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REDAKSIONEEL

Afskeidswoord: Sy Edele HJO van Heerden

By die onlangse jaarvergadering van die Bestuur van die Vereniging Hugo de Groot is met spyt daarvan kennis geneem dat appèlregter HJO van Heerden om persoonlike oorwegings besluit het om die tuig as voorsitter van die Bestuur na 'n termyn van ses jaar neer te lê. Ons is trots en dankbaar oor die verbintenis wat hy met die *Tydskrif* gehad het. Dit was gewis vir ons 'n eer dat die voorsitterstoel van die Vereniging Hugo de Groot gevul is deur 'n man van uitnemende regskaliber wat, soos ek voorheen reeds uitgewys het (1991 *THRHR* 173-174), daarin geslaag het om die hoedanighede van regsteoretikus, regspraktisyn, regspreker en regshervormer voortreflik te kombineer. Op grond van 'n leeftyd van uitmuntende bydraes tot die regslewe in Suid-Afrika word hy gedurende 1996 dan ook met ere-doktorsgrade van die Randse Afrikaanse Universiteit en die Universiteit van Stellenbosch bekroon. Ons hartlike gelukwense aan appèlregter Van Heerden met hierdie welverdiende eerbetonings, en ons allerbeste wense vergesel hom op die pad vorentoe.

Gelukwense: Sy Edele LTC Harms

Die vakature wat weens die bedanking van appèlregter Van Heerden ontstaan het, is op die afgelope jaarvergadering gevul met die eenparige verkiesing van appèlregter LTC Harms as nuwe voorsitter van die Bestuur van die Vereniging Hugo de Groot. Regter Harms is geen nuweling by die *Tydskrif* nie. Inteendeel, hy is 'n ou staatmaker wat reeds sy mondigwording as bestuurslid gevier het – hy dien naamlik reeds die afgelope een en twintig jaar op die Bestuur, eers as penningmeester vanaf 1975 tot 1986 en daarna as gewone lid. Sy verbintenis met die *Tydskrif* strek egter nog veel verder terug, na 1965 toe die Butterworths-prys vir die beste eersteling-artikel aan hom toegeken is.

Appèlregter Harms se loopbaan vertoon 'n wye belangstelling in en betrokkenheid by vele aspekte van die regswese in Suid-Afrika (inligting ontleen aan 1994 *De Jure* iii-iv). Hy behaal die grade BA (Regte) (1962) en LLB (1964) met lof aan die Universiteit van Pretoria, en verwerf as beste vierde- en vyfdejaar student die Grotius-penning. Sy verbintenis met die Universiteit van Pretoria word voortgesit as senior lektor in handelsreg in 1965, 'n aanstelling as professor en hoof van die Departement Handelsreg in 1970 (wat hy nie aanvaar het nie), en sy benoeming as lid van die Universiteitsraad vanaf 1990, waarvan hy sedert 1994 die ondervoorsitter en tans ook senaatslid is. Vanaf 1966 tot 1971 doseer hy ook deeltyds bewysreg aan die Universiteit van Suid-Afrika.

In 1966 sluit hy by die Pretoria Balie aan waar hy aktief aan baliesake (ook as sekretaris) meedoen. Hy dien vanaf 1977 tot 1986 as lid van die Pretoria Balieraad, lei die mosie vir die oopstelling van die Pretoria Balie vir alle rasse en tree op as redakteur van *Pretoria Balie 100 Jaar*. Voorts was hy vir baie jare by die aktiwiteite van die Algemene Balieraad betrokke, onder andere as verteenwoordiger van die Pretoria Balie, as lid van die Eksamenraad en eksaminator, en as verteenwoordiger van die Algemene Balieraad op die Reglementsraad van die Landdroshowe en die Regshulpraad. Gedurende sy loopbaan as advokaat was hy by verskeie interessante sake betrokke (sien 1996 *De Jure* iii).

Regter Harms spesialiseer in immaterieelgoedereg, veral patentreg. Hy was vanaf 1977 amptelik betrokke by die opstel en wysiging van die statutêre patentreg, outeursreg, modelreg en handelsmerkereg. Hy het ook die staat by internasionale konvensies oor handelsmerkereg, outeursreg en patentreg gedurende 1994 en 1995 verteenwoordig. Hierdie belangstelling lei tot sy aanstelling in 1996 as voorsitter van die Statutêre Advieskomitee wat verantwoordelik is vir wetswysigings oor handelsmerke, modelle en outeursreg. Hy was ook tot 1986 die Suid-Afrikaanse korrespondent van die *European Intellectual Property Review* en is steeds 'n bydraer. Hy is voorts die outeur of mede-outeur van verskeie handboeke, waaronder "Interdict" in 11 *LAWSA* en *Amler on Pleadings* (3e en 4e uitg).

In 1986 word hy as regter van die Transvaalse Provinsiale Afdeling en 1993 as appèlregter aangestel. As regter dien hy op verskeie eenmankommissies (sien hieroor 1994 *De Jure* iv).

Die *Tydskrif* wens appèlregter Harms van harte geluk met sy aanstelling. Dit is nie alleen vir ons 'n eer dat 'n regsman van sy formaat aan die stuur van sake staan nie, maar dit is ook gerusstellend om te weet dat die *Tydskrif* nou in die hande is van iemand wat die belange daarvan vir soveel jare al koester. Ons vertrou dat sy "nuwe" verbintenis met die *Tydskrif* aangenaam sal wees en vrug sal dra.

Hugo de Groot-prys: Bydraes oor die nuwe Grondwet

Die Bestuur van die Vereniging Hugo de Groot het by sy pasafgelope vergadering besluit om voortaan jaarliks 'n prys van R1 000 uit te loof aan die outeur wat die beste bydrae oor die Grondwet van die Republiek van Suid-Afrika 108 van 1996 vir publikasie in die *Tydskrif* aanbied. Die redaksiekomitee behartig die beoordeling na afloop van die kalenderjaar en behou hom die reg voor om die prys nie toe te ken nie indien die bydraes wat ontvang is, na sy mening nie die toekenning regverdig nie.

Langs hierdie weg poog die Vereniging om belangstelling in die nuwe Grondwet te prikkel, en deurvorste navorsing en uitnemende publikasies daaroor te stimuleer en te bevorder.

THRHR Gekonsolideerde Register 1937-1994

In 1972 is die *Gekonsolideerde Register 1937-1967 vir Bande I-XXX* van die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* gepubliseer. Dié register is deur 'n komitee van die Fakulteit Regsgeleerdheid, Universiteit van Pretoria onder toesig van professor P van Warmelo opgestel. Sedertdien, maar veral sedert die tagtigerjare, het stemme begin opgaan vir die opstel van 'n omvattende, gekonsolideerde register van die *Tydskrif* wat spesifiek ook in die behoeftes van die regspraktyk – regter, landdros, advokaat, prokureur – kon voorsien.

Na 'n ooreenkoms tussen die Vereniging Hugo de Groot en Butterworths om die register te laat opstel en gesamentlik uit te gee, het die omvangryke taak om 'n register wat oor 58 jaar strek en die 1937-1994 *THRHR* indekseer, op die skouers van professor W du Plessis van die Potchefstroomse Universiteit vir CHO en haar span medewerkers geval. Die resultaat is in 1996 gepubliseer en stel 'n omvattende verwysingsbron van 1273 bladsye daar wat onmiddellike toegang tot meer as vyf dekades se regskommentaar in die *Tydskrif* verleen. 'n Woord van hartlike gelukwense en groot dank gaan daarom aan die opstellers vir hulle onvermoeide ywer met die voltooiing van dié grootse taak. Erkentlikheid en dank is ook verskuldig aan Butterworths vir hulle bereidheid om die register te publiseer en om altyd toegewings met betrekking tot die produksiekoste en die publikasiedatum te maak.

In memoriam: DJ Joubert

Die *Tydskrif* het met diepe leedwese verneem van die afsterwe van professor DJ Joubert, 'n getroue medewerker en vriend van die *Tydskrif* oor drie dekades. Hy was sedert 1985 sekretaris van die Bestuur van die Vereniging Hugo de Groot, assistent-redakteur vanaf 1976 tot 1980, en redaksiekomiteelid sedert 1971, eers van die Universiteit van Wes-Kaapland en later (vanaf 1975) van die Universiteit van Pretoria. 'n Huldeblyk van professor Joubert deur professor FFW van Oosten verskyn verderaan in hierdie uitgawe. Saam met professor Van Oosten huldig ons die nagedagtenis van David Joubert en spreek ons innige meegevoel teenoor sy naasbestaandes en vriende uit.

Nuwe posadres: Vereniging Hugo de Groot

Intekenaars van die *Tydskrif* moet daarop let dat die posadres van die Vereniging om doelmatigheidsoorwegings verander het na:

Posbus 13946
Hatfield
Pretoria
0028

JOHANN NEETHLING

IN MEMORIAM

David Johannes Joubert

David Joubert, in lewe Dekaan van die Fakulteit Regsgeleerdheid van die Universiteit van Pretoria, is op 13 Oktober 1996, twee weke na 'n fratsongeluk, oorlede. Hy is op 10 Januarie 1936 te Johannesburg gebore, en matrikuleer in 1953 aan die Jeppe Boys High School. In 1956, 1959 en 1968, onderskeidelik, behaal hy die grade BA, LLB en LLD (met 'n proefskrif getitel *Die verpligtings van die verteenwoordiger*) aan die Universiteit van Pretoria. Hy begin in 1959 sy regsloopbaan by die Departement van Justisie, waar hy eers as staatsaanklaer en later as professionele assistent optree. In 1962 word hy as senior lektor in die Departement Handels- en Bedryfsreg aan die Universiteit van Pretoria aangestel, en in 1967 en 1968, onderskeidelik, word hy waarnemende hoof van en addisionele professor in dieselfde departement. Hy word in 1970 as professor en hoof van die Departement Regte van die Universiteit van Wes-Kaapland aangestel, en in 1974 word hy Dekaan van die Fakulteit Handel en Regte van dieselfde universiteit. In 1974 keer hy terug na die Universiteit van Pretoria as professor en hoof van die Departement Romeins-Hollandse Reg, 'n pos wat hy beklee totdat hy in 1981 as deeltydse dekaan van die Fakulteit Regsgeleerdheid aangestel word. Vanaf 1984 tot sy afsterwe was hy voltydse dekaan van dié fakulteit.

David Joubert was 'n hart-en-niere akademikus en wetenskaplike. Daarvan getuig die elf boeke waarvan hy outeur of mede-outeur was, en die sewe hoofstukke in boeke, bykans 90 artikels, 22 vonnisbesprekings en sestien boekbesprekings wat uit sy pen verskyn het. Hy was promotor van tien LLD-proefskrifte, redakteur van twee gedenkbundels (*Petere Fontes: LC Steyn-gedenkbundel* (1980); *EM Hamman-gedenkbundel* (1984)), assistent-redakteur van die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, lid van die Suid-Afrikaanse Regskommissie en van die Raad op Erkenning van Regseksamens, kommissaris van die Hof vir Klein Eise, en het op talle komitees van die universiteit en 'n aantal rade buite die universiteit gedien. Verder het hy verskeie referate en voordragte by kongresse en simposia gelewer. Die vakke waarin hy klasgegee het, was veelvuldig en bestryk hoofsaaklik gebiede van die privaatreg en die handelsreg. Sy verknogtheid aan die akademie blyk dan ook uit die feit dat hy na sy aanstelling as voltydse dekaan voortgegaan het om op 'n beperkte skaal klas te gee en gereeld navorsingsuitsette te lewer.

David Joubert was vir meer as twintig jaar 'n gewaardeerde en gerespekteerde vriend en kollega van my. As vriend is daar uiteraard heelwat wat ek van David sou kon sê. Omdat persoonlike verhoudings moeilik onder woorde te bring is, volstaan ek egter met 'n verwysing na enkele van sy kenmerkendste eienskappe: 'n sekere subtiliteit van aanslag en inslag; 'n onderliggende individualisme en 'n onverdunde lojaliteit teenoor dit en diegene wat sy hart geraak het; begrip en deernis vir sy medemens, ook dié wat hom nie aangestaan het nie; geduld, verdraagsaamheid, onverstoorbaarheid en soepelheid; die gawe om te luister en om met homself te verskil, soos veral geblyk het uit sy soms gunstige heroorweging van die meriete van voorstelle wat hy by eerste aanhoor verwerp het; sy vermoë om, anders as die meeste beoefenaars van professies, onderhoudend oor veel meer as sy professie te kan gesels; en sy gawe om so lekker te kon lag dat hy letterlik sy bril vol trane kon skiet. As kollega, met wie ek soms skerp swaarde gekruis het, was David se opvallendste kwaliteite dié wat ons professie hoog opgee maar selde beoefen: sy vermoë om sy rolle van mekaar te onderskei, die bal in stede van die man te speel, professionele geskille nie persoonlik op te neem nie en om beslis en beskaafd met 'n mens te verskil. Soos dit nou maar eenmaal met mense gaan, was David nie sonder foute en vyande nie. Gelukkig en genadig, want sonder foute sou hy aan interessantheid ingeboet het en sonder vyande sou hy net vriende gehad het aan wie 'n mens hom sou ken.

Die mense met wie die lewe 'n mens saamgooi is baie. Besondere mense wat 'n mens se pad kruis is min. Hulle is mense wat jou lewe verryk en jou perspektiewe verbreed. Hulle is die mense wat 'n verskil maak en wat 'n voorreg is om te ken. David Joubert was so 'n mens.

FERDINAND VAN OOSTEN
Universiteit van Pretoria

BUTTERWORTHS-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworths-prys vir die beste eersteling-bydrae van 1996 toegeken is aan:

Dr E de Wet
International Labour Office, Genève

Covenants in restraint of trade: An evaluation of the positive law

C-J Pretorius
BLC LLB
Senior Lecturer in Private Law, University of South Africa

OPSOMMING

Ingevolge die tradisionele benadering tot handelsbeperkings, afkomstig uit die Engelse reg, wat ons howe tot en met die uitspraak in *Magna Alloys and Research (Pty) Ltd v Ellis* 1984 4 SA 874 (A) gevolg het, was sodanige kontraktuele bepalings *prima facie* nietig en onafdwingbaar. Indien die afdwinger egter kon bewys dat die betrokke beperking redelikerwys nodig was om 'n vermoënsbelang te beskerm, kon 'n hof afdwinging van die handelsbeperking gelas. In *Magna Alloys* daarenteen is beslis dat daar geen gesag in die gemenereg te vinde is dat beperkings van hierdie aard ongeldig of onafdwingbaar is nie; gevolglik is hulle *prima facie* geldig en afdwingbaar tensy hulle teenstrydig met die openbare belang in die omstandighede is. Alhoewel hierdie beslissing die reg insake beperkings wat handelsvryheid inkort in ooreenstemming met die gemenereg gebring het, het dit ook 'n mate van onsekerheid bewerkstellig. Presies hoe die algemene riglyne wat die appèlhof gestel het prakties aangewend moes word, was onseker. In hierdie artikel word die aandag gevestig op die wyse waarop die howe die uitspraak in *Magna Alloys* toepas en verdere verwikkelings wat in die regspraak op hierdie gebied plaasgevind het. Daar word ook aandag geskenk aan die invloed wat die tradisionele benadering steeds op hierdie gebied uitoefen.

1 INTRODUCTION

Initially the decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[1] seemed to have brought about a complete turnabout regarding covenants in restraint of trade in the South African law. Traditionally, under the influence of English law, our law favoured the restraint of trade doctrine according to which restraints, unlike other contractual terms, were *prima facie* void and therefore unenforceable. This approach was derived from a preference for one of two conflicting principles, namely, the principle of sanctity of contract (*pacta sunt servanda*) above the principle of freedom of trade.[2] Nevertheless, a restraint could be enforced subject to a test of reasonableness. The contractual party seeking enforcement had to prove that the particular restraint was reasonable as between the parties, which the courts restricted to mean reasonably necessary to protect specified interests of the covenant enforcer.[3]

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1 1984 4 SA 874 (A).

2 See in general Du Plessis and Davis "Restraint of trade and public policy" 1984 *SALJ* 86; Eiselen "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" 1989 *THRHR* 516.

3 See in general Van der Merwe, Van Huyssteen, Reineeke, Lubbe and Lotz *Contract: general principles* (1993) 155–157; Joubert *General principles of the law of contract*

continued on next page

In *Magna Alloys* the Appellate Division held that there are no indications in Roman-Dutch law that restraints were prohibited and regarded with disfavour, and consequently ruled that they were *prima facie* valid and enforceable. A restraint that was found to be contrary to public interest would, however, be unenforceable.[4] The court furthermore found, regarding the aspect of reasonableness, that a restraint of trade which is unreasonable would probably also prejudice the public interest.[5] The acceptance of public interest as the true test for enforceability led the court to the following further conclusions: the party alleging that he is not bound by the restraint bears the onus of proving that enforcement would be contrary to public interest; a court may have recourse to the circumstances existing at the time that enforcement is requested and a court is empowered to rule that the restraint is partially enforceable.[6] Although this decision reinstated the position at common law in earnest, it was not a sudden and unexpected break from the then existing law, since it was to a large extent influenced by the preceding judgments in *Roffey v Catteral, Edwards & Goudré (Pty) Ltd*,[7] *National Chemsearch (SA) (Pty) Ltd v Borrowman*[8] and *Drewtons (Pty) Ltd v Carlie*.[9]

2 QUESTIONS ARISING FROM THE *MAGNA ALLOYS* JUDGMENT

Although *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* indicated in broad terms what the position in regard to the validity of covenants in restraint of trade would henceforth be, certain aspects were left unresolved. Some questions that arose pursuant to this decision are the following:

(a) Although it was said that the unenforceability of such a contractual provision is to be determined according to the dictates of public interest, the court did not indicate what characteristics would render a restraint prejudicial to public interest.

(b) Exactly what role reasonableness in general and the presence or absence of protectable interests in particular would play in the process of determining enforceability was unclear.[10]

(c) Although, in principle, partial enforcement of a restraint was approved by the court, it referred to decisions which differ in approach to this aspect and did not indicate whether the onus shifted in such an instance.[11]

(1987) 145; Schoombee "Agreements in restraint of trade: The Appellate Division confirms new principles" 1985 *THRHR* 127–130; Van Heerden and Neethling *Unlawful competition* (1995) 24–29.

4 See the comments of Lubbe and Murray *Farlam & Hathaway. Contract – cases, materials and commentary* (1988) 261–262 about the implications of the court's finding that a restraint which prejudices the public interest is not invalid (void) but merely unenforceable. See in general Van der Merwe and Van Huyssteen "The force of agreements: valid, void, voidable, unenforceable?" 1995 *THRHR* 549.

5 894D 898A–B.

6 See the court's summary 897F–898D.

7 1977 4 SA 494 (N).

8 1979 3 SA 1092 (T).

9 1981 1 SA 305 (C).

10 See Schoombee 1985 *THRHR* 140–143; Visser "Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 4 SA 874 (A)" 1985 *De Jure* 194 199; Lubbe and Murray 255–258.

11 See Schoombee 1985 *THRHR* 144 *et seq*.

3 REASONABLENESS

3 1 The role of reasonableness according to *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*

As mentioned above, in terms of the traditional doctrine, a covenantee seeking enforcement of a restraint had to prove that the restraint was reasonable *inter partes* in that it was reasonably necessary in order to protect specified interests of the covenantee. A restraint that was unreasonable *inter partes* or prejudicial to the public interest was either void or unenforceable.[12] In *Magna Alloys* Rabie CJ accepted that the only test for determining unenforceability is prejudice to the public interest[13] and paid little attention to the role that reasonableness would play. What constitutes unreasonableness in the context of restraint clauses and what effect unreasonability would have on their enforcement was not sufficiently dealt with. The court merely indicated that reasonableness would or could still play a role since enforcement of an unreasonable restraint would *probably* prejudice the public interest.[14] Since Rabie CJ apparently referred to the protectable interests of the covenantee in the context of unreasonableness,[15] it might suggest that reasonableness should still be primarily determined with reference to the protectable interests of the covenantee. The manner in which unreasonableness was treated, however, could draw one to different conclusions regarding its application: there may be instances, on the one hand, where a restraint is unreasonable *inter partes* because it serves to protect no interest of the covenantee, yet nevertheless enforceable because it does not prejudice the public interest; on the other hand, a restraint may be reasonable *inter partes* but none the less unenforceable because it damages the public interest in some way or another. Although the exact role that reasonableness was to play in determining whether a restraint should be enforced was left in a state of some uncertainty, it did create an opportunity for a widening of this concept to encompass more than the restricted meaning it had in terms of the traditional doctrine.[16]

The courts have continued, in accordance with the traditional approach, to apply a reasonableness test in which the protectable interests of the covenantee play a pivotal role. The single test of prejudice to the public interest seems, once again, to have been split into a component dealing with reasonableness as between

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12 See Schoombee 1985 *THRHR* 140–143.

13 891H 892I–893A 897I.

14 Rabie CJ held as follows (894D): "In die algemeen kan egter aanvaar word, meen ek, dat 'n beperking van 'n persoon se handelsvryheid wat onredelik is, waarskynlik ook die openbare belang sou skaad indien die betrokke persoon daaraan gebonde gehou sou word." See also 898A–B.

15 894D–F 904G–905D. The court held that the enforcement of the restraint was reasonable because the respondent had built up a successful "customer connection" while in the employ of the appellant and then proceeded to resign and take up employment with a competitor of the appellant.

16 Schoombee 1985 *THRHR* 141–142 states that the open-ended formulation by the Appellate Division in *Magna Alloys* has created the possibility of widening the category of protectable interests. It may also be seen in terms of an expansion of the criterion of reasonableness, so that it is to be determined by means of an overall balancing of interests against the background of public interest, rather than simply according to traditional doctrinal rules. It is submitted that the latter instance is the more significant implication of this decision which in turn pre-empted the judgment of Nienaber JA in *Basson v Chilwan* 1993 3 SA 742 (A). See *infra*.

the parties, on the one hand, and prejudice to public interest on the other. If the restraint does not protect some or other proprietary interest[17] of the covenantee, the court will as a rule refuse the application for enforcement.[18]

3 2 *Basson v Chilwan*

In *Basson v Chilwan*[19] four appellate judges delivered judgments.[20] That of Nienaber JA deserves special attention because, it is submitted, it indicates a flexible approach to the aspect of reasonableness in the context of covenants in restraint of trade which not only takes into consideration the interests of the covenantee, like the traditional approach, but other factors as well, including the interests of the covenantor and any relevant aspect of public interest. The following *dictum*[21] of the judge encapsulates the essence of his judgment:

> "'n Ooreenkoms is in sy geheel of ten dele aanvegbaar indien dit die openbare belang skaad en aldus teen die openbare beleid indruis. 'n Bepaling van hierdie aard wat 'n werknemer of vennoot na beëindiging van die kontrak aan bande probeer lê – en dis al geval wat hier in oënskou geneem word – druis teen die openbare beleid in as die uitwerking van die belemmering onredelik sou wees. Die redelikheid al dan nie van die belemmering word beoordeel aan die hand van die breëre belang van die gemeenskap, enersyds, en van die kontrakterende partye self, andersyds. Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkomste moet gehandhaaf word (al bevorder dit ook onproduktiwiteit); onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms) (vgl *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) te 794D–E). Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermwaardige belang van die ander

17 Proprietary or economic interests that are deserving of protection have been limited to two categories, namely trade secrets and trade connections on the one hand, and the goodwill of a business, on the other. See *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 2 SA 482 (T) 502C–F 505F–I; *Botha v Carapax Shadeports (Pty) Ltd* 1992 1 SA 202 (A) (goodwill); *Rawlins v Caravantruck (Pty) Ltd* 1993 1 SA 537 (A) 541A–542H; *Basson v Chilwan supra* 769G–770D.

18 In *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 1 SA 434 (SE) 442G Leach J made the following generalisation: "Although the respondent admits that the restraint which he signed is reasonable in extent and duration, it is generally accepted that a restraint is against public policy if it does not protect any proprietary interest but seeks merely to exclude competition. Thus, for example, in *Super Safes (Pty) Ltd v Voulgarides* 1975 (2) SA 783 (W) at 785 Nicholas J said: 'A bare covenant not to compete cannot be upheld. A restraint against competition must, if it is to be valid, serve some interest of the person in whose favour it was inserted – the purchaser of a business, for example, who requires protection against the erosion of its goodwill by the competition of the seller; or the employer who requires that his trade secrets and his trade connections be protected against exploitation by the man whom he is taking into his employment.'" Cf *Amalgamated Retail Ltd v Spark* 1991 2 SA 143 (SE) 150D–H; *Sibex Engineering Services (Pty) Ltd v Van Wyk supra* 487G–H; *Fisher v Salon La Mystique* 1995 2 SA 136 (O) 140I–J; *MacPhail (Pty) Ltd v Janse van Rensburg* 1996 1 SA 594 (T) 599I–J; *Turner Morris (Pty) Ltd v Riddell* 1996 4 SA 397 (E) 408I–409H; *Rawlins v Caravantruck (Pty) Ltd supra* 540I–541C.

19 *Supra*.

20 Eksteen JA, Nienaber JA, Van Heerden JA and Botha JA delivered separate judgments. Milne JA concurred in the judgment of Botha JA, and Botha JA agreed with the judgment of Nienaber JA.

21 767C–I.

party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid. Origens mag 'n beperking wat *inter partes* redelik is nietemin, vir 'n rede wat nie aan die partye eie is nie, die openbare belang skaad. En bes moontlik ook omgekeerd.

Vier vrae moet in dié verband gestel word:

(a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?

(b) Word so 'n belang deur die ander party in gedrang gebring?

(c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?

(d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie? (Laasgenoemde vraag kom nie hier ter sprake nie.)

Vir sover die belang in (c) die belang in (a) oortref, is die beperking in die reël onredelik en gevolglik onafdwingbaar. Dit is 'n kwessie van beoordeling wat van geval tot geval kan wissel (*Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) te 486H)."

He further stated that the parties' own perception of what is reasonable, as reflected in the agreement, cannot be decisive. It is only a factor to be taken into consideration. So too is the relative parity of the parties at the time of contracting.[22]

The following comments may be made in the light of this *dictum*:

(a) The traditional aspect of reasonableness *inter partes* still plays an important role. If the covenant enforcer does not have a protectable interest which is properly served by the restraint, the restraint will, as a rule, be unreasonable and contrary to public policy. This is a far more definite statement than the one made by Rabie CJ in *Magna Alloys* that the enforcement of an unreasonable term would only *probably* prejudice the public interest and seems to indicate that reasonableness as between the parties will continue to play a predominant role in determining the reasonableness of a restraint.[23]

(b) The determination of reasonableness, furthermore, not only revolves around the protectable interest of the restraint enforcer: this interest must so weigh up qualitatively and quantitatively against the interest of the restraint denier to be economically productive and active that the restraint should be enforced in the circumstances. In other words, a court must weigh up and balance the interests of the parties. A court could relatively easily conclude that a restraint should be enforced once it is clear that a protectable interest of the restraint enforcer has been infringed or could be infringed. The enquiry, as far as the parties themselves are concerned, should not end there, since a restraint could have grave consequences for the restraint denier.[24]

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22 767I–768C.

23 It is therefore no coincidence that the first two of the four questions posed by the judge deal with a determination of whether there is an interest of the one party deserving of protection at the termination of the agreement and also whether this interest has been prejudiced by the other party.

24 In *Basson* Nienaber JA concluded that neither the trade secrets nor the trade connections of the covenantee had been jeopardised by the covenantor (770C) and further substantiated his decision not to enforce the restraint in question in the following terms (772I–773B):

continued on next page

(c) Reasonableness, however, is not restricted to the relationship between the parties and may be determined by other matters of public interest. In the words of Nienaber JA, a restraint which is reasonable *inter partes* may for a reason not peculiar to the parties damage the public interest, and possibly, *vice versa*. As mentioned *supra*, the same conclusion flows from the *Magna Alloys* decision. The question is: when will a restraint which is reasonable *inter partes* damage the public interest and when will a restraint which is unreasonable *inter partes* not damage the public interest? As far as the former is concerned, a restraint which is reasonable between the parties may still be prejudicial to the public interest if, for instance, it prevents the covenantor from providing the public with an essential service which is in short supply.[25] As far as the latter is concerned, it is difficult to determine in what circumstances a restraint, which is unreasonable as between the parties, does not prejudice public interest. Furthermore, since, according to *Magna Alloys*, prejudice to the public interest is the only test for enforceability, the possibility arises that a covenant in restraint of trade may be unreasonable as between the parties but nevertheless enforceable because it does not damage the public interest. Is it indeed possible for a restraint to be enforced in such circumstances? There are possibly two instances where a restraint may be unreasonable *inter partes* along traditional[26] lines and yet not be in conflict with the public interest. These are: where a sum of money has been paid by the covenantee to the covenantor in exchange for agreeing to the restraint and where the contract imposes reciprocal restraints on the parties.[27]

(d) This open-ended formulation of the test to determine the reasonableness of a restraint makes provision for the application of this criterion in a more flexible manner. Whether a restraint should be enforced or not in a given instance, must be determined with reference to all possible relevant factors.[28] It also creates the possibility of further development of the criterion of reasonableness in this

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"Wat die Chilwans beoog het, was om Basson te verhinder om hom ten koste van hul kapitale belegging in Coach-Tech by 'n ander onderneming aan te sluit waar sy insette 'n beter produk sou verseker as wat Coach-Tech sonder hom kon lewer. Op stuk van sake is dit niks anders as 'n poging om kompetisie ten opsigte van potensiële toekomstige klante te smoor nie ... die ooreenkoms is 'n blatante poging om 'n monopolie oor Basson se bekwaamheid, vaardigheid en kundigheid as busbakbouer te verwerf deur Basson vir vyf jaar as busbakbouer buite aksie te stel. Daardie belang, met daardie oogmerk, kan na my mening nie opweeg teen die nadeel wat dit vir Basson inhou indien hy verhinder word om sy gekose beroep vir 'n periode van vyf jaar te beoefen nie."

25 Especially where the restraint is embodied in an employment contract.

26 In other words, the restraint does not serve to protect a recognised economic interest of the covenantee.

27 See 3 3 3 and 3 3 4 *infra*.

28 In this regard the reasonableness test in the context of covenants in restraint of trade is more than a little reminiscent of the test for wrongfulness in the law of delict. Neethling, Potgieter and Visser *Law of delict* (1994) describe this test as follows (32): "The basic question is whether, according to the legal convictions of the community and in the light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in a reasonable or an unreasonable manner." The essential ingredients of these two tests are the same: They both consist in the weighing up or balancing of the conflicting interests of the parties in the light of all the relevant circumstances; and determining on the one hand whether, according to the legal convictions of the community, an infringement is unlawful and on the other hand whether a restraint should be enforced in the light of the public interest.

context. As indicated under (c) *supra* there are still aspects which need clarification.

(e) A court may take into account any facet of public interest, having nothing to do with the parties themselves, which requires that the restraint should either be enforced or refused. Apart from the stated public interest that agreements must be abided by and unproductivity should be discouraged, it is submitted that policy considerations as such play a role in cases of this nature. Policy considerations[29] usually come to the fore where a legal rule is "open ended" and flexible enough to allow for policy considerations in its application. In the law of delict, for instance, the criteria for determining wrongfulness and legal causation[30] are examples of such rules, and so too is the aspect of legality in the law of contract.[31]

(f) Although Nienaber specifically dealt with the situation where an employee or partner is restrained upon termination of the relevant contract, it is submitted that the approach he adopted is equally applicable to restraints in other types of contracts.[32]

Whether courts will, in future, apply this wider criterion in determining reasonableness or simply look no further than the protectable interests of the covenantee is another matter. Decisions subsequent to *Basson* have shown little tendency to apply this wider test. In most instances, however, a court will not have to look further than approaching the matter along more traditional lines to enable it to arrive at a substantiated decision. In *Paragon Business Forms (Pty) Ltd v Du Preez*,[33] for instance, Leach J had little trouble in enforcing a restraint once it was established that the applicant had a protectable interest[34] which was being infringed by the respondent and the restraint was reasonable in regard to its extent and duration.[35] Similarly, in *Branco t/a Mr Cool v Gale*[36] Van Rensburg J granted partial enforcement of a restraint once it was determined that the applicant had a proprietary interest worthy of protection.[37] In *McPhail (Pty) Ltd v Janse van Rensburg*[38] Botha J dismissed an application for the enforcement of a restraint because, *inter alia*, the applicant had not proved a proprietary interest that was being infringed by the respondent.[39]

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29 Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 174 provides the following definition for policy considerations: "Policy considerations are substantive reasons for judgments reflecting values accepted by society. They consist in moral or ethical values, valuable in themselves, or in desirable goals of collective societal welfare, but there is no reason why these two types of policy considerations cannot overlap. A decision determined by such considerations – a policy decision – comprises a balancing of the various values, and is thus a value judgment by the decision-maker."

30 *Idem* 180.

31 Cf Du Plessis and Davis 1984 *SALJ* 86; Schoombee 1985 *THRHR* 138–140; Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 7; Van der Merwe and Van Huyssteen *supra*.

32 See Joubert 147–151 for a discussion of various types of restraints.

33 *Supra*.

34 *In casu* trade connections, also referred to as "customer goodwill".

35 445G–446B.

36 1996 1 SA 163 (E).

37 178I–179I. The restraint was granted to protect the applicant's trade connections.

38 *Supra*.

39 598H 601B–C.

Although judgments in which the courts follow a more restrictive approach, as opposed to the more flexible approach adopted by Nienaber JA in *Basson v Chilwan*, are not for that reason necessarily wrong, the pity is that the basis laid for a flexible approach to the aspect of reasonableness and its further development in the sphere of restraints may not bear any real fruits at all.

3 3 Factors that could indicate the reasonableness or otherwise of a restraint

Apart from the aspect of protectable interests and the actual scope of a restraint in regard to the act(s) it prohibits, its duration and area of operation, there are several factors that could play a role when determining the reasonableness of a restraint. Some of these are the following:

3 3 1 Stated reasonableness of the restraint

A clause is often inserted in contracts containing restraints to the effect that the covenantor acknowledges that the restraint is reasonable.[40] Although this is a factor which may point to the reasonableness of a restraint, it is clear that such a clause will not save an otherwise unreasonable restraint.[41]

3 3 2 Inequality in bargaining power

The specific rules pertaining to the traditional restraint of trade doctrine were influenced by and partly served to redress the problem of inequality in bargaining power between an employer and an employee who has agreed to a restraint.[42] In the *Magna Alloys* decision the inherent corrective that the traditional doctrine contained in this regard was ignored,[43] with the result that it seems that employers are unduly favoured by the current approach.[44] Under the present approach, inequality in the bargaining position of the respective parties is merely regarded as a factor to be considered when determining the reasonableness of a restraint.[45] If it is clear that the parties contracted on an equal footing, a court will more easily conclude that the restraint is reasonable and thus enforceable.[46]

3 3 3 Remuneration for a restraint

Where the covenantor is directly compensated for agreeing to the restraint, the question arises whether this in itself renders the restraint reasonable and enforceable. In *McPhail (Pty) Ltd v Janse van Rensburg*,[47] counsel for the applicant argued that the first respondent had been compensated for the restraint itself and that it would be contrary to public interest to allow the respondent to agree to the restraint in question in exchange for compensation and then proceed to do exactly what he had undertaken not to do. Although the court indicated that such an argument does have substance, it concluded on the facts that the applicant had

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40 See, eg, *Paragon Business Forms (Pty) Ltd v Du Preez supra* 437I; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra* 885E–G 905A–C. See also the comments of Lubbe and Murray 257–258 in this regard and the other cases they refer to.

41 *Basson v Chilwan supra* 767I–768E.

42 Schoombee 1985 *THRHR* 130.

43 *Idem* 140.

44 See Visser "Covenants in restraint of trade – some clarity at last" 1985 *BL* 108.

45 *Basson v Chilwan supra* 768C.

46 Cf *CTP Ltd v Argus Holdings Ltd* 1995 4 SA 774 (A).

47 *Supra*.

had its money's worth from the respondent. It seems that the court found that the compensation was not given directly in exchange for the restraint.[48] There seems to be no compelling reason not to find that, in principle, a restraint is reasonable where the covenantor has been fairly compensated[49] for agreeing to it. The fact that the covenantor has thus been compensated could also provide substance for the notion that the parties contracted on an equal footing in the circumstances. Where, however, the covenantor is only partially compensated it might, once again, only be a factor which indicates the reasonableness or otherwise of a restraint.

The question is further whether a restraint will be reasonable in such circumstances even though it does not protect some or other recognised protectable interest from infringement. Where the restraint is drafted with the intention of stifling mere competition, but the covenantor is suitably rewarded for agreeing to the restraint, could it be possible for the restraint to be reasonable in the circumstances? Could this be an instance where a restraint is unreasonable *inter partes*, in the traditional sense,[50] but the public interest is not prejudiced? On the other hand, perhaps the basic requirement of protection of a legitimate interest should be adhered to and the remuneration received by the covenantor measured against the nature and scope of the restraint to determine whether the restraint is reasonable in that regard.

3 3 4 Reciprocal restraints

Where restraints are reciprocal, and one is agreed to in exchange for another, a court may be justified in finding that both restraints are reasonable in the absence of any other relevant factors. This would especially be the case where the restraints are similar in scope and nature. As in the case where remuneration is given for the restraint, reciprocal restraints may often aid in facilitating an inference that the parties contracted on an equal footing.

A good illustration is provided in *CTP Ltd v Argus Holdings Ltd* [51] where the appellants and respondents were business associates but in competition with one another on opposite sides of the same line of business, namely publishing newspapers. The former were involved in publishing free tabloids in certain areas while the latter published regional newspapers and had an interest in a national newspaper. In various restraints the appellants agreed not to publish any regional or national newspaper and in turn the respondents undertook not to be involved in publishing a separate free newspaper, a local newspaper or magazine. Thereafter, the respondents decided to publish supplements to be inserted in one of their regional newspapers which would focus on certain areas. The appellants had unsuccessfully applied in a local division for an interdict restraining the respondents from publishing the supplements. On appeal the Appellate Division held that publication of the supplements offended the restraints since they amounted

48 601C–G.

49 What fair compensation would entail would depend entirely on the type of contract in question, the nature, extent and duration of the restraint and any other relevant factors in the circumstances.

50 In other words, it does not serve to protect a proprietary interest of the party in whose favour it operates.

51 *Supra*.

to "local newspapers" and granted a qualified interdict.[52] Although it is not clear exactly what recognised interest the restraints protected, the fact that the restraints were reciprocal and designed to protect the interests of contractants who were, in fact, business associates, was central to the court's reasoning in granting an interdict. Nienaber JA referred to the interests of the parties and the reciprocity of the restraints as follows:[53]

> "In the instant case the various restraints were reciprocal ones. They were agreed to between the parties concerned as part of the consideration for the restructuring of their respective businesses. Their purpose was to preserve the commercial *status quo*. Each side sacrificed part of its competitive edge as a hedge against attack from the other. Where the restraints formed part of the overall consideration and were designed to protect comparable interests of the respective sides, they cannot be said to be mere covenants against competition and as such to run contrary to the public interest."

It is submitted that the purpose of the restraints was, in fact, to preclude competition between the parties. Although the parties were both newspaper publishers, they did not directly compete with each other as long as they respectively engaged in the publication of their separate and markedly different newspapers. The restraints were agreed upon precisely to preserve this situation and prevent the possibility of direct competition. As such they were restraints designed for the purpose of preventing competition but were agreed to in the interest of both parties. There seems furthermore to have been no infringement of one of the traditional proprietary interests. Consequently, it is submitted, the reasonableness of the restraints hinged on the fact that they were reciprocal, coupled with the relationship that existed between the parties,[54] and not because there was an infringement of a protectable interest in the traditional sense. It is also clear from the circumstances that the parties contracted on an equal footing.

3 3 5 A restraint for an indefinite period

As was the case under the traditional restraint of trade doctrine, a restraint that is unreasonable in regard to its area of operation or duration generally will not be enforced,[55] unless it is a proper instance for partial enforcement. Nevertheless, there may be instances where a restraint for the lifetime of a party or an indefinite period will be reasonable. In *Technor (Pty) Ltd v Rishworth*[56] the particular restraint was couched in such a manner that its duration was variable and indefinite, so that it could remain in operation for the remainder of the respondent's life. Although the court concluded that the restraint was so onerous that it was contrary to public policy and could not be maintained in its entirety,[57] it did

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52 *Per* Nienaber JA 783B–784H 788H–J 789A–F.

53 784C–E.

54 Cf 784D–G.

55 Cf *Powertech Industries (Pty) Ltd v Jamneck* 1993 1 SA 328 (O); *Coin Sekerheidsgroep (Edms) Bpk v Kruger* 1993 3 SA 564 (T); *Interest Computation Experts v Nel* 1995 1 SA 174 (T); *Gero v Linder* 1995 2 SA 132 (O); *Technor (Pty) Ltd v Rishworth* 1995 4 SA 1034 (T).

56 *Supra*. This matter entailed an appeal from a local division to a full bench of the Transvaal Provincial Division. The court *a quo* did uphold the restraint in a very limited form but the appellants appealed on the basis that the restraint should be enforced in its entirety.

57 1037I–1038E. The court did not, however, change the order of the court *a quo*.

indicate that there may be circumstances which warrant a restraint for the lifetime of a party.[58] In *CTP Ltd v Argus Holdings Ltd*[59] the Appellate Division held that a restraint for an indefinite period may be warranted in certain circumstances and granted a qualified interdict for an indefinite period. The particular circumstances that justified such a conclusion were that there were reciprocal restraints, which were thus applicable to both parties, who were also business associates. The restraints also served to protect comparable interests on both sides.[60] The court, however, did not grant an interdict in the form of a *declarator* operating in perpetuity since the circumstances that justified the granting of the interdict might change. It therefore granted the respondents, against whom the restraint was upheld, leave to approach the court for an order rescinding or amending the order granted, should circumstances change materially.[61] The court did nevertheless couple the reasonability of the restraint to the protectable interest of the party seeking enforcement.[62]

3 3 6 Enforcement of a restraint pursuant to breach of contract by the covenantee

A point still open to some debate is whether breach of contract by the covenantee precludes his reliance on a restraint clause in the very contract he has breached.[63] This is of especial importance in the case of employment contracts. In *Info DB Computers v Newby*[64] Goldblatt J concluded as follows:

> "I am persuaded, both on the ordinary principles of our law and the strong English and American authorities, that, unless there are terms to the contrary, a party who has wrongfully caused the termination of a contract of employment cannot rely upon the continued existence of a restraint of trade clause forming an integral part of such contract."[65]

The question is: what are "terms to the contrary"? Logically this means that where the contract provides that the restraint clause will survive breach by the employer, it will still be enforceable even where the employer has breached the contract. However, the employer may not rely on the contract where he intentionally breaches it; such consequence would be untenable in light of the general rule that liability for intentional conduct may not be excluded.[66] Thus a general

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58 1038D.

59 *Supra.*

60 784C–H. Nienaber JA had the following to say about restraints for an indefinite period (783I–784A): "It was next argued on behalf of the respondents that a restraint for an indefinite period is so far-reaching as perforce to clash with public policy. I disagree. The cases both here and in England suggest the contrary. (See, for instance, for South Africa, *Wilkinson and another v Wiggil* 1939 NPD 4 at 16; *Vermeulen v Smit* 1946 TPD 219 222; *Weinberg v Mervis* 1953 (3) SA 863 (C) 870H–871A; *Wohlman v Buron* 1970 (2) SA 760 (C) 763D–F; and for England *Archer and others v Marsh* (1837) 6 Ad & E 959 (6 LJ KB 244; 112 ER 366); *Connors Brothers Ltd and Others v Connors* [1940] 4 All ER 179 (PC) at 195.)"

61 789A–F.

62 784B–E. See, however, the comments made *supra* 3 3 4 in regard to the type of interest that the restraints protected.

63 See *Basson v Chilwan supra* 772C–E and the cases referred to.

64 1996 1 SA 105 (W).

65 108H–I.

66 *Reeves v Marfield Insurance Brokers CC* 1996 3 SA 766 (A) 775C–E; Christie *The law of contract in South Africa* (1996) 413–414; Van der Merwe *et al* 115; Neethling *et al* 255. Although in this instance the employer does not rely on an exclusionary clause as

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approach would be to accept that where the employer breaches the contract he may not rely on the restraint, but where the contract stipulates either directly or by implication that the restraint will survive breach by the employer, the employer may rely on the restraint only where he has not intentionally committed the breach.

3 4 Factual as opposed to legal issues

A statement often encountered in judgments of this nature is that the determination whether a covenant in restraint of trade is contrary to public policy is a factual issue, pure and simple. In *Drewtons (Pty) Ltd v Carlie*,[67] for instance, Van den Heever J made the following generalisation: "[W]hat is public policy is a question of fact, not a legal principle" and that consequently the rules of judicial precedent did not apply in this sphere.[68]

In *Basson v Chilwan* Nienaber JA referred[69] with approval to the following *dictum* of Harms J in *Sibex Engineering Services (Pty) Ltd v Van Wyk*:[70]

> "I would venture to suggest that the effect of *Magna Alloys* is that the question whether a covenant is contrary to public policy is a factual issue (*ibid* at 891H–892A; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 794) and that there are no *a priori* rules which decree that certain clauses are *per se* unenforceable."

If the four questions posed by Nienaber JA in *Basson* which should be taken into consideration when determining reasonableness[71] are considered, it is clear that they consist in the weighing up of the conflicting interests of the parties, on the one hand, and the broader interests of the community, on the other. This is reminiscent of the test for wrongfulness in the law of delict, which also incorporates a reasonableness test. In delict, the general norm employed in determining whether a particular act is unlawful is the legal convictions of the community or the *boni mores* test. This test is, however, not applied as such in every instance to determine wrongfulness. Certain subrules have crystallised which indicate the presence or absence of wrongfulness in given instances. Examples of these subrules are the infringement of a "subjective" right and non-compliance with a duty to act. Where no clear legal norm is identifiable, the general *boni mores* test must be resorted to.[72] Thus although every case is considered on merit, it is rarely necessary to apply the general norm, since to determine what is unreasonable in a specific instance will usually have been predetermined. This does not reduce the test for wrongfulness to a *factual* issue.

Similarly, the general test or norm to be applied in determining whether a restraint should be enforced, is whether it damages the public interest and is therefore contrary to public policy. A covenant in restraint of trade is in conflict with public policy if the effect of the restraint would be unreasonable. To determine

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such, by the same token, he should not be able to rely on a contractual provision drafted in his favour where he has intentionally breached the contract.

67 *Supra*.

68 312H.

69 767I.

70 *Supra* 486G–H; see also, eg. *Aetiology Today CC t/a Somerset Schools v Van Aswegen* 1992 1 SA 807 824B–C.

71 *Supra* 767G–I.

72 See Neethling *et al* 31–43; Van Aswegen 1993 *THRHR* 180; fn 28 *supra*.

reasonableness, a court must weigh up the conflicting interests of the parties in the light of the interests of the community.[73] In certain circumstances, however, subrules have crystallised which indicate the unreasonableness of a restraint without the need for an application of the general test. Thus where the particular restraint does not serve to protect any protectable interest of the covenantee it is, in principle, considered to be unreasonable and contrary to public policy. The reasonableness test in regard to unlawfulness in the law of delict and the test for determining the reasonableness of a covenant in restraint of trade in the law of contract are not so far removed; both involve a determination of what is reasonable in the circumstances and involve a process of balancing the interests of the parties in light of the interests of the community. A court, when deciding upon reasonableness in regard to a restraint, applies a legal norm.[74] It is therefore submitted that the enquiry whether a covenant is contrary to public policy is not merely a factual issue, but rather the application of a legal norm or principle where policy considerations may play a decisive role. It is furthermore submitted that Nienaber JA's approval of the *dictum* of Harms J in the *Sibex* case is in contrast to the general test that he formulated in regard to reasonableness, since policy considerations – which play a role in the application of legal norms and not in factual findings – seem to be part of the test.[75]

Another consideration indicating the analogies that run between the criterion of reasonableness in regard to restraints on the one hand and to wrongfulness in the law of delict on the other, is the fact that the same general considerations often apply to the question whether conduct is wrongful for the purposes of unlawful competition and whether a restraint is in conflict with public policy.[76] This also raises the matter of concurrent contractual and delictual remedies.[77]

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73 *Basson v Chilwan supra* 767C–G.

74 Schoombee 1985 *THRHR* 133 in reaction to the approach adopted in *Drewtons* in this regard says the following: "Now, if a court finds that a certain *type* of agreement is subject to particular rules as to enforceability, this characterisation and the concommitant rules surely constitute a precedent. The fact that some of the rules may be open-textured (involving 'reasonableness' for instance) cannot mean that rulings now given by the appellate division on how enforceability should be assessed are simply occasional *dicta*. Moreover, even a finding in a particular case as regards enforceability is not simply a factual finding. The court is called upon to exercise its judgment in the application of a legal norm."

75 Cf Van Aswegen 1993 *THRHR* 180–188.

76 Cf *Aetiology Today CC t/a Somerset Schools v Van Aswegen supra* 823H–J.

77 Van Heerden and Neethling 264–265 make the following observation in regard to the concurrence of delictual and contractual actions: "In so far as a competitor or potential competitor has bound herself to a lawful contractual obligation, she naturally commits breach of contract against the other contracting party (or parties) if she does not fulfil her obligation. The prejudiced party then has the ordinary contractual remedies at her disposal. The important question, however, arises whether the conduct complained of also constitutes unlawful competition as a delictual cause of action. According to the courts this will generally only be the case if, apart from breach of contract, the conduct also wrongfully and culpably infringes a legally protected interest which exists independently of the contract. It stands to reason that the goodwill of an undertaking, as independent immaterial property, constitutes such an interest, just like, for instance, a thing or an aspect of personality. However, as has been explained earlier, the mere factual infringement of goodwill by a competitor – albeit through breach of contract – is in the majority of cases not delictually unlawful. It will only be unlawful if the breach of contract infringes the goodwill in such a manner that it is also in conflict with the competition

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4 UNREASONABLENESS IN GENERAL

In *Sasfin (Pty) Ltd v Beukes*[78] the court found that certain contractual terms were illegal because they were unconscionable and incompatible with the public interest, and therefore contrary to public policy. The court weighed sanctity of contract against "simple justice between man and man" and concluded that the effect of the contract was to place the one party almost entirely within the economic power of the other. The contract was drafted in such a manner that it provided maximum protection for the one party while completely ignoring the interests of the other.[79] It furthermore clearly exceeded the bounds of what was necessary to protect the former's interests.[80] The *Sasfin* decision has drawn criticism, *inter alia* on the basis that "simple justice between man and man" is in itself far too a vague and imprecise a criterion for having a contract struck down.[81]

A case dealing with a restraint clause somewhat reminiscent of the situation in *Sasfin* is *Sunshine Records (Pty) Ltd v Frohling*.[82] In the latter instance the members of a pop group, the respondents, concluded a recording contract with the appellant which enabled the appellant to obtain complete control over the professional activities of the respondents, without really offering anything in return. The appellant's only reciprocal obligation was to record one album of the group *per annum*, but without an obligation to release it for sale to the public. The respondents were entitled to royalties from the sale of records and the exercise of copyright, but since the appellant did not release any of the group's albums, no royalties were forthcoming. In an application by the respondents to be released from their contractual obligations with the appellant, the court *a quo* held that the recording contract was an undue restraint of trade and therefore void and unenforceable. On appeal, the Appellate Division held that the nature, extent and duration of obligations and restrictions imposed on the respondents, combined with the absence of any real reciprocal obligation on the part of the appellant, created such a serious restraint on the respondents' freedom to pursue their profession that the contract was rendered unenforceable thereby.[83]

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principle or the *boni mores* as supplementary criterion for delictual wrongfulness. Whether this is the case, will naturally depend on the relevant circumstances. If it is found that the breach of contract also amounts to unlawful competition, the prejudiced rival can then choose whether he wants to claim *ex contractu* or *ex lege Aquilia*, or he can institute the remedies in the alternative." Covenants in restraint of trade are *prima facie* valid and enforceable (in other words lawful) and non-compliance with such a clause amounts to contractual breach by way of positive malperformance (Van der Merwe *et al* 251). Where, however, it is alleged that the restraint is in conflict with public policy, the restraint denier must prove that the restraint does not serve to protect, in a reasonable manner, a protectable interest of the restraint enforcer. As indicated *supra*, this involves weighing up the interests of the contractual parties in the light of the interests of the community. Similarly, in the case of unlawful competition, a legally protected interest must be factually infringed in a legally reprehensible manner to constitute unlawful conduct. This also involves a process of weighing up the interests of the parties in the light of the interests of the community (Van Heerden and Neethling 128–140).

78 1989 1 SA 1 (A).

79 13F–14A.

80 10A–C.

81 See Lubbe 1990 *Stell LR* 17–18; Van der Merwe *et al* 160.

82 1990 4 SA 782 (A).

83 793B–F 794E–G.

What seems to be common ground between the *Sunshine Records* and *Sasfin* decisions is that a court will not enforce an agreement whereby a contractual party is effectively placed within the economic power of the other party and is subject to severe restrictions without there being any real reciprocal obligation or obligations on the part of the other party;[84] and furthermore, the restrictions imposed on the former far exceed what is reasonably necessary in the circumstances to protect the latter's interests.

5 PROTECTABLE INTERESTS

Magna Alloys and Research (SA) (Pty) Ltd v Ellis[85] did not bring about finality in regard to exactly what interests may be protected under a covenant in restraint of trade. Traditionally, under the influence of English law, the South African courts have regarded trade secrets and trade connections on the one hand, and the goodwill of a business on the other, as the two groups of proprietary interests that are worthy of protection in matters of this nature.[86]

In *Basson v Chilwan* Nienaber JA found it unnecessary to decide this point specifically. He did concede, however, as did Eksteen JA, that there is no *numerus clausus* of protectable interests and that the concept of reasonableness in our law is flexible enough to include instances where another type of interest of the one party may weigh heavier than the coinciding restriction placed on the other. He also indicated that a party is not limited to interests described in the contract as long as it is clear from the evidence what the other interest is.[87] Whatever other interests may in time be identified as worthy of protection, only time will tell. It is, however, trite that the mere elimination of competition is not an interest that may be protected by a contractual restriction on freedom to trade.[88] An investment of capital and time spent in training an employee may be protected in another manner.[89] It is, however, submitted that there may be circumstances where a restraint providing for the mere elimination of competition may be reasonable. Where, for instance, the parties have some sort of interest in each other and the particular relationship between them justifies a restraint excluding competition, such a restraint will be valid and enforceable for as long as it is necessary and the particular relationship between them exists.[90]

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84 Lubbe 1990 *Stell LR* 23 says the following about the exchanging of performances in the case of reciprocal obligations: "By wederkerige ooreenkomste gaan dit om die uitruil van prestasies, en word die onderneming om te betaal gekondisioneer deur die teenparty se onderneming om te lewer. 'n Verbintenisskeppende ooreenkoms is dan in die reël kragteloos indien verwesenliking van die kontraksdoel, naamlik die uitruil van prestasies vanweë onmoontlikheid van prestasie, uitgesluit is. As moontlike uitbreiding van hierdie redenasie geld dat 'n bepaling wat die moontlikheid inhou dat die inherente ruildoel van wederkerige ooreenkomste verydel word, nietig moet wees. So 'n bepaling kom neer op 'n onaanvaarbare negering van die belange van die teenparty en die maatskaplike funksie van die kontraksoort en is as sulks strydig met die *bona fides* en die algemene belang."

85 *Supra*.

86 *Botha v Carapax Shadeports (Pty) Ltd supra* (goodwill); *Rawlins v Caravantruck (Pty) Ltd supra* 541A–542H; *Basson v Chilwan supra* 769G–770D; Joubert 145–150; Van Heerden and Neethling 24–26; Christie 411–413.

87 770E–F.

88 *Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra* 904I; *Basson v Chilwan supra* 771D; *CTP Ltd v Argus Holdings Ltd supra* 784D–E; Van der Merwe *et al* 158.

89 Cf *Basson v Chilwan* 771B–G.

90 See the discussion of this aspect 3 3 4 *supra*.

Since the Appellate Division has clearly indicated that protectable interests need not be limited to the traditional two categories alluded to *supra*, the only question is whether the courts will be prepared to determine and recognise new interests where the need arises.

6 PARTIAL ENFORCEABILITY

The particular restraint in *Magna Alloys* was held to be enforceable in its entirety and thus remarks made by the court regarding partial enforcement are *obiter*. Rabie CJ confirmed that restraints may in certain circumstances be partially enforced depending on what the public interest requires.[91] Traditionally, partial enforcement of an invalid restraint was possible only if the term was formulated in such a way that it was readily severable. This would be the case where the valid and invalid portions in fact constituted separate and distinct restraints. A court would not make a new contract for the parties but would merely delete the invalid part with a so-called "blue pencil". The restraint or restraints, furthermore, had to be notionally severable; that is, severance of a part of the restraint may not change the meaning of the remaining part or of the restraint as a whole.[92]

A problematic aspect of the *Magna Alloys*[93] decision in this regard is that the court referred with approval to both *National Chemsearch (SA) (Pty) Ltd v Borrowman* and *Drewtons (Pty) Ltd v Carlie*, and these decisions differ in their approach to partial enforcement.[94] Common ground between them, however, is that the traditional "blue pencil test" was rejected.[95] In *Chemsearch*, on the one hand, Botha J advocated a flexible approach and approved partial enforcement in "proper instances" and subject to certain limitations. These are: the party seeking partial enforcement must raise the issue and lay a basis for it; the reformulation must not be drastic, or require "major plastic surgery"; partial enforcements should save restraints which are "clumsily rather than maliciously drawn too wide", and not ones designed to act *in terrorem*; and the contractant to be restrained should not be affected harshly or unfairly.[96] In *Drewtons*, on the other hand, the court advocated a remedy-orientated approach in general and, in regard to partial enforcement, held that courts could freely fashion an appropriate restraint in the remedy granted without a suggestion of limitations.[97]

In *Sunshine Records (Pty) Ltd v Frohling* Grosskopf JA referred, with approval, to *Chemsearch* on this point, but without rejecting the approach suggested in *Drewtons*.[98] In *Coin Sekerheidsgroep (Edms) Bpk v Kruger*[99] Spoelstra J expressed doubt about the extent to which the Appellate Division agreed with the approach adopted in *Chemsearch*,[100] but in *Sunshine Records* Grosskopf JA

91 896A–F.
92 Schoombee 1985 *THRHR* 131; Christie 405–406.
93 896E–F.
94 See Schoombee 1985 *THRHR* 131–133 147–149.
95 *Chemsearch supra* 1114F–1115F; *Drewtons supra* 310H 311E–F 312B–C 313D–E; see also Schoombee 1985 *THRHR* 147–149.
96 1116G–1117H.
97 312C–D 313D–F.
98 795G–796G.
99 1993 3 SA 564 (T) 570E–F.
100 Especially in regard to Botha J's rejection of the traditional rules as to severability in restraint of trade cases. Spoelstra J did, however, indicate (570H) that there are references

continued on next page

referred unreservedly to the *Chemsearch* decision, as have subsequent cases.[101] It seems, therefore, that the position regarding partial enforcement is largely in accordance with the approach suggested in the *Chemsearch* decision.

The courts have nevertheless been reluctant to grant partial enforcement and this could, at least in part, be attributed to the traditional approach to this aspect. It could be argued that the fact that restraints are *prima facie* enforceable should perhaps indicate that a court should, as far as the dictates of public policy allow, grant partial enforcement.[102] The opposite, however, seems to be the case. Although the law reports are not completely devoid of cases where partial enforcement was granted,[103] partial enforcement seems to be the exception rather than the rule and the courts seem to have little hesitation in refusing to grant it.[104] Although there are instances where it is clear that partial enforcement should not be allowed,[105] it seems that the courts are at times a little hasty in refusing it. Restraints, like exclusionary clauses, are drafted as widely as possible as a matter of course, the rationale being that it is safer to cast the net as wide as possible than to be more specific and run the risk of not providing sufficient protection. The approach of the courts issues a silent warning in this regard: restraints must be drafted with due consideration to what is reasonably necessary to afford protection to the interests of the covenantee in the circumstances, for a court will not readily make the restraint reasonable for the covenantee.

The question of onus where partial enforcement of a restraint is involved, has also had its fair share of problems. These probably also stem from the traditional approach. As indicated *supra*, in *Sunshine Records*[106] the Appellate Division approved the approach advocated by Botha J in *Chemsearch* and held that if a restraint enforcer wishes to rely on anything less than the entire contract he is obliged to raise this pertinently as an issue to be dealt with in evidence and argument. The question is whether this entails a shift in onus from the covenantor to the covenantee. Once it is determined or conceded that the restraint, as it stands, is unreasonable and the covenantee requests that it should be enforced in limited form, does he bear the onus of indicating that public interest requires partial enforcement?

According to Marais J in *BHT Water Treatment (Pty) Ltd v Leslie*[107] there is no shift in the onus. However, once the covenantor has discharged the onus of

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in both *Magna Alloys* and *Sunshine Records* indicating that severability plays no role in this regard.

101 See, eg, *Macphail (Pty) Ltd v Janse van Rensburg supra* 599B; *Interest Computation Experts v Nel supra* 178F–H 179A–B.

102 Cf Schoombee 1985 *THRHR* 146 who refers to an inference or presumption of "continued enforceability" arising from the covenantor's originally agreeing to the restraint as a whole.

103 See, eg, *BHT Water Treatment (Pty) Ltd v Leslie* 1993 1 SA 47 (W); *Branco t/a Mr Cool v Gale* 1996 1 SA 163 (E).

104 See, eg, *Powertech Industries (Pty) Ltd v Jamneck* 1993 1 SA 328 (O); *Coin Sekerheidsgroep (Edms) Bpk v Kruger* 1993 3 SA 564 (T); *The Concept Factory v Heyl* 1994 2 SA 105 (T); *Interest Computation Experts v Nel* 1995 1 SA 174 (T); *Gero v Linder* 1995 2 SA 132 (O) (*obiter*); *Technor (Pty) Ltd v Rishworth* 1995 4 SA 1034 (T); *Mcphail (Pty) Ltd v Janse van Rensburg* 1996 1 SA 594 (T).

105 See, eg, *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A).

106 795I–796A.

107 *Supra* 54E–I.

proving that the covenant in restraint of trade is in conflict with public interest and thus unenforceable as a whole,[108] it is not merely required that the covenantee provide a suitable answer to indicate why partial enforcement still should be allowed. He must, it is submitted, actually *prove* that partial enforcement is in the public interest because, in the words of Grosskopf JA in *Sunshine Records*:[109]

> "The *ratio* for the partial enforcement of restraints is that the public interest requires it. Thus Rabie CJ stated in the *Magna Alloys* case *supra* at 896E that the Court should be empowered to order the partial enforcement of a restraint clause 'in 'n gepaste geval, in die lig van die vereistes van die openbare belang'."

It is not for the covenantor to prove that partial enforcement would prejudice the public interest, but for the covenantee to *prove* that partial enforcement is in the public interest. Furthermore, what exactly does it mean that if the covenantee wishes to rely on anything less than the complete contract, he must pertinently raise this as an issue to be dealt with in evidence and argument? It is clear from the conservative approach of the courts to the question of partial enforcement that this means more than merely including an alternative prayer for partial enforcement in the papers. Also, where the restraint, for instance, requires substantial alterations, it is clear that partial enforcement will, as a rule, be denied. When the covenantee approaches the court in such a situation he may well, in fact, bear the full onus of proving that there are nevertheless factors indicating that partial enforcement would be in the public interest.

It is submitted that the principles governing onus in regard to restraints should be similar to those governing onus in regard to the grounds for justification in the law of delict. There the plaintiff originally bears the onus of proving *inter alia* that the defendant's act was wrongful, but if the defendant relies on a ground of justification he bears the onus of proving that ground.[110] Thus the covenantor would bear the onus of proving that the restraint prejudices the public interest and the covenantee would bear the onus of proving that partial enforcement would be in the public interest. If the curtailment of the restraint involves minor changes, the covenantee will be able to discharge the burden of proof with relative ease. Proving that partial enforcement is in the public interest may also be conveniently divided into two parts: The covenantee must indicate the factors pertaining to public interest which require that partial enforceability should be granted, and how the restraint itself may be tailored for the purposes of partial enforcement without necessitating drastic changes.[111]

7 INFLUENCE OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

The possible effect of the interim Constitution on covenants in restraint of trade has also received the attention of the courts. The right to free economic activity has been entrenched in this Constitution as a fundamental right in section 26

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108 Or the covenantee has conceded that the restraint, as it stands, is in conflict with public policy.

109 796E.

110 Neethling *et al* 67.

111 Schoombee 1985 *THRHR* 146 suggests that the covenantor should be saddled at most with an evidentiary burden (*weerleggingslas*) in these instances.

(chapter 3). In *Waltons Stationery Co (Edms) Bpk v Fourie*[112] the covenantor contended that the particular restraint was illegal (*onwettig*) because it infringed section 26 of the Constitution. Edeling J, however, concluded that covenants in restraint of trade are not excluded by section 26 and consequently that *Magna Alloys* still reflects the positive law.[113] This case has since been approved in other decisions.[114] One can only agree. If the courts had held the opposite view it would have led to some disconcerting conclusions. For example, would every employment contract where the employee is bound to serve the employer for a definite time period then not also be in conflict with section 26? The courts have all the necessary principles at their disposal to regulate the law relating to restraints without making it into a constitutional issue.

There is, however, one area where it is submitted that both the interim and the final Constitution should have an influence, and that is the question of onus. Since the right to free economic activity is regarded as a fundamental right, the onus should revert to the covenantee as was the case before *Magna Alloys*. It should be up to the covenantee to indicate why the infringement of a fundamental right is reasonable in the circumstances.[115]

8 CONCLUSION

The decision in *Magna Alloys* provided a general basis for the approach to covenants in restraint of trade, but without sufficient guidelines to indicate how this approach was to be applied in practice. In subsequent decisions, especially the judgment of Nienaber JA in *Basson v Chilwan*, the Appellate Division has attempted to provide clearer guidelines to the courts. It is submitted that in his judgment Nienaber JA advocated a flexible approach to restraints, which is welcomed. There are still, however, aspects that need clarification and development. Furthermore, it is submitted that the influence of the discarded traditional doctrine may still be felt more than a decade after it was abolished in *Magna Alloys*. That in itself is not an evil, as long as the courts approach this matter in an open-minded fashion and take into consideration all relevant aspects when deciding these matters, including the reasonable protection of individual interests with due regard to contractual justice.

112 1994 4 SA 507 (O).

113 511B–F.

114 See *Kotze & Genis (Edms) Bpk v Potgieter* 1995 3 SA 783 (C) (1995 3 BCLR 349); *Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (W).

115 See Van Heerden and Neethling 15 fn 90 27 fn 84.

Deliktuele aanspreeklikheid van die staat vir foute van die prokureur-generaal*

JMT Labuschagne
MA DPhil LLD
Professor in Inheemse Reg, Universiteit van Pretoria

SUMMARY

Delictual liability of the state for mistakes of the attorney-general

In terms of section 7(1) of the interim Constitution of the Republic of South Africa 200 of 1993, chapter 3, which deals with fundamental rights, shall bind all legislative and executive organs of state at all levels of government. In South Africa the attorney-general and his professional staff no longer form part of the executive branch of government. It would appear, therefore, that the attorney-general and his professional staff are not bound by the fundamental rights enshrined in the Constitution. Section 8(1) of the Constitution of the Republic of South Africa 108 of 1996 extends the operation of the bill of rights to the judiciary and all other organs of state. The question whether the state should be held liable for mistakes of the attorney-general and his staff is addressed and evaluated against the background of various other legal systems. For instance, according to Canadian and Dutch law, the state is held delictually liable for infringement of fundamental rights of legal subjects by the prosecuting staff. It is argued in favour of this approach.

1 INLEIDING

In 'n saak[1] wat in 1994 voor die appèlhof van die Kanadese staat Ontario gedien het, het die volgende feitestel na vore getree: Eiser het 'n genoegdoeningseis, ingevolge artikel 24(1) van die Canadian Charter of Rights and Freedoms (CCRF), vir skending van sy regte beliggaam in artikel 7 CCRF teen die prokureur-generaal en die betrokke aanklaers wat hom aangekla het, asook die polisiemanne betrokke by die ondersoek, ingestel. Eiser en 'n ander man is naamlik aangekla van moord op 'n persoon wat na bewering 'n verhouding met eiser se vrou gehad het. Na 'n voorlopige ondersoek is eiser ontslaan. Die prokureur-generaal het egter op 'n direkte vervolging besluit ("preferred a direct indictment") en eiser is intussen aangehou. Ongeveer 18 maande na sy onskuldigbevinding het eiser die onderhawige aksie ingestel. Die verweerders het aansoek gedoen (onder andere) dat eiser se eis op grond van staatsimmuniteit afgewys word. Die aansoek is toegestaan waarteen eiser geappelleer het. Sy appèl is gehandhaaf. In 'n onlangse Transvaalse saak[2] word daarop gewys dat

* Dank word hiermee uitgespreek teenoor die Universiteit van Pretoria wat my finansieel in staat gestel het om 'n deel van dié navorsing in 1994 aan die Universiteit van Tulane in New Orleans (Louisiana, VSA) te onderneem. Die menings in hierdie artikel uitgespreek, verteenwoordig egter nie noodwendig dié van die Universiteit van Pretoria nie.

1 *Prete v Ontario (Attorney-General)* (1994) 86 CCC 442 (Ontario CA).

2 *In re Mjoli* 1994 2 SA 815 (T) 827.

die staat (prokureur-generaal) in die betrokke saak stap-vir-stap binne sy regte opgetree het maar dat die resultaat daarvan 'n misbruik van die regsproses was. Misbruik van die regsproses deur die prokureur-generaal is derhalwe selfs "prosesmatig" moontlik.[3]

In *Mhlongo v Minister of Police*[4] word beslis dat die staat aanspreeklik is vir 'n delik deur 'n amptenaar of werknemer binne die omvang van sy diensverpligtinge gepleeg, al was dit nie binne sy bevoegdheidspektrum nie.[5] In Suid-Afrika is die prokureur-generaal, en gevolglik die staat, tans deliktueel slegs vir *mala fide*-optrede aanspreeklik.[6] Hoewel Suid-Afrika 'n voortreflike tradisie van prokureurs-generaal en 'n aanklaerskorps in die algemeen het,[7] is die vraag tog of die huidige toedrag van sake in 'n demokratiese en menseregtebestel in beginsel regverdigbaar is. Mag sonder kontrole in die hande van wie ook al dra die kiem van tirannie en onderdrukking.[8] Die uitvoerende gesag word veral deliktueel onder streng kontrole gestel.[9] In verskeie lande word die staat reeds in sekere omstandighede deliktueel vir foute van die regsprekende gesag aanspreeklik gehou.[10] In die onderhawige bydrae word die vraag aan die orde gestel of die staat nie aanspreeklik gehou behoort te word vir (sekere) foute van die prokureur-generaal nie. Die term "prokureur-generaal" word in 'n generieke sin as verteenwoordigend van en as alternatief vir die aanklaerkorps gebruik.

2 REGSVERGELYKENDE OORSIG

2 1 Die Engelse reg

Die leidende Engelse saak in dié verband is *Riches v DPP*.[11] Die feite in hierdie saak is kortliks soos volg: R is in 1963, op aandrang van die Director of Public Prosecutions (DPP), aangekla vir 'n oortreding van 'n artikel in die Agriculture Act van 1947. Na 'n lang verhoor is hy in Julie 1964 skuldig bevind. In April

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3 Vgl ook Rebmann "Strafprozessuele Bewältigung von Grossverfahren" 1984 *Neue Zeitschrift für Strafrecht* 246. In 'n publikasie van die American Bar Association *The judicial response to lawyer misconduct* (1984) 3 word daarop gewys dat wangedrag deur aanklaers toeneem en dat dit beskuldigdes se reg op 'n billike verhoor, die openbare belang in 'n geregtigheidsgerigte regsadministrasie en die integriteit van die regsprofessie in gevaar stel.

4 1978 2 SA 551 (A) 567.

5 Sien ook Labuschagne "Die uitlegvermoede teen staatsgebondenheid" 1978 *TRW* 59; Neethling, Potgieter en Visser *Deliktereg* (1996) 365–368.

6 Labuschagne "Deliktuele aanspreeklikheid weens misbruik van die regsproses" 1994 *THRHR* 246.

7 Sien Morkel en Labuschagne "Die diskresie van die prokureur-generaal" 1980 *SASK* 166.

8 Labuschagne "Tussen onafhanklikheid en tirannie: opmerkinge oor die kontrolemeganismes van die regsprekende gesag" 1993 *De Jure* 347; Bell en Bradley *Government liability: A comparative study* (1991) 5.

9 Sien Labuschagne "Beskerming van bewegingsvryheid: Opmerkinge oor die menseregtelike onderbou van deliktuele aanspreeklikheid" 1992 *THRHR* 235; Labuschagne "Deliktuele beskerming van die bewegingsvryheid van die gevangene" 1993 *Stell LR* 130; *Tödt v Ipser* 1993 3 SA 577 (A).

10 Hoge Raad 3 Des 1971, NJ 1972, 137; Hoge Raad 12 Feb 1993, NJ 1993, 524; Storme "De rechterlijke macht" 1993 *NJB* 917; Labuschagne "Deliktuele aanspreeklikheid van die staat vir onregmatige vryheidsontneming as gevolg van 'n regterlike fout" 1994 *THRHR* 169; Labuschagne "Deliktuele aanspreeklikheid van die staat vir foute van die regsprekende gesag: Is die oervader uiteindelik ontheilig?" 1996 *THRHR* 479.

11 [1973] 2 All ER 935 (CA).

1965 is sy skuldigbevinding egter in appèl ter syde gestel. In Maart 1972 stel R 'n aksie teen die DPP vir kwaadwillige vervolging in. Die eis was om meerendeels tegniese redes onsuksesvol. Wat vir onderhawige doeleindes egter van besondere belang is, is die volgende opmerkinge[12] van lord Stephenson:

> "I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted. But that case is, as it seems to me, many miles from this one. There is nothing in the judgment of the Court of Criminal Appeal in this particular case which lends any support to the view that there was no case for the plaintiff to answer; and I cannot find in anything that he has said to us or in any document that has been put before us anything to suggest that there was in existence material showing that there was no basis in evidence for a prosecution . . . In those circumstances, as it seems to me, he has failed to show that the defendant put the facts unfairly before prosecuting counsel, that there was anything like a lack of reasonable or probable cause, or malice, on the defendant's part or that there is any possibility of such material being produced."

2 2 Die regsposisie in die VSA

Die leidende saak in die VSA is *Imbler v Pachtman.*[13] In dié saak het die aanklaer doelbewus vals getuienis gebruik en gunstige getuienis vir die eiser (beskuldigde) se saak in 'n moordverhoor onderdruk. By sy vrylating stel eiser 'n deliktuele eis teen die aanklaer en sekere polisiebeamptes ingevolge artikel 1983, 42 USCS, in. Laasgenoemde artikel bepaal dat enigeen wat onder gesag van staatlike reg 'n ander van 'n konstitusionele reg ontneem, teenoor die benadeelde aanspreeklik is. In dié geval is onder andere die bewegingsvryheid van eiser hom ontneem. Die aanklaer het immuniteit geopper wat deur beide die distrikshof en die federale appèlhof gehandhaaf is. Die saak het uiteindelik in die Supreme Court beland. Laasgenoemde hof beslis insgelyks dat 'n aanklaer, soos in die gemenereg, absolute immuniteit[14] teen artikel 1983 besit.

Regter White verklaar verder soos volg:[15]

> "To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal

12 941.

13 (1976) 424 US 409, 47 L Ed 2d 128.

14 Sien Anoniem "Delimiting the scope of prosecutorial immunity from section 1983 damage suits" 1977 *New York ULR* 174: "Absolute immunity, unlike qualified immunity, defeats a suit at the outset: the defendant official may invoke the immunity merely by showing that he has acted within the scope of his authority. His intent and the legality of his acts, for example, are irrelevant. Of course the immunity does not apply to an individual's every deed, but rather attached to his discretionary official conduct."

15 142–143.

justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution: 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation' ... We emphasize that the immunity of prosecutors from liability in suits under s 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for wilful deprivations of constitutional rights ... The prosecutor would fare no better for his wilful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."

Die hof onderskryf 'n funksionele teorie in dié verband.[16] Absolute immuniteit volg slegs ten aansien van kwasi-judisiële handelinge; dit is handelinge wat intiem verbind is met die beregtingsproses. Vir ondersoek- en administratiewe handelinge van aanklaers bestaan slegs gekwalifiseerde immuniteit. Laasgenoemde beskerm slegs handelinge wat in goeie trou verrig is. 'n Wesenlike probleem met dié benadering is dat dit uiters moeilik, indien nie onmoontlik nie, is om aanklaershandelinge in sodanige kategorieë te klassifiseer. 'n Enkele handeling kan meer as een van dié funksies dien.[17]

Uit die beslissing van die Supreme Court in die *Imbler*-saak blyk dat daar ten minste drie redes vir die hof se houding bestaan:[18] Eerstens het 'n aanklaer 'n plig om die reg onverskrokke toe te pas. Vrees vir 'n deliktuele eis kan hierdie taak ondergrawe. 'n Aanklaer wat 'n deurdagte en verantwoorde beslissing neem, behoort myns insiens nie hierdeur afgeskrik te word nie. Tweedens skep dit die moontlikheid van 'n grootskaalse toename in regsgedinge en dit skep 'n groter bedreiging vir die besluitneming van 'n aanklaer. Dit is onwaarskynlik dat beskuldigdes in strafsake die aanklaer se beslissings as *bona fide* sal beskou, met die gevolg dat elke onskuldigbevinding tot 'n deliktuele eis aanleiding sal gee. Dit kan 'n groot deel van 'n reeds oorbelaste aanklaer se tyd in beslag neem. Deliktuele kontrole oor die aanklaer se besluite behoort myns insiens juis

16 143. Sien ook Speiser, Krause en Gans *The American law of torts* vol 2 (1985) 165–166.

17 Sien Luppino "Supplementing the functional test of prosecutorial immunity" 1982 *Stanford LR* 487–488. In *Koch v Grimminger* (1974) 192 Neb 706, 223 NW 2d 833, 79 ALR 3d 874 (SC Nebraska) 881 sê Clinton R egter die volgende: "We hold that a public prosecutor, acting within the general scope of his official authority in making a determination whether to file a criminal prosecution, is exercising a quasi-judicial and discretionary function and that where he acts in good faith he is immune from suit for an erroneous or negligent determination. This rule would not protect a prosecutor who, knowing that a particular charge is groundless in law or in fact, nonetheless intentionally files a charge and thus acts through a corrupt motive. In such a case he would not be acting within the scope of his authority."

18 Anoniem 181; Luppino 489–490.

"onnodige onskuldigbevindings" te minimiseer. Derdens sal hoogsgekwalifiseerde professionele persone afgeskrik word om die sensitiewe funksies van aanklaer te vervul, aangesien daar 'n toename in onbehoorlike beïnvloeding op die aanklaer in sy diskresie-uitoefening sal wees en baie van sy tyd as verweerder in deliktuele aksies in beslag geneem sal word. Kan kwaadwillige optrede werklik onder hierdie argumente in 'n menseregtebestel verskoon word? Word in elk geval nie te veel van die strafsanksie verwag nie? Behoort ander alternatiewe nie juis in die lig van onder andere dié probleme vir 'n groot hoeveelheid strafsake gesoek te word nie? Blatante ongeregtighede kan nie op grond van bogaande "tegniese argumente" gekondoneer word nie.[19] 'n Federale hof in die VSA het hierdie absolute immuniteit ook uitgebrei na 'n aanklaer wat die staat in 'n siviele saak verteenwoordig het.[20]

2 3 Die Kanadese reg

In *Richman v McMurty*[21] het 'n Ontariose hof beslis dat by die uitoefening van 'n diskresie om te vervolg die prokureur-generaal en sy personeel absoluut immuun teen 'n eis weens kwaadwillige vervolging is. Die hof verwerp die beslissing in die Engelse saak *Riches v Director of Publications*[22] en verklaar dat by 'n belangrike aangeleentheid soos die uitoefening van 'n vervolgingsdiskresie, daar geen risiko mag bestaan dat 'n moontlike latere deliktuele eis 'n beslissing wat die prokureur-generaal in openbare belang ag, kan beïnvloed nie.

In *German v Major*[23] konkludeer regter Kerans van die Alberta appèlhof egter soos volg:[24]

> "Counsel for the Attorney-General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused except possibly to the extent that it is alleged against him that he has not acted in good faith, and to that extent the allegation falls within the nominative tort of malicious prosecution, and that cause of action has been dealt with."

Daar word uitgewys dat 'n beskuldigde wat meen dat hy nie billik en regsprosesmatig deur die aanklaer behandel is nie, 'n reg op appèl het waardeur foute reggestel kan word. Hiertoe voeg regter Kerans by:[25]

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19 Anoniem 181–182 verwys ook na sekere "unieke oorwegings" wat ondersteuning bied vir absolute immuniteit van aanklaers: "First, if prosecutors must face the possibility of damage suits for denial of due process, they may be dissuaded from admitting weaknesses in their case or producing later-discovered exculpatory evidence. Furthermore, judges may be less prone to reverse convictions on appeal if their findings are likely to trigger damage suits. Ironically, potential civil liability may encourage rather than deter prosecutorial misconduct ... Second, prosecutors more than other officials can be deterred from misconduct by speedy and certain review mechanisms. Prosecutorial activity may be judicially scrutinized each time a conviction is appealed and remedied by dismissal of an indictment, declaration of a mistrial, or the reversal of a conviction. Furthermore, prosecutors are subject to professional discipline as well as formal removal proceedings and criminal liability." Daarbenewens sal 'n deliktuele eis dikwels op 'n herverhoor van die voorafgaande strafsaak neerkom.

20 *Barrett v United States* 798 F 2d 565 (2nd Cir 1986) bespreek deur Murphy, Schill, Stepek en Winjum "Absolute immunity wrongfully extended to assist attorney general defending the state in a civil case" 1987 *Notre Dame LR* 286.

21 (1983) 5 CCC (3d) 6 (Ontario HCJ) 11.

22 *Supra*.

23 (1985) 20 DLR (4th) 703 (Alberta CA).

24 718–719.

25 718.

> "The trial-as-a-contest of which I speak requires, in our tradition, a champion. The loyalty of counsel to client traditionally has no bounds save to be honest and respectful. It would be a remarkable alteration in the adversary system for counsel for one party in litigation to be accountable to the other party for the conduct in good faith of the litigation. The duty of counsel is to represent his client's interests; the law should not impose a conflicting duty upon him.
>
> Counsel for the Attorney-General in a criminal case is no different. His duty is to represent the interests of the Attorney-General; the only difference from the position of other counsel is that the interest of the Attorney-General is simply to put before the court all relevant material. I would not dilute the first proposition with any suggestion that counsel for the Attorney-General must account to the accused for the discharge of a duty he owes to the Attorney-General.
>
> I do not rest upon any idea of harassment. I share the unease elsewhere expressed at the prospect of a lawyer gaining protection from harassment from civil suit when other professionals do not have such immunity. But lying just beneath the surface of that rationale is the acceptable rationale that counsel should not have conflicting duties. Litigation of this sort is thought to be harassing because it also evokes *that* spectre."

In *Nelles v Ontario*[26] het die Kanadese Supreme Court finaal weggebreek van die idee van absolute immuniteit van die prokureur-generaal en sy aanklaer-personeel teen 'n deliktuele eis van 'n beskuldigde. Regter Lamer, soos hy toe was, meld in sy uitspraak die volgende:[27]

> "It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust . . . Regard must also be had for the victim of the malicious prosecution. The fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process."

Hy wys verder daarop dat 'n persoon wie se konstitusionele regte geskend word toegang tot 'n geregshof moet hê "to seek a remedy . . . for the vindication of a constitutional wrong".[28] In *Prete v Ontario (Attorney-General)*[29] waarmee hierdie artikel ingelei is, word hierdie siening bevestig.

2 4 Die Duitse en Nederlandse reg

Artikel 839 van die *Bürgerliches Gesetzbuch* (*BGB)* is hier van toepassing en lui soos volg:[30]

> "(1) Verletzt ein Beamter vorsätzlich oder fahrlässig die ihm einem Dritten gegenüber obliegende Amtspflicht, so hat er dem Dritten den daraus entstehenden Schaden zu ersetzen. Fällt dem Beamten nur Fahrlässigkeit zur Last, so kann er nur

26 (1989) 60 DLR (4th) 609 (SCC).
27 641.
28 641–642.
29 *Supra* 447–448.
30 Sien ook Rüfner "Basic elements of German law on state liability" in Bell en Bradley (red) *Government liability: A comparative study* (1991) 350.

dann in Anspruch genommen werden, wenn der Verletzte nicht auf andere Weise Ersatz zu erlangen vermag.

(2) Verletzt ein Beamter bei dem Urteil in einer Rechtssache seine Amtspflicht, so ist er für den daraus entstehenden Schaden nur dann verantwortlich, wenn die Pflichtverletzung in einer Straftat besteht. Auf eine pflichtwidrige Verweigerung oder Verzögerung der Ausübung des Amtes findet diese Vorschrift keine Anwendung.

(3) Die Ersatzpflicht tritt nicht ein, wenn der Verletzte vorsätzlich oder fahrlässig unterlassen hat, den Schaden durch Gebrauch eines Rechtsmittels abzuwenden."

Die plig van die aanklaerkorps ("Staatsanwaltschaft") tot tussenbeidetreding by strafbare handelinge[31] bestaan in die algemeen teenoor die groep en nie teenoor die slagoffer nie.[32] Die Bundesgerichtshof (BGH)[33] het beslis dat die plig van die aanklaerkorps om vas te stel of 'n aangemelde geval hoegenaamd binne die trefkrag van die strafreg val en om die ondersoek prosesmatig te voer, teenoor die beskuldigde bestaan. Skending van die regte van 'n beskuldigde kan gevolglik tot deliktuele aanspreeklikheid van die aanklaerkorps (staat) aanleiding gee. Die BGH[34] het ook beslis dat 'n aanklaer ("Staatsanwalt") by die toestaan van 'n arrestasiebevel slegs ampspligstrydig optree as by die behoorlike beoordeling van die omstandighede die aanname nie gemaak kon gewees het dat die toestaan van so 'n bevel geregverdig is nie. Die statutêre[35] gronde vir arrestasie laat naamlik 'n besliste oordeelsruimte ("Würdigungspielraum"). In dieselfde saak is ook aangedui dat die verskaffing van vals inligting deur die aanklaerkorps aan die pers oor die stand van 'n sekere strafproses 'n ampspligskending teenoor die beskuldigde daarstel.[36] Ampspligskending bestaan nie as die betrokke ampshandeling deur 'n hof bevestig is nie.[37]

Dit wil voorkom of daar 'n funksionele onderskeid in dié verband in die Duitse reg bestaan. Indien 'n regsoordeelfunksie uitgeoefen word, geld artikel 839(2) *BGB*, dit wil sê deliktuele aanspreeklikheid kom slegs ter sprake as ampspligskending 'n (ernstige) misdaad daarstel.[38] Indien sodanige funksie nie uitgevoer word nie, geld die reëls beliggaam in artikel 839(1). Hiervolgens is die opsetlike of nalatige ampspligskending, as uitgangspunt, voldoende vir deliktuele aanspreeklikheid. Volgens Blomeyer[39] wil artikel 839(2) *BGB* verhoed dat 'n afgelope proses weer heropen en die feite daarin herhaal en herbeoordeel word en wil dit verder die onafhanklikheid van regsfunksionarisse onderskraag.

Volgens die Hoge Raad in Nederland moet owerheidsoptrede deurgaans regmatig gefundeer wees.[40] In die lig hiervan kan onregmatige optrede van die aanklaerkorps tot deliktuele aanspreeklikheid van die staat aanleiding gee.[41]

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31 A 152(2) van die Strafproseskode (*StPO*).
32 Von Staudinger *et al Kommentar zum bürgerlichen Gesetzbuch* (1986) 1211.
33 *BGHZ* 20, 178; Von Staudinger *et al* 1211.
34 *BGHZ* 27, 338 351.
35 A 12 ev van die *StPO*.
36 Sien ook Von Staudinger *et al* 1212.
37 BGH, NJW 1986, 2954.
38 BGH, NJW 1970, 1543.
39 "Zur Haftung des Staates für Fehler des Staatsanwalts" 1970 *JZ* 717.
40 HR 27 Junie 1986, NJ 1987, 898.
41 Sien bv HR 9 Sept 1994, NJ 1995, 44; HR 22 Des 1995, NJ 1996, 301.

3 STAATSREGTELIKE POSISIE VAN DIE PROKUREUR-GENERAAL

Die funksioneel-staatsregtelike posisie van die prokureur-generaal is tradisioneel gesplete. So verklaar 'n anonieme kommentator[42] ten aansien van die aanklaerkorps in die VSA:

> "For most purposes, prosecutors are considered members of the executive branch; yet, when immunity is at issue, they are treated more like judges than executives. This bifurcated treatment stems from a vision of the prosecutor as a quasi-judicial official. Persuasive policy reasons support this approach.
>
> The prosecutor is an integral part of the judicial process with discretionary powers comparable to those of a judge. Prosecutors have 'more control over life, liberty, and reputation than any other person'. Prosecutorial decisions range from those affecting a preliminary investigation and issuance of an arrest warrant to those involving the presentation of evidence during trial and recommendation at final sentencing."

In die lig van 'n beslissing van die Nederlandse Hoge Raad van 19 Junie 1990[43] verklaar Wiewel[44] dat "[d]e beslissing tot vervolging is een daad van bestuur". Norton[45] wys tereg daarop dat die grensgebied tussen die staatlike ondersoekfunksie en aanklagfunksie soms vloeiend kan wees. Die ondersoekfunksie wat die polisie in die reël uitoefen, staan in finale instansie onder kontrole van die aanklaerkorps.[46]

3 1 Onafhanklike prokureur-generaal

Blykens Verpaalen,[47] en tereg ook, hou die ontstaan van 'n setel van openbare vervolging verband met die opkoms van die *trias politica*-leerstuk en veral met 'n onafhanklike regbank. Vervaele[48] verduidelik in dié verband soos volg:

> "Wie nu meent dat de rechtsleer daaruit de conclusie trekt dat het OM in de uitoefening van zijn uitvoerende macht qua statuut en juridische consequenties gelijk te stellen is met die klassieke organen van de uitvoerende macht, heeft het verkeerd voor. Diezelfde rechtsleer stelt immers dat het OM geen orgaan is van de uitvoerende macht (zoals de administraties bijvoorbeeld) maar handelt krachtens een *delegatie* hem *rechtstreeks* gegeven door de *Natie* zelf.
>
> Deze door de Natie gegeven delegatie is dus rechtstreeks, speciaal en persoonlijk."

'n Onafhanklike prokureur-generaal kan 'n kontrolefunksie veral oor die uitvoerende gesag uitoefen.[49] Kragtens artikel 2 van die Wet op die Prokureur-generaal 92 van 1992, word 'n prokureur-generaal tans in Suid-Afrika deur die president aangestel en moet hy 'n eed van getrouheid voor die senior beskikbare regter binne sy regsgebied aflê. Artikel 4(3) van hierdie wet lui soos volg:

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42 Anoniem 177.

43 Ongerapporteer.

44 "De beslissing tot vervolging is bestuur" 1991 *Delikt en Delinkwent* 14–15.

45 Nortan "Ethics and the attorney-general" 1991 *Judicature* 203.

46 Vgl Geisler "Stellung und Funktion der Staatsanwaltschaft im heutigen deutschen Strafverfahren" 1981 *Zeitschrift für die gesamte Strafrechtswissenschaft* 1113.

47 "Het OM in burgerlijke zaken geen helper in bewijsnood" 1990 *WPNR* 105.

48 "Het Openbaar Ministerie in de strafrechtspleging – Vergt strafrechtsbeleid een nieuwe definitie van de trias politica?" 1991 *Rechtskundig Weekblad* 1021.

49 Tiefer "The constitutionality of independent officers as checks on abuses of executive power" 1983 *Boston ULR* 59; Kramer en Smith "The Special Prosecutor Act: Proposals for 1983" 1982 *Minnesota LR* 963.

"(a) Die Staatspresident kan 'n prokureur-generaal in sy amp skors en, behoudens die bepalings van hierdie subartikel, hom daarvan onthef–

(i) weens wangedrag;

(ii) weens voortdurende swak gesondheid; of

(iii) weens onvermoë om sy ampspligte op 'n bekwame wyse uit te voer.

(b) 'n Skorsing van 'n prokureur-generaal en die rede daarvoor moet by boodskap aan die Parlement meegedeel word binne 14 dae na sodanige skorsing, indien die Parlement dan in sessie is, of, indien die Parlement nie dan in sessie is nie, binne 14 dae na die aanvang van sy eersvolgende sessie."

Hieruit blyk dat die moontlikheid in die vooruitsig gestel word dat ampspligte op 'n onbekwame wyse uitgevoer kan word. Die prokureur-generaal het die bevoegdheid om binne sy regsgebied vervolgings ten behoewe van die staat in te stel,[50] met die bevoegdheid om te delegeer.[51] Artikel 7 bepaal dat die beamptes en werknemers wat nodig is vir die behoorlike uitvoering van sy werksaamhede ingevolge die bepalings van die Staatsdienswet aangestel word. 'n Sekere mate van koppeling aan die uitvoerende gesag blyk duidelik uit laasgenoemde bepaling.

3 2 'n Onpartydige aanklaer

Arloth[52] vermeld dat dit 'n strydvraag is of 'n beskuldigde in Duitsland 'n aanspraak op 'n onbevooroordeelde aanklaer het. 'n Oberlandesgericht[53] het so 'n aanspraak afgewys. Hyself is egter van mening dat die fundamentele reg op 'n billike verhoor, in die lig van die benadering van die Bundesverfassungsgericht,[54] nie slegs tot die regsprekende gesag gerig is nie.[55] Gesien die konsep van pleitbedinging, wat ook in Duitsland posgevat het,[56] is dit duidelik dat 'n bevooroordeelde aanklaer billike strafregspleging kan ondergrawe.[57] In Europa word aan die eis van regterlike onpartydigheid primêre status toegeken.[58] Dieselfde behoort myns insiens vir 'n aanklaer te geld.

3 3 Privaatregtelike gelykstellingsproses

Die staat en staatsfunksionarisse word in 'n toenemende mate privaatregtelik en ook menseregtelik op gelyke voet met staatsonderdane gestel.[59] Privaatbelange is

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50 A 5(1).

51 A 6.

52 "Zur Ausschliesung und Ablehnung des Staatsanwalts" 1983 *NJW* 207.

53 OLG Hamm, NJW 1969, 808.

54 BVerf G, NJW 1981, 1719 1723.

55 208–210.

56 A 153 a (2) *StPO*; Herrmann "Bargaining justice – A bargain for German criminal justice" 1992 *U of Pittsburgh LR* 755. Labuschagne "Konsensuele strafregspleging: Opmerkinge oor die spanningsveld tussen regstaatlikheid en doelmatigheid" 1995 *SAS* 181.

57 Sien ook Geisler 1119; sien verder De Bruijn "De Officier van Justitie als rechterlijke autoriteit?" 1989 *Ars Aequi* 973.

58 Sien a 6(1) van die Europese Verdrag vir die Regte van die Mens en *Fey v Austria*, 24 Feb 1993, CEDH, Serie A vol 255; NJ 1993 647. Sien verder a 101(1)(2) van die Duitse Grondwet en BVerfG, NJW 1993, 2231; BVerfG, NJW 1994, 648; Lamprecht "Befangenheit an sich: Über den Umgang mit einem prozessualen Grundrecht" 1993 *NJW* 2222.

59 Sien Botha "'n Konstitusionele evaluering van die beperking van regsgedinge teen die staat" 1994 *SA Publiekreg* 48–49.

ook nie altyd aan die openbare belang ondergeskik nie. Wat in die onderhawige verband van wesenlike belang is, is dat die aanklaerkorps by skending van individuele regte hulle nie in alle omstandighede op die "openbare belang" sou kon beroep nie.[60]

4 GRONDSLAG VIR DIE DELIKTUELE AANSPREEKLIKHEID VAN DIE PROKUREUR-GENERAAL

Artikel 6 van die Europese Verdrag vir die Regte van die Mens (EVRM) stel die staat verantwoordelik vir die benadeling van 'n onderdaan in geval van regskending deur staatsoptrede. In die lig hiervan het die Nederlandse Hoge Raad beslis dat die staat, kragtens artikel 1401 *BW*, deliktueel aanspreeklik is teenoor 'n benadeelde indien by die voorbereiding van 'n regterlike beslissing so 'n fundamentele regsbeginsel geskend is dat daar van 'n eerlike en onpartydige behandeling van die betrokke saak geen sprake is nie en 'n ander regsmiddel nie beskikbaar is nie.[61] Hierdie benadering behoort myns insiens soveel te meer vir die aanklaerkorps te geld. In Kanada word, in die lig van artikel 24(1) CCRF, aan dié aangeleentheid in 'n toenemende mate 'n menseregtelike konnotasie gegee.[62] Pilkington[63] merk in dié verband op:

> "[T]here are two problems with the absolute immunity accorded to judges, prosecutors and, at least in the United States, officials exercising those functions. First, a victim of unconstitutional action by a prosecutor or judge is denied any redress, even though he may have suffered egregious wrong at the hands of people who should be held to the highest standards of conduct in exercising a public trust. Second, the wrongdoer cannot be held accountable by the victim through legal process. The fact that most unconstitutional conduct will be deterred is not a sufficient reason for denying redress in those instances where it does take place. If it can be established that a judge or prosecutor has abused his powers, acting with malicious intention to deprive a person of his rights, or that he has infringed settled, indisputable constitutional rights, he like other officials should be accountable to the victim. The fact that the prospect of such accountability may affect his decisions is surely all to the good – judges and prosecutors should act in good faith and respect constitutional rights. If other officials are deemed to know and obliged to comply with well-settled constitutional law, surely the same can reasonably be expected of judges and prosecutors. To the extent that it is desirable to protect judges and prosecutors from litigation designed to harass and intimidate them in the exercise of their duties, this purpose could be met by requiring that a plaintiff obtain leave to institute such an action. Under section 24(1) of the Charter, a court must consider what remedy is just and appropriate in all the circumstances. In doing so, it should reconsider the appropriateness and justness of even the most well-established common law principles and statutory protections."

Artikel 7(1) van die tussentydse Grondwet van die Republiek van Suid-Afrika 200 van 1993 het bepaal dat hoofstuk 3, wat handel oor die beskerming van fundamentele regte, "alle wetgewende en uitvoerende staatsorgane op alle regeringsvlakke" bind. Die regsprekende gesag en die prokureur-generaal word

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60 Vgl Langer "Public interests in civil law, socialist law, and common law systems: The role of the public prosecutor" 1988 *American J Comp L* 279.

61 HR 3 Des 1971, NJ 1972, 137; HR 12 Feb 1993, NJ 1993, 524.

62 Sien *Prete v Ontario (Attorney-General) supra* 447–448.

63 "Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms" 1984 *Canadian Bar R* 560–561.

nie vermeld nie. Artikel 7(4) het bepaal dat indien 'n fundamentele reg geskend of bedreig word (onder andere) die benadeelde of moontlike benadeelde geregtig is om 'n bevoegde geregshof te nader en om gepaste regshulp aan te vra.[64] Artikel 7(1) is, soos elders[65] aangedui, op voorrasionele en anachronistiese konsepte gebaseer en is onaanvaarbaar. Dit stel, paradoksaal genoeg, 'n menseregstrydige dimensie van ons huidige konstitusie daar. Artikel 8(1) van die Constitution of the Republic of South Africa 108 of 1996, brei egter die toepassing van die akte van menseregte na die regsprekende gesag en alle ander staatsorgane uit. Dit is 'n mensereg-vriendelike benadering en daarom onderskryfbaar.

Vervolgens word op enkele *voorbeelde* van moontlike deliktuele aanspreeklikheid van die prokureur-generaal (en die staat) gewys. Verskeie fundamentele[66] regte van 'n beskuldigde kan deur die volgende optrede van die aanklaerkorps geskend word:

(a) Oneerlikheid van aanklaer Dit kan op verskeie wyses geskied, soos deur die hof te mislei[67] of deur die skep en gebruik van vals getuienis[68] of deur die skending van die plig[69] om wesenlike getuienis aan die hof te openbaar of deur op 'n oneerlike wyse en ongeregverdig die uitstel van 'n saak te bewerkstellig[70] of deur opsetlik valse gesag aan die hof voor te lê[71] of deur opsetlik (of selfs grof nalatig) 'n persoon aan te kla van 'n saak waaraan hy/sy reeds skuldig bevind of ontslaan is of van 'n saak wat reeds verjaar het.[72]

(b) Laksheid van aanklaer Dit kan insgelyks op verskeie wyses geskied, soos om op 'n onverskoonbare wyse nie by die hof op te daag nie[73] of om voort te

64 Sien ook a 22.

65 Labuschagne 1996 *THRHR* 482.

66 Sien oa die volgende bepalings van die 1993-Grondwet: a 10 (reg op respek vir en beskerming van waardigheid); a 11 (reg op vryheid en sekuriteit van die persoon); a 18 (reg op vryheid van beweging); a 25(1)(e) (reg op toetsing van aanhouding voor 'n geregshof); a 25(3)(a) (reg op billike verhoor, waarby ingesluit is die reg om binne 'n redelike tyd voor 'n geregshof aangekla te word); a 25(3)(b) (reg om behoorlik ingelig te word ten aansien van 'n aanklag); a 25(3)(g) (reg om nie weer verhoor te word op 'n aanklag waaraan jy reeds skuldig bevind of vrygespreek is nie); en a 25(3)(j) (reg om binne 'n redelike tyd na skuldigbevinding gevonnis te word). A 7–39 van die nuwe Grondwet 108 van 1996 bevat gelyksoortige bepalings.

67 Vgl *State v Juarez* (1974) 111 Ariz 119, 524 P 2d 155, 90 ALR 3d 818 (Arizona SC).

68 Sien die feitestel in *Re Friedman* (1979) 76 Ill 2d 392, 30 Ill Dec 288, 392 NE 2d 1333, 10 ALR 4th 589 (SC Illinois) met annotasie deur Eclavea 10 ALR 4th 605 610–611.

69 Sien *R v Steyn* 1954 1 SA 324 (A) 337; *S v Xaba* 1983 3 SA 717 (A) 728–729; Malan "Die reg op regsverteenwoordiging in die lig van sekere fundamentele beginsels" 1992 *Obiter* 80.

70 Sien die feitestel in *Re Johnson* (1986) 102 NJ 504, 509 A 2d 171, 61 ALR 4th 1207 (SC New Jersey) met annotasie deur Raymond 61 ALR 4th 1216.

71 Sien die feitestel in *Sobol v Capital Management Consultant, Inc* (1986) 726 P 2d 335, 63 ALR 4th 1193 (SC Nevada) met annotasie deur Senesio 63 ALR 4th 1199 1200–1201.

72 Sien Labuschagne "Die effek van tydsverloop op strafregtelike aanspreeklikheid" 1987 *THRHR* 211; Labuschagne "Verjaring van die deliktuele aksie weens misbruik van die regsproses" 1993 *Obiter* 204.

73 Sien die feitestelle in die sake *In re Yengo* (1980) 84 NJ 111, 417 A 2d 533, 13 ALR 4th 102 (SC New Jersey); *Beit v Probate* (1982) 385 Mass 854, 434 NE 2d 642, 29 ALR 4th 151 (SCJ Massachusetts) met annotasie deur Maess 29 ALR 4th 161. Dietel *Leading a law practice to excellence* (1992) 103 wys daarop dat punktualiteit in die regspraktyk van besondere belang is.

gaan om 'n onverhoorbare beskuldigde aan te kla[74] of om, sonder redelike oorsaak, die beskuldigde nie binne 'n redelike tyd voor die hof te bring nie.[75]

(c) Skending van billike verhoor-reëls In die Amerikaanse saak *Killie v State*[76] is K skuldig bevind aan (onder andere) die verspreiding van marijuana. Gedurende sy finale argument het die aanklaer die argument geopper dat K, 'n hoof van 'n laerskool, marijuana gebruik het om jong seuns vir homoseksuele doeleindes na sy huis te lok. In die lig hiervan beveel die hof in appèl dat 'n herverhoor moet plaasvind. In 'n annotasie tot dié saak verklaar Danne soos volg:[77]

> "It is an axiomatic principle of law that it is highly improper for a prosecutor to unjustifiably resort to argument which tends to arouse passion, hatred, scorn, or resentment against the accused in the minds of the jurors, and statements or insinuations made by prosecuting attorneys relative to the character, conduct, habits, or associations of an accused, which were calculated to arouse social prejudice against him and were not supported by properly admitted evidence, have frequently been held to fall within the concept of attorney misconduct which can deprive the accused of a fair and impartial trial."

Dit behoort myns insiens ook as grondslag vir deliktuele aanspreeklikheid te dien.

In die Oklahoma-saak *Williams v State*[78] het 'n sekere getuie, Preston Bonds, vals getuienis gedurende 'n voorlopige ondersoek afgelê. In die lig hiervan het 'n regter beveel dat beskuldigde se regsverteenwoordiger toegelaat moet word om 'n onderhoud met Preston Bonds te voer. Die "aanklaer se kantoor" het egter bedrieglik voorgegee dat hulle nie weet waar Preston Bonds hom bevind nie. In appèl verklaar regter Bussey soos volg:[79]

> "It is our opinion that the defendant was denied the right to effective assistance of counsel, and the right to a fair trial due to the fact that Preston Bonds gave perjured testimony at this defendant's preliminary examination and the defendant's attorney was never given the opportunity to interview the State's witness, Preston Bonds, after learning of the perjured testimony; and, after Judge Kessler, who apparently considered the interview necessary in order for the defendant to properly prepare his defense, ordered that his attorney be granted an interview. As stated in the case of *Coppolino v Helpern* . . . 'We merely say that, as to interviewing a prospective prosecution witness, our constitutional notions of fair play and due process dictate that defense counsel be free from obstruction . . .'"

Dit is duidelik dat die aanklaerkorps nie in sodanige omstandighede deliktuele aanspreeklikheid behoort vry te spring nie.

(d) Skending van die reëls van natuurlike geregtigheid Indien die prokureur-generaal 'n diskresionêre bevoegdheid uitoefen moet hy/sy, waar toepaslik, dit met inagneming van die beginsels van natuurlike geregtigheid verrig.[80] Dit

74 Sien Oosthuizen en Verschoor "Intrede deur prokureur-generaal om onbillike strafproses te voorkom by onverhoorbare beskuldigde" 1992 *SAS* 194.

75 Sien die Kanadese sake *R v Gallagher* (1993) 83 CCC (3d) 122 (SCC); *R v B (JG)* (1994) 85 CCC (3d) 112 (SCC).

76 (1972) 14 Ma App 465, 287 A 2d 310, 54 ALR 3d 889 (CSA Maryland).

77 54 ALR 3d 897 899.

78 (1975) 535 P 2d 710, 90 ALR 3d 1227 (CCA Oklahoma).

79 1229–1230.

80 Sien a 24 van die 1993-Grondwet; Van den Berg "The attorney-general and aspects of natural justice" 1987 *Obiter* 105; Bekker "Borgweiering deur die prokureur-generaal en die toepassing van die audi alteram partem-reël" 1989 *SAS* 121.

behoort myns insiens ook vir die diskresie om te vervolg, te geld.[81] Indien dit nie nagekom word nie, kan die staat deliktuele aanspreeklikheid opdoen.

5 KONKLUSIE

Dit blyk uit artikel 7(1) van die tussentydse Grondwet dat die fundamentele regte wat daarin gewaarborg word, nie teenoor die prokureur-generaal geld nie. Die prokureur-generaal beklee tans in Suid-Afrika 'n onafhanklike status en staan nie meer onder ministeriële beheer nie. Uit artikel 8(1) van die 1996-Grondwet blyk egter dat die prokureur-generaal ook aan die akte van menseregte gebonde is. In verskeie lande kan die regsprekende gesag en/of die aanklaerkorps deliktuele aanspreeklikheid teenoor regsonderdane opdoen. Hierdie aanspreeklikheid het 'n duidelike menseregtelike basis en dien ook as 'n kontrolemeganisme teen magsmisbruik.[82]

Ek het by 'n ander geleentheid[83] aangetoon dat die staatsfunksie gerig is op die daarstelling en instandhouding van fisiese en normatiewe strukture waarin die mens hom- of haarself op 'n geregtigheidskonforme wyse kan verwesenlik. Die staat is aan hierdie funksie, wat in 'n voornormatiewe *lex fundamentalis* beliggaam is, gebonde. Ongeregverdigde skending van fundamentele regte van staatsonderdane deur die aanklaerkorps is staatsfunksiestrydig en behoort ook deliktuele aanspreeklikheid te vestig. 'n Menseregtebedeling het, daarbenewens, ook juis ten doel om regsonderdane teen geregtigheidstrydige magsmisbruik van die staatsorgane te beskerm. Die prokureur-generaal, en ook die regsprekende gesag, staan nie bo die staatsfunksie en menseregtekultuur nie.

81 Sien hieroor Morkel en Labuschagne 1980 *SASK* 160.

82 Sien Verpaalen 130. Vgl Beckham *et al Towards a jurisprudence of injury: The continuing creation of a system of substantive justice in American tort law* (1984) 6-3 ev; Posner "The concept of corrective justice in recent theories of tort law" in Levmore (red) *Foundations of tort law* (1994) 59; Rabkin "Where the lines have held: Tort claims against the federal government" in Olson (red) *New directions in liability law* (1988) 112; Kiely *Modern tort liability: Recovery in the '90s* (1990) 159–160. Sien ook in die algemeen Van der Vyver "The separation of powers" 1993 *SA Publiekreg* 189–190.

83 Labuschagne 1978 *TRW* 65.

Teaching Roman law on the eve of the millennium: A new beginning*

(*continued*)**

Andrew Domanski
BSc HDipCoLaw LLM
Senior Lecturer in Law, University of the Witwatersrand

3 HOW SHOULD ROMAN LAW BE TAUGHT?

The central thesis of this article has been that if the teaching of Roman law is to survive, there must be a radical shift in emphasis from the technical to the ethical content of the law. Accordingly, the need is for a method of teaching Roman law which subordinates its concrete rules to the immutable values of honesty, justice and reason, values indispensable to aspirant lawyers regardless of time and place. Those values are alive and at work in the South African Constitution.[95] Thus, for example, the Preamble pays tribute to "those who suffered for justice and freedom in our land". Section 1 speaks of unity and equality in these terms:

> "The Republic of South Africa is one sovereign democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality . . ."

Reason plays an important role in section 36(1), which requires *inter alia* that any limitation on fundamental rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

A great legal system arises only when two vital strands are intertwined and united in harmony. The first is a powerful sense of justice founded on reason – natural law, in other words. The second strand is a set of concrete rules of man-made law.[96] The developed Roman law of Justinian embodied this union.[97] The

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** See 1996 *THRHR* 539–556.

95 Constitution of the Republic of South Africa Act 108 of 1996. See also the first five constitutional principles enshrined in the interim Constitution (Sch 4 of the Constitution of the Republic of South Africa Act 200 of 1993).

96 *D* 1 1 9 (Gaius). Domat 11 1–24 gives an admirably lucid description of these two strands of law – he calls them "immutable laws" and "arbitrary laws" respectively – and cites numerous examples to illustrate their practical interaction. See further Bryce 564–565.

97 In the words of Allen 394: "[I]t is not a little surprising to find, in a system so absolute, comprehensive and explicit as the Roman, especially as codified by the authority of the supreme lawgiver, the conception of *aequitas* or *aequum et bonum* so firmly embedded.

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result is that almost fifteen hundred years later, the world has not forgotten his achievement: the *Corpus iuris* continues to be studied and to attract the attention of some of the keenest legal minds.

Nowhere is this union better illustrated than in the Institutes, the elementary textbook which enjoyed the full force of law in the Byzantine empire. Not surprisingly then, it is this work, in translation and unencumbered by commentaries, that is championed here as the means by which Roman law should be presented to beginners. Justinian himself enjoined[98] that the study of Roman law should begin with the Institutes. Though we may believe we know better today, are we really entitled to ignore a direction given by the originator of the *Corpus iuris civilis*? The emperor's much-maligned prohibition on commentaries, the merits of which will be considered below, plainly shows that he intended his legal primer to be taught and studied without gloss of any kind. By studying the unadorned Institutes, students receive their Roman law, not processed and systematised by some modern writer, but direct from Justinian himself, who stands in history alongside other great lawgivers like Hammurabi, Asoka, Solon, Lycurgus and Napoleon.

The teaching of Roman law through the Institutes of Justinian is hardly new or original. In European, including English, universities it was for a long time standard practice to teach Roman law direct via the Institutes of Gaius and Justinian. But there the similarity ends, for the thrust of this article is that students ought to study the Institutes, not as a collection of rules of positive law, nor even as a collection of basic legal institutions, but primarily as a vehicle for illustrating the practical operation of natural law in daily human experience. The Institutes abound in such illustrations, in the titles concerning persons,[99] property,[100] succession, obligations[101] and actions.[102] The teaching of Roman law from the perspective of natural law is, as we have seen, the approach approved by Justinian himself.[103]

To regard it as a mere counsel of perfection with little practical application, is entirely inconsistent with the evidence of the *Corpus Iuris*. Nor was it introduced by a side-wind through the practice of the Courts as against the strict theory of the imperial law. Not only is it not discountenanced, as future juristic interpretation and 'judge-made law' were discountenanced by the sovereign, but in the fourth century AD it is expressly enjoined by imperial legislation (Constantine and Licinius, AD 314:C3 1 8; C3 38 12) as a positive duty of the Judge . . . It is impossible to imagine a wider charter for equity than this. Nor were the doctrines of *aequitas* expressed only in sweeping generalities . . ."

98 *Constitutio omnem pr* (transl Watson). Justinian, moreover, in s 2 of the same constitution, required students to absorb the whole of the Institutes well within the first year of study!

99 *I* 1 4; *I* 1 8 1, 2; *I* 1 11 3, 4, 7 (*in fine*); *I* 1 20 6, 7; *I* 1 26 6, 12 and others.

100 *I* 2 1 1, 5, 11, 12, 25, 26, 29, 30, 32, 35, 40, 47; *I* 2 8 1 and others.

101 See, in relation to contracts, *I* 2 12 1; *I* 3 14 1, 2, 4; *I* 3 15 1; *I* 3 20 4; *I* 3 22–26; *I* 3 27 and others. Relevant texts on delicts include *I* 4 1 1; 1 4 2 *pr*; *I* 4 4 7; *I* 4 5.

102 *I* 4 6 28, 30; *I* 4 8 *pr* and others.

103 See text to fn 40 and 41, in the first instalment of this article. In the Prooemium to the Institutes, Justinian speaks of the rules of Rome as being "scrupulously regardful of justice". And a modern teacher of Roman law (see Duff 10) has said that "there is only one rule in the Institutes of which the present writer has felt bound to say 'this rule is unjust and I do not understand how it came about'. With that one obscure exception, the aims, methods and achievements of praetor and jurists are such as to appeal to the head and heart of a twentieth century undergraduate". (The offending text is *I* 3 27 7.) The same

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This point cannot be sufficiently emphasised and the reader whose patience has already worn thin will forgive me for labouring it. Heretical though it may sound, it matters little that the student comes away from a first course in Roman law with a less than perfect grasp of the rules of positive law as set forth in the texts. Her understanding of the operation of the agnatic principle in marriage, in adoption and in intestate succession may be flawed, her grasp of the subtleties of *usucapio* and of *damnum iniuria datum* may be inadequate, her knowledge of *stipulatio* may be sketchy; yet her study of Roman law will have been worthwhile, if she comes away imbued with the spirit of justice and reason which alone enliven the letter of the law. In the Institutes, natural law is made manifest and practical: the book should be studied primarily for inspiration and nourishment.

The student who has mastered the concrete rules and juridical concepts contained in the Institutes, without realising that they exist primarily to serve the higher ends of justice and reason, is not worthy of a credit in Roman law. The *Corpus iuris* itself[104] lends support to this view:

> "It has been decided that, in all things, the principles of justice and equity, rather than the strict rules of law, should be observed."

My experience of teaching Roman law over a number of years suggests that the artificial modern separation of positive rules from the natural law philosophy which enlivens them is largely responsible for the indifference or antagonism which many students feel towards the subject.

Given that the real object is to teach students the values and the practical operation of natural law, and that the use of the Institutes is no more than the means chosen to attain that end, a number of questions arise. First, why confine the study of natural law to the Justinianic texts? Why not include the Institutes of Gaius, as well as such great repositories of natural law as the works of Grotius, Voet, Blackstone, Pufendorf, Domat and others? All of these are eminently worthy of study, but none except Gaius could legitimately be accommodated in a course in Roman law. (An overarching course in foundations of the South African legal system, offered in addition to or, at worst, in place of an introductory course in Roman law, could and should include a direct study of these works. Consideration of such a course, however, is beyond the scope of this article.)

As for Gaius, the temptation to include extracts from his Institutes is indeed great. There is surely no better place in which to study the practical operation of natural law than the court of the praetor in the late Roman Republic. In that engine room of Roman equity, the procedural formula became the instrument whereby the rigid civil law was transformed under the influence of natural law. And it is in the textbook of Gaius, not in that of Justinian, that we find examples of the wording of the formula in all its precision and brevity. It is Gaius who

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writer adds: "[T]he development from the Twelve Tables to Justinian as portrayed in the Institutes, is an almost uniform progress from what seems to us barbarous and absurd to what seems to us right and reasonable. It is of priceless value to show a student that such progress is possible; he will then be ready to learn how necessary it is today." According to Duff, then, one who seeks an exposition of Roman law in proper historical perspective will find it in the Institutes.

104 *C* 3 1 8 transl Scott. Celsus, in *D* 1 3 17, is to similar effect.

enables us to observe in concrete detail the transformative effect on the substantive law of such phrases as *ex fide bona* and *dolo malo*.

And yet, with great reluctance, we must forgo Gaius: a typical law curriculum, in which only two lectures per week are allocated to Roman law, allows time for a treatment – and a selective one at that – of Justinian's Institutes only. The time required for additional study of the formulary procedure in Gaius is simply not available. Besides, the fourth book of the Institutes of Gaius does not marry well with Justinian's textbook, in which substantive law predominates and procedure is of lesser importance. Time and again, this teacher has been driven to the conclusion that he must rely on a single, coherent, self-contained textbook, and that that textbook ought to be the Institutes of Justinian.

Secondly, given that natural law and justice lie at the root of the Institutes, why did Justinian retain in his system such institutions as slavery and paternal power? He plainly acknowledges[105] the former to be in conflict with the law of nature, while the rules of the latter are not always in conformity with justice and reason.[106] In the case of slavery, the question becomes more pointed when one considers Justinian's evident dislike of that institution and his consistent bias in favour of freedom.[107] The answer, no doubt, is that extra-legal factors in the form of political, economic and social policy considerations played a decisive part in ensuring the survival of slavery. To tamper with an institution as historically entrenched, as economically and politically sensitive as slavery would have been most unwise on the part of an emperor, regardless of his personal views on the matter. This, of course, is an argument from pragmatism, not principle; it seeks to explain the persistence of slavery as a Roman legal institution, not to justify it. Bryce[108] concludes:

> "Even slavery and the *patriapotestas*, the former universal in the ancient world, the latter so deep-rooted among the Romans that it could never be altogether expunged, are in the later centuries so steadily and carefully mitigated that most of their old harshness disappears.[109] The moral tone of the law is . . . as high as that of any modern system; and in some few points higher than our own."

It is one thing to recognise natural law as the philosophical basis of the Institutes; it is quite another to devise a standard by which any rule of positive law, Roman or modern, may be tested for conformity with natural law. Voigt[110] sets forth the characteristic features of the *ius naturale* as follows:

(a) Recognition of the claims of blood;

(b) duty of faithfulness to engagements;

(c) equitable apportionment of gain and loss, so that one person is not enriched by the unfair loss of another;[111] and

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105 *I* 1 3 2.
106 *C* 7 16 1; Domat 1–2; Bryce 628–629; Lawson II 120.
107 The tenor of the rules in *I* 1 4 and *I* 1 8 1–2 is clear enough.
108 628–629.
109 Measures in mitigation of slavery included laws restraining ill-treatment of slaves by their masters: *I* 1 8 2. See also Sadler *The relation of custom to law* (1919) (hereinafter Sadler) 22. The effects of slavery were further mitigated by imperial constitutions providing for numerous modes of manumission, both formal and informal: *I* 1 5 *pr*, 1–2.
110 See Muirhead 281–282.
111 *D* 12 6 14; *D* 50 17 206.

(d) supremacy of *voluntatis ratio*, that is of intention over the mere words or form in which that intention is expressed.

This *ius naturale*, according to Voigt, is applicable to all men, among all peoples, in all ages, and is in accord with an innate conviction of right (*innere Rechtsüberzeugung*).

Many examples can be cited of Roman legal rules which embody one or more of these four propositions of the law of nature. To quote Muirhead:[112]

> "It was regard for the first that, . . . early in the principate, led the praetors to place emancipated children on a footing of equality with unemancipated in the matter of succession, and to admit collateral kindred through females alongside those related through males; and that, in the reigns of Hadrian and Marcus Aurelius respectively, induced the senate to give a mother a preferred right of succession to her children, and vice versa.[113] It was respect for the second that led to the recognition of the validity of what was called a natural obligation[114] . . . Regard for the third was nothing new in the jurisprudence of the [classical] period; the republic had already admitted it as a principle that a man was not to be unjustifiably enriched at another's cost; the jurists of the empire, however, gave it a wider application than before, and used it as a key to the solution of many a difficult question in the domain of the law of contract.[115] As for the fourth, it was one that had to be applied with delicacy; for the *voluntas* could not in equity be preferred to its manifestation, to the prejudice of other parties who in good faith had acted upon the latter. We have many evidences of the skilful way in which the matter was handled; speculative opinion being held in check by consideration of individual interest and general utility."[116]

Voigt's four propositions might well serve as a practical tool which enables the student to test any rule in the Institutes for conformity with natural law. But there is a simpler approach: the common thread which runs through these propositions as well as through Justinian's precepts[117] of natural law is reasonableness, the "sacred and golden cord of reason", as Plato[118] calls it. Cicero too, we have seen, is cogent authority for the identification of natural law with reason.[119]

Let us now, with the help of these guidelines, consider examples of the practical operation of natural law in the texts of the Institutes. These examples will illustrate the method of teaching Roman law which is advocated in this article. First, then, a clear case from the law of persons: slavery, Justinian tells us, is contrary to natural law.[120] As such, slavery is unreasonable. But in the title on freeborn men, we find this rule:[121]

> "It is enough if the mother be free at the moment of birth, though a slave at that of conception: and conversely if she be free at the time of conception, and then becomes a slave before the birth of the child, the latter is held to be free born, on

112 282.
113 *I* 3 3 4. See also *I* 2 9 2; Allen 394–395.
114 See also Allen 395.
115 *I* 3 27 6. See also Allen 396–397.
116 *I* 2 1 40, 48. See also Allen 395–396.
117 The three precepts are set forth in *I* 1 1 3, which will be considered below: see text to fn 148–153.
118 Plato *Laws I* 645 (transl Jowett).
119 See text to fn 67. See also the formulations of Christian Thomasius (text to fn 72) and Blackstone (text to fn 73).
120 *I* 1 3 2 (transl Moyle).
121 *I* 1 4 *pr* (transl Moyle).

> the ground that an unborn child ought not to be prejudiced by the mother's misfortune."

Tending as it does to mitigate the harshness of slavery, this rule is plainly reasonable.

Consider, secondly, a well-known case of *inaedificatio*:[122]

> "[I]f one man builds a house on another's land with his own materials, the house belongs to the owner of the land ... Of course, if the builder of the house has possession of the land, and the owner of the latter claims the house by real action, but refuses to pay for the materials and the workman's wages, he can be defeated by the plea of fraud, provided the builder's possession is in good faith ... "

It is again evident that this rule, which strikes a balance between the interests of the parties, is reasonable and so in harmony with natural law. All that the student needs to do, surely, is to arrive at an appreciation of that fact, by means of quiet reflection on the text, coupled if necessary with discussion in class. Yet many modern writers consider themselves at liberty to burden the student with additional detail, a Latinate style, scholarly controversies, references to journal literature, and related rules from the Digest or Code (or from Gaius), tending to qualify the basic legal position stated in the Institutes.[123] With all this superfluous matter, the directness and simplicity of the unadorned text are lost to the student.[124] Conversely, when stripped of such overlays, the skeletal framework of the institutional scheme, embedded in its matrix of natural law, stands out in sharp outline. Further consideration will be given later to the value of commentaries in teaching Roman law.

In the two examples considered thusfar, rules of positive law in the Institutes are harmoniously interwoven with natural law. As a third example, let us consider a rule which, for many students, may well require external confirmation of its conformity with justice and reasonableness. On the question of acquisition of ownership by the natural mode of specification, Justinian's "middle course" is expressed as follows:[125]

> "If the new object can be reduced to the materials of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down and so reduced to the rude material – bronze, silver or gold – of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves ... "

Now, if this text be taken at face value, it is capable of producing an unjust result. Say, for instance, that I in good faith make wine from your grapes. The

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122 *I* 2 1 30 (transl Moyle).

123 See eg Buckland *Textbook of Roman law* (Stein) (hereinafter Buckland II) 213–214; Moyle *Imperatoris Iustiniani Institutionum* (1912) (hereinafter Moyle) 204–205; Thomas *Textbook of Roman law* (hereinafter Thomas) 174. The treatment by these commentators of the *mala fide* builder (whose position is also considered in *I* 2 1 30, the passage under discussion), is even more open to the criticism levelled in the text. See also the recent remarks of Zimmermann "Roman and comparative law: The European perspective" 1995 *Journal of Legal History* 23.

124 Zimmermann *idem* viii puts it well: "The problems raised, the arguments advanced and the solutions found by the Roman lawyers have in many instances, over the centuries, maintained both their topicality and their educational value. In other words: by analysing a crisp opinion given by Celsus or Ulpian, one can frequently learn more about legal ingenuity than by wading through the elaborate treatises of many modern law professors."

125 *I* 2 1 25 (transl Moyle).

wine is mine, but what about compensation for you, the former owner of the grapes? The text says nothing of compensation. But Justinian, in the same text, expressly declares specification to be based on natural reason. Reason, in turn, would require me to pay you compensation equal to the value of the grapes, regardless of whether the wine is in your possession or in mine, of the nature of the legal remedy necessary to secure payment of that compensation and, in particular, of whether or not there exists specific textual authority providing for payment of such compensation. It is clear (to this writer, at least) that Justinian saw no need to make express provision for compensation in this text.[126] All that is required of the teacher, I would suggest, is to point this out and leave it at that.

But heaven help the teacher or student who seeks confirmation of this equitable result from the commentators, for she will end up thoroughly bewildered. Buckland[127] sees the injustice in leaving the former owner of the grapes without compensation, yet concludes that there is no evidence for the application, in these circumstances, of the general notion of enrichment or of a *condictio*. At least Buckland displays a sense of fairness. This is more than can be said for Thomas[128] who, without citation of authority, makes the startling claim that "the owner of the materials had no redress if the maker was in good faith and in possession of the thing". This view betrays a total lack of empathy with the equitable spirit of Justinian's legislation; as a statement of the law it may be dismissed from our notice.[129] As if that were not enough, there are even writers (for example, Lee) who find it unnecessary to deal with the question of compensation at all. Moyle,[130] by contrast, crisply states the true position:

> "Of course the giver of the form (ie the maker of the new species) had in all cases to pay the owner of the material its full value, on the principle '*neminem cum alterius detrimento fieri locupletiorem*'."

That position, we have seen, is entirely implicit in *I* 2 1 25, the text under discussion. Astonishing, therefore, is the degree of divergence in the views of these modern commentators; the reader is left to ponder the confusion which such divergence must evoke in the mind of the beginner.

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126 If, however, positivist pedantry were to insist on the citation of textual authority, then *D* 50 17 206 ("No one may be unjustly enriched at the expense of another") would more than suffice. One could also point to *C* 3 1 8, quoted earlier (see text to fn 104).

127 Buckland II 217.

128 176.

129 The same positivist bias is also too evident in other modern commentators: see, eg, Nicholas *An introduction to Roman law* (1962) (hereinafter Nicholas) 135–136 231–232. On the subject of unjust enrichment in general, that writer states (231): "The hostility which the principle arouses and the difficulties which it encounters derive from the fact that it claims to correct the law by an appeal to justice." But this is precisely the function of the principle enshrined in *D* 50 17 206! The hostility of the positivists is in keeping with the narrowness and irrationality of their position. Nicholas goes on (232) to question the authority of *D* 50 17 206, which is a clear and incontrovertible expression of natural law. Nicholas lists a few examples of enrichment, and then comments: "In cases such as these – and the list could be almost endless – the simple principle that a man should not be unjustly enriched at the expense of another is an uncertain guide, and unless settled rules of law are to be freely subverted, the principle requires restriction and definition." But why? The thrust of *D* 50 17 206 is plain: a remedy *must* be available whenever one person has been unjustly enriched at another's expense. The myriad limitations, complications and special cases raised by the positivists often tend to obscure the simplicity and universality of true law.

130 202.

As a fourth and final example, consider *I* 2 1 1, perhaps the most objectionable text in the Institutes, not indeed for what it says, but for what it omits. Rather innocuously, it reads (in Moyle's translation): "[T]he following things are by natural law common to all – the air, running water, the sea, and consequently the sea-shore."

Now it is entirely reasonable that these natural resources, which are not the product of human exertion or intelligence, should (unlike, say, houses, chariots and wine barrels, which are all the fruits of human labour) be excluded from private ownership. On that basis, however, there is a glaring and illogical omission from Justinian's list of natural resources, namely, land. For, like slavery, which is the private ownership of human beings, the private ownership of land violates natural law:[131] it allows men to appropriate for themselves (and, through the laws of inheritance, in perpetuity) a natural resource in the creation of which they have played no part. That is hardly reasonable. Yet nowhere in this text, or elsewhere in the Institutes, or in modern textbooks on Roman law do we find acknowledgement, let alone condemnation, of this violation of natural law – a violation which, as in the case of slavery, allows greed and expediency to triumph over justice and truth. And so, by default, land ownership, which has subsequently become a fundamental legal and economic institution in the West, received Justinian's stamp of approval.

These examples show that it does require a degree of trust on the part of both teacher and student to let the translated texts speak for themselves, but the rewards, in my experience, will amply repay the effort. We need not be enslaved by the contemporary notion that original writings like the Institutes cannot be approached without the help of an array of props.[132] Let us never forget that "it is Reasonableness, Simplicity, Self-consistency that make the excellence of a legal system".[133]

This is not to decry the awesome diligence which the great modern Romanists have bestowed on their craft; the point here is simply that the fruits of their scholarship have no place in a student textbook. The words of the Institutes must be allowed to speak for themselves, and the only legitimate function of a commentary is to make explicit the reasonableness (or unreasonableness) of a particular rule. The student should come away from the course with a powerful

131 Blackstone 2 1; George *Progress and poverty* (1975) 333–346; Maclaren *Nature of society* (1975) 113–128; Harrison *The power in the land* (1983) 35 ff; Domanski "Landownership and natural law" 1989 THRHR 433. There exists, however, no bar in natural law to exclusive, individual *occupation* of land, to the extent that it is used for the satisfaction of human needs. The occupier's obligation to put the land to good use would be enforced by imposing an annual tax on the value of all land capable of yielding rental. (Such a tax ought, of course, to be in the place of, and not in addition to income tax.) Under such a tax regime, speculators and others would find it uneconomical to hold valuable land vacant and unproductive.

132 There are, of course, terms in the Institutes which cannot be understood without help from outside – see, eg, the reference to "interdiction of fire and water" in *I* 1 16 2 – but such terms are few. The former (if not the current) policy at English universities such as Oxford, of requiring all students of Roman law to read the original texts, is an excellent one. Less appropriate in this country today would be the concomitant English insistence on reading the texts in Latin, and on the use of commentaries: see Lawson *Studi Koschaker* vol II (1954) 277–278.

133 Bryce 637.

sense of the wholeness and refinement of the Roman law. He will then have studied the law in precisely the manner envisaged by Justinian himself,[134] and will ultimately make a better lawyer for it.[135]

Justinian has been frequently and vehemently criticised for prohibiting all commentaries on his codification. Such criticism, it is amusing to note, usually comes from those whose business it is to produce commentaries. The emperor's words[136] are worth hearing, for they express, succinctly and precisely, the argument that is raised here in relation to these commentators:

> "No skilled lawyers are to presume in the future to supply commentaries thereon and confuse with their own verbosity the brevity of the aforesaid work, in the way that was done in former times, when by the conflicting opinions of expositors the whole of the law was virtually thrown into confusion."

Inevitably, these prescient words fell on deaf ears, and even in the emperor's own lifetime, the prohibition proved impossible to enforce. But Justinian was right in principle, at least in relation to the Institutes. Even Lord Mansfield's famous advice to the Duke of Portland[137] goes too far.

The treatment by modern positivist writers of the all-important opening title of the Institutes affords a vivid illustration of how they have betrayed the spirit of the Justinianic law. That title will now be considered.

Justinian begins with his celebrated definition of justice: the set and constant purpose which gives to every man his due.[138] It is here, in this title and in this definition, that the broad conceptual and jurisprudential groundwork of the Institutes is to be found. It is here, rather than in subsequent titles dealing with concrete rules of positive law, that a commentary which illuminates the meaning of the text may assist the student. Yet, ironically, it is precisely here that most modern commentators are silent. Careful study of Justinian's concept of justice, derivative though it may be, would be of immense value to the law student in a society beset with corruption and crime. But for proper treatment of the definition,

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134 *I* 1 1 2; *C* 3 1 8.

135 This method of teaching law, which relies on original texts and spurns almost all commentaries, glosses and scholarly controversies, would perhaps not lend itself to teaching contemporary law courses: there the student cannot dispense with technical detail. (Even so, modern private law courses are far too greatly concerned with technicalities at the expense of the great values of reasonableness and justice, which alone lend respectability to a legal system.)

136 *Constitutio deo auctore* s 12 (transl Watson). That the words quoted may be those of Tribonian rather than of Justinian himself is of little consequence in the present context.

137 The advice was to "read and study Justinian's Institutes without any other comment than the short one of Vinnius" (see Fifoot *Lord Mansfield* (1936) 29). But translations of this commentary are not readily available; worse, it is neither short nor easy to read. Van der Linden (*Koopmans handboek* transl Juta 4ed (1904) xxxviii) regards Vinnius's commentary as extensive and abstruse, and adds that it must be reserved until one has become familiar with the elementary principles of law contained in the Institutes. It is central to the case presented in this article that, for purposes of teaching introductory courses in Roman law, commentaries are tolerable only if, and to the extent that, they illuminate aspects of natural law (namely justice and reasonableness) which are latent in the texts of the Institutes. Mere additions of technical detail are generally inadmissible.

138 *I* 1 1 *pr* (transl Moyle). This definition, of course, predates Justinian; it can be traced back to Ulpian, Cicero and, ultimately, Plato. Its influence, even today, is far from exhausted: see Watkin "Justice and *Lear*" 1995 *Journal of Legal History* 328–329.

she will search in vain through the standard modern primers. Instead, she will have to turn to writers of earlier ages.[139]

Justinian's definition, in the first place, lays emphasis on the immutable nature of justice; as Wille[140] reminds us,

> "justice never changes; it is perpetual and everlasting. Just as accuracy and truth never vary, so the conception of honesty and of the other attributes are ever the same".

Secondly, to the reader whose only previous exposure to Roman law has been through the medium of modern text books, the choice of justice as the opening topic of the Institutes may well come as a surprise. Justinian, unlike the moderns, does not begin by inflicting fifty-odd pages of Roman legal history on the hapless student.[141] And rightly so, for the Institutes enshrine principles of law and justice capable of nourishing the mind of the student in any society in any age.

This is not to suggest that Justinian lacked regard for history. He did not, and he frequently alludes to Greek literature and law, as well as to earlier Roman jurists, emperors, enactments and legal institutions. Yet, for all that, the presentation of the law in the Institutes is essentially ahistorical: Justinian plunges into his definition of justice in *I* 1 1 without so much as a glance back into the past. Later on, it is true, we do find flashbacks in which the law of earlier ages is set forth. But the vital point to note is that the references to Roman legal history in the Institutes are invariably contextual: historical perspective is given only where and to the extent necessary to illuminate the student's understanding of Justinian's law reforms.[142] In this way, continuity, flow and interest are maintained, and the strictly legal character of the work is not compromised.

Having laid down definitions of justice and jurisprudence[143] (which latter term, it may be noted in passing, turns out to have a meaning far removed from

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139 The obvious and obligatory starting-point for study of this definition is the first two books of Plato's *Republic* (331–369). For more recent treatment, see Pufendorf *On the duty of man and citizen according to natural law* 1 2 12–15, and the lucid explanation by Voet 1 1 7–8.

140 Wille "The definition of law" 1944 *SALJ* (hereinafter Wille) 178. See further Voet 1 1 7; Van Leeuwen *Censura forensis* 1 1 1 1; Huber *Heedendaegse rechtsgeleertheyt* 1 1 2 7.

141 The latest primer to appear in English is Borkowski *Textbook on Roman law* (1994). In this book, the preliminary sections, comprising an historical introduction, the sources of the law and Roman litigation, run to no fewer than 75 pages. Similarly in Van Zyl *History and principles of Roman private law* (1983) (hereinafter Van Zyl), the introductory section on the history and sources of the law occupies 78 pages. Note the striking parallels between the opening title of the Institutes and another famous work, also intended for students of law, namely De Groot's *Introduction to Dutch jurisprudence* 1 1 1–6: De Groot, like Justinian, opens, not with history, but with crisp definitions of justice and jurisprudence.

142 See eg *I* 1 2 2–5; *I* 1 5 3; *I* 1 6 7; *I* 1 12 6; *I* 1 20 *pr*, 1–3; *I* 2 10 1–3; *I* 3 23 2. According to Birks and McLeod *Justinian's Institutes* (1987) (hereinafter Birks and McLeod) 17, the bits of history which do survive in Justinian's Institutes are there "by inertia or for propaganda". It is difficult to support this view, for the concise and strictly contextual references to the historical background in the passages cited perform a useful function, by lending depth and perspective to the student's understanding of the Justinianic law. But the total amount of historical material contained in the Institutes as a whole is minimal, and that is exactly as it should be.

143 *I* 1 1 1.

its debased modern secular signification), Justinian proceeds to establish a simple, practical and cogent policy on the teaching of Roman law. It is a policy which is as valid now as it was then. Here is the passage which, for any teacher of Roman law, is surely the most important in the Institutes:[144]

> "[O]ur object being the exposition of the law of the Roman people, we think that the most advantageous plan will be to commence with an easy and simple path, and then to proceed to details with a most careful and scrupulous exactness of interpretation. Otherwise, if we begin by burdening the student's memory, as yet weak and untrained, with a multitude and variety of matters, one of two things will happen: either we shall cause him wholly to desert the study of law, or else we shall bring him at last, after great labour, and often, too, distrustful of his own powers (the commonest cause, among the young, of ill-success), to a point which he might have reached earlier, without such labour and confident in himself, had he been led along a smoother path."

Words of wisdom! Yet, astonishingly, this clear and authoritative direction has been widely ignored in the present age. For proof of that, a glance at almost any modern textbook on Roman law will suffice: the mass of technical detail, cross-references, and commentary that too often confronts the beginner stands in sharp contrast to the clarity, brevity and precision of the words of the Institutes themselves. The vexed matter of commentaries has already been touched upon, but the question persists: Why will we not allow the original texts to speak for themselves? The passage just quoted is direct textual authority for the use of the Institutes alone, unadorned and unglossed, as a primer for students of Roman law. As Lawson[145] reminds us, the Institutes are easily read and understood. In my own experience, the validity of Justinian's direction has been amply confirmed by student response in the lecture room.

If Justinian's clear policy on legal education is not enough to disarm the modern commentators, a strong affirmation of the validity of his approach comes from the heart of the English legal tradition. Blackstone speaks:[146]

> "[An academical expounder of the laws] should consider his course as a general map of the law, working out the shape of the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged . . . 'in tracing out the originals and as it were, the elements of the law'. For if, as Justinian has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay and despondence."

Blackstone correctly lays emphasis on teaching students the skeletal framework of the law. The framework upon which Western systems of private law have been built is the institutional scheme, invented by Gaius[147] and adopted by Justinian.

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144 In *I* 1 1 2 (transl Moyle).

145 II 115.

146 Blackstone *Introduction* 1 35. For a useful evaluation of Blackstone's great institutional work and, in particular, of the striking parallels between that work and Justinian's Institutes, see Barnes's introduction to the first book of the *Commentaries* (1983) (hereinafter Barnes) 14–23.

147 A remarkable re-evaluation of Gaius has been taking place in recent decades. There are Romanists who now reject the hackneyed view that he was a competent but undistinguished

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Continuing our examination of the opening title, we come now to a text which is the very foundation, not only of the Justinianic Roman law, but of all Western law. *I* 1 1 3 reads:[148] "The precepts of the law are these: to live honestly, to injure no one, and to give every man his due."

In these three precepts, expressed in eight short words of Latin text, is enshrined the entire ethical content of the Justinianic law. The ethical juice of the law, distilled here, permeates the whole of the Institutes.

The student who comes away from a first course in Roman law with little more than a full appreciation of these timeless precepts has spent his time well. Conversely, the student who has mastered the intricacies of *iusta causa traditionis* and of the *condictiones*, but has not assimilated Justinian's three precepts, has expended his efforts in vain.[149]

Let us recapitulate: the primary aim of teaching Roman law is to inculcate in the student the timeless values of natural law, to wit truth, justice and reason. University courses in legal ethics, where they exist, have generally failed to produce graduates imbued with these values. The result is our modern breed of legal practitioners who are, deservedly in some (though by no means all) cases, viewed by the public as grasping, amoral technicians.[150] We have come a long way from the great classical Roman jurists: while they probably did not surpass our foremost modern lawyers in acuteness of intellect or forensic ability, they did regard themselves as ministers (in the sense of priests) of justice.[151] It was

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provincial jurist and teacher. See Honoré *Gaius* (1962); Birks and McLeod 16–18. The verdict of those writers is that Gaius, as inventor of the institutional scheme, which is nothing less than the framework for Western systems of private law, must now be recognised for what he was – a genius.

148 Moyle's translation.

149 Biondo Biondi's memorable eulogy of the immortal precepts (in *L'Europa e il Diritto Romano: Studies in memory of Paolo Koschaker* vol II (1954) 381 (hereinafter Biondi) 397) deserves to be widely heard: "Il genio giuridico romano ha fissato le basi fondamentali della convivenza umana, le quali, per la loro universalitá, sono veritá scientifiche. La massima astrazione, la sintesi dell'ordinamento giuridico di ogni tempo e di ogni luogo, é rachhiusa in quei *tria praecepta iuris*, da cui talvolta l'umanitá ha voluto decampare: *honeste vivere, alterum non laedere, suum cuique tribuere*. Saranno anche attinti dalla filosofia greca o stoica, ma é la qiurisprudenza che li ha elevato a precetti giuridici, di cui l'ordinamento giuridico non é che sviluppo e adattamento all' infinito. Piú che scolpiti nella pietra o stampati nella carta, dovrebbero essere sempre impressi nella nostra mente, come guida di ogni nostro atto, privato o pubblico. Sará anche diverso *l'honestum*, come potrá avere diverso riferimento il *suum* ed il *laedere*; ma se trascuriamo come anticaglie quei *praecepta* avremo quel discordine, che travaglia il mondo contemporaneo e puó preludiare al regno della bomba atomica. La scienza giuridica romana, appunto per la sua alta funzione, insegna l'armonia tra libertá ed autoritá, la coesistenza del particolare con l'universale, il superamento progressivo verso un principio di universalitá." See further on the precepts Voet 1 1 11; Wille 175–176 178. The latter writer reminds us (175) that "the changes which occur take place only in subsidiary rules, and not in fundamental principles. The fundamental principles regulating human conduct remain the same forever".

150 See text to fn 85–92. For very recent expressions of the mounting concern in the attorneys' profession, see Editorial "Guarding the guards: Time to talk about professional ethics" 1996 *De Rebus* 476; Whittle "Moving the ethics goal posts" 1996 *De Rebus* 477; Radloff "Professional ethics" 1996 *De Rebus* 524–528.

151 See Biondi 396.

their devotion and service to justice that set them apart. This is the context in which the importance of the three precepts must be weighed.

It is sometimes forgotten that Justinian's precepts lie at the root of English, as much as of Roman law: Blackstone[152] adopts them, calls them the first principles of the law of nature, and reminds us that Justinian has reduced the whole doctrine of the law to these three general precepts.

Many modern writers dismiss the precepts as a commonplace of Greek philosophy, as nothing more than the promptings of morality, to be sharply distinguished from rules of positive law. That, of course, is the positivist credo, the way of separation and fragmentation: at its door must be laid at least partial responsibility for the crime and dishonesty which plague us in the late twentieth century.[153] But even if one were to accept the absurd positivist division between law and morality, it would still not be possible to dismiss these precepts as mere promptings of morality: they were indisputably rules of positive law, by reason of the fact that the Institutes in their entirety were given the force of imperial legislation. Blackstone, no less than Justinian, treats the precepts as rules of law. Should we not follow suit today?

These precepts, it is interesting to note, are cast in the form of duties, whereas our age is predominantly concerned with rights.[154] The difference is significant, and it is tempting to ask which approach is better. The reader is left to ponder the question, consideration of which lies beyond the province of this article.

The student who has thoroughly assimilated these precepts will later bring something of exceptional value to his practice of the law, something which can benefit and uplift his community. And the need for that is indeed great, here in Africa as elsewhere. If justification were really needed for the direct study of the Institutes by modern students, the opening title alone provides enough of it.

Against this background, the treatment of *I* 1 1 by many modern commentators makes sorry reading. They tend to dismiss as a rhetorical flourish or vague generality any passage which extends beyond the range of their blinkered vision. They are well able to detail with meticulous accuracy the flaws, obscurities and inconsistencies which undoubtedly abound in the *Corpus iuris*. But seldom do their writings acknowledge the grandeur of Justinian's conception and the scope of his vision.[155] Perhaps all this is simply the mark of the sceptical and ungenerous mood of our times.

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152 Blackstone *Introduction* 2 40.

153 This is by no means to imply that Justinian's age was a model of probity and order. It certainly was not: see Norwich *Byzantium: The early centuries* (1988) 197–200 for a graphic description of the Niké riots, which marked the early phase of Justinian's reign. See further Pugsley *Justinian's Digest and the compilers* (1995) 1.

154 Witness the proliferation of bills of rights in modern constitutions, and of journals with titles proclaiming their overriding devotion to rights. Examples are not needed. Where are the bills of duties and the journals of human duties? Our new Constitution, to the credit of its drafters, does not overlook the importance of duties. S 3(2) of the Constitution of the Republic of South Africa Act 108 of 1996 provides: "All citizens are– (a) equally entitled to the rights, privileges and benefits of citizenship; and (b) equally subject to the duties and responsibilities of citizenship."

155 I am reminded (but have been unable to trace the source) of an anecdote concerning Winston Churchill. A visitor to his country estate was shown a stone wall which Churchill had built with his own hands. The visitor, after examining the wall, proceeded

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I will now consider a small selection of views on this title, culled from modern English-language textbooks on Roman law.[156] Perhaps the most sweeping rejection of the timeless values underlying the Institutes comes from Thomas, who says[157] of *I* 1 1: "In the main, this brief title is devoted to generalities of a banal character." He proceeds to point out that Justinian's definitions of justice and jurisprudence find close parallels in the "non-juristic" Plato and Cicero. The implication, typically positivist, is that such definitions are not to be taken seriously for purposes of rigorous legal scholarship. Worse, Justinian's important educational policy[158] requires, for Thomas, no comment. And Justinian's three precepts of law,[159] the very wellspring of the Institutes, are according to Thomas principles which find their realisation in rules of law rather than such rules themselves. This is a blatant denial of Justinian's declaration that the Institutes have "the fullest force of our constitutions".[160] The last section of the title,[161] while it sets forth the key distinction between public and private law, is of less importance than what has gone before. Yet, ironically (if predictably), Thomas finds that this text does raise issues which are "deserving of comment".

Lee[162] dismisses Justinian's definition of justice as a "commonplace of the schools of philosophy". Far from seeing this definition for what it is – a rule of law – Lee treats it as "a definition of a moral virtue, an attribute of human character". Justinian's definition of jurisprudence ("the knowledge of things divine and human; the science of the just and the unjust"[163]) receives similar treatment. This definition, according to Lee,[164]

> "if it is to be regarded as anything more than a rhetorical flourish, may be a tradition from a time when the sanctions of law and morality were not sharply distinguished".[165]

In similar vein are the views of Sandars[166] and of Moyle,[167] who brushes aside the opening titles of the Institutes as being "merely introductory". Birks and McLeod,[168] finally dismiss *I* 1 1 as "a short preface which deals, rather blandly and briefly, with some jurisprudential generalities".

Given the critical importance of *I* 1 1, its treatment by these and other modern commentators amounts to a gross betrayal of the very foundation of the *Corpus iuris*. That foundation is the notion that there can in truth be no separation between law and morality, or between law and justice.[169] The denial of the

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to point out certain flaws in its construction. His host retorted: "Any fool can see what's wrong with it, but can you see what's right with it?"

156 This is by no means to suggest that such views are confined to English writers: a modern Italian Romanist noted for his strongly positivist standpoint was Albertario, to mention but one.

157 *The Institutes of Justinian* (1975) 3.

158 *I* 1 2: see text to fn 144.

159 *I* 1 3.

160 Prooemium to the Institutes 6 (transl Moyle).

161 *I* 1 4.

162 33–34.

163 *I* 1 1 transl Lee.

164 33–34.

165 The sequel to this passage (see Lee 34; 38–39) is in similar vein.

166 5.

167 62 98.

168 13.

169 See text to fn 38–55.

essential unity of these concepts, the attempt to divorce law from the eternal spiritual values that are its very lifeblood, these are the hallmarks of a failed modern jurisprudence.

So much for the first title of the Institutes. In the second, we find this important description of natural law:[170]

> "[T]he laws of nature, which are observed by all nations alike, are established, as it were, by divine providence, and remain ever fixed and immutable . . ."

This authoritative formulation is fully consonant with conceptions of natural law considered in the first instalment of this article, such as those of Cicero,[171] Christian Thomasius,[172] and Blackstone.[173]

But again, the modern commentators, whose formidable industry has done so much to elucidate the letter of the *Corpus iuris*, are not in harmony with the spirit which enlivens and informs that work. Take Buckland,[174] who says that the conception of natural law as universal was for legal purposes "no more than ornament to discussion". We are also told that "the notion is of small importance in legal discussion"; that "*ius naturale* was not law" (again in direct conflict with the fact that the Institutes as a whole enjoyed the full force of law); and that the cognate notion of *aequitas* "figures in juristic texts in so many senses that it is of no great use". These comments illustrate the inability of positivist dogma to accommodate such vast concepts as *ius naturale* and *aequitas*. These concepts cannot be confined within the boundaries of a single, narrow definition; they cannot be measured with slide-rule exactitude, but their sense and meaning stand clear in the heart.

Lee's view of *ius naturale*[175] is close to Buckland's. Nicholas[176] says that, severely practical as the jurists were in their attitude to law, they may well in their writings have ignored the philosopher's *ius naturale* as mere speculation. Even where the idea of nature or natural reason does appear, it is "purely ornamental".

One modern writer who does state the true position is D'Entréves[177] who acknowledges the vital importance of the philosophy underlying the *Corpus iuris civilis*. He adds:

> "A further confirmation of that importance is derived from the very opening of the Digest, where it is said that the jurist, in order to be a minister of justice, must also be a follower of 'true philosophy'. The great jurists of the golden age of Roman law, says a recent historian (Rommen), were for the most part also philosophers. Under the influence of Stoic philosophy the doctrine of natural law passed into Roman law – to be handed on to later thought."

Nicholas, like Buckland, also clearly implies that natural law is of little practical use. This common complaint is, we have seen, without foundation.[178] The value

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170 *I* 1 2 11 transl Moyle.
171 Text to fn 67.
172 Text to fn 72.
173 Text to fn 73.
174 Buckland II 54–55.
175 38–89.
176 56.
177 27.
178 See fn 75–78 and text thereto; fn 118–129 and text thereto.

of the Institutes for the modern student lies precisely in the book's treatment of natural law, not as an abstraction, but in action, operating in the daily lives of ordinary people. Natural law, as the Roman jurists conceived it, is a vital force, practical and alive. The examples given earlier[179] afford evidence of that. By ousting natural law from its rightful station at the heart of the *Corpus iuris* and relegating it to a small, separate corner of their works, the commentators have distorted the Justinianic law; they have stripped it of its philosophical underpinnings.

This brief survey of modern views on Justinian's definitions of justice and of natural law reinforces the conclusion that the true basis of the Institutes has today been largely forgotten. Celsus reminds lawyers[180] that knowing laws is not a matter of sticking to their words but of grasping their force and tendency.

But modern perceptions notwithstanding, Justinian has little to fear: his work, flawed though it may be, has already survived for almost 1500 years; it will be remembered and studied long after today's carping criticisms of it have been forgotten. Many of these criticisms seek respectability under the guise of rational analysis and rigorous academic scholarship. But they tell us more about the mood and attitudes of the present age than about Justinian's achievement. We have laboured too long under the tyranny of the technicians.

I turn now to examine a selection of modern views, both in favour of and opposed to the teaching of Roman law through Justinian's Institutes. Ankum[181] points out that if this book were again to become widely used in law schools as the basis for teaching introductory courses in Roman law, reciprocity would be a significant benefit. That writer continues:

> "[S]uch an introductory course could excellently be followed in another country, and the originating faculty could easily acknowledge the examination passed at the foreign faculty."

Lee[182] points out that of the many books written in English on Roman law, most are soon (and deservedly) forgotten. He continues:

> "To me at least it seems lamentable that anyone should be credited with a knowledge of Roman law who has not read Justinian's Institutes. If students cannot or will not read the original, they may, perhaps, be induced to read a translation."[183]

Watson's remarks[184] are especially pertinent to the teaching of Roman law in this country:

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179 See fn 120–131 and text thereto.

180 *D* 1 3 17.

181 223.

182 vii.

183 But Lee then adds, without giving reasons, that the study of the Institutes demands an introduction and a commentary. The question of commentaries has already been dealt with (see text to fn 123–124 136–137 144–145). Their production may occasionally benefit their authors, but seldom do they illuminate the student's understanding. One notable exception, notwithstanding the criticism levelled against it earlier, is Nicholas *An introduction to Roman law*. This book offers valuable insights and does serve to broaden the reader's understanding of Roman legal concepts. Of how many modern primers can that be said?

184 62.

> "Inevitably, sooner or later – and probably sooner rather than later – any society that regards part of the *Corpus Iuris Civilis* as the law of the land or directly of importance in discovering the law, gives a place of particular honour to Justinian's *Institutes*. The reason is not that the law in the *Institutes* is more satisfactory for practice or more satisfying to the intellect than that contained in the other parts of the *Corpus Iuris*; it is purely educational. In territories that adopt the *Corpus Iuris*, Roman law studies dominate legal education; and in the process, great stress is placed on the *Institutes*. One explanation is that, on the one hand, the *Institutes*, like all of the *Corpus Iuris*, were issued as statute, and, on the other, they were intended as a student's elementary textbook . . . It is only to be expected that, with the resurgence of Roman law studies, the *Institutes* take over their old role of the student's first law book."

Birks and McLeod[185] extol the institutional scheme itself:

> "The success and subsequent influence of the *Institutes* spring above all from their having found a way of achieving a bird's eye view of the law. It is not something to which we pay much attention these days. We throw courses at the student and, at the end, the whole law will be for him the list of courses which he took, set in a rather larger list of options that he might have taken if he had chosen differently. Some courses on the list owe their place precisely to the Justinianic scheme . . . We do not spend much time relating one part with another . . . One [point about this scheme] is the strength of its grip on the law of modern Europe.
>
> Like many great intellectual advances, the institutional scheme looks extremely simple. It starts from a trichotomy: all the law is about persons, things or actions. The *Institutes* is in four books. But conceptually the division into four means nothing. It is the division into three which matters . . .
>
> The heads of the trichotomy are divided and subdivided. Persons are free or slaves. Free persons are either free-born or freed, and either independent or dependent. Independent persons either have guardians or supervisors or they are completely their own masters. The . . . order is always coherent. At its best, the system can achieve quite remarkable feats of location and classification."

These writers conclude[186] that the institutional scheme was a map of the law and that the Institutes were to be the means of ordering the law library.[187]

The Institutes are a repository of natural law, and it is primarily this feature, so I have argued, that makes the book indispensable to students taking a first course in Roman law. Yet it cannot be denied that the institutional scheme is a jewel of almost equal price and the student receives it as part of the same package. Thus the student who seizes his opportunity fully will in the course of his study of the Institutes, assimilate the values of natural law in their practical application and,

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185 13.

186 *Idem* 15.

187 This can be appreciated only by comparing the order of the Institutes with the lack of order in the Digest and the Codex. The 432 titles in the Digest are not in carefully arranged genera and species. The order is pragmatic, inherited from the past . . . The role of the Institutes was to give the student a coherent framework. Once his mind was formed, he could expand this or that section at will. There was no need for the rest of the law library (ie the Digest and the Codex) to be systematic. The enormous influence of the book is due to its having virtually monopolised that role ever since (Birks and McLeod 15–16). Blackstone's adoption of the four-book arrangement of Justinian's Institutes is described in Barnes 14–23. See further, on the merits of the institutional scheme: Bray 54–56; Sohm 102; Lawson II 124. Bryce (632–633) appears, strangely, to overlook Justinian's institutional scheme altogether. See also Schultz *Principles of Roman law* (1936) 19.

at the same time, acquire a thorough grasp of the institutional scheme. There could surely be no better springboard for the practice of the law than this. To withhold it from our students would be folly.

Buckland,[188] predictably, does not share this enthusiasm for the Institutes: to him, that work (unlike the Digest) is a very dull book, which is made tolerable to students only by a considerable amount of explanation and amplification in the form of notes and commentary. The undeniable fact that the Digest makes for livelier reading than the Institutes is irrelevant in the present context: the Digest is not a work for beginners. What is relevant is the fact that the Institutes, an original text with its concomitant qualities of brevity and directness, is considerably more appealing to the student than most of the works of the modern commentators, Buckland's own works included.[189] Moreover, Buckland's view runs contrary to my own experience in the classroom.

I would not wish to give the impression that the use of the Institutes in teaching Roman law is free from difficulty. The contrary is true, and the teacher who elects to follow this path will need to make some hard decisions. To begin with, there is the question of translations. Given that this article calls for the study of Justinian's Institutes in translation, there are at least two questions in need of answers: Is it possible to study the book adequately and effectively through a translation? If it is possible, which English translation should be chosen?

Lawson[190] convincingly disposes of the first question:

> "[O]nly good Latin scholars can hope to carry on advanced work in Roman law: but one can go quite a long way without it . . . In any case, as Professor RW Lee has said, many persons have got a good deal out of the Bible without knowing either Hebrew or Greek. Roman law too is strong enough to stand fairly close study in a good translation; and there are now excellent translations of enough Roman law texts for this intermediate stage of Roman law study. It would be a pity if purists were to encourage the view that if Roman law cannot be studied in Latin it had better not be studied at all. The texts are not poems half of whose meaning flies away in translation."

Which translation should be used for teaching purposes? A number of sound, accurate and reliable English translations of the Institutes have been made, but few are currently available.[191] Like Birks and McLeod,[192] I have found Moyle's

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188 Buckland I 122–123. For more of the same, see Buckland II 46.

189 Buckland's mastery of the Roman texts, his exceptional scholarship, and his meticulous attention to detail do nothing to detract from the force of this view. Newark 648–658 also paints a gloomy picture of the Institutes. That writer's litany of laments not only lacks substance, but actually misrepresents the character of the book; it need not detain us.

190 20.

191 For a recent survey of these translations, see Birks and McLeod 27–28. This work and Lee *Elements of Roman law* (1956, reprinted 1986) are the only complete or near-complete English translations currently in print. Lee's translation is clear, accurate and readable. But, unlike other modern translators such as Moyle, Sandars, Thomas and Birks and McLeod, he has changed the sequence of the titles in order "to accommodate it to the order of treatment in the commentary". This subordination of text to commentary goes far beyond merely appending a commentary to the translated text as originally ordered, and is unacceptable. Any decision to change the order of treatment or to omit any portion of the work (on the grounds, eg, of limited teaching time or a change in syllabus) must surely be left to the teacher who adopts a particular translation. Mention

continued on next page

translation[193] to be very good. It is a clear and accurate translation which, despite some archaic terminology, has aged remarkably well. It is, in my experience, accepted and understood by modern South African students.

Another problem confronting the teacher who adopts the Institutes is the choice of topics to be taught. What should be included in an introductory course in Roman law, given the invariably limited teaching time available in modern law curricula? In my experience, the whole of the Institutes cannot be studied in a single academic year in which only two lectures a week are allocated to Roman law. It follows that the teacher, in devising a syllabus which can be completed within these time constraints, while also allowing a reasonable amount of time for discussion of the texts in class, will need to be selective. The choice of topics for inclusion will inevitably vary from one teacher to another. The constant element in all cases, however, is the aim, which must always be to discover the spirit, and not merely the letter of the Roman law of Justinian.

Yet another difficulty facing both teacher and student of the Institutes is the typically Roman failure to define such fundamental legal concepts as "person", "thing", "ownership", "servitude" and many others. This habit, so baffling and infuriating to the modern legal mind, points to a radical difference in approach between the Roman and the modern approach to the study of law: we insist on extensive theoretical training, including years of study at university, as a preliminary to the practice of law. Roman legal education, by contrast, appears to have been far more practical from the outset, certainly during the classical period, and perhaps even in the age of Justinian. Nicholas[194] reminds us that it is not the Roman habit to formulate the problems which the law has to meet: the purpose of legal rules is left to emerge from their practical working.

How is the modern teacher of the Institutes to overcome this lack of fundamental definitions? The temptation, of course, is to supplement the text with notes in order to cure the deficiency. This temptation is not easily resisted, but to succumb to it would be to swamp the text with extraneous matter, and so defeat the purpose of the exercise. The better course, I would suggest, is for the teacher to supply the essential definitions and explanations orally in lectures.

It is most important that the teaching of the Institutes be related to the needs and circumstances of law students in the new South Africa. To an ever-increasing extent these students tend to be less than fully literate. In many cases, English is not their first language. Supplementary tutorials can play a vital part in helping such students to cope with the study of the Institutes.

4 CONCLUSION

The "why" and the "how" of teaching Roman law are large questions which continue to provoke controversy and to stimulate debate among Romanists. Here is Zimmermann's recent formulation of these questions:[195]

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should also be made of Cracknell and Wilson *Roman law – origins and influence* (1964), which includes (44–142) an abridged translation of the Institutes.

192 27.

193 *The Institutes of Justinian* (1913).

194 142.

195 Zimmermann 1995 *Journal of Legal History* 21.

> "What should be the purpose of teaching, and of studying, Roman law in a modern university? Do we have to concentrate on classical Roman law or on the *ius commune* based on it? Should the emphasis lie on elegance or on utility? Should the study of legal history be pursued in faculties of law or does it rather belong to the domain of (proper) historians? These are some of the important questions raised in a recent controversy between my Dutch colleagues Hans Ankum and Willem Zwalve. Roman law is doomed, warns Zwalve, if it continues to be taught as a purely historical subject . . ."

And so the debate goes on and on. But where does this article take its stand?

We have in recent centuries forgotten that a civilised legal order consists of more than a body of rules which are continually changing in response to changing circumstances: those rules must rest on a secure foundation of truth, justice and reason. These values are absolute: they do not change with time or place.[196] The hallmark of this age is the poisonous relativist fallacy[197] that truth, justice and reason are no more than a matter of personal belief and opinion, that they vary from person to person, from place to place, and from time to time. In falling into this error, we have ignored the wise authority of Plato, Cicero, Gaius, Blackstone and so many others.

One useful corrective, at least in our own field of law, would be to remind our students and ourselves of these eternal values through the study of Justinian's Institutes. Such a study must be anchored in the spirit rather than the letter of the texts. If Roman law were to be widely studied in this manner, there would be every reason to share Stoop's[198] confidence in its future, and his belief that it can serve as a forensic tool to remove injustice. The role envisaged here for Roman law is, therefore, a highly practical one, directed to the present and pressing needs of the country and the age.

Let us reclaim the directness and simplicity of Justinian's great work, so that the voice of the Byzantine lawgiver, free from distortion, may once again be heard in our lecture halls. There is not a moment to lose.

Let us begin.

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196 Gaius reminds us (*D* 1 1 9) that every system of positive law can be divided into two parts: some rules are changeable because they depend on men's wills: others are universally accepted and immutable since they depend on reason. See further fn 95 and text thereto; Bryce 564–545. On the historical persistence of natural law doctrine, see Rommen *The natural law* (1947) quoted by Brown (ed) *The natural law reader* (1960) 65.

197 See fn 75.

198 184. See further fn 83–94 and text thereto.

Oorbevolking van gevangenisse*

Stephan Terblanche
BJuris LLD
Professor in Straf- en Prosesreg, Universiteit van Suid-Afrika

Bobby Naudé
BJuris LLB
Lektor in Straf- en Prosesreg, Universiteit van Suid-Afrika

SUMMARY

It is trite that our prisons are overcrowded. The question is whether this fact should influence a court's decision on the appropriate sentence, especially since we now find ourselves in a human rights era. The Constitution requires that punishment shall not be cruel, inhuman or degrading and also entitles prisoners to certain rights, including the right to be provided with adequate accommodation.

South Africa has one of the highest per capita prison populations in the world, and by the end of 1995 our prisons were 19% overcrowded. This situation is not the same throughout the country, however. A substantial increase over the last number of years in the proportion of long-term prisoners and prisoners awaiting trial, is also obvious. Overcrowding is not simply a matter of space. It also impacts on matters such as the availability of ablution facilities, hospital cells, kitchens and hot water. Most prisoners in South Africa are not so much concerned about the lack of space in their cells, as about the lack of these other facilities, which is exacerbated by overcrowding.

The conditions of incarceration can be so bad that the imprisonment may become cruel and inhuman. In the United States of America the courts do not regard overcrowding as unconstitutional *per se*, but it can be a factor which, together with the other conditions of incarceration, lead to imprisonment becoming cruel and inhuman. Prisoners lose only those basic rights which are inevitably lost as a result of incarceration.

Our courts will therefore have to take the conditions in prison into account when sentencing offenders, because a court, as the defender of human rights of all citizens, dare not be instrumental in unfairly depriving persons of their human rights, by sentencing them to serve a cruel and inhuman punishment.

INLEIDING

Behoort die getal mense wat op enige gegewe tyd in tronke aangehou word, enige invloed te hê op die vonnis wat die howe oplê? Hoofregter Rumpff het hierdie vraag in 1979 soos volg beantwoord:[1]

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* Ons bedank graag vir Pieter Wiehahn vir sy hulp met die opspoor van gesag en statistiek. Ons bedank ook die Departement van Korrektiewe Dienste vir hulle bystand ten einde hierdie navorsing te kon doen. Die standpunte wat hierin uitgespreek word, is natuurlik ons eie.

1 In *S v Holder* 1979 2 SA 70 (A) 76H–77A.

> "Die konstatering van die feit dat die Republiek se gevangenisse oorvol is, en dit 'n ekonomiese las op die Staat plaas, is feite wat niks te doen het met die vraag wat 'n gepaste vonnis in 'n besondere geval is nie."

Dit het tyd geword om hierdie standpunt te herbeoordeel.

Twee sake word in die aangehaalde *dictum* aangeraak. Eerstens word verwys na die oorbevolkte toestand van Suid-Afrika se gevangenisse en dat dit 'n ekonomiese las op die staat plaas. Aan hierdie feite het niks verander nie en die mate waarin dit steeds geld, sal in die volgende paragrawe verduidelik word. Die tweede aspek is hoofregter Rumpff se mening dat hierdie feite niks te make het met die vraag of gevangenisstraf gepas is nie. Ons sal veral aan hierdie standpunt aandag gee.

Die grootste aanpassing wat ons reg sedert 1979 ondergaan het, lê sonder twyfel in die aanvaarding van 'n menseregtebedeling wat by wyse van die Grondwet van die Republiek van Suid-Afrika, 1993[2] in 1994 in werking getree het. 'n Aantal regte wat die potensiaal het om alle gevangenes te raak, is in die interim-Grondwet erken en word ook in die nuwe Grondwet[3] vervat. Een van die mees basiese van hierdie regte is dat elke mens die reg het op die beskerming van sy of haar waardigheid.[4] Daarby mag die staat geen persoon aan "wreedaardige, onmenslike of vernederende" behandeling of straf onderwerp nie.[5] Geen vonnis van gevangenisstraf mag dus op so 'n wyse afgedwing word dat dit as wreedaardig, onmenslik of vernederend beskou kan word nie. Verder het elke persoon die reg om onder menswaardige omstandighede aangehou te word, wat minstens die voorsiening van voldoende akkommodasie, voeding, leesstof en mediese behandeling op staatskoste insluit.[6]

Buiten die feit dat voldoende akkommodasie voorsien moet word, is dit maklik denkbaar dat 'n gevangenis só vol kan raak dat die omstandighede waarin die gevangenes aangehou word nie meer menswaardig sal wees nie.[7] Sodra toestande in gevangenisse hierdie punt nader, is die dag waarop 'n gevangene by die konstitusionele hof sal aansoek doen om die aanhouding in daardie oorvol gevangenis ongrondwetlik te verklaar, op hande. En sommer so op die oog af wil dit lyk of hoofregter Rumpff se standpunt dat die oorbevolking van die gevangenisse nie 'n faktor is wat die toepaslikheid van 'n vonnis kan beïnvloed nie, nie die menseregte-eeu sal kan oorleef nie.

Verskeie vrae kan uit hierdie paar inleidende gedagtes geopper word: is dit *per se* in stryd met die bepalings van die Grondwet indien gevangenes in 'n oorvol tronk aangehou word? Wat word werklik met 'n "oorvol" gevangenis bedoel? Aan watter maatstawwe word dit gemeet? Wat is die praktiese uitvloeisels van 'n oorvol gevangenis en hoe raak dit Suid-Afrikaanse gevangenes werklik? En, les bes, hoe sou die konstitusionele hof 'n aansoek van 'n gevangene

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2 Wet 200 van 1993 (hierna "die interim-Grondwet" genoem).

3 Die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996.

4 A 10 van die 1996-Grondwet bepaal: "Elke persoon het 'n inherente waardigheid en die reg op respek vir en beskerming van hierdie waardigheid" (ons vertaling).

5 A 12(1)(e) van die 1996-Grondwet.

6 A 35(2)(e) van die 1996-Grondwet.

7 As hierdie omstandighede, op die feite geoordeel, nie menswaardig is nie, sal die aanhouding waarskynlik terselfdertyd ook in stryd met a 10 en 12(1)(e) wees (kyk *supra* vn 4 en 5).

wat in 'n oorvol gevangenis aangehou word, kon beoordeel en watter faktore sal waarskynlik by hierdie beoordeling 'n wesenlike rol speel? Ons sal in hierdie bydrae poog om antwoorde op hierdie vrae te bied of voor te stel.

DIE SYFERS

Op 31 Desember 1995 was daar 112 195 gevangenes in Suid-Afrikaanse gevangenisse. Die amptelike beskikbare akkommodasie is aangedui as 94 381. Dit het 'n besettingsyfer van 118,9 persent behels, of dan 'n oorbevolking van 18,9 persent. Die provinsiale oorbesetting het egter gewissel van 39 persent in die Noordelike Provinsie, tot slegs 4 persent in die Oos-Kaap.[8] Van die groter gevangenisse was Pollsmoor Maksimum Gevangenis die volste, teen 190 persent van sy amptelike kapasiteit.[9] Dit is dus duidelik dat die oorbevolking van gevangenisse nie landwyd dieselfde omvang toon nie. Dit is inderdaad gevaarlik om te sê dat die oorbevolking 'n *Suid-Afrikaanse* probleem is, eenvoudig omdat dit nie landwyd 'n eenvormige situasie vertoon nie.

'n Vergelyking van die huidige gevangenisbevolking met die syfers van die verlede is nogal insiggewend.[10] Twintig jaar gelede was daar alreeds 90 533 gevangenes in aanhouding. Tien jaar gelede was die syfer 108 392.[11] Dit is duidelik dat die gevangenisbevolking nie oor die laaste twee dekades wesenlik gestyg het nie. Van 1975 tot 1995 was die styging gemiddeld skaars 1,2 persent per jaar, wat swak vergelyk met die dramatiese styging in misdaad oor dieselfde tyd, asook met 'n bevolkingsgroeikoers van sowat 2,5 persent.[12] Die beskikbare akkommodasie het oor die afgelope tien jaar van 83 943 tot 94 381 toegeneem, dit wil sê 12,4 persent (of sowat 1,2 persent per jaar). In der waarheid sou die huidige akkommodasie omtrent voldoende gewees het vir die aantal gevangenes wat twintig jaar gelede in aanhouding was.

'n Maatstaf wat internasionaal gebruik word om 'n idee te gee van hoe groot die gedeelte is van 'n land se bevolking wat in aanhouding verkeer, is die aantal gevangenes per 100 000 van die totale bevolking. Hierdie syfer het in Suid-Afrika in die laat 1970's en vroeë 1980's 'n hoogtepunt bereik en was al so hoog as 423.[13] Suid-Afrika is inderdaad lank beskou as die land met die hoogste *per capita* gevangenisbevolking in die wêreld. Sedertdien het Rusland en die Verenigde State van Amerika ons verbygesteek,[14] en ons huidige koers van

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8 Syfers voorsien deur Department van Korrektiewe Dienste.

9 Sonder 'n verwysing na die groot variasie wat tussen verskillende gevangenisse en streke voorkom, sou geen ondersoek oor die oorbevolking van gevangenisse volledig wees nie. Die idcaal is 'n volledige ondersoek maar hierdie artikel is beswaarlik 'n gepaste forum daarvoor.

10 Al die syfers in hierdie paragraaf is bekom uit amptelike bronne, hetsy die departementele jaarverslae of van die Departement Korrektiewe Dienste self.

11 Hierdie syfers varieer aansienlik van jaar tot jaar en die gevaar bestaan altyd dat uitsonderlike syfers geneem word en afleidings dan daaruit gemaak word. Die betrokke syfers is egter gekies omdat dit wel die algemene tendens weerspieël.

12 South African Institute of Race Relations *Race Relations Survey 1994/1995* (1995) 6.

13 Vgl Terblanche "Sentencing in South Africa" (1995) 6(2) *Overcrowded Times* 12 – hierdie syfer (wat uit 1979/1980 dateer) is nie noodwendig die hoogste wat bereik is nie. In 1971 was hierdie syfer bv 417 (vgl *Verslag van die Kommissie van Ondersoek na die Strafstelsel van Suid-Afrika* (RP78/1976) par 5.1.6.1.37 – die "Viljoen-kommissie").

14 Mauer "Russia, United States world leaders in incarceration" (1994) 5(5) *Overcrowded Times* 9. Die koers vir Rusland was 558 en vir die VSA 519. Suid-Afrika het (volgens dié publikasie) op 368 gestaan en die derde plek ingeneem.

gevangesetting staan in die omgewing van 360. Die daling in hierdie koers is hoofsaaklik veroorsaak deur 'n daling in die gevangesettingskoers vir swartmense.[15]

Indien 'n mens net na die syfers kyk, wil dit voorkom of die oorbevolkte situasie in ons gevangenisse tans beter daar uitsien as in die verlede. Die huidige gevangenisbevolking is egter anders saamgestel as tien en twintig jaar gelede. Veral die persentasie langtermyngevangenes is tans baie groter as toe. Hierdie syfer het in 1968/69 'n laagtepunt bereik maar meer as 27 persent van al die gevonniste gevangenes wat deesdae opgeneem word, het vonnisse van meer as twee jaar gevangenisstraf,[16] terwyl dit in 1984/85 9,8 persent[17] was en in 1974/75 7,7 persent.[18] Aangesien al hoe meer gevangenes lang vonnisse uitdien, word die omset van mense kleiner. Dit beteken dat die beganers van ernstige misdade die gevangenisse volsit wat 'n positiewe tendens is. Dit beteken egter ook dat die moontlikhede om iets aan die probleem van oorbevolking te doen al kleiner word, en dit is nie bemoedigend nie.

Die gevangenisbevolking is egter in nóg 'n opsig anders saamgestel – 'n al groter wordende deel daarvan is verhoorafwagtende gevangenes. Die syfer van hierdie kategorie gevangenes het tussen tien en twintig jaar gelede taamlik konstant in die omgewing van 16 000 gebly, maar oor die laaste dekade met 68,5 persent toegeneem tot 28 421 aan die einde van 1995.[19] Dit beteken dat, waar die verhoorafwagtendes in 1985 slegs 15,6 persent van die totale gevangenisbevolking uitgemaak het, hulle tans 25,3 persent daarvan uitmaak.

Die oorbevolkte situasie in 'n gevangenis soos Pollsmoor is hoofsaaklik aan verhoorafwagtende gevangenes toe te skryf. Aan die einde van 1995 het Pollsmoor akkommodasie vir 3 896 gevangenes gehad, en 'n groot deel van hierdie syfer is deur die 1 987 verhoorafwagtendes opgeneem. In totaal is 5 933 gevangenes egter in die gevangenis aangehou – 2 037 meer as die beskikbare akkommodasie. Laasgenoemde syfer is byna net so hoog as die getal verhoorafwagtendes.

'n Mens moet verder ook vir die syfers versigtig wees want dit word kunsmatig gemanipuleer. Deur middel van die (redelik ingewikkelde) vrylatingsbeleid,

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15 Vgl Terblanehe *supra* vn 13 12 – die daling was vanaf 462 (1979/1980) tot 340 (1993). Die presiese rede vir hierdie daling is feitlik onbepaalbaar en 'n mens kan maar net daaroor spekuleer. Die maklike uitweg is om dit eenvoudig aan die afskaffing van apartheid toe te skryf. Die Viljoen-kommissie het bv beklemtoon (vgl Deel III par 1.13) dat baie swartmense teen 1976 in gevangenisse was vanweë minder ernstige misdade. Dit het groot getalle kort-termyngevangenes tot gevolg gehad. Baie van hierdie oortredings was aan apartheid te koppel. Maar bruinmense is ook deur apartheid getref en hulle gevangesettingskoers staan steeds byna onveranderd in die omgewing 840 (Terblanehe *supra* vn 13 12). Na ons mening het 'n veranderde vonnisbeleid, wat sedert die middel 1980's veral in landdroshowe begin posvat het en waarvolgens daar in 'n groeiende mate van die oplegging van kort termyne van gevangenisstraf wegbeweeg is, waarskynlik die belangrikste rol in die daling van die aanhoudingskoers gespeel. Oor die presiese invloed van die hoë syfer onopgeloste misdade kan net gespekuleer word, maar dat dit die gevangenissyfers kunsmatig laag hou, is bo alle twyfel.

16 Vgl Departement van Korrektiewe Dienste *Jaarverslag (1 Jan – 31 Des 1995)* Tabel 8.

17 Vgl Departement van Korrektiewe Dienste *Jaarverslag (1 Jan – 31 Des 1994)* Tabel 1.

18 Viljoen-kommissie par 5.1.6.1.15 en 5.1.6.1.25.

19 Die syfer in 1985 was 16 864.

amnesties en ander vorme van vroeë vrylatings,[20] insluitende die sogenaamde "bursting",[21] word sorg gedra dat die gevangenisbevolking binne bepaalde perke bly.[22]

AKKOMMODASIE

Die oorbevolking van tronke behels egter veel meer as net getalle. Eerstens is daar 'n bepaalde ruimte waarbinne 'n aantal mense aangehou word. Volgens die Gevangenisdiensorders moet minstens 3,344m^2 vloeroppervlakte in 'n gemeenskaplike sel per gevangene voorsien word.[23] Wanneer lugruimte ook in ag geneem word, moet 8,5m^3 per gevangene beskikbaar wees.[24] Hierdie maatstawwe is veronderstel om aan internasionale standaarde te voldoen. Professor Van Zyl Smit noem dat dit in die verlede al gebeur het dat tot 45 mense in 'n sel van slegs 15 meter by 5 meter aangehou is.[25]

'n Mens moet aanvaar dat, wanneer dit by grondoppervlak kom, daar 'n punt is waar meeste mense sal voel dat 'n gevangenis oorbevolk is, en 'n punt waar meeste mense sal voel dat dit nie oorbevolk is nie, met 'n wye gebied tussenin.

ANDER ASPEKTE VAN OORBEVOLKING

Wanneer verder by die koue syfers van soveel gevangenes en soveel vloerruimte verbygekyk word, raak oorvol gevangenisse veral die mense wat binne-in daardie ruimte moet leef en werk. Oorbevolking het, volgens die Departement van Korrektiewe Dienste, die volgende negatiewe gevolge:

> "Die selle in gevangenisse is ontwerp om 'n spesifieke aantal gevangenes te huisves. Sodra hierdie getal gevangenes vermeerder weens oorbevolking, het dit outomaties 'n negatiewe invloed op die lewensomstandighede van die gevangenes, omdat die normale vloerspasie en lugruimte wat vir gevangenes beskikbaar is, daardeur versteur word. Dit plaas verder ook druk op ablusiefasiliteite in selle en die res van die gevangenisinfrastruktuur, wat kombuise, hospitaalafdelings, warmwaterstelsels, waskamers, ens. insluit. Dit het ook 'n negatiewe invloed op toesig- en beheerfunksies en benadeel die gestelde veiligheidstandaarde."[26]

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20 Voorbeelde van hierdie vrylatings blyk uit die *Jaarverslag (1 Jan – 31 Des 1994)* 6: 6 maande afslag van die opgelegde vonnis aan (basies) alle gevangenes; vrylating van alle gevangenes onder 18 jaar oud, moeders met kinders van onder 12 jaar en gestremdes. Hierdie vergunnings is deur die staatspresident verleen. Die vrylating van moeders met kinders van onder 12 jaar oud het 'n nadraai in die hof gehad. In *Kruger v Minister of Correctional Services* 1995 1 SASV 375 (T) het mansgevangenes met kinders onder 12 jaar oud by die hof aansoek gedoen om tersydestelling van die betrokke presidensiële bepaling omdat dit met die gelykheidsklousule van die interim-Grondwet (a 8(2)) in stryd sou wees en onbillik teen manspersone diskrimineer. Die hof het egter gemeen dat die president se optrede soos 'n geskenk was en dat niemand gevolglik op die vergunning aanspraak kan maak nie.

21 "Bursting" is 'n term uit Engeland wat basies "noodvrylatings" beteken – kyk Neser en Takoulas "Bursting at the seams: Prison overcrowding – a brief overview" 1995 (30) *Die Landdros* 135.

22 Volgens die *Citizen* 1996-4-11 "Prisons are understaffed, underfunded" is die huidige begroting voldoende vir 97 000 gevangenes. So 'n begroting is totaal onredelik – daar was immers in 1973/74 alreeds daagliks gemiddeld 98 851 mense in aanhouding (Viljoen-kommissie par 1.7). Sedertdien is daar 'n aanvullende begroting vir hierdie tekort ingedien.

23 Ander standaarde geld vir enkelselle maar in Suid-Afrika word daar hoofsaaklik van gemeenskaplike selle gebruik gemaak.

24 Van Zyl Smit *South African prison law and practice* (1992) 144.

25 *Ibid.*

26 *Jaarverslag (1 Jan – 31 Des 1994)* 3.

'n Mens moet egter daarop wys dat hierdie ander aspekte nie noodwendig met oorbevolking (in die eng sin van die woord) verband hoef te hou nie. 'n Tekort aan ablusiegeriewe kan bestaan selfs al is 'n sel net half vol; indien daar nie fondse vir voldoende personeel is nie, kan 'n half leë gevangenis te min personeel hê vir die behoorlike bestuur daarvan; onvoldoende warmwatervoorsiening is ook moontlik in gevangenisse wat nie (volgens die syfers) te veel mense huisves nie. Dit is natuurlik so dat, indien die infrastruktuur vir 'n bepaalde aantal mense ontwerp is, dit ontoereikend sal word indien daardie getal mense meer word. Die ander kant van die munt is dat dit moontlik is om voldoende geriewe te voorsien al is daar te veel mense in die selle.

Die beskikbaarheid van staatsfondse speel natuurlik 'n geweldig belangrike rol in die bepaling van die hoeveelheid gevangenisse en ander geriewe wat opgerig word. Indien geld nie 'n oorweging was nie, kon al die nodige geriewe in oorvloed voorsien word. In Suid-Afrika is dit egter byna ondenkbaar dat so 'n situasie ooit bereik sal word, en hierdie ideale toestand kan vir navorsingsdoeleindes buite rekening gelaat word.

GEVANGENES SE PERSOONLIKE GEVOELENS OOR OORVOL TRONKSELLE

Gedurende Januarie 1996 het ons oor die oorbevolking van gevangenisse kwalitatiewe navorsing gaan doen by 'n groot (Pollsmoor), medium (Victor Verster), en klein gevangenis (Beaufort-Wes).[27] Onderhoude is op 'n vrywillige grondslag met twintig gevangenes elk by Victor Verster en Pollsmoor gevoer, en met tien gevangenes by Beaufort-Wes. Ons teikengroep was verteenwoordigend van die res van die gevangenes en die meeste van hulle het die ernstiger misdrywe soos moord, roof en verkragting gepleeg. Gewoontemisdadigers het ook voorgekom.

Die verskeidenheid van misdrywe, lengte van aanhouding, lengte van vonnis en selbesetting sien soos volg daar uit:

Vermoënsmisdade

Ongeveer 38 persent van die gevangenes het uitsluitlik vermoënsmisdrywe begaan. Dit het misdrywe soos huisbraak, diefstal, voertuigdiefstal en bedrog ingesluit. Die lengte van vonnisse het gewissel vanaf 1 jaar 6 maande tot 12 jaar 3 maande met 'n gemiddeld van 6 jaar, terwyl die lengte van aanhouding gewissel het van persone wat pas gevonnis is tot 7 jaar met 'n gemiddeld van amper 2 jaar per gevangene. Die gemiddelde persentasie besetting van die selle waarin hierdie gevangenes aangehou is, was 140 persent.

Geslagsmisdade

Verkragting en poging tot verkragting was die enigste twee misdrywe in hierdie kategorie en 6 persent van die gevangenes het hulle uitsluitlik hieraan skuldig gemaak. Die lengte van hulle vonnisse het gewissel van 2 jaar 6 maande tot 10 jaar 6 maande met 'n gemiddeld van 5 jaar, terwyl die lengte van aanhouding gewissel het van 4 maande tot 4 jaar met 'n gemiddeld van 8 maande. Die gemiddelde persentasie besetting van die selle was 137 persent.

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27 Kwalitatiewe navorsing behels hoofsaaklik dat onderhoude gevoer word met 'n bepaalde groep mense ten einde 'n indruk te kry van hulle siening van 'n bepaalde saak. Dit is nie daarop gemik om syfers te genereer nie.

Geweldsmisdade

Geweldsmisdrywe het die algemeenste voorgekom en ongeveer 44 persent van die gevangenes het hierdie klas van oortredings begaan. Dit het onder andere misdade soos aanranding met die opset om ernstig te beseer, opsetlike saakbeskadiging, gewapende roof, moord en strafbare manslag ingesluit. Die lengte van die gevangenes se vonnisse het gewissel van 1 jaar tot 45 jaar met 'n gemiddeld van byna 11 jaar, terwyl die tydperke in aanhouding gewissel het van persone wat pas begin het tot 18 jaar met 'n gemiddeld van 2 jaar 7 maande. Die selbesetting was 140 persent.

Ander misdade

Die oorblywende misdrywe het 12 persent van die totaal uitgemaak en het bestaan uit misdade soos ontvlugting, onwettige besit van 'n vuurwapen, besit van verdowingsmiddels en verset teen arrestasie of 'n kombinasie van die ander misdrywe. Die vonnislengtes het gewissel van 1 jaar 5 maande tot 16 jaar 6 maande met 'n gemiddeld van 8 jaar 6 maande, terwyl die lengtes van aanhouding gewissel het van 1 jaar 6 maande tot 11 jaar met 'n gemiddeld van 5 jaar 6 maande. Die gemiddelde persentasie selbesetting was 142 persent.

Gevangenes is in afsondering gespreek en slegs by Pollsmoor was 'n bewaarder teenwoordig. Alhoewel ons nie wou hê dat die gevangenes vooraf ingelig moes word aangaande die rede vir ons besoek nie, het dit wel by Victor Verster en Beaufort-Wes gebeur – gevolglik het die kwessie van oorbevolking aldaar sterker na vore getree.

Ons onderhoude met die gevangenes was daarop gemik om te bepaal of oorbevolking in die algemeen vir individuele gevangenes 'n probleem is. Die kort antwoord is dat oorbevolking *per se* vir die meeste gevangenes nie 'n probleem is nie.[28] Hulle het die lot aanvaar om hulle vonnisse in 'n oorvol gevangenis uit te dien. Die beperkte lewens- en beweegruimte wat oorbevolking meebring, het meeste van hulle nie juis geaffekteer nie. 'n Sterk behoefte aan sosiale verkeer is deur meeste gevangenes uitgespreek. Hierdie mense se probleem met die lewe in die gevangenis was eerder geleë in faktore soos onvoldoende mediese dienste, beperkte kontak met die buitewêreld, die gehalte van hulle kos, optrede deur die bewaarders, dwangarbeid, onvoldoende ontspanningsfasiliteite en bendebedrywighede wat hulle lewens regeer. 'n Mens moet nie uit die oog verloor dat meeste van hierdie probleme uit oorbevolking kan voortspruit nie, en gevolglik kan hierdie faktore as deel van oorbevolking *in die wye sin van die woord* gesien word.[29]

Die meer opgevoede en gesofistikeerde gevangene (wat in die minderheid was), tesame met 'n klein groepie ander gevangenes vir wie oorbevolking wel 'n probleem was, het egter 'n behoefte aan groter lewensruimte gehad. Hierdie mense het hulle privaatheid hoog op prys gestel en wou wegkom van die bendebedrywighede en die slegte gewoontes van hulle medegevangenes. Hulle het verder 'n behoefte gehad aan intellektuele stimulasie en morele standaarde, wat onder andere deur oorbevolking onderdruk word.

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28 Hier word gepraat van oorbevolking *in die eng betekenis* van die woord. Dit behels eenvoudig dat 'n groot getal mense in een sel saamgehok word.

29 Vgl die eng betekenis (*supra* vn 28).

Die gevangenes se probleme met oorbevolking was grootliks beperk tot die tekort aan geriewe in die gevangenisse. Te min beddens het veroorsaak dat party gevangenes tussen die ander beddens op die vloer moes slaap. In ander gevalle word dubbeldekkerbeddens gebruik. Hierdie gebruike beperk 'n gevangene se lewens- en beweegruimte drasties en veroorsaak byvoorbeeld dat hy nie kan rondbeweeg sonder om medegevangenes te steur nie. Weens die aantal mense in 'n sel is stort- en toiletgeriewe meesal ontoereikend. Soggens is daar weens normale menslike behoeftes en roetine 'n toeloop na die storte en dus 'n beperkte storttyd vir elke gevangene. Nie alleen veroorsaak die oorbenutting van storte die opbou van stoom en dus 'n benoude en bedrukte gevoel in die selle nie, maar dit dra ook by tot die vinnige verspreiding van siektes. Dieselfde probleme bestaan by die gebruik van die toilette. Verder moedig oorbevolking bendebedrywighede aan. Gevangenes verkeer onder geweldige druk om aan hierdie bendes te behoort en het dikwels nie 'n ander keuse nie. Botsings en struwelinge tussen bendes is aan die orde van die dag en het dikwels noodlottige gevolge.

SLOTSOM UIT KWALITATIEWE NAVORSING

Die meeste gevangenes beleef die oorbevolkte toestande soos ons dit gevind het (met ander woorde 'n oorbevolking in die omgewing van 140%) as sodanig nie negatief nie. Dit is egter duidelik dat die oorbevolking van gevangenisse eerder in die wye sin van die woord verstaan moet word omdat dit nie net deur lewensruimte bepaal word nie. Aspekte van 'n normale lewe soos toilet- en wasgeriewe, ontspannings- en werksgeleenthede asook eetgeriewe is van groot belang. Gevangenes kan, bloot volgens die ruimtemaatstawwe, meer as voldoende grondgebied per gevangene gegun word maar die betrokke sel kan steeds oorbevolk wees indien daar nie voldoende toilet- en wasgeriewe is nie. Al word die sel se bevolkingskwota nie oorskry nie, kan 'n gevangenis steeds totaal oorbevolk wees omdat daar te min personeel is om behoorlike beheer oor die gevangenes uit te oefen, veral as hulle die selle om een of ander rede verlaat.[30]

'n Laaste aspek waarop gewys moet word, is dat verskillende mense verskillend op dieselfde saak reageer. Daar sal dus altyd mense wees vir wie oorbevolking in die eng sin inderdaad hoogs problematies is. In Suid-Afrika is hulle egter in die minderheid.

IS OORBEVOLKING ONGRONDWETLIK?

Professor Van Zyl Smit noem dat aanhoudingsomstandighede so swak kan word dat dit as wrede en onmenslike straf beskou kan word.[31] Dit blyk ook die uitgangspunt in die Amerikaanse reg te wees.[32]

Die regsposisie in die Verenigde State van Amerika sal waarskynlik vir Suid-Afrikaanse doeleindes van aansienlike belang wees. Die ongrondwetlikheid van straf word in Amerika geraak deur die Agste Wysiging tot die Amerikaanse Grondwet wat onder andere die oplegging van wrede en buitengewone straf ("cruel and unusual punishment") verbied. Daar is min twyfel dat gevangenisstraf

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30 Kyk in die algemeen Durham *Crisis and reform* (1994) 32 ev.

31 *Supra* vn 24 147.

32 Vgl *Hutto v Finney* 437 US 678 (1978); *Ruiz v Estelle* 503 F Supp 1265 SD Tex (1980); *Wilson v Seiter* 501 US 294 (1991); *Helling v McKinney* 113 S Ct 2475 (1993).

in bepaalde omstandighede wreed en buitengewoon kan wees. Daar is dan ook uitdruklik in *Estelle v Gamble*[33] beslis dat gevangenisstraf aan die beperkinge van die Agste Wysiging onderworpe is.

Die ontwikkeling van die huidige regsposisie in Amerika dateer basies uit die sestigerjare.[34] Sedertdien het gevangenes die federale howe oorstroom in menseregte-aksies wat elke aspek van gevangenisbestuur geraak het.[35] Een van die eerste Supreme Court-beslissings wat spesifiek na die algemene omstandighede van aanhouding in gevangenisse gekyk het, was *Rhodes v Chapman*.[36] Hier is beslis dat die aanhoudingsomstandighede in die gevangenis, hetsy alleen of in kombinasie met mekaar, ongrondwetlik sou wees indien dit die gevangenes ontneem van die "minimal civilized measure of life's necessities".[37] Dit behels egter nie dat die lewe in die gevangenis aangenaam moet wees nie; selfs moeilike lewensomstandighede is dikwels eenvoudig deel van die straf wat die gevangene in die gevangenis ondergaan.[38] In 'n daaropvolgende beslissing, *Wilson v Seiter*,[39] is daar op *Rhodes v Chapman* uitgebrei. Volgens hierdie uitbreiding is die omstandighede in die gevangenis op sigself nie genoeg om te bevind dat die straf ongrondwetlik is nie maar word 'n subjektiewe element bygevoeg, naamlik dat hierdie omstandighede die resultaat moet wees van strafbare handelinge deur die gevangenisowerhede.[40] Die blote feit dat die gevangenis oorvol was, het die aanhouding nie ongrondwetlik gemaak nie.[41]

Die "omstandighede" wat ter sprake is, is al in verskeie Supreme Court-beslissings duidelik gemaak. 'n Voorbeeld is *Helling v McKinney*,[42] waar die volgende omstandighede genoem is saam met 'n verduideliking van die oorsprong van die staat se verantwoordelikheid in hierdie verband:

> "[When] the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care and reasonable safety – it transgresses . . . the Eighth Amendment."[43]

Oefening word baie dikwels tot hierdie lys gevoeg. Uiteindelik kan 'n mens hierdie faktore saamvat as daardie omstandighede wat, indien dit ontneem word, 'n nadelige effek op die fisiese en geestesgesondheid van die betrokke persoon sal hê.[44]

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33 429 US 97 (1976).

34 Vgl Branham en Krantz *Sentencing, corrections and prisoners' rights* (1994) 128 ev.

35 Vgl Jacobs "The prisoners' rights movement and its impacts, 1960–80" in Morris en Tonry (reds) *Crime and justice: An annual review of research* (Vol 2) (1980) 429.

36 452 US 337 (1981). Die basis van die beslissing was 'n bestryding van "double celling" (waar twee mense aangehou is in 'n sel wat vir een mens ontwerp is) in die Lucasville gevangenis in Ohio.

37 347.

38 *Ibid.*

39 111 S Ct 2321 (1991).

40 Vgl Mushlin *Rights of prisoners* (1993) 28. Hierdie toevoeging is fel gekritiseer, veral omdat skokkende omstandighede volgens hierdie kritiek bestaan, ook in die afwesigheid van strafbare optrede – *idem* 36 ev.

41 Vgl *idem* 99.

42 113 S Ct 2475 (1993) 2480.

43 Vgl ook *Wilson v Seiter* 111 S Ct 2321 (1991) 2327; *DeShaney v Winnebago County Department of Social Services* 109 S Ct 998 (1989) 1005.

44 Kyk Mushlin *supra* vn 40 82 91 ev.

Om spesifiek tot oorbevolking terug te kom: dit is duidelik dat oorbevolking *per se* nie wrede en buitengewone straf uitmaak nie.[45] Die gevolge van die oorbevolking kan egter wel daartoe aanleiding gee, soos Mushlin dit stel:

> "To succeed, the plaintiffs must show that the conditions caused by overcrowding fall below the bottom line of human existence forbidden by the Eighth Amendment."[46]

Hierdie "conditions" is die wat hierbo in die aanhaling uit *Helling v McKinney* genoem is, en die vraag of die omstandighede so erg is, is 'n feitevraag waarvan die bewyslas op die eiser rus.

Dit is sinvol om in meer besonderhede te kyk na enkele beslissings oor die onderwerp wat in Amerika gegee is. In *French v Owens*[47] is 'n sogenaamde "klasaksie" namens alle gevangenes teen die Indiana *Reformatory* te Pendleton, Indiana ingestel. Die *Reformatory* is 'n maksimum sekuriteit inrigting wat reeds in 1923 gebou is. Die gevangenes se klagtes was gerig teen die oorbevolking, swak lewensomstandighede, onvoldoende mediese dienste, 'n gebrek aan veiligheid, onhigiëniese voedseldienste, onvoldoende opvoedings- en beroepsonderwysprogramme, 'n arbitrêre dissiplinestelsel en onvoldoende toegang tot die howe. Die verhoorhof bevind onder andere dat die selle nie voldoende ventilasie gehad het nie, dat die beligting onvoldoende was, dat die stort- en toiletgeriewe onhigiënies was, dat die gevangenes onvoldoende sport en ontspanning gebied is, dat mediese dienste ver tekortgeskiet het en dat opvoedings- en beroepsonderwysprogramme byna nie bestaan het nie. Teen hierdie agtergrond spreek die verhoorhof ook die belangrikste kwessies, naamlik "double celling" en oorbevolking, aan. Uit die getuienis het dit geblyk dat oorbevolking 'n ernstige inpak op die vlakke van geweld en vyandigheid gehad het. Messtekery, homoseksuele verkragtings en gewelddadige onderdrukking, met die gepaardgaande gevolge daarvan, het daagliks voorgekom. Die verweerder het onder andere verwys na *Rhodes v Chapman*[48] waarin die Supreme Court beslis het dat "double celling" nie *per se* wrede en onmenslike straf uitmaak nie.[49] Die inrigting in Lucasville was egter relatief nuut, skoon en veilig en het dus 'n sterk kontras gevorm met die Indiana *Reformatory*. Die hof beklemtoon in sy uitspraak die belangrikheid van die beginsel van die totaliteit van omstandighede en haal soos volg uit *Gates v Collier*[50] aan:

> "Each factor separately . . . may not rise to constitutional dimensions; however, the totality of these circumstances is the infliction of punishment on inmates violative of the Eighth Amendment."[51]

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45 Vgl Van Zyl Smit *supra* vn 24 147; Branham *supra* vn 34 248–254. Vir 'n algemene bespreking van oorbevolking in Amerika kyk Durham *Crisis and reform* (1994) 31–59.

46 *Supra* vn 40 100.

47 777 F2d 1250 (7th Cir 1985).

48 *Supra* vn 36.

49 Kyk die teks *supra* by vn 40.

50 501 F2d 1291 (1974).

51 Sien ook *Palmigiano v Garrahy* 639 F Supp 244 (DRI 1986) en *Hutto v Finney* 437 US 678 (1978) in hierdie verband. In lg saak het die Amerikaanse Supreme Court bevind dat die omstandighede in die isolasieselle wel inbreuk gemaak het op die Agste Wysiging se verbod teen wrede en buitengewone straf. Hierdie omstandighede het faktore soos die gevangenes se dieet, voortdurende oorbevolking van die selle, geweld, vandalisme en swak oordeel deur die bewaarders ingesluit.

Gevolglik bevind die hof dat die oorbevolking by die *Reformatory* in die lig van al die ander omstandighede en wanneer dit as 'n geheel oorweeg is, op wrede en onmenslike behandeling van die gevangenes neerkom.

Die grondwetlikheid van "double celling" is ook in *Bell v Wolfish*[52] oorweeg. Die eisers se argument was in hierdie geval egter nie op die Agste Wysiging se verbod teen wrede en buitengewone straf gebaseer nie, maar wel op die "due process"-bepaling van die Vyfde Wysiging. Die Supreme Court verwerp die eisers se argument dat "double celling" daarop neerkom dat hulle straf die reg op "due process of law" (of regsprosesreëlmatigheid) skend. Die rede hiervoor is dat die proses nie afgehandel is sodra die vonnis opgelê is nie, en dat die reëlmatigheid daarvan moet voortduur in die loop van die vonnisuitdiening. Die hof beklemtoon egter twee faktore as motivering vir die beslissing om die eis van die hand te wys, naamlik dat meeste aangehoudenes nie vir lang periodes aangehou was nie, en tweedens dat die aangehoudenes 'n groot mate van bewegingsvryheid gehad het. In gepaste gevalle het die "due process"-beginsel dus wel 'n kans op sukses.[53] Aangesien "due process" duidelik in artikel 35 van die 1996-Grondwet verskans is, sou Suid-Afrikaanse gevangenes ook op grond hiervan 'n aanval op die grondwetlikheid van oorbevolking kon loods.

Die Zimbabwese hoogste hof het in *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs*[54] ook gekyk na faktore wat die grondwetlikheid van aanhouding in 'n gevangenis kan raak. Heelwat is uit hierdie beslissing te leer, omdat dit 'n Afrika-perspektief op die probleem bied. Die applikant in hierdie saak is toegelaat om net vir 'n halfuur per weeksdag in die ope lug te oefen, en oor naweke glad nie. Dit was in reaksie op 'n poging om hom uit die gevangenis te ontset, en het beteken dat die applikant oor naweke tot so lank as 47 ure basies in sy sel moes bly. Dit beskou hoofregter Gubbay as

> "plainly offensive to one's notion of humanity and decency. It transgresses the boundaries of civilised standards and involves the infliction of unnecessary suffering".[55]

So 'n siening is analoog daaraan om te sê dat die straf wreedaardig en/of onmenslik is. Verderaan voeg die hoofregter die volgende by:

> "In my opinion, to deprive the applicant of access to fresh air, sunlight and the ability to exercise properly for a period of 23½ hours per day, by holding him in a confined space, is virtually to treat him as a non-human. I think it repugnant to the attitude of contemporary society. The emphasis must always be on *man's basic dignity*, on civilised precepts and on flexibility and improvement in standards of decency as society progresses and matures."[56]

Hieruit kom die belangrikheid van die reg op die waardigheid van mense duidelik na vore. Vir sover dit hier gaan oor die behoud van die waardigheid van mense op grond van die hoeveelheid geleenthede om in die ope lug te oefen, is dit besonder toepaslik vir die Suid-Afrikaanse situasie: die meeste gevangenes kry hier oefening vir slegs een uur per dag en dit is vir baie gevangenes 'n

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52 441 US 520 (1979).

53 Kyk Palmer *Constitutional rights of prisoners* (1977) 240–243; Mushlin *supra* vn 40 96–104 en die sake daar aangehaal vir verdere inligting aangaande die uitwerking van die Amerikaanse Grondwet op die oorbevolkingskwessie.

54 1992 2 SA 56 (ZS).

55 64A–B.

56 65G–H (ons kursivering).

praktiese probleem. Op sigself is dít waarskynlik nie ongrondwetlik nie. Hoofregter Gubbay het by 'n paar geleenthede na amptelike voorskrifte verwys waarvolgens gevangenes 'n uur se oefening per dag gebied moet word,[57] en het hierdie voorskrifte nie in enige stadium in afwysende terme beskryf nie. In der waarheid het die hof aan die begin van die uitspraak aansienlike klem daarop gelê dat die howe nie normaalweg met die werk van die gevangenisowerhede sal inmeng nie. Hierdie werk is dikwels uiters moeilik:

> "It requires expertise, comprehensive planning and a commitment of resources. all of which are peculiarly within the province of the legislative and executive branches of government. Courts recognise that they are ill-equipped to deal with such problems."[58]

Daar is deesdae geen twyfel meer nie dat 'n gevangene al die regte behou wat hy as vry mens gehad het behalwe daardie regte wat hy noodwendig moet verloor as 'n resultaat van sy aanhouding.[59] En daarom, sê hoofregter Gubbay, al is dit die taak van die gevangenisowerhede om gevangenisse te bestuur, en al moet gevangenes noodwendig aan toepaslike reëls en regulasies onderwerp word, bly dit die howe se voortdurende verantwoordelikheid om die grondwetlike regte van alle persone, insluitende gevangenes, te beskerm.[60] Hierin lê 'n basiese toets wat aangewend kan word om te bepaal of die howe moet inmeng met die manier waarop gevangenes in tronke behandel word. Dit sluit natuurlik die oorbevolkte situasie in gevangenisse in omdat dit op sigself 'n invloed kan hê op hoeveel tyd daar vir oefening vir die gevangenes beskikbaar is.[61]

Die nuwe Grondwet van 1996 bepaal dat elke aangehoudene die reg op "voldoende akkommodasie" het. "Voldoende akkommodasie" is 'n konsep wat nie in Suid-Afrika, of in ander grondwette waarvan ons bewus is, bekend is nie.[62] Dit sal mettertyd juridiese inhoud gegee moet word. Die howe sal moet bepaal of dit uitsluitlik verwys na die lewensruimte wat in die selle vir elke gevangene beskikbaar is, en of dit 'n wyer begrip is wat op die "totaliteit van omstandighede" van die aanhouding van gevangenes slaan. Daar sal verder bepaal moet word wat "voldoende" akkommodasie behels. Dit is onwaarskynlik dat ons howe sover sal gaan om absoluut enige oorbevolking ongrondwetlik te verklaar. Dit is, met ander woorde, onwaarskynlik dat die howe 'n suiwer

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57 Vgl 64G–H 65F.

58 60H–I.

59 Die duidelikste reg wat noodwendig verlore gaan, is die reg op vryheid (a 12(1) van die 1996-Grondwet).

60 61A. Amerika het ook aanvanklik 'n sg "hands-off doctrine" gebruik. Vier redes is hiervoor aangevoer: (1) Die beginsel van skeiding van magte waarvolgens die regterlike gesag nie met die uitvoerende gesag moet inmeng nie; (2) die gedagte dat die federale howe nie behoort in te meng met 'n funksie wat aan die state opgedra is nie; (3) inmenging van die howe sal die veiligheid van gevangenisse belemmer; en (4) 'n oorvloed van litigasie is verwag (vgl Branham en Krantz *supra* vn 34 128–129). Sedert die sestigerjare het dinge egter begin verander, oa vanweë intensiewer litigasie, militanter gevangenes en 'n verandering in die samestelling van die Supreme Court (*ibid*).

61 'n Mens kry 'n kykie in die praktiese gevolge (of gebrek daaraan) van hierdie uitspraak in *Beeld* 1996–07–23 "Zimbabwe-regering 'verhinder' 5 gevangenes se amnestie-aansoek" waarin melding gemaak word van die haglike omstandighede waarin hierdie gevangenes tans aangehou word. Dit sluit in dat elkeen slegs een kombers en een stel klere het.

62 Ons het die volgende lande se grondwette nagegaan en kon geen soortgelyke bepaling vind nie: VSA, Kanada, Duitsland, Australië, Nieu-Zeeland, Namibië, Zimbabwe, Indië en Japan (Blaustein *Constitutions of the countries of the world* (1971; opgedateer tot 1995)).

statistiese beoordeling sal volg. Na ons mening sal die howe waarskynlik bevind dat die akkommodasie eers onvoldoende raak wanneer die algemene aanhoudingsomstandighede sodanig word dat aanhouding in elk geval nie meer grondwetlik is nie. Die insluiting van die woorde "voldoende akkommodasie" behoort dus nie juis 'n verskil aan die regte van gevangenes te maak nie, en dit is waarskynlik uit oormaat van versigtigheid in die Grondwet ingesluit.

DIE INVLOED VAN 'N OORVOL GEVANGENIS OP DIE OPLEGGING VAN VONNIS

Hiermee het ons ook die kern van die tweede aspek van die *dictum* van hoofregter Rumpff waarmee hierdie artikel begin is, bespreek. Dit is naamlik die vraag of die toestande in tronke enige invloed op die vonnis behoort te hê. Kragtens artikel 276(1)(b) van die Strafproseswet[63] is gevangenisstraf een van die strawwe wat 'n hof 'n misdadiger kan oplê. Sodra 'n hof 'n vonnis van gevangenisstraf opgelê het, is die rol van die regsprekende gesag basies afgehandel. Die veroordeelde word dan aan die Departement van Korrektiewe Dienste oorhandig en word 'n gevangene met wie die departement handel ooreenkomstig die Wet op Korrektiewe Dienste[64] en die regulasies wat daarkragtens uitgevaardig is. Die tenuitvoerlegging van die regsprekende gesag se vonnis word inderdaad ten volle aan die uitvoerende gesag oorgelaat.

Die howe sal toenemend van aanhoudingsomstandighede in gevangenisse moet kennis neem. Dit maak eerstens logies baie sin. Hoe kan 'n hof bepaal of gevangenisstraf 'n gepaste vonnis is sonder kennis van die omstandighede waarin die gevangene hom daagliks sal bevind? Hierdie motivering het nog altyd bestaan. Maar daar is deesdae 'n tweede rede. Ons leef nou in 'n regstaat waarin die reg die oppergesag is en die howe, as regsprekende gesag, die oppergesaghebbers. 'n Hof durf in hierdie omstandighede nie 'n vonnis op te lê, met ander woorde 'n hofbevel uit te vaardig, as dit in die praktyk kan beteken dat die veroordeelde behandeling van 'n ongrondwetlike aard ontvang nie. Met ander woorde: die howe durf nie vonnisse van gevangenisstraf oplê indien hulle onbewus is van wat agter die tralies aangaan nie. Indien die gevangenisse sodanig oorbevolk is dat aanhouding daarbinne in stryd met die Grondwet is, kan 'n hof 'n veroordeelde beswaarlik veroordeel om die hof se vonnis in sodanige omstandighede uit te dien.

SLOTSOM

Die voorgaande bespreking stel ons in staat om die vrae wat ons aan die begin van die artikel gestel het, hier kernagtig te beantwoord. Eerstens: al is daar spesifieke statistiese maatstawwe waaraan die oorbevolking van gevangenisse gemeet word, behels oorbevolking baie meer as 'n bepaalde aantal vierkante meter; tweedens: Suid-Afrikaanse gevangenes kwel hulle oor die algemeen nie baie oor die lewensruimte tot hulle beskikking nie, maar die beskikbaarheid van ander geriewe (soos eet-, oefen-, was- en werksgeleenthede) is wel baie belangrik; derdens: dit is nie *per se* in stryd met die Grondwet indien daar te veel gevangenes in 'n gevangenis aangehou word nie, op voorwaarde dat die aanhouding die gevangene nie ontneem nie van soveel van wat nodig is vir 'n menslike bestaan dat wel gesê kan word dat die aanhouding wreed en onmenslik is.

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63 Wet 51 van 1977.
64 Wet 8 van 1959.

A critical analysis of section 21 of the Insolvency Act 24 of 1936

(*continued*)*

RG Evans
BLC LLM
Senior Lecturer, Department of Mercantile Law, University of South Africa

4 THE INTERPRETATION OF SECTION 21(5)

Section 21(5) of the Insolvency Act has created a cauldron of conjecture relating to the separate property of the solvent spouse and the nature of its vesting in the trustee on the one hand, and on the other, to interests of the separate creditors of both the spouses. Although spouses married by antenuptial contract are generally not liable for each other's debts, the insolvency of one such spouse does affect the position of the other. As mentioned above, where the separate estate of one spouse is sequestrated, the estate of the solvent spouse also vests first in the Master, and upon his appointment, in the trustee.[67] Under certain circumstances the solvent spouse may however claim the release of the property allegedly belonging to her.[68]

Looking first at the nature of the vesting of the solvent spouse's property, the question that arises is whether the trustee becomes the owner of the property which in terms of section 21 has vested in him. This question was considered by the Appellate Division, albeit *obiter*, in *De Villiers v Delta Cables (Pty) Ltd*.[69] It is however submitted that this will not be the last word on the matter, and in my opinion there is a strong possibility that this aspect may also find itself before the Constitutional Court.[70] Before considering the ruling of Van Heerden JA in this regard, it is necessary to look at the provisions of section 21(5) of the Insolvency Act as well as earlier case law. Section 21(5) provides:

> "Subject to any order made under sub-section (4) any property of the solvent spouse realised by the trustee shall bear a proportionate share of the costs of the sequestration as if it were property of the insolvent estate but the separate creditors for value of the solvent spouse having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, shall be entitled to prove their claims against the estate of the insolvent spouse in the same manner and, except as in this Act is otherwise provided, shall have the same rights and remedies and be subject to the same obligations as if they were creditors

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* See 1996 *THRHR* 613–625.
67 S 21(1) Act 24 of 1936.
68 See s 21(2) of the Act.
69 1992 1 SA 9 (A).
70 See part 5 below.

of the insolvent estate; and the creditors who have so proved claims shall be entitled to share in the proceeds of the property so realised according to their legal priorities *inter se* and in priority to the separate creditors of the insolvent estate, but shall not be entitled to share in the separate assets of the insolvent estate."

In *Kilburn v Estate Kilburn*[71] Wessels ACJ said the following in this respect:

"Now the Insolvency Act provides that when one spouse becomes insolvent, the estates of both spouses vest in the Master, and then in the trustee when appointed, but there is a proviso that the trustee must release such property of the solvent spouse as is shown to have been acquired during the marriage with the insolvent by a title valid as against the creditors of the insolvent spouse. In other words if property has been acquired by the spouse who is not insolvent by means of her own money or from a source other than her husband, then she holds it by title valid as against the creditors of her insolvent husband. But if she obtains it from him during marriage as a donation, or if the insolvent gives money to his wife to buy property and have it registered in her name, or if she buys property with money provided by the husband ostensibly for herself but in reality for her husband's estate or even for the benefit of both the spouses, then it is his property and forms part of his estate; and the property, though registered in her name, is not acquired by the non-insolvent spouse by a title valid as against the creditors of the insolvent."

Tindall JA said the following about this passage in *Estate Phillips v Commissioner for Inland Revenue*:[72]

"In that case immovable property bought during the marriage between Kilburn and his wife was bought with his money and registered in her name. On his insolvency his wife's estate as well as his own vested in his trustee. She applied for the release of the property under proviso (a)(iii) on the ground that she had acquired the property during the marriage by a title valid against creditors of her husband. The Court decided that she had not acquired the property by a title valid against the creditors of the insolvent. But in the judgement there is a passage (at 508) which, superficially considered, seems to support the view that the Court there held that notwithstanding the registration of the property in Mrs Kilburn's name, the husband was in law the owner. A careful perusal of the reasons shows however, that that is not the correct interpretation of the judgement. The actual decision was that under the insolvency law, Mrs Kilburn could not retain the property against her husband's creditors; the question whether the ownership in the property vested in him was not decided nor did it arise for decision."

In *Stand 382 Saxonwold CC v Kruger*[73] it was held that dominium over such property does not pass to the trustee. It was submitted in that case that ownership of immovable property of the solvent spouse had passed to the insolvent estate and that it should be dealt with in accordance with section 20 of the Insolvency Act. However, since section 20 does in fact deal with the regulation of and effect on the estate of the *insolvent*, this submission was dismissed by Kirk-Cohen J[74] as follows:

"By no stretch of the imagination does s 20(1)(c) include the property of the insolvent's spouse to whom he is married out of community of property. Her property is dealt with in terms of the provisions of section 21 . . ."

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71 1931 AD 501 507–508.
72 1942 AD 35 45–46.
73 1990 4 SA 317 (T) 323.
74 321I–J 323D.

Referring to the submission that the property of the solvent spouse must be regarded as part of the property of the insolvent estate, the judge quoted as follows from *Estate Phillips*:[75]

> "Having regard to our system of registration of immovable property, in the absence of fraud the proposition that the *dominium* in the farm vested in the donor until his death [i.e. that immovable property registered in the name of one person may be owned by another] is indeed startling."

Kirk-Cohen J ruled that the solvent spouse does not lose her rights of ownership, because, in the light of the system of registration of immovable property, the legislature would expressly have stated that ownership passes to the trustee if this was its intention.

Van Heerden JA, however, took an opposing view on this matter in *De Villiers v Delta Cables (Pty) Ltd.*[76] What follows is a brief summary of the relevant facts. Mr and Mrs Matthews (M) entered into a contract of suretyship with Delta Cables (the respondent) whereby they bound themselves as sureties for the debts which VH Cables owed to Delta Cables. Mrs M also signed a power of attorney, the terms of which she granted authority for the passing of a mortgage bond in favour of Delta Cables by VH Cables over property which was to be acquired at a future date. After the acquisition of the property, the bond was registered over the property in terms of the above power of attorney. However, registration of the bond took place approximately three months after the final sequestration of the estate of Mrs M's spouse. Judgment was later taken against Mrs M by Delta Cables on grounds of the above-mentioned contract of suretyship. In the execution of this judgment, the aforementioned property over which the mortgage bond was registered was sold in execution. Until briefly before the sale in execution, the trustee of Mrs M's estate was unaware of the registration of the aforementioned mortgage bond, or that judgment had been granted against Mrs M. (This type of problem has probably now been alleviated by the amendment of section 17 of the Act by the Insolvency Amendment Act 89 of 1989.) After becoming aware of the registration, it was agreed that the nett income from the sale in execution, minus the amount to be paid to the first bondholder, would be carried over to the trustee. After this amount had been carried over to the trustee, Delta Cables, in its capacity as a secured creditor, instituted a claim against the insolvent estate. This claim was based on the aforementioned judgment against Mrs M. The trustee refused to treat Delta Cables as a secured creditor and in the court *a quo* applied for an order declaring Delta Cables a concurrent creditor. The trustee argued that Delta Cables was not a secured creditor because the bond on which it based its claim could not legally be registered after the sequestration of Mr M's estate without the trustee's consent. This argument was rejected by the court *a quo* which stated that the trustee would be obliged to consent to the registration of the bond, despite the provisions of section 21 of the Insolvency Act. The trustee, it was ruled, was bound by the power of attorney which was granted prior to sequestration.

Relying on the fact that civil proceedings by or against a solvent spouse are not interrupted, that execution of judgments against such spouse could still proceed and the fact that such spouse's capacity to act is not limited by section

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75 322.
76 *Supra*.

23(2) of the Insolvency Act, Delta Cables argued that in terms of section 21 ownership of the solvent spouse's assets did not pass to the trustee.

Rejecting this argument, Van Heerden JA pointed out that a clear distinction must be made between assets which fall within the ambit of section 21, and those which fall outside it. Only those assets acquired prior to sequestration of the insolvent estate are subject to the provisions of section 21. Assets acquired after sequestration and assets released by the trustee fall outside the limitations imposed by section 21. According to the judge, the aforementioned circumstances on which Delta Cables based its argument that ownership had not passed regulated only the spouses' capacity in respect of assets which were not in terms of section 21 subject to the control of the trustee.[77] None of these circumstances, the court said, tend to militate against a construction that dominium in the assets of the solvent spouse vests in the trustee.

Section 21 simply provides that the assets of the solvent spouse vest in the Master and upon his appointment in the trustee "as if it were property of the sequestrated estate, and to empower the Master or the trustee to deal with such property accordingly . . ."[78] The ruling in *Stand 382 Saxonwold CC v Kruger*[79] to the effect that the legislature would have provided expressly for the passing of ownership to the trustee if this had been its intention was countered by Van Heerden JA who pointed out that in respect of the assets of the *insolvent* too, no express provision is made in section 20 for the passing of ownership to the trustee. Despite this, it is generally accepted that the assets of the insolvent pass in ownership to the trustee.[80]

It is however debatable whether it can simply be said that it is "generally accepted" that the assets pass in ownership to the trustee.[81] Although this may have been the intention of the legislature, the reference in the *Saxonwold* case to the method of registration of transfer of immovable property places a question mark on this argument. Further, although section 20 does state that the property of the insolvent vests in the trustee upon his appointment, no reference is made to the passing of ownership of such property or the manner in which the trustee may deal with such property. On the contrary, the manner in which the trustee must deal with the property of the solvent estate is regulated elsewhere in the Act.[82] It could rather be argued that it is "generally accepted" that the trustee

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77 15C.

78 See s 21(1).

79 *Supra*.

80 15G–H. Van der Merwe *Sakereg* (1989) 215 states that the Master automatically becomes the owner of the insolvent estate without the necessity for delivery or registration. He refers to this as a statutory method of derivative acquisition of ownership. In this context, however, Smith *supra* fn 2 81 says that it does not necessarily follow from the fact that the insolvent is divested of his estate, that he is deprived of all his rights in it. On the contrary, Smith says, he retains a vital reversionary interest in his insolvent estate.

81 It is clear that s 21 has a more limited purpose than s 20. It is therefore unnecessary to ascribe to s 21 the interpretation that ownership passes to the trustee. This interpretation would also be detrimental to the creditors of the solvent spouse. See also Davids "The property of the solvent spouse in the hands of the trustee" 1994 *Juta's Business Law* 119, who is of the opinion that the property of the solvent spouse does not become the insolvent's estate property.

82 See eg s 40–53 and 69; see also Van Zyl "Die subjek van 'n bestorwe boedel: Meester of eksekuteur?" 1989 *THRHR* 184 who discusses the question of who or what the subject or

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must deal with the property of the insolvent in accordance with the wishes and to the advantage of the creditors. The terms "dominium", "ownership" or "vest" are not defined in section 2 of the Act. However, the trustee of an insolvent estate is clearly not in the same position as that of a common law owner of property. Modern South African legal theory would appear to regard the definitions proposed by Bartolus de Saxaferrato and Hugo de Groot as the two most influential definitions of ownership, and the ideas that emanate from these two definitions are to some extent reflected in the definition of ownership generally accepted in South Africa.[83] Ownership in South Africa is regarded as a real right that potentially confers the most complete or comprehensive control over a thing. The right of ownership therefore empowers the owner to do with his thing as he deems fit, subject to the limitations imposed by public and private law.[84] Kleyn and Boraine[85] point out that in the light of the above definition it is usually argued that ownership is an "absolute" and "individualistic" right. "Absoluteness" of ownership implies an unrestricted right, a *plena in re potestas.* "Individuality" denotes the idea that the owner has exclusive control over the thing which he can enforce against the whole world, and the fact that there exists but one kind of ownership which can be exercised either by a sole owner or by co-owners. The characteristics of absoluteness and individuality of ownership, the aforementioned authors point out, are sometimes traced to Roman and Roman-Dutch law and in this sense, the modern South African concept of ownership is equated with that of Roman and Roman-Dutch law. The trustee in an insolvent estate, in my opinion, does not fall within this definition of ownership.

In this respect Joubert[86] points out that Van Heerden JA concluded that ownership passes in terms of sections 20 and 21 but failed to inquire whether the passing of ownership is genuinely necessary to achieve the purpose of these respective sections of the Act. Even with respect to the "vesting" of the *insolvent's assets* in the trustee it is unnecessary for ownership to pass to the trustee. Joubert in my opinion correctly states that in order to fulfil his functions, the trustee requires only the control and the *ius disponendi* in respect of the insolvent's assets. He supports his argument by referring to company liquidations in respect of which it is accepted that ownership of the company assets does not pass to the trustee.[87]

"owner" of a deceased estate is. It should, however, be pointed out that while the Insolvency Act of 1936 expressly refers to the "vesting" of the estate in the Master, the Administration of Estates Act 66 of 1965 and its predecessors contains no such references. In this context Stander says that the insolvent estate is administered by the trustee, but "hy doen dit egter volgens die aanwysings of besluite van die concursus creditorum" (*Die invloed van sekwestrasie op onuitgevoerde kontrakte* (LLD thesis PU for CHE (1994) 26).

83 See Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) 161.

84 *Ibid*; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 106; *Gien v Gien* 1979 2 SA 1113 (T) 1120.

85 161–162.

86 "Artikel 21 van die Insolvensiewet: Tyd vir 'n nuwe benadering?" 1992 *TSAR* 705.

87 See also De Wet and Van Wyk *supra* fn 4 704 and s 361 of the Companies Act 61 of 1973 and my reference to s 69 in fn 82 *supra*. Stander *supra* fn 82 31 ff points out that the trustee is not merely an agent of the creditors and that in *Gilbert v Bekker* 1984 3 SA 774 (W) the trustee was regarded as merely the holder of an office and could be regarded as a statutory officer. Stander sees the trustee as a statutory officer in a fiduciary position, but

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The other particularly contentious aspect regarding the interpretation of section 21(5), relates to the position of the creditors of the solvent spouse. In terms of this section, any property of the solvent spouse realised by the trustee bears a proportionate share of the costs of sequestration. The separate creditors for value of the solvent spouse, having claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, are entitled to prove their claims against the estate of the insolvent spouse in the same manner and have the same rights and remedies and are subjected the same obligations as if they were creditors of the insolvent estate.[88] They are, however, not liable to make any contribution under section 106 and are not entitled to vote at any meeting of creditors.[89] Separate creditors who have proved their claims are entitled to share in the proceeds of the property realised according to their legal priorities *inter se* and in priority to the separate creditors of the insolvent estate, but are not entitled to share in the separate assets of the insolvent estate.[90] In this context it should be noted, however, that the Act does not compel the solvent spouse to take vindicatory action to recover her property. In the absence of such a vindicating action by the solvent spouse, her property will be treated as part of the insolvent estate from the very beginning. In this way the separate creditors of the solvent spouse will be prejudiced because they would either not qualify as creditors of the insolvent estate, or would have to prove ownership of the property itself by means of a vindicatory action.[91]

In *De Villiers v Delta Cables (Pty) Ltd*[92] the Appellate Division had to consider the implications of section 21 in order to establish whether the registration of the mortgage bond over Mrs M's property was legally binding on the trustee of her husband's estate. To answer this question, the court first inquired what the position would have been if it had been Mrs M's estate which had been sequestrated instead of that of her husband. In an *obiter dictum* Van Heerden JA found that the registration of the bond after the sequestration of Mrs M's estate would have been invalid because it would have interfered with the *concursus creditorum* which would have been established upon the sequestration of the estate.[93]

Returning to the actual facts of the *De Villiers* case, the court found that section 21 established a *concursus creditorum* in respect of the creditors of Mrs M, and that such *concursus creditorum* prevented the valid registration of the bond after the sequestration of Mr M's estate, unless his trustee consented to such registration. This line of thought regarding the *concursus creditorum*, according to Van Heerden JA, finds its origins in section 21(5). The legislature, he says,

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at the same time points out that the trustee is in fact regarded as an owner in our insolvency law, although she is of the opinion that this situation finds no support in the Roman and Roman-Dutch law. Stander's opinion, however, appears to be that control only and not ownership of the insolvent estate passes to the trustee (or Master), and she says (42): "Die kurator [of Meester] besluit oor die vervreemding-, beheer-, beswaring-, vindikasie- en beskikkingsbevoegdheid slegs vir doeleindes van die sekwestrasie-proses volgens die Wet."

88 S 21(5).
89 S 21(9).
90 S 21(5).
91 See Ailola 1995 *J for Juridical Science* 147.
92 *Supra*.
93 13D–G.

> "clearly intended that subsequent to the vesting of the assets of the solvent spouse in the Master nothing could be done by a creditor of that spouse to alter his own rights or those of other creditors ... The 'legal priorities inter se' were thus intended to be the priorities existing at the date of the above vesting. Indeed, that vesting in itself had the effect that creditors of the solvent spouse could no longer, as against the trustee, claim specific performance of an obligation of the solvent spouse, or, as regards unrealised assets, act on authority conferred by that spouse".[94]

Whether a "fictitious" *concursus creditorum* of this nature is established, is debatable. In my opinion, the court erred in its ruling. Authority for this conclusion may be found first in the various attempts to describe what precisely is meant by a "*concursus creditorum*". Although there are basically two lines of thought about this, there is consensus that a *concursus creditorum* comes into existence upon the sequestration of an estate.[95] One should not lose sight of the fact that section 21 deals with the effect of sequestration on the property of the spouse of the insolvent in her capacity as spouse, not in her capacity as an insolvent whose estate has been sequestrated.

This question whether or not section 21(5) establishes a *concursus creditorum* with regard to the creditors of the solvent spouse is of more than mere academic importance. The court's ruling that a *concursus creditorum* is established has far-reaching implications for both the solvent spouse and for her creditors. For one thing, maintaining the relative positions of preference of the solvent spouse's creditors at the moment of sequestration of the insolvent estate necessitates the application of the rules of insolvency which relate to executory contracts.[96]

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94 14B.

95 *In Re Blanckenberg; Watermeyer v Heckroodt* 7 Kuuhl (1830) 1 Menz 477 is probably one of the earliest cases to discuss this aspect and *concursus creditorum* in that case referred to the procedure which applies after the sequestration of the estate. In the case of *Campagnie Francaise v Cornwall and Bank of Africa* 3 HCG 442 (1885) the court found that the estate in question had not been sequestrated and the court consequently found it unnecessary to settle the dispute "on the basis of any concursus or praelatio of respective creditors in insolvency". In this case *concursus* thus referred to the priorities of creditors after sequestration. *Walker v Syfret* 1911 AD 141 (also reported in *Walker v Grand Junction Railways* (1911) 4 Buch AC 378) is, of course, the *locus classicus* in the law relating to *concursus creditorum*. Here too Lord De Villiers's use of the term *concursus creditorum* is an indication that it refers to the rules of execution which apply upon the granting of a sequestration or liquidation order; Smith *supra* fn 2 uses the term primarily in the context of "a gathering of creditors". Smith 4 says that "on insolvency a concursus creditorum or concourse of creditors comes into existence". See also Smith "The recurrent motif of the Insolvency Act – advantage to creditors" 1985 *MBL* 27; Stander "Die vernietigbare regshandelinge in die insolvensiereg" (LLM dissertation UP (1985)). Most modern authorities use this term in the broader context of the collective execution procedure which comes into existence upon the sequestration of the creditor's estate. See eg De la Rey *Mars* 136; Boraine *Suid-Afrikaanse handelsreg* (1988) vol 2 651; Forder "Insolvency of the hire purchase seller: concursus creditorum, ownership and possession" 1986 *SALJ* 86; and for a comprehensive discussion see Swart "Die rol van 'n concursus creditorum in die Suid-Afrikaanse insolvensiereg" (LLD thesis UP (1990) ch 11).

96 See *Muller v Bryant and Flanagan (Pty) Ltd* 1978 2 SA 807 (A); *Smith v Parton* 1980 3 SA 724 (D); *Portevs v Strydom* 1984 2 SA 489 (D); *Thomas Construction (Pty) Ltd (in liq) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 2 SA 546 (A); Oelofse "Invloed van sekwestrasie op onuitgevoerde kontrakte" 1988 *THRHR* 543; De Wet and Van Wyk *supra* fn 4 458 468; Reinecke and Cronjé "Eiendom op die huurkoopsaak en kansellasie

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If one accepts that all the property[97] of the solvent spouse vests in the trustee, it would follow that all executory contracts whereby the solvent spouse obtained rights would be subject to the rules governing executory contracts. It has correctly been said[98] that such an interpretation of section 21 would be most burdensome to the solvent spouse and her creditors. To illustrate the absurdity of the interpretation, it has been pointed out that section 38 of the Act would apply to contracts of service entered into by the solvent spouse prior to the sequestration of the insolvent. This would result in the services of the employees of the solvent spouse being terminated upon the insolvency of her husband.

A further disadvantage suffered by the solvent spouse's creditors is that some of the protective regulations of the Act which are available to the insolvent's creditors, such as the right to receive certain notices and the rights of creditors at the various meetings of creditors, are denied the creditors of the solvent spouse.[99] One can justifiably ask why these mostly innocent third parties should be prejudiced by the actions of someone they had no contact with, or at least why they should not enjoy the same measure of protection which the insolvent's creditors enjoy.

For all the aforementioned reasons, it would appear that the legislature could not have intended to create a *concursus creditorum* in respect of the creditors of the solvent spouse. Ample authority exists to exclude the establishment of a *concursus creditorum* with respect to the solvent spouse and her creditors. Sequestration is a prerequisite for a *concursus creditorum*. This is a principle which originated through the evolving process of our common law. Principles governing the construction of statutes are not in favour of the common law being altered by legislation[100] and it is unlikely that the legislature could have intended altering the common law by means of a single section of an Act. In section 21, the legislature has in fact created an inadequate, contradictory and schizophrenic provision. The latter is succinctly illustrated by Van Heerden AJ's *dictum* which implies that the provisions of section 21(5) provide for the establishment of a *concursus creditorum*:[101]

> "Indeed, that vesting [of the assets of the solvent spouse in the Master] in itself had the effect that creditors of the solvent spouse could no longer, as against the trustee, claim specific performance of an obligation of the solvent spouse, or, as regards unreleased assets, act on an authority conferred by that spouse."

On the one hand, the legislature is including the solvent spouse's assets as part of the insolvent estate, and thereby denying the existence of any rights which the solvent spouse had in respect of those assets. On the other hand, however, the legislature is simultaneously recognising the existence of the solvent spouse's rights in respect of those assets by attempting to regulate the position of the solvent spouse's creditors.

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van onuitgevoerde kontrakte by insolvensie van die huurverkoper" 1979 *THRHR* 389; Smith *supra* fn 2 ch 8; Swart *supra* fn 15 ch 17; Van Rooyen "Terugtrede uit 'n koopkontrak na sekwestrasie van koper se boedel as gevolg van koper se kontrakbreuk voor sekwestrasie" 1985 *THRHR* 222.

97 As defined in s 2 of the Act.

98 Joubert 1992 *TSAR* 703.

99 See eg s 17 of the Act and part 2 *supra*.

100 Steyn *Die uitleg van wette* (1981) 44.

101 14B.

Further, the provision in section 21(5) for the solvent spouse's creditors to institute a claim against the insolvent estate of the husband as if they were creditors of the husband, is no indication that a *concursus creditorum* is established in respect of these creditors. The creditors of the solvent spouse are not creditors of the insolvent. In this respect Joubert[102] points out that in the absence of section 21(5) it would not be competent for them to institute claims against the insolvent estate. He further avers that the purpose of section 21(5) is merely to confirm that the solvent spouse's creditors can institute claims against the insolvent estate. By providing for the creditors to institute claims as if they are creditors of the insolvent estate, he says, the legislature probably only intended that the procedural rules of the Insolvency Act for the processing of claims should apply.

The reference in section 21(5) to the creditors of the solvent spouse being entitled to share "according to their legal priorities inter se" in the property which has been realised, does not necessarily refer to legal priorities which existed at the time of the sequestration of the insolvent estate of the husband. Here one should distinguish between circumstances where the estate of the spouse is solvent and where it is insolvent. Where the estate of the spouse is solvent, the position of priority can be established at the time when the claims are instituted. However, where the estate of the insolvent spouse's spouse is also insolvent, the separate sequestration of that spouse's estate will establish the necessary *concursus creditorum* and her creditors' relative position of priority. It is clearly unnecessary for section 21 to establish a *concursus creditorum* in this respect.

Is a *concursus creditorum* necessary for the protection of the creditors of the insolvent estate? Apparently not. Section 21(5) provides for those creditors to share in the assets in priority after the creditors of the solvent spouse. The provisions of section 21(5) have in fact reduced section 21 to a contradiction in terms. Creditors of the solvent spouse are required to prove their claims in respect of (the solvent spouse's) assets which in terms of section 21 have vested in the trustee of the insolvent estate to the satisfaction of the presiding officer at a meeting of creditors.[103] However, the question which inevitably arises is why the creditors of the solvent spouse should even be considered once the solvent spouse has failed to show that such assets do not form part of the estate of the insolvent spouse. By recognising the claims of the creditors of the solvent spouse, one is recognising the fallacy and inadequacy of section 21. If a claim by the creditor of the solvent spouse is admitted, it would effectively mean that the assets which are the subject of that claim do not form part of the insolvent estate. It has been argued that under the latter circumstances it ought to be irrelevant whether the creditor of the solvent spouse could after sequestration improve his position relative to other creditors.[104] If a creditor of a solvent spouse fails to prove his claim against the insolvent estate, it would mean that any attempt to improve his position of preference in respect of that claim after sequestration of the insolvent estate would in any event be worthless.

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102 703; see also Ailola 1993 *J for Juridical Science* 143.
103 See s 21(5) read with s 44.
104 Joubert 1992 *TSAR* 704.

In my opinion, the situations illustrated above should not even arise if the idea and purpose embodied in section 21 is to be carried to its intended consequences. Reference in section 21(5) to creditors of the solvent spouse, in my opinion, is the result of insufficient thought being given to this issue by the legislature. But what solutions may be envisaged to improve this legislation?

One possibility is that if the solvent spouse has *bona fide* creditors in respect of particular assets, the assets in question should not form part of the insolvent estate of her husband. This would create a greater measure of protection for the *bona fide* third parties (creditors) who probably had no way of knowing what the financial position of the insolvent spouse may have been at the time when they contracted with the solvent spouse.[105] To bring section 21 back into its correct perspective, one must again inquire as to the purpose of this section, namely, to ease the burden of proof which rested on the trustee of the insolvent spouse's estate. The purpose of section 21 was not to attach the consequences of insolvency to creditors of the solvent spouse and it is consequently unrealistic and jurisprudentially unsound to allow section 21 to create a *concursus creditorum* where it is unwarranted and unnecessary.

The inadequacy of the provisions of section 21, and more specifically of section 21(5), creates a conflict of interest between the creditors of the spouses. The problem, in my opinion, could have been alleviated if transactions entered into by the solvent spouse, and property obtained in consequence of such transactions, were subjected to the same provisions that regulate any other dispositions which can be set aside in terms of the Insolvency Act. The relationship between spouses would appear to be no different to the relationship between, for example, parent and child, immediate family members, employer and employee or simply friends, to mention but a few. There is no sound reason why the special provisions of section 21 together with all their implications should have been created to regulate the position between spouses. Section 21 is a drastic and inequitable provision which could have been avoided. If a trustee should suspect that property of a solvent spouse belongs to her husband's insolvent estate, such property would usually have been acquired by means of a disposition that can be set aside in terms of the Act, for example, dispositions without value (section 26), voidable preferences (section 29), undue preferences (section 30) and collusive dealings before sequestration (section 31). The machinery for doing so is provided for by the Act as it presently stands. It would obviously be impossible to apply provisions similar to those of section 21 to the myriad of relationships that could exist between two or more people. A solution should rather be sought in the removal of section 21 from the statute books. In my opinion this should not be seen as burdening the trustee of an insolvent estate in proving the status of a transaction. The trustee has the entire Act at his disposal. The Act in itself contains stringent interrogatory and protective regulations[106] in favour of the trustee and creditors, while it should not be forgotten that the trustee is being remunerated for his efforts.

The South African Law Commission[107] has recommended the easing of the trustee's burden of proof in respect of certain dispositions which may be set

105 See also the South African Law Commission Report *supra* fn 5 4.51 76.
106 See specifically s 26–44.
107 *Supra* fn 5 13.

aside under circumstances where a close relationship exists between the insolvent and another party. Acceptance of this proposal would serve as further justification for the removal of section 21 of the Act.

5 SECTION 21 IN CONFLICT WITH THE SOUTH AFRICAN CONSTITUTION ACT 200 OF 1993 (CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 OF 1996)

It has already been pointed out elsewhere in this article that section 21, traces of which can be found in the common law, is a drastic provision. According to the presumption known as the *presumptio Muciana*, everything in possession of a married woman was considered to have come from her husband or someone under his power, if the source from which the wife obtained it could not be shown. However, as time passed, this presumption was relaxed to such an extent that Voet[108] says the following about it:

> "But today such presumptions of base gain fall away, since in case of doubt everyone is believed to be honest until the contrary has been proved. For that reason it is no longer necessary to presume that what a wife holds has come to her from the generosity of her husband, but rather is a donation to be proved, especially if the wife is a public trader."

The *presumptio Muciana* was held to be unconstitutional in West Germany. It was abolished in France in 1967 and in Belgium in 1976.[109] In the United Kingdom, the Cork Report rejected the proposal that the spouses' assets should be pooled and made available to the insolvent spouse's creditors. The reasoning behind the latter report was that it would lead to an unsatisfactory inquiry to identify the solvent spouse's separate property that has not been derived directly or indirectly from the other spouse.[110]

Although Voet's comment on the *presumptio Muciana* seems particularly relevant in the twentieth century where both spouses are usually commercially active, the enactment of section 21 of the Insolvency Act[111] nevertheless appears to have relegated South African insolvency law back to the dark ages. It is probably only a matter of time before the constitutionality of the provisions of section 21 will be tested by the Constitutional Court.

Chapter 3 of the South African Constitution[112] protects fundamental rights. These rights, however, are not absolute and may come into conflict with one another. They are also subject to a general limitation clause.[113] In terms of section 33 of the Constitution a fundamental right may be limited by a law of general application if such limitation is reasonable and justified in an open and

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108 24 1 16 – Gane's translation as quoted in the South African Law Commission Working Paper 74.

109 See The South African Law Commission Working Paper 74.

110 Report of the Review Committee Insolvency Law and Practice Chairman Sir Kenneth Cork GBE Cmnd 8558 London: Her Majesty's Stationary Office 1982.

111 24 of 1936.

112 Act 200 of 1993. For a comprehensive discussion see also Cachalia *Fundamental rights in the new Constitution: An overview of the new Constitution and a commentary on chapter 3 on fundamental rights* (1994); Basson *South Africa's interim Constitution: text and notes* (1994). See also the Constitution of the Republic of South Africa, 1996, which was adopted after the completion of this article.

113 See s 33 of Act 200 of 1993 (s 36 of the 1996 Constitution).

democratic society based on freedom and equality, and provided that such limitation does not negate the essential content of the right in question.

Section 13 of the Constitution protects a person's right to privacy (as does section 14 of the 1996 Constitution). The former provision provides:

> "Every person shall have the right to his or her personal privacy, which shall include the right not to be subjected to searches, the seizure of private possessions or the violation of private communications."

To begin with, both section 16(3) and section 21 of the Insolvency Act are in conflict with section 13 of the Constitution. Section 16(3) of the Insolvency Act provides that a spouse whose separate estate has not been sequestrated and upon whom a final order of sequestration of the other spouse's separate estate has been served, must lodge with the Master a statement of his or her affairs. As mentioned above, a proposal similar to this was rejected by the Cork Report in the United Kingdom. I would argue that it would be unconstitutional to limit an individual spouse's right to privacy in the manner that section 16(3) does, even if tested solely on the criteria of reasonableness and justifiability in an open and democratic society based on freedom and equality. The provisions of both sections 16(3) and 21 of the Insolvency Act would also result in violation of private communications. The privacy of one's financial affairs was recognised even before the appearance of the new Constitution. It was in recognition of this that special legislative provisions were enacted in, for example, the Income Tax Act[114] for the invasion of the individual's right to privacy in respect of his or her financial affairs.

Further, section 16(3) comes into conflict with section 8 of the Constitution (section 9 of the 1996 Constitution). Section 8 makes provision for every person to be treated equally before the law,[115] while it also prohibits discrimination on a number of grounds including sex.[116] It can generally be accepted that in our patriarchal society it is an overwhelming majority of men who are commercially active and whose estates are sequestrated. The wife is usually the "solvent spouse".[117] Section 21[118] itself, apart from being discriminatory towards women in the same manner that section 16(3)[119] is discriminatory, also infringes the solvent spouse's rights to property protection in terms of section 28 of the Constitution (section 25 of the 1996 Constitution). The vesting of the solvent spouse's estate in the Master and ultimately in the trustee of the insolvent estate is a negation of this right.

In my opinion, attempts to interpret the various provisions of the Constitution and their effect on other legislation will give rise to much difficulty and debate. This will occur in a piecemeal fashion over a lengthy period of time. However, from a constitutional point of view, it would appear that the continued existence of section 21 of the Insolvency Act is in the balance.[120]

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114 58 of 1962.

115 S 8(1) Act 200 of 1993; see also Olivier "Chapter 3 of the Constitution – interpretation by the courts" 1994 *De Rebus* 692.

116 S 8(2) Act 200 of 1993.

117 See also the South African Law Commission Working Paper *supra* fn 5 77.

118 Insolvency Act 24 of 1936.

119 *Ibid.*

120 See eg in this context Van der Vyver "The meaning of 'law' in the Constitution of the Republic of South Africa" 1994 *SALJ* 569; Olivier 1994 *De Rebus* 692.

6 CONCLUSION

From the contents of this essay it seems reasonable to conclude that section 21 of the Insolvency Act 24 of 1936 is inequitable and outdated. The inadequate and complicated provisions of this section have resulted in legal uncertainty and wasteful academic debate about its precise interpretation.

In an attempt to ease the trustee's task of collecting the assets of the insolvent estate by providing for the solvent spouse's assets to vest in the trustee, a drastic and, in my opinion, unnecessary method has been utilised. Section 21 ignores the interests of the solvent spouse, while further conflict is created between the separate creditors of the spouses.

The inequitable and anomalous nature of section 21 was confirmed in *De Villiers v Delta Cables Pty Ltd* and *Snyman v Rheeder*. The interpretation which has been given to section 21 by the Appellate Division in the *Delta Cables* case has not eliminated its inadequacies. Although the opinion of the Constitutional Court on this matter is presently open to speculation, the proposals of the South African Law Commission can be seen as a step in the right direction. The proposals will almost certainly be taken into account should this matter come before the Constitutional Court.

From its inception, section 21 appears to have been unnecessary. As mentioned above, the relationship between spouses appears to be no different to the relationship between parent and child or between immediate family members, and many others. While it would be impossible to apply the provisions of section 21 to all the latter relationships, it is possible to apply the existing provisions regarding voidable dispositions and dispositions that may be set aside to the relationship of spouses.

Section 21, it would appear, is not an indispensable provision in the South African law of insolvency, and in today's modern society the removal of section 21 from the statute books appears to be the most satisfactory solution.

Without falling into the analogous error of suggesting that negligence on the highway falls into a discrete category, it is nevertheless appropriate to point out that particular factual circumstances, which may vary considerably from case to case, attend the driving of motor vehicles. What the reasonable driver, propelling his vehicle along a road in a metropolitan area at the peak of rush-hour, would anticipate from fellow drivers would no doubt vary substantially from what a driver would anticipate in a small rural town. Both experience, and policy considerations regarding the desirability of an efficient flow of traffic in a metropolitan area, would entitle the driver in the former context, as a general (but not inflexible) rule, to assume a greater degree of attention and care on the part of other drivers. This illustrates, once again, the vital importance of the full factual setting when deciding whether particular conduct is negligent or not (per Ackermann J in *Cape Town Municipality v Butters* 1996 1 SA 473 (C) 483).

AANTEKENINGE

THE LEGAL BASIS IN THE INCOME TAX ACT FOR THE TREATMENT OF OPENING AND CLOSING STOCK: TAKING STOCK AFTER *RICHARDS BAY IRON & TITANIUM (PTY) LTD V COMMISSIONER FOR INLAND REVENUE* 1996 1 SA 311 (A)

1 Introduction

The legal basis in the Income Tax Act 58 of 1962 as amended (the Act) and its predecessors for taking opening and closing stock into account when determining a person's taxable income has puzzled many commentators over the years. Meyerowitz ("Opening and closing stock in trade" 1955 *The Taxpayer* 22; "Stock-in-trade" 1956 *The Taxpayer* 146; "The place of stock in trade in the computation of taxable income" 1964 *The Taxpayer* 50; *Meyerowitz on income tax* (1996) par 9–86; and "Income tax – income-use of assessed loss – application of section 103(2) 1995 *The Taxpayer* 89) and Silke (*Tax avoidance and tax reduction* (1958) par 251; and *Silke on South African income tax* (1989) par 8.111) have consistently maintained that opening stock does not constitute expenditure in the production of income (see s 11(a) of the Act) and that closing stock is not encompassed by the definition of gross income (s 1 "gross income"). They conclude that the practice of adding the value of closing stock to income and of deducting the value of opening stock for purposes of determining taxable income does not fit into the artificial formula of the Act for the determination of taxable income. Broomberg ("The basis of income taxation in South Africa" 1972 *SALJ* 181–182) is also of the view that the treatment of opening and closing stock disregards the fundamental rules of the artificial formula for the determination of taxable income. Silke (*Silke on South African income tax* par 7.7 8.112) and Levin ("Analysis of the judgment in the *Nemojim* case" 1985 *SATJ* 33) share this view. (See also Van Niekerk *Income tax in the South African law* (1977) par 812–814.)

The uncertainty about the legal basis for the tax treatment of trading stock implicit in section 22 of the Act seems to be shared by the legislature. This is illustrated by the insertion, in 1994 (in terms of s 17 of the Income Tax Act 21 of 1994) of section 23F in the Act. This provision defers the deduction of expenditure incurred during a tax year on the acquisition of trading stock that is not disposed of by the taxpayer during that year nor held as trading stock at the end of that year. This provision was deemed necessary to prevent taxpayers from deducting the amount of any expense incurred for the acquisition of trading stock, the ownership of which has not been transferred to the taxpayer by the end of the tax year (see the *Explanatory memorandum on the income tax bill*, 1994

13–14). Section 23F is apparently based on the assumption that a taxpayer who has concluded an unconditional contract for the acquisition of trading stock need not reflect such stock as part of closing stock for tax purposes if the taxpayer has not acquired ownership of it by the end of the tax year. This assumption cannot, in my view, be reconciled with the legal basis for the treatment of opening and closing stock.

I argued in 1986 that the real basis for the practice of taking opening and closing stock into account in determining the deduction in respect of the cost of trading stock is to be found in the definition of "gross income" (s 1 of the Act) and in the general deduction formula (s 11(a) and (b) read in conjunction with s 23(f) and (g) and 23B(3) of the Act) and not in section 22 of the Act (see my arguments in *The taxation of trading stock: The history and theoretical basis* (unpublished LLM dissertation Stellenbosch 1987)). The recent judgment in *Richards Bay Iron & Titanium (Pty) Ltd v Commissioner for Inland Revenue* provides further support for some of my views in this regard. I will briefly review the relevant accounting principles governing trading stock and the practice adopted in this regard for tax purposes before dealing with certain aspects of this judgment.

2 Accounting principles regarding trading stock

It is established accounting practice that the net income generated by a business or enterprise must be determined at fixed intervals (usually a year) by calculating the net profit or loss resulting from its activities during the intervening period. The net profit or loss on the sale of trading stock is determined by means of a trading account and a profit and loss account (see eg Pickles and Lafferty *Accountancy* (1982) 0501 0503–0504; Yorston, Smyth and Brown *Accounting fundamentals* (1980) 35–40; Faris *Accounting for lawyers* (1975) 45–49; Needles, Anderson and Caldwell *Principles of accountancy* (1993) 376–377; Weygandt, Kieso and Kell *Accountancy principles* (1990) 361).

The first and crucial step in the process of determining the net profit or loss on the sale of trading stock is the calculation of the gross profit on the sale of stock during the accounting period. This is done by means of a trading account. Gross profit on the sale of trading stock is determined by deducting the cost of the stock sold during the accounting period from the total proceeds of these sales. The cost of the stock sold during that period can be established if the value of opening stock (ie the stock on hand at the beginning of the accounting period) and the value of the closing stock (ie the unsold stock on hand at the end of the accounting period) are taken into account. A simplified example will illustrate the way in which opening and closing stock are taken into account.

A sells one product only. His opening stock consisted of 100 items valued at R5 each (total R500). He purchased 200 items of stock at R5 each (total R1 000) and 600 items at R7 each (total R4 200) during the accounting period. His sales during the accounting period amounted to 200 items at R10 each (total R2 000) as well as 500 items at R14 each (R7 000). His unsold trading stock at the end of the accounting period consisted of 100 items acquired at a cost of R5 each (total R500) as well as 200 items acquired at a cost of R7 each (total R1 400). The cost of the stock sold during the accounting period can be determined as follows:

Cost of opening stock	R500
Add the cost of all stock purchased during the period	R5 200
Total cost of stock available for resale during the period	R5 700
Deduct the cost of closing stock (ie the stock remaining unsold at the end of the period)	R1 900
Cost of stock sold during the period	R3 800

The gross profit on the sale of trading stock can be determined by deducting the cost of the goods sold from the total proceeds of those sales:

Proceeds of sales of stock during the period	R9 000
Minus cost of stock sold during the period	R3 800
Gross profit on sales of stock during the period	R5 200

The same result is reached in the trading account by debiting the cost of opening stock as well as the cost of stock purchased during the period to that account, while crediting the proceeds of all sales of trading stock during the period as well as the cost of unsold closing stock to that account:

TRADING ACCOUNT

Opening stock	R500	Sales of stock	R9 000
Purchases of stock	R5 200		
Gross profit	R5 200	Unsold closing stock	R1 900
	R10 900		R10 900

The entry for closing stock in effect cancels the deduction of the cost of goods that remain unsold at the end of the accounting period, thereby arriving at a figure for the cost of trading stock actually sold during that period. The value of the closing stock as reflected in the trading account for that accounting period represents the value of opening stock for the following accounting period, as accounting periods run consecutively.

The accounting practice of taking closing stock into account in the trading account therefore prevents the deduction of the cost of trading stock not sold during that accounting period. The underlying accounting principle is clear: only the cost or value of trading stock actually sold during an accounting period qualifies as a deduction during that period. The cost or value of stock still unsold at the end of an accounting period may not be deducted during that period, but can only be deducted in a future accounting period when the stock is actually sold.

The trading account encompasses a second principle, namely that the cost of trading stock sold during the accounting period is determined on nominalistic principles. The historical cost of the stock forms, in principle, the basis for the determination of the relevant amount. The calculation will normally include not only the historical cost of purchasing the stock, but also all costs incurred in getting the stock to the location where it will be sold. The individual items comprising the closing stock may have been acquired over a period at widely differing prices. The value of closing stock in the example above reflects the actual historical cost of that stock. This will, however, not necessarily be the case

in practice. There are various bases for determining the cost of the closing stock under these circumstances. The method of valuation adopted may have a considerable impact on the calculation of the cost of closing stock and hence on the gross profit on sales of trading stock during the period (see eg Weygandt, Kieso and Kell *op cit* 362–367).

The market value of closing stock may of course decline below its cost for a variety of reasons, for example, a change in fashion or obsolescence. Prudent accounting practice will generally require that provision be made for such depreciation in the value of closing stock by means of an appropriate deduction from the cost of such stock. Provision is thereby made for an anticipated but unrealised loss on the eventual sale of the closing stock in a subsequent accounting period.

3 Tax practice regarding opening and closing stock in historical context

3 1 Statutory developments

Section 22 of the Act can be traced back to 1956 (see s 1 "trading stock" and 11(5) of the Income Tax Act 31 of 1941 (the 1941 Act) inserted by s 2(i) and 6(f) of the Income Tax Act 55 of 1956). The provisions inserted during 1956 represent the first provisions of general application to the valuation of trading stock. These valuation provisions clearly implied that opening and closing stock had to be taken into account in the determination of taxable income, but did not indicate the manner in which this was to be done.

The only provisions dealing with the valuation of trading stock prior to 1956 were those applying to farmers' livestock and agricultural produce. The Income Tax Act 28 of 1914 (the 1914 Act) contained a provision dealing with the position of persons carrying on pastoral, agricultural or other farming operations (s 4(6) of the 1914 Act). This provision provides a clue to the general treatment of trading stock. It provided, as a general rule, that the value of a farmer's livestock or agricultural produce on hand at the beginning and end of a tax year would not be taken into account in assessing his income. A farmer who desired such value to be taken into account could, however, give notice to that effect when furnishing his return. The formulation of this provision indicates that opening and closing stock had, as a general rule, to be taken into account under the 1914 Act. It has been argued that the 1914 Act taxed profits or gains and that the determination of these required opening and closing stock to be taken into account in accordance with accounting principles (see eg Meyerowitz *Meyerowitz on income tax* par 9.86).

The Income Tax (Consolidation) Act 41 of 1917 (the 1917 Act) consolidated the Mining Taxation Act 5 of 1910 and the 1914 Act. A comparison of the wording of the 1914 Act and the 1917 Act reveals a number of significant changes (see the remarks in this regard by Mason J in *Stephan v CIR* 1919 WLD 1 5–6). The point of departure for the determination of taxable income is "gross income", a defined concept which provides the basis for determining a taxpayer's "income" and "taxable income" (s 6 of the 1917 Act "gross income", "income" and "taxable income"). The definition of "gross income" contains no reference to "gains or profits". The 1917 Act clearly embodies the well-known statutory or artificial formula for the determination of a taxpayer's taxable income (see *Pyott Ltd v CIR* 1945 AD 128 135). The 1917 Act, however, adopted a provision dealing with the livestock or produce of farmers similar to

that under the 1914 Act (see the proviso to s 9(1) of the 1917 Act). It can be inferred from the wording of this provision that the values of opening and closing stock had to be taken into account, as a general rule, when determining the amount of a taxpayer's taxable income under the 1917 Act (see the remarks of Searle JP in *CIR v Jacobsohn* 1923 CPD 221 232). The formulation of this provision also seems to suggest that the acquisition of trading stock was treated, as a general rule, as the reinvestment or capitalisation of income and that the deduction of the cost of such stock was therefore prohibited (see s 21(1)(e) of the 1917 Act). It seems clear that only the cost of trading stock actually sold during a tax period qualified, in principle, as a deduction under the general deduction formula (s 17(1)(a) and 21(1)(c), (e) and (f) and 21(2)(b) of the 1917 Act).

A new dispensation for farmers was adopted in 1921 (s 9 of the 1917 Act as substituted by s 4 of the Income Tax (Consolidation) Act Further Amendment Act 29 of 1921). These amendments were effected as a result of the recommendations in the Van Hulsteyn Report (*Report of the committee of enquiry re taxation of incomes derived from farming operations* UG3–19 (1919) par 121 123). The new dispensation provided for the taking into account of a farmer's livestock or produce as at the beginning and end of a tax year as well as for the valuation of livestock at standard values.

The 1917 Act was repealed by the Income Tax Act 40 of 1925 (the 1925 Act). The 1925 Act adopted most of the provisions of the 1917 Act. A major change effected by the 1925 Act was the re-establishment of a farmer's right to elect whether or not the values of livestock or produce on hand at the beginning and end of a tax year had to be taken into account in the determination of his taxable income from farming (s 15 of the 1925 Act). The 1925 Act adopted most of the provisions of the 1917 Act regarding the valuation, by farmers electing to be assessed on the stock basis, of livestock at standard values.

The next consolidation Act, namely the 1941 Act, adopted most of the provisions of the 1925 Act. The new provisions introduced in the 1941 Act did not change the basic structure of the Act in respect of the determination of taxable income. The only provisions specifically providing for the treatment of trading stock remained those allowing farmers a choice whether or not to be assessed on the stock basis or a cash basis in the determination of their taxable income from farming (s 14 of the 1941 Act). The option to be taxed on the "cash" basis, that is, to ignore the value of unsold livestock or produce, was finally withdrawn (see eg the amendments effected by s 3(a) in the Income Tax Act 47 of 1944 and s 7 of the Income Tax Act 52 of 1947). The only other major change was the insertion, in 1956, of the general provision regarding the valuation of trading stock referred to above.

The 1941 Act was repealed and replaced in 1962, by the present Act which adopted most of the provisions of the 1941 Act. The valuation provisions inserted during 1956 and amended in 1958 were re-enacted as section 22 of the Act.

It may be argued that the statutory developments from 1917 onwards regarding farmers clearly point to the existence of a general rule that the value of opening and closing stock had to be taken into account in the determination of taxable income. This implication is also to be found in the valuation provisions enacted in 1956 and re-enacted as section 22. The subsequent insertion of sections 22A and 22(8) during 1971 and 1983, respectively, amounted to implicit

recognition of the tax practice of deducting the value of opening stock from income and of adding the value of closing stock.

3 2 Tax practice

It is clear that accounting practice regarding the bringing into account of opening and closing stock was generally applied for tax purposes during the period up to 1956 (Eveleigh *Income tax guide* (1917) 9; Barnes *Income tax practice in South Africa* (1919) 13 130 134; Barnes *Income tax handbook* (1925) 117; Ingram *The law of income tax in South Africa* (1933) 101; Osborn and Rothschild *Barnes' Income tax handbook* (1944) 170–171; Blann *Guide to company income tax* (1946) 12). Farmers who declined to exercise the option of being taxed on the "stock" basis constituted the only exception to this rule (Barnes *Income tax practice in South Africa* 129; Ingram 169; Gray "Income tax practice – part III" 1935 *South African Law Times* 125; Barnes *Income tax handbook* (1933) 213–214). The practice in this regard was clearly aimed at determining the deduction claimed in respect of the cost of trading stock sold during the tax year and not in respect of stock lost, destroyed or used for purposes other than its sale. It was generally understood that trading stock lost, destroyed or used for purposes other than its sale had to be brought into account separately in cases where the cost of the item involved was not included in the value of closing stock. The cost of such stock was therefore added back in the trading account in order to neutralise a proportionate part of the cost of stock taken into account in the trading account (Barnes *Income tax practice in South Africa* 50; *Income tax handbook* (1925) 58–59; *Income tax handbook* (1929) 75). A separate deduction was claimed in respect of the item of stock depending on the reason for its loss or destruction or the use to which it was put. Non-deductible items included stock taken for domestic or private purposes or for purposes of making a non-deductible donation. The method of bringing opening and closing stock into account in the trading account while bringing stock lost by pilferage or for other reasons into account separately, gave the cost of stock sold, this being considered sufficient evidence of expenditure and losses actually incurred in the production of income to support a claim under the general deduction formula (Blann *loc cit*).

The practice regarding the taking into account, for tax purposes, of opening and closing stock has been followed consistently up to the present. The cost of trading stock is, therefore, as a general rule claimed as a deduction only in the tax year in which the trading stock is sold or disposed of. Must this principle be reconciled with the statutory basis for the determination of taxable income or does it constitute an exception to it?

3 3 The statutory formula

Since the decision in *CIR v George Forest Timber Co Ltd* 1924 AD 516 522 our courts have tended to stress the element of artificiality in the statutory formula for the determination of taxable income (see eg *Lategan v CIR* 1926 CPD 203 207; *Pyott Ltd v CIR supra* 136; *CIR v Nemojim (Pty) Ltd* 1983 4 SA 935 (A) 946G 947D). Accounting practices must therefore run the gauntlet of the relevant provisions of the Act to determine their acceptability for tax purposes. The approach usually adopted by the Appellate Division in this regard is to take the provisions of the Act as the point of departure and to determine what constitutes gross income or what deductions are permissible according to the language of the Act. Accounting and commercial practices are sometimes stated to be irrelevant

for purposes of this enquiry (eg *Caltex Oil (SA) Ltd v SIR* 1975 1 SA 665 (A) 676H; *SIR v Eaton Hall (Pty) Ltd* 1975 4 SA 953 (A) 958B–E; see ITC 675 16 *SATC* 238 242 for an illustration of a result that is "repugnant" to correct accounting principles). The basic principle regarding allowable deductions was formulated as follows by Corbett CJ in *CIR v Felix Schuh (SA) (Pty) Ltd* 1994 2 SA 801 (A) 813F–G:

> "As has frequently been pointed out, the Court is concerned with the deductions permitted in terms of the Act and not with debits or other provisions made in a taxpayer's account, even though these may be regarded as prudent and proper from an accounting point of view."

It is clear from the *Nemojim* case *supra* 957D–E that the provisions of section 22 do not override the general deduction formula of the Act. The practice regarding opening and closing stock cannot therefore be regarded as an exception to the statutory formula for the determination of taxable income, but must reflect the underlying principles embodied in the formula. The question how this practice is to be reconciled with the statutory formula must be considered in the light of the views regarding the rationale for section 22 recently expressed in the *Richards Bay Iron & Titanium* case.

4 A judicial view of the rationale for section 22

The appellants in *Richards Bay Iron & Titanium* extracted and beneficiated certain minerals. Various stockpiles of material at different stages of beneficiation were created during the course of their operations. In calculating their trading income, the appellants ignored the value of certain of the stockpiles. They subtracted all the deductible expenses incurred in producing these stockpiles, but failed to add the value of the stockpiles generated by a good deal of that expenditure to their income. In the words of the court (per Marais JA 315B): "The economic and financial benefit which had accrued to appellants as a result of such expenditure was simply ignored."

The issue before the court concerned the status in tax law of the stockpiles ignored by appellants and the extent, if any, to which they were to be taken into account in assessing appellants' taxable income. The question, simply, was whether the stockpiles at the end of the tax year had to be taken into account as closing stock in terms of section 22(1), that is, whether these stockpiles constituted trading stock as defined in section 1 of the Act. The major portion of the court's judgment deals with the ambit of the definition of trading stock for purposes of section 22. In the course of its unanimous judgment the court expressed the following views regarding the rationale for section 22 (316F–317C):

> "The rationale for the existence of these provisions is neither far to seek nor difficult to comprehend. The South African system of taxation of income entails determining what the taxpayer's gross income was, subtracting from it any income which is exempt from tax, subtracting from the resultant income any deductions allowed by the Act, and thereby arriving at the taxable income. It is on the latter income that tax is levied. The concepts involved are defined in the Act . . . Where a taxpayer is carrying on a trade, any expenditure incurred by him in the acquisition of trading stock is deductible in terms of s 11(*a*) of the Act because it is expenditure incurred in the production of income, and it is not of a capital nature. Income generated by the sale of such stock is of course part of the trader's gross income. Where in his first year of trading a trader has bought, and thereafter sold, all the stock which he acquired during that year, no problem arises. There will be a perfect correlation between the trading income earned and the expenditure incurred in that particular year in purchasing and selling the stocks sold, and the difference

> between the two sums will give a true picture of the result of the year's trading. There will be no stock on hand at the close of the year of which account need be taken. Contrast with that situation a situation in which the trader, having sold all the stock acquired earlier during that year at a substantial profit, purchases large quantities of stock just prior to the close of his tax and trading year. If he were permitted to deduct the cost of purchasing that stock from the income generated by his sales, without acknowledging the benefit of the stock acquired, he would be escaping taxation in that year on income which otherwise would have been taxable by the simple expedient of converting it into trading stock of the same value. That process could be repeated every year *ad infinitum*. It is true that there would ultimately have to be a day of reckoning when trading finally ceases, but the fact remains that the taxpayer will have been enabled to avoid liability for tax until that point is reached. Where the trader is an individual who is subject to rising marginal tax rates as his trading profit increases, he would be enabled to so regulate his apparent profit that he immunised himself from them indefinitely."

The court also referred (317E–318C) to the explanation of the High Court of Australia in *FCOT v St Hubert's Island Pty Ltd (in liquidation)* 1978 8 ATR 452 of the rationale for the Australian provisions which are broadly similar to section 22 of the Act. The court concluded that the Act requires opening and closing stock to be taken into account for the same reasons as those advanced by the Australian court, namely to ensure a correct reflex of the trader's income for the accounting period. Section 22 is aimed, in the court's view (326D–E), at obtaining a more accurate calculation of the profit earned or the loss sustained during the year and at achieving a true reflection of the taxpayer's trading fortunes (see 326E 327A–B) or true financial position (327F–G). The court illustrated how integral in the computation of a trader's income the reckoning of trading stock on hand is by referring (318A–C) to a passage from the English case of *Duple Motor Bodies Ltd v Ostime* 39 TC 537 569–570, also referred to in the *St Hubert's Island* case.

British income tax legislation provides for the assessment of tax on the profits or gains of a business determined according to commercial principles and not according to a statutory or artificial formula. Does the court's reference to the *Duple Motor Bodies* case and its stress on the objective of obtaining a more accurate calculation of a trader's profit or loss amount to the recognition of a profit or gains approach as basis for the taxation of trading stock?

It would be wrong, in my view, to infer from this judgment that the profit or gains approach based on commercial or accounting practices has supplanted the statutory formula for the determination of taxable income in respect of trading stock. The court's reference to Australian case law in this regard was clearly motivated by the fundamental characteristic shared by the Australian and South African income tax system, namely "its eschewal of the assessment of tax on the profits or gains of a business in accordance with undiluted accounting principles and practices" (317D–E). Accounting principle and practice cannot prevail over the statutory provisions governing the determination of taxable income. (See also the views of Mason J in the *St Hubert's Island* case as quoted by the court in *Richards Bay Iron & Titanium* 320C–D.) It is clear from the court's views regarding the rationale for section 22, as quoted above, that its point of departure is the statutory or artificial formula for the determination of taxable income: expenditure incurred by a taxpayer in the acquisition of trading stock is deductible in terms of section 11(a) of the Act because it is expenditure incurred in the production of income, and it is not of a capital nature. Income generated by the sale of such stock forms part of the taxpayer's gross income (316G–I).

The principles governing section 22 are to be found in the artificial formula as will be demonstrated below, and not in commercial or accounting practice. The court's reasoning regarding closing stock illustrates that the primary enquiry in terms of the Act is aimed at determining whether the acquisition or sale of trading stock results in any receipt or accrual or incurral of an expense, respectively. The court refers, first, to the case where all the trading stock acquired during a trader's first year of trading is sold during that year. The trader has, in other words, no opening or closing stock. The expenditure incurred during that year in acquiring the trading stock can be deducted in full, as there will, in the court's words (316I), "be a perfect correlation between the trading income earned and *the expenditure incurred in that particular year in purchasing and selling the stocks sold*" (italics mine) – the difference between the two sums will give a true picture of the year's trading results. The position is different, however, if the trader purchases trading stock just prior to the close of the tax year, having sold all the stock acquired earlier that year at a substantial profit. The economic and financial benefit accruing to the taxpayer as a result of expenditure on the acquisition or manufacture of trading stock still on hand at the end of the tax year cannot be ignored when determining the taxpayer's taxable income.

The reasoning of the court in the *Richards Bay Iron & Titanium* case and its conclusion on the question before it illustrate two rules regarding trading stock, namely –

> (a) that the cost incurred in respect of the acquisition of trading stock qualifies in principle as a deduction under the general deduction formula of the Act, but that the Act also requires the value of the corresponding economic benefit accruing to the taxpayer to be taken into account when assessing the taxpayer's liability for tax (328A–B). This applies not only to trading stock acquired by the taxpayer, but also to trading stock manufactured or in the process of manufacture of beneficiation by the taxpayer or raw materials purchased for the purpose of manufacturing something in which the taxpayer trades (315B read with 317A–B 325H–I 326C–F, H–I, 328C–F, H–J 329B–C).
>
> (b) that the Act allows, in effect, the deduction in full only of the cost of trading stock sold or disposed of during a tax year.

The reasoning of the court is based, in effect, on the underlying assumption that the acquisition of trading stock results in a receipt or accrual in the taxpayer's hands while the sale of trading stock results in an expense. The question remains how opening and closing stock fit into the statutory formula for the determination of taxable income. I will first refer to the views of some commentators and to the problems created by a *dictum* in *Sub-Nigel Ltd v CIR* 1948 4 SA 580 (A) before venturing an answer to this question.

5 A possible solution

5 1 The views of some commentators

Meyerowitz and Silke both argue, as seen above, that opening stock does not constitute expenditure in the production of income and that closing stock is not encompassed by the definition of gross income.

Meyerowitz rejects the approach that the acquisition and sale of trading stock should be regarded as a receipt or accrual and an expenditure in kind, respectively. This approach leaves, in his view, no room for taking opening stock into account as an expense, as it becomes expenditure only when disposed of in the course of trade. The other reason for his rejection of this approach is that it is

inconsistent with the reasoning in the *Sub-Nigel* case (Meyerowitz 1955 *The Taxpayer* 22; 1964 *The Taxpayer* 48; *Meyerowitz on income tax* par 11.35). The most logical approach, in the view of Meyerowitz (1964 *The Taxpayer* 50; "Trading stock in the computation of taxable income" 1967 *The Taxpayer* 182) is to regard trading stock as circulating capital which does not constitute gross income or result in any expenditure until it is sold. Opening and closing stock will not be taken into account on this approach. The cost of the stock will be relevant only for purposes of determining the expenditure incurred in regard to the stock actually disposed of during the year. This approach accords in essence with the solution advanced by Van Niekerk (*loc cit*).

Broomberg (1972 *SALJ* 181–182) expresses the view that the use of a trading account for tax purposes results either in the taxation of a notional receipt (the statutorily determined value of closing stock) or in the deduction of a notional expense (the cost of sales). Broomberg's argument is based on the underlying assumption that the sale of trading stock acquired in a previous year does not give rise to any deductible expenditure in the year of its disposal. This view is shared by Silke (*Silke on South African income tax* par 7.7 8.112) and Levin (*loc cit*).

It is clear from the views of Meyerowitz, Silke and Van Niekerk that the Appellate Division's reasoning in the *Sub-Nigel* case *supra* represents the main obstacle to the possible solutions advanced as an explanation for the tax treatment of opening and closing stock. A consideration of this judgment is clearly called for.

5 2 A reappraisal of the Sub-Nigel *case*

The issue before the Appellate Division in the *Sub-Nigel* case *supra* was whether *Sub-Nigel* was entitled to deduct the premiums paid in respect of insurance policies against the potential loss as a result of fire from, *inter alia*, net profits. No claim was made in this regard by *Sub-Nigel* during the tax year in question.

Centlivres JA stressed that the court, in considering this issue, was concerned only with deductions permissible in terms of the Act and not with deductions considered proper from the point of view of an accountant or prudent trader. The court rejected the contention that an expense that has not produced any income during a tax year is not deductible during that year as expenditure incurred in the production of the income. The inquiry was aimed at determining whether expenditure was incurred for the purpose of earning income, and not at whether the expenditure actually produced any part of the income during the year. As part of his reasoning in this regard, Centlivres JA referred to the treatment of trading stock for tax purposes. If it were a requirement for the deductibility of expenditure incurred during a tax year that such expenditure produce income during that year, it would mean that a merchant could not deduct the purchase price of trading stock purchased during a tax year but remaining unsold at the end of that year. Centlivres JA continued (589–590):

> "That this is not so is shown by such cases as *Commissioner for Inland Revenue v Niko* (1940 AD 416 at 427), for it is clear that the merchant, in determining his taxable income, is entitled to deduct from the proceeds of any re-sales effected by him the purchase price of goods which he has not resold during the year."

The contention in question would, in the view of Centlivres JA, lead to unacceptable results in the following tax year. The purchase price of goods bought at the end of the previous tax year would not be deductible from gross income for

that year, but neither would it be deductible in the following tax year, although all the goods may have been disposed of during the latter year, as expenditure incurred in a year prior to a particular tax year cannot be deducted in the latter year. This would mean that if a merchant opened his business to the public on the first day of the year, having stocked his premises prior to that date, he would never be able to bring into account the price he paid for the goods. Centlivres JA concluded:

> "The Legislature could never have intended such an absurd result. The correct position would be that the merchant would show in his accounts for the year prior to the opening of his premises to the public the expenditure incurred during that year in purchasing his stock: that expenditure would be carried forward into the next year as an assessed loss . . . but it would not be deductible in respect of the later year as an expenditure under [the general deduction provisions]."

It is implicit in the reasoning of Centlivres JA that the values of opening and closing stock play no part in the determination of taxable income. The cost of stock acquired in an earlier year and sold in a subsequent year cannot therefore be deducted under the general deduction provisions in the year in which it is sold. Centlivres JA clearly bases his reasoning on the proposition that a merchant, in determining his taxable income, is entitled to deduct from the proceeds of any resales of trading stock the purchase price of all trading stock acquired by him during that year, including closing stock. Centlivres JA referred to *Niko's* case *supra* as authority for this proposition.

An examination of the relevant passage in *Niko's* case (427) relied on by Centlivres JA reveals, however, that it provides no support for that proposition. The facts in *Niko's* case bear, first of all, no resemblance to the examples used by Centlivres JA in *Sub-Nigel*. During the tax year under review, the taxpayer in *Niko* sold all his trading stock either in the ordinary course of business or as part of the disposal of his businesses as going concerns. He therefore had no trading stock on hand at the end of the tax year that could be brought into account. There is, secondly, another vital difference between the "correct position" as described in *Sub-Nigel's* case and the manner in which the Appellate Division dealt with the trading stock in *Niko's* case. Pointing out that *Niko* was entitled to deduct, *inter alia*, the moneys he spent in purchasing his trading stock, the court (427) set out the account that he should have rendered in this regard for tax purposes. The most striking feature of this account is that it follows the standard form of trading account. The value of opening stock and the cost of stock purchased during the tax year are debited to the account, while the proceeds of all stock sold during the period are credited to the account. The value of opening stock is therefore not shown as an assessed loss brought forward from the previous tax year. The description in *Sub-Nigel's* case of the "correct position" is therefore negated by the very case referred to as authority.

The greatest surprise when comparing the two cases is, however, the fact that the respective judgments were both delivered by Centlivres JA. It cannot, in my view, be inferred from his unqualified reference to *Niko's* case that he had reconsidered his views in *Niko's* case about the manner of treatment of trading stock and had come to a new conclusion. Had he wished to depart so drastically from the position set out in *Niko's* case, one would have expected at the very least a consideration of this aspect of the judgment in *Niko's* case, an analysis of the nature of a contract for the sale of trading stock, and a reference to other decisions conflicting with the position described in *Sub-Nigel's* case (eg *Lace*

Proprietary Mines Ltd v CIR 1938 AD 267 270–273 275 281; *Reliance Land and Investment Co (Pty) Ltd v CIR* 1946 WLD 171 174–175 181–182).

The views regarding the treatment of trading stock expressed by Centlivres JA in *Sub-Nigel's* case constitute *obiter dicta*. The nature of a short-term contract of indemnity insurance differs from the nature of a contract for the purchase of trading stock. The insurer under a short-term contract of indemnity insurance undertakes to take over from the insured, for the duration of the contract, a specified risk in which the insured has some interest. The benefit to the insured is the contractual right to be indemnified by the insurer should the specified uncertain event occur during the currency of the contract. The contract is usually entered into for the specified period and is terminated by the effluxion of time, its "renewal" being in fact the conclusion of a new contract. The insured will have no claim under the contract for the return of the premium paid if the risk attaches but does not materialise during the currency of the contract (see eg Getz and Davis *Gordon and Getz on the South African law of insurance* (1993) 79–83 163–168 199; Reinecke and Van der Merwe *General principles of insurance* (1989) 12 196). The premium paid during a tax year in which no claim has arisen under the contract has in effect no residual value and brings into being no asset that can be converted into income (other than, possibly, the amelioration of future increases of premium as a result of a favourable claims record in the past).

In contrast, a purchaser under a contract for the acquisition of trading stock acquires a right to claim delivery of the goods or property specified in the contract from the seller. The expenditure incurred under the contract is converted, in effect, into an asset capable of being converted into income. The expenditure on the trading stock results, as recognised in *Richards Bay Iron & Titanium*, in a corresponding economic and financial benefit.

The reasoning in *Sub-Nigel* is, therefore, appropriate as regards the tax treatment of premiums under short-term policies of indemnity insurance, but is, with respect, clearly inappropriate as regards the tax treatment of the purchase of trading stock, in view of the vital differences between the two types of contract described above.

The application of the reasoning in *Sub-Nigel* would create serious practical problems regarding the proper time at which the cost of trading stock is to be taken into account for tax purposes. The example in *Sub-Nigel* where the cost of trading stock is brought forward to a tax year as an assessed loss, may be used to illustrate a potential problem. The assessed loss may be lost, if the taxpayer is a company, if the company carries on no trade during that year or if the loss is disallowed under section 103(2) of the Act (see Swart "The utilisation of assessed losses by companies – a reappraisal after *Conshu (Pty) Ltd v Commissioner for Inland Revenue*" 1996 *SA Merc LJ* 138). This result will not follow if the cost of the stock is carried forward not as an assessed loss, but as opening stock in the following tax year.

The reasoning in *Sub-Nigel* that the cost of acquisition, during a tax year, of trading stock remaining unsold at the end of that year qualifies as a deduction under the general deduction provisions only during that year and not in the following year, is clearly based on the principle that an expense does not qualify as a deduction under the general deduction formula in a particular tax year if it was actually incurred in an earlier tax year (see *Concentra (Pty) Ltd v CIR* 1942 CPD 509; *Sub-Nigel supra* 589). It is therefore implicit in the reasoning in *Sub-Nigel* that a deductible expense may, under the general deduction formula, arise

in respect of the acquisition of trading stock, but not in respect of its sale. This creates a serious problem where a taxpayer converts an asset of a capital nature acquired some years previously into trading stock by changing his intention in respect of the asset in question. The cost of acquiring the asset would not have qualified as a deduction under the general deduction formula in the year of its acquisition as it constituted an asset of a capital nature at that stage (see s 11(a) of the Act). The cost of the asset cannot, however, in terms of the reasoning in *Sub-Nigel*, be claimed under the general deduction formula in the year of its sale as trading stock. The cost of assets of a capital nature would, in terms of the *Sub-Nigel* approach, be deductible under the general deduction formula only if the assets were converted into trading stock in the year of their acquisition. A merchant who converted a capital asset into trading stock in a subsequent year would, on the reasoning of *Sub-Nigel*, to use the words of Centlivres JA, "never be able to bring into account the price he paid for [it]", an absurd result which could not have been intended by the legislature. The only way of deducting such cost would then be by reopening the assessment for the year in which the assets were originally acquired, a solution that may present practical difficulties and one that was clearly not contemplated in *Sub-Nigel*.

The only valid conclusion, in my view, is that the views in *Sub-Nigel* regarding the treatment of trading stock constitute *obiter dicta* that do not, with respect, correctly reflect the position under the Act. It is also significant, in my view, that the reasoning in *Sub-Nigel* has never been applied in practice or in subsequent judgments. An early example of a result conflicting with the reasoning of Centlivres JA is to be found in *LHC Corporation of SA (Pty) Ltd v CIR* 1950 4 SA 640 (A) 642–643 646–647, where the Commissioner in effect allowed the deduction of the cost of trading stock in the year of its disposal, even though it had been acquired during the previous tax year. Another interesting example ignoring the *Sub-Nigel* approach, in effect, is to be found in *CIR v Strathmore Exploration & Management Ltd* 1956 1 SA 591 (A) 594–595 599 601, a judgment delivered by Centlivres CJ. In this case the Commissioner treated the disposal of trading stock some years after its acquisition by inheritance as giving rise to an expense in the year of its disposal. The issue of the basis for allowing this deduction was, however, not raised in this case. It is clear that the Commissioner ignored the remarks in the *Sub-Nigel* case and continued the practice of taking opening and closing stock into account when determining a taxpayer's taxable income ("Stock-in-trade" 1956 *The Taxpayer* 146).

Having concluded that the judgment in *Sub-Nigel* presents no real obstacle to the search for the underlying principles governing the tax treatment of opening and closing stock, I will, finally, deal with the primary question, namely the real basis in the Act for the practice regarding opening and closing stock.

5 3 Extracting the underlying principles

The general principles that can be extracted from the statutory formula for the determination of a taxpayer's taxable income are clear and well-known (see Swart "A Schuh, an oily patch and a slippery principle – the tax treatment of recoupments and unrealised losses" 1995 *SA Merc LJ* 357). Gross income as defined in section 1 of the Act constitutes the point of departure in determining a taxpayer's taxable income. An amount can, as a general rule, constitute gross income only if there is an actual receipt by or accrual to or in favour of the taxpayer. An amount "in cash or otherwise" accrues to a taxpayer if the taxpayer

becomes unconditionally entitled to a right to payment (*CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1990 2 SA 353 (A) 363I–367D; *Ochberg v CIR* 1933 CPD 256 263–264). The receipt or accrual need not be an actual amount of money but may be every form of property earned by the taxpayer, whether corporeal or incorporeal, that has a money value (*Lategan v CIR* 1926 CPD 203 209; *People's Stores supra* 363J–364I). Benefits in kind may therefore also constitute gross income.

The second major principle of the statutory formula is the rule that an expense or loss can be deducted only if such deduction is specifically allowed in terms of the general deduction formula (see s 11(a) and (b) and 23(f) and (g)) or in terms of a specific deduction provided for in the Act. An expense or loss must be "actually incurred" before it can be claimed as an allowable deduction under the general deduction formula. An expense is incurred if an unconditional liability is incurred during a tax year, whether or not it is dischargeable in that year (*Nasionale Pers Bpk v KBI* 1986 3 SA 549 (A) 564A–D; *CIR v Golden Dumps (Pty) Ltd* 1993 4 SA 110 (A) 118A–E). Expenditure will usually be expressed in monetary terms. Expenditure incurred in kind may, however, also qualify as an allowable deduction under the general deduction formula. Support for this view is to be found in the fact that "gross income" as defined appears to be wide enough, even in the absence of a specific reference to amounts "in cash or otherwise", to include not only money, but every form of property earned by the taxpayer (*Lategan's* case *supra* 208–209). To include receipts or accruals in kind as part of a taxpayer's gross income, but to disallow an expense or loss only on the ground that it was incurred in kind, would result in an anomalous situation that could not have been intended by the legislature.

Receipts or accruals in kind and expenditure incurred in kind may therefore constitute "gross income" or an allowable deduction under the general deduction formula, respectively. The question therefore arises whether a contract for the purchase or sale of trading stock gives rise to any receipts or accruals or expenditure in kind.

A contract of purchase and sale is a bilateral contract in terms of which reciprocal obligations are cast upon both parties to the contract. The contract of sale casts on the seller the obligation of delivering, at the very least, the possession of the thing sold to the purchaser, while the reciprocal obligation is cast on the purchaser to pay the purchase price (Kerr *The law of sale and lease* (1996) 3 142 201; De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* vol 1 (1992) 313 328). If the seller is the owner of the thing sold or can acquire ownership of it, he or she is obliged to transfer it to the purchaser, for example, a shopkeeper who sells articles not in stock and undertakes to order them, or a manufacturer who sells articles yet to be made. The majority of sales contain an express or implied provision that ownership is to be transferred. The seller need not, however, be the owner of the thing sold (Kerr *op cit* 7; De Wet and Van Wyk *op cit* 329; Mackeurtan *Mackeurtan's sale of goods in South Africa* (1984) 12 29). The seller will then be obliged to make the thing sold available to the buyer to enable the buyer to have undisturbed possession of it, and to warrant the buyer against eviction, unless this obligation has been excluded by the parties to the contract.

The rights and obligations under a contract of purchase and sale of trading stock and the nature of the assets sold should in principle determine the tax consequences for both parties to the transaction. A trader will usually acquire

trading stock by means of the conclusion of a contract of purchase and sale with a supplier of the stock. The liability incurred by the trader to pay the price agreed upon to the supplier constitutes, in principle, expenditure actually incurred that may qualify as an allowable expense under the general deduction formula. The trader is, however, also entitled under the contract to the delivery, by the supplier, of the stock purchased by the trader. This right clearly constitutes, in principle, the accrual of a benefit other than in cash. This benefit in kind may constitute gross income.

The main question remaining is whether this expense and the corresponding benefit in kind are of a capital nature. Trading stock is sometimes referred to in our case law as floating or circulating capital (eg *CIR v George Forest Timber Co Ltd supra* 529; *New State Areas Ltd v CIR* 1946 AD 610 620–621; *SBI v Aveling* 1978 1 SA 862 (A) 880B–H). The proceeds of floating capital are not regarded by our courts as being of a capital nature and are therefore not excluded from "gross income" on this ground (*George Forest Timber supra* 524–525). Expenditure and losses of a floating capital nature on the other hand, have been treated as allowable deductions under the formula, as only expenditure and losses of a fixed capital nature are disallowed on the ground that they are of a capital nature (see eg *George Forest Timber supra* 525–526 530; *Stone v SIR* 1974 3 SA 584 (A) 595A–G). Van Niekerk maintains, however, that expenditure of a capital nature included expenditure of a floating capital nature in the form of the cost of unsold trading stock and that this cost did not qualify as an allowable deduction.

The Income Tax Act was re-enacted in 1925, 1941 and 1962. The various consolidation Acts generally adopted most of the provisions contained in the Acts they replaced. The legislature cannot have been ignorant, on each of these occasions, of the manner in which the various provisions being re-enacted were being administered or of the case law on the interpretation of these provisions. This also applies to the well-established principle that expenditure in respect of unsold trading stock is not of a capital nature, as well as the practice consistently followed in respect of opening and closing stock, as seen above. As was said in *Commissioners for Special Purposes of the Income Tax v John Frederick Pemsel* (1891 AC 531 591–592, as quoted in *Randfontein Estates Gold Mining Co Witwatersrand Ltd v Minister of Finance* 1928 WLD 77 83):

> "[W]hen you find legislation following a continuous practice and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the Legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment."

I would therefore argue that there is a strong inference, in the light of the history of the Act, the continuity of the various practices and the relevant case law, that the legislature, in re-enacting the provisions defining "gross income", "income" and "taxable income" as well as the provisions setting out the general deduction formula, intended to continue these practices and intended the relevant provisions to be interpreted and applied in accordance with the relevant case law, for example the *George Forest Timber* case *supra* and *Niko's* case *supra*. I cannot find any support for Van Niekerk's approach of treating the cost of unsold trading stock as a non-deductible expense of a capital nature.

The only logical conclusion is that the expenditure incurred by a trader on the acquisition of unsold trading stock can qualify as expenditure under the general

deduction formula, but that the resulting benefit must be treated as a receipt or accrual in kind falling within the definition of gross income. The approach of treating the acquisition of trading stock as a receipt or accrual in kind and the resultant expenditure as a deduction will not affect the amount of a taxpayer's income as long as the amount of the receipt or accrual in kind is equal to the amount claimed as a deduction in respect of the price of the stock.

What is the position upon the subsequent resale of the stock by the trader? In terms of the contract of sale the trader acquires the personal right to claim the price from the buyer of the stock. The selling price accrues to the trader if he becomes entitled to it. It will form part of his gross income if it meets the requirements of the definition (s 1 "gross income"). The trader must, in return, deliver the assets sold to the buyer, while the ownership of the assets must also be transferred to the buyer if the seller is the owner of the assets.

It is submitted that the seller's liability under the contract of sale to deliver the assets sold to their buyer constitutes "expenditure actually incurred" for purposes of the general deduction formula. The liability of the seller cannot be regarded as a "notional" expense, as this approach would in effect ignore, for tax purposes, some of the legal consequences of a contract of sale. The assumption, as in *Sub-Nigel supra*, that the sale of trading stock in a year subsequent to that in which it was acquired cannot result in any deductible expenditure in the year of its disposal does not reflect the reality of the reciprocal rights and obligations of the parties to a sale. The reasoning in *Sub-Nigel* fails, in effect, to take the seller's obligations under a contract of sale into account.

