte aldaar ingeneem. In plaas daarvan om die toepaslikheid van die *Barnard*- en *Nkosi*-benaderings afhanklik te maak van die feite en gebeure van 'n bepaalde geval, behoort daar, myns insiens, net met die *Nkosi*-standpunt te werk gegaan te word. Dié standpunt is na my mening wyd genoeg om alle denkbare situasies te dek en beteken in elk geval nie dat die *ontvanklikheid* van 'n nuwe borgaansoek outomaties die *toestaan* daarvan meebring nie.

Volledigheidshalwe dien net daarop gewys te word dat in die uitspraak in *Nkosi* daar ook na 'n ongerapporteerde uitspraak van Transvaalse hof verwys word waarin waarnemende regter O'Donovan *obiter* sy bedenkinge oor die juistheid van die *Barnard*-benadering uitgespreek het. Dit is verder ook interessant om daarop te let dat die staat nòg in *Barnard* nòg in *Nkosi* die *ontvanklikheid* van 'n nuwe borgaansoek betwis het: trouens die staatsadvokaat het in *Nkosi* betoog dat *Barnard* verkeerd beslis is.

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Probability is the degree of credibility of a particular proposition (per Weil in *The Art of Practical Thinking* 69).

BOEKE

KELSEY STUART: THE NEWSPAPERMAN'S GUIDE TO THE LAW
deur W LANE, D HOFFE, D DISON en C TATHAM
Vierde uitgawe; Butterworth Durban 1986; xxv en 331 bl
Prys R65,00 (hardeband) R45,00 (sagteband) + AVB

The Newspaperman's Guide to the Law behoef waarskynlik geen bekendstelling by regslui en joernaliste nie. Sedert die publikasie van die eerste uitgawe so lank gelede as 1968 het hierdie werk, wat aanvanklik bloot as "gids" moes dien, van krag tot krag gegroei. Kritiek wat by geleentheid uitgespreek is en wenke wat aan die hand gedoen is om die werk meer bruikbaar te maak, is telkens in die opeenvolgende uitgawes in ag geneem sodat hierdie vierde uitgawe 'n naslaanwerk van hoogstaande gehalte is.

Die boek poog om in een band alle aspekte van die reg te dek waarmee die joernalis waarskynlik in die beoefening van sy beroep te doen kan kry. Met behulp hiervan moet hy probeer om veilig tussen die Scylla en Charybdis van die joernalistieke moets en moenies deur te stuur. Dit is daarom ook heel gepas dat die eerste hoofstukke begin met begrippe soos " 'n reg om te publiseer" en "skuld in geval van statutêre misdrywe." Daarna volg 'n kort bespreking van nuusbladregistrasie en die Suid-Afrikaanse mediaraad. Gemeenregtelike beperkings wat van oudsher af op vrye spraak geplaas word, word aangetref in die hoofstukke wat handel oor laster, valse neerhaling, *iniuria* en privaatheidskending. Aangesien slegs lede van die nuusbladpersunie vrygestel is van die bepalings van die Wet op Publikasies 42 van 1974 terwyl daar wel publikasies is wat deur nie-lede uitgegee word, is hierdie wet ook onder die loep geneem, aangevul deur 'n verwysing na die bepalings van die Wet op Onbetaamlike en Onwelvoeglike Fotografiese Materiaal 37 van 1967. Minagting van die hof en hofverslaggewing beslaan twee hoofstukke terwyl diverse wetlike bepalings wat betrekking het op aangeleenthede rakende binnelandse veiligheid, verdediging, die polisiediens en gevangeniswese ook bespreek word omdat die joernalis in die beoefening van sy daaglikse beroep waarskynlik dikwels hierby betrokke mag raak. Een hoofstuk word aan outeursreg gewy, terwyl die belang wat die koerantman moontlik in die handelswêreld mag hê, weerspieël word deur hoofstukke waarin verwys word na loterye, handelskoepons, die bankwese, maatskappy- en effektebeursaangeleenthede en die advertensiewese. Nadat so 'n diverse verskeidenheid regsaangeleenthede ondersoek is, sluit hierdie omvattende werk af met 'n bespreking van die joernalis se plig om sy inligtingsbronne openbaar te maak en aspekte

wat daarmee verband hou, soos deursoeking van persele, beslaglegging op dokumente en die Wet op die Advokaat-Generaal 118 van 1979.

Diegene wat vertroud is met die inhoud van die derde uitgawe sal opmerk dat die materiaal nou hergroepeer is om gedeeltes wat groter ooreenstemming vertoon saam in dieselfde hoofstuk te plaas. Enkele nuwe hoofstukke is bygewerk om die totaal op negentien te staan te bring terwyl vier bylaes, 'n *glossarium* van nuttige Latynse en regsterme en registers van gewysde sake en wetgewing, die hoofwerk aanvul.

Wat uiteensetting en tipografie van die werk betref, toon die vierde uitgawe 'n geheel nuwe benadering wat radikaal afwyk van die aanbiedingswyse wat in die derde uitgawe gevolg is – beslis tot voordeel van die werk as geheel. Daar is allereers weggedoen met die gebruik om paragrawe regdeur die werk van die begin af aaneenlopend te nommer en daar is oorgegaan tot die desimale nommeringsisteem. Sodoende word naslaanwerk vergemaklik aangesien elke hoofstuk as't ware 'n eenheid op sigself vorm. Daar is net die één hooftema wat regdeur die werk konstant bly, naamlik dat alle hoofstukke verband hou met beperkings wat op die vrye mededeling van inligting geplaas word. Die opskrifte en subopskrifte is uitgebrei en aan die begin van elke hoofstuk verskyn 'n kompakte herhaling van alle opskrifte wat in die bepaalde hoofstuk voorkom. Hierdie inhoudsopgawe in die kleine maak dit vir die leser moontlik om met 'n enkele oogopslag vas te stel watter veld deur die bepaalde hoofstuk gedek word en hoe die skrywers hul stof gesistematiseer het. Veral in die geval van studente wat die boek as leerboek moet gebruik, kan hierdie inhoudsopgawes as 'n soort opsomming dien waardeur die leerproses aansienlik vergemaklik word met gepaardgaande besparing in tyd en arbeid.

'n Verdere eienskap van hierdie werk wat dadelik opval, is dat daar weggedoen is met voetnote sodat alle stof in die teks self gedek word. Dit maak die teks meer leesbaar, en as dan verder in ag geneem word dat die boek in eerste instansie bedoel is vir joernaliste wat "waarskynlik" oor min of geen regskennis beskik nie, is so 'n beleid te verstane en ook aan te prys.

Alle aanhalings uit ander werke, uit hofbeslissings of uit wetgewing, is in 'n kleiner lettertipe gedruk en word in blokvorm vertoon waardeur dit duidelik onderskeibaar is van die skrywers se kommentaar. Wat ingeboet moes word aan spasie, is deur hierdie wyse van aanbieding oor en oor gewen aan voorkoms, ordening, eenvoud en sistematiek.

Om elke hoofstuk as eenheid meer bruikbaar te maak, sou dit miskien nuttig wees indien elk van 'n eie bronnelys voorsien kon word of indien daar in die samevattende bibliografie wat aan die einde van die gehele werk verskyn, aangedui kon word watter boeke of artikels aan watter bepaalde hoofstuk gekoppel moet word.

Die eerste twee hoofstukke in die boek is nuwe invoegings waarin die begrippe " 'n reg om te publiseer" en "skuld in geval van statutêre misdrywe" behandel word. Hoewel daar met hierdie invoeging gepoog word om 'n mate van agtergrondinligting te verskaf sodat die werk meer toeganklik kan wees, voldoen dit nie aan die behoefte wat daar bestaan aan 'n breë, inleidende bespreking soos reeds met die verskyning van vorige uitgawes bepleit is nie. Volgens die skrywers sou so 'n inleidende bespreking nie prakties wees nie en daarom volstaan hulle met die omskrywing van sekere basiese begrippe in 'n *glossarium*. Hierdie soort

aanbiedingswyse leen hom egter nie tot suksesvolle verduideliking van die verskil in betekenisnuanse wat tussen sekere regsterme kan bestaan nie. Onderwerpe wat veel beter in teksvorm verduidelik sou kon word eerder as in kort verklarende aantekeninge is onder andere die wisselwerking tussen gemene reg en wettereg, die algemene regsklassifikasie of die onderskeid tussen "reg" en "plig". Wat heeltemal ontbreek, is 'n kort verwysing na die bronne van ons reg, 'n praktiese en sinvolle verduideliking van die onderskeid tussen objektiewe en subjektiewe reg, en 'n uiteensetting van die algemene beginsels waarop vrye spraak en sensuur berus en hoeseer albei bestaansreg behoort te hê.

Aangesien beperkings op die vrye disseminasie van inligting grotendeels spruit uit statutêre verordeninge, sou dit miskien ook paslik wees om aan die begin van 'n werk van hierdie aard enkele riglyne te gee oor die wyse waarop wetsuitleg in ons land toegepas word. Hoe wetgewing deur die regspraktisyn vertolk word, wat die regskrag van proklamasies en regulasies is, is maar enkele aspekte wat waarskynlik met veel vrug aangeraak kon word. Die skrywers weerhou hulle deurgaans daarvan om standpunt in te neem hetsy vir, hetsy teen bepaalde beperkings wat op die vrye verspreiding van inligting geplaas word. 'n Uiters objektiewe standpunt word deurentyd gehandhaaf en dit word aan die leser self oorgelaat om te besluit of die beperkings wat van owerheidsweë daargestel is, verantwoord en gegrond is. 'n Eie waardebepaling is afhanklik van kennis – juis om hierdie rede behoort daar meer agtergrondinligting aan die leser verskaf te word om hom te lei tot sinvolle aanvaarding of verwerping van die betrokke beperkende maatreëls.

Die boek begin met 'n bespreking van "die reg om te publiseer." Bestaan daar wel in ons land " 'n reg" om vrylik inligting mee te deel? Daarmee word dan bedoel 'n reg wat tuisgebring kan word onder die aanvaarde groep regte wat tot op hede reeds uitgekristalliseer het, byvoorbeeld 'n reg op liggaamlike materiële sake, 'n reg op die persoonlikheid, 'n reg op prestasie of 'n reg op die vrugte van die gees. Indien aanvaar word dat hierdie "reg" in 'n juridiese sin wel bestaan, moet dit dan onder een van bogenoemde groepe geklassifiseer word of bestaan dit alleen en onafhanklik van die ander? Indien so 'n "reg" as werklikheid aanvaar word, hoe ver strek hierdie "reg"? Strek dit so ver dat dit selfs die regte van 'n derde, waaronder dan ook die staat gereken mag word, om homself en sy voortbestaan te beveilig, kan beperk? Word elke persoon se regte nie uiteindelik maar begrens deur die regte van ander waarmee dit in konflik mag kom nie? Dit bly steeds 'n filosofiese bespiegeling maar omdat hierdie aspek tot soveel emosionaliteit aanleiding gee, kan daar gerus hiervan gewag gemaak word. Te dikwels word "die reg op vryheid van spraak" of "die reg op 'n vrye pers" as politieke slagspreuke misbruik en juis daarom behoort 'n werk van hierdie aard dit duidelik te stel dat ons hier met 'n *juridiese begrip* te doen het. Hierdie sogenaamde "reg" om te publiseer kan eerder beskou word as 'n "vryheid" om te publiseer, en dan word daarmee nie soseer bedoel die vryheid van die joernalis om te sê wat hy wil nie, maar veel eerder die vryheid van die publiek om te verneem of om inligting te ontvang. Die vryheid om te vertel, om te publiseer, om openbaar te maak bly dan gekoppel aan die gelykwaardige vryheid om te verneem of te weet – en vergestalt so die behoefte wat daar waarskynlik by elke lid van die gemeenskap bestaan om inligting uit alle moontlike bronne te bekom om self 'n waarde-oordeel daarvoor te vel. So gesien is vrye spraak, en dus 'n vrye pers, nie bloot die aanspraak van die joernalis nie, maar eweseer die aanspraak van die publiek.

Behoort die leser nie gelei te word tot begrip van die probleme wat verbonde is aan 'n algehele vrye spraak nie? Behoort daar nie aan hom verduidelik te word dat vrye spraak in die sin van 'n absolute vryheid nie kan bestaan nie en dat daar daarom ook nie 'n absoluut vrye pers kan wees nie? 'n Vrye pers is uiteindelik tog niks anders nie as die konkretisering van vryheid van uitdrukking in die eng sin van die woord. Beperkings wat vrye spraak in die algemeen opgelê word, behoort ook die pers te raak en sou daarom heeltemal aanvaarbaar kon wees. Vryheid van die media kan op die lange duur maar bloot 'n gekwalifiseerde vryheid wees, 'n vryheid wat beperk word deur die belange en regte van derdes. So gesien, het ons hier eerder 'n soort "residuele vryheid" waar alles toegelaat word wat nie spesifiek verbied is nie. Eers as die leser dit begryp, kan hy self onafhanklik tot standpuntinname gebring word sodat hy by sy bestudering van die verskillende gemeenregtelike en wetteregtelike beperkings wat op 'n onderdaan geplaas word, op sy eie kan besluit of sodanige beperkings sinvol en toelaatbaar is, of eerder buitensporig is sodat dit neerkom op die misbruik van 'n magsposisie.

Die bespreking van skuld in die geval van statutêre misdrywe moet allerweë verwelkom word. Die skrywers se aanbieding is sistematies en sinvol, in noue navolging van die benadering deur Burchell en Hunt gevolg in hul tweede uitgawe van *South African Criminal Law and Procedure* Band 1 (1983). Wat egter nie duidelik is nie, is waarom die skrywers hul bespreking tot statutêre misdrywe beperk het. Die begrip van *mens rea* vind eweseer aanwending op die gebied van die gemeenregtelike misdrywe hoewel die huidige aanbieding die indruk skep dat opset of nalatigheid slegs in geval van statutêre oortredinge 'n element van die misdryf is. Voorts ken die deliktereg ook opset of nalatigheid as vereistes vir aanspreeklikheid en daarom sou verwysing hierna seker nie ontoepaslik wees nie – veral gesien in die lig van die groot rol wat laster, privaatheidskending en die gemeenregtelike beheer van die advertensiewese in die totale opset van die werk speel.

In die hoofstuk wat handel oor nuusbladregistrasie word vereistes waaraan 'n publikasie moet voldoen om as nuusblad beskou te word, asook verskillende registrasievereistes en verbandhoudende aangeleenthede kortliks uiteengesit. Ongelukkig laat die skrywers na om te verwys na die definisie van 'n nuusblad soos dit ook al by geleentheid deur ons howe verstrek is (*R v Daya Morar* 1929 TPD 696 en *R v Lewin* 1939 AD 344) en toon hulle dus ook nie aan in hoe 'n mate die statutêre definisie die definisie van die howe uitgeskakel of aangevul het nie.

Die hoofstuk oor die Suid-Afrikaanse mediaraad (hfst 4) is in sy geheel 'n nuwe invoeging genoodsaak deur veranderings in die joernalistieke wêreld en die skepping van die mediaraad in die plek van die ou Suid-Afrikaanse persraad as vrywillige beherende liggaam wat gerig is op die instandhouding van die vryheid van die pers in Suid-Afrika en die bereiking van 'n hoë professionele standaard van beriggewing. Die skrywers sit die samestelling, doel en oogmerke van die mediaraad uiteen en bespreek kortliks die gedragskode waaraan die lede hul verbind het, asook die prosedure wat gevolg moet word in geval van klagtes by beweerde oorskryding van die kode. (Die volledige tekste van die gedragskode self asook die reëls van prosedure word aan die einde van die werk in die vorm van twee bylaes verstrek.)

Die hoofstuk oor laster is heeltemal herskryf om nuwe regsontwikkelings op hierdie gebied te akkommodeer. Met betrekking tot die vraag of 'n regspersoon 'n lasteraksie kan instel, hou die skrywers by die mening wat reeds in vorige uitgawes uitgespreek is, wat ook deur McKerron *The Law of Delict* (1971) 181 gehuldig word, en wat soos volg verwoord word:

> "[W]hether or not juristic persons (that is, artificial persons, such as corporations and other like associations) can be defamed, has not yet been settled in our law. A trading corporation can sue for a defamatory statement which affects it in its trade, business or property . . .
>
> Whether or not a non-trading corporation can be defamed has not yet been decided in our law . . .
>
> Although it is not clear whether a corporation can sue for damages for defamation, it may well have a right of action to recover any actual or patrimonial damages . . ."

Volgens hierdie aanhalings wil dit voorkom asof daar by die skrywers self ietwat weersprekende menings bestaan. Eers word beweer dat 'n handeldrywende regspersoon wel 'n eis vir laster kan instel waar sy besigheid skade gely het, om dan weer te verklaar dat dit nie duidelik is of 'n regspersoon skadevergoeding vir laster kan eis nie hoewel hy tog vermoënskade wat uit die laster voortvloei, mag verhaal. Ook in geval van ons regspraak is daar nie altyd eenvormigheid oor hierdie aspek nie (vgl bv *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) en *Church of Scientology in SA (Incorporated Association not for Gain) v Reader's Digest Association SA (Pty) Ltd* 1980 4 SA 313 (K) met *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 1 SA 441 (A) en *Multiplan Insurance Brokers (Pty) Ltd v Van Blerk* 1985 3 SA 164 (D)). Die onduidelikheid en dubbelsinnigheid van standpunt spruit waarskynlik uit die feit dat daar nie duidelik onderskei word tussen persoonlikheidsregte aan die een kant, en 'n reg op werfkrag aan die ander kant nie en ook nie tussen die *actio iniuriarum* wat gerig is op die verskaffing van *solatium* vir 'n gekwetste persoonlikheid, en die *actio legis Aquiliae* waarmee vermoënskade geëis word nie. Enige handeldrywende onderneming se werfkrag is gekoppel aan sy goeie naam, sodat aantasting van sy naam onvermydelik 'n inbreuk op sy reg op werfkrag is. Neethling *Persoonlikheidsreg* (1985) 79–80 maak 'n duidelike onderskeid tussen persoonlikheidsregte waar die een of ander aspek van die persoonlikheid betrokke is en wat dus uit die aard van die saak aan 'n persoon gekoppel moet wees, en werfkrag waar 'n onderneming se klandisiewaarde op die spel is en wat dus sowel 'n individu as 'n regspersoon kan toekom. Die onderskeiding word verder deurgevoer na die twee aksies wat betrekking kan hê. Sy suiwerder standpunt is te verkies. Terloops kan vermeld word dat die saak *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1979 (1) SA 441 (A), hoewel 'n appèlhofbeslissing, nie gesien kan word as finale uitspraak vir aanvaarding van die siening dat 'n handeldrywende regspersoon wel 'n eis vir laster kan instel nie aangesien die verwysings na 'n handeldrywende regspersoon daar 'n *obiter dictum* was.

Daar moet in gedagte gehou word dat die skrywers hierdie, en die daaropvolgende hoofstuk wat oor privaatheidskending handel, deurgaans vanuit die oogpunt van die verslaggewer of koerantman benader het en dat die aanbieding daarom mag verskil van die tradisionele benadering wat gewoonlik in handboeke aangetref word. So word uitdruklik vermeld dat opset of *animus iniuriandi* nie 'n vereiste is om in geval van die pers aanspreeklikheid vir laster of privaatheidskending daar te stel nie.

Die vraag ontstaan nou of dit nie meer sinvol sou wees om eers 'n algemene uiteensetting te gee van die vereistes waaraan enige delik moet voldoen alvorens aanspreeklikheid opgedoen word nie. Soos die hoofstukke tans lui, skep dit die indruk dat elke delik as't ware op sigself en heeltemal alleenstaande beoordeel moet word en dat elk sy eie vereistes het waaraan voldoen moet word. So 'n kasuïstiese benadering toon 'n sterk Engelsregtelike invloed terwyl die huidige Suid-Afrikaanse reg eerder gerig is op die beklemtoning van die ooreenstemmende eienskappe wat eie is aan alle delikte en by almal voorkom. Die teenwoordigheid van hierdie elemente stel 'n party dan aanspreeklik vir vergoeding weens 'n onregmatige daad ongeag of die feitestel binne die raamwerk van die een of ander spesifieke delik tuisgebring kan word al dan nie. So 'n benadering laat ruimte vir gevalle wat tot dusver nog nie in ons regspraak uitgekristalliseer het nie.

Terloops kan net vermeld word dat belediging van die Staatspresident nie meer statutêr verbied word nie. Die skrywers het hierdie gedeelte weggelaat sonder om te verduidelik dat die nuwe staatsbestel wat deur die Grondwet van die Republiek van Suid-Afrika 110 van 1983 ingevoer is, meegebring het dat die Staatspresident nie meer 'n blote seremoniële hoof van die staat is nie. Hy is nou 'n politieke leiersfiguur en as sodanig nie meer in sy ampshoedanigheid verhewe bo belastering nie.

Die bespreking van *iniuria* en privaatheidskending gaan gebuk onder dieselfde probleem as laster deurdat die algemene vereistes vir deliktuele aanspreeklikheid nie eers vooraf uiteen gesit is nie. Wat sterk na vore kom in beide hierdie hoofstukke is dat die klem telkens geplaas word op die onderskeid tussen 'n objektiewe en subjektiewe benaderingswyse. 'n Eenvoudige uiteensetting van wat presies op regsgebied onder hierdie twee begrippe verstaan word, sou nuttig wees. Die verduideliking in paragraaf 5 10 skyn nie aan sy doel te beantwoord nie. (Terloops kan vermeld word dat die begrippe ook nie in die woordregister of *glossarium* opgespoor kon word nie.)

By die bespreking van privaatheidskending word slegs openbare figure, privilegie en toestemming as verwere vermeld, terwyl noodweer en noodtoestand moontlik ook vir die joernalis van belang kan wees. In die geval van openbare figure kon die skrywers gerus verwys het na die situasie wat geld wanneer lede van die publiek weens bepaalde omstandighede in die kalklig gestel word omdat hulle toevallig op 'n bepaalde tydstip op 'n bepaalde plek teenwoordig is. So kan byvoorbeeld die vraag gevra word of foto's toelaatbaar is van mense wat teenwoordig is by 'n bomontploffing. Wat weeg die swaarste – die individu se reg op privaatheid of die gemeenskap se belang om kennis te kry van nuuswaardighede?

Die bespreking van die Wet op Publikasies 42 van 1974 is aansienlik uitgebrei, en veral die begrip "ongewenstheid" word breedvoerig bespreek. Daar word verder gewag gemaak van moontlike regsonsekerheid wat mag bestaan omdat die werking en optrede van die publikasiekomitees nie aan 'n rigiede stel reëls gekoppel is nie. Die leser behoort egter in gedagte te hou dat die komitees fungeer as 'n soort sif of 'n "screening body" – soos Van der Vyver dit uitdruk (*LAWSA* vol 2 par 212) – wat allereers daargestel is om die massa publikasies wat uiteindelik voor die appèlraad oor publikasies gaan dien, ietwat af te water en in volume te verminder. Slegs die appèlraad volg hofprosedure en verkry sodoende die relatiewe regsekerheid wat vermeld word. Ongelukkig laat die skrywers na

om daarop te wys dat die Wet op Publikasies nie net publikasies of voorwerpe beheer nie, maar ook van toepassing is op rolprente en openbare vermaaklikhede. Die definisie van 'n rolprent is in die wet so wyd dat dit beslis ook foto's wat vir advertensiedoeleindes geneem word, sal kan insluit en daarom behoort joernaliste ook van hierdie aspek kennis te dra. Dit is soveel te meer die geval omdat die Wet op Onbetaamlike en Onwelvoeglike Fotografiese Materiaal 37 van 1967 wel bespreek word. Die stelling word gemaak dat die definisie van 'n publikasie in die vermelde wet so wyd is dat selfs 'n private tekening of dokument daarby inbegrepe kan wees. Dit is waar van 'n tekening maar wat 'n dokument betref, is dit nie noodwendig 'n uitgemaakte saak nie. Die definisie van "publikasie of voorwerp" omvat bo en behalwe die gewone betekenisse van die woorde 'n verdere sewe kategorieë artikels soos koerante, ander soorte drukwerk, geskrifte wat gedupliseer is, twee- en driedimensionele visuele voorstellings en klankweergawes. Die enigste moontlike groepe waaronder 'n dokument dalk sou kon val, is òf groep (ii) wat verwys na "boeke, tydskrifte, pamflette, aanplakbiljette of ander drukwerk", òf groep (iii) wat insluit " 'n geskrif of tikwerk wat gedupliseer is", òf dit moet tuisgebring word onder die gewone betekenisse van publikasie of voorwerp. Indien 'n dokument nie bestaan uit drukwerk nie of nie gedupliseer of gepubliseer is nie, moet dit dan beskou word as 'n voorwerp om so onder die definisie tuisgebring te word?

By 'n bespreking van die probleme verbonde aan skuld in geval van oortredings van die Wet op Publikasies (par 7 5), en die dispuut of dit hier die vorm van *dolus* moet aanneem en of bloot *culpa* voldoende kan wees om aanspreeklikheid te vestig, sou 'n verwysing na Burns se artikel ("The Publications Act: Production of an Undesirable Publication or Object" 1980 *THRHR* 267) nie onvanpas gewees het nie. In die artikel word die aangeleentheid sistematies en indringend beredeneer en word daar ook verwys na verskillende hofbeslissings waartydens hierdie aspek onder die loep gekom het (sien ook *S v Mati* 1986 2 SA 248 (O)).

Die hoofstuk wat handel oor minagting van die hof toon dat die skrywers wel kennis geneem het van kritiek wat in vorige resensies uitgespreek is en hierdie kritiek in hul vierde uitgawe in berekening gebring het. So is daar byvoorbeeld in paragraaf 8 13, waar die toelaatbaarheid van aanhalings uit pleitstukke en ander dokumente voor die hof bespreek word, 'n verwysing na Strauss se standpunt soos verwoord in 1979 *THRHR* 120. Die skrywers weerhou hulle egter van standpuntinname. Hoewel hierdie hoofstuk inhoudelik grotendeels onveranderd gelaat is, is daar tog nuwe invoegings in die vorm van minagting van die presidentsraad, die advokaat-generaal, landdroshowe en diverse ander geregshowe en rade. Die howe vir klein eise word nie genoem nie.

Die inwerkingtreding van die Wet op Binnelandse Veiligheid 74 van 1982 het, hoewel dit grotendeels konsoliderend van aard was, nogtans die herskrywe van die betrokke hoofstuk meegebring. Die klem word weer eens geplaas op veral die aspekte wat vir 'n kommunikator van belang kan wees: daar word verduidelik wat onder kommunisme en onwettige organisasies verstaan moet word, hoe bevordering van sulke organisasies se doelstellings 'n misdryf uitmaak, en veral word die publikasie van woorde of toesprake van verbode persone toegelig. Wie presies 'n verbode persoon is en wat publikasie uitmaak, word sistematies verduidelik. Die definisies van terrorisme en subversie word woordeliks aangehaal en oortredings wat hiermee verband hou, kortliks bespreek. Eers met die ter

perse gaan van die boek is die huidige noodtoestand en gepaardgaande maatreëls in Suid-Afrika afgekondig en om daardie rede kon die skrywers nie hierdie aspekte, wat so uiters belangrik vir die koerantman is, in hul werk inkorporeer nie; hulle het nogtans 'n kompromis getref deur wel die 1985-noodregulasies in die vorm van 'n opsomming (in bylae D) weer te gee – 'n stap wat net verwelkom kan word. Wat egter wel 'n leemte in die hoofstuk is, is die weglating van artikel 54(4) van die Wet op Binnelandse Veiligheid waarin twee besondere grade van deelneming wat vir die joernalis van belang kan wees, strafbaar gestel word; naamlik dat enigeen wat rede het om te vermoed dat 'n ander persoon van voorneme is om terrorisme, subversie of sabotasie te pleeg of dit gepleeg het of wat bewus is daarvan dat 'n persoon wat voornemens is om so 'n misdryf te pleeg, op 'n bepaalde plek teenwoordig is en wat dan daardie persoon herberg of versteek, of aan hom hulp verleen of versuim om sy teenwoordigheid aan die polisie bekend te maak, eweseer strafbaar is en dieselfde straf opgelê kan word as die persoon wat gehelp is. Hierdie artikel vind noue aansluiting by hoofstuk 19 waarin die openbaarmaking van inligtingsbronne bespreek word, en het klaarblyklik 'n aanloop vanuit die gemene reg gehad waarvolgens enige persoon wat oor kennis beskik het met betrekking tot die pleging van hoogverraad, dit moes openbaar.

Diverse wetgewing wat verband hou met verdediging, amptelike geheime en sake van strategiese belang is in een hoofstuk saam gegroepeer. In 'n poging om elke aspek te vermeld wat moontlik op hierdie gebied vir die joernalis van belang kan wees, wil dit voorkom asof die skrywers moes inboet aan eenvoud en doelmatigheid. Gevolglik is hierdie hoofstuk grotendeels 'n samevoeging van aanhalings uit verskillende verbandhoudende wette met min of geen bespreking of toeligting nie (vgl bv par 10 2 10 5 10 6 10 7). Sou 'n kort samevattende bespreking van die inhoud van die betrokke wetsartikels nie meer van waarde gewees het vir die waarskynlike leser met sy "waarskynlike" gebrek aan regsagtergrond nie? In die geval van die Poswet 44 van 1958 (par 10 4) is die bepalings van artikels 118 en 118A daarenteen kortliks saamgevat sonder om die direkte bewoording van die artikels te herhaal. Dit is waar dat 'n handboek van hierdie aard wat so 'n wye veld van die reg, met soveel uiteenlopende vertakkings, dek en wat daarbenewens ook leke as lesers sal hê, ongelukkig soms in omvang moet inboet om te kan voldoen aan die eise van duidelikheid, verstaanbaarheid en doelmatigheid. Sou so 'n skrywer egter aan sy lesers aandui waar die ontbrekende inligting nagevors kan word, sal sodanige leemtes nie noodwendig gebreke wees nie.

Baie nuttig vir die joernalis is die tekste van die ooreenkomste wat die nuusbladpersunie met die kommissaris van die Suid-Afrikaanse polisie en die minister van verdediging onderskeidelik gesluit het en wat woordeliks aangehaal word. Aanvullend hierby verskyn ook die brief waarin die uitvoerende ondervoorsitter van die Bewapeningskorporasie van Suid-Afrika die ooreenkoms van die nuusbladpersunie en die minister van verdediging onderskryf.

Die hoofstuk wat handel oor gevangenes en gevangenisse is merendeels 'n oorname van die ooreenstemmende hoofstuk in die vorige uitgawe. Interessant is dat gewag gemaak word van die veranderde standpunt wat tans deur die staat ingeneem word met betrekking tot die publikasie van inligting oor gevangenes en gevangenisdienste. In navolging van 'n verklaring wat deur die minister van justisie uitgereik is, word daar klaarblyklik nou gepoog om groter samewerking

tussen die media en die gevangenisdiens op te bou deur 'n eenvoudige prosedure daar te stel waaraan voldoen moet word wanneer 'n joernalis inligting oor gevangenisdienste wil publiseer en hom nogtans wil kwyt van die bewyslas wat deur artikel 44(f) van die Wet op Gevangenisse 8 van 1959 op hom geplaas word.

Die bespreking van hofverslaggewing is ietwat teleurstellend. Heel gepas begin die bepaalde hoofstuk met 'n bespreking van die basiese beginsel in ons reg dat verhore in 'n ope hof moet plaasvind en die skrywers verwys dan na verskillende howe en dui aan in hoeverre hierdie algemene beginsel statutêr verskans of beperk word. Daarna word toegang tot die oorkondes van sake in die verskillende howe bespreek en in die algemeen verwys na die vryheid van die joernalis om inligting oor verrigtinge te publiseer. Wanneer die skrywers in paragraaf 13 6 egter by die beperkings kom wat geplaas word op vrye toegang tot die howe en hofverslaggewing, raak die bespreking ietwat verwarrend. Sou dit nie meer verstaanbaar wees om 'n onderskeid te tref tussen hofbywoning en publikasie van hofverrigtinge en hierdie twee aspekte dan onder verskillende opskrifte te bespreek nie? Die onderskeid kan verder deurgevoer word na strafregtelike en siviele verrigtinge met uiteindelik 'n verwysing na ander howe. So 'n benadering sou daartoe lei dat artikel 153 en 154 van die Strafproseswet 51 van 1977 wat onderskeidelik oor bywoning van geregtelike verrigtinge en publikasie van inligting handel, as eenhede behandel sou word en nie fragmentaries soos tans die geval is nie.

Op bladsy 174 verklaar die skrywers:

> "Section 154(1) of the Criminal Procedure Act further reinforces the provisions of section 153(1) of the same Act."

Dit is wel waar dat artikel 154 in sy geheel in samehang met artikel 153, ook in sy geheel, gelees moet word, maar om te beweer dat artikel 154(1) artikel 153(1) versterk, neem die saak darem te ver. Indien die onderskeiding wat hierbo aan die hand gedoen is tussen bywoning en publikasie, wat geheel verskillende omstandighede dek, konsekwent toegepas sou word, sou elke artikel as eenheid verstaan word.

Die gedeelte wat oor handelskoepons handel, is weens die Wysigingswet op Handelspraktyke 7 van 1984 geheel en al herskryf. Ongelukkig is dit waar, soos die skrywers ook tereg opmerk, dat hierdie wet vol anomalieë is wat waarskynlik mettertyd deur verdere wysigings opgeklaar sal word. Dit blyk dan ook dat die praktyk nie altyd in ooreenstemming is met die beginsels wat in teorie geleer word nie. So vind ons in die praktyk dat skemas wat op die oog af 'n oortreding van die betrokke wetgewing is, skynbaar oogluikend toegelaat word. Juis om hierdie rede sou dit dalk wenslik wees om die hoofstuk effens meer uit te brei deur die besondere wetsartikels wat genoem word, ook te bespreek en die algemene regsbeginsels wat van toepassing mag wees, by te haal. Voorbeelde uit die handelswêreld – werklik of bloot hipoteties – sou veel bydra om die bestaande situasie beter toe te lig, juis miskien omdat ons regspraak se oes in hierdie verband maar skraal is.

Outeursreg is maar altyd een afdeling van ons reg wat wat hom moeilik leen tot 'n kort en kragtige bespreking. In 'n boek van hierdie aard loop 'n skrywer hom altyd vas teen 'n gebrek aan voldoende ruimte om alles te sê wat hy eintlik sou wou weergee. As hierdie beperking in ag geneem word, kan begryp word waarom die skrywers selektief slegs sekere dele van die toepaslike wetgewing

kon aanhaal terwyl hulle ander moes laat. Omdat verskillende aspekte van die stof in dieselfde volgorde aangebied word waarin dit in die Wet op Outeursreg 98 van 1978 gedek word, kom die opeenvolging van paragrawe nie altyd sinvol voor nie. So sou paragrawe 15 6, 15 7 en 15 11 wat handel oor nasionaliteit, land van herkoms en oorspronklikheid eerder onder een opskrif tuisgebring kon word wat sou uitlig dat ons hier te doen het met die gemeenregtelike en statutêre vereistes vir die bestaan van outeursreg. Die feit dat 'n werk outomaties vir outeursreg kan kwalifiseer, beteken nie noodwendig dat alle outeurs sonder meer beskerming geniet nie. Basiese vereistes waaraan voldoen moet word alvorens 'n werk op outeursregbeskerming aanspraak kan maak, kan geriefshalwe as gemeenregtelike en statutêre vereistes geklassifiseer word. Onder eersgenoemde kan dan beginsels van permanentheid, oorspronklikheid en welvoeglikheid tuisgebring word (par 15 11) terwyl 'n gekwalifiseerde persoon in geval van 'n ongepubliseerde werk of as alternatief publikasie binne die Republiek van Suid-Afrika as statutêre vereistes gestel kan word (par 15 6).

In paragraaf 15 15 sê die skrywers: "[B]esides being direct or indirect, copying may be conscious or subconscious . . ." en dan blyk dit uit die aanhaling wat die skrywers weergee dat sodanige "onbewuste" kopiëring wel in sekere omstandighede outeursregskending kan uitmaak. Wat word bedoel met hierdie "onbewuste" kopiëring en hoe sou aanspreeklikheid vir skending te rym wees met die beginsels van *mens rea* wat in die tweede hoofstuk uiteengesit word?

Dalk sou dit beter wees om paragraaf 15 9 ná 15 15 te bespreek sodat eers aangedui word wat skending van outeursreg behels en daarna wat die verskillende moontlike verwere is wat geopper kan word. Miskien sou dit ook vir 'n joernalis nuttige inligting wees indien aangedui kon word watter handelinge in geval van elke soort werk wat deur die wet vermeld word, skending sou uitmaak (a 6 7 8 9 10 11). Weer ontbreek 'n uiteensetting van die algemene beginsels: skending van outeursreg geskied net as daar *werklike kopiëring* is en indien *'n wesenlike gedeelte van die werk* gekopiëer word. Die skrywers se manier van aanbieding bring hierdie grondreël van outeursregskending nie altyd duidelik na vore nie (par 15 22).

Die hoofstuk wat handel oor banke, die poskantoor, radio en die effektebeurs is 'n nuwe invoeging en bestaan bloot uit enkele uittreksels uit die toepaslike wetgewing wat moontlik vir die joernalis van belang kan wees. 'n Kernagtige bespreking van die inhoud sou dalk die betrokke artikels beter kon toelig.

Diverse statute wat verband hou met advertensies en die advertensiewese is in een hoofstuk saam gegroepeer. Dit kan nuttig wees om alle moontlike statute wat op advertensiewese betrekking mag hê onder een hoof saam te groepeer, maar ongelukkig bly hierdie hoofstuk vir die grootste deel 'n losse konglomerasie van aanhalings uit verskillende wette omdat inleidende verduidelikende paragrawe oor die algemene beginsels van advertensiewese weers eens ontbreek. 'n Inleiding is hier soveel te meer noodsaaklik omdat die boek in sy geheel nie oor 'n bespreking van algemene regsbeginsels beskik nie. Die hele advertensiewese is immers geskoei op die lees van algemene gemeenregtelike beginsels van deliktuele aanspreeklikheid wat dan aangevul word deur statutêre bepalings. Soos die hoofstuk tans lui, skep dit by die leser die indruk dat 'n mens die toelaatbaarheid van advertensies bepaal word deur een statuut na die ander te deursoek. Daar kan net gemeld word dat die artikels wat uit sekere statute aangehaal word, soos die Wet op Menslike Weefsel 65 van 1983 (par 17 4 1) en die Wet op

Anatomiese Skenkings en Nadoodse Ondersoeke 24 van 1970 (par 17 4 2), nie regstreeks met die advertensiewese verband hou nie, maar eerder bepalings bevat wat as verbiedinge op die publikasie van inligting in die algemeen beskou kan word.

Behalwe gemeenregtelike en statutêre beheer oor die advertensiewese, bestaan daar ook 'n interne vorm van vrywillige beheer wat uitgeoefen word deur die gesagsvereniging vir reklamestandaarde. Laasgenoemde orgaan word in besonderhede deur die skrywers bespreek en die toepaslike gedeeltes uit sy gedragskode word woordeliks aangehaal.

Die laaste hoofstuk van hierdie boek wat as omvattende werk beskou kan word, hou verband met die openbaarmaking van inligtingsbronne, deursoeking en beslaglegging, en die Wet op die Advokaat-Generaal 118 van 1979. Nieteenstaande die feit dat dit sensitiewe kwelpunte in die praktyk is, slaag die skrywers daarin om hul boek op 'n hoë noot af te sluit met 'n objektiewe, volledige en bevredigende bespreking.

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FREEDOM, STATE SECURITY AND THE RULE OF LAW
deur AS MATHEWS
Juta Kaapstad Wetton en Johannesburg 1986; xxx en 312 bl
Prys R62 + AVB (hardeband)

Op 'n tydstip in ons geskiedenis dat noodtoestande 'n lewenswyse geword het, dat die hofverslae wemel van sake wat onder *internal security* in die indeks verskyn en dat nuwe noodregulasies met gereelde tussenposes die heerskappy van die uitvoerende gesag herbevestig, is professor Mathews se jongste toevoeging tot ons skrapse regsliteratuur oor die onderwerp binnelandse veiligheid so noodsaaklik as wat dit welkom is.

Mathews het baanbrekerswerk gedoen met sy boek *Law, Order and Liberty in South Africa* (1971) wat, tot met die verskyning van Marius Ackermann se werk *Die Reg insake Openbare Orde en Staatsveiligheid* (1984) die enigste gesaghebbende Suid-Afrikaanse boek oor die onderwerp was.

Waar Ackermann se boek egter hoofsaaklik uit strafregtelike perspektief geskryf is, is Mathews se nuwe werk oorkoepelend. Dit is regsfilosofies, staatsregtelik, administratiefregtelik, strafregtelik en (durf mens dit sê?) ook polities, omdat, soos Mathews in sy inleiding oor die *rule of law* sê:

> "A doctrine concerned with the relationship between the government and the citizen and with the legal control of the government in the interests of freedom and justice cannot be without political import" (xxix).

Die boek bestaan uit drie dele. Deel I handel oor die leerstuk van *rule of law* en Mathews klassifiseer sieninge oor dié begrip in vier breë kategorieë.

Die eerste kategorie noem hy die *law enforcement approach* en hy dui aan dat dié benadering neerkom op *rule by law* eerder as op *rule under law*. Die probleem met hierdie benadering "is not that it is wrong, but that it limits the rule of law to a proposition that ought to be a starting-point" (2). Die tweede kategorie wat geïdentifiseer word, is die prosessuele geregtigheidsbenadering (*procedural justice approach*). Hieronder bring hy tuis die legaliteitsbeginsel, *due process* en die *Rechtsstaatsprinzip*. Alhoewel legaliteit onontbeerlik is vir die skepping van 'n regverdige regsorde, is dit op sigself 'n onvoldoende *rule of law*-teorie omdat "particular laws, and even whole legal systems, may conform to all the requirements of legality and yet reduce human autonomy and eliminate individual choice" (10).

Die derde kategorie poog om hierdie tekortkominge te remedieer. Die sogenaamde substantiewe of materiële geregtigheidsbenadering (*material justice approach*) wil dan die *rule of law* bykans sinoniem maak met die verwesenliking van volkome sosiale en politieke geregtigheid. Die Internationale Kommissie van Juriste is die hoofeksponent van hierdie benadering, terwyl die materiële regstaatteorieë ook hieronder tuisgebring kan word. Volgens Mathews lê die tekortkoming van hierdie sieninge daarin dat hulle 'n totaal onrealistiese rol aan die reg en die howe toeken. *Alle* fasette van burgerskap kan nie deur 'n beroep op die *rule of law* beskerm word nie, want

> "the rule of law should not be transmogrified into an all-embracing political and social philosophy" (12).

Dit bring die leser dan by die benadering wat Mathews voorstaan, naamlik die beskerming van fundamentele regte-benadering (*protection of basic rights approach*). Hierdie benadering is in essensie 'n parafrase van Dicey se klassieke definisie van *rule of law* in die vorm van 'n sintese uit die prosessuele geregtigheidsbenadering en die materiële geregtigheidsbenadering. Mathews se analise van Dicey se definisie toon aan dat dit die legaliteitsbeginsel omvat, maar dit ook transendeer deur die beskerming van die onderdaan se burgerregte (*civil rights*) voor te skryf. Hierdie *civil rights* is dié deel van burgerskap wat nie sogenaamd polisentries is nie en dus vatbaar is vir regsbeskerming. Hieronder verstaan Mathews persoonlike vryheid, gewetensvryheid, vryheid van spraak, vryheid van inligting, vryheid van beweging, vergadervryheid en vryheid van assosiasie. Die 'materiële deel' van Dicey se definisie is dus beperk tot burgerregte (of -vryhede) wat dan die primêre sfeer is vir die werking van die voorskrifte van die legaliteitsbeginsel. Sodoende word 'n aanvaarbare sintese "that will respect legality by restricting its operation to areas of social concern in which it is both relevant and workable" (15) bereik. Die soeke na materiële geregtigheid word dus stewig geanker in die legaliteitsbeginsel.

Deel I is van besondere waarde omdat die skrywer in die bestek van drie-endertig bladsye daarin slaag om 'n analitiese, weldeurdagte en rype oorsig oor die hele *rule of law*-vraagstuk te gee.

Deel II is getitel *The Security System* en beslaan meer as die helfte van die boek. Hierin word die hele *corpus* van Suid-Afrikaanse veiligheidswetgewing blootgelê. Hoofstuk 6 word gewy aan 'n bespreking van die misdrywe wat deur Suid-Afrikaanse veiligheidswetgewing geskep word. Misdade soos terrorisme, subversie, sabotasie, bevordering van die oogmerke van Kommunisme en vele ander word krities uit hoofsaaklik strafregtelike perspektief ontleed, terwyl aandag ook aan prosesregtelike en bewysregtelike bepalings geskenk word.

Wat telkens duidelik aan die lig gebring word, is hoe ontstellend wyd die verbodsbeskrywings van dié misdade is en hoe allesomvattend die "besondere" opsetsvereistes is. Die uitleg deur die howe van die woorde "bereken" en "calculated" in die bewoording van veiligheidsmisdrywe as sou dit slaan op 'n objektiewe maatstaf, naamlik dat die waarskynlikheid dat 'n sekere gevolg sou intree, beoordeel moet word, word streng gekritiseer in die lig van die subjektiewe skuldbegrip. Daar word tereg aan die hand gedoen dat die howe hier eerder die bewys van *dolus* ten opsigte van sowel die handeling as die gevolge daarvan, moet vereis.

Hoofstuk 7 handel oor aanhouding ingevolge die Wet op Binnelandse Veiligheid 74 van 1982 (hierna die wet genoem). Voorkomende aanhouding soos gemagtig in artikels 28, 50 en 50A van die wet, voorverhooraanhouding ingevolge artikel 29, die sogenaamde "*no bail*" *clause* in artikel 30 asook die aanhouding van getuies ingevolge artikel 31 van die wet word in hierdie hoofstuk aan kritiese administratiefregtelike analise onderwerp. Veral die neiging van die howe om in die sfeer van veiligheidswetgewing die frases "if in his opinion," "is satisfied" en "has reason to suspect" subjektief uit te lê, word hewig gekritiseer omdat dit op die verlening van 'n absoluut vrye owerheidsdiskresie neerkom.

Mathews steun uit die aard van die saak die appèlafdeling se onlangse rigtinggewende uitspraak in *Minister of Law and Order v Hurley* 1986 3 SA 568 (A), maar betreur die feit dat die uitspraak uitdruklik beperk is tot die frase "has reason to believe" ("rede het om te vermoed") in artikel 29 van die wet, wat die gevolg het dat voorkomende aanhouding ingevolge artikel 28 van die wet nie daardeur geraak word nie. Hy is dan ook die mening toegedaan dat *al* die sogenaamde *subjective discretion clauses* (dus ook frases soos "is satisfied" en "is of the opinion") vatbaar is vir die interpretasie dat dit slegs 'n gebonde diskresie verleen, omdat

> "[c]ommon sense, apart from legal authority, appears to dictate the rule that a person cannot be of the opinion or satisfied that a certain state of affairs exists unless there are grounds upon which the opinion or satisfaction is based" (64).

Die skrywer het ook ernstige bedenkinge oor die wenslikheid en wysheid daarvan om bekentenisse, erkennings en selfs die getuienis van veral artikel 29-aangehoudenes toe te laat. Hy meen dat bekentenisse en erkennings van persone wat in geïsoleerde aanhouding verkeer het, as uitgangspunt ontoelaatbaar moet wees, tensy die afwesigheid van dwang duidelik blyk. Ook die getuienis van persone wat oor lang tydperke aangehou is, moet met die grootste versigtigheid benader word:

> "There is only one approach to detainee evidence that is consistent with the evidence of scientists and the requirements of a fair trial – to reject such evidence unless there are cogent and compelling reasons for believing that it is both truthful and reliable" (94).

Mathews skroom nie om die howe se gelate houding hieroor te kritiseer nie en hy is van mening dat hulle 'n belangrike geleentheid om 'n bres vir prosesuele geregtigheid te slaan, deur die vingers laat glip het.

Hoofstuk 8, getitel *Banning*, handel oor die onwettigverklaring van organisasies, publikasieverbiedinge, die inperking van individue en die verbied van byeenkomste. Hierdie hoofstuk is besonder insiggewend omdat die skrywer telkens die dikwels ingrypende gevolge van sodanige owerheidsoptrede vir die persone wat daardeur getref word, skets. Mathews toon ook oortuigend aan hoedat die geykte *numerus clausus* van administratiefregtelike hersieningsgronde

in hierdie gevalle, naamlik *mala fides*, ongeoorloofde doel en "not applying his mind to the matter" in hierdie veld geheel en al onvoldoende is om die minister se wye magte enigsins aan geregtelike kontrole te onderwerp.

Hoofstuk 9 behandel beskerming van inligting en beperkings op die vryheid van spraak. Die registrasie van koerante, die bekendmaking van inligting oor die Suid-Afrikaanse Polisie, Weermag en Gevangenisdiens, die Wet op Nasionale Sleutelpunte 102 van 1980, die Wet op Verkryging van Landsvoorrade 89 van 1970, die Wet op Beveiliging van Inligting 84 van 1982, asook die leerstuk van staatsprivilegie word in hierdie hoofstuk bespreek. Artikel 66 van die Wet op Binnelandse Veiligheid 74 van 1982, wat die howe hul gemeenregtelike bevoegdheid ontneem het om in gevalle waar staatsveiligheid in gedrang kom die finale arbiter van 'n beroep op staatsprivilegie te wees, asook die onderskrywing daarvan deur die Rabie- en Potgieter-Kommissie, word sterk deur Mathews bevraagteken. Hy noem ook die wesenlike moontlikheid dat 'n onthulling soortgelyk aan die sogenaamde inligtingsdebakel of "Muldergate" tans geïnhibeer kan word deur die bepalings van die Wet op Beveiliging van Inligting 84 van 1982.

Die netelige kwessies van waarneming (*surveillance*), betreding, visentering, deursoeking en beslaglegging word onder die loep geneem in hoofstuk 10. Mathews beveel onder andere aan dat amptelike riglyne neergelê moet word om die optrede en werksaamhede van klandestiene agente (*undercover operatives*) te reguleer, veral om te voorkom dat hulle as politieke spioene gebruik word of optree as *agents provocateur*.

Hoofstuk 11, getitel *Emergency Powers*, handel oor die verskeie vorme van statutêre noodtoestand wat in Suid-Afrika moontlik is. Daar word 'n onderskeid gemaak tussen makro-noodtoestande (wat deur die staatspresident afgekondig word) en mikro-noodtoestande (wat deur die minister van wet en orde afgekondig word). Die belang van hierdie hoofstuk is daarin geleë dat dit die eerste gesaghebbende bespreking van die huidige en onlangse noodtoestande in hul totaliteit is. Wat veral waardevol is, is die volledige voetnote wat gedetailleerde verwysings bevat na artikels, staatskoerante en ongerapporteerde regspraak.

Deel II word gekenmerk deur volledigheid en akkuraatheid. Die bespreking in konteks van belangrike gewysdes soos *Metal and Allied Workers Union v State President of the Republic of South Africa* 1986 4 SA 358 (D); *Momoniat and Naidoo v Minister of Law and Order* 1986 2 SA 264 (W); *Natal Newspapers v The State President* 1986 4 SA 1109 (N); *Dempsey v Minister of Law and Order* 1986 4 SA 530 (K); *Nkondo and Gumede v Minister of Law and Order* 1986 2 SA 756 (A); *S v Ramgobin* (*1*) 1985 3 SA 587 (N); *S v Ramgobin* (*2*) 1985 4 SA 130 (N), en *Katofa v Administrator-General for South West Africa* 1985 4 SA 211 (SWA) behoort vir sowel akademici as praktisyns van waarde te wees.

Wat jammer (maar miskien onvermydelik) is, is dat soveel sake (ook van dié hierbo genoem) nog nie gerapporteer was met die ter perse gaan van die boek nie, sodat Mathews noodgewonge daarna as ongerapporteerde sake moes verwys. Wat veral jammer is, is dat die *Tsenoli*-sage of, soos Mathews dit beskryf,

> "the pas-de-trois of the full bench in Durban and the similarly constituted ensemble in Pietermaritzburg" (303)

wat uitgeloop het op

> "a rather tame pas-de-cinq in Bloemfontein" (303)

nog nie gerapporteer was met die ter perse gaan nie. Alhoewel Mathews die uitsprake kortliks bespreek in sy naskrif, sal lesers wat dié belangrike saak later wil lees, 'n bietjie moet rondblaai in die hofverslae voordat hulle op die saak van *State President v Tsenoli; Kerchoff v Minister of Law and Order* 1986 4 SA 1150 (A) afkom. Hierdie onvolledigheid kan egter nie voor die skrywer se deur gelê word nie en doen nie afbreuk aan die inhoud nie.

Deel III neem die vorm aan van 'n algemene evaluasie. In hoofstuk 12 word die onderafdelings in deel II krities ontleed teen die maatstaf van die *rule of law* soos geformuleer in deel I. Die evaluasie verkry 'n verdere dimensie deurdat daar ook telkens regsvergelykend gekyk word na die hantering van soortgelyke vraagstukke in Israel en Noord-Ierland, twee gemeenskappe wat volgens die skrywer ten minste net sulke groot en selfs ouer wet-en-orde-probleme het as Suid-Afrika. Vele interessanthede kom hier aan die lig en Suid-Afrika vergelyk in sommige gevalle gunstig met dié lande.

Waar Suid-Afrika egter duidelik te kort skiet, is wanneer geregtelike kontrole ter sprake hom. Só *moet elke* geval van voorkomende aanhouding in Israel binne agt-en-veertig uur deur die *howe* hersien word, terwyl gevalle van voorkomende aanhouding in Suid-Afrika slegs deur die hoofregter hersien word as die hersieningsraad met die minister verskil oor die uitoefening van sy diskresie. Ook dan kan die hoofregter nie die meriete oorweeg nie, maar is hy aangewese op die tradisionele gronde wat veel enger as in Israel is. Verder is daar geen tydsbeperkings in Suid-Afrika nie, sodat 'n aangehoudene òf vrygelaat kan word, òf weer aangehou kan word onder 'n nuwe bevel teen die tyd dat die saak by die hoofregter uitkom. Mathews kom aan die einde van die hoofstuk tot die onomwonde gevolgtrekking dat

> "[t]he South African security system has brought about root-and-branch elimination of the rule of law . . ." (267).

In die laaste hoofstuk verskaf die skrywer onder andere riglyne vir 'n alternatiewe binnelandse veiligheidstelsel. Hy erken wel deeglik die noodsaaklikheid van *'n* stel veiligheidswetgewing in 'n turbulente en veranderende samelewing *maar*, sê hy

> "[m]ore liberty and closer adherence to the rule of law *are* compatible with the creation of a peaceful and stable social system" (296).

Hy hou dan 'n stel betreklik gedetailleerde hervormingsvoorstelle voor as

> "the best that can be hoped for in a society riven by conflict" (296).

Hierdie voorstelle van hom berus op die volgende breë beginsels:

1 die skepping van statutêre kriteria om die gebruik van veiligheidsbevoegdhede (*security powers*) te reguleer;

2 die vernouing van die strekwydte van veiligheidsmisdrywe;

3 *rule of law*-kontrole oor aanhouding en inperking;

4 die herlewing van prosessuele geregtigheid.

Mathews sluit sy boek af met 'n beroep op regsgeleerdes om hulle los te maak van die beperkende denkpatrone van positivisme:

> "We have been persuaded for too long by positivistic modes of thinking that large areas of 'settled' law are not open for reconsideration, that lawyers as such have no duty to foster the rechtsstaat idea, and that in legal disputes with political dimensions the judicial branch should keep its nose clean. It is these attitudes which will have to change if the judiciary in South Africa is to play a decisive part in the rebuilding of the rule-of-law state" (302).