Support for the view that the seller of trading stock incurs a liability in kind to the buyer is to be found in an unreported decision of the Transvaal Income Tax Special Court delivered during 1980 (case no 7200 – judgment delivered on 1980-02-28). The facts were briefly that the executor of an estate had sold a considerable quantity of shares that had constituted trading stock in the hands of the deceased. The sale was effected to discharge some estate debts. One of the issues before the court concerned the quantum and type of expenditure that could be deducted from the gross proceeds of the sale as being expenditure incurred by or on behalf of the estate. The court had to decide this issue on general principles in view of its finding that the provisions of section 22 were not applicable to the facts before it. Coetzee J came to the following conclusion:

> "[E]xpenditure can be in kind and need not be monetary. Here the expenditure was in kind and took the form of shares contributed by the estate in the production of that income, namely the proceeds. Once that is so, the actual expenditure incurred to produce that very income was in kind, namely the shares which had a value."

It is submitted that this finding merely confirms the principle underlying the practice and the approach of the courts regarding the deduction of the cost of trading stock. As is usually the case, the decisive issue concerned the quantification of the expenditure actually incurred.

6 Conclusions

The approach of treating the sale of stock as giving rise to an expense in kind provides a logical explanation, within the confines of the statutory formula for the determination of taxable income, for the practice of taking opening and closing stock into account. This practice results, as was demonstrated above, in the deduction only of the cost of trading stock sold during the tax year, as required by the statutory formula. The approach of the court in *Richards Bay Iron*

& Titanium (316I) of deducting the expenditure incurred in the particular year "in purchasing and selling the stocks sold" implicitly recognises that the sale of trading stock gives rise to an expenditure in kind. It would be inconsistent to concede that expenditure under the Act can be incurred in kind (see eg Meyerowitz *Meyerowitz on income tax* par 11.32), but to deny that this provides an explanation for the approach to trading stock followed consistently since 1917 in practice and by our courts.

The practice of taking opening and closing stock into account by means of a trading account is merely used as a method of calculating the amount of the allowable deduction in respect of the cost of stock sold during a tax year. It means, in effect, that the taxpayer need not reflect a receipt or accrual in kind in respect of each individual acquisition of trading stock or calculate the exact cost of the stock sold for each transaction involving the sale of stock. There is no need to extend the definition of gross income to include closing stock or to amend the general deduction formula to allow opening stock as a deduction. Closing stock represents, in effect, the total accrual in kind to the taxpayer resulting from the purchase of trading stock remaining unsold at the end of the tax year or, in the words of the court in *Richards Bay Iron & Titanium*, the corresponding "economic and financial benefit which ... accrued to the [taxpayer] as a result of [the] expenditure" and which must be taken into account when assessing the taxpayer's liability for tax (315B 317A–B 328A–B). Closing stock taken into account for tax purposes represents receipts or accruals in kind forming part of gross income. Opening stock which is sold during a tax year represents, on the other hand, deductible expenditure in kind.

The practice of taking opening and closing stock into account amounts to a simplified method of taking a taxpayer's rights and obligations arising from the purchase and sale of trading stock into account in order to comply with the requirements of the statutory or artificial formula. This method provides in principle, however, only for the determination of the cost of trading stock sold, and not of trading stock disposed of in other ways.

The review of the practice regarding trading stock consistently followed since 1917 and the relevant case law reveals, in the final analysis, the following underlying principles:

(a) The use of opening and closing stock to determine the cost of trading stock sold does not override the general deduction formula of the Act, but is in principle governed by it and gives effect to it.

(b) The cost of trading stock sold during a tax year must be determined on the basis of its historical cost or value on the date of its acquisition, as well as the historical costs incurred thereafter in respect of such stock. The basis of valuation of opening and closing stock determines, however, the amount taken into account in respect of the cost of stock disposed of (see Weygandt, Kieso and Kell *op cit* 362–367). The valuation principles used prior to 1956 departed in two respects from the general principles regarding deductions. The cost of the stock disposed of, as determined according to some methods of valuation, such as the last-in-first-out method, departed, in the first place, from the actual historical cost of the individual items of stock disposed of. An anticipated but unrealised loss on unsold stock was, secondly, taken into account when valuing closing stock. This did not accord with the general principle governing the non-recognition of unrealised gains and losses (see Swart 1995 *SA Merc LJ* 358–360). The main function of section 22 and its predecessor inserted in 1956 must

be seen in historical perspective. The main aim of these provisions was clearly limited to providing a legal basis for the practice regarding the valuation of trading stock, a practice which clearly departed from the principles of the general deduction formula.

(c) The extended definition of "trading stock" and the method of assessment of the value of trading stock as prescribed in section 22(1) to (3) show that the underlying principles governing trading stock also apply to trading stock in the process of production or beneficiation as well as components or materials acquired for the purpose of incorporation in something else in which the taxpayer trades.

The conclusion that the tax practice in respect of opening and closing stock is based on the fact that the acquisition of trading stock and the sale of trading stock give rise to a receipt or accrual and an expenditure in kind, respectively, has important implications for the interpretation and application of section 22 of the Act. These aspects fall outside the scope of this case comment, however, and will form the subject of a separate article.

GJ SWART
University of South Africa

ENKELE GEDAGTES RONDOM ARTIKEL 2(3) VAN DIE WET OP TESTAMENTE VAN 1953, INLYWING DEUR VERWYSING EN DIE HERLEWING VAN HERROEPE TESTAMENTE

1 Inleiding

Artikel 2(3) van die Wet op Testamente 7 van 1953 lui soos volg:

> "Indien 'n hof oortuig is dat 'n dokument of die wysiging van 'n dokument wat opgestel of verly is deur 'n persoon wat sedert die opstel of verlyding daarvan oorlede is, bedoel was om sy testament of 'n wysiging van sy testament te wees, gelas die hof die Meester om daardie dokument, of die dokument soos gewysig, vir doeleindes van die Boedelwet, 1965 (Wet No 66 van 1965), as testament te aanvaar ofskoon dit nie aan al die vormvereistes vir die verlyding of wysiging van testamente bedoel in subartikel (1) voldoen nie."

Deur middel van hierdie subartikel word die risiko uitgeskakel dat 'n egte wilsuiting van 'n testateur ten opsigte van die verdeling van sy bates gefrustreer word bloot weens nie-nakoming van die formaliteite vir testamentsverlyding en/of -wysiging.

Die toepassingsgebied van artikel 2(3) is egter nog nie met sekerheid afgebaken nie. Is die subartikel se toepassing naamlik beperk tot kondonasie van vormgebrekkige testamente, of kan dit ook aangewend word op verbandhoudende gebiede wat nie spesifiek deur die wetgewer vermeld word nie? In hierdie bydrae word die aangeleentheid ondersoek met verwysing na inlywing deur verwysing en die herlewing van herroepe testamente.

2 Inlywing deur verwysing

Volgens die Engelsregtelike leerstuk van "incorporation by reference" kan 'n dokument wat nie behoorlik as testament verly is nie, of wat wel as sodanig verly is maar daarna herroep is, in 'n latere testament geïnkorporeer word bloot deurdat laasgenoemde testament na die vermelde dokument verwys. Allerweë word aanvaar dat hierdie leerstuk nie deel van ons reg vorm nie (*Moses v Abinader* 1951 4 SA 537 (A); *Ex parte Estate Davies* 1957 3 SA 471 (N); *Burnett v Kohlberg* 1984 2 SA 137 (K)). Die rede wat tradisioneel in hierdie verband aangevoer word, is juis geleë in die nie-nakoming van testamentêre formaliteite tydens die opstel van vermelde dokument. Die vraag is nou of 'n hof van artikel 2(3) gebruik kan maak om sodanige vormgebrekkige dokument te kondoneer en sodoende erkenning daaraan te verleen naas die testateur se vormkorrekte testament.

Enkele kommentatore het hulle reeds ten gunste van sodanige toepassing van artikel 2(3) uitgespreek (bv Meyerowitz *Administration of estates* (1995) 4.16). Die probleem met hierdie benadering is dat die bewoording van artikel 2(3) oënskynlik nie sodanige toepassing in alle omstandighede regverdig nie. In hierdie verband is dit 'n geykte beginsel van wetsuitleg dat die bepalings van 'n wet net sover as die woorde daarvan strek. 'n Wetsuitlegger mag dus nie buite die woorde van 'n wet gaan nie. Dit in ag genome, staan die volgende struikelblokke onder andere in die weg van die toepassing van artikel 2(3) op die gebied van inlywing deur verwysing:

(a) Artikel 2(3) vereis dat die dokument wat gekondoneer staan te word, deur die testateur "opgestel of verly" moet wees. Die geykte voorbeeld van inlywing deur verwysing waar 'n testateur in sy testament bepaal dat sy erfgenaam 'n bloedverwant is met dieselfde naam as dié van 'n Bybelfiguur in 'n sekere Bybelteks, kan dus nie onder artikel 2(3) tuisgebring word nie aangesien die testateur nie die betrokke dokument (Bybel) self opgestel of verly het nie.

(b) Artikel 2(3) vereis voorts dat die testateur die dokument wat gekondoneer staan te word, as sy testament moet bedoel het. Die implikasie is sekerlik dat *dié dokument as sy hele testament* moet funksioneer. Waar die betrokke dokument bloot die naam van 'n begunstigde of 'n inventaris van bates bevat, bedoel die testateur nie dat sodanige dokument as sy totale testament moet funksioneer nie – dit is slegs as 'n gedeelte van sy testament bedag.

In die lig van hierdie besware lyk dit onwaarskynlik dat 'n hof geneë sal wees om artikel 2(3) sonder meer op die gebied van inlywing deur verwysing toe te pas. Die aangeleentheid kan egter nie hier gelaat word nie. Verskeie kommentatore het naamlik al betoog dat artikel 2(3) inderdaad toegepas kan word op gevalle wat nie noodwendig deur die bewoording daarvan geregverdig word nie.

Jamneck "Die invloed van artikel 2(3) van die Wet op Testamente 7 van 1953 op die erkende beginsels van interpretasie en rektifikasie" 1994 *THRHR* 596 is byvoorbeeld van mening dat artikel 2(3) ook op die gebied van interpretasie van testamente 'n rol kan speel deurdat getuienis oor informele verklarings deur die testateur aangaande die inhoud van sy testament by interpretasie toegelaat kan word. Sonnekus "Kondoneringsbevoegdheid van hof by vormgebrekkige testament" 1995 *TSAR* 359 huldig die standpunt dat, ten spyte van die voorkoms van die woord "al" in artikel 2(3) (met die implikasie dat ten minste aan sommige formaliteite voldoen moet word alvorens 'n dokument gekondoneer kan word), 'n hof sy kondonasiebevoegdheid ook kan uitoefen ten opsigte van 'n totaal

vormgebrekkige testament. Dié skrywer betoog voorts dat, ten spyte van die voorskrif in artikel 2(3) dat die dokument wat gekondoneer staan te word, deur die testateur opgestel of verly moet wees, die kondonasiebevoegdheid, in die lig van moderne testamentsverlydingstegnieke, nie beperk is tot eiehandiggeskrewe dokumente nie maar ook geld vir dokumente wat deur 'n ander (bv prokureur) opgestel is.

Uit bogenoemde is dit duidelik dat die bewoording van artikel 2(3) nie in alle opsigte bevredigend is nie. Dit sou dus onbillik wees om bloot op grond van die bewoording van dié subartikel die rug te keer op die moontlike toepassing daarvan op die gebied van inlywing deur verwysing. Daarom word ter oorweging gegee dat 'n hof *in gepaste omstandighede* van artikel 2(3) gebruik kan maak om wat streng gesproke op inlywing deur verwysing neerkom, te bekragtig. Een sodanige geval word by die herlewing van herroepe testamente gevind.

3 Herlewing van herroepe testamente

In ons reg word allerweë aanvaar dat 'n testament wat met die nodige *animus revocandi* herroep is, weer in 'n latere stadium regskrag kan kry. Onsekerheid bestaan egter oor die vereistes vir sodanige herlewing. In die appèlhofuitspraak in *Moses v Abinader* 1951 4 SA 537 (A) kon die onderskeie appèlregters nie eenstemmigheid oor hierdie aangeleentheid bereik nie. Appèlregter Van den Heever stel herlewing en inlywing deur verwysing gelyk en huldig gevolglik die standpunt dat herlewing net moontlik is deur herverlyding van die herroepe testament. Appèlregter Schreiner beslis daarenteen dat, solank die herroepe testament fisies nog bestaan, herlewing moontlik is langs die weg van 'n herstellende dokument, behoorlik verly ooreenkomstig die nodige formaliteitsvereistes, waaruit die testateur se bedoeling duidelik blyk dat sy vroeëre testament moet herleef. Die mees resente beslissings oor herlewing van herroepe testamente dui daarop dat herverlyding inderdaad nie nodig is nie (*Loureiro v The Master* 1981 4 SA 248 (N)). Die meeste kommentatore steun ook appèlregter Schreiner se standpunt (vgl Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 203–204; Cronjé en Roos *Erfreg vonnisbundel* (1993) 82–84).

Gestel appèlregter Schreiner se standpunt is korrek en oorweeg die volgende voorbeeld:

'n Testateur stel 'n vormkorrekte herstellende dokument op waaruit sy bedoeling blyk om 'n vroeëre herroepe testament te laat herleef. Wanneer laasgenoemde gevind word, blyk dit vormgebrekkig te wees. Selfs ingevolge appèlregter Schreiner se benadering sal herlewing in so 'n geval nie kan plaasvind nie. Die rede is dat die testament wat herleef staan te word, ook vormkorrek moet wees. Van der Merwe en Rowland 204 verduidelik soos volg:

> "'Herlewing' en 'verlyding' is immers twee aparte begrippe. Alleenlik 'n behoorlik verlyde testament wat daarna herroep is, kan herleef. Die herroeping het egter nie tot effek dat die herroepe testament nie meer behoorlik verly is nie. Behoorlike verlyding is 'n historiese feit wat nie ongedaan gemaak kan word nie."

Sou daar dus gepoog word om 'n vormgebrekkige testament deur middel van 'n vormkorrekte herstellende dokument te laat herleef, kan dit as ontoelaatbare inlywing deur verwysing van eersgenoemde by laasgenoemde getipeer word. In hierdie verband is dit belangrik om daarop te let dat 'n herstellende dokument nie noodwendig as 'n testament beskou kan word nie. Appèlregter Schreiner verwys in die *Moses*-uitspraak daarna as 'n "testamentary instrument" en die

onderhawige bespreking is gebaseer op die oorweging dat inlywing van 'n vormgebrekkige testament wel by dié testamentêre instrument kan plaasvind.

Die vraag ontstaan nou of 'n hof van artikel 2(3) gebruik kan maak om die vormgebrekkige testament te kondoneer en dit sodoende via die herstellende dokument te laat "herleef". Daar word ter oorweging gegee dat die antwoord op hierdie vraag positief moet wees. In die eerste plek is die vormgebrekkige testament wat herleef staan te word wel, soos artikel 2(3) vereis, deur (of, soos Sonnekus betoog, namens) die testateur opgestel of verly. Tweedens strook die inhoud daarvan met die testateur se laaste en egte wilsuiting ten opsigte van die verdeling van sy bates. Hy het dit dus, ooreenkomstig artikel 2(3), as sy testament bedoel. Die vernaamste beswaar teen die gebruik van artikel 2(3) in die onderhawige geval is geleë in die feit dat die herlewingsbedoeling eerder uit die herstellende dokument as die vormgebrekkige testament blyk. In al die gerapporteerde beslissings oor artikel 2(3) tot op hede, is juis die dokument wat gekondoneer staan te word, geïnterpreteer om die bedoeling van die testateur ten opsigte van die testamentêre status daarvan vas te stel. Dít is skynbaar wat ingevolge artikel 2(3) verlang word. Die feit dat hierdie bedoeling in die onderhawige geval nie uit die testament self blyk nie maar uit die herstellende dokument (en dus nie strook met die klaarblyklike voorskrif van artikel 2(3) nie), behoort egter na my mening nie in die weg te staan van uitoefening van die kondonasiebevoegdheid nie. Artikel 2(3) dien naamlik om te verseker dat die uiterste wense van 'n testateur nie gefrustreer word deur vormgebreke in die dokument wat sy laaste wilsuiting ten opsigte van die verdeling van sy bates bevat nie. Hierdie oogmerk behoort in die onderhawige geval (soos in die gevalle waarna vroeër verwys is) swaarder te weeg as die feit dat die kondonasiebevoegdheid aangewend word in 'n situasie wat klaarblyklik nie ten volle deur die bewoording van artikel 2(3) geregverdig word nie. Hierbenewens volg dit uit die aard van herlewing van 'n herroepe testament deur 'n herstellende dokument dat die vereiste bedoeling noodwendig uit laasgenoemde sal blyk. Daar kan dus beswaarlik aan die onderhawige voorskrif binne die konteks van herlewing van 'n herroepe testament voldoen word. Indien die oogmerk van artikel 2(3) egter gedien wil word, sal dit ongeregverdig wees indien hierdie enkele voorskrif die uitoefening van die kondonasiebevoegdheid belemmer, terwyl inderdaad aan die ander (moontlik belangriker) voorskrifte voldoen is.

4 Gevolgtrekking

Artikel 2(3) is 'n handige instrument in die hande van 'n hof om die wilsbeskikking van 'n testateur te beskerm teen die gevolge van 'n vormgebrekkige testament. Die wetgewer se versuim om die grense van die kondonasiebevoegdheid neer te lê, is egter betreurenswaardig. Die moontlikheid bestaan dat ons howe in die toekoms 'n konserwatiewe houding sal inneem wanneer met artikel 2(3) gewerk word deur dit bloot te gebruik om in beperkte gevalle nie-nakoming van formaliteite te beredder. Dit verbaas dus nie dat stemme opgaan ten gunste van 'n liberaler gebruik van dié subartikel op verwante gebiede soos inlywing deur verwysing en die herlewing van herroepe testamente nie. In die lig hiervan behoort die wetgewer 'n presieser afbakening van die hooggeregshof se kondonasiebevoegdheid te oorweeg.

FRANCOIS DU TOIT
Universiteit van Wes-Kaapland

THE CASE FOR THE RECOGNITION OF INTELLECTUAL PROPERTY IN THE BILL OF RIGHTS

Introduction

The term "intellectual property" encompasses the right to control the use of the fruits of intellectual endeavour, that is, the products of the mind. Intellectual property takes the form of inventions which are protected as patents, designs of articles which are registered as designs, literary, artistic and other works which are protected by copyright and product brands which are protected by registration as trade marks or under the common law remedy of passing-off. A brand is a distinguishing name, symbol or the like intended to distinguish the goods or services of a trader from those of competitors. Intellectual property is a form of incorporeal property and by its intangible nature has little in common with corporeal property.

When the Constitutional Assembly commenced the task of writing the final Constitution for the Republic of South Africa, it extended a general invitation to interested persons to make submissions to it regarding matters to be incorporated into the Constitution. Numerous individuals, bodies and organisations made representations to the Constitutional Assembly requesting that specific recognition and protection be granted to intellectual property in the Bill of Rights to be incorporated into the new Constitution. According to a submission made to the Constitutional Court by the Loerie Award Committee (see the record before the Constitutional Court vol 5 N715) a petition signed by 4 419 persons proposing the inclusion of an intellectual property clause was submitted. Numerous other bodies, including the Association of Marketers and the South African Institute of Intellectual Property Law, also made written submissions. These petitions did not find favour with the Constitutional Assembly and the Constitution adopted by that Assembly contained no clause in the Bill of Rights dealing specifically with intellectual property.

The Constitution came before the Constitutional Court in proceedings brought by the Constitutional Assembly seeking the certification of the Constitution as being in compliance with the Constitutional Principles set forth in Schedule 4 to the interim Constitution (*In re: Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC)). Written submissions were made to the Constitutional Court on the subject of the recognition of intellectual property in the Bill of Rights by Spoor and Fisher, attorneys acting on behalf of the Association of Marketers, the Legal Committee of the Association of Marketers, the Loerie Awards Committee, the South African Institute of Intellectual Property Law, and Mr Kurt Buchmann. The Association of Marketers was granted the right to present oral submissions to the Constitutional Court during the hearings held by it in August 1996. The author appeared on behalf of the Association of Marketers, and with the endorsement of the South African Institute of Intellectual Property Law, before the Constitutional Court and made oral submissions to the court. The thrust of the submission made by the Association of Marketers was that the right to hold intellectual property is a universally accepted fundamental right, and, since Constitutional Principle II of the interim Constitution required all universally accepted fundamental rights to be provided

for in the new Constitution, this Constitution was defective in that respect and the court's certification should be withheld.

On 6 September 1996 the Constitutional Court handed down its judgment and held, *inter alia*, that the right to hold intellectual property law is not a universally accepted fundamental right and that the new Constitution was not defective as averred (par 75). The view is widely held in intellectual property circles that the court's judgment in this respect is unsatisfactory. The purpose of this note is to set out the case for recognition of intellectual property law as a universally accepted fundamental right, as it was presented to the court, and to comment on the findings of the court on this issue. Since there is no right of appeal against a decision of the Constitutional Court, it must be left to the reader, and perhaps to Parliament, to decide on the correctness of the court's decision.

General arguments in favour of the right to hold intellectual property being recognised in the Bill of Rights

The rationale behind a state granting protection to intellectual property ("IP") is to provide an incentive, in the nature of a reward, to inventors, designers, authors and other creative persons to employ their talents in the creation of works which will be beneficial to the public interest. The reward takes the form of a qualified monopoly of limited duration in the exploitation of the invention, work and the like brought about by the creative activity. The philosophy is that the state enters into a pact with the creative person in terms of which the latter is given a temporary monopoly in the exploitation of his product on condition that when the monopoly is ended, the product will fall into the public domain and be freely available for use by all. This principle has worked well for at least the past century and has played a significant role in the explosion of development of technology, culture and the like during that period.

The IP system has achieved universal recognition and it is internationally regulated by a number of international treaties, more particularly the Paris Convention on Intellectual Property dating from 1883, the Berne Convention on Copyright dating from 1886, and the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) dating from 1994. South Africa is a signatory to all of these treaties and has thus bound itself internationally to provide protection for IP in keeping with internationally accepted norms and standards and to make such protection available to the subjects of other contracting states.

The existence of adequate protection for IP in a country has been amply demonstrated in the past to be a *sine qua non* for foreign investment and the inflow of foreign technology in that country. In the light of the strong emphasis placed on foreign investment in the South African economy and the inflow of foreign technology and know-how by government and business in South Africa, it is essential that the correct signals are transmitted to the international community. The recognition of the right to hold IP in the Bill of Rights would achieve this. Furthermore, in the light of the high priority placed on economic development, it is essential that all possible encouragement be given to South African subjects to use their creative talents to develop new technology and other creative works. The entrenchment of the right to hold IP in the Bill of Rights would ensure that the incentive provided by the IP system would be perpetuated indefinitely. Furthermore, the individual has a natural entitlement to reap the products of the intellect where he has sown.

The model created by the Constitution of the United States of America, probably the most successful industrial country in history, should be followed. Article 1, section 8 of the United States Constitution provides that Congress is empowered "to promote the progress of science and useful arts, by securing for limited time to authors and investors, the exclusive right to the respective writing and discoveries". It was contended that the new South African Constitution, like the United States Constitution, should make provision for all the elements which would provide a healthy and vibrant economy in South Africa; protection of IP is such an element. The failure to give proper protection for IP in South Africa will undoubtedly seriously inhibit South Africa's economic development as generated from both local resources and foreign investment. It is therefore of paramount importance that the right to IP should be entrenched in the Constitution.

It became apparent that opinion makers in the Constitutional Assembly did not disagree with the aforegoing considerations, but felt that the question of protection of IP in the Bill of Rights would be adequately addressed by a property clause entrenching rights of ownership in property. It was reasoned that IP is a form of property and that if property in general is protected, the result would be that protection would be afforded to IP. The fallacy in this argument will be addressed below.

Constitutional principles

Principle II of the 34 Constitutional Principles embodied in Schedule 4 to the Interim Constitution reads as follows:

> "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of this Constitution."

When the forum of debate for the Bill of Rights moved from the Constitutional Assembly to the Constitutional Court, this provision became the focus of the proponents of recognition of IP in the Bill of Rights.

In the application of Constitutional Principle II to the question of protection of the right to hold IP, it became necessary for the proponents of protection to establish the following:

(a) IP rights are fundamental rights or freedoms;

(b) IP rights are universally accepted as fundamental rights; and

(c) there are no provisions in the Bill of Rights, and more especially in the property clause, which are entrenched and justiciable provisions protecting IP rights.

At this stage the economic and policy arguments in favour of entrenchment of IP rights advanced to the Constitutional Assembly became irrelevant and the focus of the argument was of necessity confined to the parameters of Constitutional Principle II.

IP rights as fundamental rights or freedoms

The Association of Marketers, which became the standard bearer of the IP recognition crusade, founded its contention that IP rights are fundamental rights

on two bases, namely the natural law principle and the United Nations Bill of Rights.

(a) The natural law principle underlying the recognition of IP rights

In an article entitled "The development of the natural law principle as one of the principles underlying the recognition of intellectual property" 1987 *SALJ* 480, Mostert describes the natural law theory as follows:

> "The theory is based on the fundamental principle that what an individual creates by his own effort and labour, belongs to him. This principle rests on the conviction that a person is entitled to the fruits of his own intellectual effort and that equity demands that he is entitled to reap where he has sown" (481).

Mostert shows that the natural law theory was implicit in Roman law in the creation and acquisition of certain forms of property and how this foundation was built upon and modified in the 17th century and later Roman law in Europe. He states that natural law in this era in general specified law that was universal, deduced from man's reason and purported to be perfect and ideal law (486). Mostert describes how the natural law principle or theory permeated the very notion of "property" during the 18th century and later. He quotes (494) as follows from John Locke:

> "Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person'. This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with it and joined to it something that is his own, and thereby makes it his property" (*Two treatises of civil government* (1690) Second Treatise, 33 5 27).

Kohler is generally regarded as being the father of IP law. His philosophical approach to IP reflects the natural law theory as follows:

> "The philosophical foundation of property and intellectual property is based on labour; or to be more precise, on the creation of an object; he who creates something new, has a natural right to it" (*Lehrbuch der Rechtsphilosophie* n 72 98, quoted by Mostert 1987 *SALJ* 495).

Mostert 1987 *SALJ* 501 sums up his thesis on the natural law principle underlying IP as follows:

> "The notion that a creative individual who expended intellectual effort and labour in producing a work of intellect is entitled to reap where he has sown formed the foundation for the recognition of intellectual property. The natural law principle not only initiated the recognition of intellectual property; it still plays a prominent role in the recognition and protection of traditional modern-day intellectual property rights as well as new forms of intellectual property."

IP law based on the natural law theory is thus *inherently* a fundamental right.

(b) IP rights under the United Nations Bill of Rights

The United Nations Bill of Rights comprises the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, and the International Covenant on Economic, Social and Cultural rights, 1966. The aforementioned two Covenants are derived from the Universal Declaration of Human Rights. The Universal Declaration was a resolution of the General Assembly of the United Nations and thus had no binding force on

member countries in the sense that it did not create enforceable obligations on adherence to the Declaration. The Covenants, on the other hand, are international treaties having the objective of translating the provisions of the Universal Declaration of Human Rights into enforceable international obligations. In effect, the Universal Declaration of Human Rights is the "Ten Commandments" of modern human rights.

Article 27(2) of the Universal Declaration of Human Rights states:

> "Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author."

This is a clear enshrinement of the right of the individual to acquire and own IP. The Declaration purported to be, and is, a common standard of achievement for all peoples and all nations. It has the objective of securing the universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction, of the rights enunciated (see the preamble to the Declaration). The President of the General Assembly of the United Nations said at the time of the adoption of the Declaration:

> "It was the first occasion on which the organised community of Nations had made a declaration of *human rights and fundamental freedoms*. This document was backed by the authority of the body of opinion of the United Nations as a whole" (Yearbook of United Nations 1948–9, Social Humanitarian and Social Questions, 535; emphasis added).

Article 15 of the International Covenant on Economic, Social and Cultural Rights acknowledges

> "the right of everyone: . . .
>
> (c) to benefit from the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author".

This right is clearly derived from the Universal Declaration of Human Rights.

It was argued that the inclusion of the aforementioned provisions in the Declaration and Covenant was *per se* substantiation of the recognition of the right to hold IP as a fundamental right. The following authorities were quoted in support of this proposition:

(i) Yearbook of the United Nations 1948–9

Quotations from a summary of the discussion by the General Assembly in Plenary Meeting on the draft Universal Declaration of Human Rights:

> "Never before, he said, had so many nations joined together to agree on what they considered to be the fundamental rights of the individual" (the representative of the United Kingdom 530).
>
> "The representative of the United States considered it to be first and foremost a declaration of basic principles to serve as a common standard for all nations" (531).

(ii) "International enforcement of human rights": Rudolf Bernhardt and John Anthony Jolowicz:

> "If the jurisprudential character of the Declaration remains controversial, no one would doubt its significance as the principal articulation of the international human rights idea and the *authoritative enumeration of universally recognised human rights*" (6; emphasis added).

(iii) "The Universal Declaration of Human Rights: a commentary" edited by Asbjorn Eide, Gudmundur Alfredsson, Goran Melander, Lars Adam Rehof and Allan Rosas with the collaboration of Theresa Swinehart:

> "There is abundant literature . . . trying in fact to answer the question of what it did mean and what it does not mean now to be 'a common standard of achievement'. Whatever the situation at the time it was adopted, it would be difficult today to identify an article of the UDHR which States would not be bound to observe. Indirectly, of course, the numerous international human rights instruments, which the UDHR gave rise to, have made the Declaration's rights binding on the respective State Parties."

Universality of acceptance of IP rights as fundamental rights

It was argued by the Association of Marketers that the universality of the acceptance of IP rights as fundamental rights flowed from the support enjoyed by, and the universality of, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Declaration was adopted by 48 votes with only 3 abstentions, the abstentions including the Union of South Africa. There are presently 133 parties to the International Covenant on International Social and Cultural Rights and these include Canada, Germany, India, Italy, Japan, Kenya, Namibia, Netherlands, Philippines, Uganda, Zambia and Zimbabwe. South Africa signed the Covenant on 3 October 1994 but has not yet ratified it. The significance of the aforementioned countries is that it was argued by the Constitutional Assembly before the Constitutional Court that none of these countries had made provision for the protection of IP rights in their constitutions and that this demonstrated that IP rights were not universally accepted. However, these countries have bound themselves to implement the provisions of the Covenant and thus to grant protection to IP rights as fundamental rights.

The Association of Marketers relied on the following authorities in support of their contentions:

(i) Yearbook of the United Nations 1948–9

Quotation from a summary of the discussion by the General Assembly in Plenary Meeting on the draft Universal Declaration of Human Rights:

> "To the French representative, the chief novelty of the Declaration was its *universality*. Because it was *universal*, he said, the Declaration could have a broader scope than national Declarations" (531; emphasis added).

(ii) "International enforcement of human rights": Bernhardt and Jolowicz:

> "To students of the historic development of the idea of rights, to those acquainted with the United States Declaration of Independence and the US Bill of Rights, the French Declaration of the Rights of Man and the Citizen, and their English antecedents, most of the provisions of the Universal Declaration are familiar. Unlike the earlier instruments, however, the Universal Declaration, addressed to a *universal audience*, eschews building rights on any philosophical foundation and grounds them rather in general appeals to values of freedom, justice and peace, in faith in the dignity and worth of the human person, in commitment to social progress and better standards of life in larger freedom" (3; emphasis added).

(iii) "The Universal Declaration of Human Rights: a commentary" edited by Eide *et al*:

> "This realisation of the fundamentally supra-national or one could say pre-national nature of the Declaration led to the change of its title from 'International' to 'Universal' Declaration by the General Assembly. *Its universality has since been*

> *so clearly demonstrated* that we have come to admire the collective wisdom and sensitivities of its authors. In the more than 40 years since its adoption, the UDHR *has shown itself to be truly universal*, as the peoples of newly liberated independent countries have found in it a reflection of their deepest aspirations. The UDHR has inspired numerous other UN declarations and treaties as well as regional systems for the protection of human rights; it has served as the foundation for numerous constitutions and national laws; and it has been the standard applied by the UN human rights bodies when investigating allegations of violations of human rights" (20–21; emphasis added).

Reference is also made to "the universality and continuing relevance of the UDHR" (21).

(iv) "Economic, Social and Cultural Rights" edited by Eide, Krause and Rosas:

> "Internationally recognised human rights are those included in the International Bill of Human Rights or those elaborated on in subsequent instruments adopted by the UN General Assembly. The International Bill includes the Universal Declaration of Human Rights (UDHR) and the two Covenants adopted on the basis of that Declaration, that is, the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR). The International Bill of Human Rights has since been extensively elaborated through the adoption of numerous conventions and declarations, both at the universal level (by the United Nations and the specialised agencies) and at the regional level. The rights contained in these instruments form a wide-ranging, but interrelated, normative system" (21).

(v) "Human Rights: Thirty Years After the Universal Declaration" edited by Ramcharan:

> "The adoption of the Declaration was recognised as a great achievement and it immediately took on a moral and political authority not possessed by any other contemporary international instrument with the exception of the Charter itself . . . There can now in any event, thirty years after its adoption, be no doubt, that the Declaration does possess both moral and political authority. Not only has it become an international standard by which the conduct of governments is judged both within and outside the United Nations (it has been invoked so many times that it would require a major effort of research simply to list them); it has inspired a whole cluster of treaties – including the very important European Convention for the Protection of Human Rights and Fundamental Freedoms – it is reflected in many constitutions, some of which reproduce its provisions verbatim as well as in international legislation and in the decisions of both national and international courts" (28–29).

Apart from arguing that the countries mentioned above do not recognise IP rights in their Constitutions, counsel for the Constitutional Assembly stated that not all regional international instruments recognise this right. It was conceded that certain regional international human rights instruments do recognise IP rights, such as the American Declaration of Rights and Duties of Man and the Cairo Declaration of Human Rights in Islam. It was pointed out, however, that IP rights were not recognised by the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was said that it was significant that these leading international instruments do not recognise the rights in question.

This was countered by the Association of Marketers, which argued that it is erroneous to opine that a fundamental right has not been universally accepted simply because it is not dealt with specifically in certain national or international

human rights instruments. The pattern in the drafting of national and regional Bills of Rights has been to emphasise certain rights which have particular relevance or need of emphasis to the country or organisation concerned. The omission of a particular provision, namely an IP rights provision, does not mean that the country or organisation in question does not subscribe to the idea that that right is a fundamental right, where the country has acceded to the International Covenant on Economic, Social and Cultural Rights (eg Germany and Canada). It was emphasised that, by contrast to the present situation in South Africa where the Constitutional Assembly has been enjoined to ensure that the Bill of Rights includes all universally accepted fundamental rights, it is unlikely that the drafters of such other Constitutions and regional instruments had acted in terms of such a specific directive.

In any event, as will be demonstrated below, the argument presented by the Constitutional Assembly was misleading in the light of the facts.

With the exception of Mozambique, which repealed IP laws when it became independent, IP rights are in fact provided for in every country in the world. The Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS), which is intended to enjoy universal adherence, enjoins members to provide for IP rights in their national laws. In the premises, IP rights have *de facto* been universally accepted in practice.

Provisions in the Bill of Rights possibly protecting IP rights

As mentioned previously, it was the view of opinion-makers in the Constitutional Assembly that IP rights are protected by the property clause in the Bill of Rights. This view appeared to be shared by the Constitutional Court to the extent that the consideration by it of the IP rights issue was classified as an aspect of the overall debate about the property rights provision in the Bill of Rights. It was contended by the Association of Marketers that, leaving aside the question whether IP is a species of property in the context of the property rights clause, adequate protection is not granted to IP rights in any provision of the Bill, including the property clause.

Internationally, in a human rights context, IP rights are clearly distinguished from, and are not considered to be part of, property rights. This is borne out by the texts of all national Constitutions and international instruments granting protection to IP rights. More particularly, the Universal Declaration of Human Rights deals with property rights in article 17 and IP rights in article 27(2). Furthermore, for classification purposes, articles 1–21 of the Universal Declaration (including the property clause) are considered to deal with *political and civil rights*, while article 22 and the following (including the IP clause) relate to *economic, social and cultural rights*. IP rights are included in the International Covenant on Economic, Social and Cultural Rights, while property rights are included in the International Covenant on Civil and Political Rights.

Article 25 of the Constitution (the article dealing with property rights) is predicated on the assumption that property is something which is pre-existing and that the *ownership* of it is to be regulated. The emphasis falls entirely on the title to the property and not on the coming into being of that which is the subject of the ownership.

The law of IP is primarily concerned with the *creation* of property. The regulation of the ownership of that property is a secondary matter. Unless the

property comes into being no question of ownership can arise. An invention or a brand can become the subject of ownership only once it comes into existence. The fundamental right concerning IP is the right of the individual to have the fruits of his intellectual effort clothed in a form which can become the subject of property rights. Put differently, the fundamental right which relates to IP is the right to have the fruits of the individual's intellectual activity created into a thing (albeit an incorporeal thing) over which he can thereafter exert powers of ownership. The content of that ownership is entirely dependent upon the law which creates the intellectual thing and which specifies the powers which the creator or author can exercise in relation to it, for instance, the right to reproduce a mark or work, the right to make a product embodying an invention or a design, and so on. In essence, the intellectual thing is entirely a creation of the law and the law also defines what ownership of that thing entails.

Subject to the common law remedy of passing-off, all forms of IP are creations of statute. If the statutes in question were to be repealed, the property would cease to exist and would disappear. Without the entrenchment of the statutes creating IP in the Constitution, Parliament could at will summarily terminate the very *existence* of all IP.

By contrast to IP, corporeal property and in particular land, are things which do not owe their existence to statutes and cannot be destroyed by the repeal of any statute. Parliament cannot cause land or any corporeal object to cease to exist. It can go no further than regulate the ownership of such things.

It follows from the aforegoing that entirely different considerations apply to the entrenchment of the right of individuals to own property in the normal sense of the term, and to the creation of IP, the content of ownership of such property and the regulation of such ownership.

As stipulated in article 27(2) of the Universal Declaration of Human Rights, IP embraces both moral and material interests. To the extent that it creates material interests or economic rights it is analogous to the law of things. However, to the extent that it creates moral interests it is comparable to personality rights and more particularly the right of privacy and the right relating to defamation. By way of example, section 20 of the Copyright Act, 1978, provides for rights, termed moral rights, as follows:

> "Notwithstanding the transfer of the copyright in a literary, musical or artistic work, in a cinematograph film, or in a computer program, the author shall have the right to claim authorship of the work, subject to the provisions of this Act, and to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the author . . ."

These moral rights, given specific recognition by the Universal Declaration of Human Rights, are clearly not catered for in section 25 of the Constitution.

The issues of expropriation of property and restoration of property previously dispossessed, with which section 25 is preoccupied, not only have no relevance to IP but would, if applied to IP, abrogate the very underlying principles and theory of IP. None of the deprivations of the past which have existed in South Africa in respect of land has in any way been applicable to IP. In practical terms, section 25 has no bearing whatsoever on IP as a fundamental right or in the regulation of its content or ownership.

The simple test of whether section 25 of the Bill of Rights properly entrenches IP rights is to ask whether that section would preclude Parliament from passing a statute discontinuing the ongoing creation or grant of IP rights. The answer to this question is clearly in the negative.

Proposed IP rights clause

The Association of Marketers proposed that, in regard to the requirement that IP rights should be recognised as universally accepted fundamental rights and should therefore be provided for in the Bill of Rights, the following independent clause should be inserted into the Bill of Rights:

> "Everyone has the right to the protection of the moral and material interest resulting from any industrial, scientific, literary or artistic production of which they are creators, or brand equity of which they are the proprietors."

This clause is based on the text of article 27(1) of the Universal Declaration of Human Rights. It expands the scope of the Declaration's provision to the extent that it adds the word "industrial" to the list of "productions" which should be protected and incorporates a further species of property, namely "brand equity". This species of IP right is conferred primarily by the registration of trade marks but also by the common law by means of an action for passing-off.

The genus of IP is divided into four species, namely copyright, patent, designs and trade marks. The general recognition of this situation dates from recent time. The World Intellectual Property Organisation (WIPO), as an agency of the United Nations with responsibilities for all four species of IP rights, dates from 1974.

At the time of the signing of the Universal Declaration of Human Rights in 1948, the model for the recognition of IP rights as a fundamental right was the Constitution of the United States of America. Although that Constitution gives recognition to all four species of IP rights, trade mark rights are encompassed in a different section of the Constitution (ie the article dealing with interstate trade). The concept of IP rights has evolved considerably since 1948 and in 1996 we are in a position to give due recognition to current thinking on the question. The ratio for protecting brand equity or goodwill signified by a trade mark is the same as that for protecting the other species of IP rights. It makes no sense in 1996 to protect three of the recognised species of IP rights and not the fourth.

Additional arguments

The Universal Declaration of Human Rights has articles dealing with other important fundamental rights such as the rights to privacy, academic freedom and freedom of speech. These fundamental rights have been given specific recognition in chapter 2 of the South African Constitution. It is difficult to see on what rational basis certain of the fundamental rights recognised in the Universal Declaration are given specific recognition in chapter 2, but the right to IP is not. The right to IP is no less deserving of protection in chapter 2 than, for instance, the right to privacy, academic freedom or freedom of speech.

South Africa's record in the field of IP rights is a proud one and there is no reason or justification whatsoever why this universally accepted fundamental right should be omitted from South Africa's Bill of Rights. On the contrary, the enshrinement of protection of IP in the Bill of Rights will give formal recognition to one of the few fundamental rights which South Africa has honoured in

the past and should continue to honour in the future, particularly in a truly democratic dispensation.

It could be argued that IP rights run counter to some of the other fundamental rights granted protection in chapter 2, for instance the right of freedom of expression and academic freedom. By their nature, IP rights are monopolistic in that they grant exclusivity. Such exclusivity must inevitably to some extent impact detrimentally on the rights of others, more especially in the aforementioned areas. In the application of section 35, it is submitted that if a conflict develops between an IP right and one of the recognised fundamental rights, the fact that IP rights do not enjoy parity with any such rights within the Constitution could lead to IP rights being considered to be subservient to such other rights. This could be avoided by giving IP rights parity of treatment with the other fundamental rights.

South Africa presently grants a high level of protection to IP. The level of protection compares very favourably with that granted anywhere else in the world. This is beneficial to the South African economy, to technical progress in South Africa and to the attraction of foreign investment. Ultimately it is beneficial to the citizens of the country. It is in their interests that the standard level of protection should remain at this high level. The only way in which this can be properly safeguarded is for IP to be entrenched as a fundamental right in the Constitution. In this way future governments can be inhibited from impairing or destroying the value of IP and the level of protection enjoyed by it in South Africa. Entrenching IP in the Constitution would give effect to an important principle of natural law which has enjoyed due recognition for centuries.

Decision of the Constitutional Court

The Constitutional Court rejected the arguments advanced on behalf of the Association of Marketers in half a page of the typewritten judgment. The relevant portion of the court's judgment reads as follows (par 75):

> "A further objection lodged was that the NT fails to recognise a right to intellectual property. Once again the objection was based on the proposition that the right advocated is a 'universally accepted fundamental right, freedom and civil liberty'. Although it is true that many international conventions recognise a right to intellectual property,[66] it is much more rarely recognised in regional conventions protecting human rights[67] and in the constitutions of acknowledged democracies.[68] It is also true that some of the more recent constitutions, particularly in Eastern Europe,[69] do contain express provisions protecting intellectual property, but this is probably due to the particular history of those countries and cannot be characterised as a trend which is universally accepted. In the circumstances, the objection cannot be sustained.

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66 See, for example, article 27(2) of the UDHR and article 15(1) of the ICESCR.

67 There is no provision protecting intellectual property in, for example, the American Convention on Human Rights, the Banjul Charter on Human and People's Rights or the European Convention on Human Rights.

68 None of the following constitutions contain express protection for intellectual property: the Austrian Basic Law, the Belgian Constitution; the Botswana Constitution; the Canadian Charter of Rights and Freedoms; the German Basic Law; the Indian Constitution; the Japanese Constitution; the Constitution of the United States of America.

69 See, for example, article 51 of the Belarus Constitution; article 54(3) of the Bulgarian Constitution; article 39 of the Estonian Constitution and article 47 of the Macedonian Constitution."

The court acknowledged that the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights recognise IP rights, but felt that the non-recognition of such rights in certain regional conventions and in the constitutions of some countries outweighed this factor. With the greatest respect, given the nature of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights and their wide international acceptance as codifications of accepted fundamental rights, it is difficult to understand why the situation in certain regional treaties and the constitutions of certain countries should carry the day. Unfortunately, the court did not give any insight into its reasoning in this regard. Given the emphasis placed on the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights by the Association of Marketers in their argument, it is surprising and regrettable that the court did not explain why it did not consider that recognition of IP rights in these two treaties *per se* constituted recognition of their acceptance as universally accepted fundamental rights. The court's reference (fn 68 of the judgment) to non-protection for IP rights in the Constitution of the United States of America is factually incorrect as mentioned above. Even counsel for the Constitutional Assembly made a specific acknowledgement in the written argument filed on behalf of that body that IP rights were given recognition in the United States Constitution (see the court record vol 3 328).

A further examination of the facts relating to express protection for IP in the constitutions of the countries of the world shows that the court based its decision on the wrong factual premise. Mr Kurt Buchmann conducted research into the constitutions of the countries of the world in order to test the soundness of the premise on which counsel for the Constitutional Assembly based his arguments on the IP issue and the Constitutional Court found its judgment. (Mr Buchmann is a professional photographer and is seized with the question of copyright for the Association of Photographers. He is also a director of the World Council of Professional Photographers with special responsibility for copyright. He submitted written representations to the Constitutional Court on behalf of 34 organisations and was supported by a petition with more than 4 000 signatures.) He concluded that if one leaves aside those countries which have no proper constitutions at all and which have no Bills of Rights in their constitutions, there are 166 countries which come into contention. Out of these 166 countries there are 90 countries which do afford some measure of protection to IP rights in their constitutions. This makes a majority of 54% of the countries in question granting such protection. The countries granting explicit protection to IP in their constitutions include Argentina, Brazil, Croatia, Czech Republic, Estonia, Korea, Latvia, Liechtenstein, Lithuania, Philippines, Poland, Portugal, Rumania, Russian Federation and the United States of America.

In broad terms, the 90 countries can be divided into the following three categories:

(a) Those which protect IP in direct terms (eg Costa Rica: "Every author, inventor, producer or merchant shall temporarily enjoy exclusive ownership of his work, invention, trade mark or commercial name, in accordance with the law");

(b) those which have incorporated the provisions of the Universal Declaration of Human Rights into their constitutions (eg Ivory Coast: "The people of Côte D'Ivoire declare their adherence to the principles of Democracy and the Rights of Man, as they have been defined ... by the Universal Declaration of 1948 ...");

(c) those which make statements of principle which guarantee the freedom of intellectual activities and provide support for their results (eg Egypt: "The State shall guarantee the freedom of scientific research and literary, artistic and cultural invention, and provide the necessary means for its realisation").

Of the 90 countries, 51 fall into category (a), 19 into category (b) and 20 into category (c). They include the following African countries: Algeria, Angola, Burkina-Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Ivory Coast, Egypt, Equatorial Guinea, Gabon, Libya, Madagascar, Mali, Mauritania, Mozambique, Rwanda, Senegal, Somalia, Tanzania and Togo.

It is of particular significance that during roughly the past decade (ie since 1985) some 80 countries have adopted new constitutions. Of these 57 (71%) protect IP rights. Despite being enjoined to protect all universally accepted fundamental rights in the Bill of Rights, the Constitutional Assembly and the Constitutional Court have sided with the minority of countries in not granting recognition to such rights in our Bill of Rights. Mr Buchmann has calculated that the countries which have accepted either the Universal Declaration or the International Covenant on Economic, Social and Cultural Rights comprise 89% of the world's total population. It is submitted that these facts make out a strong case for the universality of the protection of IP rights as fundamental rights.

It was said earlier that the written submissions made to the Constitutional Court on behalf of the Constitutional Assembly were misleading as regards the international acceptance of IP rights as fundamental rights. The Constitutional Assembly was supported by a team of researchers and their representatives purported to furnish the facts of the matter. They stated that countries such as the United States and Brazil are exceptions and that "the overwhelming majority of domestic Constitutions do not afford any special protection to intellectual property rights" (see the court record vol 33281). In terms of Mr Buchmann's research, this statement is clearly incorrect. Furthermore, the Philippines are mentioned as an example of a country which does not afford such protection. However, article XIV section 13 of the Philippines Constitution of 1986 reads as follows:

> "The State shall protect and secure the exclusive right of scientists, inventors, artists and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law."

This is one of the most clear-cut constitutional provisions protecting IP rights available! It is submitted that this does not reflect well on the results of the research conducted on behalf of the Constitutional Assembly and the evidence presented to the court.

Germany is also mentioned by the court as a country which does not grant specific protection to IP rights. It must, however, be borne in mind that the Basic Law of Germany was adopted in 1947, only a few years after the end of the Second World War. At that time Germany was not accepted in the international

democratic community and was remote from the United Nations promotion of human rights. The German Basic Law also ante-dated the Universal Declaration of Human Rights. It took another 26 years before Germany was eventually admitted as a member of the United Nations in 1973.

The use of France as an example of a country which has made no provision for IP rights in its constitution is, with respect, not fair. Apart from a brief remark on human rights in the preamble to the French Constitution, it does not contain any chapter or section whatsoever dealing with fundamental rights.

In summing up his analysis of foreign constitutions, Mr Buchmann says, correctly with respect, that the Constitutional Assembly and the court placed too much emphasis on the contents of the constitutions of other countries. Their approach would have been correct if Constitutional Principle II had read: "All fundamental rights universally included in the Constitutions of the countries of the world." The actual wording is "all universally *accepted* fundamental rights" (emphasis added). It is submitted that the "acceptance" of IP as a fundamental right takes place either when such right is included in a Bill of Rights of a particular country or when that country accedes to the Universal Declaration of Human Rights and/or the International Covenant on Economic, Social and Cultural Rights which comprise this right.

Conclusion

It is difficult to understand the reluctance of the Constitutional Assembly and the Constitutional Court to provide for IP rights in the Bill of Rights. A substantial body of people clearly feel strongly that such rights should be included. IP rights are included in the constitutions of numerous other countries and they are given specific recognition in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Requesting protection for such rights in the Bill of Rights is thus not a startling, far-fetched or unreasonable proposition. South Africa in fact gives good protection to IP rights and its IP regime compares favourably with any country in the world. IP rights are among the few fundamental rights that South Africa has respected over the years and in particular during the apartheid regime. We have nothing to be reticent or ashamed of regarding IP rights. One asks the question: what harm is done by following the example of 71% of the countries in the world that have adopted new constitutions in the past decade and giving specific protection to IP rights? The Bill of Rights contains virtually every fundamental right provided for the Universal Declaration of Human Rights besides IP. There is no justification or sound reason for making this exception and it is submitted that the position should be rectified. South Africa has bound itself internationally in several IP treaties to provide such rights. Why can this not be echoed in the Bill of Rights?

In the Yearbook of the United Nations for 1948 the following is said about the debate on the draft text of the Universal Declaration of Human Rights before the Third Committee of the General Assembly:

> "The representative of the Union of South Africa stated that the Declaration should refer only to those fundamental rights, the universal applicability of which was recognised all over the world. The Declaration, as it stood, went beyond those generally accepted rights" (48–49).

If one considers the essence and effect of the attitude of the Constitutional Assembly and the decision of the Constitutional Court, it is astonishing that,

after all the water that has flowed under the bridge in South Africa's turbulent and unhappy history of human rights issues and notwithstanding the dawning of a new era, these organs of the state should in effect be saying precisely the same thing about the Universal Declaration of Human Rights as the Union government representative said in 1948: Is it a case of "the more things change, the more they stay the same" (Karr *Les Guepes* (1849))?

OH DEAN
Spoor and Fisher, Sandton and Centurion

ARTIKEL 44 VAN DIE VERSEKERINGSWET ONGRONDWETLIK VERKLAAR – BESTAAN DAAR 'N LEEMTE IN ONS REG?

1 Inleiding

Artikel 44 van die Versekeringswet 27 van 1943 beperk die uitsluiting van sekere lewenspolisse of die opbrengs daarvan van die boedel van die eggenoot. Subartikel 1 bepaal soos volg:

> "As die boedel van 'n man wat 'n lewenspolis ooreenkomstig artikel twee-en-veertig of drie-en-veertig gesedeer of gesluit het, as insolvent gesekwestreer is, word die polisse en alle geld wat uit kragte daarvan betaal is of verskuldig geword het of enige ander bate waarin sodanige geld omgeset is, geag aan daardie boedel te behoort: Met dien verstande dat, indien die betrokke regshandeling te goeder trou aangegaan is en voltrek is nie minder as twee jaar voor die sekwestrasie nie – (a) deur middel van of ooreenkomstig behoorlik geregistreerde huweliksvoorwaardes, die voorgaande bepalings van hierdie subartikel nie van toepassing is nie in verband met die betrokke polis, geld of ander bate; (b) anders as deur middel van of ooreenkomstig behoorlik geregistreerde huweliksvoorwaardes, slegs soveel van die gesamentlike waarde van al sodanige polisse, geld en ander bate as wat dertigduisend rand te bowe gaan, geag word aan bedoelde boedel te behoort."

Subartikel (2) bepaal voorts:

> "As die boedel van 'n man wat so 'n lewenspolis as voormeld gesedeer of gesluit het, nie gesekwestreer is nie, word die polis en alle uit kragte daarvan betaalde of verskuldigde geld of alle ander bates waarin sodanige geld omgeset is, teenoor 'n skuldeiser van daardie man beskou as die eiendom van daardie man – (a) vir sover die waarde daarvan, met inbegrip van die waarde van alle ander lewenspolisse wat soos voormeld gesedeer of gesluit is en alle geld wat betaal is of verskuldig geword het ten opsigte van so 'n polis en die waarde van alle ander bates waarin sodanige geld omgeset is, die bedrag van dertigduisend rand te bowe gaan, as 'n tydperk van twee jaar of meer verloop het sedert die datum waarop bedoelde man die polis gesedeer of gesluit het; of (b) geheelenal, as 'n tydperk van minder as twee jaar verloop het tussen die datum waarop die polis gesedeer of gesluit is, soos voormeld, en die datum waarop die betrokke skuldeiser die betrokke goed laat in beslag neem ter voldoening aan 'n vonnis of bevel van 'n geregshof."

Die konstitusionele hof het egter onlangs beslis dat artikel 44(1) en (2) onversoenbaar is met artikel 8 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (vgl a 9 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996) en hierdie bepalings ongeldig verklaar. Die doel van hierdie aantekening

is om die implikasies van hierdie beslissing te ondersoek en om vas te stel of daar 'n alternatiewe bepaling nodig is. Aspekte van die vorming van die *concursus creditorum* en die doel van artikel 21 sal ook onder die loep geneem word.

2 *Brink v Kitshoff* 1996 6 BCLR 752 (CC)

Regter O'Regan het oor die meriete van die saak uitspraak gegee. Die vraag voor die hof was of artikel 44 van die Versekeringswet 27 van 1943 inbreuk maak op die fundamentele reg van gelykheid soos vervat in artikel 8 (hfst 3) van die 1993-Grondwet (voortaan die Grondwet). Artikel 8 bepaal dat almal gelyk is voor die reg en op gelyke beskerming deur die reg geregtig is. Die artikel bepaal voorts dat daar teen niemand direk of indirek op gronde soos ras, geslagtelikheid, geslag, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, geloof, kultuur of taal gediskrimineer mag word nie. Die hof moes vasstel of artikel 44 van die Versekeringswet onbillik teenoor getroude vroue diskrimineer deur voordele van 'n lewenspolis wat aan die vrou gesedeer is, van haar te ontneem.

Die negatiewe implikasies wat hierdie bepaling vir getroude vroue inhou, blyk duidelik uit die feite van hierdie saak: Meneer Brink (die afgestorwe eggenoot van die applikant in die saak) neem in 1989 'n polis van min of meer twee miljoen rand op sy lewe uit. In 1990 sedeer hy dié lewenspolis aan sy vrou. Op 9 April 1994 sterf meneer Brink. Meneer Kitshoff (die respondent) word as eksekuteur van die boedel aangewys. Op 23 Mei 1994 stel die respondent die skuldeisers van oorledene uit hoofde van artikel 34(1) van die Boedelwet 66 van 1965 in kennis dat meneer Brink se boedel insolvent is. Gevolglik gee die respondent die versekeraar opdrag om die volle waarde van die tersaaklike lewenspolis minus R30 000 aan die insolvente boedel oor te betaal. Die versekeraar weier en die respondent doen aansoek by die hooggeregshof om die versekeraar te beveel om te betaal. Mevrou Brink bring vervolgens 'n teenaansoek vir 'n bevel wat haar as die oorspronklike eienaar van die polis verklaar. Sy het ook die vraag na die geldigheid van artikel 44 ingevolge die Grondwet geopper. Hierop verwys die hooggeregshof uit hoofde van artikel 102 van die Grondwet die saak na die konstitusionele hof. (Chaskalson P lewer uitspraak oor die geldigheid van dié verwysing na die konstitusionele hof. Vir doeleindes van hierdie aantekening word die bespreking tot die meriete van die saak beperk.)

Die lewenspolis is uitgeneem, gesedeer en meneer Brink is dood voor die Grondwet in werking getree het. Die konstitusionele hof het in 'n vorige saak (*Du Plessis v De Klerk* 1996 3 SA 850 (CC)) beslis dat die Grondwet nie so uitgelê mag word dat dit sal inmeng in reeds gevestigde regte wat voor die inwerkingtreding van die Grondwet bestaan het nie. Namens die applikant word geargumenteer dat die Grondwet wel van toepassing is: die boedel van die oorledene word eers op die opbrengs van die lewenspolis uit hoofde van artikel 44(1) geregtig sodra dit gesekwestreer is. Alhoewel die bestorwe boedel nooit formeel gesekwestreer is nie, is in *Miller v Smith* 1986 1 SA 320 (K) beslis dat die boedel op die opbrengs geregtig is sodra 'n *concursus creditorum* ingevolge artikel 44(2) van die Versekeringswet, gelees met artikel 34 van die Boedelwet, geïnisieer is. Uit hoofde van artikel 34 kan 'n informele sekwestrasieproses bewerkstellig word. Formele sekwestrasie uit hoofde van die Insolvensiewet 24 van 1936 is dus nie nodig vir die totstandkoming van die *concursus creditorum* nie. Die toepassing van artikel 34 van die Boedelwet hou in dat 'n *concursus creditorum* so vroeg soos 14 dae na kennisgewing aan die skuldeisers kan ontstaan.

Die kruks van die applikant se argument is klaarblyklik dat 'n *concursus creditorum* ontstaan het, maar eers ná die inwerkingtreding van die Grondwet. Daarom is die Grondwet in hierdie geval wel van toepassing. Die hof weier egter om uitspraak oor die korrektheid van bogenoemde kwessie te gee aangesien hy meen dat dit nie binne sy jurisdiksie val nie – dit is immers nie konstitusionele vraagstukke nie.

Ons is van mening dat sake met soortgelyke feitestelle as die een onder bespreking in die toekoms, wat verwysing daarvan na die konstitusionele hof betref, anders hanteer moet word. Die kwessie oor die ontstaan van die *concursus creditorum* behoort in eerste instansie deur die hooggeregshof beslis te word. Die rede is dat indien daar wel 'n *concursus creditorum* voor die inwerkingtreding van die Grondwet ontstaan het, vermelde beginsel in *Du Plessis v De Klerk* van toepassing is met die gevolg dat 'n beroep op die Grondwet nie geregverdig sal wees nie. Soos hieronder aangedui, is die saak dan ook na die Transvaalse Provinsiale Afdeling terugverwys om in ooreenstemming met die bevinding van hierdie uitspraak te beslis.

Hierdie is die eerste saak waar die konstitusionele hof direk by artikel 8 en meer spesifiek artikel 8(2) van die Grondwet betrokke was. Die hof meld dat gelykheid 'n belangrike rol in die Grondwet speel. Daar word verwys na die aanhef waar gelykheid tussen mans en vroue en mense van alle rasse vooropgestel word. Verder verwys die hof na artikel 33(1) wat bepaal dat die fundamentele regte (in hfst 3) slegs beperk mag word vir sover dit "regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid". Die hof kom tot die gevolgtrekking dat gelykheid 'n oorhoofse tema in die Grondwet is wat vanweë die historiese agtergrond van ons land nie uit die oog verloor moet word nie.

Om uitleg aan artikel 8 te gee, moet die hof na volkereg wat van toepassing is en vergelykbare buitelandse hofbeslissings kyk (a 35 van die Grondwet). Die hof verwys na die Universal Declaration of Human Rights van 1948, die International Covenant on Civil and Political Rights van 1966 en spesifieke internasionale konvensies rakende diskriminasie. Die hof verwys ook na die grondwette van verskillende lande, onder andere die Verenigde State van Amerika, Indië en Kanada en kom tot die gevolgtrekking dat die verbod op diskriminasie 'n belangrike doelwit vir sowel nasionale state as die internasionale gemeenskap is. Verder toon die hof aan dat daar klemverskuiwings is ten aansien van die gelykheidsbeginsel in verskillende state. Die rede hiervoor is geleë in die verskille in die historiese agtergrond en filosofiese benadering van hierdie lande.

Artikel 8 van die Grondwet is 'n produk van die Suid-Afrikaanse geskiedenis. Die hof verwys spesifiek na die diskriminerende invloed wat apartheid op swart mense gehad het en toon aan dat die gelykheidklousule in die lig hiervan geïnterpreteer moet word.

Artikel 44 van die Versekeringswet behandel vroue anders as mans. Hierdie verskil in behandeling het tot gevolg dat vroue benadeel word. Diskriminasie ingevolge hierdie bepaling is tweeledig. In die eerste plek word op grond van geslag gediskrimineer en in die tweede plek op grond van maritale status. Die hof kom dus tot die gevolgtrekking dat artikel 44(1) en (2) van die Versekeringswet inbreuk maak op artikel 8(2) van die Grondwet. Die enigste vraag wat oorbly, is of artikel 44(1) en (2) uit hoofde van artikel 33 van die Grondwet toelaatbare beperkings daarstel.

Artikel 33(1) bepaal dat 'n beperking op die regte in hoofstuk 3 van die Grondwet slegs geoorloof is in die mate waarin dit redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid en die wesenlike inhoud van die betrokke reg nie ontken nie. Die bepaling hiervan noodsaak 'n belange-afweging tussen die verskanste reg en die inbreukmakende statutêre voorskrif.

Die hof kom tot die gevolgtrekking dat artikel 44(1) en (2) die volgende ten doel gehad het: Eerstens het artikel 44 'n voordeel aan vroue verskaf wat hulle aanvanklik nie sou gehad het nie. Die rede daarvoor was dat skenkings tussen man en vrou tot en met 1 November 1984 verbied was. 'n Skenking *stante matrimonio* het nie aan die begiftigde 'n regsgeldige titel ten opsigte van die saak verleen nie (*Kilburn v Estate Kilburn* 1931 AD 501 507–508). Die doel van die gemeenregtelike bepaling was om bedrog en skyntransaksies tussen eggenote te voorkom. Artikel 22 van die Wet op Huweliksgoedere 88 van 1984 het die gemeenregtelike verbod op skenkings *stante matrimonio* egter opgehef. Gesien in die lig van artikel 22 van die Wet op Huweliksgoedere is hierdie uitwerking van artikel 44 derhalwe nie meer nodig nie. Dit is nou tot getroude vroue se nadeel.

Tweedens is die doel van artikel 44 om die skuldeisers van die insolvente boedel te beskerm. Hierdie doel word steeds deur die bepalings van artikel 44 bereik. Die hof erken dat die beginsel om skuldeisers te beskerm 'n waardevolle en belangrike publieke doelwit daarstel. Verder erken die hof dat die noue band tussen eggenote soms tot bedrog en samespanning tussen hulle kan lei. Die *ratio* van die hof se beslissing is egter in die volgende woorde van regter O'Regan geleë:

> "However, I am not persuaded that the distinction drawn between married men and married women, which is the nub of the constitutional complaint in this case, can be said to be reasonable or justifiable."

Die hof noem die volgende redes vir hierdie *ratio*: (a) Die respondent kon nie aantoon waarom hierdie bepaling slegs vroue tref wie se mans polisse aan hulle gesedeer het nie. Die kanse vir bedrog is net so groot in die geval waar vroue polisse aan hulle mans sedeer. (b) Die respondent kon ook nie aantoon dat daar nie voldoende bepalings is wat die posisie van skuldeisers beskerm nie. Die hof verwys spesifiek na artikels 26, 29, 30 en 31 van die Insolvensiewet 24 van 1936. Hierdie artikels handel oor vervreemdings wat ter syde gestel kan word. Die hof verwys ook na artikel 21 wat bepaal dat die afsonderlike boedel van die solvente eggenoot na sekwestrasie van die insolvent se boedel op die Meester oorgaan en na aanstelling van 'n kurator op hom, asof dit goedere van die gesekwestreerde boedel was. Die hof sê as hierdie bepalings nie voldoende is om skuldeisers te beskerm nie, blyk daar geen rede te wees waarom die wetgewer nie 'n bepaling soortgelyk aan artikel 44(1) en (2) kan daarstel wat nie teen getroude vroue diskrimineer nie.

Die hof beslis dus dat artikel 44 op artikel 8 van die Grondwet inbreuk maak omdat die respondent nie kon aantoon dat daar redelike gronde vir die inbreukmaking was nie.

Ten slotte wys die hof daarop dat die ongeldigverklaring uit hoofde van artikel 98(5) van die Grondwet opgeskort kan word. Dit beteken bloot dat artikel 44 dan nie ongeldig is vanaf datum van die inwerkingtreding van die Grondwet nie. Die implikasies van so 'n bevel sal volgens die hof nie in belang van geregtigheid en goeie staatsbestuur wees nie. Die hof bevind derhalwe dat die artikel ongeldig is

vanaf datum van die inwerkingtreding van die Grondwet, maar sluit ooreenkomstig artikel 98(6)(a) alle handelinge uit wat reeds vanaf daardie datum uit hoofde van artikel 44 verrig is. Dit beteken dat daardie boedels aan wie betalings reeds gemaak is, afgehandel is en dat geen eise op grond daarvan ingestel mag word nie. Die saak word vervolgens aan die Transvaalse Provinsiale Afdeling van die Hooggeregshof toegesê om daarmee in ooreenstemming met die bevindinge van hierdie uitspraak te handel.

3 Opmerkings oor uitspraak

Artikel 21(2)(d) van die Insolvensiewet verwys spesifiek na beskermde lewenspolisse soos dié in artikel 44 van die Versekeringswet. Daar is drie tipes polisse wat hier ter sprake kom, naamlik (a) polisse wat deur 'n persoon op sy eie lewe uitgeneem is; (b) polisse wat deur 'n getroude vrou op haar lewe uitgeneem is; (c) polisse wat deur 'n man op sy eie lewe uitgeneem is en aan sy vrou gesedeer is of polisse wat deur 'n man op sy eie lewe ten gunste van sy vrou uitgeneem is (Smith *The law of insolvency* (1988) 92–93; Sharrock ea *Hockly's Insolvency law* (1996) 52). Die solvente eggenoot is dus geregtig op vrygawe van hierdie lewenspolisse insoverre die Versekeringswet hom/haar beskerm. Indien artikel 44(1) en (2) ongeldig is, help die beskerming wat deur artikel 21 aan die skuldeisers van die insolvente boedel verleen is nie veel nie. Die vrou kan vrystelling van die polisopbrengs in die geheel eis. Die bewyslas rus vervolgens op die kurator in samewerking met die skuldeisers om aan te toon dat hier 'n vervreemding is wat ter syde gestel mag word. Die regter sal dus nie korrek wees as sy sou aanvaar dat artikel 21 van die Insolvensiewet die skuldeisers van die insolvent in hierdie opsig genoegsaam beskerm nie.

Dit is duidelik dat 'n alternatiewe bepaling nodig is om voorsiening te maak vir die leemte wat as gevolg van die ongeldigverklaring van artikel 44 ontstaan het. Beskerming van die skuldeisers van 'n insolvente boedel (ook 'n bestorwe boedel) is noodsaaklik. Bedrog tussen eggenote is inderdaad 'n moontlikheid. Daarom moet 'n nie-diskriminerende maatreël in die plek daarvan gestel word.

4 Ooreenstemmende reëlings in die nuwe wetsontwerp op langtermynversekering

Oor die toepassing van artikel 44(1) en (2) was daar in die Suid-Afrikaanse versekeringsreg in elk geval nie eenstemmigheid nie (sien bv Douglas 1988 *MB* 75; Roothman 1993 *TSAR* 488 ev; Henckert 1995 *THRHR* 188; Hahlo *The South African law of husband and wife* (1985) 316; Meyerowitz *The law and practice of administration of estates and estate duty* (1989) 17.5; Gordon en Getz *The South African law of insurance* (1993) 350). Die tweede konsep van die Wetsontwerp op Langtermynversekering maak in artikel 66 voorsiening vir die volgende: (a) Die voordele wat 'n persoon toekom of waarop die persoon uit hoofde van een of meer lewens-, ongeskiktheids-, of gesondheidspolisse geregtig is, (b) wat vir ten minste drie jaar van krag is (c) en waarin daardie persoon of sy/haar gade die versekerde lewe is, (d) sal gedurende sy/haar lewe nie in beslag geneem mag word óf die onderwerp van eksekusie op grond van 'n hofbevel wees óf deel van sy/haar insolvente boedel vorm nie, of (e) sal met sy/haar dood, as hy/sy deur 'n eggenoot, kind, stiefkind of ouer oorleef word, nie vir die doel van betaling van sy skulde beskikbaar wees nie.

Die omvang van die beskerming is vir 'n somtotaal van R50 000 en geld vir 'n tydperk van vyf jaar vanaf verkryging van die polisvoordele, ook ten opsigte van

bates wat uitsluitlik met daardie polisvoordele verkry is. Die beskermde bedrag in geval van 'n bestorwe boedel moet aan die langslewende eggenoot, kind, stiefkind of ouer oorgemaak word kragtens sy testament of in die afwesigheid daarvan, aan die eggenoot, ouer of kind ooreenkomstig intestate erfopvolging.

In hierdie voorgestelde artikel word nie melding gemaak van die geslag van die persoon of die wyse waarop die persoon getroud moet wees nie. Dit geld ook in die geval waar 'n vrou 'n polis op haar eie lewe aan haar man sedeer of andersom. Dit is 'n baie billiker reëling, ook teenoor die skuldeisers van die insolvente of bestorwe boedel. In die lig van ons standpunt dat beskerming van die skuldeisers van 'n insolvente boedel nodig is, veral ook in die lig van die ongeldigverklaring van artikel 44(1) en (2), is 'n nie-diskriminerende bepaling soos hierdie te verwelkom.

LINDA JANSEN VAN RENSBURG
LEONI STANDER
Potchefstroomse Universiteit vir CHO

"SUFFER THE LITTLE CHILDREN . . ." – EUTHANASIA AND THE BEST INTERESTS OF THE CHILD

Introduction

Within the context of the right to life and euthanasia, the most immediate examples which come to mind are situations involving terminally ill persons or those in a permanent vegetative state who had previously executed a "living will". In many of these cases some express or implicit indication has been made by the persons concerned of the intention to have their life terminated in a particular situation. If there are serious and difficult legal and moral issues in cases of euthanasia where some indication of intention can be established, then this is compounded in the case of persons who are incapable of expressing their will: in particular, a newborn baby, who because of congenital physical defects has no prospect of survival whatsoever, in respect of whom no medical treatment can be administered, who is in unbearable pain and where death will inevitably follow because of such congenital defects. Is the right of life sacred under any and all circumstances, or is there a point where society is under a duty to decide for persons who do not have the ability or competence to decide for themselves (for what it is worth) about the continuation of their lives?

This note sets out to consider these questions in the light of a Dutch decision by the Court of Appeals, Amsterdam delivered on 7 November 1995.

The Court of Appeals – Amsterdam

In casu one P was a gynaecologist attached to a hospital where a baby R was born on 22 March 1993. Immediately at and after the birth it was diagnosed that R had serious physical defects: *inter alia*, she had an open spine, suffered from paralysis of the lower part of her body and was also hydrocephalic. The situation became more serious because it became clear that R was undergoing progressively

increasing severe pain. P sought advice from an anaesthetist. P wanted to terminate the life of R without any contra-reactions ("nevenwerkingen") and where R would die in peace and quiet. P asked the anaesthetist what he could use and the latter gave him 50 milligrams of ketamine and 25 milligrams of succinyl hydrochloride.

On 25 March 1993 P, after careful consultation with all persons concerned, including R's parents, intentionally administered the above-mentioned drugs to R. As a result of this R died and this was also the intended aim with the administration of the drugs. He then advised the coroner who, after examining the deceased, concluded that R did not die of natural causes. The coroner added the particularity that life had been ended because of serious congenital defects.

P was thereupon charged with and convicted of murder. On appeal, it was contended on behalf of P that (a) his conduct did not amount to murder as defined in the Criminal Code; (b) his conduct was justified on the basis that it constituted a medical exception; and (c) his conduct was justified because he had acted in a situation of necessity. The Appeal Court rejected the first two defences (see Nadasen "Euthanasia: an examination of the Clark judgment in the light of Dutch experience" 1993 *Obiter* 50).

As far as the defence of necessity was concerned, the court reasoned as follows:

It noted that P had decided to practise active euthanasia under the utmost conditions of care in respect of a seriously handicapped newly born child who was in his medical care. It was argued that P found himself in a situation of a conflict of duties: as a medical doctor he was under a duty to preserve the life of R on the one hand while on the other hand, he was under a duty to do everything to end her suffering. Moreover, it was also contended that from the reports of independent experts, the premise would emerge that the duty to end her suffering through active euthanasia was, in the given circumstances, the decisive issue.

For the court, an appeal to necessity would be justified if P, after a careful balancing of the conflicting duties and interests, had made the correct choice intentionally to end the life of R. The point of departure was that the choice to end life had to be approached with the utmost caution. This applied *a fortiori* in a case where it concerned the life of a person who is unable to decide ("wilsonbekwame"). In this regard criteria based on subjective and personal perceptions about the quality of life of the patient are inapplicable – especially where a patient is incapable of expressing an opinion about the quality of life.

The decision of P to practise active euthanasia could not be evaluated without reference to the prior medical decision to abstain from any medical treatment which could have possibly extended R's life. From the reports of a paediatrician and a child neurologist, the court noted that there was a decision not to treat R and that this decision also accepted that such non-treatment would result in the death of R. P was also involved in the decision not to treat R medically and he also decided thereafter to practise active euthanasia. Accordingly, the appeal to the defence of necessity could not succeed if the decision to abstain from treating R was also not justifiable.

Moreover, even if the decision not to treat R was justified, this did not by itself justify the decision to practise active euthanasia. One had to consider further whether, in the given circumstances, the active euthanasia was justified.

In deciding whether the decision to abstain from medical treatment was justified, the court considered detailed separate internal and independent external medical evidence, all of which led to the conclusion that the prognosis concerning the life of R was so bad that it was not medically significant or worthwhile ("medisch niet zinvol") to treat her. The prognosis of R included that she would not have been able to have sat or walked, that the invalidity would in all probability have increased, that she would have been dependent on medical treatment, that her spinal defect ("rugdefect") would have had to be closed, that drainage would have been necessary because she was hydrocephalic, that she would have had to be admitted to hospital for treatment which would eventually have led to daily treatment or to her institutionalisation and, that while surgical correction would have reduced her physical pain, the surgery and other treatment would also have caused her mental and physical distress. Moreover, while her pain could be reduced by medication, there was a danger that she could have been in a prolonged comatose state with respiratory problems.

While the court acknowledged that it could not be said that all medical experts would have agreed that there should be no medical treatment under the circumstances such as those *in casu*, it could nevertheless be said that the decision not to have treated medically was accepted as a scientifically sound and responsible decision which accorded with applicable medical norms.

Against the background of a diagnosis and prognosis that R's life would have been one of serious suffering without any prospect of improvement and that R's suffering could not be alleviated significantly through medical intervention, the court accepted that the decision not to treat R medically, under the given circumstances and against the further background of how this decision was reached, was justified.

After the decision had been made not to treat R, the decision had to be made about the death of R. Opinions about R's possible life expectancy ranged from a relatively short time to approximately six months. What the court accepted was that death was inevitable and would follow in a relatively short time.

In these circumstances the court noted that the medical experts were of the opinion that two policy decisions ("beleidskeuzen") were possible: P could have chosen to have reduced the pain as the main aim of the treatment with death following as a foreseeable but unintentional consequence. The other possibility was an intentional active ending of life by thanological means leading to a quick death.

While there was no consensus within the medical profession about active euthanasia, the medical experts pointed out to the court that the conduct of P was not considered reprehensible according to the applicable medical norms.

The court noted that, according to P, quite apart from R's congenital handicaps, he was pressurised to do what he did because of the pain she was suffering and which was increasing as time went on.

The court considered whether pain and symptomatic treatment could not have been effective enough to have excluded the decision to proceed to active euthanasia. It noted that it could have been possible to have given R so much medication that R probably would not have experienced pain. That, however, could have led to R existing in a trance-like state ("tussen hemel en aarde zou komen te zweven"). However, there was also the possibility of other complications setting in if one had chosen to have treated her pain without operative treatment. These

complications raised the question whether one ought to treat the pain. This meant that one was continually in a situation of uncertainty and confusion. Such a situation was completely unbearable for the parents, the nursing staff and the medical personnel. To this must be added the fact that if it had been decided to treat R, this promised an extremely slim chance of improvement. The court noted the opinion of an independent medical expert that the treatment of pain under these circumstances was not medically feasible and that the choice for active euthanasia was preferable to the treatment of pain. The court therefore concluded that in the given circumstances, according to scientific medical accountability, the treatment of pain was not a feasible medical choice and that P could not be held responsible for not attempting this treatment.

What was of importance, was that P proceeded responsibly and with care in the decision to continue to active euthanasia: the diagnosis and the prognosis were thoroughly discussed by the medical personnel; it was discussed with the parents who expressly and definitively opted for active euthanasia and it therefore could be taken that they had consented to it; the method of ending R's life was chosen and administered in consultation with the anaesthetist, and the coroner was also informed that R's death was not natural and a written report was made of all that had happened.

In light of the above, the court concluded that P's decision to end R's life by active euthanasia was justified in the given circumstances. The fact that P had acted in terms of scientific medical accountability and in accordance with the applicable medical ethical norms and with due regard to the required duty of care, the defence of necessity justified his conduct. P was accordingly acquitted.

Comment

In its approach, the Appeal Court of Amsterdam considered the conduct of the doctor who had engaged in the active euthanasia, the medical condition of the patient, whether other medical treatment was possible and its efficacy, independent medical opinion, the procedures followed before, during and after the death of the patient and the applicable medical ethical norms. In acquitting P, the court also indirectly pronounced upon a particular definition of life as well as the special conditions applicable within the context of euthanasia and medically defective newborn babies.

To the question whether life is sacred under any and all conditions, the court introduced both quantitative and qualitative dimensions. In this regard the decision not to treat R medically echoes the view of Thirion J about the quality of life in *Clarke v Hurst* 1992 4 SA 630 (D) as regards the question whether artificial feeding should have been discontinued:

> "The decision of that issue depends on the quality of life which remains to the patient, ie the physical and mental status of that life . . ." (653A).

It is submitted that when one evaluates the "quality of life" it is important to note that applicable values operate in at least two dimensions: medical ethical values concerning the condition of the patient informed by objective data of the patient's diagnosis and prognosis; and values as perceived from the philosophical, moral or religious level which come into consideration only after a medical opinion has been expressed about the quality of the patient's physical and mental life. Whereas medical ethical norms operate at an objective level, philosophical, ethical or religious values involve a choice between either treating the patient to alleviate pain and allowing death to follow as a matter of course or, intentionally

and actively hastening the death of the patient. However, while the decision to preserve or to end life operates at the subjective level, the Appeal Court of Amsterdam evaluated that decision by objectifying it with reference to applicable medical norms. It is equally important, however, not to lose sight of the subjective element articulated by Strauss in these terms:

> "Almost any stand on euthanasia will be affected by one's own impression of the death of a beloved, by some uneasiness, perhaps subconsciously, on one's own dying 'one day', by an abhorrence of human suffering in general, by one's deepest religious beliefs in the eternal destiny of the soul, by one's sense of propriety . . ." (*Doctor, patient and the law* (1991) 336).

It is also interesting to note that in *S v De Bellocq* 1975 3 SA 538 (T), a mother drowned her baby who was an idiot because the baby suffered from a disease known as toxoplasmosis, the court noted that the mother "was in a highly emotional state". The personal dilemma of a medical doctor in the choice between preserving life and alleviating suffering, was also noted by the court in *S v Hartmann* 1975 3 SA 532 (C):

> "The general picture of such a patient is one of extreme misery due to bodily wasting . . . There comes a time when the patient's quality of life becomes meaningless to himself through the misery of his pain and physical disability, which results from the potent drugs used to free him of it.
>
> At this stage the patient presented a problem to his medical attendant which brings about a conflict in ethical principles, namely to save life and to relieve pain and suffering" (536A–B).

Section 9 of the Constitution of the Republic of South Africa Act 200 of 1993 provides that everyone shall have the right to life. Within the context of capital punishment Chaskalson P in *S v Makwanyane* 1995 3 SA 391 (CC) underscored the sanctity of life by asserting that respect for life and dignity lay at the heart of the constitutional commitment to a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans (444C–D). In affirming that capital punishment was inconsistent with the right to life, Mohamed J raised the following questions but did not answer them:

> "[Capital punishment] offends s 9 of the Constitution, which prescribes that 'every person shall have the right to life'. What does that mean? What is a 'person'? When does 'personhood' and 'life' begin? Can there be a conflict between the 'right to life' in s 9 and the right of a mother to 'personal privacy' in terms of s 13 and her possible right to the freedom and control of her body? Does the 'right to life' within the meaning of s 9, *preclude the practitioner of scientific medicine from withdrawing the modern mechanisms which mechanically and artificially enabled physical breathing in a terminal patient to continue, long beyond the point, when the 'brain is dead' and beyond the point when a human being ceases to be 'human' although some unfocussed claim to quality as a 'being' is still retained? If not, can such a practitioner go beyond the point of passive withdrawal into the area of active intervention? When? Under what circumstances?*" (489G–I; emphasis added).

On the nature of the constitutional protection afforded to life itself, it is instructive to note the following views expressed in *S v Makwanyane*: While Chaskalson P observed that section 9 of the Constitution expresses the right to life in an unqualified form (415D 429B) he nevertheless asserted that this applies in so far as it relates to capital punishment within the ambit of section 277(1) of the Criminal Procedure Act 51 of 1977; in fact, the President merely stated but did not express a view on the possibility that "[d]ifferent considerations . . . might possibly apply to paragraph (b), which makes provision for the imposition of the

death sentence for treason committed when the Republic is in a state of war . . ." (452C–F). Ackermann J described the right to life in section 9 as "(textually) unqualified" (454G). While concluding his speech by referring to the priceless value which the state must place on the lives of all its subjects (469B), Didcott J said he did "not think it wise to venture at present a comprehensive and exact definition of what is encompassed by the constitutional right to life . . ." (462A). Similarly, Kentridge J observed that although the right to life is stated in unqualified terms, its full scope and implications remained to be worked out in future cases (469G–I). Kriegler J countenanced the possibility that the right to life could bear a different meaning in other contexts (476F) and Langa J did not exclude the application of the limitation clause (ie, s 33 of the Constitution) to the right to life (479D).

It is submitted that the above views reflect the possibility that the constitutional protection of the right to life is not unqualified under all situations; exactly what those situations are and under what conditions the right to life may be qualified is the challenge. Moreover, a purposive interpretation to statutory interpretation obliges a court, it is submitted, to also consider the views of Langa J that

> "the protection afforded by the Constitution is applicable to every person. That includes the weak, the poor and the vulnerable . . ." (482D–E);

and of Sachs J that "s 33 permits limitations on rights, not their extinction . . ." (512F).

Returning to euthanasia within the context of section 9, it is submitted that possible approaches to this issue could take cognisance of the following:

(a) The approach of our Constitutional Court suggests the possibility that the protection of the right to life is unqualified only under particular circumstances.

(b) The unqualified protection of the right to life could be nuanced by the quality of the life remaining to the patient and its impact upon the dignity of the patient. The relationship between the unqualified protection of life and the quality of that life *qua* dignity is, it is submitted, recognised by O'Regan J in *S v Makwanyane supra* when she asserted:

> "In giving meaning to s 9, we must seek the purpose for which it was included in the Constitution. This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of Chapter 3 of the Constitution, and at other times a narrower or specific meaning . . .
>
> The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life, in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.
>
> The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity . . ." (506B–F).

If one were to pause at the condition of the baby in the Dutch case, where she would not have been able to have sat or to have walked, that her invalidity would in all probability have increased, that constant drainage would have been necessary because she was hydrocephalic and that she would have been in a prolonged sub-comatose state – if all this represented her prospects of life as a human being, was this what dignity also means? Similarly, is there any dignity to life under conditions which the patient faced in the *Hartmann* case? There are, of course, members of our society who believe that, notwithstanding the quality of life remaining to the patient, it is not within the province of human beings to decide who is to live and who is to die – with an appeal often being made to a higher authority in terms of which all life is sacred. This argument is unconvincing to persons who do not acknowledge the existence of any higher authority or to those who argue that it is also not in the province of human beings to claim to speak decisively and with finality on behalf of a higher authority. Be that as it may, one is again confronted with a choice between values: whether philosophical, moral, religious or secular, the decisive question is whether continuing and severe suffering is compatible with a life of dignity. As Strauss (*op cit* 200) puts it:

> "The question of non-treatment, of course, puts us squarely into the troubled waters of euthanasia. I am not going to say anything here on that subject except for stating a personal opinion: if it amounts to euthanasia to withhold medical treatment of grossly defective newborns – who have no hope of being cured or of living for any length of time – and the withholding doesn't inflict starvation or any other form of cruelty and allows the baby to die a natural and hopefully early death, I for one, am in favour of that kind of euthanasia."

Further, what right is the patient being denied: the right to life or the right to a life without dignity? It is submitted that where euthanasia concerns newly born congenitally defective babies, the closest that a court can come in assessing the best interests of that baby lies somewhere between the objective medical diagnosis and prognosis as well as the subjective perceptions and attitudes of the parents who must be assisted and counselled prior to making any decision one way or the other – it being of course understood that euthanasia will never be performed without the consent of the parents. This meeting between objective and subjective criteria at once combines and answers, it is submitted, society's concern for the respect and protection of the dignity of all human beings by objectifying its attitude in the medical diagnosis and prognosis of the patient, as well as the concern for one of the most intimate, personal and painful subjective decisions thrust upon some of us by life. As the upper guardian of all minor children and also as a further safeguard, a court will also act with the utmost diligence to ensure that the right to life is protected within the ambit of the values envisioned by the Constitution.

(c) Were a court of law to accept that active euthanasia is permissible under strict and specific conditions then it is submitted that this would be a situation tolerated, but not justified by the law and society. In *S v Makwanyane supra*, Chaskalson P after reviewing the imposition of the death penalty within the context of the International Covenant on Civil and Political Rights concluded:

> "The fact that the International Covenant sanctions capital punishment must be seen in this context. It tolerates but does not provide justification for the death penalty" (425D–E).

(d) In *S v Makwanyane* the view was affirmed several times that the Constitution is also there to protect the weakest and the vulnerable amongst us. Moreover, Sachs J also pointed out that section 33 of the Constitution provides for the limitation, not the extinction, of any right. It is arguable that these values are decisive if one interprets the letter of the law strictly and literally: it would be the duty of the state to protect and preserve life under any and all circumstances. However, it is submitted that a purposive approach suggests that a wider meaning be accorded to the protection of life. It is, of course, tempting to assert that protecting life or existence with the full knowledge of the concomitant pain and suffering is implicitly subjecting another to cruel, degrading and inhuman punishment, but such an approach would be tantamount to a distortion and a mockery of the *bona fide* belief of those who believe in the sanctity of life. A purposive approach, it is submitted, would take cognisance of the fact that the values permeating the Constitution will accept that under certain circumstances protecting the weakest and the most vulnerable does not only and necessarily mean preserving life, suffering and the inability to enjoy life and opportunity as articulated by other human rights notwithstanding. Because euthanasia, like capital punishment, is final and irreversible, it is submitted that the balancing process inherent in any approach based on proportionality must be preceded by the choice between ending life or alleviating pain and suffering where death is inevitable. It is further submitted that a purposive approach will recognise that the medical decision to withhold treatment to a cogenitially defective baby where death will ensue in a short time is no less or no more "immoral" than the decision to practise active euthanasia.

Conclusion

What represents the best interests of the seriously congenitally defective newly born baby who has no prospect of survival and is in increasing pain: preserving his or her life or ending the suffering by terminating the life of the baby? However our courts decide this issue, to some it will represent the usurpation of the divine prerogative over life and death; to others it will be an unavoidable and ineluctable choice between a lesser evil and a greater evil. The answer given to the relationship between the right to life and dignity within this context is, it is submitted, not so much the best interests of a minor, but rather, a reflection of an understanding of what it means to be human in our evolving democratic society based on freedom and equality.

S NADASEN
University of Durban-Westville

DIE *PACTUM SUCCESSORIUM* IN DIE DUITSE REG

1 Inleiding

Erfopvolging geskied normaalweg in die Suid-Afrikaanse reg óf volgens die bepalings van 'n testament óf volgens die norme van die intestate erfreg (*Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk* 1976 3 SA 488 (A);

Ex Parte Calderwood: In Re Estate Wixley 1981 3 SA 727 (Z)). Tog duik daar sporadies in die regspraak gevalle op waar die erflater deur middel van 'n tweesydige regshandeling *inter vivos* erfregtelike gevolge probeer bewerkstellig. Sodanige ooreenkomste word as *pacta successoria* beskou en word sedert die vroegste reg nie geduld nie (Joubert "Pactum successorium" 1961 *THRHR* 23).

In 1976 verklaar appèlregter Rabie in *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk supra* 501A–D soos volg:

> "'n *Pactum successorium* (of *pactum de succedendo*) is, kort gestel, 'n ooreenkoms waarin die partye die vererwing (*successio*) van die nalatenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye ná die dood (*mortis causa*) van die betrokke party of partye reël. . . . 'n Ooreenkoms van hierdie aard druis in teen die algemene reël van ons reg dat nalatenskappe *ex testamento* of *ab intestato* vererf, en word as ongeldig beskou."

Die *pactum successorium* in die Suid-Afrikaanse reg kan vergelyk word met die "Erbvertrag" of erfooreenkoms in die Duitse reg. In paragraaf 1941 van die *BGB* word soos volg bepaal:

> "Der Erblasser kann durch Vertrag einen Erben einsetzen sowie Vermächtnisse und Auflagen anordnen (Erbvertrag)."

Naas die testament as eensydige herroepbare beskikking *mortis causa*, kan die erflater dus ook sy laaste wil deur middel van 'n erfooreenkoms uitdruk (Bassinger *Bürgerliches Gesetzbuch* (1991) 1865 ev; Esch en Schulze zur Wiesche *Handbuch der Vermögensnachfolge* (1976) 32 ev; Harder *Grundzüge des Erbrechts* (1979) 32 ev; Lange en Kunchinke *Lehrbuch des Erbrechts* (1978) 294 ev; Leipold *Grundzüge des Erbrechts mit Fällen und Kontrollfragen* (1982) 167 ev; Kipp-Coing *Erbrecht* (1990) 231 ev).

Die erfooreenkoms in die Duitse reg is 'n onherroeplike ooreenkoms wat die testeervryheid van die erflater beperk. Esch en Schulze zur Wiesche 28 verklaar hieroor soos volg:

> "Auf dem gebiet des Erbrechts können weiter Beschränkungen der Verfügungsfreiheit des Erblassers gegeben sein durch vorherige, von dem Erblasser eingegangene erbrechtliche Bindungen, nämlich durch Erbvertrag . . ."

Dit is duidelik dat die *pactum successorium* in die Duitse reg 'n gevestigde en erkende regsfiguur is. Vervolgens word die vereistes, inhoud, terugtrede, regsaard en juridiese konstruksie van die erfooreenkoms in die Duitse reg bespreek.

2 Vereistes vir 'n geldige erfooreenkoms

In die *BGB* word verskeie vereistes vir die geldigheid van die erfooreenkoms gestel. Daar kan onderskei word tussen algemene vereistes en vormvereistes.

2 1 Algemene vereistes

Die erfooreenkoms kan net deur die erflater persoonlik gesluit word. Hy kan dit dus nie deur middel van 'n verteenwoordiger sluit nie. Die ander party tot die erfooreenkoms kan wel deur middel van 'n verteenwoordiger optree (Bassinger 2100–2102; Esch en Schulze zur Wiesche 43; Harder 32; Lange en Kunchinke 295; Leipold 169; Kipp-Coing 236).

Die erflater moet volkome handelingsbevoeg wees. Testeerbevoegdheid speel hier geen rol nie. Minderjariges en verkwisters kan dus nóg persoonlik nóg deur middel van 'n verteenwoordiger 'n erfooreenkoms sluit. 'n Uitsondering bestaan in geval van verloofdes en eggenote. Hulle kan wel met mekaar 'n erfooreenkoms sluit as die erflater beperk handelingsbevoeg is. Die beperk handelingsbevoegde

erflater het egter in sodanige gevalle die toestemming van sy voog, of indien dit ontbreek, die toestemming van die voogdyhof nodig (Bassinger 2100; Esch en Schulze zur Wiesche 26 43; Harder 32–33; Lange en Kuchinke 295–296; Leipold 169; Kipp-Coing 236).

Die ander party tot die erfooreenkoms kan wel beperk handelingsbevoeg wees mits hy ingevolge die erfooreenkoms net voordele verkry. Indien hy egter ingevolge die erfooreenkoms verpligtinge aanvaar of hom daarin tot bepaalde beskikkings verbind, het hy die toestemming van sy voog, of indien dit ontbreek, die toestemming van die voogdyhof nodig (Bassinger 2100; Esch en Schulze zur Wiesche 26; Harder 32–33; Lange en Kuchinke 296).

2 2 Vormvereistes

Benewens die algemene vereistes skryf die *BGB* ook sekere vormvereistes vir 'n geldige erfooreenkoms voor.

Die erfooreenkoms is 'n kontrak en kom soos elke kontrak deur middel van aanbod en aanname tot stand (Leipold 169). Dit moet op skrif gestel en notarieel voor 'n notaris verly word. Spesiale voorskrifte geld in verband met die prosedure by die verlyding en opskrifstelling van die erfooreenkoms (Bassinger 2100; Esch en Schulze zur Wiesche 43; Harder 33; Lange en Kuchinke 297–298; Leipold 169; Kipp-Coing 236–237).

Al die partye tot die erfooreenkoms moet persoonlik teenwoordig wees tydens die verlyding daarvan (Kipp-Coing 236–237). Die erflater kan nie deur middel van 'n verteenwoordiger optree nie maar die ander party tot die ooreenkoms wel (Esch en Schulze zur Wiesche 43).

Die vormvoorskrifte geld net ten opsigte van die erfooreenkoms en nie ten opsigte van verdere ooreenkomste wat in samehang met die erfooreenkoms gesluit word nie (Leipold 169).

'n Erfooreenkoms tussen verloofdes of eggenote wat in 'n huweliksvoorwaardeskontrak vervat is, moet aan die voorgeskrewe vormvereistes van 'n huweliksvoorwaardeskontrak voldoen (Bassinger 2100–2102: Esch en Schulze zur Wiesche 43; Kipp-Coing 238).

Indien die erfooreenkoms nie aan die vormvereistes voldoen nie, is dit ongeldig (Harder 33; Leipold 169). Die vraag ontstaan of die erfooreenkoms ondanks vormgebreke in sommige gevalle wel bindende werking kan verkry. Hier word veral gedink aan gevalle waar die partye *bona fide* opgetree het. Volgens Leipold 169–170 is die onderwerp omstrede. Hy is van mening dat kondonasie hier slegs tot uiterste gevalle beperk moet word, byvoorbeeld waar die een party tot die erfooreenkoms die ander party *mala fide* daarvan weerhou het om op die korrekte vormvereistes aan te dring.

3 Inhoud van die erfooreenkoms

In die erfooreenkoms kan die partye beskikkings *mortis causa* maak. Hierdie beskikkings word egter beperk tot die benoeming van erfgename en legatarisse en die maak van ander testamentêre bemakings, dit wil sê beskikkings wat verband hou met die inhoud van 'n testament (Bassinger 2103; Esch en Schulze zur Wiesche 29; Harder 32; Leipold 170; Kipp-Coing 233–234).

Elke erfooreenkoms moet ten minste een kontraktuele bepaling bevat (Leipold 171). Die erflater kan deur middel van die erfooreenkoms net oor sy eie boedel

beskik (Kipp-Coing 234). Hy kan ook die erfooreenkoms met meer as een party sluit in die mate wat elkeen daardeur geraak word (Kipp-Coing 234).

Die erfooreenkoms kan ook met 'n ander kontrak in dieselfde oorkonde verbind word, soos 'n huweliksvoorwaardeskontrak. In so 'n geval moet die voorgeskrewe vormvereistes wat op die ander kontrak betrekking het ook nagekom word (Kipp-Coing 234–235).

Joubert 1962 *THRHR* 110 dui aan dat die erfooreenkoms in die Suid-Afrikaanse reg wat sy sluiting en herroepbaarheid betref soos 'n kontrak behandel word maar wat sy inhoud betref soos 'n testament. Daar kan nie met hierdie stelling saamgestem word nie. In die Suid-Afrikaanse reg is die *pactum successorium* uitgebrei sodat dit alle ooreenkomste insluit wat die testeervryheid van die erflater beperk (Rautenbach "Die praktiese implikasies van die verbod op die *pactum successorium* met betrekking tot vennootskapsooreenkomste" 1995 *De Jure* 102–103). Dit is irrelevant of daardie ooreenkomste verband hou met die inhoud van 'n testament of nie. Dit is wel so dat die inhoud van die erfooreenkoms in die Duitse reg beperk word tot ooreenkomste wat verband hou met die inhoud van 'n testament maar dit beteken nie dat die erfooreenkoms sy kontraktuele karakter verloor nie. Die erfooreenkoms is en bly in wese 'n onherroeplike kontrak terwyl die testament 'n eensydige herroepbare beskikking *mortis causa* is (Esch en Schulze zur Wiesche 29; Harder 32 en Kipp-Coing 239).

'n Erfooreenkoms herroep alle vorige testamente van die erflater insoverre die testamentêre beskikkings strydig met beskikkings kragtens die erfooreenkoms is (Bassinger 2111; Leipold 171).

4 Terugtrede uit die erfooreenkoms

Die *BGB* maak daarvoor voorsiening dat die erflater in bepaalde omstandighede tydens sy leeftyd uit die erfooreenkoms mag terugtree.

In die eerste plek kan hy in die erfooreenkoms vir hom 'n terugtredingsreg beding (*BGB* par 2293). Tweedens kan die erfooreenkoms, soos enige ander kontrak, deur middel van 'n ooreenkoms tussen die kontrakspartye gekanselleer word (*BGB* par 2290). Derdens kan die erflater uit die erfooreenkoms terugtree wanneer die ander kontraksparty hom skuldig maak aan bepaalde verwytbare optrede teen die persoon van die erflater. Dit is optrede wat die erflater (ingevolge par 2333–2335 *BGB*) van die "Pflichtteil" (die Duitse weergawe van die legitieme porsie) sou vrystel, byvoorbeeld 'n aanslag op sy lewe of 'n skandelike of sedelose lewenswyse waarmee die erflater hom nie kan vereenselwig nie. In die vierde plek is die erflater geregtig om uit die ooreenkoms terug te tree indien dit voorsiening maak vir 'n teenprestasie deur die begunstigde tydens die lewe van die erflater en die teenprestasie nie gelewer word nie, onmoontlik word of waar die teenprestasie gekoppel is aan 'n ontbindende voorwaarde en die voorwaarde vervul word (*BGB* par 2295).

5 Regsaard en juridiese konstruksie van die erfooreenkoms

Die erfooreenkoms is in wese 'n onherroeplike verbintenisskeppende ooreenkoms waardeur die erflater *mortis causa* beskikkings maak. So gesien, het die erfooreenkoms 'n dubbele aard, enersyds as kontrak en andersyds as beskikking *mortis causa* (Esch en Schulze zur Wiesche 32). As kontrak is die erfooreenkoms reeds volgens sy aard bindend. Dit waarborg egter nog geen vermoënsregte vir die kontrakspartye nie maar slegs die verwagting om moontlik later te kan erf (Esch en Schulze zur Wiesche 32 44; Kipp-Coing 239 ev). Die begunstigde

verkry dus tydens die lewe van die erflater slegs 'n *spes* of 'n verwagting om 'n voordeel na sy afsterwe te verkry. Die regte met betrekking tot die voordeel vestig eers by die erflater se dood.

Die erfooreenkoms beperk die erflater se testeervryheid en sy bevoegdheid om ander *mortis causa* beskikkings te maak wat in stryd met die erfooreenkoms is. Die erfooreenkoms beperk egter nie die erflater se reg om *inter vivos* beskikkings te maak nie (Bassinger 2114; Esch en Schulze zur Wiesche 28 44; Kipp-Coing 243 ev). Die gevolg is dat die ander kontraksparty nie die erflater kan verhinder om *inter vivos* oor sy bates te beskik nie. Kipp-Coing 244 is van mening dat hierdie gevolge van die erfooreenkoms voordelig en nadelig kan wees. Enersyds is dit voordelig omdat die erflater gedurende sy lewe steeds die ekonomiese vryheid het om na keuse vryelik met die beswaarde bates in sy boedel in die regsverkeer te handel. Andersyds kan die erflater hierdie vryheid misbruik deur die beswaarde bates *inter vivos* aan 'n ander te laat toekom. Die opstellers van die *BGB* het ook hierdie probleem raakgesien en aan die benadeelde kontraksparty 'n terugvorderingsreg gegee ten opsigte van alle skenkings en vervreemdings van bates deur die erflater aan ander persone, asook verswaring van bates met laste deur die erflater (Bassinger 2108 ev; Kipp-Coing 244 ev). Die ander kontraksparty kan egter eers na die dood van die erflater alle skenkings en vervreemdings wat die erflater gemaak het met die bedoeling om eersgenoemde te benadeel, van die persoon terugvorder aan wie dit geskenk of vervreem is. Hierdie terugvorderingsreg is gebaseer op die beginsels van ongeregverdigde verryking en verjaar na drie jaar, ongeag of die benadeelde kontraksparty van die skenking kennis gedra het of nie (Bassinger 2108 ev; Kipp-Coing 244 ev).

6 Gevolgtrekking

In die Duitse reg word 'n hoë premie op die testeervryheid van die erflater geplaas (*BGB* par 1937–1941). Testeervryheid geniet dieselfde mate van beskerming in die Suid-Afrikaanse reg en erfopvolging deur middel van 'n ooreenkoms (*pactum successorium*) is ongeldig omdat só 'n ooreenkoms die testeervryheid van die erflater beperk (*Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk supra* 501–502). Daarteenoor maak die *BGB* voorsiening vir 'n erfooreenkoms ("Erbvertrag") wat erfopvolging deur middel van ooreenkoms moontlik maak. Hierdie erfooreenkoms is onherroeplik en plaas 'n beperking op die testeervryheid van die erflater.

Die eienskappe van die erfooreenkoms in die Duitse reg en die *pactum successorium* in die Suid-Afrikaanse reg – indien dit geldig sou wees – is dieselfde, naamlik (Hutchison "Isolating the pactum successorium" 1983 *SALJ* 237):

(a) Die begunstigde kry eers *mortis causa* regte op bates uit die oorledene se boedel; en

(b) die erflater kan nie die ooreenkoms gedurende sy lewe eensydig herroep nie.

Die erfooreenkoms en *pactum successorium* (indien geldig) is dus reeds *inter vivos* bindend op die partye maar in albei gevalle verkry die begunstigde eers *mortis causa* 'n afdwingbare reg ten opsigte van die beloofde voordeel (*Keeve v Keeve* 1952 1 SA 619 (O) 623F–G). In die Duitse reg het die begunstigde wel 'n *spes* of verwagting om 'n voordeel na die afsterwe van die erflater te verkry (par 5 hierbo). In die Suid-Afrikaanse reg bestaan daar egter nie eenstemmigheid oor wat die aard van die reg van die begunstigde sou wees nie: dit is egter duidelik

dat die begunstigde geen onvoorwaardelike, gevestigde reg sou vestig nie (Hutchison 1983 *SALJ* 227–228).

Die erfooreenkoms in die Duitse reg beperk nie die erflater se reg om *inter vivos* beskikkings te maak nie; die gevolg is dat die begunstigde kragtens die erfooreenkoms nie sy *spes* of verwagting om te erf kan beskerm deur die erflater te verhinder om *inter vivos* oor die beloofde voordeel te beskik nie. Soos aangetoon, het die begunstigde ingevolge die erfooreenkoms wel in sommige gevalle 'n reg op teruggawe (par 4 hierbo). In die Suid-Afrikaanse reg kan die begunstigde natuurlik ook nie die erflater verhinder om oor die beloofde voordeel te beskik nie aangesien die *pactum successorium* ontoelaatbaar is en die begunstigde gevolglik op geen beskerming hoegenaamd aanspraak kan maak nie.

Wat die inhoud van die erfooreenkoms in die Duitse reg en die *pactum successorium* in die Suid-Afrikaanse reg betref, is daar wel 'n onderskeid. Soos aangetoon, hou die beskikkings in die erfooreenkoms verband met die inhoud van 'n testament en is beperk tot die benoeming van erfgename, legatarisse en die maak van ander testamentêre bemakings (par 3 hierbo). Daarteenoor is die *pactum successorium* uitgebrei sodat dit alle ooreenkomste insluit wat die testeervryheid van die erflater beperk, ongeag of dit verband hou met die inhoud van 'n testament of nie (Rautenbach 1995 *De Jure* 102–103).

Volgens Joubert 1962 *THRHR* 110–111 verkeer 'n begunstigde kragtens 'n erfooreenkoms in die Duitse reg in dieselfde posisie as 'n erfgenaam kragtens 'n testament. Daarteenoor verkeer 'n begunstigde ingevolge 'n *pactum successorium* in die Suid-Afrikaanse reg in 'n gunstiger posisie as 'n erfgenaam onder 'n testament weens die aanwending van die *stipulatio alteri*. Die *pactum successorium* in die Suid-Afrikaanse reg is 'n eiesoortige ooreenkoms en behoort nie met ander regsfigure verwar te word nie. Die *pactum successorium* is nie 'n *stipulatio alteri* nie. In geval van die *pactum successorium* verkry die begunstigde eers *mortis causa* regte op die bates van die erflater. In geval van die *stipulatio alteri* verkry die begunstigde 'n reg op die bates sodra en indien hy die voordeel ingevolge die ooreenkoms aanvaar (*Mutual Life Insurance Co of New York v Hotz* 1911 AD 556 567; *CIR v Estate Crewe* 1943 AD 656 674).

Anders as in die Suid-Afrikaanse reg is die erfooreenkoms in die Duitse reg nie ontoelaatbaar weens die onherroeplikheid daarvan nie. Dit kan slegs ongeldig wees indien daar nie aan die statutêre vereistes voldoen is nie.

Daar is reeds aan die hand gedoen dat die verbod op die *pactum successorium* in die Suid-Afrikaanse reg in heroorweging geneem moet word (Rautenbach 1995 *De Jure* 112). Aangesien daar duidelike raakpunte met die erfooreenkoms in die Duitse reg bestaan, kan die Duitse reg met vrug geraadpleeg word.

CHRISTA RAUTENBACH
Potchefstroomse Universiteit vir CHO

VONNISSE

DIE REG OP PRIVAATHEID EN DIE KONSTITUSIONELE HOF: DIE NOODSAAKLIKHEID VIR DUIDELIKE BEGRIPSVORMING

Bernstein v Bester 1996 2 SA 751 (CC);
Case and Curtis v Minister of Safety and Security 1996 3 SA 617 (CC)

Die reg op privaatheid word as fundamentele (mense-) reg in artikel 13 (hoofstuk 3) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (nou a 14 (hfst 2) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996) verskans (sien Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 239; Neethling "Die reg op privaatheid en universiteite" in Van Wyk (red) *Nihil Obstat – Feesbundel vir WJ Hosten/Essays in honour of WJ Hosten* (1996) 126–128). Artikel 13 lui soos volg:

> "Elke persoon het die reg op sy of haar persoonlike privaatheid, waarby inbegrepe is die reg om nie aan visentering van sy of haar persoon, woning of eiendom, die beslaglegging op private besittings of die skending van private kommunikasie onderwerp te word nie."

Hierdie beskerming geld in beginsel ook ten aansien van regspersone mits die aard van die fundamentele regte hulle vatbaar daarvoor maak (sien a 7(3) van die 1993-Grondwet; a 8(4) van die 1996-Grondwet); en dit is inderdaad die geval wat die reg op privaatheid betref (sien *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 462–463; *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W) (1995 4 SA 293 (A) 303–304); *Neethling's Law of personality* 80–81).

Die begrip privaatheid het vir doeleindes van konstitusionele beskerming in die *Bernstein-* en *Case*-saak aandag geniet (die vrae was onderskeidelik of a 417 en 418 van die Maatskappywet 61 van 1973 wat voorsiening maak vir die ondervraging van persone en die openbaarmaking van dokumente oor sake van 'n maatskappy in likwidasie, en a 2(1) van die Wet op Onbetaamlike of Onwelvoeglike Fotografiese Materiaal 37 van 1967 wat die besit van pornografiese materiaal verbied, die konstitusionele reg op privaatheid skend). Ter wille van regsekerheid, omvattende regsbeskerming en uiteindelik geregtigheid is dit noodsaaklik om 'n duidelike insig in die hoedanigheid van privaatheid te bekom (*Neethling's Law of personality* 28). Indien nie, waarsku Gross ("The concept of privacy" 1967 *NYULR* 34) tereg,

> "our ability to articulate and apply principles of legal protection diminishes, for we become uncertain what it is that compels us towards protective measures and wherein it [privaatheid] differs from what has already been recognised or refused recognition under established legal theory".

In hierdie verband is dit belangrik om in gedagte te hou dat die persoonlikheidsbelang in privaatheid onafhanklik van juridiese erkenning selfstandig in die feitelike werklikheid bestaan. Gevolglik kan 'n begrip aangaande die hoedanigheid van hierdie belang nie deur middel van regsnorme bepaal word nie maar slegs met verwysing na sy voorkoms in die feitelike werklikheid. Regsnorme is net relevant by die erkenning én die vasstelling van die grense of omvang van die beskerming van privaatheid, oftewel by die erkenning van 'n (subjektiewe) persoonlikheidsreg op privaatheid. Dit is die taak van die regswetenskap om deur noukeurige empiriese (feitelike) waarneming 'n juiste werklikheidsooreenstemmende omskrywing aan privaatheid te verleen, aangesien regsreëls wat op 'n onjuiste opvatting oor die feitelike werklikheid gegrond is, noodwendig tot onsekerheid, inkonsekwensies en gevolglike onbillikhede sal lei. Daarom is 'n gelykskakeling deur die reg van 'n ander belang met privaatheid onaanvaarbaar, nie alleen as synde onwetenskaplik en in stryd met die feitelike werklikheid nie, maar ook as synde 'n geleibuis vir regsonsekerheid en doellose regsontwikkeling (sien *Neethling's Law of personality* 27–28).

Om duidelikheid aangaande die begrip privaatheid te bekom, is geen maklike taak nie aangesien die opvattinge daaromtrent wyduiteenlopend is (*idem* 34–36): "The concept of privacy is an amorphous and elusive one which has been the subject of much scholarly debate" (*Bernstein* 787J–788A). Wat *natuurlike persone* betref, aanvaar die howe (*National Media Ltd v Jooste* 1996 3 SA 262 (A) 271; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 384) die skrywer se omskrywing van privaatheid:

> "Privaatheid is 'n individuele lewenstoestand van afsondering van openbaarheid. Hierdie lewenstoestand omsluit al daardie persoonlike feite wat die belanghebbende self bestem om van kennismaking deur buitestanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het" (*Die reg op privaatheid* (LLD-proefskrif Unisa 1976) 287; sien ook *Neethling's Law of personality* 36; Neethling "Die reg op privaatheid, die pers en artikel 12 van die Wet op Egskeiding 70 van 1979" 1996 *THRHR* 530; Neethling *Feesbundel vir WJ Hosten* 129).

Privaatheid as 'n individuele lewenstoestand van afsondering van openbaarheid impliseer 'n afwesigheid van kennisname met die persoon of sy persoonlike aangeleenthede in daardie toestand. Dienooreenkomstig kan privaatheid slegs deur 'n ongeoorloofde kennismaking met 'n persoon of sy persoonlike sake deur buitestanders geskend word. Sodanige kennismaking kan weer op twee wyses geskied: enersyds wanneer 'n buitestander self met 'n persoon of sy persoonlike sake kennis maak (kennisname- of indringingsgevalle); en andersyds wanneer 'n buitestander derdes laat kennis maak met die betrokkene of sy persoonlike sake wat, alhoewel dit aan die buitestander self bekend is, steeds privaat is (kennismededelings- of openbaarmakingsgevalle) (sien *Neethling's Law of personality* 36 243; Neethling, Potgieter en Visser *Deliktereg* (1996) 344). Die feit dat 'n skending van 'n persoon se privaatheid strydig met sy bestemming en wil geskied, beteken uiteraard nie noodwendig dat sodanige skending sonder meer onregmatig is nie. Ten einde die reg op privaatheid aan te tas, moet, soos by alle subjektiewe regte die geval is, *skending van 'n regsnorm* – hier die *boni mores*- of redelikheidsnorm – ook teenwoordig wees (sien *Neethling's Law of personality* 243).

Hierdie "gemeenregtelike" beskouing van privaatheid word deur regter Ackermann in *Bernstein* 789B–D onderstreep:

> "In South African common law the 'right to privacy is recognised as an independent personality right which the Courts have included within the concept of dignitas'.
>
> 'Privacy is an individual condition of life characterised by seclusion from the public and publicity. This implies an absence of acquaintance with the individual or his personal affairs in this state.'
>
> In *Financial Mail (Pty) Ltd and others v Sage Holdings Ltd and another* it was held that breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a person. The unlawfulness of a (factual) infringement of privacy is adjudged 'in the light of contemporary *boni mores* and the general sense of justice of the community as perceived by the Court'."

Daar bestaan tans egter nog nie sekerheid oor hoedanig die privaatheid van *regspersone* daar uitsien nie. As uitgangspunt kan aanvaar word dat hulle privaatheid analoog aan dié van natuurlike persone is aangesien die howe die regsbeginsels wat met betrekking tot die privaatheidsbeskerming van die natuurlike persoon ontwikkel het, sonder meer op die regspersoon toepas (sien Neethling *Feesbundel vir WJ Hosten* 129–130). Trouens, in *Motor Industry Fund Administrators (Pty) Ltd v Janit supra* 60 (W) word die twee wyses van privaatheidskending waarna hierbo verwys is – asook die onregmatigheidsnorm van die *boni mores* – onomwonde ook ten opsigte van 'n regspersoon aanvaar. Op grond van bostaande word tentatief die volgende omskrywing van 'n regspersoon se privaatheid aan die hand gedoen: *Dit is 'n korporatiewe toestand van afsondering van openbaarheid, wat al daardie feite aangaande die regspersoon omvat wat hyself bestem om van kennismaking deur buitestanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het.* Uiteraard is feite wat uitsluitlik op die persoonlike lewe van natuurlike persone in die *universitas* (soos direkteure van maatskappye en werknemers) betrekking het, van dié privaatheid uitgesluit (sien verder Neethling *Feesbundel vir WJ Hosten* 130–131).

In die lig van die voorgaande moet regter Ackermann in *Bernstein* 783–799 en regter Didcott in *Case* 656–657 se beskouings oor "konstitusionele" privaatheid onder die loep geneem word. As uitgangspunt moet myns insiens aanvaar word dat daar geen verskil tussen die privaatregtelike begrip van privaatheid en die konstitusionele een behoort te wees nie aangesien die feitelike hoedanigheid van privaatheid dieselfde bly.

(a) *Bernstein*-saak

Regter Ackermann (783–799) kom na 'n deurvorste bespreking van die menings van skrywers, die Suid-Afrikaanse positiewe reg en die konstitusionele beskerming van privaatheid in Europa, Amerika en Duitsland tot die slotsom dat

> "the nature of privacy implicated by the 'right to privacy' relates only to the most personal aspects of a person's existence, and not to every aspect within his/her personal knowledge and experience" (795C).

Vroeër verduidelik hy dit so:

> "The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. *In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community.* This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. *Privacy is*

> *acknowledged in the truly personal realm*, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly" (788C–789A; my kursivering).

Gevolglik besluit hy dat die gewraakte "information concerning the . . . affairs . . . of the company" nie privaat in bedoelde betekenis en daarom ook nie konstitusioneel beskermingswaardig is nie (795E 796B). In verband met die regter se uitspraak kan drie aspekte uitgelig word:

(i) Eerstens kom dit voor of regter Ackermann se begrip van privaatheid te eng is – hy beperk dit tot "most personal aspects" – en daarom die gevaar inhou dat beskermingsbehoeftige aspekte van privaatheid oor die hoof gesien kan word. Dit geld veral die hele gebied van *databeskerming* waar die inligting wat aangaande 'n persoon versamel word, veelal nie van 'n "most personal" aard is nie, of sommige van die data, op sigself genome, selfs nie eers privaat volgens die skrywer se omskrywing van privaatheid is nie, maar die *geheelbeeld* daarvan meesal sodanig is dat die belanghebbende kennisname daarvan deur buitestanders wil beperk (vgl *S v Bailey* 1981 4 SA 187 (N) 189–190 oor die verpligte verskaffing van uiteenlopende tipes persoonsinligting aan die staat). So gesien, bedreig die versameling en openbaarmaking van persoonlike data beslis die betrokkenes se privaatheid. (Sien vir 'n uitvoerige bespreking van databeskerming Neethling "Databeskerming: Motivering en riglyne vir wetgewing in Suid-Afrika" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 105 ev; *Neethling's Law of personality* 291–306; Neethling *Feesbundel vir WJ Hosten* 132–134.)

(ii) Tweedens beperk regter Ackermann sy bespreking tot die vraag of die inligting wat direkteure, amptenare of ouditeure oor die maatskappy het, hulle persoonlike privaatheid betrek. Sodoende versaak hy ongelukkig die moontlikheid van die beskerming van die privaatheid van die maatskappy as regspersoon *in casu* (sien die bespreking hierbo). Hy sê onder meer:

> "Although the phrase 'information concerning the . . . affairs . . . of the company' appears to be quite broad facially, it must be construed in conformity with the aforementioned purpose of the enquiry. It is difficult to see how any information which an individual possesses which is relevant to the purpose of the enquiry can truly be said to be private. *One is after all concerned here with the affairs of an artificial person* with no mind or other senses of its own; it depends entirely on the knowledge, senses and mental powers of humans for all its activities . . . [I]t can hardly be said that the knowledge of the director, official or auditor bearing relevantly on the affairs of the company that has failed can be said to fall within such person's domain of personal privacy" (796B–C E–F; my kursivering).

Alhoewel met die regter saamgestem word dat die betrokke inligting waarskynlik nie op die privaatheid van die betrokke persone betrekking het nie, sal ook die konstitusionele hof – soos die appèlhof reeds gedoen het (sien weer *Financial Mail v Sage Holdings supra* 462–463; *Motor Industry Fund Administrators v Janit supra* 303–304) – in die lig van artikel 7(3) van die 1993-Grondwet (a 8(4) van die 1996-Grondwet) die reg op privaatheid van regspersone, ook vir gevalle soos die onderhawige, onder oë moet neem en uitsluitsel gee.

(iii) Derdens blyk uit regter Ackermann se bespreking (790–795) van die posisie in Europa, Duitsland en Amerika dat hierdie stelsels soms 'n veels te wye toepassingsgebied aan die reg op privaatheid verleen en inderdaad ander selfstandige persoonlikheidbelange betrek wat niks met privaatheid te make het nie. Ingevolge die resolusie van die Raadgewende Vergadering van die Raad van

Europa (*Bernstein* 791B–C) word die reg op privaatheid byvoorbeeld soos volg verwoord:

> "The right to privacy consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, *physical* and moral *integrity, honour* and *reputation*, avoidance of being placed in a *false light*, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection from disclosure of information given or received by the individual confidentially" (my kursivering).

Hiervolgens word byvoorbeeld die fisiese integriteit, die eer, die goeie naam en die identiteit ("false light") ten onregte as aspekte van privaatheid beskou. (Sien *Neethling's Law of personality* 29–30 31–32 39–41 89 ev 139 ev 209 ev 279 ev oor die teoretiese begronding en positiefregtelike erkenning en beskerming van hierdie belange as unieke persoonlikheidsgoedere in die Suid-Afrikaanse reg. Sien ook *idem* 36–38 40–41 oor die onderskeid tussen hierdie regsgoedere en privaatheid.) Daar is reeds hierbo gewys op die gevare wat hierdie benadering vir die ontplooiing van privaatheidsbeskerming in ons reg sou inhou.

Gelukkig het regter Ackermann hom nie hieraan skuldig gemaak nie maar sy beslissing suiwer tot privaatheid beperk – 'n gevolgtrekking wat beslis nie ten aansien van regter Didcott se uitspraak in *Case* gemaak kan word nie.

(b) *Case*-saak

Regter Didcott formuleer sy standpunt dat die betrokke wetsverbod die konstitusionele reg op privaatheid skend, kort en kragtig soos volg:

> "What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which s 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy. Here the invasion is aggravated by the preposterous definition of 'indecent or obscene photographic matter' which s 1 of the statute contains. So widely has it been framed that it covers, for instance, reproductions of not a few famous works of art, ancient and modern, that are publicly displayed and can readily be viewed in major galleries of the world. That s 2(1) clashes with s 13 seems to be indisputable" (656E–657A).

Die ander regters stem met regter Didcott saam dat die staat se verbod op die besit van pornografiese materiaal in die private woning die reg op privaatheid in beginsel aantas, maar hulle opper voorbehoude oor die onbeperkte besit van sodanige materiaal (sien bv 658–659 660–661 662–663). Regter Mokgoro stel dit byvoorbeeld so:

> "I must agree with his [Didcott J's] conclusion that the 1967 Act unreasonably and unjustifiably infringes the constitutional right to privacy. I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the State to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a 'South African's home is his (or her) castle'. But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials."

Vir huidige doeleindes is die vraag of bedoelde verbod inderdaad privaatheid skend. Myns insiens is die antwoord hierop negatief – wat wel in gedrang kom, om die knoop deur te hak, is *outonomie (vrye wilsuitoefening)*. Om dit te verduidelik, moet enigsins uitgewei word (sien *Neethling's Law of personality* 38).

Dit is wel so dat waar die staat of 'n ander buitestander aan 'n persoon voorskryf op welke wyse hy sy private lewe moet reël, soos sy kerk- en politieke verband, die opvoeding van sy kinders ensovoorts, hierdie handelswyse dikwels as 'n privaatheidskending tipeer word (sien Gross 1967 *NYULR* 37). So kan die voorskrifte van die staat oor die individuele gebruik van afhanklikheidsvormende stowwe volgens Rautenbach 1972 *THRHR* 352 'n skending van "persoonlike privaatheid" wees. Hierdie gevalle word in die Amerikaanse reg ook onder die beskermingsgebied van die reg op privaatheid tuisgebring. Trouens, by die erkenning van die reg op privaatheid as konstitusioneel verskanste mensereg, het die Amerikaanse hooggeregshof met so 'n geval te doen gehad. (In *Griswold v Connecticut* 381 US 479 (1965) beslis die hof dat 'n statuut wat die gebruik van voorbehoedmiddels in die huwelik verbied, inbreuk maak op die reg op privaatheid.) Op die keper beskou, gaan dit in hierdie gevalle egter glad nie om 'n privaatheidskending nie aangesien 'n kennismaking met private persoonlike feite strydig met die reghebbende se bestemming en wil ontbreek (vgl die skrywer se definisie hierbo).

'n Mens kan selfs verder gaan en konstateer dat daar in hierdie gevalle glad nie eers van 'n krenking van 'n (subjektiewe) persoonlikheidsreg sprake is nie. Outonomie of vrye wilsuitoefening hou naamlik verband met die selfsbestemmingsvryheid van die mens binne die perke van die reg in 'n samelewing wat, soos sal blyk, by die regsubjektiwiteit self tuishoort (sien *Neethling's Law of personality* 38). 'n Mens het hier, soos Joubert (*Grondslae van die persoonlikheidsreg* (1953) 123) oortuigend daarop wys, met twee fundamenteel verskillende dinge te make. Aan die een kant die algemene bevoegdheid of eienskap van die mens dat hy subjek (draer) van regte kan wees (dus die erkenning van sy persoonlikheid in regte of regsubjektiwiteit), en aan die ander kant die verskillende subjektiewe regte (ook persoonlikheidsregte) wat die mens het omdat hy regsubjek is. Joubert (*ibid*) stel dit so:

> "Heeltemal apart van mekaar staan die regspersoonlikheid van die mens, die funksie waarvolgens hy *doende in die reg optree*, waarin ook opgesluit is sy bevoegdheid om subjektiewe regte en verpligtinge te kan dra, en die subjektiewe regte self wat hy kragtens sy subjeksfunksie het of kan verwerf" (my kursivering).

Die "vryheid om doende te wees" is dus 'n algemeen menslike kenmerk of eienskap wat "die hele gebied van die menslike wilsuiting en selfuitlewing binne die grense van die reg" omvat; in kort "die selfbestemmingsvryheid van die mens in die samelewing" (Joubert 127; sien ook *Neethling's Law of personality* 18–19). So gesien, vorm outonomie deel van die regsubjektiwiteit self en kan die staat se inmenging in 'n persoon se besluit of hy pornografiese of onwelvoeglike materiaal in sy private woning wil besit en lees, ook om hierdie rede nie as privaatheidskending tipeer word nie.

In hierdie verband moet die *selfbestemmingsfunksie* van die individu oor sy privaatheid – in die sin dat die individu self die inhoud en gevolglike omvang van sy privaatheidsbelang bestem – wat as die wese van sy belang in privaatheid beskou word, nie met outonomie as aspek van regsubjektiwiteit verwar word nie. Hier het 'n mens naamlik met 'n essensiële (feitelike) eienskap van privaatheid te make wat deur regswerking ook as inhoudsbevoegdheid van die (subjektiewe) reg op privaatheid geld (sien hieroor Neethling 1996 *THRHR* 530; *Neethling's Law of personality* 35; vgl *idem* 13 en Neethling, Potgieter en Visser *Deliktereg* 48 oor inhoudsbevoegdhede van subjektiewe regte). In die *Jooste*-saak *supra* 271–272 verduidelik appèlregter Harms dit soos volg:

> "A right to privacy encompasses the competence to determine the destiny of private facts (see Neethling's comment on the judgment of the court *a quo*: 1994 *THRHR* 703 at 705). The individual concerned is entitled to dictate the ambit of disclosure eg to a circle of friends, a professional adviser or the public (cf *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A); Neethling *Persoonlikheidsreg* (3rd ed) p 238–9). He may prescribe the purpose and method of the disclosure (cf the facts in *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C) – whether that case was truly concerned with privacy does not require consideration). Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called 'absolute rights of personality' (*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 145I). It will also mean that rights of personality are of a lower order than real or personal rights. These can be limited conditionally or unconditionally and irrespective of motive."

Die voorgaande beteken nie dat persone nie teen (onredelike) staatsvoorskrifte wat hulle outonomie (veral ook in hulle private lewe) aan bande lê, beskerm moet word nie. Inteendeel, ek wil selfs sover gaan as om aan die hand te doen dat indien die handves van menseregte geen ander aanknopingspunt bied as die reg op privaatheid in artikel 13 van die 1993-Grondwet (a 14 van die 1996-Grondwet) om onderdane teen staatsvergrype in hierdie verband te beskerm nie (vgl nietemin Burchell "The protection of personality rights" in Zimmermann en Visser (reds) *Southern Cross – Civil and common law in South Africa* (1996) 653 wat aan die hand doen dat "individual autonomy" ingevolge die reg op waardigheid (a 10 van die 1993-Grondwet; a 10 van die 1996-Grondwet) beskerm moet word), outonomie wel onder die vaandel van die reg op privaatheid – soos die konstitusionele hof tans ook doen – tuisgebring moet word, maar dan met die voorbehoud dat die onderskeidelike, eiesoortige aard van privaatheid en outonomie duidelik deur die hof erken en gehandhaaf word.

J NEETHLING
Universiteit van Suid-Afrika

THE *McDONALD'S* CASE

SOUTH AFRICA JOINS THE GLOBAL VILLAGE

McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and the Registrar of Trade Marks; McDonald's Corporation v Dax Prop CC and the Registrar of Trade Marks; McDonald's Corporation v Joburgers Drive-Inn Restaurant (Pty) Ltd and Dax Prop CC 1997 1 SA 1 (A)

1 Introduction

In this case the Appellate Division clarified the position in South Africa with regard to the protection of well-known foreign trade marks. Much has been written on the protection of well-known trade marks, the most recent and

authoritative article being that of Mostert entitled "Well-known and famous marks: is harmony possible in the global village?" 86 *TMR* 103. (*TMR* had made a prepublication copy of this article available to McDonald's counsel and it was relied on in argument before the Appellate Division.) Never before, however, has there been such a perfect case study which illustrates the need for and the mechanisms behind the protection of well-known trade marks in a country.

While we will consider the *McDonald's* case against the background of the particular and peculiar facts of that case, it will become apparent to the reader that the common sense approach of the Appellate Division in determining the issues of law in the *McDonald's* case, while not upsetting the recognised principles of trade mark law, could be equally applicable in other jurisdictions. The extremely negative economic and political backlash suffered in South Africa after the unfavourable ruling of the court *a quo* is also a warning to other jurisdictions which do not offer adequate protection to the proprietor of well-known foreign trade marks.

During the period immediately preceding the Appellate Division judgment, South Africa was faced with the threat of a listing on the section 301 Watch List of the US Department of Commerce and was categorised together with other countries which are regularly criticised for their lack of adequate intellectual property protection (which countries shall remain nameless but are no doubt well-known to the reader). There was much commentary in the press and legal journals on the decision of the court *a quo*. Unfortunately, the underlying message behind such commentary was that South Africa's trade mark protection was inadequate and/or that McDonald's had failed to present its case properly before the court. Few lay commentators on the judgment correctly described the legal issues at hand and simply stressed the result of the outcome of the judgment, namely that McDonald's could not protect its trade mark in South Africa leaving open the inevitable question that "if McDonald's can't protect its trade marks, who can?". While some expert commentators concluded that South Africa's trade mark law was adequate, none bothered to look at the full evidence before the court and preferred to rely on the myopic interpretation of the evidence by Southwood J in his judgment – coming to the conclusion that McDonald's had failed adequately to present its case before the court.

All this is now history, as the Appellate Division has rectified the situation by clarifying the law relating to the protection of foreign trade marks and has found on the facts that McDonald's has proven that its trade mark is well-known in South Africa (it must be stressed that the Appellate Division relied on exactly the same facts as those presented to the court *a quo*. In fact, at the hearing before the Appellate Division, McDonald's had applied to lead further evidence, which application was refused by the court). It was against this background that we will now consider the *McDonald's* judgment.

2 The history

At the end of 1993 there were 13 993 McDonald's restaurants in over 70 countries around the world. South Africa was, however, not one of the 70 countries in question. It is safe to say that, but for South Africa's apartheid policies and the resultant economic and political sanctions during the 1970s and 1980s, the Golden Arches would have risen over South Africa by 1993. It was common cause, however, that in 1993 when the McDonald's saga commenced in South

Africa, McDonald's had not used its trade marks and had no business interests in South Africa.

McDonald's had taken the normal precautions to protect its trade marks and was the proprietor of some 52 trade marks in South Africa which were filed in 1968, 1974, 1979, 1980, 1984 and 1985, including McDONALD'S, BIG MAC and the GOLDEN ARCHES DEVICE. The trade marks were filed at roughly five-year intervals in an attempt to protect them against a non-use expungement attack. As the last registration was filed in 1985, by 1993 the McDonald's trade marks were vulnerable to expungement on the grounds of non-use.

This vulnerability did not go unnoticed by a South African entrepreneur, Mr George Sombonos, the alter ego of Joburgers Drive-Inn Restaurant (Pty) Ltd ("Joburgers"). Mr Sombonos owns a company called Chicken Licken which, so he alleges, is the biggest fried chicken fast food franchise in the world not having its origin in the USA.

Mr Sombonos clearly saw the advantages of running a pirate McDonald's chain in South Africa and Joburgers filed applications for certain of the McDonald's trade marks and then applied to expunge the trade marks of McDonald's Corporation. Mr Sombonos then threw down the gauntlet at McDonald's by publicly stating his intention to use the McDonald's trade marks in South Africa in an article which appeared in the *Sunday Times* newspaper dated 29 August 1993 reading, *inter alia*, as follows:

> "Big Macs may soon be eaten all over South Africa, but not because American Hamburger giant McDonald's is entering the market. Nor will they be on sale before judgment in which could be SA's biggest trade mark battle.
>
> Chicken Licken franchise owner George Sombonos plans to start his own national McDonald's hamburger chain. Sites have been chosen and an advertising campaign is being prepared."

McDonald's responded to this challenge by instituting trade mark infringement proceedings against Joburgers. An order was granted by agreement on 28 September 1993 whereby Joburgers undertook, pending the determination of the infringement application and expungement counter-application, not to infringe McDonald's registered trade marks.

In the meantime, Joburgers learnt that there was a fast food outlet in Durban which had been trading under the name Asian Dawn McDonald's since 1978. They proceeded to buy the business to obtain the benefit of the earlier trading under the name McDonald's. When McDonald's came to hear of this, they promptly launched proceedings on the grounds that Joburgers were in contempt of court. An order for contempt was granted on 15 March 1994.

On the very next day, Joburgers announced that they had disposed of the business. It later transpired that the business was sold to Dax Prop CC ("Dax"). Dax also applied to register the trade mark McDonald's and launched an application to expunge the McDonald's trade marks. McDonald's brought a counter-application for an interdict preventing Dax from infringing its trade marks.

At this stage the position of McDonald's was perilous as the infringement order granted in their favour was dependent on the valid registration of their trade marks. In the absence of any use of the trade marks in South Africa, McDonald's principal defence was to argue that the reason for its non-use was due to special circumstances in the trade. Even this defence would fail if Joburgers

and Dax could prove that McDonald's had no *bona fide* intention to use their trade marks when the applications were originally filed.

A critical, and ultimately conclusive, development occurred when the Trade Marks Act 194 of 1993 came into force on 1 May 1995 (the new Act). Section 35 of the new Act provides for the protection of well-known trade marks whether the proprietor has any goodwill in South Africa or not. On 20 June 1995 McDonald's promptly instituted proceedings against Joburgers and Dax based on section 35.

The various applications and counter-applications were heard together and on the same papers both in the court *a quo* and by the Appellate Division and the parties were represented by the same counsel throughout; yet the judgment of the Appellate Division was a complete reversal of the judgment of the court *a quo*. The court *a quo* had found against McDonald's on practically every point of law and fact. As the approach of the Appellate Division was entirely different to that of the court *a quo*, no purpose will be served in analysing the earlier judgment and we will simply concentrate on the reasoning of the Appellate Division.

3 Protection of well-known trade marks – the law clarified

Prior to the implementation of section 35 of the new Act it was argued that South Africa complied with article 6*bis* of the Paris Convention by means of the common law of passing off. In the leading case of *Capital Estate and General Agencies (Pty) Ltd v Holiday Inns Inc* 1977 2 SA 916 (A) 929 Rabie JA defined passing off as follows:

> "The wrong known as passing off consists in a representation of one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another."

The fundamental difficulty with this approach was that the common law of passing-off does not protect the owner of a foreign trade mark who does not have a goodwill in South Africa (*Slenderella Systems Inc of American v Hawkins* 1959 1 SA 519 (W) 521A–522B; *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd* 1981 3 SA 1129 (T) 1138H–1140A; *Tie Rack Plc v Tie Rack Stores (Pty) Ltd* 1989 4 SA 427 (T) 442G–445D).

A little known side-issue of the McDonald's saga is that, no doubt cock-a-hoop over their success in the court *a quo*, Joburgers opened a restaurant in Johannesburg which was a complete imitation of the get-up of McDonald's restaurants – save for the fact that the name was spelt MacDonald's. At that time (November 1995) McDonald's had established a goodwill in South Africa and it immediately instituted proceedings against Joburgers based on passing-off. The matter was ultimately settled out of court (on terms very favourable to McDonald's) and accordingly no judgment was handed down. It is nevertheless safe to say that McDonald's had succeeded in establishing that the aforementioned conduct of Joburgers constituted passing off.

Section 35 of the new Act provides:

> "(1) References in this Act to a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark, are to a mark which is well-known in the Republic as being the mark of –
>
> (a) a person who is a national of a convention country; or

(b) a person who is domiciled in, or has a real and effective industrial or commercial establishment in, a convention country,

whether or not such person carries on business, or has any goodwill, in the Republic.

(2) A reference in this Act to the proprietor of such a mark shall be construed accordingly.

(3) The proprietor of a trade mark which is entitled to protection under the Paris Convention as a well-known trade mark is entitled to restrain the use in the Republic of a trade mark which constitutes, or the essential part of which constitutes, a reproduction, imitation or translation of the well-known trade mark in relation to goods or services which are identical or similar to the goods or services in respect of which the trade mark is well-known and where the use is likely to cause deception or confusion."

(S 35(1) and (2) is, for practical purposes, identical to s 56(1) of the United Kingdom Trade Marks Act, 1994.)

As we have indicated above, the section specifically states that McDonald's need not carry on any business or have any goodwill in South Africa, as long as it is established in a convention country. Dealing with this issue, the Appellate Division stated:

> "[I]t would be enough for a plaintiff to prove that the mark is well-known as a mark which has its origin in some foreign country, provided that as a fact the proprietor of the mark is a person falling within subsection (1)(a) or (b)."

While this conclusion might seem obvious in interpreting the meaning and application of these provisions, the court had to reject the approach of the court *a quo*:

> "[I]t is not sufficient that the mark simply be well-known in the Republic. It must be established that the mark is well-known as the mark of a person who is (a) a national of, or (b) is domiciled in, or (c) has a real and effective industrial or commercial establishment in, a Convention country: ie it must also be well-known that there is a connection between the mark and some persona falling in categories (a), (b) or (c)."

The Appellate Division said the following about this approach:

> "This seems to suggest that the section only applies if what is well-known is not only the mark itself but also the nationality, domicile or place of business of the mark's owner, and moreover the fact that the relevant country is a Convention country. Before us counsel were *ad idem* that such an interpretation could not be supported. If it were correct the section would be a dead letter. It is difficult to imagine any mark, however well-known, in respect of which such further facts would be common knowledge" (15B–C).

The essential dispute between the parties related to the level of awareness in the public mind required for a mark to qualify as well-known in terms of section 35. In determining the issue Grosskopf JA looked at the background of the section, namely article 6*bis* of the Paris Convention. The judge then considered the various authorities in the United Kingdom (including *Alain Bernadin et Compagnie v Pavilion Properties Ltd* [1967] RPC 581 (the "Crazy Horse" case); *Athletes Foot Marketing Associates Inc v Cobra Sports Ltd* [1980] RPC 343 (Ch); *Anheuser-Busch Inc v Budejovicky Budvar NP (trading as Budweiser Budvar Brewery)* [1984] FSR 413 (CA)) and South Africa (see the *Slenderella, Lorimar Productions* and *Tie Rack* cases referred to above) dealing with passing off in the absence of a goodwill in the territory and stated:

> "However, whether the above cases were right or wrong, they demonstrate that the Courts in this country and the United Kingdom have in fact not protected the owners of foreign trade marks who did not have a goodwill within the country. To that extent the common law of passing off has not been sufficient to constitute compliance with art 6*bis* of the Paris Convention.
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> It seems clear that section 35 of the new act and the corresponding provision in the United Kingdom were intended to remedy this lack. Thus section 35(1) pertinently extends protection to the owner of a foreign mark 'whether or not such person carries on business, or has any goodwill, in the Republic'. And the type of protection which is granted by subsection (3) is typical of that which is available under the common law of passing off: a prohibition on the use of the mark in relation to goods or services in respect of which the mark is well-known and where the use is likely to cause deception or confusion" (19C–F).

It has been stated before that trade mark legislation is simply a statutory enactment of the common law. In adopting the approach it did, the Appellate Division recognised that all that the incorporation of section 35 in the new Act did was to "overrule" the requirement under the common law of passing off that a goodwill is a prerequisite, by replacing it with the criterion that the plaintiff must be a member of a convention country.

While the Appellate Division did not comment on these issues, it is worth noting that the provisions of the new Act and the approach adopted by the Appellate Division are in keeping with two other oft-quoted principles of trade mark law, namely:

(a) the geographical territoriality of a trade mark; and

(b) the maxim *qui prior est tempore potior est jure*: he has the better title who was first in point of time.

The former principle is adhered to by means of the requirement that the mark must be well-known in South Africa, that is, while a trade mark proprietor need not have a goodwill in South Africa, he must have a geographical foothold in the territory in that the reputation of his trade mark must extend to South Africa.

The first-in-time principle is protected by means of section 36 which deals with the saving of vested rights. In particular, section 36(2) provides:

> "Nothing in this Act shall allow the proprietor of a trade mark entitled to protection of such trade mark under the Paris Convention as a well-known trade mark, to interfere with or restrain the use by any person of a trade mark which constitutes, or the essential parts of which constitute, a reproduction, imitation or translation of the well-known trade mark in relation to goods or services in respect of which that person or a predecessor in title of his has made continuous and *bona fide* use of the trade mark from a date anterior to 31 August 1991 or the date on which the trade mark of the proprietor has become entitled, in the Republic, to protection under the Paris Convention, whichever is the later, or to object (on such use being proved) to the trade mark of that person being registered in relation to those goods or services under section 14."

The significance of the date 31 August 1991 is that this is the date on which the original bill of the new Act was published, that is, it is the date on which traders in South Africa were first given notice that well-known foreign trade marks would be afforded protection in the future.

Dax contended that its use of the mark MacDONALD'S in respect of its Durban business was permitted by section 36(2). The court accordingly had to consider whether Dax and its predecessors in title (including Joburgers) had used the mark MacDONALD'S continuously and *bona fide*. Grosskopf JA considered

the previous authorities on *bona fide* use and quoted with approval from *Rembrandt Fabrikante en Handelaars (Edms) Beperk v Gulf Oil Corporation* 1963 3 SA 341 (A) 351E–F where Steyn CJ had stated:

> "Whatever the full meaning of the phrase may be, it seems clear that user for an ulterior purpose, unassociated with a genuine intention of pursuing the object for which the Act allows the registration of a trade mark and protects its use, cannot pass as a *bona fide* user" (30A–B).

The court found this reasoning to be equally applicable to the case before it and found, on the facts, that the reason why Joburgers bought the MacDONALD'S business and traded under the name MacDONALD's was not to distinguish its business from that of others, but rather to use a mark confusingly similar to that of McDONALD's. This was done in breach of an interdict against Joburgers which was ultimately declared to be in contempt of court, at which time it promptly disposed of the business to Dax. The judge found that Joburgers' use and acquisition of MacDONALD'S was clearly actuated by an ulterior purpose in the sense discussed in the previous authorities and it followed that section 36(2) did not provide any defence to Dax, as Joburgers's successor in "tainted" title.

The beauty of the approach adopted by the Appellate Division whereby it equated the protection of well-known foreign trade marks with passing off without goodwill, is that it allowed the court to rely on the well-established principles of the common law of passing off in interpreting the expressions "well-known trade mark" and "well-known in the Republic". In order to establish passing off, a plaintiff must prove, *inter alia*, that his reputation extends to a substantial number of persons of the public or persons in the trade in question.

Needless to say, Joburgers and Dax argued that by giving protection only to well-known marks, the legislature imposed a higher standard than the ordinary requirement for passing-off actions. On the ordinary meaning of the language, so the respondents' argument went, a mark is well-known in the Republic only when it is known to a large part of the population as a whole.

Grosskopf JA found that the respondents' argument raised the following two questions:

(a) Must the mark be well-known to all sectors of the population?

The court concluded that a mark is well-known in the Republic if it is well-known to persons interested in the goods or services to which the mark relates. In coming to this conclusion the judge stated:

> "Section 35 of the new Act was intended to provide a practical solution to the problems of foreign businessmen whose marks were known in South Africa but who did not have a business here. The South African population is a diverse one in many respects. There are wide differences in income, education, cultural values, interests, tastes, personal lifestyles, recreational activities, etc. This was obviously known to the legislature when it passed the new Act. If protection is granted only to marks which are known (not to say well-known) to every segment of the population (or even to most segments of the population) there must be very few marks, if any, which could pass the test. The legislation would therefore not achieve its desired purpose. Moreover, there would not appear to be any point in imposing such a rigorous requirement. In argument we were referred to as an example to a mark which might be very well-known to all persons interested in golf. Why should it be relevant, when deciding whether or not to protect such a mark, that non-golfers might never have heard of it?"

(b) Whatever the relevant sector of the population may be, what degree of awareness within that sector is required before a mark can properly be described as well-known?

Dealing with this aspect, the court stressed that the important practical question is not whether a few people know the mark well, but rather whether sufficient people know it well enough to entitle it to protection against deception or confusion. Having found that the term "well-known" is vague, the court then stated:

> "The legislature intended to extend the protection of a passing off action to foreign businessmen who did not have a business or enjoy a goodwill inside the country provided their marks were well-known in the Republic. It seems logical to accept that the degree of knowledge of the marks that is required would be similar to that protected in the existing law of passing off. *The concept of a substantial number of persons is well-established.* It provides a practical and flexible criterion which is consistent with the terms of the statute. No feasible alternative has been suggested" (21B–D; emphasis added).

It has been stated before that "a substantial number" in the context of passing-off means sufficient persons to make the reputation a property of appreciable commercial value. What the number will be, depends on the circumstances of each case; in a limited and specialised market, for instance, a reputation extending to relatively few people could be sufficient (Webster and Page *South African law of trade marks* (1986) 417).

Having clarified precisely what McDonald's was required to have proved, the court then considered the evidence filed by McDonald's.

4 McDonald's evidence – who hasn't heard of McDonald's?

While every case must be judged on its own facts, the evidence submitted in the McDonald's case, and the court's approach to the evidence, is illustrative of the kind of problem faced by the proprietor of a foreign trade mark who has no goodwill in the territory (the fact that the court *a quo* came to a totally different conclusion on the same evidence is also indicative of the inherent difficulties which the proprietor of a foreign trade mark will face). What is remarkable about the *McDonald's* case is that the evidence was compiled without any clarity about what the court's interpretation of section 35 would be. As we will see, the Appellate Division had little difficulty in finding the evidence to be sufficient, in stark contrast to the following statement of Southwood J in the court *a quo*:

> "The erroneous approach of McDonald's to what must be established in terms of section 35(1) of the new Act permeates the founding affidavit of McDonald's in the famous marks application and the evidence relied on by McDonald's counsel in argument" (unreported judgment dated 1995-10-05 22).

The most fundamental difficulty faced by the proprietor of a foreign trade mark is that the plaintiff is precluded from relying on the normal evidence which a plaintiff in a passing-off action would use in order to establish its reputation, namely significant sales and advertising figures in the territory. The plaintiff can only rely on its world-wide sales figures and spill-over advertising. McDonald's evidence on these issues included:

(a) Details of its world-wide exposure, including 13 993 McDonald's restaurants in over 70 countries at the end of 1993;

(b) an annual turnover of over $23 billion;

(c) annual advertising expenditure of $900 million;

(d) sponsorship of sporting events such as the 1984 Los Angeles and 1992 Barcelona Olympics; the 1990 and 1994 Soccer World Cups in Italy and in the United States of America respectively.

The aforementioned figures speak for themselves and the Appellate Division stated:

> "Although there was no evidence on the extent to which the advertising outside South Africa spilled over into this country through printed publications and television, it must, in all probability, be quite extensive" (22J–23A).

It seems to follow that the elite group of foreign trade mark proprietors with an annual world-wide advertising expenditure of $900 million or more will probably meet this test, but somewhere below this figure lies an unknown threshold below which it will be necessary to lead further evidence relating to the precise exposure of spill-over advertising in South Africa. This should, however, be a relatively easy task when dealing with international sporting events or international magazines *et cetera*, all of which have significant exposure in South Africa.

McDonald's had also submitted evidence to the effect that between 1975 and 1993 they had received 242 requests from South Africans who wished to enter into franchise arrangements, some of the applicants being prominent companies. An affidavit from the past chairman of the South African Franchise Association was also submitted, in which he confirmed that he had on numerous occasions held up the business format adopted by McDonald's as the model for efficient franchising in numerous meetings, conferences and seminars he had addressed on franchising. He stated, furthermore, that he had received numerous requests from prospective franchisees and ordinary members of the public for advice on how to become a McDonald's franchisee.

Most importantly, and most controversially, McDonald's had relied on two market surveys which concluded that a large majority of respondents were aware of McDonald's. The respondents had criticised the surveys on the grounds, *inter alia*, that the survey evidence specifically related to persons living in relatively affluent suburbs. Unlike the position in many jurisdictions, and the United States of America in particular, market surveys have never before been accepted by a South African Court. In the *McDonald's* case the Appellate Division considered the law in considerable detail (24 ff) and held the market survey evidence to be admissible and to carry weight as corroboration of other evidence on the notoriety of the trade mark McDONALD'S. Against the background of the other issues determined in the *McDonald's* case, the significance of this aspect of the judgment, which is a landmark decision in its own right, is easily overlooked.

We have already seen that a proprietor is required to prove only that his mark is well-known to persons interested in the goods or services to which the mark relates. The approach of the court to the relevant sector of the market is illustrative, as it accepted that there were two categories of persons who are interested in the goods and services provided by McDonald's, namely: (a) potential customers; and (b) potential franchisees.

It then distinguished between these categories as follows:

> "Potential customers would cover a wide field. It would include all persons who like fast food of this type and have the money to buy it. Since the cost is not high there will be many such people. Potential franchisees would be a smaller group, namely persons who can finance and run a McDonald's franchise, or consider that they can" (27I–28A).

The latter group was more likely to be exposed to international travel and the spill-over advertising of McDonald's. The court concluded that this type of person would almost without exception have heard of McDonald's and know its marks.

Dealing with the former group the court stated:

> "Among potential customers the level of awareness would be lower. Many people who would be interested in buying a hamburger would not have heard of McDonald's. However, a certain degree of financial well-being is required for the purchase of prepared goods. Extremely poor people are not likely to patronise McDonald's establishments. The persons who are likely to do so, at least a substantial portion must be of the category who would probably have heard of McDonald's and know its marks, or some of them" (28F–G).

Taking all the aforementioned facts into account, Grosskopf JA had little difficulty in finding that McDonald's had proved its trade marks to be well-known among both categories of persons.

This conclusion was reached on the strength of the extensive evidence filed by McDonald's and it was not necessary for the court to consider the element of bad faith (as we have seen above, the court did reject the defence of "*bona fide* prior user" on the grounds that the acquisition of the earlier McDonald's business was not *bona fide*). It is, however, clear from the judgment that the court took a dim view of the actions of Joburgers and Dax, and Grosskopf JA alluded to the element of bad faith (or at least an absence of good faith) when, in considering whether McDonald's was well-known in South Africa, he stated:

> "The conduct of Joburgers and Dax in the present case confirms the reputation attaching to the McDonald's mark. Intrinsically the word McDONALD has no attractive force. It is a fairly common surname. Had it not been for the reputation it has acquired over the years, nobody would wish to appropriate it. It is therefore significant that Joburgers and Dax have gone to considerable trouble and expense to obtain control over the McDonald's marks . . .
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> Quite obviously Joburgers and Dax both consider that the McDonald's mark is a valuable asset, worth a great deal of trouble, expense and risk to secure. They have not given any explanation for this attitude. If one assumes that they intend to trade under the name McDonald's or MacDonald's there is only one possible explanation, namely that in their view the McDonald's marks enjoy a high reputation in this country" (23C–D H–I).

5 The "forgotten" issue – non-use expungement

Victory in the "well-known mark application" was the "BIG MAC" of the case but there was still the side order to be determined, namely the non-use expungement proceedings. These proceedings were based on section 36(1)(a) and (b) of the Trade Marks Act 62 of 1963 which reads:

> "(1) Subject to the provisions of subsection 2 of section 16, and section 53, a registered trade mark may, on application to the Court, or, at the option of the applicant and subject to the provisions of section 69, to the Registrar by any person aggrieved, be taken off the Register in respect of any of the goods or services in respect of which it is registered, on the grounds either–
>
> (a) that the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods or services by him, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods or services by any proprietor thereof for the time being up to the date one month before the date of the application; or

> (b) that up to the date one month before the date of the application a continuous period of five years or longer elapsed during which the trade mark was a registered trade mark and during which there was no *bona fide* use thereof in relation to those goods or services by any proprietor thereof for the time being; or . . ."

(While the Act had been repealed by the time the appeal was heard, in terms of the transitional provision contained in s 3(2) of the new Trade Marks Act all applications are proceedings commenced under the repealed Act and must be determined in accordance with the provisions of that Act.)

It was common cause that none of the McDonald's trade marks had been used in South Africa during the critical period. McDonald's defence to the non-use expungement proceedings was based on the court's general discretion and section 36(2), which provided:

> "(2) An applicant shall not be entitled to rely for the purposes of subsection (1)(b) on any non-use of a trade mark that is shown to have been due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark in relation to the goods or services to which the application relates."

It must be noted that the special circumstances defence qualifies s 36(1)(b) only and, accordingly, if Joburgers and Dax could prove that the McDonald's trade marks were registered without any *bona fide* intention on the part of the applicant that they should be used, they could be expunged, whether or not McDonald's had shown that the non-use was due to special circumstances in the trade.

The court *a quo* had found against McDonald's on section 36(1)(a) and (b) and that the non-use was not due to special circumstances. It also refused to exercise its discretion in favour of McDonald's and ordered that all the McDonald's trade marks be expunged.

The special circumstances on which McDonald's relied were the economic sanctions of the 1980s against apartheid South Africa. The argument, from a business perspective, went something like this: We honoured the call of the anti-apartheid movements not to do business with apartheid South Africa. Our actions were, in part, instrumental in the radical political changes in South Africa in the early 1990s which resulted in the anti-apartheid movements whose call we answered becoming the ruling government after the multi-racial elections in April 1994. We now wish to answer the call of the current government to foreigners to reinvest in South Africa in order to give South Africa's economy a much needed boost. In order to do business effectively in South Africa we need to protect our trade marks. We cannot protect our trade marks because they are vulnerable to expungement because we didn't use them in South Africa for a five year period.

Arguments to the effect that the non-use provisions of South Africa's trade mark law are the same as those of most countries and, in fact, are more lenient than the three-year requirements of TRIPS (a 19 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS agreement)), were of no consolation to McDonald's and others who found themselves in similar circumstances and the clear message conveyed to the South African government was: "You got us in this mess, now get us out of it." Against this background it is easy to suggest that the decision of the Appellate Division in refusing the expungement of the McDonald's trade marks was a political decision. There is no doubt in the writer's mind that had the Appellate Division expunged the McDonald's

trade marks there would have been significant political repercussions which would most likely have resulted in an amendment to South Africa's trade mark laws with a retroactive effect. This does not mean, however, that the judgment of the Appellate Division can in any way be said to be tainted by political motives, as it dealt with the non-use expungement attack on a purely apolitical basis and did not even consider the special circumstances argument. Instead, having found that McDonald's had succeeded in the well-known application, Grosskopf JA stated:

> "Moreover, the case was fought on a winner take all principle. It was not suggested by Joburgers or Dax that, even if the marks containing the name McDonald's were well-known, they would still be entitled to use, say, the clown device. The prize at issue is the mark McDONALD'S. The well-known marks application has effectively awarded it to McDonald's.
>
> In these circumstance it seems anomalous and even futile to proceed with the applications for removal from the register. Even if these applications succeeded it would not benefit Joburgers or Dax. They would still be interdicted from using the mark McDONALD'S" (31F–H).

The provisions of section 36 quoted above provide that a registered trade mark may be removed from the Register in the circumstances specified. It was argued that the word "may" in that section confers a general discretion on the court. Dealing with this issue, Grosskopf JA said:

> "The circumstances of the present case show, in my view, how desirable it is, from a practical point of view, that such a discretion should exist. The use of the word 'may' in this section appears to grant a discretion. The weight of authority, as discussed in Webster & Page *South African Law of Trade Marks* 3rd Edition at 371–372 is in favour of its existence. We should therefore now hold, I consider, that the Court retains a general or residual discretion to refuse to remove a trade mark from the Register even where section 36(1)(a) or (b) is applicable. It goes without saying that a party who has shown himself entitled to relief under the section will not be deprived of such relief by the exercise of a general discretion unless the circumstances are exceptional. In my view the present circumstances are indeed exceptional" (31I–32B).

Few will argue that the circumstances of the *McDonald's* case were not exceptional. While it is unfortunate that the court did not consider the special circumstances defence, it can hardly be criticised for ducking this issue, given the other complex legal issues with which it dealt. While the special circumstances defence is a politically and economically sensitive issue in South Africa at this time, it is one which will become less and less significant in the future for the simple reason that, as time passes, it will become more and more difficult for the proprietor of a trade mark in South Africa to argue that its non-use was because of the economic sanctions against apartheid South Africa when such sanctions were lifted in 1994.

6 Conclusion

South Africa's membership of the global village was in jeopardy after the court of first instance had ruled that McDONALD'S was not a well-known trade mark in South Africa. There can be no doubt that had the appeal gone against McDonald's, the repercussions on a political and economic front would have been severe. The timing of such a backlash would have been particularly bad for South Africa as it has only recently re-entered the global community after having been ostracised for so many years as a result of its apartheid policies. Against this background it is easy to label the judgment of the Appellate Division as a

political judgment. To do so would, however, not do justice to the well-reasoned and principled approach of South Africa's highest court to a complex area of the law which, although it has its roots in the Paris Convention of 1883 and, more recently, has been incorporated in article 16 of TRIPS, is still a grey area in trade mark law world-wide. It is submitted that the approach of the Appellate Division in the *McDonald's* case sets a precedent which can be adopted in other countries and, in doing so, may play a small part in establishing harmony in the global village.

CHARLES E WEBSTER
Spoor and Fisher, Pretoria

MEDEWERKENDE OPSET EN DIE INVORDERINGSBANK

Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank 1996 4 All SA 278 (W)

Die potensiële deliktuele aanspreeklikheid van die invorderingsbank vir die nalatige invordering van 'n gesteelde of verlore tjek is teen hierdie tyd al ou nuus. (Sien hieroor oa *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); Malan met Pretorius en De Beer *Malan on bills of exchange, cheques and promissory notes in South African law* (1994) § 238 ev; Malan en Pretorius "The collecting bank revisited" 1991 *THRHR* 705; Malan en Pretorius "Negligence and the collecting bank: Liability at last?" 1993 *SA Merc LJ* 206; Nagel en Greeff "Die deliktuele aanspreeklikheid van die invorderingsbank" 1992 *THRHR* 314; Kidd "Can a collecting banker be held liable under the Lex Aquilia? Recent developments and some thoughts on the future" 1993 *SALJ* 1; Hugo "The negligent collecting bank: recent decisions introduce a new era" 1992 *Stell LR* 115.) Die moontlikheid van medewerkende nalatigheid aan die kant van die eienaar van 'n tjek is ook al amper so te sê ou nuus en is in beginsel moontlik in gevalle waar die trekker of eienaar van 'n tjek nie die nodige sorg aan die dag gelê het om die tjek behoorlik te trek of te bewaar nie en daardie nalatige optrede of versuim saam met die nalatigheid van die invorderingsbank medewerkend bygedra het tot die skade wat die eiser ly (*Bank of Credit and Commerce Zimbabwe Ltd v UDC Ltd* 1991 4 SA 82 (ZSC); Malan, Oelofse en Pretorius *Proposals for the reform of the Bills of Exchange Act, 1964* (1988) 636 ev). Dit is egter baie opwindend dat die deliktuele aanspreeklikheid van die invorderingsbank en die verweer van medewerkende opset onlangs in bogenoemde beslissing ter sprake gekom het.

Medewerkende opset kom gewoonlik ter sprake waar die verweerder en die benadeelde eiser onderskeidelik op 'n opsetlike wyse die eiser se skade veroorsaak het (Neethling, Potgieter en Visser *Deliktereg* (1996) 153; Pretorius *Medewerkende opset as 'n verweer/absolute verweer vir deliktuele aanspreeklikheid* (LLM-verhandeling UK 1977) 181 ev (hierna "Pretorius *Medewerkende opset*")). In beginsel behoort daar tussen twee gevalle onderskei te word. In eerste instansie is dit geykte reg dat 'n eiser sy eis verbeur in omstandighede

waar hy sy eie skade opsetlik veroorsaak het en die verweerder bloot *nalatig* opgetree het (Neethling, Potgieter en Visser 153). In tweede instansie kom die verweer van medewerkende opset (en die moontlikheid van 'n *verdeling van skadevergoeding* – sien hieronder) net ter sprake waar die verweerder en die eiser onderskeidelik op 'n opsetlike en 'n medewerkend opsetlike wyse die betrokke skade veroorsaak het. Ons bepaal ons tans by laasgenoemde geval.

Die verweer van medewerkende opset het 'n baie interessante geskiedenis in die Suid-Afrikaanse reg. Alhoewel die appèlhof al by geleentheid *obiter* twyfel uitgespreek het oor die bestaan van die verweer van medewerkende opset (*Mabaso v Felix* 1981 3 SA 865 (A) 877) het dieselfde hof dit al by meer as een geleentheid nie nodig gevind om uitdruklik oor die bestaan van die verweer te beslis nie (*Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 421–422; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570). In die verlede het die debat oor die erkenning van die verweer van medewerkende opset grotendeels gedraai, en is inderdaad baie beïnvloed deur, die vermeende oorvleueling tussen die verweer van *volenti non fit iniuria* en medewerkende opset en veral oor die vraag of die toestemming in sekere omstandighede nie as *contra bonos mores* aangemerk kon word nie (sien Boberg *The law of delict: Vol I Aquilian liability* (1984) 741–743 waar die kern van hierdie debat saamgevat en meeste van die gesag hieroor aangehaal word). Na die waterskeidinguitspraak in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) waar daar in beginsel aanvaar is dat suiwer vermoënsverlies (dws vermoënskade wat nie uit sogenaamde persoon- of saakskade voortvloei nie) wel deliktuele aanspreeklikheid kan grondves (sien hieroor oa Boberg 103 ev; Burchell "The birth of a legal principle – negligent statements causing pure economic loss" 1980 *SALJ* 1; Van der Walt "Nalatige wanvoorstelling en suiwer vermoënskade: Die appèlhof spreek 'n duidelike woord" 1979 *TSAR* 145; Pretorius "Nalatige wanvoorstelling en suiwer vermoënsverlies: Die regsplig om skade te voorkom" 1986 *De Jure 57* 243; Pretorius *Aanspreeklikheid van maatskappy-ouditeure teenoor derdes op grond van wanvoorstelling in die finansiële state* (1985) 262 ev), het die tyd egter aangebreek dat die debat 'n ietwat nuwe dimensie verkry.

Die Wet op Verdeling van Skadevergoeding 34 van 1956 het die gemeenregtelike reëling ten aansien van medewerkende skuld aan die kant van die eiser ingrypend gewysig (Neethling, Potgieter en Visser 152 ev). Artikel 1(1)(*a*) van voormelde wet lui soos volg:

> "Waar iemand skade ly wat deels aan sy eie skuld en deels aan die skuld van 'n ander persoon te wyte is, word 'n vordering ten opsigte van bedoelde skade nie ten gevolge van die skuld van die eiser verydel nie, maar word die skadevergoeding wat ten opsigte daarvan verhaalbaar is in so 'n mate deur die hof verminder as wat die hof met inagneming van die mate van die eiser se skuld met betrekking tot die skade regverdig en billik ag."

Artikel 1(3) bepaal verder dat

> "[b]y die toepassing van hierdie artikel beteken 'skuld' ook 'n handeling of versuim waaruit, as dit nie vir die bepalings van hierdie artikel was nie, die verweer van bydraende nalatigheid sou ontstaan het".

Kort na die aanvaarding van hierdie wet het die vraag ontstaan of hierdie artikel hoegenaamd ruimte laat vir medewerkende opset aan die kant van die eiser. Daar was uiteenlopende standpunte hieroor (Pretorius *Medewerkende opset* 220 ev). Strauss *Toestemming tot benadeling as verweer in die strafreg en die deliktereg*

(LLD-proefskrif Unisa 1961) het hom al destyds so oor die aangeleentheid uitgelaat:

> "Die woord 'beteken ook' in art. 1(3) van die Wet gee onomwonde te kenne dat die Wetgewer vir die doeleindes van art. 1 nie 'n omvattende omskrywing van skuld wou gee nie, en is 'n duidelike erkenning dat die woord 'skuld' ook ander betekenisse kan dra. 'Skuld' is 'n regsterm en daar is geen aanduiding in die woorde van die artikel dat die Wetgewer 'n ander betekenis as die gemeenregtelike daaraan wou heg nie. Dit is wel 'n reël van die wetsuitleg dat as die wetgewer hom van 'n woord bedien wat in die regstaal 'n vaste betekenis het, 'n afwyking van daardie betekenis nie geredelik aanvaar word nie. 'Skuld' in sy gemeenregtelike betekenis sluit sowel opset as nalatigheid in. Dit kom dus voor asof 'bydraende opset' aan die kant van 'n benadeelde wat deur 'n ander se skuld gely het, ook tot die gevolge wat deur art. 1(1)(*a*) voorgeskryf word, aanleiding moet gee" (357–358).

'n Soortgelyke standpunt is ook deur verskeie ander skrywers gehandhaaf, onder andere Swanepoel "Die Wet op Verdeling van Skadevergoeding" 1959 *THRHR* 265; Millner "The Apportionment of Damages Act" 1956 *SALJ* 322; Van der Vyver "Netherlands Insurance Co of SA Ltd v Van der Vyver 1968 1 SA 412 (A)" 1968 *THRHR* 297 en die bewysplekke deur Pretorius *Medewerkende opset* 218 ev aangehaal.

Ons kan nou weer terugkeer tot medewerkende opset en die invorderingsbank: Die ooreengekome feite in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* was kortliks soos volg: Gedurende September 1991 was ene Thoms in diens van die Stadsraad van Soweto. Die Stadsraad van Soweto het later ontbind en alle regte en verpligtinge het op die eiser, die Groter Johannesburgse Metropolitaanse Raad, oorgegaan. In die loop van sy diens en handelende binne die perke van sy diensbetrekking het Thoms agt tjeks gesteel wat ten gunste van die Stadsraad van Soweto uitgemaak was. Thoms se vrou was in diens van die Rosettenville-tak van die verweerder-bank en sy was 'n kontroleur wat onder andere moes toesig hou dat die invordering van tjeks deur die Rosettenville-tak van die verweerder-bank behoorlik en korrek gedoen word. Mevrou Thoms het die gesteelde tjeks in 'n rekening inbetaal wat in die naam van haar kind by die verweerder-bank gehou is nadat sy die nodige deposito-strokies, ensovoorts, voltooi het. Die hof bevind inderdaad dat hierdie optrede van mevrou Thoms binne die perke van haar diensbetrekking was en dat haar werkgewer as invorderingsbank middellik aanspreeklik behoort te wees vir haar optrede (285, met verwysing na *Feldman (Pty) Ltd v Mall* 1945 AD 733 742).

Uit die voorgaande is dit duidelik dat meneer en mevrou Thoms albei *opsetlik* en bedrieglik opgetree het. Altwee het in die loop van hulle diensbetrekking gehandel (sien Neethling, Potgieter en Visser 362 ev vir 'n bespreking van die vereistes van middellike aanspreeklikheid). Die vraag wat die hof dus uiteindelik moes beantwoord, was of die eiser se eis teen die invorderingsbank vatbaar is vir die toepassing van die Wet op Verdeling van Skadevergoeding in die lig van die feit dat daar *opsetlike* optrede deur die werknemers van beide die eiser en die verweerder teenwoordig was.

Regter Goldstein verwys na artikel 1(1)(*a*) van die Wet op Verdeling van Skadevergoeding en kom tot die gevolgtrekking dat "skuld" in daardie artikel "opset" insluit:

> "Where there is *dolus* on both sides there appears to me no reason not to give effect to the ordinary meaning of the words 'fault' and 'skuld'" (291).

Ook wat die opskrif van die artikel betref (waar na nalatigheid verwys word) en in ag genome die *dictum* van appèlregter Stratford in *Bhyat v Commissioner for Immigration* 1932 AD 125 129–130 oor die uitleg van die opskrif, is regter Goldstein van oordeel dat die voormelde uitleg

> "leads to no absurdity, inconsistency, hardship or anomaly. The contrary is true. Applying section 1(1)(*a*) in the present matter produces a result which is fair and which the language of the statute indicates the legislature must have intended" (292).

Die hof verwys vervolgens na die *obiter* uitlating in *Mabaso v Felix supra* 877 waar die appèlhof te kenne gegee het dat dit twyfelagtig is dat "skuld" in artikel 1(1)(*a*) ook opsetlike optrede sou insluit. Regter Goldstein wys daarop dat hierdie opmerking 'n *obiter* uitlating is en dat die hof in *Felix* na alle waarskynlikheid te doen gehad het met 'n geval waar daar bloot nalatige optrede aan die kant van die eiser was (292). Die hof verwys ook na die uitleg wat die appèlhof van artikel 1(1)(*a*) in *Minister van Wet en Orde v Ntsane supra* 579 by monde van appèlregter Van Heerden gegee het. In hierdie saak het die regter die volgende gesê:

> "Soos . . . blyk, is die oogmerk van die artikel dat 'n vordering nie ten gevolge van die skuld van die eiser verydel moet word indien sy ly van skade deels aan sy eie skuld te wyte was nie. Indien 'n verweerder egter opsetlik gehandel het, sou daar by ontstentenis van die artikel geen verydeling kon gewees het van 'n vordering van 'n nalatige eiser nie. Die Wetgewer kon dus nie beoog het om die remediërende gedeelte van die artikel ook op so 'n geval van toepassing te maak nie. Daardie gedeelte geld klaarblyklik wanneer beide die eiser en die verweerder kousaal nalatig was. Indien die woord 'skuld' ook 'opset' insluit, en opset van die eiser gemeenregtelik 'n afdoende verweer was, geld dit ook wanneer 'n verwyt van opset beide partye tref. In beide gevalle sou daar sprake van verydeling van die eiser se vordering kon wees. Dit volg dan dat waar die Wetgewer die frases 'sy eie skuld' en 'aan die skuld van 'n ander persoon' langs mekaar gebruik, dit dieselfde skuldvorm in gedagte het. Anders gestel, as die eiser se skuld nalatigheid is, verwys die Wetgewer met die gebruik van die tweede frase na, en slegs na, nalatigheid van die verweerder."

Regter Goldstein is van mening dat daar nie gesê kon word dat die skuld van meneer Thoms groter is as dié van mevrou Thoms nie (293). In hierdie omstandighede is die hof van oordeel dat artikel 1(1)(*a*) van toepassing is aangesien dieselfde skuldvorm ter sprake is (294). Die hof verwys in laaste instansie met goedkeuring na die uitspraak van regter Mahomed (soos hy toe was) in *Randbond Investments (Pty) Ltd v SPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 621 waar die volgende gesê is:

> "In our law the master's liability is 'co-extensive and identical in every respect with the liability of the servant'. It is vicariously liable for the acts or omissions of its servants or agents acting within the scope of their authority or employment . . . What is relevant about the claims of a joint tortfeasor liable for the intentional delictual act of his servant is the following: at least part of the rationale behind the common law rule that a wrongdoer who intentionally performs a delictual act must not be allowed to claim a contribution from a joint wrongdoer in the same position is that such wrongdoers should not be entitled on grounds of public policy to rely upon agreements involving such turpitude – this rationale may not apply where the liability of the joint wrongdoer concerned is a vicarious liability arising from the acts of the servant and not from any conspiracy or agreement to which the Master is personally a party."

Alhoewel die voormelde aanhaling na mededaders verwys, pas regter Goldstein dit by wyse van analogie toe op die feite voor hom en kom derhalwe tot die

gevolgtrekking dat die eiser se eis met 50% verminder moet word vanweë die medewerkende opset wat middellik aan die eiser toegedig word (294). Ons doen aan die hand dat hierdie gevolgtrekking korrek en in ooreenstemming is met 'n standpunt wat regswetenskaplik verantwoordbaar is (Neethling, Potgieter en Visser 153 vn 170; Pretorius *Medewerkende opset* 223 vn 1). Die uitdruklike erkenning van die bestaan van die verweer van medewerkende opset word verwelkom.

FR MALAN
Randse Afrikaanse Universiteit
JT PRETORIUS
Universiteit van Suid-Afrika

THE APPLICABILITY OF THE CONSTITUTION, THE JURISDICTION OF THE APPELLATE DIVISION IN CONSTITUTIONAL MATTERS AND COSTS IN THE CONSTITUTIONAL COURT

Rudolph v Commissioner for Inland Revenue 1994 3 SA 771 (W); 1996 2 SA 886 (A) ; 1996 7 BCLR 889 (CC)

1 Introduction

The adoption of the new Constitution of the Republic of South Africa Act 200 of 1993 (hereinafter "the Constitution") may have been one of the unique milestones in the development of our law, but it has also introduced in its wake some challenging aspects for our judicial system. One of the results of the Constitution is the dichotomy of jurisdiction between the Appellate Division and the Constitutional Court which has been created in terms of this Constitution. Costs is another issue which calls for consideration under the Constitution. Both these issues were raised in *Rudolph v Commissioner for Inland Revenue* 1996 7 BCLR 889 (CC).

Whether certain authorisations in terms of section 74(3) of the Income Tax Act 58 of 1962 (hereinafter "the Income Tax Act") were invalid in terms of the common law and whether this section was contrary to section 13 of the Constitution and therefore invalid, were other questions before the Constitutional Court in this case.

2 Facts

The first appellant, a businessman, was the sole director of the second appellant, a company. The first appellant failed to render tax returns for several years despite various undertakings to do so. In terms of section 3(1) of the Income Tax Act the Commissioner delegated his power to the Chief Director of Administration of the Department of Finance, who, acting in terms of section 74(3) of the Income Tax Act, instructed various of the other respondents on 20 October 1993 to search the premises of the appellants and seize all relevant documents. On 21 October 1993 first appellant's premises were searched and documents seized.

On Friday 22 April 1994 some of the respondents, acting in terms of the original written authority, searched and seized various relevant documents from the premises of the second appellant. The documents seized were not removed, but locked in a sealed store-room on the premises to enable respondents to list the items seized. The key to this store-room was retained for this purpose by one of the respondents.

On 27 April 1994 the Constitution came into operation. On 29 April 1994 the appellants, invoking the provisions of the Constitution, instituted an urgent application in the Witwatersrand Local Division of the Supreme Court for an interim interdict on an urgent basis restraining the respondents from effecting further searches or using documents already seized, pending a determination by the Constitutional Court on the validity of section 74(3) of the Income Tax Act. This urgent application was at first postponed and eventually dismissed with costs.

Leave to appeal was refused, but a subsequent petition to the Chief Justice was successful. The matter was heard by the Appellate Division, which after having heard full argument on the "common law grounds of invalidity", referred several issues for decision to the Constitutional Court in terms of section 102(6) of the Constitution.

3 Argument of counsel

On appeal, counsel for the appellants contended that the Appellate Division had jurisdiction to dispose of the appeal in terms of section 102(5) of the Constitution and therefore submitted that the written authorisations issued in terms of section 74(3) of the Income Tax Act were invalid in terms of the common law, on the grounds that:

(a) such authorisations, once issued and executed, lapse and cannot thereafter be used in perpetuity; accordingly, the authorisations issued and executed in October 1993 could not be used in the subsequent searches and seizures in April 1994 and such actions therefore constituted an unlawful administrative action;

(b) although section 74(3) of the Income Tax Act empowers the Commissioner to issue written authorisations, it does not authorise him to delegate this power to the Chief Director of Administration under section 3(1) of the Income Tax Act; accordingly the delegation was invalid, rendering the authorisations invalid in consequence;

(c) the authorisations were vague and imprecise.

Counsel for the appellants conceded that if his submissions in (a)–(c) above, were to be upheld by the Appellate Division, it would amount to an infringement of the appellants' constitutional rights under section 24 of the Constitution. Although the Appellate Division cannot adjudicate on this issue in terms of section 101(5) it was contended that the court had parallel jurisdiction to entertain the appeal.

In view of this, he asked the court to adjudicate the matter in terms of section 102(5) on the "common law" grounds set forth in (a)–(c) above, with the proviso that should the appellants fail in these issues, the matter be referred to the Constitutional Court for decision on the constitutionality of section 74(3) of the Income Tax Act.

4 Findings of the court

The Appellate Division found that it does not have parallel jurisdiction to adjudicate the matter and even if it did, it would be required to interpret the Constitution which it cannot do. Subsequently, the constitutionality of section 74(3) of the Income Tax Act and the jurisdiction of the Appellate Division to adjudicate upon and determine on appeal the common law grounds of invalidity in the light of section 24 of the Constitution, were some of the issues referred to the Constitutional Court for hearing in terms of section 102(6).

Furthermore, the order as to costs in the Appellate Division was that costs were to be in the cause.

The Constitutional Court, having regard to *Du Plessis v De Klerk* 1996 3 SA 850 (CC) (1996 5 BCLR 658 (CC)), *Gardener v Whitaker* 1996 6 BCLR 775 (CC) and *Key v The Attorney General, Cape of Good Hope Provincial Division* 1996 6 BCLR 788 (CC), was firm in its approach that the Constitution did not act retrospectively and that actions taken before the coming into operation of the Constitution, do not become unlawful as a result of provisions of the Constitution coming into operation.

The Constitutional Court rejected the argument of counsel for the appellants that the seizure had not been completed before the Constitution came into operation and found that the deprivation of possession, control and use of the documents were completed on 22 April 1994, before the Constitution came into operation.

According to the Constitutional Court, the Constitution was therefore not applicable to the case and the question of the constitutionality of section 74(3) irrelevant. Thus it also followed that the Appellate Division was competent to adjudicate the matter on the common law grounds in terms of its own powers and procedure.

5 Discussion

5 1 Jurisdiction

It is important to note at the outset that the case in the Witwatersrand Local Division of the Supreme Court was finalised before the enactment of section 101(7), which expressly confers on a division of the Supreme Court the jurisdiction to grant an interim interdict, even with the effect of suspending or interfering with the application of an Act of Parliament, pending determination by the Constitutional Court of any matter mentioned in section 98(2).

It is, in any event, doubtful whether the appellants (applicants in the Witwatersrand Local Division) would have succeeded with an interim interdict even if section 101(7) had been in force at the time of delivering the judgment. This is due to the fact that the judge was of the opinion that the appellants had failed to show the existence of a *prima facie* right, which is a prerequisite for an interim interdict. According to the judge, the appellants had no rights and only the respondents had certain rights in terms of section 74(3) of the Income Tax Act, which were exercised properly and lawfully.

In terms of section 98(2)(c), read with section 101(3)(c), the Constitutional Court is the only court allowed to inquire into the constitutionality of an Act of Parliament such as the Income Tax Act, except where the parties to a case consent

to the jurisdiction of a provincial or local division of the Supreme Court to adjudicate the matter in terms of section 101(6) of the Constitution.

In terms of section 101(5) of the Constitution the Appellate Division is not competent to adjudicate upon any matter within the jurisdiction of the Constitutional Court. But if an appeal before the Appellate Division involves both constitutional and non-constitutional issues, and the Appellate Division is able to finalise the matter without dealing with the constitutional issues, it must dispose of the matter in terms of section 102(5) of the Constitution. If the Appellate Division is unable to finalise the appeal on the non-constitutional issues, the constitutional issues should be referred to the Constitutional Court in terms of section 102(6) of the Constitution. In the case under discussion, the Appellate Division was of the opinion that it would be required to interpret the Constitution to finalise the appeal. This fell outside the jurisdiction of the court and the matter was therefore referred to the Constitutional Court.

5 2 Applicability of the Constitution

For an issue to be adjudicated upon by the Constitutional Court, the Constitution must apply to the particular issue in the sense that it is a constitutional issue and that the alleged unconstitutional act was committed after the coming into operation of the Constitution on 27 April 1994. Because the Constitution does not operate retrospectively (see *Du Plessis v De Klerk supra*), the rights in terms of section 13 of the Constitution which the appellants tried to invoke, had not come into operation when the searches and seizures were done. The subsequent commencement of the Constitution does not render action lawfully taken in terms of section 74(3) of the Income Tax Act, before the coming into operation of the Constitution, unlawful by affording rights and freedoms to persons which did not exist before (see *Key v The Attorney General, Cape of Good Hope Provincial Division supra*).

According to the Constitutional Court, the searches and seizures, implying "the forcible deprivation of possession" of the documents (see *Green v Commissioner of Customs and Excise* 1941 WLD 128), were completed on 22 April 1994.

However, it is the authors' submission that if the meaning of seizure is "the forcible deprivation of possession" of the documents, then the appellants were still deprived of possession of the documents after 27 April 1994, since the respondents still had control over the documents. Thus the appellants' right of privacy in terms of section 13 of the Constitution was invaded after the coming into operation of the Constitution, until 6 May 1996 when the first respondent returned the documents to the appellants.

The authors acknowledge that the right to privacy is not absolute and can therefore still be limited in terms of section 33 of the Constitution if the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality.

If section 74(3) of the Income Tax Act should again be considered by the Constitutional Court at a later stage and is found to be unconstitutional, the searches and seizures in terms of that section would be invalid and the authors' contention is that the continuing deprivation of possession following the actual seizure should also be held to be unconstitutional.

5 3 Costs

Section 98(8) of the Constitution empowers the Constitutional Court to make any order as to costs in proceedings before it which it deems just and equitable in the circumstances. In the present case no order as to costs was made, with the effect that all parties paid their own costs, because "all the parties erred in assuming that the Constitution applied to their dispute".

In *Ferreira v Levin; Vryenhoek v Powell* 1996 2 SA 621 (CC) (1996 4 BCLR 441 (CC)) the Constitutional Court stated that the presiding officer in the Supreme Court usually has a discretion to make any cost order and secondly, the successful litigant is usually awarded costs in the matter. The latter rule is subject to the former. In exceptional circumstances, depending on the conduct of the parties or their legal representatives, the achievement of only technical success in a matter and many other circumstances, the successful party will not be awarded costs. Thus these rules are flexible and can be adapted (even substantially adapted, if necessary) on a case by case basis. The Constitutional Court stated that those rules are flexible enough to accommodate the requirements of constitutional litigation and therefore offer a useful point of departure in constitutional matters.

In most cases decided in the Constitutional Court and reported up to August 1996, no order as to costs was made, either because the issue of costs was not argued or because, even after argument, the court decided that it was just and fair to make no order as to costs. The reasons why the Constitutional Court did not order a party to pay the other party's costs when the issue was argued, varied from situations where the applicant was not substantially successful in the dispute with the respondent, whilst at the same time the respondent did not oppose a wrongful referral to the Constitutional Court (see *Ferreira v Levin; Vryenhoek v Powell supra*; *Bernstein v Bester* 1996 4 BCLR 449 (CC)), to the situation where a party seeking to test the constitutionality of a statute wished to ventilate an important issue of constitutional principle (see *In re The School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (CC); *In re Kwa Zulu-Natal Amakhosi and Iziphakanyiswa Amendment Bill of 1995; In re Payment of Salaries, Allowances and other Privileges to the Ingonyama Bill of 1995* 1996 7 BCLR 903 (CC)), to a situation where a matter was referred to the Constitutional Court by consent of the parties (see *Key v Attorney-General, Cape of Good Hope Provincial Division supra*).

The unique nature of constitutional matters and the overwhelming "no order as to costs" verdicts in the Constitutional Court to date, beg the question whether the correct point of departure for cost orders in constitutional matters should not rather be a "no order as to costs" order.

6 Conclusion

It is regrettable that the Constitutional Court was unable to adjudicate the issue of constitutionality of section 74(3) of the Income Tax Act because the court was of the opinion that the Constitution is not applicable to it. Clearly this issue will come to the fore again sooner or later.

In regard to the procedural side of constitutional litigation, due cognisance must be taken of the fact that if the Constitution is applicable to a matter, it must be brought before a court competent to adjudicate the matter in terms of the Constitution.

It is submitted that a policy reflecting a general rule in constitutional matters that parties pay their own costs, except if circumstances dictate otherwise, would be more just and fair.

ANVER TAYOB
University of the North West
CARIN SNYMAN
Potchefstroom University for CHE

THE COMFORTABLE ESTATE OF WIDOWHOOD: INSURANCE LAW AND THE CONSTITUTION

Brink v Kitshoff 1996 6 BCLR 752 (CC)

"The comfortable estate of widowhood, is the only hope that keeps up a wife's spirits."

(John Gay *The Beggar's Opera* I x)

1 Introduction

This is the first case in which the Constitutional Court was directly concerned with the application of the equality clause of the Constitution (see s 8 of the Constitution of the Republic of South Africa, Act 200 of 1993). Being aware of South Africa's history of institutionalised discrimination on the basis of race, one would almost have expected the case to deal with this matter. However, the issue was whether section 44 of the (outdated) Insurance Act 27 of 1943 discriminated against married women by depriving them of all or some of the benefits of life insurance policies ceded to them or made in their favour by their husbands.

2 The widow, the insolvent estate and the executor

A life insurance policy worth approximately R2 million was taken out on the life of Mr P Brink during 1989. The policy reflected Mr Brink as the owner of the policy and in 1990 he ceded it to his wife, Mrs A Brink, the applicant before the court. On 9 April 1994 Mr Brink died. Mr A Kitshoff, the respondent, was appointed as the executor of the estate. On 23 May 1994 he notified the creditors in terms of section 34(1) of the Administration of Estates Act 66 of 1965 that the estate was insolvent. In terms of section 44 of the Insurance Act the executor demanded that the insurer pay into the estate all but R30 000 of the proceeds of the life policy. The insurer refused to do so and the executor approached the Transvaal Provincial Division of the Supreme Court for an order compelling the insurer to pay over the proceeds.

Mrs Brink made a counter-application seeking an order that the policy be rectified to reflect her as the owner of the policy. She furthermore raised the question of the constitutionality of section 44 of the Act. On 28 March 1995 the parties successfully applied to the Supreme Court for an order referring the question of

the constitutionality of section 44 to the Constitutional Court in terms of section 102(1) of the Constitution.

3 The Constitution and section 44 of the Insurance Act

A number of issues which are not relevant to the present discussion were considered by the court. For example, the court pointed out that the insurance policy had been taken out and ceded and Mrs Brink's husband had died before the Constitution came into effect. The question was raised whether the Constitution can have application to events that occurred before it came into operation on 27 April 1994. Another matter which was considered was whether the reference of the constitutional issue to the court was proper. The court, however, stated (par 18) that

> "[t]he issue as to the constitutionality of section 44 of the Insurance Act is one of importance on which we have heard full argument by parties with an interest in the outcome, and in respect of which we are in a position to give judgment".

Section 44 of the Act provided:

> "(1) If the estate of a man who has ceded or effected a life policy in terms of section forty-two or forty-three has been sequestrated as insolvent, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith and was completed not less than two years before the sequestration –
>
> (a) by means or in pursuance of a duly registered antenuptial contract, the preceding provisions of this sub-section shall not apply in connection with the policy, money or other asset in question;
>
> (b) otherwise than by means or in pursuance of a duly registered antenuptial contract, only so much of the total value of all such policies, money and other assets as exceeds thirty thousand rand shall be deemed to belong to the said estate.
>
> (2) If the estate of a man who has ceded or effected a life policy as aforesaid, has not been sequestrated, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall, as against any creditor of that man, be deemed to be the property of the said man –
>
> (a) in so far as its value, together with the value of all other life policies ceded or effected as aforesaid and all moneys which have been paid or have become due under any such policy and the value of all other assets into which any such money was converted, exceeds the sum of thirty thousand rand, if a period of two years or longer has elapsed since the date upon which the said man ceded or effected the policy; or
>
> (b) entirely, if a period of less than two years has elapsed between the date upon which the policy was ceded or effected, as aforesaid, and the date upon which the creditor concerned causes the property in question to be attached in execution of a judgment or order of a court of law."

According to the court, one effect of these provisions was that where a life policy has been ceded to a woman, or effected in her favour, by her husband more than two years before the sequestration of her husband's estate, she will receive a maximum of R30 000 from the policy. If it was ceded or taken out less than two years from the date of sequestration, she will receive no benefit at all (see par 22). In other words, once two years have elapsed since the policy was ceded to a wife, or effected in her favour, the policy or any money due under it, to the

extent that it exceeds R30 000, will be deemed to form part of the husband's estate. If less than two years has elapsed since the date of the cession or taking out of the policy and the date of the attachment by a creditor of her husband, all the proceeds of the policy will be deemed to be part of the husband's estate. It is debatable whether this interpretation of section 44 is correct. In *Sackstein v Smith* 1995 4 SA 1029 (O) the court had to determine the meaning of "value" in section 39 of the Act. In essence this section provides that a life policy effected by a person upon his own life, which has been in force for a period of at least three years, will not form part of his insolvent estate, except in so far as the total value of all such policies exceeds thirty thousand rand. The court held that value refers to the *surrender value* of the policy at the date of sequestration. If the same were to apply to section 44 of the Act, a wife may very well receive more than the maximum of R30 000 envisaged by the court (cf eg the facts in *Sackstein v Smith supra*). However, in view of the finding of the court that section 44 was unconstitutional, arguments as to its correct interpretation are irrelevant.

Section 44(1) and (2) was challenged on the grounds that it constituted a breach of section 8 of the Constitution. The relevant clauses of this section read:

> "(1) Every person shall have the right to equality before the law and to equal protection of the law.
>
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
>
> . . .
>
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

In its discussion of section 8, the court emphasised that "equality has a very special place in the South African Constitution" and that this was a recurrent theme in the Constitution (par 33). The court referred to international instruments dealing with specific aspects of discrimination (par 34) and to provisions in the constitutions of other countries protecting equality and prohibiting discrimination (par 35–38). It pointed out that the concept of equality is of particular relevance in our history since the policy of apartheid systematically discriminated against black people in all aspects of social life (par 40). The court was of the opinion that the equality clause had to be interpreted in the light of that history. It concluded (par 42):

> "Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantages and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4)."

It was common cause that section 44(1) and (2) constituted a breach of section 8 of the Constitution. The court observed that section 44(1) and (2) treated married women and men differently and that this difference in treatment disadvantaged married women and not married men (par 43). Section 44(1) and (2) therefore discriminated on two grounds, namely sex and marital status. The court indicated

that section 8(2) does not specifically mention marital status as a ground which would constitute unfair discrimination, but that the list of grounds in this section was not exhaustive. Furthermore, discrimination on a single ground was sufficient for the purposes of section 8. In this case section 44(1) and (2) discriminated against married women and was therefore unconstitutional.

The court also enquired whether the sections could be justified in terms of section 33 of the Constitution (par 46–50). The respondent would have had to show that section 44(1) and (2) was reasonable and justifiable in an open and democratic society based on freedom and equality, and that it did not negate the essential content of section 8. For a number of reasons, the court was not convinced that section 44(1) and (2) could reasonably be justified. It was therefore not necessary to consider whether the section constituted a negation of the essential right to equality. In the final instance it was clear that the section was unconstitutional and therefore invalid.

4 The Constitution and insurance law

It is clear from the judgment in *Brink v Kitshoff* that the Constitution will have an effect on insurance law. In the first place, all relevant sections of the Insurance Act will have to comply with the Constitution. For example, it is doubtful whether the discriminatory provisions contained in sections 41, 42, 43 and 44(3) will survive judicial scrutiny. However, the impact of the Constitution on insurance law is much greater than merely determining the constitutionality of the anachronistic provisions of the Insurance Act. This may not have been so obvious under the 1993 Constitution since it apparently does not provide for direct horizontal application (see *Du Plessis v De Klerk* 1996 3 SA 850 (CC)). If this had not been so, insurers would have been obliged to stop discriminating unfairly against applicants for life insurance (per Cameron J in *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) 597B).

In the 1996 Constitution, the position has been drastically changed and the debate around "direct" and "indirect" horizontal application of the Bill of Rights, at least as far as the equality clause is concerned, becomes academic. Section 9(3) provides as follows:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

Section 9(4) is the crucial provision for insurance law. This section clearly provides for direct horizontal application of the equality clause. Once this provision comes into operation, insurers may not discriminate against applicants for insurance. But what exactly does this mean? A few examples of conduct that may

amount to discrimination are provided. The examples are given without discussion of the complexity of each case and without questioning whether such discrimination may be justifiable. Needless to say, these examples are not the only ones – there are many more.

First, the use of age, sex and marital status as factors to assess the risk in motor vehicle insurance will infringe section 9(4) of the South African Constitution (cf *Zurich Insurance Co v Ontario (Human Rights Commission)* 93 DLR (4th) 346 (SCC); *Hartford Accident and Indemnity Company v Insurance Commissioner of the Commonwealth of Pennsylvania* 482 A 2d 542 (Pa 1984); *Pennsylvania National Organisation for Women v Commonwealth of Pennsylvania Insurance Department* 551 A 2d 1162 (Pa Cmwlth 1988)). Secondly, some insurers use gender-based mortality tables to assess the risk and to determine the amount of the premium for life insurance and annuities. The use of these tables also amounts to unfair discrimination (cf *City of Los Angeles, Department of Water and Power v Manhart* 98 S Ct 1370 (1978); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v Norris* 103 S Ct 3492 (1983)). Thirdly, AIDS will also present a challenge to insurers, since giving consideration to it may constitute discrimination based on sexual orientation (cf *McGann v H&H Music Company* 946 F 2d 401 (5th Cir 1991)). Finally, there is a move among life and health insurers to use genetic testing to determine the risk. The debate is still in its early stages, but some commentators argue that the use of genetic testing may amount to discrimination in various forms (see eg Anderson "Genetic testing in insurance underwriting: a blessing or a curse? An examination of the tension between economics and equity in using genetic testing in risk classification" 1992 *Creighton LR* 1499; Miller "Genetic testing and insurance classification: National action can prevent discrimination based on the 'luck of the genetic draw'" 1989 *Dickinson LR* 729; Wolf "Beyond 'genetic discrimination': Toward the broader harm of geneticism" 1995 *Journal of Law, Medicine & Ethics* 345).

Brink v Kitshoff may be the first South African case in which the question of equality in the insurance context was raised. Judging from the debate that is taking place in other jurisdictions, it will certainly not be the last.

PETER HAVENGA
University of South Africa

UITLEG VAN KONTRAKTE – DIE VERMOEDE DAT PARTYE 'N BILLIKE OF REDELIKE GEVOLG BEOOG HET

Olivier v National Manganese Mines (Edms) Bpk 1996 1 SA 661 (T)

1 Feite

Die applikante (A) het aansoek gedoen om 'n verklarende bevel dat die notariële minerale huurkontrak tussen haar en die eerste respondent (B) behoorlik gekanselleer is.

A was die eienaar van mineraleregte in grond wat sy van haar oorlede eggenoot geërf het. In Maart 1981 het sy 'n prospekteer- en opsiekontrak ten opsigte van die genoemde mineraleregte met B gesluit. Hy was hoofsaaklik met mynbou en mynboubedrywighede gemoeid.

B het die opsie wat ingevolge die kontrak aan hom verleen is op 20 Junie 1983 uitgeoefen. Die tweede respondent het die minerale huurkontrak wat die onderwerp van die geskil is, op 13 Junie 1984 geregistreer.

Kragtens klousule 1 word 'n notariële mineralehuurkontrak "om alle steenkool op of onder die eiendomme uit te grawe en te verwyder" deur A aan B verleen (670H). Klousule 2 reël die betaling van vergoeding en daarvolgens sou B drie persent van die "verkoopprys van elke metriese ton steenkool wat verwyder en verspoor is" aan die applikante moet betaal (670I). Klousule 3 bepaal dat die tydperk van die huur vanaf 7 Julie 1983 vir 'n onbepaalde tydperk sou strek. Tydens die bestaan van die kontrak het B ingevolge klousule 6 die reg om die mineraleregte teen R472 per hektaar te koop (671A). A se reg om die kontrak te kanselleer indien B nie sy verpligtinge nakom nie, is in klousule 12 van die kontrak vervat (671B).

A maak daarop aanspraak dat die kontrak ingevolge klousule 12(a) gekanselleer is omdat B nie sy verpligtinge ingevolge die kontrak nagekom het nie. Die rede daarvoor is dat daar met geen mynbedrywighede begin is nie. Hierdie feit, asook die feit dat A geen vergoeding ontvang het nie word as gemene saak aanvaar. Hierbenewens het B ook nie sy reg om die mineraalregte te koop, uitgeoefen nie. Op 4 Augustus het A aan B kennis gegee om met die mynboubedrywighede te begin. B was egter steeds in versuim en A het die kontrak gekanselleer. Dié kansellasie is egter nie deur B aanvaar nie en hy rig die onderhawige aansoek tot die hof.

B het 'n jaarlikse bedrag van R6 000 aan A betaal. A het hierdie bedrag as 'n *ex gratia* betaling beskryf. B het egter aangevoer dat dit nie 'n *ex gratia* betaling is nie maar dat dit jaarliks sedert die registrasie van die kontrak aan A betaal word. Uit hoofde van die feit dat die partye spesifiek so ooreengekom het, is dit ter nakoming van sy kontraktuele verpligtinge betaal. Dit is B se skuld dat die kontrak soos dit geregistreer is, nie die ware kontrak tussen die partye weergee nie. Die volgende bepaling wat oorspronklik deel van die kontrak gevorm het en wat deel van die huurkontrak sou wees, is per abuis weggelaat:

> "[B]y beëindiging van die prospekteertydperk sal die prospekteerder R6 000 per jaar aan die eienaar betaal as vergoeding vir die tydperk vanaf die einde van die prospekteertydperk tot die begin van mynboubedrywighede" (671G).

Die bedrag van R6 000 is vanaf 1982 tot en met Junie 1994 aan A betaal.

Regter Daniels sê die volgende:

> "Dit is die applikante se saak dat op 'n behoorlike uitleg van die ooreenkoms, alternatiewelik ingevolge 'n geïmpliseerde beding daartoe, daar 'n plig op die respondent gerus het om binne 'n redelike tydperk te begin myn. Omdat die respondent nie begin myn het nie, so lui die argument, het dit 'n wesenlike bepaling van die kontrak verbreek, wat die applikante daarop geregtig gemaak het om die kontrak te kanselleer, wat sy dan ook gedoen het" (671G).

Die hof is van oordeel dat die kontrak nie voorsiening maak vir 'n datum waarop die mynboubedrywighede 'n aanvang moet neem nie. Die kontrak soos dit is, is vir geen ander interpretasie vatbaar nie. Dit is nie nodig om hulpmiddels aan te wend om die kontrak uit te lê nie. Die woorde is nie dubbelsinnig nie en is vir

geen ander betekenis as die gewone grammatikale betekenis vatbaar nie. Volgens die gewone betekenis van die woorde van die kontrak is daar geen verpligting op B om binne 'n bepaalde tyd – selfs 'n redelike of spesiale tyd – met die mynboubedrywighede te begin nie. Alhoewel daar oorwegings geopper is onder die vaandel van 'n interpretasie wat uiting gee aan die vermoede dat die partye eerder 'n billike of redelike gevolg beoog het, is hulle volgens die hof niks anders as billikheidsoorwegings nie. Gevolglik mag die hof hulle nie in aanmerking neem nie. Wat vir A billik is, is nie noodwendig vir B billik nie:

> "In ieder geval is die woorde wat gebruik is duidelik en ondubbelsinnig, en is dit nie nodig om op vermoedens en ander hulpmiddels staat te maak nie . . . Die Hof kan nie sonder meer iets in die kontrak inlees wat nie daar verskyn nie, en waarvoor die partye nie voorsien het nie" (672C).

Die probleem van A is nie 'n interpretasieprobleem nie maar die feit dat sy 'n kontrak tot haar nadeel gesluit het en nou spyt is daaroor. Die argument wat geopper is dat dit 'n geïmpliseerde beding van die kontrak is dat B binne 'n redelike tyd met sy mynbouwerksaamhede sou begin, kan ook nie uit die feite voor die hof afgelei word nie. Die ooreenkoms tussen die partye is ondubbelsinnig en is vir geen ander interpretasie vatbaar nie.

Gevolglik word die applikante se aansoek van die hand gewys met koste.

2 Bespreking

2 1 Dubbelsinnige woorde

Die volgende vorme van dubbelsinnigheid kom voor (Van Heerden en Crosby *Uitleg van wette* (1996) 29):

> "(a) Dubbelsinnigheid in die wet self – wanneer twee artikels in die wet mekaar weerspreek of wanneer een artikel in die een teks 'n ander betekenis as die ooreenstemmende artikel in 'n ander teks het.
>
> (b) Dubbelsinnige woorde – wanneer 'n woord meer as een betekenis het: kop – deel van die liggaam of kant van 'n munt.
>
> (c) Grammatikale dubbelsinnigheid – die konteks waarin die woord gebruik is, dui meer as een betekenis vir die woord aan."

Steyn *Die uitleg van wette* (1981) 22 sê die volgende aangaande dubbelsinnige woorde:

> "Indien die woorde van 'n wet vatbaar is vir meer as een betekenis, is dit toelaatbaar, indien nie gebiedend nie, om die keuse van die betekenis wat aangeneem dien te word, te bepaal aan die hand van die bedoeling van die wetgewer, soos vasgestel uit ander bepalings van die wet en ander aanduidings, en as die bedoeling 'n betekenis aanwys wat 'n ongewone, oneintlike of swakkere betekenis van die woorde is, moet daardie betekenis aanvaar word bo die gewone, eintlike of sterkere betekenis van daardie woorde. Hieroor is vrywel almal dit eens. Ons skrywers leer dit en ons howe neem dit aan."

In die onderhawige kontrak is daar geen sprake van dubbelsinnigheid nie. Volgens die hof (671I–672A) moet die gewone grammatikale betekenis van die woorde aan die woorde toegeken word. Die blote feit dat 'n klousule uit 'n kontrak gelaat is, maak nie 'n kontrak dubbelsinnig nie. Die interpretasieproses wat deur die hof in dié verband toegepas is, blyk dus korrek te wees.

2 2 Die vermoede dat 'n redelike of billike gevolg beoog is

By die uitleg van wette is hierdie vermoede bekend as die vermoede dat die wetgewer nie 'n onbillike, onregverdige of onredelike resultaat beoog nie.

Volgens Steyn 101 (sien ook Van Heerden en Crosby 66) beteken hierdie vermoede die volgende:

> "Waar dit die strewe van iedere regsorde is om billikheid, regverdigheid en redelikheid te bewerkstellig, lê dit voor die hand dat daar 'n sterk vermoede moet bestaan dat die wetgewer met iedere reëling wat hy invoer, dieselfde beoog. By iedere wetsbepaling moet daarom die vermoedelike wil tot geregtigheid aangeneem word."

Dieselfde beginsels wat by die uitleg van wette geld, geld ook by die uitleg van kontrakte.

Daar is reeds aangetoon dat die onderhawige kontrak nie dubbelsinnig is nie. Dubbelsinnigheid is egter nie 'n voorvereiste om 'n redelike en billike gevolg aan 'n kontrak te verleen nie. Die klousule waarop A staatmaak, is juis deur B uitgelaat:

> "Dit is die respondent se saak dat die kontrak soos geregistreer nie die ware afspraak tussen die partye korrek weergee nie, deurdat die volgende bepaling wat oorspronklik deel gevorm het van die prospekteerkontrak, en waarop ooreengekom is dat dit deel van die huurkontrak sou wees en daarin opgeneem sou word, per abuis weggelaat is, naamlik dat 'by beëindiging van die prospekteertydperk sal die prospekteerder R6 000 per jaar aan die eienaar betaal as vergoeding vir die tydperk vanaf die einde van die prospekteertydperk tot die begin van mynboubedrywighede'" (671E).

Die bedoeling van die partye is dus duidelik. Die vraag is vervolgens of aan die letter van die kontrak gehou moet word. Hierdie vraag ontstaan juis vanweë die feit dat die hof die volgende opmerk:

> "Die oorwegings wat geopper word onder die vaandel van 'n interpretasie wat uiting gee aan die vermoede dat die partye eerder 'n billike of redelike gevolg beoog het, is niks anders as sogenaamde billikheidsoorwegings nie, en is uiteraard nie oorwegings wat 'n hof in aanmerking sal neem nie."

Dit wil juis voorkom dat die hof billikheidsoorwegings in aanmerking moet neem aangesien die bedoeling van die partye duidelik was. B het die klousule uit die kontrak gelaat, hy was bewus van die inhoud van die klousule en A het hom ook nog aangemaan op welke aanmaning hy nie reageer het nie.

3 Konklusie

Die vraag is vervolgens of aan die letter van die kontrak gehou moet word en of aan die bedoeling van die partye gevolg gegee moet word. Uit die onderhawige saak blyk dit dat die bedoeling van die partye duidelik was en dat dit nie noodwendig nodig was om aan die letter van die kontrak te hou nie. Die posisie is egter so dat daar groot klem op die letterlike betekenis van 'n wet en 'n kontrak geplaas word terwyl die bedoeling van die wetgewer en die kontrakspartye die deurslag moet gee. As die partye 'n bepaalde gevolg beoog het, behoort daaraan gevolg gegee te word.

Dit blyk dus dat 'n kontrak – soos deurgaans deur die howe ten opsigte van wette beslis is – na beide kante toe uitgelê kan word. Die een groep gee gevolg aan die letter van die wet of kontrak, terwyl die ander groep groter gewig op die bedoeling van die wetgewer of die kontrakspartye plaas. Letterlike uitleg behoort egter nie nagevolg te word nie. Die doel van die wet of kontrak verloor daardeur sy waarde.

FRIK VAN HEERDEN
Universiteit van Pretoria

BOEKE

THE LAW OF MARRIAGE: VOLUME 1

by JD SINCLAIR and assisted by J HEATON

Juta Cape Town Kenwyn Johannesburg 1996; lxiv and 513 pp

Price R387,00 (VAT inclusive) (hard cover)

1 Introduction

In the preface to the book, June Sinclair conveys to the reader that the book had started in 1990 as a project to update the 5th edition of Professor HL Hahlo's *The law of husband and wife*. However, fundamental changes which legislation had brought about to our law of marriage caused a greater "need to break loose". This need, coupled with the response of students in her family law courses, inspired her to question the conventional boundaries that determined what traditionally falls within the law of marriage. This spirit is borne out throughout the work and leads to the conclusion that, even though this work is based on the well-known work of Hahlo, it is as much the product of Sinclair's probing into parts of history, economics, sociology, ethics and a philosophy of life to interpret the South African law of marriage.

It would be an exercise in futility to attempt an in-depth discussion of contentious issues raised in the work. Suffice it to present a brief overview of the contents of the book.

2 The contents of the work

This book, being the first of two volumes, consists of three parts. The first part comprises chapters one to four, the second chapters five to ten and the third chapter eleven. The first part serves as an introduction and the titles of the different chapters abundantly illustrate Sinclair's intention to challenge the conventional boundaries of the law of marriage. In fact, it depicts a definite feminist approach to this discipline. The titles are the following:

1 The state, marriage and women: Families in transition under a new Constitution

2 The history and development of the law of husband and wife

3 Pluralism in South African marriage laws: Race, culture and religion

4 Cohabitation

It is especially in the first chapter that Sinclair's pioneering spirit comes to the fore. The radical impact of the Constitution of the Republic of South Africa Act 200 of 1993 and the transition of the country "to an open and democratic society based on freedom and equality" are the main points of focus in this chapter. The sheer length of the chapter (179 pages) and the number of footnotes (512) are clear indicators of the thoroughness with which the author sets about illustrating the tremendous changes that have taken place (and which can be expected to take place) in family law in the new constitutional dispensation. The discussion of those provisions of the bill of rights in the Constitution that deal with sex, equality, dignity, security of the person, privacy and special protection for children, is particularly illuminating. The comparative legal study dealing with the

position in the United States of America, Canada, the Federal Republic of Germany and the United Kingdom, deserves special mention. The reach of the constitutional protection of gender equality is discussed not only within the private world of the family, but also in the workplace.

Special attention is devoted to the application of the bill of rights in the so-called horizontal relationship (*Drittwirkung*). In this regard one has to bear in mind that this book was published early in 1996 and the fact that the discussion of *Drittwirkung* assumes a rather provisional character, must be considered against the background that the Constitution of the Republic of South Africa 200 of 1993 was still in place then. The 1996 Constitution places this issue beyond doubt and clearly demarcates the application of the bill of rights in the sphere of private law relations.

Further aspects contained in this chapter deal with abortion and parental power. The position with regard to abortion is tackled from an equality perspective and a pro-choice stance is favoured. Under parental power, special attention is devoted to the burning issue of the legal position of the biological father of the illegitimate child. The conclusion is reached that

> "[i]n the light of a Bill of Rights that commits itself to equality, equal protection and children's rights ... we should reform our law of parent and child to incorporate full sharing of all parental rights and responsibilities, regardless whether the child is born in or out of wedlock".

Inequality within marriage, inequality on divorce and African and Muslim marriages are further aspects under consideration against the background of the provisions of the bill of rights.

Chapter 3 deals with pluralism in South African marriage laws and the focus falls on race, culture and religion. The author does not give the final answer to the vexed question of pluralism v unification in the structuring of marriage law, but nevertheless expresses some definite ideas on the relationship between African customary marriage and civil law marriage:

> "It is now widely accepted that African customary marriage exists side by side with the so-called Christian marriage of the civil law and should not be left 'hovering in the twilight between a recognised marriage and illicit cohabitation'. Both forms of marriage are socially recognised institutions for the regulation of intimate relationships. The argument that public policy prevents the full recognition of potentially polygynous unions was premised upon the notion that state policy, formulated by a minority of South Africa's population, was determinative public policy. This 'ethnocentric bias in favour of Western institutions' is problematic."

The author proceeds in this chapter with a lengthy discussion on civil marriages of Blacks, African customary marriages and Muslim and Hindu marriages. The provisions of section 14(3) of the Constitution permitting the enactment of legislation recognising the validity of marriages under a system of religious law are discussed. The author points out that one argument may run that the refusal of the legal system to recognise such marriages may amount to unfair discrimination on the grounds of religion and/or culture. Contrary to this argument, however, a viewpoint may be held that polygynous marriages violate the guarantee of sex equality as it is reflected in the Constitution. The author opts for sex equality as the overriding consideration.

Chapter 4 deals comprehensively with cohabitation. The consequences of concubinage are outlined and special attention is devoted to the question whether the law should intervene with regard to children, property and support. Also considered is the position of homosexual couples and, in line with the provisions of the Constitution, the submission is made that such couples should be given the choice to marry.

Part two of the volume deals with the definition and formulation of marriage and, in chapter 5, raises the issue of a possible definition of marriage. Considering that the majority of the South African population is black, and that African culture entails the

polygymous marriage of customary law, the author expresses doubts about whether the traditional definition of marriage, namely the legally recognised voluntary union for life in common of one man and one woman to the exclusion of all others while it lasts, is still apposite for South Africa. In fact, an argument is made out for "a more flexible approach to the definition of the so-called Christian marriage".

The contract of engagement is considered in chapter 6. The thorny issue of damages for breach of promise is comprehensively dealt with. The viewpoint that a distinction needs to be made between delictual and contractual damages, is favoured.

Chapter 7 sets out the requirements relating to capacity to marry, and chapter 8 deals with marriage formalities and the requirement of consent. Chapter 9 specifically considers the legal position of minors' marriages. In chapter 10, under the heading "nullity of marriage", a list of impediments and defects which may render a marriage either void or voidable is given. Also under consideration are the aspects of impotence and stuprum and the effect of void and voidable marriages is outlined. Putative marriages also receive special attention in this chapter.

In part 3 of the volume, the invariable consequences of marriage are discussed. Chapter 11 explains the married status, the marriage relationship and the position of children of the marriage. In the section dealing with the marriage relationship, the *consortium omnis vitae*, the position of the husband as the head of the family, the duty of support, the matrimonial home and the protection of the marriage relationship as against third parties, are analysed extensively.

On matters technical, reference can be made to the index of 26 pages, a complete bibliography and tables of cases and of statutes which are contained in the volume.

3 Conclusion

Although the author makes it clear in the preface that she wishes to challenge the traditional boundaries of the family law, she still succeeds in accurately reflecting the current legal position. She also inspires the reader constantly to consider the influence of the Constitution on aspects of the law of marriage. She succeeds outstandingly in conveying that family law, as it stands today, has become a focal point of attention under the Constitution, and as such will constantly be under pressure to change. Viewpoints taken in this volume will definitely serve as a directive in the process.

It certainly is no exaggeration to describe this volume as impressive. In fact, there can be no doubt that it has already become the primary source of reference in this legal discipline. It is without a doubt a *sine qua non* for any serious student of family law.

JA ROBINSON
Potchefstroom University for CHE

PRIVATE INTERNATIONAL LAW
(THE MODERN ROMAN-DUTCH LAW INCLUDING THE JURISDICTION OF THE SUPREME COURT)

by CF FORSYTH

Third edition; Juta Cape Town Wetton Johannesburg 1996; xlv and *429 pp*

Price R198,00 VAT incl (soft cover)

The third edition of this well-known work is now available. Like the first two issues, the third is attractively presented and bound to match the earlier editions. The pattern of the first two editions has been followed, with the work comprising ten chapters: an introduction;

an essay in history and theory; conceptual problems in choice of law; the ascertainment of the content of foreign law; the law of domicile; jurisdiction and the supreme court; the family and the choice of law; choice of law in cases involving property; and recognition and enforcement of foreign judgments. The easy writing style and the humour and wit displayed by the author in the first two editions also continue into the third.

Unfortunately the similarity between this edition and its two forerunners does not end with the appearance and pattern of the three editions. Indeed, I could do no better than quote Edwards in his review of the second edition of this work (1991 *THRHR* 851) where he says that "the second edition, too, now under the sole authorship of Forsyth, bears more than a trace of slapdash proof-reading, clumsy citations, poor updating, and worst of all a rush to judgment on many issues". All of these criticisms are equally applicable to this latest version of the work.

More disappointing than the simple lack of attention to detail which is manifested in the presence of errors of the nature alluded to by Edwards, is the fact that a number of the faults that mar the work and detract substantially from the overall impression of the work were pointed out by various reviewers of both the previous editions. For example, there is still no in-depth discussion of internal conflicts, a defect pointed out by Saunders (1982 *De Jure* 372) and Brooks (1982 *CILSA* 378) in regard to the first edition and noted again in a review by Ball of the second edition (1990 *SALJ* 547).

Chapter six, which deals with jurisdiction, continues to be too extensive for a work of this nature and the addition of Forsyth's table (412), the purpose and intended function of which the author discusses in the preface (viii), proves to be disappointingly inadequate to demystify the rules of jurisdiction for those who may well be experiencing confusion. His second table (412), relating to unexpected interpretations of the Supreme Court Act 59 of 1959, also disappoints in that it addresses court interpretations of only three of the many sections of the Act.

Layout errors have crept into the list of principal works cited (xiii–xiv) where, for example, the works of Booysen (*Volkereg: 'n Inleiding* Cape Town, Juta & Co 1980); Graveson (*Comparative conflict of laws* vol 1 Amsterdam, North Holland 1976) and Hohfeld (*Fundamental legal conceptions, as applied in judicial reasoning* New Haven Yale UP 1919) are not immediately visible. This is because no listed mode of citation is attached to them and, being indented, they are not easily seen.

Another criticism that emerges from a brief perusal of this list of principal works is that the author has failed on several occasions to make use of the most recent editions of certain works. Indeed, he refers to the third edition of Morris (JHC Morris *The conflict of laws* 3 ed London, Stevens 1984), now in its fourth edition (1993) and to the second edition of Nygh (PE Nygh *Australian conflict of laws* 2 ed Sydney Butterworths 1971), a book now in its sixth edition (1996). One may well excuse the author's failure to consult the sixth edition, which in all probability only appeared after this work had been sent to the publishers, but one would at least have expected him to have made use of the fifth edition (1991).

Neither the table of statutes, in which errors such as a reference to the Matrimonial Property Act 88 of 1884 instead of the Matrimonial Property Act 88 of 1984 appear, nor the table of cases has escaped typographical gremlins. Mistakes abound in the latter: for instance, *Jones v Krok* appears as "*Jones v Krog*"; *Joffe v Salmon* is rendered as "*Jaffe v Salmon*"; and *Märtens v Märtens* as "*Martens v Martens*".

The footnotes to the text are likewise liberally sprinkled with misspelt case names and inconsistent referencing techniques. For example, in footnote 82 (105) the reader is referred to footnote 71 for the full citation of *Commissioner of Taxes v McFarland*. The citation in fact appears in footnote 77 (104). Most of the errors in the Latin pointed out by Edwards (1991 *THRHR* 376) persist.

The index to the work also fails to please unconditionally in that it contains one glaring omission. The entry under "Intestacy" refers the reader to "Succession". No entry is found in the index for "Succession".

The work remains a useful tool for students. The inadequate proof-reading of the work, combined with errors in referencing, do, however, detract from its value as an example of referencing techniques. It should nevertheless be borne in mind that, as the sole student textbook devoted to South African private international law currently available, it remains an invaluable asset to all students who are embarked upon a study of this area of the law. Its value to practitioners, I believe, will remain limited because of its failure to fully canvass the inter-personal conflicts issues arising from the application of customary law in South Africa and the failure of the author to examine the jurisdictional issues arising in relation to the magistrates' courts as a result of such interpersonal conflicts.

The chapter on domicile is not entirely satisfactory and issues raised by Brooks (*op cit*) in his review of the first edition and those raised by Edwards (*op cit*) in his review article on the second edition remain unresolved. The discussion of the recognition and enforcement of specific types of judgment, other than money judgments, is scant. In my opinion, the author has missed an opportunity to address some interesting current legal developments: for example, one would have hoped to read something about the proposed accession of South Africa to the Hague Convention on the Civil Aspects of International Child Abduction in the discussion of recognition and enforcement of foreign custody orders. The work has, however, been updated by an inclusion of a discussion of the Constitution of the Republic of South Africa Act 200 of 1993. Unfortunately, the discussion is extremely limited and hence somewhat superficial. Other new legislation that is considered by the author includes the Divorce Amendment Act 44 of 1992; the Domicile Act 3 of 1992, which has extremely important and far-reaching implications for South African private international law; and the Law of Succession Amendment Act 43 of 1992.

I cannot help but feel that Forsyth was perhaps a little too eager to see this edition on the shelves. A little more time spent on the technical editing and proof-reading of the material would have been time well spent. Furthermore, had he waited just a little longer to see his text in print, he would have been able to include a discussion of the various implications of the Constitution of the Republic of South Africa, Act 108 of 1996 (adopted by the Constitutional Assembly on 8 May 1996) for private international law. Perhaps he has decided to leave this for a fourth edition. This said, the book remains a valuable contribution to literature on South African private international law.

CMA NICHOLSON
University of South Africa

SECTIONAL TITLES, SHARE BLOCKS AND TIME-SHARING VOLUME 1 SECTIONAL TITLES

by CG VAN DER MERWE

Butterworths Durban 1995; loose-leaf format

Price R228,00

In 1985, CG van der Merwe and DW Butler's standard textbook entitled *Sectional titles, share blocks and time-sharing* appeared. (See the reviews by Pienaar 1986 *THRHR* 495–499 and Naidu 1986 *SALJ* 308–310.) Although the book did refer to and discuss certain provisions of what was then the draft bill for a new Sectional Titles Act, it was unsatisfactory in that only a year after its publication a new Act was in operation, leaving the book rather outdated. That publication has now been divided into two loose-leaf publications. Volume 1, written by Van der Merwe and dealing with sectional titles, is the subject of this review.

It is an updated version of the earlier work, and seeks to accommodate the provisions of the Sectional Titles Act 95 of 1986 and, as the author states in the Preface, to keep the reader abreast of the constant stream of official and academic literature on the subject through its loose-leaf format.

The contents are set out in the same way as its predecessors, but concentrate on the provisions of the 1986 Act. As a result, some chapters (eg 1 "Introduction", 2 "The dogmatic basis for sectional ownership", 9 "Sanctions") do not differ materially from those in the earlier work. Some chapters (eg 3 "Terminology", 5 "Sectional plan", 6 "Establishment of a sectional title scheme", 16 "Reconstruction or termination of a sectional title development", 17 "Insurance") have been updated to take account of the provisions of the 1986 Act. Certain chapters have been substantially altered (eg 4 "Participation quota", 7 "Statutory protection of purchasers and tenants", 8 "The sectional owner's right of use and enjoyment", 12 "Phased development or construction of units in stages", 13 "The rules of a sectional title scheme", 14 "Management of a sectional title scheme"). The old chapter 10 is now divided into chapter 10 ("Legal transactions in respect of sectional title units") and chapter 11 ("Legal transactions in respect of the common property"). A new chapter (15) on the role of the managing agent has been included.

The publication includes a List of Authorities Cited, a Table of Cases, a Table of Statutes and an Index.

Many of the points raised in both reviews remain relevant and applicable. It undoubtedly remains the most complete and incisive work on sectional titles. The detailed references to the regulations are especially useful. Its present loose-leaf format will make it even more valuable to practitioners who require up-to-date information. In this regard it is crucial that both authors and publisher make the latest information available as soon as possible, and also that users insert the new information into the volume immediately upon arrival.

JEANNIE VAN WYK
University of South Africa

WETSUITLEG: 'N INLEIDING VIR STUDENTE

deur CJ BOTHA

Tweede uitgawe; Juta Kaapstad Wetton Johannesburg 1996; xviii en 201 bl

Prys 84,00 (sagteband)

Inleiding Hierdie werk beleef tans sy tweede uitgawe. Dit is hoofsaaklik geskryf met die oog op studente-in-onderrig-gebruik. In dié verband getuig die werk van heelwat vindingrykheid met 'n hoë nutswaarde. Die feit dat die outeur deurgaans 'n oop gemoed handhaaf en die tweede uitgawe, gemeet teen die agtergrond van die eerste uitgawe, insigsgroei openbaar, skep die teelaarde vir 'n langtermyn akademiese wenner.

Sistematiek Hoewel spore van die tradisionele sistematiek van die vak duidelik sigbaar is, slaan nuwighede deurgaans deur. Ter wille van illustrasie kan die volgende genoem word: Die fase-benadering tot die uitlegaksie; die wye akkommodering van menseregtebeginsels; die afsonderlike hantering van grondwetlike uitleg; en, van besondere waarde, die vrye en omvattende gebruik van praktiese voorbeelde.

Dokumentasie Die skrywer verwys na 'n veelheid gewysdes, skrywers en standpunte. 'n Omvattende bibliografie van boeke en artikels oor die uitleg van wette sou die waarde van dié werk veral vir leergierige studente verhoog. 'n Volledige Suid-Afrikaanse bibliografie oor die uitleg van wette sou nie te veel bladsye beslaan nie.

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Konklusie Hierdie werk kan met vrymoedigheid by regstudente en -dosente aanbeveel word. Regspraktisyns wat op die hoogte van nuwe ontwikkelinge en sieninge wil bly, kan ook met vrug daarvan kennis neem.

JMT LABUSCHAGNE
Universiteit van Pretoria

DIE WET OP DIE HOOGGEREGSHOF 59 VAN 1959 EN DIE WET OP LANDDROSHOWE 32 VAN 1944

deur HJ ERASMUS en OJ BARROW

Tiende uitgawe; Juta Kaapstad Wetton Johannesburg 1996; 565 bl

Prys R129,50 (BTW ingesluit) (sagteband)

Die tiende uitgawe van hierdie werk is nou beskikbaar. Soos in die verlede is dit 'n sagtebanduitgawe en is die formaat van die werk ook onveranderd gelaat.

'n Noodsaaklike toevoeging tot hierdie uitgawe is die Konstitusionele Hof-reëls. Hierdeur het die werk gewis 'n afdoende samevatting geword van die wette en reëls wat op die Suid-Afrikaanse howe van toepassing is. As sodanig is dit uiters nuttig vir studente, navorsers en praktisyns. Ter wille van diegene wat nog nie met hierdie werk kennis gemaak het nie, word daarop gewys dat benewens wetgewing, die werk ook 'n volledige inhoudsopgawe, sake-, woord- en kumulatiewe vonnisregisters bevat. In Deel C word 'n opsomming van wysigings van wetgewing en reëls gedurende 1995 asook 'n tydtafel van die voorgeskrewe tydperke wat ter sprake is in sowel die hooggeregshof as die landdroshof aangetref.

Die boek is tot 31 Oktober 1995 bygewerk en is ook in Engels beskikbaar.

E HURTER
Universiteit van Suid-Afrika

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

Section A: Problems[1*]

Susan Scott
BA LLD
Professor of Private Law, University of South Africa

OPSOMMING

Evaluering van sekerheidsessies: Probleme en moontlike oplossings

Hierdie artikel is die eerste in 'n reeks van drie wat in opeenvolgende uitgawes sal verskyn. Die artikels bestaan uit die drie afdelings van 'n verslag wat aan die Suid-Afrikaanse Regskommissie voorgelê sal word waarin hersiening van die reg insake sessie aanbeveel word. In die eerste artikel word die probleme bespreek wat in die praktyk en howe ten aansien van sessie *in securitatem debiti* ondervind word. Redes word aangevoer waarom statutêre ingryping noodsaaklik is. Een aspek van die probleem, naamlik die posisie van die partye tot 'n sekerheidsessie ten aansien van *locus standi*, word volledig bespreek.

In die tweede artikel word statutêre ingryping aanbeveel en moontlike kort- en langtermyn oplossings word aan die hand gedoen. Die aanbevelings van die Suid-Afrikaanse Regskommissie in hulle verslag (Februarie 1991) oor sekerheidstelling deur middel van roerende goed word evalueer en eie aanbevelings oor die aangeleentheid word gemaak. Daar word tot die gevolgtrekking geraak dat nie alleen die reg insake sekerheidsessies hersien moet word nie, maar die reg insake sessie in sy geheel.

In die derde artikel word die probleemaspekte wat in wetgewing aangespreek moet word verder toegelig. Aspekte wat hier ter sprake kom is die volgende: die klassifikasie van sessie as regsinstelling; geldigheidsvereistes, insluitende die *causa* (die erkenning van fidusiêre ooreenkomste as *causae* is baie belangrik vir die aanvaarding van algehele sekerheidsessies en invorderingsessies) en die rol van kennisgewing; sekerheidsessies en sessiebeperkende of verbiedende ooreenkomste.

1 INTRODUCTION

Cession in general, and security cessions (cessions *in securitatem debiti*[2]), in particular, have been the object of my research for the past twenty years. I have

1 The financial assistance of the Centre for Science Development (HSRC, South Africa) towards this research is hereby acknowledged. Opinions expressed and conclusions arrived at are those of the author and are not necessarily to be attributed to the Centre for Science Development.

* Although I am Afrikaans speaking, I have chosen to write these articles in English so that they may be accessible to a wider audience.

2 In an effort to make legal language more understandable, lawyers should translate Latin words and phrases as far as possible. For the term "cession *in securitatem debiti*", I shall use the term "security cession". In a wide context security cessions include pledge and fiduciary security cessions.

written many legal opinions, articles,[3] notes[4] and case discussions[5] on this very interesting topic. Through the years I have become acutely aware of the problems that are encountered in practice and in the courts with this branch of the law. This awareness motivated me to do comprehensive research on this topic and to submit a report to the South African Law Commission. For the purpose of publishing this report I have divided it into three sections which will be published in consecutive articles in this journal.

It is incomprehensible that the South African courts[6] refuse to acknowledge the possibility that security by means of claims can take the form of either a pledge or an out-and-out[7] (fiduciary) security cession. Consequently, they do not make a clear distinction[8] between the legal principles applicable to these two forms of security. In countries such as Germany, the Netherlands and Belgium, which have the same legal history and belong to the same legal family – the

3 "Die effek van 'n *mala fide* sessie in die lig van LTA Engineering v Seacat Investments 1974 1 SA 747 (A)" 1974 *THRHR* 351; "Sessie en dic saaklike ooreenkoms" 1979 *TSAR* 48; "Die rol van kennisgewing van sessie aan die skuldenaar" 1979 *THRHR* 155; "Sessie *in securitatem debiti*" 1979 *De Rebus* 122; "*Pacta de non cedendo*" 1981 *THRHR* 148; "*Factoring* en sessie in die Suid-Afrikaanse Reg" 1987 *De Jure* 15; "Verpanding van vorderingsregte: Uiteindelik sekerheid?" 1987 *THRHR* 175; "Algehele sekerheidsessies" 1988 *THRHR* 434, 1989 *THRHR* 45.

4 "Scssie *in securitatem debiti*" 1988 *De Jure* 367; "Pledge of personal rights and the principle of publicity" 1989 *THRHR* 458; "Can a banker cede his personal rights against his clients?" 1989 *SA Merc L* 248; "To burden or not to burden" 1991 *THRHR* 264; "The question of *locus standi* in revolving security cessions" 1991 *THRHR* 837; "Sale and transfer of goodwill and the contractual right to enforce a restraint of trade clause forming part of goodwill" 1992 *THRHR* 321; "Cessions intended to scrve secondary purpose for ultimate benefit of cedent" 1992 *THRHR* 615; "Cession *in securitatem debiti* once again" 1993 *THRHR* 478; "Cession *in securitatem debiti* and merger" 1993 *THRHR* 686; "Notarial bonds and insolvency" 1995 *THRHR* 672.

5 "*Pitluk v Law Society of Rhodesia* – sessie van kostebevele aan prokureur" 1976 *THRHR* 88; "Prudential Shippers v Tempest Clothing – sessie *in securitatem debiti*" 1977 *De Jure* 192; "Italtrafo SpA v Escom – sessie *in securitatem debiti*" 1987 *THRHR* 334; "Waikiwi Shipping Co v Thos Barlow – sessie na *litis contestatio*" 1978 *De Jure* 388; "Holzman and Another v Knights Engineering – cession *in securitatem debiti*" 1979 *THRHR* 332; "Barclays Western Bank v Comfy Hotels – sessie van verbandversekerde vorderingsreg" 1981 *De Jure* 173; "Standard Bank of SA v Ocean Commodities – A problem of cession" 1981 *SALJ* 25; "Illings Acccptance Co v Ensor – sessie" 1982 *THRHR* 336; "Muller v Trust Bank of Africa – cession – future rights – *in securitatem debiti*" 1982 *De Jure* 183; "Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd and Others – sessie – bedoeling – prosedure na" 1984 *TSAR* 186; "Sasfin (Pty) Ltd v Beukes" 1987 *De Jure* 355; "Airco Engineering v Ensor 1988 2 SA 362 (N)" 1988 *THRHR* 367; "Ex parte Deputy Shcriff for the District of Kempton Park: in re JI Case SA (Pty) Ltd" 1989 *De Jure* 359; "Delivery of document as validity requirement for cession" 1995 *TSAR* 760; "Verpanding van vorderingsregte" 1996 *THRHR* 319; "Cession of future rights" 1996 *THRHR* 689; "Objcct of cession – Coopcrs & Lybrand v Bryant" 1996 *TSAR* 812.

6 Apart from the decision of Viljoen J in *Alexander v Standard Merchant Bank Ltd* 1978 4 SA 730 (W) 740D *et seq.*

7 Although thc term "out-and-out cession" is generally used to denote this type of security cession, I prefer the tcrm "fiduciary sccurity cession". The term "out-and-out cession" may lead to confusion, since it docs not clearly distinguish between an ordinary out-and-out ccssion and an out-and-out security cession. The term "fiduciary security cession", on the othcr hand, not only distinguishes betwccn an ordinary cession and a security cession, but also characterisc this type of security ccssion.

8 See Scott *The law of cession* (1991) 231 *et seq.*

Romano-Germanic legal family – academics, practitioners and, specifically, the courts acknowledge the two forms. The most puzzling aspect of the situation in South Africa is the fact that the law does not acknowledge genuine fiduciary security cessions and that credit or lending institutions seem to accept this situation.

In Germany, fiduciary security cessions have been described as the most appropriate[9] and almost exclusive method[10] of providing credit security by means of claims[11] (debts). The old Dutch civil code explicitly recognised a pledge of claims, but in practice fiduciary security cessions developed as an alternative to pledge.[12] The new Dutch code excludes any form of fiduciary transfer as security.[13] This includes transfer of ownership of movables as well as cession of claims as security. The code clearly sets out the principles applicable to different

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9 There are various reasons for this. Soon after adoption of the *BGB*, lawyers started to develop fiduciary security cessions. Initially this development was attributed almost exclusively to the fact that § 1280 of the *BGB* requires notice to the debtor for the constitution of a pledge of claims. This was unacceptable since parties to security arrangements wished to keep the nature of their relationship confidential – see Serick *Eigentumsvorbehalt und Sicherungsübertragung, Neue Rechtsentwicklungen* (1993) 26 133 135 138 139 153; Bülow *Recht der Kreditsicherheiten* (1993) § 790. At a later stage of the development, this pursuit of confidentiality subsided. Especially after the expansion of the factoring business, financing institutions and their clients accepted that their business associates could become aware that they were making use of credit facilities. In practice, however, credit institutions and their clients still prefer fiduciary security cessions as a means to secure credit. Serick *Neue Rechtsentwicklungen* 140 mentions another factor which promoted the development of fiduciary security cessions, viz the fact that in practice future claims are often the object of security, and in terms of the *BGB* a pledge can only be constituted on notice to the debtor, who, in the case of future claims, is unknown at the time when the security agreement is concluded. The requirement of notice therefore effectively excludes pledge of future claims. In the case of fiduciary security cessions, the cession agreement constitutes a complete legal act which cannot be undone unilaterally by any of the parties. The parties may therefore conclude the transfer agreement for the transfer of future claims *in anticipando*. Security by means of future claims is indispensable for revolving security by means of claims. On the construction of revolving security cessions see Serick *Neue Rechtsentwicklungen* 142–143; also Scott *Cession* 177 *et seq*; *First National Bank of SA Ltd v Lynn* 1996 2 SA 339 (A). Bülow *Kreditsicherheiten* § 941 further mentions that the rules pertaining to realisation of the security object in the case of a pledge of claims are prescribed in the *BGB* (§§ 1281–1290) and are more complicated than those governing fiduciary security cessions.

10 Serick *Neue Rechtsentwicklungen* 26 133 135 138 139 153; Bülow *Kreditsicherheiten* § 790. Serick *Neue Rechtsentwicklungen* 153 ascribes the need for this unabandonable (*unverzichtbaren*) means of security to the need for borrowed capital (*Fremdkapital*) without which the German credit business could not have survived.

11 "Claims" are what the Germans refer to as *Forderungen* and the Dutch as *vorderingen*. In the Anglo-American legal systems the term "claims" is generally used, as well as "creditor's rights" – see *Black's law dictionary* (1991) under these headings. In Afrikaans the term is *vorderingsregte*. Although the term "vorderingsreg" can be translated as "personal right", some authors prefer "creditor's right" – see Van der Vyver "The doctrine of private law rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 232 fn 171; Van der Vyver "Expropriation, rights, entitlements and surface support of land" 1988 *SALJ* 12 *et seq*; Van der Walt "Personal rights and limited real rights" 1992 *THRHR* 170 190. I prefer claim – see Scott *Cession* 2 fn 5 for criticism of Van der Vyver's view.

12 Scott *Cession* 231 *et seq*; Nieuwenhuis, Stolker and Valk *Nieuw Burgerlijk Wetboek* (1990) 192 no 5 195 no 5.

13 See *BW* Bk 3 § 84(3).

types of pledge: It distinguishes between a possessory pledge (*vuistpand*) of movables or claims,[14] a non-possessory pledge (*bezitloos pandrecht*) of movables or claims directed to bearer[15] and a pledge of claims without publicity (*stil pandrecht*).[16]

It has been suggested that the South African courts have effectively met the needs of practice by the creation of a pledge of a *sui generis* nature.[17] This type of pledge is *sui generis* for the following reasons: the courts require no form of publicity for its constitution;[18] the "pledgee" becomes the holder of the claim itself, even to the extent that after the "cession" and before maturity of the principal debt,[19] he/she acquires *locus standi* and is the only person who can institute action.[20] However, even though they accept this complete transfer of the claim, the courts, realising the inequitable results of such a complete transfer of the claim[21] in the event of insolvency or attachment, fall back on the pledge construction to protect the interests of the pledgor and his/her creditors.[22]

Recently, Van den Heever JA observed that South African law utilises a legal fiction in terms of which a cession of incorporeal rights *in securitatem debiti* is equated with the legal institution of a pledge of corporeals. She aptly voiced the problems flowing from this approach as follows:

> "The fiction has its origin in the practical needs of modern commerce but has caused much strenuous intellectual gymnastics on the part of scholars and lawyers in trying to prise one legal concept into the garb not ideally suited."[23]

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14 See Bk 3 § 236 of the new *BW* and the discussion in section B below.

15 See Bk 3 § 237 of the new *BW*.

16 See Bk 3 § 239 of the new *BW* and the discussion in section B below.

17 Harker "Cession *in securitatem debiti* in the nature of a quasi-pledge" 1986 *SALJ* 200.

18 For criticism of this approach, see Scott *Cession* 237 *et seq*; "Pledge of personal rights and the principle of publicity" 1989 *THRHR* 458. Notice of the pledge to the debtor fulfils the requirement of publicity for the creation of real rights. The debtor should therefore be notified of the pledge. No real right can vest in the pledgee before such notice. Harker "Cession *in securitatem debiti*" 1981 *SALJ* 61 is of the opinion that it is not possible to adhere to the principle of publicity in a pledge of claims, but as Serick *Neue Rechtsentwicklungen* 134 explains, notice of the pledge to the debtor is a very effective way to achieve this, provided that the pledgor notifies the debtor. See further Scott *Cession* 237 fn 27 for criticism of Harker's view.

19 A clear distinction should be drawn between the position of the parties to a pledge before and after maturity of the pledge – see Scott *Cession* 241 *et seq*. The courts, however, do not seem to appreciate this distinction and, I think, this can be attributed to the fact that they do not really regard this form of security as a pledge. Maturity of the pledge is the date at which the principal debt becomes payable and the pledgor is unable to perform. It should be distinguished from maturity of the debt (which is the object of the pledge), ie the date at which the pledgor's debtor is obliged to perform.

20 See *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 2 SA 528 (C); *Textilaties (Pty) Ltd v Snyman* 1994 2 SA 710 (T); *Louw v WP Koöperatief Bpk* 1994 3 SA 434 (A); *Standard General Insurance Co Ltd v SA Brake CC* 1995 3 SA 806 (A); *Ovland Management (Tvl) (Pty) Ltd v Petprin (Pty) Ltd* 1995 3 SA 276 (N); *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) – see discussion of this approach below under par 1 3 1.

21 See the references to this situation in Scott (ed) *Seminar: Cession in securitatem debiti: Quo vadis?* (1989) 92 *et seq*.

22 Eg *Bank of Lisbon and SA v The Master* 1987 1 SA 276 (A).

23 *First National Bank of SA Ltd v Lynn* 1996 2 SA 339 (A) 350A.

Careful analysis of South African case law reveals the following: some judges correctly refer to a pledge of claims and apply principles pertaining to pledge.[24] Other judges use terminology pertaining to fiduciary security cessions and apply the principles applicable to this form of security correctly.[25] In some cases the judges use pledge terminology, but apply principles pertaining to fiduciary security cessions.[26] Superficially the courts' interpretation of security cessions seems to conform to the position in German law regarding fiduciary security cessions. South African courts adopted this approach largely because they tried to give effect to the intention of the parties as expressed in their agreements. They did not, however, pay attention to the nature of fiduciary agreements and the negative aspects of a complete transfer of the claim.[27] The judges acknowledged some of the unacceptable consequences of such cessions, particularly in the event of insolvency,[28] and remedied these by reverting to the principles pertaining to pledge. They disregarded others such as the fact that, after the cession, only the cessionary/pledgee may institute action or receive payment from the debtor.

This combination of a pledge of claims and fiduciary security cessions in the South African courts would be acceptable, if the judges were to state that they regard this as a *sui generis* type of security which has developed through a process of judicial interpretation. However, as long as the courts refer to security by means of claims as a pledge, and rely on cases such as *National Bank of SA v Cohen's Trustee*[29] and *Guman v Latib*,[30] their approach should be criticised because it violates two basic aspects of the legal institution of pledge. It ignores the nature of a right of pledge as well as the relevance of the publicity principle.[31] A pledge affords the pledgee a limited real right to the property of the

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24 Eg *National Bank of SA v Cohen's Trustee* 1911 AD 235; *Guman v Latib* 1965 4 SA 715 (A).

25 Eg *Lief v Dettmann* 1964 2 SA 252 (A); *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A); *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A).

26 *Holzman v Knights Engineering and Precision Works (Pty) Ltd* 1979 2 SA 784 (W); *Marais v Ruskin* 1985 4 SA 659 (A); *Incledon (Welkom) (Pty) Ltd v QwaQwa Development Corporation Ltd* 1990 4 SA 798 (A); *Louw v WP Koöperatief Bpk* 1994 3 SA 434 (A).

27 Fiduciary agreements are recognised in German law. The law (by means of statutory protection) and the parties (in their security agreements) counter the negative effects of this type of security – see discussion below in section B.

28 South African law pays very little attention to the position on attachment, but if the line of reasoning were to be followed that was adopted in the decisions on *locus standi*, creditors of a "cessionary/pledgee" may attach the security object in his/her hands. This is a consequence of neglecting the nature and effect of fiduciary agreements.

29 1911 AD 235.

30 1965 4 SA 715 (A).

31 The principle of publicity is one of the corner-stones of the law of real security and specifically of pledge. A pledge creates a limited real right in favour of the pledgee on an object belonging to the pledgor – see Scott *Cession* 237–238. See further Serick *Neue Rechtsentwicklungen* 134 for a discussion of notice to the debtor by the pledgor as constituting fulfilment of the principle of publicity. On the meaning and value of publicity see further Sonnekus "Enkele opmerkings na aanleiding van voorrangs- en sekerheidsregte op roerende sake in die Nederlandse reg" 1983 *De Jure* 244, 1984 *De Jure* 101; "Die publisiteits- en *paritas creditorum*-beginsel by mobiliêre sekerheidsregte in die Duitse reg" 1984 *TSAR* 53 105, "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97 230; Van Oosten H "Vuispand en vuislose pandreg: 'n regsvergelykende oorsig" in Van Wyk and Van Oosten (eds) *Nihil obstat: Feesbundel vir WJ Hosten/Essays in honour of WJ Hosten* (1996) 237.

pledgor and it entitles him/her to make use of this property to satisfy his/her claim against the pledgor, should the latter fail to pay the principal debt on the due date. The pledgor retains ownership (*dominium*) of the object and the pledgee acquires only a limited real right to it. In terms of the *sui generis* type of pledge, the pledgor transfers the complete claim (ownership) to the pledgee. Whereas a pledge constitutes a limited real right in favour of the pledgee on the claim of the pledgor, in terms of the above approach, the pledgee acquires ownership of the claim and the pledgor merely a claim to re-cession. In the event of insolvency, however, the complete claim that has been transferred to the pledgee's estate, is regarded as belonging to the pledgor's estate and the pledgee then acquires a limited real right to enforce payment of the principal debt out of the proceeds of the claim.

Bearing in mind the legal nature of pledge and related institutions in Roman and Roman-Dutch law, as well as in other legal systems, such as that of France, Germany, Italy, the Netherlands and Belgium, one cannot identify with or propagate a legal institution which ignores the basic principles underlying the institution it professes to be. Such an institution is furthermore unacceptable if it causes uncertainty,[32] creates confusion and does not serve the needs of practice.[33]

To a certain extent, however, I understand some of the difficulties which the courts have had to face. Certain historical and practical reasons have contributed to the confusion which exists in South African law today regarding security by means of claims. The courts,[34] mainly under the influence of De Wet,[35] recognised

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32 Since April 1994 the following cases dealing with security by means of claims have been reported: *Twiggs v Millman* 1994 1 SA 458 (C); *Erasmus v Michael James (Pty) Ltd t/a The Michael James Organisation (Standard Bank of SA Ltd Intervening)* 1994 2 SA 528 (C); *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 2 SA 528 (C); *Philotex (Pty) Ltd v Snyman; Textilaties (Pty) Ltd v Snyman* 1994 2 SA 710 (T); *Louw v WP Koöperatief Bpk* 1994 3 SA 434 (A); *Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd: In re Barrie Marais & Seuns v Eli Lilly (SA) (Pty) Ltd* 1995 1 SA 469 (W); *Ovland Management (Tvl) (Pty) Ltd v Petprin* 1995 3 SA 276 (N); *Millman v Twiggs* 1995 3 SA 674 (A); *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A); *Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd* 1995 4 SA 510 (C); *Standard General Insurance Co Ltd v SA Brake CC* 1995 3 SA 806 (A); *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd (FBC Holdings (Pty) Ltd, Third Party)* 1996 1 SA 469 (W); *Gravett v Van der Merwe* 1996 1 SA 531 (D); *First National Bank of SA Ltd v Lynn* 1996 2 SA 339 (A); *Janse van Rensburg v Muller* 1996 2 SA 557 (A); *Van Zyl v Good Look Clothing CC* 1996 3 SA 517 (SEC).

33 This resulted eg in the drafting of nonsensical deeds of cession – see *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) noted by me in 1996 *TSAR* 812.

34 See eg the Appellate Division cases of *Lief v Dettmann* 1964 2 SA 252 (A); *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A); *Marais v Ruskin* 1985 4 SA 659 (A).

35 De Wet as a person and jurist exercised a profound influence on his students, and through them and his two (co-authored) textbooks, one on criminal law and the other on contract and mercantile law, on the development of modern South African private and criminal law – see Gauntlett "JC de Wet: The jurist" 1991 *THRHR* 1; Gauntlett "JC de Wet: Regsakademikus van formaat" 1991 *Stell LR* 12; Snyman "Professor De Wet se regsvergelykende arbeid" 1991 *SACJ* 136; Cameron "Lawyers, language and politics – In memory of JC de Wet and WA Joubert" 1993 *SALJ* 51; Van der Horst "JC de Wet en die Universiteit van Stellenbosch" 1991 *Stell LR* 10; Kahn "A trimestrial potpourri" 1992 *SALJ* 344;

continued on next page

the need that was felt and expressed in practice for fiduciary security cessions. They appreciated the suitability of this form of security to the needs of practice, as well as its dogmatic soundness.[36] The most important factor contributing to the peculiar interpretation given to security by means of claims in South Africa is the fact that the judges realised that fiduciary cessions have very negative consequences in the event of insolvency, which they tried to avoid by reverting

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Zimmermann and Hugo "Fortschritte der südafrikanischen Rechtswissenschaft im 20. Jahrhundert: Der Beitrag von JC de Wet (1912–1990)" 1992 *Tijdschrift voor Rechtsgeschiedenis* 157. De Wet was a firm admirer of the German Pandectists and many of his ideas on the law of contract have their origin in the legal writings of jurists from this school. Unfortunately he took very little note of the development of German law after codification and virtually nothing of developments in Germany after 1950.

36 De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 415 fn 164 165 reject outright the idea of a pledge of claims as dogmatically unacceptable and not in line with Roman or Roman-Dutch law. At this stage of legal history, I think it no longer appropriate to debate this issue, for which the authors rely on Pandectists such as Windscheid and Dernburg. Today, not only the "dogmatic purists", the Germans, accept a pledge of claims (see §§ 1204, 1273 and 1279 of their *BGB*), but also the French, the Italians, the Belgians and the Dutch. It has also been adopted by the South African courts and I find it futile to reopen the debate at this stage. In *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019 1024, Mason J stated with reference to Sande *De Cessione* 5 4, Voet *Commentarius* 18 1 13, 18 4 9, 18 4 10 as well as *J McNeil v Insolvent Estate of Robertson* (1882) 3 NLR 190: "The Roman-Dutch law lays down that all things may be ceded which can be sold and incorporeal rights of this nature clearly come within the scope of pledge and sale." See further *McLachlan v Wienand* 1913 TPD 191 194: "There is nothing especially sacrosanct about rights of action. They are property as much as land or corporeal movables." The Roman-Dutch system of the seventeenth and eighteenth centuries was strongly influenced by the natural law ideas (see Huwiler *Der Begriff der Zession in der Gesetzgebung seit dem Vernunftrecht* (1975) 1–179) in terms of which claims were regarded as incorporeal things and cession was treated as pertaining to the law of property. None of the South African textbooks on the law of property, however, treats cession as a division of that branch of the law – not even Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992). However, Kleyn "Dogmatiese probleme rakende die rol van onstoflike sake in die sakereg" 1993 *De Jure* 1 accepts the notion that claims as incorporeals can be the object of limited real rights. However, he does not pay any attention to the notion of ownership of claims in this context. Whether one classifies claims as incorporeals, legal objects, *goedere, vermoënsobjekte, Vermögensrechte* or *Vermögensgegenstände*, the idea is basically the same: the nature of claims is such that they have a monetary value and form part of a person's estate. The "owner" may therefore also dispose of them. We have to acknowledge an exception here to the generally accepted classification of rights ("subjektiewe regte") and adopt the stance that in exceptional circumstances, a right to a right is possible. In the case of a pledge of claims, we are dealing with a limited real right to a claim as an object in a creditor's estate. De Wet and his followers, eg Pahl *Die aanwending van vorderingsregte ter versekering van skulde* (1972) and Nienaber "'n Regterlike perspektief" 1989 *THRHR* 244, reject the idea of ownership of a claim on the basis that it is theoretically unacceptable. In rejecting a pledge of claims, De Wet was probably influenced by the Pandectists, whom he strongly admired, and whose dogmatic criticism of this idea was mainly a reaction to the natural law approach and the Germanists' idea that things can be classified as corporeal and incorporeal. This idea also incorporated the notion of ownership of incorporeals. See also Scott *Cession* 2 fn 7, where I discuss the reason for this objection to the idea of ownership of claims. It is further interesting to note that the theory of fiduciary legal acts, including fiduciary security cessions, which De Wet and Wyk propagate, was developed by the Pandectists – see Coing *Die Treuhand kraft privaten Rechtsgeschäfts* (1973) 47 *et seq*, and it is therefore understandable that De Wet introduced it into South African law.

back to the pledge construction. So far they did not have the opportunity to pay much attention to the position on attachment.[37]

De Wet, in his textbook on the law of contract and mercantile law, introduced the idea of fiduciary transfers as security into our law, without discussing its theoretical basis or complex nature. De Wet and Van Wyk[38] do not refer to the unacceptable consequences of this form of security in the event of insolvency or attachment and they devote no attention to the negative aspects of such cessions. They do not indicate whether they should be upheld nor whether the principles pertaining to fiduciary ownership as expounded in German law[39] should be followed. Consequently, neither the courts nor the legislature seem to have been aware of the nature and effect of fiduciary agreements in general and on insolvency and attachment in particular. If its attention had been drawn to these, the legislature could possibly at a very early stage of this development have amended the Insolvency Act 24 of 1936 to protect the interests of the fiduciary security cedent and cessionary. This amendment could have been couched in similar terms to those of the section that applies to the reservation of ownership.[40] The courts would possibly also have paid more attention to the nature of such relationships; for example, to the fact that fiduciary property should be separated from the ordinary property of the fiduciary.

The contribution of De Wet to the South African law of security by means of claims is very interesting and an excellent example of his strong influence on the development of South African law. In most cases[41] the judges followed his approach without questioning its correctness or practical effect.

1 1 Practical example

To illustrate the needs of practice and the problems encountered in security by means of claims, I shall make use of the following example:

X, the owner of a large machine manufacturing company,[42] wishes to expand his/her business. X requires financial assistance and approaches Y, a

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37 Von Thur *Allgemeiner Teil des Deutschen Bürgerliches Rechts* Bd II 2 202–206 argues that these unacceptable consequences should be upheld and that the distinction which has been made by most authors between *formelles Eigentum* and *wirtschaftliche oder materielle Eigentum* (see discussion below) is false and unacceptable, since it was merely introduced to protect the interests of the security grantor in the case of insolvency and execution. He argues that such a division of ownership is not in conformity with the *BGB* and that its recognition is neither in the interest of theoretical lucidity nor in that of practical daily life (204). Von Thur argues that, for the sake of simplicity and purity of the law, theory and practice should act together against the perversion of the nature of recognised legal concepts, and that the so-called needs of practice, which have their foundations in convenience, should not lightly be permitted to predominate.

38 Although they do not refer to fiduciary relationships in explicit terms, their views on security cessions clearly presuppose the existence of such relationships – see De Wet and Van Wyk *Kontraktereg* 416–420.

39 See discussion in section B below.

40 See s 84.

41 Eg *Lief v Dettmann* 1964 2 SA 252 (A); *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A); *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A).

42 Although this form of security is particularly relevant for big businesses, it is just as relevant for small businesses and individuals.

bank,[43] for credit facilities. X's immovable property has already been mortgaged to Y. The manufacturing equipment is subject to a special notarial bond in favour of Y. X requires a further loan of R500 000,00 and the bank is prepared to advance that amount, but requires additional security for repayment of the loan. X's business is very successful and he/she wishes to make use of his/her future and existing claims (book debts[44]) as security for repayment of the loan. Y is prepared to accept these claims as security. X and Y further agree that these claims should serve as continuing covering security[45] and that X's creditors should, therefore, be informed of the position only if it becomes necessary; in other words, if it becomes clear that X is in financial straits and that Y will have to make use of its security. They further agree that X will continue to receive and collect payment of the claims in his/her own name.

The factual situation with which lawyers are confronted here, is the following: X wishes to have as much freedom as possible to conduct his/her business activities, whereas Y wishes to have the strongest possible security for repayment of the principal debt. Both parties wish to keep their relationship confidential. It is the task of lawyers to give effect to the wishes of X and Y as effectively as possible and within the framework of existing legal principles.

1 2 Existing legal position in South Africa

Bearing the confines of the principle of *stare decisis* in mind, South African lawyers are bound to give the following advice to X and Y: The courts regard the type of security they have in mind as a pledge of claims. To constitute such a pledge, a cession to Y is required but it is not necessary to notify the debtors.[46] Notice to the debtors is, however, advisable to prevent them from discharging their debts by payment to the pledgor. The fact that notice is not required for the constitution of the pledge meets X's need for confidentiality.

Furthermore, the parties will have to be informed that the nature of this pledge is such that, on conclusion of their agreement, Y becomes the full holder of the right and is therefore entitled and obliged to receive and collect the claims, and, if necessary, to institute action, since only the bank now has *locus standi*.[47] This

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43 In South Africa, I suspect, banks are the most important credit grantors and therefore I use a bank in the example. Banks are, however, not the only credit grantors. Other financial institutions, as well as individuals, may play this role.

44 In cession documents, the object is often described as "debts" or "book debts" – see eg *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) 767G–H. Such descriptions are incorrect: cession is a transfer of the claims to payment of the debts or book debts – see Scott *Cession* ch 4 2 6. In *Ovland Management (Tvl) (Pty) Ltd v Petprin (Pty) Ltd* 1995 3 SA 276 (N) 282J Page J even referred to cession of the contracts!

45 For a discussion of the nature of revolving security cessions, see discussion under par 1 3 1 below.

46 If one is really dealing with a pledge, this is a totally unacceptable situation since it is directly in conflict with the publicity principle, one of the basic principles pertaining to the constitution of limited real rights (of which a pledge is an example) – see Scott *Cession* ch 12 2 1 1.

47 See Scott "The question of *locus standi* in revolving security cessions" 1991 *THRHR* 837; *Philotex (Pty) Ltd v Snyman*; *Textilaties (Pty) Ltd v Snyman* 1994 2 SA 710 (T); *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 2 SA 528 (C); *Louw v WP Koöperatief Bpk* 1994 3 SA 434 (A); *Ovland Management (Tvl)*

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is probably not what X and Y had in mind, but they should be informed that Y may appoint X as mandatary to receive and collect payment and keep the proceeds,[48] without informing the debtors that he/she is actually acting on behalf of Y. This appointment will not, however, entitle X to institute action in a court of law.[49] If X wishes to institute action in court, he/she will have to indicate that he/she is acting as Y's representative. This will defeat the object of confidentiality.

Furthermore, a complete transfer of the claim has the effect that X's claims may be attached by Y's creditors, since they constitute property in that estate.[50] X should also be informed that rights of lien attached to the claims lapse on transfer of the claims to the cessionary. This is so because X will be in possession of the thing (the object of the lien), but no longer creditor, and the bank, who is now creditor, is not in possession of the lien object.[51]

It should furthermore be pointed out to X that, after the first cession, he/she will no longer be able to make further cessions of the same claims,[52] but only of the right to claim re-cession of the claims on fulfilment of his/her obligation to pay the principal debt. The second cessionary's right is the same as that of the cedent and, consequently, the second cessionary can only claim re-cession from the bank. This is a rather unfortunate and insecure situation, since the security cessionary can effectively jeopardise the second cessionary's position,[53] for example, by ceding the claims to a third person.

Y may also have difficulty with the above explanation of the legal position. In terms of this type of pledge, the bank will have to act as creditor. This entails that it will have to do the book-keeping, receive and collect payment and, if necessary, institute action, whereas it is interested in the claims for security purposes only. The whole idea with the granting of security is to enable the bank to make use of the claims once it becomes necessary, that is, when it appears that X is in financial difficulties and not in a position to repay his/her loan.

(Pty) Ltd v Petprin (Pty) Ltd 1995 3 SA 276 (N); *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A); *Standard General Insurance Co Ltd v SA Brake CC* 1995 3 SA 806 (A). See discussion of this issue in section B below under par 1 1 2.

48 In other words, Y can appoint X as *procurator in rem suam* – see Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 135–136. In this case X, however, will not disclose that he/she is acting on behalf of Y. The debtors still regard X as creditor.

49 In *Gravett v Van der Merwe* 1996 1 SA 531 (D) 537G Booysen J held that a plaintiff cannot sue in his own name as agent for a disclosed or undisclosed principal. Although the case did not deal with cession, it confirmed *Waikiwi Shipping Co Ltd v Thos Barlow & Sons (Natal) Ltd* 1978 1 SA 671 (A) (see my discussion of this case in 1978 *De Jure* 388) and *Sentrakoop Handelaars Bpk v Lourens* 1991 3 SA 540 (W). I think it can now safely be argued that South African law, like German law, does not recognise the doctrine of the undisclosed principal as functioning in the law of civil procedure. Booysen J also clearly stated that *locus standi* must exist at the time when the action is instituted (537H).

50 In the case of a bank or large financial institution, there is no real danger in this, but where the credit grantor is an individual or a smaller institution, it can be very detrimental to X.

51 See the decision of Nienaber JA in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 87G–H and my discussion of this case "Cession *in securitatem debiti* once again!" 1993 *THRHR* 485; "Cession *in securitatem debiti* and merger" 1993 *THRHR* 692.

52 For a discussion of this position, see Scott *Cession* ch 8 2 3.

53 For a discussion of this, see Scott *Cession* ch 8 2 3.

The position of the parties in the event of Y's insolvency is not clear. If X should become insolvent, his/her trustee will inform the bank that the claims which had been transferred to Y's estate remained X's *dominium* all along and that Y merely has a limited real right to repayment of the principal debt out of the proceeds of the claims.[54] However, the position of Y (in the unlikely event of its insolvency, being a bank), has not been addressed in the courts. Unless the courts, here too, fall back on the pledge construction, the claims that had been transferred to Y would form part of his insolvent estate and X, as concurrent creditor, can claim re-cession or the balance from Y's trustee. Should the courts revert to the pledge construction, by reason of analogy, the trustee (and creditors) of Y's estate will discover that, although the claims were transferred to Y, this was done for a limited reason only, namely for security purposes. In terms of the law of pledge, the *dominium* remained with the cedent, and Y acquired only a limited real right to secure repayment of the principal debt. The trustee will then have to rely on this limited real right to ensure payment to the estate.

The parties can also be advised to make use of a notarial bond of claims.[55] They should then be informed that the Security by Means of Movables Act 57 of 1993 in section 1(1) makes provision for the registration of a notarial bond over corporeal movables only, and not for a notarial bond of incorporeals, such as claims.[56]

1 3 Need for statutory intervention

The approach adopted to security by means of claims in South African courts, has resulted in uncertainty in practice and has been criticised severely on theoretical grounds. Since I started with this research project in 1994, for example, eighteen cases[57] dealing with security by means of claims were reported in the South African law reports – of these, six are Appellate Division cases! Supreme Court litigation is very expensive and I think that the country cannot afford this unnecessary waste of money and human resources.

The following problem areas need attention: a clear distinction should be made between the various ways in which security can be granted by means of claims, namely notarial bonds, fiduciary security cessions and pledge of claims. The legal principles applicable to each of these institutions should be defined. The vagueness surrounding *locus standi* of the parties in both forms of security resulting in costly litigation, with unsatisfactory consequences, should be clarified. The tax position of the parties in both forms of security should be addressed. The nature of fiduciary relationships and its applicability to security

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54 See eg *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235; Hefer JA in *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy* 1985 2 SA 769 (A) 780B: "[D]ie kurator in die insolvente boedel van die sedent van 'n vordering *in securitatem debiti* [was] geregtig om dit in te vorder en as 'n bate van die boedel te administreer op die basis dat die *dominium* van die reg in die sedent bly."

55 Very little attention has been given to this form of security, apart from Lubbe and Van der Merwe 1988 *TSAR* 554 who raise some interesting questions, without really addressing or answering them thoroughly. For a discussion of the position of a notarial bondholder of incorporeal movables registered after the Act, see Scott "Notarial bonds and insolvency" 1995 *THRHR* 672.

56 See also Van der Walt, Pienaar and Louw 1994 *THRHR* 615–617.

57 See fn 32 above.

transfers should be evaluated. The existing disadvantages[58] of fiduciary security cessions in South African law should receive attention. Furthermore, the principles of the law of pledge pertaining to corporeal movables should be adapted to accommodate a pledge of claims. In this regard the following issues require attention: The distinctive nature of the object of security[59] (a claim), publicity as a requirement for the constitution of a pledge of claims,[60] the relevance of maturity of the pledge,[61] the effect of maturity of the debt and realisation possibilities in the event of the pledgor's insolvency.

1 3 1 Locus standi

To illustrate the nature and extent of the problems encountered in practice, I shall discuss one of the above-mentioned problem areas, that is, the issue of *locus standi*[62] extensively. Since *Simonsig Landgoed and Coastal Wines (Edms) Bpk v Theron, Van der Poel, Brink, Roos*,[63] advocates, realising the possibilities created by the confusion that exists in South African law on security cessions, started to invoke lack of *locus standi* against security cedents.

Before embarking on a discussion of the recent cases, I should like to discuss the nature and effect of so-called "revolving or continuing security cessions" briefly. In this form of security, a creditor and principal debtor agree to either a pledge or a fiduciary security cession of the principal debtor's existing and future claims (mostly book debts). For various reasons, however, they agree that the pledgor shall not immediately perfect the pledge by notifying the debtor or that the cessionary shall not notify the debtors of the cession. The creditor normally does not notify the debtors since he/she merely holds the pledge/cession as covering security, extinguished book debts being replaced by new ones as long as the principal debtor remains indebted to the creditor.[64]

The creditor and principal debtor therefore conclude a security agreement, in terms of which the principal debtor undertakes to grant security in the form of either a pledge or a fiduciary security cession, as well as a transfer agreement,

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58 In particular, the position on insolvency and attachment. *Locus standi* raises some serious problems, eg the fact that, after cession, neither the cedent nor the cessionary can rely on a lien attached to the claim – see the decision of Nienaber JA in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 87G–H and my discussion of this case "Cession *in securitatem debiti* once again!" 1993 *THRHR* 479 485. See further Scott "Cession *in securitatem debiti* and merger" 1993 *THRHR* 692.

59 See eg *Millman v Twiggs* 1995 3 SA 674 (A), noted by me "Verpanding van vorderingsregte" 1996 *THRHR* 319.

60 See Scott *Cession* ch 12 2 1 1.

61 *Ibid* ch 12 2 1 5 2.

62 See eg Scott "The question of *locus standi* in revolving security cessions" 1991 *THRHR* 837; *Philotex (Pty) Ltd v Snyman*; *Textilaties (Pty) Ltd v Snyman* 1994 2 SA 710 (T); *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 2 SA 528 (C); *Louw v WP Koöperatief Bpk* 1994 3 SA 434 (A); *Ovland Management (Tvl) (Pty) Ltd v Petprin (Pty) Ltd* 1995 3 SA 276 (N); *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A); *Standard General Insurance Co Ltd v SA Brake CC* 1995 3 SA 806 (A).

63 Case no 1413/89 of 1991-08-26.

64 See *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 249 per De Villiers CJ: "As existing debts were extinguished, and fresh debts were incurred, the preference was to operate upon the fresh debts . . ."

but they do not perfect the pledge[65] or notify the debtors of the cession. The parties may also suspend the operation of the cession, subject to the occurrence of an uncertain future event.[66] In all these situations, the principal debtor (pledgor/cedent) remains creditor and, therefore, entitled to claim from the debtors, while they are entitled to regard him/her as their creditor. Both the principal debtor and the creditor approve of this state of affairs, the principal debtor because it does not affect the day-to-day running of his/her business and his/her financial arrangements are not made public.[67] For the creditor, this procedure is also favourable, since all the formalities and juridical acts required of the principal debtor for securing payment of the principal debt have been complied with. It is henceforth in the hands of the creditor to decide when he/she should perfect the security. Normally the creditor will give notice if he/she perceives his/her interests to be in danger; in other words, he/she will notify the debtors immediately the principal debtor is in financial straits.

The effect of notice to the debtors differs, depending on the different possibilities:

(a) In the case of a pledge, the pledge is perfected at the moment when the debtors receive notice. The pledgee then acquires a limited real right to the claim, which also affords him protection in the event of the pledgor's insolvency.

(b) In the case of a fiduciary security cession, the cessionary, even before notice, becomes creditor and can claim from the principal debtor's debtors. Before notice, the cedent may receive and collect payment, but after notice the debtors are obliged to pay the cessionary.

(c) In the case of a conditional cession, the cession takes effect from the moment of notice (which is given mostly when the cedent falls into arrears). After notice he/she is in the same position as the fiduciary security cessionary (see my discussion in (b) above). Before notice the creditor enjoys no protection in the event of the principal debtor's insolvency.

In a revolving covering security, the principal debtor can receive or collect payment from his/her debtors, thereby extinguishing such debts, but in terms of the continuing security agreement new book debts continually replace the extinguished ones. This procedure continues as long as the principal debtor is indebted to the creditor and the debtors are not notified.

This very brief and superficial description illustrates the different possibilities with which a court may be confronted in a given situation. In discussing the

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65 Notice is a requirement for the constitution of the pledge and no real right can vest in the pledgee before such notice.

66 In *Ovland Management (Tvl) (Pty) Ltd v Petprin (Pty) Ltd* 1995 3 SA 276 (N) the judge interpreted the cession in this way. In the *Ovland* case the cession was suspended as follows: "The bank shall have the right at any time to terminate the cedent's rights in terms of 5.1 and to notify the customer of the termination of the agency. The said right shall only be exercised where it is reasonable to do so, *inter alia* in the events of negligence, unsatisfactory collection or administrative procedures by the cedent, breach by the cedent or any other conduct on the part of the cedent which the bank deems unsatisfactory . . . On termination the cedent shall deliver all books of account, records, ledger cards and other documentation and information relating to its collections in terms of this clause ('collection records') in such reasonable form as the bank may stipulate" (281B–D).

67 See eg *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A); *Bank of Lisbon and SA v The Master* 1987 1 SA 276 (A); Scott 1988 *THRHR* 436.

issue of *locus standi*, a distinction should be made between the position of the parties in the case of cession, a pledge of claims and a fiduciary security cession.

1 3 1 1 Cession

A cession effects a complete substitution of creditors and the cessionary is therefore the only person who has *locus standi*.[68] The cessionary should apply for substitution and the court should grant it.

1 3 1 2 Pledge

In a duly constituted pledge of claims, the pledgor retains *dominium* and the pledgee acquires a limited real right of security only. The basic principles of pledge apply and are lucidly spelt out in *National Bank of SA Ltd v Cohen's Trustee*:[69]

> "[I]f there had been a pledge in that case the cedent would, in the opinion of the Court, have retained his *dominium*, which would have been an attachable asset . . . In the present case the Court cannot ignore the faet that the only object of making the cession was to secure the debt owing by Cohen to the Bank. The fact that the cessionary might, before the insolvency of the cedent, have sued the original debtor, eannot alter the original nature of the transaction . . . Upon payment by Cohen of the debt due by him to the defendant, the former could have demanded the return of the policy as his property, and no recession from the Bank to him would have been neeessary in order to eomplete his title."

And also in *Land- en Landboubank van Suid-Afrika v Die Meester*:[70]

> "Die skuldenaar behou as sedent die *dominium* van sy vorderingsreg terwyl die sessionaris *die bevoegdheid verkry om die (gesedeerde) vorderingsreg uit te oefen indien daar wanbetaling van die hoofskuld deur die sedent is* . . . Die *dominium* van die sedent is 'n 'reversionary interest' op die vorderingsreg terwyl die sessionaris *'n beperkte saaklike reg op die vorderingsreg het om dit uit te oefen of in te stel waar daar wanbetaling van die hoofskuld is*."

It does not matter whether the pledgee's right is termed "the exclusive right to claim and receive";[71] "the right to sue";[72] "die beskikkingsbevoegdheid" (entitlement to dispose of);[73] "the right to institute action"[74] or "sy reg om die gesedeerde skuld in te vorder" (his right to collect the ceded debt)[75] – the important principle to bear in mind, is the fact that the pledgor retains *dominium* and, therefore, remains creditor. The pledgee acquires a limited real security right, which can only be exercised after maturity of the pledge. These two basic aspects of pledge influence and determine the issue of *locus standi*. The legal position of the creditor and principal debtor should therefore be determined with reference to these two aspects.

Perfection of the pledge does not entitle the pledgee to claim or to receive payment from the pledgor's debtors. It merely constitutes the pledge over the

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68 For a full discussion of this position see Scott *Cession* ch 8 2.
69 1911 AD 235 246.
70 1991 2 SA 761 (A) 771D (my italics).
71 *Bank of Lisbon and SA v The Master* 1987 1 SA 276 (A) 294.
72 *Colyvas v Standard Bank* 1926 AD 56 57–58.
73 Lubbe 1989 *THRHR* 485.
74 *Philotex (Pty) Ltd v Snyman*; *Textilaties (Pty) Ltd v Snyman* 1994 2 SA 710 (T) 715D.
75 *Louw v WP Koöperatief Bpk* 1994 3 SA 434 (A) 443F.

property in favour of the pledgee. In other words, notice of the pledge to the debtors merely informs them of the existence of the pledge. This limited real security right entitles the pledgee, in the event of the pledgor's failure to pay his/her debt (that is maturity of the pledge), to have the property (claim) sold in execution or to claim performance from the debtors.[76]

The term "maturity of the pledge" denotes the moment at which the principal debt falls due and the pledgor is unable to perform. The pledgee can exercise his/her real security right only after maturity of the pledge.[77] This principle was aptly described as follows in *Land- en Landboubank van Suid-Afrika v Die Meester*:[78] "[Die pandhouer verkry] die bevoegdheid ... om die gesedeerde vorderingsreg uit te oefen *indien daar wanbetaling van die hoofskuld* deur die sedent is." And also[79] "om dit uit te oefen of in te stel *waar daar wanbetaling van die hoofskuld is*".

Apart from a few exceptions,[80] the limited real right of a pledgee does not, even after maturity of the pledge, entail an inherent right to sell the object of security, or, put in another way, to realise the object of security, but it compels him/her to employ the machinery of the law.[81] The pledgee never becomes creditor (acquires *dominium*); he/she has only a limited right over the pledged property. In the case of movables this right is defined as follows:[82]

> "The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, *to have the property sold and obtain payment of his debt out of the proceeds of the sale.* The mortgagee or the pledgee does not obtain ownership of the secured property for that always remains in the mortgagor or pledgor as long as the mortgage is in existence."

In *Land- en Landboubank van Suid-Afrika v Die Meester*[83] Joubert JA described the pledgee's right as follows:

> "Die *dominium* van die sedent is 'n 'reversionary interest' op die vordcringsreg terwyl die sessionaris *'n beperkte saaklike reg op die vorderingsreg het om dit uit te oefen of in te stel waar daar wanbetaling van die hoofskuld is.*"

Note that the pledgee's right is described as the right to exercise the claim or to institute it.

I have indicated above that the idea with revolving security is that the principal debtor's claims will serve as security for the payment of his/her debts to the creditor. The creditor does not intend to make use of this security unless and until it appears that the principal debtor is in financial straits. The object of the security therefore continually fluctuates as earlier debts are extinguished by payment to the principal debtor and new debts replace the extinguished ones.

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76 For a full discussion of the position see Scott *Cession* 244 *et seq*.

77 The term "maturity of the pledged claim" refers to the time when the debt corresponding to the pledgor's claim becomes due and payable and should be distinguished from maturity of the pledge.

78 1991 2 SA 761 (A) 771D (my italics).

79 771E (my italics).

80 See Scott and Scott *Wille's Law of mortgage and pledge* (1987) 120 *et seq*.

81 *Idem* 203.

82 *Idem* 5 (my italics).

83 1991 2 SA 761 (A) 771E (my italics).

Three stages should be distinguished:

(a) In the first stage the parties agree to secure the debts (they conclude the security agreement) and they also conclude the transfer agreement, but they agree not to perfect (constitute) the pledge.[84]

(b) In the second stage the pledge is also perfected (constituted), but the stage of maturity of the pledge has not been reached.

(c) The third stage is the one that takes effect after perfection and maturity of the pledge.

(a) First stage: before perfection of pledge

In the first situation, the security agreement and the transfer agreement are subject to the condition that it will only take effect once the creditor has indicated to the principal debtor that he/she intends to give effect to the security agreement by acting upon it and perfecting the pledge by means of notice to the principal debtor's debtors.

The principal debtor in this situation remains full holder of the right and he/she is entitled to claim from his/her debtors and receive payment from them in his/her own name. In terms of the continuing security agreement, the creditor will not intervene as long as the principal debtor is not in financial difficulties. The latter's business goes on as usual and new book debts will continually replace the extinguished ones as the objects of security. This form of security is normally employed in situations where the principal debtor's business is on a sound financial footing, but where he/she needs financial bridging from time to time. In this case the pledgor remains creditor and has *locus standi*, despite the security agreement and the transfer agreement *in anticipando*.

(b) Second stage: after perfection, but before maturity of pledge

Here the pledgee perfects the pledge by notifying the debtors of the existence of the pledge and the normal principles of the law of pledge take effect. As pledgee he/she acquires a limited real security right over the property and is entitled to retain his/her hold over the secured property until the principal debt has been paid. Furthermore, if the pledgor is in default, it entitles the pledgee to realise the claim and to satisfy the principal debt out of the proceeds of realisation. The pledgee does not obtain ownership of the secured property, since the pledgor retains it. The pledgor is creditor, but his right is limited. Therefore both the pledgor and pledgee have an interest in the claim and should institute action jointly.[85]

In *Land- en Landboubank van Suid-Afrika v Die Meester*[86] Joubert JA explicitly described the method of realisation of a claim and held that the pledgee's limited real right entitles him to exercise the claim or to institute it *on the pledgor's failure to pay his debt*. This statement clearly indicates that the pledgee does not have *locus standi* before that time. The pledgor, on the other hand, also has no *locus standi*. Although the pledgor retains *dominium*, he/she

84 Although this procedure has wrongly been rejected by the court in *Springtex Ltd v Spencer Steward and Co* case no 6135/88 of 1990-11-16 as being in conflict with the nature of a cession *in securitatem debiti*, I maintain that it is correct.

85 See Scott *Cession* 242 *et seq*.

86 1991 2 SA 761 (A) 771E.

has transferred the quasi possession of the claim. The pledgor is still creditor and although his/her right to institute action has been transferred to the pledgee, the latter cannot institute action until maturity of the pledge. The pledgor's relationship to the claim and his/her interest is stronger than that of the pledgee, although it is also limited by the real security right of the pledgee. They should therefore jointly institute action.

Before maturity of the pledge, the pledgee can in no way deal with the pledged claims, unless the pledgor authorised him/her as was the case in *Munnik Myburgh Asbestos (Kaapsche Hoop) Ltd v The Receiver of Revenue*.[87] The pledgor, on the other hand, cannot claim and receive payment since the pledge has been perfected and the debtor will refuse to pay him. As I have indicated above, the pledgor may authorise the pledgee to collect the pledged claims (in which case the pledgee acts as representative of the pledgor) and satisfy the principal debt out of the proceeds. In this instance the principal debt is extinguished and, with it, the pledge itself. The parties may also agree that the pledgee will collect the claims as the pledgor's representative and keep the proceeds in a separate bank account until the pledge reaches maturity. In the latter case the pledgor is entitled to the interest.

It should be clear from this discussion that after perfection of the pledge but before it matures, neither party can institute action: the limited real right of pledge does not furnish *locus standi* to the pledgee and the *locus standi* of the pledgor (as creditor) is also temporarily suspended. The correct position would be for the pledgor and pledgee to have joint *locus standi* and whoever wishes to institute action, should join the other as an interested party.

(c) Third stage: after maturity of pledge

Here the pledgee as limited real right holder still has no *locus standi*, since he is not creditor. On the other hand, at this stage he has the strongest interest in the claim. In German law[88] the code authorises the pledgee to claim up to the amount of the principal debt or to have the claim transferred to him to the extent of his claim against the pledgor. The code therefore affords the pledgee limited *locus standi*. In *Land- en Landboubank van Suid-Afrika v Die Meester*[89] Joubert JA, without discussing the legal nature of the pledgor's and pledgee's rights, held that the pledgee's limited real right entitles him to exercise the claim or to institute it. It appears from this statement as if he/she has *locus standi* to do this as limited real right holder and not as creditor or "owner". There is a problem in allowing the pledgee to collect the whole debt, since he/she then becomes owner of the money and the pledgor only has a claim for payment of the balance. The pledgor cannot institute the *rei vindicatio* against the pledgee to claim the balance.

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87 1927 WLD 98 111.

88 See § 1282 of the *BGB*: (1) If the conditions of § 1228(2) have occurred, the pledgee is entitled to collect the claim and the debtor may pay only to him. The pledgee is entitled to collect a monetary claim only to the extent that it is necessary to satisfy him. In so far as he is entitled to collect, he is also entitled to demand that the monetary claim be assigned to him in the place of payment. (2) The pledgee is not entitled to make other dispositions over the claim; the right to seek satisfaction out of the claim pursuant to § 1277 remains unaffected. For the position in the Dutch code see the discussion in section B below.

89 1991 2 SA 761 (A) 771E.

I shall now briefly discuss the way in which the courts have approached this whole issue in recent cases. In *Louw v WP Koöperatief Bpk*[90] Smalberger JA referred to and extensively quoted the views of Joubert JA in *Land- en Landboubank van Suid-Afrika v Die Meester,*[91] but then held that a cession *in securitatem debiti* results in the cedent (not pledgor, as it should have been, since he referred to the *Land- en Landboubank* case) being denuded of his right to claim the ceded debt and that he, consequently, has no *locus standi* to enforce the claim.[92] He did not really evaluate Joubert JA's following statement:

> "Die *dominium* van die sedent is 'n 'reversionary interest' op die vorderingsreg terwyl *die sessionaris 'n beperkte saaklike reg op die vorderingsreg het om dit uit te oefen of in te stel waar daar wanbetaling van die hoofskuld is.* Bly daar 'n balans oor nadat die hoofskuld betaal is, kan die sedent op grond van sy 'reversionary interest' daarop aanspraak maak" (my italics).

The judge, for example, did not determine the effect of the pledgor's retaining *dominium* or his/her relatively high interest in the claim compared to that of the pledgee. He did not evaluate the practical effect of his approach on banks, for example, the fact that they will have to litigate in matters that do not really concern them. Furthermore, he did not consider the consequences if banks refuse to litigate in cases such as this: will they re-cede some of the claims or waive them? In both instances they will, of course, lose their security. Should they re-cede the claims to the cedent, what is the *causa* of this cession?

This incorrect application of the relevant legal principles resulted in an unsatisfactory situation and then the judge resorted to the factual interpretation of the cession in the light of sections 38 and 63 of the Land Bank Act 13 of 1944. In the end he did come to the rescue of the purported pledgor and held that the cession was a conditional cession (subject to the conditions contained in section 63(1) of the Act). The judge refused the appellant's (Louw's) application for condonation of late lodging of the record. A reasonable prospect of success on appeal was decisive for this application, and the court held that he had no reasonable prospect of success on the merits. Louw wished to appeal against the decision of the Cape Provincial Division that respondent had *locus standi* to apply for appellant's sequestration, despite a cession by respondent to the Land Bank.

In *Coopers & Lybrand v Bryant*[93] Joubert JA side-stepped the problems surrounding *locus standi* in security cessions and held that the "matter is essentially one of interpretation". He did not address any of the legal issues referred to above.

The judgment of Van den Heever JA in *Standard General Insurance Co Ltd v SA Brake CC*[94] is, once again, one of those judgments which do not present a clear picture of the nature of security cessions. It does not address the very thorny issue of *locus standi* or the exact nature of fiduciary acts. On the one hand, the judge applied fiduciary security cession principles, stating that the

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90 1994 3 SA 434 (A).
91 1991 2 SA 761 (A) 771E.
92 443F: "'n Sessie *in securitatem debiti* het dus tot gevolg (tensy die partye anders ooreenkom) dat die sedent ontdoen word van sy reg om die gesedeerde skuld in te vorder, en gevolglik geen *locus standi* het om dit af te dwing nie."
93 1995 3 SA 761 (A).
94 1995 3 SA 806 (A).

cedent had divested himself of "the right",[95] but, on the other, she stated that security cessions are analogous to the pledge of a corporeal asset.[96] She accepted, correctly, that once a fiduciary security cession has been effected, the cessionary is the only person who has *locus standi*. Without then further paying attention to her remark that cession is analogous to a pledge of a corporeal asset, she held:

> "It is unnecessary to go into the thorny question of how the cedent who has divested himself of a claim can attempt to protect his rights should the cessionary refuse or fail to do so. Until he pays his debt to or makes some arrangement with the cessionary, he himself cannot enforce the claim. It was not SA Brake's case as pleaded or pursued that anything of that nature had occurred."[97]

Although the judge was aware of the inherent dangers of this approach for the pledgor (cedent), she did not attempt to solve the problem by directly addressing the issue of *locus standi* in security cessions.

1 3 1 3 Fiduciary security cessions

Since a fiduciary security cession is in all respects the same as an ordinary cession, coupled with a fiduciary agreement (*pactum fiduciae*),[98] the claim is completely transferred to the cessionary's estate. From this it follows that, from the moment that the cession has become operative, the cedent can no longer institute action in his/her own name. In the absence of statutory provisions, it does not revert to the cedent's estate, not even in the event of the cedent's insolvency.

The legal position of the cedent and the cessionary before the cession becomes operative and thereafter is determined by the security agreement or the cession document. Three situations may be distinguished here:

(a) In the first situation the cedent and cessionary conclude the transfer agreement, but suspend its operation. They further agree that the cessionary will not give notice of the cession to the debtor until the cessionary deems fit or under certain specified circumstances. Before that time, the cedent may continue to claim and receive payment from his/her debtors in his/her own name. The intention of the parties with this procedure is that new claims will continuously replace the old ones as the latter are being extinguished by payment to the cedent. In this situation the cedent remains creditor and therefore has *locus standi*. The obligationary agreement between the cedent and cessionary does not affect third persons.

(b) In the second situation, the position is basically the same as in the first, but the parties do not suspend operation of the cession. The cedent transfers the claim to the cessionary, but he does not notify the debtor. In German law the cedent can then collect and receive payment as *Einziehungsermächtigte* (mandatary to receive or collect another person's claim in his/her own name). This mandatary can only collect the claims extra-judicially, since he is not creditor and therefore does not have *locus standi*.[99] Although the South African

95 814I.
96 815B.
97 815F.
98 See Scott *Cession* 246 *et seq* and my discussion in section B under par 1 1 2 below.
99 See the discussion in section B under par 1 1 2 below.

courts have not expressed an opinion on the possibility of a cedent receiving or collecting payment extra-judicially on behalf of an undisclosed principal, they have explicitly rejected the idea that a cedent may institute action in a court in his own name on behalf of an undisclosed principal.[100]

In this case the cedent is no longer creditor and therefore has no *locus standi*. The cessionary, on the other hand, is creditor, but only for security purposes. Both parties have an interest in the claim and should be joined. If the cedent institutes action in his/her own name and the debtor raises the issue of lack of *locus standi*, the cedent should be allowed to apply for amendment to join the cessionary. This is a case where special circumstances exist and the court should exercise its discretion and allow an amendment. The cause of action is the same, but because of the fiduciary nature of the cession, both parties have an interest in the outcome of the litigation. Although the cessionary is creditor, he is creditor for a limited purpose only and, consequently, the cedent also has an interest in the outcome of the action.

(c) In the third situation the cession takes immediate effect and the cessionary notifies the debtors of it. Here the cessionary becomes creditor and the debtor is obliged to pay him/her. Two possibilities may, however, still be distinguished: first, the cedent can be authorised to collect the book debts as the cessionary's representative and keep the proceeds for himself. The cedent acts as representative of the cessionary who is the only person with *locus standi*. In this instance, again, the idea is that the cedent's new claims (book debts) will replace the old ones as the latter are being extinguished by payment to him. However, the moment the principal debtor does not perform or runs into financial difficulties, the cessionary terminates the cedent's authority and proceeds to collect the debts for his/her own account. Secondly, the cessionary may collect the book debts as they fall due and keep the proceeds for himself in order to satisfy his/her claim against the cedent. The cessionary is the only person with *locus standi* in this case.

I shall now briefly discuss the way in which this whole issue was approached in recent cases: In *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)*[101] Scott J held that the cedent "intended to divest himself of all his rights in respect of the claim"[102] and that this included the right to approach the court for substitution in the proceedings. This approach is correct if the parties had an ordinary cession in mind, but not in the case of a fiduciary security cession.

Textilaties (Pty) Ltd v Snyman[103] is one of those cases where the judge's view on the nature of security cessions was not clear, but it appears that he regarded the cession as a fiduciary security cession since he held that the cedent is denuded of his "right to institute action":

> "The effect of the cessions was that the plaintiffs had no cause of action at date of institution of action. The right to institute action vested in the banks (*Moola v Estate Moola* 1957 (2) SA 463 (N) at 464; *National Bank of South Africa Ltd v*

100 See *Gravett v Van der Merwe* 1996 1 SA 526 (D); *Standard General Insurance Co Ltd v Eli Lilly (SA) (Pty) Ltd* 1996 1 SA 382 (W).
101 1994 2 SA 528 (C).
102 557E.
103 1994 2 SA 710 (T).

Cohen's Trustee 1911 AD 235 at 245; *Holzman NO and Another v Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 791 and 793; *Spendiff NO v JAJ Distributors (Pty) Ltd* 1989 (4) SA 126 at 130–4; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294C)."

Some of the cases to which the judge referred as authority support the notion that in a fiduciary security cession the cedent completely divests him/herself of the claim (and also of the right to institute action), for example, the *Moola, Holzman* and *Spendiff* cases, but others such as the *Cohen's Trustee* and *Bank of Lisbon* cases support the pledge construction. In any event, I have indicated above that the cedent divests him/herself of the claim for a limited purpose only.

Having stated this, Van Dijkhorst J discussed the effect of a waiver or re-cession on the fact that the plaintiffs did not have *locus standi* at the time when the summons was issued. The court apparently accepted that the plaintiffs had no cause of action at that time and after a review of the court's discretion to allow an amendment in order to complete a cause of action, he stated that he did not have to consider whether he should exercise this discretion in granting an amendment:

"I do merely have to decide the crisp point whether a summons may disclose a cause of action which did not exist when it was issued. So put, it is a contradiction in terms. It would be in conflict with the cases set out by me, except *African Diamond Exporters* and *Simonsig Landgoed*, which both require exceptional circumstances.

On the other hand, practical considerations have in the past dictated that causes of action which arose after issue of summons be joined to the existing ones in the same action (see *OK Motors v Van Niekerk (supra); Pullen v Pullen* 1928 WLD 133; *Ritch v Bhyat* (*supra* at 592); *Van Deventer v Van Deventer and Another* 1962 (3) SA 969 (N); and see also *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 856G–857A).

This is not the *ex post facto* introduction of a fresh cause of action to an action between parties who are properly before Court, because there is no objection to the *locus standi* of some plaintiffs. The effect of this amendment is that it seeks to introduce parties to an existing action with causes of action which arose after the issue of summons.

Without expressing an opinion on the correctness of the approach in the *African Diamond Exporters* and *Simonsig Landgoed* case, even on the basis of their reasoning, the plaintiffs fail. Exceptional circumstances are required by the cases. These are absent in the present case. There is nothing exceptional in a plaintiff who jumps onto the bandwagon without his trumpet, even though it might be classified as rather unusual. There are no compelling reasons of convenience for making him welcome in this case."

Van Heerden[104] criticises this decision as follows:

"The reasoning of Van Dijkhorst J may be criticised on the basis that, the amendment to the particulars of claim have been allowed, the 'crisp point' before the court was surely whether or not the initial defect in the particulars of claim (fatal though it may have been) *had* in fact been removed by the amendment, so

104 "Legal proceedings after cession of personal rights: some perennial problems" 1995 *SALJ* 385.

that the summons (as amended) was unassailable (see the *African Diamond Exporters* (2) case supra at 107H – in fin). According to Van Dijkhorst J, however, the court merely had 'to decide the crisp point whether a summons may disclose a cause of action which did not exist when it was issued' (at 716F–G). Quite apart from this line of criticism, the approach in the *Philotex* case has been questioned as perhaps being 'too technical' (see Harms loc cit). If the primary object of allowing an amendment is indeed 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done' (per Caney J in *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd & another* supra at 638A–B), then why should the courts require proof of 'exceptional or special circumstances' before they are prepared to allow an amendment to introduce a cause of action where no cause of action existed at the time when the summons was issued? It is true that the courts should try 'to discourage persons instituting action when they have no cause of action' (see the *African Diamond Exporters* (1) case at 97H in fin), but surely this can be achieved by appropriate orders for costs without departing from the approach governing amendments generally, as discussed above. If this is so, then irrespective of whether the cession is effected *before* the issue of summons (as in the *Sentrakoop Handelaars*, the *Philotex* and the *Barrie Marais* cases) or *after* the issue of summons but before litis contestatio (as in, for example, cases such as *Clark v Van Rensburg & Another* supra and *Morgan-Smith v Elektro Vroomen (Pty) Ltd en 'n Ander NO* 1977 (2) SA 191 (O)), the court should allow an application to substitute the cessionary for the cedent as plaintiff unless such substitution will cause 'such prejudice to the opposite party as cannot be remedied by an appropriate order as to costs, postponement or otherwise' (Herbstein & Van Winsen op cit 359; see also Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 8 ed (1990) by HJ Erasmus & DE Van Loggerenberg II: *The Rules* 23). Some support for this conclusion may, it is submitted, be found in the remarks of Kotzé AJA in *Du Toit v Vermeulen* 1972 (2) SA 848 (A) at 856G–857A."

In principle, I agree with the general tenor of Van Heerden's article. Two issues should, however, be stressed: first, Van Heerden discusses the problem of *locus standi* with reference to ordinary cessions. Here a distinction should be made between the different stages at which the cession takes place: if it takes place before summons was issued, the cessionary is the only person who has *locus standi* and a cedent who continues with the action has no cause of action and a special plea relying on lack of *locus standi* should succeed. Where cession was effected after issue of summons, the cessionary has to be substituted and the courts must allow amendment. The cause of action is the same, just the creditor a different person. In this case substitution is imperative, it flows from the very nature of cession as a substitution of creditors.

Van Dijkhorst J's judgment, on the other hand, pertains to a security cession. In such a case, depending on the type of security, the position is different from the one sketched above. If one accepts that Van Dijkhorst J had a fiduciary security cession in mind, the cause of action remains the same and although the cessionary becomes creditor after the cession, the "special circumstances" exist which calls for an amendment. The special circumstances are the facts that this creditor is creditor only for security purposes and that the cedent therefore also has an interest in the claim. The parties should apply for amendment so that the cessionary can be joined as plaintiff "to obtain a proper ventilation of the dispute between the parties (creditor and debtor of the claim), to determine the real issues between them (creditor and debtor), so that justice may be done". The fact that the "creditor" has ceded the claim has not changed the original cause of

action. Furthermore, the fact that it was a fiduciary cession entails that both the cedent and cessionary have an interest in the outcome of the litigation. The legal issue to be resolved is still whether the debtor owes his creditor (previously the cedent, but after the cession the cessionary, and also the cedent as interested party, since the cession was a fiduciary security cession).

Secondly, I disagree with Van Heerden where she states that

> "[i]f this is so, then irrespective of whether the cession is effected *before* the issue of summons or *after* the issue of summons but before litis contestatio, the court should allow an application to substitute the cessionary for the cedent as plaintiff . . ."

A plaintiff who has ceded his claim before issue of summons has no cause of action and therefore no *locus standi* and a plea based on lack of *locus standi* should succeed.

From the following statement of Page J in *Ovland Management (Tvl) (Pty) Ltd v Petprin (Pty) Ltd*[105] I gather that he was of the opinion that a properly executed security cession results in the cedent denuding itself of the right to enforce payment of the rentals in terms of the agreements of lease:

> "In the light of all the considerations I have mentioned, I am of the view that, on a proper construction of the main cession agreement, the right to enforce payment of the rentals owing in terms of the contract ceded remain vested in the respondent in the absence of the occurrence of any of the events stipulated in clauses 5.1 and 9; and that the magistrate was correct in holding, on that basis, that the respondent had the necessary *locus standi in judicio* to bring the present proceedings. The use of the word 'agency' in clause 5.2 conflicts so diametrically with the remainder of the document that it can safely be disregarded as an error; and the other *indicia* raised by the appellants are far outweighed by the considerations raised by the respondent in favour of the above interpretation."

The judge regarded the cession as a fiduciary security cession subject to the conditions mentioned in clause 5.1 to 9.

1 4 Conclusion

The number of cases and the above discussion of one of the problematical aspects of security by means of claims should be strong enough evidence of the urgent need to address this complex legal phenomenon. To place security by means of claims in South Africa on a sound foundation, all the above problematic issues will have to be addressed in order to find solutions to the existing problems. Various authors[106] and judges[107] have recommended such statutory intervention to clarify the uncertainties and anomalies surrounding cession, in general, and security cessions, in particular. I shall discuss possible solutions to the existing problems in section B.

(*To be continued*)

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105 1995 3 SA 276 (N).

106 See the referenees to Lubbe and Oelofse above. Domanski "Cession in securitatem debiti: National Bank v Cohen's Trustees reconsidered" 1995 *SA Merc LJ* 427 is the latest addition to the list of protesters: "Clarity and order need to be brought into this area of our law. It may be beyond the power of the Appellate Division to refashion the law at this stage. If that is the case, the Legislature must intervene."

107 See eg the remarks of Booysen J in *Britz v Sniegocki* 1989 4 SA 372 (D).

Fin de siècle of funksionele Romeinse reg?[1]

PhJ Thomas
MR LLD
Professor in die Regte, Universiteit van Pretoria

SUMMARY

Fin de siècle or functional Roman law?

The hidden or subconscious philosophy of scientists determines not only their choice of paradigm, but also their vision of the university. Duncan Kennedy's essay "Legal education as training for hierarchy" is discussed because of its critical analysis of modern legal education. The indoctrination that law should be distinguished from politics, determines the paradigm of the majority of jurists, in spite of the fact that the Frankfurter School has stated that positivism is neither objective nor neutral and this contention has been validated by events. However, the Critical Theory offers no alternative.

Roman law is eminently suited to teach students that there is no objective, neutral, correct, juridical solution, but that several solutions are possible, that the choice is determined by time and place and the result of religious, political, economical, social and other factors.

INLEIDING

In sy intreerede kry 'n professor kans om voor 'n uitgelese gehoor sonder onderbrekings of teenspraak uit te wei oor sy dissipline, en meer in besonder oor hoe hy die ontplooiing van sy vakgebied sien. Dit staan vas dat relevansie en gemeenskapsdiens in hierdie toekomsvisie 'n hoë premie sal geniet; meeste juriste weet dat Romeinse reg sedert die twaalfde eeu op universiteite aangebied word. Hierdie bydrae is egter daarop gerig om die leser in te lig hoe die Romeinse reg vandag nog die gemeenskap kan dien.

Daar is uiteraard sedert die twaalfde eeu baie oor hierdie onderwerp gepraat en geskryf en die leser word die oorsig van die tradisionele argumente ten gunste van die studie van die Romeinse reg gespaar. Meeste juriste sal met die bekendste standpunte vertroud wees. Bowendien is ek saam met Thomas Kuhn[2] van mening dat subjektiewe keuses, vergelykbaar met 'n geloofskeuse, die wetenskaplike 'n bepaalde paradigma laat kies. Soos bekend, is dit Kuhn se oortuiging dat 'n paradigma nie slegs die teorie, metodes, tegnieke, en metodologie bepaal nie, maar ook aannames, veronderstellings en waardes.

'n Punt wat eweneens met die regwetenskaplike se versweë of onbewuste filosofiese raamwerk verband hou en wat gevolglik by voorkeur vermy word, is

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1 Intreerede gelewer op 1996-08-01 by die Universiteit van Pretoria.
2 *The structure of scientific revolutions* (1970); *The essential tension* (1977).

die siening oor die universiteit: Is dit 'n vakskool, of iets meer? Na my mening word die verskillende antwoorde op hierdie vraag in 'n belangrike mate deur die aanvaarding van die vooruitgangsgedagte bepaal. Hierdie gedagte wat reeds in die Bybel gevind word, word in die Renaissance ontwikkel in die *Utopia* van Thomas More en die *Oratio de hominis dignitate* van Pico della Mirandola. Die vooruitgangsgedagte word ook in die werk van Karl Marx gevind en moet onderskei word van die evolusieteorie van Darwin se *Origin of species*. Die vooruitgangsgedagte word naamlik gekoppel aan die idee dat die mens self sy lewensloop bepaal, en lei tot die idee van die volmaakbaarheid van die mens en die samelewing. In die agtiende eeu het wetenskaplikes soos Vico, Voltaire, Turgot, Gibbon, Condillac en Condorcet,[3] geïnspireer deur die vooruitgangsgedagte, teorieë oor menslike vooruitgang ontwikkel. In die negentiende eeu het Henri Saint-Simon en sy leerling Auguste Comte bogenoemde in 'n filosofie uitgewerk[4] waarin die idee van die onvermydelike vooruitgang van die menslike rede en die wetenskappe sentraal staan. Die mondige mens sal deur middel van die wetenskap 'n beter samelewing met vrede, harmonie en orde vestig. Dit is dus die vooruitgangsgedagte wat in die stryd teen vooroordeel en bygeloof die moontlikheid van welvaart en geluk daarstel.

Die wêreld- en mensbeskouing wat op die vooruitgangsgedagte steun, het sedert die Renaissance besondere belang aan opvoeding en opleiding geheg en die aard van die opleiding bepaal, naamlik 'n opleiding wat daarop gerig moet wees om die mens en die wêreld te verbeter en te vervolmaak. Hierdie oogmerk bepaal die keuse van vakke en metode. So was die humanistiese regsopleiding wat geleidelik vanaf die Renaissance die Westerse universiteitsmodel gevorm het, nie primêr daarop gerig om regspraktisyns soos ambagsmanne op te lei nie. Die aanhangers van die ou skool, wat deur die humaniste as 'n geldmaakberekende broodstudie gebrandmerk is,[5] was en is dan ook onmiddellik self gereed met die verwyt dat die opleiding mank gaan aan relevansie vir die praktyk.[6]

Wanneer daar egter gekies moet word tussen onderwys wat daarop gerig was om 'n veelsydige mens, 'n individualis wat rasioneel leer dink het, 'n mens wat probeer het om homself asook die wêreld te vervolmaak, af te lewer, en die alternatief: opleiding met die oog op 'n gespesialiseerde massamens wat nie belangstel, of as gevolg van sy opleiding geen belang kán stel in die vooruitgangsideaal nie, staan my keuse vas.

Ek wil egter onmiddellik erken dat bogenoemde 'n ideaal daarstel wat nooit in die geskiedenis van die universiteit geheel en al verwerklik is nie, en dat

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3 Antoine-Nicolas de Condorcet *L'Esquisse d'un tableau historique des progrès de l'esprit humain* (1795). Condorcet het die leer van vooruitgang deur rede en vryheid op elke gebied van menslike aktiwiteit toegepas.

4 Auguste Comte *Cours de philosophie positive* vol 6 (1830–1842); *Discours sur l'ensemble du positivisme* (1848).

5 Vgl die uitlatings van Pretarca, Boccaccio, Bruni, Poggio, Vegio en Valla in hierdie verband by Voigt *Die Wiederbelebung des classischen Alterthums oder das erste Jahrhundert des Humanismus* (1859) II 477–485. Ook Rabelais se *Gargantua Pantagruel* (1532–1564) is veelseggend in hierdie verband.

6 Dit word bv gedoen deur Bodin wat teleurgesteld in sy akademiese loopbaan, as advokaat aan die *Parlement de Paris* gaan praktiseer en homself giftig oor sy gewese kollegas uitlaat (Franklin *Jean Bodin and the sixteenth-century revolution in the methodology of law and history* (1966) 63 ev).

regsfakulteite deur die eeue heen gekenmerk is deur die dualisme van die wetenskaplike ambagskool en die ambagtelike wetenskap.

Laat ons egter terugkeer na die kernonderwerp van die bydrae. Ek wil dit in drie dele afhandel. Eerstens sal ek kortliks aan die hand van Duncan Kennedy se opstel "Legal education as training for hierarchy"[7] die vernaamste kenmerke van die hedendaagse regsopleiding noem. Vervolgens kom die onvermydelike resultaat van sodanige opleiding, positivisme, ter sprake. Ten slotte word die Romeinse reg se rol in die regsopleiding en die potensiaal om nuansering van denke te bewerkstellig, bespreek. 'n Aantal voorbeelde sal laasgenoemde illustreer.

REGSOPLEIDING

Duncan Kennedy se opstel is gekies omdat die beskrywing van regsopleiding deur hierdie Harvard-regsprofessor bepaalde essensiële aspekte beklemtoon wat myns insiens universeel is. Dit beteken geensins dat ek onvoorwaardelik met al sy bewerings en gevolgtrekkings saamstem nie, of dat alles wat deur hom gesê word, inderdaad universeel is nie.

Die relevante deel van sy boodskap is egter dat regsfakulteite 'n technikonmentaliteit projekteer, met eindelose aandag aan detail ten koste van die groter geheel; dat studente glo wat aan hulle vertel word omtrent die reg, die regsberoep en die samelewing; dat 'n verbasende aantal eerstejaars regstudie gekies het om die samelewing deur middel van die reg te dien – om die onderdruktes te help en die samelewing te verbeter; en dat die lesingsaal met sy pseudo-deelname 'n mengsel van die patriargale familie en 'n Kafka-staat verteenwoordig.

Die studente leer 'n nuwe taal asook om tot dusver onverstaanbare dinge te begryp. Hulle ontdek dat daar "harder" en "sagter" dosente is; dat die "sagter" dosente oor die algemeen meer liberaal dink, minder intimiderend in besprekings is, meer oopstaan vir billikheids-, beleids- of politieke argumente, terwyl die "harder" dosente meer populariteit geniet.

Die regstudie bestaan uit die leer van reëls – wat hulle is en hoekom hulle so moet wees. In hierdie verband is die deur-Kennedy-gebruikte voorbeeld van die sogenaamde "cold case" en die "hot case" insiggewend. Laasgenoemde het gewoonlik 'n simpatieke eiser en 'n onsimpatieke verweerder. Die verweerder is byvoorbeeld 'n mynmaatskappy wat grond van 'n boer gehuur het vir oopgroefmynbou en wat sy belofte om na afloop van die mynoperasie die grond in sy oorspronklike toestand te herstel, nie nagekom het nie. Die regter ken 'n paar honderd dollar aan die boer toe maar verplig die maatskappy nie om die grond te herstel nie. Hierdie saak word bespreek om die punt te maak dat die student se aanvanklike reaksie naïef, nie-juridies, irrelevant en verkeerd was. Daar is vanselfsprekend goeie redes vir die uitspraak en die standpunt van die juris moet op die reg gebaseer en logies wees en nie bloot gevoelsmatig nie.

Deur die eeue heen het juriste met oortuiging beweer dat hulle niks op universiteit geleer het nie,[8] maar Kennedy ontken dit. Sy bewering is dat hulle sekere eenvoudige maar vir die reg belangrike vaardighede geleer het. Eerstens

7 In Kairys *The politics of law. A progressive critique* (1982) 38–58.

8 Sien bv die voorwoord van Simon van Leeuwen se *Paratitula juris novissimi, dat is Een kort begrip van het Rooms-Hollandts-reght* (1652).

om 'n enorme aantal reëls te memoriseer; dit op sigself is moontlik deur die verskillende kategorieë van die stelsel te memoriseer. Verder het hulle sogenaamde "issue spotting" geleer, dit wil sê hulle kan vasstel hoe reëls dubbelsinnig, teenstrydig of ontoereikend kan wees. Ten slotte het hulle die analise van hofsake asook die lys van *pro-* en *contra*-argumente wat juriste gebruik om 'n bepaalde reël binne of buite werking te argumenteer, geleer.

Hierdie taamlik basiese vaardighede word aangeleer op 'n wyse wat die student mistifiseer. Die lesings gee voor dat daar 'n analitiese proses bestaan wat die reg onthul, die sogenaamde juridiese redenasie, om te "dink soos 'n juris". Hierdie manier van dink is onverstaanbaar vir die leek maar verduidelik en bekragtig die regsreëls. Die belangrike vaardigheid "om soos 'n juris te dink", word deur osmose verkry. Nie alleen word elke reël sodanig op sy eie aangebied dat dit vir die student onmoontlik is om 'n totaalbeeld te verkry van wat die reg is, hoe dit werk of hoe dit moontlik verander kan word nie, maar bowendien word dié vaardighede sonder enige praktiese oefening geleer.

Hierdie beeld wat die regsfakulteit projekteer, is volgens Kennedy geensins die resultaat van onkunde en domheid nie maar doelbewus. Die intellektuele kern van die opleiding is die onderskeid tussen reg en politiek. Dosente oortuig die studente dat "dink soos 'n juris" inderdaad bestaan en verskil van byvoorbeeld "dink soos 'n politikus, teoloog, of 'n gewone mens".

Dit word moontlik gemaak deurdat dit die dosent is wat bepaal watter argumente in watter gevalle geldig is. Die totale opleiding is daarop gerig om studente juridiese redenasievermoë aan te leer wat noodsaaklik is om die korrekte oplossing te vind. Vakke soos regsfilosofie en regsgeskiedenis is periferies, en word nie werklik as relevant vir die harde, objektiewe, ernstige, streng analitiese kern van die reg beskou nie. Hierdie vakke word gesien as 'n soort voltooiingskool om die juris die sosiale kuns van "self-presentasie" te laat aanleer.

Wat gevolglik nooit bevraagteken word nie, is dat daar slegs een korrekte juridiese oplossing bestaan. Daar word verswyg dat die korrekte juridiese oplossing medebepaal word deur politieke, ekonomiese, ideologiese en ander faktore. Dat die essensie van "om te dink soos 'n juris" beteken dat vrywel enige oplossing aanneemlik gemotiveer kan word, is die kern van die probleem.

Die sogenaamde kritiese ingesteldheid, wat regsfakulteite in hul missies propageer, is 'n illusie. Om te kan beoordeel, kritiseer en indien nodig veroordeel, word rasionele denke vereis, maar soos Kennedy tereg opmerk, sou dit 'n besondere student wees wat op sy eie 'n kritiese standpunt ten aansien van die stelsel sou kon ontwikkel. Die moontlike bevraagtekening van sekere reëls en van die sisteem, asook 'n bespreking van die verhouding tussen reg en samelewing, word toebedeel aan die "luukse" regsgeskiedenis en regsfilosofie.

REGSPOSITIVISME

Dat die so pas gesketste regstudie regspositiviste aflewer, behoort nie verbasing te wek nie. Dit is nie my bedoeling om die regspositivisme en sy verskillende verskyningsvorme te bespreek nie, maar vanaf die mees simplistiese wetspositivisme[9]

9 Die eenvoudigste vorm, 'n blote doel en magspositivisme wat daarop gebaseer is dat alle reg en geregtigheid in die bevele van die wetgewer setel (vgl Wieacker *Privatrechtsgeschichte der Neuzeit* (1967) 431–468; Du Plessis "Navorsingsmetodes en -tendense" in Venter ea (reds) *Regsnavorsing* (1990) 89).

tot en met die meer genuanseerde wetenskaplike positivisme[10] vertoon hulle almal dieselfde kenmerk: Die reg moet hom by die harde feite hou. Die positivisme met sy waarneembare empiriese feite, sy objektiwiteit en rasionaliteit en sy eliminasie van waardevrae uit die regswetenskap en regsberoep het die juris gevorm.

Hierdie sogenaamde neutraliteit of objektiwiteit van die juris verlos hom van die verpligting om ideologiese, filosofiese, sosiale, ekonomiese, politieke en ander faktore in sy werk en denke te betrek, terwyl hierdie faktore almal integrerende bestanddele is van die werklikheid waarmee die reg hom besig hou. Dit beteken dat die regswerklikheid van die positiviste slegs op die werklikheid soos deur hulle self gekonstrueer, betrekking het.

Selfs die wetenskaplike positivisme, wat regsnorme uit die regskultuur aflei, beskou die reg as 'n outonome sisteem wat in isolasie "suiwer wetenskaplik" bestudeer kan word.

Dit beteken nie dat positiviste geen oog vir regverdigheid sou hê nie, maar hulle regsopleiding lei tot 'n eensydige visie met betrekking tot die ontstaansbronne van die reg, naamlik wetgewerswil of regskultuur. Dit is hulle vertrekpunt en hierin word die reg en geregtigheid gevind.[11]

Daar is egter aangetoon dat ook die positivisme, insluitend die regspositivisme, nie objektief of neutraal is nie, maar lewensbeskoulik medebepaal word. Die Frankfurtse Skool het in 1923 begin om sosiale vraagstukke te bestudeer en as doelstelling van die geesteswetenskappe geformuleer dat die positiewe wetenskap van sy sogenaamde objektiwiteit en rasionaliteit genees moet word.[12] In hierdie konteks word beklemtoon dat wetenskap self ideologie kan word en die gegewe feite kan regverdig; dat die rasionaliteit van die positivisme doelrasionaliteit is en dat die wetenskap wat die mens moet bevry, gebruik word om hom in bedwang te hou.[13]

Die Kritiese Teorie wat deur die Frankfurtse Skool ontwikkel is, bepleit gevolglik die betekenis van waardes in wetenskapsbeoefening. Die positivistiese feit/waarde-onderskeiding ken aan feite 'n onafhanklike bestaan in die werklikheid toe, terwyl waardes wat afhanklik van menslike besluitneming sou wees, ontmasker word. In die plek daarvan word aanvaar dat feite en waardes vir hulle aanvaarding en bestaan afhanklik van mekaar is. Wetenskaplike feite word bepaal deur die waardes wat die wetenskap hanteer om feite van skimme te onderskei, terwyl kritiese bespreking van waardes altyd 'n beroep op die feite insluit.[14]

Habermas[15] beweer dat die sogenaamde objektiewe wetenskap nooit die belange erken het wat hom lei nie, met as resultaat dat die mens toelaat dat hy bepaal word deur die sogenaamde objektiewe kennis. Die mens is onbewus van die feit dat ander belange en ander doeleindes ander kennis kan produseer. Met ander woorde, die sogenaamde objektiewe wetenskaplike kennis wat as waarheid

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10 Wieacker 558–586.
11 Du Plessis 90.
12 Thomas "Wetenskapsfilosofie en die regswetenskap" 1995 *THRHR* 39–42.
13 Horkheimer en Adorno *Dialectic of enlightenment* (1992) 3–43.
14 Habermas "Rationalism divided in two" in Giddens (red) *Positivism and sociology* (1974) 213 ev.
15 *Erkenntnis und Interesse* (1968).

aangebied word, is in der waarheid konstruksies wat op 'n besondere belang gebaseer is.[16]

Die Frankfurtse Skool het veral met die studente-opstande van 1968 bekendheid buite akademiese kringe verwerf en dit tipeer die regswetenskap omdat 'n regsvariant van die Kritiese Teorie eers na daardie datum sy verskyning maak. Hierdie Critical Legal Studies beklemtoon uiteraard die ideologiese, politieke en ander waardes wat die regswetenskap bepaal. Dit spreek vanself dat die regswerklikheid soos deur die positiviste gekonstrueer, verwerp word en dat uitdruklik gestel word dat die regswetenskap nie in afsondering van die sosiale, politieke, ekonomiese en ander werklikhede beoefen kan word nie. Regskwessies is sosiaal-maatskaplik bepaal en moet sosiaal-maatskaplik beskou word. Een van die belangrikste eksponente van die beweging, Roberto Unger, wil die spanning tussen die reg en die onderliggende belange onthul. Hy gebruik die konflikte binne die regstelsel om die disharmonieë in die stelsel uit te lig. Op daardie wyse hoop hy om die gevoel van noodsaaklikheid in die regswetenskap te ondermyn. Deur aan te toon dat die reg en regswetenskap binne 'n kulturele konteks bestaan ('n konteks waarin die samelewing eerder gekonstrueer as gegewe is) probeer hy om die reg te herskep.[17]

Daar kan met twee opmerkings hieromtrent volstaan word: Die aanhangers van Critical Legal Studies verteenwoordig nie die heersende paradigma in die regswetenskap nie. Die beweging lyk dieselfde lot as die Kritiese Teorie beskore, naamlik esoteriese meditasie en elitisme.

Dit bring 'n mens weer by die onderwerp. Dit sal min teenspraak ontlok wanneer die stelling gemaak word dat dit 'n buitengewone student sou wees wat op sy eie 'n kritiese teoretiese standpunt ten aansien van die stelsel van onderrig en die regsisteem sou kon ontwikkel. Studente het te min kennis om te kan vasstel dat 'n dosent slegs een vorm van regsdenke en regswerklikheid bespreek en buite-juridiese faktore soos godsdiens, politiek, filosofie en ekonomie ignoreer. Die meeste studente aanvaar gewillig die voorstelling van die reg as 'n neutrale, a-politiese, op meriete gebaseerde sisteem wat in isolasie soos 'n ambag bestudeer kan word.

Dit beteken egter nie dat die *status quo* sonder protes gehandhaaf moet word nie. Dit bring my by die laaste afdeling, die potensiële rol van Romeinse reg in die laat-twintigste-eeuse regsopleiding.

ROMEINSE REG

Die Romeinse reg is by uitstek geskik om die student aan die begin van sy studie bewus te maak van die feit dat daar nie iets soos "die juiste juridiese oplossing" bestaan nie; dat die sogenaamde "dink soos 'n juris" net so maklik aanneemlike regverdigings vir vrywel enige moontlike oplossing kan verskaf. Indien die "kritiese denke", wat een van die missies van regsopleiding is, ernstig opgevat moet word, moet dit in die kursus Romeinse reg aangespreek word. Die alternatief sou wees om aan die hand van die Critical Legal Studies-paradigma die hofuitsprake en vervolgens die handboeke in elke dissipline te ontleed.

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16 Romm "Habermas se wetenskapsteorie" in Snyman en Du Plessis (reds) *Wetenskapsbeelde in die geesteswetenskappe* (1987) 180.

17 Visser "The legal historian as subversive or: killing the Capitoline geese" in Visser (red) *Essays on the history of law* (1989) 20.

Die Romeinse reg gee op elke gebied duidelike voorbeelde dat meerdere oplossings vir 'n bepaalde probleem moontlik is en dat godsdienstige, politieke, ekonomiese en ander faktore die verskeie oplossings daarstel.

Egskeiding

Dit is 'n cliché dat die resente ontwikkelings van die egskeidingsreg die Romeinsregtelike beginsel van *libera matrimonia esse antiquitus placuit*[18] geaktualiseer het. Hierdie deur die negentiende eeuse juriste gevreesde en verdoemde beginsel van egskeidingsvryheid, wat selfs deur sommiges van hulle as oorsaak van die ondergang van die Romeinse ryk aangedui is, is egter kenmerkend van die klassieke Romeinse reg, maar die voor- asook die na-klassieke reg maak dit duidelik dat ander oplossings ook moontlik is.

In die voor-klassieke reg was die huwelik *cum manu* die norm. Dit het beteken dat die vrou onder die gesag van haar man of sy vader gekom het. Die *manus*-huwelik het deur middel van *farreo* of *coemptio* tot stand gekom,[19] terwyl vir die geval waar daar van 'n huweliksvoltrekking sonder *manus* gebruik gemaak is die *usus* deur tydsverloop van een jaar die *manus* gevestig het. Die detail is minder relevant maar die gevolge gee duidelik insig in die moontlikheid van egskeiding. Die vrou kom naamlik onder die gesag van haar eggenoot waar sy *filiae loco* staan en indien sy voor die huwelik enige boedel gehad het, kom die bates haar man toe. Hoewel dit in beginsel moontlik was om die *manus*-huwelik deur middel van *diffareatio* of *mancipatio* te ontbind, moet in gedagte gehou word dat die huwelik in 'n mate 'n familie-aangeleentheid was[20] en dat die *paterfamilias* heer en meester oor sowel die persone as die sake onder sy gesag was.[21] Dit maak die gevolgtrekking waarskynlik dat egskeiding in hierdie bedeling eerder uitsondering as reël sou wees. Die egskeidingsvryheid van die klassieke reg is dus bevorder deur die in-onbruik-verval van die *manus*-huwelik.[22]

In die na-klassieke reg voer die eerste Christelike keiser Constantinus en sy opvolgers keiserlike wetgewing in wat goeie gronde vir egskeiding formuleer en egskeiding sonder goeie grond straf, alhoewel benadruk moet word dat sodanige egskeiding nie nietig verklaar word nie. Justinianus skaf in *Nov* 137 in 542 die egskeiding deur ooreenkoms tussen die gades af en verklaar in 556 'n egskeiding sonder grondige rede nietig.[23] Sy opvolger Justinus voer egter in 566 die egskeiding deur ooreenkoms weer in.[24]

Die hierbo gesketste paradoks vind sy basis in verskillende opvattings omtrent die huwelik asook die mens, te wete enersyds dat die huwelik gegrondves is op die gelykwaardige, vrye wil van die partye wat 'n belangrike humanitêre erkenning van die menslike persoonlikheid impliseer, maar wat in kontras staan met

18 *C* 8 38 2: "dit is van oudsher die *communis opinio* dat huwelike vry is"; sien ook *C* 5 4 14. Macours "Libera matrimonia esse antiquitus placuit" in Spruit en Van de Vrugt (reds) *Brocardica in honorem GC JJ van den Bergh* (1987) 55–62.

19 Gaius 1 110.

20 Sien die jonger Plinius *Epistulae* 1 14.

21 Sien Dionysius van Halicarnassus 2 26 27, *Leges regiae* Romulus FIRA I 8.

22 Sien Spruit "Een antieke huwelijkstwist" in *Romeinsrechtelijke Romanesken* (1979) 73–85 wat aan die hand van die *casus* van *D* 24 1 64 die probleme van die oorgangsperiode skets.

23 *Nov* 143 11.

24 *Nov* 140.

die huwelik as sakrament[25] soos later in die *Decretum Tametsi* van 1563 geformaliseer is, en die mens se onderhorigheid aan God.

Bogenoemde is nie slegs die gevolg van 'n veranderende mensbeeld nie maar hou uiteraard verband met die posisie van die vrou binne die patriargale samelewing asook met die karakter van die huwelik.

Handelingsbevoegdheid van die vrou

In die voor-klassieke reg moes elke vrou onder die gesag van 'n man staan, hetsy haar vader, haar man, dan wel 'n voog. In die klassieke reg het die *manus*-huwelik vir alle praktiese doeleindes verdwyn terwyl die *tutela mulierum* geen werklike betekenis meer het nie.[26] Die *SC Velleianum* van 46 nC leer *a contrario* dat vroue in alle opsigte handelingsbevoeg geword het.[27]

Karakter van die huwelik

Die Romeinse huwelik is geen regsinstelling nie maar 'n sosiale feit wat in die private sfeer sonder staatsinmenging gesluit en ontbind word. Die reg verbind sekere gevolge aan die huwelik, maar dit is opmerklik dat by die *sine manu*-huwelik albei partye eienaar van hulle eie boedel bly en sonder beperkings daaroor kan beskik.[28]

Testeervryheid

Uit die Twaalf Tafels se *Uti legassit suae rei, ita ius esto*[29] kan volledige testeervryheid afgelei word en die *pater* kon gevolglik sy naaste verwante sonder enige rede onterf. Die enigste beperking was dat dit op die korrekte formele manier gedoen moes wees. Die Justiniaanse finalisering van die reëling van die *portio legitima*[30] het in die Wes-Europese en daarvan afgeleide regstelsels inslag gevind.

Kontrastering van die Anglo-Amerikaanse testeervryheid teenoor die kontinentaalregtelike legitieme porsies plaas die sogenaamde organiese ontwikkeling van die Romeinse reg of enige ander regstelsel onder diskussie,[31] maar benadruk die standpunt dat regskwessies sosiaal-maatskaplik bepaal is en gevolglik sosiaal-maatskaplik beskou moet word.

Laesio enormis

Laesio enormis is vermoedelik ingevoer deur keisers Diocletianus en Maximianus in twee reskripte van 285 en 293 nC en oorgeneem in *C* 4 44 2 en 8. Die aldus ontwikkelde beginsel van aansienlike skade bied aan die benadeelde verkoper die geleentheid om sy skade te kanselleer. Daar word naamlik bepaal dat indien die koopprys van 'n stuk grond minder as die helfte van die werklike waarde van die saak bedra het, die verkoper die kontrak kan kanselleer. Die

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25 Paulus *Brief aan die Efesiërs* 5 32.
26 Gaius 1 144 145 157 171 190 194; Kaser 367 ev.
27 Van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 496 ev.
28 Kaser *Das römische Privatrecht* I (1971) 329.
29 Gaius 2 224.
30 *C* 3 28; *Nov* 18 115.
31 Die evolusie-idee bly aantreklik soos blyk uit bv Stein *Legal evolution. The story of an idea* (1980); Watson *The evolution of law* (1985). Dit vorm ook die ideologiese basis van vrywel die totaliteit van regshistoriese handboeke.

koper kan egter sodanige ontbinding van die kontrak verhinder deur die prys aan te suiwer tot die volle waarde van die saak.

Hierdie reskripte is in regstreekse konflik met *D* 19 2 22 3 en 4 4 15 4[32] waarvolgens dit toelaatbaar is om die ander party te kul by koop- en huurkontrakte solank daar geen *dolus* plaasvind nie.[33] Aangesien bogenoemde *Digesta*-tekste die beginsel van vrye mededinging in die handelsverkeer sou beliggaam,[34] het die twee keiserlike reskripte tot 'n aansienlike literatuur aanleiding gegee.[35]

Dit is nie my bedoeling om tot die debat toe te tree, of om die werk van een of meerdere regshistorici[36] hier op te som, of om 'n nuwe hipotese daar te stel nie, maar dit is opmerklik hoe die wel en die weë van die leerstuk ideologies gefundeer is. Die veralgemening wat in die gemeenskaps-georiënteerde laat-Middeleeue plaasvind, is moeilik verenigbaar met die in die agtiende en negentiende eeu ontwikkelde leerstuk van kontrakteervryheid. Sodra laasgenoemde tot dogma verhef word omdat die heersende ekonomiese teorieë dit as 'n noodsaaklike hoeksteen vir die ontwikkeling van handel en nywerheid beskou het, word die *laesio enormis*-beginsel aangeveg en ten slotte afgeskaf.

Die *laesio enormis*-beginsel erken naamlik die ongelykheid in onderhandelingsposisie van sekere kontrakspartye en skep sodoende die basis vir 'n algemene beginsel dat 'n kontraksparty wat as gevolg van sy swak onderhandelingsposisie in 'n baie onbillike kontrak tree, daardie kontrak kan kanselleer. Dat sodanige beginsel nie aanvaarbaar is nie vir generasies van juriste wat opgelei is om kontrakteervryheid bokant godsdiensvryheid te stel, blyk uit die enorme hoeveelheid literatuur oor twee tekste wat lankal hulle gelding verloor het. Die feit dat die keisers vir die eerste keer die gelykheidsbeginsel in die kontraktereg ingevoer het, het ook min waardering ontvang van 'n juristestand wat formele gelykheid voldoende ag.

'n Feit wat in hierdie verband vreemd is, en wat sedert *Bank of Lisbon and South Africa v De Ornelas*[37] aktueel is, is dat die *bona fides* nie vir soortgelyke situasies voorsiening gemaak het nie.[38]

Negotia stricti iuris v negotia bonae fidei

In aansluiting by bogenoemde *Lisbon*-saak, moet die onderskeid wat in die Romeinse reg gemaak word tussen die *negotia stricti iuris* en die *negotia bonae*

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32 *D* 19 2 22 3 (Paulus libro trigesimo quarto ad edictum): Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus iuris est. *D* 4 4 16 4 (Ulpianus libro undecimo ad edictum): Idem Pomponius ait in pretio emptionis et venditionis naturaliter licere contrahentibus se circumvenire.

33 *D* 19 2 23 (Hermogenianus libro secundo iuris epitomarum): et ideo praetextu minoris pensionis, locatione facta, si nullus dolus adversarii probari possit, rescindi locatio non potest.

34 Kaser 550; Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 289.

35 Sien Becker *Die Lehre von der laesio enormis in der Sicht der heutigen Wucherproblematik* Beiträge zur neueren Privatrechtsgeshichte Band 10 (1993) vir vrywel volledige literatuur-oorsig.

36 *In casu* Becker *supra* vn 35.

37 1988 3 SA 580 (A).

38 Cicero *De officiis* 3 12 ev het hom in dieselfde trant uitgelaat en kom tot die konklusie dat dit in stryd is met die natuur, wat die bron van die reg is, om uit die onwetendheid van ander wins te maak.

fidei genoem word. In die geval van eersgenoemde is die regte en verpligtinge van die partye streng bepaal en omlyn en is die regter gebonde aan hierdie streng bepaling en omlyning. Die *negotia bonae fidei* weer berus op die goeie trou en gee die regter die geleentheid om die regte en verpligtinge van die partye ooreenkomstig die vereistes van die goeie trou te bepaal.[39]

Possessio

Besit, waarvan Paulus in *D* 41 2 1 *pr* die daadwerklike liggaamlike kontak met die saak benadruk, is in beginsel 'n feitevraag. Met bogenoemde feitlike mag oor 'n saak in gedagte, sal die konstruksie van behoud van besit *animo solo*, dit wil sê deur die bedoeling alleen, as onmoontlik beskou moet word. *D* 41 2 wat oor die verkryging en verlies van besit handel, bevat egter verskeie tekste[40] wat hierdie konstruksie erken. Dat besit in die na-klassieke reg tot 'n reg ontwikkel, sal weinig verbasing wek. Die pogings wat aangewend is om die diverse tekste te probeer versoen, is meer verbasend.

Meerdere eiendomsregte

Die Romeinse eiendomsregte, dit wil sê die Romeinsregtelike eiendomsreg met sy jonger broer die bonitêre of praetoriese eiendomsreg, toon dat die Romeinse eiendomsreg nie die absolute heilige koei was wat latere juriste graag daarvan gemaak het nie, maar dat meerdere eiendomsmodaliteite deur die Romeinse juriste erken is. Hierdie onderskeid tussen die formeel juridiese eienaar en die ekonomiese eienaar word in die Romeinse reg ook by *fiducia cum creditore contracta* aangetref, en in 'n mate by die *peculium* en die provinsiale grond. Vir juriste wat met bogenoemde figure bekend is, sal die bekendstelling van die "voorlopige eiendomsreg"[41] minder skokkend wees.

Justa causa traditionis

Die *justa causa traditionis* en meer spesifiek die vraag betreffende die kousale dan wel die abstrakte stelsel van eiendomsoordrag[42] is 'n voorbeeld *par excellence* van die ryke verskeidenheid van die Romeinse reg. Die vraag watter stelsel die Romeine gevolg het, hou die dogmatici al eeue besig[43] en die naasmekaarstelling van *D* 41 1 36[44] waarin die abstrakte *causa* volstaan en

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39 Van Warmelo *'n Inleiding tot die studie van die Romeinse reg* (1971) 257 ev 260.

40 *D* 44 2 44 2; *eod tit* 45 en 46; vgl ook Paulus *Sententiae* 5 2 1.

41 Wet op Ontwikkelingsfasilitering 67 van 1995.

42 Vir 'n uiteensetting sien Van Oven 74–79.

43 Die Bisantynse juriste het die probleem eerste bespreek; sien Van Warmelo "Justa causa traditionis" in *Studi in onore di Cesare Sanfilippo* 1 (1982) 619 vn 4. Duarenus en Donellus het die abstrakte *causa* voorgestel, terwyl Pothier die konkrete *causa* aangehang het, aldus Van Warmelo 619 en vn 4 en 5. Von Savigny het die teorie van die "dingliches Vertrag" ontwikkel wat in die *BGB* opgeneem is. Vir 'n oorsig oor die belangrikste literatuur vanaf 1928 tot 1975 sien Van Warmelo 618 vn 2.

44 Iul 13 dig: Cum in corpus quidem quod traditur consentiamus, in causus vero dissentiamus, non animadverto, cur inefficax sit traditio, veluti si ego credam me ex testamento tibi obligatum esse, ut fundum tradam, tu existimes ex stipulatu tibi eum deberi, nam et si pecuniam numeratam tibi tradam donandi gratia, tu eam quasi creditam accipias, constat proprietatem ad te transire nec impedimento esse, quod circa causam dandi atque accipiendi dissenserimus. Sien Van Warmelo 647 vn 48 vir literatuur oor die teks. Ander tekste wat hierdie standpunt onderskraag is *D* 18 1 41 1; 18 1 57 *pr*. Vgl egter ook *D* 24 1 39 10 11; 24 1 5 18; 12 5 3; 12 6 1 1; 12 6 26 9.

D 41 1 35[45] waarin 'n konkrete *causa* vereis word, het tot soveel analise, hipoteses en teorieë aanleiding gegee dat dit slegs vir spesialiste op hierdie deelgebied toeganklik is. Sedert die humaniste die onaantasbaarheid van tekste en die egtheid van dokumente begin bevraagteken het, het die interpolasie in sy ruimste betekenis, dit wil sê doelbewuste asook toevallige Justiniaanse en voor-Justiniaanse verandering in die teks, sy doel ruimskoots gedien, dit wil sê die dogmas teen ondermyning beskerm. Gevolglik is dit die treurige waarheid dat geen analise van die onderhawige probleem sonder drastiese aanpassings van die tekste aangetref word nie.[46] Die moontlikheid dat die Romeinse reg en meer in die besonder die Romeinse juris meer geneë was tot 'n billike oplossing in die konkrete geval as in die instandhouding van 'n regsteorie, is klaarblyklik moeilik aanvaarbaar.

KONKLUSIE

Bostaande uiteensetting maak die sogenaamde organiese ontwikkeling van die reg as 'n mite af, en ontwikkel bowendien die hipotese dat die sogenaamde gebreke in die *Digesta* geensins gebreke is nie. Die herhalings met verskillende inhoud, die teenstrydighede, die onnoukeurige taal en ander klagtes wat sedert die twaalfde eeu ywerig deur regswetenskaplikes verduidelik en weggepraat word of soms ook onvermeld gelaat is, word in afwyking van die dogmatiese, positivistiese kritiek juis as die ware bewys van die genialiteit van die Romeinse juris gesien. Dit is dié juris wat 'n wetenskap opgebou het wat oortuigend aantoon dat dit ook anders kan – dat die oplossing van die maatskaplike konteks en nie van dogma nie afhanklik is.

Dit is gevolglik jammer dat ons inligting omtrent die Romeinse juriste beperk is en dat ook ten aansien van hierdie onderwerp feit en fiksie tot 'n mite gelei het; die mite van die juris wat aan die voet van die groot regsgeleerdes sit en leer en mettertyd self gratis regsadvies uitdeel *honoris causa*.[47] Tacitus[48] verheerlik hierdie goeie ou tyd, maar reeds in die tyd van Cicero was dit gebruiklik dat aspirant politici en juriste 'n formele opleiding as retor gevolg het wat vergelyk kan word met die moderne BA-studie. Hierdie studie het geskiedenis, reg, astronomie, geografie, filosofie, musiek, literatuur, mitologie en geometrie omvat, maar al die vakke was ondergeskik aan die retoriek, die kuns om vloeiend en oortuigend oor enige onderwerp te kan argumenteer.[49]

Wanneer die student voldoende taalkunde geleer het om sinne en hele paragrawe met gemak te konstrueer, het hulle onderwerpe vir toesprake, *suasoriae* en *controversiae* aangepak.[50] In laasgenoemdes is onderwerpe betreffende 'n regspunt aangespreek en moes die student albei kante van die saak argumenteer.

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45 Ulp 7 disp: Si procurator meus vel tutor pupilli rem suam quasi meam vel pupilli alii tradiderit, non recissit ab eis dominium et nulla est alienatio, quia nemo errans rem suam amittit. Ook *D* 12 1 18 *pr*; 24 1 5 18; 24 1 6.

46 Vgl Van Warmelo 648 ev.

47 Van der Merwe "Regsmetodologie: 'n Terreinverkenning in historiese perspektief 1987 *TSAR* 137 in besonder vn 64 65.

48 *Dialogus de oratoribus* 34 1–6. Daar moet egter opgemerk word dat Tacitus noem dat die jong man deur sy vader na 'n prominente orator geneem is en hierdie orator dan vergesel het na die howe asook die volkvergaderings.

49 Shelton *As the Romans did. A sourcebook in Roman social history* (1988) 119.

50 Marcus Annaeus Seneca *Controversiae; Suasoriae.*

'n Voorbeeld van sulke *controversiae* is die geval van 'n man wat deur seerowers gevang word en aan sy vader skryf vir die losgeld. Sy vader weier om die losgeld te betaal. Die dogter van die seerowerkaptein laat hom belowe dat hy met haar sal trou as sy hom laat ontsnap. Hy doen beide, dit wil sê belowe en ontsnap. Die meisie verlaat haar vader en trou met die jong man. 'n Ryk weduwee verskyn op die toneel en die vader beveel die seun om te skei en met die weduwee te trou. Die seun weier en die vader verstoot hom.

Alhoewel die outeurs wat hulself met retoriek besig hou hoofsaaklik op die voordragtegniek konsentreer,[51] spreek dit vanself dat die denktegniek, die onderliggende wetenskapsmetode, vir ons doeleindes belangriker is. Derek van der Merwe het verduidelik hoe die grondlegger van wetenskapsleer, Aristoteles, tussen logika en dialektiek onderskei het. Dialektiek is die tak van die wetenskap wat vanuit geredelik-geloofwaardige menings redeneer en wat oorreding ten doel het.[52] Die proses van oorreding geskied deur die probleem vanuit verskeie *topoi*, gesigspunte,[53] te benader en aan die hand daarvan óf induktief óf deduktief te redeneer. Cicero wat die Griekse denke geromaniseer het, skryf in 44 vC sy *Topica* wat 'n soort resepboek vir die retoriek is. Cicero konsentreer op die ontwerp van argumente wat volgens hom aan die hand van *topoi* wat hy as *loci* vertaal, geskied. Voorbeelde daarvan is definisie, *genus*, *species*, etimologie, analogie, oorsaak, gevolg, teenoorgesteldheid en *reductio ad absurdum*.

Dat hierdie denktegniek die regsdenke beïnvloed, word deesdae aanvaar. Om, soos Kaser, hierdie invloed te minimaliseer aangesien die Romeinse reg geen sisteem het nie en min abstraksie vertoon, is egter die resultaat van 'n anakronistiese benadering.[54] Die dialektiek is 'n wetenskaplike metode wat primêr oorreding ten doel het. Die dikwels-aangehaalde uitspraak van die juris Javolenus[55] dat elke definisie gevaarlik is, pas in hierdie konteks in en verklaar die elastisiteit van begrippe soos *possessio* en die afwesigheid van 'n definisie van eiendomsreg. Die veelgeroemde sogenaamd intuïtiewe regsgevoel van die Romeinse juriste beteken slegs dat hulle regskwessies sosiaal-maatskaplik beskou het. Die disharmonieë in die stelsel is irrelevant aangesien die gevoel van noodsaaklikheid in die regswetenskap ontbreek. Die omskrywing van 'n *regula iuris* deur Paulus is veelseggend in hierdie verband: *regula est quae rem quae est breviter enarrat. Non ex regula ius summatur, sed ex iure quod est regula fiat.*[56] Die *regula* was 'n dialektiese hulpmiddel maar kon in die betrokke geval of toegepas, of nie toegepas nie, of gewysig toegepas word.

Deur aan te toon dat die reg en regswetenskap binne 'n kulturele konteks bestaan, dat hierdie kulturele konteks subjektief bepaal is en dat die gevolglike oplossings eweneens subjektief bepaal is, kan die Romeinse reg 'n teenwig vir die positivisme in die regstudie bied.

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51 Cicero *De oratore* 1 16–20; Tacitus 35 1 3–5; Quintilianus *Institutiones oratoriae* 8 *pr* 22–26; 12 10 73.

52 Van der Merwe 1987 *TSAR* 133.

53 *Ibid.*

54 *Idem* 135 ev en die aldaar aangehaalde gesag.

55 *D* 50 17 202.

56 *D* 50 17 1 – Paulus libro sexto decimo ad Plautium: 'n Reël verduidelik 'n saak kortliks. Die reg ontstaan nie uit die reël nie, maar die reël word uit die reg afgelei. Van der Merwe 1987 *TSAR* 140 vn 86 verwys na resente literatuur oor die teks.

Regsvergelyking in fundamentele regte-litigasie

JJ Malan
BA Hons LLB
Instituut vir Fundamentele Regte, Justisie-Kollege, Pretoria

SUMMARY

Comparative law in fundamental rights litigation

This article seeks to develop a model for distinguishing between foreign legal materials within the purview of fundamental rights which qualify as *comparable* for South African purposes as opposed to those materials which do not pass the comparability test. Both the interim and the present Constitution permit South African courts to consider foreign law when interpreting the South African Bill of Rights. The considerable number of judgments in which particularly foreign case law had hitherto been referred to testifies to the practical importance and utility of this provision. It simultaneously stresses the need for a scientifically answerable model of functional comparative law serving as an aid to give due effect to this constitutional directive. Such a model, of which the contents are discussed in the article, may also contribute to guard against the undesired phenomenon of an uncritical emulation of foreign precedents instead of constructive comparative practice.

1 INLEIDING

Artikel 39(1)(c) van die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996 en sy voorganger artikel 35(1) van die tussentydse Grondwet, magtig die gebruik van buitelandse reg vir doeleindes van die uitleg van die fundamentele regte-bepalings van die Grondwet (vervat in die handves van fundamentele regte onderskeidelik in hoofstuk 3 van die tussentydse en hoofstuk 2 van die huidige Grondwet). Die Grondwet magtig dus spesifiek die gebruikmaking van buitelandse reg vir doeleindes van interpretasie van die bepalings oor fundamentele regte. Alhoewel die gebruik van buitelandse reg nog altyd vir die howe beskikbaar was[1] en daar dus nie 'n uitdruklike statutêre magtiging vereis word om van regsvergelyking gebruik te maak nie, is hierdie bepalings uniek in die sin dat dit duidelik 'n voorkeur vir die gebruik van buitelandse reg suggereer. Hierdie unieke posisie is natuurlik noodsaaklik aangesien fundamentele regte en grondwetlike litigasie tot onlangs aan die Suid-Afrikaanse regspraktyk onbekend was en daar derhalwe noodwendig by buitelandse jurisdiksies lig op te steek is. Juis om dié rede het die howe in die grondwetlik verwante sake tot dusver ruim van buitelandse reg gebruik gemaak.[2] In die proses is daar veral na Kanadese

1 Hosten *et al Introduction to South African law and legal theory* (1995) 431–435.

2 Sien bv *S v Smith* 1994 1 BCLR 63 (SOK); *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (OK); *Chairman of the Council of the State v Qokose* 1994 2 BCLR 1 (CkAD); *S v Sefadi* 1994 2 BCLR 23 (D); *S v Shangase* 1994 2 BCLR 42 (D); *S v Majavu* 1994 2

vervolg op volgende bladsy

beslissings verwys, maar ook na Amerikaanse en Britse regspraak en in 'n mindere mate na die posisie in Australië, Nieu-Seeland en Wes-Europa.[3] 'n Ernstige leemte wat egter by hierdie uitsprake voorgekom het, is dat daar nie in die proses van regsvergelyking erns gemaak is met 'n verantwoordbare regsvergelykende metodiek nie, met die gevolg dat die risiko ontstaan het dat na ontoepaslike en dus onvergelykbare regspraak verwys kan word. Slegs in enkele gevalle het die howe kritiese opmerkings gemaak oor die regsvergelykende metode[4] waardeur minstens 'n sensitiwiteit openbaar is dat daar nie lukraak na buitelandse beslissings verwys behoort te word nie. Die enkele werke wat oor grondwetlike reg en spesifiek oor die handves van regte verskyn het sedert die tussentydse Grondwet in werking getree het, het eweneens nie met 'n wetenskaplik verantwoordbare regsvergelykende metode gehandel nie.[5] In een geval[6] is die Kanadese en Amerikaanse voorbeelde so klakkeloos as navolgenswaardig voorgehou dat dit eerder op nabootsing as regsvergelyking neergekom het.

BCLR 56 (CkGD); *Khala v The Minister of Safety and Security* 1994 2 BCLR 89 (W); *S v Botha* 1994 3 BCLR 93 (W); *Mandela v Falati* 1994 4 BCLR 1 (W); *S v Vermaas* 1994 4 BCLR 18 (T); *Mulaudzi v Chairman Implementation Committee* 1994 4 BCLR 97 (V); *Gardener v Whitaker* 1994 5 BCLR 19 (OK); *Phato v Attorney-General Eastern Cape* 1994 5 BCLR 99 (OK); *Shabalala v The Attorney-General of Transvaal* 1994 6 BCLR 85 (T); *De Klerk v Du Plessis* 1994 6 BCLR 124 (T); *Zantsi v The Chairman of the Council of the State* 1994 6 BCLR 136 (Ck); *Park-Ross v The Director Office of Serious Economic Offences* 1995 2 BCLR 198 (K); *S v Makhatini* 1995 2 BCLR 226 (D); *Nortjé v Attorney-General of the Cape of Good Hope* 1995 2 BCLR 236 (K); *S v Zuma* 1995 4 BCLR 401 (SA); *Ferreira v Levin; Vryenhoek v Powel* 1995 4 BCLR 437 (W); *S v Strauss* 1995 5 BCLR 623 (O); *S v Melani* 1995 5 BCLR 632 (OK); *S v Makwanyane* 1995 6 BCLR 665 (CC); *S v Mhlungu* 1995 7 BCLR 793 (CC); *S v Williams* 1995 7 BCLR 861 (CC); *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B); *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1382 (CC); *Ynuico Ltd v Minister of Trade and Industry* 1995 11 BCLR 1453 (T); *S v Botha* 1995 11 BCLR 1489 (W); *S v Bhulwana; S v Gwadiso* 1995 12 BCLR 1579 (CC); *Shabalala v Attorney-General of the Transvaal* 1995 12 BCLR 1593 (CC); *Ferreira v Levin; Vryenhoek v Powell* 1996 1 BCLR 1 (CC); *S v Maphumulo* 1996 2 BCLR 167 (N); *S v Melani* 1996 2 BCLR 174 (OK); *S v Motloutsi* 1996 2 BCLR 220 (K); *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W); *Klink v Regional Court Magistrate* 1996 3 BCLR 402 (SOK); *Bernstein v Bester* 1996 4 BCLR 449 (CC); *In re: School Education Bill of 1995 (Gauteng)* 1996 4 BCLR 537 (CC); *Nel v Le Roux* 1996 4 BCLR 592 (CC); *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 (CC); *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC); *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W); *Moeketsi v Attorney-General Bophuthatswana* 1996 7 BCLR 947 (B); *Msomi v Attorney-General of Natal* 1996 8 BCLR 1123 (N); *S v Brown* 1996 11 BCLR 1480 (NK); *S v Scholtz* 1996 11 BCLR 1504 (NK); *Larbi-Odam v Members of the Executive Council for Education* 1996 12 BCLR 1612 (B); *S v Nombewu* 1996 12 BCLR 1635 (OK).

3 *Ibid.*

4 *Qozeleni supra* 80C; *Shabalala supra* 117H ev; *Park-Ross supra* 208C ev; *Nortjé supra* 241A ev; *Zuma supra* 414C–F; *Makwanyane supra* par 100 102 324; *Ferreira v Levin supra* par 72.

5 Chaskalson *et al Constitutional Law of South Africa* (1996) 11–6 ev; Basson *South Africa's Interim Constitution texts and notes* (1994) 58 ev; Rautenbach *General provisions of the South African Bill of Rights* (1994) 17 ev; Du Plessis en Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 121; Van Wyk *et al Rights and constitutionalism. The South African legal order* (1995); Cachalia *et al Fundamental rights in the New Constitution* (1994); Kruger en Currin *Interpreting a Bill of Rights* (1994). (Hoewel lg werk in 1994 gepubliseer is, bestaan dit uit materiaal wat reeds in 1992 voorberei is.)

6 Cachalia *passim.*

Hierdie toedrag van sake is weens verskeie redes onaanneemlik. *Eerstens* bepaal artikel 35(1) van die 1993-Grondwet (a 39(1)(c) van die 1996-Grondwet) dat die howe van *vergelykbare* buitelandse reg gebruik kan maak. Die implikasie daarvan is dat oorweging van die inhoud van buitelandse beslissings nie 'n aanvang mag neem alvorens bepaal is of die betrokke jurisdiksie se beslissings hoegenaamd vergelykbaar is nie. Indien 'n mens die grondwetlike voorskrif ernstig opneem dat van *vergelykbare* (en dus nie van enige) buitelandse regspraak gebruik gemaak mag word nie, vereis dit dus dat die hof altyd eers vooraf duidelikheid moet kry oor wat vergelykbaar is en wat nie, so nie volg blindelingse nabootsing in die naam van regsvergelyking.

Tweedens, selfs indien die Grondwet nie uitdruklik bepaal het dat *vergelykbare* buitelandse regspraak geraadpleeg kan word nie, sou die howe in elk geval tot *vergelykbare* buitelandse reg beperk gewees het, nie uit hoofde van 'n grondwetlike voorskrif nie maar weens die vereiste van behoorlike regspleging. Die huidige artikel 39(1)(c) kom in hierdie konteks pertinent ter sprake want die kwalifikasie van *vergelykbare* wat in artikel 35(1) van die tussentydse Grondwet voorgekom het, is uit hierdie bepaling verwyder met die gevolg dat dit met die eerste oogopslag sou wou voorkom dat daar nou ook van onvergelykbare buitelandse reg gebruik gemaak kan word. Dit is uiteraard nie die implikasie van hierdie weglating nie. Soos blyk uit die uiteensetting wat volg, is die gebruik van buitelandse regsbronne juis daarop gemik om die plaaslike reg en gemeenskap tot voordeel te strek. Derhalwe is dit voor die hand liggend dat jurisdiksies wat nie sekere gemeenskaplike faktore met die plaaslike jurisdiksie deel nie – en derhalwe minstens *prima facie* onvergelykbaar is – nie vir inagneming kwalifiseer met die oog op die hantering van plaaslike regsprobleme nie. Derhalwe het die weglating van die kwalifikasie dat van *vergelykbare* buitelandse reg gebruik gemaak kan word geen konkrete gevolg nie. Dit is vroeër *ex abudanti cautela* ingevoeg ter bevestiging van 'n vanselfsprekende realiteit dat die buitelandse reg wat geraadpleeg word inderdaad vergelykbaar moet wees. Die hantering van alle buitelandse reg vir doeleindes van die moontlike inspeling daarvan op die plaaslike posisie moet deurlopend die toets van vergelykbaarheid deurstaan. Ofskoon die kwalifikasie van vergelykbaarheid dus nie uitdruklik in die huidige artikel 39(1)(c) verwoord is nie, is dit ongetwyfeld steeds stilswyend by die bepaling inbegrepe. Die weglating van hierdie kwalifikasie beteken derhalwe nie dat deurdagte vergelyking nou moet plek maak vir onoorwoë nabootsing van buitelandse reg of dergelike onwetenskaplik onverantwoordbare praktyke nie. (Daar is ook ander verskille tussen die bewoording van hierdie twee bepalings van onderskeidelik die tussentydse en die huidige Grondwet. Eersgenoemde verwys slegs na die gebruik van buitelandse regspraak terwyl die huidige bepaling breedweg verwys na buitelandse *reg*, wat die moontlikheid bevestig om benewens buitelandse regspraak ook ander bronne van buitelandse reg in ag te neem. Dié aspek val egter buite die bestek van die onderhawige bespreking.) In hierdie verband kan opgemerk word dat regsvergelyking breedweg om twee redes beoefen kan word. Eerstens kan buitelandse reg bestudeer word bloot met die oogmerk om meer kennis van vreemde reg te verkry, dit wil sê as 'n teoretiese interessantheid.[7] Daarteenoor kan buitelandse reg geraadpleeg word met die

7 Steyn "The comparative method in legal study" 1931 *SALJ* 203–204; Zajtay "Aims and methods of comparative law" 1974 *CILSA* 322. Van Zyl *Beginsels van regsvergelyking* (1981) 17 wys daarop dat die onderskeid manifesteer in beskrywende teenoor toegepaste regsvergelyking.

doel om juis die binnelandse regsposisie te hervorm en te verryk, dit wil sê om as *toegepaste* regsvergelyking tot praktiese nut vir die plaaslike reg te dien. Dit is derhalwe 'n geval van *funksionele* of bruikbare regsvergelyking.[8] Wanneer regsvergelyking binne hierdie konteks beoefen word, kom die betekenis van die begrip *vergelykbaar* duidelik na vore, naamlik dat *vergelykbaarheid* bruikbaarheid impliseer. Indien die buitelandse reg nie van nut is vir plaaslike doeleindes nie, is dit onvergelykbaar. Indien buitelandse reg wat op die plaaslike situasie oorgeplant word tot nadeel van die binnelandse posisie strek, het die hele regsvergelykende oefening misluk.

Die regsvergelyking waarna in artikel 35(1) (of artikel 39(1)(c)) verwys word, is soos alle regsvergelyking waarmee die howe (in plaas van die regsakademie) sigself besig hou, *funksionele* regsvergelyking. Die doel waarvoor dit gebruik word, is om lig te werp op die inhoud van die Suid-Afrikaanse handves van regte. Funksionaliteit is derhalwe die grondreël by die toepassing van die regsvergelyking wat in artikel 35(1) (of artikel 39(1)(c)) beoog word.

In die bespreking wat volg, word gepoog om 'n skema daar te stel vir behoorlike funksionele regsvergelyking. In die proses word 'n aantal faktore bespreek wat konsekwent in ag geneem moet word ten einde geslaagde regsvergelyking te bewerkstellig. Breedweg word onderskei tussen tekstuele en kontekstuele faktore. Laastens word die parameters vir regsvergelyking wat deur die internasionale reg daargestel word, uitgelig.

2 REGSVERGELYKENDE METODE

2 1 Tekstuele faktore

Tekstuele faktore hou verband met die inhoud van die regsdokumente wat by die regsvergelykende oefening betrokke is, wat onder meer die plaaslike handves van regte, buitelandse handveste en buitelandse hofuitsprake insluit.

2 1 1 Akkuraatheid

Die regsposisie wat in die vreemde jurisdiksie van krag is en die regsargumente wat in buitelandse howe weerklank gevind het, moet korrek weergegee word. Hierdie oënskynlik onnodige waarskuwing is tog noodsaaklik aangesien onakkuraatheid maklik kan insluip by die hantering van buitelandse regsbronne. In drie onlangse grondwetlik verwante uitsprake[9] is weens gebruikmaking van verskillende regsbronne oor die Amerikaanse reg met betrekking tot blootlegging in strafsake uiteenlopende indrukke geskep oor die regsposisie in die VSA oor hierdie aangeleentheid. In *Sefadi*[10] is die Amerikaanse posisie behandel met

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8 Vir Zweigert en Kötz *Introduction to comparative law* (vert Weir 1987) 30 ev is hierdie funksionele regsvergelyking in der waarheid regsvergelyking *per se*. 'n Ander manier om die saak te beskou, is om soos Schmitthoff "The science of comparative law" 1939–41 *Cambridge LJ* 94 ev die fases van beskrywing en benutting te sien as noodsaaklike gedeeltes van een en dieselfde proses. Uiteraard moet die buitelandse regsposisie eers beskryf word, gevolg deur benutting van geselekteerde buitelandse regsreëls tot voordeel van die eie regstelsel. In beginsel verskil Schmitthoff en Zweigert-Kötz egter nie dat beide die doel en waarde van vergelyking in funksionele bruikbaarheid geleë is. Vir die (mi onoortuigende) kritiek teen dié funksionele benadering sien Venter (red) *Regsnavorsing: Metode en publikasie* (1990) 228–232.

9 *Sefadi, Khala* en *Majavu supra*.

10 *Sefadi supra* 33F–34E.

verwysing na die *Corpus iuris secundum*, terwyl in *Majavu*[11] die posisie weergegee is hoofsaaklik met verwysing na *McCormick on evidence* se kommentaar op artikel 16 van die Supreme Court-reëls oor strafregspleging. In *Khala*[12] word hierdie reël volledig aangehaal. In die eerste saak word die indruk van veel meer geredelike toegang tot dokumentasie deur die beskuldigde geskep as wat in laasgenoemde sake die geval is. In al drie die sake is na erkende regsbronne verwys maar desondanks is die posisie verskillend weergegee.[13] Dit demonstreer die noodsaak om voordat buitelandse regsbronne gebruik word, vas te stel wat die status en kwaliteit van die betrokke bronne is. Dit is voorts verkieslik om nie slegs met 'n enkele bron te werk nie maar met meerderes ten einde te voorkom dat die tendense van net een van verskeie skole in die buitelandse jurisdiksie weergegee word.

Artikel 1 van die Wysigingswet op die Bewysreg[14] is van nut by die probleem van onakkuraatheid. Dit verleen weliswaar aan die hof die keuse om geregtelik van buitelandse reg kennis te neem, maar die hof kan dit slegs doen indien die betrokke buitelandse reg met voldoende sekerheid vasgestel kan word. Die partye bly egter steeds bevoeg om ingevolge artikel 1(2) van die wet getuienis aan te bied oor die inhoud van buitelandse reg.[15] Met die oog daarop om 'n akkurate beeld van buitelandse reg te verkry, behoort die opsie van getuienislewering nie buite rekening gelaat te word nie.

2 1 2 Die stilistiese struktuur van die handves en die noodsaak vir judisiële ingrype

Breedweg kan onderskei word tussen "antieke" en moderne handveste van regte.[16] Die Amerikaanse handves is die mees tersaaklike voorbeeld van 'n antieke handves van regte. Dit is in betreklik vae terme geformuleer. Daarmee saam reflekteer dit die besondere probleme wat voorhande was in die stadium toe die handves sy beslag gekry het.[17] In teenstelling daarmee is daar 'n hele reeks nasionale handveste van fundamentele regte wat na die Tweede Wêreldoorlog

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11 *Majavu supra* 67D–J.

12 *Khala supra* 115 ev.

13 Sien *Shabalala supra* 116H ev se bespreking van hierdie verwarrende weergawe van die Amerikaanse reg asook die kommentaar daarop.

14 Wet 45 van 1988.

15 Dit is duidelik geïmpliseer in die gemelde bepaling (a 101) wat lui: "Enige hof kan van die reg van 'n vreemde staat en van inheemse reg geregtelik kennis neem vir sover sodanige reg geredelik en met voldoende sekerheid vasgestel kan word: Met dien verstande dat die inheemse reg nie in stryd mag wees nie met die beginsels van staatsgedragslyn of van natuurlike geregtigheid: Met dien verstande voorts dat 'n hof nie bevoeg is nie om te verklaar dat lobola-, bogadi- of ander dergelike gebruik met daardie beginsels in stryd is." Subartikel (2) wat die aanbied van getuienis mbt vreemde reg magtig, lui: "Die bepalings van subartikel (1) verhinder nie 'n party om getuienis aan te voer van die inhoud van 'n regsreël in daardie subartikel beoog wat by die betrokke verrigtinge in geskil is nie."

16 Van der Vyver "Limitation provisions of the Bophuthatswanan Bill of Rights" 1994 *THRHR* 48.

17 Sien bv die Tweede Wysiging tot die Amerikaanse Grondwet wat die reg tot die dra van wapens grondwetlik verskans asook die Dertiende Wysiging waardeur slawerny afgeskaf word. Die wysiging wat op 1865-12-06 geratifiseer is, dra die eiesoortige stempel van gebeure in die Amerikaanse geskiedenis van daardie tydvak (sien De Villiers *et al Human rights: Documents that paved the way* (1992) 184 187–188).

die lig gesien het. Hierdie handveste vertoon bykans almal die gemeenskaplike kenmerk dat regte wat daarin vervat is, op 'n gedetailleerde wyse omskryf is en gevolglik min twyfel laat oor die betekenis en die trefwydte daarvan.

Die praktiese effek van die besondere stilistiese eienskappe van die Amerikaanse handves van regte is dat, ten einde inhoud daaraan te verleen, die howe eintlik verplig is om dit innoverend en liberaal uit te lê.[18] Van die howe word as 't ware interpretasie-permissiwiteit vereis. In die afwesigheid daarvan sal die dokument vir hedendaagse doeleindes irrelevant raak.

'n Aansienlike graad van judisiële aktivisme word dus noodwendig vereis by so 'n vae en wydgeformuleerde handves, anders het die handves geen of min konkrete betekenis. Daarenteen is die moderne handveste in veel groter mate vanselfsprekend en op die punt af, met die gevolg dat van die howe nie naastenby dieselfde aktivisme vereis word om as 't ware betekenis aan die betrokke handves toe te dig nie. Daar is derhalwe 'n direkte korrelasie tussen die stilistiese inhoud en struktuur van die handves en die graad van judisiële aktivisme wat daaruit voortspruit.[19]

Die stilistiese onderskeid tussen gemelde twee tipes handveste is inderdaad baie belangrik, want dit hou direk verband met die grondliggende beginsel waarop 'n bepaalde konstitusionele sisteem berus. Die Suid-Afrikaanse Grondwet gaan uit van die beginsel van grondwetlike soewereiniteit.[20] Die eenvoudige implikasie daarvan is dat die teks van die Grondwet self, en dan veral van die handves van regte, die finale woord spreek met betrekking tot die omvang van regte, die beperking daarvan, die wetgewende en uitvoerende gesag se vermoë om daarop inbreuk te maak en dies meer. Daarenteen leen 'n grondwet waarin die regte vaag en onbepaald gedefinieer is, sigself nie tot 'n sisteem van grondwetlike soewereiniteit nie aangesien die blote bewoording van die grondwet (en die handves van regte) eenvoudig te weinigseggend is om sonder liberale interpretasie 'n antwoord op alledaagse grondwetlike problematiek te verskaf. Weens liberale interpretasie deur die howe word die regbank in effek die instrument wat die fundamentele regte afbaken en die regering se optrede reguleer. In plaas daarvan dat die grondwet self soos in 'n stelsel van grondwetlike soewereiniteit die hoogste gesag is, konstitueer die regbank sigself as konstitusionele oppergesag in plek van die grondwet weens die grondwet se semantiese gebreke. Die verreikende gevolg hiervan is dat die grondliggende beginsel van grondwetlike soewereiniteit hierdeur verontagsaam word en effektief vervang word deur die beginsel van soewereiniteit van die regbank.[21] Die navolging van Amerikaanse presedente waarin weens die besondere aard van die Amerikaanse handves van regte, 'n liberale interpretasie-benadering gevolg is, hou dus die ingrypende implikasie in dat die regbank deur interpretasie-permissiwiteit nie net 'n magsvergryp begaan nie, maar ook die beginsel van grondwetlike soewereiniteit soos in artikel 4(1) vervat, verontagsaam. Om saam te vat: interpretasie-permissiwiteit aan

18 Van der Vyver 1994 *THRHR* 48. Juis hierdie eienskappe van die Amerikaanse handves verskaf enorme dog eiesoortige probleme vir die Amerikaanse howe. Sien bv Tribe *American constitutional law* (1988).

19 Sien in hierdie verband *Ferreira v Levin supra* par 176–178.

20 A 4(1) van die 1993-Grondwet en a 2 van die 1996-Grondwet.

21 Van der Vyver "Sovereignty and human rights in constitutional and international law" 1991 *Emory Int LR* 375 ev.

die hand van sommige Amerikaanse voorbeelde kan ingevolge die Suid-Afrikaanse Grondwet onkonstitusioneel wees.

2 1 3 Die belang van beperkingsklousules

Bepalings in handveste wat voorsiening maak vir die beperking van regte is normaalweg van deurslaggewende belang vir grondwetlike litigasie. Die rede hiervoor is dat beperkingsklousules gewoonlik die basis is waarop gepoog word om 'n inbreuk op fundamentele regte te regverdig.

In beginsel is die twee opponerende bewerings by fundamentele regte-litigasie in baie gevalle basies die volgende: 'n Bewering deur 'n applikant dat daar in stryd met die handves van regte op een of meer van sy fundamentele regte inbreuk gemaak is, gevolg deur 'n opponerende bewering deur die respondent (gewoonlik die staat) waarin op basis van erkenning met teenwerping, toegegee word dat daar 'n *prima facie* inbreuk was, gevolg deur 'n stelling dat die inbreukmaking in die lig van die beperkingsklousule grondwetlik regverdigbaar en derhalwe nie onkonstitusioneel is nie.

Hierdie toedrag van sake demonstreer die kritiese belang van ('n) beperkingsklousule(s) in grondwetlike gedinge waar met fundamentele regte gehandel word. In die Suid-Afrikaanse konteks is dit ook reeds herhaaldelik gedemonstreer in die uitsprake waarin artikel 33(1) van die Grondwet van 1993 toegepas is.[22] Die struktuur van die 1996-Grondwet is dieselfde as die van sy voorganger. In artikel 36(1) van die 1996-Grondwet word voorsiening gemaak vir 'n beperkingsklousule, wat ofskoon nie identies nie, tog wel van dieselfde aard as sy voorganger is. Dit is daarom te wagte dat artikel 36(1) net so 'n prominente rol sal speel as artikel 33(1).

In die lig hiervan is handveste wat beperkingsklousules bevat vanuit 'n regsvergelykende oogpunt vir ons van groot belang omdat die aard van fundamentele regte-gedinge kragtens daardie grondwette ooreenkomste sal toon met ons eie, vir sover hulle handel met die uitleg en toepassing van beperkingsklousules.

Dit is weliswaar so dat handveste van regte waarin beperkingsklousules voorkom ook onderling onderskeibaar is, veral in die opsig dat sommige handveste, net soos die Suid-Afrikaanse handves, 'n enkele eksterne[23] beperkingsklousule het[24] teenoor ander met interne beperkingsklousules wat slegs op 'n enkele individuele reg betrekking het.[25] Tog is beide spesies beperkingsklousules regsvergelykend van belang omdat die litigasie wat daarmee verband hou telkens van die

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22 Sien bv *Qozeleni supra* 88; *Sefadi supra* 23; *Majavu supra* 94D ev; *Khala supra* 97B ev; *Phato supra* 130D ev; *Government of the Republic of South Africa v The Sunday Times Newspaper* 1995 2 BCLR 182 (T) 186F ev; *Nortjé supra* 251J ev; *Zuma supra* 414C–F; *S v Makwanyane supra* par 104; *S v Mbatha; S v Prinsloo* 1996 3 BCLR 293 (CC) par 26–27; *Case supra* par 48 ev 93; *Brink v Kitshoff* 1996 6 BCLR (CC) par 46 ev; *Mohlomi v Minister of Defence* 1996 12 BCLR 1959 (CC) par 15 ev; *Larbi-Odam supra* 1630H ev.

23 By 'n eksterne beperkingsklousule word bedoel dat die beperking nie vervat is in die bepalings waarin die reg verskans word nie maar buite-om sodanige bepalings in 'n afsonderlike artikel.

24 Bv a 1 van die Canadian Charter of Rights and Freedoms, Bylae B tot die Kanadese Grondwet van 1982.

25 Die Indiese bepalings mbt fundamentele regte is tipies hiervan. Sien in die algemeen Woolman "Riding the push-me pull-you: Construeting a test that reconciles the conflieting interests which animate the limitation clause" 1994 *SAJHR* 60 ev.

hof vereis om die *teks* van die handves te *interpreteer*. Die uitspraak wat die hof gee, is sowel met betrekking tot die *definiëring* van die reg as die beperking daarvan 'n *tekstuele interpretasie*-oefening, waarvoor die basis telkens in die grondwetlike teks self gevind word.

Handveste wat nie van 'n beperkingsklousule voorsien is nie, soos die Amerikaanse handves,[26] en wat die indruk wek dat die verskanste regte absoluut is, gee aanleiding tot kwalitatief anderssoortige interpretasie aangesien die basis van die beperking van die regte nie in die grondwetlike teks self voorkom nie en derhalwe minstens vir sover dit die beperking van die reg betref, nie rondom *tekstuele interpretasie* wentel nie. Dit is dan inderdaad die posisie in die Amerikaanse reg dat die beperking van regte net kan geskied langs die weg van 'n *judisiële waarde*-oordeel op grond van judisiële aktivisme. Binne die Amerikaanse opset word hierdie waarde-oordele genoodsaak deur die semantiese leemtes waarna hierbo verwys is.[27] Die semantiese leemte in die onderhawige geval is dat die regte van die Amerikaanse handves ongekwalifiseerd omskryf is. Indien bloot by die teks gehou word, word die indruk gewek dat die regte absoluut is, wat 'n reg in beginsel nooit kan wees nie. Ten einde hierdie absolutisme te oorkom wat deur die teks self geskep word, moet die hof noodwendig uit eie beweging beperkings inbou.

Die posisie kan soos volg saamgevat word: By handveste met beperkingsklousules is die beperking van regte 'n kwessie van *tekstuele interpretasie*. By die handveste wat dit nie het nie, is dit 'n geval van *judisiële waarde-oordeel*. Die Suid-Afrikaanse handves val in eersgemelde klas, met die gevolg dat regspraak met verwysing na eersgemelde handveste noodwendig veel groter waarde inhou as laasgenoemde.

Die eiesoortigheid van die Amerikaanse problematiek rakende beperking van regte en die ooreenstemmende verskille wat dit meebring in vergelyking met die Suid-Afrikaanse ondersoek met betrekking tot beperking, is ook in die konstitusionele hof uitgewys. In die Verenigde State moet regsbeperking teweeg gebring word, nie deur die uitleg van 'n beperkingsklousule nie maar deur 'n beperkende interpretasie van die regte self.[28] In *Makwanyane* word die verskil bondig só saamgevat:

> "Under our Constitution the position is different. It is not whether the decision of the State has been shown to be clearly wrong; it is whether the decision of the State is justifiable according to the criteria prescribed by section 33."[29]

Daar kan natuurlik aangevoer word dat die twee benaderings nie wesenlik van mekaar verskil nie omdat daar maar altyd ruimte vir judisiële waarde-oordele is,[30] ongeag die aard van die dokument waaroor uitspraak gegee word. Dit is

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26 Raadpleeg die Amerikaanse Handves van Regte in De Villiers 183 ev.

27 Hieroor maak Seervai *Constitutional law of India* vol 1 (1983) 106 die volgende baie betekenisvolle opmerkings: "The fundamental rights granted by the US Constitution are expressed in wide general terms with the result that the restrictions on those rights have had to be evolved by judicial decisions. Generally speaking the limitations subject to which fundamental rights are given in our Constitution are defined in the Constitution itself with the result that the nature of those restrictions must be ascertained from the words of the Constitution."

28 *S v Makwanyane supra* par 100 707F.

29 *Idem* par 102 707I.

30 Sien bv Dias *Jurisprudence* (1976) 257 ev se bespreking oor waarde-oordele.

egter 'n veralgemening wat nie water hou nie want by die handveste wat van beperkingsklousules voorsien is, moet die *judisiële waarde-oordeel* wat die hof met betrekking tot die beperking fel *tekstueel* verantwoordbaar wees. Daarenteen is die eis van tekstuele verantwoordbaarheid by handveste sonder beperkingsklousules kwalik teenwoordig en beskik die hof oor 'n veel vryer hand.[31]

2 1 4 Die interdissiplinêre aard van 'n handves van fundamentele regte

Fundamentele regte is 'n saambreelterm wat regte van 'n wyd uiteenlopende aard omvat. Fundamentele regte is die saambondeling van regte vanuit 'n verskeidenheid vakdissiplines binne die regswetenskap en vind hulle oorsprong in die privaatreg, die publiekreg, die substantiewe en die prosesreg.

Die reg op menswaardigheid, privaatheid en vryheid van uitdrukking[32] is almal persoonlikheidsregte wat vanuit die deliktereg tot fundamentele regte verhef is. Dit is derhalwe fundamentele *persoonlikheidsregte*. Burgerskapregte, politieke regte en die regte met betrekking tot administratiewe geregtigheid[33] hou verband met die reëls van die staats- en administratiefreg en is dus *staatsregtelike* en *administratiefregtelike* fundamentele regte. Die regte vervat in artikel 25(3) van die 1993-Grondwet (artikel 35(3) van die 1996-Grondwet) wat met 'n billike verhoor te make het, slaan op die strafprosesreg (byvoorbeeld om in voldoende besonderhede oor die aanklag ingelig te word[34]) en die bewysreg (byvoorbeeld die swygreg en die reg om onskuldig geag te word[35]) en is dus fundamentele *prosesregtelike* en *bewysregtelike* regte. Op sy beurt bevat artikel 26 van die interim-Grondwet (artikel 22 van die 1996-Grondwet) onder meer fundamentele *kontrakregtelike* regte, terwyl artikel 28 (artikel 25 van die 1996-Grondwet) fundamentele *sakeregtelike* regte bevat. Al die regte vervat in die bepalings van die handves kan trouens by een of meer dissiplines of subdissiplines van die regswetenskap tuisgebring word.

Hierdie feit is vir regsvergelykende doeleindes van kardinale belang, veral in die lig van die feit dat die Suid-Afrikaanse regstelsel 'n hibriede sisteem is[36] wat sy oorsprong in verskeie regstelsels vind. Die Suid-Afrikaanse strafproses- en bewysreg stam uit die Engelse reg[37] en het 'n eiesoortige adversatiewe karakter. Die detail van die bewys- en strafprosesreëls vloei direk voort uit die adversatiewe stelsel gekenmerk deur streng reëls met betrekking tot toelaatbaarheid van getuienis waarsonder die stelsel kwalik kan funksioneer.[38] Daarenteen word die

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31 Sien in die algemeen *Tribe supra* vn 18; Van der Vyver *Sovereignty* 377 ev; *Seervai supra*.

32 Onderskeidelik verskans in a 10 13 en 15(1) van die 1993-Grondwet (a 10 14 en 16(1) van die 1996-Grondwet).

33 Verskans in a 20 21 en 24 van die 1993-Grondwet (a 20 19 en 33 van die 1996-Grondwet).

34 A 25(3)(b) (a 35(3)(a) van die 1996-Grondwet).

35 A 25(3)(c) (a 35(3)(h) van die 1996-Grondwet).

36 Hosten "The permanence of Roman law concepts in South African law" 1969 *CILSA* 194; Van Zyl *supra* vn 7 284.

37 Hoffman en Zeffert *The South African law of evidence* (1988) 6–17. Hierdie feit word prakties gedemonstreer in die residuêre bepalings in Suid-Afrikaanse wetgewing wat op die bewysreg betrekking het, bv a 201 en 203 (en tot 1988 a 216 van die Strafproseswet 51 van 1977 en a 42 van die Wet op Bewysleer in Siviele Sake 25 van 1965).

38 Schmidt *Bewysreg* (1989) 13.

inkwisitoriese Europese[39] strafprosesreg geensins gekenmerk deur soortgelyke bewysregreëls nie eenvoudig omdat die inkwisitoriese stelsel veel minder afhanklik van hierdie reëls is. Die Suid-Afrikaanse strafprosesreg en bewysreg het dus weinig of niks te leer nie uit die Europese reg omdat in die Europese stelsels hierdie reëls 'n baie laer profiel geniet. Nogtans het die Suid-Afrikaanse howe by minstens een geleentheid die Duitse reg vir doeleindes van die oplossing van 'n bewysregtelike probleem as regsvergelykende verwysing gebruik.[40] Dit was weens vermelde redes aanvegbaar en dit is jammer dat die hof nie vooraf besin het oor die aard en oorsprong van die besondere regte wat ter sprake was nie. Indien dit wel gedoen is, sou die hof dit waarskynlik nie nodig gevind het om die Duitse reg te raadpleeg nie.

Ons verbintenisreg daarenteen stam uit die Europese reg[41] met die gevolg dat daar talle ooreenkomste tussen byvoorbeeld ons persoonlikheidsreg en dié van die Franse, Nederlanders en die Duitsers is. Anders as by die strafprosesreg is dit vir regsvergelykende doeleindes dus juis gepas om, wanneer die persoonlikheidsreg ter sprake kom, by Europese regspraak leiding te soek eerder as by die Engelse of die Amerikaanse reg. Die verkeerde keuse van jurisdiksies vir doeleindes van regsvergelyking kan daartoe lei dat dogmatiese denkbeelde wat heeltemal vreemd aan ons eie regsdenke is, onnodig op ons eie regsdogmatiek ingeënt word; en dit kan in baie gevalle tot verwarring bydra.

Sekere formulerings in hoofstuk 3 van die 1993-Grondwet (hoofstuk 2 van die 1996-Grondwet), selfs binne een enkele bepaling, korreleer met twee uiteenlopende buitelandse regsdokumente. Artikel 33(1) van die 1993-Grondwet was 'n sameflansing van Kanadese en Duitse formulerings met betrekking tot die beperking van regte. Die beperkingsklousule was derhalwe self 'n hibriede bepaling. Die beklemtoonde gedeelte van artikel 33(1) wat lui:

> "Die regte in hierdie Hoofstuk verskans, kan beperk word deur algemeen geldende reg, met dien verstande dat so 'n beperking (a) slegs geoorloof is in die mate waarin dit –
>
> (i) *redelik is en*
>
> (ii) *regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid*; en
>
> (iii) nie die wesenlike inhoud van die betrokke reg ontken nie",

stem ooreen met die beperkingsbepaling van die Kanadese handves.[42] Die formulering in artikel 33(1)(b), wat vereis dat daar nie aan die wesenlike inhoud van die reg afbreuk gedoen mag word nie, kom vanuit die Duitse handves.[43]

Vir doeleindes van die uitleg van laasgenoemde formulering sou dit dus nie die moeite geloon het om na enige ander regspraak as juis die Duitse regspraak te gaan kyk nie. Ander handveste bevat nie hierdie bepaling nie en derhalwe het

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39 Sien in die algemeen Hiemstra "Abolition of the right not to be questioned" 1963 *SALJ* 187 ev.

40 *Sefadi supra* 34F–35G.

41 Sien in die algemeen Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 5 ev; Neethling *Persoonlikheidsreg* (1991) 41 ev.

42 Raadpleeg vn 23 *supra*. Vgl a 36(1) van die 1996-Grondwet.

43 A 19(2) van die Duitse handves van regte aangehaal in De Villiers *supra* vn 17 210. Hierdie bepaling verskyn egter nie meer in die 1996-Grondwet nie.

ander regspraak met betrekking tot spesifiek hierdie formulering niks by te dra tot 'n beter begrip van die implikasies van hierdie formulering nie.[44]

By die hantering van buitelandse reg wat handel oor die uitleg van fundamentele regte-bepalings, is dit noodsaaklik dat ingegaan moet word op die bewoording van die bepaling wat uitgelê word. As uitgangspunt kan aanvaar word dat die buitelandse uitleg van bepalings wat met hulle Suid-Afrikaanse eweknieë ooreenstem na alle waarskynlikheid groter vergelykingswaarde sal hê as die uitleg van bepalings wat, hoewel hulle handel met dieselfde reg, tekstueel wesenlik verskillend daar uitsien. Die konstitusionele hof sê hieroor onder meer:

> "To the extent that the formulation of the right is different from that adopted in other jurisdietions, their jurisprudenee will be of less value."[45]

2 2 Kontekstuele faktore

2 2 1 Dogmatiek

Regspraak kan as 'n sekondêre regsbron getipeer word. Dit is so omdat regspraak 'n verfyning van die bestaande gemene- en statutêre reg van sy betrokke jurisdiksie is. Dit is voorts gebou op die aannames en leerstukke van die regstelsel waarin die betrokke regspraak aangetref word. Ofskoon prominent teenwoordig as die basis van regspraak word hierdie leerstukke en aannames dikwels nie uitdruklik in uitsprake vermeld nie, met die gevolg dat dit die *versweë* grondslag van regspraak is. Regspraak is gewoonlik die produk van 'n eiesoortige regshistoriese verloop van 'n bepaalde staat wat uiteraard onderskeibaar is van die regshistoriese ontwikkeling van ander state. Indien dit nie in gedagte gehou word nie, lei dit daartoe dat die versweë aannames en vertrekpunte wat bepaalde regsreëls, en dus ook uitsprake, ten grondslag lê, op die Suid-Afrikaanse reg oorgeplant word terwyl daar in werklikheid geen ruimte daarvoor in die Suid-Afrikaanse reg bestaan nie. Hierdie waarskuwing is tereg ook deur die hof gemaak met betrekking tot fundamentele regte.[46]

Van der Vyver[47] het uitgewys hoedat, weens 'n versuim om hierdie onderliggende dogmas te identifiseer, dit alreeds in ons regspraak gebeur het[48] dat onvanpaste leerstukke in die Suid-Afrikaanse reg ingedra is.

Die probleem met die risiko om onaanpasbare dogmas op die plaaslike reg oor te plant, is soos hierbo aangedui, dat dié leerstukke dikwels nooit uitdruklik in die betrokke uitspraak vermeld word nie met die gevolg dat opname daarvan onnadenkend en onwetend kan plaasvind. Dit demonstreer ook die noodsaak om

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44 Sien in dié verband *Makwanyane supra* par 132 718E–719A waarin die hof sigself juis beperk het tot *slegs* die ooreenstemmende bepalings in die Duitse, Hongaarse en Namibiese Grondwette.

45 *S v Makwanyane supra* 324 776EF; sien ook *Ferreira v Levin supra* par 72.

46 *Qozeleni supra* 80C–D.

47 "Comparative law in eonstitutional litigation" 1994 *SALJ* 19 ev.

48 In die onderhawige geval met verwysing na die uitspraak in *Kekana Royal Executive Council v The Minister of Law and Order*, 'n ongerapporteerde beslissing van die Bophuthatswana Hooggeregshof saakno M20/93 1993-06-17. In 'n grondige artikel van dieselfde outeur "Constitutional free speeeh and the law of defamation" 1995 *SALJ* 572 word dieselfde tema aangesny en word aangedui hoe onvanpaste gebruikmaking van Amerikaanse, Duitse en Kanadese denkbeelde van die probleem van sg "horisontale" toepassing van die Suid-Afrikaanse handves van regte tot foutiewe gevolgtrekkings lei mbt tot die trefwydte van hfst 3 van die interim-Grondwet.

meer geredelik tot die inwin van getuienis geneig te wees in die proses van regsvergelyking as wat met die eerste oogopslag nodig blyk te wees.

2 2 2 Die remedie-faktor en die probleem van legalistiese reduksionisme

In paragraaf 1 hierbo is daarop gewys dat praktiese regsvergelyking wesenlik funksionele regsvergelyking is. Dit hang saam met die grondliggende beskouing dat reg en regsreëls in wese bestaan ten einde die gemeenskap van nut te wees: as reëlende reg ten einde dispute te ondervang en orde en regsekerheid te bewerkstellig, en as remediërende reg ten einde sosiale en ander misstande en probleme in belang en tot voordeel van die gemeenskap die hoof te bied. Kortom: in die breë is reg altyd veronderstel om die gemeenskap tot diens te wees.[49]

Hierdie oënskynlik geykte waarheid word dikwels verontagsaam. Die miskenning daarvan blyk uit ondeurdagte regsvergelyking in die vorm van wat getipeer kan word as *legalistiese reduksionisme*. Dit behels dat regsvergelyking beperk word tot die blote geïsoleerde oorweging van die regsreëls van ander jurisdiksies sonder om die kritiese vraag te vra na die rede vir die bestaan van die betrokke regsreël in die ander jurisdiksie. Legalistiese reduksionisme kom dus voor wanneer die reëlende en remediërende aard van regsreëls uit die oog verloor word, en die ekstreme kulminasie daarvan in regsvergelykende verband kom voor wanneer buitelandse regsreëls nagevolg word sonder om vooraf te vra of dit nuttig kan wees ter oplossing van plaaslike probleme.[50] Hierdie fout is in die afgelope tyd dikwels deur die Suid-Afrikaanse howe in grondwetlik verwante regspraak begaan. 'n Voorbeeld hiervan was die howe se hantering van die grondwetlike houdbaarheid van die Suid-Afrikaanse gebruik van dossierprivilegie in die lig van artikels 23 en 25(3)(b) en (d)[51] van die 1993-Grondwet. 'n Suiwer legalistiese benadering kom voor wanneer die hof bloot vra hoe soortgelyke bepalings in ander jurisdiksies uitgelê is, gevolg deur 'n navolging van sodanige presedente. Juis hierdie legalistiese reduksionisme het voorgekom in 'n aantal Suid-Afrikaanse beslissings op die punt.[52] Daarenteen behoort die korrekte regsvergelykende vraag wat legalistiese reduksionisme in hierdie konteks vermy, die volgende te wees: Wat behoort die konstruksie te wees wat op artikels 23 en 25(3)(b) en (d) (artikels 32 en 35(3)(a) van die 1996-Grondwet) geplaas moet word in die lig van soortgelyke konstruksies in buitelandse regspraak *wat gekonfronteer is met problematiek soortgelyk aan dié van Suid-Afrika, naamlik veeltaligheid en 'n hoë voorkoms van viktimisasie van getuies*.[53]

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49 Sonder vrees vir teëspraak kan beweer word dat dit presies is wat die gemeenskap van die regspleging vereis. In die regsfilosofie kom dié perspektief veral tot sy reg in die sosiologiese regsleer. Sien in die verband Dias *supra* vn 30 580–618.

50 Dit is juis die kernvraag by funksionele regsvergelyking, aldus Zweigert-Kötz *supra* 31 vn 8.

51 A 23: "Elke persoon het die reg op toegang tot alle inligting wat deur die staat of enige orgaan van die staat op enige regeringsvlak gehou word in soverre sodanige inligting benodig word vir die uitoefening of die beskerming van enige van sy of haar regte." A 25(3)(b): "Elke beskuldigde het die reg op 'n billike verhoor waarby inbegrepe is die reg – (b) om in voldoende besonderhede van die aanklag verwittig te word." Vgl a 32 en 35(3)(a) van die 1996-Grondwet.

52 Bv *Smith, Sefadi, Majavu, Khala en Botha* maar op sy ergste in *Phato supra* waarin die hof heeltemal te geredelik en onkrities die voorbeeld van die Kanadese beslissing *R v Stinchcombe* 1992 LRC (Crim) 68 gevolg het.

53 Juis hierdie relevante vraag is deur die hof gestel in *Shabalala supra* 103B ev. In dié saak het die hof sigself by implikasie laat konfronteer deur die vraag hoe ander jurisdiksies met

vervolg op volgende bladsy

Indien slegs die eerste gedeelte van die vraag gevra word, trap die hof in die strik van legalistiese reduksionisme. Met die byvoeging van die gekursiveerde gedeelte van bogenoemde formulering word daar egter behoorlik erkenning verleen aan die remediërende karakter van regsreëls en word die gemeenskapsbelang ook verdiskonteer.

In beginsel dikteer die onderhawige faktor dat die kritiese vraag in die proses van funksionele regsvergelyking nie slegs is welke jurisdiksie 'n soortgelyke regsdokument as ons het nie, maar bykomend daartoe, welke jurisdiksie met 'n soortgelyke probleem as ons te kampe gehad het. Indien die ander jurisdiksie nie soortgelyke probleme gehad het nie, is die antwoorde en oplossings van daardie jurisdiksie, soos gemanifesteer in sy regsreëls, vir ons irrelevant want dit is antwoorde en oplossings vir ander probleme as ons eie. Die regspraak van daardie jurisdiksies op die betrokke punt stel dus nie *vergelykbare* regspraak daar nie en behoort daarom nie deur ons howe nagevolg te word nie.

2 2 3 Die effek-faktor

Wanneer, soos in die voorafgaande paragraaf betoog is, vasgestel is dat 'n bepaalde jurisdiksie voor dieselfde probleme te staan gekom het as die plaaslike jurisdiksie, kan gesê word dat vergelykbare regspraak in beginsel voorhande is. Dit impliseer egter nie noodwendig dat die betrokke regspraak vir navolging kwalifiseer nie, aangesien daar eers vasgestel moet word of die regspraak die gewenste gevolg gehad het om die problematiek waarmee dit te doen gehad het suksesvol aan te spreek. Indien nie, behoort die hof vanselfsprekend teesinnig te wees om daardie regspraak te volg. Om vas te stel of regspraak suksesvol was, kan verskeie bronne geraadpleeg word. *Eerstens* is daar byvoorbeeld (latere) regspraak wat krities staan teenoor die oplossings van die uitspraak wat onder oorweging is en *tweedens* kan daar regsakademiese kommentaar en kritiek op die onderhawige regspraak wees. Sou daar wel kritiek wees, moet die hof uiteraard daarvan kennis neem en behoort die hof ook versigtig te wees om nie goedsmoeds sodanige regspraak na te volg nie.

Derdens moet vasgestel word wat die sukses al dan nie van die regspraak was. Het dit inderdaad daarin geslaag om die probleem wat dit wou aanspreek, doeltreffend te ondervang? Weer eens behoort die hof afwysend teenoor daardie regspraak te staan indien dit nie suksesvol was met verwysing na probleemoplossing nie.

Die effek-faktor vereis derhalwe 'n evaluasie van die sukses al dan nie van die buitelandse regspraak wat onder oorweging is. Die praktiese belang van hierdie faktor vir die proses van regsvergelyking is dat die vergelykingsproses van buitelandse regspraak 'n veel wyer inset vereis as bloot die oorweging van

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soortgelyke grondwetlike bepalings die probleem van inligting aan beskuldigdes gedurende strafsake hanteer in die lig van die probleme van veeltaligheid, 'n bewese gevaar van intimidasie van getuies en die moontlikheid van meineed. Dit het die hof gebring by die meer navolgenswaardige Amerikaanse beslissing *S v Tune* 98 Atlantic R 2d 881 waar die hof se probleem soortgelyk was aan die in *Shabalala* eerder as om *Stinchcombe supra* te weerklink. Die meer geskakeerde antwoord wat die konstitusionele hof uiteindelik op die kwessie van dossierprivilegie verskaf het, gee wel blyke van die inagneming van die eiesoortige probleme van die Suid-Afrikaanse regspraktyk in plaas van 'n blindelingse navolging van buitelandse reg (sien *Shabalala v Attorney-General of Transvaal* 1995 12 BCLR 1595 (CC)).

uitsprake self. Ander buitelandse bronne, soos die menings van akademici oor die uitsprake, is hoogs relevant omdat die waarde van die uitspraak kwalik daarsonder getoets kan word. Voorts is getuienis wat lig kan werp op die sukses van die regspraak as probleemoplosser vir dieselfde rede eweseer van belang.

2 2 4 Die legitimiteitsfaktor

By al sy werksaamhede behoort 'n hof altyd in gedagte te hou dat dit as 'n legitieme handhawer van reg en 'n doeltreffende beslegter van geskille *gesien* moet word. Die howe behoort so te werk te gaan dat die gemeenskap dit kan beskou as 'n instelling wat die gemeenskap bevredigend dien. Indien daarenteen die hof op 'n wyse te werk gaan wat wantroue van die gemeenskap in die regbank genereer, lok dit eiegeregtige optrede buite-om die regsorde uit.

Hierdie realiteit het regsvergelykende implikasies want sou die hof te geredelik geneig wees tot die navolg van buitelandse regspraak sonder om die oortuigings en die reaksie van die Suid-Afrikaanse publiek daarop in ag te neem, loop die hof die gevaar om die vertroue van die Suid-Afrikaanse publiek te verbeur en so sy eie legitimiteit en die integriteit van die regspleging te benadeel.

Hierdie risiko kom veral in twee gevalle voor. Eerstens waar die gemeenskapsbelang konkreet in gedrang is, byvoorbeeld waar die hoë voorkoms van misdaad 'n benadering van die howe vereis wat die gemeenskap onder die indruk bring van die howe se verbintenis tot gemeenskapsbeskerming. Tweedens, in die geval waar van die hof 'n waarde-oordeel vereis word ten einde die inhoud van 'n wydgedefinieerde regsreël te bepaal,[54] is dit noodsaaklik om gevoeligheid vir plaaslike opvattings te hê. In die Suid-Afrikaanse regspraak is juis beklemtoon dat wanneer met die *boni mores*-begrip gewerk word, dit die *plaaslike boni mores* is wat deurslaggewend is.[55]

2 2 5 Die faktor van die onderliggende kultuur

Selfs wanneer ons eie regbank met dieselfde problematiek worstel as dié van 'n ander jurisdiksie (paragraaf 2 2 2 hierbo), beteken dit nie noodwendig dat die regspraak van daardie jurisdiksie vergelykbaar is nie want dit kan gebeur dat weens kulturele en godsdienstige verskille tussen die bevolkings van daardie jurisdiksie en die plaaslike jurisdiksie, die kloof so wyd is dat dit regsreëls (en regspraak) sal oplewer waarmee die bevolking van die plaaslike jurisdiksie sigself nie kan versoen nie. Twee uiterste voorbeelde kan vermeld word. Die uitsprake van Saoedi-Arabiese of Siriese howe kan weens die onderliggende Islamitiese godsdienstig-kulturele basis[56] daarvan so vreemd staan van die plaaslike reg dat dit geensins vergelykbaar is nie. Dieselfde geld uitsprake van die Verre Ooste, byvoorbeeld China of Japan, waar die kulturele[57] verskille so aansienlik is dat sinvolle funksionele regsvergelyking moeilik haalbaar is.

Hierdie voorbeelde behoort geen probleme op te lewer nie. Die interessantheid is egter dat dieselfde kulturele onaanpasbaarheid dikwels voorkom by jurisdiksies

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54 Bv die begrip billikheid in a 8(3)(a), waardigheid in a 10 en redelikheid in a 33(1)(a)(i) van die 1993-Grondwet (a 9(3) en 36(1) van die 1996-Grondwet).

55 Sien bv *Marais v Richard* 1981 1 SA 1157 (A) 1168D–E.

56 Sien in die algemeen Van Zyl *supra* vn 7 266 ev; David en Brierly *Major legal systems in the world today* (1978) 437 ev.

57 Van Zyl *supra* vn 7 250 ev.

wat kultureel gesproke nader aan Suid-Afrika is, byvoorbeeld met betrekking tot die eiesoortige Sweedse regsposisie rakende borgtog.[58] Ofskoon 'n mens onder andere weens die blink menseregte-rekord van die Swede sou reken dat die Sweedse posisie ook met betrekking tot borgtog 'n navolgenswaardige voorbeeld bied, vind 'n mens die besondere eienaardigheid dat die Sweedse reg hoegenaamd nie die regsverskynsel van borgtog ken nie.

Die treffendste voorbeeld waar, weens *subtiele* dog dieperliggende kultuurverskille, funksionele regsvergelyking moeilik haalbaar is, is die Amerikaanse opvattings oor vryheid van spraak en uitdrukking. Alhoewel die Suid-Afrikaanse opvattings hieroor met die eerste oogopslag met die Amerikaanse beskouings versoenbaar is, dig die Amerikaanse (regs)kultuur 'n veel groter mate van absoluutheid aan hierdie reg toe[59] as die Suid-Afrikaanse reg[60] asook die Wes-Europese reg waar die reg op vryheid van spraak substantief ingekort word deur die regte van andere op privaatheid, aansien en waardigheid. Artikel 5(2) van die Duitse Grondwet beperk uitdruklik die reg op vryheid van uitdrukking vir sover dit bots met 'n persoon se waardigheid. Waardigheid is deur die Duitse grondwetlike hof uitgelê as wyd genoeg om ook reputasie te omvat.[61] Die reg op die *fama* lê dus kragtens die Duitse Grondwet die reg op vryheid van uitdrukking aan bande.[62] Anders as die handves van regte van die Verenigde State, verleen die Suid-Afrikaanse handves ook uitdruklik beskerming aan regte wat die reg op vryheid van uitdrukking balanseer, byvoorbeeld die reg op waardigheid en dié op privaatheid.[63] Nadat die Grondwet in werking getree het, is daar trouens beslis dat die konsep waardigheid ook die begrip reputasie (*fama*) omvat.[64] Dit op sigself beperk die reg op vryheid van uitdrukking nog verder. Die Amerikaanse opvattings hieroor is die nalatenskap van die eiesoortige Amerikaanse politieke geskiedenis[65] en strek as 'n eiesoortige eienskap van die Amerikaanse psige veel dieper as 'n blote regsreël. Die Amerikaanse reg staan as gevolg hiervan afwysend teenoor die verlening van interdikte[66] wat 'n demper kan plaas

58 Sien in die algemeen die Sweedse Kode vir Judisiële Prosedure van 1942, wat in 1948 in werking getree het.

59 Van der Vyver 1995 *SALJ* 572 ev met spesifieke verwysing na die steun in *Mandela v Falati supra* op Amerikaanse gesag mbt vryheid van uitdrukking.

60 Vryheid van spraak word in Suid-Afrika wesenlik getemper deur die akkommodering van die dikwels botsende belange van die reg op privaatheid, waardigheid en reputasie. Dit word gedemonstreer deur die erkenning van die reg op die *fama* van die niehandeldrywende regspersoon in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 519 (A); die uitdruklike erkenning van die reg op privaatheid van die regspersoon in *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A); die reël dat die media skuldloos aanspreeklik is vir die publikasie van lasterlike materiaal in oa *Pakendorf v De Flamingh* 1982 3 SA 146 (A); die reël dat die verweerder by 'n lastergeding met 'n volle bewyslas belas is by die substansiëring van verwere – sien bv *Neethling v Du Preez* 1994 1 SA 708 (A) 760F–770J.

61 Barendt *Freedom of speech* (1985) 184.

62 De Wet "Can the social state prineiple in Germany guide state action in South Africa in the field of social and eeonomic rights?" 1995 *SAJHR* 34 wys daarop dat die beginsel van menswaardigheid sentraal is in die Duitse reg weens die bepalings van a 1(1) van die Duitse Grondwet.

63 Onderskeidelik a 10 en 13 van die 1993-Grondwet (a 10 en 14 van die 1996-Grondwet).

64 *Gardener supra* 36G–I.

65 Van der Vyver 1995 *SALJ* 572 ev.

66 Sien oa Spitz "Eschewing silence produeed by law: The political eore and proteeted periphery of freedom of expression" 1994 *SAJHR* 320 ev.

op vryheid van uitdrukking, ten spyte van die feit dat dit moontlik tot onbehoorlike inbreuk op die aansien of waardigheid van 'n ander persoon kan lei. Langs dieselfde weg word die publikasie van die private aangeleenthede van openbare figure toegelaat, ongeag of gesê kan word dat die publiek 'n belang by die kennisname daarvan het al dan nie. Die Suid-Afrikaanse kultuur rondom vryheid van spraak blyk derhalwe so drasties van die Amerikaanse posisie te verskil dat daar uiters versigtig met Amerikaanse beslissings oor hierdie onderwerp omgegaan behoort te word. Die gevalle wat voorgekom het waar plaaslik geargumenteer is dat Amerikaanse uitsprake wel navolgingswaardige presedente bied,[67] vertoon 'n versuim om met hierdie kultuurverskil erns te maak en verdien as onkritiese nabootsing in plaas van verantwoordbare regsvergelyking geen ondersteuning nie.

Die subtiele eerder as die ooglopende kultuurverskille bied vir behoorlike regsvergelyking die grootste uitdaging. Onsensitiwiteit hieroor maak die deur wyd oop vir kulturele imperialisme via die regspraak. Dit tas die integriteit van die Suid-Afrikaanse regsorde aan en verontagsaam tegelyk die legitimiteitsfaktor wat in paragraaf 2 2 4 hierbo bespreek is.

2 2 6 Die hiërargie-reël

Soos in paragraaf 1 hierbo aangedui, gaan dit by funksionele regsvergelyking oor die vraag welke buitelandse reg plaaslik bruikbaar is. Derhalwe behoort dit vir die hof irrelevant te wees of hy werk met byvoorbeeld 'n uitspraak van die hoogste hof van appèl of van 'n hof laer af in die hiërargie van 'n betrokke staat. Indien die uitspraak van die laer hof meer bruikbaar blyk te wees as 'n botsende uitspraak van 'n hoër hof, is daar geen beletsel op die hof om nogtans die laer hof se uitspraak te volg nie. Daar bestaan geen presedentestelsel met betrekking tot buitelandse regspraak wat die hof verplig om die uitsprake van die hoër howe van buitelandse jurisdiksies te volg nie. Dit gaan vir die plaaslike hof alleen om die bruikbaarheid van die buitelandse denkpatroon, ongeag die hiërargiese posisie van die hof wat die bron van daardie argument is. Hierdie feit is goed raakgevat in *Shabalala*, waar die hof hom by monde van regter Cloete soos volg uitlaat:[68]

> "Counsel representing the applicants sought to dismiss the majority decision in *Tune*'s case *inter alia* on the basis that that Court was lower in the hierarchy of American Courts than the Supreme Court is in Canada. But a judgment of any foreign Court is only persuasive. A Court sitting in South Africa is clearly not obliged to follow the reasoning of the highest court in one jurisdiction if it prefers the reasoning of a court which is comparatively lower in the hierarchy of another jurisdiction. Which of two competing decisions in different jurisdictions is approved, will depend on the reasoning, and not the status, of the Court."

3 REGSVERGELYKING EN SUID-AFRIKA SE VERDRAGSVERPLIGTINGE

Daar bestaan talle internasionale en streeksverdrae wat minimum menseregtestandaarde neerlê.[69] Veral die internasionale verdrae is vir Suid-Afrika van

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67 Veral *Mandela v Falati supra*. Raadpleeg die oortuigende kritiek van Van der Vyver 1995 *SALJ* 572 ev.

68 *Supra* 105B–C.

69 Sien bv *De Villiers supra* vn 17; Patel en Walters *Human rights: Fundamental instruments and documents* (1994).

belang aangesien die Republiek moontlik 'n party daartoe kan word, en die reg vervat in daardie verdrae na ratifikasie en wetgewende inkorporasie deel van die Suid-Afrikaanse reg sal wees.[70] By die skryf hiervan het Suid-Afrika nog net twee internasionale menseregte-instrumente geratifiseer[71] alhoewel 'n sewetal reeds onderteken is en die ratifikasieproses moontlik binnekort gefinaliseer sal wees.

Seker die belangrikste internasionale menseregteverdrag is die Internasionale Konvensie vir Burgerlike en Politieke Regte (IKBPR) wat met nagenoeg al die regte handel wat ook in die Suid-Afrikaanse handves beskerm word. Wanneer hierdie verdrag deur die Suid-Afrikaanse wetgewer geratifiseer is, is Suid-Afrika verplig om behoorlik daaraan gevolg te gee. Indien nie, kom Suid-Afrika nie sy internasionale verdragsverpligtinge na nie en tree hy onregmatig kragtens internasionale reg (die volkereg) op.[72]

Dit hou vir die regsvergelyking ook implikasies in want indien die hof 'n buitelandse beslissing volg wat nie met Suid-Afrika se verpligtinge kragtens 'n internasionale menseregteverdrag versoenbaar is nie, is die hof aandadig aan die Republiek se verontagsaming van sy internasionale regsverpligtinge. Dit kan inderdaad baie maklik gebeur, soos die volgende voorbeeld duidelik illustreer: Die Internasionale Konvensie vir Burgerlike en Politieke Regte beskerm benewens die reg op vryheid van uitdrukking ook die regte op privaatheid en aansien.[73] Die reg op vryheid van uitdrukking word spesifiek aan bande gelê deur ander persone se reg op aansien, en ook vir sover oorlogspropaganda en die aanblaas van nasionale, godsdienstige en rassehaat verbied word.[74] Dit verskil merkbaar van die Amerikaanse posisie waar die reg op vryheid van uitdrukking in veel meer ongekwalifiseerde terme beskerm word. Dit word duidelik gedemonstreer deurdat die Amerikaanse regering die konvensie geratifiseer het onderworpe aan voorbehoude met betrekking tot die beperkings op die vryheid van uitdrukking.[75]

Die Amerikaanse posisie rakende die regte op vryheid van uitdrukking, reputasie en privaatheid verskil gevolglik substantief van die regsposisie kragtens die IKBPR. Indien die Republiek die konvensie ratifiseer en die howe volg terselfdertyd Amerikaanse presedente oor die saak, is die howe in der waarheid aandadig aan verdragsbreuk weens onbehoorlike regsvergelyking.

Hierdie wanpraktyke kan ondervang word deur, voordat 'n buitelandse beslissing gevolg word, eers vas te stel wat die onderhawige staat se internasionale verdragsverpligtinge behels. Indien, soos in die voorbeeld, die buitelandse jurisdiksie se verpligtinge anders is as dié van die eie jurisdiksie, behoort sy uitsprake nie gevolg te word nie omdat dit gegee is binne verskillende gedefinieerde internasionale verdragsverpligtinge.

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70 Dugard *International law – A South African prospective* (1994) 264 ev.

71 *Konvensie vir die Regte van die Kind* van 1989 en die *Konvensie vir die Verwydering van Alle Vorme van Diskriminasie teen Vroue* van 1979. Die *Afrika-Handves vir Mense- en Volksregte* is ook geratifiseer.

72 Ook in die interim-tydperk na ondertekening en voor ratifikasie is die staatsparty ingevolge a 18 van die *Weense Konvensie oor Verdragsreg* verplig om niks te doen wat in stryd mag wees met die ondertekende verdrag nie.

73 Onderskeidelik a 17 en 19(b) van die Konvensie.

74 A 20 van die Konvensie. In a 16(2) van die 1996-Grondwet is die Suid-Afrikaanse posisie mbt die vryheid van uitdrukking in pas gebring met die posisie kragtens die IKBPR.

75 Green "The Matroishka Strategy: US Evasion of the spirit of the International Covenant on Civil and Political Rights" 1994 *SAJHR* 359–561.

Wanvoorstelling: berekening van skadevergoeding (Deel 1)

DJ Lötz
Blur LLM LLD
Professor in Handelsreg, Universiteit van Pretoria

SUMMARY

Misrepresentation: calculation of damages

In this article, against an analytical background of academic commentary on the positive law, a positivistic investigation is made of manners and methods of calculating damages on the ground of fraudulent or negligent misrepresentation.

Problems addressed are the basis, preconditions and refinement of calculating damages and the meaningful limitation thereof. Consequently, certain guidelines are proposed for identifying and systematising the various preconditions for calculating damages in order to place them on a suitably principled basis.

It is recommended that, depending on the factual circumstances of each case, calculation may be either contractual or delictual. If the misrepresentation forms part of a contractual term, the basis of calculation is primarily contractual. All other cases of fraudulent or negligent misrepresentation should be dealt with according to delictual principles.

In conclusion, the criteria for calculating damages are directly linked to the cause of action and specific methods of calculation are suggested. In general there is no reason in law why the general principles of the law of contract and delict should not be applied in an action for damages based on fraudulent or negligent misrepresentation.

1 INLEIDING

'n Positiefregtelike ondersoek na benaderingswyses en berekeningsmetodes van skadevergoeding op grond van wanvoorstelling word in hierdie artikel aangepak. 'n Analise en evaluasie van en kommentaar op die positiewe reg sal die kern van hierdie ondersoek uitmaak, gevolg deur oplossingsmoontlikhede.

2 ALGEMENE BEGRIPPE EN BEGINSELS VAN DIE SKADEVERGOEDINGSREG[1]

Ten einde die leser te oriënteer en moontlike onduidelikhede[2] oor die betekenis en inhoud van sekere problematiese begrippe en beginsels in die

1 Visser en Potgieter *Skadevergoedingsreg* (1993) 1 beskou die skadevergoedingsreg as "[d]aardie groep regsreëls wat aandui hoe sowel die bestaan en omvang van skade as die toepaslike bedrag skadevergoeding of genoegdoening bepaal word by 'n delik, kontrakbreuk of ander regsfeit waarvolgens vergoeding betaalbaar is". Sien Van der Walt "Die voordeeltoerekeningsreël – knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" 1980 *THRHR* 3 wat die skadevergoedingsreg omskryf as "[d]aardie groep reëls van die privaatreg wat te make het met die ontstaan, inhoud, oordrag en tot niet gaan van verpligtinge tot die vergoeding van skade".

2 Hierdie onduidelikhede is na die Romeinse en Romeins-Hollandse reg terug te spoor, wat verder deur Engelsregtelike beïnvloeding vererger is: Erasmus "Aspects of the

vervolg op volgende bladsy

skadevergoedingsreg[3] aan te spreek, word die ondergenoemde begrippe en beginsels kortliks bespreek.

2 1 Skade[4]

Skade[5] is die afname[6] in die nuttigheid[7] of kwaliteit van 'n vermoëns- of persoonlikheidsbelang (welke belang regserkende behoeftes dien) weens 'n skadestigtende gebeurtenis.[8]

Dus bestaan die skadebegrip uit die volgende elemente:[9]

(a) 'n afname-element, wat logieserwys op die vermindering van 'n vermoëns- of persoonlikheidsbelang dui;

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history of the South African law of damages" 1975 *THRHR* 112–117; Visser en Potgieter 17; Bobert *The law of delict* (1984) 476.

3 Sien in die algemeen Van der Walt 1980 *THRHR* 3 ev.

4 Die moderne skadebegrip in die Suid-Afrikaanse reg het sy beslag in die uiteensetting van Mommsen *Beiträge zum Obligationenrecht II abt zur Lehre vom Interesse* (1855) gekry. Sien verder Visser en Potgieter 25; Van der Walt *Die sommeskadeleer en die "once and for all"-reël* (LLD-proefskrif Unisa 1977) 9–19; Burchell *Principles of delict* (1993) 125 ev; Reineeke "Die elemente van die begrip skade" 1976 *TSAR* 27; *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Oslo Land Co Ltd v The Union Government* 1938 AD 584. Volgens Van der Walt 244 is skade 'n normatiewe en juridiese begrip.

5 Wat uit vermoën- en nie-vermoënskade bestaan: Neethling, Potgieter en Visser *Deliktereg* (1996) 205–207; Visser en Potgieter 28 en 31; Neethling, Potgieter en Visser *Law of delict* (1993) 199–201; McKerron *The law of delict* (1971) 51; Pauw "Aspects of the origin of the action for pain, suffering and disfigurement" 1977 *TSAR* 248; Pont "Vergoeding van skade op grond van 'loss of expectation of life'" 1942 *THRHR* 12; Visser *Kompensasie en genoegdoening volgens die aksie weens pyn en leed* (LLD-proefskrif Unisa 1980) 9. Daarenteen is Van der Walt 1980 *THRHR* 3; Reineeke "Die elemente van die begrip skade" 1976 *TSAR* 26 ev; Boberg *The law of delict: Vol 1 Aquilian Liability* (1984) 485; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 179; Van der Walt 182 ev en De Wet en Van Wyk *De Wet en Yeats: Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 202 van mening dat skade slegs uit vermoënskade kan bestaan omdat die mens se liggaam en sy gevoelens nie tot sy vermoë behoort nie.

6 Hierdie afname word ooreenkomstig die sommeskadeleer vasgestel: Visser en Potgieter 62 ev.

7 Volgens Van der Walt 281 hoef die nuttigheidswaarde van die vermoënsbestanddeel nie noodwendig 'n geldwaarde te hê nie.

8 Visser en Potgieter 18 en 23; Van der Walt 278; Neethling, Potgieter en Visser *Delict* 198 ev; Burchell 123; Erasmus en Gauntlett "Damages" in 7 *LAWSA* (1979) par 10; Koch *Damages for lost income* (1984) 20; Visser *Proefskrif* 3. Van der Walt 1980 *THRHR* 3 omskryf skade "as 'n afname in die nuttigheid van 'n getroffe vermoënsbestanddeel of vermoënstruktuur vir die planmatige bevrediging van die betrokke vermoënshebbende se erkende behoeftes". Sien Reineeke 1976 *TSAR* 27 vir 'n ander omskrywing van skade. Hierdie skadestigtende gebeurtenis moet as algemene reël onseker wees: Neethling, Potgieter en Visser *Delict* 199; Visser en Potgieter 27; Reineeke 1976 *TSAR* 34. Van der Merwe en Olivier 179 beskou skade (wat nie gelyk aan 'n vermoënsvermindering is nie) primêr as 'n vermoënsbenadeling tov 'n persoon se boedel wat uit 'n regskrenking resulteer.

9 Visser en Potgieter 23–24; Van der Merwe en Olivier 188 ev; De Wet en Van Wyk 201.

(b) 'n kousale element, wat vereis dat die skade deur 'n regtens erkende skadestigtende gebeurtenis[10] veroorsaak is alvorens die skade as nadeel gereken word;[11]

(c) 'n belange-element, waarvan die objek 'n vermoëns- of persoonlikheidsbelang is;

(d) 'n normatiewe element, wat op 'n afname in die nuttigheid of kwaliteit van 'n belang van 'n regsubjek se regserkende behoeftes dui; en

(e) 'n tyd-element, wat daarop dui dat die afname reeds plaasgevind het of waarskynlik nog in die toekoms gaan plaasvind.

Alhoewel skade en onregmatigheid twee onafhanklike delikselemente is, bestaan daar wel 'n noue verband[12] tussen hierdie twee elemente.[13] Hierdie noue verband[14] is daarin geleë dat skade en onregmatigheid handel met vermoëns- en persoonlikheidsbelange wat versteur word.[15] Sekere standpunte stel onregmatigheid as vereiste vir skade of omskryf skade met verwysing na onregmatigheid.[16] Van der Walt[17] se benadering is dat die skadevergoedingsreg skade tot 'n juridiese en normatiewe begrip verhef het wat meebring dat daar 'n losser verband tussen skade en onregmatigheid is. Visser en Potgieter[18] onderskryf nie voormelde standpunt nie omdat verkeerde beginsels by skadebepaling in ag geneem word en onregmatigheid (ongeoorloofdheid) nie 'n vereiste vir die afname in die nuttigheidswaarde van belange is nie.[19]

Skuld as 'n verwyt of verwytbare gesindheid kwalifiseer of veroorsaak nie *per se* skade nie.[20] Skade speel wel 'n rol om te bepaal of opset of nalatigheid aanwesig is.[21]

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10 Dit is 'n feitekompleks (van 'n onsekere aard, bestaande uit 'n delik, kontrakbreuk of enige ander regsfeit wat 'n plig tot die vergoeding van skade meebring) wat werklik of na bewering tot skade aanleiding gee: Van der Walt 7 9; Visser en Potgieter 7 18 24; Reinecke 1976 *TSAR* 34.

11 Sien ook Reinecke 1976 *TSAR* 34; Van der Walt 7.

12 Hierdie noue verband is noodsaaklik vir die ontwikkeling van die juridiese vermoënsbegrip: Visser en Potgieter 33 48.

13 Visser en Potgieter 33; Neethling, Potgieter en Visser *Delict* 203. Van der Walt 242 wys daarop dat skade nie met verwysing na 'n regskending omskryf moet word nie omdat dit 'n verwarring tussen die skade- en onregmatigheidsvereiste in die deliktereg sal veroorsaak.

14 Die primêre verskil tussen onregmatigheid en skade is dat skade met die afname in die nuttigheidswaarde van belange handel, terwyl die klem by onregmatigheid val op die versteuring van belange wat regstrydig of ongeoorloof is: Visser en Potgieter 34.

15 Visser en Potgieter 34 91; Neethling, Potgieter en Visser *Delict* 29; Van der Merwe en Olivier 50.

16 Van der Merwe en Olivier 179 324; Scott "Deliktereg 1985 – 'n besinning oor teorie, praktyk en onderrig" 1985 *De Jure* 136. *Contra* Boberg 470–480; Van der Walt 242–243; Neethling, Potgieter en Visser *Delict* 203 ev; Van der Walt "Wat word van die nadeelvereiste by bedrog en by estoppel?" 1973 *THRHR* 349; Reinecke 1976 *TSAR* 33–34; Neethling "Die reg op die verdienvermoë en die reg op die korrekte inligting as selfstandige subjektiewe regte" 1990 *THRHR* 101–105.

17 241–242.

18 33–34 36.

19 Mi is Ig standpunt korrek mits die *bepalende faktore* van elke delikselement juridies en feitelik uitmekaar gehou word. Sien Van der Merwe, Van Huyssteen, Reinecke, Lubbe en Lotz *Contract. General principles* (1993) 84 wat ook hierdie standpunt onderskryf.

20 Boberg 475; Neethling, Potgieter en Visser *Delict* 113; Visser en Potgieter 41.

21 Neethling, Potgieter en Visser *Delict* 116 121; Visser en Potgieter 41; Van der Merwe ea 105.

Alhoewel (feitelike) kousaliteit altyd by skade ter sprake is, bly kousaliteit en skade twee onafhanklike delikselemente.[22]

2 2 Vermoënskade

Vermoënskade, wat 'n onderdeel van die skadebegrip is, is die verlies (waardevermindering) van 'n positiewe vermoënsbestanddeel (bate) of die ontstaan (vermeerdering) van 'n negatiewe vermoënsbestanddeel (vermoënskuld).[23]

Daar is twee gedagterigtings[24] oor die vraag waaruit die vermoë kan bestaan, naamlik:[25]

(a) die juridiese vermoënsbegrip,[26] wat bepaal dat die vermoë[27] uit al die subjektiewe regte waarop 'n geldwaarde geplaas kan word (sowel as alle vermoënsverwagtinge wat tot die verkryging van vermoënsregte aanleiding kan gee) bestaan; en[28]

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22 *Shell Tankers Ltd v South African Railways and Harbours* 1967 2 SA 666 (OK); *International Slipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A); Visser en Potgieter 42 80; Neethling, Potgieter en Visser *Delict* 205; Erasmus en Gauntlett par 22–23; Kerr *The principles of the law of contract* (1989) 575 ev; De Wet en Van Wyk 203; Van der Merwe ea 105; Reineeke 1976 *TSAR* 34–42. Van der Walt 256–260 weier om die noue verband tussen die sommeskadeleer en die *conditio sine qua non*-metode (vir die bepaling van kousaliteit) te erken.

23 Visser en Potgieter 18 44 54; Neethling, Potgieter en Visser *Delict* 206. Sien Boberg 475–476; Reineeke 1976 *TSAR* 28; Van der Merwe 1980 *THRHR* 3; Van der Merwe en Olivier 179 en De Wet en Van Wyk 222 vir ander omskrywings van vermoënskade. Om vas te stel of 'n persoon vermoënskade gely het, moet daar volgens Van der Merwe en Olivier 180 'n vergelyking tussen 'n benadeelde se vermoënsposisie voor en na pleging van die onregmatige optrede getref word: Indien lg vermoënsposisie die nadeligste is, het die persoon vermoënskade gely.

24 Verder is daar ook 'n subjektiewe benadering (waar die betrokke individu se interesse beoordeel word aan die hand van hoe dit hom persoonlik in sy vermoë raak) en objektiewe benadering (wat in objektiewe normatiewe maatstawwe, soos die markprysreël en redelike herstelkoste, geleë is) tot vermoënskade: Van der Walt 281–283; Visser en Potgieter 60–61; Oelofse "Skadevergoeding as surrogaat van die prestasie-voordeeltoerekening" 1982 *TSAR* 61; Joubert "Skadevergoeding as surrogaat van prestasie – weiering van daadwerklike nakoming – berekening van skadevergoeding" 1982 *THRHR* 79; *North and Son (Pty) Ltd v Albertyn* 1962 2 SA 212 (A); *Mlombo v Fourie* 1964 3 SA 350 (T); *Erasmus v Davis* 1969 2 SA 1 (A); *Swart v Van der Vyver* 1970 1 SA 633 (A); *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A).

25 Visser en Potgieter 18 45; Van der Walt 128; Reinecke 1976 *TSAR* 28–29; Koch *Damages for lost income* (1984) 25 ev.

26 Wat deur Reineeke *Ongepubliseerde klasdiktaat vir LLM-kursus UP* (1990) hfst 3 en Van der Walt 181 243 282 444 gekritiseer word. Volgens Reineeke 1976 *TSAR* 28–29 bestaan die vermoë uit huidige vermoënsbestanddele (synde al die verskillende subjektiewe regte) en toekomstige vermoënsbestanddele (synde vermoënsverwagtinge).

27 Regtens afdwingbare verpligtinge en skuldverwagtinge wat 'n geldwaarde het, vorm deel van hierdie vermoë (Visser en Potgieter 45).

28 *Union Government (Minister of Railways and Harbours) v Warneke* hierbo; *Oslo Land Co Ltd v The Union Government* hierbo; *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 1 SA 517 (W); *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A); *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A); Van der Merwe en Olivier 324; Reinecke 1976 *TSAR* 31. Weens die praktiese werkbaarheid van die juridiese vermoënsbegrip moet hierdie benadering mi onderskryf word.

(b) die feitelik-ekonomiese vermoënsbegrip,[29] wat bepaal dat alles van 'n regsubjek wat geldwaarde het en wat gebruik kan word om erkende behoeftes (ongeag of dit in 'n reg beliggaam is) te bevredig, die vermoë uitmaak.[30]

Van belang is dat daar 'n geldwaarde aan die juridiese vermoë gekoppel moet kan word[31] en dat die blote versteuring daarvan nie noodwendig gelyk is aan deliktuele onregmatigheid of kontrakbreuk nie.[32] Verder het die blote intrede van vermoënskade nie noodwendig aanspreeklikheid tot gevolg nie.[33]

Die juridiese vermoë bestaan onder andere uit die volgende bestanddele (wat nie 'n *numerus clausus* is nie maar wel positiewe en negatiewe vermoënsbestanddele verteenwoordig), naamlik:[34]

(a) vermoënsregte, wat saaklike regte, immaterieelgoedereregte, vorderingsregte, die reg om nie mislei te word nie en persoonlike immaterieelgoedereregte op 'n verdienvermoë en kredietwaardigheid insluit;[35]

(b) vermoënsverwagtinge,[36] wat uit 'n regserkende verwagting[37] bestaan dat 'n regsubjek in die toekoms vermoënsregte kan verwerf;[38]

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29 Wat veral deur Van der Walt 280–281 onderskryf word. Sien Reinecke 1976 *TSAR* 33; Reinecke "Nabetragting oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 221; Visser "Die verhouding tussen onregmatigheid en skade" 1991 *THRHR* 785 en Visser en Potgieter 47 vir kritiek teen hierdie benadering.

30 Van der Walt 280; Visser en Potgieter 45.

31 De Wet en Van Wyk 224.

32 Visser en Potgieter 33 48 283.

33 *Idem* 54.

34 Reinecke *Diktaat* hfst 3; Visser en Potgieter 18 49–54; Neethling, Potgieter en Visser *Delict* 207–208; Reinecke 1976 *TSAR* 35 ev.

35 *Viviers v Kilian* 1927 AD 449; *Bruwer v Joubert* 1966 3 SA 334 (A); *Smit v Saipem* 1974 4 SA 918 (A); *Shoba v Minister van Justisie* 1982 2 SA 554 (K); *Swanepoel v Mutual and Federal Insurance Co Ltd* 1987 3 SA 399 (W); Van der Merwe en Olivier 55 370; Neethling, Potgieter en Visser *Delict* 45 288; Boberg 385 488 531 539; Reinecke 1976 *TSAR* 29 43; Neethling "Persoonlike immaterieelgoedereregte: 'n nuwe kategorie subjektiewe regte?" 1987 *THRHR* 316–324; Reinecke 1988 *De Jure* 235; Neethling 1990 *THRHR* 101–105.

36 Wat die moontlikheid om 'n wins deur arbeidskragte te maak, 'n inkomste in die toekoms te verdien en die verkryging van toekomstige vorderingsregte insluit: *Trichardt v Van der Linde* 1916 TPD 148; Visser en Potgieter 51–52.

37 Hierdie verwagting moet in beginsel as 'n vermoënsverwagting erken word, daar moet voldoende waarskynlikhede aanwesig wees dat die verwagting vervul sal word, die verwagting moet in geld waardeerbaar wees en dit moet nie regstrydig wees nie: *Lockhat's Estate v North British and Mercantile Insurance Co Ltd* 1959 3 SA 295 (A); *Schreuder v Steenkamp* 1962 4 SA 74 (O); *Dhlamini v Protea Assurance Co Ltd* 1974 4 SA 906 (A); *Louw v Engelbrecht* 1979 4 SA 841 (O); *Tshabalala v Tshabalala* 1980 1 SA 134 (O); Reinecke *Diktaat* hfst 3; Reinecke 1976 *TSAR* 30 55–56; Cilliers "Liability for damages arising from improper execution of a will" 1980 *De Rebus* 389; Erasmus "Wills: the price of negligence" 1980 *De Rebus* 391; Sonnekus "Testamentsformaliteite – 'end' van testament – aanspreeklikheid van sertifiserende beampte" 1981 *TSAR* 175–176; Rogers "The action of the disappointed beneficiary" 1986 *SALJ* 607–613; Wunsh "Aspects of the contractual and delictual liability of attorneys" 1988 *TSAR* 24; Reinecke 1988 *De Jure* 237; Sonnekus "Pensioenverwagtings en onderhoud na egskeiding in versorgingsregtelike in plaas van vermoënsregtelike konteks" 1989 *TSAR* 326; Van der Walt 274.

38 *Shrog v Valentine* 1949 3 SA 1228 (T); *Bedford v Suid-Kaapse Voogdy Bpk* 1968 1 SA 226 (K); *Commercial Union Assurance Co SA Ltd v Stanley* 1973 1 SA 699 (A); *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T); *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama*

vervolg op volgende bladsy

(c) skulde (uitgawes); en[39]

(d) skuldverwagtinge.[40]

Vermoënskade tree in waar daar 'n verlies of waardevermindering van 'n vermoënsbestanddeel is, 'n skuld of skuldverwagting ontstaan of vergroot is en waar die ontvangs van 'n voordeel vertraag is.[41] Verder kan vermoënskade in die volgende kategorieë ingedeel word, naamlik:[42]

(a) *lucrum cessans*, wat 'n verlies of waardevermindering van 'n vermoënsverwagting is, welke vermoënsverwagting uit die nie-realisering van 'n wins in die verlede of toekoms bestaan;[43]

(b) *damnum emergens*,[44] wat alle ander vorme van skade (wat nie *lucrum cessans* is nie) insluit;[45]

(c) saakskade, wat op 'n vermoënsvermindering dui, as gevolg van beskadiging (skade) wat aan die objek van 'n saaklike reg aangerig is;[46]

(d) suiwer vermoënskade, wat skade insluit wat nie deur die beskadiging (skade) wat aan die objek van 'n saaklike reg aangerig of krenking van die persoonlikheid is nie;[47]

SA 1980 3 SA 653 (D); *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D); *Franschhoekse Wynkelder (Ko-operatief) Bpk v South African Railways and Harbours* 1981 3 SA 36 (K); Neethling, Potgieter en Visser *Delict* 280; Reinecke "Versekering sonder versekerbare belang?" 1971 *CILSA* 325; Reinecke 1976 *TSAR* 28.

39 Van der Walt 32; Möller "Modern trends in the theory of international insurance" 1976 *TSAR* 64; *Saitowitz v Provincial Insurance Co Ltd* 1962 3 SA 443 (W).

40 Reinecke *Diktaat* hfst 3; *Burger v Union National South British Insurance Co* 1975 4 SA 72 (W); *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* hierbo.

41 *Saitowitz v Provincial Insurance Co Ltd* hierbo; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A); *Probert v Baker* 1983 3 SA 229 (D); Reinecke 1976 *TSAR* 35–37; Joubert "Negatiewe interesse en kontrakbreuk" 1976 *THRHR* 5; Oelofse 1982 *TSAR* 64; Van der Merwe en Reinecke "Skadevergoeding weens kontrakbreuk: positiewe en negatiewe interesse" 1984 *TSAR* 88; Lubbe "The assessment of loss upon cancellation of breach of contract" 1984 *SALJ* 623; Visser en Potgieter 54–56 66 113 200 227 285 340 344 372; Neethling, Potgieter en Visser *Delict* 208; Van der Walt 119–120.

42 Visser en Potgieter 20–21 56–59.

43 Boberg 476; Van der Walt 271–277; Visser en Potgieter 21; Neethling, Potgieter en Visser *Delict* 208 211–213; Burchell 34; Erasmus en Gauntlett par 14 37; De Wet en Van Wyk 201 vn 137; Wessels en Roberts *Law of contract in South Africa* (1951) 1231. Volgens Van der Walt 274 is die kern van die probleem by *lucrum cessans* dat daar altyd 'n beslissing oor 'n verwagte toekomstige ontwikkeling gevel moet word.

44 Welke begrip ook gebruik word vir skade wat tot op datum van die verhoor gely is: Boberg 476; Van der Walt 19; Reinecke 1976 *TSAR* 28–32; *Whitfield v Phillips* 1957 3 SA 318 (A); *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 1 SA 174 (D); *Evins v Shield Insurance Co Ltd* hierbo.

45 Boberg 476; Visser en Potgieter 21 57; Neethling, Potgieter en Visser *Delict* 208; Burchell 34; Erasmus en Gauntlett par 14; De Wet en Van Wyk 201 vn 137; Wessels en Roberts 1231. Sien Visser en Potgieter 66 vir die verskil tussen *damnum emergens* en *lucrum cessans*. Volgens Van der Walt 276 kan skade "nie vasgestel word alvorens dit nie ingetree het en as sodanig herken is nie".

46 *Oslo Land Co v Union Government* hierbo; Neethling, Potgieter en Visser *Delict* 208–209; Visser en Potgieter 57.

47 *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* hierbo; *Franschhoekse Wynkelder (Ko-operatief) Bpk v South African Railways and Harbours*

vervolg op volgende bladsy

(e) direkte skade, wat uit daardie skade bestaan wat onmiddellik of direk uit 'n skadestigtende gebeurtenis voortvloei;[48]

(f) gevolgskade, wat daardie skade is wat, ooreenkomstig die gesonde-verstandmaatstaf, uit direkte skade[49] vloei;[50]

(g) algemene skade[51] (wat soms na nie-vermoënskade verwys),[52] wat daardie skade is wat regtens vermoed word uit 'n onregmatige handeling of kontrakbreuk[53] te volg;[54]

(h) besondere skade,[55] wat skade is wat nie (soos algemene skade) vermoed word nie maar weens die besondere omstandighede van die betrokke geval spesiaal gepleit[56] en bewys moet word;[57]

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hierbo; Visser en Potgieter 57 362–363; Neethling, Potgieter en Visser *Delict* 208–209 280–286; Burchell 34; O'Brien "Deliktuele eis weens bemoeiing met kontraktuele verhouding" 1989 *TSAR* 279; O'Brien "Deliktuele remedie op grond van nalatige wanvoorstelling binne kontraktuele verband" 1992 *TSAR* 145–147.

48 Reinecke *Diktaat* hfst 3; Visser en Potgieter 58.

49 Direkte en gevolgskade word (met die oog op aanspreeklikheidsbeperking op grond van juridiese kousaliteit) van mekaar onderskei: Visser en Potgieter 57–58 253.

50 *Kroonstad Westelike Boere-Ko-operatiewe Vereniging Bpk v Botha* 1964 3 SA 561 (A); *Holndene Brickworks (Pty) Ltd v Roberts Construction Co (Pty) Ltd* 1977 3 SA 670 (A); Visser en Potgieter 58; Neethling, Potgieter en Visser *Delict* 209.

51 Ook bekend as intrinsieke skade: *Lavery and Co Ltd v Jungheinrich* 1931 AD 156; *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 2 SA 545 (A); *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A).

52 Visser en Potgieter 20.

53 Binne kontraktuele verband is algemene skade daardie skade wat natuurlikerwys uit die kontrakbreuk vloei en wat regtens aangeneem word binne die kontrakspartye se verwagtinge te val (Visser en Potgieter 59). Binne deliktuele verband beteken algemene skade daardie nadeel wat regtens vermoed word uit die onregmatige handeling te volg (*idem* 20 253).

54 *Botha v Pretoria Printing Works Ltd* 1906 TS 710; *Graaff v Speedy Transport* 1944 TPD 236; *Reid v Royal Insurance Co Ltd* 1951 1 SA 713 (T); *Durban Picture Frame v Jeena* 1976 1 SA 329 (D); Neethling, Potgieter en Visser *Delict* 209; Christie *The law of contract in South Africa* (1991) 644; Burchell 133; Erasmus en Gauntlett par 11.

55 Ook bekend as ekstrinsieke skade: Boberg 479–480; *Klopper v Maloko* 1930 TPD 860; *Guardian National Insurance Co v Van Gool* hierbo. Binne kontraktuele verband is besondere skade daardie nadele wat gewoonlik te ver verwyderd is en waarvoor aanspreeklikheid slegs bestaan indien dit uit die besondere omstandighede (tydens kontraksluiting) blyk dat dit inderdaad of vermoedelik deur die partye voorsien is: *Whitfield v Phillips* hierbo; *North and Son (Pty) Ltd v Albertyn* 1962 2 SA 212 (A); *Shatz Investments (Pty) Ltd v Kalovyrnas* hierbo; Visser en Potgieter 59 253–254; Kerr "Special damages in contract" 1976 *SALJ* 259. Binne deliktuele verband beteken besondere skade (wat spesiaal gepleit moet word) daardie nadeel waaroor daar regtens geen vermoede bestaan dat dit uit die onregmatige handeling volg nie (Visser en Potgieter 20). Die probleme rondom besondere en algemene skade is 'n prosesregtelike en nie 'n materieelregtelike probleem nie (Visser *Proefskrif* 16).

56 Reël 18(10) van die Hooggeregshofreëls bepaal wat tov skadevergoeding in die pleitstukke beweer moet word.

57 *Klopper v Maloko* hierbo; *Thompson v Barclays Bank DCO* 1965 1 SA 365 (W); *Gloria Caterers (Pty) Ltd v Friedman* 1983 3 SA 390 (T); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A); Neethling, Potgieter en Visser *Delict* 209; Burchell 133; Erasmus en Gauntlett par 11; Christie 645; Mulligan "Damages for breach; quantum, remoteness and causality" 1958 *SALJ* 171 ev. Indien skade nie besondere skade is nie, is dit nie noodwendig algemene skade nie (Visser *Proefskrif* 15).

(i) toekomstige skade,[58] synde daardie skade wat met 'n voldoende graad van waarskynlikheid op 'n tydstip na die oomblik van skadebepaling in die toekoms, as gevolg van 'n vroeëre skadestigtende gebeurtenis, sal intree;[59] en

(j) nominale skade ten einde 'n kostebevel te regverdig.[60]

Die waarde van die vermoënsbestanddeel is nie staties nie en kan met verloop van tyd wissel.[61] Om die primêre oogmerk van skadevergoeding te bevorder (synde om die benadeelde so volledig moontlik vir sy skade te vergoed),[62] moet die relevante tydstip van evaluering van die skade die laaste geleentheid wees waar bewysmateriaal voorgelê kan word.[63] Volgens die positiewe reg is die datum van die delikspleging die deurslaggewende tydstip vir skadebepaling.[64] By kontrakbreuk is daar verskillende tydperke[65] moontlik, [66] naamlik die tydstip van kontrakbreuk,[67] prestasie,[68] terugtrede[69] en voor terugtrede.[70]

2 3 Skadevergoeding

Visser en Potgieter[71] omskryf skadevergoeding[72] as die "geldelike ekwivalent van skade wat aan 'n persoon gegee word met die doel om sy skade terugwerkend en vir die toekoms so volledig as moontlik te kanselleer".[73]

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58 Volgens die positiewe reg kan daar nie skadevergoeding vir toekomstige skade alleen verhaal word nie: *Coetzee v SAR and H* 1933 CPD 565; *Millward v Glaser* 1949 4 SA 931 (A); Kerr 443 ev. Sien Boberg 488 ev vir kritiek teen voormelde positiefregtelike standpunt.

59 Visser en Potgieter 21 108–125; Dc Wet en Van Wyk 234.

60 Erasmus en Gauntlett par 12.

61 Visser en Potgieter 78. Sien bv *Voest Alpine Intertrading Gesellschaft GmbH v Burwill and Co (Pty) Ltd* 1985 2 SA 149 (W) tov die invloed wat 'n veranderde wisselkoers op die berekening van skadevergoeding het.

62 Van der Walt 279.

63 Koeh "Aquilian damages for personal injury and death" 1989 *THRHR* 69; Van der Walt 279.

64 *Botha v Rondalia Versekeringskorporasie van SA Bpk* 1978 1 SA 996 (T); *General Accident Insurance Co Ltd v Summers* 1987 3 SA 577 (A); Erasmus 1975 *THRHR* 104 106; Koch "Diseounting to date of delict: fair or unfair?" 1987 *THRHR* 106; Visser en Potgieter 79; Kerr "Damages in eontract and in deliet" 1994 *SALJ* 133.

65 Kerr 640 ev; Burehell 127; De Wet en Van Wyk 205 ev.

66 Visser en Potgieter 79; Kerr "Date for determining loss through breach of eontraet: fluctuating exchange rates" 1986 *SALJ* 339.

67 *Sandown Park (Pty) Ltd v Hunter Your Wine and Spirit Merchant (Pty) Ltd* 1985 1 SA 248 (W); *Voest Alpine Intertrading Gesellschaft GmbH v Burwill and Co (Pty) Ltd* hierbo; *Culverwell v Brown* 1990 1 SA 7 (A).

68 *Novick v Benjamin* 1972 2 SA 842 (A); *Culverwell v Brown* hierbo.

69 *Culverwell v Brown* hierbo; Nienaber "Enkelc beskouinge oor kontrakbreuk *in anticipando*" 1963 *THRHR* 37–38; Kerr 1986 *SALJ* 340; Nienaber "Kontrakbreuk *in anticipando* in retrospek" 1989 *TSAR* 15.

70 Nicnaber 1963 *THRHR* 37; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD-proefskrif Unisa 1991) 213; Kerr 1994 *SALJ* 133.

71 19 152.

72 Die woord "kompensasie" kan as sinoniem vir "skadevergoeding" gebruik word: Visser en Potgieter 152; Van der Merwe en Olivier 279; Visser "Kompensasie vir nievermoënskade" 1983 *THRHR* 43.

73 Sien ook *Russell Loveday v Collins Submarine Pipelines* 1975 1 SA 110 (A); Van der Walt 1980 *THRHR* 5; Neethling, Potgieter en Visser *Delict* 197. Volgens Van der Walt 285 is "skadevergoeding" 'n uitdrukking wat gebruik word wanneer daar 'n ekwivalent in die vorm van geld aan 'n benadeelde gegee word met die doel om die skadelike gevolge van 'n gewraakte gebeurtenis terugwerkend so volledig moontlik te kanselleer.

Skadevergoeding[74] word in geld[75] uitgedruk,[76] is in beginsel by alle vorme van skade (vermoën- en nie-vermoënskade)[77] beskikbaar en het primêr ten doel[78] om skade deur die byvoeging van 'n nuwe vermoënsbestanddeel te neutraliseer.[79] Indien skade of 'n gedeelte daarvan gedupliseer word, sal voormelde doel verydel word.[80]

Kragtens die "once and for all"-reël[81] mag skadevergoeding[82] (in die algemeen) slegs een maal op grond van 'n enkele eisoorsaak[83] geëis word.[84] Die werking van die "once and for all"-reël kan kontraktueel uitgesluit word.[85]

2 4 Sommeskadeleer[86]

Die sommeskadeleer[87] (wat die basis vir die aard en bepaling van vermoënskade in die Suid-Afrikaanse reg is)[88] is op 'n vergelykingsmetode[89] gebaseer

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74 Wat gekwantifiseer moet word by wyse van 'n proses waardeur regtens erkende skade (waarvoor vergoeding verhaalbaar is) in geld uitgedruk word ten einde die skadevergoedingsbedrag te bepaal (Kerr 1986 *SALJ* 339–340; Visser en Potgieter 154).

75 Wat as 'n kapitaalbedrag ("lompsom") vir sowel bestaande as toekomstige skade toegeken word: *Anthony v Cape Town Municipality* 1967 4 SA 445 (A); Erasmus en Gauntlett par 10 17; De Wet en Van Wyk 208; Van der Walt 286. *Contra* Spandua "Inflation and the law" 1975 *SALJ* 47 wat betoog dat skadevergoeding in hersienbare paaiemente verleen moet word.

76 Visser en Potgieter 152 155; Erasmus en Gauntlett par 17; *Russell Loveday v Collins Submarine Pipelines* hierbo. In *Dantile v M'Tirara* (1892) SC 452 en *Madolo v Munkwa* 1894 SC 181 is skadevergoeding in die vorm van beeste toegeken.

77 Visser en Potgieter 180; Erasmus en Gauntlett par 10.

78 Sien verder Van der Walt 279; Koch 1989 *THRHR* 69.

79 Visser en Potgieter 45 153. Volgens Van der Walt 217, 1980 *THRHR* 23 is die skadevergoedingsplig primêr op die volledigs moontlike vergoeding van skade deur die verskaffing van 'n ekwivalent van die benadeelde se interesse gerig.

80 Sien *Smit v Saipem* hierbo; *Van Gool v Guardian and National Insurance Co Ltd* 1992 1 SA 119 (W) en *McLelland v Hulett* 1992 1 SA 456 (D) ter illustrasie van hierdie dupliseringsprobleem. Sien verder Reinecke 1976 *TSAR* 48; Dendy "Claims for damages for loss of support: dependants' or breadwinners' actions?" 1990 *SALJ* 155; Neethling en Potgieter "Aquiliese aksie van 'n kind vir mediese koste weens persoonlike beserings" 1992 *THRHR* 480; Visser en Potgieter 160–161; *Erdmann v Santam Insurance Co Ltd* 1985 3 SA 402 (K).

81 Wat deur Van der Walt 314 425–485 verwerp word.

82 Vir sowel skade wat reeds gely is as skade wat in die toekoms kan intree (Visser en Potgieter 20).

83 'n Eisoorsaak dui op al daardie elemente (*facta probanda*) wat nodig is om 'n skadevergoedingseis te fundeer (Visser en Potgieter 130–134).

84 *Cape Town Council v Jacobs* 1917 AD 615; *Oslo Land Co Ltd v The Union Government* hierbo; *Custom Credit Corporation v Shembe* hierbo; *Evins v Shield Insurance Co Ltd* hierbo; *Horowitz v Brock* 1988 2 SA 160 (A); Boberg 476; Visser en Potgieter 126; Van der Walt 304 329 378–379; Neethling, Potgieter en Visser *Delict* 213–217; Burchell 34 125; Joubert *General principles of the law of contract* (1987) 255; Erasmus en Gauntlett par 18.

85 *Collins Submarine Pipelines (Pty) Ltd v Durban City Council* hierbo; Erasmus en Gauntlett par 18.

86 Ook bekend as die *Differenztheorie*, sommeskademetode of sommeskadebegrip (Van der Walt 7 10–11 284 ev).

87 Mommsen *Beiträge zum obligationenrecht II* (1855) is die vader van die sommeskadeleer.

88 *Union Government (Minister of Railways and Harbours) v Warneke* hierbo; *Oslo Land Co Ltd v Union Government* hierbo; *Victoria Falls and Transvaal Power Co Ltd v*

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waarkragtens vermoënskade bepaal word deur die benadeelde se vermoënsposisie na die skadestigtende gebeurtenis[90] te vergelyk met die hipotetiese vermoënsposisie[91] wat sou bestaan het indien die skadestigtende gebeurtenis nie plaasgevind het nie.[92] Dus word vermoënskade in die onderhawige geval as 'n afname in die waarde van 'n regsubjek se vermoë uitgedruk.[93] Gevolglik is skadevergoeding 'n toevoeging van 'n nuwe vermoënsbestanddeel[94] om die effek van die skadestigtende gebeurtenis te neutraliseer.

Ongelukkig swyg die sommeskadeleer oor hóé die hipotetiese vermoënsposisie vasgestel moet word.[95] Waar die vermoënskade reeds ten volle ingetree het, is die hipotetiese been van die sommeskadeleer oorbodig omdat die skadestigtende gebeurtenis in hierdie geval *per se* 'n vergelykingsraamwerk daarstel.[96]

Kritiek teen die sommeskadeleer is dat:[97]

(a) geen gemeenregtelike gesag daarvoor bestaan nie;[98]

Consolidated Langlaagte Mines Ltd 1915 AD 1; *De Jager v Grunder* 1964 1 SA 446 (A); *Swart v Van der Vyver* hierbo; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* hierbo; *Erdmann v Santam Insurance Co Ltd* hierbo; Van der Walt 3; Visser en Potgieter 63 ev; Zimmermann *The law of obligations. Roman foundations of the civilian tradition* (1990) 824; Van der Merwe ea 300.

89 Reinecke 1976 *TSAR* 56 is van mening dat skade nie by wyse van 'n vergelykingsmetode vasgestel moet word nie, maar dat die beoordeling van die voldonge gevolge van die gebeurtenis die korrekte wyse is waarop skade bepaalbaar is. *Contra* Reinecke 1988 *De Jure* 236 waar daar tog van 'n vergelykingsmetode gebruik gemaak word om skade te bepaal. Mi moet daar soos by die konkrete skadeleer met die daadwerklike onttrekking of verswakking van 'n besondere vermoënsbestanddeel gewerk word.

90 Kragtens die beginsel van voordeeltoerekening moet alle voordele (ook toekomstige voordele) wat die benadeelde ivm die skadestigtende gebeurtenis ontvang, billikheidshalwe in ag geneem word ter vermindering van sy skadevergoeding: Visser en Potgieter 20 187–221; Neethling, Potgieter en Visser *Delict* 217–222; Erasmus en Gauntlett par 35; De Wet en Van Wyk 203.

91 Visser en Potgieter 64 stel voor dat hierdie hipotetiese vermoënsposisie bepaal moet word deur die skadestigtende gebeurtenis te elimineer en dan met die behoud van alle ander relevante, werklike en moontlike gebeure die waarskynlike kousale verloop uit te werk, om so te bepaal hoe die benadeelde se finale vermoënsposisie sou ontwikkel het. Dieselfde metode kan aangewend word om skade in geval van 'n late, wanvoorstelling of winsverlies te bepaal: *Siman and Co (Pty) Ltd v Barclays Bank Ltd* 1984 2 SA 888 (A); Lubbe "The assessment of loss upon cancellation for breach of contract" 1984 *SALJ* 619; Visser en Potgieter 65.

92 Reinecke 1976 *TSAR* 27; Van der Walt 1980 *THRHR* 4; Reinecke 1988 *De Jure* 224–227; Visser en Potgieter 19 62 64 158–159; Neethling, Potgieter en Visser *Delict* 209–211; Kerr "Damages in contract and in delict" 1994 *SALJ* 129; *Dippenaar v Sltield Insurance Co Ltd* hierbo. Van der Walt 136 is van mening dat die spanning tussen die noodsaaklikheid van 'n skadebegrip enersyds en die veelvuldige ontoereikendheid van die sommeskadeleer andersyds, die oorsaak van die skadevergoedingsreg se verwarrende beeld is.

93 Boberg 489; Visser en Potgieter 45 158 vn 58 60.

94 Sien par 2 2 hierbo oor wat die vermoënsbestanddeel behels.

95 Visser en Potgieter 64; Visser "Gedagtes oor die vergelykingstocts by die bepaling van vermoënskade" 1994 *THRHR* 282.

96 Visser en Potgieter 65. Van der Merwe en Olivier 181 vn 3 is van mening dat dit in hierdie geval bloot oor 'n terminologiese kwessie handel.

97 Visser en Potgieter 67–68.

98 Erasmus 1975 *THRHR* 104 268; Visser en Potgieter 10 67. Aangesien die sommeskadeleer reeds vir dekades lank deur die Suid-Afrikaanse positiewe reg aanvaar word, is hierdie kritiek prakties van geen belang nie: *Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-op Mpy Bpk* 1964 2 SA 47 (T); Van der Walt 148–152.

(b) aangesien skade as die verskil tussen twee somme uitgedruk word, skade dus in 'n "anonieme" som vervat is sonder dat daar 'n aanduiding is van hoe die skade(som) saamgestel is;[99]

(c) dit kan meebring dat die vermoënsregtelike en kousale elemente[100] van skade verwar word;[101] en

(d) dit geen nut as denk- of werkmetode het nie.[102]

2 5 Konkrete skadeleer

Kragtens hierdie leerstuk word skade bepaal deur die nuttigheid van die vermoënsbestanddeel voor die skadestigtende gebeurtenis te vergelyk met die nuttigheid daarvan na die skadestigtende gebeurtenis.[103] Dus word daar met die daadwerklike onttrekking of verswakking van 'n besondere vermoënsbestanddeel gewerk en 'n "anonieme" rekenkundige som deur individuele skadeposte vervang.[104]

Die konkrete skadeleer hou die volgende voordele in:[105]

(a) Slegs die vermoënsbestanddele en laste wat aangetas word, is ter sprake[106] welke skade as individuele skadeposte uitgedruk word;

(b) aangesien geen hipotetiese vermoënsposisie in berekening gebring word nie, speel hipotetiese kousaliteit geen rol nie;

(c) naas die toestaan van skadevergoeding, is daadwerklike herstel[107] moontlik; en

(d) die moontlikheid van 'n selfstandige voordeeltoerekeningsleer is haalbaar.

2 6 Positiewe interesse

By kontrakbreuk is positiewe interesse[108] (normaalweg) die toepaslike maatstaf by skadebepaling.[109] In die onderhawige geval word die benadeelde se skade en

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99 Van der Walt 153–156; Reinecke 1988 *De Jure* 224–225.

100 Van der Walt 260 kom tot die slotsom dat alhoewel die *conditio sine qua non*-kousaliteitsleerstuk en die sommeskadeleer op 'n vergelykingsmetode gebaseer is, hierdie twee regsfigure nie so nou aan mekaar verwant is soos wat dikwels beweer word nie.

101 Reinecke 1988 *De Jure* 225 vn 25. *Contra* Van der Walt 256 ev wat van mening is dat hierdie kritiek ongegrond is.

102 Van der Walt 187. Visser en Potgieter 68 is mi ten onregte van mening dat hierdie kritiek onoortuigend is.

103 Maw dit wat *was* en dit wat *is*, word met mekaar vergelyk: Visser en Potgieter 19 68 ev; Neethling, Potgieter en Visser *Delict* 210; Reinecke 1988 *De Jure* 226; Van der Walt 49–51; Boberg 481–482; Van der Merwe ea 297 ev.

104 Koch 32; Van der Walt 284; Van der Merwe en Olivier 180; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A); *De Vos v SA Eagle Versekeringsmaatskappy Bpk* 1984 1 SA 724 (O).

105 Reinecke 1988 *De Jure* 226 ev.

106 By die sommeskadeleer is daar 'n omslagtige vergelyking van twee totaal ander vermoënsposisies (Visser en Potgieter 69).

107 By die sommeskadeleer word skade slegs deur skadevergoeding herstel (*ibid*).

108 Wat na "actual as well as prospective losses" verwys: Lubbe en Murray *Farlam and Hathaway: Contract: cases, materials and commentary* (1988) 608; Joubert 259; Lee en Honoré *The South African law of obligations* (1978) 64; Cameron "Measuring delictual damages for fraudulent misrepresentation" 1982 *SALJ* 101 ev. Volgens Harker 1993 *SALJ* 14 kan verspilde onkostes en verbeurde geleenthede deel van 'n benadeelde kontraktant se

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skadevergoeding bereken na sy volle vervullingsbelang sodat hy finansieel in die vermoënsposisie geplaas word waarin hy sou gewees het indien daar behoorlik kragtens die kontrak presteer is.[110] Positiewe interesse kan ook omskryf word met verwysing na die vermoënsposisie waarin die benadeelde finansieel sou gewees het indien kontrakbreuk nie plaasgevind het nie.[111] Waar 'n wanvoorstelling deel van 'n kontraktuele beding vorm, moet skadevergoeding myns insiens op dieselfde basis bereken word.

Skadebepaling by kontrakbreuk word in sommige gevalle op negatiewe interesse baseer,[112] in welke geval die benadeelde finansieel in die vermoënsposisie geplaas moet word asof daar geen kontrakbreuk gepleeg is nie.[113]

'n Kontraktuele skadevergoedingseis word beïnvloed deur die feit dat 'n kontrak in stand gehou of gekanselleer word.[114] In eersgenoemde geval bly die benadeelde geregtig op prestasie en behou hy wat hy ontvang het, wat gevolglik sy vermoënsposisie positief affekteer.[115] Waar die kontrak gekanselleer word, is

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positiewe interesse uitmaak, mits dit in verrekening gebring word met die bruto wins (nie netto wins nie) van die transaksie. Waar die verspilde onkostes en verbeurde geleenthede saam met die netto wins van die transaksie geëis word, sal dit veroorsaak dat dubbele skadevergoeding toegestaan word, alternatief dat die benadeelde in 'n beter vermoënsregtelike posisie geplaas word as waarin hy sou wees indien die kontrak reëlmatig nagekom is (Harker 1993 *SALJ* 15 ev).

109 Van der Walt 13–14; Van Aswegen 160 200–209; Joubert 1976 *THRHR* 1–14; Visser en Potgieter 15 21 70.

110 *Union Government (Minister of Railways and Harbours) v Warneke* hierbo; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* hierbo; *Whitfield v Phillips* hierbo; *De Jager v Grunder* hierbo; *Erasmus v Davis* hierbo; *Novick v Benjamin* hierbo; *Ranger v Wykerd* 1977 2 SA 976 (A); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co (Pty) Ltd* hierbo; *Swart v Van der Vyver* hierbo; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* hierbo; *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); Erasmus 1975 *THRHR* 113–114; Joubert 1976 *THRHR* 1; Reinecke 1976 *TSAR* 37; Lubbe 1984 *SALJ* 618; Harker "The role of contract and the object of remedies for breach of contract in contemporary Western society" 1984 *SALJ* 139; Sharrock "Breach of contract: damages for negative interest" 1985 *TSAR* 201; Joubert 250; Boberg 476; De Wet en Van Wyk 225.

111 Visser en Potgieter 70.

112 Sien par 2 7 hieronder. Daar is standpunte dat die benadeelde kontraksparty in geval van die kansellasie van 'n kontrak op grond van kontrakbreuk, 'n keuse het om óf positiewe óf negatiewe interesse te eis: Mulligan "Incompatibility of damages and recission" 1950 *SALJ* 39; "Rescission and discharge" 1951 *SALJ* 142; "Damages for breach" 1957 *SALJ* 296; Joubert 1976 *THRHR* 1–14; Hahlo en Kahn *The Union of South Africa: The development of its laws and constitution* (1960) 499.

113 Joubert 249; Erasmus en Gauntlett par 45; Lubbe 1984 *SALJ* 618. Die grondslag van kontraktuele negatiewe interesse is die keuse (gegrond op *restitutio in integrum*) wat die benadeelde het om vermoënsregtelik in die posisie geplaas te word asof geen kontrak gesluit is nie en dat geen verspilde onkostes of verlore voordele of verbeurde geleenthede deel van positiewe interesse kan vorm nie: Kerr "Some problems concerning the beginning and ending of contracts" 1989 *SALJ* 103–104; Harker 1993 *SALJ* 7. Sien ook Kerr 1994 *SALJ* 130 en Van Aswegen "Damages for negative interesse in cases of breach of contract" 1993 *TSAR* 265 wat blykbaar nie ten gunste van negatiewe interesse in geval van kontrakbreuk is nie. Sien verder par 2 7 hieronder.

114 Kerr 572 646; De Wet en Van Wyk 200.

115 Lubbe en Murray 605; Visser en Potgieter 74.

die benadeelde normaalweg op restitusie of die waarde van sy prestasie geregtig wat nie deel van sy skadevergoeding uitmaak nie, maar wel 'n rol by die berekening daarvan speel.[116]

Die vereistes vir 'n kontraktuele skadevergoedingseis is die volgende:[117]

(a) 'n kontraksparty moet kontrakbreuk gepleeg het;

(b) werklike vermoënskade van 'n bepaalde of bepaalbare omvang (as gevolg van die kontrakbreuk)[118] moet gely word;[119] en

(c) die kontrakbreker moet regtens vir die skadevergoeding (wat ooreenkomstig die beginsels van aanspreeklikheidsbegrensing binne die kontemplasie van die kontrakspartye val)[120] aanspreeklik wees.

Kontraktuele skade[121] moet in die algemeen ooreenkomstig toepaslike waardemaatstawwe in geld[122] bereken word.[123] Met inagneming van die beginsels van voordeeltoerekening,[124] die mitigasieplig en toepaslike statutêre bepalings,[125] is hierdie waardemaatstawwe aan 'n relevante tydstip en plek van prestasie gekoppel.[126] Waardemaatstawwe wat ter sprake kan kom, is onder andere die volgende:[127]

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116 Lubbe en Murray 605; Van Aswegen 205; Visser en Potgieter 284. Volgens Kerr 1989 *SALJ* 103 ev is *restitutio in integrum* 'n alternatief tot 'n eis om skadevergoeding.

117 *Oellerman v Natal Indian Traders Ltd* 1913 NPD 337; *Swart v Van der Vyver* hierbo; *Scott v Poupard* 1971 2 SA 373 (A); *Cross v Pienaar* 1978 1 SA 943 (T); Visser en Potgieter 284–285; Joubert 246 ev; Kerr 573; De Wet en Van Wyk 201 ev; Wessels en Roberts *Law of contract II* (1951) 1237; Christie 641 ev; Van der Merwe ea 296.

118 Die kousale verband (wat 'n feitevraag is) tussen die kontrakbreuk en vermoënskade moet bewys word: *Dhooma v Mehta* 1957 1 SA 676 (D); *Svorinic v Biggs* hierbo; Kerr "Causation in delict and in contract" 1980 *SALJ* 541–546; De Wet en Van Wyk 225–226; Joubert 250; Van der Merwe ea 296.

119 *Stow, Jooste and Matthews v Chester and Gibb* (1890) 3 SAR 127; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* hierbo; *Trichardt v Van der Linde* hierbo; *Versveld v SA Citrus Farms Ltd* hierbo; *Whitfield v Phillips* hierbo; *Katzenellenbogen Ltd v Mullin* hierbo; *Swart v Van der Vyver* hierbo; *Scott v Poupard* hierbo; *Bellairs v Hodnett* 1978 1 SA 1109 (A); *SM Goldstein and Co (Pty) Ltd v Gerber* 1979 4 SA 930 (A); *Sommer v Wilding* 1984 3 SA 647 (A).

120 Kerr 620 ev; Joubert 1972 *THRHR* 68 ev.

121 Wat slegs uit vermoënskade kan bestaan: *Emslie v African Merchants Ltd* 1908 EDC 82; *Dominion Earthworks (Pty) Ltd v MJ Greef Electrical Contractors (Pty) Ltd* 1970 1 SA 228 (A); Joubert 248.

122 *Versveld v SA Citrus Farms Ltd* hierbo; Joubert 248.

123 *Katzenellenbogen Ltd v Mullin* hierbo.

124 Van der Walt 1980 *THRHR* 1 ev; Visser "Gedagtes oor voordeeltoerekening by nievermoënskade" 1994 *THRHR* 93.

125 Bv die Wet op Kredietooreenkomste 75 van 1980; die Wet op Strafbedinge 15 van 1962; die Wet op die Vervreemding van Grond 68 van 1981.

126 Van Aswegen 211–213; Christie 649; Nienaber 1963 *THRHR* 33 37–38; Kerr 1986 *SALJ* 340–343; Radesich "Damages for breach of contract payable in foreign currency" 1987 *THRHR* 234; Nienaber 1989 *TSAR* 15; Reinecke "Repudiëring en skadevergoeding" 1990 *TSAR* 301; High en Pickering "Determination of damages awards under conditions of exchange rate fluctuations: Problems and (some) solutions" 1993 *SALJ* 270; Kerr 640–642; *Voest Alpine Intertrading Gesellschaft GmbH v Burwill and Co (Pty) Ltd* hierbo; *Mayes v Noordhof* 1992 4 SA 233 (K).

127 Visser en Potgieter 286; Neethling, Potgieter en Visser *Delict* 225–227; Burchell 127; Wessels en Roberts 1236. De Wet en Van Wyk 208 waarsku dat hierdie waardemaatstawwe nie selfstandige beginsels daarstel wat bestaande algemene beginsels vervang

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(a) die markprysreël;[128]

(b) waar 'n gebrekkige prestasie gelewer is, is die skade die verskil tussen die waarde van die gelewerde prestasie en die waarde van die prestasie wat ooreenkomstig die kontrak gelewer moes gewees het;[129]

(c) 'n handelaar se verlies aan wins word as die verskil tussen die mark- en kosprys bereken;

(d) herstelkoste word ooreenkomstig 'n redelikheidsmaatstaf bepaal;[130]

(e) waardemaatstawwe waarop ooreengekom is;[131] en

(f) waardemaatstawwe wat deur regswerking[132] geskep word.

Positiewe interesse behels meer as bloot die verlies van toekomstige wins.[133] Omdat die totale som wat volgens positiewe interesse as skadevergoeding geëis word, die vermoënsposisie van die benadeelde finansieel weergee asof die kontrak behoorlik uitgevoer is, kan uitgawes wat die onskuldige party in verband met die sluiting van die kontrak aangegaan het, (normaalweg) nie afsonderlik verhaal word nie.[134] Verder mag 'n benadeelde slegs werklike uitgawes as deel van sy positiewe interesse eis.[135] Waar die kontrak gekanselleer word, is die benadeelde eweneens op positiewe interesse geregtig.[136] Restitusie na terugtrede

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nie. Sien ook *Cooper v Kahn's Produce Agency Ltd* 1917 TPD 184; *South African Railways and Harbours v Theron* 1917 TPD 67; *Kahn v Beirowski* 1933 TPD 43; *Novick v Benjamin* hierbo.

128 Die markprys (wat op die tydstip van kontrakbreuk bereken moet word) word as bewys van die waarde van die saak beskou: *Van Es v Beyer's Trustees* (1884) 3 SC 9; *Greenshields v Chisholm* (1884) 3 SC 220; *Mills v Schmahmann Brothers* 1909 TS 739; *Cooper v Kahn's Produce Agency Ltd* hierbo; *Wald v Dister* 1918 CPD 305; *Slotar and Sons v De Jongh* 1922 TPD 327; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1924 AD 151; *Jordaan v Symon* 1925 OPD 207; *Hersman v Shapiro and Co* 1926 TPD 367; *Markus and Co v Louw* 1930 CPD 123; *Kahn v Beirowski* hierbo; *Erasmus v Davis* hierbo; Lubbe en Murray 638; Joubert 256; Erasmus en Gauntlett par 51; De Wet en Van Wyk 208 ev; Wessels en Roberts 1229 ev; Koch 26–27; Van der Walt 206–216; Van der Merwe ea 308–313; Mulligan 1957 *SALJ* 63 ev. Die markprys van 'n saak is die prys waarteen dit inderdaad verhandel of die prys wat 'n persoon redelikerwys daarvoor sal betaal: Joubert 1973 *THRHR* 50; Reinecke 1990 *TSAR* 776; *Celliers v Papenfus and Rooth* 1904 TS 73; *Durr v Buxton White Lime Co* 1909 TS 876; *Sarembock v Medical Leasing Services (Pty) Ltd* 1991 1 SA 344 (A). Sien De Wet en Van Wyk 231–232 vir kritiek teen die markprysreël.

129 Sien bv *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* hierbo; Erasmus en Gauntlett par 50.

130 *Maennel v Garage Continental Ltd* 1910 AD 137; *Cugno v Nel* 1932 TPD 289; *Crawley v Frank Pepper (Pty) Ltd* 1970 1 SA 29 (N); *Labuschagne Broers v Spring Farm (Pty) Ltd* 1976 2 SA 824 (T); Erasmus en Gauntlett par 49; Koch 20; Van der Merwe ea 313–315.

131 Bv strafbedinge.

132 Bv wetgewing en gemeneregsreëls.

133 Visser en Potgieter 73.

134 Van Aswegen 207; Lubbe 1984 *SALJ* 620 623; Joubert 1976 *THRHR* 7; Lubbe en Murray 608; *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W).

135 *Wood v Oxendale and Co* 1906 SC 674; *Acton v Lazarus* 1927 EDL 367; *Tierfontein Boerdery (Edms) Bpk v Weber* 1974 3 SA 445 (K); Lubbe en Murray 608; Joubert 249.

136 *Marais v Commercial General Agency Ltd* 1922 TPD 440; *Evans and Plows v Wills and Co* 1923 CPD 496; *Hoets v Wolf* 1927 CPD 408; *Stowe v Scott* 1929 TPD 450; *Microutsicos v Swart* 1949 3 SA 715 (A); *Radiotronics (Pty) Ltd v Scott Lindberg Co Ltd* 1951 1 SA 312 (K); *Whitfield v Phillips* hierbo; *Shatz Investments (Pty) Ltd v Kalovyrnas* hierbo; *Custom Credit Corporation (Pty) Ltd v Shembe* hierbo; Lubbe 1984 *SALJ* 620 621; Lubbe en Murray 607–608; Visser en Potgieter 74.

het 'n direkte invloed op die benadeelde se skade (positiewe interesse) omdat restitusie die netto vermoënsposisie beïnvloed.[137]

2 7 Negatiewe interesse

Negatiewe interesse (wat uit *damnum emergens* en *lucrum cessans* bestaan)[138] word bepaal met verwysing na die benadeelde se vermoënsposisie onmiddellik voor kontraksluiting[139] of deliksplegging of sy vermoënsposisie indien die delik nie gepleeg is nie.[140]

Die algemene skadevergoedingsmaatstaf in geval van deliktuele skade is negatiewe interesse.[141] Boberg som die posisie soos volg op:[142]

> "The object of awarding Aquilian damages is to place the plaintiff in the position in which he would have been had the delict not been committed,[143] redressing the diminution in his patrimony that the defendant has caused."[144]

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137 *Bestway Agencies (Pty) Ltd v Western Credit Bank Ltd* 1968 3 SA 400 (T); *Uni-Erections v Continental Engineering Co Ltd* 1981 1 SA 240 (W); Lubbe en Murray 593; Van Aswegen 205; Joubert 246; De Wet en Van Wyk 225; Lubbe 1984 *SALJ* 620–621; McLennan "Breach of contract and restitutionary damages" 1984 *SALJ* 40–41.

138 Visser en Potgieter 57 65 108 112; Van Aswegen 206 vn 117; Joubert 1976 *THRHR* 6; Lubbe 1984 *SALJ* 623; *Emslie v African Merchants Ltd* 1908 EDC 82; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* hierbo; *Versveld v SA Citrus Farms Ltd* hierbo; *Whitfield v Phillips* hierbo.

139 Met dien verstande dat die benadeelde vermoënsregtelik nie in 'n beter finansiële posisie geplaas mag word as waarin hy voor kontraksluiting was nie: Sharrock "Breach of contract: damages for negative interest" 1985 *TSAR* 207.

140 *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* 1906 23 SC 250; *Union Government (Minister of Railways and Harbours) v Warneke* hierbo; *Erasmus v Davis* hierbo; *Whitfield v Phillips* hierbo; *Reid v LS Hepker and Sons (Pvt) Ltd* 1971 2 SA 138 (RA); *De Jager v Grunder* hierbo; *Ranger v Wykerd* hierbo; *Probert v Baker* hierbo; *Svorinic v Biggs* hierbo; *Hamer v Wall* 1993 1 SA 235 (T); Van der Merwe en Olivier 480–482; Visser en Potgieter 15 21 71; Joubert 249; Van Aswegen 203–208; Joubert 1976 *THRHR* 1–14; Harker "The nature and scope of rescission as a remedy for breach of contract in American and South African law" 1980 *Acta Juridica* 62–64; Van der Merwe en Reinecke "Skadevergoeding weens kontrakbreuk: positiewe en negatiewe interesse" 1984 *TSAR* 85; Lubbe 1984 *SALJ* 616; Sharrock 1985 *SALJ* 616; Sharrock "Breach of contract: damages for negative interest" 1985 *TSAR* 207–208; Harker "Damages for breach of contract: negative or positive interesse" 1993 *SALJ* 7 ev; De Vos "Skadevergoeding en terugtrede weens bedrog by kontraksluiting" 1964 *Acta Juridica* 33.

141 Neethling, Potgieter en Visser *Delict* 223 ev; Erasmus en Gauntlett par 68; Koch 29; Van der Merwe 1964 *THRHR* 194.

142 489. Sien ook *Union Government (Minister of Railways and Harbours) v Warneke* hierbo 665.

143 Met inagneming van alle gevolgskade: *Modimogale v Zweni* 1990 4 SA 122 (B); *Ngubane v SA Transport Services* 1991 1 SA 756 (A); Boberg 622; Burchell 127.

144 Sien ook Burchell 35 127; Erasmus en Gauntlett par 15 36; Van der Merwe en Olivier 323; Koch 20 ev; Christie 358; Van der Merwe ea 104; *Union Government (Minister of Railways and Harbours) v Warneke* hierbo; *Matthews v Young* hierbo; *Du Plessis v Nel* 1961 2 SA 97 (OK); *Myburgh v Hanekom* 1966 2 SA 157 (OK); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 1 SA 517 (W); *Albertus v Jacobs* 1975 3 SA 836 (W); *De Vos v SA Eagle Versekeringsmaatskappy Bpk* hierbo; *Mayes v Noordhof* hierbo. Volgens Van der Merwe en Olivier 180 is die doel van 'n deliktuele skadevergoedingsaksie "om die benadeelde in die *status quo ante* te plaas".

Anders as by kontrakbreuk, waar spesifieke nakoming (nie skadevergoeding nie) die aangewese remedie is, dien skadevergoeding in geval van 'n delik primêr as regshulp.[145] Aldus het die deliktereg hoofsaaklik 'n vergoedingsfunksie (goedmakingsfunksie) ten doel.[146] *Lucrum cessans* kan deliktueel in geval van 'n bedrieglike wanvoorstelling geëis word.[147] Ook in geval van 'n delik het skadevergoeding geen bestraffende funksie nie[148] en word dit eenmalig[149] in 'n geldbedrag vereffen.[150]

Verder is die vasstelling en kwantifisering van deliktuele skade nie dieselfde nie: Eersgenoemde is 'n direkte rekeningkundige vergelyking van die benadeelde se vermoënsposisie voor en na die skadestigtende gebeurtenis, terwyl laasgenoemde die monetêre waarde verteenwoordig waarop die benadeelde regtens[151] geregtig is.[152] By 'n deliktuele skadevergoedingseis op grond van 'n wanvoorstelling handel die probleem nie soseer met die vasstelling van skadevergoedingsregsbeginsels nie, maar gaan dit oor die toepassing daarvan.[153] Die feit dat 'n kontrak as gevolg van 'n skuldige wanvoorstelling gesluit is, negeer nie enige toepaslike deliktuele beginsels nie.[154] Waar 'n wanvoorstelling deel van 'n kontraktuele beding uitmaak, kan kontraktuele skade, naas deliktuele skade, alternatief geëis word.[155] Waar beide die kontrakspartye 'n bedrieglike wanvoorstelling pleeg, is geeneen op skadevergoeding geregtig nie.[156]

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145 Neethling, Potgieter en Visser *Delict* 224; Burchell 126. Volgens Cameron 1982 *SALJ* 101 is die verskil tussen kontraktuele en deliktuele skade dat in eg geval die benadeelde vir "the benefit of his bargain" vergoed word, terwyl die benadeelde in lg geval slegs op sy "out-of-pocket loss" geregtig is.

146 Visser *Proefskrif* 3. Van der Merwe "Aspects of the law of contractual torts" 1978 *SALJ* 318 waarsku: "A contract apparently possesses that strange quality of distorting the picture of delict. For, once a contract enters on the stage, the principles of delictual liability are often cast to the wind."

147 Lubbe 1984 *SALJ* 619; De Vos 1964 *Acta Juridica* 33 ev; Van der Merwe en Reinecke 1964 *THRHR* 291.

148 Van der Walt 1980 *THRHR* 23; Visser "Genoegdoening met betrekking tot nievermoënskade" 1983 *TSAR* 68–73; Lubbe 1984 *SALJ* 627; Visser "Genoegdoening in die deliktereg" 1988 *THRHR* 470; Neethling, Potgieter en Visser *Delict* 224; Burchell 34 123; Van der Merwe en Olivier 195; Erasmus en Gauntlett par 13; Van der Walt 227.

149 Wat bestaande en toekomstige skade insluit: *Mouton v Die Mynwerkersunie* 1977 1 SA 119 (A). In *Wade v Santam* 1985 1 PH J3 (K) en *Coetzee v Guardian National Insurance Co Ltd* 1993 3 SA 388 (W) is daar aanduidings dat die hof inherente regsbevoegdheid het om skadevergoeding in paaiemente toe te staan.

150 Neethling, Potgieter en Visser *Delict* 224–225.

151 Maw met inagneming van alle beginsels soos bv die verwyderdheid van die skade, bydraende nalatigheid, die voordeeltoerekeningsreël en mitigasieplig: Neethling, Potgieter en Visser *Delict* 225.

152 *Idem* 224–225; Burchell 34.

153 Van der Merwe en Reinecke 1964 *THRHR* 291; De Wet 1960 *Annual Survey of SA Law* 91. Kahn "Random reflections on damages for misrepresentation" 1961 *SALJ* 146 wys op 'n verdere teenstrydigheid deurdat "restitutionary damages" in geval van 'n skuldlose wanvoorstelling soms meer as deliktuele skade op grond van 'n bedrieglike wanvoorstelling kan beloop.

154 *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors* 1936 TPD 209; *Claassens v Pretorius* 1950 1 SA 37 (O); *Trotman v Edwick* hierbo; *Ruto Flour Mills (Pty) Ltd v Adelson* 1958 4 SA 307 (T); Christie 356; Van der Merwe ea 84.

155 *Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 4 SA 238 (R); Christie 357; Van der Merwe ea 74–75.

156 Christie 361.

Positiewe interesse in die kontraktereg verskil nie fundamenteel van negatiewe interesse in die deliktereg nie,[157] omdat:[158]

(a) ooreenstemmende resultate in beide voormelde gevalle verkry word; en

(b) dit nie noodwendig 'n bepaalde tipe skade[159] met 'n bepaalde oogmerk[160] verteenwoordig nie.

In die kontraktereg het negatiewe interesse 'n eiesoortige betekenis omdat dit na die benadeelde se vermoënsposisie voor of sonder kontraksluiting verwys.[161] Kontraktuele negatiewe interesse kan slegs geëis word indien die kontrak *ab initio*[162] (nie *in futuro*[163] nie) gekanselleer word.[164] Verder is negatiewe interesse binne kontraktuele verband hoofsaaklik ter sprake:[165]

(a) waar 'n wanvoorstelling tot kontraksluiting aanleiding gegee het;[166] of

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157 Van der Merwe en Reinecke "Skadevergoeding weens kontrakbreuk: positiewe en negatiewe interesse" 1984 *TSAR* 88 is van mening dat die begrippe positiewe en negatiewe interesse te ruste gelê kan word omdat dit niks positiefs tot die skadevergoedingsreg bydra nie en slegs verwarring veroorsaak. Volgens Van der Merwe "Wanbeskouings oor wanvoorstelling" 1964 *THRHR* 197 201 is die onderskeid tussen positiewe en negatiewe interesse vals.

158 Joubert 1976 *THRHR* 13; Van Aswegen 202; Van der Merwe 1978 *SALJ* 325; Van der Merwe en Olivier 480–481; Visser en Potgieter 71–72. *Contra* Harker 1993 *SALJ* 13 ev wat van mening is dat die benadeelde by kontraktuele negatiewe interesse soms in 'n beter vermoënsposisie geplaas word as waarin hy sou gewees het indien die kontrak reëlmatig uitgevoer is.

159 So word aanvaar dat negatiewe interesse met vergoeding vir werklik gelede skade verband hou, terwyl positiewe interesse na verlore voordele of wins verwys: *Trotman v Edwick* hierbo; *Probert v Baker* hierbo; *Ranger v Wykerd* hierbo; *Lillicrap Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* hierbo. Die tipe skade wat normaalweg deur negatiewe interesse verteenwoordig word, is verspilde onkostes ivm die sluiting van die kontrak (Van der Merwe en Reinecke 1984 *TSAR* 88 onderskryf die gedagte dat skade uit die "nuttelooswording van 'n uitgawe" kan bestaan), verbeurde voordele en onkostes ivm die kontrakbreuk: *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* hierbo; *Wood v Oxendale* hierbo; *Trichardt v Van der Linde* hierbo; *Van der Watt v Louw* 1955 1 SA 690 (T); *Clarke v Durban and Coast SPCA* 1959 4 SA 333 (N); *Probert v Baker* hierbo; Sharrock 1985 *TSAR* 206 ev.

160 So is daar geen wesenlike verskil tussen die nie-verkryging van 'n kontraktuele voordeel en die beskadiging van 'n saak nie (Visser en Potgieter 72).

161 Van Aswegen 315 ev; Visser en Potgieter 71 75; Sharrock 1985 *TSAR* 201. Feitelike kousaliteit speel 'n belangrike rol by kontraktuele negatiewe interesse (Van der Merwe ea 105 301–303).

162 Dit is *ex tunc*.

163 Dit is *ex nunc*.

164 *Arnold v Viljoen* 1954 3 SA 322 (K); *Salzwedel v Raath* 1956 2 SA 160 (OK); *Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd* 1972 1 SA 478 (W); *Bonne Fortune Beleggings v Kalahari Salt Works (Pty) Ltd* 1974 1 SA 414 (NK); *Svorinic v Biggs* hierbo; *Probert v Baker* hierbo; *Hamer v Wall* hierbo; De Wet en Van Wyk 198–199; Sharrock 1985 *TSAR* 205; Van Aswegen 1993 *TSAR* 265; Harker 1993 *SALJ* 5.

165 Van Aswegen 315 ev; Visser en Potgieter 71 75 78 346; Joubert 249 vn 210; Lubbe 1984 *SALJ* 634–635.

166 Die twisvraag in hierdie geval is of die skade deur kontrakbreuk of die wanvoorstelling *veroorsaak* is: Van der Walt 261 vn 174. Let op dat die ontbinding van 'n kontrak op grond van 'n wanvoorstelling ten doel het om algehele aanspreeklikheid (weens die gebrek aan wilsooreenstemming) te negeer, terwyl die kansellasie van 'n kontrak op grond van kontrakbreuk slegs beoog om verdere aanspreeklikheid te voorkom: *Custom Credit Corporation (Pty) Ltd v Shembe* hierbo; Harker 1993 *SALJ* 8–10. Joubert 1976 *THRHR*

vervolg op volgende bladsy

(b) as alternatiewe skadevergoedingsmaatstaf[167] in geval van terugtrede[168] by kontrakbreuk.[169]

Omdat die benadeelde (soms) in 'n beter vermoënsposisie geplaas word as waarin hy sonder kontrakbreuk sou wees,[170] het die positiefregtelike erkenning[171] (welke erkenning geen teoretiese grondslag daarstel nie[172]) dat negatiewe interesse in geval van kontrakbreuk geëis mag word, heelwat kritiek[173] uitgelok.[174]

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3 wys tereg daarop dat 'n wanvoorstelling 'n benadeelde op *restitutio in integrum* geregtig maak en dat *restitutio in integrum* om hierdie rede nie aan negatiewe interesse gelyk is nie.

167 Meestal word aanvaar dat die benadeelde in hierdie geval 'n keuse het tussen positiewe en negatiewe interesse: *Probert v Baker* hierbo; *Hamer v Wall* hierbo; McLennan 1984 *SALJ* 40–41; Sharrock 1985 *TSAR* 204–205. *Contra* Mulligan "Incompatibility of damages and rescission" 1950 *SALJ* 43, 1957 *SALJ* 306, 1958 *SALJ* 391–392; Harker 1980 *Acta Juridica* 107 wat van mening is dat slegs negatiewe interesse in die onderhawige geval verhaalbaar is. Sharrock 1985 *TSAR* 205 ev is van mening dat skadevergoeding volgens negatiewe interesse slegs verhaalbaar is waar kansellasie van die kontrak *ab initio* (*ex tunc*) plaasvind en nie wanneer die kansellasie *ex nunc* of *in futuro* geskied nie. Mi kan lg standpunt onderskryf word.

168 Die onderliggende rede hiervoor is dat die benadeelde nie sy skade volgens positiewe interesse in die onderhawige geval kan bewys nie: Sharrock 1985 *TSAR* 201–202; Visser en Potgieter 74; *Trichardt v Van der Linde* hierbo; *Acton v Lazarus* hierbo; *Goedhals v Graaff-Reinet Municipality* 1955 3 SA 482 (K); *Clarke v Durban and Coast SPCA* hierbo.

169 In hierdie geval is kontraksluiting (nie die kontrakbreuk nie) deel van die skadestigtende gebeurtenis: *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* hierbo; *Wood v Oxendale and Co* hierbo; *Trichardt v Van der Linde* hierbo; *Acton v Lazarus* hierbo; *Stowe v Scott* hierbo; *Clarke v Durban and Coast SPCA* hierbo; *Van der Watt v Louw* hierbo; *Goedhals v Graaff-Reinet Municipality* hierbo; *Probert v Baker* hierbo; *Svorinic v Biggs* hierbo; *Hamer v Hall* hierbo; Visser en Potgieter 75; Lubbe 1984 *SALJ* 628–634. Joubert 1976 *THRHR* 14 huldig die standpunt dat skadevergoeding in die onderhawige geval met verwysing na die kontrakbreuk (nie kontraksluiting nie) moet plaasvind.

170 *McCallum v Cornelius and Hollis* 1910 NLR 52; *Lammers and Lammers v Giovannoni* 1955 3 SA 385 (A); *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* hierbo; *Trichardt v Van der Linde* hierbo; Lubbe 1984 *SALJ* 625–627; Sharrock 1985 *TSAR* 209–210.

171 *Stent v Gibson Brothers* (1888) 5 HCG 148; *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* hierbo; *Wood v Oxendale and Co* hierbo; *Trichardt v Van der Linde* hierbo; *Acton v Lazarus* hierbo; *Hoets v Wolf* hierbo; *Stowe v Scott* hierbo; *Van der Watt v Louw* 1955 1 SA 690 (T); *Whitfield v Phillips* hierbo; *Reid v LS Hepker and Sons (Pvt) Ltd* hierbo; *Probert v Baker* hierbo; *Svorinic v Biggs* hierbo; *Sommer v Wilding* 1984 3 SA 647 (A); *Hamer v Wall* hierbo.

172 Sharrock 1985 *TSAR* 202.

173 Omdat dit nie die benadeelde is wat kontrakbreuk pleeg nie, negeer billikheidsoorwegings in 'n groot mate hierdie kritiek (Visser en Potgieter 77).

174 Joubert "*Probert v Baker*" 1983 *De Jure* 373; McLennan 1984 *SALJ* 40–41; Kerr "*Probert v Baker*" 1984 *THRHR* 460; Lubbe 1984 *SALJ* 616 ev; Sharrock 1985 *SALJ* 618, 1985 *TSAR* 204–205; Van Aswegen 1993 *TSAR* 265; Harker 1993 *SALJ* 5; Van Aswegen 207. Harker 1993 *SALJ* 14 stel dit so: "To allow the aggrieved party to elect to recover damages aeeording to his negative interesse in these eireumstanees would be tantamount to the imposition of a penalty for breach." Van der Merwe en Reineeke 1984 *TSAR* 87 se kritiek teen *Probert v Baker* hierbo is dat die hof positiewe en negatiewe interesse as een vergelykingsmaatstaf behandel, maar daarmee handel asof dit twee verskillende skadestigtende gebeurtenisse is. Joubert 1976 *THRHR* 13 en Van der Merwe ea 111 ev is van mening (mi tereg) dat daar geen beginselverskil tussen positiewe en negatiewe interesse is nie en dat die begrippe weens die verwarring wat dit veroorsaak, vermy moet word.

Ten einde hierdie probleem te omseil, word die benadeelde se vermoënsposisie voor kontraksluiting vergelyk met sy vermoënsposisie asof geen kontrak gesluit is nie.[175]

Verder word die omvang van negatiewe interesse beperk deur:

(a) 'n mitigasieplig wat op die benadeelde rus;[176]

(b) die kontemplasiebeginsel;[177] en

(c) die beginsel dat die omvang van negatiewe interesse nie meer as die omvang van positiewe interesse mag wees nie.[178]

Die *ratio* waarom negatiewe interesse soms in geval van kontrakbreuk toegeken word, is billikheid omdat dit in sommige gevalle prakties onmoontlik is om positiewe interesse te bewys.[179]

2 8 Aanspreeklikheidsbegrensing

Aangesien die moontlikheid van oewerlose aanspreeklikheid 'n wesenlike probleem by (veral nalatige) wanvoorstelling is, is aanspreeklikheidsbegrensing[180] vir doeleindes van hierdie artikel uiters relevant.

Aanspreeklikheidsbegrensing (wat direk met kousaliteit verband hou) dui daarop dat 'n skadevergoedingspligtige nie vir alle skadelike gevolge aanspreeklik gehou kan word nie en dat daar kragtens normatiewe maatstawwe 'n grens vir aanspreeklikheid gestel moet word.[181] Hierdie normatiewe maatstawwe word aan die hand van feitelike en juridiese kousaliteit vasgestel.[182] Verder word juridiese kousaliteit deur onder andere die evaluasie van feitelike kousaliteit en aanspreeklikheidsvestigende elemente[183] bepaal.[184] Juridiese kousaliteit is as algemene reël slegs problematies waar verwyderde skadelike gevolge ("remote consequences") ter sprake is.[185]

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175 Sien spesifiek *Svorinic v Biggs* hierbo; McLennan 1984 *SALJ* 41; Lubbe 1984 *SALJ* 640; Sharrock 1985 *SALJ* 619; Visser en Potgieter 77.

176 Sharrock 1985 *TSAR* 209.

177 *Van der Watt v Louw* hierbo; Sharrock 1985 *TSAR* 209.

178 *Trichardt v Van der Linde* hierbo; *Whitfield v Phillips* hierbo; *Probert v Baker* hierbo; Sharrock 1985 *TSAR* 209.

179 *Goedhals v Graaff-Reinet Municipality* hierbo; Lubbe 1984 *SALJ* 628; Sharrock 1985 *TSAR* 202. *Contra Clarke v Durban and Coast SPCA* hierbo waar beslis is dat 'n benadeelde by kontrakbreuk 'n keuse het of hy negatiewe of positiewe interesse wil eis. Sharrock 1985 *TSAR* 202–204 onderskryf lg posisie op grond van billikheid. *Contra* Van der Merwe en Reinecke 1984 *TSAR* 87 wat van mening is dat hierdie billikheidsoorwegings 'n "kontrakteregtelike *versari*-leer" daarstel.

180 Wat op kousaliteit dui: *Kruger v Van der Merwe* 1966 2 SA 266 (A); *Minister van Polisie v Skosana* 1977 1 SA 31 (A); *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A); *International Shipping Co (Pty) Ltd v Bentley* hierbo; *Smit v Abrahams* 1992 3 SA 158 (K).

181 Visser en Potgieter 22 246; Van der Merwe ea 300 ev; Joubert "Voorsiene en voorsienbare skade" 1972 *THRHR* 68.

182 *International Shipping Co (Pty) Ltd v Bentley* hierbo; Erasmus en Gauntlett par 22 23.

183 Soos nalatigheid en onregmatigheid: Neethling, Potgieter en Visser *Delict* 169–172.

184 Visser en Potgieter 247.

185 *Alston v Marine and Trade Insurance Co Ltd* 1964 4 SA 112 (W); *Shatz Investments (Pty) Ltd v Kalovyrnas* hierbo; *Muller v Mutual and Federal Insurance Co Ltd* 1994 2 SA 425 (K); De Wet en Van Wyk 226 ev.

Die volgende maatstawwe (teorieë) bestaan om te bepaal of verwyderde skadelike gevolge 'n delikspleger toegereken kan word:[186]

(a) Adekwate veroorsaking, wat meebring dat 'n gevolg wat feitelik deur die dader veroorsaak is, hom toegereken kan word indien dit in 'n adekwate verband[187] met die handeling staan.[188]

(b) "Direct consequences", wat meebring dat die dader slegs vir direkte of regstreekse gevolge van sy handeling aanspreeklik is.[189]

(c) Onregmatigheid en skuld,[190] wat stilswyend die toerekenbaarheid van skade beperk met dien verstande dat die vasstelling van juridiese kousaliteit steeds 'n afsonderlike en onafhanklike voorvereiste vir aanspreeklikheid is.[191]

(d) Redelike voorsienbaarheid van skade ten tyde van die skadeveroorsakende handeling.[192] Daar bestaan egter onsekerheid oor die presiese inhoud van voormelde voorsienbaarheidsmaatstaf en hoe dit van die redelike voorsienbaarheidstoets by nalatigheid verskil.[193]

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186 Neethling, Potgieter en Visser *Delict* 172 ev; Visser en Potgieter 247–251; Van Aswegen 330. De Wet en Van Wyk 205 ev is van mening dat die benadering om die toerekenbaarheid van skadelike gevolge binne bepaalde kategorieë te plaas (bv skade wat 'n regstreekse of natuurlike of algemene gevolg van kontrakbreuk is, of gewone of besondere skade daarstel), "gekunsteld, teoreties onsuiwer en prakties onbruikbaar" is.

187 Die verband is "adekwaat" indien die handeling volgens menslike ervaring die algemene neiging het om die betrokke gevolg te laat intree (Visser en Potgieter 348).

188 Boberg 445 447; Neethling, Potgieter en Visser *Delict* 172–174; Erasmus en Gauntlett par 23; Van Rensburg "*Juridiese kousaliteit en aspekte van aanspreeklikheidsbegrensing by die onregmatige daad* (LLD-proefskrif Unisa 1970) 198 ev; Joubert 251; Van der Merwe en Olivier 207; Joubert "Oorsaaklikheid: feit of norm?" 1965 (1) *Codicillus* 10–11.

189 Boberg 440–442; McKerron 126; Neethling, Potgieter en Visser *Delict* 174–176; Joubert 251; Kerr 580 ev; *Frenkel and Co v Cadle* 1915 NPD 173; *Benjamin v Myers* 1946 CPD 655; *Bruce v Berman* 1963 3 SA 21 (T); *Alston v Marine and Trade Insurance Co Ltd* hierbo; *Da Silva v Coutinho* 1971 3 SA 123 (A); *Thandani v Minister of Law and Order* 1991 1 SA 702 (OK); *Smit v Abrahams* hierbo.

190 Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek" 1983 *De Jure* 57–60.

191 *Standard Bank of South Africa Ltd v Coetzee* 1981 1 SA 1131 (A); *S v Mokgethi* 1990 1 SA 32 (A); Van der Merwe en Olivier 198 222–223; Boberg 381; Van Rensburg 155–160; Neethling, Potgieter en Visser *Delict* 176 ev.

192 *Retief v Groenewald* (1896) 10 EDC 140; *Pietersburg Municipality v Rautenbach* 1917 TPD 252; *Workmen's Compensation Commissioner v De Villiers* 1949 1 SA 474 (K); *Herschel v Mrupe* 1954 3 SA 464 (A); *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 4 SA 147 (A); *Van den Bergh v Parity Insurance Co Ltd* 1966 2 SA 621 (W); *Botes v Van Deventer* 1966 3 SA 182 (A); *Fischbach v Pretoria City Council* 1969 2 SA 693 (T); *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A); *Minister van Binnelandse Sake v Van Aswegen* 1974 2 SA 101 (A); *Minister van Polisie v Skosana* hierbo; *Smit v Abrahams* hierbo; *Stratton v Spoornet* 1994 1 SA 803 (T); Neethling, Potgieter en Visser *Delict* 185–187; Boberg 288–290 442–445; McKerron 128–129; Van der Merwe en Olivier 214–216; Visser en Potgieter 249–250; Joubert 252–254; Erasmus en Gauntlett par 24 25; Joubert 1972 *THRHR* 68; Dean "Culpability or remoteness?" 1974 *SALJ* 47; Jordan "Foreseeability of damage" 1993 *THRHR* 44.

193 *Kruger v Coetzee* 1966 2 SA 428 (A); *Smit v Abrahams* hierbo; *Stratton v Spoornet* hierbo; Neethling, Potgieter en Visser *Delict* 183; Erasmus en Gauntlett par 24; Dean 1974 *SALJ* 58; Jordan 1993 *SALJ* 44.

(e) 'n *Novus actus interveniens*,[194] wat 'n onafhanklike gebeurtenis na afloop van die dader se handeling is wat die gewraakte gevolg óf veroorsaak óf daartoe bydra.[195]

(f) 'n Mitigasieplig,[196] synde 'n regsplig wat op die benadeelde rus om alle redelike stappe te doen om te verhinder dat skade oploop.[197]

Die positiewe reg erken die bestaan van juridiese kousaliteit[198] maar het nog nie 'n besondere toets vir die bepaling daarvan aangewys nie.[199] In *S v Mokgethi*[200] beslis die hof dat beleidsoorwegings vereis dat aanspreeklikheid nooit die grense van redelikheid, regverdigheid en billikheid mag oorskry nie en blyk die hof ten gunste van 'n buigsame maatstaf te wees ten einde te bepaal of daar 'n voldoende noue verband tussen die handeling en die gevolg daarvan bestaan.[201] In dié verband kan bovermelde maatstawwe 'n nuttige subsidiêre rol speel, maar kan geen toets vir juridiese kousaliteit op sigself in alle gevalle as afgrensingsmaatstaf aangewend word nie.[202] Aanspreeklikheidsbegrensing by skadevergoeding[203] weens kontrakbreuk[204] word aangespreek deur te verwys na algemene

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194 Wat nie redelik voorsienbaar mag wees nie (Visser en Potgieter 250).

195 Van Oosten 1982 *De Jure* 244–250; Boberg 441 448–449; Neethling, Potgieter en Visser *Delict* 187–189; Erasmus en Gauntlett par 24; *Mafesa v Parity Versekeringsmaatskappy Bpk* 1968 2 SA 603 (O).

196 Wat soms moeilik van bydraende nalatigheid onderskei word: *Fordsham v Aetna Insurance Co* 1959 2 SA 271 (A); *Van Niekerk v Labuschagne* 1959 3 SA 562 (OK); Erasmus en Gauntlett par 27.

197 *Butler v Durban Corporation* 1936 NPD 139; *Hazis v Transvaal and Delagoa Bay Investments Co Ltd* 1939 AD 372; *Shrog v Valentine* hierbo; *Da Silva v Coutinho* hierbo; *Swart v Provincial Insurance Co Ltd* 1963 2 SA 630 (A); *De Pinto v Rensea Investments (Pty) Ltd* 1977 4 SA 529 (A); *Jayber v Miller (Pty) Ltd* 1980 4 SA 280 (W); *Williams v Oosthuizen* 1981 4 SA 182 (K); *Modimogale v Zweni* 1990 4 SA 122 (B); *Ngubane v SA Transport Services* 1991 1 SA 756 (A); *President Insurance Co Ltd v Mathews* 1992 1 SA 1 (A); *Zweni v Modimogale* 1993 2 SA 192 (BA); Kerr 1994 *SALJ* 134 ev; "Anticipatory breach of contract: some problems discussed" 1972 *SALJ* 465; Mulligan 1956 *SALJ* 423; De Wet en Van Wyk 229; Van der Merwe en Olivier 187; Joubert 245; Kerr 586; Visser en Potgieter 237–242; Neethling, Potgieter en Visser *Delict* 222–223; Burchell 126; Christie 647; Joubert 254–255; Van der Merwe en Olivier 187; Erasmus en Gauntlett par 27 31–34; De Wet en Van Wyk 206 ev; Wessels en Roberts 1237 ev; Van der Merwe ea 300–301.

198 *S v Mokgethi* hierbo; Potgieter "Feitelike en juridiese kousaliteit" 1990 *THRHR* 267 ev.

199 *Da Silva v Coutinho* hierbo; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A); Visser en Potgieter 251.

200 Hierbo, wat met goedkeuring in *International Shipping Co (Pty) Ltd v Bentley* hierbo aangehaal is.

201 Visser en Potgieter 251; Kerr 1994 *SALJ* 138 ev.

202 *S v Mokgethi* hierbo; *International Shipping Co (Pty) Ltd v Bentley* hierbo; Visser en Potgieter 251.

203 De Wet en Van Wyk 228 is van mening dat aanspreeklikheid om skadevergoeding weens kontrakbreuk te betaal, nie daarop berus dat die kontrakbreker hom kontraktueel daartoe verbind het nie maar dat dit *per se* ontstaan omdat hy kontrakbreuk gepleeg het en dat sy aanspreeklikheid so ver strek as die skade wat hy tydens kontrakbreuk voorsien het of redelikerwys moes voorsien het. Sien ook *Durr v Buxton White Lime Co* 1909 TS 876; *Steenkamp v Du Toit* 1910 TPD 171; *Richter v Van Aardt* 1917 OPD 85; *Silbereisen Brothers v Lamont* 1927 TPD 382; *Acton v Lazarus* hierbo; *Lampakis v Dimitri* 1937 TPD 138.

204 Aanspreeklikheidsbegrensing in die onderhawige geval word oa as die "limitation of damages" of "remoteness of damages" behandel (Joubert 251; Christie 644).

(intrinsieke) skade,[205] besondere (ekstrinsieke) skade,[206] voorsienbare[207] skade en ooreengekome[208] skade.[209] Die aanspreeklikheidstoets by besondere skade, ten einde die verwyderdheid daarvan te bepaal, is om die volgende redes problematies:

(a) In *Lavery and Co Ltd v Jungheinrich*[210] word die voorsienbaarheidstoets (kontemplasiebeginsel) gebruik om te bepaal of die skade nie te ver verwyderd is nie.[211] Die benadeelde moet ook bewys dat die kontrakbreker inderdaad kennis[212] van die besondere omstandighede het en dat die kontrak op die basis van hierdie besondere kennis gesluit is.[213]

(b) Daarenteen word in *Shatz Investments (Pty) Ltd v Kalovyrnas*[214] beslis dat die konvensiebeginsel[215] die geldende reg in die onderhawige geval weerspieël.[216]

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205 Kerr 634; Christie 644. Reinecke *Diktaat* hfst 3 is van mening dat die probleem van aanspreeklikheidsbegrensing in geval van kontraktuele skade ondervang kan word deur 'n behoorlike begrip daar te stel van wat algemene skade is, synde skade wat by kontraksluiting redelik voorsienbaar is.

206 Christie 644.

207 Wat met die kontemplasiebeginsel van kontraktuele skade verband hou: Visser en Potgieter 252; Joubert 1972 *THRHR* 65 ev. In *Shatz Investments (Pty) Ltd v Kalovyrnas* hierbo bevind die hof dat die tydstip van kontraksluiting die relevante tydstip is om die voorsienbaarheid van skade te bepaal, omdat die kontrakspartye se regte en verpligtinge by kontraksluiting vasgelê word en dat hulle op hierdie tydstip hulle aanspreeklikheid kan uitwerk. Kerr 633 is van mening dat die relevante tydstip van voorsienbaarheid in die onderhawige geval die tydstip van kontraksluiting is, maar dat hierdie reël aangepas moet word waar billikheid dit vereis. *Contra* Joubert 253, 1972 *THRHR* 69 en De Wet en Van Wyk 205 ev wat van mening is dat die tydstip van kontrakbreuk die relevante oomblik is om die voorsienbaarheid van skade te bepaal, omdat kontrakspartye by kontraksluiting eerder dink aan die nakoming van die kontrak as die nie-nakoming daarvan: *Outeniqua Produce Agency v Machanick* 1924 CPD 315. Sien ook Christie 645; De Wet en Van Wyk 227–228. Mi moet lg standpunt onderskryf word.

208 Wat soos by voorsienbare skade met die konvensiebeginsel van kontraktuele skade verband hou (Visser en Potgieter 252).

209 *Ibid.*

210 Hierbo.

211 Sien ook *Silverton Estates Co v Bellevue Syndicate* 1904 TS 462; *Dennill v Atkins* 1905 TS 282; *Steenkamp v Du Toit* hierbo; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* hierbo; *Jockie v Meyer* 1945 AD 354; *Balay v Harwood* 1954 3 SA 498 (A); *Whitfield v Phillips* hierbo; *Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 4 SA 931 (D); *Katzenellenbogen v Mullin* 1977 4 SA 855 (A); *Administrator Natal v Edouard* 1990 3 SA 581 (A); Kerr 617 619–627; Erasmus en Gauntlett par 26; Christie 645; Van der Merwe ea 304–308.

212 Wat op die konvensiebeginsel (nie die kontemplasiebeginsel nie) dui: *North and Son (Pty) Ltd v Albertyn* hierbo; Joubert 253; Kerr 627; Visser en Potgieter 254 314.

213 Visser en Potgieter 254–255; Kerr 626 ev. Sien in die algemeen Mulligan 1956 *SALJ* 27 ev.

214 Hierbo.

215 Visser en Potgieter 256–257 kritiseer die konvensiebeginsel as tipe aanvulling van die kontemplasiebeginsel, omdat eg op 'n onnodige fiksie berus, synde: "Indien kontrakspartye werklike of veronderstelde kennis het dat kontrakbreuk tot bepaalde skade kan lei en hulle sluit die kontrak, kan die kontrakbreker nie skielik omdraai en beweer dat hy nie ooreengekom het om die skade te vergoed nie. Die aangaan van die kontrak met die werklike of veronderstelde kennis, dui tog op sy aanvaarding van die verpligting om voorsiene of voorsienbare skade goed te maak." Sien ook De Wet en Van Wyk 227; Christie 646–647; Kerr 629, 1994 *SALJ* 129 ev.

216 Visser en Potgieter 255; Erasmus en Gauntlett par 26; Kerr 627 ev. Totdat die Hoërhof van Appèl *Lavery and Co Ltd v Jungheinrich* hierbo uitdruklik verwerp, moet aanvaar word dat die konvensiebeginsel steeds ook van krag is: Visser en Potgieter 256; Christie 646; Van der Merwe ea 304–308.

(c) Deur wie (en in welke omvang)[217] die skade voorsien moet word.[218] Daar is gesag dat die skade deur al die betrokke kontrakspartye voorsien moet word.[219] Daarenteen is daar skrywers wat van mening is dat slegs die kontrakbreker se voorsienbaarheid van die skade relevant is.[220] Anders as by deliktuele skade word by kontrakbreuk (skynbaar) vereis dat nie slegs die aard van die skade nie maar ook die omvang daarvan binne die kontemplasie van die kontrakspartye moet wees.[221]

(*Word vervolg*)

HUGO DE GROOT-PRYS

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

217 Sien Kerr 630; *Whitfield v Phillips* hierbo.
218 Visser en Potgieter 256.
219 *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* hierbo; *Whitfield v Phillips* hierbo; *Shatz Investments (Pty) Ltd v Kalovyrnas* hierbo.
220 Joubert 253; De Wet en Van Wyk 227–228.
221 *Dennill v Atkins* hierbo; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* hierbo; Kerr 640; Visser en Potgieter 256; Wessels en Roberts 1230.

Die regsbeskerming van privaatregtelike belange ten aansien van inligting

T Geldenhuys
BA LLD
Hoof: Regsdienste, Nasionale Standaarde en Bestuursdienste, Suid-Afrikaanse Polisiediens

SUMMARY

The legal protection of private law interests with regard to information

This article attempts to answer the question whether information qualifies as a legal interest which could form the object of a "subjective right". This is done by analysing the different views of recognised legal writers on what the requirements for such an object should be. In this regard the conclusion is drawn that the differences between these writers are more perceived than real and that it is possible to reconcile them. An attempt is made to abstract from these different views those elements which seem to be universally accepted as requirements with which an object must comply to qualify as the object of a right. Information is tested against these requirements and it is concluded that specific well-defined categories of information (such as the objects protected by copyright, patent law, trade mark law, model law, plant breeder's rights, heraldic law, rights to trade secrets, the right to the goodwill of an undertaking, the right to privacy, the right to identity and the right to good name or reputation) qualify as legal objects and are in fact already recognised as such by our law. These different categories of information are analysed to determine the exact contents of the legal object protected in each instance and it is pointed out that each of the categories displays at least some characteristics of immaterial property. Finally, the protection offered by the law to some objects is investigated and the conclusion drawn that in some instances information is so closely related to an object that, unless such information is protected by the law, the object will not effectively be protected. Case studies are done to point out that the law does indeed protect the information in those instances.

1 DIE REGSBESKERMING VAN BELANGE IN INLIGTING DEUR DIE VERLENING VAN SUBJEKTIEWE REGTE TEN AANSIEN VAN DIE INLIGTING

Volgens Van Zyl[1] kan 'n subjektiewe reg omskryf word as

> "die deur die positiewe reg gereëlde aanspraak van 'n regsubjek op 'n regsobjek ten opsigte van ander persone, wat in die eerste plek impliseer dat die regsubjek in 'n regsverhouding met die regsobjek staan, welke verhouding enersyds inhou dat die regsubjek 'n (werklike of potensiële) beskikkings- en genotsbevoegdheid oor die regsobjek het en andersyds dat die regsobjek regtens bestem is om die

1 Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 421 (sien voorts ook die volledige bespreking van subjektiewe regte 412–439).

> regsubjek tot behoeftebevrediging te dien; en wat ook impliseer dat die regsubjek in 'n regsverhouding met derdes staan, welke verhouding in hoofsaak inhou dat hy daarop aanspraak het dat die derdes hulle sal weerhou van 'n inbreuk op die regsobjek."[2]

Uit hierdie omskrywing blyk duidelik dat die verlening van subjektiewe regte ten aansien van regsobjekte wat uit inligting bestaan, daarop sal neerkom dat daar van regsweë erkenning verleen word aan bepaalde beskermingswaardige belange in inligting en dat die betrokke belange van regsweë beskerm word.

Indien daar inderdaad iets soos 'n *subjektiewe reg op inligting* bestaan, sal dit aan 'n *regsubjek* 'n bepaalde aanspraak op inligting as *regsobjek* teenoor ander regsubjekte verleen. Alvorens daar dus sprake kan wees van iets soos 'n "reg op inligting", moet dit eers vasstaan dat inligting as sodanig 'n regsobjek vorm. Die vraag of dit wel die geval is, kan slegs beantwoord word nadat vasgestel is presies wat 'n regsobjek is en wat die vereistes is waaraan 'n entiteit moet voldoen alvorens dit as regsobjek erken sal word.

1 1 Omskrywing van 'n regsobjek

Van Zyl omskryf 'n regsobjek as

> "daardie aspek (faset, sy of funksie) van 'n entiteit wat 'n regswaarde vir 'n bepaalde regsubjek behels op grond daarvan dat een of meer buite-juridiese waardes van daardie entiteit regtens bestem is om, ter uitsluiting van ander regsubjekte, die regsubjek tot behoeftebevrediging te dien."[3]

1 2 Die vereistes vir die erkenning van 'n entiteit as regsobjek

1 2 1 Die entiteit moet vir 'n regsubjek van waarde wees en moet bestem wees om die regsubjek tot behoeftebevrediging te dien

Daar bestaan vandag eenstemmigheid onder juriste dat slegs entiteite wat vir 'n regsubjek van waarde is, as regsobjekte kan dien. Ten aansien van die vraag oor *watter tipe* waarde die entiteit vir die regsubjek moet inhou, word egter verskillende menings aangetref.

Die juriste wat standpunte in hierdie verband inneem, kan in twee groepe verdeel word. In die eerste groep val diegene wat meen dat slegs entiteite wat van *ekonomiese waarde* vir 'n regsubjek is, regsobjekte kan vorm. In die tweede groep val daardie juriste wat meen dat geen besondere eise gestel behoort te word betreffende die waarde wat 'n entiteit moet hê as om regsobjek te dien nie, solank die waarde van die entiteit maar bestem is om die regsubjek tot behoeftebevrediging te dien.

Die standpunt van die eerste groep is oorspronklik deur Dooyeweerd ingeneem, 'n Nederlandse regsfilosoof wie se standpunte 'n groot invloed op die ontwikkeling van die regswetenskap in Suid-Afrika uitgeoefen het. Dooyeweerd stel dit as absolute vereiste dat iets slegs as regsobjek beskou kan word indien dit vir 'n regsubjek van ekonomiese waarde is.[4] Met *ekonomiese waarde* bedoel

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2 Kyk ook Du Plessis en Du Plessis *Inleiding tot die reg* (1990) 132.

3 Van Zyl en Van der Vyver 405.

4 Dooyeweerd "Grondproblemen in de leer der rechtspersoonlikheid" in 1937 *Themis* 199–263 367–421 (hierna Dooyeweerd *Grondproblemen*) 405–406 408.

Dooyeweerd nie dat die entiteit noodwendig oor 'n geldwaarde of markwaarde moet beskik[5] of selfs dat *ekonomiese waarde* gelykgestel kan word met ruilwaarde nie.[6] Vir hom is *ekonomiese waarde* 'n wyer begrip omdat hy van die standpunt uitgaan dat die ekonomiese aspek van die werklikheid betrekking het op "*de besparende wijze van omgang met relatief schaarse goederen*".[7] Volgens Van der Vyver se interpretasie van Dooyeweerd beteken "relatiewe skaarsheid" dat daar 'n groter aanvraag na as aanbod van dit wat "relatief skaars" is, bestaan.[8] Hommes[9] sluit hom by Dooyeweerd aan deur te verklaar dat dit wat in die ekonomiese verkeer nie vir waardebepaling vatbaar is nie, nie as objek van 'n subjektiewe reg kan dien nie.

Van der Vyver[10] en Van Zyl[11] se vernaamste beswaar teen die standpunt van Dooyeweerd is dat, volgens die betekenis wat Dooyeweerd aan die begrip "ekonomiese waarde" heg, persoonlikheidsgoedere nie geag kan word oor ekonomiese waarde te beskik nie en derhalwe nie regsobjekte kan vorm nie. Volgens Van der Vyver vorm persoonlikheidsgoed onlosmaaklik deel van die persoon van die reghebbende; gevolglik kan dit nie in die ruilverkeer van die handel aangebied word nie en sou enige aanvraag daarvoor sinloos wees omdat dit nie oordraagbaar is nie. Slegs om hierdie rede is dit volgens hom vir Dooyeweerd en Hommes moontlik om "ekonomiese waarde" as vereiste te stel omdat hulle persoonlikheidsgoedere nie as regsobjekte beskou nie.[12] Alhoewel Dooyeweerd wel regte ten aansien van sekere goedere (wat in sy tyd as persoonlikheidsgoedere beskou is), soos outeursreg, handelsmerkereg, ensovoorts erken het,[13] het hy steeds volgehou dat dit wat vandag as persoonlikheidsgoedere beskou word, soos 'n persoon se lewe en sy liggaam, nie regsobjekte kan wees nie. Dooyeweerd stel dit soos volg:

> "Deze zgn. 'rechten' zijn inderdaad niets anders dan door het moderne positieve recht beschermde *subjectieve* rechtsbelangen, die volgens de moderne Westerse opvatting inherent zijn aan de menselijke persoonlikheid naar haar juridisch aspect, maar die naar diezelfde moderne opvatting nimmer op een rechts*objekt* kunnen zijn betrokken."[14]

Dooyeweerd baseer sy standpunt dat persoonlikheidsgoedere nie regsobjekte kan vorm nie daarop dat die mens as *regsubjek* aan die regsverkeer deelneem en dat die mens, of enige aspekte van die mens soos sy persoonlikheid, deel van sy regsubjektiwiteit uitmaak en daarom nooit 'n regsobjek kan wees nie.[15]

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5 *Idem* 405.
6 *Idem* 407 (veral vn 41).
7 Dooyeweerd *Encyclopaedie der rechtswetenskap* II 17 noem dit ook "krapheid van dienstige goederen".
8 Van der Vyver en Joubert *Persone- en familiereg* (1985).
9 *De samengestelde grondbegrippen der rechtswetenschap* (1976) 205–206.
10 Van der Vyver en Joubert 9–12.
11 Van Zyl en Van der Vyver 406.
12 Kyk Dooyeweerd *Grondproblemen* 406–407; Dooyeweerd *A new critique of theoretical thought* II (1952–1958) 412–413; Hommes *De elementaire grondbegrippen der rechtswetenschap* (1972) 14–15 370; Hommes *De samengestelde grondbegrippen der rechtswetenschap* (1976) 114 201 206 227.
13 Dooyeweerd *Grondproblemen* 406.
14 Dooyeweerd *Encyclopaedie der rechtswetenschap* I (1966) 173.
15 *Ibid.*

Joubert[16] aanvaar in navolging van Dooyeweerd dat regsobjekte 'n ekonomiese waarde moet hê om as sodanig erken te word. Joubert wys egter ook daarop dat Dooyeweerd ekonomiese belang nie met geldwaarde gelykstel nie en dat Dooyeweerd aanvaar dat die familieportret, wat geen markwaarde het nie, tog die objek van eiendomsreg kan vorm. Die rede wat Dooyeweerd hiervoor aanvoer, is dat dit tog ekonomiese waarde in die familiekring het.[17] Hierbenewens wys Joubert ook daarop dat Dooyeweerd aantoon dat 'n geldbedrag as vergoeding gevorder kan word in die geval van 'n skending van 'n persoonlikheidsgoed; dit beteken dat die persoonlikheidsgoed tog in geldwaarde waardeerbaar is.[18] Joubert bevind gevolglik dat persoonlikheidsgoedere inderdaad volgens die standpunte van Dooyeweerd geag kan word ekonomiese waarde te hê en dat dit derhalwe regsobjekte kan vorm. Joubert word in hierdie verband deur Van Heerden[19] ondersteun. Neethling[20] het self ook vroeër hierdie benadering ondersteun maar ondertussen van standpunt verander en hom by die tweede groep aangesluit.[21]

Van der Vyver[22] vestig die aandag daarop dat die betaling van vergoeding weens die aantasting van persoonlikheidsgoedere nie die geldwaarde van die persoonlikheidsgoedere verteenwoordig nie, maar *troosgeld* is wat juis betaal word omdat die goedere nie in terme van geld waardeer kan word nie. Hy wys voorts daarop dat Dooyeweerd self later van hierdie standpunt afstand gedoen het.

Die vernaamste eksponente van die tweede groep is Van der Vyver, Van Zyl, Neethling en Du Plessis. Van der Vyver,[23] Van Zyl[24] en Neethling[25] is van mening dat Dooyeweerd se standpunt betreffende die vereiste dat 'n objek oor ekonomiese waarde moet beskik om as regsobjek te kwalifiseer, verkeerd is. Volgens hulle, soos trouens ook volgens Du Plessis,[26] bestaan daar geen rede waarom ander buite-juridiese waardes van 'n bepaalde objek nie ook voldoende kan wees om sodanige objek as regsobjek te laat kwalifiseer nie. Hulle neem gevolglik ook die standpunt in dat persoonlikheidsgoedere inderdaad regsobjekte vorm ten spyte daarvan dat sodanige goedere nie oor ekonomiese waarde beskik nie.

Van Zyl,[27] wat sy regsleer op dié van Dooyeweerd baseer,[28] is van mening dat dit voldoende is om 'n entiteit as regsobjek te laat kwalifiseer indien dit oor "een

16 Joubert *Grondslae van die persoonlikheidsreg* (1953) (hierna Joubert (1953)) 119, asook "'n Realistiese benadering van die subjektiewe reg" 1958 *THRHR* 12–15 98–115 (hierna Joubert (1958)) 108–109 112 114–115.

17 Dooyeweerd *Encyclopaedie der rechtswetenschap* II 17. Hy praat hier van 'n sg *pretium affectionis*.

18 Joubert (1953) 113.

19 Van Heerden *Grondslae van die mededingingsreg* (LLD-proefskrif UOVS 1961) 111.

20 Neethling *Die reg op privaatheid* (LLD-proefskrif Unisa 1976) (hierna Neethling *Privaatheid*) 289 (veral by vn 4), asook "Persoonlike immaterieelgoedereregte: 'n Nuwe kategorie subjektiewe regte?" 1987 *THRHR* 316–324 (hierna Neethling *Immaterieel*) 316.

21 Sien Neethling *Persoonlikheidsreg* (1991) (hierna Neethling *Persoonlikheidsreg*) 14 (veral vn 115).

22 Van der Vyver en Joubert 11.

23 *Idem* 11–12; sien ook Van der Vyver "The doetrine of private law rights" in Strauss (red) *Huldigingsbundel WA Joubert* (1988) 229–231.

24 Van Zyl en Van der Vyver 406.

25 Sien *Persoonlikheidsreg* 14 (veral vn 115).

26 Du Plessis en Du Plessis 130–132.

27 Van Zyl en Van der Vyver 405.

28 Kyk *idem* 9.

of meer buite-juridiese waardes" beskik en sodanige waardes "regtens bestem" is om "die regsubjek tot behoeftebevrediging te dien". Van der Vyver[29] en Neethling[30] se standpunte stem klaarblyklik hiermee ooreen. Volgens Van der Vyver moet die entiteit oor 'n waarde beskik "in die sin dat dit 'n juridiese behoefte van 'n regsubjek bevredig". Du Plessis[31] wat ook hiermee saamstem, is selfs tevrede as die entiteit 'n regtens erkende behoefte van 'n regsubjek (kan) bevredig. Volgens hom sal dit van die gemeenskapsedes en -oortuigings afhang of die waarde wat 'n regsobjek vir 'n regsubjek het, regtens erken word of nie.

Persoonlik is ek, in navolging van Van der Westhuizen,[32] van mening dat die teoretiese fundering van die subjektiewe regsleer regswetenskap vorm en nie materiële reg nie. Die regswetenskaplike hou hom besig met die regswerklikheid en probeer om die verskynsels wat reeds in die regswerklikheid voorkom, na te vors en aan die hand van die begrippe van sy leer aan te dui. Die regswetenskaplike hou hom dus nie besig met die vraag of dit nodig is om iets soos subjektiewe regte ten aansien van persoonlikheidsgoed te erken nie, maar wel met die vraag of daar reeds sodanige regte bestaan. Sodra daar gevind word wat inderdaad ook die geval is, dat sodanige regte wel bestaan, is dit die taak van die regswetenskaplike om die presiese inhoud van hierdie regte na te vors en die regte binne die raamwerk van die regswetenskap te klassifiseer en te omskryf.[33] Gesien in die lig van die feit dat subjektiewe regte ten aansien van persoonlikheidsgoed inderdaad bestaan, wat vandag sekerlik nie meer ontken kan word nie, moet van die uitgangspunt uitgegaan word dat persoonlikheidsgoed inderdaad regsobjekte kan vorm. Die onvermydelike afleiding wat hieruit gemaak kan word, is dat indien "ekonomiese waarde" as vereiste vir die erkenning van 'n entiteit as regsobjek gestel word, daar noodwendig van die uitgangspunt uitgegaan moet word dat die begrip "ekonomiese waarde" wyd uitgelê moet word ten einde tot die slotsom te kom dat persoonlikheidsgoed inderdaad oor sodanige waarde beskik.

Indien die benadering van Joubert, as eksponent van die eerste groep, vergelyk word met dié van Van Zyl, Van der Vyver, Neethling en Du Plessis as eksponente van die tweede groep, is dit duidelik dat daar nie 'n wesenlike onderskeid tussen die praktiese uitwerking van hulle onderskeie standpunte bestaan nie. Die betekenis wat Joubert aan die begrip "ekonomiese waarde" heg, is so wyd dat dit betwyfel word of daar enige ander buite-juridiese waarde bestaan wat nie tegelykertyd ook as "ekonomiese waarde" (in hierdie wye sin) bestempel kan word nie. Indien alle ander buite-juridiese waardes ook as "ekonomiese waardes" in hierdie wye sin beskou sou kan word, kan daar geen wesenlike beswaar daarteen wees nie om "ekonomiese waarde" te vervang deur "buite-juridiese waarde" of "regtens erkende waarde" as vereiste vir 'n entiteit om as regsobjek te kwalifiseer. Trouens, om as vereiste te stel dat die entiteit oor "ekonomiese" waarde moet beskik en dan aan die begrip "ekonomiese waarde" in hierdie verband so 'n wye betekenis te heg, kom na my mening neer op die gebruik van onnodig onpresiese terminologie en behoort daarom vermy te word.

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29 Van der Vyver en Joubert 9–12.

30 Sien Neethling *Persoonlikheidsreg* 14 (veral vn 115).

31 Kyk ook Du Plessis en Du Plessis 132.

32 Van der Westhuizen *Noodtoestand as regverdigingsgrond in die strafreg* (LLD-proefskrif UP 1979) 479.

33 Vgl in hierdie verband in die algemeen Joubert (1958) 12–15 (veral 13–14).

Van der Vyver[34] meld dat daar ekonome is wat meen dat ekonomiese waarde fundamenteel in "behoeftebevrediging" geleë is. Indien die begrip "ekonomiese waarde" in hierdie wye sin verstaan sou word, gee selfs Van der Vyver toe dat daar geen wesenlike verskil tussen sy benadering en dié van Joubert bestaan nie. Volgens hom sou dit egter beteken dat daardeur 'n wyer interpretasie aan die begrip "ekonomiese waarde" geheg word as wat Dooyeweerd self daaraan geheg het.

In die lig van die voorgaande is ek van mening dat die vereiste dat 'n entiteit vir 'n regsubjek van waarde moet wees ten einde as regsobjek te dien, op so 'n wyse geformuleer behoort te word dat dit aantoon dat die entiteit die een of ander buite-juridiese waarde vir 'n regsubjek moet inhou en bestem moet wees om die regsubjek tot behoeftebevrediging te dien, ten einde as regsobjek te kwalifiseer.[35]

1 2 2 Die entiteit moet regtens toedeelbaar wees aan 'n bepaalde regsubjek

Die agtiende-eeuse Engelse filosoof David Hume[36] het daarop gewys dat daar geen behoefte aan die toewysing van regsweë van voorwerpe aan bepaalde mense sou bestaan het nie, indien die natuur aan die mens net soveel van elke ding voorsien het waarvan enige mens maar hoegenaamd kan droom, en die mens, sonder enige inspanning aan sy kant, 'n oorvloed van elke ding waarvan hy maar kan droom, kon bekom het. Hieruit kan 'n mens die afleiding maak dat indien iets vryelik beskikbaar is, soos die vrye lug, daar geen behoefte bestaan om so iets van regsweë aan 'n bepaalde regsubjek, tot uitsluiting van ander regsubjekte, toe te ken nie, met die gevolg dat daar geen behoefte daaraan sal bestaan om dit as regsobjek te erken nie.

Dit is interessant om daarop te let dat Dooyeweerd juis die vereiste van ekonomiese waarde waarna hierbo verwys is, gebruik het om aan te toon dat dit wat vryelik beskikbaar is, soos die vrye lug, nie regsobjekte kan vorm nie.[37] Deur die verwysing na die ekonomie in hierdie vereiste te verwerp, is 'n leemte gelaat. Van Zyl het wel hierdie leemte gedek deur in sy omskrywing van 'n regsobjek voorsiening daarvoor te maak dat 'n entiteit aan een regsubjek, tot uitsluiting van ander regsubjekte, "regtens toedeelbaar" moet wees om as regsobjek te kwalifiseer.[38] Hiermee sluit hy dus die moontlikheid uit dat iets wat aan almal behoort, ingevolge sy omskrywing as regsobjek kan kwalifiseer. Hierdie leemte word egter nie uitdruklik deur Van der Vyver of Du Plessis aangespreek in hulle omskrywings van 'n regsobjek nie.[39]

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34 Van der Vyver en Joubert 12 (veral vn 7).

35 Vgl ook Venter *Die publiekregtelike verhouding* (1985) 157 ev, wat self ook van mening is dat daar weggedoen moet word met die vereiste dat die regsobjek oor ekonomiese waarde moet beskik.

36 Hume *Enquiries concerning the human understanding and concerning the principles of morals* (1902) 145.

37 Dooyeweerd *Grondproblemen* 405; vgl ook Joubert (1958) 109.

38 Van Zyl en Van der Vyver 407.

39 Van der Vyver en Joubert 12. Volgens hom kan 'n regsobjek gedefinieer word as "iets met waarde in die sin dat dit 'n juridiese behoefte van 'n regsubjek bevredig en as sodanig die voorwerp van 'n subjektiewe reg kan wees". Hy verwys weliswaar na die eienskappe van regsobjekte soos deur Van Zyl en Van der Vyver 406–407 gestel en waarvolgens die objek van so 'n aard moet wees dat dit regtens aan 'n regsubjek toebedeel kan word tot uitsluiting van andere, maar inkorporeer dit nie uitdruklik in sy omskrywing van 'n regsobjek nie. Kyk ook Du Plessis en Du Plessis 132.

Na my mening sou dit egter foutief wees om die essensie van hierdie vereiste bloot te sien as die "nie-vryelike beskikbaarheid van die entiteit". Hierdie vereiste vir 'n regsobjek hou ook ander implikasies in. Daar kan byvoorbeeld nie gesê word dat die visse in die diepsee vryelik beskikbaar is nie. Menige diepseehengelaar wat al by geleentheid vol verwagting op die diepsee uitgegaan het om vis te vang maar nie daarin geslaag het om 'n enkele vis te vang nie, sal hiervan kan getuig! Visse wat vryelik in die diepsee rondswem, kan egter steeds nie as regsobjekte beskou word nie. Eers nadat 'n vis in die diepsee gevang en onder beheer gebring is, kan sodanige vis aan 'n bepaalde regsubjek tot uitsluiting van ander regsubjekte toegedeel word. Die mens beskik vir alle praktiese doeleindes nie oor die mag om voordat die vis gevang is, beheer daaroor uit te oefen nie. Alhoewel visse wat nog nie gevang is nie, nie vryelik beskikbaar is nie, kan hulle dus steeds nie as regsobjekte beskou word nie omdat die mens weens sy onmag, ten spyte van die relatiewe skaarsheid van visse, nie beheer oor die visse kan uitoefen nie; dit is gevolglik ook nie vir die reg moontlik om die visse aan een regsubjek tot uitsluiting van ander regsubjekte toe te deel nie. Ten einde as regsobjek te kwalifiseer, moet 'n entiteit dus eers vatbaar wees vir menslike beheer alvorens daar sprake van enige toedeling van die entiteit aan 'n bepaalde regsubjek kan wees. Dooyeweerd stel dit soos volg:

> "Wat echter niet, of noch niet cultureer als object beheersbaar is, kan ook geen object van subjectief recht zijn. Zo kan men bv. geen subjectief recht hebben op wilde dieren, die noch vrij in de wildernis rondzwerfen . . ."[40]

Van Zyl[41] stem saam met Dooyeweerd se standpunt dat 'n entiteit "kultureel beheerbaar" moet wees om as regsobjek te kwalifiseer, mits daaronder verstaan word dat die entiteit "aanwendbaar ter bevrediging van behoeftes" moet wees. Uit die voorgaande aanhaling is dit egter duidelik dat dit nie is wat Dooyeweerd hier in gedagte het nie. Die estetiese objektiwiteit (skoonheid) van die wilde dier in sy staat van vryheid kan immers steeds tot behoeftebevrediging van mense dien sonder dat die dier onder beheer gebring word. Omdat die dier egter nie onder beheer is nie kan die estetiese objektiwiteit van die dier nie juridies geobjektiveer word nie.[42] Van Zyl se interpretasie van hierdie vereiste wat Dooyeweerd stel, is waarskynlik toe te skryf aan die feit dat hy nie ingesien het dat 'n entiteit, ten einde regtens toedeelbaar te wees, eers *vatbaar vir menslike beheer* moet wees nie. Hierdie "beheerbaarheidsvereiste" is dus 'n noodsaaklike onderdeel van en voorvereiste vir die "toedeelbaarheidsvereiste" wat Van Zyl stel.

Die twee vereistes wat tot dusver bespreek is, naamlik dat 'n entiteit eerstens nie vryelik beskikbaar moet wees nie en tweedens vatbaar moet wees vir menslike beheer, moet nie as afsonderlike vereistes vir 'n regsobjek gesien word nie, maar eerder as twee interafhanklike komponente van die vereiste dat 'n entiteit regtens toedeelbaar moet wees aan een regsubjek tot uitsluiting van ander regsubjekte. Ter illustrasie van hierdie punt kan daarop gewys word dat iets wat vryelik beskikbaar is, soos die vrye lug, per definisie iets is wat nie vatbaar is vir menslike beheer nie. "Vrye lug" is immers per definisie lug wat vryelik rondbeweeg. Dit beteken egter nie dat *bepaalde lugdeeltjies* nie vatbaar is vir menslike beheer nie. Dit is byvoorbeeld moontlik om lug uit die atmosfeer in 'n

40 Dooyeweerd *Encyclopaedie* I 176.
41 407.
42 Vgl Van Zyl in Van Zyl en Van der Vyver 406 waar hy daarop wys dat die estetiese objektiwiteit van 'n troeteldier juridies objektiveerbaar is.

silinder in te pomp en binne die silinder vas te vang. Niemand beskik egter oor die vermoë om die vrye lug *in sy totaliteit* (al die lug in die aarde se atmosfeer) te beheer nie en derhalwe is die vrye lug as sodanig (dit wil sê in sy totaliteit) nie vatbaar vir menslike beheer nie en sal dit nooit 'n regsobjek kan vorm nie. Bepaalde lugdeeltjies *wat byvoorbeeld in 'n silinder vasgevang is*, vorm egter nie meer deel van die vrye lug nie, is nie vryelik beskikbaar nie en is dus vatbaar vir menslike beheer. Sodanige lug (in 'n silinder) is dus inderdaad regtens toedeelbaar aan een regsubjek tot uitsluiting van ander regsubjekte en kan dus 'n regsobjek vorm. Alhoewel daar dus nooit sprake kan wees van "die reg op lug" nie, kan daar wel sprake wees van "'n reg op bepaalde *lugdeeltjies*" (te wete daardie lugdeeltjies wat op die een of ander wyse vasgevang is sodat beheer daaroor uitgeoefen kan word).

Joubert[43] stel die vereiste dat 'n entiteit slegs 'n regsobjek kan vorm indien dit

> "'n genoegsame bepaaldheid, omlyndheid en selfstandigheid besit om genot daarvan en beskikking daaroor moontlik te maak".

Daar word aan die hand gedoen dat hierdie vereiste geïmpliseer word deur die wyer vereiste dat 'n entiteit regtens toedeelbaar moet wees aan een regsubjek tot uitsluiting van ander regsubjekte ten einde as regsobjek te kwalifiseer. Slegs indien 'n entiteit genoegsaam bepaald, voldoende omlyn en selfstandig is, soos deur Joubert vereis, sal sodanige objek vatbaar wees vir menslike beheer, en kan daar hoegenaamd sprake wees van enige toedeling van die objek aan 'n bepaalde regsubjek tot uitsluiting van ander regsubjekte.

1 2 3 Die juridiese toedeling van die entiteit aan 'n regsubjek moet 'n gemeenskapsordende werking hê

Van Zyl[44] verduidelik hierdie vereiste deur 'n pornografiese werk as voorbeeld te gebruik. Alhoewel 'n pornografiese werk aan al die ander vereistes van 'n regsobjek kan voldoen, kan dit nooit die objek van outeursreg wees nie omdat die toedeling van die ekonomiese waarde van sodanige werk nie gemeenskapsordende werking sal hê nie. Om dieselfde rede kan die prestasie ingevolge 'n ongeoorloofde ooreenkoms nooit 'n regsobjek daarstel waarop 'n vorderingsreg betrekking kan hê nie.

Hierdie vereiste hang ten nouste saam met die algemene oogmerk en funksie van die reg, naamlik die erkenning, afbakening en harmonisering van belange in die samelewing. Regsreëls verleen en orden die kompetensie van lede van die samelewing om aan die regsverkeer deel te neem, verleen regte aan die lede van die samelewing en lê hulle verpligtinge op, baken sodanige regte en verpligtinge af en vervul sodoende 'n harmoniserende rol in die samelewing.[45] Die erkenning van iets as regsobjek impliseer dat regte en verpligtinge ten aansien daarvan in die lewe geroep word. Indien sodanige erkenning nie 'n ordende funksie vervul nie maar chaosskeppend van aard is, sal die regsreëls wat daardeur tot stand gekom het nie as ware regsreëls nie maar as skynreg beskou word.[46]

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43 Joubert (1953) 120; sien ook Neethling *Immaterieel* 316.

44 407.

45 Vgl Van der Vyver in Van Zyl en Van der Vyver 1; Du Plessis "Reg, geregtigheid en menseregte" 1980 *Obiter* 51 ev; Venter *Publiekregtelike verhouding* 158.

46 Vgl Van der Vyver in Van Zyl en Van der Vyver 257.

1 2 4 Samevatting

Die verskillende vereistes vir 'n regsobjek kan soos volg saamgevat word:

'n Entiteit kan as regsobjek dien indien dit:

(1) vir die een of ander regsubjek van waarde is en bestem is om die regsubjek tot behoeftebevrediging te dien;

(2) die entiteit regtens toedeelbaar is aan een regsubjek tot uitsluiting van ander regsubjekte (wat impliseer dat dit nie vryelik beskikbaar is nie, vir menslike beheer vatbaar is en genoegsaam bepaald, voldoende omlyn en selfstandig is om die genot daarvan en beskikking daaroor moontlik te maak); en

(3) indien die toedeling van die entiteit aan die regsubjek 'n gemeenskapsordende funksie sal vervul.

1 3 Kwalifiseer inligting as regsobjek?

Ten einde vas te stel of inligting as regsobjek beskou kan word, is dit eerstens nodig om te bepaal of inligting aan die vereistes vir 'n regsobjek waarna hierbo verwys is, voldoen. Eers daarna kan oorweeg word of inligting onder enige van die bestaande klasse regsobjekte tuisgebring kan word en of dit nodig is om nuwe klasse regsobjekte te erken ten einde aan inligting as regsobjek erkenning te verleen.

Die eerste vraag is dus of inligting vir enige regsubjek van waarde is en bestem is om daardie regsubjek tot behoeftebevrediging te dien. Hierdie vraag kan nie ongekwalifiseerd beantwoord word nie. Daar is wel *sekere* inligting waarteenoor identifiseerbare regsubjekte in 'n *bepaalde verhouding* staan, wat vir die *betrokke* regsubjekte van waarde is en bestem is om die regsubjekte tot behoeftebevrediging te dien. Inligting wat as 'n handelsgeheim geklassifiseer kan word, het byvoorbeeld ongetwyfeld waarde vir die persoon wat daaroor beskik en is bestem om hom tot behoeftebevrediging te dien. 'n Handelsgeheim kan gevolglik as voorbeeld van sodanige inligting beskou word. Die moontlikheid kan egter nie uitgesluit word nie dat daar inligting kan wees wat op 'n bepaalde tydstip nie vir enige regsubjek van waarde is nie. Sodanige inligting sal dus nie aan hierdie vereiste vir 'n regsobjek voldoen nie. Slegs nadat vasgestel is na *watter inligting* verwys word en in *watter verhouding* die regsubjek ten opsigte van die inligting staan, kan die vraag of die betrokke inligting aan hierdie vereiste voldoen, dus beantwoord word. Hierdie antwoord sal egter slegs betrekking hê op die betrokke inligting en nie op inligting in die algemeen nie.

Benewens die moontlikheid dat daar inligting kan wees wat nie vir enige regsubjek van waarde is nie, moet ook in gedagte gehou word dat inligting wat vir een persoon van waarde is nie noodwendig vir ander persone van waarde is nie en omgekeerd. Hieruit kan die afleiding gemaak word dat daar verskillende *kategorieë* inligting bestaan wat elkeen óf vir een of meer persone van waarde is en vir ander waardeloos is, óf vir alle persone waardeloos is.

Die gevolgtrekking is dus onvermydelik dat inligting in die algemeen, dit wil sê sonder om dit te beperk tot 'n bepaalde *kategorie* inligting wat vir een of meer persone van waarde is, nooit 'n regsobjek kan vorm nie omdat dit selfs nie eers aan die eerste vereiste vir 'n regsobjek voldoen nie. Terselfdertyd is dit egter ook duidelik dat daar kategorieë inligting is wat wel vir die een of ander regsubjek van waarde is en tot sy behoeftebevrediging kan dien. Sodanige inligting voldoen dus wel aan hierdie eerste vereiste vir 'n regsobjek.

Die tweede vereiste vir 'n regsobjek is dat 'n entiteit regtens toedeelbaar moet wees aan een regsubjek tot uitsluiting van ander regsubjekte. Soos vroeër aangetoon, beteken dit eerstens dat die entiteit nie vryelik beskikbaar moet wees nie, en tweedens dat die entiteit vir menslike beheer vatbaar moet wees. Hierdie vereiste hou besonder interessante implikasies vir die erkenning van inligting as regsobjek in.

In die eerste plek is dit duidelik dat daar heelwat inligting bestaan wat vryelik beskikbaar is en waarmee enige persoon na goeddunke kan handel. Sodanige inligting kan dus nooit 'n regsobjek wees nie. Terwyl die son skyn, sal die helder daglig dien as 'n sintuiglik waarneembare voorstelling van die feit dat die son skyn en is die betrokke voorstelling 'n voorbeeld van inligting wat *op daardie tydstip* vryelik beskikbaar is. Sodanige inligting sal ook nie vatbaar wees vir menslike beheer nie. Dit is immers onmoontlik vir enige enkele persoon om op 'n bepaalde oomblik beheer uit te oefen oor die helder daglig en dit na willekeur aan of af te skakel sodat ander persone dit kan waarneem of nie.

Terselfdertyd is daar egter ook inligting wat nie vryelik beskikbaar is nie. 'n Handelsgeheim wat slegs aan een persoon bekend is, kan as 'n voorbeeld dien van inligting wat nie vryelik beskikbaar is nie. Sodanige inligting is tegelykertyd ook vir menslike beheer vatbaar. Die persoon wat die handelsgeheim ken, kan immers bloot die inligting vir homself hou en sodoende effektiewe beheer daaroor uitoefen.

Hierbo is reeds verwys na die standpunt van Joubert dat 'n entiteit genoegsaam bepaald, voldoende omlyn en selfstandig moet wees om genot daarvan en beskikking daaroor moontlik te maak, en is daarop gewys dat dit uiteraard 'n voorvereiste vir die uitoefening van beheer oor 'n entiteit is dat die entiteit hierdie eienskappe besit.

Soos uit my omskrywing van inligting blyk,[47] is een van die eienskappe van inligting juis dat dit 'n selfstandige bestaan kan voer, afgesonderd van die onderwerp of voorwerp waarop dit betrekking het. Sover dit die vereiste betref

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47 Sien Geldenhuys *Die regsbeskerming van inligting* (LLD-proefskrif Unisa 1993) 59:
"Inligting is enige voorstelling van feite betreffende enige onderwerp of voorwerp, welke voorstelling
(1) sintuiglik waarneembaar is of in 'n sintuiglik waarneembare vorm omskep kan word;
(2) 'n onstoflike en afsonderlike bestaan voer, verwyderd van dit waarop die feite wat dit voorstel, betrekking het;
(3) oor die potensiaal beskik om 'n persoon, wat dit sintuiglik waarneem, op die hoogte te stel van die feite wat daardeur voorgestel word, selfs al sou dit waarop die feite betrekking het, glad nie, of nie op daardie oomblik, vir sodanige persoon sintuiglik waarneembaar wees nie;
(4) oor die potensiaal beskik om 'n onbeperkte aantal kere gedupliseer te word, hetsy deur dieselfde voorstelling te kopieer of deur ander voorstellings van dieselfde feite saam te stel, en deur middel van die verskaffing van sodanige voorstellings aan een of meer persone, dit vir sodanige persone moontlik te maak om op die hoogte te kom van die feite wat daardeur voorgestel word, sonder dat die persoon wat dit verskaf, deur die verskaffing daarvan van enige kennis aangaande die feite wat deur sodanige voorstelling voorgestel word, afstand doen; en
(5) in die geval van 'n geestesvoorstelling, nie van 'n persoon weggeneem kan word sonder 'n ernstige inbreukmaking op die liggaamlike of geestelike integriteit van die persoon wat sodanige voorstelling gevorm het nie."

dat 'n entiteit voldoende selfstandig moet wees om die genieting daarvan en beskikking daaroor moontlik te maak, kan derhalwe aangeneem word dat inligting inderdaad oor sodanige selfstandigheid kan beskik.

Afgesien van die feit dat 'n entiteit 'n selfstandige bestaan moet kan voer om as regsobjek te kwalifiseer, moet die entiteit egter ook genoegsaam bepaald en voldoende omlyn wees. Indien inligting aan hierdie vereiste getoets word, is dit reeds met die eerste oogopslag duidelik dat inligting in die algemeen, sonder enige afbakening van die inligting, nie as genoegsaam bepaald of voldoende omlyn beskou kan word om as regsobjek te kwalifiseer nie. Slegs inligting wat sodanig afgebaken is dat daar geen onduidelikheid bestaan oor die vraag watter inligting daarby inbegrepe is en watter inligting daarvan uitgesluit is nie, kan as genoegsaam bepaald en voldoende omlyn beskou word om as regsobjek te dien. Vir doeleindes van hierdie artikel sal na inligting wat sodanig afgebaken is, verwys word as 'n *kategorie* inligting. 'n Voorbeeld van 'n kategorie inligting wat sodanig afgebaken is, is handelsgeheime waarna hierbo verwys is.

Selfs al sou inligting egter 'n selfstandige bestaan voer en genoegsaam bepaald en voldoende omlyn wees om vatbaar te wees vir menslike beheer, kan dit steeds nie 'n regsobjek vorm indien dit nie moontlik is om beheer daaroor uit te oefen nie, ongeag die rede waarom dit nie moontlik is om sodanige beheer uit te oefen nie. Dit sou byvoorbeeld die geval wees waar dit, in die voormelde voorbeeld, nie vir die persoon wat oor die handelsgeheim beskik moontlik is om die toegang van buitestanders tot 'n sintuiglik waarneembare voorstelling van die handelsgeheim te beheer nie, soos waar iemand die handelsgeheim algemeen bekend gemaak het en dit derhalwe nie meer vir die voormalige houer van die handelsgeheim moontlik is om te verhoed dat ander daarvan kennis neem nie. In so 'n geval sal die handelsgeheim nie meer geheim nie maar vryelik beskikbaar wees.

Uit die voorgaande kan die indruk gekry word dat uitoefening van beheer oor inligting sinoniem is met uitoefening van beheer oor die bekendheid van inligting. So 'n afleiding sou egter totaal ongegrond wees. Die bekendmaking of geheimhouding van inligting is immers nie die enigste handelinge ten aansien van inligting waaroor beheer uitgeoefen kan word nie. Beheer kan byvoorbeeld ook uitgeoefen word oor die benutting van inligting. Ter toeligting hiervan kan verwys word na 'n handelsgeheim wat bestaan uit inligting oor 'n unieke goedkoop proses waardeur sekere artikels vervaardig kan word. Indien die mededinger van 'n houer van so 'n handelsgeheim met die houer daarvan onderhandel om toestemming te kry om ook die proses te gebruik en die houer sou die inligting waaruit die handelsgeheim bestaan, tydens die onderhandelinge aan die mededinger verskaf ten einde 'n ooreenkoms oor vergoeding vir die benutting daarvan te bereik, sal die mededinger voordat die ooreenkoms bereik is, nie sonder die toestemming van die houer die inligting aan ander kan oordra of die betrokke vervaardigingsproses in sy vervaardiging van sulke artikels kan toepas nie. In so 'n geval sal die houer dus nie alleen oor die bekendmaking van die inligting nie maar ook oor die benutting daarvan beheer uitoefen. Weliswaar moet inligting eers verkry word alvorens dit benut kan word, maar, soos uit die voorgaande voorbeeld blyk, beteken dit nie dat 'n persoon nooit beheer kan uitoefen oor die benutting van inligting deur persone aan wie die inligting bekend is nie. Trouens, hieronder sal aangetoon word dat daar verskeie gevalle is waarin die reg persone verbied om inligting op 'n bepaalde wyse te benut ten spyte daarvan dat die inligting aan hulle bekend is.

Soos uit die voorgaande blyk, is daar dus bepaalde *kategorieë* inligting wat wel aan die toedeelbaarheidsvereiste vir 'n regsobjek voldoen, terwyl daar ook inligting is wat nie aan hierdie vereiste voldoen nie en derhalwe nie as regsobjek kan kwalifiseer nie. Die vraag of inligting regtens toedeelbaar is aan 'n bepaalde regsubjek tot uitsluiting van ander regsubjekte, is dus 'n vraag wat slegs beantwoord kan word nadat vasgestel is of die inligting wat ter sprake is vryelik beskikbaar is of nie, en of die regsubjek wat in die bepaalde verhouding ten aansien van die inligting staan in staat is om effektief beheer oor die inligting uit te oefen.

Soos in die geval van die vorige twee vereistes vir die erkenning van 'n entiteit as regsobjek, sal ook slegs bepaalde kategorieë inligting aan die derde en laaste vereiste vir 'n regsobjek voldoen. Volgens hierdie vereiste sal 'n entiteit slegs 'n regsobjek vorm indien die juridiese toedeling van die entiteit aan 'n bepaalde regsubjek 'n gemeenskapsordende werking het. Alhoewel die juridiese toedeling van *sekere* inligting, soos die handelsgeheim waarna hierbo verwys is, aan 'n bepaalde regsubjek dikwels 'n gemeenskapsordende werking sal hê, sal dit nie noodwendig altyd die geval wees nie. Indien die betrokke handelsgeheim byvoorbeeld slegs aangewend kan word om verdowingsmiddels vir die swartmark te vervaardig, sal die toedeling van die handelsgeheim aan een regsubjek tot uitsluiting van ander regsubjekte chaos veroorsaak omdat misdaadpleging daardeur bevorder eerder as bekamp sal word. Sulke inligting sal dus steeds nie as regsobjek kwalifiseer nie ongeag of dit aan die ander vereistes vir 'n regsobjek voldoen of nie.

1 4 Gevolgtrekking

In die lig van die voorgaande kan die afleiding gemaak word dat inligting as sodanig of inligting in die algemeen nooit 'n regsobjek kan vorm nie en dat daar dus nie sprake kan wees van 'n subjektiewe reg wat as *die* reg op inligting bekend kan staan nie. Dit is egter eweneens uit die voorgaande duidelik dat daar wel sprake kan wees van bepaalde *kategorieë* inligting wat as regsobjekte kan dien en ten aansien waarvan daar dus subjektiewe regte kan bestaan. In elke geval waar daar so 'n reg ten aansien van inligting bestaan, sou dit myns insiens meer korrek wees om daarna te verwys as "*'n* reg op inligting", in teenstelling met "*die* reg op inligting". Deur die bepaalde lidwoord "die" in hierdie konteks aan te wend, word die benaming "reg op inligting" gemonopoliseer en word die indruk gewek dat die betrokke reg op inligting waarna verwys word, die *enigste* reg op inligting is, wat 'n verkeerde afleiding sou wees.

1 5 Inligting wat as regsobjekte beskou kan word

Ter aanvang moet daarop gewys word dat die kategorieë inligting wat as regsobjekte beskou kan word, geen *numerus clausus* daarstel nie, net soos wat daar geen *numerus clausus* regsobjekte bestaan nie. Benewens enige kategorieë inligting wat reeds erkenning as regsobjekte geniet, kan ander kategorieë inligting in die toekoms ook deur die objektiewe reg as regsobjekte erken word, mits in elke geval bevind sou word dat daar in die feitelike werklikheid 'n selfstandige beskermingsbehoeftige individuele belang ten aansien van 'n betrokke kategorie inligting bestaan en die betrokke individuele belang aan die vereistes vir 'n regsobjek waarna hierbo verwys is, voldoen.[48]

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48 Neethling *Immaterieel* 316.

Aandrang op die erkenning van sulke regte bestaan reeds, soos uit die volgende voorbeelde blyk:

(a) Mostert[49] is byvoorbeeld van mening dat die "reklamebeeld" 'n voorbeeld is van 'n immateriële goed wat wel aan die vereistes vir 'n regsobjek voldoen en waarop 'n immaterieelgoederereg verleen behoort te word. Word die omskrywing van die "reklamebeeld" wat hy gee, nagegaan, blyk dit dat die reklamebeeld bestaan uit die lokkrag of reklamewaarde soos beliggaam in die identiteit van 'n persoonlikheidskenmerk van 'n individu, 'n fiktiewe karakter of 'n simbool.[50] Die reklamebeeld bestaan dus uit 'n voorstelling van 'n persoonlikheidskenmerk van 'n individu, van 'n fiktiewe karakter of van 'n simbool. In die lig van die omskrywing van inligting wat vroeër gegee is, is dit duidelik dat ons hier met 'n bepaalde afgebakende kategorie inligting te doen het.

(b) Klopper[51] weer propageer die erkenning van 'n subjektiewe reg op "kredietwaardigheid" as regsobjek. Hierdie reg beskou hy as 'n immaterieelgoederereg wat betrekking het op die geestesvoorstelling wat by 'n ander bestaan dat die reghebbende die wil en die vermoë het om sy finansiële verpligtinge na te kom.[52] Ook in die geval van kredietwaardigheid is dit duidelik dat die regsobjek waarvan die erkenning gepropageer word, 'n afgebakende kategorie inligting daarstel.

Volgens die huidige stand van ontwikkeling van ons reg word daar reeds subjektiewe regte verleen ten aansien van regsobjekte wat elkeen uit 'n bepaalde kategorie inligting bestaan. Die subjektiewe regte wat tans in hierdie verband erkenning geniet, sluit in outeursreg, patentreg, die reg op die handelsmerk, modelreg, planttelersreg, heraldiese reg, die reg op privaatheid, die reg op die handelsgeheim en die reg op werfkrag. In die volgende paragrawe sal 'n kort uiteensetting gegee word van die regsobjekte waarop elkeen van die voorafgaande subjektiewe regte betrekking het en sal aangetoon word dat elkeen van hierdie regsobjekte in der waarheid uit 'n bepaalde kategorie inligting bestaan.

1 5 1 Outeursreg

Outeursreg word beheer deur die Wet op Outeursreg[53] en kan omskryf word as daardie alleenreg wat die outeursreghebbende van 'n oorspronklike letterkundige of artistieke werk toekom en wat al die bevoegdhede, van watter aard ook al, omsluit wat die outeur ten aansien van sy skepping kan uitoefen.[54]

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49 Mostert *Grondslae van die reg op die reklamebeeld* (LLD-proefskrif RAU 1985) (hierna Mostert *Grondslae*) 343–348; "The right to the advertising image" 1982 *SALJ* 413.

50 Mostert *Grondslae* 281 ev. Sien ook Coetser *Die reg op identiteit* (LLM-verhandeling Unisa 1986) 163 wat hierdie reg as die reg op die (individuele) bemarkingskrag beskryf.

51 Sien in die algemeen sover dit die erkenning van kredietwaardigheid as regsobjek betref Klopper *Die beskerming van kredietwaardigheid in die Suid-Afrikaanse reg* (LLD-proefskrif UOVS 1986).

52 Sien Klopper 243 ev.

53 Wet 98 van 1978. Sien egter ook die Wet op die Beskerming van Voordraers 11 van 1967 en die Wet op Registrasie van Outeursreg in Rolprente 62 van 1977. Die beginsels wat hieronder tav die Wet op Outeursreg bespreek word, is *mutatis mutandis* ook op hierdie ander wette van toepassing.

54 Neethling *Persoonlikheidsreg* 24 saamgelees met Copeling *Copyright and the Act of 1978* (1978) 3.

Copeling, Du Plessis en Pienaar is van mening dat die regsobjek by outeursreg uit twee komponente bestaan, naamlik (1) die gedagtes of idees wat in die werk vervat word, en (2) die vorm deur middel waarvan die gedagtes en idees uitdrukking vind.[55] Die meeste regsgeleerdes skyn dit eens te wees dat die regsobjek in die geval van outeursreg nie geleë is in die *idees* per se waaruit 'n werk bestaan nie, maar eerder in die *voorstelling* van daardie idees in 'n uiterlik waarneembare fisiese of stoflike vorm.[56] Ten einde die objek van outeursreg te wees, moet die gedagtes of idees van die outeur dus vergestalt of voorgestel word in die een of ander stoflike medium.

Inligting kan omskryf word as 'n voorstelling van feite betreffende enige onderwerp of voorwerp; een van die eienskappe van inligting is dat die voorstelling waaruit dit bestaan, in die een of ander medium of draer gevorm moet wees.[57] Indien die objek van outeursreg aan die hand hiervan ontleed word, is dit duidelik dat die objek uit 'n *voorstelling* van feite betreffende 'n bepaalde onderwerp (naamlik die idees of gedagtes van die outeur) bestaan.[58] Hieruit kan afgelei word dat die objek van outeursreg in der waarheid uit 'n bepaalde kategorie inligting bestaan. Hierdie standpunt word ook deur Hugenholtz gehuldig. Trouens, hy gaan selfs sover om die objekte by outeursreg as *informatiegoederen* te beskryf.[59] Die voorgaande beteken natuurlik nie dat bedoelde inligting ongekwalifiseer en op sigself die objek van die outeursreg van die een of ander persoon is nie. Alvorens die inligting die objek van outeursreg kan vorm, moet dit aan sekere vereistes voldoen.[60] Hierdie vereistes sluit onder andere die volgende in: In die eerste plek moet die inligting bestaan uit *'n voorstelling van die idees of gedagtes van 'n persoon*. Tweedens moet hierdie voorstelling in die een of ander *stoflike vorm* beliggaam wees. In die derde plek moet die voorstelling 'n *werk* daarstel wat aan die vereistes, soos neergelê in die wetgewing wat hierop betrekking het, voldoen. Laasgenoemde beteken dat die inligting 'n letterkundige, artistieke, musikale of ander werk, soos bedoel in die toepaslike wetgewing, moet vorm en moet voldoen aan die vereistes vir sodanige werk soos dit in die betrokke wetgewing uitgespel is. Die objek van outeursreg is dus 'n skerp afgebakende *kategorie inligting*, naamlik daardie kategorie inligting wat aan die voormelde vereistes voldoen.

Die beskerming wat uit hoofde van die outeursreg aan hierdie kategorie inligting verleen word, is hierbenewens ook beperk en sluit byvoorbeeld nie 'n verbod op die openbaarmaking van die inligting in nie. Die beskerming wat ten aansien daarvan verleen word, word uitdruklik in die wetgewing wat daarop betrekking het, uitgespel en verbied byvoorbeeld die maak van skendende kopieë van die werk.

In die lig van die voorgaande word aan die hand gedoen dat outeursreg beskou kan word as 'n voorbeeld van 'n subjektiewe reg op 'n bepaalde kategorie inligting.

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55 *Ibid.*

56 Du Plessis, Pienaar en Copeling *Handelsreg: Enigste gids vir LWB401–Y (Patentereg en outeursreg)* (1989) 81–83 en gesag aldaar.

57 Sien Geldenhuys *Inligting* 59, aangehaal *supra* vn 47.

58 Vgl ook in die algemeen Copeling *The nature and object of copyright* (1969).

59 Hugenholtz *Auteursrecht op informatie* (1989) 20.

60 Sien hieroor as voorbeeld die vereistes wat blyk uit die woordomskrywings vervat in a 1(1) van die Wet op Outeursreg 98 van 1978.

1 5 2 Patentreg

Patentregte word deur die Wet op Patente[61] beheer. Die verlening van patentreg het ten doel om die uitvinder van 'n nuwe uitvinding wat op 'n vindingryke handeling berus en wat in die handel, nywerheid of landbou aangewend of toegepas kan word, vir 'n bepaalde tydperk teen die kommersiële eksploitasie van sy uitvinding deur andere te beskerm.[62] Die wetgewer probeer hierdie oogmerk bereik deur aan die uitvinder vir die betrokke tydperk 'n monopolie ten aansien van sodanige eksploitasie te verleen.[63] Hierdie monopolie behels die alleenreg om die uitvinding te vervaardig, aan te wend, uit te oefen en van die hand te sit, sodat die uitvinder gedurende die duur van die patent die wins en voordeel wat uit die uitvinding ontstaan, verkry en geniet.[64]

Ten einde vir so 'n reg te kwalifiseer, moet die uitvinder by die Registrateur van Patente aansoek doen om die registrasie van die nuwe uitvinding en voldoende inligting betreffende die uitvinding aan die registrateur verskaf om hom in staat te stel om onder andere te bepaal of die uitvinding inderdaad 'n nuwe uitvinding is of nie.[65] Die inligting wat tydens so 'n aansoek voorsien moet word, sluit in 'n volledige beskrywing en vasstelling van die uitvinding en die wyse waarop dit in werking gestel word (waar nodig toegelig met tekeninge en voorbeelde).[66]

Die registrateur is verantwoordelik vir die byhou van 'n register waarin die voorgeskrewe besonderhede betreffende patente wat ingevolge die wet aanvaar is, aangeteken word.[67] Enigiemand is geregtig om teen betaling van die voorgeskrewe gelde, insae in die register en afskrifte van enige besonderhede daarin asook afskrifte van sekere dokumente wat in verband met die aansoek ingedien is, te kry.[68]

Uit die bevoegdhede wat aan die houer verleen word, is dit duidelik dat 'n patentreg betrekking het op die *uitvinding* ten aansien waarvan die patent geregistreer is. Dit beteken egter nie dat patentregte strek oor die liggaamlike saak of apparaat wat oorspronklik gebou is en wat die uitvinding beliggaam of die dokument wat die prosedure beskryf nie, maar eerder dat dit strek oor die *idees* van die uitvinder *soos dit in 'n sintuiglik waarneembare vorm in die liggaamlike saak of die dokument voorgestel is*. Die objek van patentreg is dus die *voorstelling* van feite betreffende 'n bepaalde onderwerp (die idees van die uitvinder). Hieruit kan die afleiding gemaak word dat die regsobjek in die geval van patentreg uit 'n bepaalde kategorie inligting bestaan.

Soos in die geval van outeursreg, moet daar nie hieruit afgelei word dat die inligting ongekwalifiseer en op sigself die objek van die patentreg vorm nie. Alvorens die inligting die objek van 'n patentreg sal vorm, moet dit eers aan bepaalde vereistes voldoen. Hierdie vereistes sluit onder andere die volgende in: In die eerste plek moet die inligting bestaan uit *'n voorstelling van die idees of*

61 57 van 1978.
62 Vgl a 25(1).
63 Sien a 45 saamgelees met a 46.
64 A 45(1).
65 A 30 en 32 saamgelees met a 34.
66 A 32(3).
67 A 10.
68 A 12 13.

gedagtes van 'n persoon. Tweedens moet hierdie voorstelling in die een of ander *stoflike vorm* (dit wil sê 'n apparaat of dokument) beliggaam wees. In die derde plek moet die voorstelling 'n *uitvinding* daarstel wat aan die vereistes, soos neergelê in die toepaslike wetgewing, voldoen. Dit behels onder andere dat die uitvinding nuut moet wees, op 'n vindingryke handeling moet berus en in die handel of nywerheid aangewend of toegepas moet kan word.[69] Die objek van patentreg is dus 'n skerp afgebakende *kategorie van inligting*, naamlik daardie kategorie inligting wat aan die voormelde vereistes voldoen.

Die beskerming wat uit hoofde van die patentreg aan hierdie kategorie inligting verleen word, is hierbenewens ook beperk en sluit byvoorbeeld nie 'n verbod op die openbaarmaking van die inligting in nie. Die beskerming wat ten aansien daarvan verleen word, word uitdruklik in die betrokke wetgewing uitgespel en bestaan daarin dat ander persone as die reghebbende verbied word om sonder die toestemming van die reghebbende die uitvinding te vervaardig, aan te wend, uit te oefen of te vervreem.[70]

In die lig van die voorgaande word aan die hand gedoen dat patentreg beskou kan word as 'n voorbeeld van 'n subjektiewe reg op 'n bepaalde kategorie inligting.

1 5 3 Die reg op die handelsmerk

Regte ten aansien van handelsmerke word beheer deur die Wet op Handelsmerke.[71] Die doel met die verlening van handelsmerkregte is om 'n persoon wat 'n bepaalde handelsmerk gebruik, te beskerm teen ander se gebruik van handelsmerke of merke wat soveel ooreenkoms daarmee vertoon dat die verbruiker dit waarskynlik daarmee sal verwar of mislei sal word om te dink dat dit inderdaad die betrokke handelsmerk is.[72] Hierdie oogmerk probeer die wetgewer bereik deur aan die houer van 'n geregistreerde handelsmerk vir 'n bepaalde tydperk 'n monopolie ten aansien van die gebruik daarvan te verleen.[73]

Ten einde vir so 'n reg te kwalifiseer, moet die gebruiker of voorgenome gebruiker van die handelsmerk by die Registrateur van Handelsmerke aansoek doen om die registrasie daarvan. In sy aansoek moet die gebruiker aantoon watter onderskeidende merk hy as handelsmerk gebruik of van voornemens is om te gebruik en ten opsigte van watter goedere, dienste, of klasse van goedere of dienste die merk aangewend word of sal word.[74] Die kantoor van handelsmerke is verantwoordelik vir die byhou van 'n register waarin die voorgeskrewe besonderhede betreffende handelsmerke wat ingevolge die wet geregistreer is, aangeteken word.[75] Enigiemand is geregtig om, teen betaling van die

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69 Vgl 25(1).

70 Dit is gevolglik te verstane dat die beskikkings- en genotsbevoegdhede wat die uitvinder tav die uitvinding kan uitoefen, soos vroeër aangetoon, betrekking het op die produksie, verkoop en in- of uitvoer van die *uitvinding*. Deur beheer oor hierdie handelinge tav die uitvinding uit te oefen, oefen die reghebbende beheer uit oor die ekonomiese benutting van sy nuwe uitvinding.

71 194 van 1993. Sien ook die Handelswaremerkewet 17 van 1941 waarin die meeste van die beskermingsmaatreëls ingebou is.

72 A 34.

73 A 37.

74 A 9–11 16.

75 A 22(1).

voorgeskrewe gelde, insae in die register en afskrifte van enige besonderhede daarin te kry.[76]

Uit die bevoegdhede wat aan die houer verleen word, is dit duidelik dat 'n handelsmerkreg betrekking het op die handelsmerk wat geregistreer is. 'n Handelsmerk word in artikel 1 van die wet omskryf as

> "'n merk wat gebruik word of ten opsigte waarvan dit die voorneme is dat dit gebruik word deur 'n persoon in verband met goedere of dienste ter onderskeiding van die goedere of dienste in verband waarmee die merk gebruik word of dit die voorneme is om dit te gebruik, van dieselfde soort goedere of dienste wat in die loop van die handel met 'n ander persoon in verband gebring word."

Uit die omskrywing van inligting wat vroeër verskaf is, blyk dat inligting bestaan uit 'n voorstelling van feite. In die lig van die omskrywing van 'n handelsmerk is dit duidelik dat 'n handelsmerk 'n voorstelling daarstel van 'n verband tussen die gebruiker van die handelsmerk en die goedere of dienste ten aansien waarvan dit gebruik word. Hierdie voorstelling is egter ook 'n voorstelling van die feit dat daar 'n onderskeid tussen die dienste of goedere waarop die merk aangebring is en ander dienste of goedere bestaan. Dit beteken dat die merk 'n voorstelling is van die feit dat daar nié 'n verband tussen die dienste of goedere en iemand anders, wat soortgelyke goedere of dienste lewer, bestaan nie. Sover dit beide hierdie aspekte van die voorstelling betref, kan daar dus geen twyfel bestaan nie dat die handelsmerk 'n bepaalde kategorie inligting daarstel. Hierdie inligting moet natuurlik eweneens aan sekere vereistes voldoen soos in die voorgaande omskrywing van 'n handelsmerk uiteengesit word. Voorts is die beskerming wat aan handelsmerke verleen word, soos in the geval van patente en werke wat die objekte van outeursreg vorm, beperk en sluit dit byvoorbeeld nie 'n verbod op die openbaarmaking van die inligting in nie. Die beskerming wat verleen word, is dus slegs beskerming teen die ongemagtigde *benutting* van die inligting (deur die handelsmerk op goedere van byvoorbeeld 'n ander vervaardiger aan te bring).

In die lig van die voorgaande word aan die hand gedoen dat 'n handelsmerkreg beskou kan word as 'n voorbeeld van 'n subjektiewe reg op 'n bepaalde kategorie inligting.

1 5 4 Modelreg

Modelregte word beheer deur die Wet op Modelle.[77] Die verlening van modelleregte het ten doel om die skepper van 'n nuwe model vir 'n bepaalde tydperk teen die kommersiële eksploitasie van die model deur andere te beskerm. Hierdie oogmerk probeer die wet bereik deur aan die houer van die reg vir die betrokke tydperk 'n monopolie te verleen om enige artikel wat val in die klas waarin die model geregistreer is en ten opsigte waarvan dit toegepas is, te maak of om sulke artikels te gebruik of te verkoop.[78]

Ten einde vir so 'n reg te kwalifiseer, moet die skepper of persoon in opdrag van wie die model geskep is of op wie die reg om die model toe te pas, oorgegaan het, by die Registrateur van Modelle aansoek doen om die registrasie van die model en die nodige inligting betreffende die model aan die registrateur

76 A 22(4) en (5).
77 195 van 1993.
78 A 20(1).

verstrek om hom in staat te stel om te bepaal of die model nuut en oorspronklik is (of nie alledaags in die betrokke tegniek is nie) en aan die vereistes vir registrasie voldoen.[79] Die registrateur is verantwoordelik vir die byhou van 'n register waarin die voorgeskrewe besonderhede van modelle wat ingevolge die wet geregistreer is, aangeteken word. Enigiemand is geregtig om, teen betaling van die voorgeskrewe gelde, insae in die register van modelle en afskrifte van enige besonderhede daarin aangeteken en van stukke met betrekking daartoe ingedien, te kry.[80]

Uit die bevoegdhede wat aan die houer of reghebbende van 'n modelreg verleen word, blyk dat die geregistreerde model die regsobjek van die modelreg is. Die wet onderskei tussen 'n *estetiese* en *funksionele* model. Hulle word soos volg omskryf:[81]

> 'n *Estetiese model* is "'n model wat in verband met 'n artikel toegepas word, hetsy wat betref die patroon of die vorm of die gedaante of ter versiering daarvan, of wat betref twee of meer van daardie doeleindes, en op watter wyse dit ook al toegepas word, wat kenmerke het wat die oog trek en uitsluitlik op die oog af beoordeel word, ongeag die estetiese kwaliteit daarvan".
>
> 'n *Funksionele model* is "'n model wat in verband met 'n artikel toegepas word, hetsy wat betref die patroon of die vorm of die gedaante daarvan, of wat betref twee of meer van daardie doeleindes, en op watter wyse dit ook al toegepas word, wat kenmerke het wat genoodsaak word deur die funksie wat die artikel in verband waarmee dit toegepas word, bestem is om te verrig, en ook 'n geïntegreerde stroombaan-topografie, 'n maskerwerk en 'n stel maskerwerke".

Indien hierdie omskrywings in die lig van die omskrywing van inligting wat hierbo verskaf is, beoordeel word, is dit duidelik dat 'n model gesien moet word as 'n vergestalting of voorstelling van 'n bepaalde idee wat die houer gehad het van 'n patroon, vorm of gedaante waarin die artikel waarop dit toegepas is, vervaardig of versier kan word. Die model kan dus gesien word as die voorstelling van 'n bepaalde feit, naamlik die genoemde idee van die reghebbende. Aangesien die voorstelling van 'n feit in die een of ander sintuiglik waarneembare vorm inligting daarstel, kan die afleiding gemaak word dat die model in die geval van 'n modelreg, en derhalwe die regsobjek van die modelreg, uit 'n bepaalde kategorie inligting bestaan. Hierdie inligting moet natuurlik aan die vereistes van die wet voldoen alvorens die model geregistreer sal word en die houer daarvan 'n reg ten aansien daarvan sal bekom. Hierdie vereistes sluit onder andere in dat die model uniek moet wees en op 'n bepaalde artikel toegepas moet wees.

1 5 5 Planttelersreg

Planttelersregte word deur die Wet op Planttelersregte[82] beheer. Die verlening van planttelersregte het ten doel om die plantteler wat 'n nuwe variëteit ontwikkel of ontdek het vir 'n bepaalde tydperk teen die kommersiële eksploitasie van sy ontwikkeling of ontdekking deur andere te beskerm. Hierdie oogmerk probeer die wet bereik deur aan die plantteler vir die betrokke tydperk 'n monopolie ten aansien van sodanige eksploitasie te verleen.[83] Hierdie monopolie behels die

79 A 14–16.
80 A 7–9.
81 A 1.
82 15 van 1976.
83 Kyk a 23(2) saamgelees met die woordomskrywing van "teler" in a 1.

alleenreg om voortplantingsmateriaal van die betrokke variëteit te produseer, te verkoop, of in te voer in, of uit te voer uit die Republiek, terwyl elke ander persoon vir die duur van die planttelersreg die betrokke handelinge slegs na verkryging van 'n lisensie van die reghebbende vir hierdie doel ten aansien van die besondere variëteit mag uitvoer.[84]

Ten einde vir so 'n reg te kwalifiseer, moet die plantteler by die Registrateur van Planttelersregte aansoek doen om die registrasie van die nuwe variëteit en voldoende inligting betreffende die nuwe variëteit aan die registrateur verskaf om hom in staat te stel om te bepaal of die variëteit inderdaad 'n nuwe variëteit is of nie.[85] Die inligting wat tydens so 'n aansoek voorsien moet word, sluit 'n beskrywing in van 'n tipiese plant van die betrokke variëteit en van die prosedure wat gevolg moet word om die betrokke variëteit in stand te hou en voort te plant.[86] Die registrateur is verantwoordelik vir die byhou van 'n register waarin die voorgeskrewe besonderhede betreffende planttelersregte wat ingevolge die wet toegestaan is, aangeteken word. Enigiemand is geregtig om teen betaling van die voorgeskrewe gelde insae in die register en afskrifte van enige besonderhede daarin asook afskrifte van sekere dokumente wat in verband met die aansoek ingedien is, te kry.[87]

Uit die bevoegdhede wat aan die houer verleen word, is dit duidelik dat 'n plantttelersreg betrekking het op die variëteit van die plant ten aansien waarvan die planttelersreg geregistreer is. Dit beteken dat die nuwe *variëteit* wat die plantteler ontwikkel of ontdek het, die objek van die planttelersreg is en nie die plantjie van die nuwe variëteit wat oorspronklik ontwikkel of ontdek is nie. Hierdie nuwe variëteit is egter die resultaat van die eie *idees* wat die plantteler in die teling toegepas het om uiteindelik hierdie variëteit te ontwikkel en is derhalwe 'n geestesproduk van die plantteler. Die variëteit is dus die vergestalting of voorstelling van die idees van die plantteler. Anders gestel, is die variëteit die *idees* van die teler *soos dit in 'n sintuiglik waarneembare vorm deur die variëteit voorgestel* word. Die objek van 'n planttelersreg is dus die *voorstelling* van feite betreffende 'n bepaalde onderwerp (die idees van die plantteler). Hieruit kan die afleiding gemaak word dat die regsobjek in die geval van 'n planttelersreg bestaan uit 'n bepaalde kategorie inligting.

Soos in die geval van outeursreg, moet daar nie hieruit afgelei word dat die inligting ongekwalifiseer en op sigself die objek van die planttelersreg vorm nie. Alvorens die inligting die objek van 'n planttelersreg sal vorm, moet dit eers aan bepaalde vereistes voldoen. Hierdie vereistes sluit onder andere die volgende in: In die eerste plek moet die inligting bestaan uit *'n voorstelling van die idees of gedagtes van 'n persoon*. Tweedens moet hierdie voorstelling in 'n *stoflike vorm* (dit wil sê 'n plant van die nuwe variëteit) beliggaam wees. In die derde plek moet die voorstelling 'n *variëteit* daarstel wat aan die vereistes soos neergelê in die betrokke wetgewing voldoen. Dit behels onder andere dat die variëteit nuut moet wees en tot 'n voorgeskrewe soort plant moet behoort.[88] Die objek van 'n

84 A 23(2) saamgelees met a 23(1). Kyk ook a 23(3) waarin voorsiening vir sekere uitsonderings gemaak word.
85 A 7.
86 Reg 4(2)(a) ingevolge a 44 soos in R 2630 *SK* 7349 van 1980-12-24 uitgevaardig.
87 A 4 en 39(2) saamgelees met reg 23(1)(a).
88 Vgl a 11(1).

planttelersreg is dus 'n skerp afgebakende *kategorie van inligting*, naamlik daardie kategorie inligting wat aan die voormelde vereistes voldoen.

Die beskerming wat uit hoofde van die planttelersreg aan hierdie kategorie inligting verleen word, is hierbenewens ook beperk en sluit byvoorbeeld nie 'n verbod op die openbaarmaking van die inligting in nie. Die beskerming wat ten aansien daarvan verleen word, word uitdruklik in die betrokke wetgewing uitgespel en bestaan daarin dat ander persone as die reghebbende verbied word om sonder die toestemming van die reghebbende die betrokke variëteit te produseer, te verkoop, of in te voer in of uit te voer uit die Republiek.[89]

In die lig van die voorgaande word aan die hand gedoen dat 'n planttelersreg beskou kan word as 'n voorbeeld van 'n subjektiewe reg op 'n bepaalde kategorie inligting.

1 5 6 Heraldiese reg

Heraldiese regte word deur die Heraldiekwet[90] beheer. Die verlening van heraldiese regte het ten doel om aan die reghebbende die uitsluitlike reg te verleen om 'n heraldiese voorstelling, naam, spesiale naam of uniform te dra, te gebruik, te verkoop, te verkwansel of daarmee handel te dryf. Hierdie oogmerk probeer die wet bereik deur aan die reghebbende 'n monopolie te verleen sover dit die verrigting van die betrokke handelinge met betrekking tot die gemelde voorstellings, name of uniforms betref.[91]

Ten einde vir so 'n reg ten aansien van 'n heraldiese voorstelling te kwalifiseer, moet die amptelike of munisipale owerheid, vereniging, inrigting of persoon by die Buro vir Heraldiek aansoek doen om die registrasie van die heraldiese voorstelling.[92] Ten einde vir so 'n reg te kwalifiseer ten aansien van 'n naam, spesiale naam of betiteling wat deur die vereniging of inrigting gebruik word vir sy lede of die lede van enige organisasie deur die vereniging of inrigting daargestel, of ten aansien van 'n uniform deur die vereniging of inrigting gebruik, moet die vereniging of inrigting by die Buro vir Heraldiek aansoek doen om die registrasie van die naam, spesiale naam of uniform.[93] Aansoeke om registrasie moet vergesel wees van die dokumente en ontwerpe wat die Staatsheraldikus bepaal.[94] Die doel hiervan is klaarblyklik om hom in staat te stel om vas te stel of sodanige heraldiese voorstelling, naam, spesiale naam of uniform nie reeds ten gunste van 'n ander instelling of persoon geregistreer is nie en of dit voldoende verskil van ander reeds geregistreerde voorstellings, name, spesiale name of uniforms, dat dit nie daarmee verwar sal word nie. Die Buro vir Heraldiek is verantwoordelik vir die byhou van 'n register waarin die besonderhede betreffende heraldiese voorstellings, name, spesiale name en uniforms aangeteken word.[95] Enige persoon is geregtig op insae in die register en die buro

89 A 23(2) saamgelees met a 23(1). Kyk ook a 23(3) waarin voorsiening vir sekere uitsonderings gemaak word.
90 18 van 1962.
91 Sien a 21 waarin aan die reghebbende 'n aksie verleen word om skadevergoeding van 'n inbreukmaker te eis indien hy die betrokke handelinge sonder die skriftelike magtiging van die reghebbende sou uitvoer.
92 A 7(1).
93 A 7(3).
94 A 7(8).
95 A 5.

kan aan enige persoon teen betaling van die voorgeskrewe gelde 'n uittreksel uit die register of 'n weergawe van 'n geregistreerde voorstelling, naam, spesiale naam of uniform verskaf.[96]

Die regsobjek wat by heraldiese regte ter sprake is, is die heraldiese voorstelling, naam, spesiale naam of uniform wat die onderwerp is waaroor die heraldiese reg strek. By die oorweging van die aard van die objek waarop heraldiese regte betrekking het, is dit belangrik om kennis te neem van sekere woordomskrywings wat in die wet voorkom. Kragtens artikel 1 is 'n heraldiese voorstelling "'n wapen, kenteken of ander embleem". 'n "Wapen" word weer omskryf as

> "'n voorwerp of figuur synde 'n simboliese voorstelling in kleure op 'n skild aangebring volgens die beginsels en reëls van die heraldiek, met of sonder 'n kroon, helm, helmteken, dekklede, skildhouers, wapenspreuk of ander bystukke".

'n "Kenteken" word omskryf as

> "'n voorwerp of figuur, synde 'n simboliese voorstelling, maar nie op 'n skild aangebring nie, wat as herkennings- of onderskeidingsteken vir amptelike of munisipale doeleindes of deur 'n vereniging of persoon gebruik word".

'n "Uniform" word weer omskryf as

> "enige kledingstuk of -stukke van onderskeidende ontwerp en kleur maar sonder 'n heraldiese voorstelling, bestem om deur lede van 'n vereniging of inrigting wat nie van 'n politieke of godsdienstige aard is nie, gebruik te word".

In die lig van die omskrywing van inligting wat vroeër gegee is, kan 'n mens die afleiding maak dat 'n heraldiese voorstelling, synde 'n simboliese voorstelling van iets, as inligting beskou moet word. Ook 'n uniform kan in hierdie verband as 'n voorstelling beskou word. Die doel met die dra van 'n uniform is immers om persone wat iemand sien wat die uniform dra, in te lig dat die betrokke uniformdraer die een of ander verbintenis met 'n bepaalde instelling, persoon of groep persone het. Die uniform wat 'n persoon dra, is dus 'n voorstelling van 'n verbintenis tussen die uniformdraer en die groep persone met wie die uniform geassosieer word. Die uniform vorm dus self inligting betreffende die verbintenis. Dieselfde geld die naam of spesiale naam waarna vroeër verwys is. Die naam van 'n instelling word immers met die betrokke instelling geassosieer. Wanneer iemand na 'n bepaalde instelling wil verwys, is dit tog gebruiklik om die naam van die instelling te noem ten einde die instelling te identifiseer waarna verwys word. Die naam van 'n instelling kan dus beskou word as 'n voorstelling van die identiteit van die instelling waarna verwys word. Daar kan dus weinig twyfel bestaan dat die regsobjek in die geval van heraldiese regte uit inligting bestaan.

1 5 7 Die reg op die handelsgeheim

'n Handelsgeheim kan volgens Knobel[97] omskryf word as ekonomies waardevolle, vertroulike bedryfsinligting. Reeds uit die omskrywing is dit duidelik dat

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96 A 17(1).

97 "Die deliktuele beskerming van die reg op die handelsgeheim in die mededingingstryd" in Neethling (red) *Onregmatige mededinging/Unlawful competition* (1990) 70; sien ook Knobel *The right to the trade secret* (LLD-proefskrif Unisa 1996) 186; Van Heerden en Neethling *Unlawful competition* (1995) 223–224.

die handelsgeheim, wat die objek van hierdie reg vorm, suiwer uit inligting bestaan.

Die reg op die handelsgeheim word volgens Knobel geskend wanneer daar ongemagtigde kennisname,[98] benutting[99] of openbaarmaking[100] van die handelsgeheim plaasvind.[101] Die benadeelde behoort in beginsel enige skade wat hy weens só 'n skending gely het, deur middel van die *actio legis Aquiliae* van die inbreukmaker te kan verhaal.

1 5 8 Die reg op werfkrag

Elke onderneming bestaan uit 'n aantal ondernemingskomponente wat volgens die idee of plan van die ondernemer op so 'n wyse in 'n organisatoriese eenheid saamgesnoer is, dat dit as ekonomiese ondernemingseenheid hoër waarde verkry as die somtotaal van die waarde van die selfstandige komponente waaruit dit saamgestel is.[102] Hierdie hoër waarde staan bekend as die *werfkrag* ("goodwill") van die onderneming. Die werfkrag van 'n onderneming is dus 'n skepping of geestesproduk van die ondernemer. Dit kan 'n selfstandige bestaan onafhanklik van die ondernemer en selfs onafhanklik van die onderskeie komponente van die onderneming voer.[103] Die reg ten aansien van hierdie hoër waarde staan bekend as die reg op die werfkrag.

Die werfkrag van 'n onderneming verteenwoordig dus die idee of plan van die ondernemer soos dit gestalte vind in die organisatoriese eenheid wat, ooreenkomstig die idee of plan van die ondernemer, deur die samevoeging van ongelyksoortige ondernemingskomponente bewerkstellig is. Die organisatoriese eenheid waarin die onderskeie komponente van die onderneming saamgesnoer is, is dus 'n waarneembare vergestalting of voorstelling van die idee of plan van die ondernemer. Aangesien die werfkrag 'n waarneembare voorstelling is van 'n feit (die plan of idee van die ondernemer) sou 'n mens dus, in die lig van die omskrywing van inligting wat vroeër aanvaar is, die afleiding kon maak dat die werfkrag as regsobjek uit inligting bestaan.

1 5 9 Die reg op privaatheid

Volgens Neethling[104] kan privaatheid omskryf word as "'n individuele lewenstoestand van afsondering van openbaarheid" wat

> "al daardie persoonlike feite wat die belanghebbende self bestem om van kennismaking deur buitestanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het",

98 Knobel in Neethling (red) 79 veral vn 52. Alhoewel die regspraak nie uitdruklik meld dat blote kennisname 'n skending kan daarstel nie, skyn daar, soos Knobel aandui, tog aanknopingspunte in die regspraak te wees waaruit so 'n afleiding gemaak kan word.

99 Sien ook *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau* 1968 1 SA 209 (K) 221D–G.

100 Sien bv *Northern Office Micro Computers (Pty) Ltd v Rosenstein* 1981 4 SA 123 (K).

101 Knobel in Neethling (red) 78–79.

102 Van Heerden en Neethling 94–96.

103 Die ondernemer sou bv die onderneming met behoud van die werfkrag daarvan kon verkoop en die werfkrag kan selfs 'n tyd lank bly voortbestaan, selfs nadat die ondernemingseenheid tot niet gegaan het – sien Van Heerden en Neethling 97–99; *Polakow Bros (Pty) Ltd v Gershlowitz* 1976 1 SA 863 (OK).

104 Neethling *Persoonlikheidsreg* 34.

omsluit.[105] In sy proefskrif oor die reg op privaatheid[106] omskryf Neethling dit nader deur te sê dat privaatheid bestaan uit

> "*die somtotaal van inligting of feite* wat op die belanghebbende in sy toestand van afsondering betrekking het en sodoende van kennismaking deur buitestanders uitgesluit is".

By die oorweging van die vraag oor die presiese aard en inhoud van privaatheid as regsobjek, is dit belangrik om dit te onderskei van die individu se reg op fisiese integriteit. Hierdie reg het volgens Neethling[107] twee sye, naamlik die liggaam self en die liggaamlike vryheid. Trouens, Neethling beskou die liggaamlike vryheid en die liggaam self as afsonderlike regsobjekte waarop afsonderlike persoonlikheidsregte betrekking het.[108] Hoe dit ook al sy, dit staan vas dat enige belemmering van die bewegings- en handelingsvryheid van die individu 'n skending van 'n ander persoonlikheidsgoed as privaatheid daarstel.[109] Die bevoegdheid van die individu om hom fisies en psigies van ander af te sonder, is dus 'n bevoegdheid wat uit 'n ander persoonlikheidsreg as die reg op privaatheid voortspruit. Slegs nadat die individu hierdie bevoegdheid uitgeoefen het (dit wil sê hom fisies of psigies afgesonder het), kom privaatheid ter sprake. Die persoonlike feite[110] en inligting wat deur die betrokke individu in sy toestand van afsondering gegenereer word en op hom in daardie toestand betrekking het, vorm dan die regsobjek waarop sy reg op privaatheid betrekking het.

Uit die voorgaande kan die afleiding gemaak word dat privaatheid as regsobjek 'n besondere kategorie inligting omvat. Waar daar verder in hierdie artikel na hierdie kategorie inligting verwys word, sal die term "private inligting" gebruik word.

Soos Neethling[111] tereg aantoon, kan 'n privaatheidskending *slegs* plaasvind waar daar 'n kennismaking met hierdie inligting in stryd met die bestemming en wil van die reghebbende plaasvind. Sodanige kennisname kan plaasvind indien die buitestander self met sulke inligting kennis maak (die sogenaamde *indringingsgevalle*) of indien die buitestander sulke inligting, wat steeds privaat is alhoewel dit aan hom bekend is, aan derdes openbaar (die sogenaamde *openbaarmakingsgevalle*). Indien 'n persoon in stryd met die bestemming en wil van die reghebbende met private feite betreffende die reghebbende kennis maak of sodanige feite aan derdes oordra, kan die reghebbende met die *actio iniuriarum* genoegdoening van die inbreukmaker eis terwyl hy met die *actio legis Aquiliae* skadevergoeding vir enige vermoënskade kan eis wat hy as gevolg van die inbreukmaking ly.

1 5 10 Die reg op identiteit

"Identiteit" verwys na al daardie fasette van die mens se persoonlikheid wat hom as 'n bepaalde persoon identifiseer en hom van ander onderskei.[112] Voorbeelde

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105 Sien ook *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 384; Neethling "Die reg op privaatheid en universiteite" in Van Wyk (red) *Nihil obstat: Feesbundel vir WJ Hosten* (1996) 129.

106 Neethling *Privaatheid* 282 en gesag aldaar.

107 Neethling *Persoonlikheidsreg* 27.

108 *Idem* 28 en gesag aldaar.

109 *Ibid.*

110 Vgl weer die omskrywing van feite wat hierbo (vn 47)verstrek is.

111 Neethling *Persoonlikheidsreg* 28.

112 *Idem* 37 ev.

van *indicia* van 'n persoon se identiteit is die persoon se lewensgeskiedenis, sy karaktereienskappe, stem, handskrif, kredietwaardigheid, gestaltebeeld en naam.[113]

'n Persoon se identiteit word geskend indien *indicia* daarvan sonder magtiging gebruik word op 'n wyse wat nie met die ware persoonlikheidsbeeld van die reghebbende te versoen is nie,[114] soos waar die *indicia* van die identiteit van 'n bepaalde persoon vir ekonomiese doeleindes gebruik word en die gebruik daarvan die valse indruk skep dat die persoon toestemming daartoe verleen het, vergoeding daarvoor ontvang het, of dat die persoon 'n bepaalde produk, diens of onderneming steun.[115] Die kern van 'n identiteitskending is dus geleë in die skep van 'n valse voorstelling van die persoonlikheid of 'n bepaalde persoonlikheidseienskap van 'n sekere persoon. Sodanige valse voorstelling kan natuurlik geskep word deur 'n ware voorstelling van een of meer fasette van die persoon se persoonlikheid op so 'n wyse aan te bied dat die totale voorstelling, waarvan die ware voorstelling 'n deel vorm, 'n valse beeld van die persoon se persoonlikheid skep.[116]

By die oorweging van die aard van die regsobjek by die reg op identiteit is dit belangrik om die regsobjek by die reg op fisiese integriteit daarvan te onderskei. Alhoewel die gestaltebeeld van die mens een van daardie fasette van die mens se persoonlikheid is wat hom van ander onderskei, beteken dit nie dat iemand wat 'n persoon se gesig fisies skend en sodoende die gestaltebeeld van die persoon skend, die persoon se reg op identiteit aantas nie. So 'n fisiese skending van die persoon se gesig stel 'n skending van die persoon se reg op fisiese integriteit daar en tas nié sy reg op identiteit aan nie – deur die persoon se gestaltebeeld te skend het die dader immers nie 'n valse voorstelling van daardie persoon se gestaltebeeld geskep nie. Indien die dader egter 'n foto van die persoon neem en veranderings daarop aanbring sodat dit lyk of die reghebbende se gesig geskend is, terwyl dit in der waarheid nie die geval is nie, sal die dader daardeur 'n valse voorstelling van die gestaltebeeld van die persoon skep en dus op die persoon se reg op identiteit inbreuk maak.[117] Dieselfde geld al die ander *indicia* van 'n persoon se persoonlikheidsbeeld.