As daar 'n leemte in die boek is, is dit die feit dat Mathews slegs in die verbygaan na die *interdictum de homine libero exhibendo* (die Suid-Afrikaanse ekwivalent van *habeas corpus*) verwys. Daar word deesdae veelseggend dikwels 'n beroep op hierdie remedie gedoen en belangrike ontwikkelings ter uitbreiding en opheldering daarvan het plaasgevind sedert die appèlafdeling sy belangwekkende uitspraak in *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (A), gegee het.

Aan die ander kant het daar egter van die ware *interdictum de homine libero exhibendo* min oorgebly ná al die uitsluitingsklousules wat in ons veiligheidswetgewing opgeneem is (vergelyk artikels 28(7) en 31(7) van die Wet op Binnelandse Veiligheid 74 van 1982 en artikel 103 *ter* van die Verdedigingswet 44 van 1957) – iets wat Mathews insien (26) – sodat die hele kwessie gereduseer is tot pogings van die howe om hierdie drastiese inperkings op hulle inherente hersieningsjurisdiksie te omseil. Gesien in hierdie lig, sou 'n gedetailleerde bespreking van 'n remedie wat in die veiligheidsfeer slegs nominale bestaan geniet, miskien weinig meer as 'n kosmetiese oefening in 'n werk van hierdie aard gewees het. Mathews se bespreking van die howe se stryd om hulle sogenaamde residuele jurisdiksie teen hierdie aanslae te beskerm en hulle tentatiewe repudiëring van die *executive-minded* denkskool waarvan die meerderheidsuitspraak in die Engelse saak *Liversidge v Anderson* [1942] AC 206 steeds die berugste voorbeeld is, is in elk geval só bevredigend dat dit meer as kompensasie bied.

Ten slotte: Die veiligheidsimplikasies van vyf en sestig Suid-Afrikaanse wette word bespreek en die verslae van sewentien kommissies, komitees en konferensies word aangeraak. Die uitgebreide bibliografie, nuttige indeks en omvangryke vonnisregister is verdere getuienis van die volledigheid van hierdie werk. Geen tipografiese foute kon opgespoor word nie.

Mathews se jongste werk is 'n onontbeerlike *vade mecum* deur die labirint van die Suid-Afrikaanse reg insake staatsveiligheid. Die boek is egter veel meer as dit. Op 'n tydstip dat die werking van die Suid-Afrikaanse regsorde toenemend onder die verskerpte aandag van die wêreld kom, is *Freedom, State Security and the Rule of Law* 'n tydige waarskuwing om nie die baba saam met die badwater uit te gooi ter gewaande beskerming van demokrasie nie. Elke besorgde regsgeleerde behoort hierdie belangrike boek te lees.

JOHANN SCHOLTZ

De traditie leeft geestelyk in ons als een gevoelswêreld, die zich spontaan tracht te handhaven, door afwykingen met een gevoel van afkeer af te stooten (per JJ von Schmid in *Mensch & Maatschappy* 339).

Causation in delict: do the means justify the ends?

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"To set the cause above renown,
To love the game beyond the prize."
Sir Henry John Newbolt: *The Island Race*

OPSOMMING

Oorsaaklikheid in die Deliktereg: Heilig die Doel die Middele?

Hierdie bespreking is 'n ondersoek na die *sine-qua-non*-kousaliteitsteorie in die lig van die herkenbare oogmerke van die deliktereg om vas te stel in hoe 'n mate hierdie teorie aan dié doelwitte beantwoord. In hierdie lig gesien, openbaar die *sine-qua-non*-teorie ernstige tekortkomings. Daar word gevolglik betoog dat die ekonomiese aspekte van 'n geskil in aanmerking geneem behoort te word sodat bereik kan word wat deur die aanwending van die kousaliteitsvereiste verlang word. Geskilpunte soos gesamentlike veroorsaking en die sogenaamde "egg-skull cases" word ekonomies ondersoek en so ook die beslissing in *Minister of Police v Skosana*. Die gevolgtrekking is dat die kousaliteitsvereiste aangewend moet word in die lig van die verskeidenheid doelstellings wat die deliktereg openbaar; ook moet dit voldoende buigsaam wees sodat bereik kan word wat in bepaalde omstandighede verlang word.

INTRODUCTION

Most dissertators in the field of delict endeavour (some with more success than others) to deal with the vexatious issue of causation and its infamous cohort *sine qua non*. Despite the variety of views, there does seem to be a general,[1] although not universal,[2] acceptance that the established test for factual causation is that of *sine qua non*, but the question persists: exactly what function does the complex *nexus* of rules and principles surrounding this legacy of the Romans serve in a delictual system wedded to fault? It is submitted that the answer to this question may be found in an examination of the particular aims or goals which may be striven for by the law of delict and a consideration of the significance of causation in achieving these ends. It is submitted further that such an explicit analysis of causation in the light of such goals may help to explain those cases that, under traditional scrutiny, may have seemed paradoxical, namely

1 See Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse reg* 5th ed 193; Van der Walt *Delict: Principles and Cases* (1979) 95; McKerron *The Law of Delict* 7th ed 125.

2 Van Rensburg "Nog Eens *conditio sine qua non*" 1977 *TSAR* 101.

the thin-skull cases, the problem of joint causation and the occurrence of supervening events prior to the date of trial. Causation must live, not by the praise of past generations, but by its enduring reputation for usefulness.

A corollary to this discussion (but one by no means any less important) will be a short discourse on the failure of the fault system meaningfully to achieve any of the particular aims of the law of delict, with the view of intimating that a true economic analysis of disputes may alleviate the task of regulators in distributing any loss correctly, despite the seemingly inexorable requirements of *sine qua non*. This approach will be highlighted by means of an examination of the decisions in *Minister of Police v Skosana*[3] and *Bolton v Stone*.[4]

At the outset let it be noted that this discussion will concern itself solely with claims instituted in terms of the *actio legis Aquiliae* and, consequently, any mention of the concept of fault presupposes that negligence would be sufficient to establish liability. Furthermore, no attempt will be made to discuss the deeper philosophical meanings of cause and causation. The word causation will be used in the broad sense, that is, embracing both factual and legal causation, as indicative of the link the law requires between an act and a result before liability may ensue (depending of course on the satisfaction of the other delictual requirements). *Sine qua non* is used in a general sense as a but-for requirement establishing factual causation.

1 THE AIMS OF THE LAW OF DELICT

The general aim of the law of delict would seem to be[5] to determine under which circumstances the legally protected interests of one person are infringed by another and to establish rules in terms of which a victim may receive compensation as a result of this infringement. In other words: when will the law shift the burden of the loss from the victim to the actor? The fault system begins with the premise that the victim of any loss-causing event must always bear that loss, unless he can prove that the injurer was in fact at fault. Whenever we lack evidence as to who, if anybody, should have avoided the loss, it lies where it falls, that is, with the victim. If the victim can prove fault on the part of the injurer, the burden of the loss will shift to the latter,[6] who is then obliged to place the victim in the position in which he would have been had the delict never occurred.[7]

It should be evident that such all-encompassing language would provide little, if any, assistance to a court attempting a loss allocation and, as a result, more isolated objectives have crystallised. A fine survey of these individual aims has been made by Williams and Hepple[8] and in order to determine the relevance of the rules of causation in achieving the general objective, certain facets of this objective, as mentioned by these authors, will be examined in order to determine the part played by causation.

3 1977 1 SA 31 (A).
4 1951 1 All ER 1078.
5 Van der Merwe en Olivier *op cit* 1.
6 Van der Walt *op cit* 3.
7 *Union Government v Warneke* 1911 AD 657.
8 Williams and Hepple *Foundations of the Law of Tort* (1976).

1 1 Compensation

It is self-evident that one of the objectives of the law of delict is the provision of compensation to the victims who qualify for it. If this once-and-for-all lump sum burden would be more onerous when borne by one person than it would be if divided among many, then one function of the law of delict may be the spreading of injury burdens. If the spreading of injury losses were the only goal of the law of delict, then there would be no point at all in requiring that, as a prerequisite to liability, there should exist a causal link between the act and the injury. If spreading were the only goal of the law of delict, a social insurance fund raised through taxes assessed on a *per capita* basis would be the best method of achieving it. Such a system, designed to spread all losses to the maximum degree, would not ask causal questions. Causation cannot determine who would be the most efficient risk bearer. To reiterate: a delictual system designed with nothing in mind but the spreading of losses would be a system of social insurance funded by general taxes and would do away with any requirement of causation. Consequently, to find a justification for the requirement of *sine qua non* in the law of delict, it is necessary to look beyond the goal of compensation or spreading.

A no-fault system would, of necessity, render irrelevant the requirement of legal causation or foreseeability. However, as the law of delict retains the requirement of causation and, hence, foreseeability, this requirement may be used to select effective cost spreaders. Since the spreading of losses is achieved primarily through the medium of insurance coverage, potential loss causers are most likely to insure against loss they regard as reasonably likely to occur. If a person who causes injury to another is insured against such loss, the imposition of liability will result in spreading of the loss and a court, aware of such insurance, is far more likely to assume foreseeability of the damage and impose liability than in the case of a defendant who may be unable to bear the cost of that injury. It follows that, if the aim of spreading of the loss is likely to be achieved by the imposition of liability upon a defendant able to bear the cost of that injury, courts are likely to relax the requirement of equivalence between wrong and penalty – the aim of the decision in the *Wagon Mound*[9] – if this would be in conflict with the stated aim.

This reasoning, it is suggested, is the basis of the application of liability in the thin-skull cases[10] and was the *ratio decidendi* in *Smith v Leech Brain & Co Ltd.*[11] In this case Smith had been employed by the defendants as a labourer and galvaniser. Part of his work consisted in lowering articles into a tank of molten metal and flux and subsequently removing them. While he was so engaged, a piece of molten metal spattered out and burned his lip. He later contracted cancer, underwent operations and died. In holding the defendant company liable to pay damages to the widow and children in terms of the Fatal Accidents Act, Lord Parker CJ stated:[12]

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9 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* 1966 2 All ER 709 (The Wagon Mound no 2).

10 See the discussion below.

11 1961 3 All ER 1159. Although Van der Merwe and Olivier 199 regard this decision as a failure to appreciate the principles enunciated in the *Wagon Mound*, the distinction would seem to lie in an attempt to achieve alternative objectives.

12 1162.

> "The test is not whether these defendants could reasonably have foreseen that a burn would cause cancer and that Mr Smith would die. The question is whether these defendants could reasonably foresee the type of injury he suffered, namely, the burn."

The object of this rationalisation was to provide compensation to Smith's family. The fact that the liability bore no resemblance to the extent of the harm foreseen was regarded as irrelevant, as was the failure of such decisions to provide specific deterrence.[13]

Motor-vehicle-insurance legislation is a prime model of one facet of the law of delict which has as its pivotal aim compensation for the victim and the corresponding spreading of the burden of the loss.[14] Stemming from this pre-eminence, the motor-vehicle-insurance legislation is viewed as social legislation[15] and, as the goal of compensation receives further prominence, this particular field of the law moves further towards the ideal alluded to before, as witnessed by the increasing interest shown in no-fault systems in many Western countries.[16] However, the fact that the Motor Vehicle Accidents Act 84 of 1986 retains the elements of fault and causation,[17] would imply that, in South Africa at least, this sphere of the law of delict would serve objectives other than those aimed purely at compensation or the spreading of losses.[18]

1 2 Deterrence

Deterrence in the law of delict may be said to comprise those goals which seek to minimise the sum of injuries and injury and safety costs. These goals are achieved by creating incentives so that people will avoid those accidents that are worth avoiding (in the sense that prevention is cheaper than cure). This would appear to be the most readily recognisable aim of the law of delict justifying a requirement of fault to establish liability. If an injured person can prove that his injury is the result of the conduct of another, the law of delict will make that other compensate him for his loss. The objective will be to prevent that particular wrongdoer and any similar potential actors from conducting themselves in ways which will attract liability; in other words, by proving and penalising fault it is hoped that the behaviour of actual and potential wrongdoers will be upgraded.

Deterrence in the law of delict would appear to have two separate fields of application: *specific deterrence* which refers to a direct prohibition of dangerous conduct, for example, crossing at a red light or operating a crane without safety equipment; and *general* or *market deterrence* which places the costs of accidents upon the *activities* which cause them by means of an optimal utilisation of resources.

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13 For a discussion of specific deterrence as an aim of the law of delict see below.

14 A similar example would be the development in the USA of strict liability in the area of manufactured products liability. This approach does, however, achieve goals other than compensation, as will be seen from the discussion of market deterrence as an aim of the law of delict below.

15 *Cf AA Mutual Insurance Assoc Ltd v Biddulph* 1976 1 SA 725 (A) 738H.

16 for example The Royal Commission on Civil Liability and Compensation for Personal Injury (Cmnd 7054) Chairman: Lord Pearson and The New Zealand Accident Compensation Act 1972.

17 s 8(1) of the act.

18 Whether this act does in fact achieve any other objective is a matter for dispute. See the discussion below.

1 2 1 Specific deterrence

In its pure form this can be regarded as a judgment by society that certain acts are undesirable and are not to be tolerated regardless of the individual desire to engage in them. Society presumably decides to restrict certain activities because it believes that to engage in them would lead to an increase in the risk of injury. The safety costs are deemed small enough to be worth imposing. If specific deterrence were the only goal of the law of delict, collectively proscribed behaviour could be penalised irrespective of whether or not in a specific instance it was a *sine qua non* for certain harm. The harm that seems likely to flow from the restricted act would be sufficient to justify a penalty, quite apart from the act and any specific accident that brought the act to our attention. The judgment in *Wagon Mound*,[19] precisely because its reasoning is founded in specific deterrence would, if carried to its logical conclusion, do away with *sine qua non*. Liability, in terms of the *Wagon Mound*, is limited only to the foreseeable extent of the harm. Yet, if applied fully, this rationale would require the same level of liability even when that degree of harm fails to materialise. A consistent application of specific deterrence would require that wrongful behaviour (defined in terms of its foreseeable propensity for harm) be subject to penalties based on that propensity, regardless of whether more or less harm than that foreseen actually occurred, that is, regardless of *sine qua non* relationships. Consequently, specific deterrence can hardly be regarded as the basis for the requirement of *sine quo non* in the law of delict.

Conversely, as far as specific deterrence is concerned, the concept of foreseeability is not totally worthless in establishing causal relationships. Unlike *sine qua non*, this requirement can help to select from a wide range of causally linked actions those deemed not worth doing. Specific deterrence, as *one of a number* of the objectives of the law of delict, would be a pointless exercise if actors were penalised for activities whose propensities for harm could not have been known at the time at which they were performed. For instance, if the law wished to deter cricketers from hitting balls into pedestrian thoroughfares, future cricketers would not be deterred from trying to hit sixes unless they could foresee harm resulting from this activity – harm which they knew would be liable to punishment. Such penalties could not alter dangerous behaviour because the harmful consequences of such actions could only be determined *ex post facto*.

The fact remains, though, that if specific deterrence were the *only* goal of the law of delict, then the requirement of foreseeability would become superfluous.[20] Society could collectively determine which activities are worth doing and which are not because of their inherent proclivity towards harm. This explicit determination could serve as a satisfactory substitute in a delictual system aimed only at specific deterrence and, if hitting people with cricket balls was regarded as not being worth the runs scored, players hitting sixes could be penalised irrespective of foreseeability.

However, legal causation has not been eliminated from the law of delict, and so the question may be asked: what is the value of legal causation or foreseeability[21]

19 *supra*.

20 An exclusive reliance upon specific deterrence is not an attractive proposition, as society would have to evaluate, monitor and punish each and every incident which gave rise to more accidents than it was worth.

21 As yet the appellate division has set out no uniform test to be applied to determine legal causation, but foreseeability would seem to have the most adherents.

in achieving specific deterrence? This requirement that loss must be foreseeable in the causative sense before liability may ensue seems almost paradoxical in a fault system because, after fault is found, that is, after an action has been deemed not worth doing because of its inherent riskiness and relative avoidability, legal causation must still be established and penalties are not based upon a decision by society of what is appropriate in the light of the foreseeable (by society, that is) dangers of the particular activity. The very function of the requirement of legal causation as a prerequisite to liability casts doubt upon the balance initially struck by the fault determination. What function does fault serve if the balance that it strikes needs re-adjustment through the use of legal causation? Although the goal of specific deterrence may be furthered through the use of legal causation, this goal cannot in itself serve to justify its use.

Besides any theoretical failures mentioned above, the fault system reveals serious shortcomings of a more practical nature in the attempt to achieve specific deterrence:[22]

a A marked failure to correlate the fault and the punishment. In order to be effective, specific deterrence would imply that the punishment inflicted on the wrongdoer should be severe enough to offset the harm caused by him, but that it should not exceed that harm. Under the fault régime a wrongdoer's negligence is often slight, sometimes negligible, but the resultant injury severe.[23] Being forced, under such circumstances, to compensate for that injury, has no deterrent value; at the most it is in the nature of legalised vengeance.

Conversely, a wrongdoer may be guilty of the most gross negligence but only cause very slight harm. It would require a vivid imagination to regard the ensuing punishment as a deterrent. In fact, the law of delict allows a person to be as negligent as he chooses provided he causes no harm.[24]

b In certain situations persons who do not need deterring – in the sense that they were not at fault – are held responsible for the consequences, for example, the vicarious liability of an employer for the actions of his employee.

The conclusion that one is drawn to is that the fault system is, at the very most, a very crude deterrent, providing sanctions which bear no relation to the harm done.

c *Fault and MVA* As illustrated above, an avoidance of the consequences of negligent actions has no deterrent effect on an actor causing an injury. Compulsory accident insurance, as embodied in the Motor Vehicle Accidents Act 84 of 1986, epitomises the inability of such a system to deter individuals from injuring others. Why should the driver of a motor vehicle exercise care in order not to cause injury to others if he is aware that, not he, but his authorised insurer will have to bear the financial burden of any injury resulting from his negligent driving? It should therefore be quite clear that motor-vehicle-insurance legislation does not aim at any form of specific deterrence.

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22 See Atiyah *Accidents Compensation and the Law* 2nd ed Weidenfeld and Nicolson 131 and Glasbeek and Hasson "Fault – The Great Hoax" *Studies in Canadian Tort Law* 395.

23 Slight negligence does not necessarily imply slight foreseeability.

24 Of course, negligence is merely a retrospective rationalisation for liability which takes place once the harm has already occurred, but the fact remains that two precisely similar activities can be differently regarded – one as negligent, the other not – depending on whether or not any harm eventuates. See Van der Merwe en Olivier *op cit* 126 and Van der Walt *op cit* 68.

What then is the aim of this act? The most readily apparent answer would seem to be "to provide for the *payment of compensation* for certain loss or damage unlawfully caused . . ."[25] If this is indeed the objective to be achieved, one wonders why the act contains wording which reduces to a large extent the number of injured persons entitled to compensation by retaining the elements of fault and causation.[26]

As the present act has no deterrent value, the only conclusion one can draw from the retention of fault as a requirement for compensation, is that the legislator does desire to limit the number of persons to whom compensation is available. If this is the case, it is indeed a mystery why an individual's eligibility for compensation should be made dependent upon the actions of some other individual. If A and B suffer similar injuries from similar accidents, why should A receive compensation and B not, simply because, in A's case, a court has found negligence on the part of some other person who, as a result of the insurance provided in terms of the act, is effectively removed from the proceedings?

If, on the other hand, the legislator wished to avoid compensating persons who had suffered injury as a result of their own negligence, why on earth did it not say so instead of going about things in such a labyrinthine manner? Surely section 8 (1) of the act could simply have contained a provision restricting the compensation payable to persons whose injuries resulted from their own negligence. The onus could then be placed upon the authorised insurer to prove negligence on the part of any claimant. In order to prevent this provision from becoming an unwelcome regression to the last opportunity rule,[27] a claimant's damages could simply be reduced in accordance with his proportional negligence.[28]

All that is achieved if the law fails to come to terms with the objectives it seeks to achieve, is the disintegration of the principles of causation into a lucky-dip of unmanageable, indefensible rules and regulations which we are obliged to apply, the whys and wherefores remaining obscure.

1 2 2 Collective or market deterrence[29]

A further specific objective of the law of delict would seem to be to strike a balance between safety and injury costs by avoiding only those injuries whose harm is sufficiently great to justify costly avoidance. This approach places the cost of an injury upon those actors who can best decide whether avoidance of an injury is cheaper than bearing the costs of that injury and who were in a position to avoid the costs of the consequences more cheaply. Thus liability would attach to that person who could have spent less in avoiding the injury

25 the long title to the act, emphasis mine.

26 s 8(1) of the act.

27 This was a rule applicable in cases of contributory negligence in terms of which a person's negligence was regarded as the sole cause of his injury or death if he had had the last opportunity of avoiding the accident. See McKerron *op cit* 64. This concept was effectively expunged from our law by the Apportionment of Damages Amendment Act 58 of 1971.

28 This discussion is not intended as a final proposal for amendments to the act, but merely as an indication of the failure of this piece of legislation to achieve with any success any of the aims of the law of delict.

29 See generally the writings of: Williams and Hepple *op cit*; Palmer *Compensation for Incapacity* (Oxford Univ Press) 35; Calabresi "Concerning Cause and the Law of Torts" 1975 *Univ of Chicago Law Review* 69; Smith "The Mystery of Duty" *Studies in Canadian Tort Law* 1.

than the cost of the injury finally amounts to. If, for example, a plaintiff, having knowledge of the risk, could have avoided the injury at less expense than the cost of the injury finally amounts to, and was in a position to avoid the injury, the loss will not be shifted to the defendant. It follows then that the chosen loss-bearer must have better knowledge of the risks involved and of ways of avoiding them and he must be in a better position to use that knowledge efficiently to choose the cheaper alternative. To quote from an example by Leonard Ross:[30]

> "Market deterrence would make power lawnmower manufacturers liable for all damage caused by the malfunction of their mowers. In theory mower prices would then rise and sales fall; some families would be induced to shift to manual mowers, the total amount of power mowing would be reduced and the level of accidents would abate. Moreover, manufacturers might become choosy about customers, raising prices to non-institutional buyers or perhaps simply to obvious schlemiels. Finally, they would have an incentive to redesign mowers to improve safety features. A variety of market forces would be set in motion to lower the total loss through accidents."

The function of the *sine qua non* requirement in this goal of the law of delict would seem to be to ensure that the costs of an injury awarded to the cheapest cost-avoider include only those costs which relate to the choice between injury and safety. In other words, the losses assigned to the chosen loss-bearer are those past injury costs as to which his action was a *sine qua non*. Of course, even in the realm of market deterrence, it would occur very seldom that an actual calculation will be made between cost and injury, but future actors will be in a position to form a judgment on the basis of such decisions as to which activities are worth indulging in and which are not.

Consequently, among the goals of the law of delict, market deterrence alone can explain the relative universality of the *sine qua non* requirement. So viewed, this requirement, far from being the imperative it is sometimes made out to be, is simply a useful way of totting up the costs the cheapest cost-avoider should consider in deciding whether or not avoidance is worthwhile. By using the *sine qua non* test we are simply telling the chosen loss-bearer that his burden will equal the costs that, but for his behaviour, would not have been incurred. However, *sine qua non* alone will not suffice to identify the chosen loss-bearer. Legal causation is necessary to select from among the actors who may be cheapest cost-avoiders because they are sufficiently causally linked, those who in fact are so linked.

Various elements of legal causation are relevant in selecting the cheapest cost-avoider. Foreseeability is obviously germane, for clearly the ability to foresee risks is important in comparing accident avoidance with accident costs. Other aspects of legal causation are also relevant to the determination of which actor is best burdened as the most effective loss-bearer. Whether one category of loss bearer rather than another is the best arbiter of future accident and safety costs, or whether both are equally competent, depends on many characteristics of the activities viewed in relation to one another. Concepts such as remoteness of damage or *novus actus interveniens* may make a particular actor unsuitable as an effective loss bearer even though he was at fault and the better loss bearer was not.

Market deterrence, however, should not be regarded as a panacea for all the ills of the traditional fault system. There are certain inadequacies inherent in

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30 Ross "Notes" 1971 *Harvard Law Review* 1322.

this formula which illustrate the need to view the objectives of the law of delict as a pastiche of goals, blending with one another to provide the loss allocation that we desire. A number of these drawbacks are:

a Society does not hold individual choice in such high esteem that it would allow individuals to endanger others simply because they are in a position to pay for any damage they might cause.

b In attempting to determine who is the best cost-avoider, courts would be obliged to consider the existence of insurance coverage, the type of evidence not usually presented to a court.

c The existence of insurance is in itself a drawback to market deterrence, as it has the effect of blunting its outcome. Insured actors become immune from liability for dangerous acts because the consequences are borne by the insurance company. Having paid insurance, actors need concern themselves only with their own injuries, arrest or a possible increase in their premium. Consequently, a driver would not be induced to avoid driving through red lights, as he would be immune from the effects of his actions upon society. Specific deterrence achieves such a restriction far more effectively and yet the drawback to a too rigid application of specific deterrence is that it forces market deterrence into the background.

d True market deterrence would require a large, effective policing body. Leaving enforcement to sporadic actions for damages by aggrieved individuals would not be enough.

2 OBJECTIVES IN PRACTICE

2 1 The Utilities Approach

A largely diluted version of market deterrence has gained recognition in certain decisions of local jurisdictions in what may be termed the utilities approach.[31] In terms of this procedure, the risk of any harm originating from a certain activity must be weighed up against the utility of the conduct in question, consideration also being given to the cost and burden of possible precautionary measures.[32]

In *Lomagundi Sheetmetal and Engineering (Pvt) Ltd v Basson*[33] the Rhodesian appellate division, in attempting to decide whether the defendant was negligent[34] in allowing sparks from welding operations to a silo to ignite stover (leaves and cobs from maize after the maize had been removed) stacked against that silo, held[35] that the circumstances to be considered by the court were: (1) how real is the risk of the harm eventuating? (2) if the harm does eventuate, what is the extent of the damage likely to be? and (3) what are the costs or difficulties involved in guarding against the risk?[36]

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31 See e g *Herschel v Mrupe* 1954 3 SA 464 (A) 477.

32 See Van der Walt *op cit* 77.

33 1973 4 SA 523 (RA).

34 Although the court was, in this instance, dealing with a negligence enquiry, it is submitted that this issue, as with causation, is more often than not a policy decision based on the particular goal or combination of goals striven for by the court.

35 525A.

36 The origin of this formula would appear to be Learned Hand's formulation in *United States v Carroll Towing Co.* See Prosser *Handbook of the Law of Torts* (1971) 266.

Does this formula render any less intractable the loss allocation calculus? It is submitted that it does not. The equation the court presents as that to be solved appears incapable of solution. In what way exactly does one measure the burden of the precautions necessary against the gravity of an injury, the probability of the occurrence of which requires further speculation? Whether the cost of taking certain precautions is reasonable may very well depend upon the competitive position of the defendant, but, of course, evidence of this nature is never available to a court.

Indeed, the result of this process may well be that activities of which society approves may be rendered impractical if the precautions are met which would remove the risk of injury to the plaintiff. It is pertinent that the question who can best bear the cost of an injury is not posed, the answer to which may very well provide the solution we seek. As is mentioned above,[37] this enquiry would necessitate a consideration of the presence or availability of insurance coverage, evidence which, once again, is not available.

2 2 The Failure of the Utilities Approach

A decision of the House of Lords which further illustrates the difficulty of achieving a just allocation of loss in the absence of a consideration of the economic parameters of a dispute is the oft-quoted *Bolton v Stone.*[38]

Miss Stone was hit by a cricket ball while walking on a road near the defendant's cricket ground. She sued the cricket ground operators to recover the damage she suffered, but failed.[39] The basis for the decision was a lack of foreseeability, the risk of harm eventuating from playing cricket in that particular situation being so slight.[40]

What could the cricket club have done to avoid the accident? What about notices warning against any possible danger, especially in the light of the fact that a ball had landed in the street six times during the past thirty years. Would not higher fences have prevented the injury? In fact there was no enquiry into the costs of these measures nor into their efficacy. How then could it be decided that there was no fault?

The House made no enquiry into whether the club was insured or could have taken out insurance. They obviously felt that the club had met all the costs of

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37 *supra* par 1 2 2 (b).

38 1951 1 All ER 1078.

39 This decision illustrates an interesting side to specific deterrence: it follows that, if people may be deterred by having to compensate persons injured, people are just as likely to be deterred from engaging in any innocent activity in which they may be injured by equally innocent conduct of another, because they will receive no compensation should they be the victims of an accident. One wonders how often Miss Stone strolled past the cricket ground again.

40 This utilities approach raises a serious question: why should walking in the street, a practice indulged in by many more people than is cricket, be considered no more meritorious than playing cricket near the street? That this reasoning was inherent in the decision of the House can be seen from the fact that it is very likely that Miss Stone would have been compensated had the cricketers been young boys who had broken into the ground, stolen bats and had a quick knock-up. See *Overseas Tankship (UK) Ltd v The Miller Steamship Co supra* 642: "If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be very little doubt that *Bolton v Stone* would have been decided differently."

This suggests that Miss Stone's activity – walking in the street – will sometimes be deemed worthy of protection. That sometimes will arise when the defendant's conduct is considered less meritorious than is walking in the street!

precaution and that no additional costs could be imposed. This is all the more remarkable in the light of the fact that the club later gratuitously compensated Miss Stone in full, including most of the costs that she had incurred in pursuing the case.[41]

3 MARKET DETERRENCE IN ACTION

In many cases it would appear as if courts reach decisions based on policy (decisions which cannot be disputed) but, because of the rigidity of causative principles, that they must resort to tortuous procedures in order to attempt to accommodate the desired result within the realm of causative theories.[42] An outstanding example of just such a rationalisation can be found in the decision of the appellate division in *Minister of Police v Skosana*.[43] The facts of the case were as follows:

Timothy Skosana was injured when the motor-car which he was driving left the road and landed in a ditch. A police-van arrived at the scene of the accident and Skosana, who was suspected of being under the influence of liquor, was removed to the police station and examined by the district surgeon who confirmed that he was under the influence, but who, after complaints by Skosana of a pain in the chest, could find no sign of internal injuries. Skosana spent the night in the police cells and at 07h30 the next morning, when the cells were opened by constables Davel and Mahela, he complained of severe pains in the region of the abdomen. At 09h30 constable Mahela accompanied Skosana back to the district surgeon. Skosana was found to be suffering from "an acute abdomen" and Mahela was instructed to make provision for escorting him immediately to the nearest hospital as there was nothing further that the district surgeon could do for him. At 11h30 Skosana was released on bail and shortly thereafter an ambulance arrived which escorted him to a hospital. After admission to the ward at 14h00 he was found to be in a serious condition. Attempts were made to resuscitate him for the purposes of surgery and at 16h25 it was decided to operate. Unfortunately the operation was not a success and Skosana died.

Skosana's wife claimed damages from the minister of police on behalf of herself and her children on the basis that constables Davel and Mahela, acting within the course of their duty and the scope of their employment, had negligently caused the death of her husband. In the court *a quo* it was found that the two constables were negligent in two respects in that they had failed to summon the district surgeon immediately Skosana made known to them his distress and in not causing him to be transported to the hospital after being told to do so by the district surgeon. The minister appealed against the decision.

In giving the majority decision Corbett JA held as follows:

Deciding that the two policemen were negligent in their treatment of Skosana, the judge held that the issue in this case was essentially one of causation

41 See "Notes" 1952 *Law Quarterly Review* 3.

42 For a critical survey of this type of approach by the courts see Harari *The Place of Negligence in the Law of Torts* 88, where he maintains that "it is never the function of the determination ... to give a reason for the imposition of liability, but merely to state the decision of the court to impose liability – and possibly to suggest that this decision may be right."

43 1977 1 SA 31 (A).

> "for it could hardly be contended that, if the negligence of Davel and Mahela in fact caused or contributed to the death of the deceased, this was too remote a consequence to give rise to legal liability."[44]

Corbett JA decided that the test to be applied in such a situation was that of *conditio sine qua non*:

> "The negligent delay in furnishing the deceased with medical aid and treatment for which Davel and Mahela were responsible, can only be regarded as having caused or materially contributed to his death if the deceased would have survived but for the delay. This is the crucial question and it necessarily involves a hypothetical inquiry into what would have happened had the delay not occurred."[45]

After examining a hypothetical sequence of events Corbett JA came to the conclusion that, had it not been for the delay in the treatment of Skosana occasioned by the negligence of Davel and Mahela, it was probable that the deceased would have survived. The appeal was consequently dismissed with costs.

Wessels JA and Kotze JA concurred.

Viljoen AJA, in delivering the dissenting judgment, came to the conclusion that although the two policemen were negligent in their treatment of Skosana, the respondent had failed to prove on a balance of probabilities that the negligence was the cause of Skosana's death.[46] The reason for this decision seems to be that, after examining a similar hypothetical sequence of events to that of Corbett JA, Viljoen AJA came to the conclusion that, although the negligence of Davel and Mahela had affected the chances of Skosana's survival, this deprivation was not serious enough to warrant the conclusion that it was the cause of his death:

> "Only if the deprivation was such as to convert what would have been a probability in favour of his survival to a probability against it, could it be said to be the proven cause of his death."[47]

Jansen JA concurred.

Would a conscious application of the theory of market deterrence[48] have provided a more equitable basis for the decision of the court in this case? It is submitted that it would have. The unfortunate sequence of events in this case provides ample evidence of the inability of the *sine qua non* test to provide an effective remedy in all situations. On the facts of the case it was left to the individual opinion of the individual regulators to decide whether or not a hypothetical sequence of events would have altered matters in any way. That this

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44 35A.

45 35E.

46 Although most authors write about factual causation as though it presents only factual issues, it should be apparent from this case that this is not so. The court is engaged in trying to determine not only what did happen, but also what would have happened in certain hypothetical events. This difference is particularly important in connection with the burden of proof because it is much more likely that the standard of proof required will not be attained when the enquiry is into what might have happened rather than what did happen. An enquiry into what did happen is always capable in principle of definite conclusions, but in a might-have-been enquiry certainty can never be attained to the same degree. Consequently, one could be moved to ask: why should Skosana's widow have had to prove that her husband would probably have survived the illness had the two constables not been negligent? Should not the possibility of his death in any event simply have reduced any damages payable to her? Viljoen AJA clearly did not see matters in this light.

47 45D.

48 assuming, on the basis of the aforegoing discussion, that market deterrence is a valid aim of the law of delict.

is not an ideal method of settling disputes is self-apparent. The issue at hand was essentially which of the two parties involved could best decide whether avoidance of the injury was cheaper than bearing the costs of the injury if the injury did in fact occur. Who had better knowledge of the risks involved and of ways of avoiding them? Who was in a better position to use that knowledge efficiently to choose the cheaper alternative? Finally, who was in the better position to induce modifications in the behaviour of others where such modification was necessary to reduce the sum of accident and safety costs? On the basis of the answers to these enquiries it should be evident that, confronted with the facts of this case, the two constables were in the better position to appreciate the risks involved in the negligent failure to provide medical treatment to people detained. The minister of police himself was more capable of taking steps to ensure that such negligent activity be avoided and the minister was also in the better position to take out insurance against the occurrence of costs resulting from injury to people in his care.

This does not imply that liability should be incurred by the minister irrespective of whether there has been negligence on the part of his employees. The *sine qua non* test for causation has a role to play in the theory of market deterrence[49] because it ensures that the injury costs allocated to the cheapest cost-avoider include only those costs relevant to the choice between injury and safety. In other words, by using the *sine qua non* test, we tell the chosen loss bearer that its burden will equal those costs that, but for its behaviour, would not have been incurred.

This is not to say that the *sine qua non* test should be used as an absolute requirement for liability in all cases. Where it is difficult to prove a but-for relationship between the action and the injury, it is, at the very least, doubtful whether blind adherence to the requirement that the victim prove a but-for relationship between the actions of the defendant and his injuries serves the purpose of market deterrence. The issue is this: should the loss be allocated to the defendant in defiance of the *sine qua non* test or is it better to let the loss fall on the victim who is, by definition, not the cheaper cost-avoider of the injury?

If we apply the strict *sine qua non* test we are forced to the conclusion, as were Viljoen AJA, and Jansen JA, that the victim, in this case Skosana's widow and children, must bear the loss because it is not clear from the facts that the actions of Davel and Mahela were the cause of Skosana's death despite Corbett JA's opinion that they were. However, if we apply the theory of market deterrence and let the loss fall on the most efficient chooser and bearer of the loss, in this case the minister, we reach the same conclusion as the majority of the court but, it is submitted, on a much sounder basis. Corbett JA seems to have striven mightily, in the face of the seemingly inexorable requirements of *sine qua non*, to ignore this prerequisite and place the loss correctly, if inexactly, on the minister of police.

On the basis of the above discourse it would seem fair to postulate that, in order for causation to fulfil its role as a set of functional concepts, it must respond to the sum of the goals of the law of delict. If it is to do so, sound reasoning

49 See par 1 2 2 above.

would suggest that due recognition be given to market deterrence as a salutary objective of the law of delict.

The true test of any legal concept would seem to be how effectively it can deal, not only with the ordinary, but also with the extraordinary. In the light of this it is suggested that the aforementioned propositions do indeed provide a rational alternative to some of the more convoluted factual situations which traditionally lead to an impasse or, at the very least, cause some of the stricter adherents to the *sine qua non* test to formulate interesting deviations.

4 THE THIN-SKULL CASES[50]

This matter deals essentially with a defendant's lack of foreseeability as to the *extent* of damage suffered by a victim who is more susceptible to injury than normal. For instance: the defendant, while parking his car, negligently bumps into the plaintiff who was passing innocently by on the pavement. At face value the defendant would be liable for any small injury that ensues because that injury was easily avoidable. Unfortunately the plaintiff has a thin skull and, in reeling backwards, strikes his head against a wall and dies. Plaintiffs within thin skulls are foreseeable, but are so rare that the foreseeability of the harm would not, in itself, justify culpability for the extra damages. However, the general rule of the common law is that, once legal causation has been established between the defendant's fault and the plaintiff's injury, liability extends to more serious but unexpected damages as well.[51]

Adherents of the *Wagon Mound* approach would, of course, go in the opposite direction. Liability would be limited only to the foreseeable extent of the harm. As Van der Merwe and Olivier[52] support the decision in the *Wagon Mound*, they are forced to come to the conclusion that the defendant in the thin-skull type of case cannot be held liable for the excessive injuries suffered by the plaintiff and must fly in the face of the common-law doctrine that says you must take your victim as you find him. Van der Walt,[53] on the other hand, recognises that the traditional inflexible application of the foreseeability test does not provide an adequate solution to this problem. He proposes that the theory of foreseeability is not applicable to personal injuries and that in cases such as these a return must be made to the doctrine of direct consequences.[54]

If, however, we were to recognise that the concepts of *sine qua non* and foreseeability are merely tools used to achieve certain objectives in the law of delict and not goals in themselves and, furthermore, that market deterrence is a legitimate aim of the law of delict, then this incompatibility between the common law and the strict theory of foreseeability can be satisfactorily resolved.

In terms of the theory of market deterrence, if it is likely that a defendant is the cheapest cost-avoider of one type of damage *vis-à-vis* a given plaintiff, then

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50 The *locus classicus* in this regard is *Dulieu v White* 1901 KB 669 679.

51 There are certain doctrines that prohibit a plaintiff from receiving damages *ad infinitum*, but these doctrines are not, by and large, doctrines relating to foreseeability. They tend instead to be introduced through terms such as assumption of risk – *volenti non fit iniuria* – or contributory negligence.

52 Van der Merwe en Olivier *op cit* 207.

53 Van der Walt *op cit* 99.

54 This theory is well illustrated by the decision in *In re Polemis v Furness Withy & Co Ltd* 1921 3 KB 560. See also McKerron *op cit* 131.

that same defendant will be the cheapest avoider of any related but unforeseeable damages suffered by that same plaintiff. While it is possible, it is not very likely that a plaintiff, who is not as well suited as the defendant to avoid the readily foreseeable harm, would be better suited to avoid the excess damage.[55] To illustrate by means of an example:

A concert pianist decides to take a break from the rigours and tensions associated with his profession by working incognito in a lumber-yard in Knysna. As a result of the owner's negligence his hands are injured. He is, however, unlikely to recover his extra unforeseen damages as a court would, in all probability, hold that he had assumed the risk of such damage because he was more aware of the far-reaching consequences of an injury to his hands upon his future earning potential.[56] If, however, he was injured in his motor-car on his way to rehearsal owing to the negligence of another driver, he would probably recover the full extent of his damages even though his knowledge of the danger to his hands was still greater. In this case, unlike the former, he would have no practical alternatives (he cannot be expected to refrain from driving). The defendant would, if he were the cheaper avoider of the original injury, also be the cheaper avoider of the unforeseen damage.

Conversely, the person with a thin skull generally recovers all his damages despite the fact that his knowledge of his condition must be vastly superior to that of the defendant. Knowledge without alternatives does not make a person the cheapest avoider of the cost and placing an obligation upon the plaintiff to inform others of the dangers inherent in his condition is not a practical alternative because, in most cases, the defendant would be the driver of a car and would not be in a position to receive the information.

Causal requirements, like all other requirements, must ultimately justify themselves in functional terms. Law is a human construct designed to accomplish certain goals. The object of the law is to serve human needs and legal terms must therefore sooner or later be linked to the service of human needs. Consequently, concepts such as causation and all it involves must be sufficiently flexible to accommodate situations not readily decipherable in terms of a strict application of *sine qua non* and foreseeability.

5 INDEPENDENT DEFENDANTS CAUSING THE SAME LOSS

Where either of two or more defendants was the sufficient cause of the harm to the plaintiff and hence neither was a *sine qua non* of the result,[57] it is doubtful whether blind adherence to the *sine qua non* test for factual causation would serve the purpose of determining who should bear the resultant loss (remembering that this determination is the general aim of the law of delict) or the goal

55 In such situations, even if market deterrence is not much of a guide, it will combine with compensation goals to require defendant liability, ignoring lack of foreseeability of the type of damages. See the discussion of *Smith v Leech Brain & Co Ltd* in par 1 1 above.

56 leaving aside the provisions of the Workmen's Compensation Act 30 of 1941.

57 The classic example of such a situation is the case of two separate individuals, A and B, starting a fire which destroys the house of C. Considered individually, the conduct of neither would be a *sine qua non* for the conflagration as, without the individual participation of each, destruction would nevertheless have ensued owing to the actions of the other. Naturally one would object to both A and B's escaping liability on these grounds and, consequently, some basis other than *sine qua non* must be found for imposing liability.

of market deterrence. Functionally, the issue is this: should the loss be allocated to the particular defendant in defiance of the *sine qua non* test or is it better to let the loss fall on the wrong party, namely, the victim, who is, by definition, not the cheapest cost avoider? It is little wonder that in cases such as these commentators and courts have striven mightily, in the face of the *sine qua non* test, to ignore or modify this requirement and place the loss correctly, if inexactly, on the defendant.

Van der Merwe and Olivier,[58] seemingly with the object of achieving just such a loss allocation, maintain that the actions of the defendants in such a situation must be viewed on a global basis. In reaching this conclusion, it is submitted, they lose sight of the fact that as the objectives of the law alter, so must the application of the concept of causation. Consequently, such a uniform application of *sine qua non* would not achieve the desired result in every situation. Compare the case in which two equally culpable rapists have caused the victim to fall pregnant. Would the decision as to who is the father of the child also be based on a global view of *sine qua non*? Surely not. Rightly or wrongly the effects (and thus the function of causation) of paternity actions are perceived to be very different from those of money claims for injuries. Thus causal language in the law must respond to the fact that at times the object sought may differ.

Van der Walt[59] recognises the need for exceptions to the general rule in cases of this sort, but relies instead upon the idea that a solution to the problem can be found by using common sense. This would seem to be an indirect method[60] of achieving precisely that which market deterrence seeks, namely to identify the most effective bearer of the loss. In reality it would appear as if goals such as market deterrence and compensation would unite to require defendant liability despite the absolution suggested by *sine qua non.*

6 PRE-TRIAL SUPERVENING EVENTS

A contentious issue which does not yet seem to have reached these shores but which nevertheless provides a further illustration of the inability of the strict *sine qua non* test to provide a suitable remedy, is the problem of pre-trial supervening events unconnected with the plaintiff's original injuries.[61] A graphic example of the quandary which could confront jurists in this regard is provided by the singular facts confronting the House of Lords in *Baker v Willoughby*,[62] a case which proved that fact is indeed stranger than fiction.

The plaintiff suffered injuries to his left leg in a motor accident caused partly by the negligence of the defendant. He commenced an action in which he claimed damages for pain and suffering, loss of amenities and loss of earning capacity. However, before the trial, the plaintiff, who had obtained a job sorting scrap metal, was the victim of an armed robbery at his place of work. Two gangsters forced their way in, demanded money from him and, upon being refused, shot him in the left leg which was so seriously injured that it had to be amputated.

58 Van der Merwe en Olivier *op cit* 196.
59 Van der Walt *op cit* 97.
60 A method which would, nevertheless, seem to contain a recognition that such decisions are based on policy rather than some coherent legal principle.
61 as distinct from a failure to mitigate loss.
62 1969 3 All ER 1528.

Thus the limb, the partial incapacity of which was the basis of the plaintiff's claim against the defendant, was no longer in existence.

The defendant argued that the effects of his negligence had been obliterated by the amputation of the source of those effects, namely the plaintiff's leg, and therefore that he should be held liable only for the consequences of the injured leg between the period of his negligence and the shooting.

There is much to be said for the argument of the defence in this case, as a defendant is liable only for the consequences of his action and not for those that have effectively been caused by some other act. The plaintiff would suffer loss, but as a result of the missing leg, an injury for which the defendant was not responsible. This is the inevitable conclusion one is drawn to if one applies the strict *sine qua non* test, whether one regards the shooting as a *novus actus interveniens*[63] or not.[64] The shooting has broken the causal chain between the defendant's negligence and the plaintiff's injuries.

Furthermore, it is a well-established principle[65] that a court must take account of vicissitudes that might befall a plaintiff and when one has already occurred at the date of trial, then a court should not speculate about matters of which it now has actual knowledge. However, the defendant's argument would have caused manifest injustice to the plaintiff and this clearly influenced the House of Lords in their rejection of the defendant's submissions. Such a hardship to the plaintiff was avoided in *Baker* by the decision of the House[66] that the shooting incident and its consequences did not diminish the damages payable by the defendant. It would only have had that effect if it had reduced the extent or duration of suffering of the injuries sustained by the plaintiff as a result of the first accident. Had the plaintiff been killed by the shooting or had his expectation of life been shortened by it, then the damages caused by the defendant's delict would have been reduced in the legal sense and the damages payable consequently diminished because the impairment of a faculty is not like damage to property – the capacity to earn money has no value unless it is exercisable.[67]

This was not so in Baker's case. His disabilities survived the shooting unabated. Their lordships based their decision in this case upon the idea of concurrent causes,[68] that is that the original negligence and the shooting were concurrent causes of the plaintiff's disabilities. This basis does not seem to be altogether judicially sound and it would perhaps have been better had they stated that the decision was an exception to the normal rules of delict and, more especially, the strict *sine qua non* test, because any other decision would have been unjust towards the plaintiff.[69]

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63 See McKerron *op cit* 138 for a discussion of this concept.

64 Van der Merwe en Olivier *op cit* 210 would regard the term *novus actus* as irrelevant.

65 *Carstens v Southern Insurance Association Ltd* 1985 3 SA 1010 (C) 1020; *Baker v Willoughby* 1969 3 All ER 1528 1531; *Jobling v Associated Dairies* 1981 2 All ER 752 754.

66 in over-ruling the court of appeal.

67 lending credence to the view that it is cheaper to kill than to maim.

68 See the judgment of Lord Reid 1532D and 1534C.

69 That this is indeed the interpretation given to the decision can be seen from Street *The Law of Torts* 7th ed 208: "The House justifies them, not by some logical principle but by an over-riding aim to award fair compensation;" Munkman *Damages for Personal Injury and Death* 5th ed 35: "a greater measure of protection to the victim." See also McGregor *McGregor on Damages* 14th ed par 1146. McKerron *op cit* 121 would not see this decision as an exception, but rather as a convoluted application of the apophthegm: you must take your victim as you find him. This concept was mentioned by Lord Pearson in delivering a dissenting judgment, but the basis accepted by the majority of their lordships would appear to be that of concurrent causes.

A similar situation confronted the English court of appeal in *Jobling v Associated Dairies*[70] in which case a supervening *illness* had caused loss of further earning capacity to a plaintiff already partially incapacitated by the defendant's negligence. The court of appeal considered the decision in *Baker*[71] and came to the conclusion that the decision in that case rested on the fact that the supervening injury to Baker had been caused by the *delict*[72] of a third party. In order to do justice to the plaintiff this situation was treated as an exception to the general rule that supervening events must be taken into account in awarding damages. However, this principle was not applicable when the supervening event was not caused by the delict of another, but was, for example, a supervening illness unconnected with the plaintiff's original injuries. Consequently, in *Jobling* itself the supervening illness of the plaintiff was taken into account in a reduction of his damages.

Although the view of the court in *Jobling* regarding the *ratio* for the decision of the House of Lords in *Baker* seems to smack of retrospective rationalisation, because their lordships had not themselves made a distinction between those supervening events which are caused by delicts and those which are not, this approach seems to be indicative of a desire by the common-law courts[73] to make an exception to the strict application of the rules of the law of delict in cases in which such an application would lead to manifest injustice towards the plaintiff.

It would therefore not seem to be incorrect to come to the conclusion that justice to the plaintiff (which is simply another way of saying compensation) is one of a number of goals aspired to by the law of delict and that, in cases such as the above, in which a strict application of the rules of causation would lead to injustice to the plaintiff, exceptions must be made to the general rules and the objectives of the law must gain ascendancy over the principles themselves.

7 CONCLUSION

It is submitted, in the light of the above, that the aims of the law of delict are diverse and varied and that principles such as causation (including *sine qua non* and foreseeability) must serve the totality of these aims. Often these goals are enormously complex and difficult to analyse clearly and one is properly suspicious of analysis and prescription that would dishonour time-honoured legal terms because one cannot find immediate, clear policy justifications for them. Still, the aforementioned principles are merely constructs designed to facilitate the goal of correctly determining which party, actor or victim, should bear any loss resulting from delictual activity. Indeed, it would appear as if our blindness as regards the aims of the law of delict is singularly at variance with our claims to clear-sightedness and prescience as regards the principles involved in achieving these. There seems to be a tendency amongst jurists of all creeds to elevate the principles themselves to the status of the holy grail at the expense of the aims, resulting in scenarios which accommodate the principles but lose sight of the objectives.

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70 1981 2 All ER 752.
71 754F.
72 Lord Russel of Kellowen 760H; Lord Keith of Kinkel 764C.
73 See Kidd "Damages for Personal Injuries: Taking Account of the Vicissitudes of Life" 56 *Australian Law Journal* 389 394 for examples of the application of this principle in Australia and Canada.

If such causal concepts become too rigidly defined and applied, they no longer adequately serve the goals we can analyse nor do they permit the introduction of those we cannot affirm too openly or have not been able to analyse at all. Furthermore, such rigidity would mean that the ability to respond to changing goals and mixtures of goals, both overt and covert, would be lost. New needs could not be introduced nor old ones discarded without tearing the seamless web. For this reason one could find accord with the sentiments of Glanville Williams in observing that:[74]

> "When the lawyer uses the concept of causation he is not bound to use it in the same way as the philosopher, or a scientist or an ordinary man. The concept can be moulded by considerations of policy."

Judges and practitioners who function within the law of delict are continually going to be faced with cricket balls hitting heads, planks falling into holds and destroying entire ships, young boys falling off bridges to their apparent deaths but being killed on the way down by high-tension wires instead,[75] strange chains of events and simple injury to the human body. A decision must be reached and given as to whether a loss will be shifted from the person suffering the loss to the actor who may have caused it. That decision must be justified in terms of "The Law." If that justification is to mean anything, we must at least have a cohesive theory about causation as it relates to the goals we seek to achieve through the law of delict.

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74 1961 CLJ 62 75. Compare the approach of Van der Merwe en Olivier *op cit* 194 who regard the strength of the *sine qua non* test as lying in its necessary use in everyday life.

75 This unusual set of circumstances, almost farcical if it were not so tragic, arose in *Dillon v Twin State Gas & Electric Co.* See Prosser *Handbook of the Law of Torts* 4th ed 321. For reasons I will not discuss, the court found the defendant company, the erectors of the tension wires, guilty of negligently causing the death of the boy despite the fact that his life, at that stage, was worth only a second or two to him.

Die tugbevoegdheid ten opsigte van kinders

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SUMMARY

The Authority to Discipline Children

Parents, teachers and other persons *in loco parentis* have the authority to discipline children. Parents are invested with this authority by virtue of the parental authority they exercise over their children. Teachers have an *ex lege* authority to discipline schoolchildren. A parent may delegate his authority to a teacher, or anybody else, and then the basis of this person's authority is delegation. A parent, as primary educator of his child, may delegate both the authority to mete out punishment and the authority to exercise the discretion whether punishment should be given at all. As teachers do not bear the primary responsibility for educating children they should not have the power to delegate their authority to discipline.

The authority to discipline a child is exercised properly only where a reasonable inquiry is held into the question whether the child did indeed commit the offence for which he stands to be punished and the punishment meted out is reasonable and moderate in the light of all the circumstances. Even mass punishment is lawful as long as these requirements are fulfilled.

Where the authority to discipline is exceeded civil as well as criminal liability may ensue. The person who avers that the authority has been exceeded must prove it.

1 INLEIDING

Ouers, voogde, onderwysers en ander persone *in loco parentis* mag ter handhawing van gesag en dissipline en ter opvoeding van 'n kind, matige en redelike tugtiging op die kind toepas.[1] Oor die vraag of die uitoefening van tug op kinders as regverdigingsgrond behoort te dien, bestaan daar heelwat meningsverskil. Die wenslikheid en effektiwiteit van tug in die vorm van lyfstraf word veral bevraagteken.[2] In hierdie artikel word geen mening uitgespreek oor die wenslikheid al dan nie van tugbevoegdheid in die algemeen of tugtiging in die vorm van

1 *R v Janke & Janke* 1913 TPD 382 385 392; *R v Scheepers* 1915 AD 338; *R v Schoombee* 1924 TPD 482; *Tshabalala v Jacobs* 1942 TPD 313; *R v Muller* 1948 4 SA 848 (O) 852 860; *Hiltonian Society v Crofton* 1952 3 SA 130 (A) 134; *Germani v Herf* 1975 4 SA 887 (A) 902; *S v Lekgathe* 1982 3 SA 104 (B) 109; Burchell en Hunt *Gardiner and Landsdown South African Criminal Law and Procedure* vol I (1983) 366; De Wet en Swanepoel *Strafreg* (1985) 98; Snyman *Strafreg* (1983) 115; Keeton "A Historical Survey of the Limitation of the Rights of Parents and Schoolmasters to Inflict Corporal Punishment on Children" 1943 *SALJ* 430; Price "Defence, Necessity and Acts of Authority" 1954 *SALR* 25.

2 Sien bv Olmesdahl "Corporal Punishment in Schools" 1984 *SALJ* 544.

lyfstraf nie. Daar word volstaan met die bespreking van 'n paar algemene beginsels rakende die tugbevoegdheid.

2 DIE BASIS VAN DIE TUGBEVOEGDHEID

2 1 Die Tugbevoegdheid van Ouers en Voogde

Ouers[3] en voogde het 'n plig om kinders op te voed. Die behoorlike vervulling van hierdie plig vereis dat hulle dissipline oor die kind moet kan voer en die kind moet kan verplig tot gehoorsaamheid.[4] Die ouers se tugbevoegdheid spruit dus uit die gesag wat hulle oor hul kinders voer.

2 2 Die Tugbevoegdheid van Onderwysers en Koshuispersoneel

Onderwysers[5] en koshuisvaders staan *in loco parentis* vir sover dit die opvoeding van skoolkinders aangaan.[6] Hierdie onderwyspersoneel is, net soos ouers, geregtig om tug toe te dien ten einde gesag en dissipline te handhaaf en af te dwing.[7] Vroeër is geargumenteer dat hierdie tugbevoegdheid op delegasie daarvan deur die ouer aan die onderwyser berus.[8] 'n Ouer kan wel sy tugbevoegdheid aan 'n onderwyser delegeer[9] en dan berus die onderwyser se bevoegdheid inderdaad op delegasie, maar die onderwyser het ook in eie hoedanigheid tugbevoegdheid.[10] Die korrekte standpunt is dat 'n onderwyser se bevoegdheid oorspronklik ontstaan as gevolg van die verhouding tussen hom en die kind.[11]

Die onderwyser se oorspronklike tugbevoegdheid strek nie so ver as dié van 'n ouer nie. Vroeër is die standpunt ingeneem dat die onderwyser ook ten opsigte van wangedrag buite die skool kan optree[12] maar vandag is dit duidelik dat hy slegs bevoeg is om die kind se gedrag in die skool of kosskool te beheer en nie daarbuite nie.[13] 'n Onderwyser is waarskynlik wel bevoeg om tug toe te dien ten opsigte van wangedrag buite die skool waar die wangedrag die handhawing van dissipline in die skool of kosskool bemoeilik.[14] As 'n kind byvoorbeeld uit 'n

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3 Waar die begrippe "ouer" en "ouers" hierna gebruik word, verwys dit na alle persone wat beheer oor kinders voer behalwe onderwyspersoneel.

4 *R v Janke & Janke supra* 385; *R v Muller supra* 859; *Germani v Herf supra* 902; *S v Lekgathe supra* 109; *S v Lewis* 1987 3 SA 24 (K) 25; Boberg *The Law of Persons and the Family* (1977) 464–465; Snyman 115; Spiro *Law of Parent and Child* (1985) 89; Van der Vyver en Joubert *Persone- en Familiereg* (1985) 615; Price 1954 *SALR* 25.

5 Waar die begrippe "onderwyser" en "onderwysers" hierna gebruik word, verwys dit ook na koshuisvaders en ander onderwyspersoneel.

6 *R v Theron* 1936 OPD 170 176; *S v Lekgathe supra* 109; Burchell en Hunt 366; Snyman 115; Rosenthal "Some Undecided Points in the Law Affecting Schoolmasters and Scholars" 1925 *SALJ* 305.

7 *R v Schoombee supra* 483; *R v Roux* 1932 OPD 61; *R v Jacobs* 1941 OPD 9; *R v Le Maitre and Avenant* 1947 4 SA 616 (K) 621; *R v Muller supra* 852 859 860; *Hiltonian Society v Crofton supra* 134; Boberg 465; Burchell en Hunt 366; De Wet en Swanepoel 98; Snyman 116; Keeton 1943 *SALJ* 430; Rosenthal 1925 *SALJ* 305; Anoniem "Punishment of Pupils" 1927 *SALJ* 69–70; Price 1954 *SALR* 25.

8 *Tshabalala v Jacobs supra* 313; Burchell en Hunt 366; Anoniem 1927 *SALJ* 67 69–70; Keeton 1943 *SALJ* 431. In *R v Muller supra* 861 is die vraag of die bevoegdheid op delegasie berus, oopgelaat.

9 M b t die ouer se delegasiebevoegdheid sien par 3 *infra*.

10 Boberg 465.

11 *R v Muller supra* 862; Burchell en Hunt 366; Keeton 1943 *SALJ* 437–438 vn 41.

12 Anoniem 1927 *SALJ* 69–70; vgl *R v Roux supra* 61 62.

13 Snyman 116; Keeton 1943 *SALJ* 437.

14 Keeton 1943 *SALJ* 427.

kosskool glip om kattekwaad te gaan doen, sal die onderwyser die kind op grond daarvan kan tug aangesien die onderwyser beswaarlik dissipline in die koshuis sal kan handhaaf indien die kinders die kosskool na willekeur kan verlaat. Die grondslag vir uitoefening van die tugbevoegdheid sal in so 'n geval steeds die handhawing van gesag en dissipline in die skool of kosskool wees.

Waar 'n ouer sy tugbevoegdheid aan 'n onderwyser delegeer, kan hy die onderwyser se bevoegdhede uitbrei deur hom byvoorbeeld te magtig om ook ten opsigte van die kind se gedrag buite die skool tug toe te dien.

3 DELEGASIE VAN DIE TUGBEVOEGDHEID

Ouers mag die bevoegdheid om daadwerklik tug toe te dien, delegeer.[15] Dit is egter onduidelik of die uitoefening van die *diskresie* of tugtiging in die bepaalde geval wenslik is, ook gedelegeer mag word. In *Tshabalala v Jacobs*[16] en *R v Muller*[17] wou die hof geen mening daaroor uitspreek of uitoefening van die diskresie wel aan iemand anders oorgelaat mag word nie. Die meeste skrywers meen dat uitoefening van die diskresie wel gedelegeer mag word.[18]

Vir sover dit delegasie van 'n onderwyser se tugbevoegdheid aangaan, bepaal onderwysordonnansies van die verskillende provinsies (wat slegs vir staatskole geld) wie tug mag toedien.[19] Die ordonnansies beperk dus in effek die onderwyser se delegasiebevoegdheid. Waar die bevoegdheid nie so beperk word nie, mag 'n onderwyser wel 'n derde se hulp inroep om tug toe te dien.[20] Ook hier ontstaan die vraag of uitoefening van die diskresie of getug moet word, gedelegeer mag word. Burchell en Hunt[21] betwyfel dit maar wys tog daarop dat in gevalle waar die onderwyser sy tugbevoegdheid oorspronklik uitoefen, hy in 'n posisie soortgelyk aan dié van 'n ouer verkeer en waarskynlik, net soos 'n ouer, die uitoefening van die tugbevoegdheid in sy geheel behoort te kan delegeer. Nou is dit egter so dat alhoewel die onderwyser 'n oorspronklike tugbevoegdheid het, hy nie die primêre opvoedingstaak dra nie en sy bevoegdheid ook nie so wyd soos dié van 'n ouer strek nie. Myns insiens behoort die onderwyser daarom glad nie toegelaat te word om enige aspek van sy tugbevoegdheid te delegeer nie.

Die probleme rondom delegasie kom ook ter sprake waar prefekte gemagtig word om medeskoliere te tug. Alhoewel 'n prefek nie *in loco parentis* verkeer nie, het die hof in *Hiltonian Society v Crofton*[22] beslis dat die posisie van prefekte dieselfde is as dié waarin onderwysers met betrekking tot die handhawing van dissipline verkeer "both as regard[s] obligations and the corresponding exemptions from liability." Dit beteken egter nie dat die basis vir uitoefening van die tugbevoegdheid deur prefekte dieselfde is as die oorspronklike tugbevoegdheid wat onderwysers het nie.

Myns insiens is die grondslag vir uitoefening van die tugbevoegdheid deur prefekte in privaatskole te vinde in die kontrak wat die ouers van die skolier

15 *Tshabalala v Jacobs supra* 313; *R v Muller supra* 861; *S v Booysen* 1977 2 PH H148 (K) 158; Burchell en Hunt 366; De Wet en Swanepoel 98; Snyman 116; Price 1954 *SALR* 25.
16 *supra* 313.
17 *supra* 861.
18 Burchell en Hunt 366; De Wet en Swanepoel 98; Snyman 117.
19 Sien par 4 2 9 *infra*.
20 *R v Le Maitre and Avenant supra* 623–624; Burchell en Hunt 366.
21 366.
22 *supra* 135.

met die skool sluit.[23] Deur die kontrak met die skool te sluit, stem die ouers onder andere daartoe in dat die kind ooreenkomstig die reëls van die skool sy opvoeding sal ontvang. Indien die reëls van die skool uitdruklik of stilswyend bepaal dat prefekte 'n deel van die onderwysers se verpligtinge rakende die handhawing van dissipline mag uitoefen, kan geen beswaar teen sodanige uitoefening van die tugbevoegdheid geopper word nie.[24] Waar daar nòg 'n uitdruklike nòg 'n stilswyende bepaling hieroor in die kontrak is, moet bepaal word of die prefek in die besondere omstandighede tugbevoegdheid gehad het, byvoorbeeld omdat die kind se ouers die bevoegdheid aan die prefek gedelegeer het. By staatskole sal uitoefening van tugbevoegdheid deur prefekte altyd ontoelaatbaar wees as gevolg van die bepalings van die onderwysordonnansies.[25]

4 UITOEFENING VAN DIE TUGBEVOEGDHEID

Uitoefening van die tugbevoegdheid impliseer die regmatige of behoorlike toepassing van tug. Sodanige toepassing vind alleen plaas indien enersyds 'n redelike ondersoek gehou word voor die diskresie uitgeoefen word om tug toe te dien, en andersyds die tug wat toegepas word redelik en matig is.[26] Wat redelike en matige tuguitoefening is, hang van die omstandighede van elke geval af.[27]

4 1 Uitoefening van die Diskresie om Tug Toe te Pas

Die diskresie om tug toe te pas, moet op 'n behoorlike wyse uitgeoefen word. Dit hou in dat 'n redelike ondersoek gedoen moet word om te bepaal of die kind inderdaad die misstap waarvan hy beskuldig word, gepleeg het.[28] In hierdie verband is 'n ondersoek redelik indien dit feite blootlê wat redelikerwys oortuig dat die kind skuldig is.[29]

Aangesien tugtiging van kinders streng gesproke tuishoort onder die jurisdiksie van ouers en onderwysers sal die hof nie ligtelik inmeng met uitoefening van die diskresie of tug wel toegepas moet word nie.[30] In *R v Muller*[31] is beslis dat die hof nòg met uitoefening van die diskresie rakende die aard en mate van straf wat paslik is vir die oortreding wat begaan is, nòg met die besluit, na 'n redelike ondersoek, of die oortreding wel gepleeg is, sal inmeng mits die tugtiger *bona fide* opgetree het.[32] Die blote aanwesigheid van *bona fides* is egter nie voldoende nie. Slegs waar die tugtiger *bona fide* opgetree het *en* hy 'n redelike

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23 *Hiltonian Society v Crofton supra* 132.
24 mits die tug redelik en matig is – sien *infra*.
25 Sien par 4 2 9 *infra*.
26 *R v Janke & Janke supra* 385 392; *R v Scheepers supra* 338; *R v Muller supra* 852 860; *Hiltonian Society v Crofton supra* 134; *S v Lekgathe supra* 109; Burchell en Hunt 366; De Wet en Swanepoel 98; Snyman 115 116 117; Keeton 1943 *SALJ* 430; Price 1954 *SALR* 25.
27 Snyman 117; Van der Vyver en Joubert 612; Rosenthal 1925 *SALJ* 306 307.
28 *R v Muller supra* 864 865; Burchell en Hunt 368; Snyman 117; Olmesdahl 1984 *SALJ* 539–540.
29 *R v Muller supra* 865.
30 *Queen v Soga Mgikela* (1893) 10 SC 240 242; *R v Janke & Janke supra* 385; *R v Schoombee supra* 483; *R v Theron supra* 178; *R v Jacobs supra* 10; Boberg 465; Burchell en Hunt 367; Snyman 117–118; Spiro 89.
31 *supra* 865; sien ook *R v Scheepers supra* 338.
32 *Bona fides* en onkunde is nie dieselfde nie. Die verskil tussen *bona fides* en onkunde is daarin geleë dat *bona fides* wederregtelikheid uitskakel terwyl onkunde van die reg wederregtelikheidsbewussyn uitskakel – Snyman 79 183.

ondersoek gehou het, sal die hof hom daarvan weerhou om met uitoefening van die tugbevoegdheid in te meng.

Ongelukkig gebeur dit soms dat geen ondersoek hoegenaamd gedoen word nie of dat slegs 'n baie oppervlakkige ondersoek plaasvind. Dit kom neer op 'n oorskryding van die perke van die tugbevoegdheid. In *R v Muller*[33] is die beskuldigde aan aanranding skuldig bevind waar hy geen redelike ondersoek gedoen het nie en dus sy tugbevoegdheid oorskry het.

Die plig om behoorlik ondersoek in te stel, bestaan nie net ingevolge die gemenereg nie, maar word ook statutêr op onderwysers in staatskole gelê.[34]

4 2 Toediening van die Tug

Indien die ouer of onderwyser besluit om oor te gaan tot tugtiging van die kind moet al die omstandighede in ag geneem word om te bepaal of die tug redelik en matig is.[35]

Die tug hoef vanselfsprekend nie noodwendig die vorm van lyfstraf aan te neem nie. Alternatiewe vorms van straf moet myns insiens altyd oorweeg word. Slegs as die ouer of onderwyser oortuig is dat 'n ander vorm van straf nie effektief sal wees nie, mag daar tot lyfstraf oorgegaan word. Ook by toepassing van alternatiewe vorme van straf, byvoorbeeld die uitskryf van reëls, die uitjaag van 'n kind uit 'n klaskamer, die leer van ekstra werk of die doen van ekstra takies tuis, moet gevra word of die straf redelik en matig is. As 'n groot hoeveelheid reëls byvoorbeeld kort voor of gedurende die eksamen uitgeskryf moet word terwyl die kind vir die eksamen moet voorberei, kan die straf as onredelik beskou word.[36]

Faktore wat in ag geneem moet word om te bepaal of tug redelik en matig is, word vervolgens behandel.

4 2 1 Aard en Erns van die Oortreding[37]

Die aard en erns van die oortreding moet die tipe en hoeveelheid straf bepaal.[38] Lyfstraf word deesdae oor die algemeen beperk tot "grosser cases of insolence or disobedience, wilful misconduct, immorality or dishonesty."[39]

Alhoewel geen hof nog uitdruklik beslis het dat vorige wangedrag van die kind in aanmerking geneem moet word nie, wil dit tog voorkom asof die howe meer geneig is om lyfstraf as redelik te beskou indien die kind reeds voorheen oortree het. In byvoorbeeld *R v Theron*[40] en *R v Le Maitre and Avenant*[41] het die regters melding gemaak van die feit dat die kinders hulle reeds voorheen wangedra het. Dit beteken egter nie dat lyfstraf slegs toegedien mag word vir

33 *supra.*
34 Sien par 4 2 9 *infra.*
35 Sien vn 27 *supra.*
36 Rosenthal 1925 *SALJ* 307.
37 Al hierdie faktore is nie by al die vorms van tug ewe belangrik nie. Die kontakpunt is bv slegs by lyfstraf relevant.
38 *Queen v Soga Mgikela supra* 242; *R v Janke & Janke supra* 385; *R v Scheepers supra* 339 341; *R v Theron supra* 171; *R v Muller supra* 863; *S v Lekgathe supra* 109; Burchell en Hunt 367 368; Snyman 117; Van der Vyver en Joubert 612; Keeton 1943 *SALJ* 436.
39 Keeton 1943 *SALJ* 438.
40 *supra.*
41 *supra.*

herhaalde oortredings nie. In gevalle waar daar geen sprake was van herhaalde oortredings nie, is lyfstraf ook al as redelik beskou.[42]

4 2 2 Omvang van die Tug[43]

Die tugtiging mag nie buite verhouding tot die misstap wees nie. In *R v Theron*[44] is verwys na die maksimum aantal houe wat ingevolge die Strafproseswet 31 van 1917 by kriminele oortredings opgelê mag word as riglyn vir die maksimum lyfstraf wat in uitoefening van die tugbevoegdheid toegedien mag word. In die stadium toe die beslissing gelewer is, was 15 houe die maksimum. Ingevolge artikel 292 van die huidige Strafproseswet 51 van 1977 is die maksimum 7 houe. Na analogie van *R v Theron* kan 'n saak daarvoor uitgemaak word dat 'n maksimum van 7 houe vandag as riglyn moet dien om die buitensporigheid al dan nie van lyfstraf te bepaal.

Waar toedienings van straf (veral lyfstraf) te kort op mekaar volg, is dit onredelik, soos waar sarsies lyfstraf binne twee uur na mekaar volg[45] of twee maal op dieselfde dag toegedien word.[46] Straf wat onbehoorlik uitgerek word, is ook ontoelaatbaar.[47] Straf moet onder geen omstandighede uitgerek word vir 'n tydperk wat langer as die kind se uithouvermoë duur nie.[48]

Die vraag ontstaan of die straf nie ook onredelik is nie waar dit bestaan uit 'n gedurige berisping van die kind in die openbaar. Waar die kind byvoorbeeld gedurig in die klas uitgeskel word, kan die straf buitensporig en dus onredelik wees.

4 2 3 Aard van die Tugmiddel[49]

Tugmiddels vir lyfstraf het al ingesluit leerbande,[50] rottangs,[51] 'n stok,[52] latte,[53] 'n sambok,[54] 'n emmer,[55] 'n haarborsel,[56] 'n rubberpyp[57] en 'n dubbelgevoude elektriese draad.[58] In verskeie sake is dit as gewens geag dat die tuginstrument voor die hof geplaas moet word sodat bepaal kan word of dit geskik was vir

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42 bv in *R v Schoombee supra.*
43 *R v Janke & Janke supra* 385 387; *R v Theron supra* 171; *R v Muller supra* 863 864; *S v Lekgathe supra* 109; Burchell en Hunt 367 368; Snyman 117; Spiro 89; Van der Vyver en Joubert 612; Anoniem 1927 *SALJ* 68; Price 1954 *SALR* 27; Olmesdahl 1984 *SALJ* 535–536.
44 *supra* 171.
45 *R v Scheepers supra* 337.
46 Olmesdahl 1984 *SALJ* 535.
47 *R v Janke & Janke supra* 385 392; Keeton 1943 *SALJ* 430; Price 1954 *SALR* 27; Olmesdahl 1984 *SALJ* 536.
48 *R v Janke & Janke supra* 385 392; Keeton 1943 *SALJ* 430; Olmesdahl 1984 *SALJ* 536.
49 *R v Janke & Janke supra* 385–386 392; *R v Scheepers supra* 339 341; *R v Theron supra* 171; *R v Muller supra* 863; *S v Booysen supra* 159; *S v Lekgathe supra* 109; Burchell en Hunt 368; Van der Vyver en Joubert 612; Anoniem 1927 *SALJ* 68; Keeton 1943 *SALJ* 430 436; Price 1954 *SALR* 27; Olmesdahl 1984 *SALJ* 537–538.
50 *R v Scheepers supra; R v Roux supra.*
51 *R v Schoombee supra; R v Jacobs supra; R v Muller supra; S v Lewis supra.*
52 *Queen v Soga Mgikela supra; S v Lekgathe supra.*
53 *R v Theron supra; R v Le Maitre and Avenant supra.*
54 *R v Janke & Janke supra.*
55 *S v Lekgathe supra.*
56 *Hiltonian Society v Crofton supra.*
57 *S v Booysen supra.*
58 *ibid.*

tugtiging.[59] Indien 'n tuginstrument daarop bereken is "to produce danger to life and limb"[60] is dit nie geskik vir tugtiging nie.

4 2 4 Metode van Tugtoediening

Die wyse waarop tug toegedien word, moet nie *contra bonos mores* wees nie.[61] In *S v Lekgathe*[62] is lyfstraf toegedien nadat die kind verplig is om al sy klere uit te trek en hy aan 'n bank vasgemaak is. Hierdie optrede is duidelik *contra bonos mores.* Daarom het die hof die "tugtiging" tereg as aanranding beskou.

Die *punt van kontak* by lyfstraf hou ook verband met die metode van tugtiging; sodanige kontakpunt was al in gevalle wat voor die hof gekom het, die oor,[63] die oog,[64], die gesig,[65] die bene,[66] die rug,[67] die arms,[68] die sitvlak[69] en die hande.[70] Deesdae lyk dit asof die sitvlak beskou word as die gepaste plek om lyfstraf toe te dien.[71]

4 2 5 Liggaamlik en Geestelike Toestand van die Kind ten Tyde van Tugtiging[72] *asook die Effek wat die Tugtiging op die Kind het*[73]

Tugtiging wat matig is indien dit op 'n sterk, gesonde kind toegepas word, kan buitensporig wees indien dit op 'n swak kind toegepas word.[74] Daarom word 'n swaar tugtiging makliker as redelik beskou waar die kind groot of van "forse gestalte"[75] is as wanneer dit aan 'n swak,[76] ondervoede,[77] senuweeagtige[78] of baie sensitiewe kind[79] toegedien word.

Die effek van die straf op sowel die fisiese as die geestelike toestand van die kind moet in ag geneem word. Die aard van die beserings moet ondersoek word om die moontlike effek van die tug te bepaal.[80] Houe wat oop, rou wonde

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59 *R v Scheepers supra* 341; *R v Theron supra* 171; *R v Le Maitre and Avenant supra* 620; *Hiltonian Society v Crofton supra* 137.
60 *R v Theron supra* 171.
61 *R v Janke & Janke supra* 385; *R v Theron supra* 170; *R v Muller supra* 860; Keeton 1943 *SALJ* 434; Olmesdahl 1984 *SALJ* 538.
62 *supra.*
63 *Queen v Soga Mgikela supra.*
64 *S v Lekgathe supra.*
65 *R v Muller supra.*
66 *R v Scheepers supra; R v Le Maitre and Avenant supra; R v Muller supra; S v Lewis supra.*
67 *R v Schoombee supra.*
68 *Queen v Soga Mgikela supra; R v Schoombee supra.*
69 *R v Theron supra; R v Jacobs supra; R v Le Maitre and Avenant supra; Hiltonian Society v Crofton supra; S v Lekgathe supra; S v Lewis supra.*
70 *R v Muller supra.*
71 Olmesdahl 1984 *SALJ* 535. Vgl bv die Transvaalse Onderwysord 29 van 1953 vir blanke staatskole – sien par 4 2 9 *infra.*
72 *R v Janke & Janke supra* 385 392; *R v Theron supra* 171; *R v Jacobs supra* 11; *R v Muller supra* 863; *S v Lekgathe supra* 109; Burchell en Hunt 368; Snyman 117; Van der Vyver en Joubert 612; Keeton 1943 *SALJ* 436; Price 1954 *SALR* 27; Olmesdahl 1984 *SALJ* 537.
73 *R v Muller supra* 868; Olmesdahl 1984 *SALJ* 536.
74 *R v Janke & Janke supra* 392.
75 soos in *R v Jacobs supra.*
76 *R v Janke & Janke supra* 392; Keeton 1943 *SALJ* 436.
77 *R v Janke & Janke supra* 387.
78 *R v Theron supra* 171; Keeton 1943 *SALJ* 436.
79 *R v Scheepers supra* 344; *R v Theron supra* 171.
80 *Queen v Soga Mgikela supra* 240; *R v Schoombee supra* 485; *R v Theron supra* 175 176; *R v Jacobs supra* 11; *R v Le Maitre and Avenant supra* 623; *Hiltonian Society v Crofton supra* 137.

veroorsaak, is duidelik onredelik en buitensporig. Waar dit lyk asof die kind nie veel pyn gely of ongemak verduur het nie, byvoorbeeld as hy soos gewoonlik met sy skool- en buitemuurse aktiwiteite voortgegaan het, word die tugtiging nie maklik as onredelik en buitensporig beskou nie.[81]

Die kind se reaksie op die tugtiging moet ook in aanmerking geneem word. Daar moet gevra word of die kind gehuil,[82] gekla,[83] geskree of gesoebat[84] het of met sy straf gespog het.[85] Waar hy met sy straf gespog het, beteken dit nie noodwendig dat die straf in 'n minder ernstige lig beskou moet word nie aangesien die kind dalk bloot wou bewys hoe taai hy is.[86]

4 2 6 Ouderdom van die Kind[87]

Hoe jonger die kind is, hoe ligter moet sy straf wees. In *R v Le Maitre and Avenant*[88] is in die guns van die beskuldigde daarop gewys dat die jonger kinders 'n ligter straf as die oueres gekry het.

Aan die ander kant kan, alhoewel 'n ouer kind dalk fisies beter in staat is om lyfstraf te hanteer, sy verhoogde ouderdom die vraag na die gepastheid van lyfstraf laat ontstaan.[89] Veral gedurende die kind se puberteitsjare moet lyfstraf versigtig benader word. Die adolessent beskou lyfstraf gewoonlik òf as 'n vernedering en voel gekrenk daardeur, òf hy steur hom glad nie daaraan nie sodat dit geen invloed op hom het nie.[90] Geeneen van hierdie gevolge klop met die doelstellings van suksesvolle tug nie.

4 2 7 Geslag van die Kind[91]

Gemeenregtelik mag 'n dogter wel lyfstraf ondergaan[92] maar haar straf moet waarskynlik ligter as dié van 'n seun wees. In *R v Scheepers*[93] het die hof dit as hoogs ongewens beskou dat 'n manlike onderwyser 'n dogter slaan. Vandag verbied die onderwysordonnansies uitdruklik enige vorm van lyfstraf op dogters in staatskole.[94]

4 2 8 Doel en Motief van die Persoon wat die Tug Toedien

Die hof sal nie maklik aanvaar dat tugtiging met 'n onbehoorlike motief gepaard gegaan het nie.[95] Indien die motief van die tugtiger egter wel onbehoorlik was in die sin dat die straf bedoel is vir enige ander oogmerk as dié van berisping,

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81 *Queen v Soga Mgikela supra* 240; *R v Scheepers supra* 342; *R v Schoombee supra* 486.
82 *R v Schoombee supra* 485; *R v Le Maitre and Avenant supra* 623; *Hiltonian Society v Crofton supra* 137.
83 *Hiltonian Society v Crofton supra* 138.
84 *S v Booysen supra* 159.
85 *R v Jacobs supra* 10; *Hiltonian Society v Crofton supra* 137–138.
86 *Hiltonian Society v Crofton supra* 138.
87 *R v Muller supra* 863; *S v Lekgathe supra* 109; Burchell en Hunt 368; Snyman 117; Spiro 89; Keeton 1943 *SALJ* 436; Price 1954 *SALR* 27; Olmesdahl 1984 *SALJ* 537.
88 *supra* 623.
89 Olmesdahl 1984 *SALJ* 537. Vgl ook *R v Theron supra* 172.
90 Bekker *Verantwoorde Skooltug* 128–129. Alhoewel daar nie met die meerderheid van Bekker se standpunte en opinies saamgestem word nie, is hierdie wel 'n geldige punt.
91 *R v Scheepers supra* 341; *R v Muller supra* 863; Burchell en Hunt 368; Snyman 117; Rosenthal 1925 *SALJ* 306; Keeton 1943 *SALJ* 430 436; Price 1954 *SALR* 27.
92 Sien bv *S v Booysen supra.*
93 *supra* 338.
94 Sien par 4 2 9 *infra.*
95 *Queen v Soga Mgikela supra* 242; *R v Janke & Janke supra* 385; *R v Scheepers supra* 339 341; *R v Theron supra* 171; *R v Muller supra* 864; *S v Lekgathe supra* 109; Boberg 467; Burchell en Hunt 367; Spiro 89; Middleton "The Dynamics of the Criminal Law Approach to the Battered Child Syndrome" 1977 *SASK* 250; Olmesdahl 1984 *SALJ* 539.

vermaning en opvoeding (*correctio*), tree die tugtiger onregmatig op.[96] As die tug byvoorbeeld toegedien is "to give vent to the feelings of the parent or teacher"[97] of "for the gratification of passion or of rage,"[98] of dien as 'n "expression of... dislike,"[99] is dit onredelik.

4 2 9 Onderwysregulasies wat Moontlik van Toepassing kan Wees

Dit is belangrik om daarop te let dat die tugbevoegdheid van onderwysers aan bande gelê word deur die voorskrifte van die provinsiale onderwysordonnansies en administrateurskennisgewings rakende die omstandighede waaronder en die wyse waarop lyfstraf toegedien mag word. In *R v Schoombee*[100] is beslis dat die ordonnansies nie van toepassing is waar die klag teen 'n onderwyser in 'n staatskool ingevolge die gemenereg gelê word nie. Hierdie standpunt is in regspraak sowel as deur regskrywers verwerp.[101] Die standpunt word gehuldig dat die gemenereg deur die statutêre bepalings vervang is en dat die tugbevoegdheid ingevolge die onderwysordonnansies beoordeel moet word.[102] Olmesdahl[103] steun skynbaar die standpunt in *R v Schoombee* maar hy meen dat die ordonnansies nogtans as riglyn moet dien in gevalle waar die onderwyser ingevolge die gemenereg aangekla word en nie ingevolge die toepaslike ordonnansie nie, asook in gevalle waar die ordonnansies glad nie die situasie beheers nie. Myns insiens geld die gemenereg nog sodat 'n onderwyser wat die onderwysordonnansies oortree, nie net ingevolge die betrokke ordonnansie tot verantwoording geroep kan word nie, maar ook nog byvoorbeeld van aanranding aangekla kan word ingevolge die gemenereg.

Om te bepaal of die ordonnansies op 'n bepaalde geval van toepassing is, moet vasgestel word tot welke bevolkingsgroep die kind behoort en in welke tipe skool hy is. Vir blanke kinders word 'n onderskeid gemaak tussen staatskole waar lyfstraf gereël word deur die ordonnansies,[104] en privaatskole waar die tugbevoegdheid onderworpe is aan die kontrak wat die ouers met die skool sluit.[105] Ten opsigte van elk van die ander bevolkingsgroepe bestaan daar soortgelyke onderwysregulasies.[106] Verder bestaan daar aparte regulasies vir kinders in kinderhuise en nywerheidskole. Ook ten aansien van hierdie kinders bestaan daar aparte bepalings vir elke bevolkingsgroep.[107]

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96 *R v Janke & Janke supra* 385 387; Keeton 1943 *SALJ* 437; Middleton 1977 *SASK* 250; Olmesdahl 1984 *SALJ* 538.
97 Keeton 1943 *SALJ* 437.
98 *R v Janke & Janke supra* 385.
99 *R v Janke & Janke supra* 388.
100 *supra* 483.
101 *R v Roux supra* 61; Burchell en Hunt 366; Keeton 1943 *SALJ* 435.
102 *R v Scheepers supra* 340; *R v Roux supra* 61.
103 1984 *SALJ* 532 534.
104 a 5 van Admin KG 99 van 1955–02–09 uitgevaardig ingevolge a 121 van die Transvaalse Onderwysord 29 van 1953; a 231 van die Kaapse Onderwysord 20 van 1956; a 24 van die Natalse Onderwysord 46 van 1969; a 29 van die Vrystaatse Onderwysord 12 van 1980.
105 *Hiltonian Society v Crofton supra* 132.
106 Vir Kleurlingskole a S 28 van R 1898 van 1963–12–04 *SK* 661 uitgevaardig ingevolge a 34 van die Wet op Onderwys vir Kleurlinge 47 van 1963; vir Indiërskole a 9 van R 723 van 1966–05–13 *SK* 1444 uitgevaardig ingevolge a 33 van die Wet op Onderwys vir Indiërs 61 van 1965; en vir Swart skole a 7 van R 1143 van 1981–05–29 *SK* 7598 uitgevaardig ingevolge a 44 van die Wet op Onderwys en Opleiding 90 van 1979.
107 Vir verwysings na die toepaslike regulasies sien Olmesdahl 1984 *SALJ* 532 vn 45.

Die belangrikste bepalings rakende lyfstraf is in hooftrekke die volgende:

a Lyfstraf mag slegs deur die hoof van 'n skool of deur iemand anders in die teenwoordigheid van die hoof toegedien word.[108] Sommige onderwysordonnansies bepaal dat die hoof sy bevoegdheid mag delegeer aan die senior inwonende onderwyser in 'n kosskool.[109]

b Die misstappe waarvoor lyfstraf toegedien mag word, is ongehoorsaamheid, pligsversuim, weerspannigheid, oneerlikheid, leuenagtigheid, skoolversuim, afknouery, onwelvoeglikheid of ander ernstige wangedrag.[110]

c Lyfstraf mag nooit op 'n dogter toegedien word nie.[111]

d Lyfstraf mag nie in die teenwoordigheid van ander leerlinge toegedien word nie.[112] Kragtens sommige ordonnansies mag gesamentlike oortreders wel in mekaar se teenwoordigheid gestraf word.[113]

e Die tuginstrument en die punt van kontak vir lyfstraf word in sommige ordonnansies voorgeskryf.[114] Lyfstraf mag gewoonlik slegs op die sitvlak met 'n rottang, lat of lyfband toegedien word. Die Natalse en Vrystaatse Ordonnansies vir blanke staatskole bepaal slegs dat die straf nie op 'n wrede wyse toegedien mag word nie.[115]

f Lyfstraf mag slegs toegedien word nadat 'n behoorlike ondersoek gehou is.[116]

g In alle gevalle waar lyfstraf toegedien is, moet dit onmiddellik in 'n register opgeteken word.[117]

5 MASSASTRAF

Massastraf is al vanuit baie oorde gekritiseer as synde in stryd met die beginsel dat straf verdien moet wees.[118] Tog word daar algemeen aanvaar dat onderwysers wel regmagtig massastraf mag toedien selfs waar nie al die skoliere oortree het nie.[119] In *R v Le Maitre and Avenant*[120] is beslis dat massastraf toelaatbaar is. Die hof meen dat 'n onderwyser wat sy gesag wil behou soms "streng maatreëls" moet toepas al beteken dit dat 'n onskuldige daaronder moet ly. In *R v Muller*[121]

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108 Blankes – Tvl: a 5(2)(a) (b) (c); Natal: a 24(1); OVS a 29(4). (Die Kaapse Onderwysord 20 van 1965 bevat nie bepalings oor lyfstraf nie, maar bepaal wel in a 231 dat die direkteur van onderwys reëls mag neerlê i v m tugmaatreëls.) Kleurlinge – a S 28 2(b); Indiërs – a 9(2); Swartes – a 7(5).

109 Blankes – Natal: a 24(2); Kleurlinge – a S 28 4(a); Indiërs – a 9(4).

110 Blankes – Tvl: a 5(2)(a); Natal: a 24(1); OVS: a 29(1); Kleurlinge – a S 28 2(a); Indiërs – a 9(2); Swartes – a 7(4).

111 Blankes – Tvl: a 5(1)(a); Natal: a 24(3); OVS: a 29(2); Kleurlinge – a S 28 1; Indiërs – a 9(1); Swartes a 7(3).

112 Blankes – Tvl: a 5(1)(b); Natal: a 24(4); OVS: a 29(2); Kleurlinge – a S 28 2(c); Indiërs – a 9(2); Swartes – a 7(5).

113 Blankes – Natal: a 24(4); Kleurlinge – a S 28 2(c); Indiërs – a 9(2).

114 Blankes – Tvl: a 5(2)(d); Kleurlinge – a S 28 2(d); Indiërs – a 9(3); Swartes – a 7(6).

115 Natal: a 24(4); OVS: a 29(3).

116 Blankes – Tvl: a 5(2)(a); OVS: a 29(4) en sien par 4 1 *supra*.

117 Blankes – Tvl: a 5(3); Natal: a 24(5); OVS: a 29(5); Kleurlinge – a S 28 3; Indiërs – a 9(5); Swartes – a 7(9).

118 oa deur rp De Beer in *R v Muller supra* 852; De Wet en Swanepoel 98 vn 160; Rosenthal 1925 *SALJ* 307–308.

119 *R v Le Maitre and Avenant supra* 621; *R v Muller supra* 853; Snyman *op cit* 117.

120 *supra* 621.

121 *supra* 859–860.

is ook beslis dat massastraf soms toegepas mag (en selfs moet) word. Nogtans is toediening van massastraf in die bepaalde geval veroordeel en is die onderwyser aan aanranding skuldig bevind. Die rede vir die verskil met *R v Le Maitre and Avenant* is geleë in die feite. In *R v Le Maitre and Avenant* is die skoliere vooraf gewaarsku dat massastraf toegedien sal word indien die koshuiseiendom verder verniel word en die skuldiges nie te voorskyn kom nie. Daar is ook 'n behoorlike ondersoek gedoen om te probeer bepaal wie die werklike skuldiges was. In *R v Muller* is geen waarskuwings gerig nie en is geen ondersoek na die identiteit van die skuldiges gedoen nie. As gevolg hiervan was die onderwyser se optrede wederregtelik.

Dit blyk dus dat massastraf slegs toelaatbaar is indien dit voorafgegaan word deur 'n behoorlike ondersoek en die tug redelik en matig is. Die las om die ondersoek in te stel, mag nie aan die skoliere oorgedra word deur byvoorbeeld van hulle te verwag om te verklik nie.[122] Die plig om ondersoek in te stel, hou nie in dat daar 'n afsonderlike ondersoek na elke kind se skuld al dan nie geloods moet word nie.[123] Al wat vereis word, is dat 'n redelike ondersoek gehou moet word.[124]

6 OORSKRYDING VAN DIE TUGBEVOEGDHEID

Tugbevoegdheid dien as verweer slegs waar die bevoegdheid binne sy perke uitgeoefen word. Die bevoegdheid word oorskry indien uitoefening van die diskresie of getugtig moet word, onbehoorlik geskied het of die tug onredelik was.[125]

6 1 Gevolge van Oorskryding van die Tugbevoegdheid

Oorskryding van die tugbevoegdheid hou privaatregtelike sowel as strafregtelike gevolge in. Die belangrikste privaatregtelike gevolge is dat die ouer of onderwyser aanspreeklik gehou kan word vir vergoeding[126] en dat die hof met die uitoefening vir die ouerlike gesag kan inmeng.[127]

Die strafregtelike gevolge is dat die "tugtiger" aangekla kan word van aanranding[128] of aanranding met die opset om ernstig te beseer.[129] Dit is ook moontlik dat die "tugtiger" aangekla kan word van onsedelike aanranding. Waar die aanranding gemik is op die geslagsorgane of 'n ander erotiese deel van die kind se liggaam sal dit vanselfsprekend onsedelike aanranding daarstel. Volgens *S v F*[130] kan "die uitgesproke bedoeling van 'n beskuldigde soos oorgedra aan die klaer (hetsy deur woorde, gedrag of by implikasie)" ook van 'n aanranding 'n onsedelike aanranding maak. Waar die "tugtiger" dus lyfstraf toedien met 'n seksuele motief sal dit ook onsedelike aanranding daarstel, byvoorbeeld in die geval waar

122 *R v Muller supra* 867.
123 *R v Le Maitre and Avenant supra* 621.
124 Sien par 4 1 *supra.*
125 Sien par 4 1 en 4 2 *supra.*
126 *Tshabalala v Jacobs supra; Hiltonian Society v Crofton supra.*
127 Vir 'n bespreking hiervan sien Barnard Cronje en Olivier *SA Persone- en Familiereg* (1986) 294–298; Boberg 410–457.
128 soos in *Queen v Soga Mgikela supra; R v Janke & Janke supra; R v Scheepers supra; R v Roux supra; R v Theron supra; R v Jacobs supra; R v Le Maitre and Avenant supra; R v Muller supra; S v Lekgathe supra.*
129 soos in *R v Muller supra; S v Booysen supra; S v Lekgathe supra; S v S* 1985 3 SA 519 (T); *S v Lewis supra.*
130 1982 2 SA 580 (T) 585.

'n onderwyser perverse plesier daaruit put om seuntjies op hulle kaal boude te slaan. As die kind as gevolg van die "tugtiging" sterf, kan die "tugtiger" aangekla word van strafbare manslag of moord. 'n Aanklag ingevolge artikel 50(1) van die Wet op Kindersorg[131] is nog 'n moontlike strafregtelike gevolg.

'n Onderwyser in Natal wat sy bevoegdhede rakende toediening van lyfstraf oorskry, is ook ingevolge artikel 82 van Onderwysordonnansie 46 van 1969 aan 'n misdryf skuldig. Artikel 89 van die Transvaalse Onderwysordonnansie 29 van 1953, artikel 53 van die Vrystaatse Onderwysordannansie 12 van 1980 asook artikel 16 van die Wet op Onderwys vir Kleurlinge 47 van 1963, artikel 16 van die Wet op Onderwys vir Indiërs 61 van 1965 en artikel 22 van die Wet op Onderwys en Opleiding 90 van 1979 bepaal slegs dat 'n onderwyser wat enige bepaling van die onderskeie ordonnansies of wette oortree of versuim om daaraan te voldoen, geag word hom aan wangedrag skuldig te maak. Oortreding van die bepalings met betrekking tot lyfstraf is dus nie 'n misdaad ingevolge laasgenoemde ordonnansies nie, maar dit lei wel tot interne administratiewe gevolge op grond van die wangedrag. Die onderwyser mag byvoorbeeld berispe of beboet word.[132] Die onderwyser kan natuurlik ook nog van 'n gemeenregtelike of statutêre misdaad aangekla word.

Kindermishandeling vind dikwels plaas onder die dekmantel van uitoefening van die tugbevoegdheid. Dit is belangrik om in gedagte te hou dat kindermishandeling egter nie as selfstandige misdaad bestaan nie. Die oortreder moet dus van 'n ander misdaad aangekla word, byvoorbeeld die misdaad ingevolge artikel 50(1) van die Wet op Kindersorg 74 van 1983. Artikel 50(1) handel onder andere oor kindermishandeling maar dit is geensins wyd genoeg om alle gevalle van kindermishandeling te dek nie. In die eerste plek is die oortreder by kindermishandeling 'n ouer of persoon *in loco parentis* en tweedens is dit 'n element van kindermishandeling dat die mishandeling gewoonlik herhaal word.[133] Die vraag ontstaan of dit nie wenslik is dat 'n afsonderlike omvattende misdaad van kindermishandeling geskep word nie. In plaas daarvan om die oortreder van byvoorbeeld aanranding aan te kla, sou dit beter wees as hy aangekla kan word van kindermishandeling as sodanig.

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131 74 van 1983. Hierdie artikel handel oor mishandeling, verwaarlosing en verlating van 'n kind.

132 Blankes – Tvl: a 93(2) van Ord 29 van 1953; OVS: a 54(18) van Ord 12 van 1980; Kleurlinge – a 17(23) van Wet 61 van 1965; Indiërs – a 17(23) van Wet 61 van 1965; Swartes – a 22(23) van Wet 90 van 1979.

133 Middleton 1977 *SASK* 247 248–249. Middleton gee die volgende redes waarom dit wenslik is om (ten minste) 'n definisie van kindermishandeling te verkry wat los staan van aanranding en strafbare manslag:

"1 Failure to do so can so easily lead to a failure to recognise the peculiar helplessness of the victim; that he is completely at the mercy of his abuser and will be unable to complain of future assaults, unless appropriate steps are taken.

2 If we accept the facts that this form of child abuse is repetitive by nature and that the possibility of fatal injury to the child increases with each fresh onslaught, it is imperative to distinguish this kind of conduct from the run-of-the-mill assault, where there is no reason to assume such a potentially fatal repetitiveness.

3 With a view to the punishment and/or treatment of the offender, it is important that it should be recognised that this type of conduct is evoked, not by any external stimulus, such as provocation or drunkenness or any of the usual motives for assault, but is committed almost impulsively in moments of stress."

6 2 Bewyslas ten opsigte van Oorskryding van die Tugbevoegdheid

Die kernreël in die bewysreg is dat hy wat beweer moet bewys.[134] In gevalle waar tugbevoegdheid as verweer geopper word, beteken toepassing van die kernreël dat die persoon wat beweer dat die tugtiging onredelik was, dit moet bewys.[135] In *R v Muller*[136] is egter beslis dat die bewyslas op die beskuldigde rus om te bewys dat hy die nodige tugbevoegdheid gehad het én die bevoegdheid redelik uitgeoefen het. Die hof redeneer dat, aangesien die daad van die onderwyser *prima facie* aanranding was, hy moet bewys dat daar regverdiging vir die daad was. In *R v Schoombee*[137] was die hof die mening toegedaan dat die beskuldigde moes pleit dat sy optrede nie onredelik was nie. In die lig van die feit dat die hof egter later in dieselfde uitspraak beslis het dat die bewyslas op die staat rus, moet eersgenoemde stelling nie aanvaar word as gesag daarvoor dat die beskuldigde 'n bewyslas dra nie.[138] Om 'n bewyslas op die beskuldigde te plaas, is ongewens en daar moet met Burchell en Hunt[139] saamgestem word dat die kernreël moet geld. Daar mag wel 'n las op die beskuldigde rus om getuienis te lei vir sy verdediging maar daar behoort nie sprake te wees van 'n bewyslas op hom nie. Wat op die beskuldigde rus, is 'n weerleggingslas.[140] Dit is waarskynlik ook wat die hof met die eersgenoemde stelling in *R v Schoombee* te kenne wou gee.

Olmesdahl[141] steun skynbaar die benadering in *R v Muller.* Hy meen, met verwysing na *Mabaso v Felix*,[142] dat die "tugtiger" moontlik tog die bewyslas dra. Of hierdie bewyslas op die oortreder beperk moet word tot siviele gedinge en of dit vir alle gedinge moet geld, blyk nie uit sy artikel nie. Myns insiens behoort die kernreël in sowel siviele as strafgedinge toegepas te word.

6 3 Onkunde as Verweer

Dit lyk nie of onkunde maklik as verweer erken sal word waar die tugbevoegdheid oorskry is nie. Vroeër in die eeu is by verskeie geleenthede beslis dat die oortreder se onkunde aangaande die regsreëls rakende tugbevoegdheid hom nie aanspreeklikheid laat vryspring nie.[143] Sedert *S v De Blom*[144] kan onkunde van die reg wel as verweer teen 'n kriminele aanklag geopper word. Die werking van die verweer word egter beperk deurdat 'n persoon wat hom op 'n bepaalde gebied begewe "met die nodige omsigtigheid"[145] te werk moet gaan om hom op die hoogte te stel van die regsvoorskrifte wat die bepaalde gebied beheers. As gevolg van die besondere veld waarop onderwysers hulle begewe, het hulle die plig om

134 Sien bv Schmidt *Bewysreg* (1982) 35 e v vir 'n bespreking van die kernreël.
135 *R v Schoombee supra* 483; *Hiltonian Society v Crofton supra* 134 135; *S v Booysen supra* 159; Snyman 116.
136 *supra* 852 863.
137 *supra* 482.
138 Burchell en Hunt 369.
139 *ibid.*
140 Vir 'n bespreking van wat 'n weerleggingslas is en hoe dit van die bewyslas verskil, sien Schmidt 25–31.
141 1984 *SALJ* 531.
142 1981 3 SA 865 (A) 876.
143 *R v Scheepers supra* 343–344; *R v Theron supra* 172; *R v Jacobs supra* 10.
144 1977 3 SA 513 (A).
145 *S v De Blom supra* 532.

op die hoogte te wees van (minstens) die bepalings van die onderwysordonnansies. Onkunde behoort dus vir 'n onderwyser geen verweer te wees nie.

Vir 'n ouer kan onkunde wel ingevolge die algemene beginsel in *S v De Blom* 'n verweer wees. Volgens Burchell en Hunt[146] sal die verweer egter selde slaag. Dit beteken dat daar van die standpunt uitgegaan word dat 'n ouer die omvang van sy bevoegdhede ken en dat hy dus weet of sy optrede wederregtelik is of nie.[147] Indien hierdie argument aanvaar word, kan dit moontlik inhou dat daar ook op 'n ouer 'n plig rus om hom op die hoogte te stel van die regsvoorskrifte wat tugbevoegdheid beheers.

6 4 Strafoplegging

Die vraag ontstaan watter straf gepas is by oorskryding van die tugbevoegdheid. By die statutêre misdade word die straf statutêr bepaal. Ingevolge die Wet op Kindersorg 74 van 1983 is die misdaad geskep deur artikel 50(1) strafbaar met 'n boete van hoogstens R5 000 of, by wanbetaling van die boete, met gevangenisstraf vir 'n tydperk van hoogstens vyf jaar of met sodanige gevangenisstraf sonder die keuse van 'n boete, of met sowel sodanige boete as sodanige gevangenisstraf.[148]

'n Misdryf ingevolge die Natalse Onderwysordonnansie 46 van 1969 is strafbaar met 'n boete van hoogstens R40 of, in die geval van 'n tweede of latere veroordeling weens dieselfde oortreding, met 'n boete van hoogstens R100, of, by wanbetaling van enige boete, met gevangenisstraf van hoogstens 3 maande.[149]

By die gemeenregtelike misdade moet daar in eerste instansie bepaal word of die geval voorhande een is van gewone aanranding, moord, ensovoorts, en of dit 'n geval is van kindermishandeling onder die dekmantel van uitoefening van die tugbevoegdheid. Die benadering by laasgenoemde moet verskil van dié by eersgenoemde. In *S v S*[150] het die hof daarop gewys dat daar selde besef word dat die aard en gevolge van kindermishandeling verskil van die alledaagse geweldsmisdade en dat die opinie (ten onregte) gehuldig word dat kindermishandeling "slegs 'n besonder afskuwelike vorm van geweldsmisdaad is wat 'n uiters strawwe vonnis verdien."

Die straf wat opgelê kan word by skuldigbevinding aan een van die gemeenregtelike misdrywe wissel, afhangende van die omstandighede, van die oplê van 'n boete tot die doodstraf.[151] Die straf wat die meeste opgelê word, is gevangenisstraf met of sonder die keuse van 'n boete.[152] Of gevangenisstraf gepas is, sal van die omstandighede afhang. Aangesien 'n "gesinsiekte" dikwels die oorsaak is vir die misdaad wat gepleeg is, moet gesinsrehabilitasie as alternatief tot gevangenisstraf oorweeg word.[153] Dit beteken nie dat gevangenisstraf nooit opgelê moet word nie. Waar rehabilitasie nie moontlik lyk nie, kan gevangenisstraf wel gepas wees.[154].

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146 307.
147 Middleton 1977 *SASK* 251.
148 a 50(3) van die Wet op Kindersorg 74 van 1983.
149 a 82.
150 *supra* 524.
151 soos in *R v Janke & Janke supra; R v Muller supra; S v Booysen supra; S v Lekgathe supra; S v S supra.*
152 soos in *Queen v Soga Mgikela supra; R v Muller supra; S v Booysen supra.*
153 *S v S supra* 529.
154 *ibid.*

Ground-water law in South Africa

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OPSOMMING

Grondwaterreg in Suid Afrika

In hierdie bydrae word die huidige stand van die Suid Afrikaanse reg met betrekking tot die beskerming van grondwater en grondwaterregte bespreek. Daar word kortliks aandag gegee aan die hidrologie van grondwater ten einde aan te toon dat grondwater onlosmaaklik hidrologies verbind is met ander waterbronne. Die probleme wat met die benutting van grondwater ondervind word, word ook in hidrologiese verband bespreek. Die Suid Afrikaanse regsposisie word bespreek met verwysing na die Waterwet 54 van 1956; spesifieke aandag word gegee aan die vraag of die wet enigsins betrekking het op grondwater in die algemeen. Daar word ook gekyk na die wetgewer se hantering van probleme by die gebruik van grondwater. Die Romeinse en Romeins-Hollandse reg met betrekking tot die probleme word aangeraak en 'n uiteensetting van relevante Suid Afrikaanse hofuitsprake word gegee. Daar word telkens op gewys dat nòg die wet nòg die gemenereg voldoende beskerming aan die bron en aan die gebruiker se regte verleen. Ten slotte word die Waterwetsontwerp van 1986 bespreek ten einde te kan vasstel of die beoogde verandering 'n verbetering in die huidige situasie sal teweegbring. Daar word tot die gevolgtrekking gekom dat dit nie die geval sal wees nie. Alhoewel die wetsontwerp nie daarin slaag om die ernstige tekortkominge in die huidige situasie effektief aan te spreek nie, word dit nogtans verwelkom aangesien dit 'n nuwe gesindheid ten opsigte van die gebruik en beskerming van dié belangrike waterbron openbaar.

1 INTRODUCTION

On 1986-01-17 a proposed Water Amendment Bill was published in the *Government Gazette*.[1] The main purpose of the bill is to

> "vest in the Minister the powers to control and exploit water in subterranean sources in certain areas in the public interest."

The term *subterranean water* is defined in section 3 of the Water Amendment Bill as

> "water naturally occurring underground in an area which has in terms of section 28(1) been declared a subterranean government water control area."[2]

Throughout this article the term *subterranean water* will refer to the class of water thus defined by the bill. The term *underground water*, which is used by

1 The Water Amendment Bill, 1986 notice 45 of 1986 in *Government Gazette* 1066 (1986-01-17).

2 The wording of this definition does not differ from that of the existing definition, apart from referring to a subterranean government water control area, whereas the existing definition refers to a subterranean water control area.

most South African authorities, denotes all water sources flowing or percolating under the surface of the earth, whether that water is found in a subterranean water control area or not. The present author prefers, however, to use the term *ground water* instead of *underground water*. The former is not only the internationally acceptable term but is also more logical. Water found under the surface of the earth does not exist under the ground but in the ground under the surface.[3] Water law and in particular, ground water law, has up to now received little attention from South African legal scholars, and it appears that there has been no development worth mentioning in this part of our law. It therefore came as a surprise to many that the legislator should choose to amend the whole chapter on ground water law in the Water Act.[4] This provides the opportunity to examine the present state of ground water law in South Africa, to discuss the proposed amendments and to ask whether the new proposals will change the existing situation for the better, if at all.

It is clear from the existing state of ground water law in South Africa that this particular field of law is riddled with misconceptions and outdated ideas. It is therefore necessary first of all, to make a short reference to the science of hydrology. This does not aspire to be a scientific contribution on hydrology, but must be seen as a very simple explanation of a set of complicated facts, essential to the understanding of the legal problem we are dealing with. The following serves to illustrate how a knowledge of hydrology affects one's views on ground water law:

> "In a water deficient country like South Africa, it is highly debatable whether the concept of private water which legally applies to all underground water, except that which flows in 'known and defined channels,' should be retained. Problems also arise in attempting to optimize the conjunctive use of surface (public) and ground water. This is particularly the case in some irrigation areas where irrigators tap water from the same aquifer, which is hydraulically connected to a stream, from which they also obtain a quota of public water."[5]

2 THE HYDROLOGY OF GROUND WATER

2 1 The Hydrological Cycle

The hydrological cycle, a fundamental concept in hydrology, is a simple model of a complex sequence of events.[6] During the course of this sequence, water circulates from the earth to the atmosphere and back again through a process of evaporation and precipitation.[7] The visible part of the cycle consists in the

3 In this text, the terms *ground water* and *subterranean water* both denote water flowing or percolating under the surface. The term subterranean water refers only to that particular category of ground water created by the legislator.

4 The Water Act 54 of 1956, hereinafter referred to as the act.

5 Vegter "The Role of Ground Water in South Africa's Water Supply" in *Proceedings of the International Conference on Groundwater Technology* vol 1 1984 11.