Uit die voorgaande blyk dit dat die reg op identiteit betrekking het op elke *indicium* of *voorstelling* van 'n faset van 'n persoon se persoonlikheidsbeeld wat die betrokke persoon as 'n bepaalde individu identifiseer of individualiseer.[118] Sodanige voorstelling is iets wat buite die persoon geleë is alhoewel dit onlosmaaklik met die persoon self gekoppel is deurdat dit op die persoon se persoonlikheidsbeeld betrekking het. Die voorstelling moet dus van die persoonlikheidsbeeld self onderskei word. Slegs deur hierdie voorstelling, wat buite die reghebbende geleë is, sonder die reghebbende se toestemming aan te wend op 'n wyse wat 'n valse beeld van 'n faset van die persoon se persoonlikheidsbeeld skep, kan die reg op identiteit aangetas word. Die regsobjek by die reg op identiteit bestaan dus uit 'n *voorstelling van 'n faset van die persoonlikheidsbeeld*

113 *Ibid.*
114 *Idem* 263 ev.
115 *Ibid.*
116 Coetser 196.
117 *Idem* 198–199.
118 Neethling *Persoonlikheidsreg* 37.

van die reghebbende. Aangesien inligting bestaan uit 'n voorstelling van feite, is dit duidelik dat hierdie voorstelling inligting daarstel. Die reg op identiteit is dus 'n reg op 'n bepaalde afgebakende kategorie inligting. Hierdie kategorie inligting moet natuurlik aan sekere vereistes voldoen, waaronder ingesluit is dat dit 'n voorstelling van 'n faset van 'n persoon se persoonlikheidsbeeld daar moet stel waardeur die betrokke persoon geïdentifiseer of geïndividualiseer kan word. Die beskerming wat ten aansien daarvan verleen word, is beperk omdat dit byvoorbeeld nie die blote openbaarmaking van die inligting verbied nie, maar slegs sodanige openbaarmaking sonder die toestemming van die reghebbende en dan ook net waar dit gedoen word op 'n wyse wat 'n valse beeld van die persoonlikheid van die reghebbende skep.

1 5 11 Die reg op die goeie naam of reputasie

'n Persoon se goeie naam is die agting en aansien wat hy in die samelewing geniet.[119] Enige handeling wat die effek het om 'n persoon se aansien in die gemeenskap te laat daal, tas gevolglik sy goeie naam aan.

Die agting en aansien wat 'n persoon in die samelewing geniet, is nie iets wat in die persoon self geleë is nie, maar is iets wat in die gedagtes van die ander lede van die gemeenskap bestaan en wat bepaal word deur die kennis van die betrokke persoon waaroor daardie lede van die gemeenskap beskik. Elke lid van die gemeenskap evalueer hierdie kennis op 'n subjektiewe wyse ooreenkomstig die waardesisteem wat in daardie stadium in die betrokke gemeenskap geld, en vorm aan die hand daarvan 'n bepaalde dunk van die betrokke persoon. 'n Bepaalde lid van die gemeenskap kan byvoorbeeld aan die hand hiervan "baie" of "min" van die betrokke persoon dink. Hierdie dunk wat een persoon van 'n ander het, is 'n geestesvoorstelling wat bloot die waarde-oordeel vergestalt wat die persoon ten aansien van die ander gevorm het na aanleiding van die kennis van daardie persoon waaroor hy beskik. Hierdie waarde-oordeel word beïnvloed deur 'n verskeidenheid faktore, waarby ingesluit is die inligting betreffende die betrokke persoon se gedrag, sy sedelike en morele oortuigings, opvoedkundige kwalifikasies, finansiële posisie, fisiese of geestelike gesteldheid, ensovoorts waaroor die persoon beskik.

Hieruit blyk dat die agting en aansien wat 'n persoon in die samelewing geniet, verlaag kan word deur die persoon self (indien hy in die openbaar optree op 'n wyse wat onversoenbaar is met die agting en aansien wat hy in die gemeenskap geniet) en deur die verspreiding van inligting betreffende die persoon, sy gedrag, uitsprake, ensovoorts. In die eerste geval is daar geen sprake van 'n persoonlikheidskrenking nie omdat die persoon self vir die verlaging van die agting en aansien wat hy geniet het verantwoordelik is. In die tweede geval sal daar eweneens slegs sprake van 'n persoonlikheidskrenking wees indien die persoon nie die inligting self versprei of tot die verspreiding daarvan toestem nie.

Die afleiding wat uit die voorgaande gemaak kan word, is dat 'n persoon se goeie naam of reputasie 'n geestesvoorstelling is wat in die gedagtes van ander lede van die gemeenskap bestaan. In die lig van die omskrywing van inligting wat hierbo gegee is, is die goeie naam of reputasie van 'n persoon dus 'n bepaalde afgebakende kategorie inligting.

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119 *Idem* 29.

Dit is natuurlik belangrik om daarop te wys dat *elke* persoon in die gemeenskap nie so 'n geestesvoorstelling ten opsigte van *elke ander persoon* in die gemeenskap vorm nie. By die beoordeling van die vraag of 'n bepaalde persoon se goeie naam of reputasie aangetas is, sal 'n hof van 'n objektiewe redelikheidsmaatstaf gebruik maak. By die toepassing hiervan sal die hof van die uitgangspunt uitgaan dat elke persoon in die gemeenskap, en derhalwe ook die eiser, oor 'n goeie naam beskik en sal die hof oorweeg of dit verwag kan word dat die gedrag van die verweerder 'n redelike lid van die gemeenskap sou beweeg het om minder agting vir die eiser te koester of dat die aansien van die eiser by 'n redelike lid van die gemeenskap sou daal as gevolg van die verweerder se optrede. Indien wel, sal die hof bevind dat daar 'n aantasting van die goeie naam van die eiser plaasgevind het. Indien dit boonop wederregtelik en opsetlik geskied het, sal die eiser met die *actio iniuriarum* genoegdoening van die dader kan verhaal, en skadevergoeding vir vermoënskade met die *actio legis Aquiliae*.[120]

1 6 Die klassifikasie van regsobjekte bestaande uit inligting ooreenkomstig die indeling van regsobjekte

Regsobjekte word gewoonlik[121] ingedeel in sake, immateriële goedere, persoonlikheidsgoedere en prestasies. Hierdie groepe kan soos volg omskryf word:

(1) *Sake* 'n Saak kan omskryf word as "'n stoflike ding wat 'n regsubjek regtens teenoor ander regsubjekte toekom; dit wil sê wat regtens bestem is om in die een of ander opsig 'n regsubjek tot behoeftebevrediging te dien".[122] Die regte hierop heet *saaklike regte*.

(2) *Immateriële goedere* 'n Immateriële goed word omskryf as "'n onstoflike menslike geestesproduk wat 'n regsubjek regtens teenoor ander subjekte toekom".[123] Die regte hierop word *immateriële goedereregte* genoem.

(3) *Persoonlikheidsgoedere* 'n Persoonlikheidsgoed is "'n aspek van die reghebbende se eie persoonlikheid wat hom regtens teenoor ander subjekte toekom".[124] Die regte hierop staan bekend as *persoonlikheidsregte*.

(4) *Prestasies* 'n Prestasie bestaan uit 'n handeling van iemand, soos die gee of lewering van iets, die doen van iets (anders as om iets te gee of te lewer), en die nie-doen of weerhouding daarvan om iets te doen.[125] Die regte hierop word *vorderingsregte* genoem.

Dit is belangrik om daarop te let dat die voorgaande vier klasse van regsobjekte nie 'n *numerus clausus* daarstel nie.[126] Namate die regswetenskap ontwikkel en die behoefte daarvoor ontstaan, kan verdere klasse regsobjekte erkenning verkry. In die onlangse verlede is die moontlikheid byvoorbeeld deur Neethling[127] geopper dat die stadium van ontwikkeling in ons regspraak nou bereik is waar

120 Sien in die algemeen hieroor Neethling *Persoonlikheidsreg* 29.
121 Vgl bv Van Zyl en Van der Vyver 407 ev; Joubert (1958) 113; Van der Walt *Delict: Principles and cases* (1979) 22; Van der Vyver en Joubert 8.
122 Van Zyl en Van der Vyver 408; vgl ook Van der Merwe *Sakereg* (1989) 23 en die werke waarna in vn 121 verwys is.
123 Van Zyl en Van der Vyver 408; vgl ook die werke waarna in vn 121 verwys is.
124 *Ibid*.
125 Van der Vyver en Joubert 8; vgl ook die werke aangehaal in vn 121.
126 Sien oa Venter 159.
127 *Immaterieel* 317.

ernstige aandag geskenk behoort te word aan die moontlikheid van die erkenning van 'n *vyfde* kategorie van regsobjekte. Neethling noem hierdie kategorie regsobjekte *persoonlike immateriële goedere*. Onder *persoonlike immateriële goedere* verstaan Neethling daardie immateriële vermoënsgoed wat aan die persoonlikheid verbonde is en sluit regsobjekte soos 'n persoon se *verdienvermoë* en sy *kredietwaardigheid*[128] in.

Van Zyl[129] is ook van mening dat die huidige stand van ontwikkeling van ons reg reeds vereis dat die indeling hersien word en dat ander klasse van regsobjekte erken word.[130]

Met die uitsondering van private inligting, 'n persoon se goeie naam of reputasie en sy identiteit, word elkeen van die kategorieë inligting wat reeds erkenning as regsobjekte geniet en waarna hierbo verwys is, as immateriële goedere beskou en die regte wat ten aansien daarvan bestaan, aldus as immaterieelgoedereregte.

Indien die omskrywing van inligting ontleed word wat hierbo verskaf is, blyk dit dat inligting as sodanig 'n onstoflike en selfstandige bestaan voer afgesonderd van die onderwerp of voorwerp waarop dit betrekking het. Dit is derhalwe ook nie verbasend nie dat die gemelde regsobjekte bykans almal uit immateriële goedere bestaan. Trouens, dit is kwalik denkbaar dat 'n kategorie inligting wat 'n regsobjek vorm, ooit sal kan bestaan sonder dat dit minstens bepaalde immateriële eienskappe vertoon.

Die regte op privaatheid, identiteit en die goeie naam stel oënskynlik die enigste uitsonderings in hierdie verband daar. Private inligting vorm immers die regsobjek van die reg op privaatheid wat op sy beurt weer as deel van die persoonlikheidsreg gesien word. Die blote feit dat die reg op privaatheid egter deel vorm van die persoonlikheidsreg, beteken nie dat private inligting geen immateriële eienskappe vertoon nie. Trouens, die teenoorgestelde is juis waar. Een van die basiese onderskeidende kenmerke van immateriële goedere is dat dit 'n bestaan afsonderlik van die mens kan voer. Daar kan geen twyfel wees dat private inligting 'n bestaan afsonderlik van die mens kan voer nie. Indien dit nie moontlik was nie, sou dit immers nie vir 'n buitestander moontlik gewees het om private inligting van die reghebbende, in die afwesigheid van die reghebbende, aan derdes te openbaar nie. Die teenoorgestelde is egter ook waar. Die blote feit dat private inligting sekere immateriële eienskappe vertoon, bring nie mee dat dit om daardie rede nie deel van die persoonlikheidsreg kan vorm en eerder onder die kategorie van immateriële goedere ingesluit moet word nie. 'n Tweede belangrike eienskap van 'n immateriële goed is dat dit uit 'n *nietasbare produk van die menslike gees* bestaan.[131] Private feite is egter iets wat selde as die *produk van die reghebbende se gees* beskou sal kan word. Indien iemand 'n foto van die reghebbende neem waar hy nakend op sy bed in sy eie slaapkamer lê en slaap, sal 'n mens nouliks kan beweer dat die foto 'n produk van die reghebbende se gees vorm! Indien die indringing in die kamer en die neem van die foto

128 Sien in die algemeen sover dit die erkenning van kredietwaardigheid as regsobjek betref, Klopper *op cit*.

129 411.

130 *Ibid*. Van Zyl dink hier veral aan familieregtelike en publiekregtelike regsobjekte wat nie binne die bestaande indeling tuisgebring kan word nie.

131 Du Plessis en Du Plessis 134.

in so 'n geval in stryd met die bestemming en die wil van die reghebbende plaasgevind het, stel die indringing in die toestand van afsondering waarin die reghebbende verkeer het en waarneming van die reghebbende in daardie toestand, reeds 'n skending van die reghebbende se privaatheid daar. In so 'n geval is dit juis die vorming van die geestesvoorstelling deur die indringer wat die immateriële goed, naamlik die beeld wat deur die waarneming in die indringer se gedagtes opgewek is, geskep het. Die posisie sover dit die reg op privaatheid betref, geld *mutatis mutandis* ook vir die reg op identiteit en die reg op die goeie naam.

(*Word vervolg*)

With due deference to Ernest K Gann's Flying Circus, *I am enlightened to the truth that every pilot holds an insatiable lust for the alluring charms of flight; that once the sensual pleasure of controlling an aircraft is mastered, exhilaration diminishes and incurable habit takes command; once the secretly nursed conviction that something dangerous and dramatic might happen – with him as hero or victim – is forgotten, then the heart joins the mind in submission to the enchantment of flight. From flight one cannot sample the thrillings of polluted joy to the agonies of eternal despair, nor should its unique pleasures be compared with the voluptuousness of sex, the bawdy joys of drink or the dubious dreams of opiates, for when a pilot is aloft, he is not lost, but found. I have paid this tribute to flight,* en passant, *lest it be said that a pilot's foresight could become clouded by the rapture of flight, which flatters his confidence and lessens his usual alertness* (per Hattingh J in *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 4 SA 745 (O) 764).

AANTEKENINGE

INKORTING VAN "RESTRAINT OF TRADE"- BEDINGE IN KONTRAKTE: *MAGNA ALLOYS* SE NAGESLAG

1 Agtergrond

Byna 20 jaar gelede – 'n mens skrik as jy besef die aardse lewe vlieg so vinnig by jou verby – het daar 'n vonnisbespreking van my in die *Tydskrif* verskyn ('n bespreking van *Roffey v Catterall, Edwards & Goudré* 1977 4 SA 494 (N); sien 1978 *THRHR* 208). Hierdie saak, en gevolglik die vonnisbespreking, het gehandel oor kontrakte wat bedinge bevat wat die handelsvryheid van 'n kontraksparty aan bande lê. Die bekende Engelse begrip in hierdie verband is *contracts* (of *covenants*) *in restraint of trade*. Daar is verskillende verskyningsvorme van hierdie tipe afsprake tussen kontrakspartye. Bloot ter wille van agtergrond vir lesers wat hulle nie juis met die kontraktereg besig hou nie, word daar volstaan met twee bekende voorbeelde.

Wanneer 'n persoon 'n onderneming koop, word daar dikwels 'n bepaling in die kontrak ingevoeg wat die verkoper verbied om vir 'n bepaalde tyd binne 'n sekere gebied 'n soortgelyke besigheid te begin of 'n belang daarin te hê. Dienskontrakte bevat ook soms beperkende bepalings wat 'n werknemer verbied om na diensbeëindiging 'n soortgelyke beroep vir 'n sekere tyd binne 'n ooreengekome area te beoefen. Uit die aard van die saak wissel hierdie tipe bepalings in kontrakte wat hulle strekwydte betref met betrekking tot tyd, area en tipe handelinge wat verbied word.

Na die persoon op wie die beperking geplaas word, word gewoonlik verwys as die "covenantor" en na die reghebbende as die "covenantee". Daar kan goedskiks in Afrikaans gepraat word van die skuldenaar en die skuldeiser onderskeidelik, of, as 'n mens nou 'n bietjie meer geleerd wil klink in hierdie dae waarin Latyn nie eens meer 'n dwingende leerplan-vereiste vir voornemende juriste is nie, van *promissor* en *stipulator* (Hiemstra en Gonin *Drietalige regswoordeboek* (1992) 33).

"Restraint of trade"-bedinge is net geldig indien 'n substantiewe belang daardeur beskerm word, soos handelskontrakte, handelsgeheime of klandisiewaarde. So 'n beding is ongeldig indien dit bloot ten doel het om mededinging uit te skakel. Hierdie is geykte reg en daar is 'n groot aantal sake wat dit bevestig (sien Van Heerden en Neethling *Unlawful competition* (1995) 26 en gesag aldaar. Die jongste sake wat hierdie beginsel direk of indirek bevestig is *Amalgamated Retail Ltd v Spark* 1991 2 SA 143 (SOK); *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 2 SA 482 (T); *Rawlins v Caravantruck (Pty) Ltd* 1993 1 SA 537

(A); *Basson v Chilwan* 1993 3 SA 742 (A) 767; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 1 SA 434 (SOK); *Macphail (Pty) Ltd v Janse van Rensburg* 1996 1 SA 594 (T)).

In gemelde vonnisbespreking in die 1978-*Tydskrif* is 'n hele aantal kwessies oor kontrakte ter beperking van die handelsvryheid aangeraak waarvan sommige weerklank gevind het in 'n toonaangewende appèlhofsaak (*Magna Alloys and Research (Pty) Ltd v Ellis* 1984 4 SA 874 (A)). Die appèlhof neem in hierdie saak kennis van die standpunte van 'n paar akademiese skrywers wat hervorming op hierdie gebied van die reg in meerdere opsigte bepleit het, en stem op talle punte met die skrywers saam. Die gevolg hiervan was dat die reg in hierdie verband ingrypend gewysig is. Daar is in die besonder wegbeweeg van sekere beginsels van die Engelse reg wat oor baie dekades heen hier by ons toegepas is. Die posisie in die Engelse reg word bondig deur *Chitty on contracts* (red Guest (1994) par 16–066) weergegee:

> "All covenants in restraint of trade are *prima facie* unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Unless the unreasonable part can be severed by the removal of either part or the whole of the covenant in question, its inclusion renders the covenant or the entire contract unenforceable. A covenant in restraint of trade (if unreasonable) is void in the sense that courts will not enforce it, but if the parties wish to implement it they would not be acting illegally . . ."

Die bewyslas rus op die skuldeiser-*stipulans* om die hof te oortuig dat die beperking redelik is. Die tydstip vir beoordeling in hierdie verband is die tydstip van kontraksluiting (Furmston *Cheshire, Fifoot and Furmston's Law of contract* (1991) 406).

In die *Magna Alloys*-saak beslis die hof dat die toetssteen vir die afdwingbaarheid van kontrakte ter beperking van die handelsvryheid die openbare belang is, en nie die redelikheid van die beding nie. 'n Onredelike beding sal waarskynlik ook teen die openbare belang wees maar dit is nie noodwendig die geval nie (sien Otto 1978 *THRHR* 211; vgl ook Van der Merwe "Die funksie van die reëls ter beskerming van die handelsvryheid" 1988 *TSAR* 266). Voorts is kontrakte van hierdie aard as uitgangspunt geldig, en nie ongeldig nie. Voortaan sou die bewyslas ook op die persoon rus wat die beding aanval en nie op die persoon wat dit wil afdwing nie. 'n Hof is ook by magte om 'n beperking wat teen die openbare beleid aanstoot slegs gedeeltelik af te dwing sodat dit nie langer die openbare belang skaad nie. Die hof moet kyk na die omstandighede wat geld op die tydstip waarop die hof gevra word om die beperking af te dwing. Dié uitspraak het dus die Engelsregtelike benadering omtrent op sy kop gekeer.

Die beginsels wat in die *Magna Alloys*-saak neergelê is, is sedertdien in 'n groot aantal sake gevolg en toegepas. Die saak het ook in Zimbabwe sy invloed laat geld (*Book v Davidson* 1989 1 SA 638 (ZSC)). Die beginsels wat in die saak vervat is, is selfs teen die tussentydse Grondwet 200 van 1993 en in besonder artikel 26 wat 'n reg tot vrye ekonomiese verkeer aan iedereen verleen, getoets. Die howe was egter van mening dat die beginsels wat in *Magna Alloys* vervat is, nie teen die Grondwet aanstoot nie. (Sien *Walton's Stationery Co (Edms) Bpk v Fourie* 1994 4 SA 507 (O). Hierdie beslissing is gevolg in *Kotze & Genis (Edms) Bpk v Potgieter* 1995 3 SA 783 (K). *Knox D'Arcy Ltd v Shaw* 1996 2 SA 651 (W) het dieselfde resultaat opgelewer. Sien ook *Dav Personnel Group CC v Williams* 1996 2 *Juta's Digest of SA Law* 7. Hierdie interessante aangeleentheid

word ook bespreek deur Grové in 'n vonnisbespreking van die *Walton's*-saak (1994 *De Jure* 393) en in 'n aantekening van Rautenbach en Reinecke "Kontrakte ter beperking van die handelsvryheid en die grondwetlike reg om vrylik aan die ekonomiese verkeer deel te neem" 1995 *TSAR* 551.) 'n Mens sal maar moet wag en kyk wat die regspraak onder die nuwe Grondwet oplewer.

Die doel van hierdie aantekening is om slegs op een spesifieke aspek van bedinge wat die handelsvryheid beperk, en wat voortvloei uit *Magna Alloys*, te konsentreer en wel na aanleiding van die howe se hantering daarvan. Hierdie aspek is die bevoegdheid van 'n hof, wat deur die appèlhof onderskryf is, om beperkinge wat teen die openbare belang is te verminder of in te kort. By gebrek aan 'n beter begrip sal hierna verwys word as 'n hof se temperingsbevoegdheid.

2 Temperingsbevoegdheid

2 1 Engelse reg

Indien 'n beding ter beperking van die handelsvryheid onredelik is, is dit ingevolge die *common law* ongeldig. 'n Hof skryf nie kontrakte vir partye oor nie. Die hof sal nie dele uit 'n beding laat of woorde invoeg ten einde 'n onredelike beperking redelik te maak nie. Al wat 'n hof kan doen, is om 'n *deelbare* beding te verdeel en dié dele te skrap wat die beding onredelik maak. Dit is die sogenaamde leerstuk van "severance". Daar word in dié verband gepraat van die "blue pencil rule". 'n Hof kan naamlik slegs "met 'n blou pen" dele uit 'n beding skrap as daardie beding werklik deelbaar is in die sin dat dit voorsiening maak vir "two or more substantially distinct and independent parts" (Walker *The law of contract and related obligations in Scotland* (1995) par 12.42), of werklik "separate covenants" bevat (Treitel *The law of contract* (1995) 463).

'n Hof mag nie, buite-om die reëls van "severance", andersins 'n kontrak verander of oorskryf nie. Voorts moet deurhaling nie tot gevolg hê dat die wese van die beding in die slag bly nie. Omdat hierdie streng alles-of-niks-benadering tot ongewenste resultate lei deurdat dit tot gevolg kan hê dat geen beperking op 'n persoon rus nie in omstandighede waar 'n mindere beperking geregverdig sou wees, het die howe soms met uitlegreëls probeer om die probleem te ontkom. (Sien vir die beginsels van die Engelse reg, benewens die bronne reeds genoem, Trebilcock *The common law of restraint of trade. A legal and economic analysis* (1986) veral 47 ev 72 ev 242 ev 327 ev; Koffman *The law of contract* (1995) 305 ev; Heydon *The doctrine of restraint of trade* (1971) veral 279 ev; *Cheshire, Fifoot and Furmston's Law of contract* 423 ev; *Chitty on contracts* par 16–167. Kanadese bronne wat geraadpleeg kan word, is Waddams *The law of contracts* (1993) 390; Fridman *The law of contract in Canada* (1986) 401. Australiese bronne wat die *common law* uiteensit, is oa Carter *et al Cases and materials on contract law in Australia* (1988) 624 en Starke *et al Cheshire and Fifoot's Law of contract. Australian edition* (1992) 539.)

2 2 Afwykings van die "common law"

Daar is reeds in die 1978-vonnisbespreking (1978 *THRHR* 211) kortliks daarop gewys dat sekere lande nie altyd gediend was met die starre beginsels van die *common law* nie. In Amerika, byvoorbeeld, is daar in sekere state verder gegaan

as wat die "blue pencil rule" toelaat en is beperkings verminder om die onredelike deur die redelike te vervang (Heydon 283).

Nieu-Seeland het selfs verder gegaan en wetgewing daaroor aangeneem. Wetgewers steur hulle tradisioneel nie veel aan die kontraktereg nie. Bekende uitsonderings is wetgewing wat onbillike kontraksbedinge reël en verbruikerskredietwetgewing. Die Nieu-Seelandse wetgewer is egter besonder bedrywig op hierdie terrein. Benewens wette wat op huurkoop en kredietverskaffing betrekking het, verwys een handboek na die volgende wette in die land van die silwervaring: die Contracts Enforcement Act 1956; Contractual Mistakes Act 1977; Contractual Remedies Act 1979; Illegal Contracts Act 1970; Minors' Contracts Act 1969; Contracts (Privity) Act 1982; Frustrated Contracts Act 1944 (Burrows *et al Cheshire and Fifoot's Law of contract. New Zealand edition* (1992) 229 259 293 354 412 453 645).

Nieu-Seeland het dan ook in 1970 die Illegal Contracts Act aanvaar (Wet 129 van 1970; sien *New Zealand Statutes* 1970 (1) 608). Artikel 8 reël beperkings op die handelsvryheid en bepaal dat 'n hof drie bevoegdhede het ten opsigte van "an unreasonable restraint of trade". Die hof kan eenvoudig die bepaling skrap en die kontrak andersins afdwing; of die bepaling so aanpas dat dit by kontraksluiting redelik sou gewees het indien dit in die aangepaste vorm was; of waar aanpassing of skrapping in so 'n mate die afspraak tussen die partye wysig dat dit onredelik sou wees "to allow the contract to stand", weier om die kontrak af te dwing. 'n Hof mag 'n bepaling in die kontrak aanpas selfs al kan die aanpassing nie geskied sonder die weglating van woorde in die bepaling nie.

Die effek van die Nieu-Seelandse wet is om 'n hof toe te laat om bedinge wat die handelsvryheid beperk, oor te skryf. Dit vervang die "common law principle of severance" (Cheshire & Fifoot se Nieu-Seelandse uitg 409). In *H&R Bloch Ltd v Sanott* 1976 1 NZLR 213 (SC) het die hof so ver gegaan as om woorde in die verbodsbepaling *in te voeg* ten einde dit duideliker te stel. 'n Radius van 25 myl is ook tot vyf myl verminder en 'n tydsduur van vyf jaar na drie jaar. In *Brown v Brown* 1980 1 NZLR 484 (CA) het die hof 'n beperking wat op die hele Nieu-Seeland betrekking gehad het, verminder tot 'n afgebakende deel van die Noord-Eiland en 20 jaar verminder tot 12. Dit is interessant dat die hof faktore in aanmerking geneem het wat nie vreemd is aan die werkswyse wat ons howe oor die jare gevolg het nie. Die hof het byvoorbeeld gelet op die verhouding tussen die kontrakspartye (nl of hulle op vrywillige, gelyke vlak gekontrakteer het), die omvang van die klandisiewaarde, en die aard en omvang van die besigheid (sien ook *Landzeal Group v Kyne* 1990 3 NZLR 574 (HC) 584).

In Australië het die staat Nieu-Suid-Wallis ook wetgewing in hierdie verband aanvaar, te wete die Restraints of Trade Act (Wet 67 van 1976; sien *The Statutes of New South Wales* 1976 (2) 2. 'n Teks van die belangrikste bepalings in die wet kom ook voor in Carter *et al* 625. Die wet word bespreek deur Carter en Harland *Contract law in Australia* (1996) 599). Die wet bepaal dat 'n beperking op die handelsvryheid geldig is in die mate wat dit nie teen die openbare belang is nie, of dit deelbaar is of nie (a 4(1)). Die temperingsbepaling is vervat in artikel 4(3) wat 'n interessante kinkel in sy kabel het. 'n Hof mag op aansoek van 'n *promissor* 'n beperking op terme wat die hof goed ag, geheel en al ongeldig of gedeeltelik geldig verklaar. Die kinkel is dat die beperking teen die openbare belang moet wees

> "by reason of, or partly by reason of, a manifest failure by a person who created or joined in creating the restraint to attempt to make the restraint a reasonable restraint".

Die doel van die Nieu-Suid-Walliese wet is eweneens om algehele nietigheid van beperkingsbedinge in gepaste gevalle te verhoed (Cheshire en Fifoot se Australiese uitg 543). Hierdie skrywers meen dat dit moontlik is om woorde in die kontrak in te voeg om 'n onredelike beperking aan bande te lê. In *Orton v Melman* 1981 1 NSWR 583 (Eq) is dan ook gesê dat die wet nie so eng uitgelê moet word dat dit net weer neerkom op die "blue pencil rule" nie. In *Iraf (Pty) Ltd v Graham* 1982 1 NSWR 419 (Eq) het die hof van hierdie wet gebruik gemaak om 'n drie-jaar-beperking te verminder na een jaar. Dit is weer eens interessant om daarop te let dat die hof verskeie faktore in ag neem, te wete die feit dat 'n groot deel van die koopprys vergoeding vir klandisiewaarde verteenwoordig het, dat die *promissor* vaste kliënte opgebou het met wie hy 'n persoonlike verhouding gehad het en dat die partye op gelyke voet gekontrakteer het. Die tydperk is nogtans as te lank beskou.

2 3 Tempering van bedinge in Suid-Afrika

In *Magna Alloys* stel die appèlhof die beginsel dat

> "die Hof nie daartoe beperk is om te bevind dat 'n beperkende bepaling in sy geheel afdwingbaar of onafdwingbaar is nie, maar ook by magte is om te beslis dat 'n gedeelte van so 'n beperking afdwingbaar of onafdwingbaar is" (898D).

'n Beding wat mededinging uitskakel of beperk en wat teen die openbare belang is, kan dus ingekort en slegs gedeeltelik afgedwing word sodat dit nie in stryd met die openbare beleid is nie. Die appèlhof gee toe dat dit neerkom op 'n wysiging van die partye se kontrak maar regverdig dit in die lig daarvan dat dit hier gaan om wat die openbare belang vereis (896C).

Die moontlikheid om 'n beperking te verminder het in 'n hele aantal sake sedert *Magna Alloys* ter sprake gekom. Selfs voor dié beslissing was daar sake wat 'n nuwe rigting ingeslaan het en waarin die howe bereid was om beperkings te temper, of minstens hulle goedkeuring aan so 'n werkswyse verleen het (sien bv *Drewton's (Pty) Ltd v Carlie* 1981 4 SA 305 (K) 312C). Die belangrikste saak in hierdie verband was *National Chemsearch (SA) v Borrowman* 1979 3 SA 1092 (T). Regter Botha kritiseer in dié saak die Engelsregtelike leerstuk van deelbaarheid heftig as synde kunsmatig en nie behoorlik beskryf nie. Hy is van mening dat 'n hof 'n algemene diskresie moet hê om 'n beperking slegs gedeeltelik af te dwing ten einde dit redelik te maak. Dit, meen die regter, is nie 'n oorskryf van kontrakte nie maar bloot 'n mindere bevel wat die hof maak volgens die eise van die openbare beleid (1114F–1115E). Die mening word ook uitgespreek dat 'n hof nie maklik 'n party behulpsaam sal wees wat 'n onredelike beperking beding het indien gedeeltelike afdwinging "major plastic surgery" of 'n "drastic recasting" van die beperkende klousule vereis nie. Voorts sal 'n hof ook traag wees om 'n beperking te verminder waar die beding bereken was om onbehoorlik inperkend of *in terrorem* te wees (1114–1117). Hierdie standpunte van regter Botha het later deeglik weerklank in die regspraak gevind (sien, benewens die sake wat aanstons bespreek gaan word, ook *Freight Bureau (Pty) Ltd v Kruger* 1979 4 SA 337 (W) 339E).

Die appèlhof het na die *Magna Alloys*-saak 'n belangrike uitspraak gelewer in *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) waarin die standpunte van regter Botha in die *Chemsearch*-saak grootliks onderskryf *en toegepas* is.

Die hof beskryf die aard, omvang en duur van die beperking wat kontraktueel op die *promissores* in hierdie geval geplaas is, as "such an extreme and serious restraint" dat die hof dit nie behoort af te dwing nie (794F). Oor die moontlikheid van gedeeltelike afdwinging is daar sekere belangrike beginsels neergelê en dit is nodig om redelik volledig uit die hof se beslissing aan te haal.

Ten eerste beslis die hof dat 'n *stipulans* wat 'n beperking slegs gedeeltelik wil laat afdwing, hierdie moontlikheid moet opper en die nodige feite voor die hof moet lê:

> "The issue before the trial Court was accordingly whether the contract as a whole was against the public interest as an unreasonable restraint of trade. It was to this issue that evidence was directed, and it is common cause that the respondents discharged the *onus* of showing that the contract was unenforceable in the circumstances. If the appellant had wished to rely on less than the complete contract, it was, in my view, obliged to raise this pertinently as an issue to be dealt with in evidence and argument" (795I–796A).

Ten tweede beslis die hof dat *Magna Alloys* en *Chemsearch* wel howe se magte uitgebrei het om af te wyk van die uitdruklike grense van 'n beperking, maar dat hierdie magte ook nie onbeperk is nie:

> "Without wishing to define with exactitude what degree of plastic surgery (to use Botha J's expression) would be permissible, I am inclined to think that the amendments suggested by the appellant in the present case are so far-reaching that a court would not have been prepared to enforce such a materially altered contract under any circumstances" (796D).

Ten derde beslis die hof dat 'n *stipulans* ook nie die hof moet nader om gedeeltelike afdwinging van 'n beperking as hy in eerste instansie sy hand oorspeel het nie:

> "[B]ut I agree with the suggestion by Botha J in the *National Chemsearch* case *supra* at 1117C–E that a court may *inter alia* have regard to matters such as whether the restraint clause was calculated to be unduly oppressive or designed to act *in terrorem*, and whether a partial enforcement would not operate harshly or unfairly towards the person bound by the restraint. In the present case, as I have indicated above, B [die stipulator] designedly obtained complete control over the professional activities of the respondents . . . B wanted a complete monopoly of the respondents' professional activities without offering them anything substantial in return. The recording contract, which is the contract whereby he obtained the most important part of this monopoly, is unenforceable precisely because he was too grasping. The Court should therefore not, I consider, be astute to assist B by holding that the contract could validly have been enforced in part only" (796F–797B).

Die beperkende beding in *BHT Water Treatment (Pty) Ltd v Leslie* 1993 1 SA 47 (W) het 'n verbod op 'n persoon geplaas om sy beroep te beoefen sonder om die area af te baken. Die effek hiervan was dat dit 'n wêreldwye verbod was. Die *stipulans* het in sy aansoek om 'n interdik egter vir 'n mindere beperking gevra, naamlik een wat net die areas sou dek waarin hy besigheid doen. Dit is deur die hof toegestaan. Met verwysing na die *Sunshine Records*-saak het die hof die regsposisie aanvaar dat 'n applikant wat 'n mindere beperking wil afdwing dit moet opper. Die hof gaan egter 'n entjie verder:

> "I add that this does not necessarily mean that in suitable circumstances, and where the issues had been adequately canvassed, the Court will not *mero motu*, or at the invitation of one of the parties, cut down a restraint and enforce it in its truncated form" (53E).

Dit is myns insiens moontlik dat 'n *stipulator* kan probeer om sy bedonge beperking in die geheel af te dwing maar tog veiligheidshalwe by voorbaat alternatief vra vir 'n gedeeltelike verbod sou die hof bevind dat die oorspronklike een teen die openbare belang aanstoot. Hierdie moontlikheid is dan ook indirek en terloops genoem in die *BHT Water Treatment*-saak (54C).

Aan die ander kant van die skaal staan *Powertech Industries (Pty) Ltd v Jamneck* 1993 1 SA 328 (O). In hierdie saak het die hof geweier om 'n landswye verbod tot die Vrystaat te beperk. Die hof is van mening dat die

> "agreement was skilfully drafted. The covenant was calculated to be oppressive and was drawn with the intention to cast the net as wide as possible and to cover as many situations as possible. This is not a proper case for the partial enforcement of the restraint clause since the public interest does not require it. There is really nothing exclusive in the selling or distribution of batteries" (332A–B).

(In die *BHT Water Treatment*-saak het die hof te doen gehad met 'n meer gesofistikeerde tipe besigheid.)

Die *Powertech*-saak is gevolg in *Coin Sekerheidsgroep (Edms) Bpk v Kruger* 1993 3 SA 564 (T) en bogenoemde *dictum* is met goedkeuring aangehaal. Die hof het geweier om 'n beperking wat op Suid-Afrika en Namibië betrekking gehad het, te verminder tot afgebakende gebiede aan die Oos-Rand. Daar kan met die hof akkoord gegaan word dat dit nie 'n hof se taak is om aanstootlike dele uit 'n kontrak te sny wat eintlik in die geheel van so 'n aard is dat die hof sy rug daarop behoort te keer nie. (Die hof verwys in hierdie verband na die bekende beslissing *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) wat nie betrekking gehad het op die tipe kontrakte tans onder bespreking nie.) Ek meen egter die hof gaan ietwat te ver, in die konteks van *restraint of trade*-kontrakte, en in die lig van die *Magna Alloys*-saak, en veral teen die agtergrond van wat gesê is in die *National Chemsearch*-saak, met die volgende opmerking:

> "As die kontraksbepaling teen die openbare belang is, is dit onafdwingbaar totdat dit blyk dat die aanstootlike gedeelte weggelaat en die regshulp op dit wat oorbly, verleen kan word omdat die onafdwingbare gedeelte van die afdwingbare gedeelte *geskei kan word* sonder om van die bedoeling van die partye af te wyk en sonder om 'n nuwe kontrak vir die partye te skep" (571H; my kursivering).

Hierdie vereiste kom gevaarlik naby aan die Engelsregtelike "blue pencil"-benadering en die leerstuk van "severance". Dit blyk ook uit die volgende *dictum* (met 'n beroep op die *Sasfin*- en *Coin Sekerheidsgroep*-saak) in *The Concept Factory v Heyl* 1994 2 SA 105 (T):

> "[I]t is unenforceable until it is shown that the offending part can be omitted and the relief based on the remaining part can be granted because the unenforceable part of the contract can be separated from the enforceable part without deviating from the intention of the parties or creating a new contract for the parties" (112E).

In *Interest Computation Experts v Nel* 1995 1 SA 174 (T) weier die hof eweneens om 'n tydsbeperking van 10 jaar na drie jaar te verminder in 'n kontrak wat deur die hof beskryf is as "uiters onredelik" wat sowel tydsduur as gebiedsaanwending betref (179J).

In sake wat gevolg het op hierdie beslissings het die howe meerdere kere geweier om 'n beperking te verminder. (Sien bv *Gero v Linder* 1995 2 SA 132 (O); *Technor (Pty) Ltd v Rishworth* 1995 4 SA 1034 (T); *Macphail (Pty) Ltd v Janse van Rensburg* 1996 1 SA 594 (T) 599B: "The Courts are averse to cutting

down restraint clauses where it cannot be done neatly and conveniently by the deletion of oppressive parts".)

Daar is egter ook 'n paar sake waarin die howe wel bereid was om sonder veel probleme 'n beperking te verminder. *Branco v Gale* 1995 1 SA 163 (OK) is so 'n geval. In hierdie saak is daar wel verwys na die *Magna Alloys*-, *Sunshine Records*- en *National Chemsearch*-saak, maar nie na al die sake hierbo waarin die howe geweier het om die beperking te verminder nie. Dit is waarskynlik hoofsaaklik te wyte daaraan dat hierdie saak reeds in September 1993 verhoor en in Mei 1994 beslis is, maar eers in 1996 gerapporteer is. Nogtans was daar sake voor Mei 1994 (sos die *Coin Sekerheidsgroep*- en *Powertech Industries*-saak) waarna nie verwys is nie. Hoe dit ook al sy, in *Branço v Gale supra* het die hof 'n beperking van 300 kilometer vanaf die stadsaal van Oos-Londen beperk tot slegs daardie gebied *van die Transkei* wat binne hierdie 300 kilometer area val. Die tydsbeperking is ook verminder van drie na twee jaar.

In *Reeves v Marfield Insurance Brokers CC* 1996 3 SA 766 (A) handhaaf die appèlhof die hof *a quo* se beslissing. Die verhoorhof het 'n bedonge area van 350 kilometer vanaf die stadsaal van Oos-Londen betreklik dramaties gesny sodat dit net spesifieke gebiede insluit en byvoorbeeld Port Elizabeth, 100 kilometer verder, wat andersins deel van die beperking sou wees, uitsluit (769H–I 778C). 'n Interessante aspek van hierdie temperingshandeling is dat dit geskied het op die aanbeveling van die *promissor*! Hy was as werknemer van die *stipulans* in die versekeringsbedryf betrokke. Die skuldenaar het naamlik in sy beantwoordende beëdigde verklaring aangetoon wat hy meen 'n redelike beperking behoort te wees en die hof het dit oënskynlik net so aanvaar (777F–I). Die *stipulans* het hom trouens deurgaans op die redelikheid van die oorspronklike beperking beroep, en het onsuksesvol 'n teenappèl geloods teen die verhoorhof se temperingsbevel.

'n Baie onlangse saak, *Turner Morris (Pty) Ltd v Riddell* 1996 4 SA 401 (OK), het na my mening 'n regverdige resultaat gelewer wat tempering betref. Die hof se hele uitspraak is ook duidelik daarop gerig om eerder uitvoering aan die kontrak te gee as om dit te laat sneuwel. In die proses het die hof die kontrak verstandig en vanuit 'n besigheidsperspektief uitgelê. Die beperkingsbepaling het 'n verbod op die werknemer geplaas binne 'n radius van "100 kilometres of Turner Morris", sonder om te spesifiseer waar Turner Morris nou eintlik is. Die hof beslis dat die beperking nie te vaag was nie:

> "It is clear from the agreement that Turner Morris and its subsidiaries are engaged in commercial enterprise. Such activity is in the ordinary course conducted on or from business premises. The physical location of these premises is a fact presumably known to the parties; or is readily ascertainable by them; or, in the case of dispute, should be determinable by the Court on evidence usually admissible in such situations" (405F).

Uit die stukke het dit geblyk dat Turner Morris 14 takke landwyd gehad het. Die beperking het dus teoreties op al hierdie takke betrekking gehad. Die respondente in die saak het net in die Oos-Londen area gewerk. Die applikant het gevra vir 'n bevel wat die respondente sou verbied om vir een jaar binne 100 kilometer vanaf Turner Morris se tak in Oos-Londen te werk en dit is toegestaan. Die hof het daarop gewys dat die beperkings op die respondente beslis wyd was maar dat dit nie met onbehoorlike oogmerke opgestel is nie. Deur die wye beperking met gepaste woorde te kwalifiseer, is die beperking redelik gemaak en kon geregtigheid tussen die partye bewerkstellig word (407).

Ten slotte was daar die beslissing in *Dav Personnel Group CC v Williams*. ('n Opsomming van die saak verskyn in 1996 2 *Juta's Digest of South African Law* 7.) Dit is 'n beslissing van die Witwatersrandse plaaslike afdeling (saaknr 22223/1995). In hierdie saak het die hof 'n beperking van twee jaar op 'n werknemer wat personeelwerwing as beroep beoefen het, na een jaar verminder.

3 Evaluering en slotopmerkings

Ofskoon daar in 'n hele paar beslissings gebruik gemaak is van die nuwe bevoegdhede waaroor 'n hof beskik om 'n beperking te temper, is dit ook duidelik dat die howe taamlik konserwatief in hierdie verband is. Die howe behoort daarteen te waak om nie onwilligheid te toon wat hierdie aangeleentheid betref nie. Die argument dat dit nie 'n hof se taak is om partye se kontrakte te verander nie, klink altyd vreeslik edel maar dit deug nie in die onderhawige situasie nie. Immers, selfs met die "blue pencil rule" word 'n kontrak in 'n mate verander ten einde die openbare belang te dien. Wat is die verwydering van 'n deelbare beperking uit 'n kontrak nou anders as 'n wysiging van die kontrak?

Miskien het dit tyd geword om toe te gee dat die howe inderdaad kontrakte verander wanneer hulle beperkings verminder. In *Magna Alloys* self merk hoofregter Rabie op dat "miskien gesê kan word" dat 'n verminderde beperking

> "daarop neerkom dat die Hof se bevel op 'n wysiging van die ooreenkoms wat die partye aangegaan het, neerkom, en in 'n sekere sin is dit natuurlik so" (896B).

Hoekom hiervan terugdeins as die openbare beleid eerder wil hê dat 'n kontrak geldig moet wees as ongeldig, al beteken dit dat daar verstellings aangebring moet word? Soos reeds aangetoon is, het sekere lande selfs wetgewing hieroor aangeneem. Suid-Afrika beskik nie oor wetgewing nie en ons het dit ook nie nodig nie. *Magna Alloys* was die regskeppende handeling in hierdie verband.

Alhoewel Visser ook by geleentheid opgemerk het dat die howe nie 'n nuwe ooreenkoms vir die partye skep nie maar dat dit gaan oor oorwegings van die openbare belang wat weer afdwingbaarheid bepaal, het hy die bevoegdheid van die howe verwelkom "om in 'n groter mate met kontrakte 'in te meng'" (vonnisbespreking van *Magna Alloys* in 1985 *De Jure* 198). Schoombie "Agreements in restraint of trade: The Appellate Division confirms new principles" 1985 *THRHR* 148, wat die *Magna Alloys*-saak krities ontleed het, verwys na die howe se bevoegdheid in hierdie verband as 'n toesighoudende funksie:

> "It is submitted that the appellate division has in reality taken an (inarticulated) policy decision that restraints of trade require a flexible, supervisory jurisdiction on the part of the courts, particularly in respect of partial enforcement."

Indien 'n hof nie die beperking verminder nie, beteken dit eenvoudig dat die betrokke beperkende beding onafdwingbaar is. Dit bevorder die onafdwingbaarheid van kontrakte, dikwels in omstandighede waar 'n bindende beperking heeltemal geregverdig sou wees. Toe die appèlhof een maal vir homself, en daarmee vir al die ander howe, die pad gekies het om 'n beperking slegs gedeeltelik af te dwing, het hy 'n pad gekies wat gerus maar vreesloos bewandel kan word. Die howe moet nie teruggryp na oud-modiese redenasies wat verband hou met afskeiding van 'n beperking ("severance"), deelbaarheid van beperkinge of die "blue pencil rule" nie. Hierdie leerstukke, as 'n mens hulle enigsins so kan noem, is deeglik aan die kaak gestel in die *National Chemsearch*-saak.

Van bogenoemde opmerkings moet nie die afleiding gemaak word dat die breidellose tempering van beperkings bepleit word nie, of dat al die sake waarin geweier is om beperkings se vlerke te knip noodwendig verkeerd beslis is nie. Al wat voorgestel word, is dat die howe eerder geneë moet wees om dit te doen as om dit nie te doen nie. Natuurlik sal daar gevalle wees waar 'n hof behoort te weier om hoegenaamd die *stipulans* tegemoet te kom. Ek meen egter dat die "chirurgiese ingreep"-argument, hoe welluidend ook al, nie die toets behoort te wees nie; ook nie die vraag of die partye wesenlik 'n ander kontrak kry nie. Immers, om 'n landwye verbod te verminder na een wat net die gebied om 'n enkele dorp dek, of om honderde kilometer daaruit te sny, is op sigself drastiese chirurgie en 'n ingrypende afwyking van die oorspronklike afspraak. Daar word aan die hand gedoen dat die toets eerder behoort te wees of 'n hof die ooreengekome beperking of beperkings dermate aanstootlik, onredelik, en wyd bewoord vind dat dit in die openbare belang is om dit hoegenaamd nie af te dwing nie, en dat gesonde regspolitiek vereis dat die *stipulans* maar die gevolge van sy onbesonne kontrak moet dra.

Daar is ook 'n ander werkswyse wat, sover ek weet, nog nie aandag geniet het nie. Dit is om 'n gepaste kostebevel te verleen. 'n Hof kan naamlik in geskikte omstandighede 'n kostebevel teen 'n *stipulans* verleen wat 'n kontrak gebruik het met 'n beperking in wat 'n hof later nodig vind om te temper. Indien die beperking behoorlik en redelik bewoord was, sou litigasie of in ieder geval 'n temperingsbevel nie nodig gewees het nie. Afhangende van die omstandighede sou 'n hof kon gelas dat die *promissor* en die (suksesvolle) *stipulans* elk hulle eie koste dra. 'n Hof sou selfs in gevalle waar die wysigings taamlik drasties is, kon gelas dat die (suksesvolle) *stipulans* die teenparty se koste dra. 'n Faktor wat hier 'n rol behoort te speel, is of dit redelik van die *promissor* was om die aansoek teen te staan, veral waar die applikant van meet af vir 'n mindere beperking gevra het. Dit behoort in 'n sekere mate Kerr se gegronde beswaar teen die temperingsbevoegdheid te ondervang. Kerr ("Restraint of trade after Magna Alloys" in *Essays in honour of Ellison Kahn* (1989) 189) skryf naamlik die volgende:

> "This change gives rise to a danger: the party in the prominent bargaining position (usually the covenantee) knowing that he has nothing to lose by being unreasonable (except his reputation in commercial circles) will secure the other party's (usually the covenantor's) agreement to wide terms. Such terms will inevitably be considered unreasonable in many circumstances, and the weaker party (usually the covenantor) will then, owing to the high cost of litigation and the delay involved in bringing action, be reluctant to challenge the application of the restraint in circumstances where it is open to challenge."

Watter benadering die howe ook al in die toekoms gaan volg, hetsy behoudend of meer radikaal, sal dit kontraksopstellers loon om versigtiger te wees in die bewoording wat hulle kies. Hulle sal ook deurgaans die *promissor* se posisie in gedagte moet hou en werklik moet poog om billike beperkings op te stel (sien weer eens die interessante bepaling in die Nieu-Suid-Wallis-wet in hierdie verband waarna in par 2 2 hierbo verwys is). Die dae is verby toe standaard kontrakte maar net eensydig bewoord kon word om slegs die een party te pas. (Sien my opmerkings oor die opstel van standaard kontrakte in 'n vonnisbespreking in 1996 *De Jure* 174.)

JM OTTO
Randse Afrikaanse Universiteit

THE DICHOTOMY OF MARRIAGE REVISITED: A NOTE ON *RYLAND v EDROS*

The notion that "marriage" refers exclusively to the voluntary, monogamous union of one man and one woman that has been formally concluded and legally recognised in accordance with a Western tradition, is clearly out of keeping with reality, and is moreover inequitable, in a multi-cultural South African society. Over the years there have been many voices raised against the patent inequity of according traditional African marriages only *ad hoc* recognition and Muslim marriages virtually no recognition at all (see in general, Church "Constitutional equality and the position of women in a multi-cultural society" 1995 *CILSA* 289). It is therefore gratifying that the court in the hitherto unreported *Ryland v Edros* case no 16993/92 (C), was prepared to deviate from a "long line of decisions" that stressed the monogamous concept of marriage, reiterated in the Appellate Division decision of *Ismail v Ismail* 1983 1 SA 1006 (A) and to recognise and enforce the consequences of a Muslim marriage.

Briefly the facts were as follows: In 1976 the parties had married in accordance with the tenets of Islamic personal law. Three minor children were born of the marriage but in 1991 the husband had ended the marriage by issuing three "*talaaqi*" or notices of termination in terms of Islamic law. Subsequently he instituted action against the wife to evict her from the marital home. The wife denied that he was entitled to an eviction order, averring that a *precarium* existed in her favour in regard to the property entitling her to reasonable notice, which had not been given. More important for the purposes of this note was her claim in reconvention in which, based on the contractual agreement of the Muslim marriage, she claimed arrear maintenance, a consolatory gift and an equitable share of the husband's estate. At the pre-trial conference, the parties reached agreement on various other points, but these were the issues which remained in dispute. However, before determining these, the court had to consider two preliminary questions: first, whether it was appropriate for it to pronounce on matters of religious law (so-called doctrinal entanglement) and secondly, whether the court was precluded from enforcing the terms of the marriage (the "contractual agreement") because of the decision of the Appellate Division in *Ismail v Ismail*. In reaching its conclusions on the issues and answers to the preliminary questions, the court had recourse to the Constitution (at that stage still the interim Constitution, Act 200 of 1993).

The question of doctrinal entanglement is an interesting one and one raised by the court *mero motu* in the light of an instructive article which appeared in this journal some three years ago (Cachalia "Citizenship, Muslim family law and a future South African constitution: A preliminary enquiry" 1993 *THRHR* 392; see too Bulbulyia "The ethical foundations and distinctive features of Islamic law" 1985 *CILSA* 215). These and other writings make it clear that Islam is a "revelational culture". In the words of Bulbulyia:

> "To the Muslim, life and religion are inseparable. Thus Islamic law deals with religious as well as secular injunctions; it prescribes moral standards for a whole range of personal, social, economic and political relationships, embracing both civil and criminal law. It is as much a public affair for society, as it is a private

> affair for the individual. Society, state and religion are components in an indivisible unity and life, truth, reality and nature are viewed from a single periscope."

Prior to the commencement of the 1993 Constitution our courts would not adjudicate upon doctrinal disputes between schisms of a sect unless some "proprietary or other legally recognised right was involved" (*Allen v Gibbs* 1977 3 SA 212 (SE) 218A–B)). The question now was whether, in the light of the Constitution and particularly the provisions entrenching the right to "freedom of conscience, religion, thought, belief and opinion (s 14(1) of the interim Constitution and s 15(1) of the final Constitution, Act 108 of 1996), the position was any different. In determining this, the court referred to German and American case law dealing with the constitutionally protected freedom of belief provisions in their respective constitutions. The court determined that the American rule against doctrinal entanglement would also hold good in South Africa. In other words, having regard to the fact that Islam is a revelational culture, if a decision on the issues involved the court in deciding points of religious doctrine, then it would be "inappropriate" for it to decide these issues even when proprietary or other legally recognised rights are involved. Here one must agree with the court that it would be dangerous for a judge in a secular court to rule on religious doctrine. Nevertheless, and despite the fact that there is a continuity of Muslim law, religion and culture, the court found (and the parties agreed) that in this case there was in any event no necessity for doctrinal entanglement in order to decide the issues. However, the court determined *obiter* that, in the light of the new Constitution, the doctrine of entanglement was now probably part of our law.

The second question was whether or not, in the light of the Constitution, the court should follow the Appellate Division decision in *Ismail v Ismail*. In the *Ismail* case, the facts of which were similar to those in *Ryland v Edros*, the court determined that since "our courts have persistently refused to give recognition and effect to polygamous unions on the grounds of public policy or as being *contra bonos mores*", it was not prepared to recognise a *de facto* monogamous though potentially polygymous Muslim marriage or to give effect to any obligation that stemmed from it. Although the court (per Trengove J) conceded that the legislature had extended "very wide and comprehensive recognition to Black customary unions", it had done so for reasons of expediency. Ironically, in the light of the circumstances of the particular case, the judge did not base his rejection of polygymy on religious considerations as had been the case in the early decisions, but on the human rights argument of gender equality.

The decision elicited criticism notably by feminists (*inter alios* by Kaganas and Murray "Law, women and the family: The question of polygymy in a new South Africa" 1991 *Acta Juridica* 116) who pointed out that an uncritical human rights approach might simply serve as a new rationalisation for old prejudices. As Murray declared, it would simply compound oppression to tell a woman that because she had concluded an unacceptable form of marriage, albeit one not merely sanctioned but expected of her in her community, she could not demand maintenance assured her under the marriage contract (Murray "Is polygymy wrong?" 1994 *Agenda* 40; see too Roodt "Marriages under Islamic law: Patrimonial consequences and financial relief" 1995 (2) *Codicillus* 50). In his criticism of the case Kerr questioned the court's determination of public policy: Was

such public policy not merely "state policy" reflecting the views of only a certain section of the populace? he asked ("Back to the problems of a hundred or more years ago: Public policy concerning contracts relating to marriages that are potentially or actually polygamous" 1984 *SALJ* 445).

Ismail v Ismail was followed in *Solomons v Abrams* 1991 4 SA 437 (W) where the court was not prepared to recognise an Islamic marriage as a putative marriage. More recently in *Kalla v The Master* 1995 1 SA 261 (T) the court held that the transitional arrangements provided for in the interim Constitution did not make provision for retrospective operation of the Constitution. Accordingly, reliance on section 14(1) of the interim Constitution regarding "the right to freedom of conscience, religion, thought, belief and opinion" was misplaced. No effect could be given by the court to any consequence of a potentially polygamous Muslim marriage which, under the law existing at the time when the marriage was terminated in 1992, was invalid. Furthermore, the court determined *obiter* that the principle of gender equality embodied in the interim Constitution and in the Constitutional Principles might well lead to the conclusion that "polygamous (and potentially polygamous) marriages are as unacceptable to the *mores* of the new South Africa as they were to the old" (270G). In *Ryland v Edros* the court was to follow a less conservative approach. It did not refer to the *Kalla* case and held itself not to be bound by the decision of the Appellate Division in *Ismail v Ismail*. Here the court determined that

> "in the present case it would be difficult to find that there has been such a change in the general sense of justice of the community as to justify a refusal to follow the *Ismail* decision *if it were not for the new constitution*" (my emphasis).

In the light of the values of equality and tolerance of diversity and the recognition of the plural nature of South African society manifest in the Constitution, the court found the enforcement of obligations that stemmed from the Muslim marriage in question to be in keeping with public policy and the *boni mores* of the society. The progressive approach of the court is to be welcomed.

Accordingly it determined on the facts that the wife was entitled to arrear maintenance for three months after "*talaq*" (that is, for the traditional *Iddat* period); that she would be entitled to the consolatory gift if the marriage had been terminated at the unjustified behest of her husband, but that she was not entitled to an equitable share of her tangible and intangible contributions to the growth of the husband's estate.

In this regard the court heard expert testimony on Malaysian legislation, which had codified Islamic law and which, acknowledging "the new role of women in society", allowed a wife to share in her husband's assets on divorce as was the case in Malay *adat* (custom). However, the court found on the evidence before it that a similar custom did not exist in the Islamic community in the Western Cape.

It is interesting to note that though there was no discussion of the horizontal/vertical debate regarding the operation of the Bill of Rights (it may well be in the light of the final Constitution, that horizontal application is, in many instances, assured; however, discussion of the issue does not fall within the ambit of this note), the court referred with approval to the judgment of Ackermann J in the decision of the Constitutional Court in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) with regard to the German constitutional concept of *mittelbare Drittwrikung*. The judge declared:

> "I agree ... that the values of equality and tolerance of diversity and the recognition of the plural nature of our society are among the values that underlie our constitution. In my view those values 'radiate' ... the concepts of public policy and *boni mores* that our courts have to apply."

In this case, as in *Ismail*, the marriage was *de facto* monogamous and the position of a *de facto* polygymous marriage, has yet to be decided.

The case raises the important question of a future dispensation regarding the present dichotomy of marriage in South Africa. It seems that here the African customary marriage as an institution is in a better position than Muslim marriage. Although still referred to as a "customary union" in legislation, it does enjoy a measure of protection (see Church *op cit*). In this regard, further harmonisation of the common law and indigenous law has been proposed in Issue Paper 4 of the South African Law Commission (1996) in which it is proposed, *inter alia,* that the customary marriage be formally recognised and provision made for choice of law rules to be implemented.

Possibly there should be reform of the South African law of marriage in general. In this regard it is suggested that a holistic approach be followed, and the three models presented by Cachalia in the article referred to at the beginning of this note could be considered. Of the three models suggested, namely Legal Unification, Legal Integration and Legal Pluralism, I would favour the second (see Cachalia 1993 *THRHR* 404). This model, as the author points out, seeks to *integrate* the legal principles of different legal systems. Unlike *unification* that imposes uniform law, integration in the words of Professor Tony Allott "creates a law which brings together, without totally obliterating, laws of different origins ("What is to be done with African customary law?" 1984 *JAL* 65). At least integration would allow for parity with regard to different forms of marriage and uniform procedures for conclusion and dissolution. No doubt integration will be no easy task and comprehensive and co-operative research will be necessary to facilitate this. On a cautionary note, there is always a danger in legislating on an *ad hoc* basis.

A recent legislative amendment to the Divorce Act 70 of 1979 might serve as an example. The amendment reads:

> "If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the marriage of the other spouse removed or the court may make any other order that it finds just" (Divorce Amendment Act 95 of 1996).

It could be that what would seem to be a laudable recognition of Jewish law may well prove to be unconstitutional on the ground of infringing the right to religious freedom or possibly the right to equality in the broad sense.

JOAN CHURCH
University of South Africa

ENKELE BEGINSELS EN GEDAGTES OOR DIE HORISONTALE WERKING VAN DIE NUWE GRONDWET

1 Inleiding

Een van die mees komplekse kwessies betreffende 'n grondwetlike handves van fundamentele regte, is die toepassing daarvan op die verhouding tussen private individue wat deur die privaatreg beheers word. Daar is al in ietwat oordrewe terme na hierdie sogenaamd horisontale werking van fundamentele regte as die "konstitusionalisering" van die privaatreg (bv Markesinis "Comparative law – A subject in search of an audience" 1990 *MLR* 10) en as die "privatisering" van menseregte verwys (bv Clapham "Opinion: the privatisation of human rights" 1995 *European Human Rights* 20).

Die vraagstuk van horisontaliteit het in 'n paar resente sake in Suid-Afrika ter sprake gekom. Veral dié wat met die beskerming van persoonlikheidsbelange handel, is noemenswaardig (sien bv *De Klerk v Du Plessis* 1995 2 SA 40 (T); *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC); *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W); *Potgieter v Kilian* 1995 1 BCLR 1498 (N); *Gardiner v Whitaker* 1995 2 SA 672 (OK); *Mandela v Falati* 1994 4 BCLR 1 (W); *Motala v University of Natal* 1995 3 BCLR 374 (D) (onderwys en diskriminasie)). Een algemene afleiding uit hierdie sake is dat gesaghebbende beginsels nog nie voldoende uitgekristalliseer het nie en dat daar vir ons reg 'n ontwikkelingspad tot duideliker beginsels voorlê.

In hierdie bydrae gaan dit oor enkele algemene beginsels en gedagtes ten aansien van die horisontale werking van die nuwe handves van regte – veral met die oog op die verdere ontwikkeling van die reg insake deliktuele persoonlikheidsbeskerming. Dit is natuurlik onmoontlik om in een bydrae die hele vraagstuk van die grondwetlike invloed op die persoonlikheidsreg in oënskou te probeer neem.

Oor die algemene belang van fundamentele regte by persoonlikheidsbeskerming het Von Bar ("Die Einfluss des Verfassungsrecht auf die westeuropäischen Deliktsrechte" 1994 *RabelsZ* 224) hom so uitgelaat:

> "Nirgendwo sonst werden Grundrechte im Haftungsrecht noch einmal so intensiv und umittelbar wirksam wie gerade im Bereich des Persönlichkeitsschutzes. Der Bezug auf die Verfassung gehört hier heute längst zum Alltagsgeschäft der europäischen Fachgerichte, und die ihnen übergeordneten Verfassungsgerichte wachen aufmerksam über deren Rechtsprechung."

2 Die posisie ingevolge die tussentydse Grondwet

Die moontlike horisontale werking van die handves van regte in die tussentydse Grondwet van die Republiek van Suid-Afrika 200 van 1993 het reeds tot litigasie (sien bv hierbo par 1) en heelwat akademiese literatuur aanleiding gegee (sien oa Rautenbach *Algemene bepalings van die Suid-Afrikaanse handves van regte* (1995) 75–87; Van Aswegen "The implications of a bill of rights for the law of contract and delict" 1995 *SAJHR* 50; De Waal "A comparative analysis of the provisions of German origin in the interim bill of rights" 1995 *SAJHR* 1; De Wet "Indirect *Drittwirkung* and the application clause" 1995 *SAJHR* 610; Strydom "The private domain and the bill of rights" 1995 *SAPR/PL* 52; Lourens en

Frantzen "The South African bill of rights: public, private or both: a viewpoint on its sphere of application" 1994 *CILSA* 340; Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 378; Olivier "Vertikale en horisontale werking van die Grondwet steeds onder die loep" 1995 *De Rebus* 83; Marcus "Freedom of expression under the Constitution" 1994 *SAJHR* 140; De Wet "A German perspective on the constitutional enforceability of children's and labour rights in the interim bill of rights with special reference to *Drittwirkung*" 1996 *THRHR* 577; De Waal en Erasmus "The constitutional jurisprudence of South African courts on the application, interpretation and limitation of fundamental rights during the transition" 1996 *Stell LR* 190–202; Du Plessis "The bill of rights in the working draft of the new Constitution" 1996 *Stell LR* 10).

Die konstitusionele hof het in die lastersaak *Du Plessis v De Klerk supra* beslis dat die handves van regte in die tussentydse Grondwet nie in die algemeen direkte horisontale werking het nie (die moontlikheid van uitsonderings is wel oopgehou – sien bv par 62). Nogtans het regter Mahomed (sien par 73) *in casu* reeds daarop gewys dat hierdie beslissing waarskynlik bloot van historiese belang sal wees "because the interim Constitution will already have been overtaken by a new constitutional text with quite different formulations impacting on the problem".

3 Die algemene rol van die staat in die nuwe handves van regte

Artikel 7(2) van die Grondwet lê 'n plig op die staat "[to] respect, protect, promote and fulfil the rights in the Bill of Rights". Die woorde "protect" en "promote" impliseer reeds dat die staat nie bloot fundamentele regte direk moet respekteer, "nakom" of daarvolgens moet handel in die vertikale verhouding tot sy onderdane nie, maar *meer* moet doen om ook verdere gebondenheid (direk of indirek) daaraan te verseker.

Die bepalings van die handves is uitdruklik van toepassing op *alle* reg (sien vir kommentaar hieroor Du Plessis 1996 *Stell LR* 10; De Waal en Erasmus 1996 *Stell LR* 190–191). Daar sal natuurlik nog beslis moet word of "alle reg" op die terrein van die privaatreg net verwys na die sogenaamde "civil private law" in teenstelling met "non-civil private law" (De Wet 1995 *SAJHR* 614; sien Van der Vyver 1994 *THRHR* 378 ev wat lg as die interne reg van nie-staatlike liggame beskryf).

Die handves bind die wetgewer, die uitvoerende gesag, die regbank en alle staatsorgane (sien a 239 van die Grondwet vir die omskrywing van 'n staatsorgaan). Veral die insluiting van die regbank is betekenisvol as 'n aanduiding van beoogde horisontale werking (sien hieroor bv De Waal 1995 *SAJHR* 9 ev; De Wet 1995 *SAJHR* 612; die bekende saak *Shelley v Kraemer* 334 US 1 (1948); en *Du Plessis v De Klerk supra* par 45 47). Dit is voorts duidelik dat die hooggeregshof ('n "High Court" luidens a 169) ook oor konstitusionele kwessies – behalwe sekeres wat uitgesluit is – uitspraak mag gee. Hierdie howe sal dus gemoeid wees met die direkte en indirekte horisontale toepassing van die handves.

Wat die posisie van die *staat* in die horisontale werking van die handves betref, kan daar tussen ten minste die volgende drie gevalle onderskei word:

Eerstens is daar bepalings in die Grondwet wat die staat uitdruklik verplig om wetgewing aan te neem wat "private diskriminasie" voorkom en verbied (a 9(4)). Die staat moet dus verseker dat die diskriminasieverbod in die private sfeer ingevoer word. Hierdie voorskrif gaan wye privaatregtelike gelding aan die reg

op gelykheid voorsien. Dit spreek natuurlik vanself dat die beoogde wetgewing nie 'n onredelike aantasting van ander fundamentele regte en vryhede mag meebring nie (bv die reg op vrye assosiasie in a 18). Hopelik sal die klem in die betrokke wetgewing op *duidelik onbillike* diskriminasie val waar die openbare belang ter sprake is sodat persoonlike vryheid nie onbehoorlik aangetas word nie (die bedoeling met a 9(4) kan tog nie wees om die een of ander "diktatuur van gelykheid" te magtig nie).

Tweedens is daar bepalings wat die staat bloot veroorloof, maar nie verplig nie, om bepaalde fundamentele regte tussen private individue geldend te maak. 'n Voorbeeld is artikel 234 van die Grondwet wat lui dat

> "in order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution".

Nog 'n voorbeeld is artikel 9(2) wat sogenaamde *regstellende aksie* magtig (sien Van Aswegen 1995 *SAJHR* 57 oor regstellende aksie as vorm van indirekte horisontale werking van fundamentele regte).

In die algemeen kan die staat natuurlik binne sy grondwetlike wetgewende bevoegdheid wetgewing aanneem wat die privaatreg wysig ooreenkomstig die beginsels en waardes wat die handves onderlê.

Derdens moet kennis geneem word van nuwere sieninge waarvolgens 'n konstitusionele staat die plig het om sy burgers se regte te beskerm deur 'n behoorlike stelsel van privaatregtelike deliktuele aanspreeklikheid te waarborg gebaseer op die waardestelsel wat fundamentele menseregte onderlê (sien hieroor Von Bar *Gemeineuropäisches Deliktsrecht* (1996) par 556). Volgens Von Bar (*ibid*) is dit nie van belang of 'n mens in hierdie verband praat van die besondere plig van die staat om sy onderdane se regte te beveilig of van die sogenaamde *Drittwirkung* van fundamentele regte nie. Hy verklaar (*idem* par 570):

> "Das objektive Haftungsrecht ... is eines der Instrumente, mit denen der Staat seiner Pflicht nachkommt, sich schützend vor die Grundrechte seiner Bürger zu stellen" (sien verder oor die Duitse posisie Von Bar *idem* par 556; BverfG 15 1 1958, BVerfGE 7 S 198 206).

In praktyk beteken bogenoemde dat die staat (ook deur die howe) moet verseker dat die deliktereg behoorlik funksioneer en voldoende remedies vir regskrenkings bied – of die verweerder nou die staat of 'n private individu of regspersoon is. Hiermee saam moet artikel 34 van die handves van regte oorweeg word wat handel met die reg op toegang tot die howe en ander onafhanklike tribunale. Hierdie fundamentele reg vereis waarskynlik nie net dat die howe en ander tribunale toeganklik moet wees nie maar dat formele verwere en hindernisse (bv bevrydende verjaring, kennisgewingstydperke, bepalings oor die bewyslas, vrywaringswetgewing, die reg insake afstanddoening, ens) streng binne die algemene begrensingsmaatstaf van artikel 36 val.

4 Verskillende tipes horisontale werking van die nuwe handves van regte

Uit 'n oorsig van die handves van regte wil dit voorkom of ten minste die volgende "kategorieë" horisontale werking van die handves van regte moontlik is (hierdie kategorieë kan soms ooreensny en bowendien bied sodanige klassifikasie geen toweroplossing vir enige praktiese probleem nie):

(a) *Direkte* horisontale werking ingevolge byvoorbeeld artikel 8(2) en (3) wat hieronder bespreek word, die privaatregtelike gebruik en die uitwerking van

artikel 9(4) wat oor die verbod op private onbillike diskriminasie handel, aspekte van artikel 23 wat oor arbeidsverhoudinge gaan, die verbod op rassediskriminasie in onafhanklike skole ooreenkomstig artikel 29(3)(a), ensovoorts.

(b) *Indirekte* horisontale werking deur –

(i) die *deursypelingsklousule*, ook genoem – onder invloed van die Duitse reg – die algemene "uitstralingseffek" van fundamentele regte, deur byvoorbeeld die feit dat dit in ag geneem word by begrippe soos openbare beleid, *boni mores*, redelikheid, billikheid, ensovoorts wat hoogs relevant op die terrein van deliktuele persoonlikheidsbeskerming is (a 39(2); *Du Plessis v De Klerk supra* par 60 103 110; vgl egter ook Du Plessis 1996 *SAJHR* 10);

(ii) die *algemene beïnvloeding* van gemeenregtelike *regte* deur die handves ingevolge artikel 39(3) (die tans nog erkende reg ten aansien van die instel van 'n aksie weens seduksie kan bv hiervolgens in gedrang kom);

(iii) die toetsing van nuwe *wetgewing* wat die privaatreg reguleer aan die bepalings van die handves (a 8(1); vgl ook Van Aswegen 1995 *SAJHR* 57);

(iv) die moontlikheid om *wetgewing* wat as eisoorsaak of verweer in privaatregtelike litigasie aangewend word, aan die handves van regte te meet (bv *Du Plessis v De Klerk supra* par 38 47 49 72).

(Sien hieronder par 7 oor die moontlikheid dat die onderskeid tussen direkte en indirekte horisontale werking in praktyk sal vervaag.)

5 Bepalings oor die beginsel van direkte horisontale werking van die handves: artikel 8(2)

Artikel 8(2) van die handves lui soos volg:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

Hierdie bepaling sal sekerlik nog die onderwerp van heelwat regterlike interpretasie en akademiese kommentaar wees. Dit beoog duidelik om die toepassing van sekere bepalings van die handves uit te brei na ander verhoudings as waar die staat 'n party is (die horisontaliteit ingevolge a 8 het reeds in 'n uitspraak van die konstitusionele hof ter sprake gekom: *Certification of the Constitution of the Republic of South Africa 1996* 1997 1 BCLR 1 (CC) par 53–55; vgl ook http://www.constitution.org.za/cp1200026.html op die Internet vir die standpunte van die paneel van grondwetlike kenners oor horisontaliteit).

Geen "totale horisontaliteit" word ingevolge artikel 8(2) beoog of bewerkstellig nie – dit is trouens in geen land ter wêreld die geval nie. Terwyl die gebondenheid van die staat in wye terme uitgespel word (sien hierbo), sou dit onmoontlik wees om die gebondenheid van private natuurlike en regspersone ook so te probeer formuleer. Daar is te veel wisselende omstandighede wat relevant kan wees en alle moontlikhede kan eenvoudig nie voorsien word nie.

Die blote invoering van artikel 8(2) kan beskou word as 'n verwerping van standpunte dat direkte horisontaliteit byvoorbeeld tot te veel regsonsekerheid aanleiding sal gee (bv *De Klerk v Du Plessis supra* 49; *Potgieter v Kilian supra*) en dat ons privaatreg so iets nie nodig het nie. Die artikel verteenwoordig 'n oorwinning vir diegene wat selfs onder die tussentydse Grondwet (verkeerdelik) die direkte horisontale werking van fundamentele regte wou konstrueer (sien bv

Du Plessis v De Klerk supra par 119, *per* Kriegler R, met wie Didcott R saamgestem het, wat oa sê: "'Direct horizontality' is a bogeyman").

Ons howe sal mettertyd moet beslis wat die woord "binds" in artikel 8(2) presies beteken. Dit is duidelik iets enger as die vier besondere pligte van die staat ten aansien van fundamentele regte (sien hierbo in par 2). Die sleutel tot "binds" is net gedeeltelik in artikel 8(3) vervat (sien par 6 hieronder).

Daar is nie in artikel 8(2) gedetailleerde kriteria aan die hand waarvan die "privaatregtelike" toepassing van die handves bepaal kan word nie. Wat wel blyk, is dat sodanige toepaslikheid met verwysing na (a) die aard van die reg, en (b) die aard van die plig wat deur die reg opgelê word, vasgestel moet word. Elke fundamentele reg en die ooreenstemmende plig wat dit meebring, moet dus oorweeg word met die oog op moontlike horisontale gelding. Baie faktore sal waarskynlik in ag geneem kan word in hierdie proses, veral die algemene doel en aard van die nuwe handves van regte. Buitelandse reg sal ook oortuigingskrag hê (sien a 39(1)(c) van die handves).

Daar word in elk geval aanvaar dat sekere regte meer vatbaar vir horisontale werking as andere is (veral daardie regte wat ooreenstem met bekende subjektiewe regte – bv persoonlikheidsregte – kan meer geredelik horisontaal toegepas word). Regte wat die aanneming van wetgewing, die besteding van geld, die behandeling van gearresteerdes en beskuldigdes, die beskikbaarstelling van openbare geriewe en instellings voorsien, is duidelike voorbeelde van gevalle waar horisontale werking waarskynlik volkome uitgesluit is. Die woorde "to the extent" in artikel 8(2) dui op grade van horisontaliteit – waaroor ook nog kriteria ontwikkel sal moet word.

Dit sou beter gewees het indien die wetgewer uitdruklik nog relevante faktore by die oorweging van die gebondenheid van nie-staatsorgane genoem het. Die *aard* van 'n regspersoon moes byvoorbeeld uitdruklik as 'n faktor vermeld gewees het (soos in a 8(4) wat oor die regspersoon as reghebbende handel). So 'n oorweging sou dit byvoorbeeld moontlik kon maak om die individu se reg op die goeie naam meer effektief te beskerm teen die magsblokke wat die media beheer. Weens die vaagheid van die maatstaf vir horisontaliteit is dit natuurlik moontlik dat so 'n faktor in elk geval oorweeg kan word.

Die kriteria vir direkte horisontaliteit in artikel 8(2) word reeds wesenlik vervat in die volgende woorde van regter Madala (*Du Plessis v De Klerk supra* par 161; sien ook *Gardiner v Whitaker supra* 684):

> "We should examine every enumerated right and decide whether it can sensibly be applied in the private domain. In support of this approach, it all depends on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs."

'n Vergelykbare benadering blyk skynbaar ook uit sekere Italiaanse beslissings (volgens De Wet 1995 *SAJHR* 617) waarvolgens "the nature and aim of the various constitutional rights could be decisive in determining whether they are suitable for direct *Drittwirkung* or not" (sien in die algemeen oor die uitwerking van grondwetlike regte op die Italiaanse deliktereg, Von Bar *Gemeineuropäisches Deliktsrecht* par 560 573).

Na my mening behoort die *uitgangspunt* te wees dat fundamentele regte in die algemeen nie horisontale werking het nie totdat 'n bevoegde hof sodanige horisontaliteit bevind. Die woorde "to the extent that it is applicable" kan daarop dui dat die toepaslikheid eers gesaghebbend gekonstateer moet word. Voorts

behoort iemand wat beweer dat 'n reg horisontale werking het, in die algemeen die bewyslas te dra om die hof van die toepaslikheid daarvan in die privaatreg te oortuig. Indien wel beslis is dat die betrokke reg horisontale werking het, behoort iemand wat dit as verweer opper teen 'n aantasting van 'n erkende persoonlikheidsgoed, die hof te oortuig van die gelding van die verweer *in casu*. Byvoorbeeld: as die reg op vryheid van uitdrukking as verweer teen 'n lasteraksie aangevoer word, sou dit beteken dat die verweerder 'n bewyslas ten aansien van sy verweer het (sien verder par 6(e) hieronder).

Hier moet ook verwys word na die standpunt van De Waal en Erasmus 1996 *Stell LR* 202 dat direkte horisontaliteit beteken dat wanneer private dispute tussen individue met verwysing na die Grondwet hanteer word, die gemenereg nie 'n rol speel nie. Hierdie siening is nie korrek met verwysing na die nuwe handves nie. Die Grondwet voorsien juis 'n toepassing van konstitusionele reg *en* privaatregtelike gemenereg (a 8(3)), of van gemenereg, beïnvloed deur konstitusionele reg (a 39(2)).

6 Bepalings oor die wyse van direkte horisontale werking van die handves: artikel 8(3)

Artikel 8(3) lui soos volg:

> "(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

Ek het die inhoud van hierdie bepalings reeds ten dele elders oorweeg in die konteks van grondwetlike skadevergoeding (Visser "Geen afsonderlike eis om 'grondwetlike skadevergoeding' nie" 1996 *THRHR* 696 ev) en volstaan hier slegs met die volgende opmerkings:

(a) Ten aanvang moet beslis word of, en in welke mate, 'n fundamentele reg horisontaal geld ten opsigte van 'n bepaalde eisoorsaak of verweersgrond (gevalle buite deliktuele aanspreeklikheid word tans buite rekening gelaat).

(b) Die nodige "effek" of erkenning (welke uitdrukkings nog verder gepresiseer moet word) moet aan so 'n fundamentele reg gegee word in die besondere horisontale verhouding ("effek" verwys natuurlik in die algemeen na meer as die beskikbaarstelling van die bekende deliksaksies).

(c) Die uitgangspunt is dat, tensy daar spesifieke wetgewing is, die gemenereg gebruik moet word in die horisontale werking van fundamentele regte. As die gemenereg onvoldoende is, *moet* dit verder ontwikkel word om "effek" aan 'n reg te verleen. Hierdie bepalings skep interessante ontwikkelingsmoontlikhede en 'n nuwe relevansie vir byvoorbeeld gemeenregtelike vergoedingsaksies wat buite die tradisionele geldingsgebied toegepas moet word om grondwetlike regte te beskerm.

(d) Die aanwysing om die gemenereg toe te pas, beteken byvoorbeeld dat die algemene beginsels van deliktuele aanspreeklikheid aanwesig moet wees alvorens 'n deliktuele vergoedingsaksie toegelaat kan word. Daar kan geen sprake wees van "outomatiese aanspreeklikheid" by die beweerde skending van 'n reg in die handves vervat nie – dit sou 'n primitiewe benadering wees. Na my mening sal daar in elke geval van 'n aksie *ex delicto* onder andere bewys moet word dat daar

vermoënskade of persoonlikheidsnadeel volgens die bestaande beginsels aanwesig is alvorens skadevergoeding of genoegdoening verhaal sal kan word.

(e) By die krenking van fundamentele regte wat terselfdertyd as gemeenregtelike persoonlikheidsregte ingevolge die Romeinsregtelike triade van *corpus*, *fama* en *dignitas* erken kan word, behoort daar geen besondere probleme te wees oor die *verlening* van die normale deliktuele remedies nie (sien in die algemeen ook *Du Plessis v De Klerk supra* par 57). Dit is byvoorbeeld duidelik dat "haatspraak" wat teen 'n identifiseerbare persoon of groep geuiter word, waarskynlik die *actio iniuriarum* weens *contumelia* kan fundeer. Die aantasting van enige fundamentele reg wat tot vermoënskade aanleiding gee, behoort in die algemeen die Aquiliese aksie te fundeer (vgl in die algemeen Danneman *Schadensersatz bei Verletzung der Europäischen Menschenrechtskonvention* (1994) *passim*). Daar kan natuurlik heelwat vraagstukke wees oor die afweging van of beperking op regte (sien ook (g) hieronder). Voorbeelde is die bekende vraag oor die verhouding tussen die reg op vryheid van uitdrukking en die beskerming van die reg op die goeie naam en watter vereistes vir 'n lasteraksie behoort te geld (sien vir 'n verwysing na 'n deel van die omvangryke literatuur oor hierdie probleem, Visser "Horisonaliteit van fundamentele regte afgewys" 1996 *THRHR* 511; Van Aswegen 1995 *SAJHR* 60 ev; Van der Vyver "Constitutional free speech and the law of defamation" 1995 *SALJ* 572; Gravet *Die konstitusionalisering van die privaatreg met laster as fokuspunt* LLB-skripsie UP 1996) *passim*; Neethling en Potgieter "Regsonsekerheid in die lasterreg in die lig van die Grondwet – die pad vorentoe?" 1996 *THRHR* 706; Beater *Zivilrechtliche Schutz vor der Presse als konkretisiertes Verfassungsrecht* (1996) *passim*; Soehring "Ehrenschutz und Meinungsfreiheit" 1994 *NJW* 2926; Gounanlakis "Soldaten sind Mörder" 1996 *NJW* 481; Stürner "Empfielt es sich, die Rechte und Pflichten der Medien präziser zu regeln und dabei den Rechtsschutz des einzeln zu verbessern?" *Gutachten A für den 58. Deutschen Juristentag* München 1990).

(f) Waar die krenking van 'n fundamentele reg nie tot vermoënskade aanleiding gee of ook nie persoonlikheidsnadeel in die tradisionele sin meebring nie (sien oor die begrip "persoonlikheidsnadeel" Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 55–60) behoort die *actio iniuriarum* nogtans toepaslik te wees indien die gewraakte handeling 'n krenking van die menslike waardigheid in die breë daarstel soos in die Grondwet erken word (sien bv a 1, 7, 10 en 35; vgl in die algemeen Burchell "Beyond the glass bead game: human dignity in the law of delict" 1988 *SAJHR* 1; Hager "Der Schutz der Ehre im Zivilrecht" 1996 *AcP* 168–218). Die objektiewe aantasting van hierdie waardigheid behoort voldoende te wees om 'n persoonlikheidskrenking in 'n uitgebreide of meer *gevorderde* sin uit te maak. Dit behoort nie nodig te wees om *belediging* (skending van die *dignitas* in die eng sin) in so 'n geval te bewys nie (sien bv *Neethling's Law of personality* 242 tav die reg op privaatheid). Prakties beteken dit dat byvoorbeeld in gevalle van onbillike diskriminasie (sien ook Von Bar *Gemeineuropäisches Deliktsrecht* par 569), onbehoorlike inmenging met vryheid van uitdrukking, inbreuk op taal- of kultuurregte, inbreuk op godsdiensvryheid, inmenging met sekere politieke regte daar denkbaar 'n *actio iniuriarum* tot beskikking van die benadeelde kan wees. Die inbreuk op hierdie regte behoort dus mettertyd as 'n *iniuria* aangesien te word (sien ook 1996 *THRHR* 695).

(g) Artikel 8(3)(b) bepaal in effek dat fundamentele regte beperk kan word deur die verdere ontwikkeling van gemeenregtelike verwere mits daar aan die vereistes

van artikel 36(1) (die algemene beperkingsartikel) voldoen word. Hierdie bepaling verleen byvoorbeeld die bevoegdheid om die tradisionele verwere teen 'n lasteraksie aan te pas in die lig van die groter speelruimte wat 'n reg op vryheid van uitdrukking veral in die politieke arena meebring, om die verweer van waarneming van die openbare inligtingsbelang by 'n aksie weens privaatheidskrenking "grondwetlik" te hersien (*Neethling's Law of personality* 266 ev), ensovoorts.

7 Slotgedagtes

Een afleiding uit artikel 8 is dat die wetgewer voorsien dat die privaatreg voortaan 'n nuwe rol moet speel, naamlik om in bepaalde gevalle die toepassing en erkenning van fundamentele regte in die gemeenskap te bestendig. In welke mate dit die privaatreg gaan beïnvloed, of dit sal lei tot die "konstitusionalisering" van die privaatreg en die vermindering van privaatoutonomie, is moeilik om nou te voorspel. 'n Langtermyn gevolg sal waarskynlik wees dat die onderskeid tussen privaatreg en publiekreg nog meer vervaag namate die privaatreg onder die invloed van en in diens van die handves van fundamentele regte kom om sekere "publiekregtelike" oogmerke te bereik.

Dit kan wees dat die wetgewer nou dus tog ingevolge artikel 8 aan die howe die taak opgedra het waarna regter Ackermann in *Du Plessis v De Klerk supra* par 112 met skynbare afkeer verwys het toe hy gesê het dat direkte horisontale werking kan neerkom op die "formidable ultimate task of reforming the private common law of this country". Na my mening sal dit tot gevolg hê dat daar 'n uitbreiding van die toepassingsveld van die deliktereg plaasvind in die geval van nuwe situasies. Die inhoudelike van die deliktereg – ook by persoonlikheidsbeskerming – funksioneer heel doeltreffend en het nie dramatiese aanpassings nodig ingevolge direkte of indirekte horisontale werking nie.

In die lig van die moontlikhede van (beperkte) direkte horisontale toepassing wat deur die nuwe handves van regte gemagtig word, ontstaan die vraag of indirekte horisontaliteit nog so belangrik in Suid-Afrika gaan wees soos byvoorbeeld in die Duitse reg. Dit kan wees dat indirekte beïnvloeding van die privaatreg ingevolge artikel 39(2) sal vervaag vir sover die howe grondwetlike beginsels en regte direk tussen private regsubjekte toepas (sien ook vir soortgelyke bedenkinge Du Plessis 10). 'n Ander moontlikheid is dat direkte en indirekte horisontale werking as 'n eenheid behandel en toegepas word.

PJ VISSER
Universiteit van Pretoria

REFLECTIONS ON THE *BONI MORES* IN THE LIGHT OF CHAPTER THREE OF THE 1993 CONSTITUTION

1 Introduction

The recently reported case of *Kalla v The Master* 1995 1 SA 261 (T) raised the issue of the interpretation of constitutional prescripts and, in particular, whether

such prescripts have retrospective application. It also dealt *obiter* with the question of the determination of the *boni mores* before and after the Constitution of the Republic of South Africa Act 200 of 1993 came into force. In this comment only the question of the *boni mores* will be dealt with.

In casu the applicants sought the review of a decision by the Master of the Supreme Court whereby he upheld the contention of the second respondent that the marriage she had contracted with the deceased in India in 1948 was valid in South African law.

At the time of the marriage the deceased was domiciled in South Africa. He travelled to India where he married the second respondent. The marriage was by Muslim rites in terms of which the deceased was allowed to have a maximum of four wives simultaneously, provided, however, that he was willing and able to treat such wives on a basis of absolute equality in respect of their physical and material requirements and also generally in regard to all aspects inherent in the marital relationship. *De facto*, however, the parties maintained a monogamous relationship in India and also after they had come to South Africa.

In his will the deceased bequeathed the sum of R20 000 to the second respondent, R2 000 to a Mohammedan mosque and the residue of his estate was left in equal portions to the first and second applicants. The second respondent contended that a marriage in community of property had existed between her and the deceased and that she was entitled to half of the assets of the joint estate (264B). As an alternative she claimed half of the estate on the basis that a universal partnership had existed between her and the deceased in that they lived as "common law" husband and wife. She furthermore claimed maintenance under the Maintenance of Surviving Spouses Act 27 of 1990. Second respondent founded her claim on correspondence from the Master to the effect that he regarded the marriage valid and that it was in community of property in terms of statute, as well as on a letter received from the Director-General of the Department of Home Affairs in 1993 in which the following was said:

> "The Department does recognise marriages solemnised according to the laws of other countries, therefore the particulars of the said marriage was (*sic*) entered into the computerised population register" (263H).

The computer print-out from the Department of Home Affairs indicating that the second respondent had the surname of Kalla and that her status was that of "*weduwee/wewenaar*" was used as corroboration of her argument (263F). The executor in the estate of the deceased rejected her claims, thereby conceding, as argued by the two applicants, that the marriage between second respondent and the deceased was potentially polygamous and therefore not valid and enforceable as a marriage in terms of South African law (264D–E).

The court had no hesitation in following the well-established approach of the Appellate Division that such polygamous marriages, being *contra bonos mores*, were void *ab initio* even if contracted outside the Republic. Consequently the decision of the Master that a valid marriage had existed between second respondent and the deceased was set aside.

2 The argument on the *mores*

It was argued before the court that section 14(1) of the 1993 Constitution guaranteed the right to freedom of religion and that there has been a change in the *mores* of the South African society since 1983 when the Appellate Division confirmed in *Ismail v Ismail* 1983 1 SA 1006 (A) that such marriages were void

ab initio. The court found that it was clear that the marriage *in casu* had never been validated in terms of the Indian Relief Act 22 of 1914 (265I).

After finding that the Constitution did not have retrospective application, the court came to the conclusion that the reliance on section 14(1) of the Constitution to validate retrospectively a marriage which was legally invalid in 1992 when it was terminated by the death of the deceased, was misplaced (270E). The court, however, refrained from considering the question whether section 14(1) had horizontal application. It was held that section 33(4) of the Constitution could point in the opposite direction (270D).

In order to reflect on the arguments regarding the changed *mores* as well as the question whether section 14(1) had horizontal operation, a brief excursion into the common law needs to be made. Section 14(1) provided that every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which freedom shall include academic freedom in institutions of higher learning.

2 1 The nature and determination of the mores *in terms of the common law*

In the *Ismail* case, a distinction was made between the narrower and wider sense of the phrase "*contra bonos mores*" (1025G–1026B). In the narrower sense it is normally used with reference to conduct which is regarded as immoral or sexually reprehensible. In the wider sense of the word, it can be defined as meaning

> "the accepted customs and usages of a particular social group that are usually morally binding upon all members of the group and are regarded as essential to its welfare and preservation" (1025H).

Against the background as set out above, the court held that a polygamous union solemnised under the tenets of the Muslim faith, and the customs related thereto, could not be considered *contra bonos mores* in the narrower sense of the word, but that it could be regarded as such in its wider meaning (see *Docrat v Bhayat* 1932 TPD 125 127; *Ngqobela v Sihele* (1893) 10 SC 346 352). As such it was regarded as

> "being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society".

(See also *Brey v Secretary for Inland Revenue* 1978 4 SA 439 (C) 443.)

Although the Appellate Division in *Seedat's Executors v The Master* (*Natal*) 1917 AD 302 recognised the principle that foreign courts would recognise the validity of a marriage contracted in accordance with the local law, it also drew attention to the exceptions to the principle. One such exception was that no country was under the obligation on the grounds of international comity to recognise a legal relation which was repugnant to the moral principles of its people (307). On that basis the court rejected polygamy, since it vitally affected the most important relationship into which human beings could enter. It was rejected by the majority of civilised peoples on grounds of morality and religion and the courts of a country which forbade it were not justified in recognising a polygamous union as a valid marriage. The court held that such a union was "fundamentally opposed *to our principles and institutions*" (309). A marriage, according to the Appellate Division in *Seedat*, was the union of one man with one woman, to the exclusion of all others while it lasted (309).

The practical implication of this state of affairs is that the word "spouse" as it appears in the Administration of Estates Act 66 of 1965, does not include a

woman married according to Muslim rites (*Davids v The Master* 1983 1 SA 458 (C) 461A).

It is abundantly clear that at common law, polygamous unions are void *ab initio*. Although remarks by the Appellate Division that such unions are fundamentally opposed to "*our*" principles and institutions (the "*our*" clearly being linked to a previous statement that polygamy is repugnant to the policy and legal institutions both of Holland and of England (308)) beg further comment, suffice it here to state that this exposition regarding the contents of the *mores*, is not representative of the values and norms of a substantial portion of the South African population.

2 2 The determination of the mores

The *mores* can never be a static concept (*Olsen v Standaloft* 1983 2 SA 668 (ZSC) 673). Since they reflect the fundamental assumptions of the community, the contents of the *mores* vary from country to country and from era to era:

> "Such flexibility may manifest itself in two ways: by the closing down of existing heads of public policy and by the opening of new heads. There is no doubt that an existing head of public policy may be declared redundant . . .
>
> A final observation may be made as to the way in which the courts determine the content of public policy. Apart from reliance on previous precedents, this is done by *a priori* deductions from broad general principles. It is not the practice in English Courts for the parties to lead sociological or economic evidence as to whether particular practices are harmful and it is doubtful to what extent such evidence would be regarded as relevant if it were adduced" (Cheshire and Fifoot *Law of contract* 9 ed 331).

In *Kalla's* case the court did not explicitly deal with the argument that the *mores* had changed. It came to the conclusion, however, that the argument that Islamic polygamous unions were no longer invalid in our law in view of the provisions of section 14(1), might well flounder on the provisions of section 14(3), since it could be argued that subsection (3) would not have been necessary had the draftsmen of the Constitution foreseen that subsection (1) would validate such unions. "In fact the draftsmen adopted the approach of *Seedat's Executors v The Master (Natal)* and provided for specified procedures" (270F). Section 14(3) provided that nothing in chapter three of the Constitution shall preclude legislation recognising the validity of marriages concluded under a system of religious law *subject to specified procedures*.

Further support for the rejection of the argument that the *mores* have changed, is to be found in the principle of gender equality embodied in sections 8(2) and 119(3) and Constitutional Principles I, III and V read together with section 232(4). In fact, the court stated that the conclusion may well be reached that polygamous, and also potentially polygamous marriages, are as unacceptable to the *mores* of the new South Africa as they were to the old.

2 3 The effect of the application of the mores

In *Cumming v Cumming* 1984 4 SA 585 (T) the respondent settled on appellant in an antenuptial contract certain assets subject to the condition that in the event of a separation, judicial or otherwise, or an order of divorce being made in any court between the parties "*howsoever caused and irrespective of which of the said consorts is responsible for the same*, then the said settlements shall revert to and become the sole and absolute property of the [respondent]" (italics added).

Appellant objected to this condition as being *contra bonos mores* in that it would induce, promote or leave unpenalised a course of conduct which was inconsistent with the marriage tie (587F). The condition might have had the effect of encouraging divorce for pecuniary benefit, since it offered the respondent an inducement to act in such a way that continued cohabitation became intolerable (590E).

The court referred to the *dictum* of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL):

> "The doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds . . . In popular language . . . the contract should be given the benefit of the doubt."

This approach was also followed in *Kuhn v Karp* 1948 4 SA 825 (T) and *Barclays Bank DC & O v Anderson* 1959 2 SA 478 (T). In *Barclays Bank* the court held that a mere tendency to disrupt a marriage relationship would not be sufficient as a ground for striking down provisions in a will. But if the object of a particular provision were to interfere with or disrupt a marital relationship, such a provision would be regarded as *contra bonos mores*. What was consequently required, was a condition which was inevitably calculated to lead to an infringement of the sanctity of the marriage relationship (486C–E).

It is submitted that the exposition in the cases mentioned above correctly reflects the position in South African law. Should a provision or a condition in a contract inevitably lead to an infringement of the sanctity of the marriage, such condition or provision would be struck down as *contra bonos mores*, and therefore void *ab initio*.

The court's reluctance to consider whether section 14(1) of the Constitution had horizontal application, will be considered against this background.

3 Constitutional perspectives on the questions raised in *Kalla*

3 1 Introduction

As set out in paragraph 2 *supra*, it was argued with reference to section 14(1) of the Constitution on behalf of the second respondent that the *mores* of our society have changed since 1983 (266F). Section 14(1) guaranteed the right to freedom of conscience, religion, thought, belief and opinion. When interpreting section 14(1), a court of law was obliged to take the provisions of section 35(1) into account. Section 35(1) prescribed that the values which underlie an open and democratic society based on freedom and equality had to be promoted in the interpretation of the fundamental rights entrenched in chapter 3, of which section 14(1) formed an integral part. In terms of section 33, the fundamental rights could only be limited on very specific conditions. The question therefore arises whether the values referred to in section 35(1) differ in any way from the values of our society before the commencement of the Constitution. The court suggested that a proper interpretation of the Constitution and the Constitutional Principles

> "may well lead to the conclusion that polygamous (and potentially polygamous) marriages are as unacceptable to the *mores* of the new South Africa as they were to the old" (270G).

3 2 The Constitution as a source of values and norms

There can be no doubt that every community has certain common values and norms. These values and norms must be applied by a judge when making a

decision, "and in doing so he must become 'the living voice of the people'; he must 'know us better than we know ourselves'; he must interpret society to itself" (Corbett "Aspects of the role of policy in the evolution of our common law" 1987 *SALJ* 67). In his efforts to determine the exact nature of such values and norms, the judge will have to rely on his own honestly held beliefs and opinions (Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 195; Van Wyk "Die bewys van *boni mores*" 1975 *THRHR* 386). Included in the values and norms of a particular community, are the legal convictions (*regsoortuiging*) prevailing in that community, also referred to as the *boni mores* (Van Aswegen 1993 *THRHR* 180; Van Wyk *THRHR* 76). The *boni mores* comprise the opinion of "alle redelik ingeligte mense in die samelewing" and are therefore no more vague than the so-called reasonable man test often applied by the courts (Van Wyk 1975 *THRHR* 386).

Before the enactment of the Constitution of the Republic of South Africa 200 of 1993, the notion of the *boni mores* mainly enjoyed application in private and criminal law as a criterion to determine the unlawfulness of a person's conduct. However, since the commencement of the 1993 Constitution the concept *boni mores* have undoubtedly obtained a constitutional law dimension as well. Chapter 3 of that Constitution has been described as a "bridge away from a culture of authority" (that is, a culture in which the leadership of the ruling party commanded parliament, parliament commanded its bureaucracy, and the bureaucrats commanded the people) to a "culture of justification" (that is, a culture in which every exercise of power is expected to be justified). In this regard chapter 3 may be described as a "compendium of values empowering citizens affected by laws or decisions to demand justification" (Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 32). Not only chapter 3 in particular, but also the Constitution as a whole contained an immanent value system (Kruger "Is interpretation a question of common sense? Some reflections on value judgments and section 35" 1995 *CILSA* 11–12).

At least some of the values of the community under the pre-1993 Constitution differ vastly from those reflected by the 1993 Constitution. After all, the South African constitutional dispensation has undergone fundamental change. The sovereignty of parliament has been done away with and a chapter on justiciable fundamental rights has been introduced into the Constitution, the supremacy of which was confirmed in section 4(1) of the 1993 Constitution. In the process of establishing the contents of the *boni mores* in a particular case, a judge under the pre-1993 Constitution had a wide discretion to interpret the views of the community. Under the 1993 Constitution (and, of course, the Constitution of the Republic of South Africa 108 of 1996) however, this discretion had been limited in the sense that the provisions of the bill of fundamental rights had to be taken into account. As far as the bill of rights is concerned, it is suggested that the very basic philosophical foundation underpinning the chapter can be said to be that of a democracy based on freedom and equality (Kruger 1995 *CILSA* 15). The contents of the *boni mores* are never static and are determined by time, place and circumstances. However, its contents have to be determined within the framework constituted by the fundamental rights entrenched in the Constitution (Rautenbach "Judisiële staatsoptrede in die VSA" 1971 *THRHR* 49–51).

Although the 1993 Constitution itself did not provide an unambiguous answer to the question whether chapter 3 also had horizontal and not only vertical application (Basson "Labour law and the Constitution" 1994 *THRHR* 501–502;

Gardener v Whitaker 1995 2 SA 672 (E); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC); *De Klerk v Du Plessis* 1995 2 SA 40 (T)), it is nevertheless clear that at least some private law rules, norms and principles would have had to be interpreted in the light of the basic values entrenched in the Constitution (s 35(3) of the 1993 Constitution; Neethling and Potgieter "Aspekte van die reg op privaatheid" 1994 *THRHR* 705–706). This would be particularly true when the *boni mores* are used in order to establish delictual unlawfulness, for instance. It is suggested that the same applies to the question whether it is against the *boni mores* to recognise certain polygamous marriages in South African law. The constitutional ethos projected by the chapter on fundamental rights will most probably penetrate the so-called private sphere in many more ways, thereby convincing persons and institutions within the private sphere to toe the fundamental rights line (Van der Vyver "The private sphere in constitutional litigation" 1994 *THRHR* 395).

The Constitutional Court decided in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) that chapter 3 of the 1993 Constitution had no direct horizontal application. It is, however, submitted that the decision of the court does not imply that chapter 3 had no implications whatsoever for private law relationships. This submission is in accordance with the provisions of section 35(3) of the Constitution which stipulated that a court, in the interpretation of any law and the application and development of the common law and customary law, had to have due regard to the spirit, purport and objects of chapter 3. It is also confirmed by the observations of some of the judges. Kentridge AJ declared that

> "the provisions of chapter 3 are not *in general* capable of application to any relationship other than that between persons and legislative or executive organs of state at all levels of government" (695; our emphasis).

Mahomed DP, although concurring in the judgment of Kentridge AJ, stressed that he would remain

> "profoundly uncomfortable if the construction favoured by Kentridge AJ meant, in practice, that the Constitution was impotent to protect those who have so manifestly and brutally been victimised by the private and institutionalised desecration of the values now so eloquently articulated in the Constitution" (702).

Mokgoro J found that although the Constitution did not make provision for horizontal application in "*the ordinary course*" (733; our emphasis),

> "the realm of so-called private law, whether embodied in legislation, common law, or customary law, is by no means immunised from the values of the Constitution as a whole or from those articulated in Chapter 3 in particular" (734).

In fact, she expressly pointed out that

> "the Constitution assigns to courts an *affirmative responsibility* to apply and develop both common law and customary law in a manner that imbues both systems of law with the values embodied in Chapter 3" (733).

The 1996 Constitution is much clearer on the issue of horizontality than the 1993 Constitution. Section 8(2) provides that

> "a provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right".

Although this provision explicitly authorises the horizontal application of the Constitution in certain circumstances, it will be the task of the court to determine the exact extent of such application.

4 Conclusion

It is submitted that chapter 3 of the 1993 Constitution, and more in particular section 35(4), introduced a new framework of reference for determining the *mores*. As such it had to be considered in *Kalla* and *De Klerk* whether, and to what extent, the chapter had *Drittwirkung*. While the Court in *Kalla* refrained from formally addressing the issue, the *De Klerk* decision apparently denied the direct application of the Constitution in the sphere of private law.

We submit, however, that *De Klerk* should not be understood as rejecting the application of the Constitution in private law relationships *in toto*. As indicated above, the phrases used cast considerable doubt on what the majority decision really had in mind, but what seems to be clear is that it conveyed a definite intention that the Constitution does not have direct application in such relationships. To our understanding the decision should not be understood as excluding the indirect application of the Constitution in private law relationships. In fact, the very wording of section 35(4) illuminated the obligation on courts to bear out on the principles contained in the section. If such is the correct interpretation of *De Klerk*, it becomes clear that section 35(4) as the embodiment of a new set of *mores*, found application in the sphere of private law, albeit indirectly.

GM FERREIRA
JA ROBINSON
Potchefstroom University for CHE

DIEREREGTELIKE BESKERMING VAN HENNE IN LÊBATTERYE

1 Inleiding

Beide die Europese Geregshof (EuGH) en die Duitse Bundesgerichtshof (BGH) is in onlangse beslissings met die regsposisie van henne wat in lêbatterye aangehou word, gekonfronteer (*EuGH*, Urt v 19/10/1995, *NJW* 1996, 113; *BGH*, Urt v 6/7/1995, *NJW* 1996, 122). In 'n onlangse publikasie is die behoefte aan die erkenning van werweldiere se reg op biopsigiese integriteit onder die loep geneem (Labuschagne en Crosby "Die werweldier se reg op biopsigiese integriteit" 1996 *THRHR* 72). Teen die agtergrond van bogenoemde twee hofbeslissings word die diereregtelike beskerming van henne in lêbatterye kortliks ondersoek.

2 Die positiewe reg

Die leidende Duitse saak in dié verband is 'n beslissing van die BGH van 18 Februarie 1987 (*NJW* 1987, 1833). Die feite van die saak was kortliks soos volg: Aangeklaagde (A) het 40 000–60 000 lêhenne in draadhokke (-koue) aangehou. Hierdie hokke het in twee groot onderdakruimtes in ses dubbelrye teenoor mekaar gestaan. In elke ry is vier hokke teenoor mekaar gestel. Daar was twee groottes hokke. Die vierhenhokke was 41 sentimeter breed, 42 sentimeter diep, aan die voorkant 42 sentimeter en aan die agterkant 33 sentimeter hoog. Die vyfhenhokke het dieselfde afmetings gehad behalwe dat dit 50 sentimeter breed was. By besetting het elke hen 420 tot 430 vierkante sentimeter ruimte tot haar

beskikking gehad. Die hokbodem is, om die afrol van die eiers te verseker, met 12 grade vorentoe gekantel. Aan die voorkant van die hokke was 'n voertrog en aan die agterkant 'n waterleiding. Die henne is op die ouderdom van vyf maande in die hokke geplaas, het daar gebly vir 13 tot 15 maande en is dan as slaghoenders (in die vorm van sophoenders; "Suppenhühner") bemark. Die hof *a quo* het, na raadpleging van vier deskundiges, tot die konklusie gekom dat die henne dierartsenykundig in 'n goeie toestand was hoewel hulle aan geringe veerskade gely het, wat geleidelik verswak het maar selfs by die oudste henne nog nie beduidend was nie. Hulle kon in ieder geval 'n reeks aangebore gedragspatrone glad nie of slegs beperkend in die hokke uitvoer. Die hof kom tot die konklusie dat deur die wyse van aanhouding aan die henne lyding toegevoeg is. Die lyding was egter nie, soos vereis in artikel 17(2b) van die Tierschutzgesetz (TSG), aansienlik ("erheblich") nie. Die hof bevind verder dat die vereiste skuld nie bewys is nie en vind A onskuldig. Die staat wend hom in hoër beroep tot die BGH. Die BGH beslis eerstens dat die aanwending van 'n vae begrip soos "langdurige en herhalende aansienlike pyn of lyding" ("länger andaurende oder sich wiederholende erhebliche Schmerzen oder Leiden") nie die sekerheidseis (legaliteitsbeginsel) van die strafreg skend nie (sien ook Labuschagne "Die sekerheidsbasis van die strafreg" 1988 *SAS* 70–71). Die BGH wys verder daarop dat artikel 17(2b) TSG sonder enige begrensing geld vir intensiewe aanhouding van nutsdiere, insluitend die aanhouding van henne in lêbatterye. Volgens die BGH beteken "lyding", soos in artikel 17(2b) TSG gebruik, inbreukmaking op die welsyn van die dier wat meer is as geringe ongemak, wat vir 'n wesenlike tydperk voortduur en nie onder die begrip "pyn" tuisgebring kan word nie. Om binne die trefkrag van artikel 17(2b) TSG te val, moet die lyding aansienlik wees. Die BGH bevestig in finale instansie die beslissing van die hof *a quo*.

In die EEG word tans vereis dat 'n oppervlaktebodem van ten minste 450 vierkante sentimeter per hen beskikbaar moet wees. Die EuGH beslis dat die hedendaagse vereiste van die Duitse reg dat 550 vierkante sentimeter vir 'n hen wat minstens twee kilogram weeg, beskikbaar moet wees, nie in stryd met die riglyne van die EEG is nie. Dit staan lidlande vry om strenger voorskrifte te stel (*NJW* 1996, 113; sien ook BGH, *NJW* 1996, 122). 90% van alle eiers word in Duitsland gelê deur henne wat in hokke (koue) aangehou word. 85% van die inwoners is gekant teen gebruikmaking van lêbatterye (*NJW* 1996, 122).

Artikel 2(1)(b) van die Dierebeskermingswet 71 van 1962 bepaal in Suid-Afrika soos volg:

> "Iemand wat . . . 'n dier onnodig of in sulke toestande of op so 'n wyse of in so 'n houding dat dit onnodige lyding aan daardie dier veroorsaak of in 'n plek wat onvoldoende ruimte, lugtoevoer, lig, beskerming of beskutting teen hitte, koue of die weer bied, inperk, vasketting, op tou slaan of vasmaak . . . is, behoudens die bepalings van hierdie Wet en enige ander wetsbepalings, aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens R4 000 of, by wanbetaling, met gevangenisstraf vir 'n tydperk van hoogstens twaalf maande of met daardie gevangenisstraf sonder die keuse van 'n boete . . ."

Die begrip "dier" omvat ingevolge artikel 1 ook 'n hoender. Hierdie bepaling geld duidelik ook vir boerderybedrywighede (sien Labuschagne en Bekker "Dieremishandeling" 1986 *Obiter* 45–46; Karstaedt "Vivisection and the law" 1982 *THRHR* 351).

Die Suid-Afrikaanse Pluimveevereniging (SAPA) het pro-aktief te werk gegaan om konfrontasie met dierewelsynaktiviste en regstoepassers te voorkom

(sien Weiss "Teenvoeter teen agitasie oorweeg" *Landbouweekblad* 1992-05-08 38). Die SAPA het 'n praktykskode saamgestel wat ook voorskrifte ten aansien van kommersiële lêhenne bevat. Die volgende inligting word in dié verband in die *Poultry Bulletin* 1992-04-08 150 weergegee:

> "Commercial egg producers belonging to SAPA subscribe to the following practices: 1. To provide the housing and equipment necessary to protect the health and welfare of their flocks. 2. To provide the necessary sanitation, vaccination and medication programmes to protect the health of their flocks from disease, infection and poultry illnesses. No drugs are to be used to stimulate growth. 3. To maintain all feed, water, light, ventilation and standby equipment in good operational condition. 4. To provide cages which have adequate space and take into consideration the welfare of their flocks. 5. To give due consideration to the welfare of the flock when making husbandry decisions. 6. To use humane methods when it becomes necessary to dispose of any bird. 7. To schedule a daily inspection of all birds on their farms. 8. To make all personnel knowledgeable of those factors that can cause discomfort to pullets and hens. 9. In case of disputes, to undertake to subject themselves to an enquiry by experts appointed by the SA Poultry Association."

Dit behoort teen die agtergrond van die Duitse reg hierbo bespreek en die houding van die BGH en EuGH duidelik te wees dat dié voorskrifte te vaag is. Soos uit die verdere bespreking sal blyk, is dit daarbenewens te antroposentries en word aan die belange van die dier bloot 'n afgeleide status toegeken.

3 Diereregtelike dimensie

Soos by vorige geleenthede aangedui, is die dier se welsyn en belange ter wille van homself beskermingswaardig (Labuschagne "Regsubjektiwiteit van die dier" 1984 *THRHR* 334; "Regsobjekte sonder ekonomiese waarde en die irrasionele by regsdenke" 1990 *THRHR* 557; "Modekonformering, dieremishandeling en diereregte" 1995 *THRHR* 750; sien ook Labuschagne en Crosby 1996 *THRHR* 81). Wêreldwyd is daar toenemend 'n neiging om die pyn- en ongeriefsvlak van diere wat by wetenskaplike navorsing betrokke is, streng te monitor en duidelike grense vas te lê (Labuschagne en Crosby 1996 *THRHR* 77–78; Labuschagne "Gewetensvryheid, wetenskaplike navorsing en die diereregtelike grense van eksperimente met diere" 1995 *SALJ* 698). 'n Dier het myns insiens 'n reg op vermyding van onnodige (liggaamlike en psigiese) pyn. Sweeny wys tereg daarop dat indien onaanvaarbare lyding by diere teen ekstra koste uitgeskakel kan word, die koste gedra moet word (*Animals, cruelty and law* (1990) 37). 'n Dier behoort as uitgangspunt ook 'n reg op instinkmatige bewegingsvryheid te hê (Labuschagne en Crosby 1996 *THRHR* 80–81). Hoenders het, by wyse van voorbeeld, 'n behoefte (instink) tot versorging ("grooming") (Sweeny 37; sien verder die werk van Moss (red) *The laying hen and its environment* (1980) 1 ev en dié van die Farm Animal Welfare Council *Report on the Welfare of Laying Hens in Colony Systems* (1991) 11–20).

In 'n artikel getiteld "Cages aren't cruel" (*Farmer's Weekly* 1989-02-10 11) verklaar Phelps soos volg:

> "Is it too much to call for objectivity? Is objectivity ever possible in a case like this? There is [sic] a lot of carefully researched data on the requirements of poultry with regard to air temperature, to humidity, to population density and to many other aspects of welfare. Very few people seriously question the validity of these findings. They can be regarded for the purpose of drafting norms and standards as objective, but there remains the application of such 'objective' truths. At this stage, the democratic process begins to operate. What the producer can and should do is

> ensure that the legislative body receives all the available scientific evidence before regulations are drafted. What the consumer has to realise is that when animals are used to provide food for human consumption, this inevitably involves imposing restrictions on the behavioural pattern of these animals. Unless man goes back to trapping and killing wild animals, this pattern is here to stay. The question will always be: to what extent can we decently restrict the freedom of movement of the farm bird or animal? The answer will be based on the prevailing ethical code. The obvious and only solution is to apply the available objective scientific criteria in measuring what is to be the acceptable level of livestock welfare."

Hierdie siening is myns insiens korrek maar slegs in soverre van wetenskaplike kennis aangaande die welsyn en behoeftes van die betrokke diere gebruik gemaak word om bogenoemde diereregte te artikuleer.

4 Konklusie

Die belangrikste probleem in die onderhawige verband is dat die welsyn van die henne met die besigheidsbelange van die eienaars in konflik kom (sien bv Gittens "More hens per house with automation" *Farmer's Weekly* 1989-10-20 6; Phelps "Keeping them laying when it's hot" *Farmer's Weekly* 1989-01-13 18). Inligting dui egter daarop dat die welsyn van die henne die eierproduksie komplementeer. So verklaar Reni van Dyk van die *Livestock Welfare Association* ("Animal welfare with regard to the poultry industry" *Poultry Bulletin* Jan 1991, 29; sien ook Jasper en Nelkin *The animal rights crusade* (1992) 141–142):

> "However . . . in order to achieve and maintain optimum production (whether layer or broiler), the welfare of the birds are [sic] vitally important. Factors which come to mind include the following:
>
> – feed and water requirements (quality and cleanliness)
>
> – floor space (cage or floor density)
>
> – ventilation and temperature control
>
> – hygiene and disease control
>
> – handling and transportation in the case of broilers
>
> – debeaking in the case of layers
>
> As can be seen from the above, animal welfare and certain management practices actually go hand in hand. If we . . . can achieve full support from the various poultry enterprises in so far as visits are concerned, problem areas could be discussed and hopefully improved. This in turn will not only be advantageous to the animals, but at the same time should result in improved production for the specific enterprise and thus for the industry as a whole."

In Swede is die aanhou van henne in lêbatterye sedert 1988 verbode (Havinga "Animal rights" *Farmer's Weekly* 1989-11-10 32). Agitasie vir 'n algemene verbod daarop begin wêreldwyd steun verkry (Appelby "Modified cages for laying hens: Future prospects" in Sherwin (red) *Modified cages for laying hens* (1994) 95). Miskien is dit diereregtelik die aangewese uitweg veral aangesien misbruik daardeur in 'n groter mate hokgeslaan sou kon word.

JMT LABUSCHAGNE
Universiteit van Pretoria

DIE ETIESE FEMINISME VAN CORNELL*

Drucilla Cornell propageer 'n *etiese feminisme* en 'n nuwe choreografie vir seksuele verskil. Cornell ("The doubly-prized world: myth, allegory and the feminine" 1990 *Cornell LR* 644) wil die *vroulike* bevestig maar nie op 'n essensialistiese of naturalistiese wyse nie:

> "As we shall see, the Feminine should neither be identified with the experience of any given historical group of women, nor philosophically denied and politically rejected as a regrettable return to essentialism belied by the play of difference. To affirm the Feminine within sexual difference, we do not need an essentialist theory of woman."

Cornell voer aan dat die aanspraak op die vroulike en feministiese teorie nie negeer kan word nie. Sy erken die dilemma waarin die feminisme haarself bevind met betrekking tot die kwessie van verskil en die konsep van die vroulike. Sy argumenteer dat indien feminisme 'n beweging eie aan vroue is, 'n mens op 'n vroulike stem en 'n vroulike *werklikheid* moet kan steun. Sy plaas realiteit in aanhalingstekens om juis die posisie van die vroulike realiteit as "*stranger than facts*" en "*a little to the rere*" te verduidelik. Cornell *idem* 644 poog om verby die sentrale dilemma wat feministiese teorie konfronteer, naamlik 'n nie-essensialistiese bevestiging van die vroulike, te beweeg. Sy opper die punt dat alle weergawes van die vroulike berus op rigiede geslagsidentiteite wat die ware verskille tussen vroue ontken en die geskiedenis van onderdrukking weergee eerder as om 'n ideaal te skep waarna gestreef kan word. Hierdie dilemma kan opgelos word deur terug te keer na die vraag oor die betekenis van die vroulike. Cornell *idem* 645 verwys in hierdie verband na 'n aanhaling van Emily Brontë: "This world is hopeless without the world I doubly prize." Cornell *ibid* voer aan dat Brontë se woorde aangewend kan word om lig te werp op die betekenis van die *vroulike*:

> "The world doubly prized is the world stranger than facts that opens us to the possibility of a new choreography of sexual difference, through an allegorical account of the Feminine as beyond any of our current stereotypes of Woman. We also need to prize the Feminine, in and for itself, through the retelling of the myths of the Feminine as an imaginative universal. Both myth and allegory are necessary, indeed unavoidable, in feminist theory."

Cornell voer aan dat wanneer die verhouding tussen *mite* en *allegorie* in opvattings van die vroulike begryp word, die rol van die utopiese perspektief van die *not-yet* oopgemaak sal kan word. (*Mite* word tradisioneel omskryf as 'n verhaal wat ontstaan uit die drang van primitiewe volkere om natuurkragte, dit wat by die mens vrees inboesem, te personifieer en te vergoddelik. Daar is egter vele eietydse mites, veral rondom geslag en geslagtelikheid, geslagsrolle, ensovoorts. *Allegorie* is die teenoorgestelde van simboliek. Daar word van die *werklikheid* gebruik gemaak om iets te vertel maar die eintlike betekenis moet agter die

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* Gedeelte van LLM-skripsie (Unisa) getiteld "Rekonstruktiewe feminisme: 'n Ondersoek na die reg as 'manlike' struktuur en die moontlikheid van transformasie met spesifieke verwysing na pornografie". Dank is verskuldig aan prof JW van der Walt (studieleier) vir sy waardevolle hulp en leiding.

oppervlak-gegewe verhaal gelees word (Grové *Letterkundige sakwoordeboek* (1988) 5 89).) Hierdie perspektief lig die tekortkominge uit van die bestaande sisteem waarvolgens geslag voorgestel word. In feministiese teorie het die vroulike dikwels die gedagtes van bevryding en verlossing beliggaam. Feministe het dikwels aangevoer dat die ideaal van die vroulike nagestreef moet word. Cornell toon aan hoe hierdie normatiewe oordeel dikwels gemaak word vanuit die beskrywings van hoe vroue veronderstel word om te *wees*. Dit is belangrik dat die vrou se verhaal gehoor moet word en dat die stilte wat haar verhaal verdring het, deurbreek moet word. Die *behoort te wees* wat opgesluit is in die vroulike moet dus nie alleen beslag kry in die erkenning van die vrou as *ander* nie maar ook in die erkenning van die vroulike as 'n beter wyse van menswees. Cornell stel etiese feminisme voor as alternatief tot sowel liberale as radikale feminisme. Etiese feminisme erken spesifiek die *behoort te wees* wat in die vroulike beliggaam is. Etiese feminisme fundeer die vrou se storie nie op hoe vroue is nie maar op die herinnering aan die *not-yet* wat weergegee word in beide allegorie en mite. Dit is belangrik om op Derrida se suspisie van die gebruik van allegorie, mite en metafoor te wys ten opsigte van die beskrywing van die vroulike. Die probleem is dat enige beskrywing die gevaar loop om weer eens rigiede identiteite vas te lê. Cornell *Beyond accommodation* (1991) 170 voer egter aan:

> "The disruptive power of the allegory of Woman ironically seems to depend on deferring any attempt to specify the feminine."

'n Beskrywing van die vroulike is egter tog belangrik, veral in regsdiskoers. In hierdie verband moet Derrida se oproep tot *double writing* beklemtoon word:

> "The need for what Derrida calls 'double writing' is based on this recognition that the very idea of the limit of context, its de-limitation, also implies its non-closure, and the possibility of the transformation of any context" (Cornell *Beyond accommodation* 170).

In haar boek *Transformations* (1993) 1 bespreek Cornell twee aspekte van transformasie. In die eerste plek dui transformasie vir haar op 'n radikale en ingrypende strukturele verandering van 'n sosiale of politieke sisteem wat tot gevolg het dat die identiteit van die sisteem self verander. Die moontlikheid van so 'n ingrypende verandering van 'n sosiale sisteem hang egter nou saam met 'n tweede problematiek, naamlik die ontvanklikheid van die individue binne so 'n sosiale sisteem vir radikale verandering. Met ander woorde, die vraag na transformasie of ingrypende sosiale verandering hang in die tweede plek saam met die tipe individue wat ons moet word voordat radikale verandering 'n moontlikheid kan word. Die feministiese perspektief fokus volgens Cornell juis op die vraag waarom ons die moontlikheid van transformasie slegs kan oorweeg as ons ook die vraag opper oor watter tipe subjek oop sal wees vir die skep van nuwe wêrelde. Die tweede betekenis van transformasie hang dus nou saam met die eerste. Deur te fokus op die aard van individue om hulself oop te maak vir verandering, word die verandering wat benodig word om 'n ander struktuur te skep, beklemtoon:

> "A system can so alter itself that it not only no longer confirms its identity, but disconfirms it and, indeed, through its very iterability, generates new meanings which can be further pursued and enhanced by the socio-symbolic practice of the political contestants within its milieu" (Cornell *Transformations* 2).

Cornell (*idem* 4) ondersoek vervolgens hoe die geslagtelikheidshiërargie wat die manlike bevoorreg en die vroulike onderdruk, aangespreek moet word in die twee betekenisse van transformasie. Sy voer aan dat vir vroue om gelykheid op

politieke, regs- en ekonomiese vlak te verkry, die rigiede strukture van geslagsidentiteit en die kategorisering van heteroseksualiteit as normale volwasse seksualiteit ondermyn moet word. Die uitdaging van patriargie (sisteem van manlike gesag, hiërargiese struktuur waar mans oppergesag beklee en vroue daaraan onderwerp word) moet die bevestiging van die vroulike binne seksuele verskil bevestig. Sy argumenteer op hierdie punt teen Catherine MacKinnon wat beweer dat enige bevestiging van die vroulike deel van die tradisionele onderdrukking van die vrou vorm. Cornell gebruik in hierdie opsig *sexual difference* eerder as *gender* omdat *gender* 'n verdeling maak tussen manlik en vroulik. Daar moet gefokus word op *seksualiteit as 'n sosiale konstruksie*, en in watter mate dit sentraal tot radikale sosiale verandering staan; met ander woorde, watter rol seksualiteit, geslag en geslagtelikheid in bogenoemde proses van transformasie gaan speel. Sy voer aan dat sonder die bevestiging van vroulike seksuele verskil, die teenswoordige geslagshiërargie onbewustelik voortgesit sal word. Hierdie argument mag aanvanklik paradoksaal voorkom. Die bevestiging van die vroulike blyk op die dichotomie (naamlik die onderskeid tussen manlik en vroulik) te rus wat feministe juis poog te ondermyn. Hierdie paradoks kan opgelos word wanneer verstaan word dat die verwerping van die vroulike die logika van die patriargale orde onderlê. In hierdie verband kan na De Beauvoir se standpunt dat die vrou as "ander" verwerp is, verwys word. In die huidige sisteem word vroulike andersheid op grond van geslag en geslagtelikheid as minderwaardig geag. Feministiese teorie moet egter terselfdertyd die vroulike bevestig en opvattings van die vroulike problematiseer.

'n Ander kwessie wat Cornell indringend bespreek, is hoe die vroulike bevestig kan word sonder om aanspraak te maak op die *essensialistiese* of *naturalistiese* teorieë van die vroulike. Cornell verwys na die siening van Spivak (*"In a word" differences* (1989) 124) wat aanvoer dat 'n *strategiese essensialisme* noodsaaklik is om feminisme te bevorder slegs vir 'n tydelike en politieke doel:

> "It seems to me that the awareness of strategy – the strategic use of an essence as a mobilizing slogan or masterword like *woman* or *worker* or the name of any notion that you would like – it seems to me that this critique has to be persistent all along the way, even when it seems that to remind oneself of it is counterproductive. Unfortunately, that crisis must be with us, otherwise the strategy freezes into something like what you call an essentialist position" (Spivak soos aangehaal in Benhabib en Cornell *Feminism as critique* (1987) 180).

Die vraag wat sy in hierdie verband wil aanspreek, is hoe daar teen die agtergrond van die postmoderne kritiek op enige objektiewe beskrywing van die vrou as bevestigend van die bestaande geslagshiërargie nog hoegenaamd 'n betoog van die bevestiging van die vroulike gelewer kan word. Cornell voer aan dat die betekenis van dekonstruksie vir die feminisme in ag geneem moet word om te verstaan hoe die vroulike bevestig kan word sonder om op essensialistiese teorieë terug te val. Sy herbenoem dekonstruksie as *the philosophy of the limit* en voer aan dat dit enige poging om toe te maak (met dié begrip word bedoel alle pogings om 'n finale omskrywing te gee wat allesomvattend is) en om die *ware* te vervat, ondermyn deur die grense van sodanige pogings aan die lig te bring. Hierdie ondermyning kan en behoort gelees te word as 'n strategie om nuwe betekenismoontlikhede oop te maak. As sodanig is dit 'n bevestiging van die oop en onvoltooide spel van die vroulike verbeelding. Juis omdat die vroulike nooit beperk kan word tot die huidige definisies daarvan nie, propageer sy 'n etiese bevestiging van die vroulike binne seksuele verskil. Etiese bevestiging in hierdie verband beteken 'n bevestiging wat nie op 'n positiewe beskrywing van die

vroulike rus nie, maar oop is vir die herartikulering van die onmoontlikheid van 'n volledige weergawe van die vrou:

> "The affirmation of the feminine within sexual difference operates within a performative contradiction that explicitly recognises that the feminine is precisely what is denied in the specificity of a nature or a being within the masculine symbolic" (Cornell *Transformations* 6).

Cornell voer aan dat die politiese uitdaging van essensialisme en naturalisme ook belangrik is om die *klas* en *rasseverskille* tussen vroue te erken. Die aanspraak op 'n essensialistiese omskrywing van die vroulike het tot dusver dikwels in die slaggat getrap om die belewenis van die wit vrou as die belewenis van alle vroue te beskryf (sien Spivak *The Rani of Sirmur: An essay in reading the archives* (1985) 247).

Alice Walker het enorme negatiewe kritiek ontvang vanuit die swart gemeenskap, veral swart mans, op haar boek *The color purple* (1982) wat ook verfilm is. Die reaksie was veral gerig op die karakter "Mister" wat hom aan growwe seksisme, brutaliteit en geweld skuldig maak. Walker reageer deur te sê dat swart mans 'n oënskynlike onvermoë het om empatie te toon met swart vroue se stryd teen seksisme. Hul reaksie op die boek en film was om soveel moontlik aandag op hulself te plaas as slagoffers van negatiewe uitbeelding en sodoende die realiteit van vroue se uitbuiting te ontken: "We should just go back to the sickness we came from" (Walker 79).

Sy voer aan dat swart mans en vroue grotendeels verantwoordelik was vir die aanvuring van vryheid. As 'n kind het sy nie die dubbele standaard gehoor wat tans geld nie:

> "When Malcolm said, Freedom, by any means necessary, I thought I knew what he meant. When Martin said, agitate nonviolently against unjust oppression, I assumed he also meant in the home, if that's where the oppression was" (*ibid*).

'n Swart digter en skrywer, Cheatwood, het Walker erg gekritiseer oor 'n gedig waarin sy skryf oor die verkragting van haar ouma. Hy skryf dat Walker in die guns van die *liberal mainstream* is en dat "liberals especially like to see black people gnawing at" (*idem* 87). Sy reageer deur te verklaar dat dit juis haar etnisiteit is wat haar in staat stel om oop te maak en die minste wat sy kan doen, is om die ware storie van haar voorouers te vertel:

> "We are the African and the trader. We are the Indian and the settler. We are the slave and the enslaved. We are oppressor and oppressed. We are the women and we are the men (*idem* 89).

Walker is ook gekritiseer vir die lesbiese verhoudings wat sy uitbeeld en dat dit aandag sal vestig op lesbiëers in die swart gemeenskap. Sy voer aan dat dit nie soseer die uitbeelding van swart mans as brutaal is wat die kritici pla nie, maar die feit dat die swart vroue hulle eie agenda het wat nie aanvaarding van die gewelddadigheid van mans insluit, en die moontlikheid om vroue lief te hê, uitsluit nie.

Nog 'n kontroverse swart vrou wat haar stem laat hoor, is die digter Nikki Giovanni. Sy het baie kritiek vanuit die swart gemeenskap gekry toe sy geweier het om sport- en kultuurboikotte teen Suid-Afrika te steun. Oor feminisme laat sy haar soos volg uit:

> "I'm sympathetic of course . . . I think it has relevance to white women, and I wish them luck. But I think it's going to be a long time before they have any black women involved in it or before black women and white women come together, because there's a lot of emotion . . . Feminism says, hey you don't need it. I know

> when I'm talking to those ladies that they need it. And I say, hey, feminism says you can have it. That's the ideological breakdown (Fowler *Conversations with Nikki Giovanni* (1992) 63).

Die volgende woorde wat reeds so lank gelede as 1851 gespreek is, is tekenend van die frustrasie van die swart vrou wat haar nie met die ideologie en bevrydingstryd van die wit vrou kon vereenselwig nie:

> "Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me – and ain't I a woman? I could work as much and eat as much as a man – when I could get it – and bear the lash as well! And ain't I a woman? I have born thirteen children, and seen most of 'em sold into slavery, and when I cried out with my mother's grief, none but Jesus heard me – and ain't I a woman? (die woorde van Sojourner Truth, 1851, soos aangehaal deur Crenshaw "A black feminist critique of anti-discrimination law and politics" in Kairys *The politics of law* (1987) 203).

Die gevolg is dat feminisme beskuldig word dat sy vroue se stemme stilmaak in die proses om aan hul 'n stem te gee. Om reg te laat geskied aan vroue se verskille, moet die vroulike dus op 'n nie-essensialistiese wyse verstaan word. Sy beklemtoon die feit dat die bevestiging van die vroulike binne seksuele verskil buite huidige geslagshiërargie slegs moontlik is wanneer begryp word hoe die rigiede identiteite aanhoudend ondermyn word deur die herhaling wat die bestaan van hul betekenis toelaat. Cornell verwys hier na die Derridiaanse beginsel van *iterability* wat dui op die onvolkomendheid van herhaling om dieselfde gedagte op dieselfde wyse weer te gee:

> "The critical task is rather, to locate strategies of subversive repetition enabled by those constructions, to affirm the local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and therefore, present the immanent possibility of contesting them" (Butler soos aangehaal deur Cornell *Beyond accommodation* 199).

Die etiese bevestiging van die vroulike berus nie op 'n *positiewe* beskrywing van die vroulike binne geslagshiërargie nie, maar funksioneer binne die ruimte wat oopgehou word vir herartikulering van die onmoontlikheid van 'n volledige weergawe van die vrou.

Dit is nodig om in hierdie stadium Cornell *The philosophy of the limit* (1992) 13 se siening van die *etiese* te verduidelik. Sy onderskei tussen *moraliteit* en die *etiese verhouding*:

> "For my purposes, morality designates any attempt to spell out how one determines a right way to behave, behavioral norms which, once determined, can be translated into a system of rules. The ethical relation, a term which I contrast with morality, focuses instead on the kind of person one must become in order to develop a non-violative relationship to the Other. The concern of the ethical relation, in other words, is a way of being in the world that spans divergent value systems and allows us to criticise the repressive aspects of competing moral systems."

Sy staan 'n etiese feminisme voor wat krities op gegewe sosiale sisteme en strukture kan inwerk ten einde 'n transformasie en rekonstruksie te bewerkstellig. Die klem op gedagtes soos die *not-yet* en die *beyond* staan sentraal in die etiese feminisme se poging om die gegewe te problematiseer en streef na die vervulling van 'n onbereikbare droom. Die ophef van geslagshiërargie en die luister na die vroulike stem binne seksuele verskil is onlosmaaklik deel van 'n feministiese program van regsverandering en transformasie. Sy lewer kritiek op

onder andere twee ander feministiese regsteoretici, naamlik Robin West en, soos reeds genoem, Catherine MacKinnon.

West vertel 'n verhaal van vroue se andersheid wat gebaseer is op hulle vermoë om voort te plant. Sy wil 'n *fenomenologie* van vroue se andersheid ontwikkel wat vroue se belewenis sal ontbloot. Cornell 1990 *Cornell LR* 646 merk op dat West dié term nie in die streng filosofiese sin gebruik nie (sien West "The difference in women's hedonic lives: a phenomenological critique of legal feminist theory" 1987 *Wisconsin Women's LJ* 8). Sy voer aan dat die reg vroue se belewenis negeer. In hierdie verband wys sy daarop dat die werk wat vroue doen, geag word van minder waarde te wees as die werk wat mans doen, byvoorbeeld wanneer bydraes tot 'n gesamentlike boedel bereken moet word. Die reg kan dikwels nie vroue vergoed vir skade wat gely is nie: die reg se benadering tot verkragting en seksuele teistering akkommodeer byvoorbeeld nie vroue se werklike belewenisse nie. West kritiseer liberale feminisme omdat dit poog om vroue binne 'n raamwerk te akkommodeer wat nalaat om vroue se werklike belewenis in aanmerking te neem. Sy voer aan dat vroue as gevolg van hul liggaamstrukture 'n ander benadering tot die lewe het as mans:

> "For West, the process of translating the harms suffered by women into legally established rights should reflect women's fundamental experience of our bodies based on our reproductive capacity" (Cornell 1990 *Cornell LJ* 648).

Die vermoë om kinders voort te bring en groot te maak, het tot gevolg dat vroue *intimiteit* eerder as *identiteit* nastreef. Die vroulike liggaam maak vroue meer kwesbaar vir indringing en stroping. Vir die regsisteem om die manlike bevoordeling te oorkom, moet vroue se unieke liggaamlike belewenis asook die waardes van intimiteit en liefde na vore gebring word. Cornell wys daarop dat West self toegee dat vroue hul biologie beleef binne 'n sekere sisteem van geslagsvoorstelling en dat die sisteem eerder as die biologie as sulks vroulike identiteit skep. Tog, gaan West voort, bestaan daar sekere bande tussen vroue se identiteit, belewenis en biologie. Sy voel dat feministiese teorie gewortel moet wees in die teorie van die vroulike natuur. Sonder 'n teorie van die vroulike natuur sal dit onmoontlik wees om 'n fenomenologie van vroue se unieke belewenis te ontwikkel. Die bestaan van feminisme hang dus vir West af van 'n naturalistiese of essensialistiese siening van die vroulike. Hierdie naturalisme en essensialisme is egter iets problematies wanneer dit vanuit die postmoderne kritiek op die fenomenologie beskou word. Cornell 1990 *Cornell LJ* 650 bespreek in hierdie verband Derrida se dekonstruksie van Husserl se opvatting oor die verweefdheid van die pre-ekspresiewe *noema* (betekenis) wat in taal self uitgedruk word en die ekspressiewe mag van taal self.

Derrida en ander teoretici het die streng onderskeid tussen *Sinn* en *Bedeutung*, verwysing en betekenis, gedekonstrueer. Hulle wys uit dat verwysing 'n konteks van voorafgaande betekenis veronderstel wat 'n ware openbaring onmoontlik maak omdat die uitvoerende of skeppende aspek van taal nie mee weggedoen kan word nie. Alhoewel Husserl die produktiwiteit van taal erken as uitdrukking deur metafoor, streef hy na 'n *mirror writing* wat die metaforiese produktiwiteit van taal sal uitkanselleer en die ware essensies van die werklikheid self sal weerspieël. *Mirror writing* poog om die werklikheid weer te gee soos dit is. Die onvolkomendheid van kommunikasie en die veelduidige betekenis van taal word nie in ag geneem nie (Cornell 1990 *Cornell LJ* 651). Cornell voer aan dat hierdie poging tot *mirror writing* wat metafoor en daarmee die skeppende mag van taal wil wegneem, as sentrale omskrywing van metafisiese taal volgens Derrida

onmoontlik is. Husserl se poging om taal te suiwer, word gekritiseer. *Sinn* en *Bedeutung* is in der waarheid verweef en word gereguleer deur tekstualiteit en wyse van uitdrukking. Cornell verwys in hierdie verband na Derrida se bekende stelling dat daar niks buite die teks bestaan nie. Hy bedoel nie dat verwysing onmoontlik is nie maar dat taal self verwysing impliseer. Dekonstruksie se aandrang dat die ware wêreld in die teks is, beteken nie dat daar nie 'n ware wêreld is waarna verwys word nie. Dit beteken dat die "ware werklikheid" sigself slegs in die verwysingsnetwerk van tekstualiteit aan ons kan openbaar. As tekstuele effek is die werklikheid egter werklik en kan dit nie uitgevee word nie: "The real world cannot be erased precisely because it is here as textual effect" (Cornell 1990 *Cornell LJ* 652). Dekonstruksie ondermyn dus enige essensialistiese poging om taal as 'n suiwer medium te vestig wat slegs betekenis weergee.

West se strewe om die ware essensie van die vrou te ontbloot, veronderstel ook 'n strewe om taal te suiwer; om, anderkant taal, by die ware vrou uit te kom. Die dekonstruksie van die streng onderskeid tussen *Sinn* en *Bedeutung* is dus uiters relevant vir die feministiese debat oor essensialisme. Cornell steun weer eens op Derrida se ontleding van filosofiese taal om te verstaan wat presies op die spel is in hierdie debat. Hy dekonstrueer die poging van die filosofie om taal te suiwer en sodoende die ware essensie van dinge te bereik.

Cornell 1990 *Cornell LJ* 656 voer aan dat die aanspraak op die essensie van die vrou tot gevolg het dat sy bevestig word in die ou stereotipe wat ander bestaansmoontlikhede uitsluit:

> "Therefore, what one is really doing when one states the essence of Woman is reinstating her in her proper place. But the proper place, so defined through West's essential properties of what women can be, ends by shutting them once again in that proper place."

Daar is twee etiese weergawes van die standpunt dat die vroulike stem as 'n uitdrukking van vroulike verskil moet geld. Die eerste is dat die vrou se stem gehoor moet word, omdat alle stemme gehoor behoort te word. Die tweede berus daarenteen op 'n spesifieke sensitiwiteit vir die vroulike as 'n *ander wyse van bestaan*. Die belewenis van die vrou het bepaalde geldigheid omdat dit eties verhewe is. Die verwerping van die belang van liefde in die openbare lewe is byvoorbeeld 'n refleksie van manlike waardes, aldus West. Sy begrond die andersheid van die vrou egter in hul natuur wat tot gevolg het dat daar vir vroue 'n wyse van bestaan voorgeskryf word. Soos reeds aangetoon, hou hierdie benadering nie steek nie, veral in die lig van postmoderne dekonstruksie-filosofie. Die sentrale vraag is dus of daar 'n wyse is waarop die vroulike bevestig kan word sonder om terug te val op tradisionele en stereotipe opvattinge oor die vrou wat haar bestaan toemaak en afsluit van ander bestaansmoontlikhede.

Cornell 1990 *Cornell LJ* 659 wys op die projek van sekere feministe wat op die vroulike as 'n *psigoanalitiese* kategorie fokus om sodoende die gegewe sisteem te ondermyn. So 'n benadering kan aanklank vind omdat daar nie gepoog word om te bepaal wát die vroulike is nie, maar slegs hoe die vroulike in 'n gegewe sisteem van geslagtelikheid geproduseer word. 'n Gevaar van hierdie benadering is egter dat dit die werklike lyding van vroue miskyk ten gunste van 'n onwerklike droom. Net soos seksuele verskil nie deur die stereotipe van enige sisteem van geslagshiërargie gekaap moet word nie, mag vroue se lyding nie

ontken word nie. Vir die transformasie van 'n regsisteem kan so 'n benadering problematies wees:

> "The explosive power of feminist jurisprudence can be only too easily cut off by the reality of a legal system that denies the feminine in the name of the masculine. However, it can also be cut off by undermining the actual experience of suffering that exists now, in the name of a possibility that exists – but as a dream not an actuality" (Cornell 1990 *Cornell LJ* 659).

Cornell *ibid* wys op Julia Kristeva as een van die teoretici wat poog om 'n psigoanalitiese weergawe van die belewenis van die vroulike te ontwikkel. Kristeva steun ook op die vermoë om lewe voort te bring maar verskil tog fundamenteel van West. Die sentrale verskil is dat Kristeva haar argumente begrond op psigoanalitiese teorie en nie soos West steun op die biologiese nie. Kristeva staan in die tradisie van Lacan se psigoanalitiese teorie. Lacan se werk poog om die biologiese opvattings van Freud se weergawe van geslagsverskil deur middel van die kastrasiekompleks reg te stel. Volgens Lacan vind die ontstaan van taalbewussyn plaas wanneer die jong kind agterkom dat dit 'n afsonderlike identiteit van die moeder het. Hierdie primordiale moment van afskeiding word beleef as beide verkryging en verlies van identiteit. Die pyn van die verlies het 'n onderdrukking van die herinnering van die moeder tot gevolg en dwing die jong kind om haar/homself tot die simboliese orde te wend ten einde die verlange na die ander te vervul. Wanneer hierdie verlies egter in taal omgesit word, word dit slegs as "gebrek" geprojekteer. Die *falliese moeder* (synde bloot 'n projeksie van gebrek) kan nie in taal uitgedruk word nie. Kristeva beklemtoon dat sy slegs deur die *semiotiese* bereik kan word en nie deur die simboliese nie. Die semiotiese wys op die orde van tekens en gebare. Die simboliese wys op die orde van taal (Kristeva *Desire in language* (1980)).

> "Thus, Kristeva insists that the Feminine, when identified as the phallic Mother, embodies the dream of an undistorted relation to the other which lies at the foundation of social life, but which cannot be adequately represented" (Cornell 1990 *Cornell LJ* 661).

Dit lyk of beide die geslagte kastrasie beleef deur die verbanning van die falliese moeder. Lacan ondersteun die onderskeid tussen die penis en die fallus, laasgenoemde synde verteenwoordigend vir gebrek by beide geslagte. Die penis kan egter instaan vir die fallus. Die vroulike daarenteen kom volledig as gebrek tot stand. Die afwesigheid van die penis beteken dat die gebrek aan die falliese moeder nie eers simbolies voorgestel kan word nie. Vroue of die vroulike kan dus glad nie beslag kry in die simboliese orde van taal nie. Hieruit volg Lacan se stelling "that Woman does not exist". Die gevolg hiervan is dat vroue nie die belewenis van vroue kan weergee nie, omdat dit juis 'n universele belewenis is wat anderkant aanbieding en weergawe is. Navolgers van Lacan ondermyn alle pogings van feministe en anti-feministe om die vroulike te omskryf. *She is the beyond*. Maar, terselfdertyd is die vroulike teenwoordig juis in haar afwesigheid, verteenwoordigend van die gebrek van alle objekte van begeerte. Lacan wys op die vele mites van 'n soeke na manlike identiteit wat homself grond as 'n soeke na *haar*. Vroue is egter uitgesluit van die mite en het nie 'n stem om aan die vroulike betekenis te gee nie. Die vroulike bestaan dus net in die manlike fantasie, 'n fantasie wat gewortel is in die primordiale begeerte na die ander. Hierdie ander ondermyn egter altyd die simboliese orde waarmee die primordiale begeerte na die ander beslag kry.

Kristeva aanvaar Lacan se basiese raamwerk maar waar Lacan die verbintenis tussen die vrou en die vroulike of die falliese moeder ontken en dit reduseer tot

die manlike projeksie van begeerte, argumenteer Kristeva dat die ervaring van swangerskap wel by die vrou 'n ontmoeting met die falliese moeder meebring. Deur swangerskap beleef vroue die ander in hulself en kan vroue in 'n sekere mate die gevolge van kastrasie as gevolg van die skeiding van die falliese moeder oorkom. Vroue kan dus deur self moeders te wees, leer om op 'n niedominerende wyse op te tree waartoe mans nie toegang het nie. Cornell merk op dat Kristeva, omdat sy die semiotiese met die vroulike assosieer die moontlikheid oophou dat mans ook verby hul eie geslagsidentiteit kan reik om met die falliese moeder te herenig. Kristeva se siening van vroulike andersheid berus nie soos West s'n op biologie nie. West werk met twee duidelike kategorieë, een manlik, die ander vroulik. In haar bespreking van die fundamentele kontradiksie soos beskryf deur Duncan Kennedy voer sy aan dat dit 'n akkurate beskrywing is van manlike identiteit maar nie van vroulike identiteit nie. (Cornell verwys hier na West se argument in "Jurisprudence and gender" 1988 *Univ of Chicago LR* 1.) Ander Franse feministe soos Cixous en Irigaray beklemtoon egter ook soos Kristeva dat toegang tot die semiotiese, vroue en mans in staat stel om na die verlore moeder te beweeg. (Sien Cornell 1990 *Cornell LJ*; Cixous *The newly born woman* (1986); Irigaray *Speculum of the other woman* (1985); en *This sex which is not one* (1985).)

Cornell opper sekere probleme met die steun op moederskap as 'n basis vir feministiese teorie. Voor-die-hand-liggend is die feit dat nie alle vroue moeders is nie. Sy wys in hierdie verband op die tekste van Duras. Cornell 1990 *Cornell LJ* 667 voer aan dat waar Kristeva en West die vroulike met die moeder identifiseer, Duras juis die verlies van die vroulike by die moeder beklemtoon. Vroulike identiteite moet eerder in hul seksuele identiteite voorgestel word as in moederskap. Indien moederskap die basis vir vroulike belewenis is, word 'n groot aantal vroue uitgesluit. Moederskap is 'n belangrike metafoor vir die vroulike maar nie die enigste een nie. Vroulike belewenis kan nie beperk word deur dit slegs aan moederskap te koppel nie. 'n Verdere probleem is dat vroue nie saamstem oor die belewenis van moederskap nie. Die punt is dat verskille tussen vroue en die verskillende ervarings van vroue nie negeer moet word nie. Cornell 1990 *Cornell LJ* 669 wys in hierdie verband op Lyotard se skrywe oor die *differend*. Die *differend* is dit wat tradisioneel uit die regsdiskoers gesluit is. Die lyding van vroue kan volgens haar verstaan word ooreenkomstig die *differend* (*ibid*):

> "The harm to women literally disappears because it cannot be represented as a harm within the law. It is not so much, then, that we are lying as that we cannot discover the truth of our experience in the current system of gender representation."

Deur op een belewenis van moederskap te steun as basis vir feministiese teorie, maak feminisme dieselfde fout as eksponente van die reg wat vroue nog altyd uitsluit. In die reg is dit ook belangrik om uiting te gee aan die *differend* om te verhoed dat vroue, in hulle poging om toegang tot die regsisteem te verkry, hulle belewenis vertaal in 'n manlike belewenis. Transformasie kan nie plaasvind as vroue se behoeftes binne die bestaande norme van die stelsel aangespreek word nie. Cornell voer aan dat 'n feministiese regsgeleerdheid 'n nuwe idioom vereis. Daar moet op die skeppende funksie van taal gesteun word om vroulike *realiteite* na vore te bring. Dit kan gedoen word deur die vertel en hervertel van mites oor die vroulike wat 'n veelheid van betekenisse het en waaruit dan 'n nuwe vroulike *realiteit* geskep kan word. Dit is belangrik om te sien hoe die reg 'n geslagshiërargie produseer wat egter gedestabiliseer kan word deur die skep

van 'n nuwe *choreografie van seksuele verskil*. Op hierdie punt spreek Cornell haar kritiek teenoor West en Kristeva uit wat vroulike verskil op moederskap fundeer. Sy verwys na Lacan se skrywe dat daar nie sulke kategorieë soos man en vrou bestaan nie. Beide geslagte word gedefinieer as manlik en vroulik. Daar is dus nie so 'n duidelike verskil tussen mans en vroue soos West uitmaak nie. Dit beteken nie dat West se storie totaal en al onwaar is nie. Ander weergawes moet egter ook vertel en na geluister word sodat die moontlikheid vir verandering oopgehou kan word.

Dit is belangrik om hier ook kortliks na Cornell se kritiek op MacKinnon te kyk. MacKinnon lewer sterk kritiek op die sosiale sisteem waarin die vroulike onderdruk en die manlike bevoorreg word. Volgens Cornell reduseer MacKinnon net soos West die vroulike na 'n enkele en eenvoudige werklikheid. By MacKinnon is hierdie werklikheid nie die ware essensie van die vrou soos by West nie, maar die vroulike werklikheid soos gekonstrueer deur die manlike siening van die vrou. Met ander woorde, MacKinnon staar haar vas teen die manlike konstruksie van die vroulike as die enigste vroulike werklikheid.

MacKinnon se weiering om die vroulike te bevestig, beteken dat haar stryd gereduseer word tot 'n magstryd binne die teenwoordige magsverhoudinge waarin waardes soos vryheid en onafhanklikheid sonder meer meer waarde dra as verhouding en intimiteit. Dit gaan geensins bydra tot 'n herdefiniëring en herwaardering van geslagsidentiteite nie:

> "MacKinnon's central error is that she reduces Feminine reality by identifying the feminine totally with the real world as it is seen and constructed through the male gaze" (Cornell 1990 *Cornell LJ* 686).

Feminisme moet volgens Cornell altyd bedag wees op die moontlikheid van transformasie ten einde die vele moontlikhede van die vroulike tot haar reg te laat kom. In teenstelling met MacKinnon se onveranderbare werklikheid moet daar juis gepoog word om deur metafoor en allegorie die veranderlikheid van die werklikheid te beskryf. Cornell dring aan op 'n herskrywe van die vroulike terwyl die bestaande opvattings van die vroulike ondermyn moet word. So 'n herskrywe kan bloot in taal verkry word deur gebruik te maak van die literêre stylverskynsels soos die allegorie en metafoor. Van die Franse feministe soos Duras, Cixous en Irigaray lê ook klem op die waarde van die allegorie, metafoor en mite om die vroulike te beskryf en te bevestig. Hierdie beskrywing en bevestiging moet volgens hulle egter bedag wees op die onmoontlikheid van 'n *ware* weergawe. Met ander woorde, hulle sien die werklikheid self volgens die allegoriese en metaforiese verbeelding van die werklikheid. Die werklikheid moet nooit losgemaak of afgeskuif word van die fiktiewe herskryf van die werklikheid nie. Die mikpunt van etiese feminisme is nie net om mag vir vroue toe te eien nie, maar 'n *herdefiniëring van fundamentele opvattings*, ook van mag. Die etiese posisie is dat die politieke stryd om mag ingelig moet wees deur die *tot op hede ongerealiseerde ander*. MacKinnon se stryd waar enige bevestiging van die vroulike negeer word, gaan 'n stryd wees om mag in die huidige stelsel waar waardes soos vryheid meer waarde dra as verhouding en intimiteit. Verandering van die regsisteem sonder om bestaande geslagsidentiteite uit te daag, is nie voldoende nie. Sodanige verandering sal slegs evolusie wees en nie transformasie nie.

Cornell voer aan dat die rol van die mite in feministiese teorie noodsaaklik is vir die hervertel van stories. So ook is metafore en allegorieë belangrik. Die gegewe omskrywings van seksuele verskille van die manlike en die vroulike

moet ondermyn word sonder om deur nuwe omskrywings vervang te word. Die vroulike moet bevestig word in die lig van 'n *always shifting reality*:

> "Therefore, we cannot know, once and for all who or what She is, because the fictions in which we confront Her always carry within the possibility of multiple interpretations, and there is no outside referent, such as nature or biology, in which this process of interpretation comes to an end" (Cornell 1990 *Cornell LJ* 675).

KARIN VAN MARLE
Universiteit van Suid-Afrika

Hedendaags is bemoedering ook deel van die man se wese. Die begrip 'bemoedering' is aanduidend van 'n funksie eerder as 'n persona *en is hierdie funksie nie noodwendig geleë in die biologiese moeder nie. Dit behels die teergevoelige gehegtheid wat voortvloei uit die aandag wat van dag tot dag bestee word aan die kind se behoeftes aan liefde, fisieke versorging, voeding, vertroosting, gerustheid, geborgenheid, bemoediging en onderskraging. Alleenlik die ouer wat hierdie behoefte kan bevredig sal daarin slaag om 'n psigologiese band met die kind te smee in welke ouer se sorg die kind kan ervaar dat sy bestaan nog veelbeduidend is, en wat met toegeneentheid beskut en beskerm word. Bemoedering veronderstel om onvoorwaardelik liefde te kan betoon sonder om noodwendig 'n teenprestasie te verwag.*

Bemoedering is nie net 'n komponent van die vrou nie, maar ook deel van die man se wese. In die verlede het die gemeenskap van mans verwag om daardie deel van hulle persoonlikheid te onderdruk omdat dit nie by die beeld van die man pas nie. Tradisioneel was die man die heerser en meester, die jagter en wagter, die prediker en verdediger van huis en haard. Hy moes so ver moontlik emosioneel onbetrokke bly. Die vrou daarteenoor se bestemmingsfunksie was om kinders te baar, hulle te versorg en te vertroetel, om moeder en minnares te wees en daarmee saam die algehele huishouding na behore te behartig.

Hedendaags het die man die vrymoedigheid om sy bemoederingsgevoel te openbaar en uit te leef. In die huidige moderne tydvak waarin ons leef, is 'n diepgaande gevoel teen vooroordeel besig om wêreldwyd pos te vat. Verset bestaan teen alle vorms van rassisme, fascisme, chauvinisme, seksisme en is daar 'n strewe na gelyke regte vir die vrou en man. Tans funksioneer al hoe meer moderne egpare al minder volgens die tradisionele geslagsrolle. Die verset teen vooroordeel beïnvloed die wyse waarop die man en vrou hulle rolle sien en uitleef. Al meer mans is bereid om bemoedering as deel van hul persoonlikheid te herken, te erken en uitdrukking daaraan te verleen (per Hattingh R in *Van der Linde v Van der Linde* 1996 3 SA 509 (O) 515).

VONNISSE

THE ESTABLISHMENT OF EXCLUSIVE USE AREAS IN TERMS OF THE SECTIONAL TITLES ACT BY MEANS OF MANAGEMENT RULES

Pineleigh CC, Zackon, Ziess and Cauchois v McGrath, McGrath NO, Body Corporate of Pineleigh, Registrar of Deeds, Surveyor-General 1994-05-05 case no 74/94 (SE)

From the affidavits submitted to the court, it appeared that the first applicant in this case was the developer (a close corporation) of the Pineleigh sectional title scheme for which a sectional title register was opened in November 1980 in terms of the Sectional Titles Act 66 of 1971. The first, fourth and further respondents were the chairperson of the body corporate and other owners of the remaining units in the scheme. The second respondent was the body corporate of the scheme while the third and fifth respondents were the Registrar of Deeds and the Surveyor-General respectively. The other applicants in the case were also registered owners of remaining units of the scheme.

In terms of the original purchase agreement for the sale of units in the scheme, the first applicant, as the developer of the scheme, undertook to take such steps as were necessary to enable the sectional owners who had purchased individual parking bays to take transfer of and obtain exclusive use in respect of such parking bays. The developer intended to establish those exclusive use areas by replacing the schedule 1 model management rules applicable to the scheme. As is customary, a clause was incorporated in the standard deed of sale that the purchasers surrendered their voting rights at the first general meeting of the body corporate in order to enable the developer to effect the substitution.

The replacement rule read as follows:

> "Pineleigh CC, its successors-in-title or assigns shall be entitled to the exclusive use, occupation and enjoyment in perpetuity and to the exclusion of all other rights of all other owners and all other persons, to parking bays numbered one (1) to eleven (11) reflected on the plan annexed hereto and marked Annexure B. The said Pineleigh CC, its successors-in-title or assigns shall have the right to alienate each exclusive use by way of a cession provided that such alienation may only be effected to an owner of a section. Such cession shall be in the format of the agreement of cession attached hereto and marked Annexure C."

In the standard deeds of sale the subject-matter of the sale was described as a particular unit together with, in appropriate cases, the exclusive use of a particular parking bay. Clause 6 notified all purchasers of the developer's intention to substitute the management rules and exacted the following undertaking from each of them:

> "The purchaser hereby gives and grants to the seller an irrevocable power of attorney *in rem suam* to take such steps as may be necessary to have the Schedule 1 and 2 rules adopted by the body corporate and to attend and vote for and on behalf of the purchaser at any meeting of the body corporate convened for this purpose."

The sectional title register for Pineleigh was opened in 1980, but the units were only sold in 1988, by which time the Sectional Titles Act 66 of 1971 had already been replaced by the Sectional Titles Act 95 of 1986. Unlike the 1971 Act, the 1986 Act provides for exclusive use areas to be established as real rights capable of being mortgaged. A savings provision of the 1986 Act (s 60(3)) specifically provides for exclusive use rights obtained in terms of an agreement entered into before the Sectional Titles Act of 1986 came into operation in June 1988, to be transferred to the purchasers concerned.

After June 1988 the chief Registrar of Deeds ruled that because of section 27 of the Sectional Titles Act of 1986, exclusive use areas could not be created by substituting the model (management) rules of the scheme but only by using the procedure followed in section 27. Furthermore, a minority of sectional owners steadfastly refused to allow the purchasers of parking bays to obtain legal recognition of their rights. On a special meeting convened for this purpose, it was therefore not possible to achieve a unanimous resolution in terms of section 17 of the 1986 Act entitling the body corporate to alienate or lease parts of the common property.

Because of this impasse, it was submitted that the developer was entitled on the basis of the irrevocable power of attorney granted to him in the deeds of sale to convene a special general meeting. At this meeting, it was submitted, the developer was entitled to adopt a unanimous resolution to supplement the management rules to provide for the exclusive use of parking bays as well as a unanimous resolution to have the parking bays delineated on the appropriate sectional plan as envisaged by section 27(2) of the Sectional Titles Act of 1986.

Since all attempts to resolve the dispute amicably and on the basis of fairness to all the parties proved fruitless, the applicants approached the court by motion for relief. The relief sought was an order compelling the first respondent, the chairperson of the body corporate, to convene a special general meeting for the purpose of adding a special management rule to the model rules lodged with the Registrar of Deeds. The aim of the special management rule was to create sole utilisation areas (sketched on a plan which accompanied the special management rule) on parts of the common property of the scheme to the exclusion of all other owners and all other persons in the scheme. The sole utilisation areas were clearly cross-hatched and the purposes for which they were intended to be used, were clearly indicated on the plan annexed to the application.

In the special rule the sole utilisation of the specific areas were made subject to the following conditions: (1) that the body corporate would take all necessary steps to ensure that the sole utilisation areas be reserved for the sole utilisation of the owners concerned; (2) that an owner would be obliged to maintain the area allocated to him as if it were part of a section and take all reasonable and necessary steps to keep such area in a clean, hygienic, neat and attractive condition; (3) that an owner would not use his sole utilisation area or permit it to be used in such a manner or for such a purpose as are likely to impair the safety, appearance or amenity of other sections or other parts of the common property; (4) that an owner would permit the body corporate and other owners access to and across

his sole utilisation area for any purpose reasonably required for the maintenance of the sole utilisation areas of such other owners and the common property and for the purpose of implementing the provisions of rule 71 should the body corporate so require; (5) that no owner may let a sole utilisation area without the written consent of the trustees, which consent may not be unreasonably withheld. Rule 71 of the scheme probably embodied rule 70 of the model rules of Annexure 8 in terms of which the body corporate is in case of an owner's failure to maintain his exclusive use area, entitled to remedy the failure and to recover the reasonable cost of doing so from such owner.

Mr Justice Ludorf granted the application and ordered the first respondent in his capacity as chairperson of the body corporate to convene a special meeting of the body corporate within one month for the purpose of adding a special management rule with the content described above to the registered management rules of the scheme. The court also granted an order that the duly authorised representative of the first applicant was entitled to attend this meeting and to vote for and on behalf of the three applicant sectional owners as well as the chairperson and the remaining sectional owners cited as respondents on a resolution intending to add the special rule creating sole utilisation areas (as indicated on the plan annexed to the resolution) to the existing management rules. The court further permitted the duly authorised representative of the first applicant to attend the meeting and to vote on behalf of the sectional owners to request an architect or land surveyor in terms of section 27(2) of the Sectional Titles Act 95 of 1986 to apply to the Surveyor-General to delineate certain areas on the sectional plan showing parts of the common property (ie the block plan) as exclusive use areas. Finally, the court ordered the Surveyor-General to delineate such parking bays on the registered sectional plan of the scheme and ordered the Registrar of Deeds to note the addition to the management rules of the scheme against the certificate referred to in section 11(3)(e) of the Sectional Titles Act 95 of 1986. This section refers to the certificate which must accompany the application of the developer to the Registrar of Deeds for the registration of the sectional plan and the opening of a sectional title register. The certificate must state that the model rules in terms of the Act are applicable and must contain other rules (if any) substituted by the developer for the model rules.

The significance of this decision is, first of all, that it confirms the practice of reserving certain rights for a developer up front, namely at the time of the conclusion of the deed of sale of a sectional title unit. *In casu* the developer reserved for himself an irrevocable power of attorney to vote on behalf of all future sectional owners on a specific matter in order to obtain the unanimous resolution required for this purpose. Secondly, although the relief sought was granted on the peculiar facts of this case, the judgment of Ludorf J provides a certain amount of support for the so-called rules method of creating exclusive use areas in a sectional title scheme by an amendment of the rules of the scheme. In terms of section 35(2)(b) of the Sectional Titles Act of 1986, the management rules may be substituted, added to, amended or repealed from time to time by the unanimous resolution of the body corporate as prescribed by regulation. In terms of regulation 30(4), such resolution may, save in the case where the scheme was approved in terms of the Sectional Titles Act 66 of 1971, be taken only after the developer has transferred at least 50 per cent of the units in the scheme to outsiders. If this method is accepted, it would open the door for a cheaper and less cumbersome method of establishing exclusive use areas by the body corporate.

In my submission it is, however, not possible to establish *genuine* exclusive use areas in this manner. In terms of section 27(2), the body corporate duly authorised by a unanimous resolution of its members may request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan *in the manner prescribed* of a part or parts of the common property in terms of section 5(3)(f) for the exclusive use by the owner or owners of one or more sections. Section 5(3)(f) provides that the draft sectional plan must delineate exclusive use areas *in the prescribed manner*. Section 27(2) therefore contains two express provisions that not only the sectional plan (here the block plan), but also the delineation of exclusive use areas must comply with the requirements set out in the regulations to the Sectional Titles Act 95 of 1986.

In terms of the regulations, exclusive use areas situated on the land comprised in the scheme must be indicated on the block plan (reg 5(2)(b)(vi)) and if details cannot be clearly shown on the block plan, such details must be shown in an inset or on an additional sheet (reg 5(2)(f) referring to reg 5(2)(b)(vi)). In normal circumstances, exclusive use areas which are established by the body corporate, would be shown on an inset or on an additional sheet. The regulations require that the exclusive use areas must be uniquely numbered, delineated by means of distinctive broken lines and its total size expressed to the nearest square metre (reg 5(2)(b)(iv)). The common boundary between an exclusive use area and a section or common property is, in the case of physical features, the median line of the dividing floor, wall, ceiling, fence or other similar feature, unless boundaries have been described in a different manner on the sectional plan. A boundary which is not a physical feature, must be described in a manner acceptable to the Surveyor-General or in terms of beacons determined in accordance with the provisions of the Land Survey Act 9 of 1927, which beacons must be described. Normal survey standards are required and the exclusive use area must be beaconed in accordance with this Act (see SAPOA *Memorandum* (1991) par 5 2). Sufficient data must be furnished on the plan to define the area and to determine the location thereof in relation to the building, sections or boundaries on the land (reg 5(1)(m)).

It is clear from the above that the Act contains an express procedure for the establishment of *genuine* exclusive use areas. This involves a professional survey, and if necessary, beaconing of the exclusive use areas as well as the approval of the delineation by the Surveyor-General. Since no rule may conflict with the express provisions of an Act, *genuine* exclusive use areas cannot be established in the management rules. In the *Memorandum on the objects of the Sectional Titles Bill* of 1986 (B/W75–86), it is stated expressly that specific provision is made for the registration of a right of exclusive use of a part of the common property. The reason for this is, according to the *Memorandum*, that the Sectional Titles Act of 1971 did not specifically provide for this matter and that it was at that time regulated in the rules of a scheme in an unsatisfactory manner. The intention of the legislator in the Sectional Titles Act of 1986 was thus clearly to eliminate the unsatisfactory rules method of creating exclusive use areas and to replace it by a better method based on sound survey practice to ensure unassailable security of title for the holders of rights of exclusive use.

The fact that *genuine* exclusive use areas can be established only in terms of the procedure expressly provided for in the Sectional Titles Act, does not, however, mean that *non-genuine* areas of exclusive use or sole utilisation areas cannot be established by means of special management rules. This submission is

supported by the fact that the Chief Registrar of Deeds has meanwhile changed his ruling on whether exclusive use areas can be established in terms of the management rules. Such a special rule must contain a schedule indicating the units to which the sole use areas are attached. A lay-out plan to scale must also be attached to the rules indicating the locality of the areas. A distinctive number must be allocated to each particular area and the purpose for which the areas may be used, must be indicated. In practice, the trustees will have to keep a register of these sole use areas and record changes in ownership. The owners to whom these rights are allocated, will not, however, acquire any real rights with regard to these areas, they will not be issued with certificates of real rights and these rights will be incapable of being mortgaged as security for a loan. Ultimately the owners will acquire contractual rights enforceable only between the owners *inter se* and the body corporate. These rights will not be subject to the provisions of the Act dealing with exclusive use areas, but only subject to the limitations on use and enjoyment spelt out in the special management rule itself. (See also *Proposed Amendments to the Sectional Titles Act* arising from the meetings of the Sectional Titles Regulation Board held in July 1994 and May 1995.)

CG VAN DER MERWE
University of Stellenbosch

RIGLYNE VIR HERSTEL VAN GRONDREGTE

The Transvaal Agricultural Union v The Minister of Land Affairs; The Commission on the Restitution of Land Rights
CCT 21/96

Die herstel van grondregte aan daardie persone wat hulle grond deur middel van rasdiskriminerende wetgewing verloor het, is 'n komplekse aangeleentheid. Teen Junie 1996 was daar reeds 7 095 grondeise ingedien (Politieke Redaksie "R1 miljard bestee aan agtergeblewe boere" *Beeld* 1996-06-13 6). Kennisgewings van grondeise word feitlik weekliks in die *Staatskoerant* gepubliseer (vgl bv AK 825 in *SK* 17287 van 1996-07-05; AK 1332 in *SK* 17414 van 1996-09-13; AK 1624 in *SK* 17617 van 1996-11-22).

In die onderhawige saak het die Transvaalse Landbou-unie (TLU), 'n liggaam wat die belange van sy lede (boere) verteenwoordig, gedurende September 1996 die konstitusionele hof direk genader om sekere bepalings van die Wet op Herstel van Grondregte 22 van 1994 (hierna Wet 22 van 1994) te betwis as synde in stryd met die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (hierna 1993-Grondwet).

Alhoewel die konstitusionele hof bevind het dat die applikante se aansoek nie direkte toegang tot dié hof regverdig nie (46–48), word daar tog bepaalde riglyne in die saak neergelê vir die interpretasie van beide die relevante artikels in die 1993-Grondwet en Wet 22 van 1994. Die doel van die vonnisbespreking is

om 'n kort uiteensetting van die saak te gee en veral klem te lê op hierdie riglyne wat vir die hooggeregshof, die Kommissie op Grondtoewysing, die grondeisers en -teenstanders in die toekoms van belang kan wees.

1 Agtergrond

Wet 22 van 1994 is uitgevaardig na aanleiding van artikels 121–123 (gelees met artikels 8(2) en 28) van die 1993-Grondwet. Artikel 121 bepaal dat die parlement wetgewing kan aanneem om herstel van grondregte te verleen waar 'n persoon of gemeenskap regte in grond na aanleiding van rasdiskriminerende wetgewing na 19 Junie 1913 ontneem is (soos verwys na in a 8(2)). Die wet is nie van toepassing op grond waarvoor voldoende vergoeding kragtens die Onteieningswet 63 van 1975 ontvang is nie. Alle eise is onderworpe aan die voorwaardes, beperkings en uitsluitings wat deur die wet opgelê kan word en is slegs deur 'n hof beregbaar nadat artikel 122 toegepas is (a 122(6)).

'n Kommissie op die Herstel van Grondregte is kragtens artikel 122 van die 1993-Grondwet en artikel 4 van Wet 22 van 1994 ingestel. Die kommissie moet die meriete van die aansoeke ondersoek, geskille besleg en afhandel, verslae aan die howe voorlê en kan enige ander bevoegdhede en funksies uitoefen wat in die wet voorgeskryf word (a 122(1)(a)–(d); vgl ook a 6 Wet 22 van 1994). Die prosedures moet ook in die wetgewing uiteengesit word (a 122(2)).

Wet 22 van 1994 maak voorsiening vir 'n kommissie (a 4), 'n grondeisehof (a 22), delegasie aan 'n grondeisekommissaris en streekgrondeisekommissarisse (a 7), mediasie (a 13), prosessuele aangeleenthede soos die indiening van eise (a 11) en die ondersoekbevoegdhede van die kommissie (a 12) (vgl ook Du Plessis, Olivier en Pienaar "The ever-changing land law" 1995 *SAPR/PL* 147–154).

Daar was reeds in 1991 voorsiening gemaak vir die indiening en afhandeling van grondeise in die Wet op die Afskaffing van Rasgebaseerde Grondreëlings 108 van 1991. Die Kommissie op Grondtoewysing het verskeie eise aangehoor en heelwat eise is reeds in die periode voor 1994 afgehandel en die grond aan grondeisers oorgedra. Die eise was meestal gevalle waar stamme weens rasdiskriminerende wetgewing hul grond ontneem is (vgl Du Plessis en Olivier "Nuwe grondmaatreëls" 1991 *SAPR/PL* 264–265; "Land: new developments 1993/1994" 1994 *SAPR/PL* 183; Du Plessis, Olivier en Pienaar "Grond – verdere komplikasies" 1992 *SAPR/PL* 149; "Grond 1992/3" 1993 *SAPR/PL* 131–133; "Land: new developments 1993" 1993 *SAPR/PL* 363–364).

2 Betoë

Die TLU beweer dat die volgende artikels van Wet 22 van 1994 met die doel, gees en bepalings van die Grondwet in stryd is (1):

- artikel 6(1)(c) (grondeisekommissaris moet eisers gereeld in kennis stel van die verloop van hulle eise);
- artikels 9(1)(b) en 13(2)(b) (aanwysing deur die grondeisekommissaris van geskilbeslegters);
- artikel 11(1) (grondeisekommissaris publiseer eis na oorweging in *Staatskoerant* en maak die eis bekend in distrik waar grond geleë is);
- artikel 11(6)(b) (opdrag aan Registrateur van Aktes om nota van eis teen titelakte aan te teken);

- artikel 11(7) (sodra eis gepubliseer is, mag niemand van grond afgesit en geen verbeterings verwyder, beskadig of vernietig word sonder skriftelike toestemming van die hoofgrondeisekommissaris nie); en
- artikel 11(8) (betredingsbevoegdhede indien vermoed word dat verbeterings vernietig, beskadig of verwyder word of dat enige persoon woonagtig op die grond benadeel word – 'n lys van die werknemers, bewoners, landboukundige toestand van die grond, uitgrawings, myn en prospekteeraktiwiteite kan opgestel word).

Daar word beweer dat artikel 11(1), 11(6)(b), 11(7), 11(8) en reëls 13 en 14 in stryd met artikel 24(b) (administratiewe geregtigheid), artikel 11(7) en 11(8) met artikel 28 (beskerming van eiendomsreg en vryheid van ekonomiese bedrywighede), artikel 9(1)(b) en 13(2)(b) met artikel 122(1)(b) en artikel 6(1)(c) met die gelykheidsklousule (a 8(2)) van die Grondwet is (9–15).

Die aansoek word teengestaan deur die Minister van Grondsake op grond van (a) die meriete van die aansoek en (b) die feit dat die aansoek nie deur die konstitusionele hof verhoor behoort te word nie aangesien dit nie onder die spesiale jurisdiksie van reël 17 (GK 703 in *SK* 16407 van 1995-05-12) val nie (4).

Die konstitusionele hof versoek die partye om skriftelike argumente voor te lê oor die vraag of die saak hoegenaamd een is wat direkte toegang tot die hof behoef (3). Applikant beweer dat (a) die konstitusionele hof die enigste hof is wat jurisdiksie oor die vraag het; (b) die aansoek dringend en in die openbare belang is en 'n beslissing oor die geldigheid van die artikels die regte van grondeienaars en restitusie-aansoekers kan raak en ook 'n wesenlike uitwerking op die funksionering van die kommissie en die grondeisehof kan hê; (c) die saak afgehandel kan word sonder die aanhoor van getuienis; en (d) die redelike vooruitsig bestaan dat 'n aansoek kan slaag (17).

3 Bevinding

Die hof bevind dat die applikant nie kon aantoon waarom direkte toegang tot die konstitusionele hof nodig is nie en wys die aansoek van die hand. 'n Kostebevel word teen applikant gemaak aangesien die gewone prosedure van aansoek tot die hooggeregshof nie gevolg is nie. Die weg van 'n reël 17-aansoek is verkies met die risiko van mislukking van die aansoek (46–48).

4 Direkte toegang tot konstitusionele hof

Reël 17 van die konstitusionele hof-reëls laat slegs in uitsonderlike omstandighede direkte toegang tot dié hof toe; in alle ander gevalle moet die prosedure wat deur artikel 102(1) van die Grondwet voorgeskryf word, gevolg word. Ingevolge artikel 102(1) moet die hooggeregshof genader word om die verwysing van die sake na die konstitusionele hof – sodanige verwysing word gemaak indien dit bevind word dat die aangeleentheid binne die uitsluitlike jurisdiksie van die konstitusionele hof val, die beslissing bepalend is vir die spesifieke geskil en daar voldoende meriete in die aansoek is om die verwysing te regverdig (die hof verwys na *Brink v Kitshoff* 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC) 4 6–10 in die verband).

Wet 22 van 1994 behandel aangeleenthede wat die openbare belang in 'n groot mate raak, maar die hof is van mening dat dit nie 'n voldoende grond vir direkte toegang tot die hof is nie en dat bykomstig daartoe bewys moet word dat die vertraging wat die gewone prosedure kan meebring die openbare belang kan

raak of geregtigheid en die daarstel van 'n behoorlike staatsadministrasie ("good government") kan skaad. Volgens die hof is dit bindende vereistes (18).

Dit moet duidelik wees dat die aansoek werklik dringend is (15–17) soos in die geval van *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC); 1995 10 BCLR 1289 (CC) waar verkiesings in die wiele gery kon word en die moontlikheid bestaan het dat die parlement vinnig byeengeroep sou moes word (19–20). Die hof bevind dat die twee sake nie vergelykbaar is nie. Die applikante in die onderhawige saak het geleentheid gehad om kommentaar op die Wetsontwerp op die Herstel van Grondregte te lewer en 'n lang tydperk het reeds sedert inwerkingtreding van die wet verloop. Die applikante kon ook nie aantoon dat daar enige benadeling van hulle lede deur die publikasie van enige van die kennisgewings oor grondeise was nie (21–23).

Die vraag na die geldigheid van die bepalings van 'n wet is sekerlik in die openbare belang maar kan nie as uitsonderlik aangemerk word nie (23). Uit die beslissing van die hof blyk dit dus weer eens baie duidelik dat die konstitusionele hof werklik net in uitsonderlike gevalle direk genader moet word en dat behoorlike argumente om die aansoek te staaf, voorgelê moet word. Dit wil dus voorkom of artikel 102(1) van die 1993-Grondwet behoorlik nagekom moet word. 'n Soortgelyke bepaling is nie opgeneem in die Grondwet van die Republiek van Suid-Afrika 108 van 1996 (hierna 1996-Grondwet) nie maar artikel 167(6)(a) maak voorsiening vir nasionale wetgewing of reëls wat voorsiening moet maak dat in die belang van geregtigheid en met toestemming van die konstitusionele hof 'n saak direk voor dié hof geplaas kan word. Alle wetgewing (dus ook reël 17) bly van toepassing onderworpe aan wysiging en herroeping en die bepalings van die 1996-Grondwet (Item 2 Bylae 6).

5 Administratiewe geregtigheid

Die beswaar van applikant is dat artikel 11(1) nie voorsiening maak dat grondeienaars gehoor word alvorens die streekgrondkommissaris 'n kennisgewing in die *Staatskoerant* publiseer nie. Die hof verwys na die volgende reël gebaseer op *Cabinet for the Territory of South West Africa v Chikane* 1989 1 SA 349 (A) 379G en *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 748G–H:

> "[W]hen a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken, ... unless the statute expressly or by implication indicates the contrary" (25).

Die vraag of die *audi alteram partem*-reël uitgesluit is, hang van die interpretasie van die betrokke wetgewing af (in dié betrokke geval deur die interpretasie van die hooggeregshof: vgl *Brink v Kitshoff supra*) (26).

Die streekgrondkommissaris moet kragtens artikel 11(1)(a)–(d) bepaal of die grondeis voldoen aan die formele vereistes en of dit nie beuselagtig of kwaadwillig is nie en daarna die voorgeskrewe prosedures nakom. Die nota wat teen die titelakte aangebring word (a 11(6)), raak nie direk die regte van die grondeienaar of derdes wat belange in die eiendom het nie. Volgens die hof kan die eienaar steeds die grond vervreem en derdes hulle regte uitoefen. Die aantekening teen die titelakte is slegs 'n kennisgewing vir derde partye dat die betrokke grondstuk onderworpe is aan 'n grondeis – die eienaar sou bowendien verplig gewees het om die inligting aan 'n potensiële koper of verbandhouer te openbaar (28).

Artikel 11(7) en 11(8) raak wel die regte van die eienaar en ander moontlike belanghebbende partye. Die hoofgrondeisekommissaris kan egter toestemming vir uitsettings en die verwydering, beskadiging of vernietiging van verbeterings gee. Hierdie diskresie is onderworpe aan hersiening deur die grondeisehof (a 36). Die hof stel dit duidelik dat die regte van die grondeienaar soos deur die 1993-Grondwet beskerm en enige geregverdigde beperkings wat deur Wet 22 van 1996 opgelê word, behoorlik in ag geneem moet word voordat toestemming verleen of geweier word (29).

Die hooggeregshof sou sekere riglyne in ag kan neem om in die lig van die getuienis voor die hof te bepaal of administratiewe geregtigheid kragtens artikel 11(1) geskied het (30–31). Die belange van die eisers moet teenoor dié van die grondeienaars afgeweeg word met inagneming van (30) –

- die tydelike aard van die verswaring;
- die doel van die *status quo*-bepaling in artikel 11(7);
- die noodsaak vir die bespoediging van die beskerming van die *status quo*-doel;
- die skade wat die grondeienaars kan ly deur die beperkings van artikel 11(7) en 11(8);
- die kwesbaarheid van die eisers en die skade wat hulle kan ly indien die *status quo* nie bewaar word nie;
- die reg van die grondeienaars om die hoofgrondeisekommissaris te nader vir uitsetting of inmenging met die verbeterings op die grondstuk; en
- die vraag of Wet 22 van 1996 redelikerwys vereis dat grondeise spoedig afgehandel word.

Artikel 11(6) is vervang deur die Wysigingswet op Grondherstel- en Grondhervormingswette 78 van 1996 en 'n endossement hoef nie meer teen die titelakte aangebring te word dat die grond onderworpe is aan 'n grondeis nie; die wysiging verwyder dus die vertraging wat dit in die verkoop van die grond of die verkryging van sekuriteit kon meebring (vgl ook Politieke Redaksie "Grondhervorming: 'vasskoppery ontstel' " *Beeld* 1996-09-18 7). Artikel 11(6) vereis nou dat nadat die streekgrondeisekommissaris die kennisgewing in die *Staatskoerant* gepubliseer het, hy of sy die grondeienaar en enige ander belanghebbende party skriftelik daarvan in kennis moet stel en hulle aandag op artikel 11(7) vestig. Subartikel (aA) word by artikel 11(7) gevoeg en bepaal dat geen persoon die betrokke grond mag verkoop, verruil, skenk, verhuur, onderverdeel of hersoneer sonder om een maand vooraf skriftelik kennis aan die grondeisekommissaris te gee nie. Indien kennis nie gegee is nie, kan die betrokke handelinge deur die grondeisehof tersyde gestel of enige ander bevel gemaak word as bevind word dat die handelinge nie te goeder trou geskied het nie.

Artikel 11A is ook ingevoeg om voorsiening te maak dat enige persoon wat deur die publisering van die kennisgewing geraak word, vertoë kan rig tot die streekgrondeisekommissaris vir intrekking of wysiging van die kennisgewing. Alle belanghebbende partye moet per aangetekende pos van enige moontlike intrekking of wysiging van 'n kennisgewing in kennis gestel word en geleentheid gebied word vir die verskaffing van redes waarom die kennisgewing nie gewysig of ingetrek moet word nie.

Hierdie wysigings gee dus groter bewegingsruimte aan die grondeienaar sonder dat die belange van die grondeisers op die agtergrond geskuif word. Dit skakel ook heelwat van die TLU se besware uit.

6 Eiendomsreg en die reg op vrye ekonomiese aktiwiteit

Alhoewel artikel 28 van die 1993-Grondwet nie spesifiek verwys na die beperking op die uitoefening van eiendomsreg en regte in grond wat deur grondeise opgelê word nie, bepaal die gelykheidsklousule (a 8(3)(b)) dat elke persoon of gemeenskap wel geregtig is om 'n eis kragtens artikels 121–123 van die Grondwet in te stel (vgl 2 hierbo). Die konstitusionele hof bevind dat die bestaande eiendomsreg nie voorrang bo grondeise geniet nie. Die hof lê die riglyn neer dat "the conflicting interests of claimants and current registered owners are to be resolved on a basis that is just and equitable" met inagneming van die faktore neergelê in artikel 123(2) van die 1993-Grondwet (33). Sodra die eis deur die grondeisehof toegestaan is, moet die staat die grond indien nodig aankoop of teen billike vergoeding onteien (a 123(2), (4) en (5) gelees met a 28(3) 1993-Grondwet).

Die applikant in die saak kon nie aantoon hoe artikel 11(7) en 11(8) wesenlik op die eiendomsreg van die grondeienaar inbreuk maak nie. Die hof maak die stelling dat al sou daar wel op die grondeienaar se eiendomsreg inbreuk gemaak word, die inbreukmaking ooreenkomstig artikel 33 van die 1993-Grondwet geregverdig sou wees (37–38). Die argument sou verder deur artikel 8(3)(b) van die Grondwet gestaaf kon word.

Artikel 25(1) van die 1996-Grondwet verwys nie meer spesifiek na eiendomsreg nie, maar bepaal dat niemand van hulle eiendom ontneem kan word nie behalwe deur 'n wet met algemene werking. Grond kan ontneem word vir 'n openbare doel en in die openbare belang onderworpe aan vergoeding (a 25(2)). Die openbare belang sluit die regering se verbintenis tot grondhervorming in (a 25(3) en (8)). Artikel 25(7) maak spesifiek voorsiening dat 'n persoon of gemeenskap wie se eiendom na 19 Junie 1913 as gevolg van rasdiskriminerende wetgewing of praktyke ontneem is, geregtig is op herstel van dié eiendom of op vergoeding.

7 Delegasie

Applikant het beweer dat die grondeisekommissie nie kragtens artikel 122(1)(b) van die 1993-Grondwet die bevoegdheid het om mediasie aan iemand anders te delegeer nie (4). Volgens applikant sou die kommissie (al die kommissarisse gesamentlik) alle mediasies self moet onderneem. Dit sou volgens die hof 'n onmoontlike taak op die kommissarisse lê, veral in die lig van die hoeveelheid eise wat reeds ingedien is (42–43). Artikel 121(6) van die Grondwet voorsien volgens die hof slegs dat die kommissie 'n belangrike rol in die hele proses rondom grondeise, mediasie en onderhandeling te speel het (43).

Die konstitusionele hof stel as riglyn (44–45) dat die 1993-Grondwet aan die parlement die bevoegdheid verleen om wetgewing uit te vaardig (a 121(1)). Die parlement is nie 'n suborgaan wie se bevoegdhede tot delegasie beperk word nie en die Grondwet behoort nie legalisties uitgelê te word nie (die hof verwys na *Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 (PC) 328H in die verband). Daar is nie enige beperking in die Grondwet op die grondeisekommissaris geplaas om onderhandelaars wat 'n grondeis moet afhandel, aan te stel of sodanige bevoegdheid te delegeer nie. Artikel 122(1)(d) bepaal in elk geval dat die kommissie enige ander funksies en bevoegdhede kan uitoefen wat die wet voorskryf.

8 Slot

In die onderhawige saak het die konstitusionele hof riglyne gegee oor hoe die Wet op die Herstel van Grondregte 22 van 1994 en die 1993-Grondwet geïnterpreteer behoort te word om administratiewe geregtigheid te bewerkstellig. Die hof maak wel die opmerking dat die belange van die grondeienaar en die beskerming van sy of haar eiendomsreg nie swaarder weeg as dié van die grondeiser nie. Artikel 11(7) en 11(8) is daar om te verseker dat die grondeiser nie benadeel word nadat die grondeienaar van die eis te hore kom nie. Dié *status quo*-beskerming geld nie absoluut nie en kan deur die hoofgrondeisekommissaris opgehef word na voorlegging van behoorlike redes en met inagneming van 'n aantal faktore. Dié diskresie kan slegs na behoorlike afweging van alle belange uitgeoefen word. Sedert die publikasie van die hoofsaak was die grondeisekommissaris al gedwing om van die bepalings van artikel 11(7) en 11(8) gebruik te maak ten einde grondeisers te beskerm (vgl bv AK 521 in *SK* 17119 van 1996-05-03 (Barkly-Wes in Noord-Kaap). Hieruit blyk die noodsaak wat die beskerming van die wet in die vooruitsig gestel het en wat die konstitusionele hof korrek opgesom het.

Grondeise is en bly 'n moeilike aangeleentheid en meerdere persone as bloot die grondeisers en grondeienaars word daardeur geraak. Deur 'n behoorlike en regverdige interpretasie van die wetgewing kan heelwat van die probleme uitgeskakel word.

W DU PLESSIS
Potchefstroomse Universiteit vir CHO

EQUALITY BEFORE THE LAW AND FREEDOM FROM DISCRIMINATION – DIFFERENTIAL TREATMENT OF CLASSES OF PERSONS IN LEGISLATION

Mwellie v Ministry of Works, Transport and Communication 1995 9 BCLR 1118 (NmH)

Introduction and facts

It may be said that equality expresses the primary paradigm of the new constitutionalised legal order in South Africa. The preamble to the Constitution of the Republic of South Africa 108 of 1996, as adopted by the Constitutional Assembly on 8 May 1996, declares that every citizen is equally protected by law. The achievement of equality is one of the foundational values of a sovereign democratic South Africa (s 1) and the first subsection of the equality clause (s 9) provides that everyone is equal before the law and has the right to equal protection and benefit of the law.

Similarly, article 10 of the Namibian Constitution, entitled "Equality and freedom from discrimination" provides that all persons shall be equal before the law and that no person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The plaintiff, Mwellie, had been employed by the Ministry of Works, Transport and Communication. In June 1990, his services were terminated by the acting Postmaster-General with immediate effect. The plaintiff alleged that the dismissal was wrongful and unlawful and claimed reinstatement. The defendants, alleging that the plaintiff failed to bring his action within 12 months, raised a special plea based on section 30(1) of the Namibian Public Service Act 2 of 1980, which provides that

> "no legal proceedings of whatever nature shall be brought in respect of anything done or omitted under this Act, unless the proceedings are brought before the expiry of a period of twelve months".

The plaintiff contended that section 30(1), being a statute of limitations, was unconstitutional as being in conflict with article 10 of the Namibian Constitution.

In order to appreciate the cogency of Strydom JP's reasoning in the *Mwellie* case it is imperative to examine earlier Southern African decisions in this regard as well as the approaches followed in other jurisdictions, in particular India, the United States of America and Canada.

Earlier Southern African decisions

In *Cabinet for the Territory of South West Africa v Chikane* 1989 1 SA 349 (A), the respondents contended that section 9 of the Residents of Certain Persons in South West Africa Act 33 of 1985 offended against the right to equality before the law (art 3 of the Bill of Rights) and the right to freedom of movement and residence (art 10 of the Bill of Rights). Section 9(1)(a), they said, discriminated between two categories of persons, the first category consisting of persons born in the territory, persons rendering service in the territory in terms of the Defence Act and persons employed in the territory in the service of certain governments, while the second category consisted of all other persons not included in the first category.

In his majority judgment, Grosskopf JA stated that the general rules enunciated in articles 3 and 10 of the Bill of Rights did not forbid reasonable classifications or distinctions for the purposes of legislation. Such distinctions would be regarded as reasonable if they are founded upon intelligible *differentiae*, and if the *differentiae* bear a rational relation to the object sought to be achieved by the statute in question.

The following three cases are directly relevant in that they involved the constitutionality of statutes of limitation. First, in *Stambolie v Commissioner of Police* 1990 2 SA 369 (ZSC), appellant's counsel argued that section 67 of the Police Act, which provides that any civil action instituted against the state or a member thereof (ie, a police officer) must be commenced within six months after the cause of action arose, was inconsistent with section 13(5) of the Zimbabwean Constitution, which gives an individual an absolute entitlement to compensation for unlawful arrest or detention. After considering the judicial approaches to statutes of limitation in India and the United States of America, Gubbay JA concluded, quite simply, that statutes of limitation do not affect a substantive right guaranteed under a constitution, but merely limit in time the remedy of bringing proceedings to enforce that right (371J–372A).

However, in *Qokose v Chairman, Ciskei Council of State* 1994 2 SA 198 (Ck), Heath J strongly disagreed with this reasoning. The case centred around the constitutionality of section 48(1) of the Ciskeian Police Act 32 of 1983. The

section provided that no civil proceedings arising out of any wrong committed by any member of the police force acting in his capacity and within the scope of his authority may be brought against the state or against any such member if a period of six calendar months had elapsed from the date on which the cause of action arose. It was submitted on behalf of the applicant that section 48(1) offended against the equality clause – article 1(2) of Schedule 6 of the Republic of Ciskei Constitution Decree – because it afforded members of the police force a greater right and protection against claims based on their wrongful and unlawful conduct than that afforded to all other citizens in respect of a claim based on their wrongful and unlawful conduct. Heath J stated:

> "The inequality is so obvious that it does not require any further analysis or interpretation. To put it differently, s 48(1) does not create equal protection. On the face of the provisions of s 48(1), they therefore clearly clash with the provisions of art 1(2) of Schedule 6 and are therefore ... of no force and effect unless the provisions of s 48(1) constitute an authorised limitation or restriction" (201G–I).

On appeal to the Appellate Division of the Supreme Court of the Ciskei (see *Chairman of the Council of State v Qokose* 1994 2 BCLR 1 (CkA)), the decision of the court *a quo* was reversed. Relying on the approaches adopted in India, the United States of America and the Federal Republic of Germany, the appeal court accepted that reasonable classifications which are rationally connected to the object of the particular statute are permissible. Statutes of limitation are therefore, in principle, not unconstitutional.

The recent case of *Motala v University of Natal* 1995 3 BCLR 374 (D) underlines the extent to which a classification founded upon an intelligible *differentia* having a rational relation to the object sought to be achieved by the law may be stretched. In this case, an admission policy based on a racial classification was held not to amount to unfair discrimination between members of the African community and those of the Indian community. In fact, the court was satisfied that the admission policy was designed to achieve the adequate protection and advancement of a particular group of persons, itself disadvantaged by unfair discrimination, and that such policy was permissible in terms of section 8(3)(a) of South Africa's interim Constitution.

The court's use of foreign law and public international law

In the *Mwellie* case, Strydom JP stated that the meaning and content of article 10 of the Namibian Constitution and the parameters within which the right to equality must be applied, is to be determined by the meaning and content of the right itself, together with the other provisions of the Constitution and the values expressed thereby (1124I–J). He expressed the opinion that it would be a good starting point to see how countries with constitutions containing a bill of rights deal with this issue. In his judgment, he referred to the following jurisdictions: India, the United States of America, Canada and Malaysia.

In his authoritative work, *Constitutional law of India*, Seervai writes:

> "Statutes of limitation were at one time looked upon with disfavour but it is now generally recognised that 'the law is founded on public policy, its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression'. Are statutes of limitation constitutional when they prescribe periods of limitation for the enforcement of constitutional rights? Statutes of limitation do not bar the right but merely bar the remedy; therefore, they do not prevent the enforcement of constitutional rights but only require such rights to be asserted within a particular time, subject to the qualification that an

> unreasonably short period of limitation would prevent the enforcement of such rights in a practical sense and the law prescribing such period would be void" (269).

The writer points out that article 14 – the equality provision – is not absolute since the doctrine of classification has been incorporated into it by judicial decisions (1125F). According to Seervai, article 14 as interpreted by the courts, would read more or less as follows:

> "The state shall not deny to any person equality before the law or equal protection of the laws provided that nothing herein contained shall prevent the state from making a law based on or involving a classification founded on an intelligible *differentia* having a rational relation to the object sought to be achieved by the law" (1125G).

The approach of the Supreme Court of India may be illustrated by reference to two decisions. First, in *Nav Ratanmal v Rajasthan* (1962) 2 SCR 324, the 60-year period prescribed in article 149 of the Limitation Act of 1908 for government suits in respect of the recovery of public demands was held not to be inconsistent with or to violate article 14 of the Indian Constitution. Secondly, in *Tilookchand Motichand v HB Munshi* (1969) SCR 824, the contention of the applicants was that the right protected in article 32 of the Indian Constitution could not be barred by a plea of delay. Article 32 entrenches the right to move the court by appropriate proceedings for the enforcement of fundamental rights, in this case involving recovery of money paid to the state under coercion or mistake.

Judge Mitter stated:

> "I can, however, find no merit in the contention that because there is an invasion of a fundamental right of a citizen he can be allowed to come to this Court, no matter how long after the infraction of his right he applies for relief. The Constitution is silent on this point; nor is there any statute of limitation expressly applicable, but nevertheless, on grounds of public policy, I would hold that this Court should not lend its aid to a litigant even under art 32 of the Constitution in case of an inordinate delay in asking for relief and the question of delay ought normally to be measured by the periods fixed for the institution of suits under the Limitation Acts" (855).

A similar line of reasoning was followed in a number of decisions of the United States Supreme Court. The Fourteenth Amendment to the Constitution forbids each of the states to deny to any person within its jurisdiction the equal protection of the law. Again, reference to two decisions suffices. First, in *Atchafalaya Land Co Ltd v FB Williams Cypress Co Ltd* (1921) 258 US 188, it was held that the Statute of Limitation of 1912, which prescribed a limitation of six years for suits to annul patents from the state or any transfer of property by a subdivision of the state, was not in violation of the Constitution of the United States as a denial of due process of law or contract obligations when used to annul certain patents granting land. Justice McKenna added:

> "The Act of Prescription was a proper exercise of sovereignty. The State could recognise, as it did recognise, that there might be claims derived from it, asserted or to be asserted, rightly or wrongfully involving conflicts which should be decided and quieted in the public interest, and therefore enacted the statute. And such is the rationale of statutes of limitations, they do not necessarily lessen rights of property or impair the obligation of contracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal, and its justice and wisdom have the testimony of the practices of the world" (197).

McKenna J's words were reiterated in the case of *Block v North Dakota* (1983) 461 US 273 by Justice White, who said that "a constitutional claim can become time-barred just as any other claim can". Commenting on the Fourteenth Amendment, Willis *Constitutional law* 579 writes:

> "The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory in which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. The inhibition of the amendment . . . was designed to prevent any person or class from being singled out as a special subject for discriminating and hostile legislation. It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of fact must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

In the *Mwellie* case, Strydom JP relied on Seervai's work, as regards the Indian approach, as well as on Willis, as regards the United States approach to statutes of limitation. As to the latter jurisdiction, Strydom JP also quoted Nowak, Rotunda and Young *Constitutional law* 525 as follows:

> "The equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It does not reject the government's ability to classify persons or 'draw lines' in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria arbitrarily used to burden a group of individuals. If the government's classification relates to a proper governmental purpose, then the classification will be upheld. Such a classification does not violate the guarantee when it distinguishes persons as 'dissimilar' upon some permissible basis in order to advance the legitimate interests of society" (1127D–F).

As far as Canada is concerned, the court relied on the Canadian authors Laskin (*Canadian constitutional law* 1255) and Hogg (*Constitutional law of Canada* 800) who state that the interpretation of the equality clause – section 18 of the Canadian Charter – should be regarded as providing for the universal application of the law. Once an inequality is established, it then has to be determined whether such inequality is demonstrably justifiable in a free and democratic society in terms of the limitation clause (s 1 of the Charter) (1128C–D).

It is clear from the judgment of Strydom JP that McIntyre J has had considerable influence in the area of equality jurisprudence in Canada. McIntyre J's *dicta* from two judgments are quoted. First, in *Mackay v Others* (1980) 2 SCR 370 he stated:

> "[As] a minimum it would be necessary to inquire whether an inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application of the law for the attainment of some necessary and desirable social objective" (1128B–C).

And in the Canadian Supreme Court case of *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1, McIntyre J said:

> "It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of section 15 of the Charter. It is, of course, obvious that legislatures may – and to govern effectively – must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society" (1128G–H).

Interestingly enough, Strydom JP then referred to the Malaysian Supreme Court case of *Malaysian Bar v Government of Malaysia* (1988) LRC (Const) 428 and quoted the judgment of the Lord President, Salleh A Abas, as follows:

> "The requirement for equal protection of the law does not mean that all laws passed by a legislature must apply universally to all persons and that the laws so passed cannot create differences as to the persons to whom they apply and the territorial limits within which they are in force. Individuals in any society differ in many respects such as *inter alia*, age, ability, education, height, size, colour, health, occupation, race and religion. Any law made by a legislature must of necessity involve the making of a choice and differences and regards its application in terms of persons, time and territory. Since the legislature can create differences, the question is whether these differences are constitutional. The answer is this: if the basis of the difference has a reasonable connection with the object of the impugned legislation the difference and therefore the law which contains such provision is constitutional and valid. If on the other hand there is no such relationship the difference is stigmatised as discriminatory and the impugned legislation is therefore unconstitutional and invalid. This is the doctrine of classification which has been judicially accepted as an integral part of the equal protection clause" (1130C–F).

Conclusion

Strydom JP concluded on the basis of his references to foreign law and public international law, that the principle of equality before the law is not absolute and that the legislature must legislate for good and proper government and also for the protection of those who are unequal. Reasonable classifications may be made in such legislation and as long as these classifications are rationally connected to the object of the statute, the courts will accept the constitutionality of such legislation (1131C–E). On these grounds the court held that the provisions of section 30(1) of the Namibian Public Service Act were not unconstitutional.

The judgment is clearly in accordance with recent Southern African decisions and with international equality jurisprudence. It is also in accordance with the general philosophy and purpose of statutes of limitation. In the words of Justice Jackson:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims and the citizen from being put to his defence after memories have faded, witnesses have died or disappeared, and evidence has been lost" (*Chase Securities Corporation v Donaldson* (1944) 325 US 304).

And in the words of Gubbay JA:

> "It has been said that statutes of limitation are conservators without which society cannot wholly govern. They are founded on grounds of public policy and give effect to two maxims: first, *interest republicae ut sit finis litium* – the interest of the

state requires that there should be a limit to litigation. Second, *vigilantibus non dormientibus jura subveniunt* – the laws aid the vigilant and not those who slumber" (*Stambolie v Commissioner of Police* 1990 2 SA 369 (ZSC)).

NAZEEM GOOLAM
Vista University, Bloemfontein

PUBLIC SCHOOLS BASED ON A COMMON LANGUAGE, CULTURE OR RELIGION NOT CONSTITUTIONALLY SANCTIONED

In re: The School Education Bill of 1995 (Gauteng)
1996 4 BCLR 537 (CC)

1 Introduction and summary

The Constitutional Court ruled that section 32(c) of the interim Constitution 200 of 1993 did not place an obligation on the state to establish and fund schools based on a common language, culture or religion. There are many aspects of the majority judgment of Mahomed DP and the concurring minority judgments of Kriegler and Sachs JJ which merit discussion and closer scrutiny. However, in the present discussion I intend to concentrate only on some selected issues.

2 Section 32(c)

This subsection, which is part of the section dealing with the general fundamental right to education, provides as follows:

> "Every person shall have the right–
>
> (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race."

3 Some facts concerning the dispute

The exposition in this and the next paragraph is an edited version of the summary prepared by the School of Law at the University of the Witwatersrand and made available on the internet (at the address http://www.law.wits.ac.za).

The Speaker of the Gauteng legislature, acting in terms of section 98(9) of the interim Constitution, referred a dispute over the constitutionality of the School Education Bill to the Constitutional Court for adjudication. The disputed clauses of the Bill were clause 19 (prohibiting language competence testing as an admission requirement to a public school); clauses 21(2) and (3) (relating to the formulation of a religious policy by a public school aimed at the development of a national democratic culture of respect for the country's diverse cultural and religious traditions); and clause 22(3) (relating to the right of learners at public schools, or private schools receiving a subsidy, not to attend religious education classes and religious practices at that school). The petitioners contended that the clauses violated section 32(c) of the Constitution (see par 2 above). The petitioners contended that section 32(c) imposed a positive obligation on the state to

establish, where practicable, public schools based on a common culture, language or religion.

4 The essence of the judgment

The judgment of the court was delivered by Mahomed DP and was concurred in by the other members of the court. Kriegler and Sachs JJ delivered separate concurring judgments.

The court held that on a proper construction of section 32(c) there was no positive obligation as alleged on the state. The language and purpose of the section did not support such a construction. The section meant only that a person shall have the right, in association with others, to establish education institutions based on a common culture, language or religion, where this is reasonably practicable, and provided there is no discrimination on the ground of race. The section does not create an obligation on the state to establish such schools but rather protects the right of the individual to do so. The disputed clauses of the Bill therefore did not conflict with section 32(c).

The petitioners also contended that section 247 of the Constitution, which required negotiations to be conducted before the rights, powers or functions of the governing bodies of state aided ("model C") schools could be amended, had been violated because the Bill altered the rights, powers and functions of such governing bodies without such negotiations. The court rejected this argument as well. (I intend to deal with the significance of section 247 in another publication.)

5 Some background to the judgment

The outcome of this case on the meaning of section 32(c) (just like the earlier case on the abolition of the death penalty – *S v Makwanyane* 1995 3 SA 391 (CC)) was to me a foregone conclusion. I would have been very surprised to learn that schools based on a common culture or language could exist in the public school system as this is simply not in line with the current policy of the government and the mistrust of cultural, language, collective or minority rights (see generally on collective (group) rights De Villiers "Volkeregtelike beskerming van minderheidsgroepe: Lesse vir die staatsreg?" 1991 *THRHR* 189; Potgieter "The right to education and the protection of minorities in South Africa: a preliminary perspective" in De Groof and Bray (eds) *Education under the new Constitution in South Africa* (1996) 169; Veny "Minorities and the right to education" in De Groof and Bray 177; generally De Groof and Fiers *The legal status of minorities in education* (1996) *passim*).

The present case gives an idea of what may be expected in future regarding the new constitutional provisions (in the 1996 Constitution) on education, language and culture, which are unfortunately also susceptible to manipulation.

Facts which do not appear from the law reports containing the judgment may shed light on the attitude of the court and also reveal some of the background to the decision. Reference must especially be made to a well-publicised incident of racism in the little town of Potgietersrus which was allowed to hang like a dark shadow over the court proceedings (see *Matuka v Laerskool Potgietersrus* case nr 2436/96, also reported in De Groof and Bray 363). The Potgietersrus incident has been used effectively ever since, for example in parliamentary proceedings and negotiations on education legislation, to counter the demands by those who

lay claim to schools using only Afrikaans as medium of instruction, or who claim more autonomy for the governing bodies of public schools.

According to eye-witnesses the presentation of oral argument before the Constitutional Court in the *Gauteng* case was especially difficult for the advocates appearing on behalf of the petitioners. The aggressive attitude and body language of some of the judges were visible evidence of what the outcome of the case would be. Frequent interruptions and aggressive questions marked the hearing.

It was also alleged by some that the court did not do enough to act against some activists who attended the hearing and through their undisciplined conduct detracted from the high legal status of the court. The impression even existed that some of the judges "played to the audience" in order to provoke laughter. It was noticed that Mrs Mary Metcalfe, Gauteng MEC for education, clapped hands in the public gallery when something pleasing to her was said (see *Beeld* 11-3-1996:

> "Daarbenewens het me Metcalfe sigbaar so betrokke geraak by wat in die hof betoog, gesê en gevra is, dat sy een keer begin hande klap het weliswaar darem nie kliphard nie toe 'n regter 'n vraag vra waarmee sy ooglopend saamgestem het. Sy het ook haar kop geknik wanneer vrae gevra word en 'n slag of wat hardop met haarself gepraat. 'That's right' het sy eenkeer hoorbaar gesê. 'n Ander keer het sy hardop begin lag.")

Obviously all this neither contributed to the decorum of the Constitutional Court nor allowed the court to project an image of cool objectivity and professionalism as a forum where only facts and proper legal arguments should be seen to hold sway. After all, the Constitutional Court is not a third house of parliament (see Visser and Potgieter "Some critical comments on South Africa's bill of fundamental human rights" 1994 *THRHR* 498:

> "One just hopes that the constitutional court will indeed be a proper court and not merely a [third] house of parliament, composed of political activists . . . who are expected to create an illusion of legal justice while glibly handing down 'politically correct' judgments").

However, it was noticed that after the tea break the judges, especially Didcott J, were quieter. This led to speculation that the president of the court had possibly spoken to some of his learned colleagues regarding their conduct and attitude displayed on the bench.

6 Evaluation of some points made by Mahomed DP

Many of the arguments used by Mahomed DP in his judgment (pars 1–37) can be described as quite reasonable and acceptable, *depending of course on whether one agrees with the result that he wanted to achieve.* On the other hand, almost every important argument supporting his conclusion can be countered by other arguments which are at least equally forceful. Thus the outcome of the case did not only depend on the quality of the arguments but also on the personalities and political orientation of the judges on the bench. Given a different composition of the court, as in the United States of America for example where the Supreme Court is traditionally supposed to be more balanced, the result could have been different.

"Establish"

Mahomed DP referred to the fact that section 32(c) speaks of the right to *establish* educational institutions and then concluded that this does not place any

positive duty on the state (par 7). If I understand him correctly, the state is reduced to a mere interested spectator while some of its citizens start establishing schools based on, for example, a common language and does not have to help them financially. Why the state should be permitted to place huge financial stumbling blocks in the way of those who want to "establish" such schools, is never properly explained. As will appear from the rest of the discussion this narrow interpretation of "establish" with its far-reaching consequences is not the most reasonable construction of section 32(c).

A further consideration is what the position is of *existing* public educational institutions which are based on a common language, culture or religion. Have they not already been *de facto* so *established* with financial support of the state? Does section 32(c) mean that they cannot remain inside the public school sector? Even if it is correct that the further establishment of new schools is a matter of private initiative and expense, the *continued existence* of such institutions is not limited in the same manner.

Compromise and common sense

From a common sense point of view it may be asked whether it is really so illogical or wrong to give effect to a reasonable political compromise voluntarily accepted by the ANC and other parties to allay the justified fears of minorities regarding the suppression of their language and culture in the state-funded public school system. Who can honestly believe that the negotiating parties at Kempton Park could have intended schools based on a common language to be possible only in the case of private schools which so few in South Africa currently attend or can afford? And why should political compromises couched in relatively vague language not be enforceable in a court of law?

Three subsections of section 32

Judge Mahomed's analysis of the three subsections of section 32 does not necessarily justify the court's thesis. His conclusion is that section 32(c) offers something *more* than that awarded by (a) and (b), namely a freedom to set up private schools (section 32(a) gives a right to basic education and equal access to educational institutions and (b) provides for a right to instruction in the language of a person's choice if that is reasonably practicable).

Now section 32(c) does not necessarily mean something *more* than that offered by section 32(a) and (b), but something *different*. Sections (a) and (b) do not cover the full spectrum for which the state should reasonably be responsible (and is in any event limited to "basic education"). Only by accepting that (c) is also part of the state's area of responsibility will the whole field be covered and completed. There is no explanation why one should only be entitled to state support if one wants "instruction" in a particular language (on the level of basic education) but not "education" in a particular language, or education in a particular cultural or religious environment. Education is obviously a wider concept than instruction. The court's reasoning implies a very narrow view of the state's duty regarding the provision of education. One may also ask: where are the words "private" or "independent" in relation to section 32(c) and where is the expression "public expense" in regard to (a) and (b)?

In arguing that section 32(c) refers only to privately funded private schools, the state may conveniently escape its duty to perform properly in accordance with the right (and reasonable expectation) of a pupil to education in a particular

cultural and language context. The whole argument about positive and defensive rights in this context, is actually nothing more than a polite way of sacrificing the legitimate interests of some in order to achieve a political result favoured by others. Relatively few learners attend private schools in South Africa for obvious financial reasons. Through its judgment the Constitutional Court makes it generally impossible to have such schools. One may ask: *Whose right is the right to education anyway?* (See, in a somewhat different context, Van Beuren "Education: whose right is it anyway?" in Heffernan and Kingston *Human rights. A European perspective* (1994) 339 *et seq*.)

Money

As Kriegler J said in his brief judgment, the case was concerned with money (par 42). In effect, the judgment of the court tells some South Africans that their tax payments and additional payments of school fees at some schools are not enough to ensure educational institutions based on, for example, a common language – for that they must pay extra while their tax money only pays for the education of others who are satisfied with what the state tells them is good enough. Here one may ask: since when are educational institutions based on a common language (single-medium schools) or culture so extraordinary and luxurious that double payment must be made?

Reasonable people reject unfair discrimination based on race in the school system. However, the approach of the Constitutional Court may create the impression that the majority in South Africa are living in fear of a small minority who (now lacking any real political power) would like to have educational institutions based on, for example, a common language without unfair racial discrimination. This apartheid phobia is not conducive to the development of a free and fair education system. The ANC-dominated government virtually controls the whole public sector including public finances to fund the kind of education favoured by it. What danger is posed or what damage may be caused to the majority of the population by a number of, for example, Afrikaans schools (not practising unfair racial discrimination) existing within the state funded school system?

The right to *instruction* in the language of one's choice in terms of section 32(b) of the Constitution is not nearly enough in the South African situation, especially in view of the state's policy of having double language instruction. The new (1996) Constitution is in this sense more realistic by expressly making single language institutions a valid educational possibility to be considered (s 29(2)).

"*Practicable*"

The weakest point in judge Mahomed's reasoning is his treatment of the issue of *practicability*. Section 32(c) only allows schools where this is "practicable". The most probable explanation is that it is seen as an internal limitation of a second or third generation right against the state. The state cannot be expected to support schools which on pedagogical, financial, demographic or other factual grounds should not reasonably receive such support. However, Mahomed DP conveniently sees it as a *neutral* factor in interpreting section 32(c). According to him it is equally relevant on a "positive" or "defensive" construction of section 32(c). He then advances the following ground: *The state cannot be expected to monitor and supervise hopelessly impractical private school ventures* (par 11).

Why the state should have such an interest in the *practicability* of *private schools* that it must be specially mentioned in the Constitution, remains a mystery. It is also far-fetched to suggest that the constitutional negotiators in Kempton Park foresaw so many private schools that they wanted to protect the state's resources against these ventures. And how will the so-called "supervision" of these impractical private schools place such a heavy burden on state resources? The concern of the court about many learners who may be prejudiced by hopeless private school ventures, is not backed by any facts.

The whole argument of Mahomed DP seems to me to verge upon the fantastic. In view of the court's desire to strike down the political compromise in section 32(c), it had to find some ground to neutralise the qualification in section 32(c) which is opposed to its own dogmatic views. In my submission this is a good illustration of the length to which the court may go in imposing its ideas on others regardless of the words actually used in the Constitution. All this does not inspire confidence in the way in which the court will interpret the relatively vague education provisions in the new constitutional text.

In short: the court's handling of the matter serves the ideology it likes to promote well, but has little to do with the interpretation of the Constitution in a manner which takes proper notice of the language and cultural diversity and the need to promote cultural and language security in education – which will also benefit the country as a whole (see eg s 27 of the Canadian Charter of Rights and Freedoms: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians").

That section 32(c) was never intended to refer to private schools, is also dramatically illustrated by the fact that private or independent schools in terms of the new Constitution (s 29(3)) are not subjected to the requirement that their establishment must be "practicable". This is further proof of the artificiality of the court's argument.

7 Some remarks on the judgment of Sachs J

Judge Sachs (par 44 *et seq*) considered the case in the broader context of minority rights in the international community (see generally De Groof and Fiers *supra* for a useful collection of views from many European countries). Sachs J made an interesting general statement (par 52) which should be developed further. He said that the Constitution must be seen as a bridge to accomplish the passage from state protection of minority privileges to state acknowledgement and support of minority rights. This is precisely what is needed in the South African educational situation. Unfortunately Sachs J did not recognise and interpret section 32(c) as being aimed at achieving the very bridge he was speaking about.

Although Sachs J is correct in concluding that there is insufficient authority for placing on a state the duty to subsidise all kinds of schools (see eg also Heffernan and Kingston *Human rights. A European perspective* 347) the question still is: what should the realistic and fair approach in South Africa be? One has to consider whether it will be to the long term advantage of South Africa to drive many members of Afrikaans minorities out of the public school system. Will this advance national reconciliation and the promotion of tolerance, friendship and understanding among ethnic groups? (See on this s 13(1) of the International Covenant on Economic, Social and Cultural Rights.)

A partial answer to this is given by the vague wording in the new education clause which stipulates that the state must in the provision of education in someone's language or languages of choice consider all reasonable educational alternatives including single medium schools. However, it remains to be seen how this provision will be interpreted and applied in practice.

In the course of his long judgment Sachs J stated *inter alia* (par 81) that from a cultural or language point of view there is no clear majority in South Africa. However, he immediately qualified this by observing that there is a massive push by parents to have their children educated in English. Here Sachs J took a leaf out of the propaganda book of the previous NP apartheid government. This government, in order to justify its minority rule, was always quick to point out that there is no majority in South Africa. However, Sachs J used this observation in an attempt to argue that it could not have been the intention of the framers of the Constitution that each and every language group or religious community could have its own schools. In fact, the remarks by Sachs J on the different cultures and religions in South Africa strengthens the interpretation that section 32(c) was, where practicable, intended to solve the very problem of language, cultural and religious minorities. Why should the state only have to provide education to those who want to attend schools *not* based on a common language, culture or religion? Such a practice would be a clear example of unfair discrimination and suppression of people on the basis of culture and language orientation.

It is a pity that for the purposes of comparative law Sachs J did not pay more attention to the ideas and principles reflected by certain proposals in the draft Convention for the Protection of National Minorities in Europe (1994) (see pars 88–90 of his judgment where Sachs J merely stressed that the actual convention does not impose positive obligations on states to establish or maintain minority schools). Although not all the suggested principles have been put into effect, they are of particular relevance in the South African situation. In the document available to me, the following (draft) articles are noteworthy:

> Article 7 5: "Persons belonging to ethnic groups shall have the right to set up and manage their own schools, educational and training establishments within the framework of the legal education system" (see also Council of Europe Recommendation 1201/1993).
>
> Article 7 6: "In order to make the right to education effective, persons belonging to ethnic groups shall at least be entitled, for all types and at all levels of education, to a share in public grants proportionate to their share in the total population."
>
> Article 7 9: "State Parties to the Protocol shall be responsible for the financing of the educational system of the persons belonging to ethnic groups."

8 Conclusion

The case on section 32(c) does not inspire much confidence in the Constitutional Court as far as the future of minority languages in education are concerned. It seems unlikely that the court as presently constituted will develop to a position where there will be more understanding and respect for schools based on a minority language. Fortunately the court in its present form will not last for ever and one can merely hope that the Constitutional Court will with the passage of time in its function as political arbiter better reflect the different valid and reasonable views on education in South Africa and be more sensitive to the issue of education within a particular cultural, language and religious context (see for some recent views on culture Freeman "The morality of cultural pluralism" 1995

The International Journal of Children's Rights 1 *et seq*; see also Beukes "Verstaanbare vraagstukke rondom 'n verkleurmannetjiebegrip: Of die vele gesigte van kultuur" 1994 *SA Public Law* 137–158).

Compromise clauses should not be interpreted in such a manner that the compromise is destroyed, since compromises paved the way to a peaceful transition in South Africa.

Realism, taking into account all relevant facts – even those not favoured by the majority – is the hallmark of a lasting and enlightened legal system. This also applies in the case of the fundamental right to education.

PJ VISSER
University of Pretoria

DIE GRONDWETLIKHEID VAN DIE ONDERVRAGINGSPROSEDURE INGEVOLGE ARTIKELS 417 EN 418 VAN DIE MAATSKAPPYWET 61 VAN 1973

Bernstein v Bester 1996 2 SA 751 (CC)

1 Feite

Tollgate Holdings Ltd (die maatskappy) was 'n publieke beleggingsmaatskappy en op die Johannesburgse en Londense beurse genoteer. Die ondergang van die maatskappy het in Februarie 1988 begin toe Duros Group Ltd (waarvan M en K beherende lede en direkteure was) beheer oor die Tollgate-groep (T-groep) gekry het. A, B, C, D, M en K was almal die een of ander tyd by Duros in gesaghebbende posisies betrokke. Kessel Feinstein was ouditeure van Duros toe hulle in 1988 beheer oor T Holdings gekry het. Hulle het egter eers in 1990 hoofouditeure van die T-groep geword. As ouditeure het hulle gesertifiseer dat die gekonsolideerde jaarlikse finansiële state van die T-groep die finansiële posisie van die groep vir 1990/1991 redelik verteenwoordig. Die finale likwidasie van die maatskappy het op 13 Januarie 1993 plaasgevind. Dit het gelei tot die ineenstorting van ook die hoofiliaal maatskappye en die meeste ander maatskappye in die groep. Die maatskappy en sy filiale is in die Kaapse Provinsiale Afdeling van die Hooggeregshof onder voorlopige likwidasie geplaas. Die gevolg van die ineenstorting van die groep was skuld van byna R400 miljoen. Lasbriewe vir inhegtenisneming op aanklagte van bedrog en diefstal is ten opsigte van A en M uitgereik. K staan tereg op verskeie strafregtelike aanklagte met betrekking tot die ineenstorting van die T-groep. D en C is op grond van onregmatige dade substansiële bedrae aan die likwidateure verskuldig. Aansoek om die sekwestrasie van D se boedel is gedoen en ooreenkomste is met C bereik.

Ná die finale likwidasie het die likwidateure en ander maatskappye in die T-groep aansoek gedoen om die daarstel van 'n kommissie van ondersoek na die sake van sekere van dié maatskappye. Die Kaapse Provinsiale Afdeling het die aansoek toegestaan. Die kommissaris het Bernstein, Klotz en Nicola (vennote en werknemers van 'n firma van geoktrooieerde rekenmeesters en applikante 1 tot 3)

gedagvaar om ingevolge artikels 417 en 418 van die Maatskappywet 61 van 1973 (hierna "die wet") voor die kommissie te verskyn en dokumentasie voor te lê. Die ondervraging was gemik op die insameling van getuienis omdat gemeen is dat Kessel Feinstein sivielregtelik aanspreeklik was op grond van die wyse waarop die firma sy professionele pligte as ouditeure van die T-groep uitgevoer het. Dié feit is egter nie aan Bernstein se prokureurs geopenbaar nie. Op die derde dag van die ondervraging het Bernstein se verteenwoordigers beswaar aangeteken. Hulle het beweer dat die bepalings van artikels 417 en 418 ongeldig en ongrondwetlik is en dat die kommissaris en die likwidateure nie met die ondervraging kan voortgaan nie. Die ondervraging is vervolgens uitgestel. In 1995 het die applikante aansoek gedoen om tersydestelling van die hofbevel wat die ondersoek gemagtig het tot die omvang dat dit die oproep van die applikante toegelaat het. Hulle het verder die opheffing van die betrokke dagvaarding gevra asook 'n bevel om die likwidateure (respondente) en kommissaris te verhoed om enige getuienis of dokumente wat van die applikante verkry is aan ander te openbaar. Met betrekking tot die vraag na die grondwetlikheid van artikels 417 en 418 het adjunk regter-president Fagan die geskil na die konstitusionele hof verwys.

Die applikante grond hul saak daarop dat die meganisme geskep deur artikels 417 en 418 –

(a) inbreuk maak op die reg op vryheid en sekuriteit van 'n persoon (a 11(1) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (hierna "die Grondwet")) en op persoonlike privaatheid (a 13 van die Grondwet), waarby inbegrepe is vryheid van beslaglegging op privaatbesittings of inbreuk op privaatkommunikasie;

(b) inbreuk maak op artikel 24 van die Grondwet omdat dit administratiewe ondervraging toelaat terwyl dit nie in ooreenstemming met die bepalings van daardie artikel geskied nie;

(c) inbreuk maak op die reg op 'n billike verhoor ingevolge artikel 25 van die Grondwet vir sover dit 'n getuie ontneem van sy privilegie teen self-inkriminasie deur sy getuienis in daaropvolgende strafregtelike verrigtinge toelaatbaar te maak; en

(d) 'n geïmpliseerde grondwetlike reg op billikheid in siviele litigasie en die waarborg van gelykheid ingevolge artikel 8 van die Grondwet verbreek, vir sover die meganisme die likwidateurs en die skuldeisers van die maatskappy toelaat om 'n onbillike voordeel bo hul teenpartye te verkry wat hulle nie sou gehad het as dit nie vir die likwidasie was nie.

Kortliks is die argument dus dat die meganisme inbreuk maak op die ondervraagde se regte op vryheid en sekuriteit van die persoon, op persoonlike privaatheid (inbegrepe vryheid van beslaglegging op private besittings), op billike administrasieprosedures, en op billikheid in siviele litigasie en gelykheid. In *Ferreira v Levin* 1996 1 SA 984 (CC) het die konstitusionele hof beslis dat die woorde "any answer given to any such question may thereafter be used in evidence against him" in artikel 417(2)(b) van die wet ongrondwetlik en dus ongeldig is indien dit in strafregtelike sake teen die ondervraagde gebruik kan word, anders as strafregtelike verrigtinge waar die betrokke persoon teregstaan op 'n aanklag betreffende die oplê of aflê van 'n eed, die oplê of doen van 'n bevestiging of die aflê van valse getuienis of 'n valse verklaring in verband met sodanige vrae en antwoorde, en by strafregtelike verrigtinge met betrekking tot

'n versuim om wettige vrae volledig en bevredigend te antwoord. Sodoende is die posisie dieselfde as by artikel 65-ondervragings kragtens die Insolvensiewet 24 van 1936 (hierna Insolvensiewet; sien a 65(2A)(b)). Hierdie beslissing (*Ferreira v Levin*) was egter nog nie gelewer toe die saak onder bespreking na die konstitusionele hof verwys is nie. Desnieteenstaande gaan hierdie aansoek van die applikante baie wyer as slegs bogenoemde punt. (Sien veral par 7 hieronder waar die situasie by siviele litigasie ter sprake kom.) Die applikante versoek die deurhaling van artikels 417 en 418 in geheel.

2 Verwysing van geskille na die konstitusionele hof

Die eerste interessante aspek van die onderhawige beslissing is die verwysing van geskille na die konstitusionele hof. Die hof beklemtoon die volgende:

- Die hooggeregshof mag nie 'n saak verwys op grond van 'n ooreenkoms tussen die betrokke partye nie.
- Die vereistes van artikel 102(1) van die Grondwet moet nagekom word. Artikel 102(1) bepaal soos volg:

  "Indien daar by enige aangeleentheid voor 'n provinsiale of plaaslike afdeling van die Hooggeregshof 'n geskilpunt is wat deurslaggewend vir die saak kan wees, en wat binne die uitsluitlike jurisdiksie van die Konstitusionele Hof ingevolge artikel 98 (2) en (3) val, verwys die betrokke provinsiale of plaaslike afdeling, indien hy van mening is dat dit in die belang van geregtigheid is om dit te doen, daardie aangeleentheid na die Konstitusionele Hof vir sy beslissing: Met dien verstande dat, indien dit nodig is dat getuienis aangehoor word ten einde sodanige geskilpunt te beslis, die betrokke provinsiale of plaaslike afdeling sodanige getuienis moet aanhoor en 'n bevinding daaroor moet maak voordat die aangeleentheid na die Konstitusionele Hof verwys word."
- Daarby moet die hof, voordat dit die geskil na die konstitusionele hof verwys, ook deeglik oorweging aan daardie vereistes skenk ("must apply his mind to these requirements").
- Die hooggeregshof het slegs 'n plig om 'n saak sodanig te verwys as:
  (a) daar 'n geskil is wat inderdaad beslissend vir die saak is;
  (b) die geskil binne die eksklusiewe jurisdiksie van die konstitusionele hof val; en
  (c) die hof meen dat dit in belang van geregtigheid sal wees om die geskil na die konstitusionele hof te verwys.

Die konstitusionele hof het voorheen beslis dat dit implisiet aan artikel 102(1) van die Grondwet is dat daar 'n *redelike vooruitsig* moet wees dat die relevante bepaling ongeldig bevind sal word. Regter Ackermann meen dat hierdie aanduiding 'n *sine qua non* vir 'n verwysing na die konstitusionele hof is, maar nie op sigself 'n voldoende grond is nie. Die rede is omdat dit nie altyd in belang van geregtigheid sal wees om 'n verwysing te maak sodra die relevante geskil geopper is nie.

Met hierdie laaste opmerking van die konstitusionele hof word saamgestem en die hoop uitgespreek dat nie elke tweede insolvensie- of likwidasiegeskil in die vervolg na die konstitusionele hof verwys sal word nie. Ons is van mening dat dit 'n nadelige uitwerking op die spoedige en effektiewe afhandeling van die sekwestrasie- of likwidasieproses kan hê. Die versoek om verwysing kan 'n geforseerde en ongeregverdigde instrument in die hande van 'n insolvente skuldenaar of ander belanghebbende word wat dit gebruik met die uitsluitlike doel

om tyd te wen of strategie te bepaal. Dit is 'n geleentheid wat hy/sy nie verdien nie. Die likwidasie- of sekwestrasieproses beoog 'n sekere doel en tree na aanleiding van uitsonderlike omstandighede in werking. Dié situasie durf nie negeer te word nie.

3 Beoordeling van geskil teen 'n sekere agtergrond

Voordat die aansoek van ongrondwetlikheid deur die hof beoordeel word, maak regter Ackermann enkele opmerkings oor die pligte van die likwidateur en die oogmerke van die ondervragings uit hoofde van artikels 417 en 418. Die regter meld dat dit bloot as *agtergrond* vir die beoordeling van die kwessie oor die grondwetlikheid van die betrokke bepalings gegee word. Sy oogmerk is nie om met die uiteensetting regsbeginsels neer te lê of te ontwikkel om die artikel 417-ondervraging te kontroleer nie. Dít sien hy tereg as die funksie van die hooggeregshof. Nietemin is dit na ons mening essensiële riglyne wat deur die hooggeregshof in aanmerking geneem behoort te word by die beoordeling van die gebruik van die artikel 417- en 418-prosedure en moontlike versoeke om verwysing na die konstitusionele hof. In gepaste gevalle behoort dit verder te geld ongeag of 'n sekwestrasie- of likwidasieproses aan die orde is. Die feit dat 'n kurator in plaas van 'n likwidateur betrokke is, is volgens ons op enkele wetteregtelike en praktiese verskille na irrelevant. Die belangrikste van hierdie riglyne behels die volgende:

3 1 Die pligte van 'n likwidateur (of waar van toepassing 'n kurator)

- Die likwidateur moet alle bates van die maatskappy bymekaar maak (sien ook Meskin *Insolvency law and its operation in winding-up* (1991) 4–25 4–26(1) 4–58; Sharrock ea *Hockly's Insolvency law* (1996) 197; Cilliers ea *Corporate law* (1992) 517; Smith *The law of insolvency* (1988) 187; a 69(1) en 23(12) Insolvensiewet).
- Hy moet die sake en transaksies van die maatskappy voor likwidasie ondersoek om te bepaal of enige direkteur en beampte of vorige direkteur en beampte 'n bepaling van die wet oortree het of een of ander misdryf gepleeg het; of daar, met betrekking tot die persone genoem, gronde blyk te wees vir die bevel van die hof ingevolge artikel 219 van die wet om die direkteur van sy amp te diskwalifiseer (sien ook Sharrock 197; Cilliers ea 517; a 81(1) Insolvensiewet; Smith 190 227).
- Hy moet aan die Meester alle inligting gee of samewerking verleen wat vir die Meester nodig is om sy pligte na te kom (sien ook Sharrock 197; Cilliers ea 517).
- Behalwe in geval van 'n vrywillige likwidasie deur die lede van die maatskappy, is dit ook die plig van die likwidateur om aan die algemene vergadering van skuldeisers en bydraers van die maatskappy verslag te lewer rakende die oorsake van die maatskappy se mislukking (sien ook Sharrock 198; Cilliers ea 517; a 81(1) Insolvensiewet; Smith 190).

3 2 Oogmerke van ondervraging ingevolge artikels 417 en 418 (of waar van toepassing artikel 65 en 152 van die Insolvensiewet)

- Eerstens is die oogmerk om die likwidateur by die nakoming van bogenoemde pligte tot hulp te kom (sien ook *Costas Yiannoulis v Grobler,* soos aangehaal in *Agyrakis v Gunn* 1963 1 SA 602 (T) 604 waar sekwestrasie ter sprake was).

- Tweedens moet die bates en die verpligtinge van die maatskappy bepaal, die bates verkry en verpligtinge afgelos word op 'n wyse wat in die beste belang van die maatskappy se skuldeisers is.
- Slegs deur navrae kan vasgestel word welke bates die maatskappy besit, wie skuldeisers en wie bydraers is (sien ook a 44(7) Insolvensiewet; Sharrock 90); asook behoorlike ondersoek gedoen word na twyfelagtige eise teen buitestanders voordat van hulle geëis word.
- Om bates op te spoor, is dit toelaatbaar om die ondersoek uitsluitlik op die algehele geloofwaardigheid van die ondervraagde toe te spits.
- Persone verantwoordelik vir die wanbestuur is gewoonlik die enigstes wat kennis van die besigheid van die maatskappy voor likwidasie het. Hulle is nie geneë om die likwidateur vrywillig by te staan nie. Dit is in belang van die skuldeisers en die publiek in die algemeen om sodanige persone te dwing om die likwidateur by te staan (mbt ondervraging kragtens a 65 Insolvensiewet is in *Costas Yiannoulis v Grobler* 1963 1 SA 599 (T) 601 beslis dat die oogmerk van die vergadering van skuldeisers juis is om die kurator en die skuldeisers wat hulle eise bewys het in staat te stel om navraag op die wydste basis in die sake van die insolvent te loods. Dieselfde geld met betrekking tot ondervraging kragtens a 417 (sien Meskin 8–20)).
- Ondervraging is essensieel om die likwidateur in staat te stel om volledige inligting te kry wat as gevolg van die ingewikkelde aard van die besigheid nie altyd uit dokumente verkry kan word nie (sien ook Smith 227; *Nieuwoudt v Fought* 1987 4 SA 101 (K) 113; Meskin 8–12).
- Ondervraging het ook ten doel om so gou en goedkoop moontlik omringende feite te bekom in verband met die terugverhaal of opspoor van dokumente (of iets dergeliks) van 'n beampte, werknemers van die maatskappy of selfs 'n buitestander wat by die maatskappy se sake betrokke was (sien Meskin 8–20).
- As dit die maatskappy se gebruik is om geld van die publiek in te samel en besigheid te bedryf op die basis van beperkte aanspreeklikheid, is getuienislewering ingevolge artikel 417 'n persoon of persone se verantwoordelikheid teenoor die aandeelhouers en skuldeisers as gevolg van die mislukking van die besigheid.

Die regter is van mening dat hierdie verantwoordelikheid teenoor aandeelhouers en skuldeisers ook die verantwoordelikheid van die ouditeure van die maatskappy is. Ons stem saam dat dit gegrond word op die openbaringsplig om die likwidateur in belang van die skuldeisers by te staan. Dit is in openbare belang dat persone wat by 'n insolvente maatskappy se sake betrokke was so 'n plig teenoor die skuldeisers en aandeelhouers het. "They owe a public duty to assist the liquidator to investigate the affairs of the company." Die suksesvolle opspoor en terugverhaal van die vrugte van maatskappybedrog moet derhalwe beklemtoon word.

3 3 Riglyne vir die hof se diskresie om 'n ondersoek ingevolge artikel 418 te gelas

Regter Ackermann noem sekere riglyne wat in aanmerking geneem moet word wanneer 'n bevel vir die tersaaklike ondersoek gegee moet word. Hy doen dit met verwysing na die regsposisie in ander lande. In die eerste plek is hy van mening dat 'n balansering moet plaasvind. Die belangrikheid vir die likwidateur om die inligting te kry en die graad van dwang op die persoon wat ondervra

word, moet teen mekaar opgeweeg word. As die inligting wat benodig word fundamenteel vir die vasstelling van die eisoorsaak is terwyl die dwang in 'n mindere mate manifesteer, behoort so 'n bevel toegestaan te word. Dit kan egter nie toegelaat word as die likwidateur 'n redelik duidelike eis het en die ondersoek bloot ten doel het om die ander persoon se verweer vas te stel nie.

Ander oorwegings wat volgens die regter deur die hof in ag geneem behoort te word in die uitoefening van die diskresie om 'n ondersoek te gelas, is die volgende:

- Die feit dat die likwidateur in staat gestel sal word om kennis van die maatskappy te rekonstrueer om sodoende ingeligte besluite te kan neem. Die doel van die ondervragings is *nie* om die maatskappy in 'n sterker posisie te plaas in siviele litigasie as wat dit sou wees as likwidasie nie plaasgevind het nie.
- Dit is nie nodig dat 'n absolute behoefte aan inligting bewys moet word nie. Die bewys van 'n redelike behoefte aan inligting is voldoende.
- 'n Saak vir ondervraging is sterker teen beamptes wat 'n fidusiêre plig teenoor die maatskappy het as 'n saak vir die ondervraging van derde partye.
- 'n Bevel vir mondelinge ondervraging sal meer geredelik dwang uitoefen as 'n bevel vir voorlegging van dokumente.
- 'n Versoek deur die likwidateur sal met meer simpatie behandel word as 'n versoek deur 'n bydraer.

In aansluiting hierby het die hof reeds in *Ex parte Brivik* 1950 3 SA 790 (N) 791–792 beslis dat dit nie nodig is vir 'n applikant om 'n *prima facie* saak uit te maak dat daar voor likwidasie 'n optrede was wat aanvegbaar of strafbaar sou wees nie. Daar is dus geen sodanige *onus* op die persoon wat die ondersoek aanvra nie. Dit is voldoende om "a fair ground for suspicion" aan te toon "and that the person proposed to be examined can probably give information about what is suspected". Omdat ondervragings egter ook op 'n vergadering van skuldeisers gehou kan word, is in *Die Likwidateurs van Trust Staal (Edms) Bpk (in likwidasie)* 1967 3 SA 577 (O) beslis dat die applikant die hof (of die Meester) tevrede moet stel dat die ondersoek te verkies is.

Met betrekking tot die uiteensetting en motivering deur regter Ackermann meen regter Kriegler dat daar 'n te groot verskil tussen die Suid-Afrikaanse insolvensiereg en dié van die ander (genoemde) lande is; gevolglik meen hy dat hierdie riglyne nie in ag geneem moet word nie. Vir hom is van belang en relevant die omvang en ingewikkeldheid van die maatskappy se mislukking. Dit is inderdaad so. Hieroor stem hy dus wel met regter Ackermann saam. Hy meen dat hoewel die ondervragings potensieel dwang kan uitoefen, daar 'n noodsaak vir inligting bestaan (sien ook *Venter v Williams* 1982 2 SA 310 (N) 313). Die howe oefen op twee wyses kontrole oor die ondervragings uit. Eerstens word aansoeke om 'n ondervraging te hou noukeurig ondersoek. Gevolglik sal die howe die aansoek nie toestaan as dit dwang uitoefen, kwelsugtig of onbillik sal wees nie. Tweedens het die howe al tevore tussenbeide getree om die dwang of onbillike gebruik van die ondervragingsprosedure te voorkom (sien ook *James v Magistrate Wynberg* 1995 1 SA 1 (K) 16). Hierdie standpunt word onderskryf.

Regter Kriegler verklaar dat judisiële kontrole oor die *wyse* waarop die ondervraging gehou word aanvullend is tot die kontrole wat die hof uitoefen by beantwoording van die vraag of die ondervraging in die eerste plek behoort plaas te vind. Die omvang van die finansiële ineenstorting kan volgens hom wel 'n

uitsonderlike saak daarstel wat die balans in die guns van die likwidateur laat swaai. Die feit dat die Meester of 'n regter 'n ondervraging beveel het, beteken nie dat die hooggeregshof sy bevoegdheid verloor om dwang, kwelsugtigheid en onbillikheid, of om die instel van onbehoorlike ondervragings te verhoed nie. Die hooggeregshof behou derhalwe sy kontrolebevoegdheid in hierdie verband.

Dit wil tog voorkom of slegs die laaste drie oorwegings deur regter Ackermann hierbo genoem nie regter Kriegler se goedkeuring wegdra nie en dat die balanseringsmaatstaf en daaropvolgende twee oorwegings wel in sy kriterium en dié in *Ex parte Brivik* verdiskonteer word.

3 4 Beoordeling in die lig van die hof se kontroleplig

Die applikante se aansoek om die ongrondwetlikheid van artikels 417 en 418 word in die lig van hierdie plig oorweeg. Met verwysing na *James v Magistrate Wynberg* 1995 1 SA 1 (K) kom die hof tot die slotsom dat die hooggeregshof (net soos by a 415) tussenbeide kan tree wanneer die doel van die ondervraging is om 'n sekere punt te ondersoek wat nie op die likwidasie of finansiële belang van die skuldeisers van die maatskappy in likwidasie betrekking het nie. Wanneer dit alleen die onbehoorlike doel sal dien om byvoorbeeld ammunisie te verkry vir gebruik deur daardie spesifieke skuldeiser in litigasie wat hy teen die ondervraagde wil bring, moet die hof sy kontrolebevoegdheid uitoefen.

Namens die applikante word dan ook beweer dat die meganisme van artikels 417 en 418 'n buitengewone en geheime metode ("secret mode") is om inligting te verkry. Die ondervraagde is nie geregtig om te weet wat die onderwerpe van ondervraging sal wees nie; wie se optrede die fokus van die ondervraging sal wees nie; of bewerings of suspisies van siviele of strafregtelike aanspreeklikheid ondersoek gaan word en indien wel, wat dit alles behels nie. Die ondervraagde het nie 'n reg op insae in getuienis en bewysstukke van die kommissie nie en betree die getuiebank dikwels heeltemal onvoorbereid vir die ondervraging. Die ondervraagde mag oor 'n baie wye spektrum van sake ondervra word en kan verplig word om enige boeke of dokumente, hoe vertroulik of inkriminerend dit ook al mag wees, bekend te maak. Die meganisme is selfs teen onskuldige derdes beskikbaar.

Hierdie bewerings van die applikante doen volgens ons nie afbreuk aan die feit dat hulle 'n behoorlike en voldoende remedie in die kontrolebevoegdheid van die hooggeregshof het en daardie remedie moet benut het nie. Die ouditeure van 'n insolvente maatskappy kan ook nie heeltemal as 'n derde party gesien word nie. Die applikante beweer vervolgens dat artikels 417 en 418 se meganisme sodoende inbreuk maak op die reg op vryheid en sekuriteit ingevolge artikel 11(1) van die Grondwet, die reg op persoonlike privaatheid ingevolge artikel 13 en die reg om nie aan die beslaglegging op private besittings of die inbreukmaking op private kommunikasies onderworpe te wees nie. Hierdie beroep op die konstitusionele hof was onnodig.

4 Artikels 11(1) en 25 van die Grondwet

Regter Ackermann is van mening dat artikels 417 en 418 nie totaal "open-ended" in hul toepassing is nie. Daar is volgens hom (sien die uiteensetting hierbo) voldoende presedente om te voorkom dat die meganisme van artikels 417 en 418 met onnodige dwang, kwelsugtig of onbillik teen die ondervraagde gebruik word.

In die eerste plek wys hy daarop dat 'n groot aantal klagtes van die applikante handel oor die wyse waarop die ondervraging deur die kommissaris gehou is en nie oor enige bepaling van die Maatskappywet nie. Die artikels bepaal nie dat die ondersoek op 'n sekere wyse moet geskied nie. Die korrekte remedie in al hierdie gevalle sou wees om die hooggeregshof om verligting te nader op grond daarvan dat die ondersoek op 'n onbehoorlike en onredelike wyse hanteer is. Die konstitusionele hof het nie sy indruk gegee oor die vraag of dit wel so was nie. Heeltemal tereg is 'n beslissing oor hierdie vraag die taak van die hooggeregshof.

Tweedens is die aansoek van die applikante op die artikel 11(1)-vryheidsregte gebaseer. Om dit te beoordeel, sê regter Ackermann, moet in gedagte gehou word dat die eerlike hantering van die sake van maatskappye tans 'n saak van groot openbare belang is. Eerlike optrede kan nie verseker word tensy oneerlike optrede blootgestel, gestraf en "illgotten gains" aan die maatskappy teruggegee word nie. Sodanige blootstelling kan nie effektief plaasvind tensy die sake van die maatskappy deeglik ondersoek en gerekonstrueer word nie. Uit hoofde van die Maatskappywet en die Wet op Publieke Rekenmeesters en Ouditeurs het ouditeure talle statutêre pligte wat ten doel het om onder andere die aandeelhouers en skuldeisers te beskerm. Die kennis en deskundigheid van die ouditeur is van besondere belang by rekonstruksie van die sake van die maatskappy in likwidasie, asook om die ander doelwitte van artikel 417-ondervraging te bereik. As 'n ouditeur 'n aanstelling aanvaar, is hy van hierdie pligte bewus.

Die hof beklemtoon ook dat ná *Ferreira v Levin supra* die posisie van 'n ondervraagde in 'n artikel 417-ondervraging nie veel verskil van getuies in enige ander verhoor nie. Die verpligting om op die dagvaarding te reageer en op 'n genoemde tyd en plek teenwoordig te wees, sal nie die fisiese integriteit van die getuie in gedrang bring nie. Om 'n opheffing van die dagvaarding te bewerkstellig, moet duidelik bewys word dat die bevoegdheid om te dagvaar misbruik is. As die gedagvaarde geen sodanige bewyse het nie is dit sy plig om aan die dagvaarding gehoor te gee. Die hof beklemtoon dat dit 'n siviele verpligting is wat in alle oop en demokratiese gemeenskappe erken word.

As die getuie die dagvaarding ignoreer of weier om vrae te beantwoord, is die sanksie gevangenisstraf. Dit gebeur met alle mense wat wette wat geldig en reg gemaak is, oortree. In 'n oop en demokratiese gemeenskap is die sanksie van gevangenisstraf wat behoorlik deur 'n hof opgelê is met betrekking tot wetgewing wat andersins konstitusioneel is, geregverdig. Sanksies is noodsaaklik om wetgewing effektief te maak. Dit is die hof se mening dat hierdie bepaling omtrent altyd uit hoofde van artikel 33 geregverdig sal word.

Die sanksie van gevangenisstraf (agv die ignorering of versuim sonder voldoende rede) om effek te gee aan 'n dagvaarding wat uit hoofde van artikels 417 en 418 uitgereik is, is redelik en noodsaaklik. So ook die moontlikheid om gearresteer en voor die Meester of 'n ander persoon wat aangestel is om die ondervraging te hanteer, gebring te word. Gevangenisstraf volg ooreenkomstig die normale prosessuele beskermingsmaatreëls. Hieruit volg dus dat daar nie op artikel 11(1) en (2) of 25 van die Grondwet inbreuk gemaak word nie.

Die hof benadruk dat die meganisme wat artikels 417 en 418 daarstel absoluut essensieel en noodsaaklik is om openbare beleidsdoelwitte te bereik. Laasgenoemde kan nie op enige ander wyse bereik word wat die ondervraagde se reg op vryheid minder raak nie, veral as ag geslaan word op die hooggeregshof se bevoegdheid om 'n ondervraging te kontroleer en sodoende te voorkom dat dit kwelsugtig, ensovoorts is. Die bepaling van sy reg op vryheid is ook redelik en geregverdig in 'n demokratiese gemeenskap wat op vryheid en gelykheid gebaseer is.

5 Artikel 13 van die Grondwet

Daar word duidelik op 'n getuie se privaatheid inbreuk gemaak as hy gedwing word om boeke en dokumente wat hy vertroulik of vir homself wil hou, te openbaar. Op 'n persoon se *privaatheid* word nie inbreuk gemaak indien hy deur middel van 'n dagvaarding gedwing word om op 'n sekere tyd en plek fisies teenwoordig te wees nie. Dwang om op besondere vrae omtrent jouself en jou aktiwiteite te antwoord, kan wel inbreukmakend wees. Ingevolge artikel 418(5)(b)(iii)(aa) word die ondervraagde verskoon om te antwoord as hy "voldoende grond" het. As die beantwoording van 'n vraag ongeregverdig op 'n persoon se hoofstuk 3-regte inbreuk sal maak of met sodanige inbreuk dreig, is daar "voldoende grond" om te weier om te antwoord. Die vraag sal terselfdertyd ook nie "regmatig" gevra wees nie – artikel 418(5)(b)(iii)(aa) bepaal ook dat die vraag "regmatig" gevra moet word. Dit is die geval tensy die artikel 418(5)(b)(iii)(aa)-dwang om te antwoord in alle omstandighede 'n beperking op die reg op privaatheid sou konstitueer wat ingevolge artikel 33(1) van die Grondwet geregverdig is.

Met bogenoemde in gedagte is dit vir die hof duidelik dat geen bepaling in artikels 417 en 418 teenstrydig met applikant se artikel 13-regte is nie. Die hof verklaar dat die applikant se aansoek gegrond op 'n inbreuk van sy privaatheid baie vaag is. Geen werklike inligting oor die aard en inhoud van die dokumente en inligting word gegee nie. Die hof kan hom gevolglik nie uitspreek oor privaatheid nie tensy die inhoud van die dokument of inligting openbaar word.

Die hof dui weer eens daarop dat die omvang van die ondervraging beperk is tot bogenoemde doel, naamlik om inligting te kry wat tot die finansiële voordeel van die maatskappy sal wees. "Inligting met betrekking tot sake van die maatskappy" moet uitgelê word in ooreenstemming met hierdie doel. Die plig van bedoelde persone ontstaan juis uit die feit dat die maatskappy self geen geestelike of sintuiglike gevoelens het nie ("mental or sensory"). Aan die maatskappy moet gedink word as die eienaar van die kennis wat in die gedagtes van die beamptes van die maatskappy bestaan. Daarom val dit volgens die hof tereg nie in die persoon se *domain* van persoonlike privaatheid nie.

Daar word beklemtoon dat die oprigting van 'n maatskappy as 'n voertuig om besigheid te doen op die basis van beperkte aanspreeklikheid, nie 'n private aangeleentheid is nie. Die voordele inherent aan hierdie skepping van die wet skep sekere verantwoordelikhede. Deel daarvan is die statutêre verpligting van behoorlike openbaring aan en toerekenbaarheid teenoor die aandeelhouers.

Die posisie met betrekking tot die beslaglegging op private besittings as dokumente wat kragtens artikel 417(3) oorhandig moet word, is saamgelees met artikel 418(5)(b)(iii)(aa) dieselfde as hierbo. Dit maak volgens regter Ackermann nie inbreuk op die artikel 13-reg om nie onderworpe te wees aan die beslaglegging op private besittings nie. Ons stem saam dat in die omstandighede van die saak, solank dit *relevant* ten opsigte van 'n regmatige ondersoek ingevolge artikel 417 is waar 'n maatskappy betrokke is wat opgerig is as 'n voertuig om sake op die basis van beperkte aanspreeklikheid te doen, gedwonge oorgawe geregverdig is. Artikels 417 en 418 maak derhalwe nie inbreuk op hierdie reg nie.

Die publiek se belang in die vasstelling van die omringende omstandighede, die likwidateur se belang in 'n spoedige en effektiewe likwidasie en die skuldeisers en bydraers se finansiële belang in die terugverhaling van maatskappybates moet inderdaad opgeweeg word teen hierdie periferiese inbreukmaking op

die reg om nie aan beslaglegging op private besittings onderworpe te wees nie. Gesien in hierdie lig is artikels 417(3) en 418(2) volgens regter Ackermann 'n regmatige beperking van die reg op persoonlike privaatheid ingevolge artikel 33 van die Grondwet.

6 Artikel 24 van die Grondwet

Regter Ackermann verwys na die volgende argument: Navrae uit hoofde van artikels 417 en 418 en die uitvoering deur kommisarisse van hul pligte om uit hoofde daarvan verslag te doen, is administratiewe aksie binne die betekenis van artikel 24 van die Grondwet. By oorweging van hierdie argument ag die regter dit van belang om die aard van die prosedure van ondervragings uit hoofde van artikels 417 en 418 te karakteriseer, omdat bepaal moet word of paragrawe (b) en (c) van artikel 24 van die Grondwet toepassing vind. Hy meen dat artikel 24(b) en (c) slegs aanwending sal vind as die aard van die ondersoek 'n "administratiewe aksie" daarstel.

Die regter wys vervolgens daarop dat hierdie prosedure 'n intrinsieke deel is van die likwidasie van 'n maatskappy weens 'n hofbevel. In besonder is dit daardie deel van die proses wat beoog om die bates van die maatskappy vas te stel en te realiseer. Skuldeisers het 'n belang in die betaling van hul eise. Die ondervraging kan daarom minstens ten dele as deel van hierdie eksekusieproses, en derhalwe nie as 'n administratiewe aksie/optrede gesien word nie. Dit is inderdaad so. Alhoewel nie beslissend vir die saak nie, is die regter se standpunt na ons mening korrek. Regter Ackermann kan ook nie sien hoe artikel 24(c) toepassing kan vind nie want die ondervraging is gerig op insameling van inligting om die likwidasieproses te fasiliteer. Die doel van die ondervraging is nie om beslissings te maak wat ander bind nie. 'n Kommissaris wat 'n artikel 417-ondervraging moet behartig, kan dus nie as 'n uitvoerende orgaan/liggaam van die staat beskryf word nie. Nogtans gee dit volgens die regter nie 'n antwoord op die vraag nie en beslis dit nie of artikel 24 ten opsigte van artikels 417 en 418 aanwending vind nie. Selfs al word aangeneem dat die navraag 'n "administratiewe aksie" daarstel, help dit volgens hom nie die applikante met die bewys dat die bepalings van artikels 417 en 418 teenstrydig met artikel 24(b) en (c) is nie. In die lig van die hooggeregshof se kontrolebevoegdheid is dit ook ons mening dat dit nie werklik nodig is om te beslis of hier 'n "administratiewe aksie" voorhande is nie.

Ingevolge artikel 24(b) en (c) vra die applikante eerstens openbaring van die redes waarom hulle gedagvaar word om sodoende behoorlik voor te berei, te appelleer of die saak te laat hersien. Tweedens vra die applikante die openbaring van die inligting wat van hulle benodig word om ondervraging te vermy en inligting te gee of vir die ondervraging voor te berei as ondervraging wel nodig is. Wat hierdie aspek betref, bevind die hof tereg dat daar niks in die bepalings van artikels 417 en 418 is wat die applikante verhoed om hierdie eise (aangenome dat hulle daarop geregtig is) deur middel van die gewone howe te voer nie. Niks in hierdie bepalings is teenstrydig met artikel 24(b) of (c) of die applikante se eise nie. As hulle 'n remedie het (en die hof gee geen opinie hieroor nie), lê dit langs 'n ander weg en nie deur die deurhaling van artikels 417 en 418 deur die konstitusionele hof nie.

7 Die reg op billikheid in siviele litigasie

Die applikante beweer dat die meganisme ingevolge artikel 417 die likwidateur en skuldeisers van die maatskappy in staat stel om 'n onredelike voordeel ten

opsigte van hul teenpartye in siviele litigasie te verkry. Die hof beslis nie hieroor nie en sê dat die kwessie eerder oor gelyke behandeling in daaropvolgende litigasie gaan as oor 'n reg op 'n billike siviele verhoor. Dit is inderdaad so. Dit moet gevolglik as sodanig behandel en hanteer word.

In *Ferreira v Levin supra* is artikel 417(2)(b) ongeldig verklaar in die mate dat 'n inkriminerende antwoord in strafregtelike prosedures, anders as prosedures in verband met meineed, valse verklarings en onvolledige antwoorde (sien par 1 hierbo vir 'n volledige aanhaling), teen die ondervraagde gebruik kan word. Die grondwetlikheid van die gebruik van so 'n antwoord in *siviele* prosedures teen die ondervraagde is egter oopgelaat. Die applikante beweer dat artikels 417 en 418 die likwidateur en skuldeisers toelaat om die ondervragingsmeganisme aan te wend met die oog op siviele litigasie wat in die toekoms beoog word of nog hangende is. Sover, sê die hof, is die submissie onbetwisbaar.

Applikante gaan egter verder en verklaar dat die likwidateur en skuldeisers in staat gestel word om 'n volledige voorskou van hul opponente se saak te kry en om hul getuies uit te lok in 'n prosedure ontdaan van die normale meganismes wat ontwerp is om geskille te identifiseer en te omskryf. Hierdie bewering plaas die applikante se beswaar onmiddellik weer in die kader van die kontrolebevoegdheid van die hooggeregshof. Die hof verklaar dan ook dat laasgenoemde submissie die toesighoudende rol ignoreer wat die hooggeregshof speel om te verseker dat ondervraging nie kwelsugtig, onredelik en onbillik geskied nie. Die likwidateure is wel deur middel van hierdie meganisme geregtig om hul opponente in siviele litigasie (werklik/voornemend) te ondervra of hul opponente se getuies of potensiële getuies teen te gaan en om blootlegging van dokumente van sodanige persone te verkry op 'n tyd en wyse wat nie vir hul opponente/voornemende opponente oop is nie. Die vraag is of dit op artikel 8 van die Grondwet inbreuk maak.

Om dit te beantwoord, kyk regter Ackermann na die doel van die artikels. Die eintlike doel van artikels 417 en 418 is om die maatskappy van inligting omtrent homself, sy eie sake, eie eise en verpligtinge te voorsien. Hy beklemtoon dat die doel of effek van artikels 417 en 418 nie is om die maatskappy in 'n beter posisie as sy skuldeisers of skuldenaars te plaas nie. Dit is juis die teenoorgestelde, naamlik om 'n maatskappy in likwidasie op gelyke voet met sy skuldenaars en skuldeisers te plaas. Artikels 417 en 418 is dus nie teenstrydig met die gelykheidsklousule nie. Ons stem saam.

8 Bevel van die hof

Artikels 417 en 418 is nie teenstrydig met die Grondwet nie behalwe in die mate waarin dit in *Ferreira v Levin supra* ongeldig verklaar is. Sewe ander regters van die konstitusionele hof stem saam met die uitspraak van regter Ackermann.

8 1 Regter Kriegler met betrekking tot artikel 11(1)

Volgens regter Kriegler is dit slegs indien en wanneer die voorlegging van getuienis wat na 'n artikel 417-ondervraging verkry is, die billikheid van die verhoor benadeel dat die Grondwet betrek kan word. Hy stem saam met regter Ackermann se slotsom oor applikante se argument kragtens artikel 11(1).

8 2 Artikel 24 van die Grondwet en "administratiewe aksie"

Regter Kriegler is van mening dat, behoorlik toegepas, die meganisme van artikels 417 en 418 geen onbillikheid of onredelikheid sal bevat nie. Hy is ook van mening dat as die toepassing dreig om onbillik of onredelik te wees die hooggeregshof voorbehoedend tussenbeide kan tree.

Hy onderskryf nie regter Ackermann se twyfel oor die vraag of 'n navraag 'n "administratiewe aksie" is soos deur artikel 24 van die Grondwet voorsien nie. Tereg verklaar hy dat dit nie die geskilpunt of beslissend vir die saak is nie.

Regter O'Regan meen dat dit nie 'n noodsaaklike vereiste vir getuienislewering is dat 'n potensiële getuie voor ondervraging kennis of 'n kans moet kry om te sê waarom hy/sy nie verplig behoort te word om getuienis te lewer nie. Daar is volgens haar voldoende veiligheidsmeganismes in die Suid-Afrikaanse regstelsel om 'n getuie te beskerm. Sy is verder van mening dat die artikel 417-ondervraging 'n duidelike belang vir die gemeenskap bevat sodat burgers moet saamwerk om te verseker dat regspleging nie verhoed word nie. Die applikante het nie bewys dat artikels 417 en 418 'n verbreking van artikel 24 is nie. Regter O'Regan gee geen siening met betrekking tot "administratiewe aksie" nie. Ook sy reken dat dit nie nodig is om die punt te beslis nie.

9 Slot

Die hooftrekke van die beslissing kan soos volg opgesom word:

9 1 Artikels 11 en 25 van die Grondwet

Die meganisme wat artikels 417 en 418 daarstel, is noodsaaklik om openbare beleidsdoelwitte te bereik. Laasgenoemde kan nie op enige ander wyse bereik word wat die ondervraagde se reg op vryheid minder raak nie, veral as ag geslaan word op die hooggeregshof se bevoegdheid om 'n ondervraging te kontroleer en sodoende te voorkom dat dit kwelsugtig, ensovoorts is. Die beperking van die reg op vryheid is ook redelik en geregverdig in 'n oop en demokratiese gemeenskap wat op vryheid en gelykheid gebaseer is. Hieruit volg dus dat daar nie deur die meganisme van artikels 417 en 418 op artikel 11(1) en (2) of 25 van die Grondwet inbreuk gemaak word nie.

9 2 Artikel 13 van die Grondwet

Daar word nie op die fundamentele reg op privaatheid inbreuk gemaak nie omdat die oprigting van 'n maatskappy as 'n voertuig om sake te doen op die basis van beperkte aanspreeklikheid nie 'n private aangeleentheid is nie. Die voordele inherent aan hierdie skepping van die wet het 'n teenoorstaande verantwoordelikheid. 'n Deel daarvan is die statutêre verpligting van behoorlike openbaring aan en toerekenbaarheid teenoor aandeelhouers en skuldeisers van die maatskappy. Dit is daarom ons mening dat sodra 'n insolvente maatskappy ter sprake en die eksekusieproses aan die gang is, die insameling van inligting (op 'n behoorlike wyse) ter fasilitering van die likwidasieproses geensins as inbreukmakend op die reg op privaatheid gesien kan word nie. En dit geld veral ook die ouditeur van so 'n insolvente maatskappy, juis as gevolg van die aard van sy werk vir, diens aan en verhouding met die maatskappy. Op grond hiervan het ook die ouditeur 'n verantwoordelikheidsplig teenoor die skuldeisers en aandeelhouers.

9 3 Artikel 24 van die Grondwet

Die bepalings van artikels 417 en 418 verhoed geensins die applikante om die eise vir openbaring van redes vir die oproep as getuies by 'n ondersoek (aangenome dat hulle daarop geregtig is) deur middel van die gewone howe te voer nie. Hierdie bepalings is geensins teenstrydig met artikel 24(b) of (c) of die applikante se eise nie. As hulle 'n remedie het, (en die hof gee geen opinie oor hierdie vraag nie) lê dit langs 'n ander weg en nie deur die deurhaling van artikels 417 en 418 deur die konstitusionele hof nie.

9 4 Artikel 8 van die Grondwet

Artikels 417 en 418 is nie met die gelykheidsklousule teenstrydig nie omdat dit nie die doel of effek van artikels 417 en 418 is om die maatskappy in 'n beter posisie as sy skuldeisers of skuldenaars te plaas nie. Die doel is die teenoorgestelde, naamlik om 'n maatskappy in likwidasie *op gelyke voet* met sy skuldenaars en skuldeisers te plaas. Daarvoor het die likwidateur sekere inligting omtrent die maatskappy se eie sake, eise en verpligtinge nodig. As dit onredelike dwang daarstel om te dagvaar of te ondervra op die wyse wat die applikante gedagvaar of ondervra is, was die applikante se remedie om hulle tot die hooggeregshof te wend. Hul beweerde teistering en onbillike behandeling sou nie plaasgevind het as gevolg van die substantiewe inhoud van die bepalings van artikels 417 en 418 nie, maar die gevolg van 'n onbehoorlike aanwending daarvan wees.

9 5 Billikheid in siviele litigasie

Per se is daar niks ongrondwetlik in die gebruik van 'n inkriminerende antwoord deur die ondervraagde in siviele prosedure teen hom nie. So 'n inkriminerende antwoord mag egter nie in strafregtelike verrigtinge teen hom gebruik word nie. Die *enigste* uitsondering op hierdie beginsel is dat so 'n antwoord wel in geval van strafregtelike verrigtinge aangaande meineed, valse verklarings en onvolledige antwoorde teen hom gebruik mag word.

9 6 Verwysing na konstitusionele hof

Van belang in hierdie saak is ook die hof se houding dat die bestaan van "'n redelike vooruitsig dat 'n bepaling ongeldig sal wees" op sigself nie 'n voldoende grond vir verwysing na die konstitusionele hof is nie. Sorg moet gedra word om te verhoed dat elke tweede insolvensie- of likwidasiegeskil na die konstitusionele hof verwys word. Dit sal nie in belang van geregtigheid wees nie.

LEONI STANDER
LINDA JANSEN VAN RENSBURG
Potchefstroomse Universiteit vir CHO

DADERSKAP BY DELIKTUELE AANSPREEKLIKHEID WEENS MISBRUIK VAN DIE REGSPROSES

Martin v Watson [1995] 3 All ER 559 (HL)

1 Inleiding

In dié saak was die tersaaklike feite soos volg: M en W was bure met 'n lang geskiedenis van wedersydse antagonisme wat gekulmineer het in 'n klagte van ekshibisionisme wat W teen M gelê het. M is gearresteer en daarvan aangekla dat hy hom in stryd met artikel 4 van die Vagrancy Act van 1824 teenoor haar (W) ontbloot het met die doel om haar te beledig. By die verhoor het die staat geen getuienis aangevoer nie. M het vervolgens 'n aksie weens kwaadwillige vervolging ("malicious prosecution") teen W gebring. Die verhoorregter bevind

dat W kwaadwillig 'n vals verklaring gemaak het, daardeur aktief verantwoordelik vir die instelling van die regsproses teen M was en gevolglik deliktueel aanspreeklik is. In appèl verander die Court of Appeal die uitspraak ten gunste van W. In sy uitspraak verduidelik Ralph Gibson LJ die regsposisie soos volg (*Martin v Watson* [1994] 2 All ER 606 (CA) 625):

> "[I]t would be wrong to accept that the concept of 'setting the law in motion' can be satisfied by proof that a defendant has done no more than to make an allegation to a police officer, with the intention that the police officer should act upon it against the party accused, and with knowledge that the allegation was untrue. The point of the rule of law as formulated, in my judgment, was to protect the person who goes to the police to complain and who leaves it to the police to decide what to do. Such a person is not the prosecutor for the tort of malicious prosecution. The purpose of the protection is that such a person should not have to face the anxiety and expense of being sued upon acquittal of the party accused. That protection would largely be destroyed if an arguable claim could be put forward against such a person by the addition of an allegation that he knew that his complaint to the police was untrue."

M beroep hom vervolgens op die House of Lords. Hierdie uitspraak vorm die onderwerp van die onderhawige bespreking. Terloops, in sy uitspraak wys Lord Keith namens die House of Lords daarop dat "[t]he essential feature of malicious prosecution is an abuse of the process of the court" (568; vgl ook *Roy v Prior* [1970] 2 All ER 729 (HL) 733–734). Dit is in ooreenstemming met 'n standpunt wat ek vroeër ingeneem het ("Deliktuele aanspreeklikheid weens misbruik van die regsproses" 1994 *THRHR* 240; "Verjaring van die deliktuele aksie weens misbruik van die regsproses" 1993 *Obiter* 203). Trouens, die begrip "kwaadwillige vervolging" kan slegs op 'n geforseerde en kunsmatige wyse dit akkommodeer waarom dit hier werklik gaan. Die begrip "misbruik van die regsproses" is meer beskrywend.

2 Die Engelse reg

Lord Keith bevestig die volgende samevatting van die vereistes vir kwaadwillige vervolging in die Engelse reg in *Clark and Lindsell on torts* (1989) 1042:

> "In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the plaintiff" (562).

Aan al hierdie vereistes is in die onderhawige saak voldoen. Die probleem is egter dat W nie die klagstaat geteken het nie. Die interessante is dat daar nie 'n enkele gerapporteerde Engelse saak is wat handel oor 'n deliktuele eis waar 'n kwaadwillige beskuldiging deur verweerder teenoor 'n polisieman gemaak is en laasgenoemde die vervolging amptelik geïnisieer het nie. In sy uitspraak steun Lord Keith op verskeie buitelandse beslissings. In *Commonwealth Life Assurance Society Ltd v Braun* (1935) 53 CLR 343 is 'n klagte teen die eiser weens bedrogsameswering gelê, maar 'n verhoor het nooit plaasgevind nie omdat die prokureur-generaal geweier het om te vervolg. Die klagte is deur 'n polisiebeampte gelê op grond van inligting wat die sekretaris van die verweerder-maatskappy verskaf het en laasgenoemde het selfs aangebied om die aanklaer(s) vir die saak te voorsien. Die eiser stel 'n eis weens kwaadwillige vervolging teen genoemde maatskappy in. Regter Dixon van die High Court of Australia beslis soos volg:

> "The legal standard of liability for a prosecution which is instituted neither by the defendant nor by his servant is open to criticism on the ground of indefiniteness. It

> is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an indepcndent discretion on the part of that authority . . . But, if the discretion is misled by false information, or is otherwise practised upon in order to procure the laying of the charge, those who thus brought about the prosecution are responsible . . . Further, the Privy Council has said . . . 'In any country where, as in India, prosecution is not private an action for malicious prosecution in the most literal sense of the word cannot be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. If that is done and trouble caused an action will lie.' Their Lordships, however, held in the case before them that, as the information supplied to the police was ample cause for the initiation of prosecution proceedings, the plaintiff must, in order to succeed in his action, go the whole way of showing that it was false to the defendant's knowledge . . . The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. If the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in doing so are joint wrongdoers with him" (379).

Lord Keith verwys vervolgens ook na uitsprake van Kanadese en Nieu-Seelandse howe. Hy merk later (567) op dat die blote feit dat inligting aan 'n polisieman deurgegee word wat tot 'n vervolging lei, nie beteken dat die persoon wat die inligting verskaf die inisieerder van die vervolging is nie. Hy stel die regsposisie soos volg:

> "Where an individual falsely and maliciously gives a police officer information indicating that some person is guilty of a criminal offence, and states that he is willing to give evidence in court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted. Where the circumstances are such that the facts relating to the alleged offence can be within the knowledge only of the complainant, as was the position here, then it becomes virtually impossible for the police officer to exercise any independent discretion or judgment, and if a prosecution is instituted by the police officer the proper view of the matter is that the prosecution has been procured by the complainant" (567–568). (Vgl ook *Roy v Prior* [1970] 2 All ER 729 (HL) 736.)

3 Die Suid-Afrikaanse en Amerikaanse reg

In *Michau v Westerman* (1900) 17 SC 432 het W op versoek van die militêre owerheid 'n beëdigde verklaring gemaak dat M by hoogverraad betrokke was. M is, na 'n voorlopige ondersoek waarin W getuig het, vir verhoor verwys. Die prokureur-generaal het egter geweier om te vervolg. M stel vervolgens 'n eis weens kwaadwillige vervolging teen W in. In sy uitspraak verklaar hoofregter De Villiers soos volg:

> "[T]he plaintiff must be regarded as being in the position of a person who gave evidcnce as a witness rather than as a person who voluntarily instituted criminal proceedings. The Court cannot losc sight of the fact that there was a duty imposed on the defendant to answer the questions just as much as there is on a witness in a court of justice. A witness in a court of justice stands in a different position to a man who of his own accord institutcs a criminal prosecution. The proccedings against the defendant are not on the ground that, as a witness, he gave false cvidcnce, but that he made certain changes and instituted a prosecution" (434–435). (Sien ook Labuschagnc 1994 *THRHR* 244.)

Blykens die beslissing van ons appèlhof in *Prinsloo v Newman* 1975 1 SA 481 (A) 495 kan 'n eerlike stelling van die relevante feite waarop die vervolging

gebaseer is en waar dit aan die owerheid oorgelaat word om te vervolg of nie, nie tot deliktuele aanspreeklikheid weens kwaadwillige vervolging aanleiding gee nie. Andersins sal dit wel tot aanspreeklikheid kan lei.

In die saak *Gisondi v Town of Harrison* 72 NY 2d 280, 332 NYS 2d 234, 528 NE 2d 157, 81 ALR 4th 1021 (1988) wat voor die New Yorkse appèlhof gedien het, was die feite kortliks soos volg: G is vir verkragting gearresteer met 'n lasbrief uitgereik op grond van die klaagster se identifikasie. Daar is egter geen krapmerke op sy gesig gevind soos klaagster beweer het nie. By sy arrestasie het G daarbenewens 'n alibi met gepaardgaande getuienis aangebied. 'n "Felony hearing" is gehou waar klaagster G as die verkragter geïdentifiseer het. G het vervolgens twee getuies geroep wat getuig het dat hy op die aand van die misdaad in Massachusetts was. Die klag is later deur 'n Grand Jury afgewys. G stel vervolgens 'n eis (onder andere) vir kwaadwillige vervolging in. In sy uitspraak vat hoofregter Wachtler die regsposisie soos volg saam:

> "The plaintiff could not prevail on either cause of action if the police had probable cause to believe that the defendant, the plaintiff in the civil action, was the person who committed the rape ... In this case the victim positively identified the plaintiff and the car, and two courts held in successive proceedings that probable cause existed to arrest the plaintiff and hold him for the Grand Jury. Under these circumstances there is a presumption that the police acted with probable cause ... That presumption is not overcome by the fact that the Grand Jury later voted to dismiss the charges ... It could only be rebutted by proof that the court orders were the result of fraud, perjury or the suppression of evidence by the police" (1025).

Hieruit blyk dat 'n *bona fide* fout van die klaagster ook in die algemeen die polisie teen 'n aksie weens kwaadwillige vervolging beskerm. In *Central Florida Machinery Co Inc v Williams* 424 SO 2d 201, 46 ALR 4th 243 (1983) het 'n distriksappèlhof in Florida soortgelyke beskerming aan 'n regspraktisyn toegeken. In navolging van die Kaliforniese saak *Norton v Hines* 49 Cal App 3d 917, 123 Cal Rptr 237 (1975) bevestig regter Campbell:

> "It is the attorney's reasonable and honest belief that his client has a tenable claim that is the attorney's probable cause for representation ... and not the attorney's conviction that his client must prevail. The attorney is not an insurer to his client's adversary that his client will win in litigation. Rather, he has a duty 'to represent his client zealously ... [seeking] any lawful objective through legally permissible means ... [and presenting] for adjudication any lawful claim, issue or defense.' So long as the attorney does not abuse that duty by prosecuting a claim which a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to proceed, his client's adversary has no right to assert malicious prosecution against the attorney if the lawyer's efforts prove unsuccessful" (247).

Die reël van toepassing op regspraktisyns is gevolglik heelwat strenger as dié vir polisiebeamptes (sien ook *Fite v Lee* 11 Wash App 21, 521 P 2d 964, 97 ALR 3d 678 (1974); vgl tav regsprekende beamptes die uitspraak van die Supreme Court van Iowa in *Osbekoff v Mallory* 188 NW 2d 294, 64 ALR 3d 1242 (1971)). Wat uit hierdie beslissings duidelik blyk, is dat indien die persoon wat 'n vals klagte aanhangig maak nie self deliktueel aangespreek kan word nie, genoegdoening van die staat of professionele regskorps slegs in hoogs uitsonderlike gevalle verhaalbaar sou wees (vgl ook die Arizona-saak *Watsek v Walker* 14 Ariz App 545, 485 P 2d 3, 66 ALR 3d 1 (1971)). Die regsposisie in die VSA klop dus met die House of Lords se beslissing (sien bv *Koble v Carey* (1918) 12 ALR 1227 (Arkansas SC) 1230).

4 Konklusie

Die konklusie wat die House of Lords in die onderhawige saak bereik het, word ook in ander regstelsels aangetref. Die feit dat dit so voor die hand liggend is dat diegene wat 'n ander vals en kwaadwillig beledig of andersins benadeel nie toegelaat behoort te word om agter 'n onkundige of oningeligte of onbevoegde staatsfunksionaris te skuil nie, is miskien die rede waarom daar geen voorafgaande Engelse saak op dié punt gerapporteer is nie. Misbruik van die regsproses moet tog immers bekamp en nie bevorder word nie.

JMT LABUSCHAGNE
Universiteit van Pretoria

BOEKE

CONSTITUTIONAL LAW OF SOUTH AFRICA

by M CHASKALSON, J KENTRIDGE, J KLAAREN, G MARCUS, D SPITZ and S WOOLMAN (eds)

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Anything written about constitutional issues in South Africa these days becomes obsolete more quickly than the computer you bought yesterday. It is therefore eminently sensible, if one is planning a substantial work in this field, to resort to looseleaf publishing. The most recent publication by Juta on the South African Constitution will certainly come as a godsend to practitioners who are hard-pushed to keep up with the ever-burgeoning stock of information on constitutional and human rights law.

It would be impossible to comment at any length on every chapter in so comprehensive a work within the purview of a review such as this. I shall therefore adopt a somewhat eclectic approach and light on a few aspects only.

The first nine chapters deal with the introduction, government institutions and court powers and rules. Chapter 1 is the introductory chapter, and chapter 2 (by Heinz Klug) provides a brief (and somewhat selective) survey of South African constitutional history prior to 1993. The third chapter (by Jonathan Klaaren and Matthew Chaskalson) deals with both the legislature and the executive under the 1993 Constitution. A praiseworthy aspect of the discussion of the legislature is the analysis of substantive and procedural limitations on the legislature. However, there is very little said about matters such as the way in which members of Parliament are elected, the composition of Parliament, legislative procedures, the role of parliamentary committees, and so on. The national executive is dealt with even more briefly. While it cannot be said to be a profound study of executive authority, it is presented in a manner which enables one to find the salient features of our current system at a glance. (I must say I do not care for the use of "power" in the same breath as "authority" in this context. "Authority" (*bevoegdheid*), to my mind, connotes constitutionalism to a far greater extent than does "power" (*mag*). One does not talk about "naked authority" or "authority maps". Authority presupposes a basis of legality and legitimacy; power does not.) I should also have liked a little more attention to have been given to the question whether prerogative powers have indeed disappeared from our law, or if there is a possibility that this spectre from our past may still be with us.

Provincial government (Chaskalson and Klaaren) and federalism (Klaaren) are accorded separate chapters. The vision of co-operative governance contained in the 1996 Constitution will no doubt yield further material which is of interest in the federalism debate. Regardless of the changes brought about by the final Constitution, Klaaren's five-point test for federalism analysis (5–4) will, it is suggested, remain valuable as a starting-point for anyone faced with a dispute between the national government and a provincial

government. (For a detailed treatment of federalism, see De Villiers (ed) *Evaluating federal systems* (1994).)

Detailed attention is given to the jurisdiction, powers and procedures of the courts (ch 6), court rules and practice directives (ch 7), access to the court and justiciability (ch 8), and judicial remedies (ch 9). The rules of the Constitutional Court are included as an appendix to chapter 7. Books on constitutional law (and even administrative law) often give no more than a passing thought to some of these matters and their inclusion will be welcomed by practitioners in particular. The issues of direct access and referral to the Constitutional Court, interim relief and the transition provisions of the Constitution (notably s 241(8), which has arguably caused more nightmares than all the other provisions put together) have already featured prominently in the judgments of the Constitutional Court (see eg *S v Zuma* 1995 2 SA 624 (CC), *S v Vermaas; S v Du Plessis* 1995 7 BCLR 851 (CC) (referral by the Supreme Court); *S v Mhlungu* 1995 7 BCLR 793 (CC) (s 241(8) and interim relief); *Zantsi v Council of State, Ciskei* 1995 10 BCLR 1424 (CC) (consideration of academic issue)).

The section dealing with the so-called operational provisions of the bill of rights (chs 10–13) makes very interesting reading. In the first of these chapters, Stuart Woolman discusses the sphere of application of chapter 3 of the interim Constitution. The easier enquiry is to the beneficiaries of the conferred rights, though certain categories of potential beneficiaries, such as illegal or undocumented aliens and juristic persons, raise a number of questions. (The South African courts have already shown a tendency to limit the level of procedural protection afforded to aliens – see eg *Xu v Minister van Binnelandse Sake* 1995 1 BCLR 62 (T).) The issue of the parties on whom the burdens of chapter 3 rest, is dominated by the vertical/horizontal debate. In his enlightening analysis, the author points out, first of all, that a vertical/horizontal dichotomy is a vast oversimplification of the range of possibilities (10–1). Cameron J (*Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W)) would agree: he expressed the view that the debate about the ambit of chapter 3 as a stark choice between verticality and horizontality is misconceived. The final word has not yet been spoken on this issue. The Constitutional Court reversed the trend towards greater horizontality (evinced in cases such as *Gardener v Whitaker* 1995 2 SA 672 (E) and *Baloro v Government of Bophuthatswana* 1995 8 BCLR 1018 (B)) by holding, in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) that chapter 3 does not, *in general*, have *direct* horizontal application. Cameron's judgment is to the same effect. The final Constitution (Act 108 of 1996) alters matters to some extent, but does not give a definite answer either. In the first place, the final Constitution provides (in s 8(1)) that the bill of rights binds the judiciary as well as the other two branches of the body politic, thus removing one of the bases of the verticalist argument (s 7(1) of the 1993 Constitution). We also see (s 8(2)) that the bill of rights may be binding on private persons *where applicable* (whatever that means; it is obviously narrower than "where appropriate", but to say that a provision applies when it is applicable is a *petitio principii*), depending amongst other things on *the nature of the right*, which likewise brings us not much further. The private/public distinction has long been somewhat suspect: certain "private" relations have always been susceptible to state intervention in the public interest. Woolman's exposition will therefore retain a large measure of currency in terms of the 1996 Constitution.

An aside here: much of the agonising about whether "law" in a specific context refers to statute only or includes all law (eg see 10–31 and 10–33) could be eliminated by reference to the Afrikaans version of the text. Where the Afrikaans is "reg", it means all law; where it is "wet", statute only. The signed-text-prevails rule and its off-shoot, the express provision that the English text of the 1993 Constitution prevails in the event of conflict, does not arise here: there is no conflict. The two versions of the text can be very easily harmonised in this particular case.

All in all, Woolman's contribution is a comprehensive and coherent examination of a controversial issue. He deals (*inter alia*) with the philosophical justification given for both the verticalist and the horizontalist approach, with critiques of both approaches, with

the weaknesses of traditional distinctions and starting-points, with constructivism as an alternative to positivism, with tests for determining whether an entity is a statutory body or functionary (the government control test, the government entity test, the government function test). He also asks what *due* regard as required by section 35 means and what the implication is of a conflict between a right protected by chapter 3 and another constitutional provision.

Chapter 11 (by Janet Kentridge and Derek Spitz) deals with the vitally important topic of interpretation of the Constitution. The discussion of the position of the unsigned text (11–2) could be somewhat misleading (see my comments earlier). In the first place, the text in the other official language (now potentially in any one of ten other official languages) is not, strictly speaking, another text, but a different version of the same legislative text. Recourse to another version is therefore to an intratextual, not an extratextual source. In terms of the purposive, holistic approach to constitutional interpretation, every effort must be made to harmonise the two versions. The statement that this signed-text provision has fallen away (11–2 fn 3) is incorrect (see s 65(2) and 141(2) of the interim Constitution). Mercifully, though, it has not survived into the final Constitution. The harmonisation rule as stated above will, however, continue to apply wherever there is more than one version of legislation. I should also prefer not to regard sections 232(3) and 35(2) as conferring a presumption of *validity* (11–4). These "reading down" provisions merely embody the common law presumption that the legislature did not intend to enact futile or nugatory (or unconstitutional) provisions and the presumption that ambiguous legislation should be interpreted in favour of the individual rather than the state. In fact, it is simple common sense to accept a more restrictive (constitutional) interpretation rather than to send the legislature back to the drawing-board unnecessarily. (It is of interest that these provisions, too, do not survive in the 1996 Constitution.)

The authors are most insistent that there is an essential difference between constitutional and statutory interpretation (par 11–4). This point of view is based on the oft-quoted *dictum* of the Canadian court in *Hunter v Southam Inc* 1985 11 DLR (4th) 641 649. It is certainly true that there are differences arising largely from the transient and more workaday nature of ordinary legislation as compared with a constitution. However, it must be emphasised that the literalist/intentionalist approach to statutory interpretation which was so beloved of South African judges in the past, was regularly subjected to stringent criticism by almost every South African writer on statutory interpretation long before a supreme constitution was even dreamed of. It is also true, of course, that a purposive and an intentionalist approach may, and indeed often will, yield the same result. But that is not the point. The Constitution provides (s 35(3)) that the courts must pay due regard to the spirit, purport and objects of chapter 3 when interpreting *any* law and when applying and developing the common law. If section 35(3) is further read with 35(1), there is as clear an instruction as you will ever see that a holistic, purposive (teleological) approach to the interpretation of *all* statutes is to be preferred to the narrow confines of the intention of the legislature as manifested in the "plain meaning" of the words of the statute. The authors do distinguish between "legislative intent in the institutional sense and legislative intention in some sort of historical or psychological sense" (11–11 fn 2), but in view of the confusion that persists in this regard, it is suggested that it would be better to jettison the idea of legislative intent altogether. The distinction made by Froneman J in *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE), quoted at 11–12, refers to the difference between constitutional systems based on legislative supremacy, where legislative intent may be appropriate, and those based on constitutional supremacy; not to that between ordinary statutory interpretation and constitutional interpretation. Even the judgment of the Constitutional Court in *S v Mhlungu* 1995 7 BCLR 793 (CC), in which the applicability of certain common law presumptions was questioned, should be re-examined. If a presumption is found to be incompatible with the Constitution (the presumption that the state is not bound springs to mind here), will it not be overridden in the process of interpreting ordinary legislation anyway?

The chapter also contains a synoptic analysis of (American) theories of interpretation, with a clear exposition of the problems engendered by originalist interpretation and

political process theory. Attention is given to value-based interpretation, the development of a purposive approach to constitutional interpretation (with emphasis on the guidance to be obtained from Canadian law) and the pressures of the text. The variations in approach to interpretation even among the members of the Constitutional Court are commented on. Finally, the two-stage analysis which is involved when violation of a fundamental right is alleged, is set out with emphasis on important issues such as the difference between a purposive and a generous construction and the value of comparison with associated rights (not potentially competing rights), and the difference between an onus of proof and a burden of legal persuasion. As is pointed out in the next chapter, however, the Constitutional Court has been more reluctant than the lower courts to embrace fully the two-stage Canadian model of limitation analysis as exemplified by *R v Oakes* (1986) 26 DLR (4th) 200.

The limitation provision (s 33) is dissected by Stuart Woolman in chapter 12. He starts with the purpose, mechanics and history of the 1993 clause, and identifies certain important problems such as the transplantation of the "essential content" element of German law without the other elements of the German Basic Law's limitation provision, the awkward issues raised by internal limitations and general limitations on fundamental rights (on the latter see also Carpenter "Internal modifiers and other qualifications in bills of rights – some problems of interpretation" 1995 *SA Public Law* 260), the meaning of the phrase "law of general application" and the anomalies arising from three different standards of limitation provided for in the 1993 Constitution (see Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 31). Some of these problems have been eliminated in the 1996 Constitution: the "essence of the right" has been abandoned (fortunately, given the lack of clarity on this concept even in German law), as have the different standards of scrutiny. Internal modifiers and qualifications have been retained in all their glory. Woolman is somewhat critical of the Constitutional Court's tardiness in developing a South African limitation doctrine (12–20 *et seq*). He puts forward his own view of the limitation clause in an attempt to find what he describes as "a *via media* between the Constitutional Court's rejection of and the lower courts' over-enthusiastic endorsement of *Oakes*" (12–22). While the interim Constitution was in place, this must be one of the more thoughtful analyses that have appeared in this respect.

Subsections (2)–(5) of section 33 are also dealt with briefly. The element of compromise in this provision is aptly illustrated by the description of section 33(3) as "both sop and savings clause", 33(4) and 33(5)(a) as "both sop and immunisation clause" and 33(5)(b) as "nothing but a sop". The potentially complex relationship between 33(4) (the "affirmative action clause") and 33(1) is touched on here and in the discussion of the equality clause (s 8). I am very much inclined to agree with Woolman in regard to section 33(4) that

> "[a]s with fundamental rights that possess an internal limitation clause, *much, but not all*, of the justificatory work is done under the internal limitation clause" (12–32 fn 4; italics mine).

The fourth chapter in the section on operational provisions is John Dugard's contribution on public international law. Such a chapter is essential in the light of the important position which international law occupies in the Constitution and the widespread ignorance among South African lawyers about even the most basic tenets of international law. Since the provisions dealing with international law in the interim Constitution are anything but clear, and the 1996 Constitution has added a few conundrums of its own, practitioners involved with constitutional litigation are going to need all the help they can get.

The rest of the work (chs 14–38) is devoted to the specifically protected rights in chapter 3. The division into chapters largely follows the scheme of the 1993 Constitution, but there are a number of topics singled out for special attention: reproductive rights (ch 16), evidence (ch 26), sentencing and punishment (ch 28), family law (ch 34), cultural and minority rights, including language rights (ch 35) and language (ch 37). Strangely, the right to physical liberty (freedom and security of the person – s 11(1) of the Constitution) and the right not to be subjected to torture or cruel punishment or treatment (s 11(2))

do not rate a discussion on their own, but are dealt with *sv* reproductive rights (s 11(1)) and rights relating to criminal procedure (s 11(1) and (2)). This is a major shortcoming, since there are aspects of this most fundamental right that do not fall under either of the above. Likewise, the right not to be subjected to slavery or servitude (s 12) is not specifically dealt with.

The very concept of equality (ch 8) is riddled with difficulties, particularly when it is further complicated by affirmative action. Janet Kentridge highlights many of the dilemmas which present themselves: the difference between equal treatment and equitable treatment; the difference between delimitation and limitation of rights (ie the role of internal modifiers and qualifications); the identification of indirect discrimination; the status of unenumerated grounds of discrimination; whether affirmative action measures are to be seen as an exception to or as an affirmation of equality (an interpretive guide to the courts); what substantive as opposed to formal equality implies; the flaws inherent in the Aristotelian or "similarly situated test"; the difference (and correlation) between equal protection of the law and equality before the law (s 8(1) and (2)); the role of categories or groups in discrimination issues in South Africa; the extent to which section 8(3)(a) is insulated from the general limitation clause (s 33(1)). A question that remains unanswered is: what model of substantive equality is sought to be achieved by the Constitution? There is a belief current in some circles that substantive legal equality is synonymous with equality of outcome, which is clearly erroneous. (For an incisive analysis of the problems raised by the concept of equality, see Van Wyk *Affirmative action, equality and section 8 of the Constitution* LLM dissertation Unisa (1996).)

Among the issues touched on in the chapter on the right to life (Joanne Fedler) is the ambit of the right, with particular reference to the wide approach adopted by the Indian Supreme Court, in terms of which the right to life includes the right to a certain quality of life (see *State of Himachal Pradesh v Sharma* 1986 2 SCC 68). The issues of abortion, limitation in terms of section 33(1), euthanasia and wrongful birth actions are also dealt with briefly.

The chapter on reproductive rights (Michele O'Sullivan and Catherine Bailey) illustrates the interplay between a number of rights when the issue of abortion, in particular, arises: the right to life, to privacy, to equality, to freedom and security of the person, to religious freedom, to dignity. This analysis is welcome in the light of the recognition in the 1996 Constitution of the right to control over one's reproductive functions and the legislation on abortion. One must agree with the author, however, that there is more to the right to reproductive health than legalised abortion.

An interesting aspect of the right to human dignity (ch 17) is whether juristic persons may claim protection. One must agree with the authors (David Leibowitz and Derek Spitz) that the concept of *human* dignity appears to be an insurmountable hurdle and that section 10 could apply to juristic persons only if the protection of public reputation forms part of the entitlement. There is no doubt that the economic element of reputation should be separated from the dignity aspect, or that protection of creditworthiness as both an economic right (in the case of both natural and juristic persons) and a personality right (in the case of natural persons) needs urgent attention.

The protection of the right to privacy (ch 18) will often need to be read in the context of the right to access to information, particularly under the 1996 Constitution, which confers a very general right to demand information (18–7). Questions about the impact of the constitutionalisation of the right to privacy will certainly arise: these could concern screening procedures for jobs or credit, the requirement of intention as a prerequisite for a claim for damages and the possible effect on the onus of proof.

The case of *Hartmann v Board for Religious Objection* 1987 1 SA 922 (O), in which Buddhism was recognised as a religion conferring a claim to partial exemption from military service, could have been mentioned in the chapter on religious freedom (Nicholas Smith) as a somewhat surprising example of religious tolerance under the previous disposition. Since there is a considerable degree of overlap between freedom of conscience, religion, thought, belief and opinion (s 14) and further correlation with

freedom of expression and association, it is perhaps not as crucial to define what constitutes "religion" as opposed to any of the other terms used. Thus Rastafarianism would qualify for protection on the grounds of belief even if a court had reservations about classifying it as a religion (see *In re Chickweche* 1995 4 BCLR 533 (ZS)), as would agnosticism or atheism. Section 14(2), which makes provision for (voluntary) religious observances at state schools, must be read with section 31 (children's rights): whose right is it to decide whether a child should participate – the parents' or the child's? If the parents', is their decision immune to constitutional scrutiny? By the same token, section 14(3), which provides for the recognition of a system of family law based on a particular religion, must be read together with other provisions relating to family law (ch 34).