6 For a clear explanation of this phenomenon see Lukas "When the Well Runs Dry: A Proposal for Change in the Common Law Ground Water Rights in Massachusetts" 1982 *Environmental Affairs* 445–502 448 *et seq.*

7 *ibid.*

precipitation of rain, the flow of water in streams and rivers and its evaporation to form clouds which again are precipitated into rain.[8] An invisible, but integral part of this cycle is the ground water flowing or percolating below the surface.[9]

2 2 The Role of Ground Water in the Hydrological Cycle

Some of the precipitation that reaches the earth penetrates into the ground and moves downward to recharge or replenish the ground water sources.[10] This water is drawn by the force of gravity, to a level where the soil or rock becomes saturated with water, namely the so called "zone of saturation." The top of this level is called the "water table" and the impermeable rock or clay which prevents the further downward movement of the water is called the "basement rock" or the "bedrock."[11] Ground water flows downhill and through the zone of saturation; wherever it reaches a discharge site it manifests itself in wells and springs.[12] This movement of ground water is usually very slow and is measured in meters per day or, more often, meters per year.[13]

Ground water-bearing formations which are sufficiently permeable to transmit and yield water in usable quantities are called "aquifers."[14] In South Africa approximately 80% of the ground water is found in secondary aquifers.[15] The quantity of water stored in this type of aquifer is generally very limited since their permeability is very low. This leads to general low yield in most boreholes in South Africa.[16] The other 20% of ground water occurs in dolomite formations and primary aquifers.[17] This type of aquifer is excellent for high yield production boreholes.[18]

Although ground water does not form the major part of South Africa's water sources,[19] it nevertheless forms an integral and vital link in the hydrological cycle, by continuing to discharge water into rivers and streams, even during drier periods. Because of the slow movement of ground water, it can continue to feed surface flows, well after precipitation has ceased.[20]

It is clear that ground water and surface water are hydrologically connected and that ground water can therefore never be an independent alternative to

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8 Lowe, Ruedisili and Graham "Beyond Section 858: A Proposed Ground Water Liability and Management System for the Eastern United States" 1979 *Ecology Law Quarterly* 131–161 136–137.
9 Lukas *op cit* 449; Vegter *op cit* 11.
10 *ibid.*
11 Lowe, Ruedisili and Graham *op cit* 135; Hietbrink "Nebraska Well-interference Problems – a Proposal" 1977 *Nebraska Law Review* 565–585 567.
12 Lowe, Ruedisili and Graham *op cit* 137; Lukas *op cit* 449; Grant "Reasonable Ground Water Pumping Levels under the Appropriation Doctrine: the Law and Underlying Economic Goals" 1981 *Natural Resources Journal* 1–36 4.
13 Lukas *op cit* 449; Lowe, Ruedisili and Graham *op cit* 137.
14 Bouwer *Groundwater Hydrology* (1978) 3.
15 Vegter *op cit* 1.
16 *ibid.*
17 *ibid.*
18 See in general Bouwer *op cit* 3–6.
19 Vegter *op cit* 2.
20 Lukas *op cit* 450.

surface water supplies. Planning for the utilisation of ground water must therefore take into account the effects which such utilisation will have on the surface water as well.

3 PROBLEMS WITH GROUND WATER

It is a known fact that the withdrawal of ground water for use as a supply of water or for other purposes can have significant effects on other water users, landowners and on the hydrological cycle, as is discussed below.

3 1 Well interference

The withdrawal of water from an aquifer will produce an effect on the water level of that aquifer.[21] The water table around the well is drawn down, creating an inverted cone, called the "cone of depression."[22] This process can be reversed by natural recharge once the pumping has ceased, but it may take an appreciable length of time for the water table to be restored to pre-pumping level.[23] Furthermore, the lower the permeability of the aquifer, the higher the gradient of the cone of depression will be.[24] In South Africa, where 80% of the ground water sources are stored in secondary aquifers, with a low permeability, the diameter of individual cones of depression will be relatively large.[25]

When two wells are so close together that their cones of depression overlap, well interference occurs, and the water table will be drawn down even further. If one user has a bigger pump or a deeper well, he may even succeed in lowering the water table beyond the reach of the other users. This may lead to what is called "the common pool problem," whereby unregulated physical competition amongst ground water users encourages each pumper to pump excessively in order to prevent others from lowering the water table first.[26]

3 2 Over-pumping from an Aquifer

In addition to well interference, ground water withdrawal may cause other side effects, such as ground water mining,[27] depletion of streams and ponds and land subsidence. All these problems are connected to over-pumping from an aquifer.

Ground-water mining occurs where the withdrawal of ground water exceeds the discharge, resulting in a permanent decline off the water table. It is obvious that this process will accelerate during a period of drought.[28]

The pumping of ground water can also affect surface water by diverting water away from ponds, streams and rivers or even reducing the water level of such surface flows through a process of induced infiltration.[29]

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21 Heath and Trainer *Introduction to Groundwater Hydrology* (1968) 87–88 and 104–106.
22 Heath and Trainer *op cit* 87–88; Lukas *op cit* 454.
23 Grant *op cit* 4.
24 Grant *op cit* 5–7.
25 Vegter *op cit* 1.
26 Lukas *op cit* 454.
27 Lukas *op cit* 454; Grant *op cit* 4.
28 Grant *op cit* 4.
29 Lukas *op cit* 454.

Land subsidence occurs when the mineral grains in an aquifer become compacted after water between the grains has been removed or where the withdrawal of water from limestone formations leaves sinkholes.[30]

4 THE PRESENT SOUTH AFRICAN DISPENSATION

It is a fundamental principle of our law that the owner of land owns, not only the surface of his property, but owns it *a centro ad coelum*.[31] In order, therefore, to establish what the rights of users of ground water are and also whether those rights, and as a consequence thereof, the source itself, are adequately protected in terms of South African law, one must examine the act, the common law and the South African case law on the point.

4 1 The Water Act 54 of 1956

Looking at the opinions of the two foremost writers on the subject of water law, one is led to believe that the act is, apart from the provisions relating to subterranean water, silent on the subject of ground water.

Hall holds the opinion that where a subterranean water control area has not been proclaimed, the rules of the common law must apply.[32] Although he does not explicitly say that all other ground water is not subject to legislative control, this is to be inferred from the rest of his discussion on the matter.[33]

According to Vos, the act deals only with subterranean water, "a term used in a special technical sense."[34]

If, however, one looks at the wording of the act, it becomes clear that the opinions of Vos and Hall cannot be correct.

The Water Act deals with two classes of water, namely public and private water.

Public water is defined as water flowing in a public stream.[35] A public stream is a natural stream of water which flows in a known and defined channel and the water of which is capable of being used for common irrigational purposes on more than one original grant of riparian land.[36]

Private water is "all water which rises or falls naturally on any land or naturally drains or is lead onto one or more pieces of land, but is not capable of being used for common irrigational purposes."[37]

Besides these two classes of water, the act also refers to four other categories of water:

a "Surplus water" is water which flows in a public stream, but does not form part of the normal flow of that stream.[38] Normal flow is that quantity of water

30 Bouwer *op cit* 313 *et seq.*
31 *Union Government v Marais* 1920 AD 240 246; Vos *Principles of South African Water Law* 2 ed (1978) 24.
32 Hall and Burger *Hall on Water Rights in South Africa* 4 ed (1974) 102.
33 Hall and Burger *op cit* 101–104.
34 Vos *op cit* 20.
35 s 1 of the 1956 act.
36 *ibid.*
37 *ibid.*
38 *ibid*; see De Villiers "Water Law" 1922 *SALJ* 408–417 and "Water Law" 1923 *SALJ* 4–15 and 247–261 for a discussion of the term "surplus water."

flowing in a public stream which can be clearly and visibly seen.[39] If the public stream's flow is not derived from "springs, seepage of any kind, including return seepage from irrigated land, melting snow, the steady drainage from swamps, vleis, natural or indigenous forests, or other like sources of supply," the flow is not deemed to be natural flow and the water in that stream must be seen as surplus water.[40]

A riparian owner may, subject to existing rights, use as much of the surplus water of a public stream as he can for domestic purposes, for the watering of his stock, and for agricultural and urban purposes, provided that the water is used beneficially and is not wasted.[41]

b "Subterranean water" is water "naturally existing underground, or abstracted therefrom as is contained within areas declared to be subterranean water control areas."[42] The whole of chapter III of the act, except for section 30A, deals with this category of water.

c "Water found underground" is a category of water distinct from subterranean water.[43] Although this category of water is not defined in the act, one can assume that it is here referred to as water which also exists naturally underground but which is not included in a subterranean water control area. The act provides for the minister to dispose of such water for authorised purposes, but only after permission to do so has been obtained from the owner of such water, or if that owner has been expropriated.[44] Such water must therefore, even if only by implication, be categorised as private water.

d The fourth category of water is water obtained by artificial means on a landowner's property. Such water is deemed to be private water, provided that it is not obtained from a public stream.[45] Water obtained by means of a borehole will certainly fall into this category.

From this it can clearly be deduced that the act deals with ground water; the extent to which this is done, however, needs some clarification. Where ground water can be classified as public water, the question of the protection of rights and the protection of the source itself can be answered in terms of the act.[46] If, on the other hand, ground water is to be classified as private water, the questions relating to the problems connected with ground water cannot be answered by referring to the act.[47]

There can be no doubt that subterranean water, as defined by the act, forms part of what we call ground water or water existing under the earth's surface.

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39 *ibid*; see De Villiers "Water Law" 1921 *SALJ* 121–129 and 254–270 for a discussion of the term "normal flow."
40 s 53(2) of the 1956 act.
41 s 10(1) of the 1956 act.
42 s 27 of the 1956 act.
43 The heading of chapter III reads: "Control and Use of Subterranean Water and Water Found Underground."
44 s 30A of the 1956 act.
45 s 6(2) of the 1956 act.
46 The use of public water is regulated by s 7–21 of the 1956 act.
47 The use of private water is regulated by s 5 of the 1956 act. Private water may, subject only to certain provisions relating to the use of water for industrial purposes and the pollution of water in general, be used and enjoyed solely and exclusively by the owner on whose land such water is found.

A whole chapter of the act is set aside to regulate the use of such water. The extent to which the rights of users and the source as such is protected in terms of these provisions will be discussed in 4 1 2 below.

The rest of the water existing under the earth's surface must be seen as private water, provided that such water cannot be used for common irrigational purposes[48] or is not obtained from a public stream.[49]

4 1 1 The Use and Protection of Private Water in Terms of the Act

As was stated above, all ground water, except for subterranean water, is private water, provided that such water is not capable of common irrigational use or obtained from a public stream. In terms of the protection of rights and the protection of the source, this definition raises two problems.

First, it is simply not possible to use this definition to establish clearly whether a certain body of water is private or public. It might be possible to prove, with the aid of modern technology, that water flows in a known and defined channel or even that a certain ground water source is linked to a public stream. It will, however, be much more difficult to prove that such water is capable of common irrigational use. The latter is a quantitative test and it is not clear from the wording of the Act what the terms "capable" and "common" exactly mean. Neither is it clear on what scale a farmer's agricultural activities must be in order to qualify for water for irrigational purposes.[50] The problems which can arise as a result of this clumsy legal drafting are numerous. They have, indeed, led to a senior practitioner's stating:

> "[P]rivate water is water you had better not go to court about, for it may cost you more than it's worth. In fact it is not worth reading the Act to try and find out what it is. Grab the water on the principle of first come first served and put the onus on any claimant to the contrary."[51]

Secondly, if there is no doubt that if a certain source of ground water can be classified as private water, the act provides almost no protection to the users against possible abuse by other users, neither does it provide protection for the source against possible depletion by users.[52]

Therefore, even though the act deals with ground water, none of the problems connected with the use and protection of the source[53] is addressed in the act, except possibly for the provisions relating to subterranean water.

4 1 2 Subterranean Water

The state president may proclaim a subterranean water control area (SWCA) if the minister of water affairs (not the state president) deems it to be in the public interest, or if that area is in a dolomite or artesian area, or if he is of the opinion that the ground water in a certain area may be depleted.[54]

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48 s 1 of the 1956 act.
49 s 6(2) of the 1956 act.
50 Findlay "The Water Act and Private Water" 1973 *THRHR* 145–146.
51 Findlay 1973 *THRHR* 146.
52 s 5 of the 1956 act.
53 See 3 *supra*.
54 s 28(1) of the 1956 act.

The minister of water affairs may regulate the use of subterranean water in order to preserve it or just to prohibit its abstraction for purposes other than its preservation, as may be the case in dolomitic areas.[55] The owner of land in a SWCA may abstract and use subterranean water found under his land, but only for his own purposes and only on the land from which it was abstracted.[56] He may not alienate any of that water or use it outside the boundaries of his property, unless he has obtained a permit to do so from the minister.[57] This provision does not apply to the minister himself; he may convey, sell or otherwise use ground water found in any SWCA, wherever he wants to, as long as it is used for authorised purposes.[58]

All subterranean water is rebuttably presumed to flow or exist in defined channels.[59] The only possible reason for the existence of this presumption would be to facilitate proof that such water is public water. It is therefore strange that the characteristics of "known" channels and "capable of common irrigational use" are not also presumed.[60] It is, in any event, unnecessary to prove that subterranean water is private or public, since it is neither of the two and must be seen as a third category of water, artificially created by the legislator, which does not coincide with the general category of ground water.[61]

Only some of the problems discussed in 3 *supra*, namely those connected with over-pumping from aquifers, can be dealt with in terms of the provisions on subterranean water.

Ground water in general is, however, not protected by the act. It is therefore necessary to establish whether the source or the rights of users of that source can be protected by referring to the common law.

4 2 Protection in Terms of the Common Law

The common law provides no solution to the problems connected with over-pumping from an aquifer. The problem was not discussed by the Roman and Roman-Dutch scholars, neither has it been addressed by the South African courts.

4 2 1 Roman Law

The problem of well interference was recognised as such even by the Roman legal scholars. Ulpian refers to a judgment of Trebatius in which he stated that a landowner digging a well upon his own property and thereby cutting off his neighbour's water supply, cannot be held liable.[62] Ulpian also accepts the judgment of Marcellus who stated that no action can be brought against the land owner who, by excavating a well on his own land, interferes with the water in his neighbour's well, not even with an action brought on the grounds of malice.[63]

55 s 30(2) of the 1956 act.
56 s 30(1) of the 1956 act.
57 s 30(3) of the 1956 act.
58 s 30A of the 1956 act.
59 s 29 of the 1956 act.
60 Vos *op cit* 26.
61 Findlay 1973 *THRHR* 141.
62 *D* 39 2 24 12.
63 *D* 39 3 1 12.

Ulpian qualifies this somewhat broad statement by Marcellus by adding that the well must have been dug to improve the landowner's property, and not with the intent to injure his neighbour.[64]

Pomponius said that a landowner who diverted the course of underground water from his neighbour's ground cannot be sued with the interdict *quod vi aut clam*, if that neighbour was not, by servitude, entitled to the use of such water.[65]

The general rule in Roman law therefore seems to have been that a landowner may use the underground water found under his property, even to the extent of depriving his neighbour of that same supply of water. The only exceptions are related to the cases where the neighbour had the right, by servitude, to the use of that water,[66] or where the well was dug *animo vicino nocendi*.[67]

4 2 2 Roman-Dutch Law

Johannes Voet accepted the general rule as well as the two exceptions laid down in Roman law.[68] According to Groenewegen the doctrine of "intention to injure one's neighbour" was discarded in Roman-Dutch practice, because it was deemed by lawyers to be unworkable.[69] It seems, therefore, that there can be no doubt about the application in Roman-Dutch law, of the general rule laid down in Roman law. Of the two exceptions, the right of "contrary servitude" also seems to have been adopted without qualification, but there is a difference of opinion about the application of the *animo vicino nocendi* exception.

It remains to be seen to what extent the above principles have been received and adapted by South African courts.

4 3 Protection in Terms of South African Case Law

In *Vermaak v Palmer*[70] the general rule laid down in Roman law was accepted. It was, however, decided that where the water flows in a known and defined channel, the rule will not apply.[71]

Van Heerden v Wiese[72] recognised the general rule, subject to the limitation that such water does not form part of a public stream.

In *Struben v Cape Town Waterworks*[73] the court applied the general rule as qualified in *Vermaak v Palmer*. In referring to the statement made by Marcellus,

64 *ibid.* The interpretation given to this text, namely that Marcellus's statement is qualified by Ulpian, is also the interpretation given to it by Innes CJ in *Union Government v Marais supra* 247. In two earlier cases, *Struben v Cape Town Waterworks* 1892 9 SC 68 75 and *Meyer v Johannesburg Waterwork Co* 1893 1 Hertzog 10, the qualification was interpreted as being that of Marcellus himself. It is submitted that the interpretation given in the *Union Government* case is the correct one, since there is a distinct difference in the tenses used in the original Latin: "Denique Marcellus scribit, cum eo, qui in suo fodiens vicini fontem avertit, nihil posse agi, nec de dolo actionem; et sane non debet habere, si non animo vicino nocendi, sed suum, agrum meliorum faciendi id fecit."

65 *D* 39 3 21.

66 *ibid.*

67 *D* 39 3 1 12.

68 Voet 8 3 6 and 39 3 12.

69 Groenewegen *De Leg Abr* 39 3 12.

70 1876 Buch 25 30.

71 *ibid.*

72 (1880) 1 Buch AC 5.

73 (1892) 9 SC 68 74–75.

the court said that the only way malicious intent can be proved, is by showing that the offending landowner must have known that the ground water in contention flows in a known and defined channel.[74]

In *Meyer v The Johannesburg Waterworks Co*[75] the texts of Ulpian,[76] Pomponius[77]and Voet[78] were made subject to the rules of English law on the point. Kotze CJ stated:

> "The natural right to the flow of water is, however, only applicable to water flowing in some defined natural channel . . ."[79]

The court hereby accepted the qualification of the general rule as it was stated in *Vermaak v Palmer.*

De Villiers CJ formulated the general rule applicable in South Africa as follows:

> "The general right of a landowner to search for and appropriate underground water is undoubted, even if the result is that the spring or the well of a neighbour is reduced or altogether deprived of its supply of water."[80]

He also indicated three possible exceptions to this rule:

The first is where the cutting-off or interference took place *animo vicino nocendi.*[81] The qualification given to this statement in *Struben v Cape Town Waterworks* was questioned by the court. Although it was not decided whether this exception forms part of our law or not, it was remarked, *obiter*, that the exception was discarded by Groenewegen and by English law.[82]

Secondly, the possible exception of water flowing in a known and defined channel was discussed. The court questioned the rationale of *Struben's* case, in which this exception was based on the *animo vicino nocendi* doctrine. It was felt that it can be based only on the fact that an underground stream flowing in a known and defined channel, is analogous to a surface stream flowing in a known and defined channel. After referring to the English law, De Villiers JA stated:

> "An owner is debarred, as it seems to me, from cutting off the underground flow which goes to his neighbour in a known and defined channel, not because it would be malicious to do so, but because the underground known and defined channel is equated, in law, to a known and defined channel above ground. Accordingly if the stream flowing underground in a known and defined channel, possesses also the attribute of being capable of common use by the owners under whose land it flows, it would by Roman-Dutch law be comparable to a public stream and subject to similar rules."[83]

It is submitted that this argument is a logical one and more acceptable than the one used in *Struben's* case. This can therefore not be seen as an exception but must be seen as an illustration of the general principles applicable to the use of public water.

The third possible exception discussed was the case where a "servitude to the contrary" exists. It was decided that this does indeed form an exception to the

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74 *Struben v Cape Town Waterworks supra* 75.
75 1893 Hertzog 1 10.
76 *D* 39 3 1 12.
77 *D* 39 3 21.
78 Voet 8 3 6 and 39 3 12.
79 *Meyer v The Johannesburg Waterworks Co supra* 10.
80 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd* 1919 CPD 125 130 *et seq.*
81 *ibid.*
82 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd supra* 131.
83 *ibid.*

general rule and that it also forms part of our law. Furthermore, it was decided that, in order to debar a landowner from drawing ground water anywhere else on his property, the servitude must stipulate as much.[84] This exception was therefore qualified to the extent that where a servitude to the contrary exists, but does not stipulate clearly that the landowner is debarred from drawing ground water anywhere on his property, lest it should affect his neighbours' water supply, this may nevertheless be done even if it results in the depletion of the servitude holder's water supply, as long as the land owner could not have known that, by drawing the water elsewhere on his property, he would deplete the servitude holder's supply.

Innes CJ formulated the general rule applicable in South Africa as follows:

> "[S]ubterranean water,[85] percolating through private property, may be appropriated by the owner of such property, even though the process may be prejudicial to a neighbouring proprietor. But when we come to moving water we are confronted with another principle, namely, that water flowing in a defined channel and possessing the characteristics of a public stream is not susceptible of private ownership."[86]

This confirms the decision in the *Ohlsons Breweries* case, namely that ground water flowing in a known and defined channel does not form an exception to the general rule applicable to ground water, but indeed falls within the general principles applicable to public water.[87]

The first possible exception discussed above,[88] was questioned by Innes CJ for the same reasons as those put forward in the *Ohlsons Breweries* case. The court was, however, not prepared to discard the "high authority of Ulpian" and preferred to leave the matter undecided.[89] The court accepted the third exception discussed above,[90] because "it is adopted by Voet (39 3 4) and undoubtedly forms part of our law."[91] It was not decided whether the qualification given to this exception in the *Ohlsons Breweries* case,[92] likewise forms part of our law.[93]

The only other case to date in which the present matter was raised, added nothing to the points discussed above, except for concurring with the *Union Government v Marais* case, as far as the general rule applicable in South African law is concerned.[94]

Thus the position with regard to the protection of ground water rights in South Africa may be summarised as follows:

a The general rule laid down by the appellate division in *Union Government v Marais*, is that a landowner may abstract and use ground water percolating on his property as he wishes, even to the detriment of his neighbours.[95]

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84 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd supra* 146–147; by doing so the court accepted the ruling in two earlier cases: *Snyman v Boshoff* 1905 ORC 1 and *De Bruyn v Louw* 1905 ORC 11.

85 In the quoted passage subterranean water denotes the general category of ground water and not subterranean water in terms of the act.

86 *Union Government v Marais supra* 246 *et seq.*

87 See n 86 *supra.*

88 See n 81 *supra.*

89 *Union Government v Marais supra* 247.

90 See n 84 *supra.*

91 *Union Government v Marais supra* 247.

92 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd supra* 146–147.

93 *Union Government v Marais supra* 249.

94 *Ex Parte United Trust and Finance Co Ltd* 1931 per Watermeyer J 36.

95 *Union Government v Marais supra* 246.

b Ground water flowing in a known and defined channel which is capable of common irrigational use must not be treated as an exception to the general rule, but must be seen as falling within the principle relating to the use of public water.[96] Such water will have to be treated as surplus water, since it does not flow visibly.[97] The owner on whose property such water is found, may therefore use all that water for domestic, irrigational and other agricultural purposes, provided that there is no waste.[98]

c The only exceptions to the general rule are:

i A landowner is not allowed to interfere with his neighbour's flow of ground water with the intent to injure that neighbour. Even though malicious intent will be very difficult to prove, the exception has not been discarded by the appellate division and must therefore still be seen as part of our law, despite criticism levelled against it in the *Ohlsons Breweries* case.[99]

ii The exception of "contrary servitude" undoubtedly forms part of our law.[100] It must also be accepted that the qualification of this rule by De Villiers JA reflects the current position in South African law.[101]

It is clear from the above discussion that South African law does not provide sufficient protection either to the resource itself or to the users of the resource. The fact that South African water law and, in particular, ground water law, does not as yet reflect the increased technical knowledge about the inter-relationship between surface and ground water only exacerbates the problems experienced with the management of ground water as a resource.

Whether the provisions contained in the draft amendment bill will remedy the inadequate state of the law, remains to be seen.[102]

5 THE WATER AMENDMENT BILL 1986

The Water Amendment Bill (hereinafter referred to as the bill) has, according to its preamble, *inter alia*, as its objective to:

> "vest in the minister powers to control and exploit water in subterranean sources in certain areas in the public interest; to confer on the minister the power to exercise control in certain areas over the construction, alteration or enlargement of waterworks for the utilization of private water."

The minister will have wide powers of control over the use and abstraction of subterranean water. He will be able to declare a subterranean government water control area (SGWCA) if he deems it to be in the interest of the public to control such water.[103] The absolute right to use and control water found in a SGWCA

96 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd supra* 131.
97 According to s 1 of the 1956 act: "All water in a public stream other than normal flow is surplus water." One of the characteristics of normal flow is that the water must flow visibly; see Vos *op cit* 17.
98 Vos *op cit* 32.
99 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd supra* 130.
100 *Union Government v Marais supra* 247.
101 *Ohlsons Cape Breweries Ltd v Artesian Well Boring Co Ltd supra* 146–147.
102 The Water Amendment Bill, 1986 government notice 45 of 1986 in *Government Gazette* 10066 1986-01-17, hereafter referred to as the 1986 bill.
103 s 28(1) of the 1986 bill.

will vest in the minister.[104] The abstraction and use of subterranean water (being water found in a SGWCA) will be allowed only in three circumstances.[105]

In the first instance, a person will be permitted to use a quantity of subterranean water on the land controlled by him, which is equal to the quantity of water which he has used, annually, in the qualifying period,[106] prior to that piece of land becoming part of a subterranean government water control area.[107]

Secondly, the minister will also, after a SGWCA has been declared, be able to grant permission to the owner of land to abstract a certain quantity of subterranean water allocated to him, and to use it for such purpose as is set out in the permission.[108] However, if permission is asked for abstraction by means of a water-work which was in the process of being erected immediately prior to the declaration of a SGWCA, the minister will be bound to grant permission for the abstraction of such a quantity of water, which in his opinion, can be withdrawn with that water-work.[109]

In the third instance, the minister will have to make allocations as to the quantities of subterranean water which may be abstracted annually on land situated inside a SGWCA.[110] The minister will then have to publish a list of all the properties in relation to which the allocation has been made, the quantity of the allocation[111] and the conditions in terms of which it has been made.[112] The notice will also have to include a reference to the time during which existing waterworks may be used without authorisation in terms of section 32C.[113]

The minister will have the power to construct, alter, enlarge and use waterworks for the abstraction of subterranean water.[114] He will, however, not be able to exercise this right except in pursuance of a directive in terms of section 30(2), the provisions of section 30(1) or in terms of an authorisation granted under section 32(1).[115]

A person entitled to the use of subterranean water by virtue of the provisions of section 30(1), will be allowed to use an existing water-work for the abstraction of subterranean water.[116] The minister will, however, have the authority to instruct the owner of such a water-work to alter it at his own expense, to bring

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104 s 29 of the 1986 bill.
105 s 29(a) of the 1986 bill.
106 A qualifying period is defined in s 27 of the 1986 bill as "the period determined by the minister in respect of that area, which shall not be longer than 36 months, which immediately preceded the declaration of the area as a subterranean government water control area."
107 s 30(1) of the 1986 bill.
108 s 32A(1) of the 1986 bill.
109 *ibid.*
110 s 32B(1) of the 1986 bill; this must be done as soon as is practicable after the director-general of the department of water affairs has completed his survey into the quantity of subterranean water abstracted in such a SGWCA during the qualifying period (s 31), or after the survey into the occurrence of subterranean water in that SGWCA has been completed (s 32).
111 s 32B(2)(a) of the 1986 bill.
112 s 32B(2)(b)(ii) of the 1986 bill.
113 *ibid.*
114 s 29(b) of the 1986 bill.
115 *ibid.*
116 s 30(1) of the 1986 bill.

its abstraction capacity into line with the quantity of subterranean water he is entitled to in terms of section 30(1).[117] The minister will also be granted other far-reaching powers concerning the operation of waterworks.[118]

The conveying of abstracted subterranean water across the boundaries of the property on which it has been abstracted will not be permitted unless a permit is obtained from the minister.[119]

The minister, however, will be entitled to abstract any quantity of subterranean water from any property situated inside a SGWCA, by means of a government water-work, and to supply such water to any person on any property.[120] The minister will also be able to place restrictions on the use of subterranean water, over and above the allocations already made, if he thinks that there is a shortage or that there will be a shortage of subterranean water in a certain SGWCA.[121] It is further proposed that section 59 of the present act[122] should be amended by the insertion of a further subsection,[123] in terms of which the minister will be authorised to declare a certain area to be a government drainage control area, if he is of the opinion that the abstraction of subterranean water in that area will lead to a reduction of the water available in some public stream "inside a subterranean government water control area."[124] No person will be allowed to abstract water inside a government drainage control area except with the prior permission of the minister.[125]

Why the legislator has found it necessary to distinguish between a SGWCA and a government drainage control area is unclear. The same effect, namely effective management of the use of subterranean water, could have been obtained by having only the SGWCA. The reason for the qualification given to the class of public streams affected by the provision in section 5 of the bill, namely a public stream "inside a subterranean government water control area," is even more unclear. Numerous legal problems are bound to arise around this provision. For example: where a certain stream flows in and out of a SGWCA, how is it going to be determined which portion of the stream's water outside the SGWCA will be affected by the abstraction of ground water once it is inside the SGWCA?

The problem of affecting the water in public streams by depleting ground water sources could have been easily, and less confusingly, undercut by inserting in section 28 after the words

> "if he is of the opinion that it is desirable in the public interest that the abstraction, use, supply or distribution of subterranean water in the area be controlled"

the words

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117 s 30(2) of the 1986 bill.
118 The following sections of the 1986 bill apply: s 32C(1)(a) concerning the altering of an existing water-work; s 32C(2)(a)(i–iii) concerning the removing of an existing water-work; s 32C(3)(a) concerning the adjusting of an existing water-work.
119 s 32D(1) of the 1986 bill.
120 s 32E of the 1986 bill.
121 s 32F of the 1986 bill.
122 Act 54 of 1956.
123 s 5 of the 1986 bill.
124 *ibid.*
125 s 6 of the 1986 bill.

> "or if he is of the opinion that the abstraction and use of subterranean water in that area will result in the depletion of the water of a public stream."

In any event, it is submitted that the powers to be conferred upon the minister in terms of section 28, namely to declare a SGWCA in the public interest, are wide enough to cover the control of ground water in such an area for whatever reason, including the protection of the water supply found in a public stream.

The bill does not, unfortunately, alter the existing state of ground water law in South Africa. It will only confer wider powers concerning public management and use of subterranean water found in a SGWCA than the powers the minister already has in terms of the present act. Ground water remains private water, except where it is found in a SGWCA, when it is called subterranean water; this does not alter the present position at all. The proposed creation of government drainage control areas will only complicate the matter further and it remains to be seen how this arrangement can achieve a purpose other than that which could have been accomplished with the system of SGWCA.

It is conceded that the powers to be conferred upon the minister in terms of the proposed bill will facilitate control over the use of ground water in certain areas. The legislator has also recognised that ground water and surface water are in some way connected to each other. It does not, however, seem as if the full meaning of this relationship has been grasped as yet. The problem of well interference also remains untouched and the unsatisfactory situation regarding the protection of private ground water will remain unaltered. It is submitted that within the framework of the present philosophy of the Water Act and also of the bill, these problems could be addressed in future by the South African legislator on the following basis:

a by recognising that ground water and surface water are hydrologically connected and that they therefore cannot be separated for management purposes;

b by recognising the problems connected with well interference, over-pumping from an aquifer and the depletion of ground water to its fullest extent;

c by introducing a uniform categorisation of all ground water (for instance the re-defining of the term "subterranean water") and the classification of such water as private, except where it is found in a SGWCA, when it should be deemed to be public water.

It must be stressed that the creation of additional categories of water should be avoided, as in the present situation where one finds "surface" and "underground" water, which may be public or private, as well as "subterranean" water. Public water should be defined as all water flowing in known and defined channels which is also capable of common irrigational use by the riparian owners as well as all subterranean water found inside a SGWCA. The latter should thus be termed public for the sole reason that it is found inside a SGWCA and not because of other characteristics which can easily be discerned in surface water, but not as easily in underground water.

It is submitted that the best policy, however drastic, would be to define all ground water, namely water found under the surface, as public water and to deal with such water as is presently proposed for water found inside a SGWCA.

It should then also be possible to use the SGWCA system to facilitate the management of the use of subterranean water in areas where the problems discussed above have been identified. This could be accomplished by, *inter alia*:

a the spacing of wells to undercut the problem of well interference;

b the allocation of quantities of water in order to undercut the problem of over-pumping from an aquifer; and

c prohibiting the pumping of subterranean water where and when such pumping is likely to result in either the depletion of ground water sources or the depletion of surface water.

South Africa, as an arid country which finds itself in the midst of a population explosion, cannot afford to squander any available water, whether that water is found above or below the surface. The proposed Water Amendment bill will not provide the solution to the problem, but it represents an important beginning of a new attitude towards the utilisation of ground water. The bill must therefore be welcomed in spite of its shortcomings.

So komt het ook uit den aangebooren aart voort, dat, doorgaans der Wyven geslagt, uit een ingeschapen swakheit, minder bequaam zynde tot saken van verstand en oordeel, als het geslagt der Mannen (Van Leeuwen *R–H–R* 39).

A confession for a concession

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OPSOMMING

Pleitonderhandeling

Die artikel bespreek die aard en voorkoms van sogenaamde "plea bargaining" of pleitonderhandeling. Aan die hand van etlike moontlike omskrywings word dié verskynsel in die strafprosesreg toegelig, en dit blyk dat onderskei kan word tussen uitdruklike en stilswyende pleitonderhandeling. Die voor- en nadele wat pleitonderhandeling inhou vir die beskuldigde, sy regsverteenwoordiger, die vervolging en die gemeenskap, word ondersoek. Voorts word die rol wat die voorsittende beampte in pleitonderhandeling mag speel, onder die loep geneem. Aan die hand van 'n regsvergelykende uiteensetting van die verskynsel in Kanada, Engeland, die Verenigde State van Amerika, Nederland, Australië en Suid-Afrika, word die effek van 'n pleit van skuldig op vonnis in hierdie lande se regstelsels bespreek. Daar word tot die gevolgtrekking geraak dat ten spyte van die oënskynlike voordele wat pleitonderhandeling mag inhou, 'n daadwerklike moontlikheid bestaan dat reg en geregtigheid nie noodwendig seëvier nie. Daar word aan die hand gedoen dat 'n stelsel van pleitonderhandeling nie in die Suid-Afrikaanse strafprosesreg aanwending behoort te vind nie, solank die nodige regsinstansies en -prosedures optimaal uitgebou en benut word. Dit is egter noodsaaklik dat 'n omvattende, empiriese ondersoek na die verskynsel van pleitonderhandeling onderneem word, alvorens 'n finale standpunt daaroor ingeneem kan word.

INTRODUCTION

Although the concept and practice of plea bargaining do not form part of South African criminal procedural law, it is a well-known and recognised phenomenon among most legal practitioners in this country. Plea bargaining is not new, but is, for the most part, an unmentioned phenomenon, which could be likened to a

> "mysterious ghost freely strolling the halls of our criminal courts, no one knowing exactly what it is or what force it carries, and no one daring to ask for fear the answer might reveal that which we would rather leave unknown."[1]

The lack of research on and reference to this subject in South African legal writings[2] may suggest that it does not occur in our legal practice, yet it cannot

1 Ferguson "The Role of the Judge in Plea Bargaining" 1972 *Crim LQ* 30; Sallmann and Willis *Criminal Justice in Australia* (1984) 76.

2 Barton "Standards for the Acceptance of a Plea of Guilty – a Comparative Evaluation of Section 112(1)(b) of Act 51 of 1977, Part 1" 1981 *SACC* 212 *et seq*, although touching on the subject, does not *per se* deal with plea bargaining; Isakow and Smit "Negotiated Justice and the Legal Context" 1985 *De Rebus* 173; Smit and Isakow "The Decision on How to Plead: A Study of Plea Negotiation in Supreme Court Criminal Matters" 1986 *SACC* 3.

be denied that aspects of plea bargaining do emerge in many instances of informal pre-trial deliberation between prosecution and defence in South African criminal litigation.[3] This article is not an attempt to discuss the merits of introducing or formally recognising the concept of plea bargaining in our law of criminal procedure. The nature and purposes of this concept in relation to South African legal parallels will briefly be examined, in an endeavour to shed more light on "the vexed question of so-called 'plea bargaining'."[4]

HISTORICAL PERSPECTIVE

Tracing the real origin of plea bargaining is not as simple as finding the origin of the label in the courts' records for the first time, because "throughout history the punishment to be imposed upon wrongdoers has been subject to negotiation."[5] Dogmatically, the real origin of plea bargaining is permanently lost somewhere in unrecorded history, and furthermore, if a researcher were fortunate enough to find the original case, he would have no way of recognising it as such.[6] The practice of negotiating a plea, however, appears to have originated from practical considerations (a weak case for the prosecution or defence, a full court calendar, time, and so on), and was until recently considered to be unconstitutional in the United States of America.[7] Although not formally recognised, plea bargaining is also practised in South Africa, the United Kingdom and other Commonwealth jurisdictions.[8]

DEFINITIONAL PERSPECTIVE

One approach to the phenomenon of plea bargaining is to consider definitions found in the literature and to examine their provisions. Plea bargaining has variously been defined as

a the process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval;[9]

b an attempt by counsel to minimise the effect of rigid categorisation of criminal offences and multiple charging of offences by the police;[10]

c the process by which the accused in a criminal case relinquishes his right to go to trial in exchange for a reduction in a charge or sentence;[11]

d the exchange of prosecutorial and judicial concessions for pleas of guilty;[12] and

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3 Barton 1981 *SACC* 217: "Where the plea relates to a lesser offence, the reasons which prompt a South African prosecutor to accept such an offer are not any different from these which might encourage his American counterpart to bargain."
4 Lord Parker CJ in *R v Turner* 1970 2 All ER 281 at 285.
5 Wishingrad "The Plea Bargain in Historical Perspective" 1974 *Buffalo LR* 499.
6 Schoenthaler *Plea Bargaining: Causes, Development and its Relationship to Sentencing and Caseload* (PhD dissertation (1980) University of New York at Buffalo) 107.
7 The supreme court decisions in *Brady v United States* 397 US 742 (1970) and *Parker v North Carolina* 397 US 790 (1970) dispelled any doubts that plea bargaining was unconstitutional.
8 Litton "Plea Bargaining, an Injustice or Necessary Evil?" in *Papers of the 7th Commonwealth Law Conference* Hong Kong (1983) 37.
9 *Black's Law Dictionary* (1979) *s v* "plea bargaining."
10 Ruby *Sentencing* (1980) 75.
11 Heumann *Plea Bargaining* (1978) 1.
12 Alschuler "The Prosecutor's Role in Plea-Bargaining" 1968 *Univ of Chicago LR* 50.

e the disposition of criminal charges by agreement between the prosecutor and the accused.[13]

It should be evident from the above that the definition of plea bargaining offers a wide variety.[14] It is extremely difficult to give a short and accurate definition of plea bargaining, because the term can be used to describe many different situations and relationships.[15] For the sake of accuracy and clarity, it is necessary to differentiate between plea bargaining and a plea bargain.[16] Plea bargaining is an active negotiation *process*, while a plea bargain is a type of *agreement* between the accused and some agent of the state, usually a prosecutor.[17] Thus only when the undertakings of the parties have received court approval and have been fulfilled, has the bargain been concluded.[18] Furthermore, the words "bargain" and "bargaining" have certain drawbacks, because they tend to imply that a party is getting a good "deal" which is perceived as being unfair from the public's point of view.[19]

> "They believe the accused often receives a lighter sentence than is merited by the crime. From the accused's point of view, the state is getting the good 'deal' by forcing him to plead guilty at the risk of receiving a stiffer penalty."[20]

Schoenthaler accordingly prefers to replace the phrase "plea bargain" with "plea agreement" and to replace "plea bargaining" with "plea negotiation."[21] It should also be noted that plea bargaining is not the same as "disposition bargaining," because in the latter instance the accused does not enter a plea of guilty and is allowed to walk out free, since either the prosecutor or the presiding officer has dismissed the case.[22] Ferguson and Roberts divide plea bargaining into two major categories, namely express and tacit.[23] In tacit plea bargaining, a guilty plea is entered, without actual or express negotiation, for a benefit which the accused expects or hopes to receive because he believes that courts will frequently reward an offender who has pleaded guilty with a lighter than normal sentence. In express plea bargaining, however, actual or overt negotiation culminates in the accused's exchanging his plea of guilty for some apparent benefit.[24] According

13 *Santobello v New York* 404 US 257 (1971).

14 See also the definitions of Baily and Rothblatt *Successful Techniques for Criminal Trials* (1985) 65; Ferguson 1972 *Crim LQ* 29; Schoenthaler 66; Clark "The Public Prosecutor and Plea Bargaining" 1986 *Australian LJ* 199.

15 Ferguson and Roberts "Plea Bargaining: Directions for Canadian Reform" 1974 *Can Bar R* 509 point out that plea bargaining is not a monolithic concept although much of the discussion and debate surrounding the practice is carried on as if it were.

16 Schoenthaler 16.

17 *ibid.*

18 See, however, Miller, McDonald and Cramer *Plea Bargaining in the United States* (1978) 1.

19 Schoenthaler 17; Vetri "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas" 1964 *Univ of Pennsylvania LR* 865. It is not surprising that Parker "Copping a Plea" 1972 *Chitty's LJ* 310 observed that the phenomenon of plea bargaining was regarded as a "dirty little secret."

20 Schoenthaler 17.

21 Ferguson 1972 *Crim LQ* 26, however, points out that the American bar association has recommended that the less pungent terms "plea discussions" and "plea agreements" should be used, while it has criticised the use of the terms "plea negotiation," "trading out" and "the compromise of criminal cases," since all these terms tend to imply that these practices are either evil or at least something less than proper.

22 Schoenthaler 18.

23 1974 *Can Bar R* 509.

24 Ferguson and Roberts 1974 *Can Bar R* 509; Litton 38; Heumann 158.

to Ferguson and Roberts, express plea bargaining has at least three constant elements, namely

> "(a) there will always be a plea of guilty to one or more charges, (b) a bargain, that is, the benefit offered, will only be granted if the accused agrees to plead guilty, and (c) the bargain must result from express or overt negotiation."[25]

Furthermore, express plea bargaining has five variable elements, which may be stated by posing the following questions:[26]

1 *Where* does it occur? Plea bargaining may be carried on anywhere.[27]

2 *When* does it occur? Plea bargaining may be carried on at any time prior to conviction.[28]

3 With *whom* does it occur? The accused may bargain with the prosecutor, the police, the presiding officer and the victim or some other interested party. In this regard, Clark refers to "charge bargaining," involving discussions between the crown and an accused's advisers concerning charges, and to "sentence indication bargaining" where the trial judge participates in the said discussions, indicating the probable sentence that will be imposed should the accused plead guilty.[29]

4 In exchange for *what* does it occur?[30] The *quid pro quo* nature of plea bargaining or the benefit an accused receives in exchange for a guilty plea may range from a reduction in the charge to a lesser offence; a withdrawal of other charges or a promise not to proceed on other possible charges; a recommendation or a promise as to the type of sentence that can be expected (fine, imprisonment, corporal punishment); a promise not to apply for a harsher penalty; a promise not to mention at the time of sentencing any aggravating circumstances of the offence or not to mention a previous criminal record; a promise to arrange for sentencing before a particular presiding officer whose sentencing policies are lenient;[31] to a promise not to oppose release or bail or release after conviction but before sentence. Davis is of the opinion, however, that whatever the form, and whatever the reasons behind any particular bargain, its underlying effect is always on sentencing.[32]

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25 1974 *Can Bar R* 509 *et seq.* They point out that the second constant element should not be confused with a discussion of the appropriate charge in relation to the strength of the evidence. Thus, in other words, a charge reduction in exchange for a guilty plea is plea bargaining, unless the prosecutor would have reduced the charge regardless of whether or not the defendant agrees to plead guilty.

26 Ferguson and Roberts 1974 *Can Bar R* 509–510.

27 Ferguson 1972 *Crim LQ* 30; Ferguson and Roberts 1974 *Can Bar R* 511–512.

28 Ferguson and Roberts 1974 *Can Bar R* 512; Bailey and Rothblatt 66; Thomas "An Exploration of Plea Bargaining" 1969 *Crim LR* 70; Purves "That Plea-Bargaining Business: Some Conclusions from Research" 1971 *Crim LR* 473.

29 Thomas 1969 *Crim LR* 73; Ferguson and Roberts *Can Bar R* 513; Heinz and Kersetter "Victim Participation in Plea Bargaining: A Field Experiment" in McDonald and Cramer (eds) *Plea bargaining* (1980) 167 *et seq*; Clark 1986 *Australian LJ* 200; Sallmann "The Role of the Victim in Plea Negotiations" in Grabosky (ed) *The National Symposium on Victimology Adelaide 1981* (Australian Institute of Criminology) (1982).

30 Ferguson and Roberts 1974 *Can Bar R* 513–514; Vetri 1984 *Univ of Pennsylvania LR* 866; Clark 1986 *Australian LJ* 199.

31 Alschuler "The Defense Attorney's Role in Plea Bargaining" 1975 *Yale LJ* 1235 refers to this practice as "judge shopping."

32 "Sentences for Sale: A New Look at Plea Bargaining in England and America" 1971 *Crim LR* 151.

5 *Why* does it occur? The reasons or motivations for express plea bargaining are numerous and differ depending on the point of view of the parties concerned. Basically the reasons which motivate prosecutors to enter into plea bargaining are the administrative need to prevent further caseload backlogs, the attempt to gain an accused's co-operation in the prosecution of others, and the uncertainty that there is proof beyond a reasonable doubt to sustain a conviction on the more serious charge.[33] The accused's motivation for plea bargaining is much clearer. The primary reason is the hope of a lenient sentence, or the desire to avoid the publicity of the trial, the label that goes with some crimes (for example sexual crimes), or the disabilities that go with a serious crime record.[34] Counsel for an accused may bargain to get the best deal for his client or for the unethical purpose of quickly disposing of an unwanted, unprofitable or difficult case.[35]

There is no express agreement in tacit plea bargaining. There is only an unspoken assumption by the accused that the judge will sentence him more leniently on a plea of guilty than if he is convicted after trial.[36]

ADVANTAGES AND DISADVANTAGES OF PLEA BARGAINING

Another approach to plea bargaining is to consider its advantages and disadvantages to the accused, the prosecutor, society and defence counsel. The advantages of plea bargaining may be briefly summarised as follows:

Advantages of Plea Bargaining

Advantages to the accused[37]:

a The accused will usually receive a more lenient sentence than upon conviction after trial, either because the prosecutor agrees to recommend a more lenient sentence and the presiding officer accepts the prosecutor's recommendation, or because the charge has been reduced or other charges withdrawn and therefore the sentence is likely to be less on the lesser charge or remaining charge.

b Plea bargaining may result in a less severe stigma or label if a charge is reduced or withdrawn as a result of the bargain, for example where a charge of rape is reduced to indecent assault, or indecent assault to common assault.

c Some public disgrace or notoriety for the accused, his family and friends is avoided.

d Plea bargaining results in a faster disposal of cases, and that is advantageous to the accused, especially when he is being held in pre-trial custody.

e Plea bargaining is advantageous to the accused who does not qualify for legal aid, since it may result in the avoidance of expensive legal fees that would be incurred for a defence at trial.

f Plea bargaining removes the inevitable risks and uncertainties of trial.

g Plea bargaining is advantageous to the accused because the admission of guilt is seen as the first step towards rehabilitation.

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33 Davis 1971 *Crim LR* 219.
34 Davis 1971 *Crim LR* 219–220.
35 Ferguson and Roberts 1974 *Can Bar R* 514; Anschuler 1974 *Yale LJ* 1181–1182.
36 Litton 38; Ferguson 1972 *Crim LQ* 31.
37 Ferguson and Roberts 1974 *Can Bar R* 526–533; Thomas 1969 *Crim LR* 70; Bailey and Rothblatt 66–67.

h Plea bargaining gives the accused the opportunity to participate in and to influence the sentencing process.

Advantages to or motivations for the prosecutor:[38]

a Plea bargaining results in the efficient disposal of cases to prevent a caseload backlog.

b Plea bargaining secures a conviction, albeit on a lesser charge, where there is doubt as to the strength of the evidence for the state.

c Plea bargaining gives the prosecutor the flexibility to avoid harsh laws, and the opportunity to do justice to the victim, the accused and society.

d Plea bargaining may be motivated by a good professional relationship between the prosecutor and defence counsel, thereby avoiding unnecessary legal sparring in court.

e In some instances, for example, rape cases, it may be advantageous to the victim's long-term psychological well-being if the giving of his or her evidence can be avoided.

Advantages to society:[39]

a Plea bargaining saves a great deal of time, saves the taxpayer the expense of a costly trial, and expedites the trial of other cases, thereby allowing for proper consideration to be given to serious cases.

b Plea bargaining aids law enforcement by allowing leniency in exchange for the accused's co-operation in the arrest of other offenders.

Advantages to defence counsel:[40]

a Defence counsel can appear in more cases, and thus earn more money.

b If the plea bargaining fails, defence counsel will in the meantime have discovered a good deal of information about the prosecution's case.

c Defence counsel can build a reputation for himself as an honest, trustworthy practitioner who will not waste a court's time.

It is submitted that the above advantages of plea bargaining are, in fact, advantages of guilty pleas and not of plea bargaining as such. The above advantages can be secured without resorting to plea bargaining. Furthermore, the alleged advantages secured by way of plea bargaining are accompanied by very serious disadvantages to the administration of criminal justice.[41]

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38 Ferguson and Roberts 1974 *Can Bar R* 533–539; Bailey and Rothblatt 66; Vetri 1964 *Univ of Pennsylvania* 865; McDonald, Rossman and Cramer "The Prosecutor's Plea Bargaining Decisions" in McDonald (ed) *The Prosecutor* (1979) 151; Smit and Isakow 1986 *SACC* 18; Clark 1986 *Australian LJ* 210.

39 Ferguson and Roberts 1974 *Can Bar R* 539–541; Thomas 1969 *Crim LR* 70; Note "Official Inducements to Plead Guilty: Suggested Morals for a Marketplace" 1964 *Univ of Chicago LR* 167.

40 Ferguson and Roberts 1974 *Can Bar R* 541–542; Buckle and Buckle *Bargaining for Justice* (1977) 152; Alschuler 1975 *Yale LJ* 1179; Litton 44; Bailey and Rothblatt 71; Smit and Isakow 1986 *SACC* 18.

41 Ferguson and Roberts 1974 *Can Bar R* 539; Clark 1986 *Australian LJ* 210: "In relation to charge bargaining it cannot be said with any degree of certainty that the advantages outweigh its disadvantages."

Disadvantages of Plea Bargaining[42]

a Plea bargaining adversely affects the voluntariness of a guilty plea.

b It brings discredit to the administration of criminal justice, because it may create the impression that justice can be "bought" and that the system can be manipulated.

c It places defence counsel in a dilemma, because while striving to maintain a good relationship with prosecutors he must nevertheless always serve the best interest of his client. The ethics of legal practitioners who develop a financial interest in disposing of cases by pleading guilty, in order to pursue another brief, become questionable.

d It leads to "overcharging."

e It allows prosecutors to usurp the sentencing function of the courts.

f It results in unjustifiable sentencing disparity.

g It tends to suppress important legal issues and rights.

h It contributes to an aura of corruption in the administration of justice.

i It results in illogical charge concessions, for example where a murder charge is reduced to culpable homicide, while the facts point to intent.

j It has a demoralising effect on the police if their case has been "bargained away."

k It frustrates the pursuit of the truth, so that the truth may never be known.

l It results in more appeals, based on the fact that the judge is not bound by the plea bargain and may impose a heavier sentence than that bargained for.

m It seriously affects court administration, because it makes it difficult to plan a court roll, and thus results in a court not being occupied for the whole day.

n It circumvents the aim of prescribed sentences for specific offences.

o "Plea bargaining is inherently destructive of the values of the trial process, for it is designed to prevent trials. The practice forfeits the benefits of formal, public adjudication; it eliminates the protection of individuals provided by the adversary system and substitutes administrative for judicial determination of guilt; it removes the check on law enforcement authorities afforded by exclusionary rules; and it distorts sentencing decisions by introducing non-correctional criteria."[43]

p It may lead to the increase in the likelikhood of innocent persons being convicted.

q It may pave the way for the possibility that involvement of the judge may well lead to an erosion of the cardinal feature of the adversarial system, namely, the presumption of innocence.

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42 Ferguson and Roberts 1974 *Can Bar R* 542–554; Litton 44; Davis 1971 *Crim LR* 154; Bailey and Rothblatt 66; Purves 1971 *Crim LR* 473; Thomas 1969 *Crim LR* 74.

43 Note "The Unconstitutionality of Plea Bargaining" 1970 *Harvard LR* 1397–1398. See also Barton "Standards for the Acceptance of a Plea of Guilty – a Comparative Evaluation of Section 112(1)(b) of Act 51 of 1977, Part 2" 1982 *SACC* 66: "A desire to establish the basis of a guilty plea is not easily reconciled with the bargain on which the plea is based. A bargain implies concessions in which the facts are changed or modified to suit the formulation of the charge that results from the bargain."

JUDICIAL PLEA BARGAINING

Judicial plea bargaining, or judicial participation in plea bargaining, encompasses

> "direct involvement with prosecutors, defence counsel, or defendants in preplea discussion involving charge or sentence considerations for the defendant in exchange for a plea."[44]

Ferguson and Roberts distinguish between express and tacit judicial plea bargaining.[45] Under the former practice the presiding officer participates directly, with or without the prosecutor, in bargaining with the accused or his counsel for a plea of guilty, while under the latter practice there are no direct negotiations, but the accused nevertheless thinks that it is court policy to give a lighter sentence and therefore pleads guilty.[46] Some authors are of the opinion that judicial plea bargaining is proper and should not be prohibited, because [47]

a bargaining conducted or presided over by a judge may be less subject to administrative pressures than bargaining between prosecutor and accused;

b judicial plea bargaining may produce a sentence more appropriate to the crime;

c judicial plea bargaining reduces the opportunity for the prosecutor to use coercive tactics;

d judicial plea bargaining is necessary in order to maintain the high flow of guilty pleas which are said to be essential in preventing a backlog of cases;

e the prohibition of judicial plea bargaining will create further delays in the disposal of criminal cases, because a presiding officer who rejects a proposed bargain at plea arraignment will have to grant another remand to give the parties a chance to make a more appropriate bargain; and

f the bargain would be certain.

Other authors, however, maintain that judicial plea bargaining is improper and should be banned, because[48]

a it would destroy the accused's and the public's view of the judiciary as independent and fair arbiters, aloof from "secret deals" and incorruptible;

b a presiding officer who bargains, may lose his objectivity and impartiality;

c it may result in a presiding officer's binding himself to an inappropriate sentence at a time when he does not have all the relevant sentencing information; and

d an accused could find it too difficult to reject a judicially offered bargain in fear that his rejection would result in a harsher sentence.

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44 Cramer, Rossman and McDonald "The Judicial Role in Plea Bargaining" in McDonald and Cramer (eds) *Plea-Bargaining* (1980) 141; see also Alschuler "The Trial Judge's Role in Plea Bargaining, Part 1" 1976 *Colorado LR* 1059; Smit and Isakow 1986 *SACC* 12 *et seq*; Clark 1986 *Australian LJ* 200 refers to "sentence indication bargaining."

45 1974 *Can Bar R* 554–563.

46 Tacit prosecutorial and judical plea beginning are similar. See also Whitman "Judicial Plea Bargaining" 1967 *Stanford LR* 1082; Note "Restructuring the Plea Bargain" 1972 *Yale LJ* 296.

47 Ferguson 1972 *Crim LQ* 48.

48 Ferguson and Roberts 1974 *Can Bar R* 556–558; Clark 1986 *Australian LJ* 210.

WITNESS INDEMNITY AND PLEA BARGAINING

The undertaking either not to prosecute or to prosecute on a lesser charge in return for a person's giving evidence in the trial of another person (usually a co-accused) can, according to Clark[49], be categorised as a form of plea bargaining. In South Africa, provision is made by section 204 of the Criminal Procedure Act 51 of 1977 for a court to grant discharge from prosecution to a witness who has frankly and honestly answered all questions put to him which may have incriminated him. As the prosecution is in no way involved with the decision to grant discharge from prosecution, and because the court is not obliged, in terms of a prior undertaking, to grant discharge to a witness, it is submitted that the process provided for by the said section 204 cannot, at least in the South African context, be described as a form of plea bargaining.

COMPARATIVE ANALYSIS OF THE EXISTENCE OF PLEA BARGAINING

Canada

Although plea bargaining is not as common as in the United States of America, it is an accepted practice in Canada.[50] After discussing several Canadian cases, Ferguson and Roberts come to the following conclusions with regard to plea bargaining in Canada:

a The phenomenon of plea bargaining is not entirely unknown in Canada.

b The presiding officer, more often than not, will follow the prosecution's recommendations as to sentence, and were it not for such recommendations, sentences would be greater.

c Presiding officers frequently ignore the appropriateness of the prosecution's charge reductions.

d While Canadian courts have recognised instances of plea bargaining, they have failed to discuss and analyse the practice.

e The Canadian courts have failed to analyse the issue of the voluntariness of guilty pleas resulting from plea bargaining.[51]

The Alberta supreme court, appellate division, has, however, specifically dealt with judical plea bargaining. In *Regina v Wood* 26 C C C (2d) 100 108 McDermid JA stated:

> "There is no place in the sentencing procedure for hole-and-corner bargaining . . . There may be occasions when a Judge is justified in receiving matters in private from counsel, but such seldom occur. An example can be found in *R v Turner*, (1970) 2 All ER 281, where it is stated that counsel would be justified in telling the Judge in private that an accused was suffering from terminal cancer and it was not in the interest of the accused that he should know this . . . However, in my opinion, a Judge should take no part in any discussion as to sentencing before a plea has been taken, and all the circumstances in regard to the particular case have been placed before him, then having listened to the submission of counsel he should give his decision. To take part in a discussion of sentencing prior to a plea being taken would constitute a grave dereliction of duty . . . For a Judge in Alberta to take any part in what has been called 'plea bargaining' is, in my opinion, quite improper."

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49 1986 *Australian LJ* 211.
50 Ruby 76.
51 1974 *Can Bar R* 507–509.

The Law Reform Commission of Canada is also of the opinion that plea bargaining cannot be justified:

> "To decide upon a defendant's guilt or sentence in accordance with what he's prepared to accept and bargain for, is like determining a students' grade by reference, not to the work he's done, but the bribe he's offered his professor. If the professor hasn't time to assess all his students' work, we either need fewer students or more professors. Likewise, if the courts' case-loads are too big to get through without plea-bargaining, then we may need more courts, fewer prosecutions or better procedures. Limit the scope of criminal law... and make good use of the diversionary option, and the problem may well solve itself. Meanwhile, plea-bargaining is something for which a decent criminal justice system has no place. There has to be a trial."[52]

England

Although plea bargaining as it is practised in the United States of America is non-existent, studies indicate that it is more common than is generally thought.[53] There is, according to Davis, no evidence of "bargains" being transacted in any quantifiable number in the English courts, which are completely intent on retaining their discretion, both as to determining the level of criminal culpability of those who come before them, and as to sentencing.[54] In *R v Atkinson* (1978) 1 WLR 425 at 428, Lord Justice Scarman (as he then was), stated:

> "Plea bargaining has no place in the English criminal law. It is found in some systems of law in which the prosecution is entitled to make submissions as to the character or length of sentence. In such systems it is possible for a bargain to be driven between the defence and prosecution, but never, so far as my researches have gone, with the court itself."

Most authors, however, are of the opinion that the observations made in *R v Turner supra*, although not itself a case involving plea bargaining, are the prevailing guidelines for plea bargaining in England.[55] In *R v Turner*, Lord Parker CJ made the following observations to help presiding officers and counsel to deal with plea bargaining.:

> "1 Counsel must be completely free to do what is his duty, namely, to give the accused the best advice he can, and if need be advice in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case. Counsel, of course, will emphasise that the accused must not plead guilty unless he has committed the acts constituting the offence charged.
>
> 2 The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.
>
> 3 There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and the defence and counsel for the prosecution. If a solicitor representing the accused is in the court he should be allowed to attend the discussion if he so desires. This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them in open court. Purely by way of example, counsel for the accused may by way of mitigation wish to tell the judge that

52 1974–1975 *Fourth Annual Report* 14.

53 Litton 36 *et seq*; Purves 1971 *Crim LR* 470 *et seq*; Baldwin and McConville "Conviction by Consent: A Study of Plea Bargaining and Inducements to Plead Guilty in England" 1978 *Anglo-American LR* 271 *et seq*.

54 1971 *Crim LR* 228.

55 Litton 37 *et seq*; Thomas "Plea Bargaining and the Turner Case" 1970 *Crim LR* 559; Adams "The Second Ethical Problem in *R v Turner*, the Limits of an Advocate's Discretion' 1971 *Crim LR* 252.

the accused has not long to live, is suffering maybe from cancer, of which the accused is and should remain ignorant. Again, counsel on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence. It is, of course, imperative that, so far as possible, justice must be administered in open court. Counsel should therefore, only ask to see the judge when it is felt to be really necessary and the judge must be careful only to treat such communications as private where, in fairness to the accused person, this is necessary.

4 The judge should subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that, on a plea of guilty, he would impose one sentence but that, on a conviction following a plea of not guilty, he would impose a severer sentence, is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, are in the experience of the court happily rare. What on occasions does appear to happen, however, is that a judge will tell counsel that, having read the depositions and the antecedents, he can safely say that, on a plea of guilty, he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of not guilty. Even so, the accused may well get the impression that the judge is intimating that, in that event, a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done. The only exception to this rule is that is should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e g a probation order or a fine, or a custodial sentence. Finally, where any such discussion on sentence has taken place between judge and counsel, counsel for the defence should disclose this to the accused and inform him of what took place."[56]

The guidelines laid down in *R v Turner supra* were *obiter dicta*, but nevertheless they were rapidly accepted by the legal profession in England and remain good today[57] despite the decision in *R v Cain*,[58] when the court of appeal resiled somewhat from *R v Turner supra*.[59] The court of appeal, however, quickly corrected itself by a practice direction[60] stating that *R v Cain supra* had been subject to further consideration, and that in so far as it was inconsistent with *R v Turner supra*, the latter should prevail.

United States of America

America has been described as the birthplace of plea bargaining.[61] Since the decisions in *Brady v United States supra* and *Parker v North Caroline supra*, plea bargaining has been accepted as a constitutional and, in fact, necessary practice.[62] In *Santobello v New York*[63] plea bargaining was actually referred to as an "essential component of the administration of justice." Under rule 11 of the federal rules of criminal procedure:

56 *supra* 285.
57 Litton 39; see also *R v Stanley Grice* (1977) Cr App R 167; *R v Eccles* 1978 *Crim LR* 757; *R v Ibrahim* 1980 *Crim LR* 386.
58 1976 *Crim LR* 464–465; Clark 1986 *Australian LJ* 201.
59 Seifman "The Rise and Fall of Cain" 1976 *Crim LR* 556; Mitchell (ed) *Archbold: Pleading, Evidence and Practice in Criminal Cases* (1982) 223–225.
60 1976 *Crim LR* 561.
61 Davis 1971 *Crim LR* 225. See also, in general, Bond *Plea Bargaining and Guilty Pleas* (1983); Mather *Plea Bargaining or Trial?* (1979); Utz *Settling the Facts* (1978).
62 Davis 1971 *Crim LR* 218; Litton 41; Bailey and Rothblatt 65 *et seq*; Torcia (ed) *Wharton's Criminal Procedure* 2 (12th ed) 244 *et seq*; Isakow and Smit 1985 *De Rebus* 173.
63 *supra* 260.

> "The attorney for the government and the attorney for the defendant or the defendant when acting *pro se* may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of *nolo contendere* to a charged offence or to a lesser or related offence, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges;
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.
>
> The court shall not participate in any such discussions."[64]

Judicial plea bargaining has been approved by some judges,[65] while others have criticised the practice. In *United States ex rel Elksnis v Gilligan*[66] Weinfeld J made a scathing attack on judicial plea bargaining and stated:

> "A bargain agreement between a judge and a defendant . . . has no place in a system of justice. It impairs the judge's objectivity in passing upon the voluntariness of the plea when offered. As a party to the agreement upon which the plea is based, he is hardly in a position to discharge his function of deciding the validity of the plea."

The position appears to be that, although the American judge is not an active party to the plea bargaining, he should examine the terms of, and circumstances under which, a plea agreement has been made.[67] He may indicate, however, whether he will concur in the proposed disposition and advise the defendant of the consequences of the plea and also determine that a factual basis for it exists.[68] The judge may refuse to accept a plea, but if he rules that he cannot accept the state's recommendation as to sentence, the defence should be permitted to withdraw its plea.[69]

While criticising judicial plea bargaining, Weinfeld J indicated that prosecutorial bargaining need not necessarily be prohibited. The acceptance of the respectability of the bargained plea by the judiciary and the passing of rules of criminal procedure such as rule 11 of the federal rules of criminal procedure, has led to a much higher incidence of plea bargaining in America,[70] so that a plea bargaining system can be said to exist in America.[71]

The Netherlands

A system by which prosecuting or police officials may enter into a "transaction," or agreement, with an accused, was introduced by section 74 of the Netherlands' penal code.[72] In terms of a "transaction," prosecuting authorites decline to pros-

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64 This is, however, only the federal position. The 52 States each hold their own ideas on the subject. See Clark 1986 *Australian LJ* 203 for the standards, developed by the American bar association, to be applied where a plea of guilty is entered.

65 *United States ex rel Rosa v Follette* 395 F 2d 721 (1968) 725; *United States ex rel Mc Grath v La Vallee* 319 F 2d 308 (1963) 315.

66 256 F Supp 244 (SDNY 1966) 255.

67 Torcia 244.

68 Note 1970 *Harvard LR* 1390.

69 *United States ex rel Culbreath v Rundle* 466 F 2d 730 (1972).

70 Thomas 1969 *Crim LR* 72–73.

71 Baldwin and McConville 1978 *Anglo-American LR* 272; see Note 1970 *Harvard LR* 1390 for the American bar association standards relating to pleas of guilty.

72 See Sagel-Grande "Die in den Niederlanden nicht zur richterlichen Aburteilung gelangende Kriminalität und ihr Umfang" 1985 *Monatschrift für Kriminologie und Strafrechtsreform Heft* 4–5 215 *et seq.*

ecute an accused, who in turn complies with certain conditions, including the payment of a fine determined according to tariffs in relation to the degree of seriousness of the particular crime.[73] Transactions may be concluded only in respect of crimes which do not carry a maximum sentence of more than six years' imprisonment, and may be initiated by either party. After compliance with the conditions, an accused may not be prosecuted for the same crime, save under exceptional circumstances.[74] Primarily designed to create swifter legal procedures for the disposal of lesser or petty crimes, the system has the same advantages as those resulting from plea bargaining. Sage-Grande points out that the system has added a further dimension to the functions of prosecuting authorities, to wit effectively combating petty and moderate crime.[75]

Australia

As has been pointed out by Clark,[76] one is at a considerable disadvantage in having little empirical knowledge on which to rely when discussing the practice of plea bargaining in its various forms in Australia. According to him, it is clear from the limited research that has been conducted that "charge bargaining" (discussions between the crown and an accused's advisers concerning charges) is a not uncommon phenomenon, whereas "sentence indication bargaining" (discussions where the trial judge participates and indicates the probable sentence that will be imposed in the event of the accused pleading guilty), whilst considered objectionable, does on rare occasions occur.[77]

South Africa

The position where an accused pleads guilty to a charge is governed by section 112 of the Criminal Procedure Act 51 of 1977. This procedure has a strong inquisitorial nature[78] and is intended to establish both the voluntariness of the plea,[79] and whether the accused admits all the elements of the crime. In terms of section 112(1) the prosecutor may accept a plea on a competent lesser charge.[80] According to Van der Merwe, Barton and Kemp[81] a court should proceed in terms of section 112 only where nothing has been placed in dispute between the accused and the state. This situation can arise only where the accused has pleaded guilty to the main charge or where he has pleaded guilty to an alternative or lesser charge and the prosecutor has accepted the plea, thus withdrawing the charge to which the accused has pleaded not guilty. The reasons for withdrawing

73 Generally, the tariffs set by the five attorneys-general of the Netherlands are 20% below the amount of the fines they would propose in court – Sagel-Grande 1985 *Monatschrift für Kriminologie und Strafrechtsreform* 223.

74 e g where an aggrieved party lays a formal complaint within three months after conclusion of a "transaction" – Sagel-Grande 1985 *Monatschrift für Kriminologie und Strafrechtsreform* 222.

75 1985 *Monatschrift für Kriminologie und Strafrechtsreform* 224.

76 1986 *Australian LJ* 200; 211.

77 Also see the observations by Clark 1986 *Australian LJ* 200–204, on the existence of systems of plea bargaining in England, Scotland and the United States of America.

78 Van der Merwe, Barton and Kemp *Plea Procedures in Summary Criminal Trials* (1983) 13–14.

79 See *Chetty v Cronje* 1979 1 SA 294 (O); *Lutchmia v S* 1979 3 SA 699 (T).

80 See *S v Nyambe* 1978 1 SA 311 (NC).

81 43.

such a charge may be a result of deliberation between the prosecutor and the defence.

Plea bargaining may have played a role in *S v Ngubane*.[82] It was clear from the record that, when called upon to plead to the indictment for murder, the accused pleaded guilty to culpable homicide after his counsel had told the court that the prosecutor was prepared to accept the plea.[83] The accused was, however, convicted of murder with extenuating circumstances. On appeal a "special entry" was made on his application by the presiding judge:

> "Whether the effect of the prosecutor's willingness to accept a plea of guilty to culpable homicide had the effect of reducing the charge from murder to one of culpable homicide and whether the Court therefore acted irregularly in adjudicating on the charge of murder".[84]

Jansen JA found that a plea as envisaged by section 112 of the Criminal Procedure Act

> "must be seen as a *sui generis* act by the prosecutor by which he limits the ambit of the *lis* between the state and the accused in accordance with the accused's plea. Whether one in a case such as the present speaks of amendment, withdrawal or abandonment of the murder charge does not really seem to matter. That the *lis* is restricted by acceptance of the plea appears from section 112 and 113. The proceedings under the former are restricted to the offence 'to which he has pleaded guilty' and the latter must be read within that frame. In my view the question posed in the 'special entry' must be answered in the affirmative."[85]

Thus, if it seems that plea bargaining has taken place in a case like *S v Ngubane*, then the prosecutor and defence can bargain for the court, because it is bound by the agreement reached between the prosecutor and the defence. It is apparent that aspects of plea bargaining do emerge in many instances of informal pre-trial deliberation between prosecution and defence in South Africa, but it cannot be said that a plea bargaining system exists. Although it can be argued that the discretion vested in a prosecutor in terms of section 57(1)(a) of the Criminal Procedure Act to endorse a summons issued against an accused under section 54 of the same act to the effect that the accused may admit his guilt and pay a fine without appearing in court, is open to abuse for plea bargaining, it is submitted that a prosecutor's discretion in terms of section 57(4) of the act to reduce "on good cause shown" an admission of guilt fine imposed under section 56, is based on the *sequitur* that upon payment of the reduced fine the accused acknowledges guilt. Given the *sui generis* nature of proceedings under section 56 of Act 51 of 1977, there seems to be no question of negotiating a plea. It can, however, be argued that if the prosecutor fixes the admission of guilt fine *after* a defendant has been summoned to appear in court, it is the result of plea bargaining, because the advantages and disadvantages of plea bargaining enumerated above seem to be present. However, much of what may be said about plea bargaining in South Africa is speculation, assumption or pious hope, because there is a dearth of empirical research on the subject.[86]

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82 1985 3 SA 677 (A).
83 *S v Ngubane supra* 681–682.
84 *S v Ngubane supra* 681.
85 *S v Ngubane supra* 683.
86 Smit and Isakow 1986 *SACC* 3.

EFFECT OF GUILTY PLEAS ON SENTENCE

Canada

In Canada a guilty plea has been acknowledged as a factor that must be taken into consideration to mitigate the sentence.[87] It was, however, decided in *R v Spiller*[88] that this principle was not one of universal application.[89] Thus, in Canada, it appears that the sentencing differential on guilty pleas is small and non-automatic.[90]

England

In England leniency on a guilty plea is not automatic.[91] In *R v Davies*[92] the court of appeal required evidence of real remorse and repentance as well as the plea. In *R v Turner*[93] the court assumed that "a plea of guilty, showing an element of remorse, is a mitigating factor." "Remorse" has, however, never been judicially analysed, but presumably something more than "an elegant plea in mitigation by counsel" is required.[94]

United States of America

In America leniency on a guilty plea is automatic.[95] In practice American courts almost invariably reward guilty pleas with leniency, even without looking for evidence of actual remorse or any other mitigating factor, because it is assumed that the plea itself is a token of remorse.[96]

The Netherlands

As indicated above, a defendant who enters into a "transaction" may expect to pay 20% less than he would probably be fined in court.

South Africa

The question whether in South African law a plea of guilty entitles an accused to a more lenient sentence, remains open. Such leniency, whatever the answer may be, is always based on the penitence and contrition showed by an accused. A plea of guilty is usually considered to be an indication of such contrition.[97] In Natal[98] it was decided that a guilty plea automatically entitled an accused to a more lenient sentence, whereas in the Transvaal[99] a mere plea of guilty was not in itself regarded as a mitigating factor.

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87 *R v Carriere* (1952) 14 CR 391: *R v de Haan* (1967) 52 Cr App R 25.
88 (1969) 4 CCC 211 at 215.
89 Ruby 173–175.
90 Ferguson 1972 *Crim LQ* 51.
91 Davis 1971 *Crim LR* 152.
92 1965 *Crim LR* 251.
93 *supra* 285.
94 Litton 38; Davis 1971 *Crim LR* 152.
95 Note "The Influence of Defendant's Plea on Judicial Determination of Sentence" 1957 *Yale LJ* 204; Litton 38; Davis 1971 *Crim LR* 153.
96 Davis 1971 *Crim LR* 153; Vetri 1964 *Univ of Pennsylvania LR* 869.
97 Snyman and Morkel *Strafprosesreg* (1985) 496; Hiemstra *Strafprosesreg in Suid-Afrika* (1981) 576.
98 *R v Mvelase* 1958 3 SA 126 (N) at 127.
99 *R v Mtataung* 1959 1 SA 799 (T) at 800.

CONCLUSION

In view of the aforegoing, it is submitted that the following conclusions may be drawn:

1 "The practical effects of a plea bargain flow fairly equally in four directions: to the defendant, a reduction in sentence; to the prosecution, the certainty of a conviction; to the court, an immense saving of time, and to the public purse, the cost of a trial."[100]

2 It is axiomatic that justice must not only be done, but must manifestly be seen to be done.[101] Therefore the courts must always ensure that nothing occurs which may create the impression that there is any impropriety, let alone any corruption or a somewhat underhand method of administering justice, in connection with the conduct of any judicial proceeding.[102]

3 "The problem of induced guilty pleas illustrates a compelling problem that pervades the criminal process: the tension between the need for effective and efficient administration on the one hand, and the need for protection of the . . . rights of the defendant on the other. Pursuit of the one invades the other."[103]

4 The intention of plea bargaining is, in principle, sound, namely to speed up the administration of justice and to mitigate the harshness of heavy sentences. Plea bargaining, however, does not always operate to the benefit of the just disposition of criminal cases, because it can give rise to great inequalities of treatment:

> "[S]entences are often decided, not according to the merits of the case, but according to the relative strength or weakness of the defence or prosecution as determined often by legally or socially irrelevant considerations."[104]

Indeed,

> "it may be said that where plea bargaining is an established part of the judicial system, justice is no longer blind, but has one eye open to the right offer . . . Between the honourable good intention theoretically behind plea bargaining, the required relation of charge to offence, and the force of sheer marketplace haggling, there is room for many ills."[105]

5 Since the decision in *S v Ngubane supra*, an apparently anomalous situation has arisen in South African criminal procedural law which allows for the court to be bound in respect of a set of facts, after charges have been put to an accused. Although it could not have been the intention of the legislature in formulating section 112 of Act 51 of 1977, to provide for the sanctioning of plea bargaining under certain conditions, this phenomenon is in fact a real possibility where the prosecutor is competent to bind the court by restricting the *lis* between the prosecution and the accused *after* the latter has pleaded. It is conceded that instances of the kind foreseen would not commonly occur in practice, but a miscarriage of justice resulting from an inexperienced or unethical prosecutor's action under the provisions of section 112, is theoretically possible (compare the facts in the *Ngubane* case, if it were to have been found that the killing by the accused was in fact intentional).

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100 Litton 37.
101 See the words of Lord Hewart in *The King v Sussex Justices* (1924) 1 KB 256 259; *Slade v The Pretoria Rent Board* 1943 TPD 246; *S v Adoons* 1986 (1) PH H9 (O).
102 Klein "Plea Bargaining" 1971–72 *Crim LQ* 293.
103 Note 1964 *Univ of Chicago LR* 187.
104 Baldwin and Mc Conville 1978 *Anglo-American LR* 288.
105 Litton 43.

6 In the other countries, the presiding officer is never bound by any discussion or bargain in law, because "neither the lawyer nor the prosecutor can bargain for the court."[106]

7 "The extent of plea bargaining is difficult to determine; not only because of the silence surrounding the practice and the variations . . . but also because statistics on the number of guilty pleas are not that helpful since all guilty pleas are not negotiated."[107]

8 There is no system of plea bargaining in South Africa, and it is submitted that under South African law there is no place for the concept of plea bargaining in criminal procedure. Proper evaluation by prosecutors of evidence and witnesses for the state, progressive planning and expansion by the relevant government authorities in respect of manpower and facilities for the administration of justice and above all, the desire that the truth may emerge in every case before a criminal court, could ensure that there will be no need for plea bargaining. What the legal profession in South Africa does not need, is an attitude of hypocrisy mixed with indifference, based on the "widely held believe (*sic*) that, like nice girls in a bygone era, '*we* don't do things like that'."[108]

9 Because of the fact that pre-trial deliberations between a prosecutor and a defence lawyer do, however, commonly take place in the South African criminal law system and, as illustrated in *S v Ngubane*, these often result in the acceptance by the prosecution of a plea on a lesser competent charge, useful insights may be gleaned from the guide-lines proposed by Clark[109] for prosecutors in Australia. As indicated by him, the formulation of guide-lines used to be predicated on the principle that in some circumstances it is permissible to enter into plea negotiation, go no further than what is currently regarded as acceptable practice and is amenable to amendment in the light of empirical research highlighting aspects of the practice which would require particular consideration. These guide-lines should not be issued separately, but form part of general prosecution guide-lines. In essence, Clark proposes that under no circumstances should a charge bargaining proposal be initiated by the prosecution. Such a proposal by the defence should furthermore not be entertained by the prosecution unless (i) the charges to be proceeded with bear a reasonable relationship to the nature of the criminal conduct of the accused; (ii) those charges provide the basis for an appropriate sentence in all circumstances of the case; and (iii) there is evidence to support the charges. If such guide-lines were to be implemented, a system of checks and balances would need to accompany principles such as those outlined above. Ideally, a prosecutor should consult a senior within the office of (in the South African context) the particular attorney-general to determine whether the offer of the defence in relation to plea should be accepted.

Before any final assessment can be made of the practice of plea negotiation in South Africa, more empirical information must be gathered to clarify its extent and consequences. Until such time, as has been submitted in paragraph 8 supra, there is no reason why the present criminal procedure cannot adequately deal with the circumstances give rise to plea negotiation, if the circumstances which facilitate the proper working of criminal procedure are present.

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106 *Cortez v US* 337 F 2d 699 (1964).
107 Ferguson 1972 *Crim LQ* 30.
108 Litton 37; Isakow and Smit 1985 *De Rebus* 174.
109 1986 *Australian LJ* 211–213.

AANTEKENINGE

DISSENSUS, REASONABLENESS AND CONTRACTUAL LIABILITY

In recent years it has apparently come to be accepted in the South African law of contract, particularly as developed by the courts, that contractual liability in so far as it exists in the absence of real consensus, is determined with reference to the reasonableness of the conduct of the contractants. For this purpose the courts generally employ the concept of *iustus error*. In the process one frequently finds reference to the rôle of fault as well as to the phrase *caveat subscriptor*. In a recently reported case on this topic (*Standard Credit Corporation Ltd v Naicker* 1987 2 SA 49 (N)) *caveat subscriptor* and fault were in fact called "principles" which are applicable in these situations (52H–53C). It has been suggested elsewhere (1986 *THRHR* 352) that the approach of the courts to matters of *apparent* contractual agreement is indicative of the viewpoint that *actual consensus* is regarded as the basis of contract in principle, not for the sake of mere dogma but for the more fundamental reason that a contract reflects and gives effect to certain values in society. The basic value which underlies the approach of the courts seems to be private autonomy. In exceptional cases, however, the courts are willing to go beyond the confines of private autonomy in the strict sense by considering whether it is reasonable in all the circumstances of a particular case to give effect to apparent consensus.

This could be supported by recent decisions on the topic such as the *Standard Credit* case and *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 917 (T). In the latter case Greyling tendered to purchase erf no 651 from the housing commission for R8 200,00. The executive committee of the commission decided to accept the tender. In the letter of acceptance the erf being sold was described as erf 652. This erf was in fact substantially bigger and more valuable than erf 651. In due course a deed of sale was drawn and signed. The *res vendita* was described with reference to and in accordance with its description in the letter of acceptance, namely erf 652. When the seller discovered its mistake and refused to transfer erf 652, Greyling asked the Witwatersrand local division to order the seller to transfer erf 652 to him. The order was granted and the housing commission appealed.

The court per Schabort J found that there was no consensus relating to erf 652. The question whether Greyling as purchaser could nevertheless enforce a contract of sale was dealt with on the basis of *iustus error*.

Schabort J, in determining whether the seller's mistake was reasonable, inquired whether the respective contractants were "at fault," specifically referring to the decision in *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W). He found that the seller had not acted with the necessary care ("die vereiste mate van sorgsaamheid" 926C) in wording the letter of acceptance.

The judge then went on to consider whether Greyling's conduct in the circumstances was that of a reasonable man. The court's conclusion was that a reasonable man would not have acted as Greyling had. As a matter of fact Greyling was substantially to blame (927E) for perpetuating the mistake even into the deed of sale. This led the court to conclude that the mistake of the housing commission was reasonable (*iustus*).

In *Standard Credit Corporation v Naicker* defendant was sued in the magistrate's court on a document which he had signed. According to the appellant (plaintiff) the document was intended as an instalment sale agreement. The respondent (defendant) pleaded that he had signed the agreement of sale in the belief, induced by the fraud of third parties, that he was signing a suretyship agreement. This the appellant did not deny, but it submitted that the respondent could rely on its unilateral mistake only if it could prove that mistake to have been reasonable. The court held that the respondent's mistake had in fact not been reasonable and that he was accordingly bound by the agreement of sale. To reach this conclusion Milne JP, who delivered the judgment of the court, attached particular weight to the respondent's age, general development, the fact that he knew that he was signing a legal document, the fact that he actually intended to sign the document and that he had signed opposite the very word "purchaser" without taking the trouble to read it. The court called this "the application of the *caveat subscriptor* principle" which the court equates with the concept of "quasi-mutual assent" (521I). The court in this case also accepted the applicability of the fault principle in so far as a mistake could be reasonable if it was due to a misrepresentation by the other party to the contract. However, if the mistaken party himself was negligent, his error may well not be reasonable, as was the case here.

These two decisions again raise the question of the exact relation between the reasonableness of an error, representations, fault and *caveat subscriptor*.

If one accepts the suggestion referred to above, that the courts do not (any longer?) adhere to a strictly logical application of actual consensus as the basis for contractual liability, but have made that principle reflective of a more general policy concerning the true function of contractual liability, the requirement of a reasonable mistake acquires perspective: considerations such as fault and *caveat subscriptor* must then be understood, not as principles and maxims as such, but as "mere" factors which are relevant to the decision whether a party should be held bound in contract in the absence of actual consensus.

The "fault principle," for example, may develop into something wider than fault *strictu sensu*, so as to include "carelessness" or "inadvertence" ("onagsaamheid") in the wider sense of the word. Then the degree of "fault" of one party may well be compared with and weighed against the degree of "fault" of the other party. In *Horty Investments v Interior Acoustics supra*, Coetzee J, in applying the "fault principle" expressed himself in such a way that he apparently used the concept of fault in the strict sense of the word ("Only a very naive person, which Ackhurst may possibly be, could possibly have thought that there was no typing error... Certainly not a reasonable man" 541I–542A). Coetzee J apparently also did not attempt to compare the degrees of fault of the contractants, but assumed that fault on the part of the contractant who seeks to hold the mistaken party to the contract necessarily makes the latter's error *iustus* (540B–541G). This would mean that a mistaken party who was himself at fault

(even seriously so) could still prove his error to have been excusable if he could show the slightest degree of fault on the part of the other contractant (cf the remarks in 1984 *TSAR* 293–294).

The approach to the "fault principle" in *Horty's* case seems to be an obstacle to the sort of development envisaged above. In the *Standard Credit* case, however, the court, in deciding whether the defendant was "negligent," referred specifically to the personal circumstances and characteristics of Naicker: he had only a standard 7 education, had worked as a waiter and had trained as a carpenter – nevertheless "he was not a complete simpleton" (50I). Such an approach is more in line with the point of view (which speaks from both the *Standard Credit* and the *Nasionale Behuisingskommissie* case) that the "fault principle" should not be understood in its usual meaning of a requirement for liability, but that it is rather a part of a more general process, namely determining whether the mistake was *iustus*.

In *Nasionale Behuisingskommissie v Greyling*, moreover, the court in fact compared the degree of care ("sorgsaamheid" 926C) of the commission's employees with that of Greyling ("optrede . . . van 'n redelike man" 926E). Schabort J's conclusion that the commission's error was *iustus* was based on what he described not simply as fault but as *substantial contributing* "blame" ("wesenlike bydraende blaam" 927E).

Clearly one should not read too much into the words of the court in the *Nasionale Behuisingskommissie* and *Standard Credit* cases as far as broadening the application of *iustus error* is concerned. Should the courts indeed develop the law in this direction, it could lead to a proper fusion of the *iustus error* approach and the principle of consensus which the courts have repeatedly expressed to be the basis of a contract. The concept of *iustus error* could easily be interpreted and applied in such a manner that emphasis is placed on the formal aspects of contractual agreement, namely the *declarations* by means of which the parties purported to express their intentions. Important as these declarations may be as a *practical* starting point for determining the intention of the parties, they should not be emphasised to the extent that they distract the attention from the true underlying *principle*, namely *consensus*.

A "doctrine" of reasonable mistake would then not deviate from the principle of consensus. It would rather be a limitation of the logical consequences of a material mistake in an attempt to effect a just solution between the parties. Thus, for example, a mistaken contractant who acted with a large degree of carelessness would not necessarily be excused if his co-contractant acted with a lesser degree of carelessness.

By the same token, the reference to *caveat subscriptor* would actually be a reference not to a principle or maxim but to a typical set of facts (signature, knowledge of the general nature of the transaction etc) pointing to unreasonable conduct (1986 *THRHR* 352). Likewise the fraud of a third party which caused a contractant to conduct himself in a particular way, could be a factor which influences the decision about the reasonableness of his mistake. In such an event the discussion in the *Standard Credit* case (51–52) of the effect of the fraud of a third party would not be regarded as having expressed a general principle that such fraud could never be relevant to the issue of *iustus error*.

Such an interpretation of the meaning of *iustus error* could supplant that very concept inasmuch as contracts could simply be based either on actual consensus or on a reasonable reliance of consensus (see 1984 *TSAR* 290 *et seq*; *Nasionale Behuisingskommissie v Greyling* 927E–F). Whatever course the courts choose to follow, the determination of reasonableness would seem to be a normative process. This kind of development would, of course, not stand in the way of a reliance on estoppel to hold a party bound to the semblance of consensus if all the requirements can be proved (*Standard Credit v Naicker* 52G–H).

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DIE OMSKRYWING VAN MENSEROOF/*KIDNAPPING* AS MISDAAD

In die onlangs (en uiters beknop) gerapporteerde saak van *S v Els* 1986 1 PH H 73 (A) (wat terloops die eerste Suid-Afrikaans gerapporteerde appèlhofbeslissing oor menseroof as misdaad daarstel) verwys appèlregter Trengove na Snyman *Strafreg* (1981) 426 en Hunt *South African Criminal Law and Procedure* (1982) 509 se omskrywings van menseroof/*kidnapping* met dié opmerking:

> "Daar is blykbaar onder sommige van ons hedendaagse skrywers nog steeds meningsverskil oor die vraag of kinderdiefstal slegs 'n verskyningsvorm van menseroof is . . . en of dit 'n aparte misdaad is . . . maar vir die onderhawige doeleindes is dit nie nodig om hieroor uitsluitsel te gee nie."

Dat die omskrywing van menseroof/*kidnapping* nog 'n onuitgemaakte saak in ons strafreg is, is inderdaad so. Word Snyman en Hunt se omskrywings van dié misdaad egter vergelyk met die regsgoed wat dit volgens hulle veronderstel is om te beskerm, blyk daaruit 'n aantal probleme en inkonsekwensies. Snyman *Strafreg* (1986) —

a klassifiseer menseroof onder die "misdade teen die bewegingsvryheid" (504);

b definieer dié misdaad as

> "die wederregtelike, opsetlike ontneming van 'n persoon se vryheid van beweging en/of, indien so 'n persoon 'n kind is, die wederregtelike, opsetlike ontneming van 'n ouer se beheer oor die kind" (t a p);

c verkies die benaming "menseroof" bo "kinderdiefstal" omdat "'n [m]enslike wese . . . nie die voorwerp van diefstal [kan] wees nie" (505); en

d verklaar dat "kinderdiefstal nie 'n aparte misdaad is nie, maar slegs 'n verskyningsvorm van menseroof" (t a p).

Die onhoudbaarheid van Snyman se standpunt kan aan die hand van die volgende twee vrae aangedui word:

a As 'n minderjarige met *intellectus et judicium* hom of haar vrywillig uit die beheer van sy of haar ouers of voogde laat neem, wie se bewegingsvryheid word geskend en wat word dan van kinderdiefstal en daarmee gepaardgaande die beskerming van ouerlike of voogdelike gesagsregte waar die minderjarige die beskuldigde teen hulle sin en wil vergesel?

b As "kinderdiefstal" as misdaadnaam nie deug nie omdat 'n mens nie "gesteel" kan word nie, hoe deug "menseroof" dan waar die begrip "roof" gangbaar

diefstal deur middel van geweld of dreigemente van geweld beteken en dus, streng gesproke, nog verder van die kol is omdat nòg geweld nòg dreigemente van geweld 'n vereiste vir menseroof is?

Met die voorgaande vrae word vanselfsprekend nie ontken nie dat kinderdiefstal vanuit 'n terminologiese oogpunt 'n *species* van die *genus* menseroof uitmaak as 'n mens van die veronderstelling uitgaan dat die begrippe "diefstal" en "roof" vir doeleindes van die misdade onder bespreking albei bloot 'n ontnemingshandeling aandui. Wat Snyman egter uit die oog verloor, is dat hierdie terminologiese eenduidigheid geensins die tweeledigheid van die regsgoed wat deur menseroof en kinderdiefstal beskerm word en daarmee die tweeledige omskrywing van dié misda(a)d(e) ophef nie. Wat dus op die oog af na 'n maklike uitweg lyk om 'n monistiese misdaad uit menseroof en kinderdiefstal saam te stel, onderstreep inderdaad die dualistiese aard daarvan.

Minder problematies, maar uiteindelik ook onbevredigend is Hunt se benadering tot wat hy "*kidnapping*" noem (509). Hunt verklaar dat dié misdaad twee regsgoedere beskerm, te wete persoonlike bewegingsvryheid en ouerlike beheer oor minderjarige kinders (508). Dit en sy definisie van *kidnapping* as "unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control" (509) bring weliswaar die dualistiese aard van dié misdaad skerper na vore as dié van Snyman, maar lei eweneens tot anomalieë. Letterlik geneem, beteken *kidnapping* niks anders nie as *childnapping*, wat op sy beurt weer as kinderdiefstal of kinderontvoering omskryf word (sien bv die *Oxford Universal Dictionary*), en is dit gevolglik 'n enger begrip as menseroof, wat man, vrou en kind insluit. Afgesien daarvan, gaan dit by *childnapping* om die beskerming van ouerlike of voogdelike gesagsregte as beskermde regsgoed, soos blyk uit die feit dat as 'n minderjarige met *intellectus et judicium* die beskuldigde vrywillig maar teen die sin en wil van sy of haar ouers of voogde vergesel, dié misdaad nog steeds gepleeg word; 'n punt wat Hunt (508 512; sien ook Snyman 506) trouens self maak.

Kortom, hoe 'n mens die saak ook al wend of keer, die deurmekaarklits van menseroof en kinderdiefstal lewer geen bevredigende resultate op nie. Die gebrek aan 'n behoorlike onderskeid tussen hierdie twee misdade aan die hand van die aard van die regsgoed wat daardeur beskerm word, het dan ook in ons gerapporteerde regspraak allesbehalwe eenduidige omskrywings opgelewer (sien daaroor Van Oosten en Labuschagne "Die Plagiariese en Raptoriese Misdade" 1978 *De Jure* 32 251 vn 168 252 vn 169). Trouens, die wisselwerking tussen die omskrywings van ons skrywers en dié van ons regspraak het soms tot onversoenbare eienaardighede gelei. So is die omskrywing van Gardiner en Lansdown *South African Criminal Law and Procedure* 1 (1957) 1588, wat wesenlik met dié van Hunt en Snyman ooreenstem, enersyds in *Mncwango v R* 1955 1 PH H 2 (N) en *R v Patikele* 1958 4 SA 377 (N) 378 as gesaghebbend aanvaar, maar andersyds in *S v Levy* 1967 1 SA 351 (W) 352 353 as verwarrend verwerp. In die *Levy*-beslissing (352 353 354) is De Wet en Swanepoel *Die Suid-Afrikaanse Strafreg* (1960) 255 se omskrywing van "vryheidsberowing" as die "wederregtelike, opsetlike ontneming van die vryheid van 'n ander" as die korrekte omskrywing van *kidnapping* aanvaar, maar is hulle omskrywing van kinderdiefstal as die

> "onttrekking van 'n kind uit die ouerlike gesag met die doel om self die ouerlike gesag oor die kind uit te oefen of voordeel uit die besit van die kind te trek" (455)

as strydig met die geldende reg verwerp. Die probleem met die *Levy*-beslissing is egter dat dit aan die een kant De Wet en Swanepoel se omskrywing van vryheidsberowing as die korrekte omskrywing van *kidnapping* aanvaar, maar dan aan die ander kant, lynreg in stryd met die standpunt van De Wet en Swanepoel dat vryheidsberowing en kinderdiefstal twee aparte misdade daarstel, kinderdiefstal by die omskrywing van *kidnapping* insluit. Om sake verder te bemoeilik, is sowel De Wet en Swanepoel se omskrywing van kinderdiefstal as Hunt ("Kidnapping" 1967 *SALJ* 270 275) se omskrywing van *kidnapping* (wat terloops dieselfde is as dié wat in sy aangehaalde werk hierbo voorkom) in *S v Blanche* 1969 2 SA 359(W) 360 as gesaghebbend aanvaar; en dit terwyl Hunt se omskrywing, anders as dié van De Wet en Swanepoel, vryheidsberowing insluit en De Wet en Swanepoel se omskrywing, anders as dié van Hunt, die bedoeling om self die ouerlike gesag oor die kind uit te oefen of om voordeel uit die besit van die kind te trek, vereis.

Dat die heersende regsposisie met betrekking tot die omskrywing van menseroof hoogs verwarrend is, behoef in die lig van die voorgaande nouliks enige betoog. Die blote feit dat menseroof en kinderdiefstal deur een en dieselfde daad gepleeg kan word, regverdig net so min die vereenselwiging van hierdie twee misdade met mekaar as wat die feit dat laster en *crimen iniuria* of roof en afpersing – om maar twee voorbeelde te noem – in gegewe omstandighede tegelykertyd gepleeg kan word, die saamgooi van laster en *crimen iniuria* of roof en afpersing onder een sambreel sou regverdig. Gevolglik word daar, in navolging van De Wet en Swanepoel, aan die hand gedoen dat vryheidsberowing en kinderdiefstal twee selfstandige en afsonderlike misdade, wat elk 'n ander regsgoed beskerm, uitmaak en as sodanig deur ons howe behandel kan word sonder dat die beginsels wat tans in ons regspraktyk geld, daarmee geweld aangedoen word. Dienooreenkomstig kan vryheidsberowing omskryf word as die opsetlike, wederregtelike ontneming van die bewegingsvryheid van 'n ander persoon en geklassifiseer word as 'n misdaad teen die liggaamlike integriteit; en kan kinderdiefstal omskryf word as die opsetlike, wederregtelike ontneming van 'n minderjarige uit die beheer van sy of haar ouers of voogde en geklassifiseer word as 'n misdaad teen die ouerlike of voogdelike gesagsregte. Hiermee word egter geensins afgesien van my vroeëre voorstel dat kinderdiefstal en abduksie met vrug deur ons wetgewer tot een misdaad onder die naam "ontvoering" saamgesnoer kan word nie, omdat albei hierdie misdade die ouerlike of voogdelike gesagsregte beskerm en abduksie bloot 'n bykomende motief vereis (sien daaroor 1978 *De Jure* 270 e v).

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THE RESOLUTION OF CONTRACTUAL DISPUTES: INTERPRETATION *VERSUS* THE RECOGNITION OF NOVEL *NATURALIA*

The purpose of this note is to argue that some contractual disputes which are in everyday practice categorised as matters of interpretation, may beneficially be dealt with rather as requiring a decision whether to recognise a novel *naturale* of the particular kind of contractual relationship before the court. That the courts

do have the power to adopt novel *naturalia* in accordance with the dictates of *bona fides* or policy considerations relevant to the particular kind of contractual relationship is borne out by the following decisions: *R v Eayrs* (1894) 11 SC 330 333–334; *Douglas v Baynes* 1907 TS 508 513–514; *Birkbeck v Hill* 1915 CPD 687 704; *Nel v Cloete* 1972 2 SA 150 (A) 160G–H 163G; *A Becker & Co v Becker* 1981 3 SA 406 (A) 419F–420A. (These decisions are discussed in my doctoral thesis *Implied Terms in the Law of Contract in England and South Africa* St John's College, Cambridge (1987) 153–156.)

It not infrequently happens that at the time of the conclusion of a contract the parties have no intention regarding a matter which later turns out to be the subject of litigation between them. If that dispute is treated purely as a question of interpretation, it is not unfair to say that the court is embarking upon "an exasperating goose-chase after non-existent contractual 'meaning' " (Stoljar "Prevention and Co-operation in the Law of Contract" 1953 *Canadian Bar Review* 231 244). If the court resolves the dispute by determining the "true interpretation" of the contract, no precedent is created even though the decision is in truth based on considerations external to the will of the parties. Such a decision may well have a bearing on the obligations of parties to similar contractual relationships, but its exact impact will remain unclear. Although it is often emphasised that the interpretation of one contract affords little or no guidance for the interpretation of another (*Soeker v Colonial Government* (1908) 3 AC Cape 207 220; *Davis v Natal Government* (1909) 30 NLR 359 365; *Rapp v Aronovsky* 1943 WLD 68 76; *Elgin Engineering v Hillview Motor Transport* 1961 4 SA 450 (D) 456H; *Elite Electrical Contractors v Covered Wagon Restaurant* 1973 1 SA 195 (RA) 196H; *Ranch International Pipelines v LMG Construction* 1984 3 SA 861 (W) 874D), the courts do indeed seek guidance from previous decisions in which similar contracts have been interpreted (*Smith v Mouton* 1977 3 SA 9 (W) 12D; *Ornelas v Andrews Café* 1980 1 SA 378 (W) 386H–387B; *Ranch International Pipelines* 874E; Botha "Vertolking en Stilswyende Bedinge" *Huldigingsbundel Daniel Pont* (1970) 7 13; see also the discussion of *Brayshaw v Schoeman* below).

The proposition that the impact of such a decision is unclear, may be illustrated by reference to the decision in *Lourens v Colonial Mutual Life Assurance Society* 1986 3 SA 373 (A). In this case the appellate division had to determine the meaning of the words "criminal law" in a personal accident insurance policy which absolved the insurer from liability if the death or injury of the insured was "caused . . . while the insured was contravening the criminal law." The majority (Boshoff JA, with whom Trengove and Hefer JJA concurred) held that it was reasonable to assume that the parties intended to refer only to contraventions of the criminal law which were capable of affecting the risk of injury or death. The minority, on the other hand (Kotzé JA with whom Jansen JA concurred), held that "criminal law" referred to common-law crimes only. A party to an insurance contract containing an exclusion clause similar to the one in dispute in this case cannot rely on the decision of the majority of the court as having laid down the law of the land. Because the doctrine of precedent does not apply, a judge at first instance is free to make a decision which in effect adopts the judgment of the minority if he so wishes. It is a pity that the decision of the highest court in the land does not necessarily clarify the legal effect of the kind of clause in question. It is suggested that the argument that it may be

unfair to the litigants to delay a judgment for the purpose of giving a decision on a point of law which is of no particular interest to them (see Rabie "Regbank en Akademie" 1983 *De Jure* 21 26), is outweighed by the following consideration: A judgment such as that of the majority in *Lourens* may very well prepare the way for the eventual recognition of a *naturale*. A standard interpretation of the kind of clause in question may evolve if, for the sake of argument, the decision of the majority is adopted in a series of subsequent cases. See for example *Brayshaw v Schoeman* 1960 1 SA 625 (A) 630E–F where Van Blerk JA (delivering the judgment of the court) had the following to say with regard to the interpretation of a mandate to sell property:

> "[Die eienaar se] waarskynlike bedoeling . . . was dat [die agente] iemand moet soek wat werklik koop, sodat hy die koopprys kan ontvang waaruit die kommissie betaal sal word. Dit is hoogs onwaarskynlik, dat dit ooit die bedoeling . . . kon gewees het . . . dat [die eienaar] hom sou wou verbind om . . . kommissie . . . te betaal sonder . . . 'n koopprys . . . waaruit hy dit kan betaal."

Van Blerk JA clearly concerned himself with the intention of the litigants before him. Nevertheless, in *Roux v Schreuder* 1968 3 SA 616 (O) 620G De Villiers J cited the above judgment as authority for the proposition that it is generally accepted that an estate agent is entitled to commission only if his purchaser is willing and *able* to complete. Although Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* ((1979) 251 considers this proposition to be in accord with the "normal intention" of parties to such contracts, Silke *The Law of Agency in South Africa* (3rd ed (1981) 376–377) goes so far as to say that in the absence of a special agreement, a clause entitling an agent to commission upon introduction of a purchaser "means in a court of law" that commission is payable only when a willing and able purchaser has purchased.

A standard interpretation such as this is indistinguishable from a *naturale*. Both are legal rules which govern particular kinds of contractual relationships provided only that they are not inconsistent with the true meaning of the express terms. It follows that the decision of the majority in *Lourens* to interpret the clause as it did may be the start of a law-making exercise. The phrase "the common intention of the parties" which tends to pervade the language of interpretation, may obscure the considerations which are truly relevant to the adoption of legal rules. The possibility therefore exists that a rule which is derived from such a decision may rest on an insecure foundation. It is submitted that the possibility of uncertainty regarding the impact of a decision (adverted to above) or of a rule resting on an insecure foundation, may be averted by consciously adopting a legal rule to govern issues similar to the one in dispute. It would have been preferable, therefore, if in the *Lourens* case the court had decided that in the kind of clause in question "contravening the criminal law" meant "contravention of the criminal law of such a nature and extent as to be capable of affecting the risk," unless a contrary intention appeared from the contract.

The adoption of *naturalia* in accordance with the above proposal is not at variance with the contention of Kerr *The Principles of the Law of Contract* (3rd ed (1980) 256) that "the fundamental approach to the interpretation of standardised provisions is the same as the approach to the interpretation of provisions which are not stadardised." The recognition of a *naturale* of a class of contract (which may consist of similar or identical (i e standardised) contracts), does not relieve the court of its task of interpreting each individual contract belonging

to that class in the same way as if that contract were unique. The interpretation of each individual contract remains necessary because the *naturale* cannot apply if it is inconsistent with the true meaning of the contract.

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LEAKY VATS AND TOXIC PLANTS: ULP *D* 19 2 19 1 AND THE LIABILITY OF THE LESSOR

Introduction

In a Roman-law contract of *locato conductio rei*, one of the duties of the locator (lessor) was to let the thing to the conductor for the latter's use and (possibly) enjoyment for the agreed period and to keep the thing in such a state that it was fit for that purpose. If the lessor intentionally neglected that duty he was liable for damages (Alf *D* 19 2 30). So, too, if he had expressly or tacitly guaranteed that the thing leased was in a certain state of repair (Lab *D* 19 2 60 7). Risk in cases of *vis maior* lay with the locator, but in this instance no liability for damages arose: the lessee was simply entitled to a remission of the rent. In all other cases of loss not arising from *vis maior*, the risk lay on the lessee (Ulp *D* 19 2 15 2).

The problem is: what degree of fault, if any, in the lessor's conduct was required in order to give rise to liability for damage suffered by the lessee as a result of a defect in the leased object? In *D* 19 2 19 1 Ulpian quotes Cassius as stating that a lessor of faulty wine jars is liable for damage suffered by the lessee if the wine leaks from the wine jars. Ignorance of the fact that the jars are *vitiosa* does not relieve the lessor of his liability for the lessee's loss. However, a lessor of a field leased for grazing purposes which contains poisonous herbs is liable only if he let the field with full knowledge (*si scisti*) of its condition: the only relief available to the lessee is that he does not have to pay the rental for the field; but that is cold comfort when his valuable livestock may be dead as a result of their consuming the toxic plants.

The Profession of the Lessor

What is the reason for distinguishing between the liability of a lessor of leaking wine jars and the lessor of a field containing poisonous plants? Various solutions have been offered. Voet (*Commentarius ad Pandectas* 19 2 14) suggests that the lessor in the first case must have been the manufacturer who had made the wine jars and therefore, on the basis of his profession, he would be liable even if he were ignorant of their defective nature: *imperitia culpae adnumeratur*. In the case of the agricultural lessor, however, Voet argues that no profession or skill is involved. The lessor in this case cannot be liable for damage unless he is guilty of *dolus*. Pothier (*Traité du Contrat de Louage* par 119) goes further. He considers that *D* 19 2 19 1 imposed liability not only on the manufacturer but also on the *merchant* because "his calling as such" required him to have knowledge of the goods in which he traded. It is submitted that, in referring to the manufacturer's liability, Voet and Pothier are taking undue liberties with the

text of *D* 19 2 19 1. The text does not mention the word "manufacturer." Furthermore, why should a manufacturer of wine jars wish to lease them? Surely he would rather wish to sell them and so to maintain his turnover? Pothier's reference to the merchant who leases wine jars as being implicitly conscious of the defect by virtue of his calling seems paradoxical when contrasted with the liability of the agricultural lessor who is liable to the lessee for damage only if he had actual knowledge of the toxic plants: the lessor of wine vats would appear to be subject to strict liability as opposed to *dolus* liability on the part of the agricultural lessor. Pothier's solution to the problem is therefore not entirely satisfactory.

The Lease of Unascertained or Specific Goods

It has been suggested that the distinction made in *D* 19 2 19 1 is simply that between the lease of a specific and an unascertained thing (Heldrich *Das Verschulden beim Vertragsabschluss im klassischen Römischen Recht* (1924) 21). The hire of a piece of land is of a more specific nature than the hire of wine jars. The Roman classical jurists attached importance to the element of choice (*culpa in eligendo*) in determining the liability of a lessor (Paul *D* 19 2 45 and Lab *D* 19 2 60 7). Where a contract of *locatio conductio rei* is concluded in respect of a number of unascertained objects, the degree of choice left to the lessor in selecting the subject matter of the contract renders him guilty in the event of the lessee's loss as a result of flaws in the nature of the objects, since the lessee has had no opportunity to avert the loss. The *conductor* of a specific field, however, has an opportunity to inspect the field and to check whether there are poisonous plants growing there.

Pomp *D* 19 1 6 4 has been cited in support of the proposition that, in a contract of sale, a distinction should be made between manufactured goods and non-manufactured goods and in a contract of lease between specific and unascertained goods in order to determine the liability of the lessor for consequential damage flowing from a latent defect (Stein *Fault in the Formation of Contract in Roman and Scots Law* (1958) 104; Jean Davids "Dealer's Liability for Latent Defects" 1964 *SALJ* 419). In *D* 19 1 6 4 Pomponius appears to approve Labeo's view as regards the liability of the seller: the seller is liable for consequential loss in every case if he does not supply a sound vessel, unless the parties have arranged otherwise. This interpretation of the text would render the Aedilitian Edicts obsolete, certainly by the time of Justinian. It has therefore been suggested that the warranty applied only in the case of manufactured goods (Jean Davids *op cit* 419). In the same text Sabinus is reported to hold the same view with regard to the letting of vats as Labeo does with regard to the sale of the vessel: soundness of the object is always implied, unless explicitly excluded, rendering the lessor liable for consequential loss if the object is unsound. As in the case of sale, an attempt has been made to restrict the lessor's liability by distinguishing between unascertained and specific goods, thus limiting the lessor's liability for damage to cases where the goods are unascertained (Stein *Fault in the Formation of Contract in Roman and Scots Law* (1958) 104). It is submitted that a better solution to Pomp *D* 19 1 6 4 would be to found liability on the tacit agreement between the parties which was regarded as being in accordance with the nature of the contract (Honoré *Roman Law of Sale, Studies in Memory of F de Zulueta*

(1959) ch 10). Liability would then turn on the ability of the seller or the lessor to foresee future loss if the article is defective. In the case of sale, the factual question whether the goods are manufactured or not may well signify an implied warranty arising from the nature of the contract, since to profess the trade of a maker of vessels involves an (albeit tacit) avowal that the vessels are suitable and sound for the purpose for which they are sold. In the case of the contract of *locatio-conductio* the lessor of unascertained vats may be held liable for their soundness, since he has the opportunity to choose the *dolia* and this opportunity signifies an implied warranty arising from the nature of the contract.

Economic Background

A further factor which should be considered is the economic background to *D* 19 2 19 1. It would appear that much of the imperial lease law of Rome was based on the upper class rental market of Rome (Frier *Landlords and Tenants in Imperial Rome* (1980) 196). With regard to agricultural leases, it seems that in the two centuries prior to the time of Ulpian, landed properties had been consolidated and became a fruitful source of investment. This era saw the growth of extensive *latifundia*, generally owned by members of the upper classes who preferred to reside in Rome (see De Neeve *Colonus, Private Farm-Tenancy in Roman Italy during the Republic and Early Principate*). Many of these *latifundia* were leased to *coloni*. Large numbers of *coloni* suffered extreme poverty and deprivation during the agricultural crises of this period, a factor which frequently led to their economic dependence on the upper-class lessors. The absentee landlords were therefore not infrequently in a very much more powerful bargaining position than the *coloni*.

This is in strong contrast to the position of the lessor of *dolia*, who would generally be on the same socio-economic level as the lessee. Furthermore, the lessor of pasturage, frequently resident in Rome, could not be expected to know the toxic state of his plants, whereas the lessor of wine vats was easily able to determine whether the *dolia* were sound or not – ignorance of this fact thus constituting *culpa*. In the course of arriving at their decisions, the jurists weighed the interests of the parties in order to arrive at the most socially practicable solution to the problem (*supra* 207); the jurists used the law as a means of social control. Frier suggests that, certainly with regard to urban leases, the priorities of the lease law were to encourage property owners to exploit their property through rental to the upper classes and to encourage the upper classes to avail themselves of the opportunity (*supra* 209). Roman law placed great emphasis upon the enforced terms of the contract and was not interested in problems of unequal bargaining power. There was no great concern among the jurists to protect the disadvantaged and the law, in fact, tended to favour the interests of the landlord (Ulp *D* 13 7 11 3; Garnsey *Social Status and Privilege in the Roman Empire* (1970)). Thus the jurists, although not apparently socially biased, would not be concerned with an extension of the liability of the lessor in favour of the interests of the lessee unless this was socially practicable. This is a further factor, although not in my view a decisive one, to be considered in explaining the discrepancy between the liability of the lessor of wine vats and that of an agricultural lessor.