Freedom of expression (Gilbert Marcus and Derek Spitz, ch 20) is treated at some length, justifiably so, since it is generally accepted that it is the foundation of representative democracy and underpins all political and many non-political rights. (The status of "hate speech" has been specifically addressed in the 1996 Constitution, which provides expressly that constitutional protection of freedom of expression stops short of such speech. Subversive advocacy, by contrast, has not been subjected to the kind of strictures encountered in the German system (see Currie *The Constitution of the Federal Republic of Germany* (1994) 213–227) despite the historical parallels between the two countries.)

Stuart Woolman points out in chapter 21 that freedom of assembly is fundamental to democracy because (like freedom of association and freedom of expression, of course) it makes collective politics possible and provides a corrective to simple majoritarianism. Freedom of association (ch 22 – Woolman again) also potentially affects a wide range of other rights: "[A]ssociational freedom is often most powerfully justified by reference to other constitutional guarantees" (22–5). It is of particular importance in the South African context, because of the role it can play as a pretext for discrimination. The author suggests that two kinds of association may be excluded from constitutional protection altogether: criminal associations and associations which directly threaten the constitutional order. He argues, however, that the route of absolute exclusion is open to criticism. One must agree, particularly in the light of our own history of suppression of opposition politics.

Political rights are dealt with by Johan de Waal in chapter 23. Among the interesting questions touched on is whether the legislation that denies certain categories of convicted prisoners the right to vote is constitutionally justified.

Access to information (ch 24 – Jonathan Klaaren) has already featured prominently in post-1993 jurisprudence, albeit almost exclusively in the context of an accused's right of access to police files and dockets. With the 1996 Constitution broadening the ambit of this right still further, this prominence is likely to become more rather than less pronounced.

Administrative justice (ch 25 – also by Klaaren) is a potential source of complications. Its inclusion in the Constitution emphasises the fundamentally constitutional nature and basis of administrative law, and illustrates once again the artificiality of the traditional distinction between constitutional and administrative law. One must agree that section 24(1) should not be interpreted as immunising administrative action from non-constitutional judicial review. However, I have some reservations about the suggestion that private bodies that were previously covered by the rules of administrative law by analogy (religious organisations, for example) may now "escape coverage" as a result of the entrenchment of religious freedom. Certainly this is yet another potentially thorny area for those determining scope and ambit. Klaaren asks some vital questions about issues of standing and finality in administrative law, questions that do not appear to have been answered by the "just administrative action" clause in the 1996 Constitution.

The practical bias of the work is once again evident in the fact that a separate chapter is devoted to evidence (ch 26 – Wim Trengove). In it the author deals with such diverse topics as the admissibility of extrinsic evidence as an aid to constitutional interpretation and the evaluation of laws whose constitutionality is challenged, the right to a fair trial

(both civil and criminal), the presumption of innocence and the status of improperly obtained evidence. There is a certain amount of overlap between chapters 26 and 27 (Criminal procedure – Etienne du Toit), as both deal with the right to a fair trial. Also related to the two previous chapters is chapter 28 (sentencing and punishment, by Dirk van Zyl Smit). Since the courts have, in many cases, a very wide discretion in the imposition of sentences, the importance of a constitutionally acceptable approach to sentencing cannot be overemphasised. Constitutional scrutiny of mandatory and obviously disproportionate sentences is clearly overdue.

The right to engage in economic activity is dealt with briefly by Dennis Davis in chapter 29, who point out that while

> "freedom of economic activity has played a significant role in constitutional jurisprudence, it rarely finds express protection in constitutional instruments and then not in the exact form of s 26" (29–1).

He makes use of comparative jurisprudence to examine the concepts of "economic activity" and "livelihood" and then analyses section 26 with some emphasis on the specific limitation contained in subsection (2).

Labour relations (Martin Brassey) are the subject of chapter 30. Both the new labour relations legislation and the 1996 Constitution will have a major impact on this branch of the law, but Brassey may well be right when he says that the Constitutional Court may not be the best place for the development of South African labour law.

Property (ch 31 – Matthew Chaskalson and Carole Lewis) is already a contentious issue and it is likely to become even more so. Again the clause in the 1996 Constitution differs in certain material respects from section 28 of the interim Constitution. For all that, this chapter represents a most useful summary of the vast amount of writing that has been produced on this subject, particularly since 1993. One must certainly agree that the administrative justice clause may turn out to be as important to the constitutional rights in property as the property clause itself (31–9). In fact, there is no doubt that the administrative justice clause will assume the same importance in the context of *all* the fundamental rights entrenched in the Constitution.

Environmental rights (ch 32 – Shadrack Gutto) have certainly enjoyed a meteoric rise from almost complete obscurity to a position of some prominence as so-called third-generation rights. The author expresses the fear that environmental rights may be seen as lower in the pecking order than certain other rights, with some justification. He also highlights the fact that these rights have both an individual and a collective aspect, and emphasises their international dimension – an important issue in the light of the express recognition that international norms enjoy in both the 1993 and 1996 Constitutions. The role of indigenous law in this sphere is also acknowledged.

Children's rights (Angelo Pantazis) are dealt with in chapter 33. Although "the best interests of the child" is a concept long known to our law, the spotlight is increasingly falling on certain rights of children which have been neglected in the past because of the subordinate position of children in an authoritarian society. The chapter on family law (June Sinclair) is closely linked with the previous one and, like several of the other chapters, reaches across a number of fundamental rights. The reader's attention is drawn to the lacunae that remain in our law (such as the inferior legal position of the father of the child born out of wedlock, and the conflicts between constitutional equality and the prevailing ethos of systems of customary law and certain extant codes such as the KwaZulu Code of Zulu law).

Minority rights (language, education and culture) are accorded a separate chapter (Iain Currie), illustrating the difficulties encountered when the group-based nature of certain rights is not taken into account. Language features again in chapter 37 ("Official languages", by the same author) but in a somewhat different context.

Chapter 36 (indigenous law) was also written by Iain Currie. Although much of the chapter does not relate directly to fundamental rights, the entire issue has a very strong rights connotation. It has already transpired that the question of the role of indigenous

law is likely to cause a few constitutional headaches, mainly because of the "incompatibility of indigenous law and traditional political authority . . . and the social order envisioned by the Constitution" (36–1). Notice has also been served (both in the inclusion of the concept of *ubuntu* in the postscript to the 1993 Constitution, and in several of the judgments in *Makwanyane*) that African concepts as well as African jurisprudence will not occupy their traditional Cinderella status for much longer.

Although education features in the chapter on minority rights, it is also accorded separate treatment in the final chapter, chapter 38 (Ross Kriel). The difficulties that attend the recognition and enforcement of "positive" rights such as that to education are illustrated with reference to the social justice approach of the German Basic Law. The problems raised here have been compounded rather than eliminated by the 1996 Constitution, which provides for the right to education (including higher education) and not merely for the right to have *access* to educational institutions. As Kriel points out, too, section 32(a) of the 1993 Constitution provides for equal access, not automatic or absolute access (38–6). Problems have already arisen in regard to the exclusion of students on the grounds of non-payment of fees and inadequate academic results; they are hardly likely to diminish under the 1996 Constitution.

It is inconceivable that anyone seriously engaged in constitutional practice will ignore this book. It deals comprehensively and critically with every (or almost every) aspect of the bill of rights in the 1993 Constitution, and virtually everything that has been said will retain its relevance for the 1996 Constitution. There are, however, a number of points of criticism; these do not detract from the soundness and usefulness of the work as a whole.

First of all, I think the title of the work is a misnomer: it is about the South African Constitution (and even more specifically about the bill of rights in the South African Constitution) rather than about South African *constitutional law*. Approximately three quarters of the text is devoted to the discussion of fundamental rights. When it comes to the structural provisions of the Constitution, both the legislature and the executive are given short shrift in one brief chapter. The provinces and the courts, on the other hand, are dealt with fairly exhaustively. Little attention is given to constitutional theory or fundamental principles and concepts, except for the chapters on constitutional interpretation and federalism. Separation of powers, which is enshrined in the constitutional principles on which the 1996 Constitution is based, is tucked away in a single paragraph. The importance of this doctrine has already emerged from the decision of the Constitutional Court in *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC).

The decision to omit any treatment of basic concepts such as "state", "government", "constitutionalism" and the like is probably justified on the grounds that the work is both too expensive and too comprehensive to serve as a textbook, for undergraduate students at any rate. However, greater attention to issues, both theoretical and structural, such as the separation of powers, the role of parliamentary committees, legislative procedures, representation and the operation of systems of proportional representation, would have enhanced the value of the work for academics (and possibly for practitioners as well).

Despite the editing authors' disclaimer about the integration of styles and approaches, the variety encountered in a reading of the work does not jar. The contributions are well written and read easily, for the most part. Unfortunately, the presentation of the work is marred by an unacceptably high incident of typographical errors and similar gremlins (starting with the "perliminary" on the very first page of the subject index/table of contents!). Many of these could have been eliminated by the simple expedient of a computerised spelling check. The number of errors is the most marked in chapters 10 and 12 – a pity, since these are among the chapters containing the most valuable discussion, to my mind. Apart from obvious typographical errors, there were spelling errors (seperate, discernable, permissable, Van der Vyfer, etc) as well as American usages which are not standard South African English (offenses, behavior, different than). The word "reign" was also wrongly used in phrases such as "reigning in of the political will" (11–2)

and "free reign" (26–15 fn 7). It is hoped that updates will be subjected to more rigorous language editing.

Despite the criticism mentioned, the work represents a major achievement. The editors and authors are to be congratulated on what must be described as a *tour de force*.

GRETCHEN CARPENTER
University of South Africa

ACTIO INIURIARUM: DER SCHUTZ DER PERSÖNLICHKEIT IM SÜDAFRIKANISCHEN PRIVATRECHT

deur HELGE WALTER

Duncker & Humblot Berlyn 1996; 229 bl

Prys DM84,– (sagteband)

Dit gebeur nie aldag dat 'n boek oor die Suid-Afrikaanse reg in Duits verskyn nie, en dit is des te meer merkwaardig as die werk 'n gebied van ons deliktereg betrek, die persoonlikheids- of *iniuria*-reg, waarvan die ontwikkeling reeds in die *Twaalf Tafels* van 450 vC 'n aanvang neem en wat op die spits gedryf is in die Grondwet van die Republiek van Suid-Afrika 108 van 1996. Die handves van fundamentele (mense-)regte vervat in hoofstuk 2 beklemtoon naamlik nie net menslike waardigheid as een van die demokratiese waardes wat die Grondwet onderlê nie (a 7(1)), maar bied *eo nomine* ook verskansing aan bepaalde persoonlikheidsregte, te wete die regte op lewe, waardigheid, fisies-psigiese integriteit, liggaamlike vryheid en privaatheid (sien a 10 11 12 14).

Die boek (23–27) skop af met 'n kort bespreking van privaatregtelike persoonlikheidsbeskerming in Duitsland. Hierna stel die outeur (27–30) sy hipotese, naamlik dat die Suid-Afrikaanse *iniuria*-reg met sy hibriede Romeins-Hollandse en Engelsregtelike karakter as belangrike voorbeeld kan dien vir die ontwikkeling van 'n Europese reg waar die "common law" en "civil law" tot versoening moet kom. Vervolgens (hfst 2) word die regsgeskiedkundige ontwikkeling van die Suid-Afrikaanse reg onder oë geneem (31–40): die resepsie van die Romeins-Hollandse reg in Suid-Afrika vanaf 1652, die beïnvloeding deur die Engelse reg sedert 1795 en die vervlegte ontwikkeling daarna wat tot 'n selfstandige "gemengde" Suid-Afrikaanse reg lei:

> "Das heutige südafrikanische Recht stellt sich somit weder als reines römisch-holländisches Recht noch als englisches Recht dar, sondern als Mischrechtsordnung von eigenständigem Charakter" (39).

Hoofstuk 2 word afgesluit met 'n kort verwysing na die bronne van ons reg (40–41).

Hiervandaan neem die outeur die leser op 'n geskiedkundige rit van die persoonlikheidsreg deur die Romeinse reg (hfst 3) (*via* die *Twaalf Tafels*, praetoriese edikte, klassieke reg, na-klassieke reg, *Corpus iuris civilis*, glossatore, ultramontani en kommentatore) en die Romeins-Hollandse reg (hfst 4) (*via* die ou skrywers van wie net De Groot en Voet in besonderhede bespreek word; daar word voorts gefokus op oa *animus iniuriandi* as wesenselement van 'n *iniuria* – "iniuria non fit sine animo iniuriandi" – en die remedies vir 'n gedingsvatbare persoonlikheidskrenking).

As agtergrond vir sy hipotese bespreek Walter logieserwys persoonlikheidsbeskerming in die Engelse reg in hoofstuk 5: die "law of torts" waar aandag gegee word aan "trespass to the person" (*assault, battery, false imprisonment*), laster, kwaadwillige vervolging en privaatheidskending (waar tot op hede, afgesien van databeskerming ingevolge die Data

Protection Act, 1984, nog geen direkte beskerming verleen word nie). Die invloed van die Engelse reg op ons *iniuria*-reg is veral merkbaar met betrekking tot kwaadwillige vervolging, laster en onregmatige en kwaadwillige vryheidsberowing.

Vervolgens (hfst 6) word die toepassingsgebied van die *actio iniuriarum* in die Suid-Afrikaanse reg behandel. Eers word gewys op die generaliserende benadering van die deliktereg. Daarna volg 'n netjiese en relatief bondige uiteensetting van persoonlikheidsbeskerming wat oor die algemeen die patroon van die resensent se *Persoonlikheidsreg* (1991) volg (vertaal as *Neethling's Law of personality* (1996), met Potgieter en Visser as mede-outeurs). Vooraf word kortliks op die elemente van 'n *iniuria* gelet, naamlik 'n persoonlikheidskrenking (aantasting van die *corpus*, *fama* of *dignitas*), onregmatigheid (*contra bonos mores*) en opset of *animus iniuriandi* (uitgesonderd die gevalle van skuldlose aanspreeklikheid, nl aanspreeklikheid van die pers weens laster, onregmatige arrestasie en onregmatige beslaglegging op goed); en geniet *iniuria per consequentias* en die persoonlikheidsregte van regspersone besondere aandag. (In lg verband is die boek egter misleidend aangesien die appèlhof reeds beslis het dat 'n regspersoon oor 'n reg op privaatheid beskik: sien *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A); *Motor Industry Fund Administrators (Pty) Ltd v Janit* 1994 3 SA 56 (W) 60–61 (1995 4 SA 293 (A)); *Neethling's Law of personality* 79–81.) Vervolgens word die beskerming van die verskillende persoonlikheidsregte behandel: aantasting van die reg op die fisiese liggaam of *corpus* (waaronder seduksie; ongelukkig het die beskerming van die psigiese integriteit (*Neethling's Law of personality* 97–101), wat selfs in a 12(2) van die Grondwet uitdruklik erken word, agterweë gebly); die reg op liggaamlike vryheid (waaronder onregmatige en kwaadwillige arrestasie); die reg op die goeie naam (*fama*) (waar die hele gebied van die lasterreg, kwaadwillige vervolging en onregmatige en kwaadwillige beslaglegging op goed ter sprake kom); en die regte ten aansien van die *dignitas* waaronder die reg op die eer (belediging – hier ontbreek 'n verwysing na *Jacobs v Waks* 1992 1 SA 521 (A) waar beslis is dat rassediskriminasie beledigend teenoor die getroffenes is en daarom in beginsel 'n *iniuria* daarstel), die reg op die gevoelslewe (waaronder troubreuk en owerspel – ek mis abduksie, afrokkeling en herberging: *Neethling's Law of personality* 234–238) en die reg op privaatheid behandel word. Wat privaatheidsbeskerming betref, aanvaar Walter (191–194) die Amerikaans-regtelike indeling van "intrusion"-, "publication"-, "false light"- en "appropriation"-gevalle. In die lig van die appèlhofbeslissing in *National Media Ltd v Jooste* 1996 3 SA 262 (A) waar privaatheid as eiesoortige persoonlikheidsgoed afgebaken word (vgl ook *Bernstein v Bester* 1996 2 SA 751 (CC) 789), behoort die "false light"- en "appropriation"-gevalle, wat die toekoms betref, onder 'n selfstandige reg op identiteit beskerm te word (vgl Walter 194; sien *Neethling's Law of personality* 39–41). Aangesien die handves van fundamentele regte in die Grondwet horisontale werking (*Drittwirkung*), oftewel op die verhouding tussen onderdane onderling betrekking het (a 8(3)), behoort die feit dat die reg op die vryheid van spraak uitdruklik in die Grondwet (a 15) verskans word, 'n invloed op veral die lasterreg te hê – 'n aspek wat nie veel aandag in die boek geniet nie (vgl nietemin 206). Dit geld veral wat betref die bewyslas (wat sou kon beteken dat die eiser die volle las dra om die skuldoorsaak – laster as *iniuria* – te bewys, maar dat die verweerder 'n *weerleggingslas* – en nie soos tans 'n volle bewyslas – het om die vermoedens van onregmatigheid en *animus iniuriandi* te weerlê nie), die strikte aanspreeklikheid van die massamedia (wat sou kon inhou dat nalatigheid eerder as basis vir aanspreeklikheid aanvaar word) en die erkenning van 'n verweer van media- of politieke privilegie (wat ten doel het dat ook die publikasie van *onware* bewerings in die openbare belang, en daarom geregverdig, mag wees). (Sien Neethling en Potgieter "Regsonsekerheid in die lasterreg in die lig van die Grondwet – Die pad vorentoe?" 1996 *THRHR* 706–711; sien ook *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W); *Mandela v Falati* 1995 1 SA 251 (W); *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W); *Gardener v Whitaker* 1995 2 SA 672 (OK); *Bogoshi v National Media Ltd* 1996 3 SA 78 (W); *De Klerk v Du Plessis* 1995 2 SA 49 (T); *Potgieter v Kilian* 1995 (11) BCLR 1498 (N); *Hall v Welz* 1996 4 SA 1070 (K); *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 1 SA 391 (A).)

Hoofstuk 6 word afgesluit met 'n kort bespreking van die apartheidstelsel en die negatiewe invloed wat dit op die reg en regspleging in die algemeen en persoonlikheidsbeskerming in die besonder gehad het. Hier moet nietemin in gedagte gehou word, spesifiek ook wat die gemeenregtelike persoonlikheidsreg betref, dat die Romeins-Hollandse reg nie apartheid geskep het nie maar dat dit teweeggebring is, soos hoofregter Mahomed ("The future of Roman-Dutch law in Southern Africa, particularly in Lesotho" 1985 *Lesotho LJ* 360) dit stel, deur "certain statutory implants" wat "gross departures from the spirit and tradition" van die Romeins-Hollandse reg veroorsaak het – 'n regstelsel wat inderdaad by geleentheid beskryf is "as one of the world's great legal systems, representing civilian tradition at its best, built upon principles of equity and equality and placing a high value on the rights and liberties of the individual" (vgl Van Wyk "The task facing South African law in the 21st century, with particular emphasis on the resilience of our Roman law heritage" (voordrag gelees tydens 'n konferensie oor *L'evoluzione deldiritto alle soglie del XXI secolo. Italia e Sudafrica: due esperienze a confronto* Rome 1993-04-02) 12; sien ook Walter 205–206). Hierdie stelsel, nou ook gerugsteun deur die Grondwet, het die inherente vermoë om aan te pas by veranderde en veranderende omstandighede, waardes en verwagtinge van die gemeenskap. Dié vermoë om te verander, illustreer volgens oud-hoofregter Corbett ("Trust law in the 90s: challenges and change" 1993 *THRHR* 264)

> "the genius of Roman-Dutch law: its capacity to sustain development in new directions, to branch out when necessary, to absorb concepts from elsewhere and generally to adapt to the needs of society. It demonstrates, too, the advantages of a legal system based upon a common law rooted in broad general principles, as compared with one whose common law has been created casuistically or has been subjected to the relative rigidity of a codification".

Die outeur sluit sy werk met 'n bondige oorsig af en stel sy slotsom soos volg (211):

> "Die actio iniuriarum bietet ein anschauliches Beispiel dafür, wie das südafrikanische Privatrecht das kontinentaleuropäische ius commune und das englische Common Law miteinander verbunden und auf dieser Grundlage ein funktionstüchtiges und anpassungsfähiges Rechtssystem geschaffen hat."

Dit is dan ook juis hierdie gevolgtrekking wat die grootste waarde van die boek weerspieël. Daarom behoort alle juriste in Europa en die Verenigde Koninkryk wat hulle met die ontwikkeling van 'n Europese reg bemoei, deeglik van hierdie werk kennis te neem. Die boek ontsluit uiteraard ook die Suid-Afrikaanse *iniuria*-reg vir enige buitelandse regsgeleerde wat Duits magtig is. Hierbenewens word dit aanbeveel vir Suid-Afrikaanse juriste wat 'n leeskennis van Duits het en in die persoonlikheidsreg belangstel.

J NEETHLING
Universiteit van Suid-Afrika

INLIGTING AAN OUTEURS

Bydraes vir publikasie en korrespondensie met die redakteur moet gestuur word aan professor J Neethling, Die Redakteur THRHR, *Regsfakulteit, Unisa, Posbus 392, Pretoria 0001. Inskrywings op die blad en advertensies moet gerig word aan Butterworths, Posbus 4, Mayville 4058.*

Die redakteur moet volledig ingelig word indien 'n publikasie reeds elders in die geheel of gedeeltelik gepubliseer is, of vir publikasie voorgelê is.

Outeurs word versoek om manuskripte so ver moontlik volgens die styl van die *Tydskrif* voor te berei. Volledige riglyne aan outeurs verskyn in 1985 *THRHR* 122-126. Die algemene riglyne wat op hierdie bladsy verskyn en 'n onlangse uitgawe van die *Tydskrif* kan ook in geval van onsekerheid geraadpleeg word. Die redakteur kan bydraes op vertroulike grondslag aan kundige arbiters voorlê om geskiktheid vir publikasie te bepaal. Die redaksie sal manuskripte wysig om met die styl van die *Tydskrif* ooreen te stem, taalfoute reg te stel en waar nodig duidelikheid te bevorder.

Artikels moet in die reël nie langer wees nie as 7 000 woorde (ongeveer 20 bladsye getik soos hieronder voorgeskryf). 'n Artikel moet voorsien wees van die outeur se voorletters en van, sy akademiese kwalifikasies, 'n beskrywing van sy betrekking en die naam van die instansie waaraan hy verbonde is, en 'n kort *opsomming* (ongeveer 300 woorde) in Engels as die artikel in Afrikaans geskryf is, en omgekeerd. Die opsomming moet ook van 'n vertaalde titel voorsien word. *Voetnote* moet op aparte bladsye (dws nie onderaan die bladsy waarop hulle betrekking het nie) getik word.

Aantekeninge, vonnisbesprekings en boekresensies: Die outeur se naam en die instansie waaraan hy verbonde is, moet voorsien word. Voetnote moet glad nie gebruik word nie – alle verwysings moet in die teks, tussen hakies, ingewerk word. *Vonnisbesprekings* word ook van titels voorsien, met die naam van die vonnis as subtitel. By *boekbesprekings* dien die titel van die boek wat geresenseer word, as titel. Die naam van die boek se outeur, uitgawe (indien nie die eerste uitgawe nie), uitgewer, plek van uitgawe, jaar van publikasie, getal bladsye en die prys (harde- en sagteband waar nodig) moet verskaf word. (Raadpleeg 'n onlangse uitgawe van die *Tydskrif*.)

Die volgende geld vir alle manuskripte:

- *Formaat* Manuskripte moet dubbelgespasieerd getik wees op net een kant van A4-grootte papier. Dit geld ook vir die opsomming, aanhalings en voetnote.
- *Afkortings* verskyn nie in die teks nie; in *voetnote* (en gedeeltes tussen hakies wat dieselfde doel as voetnote dien) soveel erkende afkortings moontlik. Geen punte word by afkortings gebruik nie. Sowel aanmekaargeskrewe as aparte woorde word sonder spasie afgekort: bv, asb, km, tap, tov, aw, VSA, *THRHR*, RSA, BA, LLB, Unisa, *SALJ*. *Voorbeelde*: a vir artikel(s), bl vir bladsy(e), ev vir en volgende, par vir paragraaf(we), 2e uitg vir tweede uitgawe, R vir regter, AR vir appèlregter, RP vir regter-president, WnAR vir waarnemende appèlregter, HR vir hoofregter, reg vir regulasie, hfst vir hoofstuk, vgl vir vergelyk, WnR vir waarnemende regter.
- *Aanhalings* word presies soos in die oorspronklike weergegee, dit wil sê met die kursiverings, hoofletters, punte ensovoorts onveranderd. Enige verandering of invoeging in 'n aanhaling word tussen reghoekige hakies aangebring, byvoorbeeld "[I]n . . ." Outeurs word versoek om aanhalings noukeurig te kontroleer.
- *Hoofletters* Die gebruik van hoofletters in Afrikaanse bydraes word sover moontlik beperk: die regter, die appèlhof, die parlement, die minister, die hof, die regter-president. Alle voetnote begin met 'n hoofletter.
- *Opskrifte* Raadpleeg hierdie uitgawe vir voorbeelde.
- *Aanhalingstekens* Gebruik dubbel aanhalingstekens, met enkel aanhalingstekens *binne* 'n aanhaling. By volsinaanhalings kom die aanhalingsteken ná die punt; by ander aanhalings vóór die komma, dubbelpunt, kommapunt ensovoorts.
- *Kursivering* Aanhalings (ook uit Latyn) word *nie* gekursiveer (onderstreep) nie; woorde en uitdrukkings uit 'n ander taal as dié van die bydrae word gekursiveer: *dolus, fait accompli, Grundnorm, rule of law.*

Verwysings

- *Vonnisse* Die name van die partye en die v daartussen word gekursiveer (of onderstreep). Die woorde "and another", "en ander", "NO" ensovoorts word weggelaat. Die Engelse verwysings vir voor-1947-vonnisse word ook in Afrikaanse bydraes gebruik. Voorbeelde: *Botha v Botha* 1979 3 SA 792 (T); *Talbot v Von Boris* 1911 1 KB 854; *Ex parte F* 1963 1 PH B9 (N); *Re Waxed Papers Ltd* 1937 2 All ER 481 (CA); *Shatz v Josman* 1935 NPD 142.
- *Boeke* Dit is onnodig om die voorletters van 'n boek se outeur(s) te verskaf (behalwe as die weglating tot verwarring kan lei). Die titels van boeke word gekursiveer (onderstreep). Net die eerste woord begin met 'n hoofletter, behalwe waar eiename (ook as byvoeglike naamwoorde) in die titel voorkom. Slegs die datum van die uitgawe kom tussen hakies: Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989).
- *Artikels* Titels van artikels word tussen aanhalingstekens geplaas. Soos by boeke, begin net die eerste woord met 'n hoofletter: Joubert "Aspekte van die aanspreeklikheid van vennote" 1978 *THRHR* 291.
- *Tydskrifte* Name van tydskrifte word gekursiveer (onderstreep) en volledig uitgeskryf (behalwe *LJ*, *LR* en *Univ*): *Harvard LR, Yale LJ, De Rebus, De Jure.* Maar: *THRHR, SALJ, TSAR, CILSA, SASK, SA Merc LJ, LQR, TRW.* Die bandnommer word weggelaat (behalwe waar die bladsynommers van 'n tydskrif nie jaarliks deurlopend is nie – soos by *Codicillus*): 1971 *THRHR* 12; 1979 *SALJ* 307; 1987 (2) *Codicillus* 13.
- *Wetgewing* Die naam en nommer van 'n wet word nie gekursiveer nie en word só weergegee; Die Wet op Prokureursordes 71 van 1975; die Maatskappywet 46 van 1926. Verwysings na wette in die loop van die teks kan egter ook informeel wees (sodra dit vir die leser duidelik is na watter wet verwys word): die 1926-wet, die Maatskappywet van 1926.
- *Ou bronne* Sien 1985 *THRHR* 125.

Butterworths-prys *Die Butterworths-prys – regsboeke ter waarde van R1 000 – word elke jaar deur die uitgewer beskikbaar gestel aan die outeur van die beste* eersteling-artikel *in die* Tydskrif. *Die artikel moet die eerste substansiële bydrae wees wat die skrywer vir publikasie in 'n regstydskrif aanbied. Dit moet by voorkeur oor 'n onderwerp van die Suid-Afrikaanse reg handel. Die redaksiekomitee beslartig die beoordeling na afloop 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 kom.*

REDAKSIONEEL

Nuwe Grondwet

Sekerlik een van die belangrikste mylpale in die regsgeskiedenis van Suid-Afrika was die inwerkingtreding van die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996 op 4 Februarie vanjaar. Daarmee het die konkretisering van Suid-Afrika as 'n regstaat met 'n sterk menseregtebedeling sy finale beslag gekry, al kon 'n mens ook die tussentydse uitwerking daarvan sedert die inwerkingtreding van die interim-Grondwet van 1993 konkreet waarneem en beleef. Nou, meer as ooit tevore, is dit die taak van die regswese in die algemeen maar veral ook van regsakademici en die howe om die Suid-Afrikaanse regstelsel uit te bou tot 'n vaste burg vir alle Suid-Afrikaners en 'n model vir ander lande. Dit geld vir sowel publiek- as privaatreggeleerdes aangesien die Grondwet nou uitdruklik voorsiening maak vir direkte horisontale werking (a 8(2) en (3)). Naas die uitbouing van 'n kultuur van menseregte moet egter ook plek gemaak word vir die vestiging van 'n klimaat van "menseplígte" aangesien geen menseregtebestel kan oorleef as 'n verantwoordelikheidsin teenoor medeburgers en die staat nie ingeskerp raak nie. Die redaksie van die *Tydskrif* wens veral die regters van die hoogste hof van appèl en die konstitusionele hof, onder leiding van hoofregter I Mahomed en president A Chaskalson, sterkte, insig en Salomo-wysheid in die proses toe.

Gesien die belangrikheid van die Grondwet, het (soos reeds gerapporteer in 1997 *THRHR* 2-3) die Bestuur van die Vereniging Hugo de Groot by sy vergadering in Januarie vanjaar besluit om voortaan jaarliks 'n prys van R1 000 uit te loof aan die outeur wat die beste bydrae oor die nuwe Grondwet vir publikasie in die *Tydskrif* aanbied. Langs hierdie weg poog die Vereniging om belangstelling in die Grondwet te prikkel, en deurvorste navorsing en uitnemende publikasies daaroor te stimuleer en te bevorder. By dieselfde vergadering is ook besluit dat die redakteur 'n kenner moet nader om in 'n artikel aan lesers van die *Tydskrif* 'n algemene oorsig van die belangrikste kenmerke van die finale Grondwet te gee. Professor Dawid van Wyk van Unisa het goedgunstig ingestem en sy artikel " 'n Paar opmerkings en vrae oor die nuwe Grondwet" verskyn in hierdie uitgawe.

***In memoriam*: P van Warmelo**

Die *Tydskrif* het met leedwese verneem van die afsterwe van professor P van Warmelo, sekerlik een van die voorste Romeinse regsgeleerdes wat Suid-Afrika ooit opgelewer het. Hy was vir baie jare 'n getroue medewerker en vriend van die *Tydskrif* en het vanaf 1965 tot 1972 op die Bestuur van die Vereniging Hugo de Groot gedien, die laaste drie jaar as sekretaris. Hy was ook redaksiekomiteelid van die Universiteit van Pretoria vanaf 1965 tot 1979, en ęrelid van die redaksiekomitee vanaf 1980 tot met sy afsterwe vroeër vanjaar. In 1972 is die *Gekonsolideerde Register 1937-1967 vir Bande I-XXX* van die *THRHR* deur 'n komitee van die Regsfakulteit, Universiteit van Pretoria onder sy toesig opgestel. 'n Huldeblyk aan professor Van Warmelo deur professor PhJ Thomas van die Universiteit van Pretoria sal in die November 1997-uitgawe van die *Tydskrif* verskyn. Die redaksie van die *Tydskrif* huldig die nagedagtenis van Paul van Warmelo en spreek ons meegevoel teenoor sy naasbestaandes en vriende uit.

JOHANN NEETHLING

'n Paar opmerkings en vrae oor die nuwe Grondwet

Dawid van Wyk
BIur et Art LLM LLD
Professor in Staats- en Volkereg, Universiteit van Suid-Afrika

SUMMARY

Some comments and questions on the new Constitution

This contribution contains a number of random reflections on the new Constitution. It deals with the unfortunate numbering of the document and argues that it is invalid. The Constitution was not made by Parliament, and should not be numbered as if it were. It further raises questions about the competence of the Constitutional Assembly to repeal the constitutional principles and other parts of the interim Constitution. The suggestion is made that the question should be investigated further. The complexities of the "premature" commencement of the new Constitution, in view of the five years allowed for the notion of a government of national unity, are discussed briefly. This is followed by observations on the bill of rights; the principles of cooperative government in chapter 3; the National Council of Provinces; the distribution of competencies between the spheres of government and federalism; and finally public administration. The general tenor is that the Constitution itself is remarkable, but that it will require a constant change of heart and very hard work to cause its spirit to permeate the fabric of South African government and society permanently.

INLEIDING

Alles het nagenoeg volgens plan verloop. Die tussentydse Grondwet het bepaal dat die "nuwe grondwetlike teks", soos dit genoem is, binne twee jaar na die eerste sitting van die nasionale vergadering voltooi moet wees.[1] Die tussentydse Grondwet het verder vereis dat die nuwe teks aan die 34 konstitusionele beginsels in bylae 4 van die tussentydse Grondwet voldoen.[2] Die konstitusionele hof moes sertifiseer dat dit die geval was.[3] Die nuwe teks is op 8 Mei 1996 deur die grondwetlike vergadering aangeneem – op die dag waarop die twee jaar verstryk het. Die konstitusionele hof het ook gesertifiseer maar nie voordat die teks vir 'n aantal veranderinge na die grondwetlike vergadering teruggestuur is nie.[4]

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1 A 73(1). Die "tussentydse Grondwet" is 'n verwysing na die Grondwet van die Republiek van Suid-Afrika 200 van 1993.

2 A 71(1)(a).

3 A 71(2).

4 Die sertifiseringsuitsprake is onder die volgende verwysings te vinde: *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC); 1996 10 BCLR 1253 (CC) ("die eerste sertifiseringsuitspraak") en *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) ("die tweede sertifiseringsuitspraak").

Met die uitsondering van enkele artikels het die Grondwet van die Republiek van Suid-Afrika, 1996 op 4 Februarie 1997 in werking getree.[5]

WET 108 VAN 1996?

Voordat 'n verdere woord oor die "nuwe" of "finale" Grondwet gesê word, moet korte mette gemaak word met iets wat seker as die onooglikste administratiewe glips en onreëlmatigheid van 1996 bestempel moet word. Die nuwe Grondwet is die wêreld ingestuur as "Wet 108 van 1996". Dit is duidelik verkeerd. Wette van die *parlement* word jaarliks genommer. Die Grondwet is geen wet van die *parlement* nie. Dit kan nie as deel van die reeks wette wat in 1996 deur die parlement aangeneem is, voorgehou en genommer word nie.

Die Grondwet is deur die grondwetlike vergadering aangeneem. Al sou 'n mens die standpunt handhaaf dat die grondwetlike vergadering maar net die tussentydse parlement was wat as grondwetlike vergadering opgetree het,[6] en al sou die bewoording van die tussentydse Grondwet op die oog af so 'n siening steun,[7] was hierdie twee liggame nie identies nie. Volgens die oorspronklike bedoeling van die sogenaamde tweefase-oorgang na 'n demokratiese bedeling, sou die eerste demokratiese verkiesing primêr daarop gemik wees om 'n grondwetskrywende liggaam daar te stel. Hierdie liggaam sou terselfdertyd as tussentydse parlement optree.[8]

Die tegniese en historiese argumente is nie juis belangrik nie. Die feit is dat die grondwetlike vergadering 'n selfstandige bestaan gehad het. Dit het 'n eie voorsitter en ondervoorsitter gehad en dit kon eie reëls en reglemente aanneem.[9]

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5 Volgens a 243(1) tree a 213–216, 218 en 226–230 laatstens op 1998-01-01 in werking (hulle het almal met staatsinkomste, begrotings en die verdeling van inkomste tussen die verskillende regeringsfere te doen). Prok 6 van 1997 in *Staatskoerant* 17737 van 1997-01-24 waardeur die res van die Grondwet in werking gestel is, bepaal dat a 160(1) op 1997-06-30 van krag word.

6 Vgl bv Rautenbach en Malherbe *Staatsreg* (1996) 29; eerste sertifiseringsuitspraak (*supra* vn 4) par 13, waar daar van 'n nasionale wetgewer gepraat word wat as grondwetlike liggaam sou "double". Basson *South Africa's interim Constitution – text and notes* (1995) 102 verwys ook na die grondwetlike vergadering as "Parliament in another form". Rautenbaeh en Malherbe sê wel later in dieselfde werk (153) dat die grondwetlike vergadering formeel 'n ander liggaam met ander prosedures as die parlement was.

7 Volgens a 68(1) van die tussentydse Grondwet het die grondwetlike vergadering bestaan uit die nasionale vergadering en die senaat in gesamentlike sitting. Die nommerprobleem het reeds voor die Grondwet, 1996 ontstaan. Ingevolge a 74 van die tussentydse Grondwet kon net die grondwetlike vergadering hfst 5 wysig (meer hieroor onder die opskrif "Die nuwe Grondwet en die konstitusionele beginsels"). Die grondwetlike vergadering het dit ook gedoen – en hierdie wysiging is ook verkeerd genommer (vgl die Derde Wysigingswet op die Grondwet van die Republiek van Suid-Afrika 26 van 1996).

8 Die beginsel is beliggaam in die sg *Record of Understanding* van 1992-09-26 tussen die ANC en die destydse regering: vgl die eerste sertifiseringsuitspraak (*supra* vn 4) par 13; Van Wyk ea *Rights and constitutionalism: The new South African legal order* (1994) 143. Die gedagte word ook bevestig deur die derde par van die aanhef van die tussentydse Grondwet waarin daar verwys word na die voortgesette regering van die land terwyl 'n verkose grondwetlike vergadering die nuwe grondwet skryf.

9 A 69 en 70. Daar is ook 'n eie tydelike administrasie vir die grondwetlike vergadering op die been gebring. Een van die erflatings daarvan is 'n elektroniese adres waar die belangrikste dokumentasie oor die grondwetlike proses gevind kan word: "www.constitution.org.za".

Belangriker, egter, was dat dit slegs één opdrag gehad het, met spesifieke voorskrifte oor hoe die opdrag uitgevoer moet word: die aanname van die nuwe Grondwet. Dit is presies wat die grondwetlike vergadering as grondwetlike vergadering en nie as parlement nie, gedoen het.

Die nuwe Grondwet is en sal ten ene male nooit 'n wet van die parlement wees nie. Dit is verkeerd om met die nommering daarvan te suggereer dat dit die 108ste wet is wat in 1996 uit die parlement te voorskyn gekom het. Dit ondermyn die Grondwet as die produk van die grondwetlike vergadering; dit kan maklik die opvatting versterk dat die Grondwet eintlik nie so ernstig opgeneem hoef te word nie. Dit doen afbreuk aan die waardigheid van die Grondwet as die hoogste reg van die land.

'n Laaste woord hieroor: die redenasie is gehoor dat die tussentydse Grondwet 'n nommer gehad het – 200 van 1993. Ironies genoeg bevestig dit juis die standpunt wat hier ingeneem word. Die tussentydse Grondwet hét 'n nommer gehad omdat dit *tegnies en formeel* deur die toentertydse driekamer-parlement aangeneem is. Dit was deel van die ooreenkoms om kontinuïteit te bewerkstellig. Dit is egter opvallend dat waar dit normale praktyk was om 'n wet te begin met "Derhalwe word bepaal deur die Parlement van die Republiek van Suid-Afrika", die tussentydse Grondwet geen verwysing na die destydse parlement gehad het nie. Dit het gewoon begin met "Derhalwe word die volgende bepalings aangeneem as die Grondwet van die Republiek van Suid-Afrika".

Die slotsom is dat die nommering van die nuwe Grondwet onkonstitusioneel is, dat dit verontagsaam moet word en dat daar na die Grondwet verwys moet word net soos wat dit in artikel 243(1) staan: "Grondwet van die Republiek van Suid-Afrika, 1996". Om die waarheid te sê, die fout behoort reggestel te word.

NOU DIE GRONDWET SELF

Oor die grondwetskrywende proses word hier nie uitgewei nie, ook nie oor die detail van die Grondwet of die mate waarin dit van die tussentydse Grondwet verskil nie. Daar word met die volgende waarneming volstaan: In die vroeë fase van die proses is daar baie lugtig met die tussentydse Grondwet omgegaan, en is daar selfs by geleentheid in komiteevergaderings gewaarsku dat die teks van die nuwe Grondwet nie te gemaklik op dié van die tussentydse Grondwet geskoei moet word nie. Die enigste formele band tussen die tussentydse Grondwet en die nuwe teks was in konstitusionele beginsel II geleë. Volgens hierdie beginsel moes die nuwe handves van regte opgestel word na onder meer behoorlike oorweging van die regte in hoofstuk 3 van die tussentydse Grondwet. Dit is egter nou gemene saak dat die tussentydse Grondwet tog uiteindelik 'n soort werksdokument geword het. Die eienskappe van die voorsaat is op meer as een manier duidelik in die nuwe produk herkenbaar. Dit is een van die redes waarom die oorvloed aan publikasies, debatte en hofuitsprake wat op die tussentydse Grondwet gevolg het, van belang bly. Die oorgang van die tussentydse na die nuwe is in vele opsigte so gradueel dat 'n vergelyking eerder aan die hand van ooreenkomste as van verskille getrek moet word.[10]

10 Vir 'n seminaarbespreking van 'n vroeë konsep van die nuwe Grondwet, sien Konrad Adenauer Stigting *Seminar report: Aspects of constitutional development in South Africa: the first working draft of the final Constitution* (1996).

In wat volg, word op 'n aantal opvallende en verbandhoudende kenmerke van die nuwe Grondwet gekonsentreer. Die keuse mag nie algemeen byval vind nie; dit is deels bepaal deur eie voorkeure en deels deur 'n vraag oor die grondslae van die nuwe bestel. Die oefening word nie met enige pretensies aangepak nie. Soms word vrae onbeantwoord gelaat en kommentaar nie met groot gesag gestaaf nie. Die volgende kwessies word behandel: die wyse waarop die konstitusionele beginsels in die nuwe Grondwet beliggaam is; die manier waarop die Grondwet 'n brug slaan tussen die tussentydse Grondwet en die sperdatum 30 April 1999; die handves van regte; die beginsels van samewerkende regering; die nasionale raad van provinsies; die verdeling van bevoegdhede tussen die verskillende regeringsfere en die konstitusionele "f"-woord; en openbare administrasie. Uit die aard van die saak is daar heelwat meer interessante onderwerpe wat bespreking verdien: die taal van die Grondwet (wat oor die algemeen afwyk van die tradisionele formele wetstaal); veranderings aan die nasionale uitvoerende gesag (waar van 1 Mei 1999 af die beginsel van 'n regering van nasionale eenheid verdwyn); die nuwe jurisdiksievoorskrifte wat die gekompliseerde verwysingstelsel van die tussentydse Grondwet vervang; veiligheidsdienste; tradisionele leiers; die instellings wat konstitusionele demokrasie moet verstewig; finansies, en die gewysigde bepalings oor die volkereg. "Volgende keer", is die kortste en mees gepaste antwoord hierop.

DIE NUWE GRONDWET EN DIE KONSTITUSIONELE BEGINSELS

Die konstitusionele hof het bevind dat die nuwe Grondwet uitdrukking gee aan die beginsels wat in bylae 4 van die tussentydse Grondwet vervat is. Die vraag wat nie beantwoord is nie, is wat van die konstitusionele beginsels geword het. Op die oog af is die antwoord eenvoudig. Hulle is ingevolge artikel 242 en bylae 7 van die nuwe Grondwet saam met die res van die tussentydse Grondwet herroep. Dit is ook die gerieflike antwoord. Of dit die allerlaaste woord oor die saak is, moet egter nog gesien word. Om mee te begin, is dit glad nie so duidelik dat die konstitusionele beginsels herroep *kon* word nie. Die tussentydse Grondwet het twee wysigingsbepalings gehad. Volgens artikel 62, die algemene wysigingsvoorskrif, kon die *parlement* aan die hand van die voorgeskrewe prosedure die Grondwet wysig. Hierdie bevoegdheid was egter uitdruklik onderworpe aan artikel 74. Subartikel 2 van hierdie artikel het die wysiging van hoofstuk 5 (die aanname van die nuwe Grondwet) aan die grondwetlike vergadering oorgelaat. Subartikel (1) het bepaal dat die konstitusionele beginsels nie herroep of gewysig mag word nie. Die tweeledige vraag is dus: Op grond waarvan kon die *grondwetlike vergadering* aan die een kant die *hele* tussentydse Grondwet herroep, en spesifiek aan die ander kant die konstitusionele beginsels wat volgens artikel 74(1) nie gewysig of herroep kon word nie?

Daar word hier duidelik met 'n denksprong gewerk. Die vraag bly steeds: Op sterkte waarvan word die sprong gemaak? Dit help nie juis om te redeneer dat die hart van die konstitusionele beginsels nou in artikel 1 van die nuwe Grondwet vervat is nie. Tegnies sou dit beteken dat veelpartydemokrasie wat in artikel 1(d) as 'n funderende waarde van die een, soewereine en demokratiese Suid-Afrika gestel word, deur 'n 75% meerderheid van die nasionale vergadering en 6 uit die 9 provinsies in die nasionale raad van provinsies afgeskaf kan word.[11]

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11 A 74(1) bevat die voorskrif oor die wysiging van a 1. Die vraag waaroor hierdie bespreking gaan, moet duidelik onderskei word van die geval waar iemand sou beweer

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Effens erger: die uitbou van menseregte soos vereis deur artikel 1(a) sou met dieselfde meerderheid afgewater kon word. Die ergste: ras sou ten spyte van artikel 1(b) weer 'n diskriminerende faktor gemaak kon word. Bloot op die teks van die Grondwet af moet dit moontlik wees.[12] Dit is egter nie 'n uitgemaakte saak dat die konstitusionele hof dit ook so móét sien nie. 'n Mens kan naamlik 'n saak daarvoor uitmaak dat die grondliggende waardes van die huidige Suid-Afrikaanse konstitusionele bestel net deur 'n staatsregtelike revolusie verander sal kan word. Anders gestel: die regters sal, soos destyds na Ian Smith se eensydige onafhanklikheidsverklaring in Rhodesië, voor die keuse gestel word om 'n fundamentele breuk te volg, en sodoende die stille revolusie te bevestig, of om te bedank.

Selfs as aanvaar word dat bylae 4 van die tussentydse Grondwet afgeskaf is, is die vraag of die konstitusionele beginsels, as "grondliggende waardes", ook daarmee heen is. Die antwoord word in die aanhef van die tussentydse Grondwet gevind. Die tweede paragraaf daarvan verwys na die noodsaak om 'n nuwe orde in Suid-Afrika tot stand te bring. Met die oog hierop moet 'n ander grondwet – die "nuwe" een – geskryf word. Hierdie grondwet moet voldoen aan 'n "plegtige ooreenkoms" (in die Engels treffend as "solemn pact" beskryf) wat in die tussentydse Grondwet as die konstitusionele beginsels beliggaam is. Hier is duidelik sprake van 'n voorgrondwetlike ooreenkoms. Die konstitusionele beginsels het nie die "plegtige ooreenkoms" geskep nie. Inteendeel, die plegtige ooreenkoms gaan die Grondwet vooraf. Dit word in soveel woorde deur die konstitusionele hof in die eerste sertifiseringsuitspraak gesê: die nuwe teks moet voldoen aan "certain guidelines agreed upon in advance by the negotiating parties";[13] dit is duidelik uit die voorrede van die tussentydse Grondwet dat die konstitusionele beginsels die "formal record of the 'solemn pact' " is; en "they are acknowledged by the preamble to be foundational to the new constitution".[14] Dan volg 'n betekenisvolle sin (eie beklemtoning van "also"): "As will be shown shortly, they are *also* crucial to the certification task with which the Court has been entrusted."

Twee afleidings kan uit hierdie paar woorde van die konstitusionele hof gemaak word. Die eerste is dat die konstitusionele beginsels nie primêr daar is met die oog op sertifisering nie. Hulle hoofdoel is om die fondament van die nuwe bedeling te wees. Sertifisering, hoe belangrik ook al, was maar 'n onderdeel van 'n veel groter proses. Dit lei tot die tweede afleiding: die blote herroeping van die bylae waarin die beginsels opgeteken is, moet nie noodwendig die einde van die plegtige ooreenkoms beteken nie. Die argument is dus dat die plegtige ooreenkoms as vestigingsnorm van die nuwe orde bly staan. Die konstitusionele beginsels met hoofletter "K" en hoofletter "B" mag formeel herroep wees omdat dit so in die nuwe Grondwet staan; die konstitusionele beginsels van die plegtige

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dat die konstitusionele hof tydens die oorspronklike sertifisering van die Grondwet aan die einde van 1996 'n dwaling begaan het. Oor die onmoontlikheid van 'n "heropening" van die sertifiseringsproses moet die hof (eerste sertifiseringsuitspraak (*supra* vn 4) par 18) gelyk gegee word: dit is nie moontlik nie. Indien die herroeping van die konstitusionele beginsels egter ongeldig was, kan dit nie deur die sertifisering geldig gemaak word nie.

12 Rautenbach en Malherbe *Staatsreg* 155 is duidelik so 'n mening toegedaan.

13 (*Supra* vn 4) par 13. Vgl ook Venter "Requirements for a new constitutional test: The imperatives of the constitutional prineiples" 1995 *SALJ* 32.

14 (*Supra* vn 4) par 15.

ooreenkoms bly egter in die woorde van die konstitusionele hof as "broad constitutional strokes on the canvas of constitution making in the future".[15]

Solank 'n mens op die gebied van die algemene waardes bly, is die redenasie betreklik probleemloos. Dit raak egter ongemaklik wanneer dit oor spesifieke aspekte van die plegtige ooreenkoms gaan. Die ooreenkoms het voorsiening gemaak vir regering op drie vlakke: nasionaal, provinsiaal en plaaslik (in die nuwe Grondwet het die vlakke "sfere" geword). Kan een of twee van hierdie sfere afgeskaf word? Die antwoord is onvermydelik dat aanvaar moet word dat nie elke jota en tittel van die konstitusionele beginsels as ewig en onveranderlik beskou moet word nie. Dit beteken egter nie noodwendig dat elke aspek daarvan nou gewysig of selfs mee weggedoen kan word nie.[16]

Marinus Wiechers het hom by minstens twee geleenthede oor die vraag van onderliggende konstitusionele waardes uitgelaat. By die eerste het hy appèlregter Schreiner se uitspraak in *Collins v Minister of the Interior* ondersoek.[17] Die ander keer het hy kortliks geskryf oor die 1982-konstitusionele beginsels wat die Namibiese grondwetskrywing gerig het.[18] In laasgenoemde geval beweer hy dat die 1982-beginsels die Namibiese Grondwet voorafgaan en fundamentele bedinge vorm waarop die bestaan en die regskrag van die Grondwet steun. Wanneer hy die *Collins*-saak bespreek, is sy taak moeiliker, want hy het te doen met 'n stelsel waarin die parlement soewerein is en die soewereiniteit bewustelik en ongebreideld uitgeoefen is. Dit weerhou hom egter nie daarvan nie om tot die gevolgtrekking te kom dat ongeag hoe buigsaam 'n konstitusie mag wees, daar in elke staat reëls is – hy noem hulle "laws" – wat die konstitusie voorafgaan en wat begryp en effektief gehandhaaf moet word.[19] As hierdie opmerking waar kon wees van Suid-Afrika onder die Suid-Afrika Wet, 1909, moet dit soveel te meer geld vir die waardegebaseerde Grondwet, 1996. Dan lyk dit wel of die "solemn pact" waarop die nuwe Suid-Afrikaanse staatsregorde berus, ten minste die logiese beginpunt moet wees in die soeke na die voorgrondwetlike waardes en beginsels.[20]

Die hoofpunt van hierdie kort bespreking is dat ons hier met 'n fundamentele kwessie te doen het waaroor navorsing dringend nodig is.[21] Een van die vrae

15 Eerste sertifiseringsuitspraak (*supra* vn 4) par 36.

16 In die eerste sertifiseringsuitspraak (*supra* vn 4) par 45 som die konstitusionele hof die konstitusionele beginsels in 14 punte op. Die punt word bloot gemaak om te wys dat die kern van die beginsels van spesifieke detail geskei kan word.

17 Die uitspraak is te vinde in 1957 1 SA 552 (A). Wiechers se bespreking daarvan is as "The fundamental laws behind our constitution. Reflections on the judgment of Sehreiner JA in the Senate ease" in Kahn (red) *Fiat iustitia. Essays in memory of Oliver Deneys Schreiner* (1983) 383 gepubliseer.

18 "Namibia: The 1982 constitutional principles and their legal signifieance" 1989/90 *SAYIL* 1 (ook gereproduseer in Van Wyk, Wieehers en Hill (reds) *Namibia. Constitutional and international law issues* (1991) 1). Vgl veral 20–21.

19 Vgl veral 394.

20 Dit is waarop dit ook neerkom in Wieehers se jongste bydrae oor die onderwerp (die titel is Duits, die inhoud Engels): " 'Zeige mir dein Staatsreeht, und ieh sage,dir, welehen Staat du hast' – eine Abhandlung über den Südafrikanisehen Staat, gemessen an den Ansichten und Gedanken von Klaus Stern" in Burmeister (red) *Verfassungsstaatlichkeit. Festschrift für Klaus Stern zum 65. Geburtstag* (1997) 377.

21 Butler "The 1996 Constitution Bill, its amending power, and the constitutional principles" (*Konrad Adenauer Stiftung Occasional Papers*, Julie 1996) gaan indringend op die

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waarop 'n antwoord verskuldig is, is waaraan die grondwetlike vergadering die bevoegdheid ontleen het om die konstitusionele beginsels en meer as net hoofstuk 5 van die tussentydse Grondwet te herroep. Die bepalings van artikel 74 van die tussentydse Grondwet bied allermins 'n duidelike antwoord. Wat duidelik word, is dat dit hier oor meer gaan as net vaardige pogings om 'n grondwetteks uit te lê. Dit gaan oor *'n* Suid-Afrikaanse staatsbegrip en -bewussyn. Die onbepaalde lidwoord word doelbewus gebruik, want nóg die begrip nóg die bewussyn is al betekenisvol ontwikkel.[22]

DIE BRUG TUSSEN DIE TUSSENTYDSE GRONDWET EN 30 APRIL 1999

Populêre opvatting en werklikheid verskil dikwels hemelsbreed. Die tussentydse Grondwet sou, volgens algemene geloof, vir vyf jaar geld, waarna die nuwe Grondwet in werking sou tree. 30 April 1999 het die sperdatum geword – op drie dae na vyf jaar na die demokratiese verkiesing van 27 April 1997. In werklikheid was 30 April 1999 net 'n sperdatum vir twee dinge: aan die een kant moet die beginsel van 'n regering – spesifiek uitvoerende gesag – van nasionale eenheid volgens konstitusionele beginsel XXXII tot op daardie datum behou word; aan die ander kant verbied konstitusionele beginsel XXXIII 'n landswye verkiesing voor 30 April 1999, tensy die parlement vanweë 'n mosie van wantroue in die kabinet ontbind word.

Dat die nuwe Grondwet lank voor 30 April 1999 in werking sou tree, het gaandeweg duidelik geword. Dit sou weinig sin maak om 'n volledige grondwet, wat uiteraard 'n verfyning van die tussentydse Grondwet sou wees, vir drie jaar op die rak te laat sit, by wyse van spreke. In beginsel was daar ook niks wat verhoed het nie dat die nuwe Grondwet onmiddellik in werking tree, mits die twee aspekte wat aan 30 April 1999 verbind is, geakkommodeer word.

Die manier waarop dit gedoen is, is tegelyk vindingryk en ongemaklik. Die gevolg kan as "een-en-'n-kwart Grondwet" opgesom word. Die oorsprong van die kwart is in artikel 241 te vinde. Volgens die artikel is bylae 6 van die Grondwet van toepassing op die oorgang na die nuwe grondwetlike bedeling. Die bylae bestaan uit 28 artikels en vier aanhangsels wat elk weer 'n aantal items bevat. Die bepalings van die bylae kwalifiseer artikels van die hoofteks.

Dit gaan hier nie oor die inhoud van die bylae nie maar oor die lastigheid wat dit skep. Vanweë die omvang van die bylae is goeie raad aan elke leser van die Grondwet om 'n boekmerk by bylae 6 in te sit en iedere keer wat die Grondwet geraadpleeg word, seker te maak dat die betrokke bepaling nie deur die bylae

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belangrikste vrae oor die voortgesette gelding van die konstitusionele beginsels in. Sy bydrae is 'n waardevolle afskoppunt vir verdere ondersoek. Hy gaan spesifiek in op kwessies soos die uitwerking van a 1 en 74(1) van die nuwe Grondwet op die beginsels en die moontlike ontwikkeling van 'n "essential features"-leerstuk (soos in die Indiese staatsreg). Hy verwys ook na aanduidings in vorige uitsprake van die konstitusionele hof dat die beginsels van "ewigheidswaarde" is. 'n Verkorte weergawe van die bydrae is in 1996 *HRCLJSA* 24 gepubliseer. Vgl ook die argumente van Malherbe "Die sertifisering van die 1996 Grondwet" 1997 *TSAR* 358.

22 Vir sover daar van staatsregteorie sprake is, is dit beperk tot bydraes oor die uitleg van die Grondwet: vgl Botha *Waarde-aktiverende grondwetuitleg: Vergestalting van die materiële regstaat* (LLD-proefskrif Unisa 1997); Davis "The underlying theory that informs the wording of our bill of rights" 1996 *SALJ* 385.

geraak word nie. Dit geld veral gedeeltes van die Grondwet wat oor die nasionale, provinsiale en plaaslike regeringsinstellings gaan (waar die bylae gewoonlik na een van die aanhangsels verwys waarin die oorgangsaanpassings voortgesit word!). Bylae 6 is egter nie tot hierdie aspekte beperk nie. Selfs die handves van regte word geraak – gelukkig net sover dit die reg op inligting en regverdige administratiewe optrede betref.

'n Verbandhoudende verskynsel is die getal "nasionale" (dit wil sê parlementêre) wette wat gemaak moet word om verdere uitvoering aan die Grondwet te gee. In sommige gevalle bestaan die wetgewing reeds (soos die Wet op Suid-Afrikaanse Burgerskap 88 van 1995 wat die vereiste van artikel 3(3) van die Grondwet behoort te bevredig, of die Wet op die Openbare Beskermer 23 van 1994 wat deur artikel 182 voorsien word). Daar lê egter nog 'n berg konstitusionele wetgewing voor.[23] Kragtens item 21(1) van bylae 6 moet hierdie wetgewing binne 'n redelike

23 Benewens die twee wat reeds genoem is, voorsien die volgende artikels verdere wetgewing (dit gaan hier net oor wette wat gemaak móét word, nie ook oor die wat gemaak mag word nie – soos wetgewing oor kollektiewe bedinging ingevolge a 23(5) of nasionale toesighouding oor provinsiale administrasie (a 100(3)). In sommige gevalle bestaan wetgewing reeds – vgl ook die omskrywing van "nasionale wetgewing" in a 239: a 4 (die nasionale lied, wat deur die president by proklamasie gemaak moet word); a 6(4) (tale); a 9(4) (verbod op onbillike diskriminasie); a 26(2) (behuising); a 27(2) (gesondheid); a 32(2) (toegang tot inligting); a 33(3) (regverdige administratiewe optrede); a 46(2) (formule om die getal lede van die nasionale vergadering te bepaal); a 47(4) (vul van vakatures in die nasionale vergadering – opgeskort tot na die tweede verkiesing ingevolge die nuwe Grondwet: Bylae 6 item 6(4)); a 61(2) (vaste en spesiale afgevaardigdes in die nasionale raad van provinsies: vgl die Wet op die Nasionale Raad op Provinsies (Vaste Afgevaardigdes Vakatures) 117 van 1997); a 65(2) (eenvormige prosedure waarvolgens provinsiale wetgewers afgevaardigdes na die NROP magtig om namens hulle te stem); a 96(1) (etiese kode vir lede van die kabinet; hierdie wetgewing sal ook die vereiste van a 136(1) tov lede van provinsiale uitvoerende rade bevredig); a 106(1) (vul van vakatures in provinsiale wetgewers); a 125(3) (hulp om provinsiale administratiewe vermoë te ontwikkel); a 154(1) (versterking van munisipaliteite), a 155(2) en (3) (verskillende aangeleenthede rakende munisipaliteite); a 159 (termyn van munisipale raad); a 163 (georganiseerde munisipale regering); a 165(3) (bystand aan en beskerming van howe); a 168–171 (sake rakende howe – bestaande wetgewing voldoen waarskynlik aan die verpligtinge wat deur hierdie bepaling opgelê word); a 172(1) (verwysing van bevel van grondwetlike ongeldigheid na die konstitusionele hof); a 179 (verskillende aspekte van die nasionale vervolgingsgesag); a 184 (menseregtekommissie – waarvoor daar reeds 'n wet bestaan: Wet op die Menseregtekommissie 54 van 1994); a 185 en 186 (kommissie vir die bevordering en beskerming van die regte van kultuur-, godsdiens- en taalgemeenskappe); a 187 (kommissie vir geslagsgelykheid: vgl die Wet op die Kommissie vir Geslagsgelykheid 39 van 1996); a 188 (ouditeur-generaal: daar is bestaande wetgewing wat die posisie van die ouditeur-generaal beheers); a 190 (die verkiesingskommissie en die verkiesing); a 192 (onafhanklike uitsaai-owerheid: vgl die Wet op die Onafhanklike Uitsaai-owerheid 153 of 1993); a 195(3) (gestaltegewing aan die basiese waardes van openbare administrasie); a 196(9) (prosedure vir die aanstelling van die 14 staatsdienskommissarisse); a 199(4), 205(2), 206(7), 208 en 210 (wetgewing mbt veiligheidsdienste: hier is in die algemeen bestaande wetgewing); a 214(1) (billike verdeling en toekenning van inkomste); a 215(2) (formaat van nasionale, provinsiale en plaaslike begrotings); a 216(1) (nasionale tesourie); a 217(3) (raamwerk vir 'n verkrygingsbeleid); a 218(1) (waarborge vir regeringslenings); a 219 (kommissie vir besoldiging van persone wat openbare ampte beklee); a 220 (finansiële en fiskale kommissie); a 223 (die sentrale bank); a 236 (befondsing van politieke partye). Benewens nasionale wetgewing, is daar ook gevalle waar provinsiale wetgewers aanvullende wetgewing moet aanneem: a 120(2) (wysiging van provinsiale geldwetsontwerpe); a 154(1) (versterking van munisipaliteite; vgl ook a 155(6)); a 155(5)

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tyd vanaf die datum van inwerkingtreding van die nuwe Grondwet gemaak word. In die lig van die konstitusionele hof se uitspraak in *Minister of Justice v Ntuli*[24] is dit 'n opdrag wat ernstig opgeneem sal moet word.

Die hoofpunt wat onder hierdie opskrif gemaak word, is dit: As gevolg van die vereiste dat die nuwe Grondwet binne twee jaar voltooi moet word, en die gepaardgaande haas waarmee dit moet geskied het, is die nuwe Grondwet nie so finaal soos dit behoort te wees nie. Dit het nadele. Een daarvan is dat die versoeking, selfs die behoefte of nodigheid, om aan die dokument te wysig altyd redelik vlak sal lê. 'n Aanduiding daarvan is die wysigingsvoorstelle wat gedurende Mei 1997 gemaak is[25] omdat slegs die president van die konstitusionele hof 'n waarnemende president mag insweer. Toe die president van die hof dit nie fisies kon doen nie, is die seremonie per satelietkanaal oor televisie afgehandel. Miskien het alles by die grondwetskrywende proses te druk gegaan om oor dié soort besonderheid te dink. Die probleem is dat te veel tegniese of "bakatel" aanpassings aan die Grondwet die idee kan laat posvat dat dit eintlik in orde is om die Grondwet om elke hoek en draai te wysig; 'n soort "ons kan mos"-houding.

DIE HANDVES VAN REGTE

Soos in die geval van die tussentydse Grondwet sal die handves van regte – "bill of rights" soos dit nou in die Engelse teks genoem word – by verre die meeste belangstelling en kommentaar uitlok.[26] Om hierdie rede hoef dit nie hier

(bepaling van soorte munisipaliteite). In sommige gevalle word spesifieke tydperke voorgeskryf waarbinne die wetgewing aangeneem moet word – vgl item 21(4) en 23(1) van bylae 6.

24 1997 6 BCLR 677 (CC). Die uitspraak volg op 'n vroeëre uitspraak van die konstitusionele hof (*S v Ntuli* 1996 1 BCLR 141) waarin die parlement tot 1997-04-30 gegun is om a 309(4)(a) van die Strafproseswet in ooreenstemming met die Grondwet te bring. Dit is nie gedoen nie. Die hof roskam die Departement van Justisie vir die gebrek aan erns waarmee dit die bevel van die hof bejeën het.

25 Algemene kennisgewing 797 van 1997 in *Staatskoerant* 19004 van 1997-05-15.

26 Die sprekende bewys in die geval van die tussentydse Grondwet is Chaskalson ea *Constitutional law of South Africa* (1996), die monumentale losbladuitgawe wat volgens die titel oor die Suid-Afrikaanse *staatsreg* gaan, maar in werklikheid oor die handves. Rautenbach en Malherbe *Staatsreg* is in hierdie opsig meer gebalanseerd. Hierdie bronne kan geraadpleeg word vir publikasies wat oor die handves van die tussentydse Grondwet verskyn het. Bydraes oor die nuwe handves reeds voor die inwerkingtreding daarvan sluit die volgende in: Venter "Onderwystaalkeuse en grondslagonderwys grondwetlik beskou" 1996 *SAPR/PL* 383; Kleyn "The constitutional protection of property: A comparison between the German and the South African approach" 1996 *SAPR/PL* 402; Du Plessis en Gouws "The gender implications of the final Constitution (with particular reference to the bill of rights)" 1996 *SAPR/PL* 472; Wolhuter "Horizontality in the interim and final Constitutions" 1996 *SAPR/PL* 512; Asimov "Administrative law under South Africa's final Constitution: The need for an administrative justice act" 1996 *SALJ* 613; Govender "Horizontality revisited in the light of *Du Plessis v De Klerk* and clause 8 of the Republic of South Africa Constitution Bill 1996" 1996 *HRCLJSA* 20; Freedman "Understanding the freedom of religion clause in the South African Constitution Bill, 1996" 1996 *HRCLJSA* 35; Bronstein "Unconstitutionally obtained evidence – a study of entrapment" 1997 *SALJ* 108; Smith "Freedom of religion under the final Constitution" 1997 *SALJ* 217; Olivier "Die aanstelling van polities-agtergesteldes by universiteite: 'n grondwetlike perspektief" 1997 *TSAR* 340; Klug "Water law reform under the new Constitution" 1997 *HRCLJSA* 5; Du Plessis en Olivier "The old and the new property clause" 1997 *HRCLJSA*

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bespreek te word nie. Waarom dit nogtans as een van die vermeldenswaardige onderwerpe gekies is, is te danke aan die noot waarop artikel 8 van die nuwe Grondwet op 8 Mei 1996 afgesit het en waarop die nou oorvloedig besproke *Du Plessis v De Klerk*[27] presies 'n week later afgesluit het.

Op iemand wat gedink het dat die probleme oor die toepassing van die handves, wat so duidelik in *Du Plessis* uiteengesit is, eensklaps deur artikel 8 ondervang is, wag daar 'n verrassing. Elke kommentaar wat sover oor die nuwe Grondwet, en spesifiek artikel 8 verskyn het, bevestig die indruk dat dit ver van duidelik is presies wanneer en hoe fundamentele regte 'n natuurlike persoon bind.[28] Die laaste woord hieroor is nog nie gespreek nie.

Die debat oor die toepassing van die fundamentele regte – gangbaar onder die etikette "horisontale" en "vertikale werking" gevoer – belig 'n inherente spanning wat deur die tussentydse Grondwet en nog meer deur die nuwe een gehuisves moet word. Aan die een kant *is* die Grondwet 'n regsdokument. Dit het onvermydelik bepaalde gevolge sover dit uitleg en toepassing betref. Soos wat die "horisontale/vertikale"-debat helder uitwys, word die gesprek 'n juristediskoers wat hoe langer hoe dieper en wyer en meer ingewikkeld word. Op sigself is daar niks mee verkeerd nie; dit is dikwels die aard van die regsgeleerde gesprek. Dit lei egter tot 'n punt waar leke, gewone mense, nie-regsgeleerdes, begin wonder of die woorde wat hulle in die Grondwet lees, op sigwaarde geneem kan word. Daarmee is ons by die ander kant. Die Grondwet, en veral die nuwe Grondwet, is ook veronderstel om 'n dokument vir "die mense", "the people", te wees. Dit is, formeel ten minste, in voortdurende oorleg met "die mense" geskryf. Die aanhef verklaar luid: "Ons, die mense van Suid-Afrika . . . neem . . . deur ons vryverkose verteenwoordigers, hierdie Grondwet aan as die hoogste reg van die Republiek . . ."[29]

Of 'n wet vir "die mense" verstaanbaar is, was nog nooit een van die primêre beginsels van wetsuitleg nie; ook nie van grondwetuitleg nie. Die vraag is of dit

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11; Steyn en Tucker "Environmental rights in the bill of rights: An opportunity to develop the South African environmental jurisprudence 1997 *HRCLJSA* 23; Carpenter "Possible amendments to the 1996 bill of rights – what, where and why?" 1997 *HRCLJSA* 5; MW van Wyk "The constitutional contours of affirmative action as 'fair discrimination' " 1997 *HRCLJSA* 17. Vgl verder die volgende bydraes in Carpenter (red) *Focus on the bill of rights. A collection of papers delivered at a conference held in Pretoria on 21 August 1996* (1996): Froneman "The constitutional invasion of the common law" (6–37); De Ville "The 1996 Constitution and administrative justice" (66–77); Corder "Piercing the paper curtain: Prospects for an administrative justice act" (78–96); Carpenter "The importance of the limitation clause in the South African Constitution of 1996" (97–116).

27 1996 3 SA 850 (CC).

28 Vgl by Wolhuter (*supra* vn 26); Froneman (*supra* vn 26); en Van der Walt "Perspectives on horizontal application: *Du Plessis v De Klerk* revisited" 1997 *SAPR/PL* 1; Jeffery "The dangers of direct horizontal application: A cautionary comment on the 1996 bill of rights" 1997 *HRCLJSA* 10. Dit lyk of die konstitusionele hof in die eerste sertifiseringsuitspraak (*supra* vn 4) par 53–56 ten minste 'n graad van "horisontale" werking aanvaar. Dit mag goeie nuus wees vir Woolman en Davis "The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions" 1996 *SAJHR* 361 wat hulle insiggewende artikel met die volgende afsluit (404): "Let us hope that with the clear changes in the provisions affecting application of the Bill of Rights in the final Constitution, we get the application doctrine the majority of South Africans deserve: horizontal application. Let us hope we don't get fooled again."

29 Die aanhaling kom uit die sakboekweergawe wat onder die "mense" versprei is.

nie meer in berekening gebring behoort te word nie; ook omdat die teks van die nuwe Grondwet duidelik in die rigting van "gewone taal" ("plain language") beweeg.[30] 'n Klassieke voorbeeld van die probleem wat met die spanning tussen "regsgeleerde" teks en "gewone" teks ontstaan, word in 'n reeks vreemdelinge-uitsprake van 1994/1995 gevind.[31] Ingevolge artikel 24 van die tussentydse Grondwet (wat as item 23(2)(b) van bylae 6 in die nuwe Grondwet oorleef) het elkeen 'n reg op regverdige administratiewe optrede wanneer regte, belange en geregverdigde verwagtings geraak word. Die Transvaalse en Durbanse hof bevind egter dat sekere vreemdelinge nie as "elkeen" vir doeleindes van artikel 24 kwalifiseer nie. Die rede hiervoor spreek nie uit die Grondwet nie. Dit hang saam met die hof se vertolking van "regte", "belange" en "geregverdigde verwagtings" in die konteks van die staat se wye diskresie om te besluit wie in die land toegelaat word en wie nie; en ook die hof se vrees vir die administratiewe las as iedere en elke vreemdeling van skriftelike redes vir die weiering van verblyfvergunnings voorsien moet word. Die feit is: iemand wat aansoek doen om die verlenging van 'n tydelike verblyfpermit sal dit in die reël doen as hy of sy dit in eie belang ag. So 'n belang kan nogal werklik wees. Die persoon het 'n familielid in die land wat bereid is om onderdak en onderhoud te verskaf; die persoon het dalk onwettig maar nogtans 'n goeie werk bekom. Om bloot te argumenteer dat aanwesigheid in Suid-Afrika sonder die nodige vergunning geen belang in verblyf kan laat vestig nie, klink soos die tipiese regsgeleerde argument. Selfs al is dit die regte argument, bly dit waar dat daar redes vir die weiering tot verlengde verblyf *moet* wees, en die redes sal die besluit moet staaf. Waarom kan die redes nie verstrek word nie?

Die punt wat hier gemaak wil word, is die volgende: die manier waarop die nuwe handves geskryf is, laat 'n mens die indruk kry dat die oogmerk was om dit waar moontlik duideliker en verstaanbaarder as hoofstuk 3 van die tussentydse Grondwet te stel. 'n Goeie voorbeeld is die beperkingsbepaling in artikel 36(1). Die voorganger hiervan, artikel 33(1) van die tussentydse Grondwet, het woordeliks een ding bepaal maar is deur die howe op 'n ander manier vertolk. Om meer presies te wees: daar was geen regstreekse aanduiding in artikel 33(1) nie dat daar by die beperking van regte 'n proporsionaliteitstoets aangewend moet word. Die howe het dit eenvoudig daar ingelees. Die sleutelparagraaf is in *S v Makwanayane* te vinde, waar president Chaskalson dit so gestel het:[32]

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). . . . In the balancing process the relevant considerations will include *the nature of the right that is limited; . . . the purpose for which the right is*

30 Die spekendste voorbeeld hiervan in die Engelse teks is die vermyding van die geykte juridiese sleutelwoord "shall"; in alle weergawes is die poging opvallend om lang sinne en bysinne in genommerde subparagrawe te verdeel of selfs in die middel van 'n artikel 'n punt te plaas en 'n nuwe sin te begin. Oor die "plain language"-beweging vgl Botha (*supra* vn 22) 118 ev en die gesag daar aangehaal.

31 *Xu v Minister of Binnelandse Sake* 1995 1 SA 185 (T); 1995 1 BCLR 62 (T); *Naidenov v Minister of Home Affairs* 1995 7 BCLR 891 (T); *Parekh v Minister of Home Affairs* 1996 2 SA 710 (D). Vgl die indringende bespreking deur Klaaren "So far not so good: An analysis of immigration decisions under the interim Constitution" 1996 *SAJHR* 605; sien ook Pretorius "Discrimination against aliens – international law, the courts and the Constitution" 1996 *SAPR/PL* 261.

32 1995 3 SA 391 (CC) par 104. Eie kursivering.

limited and the importance of that purpose; . . . the extent of the limitation, . . . its efficacy . . . and whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

Die gekursiveerde woorde is met min wysigings in die tweede deel van artikel 36(1) van die nuwe Grondwet opgeneem. "Proporsionaliteit" word steeds nie genoem nie, maar dit is darem duideliker dat daar by die beperking van regte 'n op- en afweging van die een of ander aard plaasvind.

As die handves ook 'n "mensedokument" moet wees, sal die regsgeleerdes wat daarmee omgaan dit op so 'n manier moet doen dat selfs die meer tegniese uitleg daarvan nie so ver van die woorde van die handves wegdryf dat dit nie meer met min moeite tot maklik verstaanbare begrippe gereduseer kan word nie.

BEGINSELS VAN SAMEWERKENDE REGERING

In die Afrikaanse weergawe van die nuwe Grondwet wat in Maart 1997 algemeen versprei is, staan hoofstuk 3 onder die opskrif "Regering van samewerking". Dit is tegelyk 'n sleutelhoofstuk en 'n risiko-hoofstuk van die nuwe Grondwet. Dit is die ghriespomp van die nuwe bestel.

Die risiko-element kan kortliks afgehandel word. Omdat die bepalings van hoofstuk 3 in wese teen die gebruiklike aard van magsuitoefening ingaan, loop hulle die risiko om nie ernstig opgeneem te word nie. Die gevaar word vergroot deur die feit dat hoofstuk 3 heeltemal nuut en ongewoon is. Verder is dit in 'n idioom geskryf wat indruis teen tradisioneel-gangbare opvattings oor staatsgesag en -vorm in Suid-Afrika. Dit sal 'n baie bewuste opvoedingsprogram van politici en beamptes verg om hoofstuk 3 meer werd te maak as die papier waarop dit geskryf is.[33]

Hoofstuk 3 bepaal dat regering in die Republiek uit drie "sfere" bestaan, naamlik 'n nasionale, provinsiale en plaaslike sfeer. Aan "nasionaal", "provinsiaal" en "plaaslik" het ons al gewoond geraak onder die tussentydse Grondwet, ofskoon "nasionaal" nog maklik in die omgang deur "sentraal" vervang word. Die begrip "sfeer" is egter nuut. Die meer bekende vorm is "vlak", wat selfs nog in konstitusionele beginsel XVI van die tussentydse Grondwet voorgekom het. Omdat die gebruik van "sfeer" 'n doelbewuste afwyking van die gewone is, kan daar 'n spesifieke betekenis aan geheg word. Die gees en strekking van hoofstuk 3 gee 'n goeie aanduiding van so 'n spesifieke betekenis. Die aanduiding word versterk deur ander bepalings van die Grondwet waardeur die verhouding tussen die verskillende sfere gereël word. Dit lyk of die indruk berekend vermy wou word dat daar 'n hiërargiese regeringstruktuur in Suid-Afrika bestaan, met die nasionale regering "bo", provinsiale regering "in die middel" en plaaslike bestuur "onder". Die regeringsfere is volgens artikel 40(1) "onderskeidend, onderling afhanklik en onderling verbonde". Dit lyk inderdaad of die regeringsfere almal ewe belangrik is. Geen verdere argument is daarvoor nodig nie dat die woord "sentraal" in die sin van "hoogste" en "belangrikste" in die Suid-Afrikaanse staatsregwoordeskat met die banvloek getref is.

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33 As die beginsels van samewerkende regering reeds ingevolge die tussentydse Grondwet gekonstitusionaliseer was, sou die dispute wat op *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 10 BCLR 1289; 1995 4 SA 877 (CC) en *Premier of KwaZulu-Natal v President of the Republic of South Africa* 1995 12 BCLR 1561 (CC) uitgeloop het, na alle waarskynlikheid nie in die hof beland het nie.

Artikel 40(2) lê 'n verpligting op alle regeringsfere om die voorskrifte van hoofstuk 3 na te kom. Hierdie verpligting moet in die lig van artikel 2 gelees word. In dieselfde asem waarmee die Grondwet tot die hoogste reg van die land verklaar word, word daar ook verorden dat alle verpligtinge wat deur die Grondwet opgelê word, nagekom moet word.

Artikel 41 is die enigste ander bepaling – en die hart – van die hoofstuk. Eintlik moet elke woord in die artikel hier in vetgedrukte hoofletters uitgespel word. Artikel 41(1) het agt paragrawe waarin die verskillende regeringsfere en alle staatsorgane (soos omskryf in artikel 239) verplig word om die vrede, nasionale eenheid en onverdeelbaarheid van die Republiek te bewaar, om doeltreffende regering te bewerkstellig, om mekaar se grondwetlike status en bevoegdhede te respekteer en nie te probeer oorneem nie en om in goeie trou met mekaar saam te werk en mekaar te help. Koördinering, oorlegpleging en vriendskaplike betrekkinge word ook genoem. In die res van die artikel word staatsorgane aangesê om regsgeskille teen mekaar te vermy; en indien 'n hof nie tevrede is dat alle redelike pogings aangewend is om geskille te besleg nie, kan 'n saak na die betrokke staatsorgane terugverwys word.

Hoofstuk 3 is nie maar net 'n idealistiese stel waardes wat in 'n hoekie van die Grondwet ingedruk is nie. Wanneer die Grondwet aandagtig bestudeer word, is die ankerpunte wat die hoofstuk in ander bepalings van die Grondwet het, 'n openbaring. Die nasionale raad van provinsies is na die ontwerp daarvan bedoel om 'n orgaan van samewerkende regering te wees. Die nasionale uitvoerende gesag het kragtens artikel 100 'n toesighoudende funksie oor provinsiale regering; ofskoon dit nie in soveel woorde in die artikel self staan nie, sal hierdie toesig aan die hand en in die gees van hoofstuk 3 moet geskied; 'n provinsiale uitvoerende gesag het dieselfde bevoegdheid ingevolge artikel 139 ten aansien van plaaslike regering; die nasionale en provinsiale regerings moet luidens artikel 154(1) munisipaliteite se vermoë om hulleself te bestuur steun en versterk; die bepalings oor finansies in hoofstuk 13 moet by uitstek in die gees van hoofstuk 3 nagekom word. Die voorbeelde kan vermenigvuldig word.

Die punt is: die president, elke minister en adjunk-minister, elke ander politikus, iedere beampte in elke regeringsfeer, en elke werknemer van elke staatsorgaan sal voortdurend, tydig en ontydig, aan hoofstuk 3 van die Grondwet herinner moet word. Dit gaan hier by uitnemendheid oor die waardes wat oop, deursigtige en verantwoordbare regering ten grondslag lê. Die Grondwet het deur die hoofstuk 3-beginsels en die manier waarop hulle in die res van die Grondwet weerklank vind, dié sleutel tot 'n 21ste eeuse konstitusie geskep. Die tragiek sover is dat met die uitsondering van die meer as moedige pogings van Bertus de Villiers,[34] die swye oor die beginsels van samewerkende regering in die openbare debat spreekwoordelik oorverdowend is.

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34 Vgl bv sy "Intergovernmental relations: Bundestreue and the duty to cooperate from a German perspective" 1994 *SAPR/PL* 430–437; *Foreign relations and the provinces – comparative international experiences* (1995); *Bundestreue – the soul of an intergovernmental partnership* (1995); "Federalism in South Africa: The debate unfolds" in Fleiner en Schmitt (reds) *Towards a European constitution* (1996) 185–222; "Foreign relations and provinces – international experiences" 1996 *SAPR/PL* 204; "The federal-unitary debate – is there light at the end of the tunnel?" 1996 *SAJHR* 6–15; *The role and powers of provinces and local governments in the new Constitution* (1996); "The role and powers of provincial and local governments in the new Constitution – intergovernmental relations" in

vervolg op volgende bladsy

DIE NASIONALE RAAD VAN PROVINSIES

Die senaat van die tussentydse Grondwet was nie 'n groot sukses nie. Iets beters moes deur die nuwe Grondwet geskep word, of die gedagte van 'n tweede kamer van die parlement moes laat vaar word. Daar was wel onder die politieke partye geringe steun vir die moontlikheid van net een kamer van die parlement; die PAC was 'n voorstander daarvan. Die oorwig was egter aan die kant van 'n tweekamerstelsel. Redelik vroeg in die onderhandelinge oor die nuwe teks het die ANC dit duidelik gemaak dat 'n tweede kamer net bestaansreg sou hê as dit êrens 'n nuttige rol ten behoewe van die provinsies kon speel. Die ANC wou die liggaam ook liefs nie as deel van die parlement sien nie. Die Nasionale Party wou meer tipiese tweedekamerfunksies – vernaamlik kontrole en medeseggenskap – aan die tweede kamer gee. Die Vryheidsfront wou daarby die samestelling van die tweede kamer verbreed om meerdere belangegroepe te akkommodeer.

Die gedagte van 'n raad van provinsies is reeds vroeg in die grondwetskrywende proses deur Fink Haysom tydens 'n werkswinkel oor tweede kamers geopper. Dit was duidelik dat die idee deur die Duitse *Bundesrat* geïnspireer is. Daar moes egter heelwat water in die see loop voordat die beginsel aanvaar is. Die uitkoms van die uitgerekte debat was 'n liggaam wat ten spyte van ontkennings[35] in vele opsigte op die *Bundesrat* trek, maar met duidelik trekke uit die Suid-Afrikaanse konstitusionele verlede. 'n Sprekende voorbeeld is die stemprosedure in die raad. Artikel 65(1) van die Grondwet stel die gangbare stemprosedure daar. Soos in die *Bundesrat* het provinsiale afvaardigings een stem. Vyf uit nege provinsies moet ten gunste van 'n vraag stem om 'n besluit te hê. Wanneer die raad egter wetgewing behandel wat nie met die provinsies te doen het nie, verander die prosedure volgens artikel 75(2) na die tradisionele beginsel van een-lid-een-stem, een-derde-vir-'n-kworum en 'n gewone meerderheid van stemme vir 'n besluit.

So 'n enkele voorbeeld moet egter nie toegelaat word nie om die feit te verdoesel dat die eindproduk van die nasionale raad van provinsies, soos vele aspekte van die Grondwet, 'n kompromis was. Die partye wat sterk oor 'n tweede kamer gevoel het, het elk deels hulle sin gekry. Die voorbeelde hiervan is die tipiese tweede kamer-deelname aan die wetgewende proses as deel van die parlement, wat die Nasionale Party voorgestaan het, en die moontlikheid dat verteenwoordigers van plaaslike regering sonder stemreg aan die verrigtinge van die nasionale raad van provinsies deelneem[36] – 'n variasie op die voorstel van die Vryheidsfront.

Die nasionale raad van provinsies verdien afsonderlike navorsing en ontleding. Dit is duidelik 'n fyn instelling met 'n enorme potensiaal om tussenregeringsverhoudings te vergemaklik en effektiewe regering in alle sfere te bevorder.[37] Daar is egter 'n groot "mits" betrokke. Die bedoeling met die raad moet

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Konrad Adenauer Stigting *Aspects of the debate on the draft South African Constitution* (1996) 45; *Local-provincial intergovernmental relations: A comparative analysis* (1997); "Intergovernmental relations: problems and options" 1997 *SAPR/PL* (gepubliseer te word).

35 Vgl die toespraak van ondervoorsitter BT Ngcuka in die raad: 1997 *Debates of the National Council of Provinces* kol 9.

36 A 67 van die Grondwet.

37 Dat die voorsitter van die raad dit ook so insien, is duidelik uit opmerkings wat hy in die raad gemaak het: 1997 *Debates of the National Council of Provinces* kol 54–55. Vgl ook die toespraak van adj-pres Mbeki op 1997-03-13 in die raad: kol 83.

deeglik begryp word. Vier faktore werk teen 'n goeie begrip van die raad in. Die eerste is 'n historiese lam-eend-beeld van die tweede kamer, 'n ideale aflaaiplek vir politici wat met tweede pryse beloon of gebêre moet word. Die tweede faktor hou hiermee verband. 'n Beduidende getal vorige senatore het gewoon as gevolg van item 7(2) van bylae 6 van die Grondwet vaste afgevaardigdes na die raad geword. Die derde faktor is die ingewikkelde bepalings van die Grondwet oor die nasionale raad van provinsies en veral die wetgewende proses in die nasionale sfeer.[38] Laastens speel die betreklik onontwikkelde staat van die nuwe provinsiale bedeling ook 'n rol. Dit, op sy beurt, is deels die gevolg van die byna onvermydelike gravitasie van politieke talent na die nasionale sfeer.

Die groot klagte oor die senaat was dat dit maar net 'n swakkerige replika van die nasionale vergadering – en vroeër jare die volksraad – was. Dit is nog te vroeg om die nasionale raad van provinsies te beoordeel. Daar is egter wel strukturele aspekte van die raad wat dit 'n ander aanslag moet gee as die vorige senaat. Die vernaamste hiervan is die feit dat die provinsiale afvaardigings na die raad deur die premiers van die provinsies gelei word.[39] Verder lyk dit of die gebruik gaan ontwikkel dat een van die adjunkvoorsitters van die raad 'n provinsiale premier sal wees.[40] Die eerste debatte van die raad het ook 'n duidelike provinsiale inslag getoon.

Soos met die res van die Grondwet lê die uiteindelike sukses van hierdie interessante en nuwe instelling grootliks opgesluit in 'n voortdurende bestudering en bewusmaking van die eintlike oogmerke daarvan.

DIE VERDELING VAN BEVOEGDHEDE TUSSEN DIE VERSKILLENDE REGERINGSFERE, EN DIE SUID-AFRIKAANSE KONSTITUSIONELE "F"-WOORD

Die Suid-Afrikaanse konstitusionele "f"-woord is "federasie". Die wyse waarop dit van meet af aan in die konstitusionele debat hanteer is, bevestig ten minste twee verskynsels: aan die een kant die bereidwilligheid van die oorgrote getal deelnemers aan die proses tot kompromis;[41] aan die ander kant hoe 'n resultaat bereik kan word sonder om gangbare idiome te gebruik.

Wat word hiermee gesê? Eerstens, Suid-Afrika is ingevolge die Grondwet van 1996 struktureel baie nader aan 'n tipiese moderne federasie as aan die klassieke eenheidstaat. "Struktureel" word doelbewus gebruik, want uit die feit dat die staatsordening grondwetlik op 'n bepaalde manier geskied, volg dit nie noodwendig dat die ampsbekleërs dit so implementeer nie. Tweedens, solank substansie belangriker is as vorm is dit nie nodig om 'n verskynsel altyd kaalkop by die naam te noem nie. Suid-Afrika hoef nie 'n federasie genoem te word om effektief deur federalisme gedryf te word nie.

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38 Vgl veral a 44 gelees met a 73–78. Die samestelling en prosedures van die raad word deur a 60–72 van die Grondwet gereël.

39 A 60(3) van die Grondwet.

40 Ingevolge a 64(3) van die Grondwet word die "tweede" adjunkvoorsitter vir 'n jaar gekies (die "eerste" vir 'n termyn van 5 jaar: a 64(2)); die opvolger moet telkens uit 'n ander provinsie kom. Dr Frank Mdlalose, wat toe nog premier van KwaZulu-Natal was, is as eerste "tweede" adjunkvoorsitter gekies; by sy uittrede is sy opvolger, dr Ben Ngubane, onmiddellik eenparig deur die raad as adjunkvoorsitter aangewys.

41 Die IVP het telkens uit protes teen wat hulle as die afwesigheid van federasie gesien het, die proses verlaat.

Daarmee is ons by die verdeling van bevoegdhede tussen die verskillende regeringsfere. Die konstitusionele beginsels in bylae 4 van die tussentydse Grondwet het duidelike aanwysers hieroor bevat. Dit was uiteindelik een van die punte waarop die konstitusionele hof geweier het om die nuwe teks die eerste maal te sertifiseer. Provinsies moes konkurrente bevoegdhede met die nasionale regering hê, maar ook eksklusiewe bevoegdhede. 'n Raamwerk vir die bevoegdhede en strukture van plaaslike regering moes ook deur die Grondwet voorsien word.[42] Die hof het die tweede poging van die grondwetlike vergadering wel aanvaar. Die presiese besonderhede is nie hier ter sake nie. Waaroor dit wel gaan is hoe, bedoeld of onbedoeld, 'n aantal eienskappe van die Grondwet met die verdeling van bevoegdhede as sluitstuk, Suid-Afrika uiteindelik op die drempel van federalisme gebring het. Die draad loop deur van die vroeë stadiums van die politieke onderhandelingsproses, via die konstitusionele beginsels tot by die eindproduk. Die klassieke elemente van federalisme is duidelik: 'n grondwet waarin die bevoegdheidsverdeling tussen die verskillende sfere van regering rigied beskerm word; 'n hof met die bevoegdheid om onenighede tussen die sfere oor hulle afgebakende en samelopende bevoegdhede op te los; 'n tweekamerparlement waarin die tweede kamer 'n besonder sterk band met die provinsies het; beskerming van die geografiese, funksionele en institusionele integriteit van die verskillende regeringsfere; en selfs die bevoegdheid om eie grondwette aan te neem.

Die belang van die gevolgtrekking lê in die benaderingsverskuiwing tot regering wat deur die nuwe Grondwet teweeggebring moet word. Dit is al meermale hierbo gesê: die Grondwet moet die blik wegwring van waar dit histories in Suid-Afrika op die sentrale en die streng hiërargiese vasgenael is. Benewens die Grondwet as hoogste reg is daar nie meer 'n institusionele en funksionele fokuspunt nie. "Die regering" is nie meer eintlik die nasionale parlement en die nasionale uitvoerende gesag nie. "Die regering" is die samewerkende regering in al drie sfere. Om dit by selfs die huidige geslag studente tuis te bring, is 'n moeilike taak. Dit lyk byna of ons ingeskape denkpatrone hiëragies is.

OPENBARE ADMINISTRASIE

Artikel 195 van die Grondwet verklaar waarom openbare administrasie deel van hierdie bespreking uitmaak. Om mee te begin, die artikel is nuut. In die tussentydse Grondwet was daar wel 'n bepaling oor die staatsdiens (a 212), wat plekplek in artikel 195 weerklank vind. Die aanslag van artikel 212 van die tussentydse Grondwet was egter heeltemal anders. Dit was spesifiek gerig op die staatsdiens en allermins op 'n visie afgestem. Artikel 195 verskil in hierdie opsig hemelsbreed.

Eerstens bevat die opskrif van die artikels reeds 'n aanduiding van die gees daarvan: "basiese waardes en beginsels wat openbare administrasie beheers". Die eerste subartikel open met woorde wat verwys na die demokratiese waardes en beginsels van die Grondwet voordat spesifiek na nege daarvan verwys word. Soos in die geval van die beginsels van samewerkende regering, druis die meeste van hierdie waardes lynreg in teen die tradisionele bedryf van openbare administrasie in Suid-Afrika. Oor twee van die waardes sou die oordeel dalk gevel kan word dat hulle deel van die tradisionele kultuur was. Die waarde in paragraaf (a) gaan oor 'n hoë standaard van professionele etiek; die "ou" Suid-Afrikaanse

42 Konstitusionele beginsel XXIV.

staatsdiens het homself dikwels in die verlede hierop beroem (hier word geen oordeel uitgespreek oor die grondigheid van hierdie aanname nie). Die waarde in paragraaf (b) verwys na die voordelige, ekonomiese en doeltreffende gebruik van hulpbronne. Hieroor sou rekenpligtige beamptes van die ou bedeling waarskynlik voel dat hulle dit ten minste probeer het. Die waarde in (h) verwys na goeie bestuur van menslike hulpbronne en die ontwikkeling van loopbaanontwikkelingspraktyke; weer sal die ouer garde die bloei van die O en M-era en die opvolgers daarvan sedert die 1970's in die staatsdiens onthou.

Die kommentaar wat hierop uitgespreek moet word, is dat al was die waardes aanwesig, is hulle nooit geraak deur die etos van die nuwe demokratiese bestel nie. Hulle was in wese apartheidgedrewe. Met ander woorde, professionele etiek, die gebruik van hulpbronne en die ontwikkeling van menslike hulpbronne sal ook nou in die helder lig van die Grondwet ondersoek moet word om vas te stel of gangbare opvattings en praktyke steekhou.

Kom ons by die ander ses waardes – in paragrawe (c) tot (g) en (i) – is dit duidelik dat 'n nuwe hart van die openbare sektor vereis word. Dit gaan hier oor ontwikkelingsgeoriënteerde administrasie, diens wat onpartydig, billik, regverdig en onbevooroordeeld gelewer moet word; behoeftes van mense wat in ag geneem moet word en hulle deelname aan beleidsformulering wat bevorder moet word; openbare administrasie wat verantwoordbaar moet wees; deursigtige administrasie deur tydige, toeganklike en akkurate inligting; en 'n breë verteenwoordigende administrasie gegrond op bepaalde indiensnemings- en personeelbestuurspraktyke. Hierdie waardes knoop aan by die beginsels van samewerkende regering in hoofstuk 3; hulle sluit ook aan by twee spesifieke fundamentele regte. Die een oor deursigtigheid en inligting[43] hou onmiskenbaar verband met die reg op inligting[44] terwyl almal regstreeks of onregstreeks gekoppel is aan die reg op regverdige administratiewe optrede.[45]

Vanuit 'n fundamentele regte-oogpunt is die aantreklikheid hiervan dat artikel 195(1) gebruik kan word om inhoud te gee aan uitdrukkings wat byvoorbeeld in artikels 32 en 33 aangetref word (soos "redelik", "prosedureel billik", "enige inligting" en "redes").

Dat die bepalings van artikel 195 ernstig opgeneem word, word bevestig deur die konsep gedragskode vir die staatsdiens wat op 10 Junie 1997 in die Staatskoerant gepubliseer is.[46] Dit bevat 'n aantal verwysings na die Grondwet – dit sou wel gekritiseer kon word op grond van die feit dat die waardes van artikel 195 nie uitdruklik genoeg beklemtoon word nie. Indien die Grondwet in die bewussyn van mense, veral beamptes, moet leef, sal die woorde en waardes daarvan herhaaldelik en regstreeks onder hulle aandag gebring moet word. Die tipiese regsgeleerde manier om te aanvaar dat wanneer die Grondwet (bv) genoem word, iemand óf vermoed kan word om te weet wat daarin staan óf dit onmiddellik sal opsoek, werk nie.

SLOT

Wat die afgelope jare op staatsregtelike gebied in Suid-Afrika gebeur het, is verdiend in gloeiende terme opgehemel. Die hoogtepunt is veronderstel om die

43 A 195(1)(g).
44 A 32, gelees in die lig van item 23(2)(a) van aanhangsel B van bylae 6.
45 A 33, gelees in die lig van item 23(2)(b) van aanhangsel B van blyae 6.
46 Gepubliseer in *Staatskoerant* 18065 van 1997-06-10.

nuwe Grondwet te wees. Daar is goeie redes om te hoop dat dit inderdaad so sal wees. Daar is egter ook 'n paar gronde waarop 'n mens voorbehoude sou kon hê. Die realistiese siening lê êrens tussenin. Die "finale" Grondwet is nie onder ideale omstandighede aangeneem nie. Daarvoor was die druk van die oorgang van apartheid na demokrasie te groot en die omringende klimaat te onstabiel. Op sigself is dit nie rampspoedig nie. Al wat dit beteken, is dat die druk op politici, amptenare en die gemeenskap oor die algemeen baie hoog gaan bly om die demokratiese orde werklik in die gees van die Grondwet te vestig.

Stigting van die Interuniversitêre Sentrum vir Onderwysreg en Onderwysbeleid (SORB)

Behoefte Weens die bewese behoefte aan 'n sentrum van kundigheid op die terreine van onderwysreg en onderwysbeleid in Suid-Afrika, het die Universiteit van Pretoria en die Universiteit van Suid-Afrika in Februarie 1997 die Interuniversitêre Sentrum vir Onderwysreg en Onderwysbeleid (SORB) gestig. Die Fakulteite van Opvoedkunde en Regsgeleerdheid aan beide universiteite is by SORB betrokke. Sedert die stigting het die Universiteit van Oklahoma (VSA) en die Randse Afrikaanse Universiteit ook as lede toegetree. Onderhandelinge is tans met talle ander universiteite en instellings aan die gang oor lidmaatskap van SORB.

Missie Deel van SORB se missie is om te ontwikkel tot 'n nasionale wetenskaplike bate wat 'n betekenisvolle bydrae tot die kennis en vaardighede kan lewer van diegene wat met onderwysvoorsiening, onderwysbestuur en onderwysbenutting te make het.

Doel Die vernaamste doel van SORB is om onderrig en opleiding in onderwysreg en onderwysbeleid te verskaf en te bevorder en om wetenskaplike navorsing oor hierdie vakgebiede te onderneem.

Werksaamhede SORB se werksaamhede betrek onder meer aktiwiteite soos die aanbieding van kursusse en seminare, die bevordering van onderwysreg as akademiese vakgebied, die onderneem van kontraknavorsing, skakeling en samewerking met onderwysowerhede op alle regeringsvlakke, internasionale skakeling met soortgelyke instellings, die versameling van inligting, en die onderneem en bevordering van publikasies. Een van die vernaamste projekte van SORB in 1997 was die skryf van 'n gids getiteld *Understanding the SA Schools Act: What public school governors need to know* in opdrag van die nasionale Departement van Onderwys. Hierdie gids sal aan alle lede van beheerliggame van openbare skole beskikbaar gestel word.

Beheer en bestuur Die voorsitter van SORB se Raad (die hoogste gesagsliggaam) is professor Johann Neethling, dekaan van Unisa se Regsfakulteit. Die ondervoorsitter is professor Mike Bondesio, dekaan van UP se Fakulteit Opvoedkunde. Die Direkteur van die sentrum is professor Johan Beekmann van die Departement Onderwysbestuur aan UP. SORB het twee adjunk-direkteure (beide van Unisa), naamlik professore Elemene Bray en Johan Potgieter.

Verdere inligting Instellings wat wil deel word van SORB, of diegene wat verdere inligting wil bekom of moontlik van SORB se dienste gebruik wil maak, kan die volgende kontakbesonderhede benut:

Kantoortelefoon: (012) 420-3484 Faks (012) 420-3723
E-pos:eelp@eeon.up.ae.za
Posadres: Die Direkteur: SORB
p/a Departement Onderwysbestuur,
Universiteit van Pretoria, Pretoria 0002
Fisiese adres: Opvoedkunde-Regte-gebou, Kamer 4/34,
Universiteit van Pretoria

Professional liability to clients: The implications of concurrence*

Annél van Aswegen
BA LLD
Professor of Private Law, University of South Africa

OPSOMMING

Indien die optrede van 'n professionele persoon skade aan 'n kliënt veroorsaak, sal eersgenoemde op grond van kontrakbreuk teenoor laasgenoemde aanspreeklik wees vir skadevergoeding indien die optrede neerkom op 'n verbreking van die kontrak tussen die twee. Die gewraakte optrede kan egter ook tot 'n deliktuele eis vir skadevergoeding aanleiding gee indien daar onafhanklik van die kontrak ook aan die normale vereistes vir deliktuele aanspreeklikheid voldoen word. In so 'n geval doen 'n sameloop van eise om skadevergoeding hom voor, en het die eiseres volgens die positiewe reg normaalweg 'n keuse of eleksie ten aansien van die eisgrond waarop sy wil steun. Wanneer so 'n keuse hom voordoen, is die verskille wat daar tussen kontraktuele en deliktuele skadevergoedingseise bestaan van kardinale belang. In die eerste plek kan die omvang van die bedrag skadevergoeding wat verhaal kan word, verskil weens die feit dat verskillende aanspreeklikheidsbegrensingsmaatstawwe in die kontrakte- en deliktereg gebruik word en omdat hierdie maatstawwe ook ten aansien van verskillende tydstippe toegepas word: kontraksluiting by 'n eis gegrond op kontrakbreuk en delikspleging by 'n delikseis. Tweedens is dit moontlik dat 'n persoon wat nie toerekeningsvatbaar is tydens die gewraakte optrede nie wel vir kontrakbreuk aanspreeklik kan wees maar nie deliktueel nie. Derdens is deliktuele mededaders gesamentlik en afsonderlik aanspreeklik vir alle veroorsaakte skade, terwyl medekontrakspartye normaalweg elkeen slegs afsonderlik vir haar *pro rata*-aandeel aangespreek kan word. In die vierde plek kan 'n professionele persoon deliktueel middellik aanspreeklik wees vir alle delikte wat binne die bestek van die betrokke verhouding deur haar werknemers of verteenwoordigers gepleeg word, terwyl sy slegs aanspreeklik sal wees vir kontrakbreuk deur 'n ander gepleeg waar laasgenoemde uitdruklik ter voldoening van die professionele persoon se kontraktuele verpligtinge opgetree het. Vyfdens geld eensydige optrede wat neerkom op toestemming tot benadeling of die risiko van benadeling as volkome verweer teen 'n delikseis, terwyl 'n kontraksparty nie eensydig afstand kan doen van sy regte ingevolge die kontrak nie, en toestemming dus geen verweer teen 'n kontrakseis is nie. Sesdens kan kontraktuele aanspreeklikheidsuitsluitings- of beperkingsbedinge, afhangende van die formulering daarvan, so geïnterpreteer word dat hulle slegs op 'n kontraktuele en nie op 'n deliktuele eis nie, betrekking het. In die sewende plek is ooreengekome strafbedinge slegs ten aansien van kontraktuele eise afdwingbaar. Agstens kan die bydraende skuld van die eiser slegs teen 'n delikseis as verweer geopper word en nie teen 'n kontrakseis nie. In die negende plek berus die bewyslas ten aansien van skuld aan die kant van die verweerderes op die eiseres in 'n delikseis, terwyl die verweerderes die afwesigheid van skuld by kontrakbreuk moet bewys – natuurlik net in die gevalle waar skuld hoegenaamd vereis word vir kontrakbreuk. Tiendens kan verskillende howe jurisdiksie hê in eise gegrond op kontrakbreuk en delik onderskeidelik, en laastens sal die inhoud van die pleitstukke

* Paper delivered at a seminar on *Professional liability*, organised by the Department of Private Law, Unisa, on 1996-03-15.

verskil na gelang die eisgrond kontrakbreuk of delik is. Al hierdie moontlike verskille tussen eise vir skadevergoeding gegrond op kontrakbreuk of delik moet sorgvuldig oorweeg word wanneer die keuse ten aansien van die aangewese eisgrond in gevalle van professionele aanspreeklikheid gemaak word.

1 INTRODUCTION

The concept "professional liability" in its broadest sense can denote any form of liability incurred by a person or institution acting in a professional capacity. For the purposes of this article, I limit the meaning of the term "professional liability" to instances where a professional incurs liability for damages for loss caused to others by conduct relating to the exercise of the profession in which she is engaged. I will confine my remarks to an exposition of certain generally applicable legal principles concerning one particular aspect of professional liability in that sense, namely the liability of the professional to a client.

2 PROFESSIONAL LIABILITY TO CLIENTS

Instances of professional liability frequently involve liability to a client with whom the professional is in a contractual relationship. Where the conduct of the professional which causes loss to the client constitutes a breach of the terms of the contract between the professional and the client, it is obvious that the professional will be liable to the client for breach of contract. The client will then be entitled to all the contractual remedies appropriate to the particular type of breach, *inter alia* damages for patrimonial loss. However, conduct causing loss to another in general also gives rise to a claim for damages in delict, provided the requirements for delictual liability are met. The question whether breach of contract can also give rise to delictual liability between the parties to the contract, has often arisen in South African law.[1]

On two occasions, both concerning the liability of professionals to clients, the Appellate Division has expressly held this to be possible in principle. In *Van Wyk v Lewis*[2] negligent conduct by a medical practitioner contrary to his contractual duties to a patient was held to be "actionable under the Aquilian procedure". In *Lillicrap, Wassenaar and Partners v Pilkington Brothers*,[3] which also concerned the question whether the breach of contractual duties to perform professional work, this time that of structural engineers, was actionable in delict, the majority of the court confirmed that "our law . . . acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*". It is thus settled law that in principle, the liability of a professional to a client for loss caused by conduct in breach of the former's contractual duties can be based on either breach of contract or delict.[4] The possibility of a concurrence

1 Cf eg *Wellworths Bazaar Ltd v Chandlers Ltd* 1948 3 SA 248 (W); *Bruce v Berman* 1963 3 SA 21 (T); *Pockets Holdings (Pvt) Ltd v Lobel's Holdings (Pvt) Ltd* 1966 4 SA 238 (R); *Prima Toy Holdings (Pty) Ltd v Rosenberg* 1974 2 SA 477 (C); *Mazibuko v Singer* 1979 3 SA 258 (W); *Rampal (Pty) Ltd v Brett, Wills and Partners* 1981 4 SA 360 (D); *Otto v Santam Versekeringsmaatskappy Bpk* 1992 3 SA 615 (O).

2 1924 AD 438 443.

3 1985 1 SA 475 (A) 496.

4 For further confirmation of this proposition, see eg *Correira v Berwind* 1986 4 SA 60 (ZH) 65–66; *Tsimatakopolous v Hemingway, Isaacs & Coetzee CC* 1993 4 SA 428 (C) 432–433; *Cathkin Park Hotel v JD Makesh Architects* 1993 2 SA 98 (W) 102–103.

of claims for damages arising from breach of contract and delict is therefore recognised in South African law, also specifically in regard to professional liability.

3 CONCURRENCE OF CLAIMS FOR DAMAGES

3 1 Requirements for the recognition of concurrence

The recognition in principle of the possibility of a concurrence of claims for damages arising from breach of contract and delict is, however, qualified in a very important respect: delictual liability for breach of contract will be entertained only where the conduct constituting breach of contract simultaneously fulfils all the requirements for delictual liability.[5]

In general, the delictual requirements of a voluntary human act, factual causation and loss will always be met where a claim for damages for breach of contract arises. The requirement of legal causation or remoteness of damage differs as regards breach of contract and delict, but it concerns the extent of liability rather than its existence, and therefore does not influence the preliminary enquiry into the requirements for concurrent liability. I will return to this issue later. Since we are dealing only with liability for damages, it goes without saying that patrimonial loss, which is a prerequisite for an action for damages based on breach of contract,[6] will always be present. The fact that patrimonial loss is concerned, restricts the present enquiry to the possible applicability of the *actio legis Aquiliae*, which is the appropriate delictual remedy for the recovery of damages for patrimonial loss.[7]

A further requirement for delictual liability is that of fault, and for liability under the Aquilian action, negligence will suffice. The question whether fault is in principle a requirement for breach of contract is not uncontroversial, but it is in any case settled law that fault is not required for all forms of breach. The most obvious illustration in this regard is that of breach of warranty.[8] This means that all breaches of contract will not necessarily meet the delictual requirement of fault. However, in the cases of professional liability currently being considered, the breach of the contract with the client often consists in non-compliance with an implicit contractual undertaking to act with due skill and care, in other words

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5 Or, in the words used in *Lillicrap supra* where "the facts pleaded disclose a cause of action in delict" (496H).

6 Voet *Commentarius ad pandectas* 45 1 9; *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 596; *Swart v Van der Vyver* 1970 1 SA 633 (A); *Scott v Poupard* 1971 2 SA 373 (A); *ISEP Structural Engineering & Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A); Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Kontraktereg. Algemene beginsels* (1996 reprint) 302; Lubbe and Murray *Farlam and Hathaway: Contract – Cases, materials and commentary* (1988) 602–604.

7 Voet 9 2 10 and 12; *Union Government v Warneke* 1911 AD 657 665; *Matthews v Young* 1922 AD 492 504; *Oslo Land Co Ltd v Union Government* 1938 AD 584 593; Neethling, Potgieter and Visser *Deliktereg* (1996) 9–13; Boberg *The law of delict vol 1 Aquilian liability* (1989 reprint) 475 477.

8 *Administrator Natal v Edouard supra* 597; Lubbe and Murray 303 482 503 515; Van der Merwe *et al* 239–240; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD thesis Unisa 1991) 187–188 193–194; Nienaber "Kontrakbreuk *in anticipando* in retrospek" 1989 *TSAR* 6; Van Aswegen "Die toets vir die bestaan van 'n 'onafhanklike delik' in geval van kontrakbreuk" 1992 *THRHR* 272.

not to act negligently.[9] Thus the requirement of fault will be met in most instances.

The only remaining delictual requirement, namely that of wrongfulness, requires some attention. It is generally accepted that delictual wrongfulness consists of infringement of a recognised subjective right or breach of a legal duty to prevent harm.[10] Breach of contract amounts to a breach of a contractual duty or obligation, or conversely, to infringement of a contractual claim, by a party to a contract.[11] This certainly qualifies on the face of it as infringement of a subjective right (the claim or right to performance arising from the contract) or a legal duty (the duty to perform in terms of the contract). Should breach of a contractual duty or obligation *per se* constitute delictual wrongfulness, it would mean that every negligent breach of a contract causing loss would be actionable in delict. However, our courts and writers have assiduously maintained that breach of contract is not *per se* a wrongful act for purposes of delictual liability.[12]

In the *Lillicrap* case it was held that a breach of contract will qualify as delictually wrongful only where the breach "constitutes both an infringement of the plaintiff's rights *ex contractu* and a right which he had independently of the contract".[13] Thus the so-called "independent delict" test is prescribed to determine whether a breach of contract meets the requirement of delictual wrongfulness and can therefore give rise to delictual liability.[14]

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9 *Van der Spuy v Pillans* 1875 5 Buch 133 135; *Honey & Blanckenberg v Law* 1966 2 SA 43 (R) 46; *Mouton v Die Mynwerkersunie* 1977 1 SA 119 (A) 142; *Rampal (Pty) Ltd v Brett, Wills & Partners* 1981 4 SA 360 (D) 365; *Van Wyk v Lewis supra* 438; *Guardian National Insurance Co Ltd v Weyers* 1988 1 SA 255 (A) 263; Midgley *Lawyer's professional liability* (1992) 84–85 120 ff; cf also Wunsh "Aspects of the contractual and delictual liability of attorneys" 1988 *TSAR* 1; Gauntlett "Verjaarde MVA-eise en professionele nalatigheid" 1978 *THRHR* 45; Scott "Die reël *imperitiae culpae adnumeratur* as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg" in Joubert (ed) *Petere fontes – LC Steyn gedenkbundel* (1973) 124 ff.

10 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 387; *Hawker v Life Offices Association of SA* 1987 3 SA 777 (C) 780–781; *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597; *Administrateur, Transvaal v Van der Merwe* 1994 4 SA 347 (A) 358; *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 317; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26; Neethling, Potgieter and Visser 44 51–54; Boberg 30–34; Van Aswegen *Sameloop* 140–145.

11 *Lillicrap supra* 499; *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 652; Van Aswegen *Sameloop* 190–193; Van der Merwe *et al* 237–239; Lubbe and Murray 471; Nienaber "Enkele beskouings oor kontrakbreuk *in anticipando*" 1963 *THRHR* 31; Reineeke "'n Paar opmerkinge oor die aard, gevolge en indeling van kontrakbreuk" 1990 *TSAR* 677–678; Van Aswegen 1992 *THRHR* 273.

12 *Bloom's Woollens (Pty) Ltd v Taylor* 1962 2 SA 532 (A) 538; *Lillicrap supra* 499; Van Aswegen *Sameloop* 293; Boberg 2; Lubbe and Murray 10; Hosten "*Concursus actionum* of keuse van aksies" 1960 *THRHR* 251 262–263; Hutchison and Visser "Lillicrap revisited: further thoughts on pure economie loss" 1985 *SALJ* 587 592; Midgley "The nature of the inquiry into coneurrenee of aetions" 1990 *SALJ* 621 631 fn 84; Van Aswegen 1992 *THRHR* 273.

13 *Supra* 499.

14 Preeisely what is meant by "independent" in this regard, is, however, not always crystal clear. Formulations vary from satisfying the "independent requirements of both a contractual and an Aquilian action" (*Lillicrap supra* 499; *Tsimatakopolous supra* 432) to satisfying the delictual requirements "even in the absence of a contract" (*Lillicrap* 499) to requiring that "the contraet be notionally disregarded in any examination of potential delietual liability"

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It is universally accepted in case law that the requirements of the independent delict test are met where a breach of contract constitutes an infringement of a plaintiff's rights to person or property.[15] This is often the case in instances of professional liability, for example in most cases of medical negligence resulting in personal injury, or in the building or engineering professions, where negligent conduct such as design errors causes physical damage to buildings, bridges and the like. However, problems arise when the breach of contract causes only pure economic loss, that is loss unconnected with damage to the person or property of the plaintiff, such as loss of profit or additional expenses incurred. This often happens in the realm of professional liability in the financial professions, where such types of loss are incurred as a result of negligent advice, and also in other professions where design errors or negligent supervision cause additional expenditures. Such a situation prevailed in the *Lillicrap* case where a glass factory built in accordance with the specifications of structural engineers was not fit for the purpose for which it was designed and necessitated substantial additional expenditure to render it serviceable. In that case the court held that the negligent conduct of the engineers causing pure economic loss to the plaintiff did not constitute delictual wrongfulness, because such wrongfulness depended on the existence of a contractual relationship between the parties, and therefore did not exist independently of the contract.[16]

This decision seems to put paid to the possibility of delictual liability for breach of a contract causing pure economic loss. The test for delictual wrongfulness in cases of pure economic loss is the breach of a legal duty to prevent harm in the circumstances. Whether such a duty exists depends on a number of factors, of which one of the most important is the relationship between the parties.[17] Since this relationship will always be a contractual one in cases of concurrence, the decision in *Lillicrap* at present seems to deny the possibility of delictual liability of a professional to his client in cases of pure economic loss. The correctness of this aspect of the *Lillicrap* decision is not universally accepted. This issue has, however, been fully canvassed elsewhere[18] and I will not pursue it here.

(Burchell and Dendy 1985 *Annual Survey of SA Law* 184). In this regard, see Van Aswegen *Sameloop* 292–299, 1992 *THRHR* 273 ff.

15 *Van Wyk v Lewis supra* 443; *Lillicrap supra* 494 499; *Correira v Berwind supra* 66; *Lawrence v Kondotel Inns (Pty) Ltd* 1989 1 SA 44 (D) 53; *Wellworths Bazaars v Chandlers Ltd supra* 352; *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) 807; *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1982 3 SA 9 (C) 13 15–16; *Cathkin Park Hotel v JD Makesh Architects supra* 102–103; *Tsimatakopolous supra* 432; Van Aswegen *Sameloop* 294, 1992 *THRHR* 275.

16 497–498 500 501 503.

17 *Western Alarm Systems v Coini and Co* 1944 CPD 271 276; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 694; *Rampal (Pty) Ltd v Brett, Wills and Partners supra* 366; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 384; *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) 568; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N) 912; *Cathkin Park Hotel v JD Makesh Architects supra* 100; Van Aswegen *Sameloop* 296; Neethling, Potgieter and Visser 65–66.

18 Cf eg Van Aswegen *Sameloop* 295–297, 1992 *THRHR* 273–274 276–277. Suffice it to say that in such circumstances the independent delict test should be applied as follows: To determine whether the breach of contract causing pure economic loss also meets the independent requirements for delictual wrongfulness in the circumstances, only the validity of the

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3 2 Effect and implications of concurrence

Regardless of the preferred view on the recognition of concurrence of claims in cases of pure economic loss, the fact is that concurrence is recognised in numerous instances of professional liability entailing loss to the client's person or property. The question now arising concerns the effects of concurrence. Does the law allow the plaintiff a free choice between the two possible causes of action (the solution of election or alternativity), or is one or the other cause of action prescribed (the solution of exclusivity), or can the two possibilities possibly be combined (the solution of cumulation or coordination)?[19] The answer to this question is important because the consequences of liability for breach of contract and delict respectively differ in several important respects, and this has potentially far-reaching practical implications.

Generally speaking, South African law accepts the solution of election or alternativity in cases of concurrence, which means that the plaintiff can choose on which of the two concurrent grounds of liability she wishes to base her claim.[20] An exception to this rule occurs when the pleadings do not indicate the cause of action in a case of concurrence. If exception to the pleadings as being vague and embarrassing is not taken, the judge must classify the basis of the claim according to the so-called gravamen of the action to prevent the plaintiff being nonsuited where she has in fact suffered loss.[21] This in effect amounts to a form of the solution of exclusivity, or prescribing a particular ground of action. The effect of the *Lillicrap* decision, denying the concurrent existence of delictual

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contract, and not the entire factual relationship between the parties, should be disregarded. If the relationship of the parties were such that, had the contract been void, the nature of their relationship would still have imposed a legal duty in delict on the professional to prevent pure economic loss to the plaintiff, eg because of reliance on his expertise, or because of his exclusive access to necessary information, or because of his knowledge or foresight of the possibility of harm to the plaintiff, the independent delict test is satisfied and delictual liability should be recognised. This would also accord with the generally accepted legal position in regard to the determination of delictual wrongfulness in cases of pure economic loss outside the context of contract.

19 The answer to this question entails a policy decision which depends on a number of policy factors, such as the purpose, function and respective areas of application of the law of contract and delict, the importance of individual party autonomy and freedom of contract, the principle of single but complete compensation, and the harmonising of competing interests. In this regard, see Van Aswegen *Sameloop* 97–103 418–445, "Concurrence of contractual and delictual claims and the determination of delictual wrongfulness" 1994 *THRHR* 150–151; Midgley *Liability* 27–28, 1990 *SALJ* 627; Lubbe and Murray 11; Hosten 1960 *THRHR* 252 257 259. In addition to these factors, a very important consideration influencing the decision in this regard, albeit not always consciously, concerns the extent to which the consequences of the two possible grounds of liability differ. Where these consequences are identical, the whole issue of concurrence becomes meaningless. Where there are significant differences in the respective consequences, the extent and nature of such differences will influence and indeed reflect the policy factors mentioned above and thus affect the chosen solution. For a fuller explanation, see Van Aswegen *Sameloop* 451.

20 *Van Wyk v Lewis supra*; *Prima Toy Holdings (Pty) Ltd v Rosenberg supra* 483; *Lillicrap supra* 496 499; *Correira v Berwind supra* 66; *Cathkin Park Hotel v JD Makesh Architects supra* 102–103; *Tsimatakopolous supra* 432–433; Van Aswegen *Sameloop* 469; Midgley *Liability* 27–29, 1990 *SALJ* 629–630; Hutchison and Visser 1985 *SALJ* 590; Hosten 1960 *THRHR* 262 271; Neethling, Potgieter and Visser 7 259.

21 *Van Wyk v Lewis supra* 443; Hosten 1960 *THRHR* 262–263; Boberg 353; Van Aswegen *Sameloop* 467 470.

liability in cases of pure economic loss can also be interpreted as a similar exception, amounting to an acceptance of the solution of exclusivity, in that it in effect prescribes breach of contract as the only cause of action in such circumstances.[22]

The general rule nevertheless allows the plaintiff a free choice between a claim based on breach of contract and one based on delict, and therefore the differences between contractual and delictual liability are of major importance in deciding which ground to rely on.

4 DIFFERENCES BETWEEN DELICTUAL AND CONTRACTUAL CLAIMS FOR DAMAGES

There are several potential practical differences between liability for breach of contract and delict respectively. I will explore only those differences likely to arise in cases of professional liability.

4 1 The extent of damages claimable

One of the most important potential differences between claims for damages based on breach of contract and delict respectively concerns the question whether both grounds will result in the same amount of damages being recovered. Several factors may play a role in this regard.

First of all, it is often said that the measure of damages differs in cases of breach of contract and delict. Delictual damages are calculated with reference to the position in which the plaintiff would have been had the delict not been committed (the so-called negative interest) while damages for breach of contract are calculated with reference to the position in which the plaintiff would have been had the contract been fulfilled, that is, properly performed (the so-called positive interest). However, positive interest can equally well be expressed in the negative with reference to the damage-causing event, namely the breach of contract. The plaintiff then has to be placed in the position she would have been in had the breach not occurred, which after all has exactly the same meaning as the position had the contract been fulfilled. This formulation of positive interest is identical to the formulation of delictual negative interest, and therefore the application of the two measures with reference to the same conduct constituting both breach of contract and a delict will have the same results. This proves that there is no difference in principle between the measure of damages for breach of contract and delict.[23]

These formulations of positive and negative interest respectively are, however, incorrectly exclusively associated with specific types of loss. Positive interesse

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22 *Lawrence v Kondotel Inns supra* 52–53; Burchell and Dendy 1985 *Annual Survey of SA Law* 182 184; Lubbe and Murray 11–12; Hutchison and Visser 1985 *SALJ* 591; Midgley 1990 *SALJ* 629; Neethling, Potgieter and Visser 259 fn 65; Van Aswegen *Sameloop* 471. In fact, the reasons quoted for the decision in the *Lillicrap* case (500–501), namely that the Aquilian action does not fit into a contractual setting, that the recognition of delictual liability would interfere with parties' autonomy to determine their own rights and obligations, and that adequate contractual remedies exist to deal with the situation, actually all reflect policy considerations in favour of denying the plaintiff the choice of possible delictual liability.

23 For a detailed discussion of this issue, see Van Aswegen "Damages for negative interesse in cases of breach of contract" 1993 *SA Merc LJ* 265–266, *Sameloop* 314–315 and authority quoted there.

as contractual measure of damages is equated to loss of (future) profit or bargain (*lucrum cessans*) and negative interesse as delictual measure is equated to out of pocket expenses or loss actually suffered (*damnum emergens*).[24] Although these types of consequence typically flow from a breach of contract and a delict respectively, damage is not restricted to these types of loss in either of the two cases. Patrimonial loss in the law of delict includes both loss of profit and loss already suffered.[25] In the law of contract, patrimonial loss also includes both *lucrum cessans* and *damnum emergens*.[26] Here, too, the ostensible distinction regarding the measure of damages between contractual and delictual claims proves illusory.

It may be mentioned for the sake of completeness that the term negative interesse is sometimes used in contract law to denote damages calculated to place the plaintiff in the position she would have been in had the contract never been concluded. This occurs in cases of misrepresentation inducing a contract, which has nothing to do with breach of contract, and also to denote so-called restitutionary damages which are said to be claimable as an alternative to positive interesse where a contract is rescinded.[27] The latter proposition has been severely criticised and even denied in recent case law,[28] and need not be considered further at present.

Although the measure of damages for breach of contract and delict reveals no inherent differences of principle or application, the amount of damages claimable can indeed differ depending on the ground of liability. The reasons for this are twofold.

In the first place different tests for legal causation, that is remoteness, imputability or limitation of liability, are employed in the two instances. The currently accepted test in delict with regard to claims for damages entails the use of a flexible criterion, determined by policy considerations, to decide whether a sufficiently close connection exists between the conduct and the harmful consequences in the light of reasonableness, fairness and justice. Previously accepted criteria for determining remoteness, such as the presence of a *novus actus interveniens*, reasonable foreseeability by the reasonable man in the position of the

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24 *Trotman v Edwick* 1951 1 SA 443 (A) 449; *Ranger v Wykerd* 1977 2 SA 976 (A) 986 989 991; *Lillicrap supra* 505 511; *Probert v Baker* 1983 3 SA 229 (D) 234; *Davidson v Bonafede* 1981 2 SA 501 (C) 505–506.

25 Voet 45 1 9; Van Leeuwen *Censura forensis* 1 4 15 6; Huber *Hedendaegse rechtsgeleertheyt, soo elders als in Friesland gebruikelyk* 3 36 2; *Oslo Land Co Ltd v Union Government supra* 590–591; *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 835; *Whitfield v Phillips* 1957 3 SA 318 (A) 329; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 2 SA 462 (A) 177; *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150; *Ranger v Wykerd supra* 992; Van Aswegen *Sameloop* 160–161; Neethling, Potgieter and Visser 214 217–219.

26 Voet 45 1 9; Van Leeuwen 1 4 15 6; *Emslie v African Merchants Ltd* 1908 EDC 82 91; *Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 34–35; *Whitfield v Phillips supra* 329; Van der Merwe *et al* 306; Lubbe and Murray 607–608; Lubbe "The assessment of loss upon cancellation for breach of contract" 1984 *SALJ* 623; Mulligan "Damages for breach: quantum, remoteness and causality" 1956 *SALJ* 27; Van Aswegen *Sameloop* 206.

27 *Inhambane Oil and Mineral Development Syndicate Ltd v Mears and Ford* 1906 (23) SC 250 261; cf also *inter alia Clarke v Durban and Coast SPCA* 1959 4 SA 333 (N) 338; *Stowe v Scott* 1929 TPD 450; *Van der Watt v Louw* 1955 1 SA 690 (T); *Probert v Baker supra* 235; *Svorinic v Biggs* 1985 2 SA 573 (W) 580; Van der Merwe *et al* 305–306.

28 *Hamer v Wall* 1993 1 SA 235 (T); Van Aswegen 1993 *SA Merc LJ* 269 ff.

plaintiff, or direct consequences, may all be used as aids in the application of the flexible criterion.[29] In the law of contract, on the other hand, liability for general damages is limited by reasonable foreseeability by the parties to the contract, in so far as such damage is presumed to have been contemplated by the parties (the so-called contemplation principle). In regard to special damages it is required that the parties must actually or presumptively have foreseen such damage. Foreseeability of damage is therefore required in any event, but in addition it is required in regard to special damages that the parties must have agreed (at least tacitly) that such damages will be recoverable (the so-called convention principle).[30] This exposition makes it obvious that the different criteria used to determine the issue of limitation of liability in regard to claims based on breach of contract and delict can lead to vastly different results, thus influencing the amount of damages claimable in the two instances.

In the second place, the criteria used for limitation of liability are applied with reference to different points in time in the two instances. In cases of delictual liability, the decisive moment in regard to those factors influenced by a particular time frame, such as reasonable foreseeability, is the commission of the delict, while the foreseeability, actual foresight and agreement utilised in regard to contractual claims for damages, are adjudged with reference to the time of conclusion of the contract and not to the occurrence of the breach. It goes without saying that circumstances may vary considerably between these two points and may therefore lead to considerable differences in the application of the criteria applicable in the two instances, and therefore also in the amounts claimable.

4 2 Capacity of the parties for contractual and delictual liability

There are some potential differences between contractual and delictual liability concerning the requirements of capacity to act and accountability for wrongful conduct (*culpae capax*). The practical implications of these differences mostly concern the liability of minors, which is very unlikely to arise in regard to professional liability. One instance could remotely concern instances of professional liability and will be briefly explained for the sake of completeness. It is trite law that a party must have the necessary capacity to act to conclude a valid legal act, including a contract. Liability for a wrongful act, however, depends only on the act constituting voluntary human conduct, unless fault is a requirement for liability, in which case the perpetrator must be *culpae capax* or accountable to be held liable.[31] Breach of contract and a delict both constitute

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29 *S v Mokgethi* 1990 1 SA 32 (A) 40–41; *International Shipping Co (Pty) Ltd v Bentley supra* 700 702–704; *Smit v Abrahams* 1994 4 SA 1 (A) 14; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764; *Napier v Collett* 1995 3 SA 140 (A) 143; Neethling, Potgieter and Visser 177–181; Potgieter "Feitelike en juridiese kousaliteit" 1990 *THRHR* 267; Neethling and Potgieter "Juridiese kousaliteit bereik volle wasdom" 1995 *THRHR* 343.

30 *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 3 SA 670 (A); *Shatz Investments (Pty) Ltd v Kalovyrnas* 1976 2 SA 545 (A); *Victoria Falls & Transvaal Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Whitfield v Phillips supra*; *Lavery & Co v Jungheinrich* 1931 AD 156; *North & Son (Pty) Ltd v Albertyn* 1962 2 SA 212 (A); Lubbe and Murray 625–626; Van der Merwe *et al* 307–311.

31 *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389 403 410; Neethling, Potgieter and Visser 118–120; Boberg 271; Snyman *Criminal law* (1995) 145.

wrongful acts, and therefore accountability is required where fault is a requirement for liability. Fault is always required for delictual liability, but not necessarily for breach of contract, and therefore a person who is not *culpae capax* can in principle be liable for a breach not requiring negligence where delictual liability is absent. Such a situation could conceivably occur where a professional with the necessary capacity to act concludes a valid contract, but commits a breach of contract in circumstances under which she is not *culpae capax*, for example because of intoxication. Where fault is a requirement for the form of breach committed, no contractual liability arises because of the absence of accountability. This in any case excludes the possibility of delictual liability, but where the form of breach does not require fault, liability for breach of contract only may be entertained.

4 3 Joint liability

The legal rules regulating the joint liability of several parties to a contract differ from those regulating delictual liability of joint wrongdoers, and the implications of these differences should be considered when deciding on a cause of action where professional liability to a client can arise against more than one individual.

In the absence of an agreement to the contrary, the liability of several parties to a contract takes the form of simple joint liability, which means that where performance is divisible, each individual party will be liable and can be sued only for his *pro rata* share of the performance under the contract, which can be claimed in one action or from each party separately.[32] This situation also applies to liability for damages for breach of contract,[33] where the performance is by its nature always divisible. An important exception to this general rule occurs where the parties to the contract are partners, in which case the legal rules regulating partnerships will apply. Contractants may agree to vary this general rule in favour of liability *in solidum*, or joint and several liability. In such cases, the full performance, or all the damages for breach of contract, can be claimed from any of the parties individually or from them all jointly, and payment of the full amount will absolve all the debtors. The legal position between the joint debtors *inter se*, including the question of a possible right of recourse against the debtors who have not paid, will depend on the relationship between them. This is determined by the terms of their agreement.[34]

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32 *D* 45 2 11 1–2; De Groot *Inleydinge tot de Hollandsche recthsgeleertheyt* 3 3 8; Voet 45 2 2; *Alcock v Du Preez* 1875 Buch 130 132; *De Pass v The Colonial Government* (1886) 4 SC 383 390; *Tucker v Carruthers* 1941 AD 251; *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 3 SA 308 (A); *Prinsloo v Roets* 1962 3 SA 91 (O) 94–95; *Clysafis v Katsapas* 1988 4 SA 818 (A) 825; Lubbe and Murray 397–398; Van der Merwe *et al* 170–171; Van Aswegen *Sameloop* 339.

33 *Henwood & Co v Westlake & Coles* (1887) 5 SC 341 347; *Prinsloo v Roets supra* 95; *Kock & Schmidt v Alma Modehuis (Edms) Bpk supra*; De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* vol 1 (1992) 130–131; Christie *The law of contract in South Africa* (1991) 300–302 306–308; Joubert *General principles of the law of contract* (1987) 312; Van Aswegen *Sameloop* 339.

34 On this type of liability in general, see *Roelou Barry (Edms) Bpk v Bosch* 1967 1 SA 54 (C) 57; *Boyce v Bloem* 1960 3 SA 855 (T) 857; *Parekh v Shah Jehan Cinemas (Pty) Ltd* 1982 3 SA 618 (D) 622; Van der Merwe *et al* 173–176; De Wet and Van Wyk 131–142; Joubert 312–316; Christie 303–307 308–310; Lubbe and Murray 398–399. On the relationship

continued on next page

The liability of joint delictual wrongdoers (that is all persons liable in delict for the same damage) is determined by section 2 of the Apportionment of Damages Act 34 of 1956. In terms of the Act all joint wrongdoers can be sued in the same action. Notice of the action may be served on all alleged wrongdoers by the plaintiff or defendant. If the court is satisfied that all the wrongdoers are before the court, it may apportion the damages in accordance with the wrongdoers' relative degrees of fault and order payment of her *pro rata* portion only against every defendant. Otherwise, joint wrongdoers are liable jointly and severally, with the same consequences as set out above. However, the Act provides for an automatic right of recourse, again on the basis of proportionate degrees of fault, against every joint wrongdoer who received notice of the action in favour of those who have paid. Recourse can be exercised against an alleged wrongdoer who did not receive notice of the action, only with the permission of the court.[35]

4 4 Liability for the acts of another

In delict, vicarious liability for the acts of another is recognised in the employer-employee relationship, between principal and representative and between the owner of a motor car and its driver. At least the first two situations can conceivably arise in regard to professional liability. The central requirement for the existence of vicarious liability in these circumstances may be summarised as follows: a person will be held vicariously liable for the acts of another where the latter acted within the scope of his particular relationship with the former.[36] On the other hand, a party to a contract will be liable for conduct by another person constituting a breach of that contract only where the latter acted in fulfilment of the contractual obligations of the former. This can conceivably arise where the latter acted as servant of the former in fulfilling the master's obligations, or where the latter was mandated to fulfil the former's contractual obligations.[37] Again, these situations are conceivable in instances of professional liability. These differences cause the scope for vicarious liability for delictual claims to be wider than in the case of breach of contract.

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between this type of joint debtors, see *Gerber v Wolson* 1955 1 SA 158 (A) 164; *Kroonklip Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 1 SA 674 (C); De Wet and Van Wyk 125; Joubert 315; Christie 248; Lubbe and Murray 400–401; Van der Merwe *et al* 176; Van Aswegen *Sameloop* 340.

35 For more detail, see Van Aswegen *Sameloop* 340–341; Neethling, Potgieter and Visser 263–264; cf also *SAR&H v SA Stevedores Services Co Ltd* 1983 1 SA 1066 (A) 1090; *Becker v Kellerman* 1971 2 SA 172 (T); *Shield Insurance Co Ltd v Zervoudakis* 1967 4 SA 735 (E) 737–738; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 421; *Grek v Jankelowitz* 1918 CPD 140; Joubert 313; Lubbe and Murray 398.

36 *Mkize v Martens* 1914 AD 382; *Feldman (Pty) Ltd v Mall* 1945 AD 733; *SAR v Marais* 1950 4 SA 610 (A); *Weinberg v Oliver* 1943 AD 181; *Minister of Police v Mbilini* 1983 3 SA 705 (A); *Minister of Police v Rabie* 1986 1 SA 117 (A) 134; *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 4 SA 363 (A); *Broodryk v Smuts* 1942 TPD 47; Neethling, Potgieter and Visser 362–369; Scott *Middellike aanspreeklikheid in die Suid-Afrikaanse reg* (1983) 132 ff 255–266; Van Aswegen *Sameloop* 431–432.

37 *Weinberg v Oliver supra* (where reference is made to "delegation of the performance of the obligation"); *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 3 SA 178 (W) 180; Hosten 1960 *THRHR* 257, "Vonnisbespreking" 1960 *THRHR* 294; Van Aswegen *Sameloop* 342–343.

4 5 Exclusion of liability by unilateral conduct

The principle of *volenti non fit iniuria* is generally recognised in our law and underlies certain defences to delictual liability which eliminate the wrongfulness of a potential delict, namely consent to injury and consent to the risk of injury.[38] It is generally recognised that consent is a unilateral juristic act whereby the prejudiced party waives her right which the conduct in question infringes.[39] Such consent can be express or inferred from conduct, but cannot be given retrospectively. Unilateral consent by the prejudiced party to harmful conduct or the risk of harm would therefore be a valid defence to a delictual claim for damages based on such conduct.

The question whether a similar defence would avail a party to a contract claiming damages for breach of contract, depends on whether a party to a contract can unilaterally waive a claim for performance in terms of a contract or a claim for damages. In our law this question is answered in the negative, since it is not possible to extinguish a personal right or claim ("vorderingsreg") by unilateral conduct.[40] The reason given for this rule is that a personal right always consists of performance by someone, and since the party obliged to perform also has an interest in performance, her co-operation is required to extinguish the right to performance.[41] The party entitled to performance is of course always free

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38 *D* 47 10 1 5; Voet 47 10 4; De Groot 3 35 8; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 775 777 781; *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 421; *Lampert v Hefer* 1955 2 SA 507 (A) 513; *Waring & Gillow Ltd v Sherborne* 1904 TS 340 343; *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 719; *Stoffberg v Elliot* 1923 CPD 148; *Boshoff v Boshoff* 1987 2 SA 694 (O) 699 701–702; *Castell v De Greeff* 1994 4 SA 408 (C); Boberg 724 ff; Neethling, Potgieter and Visser 94–102; Strauss *Toestemming tot benadeling as verweer in die strafreg en deliktereg* (LLD thesis Unisa 1961) 332–339; Van Aswegen and Knobel "Sportbeserings en toestemming" 1989 *THRHR* 586–587; Van Aswegen *Sameloop* 343–344.

39 *Santam Insurance Co Ltd v Vorster supra* 779–781; Strauss 154–158; Boberg 726 ff; Neethling, Potgieter and Visser 96; Van Aswegen and Knobel 1989 *THRHR* 587–588; Hosten 1960 *THRHR* 265; Van Aswegen *Sameloop* 345.

40 *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Ltd* 1962 3 SA 565 (C) 571; *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 1 SA 279 (N) 294; *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd* 1933 WLD 224 226; *Laws v Rutherford* 1924 AD 261 263; *Union Free State Mining & Finance Corporation Ltd v Union Free State Gold & Diamond Corporation Ltd* 1960 4 SA 547 (W) 549; Van Aswegen *Sameloop* 346; Reinecke "Verlies van 'n terugtredingsbevoegdheid weens afstanddoening" 1986 *TSAR* 221; Lubbe and Coetzee "Dwaling en vertrouensbeskerming by eleksie en ander eensydige regshandelinge" 1990 *TSAR* 64; Joubert 297; Lubbe and Murray 729. This conclusion is supported by the settled position that waiver of a contractual claim can only take place by means of agreement (Lubbe and Murray 722; Van der Merwe *et al* 374; *Union Free State Mining & Finance Corporation Ltd v Union Free State Gold & Diamond Corporation Ltd supra* 549; *Laws v Rutherford supra* 263; *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd supra* 226; *Mthanti v Netherlands Insurance Co of SA Ltd* 1971 2 SA 305 (N) 317; *Gouws v Montesse Township and Investment Corporation (Pty) Ltd* 1964 3 SA 221 (W)). In addition, it is generally accepted that a claim for damages can be waived only by means of agreement (*D* 46 3 91; Van der Linden 1 18 3; *Lanfear v Du Toit* 1943 AD 59 62 74; Joubert 297; Boberg 16 727 734 738 743; Strauss 66 358–360; cf *Jameson's Minors v CSAR* 1908 TS 575 with regard to the *pactum de non petendo*).

41 *Union Free State Mining & Finance Corporation Ltd v Union Free State Gold & Diamond Corporation Ltd supra* 549; cf also *Muzondo v University of Zimbabwe* 1981 4 SA 755 (Z); *Margate Estates Ltd v Urtel (Pty) Ltd supra* 294; Reinecke 1986 *TSAR* 221; Lubbe and Coetzee 1990 *TSAR* 64; Lubbe and Murray 729 731; Van der Merwe *et al* 374 fn 88; Van Aswegen *Sameloop* 347.

not to enforce a personal right, but this does not extinguish the obligation from which such a right arises. The right therefore remains extant and consequently, enforceable until it is extinguished in some other manner, such as by prescription. This means that apparent unilateral consent by a party to a contract to breach of the contract, or a unilateral waiver of the right to claim damages for such breach, will not be a valid defence against a claim based on breach of contract. This once again amounts to an important difference in the consequences of liability for breach of contract and delict respectively.

4 6 Exclusion or limitation of liability by agreement

In accordance with the general principle of party autonomy or freedom of contract, legal subjects are free to regulate their legal position by agreement subject to generally applicable legal rules. This includes the freedom to exclude or limit the ambit of any form of liability arising between them, including delictual liability and liability for breach of contract. This freedom is, however, limited by the general rule that the limitation of liability for fraud or intentional conduct is *contra bonos mores* and therefore invalid.[42] In accordance with this general proposition, a professional is in general free to regulate his liability towards his client by means of agreement, and so-called exclusion or limitation clauses is a general feature of contracts between professionals and clients. Such clauses can in principle apply to delictual and contractual liability, and consequently there is no inherent difference between liability for breach of contract and delict in this regard.

Limitation or exclusion clauses are, however, based on agreement and are as such subject to the rules of interpretation. In this regard interesting situations can arise in cases of concurrence. The most important relevant rule of interpretation applicable is that the intention of the parties in the light of the agreement as a whole must be given effect to.[43] However, limitation clauses are as a general rule interpreted restrictively,[44] and where the meaning is unclear, the *contra proferentem* rule is applied.[45] This means that in cases of concurrence, no problems will

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42 *D* 9 2 27 29; *D* 2 14 27 3; *D* 50 17 23; *Wells v SA Alumenite Co* 1927 AD 69; *Rosenthal v Marks* 1944 TPD 172 180; *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd supra; Morrison v Angelo Deep Gold Mines* 1905 TS 775 779; Lubbe and Murray 340 425; Joubert 137; Van der Merwe *et al* 115–116; Hosten 1960 *THRHR* 266 fn 48; Van Aswegen *Sameloop* 355. This rule apparently does not extend to the limitation of liability for gross negligence – after the question was left open in *Essa v Divaris* 1947 1 SA 753 (A) and *Rosenthal v Marks supra*, and in spite of the opinion of writers such as Hosten 1960 *THRHR* 266 fn 48, it was finally decided in *Government of the RSA v Fibre Spinners and Weavers (Pty) Ltd supra* 807; *Van Deventer v Louw* 1980 4 SA 105 (O); cf Lubbe and Murray 425; Van der Merwe *et al* 218.

43 *D* 1 4 18; *D* 50 16 219; Van der Linden 1 14 4; *Bristowe v Lycett* 1971 4 SA 223 (RA) 236; *Lanfear v Du Toit* 1943 AD 59 72; *Van Rensburg v Taute* 1975 1 SA 279 (A); *Rand Rietfontein Estates v Cohn* 1937 AD 317 326; *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 1 SA 796 (A) 804; *Swart v Cape Fabrix (Pty) Ltd* 1979 1 SA 195 (A) 202; Joubert 59; Lubbe and Murray 451; Van der Merwe *et al* 223–224.

44 *Essa v Divaris* 1947 1 SA 753 (A); *Weinberg v Oliver supra*; *Rosenthal v Marks supra*; *SAR&H v Lyle Shipping Co Ltd* 1958 3 SA 416 (A); *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd supra*; *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C); *Lawrence v Kondotel Inns (Pty) Ltd supra*; Lubbe and Murray 340 428 467–468; Van der Merwe *et al* 218; Van Aswegen *Sameloop* 357, especially fn 161.

45 *Bristowe v Lycett supra*; *Government of the RSA v Fibre Spinners & Weavers (Pty) Ltd supra*; *Lawrence v Kondotel Inns (Pty) Ltd supra*; Lubbe and Murray 467 468; Van der Merwe *et al* 218; Van Aswegen *Sameloop* 357.

arise where the exclusion clause is applicable to both contractual and delictual liability expressly or by necessary implication, or is expressly limited to one or the other. Where the wording of the clause is wide enough to apply to both possible grounds of liability, I am of the opinion that this indicates that the parties intended it to apply irrespective of the basis of the claim. An example of such an instance in cases of concurrence is a clause excluding or limiting liability for negligence, which must in such a situation apply to both instances, since negligence is a prerequisite for concurrence occurring.[46] However, where the wording of the clause is such that it is uncertain whether it was intended to apply to possible delictual liability, the application of the *contra proferentem* rule will probably have the effect that the clause will apply only to claims based on breach of contract.[47] This means that an exclusion or limitation clause in a contract could, depending on its wording and interpretation, apply only where the claim is based on breach of contract and not where the claim is based on delict.

4 7 Penalty clauses

The Conventional Penalties Act 15 of 1962 recognises the validity of clauses in which parties to a contract agree beforehand to a fixed sum, or a particular performance or delivery, in cases of non-compliance with a contractual obligation by one of the parties. This includes so-called forfeiture clauses. Such a clause replaces the ordinary liability to pay damages for breach of contract, and is subject to reduction by the court where it is out of proportion to the prejudice suffered by the prejudiced party.

The Act expressly applies only to breach of contract ("an act or omission in conflict with a contractual obligation") and the question arising in cases of concurrence is whether a penalty clause in a contract would be applicable where the conduct envisaged has occurred, but a delictual claim for damages is instituted. The principle of party autonomy and the general rules applicable to limitation of liability by agreement would seem to favour a positive answer, at least where the agreed penalty is in actual fact smaller than the loss suffered. However, where the penalty in fact increases the liability, a negative answer is indicated by the following factors. Before the Conventional Penalties Act came into operation, penalty clauses not amounting to a genuine pre-estimate of damages were held to be *contra bonos mores* and therefore invalid because they were regarded as contrary to the compensatory nature of contractual damages.[48]

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46 Van Aswegen *Sameloop* 359; Hosten 1960 *THRHR* 266–267 296. This opinion is strengthened by the generally accepted maxim that a contractual exclusion clause may not be circumvented by claiming in delict: *Lillicrap supra* 503; *Essa v Divaris supra*; Boberg 16.

47 Cf eg *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd supra*; *Galloon v Modern Business Alarms (Pty) Ltd supra*; *Minister of Education and Culture (House of Delegates) v Azel* 1995 1 SA 30 (A); Van Aswegen *Sameloop* 359–360. Some uncertainty exists regarding the interpretation of the intention of the parties by the courts in these cases. The opinion has been expressed that the wording of the relevant exclusion clauses were wide enough to include delictual liability for negligent conduct (Lotz "*Caveat scriptor*: striking down exception clauses" 1974 *SALJ* 424–425; Hosten 1960 *THRHR* 296–297).

48 *Commissioner of Public Works v Hills* 1906 AC 368; *Union Government v Foster* 1915 CPD 204; *Warren v Union Government* 1916 TPD 695; *Pearl Assurance Co Ltd v Union Government* 1934 AD 560; *Auby & Pastellides (Pty) Ltd v Glen Anil Investments (Pty) Ltd* 1960 4 SA 865 (A); Lubbe and Murray 641; Joubert 266–268.

The enforcement of a penalty clause to increase the amount of damages claimed in a delictual action, would import a punitive element which would be equally contrary to the compensatory nature of Aquilian liability, and therefore probably *contra bonos mores*. For this reason a penalty clause in a contract which in fact increases the ordinary liability for loss suffered would in my opinion not apply in cases of concurrence where the claim for damages is based on delict.

4 8 Fault of the plaintiff

The principle that a prejudiced party cannot recover damages for loss caused by her own conduct is accepted in our law. It underlies the mitigation rule, which is applicable to the recovery of damages for loss caused by breach of contract and delict alike. It is also the basis of the Apportionment of Damages Act 34 of 1956, which in section 1 regulates the position in regard to the recovery of damages for damage caused partly by the fault of the prejudiced party and partly by the fault of another. In such cases, the court may reduce the damages recoverable by the claimant in proportion to the degree that the claimant was at fault in relation to the damage.

Although the wording of the Act is wide enough to apply to any form of fault and to any type of liability, our courts have interpreted the Act strictly. In the first place it appears from the historical background to the Act and the wording of the long title and headings that the Act was intended to apply only to negligence and it has never been applied in regard to intentional conduct in case law. Secondly, our courts have expressly held that in view of its historical background, the Act does not apply to breach of contract.[49] This situation constitutes a very important and far-reaching practical difference between the two forms of liability in cases of concurrence: where a delictual claim is instituted, the plaintiff's contributory negligence can reduce her claim; not so where the cause of action is breach of contract.

4 9 Onus of proof

The general rule that a plaintiff must prove all the elements of her claim, means that where a delictual claim is instituted, the onus of proving fault on the part of the defendant rests on the plaintiff.[50] As far as breach of contract is concerned, for those cases where fault is a requirement, the rule is invariably that the onus of proof is altered, and that the defendant must prove the absence of fault on her side to escape liability.[51] It goes without saying that this is a very important difference influencing the choice of cause of action in cases of concurrence.

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49 *Barclays Bank DCO v Straw* 1965 2 SA 93 (O) 99; *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 2 SA 521 (C) 528–529; Neethling, Potgieter and Visser 160; Van Aswegen *Sameloop* 211 367.

50 *Union Government v Sykes* 1913 AD 156 175; *Van Wyk v Lewis supra* 444; *Kotzé v Johnson* 1928 AD 313 320; *Eversmeyer (Pty) Ltd v Walker* 1963 3 SA 384 (T); Neethling, Potgieter and Visser 361; Hosten 1960 *THRHR* 257; Van Aswegen *Sameloop* 372.

51 See in general *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957; *Rosenthal v Marks supra*; *Weiner v Calderbank* 1929 TPD 654; *Challinger v Speedy Motors* 1951 1 SA 340 (C); Neethling, Potgieter and Visser 261 fn 78; Van Aswegen *Sameloop* 372–373. In regard to *mora debitoris*, see *Legogote Development Co (Pty) Ltd v Delta Trust & Finance Co Ltd* 1970 1 SA 584 (T) 581–588; *Nel v Cloete* 1972 2 SA 150 (A) 166–167; *Wehr v Botha* 1965 3 SA 46 (A); *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A); Lubbe and Murray 503; Joubert 205–206; Van der Merwe *et al* 249; in regard to *mora*

continued on next page

4 10 Jurisdiction

The various statutory and common law provisions regulating the jurisdiction of courts for different actions, include two grounds for jurisdiction which will have different results depending on whether the claim instituted is based on breach of contract or delict. Section 28 of the Magistrates' Courts Act 32 of 1944 confers jurisdiction on a court where the cause of action originated entirely within the area of jurisdiction of the court. It seems to be generally accepted that a cause of action consists of the *facta probanda* of a claim[52] and therefore the cause of action in a claim for breach of contract includes the existence, validity and contents of the contract. For the court to have jurisdiction, the conclusion of the contract and its breach would have had to occur in its area of jurisdiction, whereas in a claim based on delict in cases of concurrence, only the breach, and therefore the delict, need have occurred in that area.

Similarly, the common law ground of jurisdiction of the Supreme Court known as *ratione res gestae* confers jurisdiction on a court where the cause of action originated within the area of jurisdiction of the court.[53] In cases of breach of contract, the fact that the conclusion and the breach of the contract occurred in different places, will probably result in jurisdiction arising in regard to both areas,[54] whereas only the court in the area where the breach or delict occurred will have jurisdiction where the cause of action is based on delict. Accordingly,

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creditoris, see *Slier v Frenkel & Co* 1927 TPD 375; *LTA Construction Ltd v Minister of Public Works & Land Affairs* 1992 1 SA 837 (C) 848; Van der Merwe *et al* 270; Lubbe and Murray 527–529; in regard to positive malperformance, see Lubbe and Murray 490; Van der Merwe *et al* 255–256; in regard to prevention of performance, see *Frenkel v Ohlson's Cape Breweries Ltd supra* 964; *Grobbelaar v Bosch* 1964 3 SA 687 (E); Lubbe and Murray 483; Van der Merwe *et al* 266.

52 *Evins v Shield Insurance Co Ltd supra* 839; *McKenzie v Farmers' Co-operative Meat Industries* 1922 AD 16 23; *Mahomed v Mahomed* 1959 2 SA 688 (T) 691; *Abrahamse & Sons v SAR&H* 1933 CPD 626 637; *King's Transport v Viljoen* 1954 1 SA 133 (C) 135; *Erasmus v Unieversekerings-Adviseurs (Edms) Bpk* 1962 4 SA 646 (T) 648; *Dusheiko v Milburn* 1964 4 SA 648 (A) 658; *Makgae v Sentraboer (Koöperatief) Bpk* 1981 4 SA 329 (T) 244; *Improfed (Pty) Ltd v National Transport Commission* 1990 3 SA 324 (T) 328; Boberg 477 515–516; Van Aswegen *Sameloop* 369–370.

53 See in general Van Aswegen *Sameloop* 375–377 and authority quoted there. Unlike the previous instance, it is not necessary for the entire cause of action to have originated in the court's area of jurisdiction: *Natalse Landboukoöperasie Bpk v Fick* 1984 2 SA 287 (N) 297.

54 It is settled that the court will have jurisdiction if the contract was concluded or is to be performed in the area of jurisdiction of the court (*Cape Explosives Works Ltd v SA Oil & Fat Industries Ltd* 1921 CPD 224 226–267; *Brooks v Maquassi Halls Ltd* 1914 CPD 371 376–377; *Ex parte Naidoo* 1930 TPD 799; *Roberts Construction Ltd v Willcox Bros (Pty) Ltd* 1962 4 SA 326 (A); *Smit v Cramer* 1913 OPD 123; *City Timber Mills v Nagdee* 1916 NPD 255 258; *Atherstone v Critchlow* 1928 EDL 292), but uncertain whether the fact that the breach of contract occurred in the area of jurisdiction alone is sufficient to confer jurisdiction. In some cases this was denied (*Einwald v German West African Co* (1887) 5 SC 86; *Kopelowitz v West* 1954 4 SA 296 (W); *Roberts Construction Co Ltd v Willcox Bros (Pty) Ltd* 1962 4 SA 326 (A); *Ex parte Jackson* (1986) 13 SC 13) and in others affirmed (*Wrens (Pty) Ltd v S&W Fine Foods Inc* 1941 NPD 343; *American Cotton Products v Felt & Tweeds Ltd* 1953 2 SA 753 (N)). There is authority that it will be sufficient to confer jurisdiction if the breach of contract occurs in the area where the contract is to be (partially) performed (*Poppendick v Union Bag Co* 1923 EDL 88; *Sleeman v African Diamonds Ltd* 1928 GWL 91; *Walker v Taylor* 1934 OLD 101; *City Timber Mills v Nagdee supra*; cf Van Aswegen *Sameloop* 376–377).

different courts may have jurisdiction in cases of concurrence, depending on the cause of action selected.

4 11 Pleadings

Finally, in regard to the contents of pleadings, the general rule is that although the cause of action relied on need not be named, all the material facts on which the claim is based, or *facta probanda*, must be set out.[55] Once again, this means that the pleadings for a claim based on breach of contract must contain facts relating to the existence, validity and contents of the contract in addition to the facts relating to the breach. Where the claim is based on delict, only facts relating to the conduct constituting the breach, and thus also the delict, need be pleaded.

5 CONCLUSION

When dealing with instances of professional liability to clients, the possibility of a concurrence of claims based on delict and breach of contract respectively is always present. It is of practical importance to determine whether such a concurrence is in fact present, and to consider all the possible implications based on the differences between delictual claims for damages and claims based on breach of contract in order to determine which of these causes of action would be the most appropriate in the particular circumstances of the case.

55 See Supreme Court Rules 17(2) 18(4) 20(2) 23(1); Magistrates' Courts Rules 6(3)(a) 17(2)(a); *McKenzie v Farmers' Co-operative Meat Industries supra* 23; *Dusheiko v Milburn supra* 656; *Slomowitz v Vereeniging Town Council* 1966 3 SA 317 (A) 330; *Marais v Du Preez* 1966 4 SA 456 (E); *Evins v Shield Insurance Co Ltd supra* 825; Van Aswegen *Sameloop* 378–379.

Wanvoorstelling: berekening van skadevergoeding (Deel 2)

(*vervolg*)*

DJ Lötz
Blur LLM LLD
Professor in Handelsreg, Universiteit van Pretoria

3 INLEIDING

Aangesien 'n skadevergoedingsaksie op grond van sowel 'n bedrieglike as 'n nalatige wanvoorstelling (binne en buite kontraktuele verband) erken word,[1] kan die skadevergoedingsregsbeginsels in beide gevalle oor dieselfde kam geskeer word.[2] Dus is gewysdes wat met bedrieglike wanvoorstelling handel, *mutatis mutandis* in die onderhawige verband ook op nalatige wanvoorstelling van toepassing.[3]

4 POSITIEFREGTELIKE ANALISE

Vervolgens word 'n kronologiese positiefregtelike analise van regspraak gemaak deur eerstens na die feite van 'n beslissing te verwys om te bepaal of die wanvoorstelling *dolus dans causam contractui* of *dolus incidens* daarstel, waarna die *ratio decidendi* uitgelig en bespreek word.

4 1 *Trotman v Edwick*[4]

Trotman het aan Edwick 'n bedrieglike wanvoorstelling gemaak dat 'n aangrensende stuk grond deel van die *merx* vorm terwyl dit in werklikheid aan die stadsraad behoort het.

Die hof bevind[5] dat die bedrieglike wanvoorstelling *dolus dans causam contractui* was[6] en dat die eisoorsaak deliktueel van aard is:[7]

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* Sien 1997 *THRHR* 231–253.

1 *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A); *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A); *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (K).

2 Visser en Potgieter *Skadevergoedingsreg* (1993) 346; Woker en MeLennan "Bayer South Africa (Pty) Ltd v Frost" 1992 *SA Merc LJ* 376.

3 Sien Visser en Potgieter 347 wat hierdie benadering onderskryf.

4 1951 1 SA 443 (A). Die uitspraak is deur Van den Heever AR gelewer. Hoexter AR en Fagan AR het saamgestem. Die beslissing dra die goedkeuring van Trollip AR in *Ranger v Wykerd* 1977 2 SA 976 (A) weg.

5 449.

> "The litigant who sues on delict[8] sues to recover the loss which he has sustained because of the wrongful conduct of another . . .[9] On the facts before us it seems to me there can be only one logical answer: plaintiff was induced by fraud to buy for £11,212 10s something which was worth no more than £8,930 and the loss he suffered was the difference."[10]

Billikheid[11] is 'n belangrike faktor wat die hof by die berekening van die skadevergoeding in ag neem.[12] *In casu* wou die hof nie 'n algemene reël neerlê nie en beklemtoon dat elke geval op grond van die betrokke feite beoordeel moet word.[13]

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6 447–448. Wessels AR in *De Jager v Grunder* 1964 1 SA 446 (A) 467 is van mening dat *dolus incidens in casu* ter sprake was. Sien ook De Vos "Skadevergoeding en terugtrede weens bedrog by kontraksluiting" 1964 *Acta Juridica* 34; Christie *The law of contract in South Africa* (1991) 359. Hawthorne en Lotz *Kontraktereg vonnisbundel vir studente* (1994) 71 is van mening dat kragtens die getuienis wat *in casu* voorgelê is, dit geen verskil maak of die bedrieglike wanvoorstelling as *dolus dans causam contractui* of *dolus incidens* beskou word nie.

7 449.

8 Sou die eisgrond kontraktueel wees, bevind die hof (449) dat die benadeelde "sues to have his bargain or its equivalent in money or in money and kind".

9 Hierdie beginsel is met goedkeuring in *Colt Motors (Edms) Bpk v Kenny* 1987 4 SA 378 (T) 390 aangehaal.

10 Dus word die skadevergoeding bereken as die verskil tussen die *pretium* en die werklike waarde van die *merx*. As gesag word *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* 1936 TPD 209 (waar nalatigheid ter sprake was) en *Beukes v Bekker* 1924 EDL 4 aangehaal. Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 318 ev; Van der Merwe "Wanbeskouings oor wanvoorstelling" 1964 *THRHR* 197 onderskryf hierdie benadering. Steyn HR in *De Jager v Grunder* hierbo 449 interpreteer die skadevergoedingsformule *in casu* as "die verskil tussen die prys wat betaal is en die *billike waarde* ten tyde van die koop" (my kursivering). Sien ook *Scheepers v Handley* 1960 3 SA 54 (A) 58 waar dieselfde interpretasie gegee word. Daarenteen interpreteer Malan AR in *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* 1958 1 SA 479 (A) 484 die skadevergoedingsformule *in casu* as "the difference between the purchase price and the *market price* at the time of the sale" (my kursivering). In *Ranger v Wykerd* hierbo 987 interpreteer Jansen AR die *damnum in casu* as die verskil tussen die "price paid" en die "value of the *merx*", maar beslis verder: "[T]he difference between the price paid and the value of the *merx* cannot be accepted as an absolute measure of damages, valid in all circumstances . . ." Wessels AR in *De Jager v Grunder* hierbo 468 is van mening dat 'n sg "billike bedrag" (synde 'n denkbeeldige som) as objektiewe verwysingsmaatstaf onsuiwer is en dat die relevante waarde in die onderhawige geval eerder die *pretium* is wat die koper in werklikheid bereid was om vir die *merx* te betaal indien hy nie mislei was nie. Sien ook Visser en Potgieter 348; Visser en Potgieter *Law of damages through the cases* (1993) 418; Hawthorne en Lotz 70–71; Van der Merwe, Van Huyssteen, Reinecke, Lubbe en Lotz *Contract. General principles* (1993) 107 ev; Christie 358; Cameron "Measuring delictual damages for fraudulent misrepresentation" 1982 *SALJ* 102; De Vos 1964 *Acta Juridica* 34 ev; Kahn "Random reflections on damages for misrepresentation" 1961 *SALJ* 144; Festenstein 1961 *Annual Survey of SA Law* 91.

11 Die betoog dat die maatstaf *in casu* onbillik is omdat die prysfaktor kontraktueel en onafhanklik van werklike waardes bepaal word, word deur die hof (449) verwerp.

12 449. Indien skadevergoeding in die onderhawige geval op 'n kontraktuele basis bereken word, sal dit meebring dat die wanvoorstelling tot 'n kontraktuele beding verhef word: Christie 358.

13 450. Volgens De Vos 1964 *Acta Juridica* 33 ev moet die skadevergoedingsmaatstaf in geval van (a) *dolus dans causam contractui* negatiewe interesse wees, synde die verskil in die waarde van die onderskeie prestasies; en (b) *dolus incidens* die verhoogde waarde van die misleide se prestasie (indien enige) wat die bedrieglike wanvoorstelling te weeg gebring het. Sien ook Christie 358.

4 2 *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd*[14]

Hier het die appellant 'n sitrusplaas vir R111 000 aan die respondent verkoop. Die appellant het bedrieglik aan die respondent voorgegee dat daar 5 750 sitrusbome is wat op 35 morg aangeplant is. In werklikheid was daar slegs 4 892 (858 minder) bome op 25 morg. Die verskil tussen die *pretium* en die billike waarde van die *merx* (R22 000) word deliktueel op grond van bedrieglike wanvoorstelling geëis.

Nadat die hof bevind het dat die bedrieglike wanvoorstelling *in casu* op *dolus incidens* neerkom,[15] beslis appèlregter Malan soos volg:[16]

> "In actions for damages based upon fraudulent misrepresentation[17] the measure of damages is the actual patrimonial loss suffered by the purchaser as the reasonable and natural or the intended result of the misrepresentation . . . The method of assessing the loss must in every case be determined upon its own facts[18] and the present enquiry must be directed to the respect in which, and the extent to which, the mind of the plaintiff, as an ordinary reasonable buyer, would have been affected by the representations[19] in fixing an increased price for the property purchased."[20]

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14 1958 1 SA 479 (A). Hierdie uitspraak is deur Malan AR gegee, waarmee Fagan HR, Hoexter AR en Steyn AR saamgestem het. Hall WnAR het oor die *quantum* skadevergoeding met Malan AR saamgestem, maar 'n afsonderlike uitspraak gelewer.

15 482; sien ook Christie 359.

16 483. Mulligan "Damages for fraudulent misrepresentation: the citrus case" 1958 *SALJ* 131 beklemtoon dat 'n oordrewe billikheidsgevoel in die onderhawige geval nie bestaande deliktuele beginsels moet verdring nie.

17 Die hof beslis (483) ook dat daar bepaal moet word of die bedrieglike wanvoorstelling die waarde van die *merx* as 'n eenheid, of as 'n ondeelbare geheel, of 'n bepaalde of deelbare gedeelte daarvan raak.

18 Myns insiens is die relevante deliktuele beginsels nie korrek op die feite *in casu* toegepas nie. Sien ook Kahn 1961 *SALJ* 145.

19 Mulligan 1958 *SALJ* 131–132 wys daarop dat die wanvoorstelling slegs "'n" en nie "dié" oorsaak vir kontraksluiting hoef te wees nie.

20 *Trotman v Edwick* hierbo word as gesag aangehaal, maar voormelde gewysde word soos volg van hierdie saak onderskei: (a) In *Trotman* het die bedrieglike wanvoorstelling die waarde van die *merx* as 'n ondeelbare geheel geraak, terwyl *in casu* slegs 'n gedeelte van die *merx* se waarde daardeur geraak is; en (b) in *Trotman* was daar 'n duidelike kousale verband tussen die bedrieglike wanvoorstelling en die skade, terwyl daar *in casu* geen aanduiding is dat die bedrieglike wanvoorstelling die koper oorreed het om die verhoogde *pretium* van R22 000 te betaal nie. Sien ook Christie 359; Van der Merwe ea 107 ev; Cameron 1982 *SALJ* 103; Festenstein 1961 *Annual Survey of SA Law* 92. Hierdie benadering *in casu* word met goedkeuring deur Wessels AR in *De Jager v Grunder* hierbo 469 aangehaal. Jansen AR is in *Ranger v Wykerd* hierbo 988 van mening dat die hof *in casu* in effek skadevergoeding op 'n kontraktuele basis bereken en toegestaan het. Van der Merwe en Olivier 319 kritiseer die bevinding *in casu* omdat die hof nie suiwer deliktuele beginsels by die bepaling van die skadevergoeding toegepas het nie, deur die waarde van die ontbrekende boompies in berekening te bring. De Vos 1964 *Acta Juridica* 35 kritiseer ook hierdie beslissing omdat die toepaslike deliktuele beginsels nie korrek op die feite van die saak toegepas is nie. Van der Merwe 1964 *THRHR* 197 is van mening dat die skade *in casu* die verskil tussen die waarde van die *merx* en die *pretium* is. Sien ook Lotz "Berekening van skadevergoeding by *dolus incidens*" 1988 *THRHR* 92 wat bevestig dat in geval van 'n wanvoorstelling 'n vergelyking van die onderskeie prestasies nie die enigste wyse is waarop skadevergoeding berekenbaar is nie. Woker en McLennan 1992 *SA Merc LJ* 373 is ook van mening dat die hof *in casu* 'n kontraktuele skadevergoedingsmaatstaf aangewend het "although the court paid lip service to delictual principles".

Waarnemende appèlregter Hall beslis:[21]

> "The respondent is entitled to his *id quod interest*, and this must flow from the misrepresentation made by the seller, it appears to me that the only matter in respect of which he can claim damages is the shortage in the number of trees planted in the citrus orchard."

Aldus staan die hof R2 983 skadevergoeding toe, synde die waarde van die ontbrekende bome.[22] Die respondent kan nie vergoeding verhaal bloot omdat hy 'n slegte transaksie gesluit het nie maar kan slegs skadevergoeding eis vir die nadeel wat die bedrieglike wanvoorstelling veroorsaak het.[23]

4 3 *Scheepers v Handley*[24]

Scheepers het die plase Lansdowne en Roodekop per openbare veiling voetstoots aan Handley verkoop. Die appellant het mondelings en kragtens die koopkontrak bedrieglik aan die respondent voorgegee dat die totale oppervlakte van die *merx* 997 morg was, terwyl dit in werklikheid 766 morg beslaan het. Skadevergoeding van R7 392, synde R32 per ontbrekende morg, tesame met verhoogde hereregte, is op grond van die bedrieglike wanvoorstelling,[25] alternatief nalatige wanvoorstelling, deliktueel geëis.[26]

Die hof beslis:[27]

> "[T]he essential enquiry is how much more the purchaser has been induced to pay[28] by reason of his having relied upon the truth of the representation . . ."[29]

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21 489.

22 488. Volgens Kahn *Contract and mercantile law through the cases* (1971) 135 pas die hof *in casu* die algemene toets vir kontraktuele skade toe. Van der Merwe 1964 *THRHR* 197 is van mening dat in geval van 'n wanvoorstelling denkbeelde van die kontraktereg beswarend op die deliktereg inwerk. Van der Merwe "Aspects of the law of contractual torts" 1978 *SALJ* 325 en Woker en McLennan 1992 *SA Merc LJ* 373 wys daarop dat die benadeelde *in casu* "the benefit of his bargain" (soos in geval van kontraktuele skade) gekry het en dat die deliktuele beginsel om die *status quo ante* te herstel, verkrag is. Trollip AR in *Ranger v Wykerd* hierbo verwerp lg standpunt. Ander skrywers wat hierdie beslissing afkeur, is Mulligan 1958 *SALJ* 132–133; Festenstein 1961 *Annual Survey of SA Law* 92–93; De Wet 1960 *Annual Survey of SA Law* 92–93; Kahn 1961 *SALJ* 145–146.

23 Visser en Potgieter 348; Cameron 1982 *SALJ* 103. In *Colt Motors (Edms) Bpk v Kenny* hierbo word die hof se benadering *in casu* onderskryf.

24 1960 3 SA 54 (A). Hierdie uitspraak is deur Ogilvie Thompson AR gegee, waarmee Schreiner AR, De Beer AR, Botha WnAR en Holmes WnAR saamgestem het.

25 Die hof beslis nie uitdruklik of 'n mens *in casu* met *dolus dans causam contractui* of *dolus incidens* te make het nie, maar by implikasie blyk dit dat die hof (59) bevind dat *dolus incidens* aanwesig was: Kahn 1961 *SALJ* 145; De Vos 1964 *Acta Juridica* 37.

26 Die eiser het hom *in casu* nie eers die moeite getroos om die markwaarde van die *merx* te bewys nie.

27 59.

28 Wat myns insiens 'n bevestiging is dat *dolus incidens in casu* ter sprake was. Die hof hanteer die saak inderdaad as een van *dolus incidens* en skadevergoeding word toegeken asof daar kontrakbreuk was: Cameron 1982 *SALJ* 104.

29 *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo word as gesag aangehaal. Trollip AR in *Ranger v Wykerd* hierbo is van mening dat die skadevergoeding wat *in casu* toegestaan is, nie aan kontraktuele skade gelykgestel kan word nie. Daarenteen huldig Jansen AR in *Ranger v Wykerd* hierbo 988 die standpunt dat skadevergoeding *in casu* inderdaad op 'n kontraktuele basis bereken en toegestaan is. Woker en McLennan 1992 *SA Merc LJ* 373 is ook van mening dat die hof *in casu* skade op 'n kontraktuele basis bereken het. Van der Merwe en Olivier 319 kritiseer hierdie beslissing

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'n Belangrike faktor wat die hof in ag neem, is op watter aspek van die *merx* die wanvoorstelling spesifiek betrekking het.[30]

4 4 *De Jager v Grunder*[31]

De Jager en Grunder het 'n ruilkontrak gesluit. Grunder se prestasieverpligting (totale waarde R97 000) het uit die plaas Saucyskuil tesame met vee en plaasgereedskap bestaan. De Jager se pretasieverpligting het die plase Magermanskraal (waarde R24 000) en Melkhoutefontein (waarde R30 000) tesame met vee, plaasgereedskap, R7 000 kontant en 'n onderneming om Grunder se verband ter waarde van R36 000 oor Saucyskuil oor te neem, bestaan. De Jager het bedrieglik voorgegee dat daar 9 000 bome ter waarde van R18 000 op die plaas Magermanskraal is. In werklikheid was daar nie meer as 5 000 bome ter waarde van R1 544 op voormelde plaas nie. 'n Deliktuele skadevergoedingseis[32] op grond van die bedrieglike wanvoorstelling (wat op *dolus incidens* neergekom het[33]), is vir die verskil in die bome se waarde (R16 456) ingestel. Die hof *a quo* het R15 000 skadevergoeding toegestaan.

Hoofregter Steyn beslis in appèl:[34]

> "Die bestaan en omvang van skade is 'n feitevraag,[35] en daar is so 'n verbluffende verskeidenheid van moontlike gevalle van bedrogskade in kontraktuele verband . . . dat dit onwenslik sou wees, indien nie gevaarlik nie, om hulle almal in 'n enkele eenselwige patroon te wil indwing. Wat bewys moet word, is werklike skade, in kousale verband met die bedrog, en om te sê dat werklike skade, in so 'n verband, alleen kan blyk uit 'n waardevergelyking tussen prestasie en teenprestasie, en uit niks anders nie, is na my oordeel onjuis . . .[36] Die moontlikheid dat

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omdat dit blyk dat die hof meer begaan is oor die vraag wat die eiser se vermoënsposisie sou wees indien die *merx* die voorgestelde omvang sou gehad het. De Vos 1964 *Acta Juridica* 37 ev is van mening dat die hof *in casu* die regsbeginsels verkeerd op die tersaaklike feite toegepas het. Sien ook Festenstein 1961 *Annual Survey of SA Law* 93.

30 *Beukes v Bekker* 1924 EDL 4 word as gesag aangehaal (60). *In casu* het Handley ook die verbeteringe op die plase, wat hy inderdaad reeds ontvang het, in berekening gebring om die waarde van die ontbrekende grond op R32 per morg te stel, terwyl die werklike waarde daarvan slegs R20 per morg was. Vervolgens is Handley op R4 620 (in plaas van R7 392) skadevergoeding geregtig. Hierdie benadering is volgens Rumpff AR in *De Jager v Grunder* hierbo 459 onsuiwer omdat die wesenlike aard van die skade wat vergoed moet word, hierdeur vertroebel word en dit op vervulling van die kontrak neerkom.

31 1964 1 SA 446 (A). Die meerderheidsuitspraak is deur Steyn HR gegee waarmee Botha AR en Wessels AR (wat ook afsonderlike uitsprake gegee het), saamgestem het. Die minderheidsuitsprake is deur Rumpff AR en Hoexter WnAR gelewer. Trollip AR in *Ranger v Wykerd* hierbo is van mening dat die meerderheids- en minderheidsuitspraak *in casu* "did not depart from the elear distinetion between the delietual and contraetual measures of damages that had been drawn in *Trotman's* ease and observed and applied in *Bill Harvey's* and *Scheepers'* eases".

32 Sien Hoexter WnAR 478 wat beaam dat die aksie *in casu* deliktueel is.

33 Aldus Steyn HR 456 en Wessels AR 472 van die beslissing. Sien De Vos 1964 *Acta Juridica* 39 42; Hoexter WnAR het myns insiens die bedrieglike wanvoorstelling *in casu* oor die boeg van *dolus dans causam contractui* gegooi. Rumpff AR 462 is van mening dat *dolus dans causam contractui in casu* ter sprake is. Sien ook Hawthorne en Lotz 78.

34 451.

35 Van der Merwe en Olivier 320 gee toe dat dit 'n feitevraag is of skade gely is, maar waarsku dat die veelvuldigheid van moontlike feitekomplekse nie beginsel-grondslae mag affekteer nie. Sien Van der Merwe 1964 *THRHR* 196 waar hierdie standpunt herhaal word.

36 Hierdie waardevergelykingsmetode as skademaatstaf is vir die hof (452) slegs in geval van *dolus causam dans contractui* wenslik. De Vos 1964 *Acta Juridica* 43 is van mening dat die

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skade met 'n kontraktueel verhaalbare bedrag kan ooreenstem,[37] sonder dat dit tuis te bring is onder so 'n waardevergelyking, kan nie uitgesluit word nie . . .[38] Om 'n koper teen sulke skade herstel te ontsê by 'n bedrogsaksie, waar die bedrieër hom presies daardie skade met voorbedagte rade aangedoen het, slegs omdat die koper nie buitendien 'n slegte koop aangegaan het nie, en om die bedrieër sodoende bo 'n kontrakbreker sonder bedrog te begunstig, sou 'n anomalie wees[39] wat ek nie sonder dwingende regsgesag kan onderskryf nie."[40]

Verder beslis hoofregter Steyn dat by meervoudige prestasies die voordeel van een prestasie (as gunstige newewerking) slegs teen die nadeel van 'n ander prestasie verreken kan word indien daar 'n kousale band tussen die bedrog, skade, voordeel en prestasies bestaan.[41] Hoofregter Steyn bevind dat voormelde kousale band *in casu* ontbreek en dat die gunstige aard van een prestasie nie vir die skade van 'n ander prestasie, wat deur die bedrog veroorsaak is, in die

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hof se benadering aangaande kousaliteit onder verdenking staan omdat die vraag om kousaliteit in geval van *dolus incidens* te bepaal, daaruit bestaan of die wanvoorstelling "'n" oorsaak en nie "dié" oorsaak vir kontraksluiting was nie.

37 Vir Van der Merwe 1964 *THRHR* 197 is dit "moeilik om in te sien hoe die berekening van skadevergoeding op grond van 'n onregmatige daad wat voor kontraksluiting gepleeg is, ooit die 'patroon van kontraktuele verhaalbaarheid' kan volg". Hawthorne en Lotz 78 wys tereg daarop dat hierdie ooreenkoms bloot toevallig is.

38 *Corbett v Harris* 1914 CPD 535; *Beukes v Bekker* hierbo en *Scheepers v Handley* hierbo word as gesag aangehaal. Steyn HR beslis (452): "By 'n aksie van hierdie aard is die bedrog trouens nie van die kontrak los te maak nie . . . Dit hoef dus geen verbasing of verdenking van onjuistheid te wek indien die skadeberekening in 'n bepaalde geval die patroon van kontraktuele verhaalbaarheid volg of by benadering daarmee ooreenstem nie." Van der Merwe en Olivier 181 318–328 kritiseer hierdie benadering omdat die vervullingsinteresse van 'n kontrak met deliktuele skade gelykgestel word. Sien ook Van der Merwe 1964 *THRHR* 196 en "Die *conditio sine qua non*-toets vir oorsaak en gevolg" 1965 *THRHR* 173 waar soortgelyke kritiek geopper word. *Contra* McKerron *The law of delict* (1971) 112 wat om regspolitieke redes die benadering van die hof *in casu* onderskryf. Hawthorne en Lotz 78 wys tereg daarop dat indien daar eenmaal aanvaar is dat *dolus incidens in casu* ter sprake is, skadevergoeding suiwer ooreenkomstig deliktuele beginsels bereken word. Sien in die algemeen Lubbe "The assessment of loss upon cancellation of breach of contract" 1984 *SALJ* 419.

39 Van der Merwe en Olivier 321 kritiseer hierdie uitgangspunt omdat "totaal ongelyksoortige onregmatige handelinge" met mekaar vergelyk word. Sien ook Van der Merwe 1964 *THRHR* 198 waar soortgelyke kritiek geopper word.

40 Jansen AR is in *Ranger v Wykerd* hierbo 988 van mening dat Steyn HR *in casu* skadevergoeding in effek op 'n kontraktuele basis bereken en toegestaan het. Van der Merwe en Olivier 318 ev kritiseer hierdie uitspraak en sê dat "denkbeelde uit die gebied van die kontraktereg beswarend inwerk op die . . . deliktereg". Verder verklaar Van der Merwe en Olivier 320 dat die benadeelde *in casu* in 'n beter vermoënsposisie geplaas word as dié waarin hy was voor die wanvoorstelling gemaak is en dat die "kontrakteregtelike denkbeelde die toepaslike deliktuele beginsels besmet". Voormelde siening word deur Van der Merwe 1964 *THRHR* 198 en 1978 *SALJ* 318 herhaal. De Vos 1964 *Acta Juridica* 47 keur ook nie die beslissing goed nie. In die vorige uitgawe van De Wet en Yeats *Kontraktereg en handelsreg* (1978) 39 is die skrywers se standpunt dat die benadeelde in die onderhawige geval niks kan eis nie omdat geen skade gely is nie. Hierdie beslissing is met goedkeuring in *Coomers Motor Spares (Pvt) Ltd v Albanis* 1979 2 SA 623 (R) aangehaal, in welke saak die omvang van die skadevergoeding bereken is as die verskil tussen die markwaarde van die *merx* en die *pretium* daarvan. Sien ook Hawthorne en Lotz 71–78; Van der Merwe ea 107 ev.

41 453. Trollip AR beslis in *Ranger v Wykerd* hierbo 991 dat in geval van 'n bedrieglike wanvoorstelling waar 'n kontrak ter sprake is, die kousale band tussen die delik en skade moeilik bepaalbaar is.

onderhawige geval kan vergoed nie.[42] Die kernvraag is: Hoeveel minder kontant het die benadeelde ontvang of hoeveel meer het hy betaal omdat hy hom op die waarheid van die wanvoorstelling verlaat het?[43] Aldus word die appèl deur hoofregter Steyn van die hand gewys.[44]

Appèlregter Wessels is ook van mening dat die appèl van die hand gewys moet word[45] en beslis soos volg:[46]

> "In 'n bedrogaksie waar skadevergoeding gevorder word, moet 'n eiser bewys dat die verweerder hom (d.i. die eiser) deur opsetlike misleiding daartoe beweeg het om tot sy vermoënsregtelike nadeel te handel, en dat hy as gevolg daarvan werklike (d.i. bepaalbare) vermoënsregtelike verlies gely het . . .[47] Hierdie regsreël is van algemene toepassing by bedrogaksies, en dus ook waar beweer word dat die vermoënsverlies in kontraktuele verband gely is."[48]

Verder beslis appèlregter Wessels dat die korrekte grondslag vir die berekening van skadevergoeding[49] in geval van 'n deliktuele skadevergoedingsaksie op grond van 'n bedrieglike wanvoorstelling 'n vergelyking is tussen die *pretium* en dit wat die koper sou betaal het[50] indien hy nie mislei is nie.[51]

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42 455–456. Hierdie benadering word deur Stegmann R in *Colt Motors (Edms) Bpk v Kenny* hierbo onderskryf. Sien ook Lotz 1988 *THRHR* 92 wat bevestig dat skade in die onderhawige geval gely kan word waar die teenprestasie wat die misleide ontvang, nie minder (of meer) werd is as die prestasie wat hy self gelewer het nie. Reinecke "Die elemente van die begrip skade" 1976 *TSAR* 30 is van mening dat groter wins wat die misleide *in casu* in afwesigheid van die wanvoorstelling kon gemaak het, nie as skade beskou kan word nie.

43 Steyn HR 456. Jansen AR in *Ranger v Wykerd* hierbo 988 beslis dat hierdie berekeningswyse (wat op regspolitieke gronde berus) van skadevergoeding *in casu* "should not be read as clear and binding recognition of this as the appropriate measure of damage . . ." Van der Merwe en Olivier 320 is van mening dat skadevergoeding in die onderhawige geval steeds bereken moet word "deur 'n vergelyking te maak tussen die vermoënsregtelike posisie van die eiser voor en na pleging van die onregmatige daad". Christie 359 is van mening dat regspolitieke oorwegings die uitspraak *in casu* regverdig.

44 456; sien ook Cameron 1982 *SALJ* 104–106.

45 466.

46 467.

47 *Trotman v Edwick* hierbo; *Bill Harvey's Investments Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo en *Scheepers v Handley* hierbo word as gesag aangehaal. Wessels AR 647 beklemtoon dat 'n oppervlakkige beskouing van voormelde gewysde daartoe aanleiding kan gee dat die grondslag waarop die werklike vermoënsverlies in elke besondere geval hierbo bepaal is, tot 'n regsreël verhef word, met die gevolg dat hierdie sg "regsreël" verkeerdelik as skademaatstaf in 'n feitekompleks toegepas word waar dit glad nie tuishoort nie.

48 Van der Merwe en Olivier 324 is van mening dat deur die wanvoorstelling weg te dink, die wanvoorstelling waar gemaak word.

49 Wessels AR 474 bevind ook dat die toevallige feit dat die bedrogskade gelyk aan kontraktuele skade is, nie vir 'n hof 'n afskrikking kan wees om die skadevergoeding te weier nie.

50 By gebrek aan *facta probanda* om aan te toon wat die koper, in afwesigheid van die bedrieglike wanvoorstelling, vir die *merx* sou betaal het, bevind Wessels AR 467 dat die billike waarde van die *merx* as bewyskragtig aanvaar kan word, wat *in casu* inderdaad gedoen is.

51 469. Sien egter *Trotman v Edwick* hierbo waar beslis is dat die vergelykingsmaatstaf in geval van bedrieglike wanvoorstelling die verskil tussen die *pretium* en die werklike waarde van die *merx* is.

Appèlregter Rumpff bevind dat die appèl gehandhaaf moet word omdat die bedrieglike wanvoorstelling die waardebepaling van al die prestasies beïnvloed het, welke invloed nie bewys is nie.[52] Gevolglik moet die standpunt dat die koper se skade *in casu* die verskil tussen die *pretium* wat op Magermanskraal gedurende die onderhandelinge geplaas en die markwaarde daarvan is, verwerp word.[53] Appèlregter Rumpff beslis verder:[54]

> "Skadevergoeding by kontrakbreuk in ons reg word benader vanuit die standpunt dat die benadeelde, wat sy vermoë betref, in die posisie geplaas moet word asof die kontrak behoorlik uitgevoer is. By delik is dit natuurlik anders. Daar is die grondslag dat die benadeelde in die posisie geplaas moet word asof daar nooit 'n delik plaasgevind het nie . . .[55] Wanneer 'n koper beweer dat hy as gevolg van 'n bedrieglike wanvoorstelling 'n koopkontrak aangegaan het, kan hy kansellasie van die kontrak eis, met teruggawe wedersyds van dit wat kragtens die kontrak oorhandig is, en gevolgskade as daar is, om hom in dieselfde posisie te plaas asof daar geen delik plaasgevind het. Hy kan egter ook besluit om hom aan die kontrak te hou en 'n bedrag as skadevergoeding te vra wat hom in dieselfde posisie sal plaas ten opsigte van sy vermoë, asof die bedrog nie gepleeg is nie . . . As die koper die *merx* hou en kla dat hy op grond van die wanvoorstelling te veel betaal het, moet hy bewys wat hy wel sou betaal het as daar geen wanvoorstelling was nie . . . [D]erhalwe kan, by gebrek aan ander getuienis, aanvaar word, op grond van billikheid teenoor beide die koper en verkoper, dat die koper die markwaarde[56] van die *merx* sou aangebied het en dat die verkoper dit sou aanvaar het . . . [B]y 'n geding van hierdie aard, om vas te stel of die koper skade gely het, [moet] die waarde van wat uit die koper se boedel uitgegaan het, kragtens die kontrak, geweeg . . . word teen die waarde van wat ingekom het. Is die waarde van die *merx* minder as die koopprys, het die koper skade gely. Dit moet beklemtoon word dat hierdie skade wat die koper op grond van die wanvoorstelling ly, suiwer delikskade is, en nie skade wat deur kontrakbreuk veroorsaak is nie, en derhalwe kan die koper nie onder die dekmantel van 'n aksie vir skadevergoeding weens delik probeer om 'n kontrak af te dwing nie.[57] Hoe presies die omvang van die skade bereken moet word, hang af van die omstandighede van elke geval."[58]

Waar die *merx* net uit een saak bestaan, beslis waarnemende appèlregter Hoexter, is die vermoënskade (in geval van 'n deliktuele eis op grond van 'n bedrieglike

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52 462.

53 *Ibid.*

54 457–460, een van die minderheidsuitsprake.

55 *Trotman v Edwick* hierbo word as gesag aangehaal. Van der Merwe 1964 *THRHR* 196 is, myns insiens ten onregte, van mening dat die hof *in casu* in werklikheid skadevergoeding op 'n kontraktuele basis toegestaan het.

56 Rumpff AR 458 bevind dat indien die koper in afwesigheid van die wanvoorstelling minder of meer as die markwaarde van die *merx* in afwesigheid van die wanvoorstelling sou betaal het, dit deur hom bewys moet word en word skade gevolglik slegs gely indien die waarde van die *merx* minder werd is as die *pretium* daarvan.

57 Hierdie passasie is met goedkeuring in *Colt Motors (Edms) Bpk v Kenny* hierbo 391 aangehaal.

58 Hierdie benadering word deur Van der Merwe en Olivier 321–323; Van der Merwe 1964 *THRHR* 198, 1978 *SALJ* 318 onderskryf. De Vos 1964 *Acta Juridica* 41 is van mening dat die gevolgtrekking waartoe Rumpff AR op die feite van die saak gekom het, korrek is, maar dat daar in beginsel geen noemenswaardige verskil tussen die argumente in die meerderheids- en minderheidsuitspraak bestaan nie. *Contra* Cameron 1982 *SALJ* 107 wat van mening is dat die minderheidsuitspraak *in casu* onbillik is. Dus word die swaaie-en-draaie-beginsel, wat deur die meerderheidsuitspraak verwerp is deur die minderheidsuitspraak aanvaar: Woker en McLennan 1992 *SA Merc LJ* 374.

wanvoorstelling) die verskil tussen die markwaarde en die *pretium* van die *merx*.[59] Waar die *merx* uit meerdere sake bestaan, is die vraag of die betrokke koopkontrak (nie die *merx* nie) regtens deelbaar is.[60] Indien daar slegs een ondeelbare koopkontrak is, moet die markwaarde van die hele *merx* (al bestaan dit uit meer as een saak) met die *pretium* vergelyk word om vas te stel of die koper vermoënskade gely het.[61] Vervolgens beslis waarnemende appèlregter Hoexter:[62]

> "In die onderhawige saak was daar regtens net een ondeelbare kontrak alhoewel albei die partye meer as een saak geruil het. Dit volg dat die markwaarde van die prestasie van die eiser vergelyk moet word met die markwaarde van die teenprestasie van die verweerder. As dit gedoen word dan blyk dit . . . dat die eiser nie daarin geslaag het nie om te bewys dat hy enige vermoënskade gely het."[63]

Gevolglik is ook waarnemende appèlregter Hoexter van mening dat die appèl gehandhaaf moet word.[64]

4 5 *Heckroodt v Nurick*[65]

Hier het Nurick opsetlik aan Heckroodt verswyg dat 'n huis se houtwerk met kewers besmet was. 'n Deliktuele eis[66] op grond van 'n bedrieglike wanvoorstelling (wat op *dolus dans causam contractui* neergekom het[67]) om die herstelkoste ten bedrae van R1 515 te verhaal, is ingestel.

Die hof is van mening dat die skade wat die koper ly, die bedrag is wat die koper minder vir die *merx* sou betaal het indien hy van die ware toedrag van sake bewus was.[68] Waar die koper die koopkontrak in stand hou, is die skadevergoedingsmaatstaf *in casu* die verskil tussen die markwaarde van die *merx* en die *pretium* wat hy, as gevolg van die bedrog, daarvoor betaal het.[69]

Absolusie van die instansie word gelas omdat die eiser nie die redelike herstelkoste aan en die markwaarde van die *merx* kon bewys nie.[70]

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59 476. Die vraag volgens Hoexter WnAR 477 is of die *hele merx* se markwaarde minder as die *pretium* is.

60 477.

61 *Ibid.* Die vraag in hierdie geval is of daar slegs een kontrak is, in welke geval die markwaarde van die prestasie van een party (as 'n ondeelbare geheel) met die markwaarde van die prestasie van die ander party (as 'n ondeelbare geheel) vergelyk word.

62 477.

63 Hierdie benadering word deur Van Der Merwe en Olivier 321–323 onderskryf.

64 477. De Vos 1964 *Acta Juridica* 47 huldig die standpunt dat die wese van die verskil tussen die meerderheids- en minderheidsuitspraak die verskil in benadering tot die kousaliteitsvraag is.

65 1966 4 SA 76 (W).

66 78.

67 Sien 77 waar die eiser beweer dat hy nie die koopkontrak sou gesluit het nie indien hy tydens kontraksluiting van die houtboorders bewus was.

68 78.

69 *Ibid.* In *McInnes v White* 1962 1 SA 26 (W) was daar 'n soortgelyke feitestel en bevinding as *in casu*. Hierdie beslissings is deur Trollip AR in *Ranger v Wykerd* hierbo verwerp. Van der Merwe en Olivier 326 keur hierdie beslissings goed omdat daar suiwerder tussen kontraktuele en deliktuele skade onderskei word. *Contra* Cameron 1982 *SALJ* 108–109 wat hierdie beslissings (myns insiens tereg) kritiseer omdat dit (a) 'n onbillike bewyslas op die benadeelde plaas; (b) onprakties is; en (c) oor geen teoretiese grondslag beskik nie. Christie 360 onderskryf ook nie hierdie beslissings nie.

70 78.

4 6 *Ranger v Wykerd*[71]

Ranger het 'n woonhuis met 'n swembad voetstoots van mevrou Wykerd (wat buite gemeenskap van goed getroud was) gekoop. Meneer Wykerd het bedrieglik aan Ranger voorgegee dat die swembad in 'n goeie toestand is, terwyl dit in werklikheid erg gelek het. Hierdie feit is ook bedrieglik deur mevrou Wykerd verswyg. Ranger laat die swembad herstel, welke herstelkoste R1 250 beloop en deliktueel[72] op grond van 'n bedrieglike wanvoorstelling (verswyging) van meneer en mevrou Wykerd geëis word.

Appèlregter Trollip bevind dat die appèl teen beide meneer en mevrou Wykerd gehandhaaf moet word en beslis:[73]

> "At the first blush it would seem clear that the reasonable and neeessary eost to appellant of remedying the defects of the swimming bath must constitute the patrimonial loss that he suffered through the respondents' fraud . . . For while the true measure of sueh loss is the difference between (a) the value of the property before the delict and (b) its value after the commission of the delict, (b) could ordinarily only be established by dedueting the reasonable eost of repairs from (a), sinee there is generally no market value for properties with defective swimming baths . . .[74] Does it make any difference that here the delict perpetrated by the respondents was fraud and not a wrongful act eausing physieal damage to the swimming bath? On the faets of this ease, I do not think so."[75]

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71 1977 2 SA 976 (A). Hierdie uitspraak is deur Trollip AR gegee, waarmee De Villiers AR, Kotzé AR en Miller AR saamgestem het. Die minderheidsuitspraak is deur Jansen AR gegee.

72 Trollip AR 991 beslis dat aangesien die eisoorsaak deliktueel is, slegs deliktuele (nie kontraktuele nie) skadevergoeding (waarvan die toepassing van die algemene deliktuele skadevergoedingsregbeginsels in geval van bedrieglike wanvoorstelling problematies is), geëis kan word. Jansen AR 986 beslis ook dat die eisoorsaak *in casu* deliktueel is.

73 992.

74 Trollip AR 994 gee toe dat die omvang van die skadevergoeding op grond van hierdie vergelykingsmaatstaf met kontraktuele skade ooreenstem, maar beslis: "[I]t does not follow that such damages are therefore exelusively contraetual and cannot be delictual, any more than it ean be said that they are purely delietual and eannot also be eontractual . . . It just so coineidentally happens that in one ease such cost of repairs may represent the amount required to make good the warranty in a contract, and in another ease it also measures the patrimonial loss caused by delict." Sien Woker en McLennan 1992 *SA Merc LJ* 373; Hawthorne en Lotz 87 wat hierdie sienswyse steun.

75 *McConnel v Wright* 1903 1 Ch 546 (CA) word as analoog gebruik om hierdie standpunt te illustreer en *Witwatersrand Gold Mining Co Ltd v Cowan* 1910 TPD 312 en *Erasmus v Davis* 1969 2 SA 1 (A) word as gesag aangehaal. Sien ook *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 2 SA 111 (K); *Glaston House (Pty) Ltd v Inag (Pty) Ltd* 1977 2 SA 846 (A); *Coomers Motor Spares (Pvt) Ltd v Albanis* hierbo; Burchell *Principles of delict* (1993) 127 waar die onderskeid van die berekeningsmetode tussen kontraktuele en deliktuele skade beklemtoon word. Die benadering van die hof *in casu* word prinsipieel deur Van der Merwe en Olivier 327–328; Christie 360; Van der Merwe ea 107 ev en Beek "Delictual liability for breach of contract" 1985 *SALJ* 226 onderskryf. Woker en McLennan 1992 *SA Merc LJ* 374 wys daarop dat ooreenkomstig die positiewe reg, die swaaie-en-draaie-beginsel net in geval van *dolus dans causam contractui* (mits die kontrak nie gekanselleer word nie) van toepassing is. Cameron 1982 *SALJ* 114–115 kritiseer hierdie "appropriate assumptions of fact"-benadering van die meerderheidsuitspraak omdat dit (a) onaanvaarbaar is dat die reg van veronderstellings afhanklik is om billikheid te bewerkstellig; (b) geen antwoord op die vraag gee of die voordele van die transaksie teen die nadele daarvan verreken moet word nie; en (c) soms onuitvoerbaar is. Myns insiens moet die kritiek onderskryf word.

Aangesien die waarde van die *merx*[76] en die redelike herstelkoste[77] bewys is, word R1 000 as skadevergoeding deur appèlregter Trollip toegestaan.[78]

Appèlregter Jansen beslis dat die appèl teenoor mevrou Wykerd gehandhaaf maar teen meneer Wykerd van die hand gewys moet word.[79] Hy beslis verder:[80]

> "It would lead to less misunderstanding if it is frankly recognized that in our law, for reasons of policy, in actions based on fraudulent misrepresentation bearing upon the conclusion of a contract, a contractual measure of damages (viz making good the representation) may be applied in appropriate circumstances, despite the fact that the representee's action is not based upon the contract, but founded in delict . . . [T]he damages recoverable[81] may, therefore, be assessed on the basis of the second respondent making good the representation. To this assessment the reasonable costs of repair are relevant and appropriate."[82]

4 7 *Colt Motors (Edms) Bpk v Kenny*[83]

'n Deliktuele skadevergoedingseis[84] op grond van 'n bedrieglike wanvoorstelling (wat op *dolus incidens* neergekom het[85]), is deur Colt Motors (Edms) Bpk teen Kenny ingestel.[86] Die bedrieglike wanvoorstelling het daarin bestaan dat Kenny aan Colt Motors (Edms) Bpk bedrieglik voorgegee het dat 'n voertuig, wat gedeeltelik ter vereffening van die *pretium* van 'n nuwe voertuig aangewend

76 R22 000, synde die *pretium* van die *merx*.

77 R1 000, synde die uitgawes om die swembad te herstel. Dus word die omvang van die skadevergoeding na analogie van fisiese (saak-)skade bereken. Christie 360 steun hierdie benadering omdat meer juridiese buigsaamheid hierdeur bewerkstellig word.

78 999. McLennan 1977 *Annual Survey of SA Law* 91 kritiseer hierdie uitspraak omdat dit onduidelik is of die "swaaie-en-draaie-beginsel" op alle gevalle van toepassing is, in welke geval dit soms onbillik kan wees waar 'n voordeel deur goeie onderhandelinge bekom is. Visser en Potgieter 354 vn 105 wys tereg daarop dat die meerderheidsbeslissing in *Ranger v Wykerd* hierbo 993 duidelik bedoel het dat die "swaaie-en-draaie-beginsel" nie in alle gevalle geld nie. Sien ook Visser en Potgieter *Cases* 409–418; Christie 358. Hawthorne en Lotz 87 is van mening dat op grond van die feite dit *in casu* nie saak maak of *dolus dans causam contractui* of *dolus incidens* bevind is nie.

79 990.

80 989–990.

81 Jansen AR 986 beslis dat die markprys van die *merx* soms, maar nie noodwendig nie, met die *pretium* kan ooreenstem.

82 Van der Merwe 1978 *SALJ* 325; Woker en McLennan 1992 *SA Merc LJ* 369 onderskryf hierdie minderheidsuitspraak wat bedrog meer effektief in die handelsverkeer aan bande sal lê. In *Davidson v Bonafede* 1981 2 SA 501 (K) waar 'n koopkontrak op grond van 'n bedrieglike wanvoorstelling gekanselleer is, beslis die hof dat die benadeelde (ongeag of die eis op delik, *restitutio in integrum* of die *actio empti* gegrond is), geregtig is op terugbetaling van die *pretium*, verhaling van verspilde koste, vergoeding vir verbeterings aan die *merx* aangebring en betaling van verspilde rente, met dien verstande dat gevorderde huurgelde, tesame met rente daarop, teen voormelde bedrae ten gunste van die verweerder verreken moet word. Cameron 1982 *SALJ* 113–114 kritiseer die aanwending van 'n kontraktuele vergelykingsmaatstaf in geval van 'n deliktuele skadevergoedingsaksie omdat (a) die onderskeid tussen kontraktuele en deliktuele skade (wat die appèlhof onderskryf) ondermyn word; (b) die gesag wat aangehaal word om hierdie standpunt te staaf, onder verdenking staan; en (c) regsonsekerheid daardeur bevorder word.

83 1987 4 SA 378 (T).

84 Sien 381 390; Lotz 1988 *THRHR* 93.

85 Sien 384.

86 Daar is ook twee ander eise ingestel maar dit is vir doeleindes van hierdie bespreking irrelevant.

moes word, 'n 1980 model is, terwyl dit in werklikheid 'n 1979 model was. As gevolg van hierdie wanvoorstelling is 'n hoër inruilwaarde ten bedrae van R1 550 op die voertuig geplaas wat dienooreenkomstig die balans van die *pretium* verminder het.[87]

Oor kousaliteit beslis die hof dat daar eerstens vasgestel moet word of die wanvoorstelling slegs een gedeelte of meerdere aspekte van die koopkontrak raak.[88] Regter Stegmann bevind *in casu* dat die moontlike winste[89] van die eiser met die swaaie nie teenoor die verliese[90] met die draaie in verrekening gebring kan word nie.[91]

Verder bevestig die hof dat die eiser *in casu* 'n kontraktuele skadevergoedingseis[92] kragtens die *actio empti* weens die verweerder se positiewe wanprestasie[93] het.[94] In hierdie geval, beslis die hof, is die eiser geregtig om op grond van die verweerder se kontrakbreuk 'n bedrag skadevergoeding te eis om hom finansieel in die posisie te plaas asof die kontrak reëlmatig[95] nagekom is.[96] Aangesien die eisoorsaak *in casu* uitsluitlik op delik gegrond is, was die hof aan die toepaslike deliktuele beginsels gebonde.[97]

Die hof beslis:[98]

> "Dit is egter onseker of daar gesê kan word dat daar een grondliggende beginsel is waarvolgens vermoënsverlies wat deur bedrieglike wanvoorstelling veroorsaak word, gemeet kan word. Die Appèlafdeling het verskeie benaderings goedgekeur, en daar is herhaaldelik beklemtoon dat die gepaste maatstaf vir skadevergoeding vir verlies weens bedrieglike wanvoorstelling in elke geval van die besondere feite

87 Die feite *in casu* is met die feite in *De Jager v Grunder* hierbo vergelykbaar: Lotz 1988 *THRHR* 93.

88 As gesag word Trollip AR se "swaaie-en-draaie-beginsel" in *Ranger v Wykerd* hierbo 991 aangehaal. *In casu* bevind die hof (389) dat slegs een aspek van die koopkontrak, synde die inruilwaarde, deur die bedrieglike wanvoorstelling geraak is.

89 Synde die wins wat die eiser by die herverkoop van die ingeruilde saak maak.

90 Synde die verhoogde waarde wat die eiser op die ingeruilde saak, agv die bedrieglike wanvoorstelling, geplaas het.

91 389, na analogie van die meerderheidsuitspraak in *De Jager v Grunder* hierbo. De Waal 1988 *De Rebus* 113 wys daarop dat 'n skadevergoedingsaksie op grond van 'n wanvoorstelling gewoonlik deliktueel is en dat negatiewe interresse tradisioneel toegestaan word, maar dat die rekeningkundige berekening daarvan 'n omstrede saak is.

92 Wat om 'n onverklaarbare rede nie ingestel is nie. Lotz 1988 *THRHR* 97 vra die vraag of 'n benadeelde in hierdie geval 'n vrye keuse tussen 'n deliktuele en 'n kontraktuele aksie het. Aangesien die appèlhof die sameloop van kontraktuele en deliktuele skadevergoedingseise erken (sien *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A)), is daar myns insiens regtens geen beletsel waarom beide aksies nie *in casu* ingestel kon word nie.

93 Deur 'n 1979-model voertuig ipv 'n 1980-model voertuig te lewer soos wat kontraktueel onderneem is.

94 390. Sien Lotz 1988 *THRHR* 97 wat daarop wys dat dit in die onderhawige geval selfs nadelig sal wees om 'n deliktuele en nie 'n kontraktuele skadevergoedingsaksie nie in te stel.

95 Synde dat 'n 1980-model motor inderdaad deur die verweerder gelewer is.

96 390.

97 *Ibid.* As gesag word *Caxton Printing Works (Pty) Ltd v Transvaal Advertising Contractors Ltd* hierbo en *De Jager v Grunder* hierbo aangehaal. Sien ook De Waal 1988 *De Rebus* 113 ev.

98 931.

van die geval afhang . . .[99] Die metode waarop die vermoënsvermindering bewys moet word, is dus 'n feitevraag wat van een geval na 'n ander kan verskil . . . Waar die delik bedrieglike wanvoorstelling is, is die kernvraag hoeveel meer die eiser deur die bedrieglike wanvoorstelling oorreed is om te betaal as wat hy sou betaal het indien die wanvoorstelling nie gemaak is nie."

Regter Stegmann wys daarop dat die skadebepaling by bedrieglike wanvoorstelling in een van die volgende kategorieë kan val:[100]

(a) 'n Vergelyking van die markwaarde van die eiser se boedel voor en na pleging van die delik.[101] By *dolus dans causam contractui* is hierdie die korrekte berekeningsmetode waar die waardes van die prestasie en teenprestasie vergelykbaar is.[102]

(b) Waar die redelike herstelkoste (wat deur deskundige getuienis bewys moet word) die skade verteenwoordig omdat dit onprakties is om die betrokke boedelwaardes voor en na pleging van die delik direk te bewys.[103] Hierdie metode is 'n uitbreiding van kategorie (a) hierbo.[104]

(c) Die prysverhoging (wat nie 'n kontraktuele maatstaf verteenwoordig nie[105]) wat deur die bedrieglike wanvoorstelling veroorsaak is, sonder bewys wat die markwaarde (markprys) of herstelkoste[106] is.[107] Die kernvraag in hierdie geval is hoeveel meer die benadeelde deur die bedrieglike wanvoorstelling oorreed is[108] om vir die *merx* te betaal.[109] Dus is hierdie metode die aangewese vergelykingsmaatstaf wat in geval van *dolus incidens* gebruik moet word.[110]

Die hof stel 'n praktiese benadering voor waarvolgens deliktuele skade op grond van 'n bedrieglike wanvoorstelling berekenbaar is, welke benadering soos volg saamgevat kan word:[111]

(a) Daar moet eerstens vasgestel word of die bedrieglike wanvoorstelling deel van 'n kontraktuele beding vorm en of die eisoorsaak deliktueel is. In eersgenoemde geval word skadevergoeding op kontraktuele beginsels bereken en in laasgenoemde geval is deliktuele beginsels ter sprake.[112]

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99 *Trotman v Edwick* hierbo; *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo; *Scheepers v Handley* hierbo; *De Jager v Grunder* hierbo en *Ranger v Wykerd* hierbo word as gesag aangehaal. Sien ook Lotz 1988 *THRHR* 93.

100 391–395. Sien ook Lotz 1988 *THRHR* 93–94; De Waal 1988 *De Rebus* 113–114.

101 Hierdie vergelykingsmetode is in *Trotman v Edwick* hierbo gebruik, welke vergelykingsmaatstaf ook in geval van saakbeskadiging aangewese is: Lotz 1988 *THRHR* 94.

102 Visser en Potgieter 351; Lotz 1988 *THRHR* 94.

103 *Erasmus v Davis* hierbo word as gesag aangehaal. Hierdie wyse van skadebepaling is in *Ranger v Wykerd* hierbo aangewend: Lotz 1988 *THRHR* 94.

104 Visser en Potgieter 351; Lotz 1988 *THRHR* 94.

105 Sien die meerderheidsuitspraak van *Ranger v Wykerd* hierbo.

106 Maw gevalle waar die getuienis aandui dat die benadeelde nooit bedoel het om 'n *pretium* wat met die markwaarde verband hou, te betaal nie en deur die bedrieglike wanvoorstelling oorreed is om meer vir die *merx* te betaal as wat hy andersins sou gedoen het.

107 Hierdie berekeningsmetode is in *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo; *Scheepers v Handley* hierbo en *De Jager v Grunder* hierbo gebruik.

108 Die verskil tussen die bedrag wat die benadeelde in afwesigheid van die bedrieglike wanvoorstelling sou betaal het en die verhoogde bedrag wat inderdaad agv die bedrieglike wanvoorstelling betaal is, verteenwoordig die omvang van die skadevergoeding.

109 Sien 393.

110 Lotz 1988 *THRHR* 94.

111 395–401. Sien ook Lotz 1988 *THRHR* 95; De Waal 1988 *De Rebus* 113–114.

112 *Trotman v Edwick* hierbo word as gesag aangehaal.

(b) Vervolgens moet bepaal word of die bedrieglike wanvoorstelling *dolus dans causam contractui* of *dolus incidens* daarstel.

(c) Waar 'n eiser skade weens 'n bedrieglike wanvoorstelling ly, is daar geen regsreël wat die benadeelde verplig om die markwaarde[113] van die *merx* te beweer en te bewys nie.

(d) Om skade te bewys, is die benadeelde geregtig om te beweer en te bewys watter *pretium* hy, in afwesigheid van die bedrieglike wanvoorstelling, bereid was om vir die *merx* te betaal. Indien die benadeelde se getuienis aanvaar word, is sy skade in hierdie geval die verskil tussen die *pretium* wat hy bereid sou gewees het om te betaal en die verhoogde *pretium* as gevolg van die bedrieglike wanvoorstelling.[114] Geen getuienis hoef aangevoer te word dat die verkoper sou ingestem het om voormelde *pretium* te aanvaar nie.

(e) Indien die eiser nie in staat is om te bewys watter *pretium* hy sou betaal het nie, is hy geregtig om die markwaarde van die *merx* te beweer en te bewys. Tensy getuienis tot die teendeel aangevoer word, kan aanvaar word dat voormelde markwaarde die ooreengekome *pretium*, in afwesigheid van die bedrieglike wanvoorstelling, sou wees.[115] In hierdie geval is die benadeelde se skade die verskil tussen die markwaarde van die *merx* en die verhoogde *pretium* weens die bedrieglike wanvoorstelling.

(f) Waar die *pretium* wat die eiser beweer hy in afwesigheid van die bedrieglike wanvoorstelling sou betaal het, laer as die markwaarde van die *merx* is, moet hy bewys dat die verweerder waarskynlik hierdie laer prys sou aanvaar het.[116] Tensy die eiser hom suksesvol van voormelde bewyslas kwyt, is die waarskynlikste aanduiding dat die kontrakspartye op die markwaarde van die *merx* sou ooreengekom het.

(g) Waar die eiser nie die markwaarde van die *merx* beweer en bewys nie, is die verweerder geregtig om, ter bestryding van die eiser se saak, die markwaarde van die *merx* te beweer en te bewys.

In casu beslis die hof dat alhoewel die inruilwaarde laer as die markwaarde van die *merx* is, die eiser die kousale verband tussen die wanvoorstelling, skade en omvang daarvan bewys het en dat die verweerder die laer bedrag inderdaad sou aanvaar het.[117]

4 8 *Hunt v Van der Westhuizen*[118]

Hunt het 'n huis met 'n swembad van Van der Westhuizen gekoop. Van der Westhuizen het bedrieglik voorgegee dat die swembad met spuitsement vervaardig is. In werklikheid was die swembad (wat boonop gelek het) met bakstene gebou wat met veselglas bedek is. 'n Deliktuele eis vir R11 500, synde die koste om die swembad met spuitsement te herstel, is op grond van 'n bedrieglike

113 Wat natuurlik deur die bedrieglike wanvoorstelling opgeblaas is.

114 *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo; *Scheepers v Handley* hierbo en *De Jager v Grunder* hierbo word as gesag aangehaal.

115 *Trotman v Edwick* hierbo word as gesag aangehaal.

116 Rumpff AR in *De Jager v Grunder* hierbo word as gesag aangehaal.

117 402–403. Sien ook Visser en Potgieter *Cases* 418–420; Van der Merwe ea 109; De Waal 1988 *De Rebus* 113–114. Lotz 1988 *THRHR* 96–97 verwelkom hierdie beslissing.

118 1990 3 SA 357 (K).

wanvoorstelling (wat volgens die eiser *dolus dans causam contractui* daarstel[119]) ingestel.

Die hof beslis:[120]

> "[I]t is now well-established in our law that in appropriate circumstances[121] the measure of damages may be the reasonable cost of making good the misrepresentation, notwithstanding the fact that it coincides with the measure of damages for breach of contract."[122]

Verder bevestig die hof dat die skademaatstaf in geval van *dolus dans causam contractui* die verskil in waarde tussen die prestasie en die teenprestasie is.[123] In geval van *dolus incidens* wys die hof daarop dat die skademaatstaf die verskil in waarde is tussen die gelewerde prestasie en die prestasie wat die benadeelde sou betaal het indien daar nie 'n wanvoorstelling was nie, ongeag die feit dat dit wat die benadeelde ontvang het meer werd is as sy gelewerde prestasie.[124]

Die volgende kritiek teen die huidige positiefregtelike posisie word deur die hof geopper:[125]

(a) Die klassifikasie van *dolus dans causam contractui* of *dolus incidens* geskied arbitrêr.

(b) Daar is 'n anomalie omdat 'n benadeelde in geval van *dolus incidens* (wat 'n minder ernstige vorm van bedrog is) vermoënsregtelik in 'n beter posisie geplaas word as in die geval van *dolus dans causam contractui* (wat 'n ernstiger vorm van bedrog is).

(c) 'n Benadeelde is in geval van "wilful fraud" vermoënsregtelik slegter daaraan toe as in die geval van kontrakbreuk.

(d) Eerlikheid in die handelsverkeer sal bevorder word indien bedrieërs verplig word om hulle slagoffers beter te vergoed.

(e) Enige voordeel wat die misleide uit die kontrak ontvang, moet *res inter alios acta* ten opsigte van die bedrieër wees en nie by die berekening van die skadevergoeding in ag geneem word nie.

Die hof aanvaar dat *dolus dans causam contractui in casu* aanwesig is en beslis dat die eiser se skadevergoeding ooreenkomstig die vermoënsregtelike posisie waarin hy sou gewees het indien die wanvoorstelling waar was, bepaal moet word.[126] Aldus word R11 500 skadevergoeding toegestaan, synde die bedrag wat dit kos om die swembad op die voorgestelde standaard te bring.[127]

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119 360 en 361 waar die hof ook bevestig dat die positiewe reg die onderskeid tussen *dolus dans causam contractui* en *dolus incidens* handhaaf.

120 361.

121 Die hof bevestig (361) dat die feite van elke besondere geval die omvang van die skadevergoedingseis sal bepaal en haal *Trotman v Edwick* hierbo; *Ranger v Wykerd* hierbo en *Colt Motors (Edms) Bpk v Kenny* hierbo as gesag aan.

122 *Ranger v Wykerd* hierbo word as gesag aangehaal.

123 362. As gesag word *Ranger v Wykerd* hierbo aangehaal.

124 362.

125 362–363.

126 *Ibid. Ranger v Wykerd* hierbo word as gesag aangehaal.

127 364.

4 9 *Mayes v Noordhof*[128]

By die sluiting van 'n koopkontrak van onroerende goed en 'n besigheid[129] het Noordhof bedrieglik aan Mayes verswyg dat 'n permanente plakkersdorp langs die *merx* gaan vestig. 'n Deliktuele skadevergoedingseis (wat op *dolus dans causam contractui* neerkom[130]) is ingestel.

Regter Fagan bevind dat die eisoorsaak *in casu* deliktueel is en dat die benadeelde in hierdie geval[131]

> "is entitled to recover the loss which he has sustained because of the wrongful conduct . . . that is the loss to his patrimony caused by such conduct".[132]

Die hof wys verder daarop dat die appèlhof verskeie vergelykingsmaatstawwe neergelê het om die omvang van skadevergoeding in geval van 'n wanvoorstelling te bepaal, welke toepaslike vergelykingsmaatstaf direk van die feitelike omstandighede van elke geval afhang.[133]

Wat volgens die hof *in casu* vasstaan, is dat die benadeelde in geval van 'n deliktuele skadevergoedingseis in die vermoënsposisie geplaas moet word asof die delik nie gepleeg is nie.[134] In geval van die *dolus dans causam contractui* bevind die hof dat die skadevergoeding "cannot be calculated at the time of the sale" en dat 'n hipotetiese situasie, met inagneming van die impak van die wanvoorstelling, geskep moet word.[135] Aldus bevind die hof dat die toepaslike vergelykingsmaatstaf *in casu* die verskil in markwaarde (tydens kontraksluiting) van die *merx* met en sonder die skadeveroorsakende gegewe[136] is wat deur die wanvoorstelling verbloem is.[137]

5 EVALUASIE VAN EN KOMMENTAAR OP DIE POSITIEWE REG[138]

Daar is skrywers wat die onderskeid tussen *dolus dans causam contractui* en *dolus incidens* ontken[139] en die standpunt huldig dat die benadeelde altyd deur skadevergoeding finansieel in die vermoënsregtelike posisie geplaas moet word waarin hy sou gewees het indien geen kontrak gesluit is nie.[140] Hierdie standpunt

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128 1992 4 SA 233 (K).

129 Die hof beslis (240) dat slegs een ondeelbare koopkontrak *in casu* ter sprake is.

130 Sien 249.

131 248.

132 *Trotman v Edwick* hierbo word as gesag aangehaal.

133 248. *Trotman v Edwick* hierbo; *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo; *Scheepers v Handley* hierbo; *De Jager v Grunder* hierbo; *Ranger v Wykerd* hierbo; *Colt Motors (Edms) Bpk v Kenny* hierbo en *Hunt v Van der Westhuizen* hierbo word as gesag aangehaal.

134 249.

135 *Ibid.*

136 In hierdie geval is dit die verskil in markwaarde (tydens kontraksluiting) van die *merx* met en sonder 'n aangrensende plakkersdorp.

137 249–251.

138 Sien in die algemeen Erasmus en Gauntlett "Damages" 7 *LAWSA* (red Joubert) (1979) par 69.

139 In *Preller v Jordaan* 1956 1 SA 483 (A) is hierdie onderskeid erken. Sien ook Kahn 1961 *SALJ* 147–148.

140 Sien Van der Merwe en Olivier 320; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD-proefskrif Unisa 1991) 319; Dlamini "The measure of damages for fraud inducing a contract – a comedy of errors?" 1985 *De Jure* 347–348 351 361 367; Van der Merwe 1965 *THRHR* 184 vn 37; Erasmus en Gauntlett par 69.

word nie deur Visser en Potgieter[141] onderskryf nie omdat dit werklikheidsvreemd en nie in ooreenstemming met die appèlhof se gesag is nie. Lotz[142] wys daarop dat in geval van *dolus dans causam contractui* die aangewese wyse vir die berekening van skadevergoeding 'n vergelyking is tussen die waarde van die prestasie wat die misleide gelewer het en die waarde van die teenprestasie wat hy ontvang het.[143] In geval van *dolus incidens*[144] is die aangewese wyse waarop skadevergoeding bereken word, 'n vergelyking tussen die kontrak wat gesluit is en die putatiewe kontrak wat in afwesigheid van die wanvoorstelling gesluit sou word.[145] De Vos is van mening dat dit 'n ope vraag is of 'n benadeelde op grond van *dolus incidens* uit 'n kontrak kan terugtree.[146]

'n Ander siening is dat deliktuele skade in die onderhawige geval op werklik gelede skade (wat winsverliese uitsluit) gebaseer moet word, sodat waar 'n persoon (ten spyte van die bedrieglike wanvoorstelling) steeds 'n wins in geval van *dolus incidens* maak, hy geen skade ly nie omdat die moontlikheid dat hy 'n groter wins sou kon maak, irrelevant is.[147] Aangesien laasgenoemde mening (wat die verhaalbaarheid van winsverliese as 'n vorm van skadevergoeding ontken) op 'n foutiewe interpretasie van die beginsels oor positiewe en negatiewe interesse berus, moet dit volgens Visser en Potgieter verwerp word.[148] Nou verwant aan laasgenoemde siening is die mening dat die positiefregtelike skadevergoedingsmaatstaf om die benadeelde se kontraktuele vervullingsbelang (in geval van 'n bedrieglike wanvoorstelling) deliktueel te bewerkstellig, foutief is deur hom finansieel in die vermoënsregtelike posisie te plaas asof die wanvoorstelling waar is.[149] Van Aswegen[150] wys daarop dat 'n toekenning van skadevergoeding

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141 347–348 352. De Vos 1964 *Acta Juridica* 33 ev beklemtoon ook dat die onderskeid tussen *dolus dans causam contractui* en *dolus incidens* gehandhaaf moet word en is van mening dat voormelde onderskeid in elk geval positiefregtelik erken word.

142 Lotz 1988 *THRHR* 92.

143 Gevolgskade buite rekening gelaat: Lotz 1988 *THRHR* 92. De Vos 1964 *Acta Juridica* 33 huldig dieselfde standpunt.

144 De Vos 1964 *Acta Juridica* 47–49 is van mening dat die howe geneig is om al te maklik te bevind dat *dolus incidens* ipv *dolus dans causam contractui* ter sprake is en dat die toets na welke *dolus* gepleeg is, nie suiwer objektief is nie maar dat die redelike man-toets aangewend kan word in gevalle waar daar geen aanduiding is hoe die partye, in afwesigheid van die bedrieglike wanvoorstelling, sou opgetree het nie.

145 Lotz 1988 *THRHR* 92; De Vos 1964 *Acta Juridica* 34.

146 De Vos 1964 *Acta Juridica* 50. Na analogie van die *actio redhibitoria* is De Vos 1964 *Acta Juridica* 50 van mening dat terugtrede slegs in ernstige gevalle van *dolus incidens* mag geskied. Sien Kahn 1961 *SALJ* 148 waar 'n soortgelyke standpunt gehuldig word.

147 Van der Merwe en Olivier 324–325; De Wet 1960 *Annual Survey of SA Law* 94. Hierdie standpunt is op die minderheidsuitspraak van Rumpff AR in *De Jager v Grunder* hierbo gegrond. De Vos 1964 *Acta Juridica* 38 onderskryf nie voormelde standpunt nie omdat die tersaaklike regsbeginsels by *dolus dans causam contractui* en *dolus incidens* deurmekaar gehaspel word. Lotz 1988 *THRHR* 92 en Cameron 1982 *SALJ* 99 wys daarop dat die probleme rondom die berekening van skadevergoeding juis in die gevalle bestaan waar die wanvoorstelling binne kontraktuele verband gemaak is.

148 Visser en Potgieter 347 353. Sien Van Aswegen 320 325–327 en Hawthorne en Lotz 78 wat ook hierdie standpunt verwerp.

149 Hierdie standpunt word hoofsaaklik op die minderheidsuitspraak in *Ranger v Wykerd* hierbo gebaseer. Sien De Wet en Van Wyk *De Wet en Yeats Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 45 vn 155; Van der Merwe en Olivier 318 ev; De Vos 1964 *Acta Juridica* 37; McLennan 1977 *Annual Survey of SA Law* 89–92; Van der Merwe 1978 *SALJ* 319; Dlamini 1985 *De Jure* 348–349. Van der Merwe en Olivier 323 wys

vervolg op volgende bladsy

volgens deliktuele negatiewe interesse soms dieselfde gevolg as kontraktuele positiewe interesse het,[151] maar dat dit nie die afleiding regverdig dat 'n verkeerde skadevergoedingsmaatstaf gebruik is nie.[152]

Daar word ook geargumenteer dat voordeeltoerekening in gevalle van *dolus dans causam contractui* plaasvind, maar nie by *dolus incidens* nie en dat billikheid vereis dat voordeeltoerekening in beide voormelde gevalle werking moet vind.[153]

Tans is daar 'n klemverskuiwing vanaf die vroeëre debat waar met die oënskynlike teenstrydigheid gehandel is dat 'n kontraktuele skadevergoedingsmaatstaf in deliktuele verband aangewend word,[154] na die kwessie van hoe misleide persone nóg beter vergoed kan word.[155] Weens laasgenoemde beleidsoorweging is daar kritiek teen die huidige onderskeid tussen *dolus dans causam contractui* en *dolus incidens*, ten einde die breër benadering aangaande skadevergoeding by *dolus incidens* ook op *dolus dans causam contractui* van toepassing te maak.[156]

Kahn wys op twee moontlike benaderingswyses in geval van 'n skadevergoedingsaksie op grond van 'n bedrieglike wanvoorstelling, naamlik om[157]

(a) 'n kontraktuele skadevergoedingsmaatstaf aan te wend waar die wanvoorstelling as 'n kontraktuele beding in die kontrak opgeneem is;[158] en

(b) feitelike aannames as primêre uitgangspunt te gebruik ten einde skadevergoeding in elke besondere geval te bepaal.[159]

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daarop dat die kern van die probleem die verwarring is (a) om te onderskei tussen die vermoënsposisie waarin die benadeelde sou wees as dit nie vir die wanvoorstelling was nie en die posisie waarin hy sou wees indien die wanvoorstelling waar was; en (b) of die vermoënsnadeel en die berekening daarvan hoegenaamd skade daarstel.

150 321–322.

151 Die feit dat 'n kontrak gesluit is, kan nie geïgnoreer word nie: Van Aswegen 321. Hierdie standpunt word deur Van der Merwe ea 110–111 onderskryf.

152 Van Aswegen 322 wys verder daarop dat dit niks vreemd is dat die markwaarde van die hipotetiese prestasie (maw die prestasie wat die benadeelde sou gehad het indien die wanvoorstelling waar sou wees) met die markwaarde van die prestasie wat hy sou gelewer het as die wanvoorstelling nie gemaak is nie, ooreenstem.

153 Visser en Potgieter 354; Van Aswegen 323. Volgens Van der Walt "Die voordeeltoerekeningsreël – knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" 1980 *THRHR* 5 21 is die voordeeltoerekeningsvraag nie bloot 'n rekenkundige vraag nie maar een wat veral behorenselemente bevat en wat deur geen kousaliteitsmaatstaf beantwoord kan word nie.

154 Sien De Vos 1964 *Acta Juridica* 26; Van der Merwe 1965 *THRHR* 173; Van der Merwe en Olivier 319–326.

155 Visser en Potgieter 354; Woker en McLennan 1992 *SA Merc LJ* 376.

156 Kahn 135; *Hunt v Van der Westhuizen* hierbo; Cameron 1982 *SALJ* 106.

157 251–252.

158 Soos wat die minderheidsuitspraak in *Ranger v Wykerd* hierbo en *Colt Motors (Edms) Bpk v Kenny* hierbo voorstel. Kahn 251 onderskryf nie hierdie benaderingswyse nie omdat dit in stryd met vorige appèlhofbeslissings is. *Bayer South Africa (Pty) Ltd v Frost* hierbo (veral die minderheidsuitspraak) illustreer dat dit soms moeilik is om 'n onderskeid tussen 'n waarborg en wanvoorstelling te maak. Sien Woker en McLennan 1992 *SA Merc LJ* 376 wat lg probleem bevestig.

159 Hierdie uitgangspunt is op die meerderheidsuitspraak van *Ranger v Wykerd* hierbo gebaseer. Volgens Visser en Potgieter 354 vn 105 is hierdie benadering vatbaar vir kritiek omdat dit nie 'n antwoord gee op die vraag of die "swaaie-en-draaie-beginsel" van toepassing is nie.

Cameron stel voor dat skadevergoeding in die onderhawige geval na analogie van fisiese skade[160] met inagneming van alle gevolgskade bepaal moet word, wat sal verhinder dat die hof verkeerdelik beïnvloed word deur die toevalligheid dat 'n delik in kontraktuele verband gepleeg is.[161] Omdat hierdie benadering ook in geval van 'n nalatige wanvoorstelling billike gevolge sal hê, word dit deur Visser en Potgieter onderskryf.[162] Visser en Potgieter is van mening dat waar 'n bedrieglike of nalatige wanvoorstelling skade veroorsaak die algemene skadevergoedingsmaatstaf aangewend moet word, naamlik om die benadeelde in die vermoënsposisie te plaas waarin hy sou gewees het indien die wanvoorstelling nie gemaak is nie.[163] Verder beklemtoon die skrywers dat die bepaling van skadevergoeding in die onderhawige geval van die toepaslike feite afhang en dat die beginsels van aanspreeklikheidsbegrensing en bydraende skuld in ag geneem moet word.[164]

6 OPLOSSINGSMOONTLIKHEDE

Daar word eerstens na algemene beginsels gekyk wat as 'n primêre invalshoek by die bepaling van skade en kwantifisering van skadevergoeding (in geval van 'n skuldige wanvoorstelling) moet dien. Hierna word spesifieke oplossingsmoontlikhede onder die loep geneem waar die eisoorsaak onderskeidelik kontraktueel en deliktueel is.

6 1 Algemene beginsels

By die vasstelling van skade[165] en die berekening van skadevergoeding[166] in geval van 'n skuldige wanvoorstelling moet bestaande algemene beginsels nie

160 Welke analogie deur die meerderheidsuitspraak in *Ranger v Wykerd* hierbo gebruik is. Sien verder Erasmus en Gauntlett par 70.

161 Cameron 1982 *SALJ* 117–119 vat sy standpunt soos volg saam: "If this approach is followed, it will greatly assist the courts in acknowledging and accepting that any gain achieved by the aggrieved party through the contract, either initially or subsequently, is *res inter alios acta* and irrelevant to his claim for damages for material loss in fact resulting from the defendant's wrongdoing. It will thus, it is submitted, finally ensure that the delictual measure of damages for fraudulent (or negligent) misrepresentation will indeed yield fair and equitable results." Christie 360 en Van der Merwe ea 111 onderskryf hierdie benadering. Sien ook Van der Merwe en Olivier 326.

162 Visser en Potgieter 354 vn 105.

163 *Idem* 65 346. Myns insiens is hierdie skadevergoedingsmaatstaf slegs haalbaar indien die eisoorsaak deliktueel en buite kontraktuele verband is. Visser en Potgieter 214 347 bevestig dat waar die wanvoorstelling (bedrieglik of nalatig) tot kontraksluiting aanleiding gee, die volgende algemene beginsels van toepassing is: (a) Indien die kontrak gekanselleer word, moet die benadeelde in die vermoënsposisie geplaas word waarin hy voor kontraksluiting was; en (b) indien die kontrak in stand gehou word, moet daar onderskei word tussen (i) *dolus dans causam contractui* en (ii) *dolus incidens*. In geval van (i) moet die benadeelde in die vermoënsposisie geplaas word waarin hy sou gewees het indien geen kontrak gesluit is nie en in geval van (ii) moet die benadeelde in die vermoënsposisie geplaas word asof die hipotetiese kontrak inderdaad gesluit is. Waar die wanvoorstelling fisiese skade veroorsaak, is die toepaslike skadevergoedingsmaatstaf die vermindering in die markwaarde van die saak: Visser en Potgieter 339. Waar die wanvoorstelling liggaamlike beserings veroorsaak, kan algemene en besondere skadevergoeding (ooreenkomstig die algemene beginsels) geëis word: *idem* 368.

164 *Idem* 346.

165 Wat in geval van 'n wanvoorstelling uit die afname in die nuttigheid of kwaliteit van 'n vermoënsbelang weens 'n skadestigtende gebeurtenis bestaan.

oorboord gegooi word nie. Slegs vermoënskade[167] kan op grond van 'n skuldige wanvoorstelling geëis[168] word. As vertrekpunt moet daar eerstens (met inagneming van die beginsels oor die sameloop van aksies) bepaal word of die eisoorsaak deliktueel of kontraktueel is. Is die eisoorsaak deliktueel, moet deliktuele beginsels logieserwys geld. Eweneens moet kontraktuele beginsels toegepas word indien die eisoorsaak kontraktueel is. In beide voormelde gevalle moet aanspreeklikheidsbegrensing en die verdeling van skadevergoeding (waar nalatigheid ter sprake is) voorop gestel word. Verder moet die onderliggende filosofie billikheid wees en 'n benadering van hoe die misleide nóg beter vergoed kan word.

6 2 Kontraktuele eisoorsaak

Die eisoorsaak is kontraktueel indien die wanvoorstelling deel van 'n kontraktuele beding vorm.

Nadat vasgestel is dat die wanvoorstelling deel van 'n kontraktuele beding is, word die volgende werkswyse aan die hand gedoen:

(a) Bepaal of die kontrak gekanselleer of in stand gehou is aangesien die omvang van die skadevergoeding direk hierdeur beïnvloed word.

(b) Waar die wanvoorstelling tot kontraksluiting aanleiding gegee het en insgelyks ook deel van 'n kontraktuele beding vorm, moet daar spesifiek bepaal word of die skade deur die wanvoorstelling of kontrakbreuk veroorsaak is, in welke geval die sameloop van 'n deliktuele en kontraktuele skadevergoedingseis voor die hand liggend is.

(c) Toets of daar aan die vereistes vir kontraktuele skadevergoeding voldoen is.

(d) Identifiseer moontlike waardemaatstawwe wat as hulpmiddels by die kwantifisering van die skadevergoeding kan dien.

(e) Waar 'n koopkontrak ter sprake is, moet alle relevante koopregtelike beginsels geïsoleer en toegepas word.

Met inagneming van die resultate wat uit voormelde werkswyse voortvloei, moet die skadevergoeding vervolgens bereken word ooreenkomstig die gunstigste vermoënsregtelike posisie[169] (met insluiting van verspilde onkostes en verbeurde geleenthede[170]) waarin die misleide (hipoteties) sou gewees het indien die kontrak reëlmatig nagekom is. Hierdie hipotetiese vermoënsregtelike posisie moet bepaal word deur die kontrakbreuk te elimineer maar alle ander relevante, werklike en waarskynlike regsfeite te behou, om hierkragtens die vermoedelike kousale verloop uit te werk en só vas te stel hoe die misleide se finale en gunstigste vermoënsposisie sou ontwikkel het.

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166 Wat 'n geldelike ekwivalent van die skade is met die doel om die benadeelde so volledig moontlik te vergoed.

167 Wat 'n verlies van 'n positiewe of die ontstaan van 'n negatiewe vermoënsbestanddeel verteenwoordig.

168 Welke eis ooreenkomstig die beginsels van die sommeskadeleer benader moet word.

169 Ongeag of die vergelykingsmaatstaf op positiewe of negatiewe interesse neerkom.

170 Mits hierdie verspilde onkostes en verbeurde geleenthede teen die bruto wins van die transaksie verreken word.

6 3 Deliktuele eisoorsaak

Die primêre beginsel wat as uitgangspunt in hierdie geval moet dien, is dat die misleide so goed moontlik in die hipotetiese vermoënsregtelike posisie geplaas moet word asof die wanvoorstelling nie gepleeg is nie. Indien 'n wanvoorstelling direk of indirek aan 'n kontrak gekoppel kan word,[171] maar met die voorbehoud dat die wanvoorstelling nie deel van 'n kontraktuele beding vorm nie, is hierdie hipotetiese posisie afhanklik van die regsfeit of *dolus (culpa) dans causam contactui* of *dolus (culpa) incidens* ter sprake is. By gebrek aan *facta probantia* van hoe die misleide in afwesigheid van die wanvoorstelling sou optree, kan die redelike man-toets aangewend word om te bepaal of *dolus (culpa) dans causam contractui* of *dolus (culpa) incidens* van toepassing is.

Indien *dolus (culpa) dans causam contractui* aanwesig is en die kontrak in stand gehou word, kan die volgende berekeningsmetodes, afhangende van die feite van elke besondere geval, aangewend word:

(a) Skadevergoeding is die vermoënsregtelike verskil tussen die *pretium* en die waarde van die *merx*.[172] Afhangende van die *facta probantia* kan die waarde van die *merx* bepaal word deur te verwys na die (i) werklike waarde; (ii) billike waarde; (iii) markwaarde; of (iv) die waarde wat die misleide in afwesigheid van die wanvoorstelling daarop sou geplaas het.

(b) Skadevergoeding is die vermoënsregtelike verskil van die misleide se boedelwaardes voor en na pleging van die wanvoorstelling, met dien verstande dat waar dit onprakties of onmoontlik is om die onderskeie boedelwaardes te bewys, die herstelkoste as skadevergoedingsmaatstaf aangewend kan word.[173]

(c) Skadevergoeding is die vermoënsregtelike verskil in die markwaarde van die *merx* tydens kontraksluiting en die hipotetiese markwaarde daarvan as gevolg van die wanvoorstelling.[174]

By *dolus (culpa) incidens* waar die kontrak in stand gehou word, kan die volgende berekeningsmetodes, afhangende van die feite van elke besondere geval, gebruik word:

(a) Skadevergoeding is die werklike vermoënsverlies, bereken ooreenkomstig die gegewe dat die wanvoorstelling die misleide oortuig het om meer te presteer[175] (of minder as teenprestasie te ontvang) as wat hy in afwesigheid van die wanvoorstelling sou gedoen het.[176]

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171 Waar geen kontrak ter sprake is nie, word die algemene deliktuele beginsels toegepas en getuig die praktyk dat hierdie geval ongekompliseer is.

172 *Trotman v Edwick* hierbo; minderheidsuitspraak in *De Jager v Grunder* hierbo; *Heckroodt v Nurick* hierbo; *McInnes v White* hierbo; *Coomers Motor Spares (Pvt) Ltd v Albanis* hierbo; *Hunt v Van der Westhuizen* hierbo.

173 *Colt Motors (Edms) Bpk v Kenny* hierbo.

174 *Mayes v Noordhof* hierbo.

175 Hierdie waarde kan volgens die normale bewysregreëls aangetoon word en waar dit onmoontlik (of onprakties) is, kan die markwaarde van die *merx* as basis aangewend word, met dien verstande dat waar die misleide beweer dat hy minder as die markwaarde sou betaal het, hy ook moet bewys dat die ander kontraksparty hierdie verminderde waarde sou aanvaar het: *De Jager v Grunder* hierbo; *Colt Motors (Edms) Bpk v Kenny* hierbo.

176 *Bill Harvey's Investment Trust (Pty) Ltd v Oranjegezicht Citrus Estates (Pty) Ltd* hierbo; *Scheepers v Handley* hierbo; *Colt Motors (Edms) Bpk v Kenny* hierbo; *Hunt v Van der Westhuizen* hierbo.

(b) Skadevergoeding is die herstelkoste wat na analogie van saakskade gekwantifiseer moet word maar met uitsluiting van gevolgskade.[177]

Indien die kontrak gekanselleer word, moet die misleide (ongeag of *dolus dans causam contractui* of *dolus incidens* ter sprake is) in die vermoënsregtelike posisie waarin hy voor kontraksluiting was, geplaas word.[178]

Waar die wanvoorstelling saakskade veroorsaak, is die skadevergoeding die waardevermindering van die *merx*. Indien die wanvoorstelling liggaamlike beserings tot gevolg het, is die benadeelde ooreenkomstig algemene skadevergoedingsregsbeginsels op algemene en besondere skadevergoeding geregtig.

Bogenoemde formules moet sonder die "draaie-en-swaaie-beginsel" aangewend word.[179] Die vraagstuk oor die gevalle waar die *merx* uit meerdere sake bestaan, of waar meerdere aspekte van die transaksie deur die wanvoorstelling geraak word, is 'n kousaliteitsprobleem by die bepaling van skade wat uit 'n oorsaaklikheidshoek (en nie by die kwantifisering van skadevergoeding nie) aangespreek moet word.[180]

My gevolgtrekking is dat indien bogenoemde riglyne gevolg word, die polemiek oor die berekening van skadevergoeding by opsetlike en nalatige wanvoorstelling iets van die verlede sal wees.

Ek het op die getuienis tot die slotsom gekom dat ek tevrede is dat daar vanweë die feitekompleks voor my nie net alleen 'n reg by my berus om die inheemse reg toe te pas nie, maar ook 'n verpligting, en dat ek tevrede is dat 'n beslissing van my kant dat die inheemse reg wat van toepassing is in die geval van die eiseres sover dit die onderhoudsplig van Percy betref, nie botsend is met die reëls van openbare beleid of met die beginsels van natuurlike geregtigheid nie (per Van Dyk R in *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T) 150).

177 *Ranger v Wykerd* hierbo.
178 *De Jager v Grunder* hierbo.
179 Met die uitsondering van die minderheidsuitspraak in *De Jager v Grunder* hierbo, is hierdie beginsel deurgaans in die positiewe reg verwerp.
180 *Colt Motors (Edms) Bpk v Kenny* hierbo.

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

Section B: Possible solutions*

(continued)[1]

Susan Scott
BA LLD
Professor of Private Law, University of South Africa

1 SHORT TERM SOLUTION

1 1 Amendment of Insolvency Act 24 of 1936

Possibly the quickest short term solution to the problem of insolvency in the case of fiduciary security cessions would be for the South African Law Commission to recommend amendment of the Insolvency Act 24 of 1936. This amendment can follow the example of the type of protection afforded the credit grantor in section 84 of the Insolvency Act. This new section should have two legs: the one protecting the interests of the fiduciary security cedent and the other those of the fiduciary security cessionary. Provision should therefore be made for the fact that, although the fiduciary security cessionary becomes full holder of the right, the transfer is effected for a limited purpose only, namely for security reasons.

1 1 1 Fruition of fiduciary security cessions in South Africa

After amendment of the Insolvency Act as suggested above, the development of fiduciary security cessions can be left to practitioners, who will have to draft documents conveying their clients' intentions properly, and to judges who will have to interpret these documents in accordance with the declared intention of the parties. A process should then follow similar to the one which took place in Germany from the beginning of this century, although it already had its roots in the theory developed by the Pandectists of the nineteenth century.[2]

In *Hippo Quarries (Tvl) (Pty) Ltd v Eardley*[3] Nienaber JA took the first step in this direction in accepting the validity of fiduciary agreements in general.[4] Thus

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* The financial assistance from the *Alexander von Humboldt-Stiftung* towards my research on the German law is hereby acknowledged.

1 See 1997 *THRHR* 179–201.

2 See Coing *Treuhand* (1973) 28 *et seq.*

3 1992 1 SA 867 (A). For a discussion of this case, see Scott 1992 *THRHR* 615.

4 877G: "Two separate agreements are involved, firstly, the obligationary agreement (in terms of which Hippo would cede the claim to the plaintiff and the plaintiff would account to Hippo) and, secondly, the cession proper." See further Scott "Algehele sekerheidsessies" 1988 *THRHR* 434 *et seq.*

this decision paved the way for the acceptance of fiduciary agreements as *causae* for cessions, including cessions for collecting purposes[5] as well as fiduciary security cessions. This approach is to be welcomed and one which Nienaber JA will, probably,[6] be prepared to uphold in the case of fiduciary security cessions as well. This trend was followed in *First National Bank of SA Ltd v Lynn*[7] where Joubert JA explicitly stated (for the first time to my knowledge) that a security agreement can be the *causa* of a cession.

Although these decisions are major steps in the direction of full recognition of fiduciary relationships in general, and fiduciary security cessions in particular, one of the main obstacles in the way of full recognition of such relationships in South African law will have to be addressed: the position of the parties on insolvency and attachment.

Amendment of the Insolvency Act 24 of 1936, as suggested above, will address only one problematical aspect of fiduciary security cessions in South African law, that is, the position on insolvency. It will nevertheless facilitate full recognition of fiduciary cessions. Implementation of fiduciary security cessions is, however, in itself a very complex issue. It relies on practitioners for the proper drafting of the documents and on judges for the interpretation of these documents, as well as ingenious application of the relevant legal principles. South African practitioners and judges are not familiar with this rather complicated and sometimes even affected way of reasoning and interpretation of legal principles. In Germany this process evolved over the last two centuries within a distinctive juridical frame of mind.[8]

In South Africa there are sufficient precedents[9] for the courts, once again,[10] to introduce fiduciary security cessions into our law. Despite the fact that the courts

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5 In terms of a cession for collection purposes, the cedent transfers his/her claim to the cessionary outright, but only for collection purposes. The cessionary becomes holder of the right, but in practical reality, the cedent is entitled to the proceeds in terms of the fiduciary agreement between the cedent and the cessionary. Although doubt has been expressed whether South African courts will accept a cession for collection purposes, after the decision in *Skjelbreds Rederi A/S v Hartless (Pty) Ltd* 1982 2 SA 710 (A), I think such a cession is possible and the courts should give effect to it. It should, however, be borne in mind that if it is recognised, all the normal principles governing the law of cession should be adhered to and the cedent and the cessionary cannot rely on the agreement between them where the rights of third parties are affected.

6 In the light of his views on security cessions, see Nienaber "'n Regterlike perspektief" in Scott (ed) *Seminar: Sessie in securitatem debiti: Quo Vadis?* (1989) 169–170; Nienaber "Cession" 2 *LAWSA* (first reissue 1993).

7 1996 2 SA 339 (A) 346A: "Even an agreement to provide security by means of a cession in *securitatem debiti* is in itself adequate *justa causa* for the cession. See De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed vol 1 at 420: 'As 'n *causa* noodsaaklik is vir die sessie, dan is die afspraak dat dit in *securitatem debiti* geskied, tog seker genoegsame *causa* daarvoor . . .'"

8 Even Serick *Neue Rechtsentwicklungen* 176–177 indicates that to understand this whole process one has to have an understanding of the German mentality and legal mind: "Sie wollen vor diesem Hintergrund zugleich die Praxis ansprechen und um Verständnis für deutsche Mentalität und Deutches Rechtsdenken werben."

9 *Lief v Dettman* 1964 2 SA 252 (A); *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A); *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A); *Marais v Ruskin* 1985 4 SA 659 (A); *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992 1 SA 855 (A); *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A).

10 It was first introduced to South African law in 1842 (*Sutherland v Elliott Bros* (1842) 2 M 349), then in 1908 (*Rothschild v Lowndes* 1908 TS 493) and again in 1964 (*Lief v Dettman* 1964 2 SA 252 (A)).

should not encounter serious difficulties in interpreting the Roman-law institutions of *fiducia cum amico*[11] and *fiducia cum creditore*,[12] as well as their development in the *ius commune*, and especially in Germany[13] to accommodate the needs of practice, one should not be overly optimistic. A brief evaluation of the development of fiduciary security cessions in Germany indicates that there are many problems that will have to be addressed and will require very imaginative and inventive interpretation of the general principles of the law of obligations.

1 1 2 Development of fiduciary security cessions in Germany

In developing fiduciary security cessions in Germany, both practitioners and the courts played a very important role. The practitioners drafted the cession documents in such a way that they accommodated the needs of their clients and the courts, with reference to existing legal principles, interpreted those documents imaginatively. The agreements involved in these security cessions are: the loan or credit agreement, the security agreement and the transfer agreement (cession).[14] These documents should be drafted in clear and unambiguous terms to convey the exact intention of the parties.

Although these agreements are mostly recorded in one document or deed, a clear distinction should be made between the loan or credit agreement, the security agreement, the fiduciary agreement and the cession. In terms of the loan or credit agreement, the amount and the terms of the loan are arranged. The security agreement determines the type of security. In it the cedent undertakes to provide security and this agreement is also the cause[15] for the cession. The fiduciary agreement (the *pactum fiduciae*) is normally included in the security agreement, but it can be a separate agreement or included in the transfer agreement (cession). For purposes of this discussion I shall assume that the fiduciary agreement is included in the security agreement. I do not agree with Joubert[16] and Van der Merwe[17] that the fiduciary agreement should be read into the cession or can be implied.[18] The fiduciary agreement not only determines the fiduciary nature of the relationship between the parties, but also regulates the obligationary relationship between them. The *Bürgerliches Gesetzbuch* makes no

11 Here the fiduciary cessionary acts in the interest of the cedent, and in German law it is termed *Verwaltungstreuhand* – see Serick *Sicherungsübertragung* Bd II § 19 I 1.

12 Here the fiduciary cessionary acts in his/her own interest, and in German law it is called *Sicherungstreuhand* – see Serick *Sicherungsübertragung* Bd II § 19 I 1.

13 For a full discussion of this whole development, see Coing *Treuhand*. See further Serick *Neue Rechtsentwicklungen* 47.

14 For a discussion of the different agreements which can be embodied in one so-called cession document, see Scott *Cession* 59–69.

15 Bülow *Kreditsicherheiten* §§ 810 943.

16 "Iets oor die 'pandgewing' van onliggaamlike goed" 1971 *THRHR* 82 83; *General principles of the law of contract* (1987) 198.

17 *Sakereg* (1989) 680.

18 See discussion of this in Scott *Cession* 249–251. Bülow *Kreditsicherheiten* § 823 seems to be in agreement with Van der Merwe and Joubert. He argues that the security objective determines the cessionary's position. Once the security objective has ceased, the cessionary is obliged to re-cede the claims. See § 817 for his views on the nature of the security agreement.

explicit provision for this type of agreement, but in terms of the freedom of contract principle, the parties are free to determine the terms of their agreement. The security agreement should include clauses stipulating the security objective of the cession, as well as describing the security object (the claims which are to be ceded).

A fiduciary security cession is an abstract legal act[19] which is not dependent on the validity of the preceding obligationary agreement (loan agreement). However, without a security agreement, which describes the type of security envisaged, the security object does not acquire a fiduciary nature (*Treugut*). It will therefore not be treated as such when it becomes necessary, for example, on insolvency or attachment.[20] This security objective[21] of the cession is therefore of the utmost importance since it determines the fiduciary nature of the cession. It also indicates that the cession is effected by virtue of performance (or as conditional payment), and not to discharge the debt.[22] In terms of the specificity principle, it is also absolutely necessary to describe the object of the security so that it is determined or determinable which goods are to be regarded as fiduciary security objects (*Treugut*).

The security agreement not only determines the fiduciary nature of the relationship between the parties, but if it includes the fiduciary agreement, it also regulates the obligationary relationship between them during the subsistence of the cession and thereafter. Apart from the essential terms mentioned above, it should therefore also make provision for the following: the restrictions on the cessionary's right should be spelt out; in other words, it must be stated that he/she cannot transfer the right, that he/she cannot claim performance from the debtor or make a compromise with him before it becomes necessary. The circumstances under which the cessionary may make use of the security object must be determined.[23] Although the parties may agree that the debtor will not be notified of the cession (where they intend to effect a confidential cession[24]) and that the cedent will continue to collect and receive payment, as *Einziehungsermächtigte*,[25] they may not exclude the cessionary's right to claim permanently, since this may be interpreted as an indication that the parties to the agreement did not really intend to effect a cession.[26] The security agreement should further make provision for the circumstances under which the cessionary may make use of the blank notices of the cession signed by the cedent which the cedent will hand to the cessionary on conclusion of the agreement.[27]

In terms of the fiduciary relationship between the cedent and the cessionary, the cessionary has a special duty of care towards the cedent so that he/she has to

19 Serick *Neue Rechtsentwicklungen* 145; Bülow *Kreditsicherheiten* § 811.
20 Serick *Sicherungsübertragung* Bd II § 24 I 1, *Neue Rechtsentwicklungen* 170.
21 Serick *Sicherungsübertragung* Bd II § 24 I 1; Riedel *Abtretung* § 3.724. For Bülow *Kreditsicherheiten* § 817 the security aim determines the obligations of the cessionary.
22 Serick *Sicherungsübertragung* Bd II § 24 I 1.
23 Gernhuber *Handbuch des Schuldrechts* bd 2 (*Sukzessionen*) (Nörr/Scheyhing) (1983) § II 1 5.
24 Riedel *Abtretung* § 3.724 fn 294; Nörr/Scheyhing *Sukzessionen* § 2 III 3 b, II IV 2, V 1; Bülow *Kreditsicherheiten* § 991.
25 See discussion below under par 1 1 3.
26 See Riedel *Abtretung* § 3.725; Bülow *Kreditsicherheiten* §§ 806 792.
27 Serick *Sicherungsübertragung* Bd II § 24 I 4.

deal with the claims in the same way that he/she would have dealt with his/her own claims. This special duty entails, for example, that the cessionary who realises the claim should do it in the best possible way and to the greatest advantage of the cedent.[28] I have already indicated above that the cessionary can authorise the cedent to collect and receive the claims in terms of an *Einziehungsermächtigung*.[29] This is mostly the position where one is dealing with confidential cessions, but it can also occur where the debtor has been informed of the cession.[30] Where the debtor has been informed of the cession, but the cedent has not been appointed as *Einziehungsermächtigte*, the question arises whether the cessionary is obliged to collect the claims in terms of his/her duty of care arising from the fiduciary nature of the legal act. In German law the courts have held that he/she is not obliged to do anything and that the cedent can still claim in such cases, but that he/she has to demand that payment should be made to the cessionary.[31]

The parties to the security agreement should also make provision for the position that should prevail on extinction of the principal debt. The cessionary can undertake to re-cede the claim[32] once the security aim has been satisfied or under conditions to which the parties may agree. The cession (transfer agreement) may also explicitly be subjected to a resolutive condition.[33] The security agreement should provide for payment to the cedent of the excess of the proceeds if the cessionary has received more money than was necessary for extinction of the principal debt.[34]

The following clause in a cession document can serve as an example of a security (including fiduciary) agreement:

> "WHEREAS the cedent has agreed to grant security for the indebtedness of the cedent to the cessionary arising out of a contract of loan (acknowledgment of debt, *or* an undertaking to guarantee overdraft facilities to the bank or any payment or liability incurred thereunderto);
>
> AND WHEREAS the cedent has agreed to cede as security to the cessionary all his/her book debts, both present and future; . . .
>
> The cessionary undertakes and warrants that he/she will:
>
> (a) during such time as the cession which is the subject matter of this agreement remains of force and effect, not cede the rights ceded to him/her further;
>
> (b) not notify the debtors of the cession until the cedent's debt falls due and he/she is unable to pay (*or* a fixed date *or whatever the case may be*);

28 For a discussion of these duties see Serick *Sicherungsübertragung* Bd II § 24 I 2.

29 See discussion below under par I 1 3.

30 Serick *Sicherungsübertragung* Bd II §§ 19 I 1, 24 I, and 25.

31 Serick *Sicherungsübertragung* Bd II § 24 I 2. Cf *Simonsig Landgoed and Coastal Wines (Edms) Bpk v Theron, Van der Poel, Brink, Roos* case no 14131/89 1991-08-26 (C).

32 See Serick *Sicherungsübertragung* Bd II § 214 I 1 169; Riedel *Abtretung* § 3.726; Bülow *Kreditsicherheiten* § 830; Nörr/Sheyhing *Sukzessionen* § 1 1 1 2 and 5. This right to recession can also form the object of a later cession – see Scott *Cession* 146–147.

33 See Serick *Sicherungsübertragung* Bd II §§ 19 I 2, II 1, 24 I 1, *Neue Rechtsentwicklungen* 122 169; Riedel *Abtretung* § 3.726; Bülow *Kreditsicherheiten* § 830; Nörr/Sheyhing *Sukzessionen* § 11 1 2 and 5. Serick states that it is not customary to include this condition, since such a condition is inherent in every fiduciary security agreement. Bülow *Kreditsicherheiten* § 830, however, mentions that where provision is made for such a conditional transfer of the claim, this condition should be included in the transfer agreement.

34 Bülow *Kreditsicherheiten* § 856.

(c) pay the surplus of the proceeds of the claim to the cedent after he/she has satisfied his/her claim against the cedent;

(d) re-cede to the cedent all the remaining rights after the cessionary's claim against the cedent has been satisfied."

In the transfer agreement (the cession itself), the parties should be described clearly,[35] their intention should be stated in unambiguous terms and the object of the cession should be described in such a way that it conforms to the specificity principle.[36] The effective date of the cession and the amount which it secures should also be included in this agreement. The reason for this is the fact that a fiduciary security cession is an abstract legal act and therefore it takes effect on the date of the cession, even if no money has been advanced. If the parties wish to do so, they can introduce the causal system of transfer, but this must be clearly stated.[37] The parties should further explicitly state whether they intend a revolving security cession, or not. If they intend to effect such a cession, special provision should be made for this situation.

The following clause can serve as an example of a transfer agreement (cession):

> "I (cedent, X) hereby cede and transfer to Y (cessionary) my claims against all my book debtors alphabetically arranged from 'A'–'K' to the extent of R600 000=00 to cover my loan of R500 000=00 from Y. The effective date of this cession is/or will be . . . and it is subject to the loan being paid out or the credit facilities being provided."

1 1 3 Conclusion

The above discussion demonstrates that careful drafting of the relevant documents is vital for the full implementation of fiduciary security cessions. Once the practitioners have succeeded in drafting the cession documents in such a way that they clearly and unambiguously reflect the intention of the parties, it is the task of judges to interpret these documents and to ascertain the nature and applicability of the legal institution decided upon by the parties.[38]

Acceptance and recognition of the distinctive nature and effect of fiduciary relationships[39] is of cardinal importance for the recognition of fiduciary security

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35 It is possible for a cedent to make use of the claims of a third person as security for his/her debts, but then the holder of the right, the creditor, is the cedent, although he/she is not necessarily party to the security agreement: see eg Bülow *Kreditsicherheiten* § 813.

36 Bülow *Kreditsicherheiten* § 961; Riedel *Abtretung* § 3.3313; Nörr/Sheyhing *Sukzessionen* § 10 I 2.

37 This was held to be the position by the *BGH* (see *NJW* 82, 75) but it is criticised by Bülow *Kreditsicherheiten* § 812.

38 Van der Merwe "*Iudicis est ius dicere, non dare*: Judicial lawmaking by institutional development of the common law" in Van Wyk (ed) *Nihil obstat. Essays in honour of WJ Hosten* (1996) 225 233 explains this role of judges as follows: "Judges can best respond to these demands in their decision-making processes if they use the rules, principles, doctrines and precedent-based analogies of the common law as building-blocks for the construction of a legal institution that enables them to understand and portray the dispute they are confronted with, and to respond to the demand for justice it contains."

39 Flume *Allgemeiner Teil des Bürgerlichen Rechts* Bd II *Das Rechtsgeschäft* (1965) § 20 2 b *aa*. In this regard the excellent book of Coing *Die Treuhand kraft privaten Rechtsgeshäfts* is very enlightening and particularly interesting. Coing deals with fiduciary relationships from the historical, comparative, theoretical and practical perspectives.

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37 This was held to be the position by the *BGH* (see *NJW* 82, 75) but it is criticised by Bülow *Kreditsicherheiten* § 812.

38 Van der Merwe "*Iudicis est ius dicere, non dare*: Judicial lawmaking by institutional development of the common law" in Van Wyk (ed) *Nihil obstat. Essays in honour of WJ Hosten* (1996) 225 233 explains this role of judges as follows: "Judges can best respond to these demands in their decision-making processes if they use the rules, principles, doctrines and precedent-based analogies of the common law as building-blocks for the construction of a legal institution that enables them to understand and portray the dispute they are confronted with, and to respond to the demand for justice it contains."

39 Flume *Allgemeiner Teil des Bürgerlichen Rechts* Bd II *Das Rechtsgeschäft* (1965) § 20 2 b *aa*. In this regard the excellent book of Coing *Die Treuhand kraft privaten Rechtsgeshäfts* is very enlightening and particularly interesting. Coing deals with fiduciary relationships from the historical, comparative, theoretical and practical perspectives.

cessions, cessions for collecting purposes and the German institution of *Einziehungsermächtigung*. In German law, fiduciary security cessions have fiduciary relationships based on the Roman law institution of *fiducia cum creditore* as their theoretical foundation. This theoretical foundation has been explored by the Pandectists of the nineteenth-century and was built upon in the *Kautelarjurisprudenz*[40] of Germany during this century.

The nature of fiduciary cessions is such that the cessionary becomes creditor (holder of the complete right)[41] and, therefore, legally acquires more entitlements[42] than are needed for the security aim with which the cession has been made.[43] The fact that the fiduciary security cessionary acquires the complete right with all its entitlements, entitles him to sell the claim, transfer it and even collect the proceeds from the debtor. In terms of the fiduciary agreement, however, he/she is only entitled to hold it as security for repayment of the loan. Because these entitlements are restricted by the fiduciary agreement between the parties, which is an obligationary agreement, it does not affect the rights of third parties.[44] Fiduciary agreements are, however, of such a nature that in exceptional circumstances, such as insolvency and attachment, they acquire quasi-real effect: the legal position of the cedent strengthens and that of the cessionary weakens.[45] The Germans refer to this phenomenon as the *Umwandlungsprinzip*.[46] For the

40 For a general discussion of this type of juristic method to develop the law, see Bydlinski *Juristische Methodenlehre und Rechtsbegriff* (1982) 609 *et seq*. As to the specific application of this method to security cessions, see Bülow *Kreditsicherheiten* §§ 11–13 791–792. In the last two paragraphs this development in Germany is described fully. See further Van der Merwe *Nihil obstat* 234: "Legal institutions, therefore, are powerful organising constructs for judges who feel themselves compelled by the demands of justice to develop the common law. For legal institutions not only retain the value of ropelike stability and dependability which still constitutes a powerful argument against indulging in unbounded legal innovation, they also allow enough interpretative leeway for judges to develop the law by modification and adaptation of rules gleaned from the common law. The richness and diversity of the common law, 'the gentle, but powerful influence of laws and manners' its long history provides, then become invaluable aids to the judge who is confronted with contemporary legal theoretical demands for open-ended discourse and a loss of faith in the ability to achieve moral consensus."

41 Coing *Treuhand* 85 *et seq*; Serick *Sicherungsübertragung* Bd II § 19 I 2; Hubner *Allgemeiner Teil des Bürgerlichen Gesetzbuches* (1985) § 614.

42 I find the term "entitlements" a very appropriate translation of "subjektiewe regsbevoegdhede" (German: "Befügnisse"). For an explanation of the use of this term in South African law, see Van der Vyver "The doctrine of private-law rights" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 232 fn 171; "Expropriation, rights, entitlements and surface support of land" 1988 *SALJ* 12 *et seq*; Van der Walt "Personal rights and limited real rights" 1992 *THRHR* 190. An interesting and contentious issue which I shall not address in this article pertains to the question whether a claim (personal right), like ownership (real right) consists of a bundle of entitlements, eg the entitlement to collect, to institute action, to release the debtor, to compromise, to extend payment, etc.

43 Von Thur *Allgemeiner Teil* Bd II 2 186; Serick *Neue Rechtsentwicklungen* 47 146; Nörr/Sheyhing *Sukzessionen* § 11 I 2; Bülow *Kreditsicherheiten* § 792.

44 Non-compliance with such an agreement only gives rise to a claim for damages for breach of contract – see eg Riedel *Abtretung* 3.724–26; Nörr/Sheyhing *Sukzessionen* § 1 I 1 6 9; see also Von Thur *Allgemeiner Teil* Bd II 2 198.

45 Serick *Sicherungsübertragung* Bd II § 19 IV 1, *Neue Rechtsentwicklungen* 49.

46 Serick *Sicherungsübertragung* Bd II § 19 I 2, *Neue Rechtsentwicklungen* 50. For an exposition of this on insolvency and attachment see discussion below.

security agreement to acquire real effect, German law further requires that the security object should be transferred directly from the estate of the cedent to that of the cessionary. This is the so-called *Unmittelbarkeitsprinzip*.[47]

In explaining the nature of fiduciary agreements, a rather artificial distinction is made between the legally possible (*Können*) and the legally permissible (*Dürfen*),[48] as well as between the legal and economic position of the parties: Legally the claim falls in the estate of the cessionary (who is *formeller Eigentümer*), but only for a specific purpose, that is to secure payment of the cedent's debt. Economically,[49] for example for tax,[50] insolvency and attachment purposes the claim falls in the estate of the cedent. He/she is *wirtschaftlicher oder materieller Eigentümer*.[51]

Fiduciary relationships are divided into those that are mainly in the interest of the fiduciary, the so-called "*uneigennützige (fremdnützige) Treuhand*" (*fiducia cum amico*), and those where he/she acts in his/her own interest, the so-called "*eigennützige Treuhand*" (*fiducia cun creditore*).[52] Cessions for collecting purposes are examples of the first type of fiduciary relationship and fiduciary security cessions examples of the last-mentioned.

The nature of fiduciary acts is such that for tax purposes and in the event of insolvency or attachment, the claim is regarded as part of the security cedent's estate and not as part of the cessionary's. In the event of insolvency, the position is as follows: on the security cedent's insolvency, the fiduciary cessionary (*formeller Eigentümer*) acquires a limited real right to the security object (*Absonderungsrecht*).[53] In the event of the cessionary's insolvency, the cedent can rely on the fact that the ceded claim does not form part of the insolvent

47 See Serick *Sicherungsübertragung* Bd II § 19 II 2, *Neue Rechtsentwicklungen* 146.

48 Serick *Sicherungsübertragung* Bd II § 19, *Neue Rechtsentwicklungen* 146 170; Nörr/Sheyhing *Sukzessionen* § 11 I 4.

49 As a result of this, the cedent should reflect the claims as assets in his/her books – see Serick *Sicherungsübertragung* Bd II § 19 IV 3 b.

50 Coing *Treuhand* 200. The way in which fiduciary relationships are treated in German tax law reflects the private law distinction between the economic and the legal position of the parties. In German law the fiduciary security cedent is regarded as the person who has the economic use of and entitlement to dispose of the claim. Consequently, the object of the cession is regarded as accruing to him for tax purposes. Furthermore, a distinction is made between security fiduciary relationships, such as fiduciary security cessions, and administrative fiduciary relationships, such as cessions for collecting purposes. The latter is regarded as an administration of separated property on behalf of the cedent and therefore as accruing to him for tax purposes.

51 Serick *Sicherungsübertragung* Bd II § 19, *Neue Rechtsentwicklungen* 146 170; Bülow *Kreditsicherheiten* § 792; Nörr/Sheyhing *Sukzessionen* § 11 I 9 (b); Riedel *Abtretung* 20.333; Hubner *Allgemeiner Teil* § 614. For a discussion of this distinction and its implications see Coing *Treuhand* 94 *et seq*. Von Thur *Allgemeiner Teil* Bd II 2 202–206 criticises this distinction and its effect (see discussion above in section A fn 37), but it seems as if his criticism had very little influence on later developments – see the authority quoted in fn 48 above.

52 Coing *Treuhand* 89; Hubner *Allgemeiner Teil* § 614.

53 See § 46 of the *Konkursordnung*. An *Absonderungsrecht* enables the fiduciary cessionary to claim that the security object be separated from the insolvent estate since it serves as security for repayment of the loan. The cessionary is then not required to contribute to the costs of the administration of the insolvent estate. This position corresponds to a large extent to that of a credit grantor in South African law where s 84 of the Insolvency Act 24 of 1936 applies – see discussion under par I 1 above.

estate (*Aussonderungsrecht*).[54] Where the creditors of the fiduciary cedent wish to attach the claims which are subject to the security cession, the cessionary has a *Drittwiderspruchsklage* which enables him to intervene as a third party in execution proceedings.[55] The cedent also has this remedy when the cessionary's creditors wish to attach the ceded claims.

The effect of fiduciary security cessions, therefore, is such that, although the cedent completely transfers his/her claims to the cessionary, albeit with certain obligationary restrictions, these obligationary restrictions acquire quasi-real effect in certain circumstances. In these exceptional circumstances the cedent automatically becomes full owner of the security object, whereas the cessionary acquires a limited real right to it. This principle is referred to as the *Umwandlungsprinzip*.[56]

If fiduciary agreements are genuine and not simulated,[57] and do not offend good morals,[58] they are accepted in German law as valid. The normal protective measures available to a debtor find application here. A debtor whose creditor has employed this type of security is therefore not disadvantaged.[59] Furthermore, neither the cedent's nor the cessionary's creditors are prejudiced by this legal institution.[60]

The above is a brief exposition[61] of the prevailing position of fiduciary security cessions in German law as it was developed in the so-called *Kautelarjurisprudenz*. This development transpired to satisfy the needs and solve exactly the same problems that are encountered in the type of situation referred to in my example in section A above. The result was achieved in the following manner: lawyers advised their clients on the basis of existing general legal principles to draft their agreements in such a way that they reflected their intention to create this form of security. The drafting was done in such a way that judges had to give effect to their agreements. By means of imaginative interpretation of

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54 See § 43 of the *Konkursordnung*. The *Aussonderungsrecht* enables the fiduciary cedent to claim that he/she is in actual fact owner of the security object and that it should not be regarded as part of the insolvent estate. However, because it serves as security for the loan granted to him/her, he/she must repay the loan before he/she can claim re-cession, or if he/she is unable to repay the debt, it should be satisfied out of the proceeds of the claim and the balance should be paid over to the cedent. For a discussion of this position in Germany, see Bülow *Kreditsicherheiten* § 858; Riedel *Abtretung* §§ 15.26 15.4222 15.4223; Nörr/Sheyhing *Sukzessionen* §§ 11 I 9 (a) and (b).

55 See § 771 of the *Zivilprozessordnung*.

56 Serick *Neue Rechtsentwicklungen* 50 *et seq*. Serick (148) explains this principle and compares it with the similar situation which arises in the case of reservation of ownership as a form of security.

57 See Bülow *Kreditsicherheiten* § 806; Riedel *Abtretung* 3.724.

58 Bülow *Kreditsicherheiten* §§ 799–806 847; Riedel *Abtretung* § 3.724; Hubner *Allgemeiner Teil* § 622.

59 Serick *Sicherungsübertragung* § 24 IV 1; Hubner *Allgemeiner Teil* § 621.

60 Serick *Neue Rechtsentwicklungen* 149; Bülow *Kreditsicherheiten* §§ 974–980; Riedel *Abtretung* § 3.725.

61 For a full discussion of fiduciary relationships – see Coing *Treuhand* 1–246; Serick *Eigentumsvorbehalt und Sicherungsübertragung* II *Die Einfache Sicherungsübertragung* (1965) 1–507; Bülow *Kreditsicherheiten* §§ 1–34 790–989; Nörr/Sheyhing *Sukzessionen* § 11.

existing legal principles the courts regarded these agreements as admissible and lawful.[62]

This type of security cession is by far the most popular in Germany. It co-exists alongside the existing provisions in the *Bürgerliches Gesetzbuch* which provides only for a pledge of claims,[63] a legal institution which the German credit world found unacceptable. Shortly after adoption of the German code,[64] fiduciary security cessions were introduced through a process in which juristic theory, the inventiveness of practitioners and judicial interpretation combined to address the needs of practice.[65]

Although I personally admire the German approach in terms of which fiduciary security cessions developed alongside the statutorily regulated pledge of claims, I am mindful of the legal complexities of such a development. Judicial implementation of fiduciary security cessions calls for meticulous drafting of cession documents by lawyers, cautious judicial interpretation of these documents and of existing case law, innovative interpretation of the common law (*ius commune* in a broad sense), as well as minor legislative amendments to the Insolvency Act 24 of 1936.[66] In the case of a pledge of claims, it will require some really imaginative judicial interpretation[67] to make provision, for example, for the position of the parties before maturity of the pledge and realisation of the security object.

This possibility has always been open to the courts, and I have suggested guidelines for the courts to follow this line of reasoning, but for various understandable reasons it has never materialised. One of the reasons is probably the fact that the South African courts took a very conservative approach to simulated acts which resulted in fiduciary agreements not being generally accepted. Consequently, their

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62 Bülow *Kreditsicherheiten* §§ 12–13.

63 See §§ 1273–1291.

64 See authority quoted in section A, fn 9 and 10 above. Serick *Neue Rechtsentwicklungen* 47 states that this form of security has developed alongside the statutory forms as a customary ("gewohnheitsrechtliche") form of security. See also the following quotation at 149: "Was der Gesetzgeber mit dem Vertragspfandrecht erreichen wollte, hat sich die Wirtschaft mit dem Sicherungseigentum gewohnheitsrechtlich geschaffen."

65 Van der Merwe *Nihil obstat* 225 233 aptly describes legal institutions as follows: "A legal institutional fact (or legal institution, in short) exists because an organised group of people (legal practitioners and legal academics) have a particular view of a particular relationship between people.

This view comprises rules for the conditions of existence of the institution (institutive rules), rules for the consequences attached to the existence of the institution (consequential rules) and rules for the termination of the institution (terminative rules). These rules originate in agreed criteria amongst lawyers for their formulation, such agreed criteria residing in the conceptual tools (the rules, principles, doctrines and maxims of the law) to be found in the common law. Since the agreed criteria stem from values, goals and preferences that constitute the reasons for agreement on the manner of formulation and utilisation of the conceptual legal tools, they are subject to change as social conditions change. Therefore the rules that determine the existence of the institution are also subject to modification."

66 As suggested above under par 1 1.

67 As a starting point the position should, as far as possible, be in conformity with a pledge of movables, but the nature of the security object should be borne in mind and adjustments will have to be made to make provision for the distinctive nature of the security object. See the discussion above in section A fn 59.

effect on insolvency, attachment and tax law has never been discussed and provided for. Another reason probably lies in the fact that, in order to have achieved this, the courts[68] would have had to be bold and freely to have made use of Roman law as it developed in the *ius commune*, works of academic writers in South Africa and in Germany, where fiduciary security cessions in particular have developed from a sound theoretical base formed in the nineteenth century, in a highly sophisticated legal and economic environment for the last ninety years.[69]

Although such a *modus operandi* is possible in our judicial system and there are very competent judges in the Appellate Division (where this process[70] will have to be concluded in the final instance) who are able to undertake this task, my experience is that the South African courts tend to be very conservative in interpreting their role.[71] The introduction of the principle of *stare decisis* and the English law approach[72] to the role of the judiciary in interpreting the law, to my mind, has had a very inhibiting effect on the South African judiciary.[73] It is, however, possible that this may change under the political and judicial dispensation of the new South Africa.

Even if South African lawyers and judges succeed in fully incorporating fiduciary security cessions into our law, the problems surrounding pledge of claims will still have to be addressed. Although imaginative judicial interpretation can address these problems, the way in which the courts have thusfar interpreted a pledge of claims has actually created some of the problems. The distinctive nature of claims as objects of pledge also inhibits law reform in this area and further necessitates statutory intervention.

1 2 Conclusion

In conclusion, although I regard the above-mentioned amendment of the Insolvency Act 24 of 1936 as a possible short term solution to the problem, it will not place security by means of claims on a sound footing in South African law. A more comprehensive approach is required and I shall therefore now discuss possible long term solutions.

2 LONG TERM SOLUTION: EXTENSIVE STATUTORY INTERVENTION TO REGULATE SECURITY BY MEANS OF CLAIMS

2 1 Introduction

Various long term statutory possibilities should be considered. As a starting point, a new chapter can be introduced to the Security by Means of Movables

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68 Here I agree with Van der Merwe *Nihil obstat* 225 226 where he argues that the courts have a judicial responsibility to develop the law. He deseribes the meaning of development as follows: "I mean the improvement of law, the creative exercise that goes beyond stated law and produees new, substantially changed law, more reflective of soeial *mores* and more responsive to the economic, social and political needs and realities of society."

69 Even Seriek *Sicherungsübertragung* 176–177 indieates that to understand this whole process one has to have an understanding of the German mentality and legal mind.

70 See the remarks of Cardozo on the role of judges in such a situation, in *The nature of the judicial process* referred to in the edition of Hall *Selected writings of Benjamin Nathan Cardozo* (1947) 112 *et seq* and also Van der Merwe *Nihil obstat* 225.

71 On the role of judges in the law-making process, see Van der Merwe *Nihil obstat* 225–236.

72 *Idem* 225 227 *et seq*.

73 See also Du Plessis *Inleiding tot die reg* (1990) § 7 3 5.

Act 57 of 1993 to deal with security by means of claims, since claims are regarded as movable incorporeal things,[74] or a new Act can be adopted to regulate this form of security. Although the South African Law Commission indicated in its report[75] that it is unnecessary to introduce legislation to regulate security cessions,[76] the comments[77] of interested parties on the report of the commission and several judgments over the last years[78] have indicated the contrary. I shall therefore reconsider the whole issue.

In the final report the commission did not refer to the commentary on their proposals submitted by the Department of Private Law of the University of South Africa. In this submission I critically analysed the commission's proposals. The main thrust of my criticism was aimed at the fact that the commission did not address the problems encountered with both forms of security by means of claims and that the recommendations merely confirmed the existing problems. In reading the report and the summary of the criticism and ideas presented to the commission, it is difficult to understand how the commission came to the conclusion that "in the case of cession *in securitatem debiti* no intervention of a statutory nature should take place".[79]

2 2 Discussion of recommendations of South African Law Commission in report on security by means of movables

2 2 1 Introduction

In this section I shall briefly discuss the findings of the South African Law Commission on security cessions, since I am of the opinion that the commission has not addressed this issue thoroughly and that there are still major problems in theory and in practice as regards security by means of claims.[80] Some of the existing problems and confusion can be attributed to the incorrect and careless use of terminology;[81] an inability to apply the legal principles pertaining to a specific legal institution consistently to that institution, as well as a measure of inflexibility on the part of some academics to adapt their dogmatic paradigms to meet the needs of practice.

For the sake of clarity I refer to this type of security as security by means of claims[82] rather than security cessions. Security by means of claims can take place by means of a notarial bond, a pledge of claims or a fiduciary security cession.

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74 See eg *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019; *Jeffery v Pollak and Freemantle* 1938 AD 1; *De Hart v Virginia Land and Estate Co Ltd* 1957 4 SA 501 (O) 505A–B; *Guman v Latib* 1965 4 SA 715 (A) 721H, where the court stated "that incorporeal things cannot be possessed without cession"; *Oertel v Brink* 1972 3 SA 669 (W) 674D. The South African Law Commission also accepted this – see South African Law Commission Project 46 *The giving of security by means of movable property report* February 1991 § 3.1.

75 *Report* (Annexure D) § 5 9 10.

76 Despite the fact that the commission recommended in the Working Paper of 1987-11-23 § 5 9 1 that the pledge construction should be embodied in legislation.

77 *Report* § 5 9 4.

78 See eg the cases referred to above in section A fn 32.

79 § 5 9 10.

80 See the discussion above in section A.

81 A shortcoming of which I am also guilty – compare my use of terminology in *Cession* ch 12 with the terminology used in this article.

82 In Afrikaans: *sekerheidstelling deur middel van vorderingsregte*.

Three different legal institutions are involved here: notarial bond, pledge and cession. In the case of a notarial bond, property law principles pertaining to notarial bonds apply and the parties involved are the notarial mortgagor and notarial mortgagee. In the case of a pledge, property law principles of pledge apply and the parties should be referred to as pledgor, pledgee and debtor. In a pledge the quasi-possession of the claim is transferred, not the claim itself. In the case of a fiduciary security cession, the general principles of the law of obligations, as well as those of the law of property, apply. The parties should be referred to as fiduciary security cedent, fiduciary security cessionary and debtor. With the cession the claim itself is transferred, subject to the obligationary restrictions in the fiduciary agreement. The word "fiduciary" is added to distinguish the parties from an ordinary cedent, cessionary and debtor.

2 2 2 Recommendations as summarised in report

The report opted for only one form of security, namely a pledge of "legal claims".[83] In principle, this approach is acceptable,[84] but then the needs of practice should also be taken into consideration.[85] Provision should therefore also have been made for the recognition of a non-possessory or confidential pledge. To conform to the principle of publicity, the commission, correctly, introduced notice to the debtor as a requirement for the valid constitution of the pledge. Although the wording of this clause is somewhat vague and it is not clear whether the pledgor or the pledgee should give notice, at least, it is included and indicates that the commission was aware of this important requirement for the valid constitution of real security rights.[86]

A peculiar clause was recommended to the effect that the document evidencing the right serves only as proof of the existence of the claim. One can understand why the commission referred to the role of the document, because, at that stage,[87] delivery of the document as a prerequisite for validity of cession, in general, was a very controversial issue in South African law.[88] It was furthermore a stumbling block in the way of the recognition of cessions of future claims (including future book debts) and thus detrimentally affected the commercial institution of factoring.[89] The interesting aspect of this recommendation is that, had it been accepted, it would, at that stage, have made delivery of the document evidencing the claim unnecessary in case of a pledge of claims, whereas it would still have been a requirement for the validity of cession of claims. It is peculiar to state that some act is not required for the validity of the institution addressed in the Act. The recommendation should rather have been that where a document

83 Earlier in the *Report* reference is also made to "personal actions" or incorporeals. I have indicated above in section A fn 11 that I prefer the term "claim".

84 The Dutch have followed the same approach in the new code – see discussion below.

85 Such as the need for a confidential form of security by means of claims and the fact that the parties wish to stipulate the terms of their agreements – see the *Report* § 5 9 4, the first comment referred to.

86 See discussion above in section A fn 31.

87 Ie before the decision in *Botha v Fick* 1995 2 SA 750 (A) – see section C below. *Botha v Fick* abolished delivery of the document as a requirement for the validity of cession.

88 See Scott *Cession* ch 4; Oelofse "Lewering van die dokument waaruit die reg blyk as geldigheidsvereiste vir sessie" in Scott (ed) *Sessie in securitatem debiti: Quo vadis?* 104–118, 1990 *TIHRHR* 61.

89 Scott *Cession* ch 4 1 3.

evidencing the claim exists, delivery of such document is not a requirement for validity of the pledge, but that the pledgor is obliged to deliver it to the pledgee.[90]

The confusion that exists about the nature of a pledge of claims is perpetuated in the commission's recommendation that the pledgor is entitled to re-cession of the "legal claim" on redemption of the debt. The fundamental nature of a pledge is such that ownership (*dominium*) remains vested in the pledgor.[91] Although some academics object to the idea of a right to a right,[92] I am of the opinion that at this stage of legal history it is futile to debate the issue.[93] The needs of practice have overruled pure *Begriffsjurisprudenz* and it is now time for South African academics to forget their dogmatic reservations and give effect to the needs of practice. In any event, if an institution can possibly serve the needs of practice, it is the task of lawyers (including judges) to give theoretical content to it.

To gain a clear theoretical picture of a pledge of claims, one should, as a starting point, take heed of the dual nature of a claim. On the one hand, it is an object (asset; Roman-Dutch law: *res incorporalis*; German law: *Rechtsgegenstand*; Dutch law: *goed*) in a person's estate, but it is also a (subjective) right with its own object, namely performance by the debtor. Because of the first mentioned patrimonial aspect of a claim, the creditor can use it in much the same way that he/she can use a corporeal thing, for example, he/she can dispose of it and he/she can burden it with limited real rights. One should distinguish between the entitlements of a creditor flowing from his/her patrimonial relationship towards (his ownership of) the claim, namely his/her entitlements to use, burden, realise and dispose of, and his/her entitlements as creditor as determined by the law of obligations.[94]

Viewed from a property law angle, in a sense, a creditor is the "owner" of his/her claims (the Germans refer to *Forderungseigentum*[95]) with the normal entitlements of an owner. One of these is the entitlement to burden the object with real rights, whilst retaining "ownership" of the object.[96] When a claim is pledged, the claim itself ("ownership") is not transferred – just as in the case of a pledge of a corporeal thing, the thing itself is not transferred to the pledgee in ownership, but only possession of it. In the case of a pledge of a claim only the

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90 This would have created a statutory obligation on the pledgor to deliver the documents. It would have addressed the problems that are encountered in practice to force a pledgor to hand the documents over. Normally this obligation is included in the security agreement as a contractual duty. Possession of the documents is necessary for the effective exercise of a pledgee's rights. It has nothing to do with the constitution of the pledge. The Act merely imposes a statutory duty on the pledgor – see Scott *Cession* ch 5 1.

91 See Scott *Cession* ch 12, "Verpanding van vorderingsregte: uiteindelik sekerheid?" 1987 *THRHR* 175. See also *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235.

92 For an explanation of the concept of a right to a right, see Baur *Lehrbuch des Sachenrechts* (1989) § 60.

93 See fn 36 in section A above.

94 These may possibly include the entitlement to collect and receive payment, to institute action, to compromise, to give extension for payment, to release the debtor, etc – see fn 42 above. See further Lubbe (discussion) in Scott (ed) *Sessie in securitatem debiti: Quo vadis?*, "Sessie *in securitatem debiti* en komponente van die skuldeiersbelang" 1989 *THRHR* 485.

95 Baur *Sachenrecht* § 60.

96 For a discussion of this splitting of entitlements of an owner and its effect on the idea of a right to a right, see Baur *Sachenrecht* § 60.

quasi-possession is transferred. It can be argued that the entitlement to realise the claim (*Verwertungsbefugnis*), subject to certain circumstances, of course, is transferred to the pledgee. In other words, in a pledge of claims, the pledgor as "owner" of the object, does not make use of his/her entitlement to dispose of it, but of his/her entitlement to burden it and instead of transferring possession of the object, the pledgor transfers quasi-possession (the entitlement to realise the claim).[97]

Once it is clear that a pledge has been constituted, the normal consequences of pledge take effect. It is therefore wrong for the commission to have included the recommendation that the cedent (pledgor) is entitled "to the re-cession of the legal claim". This indicates that the commission probably did not have a pledge in mind, but a fiduciary security cession, since the terminology it uses and the effect it foresees is in line with a fiduciary security cession and not with a pledge. In fiduciary security cessions the claim itself is transferred and has to be re-ceded to the cedent. The interesting aspect of this approach is that, had it been introduced, it would have made provision for a fiduciary security cession requiring publicity, whereas fiduciary security cessions developed in Germany directly as a result of the inhibitory effect which the requirement of publicity for a pledge of claims had on security by means of claims.[98]

The recommendations of the commission show the same confused line of thinking on security by means of claims which is encountered in practice and in the courts. This was the precise reason for my original objections to the recommendations. Instead of addressing the problems, the commission has perpetuated and actually aggravated the already unacceptable situation. Although it stated an intention to introduce a statutory pledge of claims, it actually introduced a fiduciary security cession, but required publicity for this form of security.

If one intends to introduce a pledge of claims one has to apply the principles pertaining to pledge as far as possible. Provision has, of course, to be made for the distinctive nature of the object where claims are pledged and the terminology applicable to pledge should be used consistently.[99] Legislation dealing with pledge of claims should, therefore, refer to the parties as the pledgor, the pledgee and the debtor. Provisions should be made for the proper constitution of the pledge, namely an agreement and notice of the existence of the pledge. Although it is unnecessary, reference could be made to the accessory nature of pledge. This is inherent in pledge and in the case of a pledge of claims, the entitlement to realise automatically reverts to the pledgor on payment of the principal debt by the pledgor, and it is therefore unnecessary to transfer anything back to the pledgor, as in the case of a pledge of a corporeal thing where possession must be handed back to the pledgor. It is also unnecessary to refer to the position on insolvency, since the normal consequences of pledge take effect.[100] The distinctive nature of the object of pledge in this case, however, necessitates an amendment of the Insolvency Act 24 of 1936 to make provision for collection of the debt as a realisation possibility.

Bearing this criticism in mind, I can understand that the commission's recommendations were severely criticised, not only from a dogmatic but especially

97 See *ibid* and the authority cited there.
98 See discussion above in section A fn 9.
99 See in this regard the various special provisions introduced in the *BGB* §§ 1273–1296.
100 See s 83 of the Insolvency Act 24 of 1936.

from a practical point of view. The majority of commentators on this issue were probably not in favour of the changes proposed by the commission, not because they were of the opinion that change was unnecessary, but probably because the proposed changes were open to criticism on several grounds.

The commission summarised the most important comments received by it on the working paper, and I shall deal with these separately:

(a) *The parties should still have the opportunity to stipulate the consequences of the agreement to give security.*[101] This is merely an indication, which probably came from practitioners, that they do not wish to be restricted to one form of security only. They obviously have a fiduciary security cession in mind and serious consideration should have been given to this comment.

(b) *The proposal of the commission is ill-considered and shows a lack of insight as well as confusion with regard to the difference between the two constructions of cession* in securitatem debiti. *In the case of the pledge construction, unlike an out-and-out cession where the legal claim is transferred to the cessionary, only the capacity to realise the claim is transferred to the cessionary, while the cedent retains its legal claim.*[102] This was the gist of my criticism against the proposals and, I suspect, a translation of my conclusion. It is a very important comment which still holds good and I cannot understand why the commission did not pay more attention to it. Lubbe[103] and Oelofse[104] also seem to agree with me and regard statutory intervention as necessary.

(c) *The consequences of the insolvency of the cessionary are not addressed.*[105] This is a very important comment, which should be seen in perspective: it is not true that the consequences of insolvency of the cessionary (should read "pledgee") are not addressed. The effect of a pledge is such that the pledged object does not form part of the pledgee's insolvent estate, and he/she acquires a secured claim for payment of the principal debt. This comment, to my mind, is actually addressed to the position of the cessionary in a fiduciary security cession, where the cessionary becomes holder of the claim itself. It is exactly for this reason that the courts fall back on the pledge construction, even in cases where the parties clearly intended a fiduciary security cession.

The Insolvency Act 24 of 1936 does not make provision for the idea of fiduciary property. On insolvency of the fiduciary cessionary, the claim falls in his/her insolvent estate and the cedent only has a concurrent claim.[106] This situation is unfair and unacceptable. If the commission wished to introduce fiduciary security cessions into South African law, it was of the utmost importance to have made provision for the event of insolvency.[107]

(d) *What are the implications for the cessionary if the cedent is sequestrated within six months after payment and the payment is deemed to be a voidable preference?*[108] I have some difficulty in understanding this comment, since I

101 See *Report* § 5 9 4, first comment.
102 See *Report* § 5 9 4, second comment.
103 "Book review: The law of cession" 1992 *THRHR* 161 162.
104 "Book review: The law of cession" 1992 *SA Merc L* 389.
105 See *Report* § 5 9 4, third comment.
106 See Scott *Cession* 232 251.
107 As I have indicated above under par 1 1.
108 See *Report* § 5 9 4, fourth comment.

suppose it is repeated out of context here. The commentator probably had in mind a fiduciary security cession in terms of which the cedent disposed of his/her property. Here the fiduciary nature of such a cession should be borne in mind: it is not an absolute disposition, but one for security purposes only.

(e) *It should be obligatory that a cession agreement should be in writing.*[109] This is a very important comment which should not only be addressed in relation to security by means of claims, but also to all cessions. I shall deal fully with this issue below.[110]

(f) *Out-and-out cession as a form of security should not enjoy recognition.*[111] This is a very important comment and should receive careful consideration. I have already discussed the inherent difficulties of recognising this type of security.[112]

(g) *Delivery of the document in which the legal claim is embodied should be a requirement for validity.*[113] In principle, I reject this as a validity requirement for a pledge of claims, a fiduciary security cession, as well as an ordinary cession.[114]

(h) *Clause 4(1) and (2) of the proposals is superfluous as it deals with matters that have already crystallised in the case law.*[115] Clause 4(1) states that the cedent is entitled to re-cession of the claim after payment of the debt. Clause 4(2) provides that the claim falls in the insolvent estate of the cedent and that the cessionary acquires the rights of a pledgee. The commentator is correct in stating that case law deals with both these aspects, but it does not deal with it correctly or in the sense that it is used in the recommendation. Re-cession of the claim is dealt with in cases dealing with pledge, where it is unnecessary because of the effect of the accessory nature of pledge. The cases stating that the pledged article falls in the insolvent estate of the "cedent" regarded the "cedent" as pledgor and simply applied the rules of pledge. In this clause the commission in a very elementary way probably tried to introduce fiduciary security cessions into South African law, but again confused a pledge of claims with this form of security.

(i) *The rule that the ceded claim (= security object) forms part of the insolvent estate of the cedent has an unfair result in the majority of cases. The reason is that the claim of the cessionary (= principal debt or secured debt) is in general higher than the secured claim (= security object). Concurrent creditors do not benefit from it and the proceeds of the cessionary are rather curtailed by administration costs and the fees of the trustee.*[116] It is difficult to determine the meaning of this comment. As a starting point I would like to point out that the fact that the claim remains in the estate of the pledgor, or reverts to the estate of the security cedent, in the case of a fiduciary security cession, does not have

109 See *Report* § 5 9 4, fifth comment.
110 See section C below.
111 See *Report* § 5 9 4, sixth comment.
112 See discussion under par 1 1 1 above.
113 See *Report* § 5 9 4, seventh comment.
114 See Scott *Cession* ch 4. The Appellate Division also rejected this requirement in *Botha v Fick* 1995 2 SA 750 (A) (noted by me in 1995 *TSAR* 760). See further the discussion below in section C.
115 See *Report* § 5 9 4, eighth comment.
116 See *Report* § 5 9 4, ninth comment.

unfair results. On the contrary, it is precisely because of the fairness of the situation to all concerned that a pledgor retains ownership of the pledged object and that the Germans make use of the *Umwandlungsprinzip*, in the case of a fiduciary security cession. It should further be noted that in deciding on the extent of the security object, in other words, on which claim/s should serve as security, the creditor should ensure that his/her claim against the pledgor (the principal debt, which is the secured claim) is smaller than the pledgor's claim/s against his/her debtor, which is the security object.[117] Concurrent creditors of the insolvent pledgor are not excluded from making use of the surplus, should there be any. Furthermore, since the pledgee is a secured creditor, his/her liability for administration costs is limited.[118]

(j) *Any legislation in this connection should naturally be applicable only to cessions that take place after the commencement of the Act.*[119] I agree with this comment, and it should be borne in mind that whatever the intention of the parties may be, as the law currently stands, a security cession will always be interpreted as a pledge in the event of insolvency. However, should the commission decide to amend the Insolvency Act 24 of 1936 to make provision for fiduciary security cessions,[120] this type of amendment can have retroactive effect.

(k) *Section 83 of the Insolvency Act was not created for the realisation of securities that are not in possession of the creditor.*[121] There is not enough information in this comment to determine what the commentator tried to convey to the commission. It could be that he/she tried to indicate that the realisation of claims should take place in terms of their own special rules and not in the same way as corporeal things. Realisation of the pledged claim[122] is one of the problem areas which should be addressed in an Act dealing with pledge of claims.

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117 Although I do not follow the meaning of the last sentence of the comment, I would like to point out that normally the value of the security object is at least 20% higher than the principal debt (secured claim).

118 See s 89 of the Insolvency Act 24 of 1936.

119 See *Report* § 5 9 4, tenth comment.

120 See discussion above under par 1 1.

121 See *Report* § 5 9 4, eleventh comment.

122 S 83(8)(c) of the Insolvency Act 24 of 1936 does not prescribe the manner of realisation of claims, but only states that it should take place with the consent of the trustee or master. In a pledge of claims the question arises whether the pledgee may, instead of selling the right, proceed to claim performance from the debtor and satisfy his/her claim from the proceeds. In German law the code expressly empowers the pledgee to claim performance. However, he/she may do so only to the extent of his/her claim against the pledgor. If the principal debt is not completely covered by the proceeds, the pledgee still has a claim for the balance against the pledgor. The pledgee may also claim that the pledgor cedes the claim to the extent of the principal debt to the pledgee instead of payment. In South African law the pledgee may claim the full amount – and not only that portion of the debt that is sufficient to satisfy the principal debt. In *Kuranda v Boustred* 1933 WLD 49 53 and *Rixom v Mashonaland Building Loan and Agency Company Ltd* 1938 SR 207 213 it was held that the pledgee may claim the whole amount, but that he/she should account to the pledgor and pay the surplus to him. The latter approach seems more acceptable than the German one as it entails the least inconvenience to the debtor since, in this solution, he/she is faced with only one action and not two, as is possible in German law. The position in German law, on the other hand, affords the pledgor and his/her creditors the best possible protection since the surplus at no stage

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(l) *Legislation is not necessary in view of the latest series of decisions of the Appellate Division in this regard. The present position provides adequate security to all who wish to use cession as a security for a debt. All parties are free to phrase agreements as it suits them.*[123] I shall refrain from giving my own evaluation of this comment and refer to the views of Lubbe and Oelofse quoted below. I can understand that there are people who would like to see no change to the prevailing position. It provides work for lawyers and keeps the courts occupied.[124] This type of uncertainty in a legal system leads to unnecessary costly litigation and increases the costs of credit financing. Furthermore, this whole article rebuts the correctness of this comment.

(m) *If the Commission's proposal is implemented some form of proof of the cession should be made obligatory. In the case of a cession of book debts it should be provided in clause 4(2) that it is not necessary to give notice to the debtors.*[125] This comment is a further manifestation of the confusion that exists in practice and which was perpetuated in the recommendations of the commission. It strengthens my viewpoint that the recommendations did not address the needs of practice. The commentator is probably a practitioner who does not realise the implications of the fact that the commission has opted to introduce a pledge as the only form of security. Such an approach necessitates adherence to the principle of publicity. For practitioners, however, it clearly is an unacceptable requirement.[126] On the one hand, this commentator requires proof of the cession, but on the other hand, he/she rejects the publicity requirement. This commentator possibly had a deed of cession as a form of proof in mind.

2 2 3 Conclusion of commission

The commission recognises the diversity of these comments and refers to the criticism of academics.[127] It comes to the conclusion that academics, for dogmatic reasons, largely favour the fiduciary security cession construction, whereas practitioners and judges support the pledge construction. This is a rather simplistic view of the situation.

In paragraphs 5 9 7 to 5 9 9 the commission substantiates its decision not to recommend legislation to regulate security by means of claims, and I shall now deal with these reasons. The commission indicates that its preference to regulate pledge of claims statutorily and exclude fiduciary security cessions, found

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forms part of the pledgee's estate and he/she can therefore not deal with it in any way. In the absence of a statutory provision, it is advisable to include a clause in the deed of pledge authorising the pledgee, on maturity of the pledge, to collect the claim, satisfy his/her claim out of the proceeds and to pay the balance over to the pledgor. A clause in a pledge agreement that the pledgee may keep the surplus after his/her debt has been satisfied is a *pactum commissorium* and is invalid. An agreement between the pledgor and the pledgee that, on non-payment of the debt, the pledgee may cancel an insurance policy and keep the cash surrender, amounts to a *pactum commissorium* and is invalid as such. However, a provision that he/she may cancel the policy, apply the cash surrender to satisfy his/her debt, and pay the proceeds to the pledgor is valid and does not amount to a *pactum commissorium*. This, however, is subject to the fact that the surrender value of the policy should represent the fair value of the policy at the date of cancellation.

123 See *Report* § 5 9 4, twelfth comment.

124 See eg the cases cited above in section A fn 32.

125 See *Report* § 5 9 4, last comment.

126 See the discussion above in section A under par 1, in particular fn 9.

127 See *Report* § 5 9 5.

support neither with academics nor with practitioners. The commission does not seem to have considered the possibility that the recommendations were severely criticised mostly on the basis of the manner in which the pledge of claims was dealt with. Naturally, practitioners criticised the recommendations, because it did not address their needs. The objections of both academics and practitioners induced the commission to consider the possibility of regulating only pledge of claims statutorily, and to leave the development of fiduciary security cessions to the courts.[128] The commission then comes to the conclusion that fiduciary security cessions should be retained and that there is no sense in statutorily regulating pledge of claims.[129] Here the commission makes a very grave mistake in not realising the inhibiting effect which the parties' position on insolvency and attachment has had on the development of fiduciary security cessions in the South African courts.[130]

In paragraph 5 9 8 the commission argues that there is no legal uncertainty about the consequences of these two forms of security by means of claims. This statement is incorrect and can be easily rebutted. The commission further states that delivery of the document evidencing the claims poses no special problems, since the Appellate Division has decided that it only serves as proof of the existence of the claims,[131] that notice of the cession to the debtor is necessary to bind the debtor and that there are no problems in the event of insolvency. The only problem the commission has with security by means of claims is the fact that the parties do not state their intention properly. With these ill-considered statements, which show a complete misunderstanding of the legal institutions involved and their effect in practice, the commission recommends no legislative intervention, but is of the opinion

> "that the natural development should not be impeded, so that the courts can eventually decide whether one of or both of the constructions satisfy practical needs. Freedom to contract should also not be impeded and the parties should be free to give expression to their intention. The court should determine what intention the parties had only when this is not clear. It would appear that in such cases the courts would give effect to the pledge construction if it is apparent that the parties had the giving of security in mind. It is, however, also possible that the courts could from the particular circumstances of a given case infer an intention of an out-and-out cession".[132]

Bearing in mind the comments discussed above and the problems encountered in the courts with security by means of claims, I cannot accept this conclusion and the suggestions contained in it as a solution to the problem, and would also like to refer to the views of two other academics on this issue. In a book review[133] of *The law of cession* Lubbe expresses himself as follows:

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128 See the discussion of this possibility above under par 1 1 1.

129 For a discussion of this type of argument see my discussion below on the possible options that can be exercised.

130 See the discussion above under par 1 1 1.

131 I assume that the commission had the minority judgment of *Labuschagne v Denny* 1963 3 SA 538 (A) in mind, which was overruled in *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992 2 SA 807 (A) and reinstated, to a certain extent, in *Botha v Fick* 1995 2 SA 750 (A).

132 See *Report* § 5 9 9.

133 1992 *THRHR* 162.

> "Die kwessie van sessie *in securitatem debiti* en die regspraak se skynbare onvermoë om sekerheid op hierdie gebied te bewerkstellig, word in besonderhede behandel (231–252). Ten spyte daarvan dat Scott in hierdie werk, en ook elders, 'n wesenlike bydrae gemaak het tot die behoorlike begronding van die vorderingspand, skep die jongste uitlatings van die appèlhof in *Incledon (Welkom) (Pty) Ltd v Qwa Qwa DC Ltd* 1990 4 SA 798 (A) nie die vertroue dat die aangeleentheid spoedig bevredigend beredder sal word nie. Om, ten spyte van die kritiek teen *Marais v Ruskin* 1985 4 SA 659 (A) (Scott 147 234 238 vn 33), die algehele sekerheidsessie onder die vlag van verpanding te laat vaar sonder om vorige gesag tot die teendeel te verwerp insluitende beslissings soos *National Bank of SA v Cohen's Trustee* 1911 AD 235 en *Leyds v Noord Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 2 SA 729 (A), is nie goed genoeg nie. Die huidige toedrag van sake is nie net teoreties onverkwiklik nie, maar kan geredelik ook daartoe lei dat die verwagtinge van partye en die praktyk met 'n gepoogde verpanding verydel word deurdat die appèlhof ingestel op die handhawing van 'n gewaande dogmatiese suiwerheid, 'n geheel ander betekenis aan die begrip gee (vgl Scott 234)."

Oelofse[134] also sees statutory intervention as the only solution to the existing unsavoury situation:

> "Hoewel ek nie met alles wat oor die aanwending van vorderingsregte as sekuriteit gesê word (op 231–252), saamstem nie, is dit nietemin 'n voortreflike poging om orde uit die onduidelikheid en onsekerheid wat op hierdie gebied heers, te skep. Dit lyk egter vir my of wetgewing onafwendbaar geword het."

I am therefore convinced that it is absolutely imperative for the legislature to intervene in order to create certainty in this branch of the law. I shall now discuss the possible ways in which this can be achieved.

2 3 Possible legislative interventions

The following possible forms of legislative intervention can be considered:

(1) Should the commission still adhere to the idea that the principles pertaining to pledge of claims have been sufficiently developed by the courts, the Security by Means of Movables Act 57 of 1993 can be amended *to introduce fiduciary security cessions* as an alternative to a pledge of claims. This solution will necessitate amendment of the Insolvency Act 24 of 1936, to make provision for the position of the fiduciary security cedent and cessionary on insolvency.[135]

(2) The Security by Means of Movables Act 57 of 1993 can be amended *to introduce fiduciary security cessions as the only form* of security by means of claims. This, of course, will also entail amendment of the Insolvency Act 24 of 1936, as suggested above.

(3) The Security by Means of Movables Act 57 of 1993 can be amended *to regulate security cessions in general: Both pledge of claims and fiduciary security cessions can then be regulated in the Act.* Both forms of security can be retained in this way, as is the position in Germany, and to my mind, was the position in South African law until *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy.*[136] Several European codes can serve as examples for drafting the sections of the Act pertaining to pledge. This option will also

134 1992 *SA Merc LJ* 389.
135 See discussion above under par 1 1.
136 1985 2 SA 769 (A).

necessitate amendment of the Insolvency Act 24 of 1936 to accommodate fiduciary security cessions.

(4) The Security by Means of Movables Act 57 of 1993 can be amended *to introduce possessory pledge as the only form of security by means of claims*. In the drafting of this legislation, various European codifications can serve as examples. This option will not necessarily require amendment of the Insolvency Act 24 of 1936, since section 83 deals with pledge, although it is basically aimed at pledge of movable corporeals.

(5) The Security by Means of Movables Act 57 of 1993 can be amended *to introduce possessory and non-possessory pledge* in accordance with the position in the new Dutch *Burgerlijk Wetboek*. This will not entail amendment to the Insolvency Act 24 of 1936, since it already makes provision for pledge. It should, however, be borne in mind that section 83 is basically aimed at realisation of a pledge of movable corporeals and it should therefore be adapted to accommodate realisation of claims.

(6) The Security by Means of Movables Act 57 of 1993 in section 1(1) makes provision for the registration of a notarial bond over corporeal movables only.[137] This Act can be amended *to regulate notarial bonds in respect of claims*.

(7) After careful consideration of the various possibilities, I favour a new approach in terms of which *all the possibilities, referred to from 1–6 above, are accommodated*. This can be achieved as follows: the Security by Means of Movables Act 57 of 1993 can be amended to make provision for both confidential and public (conventional) pledges of claims, as well as for notarial bonds over claims. The Insolvency Act 24 of 1936 can be amended to make provision for fiduciary relationships and to regulate the realisation of pledged claims.

2 3 1 Evaluation of possible legislative actions

Ad (1): This is not a viable option, for the following reasons:

(a) It is unnecessary for the legislature to intervene in this way merely to introduce the notion of a fiduciary security cession into our law. This task could just as well be undertaken by the courts, especially once the Insolvency Act 24 of 1936 has been amended to accommodate fiduciary relationships, as I have suggested above. Although I have indicated that I foresee difficulties for such a development in the courts, I prefer this development to be undertaken by the courts, rather than by the legislature.

(b) I foresee difficulties for the drafting of this proposed legislation. As I have indicated above this form of security has developed for more than two centuries: in theory, through the highly developed juristic skills of the Pandectists, and, in practice, as a response to the credit needs of society. In this regard lawyers played a very important role in skilfully drafting documents to conform to their clients' requirements and judges in imaginatively interpreting these documents.

(c) This solution still does not address the problems encountered in practice[138] and theory[139] with regard to pledge of claims.

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137 See also van der Walt (CFC), Pienaar and Louw 1994 *THRHR* 615–617.

138 Eg the question of *locus standi*, the situation where the pledge has not matured and the debtor wishes to pay his/her debt (see Scott *Cession* 242–243), the position after maturity where ways and means of realisation of the security object has not been satisfactorily

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Ad (2): I do not find this solution acceptable for the following reasons:

(a) See (a) above ad (1).

(b) See (b) above ad (1).

(c) Such an approach will lead to an impoverishment of the law on this topic. There is no reason to exclude pledge of claims simply because it has not been dealt with properly in some instances in South African law.

Ad (3): I do not find this solution acceptable for the following reasons:

(a) As I have indicated above in (b) ad (1), drafting of such legislation will be difficult and development of fiduciary cessions should be left to the clients, lawyers and the courts.

(b) Here one should be mindful of the fact that even in German law, where a pledge of claims plays a very insignificant role and fiduciary security cession is the generally accepted form of security by means of claims, the latter caused serious difficulties in insolvency, especially in cases of a conflict of interests between different fiduciary security cessionaries.[140] The latter may, however, rather be ascribed to the acceptance of cessions of future rights in anticipation and the recognition of extended reservation of ownership (*erweiterter Eigentumsvorbehalt*), than to the recognition of fiduciary security cessions.

Ad (4): This option is unacceptable for the following reasons:

(a) It does not satisfy the needs of modern credit business.

(b) It will amount to an impoverishment of the law.

(c) Possessory pledge in South Africa, the Netherlands, Belgium and Germany was found to be too restrictive and has been circumvented in one way or another. In Germany it has resulted in the development of fiduciary security cessions and in the Netherlands in the introduction of a non-possessory pledge in the new *Burgerlijk Wetboek*.

Ad (5): I favour this possibility, but with a qualification:

Initially I favoured the Dutch approach and gave it serious consideration. It appears to serve the needs of practice and is theoretically on a sound footing; it also appears to address the specific needs of the parties and seems to be an honest approach, since it recognises the need for what it is, namely a need for the recognition of a non-possessory pledge of claims. It furthermore seems to be less complicated than the German system.

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dealt with (see Scott *Cession* 243–246) and the fact that a *parate executie* clause is valid. In German law such a clause is inadmissible and the pledgee has to approach the court for an execution order – see Weber *Kreditsicherheiten* (1994) 242. This is a very sensible approach since the value of claims are often higher than the value of immovable property where such a clause is inadmissible. A pledgee, therefore, should not be allowed to realise the claims without a court order. The position on insolvency should also be regulated separately from the position of pledge of movables.

139 Eg the way in which the specificity and publicity principles are neglected (see Scott *Cession* 237–238), as well as the problems created by the distinct nature of the object of a pledge of claims.

140 Serick *Sicherungsübertragung* 161 *et seq*; Joubert *Die regsbetrekkinge by kredietfaktorering* (LLD thesis RAU 1986).

In evaluating principles of a specific legal system with the object of introducing them into another system, one should pay close attention to the theoretical basis underlying that system, as well as to the fact that it is a component of a complete system.[141] I shall therefore evaluate the Dutch *Burgerlijk Wetboek* rather extensively and indicate if it can serve as a model for changes to the South African law of security by means of claims.

Paragraph 84(3) of Book 3, the general book on patrimonial rights, is aimed at eliminating any form of transfer of ownership for security purposes. It states that a juridical act which is intended to transfer property for purposes of security or which does not have the purpose of bringing the property into the patrimony of the acquirer, after transfer, does not constitute valid title for transfer of that property. This paragraph was placed in the code to exclude all forms of security transfers. It was aimed at fiduciary security cessions as well as transfer of ownership as security. It has met with general disapproval in the Netherlands. Reehuis[142] discusses a case in which the Dutch *Hooge Raad* has already found a way to circumvent this paragraph in the case of movables.

Paragraph 239 of the same book deals with a confidential pledge of claims. In terms of paragraph 239(1) a pledge of a claim against one or more persons that is not payable to bearer or order, or of a usufruct on such a claim can be constituted by means of an authentic deed or a registered non-notarial deed, without notice to the debtor, provided that the claim exists at the time of constitution of the pledge or would be acquired directly from an existing legal relationship. Subparagraph 2 states that paragraph 237(2)[143] applies *mutatis mutandis*. Subparagraph 3 states that when the pledgor (or principal debtor) falls in arrears with his/her obligations towards the pledgee or gives him/her good reason to believe that he/she will fail in his/her obligations, the pledgee becomes entitled to give notice to the debtor of the claim referred to in paragraph 239.1. The pledgor and pledgee can determine under what circumstances this entitlement will arise. Subparagraph 4 asserts that paragraph 88[144] applies only to a pledgee whose right was constituted in terms of subsection 1, if he/she was *bona fide* at the time of giving notice in terms of subparagraph 3.

After the debtor has been notified of the pledge, the pledge is regarded as a possessory pledge and the principles of paragraph 236 apply. Of special interest for the pledge of claims are paragraphs 245 and 246. Paragraph 245 deals with the question of *locus standi* and states that both the pledgor and pledgee are entitled to institute action to protect the pledged property, provided that the other is timeously joined in the action. Paragraph 246 deals with the entitlements to claim and receive payment. Subparagraph 1 provides that the pledgee is entitled to claim and receive payment intra- and extra-judicially. Before notice of the pledge to the debtor, the pledgor retains these entitlements. After notice of the

141 The Dutch system is not foreign to the South African system, but actually closely related to it as a result of our common Roman-Dutch heritage.

142 "Omvang en werking van het Nederlandse 'fiduciare-verbod'" 1997 *TSAR* 66.

143 In terms of this paragraph the pledgor is obliged to declare in the deed that he/she is competent to pledge the property, also that no other limited rights exist over the property or which rights exist over the property.

144 § 88 determines that an acquirer of a right validly acquires it even though the transferor had no right to dispose of it, provided that the acquirer was *bona fide*. In other words, this section determines that the abstract system of transfer applies in such instances.

pledge to the debtor, the pledgor can still exercise these entitlements, provided that the pledgee consented to it or a magistrate ("kantonrechter") authorised it.[145] After the pledgor has received payment in this way, the pledge which existed over the claim now rests on the money received.[146] Paragraph 248 provides for the inclusion of a *parate executie* clause, but also for the possibility that the parties may include an agreement in terms of which *parate executie* will only be possible once a court has determined that the pledgor (debtor) is in arrears. Paragraph 249 provides that the pledgee must notify the debtor and the pledgor of the sale. Paragraph 250 states that the pledged property should be sold at a public sale and paragraph 251 makes provision for a deviation from the prescribed method of sale. The way in which the proceeds of the sale should be distributed is determined by paragraph 253. Paragraph 255 states that in the case of a pledge of money the pledgee may, on maturity of the pledge without preceding notice to the pledgor, satisfy his/her claim and distribute the proceeds as prescribed in paragraph 253. In terms of paragraph 258(2) a pledge of claims can be terminated by agreement, provided that the consent of the pledgee is evidenced in a document.

The following aspects of the Dutch code are interesting: first and foremost it explicitly excludes any form of fiduciary security transfer. It restricts confidential pledge of claims to existing claims, in other words, it excludes pledge of future claims. Before notice to the debtor, the pledge is a confidential one and thereafter a public (conventional) pledge, that is, a pledge which conforms to the publicity requirement. Paragraph 239 is an attempt to satisfy the need for confidentiality which, before the enactment of the new *Burgerlijk Wetboek*, was met by means of fiduciary security cessions. Although paragraph 246 prescribes the entitlements to claim and collect payment and that a pledge is constituted over the money so collected, it does not, however, prescribe how the money should be invested.[147] Furthermore, this paragraph does not deal with the pledgor's entitlement to release the debtor or to come to an arrangement for payment.

Although the Dutch approach to the problem, at first glance, seems to be the solution, there are definitely shortcomings in that approach – notably the fact that in practice there still seems to be a need for security transfers. This can probably be attributed to the fact that pledge of future claims are explicitly excluded. Furthermore, the Dutch *Burgerlijk Wetboek* is not as specific and extensive as the German *Bürgerliches Gesetzbuch* in its treatment of pledge of claims. Although the German code does not make provision for a confidential pledge, the provisions for a pledge of claims are more comprehensive and therefore more acceptable than those of the Dutch code. Consequently, I suggest that the Security by Means of Movables Act 57 of 1993 can be amended to make provision for confidential pledges by including paragraph 239 of the Dutch code, but to deal extensively with a pledge of claims the amendment should follow the German code.

Ad (6): I favour this amendment, not as the solution to the problem, but as one of the solutions:

145 § 246(4).
146 § 246(5).
147 Here the German *BGB* is more satisfactory – see § 1288(1).

This amendment will broaden the possibilities for security by means of claims. Although this possibility always existed, for some reason or other it is not widely made use of. One of the reasons is probably the fact that it requires attestation by a public notary and registration. It must also conform to the requirements of the Deeds Registries Act 47 of 1937. This makes it a more expensive form of security, but if one requires a notarial deed for confidential pledges, there will probably be little difference in the cost of constituting the security. The Security by Means of Movables Act 57 of 1993 has this peculiarity that section 1(1) only makes provision for registration of a notarial bond over corporeal movables.[148] Furthermore, the effect of the wording of section 1(3) is such that it excludes the special notarial bondholder of incorporeals from enjoying the preference bestowed on special notarial bondholders of movables registered before commencement of the Act. Consequently the general notarial bondholder of incorporeal movables is in a stronger position than the special notarial bondholder of incorporeals who, in terms of *Cooper v Die Meester*,[149] cannot rely on section 102 of the Insolvency Act 24 of 1936. Such a bondholder is a non-preferent creditor who is liable to contribute to the costs in terms of section 106 of that Act. To my mind, therefore, the Security by Means of Movables Act 57 of 1993 should be amended to afford the special notarial bondholder of claims the same protection as that afforded the special notarial bondholder of movables.

Ad (7): I highly recommend this approach to the problem for the following reasons:

(a) It will enrich the South African law on security by means of claims by providing all the possibilities that the law can offer legal subjects in this regard.

(b) It will give recognition to the ability of legal subjects and their lawyers to choose exactly the form of security which suits their requirements.

(c) It will not restrain judicial responsibility and ability to develop[150] the common law. Although I have expressed reservations above about South African judges' preparedness to indulge in innovative and original decision-making activities which may be seen as an assumption of legislative responsibility, I agree with Van der Merwe[151] that

> "[t]he distinction, therefore, between judicial application of or improvement to the law and legislative innovation of the law is far less rigid and far more subtle than Jeremy Bentham and like-minded theorists have had us believe".

I believe that the judicial development of the legal institution of fiduciary security cessions affords the South African judiciary an excellent opportunity to fulfil its judicial responsibility to develop the common law.

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148 See also Van der Walt (CFC), Pienaar and Louw 1994 *THRHR* 615–617. For a discussion of the position of a notarial bondholder of claims (incorporeal movables) registered after 1993, see Scott "Notarial bonds and insolvency" 1995 *THRHR* 672.

149 1992 3 SA 60 (A).

150 On the meaning of such development see Van der Merwe *Nihil obstat* 225–226: "And by *development* I do not mean the interpretative, analytical and definitional activity that is the stuff of law-in-action and the daily fare of the jurist. I mean the improvement of law, the creative exercise that goes beyond stated law and produces new, substantially changed law, more reflective of social *mores* and more responsive to the economic, social and political needs and realities of society."

151 *Nihil obstat* 232.

2 4 Conclusion

Having considered the different options open to the South African Law Commission, I recommend the following *modus operandi*: amendment of the Security by Means of Movables Act 57 of 1993 to make provision for a confidential pledge of claims (based on paragraph 239 of the Dutch code); to introduce a (public) pledge of claims (based on paragraphs 1204 and 1273–1279 of the German code) and to afford a notarial bondholder of claims the same protection which is afforded to a notarial bondholder of movable corporeal things in terms of the Security by Means of Movables Act 57 of 1993, as well as amendment of the Insolvency Act 24 of 1936 to make provision for fiduciary security cessions and the realisation of claims as pledge objects.

Should the South African Law Commission decide to accept this recommendation, it should also consider codification of the law of cession as a whole. As I have indicated above, a piecemeal approach to legislative intervention in this regard may have negative effects,[152] especially if one decides to follow, for example, one of the European codes on security by means of claims. In consulting these codes for guidance, one should bear in mind that they are very closely linked to the general tenor of the code as a whole and in particular to the provisions pertaining to cession. There is, furthermore, no doubt in my mind that the South African law of cession as a whole, being a system based on the seventeenth and eighteenth century Roman-Dutch law, is in dire need of reform. In order to persuade the commission to consider such reform, I shall briefly refer to the problem areas in the law of cession in section C. However, I shall not deal with these problems extensively since I have dealt with most of them in my textbook on the law of cession and several articles to which I shall refer.

(*To be continued*)

Section 15 [of the 1993 Constitution, which entrenches the right to free speech], of itself, does not, in my view, call for a differentiated approach favouring the press in matters of this kind or for a departure from the well-established rules followed by our Courts in other applications for interim interdicts. When it comes to balancing the conflicting interests of the press and the individual, it seems to me that this process can well be accommodated within the four corners of the established rules (per Plewman JA in *Hix Networking Technologies v Systems Publishers (Pty) Ltd* 1997 1 SA 391 (A) 401).

152 See the problems encountered by the South African Law Commission in their recommendations, eg where it recommends that delivery of the document evidencing the right is not necessary for a pledge of claims – see discussion above under par 2 2 2.

Commercial bribery: Reconsidering the juridical basis for the principal's remedies against the briber*

Warren B Bank
BCom LLB
Law Student, University of South Africa

OPSOMMING

Handelsomkopery: 'n Heroorweging van die juridiese grondslag van die prinispaal se remedies teen die omkoper

Alhoewel handelsomkopery na bewering toenemend in Suid-Afrika voorkom, is daar verbasend min besliste sake daaroor. Handelsomkopery verwys na die verskynsel waar 'n party by 'n kontrak sy medekontraktant se verteenwoordiger omkoop om 'n handelsverhouding aan te gaan of met 'n bestaande verhouding voort te gaan. Hierdie artikel bespreek die grondslag van die prinsipaal se remedies teenoor die party wat die verteenwoordiger omgekoop het. In die regspraak kan drie moontlike grondslae onderskei word:

(a) In die vroeëre sake word die prinsipaal se remedies onder invloed van die Engelse reg op bedrog gegrond. Die begrip *fraud* het egter 'n baie wyer betekenis in die Engelse reg as in ons reg.

(b) In *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) beslis die appèlhof dat die prinsipaal se remedies gegrond is op die onbehoorlike metode waardeur wilsooreenstemming verkry is. Die kontrak is dan vernietigbaar. Sommige skrywers interpreteer hierdie saak as die formulering van 'n algemene grond vir die aanvegting van die kontrak.

(c) In die onlangse saak *Extel Industrial (Pty) Ltd & Quatrex Marketing (Pty) Ltd v Crown Mills (Pty) Ltd* 1996 2 SA 80 (W) word beslis dat sodanige kontrakte ongeoorloof en daarom nietig is. Die Switserse en Amerikaanse reg volg dieselfde benadering. Voorts verbied die Wet op Korrupsie 94 van 1992 handelsomkopery. Hierdie benadering is te verkies omdat dit inpas by bestaande beginsels van ons reg en in ooreenstemming is met die beleidsoorweging dat handelsomkopery in 'n ernstiger lig as bedrog beskou behoort te word. Die gevolge van nietigheid van die kontrak weens ongeoorloofdheid is immers veel ernstiger as dié van vernietigbaarheid van die kontrak weens bedrog. Hierdie benadering sal beslis bydra tot die bestryding van handelsomkopery in Suid-Afrika.

1 INTRODUCTION

In broad terms most situations of commercial bribery follow a similar pattern: a third party (generally a supplier of goods or services) wishes to influence a prospective contractual partner (generally a purchaser) in the former's favour, not through the usual acceptable method of offering better products at more

* This article is based on an LLB dissertation submitted at the University of South Africa in June 1996. The author wishes to express his gratitude to his supervisor, Prof TB Floyd.

competitive prices, but through pressuring the prospective partner's agent. This pressure may take the form of any inducement or secret profit. The agent's principal is the ultimate "victim" of the surreptitious dealing and is ignorant of the briber's actions. Bribery is therefore distinguished by the secrecy involved in dealings between the third party and agent.

In an atmosphere of fierce competition brought about through the combined effects of a weakening currency, lowering of tariff barriers and globalised markets, it is not surprising that commercial bribery is said to be widespread and occurring with increasing frequency in South Africa.[1] The substantial amounts involved are accompanied by a corresponding level of secrecy. It is consequently very difficult to determine with any certainty the actual incidence of commercial bribery.[2] For suppliers who refuse to compromise their principles, dealing with a buyer who expects a bribe as a matter of course is extremely difficult. Other suppliers, while not making a practice of bribery may resort to it when faced with a situation of desperation. Yet others might have already developed this practice to a fine art, generating much of their sales as a result of some form of manipulation of their customers and building the cost of bribery into the cost of goods sold.[3]

It is not the purpose of this article to propose solutions to this insidious practice, but to analyse the legal consequences of bribery upon contracts subsequently concluded.

Although the terms agent and principal are used throughout this discussion, the court *a quo* in *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk*[4] emphasised that although the word "agent" is used throughout the English and South African authorities it is clear that the term refers to "any person in a fiduciary position, such as a servant or a director of a company".[5]

At the outset it is important to note the difference between an agent's fiduciary duty towards his principal and the duties reciprocally owed between the principal and the third party as co-contractants. Failure fully to appreciate this distinction may lead to confusion when considering the principal's rights against his agent and co-contractant respectively.[6]

The aim of this article is to discuss the principal's rights against the co-contractant who bribes his agent only with respect to the validity or otherwise of consequent contracts. A discussion of the principal's right to claim damages

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1 See eg the discussion of the situation in the local footwear and leather industry: "Bribery: True cost is higher" 1995 (7) *Shoes and Views* 16. See also in general Van Heerden and Neethling *Unlawful competition* (1995) 221 as to commercial bribery as a form of unlawful competition.

2 *Ibid* 17.

3 See responses to the above article in 1995 (9) *Shoes and Views* 8.

4 Case no M3672/79 1983-03-07 (W) (hereafter *Plaaslike Boeredienste* (1)). A summary of the judgment appears at 1983 3 SA 616 (T).

5 *Plaaslike Boeredienste* (1) *supra* 1482–1483. McEwan J gave the following examples: member of a syndicate (*Nathan, Michaelis and Jacobs v Blake's Executors* 1904 TS 626); director (*Grant v The Gold Exploration and Development Syndicate Ltd* 1900 1 QB 233 (CA)); servant – chauffeur (*Alexander v Webber* 1922 1 KB 6420).

6 See eg Handley "The juridical basis for rescission?" 1987 *Responsa Meridiana* 232. He concludes that since the conduct of the *agent* constitutes a breach of the fiduciary relationship (between himself and the principal), the *principal* may resile from the contract (between principal and third party). It is submitted that Handley fails to appreciate the distinction between two completely different relationships.

from his co-contractant is beyond the scope of this article, as is a discussion of the rights and remedies of the principal against his own agent. Both these issues merit separate discussion.[7]

It is important to note that the common law *crime* of bribery is not under discussion here as this is limited to the case involving bribery of a state official in his official capacity.[8] Commercial bribery does, however, fall within the ambit of the provisions of the Corruption Act 94 of 1992.[9] The relevance of this Act will be discussed later.

Although situations of commercial bribery may be increasingly common there is a paucity of reported cases concerned with the issue. The earlier decisions[10] were decided on the basis of English authority and using principles of English law.[11] As will be shown, the approach of the courts *vis-à-vis* the exact juridical nature of the principal's right of rescission or avoidance has not been consistent. This may be attributed in part to the dearth of South African decisions on bribery but is probably due rather to the fact that *several* possible juridical bases are available as will become clear later. Although the Appellate Division has considered the issue of commercial bribery,[12] several issues were expressly left open by the court. Since that decision, the only cases to have developed the discussion further were the recent cases of *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* and *Quatrex Marketing (Pty) Ltd v Crown Mills (Pty) Ltd.*[13] As leave to appeal to the Appellate Division has been granted in this matter,[14] one can look forward to some clarity and certainty on this issue in the not too distant future.

This article is an attempt to identify the most suitable juridical basis upon which to base the principal's possible remedies against his co-contractant. In other words, the method chosen should be one that accords not only with the principles of modern South African law, but one that is also able to achieve results that are both equitable and in keeping with the norms of public policy.[15]

As this same problem has been faced by the courts of other legal systems, it is instructive (and in keeping with modern jurisprudence) to adopt a comparative approach in evaluating the appropriateness of the suggested juridical bases. Consequently the position in certain foreign legal systems will be briefly considered.

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7 This discussion has received a far more thorough treatment in English law than in our own. See eg Reynolds and Davenport *Bowstead on agency* (1976) 349 for a discussion of the principal's right to sue both agent and third party jointly and severally for damages sustained by the principal as well as the principal's right to recover the amount of the bribe from the agent. This issue was considered by the Privy Council in *Mahesan v Malaysia Government Officers' Co-Operative Housing Society Ltd* 1979 AC 374, 1978 2 All ER 405. It was held that as against agent and briber the principal had alternative, not cumulative remedies. See Fridman *The law of agency* (1990) 167.

8 See Snyman *Criminal law* (1991) 361–365.

9 S 2 prohibits the *corrupt* acceptance or offer of a consideration by or to agents but does not define the meaning of "corrupt".

10 *Davies v Donald* 1923 CPD 295; *Mangold Bros Ltd v Minnaar and Minnaar* 1936 TPD 48.

11 See the comments of Rabie CJ in *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 SA 819 (A) 846G (hereafter *Plaaslike Boeredienste* (2)).

12 *Ibid.*

13 1996 2 SA 80 (W). Because the two actions were consolidated this will henceforth be referred to as the *Crown Mills* case.

14 See the court file – case no 92/7106. Leave to appeal was granted on 1996-03-29.

15 See eg Handley 1987 *Responsa Meridiana* 232 whose treatment of this complex subject is too brief and, it is submitted, unsatisfactory.

2 POSSIBLE GROUNDS FOR THE PRINCIPAL'S REMEDIES

2 1 Fraudulent misrepresentation

2 1 1 Introduction

Before there can be any discussion of a principal's right to avoid a contract, one has first to determine whether bribery has in fact taken place.[16] The distinction between an acceptable gift and an unacceptable bribe is often quite hazy in the eyes of some business persons. The fact that some members of the business community "undoubtedly hold laxer views"[17] about what constitutes a bribe has been adverted to in several judgments. The courts have always stressed the fact that bribery is characterised by the secretive nature of the gift of remuneration.[18] If the principal knows of or consents to the briber's actions, these actions cannot logically be viewed as bribery.

Since South African law on commercial bribery developed directly out of English law, it is appropriate first to discuss the basis upon which English law allows a principal whose agent has been bribed by the principal's co-contractant to resile from a contract.

2 1 2 English law

In *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha and Telegraph Works Co*,[19] one of the earliest cases concerning bribery, the right of the principal to resile from a contract that comes about through bribery of his agent was clearly established.[20] The surreptitious dealing between principal and the agent of the other co-contractant was seen as a fraud. However, the very broad definition of fraud in English law provides ample justification for any English Court to grant relief to an aggrieved principal:

> "The modes of fraud are infinite and it has been said that the Courts have never laid down what constitutes fraud, or any general rule, beyond which they will not go in giving equitable relief on the ground of fraud."[21]

Because of the difficulty of proving all the elements of bribery, certain irrebuttable presumptions arise which assist an injured principal to claim relief against the third party who has bribed the former's agent. *Bowstead on agency* states that once the existence of the bribe has been established the following two presumptions arise:

First of all, a presumption arises that the agent has been influenced by the bribe. No evidence may be led to show that the agent has not in fact departed from his duty towards his principal.[22]

Secondly, it is presumed that the principal has suffered damage at least to the amount of the bribe regardless of whether or not he is in fact prejudiced at all.[23]

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16 See *Crown Mills supra* 90A where bribery was said to occur when a third party gives or promises to give a gift or remuneration to another's agent without the knowledge of the latter's principal with a view to influencing the agent.

17 The words of Romer LJ in *Hovenden and Sons v Milhoff* 83 LT 41, as quoted by De Wet J in *Mangold Bros supra* 54.

18 See *Plaaslike Boeredienste* (2) *supra* 845.

19 1875 LR 10 Ch App 515.

20 Per Sir WM James LJ 527.

21 Ivamy *Mozley and Whiteley's Law dictionary* (1988) *sv* "fraud" 195.

22 Reynolds and Davenport 140.

23 *Ibid.*

Chitty on contracts[24] states that the consequences of these presumptions are that the third party is regarded as a party to the breach of the agent's duty, and that the principal may rescind the transaction entered into.

2 1 3 Swiss law

In Switzerland a distinction is made between contracts concluded directly between briber and principal and those concluded between briber and agent acting on behalf of the principal.[25] The latter situation will be discussed below under illegality.[26]

Where contracts are concluded directly between principal and third party, the principal may choose to rescind the contract based on two doctrines of Swiss law: the doctrine of essential error or the doctrine of wilful deception.[27] If the principal chooses to rescind the contract under either of these doctrines, he is not precluded from claiming damages based on losses suffered.

2 1 4 South African case law

The English law presumptions were approved of and applied in the early cases of *Davies v Donald*[28] and *Mangold Bros v Minnaar & Minnaar*.[29] In both cases the contracts concerned were held voidable at the instance of the respective principals.[30] These principals have moreover been accepted by South African legal writers.[31]

In the court *a quo* in *Plaaslike Boeredienste* (1) McEwan J held[32] that the basic reason for setting aside the contract on the ground of bribery was "a failure to disclose to the principal that a payment or benefit has been given to his agent, ie, a *fraudulent non-disclosure*". If this were so, all four elements of fraud would have to be proved. According to *Novick v Comair Holdings Ltd*[33] these are: unlawful conduct – misrepresentation or non-disclosure when there is a duty to disclose; *mala fides* – intent to defraud; materiality of the misrepresentation or non-disclosure; and a causal connection between the fraud and the conclusion of the contract. The court held, however, that unlike usual cases of fraudulent misrepresentation, the presumptions of English law apply in our law. This meant

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24 Guest (ed) *Chitty on contracts* (1994) 47.

25 See Lachat-Héritier "Commercial bribes: The Swiss answer" 1983 *Journal of Comparative Business and Capital Market Law* 5 79–96.

26 See par 2 3 3 *infra*.

27 Swiss Code of Obligations art 24 al 4 – quoted in Lachat-Héritier 86.

28 1923 CPD 295 300: "The reason for the rule seems to be founded on the general principle that an agent is never allowed to act in a manner, where his duty to his principal conflicts with his own interest, and if one contracting party knowingly places the agent of another in a position, where his duty and his interest are in conflict, he commits a fraud upon the other contracting party if the [latter] is ignorant of the arrangement" (*per* Watermeyer J).

29 1936 TPD 48. De Wet J (55) approved of the *dictum* of Scrutton LJ in *Re a Debtor* 1927 2 Ch 367 376 that the agent is presumed to have been influenced by the bribe.

30 *Davies v Donald supra* 301; *Mangold Bros supra* 59.

31 This point was made by McEwan J in *Plaaslike Boeredienste* (1) *supra* 1495. The judge cited Knight *De Villiers and Macintosh – The law of agency in South Africa* (1956) 272–274 and Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 220. See also Silke *De Villiers and Macintosh – The law of agency in South Africa* (1981) 350–351.

32 *Supra* 1498 (my emphasis).

33 1979 2 SA 116 (A) 148 150.

that intent to defraud need not be proved as the principal's right of rescission is available regardless of the briber's motive or the effect of the bribe on the mind of the agent.[34]

Furthermore, it was not important what representations the agent made to the principal, whether honest or dishonest, or whether or not the principal acted on such representations because of the presumption that the bribe caused injury to the principal. This was because, in effect, the purchase price "is loaded as against the purchaser by at least the amount of the bribe".[35] This principle was extended by McEwan J to include the presumption that

> "but for the bribe the briber would have agreed to better terms for the principal than the terms of the actual contract made, and for that reason the principal is entitled to have the contract as actually made, set aside".[36]

In addition, it was held to be unnecessary to prove the existence of a causal connection between the bribe and the conclusion of the contract (as would usually be the case with fraudulent misrepresentation). This did not mean that it would be immaterial that the giving of an alleged bribe was unrelated to transactions between the briber and the principal. McEwan J held:

> "[T]here must be a relationship between the gift [bribe] and the transactions either already completed or negotiations in progress. That relationship, however, is something very different from a causal connection between the bribe and the making of the contract."[37]

This formulation of the required relationship between the bribe and the coming into being of the contracts was quoted with approval by Goldstein J in the *Crown Mills* case.[38]

On appeal in *Plaaslike Boeredienste* (2), Rabie CJ discussed the English law presumption whereby it is irrebuttably presumed in favour of the principal and against the briber and the agent, that the agent had been influenced by the bribe, upon proof that the third party had bribed the agent. He concluded that this English presumption was based on practical considerations regarding evidence and considerations of public policy,[39] but that such a presumption did not exist in our law.[40] Furthermore, the decisions in both the *Davies* and *Mangold* cases did not constitute sufficient authority for the recognition of the existence of such rule in our law.[41]

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34 *Plaaslike Boeredienste* (1) *supra* 1528: "it is immaterial whether the mind of the agent was influenced or not."

35 *Plaaslike Boeredienste* (1) *supra* 1529, quoting Slade J in *Industries and General Mortgage Co Ltd v Lewis* 1949 2 All ER 573.

36 *Plaaslike Boeredienste* (1) *supra* 1530.

37 *Idem* 1532–1533.

38 *Supra* 93F.

39 See the English version of the headnote to *Plaaslike Boeredienste* (2) *supra* 821. In support of his contention the Chief Justice quoted Chitty LJ in *Shipway v Broadwood* 1899 1 QB 369 (CA): "A contrary doctrine would be most dangerous, for it would be almost impossible to ascertain what had been the effect of the bribe;" and Romer LJ in *Hovenden and Sons v Millhof* 83 LT 43 who said that the presumptions are accepted by the courts "in the interests of morality with the view of discouraging the practice of bribery".

40 *Supra* 844H.

41 *Idem* 846H–I. This was because in both the *Davies* and *Mangold* cases it seemed that the agents had, in fact, been influenced by the bribes and that the principals had furthermore been influenced by their agents.

He did, however, concede that the practical considerations of evidence and public policy that led to the acceptance of this presumption in English law could perhaps justify the view that, in our law, the briber ought to bear the onus of proving that the bribe failed to influence the agent or his principal.[42]

It is significant that in the *Crown Mills* case the court found[43] that the English approach (whereby it is irrebuttably presumed that the bribe influenced the agent) and the above approach suggested by Rabie CJ both led to the same result, based on the specific facts of the case.[44] The court, however, identified itself with the English rule and added that it appeared to be in accordance with the principles of our law. The final decision of the Appellate Division on this question is awaited.

In *Plaaslike Boeredienste* (2) the Appellate Division did however draw attention to the differences between the South African and English law concepts of fraud.[45] In our law, contractual fraud consists of fraudulent misrepresentation. The English law concept of fraud has, as has been mentioned, a far wider meaning than the more restricted South African concept. The Chief Justice quoted from *Kerr on the law of fraud and mistake* to support his contention.[46]

He surmised that the "fraud" of English law consisted, in cases of bribery, in the infringement by the briber of the fiduciary relationship existing between principal and agent. This was because the briber places the agent in a position where his own interest and his duty to his principal are in conflict.[47]

2 1 5 Evaluation of this ground

If the third party's bribing of his co-contractant's agent is seen as a form of fraudulent misrepresentation all elements of this delict will have to be proved. Because the secretive nature of bribery will render this extremely difficult for any principal (especially the requirement of causation), such principal might be forced to remain in a contractual relationship with a co-contractant who has acted immorally, corruptly and in breach of good faith. If one accepts the presumptions of English law as being part of our law, the burden of proof will be considerably lightened and it is theoretically possible that the principal could succeed in proving fraudulent misrepresentation. However, since the Appellate Division has, in an *obiter* remark, deemed these presumptions not to form part of our law,[48] the tenability of this ground as a suitable juridical basis for rescission is considerably lessened.

Moreover, by distinguishing between the different meanings of fraud in English and South African law, Rabie CJ effectively rejected the idea that fraudulent

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42 *Plaaslike Boeredienste* (2) *supra* 846H–I.

43 *Supra* 92J–93A–B.

44 *In casu*, it was held that the plaintiffs could hardly have discharged such an onus, since the briber had falsely denied the bribe (see 93B).

45 *Supra* 847–848, *per* Rabie CJ.

46 McDonnell and Monroe *Kerr on the law of fraud and mistake* (1952) 1, the essence of which reads: "Fraud . . . include[s] therefore all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence and are injurious to another, or by which an undue or unconscientious advantage is taken of another. *All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud*" (my emphasis).

47 *Plaaslike Boeredienste* (2) *supra* 846J.

48 *Idem* 844H. In *Crown Mills supra* 92D the court disagreed with this contention.

misrepresentation (through non-disclosure) could form the juridical basis of the principal's right of repudiation. It is submitted that this decision makes it clear that the English law concept of fraud found its way into our law through the mistaken assumption that a common language and similar terminology necessarily imply the same legal content of a juridical concept.

Another reason to reject fraudulent misrepresentation as a ground for rescission is that bribery is "more insidious and serious than misrepresentation including even many manifestations of fraudulent misrepresentation".[49] The reasoning behind this statement of the court in *Crown Mills* is worth quoting in full, particularly as it represents the most recent views of the Supreme Court:

> "[I]n the latter case [of fraudulent misrepresentation] contracting parties, alive to the imperfect morals of the market place and the propensity of others to exaggeration and misstatement, can be expected to be on their guard against the danger of all kinds of misrepresentation whilst in the case of bribery the relationship of good faith between an agent and his principal, which the latter may be expected to rely on with confidence, is breached in circumstances which would shock even robust dealers in the market place. Moreover bribery has a *most destructive effect on the morality of the market-place and is calculated seriously to impede its proper functioning.*"[50]

Thus there is no justification for basing the right of rescission on fraud or fraudulent misrepresentation in our law.

2 2 Improperly obtained consensus

2 2 1 Introduction

For illustrative purposes it is useful to preface the discussion of this ground for rescission with a brief outline of the approach in a foreign legal system that follows a similar approach.

2 2 2 The law of the Netherlands

In the Netherlands the *Nieuw Burgerlijk Wetboek* provides that "misbruik van omstandigheden" (abuse of circumstances) results in a defect of will and therefore falls under the grounds for recission recognised in the code. A contract arising through such means is "vernietigbaar" and the injured party has the choice to impugn the contract.[51]

2 2 3 South African law

Until the decision of the Appellate Division in *Plaaslike Boeredienste*, the courts had required one of the three existing grounds for rescission of a contract to be proved, namely misrepresentation, duress (*metus*) or undue influence.[52] In *Plaaslike Boeredienste*, Rabie CJ concluded that, based on an analysis of English

49 *Crown Mills supra* 92G.

50 *Idem* 92G-I (my emphasis).

51 *BW* 3:44.1, 4. See Van der Merwe and Van Huyssteen "The force of agreements: Valid, void, voidable, unenforceable?" 1995 *THRHR* 549 for a more comprehensive treatment of Continental law in this regard.

52 Undue influence was accepted by the courts "in the face of opposition based on both a fundamental and a historical analysis as well as the need for legal certainty" – Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: General principles* (1993) 72.

decisions on the point in question, the principal's right to repudiate an agreement if a bribe has been given to his agent is actually based on the fact that the law views bribery as an immoral and wrongful act[53] and therefore cannot allow the briber to enforce the agreement, or the other party to be bound thereby.[54] He added that this right is based on the *wrongfulness of the method used* ("ongeoorloofdheid van die metode")[55] by the other party, namely bribery, to influence him into concluding the contract. In other words, it could be said that the principal may repudiate the contract because his consensus thereon was improperly obtained. This is suggested as the juridical basis for rescission by Van der Merwe *et al*[56] and merits further discussion.

It seems unlikely that the Appellate Division intended to create a fourth further ground for rescission, namely, the bribery of a contracting party's agent. Van der Merwe *et al* suggest that the court, by classifying bribery as an improper means of obtaining consensus, was referring to a more *general* ground for rescission of the contract that could possibly subsume the traditional three *specific* grounds for rescission. One could then perhaps speak of a *single* ground for rescission based on a prior "defective" will, namely, improper obtaining of consensus.[57]

Proof of bribery would then be an indication of improper conduct by a co-contractant and thus render the contract voidable at the instance of the innocent co-contractant.[58] The question then arises of what is meant by "improper".

Van der Merwe *et al* suggest that a contracting party's pre-contractual conduct should be judged in the light of certain broad concepts such as impropriety, unconscionability, the *boni mores* and abuse of a situation.[59] In all cases the yardstick would be good faith, inasmuch as any conduct running contrary to good faith would justify rescission of the contract. They add that although this issue has been addressed by the courts, it has as yet not been recognised.[60] Considerations such as inequity, unconscionability and breach of good faith are more readily accepted by the courts in the context of the *execution* of a contract or its terms, than in the context of the *pre-contractual* negotiations.[61]

That South African law has not yet recognised a general duty of good faith in the contractual sphere is clear from the Appellate Division's decision in *Bank of Lisbon and South Africa Ltd v De Ornelas*.[62] This decision has been criticised by Van der Merwe, Lubbe and Van Huyssteen[63] for the "absence of an in-depth discussion of general policy considerations raised by the issue before the court". They suggest that South African law is now at "the point where an analysis of *bona fides*, at policy and technical levels, has become inescapable".[64]

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53 "'n [I]mmorele en ongeoorloofde handeling" – *Plaaslike Boeredienste* (2) *supra* 848B.
54 See the headnote to *Plaaslike Boeredienste* (2) *supra* 821B.
55 *Idem* 848D.
56 73.
57 *Idem* 72 99.
58 *Idem* 72.
59 *Idem* 96.
60 *Idem* 96 fn 159.
61 *Idem* 97.
62 1988 3 SA 580 (A).
63 "The *exceptio doli generalis: requiescat in pace – vivat aequitas*" 1989 *SALJ* 240.
64 *Idem* 242.

Therefore, unless the legislator intervenes to rectify the situation the development of such a general duty of good faith will probably take place mainly as an extension, and within the framework of existing legal concepts and rules.[65] However, since the adoption of a supreme constitution South Africa may now be termed a "constitutional" state.[66] To the extent that the final Constitution approved by the Constitutional Court allows for horizontal application (that is, between subjects of the state *inter se*) this might have significant implications on commerce in general. Particularly, legal rules that incorporate policy considerations in their application – such as the duty of good faith – must be interpreted and applied in such a way as to reflect the basic values of the Constitution.[67] A detailed discussion of this point is beyond the scope of this article.

2 2 4 Evaluation of this ground

This approach is commendable to the extent that it eliminates the necessity of attempting to try to "fit" bribery into one of the existing specific grounds for rescission. It also allows the possibility of additional specific grounds being raised, all subsumed in one general ground for rescission.[68] Two main criticisms may be levelled at this approach, however.

First of all, it is based mainly on the opinions of legal authors and has no firm foundation in our case law. Although Van der Merwe *et al* suggest that improper consensus was the *ratio decidendi* for the *Plaaslike Boeredienste* decision, allowing the principal to resile from the contract in question, it will be shown later that there is reason to conclude otherwise.[69]

Secondly, it is questionable whether commercial bribery should be seen merely as an example of obtaining consensus in an improper way, especially in the light of the strongly condemnatory approach of the courts to bribery. Since fraudulent misrepresentation is but one instance of improperly obtained consensus, consequent contracts will in all cases be treated as voidable at the option of the injured party. If the principal elects to repudiate the contract each party must return the other's performance.[70] It is submitted that such a result is unsatisfactory in that it does not penalise the briber sufficiently in accordance with the dictates of public policy. This seems to indicate the need for a different juridical basis upon which the principal may base his right to avoid the contract.

Van der Merwe *et al* themselves suggest a solution: if good faith is included in the concept of public policy and thus public interest,[71] conduct adjudged to be contrary to good faith may then be classified as *illegal*. Thus, if commercial bribery were to be viewed as conduct in breach of good faith and thus against public policy and therefore illegal, the usual consequences of illegality would apply. This juridical ground will now be considered in detail.

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65 Van der Merwe *et al* 233.

66 Van der Merwe and Van Huyssteen 1995 *THRHR* 550.

67 S 35(3) Act 200 of 1993 (the interim Constitution) provided: "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter [Fundamental Rights]." S 39(2) of the final Constitution (Act 108 of 1996) contains a similar provision.

68 Van der Merwe *et al* 72 refer eg to the recognition of "economic duress" in maritime law – *Malilang v MV Houda Pearl* 1986 2 SA 714 (A).

69 See the discussion on illegality par 2 3 4 *infra*.

70 Van der Merwe *et al* 72.

71 *Idem* 234.

2 3 Illegality

2 3 1 Introduction

Illegality typically occurs where the *conclusion, performance* or *purpose* of an agreement is against the law, whether statutory or common law.[72] These should not, however, be seen as comprising a *numerus clausus* of grounds of illegality upon which a contract may be assailed. According to Aquilius[73]

> "[a] contract against public policy is one stipulating a performance which is not *per se* illegal or immoral but which the Courts, on grounds of expedience, will not enforce because performance will detrimentally affect the interests of the community".

In *Sasfin (Pty) Ltd v Beukes*[74] the Appellate Division opined that "where a court refuses to enforce a contract it ultimately so decides on the basis of public policy".

Determining illegality requires that several interests be compared and balanced. Depending on circumstances, the interests of one party may be given preference over the interests of others. In typical cases of bribery, the weighing up of interests generally involves the interest of the seller (usually the briber) in enforcing an otherwise unobjectionable contract (that is, by claiming the price of goods delivered but unpaid for) and the interest of the innocent purchaser whose agent was bribed by the seller and who maintains the agreement to be unenforceable on grounds of public policy. It is again useful briefly to consider the approach of foreign legal systems on this issue.

2 3 2 The law of the United States of America

In his work on contracts, Farnsworth[75] states that unless the court determines that the strength of public policy is sufficient to justify the resulting forfeiture of the briber's performance, it should not deny enforcement to the briber.[76] Statutes in several states specifically criminalise such commercial bribery.[77] This seems to imply that in the USA the issues of enforceability and forfeiture are not considered separately, but that the very fact that a contract is found to be unenforceable on policy grounds invariably results in the plaintiff (briber) being denied a claim to recover his performance.

In *Sirkin v Fourteenth St Store*[78] it was held that although the New York statute in question did not expressly make the contract concerned unenforceable, it evidenced "the public policy of the state, [and] it was the duty of the court to be guided thereby in administering the law". Furthermore,

> "nothing will be more effective in stopping the growth and spread of this corrupting and now criminal custom than a decision that the courts will refuse their aid to a guilty vendor".[79]

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72 *Idem* 139.
73 "Immorality and illegality in contract" 1941 *SALJ* 346.
74 1989 1 SA 1 (A) 8.
75 *Contracts* (1990).
76 375 fn 5.
77 See eg NJ Stat Ann § 2C: 21–10; NY Penal Law § 180.00–180.08.
78 124 App Div 384, 108 NYS 830 (1908).
79 124 App Div 389, 108 NYS 833–834.

Farnsworth[80] notes that this case is widely and approvingly cited despite its "harsh result", particularly in that it forms the basis of Illustration 12 to Restatement Second § 178. Also, a similar approach was followed by the New York Court of Appeals in *McConnell v Commonwealth Pictures Corp.*[81] Such a result is deemed "harsh" because one may conclude that, in the USA, contracts deemed unenforceable because of bribery are viewed in the same way as illegal and void contracts under a strict application of the *par delictum* rule in South African law.

2 3 3 Swiss law

In the case where contracts have been concluded between briber and agent acting on behalf of a principal, the principal is viewed as the victim of collusion between agent and briber, because they both act secretly to gain personal advantage at the principal's expense.[82] It is irrelevant whether the principal suffers losses or not as a result of the bribery: collusion requires only that the agent and briber acted in their own interest and that the briber used the agent's breach of duty to conclude the contract. In such a case the principal may *not* bring an action for damages since the contract is considered *non-existent.*[83]

2 3 4 South African law

2 3 4 1 Case law

An analysis of the available decisions leaves no doubt that a strongly condemnatory approach towards bribery and corruption is taken.[84] In the *Crown Mills* case the court took cognisance of the fact that public policy requires the courts to strongly condemn bribery and corruption "and thus to non-suit those who would sully their hands with such immoral and disgraceful practices".[85] This shows that, in the view of the courts, the interests served by enforcing such a tainted contract are far outweighed by both the individual interests (breach of good faith) and social interests (interests of the free market and public policy in general) served by denying such enforcement.[86]

However, there is a simpler method of determining the illegality of contracts tainted by bribery. The fact that commercial bribery is a statutory criminal offence may be seen as sufficient evidence of public policy. A contract concluded in consequence of such bribery may therefore also be deemed illegal. This approach is similar to that of the courts in the United States.[87]

In *Plaaslike Boeredienste* Rabie CJ determined that the behaviour of both briber and agent contravened the Prevention of Corruption Act.[88] This Act has

80 376 fn 9.

81 7 NY 2d 465, 166 NE 2d 494 (1960). The interest in enforcement was held to be outweighed by the public policy against commercial bribery – see Farnsworth 376 fn 12.

82 Swiss Code of Obligations: art 8 – quoted in Lachat-Héritier 86.

83 *Ibid.*

84 See eg *Plaaslike Boeredienste* (2) *supra* 848A–B.

85 *Supra* 92G.

86 As Van der Merwe and Van Huyssteen 1995 *THRHR* 561 point out, the distinction between interests which concern individuals in their personal capacity and interests which concern society as a whole is not absolute: "The underlying consideration is obviously that for both individual and society reciprocally the protection of social and individual interests, respectively, is of fundamental importance."

87 See par 2 3 2 *supra.*

88 Act 6 of 1958.

since been repealed by the Corruption Act of 1992,[89] whose stated aim is "[t]o provide anew for the criminalisation of corruption and for matters connected therewith".[90] The provisions of the Act, *inter alia*, make both the giving and receiving of a bribe a criminal offence.[91] According to the Chief Justice it was this illegal behaviour (in violation of section 2(a) and (b) of the Act) that led to the conclusion of the contract. Therefore, for considerations of public policy, the law could not allow the briber-appellant to enforce an agreement that came about through such means against the principal-defendant.[92]

It is therefore clear that the Appellate Division adopted the approach that, for the purposes of the balancing of competing interests, the interests of public policy may be evidenced from the relevant legislation prohibiting commercial bribery. On the basis of this *ratio decidendi* then, it is submitted that the true juridical basis upon which Rabie CJ founded the right of a principal to avoid a contract tainted by the bribing of his agent by a co-contractant, was the fact that the contract arose through *illegal* means. Although the Chief Justice did not state this explicitly, a similar conclusion was reached by the court in the *Crown Mills* case:[93] the contract was seen as one that arose *ex turpi causa*. The court was referring to the well-known rule *ex turpi vel iniusta causa non oritur actio*. This maxim can mean either that an illegal agreement purporting to be a contract is in fact no contract at all[94] or that no claim ("*actio*") is made available to a party to an otherwise valid contract.[95]

After reviewing the relevant South African case law, Goldstein J in the *Crown Mills* case, concluded that what was common to the *Davies*,[96] *Mangold Bros*[97] and *Plaaslike Boeredienste* (2)[98] cases was that in all instances the courts were refusing to enforce contracts which arose *ex turpi causa*.[99] It was contended by counsel for the plaintiffs (relying on *Feinstein v Niggli*[100]) that the defendant would be able to avoid the contracts of sale sued upon only if it were able and willing to restore what it had received in terms of those contracts.[101] This was rejected by the court, which pointed out that *Feinstein*'s case was concerned with contracts induced by fraudulent misrepresentation and such contracts are not regarded as arising *ex turpi causa*.[102]

In making this distinction the court was effectively declaring that contracts induced by bribery are illegal and void. In addition, this statement clearly distinguishes between voidable and void contracts and clearly places contracts induced through bribery in the latter category. Support for this may be found in the

89 Act 94 of 1992.
90 See the long title: Act 94 of 1992.
91 S 1(1)(a) and (b). It is submitted that the nature and extensive scope of this Act merit wider publicity.
92 *Plaaslike Boeredienste* (2) *supra* 849A–B.
93 *Supra* 92E.
94 Van der Merwe and Van Huyssteen 1995 *THRHR* 559.
95 This was the original meaning in Roman law – see Van der Merwe *et al* 147.
96 *Davies v Donald supra*.
97 *Supra*.
98 *Supra*.
99 *Crown Mills supra* 93I.
100 1981 2 SA 648 (A) 700G.
101 *Crown Mills supra* 94D.
102 *Idem* 94E.

statement of Van der Merwe and Van Huyssteen[103] to the effect that the *ex turpi causa* rule has come to mean that an illegal agreement which purports to be a contract is, in fact, no contract at all.

2 3 4 2 The question of restitution

Supposing that a plaintiff-briber, recognising that the courts will not enforce the contract, desires to recover a performance already made in terms of the illegal agreement. Can he recover from the other party who has obviously been enriched by his performance?

As a rule, performances in terms of an illegal agreement may be reclaimed on the basis of unjustified enrichment using the *condictio ob turpem vel iniustam causam*.[104] The right to reclaim one's performance is, however, subject to the qualification of the maxim *in pari delicto potior est conditio defendentis*, known simply as the *par delictum* rule.

According to this rule a party to an illegal agreement who acted "illegally"[105] in concluding the agreement and performing in terms of it will be barred from reclaiming that performance, with the result that the defendant is left in possession of the performance.[106] The rule enables the courts to express the law's aversion to the claims of those who approach the court with "unclean hands".[107]

In *Jajbhay v Cassim*[108] the Appellate Division held that while the application of the *ex turpi causa* rule admitted of no exception, the *par delictum* rule could be relaxed at the court's discretion in order to do "simple justice between man and man". Such a relaxation of the rule could only be considered if and when public policy allowed.[109]

In the *Crown Mills* case[110] the court found that the rules relating to the application of the *par delictum* rule did not apply, for the simple reason that the plaintiffs were attempting to enforce an illegal contract (contrary to the *ex turpi causa* rule) and not attempting to reclaim their performance. No restitution was in fact tendered and the question of restitution was left open by the court.[111]

Assuming hypothetically that the plaintiffs would have attempted to reclaim their performance, it is submitted that the *par delictum* rule ought not to have been relaxed in their favour on grounds of public policy. This was because the court found that the genuiness of the vast majority of the alleged deliveries sued upon had been shown to be suspect.[112] The court stated that there was strong evidence that the two directors who had been bribed (including the defendant company's managing director) had been involved in the deliberate falsifying of delivery notes and invoices.

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103 1995 *THRHR* 559.
104 Van der Merwe *et al* 148.
105 See *idem* 149 on the meaning of the word *delictum*.
106 See *Jajbhay v Cassim* 1939 AD 537.
107 *Idem* 548.
108 *Supra*.
109 542.
110 *Supra* 94B–C.
111 *Idem* 93H.
112 *Idem* 86H–I. The total amount claimed in the consolidated action was R639 263,35. Of this, the court held that the plaintiffs had only succeeded in proving R87 235,50 – see 89D–H 91A.

2 3 5 Evaluation of this ground

The literal meaning of the *par delictum* rule implies that both parties must be *in delicto*. However, the rule should also apply where only the plaintiff is *in delicto*. This is because if the plaintiff is unable to reclaim his performance where *both* he and the defendant are *in delicto*, he should, *a fortiori*, be even less entitled to reclaim where only he is *in delicto* but not the defendant.[113]

For this reason, the *par delictum* rule will apply as against the plaintiff (briber) who attempts to reclaim his performance pursuant to an agreement rendered illegal (and unenforceable) by his pre-contractual bribing of his co-contractant's agent.

Although the facts of each case will inevitably differ, it is submitted that in most cases of commercial bribery the force of public policy will outweigh the interests of the plaintiff-briber and that he will consequently be unable to recover his performance. However, it is submitted that the courts should not be blind to the fact that in many cases it might be found that the agent put pressure on the supplier to pay a bribe, or demanded such bribe initially. The courts should therefore recognise commercial realities regarding the difficulties of suppliers reporting requests for "inducements"[114] and see fit to relax the *par delictum* rule in such cases in order to do "simple justice between man and man", thus allowing the respective performances to be reclaimed.

Thus, the success of the plaintiff's claim for return of his performance under an illegal contract where he has bribed the defendant's agent will depend on whether or not the court will see fit to relax the *par delictum* rule in his favour.

2 3 6 Conclusion

When comparing the ground of illegality with that of improperly obtained consensus, one sees that the issue of commercial bribery may be formulated in two ways: either the innocent principal manifests a defect of will or the briber has acted illegally.[115] It is conceded, however, that both approaches are based on an extension of the norms of good faith and reasonableness and, as Van der Merwe and Van Huyssteen point out,[116] one may ask whether the concept of legality as a constitutive requirement for a contract and the concept of defect of will as part of the basis for the grounds of rescission are in fact completely distinguishable. It could be argued that "the one is therefore subsumed into the other".[117] The authors[118] conclude that

> "[i]n the final analysis, the major consideration in instances of rescission is *not* the integrity of the will of the aggrieved contractant but the propriety or impropriety of the *conduct* which *causes* the defect of will".

However, the respective juristic consequences of contracts that are legal but merely voidable and contracts that are illegal and completely void are substantially different. A contract deemed to be valid but unenforceable allows the

113 This point is made by Van der Merwe *et al* 148, citing *Minister van Justisie v Van Heerden* 1961 3 SA 25 (O) 27.

114 See Introduction *supra* par 1.

115 Van der Merwe and Van Huyssteen 1995 *THRHR* 567.

116 *Ibid.*

117 *Ibid.*

118 *Idem* 566 (my emphasis).

injured party the choice of upholding the contract or repudiating it; hence one speaks of a *voidable* contract. If the injured party elects to resile from the contract, full restitution should take place by both contractants. Illegal "contracts" on the other hand are generally said to be completely *void* in that they are not contracts at all and do not create any obligations.[119] When illegality is used as the juridical basis for voiding a contract, the consequences are more serious and far-reaching than would be the case where the right of rescission is based on a defect of will. Since in the former case no obligations are created at all, no claim may subsequently be brought to enforce any promised performances.

In the light of the clear *dicta* of the courts in both the *Plaaslike Boeredienste* and *Crown Mills* cases regarding the illegality and immorality of bribery, it is submitted that the view that the contract arises through illegal conduct and is therefore itself illegal, is preferable to the view that the contract is merely unenforceable because consensus was improperly obtained. This achieves a similar result to that of Swiss law discussed above. Most cases of corporate commercial bribery would fall into the second category distinguished in Swiss law. This would involve the briber contracting with the principal's agent, the principal being some or other corporate entity and the agent being an officer or director of that entity with authority to contract on behalf of the corporate principal, as was the case in *Crown Mills*. According to the above exposition of Swiss law, such a contract is regarded as void, not merely voidable. Furthermore, it has been shown that the courts of the United States similarly view such contracts as void.[120]

3 CONCLUSION

One therefore sees that the modern South African approach to illegal contracts in general, and cases of contracts induced through commercial bribery in particular, do not differ substantially from either the American or Swiss approach.[121]

Not only is bribery immoral and in violation of *bona fides*; it is also illegal in terms of statute.[122] The illegality of bribery may also be established by reference to the balancing of competing interests which determine that bribery is contrary to public policy.[123] The courts therefore regard contracts arising out of the bribery of a contractant's agent as arising *ex turpi causa* and hence illegal.[124]

Furthermore, according to the decision of the court *a quo* in *Plaaslike Boeredienste* a third party in fact has a positive duty to disclose to his co-contractant

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119 Van der Merwe *et al* 145. It is important to note that this distinction is not always so clear. Some illegal agreements are not regarded as invalid but merely unenforceable, eg wagering and gambling agreements (*Gibson v Van der Walt* 1952 1 SA 262 (A)) and contracts in restraint of trade which are deemed to be against public interest (*Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A)).

120 See par 2 3 2–2 3 3 *supra*.

121 This is worthy of cognisance as "[t]he unique quality possessed by the South African legal system is that its law is capable of being enriched by a constant infusion of knowledge from sources that differ in doctrine, substance and adjectival significance. Accordingly, in an attempt to develop an equitable approach towards the effects of illegality in contract, the South African courts have several paths from which they may choose": Trackman "The effect of illegality in South African law" 1977 *SALJ* 481.

122 Corruption Act 94 of 1992.

123 See par 2 3 1 *supra*.

124 *Plaaslike Boeredienste* (2) *supra* 848A–B; *Crown Mills supra* 92E.

any payment or benefit offered to the latter's agent.[125] Once bribery has been proved, any attempt on the part of the plaintiff-briber to enforce such a contract will result in the briber's being "entirely non-suited".[126]

A defendant-principal wishing to avoid a contract upon which he is sued because his agent was allegedly bribed by his co-contractant, must first prove on a balance of probability that there was in fact a bribe or an attempt to bribe. He need not prove the existence of a causal connection between the bribe and the conclusion of the contract. However, there should at least be some relationship between the bribe and transactions either already completed or negotiations in progress.[127]

It is submitted that if contracts arising out of bribery are deemed illegal, there is no need in our law for any presumption that the agent was influenced by the bribe. Once the existence of the bribe has been established on a balance of probability a subsequent contract is deemed illegal, provided of course that the necessary relationship exists between the bribe and the contract.[128]

Thus contracts that arise through bribery are illegal. This conclusion provides the courts with a significant weapon that will enable them to contribute towards the fight against bribery and corruption in South Africa. It is therefore submitted that the result of the *Crown Mills* case is a positive step forward in this regard and should therefore be commended. Moreover, the approach of the court in *Crown Mills* is also in accordance with the approach of both the American and Swiss legal systems.

It is conceded that the results of such an approach will in most cases fall quite harshly upon the plaintiff.[129] This discussion has, however, highlighted the need for our courts to take as strong a stance as possible against bribery and corruption. It is submitted that the decision in *Crown Mills* represents a significant victory in the battle to eradicate this immoral and illegal behaviour from our society.

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125 Per McEwan J in *Plaaslike Boeredienste* (1) *supra* 1501: "[T]his rule is based on sound common sense. If it were otherwise . . . it would be almost impossible from a practical point of view for the complaining party to prove collusion and so to obtain redress, because he would normally have no knowledge of the communications that had passed between the two."

126 *Crown Mills supra* 94F.

127 *Plaaslike Boeredienste* (1) *supra* 1532–1533.

128 *Crown Mills supra* 92D–E.

129 It is, however, quite clear that a "contract" that is illegal and void cannot be upheld or enforced by the innocent principal either.

Die regsbeskerming van privaatregtelike belange ten aansien van inligting

(*vervolg*)*

T Geldenhuys
BA LLD
Hoof: Regsdienste, Nasionale Standaarde en Bestuursdienste, Suid-Afrikaanse Polisiediens

2 DIE REGSBESKERMING VAN BELANGE TEN AANSIEN VAN INLIGTING WAAR DIE INLIGTING NIE 'N REGSOBJEK DAARSTEL NIE

Die kategorieë inligting wat selfstandige regsobjekte vorm, is nie die enigstes ten aansien waarvan daar belange bestaan wat van regsweë privaatregtelike beskerming geniet nie. Die kategorieë inligting wat nie as regsobjekte beskou word nie, maar ten aansien waarvan daar nogtans belange bestaan wat van regsweë beskerming geniet, is die wat so onlosmaaklik verbonde is aan 'n bepaalde regsobjek dat die beskerming van die subjektiewe reg op die regsobjek vereis dat beskerming aan die kategorie inligting ook verleen word.

Ten einde vas te stel watter sodanige kategorieë inligting bestaan, sal daar kortliks by elke klas regsobjekte stilgestaan word en oorweeg word in watter mate inligting wat aan die betrokke regsobjekte verbonde is, beskerming geniet. Soos reeds hierbo geblyk het, bestaan die regsobjekte in die geval van alle immaterieelgoedereregte uit inligting. In die bespreking wat volg, sal derhalwe nie verder aan daardie klas subjektiewe regte aandag geskenk word nie.

2 1 Sake

Een van die eienskappe van 'n saak is dat dit stoflik van aard is. Dit het outomaties tot gevolg dat dit ook sintuiglik waarneembaar is. Soos vroeër aangetoon, beteken die feit dat 'n saak sintuiglik waarneembaar is dat die saak as bron van inligting aangaande homself dien. 'n Persoon kan dus inligting aangaande 'n saak bekom deur die saak sintuiglik waar te neem. Die inligting wat die persoon in so 'n geval bekom, is die geestesvoorstelling wat in sy gedagtes gevorm word wanneer hy die saak sintuiglik waarneem. Uiteraard kan hierdie voorstelling omskep word in een of meer ander sintuiglik waarneembare voorstellings van die saak (soos sketse en beskrywings), en sal elke sodanige voorstelling ook inligting betreffende die saak daarstel. Elke voorstelling kan ook 'n onbeperkte aantal kere gedupliseer en aan 'n onbegrensde aantal persone verskaf word. Ongeag hoeveel sodanige voorstellings daar bestaan, bly daar steeds 'n eng verband

* Sien 1997 *THRHR* 254–281.

tussen die saak en die voorstellings (inligting) omdat die inligting daardeur gekenmerk word dat dit op die betrokke saak betrekking het.

Aangesien 'n liggaamlike saak as die regsobjek van 'n saaklike reg dien, en 'n mens, in die geval van elke liggaamlike saak wat 'n regsobjek vorm en ten aansien waarvan daar reeds 'n voorstelling bestaan, te doen het met inligting wat in 'n enge verband met die saak staan, ontstaan die vraag of die saak en inligting betreffende die saak so eng aan mekaar verbonde is dat die beskerming van die belang (die saaklike reg) in die saak vereis dat daar ook beskerming aan belange in die inligting self verleen word.

Die omvattendste reg wat daar ten aansien van 'n saak kan bestaan, is eiendomsreg.[132] Indien daar dus sprake sou wees van enige beskerming van belange in inligting betreffende 'n saak uit hoofde van die verbondenheid van die inligting met die saak, sou 'n mens verwag dat dit minstens die geval moet wees by eiendomsreg ten aansien van die saak. Vir doeleindes van hierdie ondersoek sal daar gevolglik hoofsaaklik op eiendomsreg gekonsentreer word.

Die eienaar van 'n saak beskik oor 'n aantal bevoegdhede ten aansien van sy saak. Volgens Van der Merwe[133] sluit hierdie bevoegdhede die genots-, gebruiks-, beskikkings-, vervreemdings- en besitsbevoegdheid ten aansien van die saak in, asook die bevoegdheid om enige inbreukmaking op die saak af te weer. Veral die gebruiks- en beskikkingsbevoegdhede is hier van besondere belang. Uit hoofde van hierdie bevoegdhede kan die eienaar van 'n saak, binne die grense wat van regsweë neergelê is, op so 'n wyse oor die saak beheer uitoefen dat geen ander persoon die saak of enige deel daarvan, sintuiglik kan waarneem en sodoende 'n voorstelling van die saak kan vorm en op hierdie wyse inligting oor die saak kan bekom nie. Die vraag is nou of die inligting betreffende die saak beskerming geniet uit hoofde van die feit dat dit betrekking het op die saak wat die objek van die eiendomsreg van die eienaar is. Myns insiens sal sodanige afleiding slegs gemaak kan word indien die reg aan die eienaar 'n remedie verleen in daardie gevalle waar 'n persoon, in stryd met die wil van die eienaar, inligting betreffende die saak verkry of openbaar en die beheer, soos hierbo uiteengesit, wat die eienaar regtens bevoeg is om oor inligting betreffende die saak uit te oefen, op só 'n wyse aangetas word.

In hierdie verband kan daar tussen drie moontlike gevalle onderskei word. Die eerste geval is waar die eienaar inligting betreffende die saak *absoluut geheim* wil hou. Die tweede geval is waar die eienaar die inligting slegs aan 'n begrensde aantal persone bekend maak en die inligting dus slegs *relatief geheim* wil hou,[134] terwyl die laaste geval betrekking het op die situasie waar die eienaar die inligting algemeen bekend wil maak en dus *nie geheim wil hou nie.* Elkeen van hierdie gevalle sal kortliks oorweeg word.

(a) *Waar die eienaar die wil tot absolute geheimhouding van die inligting openbaar* Daar is ongetwyfeld gevalle waar die eienaar van 'n saak 'n belang daarby het om inligting betreffende sy saak geheim te hou. Een sodanige geval is waar die saak uit die een of ander sekuriteitsmeganisme bestaan wat deur die eienaar aangewend word om eiendom teen diefstal te beveilig en inligting

132 Van der Merwe *Sakereg* (1989) 175.

133 *Idem* 173.

134 Soos waar die eienaar slegs persone wat toegangsgelde aan hom betaal, toelaat om die voorwerp waar te neem.

aangaande die saak voornemende diewe in staat kan stel om die sekuriteitstelsel te omseil en die besittings te steel. 'n Voorbeeld hiervan is waar die saak 'n brandkluis met 'n kombinasieslot is.

Ten aanvang moet daarop gewys word dat daar slegs van absolute geheimhouding van inligting betreffende 'n saak sprake kan wees indien die eienaar die enigste persoon is wat oor die betrokke inligting beskik. Sodra die betrokke inligting ook aan ander persone bekend is, kan die inligting nie meer vir sodanige persone geheim gehou word nie en sal die eienaar hoogstens sy bevoegdheid tot die relatiewe geheimhouding van die inligting ten aansien van sodanige persone kan uitoefen. In hierdie verband is dit egter ook nodig om daarop te wys dat dit moontlik is dat bepaalde inligting betreffende 'n saak aan ander persone bekend kan wees terwyl ander inligting betreffende die saak slegs aan die eienaar bekend is. In so 'n geval sal die eienaar uit die aard van die saak slegs sy bevoegdheid tot absolute geheimhouding kan uitoefen met betrekking tot daardie inligting wat nie aan ander bekend is nie.

Indien die eienaar wel die enigste persoon is wat oor die betrokke inligting beskik, kan hy, deur sy bevoegdhede ten aansien van die saak op die voormelde wyse uit te oefen, die inligting ten aansien van die saak absoluut geheim hou. Hierdie bevoegdheid wat voortspruit uit die eienaar se gebruiks- en beskikkingsbevoegdheid oor die saak, kan beskryf word as die bevoegdheid tot *absolute geheimhouding van inligting met betrekking tot die saak.*

Indien die eienaar van 'n saak hierdie bevoegdhede wel op hierdie wyse uitoefen, sal hy daardeur die wil openbaar om die inligting betreffende die saak geheim te hou. Indien 'n persoon in so 'n geval stappe sou doen om die inligting in stryd met die wil van die eienaar te bekom, en daarin slaag, sal sodanige optrede neerkom op 'n feitelike inwerking op die gemelde bevoegdhede van die eienaar ten aansien van die saak. Sodanige optrede sal dus *prima facie* onregmatig wees. Die vraag of die eienaar in so 'n geval enige privaatregtelike remedie teen die inbreukmaker sal hê, sal egter daarvan afhang of die gedrag van die inbreukmaker ook in stryd met die *boni mores* is.[135] Indien die optrede inderdaad as sodanig aangemerk kan word en die eienaar as gevolg hiervan skade ly, ontstaan die vraag of die eienaar die skade van die inbreukmaker sal kan verhaal.

Die aangewese aksie in gevalle van hierdie aard is die *actio legis Aquiliae*. Alhoewel aanvanklik gemeen is dat hierdie aksie slegs beskikbaar is waar daar 'n sigbare en fisiese inwerking op 'n saak plaasgevind het, word dit tans redelik algemeen aanvaar dat die stadium van ontwikkeling in ons reg nou bereik is waar die aksie ook beskikbaar sal wees selfs waar die inwerking op die saak nie sigbaar en fisies van aard was nie.[136] Alhoewel 'n persoon wat op 'n onregmatige

135 Vgl Neethling, Potgieter en Visser *Deliktereg* (1996) (hierna Neethling *et al*) 51–52, waar duidelik uitgespel word dat nie elke feitelike aantasting van 'n persoon se subjektiewe reg as onregmatig aangemerk kan word nie.

136 Vgl in die algemeen Neethling *et al* 9–13 286 ev. Soos hierdie skrywers aantoon, skyn die stadium van ontwikkeling in ons reg nou bereik te wees waar daar nie meer as streng verciste gestel word dat daar 'n sigbare en fisiese inwerking op die saak moet plaasvind, alvorens die betrokke aksie verleen sal word nie (vgl ook *Cape of Good Hope Bank v Fischer* (1886) 4 SC 368 376; *Perlman v Zoutendyk* 1934 CPD 151 155; *Greenfields Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 901 (N); *Shell and BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D); en veral *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A)).

wyse daarin slaag om toegang tot 'n saak te verkry met die oog daarop om bepaalde inligting betreffende die saak te bekom, in die proses op 'n sigbare en fisiese wyse op die saak kan inwerk (soos om die verskillende samestellende dele van die saak uitmekaar te breek), is dit goed denkbaar dat so 'n persoon dit ook sal kan doen sonder om op 'n sigbare en fisiese wyse op die saak in te werk (deur byvoorbeeld die saak self bloot noukeurig te beskou, of, in die geval van die brandkluis, met 'n stetoskoop te luister terwyl hy die slotmeganisme draai en op so 'n wyse vasstel wat die kombinasie van die slot is). In die lig van die ontwikkelinge in ons reg waarna hierbo verwys is, wil dit voorkom of daar in beginsel geen rede is waarom die *actio legis Aquiliae* nie in beide die voormelde gevalle tot beskikking van die eienaar sal wees nie, mits die optrede van die dader in elkeen van die gevalle as onregmatig en skuldig aangemerk kan word en die eienaar as gevolg daarvan vermoënsverlies sou ly. Indien die eienaar in die voorbeeld van die kluis byvoorbeeld verplig sou wees om deskundiges te ontbied ten einde die kombinasie van die slot te verander, is daar dus geen rede waarom die eienaar nie die vermoënskade wat hy in die proses gely het van die inbreukmaker sal kan verhaal nie. Daar kan immers weinig twyfel wees dat die waarde van die saak verminder is deurdat die dader op 'n onregmatige en skuldige wyse van die kombinasie van die slot kennis geneem het. Die enigste wyse waarop die eienaar die waarde van sy saak kan herstel soos dit was voordat die dader van die kombinasie kennis geneem het, sou derhalwe wees deur die kombinasie van die slot te laat verander. In die voorbeelde hierbo behoort die eienaar dus enige vermoënsverlies wat hy gely het vanweë die kennisname van die inligting deur die inbreukmaker, met die *actio legis Aquiliae* van laasgenoemde te kan verhaal.

Indien die dader tydens die insameling van die inligting op enige persoonlikheidsgoedere van die eienaar inbreuk sou maak, kan die eienaar genoegdoening van die dader met die *actio iniuriarum* eis, mits natuurlik aan die vereistes van hierdie aksie voldoen is. So 'n situasie sou byvoorbeeld ontstaan indien die indringingshandeling van die dader ook die eienaar se privaatheid of sy liggaamlike integriteit geskend het. 'n Eienaar wat weens sodanige inbreukmaking op sy persoonlikheidsgoedere ook vermoënskade ly, behoort vergoeding deur middel van die *actio legis Aquiliae* van die dader te kan verhaal.

Die blote feit dat die dader daarin slaag om die inligting ten aansien van die saak teen die wil van die eienaar te bekom, kan natuurlik ook 'n emosionele skok by die eienaar veroorsaak, in welke geval die eienaar deur middel van die aksie weens pyn en lyding kompensasie van die dader kan verhaal, terwyl hy vergoeding weens enige vermoënskade wat hy as gevolg van die skok gely het, weer eens met die *actio legis Aquiliae* sal kan verhaal.[137]

Dit is goed denkbaar dat die stappe wat die dader doen om inligting betreffende die saak te bekom, ook op ander regsbelange van die eienaar inbreuk kan

137 Vgl Neethling *et al* 256–269. In *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) is finaal beslis dat hierdie aksie tot beskikking van 'n persoon is selfs al het die persoon geen fisiese besering in die proses opgedoen nie. Vgl voorts *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K) waar hierdie aksie erken is nadat die eienaar van 'n motor op 'n afstand gesien het hoe iemand met sy motor bots en die eienaar as gevolg hiervan 'n beroerte-aanval gekry en gesterf het. Volgens hierdie beslissing kan 'n eis weens emosionele skok dus voortspruit uit vrees by 'n persoon vir die veiligheid van sy eiendom (vgl Neethling *et al* 283 ev).

maak. 'n Persoon wat 'n nalatige of bedrieglike wanvoorstelling aan die eienaar maak en die eienaar daardeur beweeg om aan hom inligting betreffende die saak te verskaf of aan hom toegang tot die saak te verleen, sal byvoorbeeld op die vermoënsbelange van die eienaar inbreuk maak. Indien Neethling[138] se standpunt oor die moontlike bestaan van 'n regsplig wat die dader verplig om in daardie omstandighede korrekte inligting aan die eienaar te verskaf, aanvaar sou word, sou daar moontlik geredeneer kan word dat die dader 'n regsplig gehad het om korrekte inligting aan die eienaar oor te dra.

Indien die dader inligting betreffende die saak wat hy op 'n onregmatige en skuldige wyse verkry het, aan derdes sou openbaar, is die vraag of die eienaar op grond hiervan teen die dader sal kan optree. Hier moet onmiddellik daarop gewys word dat die blote feit dat 'n persoon die saak van 'n ander sonder sy toestemming sintuiglik waargeneem het, nie sonder meer beteken dat hy die inligting wat hy op hierdie wyse bekom het, nooit aan derdes mag openbaar nie. Neethling is van mening dat die openbaarmaking van private feite wat op 'n onregmatige en skuldige wyse verkry is, in beginsel sonder meer onregmatig sal wees. Daar moet saamgestem word dat dit inderdaad normaalweg die geval sou wees. Dit is egter goed denkbaar dat daar gevalle kan voorkom waar sodanige openbaarmaking nie onregmatig sal wees nie, soos waar die persoon deur 'n ander onder dwang geplaas word om hierdie feite te openbaar en sy openbaarmaking binne die grense van die regverdigingsgrond noodtoestand val, of waar die persoon na aanleiding van 'n verpligting om getuienis te lewer, die inligting tydens 'n hofsaak sou openbaar.[139] By die oorweging van die vraag of die eienaar weens die openbaarmaking van inligting betreffende sy saak, wat op 'n onregmatige en skuldige wyse verkry is, enige remedie sal hê, sal die openbaarmakingshandeling en die omstandighede waarin dit plaasgevind het dus self oorweeg moet word. Slegs indien hierdie openbaarmakingshandeling op 'n onregmatige en skuldige wyse plaasgevind het en vir die eienaar van die saak vermoënskade of persoonlikheidsnadeel veroorsaak het, sal die eienaar teen die dader kan optree. In geval van persoonlikheidsnadeel behoort die eienaar met die *actio iniuriarum* teen die dader te kan optree, terwyl die eienaar enige vergoeding weens vermoënskade wat hy weens sodanige openbaarmaking gely het, met die *actio legis Aquiliae* behoort te kan verhaal, mits aan al die vereistes van hierdie aksies voldoen is.

Indien die dader in die voorbeeld hierbo inligting betreffende die saak aan derdes sou openbaar en hierdie openbaring die derdes byvoorbeeld in staat sou stel om die eienaar se sekerheidsmaatreëls te omseil en besittings van die eienaar te steel, behoort die eienaar met die *actio legis Aquiliae* teen die persoon wat die inligting openbaar het, te kan optree en skadevergoeding weens die vermoënskade wat hy as gevolg van die diefstal gely het, van hom te kan verhaal.

Tot dusver is slegs aandag geskenk aan daardie gevalle waar die eienaar die enigste persoon is wat oor die inligting betreffende die saak beskik en die inligting bekom of verkry is deurdat die dader die saak self sonder die toestemming

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138 Neethling *et al* 295. Vgl ook *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 832–833.

139 Sien Neethling *Persoonlikheidsreg* 232; vgl nietemin Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 248 vn 78 272 vn 220; *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 462–465.

van die eienaar waargeneem het. Dit is egter nodig om daarop te wys dat indien ander persone oor inligting betreffende die saak beskik, soos 'n voormalige eienaar wat onder geen regsverpligting teenoor die eienaar staan om die inligting geheim te hou nie, die eienaar geen remedie teenoor 'n persoon sal hê wat die inligting, selfs teen die wil van die eienaar, van sodanige ander persoon bekom nie. Voorts sal 'n persoon wat dit in sodanige omstandighede van die ander verkry het, onder geen verpligting teenoor die eienaar staan om die inligting nie aan ander persone bekend te maak nie, tensy die omstandighede waarin hy die inligting openbaar van so 'n aard is dat die openbaarmaking in stryd met die *boni mores* is en derhalwe as onregmatig aangemerk kan word en hy bewus was, of redelikerwys moes voorsien het, dat sy gedrag op die een of ander regsbeskermde belang van die huidige eienaar inbreuk sal maak. By oorweging van die vraag of die openbaarmaking wel aan die voorgaande vereistes voldoen het, sal die aard van die inligting waarskynlik 'n belangrike rol speel.

Daar bestaan natuurlik geen rede waarom die eienaar nie met die ander persone, wat reeds oor inligting betreffende die saak beskik, ooreen kan kom dat hulle dit nie aan derdes sal openbaar nie. In so 'n geval sal die eienaar 'n vorderingsreg verkry en sal hy uit hoofde daarvan kan optree indien 'n persoon teenoor wie hy sodanige vorderingsreg het, inligting in stryd daarmee sou openbaar; die inligting sal egter beskerming geniet, nie vanweë die enge verbondenheid daarvan met die saak nie, maar vanweë die enge verbondenheid daarvan met die prestasie waarop die eienaar uit hoofde van die vorderingsreg 'n aanspraak het.

(b) *Waar die eienaar slegs die wil tot relatiewe geheimhouding van die inligting openbaar* Die eienaar van 'n saak kan natuurlik 'n belang daarby hê om inligting betreffende sy saak op 'n selektiewe wyse aan sekere persone te openbaar. Dit sal byvoorbeeld die geval wees waar die eienaar die saak ten toon stel en slegs persone wat 'n bepaalde toegangsgeld betaal, toelaat om die saak sintuiglik waar te neem en selfs moontlik te ondersoek ten einde op daardie wyse inligting aangaande die saak te bekom, terwyl hy terselfdertyd maatreëls tref om te verhoed dat persone wat nie sodanige toegangsgeld betaal het nie, toegang tot die saak verkry. Eweneens kan die eienaar toelaat dat *sekere* inligting betreffende die saak algemeen bekend word. Optrede van hierdie aard kan, vir doeleindes van hierdie bespreking, beskryf word as die *relatiewe of selektiewe geheimhouding van inligting met betrekking tot die saak.*

Indien persone op onregmatige en skuldige wyse toegang tot die saak verkry ten spyte van die maatreëls wat die eienaar getref het om dit te verhoed, sal die eienaar uiteraard teenoor hulle kan optree op presies dieselfde wyse as waar die toegang verkry is terwyl die eienaar sy bevoegdheid uitgeoefen het om niemand toe te laat om toegang tot die saak te verkry nie. In sodanige gevalle behoort die eienaar ook met die *actio legis Aquiliae* te slaag en behoort hy minstens die toegangsgeld wat die persone veronderstel was om te betaal ten einde toegang tot die saak te verkry, van hulle te kan verhaal. Sou sodanige persone die inligting wat hulle op hierdie wyse bekom het, aan derdes openbaar, sal die situasie soos in die eerste geval geskets *mutatis mutandis* van toepassing wees.

Die vraag ontstaan nou of die eienaar, bloot uit hoofde van sy eiendomsreg oor die saak, persone wat die saak of voorstellings daarvan met sy toestemming waargeneem het, kan verbied om die inligting wat hulle op hierdie wyse bekom het, aan ander oor te dra.

In hierdie verband is dit natuurlik belangrik om te onderskei tussen inligting betreffende die saak self en inligting betreffende die verhouding tussen die eienaar en die saak. Veral in geval van regte ten aansien van liggaamlike sake (saaklike regte) moet 'n mens deurentyd die belang van die publisiteitsbeginsel in gedagte hou. Kragtens hierdie beginsel moet die sakeregtelike verhouding tussen 'n regsubjek en 'n saak sover moontlik bekend, publiek of uiterlik waarneembaar wees en behoort buitestanders van uiterlik waarneembare gegewens te kan aflei watter saaklike regte ten aansien van 'n saak bestaan en op watter tydstip 'n saaklike reg van een regsubjek op 'n ander oorgaan.[140] In wese het hierdie beginsel dus die bevordering van regsekerheid ten doel. Daar bestaan weinig twyfel dat 'n hof hierdie beginsel in aanmerking sal neem by die beoordeling van die regmatigheid al dan nie van die openbaarmaking van inligting betreffende die feit dat 'n bepaalde persoon die eienaar van 'n sekere saak is, hetsy so 'n persoon die inligting op onregmatige en skuldige wyse of op volkome geoorloofde wyse bekom het. Ingevolge die publisiteitsbeginsel is dit immers wenslik dat die feit dat 'n bepaalde persoon die eienaar van 'n sekere saak is, so wyd moontlik bekend moet wees. Indien die openbaring van die feit van die eienaar se eienaarskap oor die saak 'n ander belang van die eienaar, soos sy reg op privaatheid, sou aantas, sal 'n hof wat 'n eis vir genoegdoening of 'n skadevergoedingsaksie voortspruitend uit die openbaarmaking van hierdie feit oorweeg, uiteraard die belang van regsekerheid, wat deur die openbaarmaking gedien is, teen die belang van die eienaar wat deur die openbaarmaking aangetas is, afweeg. Na die afweging van die belange sal die hof slegs die skadevergoedingsaksie of die eis vir genoegdoening toestaan indien dit sou blyk dat die belang wat deur die openbaarmaking aangetas is, in die besondere omstandighede van die saak groter gewig dra as die belang wat deur die openbaarmaking gedien is.

Sover dit inligting rakende die saak self betref, skyn die posisie na my mening soortgelyk te wees. Myns insiens is die blote bestaan van eiendomsreg oor 'n saak nie voldoende grond vir 'n eienaar om van ander persone wat inligting betreffende die saak met sy goedkeuring verkry het, te verwag om die inligting geheim te hou nie.

Indien egter ook ander belange van die eienaar, benewens sy eiendomsreg oor die saak, aangetas sal word indien die persone die inligting betreffende die saak self aan ander sou oordra, kan die prentjie anders daar uitsien. Sodanige gevalle kan voorkom waar die oordra van die inligting byvoorbeeld die eienaar se reg op privaatheid sou aantas. 'n Eis vir genoegdoening of 'n skadevergoedingsaksie weens die openbaarmaking van inligting betreffende die saak self, sal egter waarskynlik meer geredelik toegestaan word as 'n eis wat gebaseer is op die openbaarmaking van die feit dat die betrokke persoon die eienaar van die saak is. Die belang van regsekerheid wat uit die publisiteitsfunksie voortspruit, sal immers in eersgenoemde gevalle nie 'n rol speel nie. In elkeen van die voornoemde gevalle sal enige beskerming van die inligting egter toe te skryf wees aan die noue verbondenheid daarvan met hierdie ander belang, en nie weens die verbondenheid daarvan met die saak self nie, tensy die openbaarmaking natuurlik aanleiding daartoe gee dat die saak self of die eienaar se belang in die saak aangetas sou word.

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140 Van der Merwe 13–14.

Die eienaar kan natuurlik ook met die persone wat hy toelaat om die saak waar te neem, ooreenkom dat hulle geen inligting betreffende die saak aan derdes sal openbaar nie. In so 'n geval sal die eienaar 'n vorderingsreg verkry en sal hy teen enige van die persone kan optree indien hulle die ooreenkoms nie sou nakom nie. Enige beskerming wat die inligting uit hoofde van so 'n ooreenkoms sou geniet, sal egter toe te skryf wees aan die enge verbondenheid van die inligting met die prestasie waarop die eienaar uit hoofde van die ooreenkoms geregtig is, en nie aan die verbondenheid van die inligting met die saak self nie. Dieselfde geld gevalle waar die eienaar die persone wat die saak met sy toestemming waarneem, verbied om byvoorbeeld foto's van die saak te neem of sketse daarvan te maak. Indien die eienaar die toestemming aan persone om die saak waar te neem, onderworpe maak aan die voorwaarde dat daar nie foto's van die saak geneem of sketse van die saak gemaak word nie, sal die eienaar, indien die persone hulle daartoe verbind het om die neergelegde voorwaardes na te kom, 'n vorderingsreg verkry en die persone kan verbied om foto's te neem of sketse van die saak te maak. Indien die eienaar skade sou ly weens die feit dat so 'n persoon nie die ooreenkoms nakom nie, sal die eienaar uit hoofde van hierdie vorderingsreg teen die persoon kan optree.

In die geval waar ander persone oor inligting betreffende die saak beskik het nog voordat die eienaar eiendomsreg oor die saak verkry het, soos die vorige eienaar van die saak, kom daar natuurlik ook ander oorwegings, benewens die eiendomsreg van die eienaar, ter sprake. In sodanige gevalle sal die persoon wat oor hierdie inligting aangaande die saak beskik, kwalik bloot weens die totstandkoming van die verhouding tussen die (huidige) eienaar en die saak, verbied kan word om die inligting bekend te maak. Wanneer 'n persoon sy eiendomsreg ten aansien van 'n saak aan 'n ander oordra, kan daar immers nie gesê word dat die voormalige eienaar, bloot deur die eiendomsreg ten aansien van die saak oor te dra, afstand gedoen het van sy bevoegdheid om inligting betreffende die saak waaroor hy reeds beskik aan ander persone oor te dra nie. Dieselfde geld natuurlik enige ander persoon wat reeds oor sodanige inligting beskik het voordat die huidige eienaar die eiendomsreg oor die saak verkry het. Indien hierdie inligting egter van so aard is dat die openbaarmaking daarvan die waarde van die saak vir die (nuwe) eienaar wesenlik verminder, kan die posisie natuurlik anders daar uitsien. Die kluisvervaardiger wat die kombinasie van 'n kluis se slot sonder meer aan ander persone as die persoon aan wie die kluis verkoop is, openbaar, sal ongetwyfeld nie kan redeneer dat daar nie 'n regsplig op hom gerus het om nie die kombinasie te openbaar nie. Hierbenewens kan die openbaarmaking van die inligting, afhangende van die omstandighede, ook op ander regsbelange as die eiendomsreg van die nuwe eienaar oor die saak (soos sy reg op privaatheid of sy reg op 'n handelsgeheim) inbreuk maak. Soos hierbo aangetoon, sal die inligting in sodanige gevalle wel beskerming geniet.

Die eienaar van die saak kan voorts met persone wat oor inligting betreffende die saak beskik maar onder geen regsverpligting staan om die inligting van ander te weerhou nie, ooreenkom dat hulle die inligting nie aan derdes sal openbaar nie. Sodanige ooreenkoms sal egter, soos hierbo aangetoon, slegs vorderingsregte in die lewe roep en enige nie-nakoming van die ooreenkoms sal aanleiding kan gee tot aksies weens kontrakbreuk. In sodanige gevalle sal die inligting beskerming geniet vanweë die onlosmaaklike verbondenheid daarvan met die prestasie as die regsobjek van die vorderingsreg, en *nie* vanweë enige verbondenheid daarvan met die saak self nie.

(c) *Waar die eienaar die inligting betreffende die saak algemeen bekend wil stel* Die eienaar van 'n saak kan ook belang daarby hê om inligting betreffende die saak aan ander te openbaar. Sodanige gevalle kan byvoorbeeld voorkom waar die eienaar die saak graag van die hand wil sit en inligting betreffende die saak so wyd moontlik bekend wil maak sodat hy op hierdie wyse die beste prys vir die saak kan beding.

Inherent tot die voorgaande bevoegdhede van die eienaar ten aansien van die geheimhouding van inligting betreffende die saak, is natuurlik ook die bevoegdheid van die eienaar om te besluit om die saak as 't ware aan almal ten toon te stel en almal dus toe te laat om na willekeur inligting betreffende die saak te bekom. Hierdie bevoegdheid kan, vir doeleindes van hierdie bespreking, beskryf word as die bevoegdheid tot die *algemene openbaarmaking van inligting met betrekking tot die saak*.

Indien 'n persoon stappe sou doen om die eienaar van 'n saak te verhoed om die saak, of inligting betreffende die saak, op so 'n wyse ten toon te stel of bekend te maak dat enige persoon die saak vryelik kan waarneem of inligting betreffende die saak kan bekom, sal die antwoord op die vraag of die eienaar enige remedie teen die inbreukmaker het, afhang van die wyse waarop die inbreukmaker te werk gegaan het om die eienaar te verhoed om sy regte uit te oefen en of die betrokke werkswyse as onregmatig en skuldig aangemerk kan word. Indien die inbreukmaking wel onregmatig en skuldig geskied, sal dit na alle waarskynlikheid terselfdertyd ook op ander belange van die eienaar inbreuk maak, met die gevolg dat daar in elk geval teen die inbreukmaker opgetree sal kan word weens die aantasting van hierdie ander belange van die eienaar. Belange wat hier ter sprake kan kom, sluit in persoonlikheidsregte van die eienaar (soos sy reg op fisies-psigiese integriteit, waar die inbreukmaker die eienaar fisies verhoed om die saak ten toon te stel of inligting betreffende die saak bekend te maak)[141] of 'n vorderingsreg wat die eienaar teenoor die dader self of teenoor 'n derde het (waar die dader byvoorbeeld versuim om volgens sy ooreenkoms die inligting in sy nuusblad bekend te maak of as buitestander inbreuk maak op die vorderingsreg wat die eienaar in hierdie verband teenoor 'n nuusblad kan hê). In sulke gevalle sou die eienaar ook die vergoeding weens gevolgskade voortspruitend uit sodanige inbreukmaking van die dader kon verhaal, en sal die inbreukmaking op die bevoegdheid van die eienaar om die saak so ten toon te stel dat enigeen die saak vryelik kan waarneem, waarskynlik nie eers ter sprake kom nie. In der waarheid is dit kwalik denkbaar dat 'n persoon ooit die eienaar se belang in die openbaarmaking van die inligting sal kan aantas sonder dat die inbreukmaker terselfdertyd ook 'n ander belang van die eienaar aantas.

Alhoewel die voorgaande bespreking slegs op eiendomsreg as saaklike reg betrekking gehad het, bestaan daar geen rede waarom dit nie ook in geval van ander saaklike regte kan geld nie. In geval van ander saaklike regte sal dit natuurlik afhang van die omvang van die bevoegdhede waaroor die reghebbende beskik of hy die bevoegdheid sal hê om inligting betreffende die saak van ander te weerhou of aan hulle te openbaar. Indien die reghebbende inderdaad oor hierdie bevoegdheid beskik en dit ook uitoefen, bestaan daar geen rede waarom die reghebbende nie staat kan maak op dieselfde beskerming ten aansien van die

141 Sien Joubert (1953) 142; *Sievers v Bonthuys* 1911 EDL 525 531–532; sien verder Neethling *Persoonlikheidsreg* 109; *Neethling's Law of personality* 122.

inligting as waarop die eienaar sou kon staatmaak nie. Trouens, die reghebbende mag selfs uit hoofde van sy ooreenkoms met die eienaar of van regsweë die bevoegdheid verkry om inligting betreffende die saak waaroor die saaklike reg strek, van die eienaar self te weerhou.

Samevatting

Uit die voorgaande kan die volgende afleidings rakende die beskerming van inligting betreffende liggaamlike sake in die privaatreg gemaak word:

(a) Die eienaar van 'n liggaamlike saak beskik, uit hoofde van sy eiendomsreg op die saak, oor die bevoegdheid om op sodanige wyse beheer oor die saak uit te oefen dat inligting betreffende die saak van ander weerhou word.

(b) Indien die eienaar inderdaad sodanige beheer oor die saak uitoefen, sal enige handeling waardeur 'n persoon in stryd met die wil van die eienaar kennis verkry van inligting betreffende die saak, op die eienaar se eiendomsreg ten aansien van die saak inbreuk maak. Indien sodanige inbreukmaking terselfdertyd ook met skuld aan die kant van die inbreukmaker gepaard gaan, wil dit voorkom of die eienaar vergoeding vir enige vermoënskade wat hy as gevolg van die inbreukmaking ly, met behulp van die *actio legis Aquiliae* van die inbreukmaker sal kan verhaal, ongeag of sodanige inbreukmaking met enige fisiese inwerking op die saak self gepaard gegaan het al dan nie. Die bevoegdheid van 'n persoon om beheer uit te oefen oor inligting betreffende 'n saak waarvan hy die eienaar is, geniet derhalwe reeds beskerming in die Suid-Afrikaanse privaatreg.

(c) Die beskerming wat in hierdie verband van regsweë verleen word, strek nie so ver dat persone wat die inligting op 'n regmatige wyse bekom, bloot op grond van die eienaar se eiendomsreg ten aansien van die saak onder enige verpligting sal staan om die inligting geheim te hou nie, behalwe waar die inligting van so 'n aard is dat die openbaarmaking daarvan as 'n wesenlike inbreukmaking op die eiendomsreg van die eienaar beskou kan word (soos waar die kluisvervaardiger die kombinasie van die slot van 'n kluis wat aan een persoon verkoop is, aan 'n ander persoon bekend sou maak). Voorts is dit goed denkbaar dat die openbaarmaking van die inligting deur sodanige persone op ander regsbelange van die eienaar, soos sy reg op privaatheid of vorderingsregte wat hy kan hê, kan inbreuk maak. In sodanige gevalle sal die inligting uit hoofde van die enge verbondenheid daarvan met hierdie ander belange van die eienaar, steeds van regsweë beskerming geniet.

(d) Dit is 'n absolute voorvereiste vir die beskerming van inligting betreffende 'n saak dat die eienaar van die saak die wil openbaar om die inligting te beskerm. Indien 'n eienaar sy eiendomsreg ten aansien van sy saak op só 'n wyse uitoefen dat 'n onbegrensde aantal persone na willekeur kennis kan neem van inligting betreffende die saak, word aanvaar dat die eienaar, minstens gedurende die tydperk wat hy sy eiendomsreg op hierdie wyse uitoefen, afstand gedoen het van sy bevoegdheid om beheer oor die inligting uit te oefen en derhalwe uit eie vrye wil sy eiendomsreg in dié mate ingeperk het. In so 'n geval bestaan daar klaarblyklik ook geen behoefte aan die beskerming van die inligting van regsweë nie en sal die reg dienooreenkomstig ook geen beskerming daaraan verleen nie.

(e) 'n Eienaar kan sy bevoegdheid om inligting betreffende sy saak van ander te weerhou op so 'n wyse uitoefen dat hy toelaat dat sekere inligting oor die saak algemeen bekend word, terwyl hy stappe doen om te voorkom dat ander inligting betreffende die saak ook algemeen bekend word. Insgelyks kan die eienaar

slegs 'n sekere begrensde groep persone toelaat om inligting aangaande die saak te bekom en stappe doen om te verhinder dat ander persone ook toegang daartoe verkry. In albei hierdie gevalle sal die optrede van die eienaar neerkom op die gedeeltelike afstanddoening van sy bevoegdheid om die inligting van ander te weerhou, en sal enige optrede om inligting aangaande die saak in stryd hiermee te bekom, steeds as inbreukmakende gedrag aangemerk kan word. Die eienaar behoort in dieselfde omstandighede as wat in (b) hierbo uiteengesit is, vergoeding vir enige vermoënskade wat hy as gevolg van die inbreukmakende handeling gely het, van die inbreukmaker te kan verhaal.

(f) Uit die voorgaande kan die afleiding gemaak word dat inligting betreffende 'n liggaamlike saak inderdaad in sekere omstandighede beskerming geniet uit hoofde van die enge verbondenheid daarvan met die saak wat die objek van die saaklike reg is. Eweneens kan afgelei word dat inligting betreffende 'n saak soms beskerming geniet vanweë die enge verbondenheid daarvan met ander regsbelange as die eiendomsreg oor die saak.

2 2 Persoonlikheidsgoed

Volgens Neethling[142] is die fisiese integriteit, liggaamlike vryheid, identiteit, goeie naam, eer, gevoelslewe en privaatheid van 'n persoon persoonlikheidsgoedere wat volgens die huidige stand van ons reg as regsobjekte kwalifiseer. Elke mens beskik oor subjektiewe regte ten aansien van elkeen van hierdie persoonlikheidsgoedere. Die vraag is nou of daar inligting is wat so eng verbonde is aan enige van die gemelde persoonlikheidsgoedere dat die beskerming van die betrokke persoonlikheidsgoed in elke geval vereis dat die betrokke inligting self ook beskerm word.

2 2 1 Die reg op fisiese integriteit

Volgens Neethling[143] het die fisiese integriteit twee sye, naamlik die liggaam self en die liggaamlike vryheid.[144] Die liggaam self verwys weer, volgens hom, na beide die fisiese en die psigiese elemente waaruit dit saamgestel is.

Die feit dat die liggaam van 'n persoon uit materie bestaan, hou die belangrike implikasie in dat die liggaam, net soos 'n liggaamlike saak, ook sintuiglik waarneembaar is. Eerstens impliseer dit dat die liggaam van 'n persoon as bron van inligting betreffende die liggaam self dien, en tweedens dat inligting betreffende die liggaam van 'n persoon bekom kan word deur bloot die persoon se liggaam self sintuiglik waar te neem en die een of ander voorstelling daarvan te vorm. Soos in geval van liggaamlike sake bestaan daar natuurlik ook 'n eng verband tussen die liggaam en die inligting wat verkry is deur die sintuiglike waarneming daarvan omdat die inligting op die liggaam betrekking het. Die vraag ontstaan nou of hierdie inligting só eng verbonde is aan die liggaam dat

142 *Persoonlikheidsreg* 26 ev.

143 *Idem* 27 ev.

144 *Idem* 39. Neethling is die mening toegedaan dat die liggaamlike vryheid as selfstandige regsgoed behoort te geld en vind steun vir sy standpunt by De Wet en Swanepoel 238. Vir die huidige wil dit egter voorkom of die liggaamlike vryheid nog as deel van die fisiese integriteit gesien word en word dit deur Neethling dienooreenkomstig ingedeel. Sien ook Joubert (1953) 137 wat eweneens meen dat dit as deel van die fisiese integriteit beskou moet word.

die beskerming van die liggaam vereis dat beskerming aan die inligting self ook verleen word.

By oorweging van hierdie vraag is dit interessant om daarop te let dat liggaamlike vryheid, soos hierbo aangetoon, (nog) as deel van die fisiese integriteit beskou word. Liggaamsvryheid behels onder andere ook bewegingsvryheid en handelingsvryheid.[145] Hierdie vryheid verleen aan die reghebbende die bevoegdheid om, binne die grense wat van regsweë neergelê is, sy liggaam te beweeg waarheen hy wil. Dit sluit dus ook die bevoegdheid van die reghebbende in om sy liggaam sodanig af te sonder dat andere dit nie sintuiglik kan waarneem en sodoende inligting ten aansien daarvan bekom nie. In ons moderne samelewing is dit natuurlik hoogs onwaarskynlik dat 'n persoon daarin sal slaag om hom permanent sodanig af te sonder dat andere dit nie sintuiglik kan waarneem en sodoende inligting ten aansien daarvan bekom nie. Nogtans verskaf hierdie bevoegdheid aan die persoon die vryheid om, wanneer hy van tyd tot tyd die behoefte daaraan het, hom van andere af te sonder en alleen te verkeer. Die reg op fisiese integriteit verleen ook aan 'n persoon die bevoegdheid om sy liggaam te bedek of onbedek te laat, binne die grense wat in hierdie verband van regsweë neergelê is. Deur sy liggaam of dele daarvan te bedek, kan 'n persoon eweneens die sintuiglike waarneembaarheid van sy liggaam of die dele daarvan wat hy bedek het, voorkom.

Daar kan weinig twyfel bestaan dat die kennisname deur derdes van inligting betreffende die fisiese of psigiese toestand van 'n persoon, asook inligting oor die mate van liggaamlike vryheid (of afwesigheid daarvan) wat 'n bepaalde persoon geniet, erg benadelend op sodanige persoon kan inwerk. Die vraag wat egter in hierdie afdeling oorweeg moet word, is of sodanige inligting só eng verbonde is aan die beskermde regsbelang, naamlik fisiese integriteit, dat die beskerming van fisiese integriteit vereis dat hierdie inligting self ook beskerm word.

Indien 'n ander, in stryd met die wil van die persoon oor wie se fisiese of psigiese toestand of oor wie se vryheid die inligting handel, sodanige inligting verkry, of indien 'n persoon, wat reeds kennis dra van die inligting, dit in stryd met die wil van die persoon oor wie dit handel, sou openbaar, moet die aard van die inbreukmakende handeling uiters versigtig ontleed word ten einde vas te stel of enige beskerming wat die betrokke inligting kan geniet, aan die enge verbondenheid daarvan met die fisiese integriteit toe te skryf is en of dit nie dalk weens die verbondenheid daarvan met 'n ander regsgoed, soos die persoon se privaatheid, bestaan nie. Hier kan verskillende moontlikhede oorweeg word.

Die eerste moontlikheid is dat die inbreukmakende handeling van so 'n aard is dat die slagoffer in die proses van insameling of openbaarmaking van die inligting op 'n onregmatige wyse fisieke leed aangedoen word, psigies gekrenk word, of dat sy liggaamlike vryheid fisies aan bande gelê word. Voorbeelde hiervan sou wees waar die slagoffer onregmatig met geweld vasgedruk en 'n bloedmonster van hom geneem word, hy verbaal, of deur middel van blootstelling aan reuke of deur vertoning van beelde aan hom, geestelik getreiter word, of waar hy gevange gehou word ten einde hom te beweeg om inligting betreffende sy fisiese of psigiese toestand of bewegings openbaar te maak. Hier is dit duidelik dat die

145 Neethling *Persoonlikheidsreg* 39.

slagoffer se fisiese integriteit aangetas is en hy kan deur middel van die *actio iniuriarum* teen die inbreukmaker optree en genoegdoening eis, terwyl hy terselfdertyd met behulp van die *actio legis Aquiliae* vergoeding vir enige vermoënskade wat hy in die proses gely het, van die inbreukmaker sal kan verhaal mits aan al die ander vereistes van die onderskeie aksies voldoen is. Indien die inbreukmakende handeling emosionele skok by die slagoffer veroorsaak, sal hy voorts met die aksie weens pyn en lyding teen die inbreukmaker kan optree. In gevalle van hierdie aard sal die optrede teen die inbreukmaker egter gebaseer wees op die inbreukmakende handeling, *hetsy of die inbreukmaker daardeur inligting wou bekom of openbaar wou maak of nie*. Sulke gevalle kan gevolglik nie geklassifiseer word as gevalle waar die inligting beskerming geniet vanweë enige verbondenheid daarvan met die fisiese integriteit van die slagoffer nie. Trouens, dit sou eerder geklassifiseer kon word as gevalle waar die beskerming van die slagoffer se fisiese integriteit meegebring het dat die slagoffer beskerming geniet het teen die betrokke *wyse* van insameling of openbaarmaking van die inligting – die slagoffer sou immers steeds teen die inbreukmaker kon optree selfs al is op sy fisiese integriteit inbreuk gemaak, sonder dat die inligting wat hy op hierdie wyse bekom het, betrekking gehad het op sy fisiese of psigiese toestand of liggaamlike vryheid en selfs waar die inbreukmaking nie geskied het met die oog op die verkryging of openbaarmaking van enige inligting nie (soos waar bloed van 'n persoon getrek word vir doeleindes van 'n bloedoortapping en nie om enige inligting betreffende die persoon te bekom nie). Die blote feit dat daar in die proses van insameling of openbaarmaking van die inligting op die fisiese integriteit van die slagoffer inbreuk gemaak is, beteken natuurlik nie dat daar nie ook op ander persoonlikheidsgoedere van die slagoffer, soos sy privaatheid, goeie naam of eer inbreuk gemaak is nie. Waar daar ook op sodanige ander persoonlikheidsgoedere inbreuk gemaak is, sal die slagoffer uiteraard op grond daarvan ook teen die inbreukmaker kan optree.

Die tweede moontlikheid, wat waarskynlik in die meeste van hierdie gevalle sal voorkom, is waar die krenkende handeling nie enige fisiese of psigiese skade aan die slagoffer meebring of op sy liggaamlike vryheid inbreuk maak nie, maar eerder ander persoonlikheidsgoedere van die slagoffer, soos sy privaatheid, goeie naam, identiteit of eer aantas. In gevalle van hierdie aard is dit duidelik dat die slagoffer nie teen die inbreukmaker sal optree uit hoofde van sy reg op sy fisiese integriteit nie, maar weens die aantasting van die ander regsgoed wat in die proses aangetas is. In die volgende paragrawe sal ontleed word in welke mate, indien enige, die verbondenheid van die inligting met die ander regsgoed 'n rol speel in die beskerming daarvan.

2 2 2 Die reg op identiteit

Daar is vroeër aangetoon dat 'n persoon se identiteit een van daardie regsobjekte is wat uit inligting bestaan. In geval van die identiteit is daar dus nie sprake van inligting wat weens die enge verbondenheid daarvan met 'n bepaalde regsobjek beskerming geniet nie omdat die inligting self die regsobjek is wat die beskerming geniet.

2 2 3 Die reg op die goeie naam of reputasie

Daar is vroeër aangetoon dat 'n persoon se goeie naam of reputasie een van daardie regsobjekte is wat uit inligting bestaan. In geval van die goeie naam of reputasie is daar dus nie sprake van inligting wat weens die enge verbondenheid

daarvan met 'n bepaalde regsobjek beskerming geniet nie omdat die inligting self die regsobjek is wat die beskerming geniet.

2 2 4 Die reg op die eer

Volgens Neethling[146] bestaan hierdie persoonlikheidsgoed uit die subjektiewe eergevoel of selfrespek van 'n persoon. 'n Persoon se eer word aangetas indien iemand die persoon beledigende of vernederende woorde toevoeg.

In geval van hierdie regsgoed is dit nie nodig dat publikasie van die beledigende woorde aan derdes hoef plaas te vind nie. Publikasie daarvan aan die slagoffer self is voldoende.[147] Indien publikasie van die woorde aan derdes sou plaasvind, kan daar eers sprake wees van 'n aantasting van die persoon se eergevoel wanneer hy daarvan verneem en mits hy in daardie stadium in sy eer gekrenk voel. Indien die woorde nooit tot die aandag van die reghebbende kom nie, vind daar gevolglik ook geen krenking van die persoon se eergevoel plaas nie. Hierbenewens vind daar ook geen krenking van 'n persoon se eergevoel plaas as die persoon subjektief nie voel dat sy eer daardeur gekrenk is nie (hetsy die woorde wat hom toegevoeg is objektief gesproke eerkrenkend was of nie).[148] Dit beteken dat die subjektiewe ingesteldheid van 'n persoon op die tydstip wanneer die woorde tot sy kennis kom, self in hierdie verband van deurslaggewende belang kan wees. Dieselfde geld die *wyse* waarop die woorde aan die reghebbende toegevoeg word. Woorde wat in der waarheid 'n kompliment daarstel, kan byvoorbeeld 'n ernstige belediging daarstel indien dit op 'n sarkastiese wyse uitgespreek word. Dit is dus goed denkbaar dat die toevoeging van dieselfde woorde aan dieselfde persoon by een geleentheid 'n persoonlikheidskrenking kan daarstel en by 'n ander geleentheid weer nie.

Die feit dat hierdie regsgoed aangetas word deur middel van die toevoeging van woorde aan 'n persoon, dui daarop dat 'n mens by die aantasting van hierdie regsobjek te doen het met die oordra van inligting oor 'n bepaalde persoon aan dié persoon self. Die vraag wat nou ontstaan, is of hierdie inligting in só 'n eng verband met die eer as regsgoed staan dat die beskerming van die eer vereis dat die betrokke inligting ook beskerm word. In die lig van die feit dat dit hier in wese nie afhang van die inhoud van die inligting wat oorgedra word nie (aangesien dieselfde woorde aan dieselfde persoon in een geval eerkrenkend kan wees en in 'n ander geval nie) maar eerder van die vraag of die betrokke persoon dit in daardie stadium as eerkrenkend ervaar of nie (wat weer sal afhang van die subjektiewe gemoedstoestand van die reghebbende en die *omstandighede waarin* en die *beledigende of vernederende wyse* waarop die woorde toegevoeg word), kan afgelei word dat 'n mens hier *nie* met 'n geval te doen het waar inligting beskerming geniet weens die enge verbondenheid daarvan met die eergevoel nie.

2 2 5 Die reg op die gevoelslewe

'n Persoon se gevoelslewe omvat volgens Potgieter[149] 'n verskeidenheid geestelik-sedelike gevoelens of innerlike gewaarwordinge omtrent dinge soos liefde,

146 *Persoonlikheidsreg* 30.
147 *Strydom v Fenner-Solomon* 1953 1 SA 519 (OK) 540.
148 *Minister of Police v Mbilini* 1983 3 SA 705 (A) 716.
149 Potgieter *Aspekte van die juridiese beskerming van die godsdiensgevoel* (LLD-proefskrif Unisa 1987) 7–8.

geloof (godsdiens), sentiment en kuisheid. 'n Persoon se gevoelslewe word aangetas indien enige van die gemelde gevoelens of gewaarwordings van die persoon gekrenk word.

In die Suid-Afrikaanse regspraak skyn daar nog nie 'n ondubbelsinnige erkenning van die gevoelslewe as afsonderlike persoonlikheidsgoed en regsobjek te wees nie, alhoewel daar sekerlik aanknopingspunte in hierdie verband bestaan.[150] Selfs indien daar egter vir doeleindes van hierdie bespreking aanvaar word dat daar inderdaad so 'n afsonderlike regsobjek bestaan, is dit duidelik dat 'n aantasting daarvan, soos in geval van eerkrenking, sal afhang van die subjektiewe ingesteldheid van die reghebbende en die omstandighede waarin en wyse waarop die krenkende gedrag plaasvind. Soos in geval van eerkrenking, sou daar dus nie geredeneer kon word dat 'n mens hier te doen het met 'n geval waar inligting beskerming geniet vanweë die enge verbondenheid daarvan met die gevoelslewe as regsobjek nie.

2 2 6 Die reg op privaatheid

Daar is reeds vroeër aangetoon dat privaatheid een van daardie regsobjekte is wat uit inligting bestaan. In geval van privaatheid is daar dus nie sprake van inligting wat weens die enge verbondenheid daarvan met 'n bepaalde regsobjek beskerming geniet nie, omdat die inligting self die regsobjek is wat beskerming geniet.

Samevatting

Uit die voorgaande kan die volgende afleidings rakende die beskerming van inligting wat in die een of ander verband met persoonlikheidsgoedere staan, gemaak word:

(a) Daar bestaan nie inligting wat só eng verbonde is aan sekere persoonlikheidsgoedere dat die beskerming van die goedere noodwendig vereis dat daar ook beskerming aan die betrokke inligting verleen word nie.

(b) Die persoonlikheidsgoedere waarvan die beskerming nié vereis dat daar beskerming aan sekere inligting verleen word nie, sluit die fisiese integriteit, eer en gevoelslewe in.

(c) In geval van privaatheid, identiteit en die goeie naam of reputasie, bestaan die regsobjek uit inligting. Sover dit daardie persoonlikheidsgoedere betref, het 'n mens dus nie te doen met inligting wat weens die enge verbondenheid daarvan met 'n bepaalde regsobjek beskerming geniet nie omdat hierdie inligting self die regsobjek is wat die beskerming geniet.

2 3 Prestasies

Soos reeds gemeld, bestaan 'n prestasie uit 'n handeling van iemand, soos die gee of lewering van iets, die doen van iets en die nie-doen of weerhouding daarvan om iets te doen. Die regte hierop word *vorderingsregte* en soms ook *persoonlike regte* genoem.[151]

150 Vgl Neethling *Persoonlikheidsreg* 203 ev.

151 Van der Vyver en Joubert 8. Vgl die gesag in vn 121.

Van Zyl en Van der Vyver[152] bevraagteken die geldigheid van die stelling dat 'n prestasie die objek van 'n subjektiewe reg kan wees. Hulle wys daarop dat 'n vorderingsreg tot stand kom vóór die prestasie gelewer word (dws vóór die handeling verrig word). Die prestasie self kom egter eers tot stand wanneer presteer word (dws die handeling verrig word). Volgens hulle sou dit beteken dat die vorderingsreg in die stadium waarop dit tot stand kom, betrekking het op 'n regsobjek wat nie bestaan nie. Hulle is gevolglik van mening dat dit suiwerder sou wees om te redeneer dat die objek van die vorderingsreg eerder gesien moet word as 'n aspek van die persoonlikheid van die skuldenaar wat bestem is om die reghebbende tot behoeftebevrediging te dien. Die prestasie (handeling) self moet volgens hulle eerder gesien word as die *medium* waardeur die betrokke aspek van die skuldenaar se persoonlikheid die behoefte van die reghebbende bevredig. Du Plessis[153] weer meen dat die objek van 'n vorderingsreg die *aanspraak* is wat die reghebbende op die skuldenaar se prestasie het.

Alhoewel dit vir doeleindes van hierdie bespreking nie nodig is om standpunt in te neem oor welke van hierdie benaderings as korrek beskou word nie, is dit tog belangrik om daarop te wys dat al die standpunte in een opsig ooreenstem, naamlik dat 'n mens hier te doen het met 'n geval waar die onderwerp of voorwerp ten aansien waarvan die prestasie plaasvind (die handeling verrig word), self nie objek van die vorderingsreg vorm nie. Indien die prestasie uit die lewering van 'n saak sou bestaan, sou dit volgens al die voormelde standpunte dus verkeerd wees om te redeneer dat die saak self die objek van die vorderingsreg vorm.

Die belang van die voorafgaande bevinding is daarin geleë dat selfs waar die prestasie wat by 'n bepaalde vorderingsreg ter sprake is, uit die een of ander handeling ten aansien van inligting bestaan, die inligting self nie die regsobjek is waarop die vorderingsreg betrekking het nie.

Dit is goed denkbaar dat elke handeling wat moontlik ten aansien van inligting verrig kan word, ook die onderwerp van 'n vorderingsreg kan vorm. Dit gebeur immers dikwels in die praktyk dat een persoon met 'n ander 'n ooreenkoms sluit ingevolge waarvan die een party onderneem om sekere inligting aan die ander party te verskaf, geheim te hou of openbaar te maak, ensovoorts. Veral in daardie gevalle waar die vorderingsreg bestaan uit 'n aanspraak van die reghebbende op die skuldenaar se geheimhouding van die inligting, vind 'n mens dat daar inderdaad beskerming aan die inligting verleen word. Indien 'n persoon strydig met die ooreenkoms sou optree en die inligting openbaar maak, sou die reghebbende ingevolge die kontrak tussen hom en die skuldenaar teen die skuldenaar kon optree en skadevergoeding eis. Hierbenewens sou die reghebbende 'n dreigende openbaarmaking van die inligting kon verhoed deur 'n interdik aan te vra ingevolge waarvan die skuldenaar verbied word om die inligting openbaar te maak. Daar kan weinig twyfel bestaan dat die beskerming wat in sulke gevalle aan die inligting verleen word, beskerming is wat verleen word weens die enge verbondenheid van die inligting met die objek van die vorderingsreg. In sodanige gevalle word die inligting beskerm vanweë die feit dat die beskerming van die vorderingsreg vereis dat daar noodwendig beskerming aan die inligting verleen word.

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152 409–410.
153 Du Plessis en Du Plessis 135.

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Die belang van die voorafgaande bevinding is daarin geleë dat selfs waar die prestasie wat by 'n bepaalde vorderingsreg ter sprake is, uit die een of ander handeling ten aansien van inligting bestaan, die inligting self nie die regsobjek is waarop die vorderingsreg betrekking het nie.

Dit is goed denkbaar dat elke handeling wat moontlik ten aansien van inligting verrig kan word, ook die onderwerp van 'n vorderingsreg kan vorm. Dit gebeur immers dikwels in die praktyk dat een persoon met 'n ander 'n ooreenkoms sluit ingevolge waarvan die een party onderneem om sekere inligting aan die ander party te verskaf, geheim te hou of openbaar te maak, ensovoorts. Veral in daardie gevalle waar die vorderingsreg bestaan uit 'n aanspraak van die reghebbende op die skuldenaar se geheimhouding van die inligting, vind 'n mens dat daar inderdaad beskerming aan die inligting verleen word. Indien 'n persoon strydig met die ooreenkoms sou optree en die inligting openbaar maak, sou die reghebbende ingevolge die kontrak tussen hom en die skuldenaar teen die skuldenaar kon optree en skadevergoeding eis. Hierbenewens sou die reghebbende 'n dreigende openbaarmaking van die inligting kon verhoed deur 'n interdik aan te vra ingevolge waarvan die skuldenaar verbied word om die inligting openbaar te maak. Daar kan weinig twyfel bestaan dat die beskerming wat in sulke gevalle aan die inligting verleen word, beskerming is wat verleen word weens die enge verbondenheid van die inligting met die objek van die vorderingsreg. In sodanige gevalle word die inligting beskerm vanweë die feit dat die beskerming van die vorderingsreg vereis dat daar noodwendig beskerming aan die inligting verleen word.

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152 409–410.
153 Du Plessis en Du Plessis 135.

Vorderingsregte vloei voort uit verbintenisse. Verbintenisse kom egter nie slegs tot stand uit hoofde van ooreenkomste nie maar ook as gevolg van die pleeg van 'n onregmatige daad of delik. In geval van 'n onregmatige daad verwys die verbintenis wat as gevolg daarvan tot stand kom egter na die verpligting van die dader om die skade te vergoed wat hy die slagoffer berokken het, en die vorderingsreg van die slagoffer ten aansien van die vergoeding teenoor die dader. In geval van 'n verbintenis wat uit hoofde van 'n onregmatige daad ontstaan, kan daar dus geen sprake wees van vorderingsregte wat in so 'n enge verband met inligting staan dat die beskerming van die objek van die vorderingsregte vereis dat daar beskerming aan die inligting verleen word nie.

Samevatting

In die lig van die voorgaande kan die afleiding gemaak word dat daar in geval van vorderingsregte wat uit hoofde van ooreenkomste tot stand kom, dikwels sprake kan wees van inligting wat in so 'n enge verband met die objek van die vorderingsreg staan dat die beskerming van die vorderingsreg vereis dat beskerming ook aan die inligting self verleen word.

To the extent to which it may be suggested that there have been cases in which a tendency to unduly restrict the freedom of the press to publish (having, so it was argued, a 'chilling effect' upon the enjoyment of free speech), such cases must, in my view, reflect an incorrect weighing of the countervailing interests of the parties. All that need be said is that the proper recognition of the importance of free speech is a factor which must be given full value in all cases (per Plewman JA in *Hix Networking Technologies v Systems Publishers (Pty) Ltd* 1997 1 SA 391 (A) 401).

AANTEKENINGE

ENKELE GEDAGTES OOR DIE MOONTLIKE INVLOED VAN FUNDAMENTELE REGTE TEN AANSIEN VAN DIE FISIES-PSIGIESE INTEGRITEIT OP DELIKTUELE REMEDIES

1 Inleiding

Die nuwe handves van regte in die grondwetlike teks bevat verskillende bepalings wat relevant is ten aansien van die reg op fisies-psigiese integriteit (sien bv a 12 oor die vryheid en sekuriteit van die persoon, a 24 oor die reg op 'n omgewing wat nie skadelik vir die gesondheid is nie, a 27 wat handel met die reg op gesondheidsorg en sosiale sekuriteit, a 28 wat voorsiening maak vir kinderregte tav oa basiese voeding, gesondheidsorg, beskerming teen verwaarlosing, ens). In die lig van die direkte en indirekte horisontale werking wat die nuwe handves sal hê, ontstaan die vraag hoe die deliktuele beskerming van die reg op fisies-psigiese integriteit in die toekoms kan of behoort te ontwikkel (sien in die algemeen oor horisontale werking a 8 van die nuwe Grondwet: PJ Visser "Enkele beginsels en gedagtes oor die horisontale werking van die nuwe Grondwet" 1997 *THRHR* 296 ev en die verwysings daar vermeld).

2 Die horisontale werking van die regte in die nuwe Grondwet

Direkte horisontale toepassing beteken, eenvoudig gestel, dat die betrokke fundamentele regte gelding geniet tussen regsubjekte anders as die staat en wel in die mate wat dit die geval kan wees in die lig van die aard van die betrokke reg en die aard van die plig wat dit meebring. In so 'n geval geld die bestaande wettereg en die gemenereg ten einde die nodige "effek" aan die reg te gee. Indien daar nie aldus voldoende effek gegee word nie, moet die hof die gemenereg ontwikkel ten einde hierdie doel te kan bereik (a 8(2) en (3) van die Grondwet; vgl oor hierdie bepalings ook Woolman "Defamation, application and the interim Constitution" 1996 *SALJ* 450–452).

Indirekte horisontale werking, ingevolge die benadering van die Duitse reg wat skynbaar uitdruklik in Suid-Afrika van toepassing gemaak is (deur a 35(3) van die tussentydse Grondwet 200 van 1993 en a 39(2) van die nuwe Grondwet; vgl ook Van Aswegen "The implications of a bill of rights for the law of contract and the law of delict" 1995 *SAJHR* 56; DP Visser "Future of the law of delict" in *Toekoms van die Suid-Afrikaanse privaatreg* (1993) 35 ev), verwys hoofsaaklik na die feit dat die waardes van die handves van regte 'n rol speel by normatiewe begrippe soos redelikheid, openbare beleid, *boni mores* ensovoorts wat by die onregmatigheidselement toegepas word ten einde deliktuele aanspreeklikheid te bepaal.

Dit is nie die bedoeling om in hierdie bydrae die algemene beginsels van direkte en indirekte horisontale werking te probeer uitpluis nie. Daar word bloot, sonder om aanspraak op volledigheid te maak, gekyk na sekere praktiese voorbeelde waar daar 'n moontlikheid van verdere ontwikkeling in die deliktuele vergoedingsreg bestaan – veral wat betref nie-vermoënskade. Dit is waarskynlik korrek om te aanvaar dat die meeste fasette van fundamentele regte wat met die liggaamlike en psigiese integriteit te doen het, horisontale werking het. Die aard van hierdie regte en die aard van die pligte wat dit oplê, is van sodanige basiese aard en aldus bekend aan die gemenereg (sien bv Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 29 ev 89 ev) dat dit geredelik ook tussen private individue gelding kan hê.

3 Iets oor die bestaande deliktuele remedies ter beskerming van die fisies-psigiese integriteit

Die Suid-Afrikaanse deliktereg is betreklik gesofistikeerd wat betref die beskerming van die fisies-psigiese integriteit. Die betrokke regsbelange word in 'n wye sin verstaan om sowel die fisiese as psigiese sye van die *corpus* in te sluit.

In *Minister of Justice v Hofmeyr* (1993 3 SA 131 (A) 145; vgl ook die bespreking van die reg op die *corpus* deur Joubert *Grondslae van die persoonlikheidsreg* (1953) 131) stel die hof dit so:

> "One of the individual's absolute rights of personality is his right to bodily integrity. The interest concerned is sometimes described as being one in *corpus*, but it has several aspects . . . It comprehends also a mental element."

(Geen reg is natuurlik letterlik "absolute" soos in die aanhaling nie; die woord word waarskynlik net gebruik om die relatiewe belangrikheid van die betrokke reg aan te dui.)

Verskillende remedies word beskikbaar gestel om hierdie reg te beskerm mits aan die vereistes van die betrokke remedie voldoen word. Die vernaamste en bekendste deliktuele remedies is (a) die *actio iniuriarum* waarmee genoegdoening weens opsetlike krenking van die fisies-psigiese integriteit (as 'n *iniuria*) verhaal word; (b) die aksie weens pyn en lyding waarmee onvolmaakte kompensasie weens die opsetlike of nalatige aantasting van die fisies-psigiese integriteit geëis kan word; (c) die *actio legis Aquiliae* wat ten doel het om skadevergoeding weens vermoënskade as gevolg van die aantasting van die liggaam gedingsvatbaar te stel; (d) die interdik waarmee gepoog kan word om 'n dreigende krenking van die *corpus* te verhinder; en (e) sekere ander gemeenregtelike en wetteregtelike remedies (bv die *actio de pauperie* – sien Neethling, Potgieter en Visser *Deliktereg* (1996) 354 ev; a 11(2) van die Lugvaartwet 74 van 1962; die Wet op Vergoeding vir Beroepsbeserings en -siektes 130 van 1993).

4 Fundamentele regte wat die vryheid en sekuriteit van die persoon en die gesondheid raak

Vervolgens word enkele bepalings aangehaal wat uitdruklik met die reg op die fisies-psigiese integriteit handel soos dit ingevolge die persoonlikheidsreg verstaan word (sien bv *Neethling's Law of personality* 89 ev; vir 'n bespreking van vergelykbare bepalings in die tussentydse Grondwet sien Cachalia *ea Fundamental rights in the new Constitution* (1994) 35–36).

4 1 Artikel 1

Die eerste beginsel of waarde waarop die Republiek van Suid-Afrika gegrond is, is volgens die nuwe Grondwet die menslike waardigheid (*human dignity*). Die menslike waardigheid het 'n erkende betekenis in die persoonlikheidsreg (vgl in die algemeen Burchell "Beyond the glass bead game: human dignity in the law of delict" 1988 *SAJHR* 1; *Neethling's Law of personality* 31–32) en kan in 'n sin gesien kan word as die basis vir alle fundamentele regte – wat dan ook die fundamentele persoonlikheidsreg op die *corpus* in die algemeen insluit. Hierdie bepaling kan waarskynlik in die toekoms gebruik word om op 'n wyse vergelykbaar met artikels 1 en 2 van die Duitse *Grundgesetz* die verdere ontwikkeling van besondere persoonlikheidsregte te stimuleer en vir nuwe situasies voorsiening te maak (vgl in die algemeen Kötz *Deliktsrecht* (1996) 239–240).

4 2 Artikel 12

Artikel 12 bevat bepalings wat handel met sowel die reg op die vryheid van die liggaam as die reg op die fisies-psigiese integriteit. Slegs die bepalings oor laasgenoemde word hier aangehaal:

> "(1) Everyone has the right to freedom and security of the person, which includes the right–
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right–
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

(Sien vir 'n bespreking van die veelvuldige fasette van hierdie reg(te) en die regsbelange ter sprake, Du Plessis "The rights to freedom and security of the person in South Africa's transitional Constitution?" 1994 *SACJ* 268-269 277–282; die verslag van die paneel van grondwetlike kenners aan die voorsitter van grondwetlike vergadering getiteld "Freedom and integrity of the person", gedateer 5-02-1996, par 3.1 (beskikbaar op die Internet by http:\\www.constitution.org.za/cp 105026.html); sien ook Stoll *Haftungsfolgen im bürgerlichen Recht* (1993) 351 ev oor die tendens tot objektivering van *Körperschaden* in die Duitse reg, die Belgiese reg, die Franse reg ("préjudice physiologique"), en die Italiaanse reg; vgl oor die belangrike ontwikkeling van "danno biologico" agv grondwetlike impulse in lg stelsel, Von Bar *Gemeineuropäisches Deliktsrecht* (1996) par 573.)

Alhoewel die regte en belange wat ingevolge artikel 12 erken en beskerm word in redelike besonderhede uitgespel word, dui die woorde "which includes" dat dit nie as 'n uitputtende formulering bedoel is nie. Artikel 12 handel in werklikheid met dit wat moontlik nie so duidelik uit die gemenereg blyk nie of dit beklemtoon kwessies wat van belang is ten aansien van die fisies-psigiese integriteit in 'n sogenaamde "menseregtelike sin". Die vaagheid van die bepaling kan uiteraard nuttig wees om nuwe ontwikkeling te akkommodeer.

Du Plessis (269) verduidelik oor vergelykbare bepalings in die tussentydse Grondwet:

> "This freedom and security is primarily 'bodily' or 'somatic' (*körperlich*) but not in an exclusively physical or material sense; it denotes the de facto freedom and security of the human being as a psychosomatic unity. The freedom of the human spirit, on the other hand, is guaranteed by safeguarding, for example, freedom of religion, belief and opinion and freedom of expression. It is impossible to determine, with mathematical precision, where the psychosoma ends and the spirit begins" (hy verwys veral na Katz *Staatsrecht: Grundkurs im öffentlichen Recht* (1991) 317–319).

Heelwat aspekte van hierdie regte geld klaarblyklik ook in private verhoudings en is dus vir die deliktereg relevant (buiten die staat se privaatregtelike deliktuele aanspreeklikheid). Wat betref die reg om besluite oor voortplanting te neem (a 12(2)(a)) is dit minder duidelik hoe private regsubjekte op so 'n besluitnemingsbevoegdheid inbreuk kan maak. Een voorbeeld wat vir die deliktereg van belang is, is waar 'n geneesheer op nalatige wyse verkeerde inligting aan 'n pasiënt gee wat laasgenoemde die geleentheid ontneem om betyds besluite oor voortplanting te neem. 'n Interessante voorbeeld uit die Duitse reg is die toekenning van *Schmerzensgeld* aan 'n 44-jarige vrou wie se swangerskap te laat (in die 26e week) vir 'n aborsie deur die verweerder vasgestel is. Die vrou was bevrees dat sy op haar ouderdom 'n gestremde kind in die lewe kon bring. Die hof (BGH Hamburg – 1995 *NJW* 2412 2413) het die argument verwerp dat die feit dat sy die pyn van 'n aborsie gespaar gebly het, haar eis uitskakel of verminder.

Voorts word daar met die bepaling onder oorweging waarskynlik beoog dat wetgewende maatreëls (of straks gemeenregtelike beginsels ingevolge kontrak of die huweliksreg) wat hierdie reg mag begrens aan artikel 36 van die Grondwet getoets sal kan word – ook in private regsverhoudings. Die fisieke verhindering om 'n besluit aangaande voortplanting uit te voer, kan moontlik die *actio iniuriarum* fundeer. Die bevoegdheid om besluite te neem hou natuurlik ook verband met die verweer van *volenti non fit iniuria* as regsgeldige toestemming (sien in die algemeen hieroor *Neethling's Law of personality* 106–108).

Daar kan min twyfel wees dat die soepele en ontwikkelde *actio iniuriarum* (bv *Neethling's Law of personality* 50 100) voldoende is om deliktuele aanspreeklikheid wat vereenselwig word met die verskillende vorme van fisiese of psigiese marteling ageerbaar te stel (a 12(1)(d)).

Net soos in die Duitse reg (sien 1994 *NJW* 127) sal ons reg ook moet standpunt inneem oor die vraag wat alles deel van die liggaam is vir doeleindes van deliktuele aanspreeklikheid. In die Duitse reg is beslis dat die liggaamsbegrip ruim genoeg is om ook produkte soos sperm wat van die liggaam geskei is, in te sluit. Daar is al aan die hand gedoen (*Neethling's Law of personality* 89 vn 1) dat dit wat van die liggaam geskei is nie meer *corpus* is nie maar as 'n *res* beskou moet word. Nogtans behoort die implikasies van hierdie moeilike kwessie ondersoek te word ten einde die beskerming wat die Grondwet beoog ook deur die deliktereg aan die volle *corpus* te laat toekom. Die regsbegrip van die liggaam is sekerlik nie iets staties nie (vgl ook Labuschagne 1995 *THRHR* 150).

Artikel 12(2)(c) wat mediese eksperimentering sonder toestemming verbied, sluit waarskynlik gevalle van diagnoses sonder toestemming in. In die Duitse reg het 'n HIV-toets op bloed sonder toestemming tot 'n geslaagde eis vir *Schmerzensgeld* aanleiding gegee (1995 *NJW* 1621). In werklikheid kan so 'n geval volgens die huidige persoonlikheidsreg eerder onder die reg op privaatheid

bereg word (sien bv *Neethling's Law of personality* 246; *Goldberg v Union and SWA Insurance Co Ltd* 1980 1 SA 160 (O) 164).

Sekere moontlike implikasies van artikel 12(2)(b) ten aansien van *volenti non fit iniuria* en vrywillige aanvaarding van risiko word hieronder in paragraaf 10 vermeld.

4 3 Artikel 24

> "Everyone has the right – (a) to an environment that is not harmful to their health or well-being . . ."

Dat hierdie bepalings ook in 'n mate afdwingbaar behoort te wees in private regsverhoudings, spreek vanself. Du Plessis (278) meld (sonder verwysings) dat in die Duitse reg die kwessie van regte ten aansien van die omgewing al na die reg op die fisies-psigiese integriteit herlei is. Hieroor deel Von Bar (par 584) soos volg mee:

> "Weit weiniger spektakulär, dafür in mancher Beziehung umso überraschender ist der Einfluss des verfassungsrechtlichen Persönlichkeitsschutzes auf das zivile Deliktsrecht in einigen Bereichen des Unwelthaftungsrechtes. Der vorreiterrolle fällt hier derzeit des griechischen Rechtsprechung zu."

4 4 Artikel 27

> "(1) Everyone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water . . . (3) No one may be refused emergency medical treatment."

Hierdie regte hou direk verband met die menslike gesondheid en dus die fisies-psigiese integriteit maar geld waarskynlik net teen die staat. Nogtans kan dit wat voedsel betref dalk die posisie van *skuldlose* produkte-aanspreeklikheid beïnvloed (sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* (1996) 318). Artikel 27(3) word hieronder in paragraaf 5 oorweeg.

4 5 Artikel 28

> "Every child has the right – (c) to basic nutrition, shelter, basic health care services and social services; (d) to be protected from maltreatment, neglect, abuse or degradation . . ."

Dit moet duidelik wees dat hierdie bepalings (of aspekte daarvan) ook in private verhoudings van toepassing sal wees, byvoorbeeld tussen ouer en kind, pleegouer en kind en selfs in ander verhoudings van toesig oor kinders – soos in openbare en private skole.

5 Die regsplig om geweld teen die liggaam te voorkom en om mediese noodbehandeling te voorsien

Die reg om vry te wees van alle vorme van openbare of private geweld (a 12(1)(c) van die Grondwet hierbo aangehaal) kan moontlik vertolk word (benewens enige ander implikasies van die reg, bv 'n plig op die staat om deur wetgewing en ander metodes gesinsgeweld behoorlik te bekamp – waarteen die bepalings van die Wet op die Voorkoming van Gesinsgeweld 133 van 1993 gemeet kan word) as sou dit 'n regsplig op bepaalde persone of instansies plaas om redelike stappe te doen om die aanranding van 'n persoon deur derdes in bepaalde gevalle fisies te verhinder (vgl in die algemeen Neethling, Potgieter en Visser 54 ev oor deliktuele aanspreeklikheid weens 'n *omissio*).

Dit is duidelik dat as die polisie byvoorbeeld weet dat talle aanrandings in 'n bepaalde straat plaasvind, die staat waarskynlik deliktueel aanspreeklik kan wees as dit blyk dat X skade gely het wat waarskynlik voorkom sou gewees het indien die polisie nie versuim het om binne hulle vermoë redelike stappe te doen (bv deur patrollering, ens) om misdadigers beter af te skrik nie. Ook vir die deliktereg in ander privaatverhoudings kan waarskynlik aangevoer word dat indien byvoorbeeld 'n fabriekseienaar kennis het dat sekere van sy werknemers andere gereeld aanrand of bedreig op die perseel onder sy beheer, daar 'n regsplig op hom rus om skade deur sodanige geweld te voorkom. In die algemeen kan hierdie bepaling in die handves ook volgens die beginsels van *indirekte* horisontale werking 'n rol speel by die vasstelling en omskrywing van die regsplig volgens die *boni mores* van die gemeenskap (vgl in die algemeen Neethling, Potgieter en Visser 43).

Artikel 27(3) wat bepaal dat niemand mediese noodbehandeling geweier mag word nie is negatief geformuleer. Nogtans is dit nie duidelik hoe dit anders vertolk kan word as dat elkeen 'n reg teen enige ander persoon het vir sover dit ooreenkomstig die *boni mores* of die algemene redelikheidstoets aanvaarbaar is om mediese noodbehandeling van sodanige persoon (insluitende 'n private mediese kliniek) te vereis en te ontvang nie. Die aard van die plig wat die reg oplê (sien a 8(2) van die Grondwet) veronderstel dat die persoon wat volgens die reg moet presteer, in die omstandighede redelikerwys in staat moet wees om die betrokke behandeling te kan voorsien. Die reg op mediese noodbehandeling beteken natuurlik nie dat die behandeling (altyd) gratis verskaf moet word of dat ander redelike voorwaardes nie gestel mag word nie. Dit wil voorkom of 'n onredelike versuim om die behandeling te voorsien 'n onregmatige krenking van die gesondheid – en dus die liggaam – uitmaak wat die normale deliksaksies tot gevolg sal hê. Mits aan al die algemene vereistes vir aanspreeklikheid voldoen word, kan daar skadevergoeding vir vermoënskade (sien bv Visser en Potgieter *Skadevergoedingsreg* (1993) 369 ev) en vir nie-vermoënskade (*idem* 402 ev) verhaal word. Indien iemand sterf weens die onregmatige en skuldige versuim om die betrokke mediese behandeling te voorsien, kan die normale aanspreeklikheid weens die dood van 'n persoon volg (bv eise van afhanklikes, begraafniskoste, ens).

6 Skadevergoeding vir nie-vermoënskade weens liggaamlike nadeel as gevolg van kontrakbreuk

Die appèlafdeling het in *Administrator, Natal v Edouard* 1990 3 SA 581 (A) beslis dat geen vergoeding vir nie-vermoënskade as gevolg van kontrakbreuk *ex contractu* verhaalbaar is nie. Die algemene kritiek teen hierdie beslissing (bv Visser en Potgieter 167) kan nou versterk word met verwysing na die fundamentele regte hierbo aangehaal waarvolgens die fisies-psigiese integriteit as die voorwerp van 'n fundamentele reg erken word. Hierdie reg het duidelik 'n mate van horisontale werking en daar moet (ooreenkomstig a 8(3) van die Grondwet) behoorlike remedies ingevolge die gemenereg ontwikkel word vir sover die wettereg nie so 'n remedie voorsien nie.

Na my mening is ons gemenereg in hierdie verband onvoldoende ontwikkel en behoort 'n hof by die eersvolgende geleentheid te beslis dat ten minste wat betref liggaamlike beserings of liggaamlike nadele wat uit kontrakbreuk vloei, die betrokke fundamentele regte vereis dat vergoeding vir sodanige pyn, lyding en "liggaamlike" of sintuiglike ongemak verhaalbaar behoort te wees. Dit sou onvoldoende wees om te aanvaar dat 'n benadeelde net kan eis as daar 'n deliktuele eisoorsaak bestaan.

Von Bar par 576 verwys ook na hierdie kwessie en argumenteer dat Duitse regshervorming ten aansien van *Schmerzensgeld* by kontrakbreuk nou dringend geword het. Hy maak die invloed van die grondwetlike reg duidelik (sien ook Stoll 354):

> "Denn das nunmehr auch vom BGH akzeptierte 'Gebot, die Haftungsfolgen aus Körperverletzungen an den Wertungen des Grundgesetzes auszurichten' und der von ihm ebenfalls eingeräumte Gedanke, dass es von Verfassungs wegen geboten sei, bereits in der objektiven 'Einbusse der Persönlichkeit, (im) Verlust an personaler Qualität' einen immateriellen Schaden zu sehen, lassen es auf dem Hintergrund der Schutzpflicht des Staates für die Würde (Art 1 Abs 1 S 2 *GG*) und damit die Persönlichkeit des Menschen nur dann noch zu, im Bereich des Schmerzensgeldes zwischen den einzelnen Haftungsgründen zu unterscheiden, wenn dafür Sachgründe existieren, denen gerade im Lichte jener Grundrechte ein erhebliches Gewicht zukommt."

Von Bar *ibid* betreur die feit dat Duitsland die laaste Europese staat is waar vergoeding weens kontrakbreuk wat tot liggaamlike skade lei, afgewys word: "Bei allen Persönlichkeitsverletzungen im weiteren Sinne ist das Schmerzensgeld eine mit ihnen korrelierende notwendige Haftungsform." Hy verwys na die argumente teen die gronde wat gewoonlik aangevoer word vir die toekenning van sodanige vergoeding en noem dan weerleggende argumente (let nietemin daarop dat die sestigste Duitse *Juristentag* met 'n groot meerderheid 'n voorstel afgewys het dat die Duitse posisie verander behoort te word – sien 1994 *NJW* 3075).

7 Vergoeding vir nie-vermoënskade by skuldlose aanspreeklikheid

Dit is geykte reg dat die aksie weens pyn en lyding beskikbaar is in gevalle van die skuldige veroorsaking van pyn en lyding (bv Neethling, Potgieter en Visser 18–19). By skuldlose aanspreeklikheid kan sodanige vergoeding verhaal word deur byvoorbeeld die *actio de pauperie* (bv *Creydt-Ridgeway v Hoppert* 1930 TPD 664) en moontlik ook ingevolge die *actio de effusis vel deiectis* (Visser en Potgieter 360). Die Wet op Kernenergie 131 van 1993 maak klaarblyklik ook voorsiening vir vergoeding vir nie-vermoënskade – die wet meld "kernskade" wat wyd verstaan word om siekte of kwale in te sluit wat toegeskryf kan word aan radioaktiewe materiaal; dit maak waarskynlik vir nie-vermoënskade ook voorsiening (sien Visser en Potgieter 365–366 vir voorbeelde van ander wetgewing wat hier relevant is).

Die kwessie van vergoeding vir nie-vermoënskade vir liggaamlike beserings ingevolge skuldlose aanspreeklikheid is ook in die Duitse reg 'n omstrede onderwerp (sien bv Von Bar par 577; Stoll 21 ev; Schmid *Schmerzensgeld und Gefährdungshaftung* (1971)). Daar is sterk argumente (bv Stoll 21–22) dat 'n onderskeid tussen skuldlose aanspreeklikheid en aanspreeklikheid gebaseer op skuld ten aansien van dié tipe vergoeding onhoudbaar is.

Daar word aan die hand gedoen dat ons deliktereg ook hiervan kennis neem by aanspreeklikheid vir liggaamlike beserings. Die punt is dat in die lig van die relatiewe belangrikheid van die fisies-psigiese integriteit as fundamentele reg, die gemenereg so ontwikkel behoort te word dat byvoorbeeld by skuldlose aanspreeklikheid weens oorlas (*nuisance*) die aksie weens pyn en lyding ook beskikbaar behoort te wees om by blote liggaamlike of sintuiglike ongerief en ongemak (sonder ander uitgawes of fisiese liggaamlike beserings) vergoeding te bied (*contra* bv *Herrington v Johannesburg Municipality* 1909 TH 179 203; sien

in die algemeen Visser en Potgieter 361; sien oor produkte-aanspreeklikheid Von Bar par 579).

Gevalle van statutêre skuldlose aanspreeklikheid behoort ook so uitgelê en toegepas te word dat selfs waar die betrokke wetgewing slegs materiële skade vermeld (bv a.11(2) van die Lugvaartwet 74 van 1962) die hof dit in die lig van die grondwetlike beskerming van die liggaam so moet uitlê dat dit ook vir nie-vermoënskade voorsiening maak (tensy daar besondere gronde is wat teen so 'n uitleg spreek). Waar 'n wet bloot van skade praat (sien hierbo), behoort dit in geval van liggaamlike beserings vermoënskade en nie-vermoënskade in te sluit. Slegs op so 'n wyse word die liggaamlike integriteit en die "sekuriteit" van die persoon wat grondwetlik so hoog geag word genoegsaam ingevolge die deliktuele vergoedingsreg beskerm.

8 Nie-vermoënsregtelike vergoeding aan bewustelose eisers met breinbeserings

In *Collins v Administrator, Cape* 1995 4 SA 73 (K) het die hof beslis dat 'n ernstig beseerde dogtertjie wat nie van haar beserings bewus is nie en 'n beperkte lewensverwagting het, geen vergoeding hoegenaamd kon ontvang nie. Hierdie beslissing is teenstrydig met die posisie in Europa en veral nuwe ontwikkelinge in die Duitse reg (sien Von Bar par 575; Deutsch 1993 *NJW* 781). Die grondwetlike waarde wat aan die mens toegeken word, spreek duidelik teen die houding van die *Collins*-saak (sien my bespreking van hierdie kwessie in 1996 *THRHR* 179–181).

Die *Collins*-saak behoort dus nie nagevolg te word nie aangesien die afwysing van selfs 'n simboliese vergoedingsbedrag teenstrydig met die gees en strekking van die grondwetlike bepalings oor die beskerming van die fisies-psigiese integriteit is (vgl ook Stoll 179).

9 Seduksie en seksuele teistering

In *Neethling's Law of personality* (95–97) word seduksie gesien as 'n inbreuk op die fisies-psigiese integriteit. Waarskynlik is seduksie eerder 'n aantasting van die kuisheidsgevoel of die geslagseer van 'n meisie. Hoe dit ook al sy, die voortbestaan van aanspreeklikheid weens die buite-egtelike verleiding van 'n maagd sal in die toekoms aan die Grondwet (bv die gelykheidsklousule wat ook die menseregtelike gelykstelling van die geslagte bevorder) getoets moet word (sien vir soortgelyke oorwegings in die Griekse reg Von Bar par 566). Von Bar *ibid* bespreek die beskerming van die *weibliche Geschlechtsehre* volgens Europese regsisteme en meld dat paragraaf 825 van die *BGB* (misbruik van afhanklikheidsverhouding om 'n vrou tot buite-egtelike gemeenskap te beweeg) tans sonder praktiese betekenis is. Nogtans wys hy op die Italiaanse reg ingevolge waarvan *seduzione con promesso di matrimonio* steeds gedingsvatbaar is.

In die Suid-Afrikaanse reg kan seduksie moontlik uitgebrei word om die verleiding van iemand van enige geslag as gedingsvatbaar te beskou mits dit bestaanbaar is met die beginsel van seksuele selfbestemming wat waarskynlik uit die Grondwet afgelei sal kan word.

Gevalle van seksuele teistering (sien vir omskrywings van hierdie begrip Labuschagne "Geregtigheidsdinamiek van die vroutipiese" 1996 *SAPR/PL* 233 ev) kan klaarblyklik reeds ingevolge die *actio iniuriarum* ageerbaar wees indien dit byvoorbeeld op gewone of onsedelike aanranding neerkom. Seksuele teistering

kan natuurlik ander regsgoedere ook aantas wat nie noodwendig met die fisies-psigiese integriteit verband hou nie en byvoorbeeld 'n *actio iniuriarum* op grond van krenking van die eergevoel fundeer.

10 Algemeen: *volenti non fit iniuria*, vrywillige aanvaarding van risiko, tugbevoegdheid, verjaring

Die grondwetlike erkenning en beskerming van die fisies-psigiese integriteit beteken nie noodwendig dat die deliktuele beskerming daarvan in alle opsigte versterk sal word nie. Die Grondwet maak ook vir groter beskikkingsbevoegdheid oor gemelde regsbelange voorsiening ("Instead courts would have to take account of the fact that the Bill of Rights confirms individual agency" – par 3.2 van verslag van paneel van grondwetlike kenners – vgl par 4 2 hierbo vir die verwysing). Die bepalings van artikel 12(2)(b) (sien par 4 2 hierbo) wat elkeen die reg gee om beheer oor sy liggaam uit te oefen ("control over their body"), is byvoorbeeld aanduidend van groter geldingskrag vir die verweer van *volenti non fit iniuria* wat aanspreeklikheid kan uitskakel aangesien dit individuele outonomie beklemtoon (sien oor die outonomiseringsproses wat deur menseregte aangemoedig word, bv Labuschagne "Aanranding en misdaadkondensering: Opmerkings oor die strafregtelike beskerming van biopsigiese outonomie" 1995 *De Jure* 381).

Vermelde outonomie ten aansien van die liggaam kan byvoorbeeld impliseer dat toestemming tot mediese eksperimentering, orgaanskenkings, nie-terapeutiese operasies (sien vir 'n lys van beslissings oor toestemming tot mediese behandeling Van Oosten 1996 *De Jure* 166–167) of deelname aan gevaarlike aktiwiteite wat voorheen *contra bonos mores* was, nou moontlik as privaatregtelik regmatig aangemerk kan word (vgl bv toestemming tot kastrasie, 'n operasie met geen kans op sukses nie, die skenking van albei niere, die bestyging van die enjinkap van 'n bewegende motor – bv *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A); vgl ook *Lampert v Hefer* 1955 2 SA 507 (A); Neethling, Potgieter en Visser 155 ev). Nietemin kan die grondwetlike bepalings moontlik ook die toestemmingsbevoegdheid beperk deur 'n sterker aandrang op ingeligte toestemming (vgl in die algemeen *Castell v De Greeff* 1994 4 SA 408 (K); Van Oosten 1996 *De Jure* 164 ev).

Deliktuele aanspreeklikheid sal ook deur die grondwetlike bepalings oor die beskerming van die *corpus* geraak word vir sover 'n regverdigingsgrond soos tugbevoegdheid (waar dit nog geld, bv in die verhouding ouer-kind) straks as ongrondwetlik in bepaalde omstandighede beskou kan word weens die ontoelaatbare marteling of "maltreatment" van kinders (sien a 28(1)(d) en 39(3) van die Grondwet; vgl verder Labuschagne "Ouerlike geweldaanwending as skending van die kind se reg op biopsigiese outonomie" 1996 *TSAR* 577).

Enige formele regshindernis wat die instel van deliktuele remedies op grond van die krenking van die liggaamlike integriteit aan bande lê (bv verjaringstermyne en vervaltermyne) sal ook aan die grondwetlike beskerming van hierdie regte gemeet moet word (sien reeds *Mohlomi v Minister of Defence* 1996 12 BCLR 1559 (CC) oor a 113(1) van die Verdedigingswet 44 van 1957). Dieselfde geld wetgewing wat vir sekere maksimum vergoedingsbedrae voorsiening maak. In die algemeen moet wetgewing wat voorsiening maak vir die vergoeding van persone weens liggaamlike krenkings (sien bv die Wet op Vergoeding vir Beroepsbeserings en -siektes 130 van 1993) aan die artikels wat die liggaamlike integriteit direk of indirek (bv a 27 wat 'n reg skep tot sosiale sekuriteit)

beskerm, getoets word om vas te stel of dit voldoen aan die mate van beskerming wat die Grondwet vereis (hier gaan dit natuurlik nie soseer om privaatregtelike deliktuele aanspreeklikheid nie).

PJ VISSER
Universiteit van Pretoria

VERWAARLOSING, REPRESENTASIE EN ONBEVOEGDHEID IN DIE INTESTATE ERFREG

Gestel 'n welaf kinderlose weduwee trou op gevorderde leeftyd met 'n man wat uit sy vorige huwelik twee volwasse seuns het. Die huwelik is buite gemeenskap van goed en sonder enige vorm van aanwasdeling. Ingevolge 'n gesamentlik wederkerige testament, verly in bedenklike omstandighede, erf die langslewende gade alles. Die dokument maak geensins voorsiening vir substitusie nie en die reëls van aanwas vind eweneens nie toepassing nie. Gestel verder dat die dame kort daarop ernstig siek word maar die liefdelose gade versorg haar geensins behoorlik nie en laat ook na om haar behoorlik te laat versorg. Inteendeel, hy wag haar dood met die oog op sy bekende erfregtelike bevoordeling reikhalsend af. Haar verafgeleë familie word te laat van haar benarde omstandighede bewus om iets daaraan te verbeter. Luidens die doodsertifikaat soos voltooi deur die distriksgeneesheer het die dame aan kanker gesterf. Dit kom egter tot haar familie se kennis dat, hoewel die dame kanker onder lede gehad het, sy eintlik nie aan kanker nie maar moontlik eerder aan algemene verwaarlosing in haar sterwensnood krepeer het. Indien argumentshalwe aanvaar word dat die verwaarlosing bewys kan word, wat behoort billikerwys die regsposisie te wees?

Die gemenereg ken 'n hele kategorie gevalle waar die gedrag van die potensiële bevoordeelde jeens die erflater dermate onaanvaarbaar is dat die reg die bevoordeelde as "onwaardig" tipeer om deur die erflater se afsterwe bevoordeel te kan word. Daardie onwaardigheidsgevalle word saamgroepeer as gevalle waar die potensiële bevoordeelde as onwaardig en/of onbekwaam tot erfregtelike bevoordeling bevind word omdat hy as *indignus* gebrandmerk word.

Die bekende "bloedige hand en neemt geen erfenis"-beginsel is 'n voorbeeld van dié reël, soos trouens ook die gevalle van verberging of vervalsing van 'n testament (*Yassen v Yassen* 1965 1 SA 438 (N)). (Sien oor die toepassing in die geval van die "bloedige hand"-reël oa *Caldwell v Erasmus* 1952 4 SA 43 (T); *Casey v The Master* 1992 4 SA 505 (N); *Ex parte Meier* 1980 3 SA 154 (T) en die ander uitsprake hieronder vermeld.)

Die verberging of vervalsing van 'n testament word hedendaags waarskynlik eerder hanteer onder die strafbepalings vervat in die Boedelwet 66 van 1965. Ingevolge artikel 102(1)(a) van die wet is

> "[i]emand wat – . . . 'n dokument wat 'n testament heet te wees, steel, opsetlik vernietig, verberg, vervals of beskadig; . . . aan 'n misdryf skuldig, en by skuldigbevinding strafbaar – . . . met 'n boete van hoogstens tweeduisend rand of

met gevangenisstraf vir 'n tydperk van hoogstens sewe jaar, of met sowel sodanige boete as sodanige gevangenisstraf".

In *S v Van Zyl* 1984 3 SA 25 (A) het die appèlhof die toepasbaarheid van die strafbepaling op die tersake vervalsingsgeval bevestig. Dit was egter nie nodig om in daardie geval ook te beslis oor die parallelle toepassing van die gemeenregtelike onbekwaamheidsreël nie. Daardie misdadige testamentsvervalser sou nie by ontstentenis van die vervalsing ooreenkomstig hetsy 'n vroeëre geldige testament of die reëls van die intestate erfreg tot erfregtelike bevoordeling geroep wees nie. Indien die testamentsverberger of -vervalser egter kragtens 'n ander toepaslike norm van die erfreg tot bevoordeling geroepe sou kon wees, behoort hy deur die onbekwaamheidsbeletsel van enige erfregtelike bevoordeling uitgesluit te word. En dit nieteenstaande die feit dat hy sy "straf" ingevolge die strafbepaling van artikel 102 van die Boedelwet eweneens uitdien. Die erfregtelike onbekwaamheidsreëls staan los van en kom dus bykomstig tot enige strafsanksie in spel wanneer aan die vereistes van die reël voldoen word.

Die onwaardigheidsbeletsel kom uiteraard nie gereeld voor die howe nie. In beginsel moet aanvaar word dat die deursneeburger nog dermate respek vir die reg én vir die dooies het dat daar nie 'n vloedgolf litigasie om onbekwaamheidsnorme en die onwaardigheid van erfregtelike bevoordeeldes deur die howe hoef te spoel nie. Trouens, sou dit wel die geval wees, sou dit moontlik aanduidend wees dat die reël uit pas met die moderne gemeenskapsopvatting om fatsoenlikheid in dié verband kon raak.

Die onwaardigheidsreëls is reeds in die Suid-Afrikaanse howe toegepas. In *Taylor v Pim* 1903 NLR 484 het die bevoordeelde die erflater van die spreekwoordelike wal in die sloot gehelp deur haar teen die uitdruklike opdrag van haar arts tog van drank te voorsien en haar van broodnodige mediese versorging te weerhou:

> "I am satisfied upon the evidence that the defendant was the cause of the deceased's fall from a virtuous and honourable life to a degraded and immoral one; . . . that he supplied her or allowed her to be supplied with intoxicating liquors at the time when their use was forbidden by her medical adviser, and that he did so at times when he could easily have prevented their use by the deceased had he so wished; that he neglected to provide her with medical attention at Madeira till compelled to do so by the hotel proprietor; that while there he allowed her to have intoxicating liquors which caused her death; that he endeavoured to raise money on the strength of the testamentary provision in his favour; . . . that he exercised his influence by producing the unfortunate woman's downfall, and that in other respects *his conduct was heartless and cruel, and I am of opinion that he is unworthy to succeed within the meaning of the authorities which I have cited*" (495 – my kursivering).

> "It appears to me that . . . the person named in the will as sole and universal heir *should not be allowed to succeed because of his unworthiness* inasmuch as he really compassed the death of the testatrix. He lived with her in adultery; he caused her degradation and physical and moral ruin; he got sole control of her and encouraged her in intemperate habits, which ultimately brought about her death; and he tried to prevent her having medical and nursing assistance in her last illness. Moreover, he endeavoured to forestall her death by raising money upon the strength of her will in his favour. According to the text writers on our law he is incompetent to succeed as heir, not only because of his adultery with the testatrix . . . but because of his having caused her death either wilfully or through negligence . . ." (496–497 – my kursivering).

Benewens die gemeenregtelike bronne waarna hoofregter Bale en regter Finnemore aldaar verwys, word die omvangrykste behandeling van die onderwerp aangetref by die bekende ou skrywer Antonius Matthaeus *Zinspreuken* en wel die sogenaamde "Zesde Zinspreuk": "De Bloedige Hand en neemt geen Erffenis" (127–151).

Die uitvoerige behandeling deur Matthaeus van die onderwerp word deur alle ander bekende Romeins-Hollandse skrywers as dié erkende kenbron van die reël aangehaal. (Ander vindplekke is: Van Leeuwen *Censura forensis* 3 4 42, *Het Roomsch Hollands recht* 3 3 9; Schorer in sy *Aantekeninge op De Groot* n 30 op 2 24 24 en n 42 op 2 28 42; Van der Vorm-Blondeel *Verhandeling van het Hollandsch, Zeelandsch ende Westvrieslandsch versterfrecht* (1774); Van Bynkershoek *Quaestionum iuris privati* 446; Groenewegen *Tractatus de legibus abrogatis ad Dig* 34 9; *De Keuren van Zeeland* – Kap II a 26; *Oud vaderlandsche rechtsbronne* (tweede reeks) (1920) 217. Sien oor die verskillende oudvaderlandse bronne Van der Walt en Sonnekus "Die nalatige bloedige hand – neem dit 'erffenis'?" 1981 *TSAR* 36, welke uiteensetting deur die hof in *Casey v The Master* 1992 4 SA 505 (N) gevolg is.)

Matthaeus wys daarop dat die reël om onwaardigheid in die Romeins-Hollandse gemenereg veel wyer tref as die oorspronklike Romeinse beletsel. Die Romeinse reg het nog onderskei tussen "onwaardigheid" en "onbekwaamheid". Daardie onderskeid het in die gemenereg verval sodat alle gevalle as onbekwaamheid om as bevoordeelde uit die bates van die bepaalde erflater bevoordeel te word, hanteer word (§ 6:16). Dit het tot gevolg dat die onbekwaam bevonde persoon vir alle doeleindes by die toepassing van die norme van die erfreg ten aansien van die boedel uit die prentjie gelaat word.

Die onbekwaamheidsreëls is nie beperk slegs tot die ooglopende gevalle van doodslag van die erflater en sy *conjunctissimi* nie. Dit tref by naam ook die bevoordeelde wat verantwoordelik was vir die versorging van die oorledene en sy versorgingstaak jeens die erflater skandelik verwaarloos het en so dus deur sy onagsaamheid tot die dood van die oorledene bygedra het:

> "[D]aarom leezen wy dat er is geadviseerd, dat een Man, die voor zyne zieke Vrouw geen zorg had gedraagen, zig onwaardig had gemaakt om haar te kunnen succedeeren" (Matthaeus § 6:4).

Iets verder lees ons by dieselfde skrywer:

> "En dat een ander, om dat hy zyne Vrouw, die de pest had, had verlaaten, daar om alle avantagiën des huwlyks te gelyk met zyns Vrouws Erffenis had verlooren" (§ 6:4 op 132).

Die bronne wat Matthaeus hier benut, is die erkende bronne van die gemenereg oor die aspek. (Modestinus *Pistoris Quaest* 90; Colerus *Decissionis* 159 257; Möller *ad Constitutio elect parte* 3 *const* 26; Carpzovious *Desinit* 1; Rauckbar 2 20 19 en Peccius *De testam conjugum* 1 33 5. Ander erkende bronne waar die reël om die *indignus* eweneens duidelik vermeld word, is reeds hierbo aangedui.) Voet *Commentarius ad pandectas* 34 9 na wie alle moderne handboekskrywers en die howe sedert die *Taylor*-saak sonder uitsondering vir die toepassing van die onbekwaamheidsreël verwys, steun in sy behandeling van die onderwerp grootliks op Matthaeus. Daar kan dus aanvaar word dat by ontstentenis van 'n duidelik afwykende lyn van gesag, die gemelde teks van Matthaeus die regsposisie ten aansien van verwaarlosers in die gemenereg steeds juis weergee.

Graag word aanvaar dat getrou aan die voorwoord van Matthaeus tot sy *Zinspreuken* die onderhawige fatsoenlikheidsreël eweneens steeds pas en dat die sedes nog nie dermate "omgekeer" is dat die verwaarloser nou beloon word met erfregtelike bevoordeling uit die boedel van sy slagoffer nie:

> "In alle dingen legt als een omkeering opgesloten, zo dat even als de tyden, dus ook de Zeeden beurtelings worden omgekeerd: en alles was juist by onze Voorouderen niet beeter, maar onze leeftyd heeft ook veele pryswaardige en konstryke zaaken voor de nakoomelingen ter navolging te voorschyn gebragt."

Indien vasstaan dat 'n bepaalde bevoordeelde onbekwaam en dus onwaardig is om hoegenaamd erfregtelik bevoordeel te word, skakel dit hom of haar van sowel testate as intestate bevoordeling uit die boedel van die tersake erflater uit:

> "It is trite law that, where a beneficiary either murders a testator or conspires with others to compass his death, he as an *indignus* cannot inherit either *ab intestato* or in terms of the will, in accordance with the maxim 'de bloedige hand en neemt geen erfenis'. It can be mentioned that the old authorities are collected and discussed in a decision of *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T)" – *Gafin v Kavin* 1980 3 1104 (W) 1107C–D.

Soos hierbo aangetoon, bevat die onderhawige testament geen substitusiebepaling vir die geval waar die langslewende gade nie bevoeg is om erfregtelik bevoordeel te word nie. Die normale reël behoort dan toepassing te vind, naamlik dat die bates van die oorledene ooreenkomstig die reëls van die intestate erfreg verdeel word. Aangesien die erflater in ons voorbeeld self kinderloos was en ook nooit die volwasse kinders uit haar wewenaar se eerste huwelik wettig kon aanneem nie, sterf sy sonder afstammelinge. (Ingevolge a 17 saamgelees met die woordomskrywingsartikel *sv* "kind" van die Wet op Kindersorg 74 van 1983 kan slegs kinders onder agtien aangeneem word.) Daardie kinders sal dus *persoonlik* geen erfregtelike aansprake van enige aard op bevoordeling uit die boedel van die erflater hê nie.

Gemeenregtelik was die langslewende gade vóór die statutêre nuutreëling van sy of haar aansprake aanvanklik in Natal (Wet 22 van 1863) en later in die Erfopvolging Wet 13 van 1934 nooit 'n intestate erfgenaam van die erflater nie aangesien die intestate erfreg uitsluitlik oor bloedverwantskap gegaan het. Vóór daardie datum kon daar dus nooit sprake wees van representasie van die onbevoegde of selfs vooroorlede langslewende gade deur sy afstammelinge uit 'n vroeëre huwelik nie. Hoewel geen gerapporteerde regspraak daaroor aangetref is nie, en vergeefs in die erkende handboeke na uitsluitsel daaroor gesoek word, sou ook nie ná 1934 en vóór 1992 argumenteer kon word dat die kinders uit 'n vroeëre huwelik van die vooroorlede gade van die erflater die vooroorledene kan representeer ten aansien van die intestate bevoordeling uit die langslewende se boedel nie. Daardie wet het immers slegs vir die erfregtelike bevoordeling van die *langslewende* gade voorsiening gemaak en nie ook vir dié van die vooroorledene nie. Die vooroorledene was dus nooit binne die idioom van byvoorbeeld Groenewegen se *Tafel van het Hollantsche versterf-recht* 'n vooroorlede *erfgenaam* van die erflater nie.

Voor die wetswysiging van 1992 sou representasie ook nie tot die kinders van ons hipotetiese wewenaar se voordeel ter sprake kon kom indien hul vader onwaardig of onbekwaam tot erfregtelike bevoordeling uit die boedel van die erflater bevind is nie. Die gemeenregtelike reël om representasie bepaal dat 'n persoon wat self nog in lewe is maar bloot onwaardig of onbevoeg is of die

bevoordeling repudieer, nie gerepresenteer kon word nie. (Sien oor die gemeenregtelike reël Joubert "Repudiasie deur 'n erfgenaam van 'n erfenis *ab intestato*" 1958 *THRHR* 185 en die uitvoerige gesag aldaar vermeld; Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 112 ev.)

Die wetgewer het reeds in die aanvanklike redaksie van Wet 81 van 1987 'n bepaling oor representasie opgeneem wat oënskynlik van die gemeenregtelike posisie afgewyk en ook tot lastige uitlegprobleme aanleiding gegee het, soos blyk uit *Bielovich v The Master* 1992 4 SA 736 (N). Artikel 1(4)(c) het toe bepaal:

> "By die toepassing van hierdie artikel . . . word 'n persoon wat onbevoeg is om 'n erfgenaam van die intestate boedel van die oorledene te wees, of wat van sy reg om so 'n erfgenaam te wees, afstand gedoen het, of *enigiemand wat, deur eersgenoemde persoon te representeer, geregtig sou wees om te erf as daardie persoon nie aldus onbevoeg was of afstand gedoen het nie, geag nie die oorledene te oorleef het nie*" (my kursivering).

Daarvolgens kon 'n repudians of onbevoegde bevoordeelde dus nooit self gerepresenteer word nie aangesien die persoon of persone wat hom moes representeer self geag is vóór die erflater te sterwe te gekom het. Streng gesproke was dit egter in ooreenstemming met die gemeenregtelike reël dat 'n persoon wat self nog in lewe is nooit gerepresenteer sou kon word nie. (Sien die besprekings van die *Bielovich*-saak deur Schoeman en Pienaar in onderskeidelik 1993 *De Jure* 191 en 195.)

Die wetgewer het met die wetswysiging van Wet 43 van 1992 die posisie om representasie gewysig en gemelde artikel 1(4)(c) herroep en vervang deur die nuwe subartikels 1(6) en 1(7). Die tersake subartikel van die Wet op Intestate Erfopvolging 81 van 1987 lui nou:

> "1(7) Indien 'n persoon onbevoeg is om 'n erfgenaam van die intestate boedel van die oorledene te wees . . . vererf enige voordeel wat hy sou ontvang het indien hy nie aldus onbevoeg was . . . nie . . . *asof hy onmiddellik voor die dood van die oorledene gesterf het en, indien van toepassing, asof hy nie aldus onbevoeg was nie*" (my kursivering). (Subartikel (7) is bygevoeg deur a 14(b) Wet 43 van 1992.)

Die seuns van die wewenaar mag dus net onder die dwaal verkeer dat hulle danksy die gemelde wetswysiging nou in staat is om hul onbevoegde en onwaardige vader ten aansien van die aansienlike boedel van die oorlede tante te representeer. So bly die vermoë in die familie en het die kortstondige liefdelose huwelik van hul vader tog geloon.

Die artikel moet egter saam met artikel 1(4) van dieselfde wet gelees word wat steeds die algemene toepassing van representasie beheers:

> "1(4) By die toepassing van hierdie artikel – (a) met betrekking tot *afstammelinge van die oorledene* [dit is die erflater ingevolge a 1(1) van die wet] en afstammelinge van 'n ouer van die oorledene, vind verdeling van die boedel staaksgewyse plaas en *word representasie toegelaat*" (my kursivering).

Ingevolge die artikel kom representasie dus nie ter sprake by enige ander intestaat erfregtelike bevoordeelde as slegs by afstammelinge van die erflater self of by afstammelinge van 'n ouer van die erflater persoonlik nie. Indien argumentshalwe aanvaar word dat ooreenkomstig bovermelde betoog die wewenaar weens sy liefdelose verwaarlosing van sy siek vrou inderdaad onbevoeg bevind word, word hy dus ingevolge artikel 1(7) van Wet 81 van 1987 geag vooroorlede te wees. Desnieteenstaande kan hy steeds nie deur sy kinders uit sy eerste

huwelik gerepresenteer word nie. Daardie kinders is immers self *geen afstammelinge van die erflater* nie en dít is die voorvereiste vir representasie ingevolge artikel 1(4) van Wet 81 van 1987. Die feit dat ná die herroeping van die aanvanklike artikel 1(4)(c) van Wet 81 van 1987 die seuns as partye wat die onbevoegde erfgenaam sou moes representeer nie langer self dood gewaan word nie, verander dus geen snars aan hulle regsposisie nie. Die erflater laat dus geen wettige afstammelinge na wat ingevolge die intestate erfreg self tot bevoordeling uit haar boedel geroep kan word nie en die kinders van die langslewende gade kan ook nie by wyse van representasie op die bevoordeling wat anders hul vader sou toeval, aanspraak maak nie.

Ook met inagneming van die nuwe wetswysiging behoort die intestate erfgename steeds gesoek te word in die bloedverwante van die tweede parenteel van die erflater. By ontstentenis dus van haar eie vader en moeder volg die broers en susters van die erflater wat nog in lewe is, en indien enige vooroorlede is dan vind representasie *per stirpes* uiteraard ingevolge die bepalings van artikel 1(4) van die Wet op Intestate Erfopvolging toepassing.

Dit is opmerklik dat die relatief moderne Quebec wetboek (*Civil Code of Québec*) wat op 18 Desember 1991 aanvaar is, inderdaad benewens ander gronde van onbevoegdheid om erfregtelik bevoordeel te word, in artikel 621(1) meld:

> "The following persons may be declared unworthy of inheriting:
>
> (1) a person guilty of cruelty towards the deceased or having otherwise behaved towards him in a seriously reprehensible manner."

Daar is geen twyfel dat wesenlike verwaarlosing vir doeleindes van daardie artikel as afkeurenswaardige gedrag jeens die erflater tipeer sal word nie. Die Suid-Afrikaanse reg is dus met die handhawing van dié eeue-oue beproefde onbevoegdheidsgrond nie uit pas met die gemeenskapsopvatting ook in moderne regstelsels nie. Die billikheid noop dat in die geval van verwaarlosing van die erflater deur 'n potensiële bevoordeelde, bloed in die laaste plek dikker as water bly ten einde die verwaarloser van erfregtelike bevoordeling uit die boedel van sy slagoffer uit te sluit.

JC SONNEKUS
Randse Afrikaanse Universiteit

STOKVELS AND THE PROPOSED MONEY LAUNDERING CONTROL BILL – SOME PRELIMINARY THOUGHTS

1 Introduction

Money laundering is one of the vogue concepts in today's commercial world. In layman's terms, the concept of "money laundering" may be described as the process in terms of which money that has been obtained illegally, appears to have been legally gained by passing it through (usually) foreign banks or other

legitimate financial institutions or enterprises. Put differently, money laundering is the process in terms of which "dirty" money is "washed" by circulating it through legitimate financial channels to remove and blur the tainted origin and stains of the illegal way in which the money was obtained.

Although money laundering concerns a potential unlimited number of illegal methods to obtain money, it mainly involves drug trafficking, organised crime, and white collar crime. The financial institutions and sectors which are used by money launderers to wash their money are usually banking institutions, investment service sectors and the insurance and pension sectors.

Money laundering has been an important legal issue for some time in most overseas countries. However, in South Africa it has, until recently, escaped the attention of the legislature. (For a discussion from a South African perspective for the need to create statutory measures to curtail money laundering, see Itzikowitz "Money laundering" 1994 *SA Merc LJ* 304 *et seq*; South African Law Commission *Money laundering and related matters* Issue Paper 1 Project 104 (hereafter "Paper 1") (1996) 2–3. The spate of overseas literature published on the topic of money laundering serves as proof of the need to address the problem also in South Africa. A sample of the more readily available overseas texts on the topic of money laundering includes the following: Levi *Customer confidentiality, money-laundering, and police-bank relationships: English law and practice in a global environment* (1991); Gilmore (ed) *International efforts to combat money laundering* Cambridge International Documents Series, Vol 4 (1992); *Hume Papers on public policy* Vol 1 no 2 Money Laundering (1993); Fülbier and Aepfelbach *Das Geldwäschegesetz* (1994); Palour (ed) *Butterworths International guide to money laundering: law and practice* (1995); and Kofele-Kale *International law of responsibility for economic crimes* (1995).)

However, two Acts and a proposed bill on money laundering – the latter of which emanated from the recommendations of the South African Law Commission – have recently been enacted and proposed, respectively, to counter money-laundering activities in South Africa. The Drugs and Drug Trafficking Act 140 of 1992 was the first South African statute to deal with money laundering. In terms of sections 6 and 7 it is a crime to acquire any property if the recipient knows that it is the proceeds of a defined crime (ie a drug offence or the conversion of property derived as a result of the commission of a drug offence: see s 1). Section 10 further places a duty on certain office bearers of financial institutions, stockbrokers and dealers in financial instruments to report to the authorities if they have reason to suspect that any property they have acquired is the proceeds of a drug offence. It is important to note that the Act does not recognise the manipulation of the proceeds of crime in general as an offence, but only drug-related offences. (For a discussion of the provisions of the Drugs and Drug Trafficking Act, see Itzikowitz 1994 *SA Merc LJ* 305 *et seq*; Itzikowitz "Financial institutions: Exchange control" (unpublished paper given at the Annual Banking Law Update held at the Karos Indaba Hotel, Witkoppen 1997-04-24) 28.)

Secondly, the Proceeds of Crime Act 76 of 1996 provides, *inter alia*, for the confiscation of the proceeds of crime in general and criminalises money laundering. Section 28 provides that the crime of money laundering will be committed if

> "a person knowing, or having reasonable grounds to believe that property is the proceeds of crime, enters into any agreement or performs any act in connection with such property, which is likely to have the effect of concealing or disguising the nature, source, location, or ownership of the property, or any interest which a

person may have in it, or the effect of enabling or assisting any one who has committed an offence in the Republic or elsewhere, to avoid prosecution or to remove or diminish any property acquired as a result of the commission of an offence".

(For a brief discussion of the scope of the Proceeds of Crime Act, see Itzikowitz "Financial institutions" 29 *et seq*.)

Thirdly, the recent publication of the Report on Money Laundering and Related Matters by the South African Law Commission, represents a further step in the process of putting legislation in place to curb money-laundering activities in South Africa (see South African Law Commission *Money laundering and related matters* Report on Project 104 August 1996 (hereafter "Report")). The Report further includes a proposed Money Laundering Control Bill ("the bill") (see Annexure A to the Report). (Some of the more important clauses from the bill will be discussed in par 3 below.)

The purpose of the present analysis is neither to scrutinise the provisions of the bill, nor to discuss all the possible consequences which the proposed clauses of the bill may have on the activities of stokvels. Instead, the present discussion will be restricted to a discussion of some of the more basic provisions of the bill which are also relevant to stokvels (see par 3 and 4 below). (For a more detailed discussion of the provisions of the proposed bill, see Itzikowitz "Financial institutions" 31 *et seq*.)

2 The nature of stokvels

In passing, a few comments on the concept of a "stokvel". A stokvel is in essence a credit-rotating association. A credit-rotating association, in turn, has been described as "[an association which is] formed upon a core of participants who agree to make regular contributions to a fund which is given, in whole or in part, to each contributor in rotation" (see Ardener "The comparative study of rotating credit associations" 1964 *Journal of the Royal Anthropological Institute* 201; Van der Merwe *Die stokvel. 'n Ondernemingsregtelike studie* 26 Tran CBL 39 *et seq*; Schulze *Legal aspects of the insurance premium* (LLD thesis Unisa 1996) 385). The important features which emerge from this definition are those of regularity and rotation. The feature of rotation implies reciprocity.

The concept of a "stokvel" is commonly used as a collective noun to describe a wide variety of activities, most of which have a financial and/or social basis (see Van der Merwe 25 *et seq* 52–53; Schulze *Thesis* 386 *et seq*). But the stokvel is first and foremost an agreement amongst its members. The different types of agreement which underlie stokvels often resemble financial concepts or types of agreement typical of the formal South African law. Some of the more obvious formal financial and/or legal concepts with which stokvels share similarities include the following: insurance, banking, friendly societies, and partnerships. (For a comparison between stokvels and these formal financial and/or legal concepts, see Schulze *Thesis* 382 fn 29 390 *et seq*; Schulze "Stokvels: Part 1 'People's' Insurance" 1996 *Juta's Business Law* 78; Schulze "Stokvels: Part 2 'People's' Banking" 1996 *Juta's Business Law* 105.)

It is instructive to note that stokvels show a resemblance to many of the "accountable institutions" to which the bill applies. Many of the "accountable institutions" which are listed in the bill, qualify also as "financial institutions". (For a discussion of the provisions of the bill, including a list of the "accountable institutions" to which the bill applies, see par 3 below.) The stokvel is generally

regarded as a type of financial institution that forms an important part of the broader South African financial system (see Falkena, Kok and Van der Merwe (eds) *Financial institutions* (1992) 192–193; Falkena, Fourie and Kok (eds) *The South African financial system* (1995) 7 *et seq*). Generally, the inclusion of stokvels in the group of "accountable institutions" appears therefore correct.

3 The Proposed Money Laundering Control Bill

This paragraph will be restricted to a short discussion of the more important provisions of the proposed bill as well as a selection of those provisions which may be of specific relevance to stokvels. In paragraph 4 a few comments will be made regarding the provisions which are discussed in paragraph 3. (The discussion of the provisions of the bill in par 3, and the comments made on it in par 4, will follow the same order.)

First of all, the aim of the bill is to "establish an administrative framework to facilitate the prevention, identification, investigation and prosecution of money laundering activities" (see Report par 3 *et seq*; Itzikowitz "Financial institutions" 31). The scope of application of the bill goes beyond the banking sector and applies to all "accountable institutions". An "accountable institution" as defined in clause 1 of the bill includes attorneys, executors and trust companies, persons who carry on insurance business, insurance brokers, estate agents, financial instruments traders, persons who carry on the business of a bank, persons who carry on the business of a casino or gambling institution, persons who deal in bullion, coins or Kruger rands, accountants, members of a stock exchange, persons who issue traveller's cheques or similar instruments, and any group of persons that may be described by the term or concept known as a "stokvel". In the interest of maximum effectiveness it was recommended that the scope of the administrative framework should not be limited to the mainstream banking sector. In this regard the Law Commission argued that nearly all financial intermediaries can be used as a vehicle to bring illegally obtained cash into the financial system (see Report par 3.7). (For a discussion of the role of the formal financial institutions in the South African financial system, see Falkena *et al Financial system* 55 *et seq*.)

Secondly, the concept of a stokvel is defined in clause 1 of the bill as a group of persons which–

> "(i) establishes a continuous pool of capital by raising funds by means of the subscriptions of members;
>
> (ii) is a formal or informal rotating credit scheme with entertainment, social and economic functions;
>
> (iii) consists of members who have pledged mutual support to each other towards the attainment of specific objectives;
>
> (vi) grants credit to and on behalf of members;
>
> (v) provides for members to share in profits and to nominate management; and
>
> (vi) relies on self-imposed regulation to protect the interest of its members."

Thirdly, the bill does not define the substantive offence of money laundering. However, the offence of "money laundering" is dealt with in section 28 of the Proceeds of Crime Act. (For the wording of s 28, see again par 1 above.) The prohibition on money laundering refers to "proceeds of crime", and the concept of "proceeds of crime", in turn, covers any criminal activity (see s 3 and also Itzikowitz "Financial institutions" 32–33). (For a discussion of the undesirable overlapping between the provisions of the Proceeds of Crime Act and the bill,

respectively, see Itzikowitz "Financial institutions" 37–38. This overlapping mainly concerns the obligation which rests on people who carry on business to report their suspicions within a *reasonable period to the SAPS*, and the obligation which rests on an accountable institution to report suspicious transactions within *ten days to the Financial Intelligence Centre*. It is correctly argued by Itzikowitz that the situation may occur that someone qualifies both as a "person carrying on a business" in terms of the Proceeds of Crime Act, and an "accountable institution" under the bill. In such a case there will be two contradicting statutory obligations on that person or business to report suspicious transactions.)

Fourthly, the bill lays down certain principle requirements for an administrative system to combat money laundering. Effective client identification is regarded as the starting point. Money laundering legislation in other countries also places an emphasis on the importance of deposit-taking institutions knowing their customers (see *Hume Papers* 61). The bill requires that the accountable institution must ascertain, in the prescribed manner–

- the identity of the person who approached the institution;
- the identity of the client with whom the business relationship was established; and
- the identifying particulars of all accounts at that institution that are involved in that transaction (see cl 3 18; Itzikowitz "Financial institutions" 33).

Where an intermediary acts on behalf of a principal, the institution must establish the identity of such a principal (see cl 2(2) 3(2)).

Fifthly, an accountable institution must keep records of information obtained when a single transaction is concluded or a business relationship is established. Record keeping is essential to further client identification and to follow the so-called audit trail (see cl 4 5). Records must be kept for a period of at least five years after completion of a transaction, or the date that a business transaction has ended (see cl 4(1)(e) 5(1)(f); Itzikowitz "Financial institutions" 34).

An accountable institution must report to the Financial Intelligence Centre, within five days after becoming a party to a transaction (or ten days in the case of a suspicious transaction), details of the following specified transactions:

- any transaction involving the payment or receipt of cash above a certain amount (see cl 8; Itzikowitz "Financial institutions" 35–36);
- suspicious transactions (see cl 9; Itzikowitz "Financial institutions" 36–38); and
- international electronic fund transfers (see cl 10; Itzikowitz "Financial institutions" 38).

Sixthly, the setting of an amount for a threshold is not prescribed in the bill, but will be prescribed by the minister by way of regulation (see cl 53(1)(e)). Itzikowitz ("Financial institutions" 35) remarks correctly that this will, *inter alia*, allow the minister to set different thresholds for different institutions. In the light of the wide range of different types of institutions to which the bill applies, such differentiation is necessary.

Finally, the minister may grant exemption to any accountable institution from compliance with all or any of the provisions in the bill (see cl 54). When considering an application for exemption, the minister must act in consultation with the Money Laundering Policy Board (see cl 53(3) read with cl 54).

4 Comment

The different clauses of the bill which are referred to in paragraph 3, merit a few comments, specifically from a stokvel point of view.

First of all, it cannot be denied that money laundering activities pose a serious threat to the integrity of financial institutions in general, and the institution of the stokvel in particular (see in general *Hume Papers* ix). Furthermore, virtually no type of financial institution is immune from money laundering and money launderers are always on the look-out for new routes and methods to conceal their funds (see *idem* 12). It is therefore in the interests of the integrity of stokvels to be included in the list of accountable institutions which must report money laundering activities to the Centre.

Although it is true that stokvel schemes can be used for money laundering, one should be cautious not to equate stokvel schemes with pyramids and other illegal money schemes, including money laundering activities. Stokvels have a long and honourable history of being a legitimate way in which black communities were able to save money, provide credit to one another, provide indemnity against the occurrence of an uncertain event, and perform a number of other laudable economic functions. During 1995 and 1996 "stokvels" often made the news headlines when the activities of certain money schemes, and which operated as so-called stokvels, were investigated and halted by the Registrar of Banks (see eg Anon "Court may act over 'stokvel'" *Business Day* 1995-12-19 3; Kobokoane and Klein "Stokvel warns of mass action after closure" *Sunday Times* 1995-12-24 24; Warby "Stokvel members barricade fund HQ" *The Citizen* 1995-12-28 8; Leshilo "Bank wants more power over illegal saving schemes" *The Star* 1996-01-25 1; Anon "Adapt or die" *Financial Mail* 1996-01-26 30; Mnyanda "Sun Multi Serve has lost 'millions' through theft" *Business Day* 1996-10-14 1; Anon "Stokvel members to protest against interdict" *The Star* 1996-11-17 10). A number of pyramids, the most well-known (or, rather, notorious) of which was the Sun Multi Serve scheme, professed to be stokvels, while in actual fact they were not. In addition, some of these news reports may have created the impression that all money schemes which involves black investors, are necessarily stokvels.

Although there are no hard and fast rules, there are a number of reasons why pyramids such as Sun Multi Serve do not qualify as true stokvels. First of all, a pyramid's returns depend entirely on a growth in the number of participants, while a stokvel's membership is limited and a pool of money circulates between a fixed number of people (see Anon "Pyramids: In on the right act" *Financial Mail* 1996-07-12 32). Secondly, and closely allied to the first difference, is the fact that the only way in which a pyramid can honour the undertakings that it has made towards investors, is to acquire more investors to pay the earlier ones. The running obligations of a pyramid are destined to exceed its income at some stage and thus cause the pyramid to become insolvent, so to speak. This can never happen with a true stokvel (see Bullard "You have the right to remain foolishly invested" *Sunday Times* 1996-01-07 2; Leshilo "Sun Multi Serve shunned" *The Star* 1996-01-09 1; Anon "Sun Multiserve-sage toon wette geld nog" *Finansies en Tegniek* 1996-01-19 14). Thirdly, stokvels have their origin in the culture of *ubuntu* (ie, to help each other, and which may be freely translated as "fellowship", which, in turn, entails the state of sharing mutual interests and activities) and are based on mutual trust between the members. A pyramid does not share these characteristics with a stokvel since the extent of its activities is

usually much wider than that of a stokvel. Furthermore, the mutual trust which exists between the members of a stokvel, is absent in the case of a pyramid (see Kobokoane and Klein 24; Anon 'Wiese – Die SA bankwese se ystervuis" *Finansies en Tegniek* 1996-01-19 33). With these rules in mind it is clear that the vast majority of stokvels (like the vast majority of bank accounts, to name but one example from the formal financial sector) are not used for money laundering activities. It is submitted that the authorities must continue to investigate the activities of those schemes which, for socio-political reasons, prefer to call themselves stokvels, while they are not. Strictly speaking, these schemes do not fall within the ambit of the bill (because they do not qualify as stokvels in terms of it) and are therefore not subject to the obligation to report money laundering activities.

Secondly, the definition of the concept of a "stokvel" as provided in clause 1 of the bill, is for all practical purposes identical to the definition of a stokvel as stated in Government Notice 2173 (*GG* 16167 of 1994-12-14). This Government Notice aimed at excluding the activities of stokvels from the operation of the Banks Act 94 of 1990 (see Schulze *Thesis* 396–397; Schulze "People's banking" 106). It was predicted that the definition contained in the Government Notice may form the basis of any future definition of a stokvel by the legislature for purposes of legislation which deals with stokvels specifically (see Schulze "The origin and legal nature of the stokvel (Part 2)" 1997 *SA Merc LJ* 163). Although the bill does not exclusively deal with stokvels, the reiteration of the definition of a stokvel as it was formulated in earlier legislation, confirms the suspicion that the legislature regards it as a good working definition of the concept of a "stokvel".

Thirdly, the substantive offence of money laundering, as defined in section 28 of the Proceeds of Crime Act, may occur in the course of the day-to-day activities of a stokvel. The definition of "money laundering" is wide enough to cover any criminal activity. This, in turn, will ensure that the widest range of money laundering activities, including those which may take place through the activities of stokvels, will fall within the ambit of the bill.

Fourthly, the requirement of effective client identification to combat money laundering is satisfied in the case of a true stokvel. Mutual trust and knowledge of the identity of members of a stokvel are almost invariably present in stokvels. New members are carefully screened before being allowed to join a stokvel. Non-payment of the contribution by a member of a stokvel, members who abscond after they have received the pool and default, therefore seldom occur in stokvels (see Schulze *Thesis* 415). It will therefore be easy for stokvels to comply with the requirement of client identification for purposes of the bill.

Fifthly, most stokvels do keep written records of their transactions, that is, the contributions received by members and the pools paid to them. However, the time period of five years for which records must be kept may pose a problem in a large number of stokvels. Many stokvels are formed on an *ad hoc* basis, namely to achieve a certain goal, for example, to enable all its members to buy a lounge suite. After the object has been achieved, the stokvel is usually dissolved.

Sixthly, the setting of an amount for a threshold in the case of stokvels will require research and careful thought. In the light of the volatility of the South African money market and the high inflation rate, it is desirable that a threshold should not be prescribed in the prospective "Act" but will be prescribed by the minister by way of regulation (see cl 53(1)(e)). This will allow for the necessary

flexibility for the minister to set different thresholds for different institutions and at different times, where and when it is desirable (see Itzikowitz "Financial institutions" 35). The Report does not give an indication of a possible amount that may be set as a threshold. Itzikowitz ("Financial institutions" 35) correctly argues that an amount of R10 000 may, for example, be too low for traditional financial institutions and may cause the reporting system to become clogged with reports of insignificant transactions. However, where the same author indicates, again by way of an example, that an amount of R10 000 may be too high for stokvels, her example merits comment. If her example with regard to a threshold for stokvels is based on amounts of stokvel pools gleaned from existing published materials on stokvels, it is correct. However, from information which I collected recently during field research in Mabopane, outside Pretoria, it became clear that the sample amounts of pools and contributions which are quoted in existing materials on stokvels are no longer relevant. It is evident that the effect of inflation has also reached the stokvel community. Contributions of R15 per month to R70 per week which were paid during the late 1980s and early 1990s, have increased drastically. This increase may, of course, also be ascribed to the fact that salaries and wages of black workers have risen sharply as a result of intensive labour union activities during the 1990s. This has resulted in more money being available for saving and circulation in the stokvel community. My research has revealed that contributions in a stokvel with 20 to 25 members, and which has a pooling of funds once a week, may be as high as R500 per member per week. This means that the pool in such a stokvel amounts to R10 000 a week. It would appear that although the pools of most stokvels are not as big as R10 000, there are a number of stokvels, especially in the metropolitan areas, where the pool equals or even exceed an amount of R10 000. It is suggested that a current, thorough and representative market survey be conducted to establish what amount will constitute a suitable threshold for stokvels.

Finally, it is submitted that a large number of stokvels may qualify for exemption from compliance with the provisions of the bill. Exemption may be granted by the minister on a number of possible grounds, or for a number of practical considerations. Some of these reasons or considerations include the following: First of all, the minister may decide to set an amount for a threshold for stokvels which will automatically exempt the majority of stokvels from the provisions of the bill. For example, if the amount for a threshold for stokvels is set at R5 000, the majority of stokvels will be exempted. A threshold of, say, R5 000, will ensure that most if not all of the common type of stokvel, usually being in the nature of a small-scale savings club or a burial society, will be exempt from the provisions of the bill. Simultaneously, it will ensure that all stokvels in which relatively large sums of money change hands, that is, amounts in excess of R5 000, will have to comply with the provisions of the bill. Secondly, the minister may, for example, decide to exempt those stokvels which do not have more than, say, six members. This type of stokvel will usually also qualify for exemption under the threshold consideration. Thirdly, the minister may decide to exempt certain types of stokvel, depending on their nature. For example, because of the particular aims and activities of a burial society (namely to spread the risk and to provide mutual support, and not necessarily to pool money) the minister may decide to exempt them from compliance with the provisions of the bill.

WG SCHULZE
University of South Africa

OPVOEDKUNDIG-ETIESE, PERSOONSGEBONDE EN PROJEKTIEWE STRUIKELBLOKKE EN GRENSE VAN REGSNAVORSING

1 Inleiding

Daar bestaan hedendaags 'n algemene ontevredenheid oor die navorsingsvermoë van regstudente en afgestudeerdes wat deur universiteite aan die regsprofessie en -akademie beskikbaar gestel word. So verklaar Dunn in 'n onlangse artikel oor die toestand in die VSA:

> "No one seems happy these days with either the quality of the legal research instruction provided by law schools or the quality of the legal research being conducted by law students and recent law school graduates. Practitioners complain about new associates who do not possess even the most rudimentary legal research skills." ("Why legal research skills declines, or when two rights make a wrong" 1993 *Law Library J* 49.)

Tog bestaan daar 'n groeiende behoefte, ook in die regspraktyk, aan meer navorsingstyd en -fasiliteite. In 'n opname wat Heller en Hunt ten aansien van die VSA vermeld, het geblyk dat regspraktisyns deur die bank behoefte daaraan gehad het om meer tyd in die biblioteek deur te bring (*Practicing law and managing people: How to be successful* (1988) 284). Die navorsingsbehoeftes van die regspraktisyn is in die reël, hoewel nie uitsluitlik nie, afgestem op die vind van die toepaslike regsreëls vir 'n spesifieke probleem voor hande ten einde 'n effektiewe diens aan 'n kliënt te lewer (MacEllven *Legal research handbook* (1986) 1). Regsnavorsing is egter nie tot regsvinding beperk nie. Dit het spesifiek ook 'n toekomsdimensie, naamlik 'n strewe na regsaanpassing en -verbetering met die oog op bereiking van 'n hoër vlak van geregtigheid. Nagraadse studente, regsdosente en instellings soos die Suid-Afrikaanse Regskommissie het in dié verband 'n wesenlike en leidende rol te speel.

Hoewel navorsingsfasiliteite en -geleenthede nie vergelykbaar met Wes-Europa en Noord-Amerika is nie, beklee Suid-Afrika 'n bevoorregte posisie in Afrika. Tegnologiese ontwikkelinge, veral ten aansien van rekenaars en gepaardgaande ontwikkelinge in die inligtingkunde en die opkoms van die informatikawetenskap, het aansienlike verbeteringe meegebring. In 'n ander sin het ekonomiese agteruitgang egter weer die boekery en beskikbare inligting vir onmiddellike benutting nadelig beïnvloed.

In die onderhawige bydrae word gewys op sekere grense van en struikelblokke vir sinvolle regsnavorsing wat 'n wesenlike effek op die interpretasie, doeltreffendheid en bruikbaarheid van navorsingsinligting en -resultate het.

2 Opvoedkundig-etiese en persoonsgebonde grense en struikelblokke

In dié verband wil ek graag die aandag op die volgende samehangende aspekte vestig:

2 1 Indoktrinasie en onderdrukking van individuele kreatiwiteit

Die onderrigspraktyk van die oordra van waardes en dogmadraende konsepte as ewiggeldend en bo bevraagtekening verhewe, het die effek om die student se individualiteit te skend en die kreatiewe in hom of haar te onderdruk. Hoewel 'n

mate van indoktrinasie vir elementêre oorlewing, veral ten aansien van kinders, onvermydelik is en 'n mens jouself beswaarlik geheel en al van jou eie agtergrond en waardesisteem kan losmaak, is andersindse indoktrinasie in sy wese selfsugtig, vlak, kortsigtig en 'n morele vergryp nie slegs teen die betrokke studente nie maar ook teen die lewenskwaliteit en -waardigheid van ons kinders. 'n Dosent wie se (intelligente) studente hom klakkeloos napraat, het heel waarskynlik nie slegs 'n selfbeeldprobleem nie maar het ook in sy verantwoordelikheid teenoor die gemeenskap gefaal. Die kreatiwiteit en vindingrykheid van die student moet, in ideale sin, juis in die onderrigsituasie geaktiveer word. As gevolg van die ongunstige dosent-student-verhouding in Suid-Afrika is hierdie ideaal, in 'n omvattende sin, egter moeilik haalbaar indien nie onmoontlik nie (vgl Weinstein en Schwartz "Value education without indoctrinaton" 1979 *Educational Forum* 203). Effektiewe onderrig, soos ook effektiewe menseregte, kan slegs binne 'n sterk en goed ontwikkelde ekonomie gedy.

Indoktrinasie skend menslike individualiteit en intellektuele vryheid en is derhalwe wesenlik in stryd met 'n demokratiese en menseregtebestel (sien Siegel "Critical thinking as an individual right" 1986 *New Directions for Child Development* 39; Raywid "Perspectives on the struggle against indoctrination" 1984 *Educational Forum* 137). Eers wanneer indoktrinasie, en gepaardgaande geestelike en intellektuele slawerny, as onderrigdoelwit en/of -gevolg die nek ingeslaan is, sal 'n gunstige klimaat vir sinvolle en volgehoue navorsing en die daaruitvoortvloeiende hoër vlak van geregtigheid en beskawingsvooruitgang, geskep kan word. Dit is duidelik dat die agterstand wat Afrika, en in 'n toenemende mate ook Suid-Afrika, op navorsingsgebied het nie gou uitgewis sal kan word nie. Trouens, dit wil voorkom of dié agterstand teenoor Wes-Europa, Noord-Amerika en nou ook sekere Asiatiese lande groter word.

2 2 Indoktrinasie en die stimulering van plagiaat

Uit navorsing wat in die VSA onderneem is, blyk dat ses uit elke tien voorgraadse regstudente plagiaat pleeg sonder om dit as verkeerd te beskou. Daar is die voorbeeld van 'n professor by Cornell Universiteit wat as student 'n opstel geskryf het wat jare later weer net so deur 'n student by hom ingedien is (Bills "Plagiarism in law school: Close resemblance of the worst kind?" 1990 *Santa Clara LR* 104–105). Dat hierdie verskynsel aanknopingspunte het met indoktrinasie waardeur voorgehou word dat die finale antwoord op 'n probleemvraag reeds bestaan, staan bo twyfel. In die Middeleeue, waarin die burgery onverbloemd met rigoristies-onveranderbare godsdienstige waarhede geïndoktrineer en eintlik geterroriseer is, het plagiaat derhalwe vryelik voorgekom (Bills 107).

Plagiaat word deur vele beskou as een van die ernstigste vergrype in die akademiese gemeenskap wat ook reflekteer op 'n individu se morele geskiktheid om hoegenaamd by die regsprofessie betrokke te wees (Bills 124). Plagiaat skend die wese van 'n akademiese instelling en van die handhawing van sekere standaarde. So verklaar Bills 109 tereg:

> "Academe's ethical condemnation of plagiarism protects the unique interests of scholarly institutions. On the student level, it protects the originality in scholarship essential to the evaluation process. Course grades are normally based on the comparison of a student's work with that of his or her classmates, and to a standard of excellence maintained by the faculty member and the institution. By cheating the process, a plagiarist devalues every grade and every degree conferred, and damages an institution's credibility."

2 3 Die mensfaktor

Dit is so dat sekere mense bloot nie die insig, vindingrykheid en verbeelding het om sinvolle navorsing te doen nie. Hoewel daar sekerlik biogenetiese eienskappe is waaraan nie verander kan word nie, kan individuele vermoëns tog gestimuleer en ontwikkel word. As gevolg van die ongunstige dosent-student-verhouding aan Suid-Afrikaanse universiteite word baie talente nooit na behore geaktiveer nie.

Studente behoort tot selfondersoek aangemoedig te word. As jy die prosesse wat jou gedrag beheer, kan identifiseer en begin begryp, kan jy ook oor jou medemens dink en hom begin begryp. Dan kan jy 'n begrip vir menslike behoeftes ontwikkel wat die basis van die reg en regsdenke vorm. 'n Studie van die reg is in finale sin 'n studie van mense en nie 'n studie van reëls nie.

3 Evolusielyne en regsprojeksie-onveranderlikes van regsontwikkeling en vlakke van regsnavorsing

3 1 Evolusielyne

'n Diachroniese beskouing van die ontwikkeling van die reg dui duidelik die bestaan van universele evolusieprosesse aan. Hierdie prosesse is van 'n voorrasionele oorsprong met 'n biososiale en -psigiese (natuur-) basis. Prosesse wat in dié verband duidelik identifiseerbaar is, is die dereligiërings- en deritualiseringsproses, die dekonkretiseringsproses, die individualiseringsproses en die humaniseringsproses. Twee belangrike subsidiêre prosesse wat 'n gevolg van dié prosesse is en wat weens die belangrikheid daarvan afsonderlike vermelding verdien, is die egaliseringsproses en die outonomiseringsproses (sien Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 27 en verwysings aldaar). Die oerreg was beliggaam in religieuse taboes. Die vroegste leier (*pater*; hoofman; koning) in die menslike samelewing het 'n heilige status gehad en is as almagtig deur sy onderdane beleef. Die genoemde religieuse taboes was gerig op voorkoming van die woede van die voorvadergeeste of gode. Dit was transendentaal gerig en nie op immanente menslike behoeftebevrediging nie. Tot in die Middeleeue is die reg voorgehou as die beliggaming van ewiggeldende reëls of taboes. Hierin lê die oorsprong van die primitiewe idee dat die studie van die reg bloot bestaan in die analise en sistematisering van die interessanthede van hierdie reëls. In die lig van die almag- en heilige status van die *pater*, wat ook die eerste regspreker was, en sy latere verteenwoordigers in regspraak, naamlik die regters op wie sy heilige en almagstatus oorgegaan het, is regspraak as onfeilbaar beleef. Die regspraak het volgens algemene opvattinge meganies-eksak geskied. Die mens en mensfaktor is weggedink. Vandag weet ons dat regspraak mensewerk is. Die reg en regspleging kan slegs na behore verstaan word as die rasionele en emosionele prosesse van die betrokke regspreker (eintlik: regskepper) bestudeer en begryp word. Hieruit blyk meteens ook die integrasie van die reg met die sosiologiese en psigologiese wetenskappe.

In die lig van bogenoemde universele evolusieprosesse werksaam in die reg, kan regsnavorsing slegs sinvol en van langtermynwaarde wees as dit binne die riglyne van genoemde evolusieprosesse plaasvind. Dit stel regsprojeksie-onveranderlikes vir regsnavorsing daar. Om 'n voorbeeld te gebruik: navorsing wat ten doel het om weer groepsaanspreeklikheid in die strafreg te vestig, is in stryd met genoemde individualiseringsproses en uiteindelik tot mislukking gedoem. Terloops, alle menseregte is artikulerings van genoemde prosesse.

3 2 Vlakke of dimensies van regsnavorsing

Regsnavorsing kan op verskillende oorvleuelbare vlakke plaasvind. Eerstens kan dit gerig wees op die breëre sosio-juridiese konstellasie van die menslike samelewing. Die identifisering van bogenoemde universele evolusieprosesse verg byvoorbeeld sodanige navorsing. Hierdie tipe navorsing is transkultureel. Tweedens kan navorsing gerig wees op die spesifieke artikulering van genoemde universele prosesse in 'n betrokke regskultuur. So kan die mensereg van gelyke behandeling van die geslagte deur die reg in 'n sekere regskultuur of -stelsel ondersoek word. Derdens kan regstegniese navorsing onderneem word. In dié verband is van toepassing die wye spektrum van navorsing wat binne die afsonderlike regsdissiplines onderneem word met die oog op regsvinding, regsanalise, regsistematisering, regswysiging en wat algemeen as praktyksnavorsing bekend staan (sien hieroor Cotton "Advanced legal research and writing: How to build a Cadillac" 1991 *Advocates Quarterly* 232; Dunn 61; MacEllven 3; Venter *et al Regsnavorsing, metodiek en publikasie* (1990) 1 ev). Regshistoriese en regsvergelykende navorsing kan op al drie hierdie vlakke van waarde wees (sien Venter *et al* 161 206).

3 3 Trans- en interdissiplinêre navorsing

Die bestaan van genoemde universele evolusieprosesse, en veral die daaruit geartikuleerde menseregte, noodsaak transdissiplinêre navorsing. Menseregte vorm as 't ware 'n dissipline binne en oor ander regsdissiplines heen. By transdissiplinêre navorsing is spesifieke dissiplinêre of vakkundige navorsingsmetodes en -tegnieke nie van oorwegende belang nie. Dit gaan oor die navorsing van lyne of konsepte wat deur dissiplines sny. Transdissiplinêre navorsing is egter nie tot mensregmatige navorsing beperk nie.

Interdissiplinêre navorsing is gerig op die ondersoek van 'n gemeenskaplike fenomeen binne twee of meer dissiplines of vakgebiede. So kan verkragting binne byvoorbeeld strafregtelike en inheemsregtelike verband ondersoek word, maar met gebruikmaking van die spesifieke dissiplines se metodes, tegnieke en terminologie, indien dit sou verskil. Dissiplines verwys ook nie slegs na regsdissiplines nie. Vir sinvolle regsontwikkeling en vordering op die weg van geregtigheid is beide trans- en interdissiplinêre studies van besondere belang.

4 Samevatting en konklusie

Uit bogaande uiteensetting blyk dat daar 'n behoefte aan opleiding in navorsingsmetodologie en -tegnieke is. In baie Amerikaanse universiteite is die regsbibliotekaris ook 'n lid van die doserende personeel wat kurrikulêre kursusse aanbied om studente, in 'n breë sin, met navorsing vertroud te maak. Groot regsfirmas het spesifieke programme om hulle lede se navorsingsvaardighede te ontwikkel (Heller en Hunt 284–285).

Die tradisionele regstegniese navorsing is nie meer voldoende nie. Die ou *reël*-benadering tot die reg is in 'n toenemende mate besig om plek te maak vir 'n *mens*-benadering (sien Watson *The evolution of law* (1985) 115–118). In die lig hiervan is die aanbied van dissiplines soos regsosiologie, regspsigologie en regsantropologie in regsopleiding van besondere belang. Baie aannames ten aansien van die reg en regspleging is op oeremosionele en werklikheidsvreemde fiksies gegrond wat nie bestand is teen wetenskaplike ondersoek en analise nie.

Indoktrinasie onderdruk menslike individualiteit en intellektuele vryheid. Dit vertraag vooruitgang en ontwikkeling en moet sover moontlik uit die onderrigsisteem uitfaseer word. Hiermee saam moet meganismes ontwerp word om plagiaat te bekamp. Betekenisvolle navorsing kan nie sonder 'n effektiewe navorsingsetiek plaasvind nie.

JMT LABUSCHAGNE
Universiteit van Pretoria

To sum up, cases involving an attempt to restrain publication must be approached with caution. If s 15 [of the 1993 Constitution, which entrenches the right to free speech] adds anything to this proposition it would merely be to underline that, though circumstances may sometimes dictate otherwise, freedom of speech is a right not to be overridden lightly (per Plewman JA in *Hix Networking Technologies v Systems Publishers (Pty) Ltd* 1997 1 SA 391 (A) 402).

VONNISSE

SQUATTING, SPOLIATION ORDERS AND THE NEW CONSTITUTIONAL ORDER

Rikhotso v Northcliff Ceramics (Pty) Ltd
1997 1 SA 526 (W)

1 Facts

This decision (per Nugent J) resulted from an urgent application for a spoliation order. The first respondent, the owner of land and of a factory on that land, acted as agent for another company which owns adjacent land. The remaining respondents are directors of the first respondent. The applicant occupied one of a (disputed) number of dwellings in an informal settlement on the land in question. The applicant sought relief for himself and for 206 others who are alleged to have resided in some 80 (according to the respondent 25) other dwellings in the settlement, and whose occupation of the houses was terminated by the actions of persons acting on the instructions of the respondents.

Although the applicant stated the dwellings were constructed of combustible materials (frame and walls) and iron sheets or plastic sheeting (roof), the court accepted that the dwellings were probably not uniform in construction, and that some would have been constructed mainly of combustible material, others mainly of iron sheets, and the rest of various combinations of combustible material and iron sheets.

It is common cause that at least some of those purportedly represented by the applicant were in peaceful occupation of a number of dwellings in the informal settlement. The court correctly pointed out that the question whether they were entitled to occupy these dwellings is irrelevant in an application for a spoliation order, which is granted *ante omnia* if the requirements are met. It is also common cause that these inhabitants were dispossessed of their dwellings on 8 February 1996 by persons acting on the instructions of the respondents. The manner of dispossession is in dispute: the applicant avers that the dwellings were simply burnt down, leaving no more than a few iron sheets amongst the ashes, while the respondents aver that the dwellings were dismantled, whereafter the iron sheets were removed and the combustible materials burnt. This dispute goes to the heart of the matter, as is indicated by the decision.

2 Decision

The decision turns upon the court's reconstruction of the events of 8 February 1996. Of course, in an urgent application such as this the existence of material factual disputes makes it difficult for the court to reach a simple decision on the

affidavits, and the applicant elected not to address the factual disputes by way of oral evidence.

The respondents relied on the authority of section 3B(1)(*d*) of the Prevention of Illegal Squatting Act 52 of 1951 to justify their actions. This section provides that, notwithstanding the provisions of any law to the contrary,

> "(*a*) . . . the owner of land may without an order of court demolish any building or structure erected or occupied on the land without his consent, and remove the material from the land".

The respondents argued that the dispossession of the applicant took place when the dwellings were demolished by hand, prior to the removal of the iron sheets and the burning of the combustible materials. The actual act of dispossession, according to them, was justified by section 3B(1)(*a*), even though the burning of the combustible materials was not. In order to rely on this argument the respondents had to make a clear distinction between the act of dispossession and the actual burning of the combustible materials. The court quite properly refused to accept this line of reasoning, which might have rendered the actual dispossession lawful. Apart from the fact that it is difficult, given the dispute about the facts, to accept the distinction between the dismantling phase and the burning phase of the process, the court simply refused to consider the initial dismantling and the burning as two separate processes. Consequently, in view of the court's inability to resolve the factual dispute about the construction of the dwellings it is accepted that at least some dwellings, which were constructed at least partially of combustible materials, were not merely dismantled but burnt. This line of reasoning, combined with the necessity of construing section 3B(1)(*a*) narrowly, renders at least some of the dispossessions unlawful.

The court then turned to what it considered a more difficult question, namely whether relief can be granted to those applicants who were unlawfully dispossessed. In this regard it is important that the occupants were not excluded from the land itself, nor was there any threat of such exclusion. The application was, therefore, focused on relief with regard to the destruction of the dwellings themselves. In the court's view, the application required an order to the effect that new dwellings be constructed to replace the dwellings that were destroyed. This opened up the vexed question of impossibility as a possible defence against a spoliation order, particularly where the property in question was (completely or partially) destroyed.

After a discussion of some of the materials and authorities on this issue, the court decided that the spoliation order is not an appropriate remedy in a case like this, as it would amount to an order for substitution rather than an order for restoration. In the court's view this would be foreign to the nature and function of this remedy, and consequently it was decided that even those occupants of the informal settlement who could prove that they were unlawfully dispossessed were not entitled to relief in the form of an order to reconstruct the dwellings. The court pointed out that this decision does not mean that wanton destruction of property was in order, since there are remedies in civil and criminal law which discourage such destruction, even though the *mandament van spolie* is not itself such a remedy.

The decision raises a number of interesting and important issues. In this note

affidavits, and the applicant elected not to address the factual disputes by way of oral evidence.

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The decision raises a number of interesting and important issues. In this note only three aspects of the decision are discussed: the unlawfulness issue; the impossibility issue; and the effect of the new constitutional order for disputes of this nature.

3 The unlawfulness issue

The unlawfulness issue concerns the question whether the respondent's dispossession of the applicant was unlawful. It is trite that two requirements have to be met to succeed with an application for a spoliation order: (a) peaceful and undisturbed prior control ("possession") or occupation of the property by the applicant; and (b) unlawful dispossession by the respondent (*Nino Bonino v De Lange* 1906 TS 120 122; *Yeko v Qana* 1973 4 SA 735 (A) 739). If the applicant proves these requirements, control is restored *ante omnia*, without considering the merits of the parties' claims to rights in the property. In this instance the court accepted that at least some of the residents of the informal settlement were in peaceful and undisturbed occupation of their dwellings, and also that they were dispossessed of such occupation by the respondents. The only question was whether the dispossession was lawful or not.

The relevant principle is that dispossession is unlawful if it is not justified by law and is against the will or without the knowledge and consent of the occupant (see, recently, *Stocks Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Cultural Services* 1996 4 SA 231 (C) 240). In this case, the question was whether the respondents' actions were justified by section 3B(1)(*a*) of the Prevention of Illegal Squatting Act 52 of 1951, taking into account that this section has to be construed narrowly. (The court referred to *George Municipality v Vena* 1989 2 SA 263 (A).) More particularly, since the decision in *Mpisi v Trebble* 1994 2 SA 136 (A) the respondent who claims to act in terms of this section must prove that he acted strictly within the terms of the section, and it is accepted that this does not include the burning of a structure or the materials from which it was constructed. Consequently any dispossession which was combined with a burning of the materials could be declared unlawful, since it exceeded the authority provided by the Act.

The respondents attempted to overcome this difficulty by claiming that their initial dismantling of the dwellings (which was justified by section 3B(1)(*a*)) and the removal of the iron sheets (which was also justified by the same section) must be distinguished from the burning of the combustible materials (which was not justified), thereby restricting the unlawfulness of their actions to one specific part of the dispossession process. The court quite properly refused to accept this distinction, and viewed the dismantling, removal and burning of dwellings as one continuous act, with the result that all instances of the dispossession which involved the burning of combustible materials were unlawful, even though the dwellings in question might have been dismantled before the burning. The logical result is that the actions of the respondents would be lawful only in those instances (hard to identify because of the factual disputes) where an individual dwelling consisted exclusively of iron sheets which were dismantled and removed without burning.

This conclusion makes it less critical to decide upon the respondents' versions of the facts, according to which the dwellings were dismantled prior to the burning. The court was prevented by the factual dispute from really choosing between the two versions of what happened, but fortunately the logic of the court's approach renders such a choice irrelevant. In view of earlier authority (especially *Mpisi v Trebble* 1994 2 SA 136 (A)) it is hard to find fault with this aspect of the decision.

4 The impossibility issue

The second aspect is more troublesome. In this regard the question is, assuming that the spoliation action was unlawful, whether the applicants were entitled to relief. The important fact here is that the applicants were not excluded from the land, with the result that the restoration order affects the restoration or rebuilding of the structures only. The issue of impossibility of giving effect to an eventual restoration order is therefore central to this part of the decision. The court decided that the spoliation order is not an appropriate remedy in cases where the object of the dispute has been destroyed.

The first (and surely the strongest) argument raised by the court in coming to this decision is the nature of the remedy. It was pointed out quite correctly that a spoliation remedy is traditionally regarded as a summary and preliminary order which restores prior control (possession) until the merits of the parties' claims to control the property can be ascertained in normal court proceedings. In this perspective, the court pointed out, the remedy is inappropriate if the property has been destroyed, since "[t]here is nothing upon which the order can operate". As a possessory remedy, the spoliation remedy is aimed at the restoration of possession, and once the property itself had been destroyed possession technically cannot be restored at all. In this regard the court referred to various authorities where the same point had been made before (cf particularly Kleyn "Die mandament van spolie as besitsremedie" 1986 *De Jure* 1).

It has to be pointed out that this argument is not undermined by the commonly accepted view that the spoliation remedy can include an order to take certain steps to place the property in its former condition or to effect minor repairs or reinstallation (see particularly *Zinman v Miller* 1956 3 SA 8 (T) 11; *Vena v George Municipality* 1987 4 SA 29 (C); 1989 2 SA 263 (A)). The point is not whether repairs or reinstallation are possible, but whether the property itself can be replaced.

The court's main objection against a replacement order (and this objection is shared by most authors who agree with this approach – see the references provided by the court at 533A–B) was that the spoliation remedy, being a possessory remedy, is "not . . . a general remedy against unlawfulness" (533I–J). This objection derives from the argument (see references at 533G–H 534E; see also Van der Walt "Die funksies en omskrywing van besit" 1988 *THRHR* 276–296 508–514), that the *mandament van spolie* has an important function in the protection of law and order. Several authors (and seemingly the court in this case) read this statement as if it meant that the spoliation remedy is a general remedy for the protection of lawfulness. However, when taking the very specific requirements for this remedy into consideration, such an interpretation should be impossible – the requirements ensure that the remedy can only be employed when the actual dispossession of effective control of property is in dispute. It is not really necessary or instructive to reopen this debate (the court referred to most of the earlier publications in this regard), and it should suffice to state that any view (if it was ever held by anyone) that the spoliation remedy is or should be a general remedy against unlawful action is clearly mistaken. The statement that this remedy has an important law-and-order aspect means something else: when the *mandament van spolie* is described as a possessory remedy, that does not mean that it is aimed at the protection of possession as a right (in the sense that the *rei vindicatio* is a remedy for the protection of ownership as a right). By saying that this remedy is a possessory remedy it should be very clear (as Kleyn

states quite unambiguously – see 1986 *De Jure* 1 ff) that possession in this instance is protected for the sake of upholding law and order, and not for the sake of protecting any right of the possessor. Obviously this (fairly trite) observation caused many misunderstandings and confusions in the past.

That does not dispose of the debate about the defence of impossibility of restoration, though. On the contrary. The very fact that the spoliation remedy is aimed at ensuring, through the *ante omnia* restoration of control which had been lost through unlawful spoliation, that law and order is not disturbed through unlawful self-help suggests that this remedy has to be applied strictly, and that the courts should not retreat from its objectives lightly. More pertinently, the very nature of the remedy seems to suggest that the court should do anything reasonably in its power to prevent people from getting away with unlawful self-help. Admittedly it is true that the nature of the remedy is such that restoration becomes technically impossible once the property in question has been destroyed, but the question is whether this means that the public purpose served by this remedy should be subservient to a technical, dogmatic consideration of this nature. Is it possible to develop the remedy to ensure that it still serves its public purpose, or should we resign our responsibility once we are confronted by a rule of logic (or dogma) as it was received in Roman-Dutch authority? More pertinently, which stage of the historical development of this complex remedy should we accept as the be-all and end-all?

In my view, we are not slaves of historical developments, and we have the responsibility to keep developing and amending common law institutions and remedies as and when necessary to serve our current needs and requirements optimally. We should study the history of the spoliation remedy not to see what we have to accept unquestioningly, but to see where and how we may adapt whatever we have received to serve the needs of our own context. The same applies to the spoliation remedy. I am not suggesting that there is any historical authority for allowing this remedy to be used when the property in question has been destroyed – in fact, what authority there is seems to point the other way. (See Kleyn *Die mandament van spolie in die Suid-Afrikaanse reg* (LLD thesis UP 1986) 423 ff for the most comprehensive analysis.) My suggestion is that the mere fact that this was seemingly not possible historically should not prevent us from developing the possibility of restitutive restoration where appropriate.

A moment's consideration suggests that a restoration order which involves some form of restoration is necessary. It hardly needs any argument that the violent and uncertain context of our current society requires a robust possessory remedy like the *mandament van spolie*, and that it requires such a remedy to be effective even against shrewd and desperate people who will do anything to prevent the law from taking its course. Stated simply: if people are allowed to escape this unquestionably beneficial remedy simply by ensuring that the property is destroyed, there are many people who would be willing to do so – the case is one of many that prove this point. The court did point out that its decision should not encourage wanton destruction of property, and that there are other civil and criminal remedies which could prevent such destruction, but unfortunately it did not identify or evaluate the efficacy of such alternative remedies. The point, which was perhaps not considered important enough by the court, is that the *mandament van spolie* is unique in its robust and immediate response to unlawful self-help. There really is no other remedy which can do this job with the same ruthless efficiency, and therefore one has to consider the results for law

and order of allowing respondents to escape the spoliation order by simply destroying the property in dispute.

This argument does not mean that the spoliation order should always be enforced regardless of the question whether restoration is still possible. It does mean that the courts should be very careful when deciding that restoration is impossible, and that the possibility of a replacement order should at least be considered in some instances. The only question is whether such an order, which requires that the property must be replaced and not merely returned, is so foreign that it cannot be accommodated in our legal system. I would suggest that it is not, and that in fact it can be accepted in our legal system very easily. Our common law distinguishes between various categories of things, and one (neglected) distinction is being between fungible and non-fungible things. This distinction is not meaningless, as is indicated by various principles which allow for exceptional treatment of fungible property (cf *Geldenhuys v Commissioner of Inland Revenue* 1947 3 SA 256 (C) with regard to a usufruct over fungibles). If we allow a usufruct with regard to fungible property, we can surely also allow a restitution order in a spoliation remedy to include the replacement of fungible property, when and where appropriate. Clearly this possibility is extremely problematic in cases of non-fungible property, but at least in the case of fungibles there does seem to be a way out, should the court in its discretion consider this to be appropriate and necessary. At least this will permit the courts to prevent and frustrate some fairly prevalent forms of self-help, thereby promoting the purpose and aim of this special remedy.

This argument finds support in the nature of the property so often at the heart of this kind of dispute: "squatter shacks" or structures in informal settlements. It can be argued that, from at least one perspective, these structures should be seen as houses or shelters rather than collections of wood, iron and plastic. In this perspective, the restoration order should focus on the house or shelter, and the obviously fungible building materials from which that shelter was constructed are more or less irrelevant. This raises the final point of interest in this case, namely the effect of the new constitutional order.

5 The implications of the new constitutional order

The complete absence of any mention or even awareness of the new constitutional order in this decision is striking. The case was heard and decided on 13 and 19 February 1996, in other words before the 1996 Constitution was finalised, but even then the interim Constitution was in place and the debate about property, housing and human rights which accompanied the promulgation of the interim Constitution and the writing of the final Constitution was well established at that stage. Does this debate have any bearing on the dispute in this case? Should similar cases in future be decided with reference to the bill of rights?

It is hardly necessary to ask the question – in our new constitutional order there is simply no way in which the effect of the Constitution can be escaped in a dispute like this. Even under the interim Constitution, where the spectre of horizontal application might perhaps have been raised, it should be clear that the very existence of the Prevention of Illegal Squatting Act 52 of 1951, especially

and order of allowing respondents to escape the spoliation order by simply destroying the property in dispute.

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It is hardly necessary to ask the question – in our new constitutional order there is simply no way in which the effect of the Constitution can be escaped in a dispute like this. Even under the interim Constitution, where the spectre of horizontal application might perhaps have been raised, it should be clear that the very existence of the Prevention of Illegal Squatting Act 52 of 1951, especially in view of the draconian powers with which it provides landowners against so-called unlawful squatters, projects this kind of dispute into the sphere of vertical rather than horizontal application. Under the 1996 Constitution the question of

application should raise no problem whatsoever. In other words, this kind of dispute is the very essence of what is intended to be covered by the new constitutional order, and the question should have been asked whether and how the matter is affected by the Constitution.

The interim Constitution did not contain a housing provision similar to the current section 26, and therefore the issue would have been more complicated than it might have been in terms of the 1996 Constitution. However, it still seems likely that section 28 of the interim Constitution, read in the context of the whole Constitution and especially the chapter on fundamental rights, required the court to tread carefully when addressing disputes of this nature. Even given the problematic nature of the horizontal application of the provisions of the 1993 Constitution, a case like this offers excellent opportunities to argue that one of the private parties to the dispute (in this case the respondents) was acting upon (extremely arbitrary) powers given to it by the Prevention of Illegal Squatting Act 52 of 1951, so that the application issue becomes much less problematic. The robust nature of the spoliation remedy precludes the court from asking questions or deliberating about the rights of the parties, and therefore section 28 (or the current section 25) should not be the main focus of the investigation in the sense that the constitutional protection of rights is in issue. What should have been considered (and what is much clearer in view of section 26 of the 1996 Constitution), is the courts' general attitude when solving a problem of this nature. Perhaps the most helpful indication in this regard is the idea (s 35(3) in the 1993 text, 39(1)–(2) in the 1996 text) that the court should promote the values, objects and spirit of the Constitution when interpreting the provisions of the Constitution or developing the rules of common law. In the case under discussion this might have been read to mean (in terms of the interim Constitution) that the court, in the application of the common law, should have had due regard for the spirit, purport and objects of the Constitution, or it may mean (in terms of the 1996 Constitution) that the court should develop the common law to promote the same objectives. This might well include an application of the spoliation remedy which is more robust than is reflected in the old authorities, to provide for problems caused by respondents who are willing to destroy the property in question to obstruct the course of justice. The recognition of fungible property in the common law allows more than enough room for such an approach – what is required is the willingness to take responsibility for a certain approach and a certain judgment, in the light of the new constitutional order.

In terms of the 1996 Constitution there is an even more striking possibility that affects disputes like the case under consideration. It seems possible, on the basis of Budlender's argument that a constitutional guarantee of the right to housing would at least mean that the government is precluded from acting in such a way as to prevent one from finding a home, that the Prevention of Illegal Squatting Act 52 of 1951 (as it stands) is unconstitutional in view of section 26 of the Constitution. (See Budlender "Towards a right to housing" in Van der Walt (ed) *Land reform and the future of landownership in South Africa* (1991) 39 ff.) The draft Extension of Tenure Security Bill 1997 (*GG* 17773 of 1997-02-04) suggests (see s 22) that the government intends to amend or repeal at least parts of this Act (the definition of "illegal squatter" still leaves much to be desired). In the meantime, the constitutional validity of this Act may well be called into question in terms of section 26. Of course, this option was not yet available for either the applicant or the court in the case under discussion, but it

does seem strange that the interim Constitution of 1993 was not even mentioned in this case.

AJ VAN DER WALT
University of South Africa

MANDAMENT VAN SPOLIE – RESTORATION OF THE *STATUS QUO ANTE* REVISITED

Rikhotso v Northcliff Ceramics (Pty) Ltd
1997 1 SA 526 (W)

The case deals with an application for a spoliation order concerning an informal settlement situated on an expanse of land on the outskirts of Johannesburg. The first respondent owns part of the land and has a factory on it. The remaining respondents are the directors of the first respondent. The applicant occupied one of the dwellings and sought relief not only for himself but also for others who resided in the settlement.

The facts of the case are as follows: The applicant and those he purported to represent were in peaceful occupation of a number of dwellings (erected without the consent of the respondents) constituting the settlement. On 8 February 1996, they were dispossessed of their dwelling by persons acting on the instructions of the respondents, who first dismantled all the dwellings by hand and then proceeded to burn the combustible material. The applicant then applied for a spoliation order to have the dwellings restored.

Judge Nugent divided the applicant and those he represented into two categories (521C–F): those whose dwellings were merely dismantled; and those whose dwellings were dismantled and then burnt. With regard to the dwellings that were merely dismantled, the actions of the respondents were authorised by section 3B(1)(a) of the Prevention of Illegal Squatting Act 52 of 1951. This section provides that, notwithstanding the provisions of any law to the contrary,

> "(*a*) . . . the owner of land may without an order of court demolish any building or structure erected or occupied on the land without his consent, and remove the material from the land".

Accordingly, with regard to those dwellings which were only dismantled, Nugent J found that the respondents had acted lawfully (532A).

With regard to those dwellings which were burnt after demolition, Nugent J applied the *dictum* in *Mpisi v Trebble* 1994 2 SA 136 (A) that the respondents were not entitled, after dismantling the dwellings, to burn their component materials (530H–J 531A). He expressed the view that it is "unrealistic to view the facts . . . in distinct phases, to determine whether each separate act in the course of the dispossession was lawful" (530G). Accordingly, he found that the dispossession of those occupants whose dwellings were burnt, was "clearly unlawful" (531C).

The issue of whether relief could be granted to those occupants who were unlawfully dispossessed (in broader terms, whether the *mandament van spolie* can succeed in instances where the spoliated property has been destroyed) was then addressed. Nugent J found "little authority" (533I) to support the approach favoured by Blecher ("Spoliation and the demolition of legal rights" 1978 *SALJ* 12) and Van der Walt ("Nog eens *Naidoo v Moodley* – 'n repliek" 1984 *THRHR* 436) and concluded that the "weight of authority" supports the proposition that a spoliation order cannot be granted if the property in question has ceased to exist – the *mandament van spolie* is a remedy for the restoration of possession, not for the making of reparation (535A–B). Accordingly, the application was dismissed.

There are in my view two approaches possible when dealing with this case. Each approach presents one with a different underlying question that must be answered in order to resolve the case from that particular point of view.

The first approach is to accept, as Nugent J did, that it is "unrealistic to view the facts in the present case in distinct phases to determine whether each separate act in the course of the dispossession was lawful". If one accepts this, there can be no doubt that the dispossession of those occupants whose dwellings were burnt was clearly unlawful. Because they were unlawfully dispossessed, the occupants of the dwellings may be entitled to a spoliation order. The defence available to the respondents is that the restoration of possession is impossible as the materials in question have ceased to exist. This leads one to the underlying question presented by this approach: Can a spoliation order be granted in a situation where the spoliated material has been destroyed?

One cannot attempt to answer this question directly and in my view one must first address another issue, namely the main aim and purpose of the *mandament van spolie*. The two schools of thought about this issue respectively contend that the *mandament* is a remedy aimed at the protection of possession, or that it is aimed at the protection of the peace or the prevention of self-help.

According to the first view (ie protection of possession), a spoliation order cannot be granted if the spoliated material has been destroyed. The reason for this is that if the original material (which has been destroyed) were to be replaced with similar material, possession is *not* restored but a *new* factual relationship is created between the applicant and an article which has never been possessed by him. Restoration of the *status quo ante* therefore implies restoration of the same article. This view is succinctly summed up by the words of Wessels J in *Bester v Grundling* 1917 TPD 492:

> "In a spoliation action the plaintiff comes to the Court and alleges that the *articles in question* were in his possession, and that the defendant has deprived him of *that possession*; and he asks the court to give him back the possession" (my emphasis).

It is this view that Nugent J described as being supported by the "weight of authority" (viz, Van der Merwe *Sakereg* (1989) 119 fn 212 140–143; Silberberg and Schoeman's *The law of property* (1992) 139 141; Delport and Olivier *Sakereg vonnisbundel* (1985) 83; Kleyn "Die mandament van spolie as besitsremedie" 1984 *De Jure* 1; Sonnekus "*Fredericks and Another v Stellenbosch Divisional Council* 1977 3 SA 113 (C)" 1978 *TSAR* 168; De Waal "*Naidoo v Moodley* 1982 3 SA 82 (T)" 1984 *THRHR* 115).

The alternative view is put forward by Van der Walt ("*Naidoo v Moodley* 1982 4 SA 82 (T)" 1983 *THRHR* 238–240). He describes the *mandament* as "'n aksie waarmee die regsorde teen vredesbreuk beskerm word". Naturally, according

to this view, which shifts the emphasis away from possession, a spoliation order *can* be granted where the material concerned has been destroyed, simply by substituting similar material. It would appear that this view was supported in *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (C) where it was suggested *obiter* that in cases where the original materials could not be tracked down, substitute materials could be used to restore possession. Nugent J, however, was quick to make the following observation regarding this ruling:

> "That dictum, which was obiter, must be seen in its context. It was an observation made by the learned Judge in reply to an argument as to the practicality of restoring the dwellings. I do not think the learned Judge intended by this remark to hold that it was competent to order that possession be restored by substitution."

These sentiments are echoed by De Waal ("Die *mandament van spolie* – meer as besitsherstel" 1978 *Responsa Meridiana* 275–278). He states that "die mandament van spolie nie beskou kan word as die toepaslike remedie vir 'n geval soos die *Fredericks*-saak nie".

Additional criticism of the view that the mandament is aimed specifically at protecting the peace is supplied by De Waal 1984 *THRHR* 116 where he astutely points out that the ratio underlying *all* legal rules is the protection of the legal order from "vredesbreuk".

The validity of the view put forward by Van der Walt is further lessened when one considers the various practical and dogmatic problems that accompany this view. Firstly, as Nugent J indicated (534E–F), if this view were sound, the principle must be equally applicable where the property concerned has been alienated by the spoliator. Yet there are "various cases" (eg *Burnham v Neumeyer* 1917 TPD 630) which held that a spoliation order will not be granted in such circumstances. Secondly, the search for a suitable substitute may cause delay which militates against the speedy nature of the *mandament*. Finally, since the *mandament* is aimed at only temporary relief, the question remains regarding what happens to the substitute if, after the merits of the case have been considered, the final question is decided in favour of the spoliator.

From the above it is clear that on the bases of dogma or principle, practicality and weight of authority, the preferred view is that of the *mandament van spolie* as protector of possession. In my opinion Nugent J therefore correctly concluded that a spoliation order cannot be granted in an instance where the material concerned has been destroyed.

As previously mentioned, there are two alternative approaches to this case. The first has been dealt with. While the second yields an identical end result, I believe its reasoning to be more sound.

Whereas the point of departure of the first approach was to accept the judge's view that

> "it is quite unrealistic to view the facts in the present case in distinct phases to determine whether each act in the course of the dispossession was lawful",

the point of departure of the second approach is to dismiss this view. I submit that to divide the facts into distinct phases is not at all unrealistic: Whenever there is an application for a spoliation order, a fundamental question is whether or not the dispossession was unlawful; in order to answer this, one must first ascertain which specific act(s) constituted the dispossession. I therefore submit that in the present case it is not only realistic, but technically more correct to regard the dismantling of the dwellings and their subsequent burning as two

distinct juristic facts, rather than to lump them together as one broad act of dispossession.

This simplifies the case in the following manner: if one can prove that the act of dispossession was complete after the dismantling of the dwellings (ie that burning occurred only after the occupants had already been dispossessed by demolition), the unlawful act (ie burning) and the act of dispossession become distinct from one another; as a result, the act of dispossession can no longer be considered unlawful and it is clear that a spoliation order cannot be granted. This leads one to the underlying question presented by this approach, which is co-incidentally posed in Van der Merwe and De Waal *The law of things and servitudes* (1993) par 82: "[T]he crucial question arises whether the mere breaking down of a structure amounts to an act of dispossession . . .?"

Various sources suggest that a mere act of dismantling does in fact constitute dispossession. Van der Merwe and De Waal go on to state that

> "it has, however, been accepted that deprivation of possession can also take the form of breaking down or damaging a building or structure".

According to Kleyn (*Die mandament van spolie in die Suid-Afrikaanse reg* (LLD thesis University of Pretoria 1986) 395), for dispossession to have occurred, the spoliator himself need not have possession – it is sufficient if he has merely impeded or disturbed the possessor's freedom to control and use the property concerned. In his *Observationes tumultuariae* (1406 2233), Van Bijnkershoek gives an example of spoliation where the respondent ploughed under the applicant's seedlings. Although ploughing under seedlings cannot be called dismantling, it follows that if this constitutes dispossession, dismantling does too.

Evidence to the contrary seems to have been presented in *Potgieter v Davel* 1966 3 SA 555 (O). In this case, the respondent had dismantled huts possessed by workers on his farm, but had not removed the materials. The workers subsequently applied for a spoliation order. The application was dismissed on the ground that there had been no transfer of possession to the respondent and thus no actual dispossession. However, apart from criticising this "transfer of possession" requirement, Kleyn (*supra*) submits that the judge in the *Potgieter* case confused the question whether there had been spoliation with the question whether restoration of possession was possible.

A further argument for regarding mere dismantling as an act of dispossession exists if one considers the following. In the present case, Nugent J conceded that *all* the occupants had been dispossessed (531C). However, not all the occupants had their dwellings burnt subsequent to dismantling. It follows that the act of burning was distinct from the act of dispossession, which implies that dismantling of the dwellings alone constituted the dispossession.

It would therefore appear that one may regard the dismantling of a structure as an act of dispossession. Applying this to the present case, one finds that dispossession was complete before burning took place. The act of dispossession was therefore lawful (as it has occurred in a manner permitted by statute) and as a result, a spoliation order cannot be granted. In my view this (the second) approach is preferable – it dismisses the application because a fundamental requirement of the *mandament van spolie* (ie unlawful dispossession) is lacking, and not on the ground of the controversial defence that restoration of possession is impossible.

To conclude, whichever approach one adopts, the end result is the same and in my view it is unsatisfactory. Certainly one may argue that the appropriate action is an Aquilian action for damages. I do not dispute this, but submit that the purpose of an order for damages is *not* the restoration of the *status quo ante* (as in the case of a spoliation order), and yet this is precisely what is required here as we are dealing not with an "ordinary" possession that may be sufficiently replaced with pecuniary compensation, but instead with persons deprived of their only residence. It is obvious that the paltry amount the squatters would be granted in a successful damages claim in order to replace the components of their shacks can hardly be considered an adequate replacement for their accommodation. Secondly, for obvious reasons, the speedy remedy of the *mandament* is desperately needed here.

However, De Waal 1984 *THRHR* 116 counters this argument:

> "Die mandament van spolie is nie 'n magiese regsmiddel wat maar ingespan kan word in gevalle waar 'n ander remedie nie gerieflik ter hand lê nie. Daar is steeds grense waarbuite dit nie aangewend kan word sonder om die regsbeginsels wat ten grondslag daarvan lê, te verkrag nie."

It would therefore appear that the remedies available to squatters who have been deprived of their accommodation (whether lawfully or unlawfully) are, for all practical purposes, not remedies at all. The granting of damages is not satisfactory and granting the *mandament van spolie* is unsound. A statutory solution is the only remaining alternative. It is clear that the current Prevention of Illegal Squatting Act 52 of 1951 affords little protection to squatters. This is the point of departure of the Extension of Tenure Security Bill (GN 284 *GG* 1773 1997-02-04) and it appears that the shift of emphasis from the rights of the landowner to those of the squatter has been excessive. The need for a statutory solution that protects a balanced amalgam of the rights of the landowner and those of the squatter therefore remains.

M BLUMBERG
Law Student, University of Stellenbosch

HIV-TOETSE, TOESTEMMING EN ONREGMATIGHEIDSBEWUSSYN

C v Minister of Correctional Services
1996 4 SA 292 (T)

Hierdie saak handel oor 'n gevangene se eis weens privaatheidskending teen die Minister van Korrektiewe Dienste. Die uitspraak het belangrike implikasies vir die regverdigingsgrond toestemming, die hantering van HIV-toetse, die privaatregtelike regsposisie van gevangenes en die vereiste van *animus iniuriandi* – oftewel die opsetselement – by sekere *iniuriae* of persoonlikheidskrenkings.

Die feite was kortliks soos volg: 'n Sersant K het op die betrokke dag bloedmonsters van 'n aantal gevangenes, wat almal as kombuispersoneel diens gedoen het, geneem. Die eiser C was een van dié groep gevangenes. In die gang, buite

die kamer wat as spreekkamer gebruik is, het K die groep meegedeel dat toetse vir HIV en ander seksueel oordraagbare siektes op hulle uitgevoer sou word. K het hulle ook ingelig dat hulle kon weier om die toetse te ondergaan. Hy het verder bygevoeg dat sodanige weiering moontlik hulle posisie as kombuispersoneel kon beïnvloed. (In daardie stadium, 1993, was dit gevangenisbeleid dat HIV-positiewe persone nie toegelaat is om voedsel te hanteer nie.) In die spreekkamer het K vir C gevra of hy enige beswaar teen die toets het, waarop C ontkennend geantwoord het. K het toe van C se bloed getrek. Dit het agter 'n geslote deur plaasgevind. Benewens K en C was die enigste ander persoon in die spreekkamer 'n ander gevangene wat vir K geassisteer het. Die bloedmonster is na die Suid-Afrikaanse Mediese Navorsingsinstituut gestuur en het positief vir HIV getoets. 'n Distriksgeneesheer het die uitslag aan C bekend gemaak.

C beweer in die hof dat hy nooit oor die geaardheid van die toets ingelig is nie en dat hy verplig was om sy bloed te laat trek. Regter Kirk-Cohen verwerp C se getuienis. Hy bevind op die feite dat C – ten volle bewus daarvan dat (a) die toets onder andere vir HIV was en (b) van sy bevoegdheid om te weier om die toets te ondergaan – toegestem het dat die toets op hom gedoen word (300F–G). Desnietemin bevind die regter dat K se optrede teenoor C onregmatig was (304E–F). In dié verband heg hy baie waarde aan die amptelike beleid oor die hantering van HIV-toetse wat die Departement van Korrektiewe Dienste aangeneem het. Dié beleid bepaal onder meer dat persone wat by sogenaamde hoërisiko-gedrag betrokke was, vóór en ná toetsing berading moet ontvang. Ingeligte toestemming moet deur so 'n persoon (wat berading ontvang het) gegee word alvorens hy aan 'n HIV-toets onderwerp mag word. Die persoon moet genoeg tyd gegee word om die inligting wat tydens die eerste berading aan hom oorgedra is, te oorweeg voordat hy gevra word om toe te stem om hom aan die toets te onderwerp. Die regter verklaar dat hy nie geroepe is om te bepaal wat die vereistes van toestemming in hierdie tipe geval behoort te wees nie. Die toepaslike norm is deur die Departement van Korrektiewe Dienste neergelê (303J–304B):

> "I am not called upon to adjudge what the requirements of consent or informed consent should be ... The norm was laid down by the department, and, as a prisoner, the plaintiff was entitled to the right of informed consent as determined by the department which controlled his incarceration in prison. It was not granted to him and it is obvious to what extent the consent obtained fell short of the informed consent laid down by the department itself."

Ek is nie oortuig dat die hof die aangeleentheid korrek hanteer het nie. Die hof het effektief die Departement van Korrektiewe Dienste die inhoud van die regverdigingsgrond toestemming in hierdie geval laat bepaal, en dit lyk ongewens. Sekerlik is dit die howe wat die laaste woord oor die inhoud van regsnorme moet hê. In hierdie geval kon die hof die beleid van die departement in ag geneem het as 'n faktor wat die inhoud van die *boni mores* in die besondere geval kan medebepaal. Om sonder meer te aanvaar dat die relevante regsnorm deur 'n staatsdepartement vasgelê is, lyk egter nie korrek nie, en kan denkbaar gevaarlik wees. Myns insiens kon die hof moontlik op die feite bevind het dat toestemming wel gegee is – mits die eiser werklik verstaan het waartoe hy toegestem het ('n moontlikheid wat tog nie noodwendig deur die afwesigheid van voorafberading uitgesluit word nie). Die feit dat K nie die korrekte prosedure volgens die amptelike beleid van die departement gevolg het nie, kan dan moontlik 'n grondslag vir interne dissiplinêre optrede teen hom wees. Maar as daar wel "knowledge, appreciation, consent" aan die eiser se kant was (vgl bv *Waring and Gillow Ltd v*

Sherborne 1904 TS 340 344; Neethling, Potgieter en Visser *Deliktereg* (1996) 99–100), behoort die nie-nakoming van protokol deur gevangenispersoneel nie op sigself 'n bevinding van onregmatige optrede teenoor die eiser te fundeer nie. (Vir 'n standpunt wat die hof se uitspraak steun, sien Strauss "Privaatheidskending en die toestemmingsvereiste by bloedtoetsing vir VIGS" 1996 *THRHR* 492 ev.)

Aan die ander kant kon K se stelling (dreigement?) dat weiering om die toets te ondergaan, die gevangenes se posisie as kombuispersoneel kon beïnvloed, moontlik 'n genoegsame invloed op die eiser gehad het dat sy toestemming nie uit eie vrye wil gegee is nie. Was dit die geval, was daar nie ware toestemming nie en was K se optrede inderdaad onregmatig (vgl bv Neethling, Potgieter en Visser *Deliktereg* 98).

Hoe dit ook al sy, die hof bevind dat die toetsing onregmatig was (304E–F), en gaan voort om te oorweeg of die vereiste *animus iniuriandi* teenwoordig was. Hier is dit van belang dat K nie bewus was van die amptelike beleid van die departement nie. Hy het dus nie onregmatigheidsbewussyn gehad nie en volgens algemene beginsels dus ook nie opset nie (vgl bv Neethling, Potgieter en Visser *Deliktereg* 123–124). Desnietemin bevind die hof dat die vereiste *animus iniuriandi* teenwoordig was. Die hof steun op die appèlhofuitsprake in *Whittaker v Roos and Bateman* 1912 AD 92 en *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) vir die proposisie dat die eiser in 'n geval soos die onderhawige nie onregmatigheidsbewussyn hoef te bewys nie. In laasgenoemde beslissing het appèlregter Hoexter hom byvoorbeeld soos volg uitgelaat (154H–I):

> "It is clear that without *dolus* the action for an *iniuria* would lie neither in Roman law nor in Roman-Dutch law . . . It is equally clear, however, that in a limited class of *injuriae* the current of precedent has in modern times flowed strongly in a different direction. In this limited class of delicts *dolus* remains an ingredient of the cause of action, but in a somewhat attenuated form, in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods."

Regter Kirk-Cohen beslis dat die onderhawige geval op dieselfde manier hanteer moet word (306C–E):

> "Sergeant Kinnear intended [hier klaarblyklik in die sin van 'kleurlose' opset bedoel] to take a sample of the plaintiff's blood if the plaintiff consented to undergo the test. The plaintiff did in fact consent. But Sergeant Kinnear did not know of the norm of informed consent adopted by his own department through no fault of his own. Throughout he acted completely *bona fide*. The principles enunciated by the Appellate Division in *Whittaker's* and *Hofmeyr's* cases in regard to the definition of *animus iniuriandi* apply to this case. In my opinion the fact that those cases dealt with imprisonment and this case deals with informed consent to undergo a blood test is of no consequence; they both deal with an invasion of privacy. Ill will, spite and motive are irrelevant. Despite Sergeant Kinnear's *bona fides*, the defendant is in the same situation as were the defendants in the two Appeal Court cases. In conclusion, I find that the requirements of *animus iniuriandi* in this case are the same as those laid down in the two cases *supra* and that those requirements have been proved."

Terloops kan daarop gewys word dat die relevante *iniuria* in die twee gemelde appèlhofsake nie privaatheidskending was nie, maar wel vryheidsberowing (vgl bv Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 124–125 129–130; Neethling, Potgieter en Visser *Deliktereg* 327–328 344–346). Verder is 'n kwade motief en onregmatigheidsbewussyn nie sinoniem nie. 'n

Mens kan byvoorbeeld 'n goeie motief saam met onregmatigheidsbewussyn hê – soos in die geval van genadedood om iemand lyding te spaar (vgl bv Neethling, Potgieter en Visser *Deliktereg* 42 vn 36).

Hoe ook, die onderhawige uitspraak onderstreep 'n belangrike ontwikkeling in die regspraak, naamlik dat in die geval van sekere *iniuriae* wat teenoor gevangenes gepleeg word, die opsetsvereiste afgewater word deurdat onregmatigheidsbewussyn nie vereis word nie (of dat opset as vereiste moontlik heeltemal versaak word – vgl bv Neethling, Potgieter en Visser *Deliktereg* 328). Hierdie saak verteenwoordig self ook 'n uitbreiding van hierdie ontwikkeling aangesien vorige gevalle oor vryheidsberowing (of aantasting van die fisies-psigiese integriteit: vgl *Neethling's Law of personality* 99 vn 111) gehandel het, terwyl die betrokke beginsel in die onderhawige saak nou ook na privaatheidskending uitgebrei word.

Gesien die uiters ongelyke verhouding tussen gevangenisowerheid en gevangene, kan daar waarskynlik regspolities veel ten gunste van so 'n ontwikkeling gesê word. 'n Soortgelyke posisie geld ook ten opsigte van onregmatige beslaglegging op goed, waarskynlik weer eens vanweë die ongelyke verhouding tussen geregsdienaar en gewone landsburger (vgl bv Neethling, Potgieter en Visser *Deliktereg* 342–343). Die enigste *caveat* wat 'n mens moontlik kan byvoeg, is dat die howe enige verdere uitbreidings van hierdie ontwikkeling – synde 'n afwyking van gevestigde deliksbeginsels – altyd met groot omsigtigheid behoort te benader, en telkens alle tersaaklike belange en beleidsoorwegings in ag moet neem.

JC KNOBEL
Universiteit van Suid-Afrika

VOORDEELTOEREKENING BY PENSIOENVOORDEEL EN BY ONGESKIKTHEIDSPOLIS

Standard General Insurance Co Ltd v Dugmore
1997 1 SA 33 (A)

1 Belang van die uitspraak

Voordeeltoerekening word internasionaal as een van die moeilikste vraagstukke van die skadevergoedingsreg beskou (vgl in die algemeen Fleming "Collateral benefits" in *International encyclopedia of comparative law* (1981) hfst X1; Visser en Potgieter *Skadevergoedingsreg* (1993) 187 ev 215 ev). Daar is ook relatief min uitsprake van ons hoogste hof van appèl wat hieroor handel en bloot om hierdie rede is die onderhawige uitspraak van besondere belang. Enersyds bevestig die saak die algemene aanvaarbaarheid van die bekende dog omstrede beslissing in *Dippenaar v Shield Insurance Co Ltd* 1979 2 SA 904 (A) (soos ietwat gekwalifiseer in *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 2 SA 1 (A)) waarvolgens 'n pensioenvoordeel in bepaalde gevalle teen 'n eiser se skadevergoedingsbedrag op grond van verlies van inkomste verreken moet word. Aan die ander kant beklemtoon die uitspraak die internasionaal aanvaarde beginsel

dat betalings met 'n vrygewigheidsmotief nie 'n skadevergoedingsbedrag kan verminder nie (bv *Henning v South British Insurance Co Ltd* 1963 1 SA 272 (O) en veral *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A)).

2 Basiese feite

Die eiser (ene Richter namens wie 'n aksie deur sy kurator ingestel is) is ernstig beseer in 'n motorongeluk en die verweerder was regtens verplig om skadevergoeding vir onder meer verlies van verdienvermoë (of verlies van inkomste) te betaal. Weens sy beserings moes die eiser voortydig uit sy werkgewer (Syfrets) se diens tree. As dit nie vir die beserings was nie, sou die eiser in diens gebly het tot hy 63 jaar oud was en boonop 'n salaris en pensioen van R1 349 428 ontvang het. Die eiser was kontraktueel verplig om 'n lid van die Syfrets-pensioenfonds te wees. Sowel die eiser as die werkgewer het maandeliks tot hierdie fonds bygedra. Volgens die reëls van die fonds kry die eiser vanweë sy ongeskiktheid 'n bepaalde bedrag wat die plek inneem van sy salaris en pensioen (wat hy by normale aftrede sou ontvang). Die gekapitaliseerde waarde van die ongeskiktheidsbedrag aldus ontvang, is R858 076 en die vraag is of dit verreken moet word teen die bedrag van R1 349 428 waarna hierbo verwys (40B–G).

'n Verdere vraag was of sekere voordele ten bedrae van ongeveer R400 000 vir permanente ongeskiktheid en R25 000 vir mediese onkoste in berekening gebring moet word (43). Ingevolge 'n ongeluksversekeringspolis deur Lloyds onderskryf, is die Nedcor-groep waarby Syfrets geaffilieer is, beskryf as een van die "insured" met sy werknemers die "insured persons". Die premies vir die versekering is deur Nedcor betaal en nie deur die eiser nie. Volgens die polis sou bedrae betaalbaar word in geval van 'n werknemer wat beseer word (al hou dit geen verband met sy dienslewering nie). Vermelde bedrae is aan Nedcor betaal en weer aan die eiser oorgedra.

3 Uitsprake en bevindings

Die hof bevind (42I–43B van die meerderheidsuitspraak en 46H van die minderheidsuitspraak) dat die ongeskiktheidspensioen wat die eiser van die Syfrets-pensioenfonds ontvang het, wel teen sy skadevergoedingseis verreken moet word. Die hof grond hierdie bevinding onder meer op die *Dippenaar*-saak *supra* 920 en die *Swanepoel*-saak *supra* 10. Volgens die hof is die voordeel op die eiser se dienskontrak gebaseer en het hy juis gepoog om sy skade met verwysing na hierdie kontrak te bewys. Luidens die *Dippenaar*-saak moet die hele kontrak in so 'n geval oorweeg word en lei dit tot die aftrekking van voordele waarvoor die kontrak voorsiening maak. Voorts was die bedrag deur hom ontvang duidelik bedoel as *kompensasie* vir sy skade en nie as 'n *solatium*, 'n *ex gratia*-betaling of as 'n versekeringsvoordeel nie (dit is nie presies duidelik wat die hof met die verwysing na "versekering" te kenne wil gee nie – sien oor die relevansie van die verskillende vorme van versekering Visser en Potgieter 192–195).

Wat betref die verdere bedrae van ongeveer R400 000 en R25 000 wat deur Lloyds onderskryf is, handhaaf die meerderheid van die hof (*per* Olivier AR, Vivier AR en Van Heerden AR – lg lewer 'n afsonderlike uitspraak) die standpunt van die hof *a quo* dat dit as *res inter alios acta* beskou moet word. Die voordele is nie betaal as gevolg van Richter se dienskontrak nie en daar is geen verwysing in hierdie kontrak na die betrokke voordele nie (44E). Volgens die hof is daar ook geen *nexus* tussen die versekeringsvoordele en die eiser se verlies van verdienvermoë nie. Die betrokke bedrag kan dus nie as vergoeding vir

verlies van inkomste of verdienvermoë beskou word nie. Dit moet eerder gesien word as versekering wat die werkgewer uitneem en waarvoor die werknemer nie hoef te betaal nie:

> "The benefits under the Lloyds policy are paid to the employee who has already, by payment of the disability pension, been compensated under the contract for his loss of earning capacity. Payment of the Lloyds policy constitutes additional insurance benefits procured by the benevolence of the employer. As such it is as far as the defendant is concerned *res inter alios acta* and not deductible from the plaintiff's claim" (45C).

Appèlregter Van Heerden voeg in sy uitspraak (45F–G) by dat daar geen aanduiding was dat Syfrets bedoel het om hom *vis-à-vis* sy werknemers te verbind om die versekeringsvoordele wat hy ontvang het, oor te betaal nie. Die betaling wat gemaak is, is in die aard van 'n geskenk. Die vraag is egter nie, volgens regter Van Heerden, of daar die een of ander kontraktuele verpligting tot betaling was nie maar of die voordele uit kontrak wesenlik uit vrygewigheid ontstaan het (*Santam Versekeringsmaatskappy Bpk v Byleveldt supra* 154; Boberg *The law of delict I: Aquilian liability* (1984) 587). Op grond van 'n aantal oorwegings kom die betrokke regter (46C–F) tot die slotsom dat die voordele nie verreken kan word nie aangesien dit uit 'n vrygewigheidsbedoeling spruit.

In 'n *minderheidsuitspraak* (deur Marais AR met wie Eksteen AR saamstem), word bevind dat die bedrag van R25 000 hierbo nie verreken kan word nie aangesien 'n bedrag vir mediese uitgawes nie teen 'n eis vir verlies van verdienvermoë in ag geneem kan word nie (46H). In 'n noukeurig beredeneerde uitspraak (sien egter die kommentaar in par 5 hieronder) kom die minderheid na oorweging van al die getuienis oor die versekeringsvoordeel tot die gevolgtrekking dat die betrokke voordeel inderdaad teen die eis om skadevergoeding verreken moet word:

> "It was compensation paid because of the inability to perform the very income earning occupation which was used as the basis for calculating the claimed damages for loss of earning capacity. I am therefore unable to share the view that there was no *nexus* between the benefit received and Mr Richter's loss of earning capacity. It was a benefit which had been extended to Mr Richter and other employees for at least 16 years and one which was spelt out in the handbook produced for employees" (51J–52A).

Die minderheid doen 'n beroep op die uitspraak in die *Dippenaar*-saak *supra* vir die gevolgtrekking dat die voordeel "simbioties" verband hou met die diensbetrekking en dus nie geïgnoreer kan word nie (52B).

4 Evaluasie van aspekte van meerderheidsuitspraak

Die uitspraak bevat onder meer 'n nuttige bevestiging van die volgende basiese beginsels van die skadevergoedingsreg in die algemeen en van die problematiek by voordeeltoerekening in die besonder: (a) die basiese doel van 'n skadevergoedingstoekenning (41C); (b) die vergelykingstoets by die bepaling van skade en skadevergoeding (41E); (c) 'n verwerping van die beginsel dat elke voordeel wat feitelik uit die skadestigtende gebeurtenis spruit, relevant is (41G) (en dus ook 'n verwerping van die standpunt in Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 183 wat blykbaar alle voordele voor die voet teen 'n vergoedingseis wil verreken); (d) die feit dat daar nie een toets is wat op sigself aangewend kan word om te bepaal of 'n voordeel verreken moet word of nie (42A–B); (e) dat beleidsoorwegings ten aansien van billikheid die deurslag gee by voordeeltoerekening (42B); (f) dat iemand se verdienvermoë 'n

bate in sy boedel is (42C); en (g) dat betalings wat as 'n *solatium* gedoen word of as 'n vrygewigheidsbetaling bedoel word, van voordeeltoerekening uitgesluit word (42D–E).

Die hof weier om te aanvaar dat die *Dippenaar*-saak *supra* duidelik verkeerd is (ondanks al die kritiek wat al daarteen uitgespreek is – sien bv Visser en Potgieter 197–199 vir 'n samevatting). Die hof het weliswaar nie die meriete van hierdie kritiek behandel nie maar ondanks die anomalieë deur die kritiek uitgewys, kan die onderhawige uitspraak ondersteun word dat *Dippenaar* (soos gekwalifiseer in *Swanepoel supra* 9–11; sien egter ook *Pretorius v Transnet Bpk* 1995 2 SA 309 (A)) nie so verkeerd is dat die hoogste hof van appèl dit totaal moet verwerp nie. In hierdie opsig bevestig die hof bestaande beginsels en die regsekerheid wat dit bring, kan verwelkom word.

Dit moet nietemin duidelik wees dat indien 'n eiser sou poog om sy verlies van verdienvermoë te bewys op 'n ander wyse as deur die gebruikmaking van 'n bestaande dienskontrak wat ook vir sekere voordele as gevolg van die skadestigtende gebeurtenis voorsiening maak, sodanige voordele waarskynlik buite rekening gelaat kan word. Dit behoort natuurlik steeds vir 'n *verweerder* moontlik te wees om getuienis rakende 'n bestaande dienskontrak en voordele ingevolge daarvan aan te voer wat relevant kan wees (as die vereiste *nexus* daar is) by die bepaling van skadevergoeding vir verlies van verdienvermoë – al steun die *eiser* nie op sodanige kontrak nie. 'n Bestaande dienskontrak kan beswaarlik heeltemal irrelevant wees by die bepaling van iemand se verdienvermoë (ek meen ook nie dat *Swanepoel supra* 10 werklik beoog om die teendeel te beslis nie).

Wat die voordeel van R400 000 betref, blyk dit dat die hof (44D–F) die juiste siening oor die bewyslas het: die *verweerder* (*in casu* die appellant) moet aantoon dat die voordeel verreken behoort te word omdat dit uit die bestaande dienskontrak spruit. Dit is in ooreenstemming met die korrekte benadering dat voordeeltoerekening nie handel oor *skadebepaling* nie maar wel oor die *berekening van skadevergoeding* (sien ook Visser en Potgieter 215). Net soos die bewyslas ten aansien van die nie-nakoming 'n eiser se mitigasieplig op die verweerder rus (bv *Jayber (Pty) Ltd v Miller* 1980 4 SA 280 (W)), dra laasgenoemde ook die bewyslas by 'n bewering dat die skadevergoedingsbedrag waarop die eiser *prima facie* geregtig is, deur voordeeltoerekening verminder moet word.

Ook noemenswaardig is die hof se siening dat daar *'n verband moet wees tussen die voordeel en die skade* (44I–J). *In casu* beteken dit dat sonder bewys van so 'n verband tussen die versekeringsbetaling en die verlies van verdienvermoë, die voordeel buite rekening gelaat word. Hierdie verband moet nie verwar word met die vanselfsprekende verband wat daar tussen die skadestigtende gebeurtenis en die voordeel moet wees nie (sien bv *Hunter v Shapiro* 1955 3 SA 28 (D); De Wet en Van Wyk *Kontraktereg en handelsreg* bd I (1992) 225 vn 144; Visser en Potgieter 220 wat hierna verwys as die "relevansie van die voordeel"). Hierdie verband hang waarskynlik breedweg saam met die feit dat die voordeel, om hoegenaamd in aanmerking te kan kom vir voordeeltoerekening, as kompensasie vir die betrokke nadeel bestem moet wees (sien (b) hieronder).

Ander oorwegings wat die hof aanvoer vir die nie-verrekening van die R400 000, is die volgende (45A–C):

(a) Die bedrag is arbitrêr bereken en toon nie 'n verband met die werklike skade nie (wat waarskynlik nie behoort te beteken dat so 'n bedrag *nooit* in ag geneem kan word nie);

(b) die bedrag kan nie beskou word as *kompensasie* vir die verlies van inkomste of verlies van verdienvermoë nie (Reinecke "Nabetragtinge oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 231–232 noem 'n *kompensasie-bedoeling* as een van sy vier vereistes alvorens 'n voordeel verreken kan word – die ander vereistes is 'n kousale verband tussen die skadestigtende gebeurtenis en die voordeel, dat die voordeel 'n werklike voordeel moet wees, en dat daar nie van 'n *solatium*-betaling sprake moet wees nie);

(c) die betaling van die voordeel kan gesien word as *addisionele versekeringsvoordele* wat deur die werkgewer betaalbaar geword het (sien oor die verskillende vorme van versekering en die relevansie daarvan by voordeeltoerekening, Visser en Potgieter 192–195; Reinecke 1988 *De Jure* 233; *Paton v Santam Ins Co Ltd* 1965 2 PH J25; vgl verder *Burger v President Versekeringsmaatskappy Bpk* 1994 3 SA 68 (T));

(d) die versekeringsvoordeel is deur die *vrygewigheid* van die werkgewer oorbetaal (sien ook 45G 46F *per* Van Heerden AR); en

(e) die voordeel is betaal toe daar in die lig van die pensioenbetalings aan die eiser nie meer verlies van verdienvermoë oor was waarvoor kompensasie geëis kon word nie (hierdie argument lê miskien te veel klem op die presiese *tydstip* waarop 'n betaling gemaak word, of wanneer iemand op 'n betaling geregtig word).

Bovermelde oorwegings bied 'n nuttige aanknopingspunt vir die gepoogde formulering van 'n tipe algemene leerstuk betreffende voordeeltoerekening (sien ook Reinecke 1988 *De Jure* 231–232; vgl egter ook par 6 hieronder).

Die kwessie van die vrygewigheidsbedoeling berus hoofsaaklik op 'n evaluering van die getuienis en hoef nie hier oorweeg te word nie (sien egter par 5 hieronder). In elk geval blyk dit ten minste dat die verweerder hom nie gekwyt het van sy bewyslas om aan te toon dat voordeeltoerekening wel moet plaasvind nie.

5 Evaluering van minderheidsuitspraak

Die hof se uiteensetting van die basiese beginsels by die vasstelling van skade en skadevergoeding is nuttig (47). Dit blyk dat die hof in 'n sin die sogenaamde konkrete benadering tot skadebepaling voorstaan (vgl Visser en Potgieter 68–69) en nie die klassieke sommeskadeleer nie:

> "Patrimonial loss, if any, is assessed by comparing the plaintiff's pre-injury patrimony (actual and prospective) with his post-injury patrimony and determining the extent to which the former has been diminished by the injury" (47G–H).

Dit moet duidelik wees dat skadebepaling ten aansien van toekomstige skade nie kan plaasvind sonder dat daar van 'n hipotetiese element gebruik gemaak word nie (Visser en Potgieter 66 70; vgl ook 1994 (2) *Tijdschrift voor Privaatrecht* 857).

Die minderheid se beklemtoning van die beginsel dat voordeeltoerekening nie plaasvind in gevalle van vrygewigheidsbetalings en by (skade)versekering nie (48D–E), is natuurlik korrek. Dieselfde kommentaar geld vir die hof se stelling dat logika nie (altyd) 'n verklaring vir ander gevalle van verrekening of nieverrekening bied nie en dat daar met breë oorwegings van billikheid en sosiale aanvaarbaarheid gewerk word (48).

Die hof se stelling dat dit *in casu* nie gaan om 'n algemene verlies van verdienvermoë nie maar om verlies van die voordele uit 'n bepaalde dienskontrak

(49D–E), dui moontlik op die verskille wat daar kan wees tussen skadevergoeding op grond van "toekomstige verlies van inkomste" en weens "verlies van verdienvermoë" (vgl ook Visser en Potgieter 51 vn 57). Oor die presiese verband tussen hierdie twee konstruksies is daar ongelukkig steeds nie voldoende duidelikheid in die regspraak nie.

Die feit dat die twee appèlregters wat die minderheidsuitspraak lewer op dieselfde getuienis as wat voor die meerderheid gedien het, tot die teenoorgestelde gevolgtrekking kon kom, naamlik dat die uitbetaling van R400 000 nie bloot uit vrygewigheid geskied het nie maar 'n integrerende deel was van dit waarop die eiser uit hoofde van sy diensbetrekking geregtig was (50–51), is effe kommerwekkend. Dit dui moontlik op die vaagheid van die maatstaf van "vrygewigheid" wat so 'n betekenisvolle rol by die afwysing van voordeeltoerekening speel. Anders beskou, weerspieël dit verskillende sieninge oor die billikheid van die aftrekking van die betrokke bedrag *in casu*, met 'n gevolglike "manipulasie" van die vrygewigheidsbegrip om die gewensde resultaat te regverdig. Dieselfde kommer kan uitgespreek word oor die minderheid se bevinding (52A–B) dat daar inderdaad 'n *nexus* tussen die voordeel en Richter se verlies van verdienvermoë was (hier gebruik die hof interessant genoeg die uitdrukking "loss of earning capacity" en lê nie soos voorheen (49D) klem op verlies van "anticipated earnings" nie). Hierdie siening van die minderheid is waarskynlik in effek 'n effens gewaagde uitbreiding van die strekwydte van die *Dippenaar*-saak om voordele wat nie duidelik deel uitmaak van die kontrak wat ter bewys van skade aangebied is nie, wel te kan verreken.

Aan die ander kant is die minderheid se bevinding dat die betaling van 'n pensioen aan Richter nie beteken het dat die R400 000 nie ook as kompensasie bedoel kon gewees het nie (52J–53A), waarskynlik meer oortuigend as die siening van die meerderheid (45B) dat dit nie die geval kon wees nie. Verlies van verdienvermoë is normaalweg nie so presies bepaalbaar dat geredelik bevind kan word dat iemand oorgekompenseer is nie. Die spekulatiewe elemente by die bepaling van skadevergoeding in hierdie gevalle maak dit ook moeilik om oorkompensasie te bevind.

Die standpunt van die hof (53D–E) dat die sogenaamde "vrygewigheidsbetalings" juis aan 'n werknemer gemaak word om 'n *diensbetrekking* met die werkgewer aantreklik te laat lyk, is al tevore in ietwat ander verband deur Koch gestel ("Aquilian damages for personal injury or death" 1989 *THRHR* 213):

> "When an employer continues to pay wages to an injured employee, this will seldom be a 'donation' in the strict sense of the word. An employer of a large workforce has much to gain in terms of worker contentment if he is perceived to be a caring and generous employer."

6 Slotopmerkings

Behalwe die kommerwekkende verskille ten aansien van die interpretasie van die feite oor die aard van die beweerde vrygewigheidsbetaling van R400 000 aan Richter, kan al die uitsprake in die onderhawige saak as nuttig beskou word. Dit bevestig heelwat bekende beginsels van die skadevergoedingsreg en werk so mee tot regsekerheid.

Dit is nie onverwags dat die hof die omstrede *Dippenaar*-saak bevestig het nie. Die hof verwerp in effek die standpunt van Boberg (610) dat alles nie behoort af te hang van hoe die eiser sy verlies probeer *bewys* nie, naamlik of hy 'n bestaande dienskontrak as getuienis aanvoer al dan nie. Dit is wel logies om te

onderskei tussen 'n geval waar die eiser slegs eis op grond van die verlies van voordele uit 'n bepaalde kontrak, en waar hy eis op grond van 'n algemene verlies van verdienvermoë (sien ook Reinecke 1988 *De Jure* 227 ev wat meen dat *Dippenaar* op hierdie basis verklaar kan word aangesien die eiser sy saak in effek voer as een vir verlies van regte uit 'n bepaalde dienskontrak – in so 'n geval moet daar 'n balansstaat opgestel word van wat die eiser alles uit die kontrak verkry het en wat hy *moet* verkry het; *Swanepoel supra* 10).

In die algemeen kan aanvaar word dat daar in praktyk 'n kasuïstiese benadering ten aansien van voordeeltoerekening ontwikkel het. Dit is in die lig van al die veranderlikes betrokke (sien hieroor Visser en Potgieter 219–221 vir 'n lys hiervan) onwaarskynlik dat daar ooit 'n presiese "rule of thumb" sal ontwikkel of geformuleer kan word wat alle gevalle sinvol dek. Die enigste algemene verklaring vir alle gevalle van voordeeltoerekening kan waarskynlik in vae begrippe soos "billikheid", "openbare beleid" ensovoorts geleë wees.

Die beste oplossing vir die problematiek van voordeeltoerekening word by skadeversekering aangetref. Volgens die beginsels daar toegepas, mag die verweerder nie voordeel trek uit die versekeringsvoordele nie, maar ontvang die eiser nie kompensasie vir meer as sy skade nie en het die bron van die voordeel (die versekeraar) ook 'n remedie (sonder dat die aanspreeklike meer as een keer vergoeding moet betaal). Na my mening is die algemene rigting waarin die reg ten aansien van voordeeltoerekening behoort te ontwikkel, dat die bron van voordele aan die eiser nie onverhaalbare nadeel ly of die eiser meer ontvang as die skade wat hy werklik gely het nie. Waarskynlik sal net die wetgewer sodanige veranderinge kan aanbring.

PJ VISSER
Universiteit van Pretoria

GRONDWETLIKHEID VAN MMF-WETGEWING EN TOEGANG TOT KONSTITUSIONELE HOF

Tsotetsi v Mutual and Federal Insurance Co Ltd
1997 1 SA 585 (CC)

1 Feite

Op 25 Februarie 1991 was die applikant in hierdie saak in 'n motorbotsing betrokke waarin hy na bewering so ernstig beseer is dat hy nou 'n kwadrupleeg is. Volgens die applikant was die ongeluk uit en uit die gevolg van die nalatigheid van die bestuurder van die voertuig waarin hy 'n passasier was en is hy in die loop van die besigheid van die eienaar van die voertuig vervoer. Op 5 April 1994 het die applikant 'n aksie vir skadevergoeding in die Transvaalse Afdeling van die Hooggeregshof ingestel, en 'n bedrag van R1 143 600 van die respondent geëis. Laasgenoemde is 'n benoemde agent ingevolge die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989 (hierna die MMF-wet).

Die respondent het hom op artikel 46(a)(ii) van die MMF-wet beroep. Artikel 46(a)(ii) beperk die aanspreeklikheid van die MMF of sy benoemde agent tot 'n bedrag van R25 000 vir elke passasier of elke afhanklike van 'n oorlede passasier, indien die passasier in die "loop van besigheid van die eienaar van die motorvoertuig" vervoer is. Sowel algemene as spesiale skade word by die berekening van die MMF of sy agent se aanspreeklikheid vir skadevergoeding in aanmerking geneem. Bykomstig tot hierdie pleit het die respondent hom op artikel 47 van die MMF-wet beroep. Artikel 47 beperk die passasier of sy afhanklike se skadevergoedingseis tot 'n bedrag wat gelyk is aan die verskil tussen bogenoemde R25 000 (of die werknemer se werklike, volle gemeenregtelike skade as dit minder as R25 000 is) en die bedrag deur die Vergoedingskommissaris betaal, indien die passasier 'n "werknemer" is ingevolge die Wet op Vergoeding vir Beroepsbeserings en -siektes 130 van 1993, in werking vanaf 1 Maart 1993. Hierdie wet het die Ongevallewet 30 van 1941 vervang.

Die applikant het egter die grondwetlikheid van artikels 46(a)(ii) en 47(a) in geskil geplaas en versoek dat die geldigheid van hierdie artikels uit hoofde van artikel 102 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (hierna Grondwet) na die konstitusionele hof verwys moet word. Gevolglik het die hooggeregshof (nou as die hoë hof bekend) dan ook hierdie vraag na die konstitusionele hof verwys.

2 Verwysing na die konstitusionele hof

Die eerste vraag voor die konstitusionele hof was of die verwysing na die betrokke hof korrek was. Artikel 102(1) van die Grondwet bepaal soos volg:

> "Indien daar by enige aangeleentheid voor 'n provinsiale of plaaslike afdeling van die Hooggeregshof 'n geskilpunt is wat deurslaggewend vir die saak kan wees, en wat binne die uitsluitlike jurisdiksie van die Konstitusionele Hof ingevolge artikel 98(2) en (3) val, verwys die betrokke provinsiale of plaaslike afdeling, indien hy van mening is dat dit in die belang van geregtigheid is om dit te doen, daardie aangeleentheid na die Konstitusionele Hof vir sy beslissing: Met dien verstande dat, indien dit nodig is dat getuienis aangehoor word ten einde sodanige geskilpunt te beslis, die betrokke provinsiale of plaaslike afdeling sodanige getuienis moet aanhoor en 'n bevinding daaroor moet maak voordat die aangeleentheid na die Konstitusionele Hof verwys word."

Die drie voorwaardes waaraan 'n geldige verwysing moet voldoen, word weer eens aangetoon. Eerstens moet die vraagstuk binne die eksklusiewe jurisdiksie van die konstitusionele hof val. Tweedens moet die vraagstuk bepalend vir die betrokke saak wees. Derdens moet die verwysende hof oorweeg of die verwysing in die belang van geregtigheid sal wees. Volgens regter O'Regan is die oorweging dat daar *redelike vooruitsigte* moet wees dat die verwysing suksesvol sal wees implisiet in die vereiste dat die verwysing in die belang van geregtigheid moet wees (sien ook *S v Mhlangu* 1995 3 SA 867 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC) en die bespreking van Stander en Jansen van Rensburg 1997 *THRHR* 348). Hoewel hierdie oorweging genoem word, word dit nie in die betrokke saak verder gevoer nie.

3 Uitspraak van regter O'Regan

3 1 Eksklusiewe jurisdiksie en bepalend vir die betrokke saak

Die vraagstuk val binne die eksklusiewe jurisdiksie van die konstitusionele hof maar is nie bepalend vir die betrokke saak nie. Daar word verwys na *Luitingh v*

Minister of Defence 1969 2 SA 909 (CC) waar beslis is dat die vraagstuk bepalend vir die saak voor die verwysende hof sal wees indien die bevinding van die konstitusionele hof 'n beslissende effek sal hê op die uiteindelike uitslag van die saak in die geheel óf op enige noemenswaardige aspek met betrekking tot die wyse waarop die oorblywende dele van die saak hanteer behoort te word (sien ook *Brink v Kitshoff* 1996 6 BCLR 752 (CC) en die bespreking van Stander en Jansen van Rensburg 1997 *THRHR* 119).

In die onderhawige saak het die ongeluk plaasgevind en is die dagvaarding uitgereik voordat die Grondwet in werking getree het. In *Du Plessis v De Klerk* 1996 3 SA 850 (CC) het die konstitusionele hof tereg beslis dat die hof nie geredelik sal inmeng met regte wat reeds voor die inwerkingtreding van die Grondwet gevestig het nie. Die respondent se aanspreeklikheid om skadevergoeding te betaal, was op die tydstip van die ongeluk reeds vasgestel (inderdaad beperk). Die aanspreeklikheid kon gevolglik nie deur die Grondwet uitgebrei word nie. Die Grondwet het eers in werking getree ná die ongeluk plaasgevind het. Die gevolgtrekking word bereik dat die applikant nie sy toevlug tot die Grondwet kan neem om die geldigheid van die tersaaklike artikels aan te veg nie. Dusver is die vraagstuk dus nie bepalend vir die saak nie.

Onmiddellik kom die vraag egter by 'n mens op of dit nie moontlik is dat waar die afdwinging van reeds gevestigde of vasgestelde regte onregverdig is, dit deur die konstitusionele hof verbied kan word nie. In *Du Plessis v De Klerk* is die vraag nie beantwoord nie. Die applikant argumenteer dat die konstitusionele hof wel die onregverdige afdwinging van sodanige regte kan verbied en dat die betrokke saak voor die hof inderdaad so 'n geval is. Daar word geredeneer dat daar verskeie faktore bestaan waarvolgens die betrokke saak van die *Du Plessis*-saak onderskei kan word: Eerstens het die *Du Plessis*-saak oor 'n geskil tussen private litigante gehandel. Die saak onder bespreking is 'n geskil tussen die respondent wat as agent van 'n staatsinstansie, die MMF, optree en die applikant as 'n private individu. In die tweede plek handel die betrokke saak oor 'n statutêre bepaling wat volgens die applikant tot growwe inbreukmaking van die reg op gelykheid aanleiding gee. Wat die applikant met hierdie argument te kenne gee, is klaarblyklik dat die private individu in 'n ongelyke bedingingsposisie teenoor die staatsinstansie staan en dat die individu daardeur benadeel word. Terselfdertyd bestaan 'n beperking wat deur middel van wetgewing teweeggebring is en behoort die hof die onregverdige afdwinging van bedoelde regte te kan verbied. As daar 'n beperking sou bestaan het waar twee private individue teenoor mekaar te staan kom, is die argument waarskynlik dat die beperking op ooreenkoms gebaseer is. 'n Verbod deur die konstitusionele hof is dan nie ter sprake nie. Derdens word geargumenteer dat geregtigheid bereik sal word deur die bevel net op uitstaande eise van toepassing te maak.