The Classical-Law Concept of *Culpa*

In the final analysis, the key to the solution perhaps lies in the classical-law concept of *culpa*. Lawson (*Negligence in the Civil Law* 37) points out that the distinction between causation and the standard of care demanded of a defendant was never clearly drawn by the classical jurists and many of the references to *culpa* are interpolations. Thus the fact that there was a connection between the deliberate action of the defendant and the loss suffered might well be sufficient (in the eyes of the classical jurists) to establish *culpa* (Stein *Fault in Contract in Roman and Scots Law* (1958) 107). In the case of a *locator* of a pasture, can it be said there is a direct connection between the loss suffered by the defendant and the contract for the hire of a field which contained poisonous herbs? One could not expect a Roman farmer or landowner to have the necessary expert botanical knowledge of toxic plants to be able to identify poisonous weeds growing in a field. It is otherwise in the case of the wine jars. Here the lessor's deliberate human action both in failing to check whether the selected wine jars were leaky (*culpa in eligendo*) and in failing to supply objects which were fit for the purpose of the lessee's use and enjoyment, contributed to the lessee's loss: the fact that the lessor is *ignarus* of the defect does not exonerate him.

South African Approach

The early case of *Stewart & Co v Exec of Staines* 1861 4 Searle 152 has been criticised in later judgments on the grounds that in this case the lessee recovered damages from the lessor even though the lessee had failed to prove that the lessor knew or ought to have known that the warehouse floor of the rented premises was unable to bear the weight of the lessee's stored goods (see *Alexander v Armstrong* 1879 Buch 233 238; *Frenkel and Co v Rand Mines Produce Supply Co* 1909 TS 129). In support of *Stewart's* case, Cooper (*The SA Law of Landlord & Tenant* (1973)) submits that the lessee's claim for damages caused by defective premises rests on breach of contract and not on delict and therefore the lessee should not be required to prove knowledge of the defect on the part of the lessor. Wille (*Landlord & Tenant in SA* 5th ed 161), however, criticises *Stewart's* case, contending that the court in that case erred in holding that a warranty exists in law that the thing hired is fit for the purpose for which it was hired. Wille submits that unless knowledge can be imputed to the lessor by reason of his trade or profession, he is liable in damages only if he actually knew of the defect. This approach was adopted in *Bensley v Clear* 1878 Buch 91 and *Marks v Thomson* 1900 CTR 523. This is in accordance with the view expressed by Grotius (*Introduction to Dutch Jurisprudence* 3 9 12) who attributes liability to the lessor for damage caused by a defect in the premises *only* if such defect was known to the lessor or, if, by reason of his profession, he ought to have known of such defect.

The South African courts have attempted to limit liability to circumstances where the lessor ought to have known about the defect by virtue of the fact that he practises a certain profession or trade. Following Voet (*Comm ad Pandectas* 19 2 14), the courts have explained *D* 9 2 19 1 in these terms (*Hunter v Cumnor Investments* 1952 1 SA 735 (C)). But *D* 19 2 19 1 has also been interpreted more widely as a general rule that knowledge of the defect can be imputed, not only in circumstances where, from the nature of his *occupation*, he ought to have

known, but also from a consideration of *all* the circumstances (*Nannucci v Wilson* (1894) 11 SC 240 244).

The approach of *Nannucci's* case is, it is submitted, the preferable one. The court should examine all the circumstances of the case to establish whether the lessor should, by virtue of his profession *or from other circumstances*, have known of the defect and whether he had the opportunity to remedy it; failure to do so would constitute negligence (cf Kerr *The Law of Lease* (1980) 69–70).

The problem is further compounded by the fact that the Roman-law texts repeatedly stress that the rules applicable to sale are also applicable to lease and that letting and hiring is very close to sale (*D* 19 2 2; *Inst* 3 24 *pr*). A decision in the law of sale (*Kroonstad Westelike Boere Ko-operatiewe Vereeniging v Botha* 1964 3 SA 561 (A)) appears to have modified the rule *imperitia culpae adnumeratur*, restricting it to cases in which the seller publicly professes to have certain skills and attributes in relation to the property sold. Pothier (*Traite du Contrat de Vente* par 212 ff) deals with the extent of the seller's liability for latent defects in the thing sold. If the seller is ignorant of the defects, he is liable only to restore the purchase price, but if he has knowledge of the defects, he is bound to make good the loss suffered by the purchaser. Pothier states that in certain cases knowledge will be imputed to the seller where he is an artificer or a merchant who deals in such articles (par 213). In the *Kroonstad* case (*supra*), the court adapted Pothier's rule (*Vente* par 214 ff) to cases where a merchant "publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold" (per Holmes JA 571). But this case does not solve the problem of what is meant by a public profession or skill (see Jean Davids *op cit* 419). It would certainly appear that this case has in no way clarified the law in this regard. Surely, in accordance with the English and American approach to this question, the law should be of greater assistance to the purchaser who relies on the seller's knowledge or reputation? Perhaps, however, this modified rule, applied to lease, could have the converse effect of assisting the lessee in his claim for damages. A public profession of skill or expert knowledge in respect of leased property may well be imputed by the conduct of the particular lessor and thus enable the lessee to claim damages without requiring him to prove that the lessor knew or ought to have known of the defect. In *Hunter's* case (*supra*) it was held that *only* on the ground of trade or profession could knowledge be imputed to the lessor. However, if the courts choose to apply the rule laid down in the *Kroonstad* case (*supra*) to cases of lease, the lessee will simply have to prove that the lessor has by his conduct publicly professed that he has expert knowledge in that sphere and is hence liable for loss arising from any defect in the leased premises even though his trade or profession may not imply expert knowledge. At present our courts would appear to be following the approach of *Hunter's* case (*supra*). In *Heerman's Supermarket v Mona Road Investments (Pty) Ltd* 1975 4 SA 391 (D), it was stated (*obiter*), per Van Heerden J that the principle that a lessor should have knowledge of the defect before he can be held liable for damages, has consistently been adopted by our courts and "it correctly sets out the position as firmly settled in our law" (394F).

The English and American Approach

Generally there is no implied warranty in English law on the part of a landlord that rented premises are fit for the purpose for which they are taken. On the letting of an unfurnished house, there is no implied warranty by the landlord

that the house is in a fit state for habitation nor that it may lawfully be used for the purpose for which it has been let. No distinction is therefore drawn between latent defects and repairs required to put the leased object in a condition fit for the purpose for which it was leased. The tenant intending to lease the house is presumed to make his own enquiries about its condition, and in the absence of a special stipulation he takes the house as it stands (*Chappell v Gregory* (1863 (34) Beav 250). Thus in the absence of an express warranty the tenant is without a remedy unless the lessor has been deceitful. A warranty may be implied if a representation is made which is intended to form the basis of a contractual relationship between the parties. If, however, a *furnished* house is let, then there is an implied condition that it is in a fit state for habitation at the start of the tenancy. In *Hargroves Aronson & Co v Hartopp* 1905 1 KB 472 the fact that a portion of the building remained in the control of the lessor, was regarded as a cardinal factor in determining the liability of the lessor. The fact that the gutter which had become blocked and caused damage to the property of the lessees was under the control of the lessor, imposed upon him a duty to take care that it was not in such a condition as to cause damage to the lessees' property. The lessees had given him notice and he was therefore guilty of a lack of due care and hence liable for damages. A similar problem arose in the case of *Cockburn v Smith* 1924 2 KB 119. In this case the owner of a block of flats let one of the top flats to a tenant but kept the roof of the building and the guttering in his own control. The guttering became defective, rainwater flowed into the tenant's flat and made it so damp that she suffered injury to her health. The court awarded her damages. It is not clear whether the court based the duty of the landlord in this case on some implied covenant or obligation in the contract of lease or on the fact that the landlord retained physical possession of the roof and let the other portion to the tenant. Bankes LJ, relying on *Hargroves*' case (*supra*), stated:

> "[T]he landlord must take reasonable care to prevent that portion of the premises which was kept under his control from causing damage to those portions which were demised to the tenant" (130).

The American courts, on the whole, seem to adopt a somewhat casuistic approach to this problem, examining and deciding each case on its own unique facts rather than developing a body of rules to determine issues. The general common-law rule in the United States is that the lessor is not liable if the defects were reasonably discoverable on inspection. Where defective plumbing led to damage to the tenant's property, it was held that the landlord was not liable in Californian law as he was not the "insurer of the safety of his tenant's property" (per Bartlett, Justice *Pro Tem*). In the absence of negligence or malfeasance, the landlord is not liable to the tenant for a defective condition in the premises (*Shanander v Western Loan & Building Co* 229 Pd 864). This general rule of non-liability of a landlord is based on the doctrine of *caveat conductor*. Liability can fall on a landlord only where he has knowledge of a latent defect. A suspicion that a latent defect exists does, however, qualify as knowledge (*Charlton v Brunelle* 130 A 216). Certain lessors such as builders are held to have knowledge by virtue of their specialised knowledge.

The question of causation arose in a case where the landlord's failure to supply adequate locks contributed to the tenant's loss from a burglary, which loss was foreseeable by the landlord (*Braitman v Overlook Terrace Corp* 346 A 2d 76), indicating the wide overlap between delict and contract in this area of the law. Although a tenant is not protected where there are obvious defects and dangers

in the property which he rents, in the absence of a contract providing otherwise, a landlord is under a duty not to create an unsafe condition on rented premises by any affirmative action on his part, and, if he does, he is liable for damage resulting from his failure to protect the tenant's property. However, it has been held that there was no liability on the lessor for damage from floods or flood waters (*Clark v US DC Or* 109 F Supp 213). This is contrary to Roman law, in which the owner is held responsible to the tenant farmer for all force against which resistance is impossible, such as that of "rivers, jackdaws, starlings or if there is an enemy invasion." In Roman law, it is only if flaws arise from the object itself that the loss is the tenant's, for instance where wine sours or if crops are destroyed by worms or weeds (Ulp *D* 19 2 15 2).

If the landlord is shown to be negligent, then it is irrelevant that the resulting damage was not within the contemplation of the parties at the time the lease was entered into. In a case where a landowner obtained deadly poison for grasshopper control, it was held that he could not escape liability for the loss of the lessee's cattle by raising the defence that he did not scatter the poison personally (*Underhill v Motes* 146 P 2d 374).

In contracts of sale of goods by description, however, an implied warranty of merchantability is an integral part of the transaction (*Uniform Sales Act* 1906 14). This warranty does not apply to the sale of a specified article under its trade name (*Uniform Sales Act* s 15(4)). An implied warranty of merchantability simply means that the thing sold is reasonably fit for the purpose for which it is manufactured (*Henningsen v Bloomfield Motors Inc* 161 A 2d 69). It would appear that no similar rule applies to the law of landlord and tenant (*Pointer v American Oil Co* 295 F Supp 573). There is no implied warranty that leased premises are fit for the purpose for which they are let. The rule of *caveat conductor* applies unless material representations constituting fraud are shown, with the result that the landlord is not liable for injuries to the property of the tenant arising from defects in premises unless the defects are not apparent to the tenant but known to the landlord, who failed to warn the tenant. The landlord has a duty to warn the tenant of defects, but there is no duty on the landlord to inspect the premises. In a case where a fire caused damage to the lessee's property, it was found that the cause of the fire was loose bricks and a crack in the fireplace of which the owner had implied knowledge. He was therefore liable for the damage to the lessee's property caused by the fire (*Shotwell v Bloom* 140 2d 728).

Thus the general trend of the American decisions is not in favour of the tenant. With the application of the *caveat conductor* rule, the tenant is placed on his guard and careful examination and inspection of the leased premises should be undertaken by the lessee before the contract is concluded.

French and German approach

The French Code Civil obliges the lessor to deliver the thing leased to the lessee, to maintain such thing in a condition which serves the purpose for which it was rented and to provide peaceful possession and enjoyment to the lessee for the duration of the lease (a 1719). The lessor is required to deliver the thing in a good state of repair in all respects. He must, throughout the duration of the lease, make all repairs which may become necessary other than those for which the tenant is responsible (a 1720). A warranty is due to the lessee for all defects and faults in the thing rented which impede the use of it, *even when the lessor*

did not know of them at the time of the lease. If any loss to the lessee results from such defects or faults the lessor is required to indemnify the lessee (a 1721). The approach of the civilian lawyer in this instance would be to search for the common principles underlying the particular rules of the civil law and to articulate them in the form of a new rule. One of the key distinguishing characteristics of the civil-law system is the retention of the system of categories of nominate contracts, of which the requirement of good faith serves as the creative core. Liability is kept within reasonable bounds in this area of the law by the limitation of foreseeability; hereby one's failure to perform a contract renders one liable only for damage which was foreseeable at the time the contract was entered into (Mazeaud & Chabas *Traite Theorique et Pratique de la Responsibilité Civile Delituelle et Contractuelle* No 2370). This limitation on damages is not applicable where one intentionally or grossly violates the requirement of good faith. When there is failure to perform plus intent to reap financial gain, additional damages may be recovered. Thus liability in the French code is based on the fault principle and negligence would therefore be required to render the lessor liable to the lessee for consequential damage arising from the lease of a defective object.

The position in German law is somewhat different. Under the influence of Bernhard Windscheid of the pandectist school, an attempt was made to regulate the lessor's liability for damages resulting from defects to cases of fraudulent concealment or express or implied warranty of fitness for purpose. Ulp *D* 19 2 19 1 was used to support this proposition. As a result, section 538 of the *BGB* introduced the rule that if a defect of the kind specified in section 537 existed at the time the contract was entered into, the lessee may demand compensation based on non-fulfilment. Liability is thus based on an implied guarantee and *culpa* is not a requirement. Section 538 has aroused much controversy in regard to whether it provides a satisfactory solution to the problem. It would appear to be regarded as something of an anomaly (Honsell "Positive Vertragsverletzung" 1979 *Jura* 196) and to be based on a misinterpretation of *D* 19 2 19 1.

Conclusion

In South African law the distinction made in *D* 19 2 19 1 has been described as "curious" (*Alexander v Armstrong* 1879 Buch 233 237). The distinction would appear to make little sense to the modern student. But farming today has become a specialised skill requiring some degree of knowledge of toxic plant matter. Failure to ensure that land leased for grazing purposes is free of poisonous weeds would today, it is submitted, constitute negligence and in this case, as in the case of the lessor of wine jars, knowledge would be imputed to the lessor on the basis that ignorance in this case constitutes negligence. To base the liability of the lessor for the consequential loss of the lessee flowing from the defects in the leased object upon the fault principle would seem to be a sound approach. Negligence is imputed in the case of the lessor of wine vats, since ignorance in this particular case is no excuse: the lessor should have known of the defect. On a careful examination of the particular facts of each case, the court should be able to determine whether in fact the particular lessor, with his degree of expertise, skill and knowledge, was in a position to discover the defect. If, on applying this test, the court finds that the lessor would have discovered the defect had he exercised a reasonable degree of care, then it is only equitable that

the negligent lessor should reimburse the lessee for his consequential loss. This approach would resolve the apparent paradox of *D* 19 2 19 1. This text indicates that each case in this area of the law has to be treated on its own merits to determine whether the lessor was negligent. The allocation of risk between the parties and the reliance placed upon the lessor by the lessee are important factors to be considered in this determination. If the leased objects are unascertained, the lessee is in a disadvantaged position: he has to rely upon the lessor to select goods which are fit for the purpose for which they are to be let. The court should enquire whether there was *culpa in eligendo* on the part of the lessor. A lessor of unascertained wine jars that leak, is guilty of *culpa in eligendo* and hence liable for damages. To determine whether the lessor of a specific object is negligent, one has to consider whether knowledge of the object can be imputed to him by virtue of his trade or profession or whether, by his conduct, he made a public profession of skill and expertise (upon which the lessee relied) in relation to the leased object. Knowledge of the toxic nature of plant matter in a leased field can in no way be imputed to a lessor living in the third century, nor, it is submitted, would the lessee of the third century have relied on the fact that the field was free of poisonous herbs. It was a risk which the lessee took and which arose from the nature of the leased object itself. He would thus, in the absence of *dolus* on the lessor's part, simply be entitled to a remission of rent because the field was not fit for the purpose for which it was let. The cryptic and terse nature of *D* 19 2 19 1 has obscured the subtle distinctions between the two examples. The casuistry of the Roman jurists masks the underlying equity of Roman law:

> "One thing is certain: the casuistic method, which revealed a law dynamic and struggling, gave to classical literature a vivacity and freshness which could never have been attained by a strict theoretical system . . ." (Schulz *Principles of Roman Law* (1936) 65).

BRIGITTE CLARK
Cape Town

VONNISSE

ONTEIENING VAN DIE REG OP LATERALE EN ONDERSTUT

EVKOM v JJ Fourie 1986–12–22 saak no 19674/86 (T) (ongerapporteer)

1 Feite

Die onderhawige uitspraak is gelewer nadat 'n gestelde saak ingevolge die bepalings van reël 33 van die eenvormige hofreëls deur die applikant (die Elektrisiteitsvoorsieningskommissie) en die eerste respondent ('n boer) aan die hof voorgelê is. Die tweede tot sesde respondente (drie mynmaatskappye wat 'n gesamentlike onderneming bedryf, 'n vierde mynmaatskappy en die voorsitter van die elektrisiteitsbeheerraad) is slegs ter kennisname gesiteer. Aspekte van die feitekompleks soos hieronder uiteengesit, is uit die gerapporteerde beslissing in *Matla Coal Ltd v Commissioner for Inland Revenue* 1987 1 SA 108 (A) 119E–124D afgelei. Die kernfeite is die volgende:

1 1 Die eerste respondent (JJ Fourie) is die eienaar van sekere plase in die Oos-Transvaal waarop steenkoolneerslae gevind is. Die mineraalregte ten opsigte van die plase is ingevolge 'n notariële prospekteerkontrak van die grondeiendomsreg afgeskei en aan die General Mining Union Corporation-groep vervreem. In dieselfde kontrak is die reg op laterale en oppervlaktestut (hierna laterale stut) en op stut deur die onderliggende grondlaag (hierna onderstut) egter ten gunste van die grondeienaar voorbehou.

1 2 Trans-Natal Coal Corporation Ltd (wat deel van die General Mining Union Corporation-groep uitmaak, en wat bestaan uit die tweede en derde respondente, naamlik Transvaal Navigation Colliers and Estate Co Ltd en Natal Navigation Collieries and Estate Co Ltd) het 'n voorsieningsooreenkoms met die applikant (EVKOM) aangegaan, ingevolge waarvan Trans-Natal onderneem het om steenkool aan die applikant te voorsien vir die bedryf van die applikant se kragsentrale by Matla in Oos-Transvaal. Trans-Natal het daarna 'n ooreenkoms met die vierde respondent (Clydesdale (Transvaal) Collieries Ltd) aangegaan waarin besluit is dat Trans-Natal en Clydesdale as 'n gesamentlike onderneming die voorsiening van steenkool aan die applikant sal onderneem ten einde die voorsieningsooreenkoms gestand te doen. Die gesamentlike onderneming sou die betrokke steenkoolvelde deur middel van die vyfde respondent (Matla Coal Bpk, wat voorheen as Alpha Coal Bpk bekend was, en 'n dormante maatskappy in die Trans-Natal-groep) bedryf en ontgin. Vir hierdie doel het Trans-Natal en Clydesdale elkeen 'n 50% belang in Matla verkry, en terselfdertyd is Trans-Natal se mynregte en opsies met betrekking tot die betrokke steenkoolvelde aan Matla gesedeer. Matla was dus die houer van die mineraalregte op die betrokke grond

en het ook die steenkool ontgin en namens Trans-Natal aan die applikant gelewer. Die gesamentlike onderneming het 'n mineraalhuurooreenkoms met Matla aangegaan en betaal aan Matla tantième vir die steenkool wat ontgin word.

1 3 Die applikant het verder 'n beperkingsooreenkoms met die gesamentlike onderneming en die vyfde respondent gesluit, ingevolge waarvan alle steenkool wat in die betrokke myn ontgin word aan die applikant gelewer moet word. Hierdie ooreenkoms was juis die fokuspunt van die gerapporteerde beslissing in die geskil tussen Matla en die kommissaris van binnelandse inkomste, aangesien die kommissaris Matla wou belas vir die bedrag wat deur EVKOM aan Matla betaal is as synde betaling vir die verkoop van steenkool of die steenkoolregte, terwyl Matla en die gesamentlike onderneming van mening was dat die bedrag betaal is vir die verkryging van die beperkingsooreenkoms (ook genoem die sterilisasie van die steenkoolregte) ten gunste van EVKOM. Die hof het uiteindelik beslis dat die ooreenkoms aanvanklik wel vir die verkoop van die steenkoolregte aan EVKOM voorsiening gemaak het en dat die bedrag vir daardie doel aan Matla oorbetaal is, maar dat Matla die regte as kapitaalbates gehou het en dat die verkoop daarvan dus nie belasbaar is nie. Daar is ook bevind dat die beperkingsooreenkoms die aanvanklike vervreemdingsooreenkoms deur novasie vervang het nadat die bedrag betaal is maar voordat die regte daadwerklik aan EVKOM oorgedra is. Die applikant het dus aanvanklik, soos ooreengekom is, betaal vir die koop van die betrokke mineraalregte. Nadat die betaling geskied het, het die applikant egter toegestem tot novasie waardeur Matla se verpligting in ruil vir die betaling verander is van oordrag van die mineraalregte na die sterilisasie van die steenkoolregte ten gunste van die applikant. Hierdie novasie is bewerkstellig ten einde bepaalde belastingprobleme vir Matla op te los, maar is die direkte oorsaak van EVKOM se onvermoë om in die onderhawige aansoek te slaag.

1 4 Applikant beweer dat die boonste steenkoollaag in die betrokke gebied, wat van die gesamentlike onderneming se aanvanklike tender aan EVKOM uitgesluit was, nie deur konvensionele mynboumetodes ontgin kan word nie, en dat dit vir die bedryf van sy kragstasie noodsaaklik is om al die steenkoollae met hoëverhaalmetodes te ontgin. Applikant beweer verder dat dit daarom noodsaaklik is dat die applikant die regte op laterale en onderstut van die eerste respondent moet bekom aangesien die hoëverhaalontginning onvermydelik tot insinking van die grondoppervlakte sal lei. Die applikant het aangebied om die betrokke regte van die eerste respondent te koop maar die eerste respondent weier om die regte afsonderlik van sy grondeiendomsreg te verkoop. Geen ooreenkoms kon in hierdie verband bereik word nie.

1 5 Ten einde die regte te bekom het die applikant kragtens artikel 43 en regulasie 13 van die Elektrisiteitswet 40 van 1958 by die staatspresident goedkeuring gevra vir die verpligte verkoop deur die eerste respondent van die betrokke regte, onderworpe aan skadeloosstelling deur die applikant. In hierdie verband het die applikant die elektrisiteitsbeheerraad versoek om 'n openbare verhoor kragtens artikel 43(3) van die wet te hou ten einde 'n verslag soos bedoel in artikel 43(2)(b) van die wet aan die staatspresident te kan voorlê. Die raad het sy bevinding voorbehou en die applikant versoek om 'n beslissing om die onderhawige regsvrae by die hooggeregshof te verkry, en vandaar die gestelde saak waaroor die beslissing handel.

2 Regsvraag

2 1 Die regsvraag onder bespreking kan soos volg saamgevat word:

a Of die eerste respondent se reg op laterale en onderstut, soos dit in die notariële prospekteerkontrak ten gunste van die grondeienaar voorbehou is, in die omstandighede onteien of andersins verkry kan word kragtens die bepalings van artikel 43 van die Elektrisiteitswet 40 van 1958.

b As die vermelde regte wel onteien kan word, of die applikant geregtig is om dit te onteien alhoewel die applikant nie die houer van die mineraalregte of van die oppervlakteregte is nie.

2 2 Die applikant argumenteer dat beide regsvrae bevestigend beantwoord moet word. Daarvoor steun hy op die volgende bewerings:

a Die eerste respondent se reg op laterale en onderstut is 'n reg in, oor of ten opsigte van grond soos bedoel in die wet.

b Die applikant het 'n wesenlike en genoegsame belang in hierdie reg om verkryging daarvan te regverdig.

c Die applikant het die reg nodig vir die uitoefening van sy statutêre bevoegdhede.

d Die applikant is daarom geregtig om die staatspresident te nader om die betrokke regte kragtens die betrokke wet te onteien.

2 3 Die eerste respondent argumenteer dat beide regsvrae ontkennend beantwoord moet word. Daarvoor steun hy op die volgende bewerings:

a Omdat die applikant nie self enige belang in die grond of die mineraalregte het nie, is die applikant wat betref die benutting van die grondoppervlakte en die ontginning van die mineraalregte 'n buitestaander. Gevolglik het die applikant die betrokke reg op laterale en onderstut nie self nodig nie. Die beoogde onteiening is dus eintlik in effek ten gunste van 'n onafhanklike derde party (die mineraalreghebbende en die mineraalhuurder).

b Die regte wat die applikant wil onteien, is geen selfstandige *reg* wat afsonderlik onteien kan word nie omdat dit slegs in die hande van die grondeienaar of die mineraalreghebbende enige ekonomiese substratum kan hê. Die betrokke reg val dus nie binne die trefwydte van artikel 43 van die wet nie en kan nie ingevolge die artikel onteien word nie.

c Die applikant het geen belang in òf die grond òf die mineraalregte ten opsigte van die grond nie, en kan die betrokke regte nie *in abstracto* bekom sonder dat hy die houer van die oppervlakteregte of die mineraalregte is nie.

d Omdat die applikant die betrokke regte nie self nodig het nie, kan hy die onteiening nie binne die aanwendingsveld van artikel 43 van die wet bring nie.

e Die applikant het die betrokke regte nie self nodig nie maar wil dit in effek ten gunste van 'n derde party, naamlik die vyfde respondent en die gesamentlike onderneming, onteien. Dit kom neer op 'n ongemagtigde doelstelling by die beoogde onteiening.

3 Beslissing

Die hof gee die regsverteenwoordiger van die respondent op vier van sy argumente gelyk:

a Die reg wat die applikant wil onteien, is nie 'n *reg* binne die bedoeling van artikel 43 van die wet nie.

b Al was dit wel so 'n reg, is dit nie deur die applikant bekombaar nie.

c Al is dit wel deur die applikant bekombaar, word dit nie deur die applikant self vir die uitoefening van sy bevoegdhede benodig nie.

d Wat die applikant wil bewerkstellig, is nie die verkryging van 'n reg deur hom benodig nie, maar onteiening ten behoewe van 'n onafhanklike derde party.

Die hof het egter geen bevinding gemaak oor die bewering dat die beoogde onteiening ten behoewe van 'n onafhanklike derde party onteiening vir 'n ongemagtigde doelstelling sou wees nie.

Op grond van die vier oorwegings hierbo vermeld, beslis die hof dus dat die eerste respondent se reg op laterale en onderstut ten aansien van die betrokke eiendom nie in die onderhawige omstandighede vir onteiening deur die applikant kragtens artikel 43 van die Elektrisiteitswet 40 van 1958 vatbaar is nie. Die ironie van die saak is dat die applikant, indien die aanvanklike ooreenkoms met die gesamentlike onderneming vir die verkoop van die mineraalregte gestand gedoen is en nie deur die beperkingsooreenkoms vervang is nie, wel in staat sou kon wees om die betrokke oppervlakteregte te onteien.

4 Kommentaar

Die vrae wat in hierdie beslissing op die voorgrond geplaas word, raak die bestaan, inhoud en aard van die reg op laterale en onderstut, asook die klassifikasie van hierdie reg binne die sakereg en die vervreembaarheid daarvan.

4 1 Oorsprong en Bestaan van die Reg op Laterale en Onderstut

Die onderhawige uitspraak bring ten eerste die vraag na die gemeenregtelike oorsprong en die huidige bestaan van 'n reg op laterale en onderstut opnuut na vore. Die regsverteenwoordigers van die partye in hierdie geding was dit in beginsel met mekaar eens dat 'n grondeienaar gemeenregtelik wel só 'n reg het (vgl 18 24–25 27) en daar is ook in die ouer hofuitsprake aanvaar dat daar 'n gemeenregtelike reg te dien effekte bestaan. (Vgl *McFarland v De Beer's Mining Board* (1884) 2 HCG 398 411 waar bevind is dat die afwesigheid van sodanige reg in die geval van delfkleims, soos gestel in *Murtha v Von Beek* (1882) 1 BAC 121 125, 'n uitsondering op die normale verhouding tussen buureienaars is; vgl ook die uitspraak van r Jones 415; *London and SA Exploration Co v Rouliot* (1890) 8 SC 74 89–93; *Coronation Collieries v Malan* 1911 TPD 577 586; *Phillips v South African Independent Order of Mechanics and Fidelity and Benefit Lodge and Brice* 1916 CPD 61 64–65; *Levin v Vogelstruis Estates and Gold Mining Co Ltd* 1921 WLD 66 68; *Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd* 1923 WLD 99 110; *Douglas Colliery Ltd v Bothma* 1947 3 SA 602 (T) 612; *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (OD) 476E; *Gordon v Durban City Council* 1955 1 SA 634 (D) 638B; *Demont v Akals' Investments (Pty) Ltd* 1955 2 SA 312 (D) 316B; *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 1 SA 169 (D) 175C; *Gijzen v Verrinder* 1965 1 SA 806 (D) 810B; *Foentjies v Beukes* 1977 4 SA 964 (K) 966D). In die ouer literatuur word die gemeenregtelike bestaan van sodanige reg soms ook sonder meer aanvaar: vgl Anon "Natural Rights and Natural Servitudes" 1982 *Cape Law Journal* 230; asook Hall *Maasdorp's Institutes of South African Law vol II: The Law of Property* (1971) 78–80; Hall en Kellaway *Servitudes* (1973) 105–106).

Daar word eweneens in die regspraak en ouer literatuur aanvaar dat die Suid-Afrikaanse reg in hierdie verband wesenlik met die Engelse reg ooreenstem. (Vgl 19 van die uitspraak; asook *Coronation Collieries v Malan* 1911 TPD 577 586; *Levin v Vogelstruis Estates and Gold Mining Co Ltd* 1921 WLD 66 68; *Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd* 1923 WLD 99 110; *Douglas Colliery Ltd v Bothma* 1947 3 SA 602 (T) 612; *East London Municipality v South African Railways and Harbours* 1951 4 SA (OD) 476E; *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 1 SA 169 (D) 175C.)

Hierdie aannames is afkomstig van 'n aantal ouer gewysdes wat oor die wedersydse verhouding tussen die bewerkers van aanliggende diamantkleims gehandel het, en waarin aanvaar is dat selfs al bestaan daar normaalweg 'n reg op laterale en onderstut, sodanige reg nie ten aansien van diamantkleims toegepas kan word nie gesien die besondere aard en doel van delwerskleims. In die oudste van die betrokke beslissings, naamlik *Murtha v Von Beek* (1882) 1 BAC 121 125 (soos nagevolg in *Hall v Compagnie Française des Mines de Diamants du Cap* (1883) 1 HCG 464 481), is daar nie aanvaar dat die gemenereg 'n reg op laterale en onderstut ken nie en daar is spesifiek na "the principle of lateral support embodied in English law" verwys, maar daarna is in die uitspraak in *McFarland v De Beer's Mining Board* (1884) 2 HCG 398 411 (en veral 415) uitdruklik na die "common law right of lateral support" verwys. In die gesaghebbende uitspraak van hoofregter De Villiers in *London and SA Exploration Co v Rouliot* (1890) 8 SC 74 90–91, wat gewoonlik as die *locus classicus* op hierdie onderwerp beskou word, is eweneens aangedui dat hierdie reg aan die gemenereg vreemd is. Nogtans is die standpunt ingeneem dat die afwesigheid van duidelike gesag oor die reg op laterale steun in die Romeins-Hollandse bronne op verklaarbare omstandighede berus, dat dit deur bekende en versoenbare beginsels uit die Romeinse en moderne bronne aangevul kan word en dat daar inderdaad sodanige beginsels in die Romeinse reg (soos in alle regstelsels) bestaan op grond waarvan die Suid-Afrikaanse howe ook aan die reg op laterale en onderstut erkenning kan verleen. Sodoende word daar tot die gevolgtrekking gekom dat die moderne Suid-Afrikaanse reg wel 'n reg op laterale en onderstut erken, en dat die Suid-Afrikaanse reg, soos aangevul deur die betrokke beginsels van die Romeinse reg, op hierdie punt met ander regstelsels (en spesifiek die Engelse reg) ooreenstem.

Sedert die belangrike artikel van Kadirgamar ("Lateral Support for Land and Buildings – an Aspect of Strict Liability" 1965 *SALJ* 210–231 357–374 495–506) word daar egter algemeen aanvaar dat die Romeinsregtelike beginsels wat in hierdie verband deur die howe en skrywers as aanknopingspunt aangehaal word nie die nodige steun vir die aanvaarding van 'n reg op laterale stut of vir die besondere uitwerking daarvan in die moderne reg bied nie, en dat die bestaan van sodanige reg in die Suid-Afrikaanse reg op 'n moderne en plaaslike ontwikkeling berus: sien Milton "The Law of Neighbours in South Africa" 1969 *Acta Juridica* 123–269 200–205; JC van der Walt *Risiko-aanspreeklikheid uit Onregmatige Daad* (1974) 375; CG van der Merwe *Sakereg* (1979) 126; D van der Merwe *Oorlas in die Suid-Afrikaanse Reg* (1982) 499; Delport en Olivier *Sakereg Vonnisbundel* (1985) 176.

Samevattend kan die volgende gevolgtrekkings oor die herkoms en bestaan van die reg op laterale en onderstut geformuleer word:

a Daar kan geen twyfel daaroor bestaan nie dat die huidige Suid-Afrikaanse reg 'n reg op laterale en onderstut erken.

b Hierdie reg word egter gewoonlik nie in die geval van kleims en oop delwerye toegepas nie vanweë die besondere omstandighede waaronder sodanige kleims en delwerye bewerk word.

c Die betrokke beginsels waarop hierdie reg berus, is nie uit die Romeinse of Romeins-Hollandse reg afkomstig nie maar het plaaslik ontwikkel.

4 2 Aard en Inhoud van die Reg op Laterale en Onderstut

Hoewel die literatuur aantoon dat die bestaan van 'n reg op laterale en onderstut nie vandag betwyfel kan word nie, is dit eweneens duidelik dat daar nog baie onsekerheid en verwarring oor die presiese aard en inhoud van die betrokke reg bestaan. Juis in hierdie opsig is die onderhawige uitspraak betekenisvol aangesien regter Kriegler daarin die eerste daadwerklike poging aanwend om antwoorde op hierdie probleemvraag te soek en te formuleer. (Daarom is dit ook te betreur dat die uitspraak ongerapporteer is en dat dit ook as onrapporteerbaar gemerk is. Hopelik sal die redakteurs van die hofverslae besluit om dit wel nog te rapporteer.) Verskeie teorieë en benaderings oor die aard en inhoud van die reg op laterale en onderstut is al in die Suid-Afrikaanse regspraak en literatuur geopper. 'n Kort oorsig oor die belangrikste standpunte is nodig ten einde regter Kriegler se uitspraak in hierdie verband na behore te kan beoordeel.

4 2 1 Laterale en Onderstut as 'n Natuurlike Reg

Daar is in die literatuur aanknopingspunte vir die standpunt dat die reg op laterale en onderstut 'n "natuurlike reg" is wat deel van die grondeienaar se bundel van regte ten aansien van die grondstuk uitmaak. Daar word in hierdie verband taamlik los en vas van "natuurlike regte" gepraat (vgl bv Anon 1892 *Cape Law Journal* 225–231; *London and South African Exploration Co v Rouliot* (1890) 8 SC 74 93; *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (OD) 473G; *Gordon v Durban City Council* 1955 1 SA 634 (D) 638C; *Gijzen v Verrinder* 1965 1 SA 806 (D) 810B), sonder dat dit volkome duidelik is wat die presiese aard van sodanige "natuurlike reg" sou wees. JC van der Walt (376) het die standpunt ingeneem dat die verwysings na 'n "natuurlike reg," soos die verwysings na die "betreklik niksseggende spreuk" *sic utere tuo ut alienum non laedas*, gesien moet word teen die gemeenregtelike agtergrond van die bureregtelike norme, naamlik billikheid en redelikheid. Milton "Lateral Support of Land: a Natural Right of Property" 1965 *SALJ* 459–463 460–462 het, met verwysing na *Gijzen v Verrinder* 1965 1 SA 806 (D) 810B, tot die gevolgtrekking gekom dat die "natuurlike aard" van die reg op laterale stut impliseer dat dit "a right to the integrity of the land, a natural and necessary incident of the ownership of land which ensures its full use and enjoyment" is. Daar is egter geen duidelike uiteensetting van die implikasies van hierdie standpunt vir die teoretiese verklaring en analise van die reg op laterale en onderstut nie.

4 2 2 Laterale en Onderstut as 'n Serwituut

Daar is ook al in die literatuur en in die hofverslae gewerk met die gedagte dat die reg op laterale en onderstut 'n serwituut of 'n sogenaamde natuurlike ser-

wituut sou wees (vgl Anon 1892 *Cape Law Journal* 229–230) of iets soortgelyk aan 'n serwituut (vgl Hall en Kellaway 105; *Gordon v Durban City Council* 1955 1 SA 634 (D) 638C), hoewel dit wil voorkom of die konsensus tans is dat dit nie aan 'n serwituut gelykgestel kan word nie (vgl Kadirgamar 1965 *SALJ* 216–217 230–231; Milton 1965 *SALJ* 462; Milton 1969 *Acta Juridica* 199–200; CG van der Merwe 127; D van der Merwe 500; Delport en Olivier 176; *Coronation Collieries v Malan* 1911 TPD 577 591 – met verwysing na die Engelse reg; *Demont v Akals' Investments (Pty) Ltd* 1955 2 SA 312 (D) 316C; *Gijzen v Verrinder* 1965 1 SA 806 (D) 810B). Die hoofrede hiervoor is die feit dat inbreukmakings op die reg op laterale en onderstut volgens die regspraak anders hanteer word as wat die geval sou wees as dit 'n serwituut was. Milton het reeds aangedui dat die howe se hantering van die reg op laterale stut neerkom op 'n gemengde aanvaarding van die natuurlike-reg-teorie en die serwituut-teorie. Soos wat Milton 1969 *Acta Juridica* 200 en Delport en Olivier 176 aantoon, word die serwituut-teorie gevolg vir sover die reg op laterale stut net ten opsigte van grond in die natuurlike staat toegelaat word en nie ten aansien van beboude of beswaarde grond nie ('n situasie wat deur Milton 205–211 en D van der Merwe 512–517 gekritiseer word; sien ook verwysings na toepaslike regspraak aldaar); terwyl die natuurlike-reg-teorie verteenwoordig word in die beginsel dat die eisoorsaak by onregmatige onttrekking van laterale stut in die veroorsaking van skade geleë is en nie in die onttrekking as sodanig nie (met al die meegaande gevolge: sien hieroor ook die gesag vermeld deur Milton en D van der Merwe in die vorige verwysing).

Soos hieronder aangedui sal word, moet die standpunt dat die reg op laterale en onderstut 'n serwituut is duidelik onderskei word van die feit dat die reg op laterale en onderstut soms uit die verlening van 'n serwituut mag voortspruit of daarby ter sprake mag kom. Sonder om hier verder op die aangeleentheid in te gaan, kan die moontlikheid geopper word dat sodanige gevalle binne die konteks van die gewone bureregtelike verhouding gesien moet word, en dat die verhouding tussen die eienaars van die heersende en die dienende erwe in daardie geval as 'n buureienaarverhouding gesien moet word. Die toepaslikheid van die *vicinitas*-vereiste by serwitute bied in hierdie konteks interessante moontlikhede vir verdere analise.

4 2 3 Regter Kriegler se Uitspraak: Laterale en Onderstut as Inherente Insident van Eiendomsreg in 'n Bepaalde Verhouding

In die onderhawige saak formuleer regter Kriegler sy uitspraak oor die aard van die reg op laterale en onderstut met verwysing na die onderskeie verhoudings tussen die regsobjek of saak en die regsubjekte wat daarby betrokke is, naamlik die grondeienaar enersyds en die mineraalreghebbende andersyds. Elkeen van die reghebbendes het bepaalde bevoegdhede ten aansien van die saak: die eienaar uit hoofde van sy eiendomsreg en die mineraalreghebbende uit hoofde van sy beperkte saaklike reg. Verder het die twee regsubjekte bepaalde aansprake en wederkerige verpligtinge teenoor mekaar uit hoofde van hulle onderskeie verhoudinge tot die saak (36). Hierdie uiteensetting vorm dan in die regter se uitspraak die basis vir die daaropvolgende en essensiële vraag, naamlik of die reg op laterale en oppervlaktestut en op stut deur die onderliggende grondlaag

stricto sensu 'n reg is, en meer bepaald of dit 'n "reg in, oor of ten opsigte van grond" soos bedoel in artikel 43 van die wet is. In hierdie verband spreek regter Kriegler die mening uit dat die bepaalde reg na sy mening bloot 'n bevoegdheid voortspruitend uit eiendomsreg, of 'n hoedanigheid van eiendomsreg is (37). Daarmee verwoord hy die standpunt dat die reg op laterale en onderstut, as synde 'n hoedanigheid van eiendomsreg, nie los van die verhouding tussen die grondeienaar en die mineraalreghebbende gesien kan word nie, en dat die reg dus ook nie aan iemand anders buite daardie verhouding vervreem kan word of deur iemand buite daardie verhouding onteien kan word nie. Die reg op laterale en onderstut, selfs al sou dit 'n reg soos bedoel in die wet wees, is dus nie deur 'n buitestaander ten opsigte van die grond verkrygbaar nie: die betrokke reg geld slegs tussen die grondeienaar en die mineraalreghebbende omdat dit 'n insident van die verhouding tussen hulle is, en daarom kan die reg net deur een van die twee partye tot daardie spesifieke verhouding bekom en gehou word (38).

4 3 Die Reg op Laterale en Onderstut en die Burereg

4 3 1 Agtergrond

Selfs as dit aanvaar word dat die aard en inhoud van die reg op laterale en onderstut vanuit die besondere verhouding waarbinne dit ontstaan, benader moet word, is daar nog steeds een aspek van die probleem wat onopgelos bly en wat verdere ondersoek regverdig. In die lig van die literatuur en vorige hofuitsprake is dit waarskynlik dat regter Kriegler se benadering binne die bestaande raamwerk van bureregtelike aansprake geïnterpreteer sal word. Die neiging is om die reg op laterale stut (as synde 'n natuurlike aspek van die grondeienaar se reg) binne die raamwerk van die burereg te akkommodeer. (Vgl CG van der Merwe 126–128; Silberberg–Schoeman 182–185; Delport en Olivier 175–181. Vgl ook JC van der Walt se opmerkings oor die bureregtelike beginsels van billikheid en redelikheid waarna hierbo verwys is; asook Milton 1969 *Acta Juridica* 213–214; maar veral D van der Merwe 511 574–582.) Daar bestaan egter aanduidings dat alle fasette van die reg op laterale en onderstut nie binne die burereg geakkommodeer kan word nie (vgl veral Milton 1969 *Acta Juridica* 200 206 211), omdat spesifiek die reg op onderstut in die konteks van mynbou-bedrywighede ontwikkel het. Hoewel daar in die literatuur vermeld word dat hierdie gevalle eiesoortige probleme oplewer, word daar nie uitdruklik aangedui wat die implikasies van die onderskeid tussen die "normale" bureregtelike geval en die mynbou-georiënteerde gevalle is nie. Hieruit kan afgelei word dat 'n ondersoek na die aard en inhoud van die reg op laterale en onderstut moontlik van die ooreenkomste en verskille tussen die bureregtelike gevalle en die mynbou-gevalle kennis sal moet neem.

4 3 2 Analise van Bestaande Regspraak

Dit is insiggewend om hierdie probleem in die lig van die bestaande hofuitsprake en ander literatuur te beoordeel. Vir hierdie doel kan die tersaaklike feitestelle wat al in die hofsake ter sprake gekom het in twee hoofgroepe verdeel word:

a *Gevalle waar die toestand van die grondoppervlakte deur oop uitgrawings van die een of ander aard beïnvloed word* Opvallend van hierdie groep gevalle is dat

die gevaarlike bedrywigheid en die skadelike gevolge daarvan deur 'n vertikale lyn van mekaar geskei word, en dat die bedrywigheid en die skade dus op twee aanliggende grondstukke plaasvind. In hierdie gevalle gaan dit dus in beginsel oor die verhouding tussen die reghebbendes op twee aanliggende grondstukke. Selfs in gevalle waar slegs een erf of grondstuk betrokke is, sal die probleem gewoonlik handel oor die uitgrawings van een reghebbende (bv die persoon wat op 'n bepaalde gedeelte van 'n plaas mag myn of kwarrie) op een gedeelte van die grond, en die nadelige gevolge daarvan vir die regte van 'n ander persoon op aanliggende grond. Selfs die gevalle waar dit handel oor 'n reg op laterale stut wat uit die verlening van 'n serwituut voortspruit (bv 'n serwituut van weg of van waterleiding) kan binne hierdie kategorie tuisgebring word. Verskillende subgroepe kan binne hierdie groep onderskei word:

aa Die eerste hofuitsprake oor hierdie onderwerp het (soos hierbo reeds vermeld is) oor die toepaslikheid van die reg op laterale stut in die geval van delwerskleims gehandel (vgl ook *Griqualand West Diamond Mining Co Ltd v London and South African Exploration Co Ltd* (1883) 1 BAC 239). Sulke kleims en delwerye skep kennelik een subgroep van oop uitgrawings wat eiesoortige behandeling in die regspraak ontvang het.

bb Die voorbeeld van tradisionele diamantkleims en delwerye is ook verwant aan die geval van uitgrawings wat met oop mynboubedrywighede ("strip mining") te doen het, waardeur die laterale stut van aanliggende grond in gedrang gebring is (vgl *London and SA Exploration Co v Rouliot* (1890) 8 SC 74).

cc Die subgroepe hierbo is verder verwant aan die geval van ander uitgrawings waardeur die laterale stut van aanliggende grond en geboue daarop in die gedrang gebring is sonder dat dit noodwendig met mynbou te doen het (vgl hier *Johannesburg Board of Executors and Trust Co Ltd v Victoria Building Co Ltd* (1894) 1 OR 43; *Grieves v Anderson, Grieves v Sherwood* 1901 NLR 225; *Phillips v South African Independent Order of Mechanics and Fidelity Benefit Lodge and Brice* 1916 CPD 61; *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (OD); *Gordon v Durban City Council* 1955 1 SA 634 (D); *Demont v Akals' Investments (Pty) Ltd* 1955 2 SA 312 (D); *John Newmark and Co (Pty) Ltd v Durban City Council* 1959 1 SA 169 (D); *Gijzen v Verrinder* 1965 1 SA 806 (D); *Foentjies v Beukes* 1977 4 SA 964 (K)).

b *Gevalle waar die toestand van die grondoppervlakte deur ondergrondse mynboubedrywighede beïnvloed word* Opvallend van hierdie gevalle is dat die gevaarlike bedrywigheid en die skadelike gevolge daarvan deur 'n horisontale lyn van mekaar geskei word, met die gevolg dat die bedrywigheid en die skadelike gevolge daarvan bokant mekaar op een en dieselfde grondstuk geleë is (vgl *Central South African Railways v Geldenhuis Main Reef GM Co Ltd* 1907 TH 270; *Coronation Collieries v Malan* 1911 TPD 577; *Municipal Council of Johannesburg v Robinson Gold Mining Co Ltd* 1923 WLD 99; *Douglas Colliery Ltd v Bothma* 1947 3 SA 602 (T)).

Daar bestaan dus in die hofuitsprake aansluitingspunte vir die gedagte dat die reg op laterale en onderstut nie noodwendig sonder meer by die burereg ingeskakel kan word nie. Wanneer daar na 'n teoretiese uiteensetting van die aard en inhoud van hierdie reg gesoek word, sal daar dus minstens aanvanklik rekening gehou moet word met die ooreenkomste en verskille tussen die twee groepe gevalle waarin hierdie reg ter sprake kom, naamlik die burereg-gevalle enersyds en die mynbou-gevalle andersyds.

4 3 3 Die Burereg en Laterale Stut

Kenmerkend van die gevalle waarin die kwessie van laterale en onderstut hoofsaaklik handel oor die verhouding tussen twee regsubjekte wat hulle onderskeie regte op aanliggende grond uitoefen, is dat dit gemaklik by die tradisionele burereg inskakel juis omdat die verhouding tussen twee buureienaars die sentrale fokuspunt van die burereg uitmaak (sien in hierdie verband die baie insiggewende opmerkings van D van der Merwe 582–585 rakende die eiesoortigheid van die bureregtelike verhouding). Daar bestaan in die Romeinse regstradisie goed ontwikkelde regsbeginsels waarvolgens die regte van verskillende reghebbendes ten aansien van aanliggende grondstukke gereël en wedersyds gehandhaaf kan word, en hierdie beginsels is in die Suid-Afrikaanse reg onder die vaandel van die burereg opgeneem. Dit word as sodanig ook gewoonlik behandel as deel van die bespreking van die omvang en grense van die eienaar se bevoegdhede. Dit is interessant om daarop te let dat die kwessie van laterale steun algemeen in hierdie konteks as een van die aspekte van die burereg beskou word of daarin opgeneem word, selfs wanneer die betrokke outeurs self vermeld dat hierdie reg nie een van die gemeenregtelike bureregte is nie. (Vgl Hall en Kellaway 105; CG der Merwe 126–128; Silberberg-Schoeman 182–185; Delport en Olivier 175–181; vgl ook daarmee saam JC van der Walt 374–378 en D van der Merwe 499–522.)

Sonder om hier dieper op hierdie aspek in te gaan, kan gestel word dat die ontwikkelende beginsels oor die reg op laterale steun, hoewel dit nie uit die gemenereg afkomstig is nie, relatief gemaklik in die eweneens ontwikkelende raamwerk van die tradisionele burereg ingepas kan word. As sodanig sal beginsels soos *sic utere tuo ut alienum non laedas*, wat gewoonlik taamlik sterk in die burereg figureer, ook op hierdie gevalle toepaslik wees (vgl hierby *London and South African Exploration Co v Rouliot* (1890) 8 SC 74 99). In hierdie konteks sal dit waarskynlik sinvol wees om spesifiek van *laterale stut* of *sydelingse steun* te praat, en die term dan te beperk tot die duidelik laterale aard van die stut wat tussen twee aanliggende grondstukke ter sprake is.

Van hierdie bureregtelike gevalle van laterale stut moet egter onderskei word die gevalle wat oënskynlik daaraan verwant is, maar waarin daar geen bureregtelike verhouding tussen die eienaars of okkupeerders van aanliggende grondstukke ter sprake is nie. Dit sluit dan in die gevalle waar 'n grondeienaar se uitgrawing op sy eie grond vir 'n verbyganger skade veroorsaak het. Gevalle soos hierdie handel nie oor die reg op laterale of oppervlakstut nie hoewel dit moontlik in die uitspraak vermeld of bespreek word (vgl bv *Wright v Paterson* (1863) 5 EDC 390; *Clingen v Ross* (1899) 16 SC 152; *Fleming v Rietfontein Deep Gold Mining Co Ltd* 1905 TS 111). Hierdie gevalle kan vir huidige doeleindes buite rekening gelaat word aangesien dit volgens die gewone beginsels van deliktuele aanspreeklikheid benader moet word.

4 3 4 Mynboubedrywighede en Onderstut

Wat die reg op onderstut deur die onderliggende grondlaag betref, is die saak minstens in beginsel eiesoortig aangesien die uitoefening van die betrokke reghebbendes se onderskeie regte in hierdie gevalle deur 'n horisontale verdelingslyn gekenmerk word, en die skadelike bedrywigheid van die mineraalreghebbende op dieselfde grondstuk (maar dan op 'n laer vlak) as die skadelike gevolge daar-

van vir die grondeienaar geleë is. Daarom is dit ook so dat die Romeinse regstradisie, en ook die tradisionele burereg, nie werklik vir hierdie gevalle oplossings bied nie omdat die verhouding van buureienaars ontbreek en omdat die kenmerkende verhouding tussen grondeienaar en mineraalreghebbende wat in hierdie gevalle aanwesig is aan die burereg vreemd is.

Dit is tradisioneel eie aan die Romeinse reg dat grond en onroerende goed vir doeleindes van die verdeling van regte daarop vertikaal gesien word en nie horisontaal nie. Hierdie benadering word in twee bekende beginsels uitgedruk, naamlik enersyds *cuius est solum eius est usque ad caelum et ad inferos* (*D* 43 24 22 4; vgl hierby *London and South African Exploration Co v Rouliot* (1890) 8 SC 74 90; *Rocher v Registrar of Deeds* 1911 TPD 311 315; *Vanston v Frost* 1930 NPD 121 125 (*obiter*); *Botes v Toti Development Co* (*Pty*) *Ltd* 1978 1 SA 205 (T) 207H); en andersyds *omne quod inaedificatur solo cedit* (*D* 41 1 7 10; *I* 2 1 29–30; en vgl *Botes v Toti Development Co* (*Pty*) *Ltd* 1978 1 SA 205 (T) 207H). In laasgenoemde beslissing is hierdie beginsels en die implikasies daarvan (spesifiek met verwysing na die ontwikkeling van eiendomsreg op eenhede in 'n deeltitelskema ingevolge die Wet op Deeltitels 66 van 1971) duidelik gestel (207F–H 208A):

> "This [consideration of the salient features of Act 66 of 1971] must be done against the background of the basic principle of our common law of property that there can be no ownership of a building apart from the land on which it stands . . . Where buildings are permanently annexed to the land the owner of the land by means of *accessio* becomes the owner of the buildings; *omne quod inaedificatur solo cedit*. Separate ownership of horizontal layers not being recognized . . . it was accordingly not possible to divide a building into flats each of which was the object of a separate right of ownership . . . Times may have changed but (until 1971) our law of property, in this respect, did not."

(Vgl daarby ook CG van der Merwe "Die Wet op Deeltitels in die Lig van Ons Gemeenregtelike Saak- en Eiendomsbegrip" 1974 *THRHR* 113-132, veral 115–120, waar die wysigings wat in hierdie verband deur die Wet op Deeltitels 66 van 1971 aangebring is geregverdig word; asook CG van der Merwe 280–281; Silberberg-Schoeman 359; Van der Merwe en Bulter *Sectional Titles, Share-Blocks and Time-Sharing* (1985) 26–30; Pienaar se resensie van lg werk 1986 *THRHR* 495–499 496; Pienaar "Eiendomstydsdeling: die Aard van die Reghebbende se Reg" 1986 *TRW* 1–14 5.)

Die verhouding tussen die grondeienaar en die mineraalreghebbende het binne die konteks van die mynreg ontwikkel. Daar word algemeen aanvaar dat die reg aangaande minerale en myne in die Suid-Afrikaanse reg 'n eie en unieke ontwikkelingsgang ondergaan het (en sekerlik nog steeds ondergaan), en een van die belangrikste aspekte van hierdie ontwikkeling is juis die beginsels wat rondom die onderskeie regte van die grondeienaar en die mineraalreghebbende tot stand gebring is (sien hieroor bv Franklin en Kaplan *The Mining and Mineral Laws of South Africa* (1982) 113–153). Bepaalde konsekwensies van hierdie ontwikkeling vir die grondeienaar se reg op onderstut is ook reeds ondersoek en uiteengesit binne die konteks van die mynreg (vgl bv Franklin en Kaplan 113–118 (algemene beginsels), 138–141 (spesifiek m b t oop of "strip mining"), 187–189 (spesifiek m b t skade wat uit die onttrekking van onderstut voortspruit)). Die volgende gevolgtrekkings oor die plek van die reg van onderstut in die konteks van die mynreg lyk onvermydelik:

a Hierdie reg het spesifiek binne die konteks van die mynreg ontwikkel en word spesifiek in daardie konteks erken en gehandhaaf.

b Die afskeiding van minerale regte van grondeiendomsreg en die gevolglike beklemtoning van die belangrikheid van die ontginning van minerale is 'n eiesoortige en unieke ontwikkeling in die Suid-Afrikaanse reg.

c Deur hierdie ontwikkeling is die inherente gebruiksregte van die grondeienaar grondliggend aangetas ten gunste van die mineraalreghebbende.

d Die aard en inhoud van die reg op onderstut moet binne hierdie unieke konteks beoordeel word, naamlik as synde 'n poging om die geskille tussen die grondeienaar en die mineraalreghebbende op te los.

Dit is moontlik dat daar uiteindelik geen besware teen die insluiting van die gevalle van onderstut (waar dit dus oor die ondersteuning van die bogrond tydens die ontginning van die ondergrond handel) by die burereg sal wees nie (vgl bv Hall en Kellaway 105–106 en D van der Merwe 499–522 waar daar wel 'n onderskeid tussen laterale steun en onderstut gemaak word, maar albei oor dieselfde kam geskeer word). Nogtans is dit ten minste voorlopig nuttig om van die verskil tussen die gevalle van laterale steun enersyds en onderstut andersyds kennis te neem omdat dit die verskillende verhoudinge beklemtoon wat in die twee gevalle betrokke is, naamlik die verhouding tussen buureienaars van aanliggende grondstukke in die geval van laterale steun, en die verhouding tussen grondeienaar en mineraalreghebbende in die geval van onderstut. Voordat die kenmerke van albei hierdie verhoudings en die volle implikasies daarvan volledig ondersoek is, mag dit raadsaam wees om die verskille in gedagte te hou wanneer praktiese gevalle beoordeel word.

4 4 Vervreemding van die Reg op Laterale en Onderstut

Die enigste aspek van die onderhawige beslissing wat nog nie hierbo behandel is nie, raak die bevinding dat die reg op laterale en onderstut, as synde 'n inherente deel van die eienaar se eiendomsreg binne die konteks van die verhouding tussen grondeienaar en mineraalreghebbende, nie deur 'n buitestaander (buite daardie verhouding) verkry of gehou kan word nie. Hoewel die howe en skrywers al voorheen aandag aan die vereistes bestee het wat gestel word wanneer die grondeienaar aan iemand anders van sy reg op laterale en onderstut afstand doen (vgl die diamantkleim en delwerysake waarna hierbo al verwys is, asook *London and South African Exploration Co v Rouliot* (1890) 8 SC 74 93; *Coronation Collieries v Malan* 1911 TPD 577 586; *Douglas Colliery Ltd v Bothma* 1947 3 SA 602 (T) 613; *East London Municipality v South African Railways and Harbours* 1951 4 SA 466 (OD) 477E–F), was die afstanddoenings nog altyd 'n saak tussen die grondeienaar en die mineraalreghebbende of die buureienaar, en daarom is die onderhawige saak sover bekend die eerste geval waarin die vraag geopper is of die reg ook aan 'n buitestaander, wat nòg die mineraalreghebbende nòg 'n buureienaar is, vervreem kan word.

In die algemeen is die gedagte dat die eienaar bepaalde aspekte van sy reg nie kan vervreem nie of net aan bepaalde persone mag vervreem natuurlik nie onbekend nie. Afgesien van statutêre bepalings soos die Wet op Groepsgebiede 36 van 1966 is daar ook gemeenregtelike beginsels wat inhou dat bepaalde aspekte of bevoegdhede wat uit eiendomsreg voortspruit nie los van die reg op die eiendom as sodanig vervreem kan word nie, soos die eienaar se vindikasiebevoegdheid, of die vervreemdingsbevoegdheid, of die inherente "kern" van

eiendomsreg as sodanig (vgl in hierdie verband AJ van die Walt *Die Ontwikkeling van Houerskap* (1986) 601–604). Die vraag wat hier na vore kom, is of die reg op laterale en onderstut ook tot hierdie kategorie van onvervreembare bevoegdhede tuishoort, en indien wel waarom.

Dit is insiggewend om hierdie vraag, wat in die onderhawige saak streng gesproke slegs oor die grondeienaar se reg op onderstut teenoor die mineraalreghebbende beantwoord is, ook ten aansien van die grondeienaar se reg op laterale steun teenoor die buureienaar te vra, veral aangesien die vraag in hierdie geval (gesien die opmerkings hierbo gemaak) waarskynlik met verwysing na al die bureregtelike aansprake beantwoord moet word. Dit is veral ten aansien van spesifieke bureregtelike aansprake soos met betrekking tot die natuurlike vloei van water dat hierdie vraag relevant mag wees: kan die owerheid byvoorbeeld in die afwesigheid van statutêre bevoegdheid B se bureregtelike aanspraak teenoor sy buurman C onteien ten einde die owerheid in staat te stel om op C se grond met die natuurlike vloei van water in te meng, en B sodoende benadeel word? As regter Kriegler se uitspraak in die onderhawige saak ten aansien van die grondeienaar se reg op onderstut as voorbeeld aanvaar word, wil dit voorkom of daar ook beweer kan word dat die verskillende bureregtelike aansprake, waaronder die reg op laterale steun, so 'n inherente en integrerende deel van die besondere verhouding tussen buureienaars van grond is dat dit nie van die reg op die grond as sodanig losgemaak kan word nie. Die implikasie daarvan sal dan wees dat die bureregtelike aansprake as sodanig nie los van die grondeiendomsreg vervreem of onteien kan word nie.

Daar word aan die hand gedoen dat regter Kriegler se uitspraak ten aansien van die oordraagbaarheid van die reg op laterale en onderstut sinvol is, en dat die rede vir die onoordraagbaarheid daarvan gesoek moet word in die konteks van die feit dat hierdie reg inderdaad 'n inherente en onlosmaaklike aspek van die besondere verhouding is waarbinne dit ontstaan. Hierdie opmerking geld waarskynlik eweseer vir die reg op onderstut in die konteks van die grondeienaar-mineraalreghebbende-verhouding en vir die reg op laterale steun in die konteks van die buureienaarverhouding. Dit sal vir latere en meer volledige ondersoek gelaat moet word om te bepaal of hierdie twee verhoudings van mekaar onderskei moet word en of die onderskeid maar kan verval.

4 5 Slot

Die belangrikste implikasie van hierdie uitspraak vir die sakeregteorie is geleë in die verklaring vir die aard en inhoud van die reg op laterale en onderstut in die konteks van die besondere verhouding waarbinne dit ontstaan. Teoreties is die aspekte en inhoudsbevoegdhede van eiendomsreg nog nie behoorlik gekategoriseer en ontleed nie en dit wil voorkom asof hierdie besondere reg eiesoortige probleme bied. Naas die bekende inhoudsbevoegdhede soos die vervreemdingsbevoegdheid wat nie los van eiendomsreg self oorgedra kan word nie, sal hierdie reg (of dalk bevoegdheid?) verklaar moet word met spesifieke verwysing na die ontstaan en voortbestaan daarvan binne die subjek-derdesverhouding, met gevolg dat dit nie as een van die reghebbende se inhoudsbevoegdhede gesien moet word nie. Verdere ondersoek in hierdie verband lyk nodig.

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THE DEDUCTION OF WORKMEN'S COMPENSATION BENEFITS

Senator Versekeringsmaatskappy Bpk v Bezuidenhout 1987 2 SA 361 (A)

When a workman is injured in the course of his employment, he becomes entitled to benefits in terms of the Workmen's Compensation Act 30 of 1941. Such benefits typically include the payment of medical and travelling expenses, the payment of a temporary pension and, for serious injuries, the granting of a pension payable for life. If he is killed, pensions become payable to his dependants and a contribution may be made towards funeral expenses.

Such benefits are payable even if the injury arises as a result of the workman's own negligence. However, if a third party has liability to pay compensation to the workman, section 8(1)(a) of the act enjoins a court to "have regard to" the benefits which have been awarded under the act. The interpretation of these words was over the years thought to have been established with some degree of certainty. However, with the ruling in the recent *Bezuidenhout* case the appellate division would seem to have cast doubt upon accepted practices and created the potential for a new approach to the problem and the prospect of a trail of fresh litigation.

Section 8(1) of the act entitles the workmen's compensation commissioner (or an employer who is individually liable, e g SAR & H) to a right of action against the third party who is liable to the workman for recovery of the value of what the commissioner has awarded by way of compensation. This right of intervention closely resembles what is known in insurance law as a "right of subrogation" (*Ackerman v Loubser* 1918 OPD 31 36). In order, it would seem, to protect the commissioner's right of recovery, the court is required, when assessing the compensation payable directly to the workman, to withhold amounts which the commissioner may legitimately recover. In terms of section 8(4), the compensation recoverable includes the capitalised value of any pension awarded "as determined by the Commissioner." The effect of these words has been taken to preclude an independent actuarial valuation of the pension.

Quite reasonably, the approach hitherto (Newdigate & Honey *The MVA Handbook* 52–54) has been to assess the damages payable by the third party, including allowance for any apportionment, as though the act did not exist, that is to say, as though no compensation whatsoever had been payable by the commissioner, and then from the damages so assessed to deduct the *total value* of "compensation" which the commissioner has awarded. Consequences of this approach have been the following:

a If the plaintiff has been contributorily negligent his full damages will be assessed and apportioned as though the workmen's compensation benefits had not been payable. From this reduced (i e apportioned) amount is deducted the *total unapportioned value* of "compensation" awarded by the commissioner.

b If a workman has failed to include in his claim for damages the value of medical aid provided by the commissioner, this does not prevent a deduction being made from plaintiff's damages for the value thereof (*Klaas v Union & SWA Insurance Co Ltd* 1981 4 SA 562 (A) 587B–C).

c The value of the pension to which a plaintiff becomes entitled is taken at the commissioner's value notwithstanding that its open-market actuarial value may be somewhat less.

In the recent *Bezuidenhout* case the appellate division was faced with a situation where the plaintiff had failed to include in his claim the value of medical aid provided by the commissioner. The defendant, relying on *Klaas*'s case, sought to have this amount deducted from the plaintiff's damages. The trial court refused to do so on the grounds that if no deduction were made it would not have the result of affording the plaintiff double compensation. This view was upheld on appeal. The *Klaas* principle, it was stated (367E–F), is applicable solely to cases subject to section 22(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 (now section 9(2) of the Motor Vehicle Accidents Act 84 of 1986).

In the course of the judgment the court emphasised certain principles:

i "Only like should be deducted from like" (366J).

ii A plaintiff should not receive double compensation (367C).

iii The total liability of the defendant may not exceed the amount for which he would have been liable had no benefits been payable under the Workmen's Compensation Act (s 8(1)(b)).

iv The Workmen's Compensation Act is concerned solely with patrimonial loss (368A–D).

v If the commissioner has paid too much to the plaintiff he cannot recover the excess from the defendant (368E).

Based upon the above principles one reaches conclusions very different from those prevailing under the old order:

Separation of Patrimonial Damages from General Damages

Clearly the first step in any inquiry concerned with workmen's compensation benefits is to identify the total liability of the third party defendant for *patrimonial loss*. This means that where workmen's compensation benefits are concerned, a court must indicate an amount for general damages for pain and suffering and loss of the amenities of life separately from the amount for patrimonial loss. This is clearly not an occasion for a robust assessment of a single lump sum incorporating both classes of damages. The *Bezuidenhout* case is quite clear on the point that the commissioner's right to recovery is limited to the patrimonial damages and that no deduction is to be made from that part of the plaintiff's damages which represent general damages for pain and suffering and loss of the amenities of life.

The Effect of the Apportionment of the Damages

If the damages payable to the plaintiff have been reduced by reason of contributory negligence it seems that this limits the extent to which a court may make a deduction in respect of "compensation" awarded by the commissioner. Imagine a claim by a plaintiff which includes R10 000 for medical aid which had

been paid by the commissioner and which is subject to an apportionment of 40/60 in favour of the defendant. The defendant is only liable to pay R4 000 to the plaintiff. If the commissioner is restricted to deducting like from like one would expect that he can therefore recover no more than R4 000 in respect of what he has paid towards medical aid.

The proper approach to "having regard to" benefits which the commissioner may recover, would now seem to be that each element of patrimonial damages is to be apportioned separately and then compared to its corresponding element in the commissioner's value for "compensation." The lesser amount is then deducted. It seems that these lesser amounts also determine the limits to the liability of the third-party defendant in respect of the commissioner's claim against him. This aspect deserves closer scrutiny.

The total liability of the defendant cannot exceed the damages which would have been payable in the absence of the Workmen's Compensation Act. We may observe first of all that if a plaintiff has failed to claim for an item for which the commissioner has paid compensation, for example medical expenses, then the third-party defendant has no liability for such expenditure under common law and it seems that the commissioner then has no right of recourse. This line of reasoning leads to the conclusion that a third-party defendant can never be liable to the commissioner for more than has been deducted from the plaintiff's damages.

Separate items which are included in the commissioner's "compensation" in terms of section 8(4) of the act include: medical aid; funeral expenses; conveyance costs; costs of attendant, and the capitalised value of any continuing, liability, particularly a pension. Certain special complications arise in respect of the capitalised value of a pension which are discussed in greater detail at the end of this note.

Payments by Commissioner to an Injured Plaintiff's Employer

It commonly arises that the plaintiff's employer has continued to pay his salary after the injury and that the commissioner has made payments *to the employer* to the extent of part of the cost of paying this salary. If one assesses the compensation as though no benefits had been payable under the act, it is usually appropriate to deduct from the plaintiff's compensation the value of the salary (net of tax) which has been paid since the injury. If this has been done, then whatever amount has been paid by the commissioner to the employer has effectively been *excluded* from the plaintiff's damages and thus no further deduction should be made.

The position would be otherwise if the salary paid by the employer had been treated as *res inter alios acta* (as happened in *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A)); in such a case the plaintiff's damages would not have been reduced by reason of the salary payments and would thus effectively include the amounts which the commissioner had paid to the employer. It would therefore be appropriate for the court to make a deduction from the plaintiff's damages in respect of the temporary pension paid by the commissioner, since, to the extent that the commissioner has subsidised the payments, they cannot, strictly speaking, be said to be *res inter alios acta*.

The Capitalised Value of a Pension

In the case of serious permanent disablement, the commissioner may award a pension. It is noteworthy that such pensions do not terminate at the time when the workman might otherwise have ceased employment but are payable for his lifetime. Pensions to the widows of deceased workmen do not terminate upon the remarriage of the widow and are also payable for life. Pensions to the dependent children of a deceased workman are payable until age 18 regardless of when the child becomes self-supporting.

In recovering from a third-party defendant the capitalised value of such a pension is "as determined by the commissioner" (s 8(4)). *Prima facie* this would seem to preclude an independent actuarial valuation. However, in the light of the *Bezuidenhout* principles, the commissioner's valuation would merely seem to set an upper limit to what the commissioner may recover.

Consider the following numerical example: Suppose that the commissioner has valued a pension at R100 000 but that a life office is prepared to issue a comparable pension at a price of R70 000. The extent to which the plaintiff can be said to have benefited from the award of the pension is thus only R70 000. In terms of the *Bezuidenhout* principles it seems clear that only this lesser amount may in fairness be deducted from the plaintiff's damages, since the financial advantage derived by the plaintiff has been only R70 000.

In the event of an apportionment the plaintiff would have had included in his damages only part of the R70 000. He will none the less have benefited from the full pension awarded, for that is not subject to apportionment.

It is tempting to argue that after apportionment it remains correct to deduct R70 000, since that is the extent to which the plaintiff has financially benefited from the pension. However, in the *Bezuidenhout* case the appeal court stated (368D–E) that the commissioner may not recover if he has overpaid. It is submitted, therefore, that the value of benefits provided by the commissioner should be deducted *before apportionment.*

The Actuarial Valuation Basis

The commissioner's valuation basis is a gross-multiplier method (see Koch *Damages for Lost Income* 47) using an annuity factor at 6% per year compound (for further details see Koch *Damages* 129). In the case of a claim by dependants, discounting at interest is done to the date of the death; in respect of personal injury claims discounting is done to the date when a permanent pension is awarded (usually about 18 months after the accident). In terms of his current practice the commissioner does not discount at interest to the date of the trial.

The choice of a proper net capitalisation rate is significantly affected by the rate at which pensions are expected to increase in years to come. If increases are expected in line with inflation then South African actuaries are substantially in agreement that a net capitalisation rate of 2,5% per year compound should be used. However, if the pension is expected to increase at a rate somewhat *less* than the rate of inflation then a net capitalisation rate *in excess of 2,5% per year* becomes appropriate. The higher the net capitalisation rate, the lower the capitalised value which falls to be deducted. The commissioner discounts at 6% per year compound, a rate which *prima facie* implies increases well below the

rate of inflation. Under present economic conditions, however, there are grounds for using a net capitalisation rate in excess of even 6% per year. Consider the following:

Historically the authorities have not been particularly generous with increases for pensions payable under the Workmen's Compensation Act: an increase of 15% was granted in 1979, again in 1981 and most recently in 1984 by the amendment of section 43*bis* of the Act. Assuming a much-overdue increase of 15% in 1987, this history reflects an average rate of increase of 5,75% per year compound over a 10-year period. Over the same period inflation has averaged 14,1% per year compound. *The rate of increase in pensions has thus averaged only 40% of the rate of inflation.*

What relevance, one may ask, does this have to the issues under discussion? The reply is that, if past performance is to be taken as a guide to what is to happen in the future, then in making our projections of future increases we may justifiably work with 40% of the expected inflation rate. This has a significant effect on the actuarial value of pensions awarded by the commissioner, in the sense that the open-market value of the WCA pension is then materially less than the value placed on it by the commissioner. In such circumstances, it has been argued above, it is unfair to a plaintiff to deduct from his damages the larger value as determined by the commissioner.

In order to follow the reasoning below, the reader is asked to distinguish carefully between a *gross discount rate of interest* and a *net capitalisation rate* (see Koch *Damages for Lost Income* 75). If one adopts a *gross discount rate of interest* of 15% per year compound (such as is currently used by life offices for pricing pensions for sale to the public), this implies an expected rate of inflation of 12,5% per year compound (i e 15% — 2,5%). This follows necessarily if 2,5% per year is accepted as a proper real rate of return. A figure of 40%, it has been noted above, is the proportion of inflation that pensions have increased in the past; 40% of 12,5% is 5%. In other words, the present expected average rate of increase in the future for workmen's compensation pensions is about 5% per year compound.

It is possible to buy from a life office *now* a pension which increases at 5% per year compound. The price which that life office will charge for such a pension will be calculated using a net capitalisation rate of about 10% per year compound (15% — 5%). The 10% net capitalisation rate is very much greater than the 6% used by the commissioner and, as has been mentioned above, the higher the discount rate of interest, the lower the capitalised value.

A Caveat

The foregoing discussion of actuarial values presumes that the value of the plaintiff's compensation is determined at a date fairly close to the date at which the commissioner determines his values. The greater the delay, the less will be the difference between the commissioner's values and the open-market actuarial values. This is so by reason of the usual actuarial practice to add inflation/interest to the plaintiff's common-law damages. Under circumstances of substantial delay the open-market values may well become greater than the commissioner's values.

The above discussion assumes that the actuary performing the valuation uses a *gross discount rate of interest* fairly close to the open-market rate (currently

about 15% per year compound). A number of consulting actuaries use somewhat lower rates and their values will therefore not necessarily differ from those of the commissioner by as much as in the examples above. It is the present writer's submission, however, that the open-market rate is the fairest basis for value, since that reflects the price at which a plaintiff could purchase a pension to replace that awarded by the commissioner. It would be grossly unfair if a plaintiff were compelled to accept at an inflated price from the commissioner a pension which can be purchased very much more cheaply in the open market.

As from March 1986, any pension payable in terms of section 39(1)(c) or (d) of the act is exempt from taxation (Income Tax Act 58 of 1962 s 10(1)(gB)). The exemption from liability for tax does not apply to a temporary pension payable under section 38, nor does it apply to pensions payable to widows and children under section 40. Under circumstances where there is liability for taxation, the extent to which a plaintiff benefits from the pension is thereby reduced; it follows that the deduction from the compensation should in fairness be based upon this reduced value.

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AANSPREEKLIKHEID WEENS 'N LATE IN DIE GEVAL VAN MUNISIPALITEITE

Van der Merwe Burger v Munisipaliteit van Warrenton 1987 1 SA 899 (NK)

Voor die toonaangewende uitspraak in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) het die vraagstuk van deliktuele aanspreeklikheid weens 'n late (*omissio*) veral dikwels in die sogenaamde munisipaliteitsake voorgekom. In hierdie sake (asook in ander sake waarin aanspreeklikheid weens 'n late ter sprake was) het die howe deurgaans skerp onderskei tussen 'n *commissio* en 'n *omissio*. Op enkele positiefregtelike uitsonderings na het aanspreeklikheid nie weens 'n *omissio* gevolg nie. Die mees algemene uitsondering was die sogenaamde *omissio per commissionem*. Hiervolgens is 'n regsubjek wat 'n *omissio* begaan het, deliktueel aanspreeklik gehou indien hy vóóraf deur 'n *commissio* 'n gevaarlike of potensieel gevaarlike toestand in die lewe geroep het, en sy *omissio* dan bestaan het uit 'n versuim om te verhoed dat 'n ander regsubjek benadeel word toe die toestand gevaarlik geword het. Het só 'n voorafgaande *commissio* (ook "prior conduct" genoem) ontbreek, kon aanspreeklikheid nie op 'n *omissio* volg nie (behalwe in enkele ander uitsonderingsgevalle wat gaandeweg deur die positiewe reg erken is (sien Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1985) 42–48; Boberg *The Law of Delict* bd 1 (1984) 212).

Die *omissio-per-commissionem*-reël het baie kritiek ontlok – ook van die regbank – met 'n kulminasie in *Minister van Polisie v Ewels*. In hierdie uitspraak – self nie 'n munisipaliteitsaak nie – het die appèlhof beslis dat aanspreeklikheid

weens 'n late kan volg indien daardie late begaan is in stryd met 'n *regsplig* om te verhinder dat iemand anders benadeel word. Daar word dus na die onregmatigheid al dan nie van die late gevra; en dié vraag word met verwysing na die "regsoortuiging van die gemeenskap" beantwoord. 'n Voorafgaande *commissio* is dus nie meer 'n vereiste vir aanspreeklikheid weens 'n late nie (*Minister van Polisie v Ewels* 596G–597C). In 1984 skryf Boberg (234) nietemin:

> "It will be interesting to see whether the broad approach to liability for omissions adopted in *Minister van Polisie v Ewels* . . . will have any effect on municipal immunity. This is a matter on which the writers have not been helpful . . . The court in *Ewels* made no mention of the municipality cases, and judicial reform will not be facilitated by the formidable authority of five Appellate Division decisions endorsing the doctrine . . . "

In *Van der Merwe Burger v Munisipaliteit van Warrenton* het die hooggeregshof nou – in die tydvak ná *Ewels* – met 'n tipiese munisipaliteitsaak-feitestel te doene gekry. Die munisipaliteit van Warrenton (die respondent in die saak) het 'n sekere stormwaterpyp binne sy munisipale grense gelê. Dié pyp het uitgemond in 'n voor wat veronderstel was om stormwater na 'n nabygeleë rivier af te voer. Met verloop van tyd is die voor deur riete, palmiet en opdrifsels verstop. Die appellant het die munisipaliteit skriftelik versoek om die sloot met sement uit te voer ten einde grondverspoeling te voorkom. Die munisipaliteit het geantwoord dat die saak aandag geniet, maar voordat enige konkrete stappe gedoen is, het 'n swaar reënbui die dorp getref. Stormwater het oor die verstopte sloot se walle gespoel en na bewering skade aan die appellant se eiendom aangerig. Die appellant het 'n eis vir skadevergoeding teen die munisipaliteit ingestel. In die landdroshof is absolusie van die instansie beveel, waarop die appellant na die Noord-Kaapse afdeling van die hooggeregshof geappelleer het.

In die betoog namens die munisipaliteit is swaar gesteun op *Moulang v Port Elizabeth Municipality* 1958 2 SA 518 (A) en ander munisipaliteitsake waarin die *omissio-per-commissionem*-reël telkens toegepas is. (Die uitspraak in die hof *a quo* was ook grootliks op die *Moulang*-saak gebaseer.) Namens die munisipaliteit van Warrenton is aangevoer dat die *Ewels*-saak op die feite onderskeibaar was, en dat daar in *Ewels* geen uitdruklike of stilswyende verwerping was van die beginsels wat in die munisipaliteitsake neergelê is nie.

In sy uitspraak gee regter Steenkamp (met wie waarnemende regter Erasmus saamgestem het) 'n deeglike historiese oorsig van die lotgevalle van die *omissio-per-commissionem*-reël in ons regspraak (903D–907F). Hy verwerp die argument dat die *Ewels*-uitspraak nie op munisipaliteite van toepassing is nie, aangesien

> "dit regtens onhoudbaar [is] om 'n sekere tipe regspersoon vry te stel van 'n algemene beginsel wat deur ons Appèlhof neergelê is. Dit sou beteken dat in die *Ewels*-saak die Minister van Polisie vir 'n late van sy amptenare aanspreeklik kan wees sonder enige vorige handeling aan die kant van die Minister of sy amptenare, maar as dit nou een van die polisiebeamptes van die munisipaliteit was, dan kan die munisipaliteit nie op grond hiervan op 'n blote late aanspreeklik gehou word nie" (907I–J).

Hy motiveer sy beslissing verder soos volg:

> "In ons moderne samelewing waar munisipaliteite wye bevoegdhede en verpligtinge het en ook goeie en vaste bronne van inkomste het, en ook versekering vir hulle aanspreeklikheid kan uitneem, bestaan daar geen rede waarom 'n munisipaliteit immuniteit teen eise, wat bloot op 'n late gegrond word, beskerm moet word nie mits daar 'n regsplig bestaan waarop die late gegrond word. In die hedendaagse samelewing sou die regsgevoel van 'n gemeenskap ten hemele skreeu as 'n persoon se eis nie erken word wat bv beseer word, deurdat hy in 'n diep sloot in die aand gery het, wat deur stormwater in 'n straat veroorsaak is, indien sodanige gevaar aan die munisipaliteit, binne wie se grense die

straat val, bekend is en die munisipaliteit het willens en wetens versuim om motoriste teen hierdie gevaar, betyds, te waarsku. Hier kan nie gepraat word van enige vorige handeling nie. Hier het net 'n regsplig aan die kant van die munisipaliteit ontstaan om persone wat die straat gebruik, teen die gevaar te beskerm en as dit nie gedoen is nie dan is dit moeilik om te begryp waarom so 'n munisipaliteit nie aanspreeklik moet wees nie. As die versuim die munisipaliteit vir een of ander geldige rede nie verwyt kan word nie dan sou daar ook nie nalatigheid wees nie" (908A–D).

Die regter bevind dan dat die getuienis voor die hof *a quo* genoegsaam was dat 'n hof redelikerwys kon bevind het dat daar 'n regsplig op die munisipaliteit gerus het om die afleivoor skoon te hou, en dat die munisipaliteit versuim het om dit te doen (909C–E). Hy stel dus die bevel van absolusie tersyde, en verwys die saak terug na die landdroshof (909G).

Enkele grepe uit die uitspraak verg nadere beskouing.

Regter Steenkamp verklaar (908D–E):

"Na my mening het die *Ewels*-saak 'n einde gebring aan die sogenaamde *omissio per commissionem* leerstuk ten opsigte van die aanwending daarvan in alle sake insluitende sake waarin munisipaliteite betrokke is."

Hierdie sin is vatbaar vir die interpretasie dat die *omissio-per-commissionem*-reël hoegenaamd geen rol meer in ons reg te vervul het nie. So 'n afleiding is in die lig van die *Ewels*-saak nie te regverdig nie. In daardie beslissing het hoofregter Rumpff naamlik gesê:

"As uitgangspunt word aanvaar dat daar in die algemeen geen regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly nie, al sou so 'n persoon maklik kon verhinder dat die skade gely word en al sou van so 'n persoon verwag kon word, op suiwer morele gronde, dat hy daadwerklik optree om die skade te verhinder. Ook word egter aanvaar dat in sekere omstandighede daar 'n regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly. Versuim hy om daardie plig uit te voer, ontstaan daar 'n onregmatige late wat aanleiding kan gee tot 'n eis om skadevergoeding. Hierdie gevalle is nie beperk tot 'n eienaar van grond wat deur sy late veroorsaak dat iemand anders deur iets wat in verband staan met sy grond skade ly nie, of in die algemeen, tot gevalle waar daar 'n sekere voorafgaande gedrag ("prior conduct") was nie. *'n Sekere voorafgaande gedrag* of die beheer oor eiendom *mag 'n faktor wees in die totaal van omstandighede van 'n bepaalde geval waarvan onregmatigheid afgelei word*, maar is nie 'n noodwendige onregmatigheidsvereiste nie. Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree" (596H-597B; my beklemtoning).

Die korrekte posisie is dus dat, indien 'n feitestel wat voor 'n hof dien aan die tradisionele *omissio-per-commissionem*-konstruksie voldoen, die hof die bestaan van 'n voorafgaande *commissio* in ag kan neem as 'n faktor wat daarop dui dat die daaropvolgende late onregmatig was. In dié sin het die *omissio-per-commissionem*-reël steeds 'n funksie in ons reg, al word die aanwesigheid van 'n voorafgaande *commissio* tereg nie meer beskou as 'n noodsaaklike *vereiste* vir aanspreeklikheid weens 'n late nie. Of daar in 'n gegewe feitestel 'n voorafgaande *commissio* bestaan al dan nie, sal immers normaalweg veel makliker wees om vas te stel as om die vraag te beantwoord of daar ingevolge die "regsoortuiging van die gemeenskap" 'n regsplig op iemand gerus het. Is 'n voorafgaande *commissio* voorhande, meen ek dus dat dit meestal 'n *baie sterk* aanduiding sal wees van die bestaan van 'n regsplig om benadeling te voorkom. Hiermee wil ek geensins probeer om die posisie van die *boni mores* of "regsoortuiging van die gemeenskap" as algemene onregmatigheidskriterium te bevraagteken nie; ek wil juis aanvoer dat die *boni mores* normaalweg sal verg dat

'n late in 'n feitestel wat aan die *omissio-per-commissionem*-konstruksie voldoen, as onregmatig gebrandmerk moet word.

In hierdie verband is die volgende woorde van regter Steenkamp interessant:

> "Om stormwater te konsentreer in 'n stormwaterpyp met 'n deursnee van 1,20 m en dan te laat uitmond in 'n sloot wat tussen twee eiendomme geleë is en die sloot nie skoon te hou, om sodoende die wegvloei van die water te verseker nie, is om 'n potensieel gevaarlike situasie te skep. Deur so 'n situasie te skep behoort die respondent redelikerwys te voorsien dat skade aan die aangrensende eiendomme aangerig kan word. As dit nie die geval is nie, dan sal dit nie alleen 'n morele verontwaardiging by die gemeenskap ontlok nie, maar dit sal ook teen die regsoortuiging van die gemeenskap indruis" (908G–I).

Dit blyk dus dat die regter – alhoewel hy nie in hierdie stadium sê dat hy dit doen nie – inderdaad bevind dat daar 'n voorafgaande *commissio* was. Die afleiding kan dan ook gemaak word dat die feit dat 'n voorafgaande *commissio* wel in die feitestel voor die hof voorgekom het, swaar geweeg het toe regter Steenkamp sy beslissing gegee het alhoewel hy, soos gestel, dit nêrens vooraf sê nie. So beskou, bied die onderhawige beslissing 'n illustrasie van die praktiese nut van die sogenaamde *omissio-per-commissionem*-reël in die tydvak ná *Minister van Polisie v Ewels*.

Nadat hy reeds bevind het dat 'n regsplig op die munisipaliteit gerus het, voeg regter Steenkamp die volgende by:

> "In die verbygaan kan dit ook genoem word dat al sou die beginsels van die *Moulang*-saak *supra* en ander sogenaamde munisipaliteitsake nog van toepassing wees dan het die respondent hier 'n voorafgaande handeling verrig deur die stormwaterpyp te lê en dit te laat uitmond in 'n sloot. Die versuim om die sloot skoon te hou kan dan ook aan 'n voorafgaande handeling gekoppel word wat 'n wesentlike gevaarlike situasie geskep het" (908I–J).

Myns insiens is die woorde "al sou die beginsels van die *Moulang*-saak en ander sogenaamde munisipaliteitsake nog van toepassing wees" in die pas aangehaalde gedeelte egter vatbaar vir kritiek. Die *Ewels*-uitspraak het immers self – soos hierbo aangetoon is – uitdruklik daarvoor voorsiening gemaak dat 'n voorafgaande *commissio* by die beoordeling van die onregmatigheid al dan nie van 'n late in ag geneem kan word (en regter Steenkamp het trouens vroeër in sy uitspraak (907A–B) self na hierdie moontlikheid verwys).

Oorweging van die rol van die *omissio-per-commissionem*-reël bring onvermydelik die vraag na vore of 'n late ooit deur die *boni mores* as *regmatig* bestempel kan word ten spyte daarvan dat die gegewe feitestel aan die tradisionele *omissio-per-commissionem*-konstruksie voldoen (sien Boberg 266 267 vir 'n oorsig van standpunte). Hoofregter Rumpff se woorde in *Ewels* lui soos volg:

> "'n Sekere voorafgaande gedrag . . . mag 'n faktor wees in die totaal van omstandighede van 'n bepaalde geval waarvan onregmatigheid afgelei word, maar is nie 'n noodwendige onregmatigheidsvereiste nie."

Die implikasie is duidelik dat in die "totaal van omstandighede van 'n bepaalde geval" daar ook ander faktore as 'n voorafgaande *commissio* kan wees wat in aanmerking geneem kan word. Die afleiding kan dan gemaak word dat daar in 'n gegewe geval faktore kan wees wat in die proses van belange-afweging so sterk op die redelikheid van die betrokke late in die besondere omstandighede dui, dat die andersins verdoemende teenwoordigheid van 'n voorafgaande *commissio* daardeur genegativeer word. Daarby moet onmiddellik toegegee word dat dit uiters moeilik is om aan 'n praktiese voorbeeld te dink waar dit inderdaad die geval sal wees. Dit lyk in elk geval of die hoofregter in die *Ewels*-saak die moontlikheid oopgelaat het dat so 'n situasie kan voorkom.

Afgesien van 'n voorafgaande *commissio*, neem die hof *in casu* skynbaar ook 'n ander faktor in ag om vas te stel of daar 'n regsplig op die munisipaliteit gerus het. Dit is naamlik die feit dat die munisipaliteit *bewus* geword het of *geweet* het van die gevaarlike toestand voordat die eiser daardeur benadeel is (901J–902B; vgl 908B–C). Dit lyk dus of hier 'n geval voorhande is waar 'n sogenaamde dadersubjektiewe faktor – in dié geval die munisipaliteit se *kennis* van die gevaartoestand – oorweeg word in die bepaling van onregmatigheid. ('n Soortgelyke ontwikkeling het reeds t o v aanspreeklikheid weens suiwer ekonomiese verlies plaasgevind: sien *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) en Schoeman 1986 *THRHR* 287.) Volgens regter Steenkamp kan 'n munisipaliteit se kennis van 'n gevaartoestand binne sy grense trouens genoegsaam wees om 'n regsplig om benadeling te voorkom op daardie munisipaliteit te plaas, ook al is daar geen sprake van 'n voorafgaande *commissio* nie (908B–D).

Hoe dit ook al sy, die onderhawige beslissing moet myns insiens gesien word as 'n geval waar 'n voorafgaande *commissio* en subjektiewe kennis van die gevaartoestand saamgewerk het as twee "faktore in die totaal van omstandighede" wat daarop gedui het dat die betrokke munisipaliteit se late onregmatig was.

Die munisipaliteit se skuld het – vanweë die tydstip waarop absolusie in die hof *a quo* beveel is – nie in die onderhawige saak ter sprake gekom nie.

Ter samevatting: In hierdie saak word welkom bevestiging gegee dat die *Ewels*-saak ook op munisipaliteite van toepassing is. Die praktiese nut wat die *omissio-per-commissionem*-reël as 'n *riglyn* in die bepaling van die onregmatigheid van 'n late kan hê, word egter nie genoegsaam beklemtoon nie. In die lig van die appèlhof se standpunt in die *Ewels*-uitspraak moet die onderhawige beslissing nie vertolk word as gesag dat die *omissio-per-commissionem*-reël hoegenaamd geen rol in ons reg meer het nie. Laastens tree die *kennis* van 'n munisipaliteit dat 'n gevaartoestand binne sy munisipale grense bestaan, na vore as 'n faktor wat sterk aanduidend is van 'n regsplig wat op dié munisipaliteit rus om benadeling deur daardie gevaartoestand te voorkom.

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THE DISTINCTION BETWEEN WRONGFULNESS AND FAULT – DELICTUAL LIABILITY OF A SECURITY COMPANY FOR DAMAGE TO PROPERTY IN ITS CARE

J Paar & Co (Pty) Ltd v Fawcett Security Organization (Bulawayo) (Pvt) Ltd 1987 2 SA 140 (ZSC)

The importance of the distinction between wrongfulness and fault in cases of Aquilian liability is demonstrated by *J Paar & Co (Pvt) Ltd v Fawcett Security Organization (Bulawayo) (Pvt) Ltd*, where Dumbutshena CJ (with whom Gubbay

JA and McNally JA concurred) dismissed with costs an appeal emanating from a decision of Sandura JP in the high court of Zimbabwe. The facts of the case were as follows: the appellant had contracted with Total Zimbabwe (Pvt) Ltd to carry fuel for the latter in Matabeleland. The fuel was carried in tankers which belonged to the appellant and which were driven by its employees. When not in use, the tankers were left at the Total depot in Bulawayo. The respondent had a contract with Total to guard the depot against sabotage and theft. On a particular day one of the security guards employed by the respondent permitted an employee of Total to take one of the appellant's tankers from the depot. The Total employee's unauthorised action culminated in his overturning the tanker, seriously damaging it. It was common cause that there was no contract between the appellant and the respondent, but the appellant maintained that the security company was delictually liable to it in that it had owed it a duty of care, and had been negligent in allowing the Total employee to remove the tanker, given that he was not one of the authorised drivers employed by the appellant.

Before analysing the case it is convenient, briefly and for the sake of clarity, to summarise the principles of delict upon which the analysis is based. A delict is wrongful conduct by a person at fault which causes harm to another (see PQR Boberg *The Law of Delict* vol I *Aquilian Liability* (1984) 24–25). The requirements of wrongfulness and fault are separate and distinct (Boberg 31). The inquiry pertaining to wrongfulness is objective in that the defendant's state of mind and degree of care are not taken into account (these are considered when one embarks on the fault inquiry), and is relative in that one must decide whether the defendant's conduct was wrongful in relation to the particular plaintiff (*Union Government v Ocean Accident and Guarantee Corporation* 1956 1 SA 577 (A) 585C). Whether conduct is wrongful depends on whether the defendant infringed a legal right of the plaintiff (*Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387A), or has breached a legal duty of care owed to the plaintiff (*Union Government v Ocean Accident and Guarantee Corporation* 585A). In discovering whether such a right has been infringed or such a duty breached, it is useful to inquire whether the defendant conducted himself towards the plaintiff in such a way as to offend the "regsoortuiging van die gemeenskap" (the "legal convictions of the community": *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597B). These various formulations are influenced to a large extent by public policy considerations, in that the courts decide whether the defendant's conduct was wrongful by inquiring whether it was "reasonable" in relation to the *boni mores* or convictions of the community. (See, for example, *Coronation Brick (Pty) Ltd v Strachan Construction Co Pty Ltd* 1982 4 SA 371 (D) 384C–G and *Minister van Polisie v Ewels* 597B.) While positive conduct which causes physical damage is *prima facie* wrongful (*Cape Town Municipality v Paine* 1923 AD 207 216–217 and 229), there is no general duty to protect another from harm (Boberg 210–211) and failure to act will be wrongful only if it can be shown that the particular case falls into one of the categories where a duty to act is said to exist (Boberg 212), or that failure to act offended the legal convictions of the community (*Minister van Polisie v Ewels* 597B). The inquiry pertaining to fault is subjective, in that one seeks to discover whether the particular defendant was blameworthy, taking into account such factors as his state of mind and the degree of care he exercised. Although the inquiry is subjective, an objective test – that of the reasonable man or *diligens paterfamilias* – is employed. The court must inquire whether the defendant had *dolus* or *culpa*, the latter being present if (i) a *diligens paterfamilias* in the defendant's position would

have foreseen the possibility of harm arising out of his conduct and would have taken reasonable steps to avoid such harm, and (ii) the defendant failed to take such steps (*Kruger v Coetzee* 1966 2 SA 428 (A) 430E–G). Those who adhere to the "relative" as opposed to the "abstract" theory of fault hold that the kind (but not the extent) of harm, and the identity of the plaintiff, must have been foreseeable to a reasonable man in the position of the defendant before it can be said the defendant was negligent (Boberg 308–309).

The crucial importance of distinguishing between wrongfulness and fault has not prevented confusion from entering this branch of the law. It is submitted that the confusion stems primarily from the fact that certain terms are common to both wrongfulness and fault, but the sense in which they are used is often not labelled by their user. Particular care is required when the terms "duty of care" and "foreseeability" are employed. The term "duty of care" is used mainly (see e g *Donoghue v Stevenson* 1932 AC 562 579) in inquiring whether, even if there was negligence, such negligence was wrongful in that the defendant owed the plaintiff a duty (in the light of public policy) not to be negligent towards him, it being remembered that negligent conduct may not be wrongful *vis-à-vis* a particular plaintiff (*Union Government v Ocean Accident and Guarantee Corporation* 585C). However, this term is also often used in inquiring whether the defendant was negligent towards the plaintiff (*Workmen's Compensation Commissioner v De Villiers* 1949 1 SA 474(C) 478). Indeed, in *Bourhill v Young* 1943 AC 92 102, the court went so far as to justify its finding that the deceased defendant had not been negligent by referring to the "duty of care" test as formulated in *Donoghue v Stevenson*! It is submitted that to use the term "duty of care" when engaging in the fault inquiry is to introduce unnecessary confusion into the law. However, given that old habits die hard, and that some would maintain that it is entirely legitimate to use "duty of care" in the fault sense, either the sense in which the term is used on any particular occasion must be clearly labelled, or the term "legal duty" should be substituted for it in the wrongfulness inquiry. "Foreseeability" is mainly used in the fault inquiry by "relative" theorists (see Boberg 308–309) who, in applying the test in *Kruger v Coetzee*, hold that one of the requirements for negligence is that a *bonus paterfamilias* in the defendant's position must reasonably have foreseen that a particular kind of harm (see *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 2 SA 101 (A) 107C–E) might befall a particular plaintiff (see *Bourhill v Young* 108). However, the term "foreseeability" has frequently been used in the wrongfulness inquiry as a method of discovering whether a "duty of care" was owed to the plaintiff by the defendant – (see *Shell and BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D) 659G–660A and *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 386 D–G). Here again, it is submitted that confusion would be avoided if "foreseeability" were to be considered only in the fault inquiry.

It must, of course, be conceded that the above exposition of the basic principles of Aquilian liability follows but one among many contending schools of thought, and that it can be argued that to use the terms "duty of care" and "foreseeability" in both the wrongfulness and the fault inquiries is legitimate, provided that one remembers that the terms are used from an objective policy-based perspective

in the former instance, and from a subjective perspective in the latter (see *Tobacco Finance (Pty) Ltd v Zimmat Insurance Co Ltd* 1982 3 SA 55 (ZHC) 61 F–H). It is nevertheless submitted that there is a great risk that the clear distinction between wrongfulness and fault will be blurred if the terms proper to these separate concepts are treated as being interchangeable. Hence it is proposed to analyse the case which is the subject of this note in accordance with the terminology explained above, considering (a) the form of the decision, and (b) its substance.

a In *J Paar & Co (Pty) Ltd v Fawcett Security Organization (Bulawayo) Pty Ltd* the appellant's pleadings clearly indicated (141I–142J) that its claim was founded on two separate allegations: (i) that the respondent had owed it a duty of care to ensure that its property was not unlawfully removed from the depot, and (ii) that the respondent had, in the circumstances of the case, been negligent in failing to discharge that duty. Despite the court's express recognition of the separateness of these two issues (143D 146G–147A), it is submitted that this distinction became clouded during the course of the judgment. The court began (143A) by inquiring whether there was negligence on the part of the respondent's employer. Having accepted (144D) the finding of the court *a quo* that the theft was not "foreseeable" (in the fault sense), the court then concluded rather strangely (144I) that the respondent had not been negligent *vis-à-vis Total*! Up to this point it was at least clear that the issue of negligence was being addressed, but then (144J) while still discussing negligence, the court mentioned that the appellant had to prove that the respondent owed it a "duty of care." Was the court here branching off into an inquiry into wrongfulness, or was it using the term "duty of care" (in what has been submitted is a rather confusing manner) to discover whether there was negligence *vis-à-vis* the *appellant*? It is here that one sees the inherent ambiguity of the term "duty of care," and why it is necessary to label the sense in which it is used, or avoid its use altogether. The test relied upon by the court (that in *Peri Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 373E–G) is one in which the tests for wrongfulness and fault were fused, with the "duty of care" distinguished from negligence but defined in terms of the conduct which would be expected of the *diligens paterfamilias*, and thus cannot be taken as indicating whether Dombutshena CJ was addressing wrongfulness or fault. The absence of negligence on the part of the respondent *vis-à-vis* the appellant is twice stated as a conclusion (145F 146B), giving strength to the impression that the court had indeed passed from the fault inquiry to that of wrongfulness (notwithstanding the absence of any explanation as to how the conclusion on negligence was reached). The impression that wrongfulness is being considered becomes overwhelming (from 146A onwards) where the court inquires into "proximity or neighbourhood," foreseeability here being used in what is submitted in its less suitable "wrongfulness" sense. The court decided (148F–G) that damage to the appellant was not foreseeable (in the "wrongfulness" sense) by the respondent, and that there was therefore no wrongfulness. But this conclusion, and the bald statement (147A) that the respondent had done no wrong, were both arrived at without the court having dealt with the law relating to omissions, which was surely relevant to this case. Finally, one must confess puzzlement at the statement (147A) that because there was no wrongfulness, the respondent did not depart from the standard of care of the reasonable man (does this mean that the respondent was not at fault because its conduct was not unlawful?) and at the statement (149B) that, since there was no negli-

gence, damage was not reasonably foreseeable (if "foreseeable" is here used in its "wrongfulness" sense, then is not this statement as incomprehensible as that at 147A?). To conclude the first section of this note, it is submitted that because of an undisciplined use of terminology, it is often unclear whether the court was dealing with wrongfulness or fault; and furthermore that while the case seems finally to have been decided on the basis that there was no wrongfulness, the court's oft-stated conclusion that the respondent was not negligent *vis-à-vis* the appellant (as opposed to Total – 144I) does not seem to have been argued through.

b Turning to the substance of the decision, it is submitted that the court's findings with regard to both wrongfulness and fault are open to criticism.

To deal first with wrongfulness: the issue to be decided is whether the respondent owed the appellant a duty of care. The absence of any contractual relationship between the parties is, of course, not conclusive of whether such a duty of care existed. Although it is possible for both contractual and delictual liability to arise out of the same set of facts (*Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496G), Dumbutshena CJ was at pains to point out (148F) that the two types of liability are separate. In the circumstances of the case, did the respondent owe the appellant a duty to see that their tanker was not stolen or damaged or, more accurately (given that this case involves an omission) could it be said that the "legal convictions of the community" (*Minister van Polisie v Ewels* 597B) would be offended by the respondent's failure to protect the tanker? It is submitted that it is almost inconceivable that if, for example, the respondent's employee had seen someone set fire to the tanker as it stood in the depot, the respondent could thereafter be heard to say:

> "It was no part of my function to provide security for the tankers belonging to J Paar & Co., all I was obliged to do was ensure that Total property was not stolen or damaged. I was under no duty to interfere when I saw the tanker being destroyed."

Surely the "legal convictions of the community" would not permit a security company to provide such selective cover if it had assumed the task of guarding particular premises? It is submitted that there was without doubt what Dumbutshena CJ called

> "a sufficient relationship of proximity or neighbourhood that would, were there to be negligence on the part of the wrongdoer, be likely to cause damage to the appellant" (146A).

Was not the relationship in this case at least as close as that which, for example, was held to exist between the garage and the injured third party in *Blore v Standard General Insurance Co Ltd* 1972 2 SA 89 (O)?

To deal next with fault: it ought first to be stated that the respondent in this case was Fawcett Security, not Mr Nkala, its employee. Thus it is submitted that while a defendant in the shoes of Fawcett Security could possibly become liable either directly (through its own negligence) or vicariously (through the negligence of its employee), in this particular case the issue facing the court was not really whether Mr Nkala had satisfactorily performed the duties assigned to him (as was stated by the court *a quo*, 144A and by the supreme court, 146B), nor was the issue whether a reasonable man in Mr Nkala's position would have foreseen the possibility of theft (146B), or whether Mr Nkala had complied with the norms of his work (147B). The issue which the court ought to have addressed was whether *Fawcett Security* was negligent, not in its vicarious "dealing with

[the thief] Muzira" (149C), but in failing to devise a security system which would prevent the unlawful removal of tankers from the supposedly protected premises. In other words, the court need not have approached the case on the basis of vicarious liability (as it seems to have done), but ought to have looked behind Mr Nkala and concentrated on Fawcett's own negligence. Assuming that the respondents did owe the appellants a duty of care, the question is whether they ought reasonably to have foreseen the possibility of the particular kind of damage occurring to the particular plaintiff, and if so, whether they took reasonable steps to prevent such an occurrence. Was it reasonably foreseeable that an employee of Total would unlawfully remove and then damage one of the respondent's tankers? The theft of property from premises by a person employed on those premises is clearly foreseeable – employee theft is one of the main risks insured against by industry. Similarly, damage to a vehicle removed by an employee who is not an authorised driver can by no means be said to be unforeseeable – driving a heavy vehicle requires a particular skill and a special licence, and it is submitted that it is perfectly foreseeable that one who is not a tanker driver might crash such a vehicle if allowed to remove it. Was J Paar & Co a foreseeable plaintiff? Clearly, if the respondent knew that the appellant's truck was standing in the depot with keys in its ignition, then it must reasonably have foreseen that any failure to guard the trucks could cause loss to the appellant. Did the respondent take reasonable steps to prevent the foreseeable harm? Here it must again be stressed that one must look at the steps taken by Fawcett Security, not by its employee, Mr Nkala. The question is not whether Mr Nkala satisfactorily performed those tasks that were assigned to him (one must agree with Dumbutshena CJ that he did); the question is whether Fawcett Security were negligent in devising the procedures which Mr Nkala was given to execute. In other words, ought not Fawcett Security to have designed and implemented a security system which would have enabled their guard to identify drivers, and which would therefore have made it impossible for a tanker to be removed unlawfully? The crux of this issue was touched upon at 143C–I, where the court found that Mr Nkala had no way of telling whether a person entering the premises was an authorised driver because such a person's capacity did not appear on that person's identity card. Moreover, with due respect to the court *a quo* (144D), the issue was not whether *Total* had devised a system whereby a security guard could distinguish between authorised drivers and ordinary employees – one does not hire a dog and then bark oneself – but whether Fawcett Security had done so. It was up to Fawcett Security to say:

> "In order to avoid unlawful removal of property by employees, which is very common, we are instituting a system of special identity documents for tanker drivers, so that our security guards know who is an authorised driver and who is a floor-sweeper pretending to be one."

Therefore, it is submitted that the respondent was negligent *vis-à-vis* the appellant (and probably *vis-à-vis* Total as well, given that the stolen tanker contained Total fuel!).

In conclusion, it is submitted that the court erred in its findings both as to wrongfulness and as to fault, and that the appeal ought to have succeeded. *Caviant custodes.*

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BOEKE

SCHELTINGA: "DICTATA" OOR HUGO DE GROOT SE "INLEIDING TOT DIE HOLLANDSCHE RECHTSGELEERDHEID"

bewerk deur WOUTER DE VOS en GG VISAGIE

Perskor Johannesburg en Kaapstad 1986; xxi en 485 bl

Prys R89.60

Dit is gebruiklik om van die sewentiende eeu te praat as die periode waarin die Romeins-Hollandse reg sy hoogste ontwikkeling bereik het. Dit is ook die periode waarin die hoogs belangrike ou skrywers hulle bydraes gelewer het. Dit is die eeu wat begin met persone soos De Groot en Merula, gevolg deur die skrywers soos Groenewegen, Van Leeuwen en Voet, om slegs die bekendstes te noem. Die agtiende eeu moet egter nie vergeet word nie. Waarskynlik is die skrywers van hierdie eeu nie so hooggeroem en opvallend nie omdat hulle nie juis hulle belangrikste werke destyds gepubliseer het nie. 'n Uitsondering kan miskien van Van Bijnkershoek gemaak word. Daar kan egter nie ontken word nie dat daar baie belangrike skrywers uit hierdie tyd afkomstig is. 'n Mens moet slegs aan Van Bijnkershoek en Pauw se *Observationes Tumultuariae* of Van der Keessel se *Dictata ad Ius Hodiernum* dink. Hierdie werke is eers lank na die dood van die skrywers en van hulle regswêreld geopenbaar en het tot betreklik onlangs slegs in die vorm van handskrifte bestaan. Daar hoef ook nie getwyfel te word nie dat daar nog ander ongepubliseerde handskrifte van ander Romeins-Hollandse regsgeleerdes bestaan wat die moeite werd is om bekend te stel.

Een van sodanige geestesprodukte is die *Dictata* van Scheltinga. Hy is 'n betreklik onbekende Romeins-Hollandse juris van die agtiende eeu. Daar is enkele kleiner werke van hom destyds gepubliseer, soos deur die redakteure van sy *Dictata* in hulle *Inleidende Opmerkings* (ix) gemeld word. 'n Mens merk dus dat die werke van latere Romeins-Hollandse skrywers moes wag vir publikasie wanneer hulle enigsins omvangryk was. Miskien was dit so omdat die kodifikasiegedagte al sterk in die lug was en daar 'n bewussyn was dat die Romeins-Hollandse reg se dae in sy land van herkoms getel was. Miskien was dit omdat die gesag van 'n Voet en 'n Van Leeuwen en ander sodanige skrywers van die agtiende eeu in 'n mate hulle oorskadu en dus agterweë gehou het. Miskien is die rede ook omdat sodanige werke skynbaar almal *Dictata* by die regsopleiding

was. Hoe dit ook al mag wees, die betekenis van sodanige geskrifte (sekerlik nie van almal nie) is nie sonder waarde nie. Hulle kon wys op latere ontwikkelinge in die Romeins-Hollandse reg en hulle kon ook, deur hulle kritiek, sommige van die stellings van hulle voorgangers bevraagteken en op hulle foute wys.

Hoe dit ook al mag wees, die redakteure het diegene wat in die Romeins-Hollandse reg belangstel 'n groot diens bewys deur hierdie publikasie die lig te laat sien. Dit is, na my mening, die werk van 'n hoogs verdienstelike Romeins-Hollandse juris. Dit is waar, soos in die *Inleidende Opmerkings* (x) gestel word, dat Scheltinga deur sy tydgenote nie altyd hoog geskat is nie – so was dit ook met Cassandra. Iedereen is natuurlik geregtig op sy eie mening en ek meen dat die redakteure gelyk het in hulle eie waardering (ook op x van die *Inleidende Opmerkings*) van Scheltinga se werk. Met die deurlees van die publikasie het ek 'n aantal gebiede aangemerk wat ek persoonlik van waarde skat omdat dit vir my leersaam is.[1] Scheltinga vertoon homself na my mening as iemand wat die Romeins-Hollandse reg geken het; hy kom met sy eie oordeel en verwys dikwels na wat hy "van zeer goede hand" van derdes geleer het.