Regter O'Regan meen dat hierdie argumente nie kan slaag nie. Volgens haar is dit in die geval onder bespreking onnodig om die vraag wat in die *Du Plessis*-saak oopgelaat is, te beantwoord. Die gestelde vraag het te doen met die algemene reël van nie-terugwerkendheid van 'n wetlike bepaling of 'n statuut, en die verdere vraag of daar uitsonderlike omstandighede kan bestaan waarin die algemene reël nie aanwending moet vind nie. Selfs indien die laaste vraag bevestigend beantwoord word met die gevolg dat die konstitusionele hof wel die afdwing van sulke vasgestelde regte kan verbied, is die betrokke saak in die woorde van die regter nie so 'n geval nie. Sodanige geval sal slegs ter sprake kom indien dit eerstens duidelik is dat die tersaaklike bepaling of optrede wel 'n

growwe inbreukmaking op die fundamentele regte soos in die Grondwet vervat, teweeg bring; of indien daar spesiale en buitengewone redes is waarom 'n bevel van terugwerkende krag gemaak moet word. Die regter verklaar onomwonde dat dit nie in hierdie saak die geval is nie. Selfs al sou die applikant die hof oortuig dat die tersaaklike artikels (a 46(a)(ii) en 47(a)) 'n inbreuk op die gelykheidsklousule daarstel, kan daar nie gesê word dat daardie bepalings so 'n *growwe* inbreukmaking op die gelykheidsklousule daarstel dat 'n spesiale uitsondering op die algemene reël met betrekking tot die terugwerkende toepassing van die Grondwet gemaak moet word nie. Dit wil dus voorkom of die regter meen dat die "ongelyke" regsposisie van die betrokke partye (private individu teenoor die MMF of benoemde agent) in hierdie saak nie van belang is nie, en selfs al sou dit blyk van belang te wees, dit nie buitengewone omstandighede daarstel nie. Ons stem saam.

Regter O'Regan verwys na die finansiële implikasies van 'n bevel wat die bepalings ongrondwetlik verklaar en dit met terugwerkende effek verwyder. Sy is van mening dat 'n terugwerkende bevel 'n te groot impak op die finansiële status van hierdie fonds sal hê; soveel so dat dit swaarder as die belange van geregtigheid weeg. Dit is inderdaad so. Die insolvensie van die fonds sal onberekenbare skade veroorsaak. Die regter verklaar verder dat die hof nie geredelik 'n bevel sal maak wat die finansiële sake van 'n maatskaplike program skaad nie. Dat dit nie die geval behoort te wees nie, is onbetwisbaar.

Regter O'Regan sê dat dit wel moontlik is, soos die respondent argumenteer, dat die belange van geregtigheid en goeie staatsbestuur die beste bereik sal word deur gebruikmaking van artikel 98(5) van die Grondwet uit hoofde waarvan 'n bevel oor die ongrondwetlikheid van hierdie bepalings vir 'n tydperk deur die hof bepaal, opgeskort word sodat die wetgewer die geleentheid het om die gebrek in die wet of bepaling reg te stel. Die wet bly van krag hangende die regstelling daarvan of die verstryking van die tydperk aldus bepaal. Weer eens en heeltemal tereg is dit die regter se mening dat die finansiële impak van 'n verklaring van ongrondwetlikheid bogenoemde belange van geregtigheid sekondêr stel.

Uit hoofde hiervan word die gevolgtrekking gemaak dat die verwysing van die betrokke saak na die konstitusionele hof nie geldig was nie omdat die betrokke vraagstuk by monde van regter O'Regan nie bepalend vir die saak voorhande kan wees nie. Regter O'Regan se bevinding in hierdie opsig is dan dat die meganisme van artikel 98(5) nie aangewend moet word nie omdat dit, weens die finansiële implikasies van so 'n optrede, nie gewens is dat die betrokke bepalings gewysig word nie. Dit sou die korrekte *werkswyse* wees om te volg maar is inderdaad nie gewens of nodig nie.

Daarmee beslis die regter terselfdertyd dat die verwysing nie in die belang van geregtigheid sal wees nie.

3 2 Die oorweging van direkte toegang in belang van geregtigheid

Die applikant argumenteer dat die betrokke saak 'n gepaste geval is om direkte toegang vir die applikant tot die konstitusionele hof te verleen, welke argument deur die respondent weerspreek word.

Die hof verwys na artikel 100(2) van die Grondwet wat soos volg bepaal:

> "Die reëls van die Konstitusionele Hof kan voorsiening maak vir direkte toegang tot die Hof waar dit in belang van geregtigheid is om dit te doen ten opsigte van enige aangeleentheid waaroor die Hof jurisdiksie het."

Reël 17(1) van die reëls van die konstitusionele hof bepaal dat die hof slegs in uitsonderlike omstandighede direkte toegang kan verleen. Hierdie uitsonderlike omstandighede bestaan slegs waar die saak so dringend of andersins van sodanige openbare belang is dat indien die gewone prosedure gevolg word dit die openbare belang of die belange van geregtigheid en goeie staatsbestuur sal benadeel. Die regter benadruk verder dat dit binne die diskresie van die konstitusionele hof val om direkte toegang te verleen en dat dit nie direkte toegang sal verleen in die afwesigheid van buitengewone omstandighede nie. Daar word na verskeie sake verwys waar die hof wel direkte toegang verleen het, maar daar word herhaaldelik beklemtoon dat uitsonderlike omstandighede moet bestaan en dat elke saak op sy eie unieke feite beoordeel moet word.

Die hof word egter nie oortuig dat die betrokke saak uitsonderlike omstandighede daarstel wat direkte toegang magtig nie. Die volgende redes word hiervoor gegee: Die ongeluk het voor die inwerkingtreding van die Grondwet plaasgevind en die hof kan gevolglik geen bevel in die guns van die applikant maak nie; die respondent staan die bevel teen; daar is geen bewering van enige "disruption" in die besigheid van die fonds wat voldoende is om direkte toegang tot die konstitusionele hof te waarborg nie; en daar is ook nie bewys dat 'n gekwalifiseerde litigant probleme sou hê om die hof vir verligting te nader nie. Ten slotte bestaan daar geen ander besondere omstandighede wat deur die applikant aangevoer word wat direkte toegang tot die konstitusionele hof sou waarborg nie.

Die saak word derhalwe na die Transvaalse Afdeling van die Hooggeregshof terugverwys.

4 Samevatting

Dit is inderdaad so dat die hoë gebruiksfrekwensie van motorvoertuie 'n groot benadelingspotensiaal vir passasiers, voetgangers, fietsryers en bestuurders inhou. Dit is ook so dat indien hierdie risiko as gevolg van 'n motorongeluk realiseer, die nalatige dader in die meeste gevalle nie in staat is om die skade te vergoed nie. Die wanverhouding tussen die omvang van die skade en die vermoë van die gewone man (delikspleger) is dan ook die rede vir die huidige stelsel van motorvoertuigongelukkevergoeding. Dit word deur 'n heffing op brandstofverkope gefinansier sodat daardie persone wat die meeste op die pad is, meer tot die sentrale fonds (MMF) bydra. Hieruit word volle of gedeeltelike vergoeding betaal aan sekere persone wat skade ly weens eie liggaamlike beserings of die liggaamlike besering of dood van 'n ander wat uit motorongelukke voortspruit. Die stelsel verskaf sekuriteit aan sekere benadeelde persone dat hulle wel vergoeding sal kan verhaal. In openbare belang is daar reeds gedurende die veertigerjare ingegryp ten einde hierdie aangeleentheid te reël.

Dat daar nog baie kritiek teen die stelsel ingebring kan word, is waar. MMF-vergoeding bied inderdaad hulp aan slegs 'n geringe persentasie van alle persone wat beserings opgedoen. Tog slaag dit in 'n mate daarin om 'n ekonomies-sosiale probleem te bekamp. Daarom kan die MMF-wet as 'n sosiale maatreël beskou word. Soos die stelsel tans funksioneer, kan die aanspreeklikheid van die MMF of sy benoemde agent nie absoluut en onvermydelik geld nie, óf onbeperk in alle gevalle toepassing vind nie. 'n Stelsel wat wel daarvoor voorsiening maak, sal die motoris baie meer kos. Om sodanige koste vir die motoris laag te hou, is die noodwendige effek van die stelsel dat die MMF nie op die oomblik vir die skade van alle persone kan instaan nie (kyk Hodes *Suzman, Gordon and*

Hodes on the law of compulsory motor vehicle insurance in South Africa (1982) 191). Soos dit tans daar uitsien, is die MMF nie finansieel baie sterk nie. 'n Wysiging van die stelsel sonder vasstelling van 'n addisionele inkomstebron sal die fonds finansieel knak, en dit sal voorwaar nie in belang van geregtigheid wees nie.

Een van die oorwegings wat die beperkings en uitsluitings ten opsigte van passasiers ten grondslag lê, is die moontlikheid van samespanning tussen 'n passasier en die bestuurder van die betrokke motorvoertuig wat die bewys van die bestuurder se skuld betref. 'n Bykomende oogmerk is om 'n kwantitatiewe beperking te plaas op die omvang van die aanspreeklikheid wat uit 'n enkele voorval vir die MMF of sy benoemde agent kan ontstaan (Loubser *Inleiding tot MMF-wetgewing* (1993) 19; Hodes 191).

Daar moet duidelik verstaan word dat die bepalings in artikel 46(a)(ii) nie beteken dat die passasier heeltemal sonder remedie is nie. Dit is steeds vir die benadeelde moontlik om, waar die fonds of sy benoemde agent onbevoeg is om skadevergoeding te betaal, die eienaar of bestuurder aan te spreek. Slegs in die mate waarin die skade kragtens die MMF-wet verhaal kan word, is 'n eiser verplig om die MMF of sy agent aan te spreek en word hy of sy verbied om die eienaar of bestuurder aan te spreek. Laasgenoemde word van sy gemeenregtelike aanspreeklikheid onthef slegs tot die omvang van die skadevergoeding wat kragtens die MMF-wet gebied word. Die eienaar of bestuurder mag derhalwe kragtens die gemenereg gedagvaar word vir enige skade wat die R25 000 oorskry. Artikel 46(a)(ii) is tipies so 'n geval. Die belang van geregtigheid word nie voldoende deur die bepalings in die wiele gery nie as ag geslaan word op die feit dat 'n kwantitatiewe beperking noodsaaklik is as gevolg van die finansiële posisie van die MMF, asook op die rede waarom die besondere kategorie persone soos in artikel 46(a)(ii) uitgesonder word, naamlik die moontlikheid van samespanning.

Gesien in hierdie lig sal 'n argument wat op die "ongelyke" regsposisie van die passasier gegrond is, nie slaag nie aangesien die MMF-vergoedingstelsel 'n deur en deur sosiale maatreël is wat in 'n sekere mate welkome en effektiewe verligting bring, maar terselfdertyd nie 'n benadeelde se gemeenregtelike eis totaal wegneem nie. Die partye is nie werklik in 'n ongelyke bedingingsposisie nie.

Die wisselwerking tussen die Wet op Vergoeding vir Beroepsbeserings en -siektes en die MMF-wet kom daarop neer dat 'n werknemer of sy afhanklike wat ingevolge albei wette op vergoeding geregtig is, nie dubbele vergoeding kan verhaal nie (sien bv Loubser 27). Dit beteken ook dat niks ingevolge die MMF-wet verhaalbaar is indien meer as R25 000 ingevolge die Wet op Vergoeding vir Beroepsbeserings en -siektes verhaalbaar is nie. Die verhaling van dubbele vergoeding sou onbillik wees.

Ten aanvang is gewys op die standpunt dat die vereiste dat die verwysing van 'n saak na die konstitusionele hof "in belang van geregtigheid" moet wees, 'n ander oorweging impliseer, naamlik dat daar 'n "redelike vooruitsig bestaan dat die verwysing suksesvol sal wees". Hierdie oorweging word nie spesifiek deur regter O'Regan behandel nie. Met die eerste oogopslag wil 'n mens sonder meer aanvaar dat 'n verwysing wat motorvoertuigongelukkevergoeding betref, altyd 'n redelike vooruitsig op sukses sal bewerkstellig omdat dit net redelik, billik en regverdig is dat elke persoon wat in so 'n ongeluk beseer word ten volle vir bedoelde skade vergoed moet word. Dit is 'n situasie waarna enige gemeenskap moet strewe. Maar solank ons stelsel op bogenoemde skuldbeginsel gegrond is

en skuldlose aanspreeklikheidsversekering nie van toepassing of verpligtend is nie, kan aanvaar word dat sekere beperkings moet bestaan. Soos reeds gemeld, sal skuldlose aanspreeklikheidsdekking die motoris baie meer kos. Baie motorvoertuigeienaars sal dit nie kan bekostig nie. Koste word laag gehou deur beperkings daar te stel, en die billikste wyse om te beperk, is deur grense te stel vir die eise van passasiers in die motorvoertuig van die skuldige bestuurder of eienaar. Derhalwe is dit ons mening dat 'n verwysing betreffende motorvoertuigongelukkevergoeding en die eis van bedoelde klas passasier tans nie sonder meer 'n redelike vooruitsig op sukses het nie.

LEONIE STANDER
LINDA JANSEN VAN RENSBURG
Potchefstroomse Universiteit vir CHO

EMOSIONELE SKOK, JURIDIESE KOUSALITEIT EN BYDRAENDE NALATIGHEID

Gibson v Berkowitz 1996 4 SA 1024 (W)

Tydens ginekologiese behandeling het die eerste verweerder op 'n nalatige wyse die geslagsdele van die eiseres met onverdunde suur gespoel wat ernstige brandwonde veroorsaak het. As gevolg hiervan het die eiseres geweldige pyn en ongemak verduur en emosionele en psigiese nadeel gely. Een van die nadelige gevolge was 'n ernstige depressie en angstoestand. Sy eis kompensasie vir mediese koste, verlies van verdienste, pyn, lyding en verlies van lewensgenietinge.

Vir ons doeleindes is *eerstens* die kwessie van aanspreeklikheid vir die emosionele skok en psigiese nadeel wat gevolg het op die eiseres se fisiese beserings ("the psychological *sequelae* to plaintiff's injuries" – 1038C ev) van primêre belang, en dan veral die delikselement juridiese kousaliteit in hierdie verband. *Tweedens* word die onderskeid tussen die toets vir juridiese kousaliteit en dié vir bydraende nalatigheid uitgelig; en *derdens* word kortliks ondersoek of die hof nie ook aandag moes gegee het aan die moontlikheid dat die eiseres haar mitigasieplig (die verpligting om haar skade nie te laat oploop nie) versaak het nie.

1 Regter Claassen bevestig ten aanvang dat psigiese nadeel in beginsel die Aquiliese aksie (en die aksie weens pyn en lyding) fundeer (1038C–D). *In casu* val die fokus veral op die kwessie van 'n juridiese kousale verband tussen die verweerder se nalatige optrede en die eiseres se psigiese benadeling. Die verweerder beweer eerstens dat 'n kombinasie van faktore wat nie met die verweerder se nalatigheid verband hou nie, die eiseres se depressiewe toestand veroorsaak het; en tweedens dat die eiseres se onredelike versuim om haar aan psigoterapie te onderwerp, 'n tussentredende oorsaak ("supervening cause") daarstel wat die kousale ketting verbreek het.

In verband met kousaliteit bevestig die hof die onderskeid tussen feitelike en juridiese kousaliteit. Alhoewel feitelike kousaliteit nie 'n twispunt in die saak was nie (die verweerder het toegegee dat feitelike kousaliteit aanwesig was –

1041G–I), wek die regter se opmerkings in hierdie verband ongelukkig die indruk dat hy die "but for"- of *conditio sine qua non*-benadering ten onregte as 'n "toets" vir feitelike kousaliteit beskou:

> "The test for factual causation is usually not too difficult to apply to any given circumstances. The *sine qua non* test normally results in an easy answer as to whether or not the harm would have resulted 'but for' the negligent conduct" (1040F–G).

Op grond van hierdie benadering het die regter geen moeite om feitelike kousaliteit te bevind nie. Hy verklaar: "'But for' the negligent burning incident, the plaintiff would never have fallen into her present pit of depression" (1041H).

Soos by herhaling aangetoon is, kan gemelde "toets" nie goedgepraat word nie. Sonder om die aangeleentheid weer in besonderhede te bespreek, moet dit duidelik gestel word dat die "toets" in werklikheid geen kousaliteitstoets is nie, maar hoogstens 'n *ex post facto*-wyse om 'n voorafbepaalde kousale verband uit te druk (sien oa Neethling, Potgieter en Visser *Deliktereg* (1996) 170–171; Snyman *Criminal law* (1995) 72; Neethling en Potgieter "Juridiese kousaliteit bereik volle wasdom" 1995 *THRHR* 347).

Wat juridiese kousaliteit betref, volg regter Claassen die soepele benadering van *S v Mokgethi* 1990 1 SA 32 (A), *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) en *Smit v Abrahams* 1994 4 SA 1 (A). Hier is die kernvraag of daar 'n genoegsaam noue verband tussen die dader se handeling en die gevolg bestaan dat die gevolg die dader, met inagneming van beleidsoorwegings op grond van billikheid, redelikheid en regverdigheid, toegereken kan word. Die bestaande juridiese kousaliteitsmaatstawwe (soos "direct consequences", adekwate veroorsaking en redelike voorsienbaarheid) het hiervolgens nie 'n deurslaggewende betekenis nie, maar kan wel 'n subsidiêre rol speel by die bepaling van juridiese kousaliteit aan die hand van die elastiese benadering (sien Neethling, Potgieter en Visser 178–181).

Toegepas op die feite van die saak, bevind regter Claassen dat die psigiese benadeling wel die verweerder toegereken kan word:

> "Taking into account reasonableness and equity, I am of the view that the present condition is justifiably linked to the defendant's negligence. Her present worsened depressive disorder is not harm of an altogether different kind from that which one would normally expect after an injury of the kind suffered by the plaintiff. A more severe form of depression, ie a major depressive disorder plus anxiety, following upon a burning of a woman's genitals is not an unexpected phenomenon. It is not a result of 'a different kind from that which would otherwise have resulted from the actor's negligence' (*per* Hiemstra J in *Alston and Another v Marine & Trade Insurance Co Ltd* 1964 (4) SA 112 (W) at 116F–G); it is a normal response to the stimuli created by the negligent injury to the plaintiff (see the *Alston* case *supra* at 117A), particularly so because of her neurotic state of learned helplessness and her inherent personality traits. This is merely a case of a young woman who was incapable of facing the results of her injuries with 'normal' fortitude and courage. In essence her vulnerability stemmed from the weakening effect which her pre-existing personality traits had on her ability to withstand trauma. Hers is a 'thin skull' case in the emotional and psychological sense. That being so, it seems to me that her emotional over-reaction to the stimuli emanating from these additional stressors cannot be regarded as a supervening cause and the defendants must be held liable. It must be remembered that her *sequelae* stemmed from actual physical injury to herself. It was not a case of merely witnessing a traumatic event which induced shock causing subsequent psychological *sequelae*. In cases where psychological *sequelae* follow after actual physical injury, there is less likelihood of

> 'limitless' liability and therefore greater scope for a flexible approach to include liability for psychological *sequelae* which are further removed from the original negligent conduct" (1048G–1049C).

Die regter verklaar voorts (1049I–1050E):

> "The thin skull rule applies . . . The defendants therefore found their victim as she was with all her personality traits which played an important although unquantifiable role in causing the collapse.
>
> The defendants also found the plaintiff with all her built-in stresses and strains arising out of her family-related problems. It is not possible to quantify the influence of these stressors. And thus the fact that the collapse occurred later rather than sooner is with hindsight of little consequence. I respectfully agree with what Berman AJ said in *Masiba and Another v Constantia Insurance Co Ltd and Another* 1982 (4) SA 333 (C) at 342D–F:
>
> 'Regard being had to the physical condition of the deceased and his long history of hypertension the present case affords an almost classic instance of the so-called "thin skull case", the rule being that a negligent defendant is bound to take his victim as he finds him, see *Wilson v Birt (Pty) Ltd* 1963 (2) SA 508 (D) at 516. It being a *sine qua non* of liability where non-physical injury is inflicted that this harm should have been foreseeable, the *application of the "thin skull rule" to cases involving injury of this nature is that once a psychiatric injury of gravity sufficient to render it actionable is foreseeable, then the injured party can recover for more extensive psychiatric damage which is attributable to his pre-existing weakness*, see *Bester* [*v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A)] *supra* at 779' . . .
>
> Applying these principles to the present case I am of the opinion that the defendants are liable for all forms of nervous shock and psychological trauma, the lesser as well as the more serious, following after the injury because it is irrelevant whether the precise nature and extent of plaintiff's psychological trauma could have been foreseen."

Gevolglik verwerp die regter ook die argument dat ander faktore as die verweerder se nalatigheid die eiseres se psigiese benadeling veroorsaak het. Hierdie faktore het dus nie 'n *novus actus interveniens* uitgemaak nie (1050H).

Regter Claassen se benadering tot juridiese kousaliteit in die geval van psigiese benadeling en emosionele skok verdien in die algemeen instemming. Soos die regter dit stel, gaan dit hier om 'n sogenaamde "psigiese eierskedelgeval". Hierdie tipe geval doen hom voor waar die eiser, as gevolg van die een of ander liggaamlike of psigiese swakheid, ernstiger benadeling opdoen weens die dader se optrede as wat die geval sou gewees het as die eiser nie aan so 'n swakheid gely het nie. Meeste juriste is dit eens dat die dader in so 'n geval aanspreeklik moet wees ook vir die benadeling wat aan die aanwesigheid van die betrokke swakheid toegeskryf kan word – hierdie beginsel word in die spreuk "you must take your victim as you find him" weerspieël en staan ook as die *talem qualem*-reël bekend (Neethling, Potgieter en Visser 198–199). Daar bestaan egter nie eenstemmigheid oor die juridiese grondslag vir sodanige aanspreeklikheid nie. Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 59 ev is byvoorbeeld van mening dat die redelike voorsienbaarheidsnorm ook in hierdie gevalle as grondslag van aanspreeklikheid dien. Hy geen nietemin toe dat 'n mens hier met 'n afwyking van die normale toepassing van die norm te doen het aangesien dit oor 'n aantasting van die mens se hoogste regsgoed, sy fisies-psigiese integriteit, gaan. Van der Walt *Delict: Principles and cases* (1979) 100 weer is van mening dat benadeling in hierdie gevalle gewoonlik nie redelik voorsienbaar is nie en dat dit gevolglik

ongewens sou wees om die voorsienbaarheidsmaatstaf so te rek dat aanspreeklikheid daarvolgens verklaar word. Hy doen gevolglik aan die hand dat aanspreeklikheid vir fisies-psigiese eierskedelgevalle volgens die "direct consequences"-maatstaf, soos neergelê in die stelreël "the defendant takes his victim as he finds him", bepaal moet word. Die aanvaarbaarste benadering tot die sogenaamde eierskedelgevalle word moontlik gemaak deur die soepel maatstaf vir juridiese kousaliteit en geïllustreer deur appèlregter Botha se uitspraak in *Smit v Abrahams* 1994 4 SA 1 (A) 14 ev, wat oor 'n sogenaamde "finansiële eierskedelgeval" gehandel het. Hiervolgens is die feit dat die eiser 'n "eierskedelgeval" is,

> "maar net nog 'n feit wat tesame met al die ander feite van elke besondere saak in oorweging geneem moet word by die toepassing van die 'oorheersende elastiese maatstaf' waarvolgens [op grond van redelikheid, billikheid en regverdigheid] bepaal word of die betrokke skade die verweerder toegereken behoort te word" (15).

Die kernvraag is met ander woorde nie of die skade 'n "direct consequence" of "redelikerwys voorsienbaar" was nie, maar of dit in die lig van al die omstandighede van die saak, onder meer die eierskedelkwessie, die verweerder redelikerwys toegereken behoort te word.

Spesifiek wat emosionele skok betref, het die howe tot dusver hoofsaaklik die voorsienbaarheidsmaatstaf aangewend. (In 'n onlangse beslissing, *Clinton-Parker v Administrator, Transvaal* 1996 2 SA 37 (W) 52 ev 57, lig die hof ook voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf uit maar beklemtoon dat dit net 'n faktor is by die toepassing van die soepele benadering tot juridiese kousaliteit.) Die volgende faktore speel 'n rol by die voorsienbaarheidsmaatstaf (Neethling, Potgieter en Visser 285–286): die feit dat die skok uit 'n *fisiese besering* voortgevloei het (soos *in casu*); die feit dat die benadeelde *in persoonlike gevaar* van fisiese besering verkeer het; die feit dat die slagoffer 'n *naverwant of goeie vriend is* van 'n persoon wat gedood of beseer is in die voorval wat die emosionele skok veroorsaak het; en die feit dat die benadeelde die gebeurtenis wat die skok teweeggebring het, *persoonlik waargeneem* het. Nou is dit belangrik om daarop te let dat indien eenmaal bevind is dat die gewraakte emosionele skok redelikerwys voorsienbaar was, die dader volgens die howe aanspreeklik is vir enige nadelige fisies-psigiese gevolg wat daaruit resulteer ongeag of sodanige gevolg ook voorsienbaar was. Die "thin skull"-reël dat "the wrongdoer takes his victim as he finds him", vind dus hier toepassing. Dienooreenkomstig kan 'n verweerder nie aanspreeklikheid ontkom deur te bewys dat die benadeelde *besonder vatbaar* vir die nadelige gevolge van die skok was en dat die gevolge daarom nie redelikerwys voorsienbaar was nie (sien *Masiba supra* 342; *Boswell v Minister of Police* 1978 3 SA 268 (OK) 272). Dieselfde standpunt blyk uit die uitspraak van regter Claassen in die onderhawige saak (1050E–G):

> "Applying these principles to the present case I am of the opinion that the defendants are liable for all forms of nervous shock and psychological trauma, the lesser as well as the more serious, following after the injury because it is irrelevant whether the precise nature and extent of plaintiff's psychological trauma could have been foreseen."

Hierdie standpunt lyk in die lig van die soepele benadering in *Smit v Abrahams supra* 15 egter te rigied. Dit kan in 'n gegewe geval waar fisiese beserings veroorsaak is, tog gebeur dat 'n verskuilde psigiese skadepos so ver van die skadestigtende handeling verwyder is dat dit nie alleen hoegenaamd nie redelikerwys

voorsienbaar is nie, maar dat dit ook op grond van oorwegings van billikheid, regverdigheid en redelikheid die dader nie toegereken kan word nie. Daarom is die soepele benadering ook in die eierskedelgevalle te verkies.

2 Regter Claassen onderskei tussen die toets vir juridiese kousaliteit en dié vir bydraende nalatigheid met verwysing na die verweer dat die eiseres se onredelike versuim om haar aan psigoterapie te onderwerp, 'n tussentredende oorsaak ("supervening cause") daarstel wat die kousale ketting verbreek het. Hy stel dit soos volg (1051C–1052E):

> "I was somewhat concerned about the true nature of this defence . . . If I hold that the plaintiff negligently failed to submit to psychotherapy, is her negligence to be regarded as contributory negligence or is her negligence taken into account when legal causation is evaluated? Is it truly a defence of a *novus actus inteveniens* interrupting legal causation or is it a defence of contributory negligence by the plaintiff which causes her damages to be reduced by apportionment? If the latter, then plaintiff's damages may be reduced due to her contributory negligence . . ."

Die regter toon dan met verwysing na regspraak aan dat "skuld" ingevolge artikel 1(1)(a) van die Wet op Verdeling van Skadevergoeding 34 van 1956 verwys na sowel skuld met betrekking tot die skadestigtende gebeurtenis as skuld met betrekking tot die aard en omvang van die skade (sien ook Neethling, Potgieter en Visser 158–159), en laat hierop volg:

> "A close study of these cases has convinced me that they intend to convey the notion that the plaintiff's 'fault' which may help to cause both the harmful event and the subsequent nature and extent of his damages, is restricted to 'pre-accident' or 'pre-tortious' fault. Put differently: it is the plaintiff's negligent conduct *prior* to the commission of the defendants' delict which is judged as being relevant for purposes of apportioning the plaintiff's damages, and not his negligent conduct *after* the commission of the delict. Thus, as I understand the law, a plaintiff's negligent conduct subsequent to the harmful event which caused his damages, cannot be the subject of apportionment in terms of the Apportionment of Damages Act . . .
>
> A distinction should therefore be drawn between the parties' negligence prior to the harmful event and any relevant negligence after the harmful event. In the case of a plaintiff, his pre-delictual negligence will trigger the application of contributory negligence to reduce his damages. The plaintiff's post-delictual negligence will, however, affect the principles of legal causation (or remoteness) which may reduce his damages. *Post delictor*, the plaintiff's negligent conduct may be regarded as an *actus novus interveniens* which breaks the chain of causality sufficiently to absolve the defendants from liability for the plaintiff's damages. It is therefore in terms of the doctrine of legal causation (and not contributory negligence) that I will view the defence raised . . . of plaintiff's alleged refusal to submit to psychotherapy."

Hierdie onderskeid wat die toets vir bydraende nalatigheid beperk tot die optrede van die eiser *voor* die skadestigtende gebeurtenis en dié vir juridiese kousaliteit tot handelinge van die eiser wat *daarna* verrig is – hier kom die kwessie van 'n *novus actus interveniens* (sien Neethling, Potgieter en Visser 196–198) uiteraard ter sprake – lyk vir ons teoreties suiwer en prakties nuttig en uitvoerbaar. Daarom verdien dit volle steun.

3 Ten slotte kon die verweer dat die eiseres onredelik versuim het om haar aan psigoterapie te onderwerp, ook oor die boeg van die eiseres se mitigasieplig (dws die plig om skade nie te laat oploop nie) gegooi gewees het (sien hieroor Visser en Potgieter *Skadevergoedingsreg* (1993) 237 ev; Neethling, Potgieter en Visser

228–229). Dit is 'n beginsel van die deliktereg dat 'n eiser in 'n skadevergoedingsgeding nie vergoeding kan verhaal nie vir skade wat die feitelike gevolg van die verweerder se optrede is, maar tog deur die eiser voorkom kon gewees het deur die doen van redelike stappe. 'n Versuim om te verhinder dat skade oploop, kan gesien word as 'n versuim aan die kant van die eiser om redelike stappe te doen om die aanvanklike skade te beperk, of 'n versuim om te keer dat daar verdere skade intree. Hierdie plig ontstaan sodra die eiser werklik skade ly en weet of redelikerwys behoort te weet dat hy sy skade moet beperk. Op die feite lyk dit egter onwaarskynlik of hierdie verweer sou geslaag het aangesien die regter in ieder geval nie saamgestem het met die bewering "that she 'unreasonably refused' to submit herself to psychotherapy" nie (1053C). Gevolglik sou waarskynlik nie bewys kon word dat die eiseres redelikerwys behoort te geweet het dat sy haar skade moet beperk nie.

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

VADERLIKE OMGANGSREG, DIE BUITE-EGTELIKE KIND EN REGSANTROPOLOGIESE ONVERANDERLIKES

T v M 1997 1 SA 54 (A)

1 Inleiding

Die relevante feite in dié saak is die volgende: T, die appellant, het by die hooggeregshof aansoek gedoen om 'n omgangsreg met sy buite-egtelike dogter, Koketso. Dit is suksesvol deur haar moeder, M, teengestaan. Hierdie aansoek is gedoen voor die beslissing van die appèlhof in *B v S* 1995 3 SA (A) 571 en een van die redes vir die toestaan van 'n reg tot appèl deur die verhoorhof was juis gegrond op die (destydse) onsekere regsposisie. In sy uitspraak wys appèlregter Scott daarop dat die partye nie in 'n saamblyverhouding gestaan het nie. Hoewel hulle ouderdomme nie uit die dokumentasie blyk nie, was hulle klaarblyklik nog baie jonk ten tyde van Koketso se geboorte. M het nog by haar ouers ingewoon. Dit blyk egter dat die partye 'n standhoudende verhouding gehad het wat vanaf 1985 tot 1991 geduur het. Na die geboorte van Koketso het M tuis gebly totdat sy in Augustus 1986 weer begin werk het. Aangesien haar ouers ook gewerk het, is afgespreek dat T Koketso elke oggend sou oplaai en dan na sy ouers sou neem waar sy stiefma na haar sou omsien. Saans het hy haar weer na M se huis geneem. In November 1986, toe Koketso 9 maande oud was, het M Mamelodi verlaat en na Port Elizabeth gegaan waar sy opleiding as verpleegster tot Oktober 1987 ondergaan het. Koketso het egter nie saam met haar gegaan nie. Die verhouding tussen T en Koketso het voortgegaan soos voorheen. Met haar terugkeer het M werk as verpleegster by die Ga-Rankuwa-hospitaal aanvaar. Die verhouding tussen die partye was in daardie stadium nog goed. In Augustus 1988 is T, wat 'n leerling sisteem-analitikus was, na Pietersburg oorgeplaas. Hy het gewoonlik naweke na Pretoria teruggekeer maar by geleenthede het M en

Koketso naweke by hom in Pietersburg deurgebring. In Maart 1991 het T na Pretoria teruggekeer, toe Koketso reeds vyf jaar oud was. Sy is by 'n pre-primêre skool in Pretoria ingeskryf en T het die maandelikse gelde van R300 betaal. In April 1991 het M agtergekom dat T 'n verhouding met 'n ander vrou gehad het en hulle verhouding beëindig. T het voortgegaan om Koketso te sien maar die verhouding tussen die partye was alles behalwe hartlik. In Februarie 1992 het M vir T meegedeel dat hy nie meer Koketso mag besoek nie. In daardie stadium was sy ses jaar oud en in 'n privaatskool geplaas. Die skoolgelde is deur T se werkgewer betaal. T het Koketso by die skool besoek maar dit is op aandrang van M beëindig. Vroeg in 1992 het M 'n onderhoudseis teen T ingestel wat om jurisdiksionele redes afgewys is. In April 1992 het M 'n klagte van verkragting teen T gelê. T is aangekla en onskuldig bevind, waarop hy 'n eis weens kwaadwillige vervolging teen haar ingestel het. 'n Bedrag van R7 000 is by verstek toegeken. Intussen het M 'n verhouding met 'n ander man, 'n sekere Mamabolo, aangeknoop. Hulle is in Februarie 1993 getroud. Mamabolo het 'n goeie verhouding met Koketso ontwikkel en in die loop van 1993 'n proses begin om haar aan te neem. Dit was die toedrag van sake toe T in Augustus 1993 die aansoek, wat die voorwerp van die onderhawige appèl is, gerig het. Na teenstrydige deskundige verslae is T se aansoek deur die verhoorhof afgewys.

Die uitspraak van die appèlhof in dié saak word vervolgens onder die loep geneem. Die onderhawige problematiek word daarna in 'n breë regsantropologiese konteks geplaas.

2 Evaluasie van die uitspraak

In sy uitspraak verwys die regter na die voorafgaande beslissing van dieselfde hof in *B v S supra* en vat die regsposisie soos volg saam:

> "While at common law the father of an illegitimate child, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non-custodian father is dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child's welfare which is the central and constant consideration. Accordingly, and to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Furthermore, when the question of access is judicially determined for the first time, there is no *onus* in the sense of an evidentiary burden or so-called risk of non-persuasion on either party. This is because the litigation really involves a judicial investigation in which the Court can call evidence *mero motu* and is not adversarial. Accordingly, a Court should be slow to determine facts by way of the usual approach adopted in opposed motions . . ." (57–58).

Die probleem wat ek met dié benadering in die algemeen het, kan aan die hand van die volgende hipotetiese voorbeeld verduidelik word: A en B is getroud en uit die huwelik word 'n kind C gebore. Tien jaar later word die huwelik ontbind. A doen aansoek om 'n omgangsreg met C. Die hof bevind dat dit in die kind se belang is om sy sosiale omgang (interaksie) met C te verbreek. Die eerste vraag wat by 'n mens opkom, is wat die regsposisie dan die voorafgaande tien jaar was. Was A se sosiale omgang met C regmatig of nie? Indien die antwoord nee is, beteken dit dat die sosiale omgang van duisende vaders met hulle kinders met wie hulle in 'n gesinsverhouding staan, onregmatig is. Aan die ouers se omgangsreg met hulle kind moet myns insiens 'n voorjuridiese en in besonder 'n

natuurmatig-sosiale grondslag toegeken word. Of word van die ouers verwag om elke keer as 'n kind vir hulle gebore word, eers die hof se toestemming te vra voordat hulle sosiaal met die kind omgaan? Indien daar 'n geskil bestaan oor die vraag of aan 'n ouer 'n omgangsreg met sy kind toegestaan moet word, is die belange van die kind van deurslaggewende aard. Is die hof van mening dat dit in belang van die kind is, ontstaan 'n interaksiereg, met ander woorde beide die ouer en kind het 'n omgangsreg met mekaar (sien Labuschagne "Vaderlike omgangsreg: die buite-egtelike kind en die werklikheidsonderbou van geregtigheid" 1996 *THRHR* 182). In die New Yorkse saak *Nancy M v Brian M* 642 NYS 2d 66 (AD 2 Dept 1996) 67 word dan ook na die ouerlike omgangsreg verwys as "a joint right of the noncustodial parent and the child".

Die opmerking wat gemaak word dat die ondersoek na die vaderlike omgangsreg "involves a judicial investigation in which the Court can call evidence *mero motu* and is not adversarial", sou beslis die beste belange van die kind kon dien (58). Die vraag bly steeds: wat sou die posisie by twyfel wees. In so 'n geval sou 'n omgangsreg met die betrokke kind (en van die kind met die ouer) myns insiens afgewys moet word. In die lig hiervan moet daar tog, binne tradisionele denkpatrone, sprake van 'n bewyslas wees. Die nadeel van onsekerheid kom die betrokke ouer toe, met ander woorde een of ander vorm van bewyslas rus op hom of haar.

Appèlregter Scott maak vervolgens die volgende opmerking:

> "Generally speaking, I think, it can be accepted that once a natural bond between parent and child (whether legitimate or illegitimate) has been established it would ordinarily be in the best interests of the child that the relationship be maintained, unless there are particular factors present which are of such a nature that the welfare of the child demands that it be deprived of the opportunity of maintaining contact with the parent in question" (60).

Hierdie siening beweeg duidelik in die rigting van die betekenis wat Europese howe aan die begrip "family life" in artikel 8(1) van die Europese Verdrag vir die Regte van die Mens toeken. Hiervolgens het 'n ongehude vader 'n omgangsreg met sy buite-egtelike kind indien hy in 'n gesinslewe ("family life") met sy kind gestaan het (*Keegan v Ireland* EHRC 26 Mei 1994, CEDH, Series A vol 290, NJ 1995, 247 par 44–45; Hoge Raad 11/6/1993, NJ 1993, 520). Die begrip "gesinslewe" is nie beperk tot 'n gesinslewe met 'n juridiese huwelik as basis nie maar omvat ook 'n suiwer sosiologiese gesinslewe (Labuschagne "Vaderlike omgangsreg en die toepassing van die vermoede *pater est quem nuptiae demonstrant* op 'n konkubinaat" 1994 *Obiter* 266; vgl Schwellnus "The legal position of cohabitees in the South African law" 1995 *Obiter* 135). Ek het by 'n vorige geleentheid aan die hand gedoen dat sodanige omgangsreg reeds behoort te vestig waar die ongehude vader sy verantwoordelikhede teenoor sy buite-egtelike kind erken ("Aanvaarding van verantwoordelikhede as ontstaansbron van 'n omgangsreg vir 'n ongetroude vader met sy buite-egtelike kind" 1995 *TSAR* 161; sien verder Goldberg "The right of access of a father of an extramarital child: Visited again" 1993 *SALJ* 274; Schwellnus "Paternal access to illegitimate children – A constitutional approach" 1996 *Obiter* 159–160). Kruger, Blackbeard en De Jongh maak die volgende opmerking:

> "Die oplossing wat deur sommige outeurs voorgestel word dat net 'n erkennende of deelnemende vader toegang behoort te hê, of dat 'n gevestigde ouer-kind-verhouding reeds moet bestaan, sal die vader van die buite-egtelike kind se reeds benarde posisie net verder verswak.'n Mens kan jou nouliks voorstel hoe 'n vader wat reeds vanuit die staanspoor nie deur die moeder toegelaat is om sy buite-

egtelike kind te sien nie, die bestaan van 'n gevestigde ouer-kind-verhouding sal kan bewys" ("Die vader van die buite-egtelike kind se toegangsreg" 1993 *THRHR* 703–704).

Volgens die benadering wat ek aan die hand doen, sou 'n ongehude vader wat bereid is om sy verantwoordelikhede na te kom en deur die moeder verhinder word om dit te doen, by die hof om 'n omgangsreg aansoek kan doen. Hoewel die moeder se houding 'n faktor is wat by bepaling van die beste belang van die kind in aanmerking geneem behoort te word, is dit nie die enigste faktor nie (sien Kruger "Die toegangsbevoegdhede van die ongetroude vader – is die finale woord gespreek?" 1996 *THRHR* 519).

3 Konklusie

Ek het by vorige geleenthede daarop gewys dat daar 'n antropologies-universele evolusieproses van egalisering of gelykmaking in die sosio-juridiese waardestrukture van die mens werksaam is ("Evolusielyne in die regsantropologie" 1996 *Suid-Afrikaanse Tydskrif vir Etnologie* 42; "Eengeslaghuwelike: 'n Menseregtelike en regsevolusionêre perspektief" 1996 *SAJHR* 537). Aangesien hierdie proses 'n natuurbasis het, is dit 'n regsantropologiese onveranderlike, met ander woorde reëls en houdings sou dit kon vertraag maar nooit uitskakel nie, tensy die mens homself vernietig (sien verder Labuschagne "Regsnavorsing: 'n Meerdimensionele en regsevolusionêre perspektief" 1994 *TRW* 93–95). In die lig hiervan is daar 'n voortdurende proses van gelykstelling van die juridiese werklikheid met die sosiologiese werklikheid, dit wil sê met die beleweniswerklikheid van regsonderdane. Vandaar dat die konkubinaat in 'n toenemende mate met die juridiese huwelik gelykgestel word (sien Labuschagne "Die vermoede *pater est quem nuptiae demonstrant*, sosio-morele transformasie en die reg op nakomskennis" 1996 *Obiter* 30). Die ongehude vader wat in 'n sosiologiese gesinsverhouding met sy buite-egtelike kind staan, verkry in 'n toenemende mate wêreldwyd dieselfde regte as 'n gehude vader wat in 'n (sosiologiese) gesinsverhouding met sy kind staan. Aan die feitelike of werklike, dit wil sê die sosiologiese, word, sover dit intiem-menslike verhoudinge betref, prioriteit bo die abstrak-juridiese gegee. Hierdie ontwikkeling sal in finale instansie ook nie ons regstelsel verbygaan nie.

JMT LABUSCHAGNE
Universiteit van Pretoria

That it is this Court's duty to develop the common law, in the manner laid down in the Constitution, is clear and I would, of course, endorse the importance of the rights of freedom of thought and speech as one of the main pillars of a democratic society based on individual freedom (per Plewman JA in *Hix Networking Technologies v Systems Publishers (Pty) Ltd* 1997 1 SA 391 (A) 400).

BOEKE

HOCKLY SE INSOLVENSIEREG

deur ROBERT SHARROCK, ELMARIE DE LA REY, KATHLEEN VAN DER LINDE en ALASTAIR SMITH

Juta Kaapstad, Wetton, Johannesburg 1996; xxxiv en 367 bl

Prys R130,00 (sagteband)

Hierdie boek is 'n vertaling van die sesde uitgawe van *Hockly's Insolvency law*. In die voorwoord dui die skrywers aan dat die doel met die boek is om 'n "beknopte, maar nogtans redelik gedetailleerde" weergawe van die insolvensiereg te gee. Die boek is veral gemik op studente maar poog ook om 'n gids vir insolvensiepraktisyns te wees.

'n Kort inhoudsopgawe aan die begin van die boek word opgevolg deur 'n vollediger opgawe van die inhoud aan die begin van elke gedeelte en 'n nog meer uitgebreide inhoudsopgawe voor elke hoofstuk.

Die outeurs slaag daarin om die insolvensiereg op 'n maklik toeganklike en verstaanbare wyse uiteen te sit. Die indeling wat gevolg word, is logies en die kleiner onderafdelings waarvan gebruik gemaak word, maak dit die ideale handboek om vir voorgraadse studente te gebruik. Dit is 'n groot pluspunt dat die boek in sowel Afrikaans as Engels beskikbaar is.

Die uiteensetting van die insolvensiereg gaan gepaard met verwysing na toepaslike gesag. Hier maak die skrywers nie van voetnotas gebruik nie. Die verwysings word in die teks tussen hakies aangebring en dit dra daartoe by dat die leser verplig word om ook kennis van die gesag te neem, anders as wat dikwels die geval is met die gebruik van voetnotas. Verwysings na ander gedeeltes van die handboek kom ook voor en geskied met verwysing na die betrokke bladsynommers of paragraafnommers wat die naslaan daarvan baie vergemaklik.

Die boek bevat 'n aantal bylaes met voorbeelde van aansoeke, boedelrekenings en die teks van die Insolvensiewet. 'n Register van hofsake, van wetgewing en 'n alfabetiese indeks word voorsien.

Dit is 'n kenmerk van 'n dinamiese regstelsel dat daar gedurig ontwikkeling plaasvind wat nie altyd betyds in nuwe boeke opgeneem kan word nie. 'n Voorbeeld hiervan is die beslissing van die konstitusionele hof in *Brink v Kitshoff* 1996 6 BCLR 752 (CC) wat artikel 44(1) en (2) van die Versekeringswet ongrondwetlik en gevolglik nietig verklaar. Die uitspraak raak die bespreking van die tersaaklike gedeelte op bladsy 55.

Hoewel die voorwoord verklaar dat die boek op sowel studente as insolvensiepraktisyns gerig is, sal die ervare insolvensiepraktisyn dalk nie soveel baat daarby vind nie. Die boek skyn eintlik meer op die voorgraadse student gerig te wees. Die insolvensiepraktisyn en nagraadse student sou meer by die boek kon gebaat het indien daar onder andere gewag gemaak is van die verskillende hofuitsprake, literatuur en debat oor die afstanddoening van erflatings en die vraag of dit op 'n vervreemding sonder teenwaarde of selfs op 'n daad van insolvensie neerkom (sien *Kellerman v Van Vuren* 1994 4 SA 336 (T);

Boland Bank Bpk v Du Plessis 1995 4 SA 113 (T); *Klerck and Schärges v Lee* 1995 3 SA 340 (SOK)).

Hierdie paar punte van kritiek doen egter nie afbreuk aan die waarde van die boek in geheel nie. Veral omdat die boek in Afrikaans beskikbaar is, vul dit 'n leemte wat in die regsliteratuur ten opsigte van die insolvensiereg bestaan het. Die boek sal met groot vrug deur voorgraadse studente gebruik kan word.

EC SCHLEMMER
Universiteit van Suid-Afrika

DELICTUAL LIABILITY IN MOTOR LAW
deur WE COOPER
Juta Kaapstad, Wetton, Johannesburg 1996; lx en 519 bl
Prys R387,00 (BTW ingesluit) (hardeband)

Die skrywer, regter WE Cooper, het geen bekendstelling nodig nie. Sy jarelange ervaring en navorsing op hierdie terrein word volledig weergegee in dié werk, 'n hersiening van *Motor law* vol II (1987). Die teks is hersien en uitgebrei en die inhoud is heringedeel, met nuwe hoofstukke wat bygevoeg is. Hierdie werk bevat hofuitsprake tot en met die 1996 (1)-uitgawe van die Suid-Afrikaanse Hofverslae. Die werk handel oor die algemene beginsels van aanspreeklikheid vir eise gebaseer op vermoënskade veroorsaak tydens die bestuur van motorvoertuie. 'n Duidelike onderskeid word gemaak tussen die verskillende elemente van deliktuele aanspreeklikheid en die teoretiese uiteensettings word deurlopend volledig met relevante regspraak toegelig.

In deel een (hfst 1) word die rol beskryf wat motorvoertuie in deliktuele ontwikkeling gespeel het en in deel twee word die handeling (hfst 2) en onregmatigheid (hfst 3) bespreek. Deel drie (hfst 4) handel oor toerekeningsvatbaarheid. Deel vier (hfste 5–14), waarin die skuldelement behandel word, is seker die insiggewendste gedeelte van die werk. In hoofstuk 5 identifiseer die skrywer 'n aantal riglyne of hulpmiddels wat aangewend kan word by die bepaling van skuld (nalatigheid), naamlik onder andere voorvereistes vir die veilige bestuur van 'n motorvoertuig, voorsienbaarheid, voorkomende stappe, sekere afleidings wat die motorbestuurder tydens sy bestuurstaak geregtig is om te maak, en die praktiese toepassing van die *res ipsa loquitur*-leerstuk. Hoofstuk 7, waarin die elementêre pligte van die motorbestuurder behandel word, verdien ook vermelding. Daar is voorts interessante besprekings oor gevalle waarby voetgangers (hfst 11), passasiers (hfst 12) en diere (hfst 13) betrokke is. In deel vyf (hfst 15) word kousaliteit en in deel ses (hfst 16) vermoënskade bespreek. Deel sewe (hfste 17–22) omvat al die moontlike verwere wat by motorvoertuigongelukke relevant kan wees, naamlik noodtoestand, medewerkende skuld, vrywillige aanvaarding van risiko, bevoorregte voertuie en verjaring. In deel agt (hfste 23–25) word middellike aanspreeklikheid aangeraak en deel nege (hfste 26–27) is 'n praktiese gedeelte waarin prosedures en bewysregtelike aangeleenthede bespreek word. Die werk bevat ook 'n interessante addendum (deur prof Metealf) waarin 'n formule aangebied word om die spoed waarteen 'n motorvoertuig beweeg het, met behulp van die afstand wat dit geneem het om die motorvoertuig tot stilstand te bring, te bereken.

Hierdie werk se uniekheid is veral geleë in die besondere wyse waarop die skrywer beide die akademikus en die regspraktisyn se behoeftes aanspreek deur volledige teoretiese

grondslae te lê, toegelig met praktiese toepassings uit die regspraak. Die werk word dus aanbeveel vir sowel akademici as regspraktisyns. Dit sal ook onontbeerlik wees vir die nagraadse student wat op hierdie terrein sy navorsing doen. Ten spyte van 'n paar tikfoute (Prefaceto/Preface to (ix); Hostel/Hosten (xi); *Schutte v Butt/Schultz v Butt* (liv en 29 vn 8); Appointment of Damages Act/Apportionment of Damages Act – in die advertensie), getuig die boek van hoogstaande navorsing en 'n volledige uiteensetting van 'n gespesialiseerde onderwerp wat gereeld in die praktyk voorkom.

LOMA STEYNBERG
Universiteit van Suid-Afrika

IN MEMORIAM

Paul van Warmelo

Dit is by geleenthede soos hierdie dat 'n mens homself die vraag afvra wat eintlik die somtotaal van 'n lewe is. Is dit die prestasies en die eerbetoon of is dit die teleurstellings en tekortkomings? Die rasionalis sal antwoord dat dit beide is, maar ek wil betoog dat dit gevoelsmatig anders is en dat in die voortdurende stryd tussen verstand en emosie die aangeleentheid nog geensins besleg is nie.

Vir Paul van Warmelo was prestasie amper vanselfsprekend. "Fils unique", 'n leergierige persoon met 'n bogemiddelde intelligensie, behaal hy net voor die uitbreek van die Tweede Wêreldoorlog sy LLB-graad aan die Universiteit van Pretoria. Amper sestig jaar later vertel hy nog met 'n mate van irritasie hoe 'n regter van die hooggeregshof, by wyse van steekproef, by sommige van die finale LLB-mondelinge eksamens insit om te waarborg dat die standaard na behore was, "want hulle het gedink dat dit sedert Afrikaanswording niks werd kan wees nie". Hierdie irritasie, wat verband hou met sy Afrikaner nasionalisme, staan in konflik met sy brandende begeerte om die wêreld te sien. Wanneer die skip op pad na Nederland, waar hy in Leiden sy doktorsgraad gaan doen, in Calais in die hawe aanlê, deel hy met 'n paar ander haastige passasiers 'n taxi na Nederland, sit met sy neus teen die venster gedruk en verkyk hom aan die verbygaande landskap. As gevolg van die oorlog in Nederland vasgevang tot 1946, verloor hy sy hart in meer as een opsig en kom nie slegs met 'n Nederlandse vrou nie, maar as 'n soort hibride Nederlander terug. Meer as dertig jaar later het van sy studente nog hardnekkig beweer dat hy 'n Nederlander is, en in die lig van die tydsbestel wonder 'n mens of dit as 'n kompliment bedoel was.

Wat daardie studente miskien onbewustelik ervaar het, is dat die jong Paul van Warmelo vanuit die onder-die-depressie-sugtende Pretoria amper regstreeks in die deur-die-Tweede-Wêreldoorlog-geteisterde Europa beland het, waar hy met volle teue die Europese kultuur ingeneem het. Nadat hy op Vrydag 30 Mei 1941 om vier uur sy proefskrif verdedig het, begin hy Nederlandse reg studeer totdat die sluiting van die Leidse Universiteit verhoed dat hy afstudeer. Maar meer nog as die regstudie is dit die letterkunde en musiek, moderne asook klassieke tale wat hom besig hou. Dat daar in die ou wêreld 'n nuwe wêreld vir hom oopgaan, is duidelik uit sy versugtings dat daardie oorlogsjare die beste jare van sy lewe was. Die *humanitas* wat hy hom daar eie gemaak het, was terselfdertyd sy grootste aanwins maar ook die bron van vervreemding en teleurstellings.

Voorlopig loop hy van werklus oor en daar is baie om te doen. Alhoewel die eerste Suid-Afrikaanse regsprofessor, JH Brand, in 1859 aangestel is by die South African College in Kaapstad, was dit eers vanaf die begin van die eeu dat regsopleiding sistematies aangebied word en die onderskeie universiteite hul verskyning maak. Die meeste fakulteite werk egter met die minimum fakulteitslede en maak grootliks van deeltydse dosente gebruik. Suid-Afrikaanse handboeke en navorsing is 'n seldsaamheid en veral vir Afrikaanstalige regstudente 'n probleem. Dit is dus geen wonder nie dat Paul van Warmelo wat in 1948 juigend uit die bad spring om brandewyn te drink toe hy die 1948-verkiesingsuitslag verneem, met ywer en entoesiasme maar in besonder met groot bekwaamheid aan die werk gaan. Dit is nie my bedoeling om sy talryke publikasies op te som nie maar verskeie punte verdien aandag. Eerstens, Van Warmelo skryf nie net vir vakgenote nie – hy publiseer handboeke vir regstudente. In Afrikaans geskryf verskyn 'n *Inleiding tot die studie van die Romeinse reg* asook *Die oorsprong en betekenis van die Romeinse reg*, twee handboeke oor die Romeinse reg wat verkeerdelik *ex post facto* verguis word. Die kritiek was en is hoofsaaklik gerig op die gebruikersonvriendelikheid van die indelings of gebrek daaraan. Die feit dat daar op baie ander vakgebiede Afrikaanstalige handboeke vandag nog steeds nie verskyn het nie, word egter oor die hoof gesien. Ook sou 'n vergelyking met die destyds beskikbare handboeke oorsee ongetwyfeld in die voordeel van Van Warmelo beslis word.

My eerste kennismaking met die dosent en sy boeke was in 1970 in die destydse buitemuurse gebou van Tukkies. Nie slegs het dit verbasing gewek dat die professor self die meeste lesings aanbied en in die aande vir 'n handvol studente klasgee nie, maar die duidelikheid en entoesiasme van die aanbieding het besondere indruk gemaak. Die handboek was vir studente geskryf en in 'n prettige styl met voorbeelde en was vir 'n student beslis meer toeganklik as die grote of die kleine Kaser. Daarnaas publiseer hy voortdurend in vakwetenskaplike tydskrifte, die *Tydskrif* en die *Law Journal*, maar meer en meer oorsee. Spesiale vermelding verdien sekerlik "Verbeterde lesings van die 'Inleidinge tot die Hollandsche rechts-geleerdheid' van Hugo de Groot en van andere geskrifte, waarvan deur D.G. van der Keessel melding gemaak word" 1949 *THRHR* 179. Die 1952-uitgawe van die *Inleidinge* deur Dovring, Fischer en Meijers verwys herhaaldelik na hierdie werk. Dit bring 'n mens direk by wat vir 'n ander 'n lewenswerk sou gewees het, maar vir hom een van baie ysters in die vuur, naamlik Van der Keessel: die publikasie van die manuskrip en die vertaling van die lesings van Van der Keessel op De Groot. Hierdie Sisyphus-arbeid, naamlik die ontsluiting van die bronne van die Romeins-Hollandse reg vir die Suid-Afrikaanse regspraktyk, het hom van die begin van sy akademiese loopbaan af tot aan die einde van sy lewe, toe hy ongeduldig op die publikasie van Voorda se kollege-diktaat gewag het, besig gehou.

Beslis nie met die oog op finansiële gewin of die erkenning van kollegas of die dank van die praktisyns nie (wat minimaal was in verhouding tot die tyd en kundigheid opgeoffer aan die taak), maar omdat hy geglo het in die Romeins-Hollandse reg, 'n geloof wat hy tot met sy dood behou het, het hom aangevuur.

Miskien is dit in hierdie geloof wat ons die teleurstellings van sy lewe moet soek, want die standpunt dat die Romeins-Hollandse reg in sy volmaaktheid die alfa en die omega van die regswetenskap verteenwoordig, was nou verbonde aan die sukses van die Nasionale Party. Hoewel nooit 'n Nasionale Party-man nie en in sy eie oë 'n kritiese rasionalis, bewaarheid Van Warmelo Kuhn se siening dat 'n paradigma-keuse, soos 'n geloofskeuse, 'n belangrike subjektiewe element het en bewys hy homself baie meer emosiemens as kritiese rasionalis. Die kritiese rasionalis laat sy teorieë sterf maar die dogmatikus kom saam met hulle om.

Ph J THOMAS
Universiteit van Pretoria

HUGO DE GROOT-PRYS

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

Konstitusionele voorskrifte rakende regspersone

Gerrit Pienaar
B Jur et Com LLD
Professor in Privaatreg, Potchefstroomse Universiteit vir CHO

SUMMARY

Constitutional provisions regarding juristic persons

The interim Constitution of 1993 and the final Constitution of 1996 contain specifie provisions applicable to juristic persons. Juristic persons are also entitled to the fundamental rights contained in the Bill of Rights to the extent that these rights are applicable to them. It must be kept in mind that juristic persons have peculiar characteristics and that the fundamental rights of juristic persons differ from those of natural persons.

Juristic persons are also under the obligation to respect the fundamental rights of natural persons and other juristic persons to the extent provided for in the Bill of Rights. In the case of juristic persons acting as organs of state the vertical application of the Bill of Rights safeguards the fundamental rights of persons against state action or interference. The eireumstanees where juristic persons aet as organs of state are discussed with reference to reeent case law. Difference of opinion exists regarding the horizontal application of the Bill of Rights, that is the application of the Bill of Rights to private law relationships. In terms of the interim Constitution the Bill of Rights applied horizontally in an *indirect* manner. Section 35(3) provided that the common and eustomary law must be developed by both the Supreme Court and the Constitutional Court to promote the values underlying an open and demoeratie soeiety based on human dignity, equality and freedom, without completely abolishing the eommon and eustomary law.

The final Constitution provides in seetion 8(2) that natural and juristic persons in private law relationships are also bound by the Bill of Rights if, and to the extent that, such rights are applicable, taking into account the nature of the right and the nature of any duty imposed by sueh right. The *direct* horizontal applieation of the Bill of Rights is, however, limited by section 36. The extent of the rights of juristic persons and limitations on them in private law relationships are investigated, taking into account the right of freedom of association in terms of seetion 18. The various principles to be taken into consideration in the case of clubs, religious organisations, educational institutions, politieal organisations and trading and professional institutions are discussed.

1 INLEIDING

In die tussentydse Grondwet 200 van 1993 en die finale Grondwet van die Republiek van Suid-Afrika 108 van 1996 word besondere voorskrifte in verband met regspersone gestel. Die tussentydse Grondwet beskerm in hoofstuk 3 en die finale Grondwet in hoofstuk 2 bepaalde fundamentele regte van regspersone vir sover die inhoud van die regte hulle op regspersone toepaslik maak.

Voorts rus daar bepaalde verpligtinge op regspersone om nie op die fundamentele regte van natuurlike persone en ander regspersone inbreuk te maak nie.

Die verpligtinge wat ingevolge die Grondwet op regspersone rus, bind in eerste instansie regspersone wat as staatsorgane optree (vertikale toepassing van die Grondwet[1]). Daar is meningsverskil oor die vraag of die 1993-Grondwet ook regspersone wat nie as staatsorgane optree nie, bind. Die vraag of die Grondwet ook horisontale werking het, dit wil sê ook op die privaatregtelike verhouding tussen regsubjekte onderling toepassing vind, word by paragraaf 3 1 hieronder kortliks bespreek. In die 1996-Grondwet word daar duideliker bepaal dat die Grondwet wel horisontale werking het en dat dit ook op die onderlinge privaatregtelike verhouding tussen regsubjekte (natuurlike persone en regspersone) in bepaalde omstandighede van toepassing is. Die omvang van die horisontale werking sal by paragraaf 3 2 hieronder aandag geniet.

2 REGTE EN VERPLIGTINGE VAN REGSPERSONE

2 1 Regte

Ingevolge artikel 7(3) van die tussentydse Grondwet en artikel 8(4) van die finale Grondwet word bepaalde regte van regspersone beskerm. Die finale Grondwet bepaal:

> "8(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and of that juristic person."

In die finale Grondwet word dus voorsien dat nie alleen die aard van bepaalde regte nie, maar ook die aard van sekere regspersone die beskerming van regte in bepaalde omstandighede ontoepaslik of onmoontlik maak. Voorbeelde van regte wat weens die aard daarvan nie op regspersone van toepassing kan wees nie, is die beskerming van menslike waardigheid (artikel 10), die reg op lewe (artikel 11), vryheid en beskerming van die persoon (artikel 12), die beskerming teen slawerny en gedwonge arbeid (artikel 13), die reg op burgerskap (artikel 20), die reg op behuising (artikel 26), die reg op gesondheidsorg, voedsel, water en sosiale sekuriteit (artikel 27) en die beskerming van kinderregte (artikel 28).[2]

Bepaalde regspersone kwalifiseer uit hoofde van hulle aard nie op die beskerming van sekere fundamentele regte nie. 'n Voorbeeld hiervan is dat regspersone wat as staatsorgane optree in hulle uitoefening van owerheidsgesag nie altyd op vertikale beskerming teen die owerheid aanspraak kan maak nie.[3] Die aard van regspersone wat nie as staatsorgane optree nie, sal voorts bepaal in welke mate hulle op horisontale werking aanspraak sal kan maak (sien paragraaf 3 hieronder).[4] Daar is egter geen voorskrifte ten opsigte van die tipes regspersone

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1 In *Du Plessis v De Klerk* 1996 3 SA 850 (CC) 860I–861E word, sonder om daaroor te beslis, twyfel uitgespreek oor die terminologie *vertikale* en *horisontale* toepassing van die Grondwet.

2 Woolman "Application" in Chaskalson *et al* (reds) *Constitutional law of South Africa* (1996) (hierna Woolman) 10.6–10.7 dui aan dat 'n kerk bv nie 'n reg op geloofsvryheid ingevolge a 15 het nie ('n kerk het nie geloof nie, maar die individuele lidmate wel). Dit kan egter in bepaalde omstandighede as 'n verweer opgewerp word, bv ter regverdiging van sekere besluite geneem deur 'n kerkraad. Anders Rautenbach *General provisions of the South African bill of rights* (1995) 39–41, wat daarop wys dat kerke as regspersone ingevolge die Duitse reg 'n reg op geloofsvryheid het.

3 Daar is gevalle waar staatsorgane wel op vertikale beskerming kan aanspraak maak (sien bv a 227(1)(a) van die 1996-Grondwet en *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 423 (SOK)).

4 Woolman 10.6.

wat beskerming geniet nie. Dit sluit gevolglik gemeenregtelike regspersone en statutêre regspersone in wat nie as staatsorgane funksioneer nie. Dit behoort selfs privaatinstansies wat in bepaalde omstandighede as staatsorgane optree, in omstandighede waar hulle nie owerheidsgesag uitoefen nie, asook verenigings sonder regspersoonlikheid in te sluit.[5]

2 2 Verpligtinge

Ingevolge die huidige konstitusionele bedeling rus daar bepaalde verpligtinge op regspersone om nie op die regte en vryhede van natuurlike persone en regspersone soos verskans in die Grondwet inbreuk te maak nie. Die oorgangsgrondwet skryf in artikel 7(1) en (2) voor dat alle regspersone wat as wetgewende en uitvoerende staatsorgane funksioneer, gebind word deur die voorskrifte van die handves van fundamentele regte.[6] Dit is egter 'n ingewikkelde vraag om te bepaal watter (en in watter omstandighede) regspersone as staatsorgane getipeer sal word. Die blote feit dat 'n regspersoon statutêr in die lewe geroep word, maak dit nie noodwendig 'n wetgewende of uitvoerende staatsorgaan nie (byvoorbeeld die Methodist Church of Southern Africa en die Apostoliese Geloofsending van Suidelike Afrika). Aan die ander kant is daar statutêre regspersone wat oënskynlik privaatregtelik van aard is, maar as openbare liggame bepaalde owerheidsfunksies verrig (byvoorbeeld Eskom, Transnet en die Aandelebeurs).[7] 'n Derde kategorie regspersone word statutêr ingestel en gedeeltelik deur die owerheid gefinansier, maar hulle openbare funksie is nie so duidelik uitgespel nie. 'n Voorbeeld hiervan is universiteite en ander tersiêre onderwysinstellings, wat wel bepaalde openbare onderwysfunksies vervul maar histories en bestuursmatig grootliks outonoom funksioneer en wat bepaalde aspekte van hulle funksionering betref, moeilik as staatsorgane getipeer kan word. Die meningsverskil oor die aard van regspersone as staatsorgane en die horisontale werking van die Grondwet in geval van regspersone wat nie as staatsorgane optree nie, word by paragrawe 3 2 en 4 volledíger bespreek.

Ingevolge die finale Grondwet word die probleem in verband met die tipering van regspersone as staatsorgane en die horisontale werking van die Grondwet in geval van regspersone wat nie as staatsorgane optree nie, duideliker gereël. Die volgende bepalings is van toepassing:

(a) Artikel 2[8] skryf voor dat *reg* (*law*) en *optrede* (*conduct*) in stryd met die omskrewe fundamentele regte ongeldig is. Hieronder word nie net maatreëls ingevolge wetgewing ingesluit nie maar ook die gemenereg en inheemse reg (sien paragraaf 3 2 hieronder).

(b) Ter aanvulling van artikel 8(1), wat bepaal dat die wetgewende, uitvoerende en regsprekende gesag en alle staatsorgane deur hoofstuk 2 gebind word, skryf artikel 8(2) uitdruklik voor dat hoofstuk 2 ook natuurlike persone en regspersone

5 Rautenbach *General provisions* 40 54; anders Du Plessis "Of the new Constitution: an evaluation of aspects of a constitutional text *sui generis*" 1996 *Stell LR* 5.

6 Dit is opvallend dat die regsprekende gesag by hierdie bepaling weggelaat is; die verband tussen a 7(1) en (2) word by par 3 1 hieronder bespreek.

7 *Committee Johannesburg Stock Exchange v Chairman Stock Exchange Appeal Board* 1992 2 SA 30 (W).

8 A 2 bepaal: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and duties imposed by it must be performed."

bind.[9] Die horisontale werking van hoofstuk 2 word egter gekwalifiseer deur die aard van die reg en die verpligting wat opgelê word, asook deur die feit dat daar by die ontwikkeling van die gemenereg deur die howe ook bepaalde beperkings op die regte geplaas kan word, met die voorbehoud dat beperkings op fundamentele regte slegs in ooreenstemming met die voorskrifte van artikel 36 mag plaasvind (sien paragraaf 4 hieronder).

(c) Artikel 9(4)[10] skryf voor dat geen persoon (natuurlike of regspersoon) teen 'n ander persoon mag diskrimineer nie. Ook hierdie voorskrif word gekwalifiseer deurdat artikel 9(5) voorsiening maak vir die feit dat onderskeid op grond van die faktore in artikel 9(3) onredelik is, met die uitsondering van die gevalle waar bewys kan word dat dit in die besondere omstandighede billik is.

Uit bogemelde artikels is dit dus duidelik dat die fundamentele regte van natuurlike en regspersone nie net beskerm word teen owerheidsoptrede deur staatsorgane nie, maar ook teen die optrede van ander natuurlike en regspersone (wat nie as staatsorgane optree nie) wat op die fundamentele regte van eersgenoemde natuurlike persone of regspersone inbreuk maak.

Alhoewel daar dus in die finale Grondwet uitdruklik vir die horisontale werking van fundamentele regte voorsiening gemaak word, is dit noodsaaklik om die omvang van die horisontale werking te ondersoek. Dit blyk duidelik uit die bewoording van artikels 7(3), 8(3)(b), 8(4), 9(5) en 36 dat daar wel in bepaalde omstandighede beperkings op die fundamentele regte van persone gelê kan word. Geen reg (ook nie 'n fundamentele reg nie) geld absoluut en onbeperk nie en daar is duidelike maatreëls om die regte in bepaalde omstandighede te beperk. Die voor-die-hand-liggendste beperking is dat 'n natuurlike of regspersoon se fundamentele regte in alle gevalle teen die fundamentele regte van ander natuur-

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9 A 8 bepaal: "(1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural and juristic person in terms of subsection (2), a court –
(a) in order to give effect to a right in the Bill, must apply, or if necessary, develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

10 A 9 bepaal: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

like en regspersone opgeweeg moet word. Vryheid van spraak van een persoon beteken nie noodwendig dat 'n ander persoon belaster mag word nie, maar dit kan in bepaalde omstandighede wel inhou dat een persoon se spraakvryheid nie deur die gemeenregtelike regsbeginsels aangaande laster aan bande gelê mag word nie.[11]

Aangesien daar nie 'n vasgestelde hiërargie van regte voorgeskryf word nie, hang dit van verskeie omstandighede af watter reg voorkeur bo 'n ander reg sal geniet. In geval van regspersone word die reg nog verder gekwalifiseer deur die aard van die reg en die regspersoon. Dit is dus belangrik om die omvang van die beskerming van regte van regspersone verder te ondersoek.

3 HORISONTALE WERKING VAN DIE GRONDWET

Uit die voorafgaande het dit geblyk dat daar onsekerheid bestaan ten opsigte van die omvang van die beskerming van die fundamentele regte ingevolge hoofstuk 3 van die tussentydse Grondwet en hoofstuk 2 van die finale Grondwet. Hierdie probleem is van besondere belang met betrekking tot regspersone. Indien die Grondwet wel horisontale werking het, ontstaan die vraag in watter mate regspersone by die toelating van lede, die neem van besluite, die uitoefening van regshandelinge en ten opsigte van die inhoud van hulle reglemente of konstitusies aan die voorskrifte van die gelykheidsbeginsel en nie-diskriminasievoorskrif in hoofstuk 3 (artikel 8) van die 1993-Grondwet en hoofstuk 2 (artikel 9) van die 1996-Grondwet onderskeidelik gebonde sal wees. Dit hou verband met die reg op vryheid van assosiasie wat in albei grondwette verskans is en by paragraaf 4 hieronder bespreek word.

3 1 Die 1993-Grondwet

Daar bestaan meningsverskil of die 1993-Grondwet vir die horisontale toepassing van fundamentele regte voorsiening maak, en indien wel, wat die omvang van die horisontale werking is. Daar bestaan wel eenstemmigheid oor die volgende:[12]

(a) Geen wetgewing en uitvoerende maatreëls wat deur die staat en staatsorgane op alle regeringsvlakke aangewend word in die uitoefening van staatsgesag, mag op enige fundamentele regte van regsubjekte soos in hoofstuk 3 voorgeskryf inbreuk maak nie (vertikale toepassing van hoofstuk 3). Dit is opvallend dat die regsprekende gesag nie in artikel 7(1) vermeld word nie.

(b) Wetgewing wat die privaatregtelike regsverhouding tussen regsubjekte reël, is onderworpe aan die voorskrifte van hoofstuk 3 en is hersienbaar indien dit op fundamentele regte van regsubjekte inbreuk maak (vertikale toepassing). Dit is 'n direkte gevolg van die voorskrif in artikel 7(1) dat alle wetgewende staatsorgane deur die voorskrifte van hoofstuk 3 gebind word.

(c) Indien die staat of staatsorgane gemeenregtelike beginsels toepas in die uitoefening van staatsgesag, moet dit sodanig toegepas word dat dit nie op fundamentele regte soos in hoofstuk 3 uiteengesit inbreuk maak nie.

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11 Sien hieroor bv *Gardener v Whitaker* 1995 2 SA 672 (OK), 1996 4 SA 337 (CC) 343C–E; *S v Makwanyane* 1995 6 BCLR 665 (CC) 708. Sien ook Neethling en Potgieter "Aspekte van die lasterreg in die lig van die Grondwet" 1995 *THRHR* 709–715.

12 Sien veral Woolman 10.1.

In *Du Plessis v De Klerk*[13] bevestig die konstitusionele hof dat die tussentydse Grondwet geïnterpreteer moet word aan die hand van die teks daarvan en dat daar in die wetteks nie voorsiening gemaak word vir die *direkte* horisontale toepassing van fundamentele regte nie. Die konstitusionele hof beslis by monde van regter Kentridge:

(a) Die verwysing na *reg* in artikel 7(2) sluit alle reg (ook die gemenereg) in. Indien die staat dus deur middel van staatsorgane in wetgewende of uitvoerende hoedanigheid optree, moet die toepassing van die gemenereg aan die voorskrifte van hoofstuk 3 voldoen.[14] Fundamentele regte ingevolge hoofstuk 3 word dus in alle gevalle (ook by die toepassing van gemenereg) teen wetgewende en uitvoerende optrede van staatsorgane beskerm.

(b) Die weglating van die regsprekende gesag in artikel 7(1) is nie toevallig nie, maar dit was die bedoeling dat hoofstuk 3 net op die wetgewende en uitvoerende gesag van toepassing sal wees.[15]

(c) In suiwer privaatregtelike aangeleenthede (waar geen owerheidsgesag op die verhouding tussen die partye van toepassing is nie) kan die partye gewoonlik nie steun op fundamentele regte soos in hoofstuk 3 verskans nie. Hoofstuk 3 het dus nie algemene horisontale werking nie.[16] Dit blyk veral uit die voorskrifte van artikels 33(4) en 35(3) wat onnodig sou wees as hoofstuk 3 algemene horisontale werking sou hê.

(d) In 'n privaatregtelike geskil kan 'n party egter steun op die beskerming van sy fundamentele regte ingevolge hoofstuk 3 indien die ander party se optrede berus op magtiging deur die wetgewende of uitvoerende gesag in stryd met hoofstuk 3.[17]

(e) Ingevolge artikel 35(3) word die horisontale werking van hoofstuk 3 *indirek* gemagtig in privaatregtelike verhoudings. Artikel 35(3) bepaal dat by die uitleg van enige wet en die toepassing en ontwikkeling van die gemenereg en gewoontereg, howe die gees, strekking en oogmerke van hoofstuk 3 in ag moet neem. Hiervolgens word howe nie gemagtig om die gemenereg en gewoontereg te vervang nie maar moet die gemenereg en gewoontereg ontwikkel word in ooreenstemming met die gees, strekking en waardes vervat in die Grondwet. Regter Kentridge beslis in hierdie verband:[18]

> "Fortunately, the Constitution allows for the development of the common law and customary law by the Supreme Court in accordance with the objects of chapter 3. I have no doubt that this section 35(3) introduces the *indirect* application of the fundamental rights provisions to private law. I draw attention to the words 'have due regard to' in section 35(3). That choice of language is significant. The Lawgiver did not say that Courts should invalidate rules of common law inconsistent with chapter 3 or declare them unconstitutional. The fact that courts are to do no more than have regard to the spirit, purport and objects of the chapter indicates that the requisite development of the common law and customary law is not to be pursued through the exercise of the powers of this Court under s 98 of the Constitution. The presence of this subsection ensures that the values embodied in chapter 3 will permeate the common law in all its aspects, including private litigation."

13 1996 3 SA 850 (CC).
14 876D–877A.
15 877H–878F.
16 881D–G.
17 879A–C.
18 885E–H.

(f) Die moontlikheid dat daar wel in bepaalde gevalle direkte horisontale toepassing van hoofstuk 3 in privaatregtelike geskille kan voorkom, word wel deur die konstitusionele hof voorsien sonder om voorbeelde daarvan te noem.[19] Die hof beslis egter dat dit nie in die besondere omstandighede van hierdie beslissing van toepassing is nie.

Ten einde te voorkom dat privaatregtelike regspersone en natuurlike persone in onderlinge regsverhoudinge met ander regsubjekte apartheidsgebruike voortsit, is artikel 33(4) ingevoeg. Artikel 33(4) bepaal dat die bepalings van hoofstuk 3 deur wetgewing en administratiewe maatreëls ook van toepassing gemaak kan word op ander persone en instansies as dié in artikel 7(1) genoem ten einde diskriminasie te voorkom.[20]

In verskeie hofuitsprake is daar ten gunste van die horisontale toepassing van hoofstuk 3 beslis.[21] Die uitspraak in *Gardener v Whitaker*[22] is in hierdie verband insiggewend. Volgens regter Froneman vereis die waardes onderliggend aan die Grondwet dat fundamentele regte wyer as net in regsverhoudings tussen die staat en ander regsubjekte beskerm moet word. Die doel van die Grondwet is om versoening en die uitskakeling van diskriminasie te bewerkstellig en dit kan slegs geskied deur die horisontale toepassing van fundamentele regte, ook in geval van die gemenereg en inheemse reg. Hoofstuk 3 behoort egter nie ongekwalifiseerd horisontaal toegepas te word nie:[23]

> "A word of caution, though, may also be called for. A radical break with *all* the legal traditions of the past is not what the Constitution demands. The Roman-Dutch legal system, interpreted at its best, was a rational, enlightened system of law, motivated by considerations of fairness' . . . What the Constitution has done is to release the common law from the shackles of institutionalised racial inequality . . .[24]
>
> It follows that, in my view, all aspects of the common law, including the present state of the law of defamation, should, in cases that now come before the courts, be scrutinised to decide whether they accord with the demands of the Constitution. To leave those areas of common law which are in conflict with the Constitution unaffected would in effect, if not by intent, perpetuate aspects of an undemocratic, discriminatory and unjust past."

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19 887B–C.

20 Du Plessis "The genesis of the provisions concerned with the application and interpretation of the chapter on fundamental rights in South Africa's transitional Constitution" 1994 *TSAR* 93–94.

21 Sien veral *Waltons Stationary Company (Pty) Ltd v Fourie* 1994 1 BCLR 507 (O); *Mandela v Falati* 1995 1 SA 251 (W); *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W); *Motala v University of Natal* 1995 3 BCLR 374; *Matukane v Laerskool Potgietersrus* 1996 1 All SA LR 468 (T); *Holomisa v Argus Newspapers* 1996 2 SA 588 (W). Sien ook Cachalia *et al Fundamental rights in the new Constitution* (1994) 19–20; Neethling en Potgieter 1995 *THRHR* 709–715; Henderson "Operation of the Constitution between private actors" 1995 *De Rebus* 439–441; Carpenter en Botha "The 'constitutional attack on private law': are the fears well founded?" 1996 *THRHR* 126–135.

22 1995 2 SA 672 (OK).

23 685B–E.

24 Sien egter Zaal "Roman law and the racial policies of the Dutch East India Company" 1996 *CILSA* 30–48 ivm diskriminerende praktyke ingevolge die Romeinse en Romeins-Hollandse reg. Anders Domanski "Teaching Roman law on the eve of the millenium: a new beginning" 1996 *THRHR* 539–556.

In *Gardener v Whitaker*[25] bevestig die konstitusionele hof die uitspraak van regter Froneman, maar wys daarop dat dit nie soseer neerkom op die direkte horisontale toepassing van fundamentele regte nie maar dat die regter by die toepassing van gemeenregtelike beginsels ingevolge die voorskrifte van artikel 35(3) die gees, strekking en oogmerke van die Grondwet in 'n privaatregtelike geskil in ag geneem het. Regter Kentridge beslis (343C–E):

> "My impression was that he the Judge was balancing one fundamental right (dignity, including reputation) against another (freedom of speech), and developing (or altering) a common-law rule in a manner which in his opinion struck the correct balance. He did not find that there had been an infringement of one or other of the two fundamental rights, and then go on to consider whether the infringement was justifiable in terms of s 33(1). Indeed, in one passage in his judgment he points out that, whereas the limitation provision in chap 3, ie s 33(1), seeks to diminish a right regarded as fundamental by the Constitution, 'the same cannot be said of competing fundamental rights. They are inherently of equal value in terms of the Constitution'."

In effek beteken dit dat die volgende prosedure in grondwetlike geskille tussen privaatindividue of instansies gevolg moet word:[26]

(a) Die hof beslis die aangeleentheid deur die onderskeie partye se belange teen mekaar op te weeg, met inagneming van die gemeenskapsbelang, redelikheid, billikheid en die *boni mores*.

(b) Daar rus 'n bewyslas op die eiser om aan te toon dat sy fundamentele regte voorkeur moet geniet bo dié van die verweerder.

(c) Indien die eiser daarin slaag, kom dit nie daarop neer dat die verweerder se fundamentele regte beperk is ingevolge die voorskrifte van artikel 33(1) nie, maar dat by die afweging van die partye se onderskeie fundamentele regte die eiser se reg in die bepaalde omstandighede voorkeur geniet bo dié van die verweerder.

3 2 Die 1996-Grondwet

Die finale Grondwet is met betrekking tot die horisontale toepassing van hoofstuk 2 heelwat duideliker as die tussentydse Grondwet. Tog is daar steeds enkele aspekte wat onduidelik is en verdere oorweging verdien. Daar sal nog steeds vasgestel moet word wanneer 'n persoon of instansie as 'n staatsorgaan optree en die omvang van die horisontale werking van hoofstuk 2 sal bepaal moet word. Dit is nouliks denkbaar dat alle privaatregtelike regsverhoudings tussen regsubjekte onderling ongekwalifiseerd aan die bepalings van hoofstuk 2 sal moet voldoen (sien byvoorbeeld artikel 9(5)).

3 2 1 Staatsorgaan

In die verhouding tussen die staat en ander regsubjekte tree die staat self as 'n regspersoon op.[27] Die staat as regspersoon is saamgestel uit sowel staatsburgers individueel en in groepsverband (as lede) as 'n verskeidenheid staatsorgane (regspersone, instellings en funksionarisse) wat draers van owerheidsgesag is of

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25 1996 4 SA 337 (CC).

26 *Gardener*-saak 37A; sien ook Henderson 1995 *De Rebus* 441.

27 Basson en Viljoen *Staatsreg* (1988) 27; *Regering van die RSA v SANTAM Versekeringsmaatskappy* 1964 1 SA 546 (W).

openbare funksies vervul. 'n Staatsorgaan word ingevolge artikel 239 soos volg omskryf:

> "(1) In the Constitution, unless the context indicates otherwise, 'organ of state' means
>
> (a) any department of state or administration in the national, provincial or local sphere of government; and
>
> (b) any other functionary or institution –
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation.
>
> (2) Despite subsection (1), "organ of state" does not include judicial officers or courts."

Artikel 239(1)(a) is heeltemal duidelik maar daar kan steeds meningsverskil bestaan oor artikel 239(1)(b). In laasgenoemde geval hoef die instansie nie 'n statutêre regspersoon te wees nie,[28] maar enige persoon (funksionaris) of instelling (regspersoon of nie-regspersoon) wat ingevolge die Grondwet of 'n provinsiale grondwet 'n funksie vervul of owerheidsgesag uitoefen (subartikel (i)) of wat ingevolge *enige ander wetgewing* 'n openbare funksie vervul of openbare gesag uitoefen (subartikel (ii)), tree as 'n staatsorgaan ingevolge artikel 8(1) op. Persone en instansies wat nie ingevolge die Grondwet, provinsiale grondwette of ander wetgewing openbare funksies of owerheidsgesag uitoefen nie, tree dus nie as staatsorgane op nie. Laasgenoemde persone en instansies is wel aan die bepalings van hoofstuk 2 gebonde as gevolg van die bewoording van artikel 8(2) (horisontale werking), maar die omvang van die horisontale werking van hoofstuk 2 word in hierdie geval gekwalifiseer deur sowel die aard van die reg wat ingevolge hoofstuk 2 beskerm word, as die aard van die verpligting wat deur die beskermde reg op die instansie gelê word.

Oor die vraag wanneer 'n persoon of 'n instansie deur die uitvoering van 'n openbare funksie of die uitoefening van owerheidsgesag as staatsorgaan omskryf kan word, bestaan daar meningsverskil. Dit is duidelik dat alle statutêre regspersone nie noodwendig staatsorgane is nie, maar dat dit gekwalifiseer word deur artikel 239(1)(b), naamlik dat die persoon of instansie ingevolge *wetgewing* owerheidsgesag uitoefen of 'n openbare funksie vervul. Dit sluit statutêre regspersone soos die Apostoliese Geloofsending en die Metodiste Kerk uit, maar twyfel bestaan oor instellings soos statutêre rade en universiteite.[29]

In *Baloro v University of Bophuthatswana*[30] is staatsorgane aan die hand van die volgende vereistes omskryf:

(a) Dit moet met die staat geïntegreer wees as 'n orgaan wat owerheidsgesag uitoefen. Die blote feit dat 'n instansie statutêr ontstaan, is nie noodwendig 'n aanduiding dat dit 'n staatsorgaan is nie.

(b) Dit kan by wyse van 'n spesifieke wet of algemeen magtigende wetgewing in die lewe geroep word.

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28 Sien hieroor Rautenbach *General provisions* 54–55.
29 Du Plessis 1994 *TSAR* 110–111.
30 1995 4 SA 197 (B); sien ook Du Plessis 1994 *TSAR* 709.

(c) Liggame wat openbare funksies vervul, finansiële of ander ondersteuning van die staat ontvang en in noue samewerking met staatstrukture funksioneer, soos blyk uit staatsverteenwoordiging in sodanige liggame se bestuurstrukture, is staatsorgane. Voorbeelde hiervan is universiteite, beheerliggame van professies soos die Vereniging van Prokureursordes en die Mediese en Tandheelkundige Vereniging van Suidelike Afrika. Hierdie instansies funksioneer grotendeels deur privaatinisiatief maar met beduidende staatsbeïnvloeding.

(d) Privaatinstansies wat nie deur wetgewing in die lewe geroep word nie, maar wat 'n sleutelrol van openbare aard onder staatstoesig vervul, byvoorbeeld 'n privaat ouetehuis wat by die staat geregistreer is, staatsfinansiering ontvang en onder toesig van openbare maatskaplike werkers funksioneer, is staatsorgane.

(e) Statutêre regspersone, soos privaat- en publieke maatskappye, wat geen openbare funksie vervul of staatsgesag uitoefen nie, is nie staatsorgane nie.

In *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting*[31] word daar twyfel uitgespreek of instansies soos omskryf in (c) en (d) hierbo in *alle* omstandighede as staatsorgane geklassifiseer kan word. Daar word byvoorbeeld verwys na Kanadese regspraak ingevolge waarvan dit nie moontlik is om universiteite, ten spyte van staatsubsidie en owerheidsverteenwoordiging in bestuurstrukture, as staatsorgane te tipeer nie.

Ek is van mening dat die blote feit van owerheidsregistrasie en -inspeksie nie noodwendig 'n privaatinstansie as 'n staatsorgaan sal tipeer nie. Alle organisasies wat fondse by die publiek insamel, moet byvoorbeeld ingevolge die Wet op Fondsinsameling 107 van 1978 by die Direkteur van Fondsinsameling geregistreer word en aan hom verslag doen. Dit bring egter nie mee dat al sodanige organisasies as staatsorgane getipeer kan word nie.

Dit is duidelik dat die oorsprong of aard van 'n regspersoon nie finaliter bepaal of die regspersoon aan die bepalings van hoofstuk 2 gebonde sal wees nie, maar of die instansie 'n funksie vervul of owerheidsgesag uitoefen ingevolge die Grondwet of provinsiale wetgewing (artikel 239(1)(b)(i)) of 'n *openbare* funksie vervul of owerheidsgesag uitoefen ingevolge enige ander wetgewing (artikel 239(b)(ii)), in welke geval artikel 8(1) toepassing vind deurdat sodanige instansie as 'n staatsorgaan optree; in geval van enige ander regspersone geld artikel 8(2) (horisontale werking).

'n Privaat ouetehuis (voorbeeld (d) in die *Baloro*-saak hierbo genoem) kan dus in bepaalde omstandighede as 'n staatsorgaan getipeer word, afhangende van die mate waarin dit as statutêre liggaam optree en 'n openbare funksie vervul, maar alle ouetehuise is nie noodwendig staatsorgane nie. Daarteenoor is Telkom ongetwyfeld 'n staatsorgaan vanweë die openbare funksie wat dit vervul.[32] Dit is moeiliker om rade soos die Vereniging van Prokureursordes en die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad as staatsorgane te tipeer, aangesien hulle nouliks as openbare liggame wat owerheidsgesag uitoefen, omskryf kan word. Die vraag ontstaan egter in watter mate hierdie instansies 'n

31 1996 3 SA 800 (T) 809; sien ook Venter "Die staat en die universiteitswese" 1995 *THRHR* 385–388.

32 Sien *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 (T) 811G–H.

openbare funksie vervul. Hieroor bestaan daar tans nie duidelike riglyne nie en regspraak (veral van die konstitusionele hof) behoort mettertyd riglyne in die verband te verskaf.

In geval van universiteite geld egter ander omstandighede. Universiteite is statutêre regspersone, vervul 'n openbare onderrigfunksie, word grotendeels deur die staat gefinansier, het 'n verslagverpligting teenoor die staat en staatsverteenwoordigers word in die rade van universiteite aangestel. Voorts kan kursusse en grade net met staatstoestemming ingestel word. Universiteite maak aanspraak op hulle outonomie ingevolge hulle ontstaansgeskiedenis, interne bestuursmaatreëls en samestelling, asook die feit dat hulle nie owerheidsgesag uitoefen nie. Tog is universiteite na my mening instellings van openbare aard wat nie naastenby met dieselfde onafhanklikheid, privaatinisiatief en -befondsing as die rade hierbo genoem funksioneer nie. Dit word vollediger by paragraaf 4 3 hieronder bespreek.

3 2 2 *Omvang van horisontale toepassing*

Ingevolge artikel 8(2) word alle handelinge en besluite van regspersone (ook regspersone wat nie as staatsorgane optree nie) binne die trefwydte van hoofstuk 2 gestel "... if, and to the extent that, it is applicable, taking into account the nature of the right and of the duty imposed by the right".

Laasgenoemde kwalifikasie laat die vraag ontstaan wat die omvang van die horisontale toepassing van hoofstuk 2 op regspersone in privaatregtelike regsverhoudinge is. Wêreldwyd het die tendens ontwikkel dat nie slegs ten opsigte van die verhouding tussen die staat en ander regsubjekte nie, maar ook in geval van die onderlinge verhouding tussen regsubjekte ongelykhede kan bestaan wat op regte van individue inbreuk kan maak.

Die verwysing na "all law" in artikel 8(1) sluit ook die gemenereg en die gewoontereg in. Voorts bepaal artikel 39:

> "(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.
>
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

Dit is egter duidelik dat die horisontale werking van hoofstuk 2 nie onbegrens toegepas sal kan word nie en die vraag ontstaan wat die omvang van die horisontale werking sal wees. Rautenbach[33] dui aan dat die vereiste in artikel 39(2) (artikel 35(3) van die tussentydse Grondwet) dat 'n hof by die uitleg van wetgewing en by die toepassing en ontwikkeling van die gemenereg en gewoontereg die gees, strekking en oogmerke van hoofstuk 2 in ag moet neem, met betrekking tot die omvang van die horisontale toepassing die volgende inhou:

(a) Ongelyke privaatregtelike verhoudings: Aangesien die doel van hoofstuk 2 is om beskerming te bied in die ongelyke regsverhouding tussen staat en ander regsubjekte, word die gees, strekking en oogmerke ook in ag geneem by ongelyke privaatregtelike verhoudings, veral in geval van vrywillige verenigings. Administratiefregtelik bestaan daar alreeds die beginsel dat hierdie verhoudings

33 *General provisions* 76–80.

nie bloot kontraktueel van aard is nie maar dat administratiefregtelike beginsels toepassing vind.[34] Die standpunt is dat administratiefregtelike beginsels op privaatregtelike regspersone van toepassing is, uitgesonderd in gevalle waar dit uitdruklik kontraktueel tussen die partye uitgesluit is. As gevolg van die ongelyke verhouding kan dit selfs wees dat die kontraktuele uitsluiting van hierdie gemeenregtelike administratiefregtelike beginsels deur 'n hof onkonstitusioneel bevind kan word.

(b) Algemene privaatregtelike beginsels: Daar bestaan reeds in privaatregtelike verhoudings die beginsels van goeie trou, redelikheid, *boni mores* en openbare belang. Veral kontrakte wat nie aan bogemelde beginsels voldoen nie word nie deur die howe toegepas nie. Hierdie beginsels kan 'n nuttige funksie vervul in die bepaling van watter privaatregtelike regsverhoudings in stryd met die beginsels van hoofstuk 2 sal wees (sien *Rock Insurance Co Ltd v Carmichael's Executor*[35] en *Robinson v Randfontein Estates*[36] waar die hof geweier het om 'n kontrak wat in albei partye se guns was, af te dwing weens die feit dat dit teen die openbare belang was).

(c) Die gelykheidsbeginsel: Artikel 9(4) en (5) maak die gelykheidsbeginsel gekwalifiseerd op privaatregtelike verhoudings van toepassing. Hiervolgens is diskriminasie op die gronde soos uiteengesit in artikel 9(3) (ras, geslag, geslagtelikheid, swangerskap, huwelikstatus, etniese of sosiale oorsprong, kleur, geslagtelike oriëntasie, ouderdom, gestremdheid, godsdiens, geloof, kultuur, taal en geboorte) onbillik tensy bewys word dat dit regverdigbaar is. Die bewyslas dat dit geregverdig is, rus vanselfsprekend op die persoon wat dit beweer. Hierdie aspek is van groot belang by die regshandelinge, lidmaatskap en interne verbandsreg van regspersone en word by paragraaf 4 hieronder vollediger bespreek.

(d) Ingevolge artikel 39(3) word ander regte (as die regte verskans in hoofstuk 2) ingevolge wetgewing, die gemenereg en gewoontereg erken in die mate wat dit met die regte in hoofstuk 2 bestaanbaar is. Omdat daar nie 'n hiërargie van verskanste regte bestaan nie, behoort die afweging van regte van die omstandighede in die verskillende gevalle af te hang en sal 'n besondere reg nie in alle gevalle voorrang geniet bo ander regte in hoofstuk 2 en ingevolge die gemene- of gewoontereg nie.[37]

Tans is die situasie dat ingevolge die gelykheidsbeginsel (artikel 9) alle regsverhoudings, ook privaatregtelike regsverhoudings, nie-diskriminerend van aard moet wees, tensy daar ingevolge artikel 9(5) aangetoon kan word dat dit 'n regverdigbare onderskeid is.[38] Die howe, en veral die konstitusionele hof, sal in

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34 Vgl *Theron v Ring van Wellington, NG Sendingkerk in SA* 1976 2 SA 1 (A) 21D–F; sien ook *Durr v Universiteit van Stellenbosch* 1990 3 SA 598 (A); *Mfolo v Minister of Education, Bophuthatswana* 1994 BCLR 136 (B); *Yates v University of Bophuthatswana* 1994 3 SA 815 (B); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B); Wiechers *Administratiefreg* (1984) 77; Baxter *Administrative law* (1984) 340–342; Ferreira "Enkele gedagtes oor die onderskeid tussen publiek- en privaatreg in die Suid-Afrikaanse reg" 1990 *SA Publiekreg* 64, "Die nakoming van die *audi alteram partem*-reël in kontraktuele verhoudinge" 1991 *SA Publiekreg* 140–146.

35 1917 AD 598.

36 1926 AD 204.

37 Sien hieroor die prosedure van afweging van belange soos voorgestel deur Froneman R in *Gardener v Whitaker* 1995 2 SA 672 (OK) 37A (par 3 1 hierbo).

38 *K Entertainment CC v Minister of Safety and Security* 1994 2 BCLR 718 (OK).

die toekoms 'n uiters belangrike funksie vervul in die stel van presedente van die omstandighede waar die maak van onderskeide regverdigbaar sal wees.

Die mate waarin regspersone ten opsigte van lidmaatskapsregte, die inhoud en toepassing van die konstitusie of reglement van sodanige regspersoon en ten opsigte van interne verbandsreg en eksterne regshandelinge aan konstitusionele voorskrifte gebonde is, hang nou saam met die wisselwerking tussen artikel 9 (die gelykheidsbeginsel) en artikel 18 (vryheid van assosiasie).

4 VRYHEID VAN ASSOSIASIE

Artikel 18 van die finale Grondwet bepaal: "Everyone has the right to freedom of association."

Groepvorming is 'n natuurlike gegewe waarop normale gesins- en familiebande berus en wat die grondslag van religieuse, sosiale, ekonomiese en politieke betrekkinge vorm. Dit vorm dus deel van die menslike bestaanswyse en neem 'n onontbeerlike plek in enige samelewing in. Die reg op vryheid van assosiasie is dus een van die mees fundamentele regte wat alle samelewings erken.[39]

Die begrip vryheid van assosiasie is 'n wye begrip wat vir verskillende vertolkings vatbaar is.[40] Twee aspekte van vryheid van assosiasie kan geïdentifiseer word. Enersyds het lede van organisasies die vryheid om te bepaal met wie, waarom en wanneer hulle wil assosieer. Dit hou verband met die lidmaatskaps- of toelatingsvereistes van organisasies. Andersyds het elkeen die reg om te besluit by watter organisasies hy/sy wil aansluit. Eersgenoemde aspek hou verband met die feit dat individue en groepe bepaalde verbintenisse kan sluit en handhaaf wat verband hou met hulle sosiale, kulturele, religieuse en politieke oortuigings, wat dien as manifestering van hulle vryheid van geloof, godsdiens, spraak, uitdrukking, kultuur en taal. Dit lei tot 'n vrye samelewing waarin elke individu hom/haar na vrye keuse kan ontwikkel en uitleef.

Daarteenoor hou die horisontale toepassing van hoofstuk 2 in dat daar nie op grond van ras, geslag, geslagtelikheid, swangerskap, huwelikstaat, etniese of sosiale oorsprong, kleur, seksuele oriëntasie, ouderdom, gestremdheid, geloof, oortuiging, kultuur of taal teen 'n persoon gediskrimineer mag word nie (artikel 9(4)), met die uitsondering van gevalle waar sodanige diskriminasie geregverdig kan word (artikel 9(5)). Hierdie aspek hou veral verband met diskriminerende toelatingsvereistes of interne verbandsreg van organisasies.

Die vraag ontstaan in watter omstandighede diskriminasie ingevolge artikel 9(5) geregverdig mag word en in watter omstandighede die owerheid op grond van diskriminerende praktyke met die werksaamhede van organisasies sal inmeng. Staatsinmenging ter beperking van die reg op vryheid van assosiasie vind primêr plaas ten einde die gelykheidsbeginsel ingevolge artikel 9 toe te pas. Artikel 36 bevat voorskrifte met betrekking tot die beperking van fundamentele regte:[41]

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39 Pienaar "Freedom of association in South Africa and the United States" 1993 *CILSA* 147–148.

40 Woolman en De Waal "Freedom of association" in Van Wyk *et al* (reds) *Rights and constitutionalism: The new South African legal order* (1994) (hierna Woolman en De Waal) 338.

41 Sien hieroor ook *S v Makwanyane* 1995 6 BCLR 665 (CC) 708.

"36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

Hiervolgens behoort die staat op die volgende wyses by die funksionering of werksaamhede van organisasies te kan inmeng:

(a) Die verbod op of ontbinding van 'n organisasie of 'n voorskrif tot wysiging van die doelstellings van 'n organisasie waar sodanige organisasie se doelstellings of werksaamhede ingevolge sy konstitusie of reglement in stryd is met die beginsel van 'n oop en vrye gemeenskap gebaseer op menslike waardigheid, gelykheid en vryheid.

(b) Die eis dat lidmaatskap oopgestel word ten einde persone in te sluit wat 'n wesenlike belang by die doelstellings van die organisasie het en ingevolge die konstitusie lidmaatskap geweier word op grond van diskriminerende oorwegings.

(c) Die eis dat die interne verbandsreg van veral politieke organisasies aan demokratiese beginsels moet voldoen.

Die motivering vir bogemelde staatsinmenging is geleë in die bevordering van die openbare belang ingevolge die voorskrifte van artikel 36(1), maar dit geld nie absoluut nie en sal verskil na gelang die aard van die organisasie.[42] In hierdie verband speel die openbare funksie wat 'n organisasie vervul 'n groot rol. Vanselfsprekend sal organisasies wat ingevolge artikel 239(1)(b)(ii) as staatsorgane optree (sien paragraaf 3 2 1 hierbo) as gevolg van die vertikale toepassing van hoofstuk 2 op geen wyse mag diskrimineer nie, behalwe in hoogs uitsonderlike gevalle waar die diskriminasie ingevolge artikel 9(5) geregverdig kan word. Organisasies wat nie as staatsorgane optree nie is egter eweneens weens die horisontale werking van die Grondwet aan die voorskrifte van hoofstuk 2 gebonde maar in 'n beperkter mate. Dit is dus noodsaaklik om die trefwydte van die toepassing van hoofstuk 2 by organisasies wat nie as staatsorgane optree nie te ondersoek.

Die lidmaatskapsvereistes en interne reëlings van 'n tennisklub met 12 lede sal byvoorbeeld moeilik deur die owerheid beperk kan word aangesien sodanige vereniging weens sy aard binne die private sfeer val waar vryheid van assosiasie beskerm word.[43] In sodanige geval sal staatsinmenging nie as redelik en regverdigbaar in 'n oop en demokratiese samelewing beskou kan word nie. Daar kan egter ander kompliserende faktore bestaan. Indien die tennisklub byvoorbeeld van munisipale tennisgeriewe gebruik maak en lidmaatskapsvereistes op 'n

42 Woolman en De Waal 381–382.

43 Vir die onderskeid tussen die private sfeer en openbare sfeer, sien Rautenbach *General provisions* 77–78; Woolman 10.34.

rassegrondslag openlik geadverteer word, ontstaan die vraag of die lede op regverdiging van die diskriminerende faktor ingevolge artikel 9(5) kan steun. Dit laat die moontlikheid dat die owerheid in openbare belang en ter bevordering van 'n oop en demokratiese samelewing gebaseer op menslike waardigheid, gelykheid en vryheid in die interne aangeleenthede van die tennisklub kan inmeng. Die klub se konstitusie en/of optrede na buite het dit dus uit die private sfeer na die openbare sfeer verskuif wat owerheidsinmenging ingevolge artikel 36(1) regverdig. Die grens tussen die openbare en private sfeer is egter moeilik bepaalbaar en riglyne sal in die verband ontwikkel moet word.

Die teenoorgestelde is ook waar. 'n Plaaslike sakekamer waar die onderlinge ekonomiese belange van sakelui gedien en bevorder word, kan moontlik nog op taal- of ekonomiese grondslae lidmaatskapsvereistes stel, maar vereistes op grond van geslag of ras is moeiliker regverdigbaar ingevolge artikel 9(5). 'n Sosiale klub van sakelui wat geen openbare of ekonomiese nadele vir nie-lede inhou nie, sal egter wel diskriminerende lidmaatskapsvereistes kan stel as gevolg van die private aard daarvan. Die riglyn in al hierdie gevalle is die mate waarin sodanige organisasie in die openbare sfeer funksioneer, teenoor privaat organisasies wat hulle aktiwiteite nie met openbare oogmerke nie maar ter realisering van die lede die ekonomiese, sosiale, kulturele, taal- of godsdienstige belange uitoefen. In die Amerikaanse reg is daar egter twee vorme van diskriminasie wat moeilik regverdigbaar is (selfs by organisasies van 'n private aard), naamlik diskriminasie op grond van ras[44] en geslag. Dit is nie onmoontlik om sodanige organisasies op 'n private grondslag te bedryf nie, maar die vraag of daar 'n regverdigbare motivering vir sodanige onderskeid is, word strenger toegepas as gevolg van die krenkende effek van sodanige optrede.[45]

Wanneer diskriminerende maatreëls dus getref word deur organisasies wat in die private sfeer optree, geld die volgende riglyne met betrekking tot die toelaatbaarheid van sodanige onderskeide:[46]

(a) Kan die onderskeid gemotiveer word in die lig van die organisasie se doelstellings en werksaamhede?

(b) Is die onderskeid in stryd met die openbare belang deurdat dit krenkend van aard is en dus nie as redelik en regverdigbaar in 'n oop en demokratiese samelewing bestempel kan word nie?

(c) Moet die belange van die lede van die organisasie voorkeur geniet bo die belange van persone wat wil toetree tot die organisasie of gekrenk word deur die organisasie se doelstellings of werksaamhede?

Daar word in geval van private organisasies waar die owerheid se inmenging ten opsigte van lidmaatskapsvereistes, die inhoud van die konstitusie of reglement

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44 Davis "Equality and equal protection" in Van Wyk *et al* (hierna Davis) 202: "The justification for differentiation has also been fundamental to anti-discrimination jurisprudence in the US. Classification based upon racial criteria are [*sic*] considered to be suspect and the doctrine of strict scrutiny has been applied to them. In such cases it is not sufficient to justify a differentiation on the basis of a rational relationship between the classification and a state interest. The classification must be shown to be a necessary means to the promotion of a 'compelling and overriding' state interest."

45 *Roberts v United States Jaycees* 468 US 606 (1984); sien Pienaar 1993 *CILSA* 150–151 en gesag aldaar.

46 Rautenbach *General provisions* 54–55.

en die interne verbandsreg in bepaalde gevalle kan plaasvind, veral onderskei tussen klubs (verenigings met of sonder regspersoonlikheid), kerke, opvoedkundige instellings, politieke organisasies en ekonomiese (beroeps-, professionele of bedryfs-) organisasies. Die aard van die organisasie sal dikwels bepaal in welke mate dit in die private of openbare sfeer val en in watter mate owerheidsinmenging ingevolge artikels 9 en 36 regverdigbaar is.

4 1 Klubs

'n Klub kan gemeenregtelik getipeer word as 'n vereniging met of sonder regspersoonlikheid.[47] Die regspersoonlikheid van 'n vereniging hou egter verband met die uitoefening van kompetensies en het nie direk betrekking op die vraagstuk van vryheid van assosiasie soos dit veral met betrekking tot lidmaatskapsvereistes en interne verbandsreg toepassing vind nie. Vir doeleindes van die verdere bespreking maak dit dus nie 'n verskil of 'n vereniging regspersoonlikheid het al dan nie.

Lidmaatskapsvereistes bepaal gewoonlik 'n vereniging se identiteit en funksioneringswyse en is 'n uiting van die bestaande (individuele) lede se reg op vryheid van assosiasie. Daar sal egter in geval van diskriminerende lidmaatskapsvereistes 'n bewyslas op die vereniging rus dat die diskriminasie regverdigbaar is ingevolge artikel 9(5), maar daar rus eweneens 'n bewyslas op die ander party dat 'n beperking op die vereniging om lidmaatskapsvereistes te stel of 'n voorskrif om dit te verslap ingevolge artikel 36 redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menslike waardigheid, gelykheid en vryheid.[48]

Vryheid en gelykheid as beginsels wat in hierdie verband in ag geneem moet word, is op die oog af teenstrydige beginsels.[49] Dit is egter noodsaaklik dat daar 'n afweging van belange plaasvind wat in elke besondere geval sal aandui in watter mate die gelykheidsbeginsel met die vryheid van individue (in hierdie geval vryheid van assosiasie) versoenbaar is.[50] In die afweging van hierdie belange is die mate waarin 'n vereniging privaat of openbaar van aard is en/of funksioneer dikwels van deurslaggewende belang.

In die Amerikaanse reg word daar onderskei tussen die reg op *intimate association* en *expressive association*, en in albei gevalle kan daar (indien geregverdig) lidmaatskapsvereistes gestel word wat diskriminerend van aard mag wees.[51] In geval van *intimate association* word beperkende lidmaatskapsvereistes toegelaat op grond van die feit dat dit 'n inherente deel van individuele vryheid van keuse (en gevolglik assosiasie) vorm. Die vereistes wat die regspraak stel, is dat dit slegs toelaatbaar is in geval van relatief klein organisasies (in die besondere geval minder as 400 lede), dat die keuse van lede gemotiveer kan word in die lig van die klub se doelstellings en funksioneringswyse en dat nie-lede

47 Pienaar *Die gemeenregtelike regspersoon in die SA privaatreg* (LLD-proefskrif PU vir CHO 1982) 190–232, "Die regsaard van verenigingsregspersone" 1990 *De Jure* 81–97.

48 *Gardener v Whitaker* 1995 2 SA 672 (OK); 1996 4 SA 337 (CC).

49 Davis 196.

50 *Ibid*: "Equality thus is inextricably linked to the conception of liberty if society is to allow the promotion of competing interests. Where equality is different, however, to liberty is that it depends upon a comparator. It is here that equality becomes an enigmatic concept."

51 Pienaar 1993 *CILSA* 149–151; Davis 202–203; Woolman en De Waal 345–350.

uitgesluit word van die klub se aktiwiteite wat inhou dat dit 'n privaatklub is wat nie enige openbare aktiwiteite beoefen nie.[52] Dat daar egter nie in alle gevalle op die reg op *intimate association* aanspraak gemaak kan word nie, blyk uit die uitspraak in *Roberts v United States Jaycees*[53] – die hof was nie bereid om op grond van die reg op *intimate association* die Jaycees se besluit dat vroue nie vir lidmaatskap kwalifiseer nie, te handhaaf nie. Die hof beslis dat die feit dat die Jaycees 'n openbare diensfunksie vervul en nie-toelating tot die organisasie die potensiaal het om lede ekonomies te benadeel, die organisasie buite die kader van *intimate association* plaas.

In geval van *expressive association* bepaal die organisasie se doelstellings dat lede die bevordering van bepaalde gemeenskaplike oogmerke nastreef. Indien die toelating van bepaalde persone die funksionering van die organisasie ter uitoefening van die gemeenskaplike doelstellings bemoeilik of onmoontlik maak, of die aard van die organisasie sal verander, kan daar beperkende lidmaatskapsvereistes gestel word:[54]

> "The right to expressive association is linked to recognition of the fact that people have the right to associate in pursuit of activities protected by the First Amendment and that such people have the right to exclude certain categories of people from membership of the association if inclusion of such categories will prevent the association from engaging in its various activities or expressing its views."

Hierdie kriteria sal waarskynlik nie regstreeks uit die Amerikaanse reg in die Suid-Afrikaanse situasie toepassing vind nie, maar die feit dat 'n organisasie van openbare aard is of 'n openbare funksie vervul,[55] sal waarskynlik deurslaggewend wees in die toepassing van die gelykheidsbeginsel ingevolge artikel 9 (horisontale werking van die Grondwet). Daarteenoor behoort dit hoogs onwaarskynlik te wees dat die owerheid sal inmeng in die lidmaatskapsvereistes en aktiwiteite van suiwer privaat organisasies wat nie enigsins 'n openbare funksie vervul nie. Indien 'n organisasie (selfs 'n privaat organisasie) se doelstellings en/of aktiwiteite egter sodanig is dat dit krenkend van aard is, is dit wel moontlik dat die owerheid daarmee sal inmeng vanweë die feit dat die inmenging ingevolge artikel 36(1) redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid.

Die bepalings van artikel 31 (vryheid van kulturele, godsdienstige en taalgemeenskappe) sal egter ook deurentyd in gedagte gehou moet word (vir 'n bespreking hiervan, sien paragraaf 4 2 hieronder). Veral artikel 31(1)(b) maak dit moontlik dat organisasies gebaseer op gemeenskaplike kultuur, taal en godsdiens vrylik kan bestaan mits hulle privaat van aard is ("associations and other organs of civil society"). Die vraag of daar in sodanige organisasies beperkings op grond van ras of geslag opgelê sal kan word, sal afhang van die feit of dit geregverdig kan word ingevolge die voorskrif van artikel 9(5) wat bepaal dat daar 'n bewyslas op die organisasie rus dat sodanige diskriminasie regverdigbaar is.

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52 *New York State Club Association v City of New York* 69 NY 211 215 (1987).

53 468 US 609 (1984); sien ook *Rotary Club of Duarte v Board of Directors of Rotary International* 178 Cal App 1035 (1987).

54 Pienaar 1993 *CILSA* 151; *Roberts v United States Jaycees* 468 US 609 627 (1984).

55 Indien sodanige organisasie 'n openbare funksie *ingevolge wetgewing* uitoefen, is dit natuurlik 'n staatsorgaan ingevolge a 239(1)(b)(ii).

4 2 Kerke en godsdienstige organisasies

In geval van kerke en godsdienstige organisasies word bogemelde beginsels verder gekompliseer deur die volgende artikels van die finale Grondwet:

"15. Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions provided that –

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising –

(i) marriages concluded under any tradition or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.

31. Cultural, religious and linguistic communities

(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to –

(a) enjoy their culture, practise their religion and use their language, and

(b) form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

In die eerste plek is artikel 15(1) daarop gemik om individue se reg op vryheid van geloof, oortuiging en meningsuiting te beskerm. Aangesien artikel 8(4) egter voorsiening maak vir die beskerming van regte van regspersone vir sover die aard van die reg en die aard van die regspersoon dit moontlik maak, ontstaan die vraag of artikel 15(1) ook beskerming verleen aan kerke as regspersone. Dit is te betwyfel of 'n kerk oor geloof of gewete beskik en in dié geval wil dit voorkom of artikel 15(1) slegs op individue van toepassing is.[56] Artikel 31(1)(a) en (b) maak egter voorsiening vir vryheid van assosiasie van godsdienstige, kulturele en taalgemeenskappe.

In geval van godsdienstige gemeenskappe behoort die owerheid, op grond van die aard van sodanige organisasies, slegs as gevolg van grondige redes te oorweeg om in te meng in die lidmaatskapsvereistes en aktiwiteite van 'n betrokke organisasie aangesien dit die lede se reg op vryheid van geloofsoortuiging (artikel 15), reg van assosiasie (artikel 18) en reg op die vorming van gemeenskappe op grond van geloofsoortuiging (artikel 31) aantas. Indien bepaalde geloofsvoorskrifte dus gestel word as lidmaatskapsvereistes en die interne verbandsreg en aktiwiteite dus in ooreenstemming met die geloofsvoorskrifte uitgeoefen word, behoort die owerheid nie daarmee in te meng nie.

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56 Woolman 10.6. Anders egter Rautenbach *General provisions* 42 wat na aanleiding van die Duitse reg skynbaar wel bereid is om vryheid van godsdiens en gewete aan kerke toe te staan. Dit kom egter ietwat kunsmatig voor, veral in die lig van die bepalings van a 31(1).

Die toepassing van die gelykheidsbeginsel ingevolge artikel 9 kompliseer egter die aangeleentheid. In watter mate sal kerke kan diskrimineer op grond van ras (byvoorbeeld lidmaatskapsvereistes) of geslag (byvoorbeeld die weerhouding van ampte aan vroue)? Die weerhouding van lidmaatskap op grond van ras sal by kerke en godsdienstige organisasies ingevolge artikels 9(5) en 31(2) baie goed gemotiveer moet word ten einde aan te dui dat dit op geloofsoortuiging berus alvorens dit as billike onderskeid aanvaar sal word.[57] Die weerhouding van toetrede tot bepaalde ampte op grond van geslag kan moontlik ingevolge die bepaalde godsdienstige groepering se geloofsuitgangspunt geregverdig word. Woolman en De Waal[58] stel dit soos volg:

> "Cultural (and religious) associations will generally find themselves in a similarly advantageous position. To the extent that these associations stick to *bona fide* religious and cultural activities they will be relatively immune to state intervention. If cultural or religious associations can demonstrate that their discriminatory membership policies legitimately help to preserve their communities' religious or cultural life, then the associational right to determine membership should trump the state's interest in equality. And for good reason: the state's interest in equality here is rather weak. The goods provided by such association are less public than those provided by other types of association – political and economic – which are legitimately subject to far greater state control ... While there may be the odd good reason[59] to open up the membership policies of cultural and religious associations, there are no good reasons for state interference in the internal affairs of such associations. The internal affairs of such associations are generally linked to some concrete vision of religious or community life. In a liberal society the state should have no role to play in the construction of these particular visions of the good life."

Alhoewel daar in breë trekke met hierdie standpunt van die skrywers saamgestem word, behoort die owerheid tog ten opsigte van die interne verbandreg of aktiwiteite van die organisasie te kan ingryp indien diskriminerende maatreëls van 'n kerk nie op grond van geloofsoorwegings toegepas word nie, maar op grond van ander oorwegings, soos politieke of ekonomiese oorwegings. In sodanige omstandighede sal die kerk die diskriminerende maatreël moeilik op grond van artikel 9(5) kan regverdig.

4 3 Opvoedkundige instellings

Daar bestaan meningsverskil oor die wyse waarop fundamentele regte op opvoedkundige instellings van toepassing sal wees. Uiteraard sal alle staatskole en -onderwyskolleges as staatsorgane funksioneer en sal die fundamentele regte regstreeks (vertikaal) op sodanige instellings van toepassing wees. In die geval van privaatskole word wel 'n openbare funksie (primêre en sekondêre onderwys) vervul wat sodanige skole as staatsorgane sal tipeer indien die funksie kragtens wetgewing uitgeoefen word. Selfs indien privaatskole nie as staatsorgane getipeer kan word nie, sal hoofstuk 2 as gevolg die horisontale werking van die Grondwet van toepassing wees (sien paragraaf 3 2 hierbo).

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57 Tov die kriteria wat gestel word om te bepaal of die maak van 'n onderskeid billik is, vgl *K Entertainment CC v Minister of Safety and Security* 1994 2 BCLR 718 (OK).

58 384.

59 Die skrywers toon aan dat diskriminerende toelatingsvereistes by kulturele of godsdienstige verenigings wel ontoelaatbaar behoort te wees as dit nie op kulturele of godsdienstige oorwegings berus nie maar bv op politieke of ekonomiese oorwegings.

Die vraag in watter mate universiteite en ander tersiêre instellings deur hoofstuk 2 gebind word, is moeiliker om te beantwoord. Du Plessis[60] is van mening dat universiteite as staatsorgane funksioneer (sien paragraaf 3 2 1 hierbo). Hy grond sy standpunt daarop dat universiteite, hoewel hulle grootliks deur privaatinisiatief bestuur, beheer en bedryf word en nie owerheidsgesag uitoefen nie, statutêre liggame is wat in 'n groot mate in die owerheidstrukture van die staat geïntegreer is deurdat hulle:

(a) openbare onderwysfunksies vervul;

(b) grootliks afhanklik is van 'n infrastruktuur wat deur die staat verskaf word; en

(c) nou saamwerk met strukture van owerheidsgesag, soos onder andere blyk uit staatsverteenwoordiging in hulle bestuurstrukture.

Hierby kan gevoeg word dat universiteite op grond van regspraak nog altyd as semi-openbare instellings beskou is. Dit blyk uit die feit dat universiteite nie as suiwer privaatregtelike regspersone getipeer word nie maar dat die samestelling van universiteite, erkenning van grade en kursusse, administratiewe besluitnemingsprosesse en tugaangeleenthede met owerheidsinspraak geskied en grootliks deur administratiefregtelike beginsels beheers word.[61]

Daarteenoor beklemtoon Venter[62] die feit dat universiteite vanweë hulle ontstaan en funksionering op institusionele outonomie en akademiese vryheid geregtig is. Met verwysing na veral die Duitse en Kanadese reg argumenteer Venter dat die beperking op owerheidsinmenging by tersiêre instellings versterk word deur die feit dat sodanige inmenging nie slegs redelik en regverdigbaar moet wees nie, maar ook noodsaaklik (artikel 33(1)(b) van die tussentydse Grondwet). Ten spyte van finansiële steun deur die owerheid en owerheidsverteenwoordiging in die bestuurstrukture van hierdie instellings, is dit in die meeste regstelsels 'n beginsel dat outonomie en akademiese vryheid owerheidsinmenging in 'n groot mate beperk. Akademiese vryheid hou in die Duitse reg in dat veral twee grense vir owerheidsinmenging met betrekking tot die strukturering van universiteite gestel word:

(a) gepaste vryheidsbevorderende universiteitstrukture moet geskep word sodat soveel moontlik (akademiese) vryheid vir die betrokke individuele reghebbendes toegelaat word;

(b) die wetgewer moet verplig word om die universiteitswese so te struktureer dat daar ruimte vir universiteitspersoneel bestaan om hulle akademiese vryheid uit te oefen.

Die voorstelle met betrekking tot outonomie en akademiese vryheid hou egter grootliks verband met die interpretasie van artikels 32 en 247 van die tussentydse Grondwet. In die finale Grondwet word bepaal:

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60 1994 *TSAR* 708.

61 *Durr v Universiteit van Stellenbosch* 1990 3 SA 598 (A); sien ook *Blacker v University of Cape Town* 1993 4 SA 402 (K); *Yates v University of Bophuthatswana* 1994 3 SA 815 (B); *Toerien v De Villiers* 1995 2 SA 879 (K); Ferreira en Olivier "Universiteite en tugbepalings na *Durr*" 1991 *SA Publiekreg* 146–151.

62 1995 *THRHR* 389–393.

"29. Education

(1) Everyone has the right –

(a) to a basic education, including adult basic education; and

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account–

(a) equity;

(b) practicability; and

(c) the need to redress the results of past racially discriminatory law and practice.

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –

(a) do not discriminate on the basis of race;

(b) are registered with the state; and

(c) maintain standards that are not inferior to standards at comparable public educational institutions.

(4) Subsection (3) does not preclude state subsidies for independent educational institutions."

Saamgelees met artikels 16(1)(d) (reg op akademiese vryheid) en 31 (regte van kulturele, religieuse en taalgemeenskappe), hou artikel 29 primêr die reg van individue op akademiese vryheid in, ook met betrekking tot taal, kultuur en godsdiens, onderworpe aan al die ander bepalings en beperkings in hoofstuk 2. In hoeverre dit aan instellings die vryheid gee om te diskrimineer op grond van bepaalde oorwegings, blyk uit artikel 29(3) wat uitdruklik bepaal dat onafhanklike onderwysinstellings met eie befondsing (wat ingevolge artikel 29(4) nie staatsubsidies uitsluit nie), wel onderskeid op grond van taal, godsdiens of kultuur mag maak maar nie op grond van ras mag diskrimineer nie. Universiteite wat binne die woordomskrywing van die Wet op Universiteite 61 van 1955 val, voldoen egter aan die vereistes wat ingevolge artikel 239(1)(b)(ii) met betrekking tot staatsorgane gestel word deurdat dit instellings is wat 'n openbare funksie ingevolge wetgewing vervul.

Dit sluit egter nie die moontlikheid uit dat privaatuniversiteite (wat selfs gedeeltelik deur die staat befonds mag word), ingevolge artikels 29(3) en (4) tot stand kan kom nie, welke universiteite dan nie as staatsorgane sal optree nie maar steeds ingevolge die horisontale werking van die Grondwet gebonde sal wees aan die voorskrifte van hoofstuk 2. Op so 'n wyse kan karakteruniversiteite op grond van taal, godsdiens en/of kultuur bedryf word, behalwe dat dit nie op grond van ras mag diskrimineer nie (artikel 29(3)(a)). Voorts sal die diskriminasie ingevolge artikel 9(5) redelik moet wees – dit sou byvoorbeeld onredelik wees om op grond van liggaamlike gestremdheid of huwelikstaat by 'n akademiese inrigting te diskrimineer. Geslagdiskriminasie sal gewoonlik ontoelaatbaar wees, behalwe in geval van enkelgeslagskole of tersiêre inrigtings. Laasgenoemde is nie in Suid-Afrika bekend nie en dit is onwaarskynlik dat dit ekonomies of andersins regverdigbaar is.

4 4 Politieke organisasies

In geval van politieke organisasies bestaan daar in die meeste liberaal-demokratiese lande groter omsigtigheid met betrekking tot owerheidsinmenging betreffende lidmaatskapsvereistes en interne verbandsreg.[63] Die rede is dat hierdie organisasies normaalweg in enige demokratiese bestel 'n onontbeerlike funksie vervul ter behoud en bevordering van sodanige demokrasie. Inmenging deur die owerheid in hierdie organisasies se aktiwiteite kan maklik 'n aanduiding van 'n ondemokratiese regeringstelsel wees.[64] Aan die ander kant vervul politieke organisasies in 'n veel groter mate 'n openbare funksie as wat privaat klubs en sosiale verenigings dit doen. Dit beteken in effek dat dit 'n groter motivering vir staatsinmenging bied as in geval van ander organisasies.

Artikel 19, wat handel oor politieke regte, lui soos volg:

> "19 (1) Every citizen is free to make political choices, which includes the right:
> (a) to form a political party;
> (b) to participate in the activities of, or recruit members for, a political party; and
> (c) to campaign for a political party or cause."

Alhoewel hierdie artikel op die oog af die individuele reg van burgers beskerm om politieke organisasies te vorm en te bedryf, beskerm dit, saamgelees met artikel 18 (vryheid van assosiasie), die vrye bedryf van politieke aktiwiteite deur middel van politieke organisasies. Die owerheid mag slegs in hierdie organisasies se aktiwiteite inmeng vir sover dit redelik en regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid (artikel 36(1)). In die interpretasie van die Grondwet moet 'n hof by die bepaling van die waardes wat 'n oop en demokratiese gemeenskap gebaseer op menswaardigheid, gelykheid en vryheid onderlê, ingevolge artikel 39(1) die bepalings van die internasionale reg en ander regstelsels oorweeg. In sowel die Amerikaanse as Duitse reg is dit geykte reg dat politieke organisasies die hoogste mate van beskerming teen owerheidsinmenging geniet. Die Amerikaanse Supreme Court beslis in *Elrod v Burns*:[65]

> "Political belief and association constitute the core of those activities protected by the First Amendment. Regardless of the nature of the inducement, whether it be by the denial of public employment or . . . by the influence of a teacher over students, no government official can prescribe what shall be orthodox in politics or other matters of opinion or force citizens to confess by word or act their faith therein . . . And, though freedom of belief is central, the First Amendment protects political association as well as political expression."

In die Amerikaanse reg is dit egter 'n erkende beginsel dat diskriminerende lidmaatskapsvereistes slegs toelaatbaar sal wees indien dit regstreeks verband hou met die organisasie se *politieke* oogmerke (*freedom of expressive association*). So sal 'n politieke party wat omgewingsbewaring as hoofdoel het nie lidmaatskapsvereistes op 'n rassegrondslag mag stel nie.[66]

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63 Woolman en De Waal 381–382.

64 Voorbeelde van verbode politieke organisasies in die vorige bestel was die ANC, PAC, UDF en SAKP; sien hieroor veral Mathews *Freedom, state security and the law* (1986) 140; Pienaar 1993 *CILSA* 164–165.

65 427 US 347 (1976); sien ook Pienaar "Freedom of political association in South Africa, Germany and the United States" 1993 *TSAR* 240–244; Woolman en De Waal 345–347 371–376.

66 Pienaar 1993 *CILSA* 155–159; Woolman en De Waal 346–347.

In die Duitse reg is daar twee gronde waarop die owerheid in die aktiwiteite van 'n politieke organisasie mag inmeng, naamlik indien die organisasie se interne verbandreg ondemokraties is – alle politieke organisasies moet hulle finansiële state aan die owerheid openbaar.[67] Voorts mag 'n politieke organisasie slegs deur die *Bundesverfassungsgericht* op aanbeveling van die *Bundesrat* of *Bundestag* verbied word indien dit 'n gewelddadige bedreiging vir die demokratiese staatsbestel inhou (en nie omdat dit 'n ander politieke siening of stelsel propageer nie).

In Suid-Afrika behoort dieselfde beginsels te geld, naamlik dat daar slegs ingevolge artikel 36(1) in die interne aktiwiteite of lidmaatskapsvereistes van 'n politieke organisasie ingemeng behoort te word indien diskriminerende maatreëls nie verband hou met die politieke oogmerke van die organisasie nie. 'n Politieke organisasie behoort slegs verbied te word indien dit die demokratiese orde bedreig deur gewelddadige of dreigend gewelddadige optrede.

4 5 Ekonomiese (professionele, beroeps- of bedryfs-) verenigings

In geval van ekonomiese en beroepsverenigings kan diskriminerende lidmaatskapsvereistes, benewens die feit dat dit teenstrydig met die gelykheidsbeginsel is, aansienlike vermoënsregtelike nadeel of potensiële nadeel meebring en gevolglik inbreuk maak op mense se regte in eiendom ingevolge artikel 25. Dit is vanselfsprekend dat toelatingsvereistes op grond van beroeps-, bedryfs- of professionele kwalifikasies gestel mag word, byvoorbeeld slegs geregistreerde mediese dokters, tandartse en persone verbonde aan verwante mediese professies kwalifiseer as lede van die Mediese en Tandheelkundige Vereniging van Suidelike Afrika. Om egter ander vorme van diskriminerende lidmaatskapsvereistes te stel, byvoorbeeld op grond van geslag of ras, sal moeilik as redelik en regverdigbaar aangemerk kan word. Dit tas voorts 'n individu se reg op die vrye beoefening van 'n bedryf, beroep of professie aan. Artikel 22 bepaal in hierdie verband:

> "22. Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

Die vraag ontstaan in watter omstandighede privaat verenigings ter bevordering van die lede se beroeps-, bedryfs- of professionele vaardighede en/of ondernemings lidmaatskapsvereistes kan stel wat nie berus op beroeps- of professionele kwalifikasies nie. Kan 'n sakekamer lidmaatskapsvereistes op grond van taal stel of kan die Black Lawyers' Association lidmaatskapsvereistes op grond van ras stel? Ek is van mening dat dit wel ingevolge artikel 9(5) toelaatbaar sal wees indien die doelstellings van so 'n vereniging juis is om die professionele of beroepsmoontlikhede van die besondere groep te bevorder. Ten einde dit ingevolge artikel 9(5) te regverdig, sal 'n verdere maatstaf wees of die vereniging van private of openbare aard is. In die Amerikaanse beslissing *Roberts v United States Jaycees*[68] het die Supreme Court beslis dat die openbare aard van die Jaycees en die beroepsvoordele wat dit vir lede bied, nie die verbod op lidmaatskap van vroue op grond van *intimate association* of *expressive association* regverdig nie.

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67 Pienaar 1993 *TSAR* 240–243; Woolman en De Waal 373–375.
68 468 US 609 (1984).

Dit is te verwagte dat min professionele of beroepsorganisasies sal kan steun op die feit dat diskriminasie op ander gronde as beroeps- of professionele kwalifikasies 'n privaat aangeleentheid is as gevolg van die nadeel of potensiële nadeel wat dit kan meebring. Sosiale verenigings van beroepslui van 'n private aard is egter in 'n beter posisie om diskriminerende praktyke te kan regverdig, juis vanweë die private sfeer waarin dit funksioneer.

Indien lidmaatskapsvereistes wat deur die owerheid gesanksioneer word bepaalde persone weerhou om ingevolge artikel 22 'n bedryf, professie of beroep te beoefen, kan dit (ondersteun deur die reg van 'n individu in eiendom ingevolge artikel 25) die vraag laat ontstaan of die beperking redelik en regverdigbaar ingevolge artikel 36(1) is. Die owerheid sal dan moet aantoon dat so 'n beperking in ooreenstemming is met die beginsels wat geld in 'n oop en demokratiese samelewing wat berus op menswaardigheid, gelykheid en vryheid. 'n Beslissing in hierdie verband berus dus weer eens op sowel die afweging van openbare belange teenoor individuele belange, as die afweging van individuele belange onderling.

5 SAMEVATTING

In die nuwe konstitusionele bedeling word daar besondere voorskrifte met betrekking tot regspersone gestel. Regspersone geniet (net soos natuurlike persone) beskerming van fundamentele regte teen owerheidsoptrede indien die aard van die reg en die aard van die regspersoon dit vir sodanige beskerming vatbaar maak. In hierdie verband moet daar beklemtoon word dat regspersone eiesoortige regsubjekte is en dat die regte van regspersone dus op 'n eiesoortige wyse beskerm word wat nie noodwendig ooreenstem met die wyse waarop natuurlike persone se regte beskerm word nie.

Insgelyks rus daar op regspersone die verpligting om nie op die regte van ander regsubjekte inbreuk te maak nie. In geval van regspersone wat as staatsorgane optree, hou dit verband met die vertikale toepassing van die Grondwet in die regsverhouding tussen die staat en ander regsubjekte. Daar bestaan meningsverskil of die tussentydse Grondwet ook hierdie verpligting op regspersone in die horisontale verhouding tussen regsubjekte onderling gelê het. In die finale Grondwet word daar egter uitdruklik voorsiening gemaak vir die horisontale toepassing van fundamentele regte.

Die omvang van die horisontale beskerming van fundamentele regte hou in geval van regspersone verband met vryheid van assosiasie. Vryheid van assosiasie beteken enersyds dat 'n organisasie (diskriminerende) lidmaatskapsvereistes kan stel ten einde bepaalde doelstellings na te streef en werksaamhede te verrig. Andersyds hou dit in dat 'n individu die vrye keuse het om te besluit met wie hy/sy wil assosieer. In die afweging van hierdie teenstrydige belange behoort die volgende beginsels as maatstaf te dien:

(a) Is die diskriminerende maatreëls noodsaaklik vir die uitoefening van die doelstellings en werksaamhede van die organisasie?

(b) Is die diskriminerende maatreëls krenkend van aard en as sodanig in stryd met die openbare belang deurdat dit nie redelik en regverdigbaar is in 'n oop en demokratiese samelewing nie?

(c) Moet die belange van die organisasie in die uitoefening van die diskriminerende maatreëls voorkeur geniet bo die belange van individue wat deur die maatreëls geraak word?

By die beantwoording van bogenoemde vrae sal die aard van die organisasie 'n invloed uitoefen op die afweging van die belange van die onderskeie partye. Uiteraard sal privaatorganisasies wat in die openbare sfeer optree strenger beoordeel word by die vraag of diskriminerende maatreëls regverdigbaar is. Voorts word bogenoemde beginsels verskillend toegepas in geval van klubs, godsdienstige organisasies, politieke organisasies, opvoedkundige inrigtings en professionele, beroeps- en bedryfsverenigings.

Dit illustreer die beginsel dat die horisontale werking van die Grondwet op 'n afweging van belange berus. Dit is dikwels nie moontlik om rigiede beginsels neer te lê of finale antwoorde te verskaf nie – belange wat in bepaalde omstandighede beskermingswaardig is, kan in ander omstandighede ondergeskik gestel word aan ander belange.

I understand the Chief Justice to have said that even politicians can be defamed. They must, however, not be overhasty to complain about slatings against them unless it is really serious. Now it is obvious, in my view, that a distinction must be drawn between an attack against the dignity and reputation of a politician, on the one hand, and an attack upon his political views, policies and conduct, on the other hand. When it comes to the latter, the Courts will be slower to come to the assistance of a politician. But, even if, in that context, a defendant oversteps the bounds of what is permissible, he will be held liable. On the other hand, if there is an unwarranted slating which lowers him in the esteem of his fellow human beings which is not at all necessary in commenting upon his policy and his conduct, a Court will be more readily inclined to protect his dignity and reputation. Apart from the somewhat more robust approach in the case of public figures and politicians I am not aware of any policy, prior to the coming into effect of the interim Constitution, disqualifying public figures or politicians from claiming damages for defamation (per Hartzenberg J in *Mangope v Ismal* 1997 4 SA 277 (T) 287–288).

Why is a great work termed seminal and not ovular? Feminism[1] and the law

Adrienne van Blerk
BIuris LLD
Professor of Jurisprudence, University of South Africa

OPSOMMING

Waarom word 'n groot werk seminaal eerder as ovulêr genoem? Feminisme en die reg

Die nuwe grondwetlike bedeling in Suid-Afrika waarborg sonder twyfel gelykheid van mans en vroue voor die reg. Dit is 'n merkbare breuk met die patriargale geskiedenis van die Suid-Afrikaanse reg, wat die skerpste weerspieël word deur die minderwaardige status wat afgedwing is op die swart, getroude vrou deur die tweeledige regsisteem van die gewoontereg en die reg toegepas deur die blanke regering, en ook deur ander bepalings wat in diskriminerende wetgewing vervat is.

Die gelyke status wat deur die Grondwet verskans word, moet egter nie ligtelik opgeneem word nie. Bevryding vereis meer as stellings op papier. Tot op hede was die regsisteem in Suid-Afrika die hoofinstrument wat deur vroue gebruik is om veranderinge te bewerkstellig; dit het egter net onbeduidende veranderinge meegebring. Omdat Suid-Afrikaanse feministe grootliks tevrede was met dié toedrag van sake, was feministiese regsliteratuur primêr ingestel op die vestiging van aandag op diskriminerende wetgewing en beroepe om hervorming.

In lande met 'n ouer geskiedenis van feministiese regsleer as Suid-Afrika, is die feministe lankal reeds nie meer tevrede met sulke stuksgewyse hervorming nie. Hier bou kritiese feminisme, soos ander kritiese benaderings, op resente ontwikkelinge in kontemporêre teorie wat gekant is teen tradisionele filosofiese beginsels. So aanvaar feminisme die post-moderne kritiek van die tradisionele Verligtingsbeginsels en is hulle baie krities oor die feit dat die reg hom as neutraal voordoen, asook oor die wyse waarop regsleerstellings en regsopvoeding aangewend word om ongelykhede ten opsigte van geslag te wettig en in te skerp. Hierdie artikel lig die breër debat uit wat feminisme in hierdie lande gevoer het.

1 INTRODUCTION

Today, the new constitutional dispensation in South Africa[2] unswervingly promises equality between men and women before the law.[3] This constitutes a

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1 "Feminism" is a term coined early in the 20th century to signify that the women's movement advocated revolutionary changes to the status of women in socicty: see Bender "A lawyer's primer on feminist theory and tort" 1988 *Journal of Legal Education* 5–6. The title of the article is adapted from a question posed by Bender (see further below 599).

2 The Constitution of the Republic of South Africa Act 108 of 1996.

3 S 9 of the Constitution states: "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoymcnt

continued on next page

significant break with the patriarchal history of South African law, reflected most glaringly in the inferior status conferred on married black women by the dual systems of African customary law and the law imposed by the white regime, but also in certain other provisions encoded in erstwhile discriminatory acts.

The equal status promised by the Constitution should not, however, be taken for granted. Liberation requires more than statements on paper. To date, in South Africa, the legal system has been the chief instrument used by women to achieve change. However, this has resulted only in incremental change. Because South African feminists have been largely content to leave it at that, feminist legal writing in South Africa has likewise limited itself primarily to drawing attention to discriminatory legislation and calling for reform.[4]

In countries with an older tradition of feminist jurisprudence than South Africa, feminists have long since become dissatisfied with piecemeal reform.[5] Here critical feminism, like other critical approaches, builds on recent currents in contemporary theory which are opposed to traditional philosophical underpinnings. So, for example, feminism accepts the post-modern critique of traditional Enlightenment principles and is critical of the law's claim to neutrality, and of the way in which legal doctrine and legal education serve to legitimate and entrench gender inequalities. It may be useful therefore in what follows to outline the wider debate which feminism has taken in these countries.

2 OF MYTHS AND MOTHERS: THE REJECTION OF PATRIARCHY

Feminist analysis usually begins with an exposure of the myths of patriarchy, the feminist term for the pervasive dominance, in and of society, by the male hierarchy.

The most prejudicial myth is that men have a natural right to dominate women. In the Greek myth of Perseus, for example, Perseus beheads Medusa, a female gorgon or monster, and presents her head to Athena, the goddess of wisdom, who then places it upon her shield. Athena is considered to be a patriarchal female stereotype and a projection of male needs. Because she was not born of a woman, but sprang fully grown from the forehead of her father, Zeus,

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of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

4 See Van Zyl "Feminism and the law – teaching and theory" 1995 (2) *Codicillus* 32.

5 The volume edited by Murray (*Gender and the new South African legal order* (1994)) clearly indicates, however, that South African feminists acknowledge that legislating reform is not sufficient; that, on the contrary, it can work to the detriment of women. The volume accordingly shows the feminist approach to be moving in the direction of contemporary overseas jurisprudential trends.

Athena is represented as always at her father's side, a product and "an avowed servant of patriarchy".[6]

Legal objectivity is also a myth. The legal system has been thoroughly dominated by men, so too the social, economic and political systems, with the consequence that they have reserved for themselves the most powerful public roles. The law, almost without exception, has confined women to the roles of wife, mother and domestic servant. Legal language is an overt display of sexism, and the doctrine that "All law is man-made", usually articulated in positivist legal circles, is an obvious example of the exclusionary tone common to the law. Would men feel included, it is often asked, if the statement were that "All law is woman-made"?

The male character of law is further illustrated in the competitive, adversarial character of the legal system. In many ways, according to Leslie Bender,[7] such a system is the intellectual counterpart of the earlier practices of duelling and mediaeval jousting tournaments. If it were to be found that "competitive sparring is not the way the majority of women function most effectively", the patriarchal conclusion could well be that women are unsuitable for legal practice.

These implied meanings of male-generated imagery, language, thinking processes and power structures have so permeated the consciousness of women that women themselves often recreate and entrench patriarchy thereby becoming in many ways collaborators in rather than passive victims of patriarchy. Feminism therefore seeks to make men and women aware of the ways in which patriarchy has distorted gender issues, and indeed, sees this as one of its main tasks.

Feminism works from the assumption that gender is a social construct created within a hierarchy of male domination and female subordination. Feminism arises from this initial premiss and, in spite of the divergent views among feminists, this is the point of reference on which all their theories pivot.

The "phallocentric"[8] legal profession, far from being the catalyst of social change, has determinedly resisted feminist attempts to join the profession in its bid to "preserve jobs for the boys and to keep women in the home performing their domestic labours".[9] In South Africa perhaps the most telling example of the confirmation of women's traditional role as mothers, is to be found in the 1912 decision of *Incorporated Law Society v Wookey*.[10] In this decision the court disbarred a woman from practising as an attorney because section 20 of the Cape Charter of Justice stated that only suitably qualified "persons" could practise as attorneys, and the term "persons", in the light of "the immemorial practice of centuries", had to be understood to refer exclusively to male persons. In 1914,

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6 See Scales "The emergence of feminist jurisprudence: an essay" 1986 *Yale LJ* 1373 1379. Millett first linked the connotation of male domination with the concept of patriarchy in her feminist tract *Sexual politics* (1970).

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8 The term was adopted by feminists to refer to the way in which law has been determined by patriarchal conditions and influences: see Smart "The quest for a feminist jurisprudence" in Smart (ed) *Feminism and the power of law* (1989) 86.

9 See Sachs and Wilson *Sexism and the law* (1978), cited in Naffine *Law and the sexes: explorations in feminist jurisprudence* (1990) 4.

10 1912 AD 623.

RPB Davis, later an acting judge of appeal, commented on the interrelationship between women as mothers as follows:

> "The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the world . . . all life long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of law, are departures from the order of nature; and when voluntary, treason against it."[11]

The touchstone common to the numerous feminist theories, then, and the feature unique to them, is the rejection of patriarchy. Dorothy Dinnerstein[12] makes use of Freudian theory to trace the origin of patriarchal behaviour to the male infant's experience of complete dependence upon his mother, and his later need to turn against women when he discovers that his mother is somewhat less than perfect. Dinnerstein contends that while women are responsible for the care of children, this need to possess and then reject the feminine will always be a part of the masculine infant psychology. The anger felt by the child results in a residual or unconscious hatred of the mother in particular and women in general. This translation of anger is often apparent in, and channelled by, the legal system.

In its most blatant forms, patriarchy is easily detected. For centuries, a woman in South Africa, as elsewhere, lost her legal identity when she married. For example, two forms of description have been used for the registration of property deeds by, or in favour of, married women in South Africa. The "old style" version read: "Mary Smith married in or out of community of property to John Miller", and the "new style" version read: "Mary Miller born Smith married in or out of community of property to John Miller". The parties were free to adopt either style, but in practice, no such freedom of choice was allowed. The new style was preferred because it had been introduced in 1855 by the Registrar of Deeds, a devout Anglican, to avoid offending husbands by the use of the "less obnoxious" mode of designation for their wives.[13]

3 FEMINIST THEORY

In Anglo-American jurisdictions, feminists have not stopped at the identification of discriminatory sexism present in discrete legal rules.[14] They have gone on to call for formal equality on the basis of the sameness of the sexes, as well as to insist on special treatment and, ultimately, to analyse critically the ideology, method and character of the law, and the way in which men have created institutions that mirror male values and masculine perceptions of the genders. Clearly,

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11 Cited in Kaganas and Murray "Law and women's rights in South Africa: an overview" in Murray (ed) 6 fn 46. Kaganas and Murray also cite the similar view of Melius de Villiers, later Chief Justice of the Orange Free State.

12 *The mermaid and the minotaur* (1977) *passim*.

13 This preference prevailed in spite of the fact that the wording of the "old style" was less ponderous, as it used the husband's name only once, and the identity of the woman was much clearer if she had been married more than once. Similarly, a woman who wished to use her maiden name for passports, licences, or for letters, circulars or catalogues pertaining to a company of which she was a director, encountered resistance: see my article "Misnomer" in 1975 (2) *Codicillus* 19.

14 Feminism has exposed the sexism apparent in a wide range of laws such as reproductive rights and freedoms, domestic violence, sexual harassment, rape and pornography.

then, one cannot speak of a monolithic feminist jurisprudence.[15] Nancy Fraser and Linda Nicholson[16] attribute the eclecticism of feminists to the fact that the nature of women's oppression itself lacks homogeneity and is not the product of an isolated root cause. Nevertheless, it is possible to identify dominant debates and jurisprudential currents within the feminist debate.

One can say that theories of jurisprudence are "political theories with legal ramifications", and this is borne out by such political theories as liberalism, Marxism and socialism, which have generated jurisprudential theories to support and express them. The feminist call for the liberation of women has a decidedly political agenda, and feminist jurisprudence has applied a number of political theories to the overt and covert discrimination against women in the law. Liberal feminists, for example, contend that liberal values should be as applicable to women as they are to men; Marxist feminists have transposed the marxist theory of class to gender;[17] socialist feminists have sought to demonstrate how law legitimises capitalist and patriarchal relationships. And, as a post-modern project, feminism has undercut the claims of mainstream academics to the objectivity and universality of knowledge, including law; so too, the mainstream conception of self as singular and coherent; and more recently, feminists have turned the post-modern critique of traditional Western essentialism to the essentialism of feminism.[18]

But although much feminist critique may be derivative and neo-political, feminist jurisprudence is a field of law that has set its own unique terms and priorities. There are thus "many feminisms" and they each have different emphases. Although these debates have emerged in Anglo-American feminist legal literature, it goes without saying that they are important for South African legal scholarship.

4 FIRST PHASE FEMINISM: THE EMERGENCE OF A FEMINIST JURISPRUDENCE[19]

Feminist legal theory is a powerful and challenging presence in modern jurisprudential thought, bringing into question contemporary law and legal institutions. Criticism of the law, however, is not a late twentieth-century phenomenon. What is commonly termed "first wave" feminism, made a dramatic appearance in the nineteenth century, although its earliest stirrings can be traced as far back

15 The many labels applied to feminism, such as radical feminism, lesbian feminism, cultural or relational feminism, show this. Such labelling has been resisted by many feminists as being divisive.

16 "Social criticism without philosophy: an encounter between feminism and post-modernism" in Nicholson (ed) *Feminism/Post-modernism* (1990) 27.

17 Modern feminists, including socialist feminists, have become disenchanted with the Marxist approach as it does not explain the oppression of women *as* women, but rather emphasises the prejudice which attaches to women as workers. Furthermore, the subjection of women in both the private and public spheres and an analysis of gender and patriarchy are overlooked: see Smith (ed) *Feminist jurisprudence* (1993) 6.

18 On the latter trend, see Dailey "Feminism's return to liberalism" 1993 *Yale LJ* 1267, and see further below.

19 The various transitions in feminist jurisprudence are described in Naffine 3 ff; Cain "Feminist jurisprudence: grounding the theories" in Bartlett and Kennedy (eds) *Feminist legal theory: readings in law and gender* (1991) 263; Dalton "Where we stand: observations on the situation of feminist legal thought" 1988 *Berkeley Women's LJ* 1.

as 1792.[20] This was the year Mary Wollstonecroft published *A vindication of the rights of women*, while in 1873, Susan B Antony, the American activist and example of early feminism, defended her "crime" of voting and argued for women's suffrage.[21] The women of the nineteenth and early twentieth centuries fought for the right of married women to own property, for legal access to contraceptives and for the freedom to move beyond the domestic sphere in order to attain education and enter professional and political office.[22] South African women have given an equally good account of themselves in the struggle for women's rights, although early battles were largely waged by and for white women.[23] And although later their aspirations took second place to the struggle for human rights in the apartheid context, feminists have, none the less, challenged the rules of both South African law and African customary law, and the male hierarchy responsible for them. Indeed Sachs has noted, with some irony, the way in which patriarchy has had the dubious honour, in feminist and in apartheid terms, of being one of the few institutions in South Africa which has been non-racial.[24] In South Africa, then, the law, with all its flaws, has been the instrument used by women to achieve change, a little at a time.

The early achievements of the women's movement for legal reform are acknowledged as considerable, even though later feminist writing has developed the thinking of first-phase theorists to much more sophisticated levels. By making skilful use of liberal arguments and the self-proclaimed standards of the law to achieve fair, rational and impartial treatment for women, first-phase feminists indicted law on its own terms and offered the intellectual justification for the feminist call for equality.[25] Liberal feminists thus called upon liberals to account for their own stated principles of universal human rights.

5 SECOND PHASE FEMINISM: THE "NOT DIFFERENT"/"DIFFERENCE" DEBATE

In countries with an older tradition of feminist jurisprudence than South Africa, feminists became dissatisfied with incremental reform. Describing first phase feminism, Claire Dalton[26] stated that it was essentially a strategy which accepted

20 Women did not have the economic power, education or political forum for stating their plight before the late 1700s. There is little remaining record of the feminine contribution to history, because historians have discounted material written by women (and moreover, black men and women) as insignificant. As Bender (12 fn 25) remarks, the past is very much "his-story", because white men have for centuries portrayed that past in their own terms, as white men, concentrating on "great events" and "great men". Feminists have, in the decades following 1970, uncovered and exposed the way in which historians have perpetuated and reinforced the phenomenon of patriarchy: see *idem* 13.

21 Antony stated that for women, an American democracy did not exist. The US was, in effect, a male aristocracy with an elitist government based upon gender, which raised the men of every household to the level of sovereign or master, and reduced the women of every household to the hateful position of subject or slave. Rebellion was thereby carried "into every home of the Nation": Antony's own statement is quoted in Naffine 5.

22 See Bartlett and Kennedy "Introduction" in Bartlett and Kennedy (eds) 1.

23 An early reference to the plight of black woman was made by Olive Schreiner in *Women and labour*: see Murray 5. Schreiner's early attempt to locate the source of women's oppression is referred to in Murray 6.

24 See Van Zyl "What do women want from the law?" 1992 *SALJ* 514.

25 See Naffine 6.

26 4.

> "for purposes of argument, the supposedly neutral norms and universal principles of the legal system, like equality, and challenged the arbitrariness with which they were being applied".

However, as Patricia A Cain[27] has said,

> "[o]nce women began to be treated like men, people began to notice that women really are not like men. Women are most noticeably not like men when they are pregnant".

Second phase feminists therefore began to develop theories of equality which could account for certain differences between men and women. Initially these were limited to biological differences. In the early 1960s, Shulamith Firestone[28] laid much of the blame for women's oppression at the door of their biological role as child bearers. Pregnancy, Firestone said, has not only been treated with masculine contempt, but pregnancy is itself invasive, dangerous and oppressive. True liberation for women would come, she contended, when technology permitted human reproduction outside the female body. As we will see, the more radical feminism of the 1970s would shift the focus to the invasive nature of sexual intercourse, as opposed to pregnancy.

The tempestuous decade of the sixties was almost over, however, before a sufficient number of women committed to bringing about social reform had made their way through law school and were in a position to mount a substantial challenge to the law. The reawakening of the American feminist movement in the 1960s had been partly a reaction by radical student groups to the male-dominated hierarchy within such movements. Men ran the meetings and shaped policy, Carrie Menkel-Meadow[29] remarks, and women made the coffee, the placards and the posters. It was even men who founded the Columbia Women's Liberation movement.

Whereas first phase feminists still had faith in the law, second phase feminism had no illusions about the essential subjectivity of the law. They perceived the law as a cultural phenomenon, a "paradigm of maleness", and a "symbol and a vehicle of male authority".[30] Feminism was obliged to call for much more than social reform. Social revolution and the overturn of patriarchy inherent in the legal system would henceforth constitute the feminist agenda.

During the sixties and seventies, liberal feminist arguments continued to co-exist with the increasingly radical arguments which were emerging.[31] The flaw in the equality doctrine was that it necessitated comparisons, and comparisons which entailed that equality meant equality with white, middle-class men.[32]

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27 In Bartlett and Kennedy (eds) 265.

28 *The dialectic of sex* (1970) cited in West "Jurisprudence and gender [1988]" in Bartlett and Kennedy (eds) 213–214.

29 "Feminist legal theory, Critical Legal Studies, and legal education or 'The fem-crits go to law school'" 1988 *Journal of Legal Education* 62.

30 See Naffine 6 (citing Rifkin "Toward a theory of law and patriarchy" 1988 *Harvard Women's LJ* 3).

31 The traditional liberal doctrine of equal treatment was triumphant in the American Supreme Court decision in *Reed v Reed* 404 US 71 (1971) and in a sequence of further cases which overturned the outdated laws based on the breadwinner-homemaker roles of men and women: see Dailey 1267.

32 In a number of crucial contexts, many women have been disadvantaged as a result of being treated "the same" as men: see eg Kaganas "Joint custody and equality in South Africa" in Murray (ed) 169 in which she warns of this danger in relation to child custody.

Consequently, feminism was confronted with two questions: do women *want* to be treated as men, or should sexual differences be recognised and used to compel affirmative treatment, so that even though "different", women would receive some practical equality? Put differently, the question is whether women should, for example, treat pregnancy as the equivalent of prostate trouble, or acknowledge that their childbearing capacity is unique to them.[33]

This conflict and consequent tension was reflected in feminist writings as the frame of reference of the original conception of equality, which had been a unifying factor, began to lose its grip.

Once they had acknowledged the well-founded fear that where the law saw difference it would justify disadvantage, feminists began to move beyond liberalism. Focus now shifted to the ideology of law that was constructed upon the assumption that women were primarily wives and mothers, and it was into this area that feminism next progressed.[34]

5 1 Dominance theory

The work of Catharine MacKinnon[35] was especially influential during the second phase of feminism. As she said:

> "[M]ale dominance is perhaps the most pervasive and tenacious system of power in history . . . it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy."

For MacKinnon women and men are indeed different but the difference is that men dominate and women are dominated. Which came first – dominance or difference – is not important. What is important, is to end the dominance.

MacKinnon[36] questions why man should be the measure of woman and of equality; why should "equal" mean "the same as or equal to men?" By the same token, she argues, if it is accepted that men and women are different, why do women have to battle for "special treatment?" Consequently, she rejects both of these approaches and takes male domination as the focal point of her theory. Men have possessed, and used, power to subjugate women, and this has allowed them to set the frame of reference for debate upon women's issues, to promote their language and to name the concepts, and, ultimately, to serve as the norm against which women are measured.

Male control over female sexuality has, to MacKinnon's thinking, been the origin of women's subordination. Female sexuality, the crux of gender identity,

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33 See Dalton 5. In her classic article, "The equality crisis: some reflections on culture, courts, and feminism", Williams writes that it is impossible to have it both ways, and she favours basing equality between the sexes upon their similarities. Since difference usually means "woman's difference" from man, the door is opened to women being treated less well, or better, than men. She notes, too, the reinforcement of gender stereotypes that have occurred because women have fought only for the privileges that men have enjoyed and not for the risks that they are compelled to face: see Williams in Bartlett and Kennedy (eds) 15.

34 See Smart 84.

35 "Feminism, Marxism, method, and the state: toward feminist jurisprudence" (1983) in Bartlett and Kennedy (eds) 182 (hereafter cited as "Feminism, Marxism and the state").

36 "Feminist discourse, moral values and the law – a conversation" 1985 *Buffalo LR* 20–28.

has been constructed by men to their own benefit and pleasure by means of objectification. "Sexuality is to feminism", she states, "what work is to Marxism: that which is most one's own, yet most taken away".[37] According to MacKinnon,[38] gender role characteristics are imposed responses to male needs and desires and therefore cannot be praised as *natural* to the female gender. Male dominance and power has moulded the social constructs of gender in such a way that it protects patriarchal institutions and perpetuates the subordination of women. MacKinnon has accordingly devoted her attention to those legal issues which confront women particularly, for example, pornography, rape and sexual harassment. Her work is credited with giving North American feminist lawyers and scholars the momentum to move away from liberalism, and this momentum continues to influence the growth of feminist legal thought.

5 2 Relational feminism

The theory of relational or cultural feminism was another approach which broke through the confines of liberalism during this phase of feminism. Relational feminism reverses the focus of liberal theory that men and women are essentially similar and, on this ground, should have equal rights and opportunities. The influential work of Harvard educational psychologist, Carol Gilligan, heralded an interest in the ways women are different from their male counterparts beyond just crude biology. In her work, *In a different voice*, published in 1982, Gilligan states that there is a distinctly male point of view which is centred primarily upon autonomy, abstract rules, principles and rights as paramount values, and only secondarily on relationships. The distinctively female point of view – the overriding moral priority for women – on the other hand, is the preservation of relationships and concern for others, what Gilligan calls "the ethic of care". The male attitude towards self and other is an oppositional one, whereas the female attitude towards self and other is relational. According to Gilligan, the female ethic has been marginalised and its importance underrated, while the masculine ethic permeates legal systems. This disjunction Gilligan believes, lies at the core of domination.

Influenced by Gilligan's insight, many relational feminists have called for the integration of the feminine ethic of care into the law and legal institutions, instead of it being required that women adapt to meet existing conditions.[39]

The contrast between the dominance and relational standpoints as expressed in political terms has been analysed by Robin West.[40] According to her, relational feminists appear from a mainstream, non-feminist perspective to take a more moderate stance and celebrate the feminine traits assigned to women by traditional culture, while the radical feminists, again from a mainstream vantage, are

37 Cited in Smart 76.

38 "Difference and dominance" in MacKinnon (ed) *Feminism unmodified: discourses on life and law* (1987) 32 39 (hereafter cited as *Feminism unmodified*). "[L]aw not only reflects a society in which men rule women; it rules in a male way: 'The phallus means everything that sets itself up in a mirror'": See MacKinnon "Feminism, Marxism, and the state" in Bartlett and Kennedy (eds) 186. Dworkin and Firestone are two other proponents of the dominance theory, but from outside the field of law.

39 Rich and O'Brien stress in this context that, as the bearers and rearers of children, women must either be relieved of these responsibilities or given full control of them.

40 Cf "Jurisprudence and gender" in Bartlett and Kennedy (eds) 206.

separatist and, by comparison, revolutionary, and as such more aware of the imbalance of power between men and women.

The danger of the relational theory of feminism, so the critique has run, is that it can easily be associated with the traditional image of women as biologically inclined to domestic dependence, and therefore does not present a serious challenge to the discrimination and domination to which women have been subjected.[41] However, the objective of relational feminism is also to challenge patriarchy; by affirming traditionally feminine attributes, the relational feminists are undermining the monopoly of masculine norms. In other words, even if men and women are different why should the male be the norm? The relational feminists assert that the law should recognise women's difference.

The criticism levelled by MacKinnon at Gilligan is important. For MacKinnon[42] differences of biology, differences in identity, differences in experience should be put aside to make way for the only difference which counts, namely, the difference in power. With regard to Gilligan's ethic of care, MacKinnon is doubtful that this is anything more than a by-product of subordination: "Women value care because men have valued us according to the care we give them."

MacKinnon vigorously rejects any idea that the affirmation of difference is politically useful to the feminist cause. She accuses Gilligan of the kind of moral reasoning which allows women to claim as their own the very qualities (with their consequences) that male supremacy has projected upon them for its own advantage. To affirm difference "when difference means dominance" is, in effect, to affirm the feminine history of powerlessness. MacKinnon goes on to declare that she does not think "the way women reason morally is morality 'in a different voice'. I think it is morality in a higher register, in the feminine voice".[43]

6 THIRD PHASE FEMINISM: POST-MODERNISM

Critical feminism, like other critical approaches, builds on recent trends in contemporary theory which are opposed to traditional philosophical underpinnings. Those feminists who have followed the post-modern route are sceptical of a single solution to the oppression of women, and assert that categorical, non-contingent rules, and abstraction and generalisation are not going to solve the problem. They have criticised modern foundationalist theories, exposing the contingent, partial, and history-bound character of what has passed in the mainstream for necessary, universal and ahistorical truths. For post-modern feminists, the idea of Woman, like the idea of the Self, is socially constructed, produced by various, changing and contradictory social discourses, including the discourse of the law. A more particularised approach is adopted with a concomitant abandoning of the controversies over equality and difference as too essentialist (all

41 It is for this reason that Scales (1380), eg, is sceptical, and she believes that the "different voice" will undermine the transformative potential of feminism.

42 *Feminism unmodified* 32–45.

43 Cited in Smart 76. Rhode agrees with MacKinnon and suggests that the correct approach to the "difference dilemma" is to contest the context in which these issues are usually dealt with. The key to the dilemma is: what difference does the difference make? That is, to the extent that women are different, why are these differences constructed in a way that is detrimental to women? (See Rhode "Feminist critical theories" in Bartlett and Kennedy (eds) 333.)

women are the same as men/all women are different to men). Armed with the tools of deconstructive analysis and personal narrative, anti-essentialist feminists have turned to dismantling the idea of a coherent, integrated self. Difference is no longer only that which separates men from women, but also that which separates women from women. In this process, critical feminists have employed the strategy of deconstruction to debunk and transcend false dichotomies other than sameness/difference; for example, male/female, public/private as well as to debunk the patriarchal structure of social organisation.

The French existentialist writer, Simone de Beauvoir,[44] gave post-modern feminists a breakthrough insight when she said that one is "not born, but rather become[s] a woman". This went to the heart of the problem because it clarified the way in which women are socialised or acculturated into becoming what society dictates. Gender, de Beauvoir implies, is not a collection of inevitable moral, intellectual or social characteristics that are biologically programmed products belonging to one or other of the sexes, but a learned cultural and psychological phenomenon. The feminists took de Beauvoir's point and arrived at the theory that the masculine power of language construction and the use of an implicit male norm has dominated the way in which women are perceived, portrayed and treated to such an extent that the traits which have been traditionally and fictitiously attributed to women have effectively confined the freedom, the power and the true nature of women.

The idea that gender is a social construct and not some instinctual blueprint brings a post-structuralist strand to feminist thought that has immense transformative potential; and it is a goal of feminism to find out how this social "indoctrination" of women happens and to combat it.

Leslie Bender[45] has analysed the way in which we accept the language we use without questioning its patriarchal bias. She refers to *Beyond God the Father*, published in 1973 by Mary Daly, the feminist theologian, in which the male power of naming and language are evident in the fact that man is said to be created in the image of God, while evil has been cast in the image of woman. The feminist analysis of language tellingly reveals the psychological attitudes which men have held, and which women have absorbed, about the two sexes. Bender gives other examples of the dominant influence of the male experience and perspective upon language; for instance that an important work is described as "seminal" and not "ovular", that the very name "woman" is derived from the word "man", and the telling way in which sexual intercourse is described from the perspective of the male – "penetration" and not, for example, "enclosure". It is on the basis of such linguistic analysis that the feminists illustrate their contention that the concepts attached to "woman" were determined, not by women or the objective reality of women, but "by men for men". The language used by men to describe women implies, "I am, and woman is what I am not". In the same vein, Bender notes that the original standard of care for negligence in law was that of "a reasonable man", and although the courts have bowed to political correctness and refer now to "the reasonable person" standard, the actual content of the standard is still male. Case law and texts still offer predominantly male examples of the "reasonable person", such as the "man on the Clapham Omnibus"

44 *The second sex* (1949) (reprinted in 1961).
45 15 ff.

or "the man who takes the magazines at home and in the evening pushes the lawnmower in his short sleeves".[46] Sachs recommended in 1990 that the new South African Constitution should make a point of using the terms "man and woman" or "woman and man", rather than "person" or "man", to make it undeniably clear that women are included.[47]

It is apparent that to use different words is not sufficient, if the actual model at work does not change too. Guido Calabresi[48] points out how the application of a universal standard can pressure those who are "different" to conform to the dominant ideological stance. The effect is to silence the "different voices".

An early rapport sprang up between the critical feminists and the Critical Legal Studies (CLS) movement. The latter movement accepts the post-modern critique of the traditional Enlightenment principles of rationalism, universal morality and individual autonomy in modern Western culture. CLS is critical of the law's claim to neutrality and the way legal doctrine and legal education serve to legitimate and entrench social inequalities.[49] However, whereas the CLS movement began in the law faculties taking much of its inspiration from the theoretical stance of Marxism and the Frankfurt School, feminist legal theories sprang from a mass political movement. Carrie Menkel-Meadow[50] attributes much of the vitality and power of feminism to its roots in experience, in the reality of "*being* dominated", and in challenging that experience, as opposed to just "thinking about domination". This is a crucial difference between critical feminists and the Critical Legal Studies movement; the feminist critique is founded in the world view of the dominated and devalued, while the Critical Legal Studies critique comes from the world view of male privilege where the realities of silence, powerlessness and an absence of rights may be imagined and described but not fully experienced.

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46 *Idem* 21–22.

47 See Van Zyl 1992 *SALJ* 514. Bender (22 fn 75) turns to the satirist AP Herbert for wry comment upon the futile search for the reasonable woman: "My own researches incline me to agree, that in all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman. It is ably insisted before us that such an omission, extending over a century and more of judicial pronouncements, must be something more than a coincidence: that among the innumerable tributes to the reasonable man there might be expected at least some passing reference to a reasonable person of the opposite sex; that no such reference is found, for the simple reason that no such being is contemplated by law; that legally at least there is no reasonable woman, and that therefore in this case the learned judge should have directed the jury that, while there was evidence on which they might find that the defendant had not come up to the standard required of a reasonable man, her conduct was only what was to be expected of a woman, as such . . . I find that at Common Law a reasonable woman does not exist."

48 *Ideals, beliefs, attitudes, and the law: private law perspectives on a public law problem* (1985) 26–28.

49 A number of Critical Legal Studies approaches are echoed by feminist critiques of law and legal institutions, among them Olsen's examination of the reciprocal and reinforcing relationship between the family and the market; Taub and Schnieder's analysis of the differences between the public and private spheres; Freedman's and Williams's (among others) exposé of the Supreme Court's manipulative interpretation of sex discrimination cases; and Rifkin's and Polan's treatment of law as a system of oppression in its legitimation of patriarchy.

50 61.

In line with critical thinking generally, feminist legal theory sets itself against a common target, namely, the dominance of liberalism and the gender biases it reflects. Thus critical feminism has found it an instructive and necessary process to join in the attack upon the traditional liberal defence of a private zone in which individuals make autonomous choices. To the extent that critical feminists embrace post-modernism, they emphasise the importance of communal social networks and relationships rather than atomistic actors competing with each other.[51] Critical feminists also challenge the liberal assumptions of the determinacy of rules, and the insistence of liberalism that law is separate from politics. For feminists, law is political because it is patriarchal, hierarchical and ideological.[52] Feminists have similarly found it helpful to understand how the hierarchical positions given to the masculine and the feminine as expressed in such binary relationships as public/private, objective/subjective, or form/substance, have served to favour the male sphere above the female.[53]

Ultimately, the purpose of all this study is to use it as a springboard for freedom and change. However, although feminists see the dominance of liberal legalism and the law's support of it as a common target, from a pragmatic viewpoint there is less at stake for the feminists in this attack. Feminists are, naturally, more concerned with gender inequality and have drawn their allies against this phenomenon from diverse sources. Therefore, the feminist support for the attack on liberal legalism is qualified by their feminist priorities. One of these relates to the negative attitude within the new critical theory to legal rights.

Like Critical Race theorists, feminists have had first-hand experience of how important equal rights are. Kimberley Crenshaw, Christine Littleton, Elizabeth Schneider and Patricia Williams have all noted the deep significance that legal rights hold in Western culture. The well-established history of rights, according to these authors, makes the issue of rights more difficult to dismiss than other more radical demands, and by calling on the rule of law to meet its own criterion, rights-oriented strategies offer real potential for internal transformation. Rights, Schneider[54] reminds us, are dynamic and often emerge as a response to actual political issues, and the rights discourse itself has at least encouraged women to unite under the collective identity of their shared experiences. Critical Race theorists, not unexpectedly, also criticise the negative attitude towards rights.[55]

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51 Dailey (1282 fn 90) points to the similarity between the feminist critique of liberal autonomous individuals and the critique of communitarians. However, Dailey *ibid* makes the point that, although recent feminist theory and communitarianism share a similar vision of the relationship between the individual self and the community (as well as a similar interest in dialogue), communitarianism is nevertheless incompatible with the anti-essentialist principles of recent feminist theory.

52 See Smith (ed) *Feminist jurisprudence* (1993) 489.

53 The liberal legal distinction between the public and private spheres curtails rather than expands individual autonomy; to give an example, the courts' refusal to forbid rape in marriage had the effect of expanding the liberties of husbands at the expense of their wives: see Rhode in Bartlett and Kennedy (eds) 333 340.

54 "The dialectic of rights and politics: perspectives from the Women's Movement" in Bartlett and Kennedy (eds) 318.

55 The rights issue was also a source of contention between some CLS feminists and the CLS movement in their early collaboration. Feminist CLS theorists challenged the CLS scepticism of the effectiveness of rights analysis in achieving social reform with a

continued on next page

The adoption of the post-modern stance has not been without other political and theoretical difficulties. Deborah Rhode[56] makes the point this way:

> "The revolution will not be made with slogans from Lyotard's *Post-modern Condition*, and the audiences that are most in need of persuasion are seldom interested in philosophical anxieties."

An example of women's more immediate concerns is the importance of ascertaining accurate rape statistics and questioning the usual definitions upon which such statistics are based.[57] Feminist legal tradition and the current agenda must therefore also reflect a pragmatic focus.

These shifts of thought have resulted in a renewed interest in pragmatism within feminism. The practical, personal, contextual style of post-modern pragmatism has much more appeal for feminists than the traditional theoretical categories, dichotomies and pretensions of a logical, liberal analysis of law. As Margaret J Radin[58] states:

> "Pragmatism and feminism largely share, I think . . . a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality: . . . in favour of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning."

At the end of the day, however, it should be emphasised once more that the post-modern feminists are not convinced that any single theory could contain in itself an explanation for the many facets of the domination and subjugation of women.

7 THE ANTI-ESSENTIALIST ABYSS

The feminist inquiry usually begins with "asking the woman question",[59] which entails asking in which ways women's lives differ from men's and how the law has dealt with that difference. As Dailey[60] points out, in terms of post-modern thinking this essentialist idea of one commonality shared by all women, is too limited. This anti-essentialist stance has given a new dimension to "asking the woman question", because the inquiry now includes not only the difference between men and women, but the differences between women themselves. The question posed is whether it is possible for feminist politics to evolve when women are all so different. Modern feminist theory has thus come full cycle: from its initial concern with how women were similar to men, to its examination of how they are different, and then to the turning point of realising the ways in which women differ from one another.[61]

"heavy rights agenda", and they questioned if liberal rights truly were "as alienating and meaningless" as the CLS scholars contend: see Dailey 1280. Menkel-Meadow 63 observes that at CLS conferences, women were relegated to their own ghetto-like session on feminist theory and the law, a session poorly attended by the men. She also notes that both Schlegal and Gordon, two scholars within the CLS movement, give only passing mention to feminism in the footnotes to their work on the social histories of the CLS movement.

56 In Bartlett and Kennedy (eds) 333.

57 *Ibid.*

58 "The pragmatist and the feminist" in Smith (ed) *Feminist jurisprudence* 560–561.

59 See also further below on "Feminist methods".

60 1266.

61 *Ibid.*

Anti-essentialism emerged with the limited goal of including and highlighting the dimension of race which the essentialist approach had masked. In feminist endeavours in South Africa, where this problem also arose acutely, women's organisations were seen as elitist, alienating women at the grassroots level.[62] Anti-essentialism, however, has driven feminism into a more radical position, pushing feminists, as Dailey[63] states, "toward greater and greater particularity". Martha Minow has pointed to the wide array of human differences that may impinge upon an individual, and which go beyond gender. Those she mentions are religion, ethnicity, race, handicap, sexual preference, socio-economic rights, class and age.

The notion that there is a central "women's experience", uninfluenced by such factors as race, class, or sexual orientation has a detrimental effect on women who suffer complex combinations of discrimination. Thus, for example, racism and sexism may combine to shape the experience of a heterosexual black woman, while the combination of racism, sexism and homophobia may combine to shape the experience of the black lesbian.[64] The "women's experience" of the women in these two examples will not necessarily be the same. "In a racist society like ours", Harris[65] says of the United States, "the story-tellers are usually white, and so 'woman' turns out to be 'white woman'."

Feminists have therefore begun to question the notion of a common female voice or culture. They disagree that all women have a universally female experience or essence; this type of reductionist feminist theory is merely oppression in another guise, "in a different voice". According to Dailey,[66] anti-essentialism frees traditional feminism of its "oppositional politics", where man is perceived as an opponent, and allows women to investigate their collaboration with their own subjection. No matter into how many components the differences between women are broken down, "further distinctions will always present themselves". Politics based upon being black women, for example, can break up along divisions of class, while politics based upon being black middle-class women can break up along lines of sexual orientation. The possibilities for political groups based upon differences are endless.[67]

The argument that there is one essential commonality among all women is thus rejected by anti-essentialism, and this would apply equally to the relational feminist view of "woman" as predominantly maternal and caring, or the radical feminist view of someone like MacKinnon who defines "woman" in terms of her sexual subordination. Both the latter are essentialist views. They are "limited truths" according to Cain,[68] and are rejected for that reason by the anti-essentialist viewpoint.

Feminist essentialism, however, is well-entrenched, and Angela P Harris[69] attributes this to the fact that it is "intellectually convenient, and carries with it

62 See Van Zyl 1992 *SALJ* 515.
63 1272.
64 "Race and essentialism in feminist legal theory" in Bartlett and Kennedy (eds) 235 240.
65 *Ibid.*
66 1272.
67 *Ibid.*
68 In Bartlett and Kennedy (eds) 267–268.
69 *Idem* 240.

emotional political pay-offs". MacKinnon[70] defends her support of essentialism by saying that "men have their foot on women's necks, regardless of race or class". She states that it does not matter in what sort of regime one lives, be it feudal, capitalist or socialist, if oppression places you on the lowest rung in that regime, then everyone who shares that lowest rung shares that commonality. "The commonality argued is that ... bottom is bottom."[71] MacKinnon knows that women's conditions differ in a variety of particular ways, but what women *do* have in common is the fact that they are "all measured by a male standard for women, a standard that is not ours".[72] Harris,[73] however, regards feminist essentialism as offensive and as a broken promise – the promise to hear "women's stories" and the "promise of feminist method". So, Harris says accusingly of MacKinnon's essentialism:

> "In MacKinnon's writing, the word 'black', applied to women, is an intensifier: If things are bad for everybody (meaning white women), then they're even worse for black women. Silent and suffering, we are trotted onto the page (mostly in footnotes) as the ultimate example of how bad things are."[74]

The consequence of gender essentialism, Harris continues, is

> "not only that some voices are silenced in order to privilege others ... but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice".[75]

Respecting similarity but not difference has the effect of trivialising difference, says the lesbian poet, Adrienne Rich. Rich tells of the occasion when two heterosexual friends of hers (artists like herself) wrote and told her about their experience of sharing her "Twenty-One Love Poems" with their male lovers. They wanted her to know how "universal" the poems were, and how they had been able to identify with the sentiments expressed in them. Adrienne Rich was puzzled by her angry reaction to their letters until she realised that the uniquely lesbian experience which had inspired her work and was essential to its meaning had been treated as no different from heterosexual love, and hence had been appropriated. She rejects this kind of "acceptance" of her work, the kind that looks for what is held in common, because it is "a refusal of its deepest implications ... a denial, a kind of resistance, a refusal to read and hear what I've actually written, to acknowledge what I am".[76]

Rich's contention is that while of course the experience of love does possess a certain universality, the heterosexual world is never going to understand the gay and lesbian world if it seeks only what is universally held in common.

The feminist acceptance of a white or black, middle class, heterosexual, Christian, able-bodied woman as the definitive norm for "women's experience" is an example of the prejudice they wish to eliminate. Martha Minow[77] notes

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70 In *Feminism unmodified* 32 45.

71 MacKinnon "Feminism, marxism, method and the state: an agenda for theory" 1982 *Signs* 523.

72 See MacKinnon "Introduction: the art of the impossible" in *Feminism unmodified* 16.

73 In Bartlett and Kennedy *op cit* 248.

74 *Idem* 245.

75 *Idem* 238.

76 Rich's story is retold by Cain in Bartlett and Kennedy (eds) 269.

77 "Feminist reason: getting it and losing it" in Bartlett and Kennedy (eds) 358 359. Minow analyses the claim to a homogeneous experience as a "tool of social control": *idem* 367

continued on next page

that, in this, the feminists are guilty of the fault they find in others and have betrayed the "insights that animate feminist initiatives". As Audre Lorde[78] powerfully states it:

> "Some problems we share as women, some we do not. You [white women] fear your children will grow up to join the patriarchy and testify against you, we [black women] fear our children will be dragged from a car and shot down in the street, and you will turn your backs upon the reasons they are dying."

8 FEMINIST METHODS

Feminist legal thinkers have made full use of the range of methods at the disposal of legal reasoning: deduction, induction, analogy and policy, to name a few.[79] Feminists have, however, added new methods to these traditional tools, new methods which seek to uncover those aspects of a legal issue which usually escape or are suppressed by the more traditional methods of legal logic.

Among these methods are, of course, asking the woman question, which counteracts the way in which women (and other groups) are silently excluded by the law. Feminist practical reasoning is another method which broadens traditional notions of legal relevance in order to attune legal decision-making to the features of a case which are not always posited in legal doctrine. A further method is that of consciousness-raising, which measures the validity of legal principles against the personal experience of those directly affected by such principles. This technique is closely related to a fourth method, narrative theory, which is consciousness-raising in narrative form.[80]

8 1 Asking the woman question

This method entails investigating how the law has not accommodated the values and experiences which are more typical of women than of men, and how current legal norms and ideas inhibit the rights of women.[81]

Myra Bradwell was one of the first within the American judicial system to ask the woman question when she inquired why the laws pertaining to citizenship in the state of Illinois did not give married women the right to apply for a state licence to practice law. Justice Bradley, in his concurring opinion, laid out the legal ideology of "separate spheres" behind the Illinois law:

> "[T]he civil law, as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation ... indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[82]

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fn 26. Disregarding differences between women favours the more privileged groups of women who then identify their lot with "all discrimination" experienced by women and claim an illegitimate mandate to speak for women unlike themselves: *idem* 360.

78 "Age, race, class, and sex: women redefining difference" in *Sister outsider* (1984) 119.

79 Much of what follows on feminist legal methods is from Bartlett "Feminist legal methods" in Bartlett and Kennedy (eds) 370.

80 *Idem* 371.

81 *Ibid.*

82 Cited by Bartlett and Kennedy 372.

Asking the woman question clearly exposes the political choices and institutional arrangements that have subordinated women. Many of the laws discriminate against women in much more covert ways, and do not necessarily do so on the stated basis of gender, so the woman question reveals those structures whose norms implicitly treat women as different and lesser.

Bartlett considers whether asking the woman question is not "politically loaded". She notes that the question does not demand a decision in favour of a woman, but that it does demand that the decision-maker be alert to the presence of gender bias and accordingly come to an unbiased decision. The assertion that bias does indeed exist and therefore justifies the woman question, is political, but the extent to which it *is* political would depend upon whether the explicit or implied assertion that such bias does not exist is *also* political.[83]

8 2 Feminist practical reasoning

As we have seen, some feminists have contended that women reason differently to men, being more aware of connection and context. The method of practical reasoning regards particular facts as sources of greater insight and not simply as "inert material to which to apply the law".[84] Thus an abstract principle such as family autonomy appears to have conventional logic on its side when it prescribes that minors, being immature, need their parents' consent to have an abortion. However, the accounts of such cases have shown that many minors are exposed to extreme physical and emotional abuse as a result of the law which insists that their parents know about their pregnancy.[85]

Legal reasoning, in whatever form, is inevitably influenced by traditional or community norms and by the context of practices and values in which it occurs. The virtue of feminist practical reasoning is that it actively seeks reason among the "many overlapping communities".[86] This concern for inclusiveness prompts feminists to stress that one community does not have the right to speak on behalf of all the others. This method thus differs from the cohesive community visualised by masculine versions of practical reasoning in giving genuine attention to the validity of perspectives of reason from outside the prevailing and dominant culture.

The dynamic of feminist practical reasoning also lies in its awareness of the expanding horizons of what is legally relevant. As Bartlett points out, the shift from *Plessy v Ferguson* to *Brown v Board of Education* illustrates how what was legally relevant in race discrimination cases grew to include the "actual experiences of black Americans and the inferiority implicit in segregation". The same wide-angle lens has been of benefit to the cause of women, and much legal reform has come about thanks to the inclusion of the "missing perspectives of women" and an examination of the perceived role and nature of women.[87]

83 *Idem* 375.
84 *Idem* 378.
85 *Ibid.*
86 *Idem* 379.
87 *Idem* 381.

8 3 Consciousness-raising

Consciousness-raising is viewed by many feminists as the most important feminist method. This technique, Leslie Bender[88] explains, builds our store of knowledge by providing access to the common experiences and patterns revealed by hearing the stories of others who are similarly oppressed. The experience of sharing problems and feelings helps us to realise that they are not the result of personal failings or inherent weaknesses, but actually stem from dominant ideologies of systemic discrimination and oppression.

Consciousness-raising has had a positive effect beyond the intimacy of small growth groups. Testimony to the detrimental influence of patriarchy, and the persistent dialogue with patriarchal figures in the mass media, literature and art, together with the feminist lobby and recourse to litigation have had a positive, transforming effect. Consciousness-raising is, as Bender states, "both subversive and transformative".[89]

An example of consciousness-raising in action took place when three women sued *Hustler Magazine* for "libel, invasions of privacy, intentional infliction of emotional injury, outrage" and a number of civil rights claims following on the publication of a pornographic cartoon and certain photographs. One of the plaintiffs was Andrea Dworkin, who had been targeted by the offending material for her work as an anti-pornography activist. The sum the women claimed in damages was $150 million for the immediate harm caused to the women portrayed in the pornographic article, and for the indirect harm the article would have upon women in general. It was argued that such an article was meant to intimidate women from exercising their political freedoms for fear of incurring a similar pornographic diatribe. While the plaintiffs clearly did not expect their claim to be successful (and indeed, it was not) the publicity and controversy surrounding the case did much to educate the public and stimulate public debate. Litigation which is seen to be frivolous is, of course, discouraged, and in the *Dworkin* case, not only was the plaintiffs' request for double costs and attorneys' fees not granted, but it was suggested that if a similar request were raised in future cases, sanctions might be considered.[90]

The lecture room and the scholarly text are both important forums for raising consciousness of the insidious effects of patriarchy. Bender, in this context, cautions the academic legal profession against falling prey to patriarchal attempts to discredit the scholarliness of feminist writings or to block women from academic positions.[91]

8 4 Narrative

Narrative is closely related to the feminist method of consciousness-raising and the terms are sometimes used synonymously, but narrative does have characteristics of its own. Narrative has a different objective to the spontaneity and unstructured dialogue employed by the consciousness-raising method. It is, to a large degree, an art form, for while many of the stories are semi-autobiographical

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88 9.

89 *Idem* 9–10.

90 See Bartlett in Bartlett and Kennedy (eds) 398–399 fn 144.

91 Examples of the extent of the antagonism against academic feminism are given by Bender (10 fn 22) and the references cited in her work.

and true, many of them are created fictions. The effect of this kind of storytelling is to integrate a sense of identity by resolving internal conflicts.

In this way, narrative alters the assumption that a sense of self or identity is entirely the creation of social discourse, because it introduces the individual will into the socially-constructed post-modern subject. Dailey[92] notes that the anti-essentialist critique takes its impetus from the stories told by women from different states of life. The stories from lesbians or women of colour simultaneously present the multiplicity and richness of the female experience in a way which cannot be matched by pure abstract theory. These narratives may make the idea of "Woman" a kaleidoscopic one, but they do not "shatter her altogether" as post-modern theory has the potential to do. Where post-modern theory might arrive at the conclusion that "Woman no longer exists", narrative reaffirms the meaningful connections between women. It bridges the gap opened by post-modernism between a "unified, essentialist meaning of womanhood and no meaning at all".[93] In narrative also lies the ability to establish the commonalities necessary to maintain the momentum of political movement.[94]

Joan C Williams[95] gives the following example of narrative from the work of Marie Ashe in *Zig-zag stitching and the seamless web*. The work intertwines cases on reproduction and narratives of Ashe's eight pregnancies – three of which culminated in abortions. Williams draws the following picture from Ashe's work:

> "We see Ashe standing in her kitchen in the middle of a miscarriage. She notes: '*Purple as sun-done plums, your fine remains ... I have learned through miscarriage the bloodiness of abortion – spontaneous or induced. Every abortion involves violence and bloodiness.*'"

As Williams says, Ashe's achievement is to convey the "conversational aura of the obstetrician's office, the maternity hospital, and the birthing table",[96] into law journals, with the possibility of its filtering into the male dominated law and courtrooms.

9 FEMINISM IN THE SOUTH AFRICAN CONTEXT

As has been seen, South Africa's Constitution contains liberal references to equality between men and women, providing a significant break with the patriarchal history of South African law. Although the women's movement in South Africa has largely been the story of white women and their concerns, the struggle has not been wholly essentialist and the predicament of black women has gained increasing currency.[97]

It is not impossible that in South Africa today, the black woman's right to equality may impact negatively on her black male counterpart, who might see it

92 1276.
93 *Ibid.*
94 *Idem* 1276–1277.
95 "Dissolving the sameness/difference debate: a post-modern path beyond essentialism in feminist and critical race theory" 1991 *Duke LJ* 321.
96 *Ibid.*
97 This care for the plight of the black woman developed late, but the early visionary, Olive Schreiner, discussed the oppression suffered by black women as a result of polygamy and their lack of legal status in *Woman and labour*: see Murray 5.

as disruptive of the cultural solidarity which he may wish to give a higher priority, at least in the short term. That cultural solidarity is commonly seen as the more important issue, is clear from the reaction of many black Americans of both sexes to Anita Hill's testimony. A professor of law, Anita Hill, volunteered evidence of sexual harassment while in the employ of Clarence Thomas, a conservative African American candidate for the position of Supreme Court judge. Thomas's nomination was unpopular among civil rights and women's groups, but black Americans were none the less of the opinion that Hill should have remained silent. They considered that her primary loyalty was to the empowerment of the black community by the appointment of Clarence Thomas, and that she should have subordinated her personal suffering to the interests of black solidarity.[98]

To date, in South Africa, an essentialist stance has largely ignored the position of lesbians and disabled women, and these categories have received little attention in legal literature. However, in keeping with the thematic ideal of equality and non-discrimination, the new Constitution provides protection to individuals regardless of their sexual orientation[99] or disabilities.

Yet having gained on this front, women now need to look inward at the differences between women. A bill of rights cannot remove from the community covert and overt discrimination against homosexuals and lesbians. Carl Mischke[100] asks whether the law can be *expected* to alter the intolerant attitudes of society towards homosexuals, so that they might be seen "as one colour among many in a bright, bold colourful and coherent cloth?" The dilemma posed by children in the context of homosexual partnerships has yet to be resolved in terms of the constitutional protection of homosexuals.[101] In this regard Edwin Cameron[102] notes the telling fact that, despite its unswerving endorsement of constitutional protection for homosexuals, the South African Law Commission took no *stated* position on whether homosexual couples may marry and adopt children.

Recently, women have united to place their needs and rights on the international human rights agenda, because they recognise that the problems of dis-

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98 See 1993 *Rights: A Lawyers for Human Rights Publication* 36.

99 The Constitution chooses the term "sexual orientation" rather than "sexual preference" in order to exclude the inadvertent sanction of bestiality, non-consensual sexual intercourse or paedophilia-deviations forbidden by all legal systems: see Mischke "Big law – little wrong: discrimination on the basis of sexual orientation and the new South African constitutional order" 1995 (1) *Codicillus* 40.

100 42.

101 In *Van Rooyen v Van Rooyen* 1994 2 SA 325 (W) which was decided before the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) came into effect, the court preferred to leave the sinfulness or otherwise of homosexuality for decision by the "Heavenly Father". In order to prevent the homosexual couple from sending the wrong signals to the child of one of them, the court issued a number of directives as to how the mother and her partner were to behave, eg, that the mother not share a bedroom with her female partner when the child was in the house: see Mischke 40–41.

102 "Sexual orientation and the Constitution: a test case for human rights 1993 *Rights: A Lawyers for Human Rights Publication* 38.

crimination, subordination and violence against women occur on a global scale and need a global solution.

These world-wide violations of women's rights, however, vary in nature and degree from country to country. Thus Asian women's groups are particularly concerned with slave traffic and prostitution. In Latin America and the former Eastern bloc countries, for example, reproductive rights are the central issue, whereas in the West, the common focus is domestic violence. The African continent, on the other hand, seeks to abolish the ancient practice of female circumcision and remaining discriminatory legislation.[103]

It is feared that international protection of women's rights may be compromised by the preponderance of men in the institutions of the United Nations and their undue influence upon decisions on what qualifies as a serious human rights issue. The liaison between the Commission on Human Rights (established in 1946) and the Commission on the Status of Women (established in 1947) is poor, and Rebecca Cook accuses the United Nations and its human rights treaties of giving priority to abuses largely suffered by men, usually in the civil and political rights arena, and of turning a blind eye to the sufferings particularly associated with women, such as domestic violence or unenlightened religious and customary laws.[104]

Nevertheless, certain breakthroughs have been made, both at domestic and international levels. In 1967, the Commission on the Status of Women drew up the Declaration on the Elimination of Discrimination Against Women, and in 1981 the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) took effect and was ratified by South Africa in 1995. Although the African Charter of 1981 emphasises the preservation of traditional values and family life, it at the same time forbids member parties from practising gender discrimination.[105] In Botswana, the *Unity Dow*[106] case made a significant gain for feminism, both locally and in the global context, by providing guidance for similar decisions in the future. In this case, the Botswanan Appeal Court chose to strike down the citizenship laws which prohibited women from passing on their citizenship to their offspring in the way that men could. Rebecca Cook, professor at the University of Toronto and founder of the International Women's Rights Watch, made this comment on the decision:

> "This was a significant victory because the President of the Court, Judge Amissah, said that custom could not be used to justify discrimination against women and domestic law could not be used to avoid a country's international human rights obligations."[107]

But Cook also notes that the protection offered to women by the United Nations treaties has not been applied with the vigour necessary to diminish the levels of violence and discrimination faced by women throughout the world. She advo-

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103 See 1993 *Rights: A Lawyers for Human Rights Publication* 24.
104 *Ibid.*
105 It is likely that the African Charter will be ratified by the South African government in the near future.
106 Cited in 1993 *Rights: A Lawyer for Human Rights Publication* 24–25.
107 See *idem* 24.

cates that torture be redefined to include violence against women under its umbrella as a measure of the seriousness of this offence.[108]

In 1994 a conference at regional level was held in Senegal, the "French Riviera" of West Africa, where women from throughout the African continent, including South Africa, reported on the legal status of women in their countries and examined possible courses of action.[109] Non-governmental organisations have successfully drawn many issues to the attention of the public and made recommendations to government ministers on policy and strategy, and their role cannot be over-estimated. The strength that the women's human rights movement has gathered was dramatically illustrated by the 1995 Fourth World Conference on Women in Beijing, the largest of its kind ever held.

Women in Africa today are afflicted by the politico-economic injustices and inequities that have detrimentally affected the development of the continent as a whole. Although each region and country is beset by its own individual historical problems, these problems are generally characteristic of the aftermath of colonialism, economic under-development, abusive social, traditional and religious practices and civil strife. The economic situation of African women is such that, while they contribute the most to the Gross Domestic Product through their work in agricultural production, they own the smallest percentage of land and their access to such ownership is severely limited.[110] This clearly illustrates the imbalance between what women contribute to the economic growth of their countries, and the benefits and rights allowed to them. Illiteracy is highest among women and this makes it very difficult for them to challenge the *status quo*. The distinction between the public and private sphere, and the law's refusal to act in the private sphere, continues to the detriment of women and is an issue yet to be resolved.[111]

At present, the International Women's Rights Action Watch (IWRAW), which monitors the observance of the Convention on All Forms of Discrimination Against Women (CEDAW), notes that while many African countries have ratified this convention, they have done so with significant reservations in regard to the rights of women in marriage and the family.[112]

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108 *Ibid.*
109 See 1994 *Rights: A Lawyers for Human Rights Publication* 26.
110 *Idem* 26–27.
111 *Idem* 27.
112 *Idem* 27–28.

The interim Constitution in the making*[1]

George Devenish
BSc LLD
Professor of Law, University of Natal (Durban)

OPSOMMING

FW de Klerk se epogmakende en betekenisvolle toespraak in die Suid-Afrikaanse parlement op 2 Februarie 1990 – onder andere betreffende die ontbanning van die ANC, die PAC en die SAKP – was 'n dapper politieke inisiatief, wat 'n rewolusie eerder as konstitusionele en politieke hervorming kon ontketen het. Dit was bedoel om 'n gevaarlike dooiepunt, wat toenemende tragiese gevolge vir al die mense van Suid-Afrika tot gevolg gehad het, te verbreek. Hierdie artikel handel oor die gebeurtenisse wat tot die ontstaan van die tussentydse Grondwet van 1993, uit die onderhandelde politieke skikking by die Wêreld Handelsentrum gedurende 1993, gelei het.

Suid-Afrika het 'n wonderbaarlike transformasie van 'n onderdrukkende rassistiese staat tot 'n politieke bedeling gereguleer deur 'n nie-rassige demokratiese grondwet met 'n progressiewe handves van fundamentele regte ondergaan. Gedurende die periode van die Nasionale Party-heerskappy was die meeste ingeligte politieke kommentatore van mening dat die prognose vir Suid-Afrika apokalipties was. Hierdie apokalips, so beklemmend deur doemprofete voorspel, het egter nooit gekom nie. 'n Politieke skikking wat tot die tussentydse Grondwet gelei het, is by die Wêreld Handelsentrum bereik. Ongelukkig was hierdie proses nie heeltemal inklusief nie. Voor die verkiesing in 1994 het Suid-Afrika gevaarlik onseker op die rand van 'n nasionale ramp gestaan. Ter elfder ure, metafories gesproke, het die Inkatha Vryheidsparty by die verkiesingsproses aangesluit. Die verkiesing self, hoewel ontsier deur verwarring, bedrog en onreëlmatighede, was 'n betekenisvolle gebeurtenis, terwyl die mense van Suid-Afrika met klaarblyklike geduld bewys het dat hulle 'n vredevolle toekoms vir Suid-Afrika begeer. Die indrukwekkende vertoning van openbare dissipline en geduld het buitelandse waarnemers wat grootskaalse geweld verwag het, verbaas. Die ordelike stemmery was 'n kragtige manifestasie dat gewone mense en politieke leiers hulle verskille kon bylê. Die verkiesing self het die uitoefening van die fundamentele regte om te stem deur al die mense van Suid-Afrika in 'n nie-rassige verkiesing gebaseer op algemene volwasse stemreg, uitgemaak. Die verkiesing het ook die Regering van Nasionale Eenheid (RNE) aan bewind gebring, met die ANC as vernaamste en seëvierende politieke party en die NP en IVP as die ander beduidende deelnemende partye. 'n Stelsel van magsdeling is vir 'n periode van vyf jaar in werking gestel.

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* Leeture given at University of Natal, Durban, in the Comparative Studies in South Afriea Seminar Series on 1995-10-24.

1 Editor's note: In the two years or so sinee this paper was written, South Afriea has made further progress on the road to the aehievement of full eonstitutional demoeraey. The so-ealled "final eonstitutional text" was drafted by the Constitutional Assembly and eertified by the Constitutional Court as being in eonformity with the Constitutional Prineiples of the 1993 Constitution – albeit at the seeond attempt. The 1996 Constitution eame into operation on 4 February 1997. However, the problems highlighted in this artiele (sueh as the violenee in KwaZulu-Natal) remain unresolved.

Die RNE het met 'n ambisieuse Heropbou- en Ontwikkelingsprogram begin om die geweldig benadeelde swart bevolking van Suid-Afrika te rehabiliteer. Hierdie program behels uiters versigtige en omvattende beplanning voor dit geïmplementeer kan word. Dit het nou plaasgevind en dit behoort binnekort te begin vrugte afwerp. Na 'n dekade van politieke geweld het vrede na Suid-Afrika teruggekeer behalwe wat sekere dele betref. Ekonomiese groei het hervat en buitelandse beleggers wat in groot getalle gedurende die apartheidsjare onttrek het, begin geleidelik terugkeer. Daar is rede vir versigtige optimisme en hoop dat 'n beleid van medelye en maatskaplike rehabilitasie sal seëvier ten spyte van ontsaglike probleme van armoede en ongelykheid. Daar bestaan egter geen maklike oplossing vir die hardnekkige probleme van KwaZulu-Natal nie.

Die kompleksiteit en problematiese aard van die konstitusionele en politieke transformasieproses is verder vererger deur die ontplooiing van 'n strategie van "randlopery" deur die IVP en sy leierskap. Deur van so 'n twyfelagtige strategie gebruik te maak, het hulle noemenswaardige konsessies bekom – betreffende die dubbele stembrief-stelsel, die Zulu-monargie en die uitbreiding van provinsiale magte, wat die ander voorstanders van regionale devolusie of federalisme nie deur konvensionele strategie gedurende die onderhandelingsproses kon regkry nie. Die proses is egter nog maar in sy beginstadium en die grootste uitdaging lê nog voor. 'n Reusetaak staan onderneem en verwerklik te word, sowel wat betref die ekonomiese en maatskaplike rekonstruksie van Suid-Afrika as die versoening van universalisme met partikularisme, wat die essensie van die konflik in KwaZulu-Natal is.

INTRODUCTION

FW de Klerk's epochal and momentous speech to the South African Parliament on 2 February 1990, involving the unbanning of the African National Congress (ANC), the Pan-Africanist Congress (PAC) and the South African Communist Party (SACP), and the removal of restrictions on the United Democratic Front (UDF) and Council of South African Trade Unions (Cosatu), was intended to normalise the situation of chronic crisis and escalating violence that had prevailed in South Africa for more than a decade. This was followed by the dramatic and internationally sensational release on 11 February 1990 of Mr Nelson Mandela from prison after a period of 27 years of incarceration.

This bold political initiative, which could have precipitated a revolution rather than constitutional and political reform, was intended to break a dangerous impasse that resulted in increasingly tragic consequences for all the people of South Africa. Although certain significant reforms had been effected by PW Botha, such as the jettisoning of apartheid's institutional infrastructure embodied in influx control and the mythical dogma that Africans were temporary sojourners in the white man's urban areas, the aggressive and arrogant style of his imperial presidency premised on the ignominious ideology of the total onslaught, made it impossible for his regime to make the paradigmatic shift required for unconditional negotiations with the ANC which was a *sine qua non* for lasting peace and democratic government in South Africa. The "finger-wagging, irascible"[2] temperament of Botha influenced and permeated all aspects of government concerned with political change and most of his ministers tended to be terrorised by his arrogance and dictatorial leadership. Providence intervened and Botha's stroke in January 1989 paved the way for a younger less ideological and more pragmatic leader of the National Party in the person of

2 Welsh "The making of the Constitution" in Giliomee *et al* (eds) *The bold experiment* (1995) 82.

FW de Klerk, who had impeccable credentials as a Nationalist to commence a process of genuine negotiations leading to a political settlement and the interim Constitution. It was abundantly clear to De Klerk, as he assumed the reigns of power, that South Africa was moving inexorably into a catastrophic impasse from which there would be no victors and that apartheid was incapable of being redeemed or reformed. It was also clear to Mandela that the heroic struggle between the forces of liberation and those of reaction was leading to civil commotion on an escalating scale and that political negotiations were urgently required to save the country from a future too ghastly to contemplate.

The four-year period spanning the interlude from 2 February to 27 April 1994, when the interim Constitution came into operation, can be subdivided into three periods.[3] First, there was the period of preparation and adjustment from 2 February 1990 to the beginning of the Conference for a Democratic South Africa (Codesa) in December 1991; secondly the first period of formal but abortive negotiations from Codesa to the beginning of the Multi-party Negotiation Process (MPNP) in March 1993; and finally the second and successful period of negotiations from the MPNP to 27 April 1994. Thorough preparations were necessary for negotiation. Progress in this regard was, however, always rendered highly problematic by the continuing violence that erupted in South Africa. Thus in March 1990 the ANC was constrained to call off further talks with the South African government because of the impetuous and brutal police shooting of nine persons in Sebokeng.[4] Invariably, certain elements in the community constantly attempted to derail the process of negotiations. The commission of inquiry into the Sebokeng shootings by the security forces declared their action unjustifiable.[5]

Besides the release of a significant number of political prisoners within South Africa, complex arrangements were necessary for the return of persons who had fled from South Africa during the period of political oppression. A further problematic issue flowing from the unbanning of the liberation movements was the future of the armed wings of these organisations. All the liberation movements had to be involved in the process of negotiations and this slowed down and complicated the discussions.[6]

The historic first meeting of the ANC on 4 May 1990 at the magnificent Groote Schuur estate with its colonial and apartheid ethos was to produce the Groote Schuur Minute, which was the first in a line of negotiated agreements paving the way for the political settlement that was to be encapsulated in the interim Constitution.[7] In this regard Mandela comments in his autobiography that, contrary to expectation, these talks were conducted "with seriousness and good humour".[8] He further comments that "each side discovered that the other did not have horns".[9] These talks were dominated by the issue of the definition of a political prisoner, the government arguing for a narrow definition and the ANC for a much wider one. At the end of this meeting both delegations undertook

3 See Van Wyk *et al* (eds) *Rights and constitutionalism* (1994) 137.
4 See *Weekly Mail and Guardian A-Zo* (1994) 320.
5 *Ibid.*
6 *Ibid.*
7 Act 200 of 1993.
8 *The long walk to freedom* (1994) 569.
9 *Idem* 570.

to continue with the peaceful process of negotiations and the government undertook to lift the state of emergency, which they did shortly afterwards with the exception of Natal, where violence appeared to be endemic.

In the process of continuing negotiations it was none other than the person of Joe Slovo, who more than any other personality had been demonised by the South African government as the embodiment of revolutionary Marxism, who ironically seized the initiative to advance the process of peaceful negotiations. Thus in July 1990 he privately suggested to Mandela that the heroic armed struggle should be suspended "in order to create the right climate to move the negotiation process forward".[10]

The Groote Schuur Minute was followed by two further significant agreements, the Pretoria Minute of 6 August 1990 and the DF Malan Agreement of February 1991. The former was a further development of the Groote Schuur Minute, particularly in relation to political prisoners, violence and the state of emergency that still existed in Natal, and other security measures. Two new issues were, however, canvassed, one related to the ANC's renunciation of violence and the other the creation of effective channels of communication at national, regional and local levels in order particularly to redress certain grievances. This document concluded by expressing the view that the path was open for constructive and meaningful negotiations on a new constitution, and that exploratory talks were soon to start.[11] However, a clear pattern began to emerge: each time the negotiation parties made meaningful progress, this was invariably followed by horrific and large scale violence, as occurred in August 1990, when hundreds of people were killed in a wave of violence in the East Rand townships between the ANC and the Inkatha Freedom Party (IFP).[12] The nefarious perpetrators were invariably skilfully elusive and incapable of being tracked down.

The DF Malan Agreement further addressed the question of the ANC's suspension of violence, thereby clarifying uncertainties inherent in paragraph three of the Pretoria Minute. All parties to the negotiations were profoundly concerned with the tragic and endemic violence that was continuing unabated in South Africa. In order effectively to engage this issue, a National Peace Accord was signed amid great public acclamation by a large number of political organisations on 14 September 1991. This document dealt very extensively with how and what structures had to be used so that peace could be realised in South Africa.

The Peace Accord facilitated a climate suitable for negotiations, which began to gather significantly in momentum. By the end of 1991, the major parties were ready to start a process of formal negotiation in order to reach a political settlement necessary for a new and democratic constitution for South Africa.

THE ESTABLISHMENT OF THE CONVENTION FOR A DEMOCRATIC SOUTH AFRICA

Introduction

With the televised and highly publicised convening of the Conference for a Democratic South Africa (Codesa) on 20 December 1991 in the main venue of

10 *Idem* 577.
11 *Ibid.*
12 *A–Z of South African politics* (1994) 321.

the World Trade Centre, South Africa entered a crucial stage in the process of a transition to a new and democratic political and constitutional dispensation.[13] The opening of Codesa was to witness the sensational and acrimonious altercation between De Klerk and Mandela, precipitated by the former's allegation that he had not honoured an earlier undertaking to end the armed struggle. This represented a serious deterioration in their relationship characterised by Mandela's initial assessment of De Klerk's character as one of integrity.[14] Despite this manifest deterioration in their personal relationship, the negotiation process had gathered momentum and was to continue.

Codesa, as it became known, convening at the cavernous venue of the World Trade Centre near the Jan Smuts Airport, initially generated considerable optimism and enthusiasm. It commenced working in January 1992 when nearly 200 enthusiastic and loquacious delegates met to initiate the process of negotiating a new constitutional dispensation for South Africa.[15] There were 19 delegations at Codesa.[16] Notable absentees were the Conservative Party (CP), PAC and Azanian Peoples' Organisation (AZAPO).[17] Initially significant progress was made.[18] This optimism was enhanced when on 17 March 1992, a Whites only referendum voted overwhelmingly in favour of continuing on the path of constitutional and political negotiation and reform. However, the principal players approached the process of negotiations embodied in Codesa with "widely diverging views of what democracy consisted of".[19] It was not difficult to reach agreement on formal broad principles that were to be encapsulated in the Declaration of Intent reached by Codesa on 21 December 1991, but there remained profound differences of perception in relation to the form of state, the question of executive power sharing, the extent of government involvement in the economy, and the protection of private property.[20] The ANC was committed to the democracy of untrammelled majority rule within a unitary state, whereas the minority parties were determined to secure the protection afforded by a constitution against simple majoritarianism which could be furnished by a variety of mechanisms such as geographical federation, the protection afforded by a bill of rights and the principles of consociational democracy involving grand coalition, mutual veto, proportionality and segmental autonomy.[21]

Unfortunately the government began to manifestly adopt a more aggressive approach after the referendum.[22] As Welsh observes, De Klerk had taken a high-risk gamble since "a narrow victory would have been only a Pyrrhic one; loss would have been a disaster of incalculable dimensions".[23] Unfortunately his resounding victory was also to have a negative consequence for the negotiation

13 See Race Relations Survey 1992/1993 499; 1992 *Annual Survey of SA Law* 693; and Friedman *The long journey* (1993) *passim*.
14 He said: "We are dealing with an honest man . . . we should negotiate with him." See *The Argus* 1991-07-18.
15 See *Business Day* 1992-01-22.
16 *Race Relations Survey* 1991/1992 xlviii.
17 *Race Relations Survey* 1991/1992 il and li.
18 See "Codesa makes huge progress" *Sowetan* 1992-02-19.
19 Welsh in Giliomee *et al* (eds) 87.
20 *Ibid*.
21 See Boulle *The consociational option* 3.
22 Friedman *The long journey* 40.
23 *The bold experiment* 91.

process. As Mandela commented, De Klerk's hand was strengthened, but as a result the Nationalists toughened their negotiation positions, giving rise to a dangerous strategy.[24]

The apparent progress was increased by the gradual convergence of opinion between important political groupings and parties. The ANC and the National Party (NP) government agreed on a number of cardinal issues, including the establishment of a multi-party democracy in a unified South Africa with an entrenched and justiciable bill of rights involving a constitutional court. The process of substantive negotiations began with the convening of Codesa's five working groups in February 1992 at the World Trade Centre at Kempton Park co-ordinated by a steering committee.[25] Their terms of reference included:

(a) The re-incorporation of the four nominally independent Bantustans, Transkei, Bophuthatswana, Ciskei and Venda.

(b) The creation of a transitional government to lead the country to fully fledged democracy.

(c) A set of binding constitutional principles, a method of drafting and adopting the new constitution.

(d) The creation of a climate for free and fair political activity.

Regrettably, however, it soon became apparent that the convergence merely tended to be one of semantics described aptly by Allister Sparks as "so small a gap; so wide a difference".[26] Therefore convergence masked profound differences of policy and strategy and basic principles were being increasingly submerged beneath complicated and detailed arguments.[27] Elements within the NP government wished surreptiously to retain political control of the transition process and thus protect its power and that of its allies in the future through skilful constitutional manoeuvring. The government was in favour of a rigidly federal system.[28] In this regard the ANC was prepared to make certain concessions[29] to effect a political settlement.

Working groups of Codesa

Working Group 1

This working group was set up at the first meeting of Codesa in December 1991.[30] The principal task of Working Group 1 was the establishment of a climate conducive to free political activity. The important issues tackled by this working group included the need to resolve the status of political prisoners and exiles, the reform of emergency and security legislation and the regulation of broadcast media and the South African Broadcasting Corporation in particular. It was also concerned with the implementation of the National Peace Accord, the funding of political parties and the control over security forces during the transitional period.

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24 *Long walk to freedom* 590.
25 See "Codesa groups activated" *Business Day* 1992-01-21.
26 See *Daily Dispatch* 1992-05-22.
27 "Codesa weighed down by detail" *Daily News* 1992-03-30.
28 See Lagardien "Federal state issue gaining momentum" *The Sowetan* 1992-05-27.
29 See "Major ANC concession on federalism likely" *Daily Dispatch* 1992-02-18.
30 *Race Relations Survey* 1992/1993 499.

In general, substantial progress was made on most of these issues. The question of the release of political prisoners and the return of exiles was identified as a priority in the completion of the reconciliation process, but it was decided that it could only be resolved in bilateral negotiations between the government and the ANC.[31] Although the working group agreed to place controls over the declaration and implementation of states of emergency, it was agreed that special measures were necessary to deal with the threats to public peace and order during the process of transition. The working group's understanding of the role news reporting plays in the creation of a climate of free political participation was reflected in the agreement on the establishment of an independent body to regulate the broadcasting media. In addition, Working Group 1 agreed on a whole range of specific mechanisms to ensure the effective implementation of the National Peace Accord including the imposition of strong sentences for the possession of illegal arms or public displays of dangerous weapons. In debating and discussing the funding of political parties, Working Group 1 agreed to the suspension of the Prohibition of Foreign Financing of Political Parties Act[32] until six months after the first non-racial election. Finally, the working group agreed that during the transition period the security forces should be placed under the control of one of the sub-councils of the Transition Executive Authority (TEA).

Working Group 2

Working Group 2 had to grapple with the daunting question of the political and constitutional transformation of South Africa. Initially this working group sought to establish a set of constitutional principles which would be absolutely binding on a future elected constitution-making body. Secondly, the working group had to decide upon a method of drafting and adoption of the new constitution. However strong differences of opinion were to emerge within Working Group 2. The government and its allies argued cogently for a broad definition of constitutional principles to ensure that the substance of the future constitution would be actually negotiated within Codesa, whereas the ANC and its allies, on the other hand, argued equally convincingly for a more limited conception of constitutional principles, in order not to encroach upon the jurisdiction of the constitution-making body which they wanted to be an elected Constituent Assembly. There seems to have been an agreement on the inclusion of principles guaranteeing individual rights and democratic process, but there was a difference in opinion on principles relating to the composition of the government and distribution of power within the state. It was this controversy that flowed over into the debate on the constitution-making body. The ANC and its allies considered an elected Constituent Assembly as the only politically legitimate means of producing a new and credible constitution. The government and the IFP wished, however, to resolve all uncertainty about a future constitutional order at Codesa itself. Thus, for the government, this would require the establishment of an interim constitution and a 75% threshold for the adoption of a new constitution in an elected Constituent Assembly. The IFP went even further and objected in principle to an elected body and insisted that federalism be constitutionally guaranteed prior to any election. Unfortunately, Working Group 2 failed to reach

31 *Ibid.*
32 51 of 1968.

agreement and this was to precipitate Codesa's deadlock when the government insisted on a 75% majority for the adoption of the new constitution, while the ANC insisted on 70% for the adoption of the constitution although agreeing to 75% for the adoption of the bill of rights. Codesa came very close to agreement. However, the parties did not trust one another and it was the lack of trust and the inability and maladroitness of the negotiators that led to the collapse of Codesa. Throughout the period of deliberations in Working Group 2, the IFP indicated its deep concern and rejection of a constitution-making body. It wanted a final constitution to be drawn up by Codesa itself on the basis of consensus and then approved by a referendum.[33]

Working Group 3

Working Group 3 achieved a considerable measure of consensus on how the country should be governed during the transition to democracy by agreeing on a two-phase process.[34] The first phase was to evolve the establishment of a multi-party Transitional Executive Authority in conjunction with existing legislative and executive structures rid, however, of the discredited tricameral structure, while the second stage was that period between the election and the adoption of the democratic constitution. During this period the elected body would combine the functions of an ordinary legislature and a constitution-making body. In addition, it was agreed that an Independent Electoral Commission be established to ensure a free and fair election and that there should be an Independent Media Commission.[35] Working Group 3 therefore made good progress on the issue of interim government.[36]

Working Group 4

Working Group 4 concentrated on the future of the nominally independent "Bantustans" (the so-called TBVC states, comprising Transkei, Bophuthatswana, Venda and Ciskei) and agreed in principle to their re-incorporation. Although the parties agreed that the TBVC administration should come under the control of the Transitional Executive Council, conflict remained over whether re-incorporation would be contingent on a decision by the population of each of the TBVC entities. Although the ANC and its Patriotic Front allies refused to agree to any procedure which would recognise the TBVC entities claims to statehood, they accepted that voting in a national election could be arranged to demonstrate support for or rejection of the re-incorporation. This was an important issue, as it was estimated that the TBVC contained about 5 million voters, "most of them likely African National Congress supporters".[37]

Working Group 5

Working Group 5, which was to determine the time-frame for the implementation of Codesa agreements, remained dependent on the progress in the other groups. Initially commendable progress was made, and it was thought that South

33 See Alachouzos "Plain democracy far from perfect" *Sowetan* 1992-05-06.
34 See "Interim rule confirmed" *Sowetan* 1992-03-10.
35 "Executive interim council proposed" *Daily Dispatch* 1992-04-28.
36 See "Agreement on interim rule" *Daily Dispatch* 1992-05-12.
37 "Tussle over TBVC voters at Codesa" *Daily Dispatch* 1992-05-30.

Africa could have an interim government by the end of June 1992,[38] but it collapsed with the failure of Working Group 2 to submit its report to the plenary session of Codesa. Regrettably, the apparent progress of the working groups and the achievement of substantial agreement on a series of issues central to the important process of transition to democracy failed to avert the deadlock and ignominious breakdown of negotiations at the second plenary session of Codesa on 15 and 16 May 1992.

As indicated above, it was this insistence on rigid federalism plus the demand that the new constitution be adopted by 75% of the elected constitutional body as well as 75% of the regionally elected delegates, that led ultimately to the collapse of Codesa's second plenary session in May 1992.

A breakthrough was very nearly achieved at Codesa, but unfortunately the South African government's chief negotiator, Dr G Viljoen, became ill at a very crucial time. He was replaced by Dr T Delport, who had neither the stature nor experience of Dr Viljoen. Despite the sterling and statesmanlike effort made by Mr Mandela in securing an important compromise in a meeting of the Patriotic Front on 14 May 1992, which the writer was privileged to attend, the parties did not trust one another and there appeared, in my opinion, to be a psychological withdrawal from the inevitable end of white domination and a fear of what they considered to be "simple majoritarianism" by the South African government's delegates at the very end of the negotiations.

The aftermath of the collapse of Codesa

Despite the inglorious and tragic collapse of Codesa, all the parties acknowledged that negotiations remained the only viable option for political transformation and change. Although there were considerable tensions, consequential political mobilisation and violence, the major players embarked on a process of public debate on crucial issues. The debate related to inter-connected issues of transitional arrangements, the constitutional status of the regions and the exercise of power by identified social, cultural, ethnic and even racial groups. The tragic and bleak period that followed in the wake of the collapse of Codesa as a result of the Boipatong and Bisho massacres, was a cause of deep national despair and political despondency. The relationship between Mandela and De Klerk was acrimonious at this time,[39] but Ramaphosa and Meyer maintained a personal contact[40] that was to develop into a legendary friendship.

The ANC and its allies in the Labour Party, Cosatu and the Communist Party responded to the collapse of Codesa by threatening to mobilise their supporters in a campaign of mass action[41] demanding a democratically elected Constituent Assembly. The situation in the country became fluid and the ANC's initiative of rolling mass action gave rise to an upsurge of violent attacks in the community, culminating in the tragic massacre at Boipatong. It appeared at this stage, more than at any other juncture, that the country was teetering on the brink of revolution or at least civil commotion on a virtually uncontrollable scale, since the process of negotiation and reform appeared discredited and emasculated and

38 "SA interim govt by June 30" *Natal Witness* 1992-03-27.
39 Welsh *The bold experiment* 93.
40 *Ibid.*
41 See "High-level talks focus on peace, constitution" *Cape Times* 1992-05-25.

could have been destroyed by the pent-up and inordinate anger of the people. In response to this situation, the ANC announced a formal suspension of multi-party negotiations and demanded that the government halt the escalating violence.

Early in August 1992, the National Party government endeavoured to re-open negotiations with the ANC, and in return indicated that it would make certain significant concessions such as the acceptance of international observers and the expansion of the Peace Accord structures designed to address the violence. The NP government was, however, still opposed to a democratically controlled constitution-making body. They desired to make use of a multi-party negotiating forum for the drafting of the constitution. The ANC responded to what they considered as recalcitrance on the part of the government by committing itself to further rolling mass action to ensure free political activity particularly in the TBVC states and the right-wing white towns, where it claimed local administrations continued to suppress ANC organisations. This strategy was designed to illustrate the anomaly in the government's claim that apartheid was dead while it at the same time continued to sustain the four nominally independent states. At this stage, KwaZulu-Natal published a draft Constitution endorsed by the KwaZulu Legislative Assembly in Natal, which reflected confederal thinking.[42] The wording was unambiguous: "The sovereignty of the state of KwaZulu-Natal as asserted under this constitution is indivisible, inalienable and untransferable." However, in a marathon address to the KwaZulu legislature, Buthelezi categorically denied that the constitutional proposals amounted to secession.[43]

Despite the collapse of Codesa, the formal and informal negotiations that took place there formed an important basis for subsequent constitutional discussions and political development. The breakdown of formal negotiations did, however, precipitate a debate on the status of the agreements reached in Codesa's working groups. To some extent this debate was characterised by the same conflicts over the meaning that characterised the process of negotiation itself. Although the negotiating parties often used the same language or agreed to use very similar rhetoric and definitions, they ultimately continued to contest the meaning of their agreement. Thus although important groundwork was done at Codesa, this work could not be consummated there, but was only achieved in 1993 as a result of the multi-party negotiating process at the World Trade Centre.

There was intense diplomatic pressure for the formal resumption of negotiations and the deteriorating economic system induced the parties to seek rapprochement which took the form of the historic Record of Understanding between Mandela and De Klerk on 26 September 1992. This agreement constituted the resumption of formal negotiations, although it was not until 1 April 1993 that the Multi-Party Negotiation Process (MPNP) was to start. The Record of Understanding embodied significant concessions made by both the ANC and the NP government. The latter conceded that the final constitution should be

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42 Ellmann "Federalism awry: the structure of government in the KwaZulu-Natal Constitution" 1993 *SAJHR* 165. In this regard Welsh stated that the IFP continued to propagate "a brand of federalist policy that would effectively strip the central government of most significant powers". See "Federalism and the divided society: a South African perspective" in De Villiers (ed) *Evaluating federal systems* (1994) 244.

43 Welsh *The bold experiment* 90.

drafted and adopted by an elected constitution-making body, whereas the former accepted that the constitution-making body should be bound by agreed constitutional principles that would emerge from the MPNP as a result of a political settlement. The Record of Understanding was, however, to have a very important consequence in relation to Inkatha. Buthelezi was infuriated by the agreement and it induced him to sever relations with the NP and form an alliance with homeland leaders and the white right-wing parties who were obsessed with the idea of a volkstaat.[44] He felt he had been betrayed by the NP and outmanoeuvred by the ANC.

In the same way that the chain smoking, jovial but intellectually sharp Joe Slovo had skilfully seized the political initiative concerning the suspension of the armed struggle, he once again made an innovative and deadlock-breaking but controversial proposal that was to facilitate the reaching of a political settlement between the parties. This proposal involved the so-called "sunset clause", providing for a government of national unity or an institutionalised coalition government for a fixed period, an amnesty for security officers and the honouring of the contracts of civil servants.[45] The concept of a government of national unity was an innovative development, since the ANC was initially strongly and intuitively opposed to any form of compulsory power-sharing like that in Cyprus and Northern Ireland, since the precedents were invariably not encouraging.[46] Ideologically and intuitively, too, the ANC was opposed to any form of abridged majoritarianism; moreover "if all or most of the parties in the legislature were also represented in the executive, how could vigorous opposition exist?"[47] Nevertheless, in a politically significant way, pragmatism triumphed over ideology and it was the concept of a government of national unity more than any other innovation that made a political settlement possible.

THE POLITICAL SETTLEMENT AND THE EMERGENCE OF THE INTERIM CONSTITUTION IN SOUTH AFRICA

In our turbulent and eventful history, the year 1993 must undoubtedly be perceived as of singular importance. During a period of nine months from March to November 1993, the Multi-Party Negotiation Process (MPNP) was involved in a process of effecting a political settlement between the major political forces in South Africa which culminated in the acceptance of the draft interim Constitution,[48] which was subsequently to be enacted by the South African Parliament. In addition, four cognate draft bills relating to the Transitional Executive Council,[49] the Independent Electoral Commission,[50] the Independent Media Commission[51] and the Independent Broadcasting Commission[52] were agreed upon and enacted by the South African Parliament. A new Electoral Act[53] to govern the first

44 Mandela *Long walk to freedom* 597.
45 *Idem* 598.
46 Welsh *The bold experiment* 90.
47 *Ibid.*
48 The Constitution of the Republic of South Africa Act 200 of 1993.
49 Act 151 of 1993.
50 Act 150 of 1993.
51 Act 148 of 1993.
52 Act 153 of 1993.
53 Act 200 of 1993.

democratic elections in South Africa was also negotiated. All this was part of a virtually miraculous process of transition from the old discredited and unjust apartheid order to a new democratic order in South Africa.

Valiant endeavours were made to bring about a settlement at Codesa. Although these proved to be abortive, important lessons were learnt from the Codesa experience.[54] Furthermore, important preparatory work done at Codesa was used and further developed at the MPNP. Early in 1993 bilateral discussions began to take place in order to convene a multi-party conference for the purpose of bringing about a political and constitutional settlement in South Africa.[55] These bilaterals involved a variety of political parties. The most important were between the South African government and the ANC, which resulted in a tentative draft blueprint for a democratic form of government, involving a rigid constitution, a bill of rights and a government of national unity[56] for a period of five years.[57] A concerted effort was made to ensure that the new process was as inclusive as possible and thus the PAC, AZAPO, the Conservative Party and the Herstigte Nasionale Party were approached.[58] AZAPO rejected the multi-party negotiations.[59]

The structures and process of negotiation of the MPNP

Unlike Codesa, the MPNP ultimately proved to be a success. Nevertheless the process of negotiation was problematic and there was a variety of factors which could have caused it to collapse. Miraculously it survived the political crises caused by the iniquitous and cold-blooded assassination of Chris Hani, General-Secretary of the South African Communist Party and the untimely, brutal and unconscionable SADF raid on a PAC house in Umtata.[60] The process also survived the crudely amateurish and clamant storming of the World Trade Centre by members of the Afrikaner Weerstand Beweging, their boorish and frenetic occupation of the Negotiation Council's chamber and their racist and obscene conduct and language indiscriminately inflicted on all and sundry.

The structures of the MPNP[61]

The Negotiation Forum and the Negotiation Council

These structures proved to be more streamlined than those used at Codesa. The plenary session of the MPNP was the body or forum required to confirm the agreements reached by the participants of the MPNP. It was a large formal body consisting of ten representatives of each negotiation party.

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54 Alewife "The process of giving birth" in De Villiers (ed) *The birth of the new Constitution* (1994).

55 See "Mangope meets FW for talks today" *The Citizen* 1993-02-16.

56 See Paddock "Nat power-sharing model rejected – ANC support for five-year coalition govt" *Business Day* 1993-02-19.

57 See Lagardien "The government and the ANC have agreed on a blueprint for a democratic South Africa" *The Sowetan* 1993-02-19.

58 *Ibid.*

59 See Zwane "Azapo rejects multi-party negotiations" *Business Day* 1993-05-11.

60 See Molefe "Kriel in the dock" *The Sowetan* 1993-05-28. See also "Negotiations surviving biggest test" *The Citizen* 1993-05-26.

61 See "Organisation ready for new negotiations" *Business Day* 1993-03-31.

The Negotiation Forum's life span proved to be of short duration. It was intended to be used publicly to confirm agreements reached by the Negotiation Council, which was initially required to operate behind closed doors. When the Negotiation Council was enlarged and opened to the media, the need for the Forum fell away and it conferred all its powers on the Negotiation Council at its second and final meeting in June 1993.

The Negotiation Council, initially known as the Facilitating Committee,[62] with two members per party, became the most important negotiation forum of the MPNP. Furthermore, each delegation was entitled to have two advisers and was also obliged to have one woman delegate. This resulted in a strong women's lobby straddling party political affiliations. Whereas 19 parties were involved with Codesa, 26 were initially involved in the Negotiation Council.[63]

After it received and studied reports from different bodies and committees, the council debated issues and reached agreements which were given expression in the emerging draft interim constitution and the draft bills referred to above. It soon became clear that the Negotiation Council was a body of legitimacy and authority. This became apparent from certain important resolutions it adopted, such as those relating to the incorporation of the enclave of Walvis Bay into Namibia and the infamous SADF raid on the PAC in Umtata. In effect this resulted in the political spotlight moving from Parliament in Cape Town to the World Trade Centre in Kempton Park. This was acutely perceived by the local and international media whose members descended like vultures on the World Trade Centre.

The Planning Committee and the Technical Committees

The influential Planning Committee,[64] consisting of prominent negotiators spanning virtually the entire political spectrum from left to right in South Africa, provided the Negotiation Council with reports and gave instructions and advice to the Technical Committees. The Planning Committee was composed of ten members, each appointed in a personal capacity.[65] The Planning Committee played a seminal role in facilitating the process of negotiation. Although it had no jurisdiction to take any decisions on substantive constitutional and political issues, its role in effecting reconciliation and pre-empting conflict was indispensable to the whole process.[66] A *de facto* subcommittee of the Planning Committee, consisting of Mac Maharaj, Ben Ngubane and Fanie van der Merwe, acting with a low profile but with skilful diplomacy, facilitated the difficult task of the MPNP.[67] They devised strategy and resolved conflicts.

The Negotiation Council received substantial assistance from the seven Technical Committees, made up of non-party persons who were acceptable to the participants and who were considered to have expertise in regard to the whole process of negotiation and constitution-making. These committees were

62 See Lagardien "Focus on talks" *The Sowetan* 1993-04-01.
63 *Ibid.*
64 Initially this included Benny Alexander, Cyril Ramaphosa and Roelf Meyer. See "Organisation ready for new negotiations" *Business Day* 1993-03-13.
65 See Lagardien "Focus on talks" *The Sowetan* 1993-04-01.
66 De Villiers *Birth of a constitution* 14.
67 *Idem* 17.

furnished with submissions from the participants, from which the committees presented carefully deliberated reports to the councils, with suggestions of compromise and reconciliation of conflicts. Although their role was not political, they formulated their proposals in a creative way, presenting different options aimed at deadlock resolution. In certain cases where they were unable to effect a deadlock resolution, *ad hoc* task groups were mandated to assist. Seven technical committees were set up.[68] They reported on "commonalties and areas of conflict between parties in the Negotiation Council".[69] In doing this, they facilitated the process of negotiation. These technical sub-committees did not negotiate substantive issues, but were "instruments of the negotiation council (employed) in order to produce systematic documentation to facilitate discussion and negotiation in the council".[70]

The two commissions

Two important and sensitive issues required the setting up of separate commissions. Their members were non-partisan persons acceptable to political negotiators as a whole. The first related to the demarcation of regions[71] and was the Commission for the Demarcation/Delimitation of Regions; the second was the Commission on National Symbols. The latter was submitted to the Council, but no consensus could be reached.[72] The former was a multi-party task group, which reached agreement on nine constitutionally entrenched provinces.

The process used by the MPNP culminating in the political settlement and the interim Constitution

The Technical Committees were furnished with submissions, which they used to draw up reports. Other matters were referred to the Technical Committees by the Negotiation Council through the Planning Committee. The MPNP was designed to facilitate flexible and informal negotiation. Provision was made for alternating chairpersons, selected from an appointed panel of eight, ensuring that the chairperson acted with impartiality. The MPNP was designed to be as inclusive as circumstances permitted in South Africa's deeply divided society. With the departure of COSAG (Concerned South African Group) its inclusivity was detrimentally affected. The persistent complaint of this group was that the ANC and the South African government were manipulating the negotiation process.[73] However, the MPNP continued to function despite the departure of COSAG. (At a later stage the Freedom Alliance was to emerge out of the membership of COSAG.[74]) Even after the departure of members of COSAG, sustained and

68 See "Tight deadlines for negotiations blueprint" *Business Day* 1993-05-11. These seven committees had to investigate and draft proposals on: (1) Constitutional issues; (2) fundamental human rights during the transition; (3) violence, setting up a peace corps and the strengthening of the national peace accord; (4) an independent election commission and electoral act; (5) amendment or repeal of legislation impeding free political activity and discriminatory legislation; (6) an independent media commission and telecommunications authority; and (7) a transitional executive council and its subcouncils, including the joint control of the security forces.

69 "Breakthrough at talks" *The Citizen* 1993-05-08.

70 "Mechanisms agreed to at the peace talks" *The Citizen* 1993-05-01.

71 See "Deciding the region question" *Natal Witness* 1994-07-07.

72 De Villiers *Birth of a constitution* 17.

73 See "Cosag takes 'firm stand on ANC-govt manipulation'" *The Citizen* 1993-04-08.

74 "COSAG men form Alliance" *The Citizen* 1994-10-08.

determined efforts were made to involve them in the process again. The ANC endeavoured to hold talks with the Freedom Alliance, and when these stalled the National Party was forced into the role of mediator.[75] Concerted efforts were made to make the talks as inclusive as possible.

At an early stage the MPNP took the decision to open the proceedings of the Negotiation Council to the media and the diplomatic liaison officers, which had not been the position with Codesa. This resulted in greater transparency and accountability as far as the public was concerned. The public were also entitled to submit proposals to the respective Technical Committees on a variety of matters.

In June, a basis was reached for a political settlement.[76] This involved a two-phase transitional process with built-in guarantees for constitutional principles and powers, functions and structures of regions. This gave rise, on the one hand, to a Transitional Executive Council to manage the interim period, and an elected constitution-making body to draw up the final constitution. On the other hand, it produced an interim constitution with guaranteed powers, functions, and structures of regions. Shortly after this basis for a political settlement had been reached, the Negotiation Council set 27 April down as a date for the first democratic non-racial election.[77]

Personal friendships and trust developed between the participants cutting across political divisions. In a sense South African political leaders came of age, since they realised that it was imperative for the process to succeed for the salvation of the country and its people, who had suffered so greatly under the policy of apartheid. This required hard work, good faith and political compromises to bring about a negotiated settlement. The acceptance of the draft bills referred to above represented important milestones in the emerging interim constitutional process and were hailed with applause – and indeed relief – by the participators.

Decisions in the Negotiation Council were taken by "sufficient consensus", a controversial practice that was unsuccessfully challenged[78] in the Transvaal Division of the Supreme Court by Inkatha after it had walked out of the council.[79] As a result, a set of guidelines was adopted for the interpretation of what constituted sufficient consensus.[80] After its petulant and crisis-provoking departure, Inkatha indicated that it would not attend further multi-party talks until its demand for a veto had been met.[81] This was part of its controversial and indeed risky strategy of brinkmanship which was effectively employed just prior to the election.

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75 "ANC talks with Freedom Alliance stall" *Business Day* 1993-10-26.

76 See "Basis for settlement" *The Citizen* 1993-06-02.

77 See Paddock and Zwane "April 27 set down as date for elections" *Business Day* 1993-06-04.

78 "KwaZulu court bid against poll" *The Citizen* 1993-08-10. See also "KwaZulu loses case" *The Sowetan* 1993-08-10. In his judgment Alewife J said that it would be "inappropriate for the court to interfere in the course of a political process which is still far from being completed".

79 "Draft Constitution: CP quits talks" *Natal Witness* 1993-07-27.

80 "Consensus: New guidelines" *The Citizen* 1993-08-05.

81 See "Inkatha boycotts talks over veto" *Cape Times* 1993-07-22.

Political problems encountered by the MPNP

Although progress was made by the MPNP, many serious differences occurred relating to the process and the substance of negotiations. Inclusivity was imperative for the legitimacy of the process. The withdrawal of COSAG which occurred at various stages, represented a serious threat to the process. First the IFP, the CP and the KwaZulu government departed, followed at a later stage by the Bophuthatswanan and Ciskeian governments and finally the Volksfront. The vociferous and aggressive demands of the right wing were taken seriously and Roelf Meyer indicated that the issue of self-determination should be negotiated.[82] However, at no stage did the actual withdrawal or threatened withdrawal constitute a real danger to the continuation of the MPNP. Buthelezi did, however, threaten to set up a rival "constitutional convention".[83] The withdrawals were prompted by a difference about the constitution making process, namely whether it should be a one or two stage process, and the extent of the powers that the provinces would have. These powers were increased as an "olive branch gesture" to COSAG.[84] It was also agreed that the provincial legislatures would be allowed to adopt their own constitutions subject to the provisions of the national constitution.[85]

From the beginning of the negotiations, the unconscionable and traumatic violence in South Africa constituted a threat to the process of the negotiations.[86] Nevertheless even the tragic death of the charismatic Chris Hani did not actually derail the process, although the future of the country did hang in the balance during this period and negotiations were delayed by a week.[87] Miraculously, reconciliation triumphed over revenge and retribution.

Besides the process of negotiation between the parties in the Negotiation Council, important bilateral talks took place, essentially between the ANC and the South African government. COSAG and other participants were also involved in bilaterals, which occurred after the departure of members of COSAG from the MPNP.[88] The bilaterals were responsible for very significant political and other compromises and may therefore be said to have been fundamental to the ultimate success of the whole process.

The position and status of the traditional leadership and customary law were intensely and emotionally sensitive issues throughout the negotiations. Customary law and tribal leadership were recognised in the interim Constitution, but subject to the fundamental rights contained in chapter 3.[89] It was the serious and persistent threat by rural women to boycott the election that led to the decision that the application of customary law should be subject to the provisions of the chapter on fundamental rights. This did not mean that African culture was being eradicated, "but that women can challenge customary law and provide for its development and reform".[90]

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82 See Lagardien "Meyer defuses right-wing 'war talk'" *The Sowetan* 1993-05-12.
83 "Buthelezi threatens rival talks set-up" *Daily Dispatch* 1993-07-17.
84 See "Olive branch held out to absent Cosag" *Daily Dispatch* 1993-07-29.
85 See "The Constitution" *The Natal Witness* 1993-07-29.
86 See Paddock "Violence tops agenda as talks resume" *Business Day* 1993-04-01.
87 See Paddock "Negotiations delayed by a week" *Business Day* 1994-04-14.
88 See "Inkatha wants demands met first" *Echo* 1993-07-22.
89 "New constitution begins to take shape" *Daily Dispatch* 1993-07-02.
90 Kooma "Elation as customary law gets the thumbs down" *The Sowetan* 1994-11-17.

The method of appointment of the members of the Constitutional Court was also a matter of great contention. Ultimately a meritorious compromise was skilfully brokered by the Democratic Party in terms of which the Judicial Service Commission would present to the President a list of ten names from which six would be selected for appointment.[91]

On the sensitive issue of the reincorporation of the TBVC states, the Negotiation Council accepted in principle that they would be reincorporated and that residents would have South African citizenship restored to them on 1 January 1994. This was intended to allow them to vote on 27 April 1994.[92]

THE OUTCOME

A historic political settlement was negotiated at the MPNP at the World Trade Centre at Kempton Park. The interim Constitution was the outcome of a comprehensive process of political negotiation and compromise. All the major parties had to make substantial compromises.[93] Thus, for instance, the ANC perceptively shifted its stance on regionalism.[94] The interim Constitution was most certainly not a perfect constitution; indeed, its flaws were legion, but it provided an important basis for future political and constitutional development. The Constitutional Principles contained in the interim Constitution formed an important part of the political settlement,[95] since they were binding on the Constitutional Assembly in its drafting of the final Constitution.

Part of the political settlement involved the constituting of the Transitional Executive Council (TEC). This important body held its first session in the historic old President's Council Chamber in Cape Town on 7 December 1993.[96] One of the purposes of the TEC was to ensure a smooth transition to the build-up to the elections on 27 April 1994.[97] It was a statutory body with powers to keep the "present and still ruling National Party Government in legal check",[98] and was intended to level the metaphorical playing fields in the run-up to the elections. The operation of the TEC was hailed as the beginning of the end of white rule.[99]

The political settlement negotiated at the World Trade Centre in December 1993 involved a single ballot for the elections of 27 April 1994. This was strongly opposed by the smaller parties, who argued cogently for a double ballot system for the election of members of the provincial and national legislatures.[100] In order to induce the Inkatha Freedom Party to participate in the election, the interim Constitution was amended to provide for a double ballot in 1994 prior to the election date of 27 April.[101] At the metaphorical eleventh hour the Inkatha

91 See "Two verdicts on the judges debate" *Mail and Guardian* 1993-12-10-16.
92 Luti "It's nothing new, say TBVC states" *The Sowetan* 1993-12-03.
93 See "Big step forward at talks – compromise on constitution" *The Natal Witness* 1993-07-01.
94 See Paddock "ANC shifts its stance on regionalism" *Business Day* 1993-05-18.
95 See "Principles that will be entrenched in new Constitution" *The Citizen* 1993-07-27.
96 *The Sowetan* 1993-12-08.
97 Molefe "FA stops launch of TEC over 'small' issue" *The Sowetan* 1993-12-07.
98 Molefe "No sparks fly as TEC meets" *The Sowetan* 1993-12-08.
99 *Ibid.*
100 Molefe "Last lap to polls" *The Sowetan* 1993-12-14.
101 Act 2 of 1994.

Freedom Party wrung significant concessions from the ANC as a condition to participating in the election.

The leadership qualities of President Mandela are a vital element for the political development and the realisation of human rights in South Africa. He is a man of vision, magnanimity, strong leadership and personality and a willingness to compromise. He is both pragmatic and moral in his approach and enjoys manifest international respect and esteem. Internationally his moral and political stature has been likened to that of the legendary Mahatma Gandhi.[102] From a national point of view he "is South Africa's George Washington, the revolutionary turned President who has overseen the birth of a nation".[103] He is, however, fallible and is thus capable of errors of judgment[104] in the way he handles people and situations.[105] Nevertheless he is a man of such international status that he is universally revered for his wisdom, humility and the personal sacrifices he has made in the cause of both liberation and reconciliation. More than any other person in South Africa's history, he has made the realisation of human rights in the "beloved country" (to use the words of the distinguished South African liberal author Alan Paton in his celebrated novel[106]), possible. The maintenance and promotion of human rights requires strong political leadership. President Mandela has by his conduct and example demonstrated such leadership.

Former Deputy President de Klerk also made a seminal contribution to the process of transformation as a reformer of historic calibre, who was exemplary in the way he has stepped aside to allow Mandela to take over the reins of government and enjoy the limelight.[107] South Africa is rich in human potential and there are talented and charismatic leaders in the major political parties who are cogently committed to the cause and ethos of human rights. Both Mandela and De Klerk kept the process of negotiations on track by their complementary efforts.

Buthelezi of the IFP played an important albeit controversial role using an inherently dangerous, but not entirely unsuccessful, strategy of brinkmanship in the realisation of the political settlement that made the election of 27 April possible. The success of the election was therefore the outcome of the political contributions of a triumvirate, of Mandela, De Klerk and Buthelezi. The truth of the matter, in relation to the impasse resulting from the withdrawal of the IFP from the Constitutional Assembly, is complex and involves a titanic power

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102 See "Miracle year is over, now time to deliver" *City Press* 1995-01-01.

103 *Time* 1995-05-08.

104 See "Is Mandela the leader of a party or a country?" *Business Day* 1995-06-09.

105 This is evident from the way in which he threatened to cut off funds from KwaZulu-Natal, regardless of constitutional requirements. This had an "adverse effect on the cautious image of his statesmanship built up over his first year in office". See "The Presidency undermining the magic" *Financial Mail* 1995-05-12. His initial threat was made obviously out of intense frustration. In effect it had to be retracted by his advisers who called a press conference. Their statement read: "The President would wish to make it clear that withholding funds from a provincial government working within the constitutional democratic structures would be contrary to the letter of the constitution and his own deep belief in democratic ideals."

106 Paton received international acclaim for his novel *Cry, the beloved country*, first published in 1948, the very year the NP came to power and began to implement its iniquitous policy of apartheid.

107 Tutu "We must not expect manna from heaven" *Sunday Times* 1995-04-23.

struggle between two political organisations in regard to political hegemony in KwaZulu-Natal. From an anthropological viewpoint there is a conflict between universalism and particularism, which has so frequently found expression in western political and philosophical thought and history. Ultimately some form of international mediation appears to be essential to resolve this dangerous impasse.

CONCLUSION

South Africa has made a virtually miraculous[108] transformation from an oppressive racist state to a political dispensation regulated by a non-racial democratic constitution with a progressive bill of rights. Although the progress made in the field of human rights since FW de Klerk delivered his momentous speech on 2 February 1990 has been erratic and at times has faltered, it has, looking back over this traumatic and turbulent period, been a unique and remarkable political experience. During the period of NP hegemony most informed political commentators were of the opinion that the prognosis for South Africa was apocalyptic, since apartheid would inexorably lead to a horrendous civil war between the liberation movements and the government of South Africa. The apocalypse, so cogently predicted by the profits of doom and gloom, never came. A political settlement was reached at the World Trade Centre which gave rise to the interim Constitution. Unfortunately this process was not completely inclusive. Before the election in 1994 South Africa was hovering precariously on the verge of national calamity. The Inkatha Freedom Party came into the election process at the metaphorical eleventh hour. The election itself, although marred by muddle, fraud and irregularities, was a significant event and the people of South Africa demonstrated by their manifest patience that they desire a peaceful and democratic future for South Africa. The impressive display of public discipline and patience astonished foreign observers and reporters who anticipated large-scale violence. The orderly voting was a powerful manifestation that ordinary people and political leaders could reconcile their differences and unite for the benefit of the good of all. The election itself constituted the exercise of the fundamental right to vote by all the people of South Africa in a non-racial election based on adult universal franchise. This event must surely rank in the annals of history as one of the politically most significant elections of the 20th century. It was indeed a seminal event in the process of restoring dignity to all the people of South Africa. This restoration of dignity has made a contribution to the improvement in the state of race relations in South Africa. The election also brought to power the Government of National Unity (GNU), with the ANC constituting the major and victorious political party, and the NP and IFP as the other significant participating parties. A system of power-sharing or neo-consociational[109] government was embarked on for a period of five years.[110] This experiment with power sharing government reflected the realisation that a South African democracy involving

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108 See in general Friedman and Atkinson (eds) 1994 *South African Review – The small miracle.*

109 See Boulle *South Africa and the consociational option* (1984) 45 ff.

110 The first scholarly analysis on the issue of power sharing in deeply cleavaged societies is found in the work of the Nobel Prize winning economist Sir Arthur Lewis, who advocated power sharing for ethnically divided countries of West Africa in his celebrated Widden Lectures in 1965. See Lewis *Politics in West Africa* (1965), quoted by Lijphart "Prospects for the future" in Reynolds (ed) *Election '94 South Africa* 230.

the propagation and maintenance of human rights requires "a culture of moderation, co-operation, bargaining, accommodation, and above all, pragmatism".[111] What must still be forged in the immediate future is a "social contract in which they key players agree to compromises in exchange for concessions from the other parties to the contract".[112] This social contract must *inter alia* involve organised labour as well as the major political parties.[113]

The GNU commenced with an ambitious Reconstruction and Development Programme to rehabilitate the vast disadvantaged black population of South Africa. Although there were a number of "teething problems", some progress has already been made and it is hoped that the programme will bear fruit in the near future. With certain significant exceptions, peace has returned to this country after a decade of political violence that left more than 20 000 persons dead. Economic growth has recommenced and foreign investors, who departed in their droves during the apartheid years, are gradually beginning to retrace their steps to a reformed and more stable South Africa,[114] which is now perceived to be a political exemplar and no longer the polecat of the family of nations in the international community. There is cause for guarded optimism and hope that the policies of social rehabilitation and compassion will triumph despite the formidable problems of poverty and inequality. The problems relating to KwaZulu-Natal, however, appear to be intractable. There is no easy solution and the political leaders must continue despite their serious personal differences to explore the avenues that genuine negotiations open up. A constitutional blueprint should, however, not be imposed on KwaZulu-Natal. In this regard David Welsh opines that

> "[i]n no single attested case since the proliferation of independent, ex-colonial states began after 1945, has nation-building, as a conscious attempt to detach people's loyalties from sub-national entities and focus them on a putative 'nation' succeeded. On the contrary, hot-house methods of nation building invariably appear to be counterproductive, especially if they involve, as they often do, attempts by the dominant groups to impose a cultural and symbolic hegemony".[115]

In effect this means that a negotiated settlement must be pursued and reached in relation to the present impasse in KwaZulu-Natal.

The unique process of transformation from apartheid to non-racial democracy was a synthesis of both reform and revolution, as Welsh has so perceptively observed.[116] It is to some extent analogous to what has occurred in both Poland and Hungary, in the wake of the collapse of Communist hegemony in Eastern Europe, for which, as Welsh points out, Timothy Garton Ash has appropriately coined the term "refolution" which he describes as follows:

> "It was in fact a mixture of reform and revolution . . . There was a strong and essential element of change 'from above' led by an enlightened minority in the still ruling communist parties. But there was also a vital element of popular pressure

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111 *The bold experiment* 194. Since the time of writing, however, the NP has withdrawn from the GNU.

112 See Friedman "Beyond symbols? The politics of economic compromise" in Schrive (ed) *Wealth or poverty* 610.

113 *The bold experiment* 194.

114 See "Miracle year is over, now time to deliver" *City Press* 1995-01-01.

115 "The making of the Constitution" in *The bold experiment* 88.

116 *Idem* 86.

'from below'; in both countries the story was that of an interaction between the two."[117]

The complexity and problematic nature of the process of constitutional and political transformation was further compounded by the deployment of a strategy of brinkmanship employed by the IFP and its leadership. Using this questionable strategy, they obtained significant concessions in relation to the double ballot, the Zulu monarchy and the increase of provincial powers, which the other protagonists of regional devolution for federalism had been unable to secure in the negotiation process using conventional strategies. The strategy of brinkmanship did undoubtedly however have a detrimental influence on the levels of violence prevailing, particularly in Natal. South Africa's miraculous transformation has involved *inter alia* a concatenation of many factors involving the desire and need for reform, the dire consequences of the policy of mass or revolutionary action and liberatory mobilisation, the cathartic ideas of reconciliation and the unusual qualities of statesmanship both of De Klerk and Mandela. The process is still inchoate and the greatest challenge lies ahead. A Herculean task has to be engaged and brought to fruition in the economic and social reconstruction of South Africa and the reconciliation of universalism with particularism, which is the essence of the conflict in KwaZulu-Natal.

I also see no embarrassment in an urgent Court Judge been overridden by a trial Judge. Each of us, privileged to hold this high and responsible office, owe, in the wielding of our considerable power, a duty only to truth and justice. The interlocutory decisions of Colleagues, and indeed those of our own, are not binding at later stages of the proceedings and should, I trust, do yield easily to persuasive arguments indicating error and oversight (per Goldstein J in *Tony Rahme Marketing Agencies SA (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1997 4 SA 213 (W) 216).

117 Ash *We the people* (1990) 14 quoted by Welsh in *The bold experiment* 86–87.

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

Section C: Codification of the law of cession

(*continued*)*

Susan Scott
BA LLD
Professor of Private Law, University of South Africa

1 INTRODUCTION

Various authors and judges have recommended statutory intervention to clarify the uncertainties and anomalies surrounding cession, especially as regards security by means of claims (security cessions). I suggested in the two preceding articles that the South African Law Commission should consider recommending legislation to regulate not only security by means of claims, but the entire law of cession. This should not be such a difficult task, since various modern codifications of the Romano-Germanic family, such as the German *Bürgerliches Gesetzbuch*, the Dutch *Burgerlijk Wetboek* and the newly adopted Belgian code on cession, can serve as examples. There is no doubt in my mind that the South African law of cession is in dire need of reform and that the Law Commission should consider such reform as a matter of urgency.

The rather confused state in which the South African law of cession finds itself today can be attributed partly to the peculiar nature of the South African legal system and partly to the distinctive historical development and complexity of cession as a legal phenomenon. Modern South African law is a hybrid system belonging mainly to the Romano-Germanic legal family. The common law of South Africa, the so-called Roman-Dutch law, however, has been adapted over the past three hundred and fifty years to form the South African law as we know it today. During this period, English law and doctrine had a unique influence on developments here; for example, the doctrine of *stare decisis* and its distinctive application in South Africa has exacerbated the existing anomalies. These include the fact that not even the very basic problem pertaining to the systematic

* See 1997 *THRHR* 179–201 434–460.

classification of cession in private law has been clarified; that the validity requirements of cession have been dealt with in a very casuistic and unsatisfactory way[1] and that the role of notice to the debtor,[2] security by means of claims and the *causa* of cession[3] still need to be resolved.

If one bears in mind that the modern law of cession as expounded, for example, in German and Belgian law, and indeed in South African law, is the result of a particular development which took place in Germany in the nineteenth century, it is obvious that South African lawyers can no longer consult the Roman-Dutch authorities of the seventeenth and eighteenth centuries to solve the problems pertaining to cession today. Roman-Dutch law of this period was basically a system of actions and not a system of rights. Cession was seen as a transfer of actions. The idea that an obligation is very personal in nature played a very important role and resulted in the non-transferability of the claims flowing from it.[4] This eighteenth-century system of actions had been interpreted in South Africa over a period of some three hundred and fifty years by judges of various educational backgrounds and juridical viewpoints. Therefore, although there are precedents in case law, there are so many conflicting precedents[5] that it is no longer possible for the courts to adapt the law of cession in order to ensure certainty, and to bring it in line with modern legal systems and with the needs of the modern commercial world.

1 1 Approaches to cession in Roman-Dutch and South African law

The most recent definitions[6] of cession as a legal phenomenon may be rendered as follows: Cession is an act of transfer in terms of which the cedent transfers

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1 See Scott *Cession* ch 4.

2 *Idem* ch 7.

3 *Idem* ch 6 2 and 6 3.

4 See Wiarda *Cessie of overdracth van schuldvorderingen op naam* (1937) 14 19 25 40 *et seq*; Huwiler *Begriff* 25 *et seq*; Scott *Sessie in die Suid-Afrikaanse reg* (1977) 112 *et seq*; Zwalve *Hoofdstukken uit de geschiedenis van het Europese privaatrecht* 1 *Inleiding en zakenrecht* (1993) 267.

5 Eg *Jeffery v Pollak and Freemantle* 1938 AD 1 and *Labuschagne v Denny* 1963 3 SA 538 (A) (on the role of delivery of the document); *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 3 SA 166 (A) and *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 (on the nature of security by means of claims); *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 3 SA 166 (A) and *Paiges v Van Rijn Gold Mines* 1920 AD 600 (on the nature of agreements prohibiting cession); *Illings (Acceptance) Co (Pty) Ltd v Ensor* 1982 1 SA 570 (A), *Katz v Katzenellenbogen* 1955 3 SA 188 (T) and *Brook v Jones* 1964 1 SA 765 (N) (on the role of notice to the debtor and the reason for the debtor's discharge through payment to the cedent).

6 *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 331G–H, followed and approved in *Botha v Fick* 1995 2 SA 750 (A) and *First National Bank of SA Ltd v Lynn* 1996 2 SA 339 (A) 345G–346A: "Cession is a particular method of transferring rights in a movable incorporeal thing in the same manner in which delivery (*traditio*) transfers rights in a movable corporeal thing. It is in substance an act of transfer ('oordragshandeling') by means of which the transfer of a right (*translatio juris*) from the cedent to the cessionary is achieved. The transfer is accomplished by means of an agreement of transfer ('oordragsoorecnkoms') between the cedent and the cessionary arising out of a *justa causa* from which the former's intention to transfer the right (*animus transferendi*) and the latter's intention to become the holder of the right (*animus acquirendi*) appears or can be inferred. It is an agreement to divest the cedent of the right and to vest it in the cessionary. Moreover, the agreement of transfer can coincide

continued on next page

his/her claim ("vorderingsreg") to the cessionary by means of a transfer agreement. This transfer of the right itself (*translatio iuris*) results in the cessionary replacing the cedent as creditor of the debtor.[7] It has also been generally accepted that the cedent may transfer his/her claim to the cessionary without the co-operation or knowledge of the debtor and even against his/her will. Although notice of the cession is not a validity requirement for the transfer, the debtor who pays the cedent without knowledge of the cession is discharged by such payment. The cession should, furthermore, be preceded by a valid cause.[8]

In short, cession in modern South African law is regarded as a legal phenomenon pertaining to the law of obligations. Cession transfers a claim and the cessionary replaces the cedent as creditor. It brings about a complete substitution of creditors.[9] This position conforms to a large extent to that in the German *Bürgerliches Gesetzbuch*,[10] but not, as I intend to show, to Roman-Dutch law, the common law of South Africa.

A comparison between the above exposition of cession and the one in *Guman v Latib*[11] (which in essence, amounts to a summary of the position in Roman-Dutch law) reveals certain distinct differences between the position in Roman-Dutch law and contemporary South African law. At the outset it should be noted that the views of the Roman-Dutch authors on cession are not uniform: a distinction can be made between those authors who were strongly under the influence of Roman law and the more practical ones, some of whom were, nevertheless, to some extent influenced by the Roman law. Even in restricting oneself to the so-called true Roman-Dutch authors, that is, the authors of the Province of Holland during the seventeenth and eighteenth centuries, it is difficult to construe a uniform approach to the law of cession.[12] Some authors, while

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with, or be preceded by, a *justa causa* which can be an obligatory agreement, also called an obligationary agreement ('verbintenisskeppende ooreenkoms'), such as a contract of sale, exchange or donation. See *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) 331G. Even an agreement to provide security by means of a cession in *securitatem debiti* is in itself adequate *justa causa* for the cession. See De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed vol 1 at 420: 'As 'n *causa* noodsaaklik is vir die sessie, dan is die afspraak dat dit in *securitatem debiti* geskied, tog seker genoegsame *causa* daarvoor . . .'"

7 *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 762A.

8 This exposition of cession has been adopted by most modern textbooks – see Scott *Cession* 7 21; Van der Merwe *et al Contract, general principles* (1993) 322; Joubert *General principles of the law of contract* (1987) 190.

9 See Scott *Cession* 4 7 21; Van der Merwe *et al Contract* 322 *et seq*; Joubert *Contract* 190 *et seq*.

10 § 398.

11 1965 4 SA 715 (A) 722A–B: "In the case of the latter (= rights of action), it is acquired by cession (*cessione vero potissimum in actionibus transferendis*). In another passage (18.4.17) he says that in actions cession stands in the place of delivery. That was affirmed in *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019 at 1025. (Cf *Jeffery v Pollak and Freemantle* 1938 AD 1.) According to Sande, *De Actionum Cessione*, 1.3, cession of action is nothing else than to furnish another with an action, to deliver, hand over or transfer an action to another."

12 For a full discussion of the views of the Roman-Dutch authors see Wiarda *Cessie* 37–52; Grosskopf *Die geskiedenis van die sessie van vorderingsregte* (1960) 98–126; Luig *Zur Geschichte der Zessionslehre* (1966) 16–22; Scott *Sessie* 13–32 86–91; Zimmermann *The law of obligations* (1990) 62–64; Zwalve *Hoofdstukken* 280–283.

strongly influenced by Roman law, propagated views conforming to those held by the practical jurists, whereas some of the more practical jurists held views corresponding to Roman-law notions. Broadly speaking, however, it may be said that cession was viewed in Roman-Dutch law as a transfer of actions. Actions, real and personal, were regarded as incorporeal things. Personal actions, as incorporeals, could be dealt with much in the same way as corporeals; that is, they could be sold, mortgaged and pledged. However, because they were intangible, it was not possible to possess them or to transfer ownership of them by means of delivery. Consequently, cession was used to effect such transfers. Cession was effected by means of a mandate or by mere consensus which was incorporated in a deed of cession. A just cause was required for the transfer. In fact, the cause had to be mentioned in the deed of cession. The cession could be effected without the co-operation of the debtor and even against his/her will.

Most Roman-Dutch authors acknowledged, in principle, the Roman law distinction between the *actio utilis* and the *actio directa*, but different views about the further implications of this distinction emerge from the sources. Some authors[13] adhered to the notion that an obligation is of such a very personal nature that the right flowing from it cannot be transferred. The *actio directa* was, therefore, not transferable and the cessionary had to act with the *actio utilis*. After the cession there were two creditors (that is, the cedent and the cessionary). The cedent lost the *actio directa* and the cessionary became the sole creditor only once notice of the cession had been given (or one of the other instances mentioned in *C* 8 41 3 had materialised). Others, however, recognised that, after the cession, the cedent could no longer use his/her *actio directa* and, consequently, they tended to adopt the view that cession effected a transfer of the claim itself. Mainly because of the influence of natural law, most Roman-Dutch authors treated cession as a transfer of ownership of incorporeals, and therefore as a legal institution pertaining to the law of property.

The essential differences between the position of eighteenth-century Roman-Dutch law and modern South African law are, therefore the following: (a) the former displayed a rigid devotion to the principle of non-transferability of claims arising from obligations, whereas the latter, being a modern system, accepted the transferability of claims; and (b) cession was treated as pertaining to the law of property in Roman-Dutch law, but as pertaining to the law of obligations in South African law. The irreconcilability of these viewpoints has rendered the South African law of cession unsatisfactory in many respects, as is clearly revealed in the conflicting Appellate Division[14] decisions on the definition of cession over the years.

1 2 South African law of cession

The present state of the law of cession in South Africa is the result of developments, not only within South Africa, but also in England and even in Germany.[15] The evolution of the law of cession in the latter two countries filtered into South African law through the agency of the courts. Several aspects of the development

13 Eg those referred to in *Guman v Latib* 1965 4 SA 715 (A) 722A–B.

14 Compare the *Johnson* and *Guman* cases referred to above.

15 Luig *Geschichte* 77–125; Huwiler *Begriff* 175–179; Scott *Cession* 39–66; Zimmermann *Obligations* 64–67; Zwalve *Hoofdstukken* 299–304.

of South African law, in general, and the law of cession, in particular, deserve attention here.

The work of the German jurists of the Historical School influenced current South African law of cession in important ways, albeit indirectly.[16] Consider, by way of example, the central notion of the transferability of claims. A study of their work reveals that some of these jurists, the Germanists, based their arguments in favour of the transferability of claims on German common law, whilst others, the Pandectists, turned to Roman law for substantiation. The Germanists explained the transferability of claims, on the one hand, by emphasising the property-law aspect of a claim and stressing its value as an asset in a person's estate, and on the other hand, by depersonalising obligations. Through objectifying a claim and stressing its economic value as an asset, the Germanists made their most important contribution to the acceptance of the transferability of claims created in terms of an obligation. The Pandectists, in their turn, declared that the claim itself had always been transferable, even in Roman times. Between 1860 and 1880, the idea prevailed that cession effects a complete transfer of the claim itself. The Romanists justified this transferability with reference to Savigny's view that a substitution of creditors does not change the identity of the claim itself.[17] Having accepted the transferability of claims, as well as the ensuing complete substitution of creditors, the Romanists further occupied themselves only with defining the role of notice of the cession to the debtor, and interpreted it as a purely protective measure, albeit a very strong one. These views are entrenched in the German civil code and the latest definitions of cession in the South African case law are also in line with this modern idea of cession.

English law and legal concepts also influenced the South African law of cession. De Villiers CJ[18] introduced certain English legal principles pertaining to assignment into the South African law of cession, and the application of the English-law principle of *stare decisis* led to the entrenchment of these ideas in the case law. Since the Roman-Dutch theories on cession are to a large extent outdated and Roman-Dutch law is, as a result, unsuitable as a source of this branch of the law, case law has become the most important source of the South African law of cession. The role of English law can, therefore, not be underestimated.

Certain general characteristics of the South African judiciary are also relevant and deserve to be mentioned here. First, although it is a general principle that judges expound law and do not make law, the role judges play in South Africa in the judicial process of interpreting the law is significant. It can be stated that in interpreting the law, South African judges not only develop existing law, but also make new law. A clear example of this can be found in their handling of the role of delivery of the document evidencing the right.[19]

It should further be borne in mind that the divergent eighteenth-century Roman-Dutch views on cession were reconstructed in South Africa over a period of roughly three hundred and fifty years by judges of various educational and

16 Prof JC de Wet played an important role in introducing the views of the Pandectists into the South African law of cession: see discussion below.

17 See Wiarda *Cessie* 75–82.

18 See eg the discussion of his decisions in Scott *Cession* ch 4 1 2, 1995 *TSAR* 760.

19 *Ibid.*

political backgrounds, as well as jurisprudential viewpoints.[20] In this regard, there are two main streams of thought, that are usually identified as the Purist and the Modernist approaches.

From the early 1940s, a definite change can be detected in the approach to Roman-Dutch law as the common law of the country. This may be attributed to the fact that more Afrikaans-speaking judges were being appointed to the bench, many of whom had been educated at universities where a renewed interest in Roman-Dutch law flourished and Afrikaner sentiments were strong. Some professors[21] at these universities had been educated in the Netherlands or in Germany, or were at least strongly influenced by the legal systems of those countries. From the early 1960s, an orchestrated effort ensured that the influence of English law gradually waned and Roman-Dutch law gained renewed significance.[22]

English law (championed by the Modernists,[23] who were generally educated at the English universities, where case law was emphasised and Anglo-American legal systems provided guidance), nevertheless, largely retained its position, in spite of concerted efforts to purge it from the law. Although English law in general had a wholesome effect on the development of the law, in the law of cession, for example, it created very specific problems.[24]

Secondly, the South African courts' approach to academic writing merits mention. Romano-Germanic legal systems evolved within a tradition which allowed the so-called learned lawyers to play a leading role in developing the law. The views of academic lawyers played an important role in developing these systems, even after codification. In English law, however, academic writing received little attention, whereas case law and statutes played a far more important role. Only recently has more weight been given to the writings of contemporary authors and textbooks. On the whole, the South African judiciary tends to lean more towards the English than to the continental approach in this regard.[25] Although it is difficult to categorise South African judges, it may be stated in general that they do not value academic writing highly. Their methods vary: some acknowledge and refer to academic works,[26] while others ignore or use such writings selectively, even where contentious aspects of the law are

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20 See the research of Corder *Judges at work* (1984), as well as Van Blerk *The "purists" in South African legal literature and their influence on the judgments of the Appellate Division in selected areas* (LLM dissertation Unisa 1981), *Judge and be judged* (1988). Although their research does not cover judgments in the private law sphere, it indicates the effect which different social and educational backgrounds can have on the way in which judges interpret the law. In the law of cession, a very good example of this can be found in the way in which De Villiers CJ interpreted the Roman-Dutch law pertaining to the method of transfer – see Scott *Cession* ch 4 1 2, 1995 *TSAR* 760.

21 Eg WMR Malherbe, HDJ Bodenstein and D Pont.

22 For criticism of this state of affairs, see Proculus "*Bellum juridicum* – Two approaches to South African law" 1951 *SALJ* 306 *et seq*.

23 See *ibid*.

24 Eg the introduction of the doctrine of all effort – see Scott *Cession* ch 4 1 2, 1995 *TSAR* 760.

25 Du Plessis *Inleiding tot die reg* (1990) § 7 3 5.

26 See eg *Beaumont v Beaumont* 1987 1 SA 967 (A); *Lubbe v Volkskas Bpk* 1991 1 SA 398 (O); *Erasmus v Minister van Wet en Orde* 1991 1 SA 410 (A); *Botha v Fick* 1995 2 SA 750 (A).

concerned. There are also those who, as they put it, prefer not to burden their judgments with references to academic and other literature available on the subject under discussion.[27]

As a result of the above-mentioned peculiarities, modern South African private law is a complex legal system which, I believe, is in a very bad state in many respects, *inter alia*, the law of cession. The reasons for this are manifold and may be attributed mainly to its peculiar historical development which has resulted in its hybrid nature. In tracing the development of the law of cession from its Roman-Dutch origins to contemporary South African law, one becomes acutely aware of all the above influences and the effect that each of them had in creating the contemporary law of cession.

The influence of German law on South African private law is often underestimated, criticised[28] or overlooked. Initially, the works of the jurists from the Historical School, particularly the Pandectists,[29] influenced South African legal thinking. The influence that German law, and in particular the law as expounded by the Pandectists, had on South African private and criminal law can largely be attributed to the work of Professor JC de Wet[30] of the University of Stellenbosch. De Wet, however, took very little note of the development of German law after codification, and virtually nothing of developments in that legal system after 1950.

More recently, modern German private and criminal law have also influenced South African legal thinking, owing to the fact that many South African private- and criminal-law scholars have been awarded scholarships from the *Alexander von Humboldt-Stiftung*, enabling them to do research in Germany.

In the discussion that follows, I shall deal briefly with some of the problem areas in the law of cession which require attention and indicate why I recommend legislative intervention.

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27 See my discussion of *Incledon (Welkom) (Pty) Ltd v Qwa-Qwa Development Corporation Ltd* 1990 4 SA 798 (A) 804G–H in "To burden, or not to burden" 1991 *THRHR* 264.

28 See van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1983) 19–20. *Contra* De Vos *Regsgeskiedenis* (1992) 119.

29 Van Zyl *Geskiedenis* 246 *et seq*. This development is regarded by Van Zyl as a wholesome development, but in the law of cession, it is to a certain extent the source of the confusion which exists today on some of the important issues – see Scott *Cession* ch 7 10 (*pactum de non cedendo*) 12.

30 See fn 35 in section A above. Examples of his indirect influence can be found in *Lief v Dettmann* 1964 2 SA 252 (A) 271E–H where Wessels JA, with reference to the textbook on the law of contract by De Wet and Yeats, held that the only way in which claims can be used as security is by means of an out-and-out fiduciary security cession, whereas, Steyn CJ, a vehement supporter of Roman-Dutch law as the common law of South Africa, in other words, a so-called Purist, one year later in *Guman v Latib* 1965 4 SA 715 (A) applied the principles of pledge to such a cession as it prevailed in Roman-Dutch law – see Scott *Cession* ch 12. In *Trust Bank of Africa Ltd v Standard Bank of SA* 1968 3 SA 166 (A) Ogilvie Thompson JA, who may be classified as a Modernist or Positivist, adhered strictly to the principle of *stare decisis* and held that delivery of the document is required for a valid cession, whereas Botha JA (189H) seemed hesitant to accept this requirement, although it was not necessary for him to decide the case on this issue. Counsel for the appellant, HJO van Heerden, now a judge of the Supreme Court of Appeal, was a student of De Wet. Van Heerden argued against this requirement with reference to the textbook on the law of contract written by De Wet and Yeats. See further my discussion in *Cession* ch 4 1 2 and of *Botha v Fick* 1995 2 SA 750 (A) in 1995 *TSAR* 760.

2 PROBLEM AREAS

2 1 Classification of law of cession

In South Africa even the very basic question of the classification of cession as a legal phenomenon in the private law system has not been clarified. Although it is generally accepted that it should be treated as part of the law of obligations,[31] such acceptance poses certain problems: if one takes account of the Roman-Dutch background of cession, as well as the many South African cases in which cession was treated as a transfer of ownership[32] of incorporeals[33] (that is, a transfer of the quasi-possession of incorporeals, which, like corporeals, form part of a person's estate[34]), it could be argued that cession should be classified as a transfer of assets pertaining to the law of property.[35] Therefore, if South African law were to follow the Roman-Dutch law or the natural-law ideas,[36] cession should certainly be treated as pertaining to the law of property. None of the South African textbooks on the law of property, however, treats cession as a division of this branch of the law.[37]

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31 See the textbooks on cession referred to above in fn 8. De Wet is the father of this idea in South Africa. Joubert JA entrenched it in *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) and it is essentially in line with the position in German law. Huwiler *Begriff* 159 clearly explains the shifting of cession as a legal phenomenon from the law of property to the law of obligations.

32 *Morkel v Holm* (1883–1884) 2 SC 57 63; *Wetzlar v The General Insurance Co* (1884) 3 SC 86 88; *Rothschild v Lowndes* 1908 TS 493 504 505; *Pooley v Bredenkamp* 1925 GWL 60 65; *Liquidators, Union Share Agency v Hatton* 1927 AD 240 251; *Hartley v Filmer's Estate* 1938 EDL 101 111; *Jeffery v Pollak and Freemantle* 1938 AD 1; *Moola v Estate Moola* 1957 2 SA 463 (N); *Rabinowitz v De Beers Consolidated Mines Ltd* 1958 3 SA 619 (A) 637B; *Fisher v Schlemmer* 1962 4 SA 651 (T) 652D–F; *De Wet v Bank van die OVS Bpk* 1968 2 SA 73 (O) 77C; *Jerome Investments (Pty) Ltd v Gluckman* 1970 3 SA 67 (W); *Friedman v Woolfson* 1970 3 SA 521 (D) 522C; *Mannesmann Engineering and Tubes (Pty) Ltd v LTA Construction Ltd* 1972 3 SA 773 (W) 775; *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd* 1976 4 SA 75 (W) 79G.

33 *De Hart v Virginia Land and Estate Co Ltd* 1957 4 SA 501 (O) 505A–B; *Guman v Latib* 1965 4 SA 715 (A) 721H, where the court stated that "incorporeal things cannot be possessed without cession". As authority for this statement the court referred to Sande *De Cessione* 1 3; De Groot *Inl* 2 2 5; Voet *Commentarius* 18 4 17, 41 2 11 and Van der Keessel *ad Gr* 2 2 5; *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019; *Jeffery v Pollak and Freemantle* 1938 AD 1. See further Boshoff J in *Oertel v Brink* 1972 3 SA 669 (W) 674D: "[B]ut in the case of an incorporeal right, such right is not capable of possession in any physical sensc and there cannot also be a real delivery of such right. Delivery is by way of a cession of the right, and the possession which the cessionary then has is really a *quasi* possession." The judge referred to *Guman v Latib supra* as authority.

34 *Wilcocks v Visser and New York Life Insurance Co* 1910 OPD 91 101; *Araxos (East London) (Pty) Ltd v Contara Lines Ltd* 1979 1 SA 1027 (EC) 1030F.

35 In *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019 1024, with reference to Sande *De Cessione* 5 4; Voet *Commentarius* 18 1 13, 18 4 9, 18 4 10 as well as *J McNeil v Insolvent Estate of R Robertson* (1882) 3 NLR 190, Mason J stated: "The Roman-Dutch law lays down that all things may be ceded which can be sold and incorporeal rights of this nature clearly come within the scope of pledge and sale." See further *McLachlan v Wienand* 1913 TPD 191 194: "There is nothing especially sacrosanct about rights of action. They are property as much as land or corporeal movables."

36 See Huwiler *Begriff* 1–179.

37 Not even Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992). However, Kleyn "Dogmatiese probleme rakende die rol van onstoflike sake in die sakereg"

continued on next page

The systematic classification of cession as a legal phenomenon is not a new problem – it has bedevilled the work of jurists for a very long time.[38] The reason for this lies in the nature of a claim as a legal object: on the one hand it is an asset in a person's estate (property), while on the other hand, and simultaneously, it is a right against a specific person, the debtor. This peculiar nature of the object of cession has been referred to as the "dual nature" of a claim and it results in cession as a legal phenomenon having aspects, on the one hand, pertaining to the law of property and, on the other, to the law of obligations.[39]

The theoretical classification of cession is, therefore, determined to a large extent by the nature of the object of cession (claim), as well as by the meaning and relative importance assigned to the term "property". Depending on whether one emphasises the transfer-of-property aspect of cession or the substitution-of-creditors aspect, one can classify it as pertaining either to the law of property or to the law of obligations. One can also regard both aspects as equally important and treat cession as falling within both the law of property and the law of obligations.

In the French civil code, cession is treated under the title pertaining to sale, in other words, under the section dealing with obligations. The ownership passes to the cessionary on conclusion of the contract of sale, but in terms of the sale agreement the cedent is obliged to transfer possession to the cessionary.[40] Transfer of possession is effected by delivery of the documents evidencing the right. The substitution of creditors, however, is only completed on formal notice or acceptance of the cession. The Italian civil code addresses cession in book 4 (dealing with obligations), title 1 (dealing with obligations in general), chapter 5 (dealing with the cession of claims). In German law, cession is treated in book 2 (dealing with the law of obligations), title 4 (dealing with the transfer of claims). In German law, the transfer as such also effects the substitution of creditors and cession is therefore treated as falling purely within the law of obligations. In the new Dutch code we find an interesting approach: the transfer of the claim is treated in book 3 (on patrimonial law in general), title 4 under the acquisition and loss of property (*goedere*). The consequences of the transfer are dealt with in book 6 (the general section on the law of obligations), title 2 on the passing of claims (*vorderingen*) and debts. The Dutch code recognises the dual nature of claims, but deals with the requirements for both the transfer of the asset and the substitution of creditors in the section dealing with patrimonial law in general. Patrimonial law determines the requirements for the transfer. The transfer itself also effects the substitution of creditors. The consequences of cession are, however, determined by the law of obligations.

Dogmatically speaking, Joubert JA's definition of cession in the *Johnson* case, referred to above, is correct and in line with modern views on cession. However, if one accepts this definition as reflecting the position in modern South African

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1993 *De Jure* 1 *et seq* accepts the notion that claims as incorporeals can be the object of limited real rights. However, he does not pay any attention to the notion of ownership of claims in this context.

38 Wiarda *Cessie* 86–94; Huwiler *Begriff*; Zwalve *Hoofdstukken* 280–317.

39 For a full discussion of the dual nature of a claim see Scott *Cession* 3 *et seq* and the authority quoted there. See further Huwiler *Begriff* 34 *et seq* 60 123.

40 §§ 711 1607 1689–1691 of the *CC*.

law, it makes nonsense of both Roman-Dutch law as the common law of South Africa, and the principle of *stare decisis*. It completely ignores the Roman-Dutch law of cession and differs from most South African cases, including Appellate Division decisions dealing with cession. This approach is, however, in line with the ideas of the German Pandectists and the *Bürgerliches Gesetzbuch* and it has now also been endorsed in the *Botha* and *First National Bank* cases.

2 2 Object of cession

Closely related to the classification of cession is the determination of the exact object of cession. In South African case law, the following terms are often used indiscriminately to denote the object of cession: cession of actions,[41] cession of rights of action,[42] cession of rights,[43] cession of incorporeal things[44] and cession of incorporeal rights.[45] However, despite differences in the use of terminology,[46] it is now generally accepted[47] that in accordance with modern attitudes to cession, the object of cession is a claim held by a creditor against his/her debtor.[48]

An understanding of the Roman-Dutch concept that cession is a transfer of actions is, however, still of great significance for the modern South African law of cession, since the courts, especially in earlier cases, consulted and referred to the "old authorities" to determine which principles had to be applied in solving

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41 See eg *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 25; *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600 614; *Guman v Latib* 1965 4 SA 715 (A) 722A.

42 *Paterson's Executor v Webster, Steele & Co* (1880–1882) 1 SC 350; *Theron Ltd v Gross* 1929 CPD 345; *Northern Assurance Co Ltd v Methuen* 1937 SR 103 108; *Spies v Hansford & Hansford Ltd* 1940 TPD 1 7; *Miller's Trust Foreshore Properties (Pty) Ltd v Kasimov* 1960 4 SA 953 (C) 958G; *Guman v Latib* 1965 4 SA 715 (A) 722A–B (with reference to Sande *De Cessione* 1 3; *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 762A; *Muller v Trust Bank of Africa Ltd* 1981 2 SA 117 (A) (noted by me in 1982 *De Jure* 183 *et seq* 186).

43 *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 3 SA 166 (A) 172; *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 331G. In most cases the term "cession of actions" is used as a synonym for a cession of rights. It should, however, be borne in mind that it is possible to transfer an action without ceding its corresponding right – see Scott *Sessie* 104–106.

44 See the authority quoted in fn 33 above.

45 See eg *Consolidated Finance Co Ltd v Reuvid* 1912 TPD 1019 1024; *Guman v Latib* 1965 4 SA 715 (A) 721G; *Incledon (Welkom) (Pty) Ltd v Qwaqwa DC Ltd* 1990 4 SA 798 (A) 805H.

46 An issue which merits special attention but falls outside the scope of this research, is the exact meaning and interaction in practice of terms such as "right of action", "cause of action", "action" and "claim". Even Roman-Dutch authors like Voet, Grotius and Van der Linden did not clearly distinguish between the different terms – see Wiarda *Cessie* 44–45. In Dutch law the term "schuldvordering op naam" is used for "claim" and "rechtsvordering" for "right of action". See further in this regard *Simonsig Landgoed v Theron, Van der Poel, Brink & Roos* case no 14131/89 1991-08-26 (C).

47 See authority referred to in fn 8.

48 See, however, *Spies v Hansford & Hansford Ltd* 1940 TPD 1 7: "Historically our conception of the cession of a right or of a debt due to the cedent is based upon the cession of an action, that is, a right of action, and when a debt is said to be ceded what is meant is that the right of action which the cedent holds, is transferred . . ."

particular problems pertaining to cession.[49] Although some Roman-Dutch authors already recognised that cession effected a transfer of the claim itself and that the necessity of the distinction between the *actio directa* and the *actio utilis* should therefore fall away,[50] they did not always fully appreciate the consequences and implications of the abolition of this distinction. Consequently, it still influenced some of these Roman-Dutch writers, as well as the later development of the law of cession in the South African case law.

If one accepts (as Joubert JA apparently did in the *Johnson* case) that in the modern law of cession the claim itself is transferable, then the cedent retains nothing and the cessionary becomes the creditor (acting with the *actio directa*, should it be necessary to name the action). Transfer of the *actio utilis* to the cessionary is out of the question, since this action was never available to the cedent, but was given to the cessionary *ex lege* upon conclusion of the obligationary agreement to cede. The *actio utilis* entitled the cessionary to act in his/her own name as cessionary. The cedent's *actio directa* was terminated on notice of the cession to the debtor or if any of the other two instances mentioned in *C* 8 41 3 prevailed.[51] Voet seems to be the only Roman-Dutch author who accepted the transferability of claims, arguing that the right passes from the cedent's estate to the cessionary's upon conclusion of the *pactum cessionis* (the cession itself) and not upon fulfilment of one of the conditions in *C* 8 41 3.[52] According to Voet's argument, then, the cessionary acts with the *actio directa*.

It is interesting to note that, despite his acceptance of the transferability of the claim itself, Joubert JA held in the *Johnson* case that the cessionary acts with the *actio utilis*.[53] As I have indicated above, this view has its origin in Roman-Dutch

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49 See eg *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A), and my discussion of the case in "Die effek van 'n mala fide-sessie van 'n vorderingsreg" 1974 *THRHR* 351–363.

50 See Wiarda *Cessie* 43; Huwiler *Begriff* 28 116; Scott *Sessie* 32–33; Zwalve *Hoofdstukken* 280–283.

51 De Groot *Inl* 2 2 5, 2 1 9, 2 1 14, 2 1 57, 2 1 59; Vinnius *Ins* 2 2 no 2; Voet *Beginselen* 2 2, *Commentarius* 1 8 11, 18, 21, 29, 30; 18 1 13, 18 4 9, 10, 17; 41 2 11; Van Bijnkershoek *Obs Tum* 364 664; Van der Keessel *ad Gr* 2 1 3, 9, 14; 2 2 5; Van der Linden *Ontwerp BW* s 28.

52 According to Voet *Commentarius* 18 4 12, the cessionary acts with the *actio utilis* without cession having taken place. He states that on conclusion of the sale agreement between the cedent and the cessionary, ie the obligationary agreement, the cessionary acquires the *actio utilis*. He further makes it clear that the cessionary can only institute the *actio directa* after cession has taken place. This view is correct and in line with the idea that cession effects a complete transfer of the claim itself. See further Zwalve *Hoofdstukken* 280–283.

53 See *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 331C: "[D]ie sedent en die sessionaris kan deur consensus (wilsooreenstemming) wat op 'n *justa causa* soos 'n verkoop, 'n ruil, 'n skenking of 'n betaling gebaseer is 'n *actio utilis* aan die sessionaris oordra." In *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 256 Laurence JA referred to this issue, but did not find it necessary to decide upon it: "Whether the action should be regarded as in the nature of the *actio utilis* in Roman law, given by the Praetor to a cessionary on his/her own behalf, or of the *actio directa* brought by him as mandatary of the cedent, may depend on circumstances which I need not pause to discuss." From the judgment of Jansen JA in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 764, followed in *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons Ltd* 1978 1 SA 671 (A) 675F, it appears that the action with which the cessionary acts is regarded as being in the nature of the *actio utilis*. In

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law and is in line with the ideas of the Romanists, especially Sande, who did not accept the transferability of the claim itself.[54] This approach is, however, totally irreconcilable with the complete transfer of the claim, as propagated by Voet and accepted by Joubert JA.

It is important, therefore, both from a theoretical and from a practical viewpoint, to determine the nature of the action used by the cessionary. Theoretically it is relevant, because, if one accepts the transferability of the claim itself, the cessionary becomes the creditor and can act only with the *actio directa*. Practically, it is significant because, in consulting Roman-Dutch authority on any specific issue relating to the position of the cessionary, one should establish whether the specific author accepted the transferability of claims or not. Acceptance of the transferability of claims has as a necessary incidence the fact that the cessionary replaces the cedent as creditor. Unfortunately, the intrinsic connection between the transfer of the claim and the substitution of the creditor has not always been appreciated in South African law.[55] This can be explained, at least partly, by the fact that some Roman-Dutch authors, in particular Sande, exerted a strong influence on the development of the South African law of cession, mainly because an English translation of his work on cession has been available to South African lawyers since 1906.[56] Another factor contributing to the flawed understanding of the effect of a complete transfer of the claim itself, is the fact that very little attention is paid to the depersonalisation of obligations, which resulted in the acceptance of the transferability of claims. The process of objectifying the claim and depersonalising the obligation took place mainly in Germany during the nineteenth century and paved the way for cession being regarded as complete transfer of the claim itself.

The tendency in modern-day South African law to regard "cession"[57] as a transfer of the claim itself,[58] is neither in accordance with Roman-Dutch law nor with most earlier South African cases. The bulk of the case law, following the views of the Roman-Dutch authors, treats claims as incorporeals, which, like corporeals, form part of a person's estate and are transferable as such. Possession of an intangible thing, such as a claim, is impossible and delivery, as a method of transferring ownership is therefore also excluded. Consequently, it has been held that the quasi possession of incorporeals is transferred by means of cession.[59] In

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this particular case it was important to establish the nature of the action with which the cessionary acted in order to ascertain which rules were applicable. The actions in the two texts to which the court refers, were both regarded as *actiones directae*. The action in *D* 3 3 33 5 is the *actio directa* which a representative institutes in the name of his/her principal, but the action with which the cessionary claims in *D* 3 3 34 is the *actio utilis* since he/she claims *procuratorio nomine*.

54 See also Zwalve *Hoofdstukken* 281.

55 See eg *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 771.

56 See Anders *Commentary on cession of actions by Johannes à Sande* (1906).

57 Note that the word "cession" is sometimes used in a wide sense meaning "transfer"; ideally it should be restricted to the technical meaning of the transfer of claims – see Scott *Cession* 21–22.

58 *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 331G; Scott *Cession* 7 21; Van der Merwe *et al Contract* 322; Joubert *Contract* 190.

59 Although the idea of *Eigentum an Forderungen*, which was rejected by the Pandectists, is not explicitly recognised, it is a necessary result of this line of reasoning. Kleyn 1993 *De Jure* 1 *et seq* seems to be thinking in this direction. For a discussion of the approach of the Pandectists to the idea of *Eigentum an Forderungen*, see Huwiler *Begriff* 149 *et seq*.

terms of this approach cession is regarded as a quasi-delivery[60] of claims (as incorporeals). A pledge of claims, as incorporeals, has furthermore been widely accepted.[61]

The interesting situation prevailing in modern South African law is that the logical conclusion of the above approach has never been drawn: if cession transfers the quasi-possession of incorporeals, then it should be regarded as a transfer of ownership of incorporeals pertaining to the law of property.[62] Until quite recently, the South African courts' approach to cession was in line with this view. Today, however, mainly under the influence of De Wet, most South African textbooks and authors[63] regard cession as a transfer of claims resulting in a substitution of creditors pertaining to the law of obligations. This approach is dogmatically sound, but ignores both the Roman-Dutch law as the common law of South Africa, and the case law.

An interesting aspect of De Wet's views on cession, as expounded in his well-known textbook,[64] is the following: although he rejects the idea of cession as a transfer of ownership of incorporeals, he expresses the opinion that the agreement effecting cession is a real agreement.[65] In my thesis I draw attention to the inconsistency of this argument and, possibly, it influenced Joubert JA to point out in the *Johnson* case that cession is a transfer of claims effected by means of a transfer agreement. He stated this, possibly without realising that this view conforms to the German-law approach to cession, but not to the Roman-Dutch law.[66] De Wet's approach to cession is in accordance with the German *Bürgerliches Gesetzbuch*, but his view on the type of agreement that effects the transfer is in line with Roman-Dutch law.[67]

Despite the above inconsistencies and idiosyncrasies, in terms of the *Johnson* case,[68] the object of cession is a claim. Although this view of the nature of the object is correct, the views expounded in Roman-Dutch law and in some cases cannot be ignored. The *Johnson* case can possibly be regarded as a good example of judicial law-making. It is, however, questionable whether this was really the judge's intention. His reference to the type of action with which the cessionary can claim, as well as his incorrect understanding of the position, seem to indicate that this is not a wholly satisfactory method of creating law. I therefore think it imperative for the legislature to intervene and give clear and unambiguous guidance on this issue. The legislature should also address certain theoretical issues pertaining to the object of cession,[69] as well as the question whether

60 For a very recent application of this approach, see *Botha v Fick* 1995 2 SA 750 (A).

61 See Scott *Cession* ch 12 and discussion above in sections A and B.

62 This view is in line with the Roman-Dutch law of the eighteenth century and especially with the exponents of natural law – see Huwiler *Begriff* 25 *et seq*; Zwalve *Hoofdstukken* 282 *et seq*.

63 Scott *Cession* 7 21; Van der Merwe *et al Contract* 322; Joubert *Contract* 190; Nienaber 2 *LAWSA* 223 *et seq*.

64 *Kontraktereg* 252.

65 A real agreement creates, transfers or extinguishes real rights – see Scott *Cession* 10–11.

66 This is interesting since Joubert JA is a true Purist and staunch supporter of Roman-Dutch law as the common law of South Africa.

67 See Scott *Cession* 8–11.

68 *Supra* 331G–H.

69 Scott *Cession* ch 3.

claims embodied in shares[70] and negotiable instruments can be ceded in the normal way.[71]

2 2 1 Description of object

An evaluation of recent South African cases still reveals a great measure of uncertainty about the exact nature and description of the object of cession. Even Joubert JA mentioned in *Coopers & Lybrand v Bryant*[72] that the vindicatory action can be the object of cession. Furthermore, in cession documents, the object is often described as "debts" or "book debts".[73] Such descriptions are incorrect: cession is a transfer of the claims to payment of the debts or book debts. In *Ovland Management (Tvl) (Pty) Ltd v Petprin (Pty) Ltd*[74] Page J even stated that the contracts had been ceded.

The precise nature and description of the object is a fascinating aspect of the law of cession which has recently also been highlighted in *First National Bank of SA Ltd v Lynn*.[75] Whereas Joubert JA defined the object in the *Johnson* case correctly as a claim ("vorderingsreg"), he described it here as "rights in a movable incorporeal thing". Van den Heever JA also referred to this problem of terminology[76] and preferred to use the words "debts" and "claims", but she then went on to use the following words: "rights",[77] "exigible debts",[78] "personal rights",[79] "the right to institute action",[80] "incorporeal rights"[81] and "book debts".[82] Olivier JA referred to "book debts",[83] "right",[84] "claim",[85] "right to

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70 In dealing with the transfer of shares, I prefer to distinguish between the cession of the personal right to claim dividends, as one of the aspects of a share, and the transfer of the shares as such. The former personal right is only one right in the bundle (or conglomerate) of rights (*Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 1 SA 276 (A) 288H *et seq*) represented by a share. Transfer of shares and the claims embodied in such shares should be determined by the Companies Act or the articles of association of a company. The principles applying there should not affect the validity requirements of cession of ordinary claims. Furthermore, the validity requirements of cession should not influence the transfer of shares. Kritzinger "Share transfer by mere consensus?" 1995 *SALJ* 389–401 does not make this distinction and criticises *Botha v Fick* 1995 2 SA 750 (A) for introducing a transfer of shares by mere consensus. He is of the opinion that the transfer of shares is determined by common law, legislation (primarily, the Companies Act 61 of 1973) and the articles of association (396 *et seq*). Kritzinger (397) also criticises the judgment with special reference to the requirements of the Stamp Duties Act 77 of 1968. I fully agree with Kritzinger's criticism of the case if one considers this to be a case concerning the transfer of shares.

71 See my discussion in *Cession* ch 4 2 2.

72 1995 3 SA 761 (A) 768I–J.

73 *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) 767G–H.

74 1995 3 SA 276 (N) 282J.

75 1996 2 SA 339 (A).

76 350G–H.

77 349J 351A 351H 356G–H 357I.

78 350C.

79 351G 352H 353F–G.

80 352B.

81 *Ibid.*

82 353A.

83 353I 359J 360B.

84 355E 356B 360A.

85 356C.

claim payment",[86] "right of action"[87] and "future debts".[88] Again, in *Janse van Rensburg v Muller*[89] Joubert JA referred alternately to the object of cession as "vorderingsreg" (claim) and "skadevergoedingseis" (action for damages).

It is interesting to note that in the past the object of cession and its description received very little attention from academic lawyers. In practice, for various reasons (mainly because of the uncertainty surrounding security by means of claims) the object of cession was expressed in such wide terms that it was bound to cause problems in one way or another. In terms of the general principle of specificity applying to all agreements,[90] the object of an agreement (and therefore of a transfer agreement (cession)) must be determined or determinable.

In most deeds of cession the object of the cession is described too widely and the courts should actually reject them as void for vagueness. The validity of cessions are, however, seldom attacked on this basis. In recent months deeds of cession encompassing such a wide description of the object of cession have resulted in unnecessary and costly litigation, even all the way to the Appellate Division. The problem is even more acute in security cessions. In such cessions banks take cession of all possible claims that a client may have, as security for repayment of the client's indebtedness to the bank. Mainly as a result of the uncertainty that exists about the nature and effect of such cessions, the object is frequently couched in very wide terms to cover every possible interpretation. Furthermore, since it is not clear what the legal position of parties to such cessions is, especially with reference to the issue of *locus standi*, the courts sometimes side-step the problem by resorting to other principles of the law of cession, such as the description of the object.[91]

Coopers & Lybrand v Bryant[92] provides an excellent example of how a wide description of the object of cession can land the parties to it in unforeseen situations and of how such a wide description opens the door to the kind of decision that was handed down in the *Coopers & Lybrand* case.

2 2 2 Future claims

I have indicated above that the object of cession is a claim. A very interesting and controversial question arises in this regard, namely whether a future claim can be the object of cession.[93] Cession of future claims is very important for

86 356D.
87 356I 357B 357I.
88 359I.
89 1996 2 SA 557 (A).
90 For a discussion of this principle, see eg Joubert *Contract* 179–180. See further Van den Heever JA in *First National Bank of SA Ltd v Lynn* 1996 2 SA 339 (A): "The requirement that the object of a cession must be certain does not mean that the money value of the (defined) right which is ceded must be precisely calculable when the transfer of that right occurs."
91 In *Philotex (Pty) Ltd v Snyman; Textilaties (Pty) Ltd v Snyman* 1994 2 SA 710 (T) 713 the judge scrutinised the cession to determine the exact object of the cession.
92 1995 3 SA 761 (A) (noted by me in 1996 *TSAR* 812).
93 Although acceptance of cession of future claims caused extensive conflicts of interests in German law, the Germans regard it as essential for their credit dealings and merely strive to solve these conflicts. In terms of § 97 of the Dutch code, transfer of future property is possible, but § 239(1) effectively excludes a pledge of future rights. Cession

continued on next page

commerce and occurs daily in practice. The nature and effect of such cessions are, however, rather controversial.[94]

Although cession of future rights has been accepted in South African case law, very little attention has been paid to the problems surrounding such recognition. De Wet and Van Wyk[95] reject the possibility that future claims may be ceded as legally impossible. For years I have accepted the possibility that future claims can be ceded and propagated a construction, based on the position in German law, which gives effect to the intention of the parties to such cessions.[96]

In *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)*[97] Scott J affirmed the construction which I propagate of a cession of future claims, and which was, to a certain extent, also confirmed in *Muller v Trust Bank of Africa Ltd*.[98] However, he found it unnecessary to decide the issue.

In *Standard General Insurance Co Ltd v SA Brake CC*[99] Van den Heever JA basically adopted the same approach. She clearly and correctly distinguished between a future and a contingent right, and also indicated that a right to claim in terms of an insurance policy is a contingent and not a future right.[100]

Very recently, however, the Appellate Division unequivocally accepted cession of future claims in *First National Bank of SA Ltd v Lynn*.[101] In the minority judgment, Joubert JA, with Nestadt JA concurring, supported the view of De Wet and Van Wyk and held that cession of future claims is not possible. The majority judgment of Van den Heever JA, Van Coller JA and Olivier JA confirmed that a cession of future claims is possible in our law. After he had lucidly stated the facts of the case, Olivier JA gave the correct interpretation of the nature of a right to claim retention money. He regarded it as a contingent (conditional) right which can be freely ceded. He furthermore accepted and explained the nature of a cession *in anticipando* of a future claim. Olivier JA referred to De Wet and Van Wyk and the various cases in which cession of future claims were accepted – despite De Wet's consistent criticism against such a possibility. The judge also evaluated the two approaches to the issue,[102] referred to the cases supporting the idea of a cession of future claims[103] and considered the impact of rejecting the validity of such cessions on commercial dealings.[104] The judge then came to the following conclusion:

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of future claims is also possible in terms of § 1690 of the Belgian civil code (see Dirix *et al Overdracht en in pandgeving van schuldvorderingen* (1995) 4–5).

94 See Scott *Cession* 170–181 265–266.

95 *Kontraktereg* 254.

96 See *Cession* ch 10 2 2 3.

97 1994 2 SA 528 (C) 556D–I.

98 1981 2 SA 117 (N) 126G–H.

99 1995 3 SA 806 (A) 815E.

100 See further Scott *Cession* ch 10 2 2 3. It is a contingent right because the obligation creating agreement already exists, but liability in terms of it for the insurer is subject to a condition or a term, depending on the terms of the contract.

101 1996 2 SA 339 (A) (noted by me in "Cession of future rights" 1996 *THRHR* 689).

102 357H–I.

103 358J–359I.

104 359J.

> "The position, in my view, then is that it has been accepted in commerce and by the Courts of our country for more than a century that future rights can be ceded and transferred *in anticipando*. The decisions of our Courts have thus been regarded for a very long period of time as being correct. Clearly these decisions have been acted upon and served as the basis for the general and well-known practice of taking security in the form of the cession of book debts (including future debts), cession of existing and future rights *in securitatem debiti* and factoring of existing and future rights. In these circumstances I am not inclined to hold that these decisions are wrong . . ."[105]

Although the Appellate Division has now clearly come out in favour of the possibility that future rights can be ceded, the following problematic aspects of such cessions have not been addressed and deserve serious consideration: the exact nature of future claims, the description of the object with a view to adhere to the principle of specificity, the effect of insolvency on such cessions, the effect of consecutive cessions of the same future claims and the solving of conflicts of interests that may arise.

(*To be continued*)

In my view, the individual's right to protection of his reputation in terms of the Constitution is wide enough also to include politicians. I do not accept that the Constitution legalises character assassination of individuals merely because they are politicians. A defamatory statement even about a politician aimed at his personal dignity and reputation, and not aimed at his public conduct and policy, cannot be justified under the guise of freedom of speech and is therefore actionable (per Hartzenberg J in *Mangope v Asmal* 1997 4 SA 277 (T) 289).

105 360A–B.

Die onteieningsbegrip en vereistes vir onteiening in die Nederlandse reg*

PJ Badenhorst
BLC LLM LLM LLD
Professor in Privaatreg, Universiteit van Port Elizabeth

SUMMARY

The concept of expropriation and the requirements of expropriation in Dutch law

In this article the concept of expropriation in Dutch law is examined from a private law, publie law and a neutral perspeetive. Expropriation is distinguished from different forms of governmental restrictions of ownership. The concept of expropriation and the requirements for expropriation, namely publie interests and the payment of complete eompensation, are examined on different levels, namely the Expropriation Aet of 1851, the Duteh Constitution of 1983 and the Convention for the Proteetion of Human Rights and Fundamental Freedoms.

It is coneluded that the interaction between the private law and public law viewpoint of expropriation has eontributed towards the development of the Dutch law of expropriation and restrictions of ownership. Expropriation statutes seem to have contributed rather than restricted the constitutional provisions against expropriation not in accordance with the preseribed requirements. Proteetion against expropriations that are not in accordanee with the preseribed requirements is provided for on the above-mentioned three levels. Ownership (in a wide sense) is also guaranteed on the supra-national level.

1 INLEIDING

In hierdie artikel word die onteieningsbegrip vanuit sowel 'n privaatregtelike as 'n publiekregtelike gesigspunt in die Nederlandse reg ondersoek. Die betekenis van die begrip, asook die vereistes vir 'n geldige onteieningshandeling, word voorts op verskillende *niveaus* ontleed, naamlik binne die konteks van die Nederlandse *Onteigeningswet* van 28 Augustus 1851,[1] die Nederlandse Grondwet van 1983 en die Europese Konvensie vir die Beskerming van Menseregte en Fundamentele Vryhede (EVRM).

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* Die finansiële bystand gelewer deur die Nederlandse Organisatie voor Wetensehappelijk Onderzoek (Den Haag) en die Sentrum vir Wetenskapsontwikkeling (RGN, Pretoria) vir hierdie navorsing aan die Vrije Universiteit, Amsterdam word hiermee erken. Menings uitgespreek en gevolgtrekkings waartoe geraak is, is dié van die outeur en moet nie noodwendig aan die Nederlandse Organisatie voor Wetenschappelijk Onderzoek of die Sentrum vir Wetenskapsontwikkeling toegeskryf word nie. Erkenning word met dank verleen aan die kommentaar en voostelle van professore CC van Dam, FCMA Michielse van die Vrije Universiteit, Amsterdam asook dié van mnr PCE van Wijmen. Verantwoordelikheid vir die eindproduk berus natuurlik by die outeur.

1 Stb 125.

Die onteieningsprosedure kragtens die *Onteigeningswet* word gekenmerk deur twee fases: die administratiewe en die regterlike.[2] Die eerste fase behels die totstandkoming van 'n sogenaamde nutswet of die besluit van die owerheid, hetsy die kroon, hetsy 'n gemeenteraad om te onteien, asook die presiese aanwysing van die onteiende perseel.[3] Tydens hierdie fase is planne van die onteiening ter insae en bestaan daar geleentheid vir beswaarmaking teen die onteiening.[4] Tydens die regterlike fase, wat 'n aanvang neem met dagvaarding en eindig in vonnis, gaan die regter na of aan die administratiewe prosedure voldoen is, word die onteiening uitgespreek en word skadeloosstelling na aanhoor van deskundiges bepaal.[5]

Die belang van hierdie ondersoek vir die Suid-Afrikaanse reg is daarin geleë dat met die inwerkingtreding op 27 April 1994 van die tussentydse Grondwet van die Republiek van Suid-Afrika, met 'n handves van menseregte, die onteieningsreg gewysig skyn te wees en 'n behoefte ontstaan het om die onteieningsreg te hersien in ooreenstemming met die Grondwet.[6] Daar word in oorweging gegee dat 'n ondersoek van die onteieningsbegrip en die vereistes vir onteiening op verskillende *niveaus* in die Nederlandse reg kan bydra tot opheldering van die begrippe en vereistes in die nuwe Suid-Afrikaanse reg.

2 ONTEIENINGSBEGRIP

Daar word in oorweging gegee dat onteiening vanuit sowel 'n privaatregtelike as 'n publiekregtelike gesigspunt beskou kan word. In die privaatregtelike sfeer word onteiening hoofsaaklik aangemerk as 'n ontneming van eiendomsreg. In die publiekreg word onteiening beskou as 'n owerheids- of administratiewe handeling wat nadeel tot gevolg het.[7]

Voortspruitend uit hierdie verskillende gesigspunte word vir doeleindes van die aanspreeklikheid van die owerheid vir die uitoefening van 'n regmatige owerheidshandeling[8] wat tot nadeel van die onderdaan strek, onderskei tussen 'n

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2 Vir 'n volledige bespreking hiervan, sien Lubaeh en Van Wijmen (reds) *Bestuursrechtelijke schadevergoeding* Band 1 (1992) deur De Bont, Meijer ea C–1–3, C–2–3 t/m C–2–12 C–2–12 t/m C–2–22 (hierna *Bestuursrechtelijke schadevergoeding*); Schenk en Den Drijver-van Rijekevorsel *Onteigening* (1986) 7–26 26–65 (hierna *Onteigening*).

3 A 14–15; Schenk en Den Drijver-van Rijkevorsel *Onteigening* 3; Van Wijk *Hoofdstukken van administratief recht* deur Konijnenbelt en Van Male (1993) 632 (hierna *Administratief recht*); Koopmans *Compendium van het staatsrecht* (1994) deur Bellekom, Heringa ea 311 (hierna *Staatsrecht*).

4 Schenk en Den Drijver-van Rijekevorsel *Onteigening* 3; Koopmans-Bellekom-Heringa *Staatsrecht* 311.

5 Schenk en Den Drijver-van Rijekevorsel *Onteigening* 3; Koopmans-Bellekom-Heringa *Staatsrecht* 311; Van Wijk-Konijnenbelt-Van Male *Administratief recht* 632.

6 200 van 1993 (nou die Grondwet van die Republiek van Suid-Afrika, Wet 108 van 1996). Sien in die algemeen Badenhorst "Enkele opmerkings na aanleiding van die moderne Suid-Afrikaanse onteieningsreg", 'n voordrag op 1995-04-06 te Amsterdam gelewer tydens die jaarlikse vergadering van die Nederlandse Vereniging van Onteigenings-Advocaten.

7 Uiteraard kom oorvleueling tussen die verskillende gesigspunte voor en blyk oorvleueling selfs uit die bespreking van die verskillende soorte beperkinge van eiendomsreg in par 2 1 hieronder.

8 Van der Gouwe *Onteigening en schadevergoeding bij rechtmatige overheidsdaad* (1976) Band 1 I–2 toon aan dat selfs die onregmatigheidsbegrip in die privaatreg verskil van dié begrip in die publiekreg en tot verwarring aanleiding kan gee. 'n Handeling is volgens Van der Gouwe I–2 regmatig vir doeleindes van die publiekreg indien (a) die handeling onder die

vervolg op volgende bladsy

privaatregtelike[9] en 'n publiekregtelike aanspreeklikheidsteorie.[10] Daarbenewens is daar ook sprake van 'n nuwe gedagtegang om skadeveroorsakende owerheidshandelinge vanuit 'n neutrale hoek te beskou.

2 1 Onteiening vanuit 'n privaatregtelike gesigspunt

Alhoewel die voorwerp van onteiening uiteraard nie beperk is tot eiendomsreg van 'n saak nie,[11] is die teenkant van die privaatregtelike onteieningsbegrip gewoonlik die eiendomsbegrip.[12] Sonder om te poog om die eiendomsbegrip as sodanig te ondersoek,[13] kan as vertrekpunt daarop gewys word dat eiendomsreg in die Nederlandse reg gedefinieer word as die mees omvattende reg wat 'n persoon ten aansien van 'n saak kan hê.[14] As 'n saak word slegs beskou stoflike objekte wat vatbaar is vir menslike beheersing.[15] Sake word verdeel in onroerende[16] en roerende sake.[17] Eiendomsreg het tot inhoud die bevoegdheid om die saak tot uitsluiting van iedere ander vrylik te gebruik,[18] daarvan vrugte te trek,[19] te besit,[20] daaroor te beskik[21] en om die saak in eiendomsreg op te vorder.[22]

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owerheidstaak tuishoort; (b) die handeling in algemene belang plaasvind; (c) daar vooraf 'n afweging van belange plaasgevind het; en (d) die handeling op sodanige wyse en op sodanige tydstip uitgevoer word dat so min moontlik nadeel plaasvind.

9 Sien Van der Gouwe *Onteigening* Band I I–2 t/m I–7, I–9 t/m I–13.

10 Sien *idem* I–7 t/m I–9, I–13 t/m I–17.

11 Sien vn 105 en 106 hieronder.

12 Vir sover dit die taalkundige betekenis van "onteigening" betref, verklaar Jonckers Nieboer *Onteigeningsrecht* (1931) 4: "Onteigenen was in het Middelnederlandseh de tegenstelling van eigenen: eigenen beteekende: in reehten den eigendom toekennen, toewijzen; onteigenen: in reehten den eiendom van iets aan iemand ontzeggen."

13 Sien in die algemeen die omvattende bespreking van die eiendomsbegrip deur Van Maanen *Eigendomsschijnbewegingen: Juridische, historische en politiek-filosofische opmerkingen over eigendom in huidig en komend recht* (1987) en veral sy definisie op 157.

14 A 5:1 lid 1 van die *Nieuwe Burgerlijk Wetboek* (hierna *NBW*). Boeke 3, 5 en 6, tesame met vier titels van boek 7 van die *NBW* het op 1992-01-01 in werking getree.

15 A 3:2 *NBW*. In soverre slegs sake en vermoënsregte ingevolge a 3:1 *NBW* "goedere"uitmaak, kan eiendomsreg slegs tav sake bestaan. Sien Pitlo *Het Nederlands burgerlijk recht* Deel 3 *Goederenrecht* deur Reehuis, Heisterkamp ea (1994) 273 (hierna *Goederenrecht*); Hijma en Olthof *Compendium van het Nederlandse vermogensrecht: Leidraad voor het nieuwe BW* (1993) 140 (hierna *Vermogensrecht*). A 3:1 van die *NBW* beëindig ook die standpunt van 'n ruimer eiendomsbegrip wat bv eiendomsreg van aandele sou insluit en volg dus die tradisionele leer waarvolgens eiendomsreg beperk word tot eiendomsreg van 'n saak. Sien *Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht: Zakenrecht* Deel 2 *Eigendom en beperkte zakelijke genotsrechten* deur Beekhuis (1990) 15 (hierna *Eigendom*).

16 A 3:3 lid 1 *NBW*.

17 A 3:3 lid 2 *NBW*.

18 A 5:1 lid 2 *NBW*; Snijders en Rank-Berensehot *Goederenrecht* (1994) 145. Volgens Pitlo-Reehuis-Heisterkamp *Goederenrecht* 280 en Snijders en Rank-Berensehot *Goederenrecht* 145 moet die begrip "gebruik" ruim opgevat word met daarby inbegrepe die bevoegdheid om die saak te verbruik, te verander en te vernietig. Sien ook Hijma en Olthof *Vermogensrecht* 142.

19 A 5:1 lid 3 *NBW*.

20 Pitlo-Reehuis-Heisterkamp *Goederenrecht* 275 280; Snijders en Rank-Berensehot *Goederenrecht* 144.

21 A 3:81 lid 1, 3:83 lid 1 *NBW*; Hijma en Olthof *Vermogensrecht* 142; Pitlo-Reehuis-Heisterkamp *Goederenrecht* 280; Snijders en Rank-Berensehot *Goederenrecht* 145 146. Volgens Snijders en Rank-Berensehot 146 omvat die begrip "beskikking" in 'n goederegtelike sin die vervreemding of beswaring van goed.

22 A 5:2 *NBW*.

Bevoegdheidsuitoefening uit hoofde van eiendomsreg (soos trouens alle ander subjektiewe regte) is onderworpe aan beperkinge. Sodanige beperkinge kan byvoorbeeld slaan op die gebruiksbevoegdheid (deur die verhuring van die saak), op die beskikkingsbevoegheid (die saak van die eienaar is onderworpe aan bewind) of op die somtotaal van bevoegdhede (deur onteiening[23]).[24] Die begrensing van eiendomsreg as prinsipieel onbepaalbare reg is te vinde in die regtens beskermde publiekregtelike en privaatregtelike belange van ander regsubjekte.[25] Die uitoefening van die gebruiksbevoegdheid[26] ten aansien van 'n saak geskied onderworpe aan beperkinge vervat in wetlike voorskrifte en ongeskrewe privaat- en publiekreg, asook saaklike en persoonlike regte van ander regsubjekte.[27]

Talle wette beperk die eienaar in die uitoefening van eiendomsreg. Een van die ingrypendste vorme van "beperking" op eiendomsreg is natuurlik die *Onteigeningswet* waarvolgens die eiendomsreg van 'n saak teen skadeloosstelling deur die owerheid ontneem kan word en aan die onteienaar oorgedra word.[28] Onteiening is ook moontlik kragtens ander wetgewing.[29] Benewens owerheidsoptrede kragtens onteieningswetgewing is daar ook ander vorme van owerheidsoptrede kragtens wetgewing waardeur eiendomsreg beperk word, hetsy met voorsiening vir skadeloosstelling, hetsy daarsonder. Hierdie beperkinge word vervolgens in 'n skema aangetoon. So 'n skema is belangrik ten einde onteiening te kan onderskei van die verskillende vorme van inbreukmaking op eiendomsreg. Daarbenewens, vanweë die verfyning wat die onteieningsreg in die praktyk en regspraak oor 'n tydperk van meer as 'n eeu ondergaan het, dien onteiening as 'n spieëlbeeld vir die ontwikkeling van die verskillende vorme van owerheidsbeperkinge op eiendomsreg.[30]

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23 Sien Jansen *Onteigenen: Enige inleidende beschouwingen over het onteigeningsrecht* (1966) 4 (hierna *Onteigenen*).

24 Sien Snijders en Rank-Berenschot *Goederenrecht* 149. Of onteiening neerkom op 'n ontneming of 'n beperking van eiendomsreg, word hieronder verder bespreek.

25 Asser-Beekhuis *Eigendom* 21.

26 Die beskikkingsbevoegdheid (en die beperking daarvan in a 5:1 lid 2 *NBW*) word nie uitdruklik in die definisie van eiendomsreg in a 5:1 *NBW* vermeld nie. Sien verder Van Wijmen en Hamming *Onteigening en eiendomsbeperking* (1970) deur Van Gelder, Van Mierlo ea Band 1 Alg Inl–10 (hierna *Onteigening*); Asser-Beekhuis *Eigendom* 16. Volgens Pitlo-Reehuis-Heisterkamp *Goederenrecht* 280 blyk die bestaan van die beskikkingsbevoegdheid reeds uit a 3:83 *NBW*. 'n Verdere verklaring vir die feit dat die beskikkingsbevoegdheid nie vermeld word nie, is volgens Pitlo-Reehuis-Heisterkamp daarin geleë dat die privaatregtelike beperking van oordraagbaarheid 'n wetteregtelike grondslag moet hê ten einde die vrye handelsverkeer van sake te bevorder deurdat sake vrylik vir oordrag en uitwinning vatbaar moet wees. Snijders en Rank-Berenschot *Goederenrecht* 149 wys egter tereg daarop dat anders as wat a 5:1 lid 2 *NBW* suggereer, daar nie slegs beperkinge tav gebruiksregte bestaan nie.

27 A 5:1 lid 2 *NBW*; Pitlo-Reehuis-Heisterkamp *Goederenrecht* 282–284; Hijma en Olthof *Vermogensrecht* 143. Volgens Snijders en Rank-Berenschot *Goederenrecht* 150 vorm a 3:14 *NBW*, wat bepaal dat bevoegdheidsuitoefening uit hoofde van eiendomsreg nie in stryd met die publiekreg mag wees nie, 'n "kapstokbepaling" vir verdere publiekregtelike beperking van eiendomsreg. Beperkinge deur ander verleende regte en reëls van die ongeskrewe reg val buite die omvang van hierdie bydrae en word nie verder bespreek nie.

28 Asser-Beekhuis *Eigendom* 23.

29 Bv *de Vorderingswet* van 1962, Stb 587; *de Oorlogswet voor Nederland* van 1964, Stb 337; *de Deltawet* van 1958, Stb 246; *de Wet bodembescherming* van 1986, Stb 374 en *de Landinrichtiningswet* van 1985, Stb 299.

30 Sien Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2.

Aan die hand van Van Wijmen-Hamming[31] kan die volgende vorme van beperking van eiendomsreg onderskei word:

(a) Die oplegging van 'n algehele of gedeeltelike of tydelike of blywende gebruiksbeperking op eiendomsreg teen die betaling van vergoeding waarvoor uitdruklik wetlik voorsiening gemaak word.[32] 'n Verskeidenheid van wette[33] maak voorsiening vir die betaling van billike vergoeding vir oneweredige skade[34] wat redelikerwys nie deur die betrokke onderdaan gely behoort te word nie.[35] Die verhaal van sodanige oneweredige skade blyk gegrond te wees op 'n sogenaamde gelykheidsbeginsel.[36]

(b) Die oplegging van gebruiksbeperkinge teen betaling van sogenaamde *nadeelcompensatie* of *bestuurscompensatie*.[37] By sodanige eiendomsbeperkinge bestaan daar nie vir die owerheid 'n wetlike verpligting tot betaling van skadevergoeding nie. Op sterkte van die beginsels van behoorlike staatsbestuur moet oorweeg word of en in watter mate oneweredige nadeel van 'n belanghebbende vergoed behoort te word, hetsy uit blote regverdigheidsoorwegings, hetsy ter voorkoming van 'n bevinding van die onregmatigheid van die owerheidshandeling deur 'n regter.[38] Die stelsel van *nadeelcompensatie* behels dus die buite-wetlike aanvaarding van owerheidsaanspreeklikheid en die totstandkoming van 'n regsplig tot vergoeding van skade waar die toekomstige of gelede skade redelikerwys nie ten laste van die betrokkene behoort te wees nie.[39] Heelwat meningsverskille bestaan egter nog omtrent die grondslag vir hierdie publiekregtelike stelsel van buite-statutêre aanspreeklikheid vir regmatige owerheidsoptrede.[40]

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31 *Onteigening* Band 1 Alg Inl.

32 Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2.

33 Daar word volstaan met enkele voorbeelde, nl a 4 van *de Wet Aansprakelijkheid kernongevallen* van 1979, Stb 225; a 31 van *de Kampeerwet* van 1981, Stb 372; a 129 van *de Landinrichtingswet* van 1985, Stb 299; a 50 van *de Luchtvaartwet* van 1958, Stb 47; a 22–29 van *de Momentenwet* van 1988, Stb 638; a 14 en 18 van *de Natuurbeschermingswet* van 1967, Stb 572; a 26 van *de Ontgrondingenwet* van 1965, Stb 509; a 49 van *de Wet op de Ruimtelijke Ordening* van 1962, Stb 286.

34 Nl skade wat te wyte is aan die oneweredige belasting van een besondere individu dmv 'n owerheidsbeperking.

35 Vgl Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–13.

36 *Ibid.*

37 *Idem.* Alg Inl–2 Alg Inl–102. *Bestuurscompensatie* kom bv ter sprake in die volgende gevalle: (i) die regmatige onttrekking deur 'n munisipaliteit (gemeente) van drinkwater vir die inwoners van die munisipaliteit, welke onttrekking lei tot die uitdroging van 'n naburige landgoed tot nadeel van die eienaar (sien HR 1944-02-18, NJ 1944, 226 (*'s-Gravenhage/Jochems*); (ii) die verlening van 'n vergunning aan 'n munisipaliteit om 'n brug aan te lê, waarvan die hoogte die deurvaart van skepe beperk, ter vervanging van 'n ophaalbare brug. Die aanleg van die nuwe brug strek tot nadeel van 'n skeepswerf wat geleë is aan die kanaal aangesien skepe vanweë die nuwe brug nie meer in die kanaal kan vaar nie (sien AR 1982-01-12, AB 1982, 299 (*Paul Krugerbrug I*); AR 1983-11-22, AB 1984, 154 *Paul Krugerbrug II*).

38 Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2.

39 *Idem* Alg Inl–14.

40 Sien *idem* Alg Inl–102 t/m Alg Inl–122; Lubach en Van Wijmen *Bestuursrechtelijke schadevergoeding* F–3–1 t/m F–3–98. Lubach en Van Wijmen F–3–99 konkludeer dat die grondslag vir *nadeelcompensatie* tans te vinde is in a 3:4 van *de Algemene wet bestuursrecht* van 1992, Stb 315.

(c) Die oplegging van gebruiksbeperkinge wat nie so ingrypend beskou word dat betaling van vergoeding hoef plaas te vind nie.[41]

(d) Die oplegging van "gedoog"-pligte teen betaling van volledige skadevergoeding.[42] In 'n aantal sogenaamde "gedoog"-wette[43] word 'n tydelike of langdurige verpligting vir die grondeienaar opgelê om die aanleg en gebruik van owerheidswerke te duld wat inbreuk maak op eiendomsreg,[44] byvoorbeeld die aanleg van hoogspanningslyne, elektrisiteitskabels, telefoonlyne, gaspype en dergelike.[45]

(e) Die vernietiging of onbruikbaarmaking van eiendom in algemene belang deur die owerheid teen betaling van skadevergoeding of tegemoetkoming in skade waarvoor kragtens wetgewing[46] voorsiening gemaak word.[47]

(f) Skadevergoeding by vordering in algemene belang.[48]

Teen die agtergrond van voorgaande skema ontstaan die vraag vervolgens of onteiening in 'n privaatregtelike sin gesien behoort te word as 'n ontneming van eiendomsreg of 'n beperking daarvan. Hierdie onderskeid was vantevore belangrik in soverre vergoeding altyd vereis is by onteiening terwyl vergoeding vir die beperking van bevoegdhede voortspruitend uit eiendomsreg nie vanselfsprekend was nie.[49] Onteiening kan in 'n sakeregtelike sin gesien word as 'n ontneming of oorgang van eiendomsreg[50] en behoort steeds onderskei te word van die beperkinge van eiendomsreg,[51] hetsy vergoeding betaalbaar is vir sodanige beperkinge al dan nie. Onteiening word inderdaad beskou as 'n oorspronklike wyse van eiendomsverkryging.[52] Onteiening werk titelsuiwerend, dit wil sê die grond word van saaklike laste bevry.[53]

Telders[54] huldig ook 'n wyer beskouing van onteiening, as synde nie alleen die oorgang van eiendomsreg nie maar ook die verbreking van die feitelike en ekonomiese betrekking tussen die eienaar en sy saak. Van Wijmen en Hamming[55] voer aan dat onteiening nie net beperk kan word tot ontneming van

41 Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2 t/m Alg Inl–3.
42 *Idem* Alg Inl–2.
43 Bv a 1 van *de Belemmeringenwet privaatrecht* van 1927, Stb 159; a 7 van *de Spoorwetgeving* van 1917, Stb 703; a 15 van *de Rivierenwet* van 1908, Stb 339; a 7–11 van *de Waterstaatswet* van 1900, Stb 176; a 32 van *de Wet op de Telecommunicatievoorzieningen* van 1988, Stb 520; a 14 van *de Wegenwet* van 1930, Stb 342; a 29 van *de Wet op Stads- en dorpsvernieuwing* van 1984, Stb 406.
44 Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2, Alg Inl–122; Van Wijk-Konijnenbelt-Van Male *Administratief recht* 632.
45 Van Wijk-Konijnenbelt-Van Male *Administratief recht* 632.
46 Bv a 59 en 39 van *de Veewet* van 1920, Stb 153.
47 A 14 van die Grondwet; Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–134.
48 Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2.
49 *Idem* Alg Inl–12.
50 Telders *Schadeloosstelling voor onteigening* (1968) 8 (hierna *Schadeloosstelling*); Jansen *Onteigenen* 4; Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–2, Band 3 Bijz II.I–4 Bijz II.I–6; Van der Gouwe *Onteigening* Band 1 II–1; Van den Berk *Schadevergoeding voor rechtmatig toegebrachte schade door de overheid* (1991) 2 (hierna *Schadevergoeding*).
51 Jansen *Onteigenen* 5.
52 Snijders en Rand-Berenschot *Goederenrecht* 223.
53 A 4 lid 2 van *de Onteigeningswet*; Van Zundert *Het bestemmingsplan: Een juridisch-bestuurlijke inleiding in de ruimtelijke ordening* (1993) 233 (hierna *Bestemmingsplan*).
54 *Schadeloosstelling* 21–22.
55 *Onteigening* Band 3 Bijz II.I–6.

eiendomsreg of verbreking van die regsbetrekking tussen eienaar en saak nie omdat onteiening ook finansiële gevolge inhou vir derdes wat as reghebbendes ingevolge die *Onteigeningswet* erken word.

By die privaatregtelike benadering tot owerheidsaanspreeklikheid vir sogenaamde regmatige owerheidsdade (waaronder onteiening en voorgaande beperkinge van eiendomsreg tuishoort) val die klem op die burger se reg of belange wat ontneem of beperk word en daarop dat die burger vervolgens volle vergoeding kan eis.[56]

Die privaatregtelike beskouing van onteiening as 'n ontneming van eiendomsreg (in 'n sakeregtelike sin) beteken egter nie dat ontken word dat die skeidslyn vir doeleindes van aanspreeklikheid vir verskillende owerheidshandelinge besig is om te vervaag en eenvormig hanteer behoort te word nie.

2 2 Onteiening vanuit 'n publiekregtelike gesigspunt

In die publiekregtelike sfeer val die klem op die handeling vanaf owerheidskant: owerheidshandelinge synde aktiwiteite wat die owerheid verrig.[57] In die huidige konteks word wetgewingshandelinge onderskei van administratiewe (oftewel bestuurs-) handelinge. Laasgenoemde handelinge word weer in regmatige en onregmatige bestuurshandelinge verdeel.[58] Onteiening (en die ander vorme van eiendomsbeperkinge) is 'n regmatige bestuurshandeling wat onder die bestuursreg tuishoort.[59] Regmatige bestuurshandelinge kan voorts onderverdeel word in regshandelinge (waaronder onteiening tuishoort) en feitelike handelinge.[60]

By die publiekregtelike benadering tot owerheidsaanspreeklikheid word die burger slegs vergoed tot die hoogte waaraan die owerheidshandeling nie aan die eise van behoorlike bestuur voldoen nie.[61] Soos weldra aangetoon sal word, word egter in die geval van onteiening vir volle vergoeding voorsiening gemaak.

2 3 Onteiening vanuit 'n neutrale gesigspunt

In die konteks van owerheidsaanspreeklikheid vir owerheidshandelinge is die nuwe benadering van Lubach en Van Wijmen[62] om nie meer 'n prinsipiële onderskeid te maak tussen publiekregtelike en privaatregtelike skadevergoedingsreg nie. Met ander woorde, binne hierdie kader sou die onteieningsbegrip vanuit 'n neutrale gesigspunt benader behoort te word.

As motivering vir hulle benadering word die volgende redes aangegee:[63] (a) die nuwe ontwikkelinge op die grensgebied tussen privaat- en publiekreg bring mee dat dit onwenslik is om steeds die prinsipiële onderskeid te handhaaf; (b) die moeilike onderskeid tussen skadevergoeding by regmatige en onregmatige

56 Van der Gouwe *Onteigening* Band 1 I–6 I–15.
57 *Idem* I–1.
58 *Ibid.* Aanspreeklikheid vir die onregmatige owerheidsdaad is gegrond op a 6:162 *NBW*, welke vorm van aanspreeklikheid buite bespreking gelaat word.
59 Wijting *Een studie tot hervorming van het onteigeningsprocesrecht* (1983) 2–4 (hierna *Onteigeningsprocesrecht*).
60 Van der Gouwe *Onteigening* Band 1 I–1.
61 *Idem* I–8 t/m I–9 en I–15.
62 *Bestuursrechtelijke schadevergoeding* Band 1 Deel B–1–1.
63 *Idem* B–1–1 t/m B–1–3 en C–1–1.

owerheidsdaad kan juis vermy word; (c) die verskillende vorme van bestuursregtelike skadevergoeding kan vanuit 'n samehang tussen verskillende leerstukke en tipes skadevergoeding beskou word; (d) die skadevergoedingsreëls ten aansien van onteiening en die skadevergoedingsreëls ten aansien van die ander bestuursregtelike onderwerpe groei steeds nader aan mekaar; en (e) die behoefte wat bestaan vir die daarstelling van 'n algemene wetlike basis vir die verskillende soorte bestuursregtelike skadevergoeding.

Lubach en Van Wijmen onderskei eenvoudig tussen skadeveroorsakende owerheidshandelinge waardeur fisiese inbreuk gemaak word op 'n saak en skadeveroorsakende owerheidshandelinge waardeur nie fisies inbreuk gemaak word op 'n saak nie.[64] Onteiening kragtens die *Onteigeningswet* en die oplegging van "gedoog"-pligte kragtens wetgewing word as voorbeelde van die eerste kategorie vermeld.[65] Skadeveroorsakende owerheidshandelinge sonder 'n fisiese inbreuk op 'n saak word op hulle beurt weer onderverdeel in owerheidshandelinge waar skadevergoeding op 'n wetlike grondslag berus en owerheidshandelinge waar dit nie die geval is nie.[66] As voorbeeld van eersgenoemde subkategorie dien wetgewing[67] wat voorsiening maak vir plan-[68] en maatreëlskade.[69] Die handeling by die betaling van *nadeelcompensatie* word gemeld as voorbeeld van die laaste subkategorie.[70]

Op sterkte van Lubach en Van Wijmen se skema sou onteiening, neutraal gesien, aangemerk kan word as 'n skadeveroorsakende owerheidshandeling waardeur fisies inbreuk gemaak word op 'n saak teen betaling van volledige vergoeding.[71]

3 VEREISTES VIR ONTEIENING

Vervolgens word gekyk na die onteieningsbegrip en vereistes vir onteiening in wetgewing.

3 1 Nederlandse Grondwet

Die onteieningsklousule in artikel 14 van die Nederlandse Grondwet bepaal:

> "1. Onteigening kan alleen geschieden in het algemeen belang en tegen vooraf verzekerde schadeloosstelling, een en ander naar bij of krachtens de wet te stellen voorschriften.
>
> 2. De schadeloosstelling behoeft nie vooraf verzekerd te zijn, wanneer in geval van nood onverwijld onteigening geboden is.

64 *Idem* B–1–6 t/m B–1–7.

65 Sien vn 43 hierbo.

66 *Bestuursrechtelijke schadevergoeding* B–1–7 t/m –11.

67 Onderskeidelik a 49 van *de Wet op de Ruimtelijke Ordening* van 1962, Stb 286; a 13 van *de Boswet* van 1961, Stb 256; a 22–29 van *de Monumentenwet*; en a 18 van *de Natuursbeschermingswet* van 1967, Stb 572.

68 Planskade spruit voort uit die verandering van die gebruik van 'n eienaar se perseel of persele wat aan 'n ander behoort kragtens 'n dorpsbeplanningskema (bestemmingsplan), welke gebruiksverandering tot nadeel strek van die betrokke eienaar.

69 Bv die tref van maatreëls tav 'n onroerende saak, soos die aanwysing van 'n beskermde natuurmonument.

70 *Bestuursrechtelijke schadevergoeding* B–1–9.

71 Vgl *idem* B–1–6 en G–1–2.

> 3. In de gevallen bij of krachtens de wet bepaald bestaat recht op schadeloosstelling of tegemoetkoming in de schade indien in het algemeen belang eigendom door het bevoegde gezag wordt vernietigd of onbruikbaar gemaakt of de uitoefening van het eigendomsrecht wordt beperkt."

Vir doeleindes van artikel 14 van die Grondwet kan onderskei word tussen (a) onteiening; (b) die beperking van die uitoefening van eiendomsreg; en (c) die onbruikbaarmaking en vernietiging van eiendom deur die owerheid. Artikel 14 verskaf dus 'n waarborg waaraan onteiening, vernietiging of onbruikbaarmaking van eiendom, of die beperking van eiendomsreg, moet voldoen.[72]

Eiendomsreg as sodanig word egter nie gewaarborg nie.[73] Die verklaring vir die nie-erkenning van eiendomsreg in die Grondwet was die regering se beskouing dat die insluiting van eiendomsreg in die Grondwet verwagtinge sou skep waaraan nie voldoen kon word nie. In soverre eiendomsreg as onbepaalde reg aan die uiteenlopendste beperkinge onderworpe is, bring dit voorts mee dat die grondwetlike erkenning van eiendomsreg meteens opgevolg sou moes word deur 'n beperkingsklousule in die allerruimste sin van die woord.[74] Artikel 14 bied slegs 'n waarborg teen owerheidsoptrede. Van horisontale werking van die bepalings van die Grondwet is daar ook nie sprake nie.[75]

Onteiening kan dus ingevolge die Grondwet plaasvind: (a) by verklaring van die algemene belang; (b) teen vooraf versekerde skadeloosstelling;[76] en (c) met inagneming van die voorskrifte van die wet[77] ingevolge waarvan die onteiening moet plaasvind.[78]

Die begrip "onteigening" in lid 1 van artikel 14 word nie nader omskryf nie. Met "onteigening" word bedoel die reeks administratiewe en prosesregtelike handelinge wat die owerheid die reg en middele verskaf om eiendomsreg van 'n ander te verkry, bevry van alle laste en regte wat daarop rus, vir doeleindes van die gebruik deur die owerheid teen betaling van skadeloosstelling.[79]

Die doelkriterium van "het algemene belang" in die eerste lid van artikel 14 in die *Onteigeningswet* word nader omskryf as die "publieke belang" van openbare liggame.[80] Akkermans en Koekkoek[81] doen aan die hand dat vir sover die *Onteigeningswet* onderskei tussen verskillende tipe onteienings, die begrip "algemene belang" in die onderskeie gevalle 'n verskillende betekenis kan kry na gelang die doelstellings verskil.

Die begrip "schadeloosstelling" in lid 1 van artikel 14 word ook nie in die Grondwet omskryf nie. 'n Toevoeging van die begrip "volledige" tot skadeloosstelling ontbreek ook in die Grondwet.[82] Uit die geskiedenis van die

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72 Koopmans-Bellekom-Heringa *Staatsrecht* 310; Belinfante en De Reede *Beginselen van het Nederlands staatsrecht* (1994) 259 (hierna *Staatsrecht*).
73 Koopmans-Bellekom-Heringa *Staatsrecht* 310; Belinfante en De Reede *Staatsrecht* 259; Van den Berk *Schadevergoeding* 10.
74 Koopmans-Bellekom-Heringa *Staatsrecht* 310–311; Akkermans en Koekkoek *De Grondwet – een artikelsgewijs commentaar* (1992) 300 (hierna *Grondwet*).
75 Akkermans en Koekkoek *Grondwet* 303.
76 Tensy in nood onteien word.
77 *De Onteigeningswet* of ander onteieningswetgewing soos vermeld in vn 29 hierbo.
78 Van Wijmen-Hamming *Onteigening* Band 1 Alg Inl–5; Van Zundert *Bestemmingsplan* 227.
79 Van Wijmen-Hamming *Onteigening* Band 3 Bijz II.1–4.
80 Akkermans en Koekkoek *Grondwet* 300.
81 *Grondwet* 300.
82 Van Wijmen-Hamming *Onteigening* Band 3 Bijz II.1–5.

totstandkoming van artikel 14 blyk dit dat die regering met die grondwetlike verpligting tot skadeloosstelling wel volledige skadeloosstelling beoog.[83] In die regspraak[84] word skadeloosstelling van meet af vertolk as volledige skadeloosstelling, met ander woorde nie alleen die waarde vir die onteiende moet vergoed word nie maar ook alle skade wat 'n regstreekse gevolg van die ontneming van eiendomsreg is.[85]

Skadeloosstelling word in die gewone gang van sake vooraf verseker deurdat die inskrywing van die onteieningsvonnis, waardeur eiendomsreg oorgaan, slegs geskied by voorlegging van 'n kwitansie vir die bedrag in die vonnis vermeld.[86]

Anders as in artikel 14 lid 3, waar vir doeleindes van onbruikbaarmaking na *eigendom* verwys word, word die voorwerp van onteiening nie in lid 1 vermeld nie.[87] *Eigendom* vir doeleindes van artikel 14 van die Grondwet word in die tradisionele sin van eiendomsreg van 'n stoflike saak opgevat. 'n Ruim vertolking van die grondwetlike begrip van eiendom (en daarmee gepaardgaande onteiening) ontbreek derhalwe.[88]

Beperking van eiendomsreg kan dus ooreenkomstig die Grondwet plaasvind (a) in die algemene belang; en (b) teen skadeloosstelling of tegemoetkoming in skade indien statutêr daarvoor voorsiening gemaak word. Dieselfde vereistes geld vir vernietiging of onbruikbaarmaking van eiendom.

Die beperking van die uitoefening van eiendomsreg in artikel 14 lid 3 geskied nie kragtens die *Onteigeningswet* nie maar kragtens diverse ander wetgewing.[89] 'n Reg op skadeloosstelling of tegemoetkoming in skade bestaan alleen indien wetgewing daarvoor voorsiening maak.[90]

Vernietiging en onbruikbaarmaking van eiendom verskil prinsipieel van onteiening omdat daar glad nie sprake is van oorgang van eiendomsreg nie.[91] "Onbruikbaarmaking" vir doeleindes van artikel 14 lid 3 beteken dat die goed geheel en al in stand kan bly dog die funksie of funksies daarvan ontneem word.[92]

Die regsbeskerming teen inbreuk deur die owerheid op eiendomsreg en ander vermoënsregte is dus eerder gegrond op 'n sisteem van wetlike skadevergoedingsreëlings as 'n verruimde grondwetlike uitleg van die begrip eiendom.[93]

3 2 *Onteigeningswet*

Artikel 1 lid 1 van die *Onteigeningswet* bepaal soos volg: "Onteigening ten algemeenen nutte kan in het publiek belang van den Staat, van eene of meer

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83 *Idem* Band 1 Alg Inl–6 t/m Alg Inl–10, Band 3 Bijz II.I 5; sien verder Belinfante en De Reede *Staatsrecht* 259; Akkermans en Koekkoek *Grondwet* 301.

84 Sien bv van die vroeë beslissings soos HR 1864-03-07, W2569 (*Haenen/Staat*); HR 1864-12-23, W2652 (*Staat/Overtuwe*).

85 Schenk en Den Drijver-Van Rijkevorsel *Onteigening* (1986) 3.

86 *Ibid.*

87 Indien a 14 in die geheel gelees word, blyk dit dat onteiening van "eigendom" beoog word.

88 Van den Berk *Schadevergoeding* 8–9.

89 Van Wijmen-Hamming *Onteigening* Band 3 Bijz II.I–4 t/m Bijz II.1–5; sommige van hierdie wette word in vn 33 hierbo vermeld.

90 Belinfante en De Reede *Staatsrecht* 259–260.

91 *Idem* 259.

92 Van Wijmen-Hamming *Onteigening* Band 3 Bijz II.I–4.

93 Van den Berk *Schadevergoeding* 8–9.

provincien, van eene of meer gemeente, en van een of meer waterschappen plaats hebben."

Artikel 1 van die *Onteigeningswet* kan gesien word as 'n nadere uitwerking van die grondwetartikel omtrent onteiening.[94]

Voordat onteien word, moet – volgens die *Onteigeningswet* – die algemene nut of belang van die besondere onteiening in 'n sogenaamde nutswet verklaar word.[95] Alhoewel die nutswet nie meer in artikel 14 van die Grondwet genoem word as 'n administratiewe titel vir onteiening nie, is dit nog nie geskrap uit die *Onteigeningswet* nie en bevat titel I van die *Onteigeningswet* bepalings omtrent die gewone nutswetprosedure.[96] Die spesifieke gevalle of doelwitte waarvoor onteien mag word en waarvoor geen nutswet vereis word nie, word opgesom in titels II tot en met VII van die *Onteigeningswet*. Weinig onteienings vind egter nog plaas kragtens "nutswet".[97] Op die nutswetvereiste bestaan 'n aantal uitsonderings waar meteens oorgegaan kan word tot die aanwysing by koninklike besluit van die persele wat benodig word en onteien staan te word of tot die neem van die onteieningsbesluit deur die gemeenteraad welke besluit koninklike goedkeuring verg. Ten aansien van sodanige uitsonderings, wat by name in die wet vermeld word, hou die *Onteigeningswet* self dus implisiet die verklaring van algemene nut in.[98]

Alhoewel die begrippe "ten algemenen nutte" en "publieke belang" sinonieme blyk te wees, word beide begrippe in artikel 1 gebruik.[99] Uit die geskiedenis van die wetsartikel lei Van Wijmen en Hamming[100] af dat met "het publieke belang van de Staat" 'n nadere omskrywing van die algemene nut beoog word. Onder "algemeen nut" behoort verstaan te word die publieke taak van die owerheid wat die onteiening moet bevorder.[101] Byvoorbeeld, die voorgenome onteiening van 'n perseel vir oordrag na onteiening aan 'n garagebedryf ten einde 'n aaneenlopende stuk grond aan die garage te voorsien, is vanweë 'n tekort aan publieke belang afgekeur.[102] Daarteenoor is goedkeuring verleen aan die onteiening van 'n perseel wat na onteiening oorgedra sou word aan die eienaar van 'n aangrensende perseel om hom in staat te stel om die perseel saam met ander grond as nuwe bougrond te verkoop aangesien die belange van volkshuisvesting daardeur gedien sou word.[103]

Ingevolge die *Onteigeningswet* is die voorwerp van onteiening in die praktyk meestal eiendomsreg van onroerende sake.[104] Ook ander saaklike regte[105] en

94 Van Wijmen-Hamming *Onteigening* Band 2 Bijz I.A–1.
95 A 10 van *de Onteigeningswet*; Van der Gouwe *Onteigening* Band 1 II–4.
96 Van Wijmen-Hamming *Onteigening* Band 2 Bijz I.A–2.
97 Schenk en Den Drijver-Van Rijckevorsel *Onteigening* 2.
98 Van der Gouwe *Onteigening* Band 1 II–4.
99 Van Wijmen-Hamming *Onteigening* Band 2 Bijz 1.A–3.
100 *Onteigening* Band 2 Bijz 1.A–3.
101 Van der Gouwe *Onteigening* Band 1 II–4.
102 KB 1997-12-19, nr 15 (*Weststellingwerf*), 1978 *Bouwrecht* 148.
103 KB 1984-10-12, nr 57 (*Harderwijk*), 1985 *Bouwrecht* 642; sien voorts KB 1986-08-12 nr 13 (*Venlo*), 1987 *Bouwrecht* 55; KB 1987-08-14 nr 16 (*Harderwijk*) 1988 *Bouwrecht* 917.
104 Van Wijmen-Hamming *Onteigening* Band 3 Bijz II.I–4; sien verder a 3, lid 1; 59, lid 3 van *de Onteigeningswet*.
105 A 4 van *de Onteigeningswet* bepaal dat indien die onteiende onroerende saak onderworpe is aan reg van opstal, erfpag, vruggebruik, gebruik, bewoning of beklemming,

vervolg op volgende bladsy

vermoënsregte[106] kan die voorwerp van onteiening uitmaak.[107] Die *Onteigeningswet* bevat ook voorskrifte oor roerende sake.[108]

Skadeloosstelling vir doeleindes van die *Onteigeningswet* beteken volledige vergoeding vir alle skade wat die eienaar regstreeks en noodsaaklikerwys deur sy verlies van die saak ly.[109]

3 3 Europese Konvensie vir die Beskerming van Menseregte en Fundamentele Vryhede

Die bepalings van die Europese Konvensie vir die Beskerming van Menseregte en Fundamentele Vryhede (EVRM) vind regstreeks aanwending in die Nederlandse reg.[110] Artikel 1 van die eerste Protokol van die EVRM bepaal soos volg:

> "Iedere natuurlijke of rechtspersoon heeft recht op het ongestoord genot van zijn eigendom. Aan niemand zal zijn eigendom worden ontnomen behalve in het algemeen belang en onder de voorwaarden voorzien in de wet en in de algemene beginselen van internationaal recht.
>
> De voorgaande bepalingen tasten echter op geen enkele wijze het recht aan, dat een Staat heeft om de wetten toe te passen, die hij noodzakelijk oordeelt om het gebruik van eigendom te reguleren in overeenstemming met het algemeen belang of om de betaling van belastingen of ander heffingen of boeten te verzekeren."

Eiendomsreg word gewaarborg in artikel 1 van die Eerste Protokol.[111] Die begrip "eigendom" word nie omskryf nie.[112] Eiendom word egter wyd vertolk as insluitende alle subjektiewe (publiek- en privaatregtelike) vermoënsregte.[113] So word die reg op werfkrag van 'n rekenmeester,[114] 'n vergunning om 'n perseel vir die verkoop van brandstof te gebruik[115] en eksklusiewe produksieregte wat ingevolge landbou-, vervoer-, milieu- en ander sosiaal-ekonomiese wette deur die owerheid toegeken word, as eiendom beskou.[116]

'n Drieledige onderskeid kan dus gemaak word tussen die ontneming van eiendomsreg, die beperking daarvan en die heffing van belasting. Solank daar nog eienaarsbevoegdhede vir die eienaar oorbly, is beperking en nie ontneming nie van eiendomsreg voorhande.[117] Onteiening moet geskied in algemene belang,

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sodanige saaklike regte afsonderlik onteien kan word. 'n Reghebbende kragtens *appartementsrecht* word as mede-eienaar beskou. Sien in die algemeen Wijting *Onteigeningsprocesrecht* 5–13; Van Wijmen-Hamming *Onteigening* Band 2 Bijz I.A–10 t/m–15.

106 Bv *oktrooien* (a 97). Persoonlike regte, soos huur, huurkoop en bruikleen is egter nie vatbaar vir onteiening nie. Sien verder Wijting *Onteigeningsprocesrecht* 13; Van Wijmen-Hamming *Onteigening* Band 3 Bijz II.I–9.

107 Akkermans en Koekkoek *Grondwet* 300.

108 A 76a, lid 1 Ow.

109 A 40 Ow.

110 AR 1979-07-31, AB 1979, 539 (*Moor/Terschelling*); Koopmans-Bellekom-Heringa *Staatsrecht* 44.

111 Belinfante en De Reede *Staatsrecht* 259.

112 Sewandono (nota oor HvJEG 1989-07-13, AB 1992, 14 (*Wachuaf/Germany*) 41.

113 Van den Berk *Schadevergoeding* 9 vn 26; Lubach en Van Wijmen *Bestuursrechtelijke schadevergoeding* F–3–91.

114 EHRM 1986-06-26, NJ 1987, 581 (*Marle/Nederland*) 2008.

115 EHRM 1985-03-23, AB 1986, 1 (*Benthem/Netherlands*) 4.

116 Lubach en Van Wijmen *Bestuursrechtelijke schadevergoeding* Band 1 F–3–91; sien verder Sewandono (nota oor die *Wachauf*-beslissing) 41.

117 Lubach en Van Wijmen *Bestuursrechtelijke schadevergoeding* Band 1 F–3–91; EHRM 1989-07-07 (*Tre Traktorer*), A 159, par 55.

ooreenkomstig wetsvoorskrifte en beginsels van die volkereg. Die beperking van eiendomsreg deur die staat is dus ook moontlik mits die beperking in openbare belang plaasvind en noodsaaklik blyk te wees.

Artikel 1 van voorgenoemde Protokol word uitgelê as bestaande uit drie afsonderlike reëls:[118] Die eerste is van 'n algemene aard en bevestig die beginsel van ongestoorde genot van eiendom. Die tweede dek die ontneming van eiendomsreg en maak sodanige ontneming onderworpe aan besondere voorwaardes. Erkenning word in die derde reël verleen aan die bevoegdheid van die staat om deur wetgewing die gebruik van eiendom in ooreenstemming met die algemene belang en noodsaak te reguleer. Die drie reëls staan egter nie los van mekaar nie. Die tweede en derde reël handel oor die besondere wyses van inbreukmaking op die ongestoorde genot van eiendom. Sodanige reëls behoort uitgelê te word in die lig van die algemene beginsel wat in die eerste reël neergelê is. By die oorweging van die derde reël binne die konteks van die eerste reël word as toets ter bepaling van 'n moontlike skending van artikel 1 vereis dat daar 'n redelike eweredigheid of proporsionaliteit moet bestaan tussen die maatreëls deur die staat getref en die oogmerke wat die staat daardeur wil bereik.[119] In die daarstelling van 'n redelike ewewig tussen die algemene belange van die gemeenskap en die beskerming van die fundamentele regte van die individu geniet die staat 'n groot mate van vryheid.

Die derde reël en toepassing van die toets van eweredigheid bied wye moontlikhede vir die beperking van die genot van eiendom vir die owerheid.[120] Daar word volstaan met enkele voorbeelde uit die gewysdes:

In die *Moor*-beslissing[121] was die regsvraag of 'n bewoningsvergunningstelsel wat kragtens die *Vestigingsregeling* van die gemeente (munisipaliteit) van Tershelling op die eiland Terschelling ingestel is ingevolge waarvan dit verbode was om 'n woning te betrek alvorens 'n skriftelike vergunning deur die munisipaliteit verleen is aan 'n bewoner wat aan die maatskaplike of ekonomiese vereiste van eiland-binding voldoen het, in stryd is met (onder andere) artikel 1 van die eerste Protokol van die EVRM. Die afdeling Regspraak van die Raad van State was van mening dat, vanweë die toepassing van 'n vergunningstelsel, inbreuk gemaak word op eiendomsreg indien 'n eienaar van 'n woning nie vergun sou word om die woning te betrek nie.[122] Maar in soverre die vergunningstelsel daarop gemik was om die tekort in die bestaande woningvoorraad te verlig en die leefbaarheid op die eiland te beskerm, word voorts beslis dat die stelsel 'n noodsaaklike beperking en 'n beperking in algemene belang op

118 EHRM 1989-10-25, AB 1990, 334 (*Jacobson/Zweden*) 999.

119 In die *James*-beslissing (EHRM 1986-02-21, NJCM-bulletin 1986, 546 (*James/VK*)) word die toets soos volg geformuleer (553): "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden' ..." Sien ook HvJEG 1989-07-13, AB 1992, 14 (*Wachauf/Germany*) 39.

120 Lubach en Van Wijmen *Bestuursrechtelijke schadevergoeding* F–3–91.

121 AR 1979-07-31, AB 1979, 539 (*Moor/Terschelling*).

122 1366–1367.

uitoefening van eiendomsreg verteenwoordig, welke beperking kragtens artikel 1 van die Eerste Protokol geoorloof is.[123]

In die *Jacobson*-saak[124] is vir doeleindes van artikel 1 van die Eerste Protokol deur die Europese Hof vir Menseregte bevind dat die uitgerekte toepassing van boubeperkings op 'n eiendom ingevolge 'n stadbeplanningskema nie buite verhouding is tot die strewe van 'n munisipaliteit om die area behoorlik te beplan nie. In die *Van Marle*-saak[125] het die Europese Hof vir Menseregte beslis dat die beperking van die toelating tot registrasie as rekenmeesters kragtens wetgewing nie in stryd met artikel 1 is nie. Daar is beslis dat die beperking die algemene belang van 'n bevoegde rekenmeestersprofessie bevorder het. Die beperking het voorts 'n regverdige balans verseker tussen die middele wat aangewend en die oogmerk wat beoog is deurdat die oorgangsmaatreëls verseker het dat voormalige ongekwalifiseerde rekenmeesters by nakoming van voorgeskrewe voorwaardes wel toegang tot die professie kan verkry.

In die *Hauer*-beslissing[126] het die hof van Justisie van die Europese Gemeenskappe oorweging geskenk aan die geldigheid van die Raad van Europese Gemeenskappe se verbod op die aanplanting van nuwe wingerde ten einde wynoorskotte te voorkom. Daar word bevind dat die tydelike beperking van eiendomsreg deur die verbod regverdigbaar is in die lig van die bevordering van die algemene belang van die Europese Gemeenskap. Die verordening staan in 'n redelike verhouding tot die Europese Gemeenskap se doelwitte om die wynmark op 'n gemeenskaplike wyse te orden en om die wynboubedryf struktureel te verbeter.[127]

Die *Sporrong en Lönnroth*-beslissing[128] bied daarenteen 'n voorbeeld waar die Europese hof vir Menseregte beslis het dat 'n skending van artikel 1 van die Eerste Protokol van die EVRM plaasgevind het. Die onroerende sake van twee klaagsters was vir periodes van 25 en 12 jaar, onderskeidelik, onderworpe aan 'n vergunning tot onteiening ten gunste van die stad van Stockholm. Kragtens sodanige vergunning moes die owerheid die eienaar binne vyf jaar voor 'n bevoegde hof daag ten einde skadevergoeding vas te stel. Die vergunning is egter telkens verleng. Die hof het bevind dat die lang geldingsduur van die onteieningsvergunnings, die daarmee gepaardgaande onsekerheid en afwesigheid van die wetlike moontlikheid om die belange van die owerheid en die onderdaan in die tussentyd en opnuut af te weeg, daartoe aanleiding gegee het dat die juiste ewewig tussen die beskerming van eiendomsreg en die algemene belang versteur is. Daar is bevind dat die klaagsters 'n buitengewone swaar las gedra het wat slegs geregverdig sou wees indien dit vir hulle moontlik sou wees om die geldingsduur van die vergunning te verkort of om skadevergoeding te eis. Artikel 1 van die Eerste Protokol is derhalwe geskend.

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123 1367. Daar is egter bevind dat die vergunningstelsel in stryd met a 14 van die EVRM is. Deur 'n onderskeid te maak tussen diegene wat op die eiland gebore en getoë is en ander persone, het die applikant nie gelyke behandeling in die toekenning van regte geniet nie, soos vereis word deur a 14 van die genoemde verdrag (1367).

124 EHRM 1989-10-25, AB 1990, 334 (*Jacobson/Zweden*) 999–1000.

125 EHRM 1986-06-26, NJ 1987, 581 (*Marle/Nederland*) 2008.

126 HvJEG 1979-12-13, AA 1980, 6 (*Hauer/Rheinland-Pfalz*).

127 361.

128 EHRM 1982-09-23 NJ 1988, 290 (*Sporrong/Zweden*).

4 SAMEVATTING

Alhoewel die ontneming van eiendomsreg voorop staan in die privaatregtelike beskouing van die onteieningsbegrip in Nederland, word ook rekening gehou met verdere fasette soos die implikasies van die verbreking van die betrekking tussen die eienaar en sy saak en die finansiële gevolge van onteiening. Onteiening as verlies van eiendomsreg dien dan as vertrekpunt in die daarstelling van 'n oorsaaklike verband tussen onteiening en die skade waarvoor skadeloosstelling betaalbaar is, welke verband die grondslag van die moderne Nederlandse onteieningsreg vorm.[129]

By die publiekregtelike beskouing van onteiening word gefokus op die nadelige gevolge van die regmatige uitoefening van 'n owerheidshandeling. Die neutrale beskouing van onteiening, as verfyning van die publiekregtelike beskouing, lê daarbenewens ook klem op feitelike inbreuk op 'n saak deur 'n skadeveroorsakende handeling van die owerheid. Die publiekregtelike beskouing van onteiening sluit aan by belangrike resente ontwikkelinge, soos *nadeelcompensatie*, wat op die gebied van die bestuursreg plaasgevind het.

Op die verskillende *niveaus* kan steeds onderskei word tussen die ontneming van eiendomsreg (onteiening) en beperking van eiendomsbevoegdhede. Die ontneming van eiendomsreg kan net geskied in openbare belang en teen betaling van volledige skadeloosstelling ooreenkomstig die voorskrifte van wetgewing en die norme van internasionale reg. Die beperking van eiendomsreg in die algemene belang en noodsaak is toelaatbaar. Indien wetgewing of die norme van bestuursreg voorsiening maak vir skadeloosstelling, is vergoeding betaalbaar. Die vereistes van openbare belang en skadeloosstelling figureer dus deurgaans op die verskillende *niveaus*.

5 SLOTSOM

Die wisselwerking tussen 'n privaatregtelike en publiekregtelike beskouing van onteiening het bygedra tot die ontwikkeling van die moderne Nederlandse reg betreffende onteiening en eiendomsbeperking. Alhoewel 'n toetsingsreg in die Nederlandse Grondwet ontbreek,[130] dien onteieningswetgewing tot uitbouing (eerder as inperking) van die grondwetlike vereistes van openbare belang en volledige skadeloosstelling vir doeleindes van geldige onteiening. Op supranasionale vlak word hierop voortgebou deur die byvoeging van die verskansing van eiendomsreg in artikel 1 van die eerste Protokol van die EVRM. In soverre die begrip "eiendom" op supra-nasionale vlak wyer strek as die grondwetlike eweknie, is die trefwydte vir die beskerming van regte teen onteiening daardeur vergroot.

129 Sien in die algemeen Badenhorst "Oorsaaklikheid in die Nederlandse Onteieningsreg" 1996 *De Jure* 273 ev.

130 A 120 van die Grondwet.

AANTEKENINGE

NEW YORK TIMES v SULLIVAN AND SOUTH AFRICAN LAW

In recent years it has on more than one occasion been proposed that our courts should adopt the solution proferred by the American Supreme Court in *New York Times Co v Sullivan* 376 US 254 (1964) to the problem of finding a balance between freedom of expression and protection of reputation. In both *Du Plessis v De Klerk* 1996 3 SA 850 (CC) and *Holomisa v Argus Newspapers Ltd* 1996 2 SA 588 (W) the defendants attempted, in the latter case by way of exception (594H), to import into our law the protection accorded to the press and other critics of the government in *Sullivan*. *Sullivan* featured in a number of judgments even before the interim Constitution with its bill of rights came into operation (see eg *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 33F–G; *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 780B–C). In *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 594G EM Grosskopf JA said that *Sullivan* and other American cases cited in argument were "of limited assistance because of the different legal, social and political milieu in which they operate".

In *Du Plessis v De Klerk supra*, Kentridge AJ warned (par 58) that before we adopt the rules enunciated in *Sullivan*, consideration should be given to the sharp criticism they have elicited and their rejection by the Supreme Court of Canada in *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129. The High Court of Australia in *Theophanous v Herald and Weekly Times Ltd* (1994) 124 ALR 1 and *Stephens v West Australian Newspapers Ltd* (1994) 182 ALR 211 adopted a highly modified and qualified version of the *Sullivan* rules. (The Australian cases have given rise to considerable discussion. See Chesterman "The money or the truth: Defamation reform in Australia and the USA" 1995 *Univ NSW LJ* 300–326; Cassimatis "Defamation – The constitutional public officer defence" 1996 *The Tort* 27–43; Loveland "*Sullivan v The New York Times* goes down under" 1996 *Public Law* 126–139.)

In the United States, the law under *Sullivan* has been described as "a failure" which is "not worth saving":

> "It gives plaintiffs delusions of large windfalls, defendants nightmares of intrusive and protracted litigation, and the public little assurance that the law favours truth over falsehood" (see Anderson "Is libel law worth reforming?" 1991 *Univ Penn LR* 487–554 489; the conclusion that the present libel law of the US is "a failure" is stated at 550).

A closer look at the genesis and deve'opment of the rules in *Sullivan* will perhaps facilitate a proper evaluation of the suitability of those rules for South African law.

The facts of *Sullivan* are well-known and can be briefly stated. The late nineteen-fifties was a time of frequently violent conflict in southern states between white groups which tried to prevent civil rights groups from asserting and exercising their newly accorded rights after *Brown v Board of Education* 347 US 483 (1954). Newspapers from northern states, including the *New York Times*, reported on this violence. In the south "an ingenious, devastating counteroffensive weapon" against the civil rights movement was adopted: the defamation action (Leval "'Strangers on a train', a review of Anthony Lewis *Make no law: the Sullivan case and the First Amendment* (1991)" 1993 *Mich LR* 1138–1157 1139). Numerous actions were brought against newspapers in the courts of Alabama by public officials of local government. These actions were invariably successful since, truth being the only defence available in the circumstances, it was easy to show that a report contained mistakes, however trivial and innocuous. The *New York Times* was a prime target and in all millions of dollars in damages were claimed.

In a full-page advertisement, headed "Heed their rising voices", which appeared in the *New York Times* of 2 March 1960, contributions were sought on behalf of the "Committee to defend Martin Luther King and the Struggle for Freedom in the South", and attention was drawn to the violent repression of peaceful demonstrations.

Lester B Sullivan, who was not mentioned in the advertisement, brought suit against the *New York Times* on the ground that the references to the actions of the police in the advertisement were defamatory of him as head of the Montgomery police. The advertisement contained a few trivial mistakes, but this was sufficient to render the defendant liable in terms of Alabama law.

Judgment was given for Sullivan and the jury awarded the full 500 000 dollars claimed. The decision was confirmed by the Supreme Court of Alabama. By the time the *Sullivan* case reached the Supreme Court of the United States of America, another plaintiff who claimed in respect of the same advertisement had been awarded a further 500 000 dollars, and several more judgments were pending.

Chief Justice Warren assigned the writing of the opinion to Justice Brennan. Though it was clear from the justices' first conference that the Alabama judgment would be set aside, Justice Brennan was faced with a task of extreme delicacy if he were to structure an opinion that would command a majority of the court – in the end his endeavours took him through a number of different approaches. (The genesis of the opinion and the negotiating process that occurred behind the scenes are traced by Lewis *op cit.*)

For a proper understanding the eventual opinion must be seen against the background of the problems that faced Justice Brennan. These included the following:

(a) The justices were in agreement that the judgment of the Alabama court should be set aside, but generally on the narrow ground of insufficient reference to the plaintiff in the advertisement. A finding on this basis would not have resolved the issues of principle raised by the case.

(b) Defamation (libel) is governed by state tort law and falls outside the scope of the First Amendment. Moreover, the Alabama court had found that the advertisement contained factual errors, and since this was a correct finding, the Supreme Court had no jurisdiction to intervene. The only way in which the Supreme Court could intervene, and prevent the Alabama verdicts in libel cases

from establishing censorship and effectively destroying press freedom, was to "read" the values embedded in the First Amendment into libel law (see Hall "Justice Brennan and cultural history: *New York Times v Sullivan* and its times" 1990/91 *Cal West LR* 340). Justice Brennan was, however, sensitive to the fact that such an expansion of constitutional principles into tort law might offend the deep commitment to federalism shared by several of the justices.

(c) A major problem was how to deal with the possibility of retrial in the Alabama courts should the judgment be vacated. A formulation had to be found which would prevent a state court, upon retrial, from paying ostensible heed to the opinion of the Supreme Court reversing the original judgment, but in the end arriving at exactly the same result as before.

The principal findings of the Supreme Court in *Sullivan* were prefaced by a statement of policy:

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Against this background the Supreme Court propounded a main "federal rule" and two ancillary rules. The federal rule

> "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard whether it was false or not".

The Supreme Court promulgated the two rules ancillary to the main rule for, had the case gone back to Alabama for retrial, the "actual malice" test would merely have raised a jury issue and a new jury might well have found that the *New York Times* had published with the requisite subjective awareness of falsity.

Anderson has pointed out (1991 *Univ Penn LR* 494 fn 18) that though it is not clear from the *Sullivan* decision itself that the ancillary rules were distinct rules in themselves, they soon emerged in subsequent decisions as important rules in their own right. The two ancillary rules are:

(a) "Actual malice" must be established with "convincing clarity" rather than by the usual preponderance-of-evidence standard in civil cases.

(b) Since the factual issue of "actual malice" was one upon which constitutional rights depended, the members of the Supreme Court must engage in independent review of a jury finding of actual malice to satisfy themselves that the evidence is constitutionally sufficient. Under this rule, the judges are empowered to overturn jury verdicts that under usual rules will have to be accepted.

It was not so much the "actual malice" rule that effected a decisive break with the English law of defamation, as the court's

> "demonstrated willingness to involve itself deeply in the administration of state libel law, to make sure that the preference for 'wide open, robust debate' was observed in practice as well as theory" (Anderson "An American perspective" in Dias and Markesinis *Tort law* (1989) 465).

The introduction of fault in the sense of a subjective state of mind (which is not a feature of the common law of defamation) on the part of a defendant has led to an increase in costs. The root of the costs problem is the massive amount of discovery that has been allowed in defamation cases since the ruling in *Herbert v Lando* 441 US 153 (1979). (See Hopkins *Actual malice: Twenty-five years after*

Times v Sullivan (1989) and the review by Wille 1991 *Mich LR* 1414–1420. It must also be kept in mind that discovery in the American civil process is a much more comprehensive, and a much more probing, penetrative and invasive process than in either English or South African law.) Once the spotlight is turned on the defendant's state of mind, the importance of investigating that state of mind assumes a new significance. The costs of such an investigation have become a major factor in defamation litigation, especially where the defendant is a newspaper or other media organ. The costs of discovery have escalated to the extent that the costs of litigation have become as much of an incentive to self-censorship as the common law rules ever were.

Subsequent to *Sullivan*, the Supreme Court introduced a further fault requirement in respect of private figures. In *Gertz v Welch* (1974) 418 US 323 it was held that the requisite standard in respect of private figures was that the plaintiff must show some sort of fault, at the minimum negligence, on the part of the defendant. The appropriate standard is left to the individual states to determine. The Supreme Court held, in the words of Justice Powell, that

> "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual".

The fault requirement was also extended to damages, the Supreme Court holding in *Gertz* that the states could not permit recovery of presumed or punitive damages unless liability was based on showing of knowledge of falsity or reckless disregard for truth. The law of defamation in the United States is, in the wake of *Sullivan* and *Gertz* and subsequent cases, characterised by a multiplicity of factors which dictate the rules applicable to a particular case.

The pros and the cons of *Sullivan* have been extensively debated (see the comprehensive discussion of all the problems by Anderson 1991 *Univ Penn LR* 487–554 which also contains references to the voluminous literature). We have already adverted to one such criticism, namely that it increases costs to the extent that it may encourage self-censorship. Other points of criticism are:

(a) The concept of "public official" has given rise to endless difficulties and anomalies – in *Curtis Publishing Co v Butts* 388 US 130 (1967) the *Sullivan* principle was extended to other so-called "public figures" to include one Wally Butts, a university athletic director accused of rigging football games.

(b) Confidentiality of sources has always been regarded as one of the pillars of the freedom of the press; *Sullivan* requires that a plaintiff may minutely investigate the editorial process. It was held in *Herbert v Lando supra* that in order to enable a plaintiff to satisfy the heavy burden of proof imposed by *Sullivan*, a plaintiff in a defamation case may inquire into the state of mind and the editorial processes of the defendant newspaper or broadcaster.

(c) *Sullivan* presents a pro-defendant bias rather than a compromise or balance between the competing interests (values) of reputation and free speech. This has been held to be the case by the Canadian Supreme Court in *Derrickson v Tomat* (1992) 88 DLR (4th) 401 and *Hill v Church of Scientology of Toronto supra*, and by the High Court of Australia in *Theophanous v Herald and Weekly Times Ltd supra* and *Stephens v West Australian Newspapers Ltd supra* (see also Schauer "Uncoupling free speech" 1992 *Col LR* 1321–1357; Kentridge "Freedom of speech: Is it the primary right?" 1996 *ICLQR* 253–270).

(d) The rule in *Sullivan* fails to make provision for the determination of the truth (at the end of litigation governed by *Sullivan* we still do not know the truth of the matter).

If, as counsel in *Du Plessis v De Klerk supra* and *Holomisa v Argus Newspapers Ltd supra* urged, the rules in *Sullivan* are to be imported into our law, a number of questions arise:

(a) Our law of defamation has hitherto made no distinction between different kinds of plaintiffs, such as between public figures and private persons, nor was such a distinction known to Roman-Dutch law or English law, the constituent elements of our common law. Will adoption of the *Sullivan* rules entail the importation into our law of the difficulties of classification experienced in the United States in the wake of *Sullivan*? In *Rivett-Carnac v Wiggins* 1997 2 *Juta's Digest* 8, Davis AJ adverted to the fact that the "plaintiff is not a public figure". It would seem that the phrase was not used in any "technical" sense.

(b) The "federal rule" enunciated in *Sullivan* imposes upon a public figure a heavy onus to prove fault on the part of a defendant newspaper or broadcaster. This is in contrast to the strict liability and heavy onus our law imposes on the printed and electronic media. As Kentridge AJ indicated in *Du Plessis v De Klerk supra* par 58, the strict liability of the media and the burden of proof imposed upon the defendant in a defamation action in our law are clearly issues which require reconsideration. While there seems to be little doubt that the strict liability of the media will be found to be in conflict with the values entrenched in the Constitution, it is less certain which way the eventual decision on onus will go. The decision on onus is, as was recognised by EM Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party supra* 591B–C dependent upon "the balance to be struck between various policy considerations".

(c) Do the proponents of the adoption of the *Sullivan* rules envisage, in respect of private figures, adoption of the rule in *Gertz v Welch supra* that the plaintiff must show some sort of fault, at the minimum negligence, but that the recovery of presumed or punitive damages cannot be allowed unless liability is based on showing of knowledge of falsity or reckless disregard for truth? Hitherto in our law *culpa* in the form of negligence has not been an element of defamation which is a delict of intent (*iniuria*) (see *Du Plessis v De Klerk supra* 883G (par 58) where it was pointed out that the solitary judgment to the contrary in *Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 562 (W) was overruled in *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A)). Moreover, although the term punitive damages is sometimes used, it does not have the technical significance in our law of damages which it has in English and American law.

(d) A final question is, how will the operation and efficacy of the *Sullivan* rules be affected if they were to be transplanted into a procedural environment in which discovery procedures are far less invasive that in the United States?

In *Du Plessis v De Klerk supra* it was held that, subject to certain reservations (set out in par 63), the development of the common law of defamation is primarily the task of the High Court and the Supreme Court of Appeal, and not that of the Constitutional Court. In his judgment (par 58) Kentridge AJ set out the "multitude of choices" available to the courts in the development of the common law of defamation. In terms of section 39(2) of the Constitution of the Republic of South Africa, Act 108 of 1996, the courts, when developing the common law, "must promote the spirit, purport, and objects of

the Bill of Rights". (The wording of s 35(2) of the interim Constitution was somewhat different: it provided that in the development of the common law, "a court shall have due regard to the spirit, purport and objects of this Chapter".) The courts must, therefore, ensure that the values embodied in the Bill of Rights "will permeate the common law in all its aspects" (par 58 of the *De Klerk* case).

Our law of defamation at present gives primacy to the value of reputation over that of freedom of speech and expression. For example, in *Argus Printing and Publishing Co Ltd v Esselen's Estate supra* 25C–E Corbett CJ said that

> "the right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed".

A similar approach was adopted by Eloff JP in *Bogoshi v National Media Ltd* 1996 3 SA 78 (W) 84E–F: "The right of free speech is subject to the right of a person . . . to preserve his reputation unblemished." There can be no doubt, as Cameron J stressed in *Holomisa v Argus Newspapers Ltd supra* 611D, that the primacy given to the value of reputation is difficult to reconcile with the importance which the Constitution attaches to the value of freedom of speech.

In contrast, the United States Supreme Court in *Sullivan* came down squarely on the side of freedom of expression. The approach adopted in *Sullivan* has not found universal approach in common law countries. It was, as has been pointed out at the beginning of this note, rejected by the Supreme Court of Canada in *Hill v Church of Scientology of Toronto* and adopted in strongly modified form by the High Court of Australia in *Theophanous v Herald and Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd*. In the Canadian case of *Derrickson v Tomat supra* 408, Wood AJ went so far as to say that the rule in *Sullivan* "destroys, rather than preserves, the delicate balance between freedom of expression and protection of reputation".

The delicate balance between freedom of expression and protection of reputation will be achieved in our law by careful evaluation of the rules of our common law against the background of the values entrenched in the Constitution, taking account

> "of the fact that our Constitution, like that of Germany but unlike that of the United States, expressly recognises the right to dignity and personal privacy" (Kentridge AJ in *Du Plessis v De Klerk supra* 885C (par 58)). It will not be achieved by simply taking over rules which emanate from a 'legal, social and political milieu' which differs radically from ours" (see *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party supra* 594G).

HJ ERASMUS
University of Stellenbosch

EKSTRATERRITORIALE JURISDIKSIE EN DIE DILEMMA VAN DIE INDIVIDU

Inleiding

Die individue in Suid-Afrika lewe deesdae in 'n samelewing van regte, werklik of gewaand. Die meeste burgers het 'n goeie idee waar hulle regte vandaan kom,

terwyl ander nie eintlik veel omgee oor die bron nie en eenvoudig alles eis wat op 'n bepaalde oomblik polities doelmatig lyk. Regsgeleerdes – veral dié in opleiding – sal as vertrekpunt die bron van regte in die Suid-Afrikaanse samelewing, hoofstuk 2 van die Grondwet van die Republiek van Suid-Afrika 108 van 1996, fynkam. Die Grondwet se handves van regte in hoofstuk 2 verskaf talle regte waarop individue geregtig is. Dit ontken ook nie die bestaan van ander regte wat deur die gemenereg, gewoontereg of wetgewing erken of verleen word nie (a 39(3)). Die regte in die Grondwet kan slegs deur "'n algemeen geldende regsvoorskrif beperk word" (a 36(1)) wat aan sekere voorwaardes voldoen. Die bepaling het betrekking op die aantasting van die bepaalde regte wat in die handves genoem word en nie dié waarvan die bestaan bloot nie ontken word nie.

Die Grondwet bepaal in artikel 237 dat alle grondwetlike verpligtinge getrou en sonder versuim nagekom moet word. Die vraag is of die bepaling betrekking het op die algemene plig van die individu om die reg van die land na te kom. Of het dit slegs betrekking op besondere verpligtinge wat in die Grondwet genoem word? Die Grondwet bepaal byvoorbeeld in artikel 232 dat volkeregtelike gewoontereg regskrag in die Republiek het tensy dit met die Grondwet of 'n parlementswet onbestaanbaar is. Ingevolge artikel 231(4) van die Grondwet kan ook internasionale ooreenkomste in sekere omstandighede soortgelyke regskrag in die Republiek verkry. Vloei dit hieruit voort dat daar 'n grondwetlike plig op die individu rus om die volkereg na te kom? Artikel 199(5) van die Grondwet bepaal byvoorbeeld uitdruklik dat die veiligheidsdienste moet optree ooreenkomstig die gewoonteregtelike volkereg en internasionale ooreenkomste. In hierdie geval het 'n mens duidelik met 'n grondwetlike verpligting te doen. Maar bestaan daar ook so 'n algemene verpligting uit die feit dat artikel 232 gewoonteregtelike volkereg deel van ons reg maak?

As 'n mens aanvaar dat dit slegs sin maak dat die howe gewoonteregtelike volkereg of verdrae in bepaalde gevalle kan toepas waar daar 'n individuele plig bestaan om die volkereg na te kom, ontstaan die vraag of hierdie plig slegs op die individu as staatsamptenaar rus en of dit 'n algemene plig is wat alle individue betrek. Word die algemene definisies van volkereg bekyk (sien bv Jennings en Watts *Oppenheim's International law* vol 1 (1992) §§ 1 7), is dit duidelik dat volkereg slegs in beperkte gevalle bindend op individue kan wees (sien bv Verdross en Simma *Universelles Völkerrecht; Theorie und Praxis* (1984) 1–7). Hierdie gevalle kom hoofsaaklik voor in die humanitêre reg en die reg van gewapende konflik (sien Jennings en Watts § 7; Brownlie *Principles of public international law* (1990) 37). Die reg op selfbeskikking kom ook individue in hulle volksverband toe en betrek gevolglik ook ander subjekte as slegs state (sien Booysen *Volkereg* (1989) 147 ev). In sekere gevalle kan individue ook menseregte verkry uit die volkereg wat teen hulle state afdwingbaar is (Jennings en Watts § 7). Ek is van mening dat die volkereg 'n wyer definisie as bloot 'n interstaatlike reg regverdig (sien bv Booysen "Völkerrecht als Vertragsstatut internationaler privatrechtlicher Verträge" 1995 *Rabels Zeitschrif* 245 ev, "Is international law relinquishing its exclusively public law nature?" 1997 *Tulsa J of Comp & Int L* 219 ev, *International transactions and the international law merchant* (1995) 27), maar selfs al word so 'n wye definisie aanvaar, is die volkereg van toepassing op individue 'n dispositiewe reg (sien Booysen *International transactions* 27, *Tulsa J of Comp & Int L* 226) en nie een uit 'n regsverpligting nie. Afgesien dus van die beperkte uitsonderings, kan aanvaar word dat gewoonteregtelike volkereg nie algemene pligte op individue lê nie.

Die implisiete grondwetlike verpligting dat die volkereg deur individue nagekom moet word, het dus betrekking op individue in hulle hoedanigheid as staatsamptenare. Hulle tree namens die staat op en aangesien die staat 'n subjek van die volkereg is, moet hulle ooreenkomstig die volkereg optree en nie in stryd daarmee nie. Verdrae kan natuurlik verpligtinge vir individue bevat en ingevolge die Grondwet se bepalings is individue verplig om sodanige verpligtinge in verdrae wat regskrag in die Suid-Afrikaanse reg het, na te kom. Behalwe vir sodanige gevalle, hoef 'n individu nie die bepalings van verdrae in die Suid-Afrikaanse reg na te kom nie.

Indien die individu in Suid-Afrika geen algemene plig het om die volkereg in Suid-Afrika na te kom behalwe in bogenoemde uitsonderingsgevalle nie, behoort hy ook nie die plig te hê om die wetgewing van ander lande na te kom nie. Die Suid-Afrikaanse howe gee nie effek aan ekstraterritoriale wetgewing van ander state nie (sien *Federation of Rhodesia v McFarland* 1965 1 SA 470 (W) 473; *Standard Bank of SA Ltd v Ocean Commodities Inc* 1980 2 SA 175 (T) 183 ev, 1983 1 SA 276 (A) 293). Sodanige plig kan net uit die volkereg ontstaan en nie *via* die vreemde reg nie. Vir doeleindes van die argument kan aanvaar word dat die individu geen ander geldige regsverbintenis soos burgerskap met die vreemde staat het nie.

Sou 'n mens wel die standpunt inneem dat daar ingevolge gewoonteregtelike volkereg en die Grondwet 'n algemene verpligting is dat individue die gewoonteregtelike volkereg in hulle alledaagse bestaan moet nakom, ontstaan die vraag of dit slegs op gebiedende bepalings van die volkereg betrekking het of ook op die magtigende bepalings. As gebiedende bepaling kan byvoorbeeld geneem word die bepaling dat 'n diplomaat se persoon in die geakkrediteerde staat nie geskend mag word nie (sien Jennings en Watts § 492). As magtigende bepaling kan byvoorbeeld genoem word dat state ekstraterritoriale wetgewing mag maak (sien Booysen *International transactions* 119 § 4 2 1). As 'n vreemde staat sy bevoegdheid ingevolge die volkereg uitoefen deur ekstraterritoriale wetgewing te verorden, is 'n individu in 'n ander staat volkeregtelik verplig om daardie wetgewing na te kom? Indien nie, hoekom laat die volkereg sodanige wetgewing toe? Indien wel, waaruit ontstaan hierdie verpligting? Hierdie aangeleentheid is een wat ongelukkig nie altyd behoorlik in die volkereg bespreek word nie.

Resente gevalle van ekstraterritoriale wetgewing en bevoegdheidsuitoefening

Twee gevalle waar ekstraterritoriale wetgewing en bevoegdheidsuitoefening ter sprake is, het die afgelope tyd bespreking in die ekonomiese pers en regstydskrifte ontlok. Die eerste geval het betrekking op die VSA se *Cuban Liberty and Democratic Solidarity (Libertad) Act* van 1996 (gepubliseer in 1996 *International Legal Materials* (*ILM*) 357), die sogenaamde Helms-Burton-wet en die tweeling daarvan, die *Iran and Libya Sanctions Act* van 1996, die sogenaamde D'Amato-wet (gepubliseer in 1996 *ILM* 1273). Die tweede geval het betrekking op die Europese Kommissie se reaksie op die Amerikaanse vliegtuigmaatskappy, Boeing, se oorname van die ander groot Amerikaanse vliegtuigmaatskappy, McDonnell-Douglas.

Die Helms-Burton-wet het as doel om internasionale sanksies teen Kuba te versterk, terwyl die D'Amato-wet betrekking het op sanksies teen Iran en Libië. Beide hierdie wette is aan intense kommentaar en kritiek in internasionale regstydskrifte onderwerp (sien bv Lowe "US extraterritorial jurisdiction: The

Helms-Burton and D'Amato Acts" 1997 *Int and Comp LQ* 379; Welke "GATT and NAFTA v the Helms-Burton Act: Has the United States violated multilateral agreements?" 1997 *Tulsa J of Comp & Int L* 361; Lowenfeld en Clagett "Agora: The Cuban Liberty and Democratic Solidarity (Libertad) Act" 1996 *American J of Int L* 419). Dit is nie die doel om óf die inhoud van hierdie wette óf die kritiek daarteen te bespreek nie. Slegs 'n enkele voorbeeld kan genoem word om die dilemma van die individu met hierdie soort wette te illustreer.

Die Helms-Burton-wet bepaal dat enige persoon wat handel (*traffics*) met eiendom wat deur Kuba gekonfiskeer is in of na 1959 aanspreeklik is teenoor enige burger van die VSA wat 'n reg op sodanige eiendom het (a 302(a)(1)). *Traffics* het volgens die wet 'n baie wye betekenis en omvat selfs die verkryging van enige voordeel uit gekonfiskeerde eiendom en die verkryging van 'n voordeel van 'n ander persoon wat sodanig handel (a 4(13)). Persone buite die VSA wat wettig handel dryf met Kubaanse goedere loop derhalwe die risiko om aanspreeklikheid op te doen ingevolge die wet se bepalings. Die Europese Unie (sien 1996 *ILM* 397 ev) en die Organisasie van Amerikaanse State (sien 1996 *ILM* 1322, veral 1332 ev) het die wye ekstraterritoriale effek van die wet as in stryd met die volkereg beskryf en daarteen beswaar gemaak. Die beswaar is hoofsaaklik daarop gegrond dat die VSA nie die gedrag van vreemdelinge buite die VSA kan reguleer in omstandighede waar nóg die vreemdeling nóg sy gedrag enige verbintenis met die VSA het nie (sien beswaar van die Organisasie van Amerikaanse State 1996 *ILM* 1333). Lande soos Kanada (sien 1997 *ILM* 111), Mexiko (1997 *ILM Materials* 133 ev) en dié van die Europese Unie (Raadsregulasie (EC) No 2271/96) in 1997 *ILM* 127 ev) het daarvoor voorsiening gemaak om die ekstraterritoriale effek van die Helms-Burton-wet in hulle onderskeie gebiede te blok en om die terugverhaal van vergoeding te reël wat in die VSA ingevolge die bepalings van die wet verkry is. Die VSA en die Europese Unie het ook 'n memorandum van ooreenkoms gesluit oor die toepassing, of liewers die nie-toepassing, van die twee Amerikaanse wette (sien 1997 *ILM* 529 ev).

In die tweede geval was dit weer die Europese Unie wat gedreig het om Boeing se oorname van McDonnell-Douglas te stop (sien *The Economist* 1997-07-26 61). 'n Mens behoort met reg te vra hoe dit moontlik is dat 'n oorname tussen twee Amerikaanse maatskappye in Amerika deur die Europese Unie stopgesit kan word. Die antwoord lê in die ekstraterritoriale effek van die Europese kompetisiemaatreëls (sien ook die artikel in *The Economist supra* 62). Die uiteinde van hierdie konflik was dat die Europese Kommissie wel die oorname erken het maar slegs nadat Boeing aan sekere voorwaardes voldoen het. Hierdie voorwaardes het hoofsaaklik betrekking op dit wat Boeing in die VSA moet doen. Boeing het onder meer onderneem om sekere van die kontrakte wat dit alreeds met lugrederye in die VSA gesluit het, nie af te dwing nie en om nie verder sodanige kontrakte te sluit nie (sien Dokument DN: IP/97/729 van 1997-07-30 met die titel "The Commission clears the merger between Boeing and McDonnell Douglas under conditions and obligations").

Die individu se dilemma

Uit bogenoemde twee voorbeelde blyk dit duidelik dat geen persoon aan die internasionale handel kan deelneem sonder om ten minste kennis te dra van ander lande se ekstraterritoriale wetgewing nie. Sodanige wetgewing kan geïgnoreer

word maar nie sonder groot risiko's nie. State probeer gewoonlik wel om hulle burgers wat die slagoffers van ekstraterritoriale wetgewing kan wees, te beskerm. Hierdie wetgewing het veral vir die individu die onaangename effek dat hy onder die dreigement van straf gedwing word om nie aan die ekstraterritoriale wetgewing van die ander staat effek te gee nie (sien bv die Europese Unie se Raadsregulasie *supra* a 5 en 9.) Vir die individu wat wel bereid is om ter wille van sy sakebelange aan ekstraterritoriale wetgewing te voldoen, is die beskermde wetgewing dus ook nie veel van 'n troos nie. Alle lande beskerm ook nie noodwendig hulle burgers teen die effek van ekstraterritoriale wetgewing nie.

Die reg se dilemma

'n Mens kan aanvaar dat die volkereg ekstraterritoriale wetgewing toelaat. Soos uit die twee voorbeelde blyk, bedien beide die VSA en die Europese Unie hulle van ekstraterritoriale wetgewing en so ook Mexiko en Kanada, die ander twee lande waarna hierbo verwys is (sien die verwysings *supra*). Die dispuut gaan natuurlik oor die trefwydte en toepassingsgebied van die verskillende wetgewende handelinge. Alle ekstraterritoriale wetgewing het egter die effek dat 'n individu se gedraginge in 'n ander staat daardeur geraak word. Die kernvraag vir doeleindes van hierdie aantekening raak die regsverpligting wat daar op die individu gelê word. Waar kom hierdie verpligting vandaan? Bestaan dit bloot omdat die volkereg ekstraterritoriale wetgewing toelaat? Die feit van die saak is dat Boeing nie ongesteurd sy internasionale handelsbedrywighede sou kon uitvoer as dit nie aan die Europese Kommissie se voorwaardes voldoen het nie.

Die debat oor die ekstraterritoriale wetgewing word gewoonlik op interstaatlike vlak gevoer (sien Gerber "The extraterritorial application of the German antitrust laws" 1983 *AJ of Int L* 754 veral 782; Meessen "Antitrust jurisdiction under customary international law" 1984 *AJ of Int L* 783 ev; Maier "Extraterritorial jurisdiction at a crossroads: an intersection between public and private international law" 1982 *AJ of Int L* 280 ev). In sy regverdiging van die Helms-Burton-wet bring Clagett (sien Lowenfeld en Clagett *supra* se debat oor die geldigheid van die wet) wel menseregte-oorwegings ter sprake. Volgens hom (sien 438) is die menseregte wat geskend word die privaat eiendomsregte van die persone wie se goedere deur Kuba gekonfiskeer is. Volgens hierdie argument beskerm die Helms-Burton-wet slegs die menseregte van individue wie se goedere gekonfiskeer is. Hiermee kan 'n mens baie simpatie hê. Die probleem is egter dat daar ook ander menseregte ter sprake kan wees, waaronder die reg dat 'n persoon nie aanspreeklik gehou kan word indien hy geen regsverpligting verbreek het nie. Internasionale menseregte-aktes erken wel die legitimiteitsbeginsel – *nulla poena sine lege* – in die geval van die strafreg, maar nie so uitdruklik in die geval van siviele aanspreeklikheid nie (sien bv a 15 van die Internasionale Handves van Burgerlike en Politieke Regte van 1966, 1967 *ILM* 368, asook a 11 van die Universele Deklarasie van Menseregte, Algemene Vergadering resolusie 217 van 1948). Aan die ander kant kan 'n mens wel menseregte uitwys wat geskend sal word indien 'n persoon gedwing sou word om vergoeding te betaal sonder dat hy enige regsverpligting verbreek het. Die voor-die-hand-liggende reg is natuurlik die arbitrêre ontneming van eiendomsreg (sien a 17 van die Universele Deklarasie *supra*).

Indien geargumenteer sou word dat die regsverpligting van die individu om ekstraterritoriale wetgewing na te kom uit die gebruik van state ontstaan, is hierdie een van die uitsonderingsgevalle waar die volkereg direk verpligtinge vir

die individu inhou ten spyte van die feit dat dit nie as sodanig in volkeregh-handboeke uiteengesit word nie. Die vraag sal dan nog steeds ontstaan of sodanig verpligting te versoen is met die algemene beginsels van die volkereg en selfs met die normale beginsels van geregtigheid wat vermoedelik in die meeste munisipale regstelsels geld. 'n Mens sal dan hier moet werk met 'n regsverpligting wat gebaseer is op 'n *renvoi*. Die volkereg lê wel die verpligting op maar die inhoud daarvan kan slegs vasgestel word deur te gaan kyk na verskillende (alle) nasionale regstelsels. So gesien, het 'n mens te doen met 'n regsverpligting wat na alle waarskynlikheid nie op grond van die beginsels van reg en billikheid geregverdig kan word nie.

'n Mens sou ook kon argumenteer dat indien die verpligting om ekstraterritoriale wetgewing na te kom deur die volkereg opgelê word, die Suid-Afrikaanse howe se standpunt dat hulle nie ekstraterritoriale wetgewing in ag neem nie, hersien behoort te word. Omdat die howe volgens die Grondwet volkereg moet toepas, behoort hulle ook ekstraterritoriale wetgewing in ag te neem. Dit is slegs in daardie gevalle waar die bepaalde ekstraterritoriale wetgewing die volkeregtelike grense van toelaatbaarheid skend dat sodanige wetgewing, volgens hierdie argument, nie in ag geneem behoort te word nie.

Sou 'n mens argumenteer dat die volkereg geen regsverpligting op die individu lê om ekstraterritoriale wetgewing na te kom nie, ontstaan die vraag hoe versoenbaar ekstraterritoriale wetgewing werklik is met die regte van die individu wat in 'n ander staat woonagtig is en verpligtinge opgelê kan word waarvan hy nie weet nie en waaraan hy nie werklik juridies gebonde is nie, maar waarvoor hy tog gestraf kan word sou hy dit ignoreer. Hierdie aspek behoort meer aandag te kry in Westerse state wat die gebruik volg om ekstraterritoriale wetgewing te verorden veral aangesien hulle ook menseregte erken.

HERCULES BOOYSEN
Universiteit van Suid-Afrika

INTRODUCTORY NOTES ON LIMITED LIABILITY COMPANIES

1 Introduction

The introduction of the limited liability company (hereafter LLC) and the limited liability partnership (hereafter LLP) in the United States of America, has evoked much interest in South Africa as well and merits closer inspection.

The LLC is a legal entity separate from its members (Lederman "Miami device: The Florida limited liability company" 1989 *The Tax Magazine* 340; Kalinka "The limited liability company and subchapters: classification issues revisited" 1992 *Cincinnati LR* 1089) and is a creature of statute (Geu "Understanding the limited liability company: A basic comparative primer" 1992 *South Dakota LR* 45; Bryant "Georgia's new Limited Liability Company Act" 1993 *Georgia State Bar J* 62; Giovagnoli "Missouri Limited liability companies: An innovative and developing business choice" 1995 *Univ of Missouri-Kansas City LR* 701: Goforth "Why limited liability company membership interests

should not be treated as securities and possible steps to encourage this result" 1994 *Hastings LJ* 1229). The LLC is neither a partnership nor a corporation (Giovagnoli 701), but the LLC can be regarded as a partnership for tax purposes and a corporation for non-tax legal purposes. The LLP is a form of an unincorporated entity that can be used only by licensed professionals (Anon "NY passes LLC/LLP Bill" 1994 *The CPA Journal* 8) where the general partners are given the ability to limit their personal liability for certain obligations of the partnership (Mellen and Myre "Limited liability companies and registered limited liability partnerships in Kentucky: a practical analysis" 1995 *Northern Kentucky LR* 233). This contribution is limited to the LLC.

2 Historical background

The first LLC legislation was passed in Wyoming (Wyo Stat s 17–15–113 (1977)) in 1977 (Steinberg and Conway "The limited liability company as a security" 1992 *Pepperdine LR* 1105; Sargent "Are limited liability company interests securities?" 1992 *Pepperdine LR* 1072; Geu 45; Kalinka 1084; Bryans and Shields "Registered limited liability partnerships for the practice of law in Pennsylvania" 1995 *Penn Bar Ass Q* 79 fn 2; Goforth 1225). The Wyoming legislature enacted the LLC statute to achieve a lower tax burden than the corporate form and to provide the protection of limited liability that a partnership failed to offer (Giovagnoli 702).

Florida adopted the Florida Limited Liability Company Act five years later (Geu 45; Kalinka 1084; Ginocchi and Taylor "How 'limited' is Pennsylvania's Limited Liability Company Act?" 1995 *Duquesne LR* 615). Florida enacted the LLC statute in the hope of drawing more capital into the state (Giovagnoli 702).

Although the LLC had many advantages, it did not flourish in Wyoming or Florida (Giovagnoli 702) and relatively few other states adopted this concept until 1988 when the Internal Revenue Services (IRS) ruled that a Wyoming LLC would be treated as a partnership for tax purposes. Between 1988 and 1990, the IRS issued a single revenue ruling and a short series of private letter rulings that classified LLCs as partnerships. These rulings encouraged greater use of existing LLC statutes and the enactment of similar statutes in other jurisdictions (Sargent 1070; Geu 45 49; Kalinka 1083; Bryans and Shields 79 fn 2; Bryant "Georgia's new Limited Liability Company Act" 1993 *Georgia State Bar J* 62; Ginocchi and Taylor 613 615; Giovagnoli 701; Goforth 1225). In 1990, Kansas and Colorado adopted LLC statutes and in 1991, Virginia, Texas, Nevada and Utah all enacted LLC laws (Geu 45). By 1992 eight states had enacted LLC statutes (Sargent 1070; Geu 45) and LLC legislation was pending in approximately fifteen other states (Sargent 1070; see also Parker "Corporate benefits without corporate taxation: Limited liability companies and limited partnership solutions to the choice of entity dilemma" 1992 *San Diego LR* 459 fn 287). Even the National Conference of Commissioners on Uniform State Laws established a study group to determine the advisability of drafting a uniform act for adoption by the states (Geu 46).

Between 1992 and 1994 nearly forty states adopted LLC legislation (Martin "Expanded flexibility for Ohio businesses and professionals" 1994 *The Ohio CPA* 11) and by 1995 forty-seven states and the District of Columbia had adopted LLC statutes, while the three remaining jurisdictions had bills pending to adopt LLC acts (Sider "Self-employment tax rules may exclude some LLC members" 1995 *Taxation for Accountants* 132). Since then all US jurisdictions

except Hawaii have passed LLC statutes (Mellen and Myre 233; Ribstein "The emergence of the limited liability company" 1995 *The Business Lawyer* 1).

LLCs have generated a tremendous amount of interest nationwide in the USA (Bader "Organisation, operation, and termination of North Dakota and Minnesota limited liability companies" 1994 *North Dakota LR* 591) and are quickly becoming the organisation of choice (Giovagnoli 701).

3 Basic characteristics and advantages of an LLC

The LLC is a unique and relatively new form of business organisation created by statute (Geu 45; Bryant 62; Giovagnoli 701; Goforth 1229; Mellen and Myre 235). The LLC is neither a partnership nor a corporation (Giovagnoli 701); however, the LLC has both corporate and partnership-like characteristics (Kalinka 1087; Ginocchi and Taylor 616; Giovagnoli 703; Goforth 1223; Guest "Limited liability company: Oklahoma's Limited Liability Company Act: concerns, considerations, and conclusions" 1993 *Oklahoma LR* 349). An LLC is a separate legal entity distinct from its members and has full power to conduct business in its own name (Lederman 340; Kalinka 1089). The LLC can sue and be sued in its own name (Kalinka 1089).

The LLC as an alternative form of business combines the advantages of a corporation's limited liability with, if properly organised, the benefits of a partnership's flow-through of income to its members (Steinberg and Conway 1105; Sider 132; Martin 10; Geu 45; Kalinka 1103; Goforth 1223), while providing more flexibility than either (Martin 10). The LLC offers its equity investors protection for obligations of the entity (Lederman 339). The two key features are therefore that members enjoy insulation from personal liability and that the LLC may be taxed as flow-through entities, similar to partnerships (Sider 132; Martin 10; Kalinka 1083). Other forms of business organisations, such as S corporations and limited partnerships with a corporate general partner, offer the same combination of advantages, but LLCs do so while avoiding the problems inherent in the other pass-through entities. For example, the LLC is not subject to the restrictions and requirements imposed on the S corporation (Giovagnoli 709), like strict rules on ownership and capital maintenance (Bryant 62).

The IRS ruled that an LLC can be classified as a partnership for federal income tax purposes, avoid federal corporate-level tax and pass through profits and losses to its members. The basic tax benefit is therefore that the income of the LLC is taxed only once (Kalinka 1085). An LLC has no limitation on eligibility of equity investors and because the tax basis in the membership interest of a member of an LLC includes his share of the LLC's liabilities, a potentially larger basis for the pass-through of tax losses exists (Lederman 339).

The IRS considers four basic factors when determining whether an LLC will be treated as a partnership for income tax purposes, namely limited liability, continuity of life, free transferability of interest and centralised management (Martin 12; see also Steinberg and Conway 1105; Geu 48; Bader 489; Goforth 1235). An LLC must possess no more than two of these characteristics to be treated as a partnership (Martin 12; Goforth 1235).

The regulations of the Treasury Department provide that an organisation has limited liability if there is no member who is personally liable for the debts of the organisation (Treasury Regulation s 301.7701–2(d)(1) (1993); Bader 589).

All LLCs by nature possess limited liability. Therefore an LLC must lack two of the remaining characteristics in order to ensure partnership status (Martin 12).

The Treasury Department regulations provide that the characteristic of life exists when the entity continues to exist after the death, insanity, bankruptcy, retirement, resignation or expulsion of one or more of its members (Treasury Regulation s 301.7701–2(b)(1) (1993); Bader 589; Goforth 1235).

Centralisation may or may not be present in an LLC. Centralisation of management requires the concentration of continuing exclusive authority of any person or persons to make management decisions necessary to conduct the business of the organisation without the approval of other members (Treasury Regulation s 301.7701–2(c)(1) (1993); Bader 589; Goforth 1236).

Furthermore, the regulations of the Treasury Department provide that an organisation has free transferability of interests if those members owning substantially all of the interests in the organisation have the power to substitute a person who is not a member as a member of the organisation without the consent of the other members (Treasury Regulation s 301.7701–2(e)(1) (1993); Bader 589).

The flexibility of the LLC as a form of business deserves particular emphasis (Sargent 1074). LLCs have a flexible capital structure and profit and loss allocation similar to general partnerships (Ginocchi and Taylor 613). The LLC legislation contains no rules governing the issuance of ownership interest, the creation of classes or series of interest, or the allocation of equity contributions to stated capital or capital surplus accounts. There are no statutory rules governing differential treatment of holders of the same class or series of interest as there are under corporation statutes. All the essential elements of the capital structure of the LLC are therèfore to be determined by the members in the operating document (Sargent 1074). Furthermore, the LLC statutes abandon the corporation statutes' mandatory hierarchy of shareholders, directors and officers (*ibid*). An LLC, as a non-corporate business, is therefore not subject to the mandatory provisions of corporate statutes that require boards of directors, officers and related corporate formalities (Ginocchi 613). The statutes also allow the owners of the business to use the operating agreement to set up the management of the LLC in a manner far less restrictive than would be permitted by the corporation statutes (Sargent 1075).

The unique ability of the LLC to combine limited liability for all with the flexibility of partnership taxation, also make it an appealing option for professionals, mainly because of limited liability for all members regardless of their participation in management. The real estate industry is also finding the LLC useful. The LLC gives real estate ventures the advantage that all owners may participate in management as well as limited liability (Bader 591).

4 Formation of an LLC

An LLC may be organised for any lawful purpose (Lederman 340). Certain types of business may be restricted or prohibited by state statute from operating as an LLC; in Minnesota, for example, an LLC may not engage in farming (Bader 591–592). In California and Wyoming, banking and insurance industries are prohibited from operating as LLCs (Ginocchi and Taylor 617).

Some statutes limit the duration of the LLC to 30 years (eg, Col Rev Stat Ann s 7–80–204(1)(b) (1991); Fla Stat Ann s 608.407(1)(b) (1992); Kan Stat Ann

s 17–7605 (1991); Nevada Rev Stat 2 86.290(b) (1991); Wyo Stat s 17–15–107(a)(ii) (1977); Sargent 1074; Lederman 340). Numerous LLC statutes (Col Rev Stat Ann s 7–80–102(7) (1991); Fla Stat Ann s 608.405 (1992); Kan Stat Ann s 17–7605 (1991); Nevada Rev Stat s 86.151 (1991); Utah Code Ann s 48–2b–103 (1991); Va Code Ann s 13.1–1002 (1992); Wyo Stat s 17–15–106 (1977)) require two or more members (persons) to form an LLC (Steinberg and Conway 1109; Martin 11; Ginocchi and Taylor 617). There is no maximum limit to the number of members in an LLC (Kalinka 1093). The persons who form the LLC may be individuals as in Wyoming (Wy Stat 17–15–106 (1977)), partnerships (both general and limited), limited liability companies, corporations, trusts, business trusts, real estate trusts, estates and other associations (Geu 57). However, the Colorado statute (Colo Rev Stat s 7–80–203 (1991)) provides that an LLC may be organised by one or more natural persons eighteen years of age or older (Geu 58), and the legislation in Virginia (Va Code Ann S 13.1–1002 (1992)) and Texas (Tex Sess Law Serv 102(4) (1991)) allows one or more persons to form an LLC (Geu 58). According to Geu, there appears to be significant risk in establishing LLCs with only one member under existing statutes. The requirement of at least two members is more closely analogous to general partnership law than corporate law (Geu 59).

LLCs do not have general or limited members (Sider 132). Each contributor to an LLC shares a common interest in the success and profitability of the LLC (Steinberg and Conway 1108–9). Members can contribute cash, property and services to the LLC in return for their membership interests (Goforth 1232). Two LLC statutes (Florida and Wyoming: Fla Stat Ann s 608.4211 (1992); Wyo Stat s 17–15–115 (1977)) exclude services as a valid form of contribution to an LLC (Steinberg and Conway 1108). The title to real and personal property owned by an LLC is held and conveyed in the LLC's name (Geu 85).

Members acquire an interest in an LLC by contributing capital. The LLC statutes contain no rules governing the issuance of ownership interests, or the allocation of equity contributions to stated capital or surplus accounts. There are also no statutory rules concerning differential treatment of holders of the same class or series of interest as there are under the corporation statutes (Ginocchi and Taylor 619–620). The capital structure is determined by the parties in their operating agreement and, because of its flexibility, makes LLCs attractive to investors. The means for allocating profits and losses varies among the different state statutes. Distribution to the members is usually determined by the proportionate share of membership ownership or equally among the members (Ginocchi and Taylor 620).

An LLC is formed by the filing with the Secretary of the State (Ginocchi and Taylor 616) of "articles of organisation" (Goforth 1231) which are similar to a corporation's articles of incorporation or a limited partnership certificate and include information such as the name of the LLC; the address from where copies of the operating agreement and the bylaws of the LLC may be requested (Martin 11); the duration and purpose of the LLC; the place of business and agent; initial contribution; future contributions; policy on admitting new members; potential continuation upon a member's withdrawal; management; and other discretionary provisions desired (Lederman 340; Kalinka 1090). However, the contents of the articles of organisation vary among the statutes of the various states (Geu 56). An LLC is deemed to be organised either upon the members' endorsement of the

articles, upon filing of the articles or upon the issuance of a certificate of organisation by the Secretary of State (Ginocchi and Taylor 616).

The name of the LLC must indicate that the liability of its members is limited. The name of the LLC must therefore include the words "limited liability company", "Limited", or abbreviations "LP", "LC" or "Ltd" (Martin 11; Kalinka 1090). In some states omission may render any person who participates or acquiesces in the omission personally liable for any loss occasioned by the omission or may even render all members personally liable (Lederman 340; Ginocchi and Taylor 617).

5 Management of an LLC

The LLC is composed of members (Ginocchi and Taylor 618) and the management of an LLC is vested in the members, unless the members have agreed otherwise (Parker 460). LLCs do not have general or limited members. The interests of the members of an LLC are characterised as personal property in the LLC (Ginocchi and Taylor 618). All members have equal rights and privileges and may elect to retain authority to operate and bind the LLC (Parker 470; Sider 132), like general partners, or may elect to have the LLC run by a manager (Sider 132).

The members may enter into an operating agreement in order to regulate the conduct of the business of the LLC and the relations of members of the LLC. The operating agreement may be written or oral and is subject to amendment. The operating agreement generally provides for capital contribution obligations and remedies for default; management authority and compensation; allocations and distributions to its members; transferability of interests; and dissolution provisions (Ginocchi and Taylor 618).

There are mainly two forms of management provisions in the LLC statutes. The basic form, which appears in the majority of the states, simply states that unless the articles vest management in managers, management is vested in the members. The members may therefore choose to give up management power by electing the managers to their position. Unless otherwise provided for by the articles, management powers are vested in the members of the LLC in proportion to their contributions to capital. This differs from the typical partnership statute which provides that all partners should have equal voting and management powers. The managers derive their responsibilities from the members as delineated in the operating agreement. Thus the members control the extent of power of the managers (Ginocchi and Taylor 619).

Both managers and members are responsible for the general fiduciary duties arising from the agency relationship. Some statutes require the managers of the LLC to act in good faith (Conn Gen Stat s 7–80–101 (1994); Ginocchi and Taylor 619) or without gross negligence (NJ Stat Ann s 42:2B–30 (1994); Ginocchi and Taylor 619), while other statutes do provide for a standard of conduct (eg Del Code Ann Title 6 s 18–306 and 18–405; Ginocchi and Taylor 619).

Most LLCs are governed by an operating agreement (Martin 11) and the articles of organisation (Geu 63). The operating agreement is an agreement of the members on the affairs of the LLC and the conduct of its business. The operating agreement is similar to the bylaws of a corporation (Kalinka 1091).

Where the management of the LLC is vested in its members, the management structure is like that of a partnership. Each member can therefore bind the LLC when acting with apparent authority in carrying on the business of the LLC (Kalinka 1099). State acts vary in regard to whether the managers must also be members (Sider 132).

The internal affairs of the LLC are managed in accordance with either the statutory default rules or with an operating agreement or internal regulations agreed upon by the members (Goforth 1232).

6 Limited liability

Limited liability is imposed on members of an LLC although the members may retain complete control and management of the business (Geu 50). The LLC is also, unlike the limited partnership, not required to have any "general partner" or member who is personally liable (Geu 52). Unlike general partners, the members of an LLC have a shareholder-type limited liability (Sargent 1073).

When the owners of an entity have limited liability, creditors may look only to the entity's assets rather than to the owners' personal assets. The owners' liability for the debts of the entity is restricted to their investment in the entity (Ginocchi and Taylor 620).

The enactments of the various states imposing limited liability on members are significantly similar (Geu 50). The Wyoming (Wyo Stat s 17–15–113 (1977)) provision that neither the members of a limited liability company nor the managers of a limited liability company managed by a manager or managers are liable under any judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company, was also adopted by Florida (Fla Stat Ann s 608.436 (1992); Geu 50) and Kansas (Kan Stat Ann s 17–7620 (1991); Geu 50).

The statutes of Colorado (Colo Rev Stat s 7–80–705 (1991)) and Nevada (1991 Nev Stat 310) are basically the same as that of Wyoming, but are couched in positive rather than negative terms (Geu 50).

The Colorado Act states that the members and managers of limited liability companies are not liable under a judgment, decree, or order of court, or in any other matter, for a debt, obligation, or liability of the limited liability company (Colo Rev Stat s 7–80–705 (1991); Geu 51).

The Nevada Act states that the members of a limited liability company and the managers of a limited liability company managed by a manager or managers are not liable under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the company (1991 Nev Stat 310; Geu 51).

According to Geu, the basic statutory provisions imposing limited liability are basically similar to those found in both the Model Business Corporation Act and the Revised Uniform Limited Partnership Act to limit the liability of shareholders and limited partnerships respectively (Geu 51). However, the members of an LLC may be held jointly and severally liable if they "assume to act as a limited liability company without the authority to do so" (Wyo Stat s 17–15–133 (1977); Fla Stat s 608.437 (1992); Kan Stat Ann s 17–7621 (1991); Utah Code Ann s 48–2b–110 (1991); Geu 53).

There are several exceptions to limited liability. For example, a member is personally liable to the LLC if that member has failed to make the initial contribution set forth in the articles. Where the articles provide for further contributions,

the members are personally liable to the LLC to make the contributions as stipulated in the articles. A member is also personally liable to the LLC to restore distributions made to him while the LLC's liabilities exceed the LLC's assets (Lederman 341–342).

7 Conclusion

Clearly, the LLC is a tax-driven innovation. Whether it will last into the next century as such, is an open question. Nevertheless, the development of the LLC and its attendant legislation is proof of American lawyers' dynamic ability to adapt existing concepts and principles to maximise opportunities to meet the needs of their clients and to create new forms of business enterprises in the process. This creativity should set a shining example for South African law reformers.

E SNYMAN
JJ HENNING
Centre for Business Law, University of the Free State

It is obvious that to postulate a normal, balanced, orthodox, reasonable South African is a task of great complexity. We have 11 official languages. Our nation consists of a great number of ethnic groups with different cultures. Recognition is given to freedom of religion and a number of religions are practised by sizeable numbers of people. Is the average South African of the Protestant, Catholic, Muslim or Buddhist faith or is he or she perhaps an atheist or does he or she believe in forefather spirits? Of what culture group is the average South African? What language does he or she speak? Is the average South African black, coloured or white? If it is asked how the description of the average South African can become relevant, it must be borne in mind that the words complained of were broadcast on national television (per Hartzenberg J in *Mangope v Asmal* 1997 4 SA 277 (T) 285).

VONNISSE

SALES AFTER THE CESSATION OF TRADE AND THE INHERENT ANOMALY IN THE GENERAL DEDUCTION FORMULA OF THE INCOME TAX ACT

Robin Consolidated Industries Ltd v Commissioner for Inland Revenue 1997 3 SA 654 (SCA)

1 Introduction

The judgment in the *Robin* case was delivered two and a half years after that in *Conshu (Pty) Ltd v Commissioner for Inland Revenue* 1994 4 SA 603 (A). The utilisation of an assessed loss by a company formed the subject of the dispute in both cases. The judgment of the Supreme Court of Appeal in the *Robin* case will undoubtedly, however, be of interest to a wide range of taxpayers other than companies wishing to utilise an assessed loss. The judgment not only confirms some of the principles governing the use of assessed losses, but also provides valuable pointers to what constitutes the carrying on of a trade. The outcome of the case also raises the issue of the tax treatment of expenditure incurred in the production of non-trade income. The facts before the court illustrate, finally, a misconception common among taxpayers about what must be reflected as trading stock on hand for purposes of section 22 of the Income Tax Act 58 of 1962 (the Act).

2 The background to the dispute

By 1986 Robin had become insolvent and was running at a loss. Provisional liquidation followed during its 1987 tax year (namely on 16 September 1986). The creditors thereupon resolved to sell its business as a going concern. The liquidators continued to trade up to 30 September 1986 in order to keep the business going long enough for it to be sold as a going concern. The eventual sale of the business took effect from 1 October 1986. It was a lock, stock and barrel sale which included all stock reflected by Robin as stock on hand. Stock in transit or in a bonded or state warehouse remained, however, Robin's property.

The creditors did not wish Robin to continue trading after the sale of its business because of the possible losses that could then be incurred. The stock in transit was deflected from becoming stock on hand – the goods were either not accepted or returned. The liquidators also decided not to incur any expense in order to take delivery of the stock in bond in order to avoid the possibility of incurring a further loss. The stock in bond was sold by means of two sales during Robin's 1988 tax year. The buyers involved had to pay all charges necessary to have the goods cleared from bond.

Robin contended that the two sales constituted trading during its 1988 tax year and that it was therefore entitled to carry forward its assessed losses accumulated prior to that year to later years. It contended, alternatively, that section 20(1) entitled it to carry forward its assessed loss to later tax years even though it neither traded nor earned an income from trade during the 1988 tax year.

3 The meaning of "trade"

The court first considered the question whether the two sales by Robin during its 1988 tax year constituted the carrying on of a trade. The court (662B–E) accepted, in principle, the following arguments in this regard: The definition of "trade" in section 1 of the Act should be given a wide interpretation. It is possible for even a single transaction, and in special circumstances, for resale at a loss to constitute trading. The activities of a taxpayer must be viewed in their context and not in isolation. They must be characterised with reference to the taxpayer's scheme or venture as a whole, even if it straddles more than one tax year. A retailer may, for example, trade and keep his or her doors open for nine years, but commence to wind up the business and sell its assets as from the beginning of the tenth year. Schutz JA (662F–H) continued:

> "On those bare facts the proceeds of the stock sales would constitute gross income . . . But for the cost price of that stock (if incorporated in an assessed loss) to be deductible, it would be necessary that the sales be characterised as carrying on a trade. The submission is that that characterisation should be made, and on those simple hypothetical facts I would agree."

It was argued on behalf of Robin that the position would be no different if the winding up of the business in year ten was the result of a liquidation and the sale of assets was controlled by a liquidator. The court accepted this argument only in respect of the sales effected by the liquidators between the date of Robin's provisional liquidation and the effective date of the sale of its business. In assessing the status of the two sales effected after that, the court referred to the English case of *J&R O'Kane & Co v The Commissioners of Inland Revenue* 12 TC 303 (HL) and to *ITC 172* (1930) 5 SATC 171. Both cases concerned the sale of trading stock in pursuance of the closing down or liquidation of the taxpayer's business. Neither, however, involved the sale of the business as a going concern. In *O'Kane* a circular was sent to customers offering the stock (consisting of wine and spirits) for sale. The sales differed in only two respects from the taxpayer's previous sales, namely the fact that the casks containing the trading stock were included in each sale, and the fact that customers could not take delivery direct from the taxpayer, but had themselves to clear the stock from bond. It was, so far as the external world was concerned, the ordinary method of carrying on trade modified only by those two arrangements. The court therefore came to the conclusion that those transactions amounted to trading. This decision was followed in *ITC 172* which involved the liquidation of a real estate company. The company's trading stock was disposed of gradually over a period of three years on the same terms and conditions as prior to the company's liquidation. The conclusion was the same as in the *O'Kane* case, namely that the taxpayer's conduct amounted to the carrying on of its business or trade.

Turning to the two sales of the stock in bond by Robin in the 1988 tax year, the court pointed to the marked differences between those sales and the circumstances in which the stock was sold in *ITC 172* and the *O'Kane* case as well as the differences between those sales and the post-liquidation sales of trading stock prior to the sale of Robin's business as a going concern. The stock in bond was

not sold over the counter to the general public. The manner of effecting the sales in bond differed materially from Robin's method of operation in the past (661H–I). Schutz JA (664B–G) continued:

> "The creditors had decided to bring an end to trading as soon as this could be advantageously done . . . [After the sale of the business as a going concern] no new trading venture was commenced – certainly no trading venture in any ordinary sense. A decision was taken . . . not to incur any expense in order to take delivery of the stock in bond . . . There was no venture into trading in the ordinary way – by the acquisition and holding of stock in the hope of reselling it at a profit whilst accepting the risk of loss . . . [T]he stock in bond was kept at a distance, and the opportunity was offered to others to make a profit and risk a loss.
>
> It seems to me that the only possible escape from the conclusion that these activities did not constitute trade is [the proposition] . . . that it is in the normal course of trading *for a liquidator* to sell off assets in bulk . . . [This would equate] trade and realisation, which are normally viewed as different, sometimes even opposed, concepts . . . An *indicium*, it is no more, of trading is the replenishment of stock. There was none of that here. Rather, . . . steps were taken to see that Robin did not receive stocks already destined for it, the stocks in transit and in bond. The disposal of the stock in bond was . . . designed to allow others to trade in that stock and release Robin from the risks entailed in doing so itself."

The court therefore concluded that the two transactions did not constitute the carrying on of trade.

4 The interpretation of section 20(1) of the Act

Robin's alternative argument entailed, in the words of the court (664H), a frontal assault on the rule in *SA Bazaars (Pty) Ltd v Commissioner for Inland Revenue* 1952 4 SA 505 (A) as interpreted in *New Urban Properties Ltd v Secretary for Inland Revenue* 1966 1 SA 217 (A). The set-off of a balance of assessed loss is, in terms of *SA Bazaars*, admissible only against income derived from trade and where the balance of assessed loss has been carried forward from the preceding year. Past assessed losses may, therefore, only be carried forward to a specific tax year if a new balance of assessed loss was struck in the immediately preceding year. The provision envisages, according to *New Urban Properties*, a continuity in setting off an assessed loss in every tax year succeeding that in which it was originally incurred. Any interruption of this continuity, for example where a company carries on no trade at all during a tax year, or where the use of an assessed loss is prevented under section 103(2), will result in the forfeiture of a company's assessed loss.

Robin submitted that the judgments in *SA Bazaars* and *New Urban Properties* as well as the relevant remarks to the same effect in *Conshu* were clearly wrong and should not be followed by the court. It argued that there was nothing in the language of section 20(1) suggesting that a new balance of assessed loss has to be struck every tax year, and that it did not preclude the same balance simply being carried forward from year to year. Robin was, on this view, therefore, entitled to carry forward its assessed loss accumulated prior to its 1988 tax year to future tax years even though no new balance of assessed loss was struck during 1988 due to the lack of any trading activities during that year. The court responded to this argument as follows (666C–E):

> "Involving as it does the altering of plain words, the attribution of excessive tautology to the Legislature and a failure to read the words as they are, this part of Robin's argument falls short of demonstrating that the construction adopted in the two cases is wrong: even less, clearly wrong. In fact I think that it is correct."

The court's confirmation of the rule in *SA Bazaars* meant that Robin's appeal had to fail, as no new balance of assessed loss was struck during the 1988 tax year. Robin also conceded (666I–J) that the proposition that an assessed loss may only be set off against income derived from trade was properly derived from section 20. The fact that Robin did not carry on a trade in the 1988 tax year was therefore an added ground for the failure of the appeal. Robin therefore lost the benefit of any deduction in respect of the expenditure and losses incorporated in its assessed loss.

5 An evaluation of some aspects of the case

5 1 The principles governing the utilisation of assessed losses by companies

The court's confirmation of the rule in *SA Bazaars* is not surprising. The wording of section 20(1) supports the view that it envisages a continuity in setting off an assessed loss in every year succeeding that in which it was originally incurred. There is also the added factor that businessmen and the revenue authorities have for 45 years been ordering their affairs on the assumption that the *SA Bazaars* case laid down the law. The court pointed out (666H–I) that "[t]here has been no material change in the context in which the rule in that case operates, so that this would have been a case in which this Court would have been especially slow to depart from its earlier decision".

The outcome of the case provides a good illustration of the effect of the application of the rule in *SA Bazaars*. The absence of any trading activity in the 1988 tax year resulted in the forfeiture of Robin's assessed loss carried forward from the preceding year, thereby rendering ineffective the attempt to preserve Robin's assessed loss by means of an elaborate scheme of arrangement with its creditors (*Ex parte Kaplan: In re Robin Consolidated Industries Ltd* 1987 3 SA 413 (W); *Ex parte Millman: In re Multi-Bou (Pty) Ltd* 1987 4 SA 405 (C) 408E–409J; *Ex parte Strydom: In re Central Plumbing Works (Natal) (Pty) Ltd; Ex parte Spendiff: In re Candida Footwear Manufacturers (Pty) Ltd; Ex parte Spendiff: In re Jerseytex (Pty) Ltd* 1988 1 SA 616 (D) 618G–619B). Even a temporary closure of a company's business for a full tax year will result in the forfeiture of its assessed loss, as it will be regarded as not carrying on a trade as long as it keeps its business closed (*SA Bazaars* 510G–H). This is clearly an oppressive result where the company intends to resume business again in a later tax year. The distinction in this regard between companies and persons other than companies may, as I have suggested elsewhere ("The utilisation of assessed losses by companies – a reappraisal after *Conshu (Pty) Ltd v Commissioner for Inland Revenue*" 1996 *SA Merc LJ* 133), be open to constitutional attack.

The judgment in *Timberfellers (Pty) Ltd v Commissioner for Inland Revenue* 59 SATC 153 157–159 162–165 affords another recent example of the need for a company to continue trading for at least a portion of a tax year in order to keep its assessed loss alive.

Will a company be able to preserve its assessed loss if it carries on a trade during a tax year which fails to produce any income during that year? The judgment in *Robin* is silent on this point. The court referred (666D–F) to the rule in section 20(2A)(b) that a taxpayer other than a company may carry forward an assessed loss even though he or she has not derived any income from trade during a particular tax year, but specifically refrained from answering the question whether this provision may be taken into account in construing section

20(1). It did refer (659I–J) to its decisions in *SA Bazaars* and *New Urban Properties* "which . . . construed s 20(1) and its predecessor as meaning that if there is no income or loss from trading in a given year the machinery for setting off an assessed loss cannot operate . . ." The remark to that effect in the *New Urban Properties* case (224C–D) and the reference in the latter case to the court's remarks in *Commissioner for Inland Revenue v Louis Zinn Organisation (Pty) Ltd* 1958 4 SA 477 (A) 485H–486C and to *Sub-Nigel Ltd v Commissioner for Inland Revenue* 1948 4 SA 580 (A) 590 leave the door open to the cumulation of assessed losses incurred in consecutive tax years.

The judgment in *Timberfellers* does not provide a direct answer to the question whether the actual derivation of income is a prerequisite for the preservation of a company's assessed loss. It is of interest to note, however, that the court considered the question whether the taxpayer's activities constituted the carrying on of a trade (162–165) although it was well aware that the particular activities had generated no income whatsoever during the relevant tax year (158).

I have argued (1996 *SA Merc LJ* 124–132) that the actual derivation of income from trade is not a requirement for the utilisation by a company of an assessed loss from a prior year. My arguments in this regard, which I do not propose to repeat here, are based mainly on the history of section 20(1), its underlying function, and on the principle to be extracted from *Sub-Nigel* that an expense or loss incurred or suffered in the production of income is not disqualified as a deduction under the general deduction formula of the Act merely by reason of its failure to produce any income in the same or a future tax year. The disallowance and forfeiture of an assessed loss on the ground that the company's trading activities failed to produce any income, would to a large extent neutralise the latter principle. This consideration also applies to most of the specific deductions, the availability of which is not dependent on the actual production of income, or which actually dispense with the requirement that the expense be incurred in the production of income, for example in the case of legal expenses falling under section 11(c). Some provisions, for example section 11(bA) dealing with pre-production interest, even provide for the deduction of an accumulated expense in a tax year other than that in which it was originally incurred and regardless of whether the taxpayer actually derives any income from the trading activities during the year of its deduction. There seems to be no logical reason why the derivation of income should be a requirement for the set-off of an assessed loss by a company under section 20(1) while it is not a requirement for the deduction, under the general deduction formula or under most of the specific deductions, of the expenditure or losses incorporated in an assessed loss. Section 20(1) should therefore not preclude a company from utilising an assessed loss in a year in which it earned no income from its trading activities or from cumulating assessed losses incurred in successive years. It appears to be the practice, however, to deny a company the benefit of an assessed loss in a tax year in which it earns no income (see Chait and Chambers (eds) *South African Revenue Services Income Tax Practice Manual* (1996) A–547–548).

5 2 The possible application of section 22 of the Act

The stock in bond sold by Robin was clearly never reflected as stock on hand for tax purposes. The stock in bond was, as was seen above, kept at a distance (664C–F) or "deflected" from becoming stock on hand (661D–F). Its cost was apparently incorporated in Robin's assessed loss. It is clear from the facts,

however, that the stock in bond was Robin's property (660H–I) or, at the very least, remained under the control of Robin's liquidators (661D–F and H–I). The question therefore arises whether the stock in bond should, in these circumstances, have been reflected under section 22 of the Act as closing stock at the end of Robin's 1987 tax year and as opening stock for the 1988 tax year.

I have argued ("The legal basis in the Income Tax Act for the treatment of opening and closing stock: Taking stock after *Richards Bay Iron & Titanium (Pty) Ltd v Commissioner for Inland Revenue* 1996 1 SA 311 (A)" 1997 *THRHR* 84) that the deduction of the value of opening stock and the inclusion of the value of closing stock in a taxpayer's income which is implicit in section 22 are based on the fact that the acquisition of trading stock and its sale give rise to a receipt or accrual and an expenditure in kind, respectively. "Gross income" comprises not only receipts in kind but also accruals falling within its ambit. This should, in principle, also apply to receipts in kind or accruals resulting from the purchase or acquisition of trading stock ("Trading stock held and not disposed of in terms of the Income Tax Act – an analysis within the context of the statutory definition of taxable income" 1997 *SA Merc LJ* 193). Closing stock represents the total accrual or receipt in kind to the taxpayer resulting from the purchase or acquisition of trading stock remaining unsold at the end of the tax year. It follows that the benefit which must be taken into account under section 22 in respect of closing stock is not limited to that from trading stock actually delivered or transferred to the taxpayer, but includes any unconditional right entitling the taxpayer to claim such delivery or transfer on a basis which is final and complete as far as the relevant trading stock is concerned.

Robin's stock in bond should, on the view above, have been reflected for purposes of section 22 as trading stock held and not disposed of in spite of the liquidators' decision not to clear the goods from bond. There was no need for the goods to be cleared – Robin's accrued rights to the stock could be turned into money in any event, as is shown by the facts. The clearing of the stock from bond would therefore have made no difference to the status of the stock for purposes of section 22 – any cost incurred by the liquidators in this regard would merely have been included in the stock's valuation as "further costs incurred by [the taxpayer] . . . in getting such trading stock into its then existing condition and location . . ." (s 22(3)).

Would the tax consequences for Robin have been different had it reflected the stock in bond as closing stock in the 1987 tax year and as opening stock in the 1988 tax year? The cost incurred before the 1988 tax year in respect of the acquisition of the stock in bond would in such event obviously not have been incorporated in the assessed loss carried forward to the 1988 tax year. This expense would therefore, at first sight, not share the fate of the other expenses incorporated in the forfeited assessed loss. A review of the history of section 22 and of relevant case law reveals, however, that section 22 does not override the general deduction formula of the Act (s 11(a) and (b) and 23(f) and (g)) but is subordinate to it (see Swart 1997 *THRHR* 87–92 97–99, "Disposals other than in the ordinary course of trade and section 22(8) of the Income Tax Act" 1997 *SA Merc LJ* 336 338–342). The cost of assets reflected as trading stock can be deducted under section 22 only if the assets are sold in such a manner as to render the full amount of the cost deductible under the general deduction formula. The total amount of the cost incurred in kind under the sale of such stock, quantified under section 22 on the basis of its historical cost, will therefore be

deductible under section 22 only if it is incurred, *inter alia*, in the production of income as well as for purposes of trade. The introductory words of section 22(1) and (2) also make it clear that an amount may be taken into account under those provisions only for purposes of determining the taxable income derived during a tax year from the carrying on of any trade. The cost of stock which does not meet these requirements cannot be deducted under section 22. Section 22(8) specifically provides for the recoupment of the market value of trading stock disposed of not in the ordinary course of the taxpayer's trade, thereby preventing its deduction under section 22.

The finding that Robin had ceased carrying on a trade and that the two sales of the stock in bond did not constitute the carrying on of a new trade, would therefore have prevented any deduction of the stock's cost under section 22. Robin could not have argued that the sales amounted to disposals in the ordinary course of its trade if no trade was being carried on. Robin would therefore have had to recoup the market value of the stock in bond under section 22(8). A recoupment under section 22(8) does not preclude the taxpayer from making a separate claim for a deduction in respect of the recouped amount under the general deduction formula or a specific deduction (Swart 1997 *SA Merc LJ* 353). Robin would, however, not have been entitled to a deduction under the general deduction formula after the cessation of its trade – the expenditure in kind incurred under the sales effected after the cessation of trade could scarcely have been said to have been incurred for purposes of trade as required by the general deduction formula. The expense would ultimately, therefore, not have escaped the fate of the other expenses incorporated in the forfeited assessed loss.

5 3 Lock, stock and barrel sales

The disposal of a business as a going concern usually also includes its trading stock. This mode of disposal of the stock (as an integral part of the sale of the business itself) will usually differ materially from the trader's usual method of operation in the past. The trading stock disposed of in the course of a lock, stock and barrel sale will sometimes be disposed of at its historic cost, and not at the price at which the trader would normally be able to sell it to his or her usual customers. The disposal of trading stock as part of the sale of a business as a going concern would therefore seem to amount to a disposal other than in the ordinary course of the taxpayer's trade. This implies that the seller of the business will have to reflect the market value of the trading stock as a recoupment under section 22(8) and claim a separate deduction in respect of that stock under the general deduction formula. Section 22(8) should, however, not be applicable where the business is sold as part of a profit-making scheme, that is where the going concern constitutes, in its own right, trading stock in the seller's hands.

The question which arises in the light of the approach of the court in *Robin*'s case, is whether the seller of a business as a going concern who reflects the market value of the trading stock involved in the sale as a recoupment under section 22(8), will be entitled to deduct the cost of the stock under the general deduction formula. The disposal of the trading stock as part of the sale of a business as a going concern would, in the light of the court's approach in *Robin*, not seem to constitute part of the carrying on of a trade if this manner of disposal differs materially from the seller's method of operation in the past (661H–J 662J 663D–E) and if the opportunity was thereby offered to the buyer of the business to make a profit and risk a loss on the resale of the stock (664C–E). If this view

is correct, it follows that the seller would not be entitled to claim that the expenditure in kind incurred by reason of the sale of the stock was incurred for purposes of trade as required by the general deduction formula. The seller could therefore end up in the anomalous position of being taxed on the proceeds of the trading stock (see *Commissioner for Inland Revenue v Niko* 1940 AD 416 429) while being denied a deduction in respect of its cost. This potential outcome brings to the fore the real issue, namely the requirements of the general deduction formula.

5 4 The underlying issue

Robin's case raises, at first sight, the policy issue why the carrying on of a trade should be a requirement for the preservation for an assessed loss by a company while it is not a requirement in the case of persons other than companies, for example natural persons and trusts. The real issue underlying *Robin*'s case relates, however, to the requirement that an expense may be deducted under the general deduction formula only to the extent to which it has been incurred, *inter alia*, for the purposes of trade (s 23(g)). This issue affects companies as well as persons other than companies. As seen above, this requirement would have prevented the deduction by Robin of the expenditure in kind incurred under the sales of the stock effected after the cessation of its trade. The outcome would have been the same in the case of a person other than a company. The problems regarding the deductibility of expenses incurred after the cessation of trade are well-known (see eg De Koker *Silke on South African income tax* (1995) 7–51; Meyerowitz *Meyerowitz on income tax* (1997) par 11.84). At the heart of these problems lies what was referred to in *Robin*'s case (667A–B) as a lack of symmetry between the concept of "gross income" and the general deduction formula – "gross income" is not limited to amounts derived from a trade and may therefore include amounts resulting from activities not constituting a trade, while the general deduction formula makes provision for qualifying expenditure to be claimed only against income derived from trade (see the introductory words to s 11(a)) and only to the extent to which the expenditure was incurred for purposes of trade (s 23(g)). The anomalous possibility therefore arises that non-trade income may be taxed in a taxpayer's hands while the expense incurred in the production of that income is disallowed on the ground that it was not incurred for purposes of trade. This problem usually arises where an individual invests money in interest-bearing securities, but it is not limited to income-producing activities of that type (see eg *ITC 1275* 40 SATC 197 198–199; 1958 *The Taxpayer* 105).

The problems inherent in the general deduction formula have been addressed in various official reports. The Steyn Committee identified the relevant problems in 1951 (*First Report of the Committee of Enquiry into the Income Tax Act* [UG No 75–1951] 25–27) and recommended the reformulation of the general deduction formula to delete the "wholly or exclusively for purposes of trade" test and to widen the general deduction formula to allow the deduction of expenditure incurred in the production of non-trade income (*Second and Final Report of the Committee of Inquiry into the Income Tax Act* [UG No 63–1952] 72 cl 11(1) and (2)). This recommendation was, however, rejected by the Commission of Enquiry of 1953 (*First and Final Report of the Income Tax Commission of 1953* [UG No 11–1954] 9–10). The commission recommended, however, that a specific provision be inserted to cover expenditure incurred in the production of non-trade income (*First and Final Report* 12 par (e)). The Franzsen Commission,

on the other hand, viewed the complaints regarding the general deduction formula as being largely unfounded (*Second Report of the Commission of Enquiry into Fiscal and Monetary Policy in South Africa* [RP 86/1970] 10–12; but see its view at 18 par 78). The legislature was eventually galvanised into some remedial action by the outcome in *Solaglass Finance Co (Pty) Ltd v Commissioner for Inland Revenue* 1991 2 SA 257 (A), which in effect confirmed the validity of the Steyn Committee's views.

It is my view that the remaining anomalies justify the deletion, from the general deduction formula, of the "for purposes of trade" requirement. The present distinction between the sphere of income and the sphere of deductibility may, in the court's words (667B–C)

> "derive from differently designed English legislation of long ago, which has simply been copied here without sufficient reflection. This lack of symmetry may be a reflection on the legislation, but it is not something that allows us to depart from the wording of the Act".

It is of interest to note that the formulation of the Australian equivalent of the general deduction formula (see s 51(1) of the Australian Income Tax Assessment Act 27 of 1936) allows the deduction of expenditure incurred in the production of non-trade income. Should it be necessary to provide for the separate determination of the taxable income or assessed loss of a specific trade, for example where a specific trade is to be ring-fenced for purposes of some deductions, this should preferably be done by means of the specific deduction provisions or by means of specific rules for specific trades.

GJ SWART
University of South Africa

POTENSIëLE NADEEL BY DIE MISDAAD BEDROG

S v Labuschagne 1997 2 SASV 6 (NK)

1 Inleiding en feite

In hierdie saak moes die hof besluit of die beskuldigde se optrede voldoende was om die nadeelvereiste by die misdaad bedrog te bevredig. Ten einde hierdie vraag te beantwoord, het die hof 'n sekere aspek van die nadeelvereiste by hierdie misdaad onder die vergrootglas geplaas.

Die feite was die volgende: Die beskuldigde was die bestuurderes van 'n klerewinkel in Kimberley, genaamd Markhams. Deel van haar pligte was die betaling van die besigheid se bedryfsuitgawes, waaronder die maandelikse telefoonrekening. Sy moes die telefoonrekening uit die kontant in die besigheid se "kleinkas" betaal. Sy en haar man het van mekaar vervreemd geraak en sy het haar in 'n geldelike verknorsing bevind. Sy het toe kontantgeld uit die "kleinkas" geneem wat sy vir haar eie persoonlike behoeftes aangewend het. Op grond van

hierdie optrede is sy tereg skuldig bevind aan diefstal van hierdie bedrae geld, wat die eiendom van Markhams was.

Die bedrogklagtes het betrekking op haar optrede nadat sy die kontant gesteel het. Sy het tjeks op haar persoonlike bankrekening uitgeskryf vir die telefoonrekening wat Markhams aan Telkom verskuldig was en dit aan Telkom oorhandig. Sodoende het sy aan Markhams voorgegee dat sy die telefoonrekenings kontant betaal het. Toe sy die tjeks uitgeskryf en aan Telkom oorhandig het, het sy besef dat daar nie voldoende fondse in haar bankrekening was vir die uitbetaling van die tjeks nie. Die tjeks is ook inderdaad deur die bank gedishonoreer.

Op grond van laasgenoemde optrede is sy van bedrog aangekla. Sy het skuldig gepleit en is in die streekhof skuldig bevind. Sy het geappelleer na die Noord-Kaapse Afdeling van die Hooggeregshof teen die vonnis wat haar in die streekhof opgelê is. In appèl is egter beslis (per Basson R, met wie Lacock WnR saamgestem het) dat haar skuldigbevinding aan bedrog verkeerd was en dat die streekhof haar in werklikheid onskuldig moes bevind het op die bedrogklagtes.

2 Beslissing

Ten einde aan bedrog skuldig bevind te word, moet aan vier kernelemente van die misdaad voldoen word, te wete (a) daar moet 'n wanvoorstelling wees; (b) daar moet nadeel wees; (c) die beskuldigde se gedrag moet wederregtelik wees en (d) hy of sy moet met opset (meer bepaald: die opset om te bedrieg) opgetree het. In die saak tans onder bespreking was elemente (a), (c) en (d) nie in geskil nie. Die uitspraak het slegs gehandel oor die vraag of daar aan element (b) voldoen is.

Die redes waarom die Noord-Kaapse Afdeling tot die gevolgtrekking kom dat die staat nie bewys het dat daar aan die nadeelvereiste voldoen is nie, is die volgende. Die staat het, volgens die hof, nie daarin geslaag om te bewys dat daar enige werklike of potensiële benadeling vir enige party was nie. Daar was volgens die hof geen benadeling teenoor die bank nie, want die bank hoef slegs geld uit te betaal indien daar geld in die rekening is. Daar was geen geld in die rekening nie en die bank het dan ook geen geld uitbetaal nie. Gevolglik het die bank geen skade gely nie (13*b–e*). Wat Telkom betref, is die tjeks aangebied ter betaling van 'n reeds gelewerde rekening, dit wil sê 'n reeds bestaande skuld. Volgens die hof kom die uitreiking van 'n waardelose tjek ter betaling van 'n reeds bestaande skuld nie neer op die pleging van bedrog nie omdat daar geen nadeel aanwysbaar is nie. Indien daar wel sprake van nadeel is, is die nadeel te verwyderd en vergesog om 'n skuldigbevinding aan bedrog te regverdig (13*f*–14*h*). As gesag vir sy standpunt steun die hof op *R v Lipschitz* 1938 2 PH H234 (T), *R v Webb* 1954 1 PH H34 (K) en *S v Ellis* 1969 2 SA 622 (N). Terloops, daar is twee ander onlangse Vrystaatse uitsprake wat die hof nie genoem het nie maar waarop hy ook kon gesteun het vir sy slotsom, te wete *S v Van Aswegen* 1992 1 SASV 487 (O) 490*b–c* en *S v Calitz* 1992 2 SASV 66 (O). In albei hierdie sake is die standpunt eweneens ingeneem dat die uitskryf en oorhandiging van 'n waardelose tjek vir 'n reeds bestaande skuld nie bedrog is nie omdat daar geen werklike of potensiële nadeel aanwysbaar is nie.

Wat die verhouding tussen die beskuldigde en Markhams betref, is die hof van oordeel dat, as die beskuldigde wel enige wanvoorstelling teenoor Markhams gemaak het, dit geleë was in die feit dat sy 'n voorstelling gemaak het dat sy die rekening betaal het terwyl sy dit in werklikheid nie betaal het nie. Volgens die

hof kom dit egter nie op bedrog neer nie maar slegs op 'n pligsversuim waarvoor Markhams haar sivielregtelik aanspreeklik kan hou (15*c*). Haar optrede het in wese maar slegs neergekom op pogings aan haar kant om haar diefstal toe te smeer (16*h–i*).

3 Kritiek

Na my mening is die beslissing verkeerd. Die streekhoflanddros het heeltemal reg opgetree om die beskuldigde aan bedrog skuldig te bevind.

Dit is nodig om sekere van die belangrikste reëls wat in ons reg aanvaar word met betrekking tot die aard van die nadeelvereiste by die misdaad bedrog in herinnering te roep. Dit is geykte reg, eerstens dat die nadeel nie noodwendig vermoënsregtelik van aard hoef te wees nie, en tweedens dat daar nie vereis word dat daar werklike nadeel hoef te wees nie: potensiële nadeel is voldoende (*R v Heyne* 1956 3 SA 604 (A) 622). Verder hoef die nadeel nie noodwendig gely te word deur die persoon aan wie die wanvoorstelling gemaak is nie (*Myeza* 1985 4 SA 30 (T) 32C).

As X iets van Y koop of Y 'n diens vir X verrig, en X ter betaling van die koopsaak of diens aan Y 'n tjek oorhandig in die wete dat daar nie genoeg geld in sy bankrekening vir die uitbetaling van die bedrag genoem in die tjek is nie, pleeg X 'n wanvoorstelling en is daar nadeel, werklik of potensieel, vir Y omdat hy afstand van sy saak gedoen het of dienste aan X verskaf het in die geloof dat hy betaal sal word terwyl hy nooit betaal is nie en hy nou moeite moet doen om die geld wat X aan hom verskuldig is, in te vorder. Die gewysdes hierbo gemeld waarop die hof gesteun het, kom egter daarop neer dat as X reeds aan Y geld skuld, deur Y gedruk word vir betaling en X dan 'n tjek uitskryf en aan Y oorhandig as oënskynlike betaling vir die reeds bestaande skuld, in die wete dat daar nie voldoende fondse in sy bankrekening vir die uitbetaling van die bedrag genoem in die tjek is nie, X hom nie aan bedrog skuldig maak nie omdat 'n mens nie kan aanvaar dat daar enige nadeel, werklik of potensieel, vir Y is nie. Daar word geredeneer dat deur die oorhandiging van die (waardelose) tjek Y nie beweeg is om tot sy nadeel te handel nie. Nadat die tjek gedishonoreer is, het Y nog steeds 'n vorderingsreg teenoor X vir betaling van die skuld en bevind Y hom nie in 'n slegter posisie as waarin hy voor oorhandiging van die tjek was nie.

Die vraag ontstaan of hierdie gewysdes, asook die hof in *Labuschagne* se aanvaarding dat hulle korrek beslis is, juis is. Daar word aan die hand gedoen dat die standpunt in hierdie gewysdes ingeneem verkeerd is.

Die reg uiteengesit in hierdie reeks sake word na my mening heeltemal tereg gekritiseer in Hunt en Milton *South African criminal law and procedure* vol II *Common-law crimes* (1996) 721–722 waar die volgende verklaar word:

> "It has been held that where a bad cheque is fraudulently given in 'payment' of an existing debt there is no prejudice. It is submitted, however, that there will usually be sufficient potential prejudice in such cases: Y is placed in a weaker position than if he had not accepted the cheque; Y may overdraw against the value of the cheque; Y may negotiate the cheque and incur liability to the holder; Y may withhold legal proceedings, which may lead to a delay in getting his money or to its loss through X's insolvency; Y may give up a lien; Y may have to make various bookkeeping entries and will inevitably be inconvenienced."

Hierdie kritiek teen die regspraak word ondersteun deur Botha *Bedrog in die Suid-Afrikaanse reg* (LLD-proefskrif Unisa (1988) 429) wat van mening is dat

veral die heel eerste voorbeeld genoem in die werk van Hunt en Milton 'n wesenlike moontlikheid van benadeling inhou in feitlik alle gevalle waar iemand sy skuld deur middel van 'n waardelose tjek betaal. Hy voeg by:

> "Normaalweg aanvaar die nemer van 'n tjek (Y) dat daar voldoende fondse in X [die beskuldigde] se bankrekening sal wees, sodat die tjek deur die bank uitbetaal sal word. Op sterkte van hierdie geloof bank Y die tjek en aanvaar hy dat sy rekening met die bedrag op die tjek vermeld, gekrediteer sal word en dat dit vir hom veilig sal wees om teen hierdie bedrag onttrekkings uit sy bankrekening te maak."

Hierby kan 'n mens nog die oorweging voeg dat die nemer van die tjek seker in alle gevalle die moeite moet doen om na die bank toe te gaan, of om iemand soontoe te stuur, ten einde die tjek in te betaal of te wissel, net om dan later uit te vind dat sy moeite tevergeefs was omdat die tjek waardeloos is. Toon hierdie oorweging nie dat daar reeds nadeel is nie? Let 'n mens op die feite in die saak tans onder bespreking, wil dit buitendien voorkom of daar wel potensiële nadeel was deurdat daar minstens 'n moontlikheid bestaan het dat Telkom Markhams se telefoonverbinding kon afsny weens die nie-betaling, in welke geval dit moeite vir Markhams sou wees om te reël dat die telefoonverbinding weer herstel word. Afgesien hiervan, is dit seker redelik om te aanvaar dat Markhams in die verleentheid gestel is deur die nie-betaling van die rekening, en dat dit hulle moeite gekos het om hulle telefoonrekening te betaal op 'n manier wat verskil van die manier voorgeskryf in die "amptelike instruksies" wat volgens die getuienis in die saak (11*g*) aan die bestuurderes uitgereik is rakende die wyse van betaling.

Die gemelde beslissings waarop die hof staatgemaak het, is verder moeilik versoenbaar met ander beslissings oor bedrog waarin duidelik beslis is dat die nadeelvereiste bevredig word deur die blote objektiewe skepping van 'n risiko van nadeel (*R v Seabe* 1927 AD 28 32–34; *S v Kruger* 1961 4 SA 816 (A) 827–828); dat slegs 'n moontlikheid van nadeel vereis word en nie 'n waarskynlikheid nie (*S v Campbell* 1991 1 SASV 503 (Nm) 507*d*); dat die wanvoorstelling slegs objektief beskou die potensiaal hoef te hê om tot nadeel aanleiding te gee (*R v Dyonta* 1935 AD 52 56); dat nie vereis word dat die wanvoorstelling suksesvol hoef te wees nie (*Campbell supra* 508*h*); en dat bedrog selfs teenoor 'n polisielokvink of iemand wat van die begin af geweet het dat X se voorstelling vals is, gepleeg kan word (*Dyonta supra*). Kortom, al wat vereis word by die nadeelvereiste is dat "the false representation [be] of such a nature as in the ordinary course of things, to be likely to prejudice the complainant" (*Kruse* 1946 AD 524 533) of dat dit "was capable in the ordinary course of deceiving a person" (*Dyonta supra* 56). Daar word aan die hand gedoen dat veral die heel laaste formulering van die nadeelvereiste in *Dyonta* wyd genoeg is om 'n bevinding van nadeel in die *Labuschagne*-saak te regverdig.

4 Poging tot bedrog

Selfs al aanvaar 'n mens dat daar in gevalle waar 'n waardelose tjek uitgeskryf en oorhandig word as oënskynlike betaling vir 'n reeds bestaande skuld, daar nie eens potensiële nadeel is nie, moet die beskuldigde na my mening minstens aan poging tot bedrog skuldig bevind word. Hy het immers wederregtelik en met die opset om Y te bedrieg, 'n handeling verrig wat nie slegs 'n voorbereidingshandeling was nie maar inderdaad 'n uitvoeringshandeling in die pleging van die misdaad; die omstandighede was egter sodanig dat dit later geblyk het dat sy optrede nie op die voltooide misdaad uitgeloop het nie. As, soos die hof in

Labuschagne gevoel het, die moontlikheid van nadeel te verwyderd of vergesog was, moes die hof die beskuldigde aan poging tot bedrog skuldig bevind het.

Hierdie standpunt word onderskryf deur Hunt en Milton 736 en is inderdaad ook deur regter Kumleben in *S v Ostilly* 1977 4 SA 699 (D) 714–716 gevolg. In hierdie saak is die beskuldigde aan poging tot bedrog skuldig bevind ten spyte daarvan dat potensiële nadeel ontbreek het. Die hof verklaar (714H) dat daar in beginsel geen verskil is tussen die geval waar X 'n wanvoorstelling maak maar die wanvoorstelling nie tot Y se kennis kom nie, en die geval waar X 'n voltooide wanvoorstelling aan Y maak maar "where the absence of proof of potential prejudice is fatal to a fraud conviction". Die hof voeg by (714–715) dat in albei gevalle "the overt act and intention are the same and, one need hardly add, in each case the acts have passed the stage of preparation". Die beskuldigde se skuldigbevinding aan poging tot bedrog is egter in appèl in *S v Rosenthal* 1980 1 SA 65 (A) ter syde gestel. (Die rede waarom die naam van die saak in die hof *a quo* – *Ostilly* – verskil van dié van die saak in appèl, is omdat net Rosenthal, wat saam met Ostilly aangekla is, geappelleer het, en nie ook Ostilly nie.) Die appèlhof bevind (87) dat daar nie in hierdie saak 'n wanvoorstelling was nie maar merk nietemin *obiter* op dat indien 'n voltooide wanvoorstelling aanwesig is maar potensiële nadeel ontbreek, 'n skuldigbevinding aan poging moontlik kan wees alhoewel die hof nie hieroor 'n besliste bevinding wou maak nie.

5 Slot

Om dus op te som: daar word aan die hand gedoen dat die beskuldigde in *Labuschagne* skuldig bevind moes gewees het aan óf bedrog óf minstens poging tot bedrog.

CR SNYMAN
Universiteit van Suid-Afrika

POSSIBLE RECOGNITION OF POLYGAMOUS MARRIAGES

Ryland v Edros 1997 2 SA 690 (C)

The importance of the decision in *Ryland v Edros* is twofold. In the first instance, it redefines the meaning of the term "public policy" as understood in the South African legal system before 27 April 1994. Secondly, it indicates that certain consequences of marital relationships which are not recognised by South African law because of their potential polygamous nature, can be enforced. The court did not follow previous decisions which refused to give effect to consequences of unrecognised marital relationships (*Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ismail v Ismail* 1983 1 SA 1006 (A); *Kaba v Nteta* 1910 TS 964; *Ngqobela v Sihele* (1893) 10 SC 346; *Docrat v Bhayat* 1932 TPD 125). Thus the court

> "deviated from the long line of decisions in which our courts have consistently refused, on ground of public policy, to recognise, or to give effect to the consequences of polygamous unions contracted in South Africa, statutory exceptions apart" (*Ismail v Ismail supra* 1024D–E).

Unrecognised marriages

Before the decision in *Ryland*, consequences flowing from polygamous or potentially polygamous marriages were generally not enforced by our courts. Only one type of marriage was recognised by South African law, namely, a civil or Christian marriage. This marriage has been defined as the "voluntary union for life in common of one man and one woman to the exclusion of all others while it lasts" (Sinclair *The law of marriage* Vol 1 (1996) 305; *Hyde v Hyde* (1866) LR 1 P&D 130; *In re Bethel, Bethel v Hildyard* (1888) 38 ChD 220). Thus any marriage which did not meet the characteristics of this recognised marriage was regarded as invalid and consequences flowing from it could not be enforced except where exceptions were made by express statutory enactments. This implied that piecemeal recognition was granted by statute to certain unrecognised marriages, in particular customary marriages, whereas in the majority of cases polygamous or potentially polygamous marriages were unrecognised (see *inter alia* s 31 of Act 76 of 1963). Consequences flowing from these marriages could not be enforced as a result of the concept of "public policy" (see *inter alia Samente v Minister of Police* 1978 4 SA 632 (E)). A clear distinction was maintained between a recognised and an unrecognised marriage. A typical example is the distinction made between a recognised marriage and a customary marriage (*Nkambula v Linda* 1951 1 SA 377 (A); *Mvumvu v Chuna* 1984 BSC 42). The latter form of marriage has even been described by a statutory enactment as "an association of a man and a woman in conjugal relationship according to Black law and custom where neither the man nor the woman is a party to a subsisting marriage" (s 35 of Act 38 of 1927). The same legislative enactment goes further to distinguish between these two forms of relationships by defining a recognised marriage:

> "[T]he union of one man with one woman in accordance with any law for the time being in force in any province governing marriage, but does not include any union recognised as a marriage in Native law or custom or any union recognised as a marriage in Native law under the provisions of section one hundred and forty-seven of the Code of Native law contained in the Schedule to Law 19 of 1891 (Natal) or any amendment thereof or any other law."

Denial of recognition or refusal to enforce consequences of these marriages, as pointed out above, was based on public policy. In most cases that came before our courts prior to *Ryland*, it was held that the

> "claims are based on a custom or contract which arises directly from, and is intimately connected with, the polygamous relationship entered into by the parties . . . it follows from this that, if the polygamous relationship is regarded as void on the grounds of public policy, the custom or the contract is also vitiated. See *Ngqobela v Sihele supra* 352 and *Kaba v Nteta* (*supra*) at 269 – in each instance the court held that no action could be brought for the recovery of lobola cattle because they have been paid in respect of a Black customary union, ie a polygamous union. I should mention that the courts have since been precluded by s 11 of Act 38 of 1927, from declaring that the custom of lobola or bogadi is repugnant to the principles of public policy. The principle enunciated in the aforementioned cases, nevertheless, still holds good as far as the consequences of polygamous unions between other members of our community are concerned" (*Ismail v Ismail supra* 1025C–1026B).

Constitutional dispensation

In arriving at the decision in *Ryland*, the court relied upon the provisions the Constitution of the Republic of South Africa, Act 200 of 1993 (the interim

Constitution) which came into operation on 27 April 1994. This Constitution ushered in a new era of constitutional supremacy as opposed to the previous position of parliamentary sovereignty (s 4 Act 200 of 1993). This interim Constitution has now been repealed and replaced by the 1996 Constitution, Act 108 of 1996.

The basic question to be determined by the court was phrased as follows (707E–F):

> "Can it be said since the coming into operation of the new Constitution, that a contract concluded by parties which arises from a marriage relationship entered into by them in accordance with rites of their religion and which as a fact is monogamous is contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society or is fundamentally opposed to our principles and institutions?"

The provisions relied upon in arriving at the decision were the preamble which recognises equality between men and women and people of all races, and the equality (anti-discriminatory) clause as contained in section 8 of the interim Constitution (presently s 9 Act 108 of 1996). In an earlier note ("Customary law of marriage and a bill of rights in South Africa. *Quo vadis*?" 1996 *THRHR* 304), I pointed out that customary marriages and indeed, all other marriages not yet fully recognised on the same footing as civil marriages, cannot, in the light of the provisions of the Constitution, continue to be recognised in a piecemeal fashion.

The judgment in *Ryland v Edros* must be commended. It should, however, be borne in mind that the court was not requested to determine the validity of the marriage contracted by the parties, but was called upon to enforce certain consequences of the marital relationship entered into by them (709E–F). Be that as it may, it is my submission that even if the court had been called upon to determine the question of validity or recognition of this marital relationship, this could have been answered in the affirmative on the basis of the equality and non-discriminatory provisions of the interim Constitution.[1] The provisions of this Constitution dealing with the possibility of the enactment of legislation concerning the recognition of personal and family law of persons professing a particular religion, could also have been useful in arriving at this decision (s 14 Act 200 of 1993; cf *Kalla v The Master* 1995 1 SA 261 (T)).

Decision and reasons

The basis for the non-recognition of both customary and marriages by Muslim (Hindu) rites has always been public policy (Sinclair 158 263–265). In the same manner, certain consequences flowing from these marriages could not be enforced by our courts (*Ismail supra*). In *Ryland* the court had to determine whether the public policy that previously dictated the non-enforcement of consequences of an unrecognised marriage could still preclude it from enforcing such consequences. In determining this issue, the court took into consideration the provisions of the interim Constitution and came to the conclusion that

> "it is quite inimical to all the values of the new South Africa for one group to impose its values on another and that the courts should only brand a contract as offensive to public policy if it is offensive to those values which are shared by the community at large, by all right-thinking people in the community and not only by one section of it. It is clear, in my view, that in the *Ismail* case the views (or presumed views) of only one group in our plural society were taken into account" (707G–H).

In particular, the provisions of section 35(3) of the 1993 Constitution were considered by the court. It was indicated that if the spirit, purport and object of chapter 3 of the interim Constitution and the basic values underlying it are in conflict with the view as to public policy expressed and applied in the *Ismail* case, then the values underlying chapter 3 must prevail (see also s 39 Act 108 of 1996). Thus the spirit and the tenor of the Constitution was made to permeate the process of interpretation and judicial discretion (*S v Acheson* 1991 2 SA 805 (Nm)). Justification to deviate from the decisions which refused, on the ground of public policy, to recognise, or to give effect to the consequences of unrecognised marriages was founded on the spirit, purport and object of the interim Constitution.

Monogamy *vis-à-vis* polygamy

It cannot be disputed that (potentially) polygamous marriages are contracted in South Africa (*Mthembu v Letsela* 1997 2 SA 986 (T) 944B). Despite the fact that the court in *Ryland* was not called upon to decide on the validity of a polygamous marriage, I think it is apposite for the purposes of this note to determine whether, in the light of our present constitutional dispensation, polygamous marriages deserve some form of recognition. The definition of a fully recognised monogamous marriage has already been given above and mention has also been made that the non-recognition of Hindu (Muslim) and customary marriages is based on potential polygamy which has been regarded as being against public policy.

In my opinion, the nature of a marriage, that is, whether it is polygamous or monogamous, should not be used as justification for its non-recognition or for refusing to give effect to its consequences. The basic question that has to be determined is whether the community within which such a marriage is prevalent, regards it as legally binding. This in effect involves the determination of the *mores* of a particular community (see Maithufi "*Chawanda v Zimnat* 1990 1 SA 1019 (Z)" 1990 *De Jure* 379; Ferreira and Robinson "Reflections on the *boni mores* in the light of chapter 3 of the 1993 Constitution" 1997 *THRHR* 303).

If the community regards such a marriage as valid, the courts have to recognise it and enforce consequences arising therefrom. Non-recognition of such marriages would cause hardships to both children born therefrom and the spouses. South Africa is an African country and its legal system inevitably has to be interpreted in a manner which reflects African values, culture and aspirations (Heyns "Where is the voice of Africa in our Constitution?" *Centre for Human Rights (UP)* (1996)). The South African position with regard to these marriages has been that they are invalid because they are "fundamentally opposed to our principles and institutions" (*Ismail supra* 1024D–E).

We cannot, in the light of our present constitutional dispensation, continue to hold the view that

> "it is unwise to accord recognition to polygamous marriages for the simple reason that all our marriage and family laws – and to some extent also our law of succession – are primarily designed for monogamous relationships" (*Ismail supra* 1024E–1025B).

This does not reflect the position in South Africa – even before 27 April 1994, the need for the recognition and enforcement of certain consequences of polygamous marriages existed (see Molepo "A contemporary view of the status of African customary unions outside KwaZulu-Natal" 1996 *De Rebus* 629). The

examples in mind here are the numerous legislative enactments aimed at recognising customary marriages for certain specified purposes (see *inter alia* s 31 of Act 76 of 1963; Regulations for the Administration and Distribution of Estates of Deceased Blacks R 200 of 1987). Of interest in this regard, although it is beyond the scope of this note, is the decision in *Mthembu v Letsela* 1997 2 SA 936 (T) concerning the constitutionality of the rule of primogeniture applicable in the customary law of succession. This rule generally excludes African women from inheriting *ab intestato*. The question to be determined here was whether this rule is inconsistent with the provisions of the bill of rights as contained in chapter 3 of the 1993 Constitution (presently ch 2 Act 108 of 1996; see *Mthembu* 945E). The court decided that, bearing in mind the duty to provide sustenance, maintenance and shelter by the heir in customary law as a corollary of the system of primogeniture, this rule cannot be regarded as unfair discrimination in terms of the interim Constitution. The court commented as follows (945J–946A:

> "In view of the manifest acknowledgement of customary law as a system existing parallel to the common law by the Constitution (vide ss 33(3) and 181(1)) and the freedom granted to persons to choose this system as governing their relationships (as implied in s 31), I cannot accept the submission that the succession rule is necessarily in conflict with s 8. Neither is it contrary to public policy as envisaged in Act 45 of 1988" (see also *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T)).

It was, however, stressed that, should the right to support by the heir fall away, the whole matter will assume a different aspect as a result of the possible operation of the Intestate Succession Act 81 of 1987 to the benefit of the children of the deceased. This Act places so-called illegitimate children on the same basis as legitimate children of the deceased (children born of a recognised marriage) for the purposes of succession *ab intestato* (*Mthembu* 946D–E).

Conclusion

The case of *Ryland v Edros* indicates that the question of the eventual recognition of potentially polygamous marital relationships has to be addressed. This endeavour should involve "a holistic approach aimed at the reform of the South African law of marriage" (Church "The dichotomy of marriage revisited: a note on *Ryland v Edros*" 1997 *THRHR* 295). Although these marriages have been recognised for various purposes by statute, they do not enjoy the same status as civil marriages. It has already been indicated that this eventual recognition can be brought about by means of legislation or by our courts in interpreting our law in accordance with the spirit, purport and object of our newly found constitutional dispensation (see Maithufi 1996 *THRHR* 298; Church 1997 *THRHR* 294).

IP MAITHUFI
Vista University

DIE REGTE VAN GEVANGENES MET HIV

C v Minister of Correctional Services 1996 4 SA 292 (T);
B v Minister of Correctional Services [1997] 2 All SA 574 (K)

Twee sake waarin HIV-infeksie ter sprake was, is in die onlangse verlede in Suid-Afrikaanse howe beslis. In beide gevalle was die Minister van Korrektiewe

Dienste 'n verweerder. Die eerste saak het gegaan oor die vraag of 'n gevangene sy ingeligte toestemming ten opsigte van 'n bloedtoets vir HIV gegee het. In die tweede saak moes die hof beslis of 'n gevangene geregtig was op duur behandeling teen HIV op staatsonkoste. In beide gevalle was die resultaat dat 'n gevangene met HIV in 'n beter posisie geplaas is as 'n persoon met HIV in vergelykbare omstandighede buite 'n gevangenis (buiten natuurlik die beperking van sy of haar vryheid).

C v Minister of Correctional Services is reeds by twee geleenthede in hierdie tydskrif bespreek. (Sien die vonnisbesprekings deur Strauss en Knobel in 1996 *THRHR* 492 ev en 1997 *THRHR* 533 ev onderskeidelik.) Daar word gevolglik in hierdie bespreking met enkele opmerkings volstaan. Die saak het hoofsaaklik gehandel oor die omvang van inligting wat gegee moet word ten einde ingeligte toestemming te verkry van 'n persoon (in dié geval 'n gevangene wat in die gevangenis se kombuis gewerk het) wie se bloed vir HIV getoets sou word. Volgens die gevangenisbeleid wat op daardie tydstip (September 1993) nog gegeld het en wat intussen hersien is, kon slegs mense wat vry van HIV was, in kombuise van gevangenisse werk. (Hierdie beleid was in ooreenstemming met regulasies mbt oordraagbare siektes en die aanmelding van aanmeldbare mediese toestande wat in Oktober 1987 ingevolge die Wet op Gesondheid 63 van 1977 afgekondig is. Hierdie regulasies het onder meer bepaal dat draers van oordraagbare siektes nie voedsel vir ander mense mag voorberei nie. VIGS is in aanhangsel 1 onder "oordraagbare siektes" ingesluit. Hierdie regulasies is intussen hersien en reeds in 1993 vir kommentaar gepubliseer (*GK* 703 van 1993-07-30). In die hersiene regulasies word VIGS nie meer onder "oordraagbare siektes" ingesluit nie. Die hersiene regulasies is egter nog nie afgekondig nie. Gevolglik het die Suid-Afrikaanse Regskommissie in sy eerste tussentydse verslag oor *Aspekte van die reg wat betrekking het op VIGS* in Februarie vanjaar onder meer aanbeveel dat die ontwerpregulasies gefinaliseer en gepromulgeer word. Hierdie verslag is onlangs, op 28 Augustus, deur die Minister van Justisie in die parlement ter tafel gelê.)

Knobel 1997 *THRHR* 534–535 kritiseer die hof se verheffing van die Departement van Korrektiewe Dienste se "Hanteringstrategie: VIGS in Gevangenisse" tot norm om die inhoud van die regverdigingsgrond toestemming te bepaal, in plaas daarvan dat die hof primêr die algemene beginsels van ingeligte toestemming (kennis, begrip en afwesigheid van dwang) soos dit in die deliktereg neerslag gevind het, toepas. Ingevolge die departement se beleidsdokument is die doel van voor-toets berading onder meer om te verseker dat die gevangene weet wat HIV-infeksie beteken, hoe die infeksie oorgedra word, wat die toets behels, wat die sosiale, sielkundige en regsimplikasies van die toets is en wat om te verwag as die uitslag van die toets positief is. Voorts moet die gevangene ingevolge die beleid "tyd gegun word om die inligting wat hy/sy van die berader ontvang het te oordink alvorens toestemming verleen word om die bloed te laat trek vir die toets". Die beleid maak ook voorsiening vir na-toets berading, of die uitslag van die toets nou positief of negatief is.

Regter Kirk-Cohen aanvaar dat C ingelig was dat sy bloed getoets sou word vir HIV en oor sy reg om te weier om die toets te ondergaan toe hy mondeling tot die toets ingestem het. Die hof bevind egter dat C geen privaatheid of *tyd* gegun is om die besluit te neem nie. Hoofsaaklik op grond van hierdie afwyking van die norm, soos gestel in die gevangenisbeleid, beslis die hof dat die optrede van die gevangenisbeampte (K) wat die bloed getrek het, onregmatig was en dat

C nie die voor-toets berading ontvang het wat vir ingeligte toestemming nodig is nie. Die hof bevind voorts dat die vereiste *animus iniuriandi* aanwesig was ten spyte daarvan dat K *bona fide* opgetree het, gemeen het dat hy die ingeligte toestemming van C verkry het en onbewus was van die bestaan van die beleidsdokument en laasgenoemde se inhoud. Die hof staan R1 000 skadevergoeding toe vir privaatheidskending. Hierdie "verslapping" van die vereiste van onregmatigheidsbewussyn as deel van opset, is volgens die hof die gevolg van die omstandighede van die geval, naamlik die inperking van C se persoonlike vryheid. Regter Kirk-Cohen brei hiermee die beperkte klas *iniuriae* (onder meer onregmatige vryheidsberowing) waarvoor onregmatigheidsbewussyn nie vereis word nie, uit na gevalle van privaatheidskending in omstandighede van gevangeskap. Strauss 1996 *THRHR* 497 bestempel hierdie uitspraak as 'n uitnemend billike een omdat dit die belangrikheid van die verkryging van ingeligte toestemming tot HIV-toetsing beklemtoon. Ten spyte van enkele punte van kritiek, meen Knobel 1997 *THRHR* 536 ook dat daar regspolities veel vir hierdie ontwikkeling in die reg gesê kan word, aangesien die verhouding tussen gevangenisowerheid en gevangene so ongelyk is.

Dit is interessant om daarop te let dat alhoewel regter Kirk-Cohen uitdruklik geweier het om uitspraak te lewer oor die vereistes van ingeligte toestemming *in die algemeen*, sy uitspraak wyer implikasies gehad het. Dit is naamlik as gesag aanvaar deur die projekkomitee van die Suid-Afrikaanse Regskommissie wat regshervorming in die konteks van HIV/VIGS ondersoek. Die projekkomitee het tot die gevolgtrekking gekom dat die regsnorm vir ingeligte toestemming, in die lig van hierdie uitspraak, voor-toets berading moet insluit. Die projekkomitee het gevolglik voorgestel dat 'n nasionale beleid oor HIV-toetsing en ingeligte toestemming aanvaar moet word waarin ingeligte toestemming in die algemeen voor-toets berading moet insluit. Die voorgestelde beleid gee die volgende inhoud aan ingeligte toestemming en voor-toets berading in die konteks van HIV/VIGS: Ingeligte toestemming beteken dat die individu ingelig word oor die implikasies van die toets (insluitend die voordele, risiko's, alternatiewe en die moontlike sosiale implikasies daarvan) en dit verstaan; dat die inligting gegee word in 'n taal en in woorde wat die pasiënt verstaan; en dat uitdruklike toestemming tot HIV-toetsing (verkieslik skriftelik) gegee word in omstandighede waarin dwang afwesig is, en waarin die individu net so vry voel om toestemming te gee as om dit te weerhou. Voor-toets berading, in die vorm van 'n vertroulike gesprek tussen die individu en 'n toepaslik gekwalifiseerde persoon, soos 'n geneesheer, 'n verpleegster of 'n opgeleide HIV-berader, word beskou as die doeltreffendste manier waarop inligting gegee en toestemming verkry kan word. Kennisgewings, pamflette en ander media (insluitende video's) kan gebruik word om inligting oor HIV/VIGS beskikbaar te stel, maar kan nie beskou word as algemene plaasvervangers vir voor-toets berading nie. Die Suid-Afrikaanse Regskommissie het in sy eerste tussentydse verslag oor *Aspekte van die reg wat betrekking het op VIGS* (sien hierbo) aanbeveel dat die Minister van Gesondheid so 'n nasionale beleid behoort te aanvaar kragtens die bevoegdhede wat aan haar verleen is. Daar word voorsien dat die beleid die basiese regsbeginsels sal stel waaraan gevolg gegee sal moet word, en dat omvattender riglyne in die praktyk opgestel sal word waarin die basiese regsbeginsels beliggaam en verder uitgebou sal word.

In *B v Minister of Correctional Services* was die feite kortliks soos volg: B (en drie ander applikante) was gevangenes met HIV. B was die enigste applikant wie

se mediese besonderhede aan die hof bekend was. Hy is in Februarie 1992 as HIV-positief gediagnoseer. Hy was by verskeie vorige geleenthede in die gevangenis, is in een stadium op parool vrygelaat en het by 'n ander geleentheid uit aanhouding ontsnap. Hy is in Augustus 1995 gearresteer en in die Pollsmoor Gevangenis buite Kaapstad aangehou. Hy het geen spesifieke behandeling vir sy HIV-infeksie ontvang nie, en sy CD4-telling was in daardie stadium 298 per milliliter bloed (298/ml). (CD4 is 'n limfosiet- of witbloedsel wat infeksie help beveg. Hoe laer die CD4-telling, hoe swakker is die liggaam se weerstand teen infeksie. 'n Gesonde persoon het 'n CD4-telling van tussen 600 en 1 200.) Gedurende 1996 is reëlings getref vir gevangenes met HIV om by twee HIV-klinieke behandeling te ontvang. By een so 'n kliniek (verbonde aan 'n gevangenis) is 'n kombinasieterapie van AZT en ddl vir B voorgeskryf. Hierdie behandeling is egter nie deur die gevangenisowerheid aan hom gegee nie. By die ander kliniek (verbonde aan 'n provinsiale hospitaal) het B nie vir behandeling met AZT gekwalifiseer nie omdat sy CD4-telling nog te hoog was, gemeet aan die hospitaal se behandelingsbeleid.

In September 1996 het B die huidige aansoek gebring. Die ander drie applikante het ook almal CD4-tellings van minder as 500/ml gehad. Die applikante vra 'n verklarende bevel tot die effek dat hulle (en ander gevangenes met HIV) die reg het op behoorlike en toereikende mediese aandag, versorging en behandeling, en dat hierdie reg diegene wat simptomaties is en 'n CD4-telling van minder as 500/ml het, daarop geregtig maak om (1) 'n voorskrif te ontvang en (2) op staatsonkoste gepaste medisyne teen HIV te ontvang. Volgens die aansoek sluit gepaste medisyne AZT, ddl, 3TC of ddC afsonderlik of in kombinasie in, maar is dit nie beperk tot hierdie middels nie. Alternatief vra die applikante 'n *mandamus* dat hulle uit die gevangenis vrygelaat moet word.

Regter Brand van die Kaapse hooggeregshof bevind eerstens dat die vraag of pasiënte geregtig is op 'n voorskrif vir medisyne op mediese gronde, 'n mediese aangeleentheid is waaroor die hof nie by magte is om te beslis nie en dat die hof nie aan geneeshere kan dikteer wanneer hulle 'n bepaalde behandeling moet voorskryf nie. Aangesien AZT en ddl wel op mediese gronde vir B en die tweede applikant voorgeskryf is, kan die hof die vraag oorweeg of hierdie twee applikante geregtig is om op staatsonkoste van dié medisyne voorsien te word.

Die hof verwys na artikel 35(2) van die Grondwet van die Republiek van Suid-Afrika 108 van 1996 waarvolgens elkeen wat aangehou word, met inbegrip van elke gevonniste gevangene, die reg het "op omstandighede van aanhouding wat met menswaardigheid rekening hou, met inbegrip van, minstens, oefening en die voorsiening, op staatskoste, van toereikende akkommodasie, voeding, leesstof en mediese behandeling" (nie-amptelike Afrikaanse vertaling). Die Grondwet waarborg nie sodanige regte aan individue buite gevangenisse nie; laasgenoemde het bloot die reg *op toegang tot* toereikende behuising (a 26(1)), tot gesondheidsdienste en tot voldoende kos en water (a 27(1)) en die staat moet bloot redelike wetgewende en ander stappe binne sy beskikbare bronne doen om hierdie regte progressief te verwesenlik. Die reg op toegang tot behuising, voedsel en gesondheidsdienste word wel as fundamenteel beskou, maar word gekoppel aan die staat se vermoë om daarin te voorsien.

Uit artikel 35(2) is dit duidelik dat die applikante 'n reg op toereikende mediese behandeling op staatsonkoste het. By die uitleg van hierdie artikel verwys die hof na gemeenregtelike beginsels rakende die regte van gevangenes. Volgens die gemenereg behou gevangenes alle basiese regte wat gewone burgers het, met

uitsluiting van daardie regte wat uitdruklik of by noodwendige implikasie (tydelik) deur wetgewing van hulle weggeneem is of wat noodwendig onversoenbaar is met hul staat van gevangeskap (vgl die *dicta* van Innes AR in *Whittaker and Morant v Roos and Bateman* 1912 AD 92 122–123; Corbett AR in *Goldberg v The Minister of Prisons* 1979 1 SA 14 (A) 39C–E; Jansen AR in *Mandela v Minister of Prisons* 1983 1 SA 938 (A) 957E–F; Hoexter AR in *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 141C–D).

In die lig van artikel 35(2) van die Grondwet en van die *residuum* van regte, moet die hof nou beslis of "toereikende mediese behandeling" neerkom op die behandeling van die simptome van HIV-infeksie (nl opportunistiese siektes, soos tuberkulose, wat toeslaan waar immuniteit laag is), of op terapie teen die menslike immuniteitsgebrekvirus (HIV) self waarmee gepoog word om die immuunstelsel langer te beskerm. Aangesien HIV-infeksie en VIGS steeds ongeneeslik is, gaan dit dus nie hier om enige behandeling wat genesing bring nie.

Die Departement van Korrektiewe Dienste het geen duidelike riglyne oor die anti-HIV behandeling van gevangenes gehad nie en het die beleid van provinsiale hospitale en hulle klinieke in die verband gevolg. Namens die departement is geargumenteer dat toereikende, en nie optimale mediese behandeling nie, gegee moes word en dat wat goed genoeg was vir mense buite gevangenisse, goed genoeg moes wees vir gevangenes. Daar is aangevoer dat pasiënte wat in dieselfde mediese toestand as applikante verkeer het, nie die behandeling wat deur die applikante geëis is, in provinsiale hospitale ontvang het nie. Weens die koste van AZT gekombineer met ander medisyne (R18 000–R24 000 per pasiënt per jaar) is slegs AZT-monoterapie (R14 000 per pasiënt per jaar) in provinsiale hospitale gegee en is slegs pasiënte met 'n CD4-telling van minder as 200/ml (maar meer as 50/ml) vir AZT-behandeling oorweeg. (Wanneer die CD4-telling onder 200 is, het die pasiënt reeds volskaalse VIGS en 'n lewensverwagting van twee jaar.) Daar is verder aangevoer dat bronne beperk is en dat behandeling gegee moet word waar die beste resultate behaal kan word. Indien swanger vroue byvoorbeeld met AZT behandel word, kan voorkom word dat die virus aan hulle babas oorgedra word. Voorts is aangevoer dat indien pasiënte met HIV die kombinasieterapie sou ontvang, dit ander pasiënte wat ook afhanklik is van die voorsiening van mediese sorg deur die staat, sou benadeel. 'n Verdere argument was dat selfs al word anti-HIV terapie nie gegee nie, staatspasiënte met HIV nog steeds behandeling ontvang vir die opportunistiese siektes waaraan hulle ly. Sodoende word hulle gesondheid verbeter en hulle lewens verleng.

Die volgende argumente is namens die applikante aangevoer: Die behandeling van opportunistiese infeksies alleen is ontoereikend. Wanneer die pasiënt eers aan opportunistiese infeksies begin ly, is dit 'n teken dat sy of haar immuunstelsel reeds uitgeput is. Verder is dit kostedoeltreffend om voorkomende terapie teen HIV in 'n vroeër stadium te gee omdat die immuunstelsel beter beskerm word en die vatbaarheid vir opportunistiese siektes verminder word. Sodoende word dit minder noodsaaklik om opportunistiese infeksies later te behandel.

Die hof aanvaar deskundige mediese getuienis dat terapie teen HIV aangedui is wanneer die CD4-telling onder 500/ml is en die pasiënt simptomaties is (maw simptome van opportunistiese siektes begin toon). Die hof aanvaar ook dat die beste behandeling vir HIV-infeksie tans bestaan uit 'n kombinasie van AZT met 3TC of met goedkoper alternatiewe (ddI en ddC) en dat hierdie behandeling die uitwerking van die virus vertraag, die pasiënt se vatbaarheid vir ander infeksies verminder en sy of haar lewensgehalte en -verwagting verbeter.

Regter Brand beslis dat die posisie in provinsiale hospitale irrelevant is: Die staat het 'n groter plig teenoor gevangenes as teenoor burgers wat dieselfde infeksie het, en die standaard van toereikende mediese behandeling vir gevangenes kan nie *per se* bepaal word deur wat die staat vir pasiënte met HIV buite gevangenisse gee nie. Sy redes is kortliks die volgende:

(a) Die Grondwet self maak 'n onderskeid tussen gevangenes en mense daarbuite. Ingevolge artikel 35(2) het gevangenes 'n fundamentele reg op toereikende huisvesting, voeding en mediese sorg, terwyl sodanige waarborg nie vir mense buite gevangenisse gegee word nie. Wat voorsien word vir mense daarbuite kan gevolglik nie die standaard stel vir huisvesting, voeding of toereikende mediese sorg binne gevangenisse nie.

(b) Om toegang tot mediese behandeling teen HIV te weier, sou 'n inbreuk op die *residuum* van gevangenes se regte daarstel wat nie 'n noodwendige gevolg van aanhouding is nie.

(c) Aangesien die staat gevangenes met HIV aanhou in omstandighede waar hulle meer vatbaar is vir opportunistiese infeksies as pasiënte met HIV daarbuite, moet toereikende behandeling deur die staat hulle immuunstelsels beter beskerm as die behandeling wat die staat vir pasiënte met HIV buite gevangenisse bied.

Regter Brand beslis dat anti-HIV behandeling die "toereikende mediese behandeling" is tensy die departement afdoende bewys kan lewer dat die behandeling onbekostigbaar is of dat dit 'n ongeregverdigde las op die staat sou plaas. Hy beslis dat die departement nie sodanige bewys gelewer het nie. Hy beveel gevolglik dat die eerste en tweede applikante voorsien moet word van die anti-HIV terapie (nl AZT en ddl) soos vir hulle voorgeskryf op mediese gronde en dat hulle die behandeling moet ontvang vir die tydperk wat dit voorgeskryf word. Die derde en vierde applikante (en by implikasie al die ander gevangenes met HIV) is nie geregtig op 'n bevel dat die respondente aan hulle anti-HIV behandeling moet gee wat nie op mediese gronde vir hulle voorgeskryf is nie. Die versoek om 'n *mandamus* word ook van die hand gewys.

Regter Brand verwys na die *residuum* van gevangenes se basiese regte wat nie aangetas mag word nie. Wat presies onder hierdie basiese regte inbegryp word, blyk egter nie duidelik uit die regspraak nie: In *Goldberg supra* is beslis dat hulle aan die hand van sowel die gemenereg as wetgewing bepaal moet word; in *Mandela supra* is verwys na fundamentele gemeenregtelike regte wat soms in wetgewing neerslag vind; in *Whittaker supra* na natuurlike regte wat verband hou met die persoonlikheid en waardigheid en in *Hofmeyr supra* na persoonlike en persoonlikheidsregte soos vervat in die gemenereg en wetgewing. In die saak onder bespreking word melding gemaak van "persoonlike vryhede", maar daar word nie na wetgewing verwys nie. (Gevangenisregulasies wat kragtens a 94 van die Wet op Gevangenisse 8 van 1959 uitgevaardig is (*GK* R 2080 van 1965-12-31) maak bv ook voorsiening vir mediese dienste, toereikende voedsel en huisvesting.) Die *residuum*-begrip wat in die onderhawige geval gebruik word om die grondwetlike reg op toereikende mediese behandeling te interpreteer, slaan waarskynlik hoofsaaklik op die reg op liggaamlike integriteit wat die gesondheid insluit (sien Joubert *Grondslae van die persoonlikheidsreg* (1953) 131; Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 29–30). Alhoewel die hof dit nie uitspel nie, is dit sekerlik hierdie residuele reg wat geskend sou word indien anti-HIV behandeling geweier word.

Die hof volg 'n gesonde regsbeleid deur die *onus* om die onbekostigbaarheid van die behandeling te bewys, te plaas op die departement wat die aanhouding gelas het en nie die aangeduide mediese behandeling gee nie (en sodoende die reg op liggaamlike integriteit van gevangenes aantas). Die bewyslas hang dus saam met die *residuum*-beginsel (per Hoexter AR in *Hofmeyr supra* 153IJ). Hierdie benadering is ook in ooreenstemming met die vermoede van uitleg dat wanneer meer as een konstruksie van 'n bepaling moontlik is, die een gekies moet word wat die billikste en regverdigste is en nie bestaande regte wegneem nie (Du Plessis *The interpretation of statutes* (1986) 85 ev). Dit is ook in ooreenstemming met die beginsels van grondwetlike uitleg wat daarna streef om die waardes onderliggend aan die Grondwet (menswaardigheid, gelykheid en vryheid) te bevorder by die uitleg van sowel die menseregte-akte as gemeenregtelike regte (a 39 van die Grondwet).

Alhoewel die uitspraak betrekking het op die voorsiening van duur medisyne aan net twee gevangenes, kan dit wyer implikasies hê. Ander gevangenes met HIV (en volgens die Departement Korrektiewe Dienste was daar teen Junie 1997 ten minste 1 026) sal anti-HIV behandeling as hul grondwetlike reg kan eis indien dit op mediese gronde aan hulle voorgeskryf word en die departement nie kan bewys dat hierdie behandeling onbekostigbaar is nie. Dit kan meebring dat skaars fondse van ander verdienstelike programme weggeneem sal moet word. Ten spyte hiervan is hierdie uitspraak (soos ook dié in *C v Minister of Correctional Services*) billik omdat dit diegene wat vanweë gevangeskap nog meer kwesbaar as ander individue is, teen die oormag van die staat beskerm. Regter Brand gaan in sy uitspraak egter nog verder: Hy neem ook kennis daarvan dat gevangenes met HIV as "dubbel kwesbaar" bestempel kan word vanweë hulle gebrekkige immuniteit.

CHRISTA VAN WYK
Universiteit van Suid-Afrika

AANRANDING EN VRYHEIDSBEROWING AS SELFSTANDIGE EISOORSAKE EN DIE TOEPASLIKHEID VAN DIE *ACTIO LEGIS AQUILIAE*, AKSIE WEENS PYN EN LYDING EN *ACTIO INIURIARUM*

Brandon v Minister of Law and Order 1997 3 SA 68 (K)

Die relevante feite is kortliks die volgende: Die eiser is na bewering deur twee lede van die publiek (Kirsten en Muir) aangerand waarna die polisie al drie gearresteer en in dieselfde sel aangehou het. Hier is die aanranding op die eiser deur K en M voortgesit. Aanvanklik het die eiser sy eis net op hierdie aanranding gebaseer, maar later sy pleitstukke gewysig sodat dit óók op onregmatige arrestasie en aanhouding gegrond was. Die verweerder se spesiale pleit dat laasgenoemde eisoorsaak verjaar het omdat die eiser gefaal het om die eis in te stel binne ses maande nadat die eisoorsaak ontstaan het, word gehandhaaf.

In die loop van sy uitspraak maak regter Van Reenen die volgende stellings wat kommentaar regverdig (78E–79D):

> "The plaintiff's cause of action regarding the damages suffered by him as a result of the assault by Kirsten and Muir contains all the elements of the Aquilian action, under which, in an extended sense, in the case of bodily injuries, not only patrimonial, but also non-patrimonial loss may be recovered (see *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 606; *Evins v Shield Insurance Co Ltd* (*supra* at 838H–839A); *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 595F–H). A claim for wrongful arrest and detention, on the other hand, seeks to compensate a claimant for the infringement of different interests of personality, namely the restriction of his or her physical freedom of movement and also impairment of his or her subjective feelings of dignity or self-respect (see Joubert (ed) *The Law of South Africa* (1st Reissue) vol 7 para 101; Neethling *Persoonlikheidsreg* 2nd ed at 111; Neethling, Potgieter and Visser *Deliktereg* 3rd ed at 327–8; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6th ed at 550; Visser and Potgieter *Law of Damages* at 423–5). Such compensation is recoverable by means of the *actio iniuriarum*, but patrimonial loss flowing therefrom may be recovered by means of the *actio legis Aquiliae* (see Amerasinghe 'The Protection of *Corpus* in Roman-Dutch Law' (1967) 84 *SALJ* 335; *Neethling* (*op cit* at 118); *Visser and Potgieter* (*op cit* at 404)). What is apparent from the aforegoing is that, whilst the plaintiff's claim for damages flowing from the assault is based on the *actio legis Aquiliae*, the claim for damages for wrongful arrest and detention is based on the *actio iniuriarum*. Although both causes of action are delictual in nature, their elements and characteristics are unidentical (see Joubert (ed) *The Law of South Africa* (1st Reissue) vol 8 part 1 paras 7–10, para 32).
>
> It is apparent from the manner in which the causes of action for damages flowing from the assault, on the one hand, and wrongful arrest and detention, on the other hand, have been formulated in the amended particulars of claim, that the respective *facta probanda* for their proof are not identical (cf *Evins v Shield Insurance Co Ltd* (*supra* at 839C–E)). That is not surprising as they, in my view, constitute separate and distinct causes of action.
>
> In addition, *contumelia* is not an automatic element of loss for wrongful arrest and detention and has to be averred and proved (see *Bennett v Minister of Police and Another* 1980 (3) SA 24 (C) at 37D and see also Neethling *Persoonlikheidsreg* 2nd ed at 111; *PJ Visser and JM Potgieter* (*op cit* at 99); *Neethling, Potgieter and Visser* (*op cit* at 325) but cf *Makhanya v Minister of Justice* 1965 (2) SA 488 (N) at 492). The plaintiff, in the instant case, not only failed to aver in the particulars of claim, as originally formulated, that he suffered *contumelia*, but made no allegations that he suffered damages as a result of the alleged wrongful arrest and furthermore did not claim any damages in respect thereof. That omission resulted therein that the cause of action for wrongful arrest and detention on which the plaintiff now relies, did not form part of the claim originally instituted. As the cause of action on which the plaintiff now relies was perfected longer than six months after it had arisen, the plaintiff, in my opinion, failed to commence a civil action to recover the damages which flowed from his alleged wrongful arrest and detention, timeously."

(a) Daar kan met die hof saamgestem word dat die eis weens aanranding en dié weens onregmatige arrestasie en gevangehouding twee selfstandige eisoorsake daarstel. (Soos egter sal blyk uit par (b) *infra*, verdien nie al die beweegredes vir Van Reenen R se standpunt instemming nie.) Volgens die benadering in *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 838 bestaan daar 'n eisoorsaak indien al die vereistes daarvoor (die *facta probanda*) aanwesig is. Hierdie vereistes is die elemente wat nodig is om deliktuele aanspreeklikheid te fundeer

(sien Visser en Potgieter *Skadevergoedingsreg* (1993) 130–131; Neethling, Potgieter en Visser *Deliktereg* (1996) 221). So toegepas, verskil die elemente van 'n gedingsvatbare aanranding (die onregmatige opsetlike aantasting van die liggaam of *corpus*) van dié van onregmatige arrestasie en gevangehouding (die onregmatige krenking van die liggaamlike vryheid of *libertas*) op tweërlei wyse (sien Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 89 ev 101 114 123 ev 124 129; Neethling, Potgieter en Visser *Deliktereg* 324–325 327–328): Eerstens is die betrokke persoonlikheidsgoedere (*corpus versus libertas*) en gevolglik die persoonlikheidsnadeel wat ervaar word, verskillend (liggaamsaantasting teenoor vryheidsberowing; vgl ook *in casu* 78F); en tweedens, anders as by aanranding, is *animus iniuriandi* nie 'n aanspreeklikheidsvereiste vir onregmatige arrestasie en gevangehouding ingevolge die *actio iniuriarum* nie (sien *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 156).

(b) Die hof se belangrikste oorweging vir sy beskouing dat dit hier om twee eisoorsake gaan, is vatbaar vir kritiek, te wete dat die eis weens aanranding die Aquiliese aksie fundeer waarmee vergoeding vir sowel vermoënskade as nievermoënskade verhaal kan word, terwyl die *actio iniuriarum* ingestel moet word vir die eis weens onregmatige arrestasie en gevangehouding. Sodoende word nie alleen die selfstandige bestaan van die aksie weens pyn en lyding as *sui generis*-aksie en die toepaslikheid van die *actio iniuriarum* by aanranding misken nie, maar word ook die prinsipiële verskille tussen die drie grondpilare van ons deliktereg – die *actio iniuriarum*, die aksie weens pyn en lyding en die *actio legis Aquiliae* (Neethling, Potgieter en Visser *Deliktereg* 5–6) – by aanranding ten onregte negeer.

Regter Van Reenen se standpunt dat vergoeding vir die nie-vermoënskade weens die aanranding *in casu* met die (uitgebreide) Aquiliese aksie verhaal kan word, is in die lig van gesaghebbende *dicta* van die appèlhof duidelik verkeerd. In *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 776 het die hof uitdruklik daarop gewys dat genoegdoening vir skok, pyn en lyding weens liggaamsaantasting verhaal word "met die besondere aksie wat in die Romeins-Hollandse reg, onder invloed van die Germaanse gebruiksreg, ontwikkel het" (sien ook *Hoffa v SA Mutual Fire and General Insurance Co Ltd* 1965 2 SA 944 (K) 950–952; sien in die algemeen Visser en Potgieter 92–99 179–186 402–415; Neethling, Potgieter en Visser *Deliktereg* 18–19 239–250). Ook in *Government of the Republic of South Africa v Ngubane* 1972 2 SA 601 (A) 606 – 'n beslissing waarna regter Van Reenen as gesag vir sy standpunt verwys – word die korrektheid van die *Hoffa*-saak bevestig dat "[it would be] inappropriate to try to bring such a claim under the umbrella of either the *actio legis Aquiliae* or the *actio iniuriarum*". Dieselfde geld *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 595 waar appèlregter Van Heerden die aksie weens pyn en lyding as 'n *actio sui generis* bestempel. Laasgenoemde twee beslissings is bevestig in *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A) 65. Net in *Evins supra* 838 blyk 'n mate van steun vir regter Van Reenen se benadering. Appèlregter Corbett praat wel van "an Aquilian action for damages for bodily injury" maar kwalifiseer dit onmiddellik met die volgende woorde:

> "[A]nd here I use the term Aquilian in an extended sense to include the *solatium* awarded for pain and suffering, loss of amenities of life, etc, which is *sui generis* and strictly does not fall under the umbrella of the *actio legis Aquiliae: Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 606E–H) . . ."

In die lig van hierdie kwalifikasie en die duidelike *dicta* van die appèlhof waarna hierbo verwys is, asook om verwarring en bygevolg regsonsekerheid te vermy, is dit noodsaaklik om die toepassingsgebiede van die Aquiliese aksie (skadevergoeding vir vermoënskade) en die aksie weens pyn en lyding (vergoeding vir persoonlikheidsnadeel weens liggaamsaantasting) duidelik uitmekaar te hou (sien Neethling, Potgieter en Visser *Deliktereg* 5–6 256–257).

Soos aangedui, is daar geen blyke in regter Van Reenen se uitspraak dat die *actio iniuriarum* ook by die onderhawige aanranding te pas kon kom nie; en dat daar dus 'n sameloop van die *actio legis Aquiliae*, die aksie weens pyn en lyding en die *actio iniuriarum* by die aanranding kon plaasvind, soos trouens veelal by dié tipe gevalle gebeur. Snaaks genoeg, dit was inderdaad die geval *in casu* aangesien die eiser vergoeding geëis het vir "past and future medical expenses"; "pain and suffering, loss of amenities of life, shock and permanent disablement"; en *contumelia* (73F–G).

Die sameloop van hierdie drie deliksremedies by aanranding sien soos volg daaruit. Staan dit vas dat die dader die fisies-psigiese integriteit van die benadeelde op onregmatige en opsetlike wyse aangetas het, kan laasgenoemde genoegdoening, wat *ex aequo et bono* begroot word, met die *actio iniuriarum* verhaal. Hierdie bedrag *solatium* word primêr vir gekwetste gevoelens toegeken, oftewel die "sentimental loss" wat die eiser weens die *contumelia* of die minagting van sy liggaam ervaar het. *Contumelia* moet hier nie as sinoniem vir *belediging* (sien ook *infra*) opgevat word nie, maar eerder in die sin van 'n *gevoel van veronregting* wat uit die minagting van die liggaam resulteer (sien *Neethling's Law of personality* 55–56 65–66 117–118).

Waar die eiser afgesien van *contumelia* ook fisiese pyn en lyding weens 'n opsetlike aantasting van sy liggaam ervaar het, kan (onvolmaakte) kompensasie (genoegdoening of *solatium*) met die aksie weens pyn en lyding verhaal word. Hierdie aksie is gerig op vergoeding vir pyn, lyding, skok, liggaamlike ontsiering, verlies aan lewensgenietinge en verkorte lewensverwagting as gevolg van 'n skuldige (opsetlike of nalatige) aantasting van 'n persoon se fisies-psigiese integriteit. Van belang vir huidige doeleindes is die verhouding tussen dié aksie en die *actio iniuriarum*. Uit bostaande behoort reeds duidelik te wees dat in die geval van 'n opsetlike aantasting van die liggaam, die aksie weens pyn en lyding vir kompensasie naas die *actio iniuriarum* vir genoegdoening ingestel kan word. By aanranding loop die twee aksies dus saam. Hierdie feit word egter deur Van der Merwe en Olivier (*Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 465) ontken. Hulle redeneer dat in die geval van aanranding die aksie weens pyn en lyding sy sin verloor en vervang word deur die *actio iniuriarum* waarmee volle genoegdoening (ook vir pyn en lyding) verhaal kan word. Hierdie beskouing gaan egter nie op nie. Afgesien van regspraak wat die *sui generis*-aard van die aksie weens pyn en lyding teenoor die *actio iniuriarum* beklemtoon (sien *supra*), verskil die doel of funksie van die *actio iniuriarum* (*genoegdoeningsfunksie*) van dié van die aksie weens pyn en lyding (*kompensasiefunksie*). Daarom kan hulle wat aanranding betref nie oor dieselfde kam geskeer word nie. Beide aksies is dus in beginsel by 'n onregmatige en opsetlike liggaamsaantasting beskikbaar (sien *Neethling's Law of personality* 118–119; Neethling, Potgieter en Visser *Deliktereg* 257). Hierdie posisie blyk by implikasie ook reeds uit die regspraak waar onderskei word tussen genoegdoening vir *contumelia* (*iniuria* – ongelukkig meesal in die verkeerde sin van belediging: sien *Neethling's Law of personality* 49–50 53 55–56 oor die regte beskouing van die begrip *contumelia*) en kompensasie vir

fisiese pyn en lyding (sien bv *Radebe v Hough* 1949 1 SA 380 (A) 384–385; *Magqabi v Mafundityala* 1979 4 SA 106 (OK) 110; *Mabona v Minister of Law and Order* 1988 2 SA 654 (SOK) 664; *N v T* 1994 1 SA 862 (K) 864; *GQ v Yedwa* 1996 2 SA 437 (Tk) 438–439).

Waar 'n persoon ook vermoënskade as gevolg van aanranding oploop, soos mediese koste, verlies van verdienste of verdienvermoë, kan skadevergoeding met die *actio legis Aquiliae* verhaal word (sien *Neethling's Law of personality* 119).

(c) Regter Van Reenen wys tereg daarop dat onregmatige arrestasie en gevangehouding nie noodwendig met *contumelia* (wat hy klaarblyklik ook hier in die verkeerde sin van belediging of krenking van die eergevoel opneem: vgl 78F waar hy van "impairment of his or her subjective feelings of dignity or self-respect" praat) gepaard hoef te gaan nie. Belediging is dus nie 'n *factum probandum* vir onregmatige arrestasie en gevangehouding nie. Dit beteken natuurlik nie dat 'n aantasting van die liggaamlike vryheid nie terselfdertyd ook die eergevoel kan krenk nie. Trouens, in *Makhanya v Minister of Justice* 1965 2 SA 488 (N) 492 word verklaar dat *contumelia* (krenking van "dignity") "is always an element in deprivation of liberty involved in imprisonment by authority". Nietemin onderskei die hof (491 – soos Van Reenen R) tog duidelik tussen die "aggression upon her liberty" en dié "upon her dignity" (sien ook *Neethling's Law of personality* 123 vn 20).

Samevattend word aan die hand gedoen dat die howe ter wille van gesonde regsontwikkeling en regsekerheid op die gebied van die deliktereg, die vereistes, funksies en toepassingsgebiede van die *actio iniuriarum*, die aksie weens pyn en lyding en die *actio legis Aquiliae* suiwer moet onderskei, al is dit dan ook so dat die aksies in die pleitstukke nie (altyd) by name genoem word nie.

J NEETHLING
Universiteit van Suid-Afrika

RIGLYNE VIR HERSTEL VAN GRONDREGTE

The Transvaal Agricultural Union v The Minister of Land Affairs; The Commission on the Restitution of Land Rights CCT 21/96

Die herstel van grondregte aan daardie persone wat hulle grond deur middel van rasdiskriminerende wetgewing verloor het, is 'n komplekse aangeleentheid. Teen Junie 1996 was daar reeds 7 095 grondeise ingedien (Politieke Redaksie "R1 miljard bestee aan agtergeblewe boere" *Beeld* 1996-06-13 6). Kennisgewings van grondeise word feitlik weekliks in die *Staatskoerant* gepubliseer (vgl bv AK 825 in *SK* 17287 van 1996-07-05; AK 1332 in *SK* 17414 van 1996-09-13; AK 1624 in *SK* 17617 van 1996-11-22).

Die Transvaalse Landbou Unie (TLU), 'n liggaam wat die belange van hulle lede (boere) verteenwoordig, het gedurende September 1996 die konstitusionele hof *in casu* direk genader om sekere bepalings van die Wet op Herstel van

Grondregte 22 van 1994 (hierna Wet 22 van 1994) te betwis as synde in stryd met die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (hierna 1993-Grondwet).

Alhoewel die konstitusionele hof bevind dat die applikante se aansoek nie direkte toegang tot dié hof regverdig nie (46–48), word daar tog bepaalde riglyne in die saak neergelê vir die interpretasie van beide die relevante artikels in die 1993-Grondwet en Wet 22 van 1994. Die doel van die vonnisbespreking is om 'n kort uiteensetting van die saak te gee en veral klem te lê op hierdie riglyne wat vir die hooggeregshof, die Kommissie op Grondtoewysing en grondeisers en -teenstanders in die toekoms van belang kan wees.

1 Agtergrond

Wet 22 van 1994 is uitgevaardig na aanleiding van artikels 121–123 (gelees met artikels 8(2) en 28) van die 1993-Grondwet. Artikel 121 bepaal dat die parlement wetgewing kan daarstel om herstel van grondregte te verleen in gevalle waar 'n persoon of gemeenskap van hulle regte in grond na aanleiding van rasdiskriminerende wetgewing na 19 Junie 1913 ontneem is (soos verwys na in a 8(2)). Die wet is nie van toepassing op grond waarvoor voldoende vergoeding kragtens die Onteieningswet 63 van 1975 ontvang is nie. Alle eise is onderworpe aan die voorwaardes, beperkings en uitsluitings wat deur die wet opgelê kan word en is slegs deur 'n hof beregbaar nadat artikel 122 toegepas is (a 122(6)).

'n Kommissie op die Herstel van Grondregte is kragtens artikel 122 van die 1993-Grondwet en artikel 4 van Wet 22 van 1994 ingestel. Die kommissie moet die meriete van die aansoeke ondersoek, geskille besleg en afhandel, verslae aan die howe voorlê en kan enige ander bevoegdhede en funksies uitoefen wat in die wet voorgeskryf word (a 122(1)(a)–(d); vgl ook a 6 Wet 22 van 1994). Die prosedures moet ook in die wetgewing uiteengesit word (a 122(2)).

Wet 22 van 1994 maak voorsiening vir 'n kommissie (a 4), 'n grondeisehof (a 22), delegasie aan 'n grondeisekommissaris en streekgrondeisekommissarisse (a 7), mediasie (a 13), prosessuele aangeleenthede soos die indiening van eise (a 11) en die ondersoekbevoegdhede van die kommissie (a 12) (vgl ook Du Plessis, Olivier en Pienaar "The ever-changing land law" 1995 *SAPR/PL* 147–154).

Daar is reeds in 1991 voorsiening gemaak vir die indiening en afhandeling van grondeise in die Wet op die Afskaffing van Rasgebaseerde Grondreëlings 108 van 1991. Die Kommissie op Grondtoewysing het verskeie eise aangehoor en heelwat eise is reeds in die periode voor 1994 afgehandel en die grond aan grondeisers oorgedra. Die eise was meestal gevalle waar stamme weens rasdiskriminerende wetgewing hul grond ontneem is (vgl Du Plessis en Olivier "Nuwe grondmaatreëls" 1991 *SAPR/PL* 264–265, "Land: new developments 1993/1994" 1994 *SAPR/PL* 183; Du Plessis, Olivier en Pienaar "Grond – verdere komplikasies" 1992 *SAPR/PL* 149, "Grond 1992/3" 1993 *SAPR/PL* 131–133, "Land: new developments 1993" 1993 *SAPR/PL* 363–364).

2 Betoë

Die TLU beweer dat die volgende artikels met die doel, gees en bepalings van die Grondwet in stryd is (1):

• artikel 6(1)(c) (die grondeisekommissaris moet eisers gereeld in kennis stel van die verloop van hulle eise)

• artikels 9(1)(b) en 13(2)(b) (aanwysing deur die grondeisekommissaris van geskilbeslegters)

• artikel 11(1) (die grondeisekommissaris publiseer na oorweging die eis in die *Staatskoerant* en maak dit bekend in die distrik waar die grond geleë is)

• artikel 11(6)(b) (opdrag aan die registrateur van aktes om 'n nota van die eis teen die titelakte aan te teken)

• artikel 11(7) (sodra die eis gepubliseer is, mag niemand van grond afgesit en geen verbeterings verwyder, beskadig of vernietig word sonder skriftelike toestemming van die hoofgrondeisekommissaris nie)

• artikel 11(8) (betredingsbevoegdhede indien vermoed word dat verbeterings vernietig, beskadig of verwyder word of dat enige persoon woonagtig op die grond benadeel word – 'n lys van die werknemers, bewoners, landboukundige toestand van die grond, uitgrawings, myn- en prospekteeraktiwiteite kan opgestel word).

Daar is beweer dat artikels 11(1), 11(6)(b), 11(7), 11(8) en reëls 13 en 14 in stryd is met artikel 24(b) (administratiewe geregtigheid); artikels 11(7) en 11(8) met artikels 28 (beskerming van eiendomsreg en vryheid van ekonomiese bedrywighede); artikels 9(1)(b) en 13(2)(b) met artikel 122(1)(b); en artikel 6(1)(c) met die gelykheidsklousule (a 8(2)) van die Grondwet (9–15).

Die aansoek word deur die Minister van Grondsake teengestaan op grond van (a) die meriete van die aansoek en (b) die feit dat die aansoek nie deur die konstitusionele hof verhoor behoort te word nie aangesien dit nie onder die spesiale jurisdiksie van reël 17 (GK 703 in *SK* 16407 van 1995-05-12) val nie (4).

Die konstitusionele hof versoek die partye om skriftelike argumente voor te lê oor die vraag of die saak hoegenaamd direkte toegang tot die hof behoef (3). Applikant beweer dat (a) die konstitusionele hof die enigste hof is wat jurisdiksie oor die vraag het; (b) die aansoek dringend en in die openbare belang is en 'n beslissing oor die geldigheid van die artikels die regte van grondeienaars en restitusie-aansoekers kan raak en ook 'n wesenlike uitwerking op die funksionering van die kommissie en die grondeisehof kan hê; (c) die saak afgehandel kan word sonder die aanhoor van getuienis; en (d) die redelike vooruitsig bestaan dat 'n aansoek kan slaag (17).

3 Bevinding

Die hof bevind dat die applikant nie kon aantoon waarom direkte toegang tot die hof nodig is nie en wys die aansoek van die hand. 'n Kostebevel word teen applikant gemaak aangesien die gewone prosedure van aansoek tot die hooggeregshof nie gevolg is nie. Die weg van 'n reël 17-aansoek is verkies met die risiko van mislukking van die aansoek (46–48).

4 Direkte toegang tot konstitusionele hof

Reël 17 van die konstitusionele hofreëls laat slegs in uitsonderlike omstandighede direkte toegang tot dié hof toe; in alle ander gevalle moet die prosedure wat deur artikel 102(1) van die Grondwet voorgeskryf word, gevolg word. Ingevolge artikel 102(1) moet die hooggeregshof genader word vir die verwysing van die saak na die konstitusionele hof. Sou bevind word dat die aangeleentheid binne die uitsluitlike jurisdiksie van die konstitusionele hof val, moet voorts bepaal word of die beslissing bepalend is vir die spesifieke geskil en of daar voldoende meriete in die aansoek is om die verwysing te regverdig

(die hof verwys na *Brink v Kitshoff* 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC) 4 6–10 in die verband).

Wet 22 van 1994 behandel aangeleenthede wat die openbare belang in 'n groot mate raak. Die hof is egter van mening dat dit nie 'n voldoende grond vir direkte toegang tot die hof is nie en dat ook bewys moet word dat die vertraging wat die gewone prosedure kan meebring die openbare belang kan raak of geregtigheid en die daarstel van 'n behoorlike staatsadministrasie ("good government") kan skaad. Volgens die hof is dit bindende vereistes (18).

Dit moet duidelik wees dat die aansoek werklik dringend is soos in die geval van *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 4 SA 877 (CC); 1995 10 BCLR 1289 (CC) 15–17 waar verkiesings in die wiele gery kon word en die moontlikheid bestaan het dat die parlement vinnig byeengeroep sou moes word (19–20). Die hof bevind dat die twee sake nie vergelykbaar is nie. Die applikante in die onderhawige saak het geleentheid gehad om kommentaar te lewer op die Wetsontwerp op die Herstel van Grondregte en 'n lang tydperk het reeds sedert inwerkingtreding van die wet verloop. Die applikante kon ook nie aantoon dat daar enige benadeling van hulle lede deur die publikasie van enige van die kennisgewings oor grondeise was nie (21–23).

Die vraag na die geldigheid van die bepalings van 'n wet is sekerlik in die openbare belang maar kan nie as uitsonderlik aangemerk word nie (23). Uit die beslissing van die hof blyk dit dus weer eens baie duidelik dat die konstitusionele hof werklik net in uitsonderlike gevalle direk genader moet word en dat behoorlike argumente om die aansoek te staaf, voorgelê moet word. Dit wil dus voorkom of artikel 102(1) van die 1993-Grondwet behoorlik nagekom moet word. 'n Soortgelyke bepaling is nie in die Grondwet van die Republiek van Suid-Afrika 108 van 1996 (hierna 1996-Grondwet) opgeneem nie maar artikel 167(6)(a) maak voorsiening vir nasionale wetgewing of reëls wat voorsiening moet maak dat in die belang van geregtigheid en met toestemming van die konstitusionele hof 'n saak direk voor dié hof geplaas kan word. Alle wetgewing (dus ook reël 17) bly van toepassing onderworpe aan wysiging en herroeping en die bepalings van die 1996-Grondwet (Item 2 Bylae 6).

5 Administratiewe geregtigheid

Die beswaar van applikant is dat artikel 11(1) nie voorsiening maak dat grondeienaars gehoor word alvorens die streekgrondkommissaris 'n kennisgewing in die *Staatskoerant* publiseer nie. Die hof verwys (25) na die volgende reël gebaseer op *Cabinet for the Territory of South West Africa v Chikane* 1989 1 SA 349 (A) 379G en *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 748G–H:

> "[W]hen a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken ... unless the statute expressly or by implication indicates the contrary."

Die vraag of die *audi alteram partem*-reël uitgesluit is, hang van die interpretasie van die betrokke wetgewing af (26) (in dié betrokke geval die interpretasie van die hooggeregshof: vgl *Brink v Kitshoff* 1996 4 SA 197 (CC); 1996 6 BCLR 752 (CC) 14).

Die streekgrondkommissaris moet volgens artikel 11(1)(a)–(d) bepaal of die grondeis aan die formele vereistes voldoen en of dit nie beuselagtig of kwaadwillig is nie. Daarna moet die voorgeskrewe prosedures nagekom word. Die nota

wat teen die titelakte aangebring word (a 11(6)), raak nie die regte van die grondeienaar of derdes wat belange in die eiendom het direk nie. Volgens die hof kan die eienaar steeds die grond vervreem en derdes hulle regte uitoefen. Die aantekening teen die titelakte is slegs 'n kennisgewing aan derde partye dat die betrokke grondstuk onderworpe is aan 'n grondeis – die eienaar sou bowendien verplig gewees het om die inligting aan 'n potensiële koper of verbandhouer te openbaar (28).

Artikel 11(7) en (8) raak wel die regte van die eienaar en ander moontlike belanghebbende partye. Die hoofgrondeisekommissaris kan egter toestemming vir uitsettings en die verwydering, beskadiging of vernietiging van verbeterings gee. Hierdie diskresie is onderworpe aan hersiening deur die grondeisehof (a 36). Die hof stel dit duidelik dat die regte van die grondeienaar soos deur die 1993-Grondwet beskerm en enige geregverdigde beperkings wat deur Wet 22 van 1994 opgelê word, behoorlik in ag geneem moet word voordat toestemming verleen of geweier word (29).

Die hooggeregshof sou sekere riglyne in ag kan neem om in die lig van die getuienis voor die hof te bepaal of administratiewe geregtigheid kragtens artikel 11(1) geskied het (30–31). Die belange van die eisers moet teenoor dié van die grondeienaars opgeweeg word met inagneming van die volgende (30):

- die tydelike aard van die verswaring
- die doel van die *status quo*-bepaling in artikel 11(7)
- die noodsaak vir die bespoediging van die beskerming van die *status quo*-doel
- die skade wat die grondeienaars kan ly deur die beperkings van artikel 11(7) en (8)
- die kwesbaarheid van die eisers en die skade wat hulle kan ly indien die *status quo* nie bewaar word nie
- die reg van die grondeienaars om die hoofgrondeisekommissaris te nader vir uitsetting of inmenging met die verbeterings op die grondstuk
- die vraag of Wet 22 van 1996 redelikerwys vereis dat grondeise spoedig afgehandel word.

Artikel 11(6) is vervang deur die Wysigingswet op Grondherstel- en Grondhervormingswette 78 van 1996 en 'n endossement hoef nie meer teen die titelakte aangebring te word dat die grond onderworpe aan 'n grondeis is nie; die wysiging verwyder dus die vertraging wat dit in die verkoop van die grond of die verkryging van sekuriteit kon meebring (vgl ook Politieke Redaksie "Grondhervorming: 'vasskoppery ontstel'" *Beeld* 1996-09-18 7). Artikel 11(6) vereis nou nadat die streekgrondeisekommissaris die kennisgewing in die *Staatskoerant* gepubliseer het, hy of sy die grondeienaar en enige ander belanghebbende party skriftelik daarvan in kennis moet stel en hulle aandag op artikel 11(7) vestig. Subartikel (aA) word by artikel 11(7) gevoeg en bepaal dat geen persoon die betrokke grond mag verkoop, verruil, skenk, verhuur, onderverdeel of hersoneer sonder om een maand vooraf skriftelik kennis aan die grondeisekommissaris te gee nie. Indien kennis nie gegee is nie kan die betrokke handelinge deur die grondeisehof tersyde gestel word of enige ander bevel gemaak word as bevind word dat die handelinge nie te goeder trou geskied het nie.

Artikel 11A is ook ingevoeg om voorsiening te maak dat enige persoon wat deur die publikasie van die kennisgewing geraak word, vertoë kan rig tot die

streekgrondeisekommissaris vir intrekking of wysiging van die kennisgewing. Alle belanghebbende partye moet per aangetekende pos van enige moontlike intrekking of wysiging van 'n kennisgewing in kennis gestel word en geleentheid gebied word vir die verskaffing van redes waarom die kennisgewing nie gewysig of ingetrek moet word nie.

Hierdie wysigings gee dus groter beweegruimte aan die grondeienaar sonder dat die belange van die grondeisers op die agtergrond geskuif word. Dit skakel ook heelwat van die TLU se besware uit.

6 Eiendomsreg en die reg op vrye ekonomiese aktiwiteit

Alhoewel artikel 28 van die 1993-Grondwet nie spesifiek verwys na die beperking op die uitoefening van eiendomsreg en regte in grond wat deur grondeise opgelê word nie, bepaal die gelykheidsklousule (a 8(3)(b)) dat elke persoon of gemeenskap wel geregtig is om 'n eis kragtens artikels 121–123 van die Grondwet in te stel (vgl par 2 hierbo). Die konstitusionele hof bevind dat die bestaande eiendomsreg nie voorrang geniet bo grondeise nie. Die hof lê die riglyn neer dat "the conflicting interests of claimants and current registered owners are to be resolved on a basis that is just and equitable" met inagneming van die faktore neergelê in artikel 123(2) van die 1993-Grondwet (33). Sodra die eis deur die grondeisehof toegestaan is, moet die staat die grond, indien nodig, aankoop of teen billike vergoeding onteien (a 123(2), (4) en (5) gelees met a 28(3) 1993-Grondwet).

Die applikant in die saak kon nie aantoon hoe artikel 11(7) en (8) wesenlik op die eiendomsreg van die grondeienaar inbreuk maak nie. Die hof maak die stelling dat al sou daar wel op die grondeienaar se eiendomsreg inbreuk gemaak word, die inbreukmaking ooreenkomstig artikel 33 van die 1993-Grondwet geregverdig sou wees (37–38). Die argument sou verder deur artikel 8(3)(b) van die Grondwet gestaaf kon word.

Artikel 25(1) van die 1996-Grondwet verwys nie meer spesifiek na eiendomsreg nie maar bepaal dat niemand van hulle eiendom ontneem mag word nie behalwe deur 'n wet met algemene werking. Grond mag ontneem word vir 'n openbare doel en in die openbare belang onderworpe aan vergoeding (a 25(2)). Die openbare belang sluit die regering se verbintenis tot grondhervorming in (a 25(3) en (8)). Artikel 25(7) maak spesifiek voorsiening dat 'n persoon of gemeenskap wie se eiendom na 19 Junie 1913 as gevolg van rasdiskriminerende wetgewing of praktyke ontneem is, geregtig is op herstel van dié eiendom of vergoeding.

7 Delegasie

Applikant het beweer dat die grondeisekommissie nie kragtens artikel 122(1)(b) van die 1993-Grondwet die bevoegdheid het om in wetgewing-mediasie aan iemand anders te delegeer nie (40). Volgens applikant sou die kommissie (al die kommissarisse gesamentlik) alle mediasies self moet onderneem. Dit sou volgens die hof 'n onmoontlike taak op die kommissarisse lê, veral in die lig van die hoeveelheid eise wat reeds ingedien is (42–43). Artikel 121(6) van die Grondwet voorsien volgens die hof slegs dat die kommissie 'n belangrike rol in die hele proses rondom grondeise, mediasie en onderhandeling te speel het (43).

Die konstitusionele hof stel as riglyn (45) dat die 1993-Grondwet aan die parlement die bevoegdheid verleen om wetgewing uit te vaardig (a 121(1) – 44). Die parlement is nie 'n suborgaan waarvan die bevoegdhede van delegasie

beperk word nie en die Grondwet behoort nie legalisties uitgelê te word nie (die hof verwys na *Minister of Home Affairs (Bermuda) v Fischer* 1980 AC 319 (PC) 328H in die verband). Daar is geen beperking in die Grondwet op die grondeisekommissaris om onderhandelaars om 'n grondeis af te handel, aan te stel of sodanige bevoegdheid te delegeer nie. Artikel 122(1)(d) bepaal in elk geval dat die kommissie enige ander funksies en bevoegdhede kan uitoefen wat die wet voorskryf.

8 Slot

In die onderhawige saak het die konstitusionele hof riglyne verskaf oor hoe die Wet op die Herstel van Grondregte 22 van 1994 en die 1993-Grondwet geïnterpreteer behoort te word om administratiewe geregtigheid te bewerkstellig. Die hof maak wel die opmerking dat die belange van die grondeienaar en die beskerming van sy of haar eiendomsreg nie swaarder weeg as dié van die grondeiser nie. Artikel 11(7) en (8) is daar geplaas om te verseker dat die grondeiser nie benadeel word nadat die grondeienaar van die eis te hore kom nie. Dié *status quo* beskerming geld nie absoluut nie en kan deur die hoofgrondeisekommissaris opgehef word na voorlegging van behoorlike redes en met inagneming van 'n aantal faktore. Dié diskresie kan slegs na behoorlike afweging van alle belange uitgeoefen word. Sedert die publikasie van die hofsaak was die grondeisekommissaris al gedwing om van die bepalings van artikel 11(7) en (8) gebruik te maak ten einde grondeisers te beskerm (vgl bv AK 521 in *SK* 17119 van 1996-05-03 (Barkly-Wes in Noord-Kaap)); die noodsaak van die beskerming van wat die wet in die vooruitsig gestel het en wat die konstitusionele hof korrek opgesom het, blyk hieruit.

Grondeise is en bly 'n moeilike aangeleentheid en meerdere persone as bloot die grondeisers en grondeienaars word daardeur geraak. Deur 'n behoorlike en regverdige uitleg van wetgewing kan heelwat van die probleme uitgeskakel word.

W DU PLESSIS
Potchefstroomse Universiteit vir CHO

VOORDELE EN NADELE WEENS DIE DOOD VAN 'N MEDEBROODWINNER

Santam Insurance Co Ltd v Fourie 1997 1 SA 611 (A)

1 Basiese feite

Die eiser (respondent) en sy (oorlede) gade (X) was buite gemeenskap van goed getroud maar het hulle onderskeie inkomstes in 'n gemeenskaplike fonds gestort waaruit onderhoud voorsien is aan sowel hulleself as hulle drie afhanklike kinders. Die gekombineerde gesinsinkomste is so verdeel dat elkeen van die gades twee dele en elkeen van die kinders een deel ontvang het. X het in lewe

meer uit die gemeenskaplike fonds vir haar eie onderhoud ontvang as wat sy tot hierdie fonds bygedra het (614B–C).

2 Regsvraag

Na die nalatige doding van X ontstaan die vraag of die drie afhanklike kinders skade gely het weens X se dood (in die lig van die feite hierbo gemeld) en, indien wel, welke bedrag skadevergoeding hulle daarvoor behoort te ontvang (betaalbaar aan die eiser as verantwoordelike voog deur die aanspreeklike versekeraar van die motorbestuurder wat X se dood veroorsaak het) (615D).

3 Twee moontlike benaderings tot skadebepaling

In die uitspraak van die hof *a quo* is daar gewys op die volgende twee moontlike benaderings tot skadebepaling wat in hierdie geval aangewend kan word (sien *Fourie v Santam Insurance Ltd* 1996 1 SA 63 (T) 64J–64D):

Volgens *metode 1* (wat deur die appellant se advokaat voorgestel is) moet die feit dat X meer uit die gemeenskaplike fonds ontvang het as wat sy daartoe bygedra het (in haar hoedanigheid as 'n tipe "medebroodwinner"), noodwendig beteken dat haar dood geen netto geldelike verlies vir die fonds aandui nie maar eerder dat die fonds nou beter daaraan toe is. Gevolglik kan nie gesê word dat X enige netto bydrae tot die onderhoud van die drie kinders gemaak het nie en impliseer haar dood geen vermoënsverlies (onderhoudsverlies) vir hulle nie. Daar was ook geen sprake van 'n toekomstige verlies nie aangesien die getuienis nie die moontlikheid van 'n relevante verswakking van die kinders se toekomstige vermoënsposisie aangedui het nie (614H).

Ingevolge *metode 2* wat namens die eiser (respondent) se advokaat as korrekte metode voorgehou is, is daar *in casu* wel skade teenwoordig. Hierdie metode aanvaar dat beide ouers 'n plig het om hulle kinders te onderhou. Die geld wat in die gemeenskaplike fonds inbetaal is, moet dus gesien word as 'n onderhoudsbetaling aan beide die gades en aan die afhanklike kinders. Elkeen van die gades se bydrae moet gevolglik op die gebruiklike wyse in breukdele verdeel word (sien vir verdere gesag hieroor Davel *Skadevergoeding aan afhanklikes* (1987) 94; Koch *The reduced utility of a life-plan* (1993) 304–305). Met ander woorde, ook X se inkomste word verdeel in twee dele vir haar en die eiser sowel as een deel vir elke kind. Met die dood van X verval haar bydrae tot die kinders se onderhoud en, so lui die argument, is daar gevolglik skade waarvoor skadevergoeding toegeken moet word (615A–C).

Volgens metode 2 is dit natuurlik irrelevant dat X se onderhoudsvoorsiening na haar dood deur die eiser oorgeneem sou word.

4 Die hof se beslissing

Die hoogste hof van appèl beslis in 'n kort maar eenparige uitspraak (gelewer deur EM Grosskopf AR met wie Eksteen AR, Howie AR, Scott AR en Zulman AR saamstem) dat metode 1 die korrekte benadering weerspieël en dat die hof *a quo* se gebruik van metode 2 verkeerd is. In die proses verwerp die hof onder meer die ongerapporteerde saak *Bosch v Mutual and Federal Versekeringsmaatskappy Bpk* (saaknr 2090/92 van 1993-03-25 (T)) vir sover dit met die uitspraak *in casu* teenstrydig sou wees (sien verder oor hierdie saak Koch 315 vn 314).

Volgens die hof is die vraag na die bestaan van skade bloot 'n feitevraag en lei die aktuariële teorieë tot 'n verduistering van hierdie basiese kwessie (615D).

In 'n sin is die hof natuurlik reg maar die vraagstuk deur middel van welke *skadeformule* skade (en skadevergoeding) bepaal of uitgedruk word, is inderdaad 'n regsvraag (sien in die algemeen Visser en Potgieter *Skadevergoedingsreg* (1993) 62 ev). Weens die feit dat X *in casu* meer uit die gemeenskaplike fonds benodig het as wat sy daarin geplaas het, meen die hof (sonder om hom op enige besondere skadeformule te beroep) dat die afhanklike kinders geen skade kon gely het nie (615F).

Appèlregter Grosskopf motiveer sy gevolgtrekking soos volg:

> "The basic fallacy in the plaintiff's approach, it seems to me, is the following: It assumes that, because the wife is in principle under a duty to support her husband and children, every contribution which she makes to the common pool must be taken to be (in part) a payment pursuant to that duty. This does not follow. The question whether she paid for the maintenance of the children is, as stated above, one of fact. There are no legal rules as to appropriation of payments in this situation" (615G).

5 Evaluasie en bespreking

Daar kan min twyfel wees dat die hof se beslissing *in casu* korrek is. Die basiese struikelblok vir die eiser se argument betreffende die gebruik van metode 2 hierbo verduidelik, is geleë in die erkenning (614B) dat die eiser en sy gade X hulle inkomste in 'n *gemeenskaplike fonds* betaal en daaruit aangewend het. Hierdie feit weerspreek die kunsmatige verdeling van elke gade se inkomste in verskillende dele ingevolge metode 2. Waar die totale gesinsinkomste *de facto* as 'n eenheid behandel is, maak dit geen sin om nou by afsterwe van 'n gade vir skadevergoedingsdoeleindes dit skielik as twee afsonderlike fondse of bronne van onderhoud te behandel nie.

Die hof deins ook nie terug om die ietwat koelbloedige maar korrekte afleiding te maak (sien ook Reinecke "Nabetragtinge oor die skadeleer en voordeeltoerekening" 1988 *De Jure* 224 in ietwat ander verband) dat die betrokke gesin *per capita* na die dood van X geldelik beter daaraan toe is as *voor* haar dood nie (616A). Waar die doel van 'n skadevergoedingstoekenning is om die afhanklike in die posisie te plaas waarin hy/sy sou gewees het indien die betrokke broodwinner (of medebroodwinner soos *in casu*) nie voortydig gedood is nie (sien bv *Legal Ins Co Ltd v Botes* 1963 1 SA 608 (A) 614; *Groenewald v Snyders* 1966 3 SA 237 (A) 246; *Milns v Protea Ass Co Ltd* 1978 3 SA 1006 (K) 1010; *Kotwane v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1982 4 SA 458 (O) 463: "Die skadevergoeding moet net vervang wat sy sou ontvang het"; Visser en Potgieter 158), is 'n *vergoedende* toekenning *in casu* beswaarlik moontlik. En, soos bekend, veroorloof ons reg nie *solatium*-betalings as gevolg van nievermoënskade weens die dood van 'n bloedverwant nie.

Na my mening beteken die onderhawige uitspraak nie dat waar die moeder as medebroodwinner meer onderhoud uit die gesinsinkomste wegneem as wat sy daarin plaas, haar afhanklike kinders *nooit* 'n aksie sal hê weens verlies aan onderhoud na haar dood nie. Die hof voorsien immers self die geval waar die blote feit dat 'n afhanklike nou 'n enkelouer as broodwinner het, die onderhoudsposisie van so 'n afhanklike kan verswak (vgl ook *Senior v National Employers General Ins Co Ltd* 1989 2 SA 136 (W) wat moontlik ook 'n tipe voorbeeld van so 'n geval bied; vgl egter Burchell 1989 *Annual Survey* 137–138; sien verder Davel "*Senior v National Employers General Insurance Co Ltd* 1989 2 SA 136

(W)" 1989 *De Jure* 365; Dendy "Claims for damages for loss of support: Dependants' or breadwinners' actions?" 1990 *SALJ* 155).

Die hof gee in hierdie verband 'n voorbeeld van waar 'n vader na die dood van sy vrou weer trou met 'n vrou wat geen inkomste het nie of waar die vader sy inkomste verloor (615H). Daar moet egter in gedagte gehou word dat slegs verdere feite wat redelikerwys met die skadestigtende gebeurtenis verband hou (die nalatige doding van die moeder as medebroodwinner) waarskynlik aldus in aanmerking geneem kan word. Met ander woorde, die hertroue van 'n man (met die gepaardgaande finansiële gevolge) kan *moontlik* relevant wees maar waarskynlik nie bloot die toekomstige verlies of vermindering van sy inkomste weens ander redes nie – tensy 'n mens die uitgangspunt aanvaar dat die verlies van 'n ouer wat op enige wyse inkomste bygedra het (of later sou kon bydra), noodwendig die afhanklike se verwagting op onderhoud aantas. 'n Ander geval wat die hof nie vermeld nie, is waar die vader in elk geval mettertyd weens gesondheidsredes deur die moeder as hoofbroodwinner vervang sou word. In so 'n geval moet dit duidelik wees dat 'n hof noukeurig sal moet oorweeg of die voortydige dood van die moeder (ongeag haar bydrae tot onderhoud in daardie stadium) nie die afhanklike kinders se onderhoudsposisie so verswak dat hulle op skadevergoeding geregtig is nie.

Dit is miskien 'n leemte in die onderhawige saak dat die hof nie uitdruklik 'n skadeformule as uitgangspunt gestel het nie (ondanks die verwysing na *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 838). Waar die hof juis met verwysing na bespaarde uitgawes bevind dat daar *in casu* geen skade gely is nie, ontstaan die vraag of bespaarde uitgawes ingevolge 'n skadeformule hanteer moet word of dalk eerder ingevolge die leerstuk van voordeeltoerekening (sien bv Visser en Potgieter 200–201 207).

In *Hendricks v President Ins Co Ltd* 1993 3 SA 158 (K) het dit gegaan oor 'n man wat vergoeding geëis het weens die verlies van sy vrou se dienste na haar nalatig veroorsaakte dood. In hierdie geval is die man se eis van die hand gewys aangesien hy nie van meet af aan bewys het dat haar dood nie groter geldelike besparings meegebring het as die onkoste om 'n huishoudster te huur nie (163C). Hierdie saak is dus ook gesag (net soos die saak onder bespreking) dat sekere besparings blykbaar reeds in die stadium van skadebepaling oorweeg kan word en dat dit nie die *verweerder* is wat dit as toegerekende voordele moet aandui nie. Die vraag is nou of *alle* besparings so hanteer moet word en wat die kriteria sou wees indien 'n mens byvoorbeeld 'n rasionele onderskeid tussen verskillende tipes relevante besparings wil maak.

Die feite in die *Hendricks*-saak is natuurlik indirek van belang by die bepaling of afhanklikes 'n eis weens onderhoudsverlies het aangesien Grosskopf AR juis na die geval verwys waar 'n man na sy vrou se dood 'n huishoudster moet huur (615I). Indien die man geen vergoeding vir die (addisionele) uitgawes in hierdie verband eis of ontvang nie, kan dit die afhanklike kinders se onderhoudsposisie negatief beïnvloed. Nogtans blyk dit dat die hof nie voorsien dat die *afhanklikes* in so 'n geval 'n eis het nie maar dat die langslewende broodwinner sy geld wat vir onderhoud beskikbaar is, sal moet aanvul deur self 'n aksie in te stel. Dit is egter onseker of die hof se kriptiese voorbeeld regverdiging vir so 'n algemene afleiding bied.

Ten slotte kan 'n mens daarop wys dat alhoewel die uitspraak *in casu* korrek is wat die feite voor die hof betref (en dat dit enkele algemene riglyne vir ander

howe bied), die uitspraak nie voorgee om 'n antwoord te bevat wat noodwendig in alle feitelike situasies geldig sal wees nie.

PJ VISSER
Universiteit van Pretoria

VERFYNING VAN DIE ONREGMATIGHEIDSTOETS BY LASTER EN BY KRENKING VAN DIE GODSDIENSGEVOEL

Mohamed v Jassiem 1996 1 SA 673 (A)

Inleiding

Vir doeleindes van hierdie bespreking is die tersaaklike feite in die onderhawige saak dat die verweerder die eiser, 'n Moslem van die Wes-Kaap, in 'n moskee by 'n huweliksplegtigheid daarvan beskuldig het dat hy (die eiser) "'n sympathiser met die Ahmadis [is]. Hy staan saam met hulle". By die verhoor was dit gemeensaak dat dit volgens die ortodokse Wes-Kaapse Moslemgemeenskap uiters krenkend is om as aanhanger van of simpatiseerder met die Ahmadi gebrandmerk te word (690C–D): diesulkes word as afvalliges van Islam beskou en moet as "Murtad" of "kafirs", dit wil sê uitgeworpenes uit die geloof, behandel word. Die gevolge daarvan is verreikend en kom op ban uit die betrokke gemeenskap neer (sien oa 681D–I).

Die eiser slaag in die hof *a quo* met 'n lastereis gegrond op die vermelde woorde en R25 000 word aan hom toegeken. Die hoogste hof van appèl gee die verhoorhof gelyk wat hierdie deel van die beslissing betref.

Die aard van die onregmatigheidstoets by laster

Die saak is veral belangrik weens die hof se siening van aspekte van die onregmatigheidstoets by laster. Voor die beslissing is betreklik algemeen aanvaar dat die gewraakte gepubliseerde woorde of gedrag volgens die oordeel van die redelike man die strekking moet hê om die eiser se goeie naam *in die gemeenskap in die algemeen* aan te tas; dat die redelike man hier die *gemeenskap as geheel* verteenwoordig en *nie slegs 'n bepaalde groep of segment van die gemeenskap nie* (sien bv *Botha v Marais* 1974 1 SA 44 (A) 49; *HRH Zwelithini of KwaZulu v Mervis* 1978 2 SA 521 (W) 528–529; *Conroy v Nicol* 1951 1 SA 653 (A) 662–663; *Mohamed* 691B; Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 146–147 en die ander bronne daar aangehaal). Daar was weliswaar enkele uitsonderings op die reël: die feit dat die eiser 'n blanke of 'n Indiër was het byvoorbeeld al 'n rol gespeel by die toepassing van die redelike man-maatstaf (vgl onderskeidelik *Brill v Madeley* 1937 TPD 106 109–110 en *Naidu v Naidu* (1915) 36 NPD 43 waaroor later meer). Tot met die hoogste hof van appèl se beslissing in die saak onder bespreking kon die regsposisie egter tereg as onseker beskryf word (*Neethling's Law of personality* 147).

In *Mohamed* bekragtig die hoogste hof van appèl in 'n enkele uitspraak van die volle regbank (dié van regters Hoexter, Smalberger, MT Steyn, Marais en Schutz) nou die beslissing van die Kaapse Provinsiale Afdeling (Van den Heever

R) dat 'n lasteraksie kan slaag ook waar die gewraakte woorde die reputasie van die eiser aantas in die oë van 'n *bepaalde segment* van die groter Suid-Afrikaanse gemeenskap en nie noodwendig in die oë van die hele gemeenskap nie.

Die hof stem saam (703E ev) met regter Van den Heever se opmerking dat 'n mens se reputasie nie in 'n lugleegte ("a void") bestaan nie (702G) en beskou die argumente wat sy in die loop van die volgende opmerkings maak (sien 702G–703B) as "both logically compelling and sound in principle" (703E):

> "[A man's reputation] consists of the esteem in which he is held by 'society' or within 'the community'. How the community, society, is to be defined, must, in my view, depend upon the facts and the pleadings in each particular case. Sometimes geographical borders of a country may define what society or community is relevant in a particular case; for example, where a member of Parliament of a government within those boundaries claims to be defamed as such. If a man's reputation within the scientific community of which he is a member, or within the financial community within which he operates, or within the black community within which he lives, is tarnished by an imputation within that community of conduct disapproved on the whole by that community, the Court will use its muscle to recompense him for the loss . . . And by his pleadings a plaintiff makes it clear whether the loss for which he claims reparation is of reputation countrywide, or in a more limited particular society . . .
>
> I do not understand anything in the Appellate Division decisions as barring such an approach, which is accepted in many other countries and urged here as a matter of common sense and fairness . . . [Hier verwys Van den Heever R ter ondersteuning na die werke van Prosser, Burchell, Street, Salmond en Heuston, Ameransinghe, Ranchod, en Hahlo en Kahn; 'n mens sou Neethling *Persoonlikheidsreg* (1991) 133 en *Neethling's Law of personality* 147 ook kon byvoeg.] The only qualification, it seems to me, is that the particular society should not be one whose reasonably uniform norms are *contra bonos mores* or anti-social" (sien weer *Neethling's Law of personality* 147 vn 70).

Die verhoorhof – en hiermee stem die hoogste hof van appèl saam – bevind dan dat die eiser behoort te slaag al verteenwoordig die Wes-Kaapse Moslemgemeenskap (in wie se oë die eiser se aansien gedaal het) slegs 'n klein deeltjie van die totale nasionale bevolking (703D): na raming ongeveer 260 000 mense (679E).

Die hoogste hof van appèl bespreek (703H–709B) enkele hofbeslissings en menings van skrywers oor die vraag of 'n lastereis kan slaag waar die mening van slegs 'n deel van die gemeenskap betrokke is (oa *Sim v Stretch* [1936] 2 All ER 1237 (HL); *Demmers v Wyllie* 1978 4 SA 619 (D); *Naidu v Naidu supra*; *Pillay v Ivins* (1919) 40 NLR 137; *Brill v Madeley supra*; *GA Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1; *Wallachs Ltd v Marsh* 1928 TPD 531; *Conroy v Nicol* 1951 1 SA 653 (A); Hahlo en Kahn *The Union of South Africa – The development of its laws and constitution* (1960) 546; Ranchod *Foundations of the South African law of defamation* (1972) 256; Burchell *The law of defamation in South Africa* (1985) 99). Daar word bevind dat die presiese probleem wat deur die besondere feite in die onderhawige saak na vore gebring is, nog nie deur die hoogste hof van appèl oorweeg is nie; nóg is daar enige beslissing van die hof wat direk teenstrydig is met regter Van den Heever se hierbo aangehaalde uiteensetting van die regsposisie (703F). Voorts bestaan daar volgens die hof nie regtig gesag in die regspraak vir die stelling dat ons reg nie sogenaamde "segmental defamation" erken nie (707C). Die hof som sy siening soos volg op (706J–707B):

> "If the requirement of 'society generally' ... were to be applied in every conceivable case of defamation it would have the consequence that, in the case of a plaintiff belonging to a particular community representing only a fraction of the entire population of the country, the views of such community would be disregarded in circumstances in which the views of that community were all that mattered. That, so we consider, is not the position in our law of defamation."

Daar moet volmondig met die hof saamgestem word. Soos by herhaling uitgewys deur die skrywers wat die hof met klaarblyklike instemming aanhaal (sien hierbo), is 'n streng toepassing van die "society generally"-beginsel onrealisties in die heterogene Suid-Afrikaanse gemeenskap (708F). Hahlo en Kahn (546; deur die hof aangehaal by 708F–H), som die posisie so op:

> "The South African population is composed of comparatively large groups of persons having widely divergent cultural, education, social and economic backgrounds. In many cases persons belonging to different racial groups hold different views. Under these circumstances it is submitted that it would be preferable to adopt the American approach, according to which it is recognised 'that the plaintiff may suffer real damage if he is lowered in the esteem of any substantial and respectable group, even though it be a minority one, with ideas that are not necessarily reasonable [provided that] ... if the group who will think the worse of the plaintiff is so small as to be negligible, or one whose standards are so clearly anti-social that the court may not properly consider them, no defamation will be found'."

Die hof self stel dit soos volg (704F–G):

> "It is hardly a matter for surprise that the complex population structure of our country has been mirrored in a number of South African defamation cases in which the Court has appeared to disregard the view of 'society in general' in favour of a narrower provincial, ethnic or religious view."

Wanneer bestaan daar 'n groep vir doeleindes van die onregmatigheidstoets by laster?

Dit is duidelik dat 'n bewering lasterlik kan wees ook wanneer die eiser se aansien in die oë van slegs 'n gedeelte van die gemeenskap gedaal het en nie net volgens die bevolking as geheel nie. Wanneer kan gesê word dat daar so 'n groep vir doeleindes van die lasterreg bestaan? Volgens die hoogste hof van appèl is dit 'n feitelike vraag wat van die omstandighede van elke gegewe geval afhang (709B–C). Die hof vervolg (709C–D):

> "It goes without saying that such jurisdiction is to be exercised cautiously, and that appropriate line-drawing may prove difficult. It may also require the concomitant evolution of defences peculiarly appropriate to it and which would not necessarily be recognised as defences where the words complained of are defamatory in the eyes of society at large."

Die faktore wat die hof in *Mohamed* oorweeg het, bied nuttige riglyne ook vir ander sake (709D–F):

> "In the present case ... the claim for recognition is, in our view, a strong one. In the total fabric of South African society the Western Cape Muslim community is a long-established, well-defined and closely-knit social, cultural and religious unit. Despite the fact that its numbers are relatively small the evidence in this case satisfies us, inasmuch as it is a substantial and respectable segment of our society, that when a member of the Western Cape Muslim community is lowered in its esteem he suffers damage; and that he is in law entitled to seek reparation by way of an action for damages for defamation."

Volgens Melius de Villiers (aangehaal deur Burchell 99) gaan dit by reputasie om "that character for moral or social worth to which [a person] is entitled among his *fellow men*" (my beklemtoning). Hierop vervolg Burchell (*ibid* – sien *Mohamed* 709A–B):

> "In South Africa, with its diverse population with different ideologies and cultures, in many instances the concept of a person's fellow men inevitably assumes a sectional meaning and there is a distinct need for the recognition of the views of different groups."

'n Segmentale benadering blyk ook uit die regspraak waarna die hoogste hof van appèl verwys. Volgens die hof het in *Naidu v Naidu supra* 'n "narrower provincial, ethnic or religious view" (704F) voorkeur bo die algemene gemeenskapsopvatting geniet: in *Naidu* het die hof naamlik bevind dat dit lasterlik is om te beweer dat 'n Indiër van die Naidu kaste 'n lid van die Woda kaste is. In *Brill v Madeley supra* het die hof uitsluitlik ag geslaan op die siening van blankes in die destydse Transvaal – 'n suiwer streeksopvatting van 'n bepaalde rassegroep – by sy bevinding dat dit lasterlik is om valslik te kenne te gee dat 'n openbare figuur 'n voorstander van rassevermenging is. Die hof in *Brill* vind dit nie nodig om in te gaan op die vraag of die siening van hierdie bepaalde groep (die meerderheid witmense in die Transvaal) gedeel sou word deur die meerderheid van die "better classes" en van die "saner members" van witmense elders in Suid-Afrika nie.

Die hoogste hof van appèl het klaarblyklik geen beginselprobleem met die benadering in byvoorbeeld *Brill* nie (706F–H). Tog moet daar, soos die hof self aandui (709C–D), versigtig te werk gegaan word wanneer 'n mens moet bepaal of 'n groep se siening deur die reg aanvaar behoort te word om vas te stel of 'n eiser wie se reputasie weens krenkende bewerings in die oë van daardie groep gedaal het, met 'n lasteraksie moet slaag. Indien die reg 'n afkeur behoort te hê van die siening van 'n bepaalde groep, behoort in die onderhawige verband nie daarvan kennis geneem te word nie. Hier doen Neethling *Persoonlikheidsreg* 133 vn 66 (sien ook *Neethling's Law of personality* 147 vn 70) as algemene riglyn aan die hand dat

> "die reaksie van *redelike mense* in *belangrike groepe of segmente* van die samelewing teenoor wie die *reg nie 'n antipatie het nie*, by die vraag na die lasterlikheid van woorde of gedrag 'n rol behoort te kan speel".

By hierdie beoordeling kan die waardes in die Grondwet van die Republiek van Suid-Afrika 108 van 1996, byvoorbeeld dié ten opsigte van nie-diskriminasie, 'n rol speel: die reg sal waarskynlik nie in die huidige tydsgewrig geneë wees om 'n eiser genoegdoening weens laster toe te ken indien sy reputasie uitsluitlik in die oë van byvoorbeeld 'n ekstremistiese rassistiese groep gedaal het nie.

Onregmatigheid by die krenking van die godsdiensgevoel

'n Mens sou 'n saak kon uitmaak dat in *Mohamed* nie net die eiser se goeie naam aangetas is nie, maar ook sy persoonlikheidsreg op sy *godsdiensgevoel*. Die hof sê onder meer (690C–D):

> "It was common cause at the trial that to say of a Muslim in the Western Cape that he is an Ahmadi or Ahmadi sympathiser, is highly *insulting*" (my beklemtoning).

Ek doen aan die hand dat 'n mens met "insulting" hier nie soseer met die goeie naam of die eergevoel van die eiser te doen het nie – dit natuurlik ook – maar met sy *godsdiensgevoel*, en dat die benadering wat die hoogste hof van appèl in *Mohamed* tot onregmatigheid by laster aanvaar het, *de lege ferenda* ook by die

krenking van die godsdiensgevoel diens kan doen. (Ek gaan nie hier op die godsdiensgevoel as regtens beskermingswaardige persoonlikheidsgoed in nie; sien daaroor in die algemeen Potgieter *Aspekte van die juridiese beskerming van die godsdiensgevoel* (LLD-proefskrif Unisa 1987) *passim*, "Die toets vir onregmatigheid by die krenking van die godsdiensgevoel" 1992 *THRHR* 462–465; *Neethling's Law of personality* 222–225).

As vertrekpunt is die krenking van die godsdiensgevoel *prima facie* onregmatig indien die gewraakte woorde of gedrag die godsdiensgevoel nie alleen subjektief krenk nie, maar van so 'n aard is dat die *redelike man* se godsdiensgevoel ook in die besondere omstandighede gekrenk sou gewees het (Potgieter 1992 *THRHR* 463). Omdat daar soveel uiteenlopende godsdiensrigtings in Suid-Afrika is, sal dit gewoon onrealisties wees om die redelike man-kriterium toe te pas met verwysing na die oordeel van die redelike man wat die gemeenskap *as geheel* verteenwoordig. In die reël deel 'n individu sy godsdiensgevoel met 'n godsdiensgroep waarvan hy lid is en hierdie feit moet by die bepaling van onregmatigheid in ag geneem word. Onregmatigheid moet immers altyd konkreet, in die lig van die omstandighede wat inderdaad in die betrokke geval aanwesig is, bepaal word.

As algemene reël behoort daar gevolglik by die bepaling van die *prima facie* onregmatigheid van optrede wat 'n eiser se godsdiensgevoel krenk, telkens vasgestel te word of die gewraakte optrede ook die godsdiensgevoel van die *redelike lid van die godsdiensgroep of kerk waaraan die eiser behoort*, sou gekrenk het (die "redelike lid"-maatstaf). Vanselfsprekend behoort die redelike lid-maatstaf nie absoluut te geld nie. Die redelike lid-maatstaf is immers, soos die redelike man-toets by laster, bloot 'n konkretisering van die algemene *boni mores*-onregmatigheidsmaatstaf; 'n hulpmiddel om die regsopvattings van die gemeenskap te peil en te verwoord. Daarom behoort die opvattings van 'n lid van die godsdiensgroep wat volgens die gemeenskapsopvatting byvoorbeeld *ongewenste* of *skadelike* beskouings handhaaf, nie juridies beskerm te word nie selfs al het die gewraakte bewering die godsdiensgevoel van die "redelike" lid van daardie ongewenste groep gekrenk. In so 'n geval kan dit volgens die gemeenskapsopvatting dalk nie net redelik en regmatig nie, maar selfs prysenswaardig wees om die ongewenste groep se oortuigings aan die kaak te stel al krenk dit die godsdiensgevoelens van individuele lede van so 'n groep ernstig (sien vir voorbeelde die British Law Commission se Working Paper No 79 *Offences against religion and public worship* (1981) 128–129). Ook hier, soos by onregmatigheid in die algemeen (sien Neethling, Potgieter en Visser *Delik-tereg* (1996) 33 ev), gaan dit om die afweeg van belange. Waar die gemeenskapsbelang dit eis, moet individuele en selfs groepsbelange wyk.

JM POTGIETER
Universiteit van Suid-Afrika

MISAPPROPRIATION OF A RIVAL'S PERFORMANCE: IS IT LAWFUL, UNLAWFUL OR MERELY "UNFAIR"?

Premier Hangers CC v Polyoak (Pty) Ltd 1997 1 SA 416 (A)

Unlawful competition in South Africa is not governed by any single comprehensive Act. The common law and more specifically the law of delict is the primary source from which one draws when seeking protection from unlawful competition. In *Matthews v Young* 1922 AD 492 507 it was said:

> "In the absence of special legal restrictions a person is without doubt entitled to the free exercise of his trade, profession or calling ... But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition ... must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an injuria for which an action under the Lex Aquilia lies if it has directly resulted in loss."

Applying the *actio legis Aquiliae* for protection against unlawful competition has been generally recognised by the Appellate Division in *Geary and Son (Pty) Ltd v Gove* 1964 1 SA 434 (A) (see also *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 186; *Schultz v Butt* 1986 3 SA 667 (A) 678). The courts have consequently applied the general principles of Aquilian liability to the various forms of unlawful competition recognised in our law, namely, passing-off, misrepresentation as to a rival's own performance, acquisition and use of a competitor's trade secrets, copying and adopting of a rival's own performance, competition in conflict with statutory provisions and boycott. An important implication of this, as pointed out by Van Heerden and Neethling (*Unlawful competition* (1995) 64) is that the comprehensive basis of the *actio legis Aquiliae* is now at the disposal of an aggrieved competitor even where there is no direct precedent in case law. Thus it is unnecessary for the wronged competitor to squeeze his action into the sphere of one of the recognised categories of unlawful competition or another particular type of delict. In this respect it has been stated that the common law delict of unlawful competition has begun to play a more prominent role in the protection of technology and technological innovations, and that the diminished role of copyright in recent developments may result in unlawful competition becoming a dominant force in protecting intellectual property in the technological field (Dean "Reproduction of three-dimensional utilitarian objects – copyright infringement and unlawful competition" 1990 *Stell LR* 50).

In respect of one of these recognised forms of unlawful competition, the act known as the misappropriation (copying or adopting) of a rival's performance, however, a tendency seems to be developing in the courts to allow a prejudiced competitor to take recourse on Aquilian grounds under very limited circumstances only. "Piracy" or the "slavish copying of a rival's performance" occurs where not only the idea on which a competitor's performance is based is copied, but the performance as such is made the basis of the perpetrator's performance. The attitude of our courts, however, is that not all imitation is unlawful; on the

contrary, imitation may be said to be the essence of life (*Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (W) 474) and an entrepreneur may copy that which is in the public domain or take over the published ideas and concepts of a competitor (see also *Payen Components SA Ltd v Bovic Gaskets CC* 1994 2 SA 464 (W) 477; Callman *The law of unfair competition, trademarks and monopolies* vol 2 (1982) 15: 17–20). This issue will further be considered in analysing the judgment in *Premier Hangers CC v Polyoak (Pty) Ltd* hereunder.

In *Schultz v Butt* 1986 3 SA 667 (A), the *locus classicus* in our law in respect of misappropriation of a rival's performance, Nicholas AJA stated, *inter alia* (683–684):

> "In South Africa the Legislature has not limited the protection of the law in cases of copying to those who enjoy rights of intellectual property under statutes. The fact that in a particular case there is no protection by way of patent, copyright or registered design, does not license a trader to carry on his business in unfair competition with his rivals."

Case law seems to indicate, however, that as far as copying is concerned traders sometimes do hold licence to compete unfairly, albeit not unlawfully. A question to be considered is whether a trader who has not utilised or cannot utilise the available legislative protection should even bother to approach the courts in cases which might be classified as a misappropriation of a rival's performance. The rationale behind the principles applicable to copying is that a monopoly or stifling of technology should be avoided. In this respect the following has been said:

> "The basic theory of the patent system postulates that it is desirable in the public interest that industrial techniques should be improved. In order to encourage improvement, and to encourage also the disclosure of improvements in preference to their use in secret, any person devising an improvement in a manufactured article, or in machinery or methods for making it, may upon disclosure of his improvement at the patent office demand to be given a monopoly in the use of it for a fixed period. After that period it passes into the public domain; and the temporary monopoly is not objectionable, for if it had not been for the inventor who devised and disclosed the improvement, nobody would have been able to use it at that or any other time, since nobody would have known about it. Furthermore, the gaining of the monopoly encourages the putting into practice of the invention, for the only way the inventor can make a profit from it (or even receive the fees for his patent) is by putting it into practice: either by using it himself, and deriving an advantage over his competitors by its use, or allowing others to use it in return for royalties . . ." (*Lewis Berger & Sons Ltd v Svenska Ojeslageri Aktiebolaget* 1959 3 SA 604 (T), as cited in *Premier Hangers CC* 423).

These principles therefore lean in favour of copying and competitors must consequently use the limited protection of the legislation which is at their disposal, or alternatively they must (hope to) rely on the common law protection based on unlawful competition. I would submit that the reasoning in the above quoted text can however be countered with an argument of equal force if the point of view of the individual inventor or innovator is considered. Is his enthusiasm to improve technology through his ideas not stifled by the knowledge that he can succeed only if he incurs the substantial expense of obtaining statutory protection (where possible), which lasts for only a limited period? Further, he may find no solace in common law protection if, for example, a large corporation has filched his idea, and with the required capital and labour uses that idea and drives that small inventor out of the market place with his own weapon.

Financial constraints on the little man in any event usually eliminate the expensive option of recourse in the courts. On this point Neethling says the following:

> "Hier moet in gedagte gehou word dat die wesenlike sin van vrye mededinging geleë is in die prikkel wat dit aan die individuele mededinger verskaf om sy eie belang deur sy eie inisiatief te bevorder. Hierdie prikkel kan egter net volle krag verkry indien die mededinger so ver moontlik in staat gestel word om self die vrugte van sy inisiatief te pluk; dié vrugte behoort hom dus nie ontneem te word nie deur 'n mededinger wat bloot deur sy aanklampingshandeling – en dus deur die ontduiking van die inisiatief, koste en moeite wat die ontwikkeling en daarstelling van die prestasie geverg het – in staat gestel word om die voorsprong in die mededingingstryd te behaal. Daarom hou die mededingingsprinsiep steeds in dat die meriete van die eie prestasie – met die klem op die eie – die deurslag moet gee. Al is dit dan ook so dat die idee van 'n mededinger nagevolg en tot grondslag van 'n eie prestasie gemaak mag word, kan regtens slegs 'n prestasie wat *in alle ander opsigte selfstandig daargestel* is ... as 'n eie prestasie aangemerk word" ("Onregmatige mededinging: prestasieaanklamping en die rol van motief" 1992 *THRHR* 138).

Before debating this issue further, it is necessary to briefly dissect the body of the unlawful competitive act known as misappropriation (adopting or copying) of a competitor's performance. Van Heerden and Neethling 242 ff distinguish between two forms of such copying, namely the direct or immediate adoption of a rival's performance, and the identical or substantially identical duplication thereof. First, direct adoption of a rival's performance occurs where the "perpetrator" has produced no real, own performance, but parasitically takes the performance of another as his own. This our courts consider (in principle) to be *contra bonos mores*, and therefore wrongful competition. Secondly, identical or substantially identical duplication of a rival's performance is also the imitation of a performance, and not the copying of an idea. One must agree with the observation that essentially there is no difference between the direct adoption and the identical copying of a competitor's performance, because in both cases the competitor's performance is used as the basis of the perpetrator's performance. However, our courts do not consider the identical or substantially identical copying of a rival's performance as unlawful competition (*idem* 247; Neethling 1992 *THRHR* 137). Dean 1990 *Stell LR* 65 expresses this as follows:

> "Developing and perfecting utilitarian three-dimensional objects which do not qualify for patent or design protection often involves the utilization of considerable expertise, effort and entrepreneurial spirit as well as the expenditure of large sums of money. It is inequitable that a competitor should be able to reap the benefits of all this and simply copy an earlier product, thereby placing himself in a position where he can compete with that product with the minimum of trouble and expense and probably at a cheaper price because of his lower development expenses and cost structure. It is *submitted* that there is no good reason to differentiate between copying the design of another's boat by means of using the same 'plug' for making a mould, and copying that design by some other means such as measuring it up meticulously."

In practice it may in fact be difficult to distinguish from the facts which form of misappropriation is applicable (see also *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 2 SA 455 (W) 474; Van Heerden and Neethling 242). Be that as it may, both direct adoption and identical copying of a rival's performance are in conflict with the competition principle and thus one can imply that such practices are also in principle *contra bonos mores* and therefore a wrongful misappropriation of a rival's performance (see also Dean

1990 *Stell LR* 66). It may be appropriate to mention that the competition principle is a concretisation of the *boni mores* criterion for judging wrongfulness in the competitive struggle between business rivals. In terms of the competition principle the competitor who fairly renders the most meritorious performance deserves to succeed in the competitive struggle, while the one offering a poorer performance deserves to suffer defeat (see Neethling "Unlawful competition and schools" 1993 *SALJ* 11, "Misappropriation or copying of a rival's performance as a form of unlawful competition" 1993 *SALJ* 717; Van Heerden and Neethling 128; *Van der Westhuizen v Scholtz* 1992 4 SA 866 (O)).

Some examples of cases in which the adoption or copying of a rival's performance was considered are *International News Service v Associated Press* (1918) 248 US 215; *Schultz v Butt supra*; *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 2 SA 718 (T); *Taylor and Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 1 SA 412 (A); *The Concept Factory v Heyl* 1994 2 SA 105 (T); and *Payen Components SA Ltd v Bovic Gaskets CC* 1994 2 SA 464 (W). As stated above, the premise here is that it is not merely an idea which is being copied, but the actual performance which is being parasitically used, which constitutes unlawful competition.

The misappropriation of a rival's performance also came before the Supreme Court of Appeal in *Premier Hangers CC*. In this case both the appellant (Premier) and the respondent (Polyoak) were manufactures of clothes hangers and were competitors in the clothing field. In the Provincial Division Polyoak claimed that Premier was passing off hangers manufactured by it as being those of Polyoak. In the alternative it was alleged that Premier was guilty of unlawful competition. These proceedings in the court *a quo* also included claims brought (in the same action) by the joint managing director of Polyoak, one Louw, alleging infringement by Premier of certain designs, registered in terms of the Designs Act 57 of 1967, of which he is the proprietor. Premier in effect conceded these claims and this part of the litigation was disposed of by a consent order. This aspect of design infringement will again be considered when judging the lawfulness of Premier's actions and the possible application of motive as evidence of the unlawfulness of Premier's conduct.

In the court *a quo* Polyoak failed in its claim based on passing off and there was no cross-appeal in this respect. However, Polyoak succeeded in the lower court in its claim based on unlawful competition and it was this aspect that was in issue in the appeal. The appeal essentially concerned the lower court's order in respect of three items referred to as: (i) the "Uni-range" of hangers; (ii) the "knitwear" hanger; and (iii) the label plate of one hanger.

Premier admitted that the general appearance of its hangers, and the individual parts of the hangers, were similar to Polyoaks hangers and their individual parts. A further admission at a pre-trial conference was that the design of one of the range of its hangers was derived from (that is, had its origin in) Polyoak's hangers in the Uni-range. The admission was that it had made drawings of the Polyoak hanger and had used such drawings in order to produce the mould from which it manufactured its own hangers. The feature of this case that the court considered crucial was the fact that the Uni-range of hangers and the knitwear hanger were not protected by design registration in terms of the Designs Act. Further, neither copyright nor any other form of statutory protection was raised in the pleadings. The appeal therefore concerned the conduct of a trade rival who had adopted Polyoak's unprotected designs, and the question whether the copying

of an industrial design not protected by the Designs Act can be unfair or unlawful.

Citing *Shultz v Butt supra* the court confirmed (421G–I) the principle that competition which is conducted unlawfully, in the sense that it involves wrongful interference with another's right as a trader, and has resulted in loss, constitutes an *iniuria* for which an Aquilian action lies. In *Schultz v Butt* the question was not whether one may lawfully copy the product of another, but whether A, in making a substantially identical copy, with the use of B's mould, of an article made by B, and selling it in competition with B, is engaging in unfair competition. In the *Premier Hangers* case the question on appeal was whether the copying of an industrial design not protected by the Designs Act can be unfair or unlawful.

The court in *Premier* regarded the existence of design, copyright and patent protection afforded by legislation an important issue in the debate. Citing Fellner (*The future of legal protection for industrial design – a Report commissioned by the Common Law Institute of Intellectual Property and the Intellectual Property Unit* Queen Mary College, London 1985) in respect of the scope of the remedy of unfair competition as it has developed in foreign systems, the court concluded that it has generally been established that the absence (or expiration) of statutory protection is regarded as opening the field to competition by copying or imitating and that this is quite legitimate. The court stated (423H–I) that it was clear that in *Schultz v Butt* Nicholas AJA had regarded it as axiomatic that in a situation where there was no statutory protection, copying by a competitor was legitimate. In the latter case Schultz had used the hull of one of Butt's boats to form a mould for the construction of his own boats in competition with Butt. I would submit that it is perhaps incorrect to say that Nicholas AJA regarded it as self-evident that the absence of statutory protection opens the field to legitimate copying, as is evident from the following *dictum* (683I–J):

> "In South Africa the Legislature has not limited the protection of the law in cases of copying to those who enjoy rights of intellectual property under statutes. The fact that in a particular case there is no protection by way of patent, copyright or registered design, does not license a trader to carry on his business in unfair competition with his rivals."

Therefore, although it has been said that imitation is the lifeblood of competition and that the absence of protective legislation permits imitation, this attitude appears to concern "the bare imitation of another's product, without more" (see *American Safety Table Co Inc v Schreiber* (1959) 269 F 2nd 255) and it does not mean that the victim is without relief. This is confirmed by further scrutiny of Fellner's exposition (200) of the ways in which foreign jurisdictions selectively control slavish imitation through their unfair competition laws. She states:

> "In the absence of specific industrial property rights, by no means all copying is prohibited; but where it is felt to be 'unfair', the law will provide a remedy. As well as the fact of copying, the judge can consider . . . the ease with which it was copied . . . He can also scrutinise the behaviour of the parties, taking account, for example, of any unfairness in the way information was obtained, impropriety of motive . . . His aim is to reach a decision which is fair as between the parties while paying due regard to the public interest in free, as well as fair, competition."

In the *Schultz* case Nicholas AJA then proceeded to say that in his view the principles enunciated in the *International News Service* case *supra*, and the principles quoted in the above passage by Fellner are generally in accordance with the *broad equitable approach* adopted by South African courts in unfair

competition cases (683C). In the *Premier* case Plewman JA pointed out that in most foreign systems where unfair competition rules apply, there seems to be a search, where relief is to be given, for some special unfairness in the actions of the perpetrator. This, in the court's view, is an arduous task which may be hampered by the substantial differences in the amount of effort and skill that is called for in the design of articles which would warrant statutory protection. The court thought that considerations such as these underlie *Schultz v Butt's* decision that copying was not unlawful *per se* and that only the existence of extraneous factors rendered the unsuccessful party's conduct unlawful.

In the *Premier* case Polyoak's problems appear to have arisen from the fact that Polyoak did not support the lower court's judgment on the basis that some extraneous unfairness had been shown, but instead presented its case on the assumption that copying *per se* is unlawful. The appeal could therefore simply be disposed of on the ground that Polyoak had failed to procure the benefit of statutory protection for itself, and by its own acts allowed the designs in question to pass to the public domain. The court stated that, strictly speaking, this made it unnecessary to examine the facts in relation to considerations relevant to the *boni mores* or the general sense of fairness of the community, but that the evidence warranted consideration of the reasons for the lower court's holding that Premier's competition was unlawful. The court dismissed the various acts which the court *a quo* considered unlawful actions and pointed out that in this particular field of trade, copying of each other's products was in fact the order of the day while individual innovations were rare. In the general sense of justice of the community (quite apart from the question of design registration), the court found (425E–F) that copying in this field would not be regarded as improper.

In this regard two aspects should be taken into account regarding admissions made by Premier which reflect on Premier's motive for its actions. The first is that Premier admitted that it made drawings of the Polyoak hanger and used these drawings to produce the mould from which it produced its own hangers. Here one is again reminded of Dean's submission that there is no good reason to differentiate between copying the design of another's boat by using the same plug for making a mould and copying that design by some other means such as measuring it up meticulously. Secondly, evidence in the court *a quo* showed that Premier conceded that it had infringed certain designs, registered in terms of the Designs Act 57 of 1967, which belonged to a managing director of Polyoak. All indications are that it was the motive of Premier to steal. It entered Polyoak's cupboard and robbed it of its contents without being selective about what it was taking. Upon being caught, Premier admitted to being a thief and immediately agreed to give back the stolen goods which were protected by the Designs Act. Ironically, however, the same Act would also protect the thief because he would refuse to return the rest of the (unprotected) stolen property and the victim would suffer the financial consequences of unsuccessfully trying to retrieve his property. Surely Premier's extraneous actions serve as evidence of an unsavoury motive to "reap where it had not sown", and consequently of unlawful conduct? Or is this merely "unfair" in the general sense of fairness of the community? Clearly Premier's conduct was not categorised under that "special unfairness" which Plewman JA referred to (424F–G) and which must be sought before giving relief to the victim. The *Premier* case is analogous to the *Bress Designs* case in which the required element of wrongfulness was identified in the malicious motive of one of the parties, and Neethling's comments regarding identical

duplication in his case discussion (1992 *THRHR* 137–138) of the *Bress Designs* case hold true here too.

Be that as it may, the apparent direction of thought in the *Premier* case is a further affirmation of academic observation that our courts are generally reluctant to regard the identical copying of a rival's performance as unlawful competition. Thus in the absence of passing off or statutory protection, traders may freely and exactly copy anything produced by their rivals which is in the public domain. Although the respondent in the *Premier* case did bring about various innovations to his hangers to suit the needs of the specific garments (wool, silk, cotton, etc) for which they would be used, it may be argued that the hangers did not have a competitive own identity (Van Heerden and Neethling 247–249), and therefore, in the absence of statutory protection, the appellant, Premier, was not acting unlawfully in copying these products. However, as previously stated, this case is not entirely distinguishable from previous cases in which the *conduct* of the perpetrator was condemned. Under the common law a rival whose performance has been identically copied may therefore have some difficulty in identifying the unlawfulness, as opposed to the unfairness, of his competitor's actions. Or will some "special unfairness" suffice?

RG EVANS
University of South Africa

NOGMAALS "DUTY OF CARE" – ONREGMATIGHEID EN NALATIGHEID BY AANSPREEKLIKHEID WEENS 'N LATE

Faiga v Body Corporate of Dumbarton Oaks 1997 2 SA 651 (W)

In 'n onlangse bespreking van *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) (sien Neethling "Onregmatigheid, nalatigheid; regsplig, 'duty of care'; en die rol van redelike voorsienbaarheid – Praat die appèlhof uit twee monde?" 1996 *THRHR* 682 ev) het die skrywer aangedui dat as gevolg van die aanwending van die verwarringstigtende Engelsregtelike "duty of care"-benadering, die gesonde "modern distinctions in our law of delict between fault and unlawfulness" (*Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196) in *Basdeo* verdoesel word. Waar hierdie gevestigde onderskeid negeer word, word nie alleen die regsteoretiese grondslae van ons deliktereg ondergrawe nie, maar kan die proses ook net dien as 'n geleibuis vir verwarring en gevolglike regsonsekerheid – en soveel te meer as selfs ons hoogste hof nog nie klaarheid in die onderhawige verband het nie deur duidelik uit twee monde te praat (sien *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833 en *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27 vir die regte benadering: Neethling 1996 *THRHR* 685–686). 'n Mens kan maar net vertrou dat die hoogste hof van appèl die aangeleentheid by die eersvolgende geleentheid in die reine sal bring. Totdat dit gebeur, is dit uiteraard te wagte dat die tweeledige benadering – ook die verkeerde een (sien bv *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 4 SA 745 (O) 757: Neethling 1996

THRHR 687) – deur uitsprake van die verskillende afdelings van die hooggeregshof weerspieël sal word.

Die onderhawige uitspraak vertoon inderdaad 'n vermenging van die twee benaderings tot onregmatigheid en nalatigheid deur enersyds die "duty of care"-leerstuk by te bring maar andersyds dan tog die onderskeid tussen hierdie twee delikselemente suiwer te handhaaf. In *Faiga* is die eiseres beseer toe sy by die goederehyser van 'n woonstelblok uitgeklim, gestruikel en kop eerste neergeslaan het omdat die hyser nie gelyk met die vloer gestop het nie. Die eiseres stel 'n eis vir vergoeding in teen sowel die regspersoon in beheer van die woonstelblok kragtens die Wet op Deeltitels (eerste verweerder), as die maatskappy wat die hysers ingevolge 'n ooreenkoms met die regspersoon moes onderhou (tweede verweerder). Sy beweer dat beide verweerders die "duty of care" verbreek het wat hulle teenoor haar verskuldig was. Eerstens was albei verplig om die hysers so te onderhou dat hulle gelyk met die betrokke vloer stop; en tweedens moes hulle, wel bewus daarvan dat veral die goederehysbak van tyd tot tyd nie gelyk met die vloer stop nie, gebruikers daarvan teen dié gevaar gewaarsku het. Waarnemende regter AP Joubert maak korte mette met die eerste grond vir verbreking van die "duty of care" (664B):

> "I am unpersuaded that the malfunctioning of the goods lift causing plaintiff's fall was caused by poor preventative maintenance. It follows that neither defendant can be held liable to the plaintiff on the ground that they owed her a duty of care to properly maintain the goods lift."

Wat die tweede grond vir die verbreking van die "duty of care" betref, wys die hof (664G) ten aanvang daarop dat die "duty of care is not a general duty necessarily owed to all. It is owed to a particular person, persons or class of persons to whom harm may reasonably be foreseen". Ter toeligting word dan uit *Peri-Urban Health Board v Munarin* 1965 3 SA 367 (A) 373 aangehaal (664G–665A) waarvan die volgende vir huidige doeleindes van belang is:

> "[S]ometimes the law requires me to be my brother's keeper. This happens, for example, when the circumstances are such that I owe him a duty of care; and I am negligent if I breach it. I owe him such a duty if a *diligens paterfamilias*, that notional epitome of reasonable prudence, in the position in which I am in, would – (*a*) foresee the possibility of harm occurring to him; and (*b*) take steps to guard against its occurrence."

Hierop laat regter Joubert volg (665A–665E):

> "The duty of care on which plaintiff founds her claim is that defendants omitted to put up signs warning users of the elevators of the potential hazard created by the fact that the floor of the elevator might from time to time stop out of level with the landings, thus creating a step which is in the nature of a trap. It is common cause that no such signs were ever put up. The *dictum* in *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) at 358D–F is apposite:
>
> 'In die lig van hierdie feite, het die respondent sy aksiegrond noukeurig gebou op grondslag van die algemene beginsel, wat in die laaste twee dekades in ons regspraak uitgekristalliseer het, dat 'n blote late ook onregmatig is indien dit, volgens die gemeenskapsoortuiging, onredelik oftewel sosiaal-inadekwaat is. Indien daardie late ook spreek van nalatigheid, is daar deliktuele aanspreeklikheid . . .
>
> Aangesien die kwantum van respondent se skade erken is, is die enigste twee vrae wat hierdie Hof moet beantwoord die volgende: (i) was appellant se late onregmatig? en, indien wel, (ii) was dit ook nalatig?'

> It will firstly be considered whether first defendant's omission was unlawful, and, if so, whether it was also negligent. Thereafter second defendant's position will be addressed."

In die lig van die pas aangehaalde *dictum* uit die *Van der Merwe*-saak oor aanspreeklikheid weens 'n late, waarin appèlregter Olivier – in een van die tot nog toe teoreties-suiwerste uiteensettings van die betrokke regsbeginsels (sien hieroor ook Neethling, Potgieter en Visser *Deliktereg* (1996) 54 ev) – duidelik onderskei tussen die bepaling van die regsplig om positief op te tree volgens die *boni mores*-toets vir onregmatigheid en die nalatigheidsvraag, is dit eintlik onbegryplik waarom regter Joubert dit nodig vind om met die "duty of care"-werkswyse af te skop. Soos by herhaling reeds uitgewys (sien Neethling, Potgieter en Visser 144–145; Neethling 1996 *THRHR* 686–687), is dit 'n onnodige en omslagtige metode om te bepaal wat direk deur die redelike man-nalatigheidstoets gedoen word, naamlik of die redelike man nadeel sou voorsien en voorkom het. (Die gesaghebbendste formulering van dié toets vir nalatigheid in ons reg (sien Neethling, Potgieter en Visser 127) word gevind in *Kruger v Coetzee* 1966 2 SA 428 (A) 430.) Daar bestaan werklik dus geen rede om die "duty of care"-benadering te gebruik in die vasstelling van nalatigheid nie en dit wil tans voorkom of die howe in die meeste gevalle bloot met die toets van die redelike man werk. Soos duidelik uit die bespreking van *Basdeo supra* blyk (Neethling 1996 *THRHR* 684–686), kan die gebruik van "duty of care" boonop net verwarring laat ontstaan tussen die toets vir onregmatigheid en dié vir nalatigheid. Hierdie verwarring blyk ook uit die feit dat die howe soms die "duty of care"-begrip as sinoniem vir 'n *regsplig* by onregmatigheid gebruik (sien Neethling, Potgieter en Visser 53 ev). Ten einde ordelikheid te bevorder, is dit daarom beter om "regsplig" by onregmatigheid met "legal duty" te vertaal (*idem* 145) en die begrip "duty of care" geheel en al te vermy. In *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27 verwoord appèlregter Botha dit soos volg:

> "For present purposes ... the difference between the two elements of a duty of care is perhaps more aptly described by Millner ... 'The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based.' The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and 'duty of care' in this sense is a convenient but dispensable concept. In the phrascology of our law the 'policy-based or notional duty of care' is more appropriately expressed as a legal duty, in consonance with the requirement of wrongfulness as an element of delictual liability ..."

Om nou terug te keer tot regter Joubert se uitspraak, is dit moeilik om te peil waarom hy hoegenaamd die "duty of care"-begrip as inleiding vir sy regsbetoog gebruik. Op die oog af gebruik hy die begrip as sinoniem vir nalatigheid. Hierdie afleiding maak egter nie sin nie aangesien hy later (665–667) suiwer tussen onregmatigheid en nalatigheid onderskei en boonop beklemtoon, in navolging van die *Van der Merwe*-saak *supra* 364, dat nalatigheid eers ter sprake kan kom as onregmatigheid reeds vasstaan. Appèlregter Olivier stel dit so:

> "'n Bevinding dat appellant se late nie onregmatig was, bring mee dat daar geen sprake van nalatigheid kan wees nie. Nie alleen is dit dus ondoenlik om oor moontlike nalatigheid aan die kant van appellant te spekuleer nie, maar dit is trouens juridies onmoontlik. Die nalatigheidsvraag kan naamlik slegs beantwoord word as presies vasstaan welke regsplig op 'n verweerder gerus het en dat *daardie* regsplig verbreek is."

Logies konsekwent beteken dit dat regter Joubert se inleidende verwysing na "duty of care" op die vraag na die regsplig by onregmatigheid slaan. Hierdie afleiding sou egter op 'n volslae verwarring van onregmatigheid en nalatigheid dui (soos in *Basdeo supra*) en maak ook nie sin in die lig van sy latere juiste hantering van onregmatigheid en nalatigheid nie. Die gevolgtrekking is dus dat die regter in 'n slaggat van Engelsregtelike tradisie getrap het wat in die Suid-Afrikaanse reg net verwarring stig en daarom liefs vermy moes gewees het. Trouens, sy "duty of care"-inleiding het inderdaad geen jota of tittel tot sy andersins prysenswaardige uitspraak bygedra nie en kon daarom goedskiks in die geheel weggelaat gewees het.

Vervolgens bespreek die hof die posisie van die twee verweerders afsonderlik aan die hand daarvan of daar onregmatigheid en nalatigheid by elk aanwesig was.

(a) *Eerste verweerder* Regter Joubert (665F–H) beskou tereg die feit dat die eerste verweerder *in beheer* van die woonstelblok was, as 'n belangrike faktor by die vraag of sy late onregmatig was (sien hieroor Neethling, Potgieter en Visser 60–63; die *Van der Merwe*-saak *supra* 360). Hierby kan die volgende faktore ook 'n rol speel (665I–666B: *dictum* aangehaal uit *Van der Merwe* 361–362):

> "Ten einde vas te stel of 'n positiewe handeling of late sodanig is dat dit as onregmatig aangemerk kan word, moet gevolglik onder andere die onderskeie belange van die partye, die verhouding waarin hulle tot mekaar staan en die maatskaplike gevolge van die oplegging van aanspreeklikheid in die betrokke soort gevalle, versigtig teen mekaar opgeweeg word. Faktore wat 'n belangrike rol speel in die opwegingsproses is, onder andere, die waarskynlike of moontlike omvang van nadeel vir andere; die graad van risiko van intrede van sodanige nadeel; die belange wat die verweerder en die gemeenskap of beide gehad het in die betrokke dadigheid of late; of daar redelik doenlik maatreëls vir die verweerder beskikbaar was om die nadeel te vermy; wat die kanse was dat gemelde maatreëls suksesvol sou wees; en of die koste verbonde aan die neem van sodanige maatreëls redelikerwys proporsioneel sou wees tot die skade wat die eiser kon ly."

Op grond daarvan dat die aanbring van waarskuwingstekens die aandag van gebruikers effektief sou vestig op die moontlikheid dat die hysers nie gelyk met die vloer stop nie, die koste verbonde aan waarskuwingstekens relatief gering sou wees en die feit dat die gebruikers meesal ouer mense is, bevind die regter (666C–D) dat die eerste verweerder sy regsplig (ongelukkig word steeds van "duty of care" gepraat) om gebruikers teen bedoelde gevaar te waarsku, verbreek het en daarom onregmatig teenoor die eiser opgetree het. 'n Faktor wat myns insiens sterk aanduidend van die regsplig was maar nie uitdruklik deur regter Joubert vermeld is nie, is die feit dat die eerste verweerder *geweet* het van die gevaarlike toestand by die hysers wat gebruikers kon benadeel (vgl 664D; sien Neethling, Potgieter en Visser 61 van 126; vgl *idem* 42 oor die rol van sg dader-subjektiewe faktore, soos wete of motief, by die onregmatigheidsvraag).

Wat nalatigheid aan die kant van die tweede verweerder betref, laat die hof hom soos volg uit (666E 667G):

> "The next matter to be considered is whether a reasonable man in the position of the first defendant would have taken steps to guard against the danger of the goods lift, from time to time, not stopping flush with the landings and consequently creating a step which was in the nature of a trap ... Dumbarton Oaks [die woonstelblok] is the residence of, and visited by, many elderly people, some of whom had prior to plaintiff's injuries themselves fallen due to the goods lift stopping out of level with the landings. Quite plainly it was reasonably foreseeable that such an accident as the present might occur. Yet, management did nothing to

> forewarn users of the goods lift of these dangers. This omission, in my judgment, amounted to a negligent breach of its duty of care [lees 'regsplig' of 'legal duty']."

(b) *Tweede verweerder* Hier was die vraag ook of daar 'n regsplig op die tweede verweerder gerus het om gebruikers van die goederehyser teen vermelde gevaar te waarsku. Aangesien 'n mens hier met 'n nuwe situasie te make het, moet dit volgens regter Joubert beantwoord word met verwysing na

> "*considerations of public policy*: see *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 527D. What public policy demands in a particular instance depends on considerations of justice, equity, good faith, reasonableness, common sense and the like. The balance ultimately struck must be harmonious with the public's notion of what justice demands".

Nou is dit so dat die Suid-Afrikaanse howe in die algemeen 'n konserwatiewe benadering volg en 'n uitbreiding van Aquiliese aanspreeklikheid sal toestaan net as positiewe beleidsoorwegings dit regverdig (sien bv *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 500 503–504; Neethling, Potgieter en Visser 13 vn 66; sien in die algemeen Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 171 oor die rol van beleidsoorwegings). *In casu* is dit klaarblyklik nie die geval nie. Inteendeel, op grond van 'n verskeidenheid oorwegings besluit die regter (668H–669B) dat die tweede verweerder nie 'n regsplig teenoor die eiser gehad het nie, onder andere omdat eersgenoemde nie die hyser geïnstalleer het nie, nooit in beheer van die woonstelblok of hysers was nie, uiteenlopende onderhoudskontrakte ten aansien van 'n groot verskeidenheid hysers met verskillende klante het, en self (of enige ander hysbakonderhoudsmaatskappy) nog nooit vantevore waarskuwingstekens by enige hysbak opgerig het nie. Die tweede verweerder het dus nie onregmatig opgetree nie en gevolglik verval die nodigheid om die nalatigheidsvraag hier te ondersoek.

Hierdie beslissing is in ooreenstemming met die uitgangspunt dat die reg in die algemeen nie altruïstiese optrede vereis nie en dat daar dus nie 'n algemene regsplig op die individu rus om te voorkom dat iemand anders se belange aangetas word nie, selfs al sou die betrokkene maklik die intrede van skade kon verhinder het en sodanige positiewe optrede uit 'n morele hoek dus verwag kon word (sien *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 596; Van der Walt *Delict: Principles and cases* (1979) 58; Neethling, Potgieter en Visser 54–55, ook vn 101). 'n Algemene plig sou 'n te swaar las op individue in die gemeenskap plaas. Daarom kan daar net van 'n onregmatige late sprake wees as daar volgens die *boni mores* 'n regsplig op 'n individu gerus het om die betrokke benadeling te voorkom; en hier moet alle faktore wat volgens die gemeenskapsopvattinge op 'n regsplig kan dui, oorweeg word (sien Neethling, Potgieter en Visser 55 ev). Twee faktore wat *in casu* miskien meer aandag kon geniet het in die lig van die tweede verweerder se kontraktuele plig om die hysbakke te onderhou, is 'n kontraktuele onderneming (by implikasie) om benadeling van hysbakgebruikers te verhinder, en die verwekking van 'n skyn dat hysbakgebruikers se veiligheid verseker word (sien *idem* 66–68).

Die slotsom is dat as dit nie vir regter Joubert se inleidende opmerkings oor die "duty of care" was nie, die uitspraak as 'n skoolvoorbeeld kon dien van hoe die vrae na onregmatigheid en nalatigheid by aanspreeklikheid weens 'n late in ons reg hanteer moet word (sien ook *idem* 150).

J NEETHLING
Universiteit van Suid-Afrika

BOEKE

PROPERTY IN THINGS IN THE COMMON LAW SYSTEM

by BRUCE WELLING

Scribblers Publishing, Gold Coast, Queensland, Australia 1996; xx and 353 pp

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> "Property law is straightforward, principled and interesting. Property cases tend to be complicated, irrational, and (occasionally) deadly dull and boring. Contradiction or paradox? I think it's the latter. Careless terminology is the cause. It isn't that hard to correct" (v).

These are the opening words of Welling's book about the common law of property in things. The author's objective is to explain property law in a straightforward and principled way. This is achieved by giving the reader a succinct account of the history of the principles of the law of property, while the various concepts are considered and defined before the author continues with a discussion of the applicable rules. At the same time the reader's attention is focused on what the current state of the law is, whether this is a satisfactory position and, if not, what should be done about it. Reading this outstanding book will convince any sceptic that Welling has not only succeeded admirably in reaching this laudable goal, but that he has also managed to show that property law can be interesting. Imaginary sets of facts are posed and amusing anecdotes are used throughout. The author's treatment of practical problems is novel and thought-provoking. The book reads like a story that is being told: fascinating, in crisp, colloquial language but without losing its scholarly impact.

This is no ordinary or conventional book on the common law of property in things. The book, both in arrangement and substance, differs widely from the traditional common law approach. It is divided into four parts. A brief synopsis of what is contained between the covers of this book will suffice:

In part I, "Nature and types of property in things", the author describes property as a legal relationship between people enforceable by the state. He points out that some, though not all, types of property are held in things. Property should not be confused with things, which refer to "a material object, a body; a being or entity consisting of matter, or occupying space" (1). It is precisely because of the confusion of these two concepts that all areas of property analysis have been complicated and that erroneous decisions have been handed down. Four forms or types of property in things are identified, namely possession, the right to immediate possession, ownership, and security interests. The holder of property in a particular thing can invoke the aid of the courts to suppress the liberty of a non-holder to use or otherwise deal with the thing.

In Part II, "Discovery and creation: Escape and destruction", some modes of acquiring and disposing of property in things are discussed. Welling points out that

> "some acquisitions and dispositions are accomplished by one person acting alone. Most of the rules about hunting and herding animals, prospecting for minerals, and manufacturing artefacts, have been recognised for centuries. However, the judicial

> decisions are often not clearly explained. Questions remain about what evidence is required to prove acquisition or disposition of what forms of property" (45).

Part III is entitled "The lost and found department". In this part the author examines the meaning of possession by finding, explains how such possessors are protected against strangers, and categorises plaintiffs who defeat possessors claiming to have found lost things into four groups, namely, the owner of the thing found, a prior possessor, an employer of the finder, and the state:

> "Finders keepers. Possession is nine parts of the law. Like most old husbands' tales, these ones are usually true. A lawyer must know when they are false" (101).

In this part Welling clearly proffers guidance for the evaluation of old husbands' tales.

Part IV "Acquisition and disposition by transaction" covers three transactions which deal primarily with the transfer of property in things, namely, purchase and sale, gift, and bailment. Traditionally they are treated as separate categories and governed by different rules. But the author argues that the simple property questions have become confused with the details of the transactions. In his view their continued existence as separate categories is not warranted.

From the first chapter it is apparent that this is an ingeniously written book – it is not your traditional law book with pages teeming with cases and sterile, "lifeless" analyses of the leading English cases with confident conclusions. Welling's writing is clear and his command of the material enables him to present the reader with an overall picture of the contemporary property law of the countries that have the English common law as their basis. Contemporary examples are used and pertinent selected cases, decided not only in England but also in countries such as Australia, Canada, India, Malaysia, New Zealand and the United States of America, are analysed in a conversational, interactive manner. This makes the reader feel part of the discussion, the analysing process, and, ultimately, the conclusion. Welling succeeds in capturing a sense of attunement between property law as it is described and property law as it works in practice. The footnotes contain valuable references, stimulating thoughts and entertaining examples which will satisfy the "[h]ealthy sceptics, and those curious for more detail" (v).

The technical layout and the attractive physical appearance of the book make it easy to read. Very few printing errors could be detected. The short summaries at the start of each part are informative and encapsulate the essence of the various parts. The index and cross-references are useful and appear to be accurate.

It stands to reason that in a book of this nature not all the important decisions in the various jurisdictions can be discussed or even referred to. As a result, students of the law of property in things in Australia, to mention an example, will look in vain for some of the familiar Australian decisions regarding the doctrine of fixtures, such as *Reid v Smith* [1906] 3 CLR 656 (HCA) and *Eon Metals v Commissioner of State Taxation (WA)* (1991) 22 Aust Tax Rep 601. Similarly, a discussion of the Australian High Court decision of *Victoria Park Racing v Taylor* (1937) 558 CLR 479 (HCA) and a comparison of this case with the USA decision of *International News Service v Associated Press* (1918) 248 US 215 regarding the approach to and treatment of new forms of property or quasi-property such as news and inventions would have been welcomed.

This book will undoubtedly be of great value to lawyers in the countries in which the English common law forms the basis of the law of property in things. But what about the South African lawyer? Although the South African law of property has been influenced by English law only to a very limited extent, Welling's book may be recommended to South African lawyers interested in property law, and indeed every lawyer whose interest extends beyond the immediate concerns of his practice, because of the logical discipline it displays. The book takes its place in the front rank of books on property law and is a compelling item for the South African property law specialist. Furthermore, this book will prove useful to academics and post-graduate students alike, as it provides a sound basis for furthering their study of the common law of property in things. Law teachers will find the examples, which can be universally applied, refreshing, while the unique

approach adopted in this book will offer a new way of teaching property law to students. Finally, practitioners who contemplate requalifying in jurisdictions which have the English common law of property as a basis, for example by taking the Qualified Lawyers Transfer Test (for which property law is compulsory) pursuant to the Qualified Lawyers Transfer Regulations 1990 (England), will need to grasp the essence of the common law of property, and this book will alleviate their plight in preparing for these tests.

To conclude, there are a number of well-known and widely-used textbooks on property law in the various common law countries, which are continuously being updated and reprinted. However, the words of MA Millner, used in a book review (1957 *SALJ* 469), are apposite. He states that even an eminent textbook has a life and that once it passes its prime "no amount of plastic surgery can restore to it the comeliness of its youth. Inevitably, others must come forward to take its place". As regards the common law of property in things, Professor Welling's new book presents itself as a worthy replacement.

JEANNE CILLIERS
University of South Africa

The fact that people of radically different political views may all be members of the government does not change defamatory matter into non-defamatory matter and does not justify a cabinet minister acting without the necessary reserve (per Hartzenberg J in *Mangope v Asmal* 1997 4 SA 277 (T) 291).