Scheltinga se *Dictata* is, uit die aard van die saak, in die eerste plek 'n kommentaar op De Groot se *Inleiding* (die werk kan enigsins vergelyk word met Fockema Andreae en Van Apeldoorn se uitgawes van die *Inleiding*) en vorm dus nie 'n algemene en deurlopende relaas van die Romeins-Hollandse reg nie. Dit is ook interessant hoe uit sy *Dictata* blyk dat De Groot se *Inleiding* deur die eeue heen sy betekenis behou het en steeds as handboek vir dosente gedien het. Voet, Scheltinga en Van der Keessel is ten minste drie dosente wat die *Inleiding* op hierdie manier gebruik het.

Die publikasie is nie 'n weergawe van Scheltinga se eie geskrewe handskrif nie. Na alle waarskynlikheid het daar so 'n handskrif bestaan, maar dit het

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1 Diegene wat meer van die Romeins-Hollandse reg weet, sal seker nie altyd saamstem nie. Ek waag dit nieteenstaande om aan te dui watter uiteensettinge (en geensins almal nie) vir my waardevol is: Gr 1 2 20 *is kenlyk*; Gr 1 2 21 *van naastinge*, etc; Gr 1 2 22; Gr 1 2 27 *om dat*, etc; Gr 1 4 2 *Tusschen de onmondige plag te zyn*; Gr 1 4 2 *Dat meer is*; op 31 vn 37; Gr 1 5 16 *of Marktdaagsche*; Gr 1 7 6 *Krygsluiden* etc; G 1 8 3 *die in dit stuk meer*; Gr 1 10 3 *bij het Hof van Holland*; Gr 1 11 4 *wederom afkondigen*; Gr 1 10 7; Gr 1 12 3; Gr 1 12 7 *oorkonden*; Gr 1 12 9 *raakt de magen niet* etc; Gr 1 13 2 *aan de Graaflykheid* en *t'oorkonden* asook *minder straffe* etc; Gr 1 13 3; Gr 2 1 44 *door opzet* etc en *want hunne lichamen worden op een horde gesleept, en gehangen in een mik* etc; Gr 2 1 45; Gr 2 4 7 *zonder opzet*; Gr 2 4 9 *maar ook op een anders grond, daarvan eigenaar*; Gr 2 4 38; Gr 2 5 2 *levering of opdracht*; Gr 2 5 4 *mits dat aan d'andere zyde* etc; Gr 2 7 8 *en van Waterland*; Gr 2 7 8 *uitlandige weezen uitgenomen*; Gr 2 7 8 *de landen van Voorn*; Gr 2 10 8; Gr 2 12 4; Gr 2 12 14 asook daar: *waar in de erfenisse*; Gr 2 12 13; Gr 2 12 16; Gr 2 12 17 *geen winst*; Gr 2 18 20; Gr 2 23 20; Gr 2 24 14; Gr 2 26 4; Gr 2 27 28 *uitgenomen*, etc; Gr 2 28 *die hele titel*; Gr 2 28 13; Gr 2 30 1 *by gebrek van het tiende lid*; Gr 2 31 4; Gr 2 31 5; Gr 2 34 10; Gr 2 36 2 *worden dezelve bekomen door*, etc; Gr 2 41 3 *Anderzins voor zoo veel*, etc; Gr 2 41 7 *op een van het derde lid*; Gr 2 42 2 *Deze toelatingen plachten*, etc; Gr 2 42 3 *welke opdrachte moet*, etc; Gr 2 42 3 *wel verstaande dat*, etc; Gr 2 43 7 *in de zake van Floris*, etc; Gr 2 45 2 *maar veel eer*; Gr 2 44 2 *Die ook alles*, etc; Gr 2 45 2 *het gemeene beschreve recht*; Gr 2 46 11; Gr 2 48 23; Gr 2 48 24; Gr 3 2 3; Gr 3 2 11; Gr 3 2 17 *Oorzaken van*, etc; Gr 3 3 19; Gr 3 11 2; Gr 3 13 4; Gr 3 14 5 *worden by ons*, etc; Gr 3 14 18; Gr 3 14 21; Gr 3 14 27 *Zoo lang de koop*, etc; Gr 3 14 33; Gr 3 14 34; Gr 3 15 9 *Dan twyfelachtige bedingen*; Gr 3 16 2; Gr 3 16 7; Gr 3 16 11 *met zyn zelfs goed om geld*, etc Gr 3 16 17 *De vructen*, etc; Gr 3 21 3 *welke gemeenschap*, etc; Gr 3 21 7 *weder-bekomen van*, etc; Gr 3 24 5 *na eenighe plaetsen van Europe ofte Barbarie*; Gr 3 25 4 *Dog ewenwel is*, etc; Gr 3 26 6 *de weesmeesters*; Gr 2 27 3; Gr 3 28 5 *wrenze vools*; Gr 3 26 6; Gr 3 44 9.

blykbaar verlore geraak. Daar is egter verskeie studente-eksemplare van beter of slegter kwaliteit en wat uit verskeie jare afkomstig is, soos die redakteure in die *Inleidende Opmerkings* (xiv en xv) aandui. Die redakteure het hoofsaaklik van twee handskrifte (M en Grn) gebruik gemaak en, soos uit die gepubliseerde afskrifte van 'n bladsy uit elke handskrif blyk, is dit twee netjiese handskrifte. Dit is nie moeilik nie om af te lei dat hulle afgeskryf is van oorspronklike handskrifte wat miskien die aantekeninge van die student of 'n ander bevat het. Daar kan moeilik getwyfel word dat hulle kopieë van sodanige aantekeninge is wat dan oorgeskryf of wat voorgelees en dan weer afgeskryf is. Hierdie slotsom blyk uit die herhalings en ook die skryffoute[2] (die Latynse aanhalings word somtyds afskuwelik verknoei, sodat 'n mens jou afvra of die skrywer iets van Latyn geken het[3]) – dit is onmoontlik om sodanige foute op Scheltinga se rekening te plaas. As 'n mens Scheltinga se eie handskrif kon sien, sou dit sekerlik veranderinge bevat het: ongetwyfeld sou hy veranderinge en toevoegings deur die loop van jare gemaak het en dit sou ook die rede wees waarom die twee gebruiklike handskrifte somtyds so verskillend is. Soos uit die voetnote blyk, wil dit voorkom of Grn (dit kom voor in die voetnote) vir M in baie opsigte aanvullend verbeter, maar nie sonder dat daar probleme ontstaan nie.[4] M is

2 Die redakteure meld die moontlikheid op xv van die *Inleidende Opmerkings*. Dit blyk uit verskeie omstandighede, soos somtyds deur die redakteure in die voetnote aangedui word. Onder andere kan daar ook gekyk word na: 156 reël 22, waar die woord "genoegsaam" twee keer verskyn; 188, waar op die agste en negende reël van onder van die teks die woorde "te meer" ook twee keer verskyn; die volgende bladsy, waar daar 'n soortgelyke herhaling verskyn wat deur die redakteure aangewys word; die herhaling op 211 wat in vn 15 aangedui is; 228 reël 5 waar "als zynde" i p v "al zynde," soos deur die redakteure aangedui, 'n tipiese fout is van iemand wat 'n diktaat afskryf; 243 reël 11 van onder van die teks waar soos die redakteure aandui, "kwaad" met "graad" vervang moet word – weer 'n tipiese fout wanneer 'n diktaat oorgeskryf word; 281 die negende en agste reël van onder van die teks: weer skyn die persoon wat die aantekeninge geskryf het nie goed te verstaan wat hy gehoor het nie – hy skryf oor wat hy dink dat hy gehoor het maar gee nie juis om of dit sin maak nie; 290 reël 28 waar daar weer 'n tipiese oorskryffout is; 333 reël 4 waar die skryffout wat die redakteure aandui ook tipies is vir iemand wat meganies oorskryf; bo aan 408 vir, soos deur die redakteure (vn 8) aangedui, die herhaling wat daar voorkom; die herhaling op 441 (kyk vn 94); 469 reël 9 waar "by de" vir "beide" geskryf is; 482 dertiende reël van onder van die teks waar die skrywer op dieselfde manier 'n fout gehoor of gelees het: "op rechten" staan nl i p v "oprichten" geskryf.

3 Die Latyn is somtyds eenvoudig belaglik. Die redakteure wend somtyds dapper pogings aan (en slaag selfs daarin) om sekere fragmente te vertaal. Kyk bv na 412 en die vertaling in vn 44. Daar is nog 'n voorbeeld op 439, veertiende reël van onder van die teks. As ek 'n raaiskoot mag maak: *propter auctoritatem Bynkershoekii, qui toties de hisce rebus judicavit*. Om nog 'n paar voorbeelde te noem, kyk na die aanhalings op 458 en vne 3 6 en daarna 1 op daardie bladsy. Dan ook die nota by Gr 3 36 en die vertaling in die voetnoot: "*hac*" moet natuurlik "*hic*" wees. Ten slotte kan verwys word na die aanhalings op 471 wat vertaal of behandel word in vne 2 3 4 en 5.

4 Die voetnote wat deur die redakteure toegevoeg is, is baie waardevol om 'n goeie teks van die werk te gee. As ek my pennie op die trom mag gooi om te probeer help waar die redakteure probleme had en miskien nie altyd uit die moeilikheid kon kom nie: (1) Op 8 reël 22, waar "onleesbaar" in vierkante hakies staan, mag ek raai dat die ontbrekende woord "berooven" is? (Vgl *Exodi libr* 12: 36, *spoliaverunt* wat as *beroofden* vertaal is.) (2) Op 9 reël 2, waar "onleesbaar" in vierkante hakies staan, kan dit miskien *hevige* wees? (3) Wat betref vn 31 op 20: 'n Mens sou verwag dat die verwysiging na *C* 5 37 12 is. Dit maak nie sin nie. Sou miskien *D* 26 5 12 bedoel word? (4) Op 58, ses reëls van onder van die teks, stel die redakteure 'n vraagteken na die verwysing. Ek glo dat *Frag Ulp* 1 1 2 bedoel word. (5) Op 79 word na Phillippus van Leyden verwys. Daar is die betreklike jong uitgawe van Feenstra. (6) Op 138, vyf reëls van onder van die teks: Is die laaste woord "met" of "niet"?

blykbaar die beste en uitvoerigste (ook al bevat dit verskeie onnoukeurighede) en daarvan bestaan blykbaar verskeie eksemplare, vermoedelik gemaak van dieselfde oorspronklike.[5] Die vraag kan ontstaan of Scheltinga miskien sy eie handskrif uitgeleen het om oor te laat skryf. Dit is in ieder geval die indruk wat 'n mens kry uit die kopieë wat gemaak is deur studente of ander van die *Dictata* van sommige ander skrywers, naamlik dat die dosent se eie handskrif as oorspronklike eksemplaar gedien het waarvan verdere handskrifte oorgeskryf is of dat die oorspronklike handskrif voorgelees is aan meerdere toehoorders om verder oor te skryf.

Die redakteure het 'n moeilike taak voltooi deur die teks op te stel en van waardevolle voetnote te voorsien. Die teks is nie altyd maklik leesbaar nie en

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vervolg van vorige bladsy

(Vermoedelik "niet," maar onduidelik gedruk.) En in die laaste reël van die teks het die woord "heeft" blykbaar uitgeval waar die oop ruimte in die reël voorkom. (7) Op 239, dertien reëls van onder van die teks moet, na my mening, "aan den" in vierkante hakies ingevoeg word voor *Iste kind van een vooroverleeden volle broer.* (8) Op 242, reël 9 is "hou" onsinnig. Moet daar miskien "hen" gelees word?(9) Die Latyn is somtyds uiters swak en onverstaanbaar. Dit is natuurlik nie Scheltinga se fout nie. As ek mag waag om die derde laate reël van die teks op 252 te verbeter: *stipulationibus; conceduntur quasi traditione, quae consistit in patientia et usu.* Kon die skrywer die oorspronklike aantekening van Scheltinga se diktaat nie meer ontsyfer nie? (10) Op 254, die laaste reël van Gr 3 36 vn 17, kan die verwysing waarskynlik wees na een of meer of almal van die volgende: Gr 2 36 4; Gr 2 39 11; Gr 2 40 12; Gr 2 46 17; Gr 2 48 44. (11) Op 262, vier reëls van onder van die teks, is dit miskien eenvoudiger om te lees: "maar waar in de erfpagter evenwel nalatig is." (12) Is dit werklik nodig om "een" en "lees *die*" op 271, derde reël in te voeg? (13) Op 323, vn 62: ek glo nie dat 'n *Pactum commissorium* as 'n beding van *parate executie* omskryf kan word nie. (14) Op 334, twee reëls van onder van die teks, stel die redakteure *devinctionem* voor. Is *evictionem* nie miskien meer korrek nie? (15) Op 337 reël 8, waar die redakteure "onleesbaar" skryf, moet daar nie net eenvoudig "het" staan nie? (16) Op 339 vn 32, sou ek verkies dat die tweede laaste reël lui: *Condictio ad supplendam legitimam.* (17) Op 338, vn 34: Ek glo dat dit juister is om te sê dat die bedinge bindende bepalinge van die kontrak is. Dit is duidelik dat dieselfde reël of woorde verskillend vertaal kan word. (18) Dit is nie die tyd en plek om polemieke te begin nie, maar ek glo nie dat almal met die redakteure sal saamstem wat betref die stelling op 386 vn 55 nie. Ek is dit eens dat die betrokke sin lank en moeilik leesbaar is en die hoofwerkwoord vermoedelik ingelees moet word in die tweede reël op 386 (en dus "niet gemaakt is om iets te bepaelen," ens), maar *niet* moet m i inderdaad daar staan. (19) Ek kan nie sien hoe op 389 vn 22 daar gekonkludeer kan word dat Scheltinga aan 'n deliksaksie (watter een?) kon gedink het nie. (20) Op 390 vn 24: Ek vra my af of met "de Heelyke wet van *Papinianus*, 1.15." nie miskien verwys word nie na *D* 2 14 7 5, gelees saam met *D* 18 1 72. Dit is moontlik om 1 7 5 oor te skryf as 1 15. (21) Moet "is" (in vierkante hakies) op 427 reël 5 van G 3 23 nie tussen "hun" en "te" ingevoeg word nie? (22) Ek glo dat op 435 reël 5 "in" in vierkante hakies tussen "indien" en "de police" ingevoeg moet word. (23) Ek dink dit is wenslik om "Lees" in vierkante hakies in te voeg na "*Lege*" op 437 reël 17. (24) Kyk ook vn 3 hierbo en die voorbeeld op 439 daar genoem. (25) Moet "en" (in vierkante hakies) nie ingevoeg word op 442 reël 15 tussen "in" en "het" nie? (26) Ek meen dat dit wenslik is om op 456, reël 20 "*quae*" tussen "*culpa*" en "*nocet*" (in vierkante hakies) in te voeg. (27) Ek meen dat dit wenslik is om in reël vier van Gr 3 30 (457) *I e* in vierkante hakies in te voeg na *L. ê.* (28) Ek meen dat op 460 in vn 2 verwys behoort te word na Groenewegen *De Leg Abr ad D* 35 2 68. (29) Ek sou die vertaling in vn 7 op 464 soos volg wil lees: Solank die saak teen die oorledene aanhangig gemaak is, alhoewel die uitspraak nog nie gegee is nie, naamlik omdat daar deur die *litis contestatio* as 't ware 'n kontrak met die oorledene gesluit is. (30) Ek sou op 469 n 23 eerder "naamlik" as "inderdaad" wil skryf. (31) Op 471 vn 2, meen ek daar moet in die tweede reël na . . . gelees word "om verskuldigde goedere" ens.

5 soos no 3 wat deur die redakteure op xiv van die *Inleidende Opmerkings* genoem word. Baie onlangs, en veels te laat vir die redakteure om daarvan gebruik te maak, het dit bekend geword dat daar nog so 'n kopie bestaan wat onlangs in die besit van professor P Gerbenzon (voorheen van die Universiteit van Groningen) gekom het.

dit is vermoedelik grotendeels te wyte aan die student wat sy aantekeninge oorgeskryf het. Aan die ander kant, die Nederlands van die agtiende eeu het 'n taal, styl en spelling (of gebrek daaraan) gehad wat dit geensins 'n De Vries en Te Winkel se Nederlands gemaak het nie. Vir die hedendaagse nie-Nederlander (en waarskynlik vir baie Nederlanders) is dit somtyds moeilik om te lees en te verstaan – net soos Latyn! Die redakteure stel dit (in die *Inleidende Opmerkings* xvi–xvii) dat dit nie nodig is om die teks te vertaal nie, want diegene wat Afrikaans magtig is, behoort geen probleme met die Nederlands te ondervind nie. (Dit kan bevraagteken word.) Die redakteure verseker die leser dat die teks presies en korrek afgeskryf is. Somtyds word duisterhede met (*sic*), met 'n (?), met 'n ander woord in vierkante hakies of deur 'n aantekening in die voetnote aangestip. Ek meen egter dat daar baie gevalle voorkom waar die leser sal twyfel of dit werklik so geskryf staan soos dit gedruk is; dit wil sê dat die leser (afhangende van sy bekwaamhede) miskien in baie gevalle tog gehelp sou wil word en dus nog baie meer kere (*sic*) of 'n verduidelikende woord of aantekening sou verwelkom.[6] In die teks is daar 'n aantal redaksionele foute en in die voetnote ook. So is daar ook skryffoute in voetnote wat in Afrikaans geskryf is.[7]

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6 Die redakteure praat (xvii van die *Inleidende Opmerkings*) van inkonsekwenthede in die spelling. Dit is nie slegs die spelling wat die leser mag hinder nie. Die een leser moet miskien baie meer as 'n ander gehelp word om die teks met 'n mate van gemak te kan lees. Dit is dus 'n hoogs persoonlike oordeel om te bepaal waar om sodanige hulpvaardige tekens te gee. Ek het vir myself 'n aantal voorbeelde aangestip waar ek graag (*sic*) of 'n ander hulpmiddel sou verlang het. Dit is nie 'n volledige lys nie, maar hier volg 'n reeks soos dwarsdeur die boek aangeteken: Op 4 reël 10: die *Hollandsche Cons.*; op 5 reël 3: *die Rechtvaardigheid*; op 5 reël 24 *Aristotelis*; op 6 112e Deel, reël 13: de D.D. (vgl 13 op 8); op 22 reël 14: *lilustr*; op 26 reël 23: veleend (verleend?); op 26 reël 33: *oa*(*aô*); op 34 vn 10, reël 13: geinstotueerde; op 36 reël 27: heft (heeft?); op 42 vn 42, reël 8: toit (tot); op 44 reël 8: Groot (De Groot?); op 46, derde laaste reël van die teks: 1246), (vierkante hakie?); op 53 reël 29: gespreken (gesproken?); op 72, die eerste reël van die 11e Deel: die titul; op 76 reël 17: peroonen (personen?); op 97 n 41, reël 4: kom; Gr 2 2 12 *'t word ook verloren* (kursief?); op 102, reël 5 van Gr 2 3 3: *Gausa*; op 103 reël 24: retitueeren; op 104 reël 19: *pro lubta* (*pro lubito?*); op 121 vn 13, agt reëls van onder: versheilt; op 128 reël 7: gehedt (gehadt?); op 135 reël 12: ia (is?); op 136 reël 12: *nom.* (*num.*?); op 140, die laaste reël van die teks: *waest.* (quaest.?); op 147, sewe reëls van onder van die teks: hy (by?); op 152 reël 3: *tit* (*tit.*?); op 152 reël 26: vam; op 153 reël 18: op. (op?); op 158 eerste reël: *hac.* (*hac*?); op 156 n 11, reël 12: Westerloo (Westerlo, soos ook in vn 10?); op 159 reël 7: meedere (meerdere?); op 159 reël 13 en 17: uiterste (uiterse wille, soos in reël 4?); op 159 vn 10, reël 4: onderleenmans', (onderleenmans,?); op 163, *ad* 17e Deel, § 10: *irruptione* (*interruptione?*); op 166 tweede reël: 18 (vn 18?); op 170 vn 8, tweede reël: pars. (pars?); op 179, reël ses van onder van die teks: testeur (testateur, soos op die volgende bladsy?); op 187 reël 3: *verum* (*rerum*?); op 198 reël 14: *segg.* (*seqq.*?); op 215, agt reëls van onder van die teks: onbestruve (onbesturve?); op 216 derde reël: onbestruve (onbesturve); op 233 reëls 26 en 31: bestruve (besturve?); op 240 reël 5: hy (by?); op 245 vn 1 vervolg, reël 2: elleenelyk? haddelen (handelen?); op 248 reël 26: *reciprocia*?; op 249 reël 28: geconsentreerd (geconsenteerd?); op 251, agt reëls van onder van die teks: Hoor (Hier?); op 254, die derde reël van onder van die teks: verjarig (verjaring?); op 255, reël sewe en agt van onder van die teks: O. en W. I. (Oost- en West- Indische?); op 256 39e Deel, tweede reël: *eorum* (*earum?*); op 263 n 34, tweede reël: voet?; op 269 reël 5: vrouewen; op 270 reël 5; bechut (beschut?); op 272 reël 14: 1 en reël 18: L. (et?); op 275 reël 14: everwel (evenwel?); op 276 reël 5: zoonene (sic?); op 276 vn 37, reël 5: *Bon.* (*Bort.*?); op 276 vn 37, reël 22: ou (zou?); op 278, derde reël van onder van die teks: weaarde (waarde?); op 286 reël 3: Met (Men?); op 287 reël 12: 610 (610.?); op 287 reël 25: eed. (eed?); op 287 reël 28: verplicting (verplichting); op 287 reël 35: retmrs (rentmeesters); op 288 reël 13: met (men?); op 289 reël 13: overgaat. (overgaat?); op 289 reël 21: successenren (successeuren?); op 290 reël 27: dis (dus?); 292 reël 20: *honorarie* (*honoraria*?); op 300 reël 10: onsteert (obsteert?); op 300 vn 16, reël 3: ontrent (sic?); op 300 vn

Origens verskyn daar stukkies Latyn in die teks. Die redakteure gee somtyds vertalings in die voetnote, indien moontlik. Ek kan my voorstel dat nie almal met al die vertalings sal instem nie,[8] maar dit is so dikwels die geval met enige

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16, reël 6: as (als?); op 300 vn 16, reël 7: out (oud?); op 301, sewende reël van onder van die teks: provisie. (provisie?); op 302 reël 21: dezelve. (dezelve?); op 316, reël 7 van onder van die teks: geworden (geworden.?); op 317 reël 8: *pignoria* (sic?) en Vorde (Vorder?); op 317 reël 15: n. 8 (n. 8.?); op 318 reël 7: hyptoteek (sic?); op 319 reël 10: HANDZETING (sic?); op 325, die tweede laaste reël van die teks: n. 9 (n. 9.?); op 326, tweede laaste reël van die teks: *explim.* (sic?); op 327 reël 16 *memo* (*nemo*?); op 328, reël 9 van onder van die teks: *Nem.* (*Nimirum*?); op 332 reël 19: net (met?); op 333, reël 11 van onder van die teks *praesciptis* (sic?); op 344 vn 24, tweede laaste reël: *voet* (sic?); op 354 eerste reël: amptissement (sic?); op 354 reël 4: definitie (definitive?); op 358 reël 2: Namtnlyk (sic?); op 358 reël 2: *postitaruis* (*depositarius*?); op 360 reël 19: *antichresticum* (*antichreseos*?); op 361, tweede laaste reël van die teks: *veheeld* (*verheeld*?); op 362 vn 6, vierde reël: *naddele* (*nadeele*?); op 363 vn 9, reël 3: *luiis* (*litis?*); op 364 reël 8: geadkudiceerd (sic?); op 364, reël 7 van onder van die teks: advocaat (advocaat?); op 365 reël 13: die (de?); op 368 reël 21: nier (niet?); op 369 reël 13: etv. (sic?); op 371, laaste reël van die teks: preajudicie (sic?); op 372, tweede laaste reël van die teks: de (te?); op 374 reël 11: Cist. (Cost?); op 376 reël 2: hededaags (sic?); op 379 reël 12: scryft (schryft?); op 380 reël 10, de groot (sic?); op 380 reël 23: geërrerd (geërreerd?); op 381 vn 36, reël 4: ek neem aan die woord is "koopschats"?; op 381 vn 36, reël 14: by tyden een deelen (*by tyden ende deelen*?); op 382 reël 8: lank (dank?); op 383 reël 7: *en zoo is daar iets meer* (*en zoo daer iets meer*?); op 386 reël 3 en 9: *vendita* (*venditae*?); op 388, eerste reël *belanden* (*belenden*?); op 389 vn 22, laaste reël: bedrag en *morg* (bedrog en *mora*); op 396 reël 4: ZuidHill. (sic?); op 397 reël 12: *Reperetorium* (*Repertorium*?); op 397 vn 26, tweede laaste reël: *Bink.* (sic?); op 399 reël 24: graf-roeringe (aardroeringe?); op 389 reël 9 en op 400 reël 19 – kyk ook op 401 vn 39, derde reël: watter datum van die "turbe" sou die juiste wees?; op 401 reël 14: 31? 37 (31 & 37?); op 402, reël ses van onder van die teks: te (de?); op 406, reël 10 van onder van die teks: doe (die?); op 408, vier reëls van onder van die teks: *patiae* (*patientia*?); op 409, sewe reëls van onder van die teks: is (sic?); op 410 reël 3: efficacienso (sic?); op 414 reël 4: teelanden (teellanden?); op 415, sesde reël van onder van die teks: *besproochen* (*besproocken*?); op 416 reël 21: gedetereerd (gedetermineerd?); op 417 vn 24: *Manijnsdag* (*Martijnsdag*?); op 418 reël 16: stuurluÿden (stuurluijden?); op 420 reël 4: lekken (lekker?); op 421, agt reëls van onder van die teks: Diversi, (Diverse?); op 422 vn 3: *sungularis* (sic?); op 424, ses reëls van onder van die teks: nie (niet?); op 425, die vierde reël van onder van die teks: *initia* (sic?); op 426 reël 9: wette (wetten?); op 428, vn 11, laaste reël: ontrent (sic?); op 435, derde reël van onder van die teks: zoo de reeds (zoo die reeds?); op 437 vn 63, eerste reël: polus (police?); op 440 reël 20: *of* (*ofte*?); op 444, nege reëls van onder van die teks: gemaakte (sic?); op 447, vn 5: As (AIs?); op 448, reël 7 van 26e Deel: *aministrationes* (*administratione*?); op 448, reël 17 van 26e Deel: adionem (sic?); op 448, reël 21 van 26e Deel: en (*in*?); op 449 reël 17: alles (anders?); op 450 reël 6: *cod* (*Cod.*?); op 451, reël 7 van 28e Deel: geschieten (geschieden?); op 452 reël 2: Rhÿnland (Rhijnland?); op 453, tweede laaste reël van die teks: begrypt (begrypen?); op 454, laaste reël van die teks: heel (hier?); op 455 reël 13: kennene (kennen?); op 456 vn 26, laaste reël: ontrent (sic?); op 457 reël 7: daaroor (daardoor?); op 457 vn 5, tweede reël: duÿding (duijding?); op 459, sewe reëls van onder van die teks: praest. (praesens?); op 459 vn 6: Houte (Stoute?); op 460 eerste reël: geinerceerd (geintroduceerd?); op 460, tien reëls van onder van die teks: wed. (weduwen?); op 461 reël 7: gescjiedt (geschiedt?); op 463, reël 3 van 35e Deel: *praetoriae* (*praetoria*?); op 463, reël 4 van 35e Deel: *zwigjghen* (*zwijghen*?); op 464 reël 11: watering (Waveren???); op 464 reël 24: na (Na?); op 466 reël 8: mileteerd (militeerd?); op 467 reël 10: *condabat* (*constabat*?); op 467 reël 11: *persecutoriae* (*persecutoria*?); op 467 reël 15: *actione populari* (*actione populari de*?); op 467 reël 16: *decretis* (*dejectis*?); op 467 reël 30–31: *gedestind.* (*gedestineerd*?); op 469 reël 9: by de (beide?); op 470, agt reëls van onder van die teks: *tenet* (*tenetur*?); op 470, die tweede laaste reël van die teks: evenwel (evenveel?); op 472 reël 2: banque, routiers (banqueroutiers?); op 473, reël 2 van 44e Deel: platse (plaatse?); op 473, drie reëls van onder van die teks: batalen (sic?); op 476 reël 2: N. (Nam?); op 476 reël 3: *aD* (*ad D.*?); op 479, laaste reël van die teks: *iniquitam* (*iniquum*?); op 480 reël 4: dis (dus?); op 480 reël 12: gedemandeers

vertaling. Somtyds is die Latyn eenvoudig onsinnig en kan 'n mens nie baie daaruit wys word nie.[9] (Dit is natuurlik 'n bewys dat die teks deur 'n onkundige afgeskryf is.) Ek meen dat die redakteure gerus die afkortings (*ô, ê, m̂, aôem, ttun* (*tantum*), *st* (*sunt*), *qdn* (*quando*), *srê* (*solvere*), *pŝt* (*potest*) ensovoorts ook in vierkante hakies na die afkorting kon uitgespel het. Ek kan my voorstel dat sommige lesers moeilikhede met sodanige afkortings kan ondervind. So ook met sommige Nederlandse afkortings in die teks wat dikwels, maar nie altyd nie, op hierdie manier in vierkante hakies in die teks uitgespel word. Daarbenewens is

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(gedemandeerd?); op 482, dertiende reël van onder van die teks: op rechten (oprichten?); op 484, reël 2 van 52e Deel: *suae* (*sive*?).

7 Wat die Afrikaans in die voetnote en die bydraes van die redakteure betref, asook ander vorms van skryffoute, wil ek hier ook slegs 'n aantal aanwys. Ongetwyfeld is die skryffoute dikwels te wyte aan die swak drukwerk. (*Pace*, die redakteur van hierdie Tydskrif en/of die Taalindoenas.): (1) Op 25 het 'n reël van die vn 1 weggeraak. (2) Op 31, vn 37 word Van der Keessel (tweede reël) ontmoet. (3) Op 39 n 33: Is die derde woord "*rerum*"? (4) Op 53 vn 2 word die aanhalingstekens m b t die Lund-uitgawe nie afgesluit nie. (5) Op 62 vn 5 moet dit "Roberts" lees. (6) Iets het fout geloop met die voetnote (ook die nommers in die teks) op 89 en 90; kyk ook vne 13 en 14 op 91 en 92. (7) Op 114 vn 25: Momusen. (8) Op 115: Moet die hakie in die laaste reël van die teks daar voorkom? (9) Op 115 vn 30, die laaste reël staan daar *zeerechten*. (10) Op 155 vn 9: Die punt ontbreek. (11) Op 158 vn 6: *Epargne* of *Epargnes*; kyk ook 450 reël 13. Ek sou dit vertaal met "spaarkas." (12) Op 201 reël 3 is die verwysing na vn 15 i p v 51 en n 53 moet met 'n hoofletter begin. (13) Op 209 vn 6 tweede reël: "recht der Vriesen" moet kursief gedruk word. (14) Op 212, die tweede laaste reël moet *Voorree* as *Voorree*- gedruk word. (15) Op 213 word reël 28 herhaal. (16) Op 214 vn 21, reël 2: 'n hakie ontbreek. (17) Op 227 vn 68, eerste reël: "nóg . . . nóg" of "nòg . . . nòg"? (18) Die redakteure maak gebruik van die Lund-weergawe van 1952 (kyk die *Inleidende Opmerkings* xvi). Op 229 sou vn 75 oorbodig gewees het indien die 1965-uitgawe gebruik is. So ook vn 85 op 233. (19) Op 269 vn 22, tweede reël: "uitwat" of "ietwat"? (20) Op 279 vn 42 is die teks nie voltooi nie. Kennelik het by die drukker 'n reël of twee in die slag gebly. (21) Op 307, derde reël van onder van die teks staan "bedenkingen." Dit is seker 'n setfout. (22) *Ad* die 47e en 48e Deel loop die nommers van die voetnote deur. (23) Op 316, vn 13A ontbreek die punt aan die end en aan die einde van vn 14 is 'n komma. (24) Waar kom die verwysing na vn 18 op 317 in die teks voor? (25) Op 321 ontbreek die punt aan die end van vne 48 en 49. (26) Op 333 vn 36 word "aantekening" foutief gedruk en die kommentaar het in die slag gebly. (27) Op 333 ontbreek die punt na vn 38. (28) Op 336 word vn 21 swak geset en die punt aan die einde ontbreek. (29) Op 338 reël 9 moet vn 28a aangemerk word en nie vn 28 nie. (30) Op 338 reël 9 moet na vn 26a verwys word. (31) Op 343 moet vn 21 lees: Voet 46 1 21 e v. (32) Op 346 reël 12: lees 35a i p v 35 as verwysing na die voetnoot. (33) Op 349, vierde reël van onder van die teks: wat is verkeerd met "verboden"? (34) Op 357: die punt ontbreek aan die einde van vn 8. (35) Op 362 vn 2: Daar staan "gedig" i p v "geldig." (36) Op 373 vn 1 tweede reël: Daar staan "uitwinnig" i p v "uitwinning." (37) Op 373 vn 2, reël 2: "en 524" i p v "en nie 524." (38) Op 374: die punt ontbreek aan die einde van vn 4. (39) Op 377 reël 13: die verwysing na die voetnoot moet 23a i p v 23 wees. (40) Op 377 vn 22, eerste reël: "*Observatien*" i p v "*Onservatien*." (41) Op 389 vn 18 moet daar gelees word: Voet 19 1 8 . (42) Op 393 n 17: Die punt ontbreek aan die end. (43) Op 412 vn 47: Die punt ontbreek aan die end. (44) Op 428 reël 19 is "Dese" nie kursief gedruk nie. (45) Op 430, sewe reëls van onder van die teks word die voetnoot as 33 i p v 23 aangedui. (46) Op 441 vn 88: Die punt ontbreek aan die end. (47) Op 448 vn 5, tweede reël: Fochema. (48) Op 451, reël 1 van 28e Deel: "Deze" i p v "*Deze*." (49) Op 459 vn 2, tweede laaste reël: "Andrea" i p v "Andreae." (50) Op 460 reël 6: 11 dui die voetnoot aan. (51) Op 480 vn 7: die laaste nommer van Voet 42 3 is uitgelaat. (52) Op 481 agt reëls van onder van die teks staan 18 in vierkante hakies na 18. Waarom? (53) Op 484 n 37 word na 28 van Van Alphen verwys. In die teks staan 218. (54) Op 484 vn 3 op 52e Deel staan Voet 18 5 16. In die teks staan n 14.

8 Kyk bv na sommige punte in vn 4 hierbo aangedui. Kyk ook na vn 3 hierbo.

9 Kyk na vn 3 hierbo.

die teks somtyds onleesbaar en selfs kennelik foutief. Die leser sal waardering hê vir die nuttige aanvullings ter verduideliking deur die redakteure in die voetnote of in vierkante hakies in die teks bygevoeg.

Opmerkings hierbo wat miskien as kritiek opgevat kan word, moet egter nie as ernstige besware gesien word nie. Die redakteure het 'n uiters waardevolle stuk werk gelewer onder uiters moeilike omstandighede. Hulle het baie lank aan die publikasie gewerk en dit is baie duidelik dat dit in 'n groot mate aan die drukker te wyte is wat nie juis sy kant gebring het nie. Dit is duidelik dat die proewe herhaaldelik na die drukker moes teruggaan. Daar is 'n menigte bladsye waarop die reëls afwisselend ligter en donker is – 'n duidelike teken van herhaalde korreksies van die proef. Dan is reëls somtyds te kort en dan weer te lank, te dikwels is daar te veel of te weinig ruimte tussen letters of woorde en swakgedrukte letters kom ook voor. 'n Mens kan jou voorstel dat die redakteure moedeloos en wanhopig geword het. Is dit miskien een van die redes waarom hulle nie 'n register opgestel het nie en beweer dat dit oorbodig is? Is dit ook die rede waarom hulle nie geswoeg het om die werk te vertaal nie?[10] (Laat ek onmiddellik byvoeg dat ek twyfel aan die waarde van 'n vertaling. Dit is nuttig as 'n sleutel om jou eie siening te kontroleer, maar dit word gebruiklik om die vertaling as die outentieke weergawe te gebruik. Dan is dit nie meer Voet wat gebruik word nie, maar Gane.)

Hierdie werk is 'n baie waardevolle bydrae vir die praktiserende regsgeleerde, ten minste vir sover as wat hy van die Romeins-Hollandse reg kan of moet of wil gebruik maak. Dit geld miskien temeer nog vir die regshistorikus in Suid-Afrika of elders wat met hierdie regstelsel werksaam is. Die Suid-Afrikaanse regskommissie moet ook gelukgewens word dat hulle soortgelyke publikasies die lig laat sien. Die redakteure moet waardeer word aangesien hulle hierdie werk onder moeilike omstandighede verrig het sonder die ryke beloning wat sommige "kunstenaars" of beroepspelers te beurt val. Ek glo nie dat hulle baie sal ontvang van die hoë prys wat vir die boek betaal moet word nie.

PAUL VAN WARMELO

10 Om die teks te vertaal, sou nie maklik wees nie. Daar is reeds na die aanhalings in Latyn verwys. (Inderdaad het die redakteure sommige Latynse aanhalings vertaal, maar nie almal nie.) Die Nederlands van die agtiende eeu, om nie eens na die taal en styl te verwys nie, maak enige vertaling uiters moeilik. Sommige uitdrukkings is ook maar moeilik vertaalbaar. Wat moet 'n mens met "aanstaaning" op 250 maak? Op 257 vn 9, kan 'n mens die vreemde woord "geheng" ('n verlede deelwoord wat as substantief gebruik word) seker slegs met *patientia* vertaal! Weet ons almal wat met die Griekse woord "*emponemata*" (op 447 reël 11 en 13) nou juis bedoel word? Selfs Voet erken (in sy *Dictata ad Grotium*) dat hy nie juis raad met "*wrenze vools*" (kyk Gr 3 28 5) weet nie, alhoewel Scheltinga inderdaad (gelukkig!) vertel wat daarmee bedoel word. Die spreekwoord op 460 (kyk Scheltinga op Gr 3 32 21) is ook maar moeilik om te vertaal. Wat dan ook verder van "ongepermeteert geweer" (op 461 vn 8 reël 3)? Beteken dit deur 'n wapen waartoe iemand geen reg had nie? "Haaringbuizen" en "haringbuysvaarders" (op 468 reël 10 en in vn 16 aldaar) is ook nie algemeen bekende woorde nie.

ADMIRALTY JURISDICTION AND PRACTICE IN SOUTH AFRICA
by DJ SHAW
Juta & Co Ltd Cape Town Wetton Johannesburg 1987; 264 pp
Price R110.00 + GST (hard cover)

Structure

This book is divided into three major parts. The first part deals with admiralty jurisdiction and practice in South Africa. Subjects discussed in the first part are: the subject-matter of jurisdiction, actions *in rem* and *in personam*, limitations on jurisdiction, the consequences of arrest and attachment of ships, the law to be applied in admiralty cases as well as the powers of the courts. This is followed by a conclusion by the writer on this section.

The second part provides a commentary on the new admiralty proceedings rules which were published in November 1986. This discussion should provide valuable guidelines to practitioners.

The third part contains appendices which include the Admiralty Jurisdiction Regulation Act 105 of 1983, The Admiralty Court Acts of 1840 and 1861, the Colonial Courts of Admiralty Act of 1890, admiralty proceedings rules, uniform rules of the supreme court of South Africa not excluded in terms of rule 23 of the admiralty proceedings rules, form of order for attachment to found jurisdiction and edictal citation and form of order for sale of ships.

Discussion

The author of this book, DJ Shaw QC, is certainly well qualified to write a book on the Admiralty Jurisdiction Regulation Act 105 of 1983 and admiralty practice in general. He is a senior member of the Durban bar and has a vast amount of practical experience in the field of shipping law. He was also involved in the structuring of the 1983 Admiralty Jurisdiction Regulation Act, which became operative on 1983–11–01.

As Milne AJ points out in the foreword, the act was sorely needed and is a remarkable piece of legislation. It represents a real attempt to reform admiralty law in South Africa and is much more than a mere admiralty jurisdiction regulation act as other topics, besides jurisdiction, are also dealt with.

The author's style is relaxed and the language clear even when he deals with extremely complicated issues. His comparative method throughout the book provides interesting facts and valuable insight to the understanding of our own system, based on English admiralty law. As Shaw points out (2), the new act unfortunately does not "relieve the South African practitioner of the burden of history" as a maritime claim includes claims which fell under the Colonial Courts of Admiralty Act of 1890. Section 6(1)(a) of the new act provides that the law

applicable to matters which fell within the jurisdiction of the colonial court of admiralty is "the law which the High Court of Justice of the United Kingdom in the exercise of its Admiralty jurisdiction would have applied with regard to such a matter." This is unfortunate as the English law as it existed on 1983–11–01, the day the act became operative, is applicable in certain cases and thus becomes part of South African admiralty law. There can be no doubt that lawyers and practitioners dealing with admiralty claims will need to consult the Admiralty Court Acts of 1840 and 1861 as well as the Colonial Courts of Admiralty Act of 1890. Their inclusion in the appendices is consequently to be welcomed.

The first chapter provides a background on the unsatisfactory situation which existed in South Africa prior to the coming into operation of the Admiralty Jurisdiction Regulation Act. As work relating to shipping matters in South Africa increased with the closing of the Suez canal in the mid-1960s, dissatisfaction and frustration increased among practitioners working in the field of admiralty law. In the words of Shaw, problems centred primarily around

> "the confusing and frequently embarrassingly archaic state of affairs with regard to the jurisdiction and practice of the courts exercising admiralty jurisdiction in South Africa, and the sometimes bewildering conflicts of jurisdiction and of legal systems which prevailed."

Chapter 2 deals with the subject-matter of jurisdiction and provides a discussion of the various heads of claim under the new act which affords an extended scope for jurisdiction. This section is supplemented with practical examples in the form of case law.

Chapter 3 deals with actions *in rem*. The nature of the action is discussed and its origin traced back to

> "a combination of the hypothecary action of the Roman law, a true action *in rem* and the rules of the *actio de pauperie*, which were adapted to maritime actions" (31).

Special attention is also afforded to the meaning of the word "owner" in section 3(4), which is not defined in the act. Other important matters discussed in chapter 3 are the stage at which the relevant property must be owned, and interruption of prescription.

The author's discussion of the arrest of associated ships (s 3(6) and 3(7)) at 37–42, is of particular interest, as this is a new provision in the Admiralty Jurisdiction Regulation Act, which has already enjoyed the attention of the courts on various occasions since the act became operative. There is a brief reference to the decision of the Natal court as well as that of the appellate division in *Euromarine International of Mauren v The Berg* 1984 4 SA 647 (N) and 1986 2 SA 700 (A) in which arrests of associated ships were dealt with in detail by South African courts.

Actions *in personam* are discussed in chapter 4. A clear analysis is provided of the distinction between the jurisdiction of inland divisions of the supreme court, whose area of jurisdiction is not adjacent to the territorial waters of the Republic, and those adjacent to the territorial waters. The categories of claims which fall under each division are discussed in detail, and the difficulties which may arise in this regard are pointed out.

Chapter 5 deals with the important topic of limitations of jurisdiction. Although admiralty law has a distinctly international flavour, Shaw points out that the act does not indiscriminately open the floodgates of the admiralty jurisdiction

to foreign litigants – a view supported by Friedman J in *Katagum Wholesale Commodities v The MV Paz* 1984 3 SA 261 (N).

The meaning of section 7(1)(a), which enables the court to decline to exercise its admiralty jurisdiction in certain instances, for example when an action can more appropriately be adjudicated by another court or tribunal in the Republic or elsewhere, is also discussed. Stay of proceedings and arbitration under section 7(1)(b) are also dealt with and illustrated by case law.

Immunity of foreign states and section 11(1) of the act, which provides immunity to foreign states from admiralty jurisdiction only if the ship was not used for commercial purposes, are discussed. This is in line with the doctrine of limited foreign state immunity referred to by Margo J in *Inter-Science Research v Republica de Mocambique* 1980 2 SA 111 (T) and which was enacted in section 4 of the Foreign States Immunities Act 87 of 1981.

Chapter 6 deals with the consequences of arrest and attachment and is divided into six parts: wrongful arrest or attachment; commencement of the action; possession and custody; care of property arrested or attached; arrest for further security; and sale of the property.

In chapter 7 the very important aspect of the law to be applied by the court exercising its admiralty jurisdiction under section 6 is dealt with. As was stated *supra*, the act does not relieve the South African practitioner of the burden of history and in some instances English law will be applicable. Shaw points out the strange and far-reaching implications this section may have.

Chapter 8 deals with the powers of the court with regard to evidence and procedure. This chapter is divided into four parts: evidence and inspections; disputes as to jurisdiction; reference to arbitrator or referee; interest and currency.

Priorities are dealt with in chapter 9, which is divided into six parts: the maritime lien; insolvency and winding up; priorities: general; claims; priorities; order of payment; and associated ship claims.

The author points out that the phrase "maritime lien" is derived from English and American law, but that the notion conveyed is in accordance with the rules of Roman-Dutch law. The discussion of priorities in general and claims priorities under section 11 of the act, will no doubt be an important one for practitioners dealing with maritime claims. The ranking of claims has already enjoyed the attention of the courts on various occasions. Shaw points out the difficulties which may arise from this section of the act and provides English as well as South African case-law examples.

In his conclusion (chapter 10) Shaw points out the interesting link between English and Roman-Dutch law in the field of admiralty litigation.

Conclusion

This book is a major contribution to South African legal literature and should prove extremely helpful to scholars as well as practitioners in the field of admiralty law.

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INDIGENOUS PUBLIC LAW IN KWANDEBELE
deur AC MYBURGH en MW PRINSLOO
JL van Schaik Pretoria 1985; x en 161 bl
Prys R19,50 + AVB

Hierdie werk is een van vier projekte van die Sentrum vir Inheemse Reg van die Universiteit van Suid-Afrika deur Myburgh en Prinsloo en handel oor die publiekreg van 'n groep van die Nguni, naamlik die Ndebele van KwaNdebele. Twee van die projekte getitel *Indigenous Criminal Law in Bophuthatswana* en die *Inheemse Publiekreg in Lebowa* het reeds verskyn terwyl die derde projek oor die inheemse kontraktereg in Bophuthatswana by die ter perse gaan van die onderhawige werk nog nie voltooi was nie.

Die KwaNdebele-owerheid het versoek dat die hele gebied van die reg ondersoek word maar vanweë die omvang daarvan het die outeurs hulle ondersoek tot die publiekreg beperk. Die ondersoek is gedurende die tweede helfte van 1983 onder die vier Ndebele-kapteinskappe van KwaNdebele gedoen waartydens besprekings aan die hand van 'n voorbereide memorandum gevoer is. Die vier kapteinskappe is die Manala, die Nduzundza van Mabhoko, die Litho Ndzundza en die Pungutsha Ndzundza en al vier geniet statutêre erkenning. Daar is van negentien deskundiges gesamentlik onder die vier groepe gebruik gemaak. Die gegewens is in die verskillende afdelings van die publiekreg ingedeel, algemene reëls is geformuleer en waar verskille tussen die kapteinskappe bestaan, is dit aangedui.

Die eerste hoofstuk handel oor die staatsreg van die Ndebele en daar word aangetoon dat die owerheid nie in verskillende organe ingedeel is nie. Dit funksioneer nog op dieselfde vlak as die kapteinskap en tradisioneel is die gesag in die kaptein en hoofmanne gesetel. Ingevolge die KwaNdebele Traditional Authorities Act 8 van 1984 word ook vir die aanwysing van 'n opperhoof voorsiening gemaak. Die skrywers gee 'n uiteensetting van die verdeling van die kaptein se grondgebied in distrikte met 'n hoofman aan die hoof van elke distrik. Daar word op die belang van die kaptein as administratiewe, wetgewende en regsprekende hoof gewys asook die feit dat sy regte en bevoegdhede deur opvolging bepaal word. Erkenning van sy gesag word tans ook deur die KwaNdebele owerheid verleen. Melding word gemaak van die private en verteenwoordigende raad met wie die kaptein in konsultasie regeer asook die instelling van die statutêre stamowerheid met administratiewe magte vir elke kapteinskap.

Verder word in hoofstuk 1 vermeld dat die bevoegdheid van die kaptein as hoof- regsprekende beampte deur die KwaNdebele Wet 3 van 1984 getemper is aangesien hy nou nie meer sonder die magtiging van die minister van justisie

as regsprekende beampte mag optree nie. Ook wat wetgewing betref, kan geen wet deur 'n ander persoon as die kaptein aan die wetgewende raad voorgelê word nie. Die kaptein is ook die hoof- uitvoerende beampte. Dwarsdeur die eerste hoofstuk wys die outeurs op die magsposisie van die kaptein en daarom is gedetailleerde aandag aan hierdie aspek in die hoofstuk verleen.

Hoofstuk 2 handel oor die administratiefreg. Daar word aangetoon dat die kaptein ook aan die hoof van die stamadministrasie staan en verantwoordelik is vir die behoorlike funksionering daarvan, wat onder andere die handhawing van die openbare orde en veiligheid insluit. Die hoofstuk behandel verder die bevoegdheid van die kaptein om na konsultasie met sy private raad lidmaatskap van die stam aan vreemdelinge te verleen; die registrasie van geboortes, huwelike en sterfgevalle by die kaptein; die reëling van inisiasieskole deur die kaptein en sy beheer oor grondsake. In hierdie hoofstuk word ook 'n uiteensetting van die verskillende rade waarmee die kaptein saamwerk asook die geldigheid van administratiewe handelinge en die beheer daaroor, gegee.

In hoofstuk 3 word die strafreg behandel en wel die misdrywe wat aan die Ndebele gewoontereg bekend is. Daar word op die feit dat die meer ernstige misdrywe ingevolge artikel 5 van die KwaNdebele Wet 3 van 1984 nie meer deur 'n kapteinshof verhoor mag word nie, gewys. Die hoofstuk bevat die algemene beginsels van die strafreg asook die besondere misdade soos aan die Ndebele bekend. Interessant is dat daarop gewys word dat poging om 'n misdaad te pleeg, nie onder die Ndebele 'n misdaad daarstel nie.

Hoofstuk 4 handel oor die prosesreg. Die outeurs wys daarop dat die Ndebele duidelik tussen straf- en siviele proses onderskei. Die hoofmanshowe het geen siviele jurisdiksiebeperkinge nie hoewel hulle strafregsprekersbevoegdheid beperk is. Die kapteinshowe se bevoegdhede ten opsigte van sowel siviele as strafsake word hedendaags statutêr gereël en dit is opvallend dat die outeurs daarop wys dat die kaptein by die Ndebele, behalwe by die Litho Ndzundza, nie meer deel aan die verrigtinge in die kapteinshof het nie. Net soos die uiteensetting van Olivier (*Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 1981 568); Khumalo (*The Civil Practice of all Courts for Blacks in Southern Africa* 1948 42) en Bekker en Coertze (*Seymour's Customary Law in Southern Africa* 1982 16) sit die outeurs die appèlrangorde uiteen as synde vanaf die kapteinshof na die kommissarishof, hoewel beide howe ook oor jurisdiksie as hof van eerste instansie beskik. Hulle wys daarop dat die prosedurereëls van die Ndebele-howe eenvoudig en nie-tegnies is.

Hoofstuk 5 handel oor die bewysreg. Volgens die outeurs volg die Ndebelehowe 'n inkwisitoriese metode en in die hof se soeke na die waarheid is daar geen tegniese reëls wat getuienis ontoelaatbaar stel nie. Die tradisionele bewysmaatstawwe word steeds ingevolge artikel 8 van die KwaNdebele Wet toegepas mits dit nie strydig met die staatsgedragslyn of natuurlike geregtigheid is nie.

Die werk bevat 'n woordindeks van sewe bladsye asook 'n bibliografie, 'n sakelys en 'n lys van aangehaalde wetgewing. Aanhangsel A tot die werk bevat die stamregister van die Ndebele kapteins en is deur doktor CV Bothma saamgestel en vir insluiting in die werk beskikbaar gestel. Aanhangsel B bevat die

ouderdomsregimente van die Ndebele wat bestaan uit seuns van dieselfde ouderdomsgroep wat saam in dieselfde inisiasieskool was.

Nodeloos om te sê, verrig enigiemand wat veldwerk onderneem en regsoptekeninge doen waar die veld voorheen braak gelê het, inderdaad baanbrekerswerk.

Weinig setfoute is opgemerk. Die veldwerk is in 'n periode van agt weke afgehandel. Op die oog af blyk dit 'n baie kort termyn te wees wat die gehalte van die werk nadelig kan beïnvloed. Word egter in aanmerking geneem dat die werk aan die hand van 'n voorbereide memorandum afgehandel is, kan nie betwyfel word nie dat die outeurs uit vorige ervaring soos reeds vermeld, waardevolle werk verrig het. 'n Handboek oor die tradisionele inheemse reg is altyd welkom en al word met die tradisie statutêr weggedoen, sal die tradisionele altyd geskiedkundige en volkekundige waarde behou.

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BUSINESS TRANSACTIONS LAW
by R SHARROCK and A BORROWDALE
Juta & Co Ltd Cape Town Wetton Johannesburg 1987; pp xiv and 385
Price R29,95 + GST

Business Transactions Law, the ninth work to appear in Juta's Legal Guide Series, sets out an extensive section of the law. As the preface states, it is a guide specifically directed at the professional business sector and particularly at those students writing the public accountant and auditors board examinations.

The book is divided into seven parts. The first contains a very brief introduction regarding the sources and practice of the law as well as an explanation of basic concepts. Parts two and three deal with the requirements which must be met for a valid contract to come into existence. The authors state these general principles concisely before embarking, in part four, on a discussion of the most important everyday contracts. The authors deal with contracts relating to offers, sale, lease, credit agreement, loan for consumption, employment, service contracts, carriage and storage, and insurance. These contracts are discussed within the context and against the background of the general principles, thus eliminating repetition. Part five completes the general principles of the law of contract where the excuses for non-performance and the remedies which are available in the event of a contract being breached without lawful excuse are examined. Parts six and seven deal with security and insolvency.

The authors make use of a system of cross-references to facilitate understanding while maintaining brevity. This works remarkably well as the reader's attention is

constantly drawn either to the general application of a rule or to the fact that a particular contract diverges from the general principle. Clear indications are given that there is far more to certain topics than appears from the text, which serves as a warning to look further when necessary.

Generous use is made of case law to illustrate the practical application of the law. Short summaries of cases are provided which enhance the value of this book for the novice reader in this field. Frequent reference is made to English case law both as illustration and where points have not as yet been decided by South African courts (e g *Entores Ltd v Miles Far East Corporation* 1955 2 A11 ER 493 19; *Goldman v Thai Airways International Ltd* 1983 3 A11 ER 693 (CA) 230, and several others.)

The authors have included appendices dealing briefly with stamp duty, sales of sectional and occupational interests in immovable property, the Rent Control Act 1976, the Basic Conditions of Employment Act 1983, cheques and rights and duties of the trustee in insolvency. A comprehensive index which adds to its viability as a quick reference book in the business world is provided.

A minor oversight, which by no means detracts from the value of the book, is the omission of the formal requirement that a contract conferring a right of pre-emption with regard to land, should, according to *Hirshowitz v Moolman* 1985 3 SA 729 (A), be in writing.

The authors' aim was to present a succinct yet fairly comprehensive text for the student encountering business transactions for the first time. They have succeeded in their aim. The work will undoubtedly be popular with their target group.

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Common Law and Statute Law alike derive their moral sanction from the consent of the people, evidenced in the former case by their acquiescence in customs which they have found convenient and equitable, and in the latter case, by their participation in the process of its enactment (Lord Macmillan).